

The Nature, Impact and Prosecution of White-Collar Crime

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U.S. DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

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National Institute of Law Enforcement
and Criminal Justice

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FOREWORD

In addressing the problem of research priorities, the National Institute of Law Enforcement and Criminal Justice has developed an intensive concern that so-called "white-collar crime" receives scant attention from the law enforcement and research communities. Indeed, only recently has the public displayed an increased awareness of the vast economic and social harm caused by those who obtain money and property through illegal schemes and deceptive business practices. Though the weapons of this criminal activity are mere words and pieces of paper, the devastation reaped thereby affects all of us—and most seriously affects the ghetto dweller who seeks a stake in our society and the retired man or woman who constantly battles to conserve scarce personal resources.

The entire field of white-collar crime represents a national priority for action and research—to define the problem, to examine its many faces, to measure its impact, to look for ways in which its victims can be helped, and to determine how such crime can be prevented, deterred, and effectively prosecuted. As one step toward stimulating such research, this paper was prepared by Herbert Edelhertz, formerly Chief of the Fraud Section, Criminal Division, U.S. Department of Justice. Mr. Edelhertz supervised nationwide prosecution under a broad group of Federal statutes in this area and is now a member of the staff of the National Institute of Law Enforcement and Criminal Justice.

The National Institute is the research arm of the Law Enforcement Assistance Administration, U.S. Department of Justice. It was established under the Omnibus Crime Control and Safe Streets Act of 1968 in response to a widely recognized need for research and development in crime control and prevention.

This document is one of a planned series to be issued by the Institute, to reflect research by members of its staff and by researchers working under Institute grants and contracts. Publication, however, does not necessarily indicate the concurrence of the Institute in the statements or conclusions contained herein.

Information about the Institute, and its research plan and programs, may be obtained from the Institute on request.

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INTRODUCTION

Public attention is currently focused on crimes physical in execution and immediate in impact, the so-called common crimes. Massive and costly efforts are being mounted to meet the challenge of street crimes, burglaries, the narcotics trade, and all of the tentacled manifestations of organized criminal activity.

Our justified concern with common crimes and organized crime should not be allowed to obscure our view of the socially destructive and costly, but less dramatic criminal activities, which are popularly called white-collar crime.

White-collar crime is covert, and not immediate in impact. It is therefore difficult to move to the forefront of issues calling for public attention and a place in the priorities for allocation of law enforcement resources. Common crimes always appear more pressing, and no white-collar victim constituency clamors for attention. Yet white-collar crimes are serious, and must be investigated and prosecuted promptly. To ignore white-collar crime is to undercut the integrity of our society, just as we ignore the safety of society when we fail to cope with common crime. To delay or postpone action is an abdication of law enforcement responsibility and not an ordering of priorities.

Law enforcement is not merely an instrument for social control. It is also a discipline aimed at maintaining or creating standards of conduct which will further the economic and social development of the community. To the extent street crimes are prevented, our people are free to heighten the levels of social and economic interaction which contribute to the growth of our economy and to the quality of our life. In exactly the same way the curbing of white-collar criminal activities, by contributing to the integrity of our economic and social transactions, may free large resources for socially and economically productive purposes. If the poor are not cheated, their few dollars may be channeled into meeting their real needs and hopefully lessen the burdens and degradations of welfare support. If the consumer can be helped to know what he is really buying and what he is paying for credit, he can make the budget decisions which will enable him to most effectively pursue his image of what the quality of life should be for him. To the extent that tax evaders are deterred, we either can redirect tax savings into personally or economically more desirable channels, or have

more resources available to cope with the problems of our national community.

There can be and should be priorities in law enforcement, as in every area of private and community endeavor. But both the substance and the image of law enforcement will be lost if criminal and antisocial activity is not recognized, prevented, and prosecuted, when committed in the comfortably furnished office as well as in the street.

The purpose of this paper is to focus attention on the nature and impact of white-collar crime, and on problems of law enforcement in this area. It seeks to define white-collar crime, to determine the common elements of its operative structure, and to examine how it is detected, investigated, and prosecuted. Most of all, its aim is to open doors which may lead to measures which will both deter such crimes and provide an extra measure of relief for victims.

Definition of White-Collar Crime

The term "white-collar crime" is not subject to any one clear definition. Everyone believes he knows what the term means, but when definitions are compared there are usually sharp divergences as to whether one crime or another comes within the definition. It may well be that, as Humpty Dumpty said to Alice,¹ "it means just what I choose it to mean—neither more nor less."

For the purpose of this paper, the term will be defined as *an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage.*

The definition, in that it hinges on the modifying words "an illegal act or series of illegal acts," does not go to the question whether particular activities should be the subject of criminal proscriptions.

It is a definition which differs markedly from that advanced by Edwin H. Sutherland, who said that "* * * white-collar crime may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation." Sutherland² introduced this definition with the comment that these white-collar crimes are violations of law by persons in the "upper socio-economic class."

Sutherland's definition is far too restrictive. His view provided a rational basis for the economic determinism which was the underlying theme of his analysis, but did not comprehend the many crimes committed outside one's occupation. Ready examples of crimes falling outside one's occupation would be personal and nonbusiness false income tax returns, fraudulent claims for social security benefits, concealing assets in a personal bankruptcy, and use of large-scale buying on credit with no intention or capability to ever pay for purchases. His definition does not take into account crime as a business, such as a planned bankruptcy, or an old fashioned "con game" operated in a business milieu. Though these crimes fall outside Sutherland's definition, they were considered and discussed by him.

Sutherland made a valuable contribution. He illuminated the double standard built into our law enforcement structure, and contrasted society's

¹ Lewis Carroll, "Through the Looking Glass."

² Edwin H. Sutherland, "White Collar Crime" (Dryden Press, Inc., 1949), p. 9.

treatment of abusive acts by the well-to-do with law enforcement and penal provisions applicable to abusive acts by those less fortunate or well placed. He forcefully pointed out that our legislation had established a unique legal structure with a complex of administrative proceedings, injunctions, and cease and desist orders, to meet common law fraud if committed in a business context, thus largely preempting the field of enforcement and making criminal proceedings unlikely or seemingly inappropriate. He showed how fraudulent sales practices, or sale of drugs by misrepresentations, or patent abuses, can continue through years of administrative and judicial proceedings to a determination which is no more than a slap on the wrist, whereas the less sophisticated thief must face additional criminal charges if he commits further and similar acts in the course of his much briefer and less lucrative activity.

Sutherland was basically concerned with society's disparate approach to the crimes of the respectable and well-to-do on the one hand, and those of the poor and disadvantaged on the other. His definition of white-collar crime concentrated, therefore, on characterizing violators rather than violations. The definition on which this paper is based is, hopefully, a more inclusive one.

White-collar crime is democratic. It can be committed by a bank teller or the head of his institution. The offender can be a high government official with a conflict of interest. He can be the destitute beneficiary of a poverty program who is told to hire a work group and puts fictional workers on the payroll so that he can appropriate their wages. The character of white-collar crime must be found in its *modi operandi* and its objectives rather in the nature of the offenders.

It is important that in our definitions of crime we concentrate on the nature of the crime rather than on the personal characteristics or status of the criminal. The latter analysis may be relevant and even of primary utility in the design and implementation of specific law enforcement programs, or to rehabilitation of offenders. Confusion and discriminatory application of penal sanctions must necessarily flow, however, from personalizing our conceptions of the nature of any one crime or group of crimes.

The above definition is the cornerstone of the following conceptualizations of various aspects of white-collar crime. It is crucial to this discussion of deterrence, investigation, evaluation, prosecution, and sentencing.

The Impact of White-Collar Crime

Sutherland published his "White Collar Crime" in 1949, a year already in the buried past. The complexity of our society in the intervening fifth of a century has increased so rapidly that it is difficult to do more than recognize resemblances between the problem he described and that which we face today. He saw the problem as one of victimization and discrimination, valid today as then. More important now, however, is our expanded vulnerability to white-collar crime because of changes in our economic and social environment.

We should not fall into the trap of idealizing the past (as with Rousseau's noble savage) but we can recognize that progress has its harmful side effects. In the white-collar field the basic side effect is the weakening of certain safeguards which were built into the marketing and distribution patterns of an earlier age, and which retained much of their vitality only 20 years ago.

Most purchases were once made in stores which were managed and serviced by their individual owners. Owners either lived in the communities which they serviced, or had close ties to these communities. They were known to their customers and had to face them after a purchase as well as before. These proprietors competed on the basis of service and reliability and, even though products might be presold by advertising, they would bear the brunt of customer dissatisfaction. Today most consumer goods—food, drugs, appliances, are sold by chains or similar large organizations, and the mobility of their personnel is matched, in part at least, by the mobility of their customers. On the retail level there has developed an essentially faceless transactional environment.

Today transactions are executed or moved by nonpersonal or credit instrumentalities. Retail credit is no longer carried on the books of the retailer, to be financed by retailer bank loans, but is now the subject of highly sophisticated and costly credit transactions involving bank and non-bank credit cards, revolving credit, credit life insurance—all substituting the credit granting and administering entities for the retailer after the sale is made.

The genesis of transactions between businesses, and within businesses, is less the subject of individual decisions and more the result of programed procedures. Thus we now have electronic links, managed by computers. A

perpetual inventory system may trigger a purchase order which in turn galvanizes a series of computer-induced stages culminating in an automatically written and signed check to pay for the purchase.

Conflicting objectives internal to business operations multiply exposure to white-collar crimes. Thus manufacturing and sales departments within a company will seek to override the restraints imposed by a credit department with consequent vulnerability to bankruptcy fraud operations. Sales departments will deliberately court risks, as by mailing of unsolicited credit cards, relegating possible fraud losses to the status of costs of doing business as if mere rent or utility charges. This may be an acceptable price to pay for economic growth, but it does invite white-collar crime.

Business planning is more and more keyed to the creation of needs, rather than to discovering or satisfying needs. Thus we have patterns of built-in style obsolescence, in hard goods and soft, and products may also be manufactured with a limited useful life.

Our economy has passed the point where it is geared to meet only the basic and elemental needs of the greater part of our population. The number of "haves" is very high, and large numbers of "have-nots" possess items which generate the desire for similar items on the part of their neighbors. Television exposes even the poorest to an incessant barrage of incitation to consumption of nonnecessities and to the titillation of desires based on nothing more than the exploitation of longing for status, beauty, or virility. The juxtaposition of these desires with our credit economy intensifies the incentive and opportunity for fraud in the marketing of consumer goods and services.

Our social and economic organization exposes us to new species of white-collar crime, having different or mixed objectives. In an earlier age the unlawful or ethically questionable amassing of wealth was characteristically accomplished by bald plunder or seizure of the public domain. "Teapot Dome" was a classic case, as was the land-grant device which provided the capital for building much of this Nation's railroad grid. Today such blatant power and property grabs are avoided. The new avenues for creation of wealth often involve tax avoidance (or evasion, which is criminal) to facilitate the accumulation of capital on which further acquisitions of wealth may be based. Tax avoidance or evasion are advantages to be wielded as is the ability to obtain favored treatment by zoning commissions, or special favors in connection with public guarantees of real property loans, or to be free from regulation in the operation of quasi-public utilities. The boundaries of the permissible and the impermissible are not drawn with precision, and perhaps they should not be. But as a consequence substantial loopholes persist, permitting the commission of crimes or acts inconsistent with policy limits set by our society.

The affluence of our society heightens exposure to criminal abuses by fiduciaries, an exposure which was once confined to the wealthy and the upper middle classes. More of us are now beneficiaries of trusts and quasi-trusts managed by the growing fiduciary industry. New targets for crime are the increasing proportion of trusts and estates of middle-class decedents, interests in union and company pension, welfare, and profit-sharing funds, and the broad panoply of mutual funds, investment trusts, credit unions, and investment clubs.

As of June 30, 1969 open end and closed end mutual funds possessed assets of approximately \$63 billion.¹ One estimate is that private retirement plans now total about \$200 billion, covering about 48 percent of the Nation's private work force.² The SEC reports \$115.3 billion in insured and noninsured private pension fund assets as of December 31, 1968.³ Insurance companies and investment advisers have been fashioning fiduciary managed retirement plans under the Keogh Act, and this movement is explosively expanding in light of new rulings by the Internal Revenue Service and the proliferation of corporations which physicians and other professionals are now being permitted to organize for tax purposes. We are increasingly a beneficiary population, with a vulnerability which can be estimated by a review of the evidence which served to convict James L. Hoffa for a scheme to loot Teamsters Union pension funds.⁴

As individuals we are more exposed to abuse. We are more likely to deal with strangers than with those we know (whose blemishes we can assess), and we are more vulnerable than we used to be because we tend to rely more on one another or on protection by Government. Those who buy securities are better protected than ever before because of the work of the Securities and Exchange Commission and comparable State agencies, yet are more exposed to the stock fraud artist who deceives the regulatory agency or totally circumvents its supervision. The buyer of food relies on weights and measures marked on prepackaged merchandise, since there is no occasion to look for the thumb on the seller's scale. We find it hard to believe that Government food inspectors would permit most unesthetic portions of animals to be ground into our hamburgers or sausages, and are therefore most shocked when sporadic inquiries disclose what we are eating. The physician relies on the vigilance of the Food and Drug Administration, and therefore accepts his education as to prescribable drugs from detail men sent to his office by pharmaceutical manufacturers. The certificates of guarantee which accompany our purchases of appliances and automobiles give us a false sense of security, no matter how often we have been burned in the past.⁵ *Caveat emptor* loses meaning when we buy closed packages.

Technical developments increase our exposure to white-collar crime. A prime objective of computerization is the cutting of labor costs, which means substituting hardware and computer programs for expensive labor. Our experience has given us an extensive fund of knowledge (often imperfect) as to how we can control, audit, and monitor people, but we have only the most elementary knowledge of how to audit computers and those who have

¹ "Classification, Assets and Location of Registered Investment Companies Under the Investment Company Act of 1940," as of June 30, 1949 (SEC Publication).

² Business Week (Oct. 25, 1969), p. 108.

³ Book value rose to \$115.3 billion in 1968 from \$46.6 billion in 1959. These assets are increasingly invested in equity rather than debt securities. Investments by private noninsured pension funds in common stock rose from 27 percent to 50.2 percent of their total assets from 1959 to 1968. SEC Statistical Series, Dec. 12, 1969, Release No. 2406.

⁴ *United States v. Hoffa*, 367 F. 2d 698 (7 Cir. 1966).

⁵ Guarantees are drafted more to limit liability than to assure the purchaser's satisfaction, since in the absence of guarantees the manufacturer might be held to a far broader standard of liability. The requirement that items be packaged and returned to the maker, with a handling fee, insures minimal accountability.

learned how to use them. Much thought is being given to methods of coping with computers from a management point of view, i.e., internal controls, but little to audit by outsiders such as regulatory or law enforcement agencies. The search for control procedures is complicated by the accelerating rate at which the computer art is developing, a rate which makes controls obsolete almost as quickly as they are developed. Existing control methodology is not adequate for internal control, or for investigation by investigating agencies, or for regulation by regulatory agencies.

White-collar crime is a low visibility, high impact factor in our society. Because of the changes in the nature of our economic organization, particularly new developments in marketing, distribution, and investment, it is a fair assumption that white-collar crime has increased at a rate which exceeds population growth. Its effects intersect with and interact with other problems of our society, such as poverty and discrimination. It also weighs heavily on the aged⁶ who are, in our society, divorced from the homes and community of their children in contrast to most prior human social organization.

The increasing complexity of our society heightens vulnerability because it increases the difficulty of obtaining redress for losses suffered. Legal services are costly, prosecutors and investigators are overburdened, and court calendars are clogged. A victim must measure the time it takes to obtain redress and wonder whether he will not be the major sufferer, rather than the target of his complaint.

The prevention, deterrence, investigation, and prosecution of white-collar crime must compete with other interests for allocation of law enforcement dollars, in an atmosphere in which every other national problem is made more serious and more costly of solution by the increasing complexities of our society.

No dollar amount can adequately identify the costs of white-collar crime,⁷ though many figures have been used in various studies. Invariably these are projections based on known cases yet even with highly publicized cases there is no way of truly determining costs to victims and to the public.⁸

White-collar crime costs are not subject to clear measurements. If a buyer for an automobile manufacturer takes a \$25,000 bribe from a supplier of shock absorbers in connection with a \$1 million contract, what is the true social and economic cost? It is not the \$25,000. It is not the difference between the contract price and what someone else would have charged (such differential might be small). The true loss might be measured in these ways, of course, or by a qualitative evaluation of the shock absorbers sup-

⁶ U.S. Congress, Senate, Special Committee on Aging, subcommittee on Frauds and Misrepresentations Affecting the Elderly; hearings, January 15-17, 1963. Washington, D.C. 1963.

⁷ "The Task Force on Assessment of the President's Committee on Law Enforcement and Criminal Justice," (1967), in its chapter on white-collar crime (p. 102 et seq.) accurately noted that "There is little systematic data available regarding the incidence of white-collar crime" and, as to costs, cites two estimates. One is loss of taxes on \$25 to \$40 billion of unreported income annually, and the other is \$500 million to \$1 billion annually in securities fraud.

⁸ Estimates of losses in the painstakingly investigated case of Anthony DeAngelis, the "Salad Oil King," have ranged from \$125 million to \$200 million, a spread of from 37½ percent to 60 percent depending on the base figure used.

plied, but the major loss might well be the erosion of the integrity of the buying operation itself which could contribute to further losses in other transactions.

How does one set a dollar value on food and drug violations which may permanently disable or kill? What is the true dollar cost of a fraudulent banking operation without valid deposit insurance which destroys the life savings of the elderly and makes them a burden on their children or on the State? A comparatively minor fraud in a governmental social or welfare operation may be magnified to discredit an entire program, thus destroying it or causing a sharply diminished legislative appropriation.

Concern for the problem of white-collar crime is sometimes limited, as is the severity of sentences, because of the superficial view that such crime only involves money or property rights. A more careful analysis will show that the impact of such crime is on people, and on their physical and psychological integrity and security—that its impact is not truly so different from that of common crime except that its effects are longer lasting.

White-collar crime, like common crime, can have a serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions. Every stock market fraud lessens confidence in the securities market. Every commercial bribe or kickback debases the level of business competition, often forcing other suppliers to join in the practice if they are to survive. The business which accumulates capital to finance expansion by tax evasion places at a disadvantage the competitor who pays his taxes and is compelled to turn to lenders (for operating and expansion capital). The pharmaceutical company which markets a new drug based on fraudulent test results undercuts its competitors who are still marketing the properly tested drugs, and may cause them to adopt similar methods. Competitors who join in a conspiracy to freeze out their competition, or to fix prices, may gravely influence the course of our economy, in addition to harming their competitors and customers.⁹ The tax evader adds to the ultimate burden of the man who pays his taxes.

We should take special note of the impact of white-collar crime on the elderly and the poor, especially ghetto residents. These groups are the victims of minor offenses, such as housing violations, and of what we conventionally refer to as "consumer frauds." The impact is self-evident, but there is little comprehension of the outward rippling from consumer frauds on the elderly and the poor.

The very poor, and particularly the destitute elderly, are not profitable targets for those engaged in white-collar criminal activities. They may "pay more", as some surveys have indicated, but they are relatively impervious to the general harassment of process servers and collection agents, whose success is the ultimate reliance and *raison d'être* of every consumer fraud operation. If a mother on welfare is given a short weight when she buys food the impact on her family is clear, but the transaction itself is not a vehicle for continued oppression and victimization.

⁹ The cost to ghetto residents of lack of competition in their neighborhoods is graphically illustrated by the FTC staff report (1969), "Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco."

The true and ultimate vulnerability is the possession of an asset which can be lost. Such an asset may be tangible, such as a house, or an intangible such as a job which can be lost or made less desirable if wages are garnisheed, or some relationship which can be exploited by the fraud operator. A surprisingly large number of people living in ghettos do have something to lose, but unlike the established middle classes the asset in jeopardy is very often the only asset which stands between its owner and utter destitution.

In the case of a home improvement fraud the fraud operator will solicit a job such as installation of aluminum siding for a house, making misrepresentations as to cost, quality, and credit terms. The victims are often past their prime working years, with perhaps very small savings to piece out the submarginal existence afforded by social security payments. Such victims have just about worked out their life schemes to avoid becoming public charges in their old age. The monthly payments required are more or less manageable, but the victims do not realize that these installments are largely interest payments on the inflated cost and that the major part of the contract price will be payable immediately following the final monthly payment in what is called a "balloon." The victims also do not understand that their house has been mortgaged to secure the exorbitant cost of the repair or improvement and interest and fees in connection therewith. Nor do they understand that their promissory note and mortgage will be promptly negotiated to a so-called holder in due course who will demand payment even if the work is never done, or never properly done.¹⁰ When the balloon payment is due the victims must refinance and subject themselves to what often is a form of perpetual peonage to finance companies, inevitably resulting in a desperate economic situation with consequent loss of house, savings, and all payments made. The victims are then on welfare, or a burden on their children.

Merchandising frauds may have similar impact. The typical case would involve an overpriced television set or furniture, with heavy finance charges. This kind of credit is extended only to those with jobs (to be endangered if wages are garnisheed) or to those whose obligations can be guaranteed by relatives or parents who have jobs or other assets. When installment payments are missed the entire obligation becomes immediately due and payable, and the victims are faced with the choice of refinancing and assuming even greater obligations, or becoming subject to garnishment procedures which could cost them their jobs.¹¹

¹⁰ Good legal representation will usually serve to pierce the holder in due course claim where the paper is negotiated promptly by the contractor, but such good legal representation is the exception rather than the rule. Most attorneys hesitate to challenge such status, and concentrate on settlements.

¹¹ Garnishment must usually be preceded by service of a summons and judicial proceedings in which the debtor may have his day in court. The fraud process may also include so-called sewer service of process, which means that the debtor is fraudulently deprived of an opportunity to contest the action because the process server falsely attests to the service of a summons. An investigation of such sewer services with the help of postal inspectors and a grand jury has been underway in the Southern District of New York for more than a year, and estimates are that half of all judgments in New York City may be based on such sewer services. The victims' first notice of litigation is therefore a post-judgment demand, or threat of garnishment. The New York Times, p. 60, Oct. 14, 1969. A process server was convicted by a jury in the

While the contribution of consumer fraud to ghetto disturbances is not easily provable, it is clear that there is substantial hostility toward credit merchants by ghetto residents. This may be based on the use of fraudulent sales and credit practices by some merchants, and also on the frequent resort to such operations by direct or door-to-door sellers of expensive appliances, encyclopedias, self-improvement schools, etc. There is some reason to believe that resentments stirred by such tactics played a part in the Watts riot of July, 1966.¹²

The social and economic costs of tax violations, self-dealing by corporate employees and bank officials, adulteration or watering of foods and drugs, charity frauds, insurance frauds, price fixing, frauds arising out of government procurement, and abuses of trust are clearly enormous even though not easily measured. If substantial progress can be made in the prevention, deterrence, and successful prosecution of these crimes we may reasonably anticipate substantial benefits to the material and qualitative aspects of our national life.

Southern District of New York for violation of the 1866 Civil Rights Act in May, 1969, on charges that he had unconstitutionally deprived debtors of their property by his sewer services.

¹² Governor's Commission on the Los Angeles Riots, "Violence in the City—An End or a Beginning?" (Los Angeles: Office of the Governor, 1965), p. 62; see also "Saga of the Little Green Pig" by Ralph Lee Smith, *The Reporter*, Nov. 3, 1966.

Common Elements of White-Collar Crimes

Basic to any determination of fruitful avenues of exploration with respect to the prevention, detection, and prosecution of white-collar crime, is an analysis of how it operates. What are its component parts? Where the spectrum of possible criminal acts is so broad and the perpetrators so different in character, status, and motivation, can there be identifiable elements of universal applicability? Can they apply to crimes so diverse as antitrust violations and bank embezzlement, or so diverse as tax fraud and the ordering of merchandise with no intention to pay?

Without implying that motivations are necessarily similar, and recognizing that the *modi operandi* may be as diverse as the activities of all mankind, it may be that there are common elements which may be basic to all white-collar crimes.

In any white-collar crime, we will find the following elements:

- (a) Intent to commit a wrongful act or to achieve a purpose inconsistent with law or public policy.
- (b) Disguise of purpose or intent.
- (c) Reliance by perpetrator on ignorance or carelessness of victim.
- (d) Acquiescence by victim in what he believes to be the true nature and content of the transaction.
- (e) Concealment of crime by—
 - (1) Preventing the victim from realizing that he has been victimized, or
 - (2) Relying on the fact that only a small percentage of victims will react to what has happened, and making provisions for restitution to or other handling of the disgruntled victim, or
 - (3) Creation of a deceptive paper, organizational, or transactional facade to disguise the true nature of what has occurred.

If these are, in fact, common elements, or even elements which are present in the greater number of white-collar crimes, then awareness of this structure may help us in our search for preventive, deterrent, and prosecutive measures.

- (a) *Intent to commit a wrongful act or to achieve a purpose inconsistent with law or public policy*

The presence of this element is self evident in the case of most white-collar crimes. It may be less easily seen in criminal cases in which prosecutors do

not have the burden of showing that the defendant knew his act was unlawful or wrongful. Examples would be offenses of omission, such as failure to provide heat or proper repair, or failure to register securities for lack of awareness of the requirements of the Securities Act of 1933, or misinterpretation of such requirements. It is often difficult to prove such intent where the subject has been advised by counsel that his proposed course of conduct is legal, or where there has been a history of laxity with respect to such conduct by law enforcement authorities.

There is always an intent to commit a wrongful act or to achieve a purpose inconsistent with law or public policy where there is a white-collar crime or offense, even one not requiring proof of intent, notwithstanding the existence of advice of counsel, misinterpretations of law, omission rather than commission, or laxity by authorities. In these instances the intent is properly inferable from the deliberate decision to go into the gray areas, and to risk crossing the line in order to achieve some advantage. It is a calculated risk, with the risk-taker seeking to achieve immunity from the consequences of his acts. It may be that a defendant will succeed in frustrating proof of intent where that is required, or in influencing the prosecutive evaluation in his favor, but for our purposes we should not close our eyes to the presence of intent, in whatever form it may appear.¹

Some examples of complex problems of intent would be the following:

A landlord very rarely gets in trouble for failure to provide heat or maintenance, unless he skimps and tries to provide the minimum required by law, or sets out to provide less on the theory that the penalty will only be a minor fine and therefore a supportable cost of doing business. One who seeks advice of counsel in a borderline area is often seeking to establish a future defense in case his transaction is critically examined.² A taxpayer plays the percentages when he takes an entertainment deduction which he knows will be disallowed if closely audited, suspecting that he risks only a 6 percent interest charge on the extra tax he should have paid. One who makes purchases on credit with no intent to pay, will use the defense that he was merely improvident, which may be a good defense, but most people know whether they have enough money to pay their bills. Even in the apparently innocuous situation where one writes a check today, knowing that by the time it clears he will have deposited a salary check to cover it, he is skirting the line in issuing a check, knowing there are no funds to cover it if immediately presented.³ In many instances in which check kites defraud banks of the principal amounts of large checks, the true intent of the defendant is to use the bank's capital without paying interest, or because his financial condition is not good

¹ This is not to say that variations in degrees of intent should not be taken into account in any sane and sensible evaluative process.

² This defense may or may not be successful. The attorney admits the advice, but claims he did not have all the facts, or that things worked out differently than he anticipated. The client says he gave, in good faith, what he thought were all the relevant and material facts.

³ The writer does not suggest that there should be prosecution in these instances, but only that there is always a questionable intent. Many State laws, and the District of Columbia Code provide that a subsequent payment, within a specified time, rebuts the inference of fraudulent intent. 22 D.C. Code 1410.

enough to justify orthodox borrowing; he fully intends to ultimately cover his checks but "unforeseen" circumstances intervene. In a remarkably high proportion of white-collar crimes unforeseen circumstances do intervene. For example, money is embezzled to finance a profitable investment which will enable return of the funds prior to detection but the venture fails; or a furnace breaks down because maintenance did not anticipate a lengthy cold spell; or a shortcut in testing a drug could not be expected to result in such horrendous side effects as in the Thalidomide case.

(b) *Disguise of purpose or intent*

Once again, in the conventional situation this element is obviously present. It is to the unconventional situation that we must look in order to determine whether this is an element always, or almost always present in white-collar crimes.

Under discussion here is a basic misrepresentation as to the nature and purpose of the transaction which is at the heart of the violation.

In an antitrust case an agreement for reciprocal business dealings between supplier and purchaser conceals: (1) The absence of price, quality and service as elements inducing the transaction; and (2) the intent of the purchaser to foreclose supplier-competitors. In the SEC case the facade of a private offering to a purported limited number of offerees, or some other device, may conceal the effort to sell without a registration statement or offering circular which fully discloses the material facts which should influence investment decisions.⁴ In a commercial bribery or kickback case a buyer for a corporation is given an opportunity to buy something at far below cost, the purchase being subsidized by the corrupting supplier. An investment by a union officer in a business enterprise which employs his union members is in fact consideration for breach of his fiduciary duty to his membership. What looks like a simple purchase or sale of stock by a corporate insider, may in fact be a wrongful exploitation of inside information. The submission of an order for merchandise to a supplier may mask the intent or aim not to pay. A vanity publisher or correspondence school will attest to belief in the marketability of the victims' work or potential, concealing or failing to disclose its knowledge that the odds against any success or fulfillment are astronomical.

Disguise differs from intent. That they are distinct and separate elements can be seen if one compares a white-collar crime to a common crime. In a common crime the intent once formed is followed by the implementing act which is subject to no misinterpretation. The element of disguise in white-collar crime serves to blur intent to the point where it often can only be derived by interpretation.

⁴The U.S. Court of Appeals for the Second Circuit, in *United States v. Doyle*, 384 F. 2d 715, 720 (2d Cir. 1965), cert. denied, 382 U.S. 843 (1965) held that nonregistration was tantamount to fraud since it served to deny the investing public the protections of full disclosure required by the Securities Act of 1933. Our courts recognize that fraud may well be the motivation for violation of these so-called technical registration requirements. *United States v. Abrams*, 357 F. 2d 539, 546 (2d Cir. 1966), cert. denied, 384 U.S. 1001 (1966); *United States v. Wolfson*, 405 F. 2d 779 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

(c) *Reliance by perpetrator on ignorance or carelessness of the victim*

The white-collar criminal must rely on the ignorance or carelessness of the victim and, in those areas in which regulatory agencies have a statutory mandate to protect the public, the ignorance of the public must be maintained by misleading the agency or circumventing its disclosure requirements.

One example would be the looting of an automobile liability insurance carrier. In a typical situation such a carrier will be purchased by a group which will promptly sell off good assets in its portfolios and replace these with worthless or overvalued assets. The policy holders are ignorant of these manipulations. The State insurance department either accepts these new assets at their represented value, or does no more than look at over-the-counter stock quotations which may have been manipulated for this purpose.⁵ Since the State insurance department is ignorant (possibly because of less than adequate audit procedures) of the hollowness of the assets in the portfolio, it permits the company to continue in business, collecting premiums, and holding off settlement of claims against its insureds. When the collapse comes, claimants cannot collect on their claims or judgments and policy holders are helplessly exposed to the very liabilities they paid premiums to avoid.

Ignorance or carelessness of the victim is crucial to the success of the white-collar criminal, and is the objective sought by the disguise of purpose or intent referred to above. In a home improvement scheme the victim is ignorant of the work history of the company which solicits him, and does not take the precaution of requiring or checking on references. The victim is customarily unaware of the contents of the documents he signs, generally having no idea of the true price and the credit terms, and few victims have ever even suspected that they were placing mortgages on their homes as part of the deal.

Ignorance of the victim may be the direct result of a calculated effort to keep in ignorance the regulatory agency whose procedures are designed to protect him. The Securities and Exchange Commission cannot protect the public by its disclosure requirements if the white-collar criminal risks prosecution by submitting false information to the Commission in purported compliance with its registration or filing requirements. Banking agencies are hardly in a position to protect a bank against loss caused by a faithless officer who inserts false loan papers in bank records and vouches for their authenticity to bank examiners. Neither physicians nor their patients can be protected properly if a pharmaceutical manufacturer submits fraudulent test results to the Food and Drug Administration (or if the manufacturer is itself a victim because it is ignorant of the fraudulent operations of its chosen testing facility).

In some instances ignorance of the victim is almost a certainty because of the context in which the wrongful actions arise. In one case (not resulting in prosecution) a department manager in a defense industry deliberately shifted labor costs from a fixed price contract to the performance of a cost

⁵ Certain stocks have been traded for the sole purpose of establishing value so that they could be part of insurance company reserves. This is sometimes their only value.

reimbursable contract. He did this without the knowledge of his employer, the sole motive being to make his department more profitable and thus enhance his career and promotion prospects. This was a case where the direct financial reward from the scheme came to an innocent, albeit ignorant party (the employer), whose ignorance promoted the ignorance of the Government which was the ultimate victim of the scheme.

Ignorance of the true facts is sometimes inevitable in the face of a calculated effort to deceive, but the perpetrator's efforts to deceive and mislead are only too often matched by the carelessness, self-deception, or cupidity of victims. It does little good to require a prospectus to be issued in connection with the sale of stock if the purchaser of stock will not read it. This raises the central question of what measures can be taken to strike at the ignorance of victims or abate their cupidity.

(d) *Acquiescence by victim in what he believes to be the true nature and content of the transaction*

White-collar crimes are unique. They generally require the victim to acquiesce in being victimized. In the great majority of cases we are confronted with crimes which require affirmative acts of cooperation by victims before the fraud can be completed. Put another way, victims must help to "dig their own graves."

In considering this element the term "victim" must be broadly construed. For a white-collar crime to succeed someone with an interest, either as a direct victim or as a protector of potential victims, must affirmatively cooperate or passively acquiesce in the crime.

In its role as collector of taxes the Internal Revenue Service operates on the theory that taxpayers file honest returns. It concedes the position of the taxpayer except in those rare instances where there is an audit; the Internal Revenue Service therefore acquiesces in an act the true nature and content of which is not known to it. If an issuer of securities files a false prospectus, the Securities and Exchange Commission acquiesces by permitting the filing and public sales based thereon. The victim purchaser acquiesces by the affirmative act of making a purchase. One is cheated in buying through the mails, taking the essential affirmative step of making the purchase which is the object of the criminal intent.

With respect to many *malum prohibitum* offenses acquiescence is negative rather than affirmative. The tenement dweller acquiesces in being deprived of heat or repairs because he does not fully comprehend that this deprivation is a transaction different from that mandated by law. Collusive pricing succeeds because purchasers believe the prices quoted have been individually arrived at and do not know that the bidders have conspired. The Food and Drug Administration acquiesces in the marketing of a drug because it believes the tests are as represented, and physicians affirmatively prescribe such drugs for their patients in reliance on drug company salesmen, drug advertising, and the presumed vigilance of the Food and Drug Administration.

Since someone's acquiescence is needed for a white-collar crime to be committed (in contrast to murder, robbery, assault or rape), a central question is how to prevent acquiescence, affirmative or negative.

(e) Concealment of crime

When a murder, robbery, burglary, assault, or rape has been committed, it is clear there has been a violation, though there may be some question as to the identity of the perpetrator or his legal or mental capacity to form the requisite criminal intent. This is not the case with white-collar crimes, where victims almost never know they have been victimized until well after the executing transactions or occurrences and, in fact, may never know they have been victimized.

The ideal scheme or plan, from the point of view of the perpetrator, is one in which the victim never learns the true nature of the blow struck. Charity frauds classically illustrate such a scheme. The takings are small for each individual no matter how large cumulatively, and few victims have sufficient personal interest in their contributions to attempt to follow up. As a result charity frauds almost always are exposed through the curiosity of news media or the vigilance of public officials, rather than as the result of investigations following victims' complaints. If prepackaged goods are marked with short weights it is highly unlikely that any customer will weigh his purchase to check the labeled weight. If the grade or quality of food is mismarked, we have the victim eating the evidence. If fabrics are mismarked, the perpetrator runs the risk of FTC surveillance, but the victims who can spot the fact that their garments are 30 percent wool rather than 50 percent are few in number. If the price of securities is manipulated in such a way as to avoid the scrutiny of the SEC, the investor victim is more likely to blame his luck, or impersonal market forces, than the chicanery of unknown persons. If sellers collaborate to fix prices the victims will rarely know about it, and only lengthy and complex Government action will uncover the facts.

Since it is not always possible to anticipate an uninterrupted series of complacent victims, standby tactics are often employed. Thus some schemes will contemplate making immediate restitution to any victim who complains, to make the victim feel that the perpetrators acted in good faith or to ensure the victim's silence.

The most usual form of concealment is the lulling tactic, followed by silence and the collapse of a corporate entity. This works best when the scheme involves a continuity of performance. In an advance fee swindle a businessman seeking a loan will agree to pay \$2,000 to a loan broker for securing a \$75,000 loan. The loan broker will ask for \$500 or \$750 initially, graciously offering to waive the balance until he has delivered the promised financing. The loan broker has no intention of ever earning the balance. His objective is the initial retainer. A series of lulling letters is then used to keep the victim quiet while others are being victimized, and to tire the victim out. Finally, the loan brokerage firm collapses and the grifter who closed the deal (and who was working on a commission basis) drifts on to other schemes. A year may elapse while pre-programmed lulling letters continue, with the victim sinking into bankruptcy or incapacitating despondency. If the victim still is afloat after all this, the wind is usually taken out of his sails when he learns that the loan brokerage company is no longer in existence.

Concealment is achieved by design of an organizational structure to frustrate and discourage complaint or pursuit by victims. A typical example would be a home improvement fraud in which a faceless corporation is set up, hires itinerant salesman, and promptly negotiates its paper to so-called holders in due course. The victims are so tied in legal knots that they find it hard to even consider complaining to enforcement authorities—since they do not believe this will protect them against the “holders in due course.” Attorneys will rarely take these as charity cases, and if the victim does obtain legal assistance his attorney will usually concentrate on trying to settle obligations for less than the face amount of the paper. All cooperate in muffling the outcry.

Concealment is also achieved by limiting the residue of provable facts, so that there is great difficulty in organizing a case which will meet necessary legal standards for criminal sanctions or civil process. Because of the manner in which white-collar crimes are organized and executed it is possible to generalize (it is not true in all cases) that in investigating and prosecuting these cases the problem is more one of what the facts spell out than what the facts are. The key question (in a prosecution, not in a study of the problem of white-collar crime) is whether criminal intent is inferable beyond a reasonable doubt from the facts unearthed by investigation, that is, was there a crime? If the answer is negative, then the crime is concealed, no matter how deep the wound.

It is not uncommon for a prosecutor to face the most difficult evaluation problem where he has what amounts to a stipulated set of facts before him. One example would be the case of the “vanity publisher” who signs a contract with a would-be author to publish his book, send copies to reviewers, advertise the book in respectable publications, and provide editing services. The publisher receives many thousands of dollars for this service and, in fact, he does provide editing service, does provide a number of hard cover copies, does advertise, and does send copies to reviewers. The victim, in such cases, is led to hope that his book is being promoted and handled as it would be by a legitimate publisher, though he has nothing in writing. Is there a fraud when the publisher knows that the reviewers throw all his books in the trash can, that the advertisement in a reputable newspaper's book section is almost a classified ad in format, and that of the multitude of books published by vanity presses in recent years only a miniscule number have recovered as much as the victim's own cash outlay.⁶

⁶ In talking to other than their victims, vanity publishers are quite frank about this situation, and have been quoted as justifying their operations as a worthwhile ego massage for victims.

Classifying White-Collar Crimes

For any study such as this is necessary that some method of classifying white-collar crimes be devised.

One method would be to categorize on the basis of the pattern of the crime involved: financial crimes (SEC, banking, etc.); business operations (bankruptcy, antitrust, tax avoidance, corporate self dealing, commercial bribery); con games, consumer frauds, frauds against the Government, and administrative offenses (sanitation, licensing, tenement maintenance). A second system might be based upon parallel or related Federal and State statutes. A third possibility is to categorize based on the investigatory agencies involved.

Such classifications would give little insight into the basic problems which must be met and are therefore of only limited use. They shed no light on motivation or propensities for crime, or on the nature of potential victims. They promote a rigid and highly structured analysis which might at best be of only limited benefit in coping with specific crimes or in helping specific investigatory agencies.

We would be better served in classifying white-collar crimes by the general environment and motivation of the perpetrator. If such categories are valid in that they comprehend an almost complete spectrum of white-collar crimes, and if these categories provide a reasonable degree of certainty in distinguishing particular crimes, we may derive these benefits: (1) Opening of new areas for study of motivation, to assist programs of deterrence and prevention; (2) examination of possibilities for alteration of environments having a high probability of criminal violations, or for intensified surveillance of such environments; and (3) with increased knowledge of motivation and environment, there may be a basis for prevention by concentrating on the psychology, and susceptibility or other exposed weaknesses of victims.

The following categories should serve as a helpful starting point:

- (1) Crimes by persons operating on an individual, *ad hoc* basis, for personal gain in a nonbusiness context (hereinafter referred to as "*personal crimes*").
- (2) Crimes in the course of their occupations by those operating inside businesses, Government, or other establishments, or in a professional capacity, in violation of their duty of loyalty and fidelity to employer or client (hereinafter referred to as "*abuses of trust*").

- (3) Crimes incidental to and in furtherance of business operations, but not the central purpose of such business operations (hereinafter referred to as "*business crimes*").
- (4) White-collar crime as a business, or as the central activity of the business (hereinafter referred to as "*con games*").

Attached as appendix A ¹ is a list of examples of crimes within each of these categories. It is not intended to be all-inclusive, and could easily be expanded within each category. The most different crimes, committed by most disparate individuals, may be included within any single category. This may signify either a fundamental flaw in the classification or a worthwhile step in the direction of generalized and rational across-the-board white-collar crime categorization. Hopefully, the latter is the case.

Certain crimes may fall within more than a single category, depending on the offender and the context in which he commits a violation. A violation of the Securities Acts can be committed by an entrepreneur in search of working capital, a business crime, and also by a boiler room operator ² engaged in a con game. Tax evasion may be the crime of a day laborer who takes an exemption for his deceased mother, a personal crime, or by a business enterprise seeking to retain earnings to finance expansion, a business crime. An insolvent debtor may be guilty of a bankruptcy fraud by hiding one of his bank accounts to save it from creditors, a personal crime, but con games are the livelihood of scam ³ artists who create and then collapse businesses to exploit suppliers who give them credit.

There are substantial interrelationships between white-collar and other crimes. Thus, an organized crime syndicate may by extortion or threats obtain control of an otherwise legitimate business, and propel it into a stock fraud or bankruptcy fraud. A purse snatcher may extract a credit card and put it in a channel of distribution which results in its being used to commit a violation of the Mail Fraud Statute or a State fraud statute. A craving for narcotics may create such financial need that an employee of a business may be moved to abuses of trust. The lines are not hard and fast, and these interrelationships, particularly that between gambling and abuses of trust, should be particularly valuable areas for inquiry.

¹ Page 73.

² A boiler room operator makes telephone sales of worthless securities to gullible victims.

³ The term "scam" is underworld argot for bankruptcy fraud.

Responsibility for Investigation and Prosecution of White-Collar Crimes

White-collar crimes are prosecutive responsibilities on every level of government, Federal, State, county, and municipal. There is often concurrent jurisdiction of white-collar crimes on all levels.

Federal jurisdiction can only be based on violations of specific Federal statutes. Thus it would extend to antitrust violations, tax violations, mail fraud, consumer fraud, frauds arising out of Government procurement and programs, securities fraud, water pollution, violations of the Truth-in-Lending Act, Food and Drug violations, Election Law and Corrupt Practices Act violations, and violations of statutes designed to protect the marking and labeling of food. Prosecutive jurisdiction rests with the U.S. Department of Justice, which mainly operates through U.S. Attorneys, but investigative jurisdiction is more widespread. Every Government department, and thus every cabinet officer, has specific responsibilities for criminal investigations in the white-collar crime area. There is also more specific investigatory and referring responsibility in particular independent agencies, such as the following: Securities and Exchange Commission, Board of Governors of the Federal Reserve System, Veterans Administration, Interstate Commerce Commission, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Trade Commission, General Services Administration, Office of Economic Opportunity, and the Small Business Administration.

These responsibilities may be major or minor, in individual cases. For example, commissioners of the Securities and Exchange Commission and the Postmaster General are continually compelled to exercise their investigatory and prosecutive powers, but a high level official in the Interstate Commerce Commission or the Federal Reserve System would but rarely have occasion to consider his agency's criminal law enforcement responsibilities.

On the Federal level criminal investigations are often the "other side of the coin" with respect to civil proceedings. Thus (1) most SEC criminal referrals follow administrative proceedings or judicial applications for injunctions; (2) FBI investigations of fraud cases may result in civil fraud cases following or in lieu of criminal prosecutions; (3) an investigation by the Agency for International Development may result in civil proceedings following, or in lieu of a criminal prosecution; (4) an investigation by the

Department of Defense or the General Services Administration may result in a contract termination, rather than either criminal or civil proceedings; (5) an investigation by the Office of Economic Opportunity may result in a charge-back with respect to funds, or a deduction from a subsequent grant, rather than criminal action.

On State and local levels there is no set pattern for investigations. Consumer frauds might be investigated by the attorney general of a State, by State or local police, or by municipal licensing authorities. Banking violations might be investigated by state banking agencies or by police at any level. Con games have been investigated by State attorneys general, and by local police. Breaches of trust by attorneys have been investigated by police, by bar associations, and sometimes by special hearing examiners appointed by the judiciary on application by bar associations.

There are investigatory contributions by private organizations. Thus the Furniture Manufacturers Credit Association in High Point, N.C., maintains liaison with the FBI, the Post Office Department, and the Criminal Division of the U.S. Department of Justice, sometimes making preliminary investigations of putative bankruptcy frauds in order to trigger formal Government investigatory and prosecutive action. Better Business Bureaus, associations of credit men, and consumer groups play similar roles. Private participations of this kind are most valuable, particularly since they are usually handled in a sophisticated fashion by these organizations. They generally conduct themselves in a manner which avoids even the appearance of vigilantism. The same may be said of individual businesses with law enforcement interests. Thus the American Express Co. has an efficient, computerized security office to protect the integrity of its credit card, money order, and banking operations—which seeks to and does cooperate with government law enforcement at all levels. American Telephone and Telegraph Co. also has similar facilities, which are made available in criminal enforcement. There could be much value in increasing such private efforts if we carefully protect law enforcement processes against vigilantism or the misuse of Government processes to further the private objectives of business (such as intimidating debtors by the threat of criminal action).

Detection of White-Collar Crimes

There are three basic sources of detection. They are: (a) complaints by victims; (b) informants; and (c) affirmative searches for violations by law enforcement agencies.

(a) Complaints by victims

When a common crime is committed, the victim immediately knows that something has been done to him. He has been assaulted, or robbed, or injured in some clearly definable way. He then has the plain option to report the crime to law enforcement authorities, or to refrain from doing so. This is not necessarily the case with respect to white-collar crimes in which the victim may never learn he has been victimized, or the realization comes too late to do him any good, or too late to be of meaningful assistance to law enforcement authorities. In the case of a charity fraud, where the victim makes a small contribution, it is highly unlikely that he will even take the trouble to think about the possibility of a loss, since his consideration is of a nonmaterial nature without practical consequences except for the remote disallowance of a charity deduction claimed on an income tax return.¹ In the case of a magazine-selling fraud, the salesman "working his way through college" will also falsely represent that the subscriptions offered are at a discount price. In fact the price may well be higher than that available by regular subscription—yet the victim may never know it. The victim is quite likely, especially where small amounts are involved, to attribute his disappointments to the factors other than criminality, and will simply decide to write off the entire episode as not worth further trouble.

In many instances white-collar crimes are based upon predictable delays in victims' awareness of the fact that they have been defrauded. Arid desert land was sold by mail for millions of dollars, in reliance that very few purchasers would quickly travel from the East to parched areas of Arizona or Nevada to see their expensive oases (which in fact are waterless patches of

¹ There can hardly be consciousness of loss where little conscious thinking goes into the decision to give. Thus, in 1955 following charity investigations in New York, a Philadelphia newspaper sent collectors into the street, whose collection cans bore the legends "Society For Twinkletoe Children," and "Fund for Unregenerate Nazis." Collections were good. One clergyman asked a collector for twinkletoe children what the collection was for. When she told him he put a quarter in her collection can and said "I'm always glad to contribute to a good cause."

scrub and sand). Ponzi schemes² rely on perpetual delay in victim realization, as do chain referral schemes, work-at-home schemes, fraudulent self-improvement schools, advance fee schemes, and credit card frauds.³

There are frauds committed every day, where the victims never learn about the frauds and as a practical matter it is impossible for them to learn. A typical example would be a check kite by an otherwise legitimate businessman who cannot obtain a bank loan but needs operating capital to tide him over his busy season. To obtain \$50,000 he may put millions of dollars of checks in circulation between several bank accounts and, if his season goes as planned, he settles up. The banks have, in fact, made a \$50,000 loan without interest to one who might be an ineligible credit risk for this amount, and they have been exposed to loss without knowing it. In most cases, these check kites work out, and, although a mail fraud has been committed, law enforcement authorities will never have the violation brought to their attention.

Many white-collar crimes against governments are based on "playing the percentages" that the victim will never know and, if by chance it should find out, will easily be induced to settle. The false entertainment deduction, where the taxpayer expects his claim to be passed without examination, is a good example. Another example of this would be the padding of expenses on cost reimbursable contracts, or "accidental" shifting of costs from work on fixed-cost contracts to those which are cost reimbursable.

Once the victim knows, or suspects that he has been criminally wronged, he must make a decision as to whether he should complain to law enforcement authorities, and then, a second decision as to where he must go to lodge his complaint. This is a crucial stage from the law enforcement point of view for several reasons: (a) If the victim does not complain a crime will go unheeded, and others may similarly suffer; (b) the success of a white-collar criminal prosecution is dependent on a showing of criminal intent, inferable from the circumstances—which often means a showing of similar acts and transactions. The number of complaints will therefore play a key role in the prosecutive evaluation, and in the ultimate success of a prosecution; (c) if there are not clear lines for intake of complaints, victims who make the threshold determination to complain may very well cease their efforts after unsuccessful initial attempts to reach appropriate law enforcement officials.

At this point we should recognize that many white-collar crimes are technical and not worthy of serious prosecutive consideration. Our concern that complaints be made and properly received should not be carried so far as to cause us to seek ways to "drum up business." There are more than enough cases in every investigator's office and in every prosecutor's office.

If we assume that appropriate complaints by victims should be encouraged (without attempting to define which complaints are "appropriate") we should also appreciate that victims' confidence in law enforcement

² A "Ponzi scheme" is one in which victims are promised large interest or profit returns on their investments, but are in fact paid out of the capital investments of subsequent victims. Some of these schemes continue for years, with a dozen sequential investing groups, and losses when they collapse often amount to millions of dollars.

³ Mail fraud jurisdiction of credit frauds is based on the theory that the defendant relies on the time delays stemming from mailing of invoices, to enable him to make credit card purchases over a period of time, before the alerts go out.

is a necessary precondition to the success of the enforcement effort. The law enforcement effort must have credibility. Victims are unlikely to complain if they believe nothing will be done as a result of their complaints. A negative view of the criminal process may stem from prior unsatisfactory personal experience with complaints, or from the community reputation of law enforcement agencies. In some way his relationship with the law enforcement authority must benefit a complainant, and certainly not hurt him. Consideration must also be given to the interpersonal relationship between the victim and the representative of the appropriate law enforcement agency.

(b) Informants:

Informants are an established detection resource with respect to certain white-collar crimes, such as tax or customs violations where the reward or bounty system is employed. Informants play a role, though a lesser one, with respect to Securities Act violations, banking violations, and frauds against the Government, but are practically a nonexistent factor in consumer frauds and con games. Informants are valuable in the investigation of white-collar crimes but, except as indicated above, they are of minimal significance in bringing possible white-collar violations to the attention of investigating or prosecuting agencies in the first instance.

(c) Affirmative searches for violations by law enforcement personnel

Distinctions must be made between classes of white-collar crimes, and perpetrators of such crimes, in assessing the desirability and cost effectiveness of intensive affirmative searches for violations by law enforcement personnel.

If we use the classifications of white collar crimes advanced above⁴ it will be apparent that there is more likelihood of victim complaints in the cases of personal crimes, abuses of trust, or con games, than with respect to business crimes (crimes incidental to and in furtherance of business operations, but not the central purpose of such business operations).

Business crimes, as defined, are carefully contrived in private transactions to avoid total destructive impact on other parties, to only partially affect such transactions, or to appear to be only a matter of degree.⁵ In transactions with governmental bodies they are designed to shade liabilities or obtain only incremental profits or advantages, and are extremely surreptitious and sophisticated in implementation.

The most intensive pattern of affirmative searches is to be found in the area of such business crimes. The Antitrust Division of the Department of Justice and the Federal Trade Commission maintain oversight with respect to mergers, trade association activities, and pricing policies of dominant firms in important markets. The Internal Revenue Service and State tax authorities strive to more carefully audit larger returns. The Department of Agriculture and the Food and Drug Administration make qualitative and quantitative examinations of food and drug products. The Securities and

⁴ (1) Personal crimes; (2) abuses of trust; (3) business crimes; and (4) con games.

⁵ Violations involving weights and measures, valuations in financial statements, misrepresentations exaggerating qualitative aspects of goods sold, etc.

Exchange Commission examines new stock issues and monitors over-the-counter and exchange trading. All of these activities have, of course, non-prosecutive objectives such as collecting tax revenues, civil injunctions, maintenance of qualitative standards of food and drugs on a preventive basis, and protection of the interests of the investing public. Yet, always in the background, is the ultimate sanction of criminal prosecution. Agencies operating in the area of business crimes cannot rely on others to give them the information necessary to meet their responsibilities. They must maintain a solid capability to mount and sustain affirmative searches for violations.⁶

In the case of business crimes, the desirability of beefing up affirmative investigative capabilities is self-evident. In other areas, such as consumer frauds, increased investigatory capability is more likely to be utilized in the handling and investigation of complaints which are not being adequately and fully dealt with at the present time. This might be a correct decision, since there are more than enough complaints at the post office (for example) to produce a very good payoff in worthwhile consumer fraud cases if the staff of postal inspectors is increased. However, we should ask ourselves the hard question whether this would not result in better protection for certain classes of victims, such as those most prone to make complaints, while more silent sufferers (ghetto residents, or the elderly, or the unknowing victims of charity frauds) are an overlooked or minimized constituency. We must always be careful not to operate on the principle that "only the squeaky wheel gets the grease." However, since investigators of consumer fraud are generally an idealistic lot (though they might well balk at this adjective) it would take but little support and encouragement to make them look up from overloaded complaint desks to give greater attention to criminal abuses which are not the subject of complaints.

⁶ Even a cursory examination of the relationship between enforcement budgets and results at the Internal Revenue Service or Securities and Exchange Commission would show a startling correlation. The writer is of the opinion that the result curve in such agencies, with increased funds, would show a steeper ascent than would be the case with respect to agencies which rely primarily on complaints.

Investigations

The question how investigations can be conducted more efficiently and a listing of all possible investigatory problems are not within the scope of this paper. The varieties of techniques available are infinite, and so are the problems. We should, however, concentrate on a few specific problems of almost universal applicability, and on the special problem of ghetto or inner city investigations.

(a) Jurisdiction

Most white-collar crimes are violations of laws in multiple jurisdictions, either vertically (State-Federal) or horizontally (between States, between jurisdictions in one State, or between jurisdictions in the Federal Government). This leads to problems of coordination of effort where more than one jurisdiction is fully on the case, or cooperation where one jurisdiction assumes or is ceded the laboring oar, or conflicts, or attempts to avoid responsibility by claiming another jurisdiction has primary responsibility.

A good example of a multi-jurisdictional crime would be a charity fraud in New York which collects money in the streets and by mail and other solicitations within and outside New York. To start with, the "charity" must register with the State Department of Social Services, and it may be enjoined from operation for nonregistration or for violations of the New York Social Services Law. The State attorney general would investigate.¹ Street collections must be licensed by New York City, and while a violation would only be an offense, it would still be criminal. The local police would investigate.² Collections by means of false representations would violate the State larceny statute,³ and thus could be prosecuted by the district attorney of any of the five counties in New York City and be investigated by the New York City Police. Interstate mail solicitations could be a violation of the Mail Fraud Statute, to be investigated by the Post Office Department. TV or radio solicitations, or use of interstate telephone lines to solicit or conduct other related business could constitute a violation of the Wire Fraud Statute, which is within the investigative jurisdiction of the FBI. There is also the parallel tax problem to be considered, with the New York State Tax Commission and

¹ Article 10-A, New York State Social Services Law.

² Chap. 24, Sec. 603-11.0, Administrative Code of the city of New York.

³ Sec. 155.00 et seq., New York State Penal Law.

the Internal Revenue Service investigating with respect to the taxability of the "charity" and its personnel.

This example poses the horrible prospect of an investigation which would resemble a free-for-all in a sea of mud. In all but a few rare instances conflicts and interferences are fortunately minimal, sometimes for reasons which should trouble us as much as conflict itself.

The first point to be considered is that a charity fraud prosecution, like prosecution of other white-collar crimes, requires a complex investigation. As a result, the smaller the governmental unit having jurisdiction the less willing it will be to become involved. Noncriminal steps, i.e., an injunction by the State attorney general, may go forward almost automatically. Police will pursue the minor offense of street collection without a license automatically, since proof of the violation is patently simple. The real fraud violation, however, would either be directed by one county prosecutor and investigated by the New York City police, or would be referred to the postal inspector in New York City as a violation of the Federal Mail Fraud statute. This situation is replete with opportunities for fly balls being dropped between outfielders. It is a tribute to the fraternity of investigators and police that very few balls are dropped, but it must be added that some are held so long in the outfield after being caught that the difference can be academic. Thus, in a typical situation of this sort,⁴ local police might issue a summons for the street collection, a State attorney general would be likely to apply for an injunction, but the real criminal investigation would most likely be made by the postal inspector, notwithstanding the overwhelming local interest in the case. The overburdened postal inspectors, however, might very well be compelled to set up a scale of priorities which would preclude timely investigation of such a case.

For consideration, therefore, is whether local investigations of white-collar crimes would not be more appropriate than Federal investigations in many cases where primary federal jurisdiction has been conceded by default. Local investigations might be simpler and cheaper. Perhaps post office cooperation with the New York City police having the laboring oar would result in quicker, more appropriate justice, based on narrower statutes. Larceny or fraud (State violations) are much easier to prove than mail fraud in a consumer fraud case. Commercial bribery is a much easier charge (where a supplier subverts his customer's employee) than is a wire fraud charge jurisdictionally grounded on an interstate telephone call to set up the deal.

The point will be made that State and local jurisdictions do not have the money, and that their writ does not run country-wide if witnesses must be interviewed 1,000 miles away. It is not impossible, where a crime is essentially local in character, to develop methods whereby Federal investigatory agencies can service the States in areas of concurrent jurisdiction and even assume the costs of such servicing—since such servicing might lessen the burden and costs arising from responsibility for many cases which

⁴ Certain counties in New York City may be atypical, since they have prosecutors specializing in fraud cases.

are more appropriately handled locally.⁵ This might involve changing the statistical format used by a Federal agency for budget justifications, but the cost effectiveness of such servicing should not be difficult to demonstrate.

(b) Facilitating private aid to investigators

There is a tradition that governments should run their own investigations, separate and apart from any involvement with interested private parties. It is a good tradition. Any other course would open the door to use of the prosecutive mechanism of government to improper exploitation by private parties. Every prosecutor's office is haunted by the spectre of becoming a collection agency for private debts, and it would be unthinkable for public policy on investigative priorities to be determined by private interests willing to pick up the costs. The halls of law enforcement agencies should not be frequented by lobbyists or special pleaders.

Having said this, we should recognize that existing practices implicitly recognize the desirability, and even the necessity of private support for the investigative process. Thus a prosecution for fraud on a telephone company in connection with long distance tolls will inevitably be based on investigations by telephone company security departments. The security department of a credit card company will already have completed the major part of the necessary criminal investigation before the matter is turned over to local police or to federal investigators. A bank embezzlement case will necessarily exploit the work of the bank's own auditors. In a bankruptcy fraud, work by creditors' investigators and attorneys often represent the basic case ultimately prosecuted.

Whether we like it or not there is a private element in every prosecution, and every complainant makes his necessary contribution to an investigation. If he doesn't, he may not get very far. In the white-collar crime area it is not unusual for a complainant to be told that he must come back with evidence to support his charge, that allegations are not enough.

Little thought has been given to examining the proper role of the interested party in an investigation. Is there justification for a double standard: (1) Where the victim has no investigative facilities, to expect or require no assistance; and (2) in the case of victims which have or can afford to finance investigative facilities, to encourage or require such assistance? An argument could be made that where a profitmaking venture creates new kinds of criminal opportunities the cost should in some measure be borne directly by such ventures. This could be by analogy to the theory that where water pollution is a byproduct of manufacturing operations, the manufacturer should bear the costs of cleansing the water. This still would leave us with the problem of how to employ such private aid, how to monitor its performance, and how to prevent abuses.

As a practical matter, in the white-collar crime area (where there is a complaint by a competent corporate party) such aid is now invoked and monitored by the implied threat that the investigation will not go forward in the absence of satisfactory cooperation. This system may work well, but

⁵ There are precedents for this. The FBI provides many services for local police, and 28 U.S.C. 1782, 1783 provide for free services by U.S. attorneys in aid of foreign legal process. The SEC services State agencies in their "Blue Sky" law enforcement, in an effort to spur more State-level enforcement.

no one has directly examined the problem even to the point of assessing its dimensions or implications.

Reference has been made to assistance given by trade associations to investigative authorities.⁹ Consideration should be given as to whether this is desirable and, if so, whether the relationship should not be dignified and facilitated by the setting up of specific procedures.

(c) Conflicting interests of victims and private parties

Since white-collar crimes more often than not deal with deprivations of money or property, the first concern of any victim is restitution rather than punishment. The complaint made by a victim is usually preceded by a failure to obtain such restitution, and is in fact triggered by it, but the desire for restitution (even at the cost of denying or minimizing cooperation with the Government whose aid has been invoked) continues unabated.

While it may have no legal significance, a civil settlement by a victim or victims during a criminal investigation or prosecution has an almost lethal effect on criminal enforcement. To start with, the dividing line between civil abuse and a criminal violation is often less than clear in the white-collar crime area, and therefore prosecutors and investigators will tend to accept the fact of a settlement as an indication that the civil aspect outweighed the criminal. The investigator (or prosecutor) also knows that the victim will no longer be a wholehearted witness for the prosecution, and that any defense counsel worth his salt will find some way to make the jury aware that the case was mooted by civil settlement, even though evidence of such settlement might be inadmissible. Civil settlement may also be pursued as a device to dispose of an issue of fact crucial to criminal prosecution; this is a particularly effective technique where the settlement requires judicial approval (and thus judicial imprimatur).

Settlement has an implication of compounding a felony (a crime in and of itself) which is the reason why most such settlements are cleared with prosecutors' offices, after prosecutors have taken over from investigators. However, while matters are in the exclusive hands of investigators such amenities are not even nominally observed, killing many a case which should be prosecuted.

The drive for settlement, by a victim, is not purely a matter of greed. It may be seen even in a case where the Federal Government is a victim. In one procurement case, while a grand jury was investigating, the defense service involved entered into a new contract with the supplier, providing for monetary allowances in settlement of the very transactions which were the subject of the impending indictment. The reason given was that the procurement was necessary for the Vietnam effort. This new contract effectively terminated the prosecutive effort.

In some instances the drive for settlement may not have any impact on an impending prosecution but can have an adverse impact on the interests sought to be protected by investigators and prosecutors. An example would be the second prosecution of Louis Wolfson in the Southern District of New York. A stockholder's derivative action had been commenced in the New York Supreme Court (a State court of general jurisdiction) in connection

⁹ P. 22 supra.

with Wolfson's management of the Merritt-Chapman-Scott Corp. Counsel for Wolfson and the suing stockholders had arrived at a settlement, and applied for judicial approval which was necessary because the settlement would compromise the rights of all stockholders and not merely those of the plaintiffs. The Securities and Exchange Commission was then investigating certain of Wolfson's transactions, had already referred them to the U.S. attorney for criminal prosecution, yet realized that any settlement made in the absence of judicial awareness of facts uncovered in the investigation would be unfair to the shareholders whose rights were being compromised. SEC attorneys therefore appeared in the State court and requested that approval of the settlement be deferred because the pending inquiries might be of material significance to the settlement. Notwithstanding the fact that such disclosures might strengthen the settlement position of the plaintiffs, their counsel joined with Wolfson's counsel in bitterly objecting to any delay in the settlement. The court granted the delay and new facts as to Wolfson's management of the corporation were subsequently disclosed. Holding up the settlement, over the objections of plaintiffs' counsel, furthered the objective of a settlement made with full awareness of all the facts.

The Wolfson situation illustrates the point that the public interest in preventing or deferring settlement may be an overriding one, even where a criminal prosecution will not be affected, and where victims, third parties, or their attorneys wish to enter into a settlement in the face of an obviously ongoing criminal investigation.

The desire for settlement is not the only point of conflict between the victim and the investigator or prosecutor. The victim may object to being troubled or, more and more, he may be concerned with his public image. Defrauded corporate victims may drag their feet in cooperating because their image, as a victim, may make their management look bad to stockholders, and corporate executives have even voiced concern that customers may question whether a company which could be easily victimized would be capable of maintaining the quality of its product. There are also instances where the white-collar crime involved may expose a weakness in the business structure, and the corporation is fearful that prosecution will educate others as to how to do the same thing.⁷

A number of related questions come readily to mind. What problem may potentially arise in a Food and Drug investigation or prosecution because the American Medical Association has earlier bestowed its imprimatur by accepting advertisements in its journal? What should be the investigator's attitude (especially where he has regulatory responsibilities) if his work results in a prosecution which makes it impossible for the subject of the prosecution to make restitution to victims?

With what may be "lesser offenses," there are similar difficulties which face investigators and enforcement authorities. In the case of housing violations, would not an inspector be justified in leniency to give a landlord time,

⁷ In one case the defendants learned how to manipulate postage meters to enable them to avoid the payment of more than \$750,000 in postage. The defendants were prosecuted for fooling a foolproof system, but both the manufacturer of the metering machine and the Post Office Department (which investigated the case) were most concerned that the *modus operandi* not be made public until corrective measures could be taken.

even extended time, to make repairs, in order to make it possible to avoid a decrease in available housing in a tight housing market? Even where repairs are impractical or not economically feasible, may there not be a valid conflicting tenant or public interest to have bad housing rather than no housing at all? The contrary question must be whether stringent enforcement would not be beneficial to the vast majority of tenants, even if a few were to suffer or become the relocation responsibilities of public agencies.

(d) Cooperation of victims and witnesses

An observer might conclude that victims and witnesses exist only insofar as they are useful to law enforcement authorities, rather than the other way around. This anomaly is not characteristic of the white-collar crime area alone, or even more of a problem in this area than in others. However, in light of greater difficulty of assembling white-collar prosecutions and the larger numbers of victims and witnesses usually involved in any one case, the impact of this problem is greater in the white-collar crime field.

To make this indictment is not to be critical of law enforcement officials involved. Rather, it is a criticism of a situation which has been frozen in a mold, with the thawing process being inhibited by ever increasing workloads and relatively less personnel to bear the investigatory and prosecutory burden.

Whether an investigation is being conducted by police, licensing agencies, regulatory agencies, the FBI, postal inspectors, or prosecuting attorneys, there is rarely any provision for compensation for a victim or witness' time, except for witness fees for days actually before grand juries or trial courts.⁸ While a victim does not expect compensation for his first visit to make a complaint, he generally does not foresee that he may be called down again and again, with the loss of a day's pay each time. Postal inspectors and FBI agents will ordinarily make it a practice to visit witnesses, thus lessening inconvenience, but these visitations may be repetitive and therefore burdensome. Where witness fees can be provided, they are usually inadequate and no substitute for a workingman's day's pay. Investigations and prosecutions are in the public interest, and not mere delegations to government of the execution of private vengeance.

The problem of inconvenience and cost is not necessarily a serious one where the cooperation sought is that of a large financial institution. It may be very costly for a large bank to respond to hundreds, perhaps thousands of subpoenas in the course of a year, and the same magnitude of costly compliance may be borne by telephone companies, but this is a necessary and foreseeable consequence of the businesses in which they are engaged. Nor would it be a particular problem for a mail order house or book club, for the same reason. But the total impact on victims in a consumer fraud case could be staggering and, in a sense, add insult to injury. Everyone involved in grand jury investigations can tell stories of groups of victims

⁸ There are certain *ad hoc* measures such as use of subpoenas to justify fees and travel expense, where the prosecutor knows he does not intend to put the subpoenaed party before a grand jury, but only to conduct interviews. It should also be noted that certain regulatory agencies such as SEC, FTC, FCC, and ICC can issue subpoenas legally in aid of their investigations, as can the Commissioner of Investigation in New York City.

and witnesses subpoenaed to testify, asked to come back time after time because they were not reached on the initial subpoena date, and these impositions are aggravated by delays and continuances after indictment and during the trial stage.

The problem posed is not necessarily one which is the fault of the investigator or investigating prosecutor. The investigator or prosecutor is, like most of us, occupied with his own problems and his own workload. Victims or witnesses may become objects to be moved, to be used, or if difficult, cajoled or placated. It would be profitable to consider whether some alterations in existing practices might not be structured. Among them might be provisions for compensation to witnesses or victim witnesses for earnings lost by reason of their assisting investigations,⁹ better scheduling of witnesses before grand juries,¹⁰ and alternative interviewing techniques. Victim witnesses certainly make no less a contribution to an investigation than expert witnesses, who expect to be paid for all their time, including trial preparation.

Crucial to obtaining the cooperation of victims and witnesses must be the personal element in their relationship with the investigators who deal with them. There would be no simple pattern of such interpersonal relationships. Some investigators are obviously more sensitive than others, more tactful, more aware of the insecurities, frustrations, and even of the fear of the very authority whose assistance is invoked. Investigators doubtless conduct themselves differently with interviewees of dissimilar status, and certainly tailor their approaches to what they wish or expect to achieve with the interview. There are probable distinctions in approach based on interventions or introductions, whether by counsel for victims or witnesses or because the victim has been referred to the investigator by some public official or one known to the investigator personally or by reputation.

(e) Benefits of investigation

No private party or nonpublic body has available to it the evidence gathering powers of a law enforcement agency. Banks will often give information to an FBI agent, subject only to the condition that subpoena will be subsequently delivered if the data produced will be used in some public way. Individuals will commonly talk to a Government investigator or prosecutor in situations where they would not talk to private litigants. Where cooperation with law enforcement agencies is not voluntary, there is available the administrative subpoena, the grand jury subpoena, or the trial subpoena—sometimes backed up by the power to grant immunity from prosecution and thus the ultimate compulsion which overrides even a plea against self-incrimination.

It is therefore completely understandable that victims of white-collar crimes, who are more likely to be pursuing related civil remedies than victims of common crimes, will seek to obtain the benefits of a public investigation. In some instances their complaint is motivated by a desire to get at

⁹ It might be possible to discriminate, i.e., between witnesses or by types of offenses, so as to get closer to a system of compensation based on need.

¹⁰ If studies show that a large proportion of witnesses are never reached on the day for which they are subpoenaed, then something is obviously wrong with the scheduling process. It is not at all clear what a study would show.

proofs which would not be available to them as part of discovery proceedings in civil litigation, or to exploit a criminal conviction because of the possible collateral estoppel or *res adjudicata* effects of such a conviction.

Civil litigants, particularly plaintiffs and witnesses, can point to the attitude of the Federal Government with respect to its own civil interests. If the Federal Government investigates a fraud case, the results (including grand jury proceedings) are available for use in the related civil litigation, even if the Government declines to prosecute, or if the grand jury votes a no-bill, or if the defendant is acquitted after trial. Civil litigants can contrast this with the one-way-street they usually encounter, in which they and their attorneys get no benefit from the investigation to which they contributed, or which was based on their victimization. This will often be true even if there is a conviction,¹¹ although particular prosecutive policies may allow for exceptions.¹²

Governmental policies with respect to making such data available should be examined. There should be nothing sacrosanct about public investigations, and many of the very good objectives which underlie the secrecy policy¹³ might well be satisfied in other ways. Much of the investigative work of the Securities and Exchange Commission has been made public, either directly or by forcing registrants to disclose information resulting from staff investigations and, even though used in private litigation, the results have been both controllable and beneficial to the public. While the Securities and Exchange Commission may be a special case, its experience should cause us to reexamine whether this wall of separateness should not be pierced by a few more doors and windows.¹⁴

An examination of past policies would also be justified in light of the deterrent effect new policies might have, and the degree to which they could benefit victims and thus improve cooperation both in filing of complaints and in investigations. Not the least of the benefits which would

¹¹ One of the major reasons for *nolo* pleas is to suppress the use of evidence and preclude victims from using convictions for their collateral estoppel or *res adjudicata* effect.

¹² The Department of Justice may release evidence or allow testimony by its investigators "in the interests of justice." This is a matter of discretion, and discretion is exercised under this policy in rare instances only after most painstaking examination. The Department does not wish to act to assist one side in private litigation except under most unusual circumstances. If the evidence consists of grand jury testimony or material, only the U.S. District Court can release it. Rule 6(R), F.R. Cr. Proc.

¹³ The usual objections are: (1) Government should not take sides between private litigants, giving them more than they could get under civil discovery rules; (2) information might be planted in Government investigations to give such evidence the benefit of a Government imprimatur when subsequently surfaced; (3) such disclosures might reveal confidential investigative techniques; (4) private litigants might be more prone to make unjustified criminal allegations in order to initiate investigations which they could exploit; (5) such cooperation would be most burdensome on Government personnel, and might entail considerable Government expense; and (6) there would be a rash of post mortems and complaints about the insufficiency of investigations which, though unjustified and possibly selfishly motivated, would make for difficult administrative and public relations problems.

¹⁴ There is a trend in this direction in the antitrust area. "The Government and the Private Anti-Trust Suit", Remarks of Richard W. McLaren, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Antitrust Committees of the Federal Bar Association and the Philadelphia Bar Association, Dec. 11, 1969.

accrue from a change of policy, if one is feasible and can meet the very valid objections commonly made, would be a step toward the integration of criminal and civil remedies to help achieve the overall objective of affording lower cost and timelier remedies for victims of white-collar crimes.

(f) *Investigative techniques*

White-collar crimes are investigated by all of the usual techniques, plus a few very special ones. The methods employed depend on the agencies, both state and federal, and on prosecutors who often supervise the latter stages of investigations. Underlying government action is, of course, private inquiry (formal or informal, amateurish or professional) which so often precedes the complaint triggering an official investigation.

With a complaint on his desk, the investigator must first determine whether the facts alleged, if supported by legal evidence, would constitute a crime and if so, what crime. He is usually not an attorney. If it would be a crime worthy of prosecution¹⁵ the investigator will interview witnesses and seek to examine pertinent records. If an agency has regulatory or special investigatory powers, it may compel answers or production of records by threat of suspension of business operations, or by subpoena, or both. If there is a refusal to cooperate with a regulatory agency there may be a grant of immunity.¹⁶ At some point there is a shift in the theater of action to the prosecutor's bailiwick, and an investigation may be continued by a grand jury.

The methods described work very well with respect to the usual run of SEC cases, financial cases, procurement frauds, and similar crimes. In many instances of consumer fraud, or housing maintenance or health offenses on the local level, these methods may not be adequate. They are certainly inconvenient if large numbers of victims are to be interviewed in a consumer fraud case, or with respect to wage and hour violations. Interviewers could make numerous calls before victims or witnesses could be found at home, and the environment might not be conducive to the taking of reliable statements. Some investigators will use letters or telephone calls to bring victims and witnesses to them, but these can be easily and safely ignored in most cases. This problem is now compounded by the difficulty of conducting interviews in hostile inner city areas.

As part of the general problem of reconsidering investigative methods it would be wise to seek new techniques such as administrative subpoenas for general use by police, investigators and prosecutors,¹⁷ which would provide for compensation and travel expense. Parallel to this there could be consideration of making such subpoenas returnable at convenient locations for the majority of those to be questioned, possibly by proper scheduling in their own neighborhoods. For consideration would be whether subpoenas should

¹⁵ In some instances investigators who deem a case unworthy will still use the investigatory process to prod the subject into making restitution or ceasing his questionable practices.

¹⁶ One of the serious prosecutive problems in the white-collar area is the automatic immunity which is conferred on those responding to certain agency subpoenas such as those of the FTC and ICC, in contrast to SEC immunity which attaches only after the privilege against self-incrimination is first claimed and then overridden by the investigator.

¹⁷ Tools already available to SEC, ICC, FTC, and many State and local agencies.

require answers, or only require attendance with the right reserved to refuse to answer part of or all questions, for any reason or even for no reason at all.¹⁸

Bringing witnesses and victims together at a convenient local site would have other advantages. Victims or witnesses not known to the investigator would be more likely to come forward. Mutual support and confidence would be fostered among victims and witnesses. Not the least of the advantages would be that investigators would be helped to see the crime they investigate in its full human and environmental context, that witnesses and victims are not objects to be moved in aid of the investigation, but that investigator and investigation have as their *raison d'être* the well being and protection of the victims and those similarly situated.

Special note must be made of the difficulties of conducting investigations in our inner city ghettos where there is often a measure of hostility, suspicion, or disbelief in the motives of law enforcement authorities. Ghetto complaints merit special priority, yet fail to receive the attention they deserve at least partially because of lack of cooperation on the part of victims and witnesses. Investigative interviews at the homes of prospective witnesses may be handicapped by pressure against cooperation, while calls "downtown" can be burdensome and oppressive. This would be one additional reason to for localized interviews, not far from but outside the homes of interviewees.

(g) *Joint investigations*

Joint investigations, whether vertical (State-Federal) or horizontal (as between Federal law enforcement agencies) can be very productive, or the opposite. A high level of cooperation exists, for instance, between the Post Office Department and the Securities and Exchange Commission. In one major SEC prosecution postal officials contributed their services and interviewed witnesses because of the magnitude and importance of the case, and IRS provided electronic data specialists to help with the organization and evaluation of a mass of data. At the opposite extreme, in another major SEC case, a sister Federal agency with joint (but incomparably minor) jurisdiction, delayed effective action by working with books and records it had, while withholding them from the SEC. On the vertical level, New York was shaken by the conflict between former U.S. Attorney Morgenthau and New York County District Attorney Hogan over the Itkin-Marcus affair in which, whatever the merits on either side, the image and substances of law enforcement was not advanced when District Attorney Hogan indicted U.S. Attorney Morgenthau's cooperating witnesses and defendants. Even where two outstanding offices are involved, the germ of dissension may surface.¹⁹

The SEC makes quite a point of giving assistance and guidance to state securities agencies. It convenes regular regional conferences to educate state securities law officials and foster the spirit of cooperation. The benefits flow naturally, not only in the area of cooperation in individual cases but

¹⁸ The office of the U.S. attorney for the District of Columbia has been using a subpoena-like document, with no official status, to bring witnesses in. These papers have no enforceable backing, but a study of their use and effectiveness might shed some light in this area.

¹⁹ The New York Times, Dec. 15, 1969, p. 1, contains a summary of this conflict.

also in State action with respect to cases which would otherwise be a most difficult burden on Federal enforcement. Expenditures of manpower and money in such efforts are fully justified.

On both the vertical and horizontal planes, a decent regard for the interests of other law enforcement interests can be most beneficial. For example, deceptive practices are subject to the regulatory jurisdiction of the Federal Trade Commission, but these deceptive practices may also be criminal violations under the Mail Fraud statute. The Federal Trade Commission therefore is kept aware of pending postal investigations so that it does not encroach to the prejudice of a criminal investigation (as by an inadvertent grant of immunity) and strives to cooperate.²⁰ Post Office mail fraud investigations often uncover cases which could not be proven under the Mail Fraud statute, and the files are transmitted to State and local prosecutors, to state insurance departments, or to the Federal Trade Commission for administrative proceedings.

To say that cooperation, vertical or horizontal, is desirable and should be increased is to state the obvious. The question is how such cooperation is to be fostered and made most effective. Good personal relations are not the answer, since personalities are rarely the problem. As discussed above²¹ the problem arises because there is dual jurisdiction of particular fact situations constituting violations, and where there is such dual jurisdiction other problems are more likely to come to the fore, such as shortages of funds or manpower on the lower side of the vertical groupings, or between equal jurisdictions within horizontal groupings who wish to shift the burden elsewhere, or competition for control of a case between co-equal jurisdictions.

The Federal experience with organized crime strike forces is probably not the answer to this jurisdictional problem, since these efforts were sponsored at the highest level to meet rather specific objectives. Required in the white-collar crime area is some method of bringing diverse interests together on a voluntary basis to achieve common objectives. A better pattern for study may be the SEC regional conference experience or similar cooperative efforts.²²

²⁰ In one landmark consumer fraud case, key evidence on the criminal mail fraud trial came from an FTC investigation which had taken place before the Post Office investigation. Similarly, a major wire fraud trial was preceded by, and helped by a prior food and drug case which had been conducted without any inkling that there might be a subsequent fraud prosecution.

²¹ Page 27, et seq., *supra*.

²² The Securities and Exchange Commission annually convenes several conferences, each in a different part of the United States. State securities regulators and law enforcement officials are invited to attend, together with SEC regional personnel. Mutual problems are explored in talks and panels, by State and Federal officials. U.S. Department of Justice personnel also participate. Officials with related responsibilities learn to know and work with each other.

Prosecutive Evaluations

For the purposes of this paper "evaluation" is defined as the decision making process whereby an investigator or prosecutor determines whether or not the case at hand is to be switched onto a track directly pointed toward ultimate criminal prosecution, subject only to being switched off such track in the light of new facts or other prosecutive disabilities which may emerge.

The major problem lies with cases in which it appears that a *prima facie* violation will be provable, rather than where there is some doubt that the evidence spells out a violation. Every prosecutor can obtain numerous convictions in cases which never are the subject of criminal prosecutions, because he makes the conscious decision that the overall interests of justice would not be served by prosecuting these cases. Even more numerous are the cases where conviction might be in doubt, but where the prosecutor could clearly establish his right to be in court by proving a *prima facie* case entitling him to go to a jury. Investigators have the same judgment to make, before launching investigations, though unlike the prosecutor they do not usually have the luxury of openly stating that they decline to act "for lack of prosecutive merit" or "lack of jury appeal" where there is a clear violation of law.

Evaluation is an art, and not technique. In practicing this art a law enforcement official must call upon his every personal resource of intelligence, social perception, psychology, diplomacy, and public relations skill. More than all this, however, he must have courage, the courage to make what he believes to be the correct decision in an area so subjective that anyone can disagree, and where he himself may find it most difficult to articulate or justify his decision.

The evaluative process is one of overwhelming importance to the administration of justice, to the credibility of law enforcement, and to rehabilitation and correction. Evaluation is crucial to the allocation of law enforcement resources, since determinations as to classes of cases to investigate or prosecute must always be made in the arena of conflicting claims and finite resources. When an investigative agency decides to concentrate on one set of violations, others must suffer or remain on standby. When a prosecutor decides that every bank robbery case must be the subject of an indictment, he makes the implicit decision that wage and hour violations will not be prosecuted, even if he does not consider it in that light. Within particular

classes of violations, when a prosecutor makes the decision to prosecute only the more serious violations, such as to prosecute first offense bank embezzlers who have stolen more than \$1,000, he is making the decision not to prosecute others.

If prosecutive evaluations are mishandled the consequences may be serious and far reaching, both to the subjects of evaluation and to the administration of justice:

- (1) A sense of injustice on the part of those who know they are singled out for prosecution whereas others escape the net after being apprehended.
- (2) Failure to effectively use prosecutions and investigations for maximum effect in prevention, deterrence, and detection.
- (3) Blurring of standards for measuring the effectiveness of law enforcement efforts.
- (4) Vulnerability to disparity in treatment of offenders based on influence or quality of defense counsel.
- (5) Imposition of the brand of criminality on those who should not have been prosecuted in the first instance, whether they are convicted or found not guilty.
- (6) Failure to adequately prosecute certain crimes, particularly some white-collar crimes which may have little publicity value or provide for minimal penalties, may discourage enforcement efforts by agencies and investigators.¹

Evaluation is also one of the most important elements affecting maintenance of orderly and efficient court processes. Judges are keenly aware of this, and every prosecutor has his stories about the biting lash of a judge's comment when a case is presented which the judge deems unworthy (in importance) of his court. Evaluation is the lever by which a prosecutor crucially determines his court's workload, as well as the workload of the police or investigating agencies which generate and support his prosecutions.

These are general comments about the importance of a proper evaluation process. They apply to all criminal prosecutions, not only to the white-collar crime area. Prosecutive evaluations in this area do require special comment.

Because of the money element present in white-collar cases, investigations and prosecutions will influence restitution and the ability of victims to recover damages. This is a social and economic interest distinct from and in addition to the retributive and penal rationales which underlie criminal enforcement generally. White-collar crimes are not instinctive or reactive, but involve planning and the exercise of rational considerations (including the value judgements which lead to acts of omission), and therefore the manner in which these cases are known to be evaluated may have substantial deterrent effects.

White-collar crimes require longer and more sophisticated investigations and longer, more complicated trials. Sentences are less impressive than those

¹ Every agency charged with maintaining a Government program must in some way police that program. Thus the Social Security Administration refers countless cases to U.S. attorneys, most of which are declined. With limited resources, it is understandable that an assistant U.S. attorney will prefer to spend his time and energy on a bank robbery, or organized crime case, rather than on a case in which a widow continued to receive benefits by concealing the fact that she remarried.

which follow convictions for common crimes. This tends to encourage procrastination on the part of investigators or prosecutors. Lengthy prosecutions mean heavier expenditures of time and money, thus weighting the scale against these cases in many an office. No single comment can be made as to how white-collar crimes are evaluated by investigators or prosecutors, since the variety of these crimes, their perpetrators, and the victims are infinite—as are the public interests affected.

(a) *Evaluation by investigators*

There is no saturation coverage of transactions susceptible to white-collar criminal activity. Every investigative agency, be it the SEC, IRS, FBI, FDA, or comparable State and local agencies, must operate on a spot check basis, by reacting to victims' complaints, or by general surveillance of an area of possible violations.

The Securities and Exchange Commission is a unique agency, with both civil and criminal investigative jurisdiction, and with the rare power to make a criminal evaluation as to whether or not it should refer a case to a prosecutor for criminal action.² Because it has prosecutive discretion to separate the wheat from the chaff, because it exercises this discretion with sophistication and provides extraordinary assistance to prosecutors, and because it polices its cases directly and by liaison with the Department of Justice in Washington, the cases it refers are almost invariably prosecuted. Much of the basic evaluative work has been done before the referral, with consideration of the quality of the proof, egregiousness of the offense, the relationship of the particular case to the overall enforcement of the Securities Acts, and the deterrence factor. The U.S. Attorney will play an important role in determining who is to be indicted, and may expand or contract the case in the grand jury. His role is crucial with respect to the pace and zeal of the prosecution, but the basic evaluation is usually made earlier by the SEC in light of the standards referred to above, in this paragraph.

What the Securities and Exchange Commission does under its statutory authority to evaluate, other Federal and State agencies may do in a less structured fashion. Strict construction of their legal responsibilities usually requires that they report all indicated criminal violations to prosecutive agencies if there is some evidence to support the allegation that a crime has been committed. They have no discretion to refrain from doing so. However, they may as a practical matter exercise prosecutive discretion in several ways, such as by construing the allegations received as insufficient to spell out a crime as a matter of law.

The referral technique may itself be an evaluative exercise. Thus the likelihood of an affirmative prosecutive mail fraud evaluation by a United States Attorney can be raised almost to the level of a certainty if the postal inspectors put together the equivalent of an SEC criminal reference report. A procurement fraud is most likely to be prosecuted if the FBI has made a massive and comprehensive effort, and maintains continuous contact with the U.S. attorney's office to ask about the case and to obviously be available if any supplemental services are required.

² Sec. 20(b), Securities Act of 1933; Sec. 21(e), Securities Exchange Act of 1934.

Contrast this to the written referrals which are received in large quantities by a U.S. Attorney's office, or the brief written referrals handed in by investigating agencies—followed up by pressure for a prosecutive decision, but obviously not for any particular decision.

It is clear then, that the prosecutor's ultimate evaluation is initially influenced, most heavily, by the work and quality of the preceding investigation, by the zeal of the investigator, and therefore by the implicit evaluation already made by the investigating agency. This, of course, depends on the reputation and prior performance of the investigating agency. An investigator who promotes every minor case as being worthy of prosecution, or who withdraws or does not deliver support when the prosecutor has committed himself to the battle by returning an indictment or information, will find small regard for his evaluations on subsequent visits to that prosecutor's office.

No matter what the quality of the investigator's preparation and evaluation, he may have a built-in handicap if his product is intrinsically unable to compete in the market. In any prosecutor's office it would be difficult to imagine a major narcotics case being held aside so that a prosecution for fraudulent social security claims could go forward. Yet the integrity of the Social Security system, or the unemployment insurance program, or the food stamp program, taken in a total sense rather than by particular cases, may be more important than any one or two bank robbery or narcotics cases, and literally demand a representative sampling of prosecutions, properly spaced geographically and in point of time, to maintain the integrity of these programs.³

The role of the investigator with respect to prosecutive evaluations is crucial, should be faced openly, and examined in depth. It should not be avoided because of statutory or policy doctrines that only prosecutors have the power or authority to make evaluations. Once the investigator's role is directly confronted it may be possible to simultaneously improve the quality of complaint intake procedures, to substitute statewide or national objective standards for subjective hunches to a considerable extent,⁴ to set higher qualitative standards for investigations and reports, and possibly to define procedures for more formal inputs by investigators into the evaluation process.⁵ Since the varieties of investigators are almost infinite, ranging from local housing inspectors and police to FBI and SEC personnel, the problem is obviously a broad one which would permit no single group of conclusions.

³ The Internal Revenue Service thus goes to great pains to persuade prosecutors to launch prosecutions prior to tax time to deter taxpayers from claiming exemptions for nonexistent children, or crimes of similar magnitude. Prosecutions of this type are few, but they can be most important.

⁴ Great care should be taken to preserve considerable latitude for the exercise of "hunches," particularly in the white-collar area, where the ability to find evidence of a fraud may well depend on a series of informed guesses, based on prior experience, as to what the scheme was and how it was executed.

⁵ Many agencies make full reports and accompany them by formal recommendations, which the prosecutor may or may not follow. Others adopt specific procedures whereby special flimsy reports are submitted on cases which they deem unworthy of prosecution. Some agencies ask for conferences if cases are declined. In some instances referring agencies will compel a declination by reason of prior civil or administrative disposition. See p. 30, supra.

There will, however, be merit in an open airing of the evaluative role of investigators.

(b) Evaluation by prosecutors

Prosecutors traditionally have the duty to determine who will and who will not be prosecuted. They are subject to many pressures in arriving at their decisions, and are continually forced not only to make value judgments or moral judgments, but to make difficult discriminations based on their assessments of priorities. It would be profitable to look at what these pressures are.

Cases come with victims who, individually or as representatives of broader interest groups, feel strongly that their cases call for public vindication, or for public assistance in squeezing restitution out of the alleged violators. In some instances they may be cranks. In most instances they are genuinely aggrieved. And there are even genuinely aggrieved cranks. Their anger may be a salutary influence, compelling serious consideration of prosecutions which might otherwise be ignored or deferred. Or, where Government itself is the victim, the pressures may come in the form of requests for conferences at higher interagency or interdepartmental levels, sometimes for and sometimes against prosecutions.

Alleged violators in white-collar criminal areas are usually represented by counsel who are well above average in ability, standing at the bar, and political influence. Their ability promises more tenacious opposition, their standing at the bar promises unique difficulties,⁶ and the importance of political influence will vary from jurisdiction to jurisdiction.

Situations create pressures. If one's community has been particularly victimized, and the press has given much attention to the particular abuse, then the pressure to go forward will be commensurately great. If there has been a ghetto riot, there may be special pressures to pursue housing violations or consumer fraud violations which may have been a partial cause of the riot. If the nation is at war, the integrity of the materiel procurement process may mandate fervent prosecutive efforts. Public feeling may be particularly high, and this will be reflected by efforts of both appointive and elected officials.

Lack of resources create pressures. If the caseload of a prosecutor has passed the point where he can adequately handle the cases he already has, even by working 70 hours per week, then he must of necessity become very selective about the cases on which he will proceed. This is certainly one of the most telling pressures on any prosecutor, and is often the motive or rationale for his seeking other or alternative dispositions for cases submitted to him.

Courts create pressures, particularly with respect to white collar crimes, since these cases are most difficult and time consuming to try, usually generating most complex questions of law for consideration, and promising a high probability of appeals (and thus possible reversals) if there should be

⁶ Leaders of the bar are generally more successful in securing delays due to conflicting court engagements, and even their wildest positions are given more than justified credence by many judges. They are usually most experienced in using the press to orchestrate and enhance their positions, a talent which, of course, is also found in prosecutors' offices in some abundance.

a conviction. Judges frequently have little understanding of the social impact of white-collar cases, often regarding them as essentially civil in nature. A notable exception is the U.S. Court of Appeals for the Second Circuit, sitting in New York City, which has had an opportunity to obtain a liberal education in this field. Judge Friendly, speaking for his court in *United States v. Benjamin*, 328 F. 2d 854 (1964), used his decision to illuminate the shadows in the white-collar area when he declared:

* * * In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or crowbar. Of course, Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or accountant to criminal liability simply because more skilled practitioners would not have made them. But Congress equally could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge which they knew they did not possess.

For lack of such understanding or, in other instances because of the monumental insignificance of cases brought in to clog calendars already jammed with truly more important cases, judges will pressure prosecutors to decline or dismiss white-collar cases.

Most important of the pressures are those on the prosecutors themselves. It was said of Napoleon's legions that "every private carries a marshal's baton in his knapsack." Similarly, the prosecutor's role has traditionally led to political stardom. Run-of-the-mill white-collar cases rarely attract great publicity but will often generate fierce opposition on the part of private interests and members of the bar who can be most important to a political career, while victim interests on the other side may be able to offer no counter-balancing weight. Of course white-collar cases which are not "run-of-the-mill" can excite great public interest, and be stepping stones in and of themselves, particularly when they are abuse of trust cases.

Personal pressures, of a more praiseworthy nature, are fortunately far more common but have an equal potential for harm. Every prosecutor worth his salt wishes to help the particular victim in his case, and that decision may well call for fostering restitution in lieu of prosecution. Thus a prosecutor may waive prosecution of housing violations, or dismiss many of the charges, if the landlord makes repairs. A case in which numerous poor victims were swindled in a home freezer plan may be declined where the operators of the scheme buy back or prevail upon so-called holders in due cause to surrender the commercial paper negotiated as part of the scheme. Any concerned prosecutor may well yield to these very human feelings to help, even at the cost of leaving the schemers to victimize others. This may be a good decision or a bad decision, depending on the circumstances and on the orientation of the person making the judgment. The basic danger is that the prosecutor may rationalize his judgment of the case downward to justify personal assistance to the victim, without fully recognizing what he is doing and why he is doing it. This would be in contrast to making a conscious decision that the interests of justice warrant the sacrifice of a good case to benefit a particular victim or victims.

From what has been said it is obvious that a case being evaluated by a prosecutor must be considered on two levels. The first is whether acts have

been committed which (whether violations or not) would justify criminal sanctions. The second question is whether other legitimate factors should deter action even if the first question is answered affirmatively. This means that there must be some system of priorities. In any rational system some cases must stand in line and never be reached. Prosecutive resources will always lag behind need and, in truth, overall law enforcement objectives would certainly be better achieved by a policy of selective prosecution.

In view of the obvious importance of the evaluative process, and the cockpit of conflicting pressures in which it must be exercised, there has been surprisingly little attention given to the process as a whole. Within any prosecutor's office younger staff members will learn by example or by making their own deductions as to the underlying rationale of the decisions made by their seniors. There may be some intraoffice training program, on a formal basis, as to the elements which make for a prosecutable case. These programs are of little help when a young (or old) prosecutor is faced with the problem of which case will live and which case will die, unless the factors to be considered are fully evident within the four corners of the file—an unusual situation.

A comprehensive study of existing practices in prosecutive evaluation would yield valuable results in many areas. By shedding light on what we do and why we do it, it could assist prosecutors' offices in arriving at more aware and meaningful decisions, with respect to prevention, deterrence, punishment, correction, and rehabilitation. It could help with respect to court calendars. It could direct us toward effective alternate judicial or administrative remedies to relieve congestion in prosecutors' offices and courts, and to reconcile conflicts such as that between restitution and punishment. Any such study would require the support of systems analysts, psychologists, and those well versed in prosecutors' problems.

Prosecutions

White-collar prosecutions, like all prosecutive groupings, tend to have many singular problems as well as characteristics which they share with other prosecutions. It is not possible to generalize about the specific problems, since white-collar crimes vary so greatly by subject matter, motive, personality of defendants, and magnitude.

The basic dichotomy is probably that between the "big case" and the minor cases, though the use of such terms can be quite misleading. Statistics are unavailable, and it may well be that within any one violation grouping average sentences after conviction in minor cases may be more severe than in major cases.

The major case is one marked by significance either in economic impact, public interest, or the importance of its subject. The heinousness of the crime and the fact that possible penalties are quite mild may be of little importance in making such a determination. Antitrust cases and SEC cases are almost all major, by this definition. A tax case would be "major" against a physician or attorney whose professional life and reputation were at stake, but not one against a laborer who took an exemption and filed a joint return though he had no wife. A bank embezzlement case is "major" against a bank president who steals \$10,000, but it could be minor against a teller who steals \$25,000. A conflict of interest by a purchasing agent who takes a \$5,000 kickback on the purchase of printing may be minor, yet a conflict of interest by a legislator whose firm takes a \$1,000 fee will be major.

Obviously there is no clear line between the categories of "major" and "minor," and yet the line must be drawn because it is the key factor in analyzing problems arising out of the prosecution of white-collar crimes.

Characteristic of major cases will be astute, experienced, and tenacious counsel bending every effort and using every resource and tactic, to insulate their clients from indictment, from trial, from conviction, and from the direct or indirect consequences of conviction. Counsel will pursue these objectives by continually seeking conferences with the prosecutor and his supervisors, by interminable motions which are largely destined for defeat, and by extensive discovery proceedings and delaying tactics. When and if the case appears ready for trial there will be attempts to dispose of these cases by *nolo contendere* pleas, or attempts to convince the prosecutor that the defendant

should be permitted to plead to lesser offenses which are not even lesser included offenses comprehended within crimes charged in the indictment.

While the foregoing description of how a major case is uniquely defended sounds like a blueprint for vigorous defense by almost any conscientious defense counsel, experience indicates that such dedication and tenacity is rarely to be seen in minor cases. Prosecution for a false claim in a social security case is not likely to be the subject of thirty defense motions, as is prosecution for a false filing in an important securities case. There may also be some reason to doubt that our courts would be as patient to receive five hundred pages of motion papers on behalf of a small storekeeper charged with tax evasion, as from an attorney or bank president charged with the same crime. We are not dealing with conscious and deliberate discriminations, but rather with a peculiar alchemy of expectations, motives, financial resources, and counsel capable of putting obstructive and delaying tactics in the garb of protection of clients' constitutional rights.¹

A major problem in prosecuting major white-collar crimes is delay, a difficulty not unique to white-collar crimes. In one sense white-collar prosecutions are less harmed by delay than are other prosecutions. They are more frequently provable by documents and records which, unlike memories, are not easily altered by the passage of time. Notwithstanding this, delay may wreak greater havoc on white-collar criminal prosecutions because there are more excuses for delay, and also because turnover of personnel in prosecutors' offices makes it difficult to be certain that the prosecutor who generated the prosecution and knows most about it will still be on board when the case is finally to be tried.

Since the trials are lengthy and complicated, and since questions of guilt or innocence will often turn on inferences drawn, much study of the facts and research of the law may be necessary before a case can be tried. Typical questions would be: (1) Although the indictment charges a conspiracy, were there not in fact two or three, as a matter of law? (2) Was the economic interest sold a "security" within the meaning of the Securities Act of 1933? This question might entail an exhaustive analysis of the underlying business; (3) Although monies solicited for a church were promptly bet at a local dog track, did the defendant really believe that his gambling was commanded by God; (4) Could there be a mail fraud where a defendant's advertising promised pornography but delivered material of only mildly salacious content? (5) Do continuous, unexplained payments to a Swiss corporation spell out a criminal tax evasion where the defendant pleads the fifth amendment and Swiss law prohibits tracing of the funds? (6) Where the condemnation of land for a public purpose is immediately preceded by two sales of the same property, at markedly higher prices on each transaction, was there a

¹ In one major securities case defense counsel secured a delay in a prosecution by asking the prosecutors to investigate a specific defense. After investigation of most complex issues, which took several months to complete, the prosecutor found no merit in the defense and proceeded with his prosecution. The defendant then moved, among many other motions, to dismiss the indictment for lack of a speedy trial citing the delay caused by the investigation he had requested. While this motion was denied in the U.S. District Court, and as a ground for appeal in the U.S. Circuit Court of Appeals, as a species of unmitigated gall, it did serve a purpose of delay as part of a paperwork barrage.

scheme to defraud the government by creating a fictitious value for condemnation purposes?

Prosecutions in which such questions are relevant are fertile soil for complex motions for bills of particular, for discovery of filing cabinets full of documents, and for pretrial disputations as to the meaning of documents and constructions of and limitations on indictment language.

It may well be that the marked contrasts between the trial of white-collar crimes and common crimes stems from the fact that in white-collar criminal trials the issue of why something was done generally dominates the trial. If five manufacturers equally raise their prices within a 1-week period, there will be no antitrust violation if they did so independently and without collusive communications or agreements, but there will be a criminal violation if their actions did involve such communications and agreements. The basic issue of criminal intent thus would depend on inferences or actual proof of collusive agreements, even though there would be no problem of proof with respect to the simultaneous price rise. Contrast this to a homicide or burglary, where there is usually no question as to whether a crime has been committed; the only question is who did it and whether there is available evidence competent and admissible in such measure as to prove guilt beyond a reasonable doubt.

To further illustrate this point, it would be helpful to examine other specific questions which are quite common in representative white-collar criminal cases:

(a) Section 5 of the Securities Act of 1933 makes it a felony to publicly offer securities for sale without filing a registration statement with the Securities and Exchange Commission, unless the offering comes within some specific statutory exemption. A promoter (issuer) offers stock to 40 people and sells to 20, without registration. If this was a public offering he has committed a felony; if it is a private offering he has not. The line may be hard to draw, since the test may be whether the offerees were in a position to have had access to the kind of information which would have been disclosed in the course of a registration.²

(b) A homeowner borrows \$3,500 from a lending institution to add a room to his house, the loan being guaranteed by the FHA in reliance on his application stating the purpose for which the money is to be borrowed. Immediately on receipt of the loan proceeds, the borrower pays off business debts. If he falsely represented the purpose for which he applied for the loan, he violated 18 U.S.C. 1010, a felony. If he honestly stated his purpose but thereafter changed his mind there would be no federal criminal statute proscribing his conduct. Thus his guilt would have to be inferable from his circumstances and conduct, rather than simply from the fact that he misused the loan proceeds.

(c) A businessman short of operating capital increases his buying on credit from suppliers and, as soon as the merchandise arrives he sells it at a loss, using the proceeds to finance pressing business obligations, living expenses, and other undisclosed purposes. At this point he is exposed to prosecution under the Mail Fraud and Wire Fraud statutes for a scheme

² SEC release No. 5847 (Oct. 21, 1967).

to buy with no intention to pay, and to prosecution for bankruptcy fraud for alleged concealment of assets, since the disposition of proceeds of sales is in part unexplained. His defense to the fraud charges is that he expected to pay for the merchandise because he always anticipated the business tide would turn momentarily, and that the missing assets were gambled away in a desperate effort to recoup when he knew the tide would not turn in time. The basic issue would not be what he did, but with what motive, since the facts as to the purchases and sales would be clear, and the defendant would at least have visited a race track and made a few bets, even if he were pocketing or secreting the missing funds.

(d) A corporate road contractor bills a public authority for 500 truckloads of fill, but a subsequent survey shows that not more than 300 truckloads of fill are actually in the roadbed. The corporate contractor defends on the ground that it was all a paperwork mistake, and that no responsible officer of his company knew about the false billing. The truckdrivers all filed delivery tickets, and there are 500 such tickets, with the 15 truck drivers having no recollection of filing false tickets. Whether a crime was committed depends on the proof of willful falsities which might, in turn, depend on such proof as finding evidence that the same corporate officer who filed the claim for 500 truckloads actually purchased only 325—but even here he could claim that his right hand didn't know what his left hand was doing, still leaving the issue of criminal intent for the jury.

(e) A corporation issues a promotional blurb with respect to a new product development, which is deliberately misleading. As a consequence the common stock of the corporation rises in value, and later collapses with substantial losses to the investing public. Criminal culpability might well rest on the ability of the prosecutor to show that the corporate officer issuing the statement had its stock market impact in mind, or at least some specific motive to affect the price of the shares. If a jury believed that the corporate officer was only "puffing" the merchandise to increase sales, the same facts might only spell out deceptive practices which would be a predicate for cease and desist proceedings by the Federal Trade Commission.

A further complication with respect to proving criminal intent arises from the fact that most white-collar crimes arise in noncriminal contexts, and are often only illegal appendages attached to the otherwise proper execution of a previously legitimate role. Thus an insolvent business man might commit bankruptcy fraud after months of fending off disaster in good faith, and the fraud would be executed by continuing a prior course of conduct but for a different purpose. A broker may have taken a heavy position in a stock, to the point where its further decline would spell disaster for him—at which point a continuation of advice to clients to buy the stock might well be altered in character from a mistake in judgment to a criminal manipulative and deceptive device in connection with the purchase of a security.³ Crimes of omission, such as the failure of a landlord to provide heat or repairs, would be classic instances of the equivocal contexts in which most white-collar crimes are committed.

The importance of intent, as contrasted with the facts of admitted occurrences or acts, places a premium, both for prosecution and for the defense,

³ SEC Rule 10b-5, 17 C.R. 240. 10b-5.

on eliciting every minute scrap of evidence which might be available. There is rarely a point for the prosecution when it has enough evidence for its *prima facie* case or for rebuttal of anticipated defenses. In major cases indictments therefore tend to become lengthy, with numerous counts, and some critics will make the point that major white-collar criminal cases tend to be "overtried." If this is so it stems from the well justified concern of the prosecutor that he has no way of knowing in advance what quantum of evidence will be sufficient. It must also be understood that in a major white-collar prosecution there may be no realistic limit to the evidence, since either the prosecutor or the defense might just as easily find and use 5,000 relevant documents as 50 relevant documents, in contrast to common crimes where the amount of relevant and admissible evidence is more circumscribed by the nature of the criminal acts involved.

When one examines the issues in such cases and the lack of natural boundaries with respect to the quantity of admissible and relevant evidence, it is possible to understand the potentials of delay in pretrial period, and the drawn out nature of the trials which follow. There are innumerable sub-issues quite properly the subject of extensive pretrial motions. Once the outlines of permissible discovery are drawn by the judge, weeks or months may be consumed in the arduous work of examining and considering documents which may be produced. These will, in turn, be a launching platform for further motion practice. Thus intricate and involved cases trigger maximum utilization of procedural potentials for further delay, and each step in the cycle energizes and justifies further steps. If a defense attorney deliberately exploits this system to obtain delay, the effect on orderly prosecution can be deadly, especially if indulged by the courts or by the instinctive reluctance of overworked prosecutors to become involved in lengthy and time consuming cases.

Consideration must be given to methods whereby such major white-collar criminal cases may be handled in new ways, without depriving defendants of their rights. The first method which comes to mind would be the enactment of procedural rules to advance the fair and expeditious conduct of prosecutions generally, but which would have a particularly beneficial effect in the white-collar crime area. Some possible approaches would be the following:

(1) Discipline in the timing of pretrial motions has deteriorated because continuances or extensions of time have almost become the rule rather than the exception.⁴ Requiring inferior courts to make periodic public reports to the highest appellate courts of their jurisdiction as to the number of exceptions granted and the detailed reasons therefore, and requiring that orders granting such extensions set forth the justification, would have a most salutary effect.

(2) Extensive discovery proceedings in criminal cases are justified on the dual grounds that they clear the underbrush so that the crucial issues in dispute will be spotlighted and that ultimate justice will be furthered by having all the facts before the court, thus minimizing the effect of tactics and

⁴ The old legal adage that "every dog is entitled to one bite" has its new counterpart—that every litigant is entitled to at least one continuance at any crucial stage of a case.

games of legal skill. Neither objective is really achieved by current methods, and it would probably be fair to say that both are frustrated.

True exchanges of discovery would clearly be a desirable goal, but this cannot be accomplished so long as discovery is a one way street. Discovery is not a constitutional right, and should not be granted the defendant in any case where full reciprocal discovery is not granted to the prosecution. Put another way, a defendant should be confined to a bill of particulars unless he waives his fifth amendment rights for the pretrial period, as to every tangible piece of evidence. This would not, of course, permit depositions. The so-called reciprocal discovery rules are highly illusory, and in practice are not reciprocal.⁵

(3) Careful examination should be given to the impact of engagement commitments of eminent counsel on the orderly administration of justice, particularly with respect to white collar and other major criminal cases. Trials, and pretrial proceedings, are often interminably delayed because of conflicting engagements of counsel who have so many retainers that they can always point to some conflicting engagement or, if need be, find one in their offices. There is no rule of law, constitutional or otherwise, which gives a defendant the right to a particularly attorney.

(4) One of the crucial problems in major white-collar criminal prosecutions (it is not confined to white-collar cases) is the delay inherent in multiple defendant cases, whether the defendants be consistent in their interests, or in conflict. Not only is there an increasing workload in the pretrial period, by prosecutors in answering motions and by judges in ruling on them, but the trial itself will customarily be plagued by repetitive cross-examination and argument. Counsel for one defendant will often, by incompetence as easily as by design, harm the position of his client's co-defendants. The arguments against severances are of course, that those who chose to act together should expect to be judged together, that the Government should not have to try its case more than once, and that a defendant should not have his guilt made either more likely or less likely because of a common trial.

The problem becomes even more complex in a *DeLuna*⁶ situation, where one defendant takes the stand in contrast to the silence of his co-defendant, attempts to shift all culpability, and on summation to the jury his counsel demands the right to compare his client's frankness to the co-defendant's reticence.

The "big trial" has been bemoaned by defense counsel, prosecutors, and judges, yet remedial measures such as broadened discovery and pretrial procedures have almost always been counter-productive. Steps designed to facilitate stipulations and to confine trials to those issues really in dispute have instead become tools for delay and obfuscation. Remedies seem to

⁵ One very prominent defense counsel, in lectures and television appearances, has often made the point that if he is defending his client's property the procedural rules will permit him to obtain every bit of the plaintiff's evidence in advance of trial, but that when he is defending a client's life or liberty he has only a limited access to the Government's file. He does not mention that in a civil case the plaintiff has the reciprocal right to see the defendant's evidence. Few prosecutors would object to trying their cases under civil rules of procedure, while having to meet the criminal burden of proof to secure a unanimous jury verdict.

⁶ *DeLuna v. United States*, 308 F. 2d 140, (5 Cir., 1962).

produce crippling side effects worse than the maladies at which they are aimed. The "big trial" is *sui generis*, and should be the subject of special studies with respect to problems of traffic control, enforcement of rights of defendants vis a vis each other and, last but not least, the exploration of special procedures, optional⁷ or otherwise.

(5) Complex white-collar cases, particularly those involving victimization of consumers or investors, are often complicated by court rulings. For example, some judges in mail fraud cases take the position that the only victims who will be permitted to testify are victims named as the mail recipients or senders, i.e., one victim for each count of the indictment. Thus, even if the Government wishes to try a streamlined case before these judges, it must recommend a massive multicount indictment lest it be swamped on defense with a larger number of so-called satisfied customers, and have no avenue for rebuttal. This places a premium on the playing of a "numbers game" by defense counsel, and on massive multicount indictments.

A similar problem arises with respect to proving jurisdictional mailings in consumer fraud or securities cases. In a nontechnical sense the counts of such indictments are merely representative, and the selection of a particular mailing is only to confer jurisdiction on the court. Yet, if the mailing witness should die or become otherwise unavailable during trial, the specific count would fail. This places a premium, once again, on massive, multicount indictments, as insurance against the feared contingency of loss of a count mailing witness.

If indictments could be free from infirmities such as these, simpler indictments and trials would be possible. Prosecutors do not require 50-count indictments, carrying penalties of 5 years on each count, when in their most zealous moods they would regard a maximum 5-year prison sentence as more than appropriate on all charges. Consideration should therefore be given to statutory and procedural enactments, including provisions for nonsubstantive amendments, which might lessen the need for long multicount indictments.

(6) Jury trials represent a very real hobbling force with respect to major complex white-collar cases and should, wherever possible, be discouraged. Doing this poses very real constitutional problems, since a defendant may not be penalized for availing himself of constitutional rights, as has been

⁷ On one occasion the writer's former law firm was counsel to one of many defendants in a large case. There were two main defendants who were the hub of the scheme, and numerous peripheral defendants. Since ninety per cent of the evidence dealt with the two main defendants, all other defendants, after losing motions for severances, agreed to be tried by the judge in the same trial as the two main defendants who were being tried by the jury. As the trial progressed counsel for the peripheral defendants were absent, or appeared from time to time to cross-examine. All defendants were convicted but, except as limited by this dour outcome, all participants felt that this awkward *ad hoc* procedure had been fair and saved everyone's time and money. I outline this unique procedure not necessarily because it has general application or even to indicate that it was a wise move from the point of view of the defense or prosecution, but because it illustrates the resources of courts and counsel when they have a common interest. It should be the purpose of the Institute to plumb the depths of the resources of our system to enforce imaginative solutions to real trial problems without requiring such unanimity of court and counsel.

forcefully pointed out by the Supreme Court of the United States in fifth amendment cases. Nevertheless it would be helpful to explore possible inducements for acquiescence in nonjury trials, especially since they would not have to involve essential harm to a potential defendant's position as in the fifth amendment cases.⁸

Would it be unconstitutional, for instance, to provide that after a jury waiver a defendant would have unusually broad discovery rights plus special exceptions from evidentiary restrictions in view of the presumed greater ability of the judge to sift the wheat from the chaff? On similar grounds, could not defendants have the right to take depositions for use on trial, outside the jurisdiction, if the Government has the opportunity to cross-examine on taking of the deposition?⁹

Can we not find similar advantages for the defense which would have their own justifications in the trial situation, and therefore be properly exempt from being characterized as a penalty on their being withheld? This is not to exercise guile to circumvent a constitutional right, but rather to offer a *quid pro quo* for something advantageous to our legal system rather than to the prosecution's position in any specific case.

(7) Rules of evidence in criminal trials were basically designed for analysis of simpler human transactions, such as robbery, murder, and arson which, however involved their emotional or psychological motivation, were simple in implementation compared to a stock fraud. Rules involving authentication of documents, for instance, were evolved in response to the need to prove transactions reflected by an earlier generation of business records kept in the course of business operations elementary in comparison with those which are the subject of today's civil and criminal litigation. Precedents established to deal with records kept in the ordinary course of business were not formulated in anticipation of electronic repositories of transactional data. Can we consider one who attests to the authenticity of data spewed out in response to a question put to a memory bank in the same light as a clerk who testifies that he kept certain records in the ordinary course of business? Are current rules for authentication and admissibility of business records consistent with the realities of modern record keeping and, for that matter, have they been current for the last generation?¹⁰

⁸ There is no reason to believe that verdicts in non-jury white-collar criminal cases would differ significantly from jury verdicts. The percentage of convictions in white-collar criminal cases is markedly high, despite the fact that most of them are tried before juries. Nevertheless, there is more of an appellate potential in jury cases, and the delay in waiting for a jury trial assignment is far longer. The latter point also raises the possibility that the common practice of granting trial priority to nonjury cases discourages jury waivers.

⁹ This is already permitted in Federal criminal practice, rule 15, Fed. R. Crim. P.

¹⁰ It is to be doubted that the secretary of a large corporation is as truly competent to testify that certain records were kept in the ordinary course of business as would be a subordinate clerk five levels beneath him in the business hierarchy. Is there then any reason to insist on a live witness to support authentication? It would appear far more sensible to provide for a simple certification by a custodian or officer, to be shown to all parties sufficiently in advance of introduction into evidence to enable objections which could trigger a more searching examination if warranted.

It would also be profitable to inquire whether certain types of records, or evidence, should not be treated as special exceptions because of their particular reliability.¹¹

(8) Consideration should also be given to possible expansion of the role of expert witnesses with respect to the nature of transactions more complex than medical or scientific data traditionally subject to interpretation by experts. This not to suggest that experts should be able to testify as to ultimate facts, such as the existence of criminal intent. The opinion of a stock market expert of the effect on price of a particular sale of a stock in a market where there was a limited amount of stock outstanding and available for trading would be of a different order

¹¹ In a recent case Swiss bank records were seized by a Swiss examining magistrate and made available to the U.S. Government, as the victim of the fraud, by the Swiss court. Their introduction into evidence would have presented special problems because Swiss bankers, themselves under criminal investigation in Switzerland, would hardly have been likely to come to the United States to authenticate their records at trial. 18 U.S.C. 3491 et seq., is totally ineffective in this situation.

Pleas and Plea Bargaining

White-collar cases are generally characterized by the use of representative charges, in many counts, rather than charges which comprehend the entire range of criminal conduct which is the subject of the indictment. The exception would be the common use of the conspiracy charge, which is an effort to sweep together all the bits and pieces.¹ The fact that white collar criminal charges are narrow in scope does not mean that a defendant's full range of conduct will not be comprehended on the trial, but it is a reflection of the structured framework of criminal enforcement.

Thus a bank robber will be charged with the bank robbery which resulted in his apprehension, while the white-collar defendant is usually being charged with specific acts which represent points on a line which is a continuum of conduct. A securities promotor may have made 5,000 sales of unregistered stock, but the indictment will charge in 15 counts that he mailed confirmations of purchases, or certificates, to 15 specific customers. There may also be a conspiracy charge if two or more persons were involved in the sale. Similarly, a bank officer may cover up his peculations by a series of 300 specific false entries, but the indictment will probably contain only 10 false entry counts. Less significant cases may also be the subject of multicount indictments. A housewife who orders books and records through the mail with no intention to pay is not likely to be indicted unless there are numerous instances of such conduct, yet only a small number of the mailed orders will be the subject of representative counts.

Although the use of representative counts in white-collar cases only occasionally has the effect of restricting proof at the trial, it does establish the dimensions of the arena for plea bargaining. The bank robber or burglar has one act to answer for, and his counsel may direct his efforts to negotiating a plea to a lesser-included offense. The white-collar defendant usually must target in on the additional objective of pleading to a lesser number of counts.

The objectives of a plea are therefore several, in white-collar areas:

- (1) As in all plea bargaining, to restrict the punishment by pleading to lesser offenses or lesser-included offenses.

¹ Other exceptions would be Mail Fraud, since it charges a scheme and artifice to defraud, 18 U.S.C. 1341, and similar charges such as Wire Fraud, 18 U.S.C. 1343, and fraud in the sale of securities, 15 U.S.C. 77(q).

- (2) As in all plea bargaining, to restrict the punishment by pleading to the smallest possible number of counts.
- (3) By minimizing the number of counts to which guilty pleas are entered, to establish a basis for a defense argument on sentencing aimed at narrowing the scope of the overall conduct for which the judge is meting out punishment.
- (4) By minimizing the number of counts, to limit the extent to which the defendant may be civilly liable to the victims of his conduct.
- (5) By seeking permission to enter *nolo contendere* pleas, to eliminate civil consequences which might flow guilty pleas.²
- (6) By seeking permission to enter a *nolo contendere* plea to deter the court from imposing a severe sentence. While the traditional doctrine is that a *nolo* plea is the same as a guilty plea for sentencing purposes, it is plain that courts regard government acquiescence or nominal objection to the proffer of a *nolo* plea as a downgrading of the importance or true criminal impact of the acts charged in the indictment or information. If the prosecutor genuinely objects, overriding of such an objection by the court will generally be followed by a light or only nominal sentence.³

There is usually much bargaining as to the number of counts to which a defendant will plead. In most instances pleas to multiple counts will not substantially affect the judge's sentencing discretion since multiple counts are representative of each other, and in white-collar cases the total sentence is not likely to exceed the maximum sentence on a single count. In an aggravated case where the prosecutor believes the conduct warrants a consecutive sentence exceeding the maximum on a single count he is in a position to block disposition by the threat of going forward on any counts to which the defendant has not pleaded.

Bargaining as to the number of counts is often crucially important, notwithstanding what has just been said, because an agreement on a number of counts may have a secondary meaning, and because of the civil ramifications discussed below. Particularly where courts do not rely on sentencing recommendations by prosecutors, requiring a plea to two or more counts may be a signal to the court that the prosecution regards the crime as one calling for a severe penalty, even though a lesser one than would be possible on one count alone. There would be no need for pleas to multiple counts in most instances if prosecutors deemed such signals to be unnecessary. Such signals would not be necessary if they were not expected by the courts, and if our systems provided for more adequate presentence reports.

There is no reason why, in the interest of justice, a prosecutor should not agree to take pleas to technically equal, but realistically lesser offenses under certain circumstances. An example would be a Federal Securities Act indictment charging the sale of unregistered securities in one count and fraud in connection with such sale in another count, where proof of fraud might

² Under certain circumstances, a guilty plea may have a *res adjudicata* effect with respect to the issues and parties in the indictment, or act as a collateral estoppel with respect to the defendants. Pleas of *nolo contendere* are not always available in state courts.

³ It is possible to cite exceptions, but they would be statistically insignificant.

be long and arduous. Each crime charged is punishable by 5 years imprisonment. The trial of a Securities Act case can be difficult and complex, and the overall objectives of the regulatory and law enforcement effort may well be satisfied by a plea to any felony charged in the indictment since the court is free to consider conduct of the defendant other than his guilt on the count to which he pleads.⁴

In many instances prosecutors are offered pleas to crimes not charged in indictments, nor even related to facts charged in the indictments, to dispose of criminal charges. For example, a bankruptcy trustee might embezzle funds, a violation of 18 U.S.C. 153 punishable by 5 years imprisonment, and offer a plea to an information under 18 U.S.C. 154 charging that he refused to permit an inspection of his records, an offense punishable by a \$500 fine and forfeiture of his office.⁵ Stranger pleas have been offered, and accepted. Consideration should be given to the question of how such dispositions may be controlled.

No blanket judgment can be made as to bargaining for pleas to lesser-included offenses, or to pleas reflecting acts not charged in an indictment. Each case would have to be viewed on its merits. Suffice it to say that in the white-collar crime area much ingenuity is exercised in the search for esoteric and rarely heard of lesser violations, as substitutes for the crimes charged.

The most troublesome plea area is that dealing with proffers of the plea of *nolo contendere*. Theoretically such a plea is exactly the same as a guilty plea, except that it cannot be used against the defendant in any other action or proceeding. As a practical matter it may have a number of significant consequences which distinguish it from a guilty plea.

Judges usually decline to accept a *nolo* plea unless the prosecutor consents openly, or tacitly by the lack of intensity of his objections. Under these circumstances, sentences are lighter and jail sentences most rare. If a judge accepts a *nolo* plea over the genuine and strenuous objections of the prosecution, his severity will be similarly tempered by mercy because his decision to accept the plea is usually indicative of his attitude toward the case.

Victims will have no benefit from the plea, though the prosecution was initiated by a grand jury because of what was done to them and to those similarly situated. Having pleaded *nolo* and been technically subjected to punishment as though he pleaded guilty, the defendant is free to defend companion civil litigation against his victims and to deny the very guilt to which he exposed himself to punishment by the *nolo* plea.

It is difficult to find a justification for such pleas. They are often excused on the ground that they save time and effort, of counsel, the courts, and the parties, but this could as easily justify dismissal of the indictment after the public pillorying involved in a white collar indictment of "respectable" defendants. Pleas of *nolo contendere* also serve to lock up the prosecutor's file, so that victims who would have been able to get evidence made public

⁴ *Williams v. New York*, 337 U.S. 241 (1949), rehearing denied 337 U.S. 961 (1949) rehearing denied 338 U.S. 841 (1949).

⁵ The writer is not referring to any such case within his knowledge, and deliberately avoided specific examples known to him which might reflect on the competence or zeal of possibly identifiable prosecutors.

at trial find access barred.⁹ It is difficult to reconcile this plea with the ancient concept of a criminal proceeding as a public substitute for private vengeance. Last but not least, the acceptance of a *nolo* plea fixes victims in the role of pawns unimportant except in that they contribute to the prosecutor's case, with no reciprocal obligation as the part of the government. If a prosecutor and a grand jury have determined that the wrong done to a victim warrants public action, and looks to the victim to cooperate, they would seem to owe such victim the minimal duty of prosecuting the case to a determination. If the case is found to lack prosecutive merit before trial the defendant is entitled to a dismissal, and there can be no justification for extortion of a *nolo* plea to save the prosecutor's face.

Arguments will certainly be made that if *nolo* pleas were to be eliminated the workload of courts and prosecutors would soar, and that more criminal complaints would be motivated by those who hoped to exploit the fact finding powers of the prosecutors. The first argument avoids the merits of the criticisms levelled at *nolo* pleas; the second underestimates the evaluative competence of prosecutors.

The role of the judge in participating in or supervising white-collar plea bargaining has aspects which add to his usual participation in the plea bargaining process, particularly where he presides over major cases. In any major white-collar case there is likely to be a continuous series of motions, arguments, conferences, and extensive pretrial proceedings. All these provide numerous opportunities for plea bargaining discussions in the presence of the judge, and for defense counsel to speculate and to probe the judge's possible sentencing bent if his client should plead. Discussions are likely to be furthered by the presence of more experienced defense counsel, many of whom will be well known to the court, personally or by reputation—a factor which may well benefit both the defendant and the overall objectives of law enforcement authorities.

Defense counsel will frequently express their desire to spare the overburdened court the expense and trauma of a long and complicated trial. Since it is the primary duty of defense counsel to worry about their clients' problems and not those of the courts, a responsibility they take quite seriously, it may safely be assumed they have other motives as well. If defense counsel are pessimistic about the result they will seek to avoid the publicity of a trial and the public record which will be available to civil litigants thereafter. Last but not least, the judge will do the sentencing and there is often a covert desire to deprive him of a first-class education in the facts of the case.

⁹ Access may be similarly barred by a guilty plea before trial, but the defendant under such circumstances may suffer by reason of the *res adjudicata* or collateral estoppel effect of his plea. For a contrary trend in the anti-trust area, see footnot (*14) at p. 34, supra.

Sentencing

There is a general impression that the more serious the white-collar crime, the less severe the sentence. This is part of the folk myth that if one steals it is better to steal big. Part of the rationale for this generalization is that the penalties are no greater, the chances of being caught are less, and operating on a large scale will ensure that money is available for hiring most able counsel.

While one should be wary of generalizations, they usually emerge because they are valid most of the time. They fail us when we do not realize that they may not be valid in all situations. This generalization, that it pays to steal big, can be the subject of innumerable illustrations, and also can be countered with a few dramatic opposites.¹

Assuming the validity of the generalization,² the explanation may partially be that those who steal big can afford to hire the best counsel, but this can only be a partial explanation since white-collar crimes generally result in the lighter sentences than common crimes, whether the defendants be rich or poor.³

Analyses of white-collar crimes and those who commit them may provide us with better explanations for disparities of treatment on sentencing than the simplistic division between the defense resources of the rich and those of the poor. Or, if there be some credit to be given to the rich versus poor explanation, we would probably find that it is only one factor for consideration.

In the analysis of white-collar crimes, *supra*, four categories were outlined: (1) personal crimes; (2) abuses of trust; (3) business crimes; and (4) con games. Consideration of these categories would make it obvious that, except for the fourth category, con games, the vast majority of defend-

¹ An example which stands out as a contrast to the general pattern is the 20-year sentence meted out to Anthony DeAngelis as a result of the notorious "Salad Oil" case referred to in footnote 8 at p. 8, *supra*.

² This is done without any substantiation.

³ It would be interesting to know whether, within any specific categories of crime, i.e., fraud in the sale of securities, the well-to-do convicted defendants are punished less severely. In order to make such an analysis the categories would have to be broken down as to defendants pleading, or convicted after trial, and as to the type of role they played in the fraud, i.e., as principals or tools of principals.

ants would have no criminal records, and that the recidivism rate would be almost nonexistent. Sentencing judges would, therefore, have before them (in the first three categories) a defendant with no record, already severely punished by criminal charges because part of business and social milieu in which arrestees or people with records are almost unknown, and with little likelihood of recidivism. This narrows the judge's objectives to two, deterrence and punishment supplementary to that already suffered by the defendant. Under these circumstances it is not surprising that sentences in white-collar cases tend to be lighter in the first three categories, even though the judge's discretion to inflict severe punishment does not differ markedly from that available to him in most non-white-collar cases.

Notwithstanding this apparently rational explanation for presumed judicial leniency in sentencing white-collar criminal defendants guilty of crimes other than con games, two questions remain: (1) As to any specific white-collar crime, are there disparities in sentencing which are not attributable to idiosyncracies of individual judges, but to some more general cause or causes; and (2) do present levels of sentencing in white-collar cases adequately meet the deterrence and punishment objectives which should be considered by judges? This assumes that the problems of correction and rehabilitation are comparatively unimportant in these areas.

In the absence of hard data the first question can only be answered by reference to impressions gained from observations over a period of time. The impressions of the writer are that, as to embezzlement and misapplication violations by bank personnel, the bank teller is more likely to go to prison than the bank officer or director.⁴ With respect to most other violations the writer has no clear impressions as to disparities of sentencing within violation categories. The writer is of the view, however that within violation categories the wealthier or better placed subject has a substantially smaller likelihood of being charged or if charged tried, or if tried, convicted. There would thus be an unrepresentative sampling at the sentencing level even if the disparities at that level were found to be minor.

Deterrence and punitive considerations are not, in the writer's view, given sufficient weight in the sentencing of white-collar criminals. White-collar crimes are not reactive or spontaneous and in most cases they are not the result of irresistible impulses. Sentences will therefore have marked deterrent effect to the extent that they are known. This would be true even for suspended sentences,⁵ for the brand of felon is a heavy burden for most men to carry, and the higher the social scale the heavier and more disabling the burden. Yet the paucity of prison sentences in these areas undercuts deterrence and the credibility of the criminal process in other ways which must be considered. In a tax evasion case the taxpayer has stolen money from the Government just as has a burglar who breaks into a post office. When a lawyer takes his client's money, it usually has greater impact on the client than any single burglary of the client's home. The unlawful deprivation of heat to a tenant may cause far more serious and long-lasting injury than a street assault.

⁴ The writer has no clear impression as to how the length of prison sentences would compare, where there are prison sentences.

⁵ This, would be in contrast to lower class or ghetto environments where records are so common that a nonprison sentence will have less deterrence value.

Lesser sentences may or may not result in lesser deterrence to those similarly situated, but it certainly undercuts the image of even-handed law enforcement in the eyes of those not so fortunately situated.

In discussing deterrence one's first inclination is to think of prison. In the white-collar crime area we often deal, however, with corporate defendants. Top management is highly sophisticated in its ability to insulate itself from exposure to prosecution for the crimes it generates and supervises, and the prosecutor is often relegated to charging only the corporation and lower level officials or employees. Punishment for the corporation can rarely be measured on any scale other than money. Such punishments could be quite meaningful, especially if nondeductible for tax purposes, yet the scale of such penalties bears no true relationship to the conduct on which the prosecution is grounded. The power of the Securities and Exchange Commission to suspend the activity of a broker-dealer for failure to properly supervise its employees provides more meaningful monetary penalties than any fines provided for in our penal codes. Unless such administrative penalty or parallel civil litigation is available, corporate fines are no more than a modest, though somewhat messy cost of doing business. Fines, at anything like their present levels, constitute neither meaningful punishment for the corporation or wealthy defendant, nor deterrence to those tempted to commit similar transgressions.

If punishment is a valid consideration in sentencing, apart from deterrence and rehabilitation, it suffers in this area as compared to non-white-collar crimes. In the abuse of trust and business crimes categories, the crimes are only possible because the violators are given the opportunity to commit crimes, by society, because they have presumably shown themselves worthy. Under these circumstances white-collar violations may well be more reprehensible, and more deserving of punishment if punishment is the sole criterion, than common crimes such as burglary.⁶

The sentencing procedure generally illustrates the some indifference toward white-collar victims as do earlier law enforcement steps such as complaint intake, evaluation, and trials. Judges do have certain powers inherent in the range of punishments at their disposal if they wish to use them, or if they are motivated to use them. The very real nature of this power can be seen by the race which many a defendant makes between the guilty verdict and the sentence to enable his counsel to point out how contritely restitution has been voluntarily made.⁷ In most instances judges have little interest in this, and might even consider it improper to promote restitution, on the theory that it would appear to be a sale of leniency with restitution as the consideration. Judges are rarely helped by prosecutors in these situations and, unlike certain Europe jurisdictions where victims participate by their counsel at trials, there is no one to speak for the victims.

Sentencing procedures should be carefully examined to ascertain whether there are not methods whereby victims can have their interests considered, directly and openly. There are precedents. Count victims in mail fraud pros-

⁶ See quote from *U.S. v. Benjamin*, at p. 43 supra.

⁷ This is usually done only with respect to a few victims, rarely where large sums are involved.

ecutions have been the subject of restitution orders in connection with sentencing. Magistrates have adjourned bad check cases by the tens of thousands, before prosecution, to give the writer a chance to make his checks good and thereby avoid prosecution. One judge sentenced a defendant who had looted an insurance company to 10 years in prison on one count, and to a consecutive 5-year sentence which would be probational only if the defendant restored approximately \$1 million to the receiver of the insurance company (for the benefit of policyholders and claimants). And, in a very recent case, *United States v. Baucum*, a U.S. District Court Judge sentenced a corporate executive to a maximum 5-year prison term for evading \$84,494 in Federal income taxes, and was quoted in the Wall Street Journal on October 13, 1969 as saying that the maximum term was imposed because of the failure of the defendant and his lawyer to cooperate with the Government in collection of delinquent taxes. The court also indicated that it would consider a petition for review of the sentence if the tax payment had been settled or that substantial progress in payment had been made. Such sentencing discretion can of course be abused, but the existence of such discretion as a remedy in aid of victims should be recognized and perhaps controlled by giving it a statutory base.

Judges should be alert to help victims, and prosecutors should have the burden of initiating suggestions to courts as to whether and how such help can be supplied. This should be a firm policy in every prosecutor's office. There is no reason why a convicted defendant should not be required to make restitution to the limit of his resources in order to receive less than the maximum sentence, nor any reason why a victim should have to prove his case by the civil standard of proof when the prosecutor has already met a far higher burden. The argument might be made that amounts may be in doubt, but masters and referees have always been named to deal with such questions when the issue of liability has been first resolved.

The area of assisted restitution in white-collar criminal cases could be a most fruitful one for study and research.

All of the questions discussed thus far in this section are closely related to what the judge knows about the white-collar crime involved, and about the defendant awaiting sentence. His ability to do justice on sentencing, and to achieve the various objectives of sentencing, depends on information submitted to him, especially where there has been a plea rather than a trial.⁸

Presentence reports, or their equivalent, cannot be the subject of any generalized comment. Format and completeness will vary from jurisdiction to jurisdiction, even within the Federal court system. In state and local courts there is no assurance that a prior records, if any, will be forthcoming. It is quite common in inferior courts, where offenses charging lack of heat or housing violations are tried, to find that the court has no information about prior similar offenses by the same landlord.

⁸ In many instances defense counsel advise their clients to plead because they anticipate that if a full trial is held the judge will fully understand how heinous an offense is involved, and that the client is the type of person who richly merits imprisonment. In contrast, if there is a plea the judge will have only the cold words of the indictment to consider, plus a presentence or probation report of varying depth and quality, plus such other and interested assistance as he can get from counsel on both sides.

Model presentence reports and patterns of assistance for judges on different levels would be worthy of substantial study, with respect to all crimes. Such studies can, however, be most helpful in the white-collar area in which it is important to convey to a court that it is dealing not merely with money but with real human concerns and tragedies, and where the background report on the defendant and his activities may give more guidance than the specifics of the crime involved. In the white-collar crime area presentence reports can also be used to educate judges to the human costs of white-collar crimes which are so often overlooked, and are hardly understood even by prosecutors. A victim usually recovers from physical assault, and simple robbery strikes at only a small portion of his property. White-collar crimes may destitute the well-to-do, propel the marginal elderly onto welfare or other dependence, or kick down the ghetto resident who has by great effort managed to climb a few steps up the ladder.

Legislation

There are many inconsistent and anomalous statutory provisions dealing with white-collar crimes, on Federal and State levels, which should be thoroughly reviewed. Many of them are being considered on the Federal level by the committee presently reviewing the Federal Criminal Code.¹ Particular stress should be given to the feasibility of a number of proposals, the need for which is quite evident in all jurisdictions.

Criminal fines should be raised to levels which realistically punish and realistically deter, and not merely to levels reflecting decreases in the value of the dollar since enactment of the fines presently on our statute books. Fines of merely a few thousand dollars on each count for violations of securities acts, or broad scale consumer frauds, or procurement frauds which may have cost the public or the Government millions of dollars, are poor deterrence and little or no punishment.

In conjunction with raising of fines, State and Federal legislation should be considered to establish particular rebuttable presumptions against corporations, since responsibility for their actions is so diffused and their power to harm is so great. Fines should, at a minimum, take all the profit out of the crime involved.

Basic inconsistencies in our statutory patterns should be eliminated. One example would be the existence of 18 U.S.C. 215 which makes it a Federal misdemeanor for a banker to accept a bribe for granting a loan, while it is not a criminal violation to offer or pay such a bribe. Is it rational to make it a specific Federal felony to procure a loan from a federally insured savings and loan association by submission of a false financial statement, but not to proscribe the same abuse of the loan processes of a federally insured or chartered commercial bank?

Legislation should be considered as a vehicle for using the criminal process to provide a basis for restitution to victims, whenever they are part of the class victimized by the scheme or pattern of acts charged in the indictment on information.

Consideration should be given to possibilities of injunctive relief, analogous to that which the Securities and Exchange Commission may apply for, either during investigations or between indictment and trial, to protect fur-

¹ The National Commission on Reform of the Federal Criminal Laws.

ther victimization of the public. We are all familiar with receiverships and trusteeships to prevent looting of business or wastage of assets on a proper showing of danger, or involuntary bankruptcy proceedings. The public as a class of prospective victims should be entitled to the same protection, on a proper showing, where criminal processes, investigatory or prosecutorial, are pending or impending.

Consideration should be given to statutes of general application authorizing investigatory subpoenas, on State and Federal levels.

On the State and local level the problem is so diverse and amorphous that it is difficult to suggest any simple pattern of legislation. One possible avenue, which would have deterrence value and be punitive in a monetary sense, would be to adopt one of the various existing proposals to create Federal rights in consumer fraud cases, which could be the subject of private derivative actions or actions by law enforcement officers in State as well as Federal courts.

For criminal law to be an adequate deterrent and remedy in the white-collar criminal field, it must be employed flexibly and with imagination,² for the varieties of culpable human behavior in the white-collar area are almost without limit. It would be impossible to create specific statutes to proscribe all such wrongful conduct.

There are tools which, if used now with imagination, would serve to provide criminal remedies in aggravated situations which are generally considered civil or regulatory in nature. One example, in the Federal area, is the use of 18 U.S.C. 1001 (the false statement statute) in areas such as civil rights or environmental controls, as discussed in the next chapter.

The statute books, State as well as Federal, contain numerous acts which if properly employed could be used now to reach areas of white-collar abuses largely untouched by the criminal process. The enactment of false statement statutes on a State level, comparable to 18 U.S.C. 1001, could fill very real loopholes in criminal statutory patterns with respect to unforeseeable variations which might be difficult to reach under existing specific statutes.³

While there are many abusive acts which are not specifically proscribed by criminal statutes, and which should be punishable as crimes, it is important that our statute books not be burdened by a complex of statutes confronting all of the observed varieties of wrongful behavior. Before we resort to new statutes we should examine the regulatory powers of State and Federal agencies, and determine whether changes in regulations or in methods of implementation (for the purpose of improving effectiveness of the regulatory function) cannot be designed to provide criminal remedies in aggravated cases and thus to obviate the necessity for proliferations of statutes. A good example would be the use by the Securities and Exchange Commission of its power to issue regulations, 15 U.S.C. 77(s), combined with the provisions of 15 U.S.C. 77(x) which makes it a crime to willfully violate a duly promulgated regulation.

² It is counter-productive, for instance, to permit tax deductibility with respect to treble damage judgments in the antitrust field—a position which can hardly contribute to deterrence.

³ This would not act as entrapment, or raise constitutional questions because of lack of specificity as to what is or is not a crime, since the application of a false statement statute is limited to instances where there is willful deceit.

Consideration of Specific Areas of Concern

Over and over again the point has been made that there is a very grey area dividing white-collar crime from abuses which are remediable only by civil action (if there is any remedy). It can therefore be confidently anticipated that whenever new kinds of problems arise to plague our communities, or whenever old problems are finally grappled with, criminal law, as a policing tool or as an instrument for advancing policy, will be one factor for consideration.

Legislation in areas such as community development or welfare programs inevitably contemplate some criminal sanctions. These are often buried far back in the texts of legislation, almost appearing to be afterthoughts—but the importance of these provisions is great, though latent. Criminal enforcement in meeting social concerns is almost entirely through white-collar criminal investigation and prosecution. For this reason it would be profitable to examine certain specific areas in which we may expect white-collar criminal law enforcement to become increasingly important.

A. Implications of the cashless society

We must make a start on consideration of the law enforcement implications of the creditless person in the looming cashless, credit card society.

One straw in the wind was the recent demonstration by welfare recipients, demanding department store credit. They saw the issue as one in which they were being denied the lower prices and better credit terms available in large stores outside the ghetto. Their action, however, illustrated the easily foreseeable plight of the creditless person (creditless because of poverty, improvidence, or even computer error) who may become a Kafkaesque nonperson.¹

Cash is losing much of its utility as a medium of exchange. For a host of reasons, including crime, buses and possibly taxis within less than a decade will be charging fares by accepting credit cards pushed into a slot. Bank credit cards have expanded retailer credit from large sales outlets to

¹ Steps are already being taken by large retailers to provide credit to the welfare poor. The New York Times, Dec. 9, 1969, at p. 37.

the neighborhood specialty store, and supermarkets may soon be expected to succumb to this trend.²

The expansion of our credit card environment will create broad scale opportunities for thefts of cards, for disavowals of use by fraudulent reports that cards were stolen, by misuse of restricted cards,³ and by retailer-facilitated misuse of credit cards.⁴

There should be careful studies, now, of avenues for prevention, deterrence, investigation, and prosecution in the credit card area. Among the matters for consideration should be:

1. Should there not be some control over the distribution of unsolicited credit cards? Should they be permitted? If permitted, should their mailing by certified or registered mail be compulsory?⁵

2. Should identification pictures on credit cards be made compulsory? Or should legislation make the requirement of such pictures a condition of holder liability whenever a lost or stolen credit card is used?

3. What are the technical possibilities in this area? Would it not be desirable to foster uniformity of shape and size of cards, so that service establishments could have a single processing machine for all cards which would be wired to computers which could instantly identify stolen cards or the attempted unauthorized use for prohibited classes of goods or services?

4. Credit cards add a new element to the problem of fraud by computers. Most people tend to accept their bills without checking, as they have a tendency to do with bank statements, merely adjusting for errors. More and more retailers and credit card companies are moving away from submission of duplicate invoices, and substituting coded listings referring to merchandise classifications.⁶ This opens the way to frauds by insiders in retail establishments, particularly in billing departments, who may be able to work out methods for thefts of merchandise under this system, and even for compensating if account holders catch the errors in their bills.

6. If we assume that credit cards may well be necessary for those on welfare, the question of control to prevent misuse should be a first priority. Prevention here would be a primary objective.

7. What will be the role of state and local law enforcement authorities in the credit card area? Is the problem itself so vast, with cards becoming more and more national in character, that it should be primarily a Federal problem?

² This may well alter existing patterns of common crimes committed against retailers, since the target of a holdup will no longer be cash, but rather merchandise which must be fenced.

³ These would be analogous to misuse of food stamps, i.e., cards may be issued with restrictions as to use, and be fraudulently or indirectly be used to charge unauthorized purchases.

⁴ The security departments of credit card companies and oil companies unequivocally take the position that the greatest part of their fraud losses result from the knowing participation and criminal cooperation of retailers and suppliers of services.

⁵ This would also be important with respect to replacement cards and cards formally requested. Our mobile society causes many cards to be returned as undeliverable because the intended recipients have moved. Credit card security officers assert that most thefts take place in post offices while these cards are in "return to sender" channels.

⁶ This departure has already been made in billings of Sears, Roebuck and Co., and other large retailers.

B. *Civil rights and white-collar crime*

Under what circumstances should civil rights violations be considered white-collar crimes and punishable as such? This is not an academic question since the tools of white-collar enforcement are both available and applicable to problems of civil rights compliance. Under the Federal false statement statute, 18 U.S.C. 1001, it is a felony to make a false statement, or to conceal a fact which would be material to the making of an administrative decision or determination. Where statements of compliance with civil rights mandates are required, i.e. by government contractors, false statements would be prosecutable. Where they are not now required, to compel such filings would shift the arena from the regulatory to the criminal area and provide options for increased enforcement.

This possibility illustrates the potential of criminal law as a tool of limited shifts into the criminal area where social policies or public protection from white-collar abuses are involved. If regulatory agencies or government departments have the power to make decisions and to ask questions in aid of their decision making functions (whether to buy, or to grant licenses or permits for specific activities), then criminal sanctions can be invoked if these answers be false. Put another way, public objectives may be advanced via white-collar criminal processes by asking questions which induce particular action or conduct, since favorable exercise of government discretion will depend on the answers. This sounds as if it might be subject to considerable abuse, but as a practical matter this device could not be utilized except with respect to broadly accepted national objectives and even then would be subject to critical court scrutiny.⁷

C. *Election laws and corrupt practices*

This is a complex area with limitless ramifications, criminal, social, and political. Such legislation as exists is still ill suited to achieving reporting and public disclosure on a level which serves to inform the public of the true costs of electing public officials and the equally crucial question of who is paying these costs. The first problem, therefore, is a legislative one, to amend existing statutes, Federal and State, to close many obvious loopholes. The second problem is the investigatory and prosecutive one of coordinating election problems with tax enforcement, since all those familiar with the field are quite convinced that many campaign costs such as printing and provision of office space are met by contributions in the form of picking up bills, and end up as deductions on business tax returns.

D. *Environmental problems*

Enforcement in the environmental field, with respect to air and water pollution and disposition of waste, is necessary if we hope to maintain

⁷ Such prosecutions in the internal security area have been viewed most critically by the Supreme Court of the United States.

or improve the quality of life. While there are some petty substantive criminal violations, usually at the level of technical misdemeanors, available as enforcement tools, the primary thrust of enforcement efforts has been to induce compliance by persuasion, conferences, subsidies, and regulatory measures of various kinds.

The pollution of our atmosphere, water, and soil is obviously too great a problem for draconian criminal solutions. Major efforts must be non-criminal, as they are now. But the ultimate sanction, the penal sanction, may be every bit as important in achieving civil compliance in this area as it is in the securities and banking areas, where only a very small portion of entrepreneurial violations ever reach the level of criminal prosecution. The potential is, however, of the utmost importance in meeting the overall regulatory responsibilities of the agencies involved.

A pattern of statutes in the environmental field should be considered, making use of the application of the false statement statute (as discussed in connection with civil rights, above) to reporting requirements and subsidy applications, as well as specific felony provisions applicable to repeated or persistent violations of statutes or regulations which are designed to protect the integrity of our environment.⁸

E. *Consumer protection*

State and municipal governments, as well as the Federal Government, are taking a new look at their responsibilities in the area of consumer protection. The National Association of Attorneys General, in its current study of the nature of the state attorney general's office, is placing special emphasis on the role and the capabilities of State government in this area. On the Federal level Congress has in recent years enacted such legislation as the Truth-in-Lending Act, the Truth-in-Packaging Act, the Wholesome Meat Act, and the Wholesome Poultry Inspection Act.⁹ On the municipal level, the City of New York has just established a Department of Consumer Affairs, not only combining in one agency previously scattered consumer protection powers, but adding new and meaningful powers to the city's arsenal.

This new look at consumer protection, at all levels, covers not only how existing responsibilities are being met but, more important, is directed at the question of what government responsibilities should be.

⁸ Here applicable would be Sutherland's attempt to grapple with what should be a crime, in his "White-Collar Crime," *ibid* at page 31:

"The essential characteristic of crime is that it is behavior which is prohibited by the State as an injury to the State and against which the State may react, at least in the last resort by punishment. The two abstract criteria generally regarded by legal scholars as necessary elements in a definition of crime are legal description of the act as socially harmful and legal provision of a penalty for the act."

⁹ Existing and proposed Federal activities in this sphere were summarized by Richard W. McLaren, Assistant Attorney General, Antitrust Division, in testimony before the subcommittee on Commerce and Finance of the House Interstate and Foreign Commerce Committee, Feb. 17, 1970, in testifying on H.R. 14931 (The Consumer Protection Act).

Many proposals have been advanced to provide for improved consumer protection. Some provide for new consumer rights and remedies, some for organizational changes to make possible more effective government action. All are directed, at a minimum, to the conversion of technical rights into meaningful and realistic remedies.

Certain problems in this area call for particular attention:

(1) Consumer protection is undermined by the "holder in due course" doctrine which strips a victim of his right to defend or to interpose a setoff, when he is sued for payment by one who purchased the right to collect installment payments. It is easy to recommend a statutory elimination of "holder in due course status" in connection with purchases of goods and services by ultimate consumers, but the existence of mechanisms for legally protected purchases of installment paper is necessary to the maintenance of credit installment sales. Developing new approaches to the "holder in due course" doctrine, new forms of debt instruments, and legislation to reconcile the need for credit generating mechanisms with consumer protection, should be priority objectives for legislators and researchers.

(2) Concern for the consumer inspires the structuring of proposals for consumer relief through class actions, restraining orders, and the statutory right to rescind contracts. As such proposals are enacted they will be evaluated to determine their effectiveness. It is important, however, that there be continuous scrutiny to determine whether criminal sanctions are being used, where available, and whether such sanctions should not be provided for in any new proposed consumer protection legislation. Those who seek to abuse the consumer must be required to recognize that they may face penalties which cannot be mentally assessed as being no more than a supportable cost of doing business.

(3) Special consideration should be given to the problem of preventing victimization of the public after an abuse has been brought to the attention of investigative agencies. This is a most difficult problem, since restraining orders and injunctions are not customarily available to law enforcement agencies. Methods must be devised to stop ongoing frauds during State and Federal criminal investigations without risking immunity baths,¹⁰ and also without risking irreparable injury to those who may be falsely accused. Examining the possible adaptation of the provisions of sections 20 and 21 of the Securities Act of 1933 to this problem would be a good starting point.

F. *Diversion of cases to non-criminal channels*

Truly effective and intelligent prosecutive evaluation would serve to screen out many of the cases which currently clog our courts and prosecutors' offices. The development of effective evaluation procedures may well be hampered by the absence of procedures and standards which offer prosecutors a meaningful alternative when they consider a case which is prosecutable but not truly worthy of prosecution.

¹⁰ See *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965), and *United States v. Kordel*, — U.S. —, 38 U.S. L. Week 4153 (1970), which reversed *United States v. Detroit Vital Foods*, 407 F. 2d 570 (6th Cir. 1969). The problem is also raised by immunity statutes, such as 15 U.S.C. 49, which bestows immunity on one subpoenaed to testify in a Federal Trade Commission investigation.

Alternative remedies, whether in the form of arbitration or priority civil or civil class actions, would provide many benefits. Victims could obtain faster relief. Perpetrators of fraud would be subject to restraint by the use of legal tools which would not be available if there were to be an impending prosecution. And, most important, our courts and prosecutors would be freed to deal with prosecutions which would provide a more meaningful return because more significant in character and more intensively pursued.

General Objectives of Research

This paper has addressed itself to the nature of white-collar crime and to the methods whereby our society and its legal instrumentalities strive to cope with it. This has been done in order to lay groundwork for rational and informed consideration of more detailed areas of inquiry which might assist us, as students in the field or as those charged with law enforcement or regulatory responsibilities.

In outlining possible areas of inquiry, for possible support, our basic objective should be to make improvements in the prevention, detection, investigation, evaluation, and prosecution of white-collar crimes, and to critically examine the impact of sentencing and correction processes on these objectives. In order to focus on profitable areas for research within these broad general areas, we must seek reliable data as to who white-collar criminals are, who their victims are, and in some way to make a gross comparison between the problem of white-collar crime and the level of its recognition by legislatures, police, prosecutive agencies, and the courts.

It would be simplest to set up an extended list of problems, and to make recommendations that each be investigated and researched. Alternatively, problems can be listed in order of importance, with such order determining priority. While there is some value in listing of problems and in evaluation of priorities, a situation where resources are limited requires that we select our objectives by looking for real problems¹ (not necessarily the most important) where research will yield meaningful and persuasive data which has a potential for spurring further thought, research, and action by foundations, law schools, and law enforcement authorities. Research expenditures should be "seed money" to the greatest extent possible. Also, if possible, the very fact of ongoing research should ideally trigger self-examination by law enforcement authorities whose work may be the subject of review.

The ideal project, therefore, would be one which would survey a defined body of data to obtain new insights into a problem. Conduct of the study would involve contact with law enforcement authorities, judges, judicial support personnel, and perhaps trade and industry groups, making them think about new aspects of their work or about aspects they never had time to fully consider before. The resulting data should have the potential for triggering discussion, dispute, and strong desires on the part of academics and

¹ Appendix B, *infra*, is an index of research areas referred to in this paper.

professionals to verify, disprove, and most important, to build on such prior work.

To describe the ideal study is to go but a short distance toward identifying particular and specific implementing projects. No suggested study will promise to meet all these criteria. But it does give us a standard against which we may measure research proposals competing for support, and assist in the monitoring of the studies which are funded.

Appendix A

Categories of white-collar crimes (Excluding organized crime)

A. Crimes by persons operating on an individual, ad hoc basis

1. Purchases on credit with no intention to pay, or purchases by mail in the name of another.
2. Individual income tax violations.
3. Credit card frauds.
4. Bankruptcy frauds.
5. Title II home improvement loan frauds.
6. Frauds with respect to social security, unemployment insurance, or welfare.
7. Unorganized or occasional frauds on insurance companies (theft, casualty, health, etc.).
8. Violations of Federal Reserve regulations by pledging stock for further purchases, flouting margin requirements.
9. Unorganized "lonely hearts" appeal by mail.

B. Crimes in the course of their occupations by those operating inside business, Government, or other establishments, in violation of their duty of loyalty and fidelity to employer or client

1. Commercial bribery and kickbacks, i.e., by and to buyers, insurance adjusters, contracting officers, quality inspectors, government inspectors and auditors, etc.
2. Bank violations by bank officers, employees, and directors.
3. Embezzlement or self-dealing by business or union officers and employees.
4. Securities fraud by insiders trading to their advantage by the use of special knowledge, or causing their firms to take positions in the market to benefit themselves.
5. Employee petty larceny and expense account frauds.
6. Frauds by computer, causing unauthorized payouts.
7. "Sweetheart contracts" entered into by union officers.
8. Embezzlement or self-dealing by attorneys, trustees, and fiduciaries.
9. Fraud against the Government.
 - (a) Padding of payrolls.
 - (b) Conflicts of interest.
 - (c) False travel, expense, or per diem claims.

C. Crimes incidental to and in furtherance of business operations, but not the central purpose of the business

1. Tax violations.
2. Antitrust violations.
3. Commercial bribery of another's employee, officer or fiduciary (including union officers).
4. Food and drug violations.
5. False weights and measures by retailers.
6. Violations of Truth-in-Lending Act by misrepresentation of credit terms and prices.
7. Submission or publication of false financial statements to obtain credit.
8. Use of fictitious or over-valued collateral.
9. Check-kiting to obtain operating capital on short term financing.
10. Securities Act violations, i.e. sale of non-registered securities, to obtain operating capital, false proxy statements, manipulation of market to support corporate credit or access to capital markets, etc.
11. Collusion between physicians and pharmacists to cause the writing of unnecessary prescriptions.
12. Dispensing by pharmacists in violation of law, excluding narcotics traffic.
13. Immigration fraud in support of employment agency operations to provide domestics.
14. Housing code violations by landlords.
15. Deceptive advertising.
16. Fraud against the Government:
 - (a) False claims.
 - (b) False statements:
 - (1) to induce contracts
 - (2) AID frauds
 - (3) Housing frauds
 - (4) SBA frauds, such as SBIC bootstrapping, selfdealing, cross-dealing, etc., or obtaining direct loans by use of false financial statements.
 - (c) Moving contracts in urban renewal.
17. Labor violations (Davis-Bacon Act).
18. Commercial espionage.

D. White-collar crime as a business, or as the central activity

1. Medical or health frauds.
2. Advance fee swindles.
3. Phony contests.
4. Bankruptcy fraud, including schemes devised as salvage operation after insolvency of otherwise legitimate businesses.
5. Securities fraud and commodities fraud.
6. Charity referral schemes.
7. Home improvement schemes.
8. Debt consolidation schemes.
9. Mortgage milking.
10. Merchandise swindles:
 - (a) Gun and coin swindles
 - (b) General merchandise
 - (c) Buying or pyramid clubs.
11. Land frauds.
12. Directory advertising schemes.
13. Charity and religious frauds.
14. Personal improvement schemes:
 - (a) Diploma Mills
 - (b) Correspondence Schools
 - (c) Modeling Schools.
15. Fraudulent application for, use and/or sale of credit cards, airline tickets, etc.

16. Insurance frauds
 - (a) Phony accident rings.
 - (b) Looting of companies by purchase of over-valued assets, phony management contracts, self-dealing with agents, inter-company transfers, etc.
 - (c) Frauds by agents writing false policies to obtain advance commissions.
 - (d) Issuance of annuities or paidup life insurance, with no consideration, so that they can be used as collateral for loans.
 - (e) Sales by misrepresentations to military personnel or those otherwise uninsurable.
17. Vanity and song publishing schemes.
18. Ponzi schemes.
19. False security frauds, i.e. Billy Sol Estes or De Angelis type schemes.
20. Purchase of banks, or control thereof, with deliberate intention to loot them.
21. Fraudulent establishing and operation of banks or savings and loan associations.
22. Fraud against the Government
 - (a) Organized income tax refund swindles, sometimes operated by income tax "counselors."
 - (b) AID frauds, i.e. where totally worthless goods shipped.
 - (c) F.H.A. frauds.
 - (1) Obtaining guarantees of mortgages on multiple family housing far in excess of value of property with foreseeable inevitable foreclosure.
 - (2) Home improvement frauds.
23. Executive placement and employment agency frauds.
24. Coupon redemption frauds.
25. Money order swindles.

Appendix B

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