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Convergences and Omissions in Reporting Corporate and White Collar Crime

Zachary Bookman*

I. Introduction

The field of corporate regulation has changed dramatically in the last decade as a number of high-profile corporate scandals have been exposed. Some of the notable imbroglios included one of the nation’s largest auditors, KPMG, found to have engaged in tax shelter fraud on a massive scale. WorldCom notched up the largest corporate insolvency ever due to illegal revenue inflation and cost underreporting. A major dealer in mortgage-backed securities, Freddie Mac, is still under investigation for serious accounting irregularities. The most dramatic and pervasive of the many corporate fraud cases was probably the 2001 implosion of Enron. In its wake came a series of regulatory moves that are still being felt. In July 2002, George Bush announced the creation of the President’s Corporate Fraud Task Force to maximize the federal government’s ability to enforce the existing legal infrastructure. Shortly thereafter, the legal infrastructure itself was amended by congressional passage of the 2002 Sarbanes-Oxley Act,


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which included numerous provisions aimed at improving corporate governance.\textsuperscript{6}

Amidst the maelstrom of scandal and government response, however, a number of questions have gone unanswered. For instance, on what informational basis is the President or Congress acting? Are they undertaking rigorous analysis or merely reacting to a series of corporate spectacles? This Article argues that the dearth of available data on the number and size of various corporate crimes makes it almost certain that legislators, commentators, investors, and average citizens are making decisions without adequate information. The Article proposes a good first step would be to overhaul the reporting processes of corporate prosecutions and white collar crime so, as a society, we could know with more certainty how best to discuss—and legislate on—the issues.

A simple example will help show the current problem: As the reporting arm of the Department of Justice ("DOJ"), the Bureau of Justice Statistics ("BJS") reports white collar crime dispositions from United States federal courts for fraud, forgery and counterfeiting, bribery, and embezzlement.\textsuperscript{7} Published data exists for the years 1972 through 2004. When examining the statistics, one would have a difficult time discerning the difference between a small-town lawyer embezzling from his trusts and estate practice and Ken Lay bilking shareholders and pensioners across the country. This is because there is presently no breakdown between personal and corporate frauds, and there is no weighting of the particular crimes. The implications are staggering because surely some types of fraud (for example, massive corporate misfeasance) are more costly and socially reprehensible than others (for example, low-level venality). Moreover, one can imagine that the various types could be inversely proportional; that is, one could expect to see a far larger number of simple small town-style frauds than Enron-type cases. Thus, a single fraud statistic without definitional breakdown or seriousness weighting is likely to be practically useless given the skewing that takes place due to the low frequency of massive frauds and differences in criminal enforcement or deterrence strategies between the two.

In fact, the BJS does not even publish specific data on corporate crime as distinct from white collar crime. To find such data, one must review assorted publications from the President's Corporate Fraud

\textsuperscript{6} H.R. 3763, 107th Cong. (2002).

Task Force and various academic studies. For instance, the second report of the Corporate Fraud Task Force listed over five hundred corporate fraud convictions in 2004, an increase of 250 over 2003. A study by Corporate Crime Reporter of criminal fines revealed that twenty-one percent of the Fortune 500 paid criminal fines of at least one hundred and fifty thousand dollars in the 1990s. A 1979 study, Illegal Corporate Behavior, found that in just two years, 1975 and 1976, sixty percent of the 582 largest public U.S. corporations had an action initiated against them, and almost one-half had two or more violations. Yet, one can quickly see what this reporting misses. While interesting, these disparate data compiled over different years and in different time periods provides nothing close to a comprehensive picture of corporate crime in America. How could Congress even know if there has been more corporate crime of late rather than just more public scrutiny of corporate crime?

A similar story can be told about white collar crime in general. Again, the BJS is not the only source of statistics on the matter, but other organizations are hard-pressed and rather poorly situated to deliver a complete story. The U.S. Sentencing Commission, for instance, has published data on fraud, the largest white collar offense, but only since 1995, and it still suffers from the same level of generality. The Transactional Records Access Clearinghouse at Syracuse University does useful and creative work, but is still relegated to using DOJ data on new white collar prosecutions. The Journal of Law and Economics published a study in 1999 measuring the effect of the sentencing guidelines on white collar criminal penalties, showing that from 1988 to November, 1991, there were 101 corporate criminal convictions, averaging 2.2 per month, compared to 2.3 for the 142 firms sentenced between that time and 1996. Criminal fines, however, were significantly higher, increasing from $1.9 million to $19.1 million.

9. Id.
13. Agency specific data can be found at Transactional Records Access Clearinghouse (TRAC), http://trac.syr.edu/ (last visited May 5, 2008).
The bottom line is that a comprehensive database of corporate criminal prosecutions does not exist, nor is there even a highly relevant historical record of white collar crime kept by the federal government. A number of different organizations, both public and private, publish data, but unfortunately each data set is typically narrowly focused on the needs or subject matter of that particular outfit. To demonstrate this, Part III of this Article assembles the most complete collection of data on the subject using each of the major sources. This will serve to show more specifically what is lacking from a numerical perspective and how the overall federal corporate crime architecture is unsatisfactory. Part IV then seeks an institutional explanation of why satisfactory data does not exist in a single U.S. repository. Is it simply impossible to obtain? Is the Department of Justice too bureaucratic to break with historical inertia? Does the data actually exist and is simply not made public? These and other political-economic considerations, such as what organizational interests are at stake, are examined to see how and why corporate and white collar reporting differs from violent crime and property crime reporting. Part V sketches a vision for what an effective reporting scheme would look like, including necessary white collar and corporate distinctions and the possibility of seriousness or dollar-cost weighting indicators. The current reporting system for violent and property crime is critiqued for comparative purposes. The Article’s conclusion suggests that the best way to achieve a more robust reporting vision may be a congressional mandate of the kind that has been issued for sexual assault and discrimination. A detailed and firm legislative hand-binding would not only benefit Congress, but the entire community of concerned citizens and investors.

Before jumping into the possibilities for change, however, Part II traces the growth of corporate regulation, giving context to the broader inquiry. Also included in Part II is a discussion on the lexicographical distinctions between corporate and white collar crime, necessary when discussing the topics addressed herein.

II. CORPORATE REGULATION AND WHITE COLLAR OFFENSE

While this Article is concerned primarily with numerical reporting and the benefits that could follow improvements in those practices, it is critical to know just what is at stake. This Part gives a very brief history of the corporate form and the regulation of it, so that recent events and this Article’s consequent recommendations can be seen in definitional and historical context. A discussion about terminology follows, as corporate regulation and white collar crime do not necessa-
rily go hand in hand. Fleshing out the overlaps and differences will make later arguments clearer and perhaps more forceful.

A. History

In use by the fourteenth century, the early corporate form was primarily adopted by medieval ecclesiastical bodies for the purpose of managing church property. Brickey states that "from these bodies evolved lay associations, chiefly municipalities, and mercantile and craft guilds, the precursors of the modern business corporation." The effectiveness of this legal structure was evidenced by its growth in the sixteenth and seventeenth centuries "as hospitals, universities, and other similar associations adapted to the corporate form." As global commerce developed too, early efforts at venture capital utilized the joint stock company, a form of business association that proved important in the mobilization and democratization of credit.

Brickey explains that, in the wake of the establishment of the corporate form, a series of legal principles evolved so that corporations took on the status of persons: "First, a corporation was recognized as an entity distinct from its members. Second, corporate property was considered distinct from the property of its members. Third, a judgment against a corporation could be executed only against the property of the corporation, not that of its members." A fourth principle of sorts came through the extension of the mortmain laws. These endowed the "lay corporation . . . with immortality, from which logically followed the notion that a corporation could not be outlawed or excommunicated, assaulted or imprisoned; nor could it commit treason or felony."

1. Development of Corporate Liability

It was the practice of the common law to grant criminal immunity to the corporate entity. They were considered juristic fictions, lacking

18. Id.
19. Id. at 400.
20. Id.
21. Id.
corporeal members and any ability to act physically. A corporation was held liable on a presentment for nonfeasance as early as 1635, but misfeasance cases were not decided for another two centuries.

2. Development of American Doctrine

In the eighteenth century, royal governors in the American colonies were frequently granted corporate charters from the British crown. When colonies became states, the power to create corporations was reposed in the legislatures. In Massachusetts, for example, an early statute provided that "the inhabitants of every town . . . are hereby declared to be a body politic and corporate." This practice, as Brickey notes, became "the foundation of most forms of political organization in the American colonies. . . . By 1900, the number of incorporated cities and towns in the U.S. exceeded 10,000." Private business corporations took longer to develop, though, as evidenced by the fact that "[of] the 225 private corporate charters granted before 1800, fewer than a third were issued to enterprises whose purpose was to engage in general commercial activity." Accordingly, it was to the more common "public and quasi-public corporations that criminal liability first attached."

3. Nuisance and Crimes Not Requiring Criminal Intent

The law of nuisance provided the earliest mechanism for corporate criminal prosecution. Common nuisance was defined as "an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires." Brickey points out that "as had been true in English law[,] the 'neglect' prong of the definition first was applied to American corporations." "As the presence and importance of corporations grew," Khanna notes that courts then "extended corporate criminal liability from public nuisances to all offenses that did not

23. Brickey, supra note 15, at 401 (citation omitted).
27. Id. (citations omitted).
28. Id. at 405.
29. Id.
30. Id. (citation omitted).
require criminal intent.”32 In legal terms, this did not introduce much of a problem because individual corporate agents shared no responsibility for the omission, and guilt was not imputed from agent to principal; the duty fell on the corporation, not the individual.

As Khanna states, “prior to the mid-1800s, it was questionable whether corporations could be held criminally liable for misfeasances (positive acts) as well as nonfeasances (omissions).”33 The situation changed in 1846, however, when Lord Denman ruled in The Queen v. Great North of England Railway Co.34 that “corporations could be convicted of misfeasance . . . .”35 According to Khanna, American courts thereafter “began making similar rulings.”36

Yet in order to find corporations liable for misfeasance, courts had to find a way to attribute agent conduct to corporations. Khanna explains that the imputation relied, for logical consistency, on the doctrine of respondeat superior (“let the master answer”) and, further, that this development eventually paved the way for courts “to extend corporate criminal liability to all crimes not requiring intent.”37

4. Crimes Requiring Intent

Brickey argues on this count that the imposition of criminal liability for crimes requiring intent followed two themes. The first theme was that the corporation “has no hands with which to strike” and, because it “has no soul,” it cannot have “wicked intent.”38 The second theme was an ultra vires plea, noting some acts are so beyond the purpose and powers granted by a corporate charter that an entity is incapable of committing them.39

Both were overcome in 1909, when the Supreme Court held a corporation liable for an intent-based crime in New York Central & Hudson River Railroad Co. v. United States.40 A unanimous court noted that since Congress is empowered to regulate interstate commerce, “[i]t would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding

33. Id.
35. Khanna, supra note 32, at 1481 (citation omitted).
36. Id. (citing James R. Elkins, Corporations and the Criminal Law: An Uneasy Alliance, 65 KY. L.J. 73, 87-88 (1976)).
37. Khanna, supra note 32, at 1482.
38. Brickey, supra note 15, at 411 (citation omitted).
39. Id. (citation omitted).
40. 212 U.S. 481 (1909).
them responsible for the intent and purposes of the agents to whom they have delegated the power to act . . . .”41 The Court stated that the law “cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands . . . .”42

5. Modern Expansion of Corporate Criminal Liability

Khanna breaks down four historical developments that “facilitated the continued growth of corporate criminal liability in the twentieth century:”43

First, federal courts in the United States disregarded European liability standards as well as the standards laid out in the Model Penal Code, settling instead on respondeat superior as the vehicle for corporate liability. Second, Congress enacted a growing body of legislation authorizing the imposition of corporate criminal liability on corporations. . . . Third, public civil enforcement became more feasible after the dawn of the twentieth century, providing the government with a tool other than corporate criminal liability that combined both public enforcement and corporate liability. . . . The fourth development is the issuance of federal sentencing guidelines for crimes committed by organizations.44

As it stands today, the scope of corporate criminal liability in the United States is very broad. Khanna states, for instance, that “[a] corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.”45

B. Terminology

Corporate lawbreakers are mostly handled by quasi-judicial bodies of government regulators like the Federal Trade Commission, Environmental Protection Agency, and Food and Drug Administration. The administrative and civil enforcement measures generally used in corporate violations include warning letters, consent agreements or decrees not to repeat the violation, orders to compel compliance, seizure or recall of commodities, administrative or civil monetary penalties, and court injunctions to refrain from further violations.

41. Id. at 496.
42. Id. at 495.
43. Khanna, supra note 32, at 1487.
44. Id. at 1487-88 (citations omitted).
45. Id. at 1488. As a practical matter, however, the growth of deferred prosecution agreements has changed the corporate landscape dramatically.
With so many competing actions, some experts prefer an expansive definition of corporate crime, defining it as "any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil, or criminal law." This broadens the definition of crime beyond the criminal law, which is the only governmental action for ordinary offenders. For clarity, this Article mostly ignores civil regulatory action in favor of focusing on criminal fines and sentencing of corporate executives and white collar defendants under traditional criminal law prosecutions.

1. Corporate Crime: A Type of White Collar Crime

When sociologist Edwin Sutherland coined the phrase "white collar crime" in a 1939 speech, he defined it as "crime committed by a person of respectability and high social status in the course of his occupation." His definition generated controversy, and is now regarded as too restrictive, the class of the offender being irrelevant. In 1970, Edelhertz refined the issue by averring that white collar crime is "an illegal act committed by non-physical means and by concealment or guile, to obtain money or property, to avoid payment or loss of money or property, or to obtain business or personal advantage." It is this updated definition, in its basic tenor, which has informed present policy.

2. Occupational Verses Corporate Crime

Scholars have attempted to separate white collar crime into two types: occupational and corporate. Occupational crime is committed largely by individuals or small groups in connection with their jobs. It includes embezzling from an employer, theft of merchandise, income tax evasion, and manipulation of sales, fraud, and violations in the sale of securities. Corporate crime, on the other hand, is enacted by collectivities or aggregates of discrete individuals. If a corporate official violates the law in acting for the corporation it is deemed a corporate crime, but if he or she gains personal benefit in the commission of a crime against the corporation, as in the case of embezzlement of cor-

46. CLINARD ET AL., supra note 11.
48. Id.
50. CLINARD ET AL., supra note 11.
porate funds, it is occupational crime. In addition, a corporation cannot, of course, be jailed, and, thus, the major penalty to control individual violators is not available for corporations per se.

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

III. THE DATA

Eight studies are canvassed below, representing a multitude of inquiries. Collectively, they offer a range of data on both white collar crime statistics and corporate criminal prosecutions. The studies are ordered chronologically, so as to impart a sense of the evolution of this field of study and the regulatory environment that has driven the data. The special aim of this approach is to demonstrate that, while interesting and reflective of a number of trends, even the sum total of the data leaves basic questions unanswered, such as how much corporate crime there is in America, or what the level of growth of corporate and white collar crime is in the United States.

51. This can cause confusion, when, as was the case in numerous recent scandals, the executive gains tremendously from increased share prices.

52. See Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys 1 (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. In 2003, then-Deputy Attorney General, Larry Thompson, laid out what firms should do to avoid a corporate indictment, including waiving attorney-client privilege and leaving accused employees to their own devices. The effect of this highly controversial memorandum arose because of the coercive weight of a corporate indictment. For a journalistic analysis, see Editorial, Corporate Injustice, WALL ST. J., Apr. 6, 2006, at A14.
A. Sutherland’s Conclusion

Edwin Sutherland, "arguably the premier American sociological criminologist of the 20th century," carried out the first empirical effort in the field. In 1949, he published White Collar Crime, a twenty-year study of the illegal behavior of seventy of the two hundred largest U.S. non-financial corporations in the United States. More aptly titled "Corporate Crime," he concluded that a full nine-tenths of these corporations broke advertising, labor, trade, patent, copyright, and other laws in the course of their daily business. Melodramatically, he opened his book by noting, "Business is crime."

In total, Sutherland found 980 infractions over those twenty years, amounting to an average of fourteen per corporate entity. As a result, he asserted that corporate crime was not a phenomenon exclusive to a select few venal executives. Instead, as the Miami Herald summarized his hypothesis in the wake of the Enron scandal, "just as novice street criminals learn their trade through association with more seasoned offenders, executives learn the attitudes that result in corporate crime in the normal course of business."

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

B. 1979 Federal Study on Illegal Corporate Behavior

Marshall Clinard and Peter Yeager conducted an empirical investigation of the 582 largest publicly owned corporations in the United States for two years during 1975 and 1976. It was first published in

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55. Castro, supra note 53.
56. Id.
59. Clinard & Yeager, supra note 58, at 255-72.
1979 by the DOJ, and, then, a year later in 1980, it came out in book form. Of the firms covered in the study, 477 fell in the manufacturing sector with a smattering in wholesale (18), retail (66), and services (21). Annual revenues ranged from a few hundred million to tens of billions, with an average volume of $1.7 billion. Methodologically, the authors noted that they included all enforcement actions obtainable, with actions initiated or imposed by twenty-four federal agencies during 1975 and 1976. Though the study revealed a wide range of corporate misdeeds and government responses, one problem with this approach is that by including any enforcement action, the focus was so broad as to make criminal and civil differentiations difficult to ascertain.

1. Findings

More than three-fifths of the corporations profiled found themselves the recipients of some type of government action. Approximately half were cited for "severe" or "moderately severe" violations, according to a multi-variable definition by the authors. Interestingly, the larger corporations were found to have committed a disproportionate number of violations.

A total of 1,553 federal cases were begun against all 582 corporations during 1975 and 1976, making for an average of 2.7 federal cases each. Of the 582 corporations, 350 (60.1%) were dealt one or more federal action, and, for these firms (those with at least one action), the average was 4.4. Around forty percent of both the total group of 582 corporations and the 477 manufacturing firms were not charged with any violations during the two-year period.

For the manufacturing corporations studied, 1,529 sanctions were imposed. Most were not severe; for example, twice as many warnings were issued than any other type of sanction, and an average of 3.9 warnings were issued for those corporations who were issued at least

61. CLINARD & YEAGER, supra note 58, at 255-72.
62. Id.
63. Id.
64. Id.
65. Id.
66. CLINARD & YEAGER, supra note 58, at 255-72.
67. Id.
68. Id.
69. Id.
70. Id.
one.\textsuperscript{71} Consent orders and consent decrees were widely given, making up 12.9\% of the sanctions.\textsuperscript{72} Clinard gives the breakdown as follows: Of 1,529 sanctions in total, 1,446 were primary enforcement actions;\textsuperscript{73} 44.2\% were warnings, including recalls;\textsuperscript{74} 23.4\% were monetary penalties;\textsuperscript{75} 17.6\% were unilateral orders;\textsuperscript{76} 12.4\% were consent orders;\textsuperscript{77} and 2.4\% were injunctions and other types of sanctions.\textsuperscript{78} The average number of enforcement actions was three per corporation;\textsuperscript{79} 4.5 for the 321 corporations with at least one.\textsuperscript{80} About one-third of the corporate entities received a warning at least, and roughly the same proportion received unilateral as well as consent orders.\textsuperscript{81} Two of ten had, at minimum, a monetary penalty assessed against them and one of ten had at least one injunction imposed.\textsuperscript{82}

The authors found that rates of recidivism varied from about twenty-five percent to as high as sixty percent for ordinary crime.\textsuperscript{83} It is interesting to compare these rates with those in the field of corporate sanctions. In Sutherland’s study, for instance, a very high rate of recidivism was found.\textsuperscript{84} He found that the average corporation had an enforcement action taken against it fourteen times and that 97.1\% were recidivists in the sense of having two or more adverse decisions against them.\textsuperscript{85} The forty-one criminally convicted corporations had an average of four such convictions each.\textsuperscript{86} The sixty firms found in violation of restraint of trade averaged 5.1 decisions, with one-half to three-fourths of the corporations engaged in such practices so regularly that Sutherland termed them habitual.\textsuperscript{87}

In the Clinard study, of the 477 manufacturing corporations, 210, or almost one-half, had two or more legal actions completed against them during 1975 and 1976;\textsuperscript{88} 18.2\% had five or more.\textsuperscript{89} For serious

\textsuperscript{71} CLINARD & YEAGER, supra note 58, at 255-72.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} CLINARD & YEAGER, supra note 58, at 255-72.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} CLINARD & YEAGER, supra note 58, at 255-72.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} SUTHERLAND, supra note 54.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} CLINARD & YEAGER, supra note 58, at 255-72.
\textsuperscript{89} Id.
and moderately serious violations, 124 firms, or one-fourth, had two or more actions, and 7.8% had five or more.\textsuperscript{90} If one could extrapolate the number of sanctions over the average equivalent period used by Sutherland, the result would far exceed an average of fourteen.\textsuperscript{91}

2. Corporate Executive Criminal Prosecution

One and a half percent of the cases profiled involved the conviction of a corporate officer.\textsuperscript{92} Of the fifty-six executives convicted in total, ninety-one percent were for federal antitrust violations, five percent for financial or tax infractions, and four percent for federal food and drug laws.\textsuperscript{93} In sum, sixteen officers of the 582 corporations were sentenced to 594 days of imprisonment (not suspended sentences) combined, though it should be noted that 360 days (60.6\%) were accounted for by two officers who received six months each in a single case.\textsuperscript{94} Of the remaining 234 days, one officer received a sixty-day sentence, another forty-five days, and a third received thirty days.\textsuperscript{95} The average for all imprisoned executives was 37.1 days.\textsuperscript{96}

C. Bureau of Justice Statistics

The BJS collects information on offenses considered to be white collar crimes, including fraud, forgery and counterfeiting, bribery, and embezzlement.\textsuperscript{97} Below is a comprehensive listing of these four crimes by year. Note that these are dispositions from federal courts, referring to those who are initially prosecuted, whether or not convicted or sentenced.\textsuperscript{98} Conspicuously, there is no breakdown between individuals and corporations.
The data reveals a strong rise in fraud through the 1970s and 1980s, with a slowing rate of increase in the 1990s. The period from 2000 through 2004 shows barely any rise at all; though in its 2005 report on fraud, PWC Global reported a more dramatic rise from 2003 to

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

D. Study on Criminal Fines Before and After Sentencing Guidelines

Before 1984, corporate criminal defendants were essentially faced with the same set of penalties applicable to natural persons. Fines were thus fairly small. According to the authors of this study, Alexander, Arlen, and Cohen, "60% of the fines imposed on corporations were less than $10,000, with an average fine of about $46,000." Twice in the 1980s (1984 and 1987), Congress passed laws with an eye toward strengthening corporate sanctions by upping the maximum penalties. The study explains, however, that despite an increase in corporate fines, they still "generally remained less than the loss estimated to have been caused by the offense."

The Sentencing Commission responded to this perceived lacuna by drafting stiff federal Guidelines by which convicted organizations would be sentenced. These Guidelines became effective on November 1, 1991, after congressional approval. The Guidelines "purport to constrain judges’ discretion over criminal fines, non-fine criminal sanctions (such as restitution), and non-monetary sanctions (such as probation)," with a general goal of increasing both monetary and non-monetary corporate sanctions.

In their effort to determine the effect of the sentencing guidelines, the authors focused exclusively on public corporations. They used a data set consisting of all the criminal offenses for which public corpo-
rations were sentenced by federal courts during the 1988 through 1996 period. The study identified 243 sentences of public firms in total during those years.\textsuperscript{112}

1. Types of Crimes

Table No. 2 below presents initial statistics comparing pre-Guidelines and post-Guidelines penalties. It characterizes the 243 criminal cases according to the type of crime and the conditions under which sentencing occurred. One can see that “about 40\% (101 out of 243) are pre-Guidelines cases,” while “the other 60\% were sentenced after the Guidelines took effect.”\textsuperscript{113} Of the 142 Guidelines-era cases, 105 are “unconstrained,” meaning that occurred before November 1, 1991, or involved offenses that the fine provisions do not speak to, such as environmental, food and drug, wildlife, safety, and export violations.\textsuperscript{114} The remaining 34 post-Guidelines offenses were sentenced under the Guidelines’ fine provisions.

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<td>3</td>
<td>2.9</td>
<td>0</td>
</tr>
<tr>
<td>Tax</td>
<td>2</td>
<td>2.0</td>
<td>2</td>
<td>1.9</td>
<td>1</td>
</tr>
<tr>
<td>Wildlife</td>
<td>1</td>
<td>1.0</td>
<td>2</td>
<td>1.9</td>
<td>0</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>1</td>
<td>1.0</td>
<td>5</td>
<td>4.8</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>101</td>
<td></td>
<td>105</td>
<td></td>
<td>34</td>
</tr>
</tbody>
</table>

\textbf{Table No. 2: Type & Number of Federal Criminal Sentences of Public Corporations, 1988-96}\textsuperscript{115}

In total, “fraud constitutes the single largest source of convicted wrongdoing by publicly held firms, accounting for 27\% of all convic-

\textsuperscript{112} Id. at 405.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 406.
tions.” The authors note that “although fraud constitutes 38% of pre-Guideline convictions, it comprises only 20% of post-Guidelines cases.”

Antitrust and environmental offenses also feature prominently in the data, making up “26% and 20% of all cases, respectively.” The authors show that “antitrust sentences rose from 25% of pre-Guidelines cases to 27% during the post-Guidelines era and 47% of cases sentenced under the Guidelines.” The study stated that the “the percentage of crimes involving environmental offenses rose slightly from 18% to 22% in the post-Guidelines era.” They found this surprising since both antitrust and the Environmental Protection Agency began policies at this time of not pursuing criminal charges against firms that voluntarily took steps to deter, report, and correct wrongdoing.

2. Number of Crimes

Alexander and the other researchers noted the following statistics resulting from their study:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>PRE-GUIDELINES</th>
<th>CONSTRAINED</th>
<th>unconstrained</th>
<th>SUBTOTAL</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>19</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>19</td>
</tr>
<tr>
<td>1989</td>
<td>27</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>27</td>
</tr>
<tr>
<td>1990</td>
<td>29</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>29</td>
</tr>
<tr>
<td>1991</td>
<td>26</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>28</td>
</tr>
<tr>
<td>1992</td>
<td>0</td>
<td>0</td>
<td>29</td>
<td>29</td>
<td>29</td>
</tr>
<tr>
<td>1993</td>
<td>0</td>
<td>3</td>
<td>28</td>
<td>32</td>
<td>32</td>
</tr>
<tr>
<td>1994</td>
<td>0</td>
<td>11</td>
<td>17</td>
<td>28</td>
<td>28</td>
</tr>
<tr>
<td>1995</td>
<td>0</td>
<td>10</td>
<td>21</td>
<td>31</td>
<td>31</td>
</tr>
<tr>
<td>1996</td>
<td>0</td>
<td>10</td>
<td>8</td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>Total</td>
<td>101</td>
<td>34</td>
<td>105</td>
<td>142</td>
<td>243</td>
</tr>
</tbody>
</table>

TABLE NO. 3: FEDERAL CRIMINAL SENTENCES OF PUBLIC CORPORATIONS, BY YEAR OF SENTENCE

As shown in the last column of Table No. 3, above, there were similar numbers of corporate criminal convictions before and after the

117. Id.
118. Id. at 407.
119. Id.
120. Id.
121. Alexander et al., supra note 14, at 407.
122. Id.
Guidelines went into effect. The 101 sentences imposed from 1988 through November 1, 1991, represent an average sentencing rate of 2.2 per month, compared to 2.3 per month for the 142 firms sentenced between 1991 and 1996. The absence of an increase in the rate at which corporations have been sentenced is inconsistent with the idea that prosecutors would respond to higher penalties by seeking more frequent prosecution.

3. Criminal Fines

The following table compares fines and total sanctions both from 1988 to October of 1991 and from November of 1991 to 1996 for only those cases sentenced under the guideline provisions:

<table>
<thead>
<tr>
<th>NUMBER OF CASES</th>
<th>MEAN ($)</th>
<th>MEDIAN ($)</th>
<th>MAXIMUM ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-November 1991 cases, fine only</td>
<td>99</td>
<td>1,918,309</td>
<td>632,661</td>
</tr>
<tr>
<td>Guidelines-constrained cases, fine only</td>
<td>34</td>
<td>19,050,717</td>
<td>3,095,460</td>
</tr>
<tr>
<td>Pre-November 1991 cases, total sanctions</td>
<td>101</td>
<td>114,985,458</td>
<td>1,612,775</td>
</tr>
<tr>
<td>Guidelines-constrained cases, total sanctions</td>
<td>34</td>
<td>49,261,188</td>
<td>4,427,608</td>
</tr>
</tbody>
</table>

Table No. 4: Pre-November 1991 Comparison to Guideline-Constrained Sanctions, 1988-96

As shown in Table No. 4, above, criminal fines are significantly higher in Guidelines-constrained cases than they were previously. The average fine imposed on a publicly held firm rose from $1.9 million to $19.1 million, representing a ten-fold jump. The median fine rose by roughly five times from $633 thousand to $3.1 million. Also of note, the percentage of fines over one million dollars increased from 37% to 59% and the percentage of fines that were relatively small ($50,000 or less) decreased from 15% to 5%.

Total sanctions, as defined in the study, include the pecuniary fine and a variety of other penalties like "restitution, disgorgement, reme-

123. Id.
124. Id.
125. Id. at 409.
126. This number includes a $10.3 billion total sanction of Exxon Valdez. If that number were excluded, the mean would be $13.3 million.
127. Alexander et al., supra note 14, at 409. Note that all dollars are updated to 1996.
128. Id.
129. Id.
130. Id.
dial orders, forfeiture, assessments, and compensation to the government for its expenses in enforcing probation," plus civil penalties and even private liability.\(^\text{131}\) Table No. 4 reveals that pecuniary sanctions increased, with the median rising from $1.6 to $4.4 million. Alexander and others point out that though "although the mean total sanction decreased from $115 million to $49.3 million, when one outlier is excluded the total mean sanction increase from $13.3 million to $49.3 million – a nearly fourfold increase."\(^\text{132}\)

E. United States Sentencing Commission

The Sentencing Commission has published data since 1995. Table No. 5 below is an amalgamation from each year of the number of cases for each of seven white collar offenses. Included also is the percentage the offense represents of all guidelines-constrained cases.\(^\text{133}\)

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

**Table No. 5: Distribution of Sentenced Guideline Defendants by Primary Offense Category**\(^\text{134}\)

Fraud is the largest offense each year and has sustained modest absolute growth, but it has declined substantially overall in percentage representation.\(^\text{135}\) Embezzlement has dropped by a third, and its representation among all sentences has dropped by over a half.\(^\text{136}\) Forgery and counterfeiting saw a fifty percent rise over the eleven year

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131. Id.
134. See id.
135. See id.
136. See id.
period, but a decline in percentage terms by a quarter.\textsuperscript{137} Bribery fell by one-third, and its percentage representation by over one-half.\textsuperscript{138} Tax dropped by fifteen percent, and its representation of the whole by over one-half.\textsuperscript{139} Money laundering rose thirteen percent in absolute terms, but fell forty percent in percentage terms.\textsuperscript{140} Antitrust saw fluctuations around 2000, but was level by 2005.\textsuperscript{141}

F. Corporate Criminal Fines in the 1990s

The following table shows the hundred largest criminal fines paid by corporations that pled guilty or no-contest in the 1990s.\textsuperscript{142} Fourteen categories of crime are represented: environmental, antitrust, fraud, campaign finance, food and drug, financial, false statements, illegal exports, illegal boycott, worker death, bribery, obstruction of justice, public corruption, and tax evasion.

<table>
<thead>
<tr>
<th>COMPANY</th>
<th>CRIME</th>
<th>FINE</th>
<th>DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>F. Hoffman-LaRoche Ltd.</td>
<td>Antitrust</td>
<td>$500 mil.</td>
<td>05/99</td>
</tr>
<tr>
<td>Daiwa Bank Ltd.</td>
<td>Financial</td>
<td>$340 mil.</td>
<td>03/96</td>
</tr>
<tr>
<td>BASF Aktiengesellschaft</td>
<td>Antitrust</td>
<td>$225 mil.</td>
<td>05/99</td>
</tr>
<tr>
<td>SGL Carbon</td>
<td>Antitrust</td>
<td>$135 mil.</td>
<td>05/99</td>
</tr>
<tr>
<td>Exxon Corp.</td>
<td>Environmental</td>
<td>$125 mil.</td>
<td>03/91</td>
</tr>
<tr>
<td>UCAR International, Inc.</td>
<td>Antitrust</td>
<td>$110 mil.</td>
<td>04/98</td>
</tr>
<tr>
<td>Archer Daniels Midland</td>
<td>Antitrust</td>
<td>$100 mil.</td>
<td>10/96</td>
</tr>
<tr>
<td>Banker's Trust (tied)</td>
<td>Financial</td>
<td>$60 mil.</td>
<td>03/99</td>
</tr>
<tr>
<td>Sears Bankruptcy Svs (tied)</td>
<td>Fraud</td>
<td>$60 mil.</td>
<td>02/99</td>
</tr>
<tr>
<td>Haarman &amp; Reimer Corp.</td>
<td>Antitrust</td>
<td>$50 mil.</td>
<td>02/97</td>
</tr>
<tr>
<td>Louisiana-Pacific Corp.</td>
<td>Environmental</td>
<td>$37 mil.</td>
<td>06/98</td>
</tr>
<tr>
<td>Hoechst AG</td>
<td>Antitrust</td>
<td>$36 mil.</td>
<td>05/99</td>
</tr>
<tr>
<td>Damon Clinical Labs, Inc.</td>
<td>Fraud</td>
<td>$35.2 mil.</td>
<td>10/96</td>
</tr>
<tr>
<td>C.R. Bard Inc.</td>
<td>Food and Drug</td>
<td>$30.9 mil.</td>
<td>10/93</td>
</tr>
<tr>
<td>Genentech Inc.</td>
<td>Food and Drug</td>
<td>$30 mil.</td>
<td>04/99</td>
</tr>
<tr>
<td>Nippon Gohsei</td>
<td>Antitrust</td>
<td>$21 mil.</td>
<td>07/99</td>
</tr>
<tr>
<td>Pfizer Inc. (tied)</td>
<td>Antitrust</td>
<td>$20 mil.</td>
<td>07/99</td>
</tr>
<tr>
<td>Summitville Mining (tied)</td>
<td>Environmental</td>
<td>$20 mil.</td>
<td>05/96</td>
</tr>
</tbody>
</table>

\textsuperscript{137} See id.
\textsuperscript{139} See id.
\textsuperscript{140} See id.
\textsuperscript{141} See id.
\textsuperscript{142} Mokhiber, supra note 10.
<table>
<thead>
<tr>
<th></th>
<th>Company Name</th>
<th>Violation Type</th>
<th>Amount</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>19</td>
<td>Lucas Western Inc. (tied)</td>
<td>False Stmts.</td>
<td>$18.5 mil</td>
<td>01/95</td>
</tr>
<tr>
<td>19</td>
<td>Rockwell Int'l Corp. (tied)</td>
<td>Environmental</td>
<td>$18.5 mil</td>
<td>03/92</td>
</tr>
<tr>
<td>21</td>
<td>Royal Caribbean Cruises</td>
<td>Environmental</td>
<td>$18 mil</td>
<td>07/99</td>
</tr>
<tr>
<td>22</td>
<td>Teledyne Industries Inc.</td>
<td>Fraud</td>
<td>$17.5 mil</td>
<td>10/92</td>
</tr>
<tr>
<td>23</td>
<td>Northrop</td>
<td>False Stmts.</td>
<td>$17 mil</td>
<td>03/90</td>
</tr>
<tr>
<td>24</td>
<td>Litton Applied Technology</td>
<td>Fraud</td>
<td>$16.5 mil</td>
<td>07/99</td>
</tr>
<tr>
<td>25</td>
<td>Iroquois Pipeline Operating</td>
<td>Environmental</td>
<td>$15 mil</td>
<td>06/96</td>
</tr>
<tr>
<td>26</td>
<td>Eastman Chemical Co.</td>
<td>Antitrust</td>
<td>$11 mil</td>
<td>10/98</td>
</tr>
<tr>
<td>27</td>
<td>Copley Pharmaceutical, Inc.</td>
<td>Food and Drug</td>
<td>$10.65 mil</td>
<td>06/97</td>
</tr>
<tr>
<td>28</td>
<td>Lonza AG</td>
<td>Antitrust</td>
<td>$10.5 mil</td>
<td>03/99</td>
</tr>
<tr>
<td>29</td>
<td>Kimberly Home Health Care</td>
<td>Fraud</td>
<td>$10.08 mil</td>
<td>07/99</td>
</tr>
<tr>
<td>30</td>
<td>Ajinomoto Co. Inc. (tied)</td>
<td>Antitrust</td>
<td>$10 mil</td>
<td>10/96</td>
</tr>
<tr>
<td>30</td>
<td>(BCCI) (tied)</td>
<td>Financial</td>
<td>$10 mil</td>
<td>01/90</td>
</tr>
<tr>
<td>30</td>
<td>Kyowa Hakko Kogyo (tied)</td>
<td>Antitrust</td>
<td>$10 mil</td>
<td>10/96</td>
</tr>
<tr>
<td>30</td>
<td>Warner-Lambert Co. (tied)</td>
<td>Food and Drug</td>
<td>$10 mil</td>
<td>12/95</td>
</tr>
<tr>
<td>34</td>
<td>General Electric</td>
<td>Fraud</td>
<td>$9.5 mil</td>
<td>07/92</td>
</tr>
<tr>
<td>35</td>
<td>Royal Caribbean (tied)</td>
<td>Environmental</td>
<td>$9 mil</td>
<td>06/98</td>
</tr>
<tr>
<td>35</td>
<td>Showa Denko Carbon (tied)</td>
<td>Antitrust</td>
<td>$9 mil</td>
<td>05/99</td>
</tr>
<tr>
<td>37</td>
<td>IBM East Europe/Asia Ltd.</td>
<td>Illegal Exports</td>
<td>$8.5 mil</td>
<td>08/98</td>
</tr>
<tr>
<td>38</td>
<td>Empire Sanitary Landfill Inc.</td>
<td>Campaign Fin.</td>
<td>$8 mil</td>
<td>10/97</td>
</tr>
<tr>
<td>39</td>
<td>Colonial Pipeline Co. (tied)</td>
<td>Environmental</td>
<td>$7 mil</td>
<td>03/99</td>
</tr>
<tr>
<td>39</td>
<td>Eklof Marine Corp. (tied)</td>
<td>Environmental</td>
<td>$7 mil</td>
<td>09/97</td>
</tr>
<tr>
<td>41</td>
<td>Chevron (tied)</td>
<td>Environmental</td>
<td>$6.5 mil</td>
<td>06/92</td>
</tr>
<tr>
<td>41</td>
<td>Rockwell Int'l Corp. (tied)</td>
<td>Environmental</td>
<td>$6.5 mil</td>
<td>04/96</td>
</tr>
<tr>
<td>43</td>
<td>Tokai Carbon Ltd. Co.</td>
<td>Antitrust</td>
<td>$6 mil</td>
<td>05/99</td>
</tr>
<tr>
<td>44</td>
<td>Allied Clinical Labs, (tied)</td>
<td>Fraud</td>
<td>$5 mil</td>
<td>11/96</td>
</tr>
<tr>
<td>44</td>
<td>Northern Brands Int'l (tied)</td>
<td>Fraud</td>
<td>$5 mil</td>
<td>01/99</td>
</tr>
<tr>
<td>44</td>
<td>Ortho Pharmaceutical (tied)</td>
<td>Obst. of Justice</td>
<td>$5 mil</td>
<td>01/95</td>
</tr>
<tr>
<td>44</td>
<td>Unisys (tied)</td>
<td>Bribery</td>
<td>$5 mil</td>
<td>09/91</td>
</tr>
<tr>
<td>44</td>
<td>Georgia Pacific Corp. (tied)</td>
<td>Tax Evasion</td>
<td>$5 mil</td>
<td>10/91</td>
</tr>
<tr>
<td>49</td>
<td>Kanzaki Specialty Papers</td>
<td>Antitrust</td>
<td>$4.5 mil</td>
<td>07/94</td>
</tr>
<tr>
<td>50</td>
<td>ConAgra Inc.</td>
<td>Fraud</td>
<td>$4.4 mil</td>
<td>03/97</td>
</tr>
<tr>
<td>51</td>
<td>Ryland Mortgage Co.</td>
<td>Financial</td>
<td>$4.2 mil</td>
<td>08/98</td>
</tr>
<tr>
<td>52</td>
<td>Blue Cross Blue Shield (tied)</td>
<td>Fraud</td>
<td>$4 mil</td>
<td>07/98</td>
</tr>
<tr>
<td>52</td>
<td>Borden Inc. (tied)</td>
<td>Antitrust</td>
<td>$4 mil</td>
<td>03/90</td>
</tr>
<tr>
<td>52</td>
<td>Dexter Corp. (tied)</td>
<td>Environmental</td>
<td>$4 mil</td>
<td>09/92</td>
</tr>
<tr>
<td>52</td>
<td>Southland Corp. (tied)</td>
<td>Antitrust</td>
<td>$4 mil</td>
<td>03/90</td>
</tr>
<tr>
<td>52</td>
<td>Teledyne Industries (tied)</td>
<td>Illegal Exports</td>
<td>$4 mil</td>
<td>02/95</td>
</tr>
<tr>
<td>52</td>
<td>Tyson Foods Inc. (tied)</td>
<td>Pub. Corruption</td>
<td>$4 mil</td>
<td>01/98</td>
</tr>
<tr>
<td>58</td>
<td>ALCOA (tied)</td>
<td>Environmental</td>
<td>$3.75 mil</td>
<td>07/91</td>
</tr>
<tr>
<td>58</td>
<td>Costain Coal Inc. (tied)</td>
<td>Worker Death</td>
<td>$3.75 mil</td>
<td>03/93</td>
</tr>
<tr>
<td>No.</td>
<td>Company</td>
<td>Type</td>
<td>Amount</td>
<td>Year/Quarter</td>
</tr>
<tr>
<td>-----</td>
<td>---------------------------------</td>
<td>------------------</td>
<td>------------</td>
<td>--------------</td>
</tr>
<tr>
<td>58</td>
<td>U.S. Sugar Corp. (tied)</td>
<td>Environmental</td>
<td>$3.75 mil.</td>
<td>12/91</td>
</tr>
<tr>
<td>61</td>
<td>Saybolt, Inc.</td>
<td>Environmental</td>
<td>$3.4 mil.</td>
<td>08/98</td>
</tr>
<tr>
<td>62</td>
<td>Bristol-Myers Squibb (tied)</td>
<td>Environmental</td>
<td>$3 mil.</td>
<td>05/92</td>
</tr>
<tr>
<td>62</td>
<td>Chemical Waste Mgmt (tied)</td>
<td>Environmental</td>
<td>$3 mil.</td>
<td>10/92</td>
</tr>
<tr>
<td>62</td>
<td>Ketchikan Pulp Co. (tied)</td>
<td>Environmental</td>
<td>$3 mil.</td>
<td>04/95</td>
</tr>
<tr>
<td>62</td>
<td>United Technologies (tied)</td>
<td>Environmental</td>
<td>$3 mil.</td>
<td>05/91</td>
</tr>
<tr>
<td>62</td>
<td>Warner-Lambert Inc. (tied)</td>
<td>Environmental</td>
<td>$3 mil.</td>
<td>09/97</td>
</tr>
<tr>
<td>67</td>
<td>Arizona Chemical Co. (tied)</td>
<td>Environmental</td>
<td>$2.5 mil.</td>
<td>10/96</td>
</tr>
<tr>
<td>67</td>
<td>Consolidated Rail (tied)</td>
<td>Environmental</td>
<td>$2.5 mil.</td>
<td>07/95</td>
</tr>
<tr>
<td>69</td>
<td>International Paper</td>
<td>Environmental</td>
<td>$2.2 mil.</td>
<td>08/91</td>
</tr>
<tr>
<td>70</td>
<td>Consolidated Edison (tied)</td>
<td>Environmental</td>
<td>$2 mil.</td>
<td>11/94</td>
</tr>
<tr>
<td>70</td>
<td>Crop Growers Corp. (tied)</td>
<td>Campaign Fin.</td>
<td>$2 mil.</td>
<td>01/97</td>
</tr>
<tr>
<td>70</td>
<td>E-Systems Inc. (tied)</td>
<td>Fraud</td>
<td>$2 mil.</td>
<td>09/90</td>
</tr>
<tr>
<td>70</td>
<td>HAL Beheer BV (tied)</td>
<td>Environmental</td>
<td>$2 mil.</td>
<td>10/98</td>
</tr>
<tr>
<td>70</td>
<td>John Morrell and Co. (tied)</td>
<td>Environmental</td>
<td>$2 mil.</td>
<td>02/96</td>
</tr>
<tr>
<td>70</td>
<td>United Technologies (tied)</td>
<td>Fraud</td>
<td>$2 mil.</td>
<td>09/92</td>
</tr>
<tr>
<td>76</td>
<td>Mitsubishi Int'l Corp.</td>
<td>Antitrust</td>
<td>$1.8 mil.</td>
<td>07/94</td>
</tr>
<tr>
<td>77</td>
<td>Blue Shield of CA (tied)</td>
<td>Fraud</td>
<td>$1.5 mil.</td>
<td>05/96</td>
</tr>
<tr>
<td>77</td>
<td>Browning-Ferris Inc. (tied)</td>
<td>Environmental</td>
<td>$1.5 mil.</td>
<td>06/98</td>
</tr>
<tr>
<td>77</td>
<td>Odwalla Inc. (tied)</td>
<td>Food and Drug</td>
<td>$1.5 mil.</td>
<td>07/98</td>
</tr>
<tr>
<td>77</td>
<td>Teledyne Inc. (tied)</td>
<td>False Stmts.</td>
<td>$1.5 mil.</td>
<td>09/93</td>
</tr>
<tr>
<td>77</td>
<td>Unocal Corp. (tied)</td>
<td>Environmental</td>
<td>$1.5 mil.</td>
<td>03/94</td>
</tr>
<tr>
<td>82</td>
<td>Doyon Drilling Inc. (tied)</td>
<td>Environmental</td>
<td>$1 mil.</td>
<td>05/98</td>
</tr>
<tr>
<td>82</td>
<td>Eastman Kodak (tied)</td>
<td>Environmental</td>
<td>$1 mil.</td>
<td>04/90</td>
</tr>
<tr>
<td>82</td>
<td>Case Corp. (tied)</td>
<td>Illegal Exports</td>
<td>$1 mil.</td>
<td>06/96</td>
</tr>
<tr>
<td>85</td>
<td>Marathon Oil</td>
<td>Environmental</td>
<td>$900,000</td>
<td>06/91</td>
</tr>
<tr>
<td>86</td>
<td>Hyundai Motor Co.</td>
<td>Campaign Fin.</td>
<td>$600,000</td>
<td>12/95</td>
</tr>
<tr>
<td>87</td>
<td>Baxter Int'l Inc. (tied)</td>
<td>Illegal Boycott</td>
<td>$500,000</td>
<td>03/93</td>
</tr>
<tr>
<td>87</td>
<td>Bethship-Sabine Yard (tied)</td>
<td>Environmental</td>
<td>$500,000</td>
<td>07/95</td>
</tr>
<tr>
<td>87</td>
<td>Palm Beach Cruises (tied)</td>
<td>Environmental</td>
<td>$500,000</td>
<td>07/99</td>
</tr>
<tr>
<td>87</td>
<td>Princess Cruises (tied)</td>
<td>Environmental</td>
<td>$500,000</td>
<td>07/99</td>
</tr>
<tr>
<td>91</td>
<td>Cerestar Bioproducts (tied)</td>
<td>Antitrust</td>
<td>$400,000</td>
<td>06/98</td>
</tr>
<tr>
<td>91</td>
<td>Sun-Land Products (tied)</td>
<td>Campaign Fin.</td>
<td>$400,000</td>
<td>08/98</td>
</tr>
<tr>
<td>93</td>
<td>American Cyanamid (tied)</td>
<td>Environmental</td>
<td>$250,000</td>
<td>12/90</td>
</tr>
<tr>
<td>93</td>
<td>Korean Air Lines (tied)</td>
<td>Campaign Fin.</td>
<td>$250,000</td>
<td>12/95</td>
</tr>
<tr>
<td>93</td>
<td>Regency Cruises Inc. (tied)</td>
<td>Environmental</td>
<td>$250,000</td>
<td>07/99</td>
</tr>
<tr>
<td>96</td>
<td>Adolph Coors Co. (tied)</td>
<td>Environmental</td>
<td>$200,000</td>
<td>11/90</td>
</tr>
<tr>
<td>96</td>
<td>Andrew &amp; Williamson (tied)</td>
<td>Food and Drug</td>
<td>$200,000</td>
<td>11/97</td>
</tr>
<tr>
<td>96</td>
<td>Daewoo Int. Corp. (tied)</td>
<td>Campaign Fin.</td>
<td>$200,000</td>
<td>04/96</td>
</tr>
</tbody>
</table>
In sum, twenty-one percent of today’s Fortune 500, which includes only American companies, paid a criminal fine of at least $150,000 in the 1990s.\textsuperscript{144}

\textbf{G. Corporate Fraud Task Force}

In July 2002, the President established the Corporate Fraud Task Force, which was comprised of a DOJ group focused on corporate fraud efforts as well as an interagency working group focused on generating cooperation across law enforcement agencies. The Task Force’s second annual report, published in 2004, noted over five hundred corporate fraud convictions or guilty pleas, an increase of two hundred and fifty over the previous year.\textsuperscript{145} Since inception, the Task Force had charged over nine hundred defendants and sixty corporate CEOs and presidents with some type of crime involving corporate fraud.

\textbf{H. Transactional Records Access Clearinghouse Data}

DOJ data show that in February 2006, 473 new white collar prosecutions were filed. “According to case-by-case information analyzed by the Transactional Records Access Clearinghouse (TRAC),” under the Freedom of Information Act from the Executive Office for U.S. Attorneys, “this number is down 10.6% from a month before.”\textsuperscript{146}

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Rank & Company & Crime & Fine & Date & Number \\
\hline
96. & Exxon Corp. (tied) & Environmental & $200,000 & 03/91 & 2 \\
100. & Samsung America Inc. & Campaign Fin. & $150,000 & 02/06 & \\
\hline
\end{tabular}
\caption{Table No. 6: The Top 100 Corporate Criminals of the 1990s\textsuperscript{143}}
\end{table}

\begin{itemize}
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Corporate Fraud Task Force, supra note 8.
\end{itemize}
REPORTING CORPORATE AND WHITE COLLAR CRIME  

<table>
<thead>
<tr>
<th>Number Latest Month</th>
<th>473</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage Change from Previous Month</td>
<td>-10.6</td>
</tr>
<tr>
<td>Percentage Change from One Year Ago</td>
<td>-2.5</td>
</tr>
<tr>
<td>Percentage Change from Five Years Ago (Including Magistrate Court)</td>
<td>-43.3</td>
</tr>
<tr>
<td>Percentage Change from Five Years Ago (Excluding Magistrate Court)</td>
<td>-45.4</td>
</tr>
</tbody>
</table>

TABLE NO. 7: CRIMINAL WHITE COLLAR CRIME PROSECUTIONS  
FEBRUARY 2006-2001

TRAC also shows a comparison of monthly 2006 prosecutions with the same period in the prior year, revealing that filings had dropped 2.5%. TRAC notes that not only are prosecutions over the past year . . . still much lower than they were five years ago,” but that “overall, the data show that prosecutions are down 43.3% from levels reported in 2001.” TRAC provides the following figure below, which depicts graphically a generally declining trend in white collar crime prosecutions over the last half decade.

FIGURE A: WHITE COLLAR PROSECUTIONS OVER THE LAST FIVE YEARS (MOVING AVERAGE)

The vertical bars count white collar crime prosecutions on a monthly basis, while the horizontal line represents the six-month moving average. Intended to even out the fluctuations, the moving average also forms the basis for the one and five-year rates of change in Table No. 7 above.

147. Id.
148. Id.
149. Id.
150. Id.
1. Lead Charge in White Collar Crime Prosecutions

TRAC provides the following pie chart, Figure B, showing that “the lead investigative agency for white collar prosecutions in February 2006 was the FBI accounting for 43%.”151 “Other agencies,” it notes, “with substantial numbers of white collar crime referrals were: Secret Service (12%), IRS (11%), and Postal Service (10%).”152

![Pie chart showing lead investigative agencies for white collar crime prosecutions]

**Figure B: Prosecutions by Investigative Agency**

Thanks to 28 U.S.C. § 631, the government maintains a system of Article One magistrate courts, judges of which are appointed to eight year terms by life-term federal district judges.154 With an overall purpose of expediting federal caseloads, in the criminal context, United States magistrate judges primarily handle misdemeanor and petty offense cases. TRAC provides data attesting that in February 2006, these courts handled fifteen percent of all white collar cases.155 The breakdown of the most recent data they have published is as follows:

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152. Id.
153. Id.
In the magistrate courts . . . the most frequently cited lead charge [31.5% of filings] . . . involve[d] bank fraud . . . Other frequently prosecuted lead charges included: "... Fraud and related activity – id documents" (12.3%), "... Conspiracy . . ." (6.8%), "... Fraud and related activity - access devices" (6.8%), and "Mail Fraud . . ." (6.8%).

3. United States District Courts

District Courts are full-fledged Article III entities; Table No. 8 below portrays February 2006 lead charges in their domain.

<table>
<thead>
<tr>
<th>LEAD CHARGE</th>
<th>COUNT</th>
<th>RANK</th>
<th>1 YR. AGO</th>
<th>5 YRS. AGO</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 U.S.C. § 1341</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mail Fraud - Frauds and Swindles</td>
<td>56</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>18 U.S.C. § 1344</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Fraud</td>
<td>41</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>18 U.S.C. § 1343</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud by Wire, Radio, or Television</td>
<td>34</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>18 U.S.C. § 1029</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud and Related Activity - Access Devices</td>
<td>29</td>
<td>4</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>18 U.S.C. § 1028</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud and Related Activity – ID Documents</td>
<td>21</td>
<td>5</td>
<td>6</td>
<td>13</td>
</tr>
<tr>
<td>18 U.S.C. § 0371</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conspiracy to Commit Offense or To Defraud the United States</td>
<td>20</td>
<td>6</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>18 U.S.C. § 0287</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>False, Fictitious or Fraudulent Claims</td>
<td>19</td>
<td>7</td>
<td>16</td>
<td>17</td>
</tr>
<tr>
<td>18 U.S.C. § 1001</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud/False Statements Generally</td>
<td>16</td>
<td>8</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>18 U.S.C. § 0513</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Securities of the States and Private Entities</td>
<td>12</td>
<td>9</td>
<td>17</td>
<td>11</td>
</tr>
<tr>
<td>18 U.S.C. § 0641</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Money, Property or Records</td>
<td>12</td>
<td>9</td>
<td>7</td>
<td>12</td>
</tr>
</tbody>
</table>

**Table No. 8: Top Ten Charges Filed In United States District Court For February 2006**

Mail fraud is evidently the most common lead charge. TRAC notes, however, that it "was ranked 2nd a year ago as well as five years ago." Bank fraud holds second place, though the statute was first both one year and five years earlier. Fraud by wire, radio, or

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157. Id.
158. Id.
159. Id.
160. Id.
television is third in frequency, whereas it was fourth a year earlier and fifth five years back.\textsuperscript{161}

The lead charge with the largest prosecutorial rise in the past year was false, fictitious or fraudulent claims; it rose two hundred and fifty percent.\textsuperscript{162} Compared to five years ago, this statute saw an increase of 96.9%.\textsuperscript{163} By contrast, conspiracy saw a falloff in prosecutions over the previous year of 32.6%.\textsuperscript{164} TRAC states that over the last five years bank fraud experienced the largest prosecutorial decline at 67.8%.\textsuperscript{165} For purposes of comparison with the foregoing data on the nation’s magistrate system, TRAC provides the following figure, which helpfully depicts the division of cases between District and Magistrate Court.

\begin{figure}
\centering
\includegraphics[width=0.5\textwidth]{fig_c.png}
\caption{District Court Verses Magistrate Court\textsuperscript{166}}
\end{figure}

4. White Collar Crime Prosecutions by Judicial District

TRAC reported that in February 2006, the DOJ maintained “163.5 white collar crime prosecutions for every ten million people in the U.S.”\textsuperscript{167} Since the ninety-four federal judicial districts show a substantial degree of variation in prosecution numbers, TRAC lists the ten

\begin{itemize}
\item 162. Id.
\item 163. Id.
\item 164. Id.
\item 165. Id.
\item 167. Id.
\end{itemize}
The Middle District of Louisiana (Baton Rouge) registered 1,317 prosecutions in February 2006, soaring far above the nation’s average of 163.5. In 2001, it also ranked first. The Western District of Tennessee (Memphis) was second in 2006, as it was the year before that. The Southern District of Mississippi (Jackson), third in 2006, was eighth five years previous to that. The district experiencing the most white collar prosecution growth (57.8%) from 2005 to 2006 was Middle District of Pennsylvania (Scranton). Over five years, though, the Western District of Pennsylvania (Pittsburgh) counted the most growth (9.4%). By contrast, the largest decline in white collar prosecutions from 2005 to 2006 (10.7%) occurred in the Eastern District of Missouri (St. Louis); the Eastern District of Arkansas (Little Rock) holds that spot from 2001 to 2006, with a fall of 33.3%.

168. Id.
169. Id.
170. Id.
172. Id.
173. Id.
174. Id.
175. Id.
IV. WHY POOR REPORTING?

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

A. Obtaining the Data

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

1. History of Uniform Crime Reporting

In 1927, the International Association of Chiefs of Police (IACP) formed the Committee on Uniform Crime Records with the goal of filling the latent need for national police statistics. The result was the Uniform Crime Reporting ("UCR") Program of 1929, which included a manual disseminated to law enforcement agencies setting offense definition for those crimes known to have occurred whether or not there was an arrest. The following seven crimes were prioritized because of their "seriousness, frequency of occurrence, pervasiveness in all geographic areas, and likelihood of being reported:" homicide, rape, robbery, aggravated assault, burglary, larceny, and auto theft. Other crimes, including white collar categories like fraud and embezzlement, were lumped into a second tier. During the months following the initiation of the program:

[L]aw enforcement agencies in 400 cities from 43 states and the territories of Puerto Rico, Alaska, and Hawaii submitted statistics, and the IACP published the first monthly Uniform Crime Reports for

178. Id. at 6.
179. Id. at 2.
180. Id.
the United States and Its Possessions.\textsuperscript{181} The pamphlet consisted of one table, "Number of Offenses Known to the Police: January 1930."\textsuperscript{182}

Later that year, at the urging of the IACP, the Congress passed 28 USC § 534.\textsuperscript{183} This Act granted the Attorney General the ability to "acquire, collect, classify, and preserve criminal identification, crime, and other records" and the ability to appoint officials to oversee this duty.\textsuperscript{184} Consistent with this, the FBI, since 1930, has been the data clearinghouse for the UCR, soliciting, assembling, and publishing local, state, federal, and tribal law enforcement agency information.\textsuperscript{185}

The scope of the program has expanded over the decades as a result of federal mandates and suggestions from law enforcement advisory groups.\textsuperscript{186} For example, agencies began contributing data on the age, sex, and race of arrestees in 1952,\textsuperscript{187} and national data on the age, sex, and race of murder victims and the weapon used only became available with the advent of the Supplementary Homicide Report in 1962.\textsuperscript{188} Other important years in the program's evolution include 1978 when Congress mandated the collection of arson data and 1982 when it ordered the FBI to count arson as a basic property offense.\textsuperscript{189} After the Hate Crime Statistics Act of 1990, the FBI asked agencies to record and report whether an offense was motivated "in whole or in part by the offender's bias against a race, religion, sexual orientation, or ethnicity/national origin."\textsuperscript{190} Congress amended this Act in 1994 to include prejudice against physical or mental disability.\textsuperscript{191}


\textsuperscript{184} Id.

\textsuperscript{185} Interestingly, the principle investigative arm of the DOJ only received its current name in 1935. It was originally unnamed when then-Attorney General Charles J. Bonaparte organized its predecessor group of special agents in 1908. It was renamed various times in the 1930s, settling on FBI only in 1935.

\textsuperscript{186} Alexander et al., supra note 14.

\textsuperscript{187} Id.

\textsuperscript{188} Barnett, supra note 7.


\textsuperscript{190} H.R. 1048, 101st Cong. (1990).

2. Relegation of White Collar Crime

For our purposes, the 1980s was a noteworthy time in the evolution of crime statistics reporting, because a series of National UCR Conferences was held during those years to determine necessary system revisions. With members from the IACP, Department of Justice, including the FBI, and the newly formed Bureau of Justice Statistics (BJS), a "Blueprint for the Future of the Uniform Crime Reporting Program" was released in 1985. The report proposed splitting reported data into two clear divisions, the eight "serious" crimes and twenty-one less commonly reported crimes. The first category became known as Part I index crimes, and these were further split into two groups: violent and property crimes. Aggravated assault, forcible rape, murder, and robbery are classified as violent, while arson, burglary, larceny-theft, and motor vehicle theft are classified as property crimes. The additional twenty-one crimes were considered Part II index crimes, with the following categories indexed: simple assault, curfew offenses and loitering, embezzlement, forgery and counterfeiting, disorderly conduct, driving under the influence, drug offenses, fraud, gambling, liquor offenses, offenses against the family, prostitution, public drunkenness, runaways, sex offenses, stolen property, vandalism, vagrancy, and weapons offenses.

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

193. An account of this is provided in the 2005 publication of Crime in the United States, which can be found at Fed. Bureau of Investigation, About the UCR Program, http://www.fbi.gov/ucr/05cius/about/about_ucr.html (last visited May 6, 2008).
194. Id.
195. Id.
196. Id.
197. Id.
B. Self-Starting

As it stands, the collection of UCR data is a collaborative effort on the part of city, county, state, tribal, and federal law enforcement agencies that voluntarily provide reports on crimes police are aware of and on persons arrested. For the most part (some states do not have a UCR program and, thus, submit their data directly to the FBI), participating agencies prepare monthly crime reports, using uniform index offense definitions, which are centralized within state repositories. This collection mostly includes crimes reported by the public, but also contains crimes that officers discover in the course of duty. State UCR Programs then forward data to the FBI, which provides three annual publications: Crime in the United States, Hate Crime Statistics, and Law Enforcement Officers Killed and Assaulted. Crime in the United States is the primary report, including offense and arrest data, the number of law enforcement employees, and particular trend analyses.

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

To understand the current state of white collar reporting, public choice theory cautions that the right perspective is not that of the public interest at large, but rather the incentive structure of the specific

199. Id.
201. Id.
203. See Gary Becker & George Stigler, Law Enforcement, Malfeasance, and the Compensation of Enforcers, 3 J. Legal Stud. 1 (1974). Has this happened in this case? Probably not, but there is more to this perspective than mere “capture” theory.
reporting arm. Just as one might examine the expected benefits when analyzing an individual's actions, it may be useful to look at the entity-interests of the DOJ. What exactly would the agency stand to gain from an overhaul of their reporting standards? What does the Bureau of Justice Statistics specifically stand to gain from even modest reform? Apparently little. After all, many of the important changes in the UCR's history have come at the behest of congressional urging or outright legislative mandates. In addition, the bureaucratic inertia explanation comports with more general organizational theory on agency interests. A self-initiated move could help the agency and the federal government as a whole fight white collar crime, but, on the other hand, it could also highlight more pervasive deficiencies or even organizational incompetence. In other words, action includes risk. When the payoff (from the agency's perspective, not the public's) is small, even modest reform may be outweighed by conservatism.

One possibility, for example, is that more detailed focus on white collar and corporate crime could upset certain vested interests or cause intra-agency factional strife. Less dramatically, if white collar crime was found to impose a large enough burden on the public and the economy, it could signal the need for more in-depth rebalancing, opening a Pandora's Box of reform.

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

205. The founding of the UCR program cuts against this point, but beyond that critical moment it appears that Congress has taken the reins in terms of organizational action.


For instance, in response to a general law enforcement need for more flexible, in-depth data, the UCR program formulated the National Incident-Based Reporting System (NIBRS), which provides detailed information about particular crime incidents to various law enforcement agencies, researchers, and the general public.\textsuperscript{209} The pilot program was launched in 1987 in the South Carolina Division and has grown since then.\textsuperscript{210} The data, however, is still not pervasive enough to make broad generalizations about United States crime levels. Thus, like the founding of the UCR program itself, the NIBRS example cuts both ways. The program got off the ground in seemingly self-starting fashion, but its execution and evolution has not been carried through with the same level of expediency. One wonders whether this point tracks bureaucratic growth more generally in terms of rapid or powerful initial catalysts for the creation of an agency or program, followed by sluggishness, indecisiveness, or even infighting in carrying out the mission over time.

C. Existing Data

Upon reflection, one might think that the needed data simply must exist. Were this the case, then this Article is merely a call for publication of the data. However, there is little reason to assume the necessary data exists and is held under lock and key. First of all, such a state would defeat much of the purpose of data collection considering part of the value proposition of the practice is to help the federal government at large correctly appropriate money and resources.\textsuperscript{211} It would be illogical to keep white collar crime data confidential. Second, the history of the UCR, as described in Section A of this Part, shows that white collar crime data has, in fact, been collected for decades and published alongside other categories of crime. The point of this Article is to decry that, although some data exists, it is, at this point, not maximally useful. The growth in importance of white collar and corporate crime over the past few decades, particularly the past decade, has rendered the current reporting system notably insufficient. This is the case because, as a polity, we evidently intend to focus efforts more closely on the prevention and punishment of this type of behavior, yet the existing measurement standards may be limiting our ability to do


\textsuperscript{210} Id.

\textsuperscript{211} Barnett, supra note 7.
so. An implicit point is also that the existing reporting system may be hiding the true extent of the problem, for better or worse.

From a historical perspective, the state of the current system is understandable. As the UCR was getting off the ground, white collar crime was not of the same macro-level concern as street safety.\footnote{212} As conferences were taking place in the early 1980s, participants unfortunately did not have the sense that corporate and white collar crime were going to be of critical macro-economic importance.\footnote{213} This is somewhat ironic, considering that the U.S. economy was undergoing massive transformations in corporate structure and efficiency, literally as the topic was being discussed at the highest law enforcement levels.\footnote{214} While economic growth in the United States has seen numerous boom periods, the growth of capital markets in the 1980s, along with increasingly sophisticated leveraged buyouts and mergers and acquisitions, was setting the stage for vast new corporate criminal domains.\footnote{215}

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

\footnote{212} Note that the term itself and formal study of the topic did not come into play until many years after the founding of the UCR.

\footnote{213} This point is merely deductive, in the sense that if they did they probably would have used the opportunity to steer changes in that direction.

\footnote{214} For a history and discussion of the changing face of the U.S. corporate economy during this time, see Barry Wigmore, Securities Markets in the 1980s: The New Regime 1979-1984 (1997).

\footnote{215} Michael Milken's innovations, success, and ultimate fall along with the firm Drexel Burnham are perhaps the most salient features of this time. After a recession during Reagan's first term, the economy recovered strongly. See generally Connie Bruck, The Predators' Ball: The Inside Story of Drexel Burnham and the Rise of the Junk Bond Raiders (1989); James B. Stewart, Den of Thieves (1993).
Part is intended to provide a preliminary roadmap for thinking about future legal changes.

V. Better Data

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

A. Biases and General Problems in Reporting

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

Another criticism concerns how the numbers are actually counted. As it stands, if a number of crimes are connected, only the most serious one is listed. For instance, if someone was murdered during a robbery, only murder would be listed. This could underweigh a variety of secondary crimes. Two countervailing points deserve mention, though. First, this bias would generally occur exclusively with the presence of serious crimes. Since serious crimes, like murder, make up a much smaller percentage of overall crimes, such as robbery, the effect across the data is probably not great. Second, if someone is murdered while being robbed, intuition suggests that they were murdered and not robbed. That is, something qualitative about the more serious

crime may tend to diminish society's need or interest in knowing other crimes carried out contemporaneously.

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

A more systemic problem concerns the differences among state criminal codes. From the beginning it was recognized that the federal structure of state autonomy precluded a mere aggregation of state statistics to arrive at a national total. This is the case because different states have different crime definitions. Further, because of the variances in punishment for the same offenses in different state codes, no distinction between felony and misdemeanor crimes was considered possible. To skirt some of these problems and provide nationwide uniformity, the UCR formulated standardized offense definitions by which law enforcement agencies were to submit data without regard for local statutes. This, however, means that some states, and more particularly, some localities, often fail to comply properly and their data is not able to be included. According to the FBI, approximately ninety-four percent of the U.S. population resides in law enforcement jurisdictions that participate in the UCR program. This is quite an achievement, but considering the variability among specific jurisdictions, this is far from perfect.

B. Part I Index Crimes

As noted earlier, the Part I index offenses are homicide, rape, robbery, aggravated assault, burglary, larceny, and auto theft. These are divided into a Violent Crime Index which includes homicide, rape, robbery, and aggravated assault and a Property Crime Index, which contains burglary, larceny, auto theft, and, since 1982, arson.

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218. For a thorough discussion on this issue, see Dean G. Kilpatrick & Kenneth J. Ruggiero, Making Sense of Rape in America: Where Do the Numbers Come From and What Do They Mean? 4 (2004).
219. Id.
220. Id.
221. Alexander et al., supra note 14.
223. Id.
sidering the variety of biases and problems noted above and the fact that there are other forms of violent and property crime, the indices surely do not accurately measure crime, even in these delimited areas. Then again, they purport only to be a yardstick or proxy for crime measurement in these areas. On that count, the breakdowns are somewhat helpful since they comport reasonably well with intuitive judgments about how one might classify crime. This perspective may suggest an analogously separate conceptual structure for the reporting of white collar and corporate crime. This is discussed as the first tier recommendation in the next Section.

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

Not surprisingly, there has been a relatively long history of attempts to weight the seriousness of crimes. This could be useful in a variety of contexts, including for more accurate crime trends, appropriation of money used to fight crime, and for regular consumers of crime information such as scholars and average citizens. The main problem with traditional attempts to weight the seriousness of crime, however, is that they have often sought to use a survey-based methodology. This involves asking victims, through random surveys, various questions about how one crime compares on a numerical scale with another crime or how certain victimizations might compare with a hypothetical crime. Potential problems of bias and inaccuracy are
rife. Other attempts have sought to use jury awards or hedonic pricing approaches to find the cost of crime and through that to place relative values on the different categories.\textsuperscript{227}

As cost estimates have improved, however, a potentially new approach is to weight the indexes using collective data (based on tangible and intangible factors) on the average cost of different crimes.\textsuperscript{228} This could be highly beneficial because it relies on more concrete estimations of cost than previously were available and it would provide a readily usable relative measuring system not dependent on individual survey estimations. Considering that the Violent and Property Crime Indexes are referenced in numerous ways in scholarship, media, and even legislation, a more accurately balanced index could have serious ramifications. It also suggests that corporate and white collar crime reporting could borrow from this ground-breaking research in due time.\textsuperscript{229}

C. White Collar Data

As an example of the vagueness and indeterminacy which currently shrouds public discussion, one needs to look no further than the FBI's publications. For instance, a 2002 report on the state of white collar crime reporting concludes anemically that "tremendous growth of and involvement in the securities and commodities markets at the institutional, corporate, and private investor levels have led to great numbers of individuals involved in intentional corporate fraud and misconduct."\textsuperscript{230} Great numbers? To say that there have been "great numbers" of corporate and individual fraud of late sounds unscientific at best. At worst, it sounds like a "hunch," which is exactly the kind of policy motivations that good data can help eliminate. The FBI does note that it is currently investigating over 189 major corporate frauds.\textsuperscript{231} While important, and perhaps even laudable, it would be useful to have comprehensive data. This would include smaller (but still corporate) frauds and would allow for, again, better information

\textsuperscript{227} See James P. Lynch & Mona Danner, Offense Seriousness Scaling: An Alternative to Scenario Methods, 9 J. QUANTITATIVE CRIMINOLOGY 309 (2005).

\textsuperscript{228} The author is involved in a novel study with Ian Ayres and Isra Bhattty using recent cost estimates to reformulate the indexes and to see how dollar-weighting affects state and other rankings.


\textsuperscript{230} Barnett, \textit{supra} note 7.

\textsuperscript{231} See Center for Corporate Policy, 2006 Budget Analysis, \url{http://www.corporatepolicy.org/topics/budget.htm} (last visited May 6, 2008).
on which to make policy decisions. Considering the foregoing, the following two levels of recommendations, each with two specific recommendations, are called for. The list is organized as such for ease of presentation, but a wholesale effort at developing better white collar crime reporting procedures would take the entire set of recommendations into account at the same time.

1. Tier One Recommendations

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

While simple, this recommendation is of the first order of importance because, currently, these white collar categories are merely four randomly listed classifications among the 21 Part II index crimes. They are thus not readily accessible to the public because of the work required to single the categories out and then aggregate the figures by hand. The next Subsection on Tier Two recommendations will talk about seriousness weighting (and its potential for problems in the white collar domain), but this does not qualify as a first order need because there is not even a white collar index to speak of as of yet.

A second recommendation, and one which is far more aggressive in terms of organizational imperative, is to split these categories along corporate and personal lines. As the general public talks heavily about the pervasive influence of corporate crime, and since the government purports to be taking this threat seriously, it would make sense to have a separate indicator of corporate prosecutions.232 There are at least two reasons for this, both revolving around the fact that corporations are different beasts than individuals. First, they use the imprimatur of the corporate form (a legal fiction of state sponsorship), which

imparts a clear, organizational aspect to the crime. In definitional terms, then, such a distinction makes sense. Secondly, corporate white collar crimes may tend to be larger or more costly than individual crimes. Breaking this out may be helpful for better understanding society's white collar crime problem and assessing strategic approaches to it.

This recommendation would require a reformulation of federal reporting guidelines. While no small task, this has been done before and could be done again.233 Law enforcement agencies at all levels would be asked to record whether it is a corporate interest at stake or an individual acting in his or her own capacity. There is much other information, like magnitude and other data (discussed next), that could be garnered, which would be extremely telling about the state of corporate crime, but the basic framework would help provide a measure of comprehensiveness that is currently lacking from reports and figures on the subject. It would also likely engender much new research on the subject, which could return further dividends over time.234

2. Tier Two Recommendations

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

The FBI has opted to approach white collar crime in terms of the offense, defining it as follows:

[T]hose illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to

234. For a discussion of new areas of research and their expected returns, see the conclusion of COHEN, supra note 221.
While controversial in light of the foregoing discussion, this definition is not unduly problematic in and of itself. It does make the definitional choice, however, and, thus, leaves the door open for many different types of crime to be included. For instance, there is UCR data on bad checks. Fraud itself is sometimes broken into five subcategories: false pretenses/swindle/confidence games, credit card/ATM fraud, impersonation, welfare fraud, and wire fraud. In addition, there is a host of other possibilities for inclusion, including jury tampering, strategic bankruptcies, tax law violations, and various misappropriations.

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

A second Tier Two recommendation concerns seriousness rankings. Once a white collar crime index has been formally established with differentiation between corporate and individual crimes (and, perhaps, also after something approaching industry consensus has been reached regarding what classifications to include in the index itself), then attention should properly turn to seriousness rankings. As previously noted with regard to the Violent and Property Crime Indexes, knowing the relative measurements, and even the average costs of crimes and crime categories, could aid multiple decision makers because the magnitude of the crimes, as opposed to just the tally of the act itself, contains critical information. It could answer the fundamental question, raised at the beginning of this Article, of whether the government is legislating in response to a series of large scandals, or

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whether there is a more deeply ingrained problem in the fabric of our economy and social apparatus. It could advise federal law enforcement practices, because different approaches with differing levels of sophistication may be required for large versus small white collar crimes. It could also potentially direct future congressional legislation, not to mention countless decisions in state and local governments about the use of resources, prosecution decisions, and organizational approaches.

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

Like the Tier One recommendation regarding corporate reporting, this final recommendation would require an overhaul of the federal reporting guidelines. This might not be as difficult as it sounds, considering such data is collected on many types of property crimes and the National Incident-Based Reporting Service also is capable of collecting detailed data. Nevertheless, as noted originally, it might make sense to consider this proposal in sum with the previous recommendations because significant time and energy savings could result if this was done in conjunction with other reforms.

VI. CONCLUSION

White collar and particularly corporate crime has not only changed the criminal landscape, but deeply affected the American economy. Though this fact is recognized by the FBI, Congress, and the President in the form of legislation, internal policies, and appropriations, it has

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

238. Differences in the cost of different violent crimes is striking indeed. See Miller et al., supra note 222. This issue is further fleshed out in the author's forthcoming paper re-ranking the violent and property crime indexes.

239. See supra text accompanying note 205.

240. See, e.g., The White House, The President's Leadership in Combating Corporate Fraud, http://www.whitehouse.gov/infocus/corporateresponsibility/ (last visited May 6, 2008) (specifically the September 26, 2002, Speech at Corporate Fraud Conference, where President Bush notes that "high-profile acts of deception in corporate America have shaken people's trust in corporations, the markets and the economy").
not spurred the necessary structural reporting adjustments. More accurate and effective data in the area of white collar crime could aid lawmakers in how they approach legislative reform, law enforcement in how crime is prosecuted within the existing legal infrastructure and within existing resource constraints, the media in how it reports crime and scandal, and citizen-investors in how they evaluate the relative prospects of American companies and the stability of the domestic economy.

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

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

Something similar happened in April 1990, when Congress enacted the Hate Crime Statistics Act of 1990 ("Act").241 The Act forced:

[T]he Attorney General to establish guidelines and collect, as part of the UCR Program, data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including the crimes of murder and nonnegligent manslaughter; forcible rape; robbery; aggravated assault; burglary; larceny-theft; mo-

tor vehicle theft; arson; simple assault; intimidation; and destruction, damage or vandalism of property."\textsuperscript{242}

As a result, "the FBI in conjunction with the Department of Justice developed procedures for and implemented the collection of hate crime data" through the UCR program.\textsuperscript{243} "In September 1994, the Violent Crime Control and Law Enforcement Act amended the Hate Crime Statistics Act to add disabilities, both physical and mental, as factors that could be considered a basis for hate crime."\textsuperscript{244} While "there are many kinds of bias, . . . those mandated by the enabling Act [and, thus, those reported] . . . currently include[ ] race, religion, disability, sexual orientation, and ethnicity/national origin."\textsuperscript{245}

This Act serves as an excellent case in point for reforming white collar procedure. As an administrative department, the DOJ and its subordinate agency, the FBI, may actually be dependent on congressional action in order to surmount vested interests and bureaucratic inertia. A legislative act requiring comprehensive and accurate figures on white collar and corporate crime data would be well aligned with Congress's mission to fight corporate scandal, and it could further empower investors, academia, the media, and ordinary citizens interested in the state of crime and corporate ethics. If Congress cares as much as it asserts, it should rectify the situation so sheepishly admitted to by the Department of Justice itself in 2002: "The true extent and expense of white collar crime are [currently] unknown. Summary-based UCR statistics can provide only a limited amount of information on a limited number of offenses."\textsuperscript{246}


\textsuperscript{243} Id.

\textsuperscript{244} Id.

\textsuperscript{245} Id.

\textsuperscript{246} Barnett, supra note 7.