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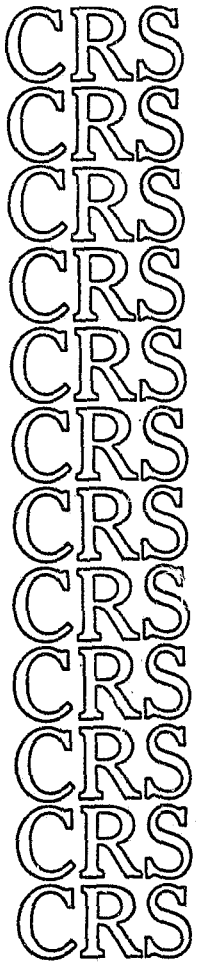

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WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE

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EXECUTIVE SUMMARY

Since the term was first used in 1939 by sociologist Edwin Sutherland, numerous attempts have been made to describe what is meant by "white collar crime." There is no general agreement on any one definition. Basically the definitions fall into three groups, according to where the most emphasis is placed: (1) on the characteristics of the offender; (2) on the characteristics of the crime itself; or (3) on the means employed to commit the illegal act. Despite their differences, all the proposed definitions suggest that a white collar crime is an illegal act which is committed in the context of a lawful occupation, involves a breach of trust, does not rely on physical force, and has money, property, or power as the primary goals.

Recent studies have emphasized the seriousness of the white collar crime problem, in terms of both economic and social costs. The most widely accepted estimates place the monetary cost of white collar crime in excess of $40 billion annually, and although research in the area is scarce, some argue that these types of crimes cause even more severe damage by destroying the public's faith in our legal, social, and political institutions.

There are indications that public concern about white collar crime has increased in recent years. This public interest has been reflected in Congressional and executive action to control white collar crime by improving available enforcement tools and increasing the potential sentences for convicted white collar crime defendants.

An area of particular controversy involves what type of sentence is appropriate for a white collar criminal. Some argue that prosecution and conviction are enough punishment in themselves, while others maintain that such offenders should be sentenced to imprisonment because of the seriousness of their crime, or for the purpose of deterring others.

Numerous research groups, including a special committee of the American Bar Association and a Ralph Nader research group, have suggested reform measures covering all aspects of white collar crime. These recommendations, for example, call for increased coordination between jurisdictions and among enforcement agencies in order to improve investigatory efforts, increased staff and funding resources, and more adequate sentencing procedures for white collar crime offenders.

WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE

There are growing indications that the category of crime generally referred to as "white collar crime" is a major problem in America today. Increasing attention recently has been directed toward the problems of white collar crime in terms of congressional interest, attempts by government agencies to improve enforcement efforts, and research efforts by various private and public groups.

This paper attempts to define the problem of white collar crime, examine the Federal enforcement efforts to control these crimes, and analyze the various theoretical explanations for these crimes. Since in recent years Congress has expressed an interest in many types of offenses that fall under the label of "white collar crime," this analysis focuses on the general characteristics of these types of crimes rather than on a specific set of white collar crimes, such as antitrust violations.

I. The Nature and Scope of White Collar Crime

A. Definitions

It is difficult precisely to define "white collar crime," in part because it is a social category or concept, similar to "juvenile delinquency," rather than a legal concept. Thus, some acts that might fall within the category "white collar crime" are violations of regulatory statutes and not of criminal law per se, and although some regulatory statutes carry criminal penalties, there is no set of statutes labelled "white collar crimes." Therefore, unlike the clear definitions of what constitutes auto theft or rape, there is no legal definition, as part of the traditional criminal code, for white collar crime.

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Many experts have attempted to define "white collar crime." In general all the definitions that have been proposed since the term was first used in 1939, by sociologist Edwin H. Sutherland, can be divided into three different types: (1) those using the characteristics of the offender as the definitional basis (e.g., "a white collar criminal is someone of high social standing who commits a crime"); (2) those definitions based on the characteristics of the crime committed (e.g., "a white collar crime is an illegal act committed in the course of one's business or professional activity"); and (3) those definitions using the means by which the crime was committed as the descriptive base (e.g., "an illegal act committed through intentional deceit, misrepresentation, or breach of trust").

Sutherland, the originator of this term, defined white collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation." 1/ He maintained that such crimes involve a "violation of delegated or implied trust," 2/ in one form or another.

The definition most commonly used by government officials is that provided by Herbert Edelhertz in his pamphlet, The Nature, Impact, and Prosecution of White Collar Crime. In this paper Edelhertz attempts to shed some light on the complexity of this problem and the Federal response to it. His definition of white collar crime is:

1/ Sutherland, Edwin H. White Collar Crime. New York, Holt, Rinehart, and Winston [1949] p. 9.

2/ Cohen, Albert, et al., eds. The Sutherland Papers. Social Science Series No. 15. Bloomington, Ind., Indiana University Publications [1956] p. 49.

> 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. 3/

However, it might be noted that although "committed by nonphysical [non-violent] means," white collar crimes can have physical [violent] results. Examples include an industrial plant that knowingly allows carcinogenic wastes to pollute a water supply, or the MER/29 case of a pharmaceutical corporation that knowingly sold an anti-cholesterol drug that subjected at least 5,000 people to such serious side effects as cataracts and hair loss. 4/ As Deputy Attorney General-designate Benjamin Civiletti has emphasized, the frequent use of the phrase "non-violent" in defining white collar crime is not to describe the severity of the public impact of such acts but to denote their method of commission. 5/ Or, as Gilbert Geis has stated, "corporate criminals deal death not deliberately but through inadvertence, omission, and indifference." 6/ Edelhertz has further specifically broken down white collar crime into such elements as

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3/ Edelhertz, Herbert. The Nature, Impact, and Prosecution of White Collar Crime. Washington, National Institute of Law Enforcement and Criminal Justice, for sale by the Supt. of Docs., U.S. Govt. Print. Off., 1970. p. 3.

4/ Gibbons, Don C. Crime and Punishment: A Study in Social Attitudes. Social Forces, v. 47, June 1969: 392.

5/ Civiletti, Benjamin R. In a speech to the International Association of Chiefs of Police, October 5, 1977. pp. 3-4.

6/ Geis, Gilbert. Criminal Penalties for Corporate Criminals. Criminal Law Bulletin, v. 8, Aug. 1972: 386.

intent to commit a wrongful act, disguise of this intent, reliance on a victim's ignorance or carelessness, and concealment of the crime through creation of a deceptive transactional facade, paying off the victim, or some similar action. 7/

A study group within the Department of Justice developed a working definition of white collar crime which is similar to the definition provided by Edelhertz (p. CRS-3).

> Economic crime constitutes any non-violent criminal activity which principally involves traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge or illegal circumvention. 8/

This definition was modified somewhat by the American Bar Association's Committee on Economic Offenses in its recent publication of recommendations on white collar crime. Their report, entitled "Economic Offenses," contains the following definition:

> An economic offense is any non-violent,* illegal activity which principally involves deceit, misrepresentation, concealment, manipulation, breach of trust, subterfuge, or illegal circumvention.**
>
> *"Non-violent" refers to the means by which the crime is committed. It is not intended to describe the harm that is caused to the victim, which is frequently excessively violent in that it may involve the loss of one's home, life savings, or quite literally all of one's property. In addition, particularly in those many instances of economic crime in which hundreds or thousands of people are affected, the harm to society can frequently be described as violent.

7/ Edelhertz, op. cit., p. 12.

8/ American Bar Association. Section of Criminal Justice. Committee on Economic Offenses. Economic Offenses. Washington, American Bar Association, March 1977, p. 16.

(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"). 13/

Another definition is that of sociologist Ronald L. Akers:

> occupational crime (white collar crime) is defined here as violation of legal norms governing lawful occupational endeavors during the course of practicing the occupation. The reference to norms governing the occupation is meant to exclude violations of the usual criminal law, such as arson, murder, and assault, while on the job, unless the law applied to the occupational behavior -- for example, theft or embezzlement of funds. The reference to lawful occupations is meant to exclude the activities of those whose entire job is illegal, such as prostitutes, con men, professional forgers, thieves, and organized criminals. 14/

He further argues that white collar crime is "real" crime because these are "acts which are defined as socially injurious and for which punishment is provided. They differ from the other crimes chiefly in the way many of them are handled -- that is, by enforcement boards, commissions, departments, or other government agencies rather than by regular criminal courts." 15/

13/ Edelhertz, op. cit., pp. 19-20.

14/ Akers, Ronald L. Deviant Behavior: A Social Learning Approach. Belmont, Calif., Wadsworth Publishing Co. [1973] p. 179.

15/ Ibid., p. 178.

> **Among the offenses included in "illegal circumvention" are auto repair fraud, bait and switch schemes, land fraud, home improvement fraud, and job opportunity schemes. 9/

It should be noted that the Committee changed the word "criminal" to "illegal" in order to include "conduct and behavior in which civil remedies might prove to be a more appropriate -- as well as effective -- remedy." 10/

From another viewpoint, both sociologist Donald Cressey 11/ and Mark Green, an associate of Ralph Nader, define white collar crime as corporate crime ("crime in the suites" as Nader terms it, as opposed to "crime in the streets"). Green differentiates between white collar crimes committed by an individual (e.g., embezzlement) and those committed in the corporation's name, and he divides corporate crime into four subcategories: commercial bribery, antitrust crimes (e.g., price-fixing or predatory monopolization), product safety and health crimes (e.g., pollution, manufacturing a dangerous product), and financial crimes (e.g., securities fraud). 12/

Edelhertz, on the other hand, roposes the following categorization:

> (1) Crimes by persons operating on an individual, ad hoc basis, for personal gain in a nonbusiness context (hereinafter referred to as "personal crimes").

9/ Ibid., pp. 17-18.

10/ Ibid., p. 17.

11/ U.S. Congress. House of Representatives. Committee on the Judiciary. Subcommittee on Crime. New Directions for Federal Involvement in Crime Control. (Committee Print) Washington, U.S. Govt. Print. Off., 1977. p. 67.

12/ White Collar Justice: A BNA Special Report on White Collar Crime. Washington, Bureau of National Affairs, April 13, 1977, p. 2.

All of these somewhat disparate definitions of what acts should be labelled as "white collar crime" are based on several similar concepts. These concepts or common elements of most white collar crime definitions can be summarized as follows:

-- crimes committed in the course of (or the context of) one's lawful occupation (e.g., a bank employee who embezzles funds while carrying out his normal, legal bank duties);

-- a violation of trust;

-- a lack of physical force to accomplish the crime;

-- money, property, or power and prestige as the primary goals of the crime;

-- definite intent to commit the illegal act; and

-- an attempt to conceal the crime (usually by passing it off as a normal, legal business transaction or by using one's power and resources to prevent its detection or prosecution).

Some examples of the types of crimes generally categorized as "white collar crime" are: consumer fraud, illegal competition, price fixing, deceptive practices, embezzlement, check and credit card fraud, tax evasion, bankruptcy fraud, corporate bribery, kickbacks, payoffs, bait and switch frauds, computer crime, pilferage, insurance fraud (including arson for profit), securities fraud, political corruption, and fraud against the government (e.g, Medicaid fraud or fraud related to some other government-funded program).

B. Economic and Social Costs

Since so little data exist, any estimate of the cost of white collar crime can only be a "ball park figure" and must be dependent upon broad assumptions. However, it may be useful to review several attempts to assess the state of the problem.

In 1974 the U.S. Chamber of Commerce estimated that the short-term, direct cost of white collar crimes to the U.S. economy is no less than $40 billion annually.[16/] This estimate does not include antitrust violations such as price-fixing, which would greatly increase this economic cost figure, and it excludes the non-financial consequences of white collar crimes which violate health and safety standards. The breakdown provided, in billions of dollars, was:

Bankruptcy Fraud		$ 0.08
Bribery, Kickbacks, and Payoffs		3.00
Computer-Related Crime		0.10
Consumer Fraud, Illegal Competition, Deceptive Practices (excluding price-fixing and industrial espionage)		21.00
Consumer victims:	$ 5.5	
Business victims:	3.5	
Government revenue loss:	12.0	
Credit Card and Check Fraud		1.10
Credit Card:	0.1	
Check:	1.0	
Embezzlement and Pilferage		7.00
Embezzlement (Cash, goods, services):	3.0	
Pilferage:	4.0	

16/ Chamber of Commerce of the United States of America. A Handbook on White Collar Crime: Everyone's Problem, Everyone's Loss. Washington, 1974, p. 5.

Insurance Fraud		2.00
Insurer victims:	1.5	
Policyholder victims:	0.5	
Receiving Stolen Property		3.50
Securities Thefts and Frauds		4.00
TOTAL =		$41.78 17/

The Chamber of Commerce notes that the yearly cost of embezzlement and pilferage alone "reportedly exceeds by several billion dollars the losses sustained throughout the nation from burglary and robbery." 18/

According to an LEAA-funded study by the American Management Associations' Crimes Against Business Project, nonviolent crimes against business firms cost $30-$40 billion per year. The AMA study indicates the following breakdown:

Employee pilferage	$5-$10 billion
Commercial bribery and kickbacks	$3.5-$10 billion
Securities theft and fraud	$5 billion
Embezzlement	$4 billion
Burglary and vandalism	$2.5 billion each
Shoplifting and insurance fraud	$2 billion each
Credit card fraud	$0.5 million

17/ Ibid., p. 6. The total exceeds the $40 billion estimate cited by the U.S. Chamber of Commerce because these categories are not mutually exclusive (e.g., a part of the embezzlement figure is also included in the computer-related crime estimate).

18/ Ibid., p. 4.

The 1977 report indicates that there is some overlapping of some of these categories, and that the $30-40 billion total figure does not include the costs of alleged bribery and overseas payoffs by some U.S. corporations. The study also states that perhaps 15 percent of the retail costs of U.S. goods is due to such business crimes and that as many as one in five "business failures" may be the result of business-related crimes. 19/

In 1976 the Joint Economic Committee (JEC) of the United States Congress estimated that white collar crime costs the economy $44 billion a year. The JEC further estimated that the costs of crimes against property, such as breaking and entering or robbery, only cost $4 billion annually. 20/ In comparison, the Food and Drug Administration (FDA) has conservatively estimated that nearly $500 million is spent each year on worthless or misrepresented drugs and therapeutic devices alone. 21/ And ten years ago the Antitrust Division of the Justice Department estimated that $35-40 billion was affected each year by violations of the Sherman Act. 22/

19/ Crimes Against Business. Recommendations for Demonstration, Research and Related Programs Designed to Reduce and Control Non-Violent Crimes Against Business. Washington, American Management Associations, Dec. 1, 1977. 88 p. As reported in Halverson, Guy. Businessmen Seek Action Against Crime. Christian Science Monitor, Feb. 1, 1978: 11.

20/ U.S. Congress. Joint Economic Committee. The Cost of Crime in 1976. Washington, U.S. Govt. Print. Off., 1976. 8 p. This $44 billion figure was obtained by multiplying the 1974 Chamber of Commerce estimate by the inflation rate 1974-1976, inclusive.

21/ Magnuson, Warren G., and Jean Carper. The Dark Side of the Marketplace. Englewood Cliffs, N.J., Prentice Hall, 1968. Cited in Hills, Stuart L. Crime, Power, and Morality: The Criminal Law Process in the United States. Scranton, Chandler Publishing Co. [1971] p. 168.

22/ American Bar Association, op. cit., p. 31.

Both Gilbert Geis and Herbert Edelhertz, among others, have noted that perhaps even more damaging than the monetary costs to society of white collar crimes are the broader social consequences of crimes and illegal actions committed by individuals of high social standing and responsibility. During the period when ex-Governor Marvin Mandel was being tried for political corruption, a public information ad was being aired on television in which Mandel warned the "crooks" that the State of Maryland intended to be tough in enforcing and prosecuting the law and thus to control [street] crime within the State. Similarly, President Nixon was involved in the Watergate cover-up at the same time that he called for increased "law and order." It has been argued that such actions by individuals who publicly denounce violent crimes, while allegedly committing white collar crimes, contribute to an erosion of public confidence in our legal system, and that the American social and economic system is undermined when some of our political and economic leaders disregard the laws they advocate for others.[23/] Such violations create cynicism and an attitude of "if others are doing it, I will too." For instance, Geis has stated that tax authorities believe that after exposure of former President Nixon's tax deceits, false reporting of taxes increased dramatically.[24/] And although

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23/ See President's Commission on Law Enforcement and Administration of Justice. Task Force Report: Crime and Its Impact — An Assessment. [Washington, U.S. Govt. Print. Off., 1967] p. 104; Geis, op. cit., p. 378; Morgenthau, Robert W. Equal Justice and the Problem of White Collar Crime. The Conference Board Record, Aug. 1969: 18, 20; Ogren, Robert W. The Effectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White Collar Crime. American Criminal Law Review, v. 11, Nov. 1973: 960.

24/ Geis, Gilbert. White Collar Crime: It Pays. Washington Post, Sept. 16, 1977: 11.

research in this area is scarce, it has been argued that such destruction of faith in our legal system promotes an atmosphere of lawlessness, leading to more crime. 25/ Furthermore, deceptive and fraudulent practices by some businessmen tend to force others to engage in similar practices in order to remain competitive, and thus the credibility of the commercial market is threatened. As Gilbert Geis has stated:

> It can be argued, convincingly I think, that social power and prestige carry heavier demands for social responsibility, and that failure of corporation executives to obey the law represents an even more serious problem than equivalent failure by persons less well-situated in the social structure. 26/

C. Extent of the Problem

There is no single, centralized compilation of white collar crime statistics similar to the statistics on street crime compiled by the FBI in its annual Uniform Crime Reports. 27/ Such statistics as are available are generally located in relatively inaccessible reports of the various regulatory agencies (e.g., the annual reports of the Internal Revenue Service or Securities and Exchange Commission). The report of the American Bar Association's Committee on Economic Offenses concludes that the Federal Government lacks both the necessary mechanisms to measure accurately its own efforts against white collar crime and

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25/ For further information on the relationship between white collar crime and street crime, see the Appendix (p. CRS-57).

26/ Geis, Criminal Penalties for Corporate Criminals, op. cit., pp. 380-381.

27/ The Uniform Crime Reports do include arrest data on forgery, embezzlement, and fraud but the most accurate data reported, in terms of reflecting the true incidences of crime, are "crimes known to the police" which only include the seven "indexed crimes" of murder, rape, assault, robbery, larceny-theft, burglary, and motor vehicle theft.

to assess the impact of such offenses on the country as a whole. This report further concludes that the Federal Government has collected little data in this crime area, and the data which have been gathered are of "questionable validity" because there are "no uniform standards for collecting economic crime data as among the relevant agencies." 28/

However, some research has indicated that white collar crimes are not rare occurrences in the business world. The first major study, and still the most comprehensive study, of corporate crimes was conducted by Edwin Sutherland in the 1940's. In his study Sutherland was concerned with seventy of the largest and most influential corporations in the United States. By examining official case reports and newspaper accounts, he discovered that every one of the seventy corporations had been charged with more than one illegal act, and that on the average these corporations were cited fourteen times by a court or official regulatory agency for violations of law. Of the total 980 separate violations he discovered, 307 were for restraint of trade, 222 for patent infringement, 158 for unfair labor practices, 97 for false advertising, and 66 for illegal rebates. 29/

Marshall Clinard, in a study of World War II blackmarket violations, found that about one out of every 15 of the three million businesses had been punished for major violations of price regulations. Additional evidence suggested that the total number of law violations was actually much larger than the officially imposed sanctions indicated. 30/

28/ American Bar Association, op. cit., p. 5.

29/ Sutherland, op. cit., p. 272.

30/ Clinard, Marshall B. The Black Market: A Study of White Collar Crime. New York, Holt, Rinehart, and Winston, 1952. 392 p.

In a report filed May 12, 1976, with the Senate Banking Committee, the Securities and Exchange Commission (SEC) reported that 95 companies had admitted making or had been formally charged with making payments of questionable legality to foreign officials. According to the SEC report, 19 of the 95 companies stated that the discontinuation of such payments would not affect their total profit or overall business. 31/

These are among the few systematic studies of the extent of white collar criminality. However, there have been several surveys indicating a possible decline in ethical business practices. 32/ Although these are not criminal acts or statute violations, Edelhertz and others have argued that unethical practices invite white collar crime. As Edelhertz states:

> 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. 33/

Many corporate officials have insisted that antitrust laws are extremely complex and thus it is easy unwittingly to violate the law. They also protest that such disclosures as described above imply that all businessmen are corrupt.

31/ Sobel, Lester A., ed. Corruption in Business. New York, Facts on File, Inc. [1977] pp. 150-151.

32/ See Baumhart, Raymond C. How Ethical are Businessmen? Harvard Business Review, v. 39, July-Aug. 1961: 6. This survey indicated that almost half of the respondents would agree that the American business executive tends to ignore the ethical laws applicable to his work because he is "preoccupied chiefly with gains." Also, see White Collar Justice, op. cit., p. 3 for information on other surveys.

33/ Edelhertz, op. cit., p. 6.

As Treasury Secretary W. Michael Blumenthal, while still president of the Bendix Corporation, stated in the May 25, 1975 issue of the New York Times, "if the misbehavior of a large corporation makes news, that is because the majority of large corporations do not misbehave." But he goes on to state that although this is true, it misses the point in that to rush to the defense of business in general whenever some abuse is discovered tends "in the public mind" only to associate business with the abuse in question. For if businessmen are "ethically strong and morally clean," they should be the first to denounce illegal and unethical practices that "far more than our critics in the media -- threaten the survival of the free-enterprise system." 34/

D. Increased Concern

Although these research studies proclaim the pervasiveness of the white collar crime problem, only recently has the public begun to be aware of the extent and seriousness of occupational crimes. The final report of the 1967 President's Commission on Law Enforcement and Administration of Justice, a major study of the U.S. crime problem and the Federal response to it, stated that "the public tends to be indifferent to business crime or even to sympathize with the offenders when they have been caught." 35/ This public indifference was reflected by the Crime Commission itself in that only two pages of its final report

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34/ Quoted in Sobel, Lester A., ed., op. cit., p. 2.

35/ President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society. [Washington, for sale by the Supt. of Docs., U.S. Govt. Print. Off., 1967] p. 48.

were devoted to white collar crime and only one chapter on this crime category was provided in the detailed task force report assessing crime and its impact, because "of limited time and resources."

However, recent evidence indicates that ten years later public concern has increased. Preliminary results from a survey conducted in the summer of 1977 by Dr. Marvin Wolfgang, Director of the Center for Studies in Criminology and Criminal Law at the University of Pennsylvania, indicate that white collar crime is a major concern of many people.[36/] This study, intended to develop an index of crime severity, was based on a random survey of over 8,000 households. Wolfgang's preliminary analyses show that such white collar crimes as factory pollution ("A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city."), corporate bribery of a legislator or government official, political corruption ("A county court judge takes a bribe to give a light sentence in a criminal case."), and fraud against a government program ("A doctor cheats on claims he makes to a Federal health insurance plan for patient services. He gains $10,000.") are considered serious crimes by the general public. Such crimes are often viewed as being as serious as robbery resulting in physical harm, aggravated assault, and kidnapping, and more serious than theft of over $1,000.

Such findings, even though preliminary in nature, do suggest that the general public is becoming increasingly concerned with the problems of white collar crime.

36/ From unpublished data supplied by Dr. Wolfgang.

II. Federal Efforts to Combat White Collar Crime

This section includes both an analysis of recent action taken by Congress and the executive branch in improving the Federal enforcement efforts against white collar crime and a description of the problems encountered by the Federal Government in combating these types of crimes, including jurisdictional problems and difficulties in the detection, investigation, and prosecution of such cases.

A. Federal Jurisdiction

The Federal Government's role in combating street crimes such as murder, rape, or burglary is limited because these types of crimes are most commonly violations of State laws and thus the responsibility of State and local governments. However, this is less frequently the case with regard to white collar crimes, which often involve violations of Federal laws or regulations or involve crime schemes which cut across several jurisdictional boundaries. Thus, with these types of crimes the Federal Government has a significant law enforcement role.

In The Nature, Impact and Prosecution of White Collar Crime, Edelhertz explains the complexities of "white collar" violations which fall within the Federal jurisdiction. First, he points out that Federal jurisdiction must be based on violations of specific Federal statutes, such as antitrust violations, tax violations, consumer or mail or securities fraud, frauds against Federal Government programs and procurement, water and air pollution violations, food

and drug violations, or violations of election laws. In terms of authority to prosecute, only the Department of Justice, operating mainly through U.S. Attorneys, has this authority although investigative jurisdiction is more widespread. Nearly every Government agency or department (HEW, Treasury, Labor, etc.) has some responsibility for criminal investigations in the area of white collar crime. And even more specific investigatory and referral responsibilities are held by certain independent agencies, such as the Securities and Exchange Commission, the Veterans Administration, the Federal Communications Commission, the Federal Trade Commission, the Board of Governors of the Federal Reserve System, the Environmental Protection Agency, the Federal Deposit Insurance Corporation, and the General Services Administration.

Edelhertz attempts to clarify the relationships among the agencies, criminal courts and civil courts by pointing to some examples. For instance, FBI or SEC investigations may result in civil proceedings either following or in lieu of criminal prosecutions. And similarly an investigation by the Department of Defense or the General Services Administration may result in a contract termination, repayment of allocated funds, or a deduction from a subsequent grant, rather than either criminal or civil proceedings. 37/

B. Congressional Action in Combating White Collar Crime

Increased public concern about white collar crime, as evidenced by Wolfgang's study, has been reflected in recent years in increased congressional action against these types of crimes. For instance, the Antitrust Procedures

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37/ Edelhertz, op. cit., pp. 21-22.

and Penalties Act of 1974 (P.L. 93-528; 88 Stat. 1706) amended the Sherman Antitrust Act to raise violations of this Act from a misdemeanor to a felony, punishable by up to three years in prison and by a $100,000 fine for individuals and a $1 million fine for corporations.

In the 94th Congress, the Antitrust Parens Patriae Act (P.L. 94-435; 90 Stat. 1383) [38/] gave the Antitrust Division of the Justice Department greater civil investigative power, required corporations to provide advance warning for significant mergers and acquisition of securities or assets of any other corporation, and permitted State attorneys general to bring civil actions to recover treble damages as parens patriae on behalf of a State's consumers who have been injured by any violation of the Sherman Act.

Also, the 94th Congress passed the Crime Control Act of 1976 (P.L. 94-503; 90 Stat. 2407), amending Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (establishing the Law Enforcement Assistance Administration); this legislation included a provision authorizing the Attorney General "to provide assistance and make grants to the States...to improve the antitrust enforcement capability of such State."

More recently, during the first session of the 95th Congress, two major laws concerning white-collar types of crimes were enacted: P.L. 95-213 (91 Stat. 1494; S. 305), which prohibits the bribery of foreign officials by any domestic concern, and P.L. 95-142 (91 Stat. 1175; H.R. 3), which increases the

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38/ Also known as the Antitrust Civil Process Act Amendment or the Antitrust Improvements Act (Hart-Scott-Rodino). The parens patriae portion of this act has been severely limited in application by the Supreme Court decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

penalties for defrauding the Medicare or Medicaid programs and requires the Secretary of HEW to suspend any physician or practitioner from participation in either of these programs if he has been convicted of a criminal offense relating to involvement in any such programs.

Other bills have been introduced in the 95th Congress to make it a crime to use a United States owned or operated computer for fraudulent or illegal purposes (S. 1766/H.R. 8421) and to protect consumers from deceptive practices such as false advertising (H.R. 1882, H.R. 4471, H.R. 9980). Also, the Congress is proceeding in the consideration of the Criminal Code Reform Act of 1977 (S. 1437/H.R. 6869), the penalty structure of which would provide potentially greater deterrents for white collar crimes.

Among the congressional agencies researching this area, the General Accounting Office (GAO) is conducting a lengthy study of fraud against the Federal Government and whether Federal agencies are equipped to handle fraudulent schemes against their programs. The GAO is also currently initiating an analysis of bank fraud and embezzlement, including a survey of preventive measures used by banks, of the adequacy of FBI investigations of such crimes, and of the way such offenses are handled by prosecuting officials.

C. Action by the Executive Branch: Enforcement and Prosecution

In analyzing the executive branch attempts to improve the Federal enforcement efforts against white collar crime, it appears that the Federal record is not consistent — that is, significant improvements have been made in some areas

by some Federal agencies, but such improvements are not necessarily across-the-board accomplishments. However, as discussed previously, statistics in this area are scarce and often misleading; therefore it is difficult to summarize the improvements which have actually resulted from such actions.

Nevertheless, the Federal Government has been criticized in recent years for its failure to effectively enforce the laws against white collar crime. Part of this failure is argued to be due to the distinctive nature of white collar criminality (i.e., the low visibility of such crimes and the fact that harm is not readily apparent). It has also been argued that some of this failure is due to political pressures on the executive branch from powerful and influential business leaders.[39/] However, many observers have stressed that some Federal enforcement efforts are unsuccessful not from a lack of enforcement zeal but because the Federal agencies involved in controlling business and professional crimes are not given the financial resources necessary to effectively combat these crimes.[40/]

39/ Stuart Hills states that: "In myriad ways, white-collar offenders utilize their status attributes, resources, and power to reward legal authorities for selective nonenforcement of the law and threaten intolerable stress and strain for law enforcement bureaucracies that might attempt to do otherwise." See Crime, Power, and Morality: The Criminal Law Process in the United States. Scranton, Chandler Publishing Co. [1971] p. 176.

40/ However, one attorney/professor, August Bequai, has recently argued that the problem is not one of "manpower and resources, but rather of structure and leadership." He maintains that the very structure of the Federal agencies "confines their options, and forces them to utilize noneffective vehicles to deal with a serious and growing problem." See White Collar Plea Bargaining, Trial Magazine, v. 13, July 1977: 39.

An analysis of the Federal enforcement effort against economic (white collar) crimes, conducted by the Committee on Economic Offenses of the American Bar Association, led to the conclusion by the Committee members that the Federal effort against such crimes is "underfunded, undirected, and uncoordinated, and is in need of the development of priorities." Furthermore, the Committee found that "for the most part, within the Federal agencies with direct responsibility in the economic crime offenses area, available resources are unequal to the task of combatting economic crime." 41/ However, the Committee provides no standards for measuring the adequacy of available funds and staff resources (i.e., how much money and manpower would be needed to mount a responsible attack on economic crime).

The Committee also found that in cases where "seemingly adequate" resources exist, these resources are "poorly deployed, underutilized, or frustrated by jurisdictional considerations. 42/ Directly related to such inefficient, ineffective enforcement efforts are two problems noted by the Committee. First, the Committee's report emphasizes that because there are no uniform data on the incidences of white collar crimes, it is virtually impossible accurately to compare and evaluate the effectiveness of the efforts of the various enforcement agencies. The report states that the Federal Government has no "uniform codification of economic crime offenses," so not all the Federal agencies even consider the same violations to be economic crimes. 43/ Second, the ABA report argues that there is

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41/ American Bar Association, op. cit., p. 6.

42/ Ibid., pp. 6-7.

43/ Ibid., p. 5.

a problem in that the various agencies with enforcement responsibilities report to several different congressional committees, and thus there is no centralized congressional oversight responsibility for the Federal effort to control white collar crime. In somewhat stronger language, the Committee's report notes that:

> Accountability to the Congress from both the Federal enforcement agencies and the program agencies is exceedingly weak. There is some reason to believe that if the public were aware of the extent of economic crime violations in the program agencies which remain unaffected by the enforcement agencies, it would reflect badly on the agencies and on the officials charged with the responsibilities within those agencies to prevent or detect violations of law. 44/

In looking more closely at the Federal enforcement efforts, it is necessary first to analyze what the executive departments have done recently to improve their enforcement efforts, and then second to analyze the problems specifically relating to the detection, investigation, and prosecution of white collar crimes.

The Law Enforcement Division of the Securities and Exchange Commission (SEC), under the direction of Stanley Sporkin, has been noted by several observers (the Federal Bar Association, among others) as having provided major contributions to the control of illegal and unfair securities practices. The following are SEC statistics for injunctive actions 45/ and criminal referrals for fiscal years 1972-1976. 46/

44/ Ibid., p. 8.

45/ The most common procedure employed by the SEC is to seek an injunction against a corporation because the SEC does not have the authority to impose civil fines or penalties as do other administrative agencies.

46/ American Bar Association, op. cit., p. 20.

Injunctive Actions

Fiscal Year	Cases Instituted	Injunctions Ordered 47/	Defendants Enjoined
1972	119	113	511
1973	178	145	654
1974	148	289	613
1975	174	453	749
1976	158	435	722

Criminal Referrals

Fiscal Year	Number of Cases Referred to the Justice Dept.	Number of Indictments 48/	Defendants Indicted	Convictions
1972	38	28	67	75
1973	49	40	178	83
1974	67	40	169	81
1975	88	53	199	116
1976	114	23	118	97

47/ The number of cases instituted by the SEC in a particular fiscal year and the number of injunctions ordered (and defendants enjoined) differ considerably because the injunctions ordered by the court may be for cases instituted by the SEC in previous years.

48/ The number of cases referred and the number of indictments do not necessarily coincide because one case may result in several indictments or it may take the referral of several cases to obtain one indictment.

The growing number of referrals to the Justice Department for criminal prosecution reflects, in part, the early warning system developed several years ago by the SEC and the Justice Department which provides for greater cooperation between the two agencies and apprises the Justice Department at an early stage of the Commission's enforcement actions.

Within the Justice Department, the Antitrust Division is devoting more of its resources to criminal prosecutions and has recently increased its emphasis on price-fixing. [49/] The following statistics indicate the growth of the Antitrust Division's budget and the increasing number of cases handled by the Division. [50/]

Appropriations for Enforcement of Antitrust, Consumer Protection and Kindred Laws

Fiscal Year	Appropriations (in thousands of $)
1974	$ 14,591
1975	17,666
1976*	27,488
1977	25,376
1978 (estimate)	31,148
1979 (estimate)	36,377

*Includes transition quarter.

49/ Baker, Donald I. (Former Assistant Attorney General, Antitrust Division). Price-fixers, Beware! Across the Board, v. 14, Feb. 1977: 37-39, 41-43; address by Attorney General Griffin Bell to the Harvard Law Review, March 19, 1977.

50/ From the Budget of the United States Government: Appendix, for fiscal years 1976-1979.

Actual Caseloads

Fiscal Year	Cases Filed	Cases Terminated
1974	1,385	1,473
1975	1,526	1,547
1976*	1,578	1,598
1977	1,823	1,987
1978 (estimate)	1,600	1,690

*Includes transition quarter.

Also, within the Justice Department there is a new section, the Public Integrity Section of the Criminal Division, which was created in January of 1976 by former Assistant Attorney General Richard Thornburgh to investigate complaints and accusations of corruption by public officials (i.e., all elected representatives and all officials of government at the Federal, State, and local levels).

The Federal Bureau of Investigation (FBI), in its fiscal 1975 report, disclosed that its investigations of white collar types of offenses have increased more than 25 percent since fiscal year 1971. The following are FBI figures for the number of white collar crime convictions based on FBI investigations: 51/

51/ U.S. Congress. House of Representatives. Committee on Appropriations. Subcommittee on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies. Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1978. Part 5 -- Department of Justice. Hearings, 95th Congress, 1st session. March 11, 1977. Washington, U.S. Govt. Print. Off., 1977. p. 667.

Fiscal Year	Number of Convictions
1972	2,380
1973	2,711
1974	3,201
1975	3,753
1976	4,610

This improvement is in part due to the Bureau's new program, called the "Quality Over Quantity Program," which puts the investigation of these types of crimes as a high enforcement priority. Under this program, the FBI has emphasized the recruitment of "special agent accountants" (SAAs) to handle complex white collar crime investigations. In 1976, 177 of these SAAs were hired, thus making the total number of SAAs greater than 800. 52/ Also, the FBI has increased its public education and prevention efforts in this area of crime control.

In addition, under former Attorney General Edward Levi, a White Collar Crime Committee, composed of representatives of all the Federal agencies concerned with white collar crime (e.g., Justice Department, Commerce Department, Treasury Department), was established to attempt to coordinate the Federal efforts against white collar crime. This Committee, headed by former Deputy Attorney General Harold Tyler, adopted several internal proposals, but no formal, written report on its accomplishments or recommendations was adopted or issued by the Committee. Attorney General Griffin Bell has indicated an interest in reorganizing this committee; however the current status of this new committee is uncertain at this time.

52/ Ibid.

In terms of other executive branch activity in this area, there have been several federally funded projects to increase enforcement efforts against white collar crime. The Law Enforcement Assistance Administration (LEAA) has provided Federal funds to the National District Attorneys Association's Economic Crime Project, an ongoing effort to coordinate the prosecutions of white collar types of crimes at the State level. This project, involving 62 district attorneys, aims to control multi-jurisdictional frauds, set priorities for more efficient use of limited manpower and resources, and increase public awareness of the problems of economic crimes. As of August 31, 1976, the efforts of participating district attorneys had resulted in 2,149 convictions of economic offenders, 1,177 of which were felony convictions. 53/

Also, more research funds, both public and private, are being directed at projects studying the causes and prevention of white collar crime. For example, reportedly the Ford Foundation has recently offered several grants for research on issues specifically relating to white collar crime, and Yale professor Stanton Wheeler has received LEAA funds to begin five studies covering such topics as how white collar crimes are prosecuted in the courts and the problem of transnational bribery. Also, with an LEAA grant, the Battelle Law and Justice Study Center in Seattle in 1977 established a National Center on White Collar Crime under the direction of Herbert Edelhertz, former head of the Fraud Division of the Justice Department.

53/ American Bar Association, op. cit., p. 38.

D. Problems in Detection, Investigation, and Prosecution of White Collar Crime

All of the preceding discussions have pointed to efforts by the executive agencies to improve their enforcement efforts. However, to fully understand the problems encountered by Federal departments having the responsibility to combat white collar crime, it is helpful to analyze some specific problems relating to the enforcement of such crimes. First, in terms of detection, it has been noted that many white collar crimes go undiscovered because they are not reported to law enforcement officials. Frequently, the victim of a white collar crime such as an intricate price-fixing scheme may not even be aware that he has been victimized, and thus there may be no complainant who draws the attention of the police to the crime. And to further complicate the matter, some victims, such as those of a consumer fraud, may realize that they have been victimized but may feel that no action will be taken even if a complaint is filed. Such factors add to the general lack of reliable statistics on the incidences of white collar crime.

Law enforcement officials also have difficulty in detecting white collar crimes because the techniques employed by a businessman or a professional person for illegal purposes are often the same methods used in ordinary work. Many white collar crimes may be concealed within a complex commercial transaction and therefore have the appearance of normal business transactions. The appearance of normal business activities can make it difficult to prove criminal intent, and in cases where it is necessary to demonstrate such intent, this might discourage prosecution. Also, many white collar crimes are not easily

detected because they are based on acts of omission, rather than the blatant commission of a crime. That is, instead of robbing a bank with a gun, a white collar criminal such as a tax evader may simply fail to mention some income when he reports his taxes.

The law enforcement detection problems may also be related to American cultural values and the distribution of power and status in American society. It is argued that not only is the corporate executive less likely to fall under suspicion of criminal behavior than is a "street kid," but also that an influential community leader has the means at his disposal to prevent the detection of his criminal activity. In looking at the relationship of American cultural values and white collar crime, Stuart Hills states that:

> a society in which profit-oriented private business has been the prevailing institutional pattern -- and which has been partly responsible for the "highest standard of living in the world" -- resists viewing violations of laws regulating business enterprise as deserving of the same degree of serious concern as are conventional crimes. 54/

Added to these detection problems are significant problems relating to the investigation of white collar crimes. The investigation of these types of offenses is extremely time-consuming. Such crimes as massive fraud or price-fixing schemes often require months and even years of tedious research in order to unravel all the transactions involved (sometimes referred to as "following the paper trail"). These investigations can also be very technical, and thus

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54/ Hills, op. cit., p. 187.

necessitate numerous investigators with specialized skills such as accounting.[55] Also, as noted by Robert W. Ogren, Assistant U.S. Attorney for the District of Columbia, investigators trained in street crime investigations are accustomed to short investigations and fast arrests because the typical street crime is readily visible. However, with white collar crime investigations they must adjust to slow, painstaking investigations which require patience and thoroughness.[56]

The great expenditure of time and staff resources to develop one case against a white collar criminal means that such investigations are expensive, and many agencies with these law enforcement powers complain that they are understaffed and on comparatively low budgets. This is generally argued to be one of the most severe liabilities impeding an increased attack on white collar crimes. For example, the Fraud Division of the U.S. Department of Justice has 45 staff attorneys to prosecute all Federal fraud crimes which include many widespread offenses on the scale of the Equity Funding case.[57] In terms of

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55/ For additional discussion of these problems, see former U.S. Attorney Jonathan Goldstein's comments in U.S. Congress. House of Representatives. Committee on the Judiciary. Subcommittee on Crime. New Directions for Federal Involvement in Crime Control, op. cit., pp. 73-75.

56/ Ogren, op. cit., p. 969.

57/ On April 2, 1973, the SEC charged Equity Funding Corporation of America with engaging in a fraud involving at least 56,000 non-existent insurance policies, forged bonds and death certificates and $120 million in non-existent assets. According to the Wall Street Journal, which broke the story, this case was "one of the biggest scandals in the history of the insurance industry," and it resulted in prison sentences for several top Equity executives. For further information, see Soble, Ronald L., and Robert E. Dallos. The Impossible Dream; the Equity Funding Story: The Fraud of the Century. New York, Signet Book [1975] 273 p.

the complaints of inadequate funding for investigatory efforts, the entire 1976 budget authority of the Justice Department's Antitrust Division, empowered to enforce the antitrust and consumer protection laws, was approximately $28 million. According to the 1975 Senate report on the Antitrust Enforcement Authorization Act of 1975 (Senate Report No. 94-498),

> ...Acting Assistant Attorney General Bruce B. Wilson advised that the cost to the Division of litigating just one case -- the giant IBM monopolization case -- thus far cost the Antitrust Division "slightly less than $4 million." Transcripts and travel in fiscal 1975 for the IBM case alone amounted to $500,000.... Because of inadequate resources, in the IBM litigation the Division had to use FBI agents to cover depositions. 58/

Furthermore, the ABA Committee on Economic Offenses reports that, according to testimony before the Committee by a Justice Department official, one of the most difficult problems facing the Antitrust Division is keeping good attorneys to try the antitrust cases brought by the Government. The Government salary structure, especially when compared to the private sector fees for experienced antitrust attorneys, results in a large turnover among the Antitrust Division's staff attorneys. The Committee notes that this disparity in salaries is particularly serious since the Government antitrust prosecutor is often

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58/ U.S. Congress. Senate. Committee on the Judiciary and the Committee on Commerce. Antitrust Enforcement Authorization Act of 1975; report together with minority views to accompany S. 1136. Washington, U.S. Govt. Print. Off., 1975. (94th Congress, 1st session. Senate Report no. 94-498) p. 4.

arguing a case against a highly skilled, well-trained defense attorney.[59/] Such analyses have led some experts to view antitrust enforcement as merely a ritualistic exercise, or as one writer has described it, a "ceremonial observance of the American belief in competition."[60/]

However, this situation may be improving. According to a recent press release, the Department of Justice budget request for fiscal year 1979 includes an increase of over three million dollars (7.2 percent) and 57 positions (6.2 percent) for the Antitrust Division. Also, an additional $7.3 million (6.3 percent) and 70 new positions (1.9 percent) have been requested for the U.S. Attorneys in order to, among other things, handle the increasing volume of white collar crime cases. The total Justice Department request for fiscal year 1979 represents only a 3.8 percent budgetary increase and a 2.1 percent increase in the number of total positions.

It has been argued by Government officials and private researchers that another factor hampering investigative efforts at the the Federal level is the number of law enforcement and regulatory units trying to control white collar crime. It is argued that because there are so many enforcement agencies, there is a great deal of overlap and needless duplication of effort. The following two examples illustrate how such enforcement duplication can occur: (1) there are three separate investigatory and auditing agencies among the Federal banking agencies, and their jurisdictional responsibilities are a function of the bank charter, not the location of the bank, the type of

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59/ American Bar Association, op. cit., p. 32.

60/ Lundberg, Ferdinand. The Rich and the Super-Rich: A Study in the Power of Money Today. New York, Lyle Stuart, 1968. p. 124.

bank business conducted, or the type of depositor; [61] (2) a case involving deceptive practices which are subject to regulation by the Federal Trade Commission may also fall within the enforcement domain of the Post Office because such acts may also be criminal violations under the mail fraud statutes. So it is possible for several agencies to be investigating the same case without being aware of the work of the other agency, due to a lack of adequate coordination among the agencies involved.

The report of the American Bar Association's Committee on Economic Offenses states that insufficient resources at the Federal level have forced the Federal enforcement agencies to be extremely selective in the types of cases they investigate, and although selective law enforcement is generally recognized as legitimate, when there is no coordination among the Federal agencies, "the legitimacy of the procedure gives way to undirected and unguided enforcement." [62] Furthermore, the Justice Department is the only Federal law enforcement agency empowered to prosecute criminal violations, yet it often lacks the specialized expertise of other agencies (e.g., the IRS or SEC). Therefore, in some cases the Justice Department staff may lack the necessary specialization and knowledge to complete the investigation of criminal cases referred to them by a regulatory agency. In light of these problems, the ABA Committee on Economic Offenses, and others, recommend that coordination between the various agencies and the Department of Justice be expanded. [63]

61/ American Bar Association, op. cit., pp. 6-7.

62/ Ibid., p. 10.

63/ Ibid.

In 1977 a manual for law enforcement agencies, entitled The Investigation of White Collar Crime, was prepared by the Battelle Law and Justice Study Center. This project was directed by Herbert Edelhertz and funded by a grant from the Law Enforcement Assistance Adminstration (LEAA). The report describes additional factors which inhibit the investigation process in white collar crime cases. These factors are based on two types of rationalizations which the manual says are used frequently by law enforcement agencies to avoid dealing with white collar crime. The first type of rationalization is related to subject matter and usually results from a lack of a clear understanding of the agency mission. Some examples cited are: (1) such investigations are more properly private disputes and only appropriate for private civil litigation; (2) such crimes are disputes for which other remedies appear to be available, such as consumer mediation agencies or Better Business Bureaus; or (3) "we have no jurisdiction." The second type of rationalization is related to "victim character." Under such rationalizations the victim is regarded as the party at fault, either due to his gullibility or greed, or because the victim is only interested in getting his own money back and presumably will not continue to cooperate during the investigation or prosecution. However, the report notes that such factors may apply to all victims of crime, yet such factors are rarely used as rationalizations for inaction in other crime areas. 64/

64/ Edelhertz, Herbert, and others. The Investigation of White Collar Crime: A Manual for Law Enforcement Agencies. [Washington, Law Enforcement Assistance Administration, for sale by the Supt. of Docs.] 1977. pp. 8-10.

The third enforcement problem, in addition to the problems relating to the detection and investigation of white collar crimes, involves the prosecution of these crimes. As noted previously, many white collar types of statute violations fall under the jurisdiction of Federal regulatory agencies and not just the criminal courts. Consequently, there is no across-the-board consistency in how a business or professional offense is handled. Many administrative agencies, upon finding violations of their regulatory laws, order the violator to abandon an improper practice by issuing a "cease and desist" order, or suspend the violator's license, or issue a formal warning to the accused corporation, rather than referring the case to the Justice Department for criminal prosecution. However, it is argued that many administrative cease and desist orders or administrative warnings are viewed by corporations as a mere slap on the wrist or just one of the annoying hazards of doing business. Cease and desist orders are issued even in cases involving large-scale corporate swindles. Furthermore, when white collar offenses are not handled by a criminal court, the admonition of these offenders is removed from the public eye.

The Committee on Economic Offenses of the American Bar Association has made several observations on the current prosecution of white collar crime cases and it has proposed remedial actions. One conclusion reached by the Committee was that effective prosecution in this area necessitates both a national policy of enforcement and increased Federal and State cooperation. The Committee has suggested that State attorneys general, local district attorneys, and the Justice Department "should actively encourage the establishment of Federal-State Law Enforcement Committees in every state," noting that eighteen such committees currently

exist. 65/ In addition, the Committee's report states that insufficient resources at the Federal level have forced the Federal enforcement agencies to be extremely selective in the types of cases they investigate, and the priorities used by the Federal agencies in selecting cases to investigate are not necessarily the same prosecution priorities established by the Department of Justice. Furthermore, the Department of Justice has limited manpower assigned to the prosecution of white collar crimes, and these limitations should be understood by those agencies which refer criminal prosecutions to the Department. Therefore expanded coordination between the various agencies and the Department of Justice is proposed by the Committee. 66/

In a similar vein, August Bequai, a Washington D.C. attorney and law professor at American University, notes that inherent in the present structure of Federal law enforcement are problems in coordination because the Federal regulatory agencies are empowered with only civil jurisdiction, and the Justice Department handles all cases involving criminal violations. Among other things, Bequai states that the U.S. Attorneys, which prosecute the cases referred to them by the Justice Department, based on referrals by a regulatory agency, rarely have specialists on their staffs, so they are dependent on the agencies, which do possess the requisite resources and expertise, for assistance. However, Bequai says that agency attorneys assigned to aid a U.S. Attorney are frequently treated as second-class assistants. Rarely are they designated as temporary Assistant U.S. Attorneys and allowed to aid in the actual prosecution

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65/ American Bar Association, op. cit., p. 10.

66/ Ibid.

of the case in court. Thus, they receive no status or recognition in prosecuting the case. And as Bequai notes, if the court case is successful, the U.S. Attorney receives the credit and recognition, but if the case is won by the defense, the agency often gets the blame.[67/]

Therefore, many Federal agencies would rather bring their own civil cases, and according to Bequai, they may even delay making a referral to the Justice Department until they have brought their own action first. Thus he argues that this situation results in civil cases taking precedent over criminal cases so that in most instances, civil action is the end of the line. Once the agency has its "notch," it is hesitant to refer a matter to the Department of Justice, and even if the matter is referred, years have often passed, witnesses may be dead or gone and memories may have faded, the result being that the Justice Department is reluctant to prosecute.[68/] In order to correct this, Bequai suggests that either the agencies be given direct criminal jurisdiction or the Justice Department be given personnel with the specialization and knowledge essential for the prosecution of white collar crime cases.

Another recommendation for improving white collar crime prosecutions which has been suggested by the ABA Committee on Economic Offenses is that there be an increase in "pretrial, reciprocal discovery," i.e., pretrial disclosure of evidence between the defense and the prosecution in white collar crime cases in order to expedite trials. The Federal Rules of Criminal Procedure currently do not provide for extensive pretrial discovery in criminal cases such as is now

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67/ Bequai, August, op. cit., p. 41.

68/ Ibid.

allowed in civil cases. The Committee report states that an enhanced discovery procedure probably would result in the obtaining of pleas in many more white collar cases, as well as many more stipulations in those cases which do go to trial.[69/] Since many white collar crime cases require great commitments of time and resources by the prosecution, the courts, and the defense, some trials of this type may become a test of the parties' perseverance and stamina. The Committee argues that lengthy trials mean that it is not probable that a cross-section of the community will be selected as jurors and that the ability of many defendants to defend themselves decreases due to the expense involved. However, the Committee notes that the Federal Speedy Trial Act, by the time it is fully implemented, will require that a defendant be brought to trial within 100 days after his arrest, which in some complex white collar crime cases may not allow adequate time for case development if courts do not grant extensions to either side.[70/]

Another area of controversy relating to prosecution is the type of plea white collar offenders are allowed to enter before the court in criminal proceedings. All defendants, whether accused of a white collar crime or any other crime, have three options: to plead guilty, not guilty, or nolo contendre. Frequently a white collar offender is allowed to enter this third type of plea, a nolo contendre or "no contest" plea, which although theoretically the same as a guilty plea, does not force the offender to admit his

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69/ American Bar Association, op. cit., p. 10. However, the report does not address the constitutionality of such a recommendation or why it would be fair to provide increased pretrial discovery only for white collar crime trials, and not for all criminal trials.

70/ Ibid., pp. 67-68.

guilt. As one indication of how frequently nolo pleas are accepted by the courts in white collar crime cases, the Legal Procedures Unit of the Justice Department's Antitrust Division has provided the following figures for the termination of criminal antitrust cases by the acceptance of nolo pleas for fiscal years 1976 and 1977:

Fiscal Year	Total Cases Terminated	Number Settled by Nolo Contendre Plea	Percent
1976	35	26	74
Transition Quarter	7	7	100
1977	24	15	63

One of the problems with widespread use of nolo contendre pleas is that unlike a guilty plea, a nolo plea cannot be used as evidence against the defendant in any other proceeding. Thus the victims of a white collar offense cannot use the plea as proof of guilt by the defendant in any subsequent civil litigation to recover their losses.[71/] Also, prosecutors argue that apparently some judges tend to subtly differentiate between a nolo plea and a guilty plea in that more lenient treatment is given to those who plead nolo contendre.[72/]

71/ Under the Federal Rules of Criminal Procedure a person convicted subsequent to a nolo contendre plea can be forced to answer questions about his offense in court, but under the Federal Rules of Evidence a nolo plea cannot be used against him in another criminal or civil proceeding, unless provided by an Act of Congress. Thus, this situation could be changed legislatively.

72/ White Collar Justice, op. cit., p. 12.

Despite these problems with the use of nolo contendre pleas, it is not certain that they should be eliminated or even greatly curtailed. If defendants are not permitted to enter nolo pleas, a good number of them might insist on pleading not guilty and going to trial. The result could be a great increase in the workload of already overburdened courts and prosecutors.

The use of consent decrees to handle white collar offenses is also an area of controversy. A consent decree is a formal, written agreement in which wrongdoing is neither admitted nor denied but the party simply agrees to abide by the law in the future and not violate any statutes specifically delineated in the decree. Thus the case is settled out of court and there is no trial, although the terms of the agreement must be signed by a judge and are incorporated into a formal court document. Therefore, if the agreement is violated, the offender can be held in contempt of court, and sentenced accordingly. However, objections have been expressed to the fact that the provisions of the consent decree are worked out in private and that, unlike the situation of nolo contendre pleas, a party agreeing to a consent decree does not have to appear in court at all. Furthermore, there is objection to the fact that the court has no voice in the negotiations.

Consent decrees appear to be used frequently. The Antitrust Division of the U.S. Department of Justice has provided the Congressional Research Service with the following statistics on the percentage of antitrust cases settled by consent decrees in the past six years.[73/] Even though there is no pattern indicated by these statistics, percentages consistently range from 75 to 90 percent, and the average is 82 percent.

73/ Figures provided by the Legal Procedures Unit of the Antitrust Division, U.S. Department of Justice.

Percentage of Antitrust Cases Settled by Consent Decree

Fiscal Year	Percent
1972	76
1973	80
1974	81
1975	77
1976	90
Transition Quarter	63
1977	88

According to the "Report of the Securities and Exchange Commission on Draft Recommendations Presented to the Administrative Conference of the United States Concerning Consent Decree Settlements" (December 7, 1976), the approximate percentage of civil cases before the SEC which are settled by consent decree is 0 percent.

The Antitrust Procedures and Penalties Act of 1974 (P.L. 93-528; 88 Stat. 1706) provides that any consent judgment, and any written comments or responses to the consent decree, must be filed with the appropriate Federal district court and published in the Federal Register at least 60 days prior to the effective date of the judgment. At the same time, a competitive impact statement must also be published describing, among other things, what practices or events gave rise to the alleged violation of the antitrust laws and what remedies are available to potential plaintiffs damaged by the alleged violation should the consent proposal be entered. Also, a summary of the terms of the proposed consent decree, a summary of the competitive impact statement, and a list of the materials and documents available for public comment and where such information is available

for public inspection must be published for seven days in the newspapers of the district in which the case has been filed, in the District of Columbia, and other districts as directed by the court. Furthermore, before signing the consent decree, the court is required to determine that such a judgment is in the public interest. However, neither these proceedings nor the competitive impact statement are admissible against a defendant in any subsequent proceeding brought against him under the antitrust laws.

In 1976 a committee of the Administrative Conference of the United States (ACUS) recommended that the consent decree settlement procedures followed by the Antitrust Division and the Equal Employment Opportunity Commission be revised to provide for even greater public participation in consent decree procedures. The committee proposed that all settlement agreements should be made available for public comment prior to submission of any proposed decree to the Federal court. Although enthusiastically supported by the Georgetown University Law Center's Institute for Public Interest Representation, this recommendation was strongly opposed by the Antitrust Division, which argued that sufficient public participation is provided by the Antitrust Procedures and Penalties Act (APPA) and that this proposal would create more problems than it would supposedly cure. Joe Sims, Deputy Assistant Attorney General, Antitrust Division, also stated that the Division did not agree with the ACUS committee's argument that little guidance is given to the court by the APPA for determining whether a proposed decree is in the public interest. 74/ According to a Bureau of National Affairs (BNA) report (October 26, 1976), the U.S. Chamber of Commerce, among others, also opposed the recommendations on the grounds that it would seriously

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74/ Mr. Sims' comments on the proposed reform are contained in a letter to the Chairman of the Administrative Conference, October 4, 1976.

inhibit the ability of a responsible government agency "to conduct the public's business in the public interest." Pending further study, the Administrative Conference has withdrawn its proposal from active consideration.

III. Sentencing Issues

There are two schools of thought on what type of sentence white collar defendants should receive if convicted of a criminal offense. One side maintains that offenders of high social status are punished sufficiently by the opprobrium brought upon them and their families by their criminal conviction. The conviction itself is all that is necessary, it is argued, and at the most these offenders should only receive a suspended sentence or a brief period of probation or community service, or pay a nominal fine. In support of this position, it is argued further that professional persons found guilty of criminal violations are frequently barred from practicing their vocations by their legal, medical, or accounting associations, and that such offenders are not likely to repeat their crimes. This position is advanced by many judges at both the State and Federal level. For example, Charles B. Renfrew, Federal district judge in San Francisco, in 1974 sentenced several convicted price-fixers to making speeches to civic groups about the evils of their type of illegal activity in lieu of sentencing them to imprisonment for their crimes. He argued that such public confessions not only were enough punishment for these men, but that such a sentence had significant deterrent value. Another Federal judge, Carl A. Muecke, sentenced dairy executives guilty of price-fixing to serve food in charity dining rooms, and he ordered their companies to contribute free milk to charity instead of paying a stiff fine. Judge Muecke stated his belief that

such punishment, in addition to serving a deterrent effect, also provided restitution to the community, which would not have been the case if imprisonment and fines had been the sentences he handed down. 75/ Judge Warren J. Ferguson, U.S. District Judge in Los Angeles, summarized the opinion of many of his colleagues when he stated:

> When I sentence, I sentence based on what I feel are the needs of the individual, and the needs of society based on the conduct of that individual. All people don't need to be sent to prison. For white collar criminals, the mere fact of prosecution, pleading guilty -- the psychological trauma of that -- is punishment enough. They've received the full benefit of punishment. 76/

Many of those who adhere to this position feel that the most effective deterrent is not necessarily prison, but prosecution. Judge Muecke has argued that there are not enough white collar crime cases brought before any court to justify prosecutors in saying that people commit these crimes because they do not get long prison sentences. 77/

Attorney Arthur Liman has summarized this position by stating that:

> Courts must therefore resist demands for prison sentences in all white-collar cases. Jail sentences are frequently appropriate, even if only for short terms. But not always. General deterrence is only one consideration. Fairness, hard to define and impossible to measure, is a more important one. 78/

75/ White Collar Justice, op. cit., pp. 5-7, 10.

76/ Ibid., p. 11.

77/ Ibid., p. 12.

78/ Liman, Arthur L. The Paper Label Sentences: Critiques. The Yale Law Journal, v. 86, March 1977: 635.

On the other hand, many criminologists and government officials[79] argue that prison sentences are the most effective deterrents of individual offenders, and are also necessary in order to deter other white collar criminals.[80] It is further argued that fines, at their current levels, do not constitute meaningful punishment for the corporation or wealthy corporate executive and they do not provide deterrence for others tempted to commit similar acts.[81]

The ABA Committee on Economic Offenses recognized the importance of so-called "social sentences" of the type employed by Judges Muecke and Renfrew, but concluded that the most effective punishment for this type of offender is incarceration. The Committee did not propose the elimination of fines or restitution to victims "where possible and appropriate," however, it concluded that imprisonment of such offenders results in equal justice, in addition to special and general deterrence.[82] To illustrate the leniency of sentences imposed on some economic crime offenders, the Committee report noted that its

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79/ Gilbert Geis, Donald Cressey, former Deputy Attorney General Harold Tyler, Robert Ogren, and others.

80/ However, on the issue of deterrence, note the following written by Assistant U.S. Attorney Robert Ogren (see Ogren, op. cit., pp. 960-961): the concept of "special deterrence" is of little practical use in discussing contemporary handling of white collar crime. Special deterrence refers to the effect punishment has on the recidivism rates of the punished. However, white collar crime prosecutions are so infrequent that there has been little need to consider the recidivism problem.... [In terms of general deterrence], the vast majority of citizens require little in the way of a serious threat to prevent them from engaging in white collar crimes. Either they lack the opportunity, capacity, need, or desire to commit those offenses.

81/ Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime, op. cit., p. 60.

82/ American Bar Association, op. cit., p. 12.

members were informed of a 1971 bank failure, involving $60 million, which resulted in a three-year probation and $5,000 fine to the official who was directly responsible. 83/

Ten years ago, a task force of the 1967 Crime Commission stated that jail sentences, even ones of short duration, "would constitute particularly significant deterrents for white collar crime." The report stated that such prison terms may be the only adequate way "to symbolize society's condemnation of the behavior in question, particularly where it is not on its face brutal or repulsive," and that incarceration may be the only available sanction that can adequately deter others. 84/ However, the Commission warned that whereas such sanctions may serve to educate the public about the seriousness of an illegal action that is not "on its face abhorrent," the indiscriminate use of severe sanctions "in areas where public opinion has not crystallized may seriously weaken the condemnatory effect of the criminal law." 85/

Those who argue for increased punishment for white collar defendants also contend that the traditional concepts of "recidivist" and "first offender" do not apply to white collar criminals because the typical white collar crime (price-fixing, embezzlement, insurance fraud, etc.) is a continuing crime and should be treated as a multiple offense.

83/ Ibid., p. 36.

84/ President's Commission on Law Enforcement and Administration of Justice. Task Force Report -- Crime and Its Impact: An Assessment, op. cit., p. 105.

85/ Ibid., p. 108.

Finally, supporters of this school of thought base some of their arguments on the concept of "just deserts." The theory is that white collar criminals are more culpable than ordinary street criminals because their crimes cause severe physical and fiscal harm to a large number of people. Also, it is maintained that positions of social power and prestige, held by many corporate offenders, carry heavier demands for social responsibility. The combination of these two factors means that white collar offenders deserve to be treated harshly by the sentencing judge. In the interest of justice and fairness, they certainly should not be given more leniency than street criminals. In rather strong language, Gilbert Geis has stated that:

> The failure of law enforcement agencies, administrative boards, prosecutors, and judges to press for and to inflict heavy penalties, particularly jail or prison sentences, on corporate criminals often represents a class prejudice so evident that it leads citizens to question the fairness and the integrity of our system of justice. 86/

Two recent studies have pointed to the sentencing disparities between "crime in the streets" and "crime in the suites." The U.S. Attorney's Office for the Southern District of New York studied all sentences imposed in Manhattan for 645 convicted offenders during the period of May 1, 1972 through October 31, 1972.

86/ Geis, Criminal Penalties for Corporate Criminals, op. cit., p. 378.

The results demonstrated that white collar criminals "as a general rule" received more lenient sentences than did individuals convicted of common "street crimes." [87/] More specifically, the results indicated that white collar defendants had a 36 percent chance of going to prison, whereas individuals convicted of non-violent common ("street") crimes had a 53 percent chance of being imprisoned, and those convicted of violent street crimes had an 80 percent chance of being incarcerated. Also, the study showed that the average prison sentence in the Southern District of New York was 18 months for bank embezzlement and 69 months for bank robbery, and 11 months for bribery and 18 months for interstate theft. The chances of being sentenced to a prison term on a national average is 20 percent for bank embezzlement, 89 percent for bank robbery, 27 percent for bribery, and 42 percent for interstate theft. [88/]

Another study, by Edward Browder, a Federal prison inmate convicted of interstate transportation of stolen securities, analyzed the sentences received by 138 white collar offenders and showed that these convicted offenders were treated leniently. Of those offenders who were sentenced to imprisonment, the average

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87/ White Collar Justice, op. cit., pp. 7, 10-11. However, Assistant U.S. Attorney Robert Ogren (see Ogren, op. cit., p. 964) has noted that this "light sentence characteristic is in part a function of the possible sentencing options." He states that many of the Federal statutes outlawing white-collar types of offenses, such as bribery, mail fraud, tax evasion, and securities fraud, provide for penalties of no greater than five years in prison.

88/ Seymour, Whitney North, Jr., former U.S. Attorney, Southern District of New York. Social and Ethical Considerations in Assessing White Collar Crime. American Criminal Law Review, v. 11, Nov. 4, 1973: 826-829.

prison term imposed was 2.8 years,[89] whereas, according to U.S. Bureau of Prisons figures, the average prison term for robbery was 134 months (11.2 years) for the comparable period (FY 1972).[90]

Congress is now considering the Criminal Code Reform Act of 1977 (S. 1437/ H.R. 6869), legislation which, if enacted, would widen the sentencing options available in white collar crime cases. The authorized maximum prison sentences for most white collar crimes would not be changed significantly;[91] however, the fine limits would be increased sharply over those available under current law for these types of crimes. The maximum fines for organizations would be greatly increased to: $500,000 for a felony, $100,000 for a misdemeanor, and $10,000 for an infraction. For an individual, the maximum fine would be $100,000 for a felony and $10,00 for a misdemeanor. The proposed code also would permit an alternative fine of double the monetary gain of the defendant or double the loss caused to the victim, whichever is greater. This is a general provision affecting all types of offenders, but it could be especially useful against white collar offenders engaged in fraudulent schemes. In addition,

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89/ White Collar Justice, op. cit., pp. 7, 10-11.

90/ U.S. Bureau of Prisons. Statistical Reports: Fiscal Year 1974 [Washington, U.S. Department of Justice, Federal Bureau of Prisons, 1974] p. 23.

91/ Some bribery, tax evasion, and theft offenses would be classified as C felonies, but most white collar crimes would be D or E felonies or misdemeanors, thus carrying maximum prison terms comparable to those under current law. S. 1437, as passed by the Senate, provides a maximum penalty of 10 years for a class C felony, five years for a class D felony, two years for a class E felony, and one year for a class A misdemeanor. Under H.R. 6869, a class C felony would carry a 12 year maximum prison term; a class D felony, a six year maximum; a class E felony, a three year maximum; and a class A misdemeanor, a one year maximum penalty.

the proposed Code would provide for improved methods for the collection of fines by allowing recourse to the Internal Revenue Service statutes so that a lien could be placed on a defendant's property if he attempts to avoid payment of the court-ordered fine.[92] Finally, this legislation would authorize the sentencing judge to require the perpetrators of frauds or other deceptive practices to give notice of their conviction to their victims so that civil damage claims could be filed, and it would authorize the judge to order a convicted defendant to make restitution to this victim.

IV. Reform Proposals

Many researchers of the problems involved in controlling white collar crime have suggested reform measures. Some of the most comprehensive recommendations have been made recently in the 1977 report of the American Bar Association's Committee on Economic Offenses, entitled "Economic Offenses." The ABA committee project was funded by the Law Enforcement Assistance Administration (LEAA) and the committee was composed of representatives of all elements of the criminal justice system, including judges, prosecutors, defense counsels, and academicians and others with expertise in this area. This committee, in the process of conducting its investigation of this problem, heard testimony from representatives of all the major Federal departments involved in the enforcement of Federal statutes and regulations on economic offenses. The ten major recommendations resulting from this study are:[93]

92/ Gainer, Ronald L. Statement before the Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary concerning the sentencing provisions of S. 1437, the proposed revision of the Federal Criminal Code. June 20, 1977. pp. 24-25.

93/ American Bar Association, op. cit., pp. 5-15.

(1) The Federal government should collect data from all Federal agencies having jurisdiction in the detection, investigation, or prosecution of economic crime offenses. After such a data collection system is established, appropriate consideration should be given to the implementation of a "case-weighing system" 94/ in which predetermined factors as to the importance of cases can be counted.

(2) The Congress should undertake an evaluation of the Federal effort against economic crime and it should review the enforcement priorities for the detection, investigation, and prosecution of such crimes.

(3) All Federal and all State agencies with either a law enforcement or law inspection function should be required to issue annual compliance reports. 95/

(4) All future Federal social programs, excluding revenue-sharing funds, should be designed so as to diminish the probability of abuse and specifically to recognize the potential for fraud within the program.

(5) Both recruitment and manpower training should become priority items for every agency with economic crime enforcement responsibility. Included in this proposal are:

> (a) the establishment of experienced white collar crime prosecution specialists in every U.S. Attorney's office and in every local district attorney's office;

94/ Ibid., p. 5. On this point, the report states that the Justice Department is planning for the initial implementation of such data collection in that when cases are referred to the Department, Federal agencies are to complete a form including information on the amount of provable loss, amount of suspected loss, the number of identified or suspected victims, the number of defendants, etc.

95/ The report mentions that one witness testifying before the Committee said that if an agency has no compliance reporting function, it is neither serious about enforcing the law nor serious about "developing a constituency" for resources that may be needed. (p. 7)

(b) a direct exchange of personnel between the Department of Justice and other Federal agencies so that these employees will acquire knowledge in a particular program area;

(c) an increase in the salaries of experienced prosecutors in the white collar crime area in order to retain them in continued Federal service; and

(d) the recruitment of trained auditors in all agencies with program responsibilities.

(6) Such projects as the Economic Crime Project should receive continued and substantial funding and the Law Enforcement Assistance Administration should consider economic crime as a major factor in crime in the U.S. This consideration should be a factor in the LEAA's discretionary grant fund priorities.

(7) The pilot project in San Diego, under which an assistant U.S. Attorney is also an assistant district attorney, and vice versa, should be expanded to other jurisdictions. Also, joint investigations, similar to the Strike Force concept, may be needed between Federal and local agencies and between the Fraud Division of the Justice Department and the SEC.

(8) Pretrial, reciprocal discovery in economic crime cases should be increased. (See pp. CRS-38-39)

(9) A greater emphasis should be placed on punishing economic crime offenders following their convictions.

(10) The American Bar Association should have a continuing committee on economic crime within the Section of Criminal Justice because the most effective crime prevention tool is public education.

Various other groups have proposed additional reforms for controlling white collar crime. One such group is the Corporate Accountability Research Group, a Ralph Nader associate, which has proposed a Federal Chartering Act whereby the sanctions against corporate crime would be greatly increased and there would be more checks and balances on corporate management. 96/ A bill was introduced during the 94th Congress to establish Federal corporate chartering, but no action was taken on this bill and a similar bill has not been introduced in the 95th Congress.

It has been argued that Federal incorporation is not necessary as corporations are already Federally controlled through the regulation of stock by the Securities and Exchange Commission and through control exercised by the Interstate Commerce Commission. Also, it is possible that the States, which collect revenue from incorporation, would oppose giving up State incorporation. However, the Corporate Accountability Research Group asserts that State chartering is a "costly anachronism" that does not force corporations to account for their actions, and they claim this is documented by the alleged current corporate crime wave.

In 1971 the National Commission on Reform of Federal Criminal Laws (the Brown Commission) suggested in its final report that disqualification from and forfeiture of Federal office and disqualification from holding a job in a corporation or similar organization should be available sentencing alternatives

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96/ Nader, Ralph, Mark Green, and Joel Seligman. Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations. Washington, Corporate Accountability Research Group, 1976. 592 p.

for the courts to use against public officials or corporate managers or officers. Specifically, the Brown Commission proposed that, at the sentencing judge's discretion, a defendant found guilty of treason or other crimes affecting national security, bribery or similar crimes of illegal influence or betrayal of office, unlawful acts under color of law, or felonious theft or fraud could be disqualified from holding any Federal position for up to five years. Forfeiture of any Federal office at the time of the conviction would be at the discretion of the judge unless the crime was treason, bribery, or a crime relating to national security, for which forfeiture of office would be mandatory. Furthermore, the Commission recommended that any corporate official convicted of an offense committed in the course of his occupation could be disqualified from holding a similar position in the same or any other organization for up to five years, if the court determined that it would be "dangerous" to entrust such a defendant with his former duties.

Other reform recommendations that have been made by various experts and research groups are:

-- increased publicity of the extent of white collar crime and the harm it causes, and a major educational effort on these problems, aimed at judges, prosecutors, investigators, and legislators;

-- legislation allowing injured parties to sue for damages by using cease and desist orders or consent decrees as prima facie evidence of illegal business practices;

-- reduced acceptance by judges of nolo contendre pleas so that guilty pleas may be used by victims to recover their losses, or if the defendant pleads not guilty, the facts of the case can be presented in court;

-- more research into the interrelationships between white collar and other crime, especially the relationship between white collar crime and organized crime activity (e.g., the infiltration of organized crime into legitimate business);

-- a revision of the fraud and corruption statutes to provide for the possibility of significantly increased prison sentences and fines in serious and aggravated white collar crime cases;

-- more research and planning on the need for resources to combat newly emerging types of white collar crimes (e.g., computer crime); and

-- greatly increased fines for corporations, such as those proposed by the criminal code reform legislation, so that if a corporation is found guilty of an illegal act, the punishment will be significant and not easily written off as a small business expense.

This wide array of proposed solutions makes obvious the fact that the problem of white collar crime is a complex one covering a variety of illegal and criminal acts which pose difficult problems for Federal enforcement agencies. However, as this paper has shown, in the past several years increasing attention has been directed toward the special problems of controlling these types of crimes. It would appear that the Federal effort to combat white collar crime will continue to improve.

APPENDIX

THEORETICAL PERSPECTIVES ON THE CAUSES OF WHITE COLLAR CRIME AND ITS RELATIONSHIP TO STREET CRIME

There are three major criminological theories which attempt to provide a causal explanation of crime and which are applicable to both white collar crime and "ordinary" street crime. These are control theory, learning theory, and conflict theory. In this appendix a brief description is provided of the basic propositions contained in these criminological theories, as well as the propositions of an applicable political science theory called organizational theory. Next, these theories will be analyzed in terms of their implications for policy toward white collar crime -- assuming each theory were accepted as explaining the causes of white collar crime. Finally, arguments will be analyzed that assert that white collar crime and street crime are related, in that widespread white collar crime purportedly leads to more street crime.

Control Theory

Most of the criminological theories take conformity as the norm and concentrate on explaining deviant behavior. However, control theory assumes that deviancy is normal and it is conformity that is problematic. Under this theory, people are seen as amoral creatures who quickly discover that deviance often may result in faster, easier goal attainment than conformity. Therefore, under the appropriate circumstances, anyone would commit criminal, unethical, or socially unacceptable acts if they thought they would benefit from such acts and that they could get away with such behavior.

The control theorist does not ask why a (white collar) criminal does what he does, but why all people with similar opportunities do not commit such acts. This theory attempts to answer the question posed by Thomas Hobbes, "Why do men obey the rules of society?" Or, as Travis Hirschi states it:

> The question "Why do they do it?" is simply not the question the theory is designed to answer. The question is, "Why don't we do it?" There is much evidence that we would if we dared. 1/

There are two leading forms of control theory, one proposed by Walter Reckless (known as "containment theory") 2/ and another described by Travis Hirschi. 3/ Briefly, Reckless described individuals as being "contained", or restrained from carrying out their antisocial urges, by two factors: (1) social pressures to obey the norms or rules of one's group (outer containment) and (2) self-control, or conscience, resulting from internalization of society's rules through socialization processes (inner containment). Hirschi, on the other hand, points to four elements of an individual's bond to society which, if weakened, result in deviant behavior: (1) affective attachments to other individuals and social objects; (2) commitment to society's means of goal achievement or performance standards; (3) involvement in conventional activities which keep the individual too busy to be deviant; and (4) belief in the validity of society's rules.

1/ Hirschi, Travis. Causes of Delinquency. Berkeley, Univ. of Calif. Press [1969] p. 34.

2/ Reckless, Walter. The Crime Problem. New York, Appleton-Century-Crofts [1973] 718 p.

3/ Hirschi, op. cit., 309 p.

It has been argued that the propositions of control theories aid in explaining white-collar types of crimes by asserting that anyone will be tempted to embezzle funds, carry out a fraudulent scheme, or bribe a government official if there are no "controls" on his behavior and if there is little risk of being caught. When corporate crimes are widely accepted within the business world (refer to the previous discussion of the extent of white collar crime, p. CRS-12), neither inner nor outer containment, to use Reckless' terminology, serves to inhibit an individual's urge to get more money or power. Also, it is argued that society does not increase the external controls on such behavior when many white collar crimes are not discovered or prosecuted or when those offenders who are apprehended and convicted are not punished.

If control theory provides an accurate explanation for the existence of white collar crime as well as other crimes, then there are several resultant policy implications for effective control of these types of illegal acts. However, one expert, Gwynn Nettler, has argued that control propositions do not indicate popular, or easy, political solutions. 4/

Under control theory, the most effective and realistic methods of controlling the antisocial inclinations which lead people to commit white collar crimes might be:

4/ Nettler states that this is because if the control hypothesis is correct, "the usual welfare recommendations, commendable as they may be in their own right, do not address themselves directly to reducing crime. It cannot be said that guaranteeing everyone a minimum income or redistributing wealth will reduce crime." Nettler, Gwynn. Explaining Crime. New York, McGraw-Hill [1974] p. 247.

- improvements in the social education process through which conduct and its justification (beliefs) are acquired -- for instance, more money allocated to the improvement of schools, and increased emphasis on religious training, moral education and the central role of the family in a moral society;

- preventive measures, such as technological adaptations to prevent illegal manipulation of a computer or accounting controls to reduce the opportunities for theft;

- education programs within corporations to teach employees that "borrowing is stealing" (i.e., that such acts cannot be rationalized away);

- increased prosecution of white collar crime offenders so others will realize that they too could get caught; and

- increased punishments for white collar offenses so that such crimes are not regarded as worth the risk. 5/

Learning Theory

The key assumption of learning theory, in all its forms, is that criminal behavior is learned behavior, and not simply some inherited predisposition. This learning process applies to both the techniques used in committing the crime and the motives for committing it.

Learning theory in its earliest form, as proposed by Edwin Sutherland, 6/ is known as differential association theory. Sutherland stated that "criminal behavior [including techniques and motives, rationalizations, and attitudes] is

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5/ Both this last policy suggestion and the preceding one would be specifically applicable to Hirschi's emphasis on the significance of attachment to others and commitment to conforming activities because a criminal conviction could result in loss of one's job and shame for one's family and friends, two things a white collar offender would most fear.

6/ Sutherland, Edwin H., and Donald R. Cressey. Criminology. 9th edition. Philadelphia, Lippincott [1974] 658 p.

learned in interaction with other persons in a process of communication." The specific direction of an individual's motives and attitudes "is learned from definitions of the legal codes as favorable or unfavorable." A person becomes a criminal due to "an excess of definitions favorable to violation of law over definitions unfavorable to violation of law." 7/ Thus, most members of complex societies are subject to a continual competition between definitions of situations which justify illegal acts and definitions which legitimize a law in the individual's mind so that he is not prone to break it.

Learning theory in its more recent form builds on Sutherland's theory of differential association and Skinnerian psychological theories of operant conditioning. According to this form of learning theory, an individual learns criminal behavior, usually from his peers, through a series of positive and negative reinforcements which support and encourage, or negate, his behavior. One of the leading proponents of this theory, Ronald Akers, maintains that:

> occupational behavior in general is normally learned behavior which is sustained through social and economic reinforcement....[The] criminal aspects of occupational behavior can be understood in the same way. Occupational encumbents learn criminal behavior and definitions [justifying this behavior] from others in similar positions. In addition to whatever social support they get from these others, the major source of reinforcement for their criminal behavior is economic. 8/

7/ Ibid., p. 75.

8/ Akers, Ronald L. Deviant Behavior: A Social Learning Approach. Belmont, Calif., Wadsworth Publ. Co. [1973] p. 183. It has been noted that such an analysis might also apply as an explanation of the criminal and unethical activities of the functionals in the Watergate scandals.

Donald Cressey has also argued in favor of this learning perspective and presented the proposition that just as there are "criminal neighborhoods" in which delinquents are likely to learn delinquent behavior, there are also "corporate neighborhoods" in which members of corporations learn to be deviant. As he states in a recent article:

> Henry McKay...has shown that, even in high delinquency areas, alternative educational processes are in operation, so that a child may be educated in either "conventional" or criminal means of achieving success. Certainly this generalization holds for the corporate world as well as for the neighborhood. Diffusion of the ideologies and techniques of restraint of trade leads to restraint of trade, and diffusion of ideologies and techniques of larceny leads to larceny. 9/

If learning theory provides an accurate explanation of the causes of white collar crime, then the following might be some resulting policy implications. Note that some of the possible policy implications from control theory might also result from the assumptions of learning theory.

- The economic reinforcements of white collar crime should be removed. For instance, the sanctions against many corporate offenses should be increased and the applicable laws strictly enforced to make it unprofitable for a company to allow pollution to continue or to risk bribing officials or engaging in price-fixing.

- Negative reinforcements resulting from increased prosecution and punishment of white collar offenders should be applied so these offenders do not receive social support from others.

9/ Cressey, Donald R. Restraint of Trade, Recidivism, and Delinquent Neighborhoods. In Short, James F., Jr., ed. Delinquency, Crime and Society. Chicago, Univ. of Chicago Press [1976] pp. 209-210. For an example of how a criminal corporate "neighborhood" can operate and social learning of criminal behavior result, see Gilbert Geis' account of the heavy electrical equipment antitrust cases. (Geis, Gilbert, ed. White-Collar Crime. New York, Free Press [1977] pp. 117-132.)

- Convicted white collar offenders in positions of responsibility should not be allowed to resume their positions of power in a corporation, government, or a profession. This would also eliminate any positive reinforcements for criminal behavior (e.g., power and prestige).

- Just as with control theory, the social education process should be improved through better schools, more religious training, etc., so that socially acceptable behavior is learned at an early age. Also, companies should provide economic and social incentives for employees who attend on-the-job educational programs which teach employees that embezzlement, pilferage, etc., are crimes.

Conflict Theory

This third criminological theory is the most controversial of the three, as much of the writings of conflict theorists is based on Marxist class-conflict propositions and the power elite idea presented in the 1950s by sociologist C. Wright Mills. 10/

This theory, as currently developed by such criminologists as Richard Quinney and William Chambliss, 11/ is based on ideas similar to those presented in a statement by Donald Cressey:

> If one takes diminished price competition as an index of socialism, then it is correct to say that America has developed a system of socialism for the rich, while retaining a system of free competition for the poor.

10/ Mills, C. Wright. The Power Elite. New York, Oxford Univ. Press, 1956. 423 p.

11/ See Quinney, Richard. The Social Reality of Crime. Boston, Little, Brown and Co. [1970] 339 p.; Quinney, Richard. Critique of Legal Order: Crime Control in Capitalist Society. Boston, Little, Brown and Co. [1974] 206 p.; and Chambliss, William, and Milton Mankoff. Whose Law? Whose Order? New York, John Wiley and Sons [1976] 256 p.

> Ghetto dwellers, behaving like the capitalists they are told to be, compete with each other for bread; corporation executives, behaving like the socialists they say they deplore, make illegal arrangements for restraining trade. In the process, both commit crimes. 12/

Theorists arguing from a conflict perspective use economic and historical methods of analysis to support their propositions that corporate officials control the U.S. economy (i.e., that free enterprise is a myth) and that these executives have a strong interest in maintaining the economic and social status quo. As Richard Quinney states it, the powerful group's interests usually conflict with the interests of the subordinate groups; yet the ruling class is able to make laws and define the social values which protect their interests, usually at the expense of the lower class. 13/ In the eyes of the conflict theorists, this explains why our prisons are mainly filled with people from the lower class; why most of our laws are to protect private property even though most property is under the ownership of the upper classes; and why most upper-class types of crimes, such as corporate offenses, are either not against the law or if they are against the law, the offenders are rarely prosecuted.

According to conflict hypotheses, economic elites will do anything perceived as necessary to maintain their position of power and wealth -- that is, they will bribe government officials, provide illegal payoffs, engage in all forms of fraud and deceit, and commit any other criminal or unethical act in order to achieve their ends.

12/ Cressey, op. cit., p. 215.

13/ Quinney, The Social Reality of Crime, op. cit.

If it is assumed that conflict theory best explains the causes of white collar crime, then the possible policy implications are extremely broad, politically unpopular, and difficult to accomplish as they would necessitate drastic changes in our current political and economic system. Although conflict theory is congenial to revoluntionaries who use it to translate the label "convict" to "political prisoner," it also might be useful in thinking about the cost of applying the criminal law to various categories of socially unacceptable behavior.

Some of the policy changes that appear to be suggested by conflict theory are:

- A cost-benefit analysis should be done on criminalizing or decriminalizing certain forms of immoral, deviant, unhealthy, or dangerous behavior. In other words, the conflict theorists would increase the criminalization of white collar crimes, which are argued to be more serious and dangerous than such crimes as petty theft, and decriminalize relatively harmless, "moral terpitude" crimes such as marijuana possession or prostitution, in order to equalize the punishment of criminal acts among the socioeconomic classes and to place the emphasis on the most serious threats to our society, as they perceive those threats.

- The giant corporations should be broken up so that the wealth and power in the United States will not be controlled by a small group of individuals.

- Existing laws should be enforced to ensure that the democratic method of "one man, one vote," not "one dollar," prevails and elected officials represent the wishes of all citizens, not just those with money and power.

Organizational Theory

Finally, there is a general political science theory that appears to shed some light on the causes of white collar criminality. This is organizational theory, which examines the nature and structure of complex organizations and bureaucracies to determine why they function as they do and how they affect the people they employ. According to this theory, an organization, once established, tends to take on a life of its own and the individuals who work for the organization will do anything necessary to protect and defend it. Once formed, organizations acquire their own needs, and these needs sometimes become the masters of the organization. 14/ Or, as one expert has stated, organizations can become institutionalized.

> They take on a distinctive character; they become prized in and of themselves, not merely for the goods or services they grind out. People build their lives around them, identify with them, become dependent upon them. 15/

According to this perspective, a collection of individuals with separate goals can be transformed into a working organization that exists apart from its members and shapes their behavior. Mere membership in such a corporate organization means that an individual may be pressured into a position of committing a crime in the name of, or for, the corporation or bureaucracy or institution.

14/ See Etzioni, Amitai. Modern Organizations. Englewood Cliffs, N.J., Prentice-Hall [1964] pp. 5-19.

15/ Perrow, Charles. Complex Organizations: A Critical Essay. Glenview, Ill., Scott, Foresman and Co. [1972] p. 190.

Also, ideological identification with the organization may mean that an individual who attempts to point out any illegal or unethical activity by the organization will be suppressed by other members. Furthermore, as Peter Blau and Marshall Meyer have pointed out,

> although many members of an organization may be aware of certain problems and deficiencies, each may think that all others are satisfied with existing arrangements, and this state of pluralistic ignorance...prevents the information from becoming official knowledge. 16/

Organizational theory does not describe such selfish, individual white collar crimes as embezzlement of funds or pilferage (crimes against the company), but it does help explain why otherwise law-abiding citizens will engage in criminal or unethical practices to make profits for "the corporation" or the government group.

The policy implications of organizational theory might be:

- the development of democratic methods of controlling organizations and bureaucracies, such as placing ordinary citizens, to represent the interests of consumers, on corporate boards of directors;
- increased Federal regulation of organizations to serve as external controls and counteract any pressures on organization members to commit illegal acts; 17/
- decentralization of corporations and rotation of top officials to keep the organization from becoming too institutionalized; 18/ and

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16/ Blau, Peter M., and Marshall W. Meyer. Bureaucracy in Modern Society. 2d ed. New York, Random House [1971] p. 54.

17/ Note the similarity of this policy implication and the policy changes suggested by both control and learning theories.

18/ As Chester Barnard has stated (The Functions of the Executive. Cambridge, Mass., Harvard Univ. Press, 1960. p. 215): "Executive work is not that of the organization, but the specialized work of maintaining the organization in operation." [Emphasis in the original.]

- increased public disclosure of the internal operations of organizations and any corporate expansions and divestitures in order to make organizational operations less secretive and obscure.

Possible Relationships between White Collar Crime and Street Crime

Several criminologists have hypothesized that there is some connection between white collar crime and street crime. Don Gibbons, in his book, Changing the Lawbreaker: The Treatment of Delinquents and Criminals, stated that:

> It is not unlikely that the existence of white-collar criminality, along with differential handling of the individuals involved in it, provides run-of-the-mill offenders with powerful rationalizations for their own conduct. The latter can argue that "everyone is crooked" and that they are the "little fish" who are the victims of a corrupt and hypocritical society. In the same way, some rather obvious problems for treatment of conventional offenders may arise from their perception of widespread illegality among individuals of comfortable economic standing. Although definitive evidence on this matter is lacking, it is possible to gather up an abundance of statements by articulate criminals and delinquents in which these individuals allude to the facts of white-collar crime as one basis for their grievances against "society." 19/

Robert M. Morgenthau, former U.S. Attorney for the Southern District of New York and now the District Attorney for New York County, agrees with Gibbons' idea that white collar crime tends to foster street crime. He argues that there is a double relationship between the crimes of the poor and white collar crimes. First, it is the poor who are usually the victims of white

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19/ Gibbons, Don C. Changing the Lawbreaker: The Treatment of Delinquents and Criminals. Englewood Cliffs, N.J., Prentice-Hall [1965] p. 271.

collar crimes and "may at times violently react against it." Second, if the affluent disregard the law, Morgenthau states that the poor will follow their leadership. 20/

Similarly, the 1967 Crime Commission stated that it is reasonable to assume that when prestigious companies and respected community leaders break the law, they "set an example for other businesses and influence individuals, particularly young people, to commit other kinds of crime on the ground that everyone is taking what he can get." 21/

The individuals who point to evidence of a disparity between the treatment of white-collar, high-status offenders and the treatment of street criminals (frequently members of low-income groups and racial minorities), maintain that a diminution of this discrepancy possibly would lead to a decrease in the incidences of street crime, and would definitely lead to more respect for the American system of justice. As Morgenthau summarizes:

> prosecution of white-collar criminals demonstrates the evenhandedness of the law. Without that, we'll have no faith in our law-enforcement system, and without faith we'll just have more crime everywhere. 22/

However, there have been few formal research studies into the relationship between white collar crime and street crime. So propositions asserting a strong interrelationship between such crimes can only be inferred at this time.

20/ Morgenthau, Robert M. Equal Justice and the Problem of White Collar Crime. The Conference Board Record, Aug. 1969: 17.

21/ President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society. Washington, U.S. Govt. Print. Off., 1967. p. 48.

22/ Quoted in Harris, Richard. Crime in New York. New Yorker, v. 53, Sept. 26, 1977: 76.

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