PROCEEDINGS OF

SYMPOSIUM 87:

WHITE COLLAR/INSTITUTIONAL CRIME-
Its Measurement and Analysis

Office of the Attorney General
California Department of Justice
Division of Law Enforcement
Criminal Identification and Information Branch
Bureau of Criminal Statistics and Special Services

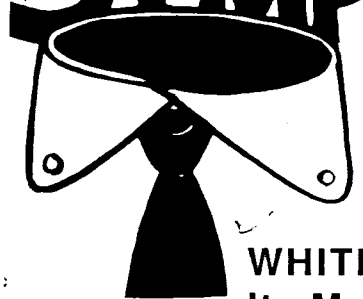
John K. Van de Kamp, Attorney General

State of California

Department of Justice

JOHN K. VAN DE KAMP, Attorney General

Proceedings of SYMPOSIUM 87:



WHITE-COLLAR/INSTITUTIONAL CRIME - Its Measurement and Analysis

Co-Sponsored by the Office of the Attorney General
and the University of California, Berkeley

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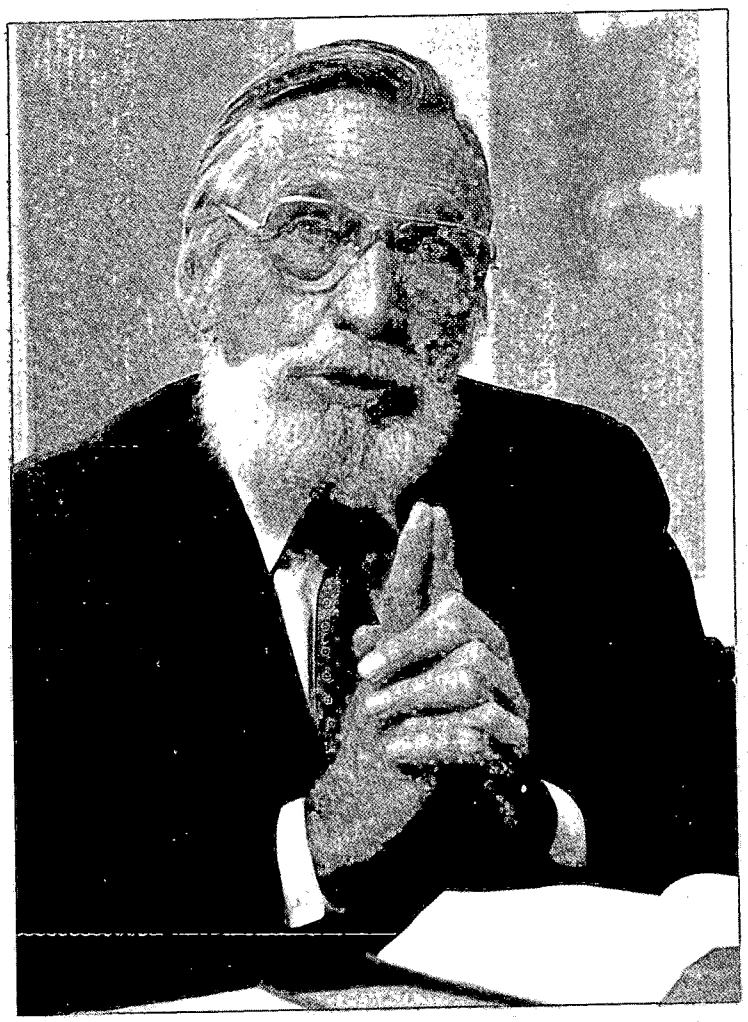
Message from the ATTORNEY GENERAL

John Van de Kamp

Sociologist Edwin Sutherland coined the term "white-collar crime" in the late 1930s, stressing that too little attention was paid to this particular array of offenses. Debate over the definition of this category of crime has intensified over the past half-century. Amid concerns that the rates of offenses such as financial institutions fraud and unfair business practices may be rising sharply, little progress has been made in measuring white-collar crime.

In September 1987, the University of California at Berkeley and my office convened the Symposium 87: White-Collar/ Institutional Crime — Its Measurement and Analysis. Our purpose was to unite academicians and policy makers in discussion towards a workable definition of white-collar crime, a structure for measuring the extent of harm and analyzing the data to guide our future responses.

We are publishing these proceedings to share the Symposium's results with a broad audience. To enhance their clarity, the transcripts were edited with the assistance of panel members. We hope this publication will serve as a source document, a foundation for future exploration into the field of white-collar crime.



I N M E M O R I A M

Professor Donald R. Cressey, a scheduled participant at this Symposium, passed away on July 21, 1987. Cressey was Professor Emeritus of Sociology at the University of California, Santa Barbara, and President of the Insitutute for Financial Crime Prevention. He received his Ph.D. in 1950 from the University of Indiana, where he studied under Edwin Sutherland.

After thirteen years on the faculty of UCLA, Professor Cressey joined the UCSB faculty in 1962, serving five years as Dean of the College of Letters and Sciences. He also served on the California Task Force on Organized Crime, the California Council on Criminal Justice, as president of the Pacific Sociological Association, and as consultant to several national and presidential crime commissions.

A leading authority on criminal justice, organized crime, embezzlement and other white-collar crimes, Professor Cressey's professional contributions have been repeatedly honored. He received the Edwin H. Sutherland Research Award in 1967, and was an elected fellow of the American Society of Criminology and the American Association for the Advancement of Science. In addition to nearly 200 papers, his writings include Other People's Money: The Social Psychology of Embezzlement, Theft of the Nation and Principles of Criminology.

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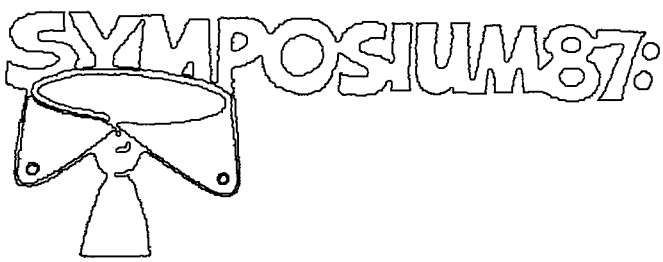

TABLE OF CONTENTS

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THE FORMAT

Symposium 87: was held on September 17-18, 1987 at the University of California, Berkeley.

Day One consisted of three panels centering on the topics introduced by moderators, presenters and respondents. The panelists then opened the discussion to all attendees, who participated in "round-table" fashion.

Day Two featured a discussion of a hypothetical fraud case. Twelve participants, each designated a specific role, enacted trial scenes and engaged in dialogue on the "Silver Shadow" case.

DAY ONE: PANEL DISCUSSIONS

Panel 1 - ***History and Status of White-Collar/Institutional Crime***

Moderator:	Troy Duster, U.C. Berkeley
Presenter:	Gilbert Geis, U.C. Irvine
Respondents:	John Braithwaite, Australian National University
	Peter Yeager, Boston University

Panel 2 - ***Status of Prosecution of White-Collar/Institutional Crime***

Moderator:	Steven V. Adler, Attorney General's Office
Presenters:	John C. Coffee, Jr., Columbia University
	Richard Gruner, Whittier College
	William J. Maakestad, Western Illinois University
Respondents:	Ed Clark, Atlantic Richfield Company
	Richard E. Drooyan, U.S. Attorney's Office - Los Angeles
	Harry M. Snyder, West Coast Consumer's Union

Panel 3 - ***Problems and Means of Measuring Incidence, Prevalence and Costs of White-Collar/Institutional Crime***

Moderator:	Sheldon L. Messinger, U.C. Berkeley
Presenter:	Albert J. Reiss, Jr., Yale University
Respondents:	Stanton Wheeler, Yale University
	Franklin E. Zimring, U.C. Berkeley

DAY TWO: CASE DISCUSSION — "SILVER SHADOW MORTGAGE CORPORATION"

Moderator:	John Kaplan, Stanford University
Regulator:	William K. Black, Federal Home Loan Bank
Accountant:	Arthur Brodshatzer, C.P.A.
Judge:	D. Lowell Jensen, U.S. District Court. S.F.
Referee:	Melvyn J. CoBen, Esq.
Investigative Reporter:	Stanley E. Cohen, Retired Journalist
Principal:	Jerome Skolnick, U.C. Berkeley
Victim:	Gil Westoby, Victims' Advocate
Defense Attorneys	
Criminal:	Patrick Hallinan, Esq.
Civil:	Mark Topel, Esq.
Prosecutor:	Judith F. Hayes, Attorney General's Office
State Attorney:	Richard D. Martland, Attorney General's Office

Welcome

Edwin Epstein

PROFESSOR EPSTEIN: If everyone is seated, let us open up this morning's proceedings.

My name is Ed Epstein, Professor in the School of Business here, and I have the pleasant responsibility of opening this two-day conference on White-Collar/ Institutional Crime - Its Measurement and Analysis.

My primary function is to introduce the Vice Chancellor, Roderic Park. I will have an opportunity to speak with you in a more substantive vein tomorrow. I'm starting you off and finishing you up as far as the program is concerned.

I thought it would be derelict on my part, however, not to make two very, very brief observations at the beginning of this meeting. The planning committee for this conference has planned every detail. I think one thing that occurred more or less serendipitously is that the conference today is taking place precisely on the day of the signing 200 years ago of the Constitution. So, although we're not formally a Bicentennial event, it does turn out that there's a certain appropriateness to the timing of this conference.

The Constitution, of course, provides a framework within which many of the issues with which we're going to be concerned over these two days arises. The drafters were not totally unfamiliar with investment scams or consumer fraud or South Sea Bubbles or things of this nature.

They, of course, in no way could have anticipated the types of opportunities for white-collar/institutional crime, given the expansion of technology, the nature of instantaneous financial markets, just all the things that we have in an advanced industrial society and the range of activities that are appropriate within the scope of what we are concerned with here.

Also, in terms of our topic and its germaneness, I was rather struck in picking up my mail just this morning that two publications I received, two rather different ones — one was Fortune and the other one was the American Journal of Sociology — each had features dealing with aspects of white-collar crime. One was an article in Fortune dealing with the subject of Dennis Levine.

The second in AJS was an article, Towards a Theory of White-Collar Crime, something to which we have been aspiring as scholars and as practitioners for a period of time.

Last comment has to do with somebody who isn't here. That's Don Cressey. Of course, he was supposed to have been one of our speakers. Regrettably, he is not with us in this life. But I took a look at Don's forward to, of course, Edwin Sutherland's classic White-Collar Crime and something that he had to say here and talking about what Sutherland was attempting to do and talking about his own perspectives.

He makes the observation that it's possible in the long run we'll discover that white-collar crime or at least some white-collar crime is a sociological entity as well as a legal entity. Such a discovery would reveal that one class of crime in criminal behavior is different from other classes in causal process.

I guess one of the things that we're attempting to do during this seminar is to look at white-collar/institutional crime as a legal phenomenon, as a sociological phenomenon, trying to understand its unique characteristics and, as our title suggests, look at its measurement and analysis.

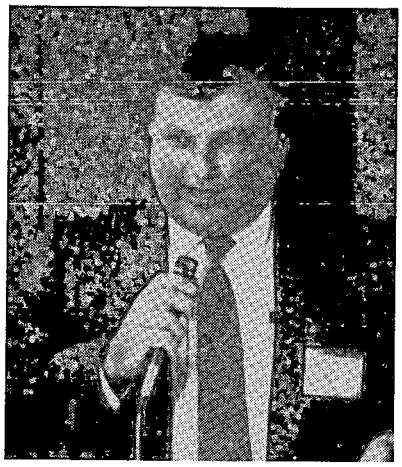
So much for introductory comment. It's now my pleasure to introduce my colleague, Professor Roderic Park, who is the Vice Chancellor of the University and will be presenting the greetings of the University. He is not either a lawyer, a sociologist, a practitioner, nor a white-collar criminal — that's an article of faith.

He is a professor of botany. I guess botanists are always concerned about taxonomies of, if not behavior, at least of plant life and existence. Some of what we are going to be doing here is taxonomic in character. So, here I'd like to present Vice Chancellor Park to extend the greetings of the campus.

Thank you for being with us, Rod.

VICE CHANCELLOR PARK: Good morning and welcome to the Berkeley campus. Our Chancellor, Michael Heyman, would have loved to be here. But today is an important Regents meeting for him in which the Berkeley capital campaign of some $320 million is being considered by the Regents along with other matters. So, he really had to be in Los Angeles. But he wished to be here and I extend his welcome.

Meetings like this are very important to the University and I hope also important to the Attorney General's Office. I often look at the University as a huge wheel with all our departments and programs like spokes pushing out at the edges, pushing knowledge ever further back and we keep moving more and more distantly from each other. Any time we can put



Vice Chancellor Park

those spokes back together to consider real problems, I regard that as a great benefit.

I'd particularly like to acknowledge the Attorney General's Office in its contribution to this symposium and also some spokes from the Berkeley campus. I'll mention those that I know about. The grouping of spokes is the California Policy Seminar, Center for the Study of Law and Society, Institute for the Study of Social Change, the Program in Business and Social Policy and the Earl Warren Legal Institute. I've noticed some other people here who are connected with none of those who represent still other spokes on this campus.

So, it gives us an opportunity to take our different backgrounds and to talk to each other about real problems and how we're going to work with them.

My own experience with white-collar/ institutional crime is very limited. I see it primarily through problems in this institution. All institutions have problems; universities, as well as all others. I'd just like to recount several take-home lessons that I've learned.

The first lesson is that if you place in a position of authority a very smart person who tends to be somewhat amoral, problems are going to start developing rather rapidly. These problems can be from every direction and are not necessarily financial. It could be a problem with respect to human subjects legislation, or with respect to animal care practices that are required by federal statute — all sorts of problems can arise.

The second lesson is that if you take very smart people who are somewhat amoral and they also happen to be rather effective exploiters of basic human emotions such as greed and avarice, then you're really in trouble!

All have institutional "games" and "rules" and the one thing that I've seen recently that is a new "game" I'm sure you'll be talking about. It is the introduction of computing into our institutional environment. There's something about computing all the way from grade school to university that produces an intellectual approach that's very much that of doing a crossword puzzle. Doing a crossword puzzle can be regarded as an amoral act and many people regard solving computing problems as rather like solving a crossword puzzle. We finally get to a point at which an amoral person finds any computing problem a challenge whether harmless or the key to very important and restricted information. They get the satisfaction of solving the puzzle and can certainly cause some huge problems in the process. That's obviously a new factor in the whole world of white-collar crime.

In conclusion, I'm delighted you're here and I'm sure some very good things are going to happen and I'm pleased that the Attorney General's Office has compelled us to put some of our spokes together so we can have this symposium. Thank you.

(Applause.)

VICE CHANCELLOR PARK: Now I have the pleasure of introducing John Van de Kamp, our Attorney General. I know he's a close personal friend of our Chancellor, who occasionally consults him for advice on some of the legal problems we face here at the University. He's been a great friend to this campus and we're delighted to have you here today, Attorney General Van de Kamp.

(Applause.)

ATTORNEY GENERAL VAN DE KAMP: First of all, thank you very much. My job this morning is a simple one. It's to welcome you to what is called

Symposium 87 on white-collar and institutional crime, "its measurement and analysis."

I'm eager to get going with this conference. It's been long in the making. I'm very grateful that all of you could come here in a sense to dine with us on this feast of white-collar crime that will take place in the next two days. I must say I'm particularly grateful to the University of California at Berkeley for making the facilities available and also putting this together.

Your involvement and that of the University and academic communities is something that is refreshingly new in terms of combining with us at the state level and it's something that developed and grew out of the 1984-85 crime conference that we had down at UCLA.

The intellectual banquet that we will sit down to this morning, this afternoon and tomorrow will mostly be served up from the past. Yet, I expect, if you will, that the dinner conversation will be mostly about the future. That mild irony is a natural consequence of bringing academicians and policy makers together around the same table. That's exactly what we have here this morning.

From the law enforcement perspective it often appears that you academics wait with barely concealed glee for the future to be finished. At that point you get down to the business of telling us in loving detail how we screwed up.

At the same time from your side of the table I suspect that the view is somewhat different. Policy makers appear as frantic seekers of foolproof guides to the future based on the long-term trend of the last two weeks. We crave certainty above all even if it comes from the latest guru of instant analysis to catch the attention of USA Today.

In our defense let me simply say that we in government are usually engaged in manic if sometimes futile attempts to protect the future and control our own destinies. We are not, after all, blessed with tenure. We share a sense of permanence with other long-lived species.

Take football coaching, for example. Lou Holtz put it very well not too long ago. Of course, he's the coach of Notre Dame. He said, "I have a lifetime contract here. That means I can't be fired during the third quarter if we're ahead and moving the ball."

Even when tenure is at least temporarily not at issue, most of us are distracted by the more or less perpetual process of crisis-based budgeting. In that respect we tend to feel a little bit like the golfer, Doug Sanders. Some of you may remember Doug Sanders, who once said, "I'm working as hard as I can to get my life and my cash to run out at the same time. Now if I can just die after lunch on Friday, everything's going to be perfect."

In short, law enforcement is not a profession which encourages quiet afternoons of contemplation of the past as a guide to the future. Time to read, time to think, time to contemplate has to be carved out of frenzied, demanding days that never seen to end. But, indeed, that is what we are trying to do with you over the next couple of days.

As a result — and this is a rarity in our lives — our view of policy tends to be short-term. I must tell you that personally I come from the oh-Lord-let-me-just-make-it-through-this-month category. Around Sacramento that classifies me as a long-term thinker.

But I want to tell you what a pleasure it is to be able to sponsor and organize this conference. For us it is a great opportunity to listen, to reflect, to argue, to discuss the implications of research for policy on white-collar crime. Because that is more than welcome, indeed, in our view it is essential.

We in the Department of Justice at the state level and other law enforcement

agencies, of course, represented in this room hope to learn a lot of this conference and we hope that our focus on the day-to-day will be somewhat tempered by the more measured thinking that we encounter here. We hope, too, that some exposure to our diet of difficult and practical decisions will help shape the thinking and research of academicians in ways that may benefit us all. So, I ask you not to disappoint us.

At the same time we also welcome this meeting as a reality check. For it's all too easy amid the daily crunch of cases to avoid facing unpleasant truths and inconvenient ambiguities.

Two years ago we sponsored the conference at UCLA on what we perceived to be a multi-year decline in crime rates. So we called it the "Why is Crime Down? conference" I think it was a relatively enlightening couple of days, but it was also disturbing. Because we quickly discerned that there was no agreement whatever that crime was in fact heading down. There was enormous ambiguity and controversy in an area where we, of course, would have much preferred to have seen universal acclamation of a comforting trend. Indeed, we would have hoped to have come away from that meeting with some rational explanations for what was perceived to be a trend that might help us with respect to future policy setting.

Well, fast forward to yesterday's Los Angeles Times and the headline, "Is This a 'Bull Market' for Crime?" The story was about the sharp jump in the latest FBI crime reports, which to quote Alfred Blumstein of Carnegie-Melon, is "surprising and disappointing." As one of the principal participants in our conference a couple of years ago, Dr. Blumstein was an articulate advocate of the view that we had entered a period of decline in crime rates.

Those of us in attendance, I think, were heartened by that view; but we also learned from others that it was hardly a consensus and that we had better not swallow it whole. I don't think many of us did. We came away feeling a little bit confused as a result of that conference.

One footnote for those of you who were there. We discussed, as I remember, the Olympics and its impact on crime in Los Angeles as an unusual event and one of those startling things that may have an impact on the crime rate. I picked up the paper yesterday in Los Angeles, having been involved with some of the Pope's visit there, and a footnote for Los Angeles is that crime in Los Angeles on Tuesday went down 18 percent from the previous Tuesday — the Pope, mind you, coming to Los Angeles on Tuesday — and that the homicide rates on Tuesday were at zero, which is somewhat, of course, less than normal in Los Angeles, where we average two or three a day.

I'm waiting to see exactly what happened yesterday. But that little two-day visit — and it will be interesting to see what happens here in San Francisco today — will be food for thought for many of you in the academic life for a while, raising all kinds of little points about what we can do with the deployment of police, what we do about traffic and how all that has an impact on crime.

For those yesterday, however, who were saying, well, it's the Pope's visit and it's the universal message that he is bringing to town, I had to remind them that, indeed, crime goes down usually during the fall on nights with Monday Night Football as well.

So, anyway, those are some of the things that we have considered before. Today, of course, we're dealing with something that's quite different.

I must tell you that in large measure this conference grew out of questions that were raised at UCLA. John Irwin, Gilbert Geis, Troy Duster, who are with us this morning, and others, raised the question of the premise of the decline in crime by questioning the adequacy of our measurements. In particular, they asked whether we had any reliable data at all on the whole class of crimes which are generally lumped together under the term "white-collar crime;" the point being raised that, indeed, by focusing on street crime, which has been the traditional method of review, we tend to throw out a tremendous part of the crime rate that is never evaluated and which may indeed be going off the boards.

Well, the fact of the matter is that we have not evaluated white-collar crime in the way that we should. We still do not. It's not, I believe, for lack of interest, but because we're only just learning how complicated the measurement is that we face.

The logical first question for this conference is how much white-collar crime is there. I must tell you in candor at the beginning of this conference, in California we do not know that answer. It all comes in a sense from anecdote and from the momentary blips on the screen that we all feel in terms of reading the newspapers and getting mail.

From complaints received by our Public Inquiry Unit, our Consumer Law Section, our Major Fraud Unit, we know, I think as all of us do around this table or we wouldn't be here, that fraud is a major problem for California citizens. However, our Bureau of Criminal Statistics, which we rank among the very best in the United States, has been unable to come up with useful measures and useful collecting devices.

We're in good company. The same information deficit exists all over this country, state by state. It exists at the federal level in the statistics maintained by the FBI. The common denominator is an inability to arrive at a working definition of what constitutes fraud and where and how to measure cases.

Under Jim Rasmussen's leadership — and Jim is the head of our Bureau of Criminal Statistics and I'd like to ask Jim just to raise his hand so you all know who he is, because I want you to get to know him well during the next day and a half — I'd like to think that our Bureau of Criminal Statistics has become a national leader in not only collecting, but in analyzing law enforcement data.

Indeed, the one thing that I have sought in my five years now as Attorney General is to bring our data to professionals so that we can get more out of it so that we can determine more about what that data

means. Indeed, many of the members of our Advisory Council are around this table this morning.

We are chagrined that our data in the area of discussion today and even our ideas on how to get the data that we need are weak. I know that Jim will be looking to Dr. Reiss' work and to the discussion that follows for some practical assistance about what we might do better.

So, as the title of this seminar suggests, measurement and analysis are our first concern. Of course, we're also very interested in the practical implications of white-collar crime, in particular, enforcement and prosecution.

I think it's fair to say that California and particularly Southern California is on the leading edge of the movement to prosecute white-collar crime aggressively. There may be a reason for Southern California being there in particular and that is because so much of it is there.

The Los Angeles County D.A.'s Office, which I proudly served as its D.A. for seven years, has been exceptionally aggressive in pursuing criminal violations of OSHA, for example. Occupational safety and health violations. My office's Major Fraud Unit under the direction of Steve Adler, who is here — Steve, put your hand up — which I created in 1984 with the support and at the request of local D.A.s around the state, was in response to a perceived surge in white-collar crime.

Steve has totaled up the cases that we now have under investigation and we have cases within our small unit that involve some $650 million in losses just within our small unit of some 20 persons, only six of whom are lawyers.

We're only skimming the surface and I want to underscore that in terms of what D.A.s and we at the state level are able to do. Our resources are limited; but we hope to maximize those resources, particularly with respect to our Major Frauds Unit, by developing even stronger relationships with United States Attorneys and D.A.s throughout Southern California. I'm convinced that our best and biggest cases lie ahead of us.

Yet with all the activity, we know remarkably little about the overall patterns of prosecution for organized white-collar crime and still less about what works best to limit their damage to our citizens and our economy. So, I look forward to the presentation of Drs. Coffee, Gruner and Maakestad.

I'm particularly interested in some of the work that Frank Zimring has done here over the past with respect to deterrents. Because if there's one area that comes out of his research it's that deterrence appears to have major value with those kinds of individuals who are socialized in the same sense as many of us who are sitting around this room. Those of us who know that, know that we are raised with expectations of behavior. Indeed, it appears that the sanction of the criminal law in the past has had some major impact for some of those people who behave according to the strictures of society. Obviously, when we get too lax, those strictures don't mean very much.

We're concerned, too, about the role of government regulation. Troy Duster's overview, among others, will help us focus on this issue.

Regulation is certainly very much in the news and very much of concern to policy makers at every level today. In New York and Washington the SEC is engaged in a remarkable series of investigations and prosecutions for insider trading. Throughout the country we have seen an alarming rise in the failure rate among savings and loan institutions as financial deregulation takes hold.

Last year the United States banking industry lost an estimated $1.1 billion to fraud and embezzlement and theft by insiders was a factor in about one-third of all those bank failures. Ultimately, tens of billions of dollars may be at risk.

So far the problem has been greatest in Texas and Oklahoma where oil-based economies have collapsed. But many critics contend that the real culprit is lax state regulation and that California is equally vulnerable, awaiting only the right or, if you will, the wrong economic moment for Los Angeles to displace Houston as the capital of bank failures.

Beyond measurement, prosecution and regulation, we look to you for a deeper understanding of a complex and emotionally-charged issue. After all, the very concept of white-collar crime grows out of an intersection between, if you

will, profit and to some extent greed and social evil.

It's often observed that the most productive segments of our economy, the real job-producing and wealth-producing engines of American growth, are small entrepreneurial enterprises. Yet these are the least regulated sectors of the economy and the areas in which some of the worst white-collar crime abuses seem to occur, whether they be gruesome violations of OSHA or spectacular varieties of fraud.

That tension between the raw workings of capitalism and the need for protection from corporate and individual rapaciousness produces an area of criminal justice that can be profoundly affected by political calculations.

The wave of deregulation in banking with its dire consequences for the savings and loan industry is but one example. Governor Deukmejian's decision to dismantle efficient Cal-OSHA, a program that was in place here for a number of years and was a successful one and so viewed by both business and labor, is another. For it is Cal-OSHA, mind you, that referred some of those cases to the Los Angeles County D.A.'s Office that that office has been prosecuting so aggressively.

When ideology is so close to the surface, people develop particular and peculiar blind spots. That, of course, is when solid research is most necessary.

Conservatives may wish to minimize the cost of white-collar crime vis-a-vis street crime. Well, Dr. Geis' work leads us inexorably back to a sense of proportion.

Liberals may assert that white-collar criminals are punished lightly, if at all, because of their race and status. Yet I'm told on one hand by Donald Manson of the federal Bureau of Justice Statistics that the opposite may be true. Persons arrested for white-collar crime, he says, are more likely to be prosecuted than those arrested for other kinds of felonies. That, of course, doesn't mean that they are punished commensurately. Indeed, one of the things that has stuck with me through my career is a little case that I handled a long time ago when I was the federal Public Defender in Los Angeles. I'll never forget representing an illiterate black man with a fourth grade education, no felony record, very minor arrest record, who, upon conviction in Federal District Court, was sent to a federal prison for three years for aiding and abetting in the passage of $200 worth of United States Treasury checks. He was one of three people; so, he probably got $66, if they split it three ways, from his crime.

No one can ever tell me that the federal judge who sentenced that man would have ever come even close to the sentence that he gave if he had given it to, let's say, a college student who might be sitting around this table or someone who looks much the same as we do, a white-collar businessman who might have embezzled $200 from the same business. Indeed, not only would the sentence in all likelihood be virtually nothing, I doubt that he would ever be prosecuted.

Anyway, I'm asking you in coming here for the next day and a half to check your assumptions at this door. We expect to see those assumptions that manage to sneak in to get thoroughly skewered in the next day and a half.

Anyway, in short, my thanks to all of those who labored so hard to put this conference together. May their reward be a world that is just a little bit more dangerous for white-collar criminals. Let's get on with the morning. Thank you very much.

(Applause.)

VICE CHANCELLOR PARK: The schedule now shows a break for 10 or 15 minutes while the first panel is set up. Thank you.

PANEL MEMBER DUSTER: Take your seats, please, and we can begin. We are about 15 minutes behind.

My name is Troy Duster. I teach sociology of law at U.C. Berkeley. An announcement before we begin. I've been asked on behalf of the court reporter that you all wear your badges and that you turn your name tags toward the court reporter, your name cards.

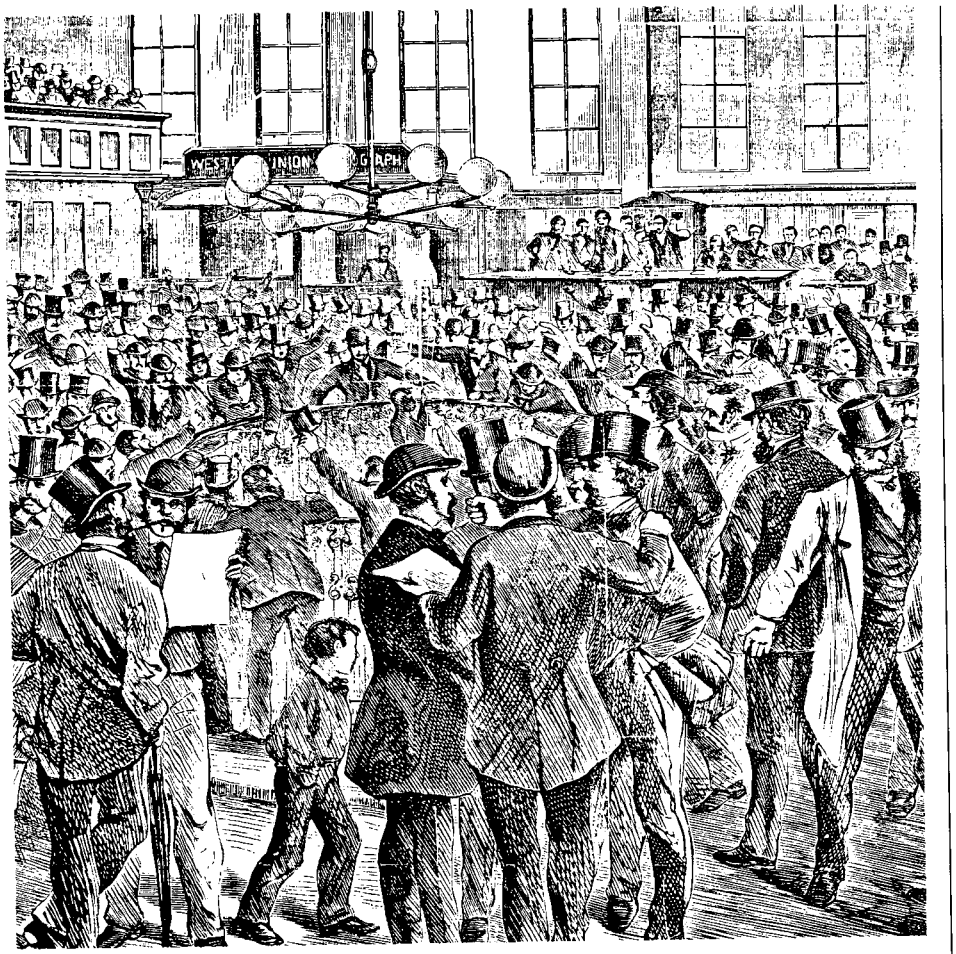
As Ed Epstein noted, there is a sadness that hangs over the panel. He referred to the passing of Don Cressey, who was invited to be a panelist today to respond to Gil Geis' paper. Cressey was a mentor, a colleague and a friend to many people around the table. Also, as Ed noted, his own mentor was Ed Sutherland; who was the creator of the term "white-collar crime."

It's appropriate that we dedicate this program, as Jim Rasmussen has done, to Don Cressey.

You'll note that the seating arrangement puts people for the most part around the table. That was part of our conference plan that we would try to have a dialogue here as opposed to a series of monologues. In that spirit I want to try to make sure that in this first hour and a half we increase a talking together, an exchange, as opposed to one or two of us monopolizing the conversation. I'd like to ask each speaker to identify himself or herself as they respond.

Also, in planning the conference we wanted to begin with an overview, an historical wandering. I don't use Gil's language of perlustration. Gil gets to say what he wants to say. He's one of the pioneers in this field and we wanted an historical overview, but we were not sure we wanted to go back to the Old Testament.

PROFESSOR EPSTEIN: Why not?



given legal birth, lawyers had strongly warned about — and I'm quoting — "keeping the corporate form under lock and key." To this end they established what often has been the most significant restraint, the doctrine that corporations can be created and exist only under charter by the state. The Delawarization of corporate control could vitiate the efficacy of this structural arrangement, but its unquestioned legitimacy and its potential as a lever for control are vital to understanding the history of institutional crime.

That corporations got so unconscionably out of control for a century or more and in some views still remain much too powerfully arrogant and unchecked has been traced by Holdsworth to a paradoxical situation:

"They would have continued to increase more rapidly," he says of corporations in the early period, "and in consequence the law on this topic would have developed much more quickly had not the legislature as a result of the episode of the 'South Sea Bubble' deliberately made the assumption of the corporate form difficult."

Chris Stone makes the same point in what I think is an argument worth quoting. He says:

"The pre-eminence of corporations. . . is a state of affairs that the law inherited, but unfortunately did not plan for. When much of the law and political theory was taking shape, there were identifiable humans operating independently of complex institutional frameworks who did things that it was possible for the law to prevent. The law responded with rules and concepts concerning what motivated people and what was possible, just and appropriate toward them. The size and structure of early corporations were so unprepossessing that when a wrong was done, it was usually not hard to locate a responsible individual, a culprit, and to apply the sanctions of the law to him."

The South Sea Bubble, I might point out, was an early 1700 case. It involved the manipulation by a British monopoly of trading in South America. I might add that the famous historian Edward Gibbon's grandfather was central to that affair. He managed to sequester an ill-gotten fortune beyond the reach of the court's fines, which I take as fairly prototypical.

There's another section on the paper that just opens up momentarily — and I shan't do more than that — the issue of the phenomenon of equal justice under law. The argument is made very tentatively that that dictum is enormously favorable to the corporate form and that equal justice under law in many ways can be a very deceptive and very complicated and arguable concept.

I might add that Ken Mann in the recent book on white-collar crime argues and suggests dilution of the Fourth Amendment in the context of white-collar crime investigations. That's essentially where I'll leave the subject for a moment.

Ultimately, in terms of reform a good number of people — Teddy Roosevelt, Brandeis — called attention to what I would call the maleficent misdeeds of railroad magnates. Again, I'm trying to skip fairly hurriedly to the reform movement. These magnates were seemingly larger-than-life individuals who became known as the Robber Barons. The railroads epitomized the whole reform movement. They were the first big business and they made other big business possible and necessary.

Rubin, for example, recently remarks, "In one way or another every new economic disruption that arose was linked to the railroads and their practices." Those manipulations, I might add, were aided by an 1886 Supreme Court decision which applied to the corporations the protections

guaranteed to individuals by the Fourteenth Amendment; which, of course, had been enacted in the wake of the Civil War.

The attitudes of the railroads I will simply transmit to you by one of numerous quotations which appear in the paper. This is George Baier, who was a spokesman for the railroads. He says:

"The rights and interests of the laboring man will be protected and cared for not by labor agitators, but by the Christian men to whom God in His infinite wisdom has given the control of the property interests of this country."

You might be interested in a very brief excursion about the Central Pacific Railroad because it's so local and really almost nostalgic.

In the Far West by 1869 four men, whose names still ring notoriously and famously in California — Collis Huntington, Leland Stanford, Charles Crocker and Mark Hopkins — had gained control of the Central Pacific Railroad and in many ways — in fact, I'd say totally — the economic and political destiny of the state of California. The leading newspaper in California called the Big Four, as they were known, "simply cold-hearted, selfish, sordid men."

The four had come together to plan the building of the railroad in a meeting that took place over a dry goods store operated by Huntington and Hopkins at what now is 200 K Street in Sacramento. All four were local merchants. Huntington, who was later their leader, was notorious for tactics such as sailing out to meet boats in the San Francisco Bay, buying up goods, then withholding them from the market until he could obtain a scarcity-dictated price; which, of course, if you noted the paper, is the old forestalling tactic. Later Huntington would set and rearrange railroad carrying rates at virtually extortionate levels, calculated exquisitely to a point where the shipper could realize only enough to sustain himself.

The character of the railroad builders and Huntington particularly was very aptly summarized by a description of Huntington in two words. It says he was a man who was "scrupulously dishonest."

The renaissance then of the reform movement regarding economic abuses began with the control of the railroads in the early 1900s. It's been noted in some detail in the work of Bellah and his colleagues. They find a strong reformist impulse in America directed against the dominance of business leaders and the rule of technical experts to have taken place during the transitional period at the beginning of the century. The reforms arose, Bellah insists, from "a fundamentally similar political understanding, an animated agrarian populism in the Midwest and Southwest, some aspects of progressivism, and an upsurge of industrial unions in the 1930s." I've got some further long quotes on that which I will spare you.

In an elegant analysis of the drive to check the corporate power, McCormick, in what I still think is the best review of the period, notes that 1904 to 1908 saw the appearance of the muckraking years not only in terms of articles in national magazines, but also in regard to local newspapers and legislative halls across the country.

McCormick notes that in 1905 governors throughout the Midwest suddenly let loose denunciations of corporate bribery, lobbying campaigns and free railroad passes. In Nebraska, where, as you may have noted in the paper, the term and concept of white-collar crime would incubate in the mind and soul of a future renowned sociologist — of course, Edwin Sutherland — the governor attacked "the onslaught of private and corporate lobbyists who seek to accomplish pernicious ends by the exercise of undue influence."

Ultimately, there were four possible conceivable solutions, which are outlined in the paper. The one that was to prevail, of course, was the recourse to regulation and administrative remedy.

The regulatory system primarily was created not in terms of a systematic analysis, but rather as a response to a series of disasters. Ralph Nader cynically observes that the corporate world has shown — and I'm quoting — "a greater absorptive capacity than Mandarin China and more resilience than the Vatican." Corporations yielded, he notes, only when forced to. Along the way Nader believes any real reform came only from disasters. By and large, I think, so it did.

In terms of the review of Sutherland, which is the concluding part of the paper that you have, I would only emphasize the strain that has existed between lawyers and social scientists which is highlighted in that review.

I also have a quote from E. B. White which I think indicates that Sutherland was not alone in comparing the tactics of the corporations to the tactics that occurred in Germany during the Nazi era when they were both writing. E. B. White, for example, who you remember was a New Yorker editor, in 1938 wrote of moral fraudulence in the behavior of Americans, and thought that our advertising bore a, quote, curious resemblance, to the propaganda that sold Naziism in Germany.

I will not go through the review of the twists and turns of academic concern for white-collar crime. That, too, is outlined as fully, I think, as needs be or as I could in the material.

I did want to add a personal note. You may remember that I mentioned the McCarthy period as putting a damper on white-collar crime study and investigation and I wanted to add a personal footnote to that.

In 1953 I gave a talk in Oklahoma where I argued against the deterrent effect of the death penalty. The Associated Press attached a summary of my remarks to a dispatch about an execution that had taken place the same day in Jefferson City, Missouri, of a man involved in a particularly grisly child murder. Both I and the president of my university were deluged by letters which it seemed to me were obviously inspired by the tone of the period.

I still have one and I dug it out and thought I'd read you a little bit of it. "Since you have expressed your communist views," it started out, and it continued with a diatribe against Alger Hiss, Harry Dexter, White and Harry Truman and ended with the observation — again I'm quoting — "it's a disgrace to our institutions of learning that they are festered with red hypos."

That was one of a very large barrage of letters that essentially took the same theme. What I'm trying to recreate for you — and, of course, I can't do it in so brief and cursory an analysis — is the mood of the times as it bore upon the investigation of white-collar crime and concern with the subject.

The last line I've written here is that the experience made at least one young, expendable assistant professor reflect seriously about his research priorities.

Let me read the conclusion then, which attempts to tie up some of the themes that I've addressed.

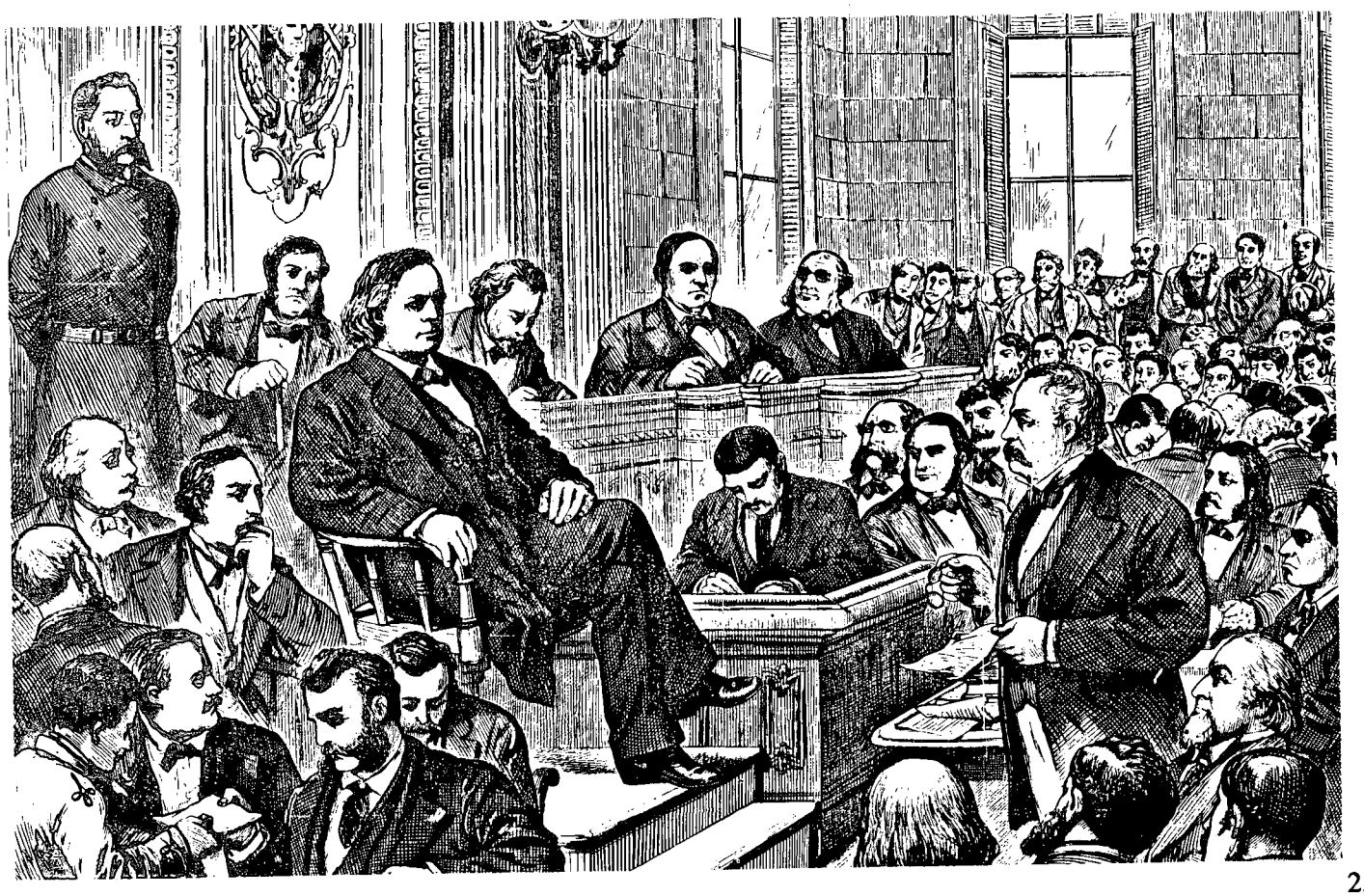
No political entity can exist without the forbearance of its citizens. Such forbearance can be stretched to inordinate lengths by tactics of oppression and disinformation. But it is not infinitely or indefinitely pliant. That is one of the lessons offered by the history of white-collar and institutional crime.

The record further suggests that unharnessed power is not to be trusted, at least in social systems where the desire for personal gain and the opportunity to secure such gain at the expense of others is readily available. Human beings, particularly with strong organizational force behind them, are much too artful in constructing benign, personally lulling explanations for evil actions to be allowed to operate without scrutiny and checks.

It seems essential that efforts need to be directed toward encouraging countervailing centers of power so that the aggrieved and the victimized have access to influential champions of their cause; be it in the courts, the Legislature, the executive or in the forum of public opinion by means of media attention or from other competing forces.

In this sense the symposium here today at Berkeley represents the kind of public spotlight that is essential to efforts to disseminate information and ideas that can serve to inhibit and control the abuse of power that typifies white-collar and institutional crime.

It is in this sense, too, that the views of Supreme Court nominee, Robert Bork, decently and intelligently held, seem to me to be the most threatening. By abdicating responsibility to the legislature as the elected officials, except for the very narrow confines of explicit constitutional statement and judicial courtesy to precedent, Bork virtually removes from the contest one of its major forces. Constitutional democracy, as I understand it, means more than anything else that the will of the majority shall not prevail if it conflicts with the basic spirit, not the specific century-old doctrines, of free society. Totalitarian rule may be



notably benign. Its horror is that it possess unimpeachable power to impose its decisions arbitrarily.

I had not expected when I set out on my excursion, the perlustration of my title, through the historical background of white-collar crime, to discover so much emphasis on the vital role played by particular reformers in the arousal of public outrage and the outlawing of exploitative practices.

I suspect that, unfortunately, it is correct that it often takes an awful tragedy to coalesce reformist impulses. But that such impulses can and often have been aroused indicates that there exists a reasonably strong sense of fairness to go along with their self-interest in protecting themselves in the bulk of the people that can be enrolled in crusades to control white-collar crime.

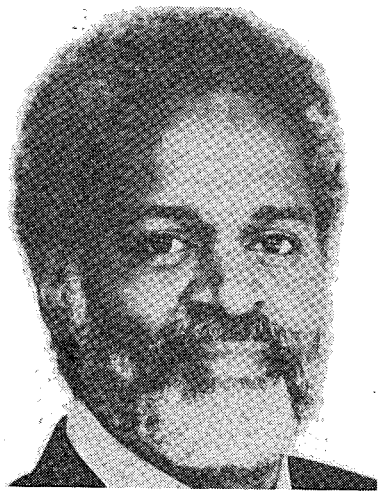
The record of scholarship on white-collar crime indicates rather clearly how closely academic work can parallel political and social climates.

Sutherland, who thrust sociology into the study of white-collar crime, was a child of populism. Thereafter the ebb and flow of research and theory regarding institutional crime was largely dictated by the priorities of the federal government and the spirits of the times, themselves interactive. Yet individuals occasionally nudged the academic agenda a bit in one direction or another. Lloyd Owen, for example, inserted a review of white-collar crime into the brief of the President's Commission on Law Enforcement and Administration of Justice in the mid 1960's, resurrecting academic concern and ultimately bringing back to work on the subject eminent scholars such as Clinard and Cressey, who had moved on to other subjects after initial scholarly work on white-collar crime.

I appreciate that it is necessary to be wary about generalizations based on so brief and selective a survey of so variegated phenomena as those which deal with white-collar crime. Nonetheless, I read the record as indicating the establishment in early times of solid ideological and legal foundations toward the control of business power. At moments this control has been and is muted by the overwhelming and inaccessible positions of the progenitors of exploitative behavior, such as when the corporate form first proliferated.

In all, the situation with regard to white-collar crimes seems much as it is in regard to race relations in the United States — a good deal better than it used to be, not nearly as good as it ought to be. Even that judgment is arguable, of course. There are those who believe that what I find to be improvement is merely cosmetic. I remain, however, persuaded otherwise.

I had not expected to find more than small increments of change over long stretches of time. That the record reflects such change and that overall it is for the better seems to me to be truly encouraging.



Troy Duster

PANEL MEMBER DUSTER: Thank you very much, Gil. Our first respondent is John Braithwaite. John tells me that there's now a direct flight between Sydney and San Francisco. That's 14 hours of flying. So, it's cruel to give you about seven minutes to respond. So, I'm going to make it ten.

John is a Senior Research Fellow at Canberra. He is, I think, fairly described as one of the most important contributors to the study of corporate crime in the English-speaking world. His two major publications in this area are pathbreaking and he's one of the premier contributors to this field. John Braithwaite.

PANEL MEMBER BRAITHWAITE: Thanks, Troy. We've been treated to an erudite and stimulating paper by Gil Geis. It struck me as he was discussing in the paper the history of criminological concern about white-collar crime that there was a major omission. He talked of the central role of Sutherland and of Sutherland's students, most particularly Don Cressey, and then went on to discuss the 1964-75 period as a period when white-collar crime research went into the doldrums.

But it wasn't completely in the doldrums, because it was Gil Geis who kept a flickering flame of white-collar crime research alive during those years; kept it in the criminology textbooks so that when in this country, post-Watergate, there was a new boom of enthusiasm for white-collar crime as a research topic, there was a very strong tradition within criminology that Gil Geis had helped nurture through many wonderful articles during that period.

Gil begins by asking the question: What are the conditions that caused medieval peasants successfully to demand reforms rather than starve to death gracefully? He's led to then ponder about the social conditions conducive to a mood of moral indignation, the importance of scandal. In the written paper he illustrates, for example, with coal mining disasters being the trigger for reforms to enforce safety laws.

There was a paper in the International Journal of Health Services recently by Daniel Curran in which he said, true, reform has been something that's followed in that particular industry from disasters; but we should wait a minute and ponder the fact that most disasters did not lead to reform. So one needs to look more intricately at the processes of legal reform.

As another condition, Curran draws attention to economic factors, to the

proposition that during periods when coal was in great demand and there were great costs to the industry from worker resistance (e.g., strikes over safety matters) there was a willingness of capital to respond to reform movements through granting change. Obviously in periods when miners were being retrenched, the reform efforts arising from disasters could be successfully resisted. We haven't adequate data to thoroughly assess that proposition, but I suspect that might be an important elaboration to the analysis.

Moreover, Curran argues that even when the reform does occur — citing Edelman — the reform is often symbolic, that concentrated interests (in particular, capital) are able to secure tangible rewards; whereas more marginalized interests such as coal miners tend to secure symbolic rewards that don't really change the level of safety in coal miners.

It seemed to me that that latter part of the analysis was overstated. Because even in the United States where coal mine safety regulation is perhaps done less adequately than in most other countries, it is nevertheless true that the reform that has occurred has been much more than symbolic.

Yet all of that leads us to the need for a theory of scandal and reform. The basic point is right; most scandals are one-week wonders. Larry Sherman's work on police corruption scandals was, I think, seminal in that regard in suggesting that while scandal can produce reform, reform will not happen unless some policy follow-through is institutionalized. What is required is that someone pick up the ball and run with it through the policy process.

John Braithwaite

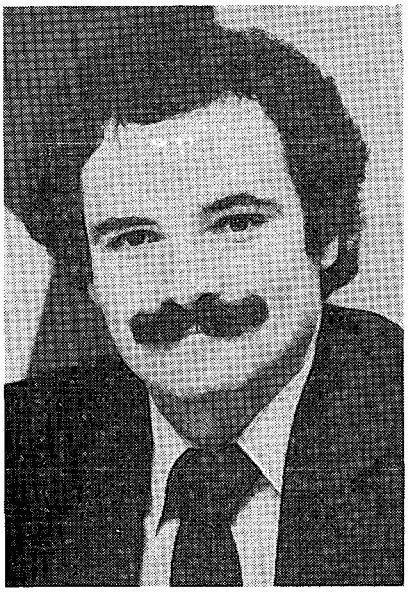
If I can perhaps manifest my unsophisticated understanding of American football and suggest that when scandal occurs, a lot of the defenses get knocked out; but the defenses to reform being down doesn't mean that anything will happen unless there's the capacity of someone to pick up that ball and put it over the try line. You know what I mean.

PROFESSOR WHEELER: Close enough, John.

PANEL MEMBER BRAITHWAITE: Indeed, the work that Brent Fisse and I did on corporate scandals led to very similar conclusions. We think about the very considerable successes that Ralph Nader has achieved. Many failures as well, of course. But I think we can study the successes in terms of a scandal being generated, and scandal in circumstances where a program of reform had been formulated in advance, a program ready to be put on the table and steered through the convoluted policy process to secure reform.

I was impressed by an article in Law and Policy in January of this year by Laureen Snider in which he argued that struggles waged in the community by trade unions, the consumer movement, the environmental movement often achieve real reform by forging change at the ideological level. Adverse publicity over corporate crime can gradually insinuate a redefinition of reasonable business behavior. Shaming of business misconduct can raise the price of legitimacy for corporations by lifting the standards of corporate behavior necessary to secure public acceptance.

So that when these struggles secure victories in the court of public opinion, if business wants to avert a legitimation



Peter Yeager

crisis, new limits on the tactics that are acceptable in the pursuit of profit are required. So that to quote Snider, he says:

"Thus, while ideological structures reinforce the cohesion of the dominant class in most instances, this cohesion does not come without a price. Class and right struggles, by increasing the price the dominant class must pay for legitimacy, create interstices within capitalism whereby meaningful and beneficial change can occur."

It follows from Snider's analysis that even where scandal does not produce public reform or where the public reform is symbolic rather than real, it might still produce valuable private reform.

All of this, it seems to me, opens up exciting new directions for where we might go with white-collar crime research. We need to engage in some lateral thinking about new paradigms of social control and that in the years ahead, all the indications are that that thinking will blossom, and indeed has begun to blossom, and we'll have a generation of white-collar crime research that won't be just pursuing the old well-worn tracks.

Thinking about Snider's point about scandal impacting at the ideological level rather than necessarily at the public reform level opens up the need to study private justice systems, the need to study self-regulation and how that interacts with public regulation. That work has substantially started.

Susan Shapiro's work on the sociology of trust is example of manifestation of the kind of lateral thinking that's needed. The interplay between litigation and negotiation, Al Reiss' work on deterrence and compliance regulatory systems, punitive social control versus moralizing social control. (sic)

It's not a question of making either/or judgments between alternative paradigms of social control. There is a synergy between them. The nut that we've got to crack as white-collar crime researchers is to understand the mechanics of how that synergy is played out. When is it that punitive social control underwrites moralizing social control and how can it be that moralizing social control can make punitive social control more effective, for example.

So, it will be an exciting time to be working in this area in the years ahead and we can learn from the history of scandals which succeed and fail in controlling the abuses of the marketplace.

So that Gil's paper, I think, heads us off in the right direction — in the direction of learning lessons from history about the possibilities for new paradigms of social control being exploited in the future.

PANEL MEMBER DUSTER: Thank you. Our second respondent is Peter Yeager, Boston University, who's written two major works on the topic including co-authoring the standard work with Marshall Clinard on corporate crime. He is now working on a third book on environmental regulations and the business community. Professor Yeager.

PANEL MEMBER YEAGER: I thought what I would do was respond to ideas that Gil's paper brought to my mind regarding the area of white-collar crime research, although my own interest has been more in the area of regulation and law recently. So I thought what I would do was talk about the ways in which the concerns for regulation have evolved in our research for the last decade and some of the implications of that.

Criminology has always been an applied discipline — that is, all the criminologists I've ever met have entered the field with a view toward solving problems of crime rather than creating theories for theory's sake. One of the major benefits, nonetheless, of this resurgence over the last decade in white-collar crime research in the academy has been a growing investigation of the role of law, in terms of both theory and practice. Whereas conventional criminology had for a number of years, it seems to me, left the law behind and assumed law as a relatively non-problematic entity, much of the research in the white-collar crime area has found law to be quite problematic indeed.

One of the issues that Gil's paper suggests to me has to do with the cycles of regulatory passion historically. As he takes us back to the Old Testament and brings us to the future, we see that the clamor for social control of identifiable harmful business behaviors comes and goes.

Another note in his paper, if I read it correctly — and I think I did — suggests something interesting as well as historically: When peasants were starving and market constraints at law were thought necessary to control producer and distributional behavior for these commodities that people needed to survive, the state indeed regulated the market in these initial attempts, but it seemed to more stringently regulate the riots that were occasioned by the hunger. The criminal prohibitions, therefore, weighed more heavily on the peasants than on the producers. That's another reality that seems to recur more often than not.

Now it seems to me that business historically, from Biblical times to the present, has always been viewed ambivalently. We have a two-headed enterprise here, I think, that's lodged in the very nature of competition, long recognized as carrying the potential for both great social good and social ill.

It reminds me of a story some of you may have heard. I picked this up from business school colleagues, a story of two business partners going on a walk in the woods, taking a day off, all decked out in their hiking boots. They come upon a bear in the woods who spots them and becomes very menacing. The two men freeze for a moment. One of them, though, quickly drops to the ground and changes from his hiking boots to the tennis shoes he was carrying in his backpack. The other turns to him in astonishment and says, "What are you doing? If the bear charges, we can't outrun it." The man with the tennis shoes says, "I don't need to outrun that bear, I only need to outrun you."

Competition spurs perhaps the greatest of human accomplishments in many spheres, but it also brings out ill in some endeavors as well. So the large social question before white-collar crime researchers as applied practitioners, and certainly to the legal community, is how to save the beneficial aspects of competitive enterprise while forestalling the other.

Of course, the question beyond that is: What is the other? How do I identify the harmful outfalls of otherwise useful competitive behavior? Ultimately, that's a philosophical and a political question.

The other image that jumps for me out of Gil's paper is this notion of the evolution of regulation over time. Not in terms of cycles of passion necessarily, but in terms of precisely what is regulated. I would characterize it as having been historically a transition from the politics of markets to the politics of production. The evolution in law in that way reflects structural developments, I believe, and economic arrangements.

Historically, the law, as Gil's paper points out, was concerned in the white-collar crime area with systemic market matters. That is, with the way in which the market was structured over the ways in which participants should behave if the market was to be efficient and if community peace was to be ensured.

So responding to competitive relations, what we call economic regulation in the literature, seemed to be the first impulse for white-collar crime regulation. Also, on occasion, acute political crises were able to bring about changes in law. The Pure Food and Drug Laws in the early part of this century were occasioned by certain sociopolitical crises that were also market-related crises. Because as some analysis has shown, an important reason the federal government got into the business of regulating meat was because European markets were collapsing for large American producers. So this law became a market protection device as well as a consumer protection device.

We tend to see the early regulation being market directed. In recent decades, in contrast, we see an increase in social regulation which attempts to address the more chronic effects of harmful business behavior. We see this in the

environmental and in the occupational safety areas, for example, where we're talking about the politics of production now and not the politics of exchange; how material is produced and distributed, how it affects workers and other citizens in its production.

I think that while we have seen a decline in the area of social regulation over the last several years in many venues, we can expect to see greater attention to it in the future. For example, in a paper we'll hear later in these discussions about the way in which prosecutors handle the various kinds of white-collar crime, occupational safety and health enforcement lags behind even environmental regulation, which lags behind market regulation to some extent in the present climate.

But I think occupational safety and health is going to experience a resurgence in political and prosecutorial interests as the way in which American workers produce goods becomes ever more important in the world market. Which is to say that we're going to be needing ever-more skilled and fewer workers to produce goods, and those skilled and fewer workers are going to be paid higher wages to produce refined goods. They are going to need protection if the market is to be stabilized and those goods are to be well-produced without labor disruptions and the rest.

So, as I mentioned, we've had a period of deregulation the last several years that has been of concern to many people who do research in this area. But, if nothing else, the period of deregulation has suggested this to most of us: As in cases of earlier lawmaking, the evidence is that businesses can't self-regulate themselves without a legal constraint. They need something to make the playing field even.

Current research that I'm involved in regarding the ways in which managers make decisions regarding laws and ethics suggests to me that even in the most well-intended companies — and those are the only companies who will let us in to do this kind of research, so we have a biased sample to begin with — even in the most well-intended companies the pressures to violate fairly important laws are immense. Indeed, interviews that we've done with CEOs all the way down to first-line supervisors suggest that these tensions often result in violations, violations that well-intended folks in good companies are willing to admit to interviewers.

We've been interviewing in a large bank and in a large high-tech multi-national company, and found that in both cases, the pressures of the equity markets, the stock markets, lead top managers, for example, to misaccount funds as profits when they should be accounted for as expenses and those sorts of things; clearly violations of law. So we need some sort of constraint other than market forces.

It brings us to the question of the politics of law, and I'll end on this set of remarks. The law is, of course, as Attorney General Van de Kamp indicated, subject to shifting political winds and interests. Gil Geis' paper mentions the dialectic between information, moral indignation and the concern for white-collar crime. Of course, that's quite true that information has brought to public attention the harms done by certain unscrupulous business folk and the need to regulate them. But there are substantial barriers to fully-informed debate on this topic, which is one of the key values of this conference, I believe, to open up some of those barriers. I'll just tell you about some personal experience that we've had in this.

When Marshall Clinard and I did the study in 1979 for the Justice Department, studying the infractions of the Fortune 500 corporations in this country, the Justice Department prepared a large press release when the project was finished and went through two to three weeks of negotiations with us on the content of this press release to be distributed to all major news media. We were, of course, pleased about that.

Once the press release was finalized we waited two to three days expecting its imminent release. Whereupon we received a call from the Department of Justice liaison with whom we were

working, who notified us that the Department of Justice in the fall of '79 was going to quash the release. It was not released to the mass media.

I asked why and my contact said he didn't know why. The National Institute of Justice was very pleased with the report. They were eager to have it disseminated, made publicly available and all the rest. But from on high, at some level which he was not willing to identify to me, it was decided that the government was not going to advertise that it had sponsored this research after having spent a quarter of a million dollars funding it; a form of white-collar "crime" of some sort perhaps, but not technically, of course.

Only one newspaper in the country picked up on the fact that the Justice Department had made the decision in effect to sit on the document, publicly speaking at least. The Washington Post, with an investigative reporter, produced an article on this fact. The article itself was buried on page 16 in a series of advertisements in which you had to look very carefully to find out that there was an article even there.

So it seems to me that there are substantial barriers to communication for fully-informed public debate about these fundamentally political and philosophical questions as to what kinds of behaviors we want to identify as worthy and necessary of control and as to precisely what controls we are going to exert. So that while we have seen a net increase in consumer attention to such problems and certainly labor's attention and the law's attention to such problems, we still, I believe, do not have fully-informed debate on these questions.

Regulation is also subject to shifting political winds. The Reagan administration has not been completely absent of white-collar crime regulation, but it's interesting to point out and to think about the kinds of regulations that have been enforced. The insider trading, the defense contracting and the bank secrecy laws have garnered most of the enforcement resources and the attention in the media. All of them, I think, can be explained as the kinds of regulations that fit particular political interests; in the case of insider trading, a very important area of white-collar crime, the sanctity of fair market information for investment and trade. Defense contracting crime clearly involved a legitimacy problem that needed solving given the high levels of defense spending amidst large budget deficits. The Bank Secrecy Act enforcement is connected to the enforcement of organized crime laws.

Finally, law has another set of traditions that it needs to confront when it tangles with white-collar crime. As Gil's paper suggests, the law typically has been more comfortable with areas of identifiable harm and identifiable offenders, individuals who could be prosecuted.

In research I have had experience with at EPA, I came across memoranda in which Justice Department and EPA did battle over the question of what kinds of water pollution cases would be criminally prosecutable. Under the 1972 Water Law, if a company was in flagrant violation of its dumping permit, it could be criminally prosecuted. No showing of harm was necessary.

It turns out that the Department of Justice, even in a period of relatively stringent regulation in the middle 70s in this country, was denying prosecution of these cases to EPA because there was no demonstrable harm. They said, "we admit that this company is in flagrant violation of its permit, but unless you can show us harm, we don't believe as a matter of fact that we can carry forth a successful prosecution. That is, if the pollution dissipated, we don't think we can make the case."

So even when the Congress wrote laws that had elements attempting to deal with the thorny problems of harm and evidence and all the rest that often plague white-collar crime cases, the Justice Department was clinging to certain legal traditions and denying prosecutions of cases at that point in time.

Again, I will conclude only by saying that I think forums like this are vital. This is the first such forum of its kind that I

know of bringing together policy makers and academics for dialogue and debate and I think this is probably a key starting point that may help kick off a new resurgence in this kind of discussion. Thank you.

PANEL MEMBER DUSTER: I'd like to open the floor with some guidelines. First of all, we welcome commentary, not just questions. This is not seen as a question-and-answer period where the panel has expertise and those around the table are raising issues for us to respond to. So, my first guideline is feel free to comment.

Secondly, for the court reporter, as I indicated in my opening remarks, please state your name. Just raise your hand and I'll recognize you and then you can use one of the many microphones around the tables.

Gil Geis will have a chance to respond in this period, but he's waived his immediate response. So the floor's open.

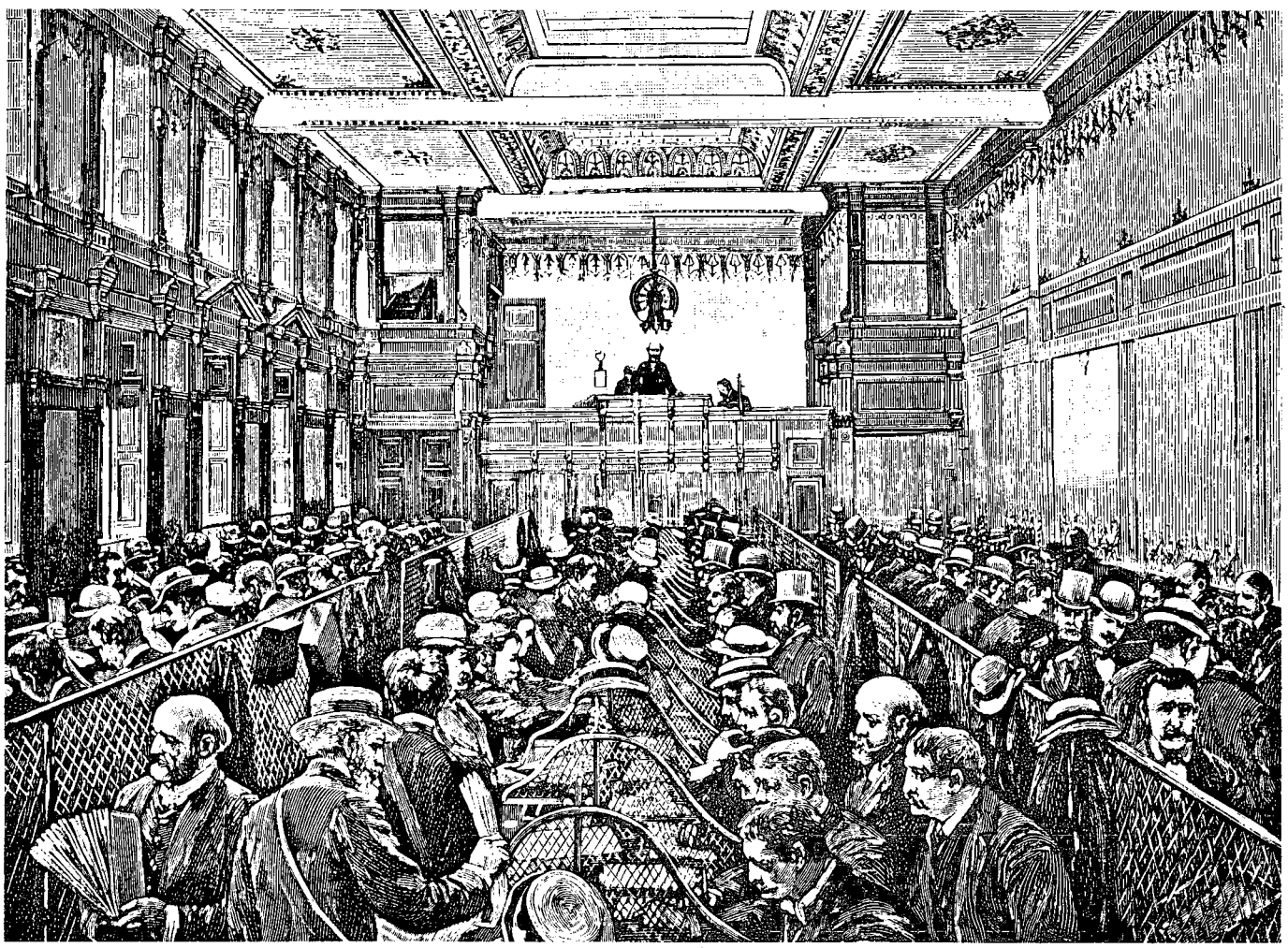
PROFESSOR KAPLAN: I'm John Kaplan, professor at Stanford.

I come at this from having done a lot of work in the drug area. There are a number of interesting things about this. One is that in that area very often what seems to be sociological, legal and in that case medical discourse, is in fact political discourse and that again and again we find moral judgments disguised as medical judgments. Here we find moral judgments disguised as economic judgments.

It's a great irony to my mind that, for instance, the economic arrangements often that were regulatory or reformist, I think by most people's idea, did more harm than good.

In other words, the concept that all reform or regulation is good flies in the face of century-long efforts to enforce the concept of a just price and century-long efforts to prevent the charging of interest which, I think, with the hind-sight of economics, we know did a great deal more harm than good.

The other aspect is the moral tinge of the arguments. I just copied a couple of words that Gil was using — unconscionable, arrogance, comparisons with the Nazis and the McCarthy era. That strikes me as a kind of moral passion. The same kind, by the way, that you hear in the drug area.



SYMPOSIUM 87: EXECUTIVE SUMMARY

by Julie Pearl

Panel 1: The History and Status of White-Collar/Institutional Crime

The first panel considered the historical, political and definitional issues of white-collar crime. Gilbert Geis, Professor Emeritus at U.C. Irvine, presented a "Historical Perlustration on White-Collar Crime." Sociologist Troy Duster (U.C. Berkeley) moderated the panel, on which Professors John Braithwaite (Australian National University) and Peter Yeager (Boston University) served as respondents.

The discussion centered first on the roots and patterns of the reaction to white-collar crime. Panelists next focused on the causes of this crime, and concluded with a revealing dialogue on the definitional problems in the field of white-collar offenses.

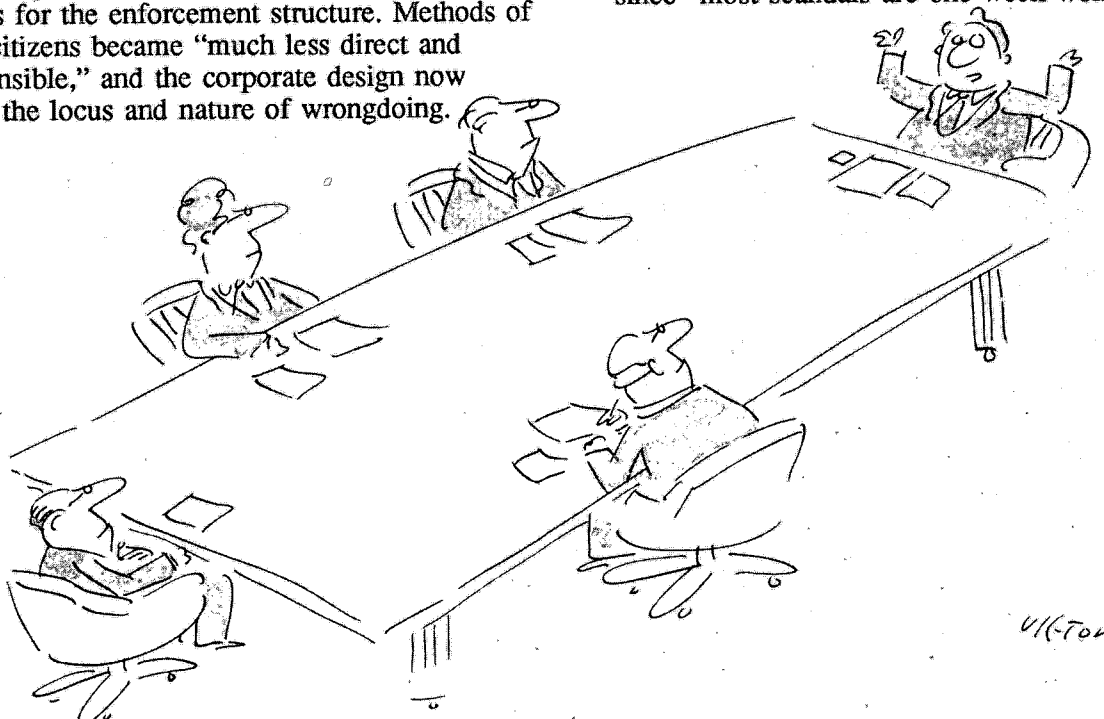
Origins of the Reaction to White-Collar Crime

Studying Western history, Geis found that "solid ideological and legal foundations" for monitoring market forces date back to the Roman Empire. Efforts to control business power, however, have been muted, revamped, and resurrected over time. For example, the advent of the large corporation and the industrial age brought new challenges for the enforcement structure. Methods of harming citizens became "much less direct and comprehensible," and the corporate design now mystified the locus and nature of wrongdoing.

After a century of waning enforcement, the appearance of the mass media, "widespread literacy [and] moral indignation" rekindled regulatory efforts against the "newer, subtle and insidious kinds of abuse." The outcry against the unharnessed menace of big business crime gained steam in the early 1900s, in response to the collusive misdeeds of Central Pacific Railroad magnates.

These historical factors led Geis to the question: What are the conditions which spark the "public sense of justice" to form coalitions that will successfully demand reform? "The regulatory system primarily was created," Geis suggested, "as a response to a series of disasters."

Respondent Braithwaite observed, however, that most disasters have not led to reform. Further examining the process of legal reform Braithwaite cited the strong influence of economic factors. For example, a recent paper by Daniel Curran explains that coal miners' strikes have been most fruitful during periods of high market demand for coal, when worker resistance was costliest to the mine owners. Moreover, Braithwaite continued, reforms do not guarantee that the fundamental conditions will be changed. Reforms are often symbolic, failing to address the "marginalized interests," such as the safety of coal miners. Thus, Braithwaite asserted, scandals or disasters alone do not create true reform, since "most scandals are one-week wonders." The



"This might not be ethical. Is that a problem for anybody?"

Drawing by Victor; ©1987 The New Yorker Magazine, Inc.

formula for provoking any significant change requires "someone to pick up the ball and run with it through the policy process" after the scandal has aroused public interest.

Apart from seeking formal controls, Braithwaite called for exploration of the legitimacy crises that the business community endeavors to avert. He drew on Laureen Snider's work to suggest that the "court of public opinion" can shame business forces into adopting more acceptable tactics in generating profits. The interaction of private or self-reform with public action is thus one of the "alternative paradigms of social control" that future research might address.

Trends in the Reaction

Respondent Yeager opened the discussion of the political influences on the government response to white-collar crime. First, he noted that regulations under the Reagan Administration tend to fit particular political interests. For example, insider trading laws are heavily enforced to protect the sanctity of market information. Likewise, defense contracting is now closely supervised to avoid "legitimacy problems," and bank secrecy laws are strongly upheld because of their connection to the battle against organized crime.

Yeager also described how changes in the market and the means of production can influence the public response to white-collar violations. He predicted that occupational safety regulations will gain priority as quality production of goods demands fewer but more highly-skilled workers.

The use of sanctions has also changed over time, according to Stanton Wheeler of Yale University. His studies of federal sentencing practices indicate that the sanctions are growing stronger against offenders who commit severe white-collar violations and who are of a higher socio-economic status.

Causes of White-Collar Crime

Several participants noted that competition is a primary cause of white-collar criminality in the modern business environment. Yeager observed that competition carries the potential for "both great social good and social ill." Therefore, the philosophical question posed by this condition is how to best preserve the beneficial aspects of competition, while forestalling its harmful outfalls. As Attorney General John Van de Kamp stated in his Keynote Address, criminal justice experts must calculate policy responses that balance the "tension between the raw workings of capitalism and the need for protection from corporate and individual rapaciousness."

The record warns us, Geis remarked, not to trust unchecked power "in social systems where the desire for personal gain and the opportunity to secure such gain at the expense of others is readily available." He said that human beings, especially those backed by strong organizational structures, "are much too artful in constructing benign, personally lulling explanations for evil actions to be allowed to operate without scrutiny." Yeager echoed this concern, pointing to the tremendous pressures to violate regulations that permeate even the most "well intended" companies. Noting that we have undergone a period of deregulation in recent years, Yeager insisted that historical evidence leads to the conclusion that business cannot regulate itself.

Definitional Issues

The debate over the precise definition of the term "white-collar crime" has persisted for decades. However, as the Attorney General explained, we must confront the "inconvenient ambiguities" of this field if we are to take concrete, coordinated action against the harms.

Former Governor Pat Brown candidly posed the question: what is white-collar crime? Yeager responded that the traditional definition was based on the socio-economic class of the offender, that the trend among scholars is to focus on crime that involves an abuse of "trust and power . . . in any legitimate occupation."

The panel considered the problem of defining corporate criminal liability. First, complications arise in distinguishing between individual and corporate offenders. Second, Jack Coffee (Columbia University) explained that the legal concept of "corporate *mens rea*" is developing to impose liability on the corporation for its actors' collective knowledge. This represents a significant shift away from the traditional notion of the individual actor's knowledge and intent.

Russell Mokhiber, editor of the Corporate Crime Reporter, asked whether corporations should be afforded the same rights to privacy that individuals enjoy. Coffee answered that in fact, corporations do not have the same rights. Despite fourth amendment protections, corporate records can be subpoenaed far more easily than personal records.

Journalist Stanley Cohen expressed concern over the disassociation that can take place in the corporate environment. He recounted that he has often seen

"decent individuals" make decisions as a group in their corporate roles that they would have considered unethical in their personal lives. In light of the difficulty of identifying culpability at the higher levels of large organizations, Jan Chatten-Brown (Assistant D.A., Los Angeles) favored a broadened definition of white-collar liability that would accommodate both corporate and individual conduct.

Panelists agreed that the definition of white-collar crime reaches beyond corporate crime and into many other areas of organizational conduct. Some sociologists, including Yale Professor Albert Reiss, favor a definition of white-collar "law-breaking" that includes civil and regulatory violations, as well as criminal conduct. Lawyers attending the Symposium countered that the definition must require the element of *mens rea*, the criminal intent of the perpetrator. To do otherwise, attorneys Coffee, Ed Clark (ARCO) and Patrick Hallinan (private practice, San Francisco) argued, would undermine the legitimacy of the criminal justice system.

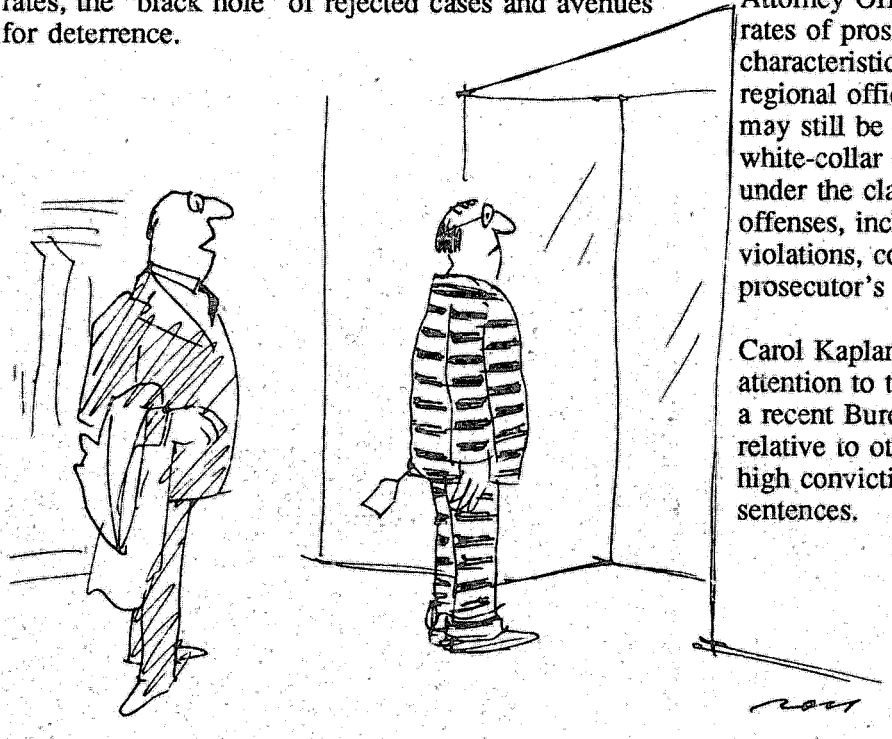
Problems of proof arise, however, in many white-collar cases, since our legal system is predicated on the delineation between criminal and non-criminal conduct. To establish criminal culpability the prosecutor must show that the defendant intended to commit the wrong (e.g., to evade taxes or to defraud the victim). Coffee stated that prosecutors face difficulties where an act crosses over between a crime and a tort, in which the less exacting "reasonable person" standard is used instead of the criminal *mens rea* standard.

In view of these complications, attorneys Clark and Hallinan preferred a narrow definition of white-collar crime that emphasizes criminal fraud. Sheldon Messinger (U.C. Berkeley) responded that fraud alone does not encompass the breadth of violations that could be classified as white-collar. Gene Anderson (Assistant U.S. Attorney-Seattle) remarked that "half of the problem of white-collar crime is that it is a phrase that was spawned by a sociologist and not an attorney." A tension exists, he explained, between the "socioeconomic-directed" definition and the "conduct-based statute that defines a crime." As a prosecutor, Anderson said he would merge the two concepts including the sociological factors because individuals who use organizational power are a "significantly different type of criminal target" than other offenders.

Finally, Harry Snyder of the West Coast Consumer's Union stated that opinion polls indicate the public's concern over activities, such as excessive campaign contributions, which the defense bar and the academic community might exclude from the white-collar taxonomy. Snyder suggested a broad definition based on the institutional problems presently confronting society and the criminal justice system.

Panel 2: Status of Prosecution of White-Collar/Institutional Crime

The presentations of the second panel explored prosecutorial responses to white-collar/institutional crime by analyzing the activities of federal and California prosecutors. The panel was moderated by Steven Adler, Chief of the Major Fraud Unit, Attorney General's Office. John Coffee (Columbia University) and Richard Gruner (Whittier College) began the session by presenting a "Statistical Profile of Federal Prosecutorial Behavior," based on data from the U.S. Attorney's Docket and Reporting System. William Maakestad (Western Illinois University) then presented a paper on "Prosecuting Corporate Crime at the State Level," summarizing a survey of California district attorneys. Respondents on this panel were Ed Clark (Atlantic Richfield Company), Richard Drooyan (U.S. Attorney's Office, Los Angeles) and Harry Snyder (Consumer's Union). The presentations led to discussions on four major issues in prosecutorial practice: rates of investigation and prosecution, factors influencing these rates, the "black hole" of rejected cases and avenues for deterrence.



"How much time do you expect to do?"

Drawing by Ross; ©1987
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Investigation and Prosecution Rates

The Coffee and Gruner study indicated that white-collar crime comprises a greater share of the federal prosecutor's workload than any other category of crime. In each year from 1980 to 1983, approximately 17-18 percent of all new investigations were for white-collar crime. This study also suggested that white-collar offenses involve lengthy prosecutions; other crimes were nearly twice as likely to be prosecuted within the first year of investigation.

Most California district attorneys responding to Maakestad's survey reported that they received both citizen complaints and regulatory agency referrals concerning corporate crime in 1986. The survey indicated, however, that only approximately 20 percent of these complaints and referrals resulted in prosecution.

Panel members responding to the presentations commented on the need for studies on prosecution rates that may yield more qualitative data. Malcolm Feeley (U.C. Berkeley) suggested that future research on U.S. Attorney Offices should focus not only on the basic rates of prosecution, but also on the methods and characteristics of prosecution within the different regional offices. Coffee noted that federal prosecutors may still be concentrating too heavily on the traditional white-collar crimes, such as financial scams charged under the classic mail and wire fraud statute. Newer offenses, including insider trading and employee safety violations, comprise a "trivial portion" of the federal prosecutor's caseload, Coffee observed.

Carol Kaplan (U.S. Department of Justice) drew attention to the ultimate dispositions of those prosecuted; a recent Bureau of Justice Statistics report showed that, relative to other crimes, white-collar prosecutions yield high conviction rates, but fewer and shorter incarcerative sentences.

Factors Influencing Prosecutorial Responses

Coffee and Gruner expected to find a higher correlation between federal prosecution rates and "priority codes" assigned to various white-collar and other crimes. U.S. Attorney Offices appear to follow neither the codes developed at the national nor district levels. Gruner offered alternate explanations: "Either the message isn't getting through or the cases are simply too difficult." Respondent Drooyan asserted that prosecution rates should not be tied to the priority codes, since this may lead prosecutors to try cases merely because of their priority rating rather than evaluating each case on its merits.

The transition from the Carter to the Reagan Administrations caused few immediate changes in the priorities of federal prosecutors studied. The political structure may, however, have had a delayed impact on prosecutorial priorities. Between 1981 and 1983, new white-collar crime investigations declined in four out of the six largest U.S. Attorney districts. There was a shift over the last years studied "in the direction of greater emphasis on drug offenses and away from 'government regulatory offenses' and similar categories." Drooyan commented that these shifts correspond directly with the investigative resources made available in U.S. Attorneys offices.

Likewise, Maakestad found that the level of office resources heavily influences the decisions of California district attorneys on whether to prosecute corporate criminal cases. Most notably, offices serving a population of under 200,000 were far more likely to decide against prosecution due to the following factors: (1) the state of the economy in the jurisdiction; (2) the length of time required to prosecute a corporate criminal case; and (3) the level of resources that a corporation has for its defense.

The "Black Hole"

After considering the factors influencing prosecutorial decisions, the panel discussed the outcome when prosecutors decline white-collar crime cases. Richard Iglehart of the Alameda County District Attorney's Office observed that, when federal prosecutors turn down a case, "there is a vast black hole that these cases go down and no one hears about them." Joseph Wells, a former FBI agent, stated that U.S. Attorneys often create this void by insisting on taking only the most promising and newsworthy cases. Coffee said that agencies often limit their referrals to the types of cases the U.S. Attorneys have agreed to accept in "formal memorandums of understanding [or] treaties" between the prosecutors and the agencies.

Iglehart recommended that U.S. Attorneys turn over cases that they have dropped to the local and state prosecutors, who might have a greater interest in pursuing the "little $20,000, $50,000 cases," or the instance in which a "small creek was polluted instead of a major river." Iglehart asked that, in giving their "spillover" cases to local prosecutors, the U.S. Attorneys allow state and district attorneys to use federal investigators and their evidence in state courts. Federal prosecutor Drooyan concurred that state and local prosecutors, given their sophistication and sheer numbers, are well-equipped to handle many federally rejected cases.

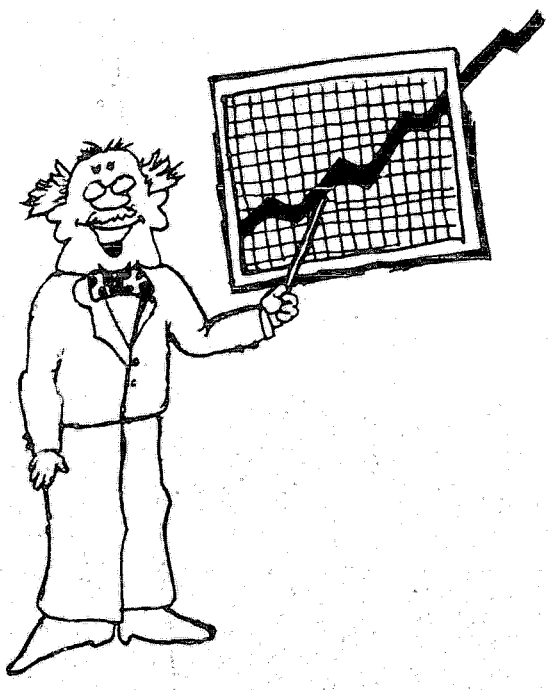
Apart from the tensions between federal and state prosecutors and law enforcement officers, Drooyan attributed the "black hole" syndrome to the divergent interests of prosecutors and regulatory agencies. He pointed out that regulatory agencies often have little incentive to refer to prosecutors cases that the regulatory attorneys could pursue through civil or administrative actions. Despite the assistance they render to the U.S. Attorneys, regulatory agencies ordinarily receive "no statistical credit" for criminal prosecutions when preparing their budget proposals. Drooyan said the agencies' reluctance to share their investigative resources with prosecutors is particularly common in the area of health and safety laws.

Deterrence through Prosecution and Other Tools

Maakestad's presentation emphasized the importance of imposing criminal sanctions on certain corporate behavior. He pointed to public opinion polls in which a strong majority of Americans have responded that white-collar criminals are seldomly and too leniently punished. Respondent Harry Snyder of the Consumer's Union echoed this concern, opining that business managers would avoid much harmful activity if the threat of prosecution and actual punishment were strong enough to factor more heavily into the risk calculus of business decision-making.

Other symposium attendees noted that prosecution is not the only tool available for combatting white-collar violations. Civil actions resulting in substantial fines and penalties are "potent remedies," Tom Papageorge stated. As head of the Consumer Protection Division of the Los Angeles District Attorney's Office, Papageorge pointed out that his office brought 75 percent of its consumer and antitrust cases to civil court. Regulatory agencies also serve an important function in deterring certain business conduct. Participants expressed skepticism, however, about some of the alternatives to regulation in controlling businesses' actions. In particular, little confidence was expressed in "self-regulation" and "business ethics" as control mechanisms against white-collar crime.

Panel 3: Problems and Means of Measuring Incidence, Prevalence and Costs of White-Collar/Institutional Crime



The third panel addressed issues in ascertaining the identity, incidence and costs of white-collar crime. Sheldon Messinger (U.C. Berkeley) moderated the session, which began with the presentation of Al Reiss (Yale University) on "Measuring White-Collar Law-Breaking." Stan Wheeler (Yale University) and Frank Zimring (U.C. Berkeley) were the respondents.

Three principle themes characterized the discussion: first, the development of a typology of white-collar crime; second, considerations in reporting and counting these violations; and third, the objectives that a white-collar data system would serve.

Developing a Typology

Al Reiss first presented his own definition of white-collar "law-breaking," which are "those violations of law to which penalties are attached that involve the violator using a position of power, influence or trust in the legitimate institutional order for a legal, personal or organizational gain." He explained that the requirement of a "legitimate" institution distinguished white-collar crime from organized crime.

Reiss described the typology developed by Mitch Rothman, in which violations are categorized as frauds, keepings, takings, omissions or collusion. Reiss said that this typology demonstrates how a white-collar classification scheme need not be built around the penal code. Respondent Zimring, however, employed a hypothetical insider trading case to illustrate the "plasticity" of Rothman's categories. It is not clear, Zimring maintained, whether the core violation in such a case is a "taking" (a corporate officer breaching his fiduciary duty) or a "fraud" (withholding material information).

Zimring called insider trading a "silent crime" because the victim is seldom aware that the offense has been perpetrated. Indeed, Messinger noted that one of the unique features of white-collar crime is "the absence of appreciation that one had been a victim." Zimring and John Kaplan (Stanford University) concluded that insider trading is not a "victimless" crime, as some commentators have suggested, but it produces a peculiar kind of victim. The essence of the offense, Kaplan suggested, is "unfairness."

Still, the question of how to characterize the nature and the injuries of white-collar offenses lingered throughout the session. Participants referred to these events with terms ranging from "crimes" and "law-breaking" to "violations" and "harms." Wheeler concluded that, despite the ambiguity it engenders, the concept of white-collar crime serves an important function. He cited the observation of Norwegian sociologist Wilhelm Aubert that this concept is "more evocative than scientific." Conceding that a clearer definition is required for operational purposes, Wheeler asserted that the "fuzzy" white-collar terminology is a symbol that calls attention to hard-hitting misdeeds "by persons of position or organizations of wealth."

Reporting and Counting

In discussing the measurement of white-collar crime, Panel 3 first considered which violations and variables might get counted, and then explored alternative methods for collecting data. Reiss observed that "what gets counted" depends largely on the "mobilization paradigm," or the manner in which the agency is mobilized to respond to violations. For example, the police are "reactive" to complaints from citizens, so police departments may deem that a complaint or an ensuing investigation constitutes a "case" for measurement purposes. By contrast, tax collection agencies are "proactive;" an event is counted as a tax violation when the agency initiates an audit.

Wheeler described his ongoing study of offenders convicted of eight federal white-collar crimes, which measured five variables: (1) the amount of loss involved; (2) the geographic scope of the offense; (3) whether an organizational form was used to commit the offense; (4) the job status of offenders; and (5) whether the offenders held college degrees.

As for the first variable, the "size of the take," the study found that antitrust and securities fraud cases involved the largest amounts (usually in excess of $100,000), while bribery and tax fraud cases entailed the smallest amounts. Second, 68 percent of offenses occurred on a national scale, although bank embezzlement cases were mostly local. Third, 85 percent of securities fraud crimes and 90 percent of tax fraud offenses were committed through the use of an organizational form. On the fourth variable, job status, offenders held "white-collar" titles in all SEC cases and two-thirds of mail fraud cases. The fifth variable signals the heterogeneity among offenders; most antitrust offenders held college degrees, but fewer than one-third of bank embezzlers did.

Wheeler concluded that two variables appear to have the greatest impact on the size of the take. First, the study found a correlation between the "complexity of the offense" and the amount involved; much more money can be netted by several offenders jointly planning a crime in an organizational context than by an individual offender. In this regard, Wheeler suggested classifying offenses by their "underlying strategies or mode of conduct." He asserted that this focus would lend a consistent theme to disparate substantive offenses such as bribery and antitrust, which both involve collusion.

Second, the largest takes in Wheeler's study were by offenders in middle management positions with "sign-off power" for the money of their large organizations. Wheeler thus urged investigative agencies to take a proactive stance by conducting systematic inventories on the "gate-keepers" in the state's organizations and businesses; focus on the people who control, store and have access to the money.

Similarly, Zimring recommended proactive investigative techniques in the field of insider trading. First, he said, select a sample of corporations which have made major announcements (e.g., concerning takeovers). Second, use computers to construct baseline figures on the "trends in volume" of stock traded within these companies in normal circumstances (periods in which no major announcements are made). Third, scan for significant deviations from the baseline figures during periods preceding the public announcements. Heavy trading during these periods, Zimring maintained, may well correspond with information leakage, which should trigger a more detailed investigation for insider trading. Moreover, such techniques may generate measures of insider activity as a proportion of total trading activity. By analogy, Zimring pointed to qualitative studies presently conducted on the frequency of unnecessary surgeries by comparing incidence statistics among hospitals. Without proving any facts in individual surgery cases, these studies yield fairly reliable indicators of overall hospital trends.

Some lawyers in attendance were skeptical of the possibilities for measuring such crimes as insider trading, pointing again to the prosecutor's burden of proving the offender's criminal intent and other factors. Sociologists intervened to remind the attorneys that all crimes—and not only white-collar offenses—are unique

and complex. No homicide is simple, Reiss insisted, and a causal relationship must always be shown in criminal cases. He warned against the futility of an aimless "lawyers' hypothetical game," while John Braithwaite (Australian National University) remarked that "we're being altogether too dismissive of the problems here." Over the years, Braithwaite continued, good quantitative work has been accomplished with difficult crimes.

Peter Greenwood (Rand Corporation) noted that the task of measuring presents an opportunity for a "partnership," with lawyers performing on individual cases and sociologists drawing sample frames to provide an overview of the phenomena. Messinger and Zimring also expressed optimism about the outcomes once quantitative work gets underway. This work could only improve on the present state, Messinger observed, in which there is so little counting that it is impossible to know how many white-collar crimes "of any definition" have occurred. Furthermore, he noted, experience has taught us that the "effort to count drives you to be more specific" and better aware of the right approaches for generating reliable measures. The "bottom line," Zimring concurred, is that "any good work on measurement and on classification...has got to help us read real precision" into the theoretical and operational issues of white-collar crime.

The panel next considered the role that surveys might play in collecting data. Reiss said that victim surveys are problematic due to the victims' common lack of awareness of the offense. He also stated that self-report surveys were unlikely to yield much data on organizational and corporate crime. To the contrary, Zimring proposed that a range of self-reporting options is waiting to be explored. One example is the retrospective self-reporting technique that Marshall Clinard employed when he interviewed retired business executives on white-collar crime. Another possibility is to exploit the competitive nature of business; "ask Macys what Gimbel's is doing and Gimbel's about Macys." Although their reports will require corroboration, Zimring asserted, this one of several non-conventional approaches to measuring white-collar crime that should be tried before all hope is abandoned.

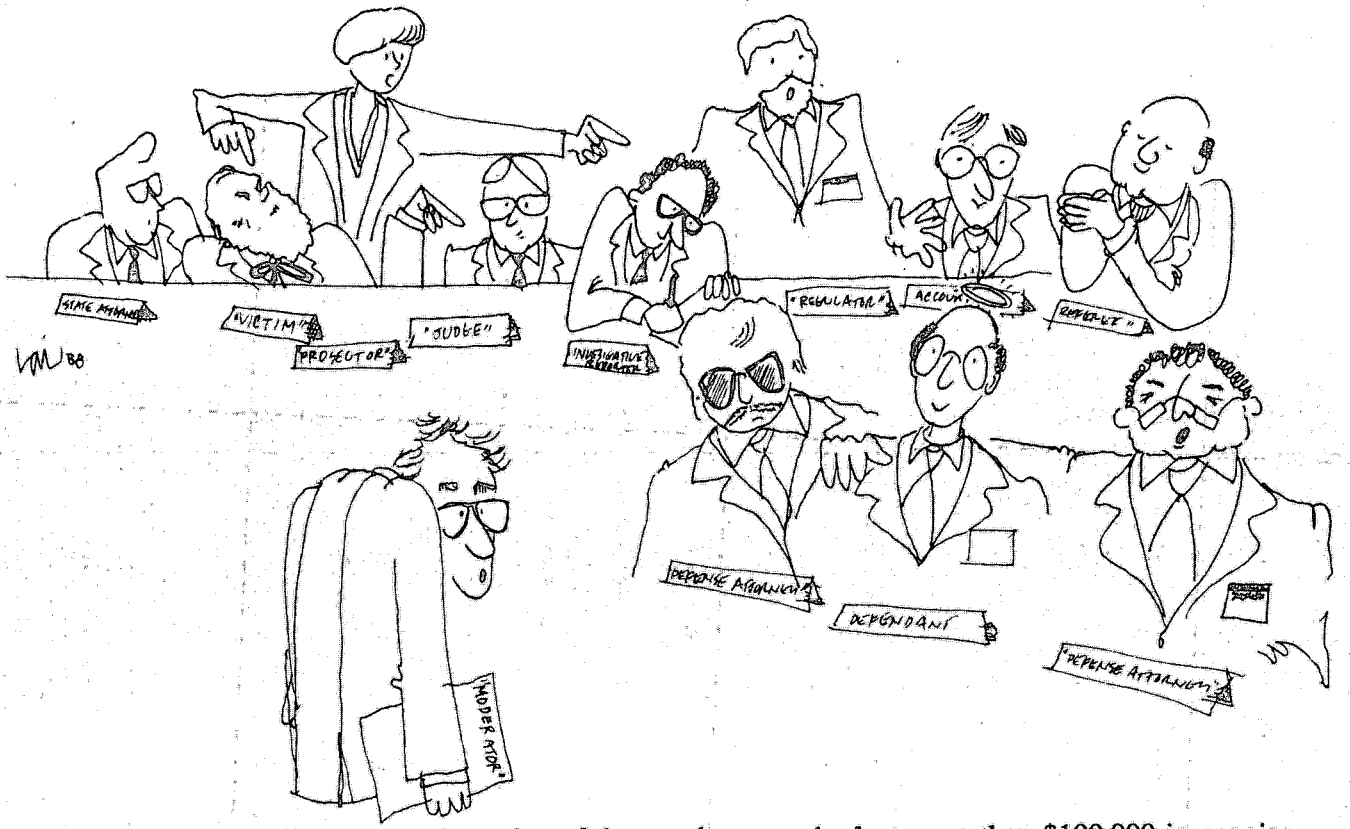
Objectives of a Data System

Reiss noted that information on white-collar crime might serve a deterrent objective, as the IRS intends when it releases information on convicted offenders near tax-filing time. Practitioners said they welcome the measurement efforts more as a help in the budget and policy processes. Bill McDonald, Assistant Commissioner of the Department of Corporations and head of the White-Collar Crime Task Force, explained that legislators reviewing his funding requests demand proof of the number of white-collar cases requiring attention. Tom Papageorge (District Attorney's Office, Los Angeles) added that local prosecutors also need statistics to convince policy makers that "white-collar crime is worth the invest-ment."

Lawyers and sociologists agreed that a key benefit of a measurement system would be the increased public and governmental awareness of white-collar crime. Messinger suggested that published measurements reflecting the extent of white-collar crime could cause a "reconstruction of the public consciousness about what constitutes serious criminal activity."

Although Reiss criticized the aggregate indices of the FBI's Uniform Crime Reports (UCR), Wheeler called the Reports a "very powerful sort of symbol." The UCR Crime Clock depicting the frequency of occurrence of seven major offenses "gives a public definition of what crime is all about," Wheeler stated. That definition portrayed in the UCR currently does not include any white-collar crimes. Zimring concluded that, for the public, law enforcement and policy communities alike, "new technical approaches to measurement are of central importance to the recognition and social perception of white-collar crime."

Case Discussion: "Silver Shadow Mortgage Corporation"



The second day was devoted to a case discussion of the "Silver Shadow Mortgage Corporation" (Shadow), a hypothetical mortgage loan business that is charged with perpetrating multiple frauds on its investors. Deputy Attorney General Judy Hayes wrote the case scenario, which was loosely based on several California fraud cases. The purpose of the case discussion was to illustrate the complexity and various forces at work within a fraud case.

The twelve participants in the Shadow discussion, drawing on their real-life expertise, played the roles of Principal (the defendant, one of Shadow's chief executive officers), Victim, Defense Counsel, Prosecutors, Regulator, Accountant, Judge, Referee, Investigative Reporter and Moderator. The session proved to be an instructive and highly entertaining enactment of a fraud scheme trial. (San Francisco public television station KQED videotaped the session and used it as the basis for a program on investor fraud which aired on November 4, 1987.)

THE VICTIM'S STORY

As Moderator, Professor John Kaplan of Stanford University began the discussion by turning to Mr. Gil Westoby, the Victim. Westoby is actually a victims' advocate who lost more than $100,000 in a major California fraud scheme. Reenacting his experience in the Shadow case, Westoby explained that he invested in the mortgage company after reading a newspaper advertisement and examining the papers sent to him by the company. He also consulted California regulatory agencies and the Better Business Bureau, which reported no complaints against Shadow.

Mr. and Mrs. Westoby were initially satisfied with the interest return on their money. They learned much later that Shadow did not even own two of the real estate properties which purportedly secured the Westobys' investment. The principals of Shadow had overstated the value of many other properties to induce new and continued investments in the company and its subsidiaries. Specifically, the Victim asserted, the principals had falsely "upgraded" the prospectuses; they "increased the size of the lots," the houses and garages, and said there were swimming pools when there were none.

The people who ran the company, according to Westoby, "were very gracious, told very plausible stories [and] lied through their teeth." When Shadow suddenly collapsed, after seven years of business, hundreds of victim-creditors claimed that they had lost

their life savings through Shadow's malfeasance. Representing victims in the Sacramento area, Westoby has spent five and one-half years in legal disputes without yet recouping any of his losses.

THE DEFENDANT'S STORY

The Principal, played by Professor Jerome Skolnick of U.C. Berkeley, asserted that his behavior merely constituted "poor business judgment" rather than criminal acts. A drama major in college, the Principal stated that he had regrettably flunked his business classes. He then formed Shadow in partnership with Arthur Post, who worked for a prominent ("Big Eight") accounting firm. Principal Skolnick claimed that Mr. Post, who had "outlined this scheme" and masterminded the fraud, was hiding out and unreachable in Argentina.

Shadow sold second mortgages, the Principal explained, to investors whose loans were safely tied to "very good" real estate properties. Although Arthur Post had informed his partner Skolnick that Shadow was in financial trouble and was improperly commingling its investors' funds, Skolnick thought that the company was simply facing a temporary setback and he simply had to "do something [to] keep this thing going." Demonstrating his commitment to Shadow's survival, the independently wealthy Principal agreed to forego his salary in the company's final year of operation, and borrowed $20,000 from his parents to ease Shadow's cash-flow problems.

Skolnick said he was convinced that the properties securing investors' loans would increase in value, since he believed that "the real estate market in California was just booming and would continue to boom in this glorious state." The Principal thus framed his violation as one of "optimism" concerning the market.

THE PROSECUTION

In the role of Prosecutor, Deputy Attorney General Judy Hayes noted that it "certainly isn't criminal to be an optimist." Hayes then concisely stated her case against the Principal: "[I]n a word, Mr. Skolnick lied. He lied to obtain people's money, and then the money was lost." The Prosecutor charged Skolnick, manager of Shadow's sales staff, with knowingly making false statements to prospective investors concerning the company's financial condition and practices.

Moderator Kaplan asked the Prosecutor how she could prove the Principal's actual knowledge of and complicity with the scheme to defraud investors. Hayes then recited a memo sent to Mr. Skolnick by his partner (Post) that clearly acknowledged the partners' complicity in the invasion of investors' trust funds. The Prosecutor's evidence also showed that Skolnick hand-wrote the prospectuses containing false statements. A prospectus or "Investment Analysis" was shown to investors for each property that purportedly secured their money.

Lastly, Hayes alleged, Principal Skolnick continually imbued other sales materials and Shadow sales events with false assurances of safe and profitable investments in the company. The Principal had personally directed his sales staff of "financial consultants" in conducting dinner seminars for retirees at local restaurants. Despite Shadow's increasing failure, prospective investors were guaranteed payment on their loans, and were promised investment returns of up to 25 percent.

Hayes also charged that the Principal had been misusing investors' funds from the company's inception. For example, these funds were used to pay for Mercedes-Benz cars, yearly European vacations and leased Bel Air homes for Shadow's corporate officers. This money also went to pay salaries exceeding $25,000 to the principals' adolescent children. Finally, Skolnick used these funds to buy a thoroughbred horse breeding facility, and to make a $200,000 construction loan — taken out in his wife's maiden name — for his own house. (Skolnick explained that he was not trying to hide the loan by putting it in his wife's maiden name. He told Prosecutor Hayes that his wife had joined a "women's consciousness raising group," and she insisted on developing "credit ratings in her name as an individual whole person. And I respect that, Ms. Hayes.")

The Prosecutor will charge Skolnick through the U.S. Attorney's Office for mail fraud. United States District Court Judge D. Lowell Jensen explained that federal prosecution would afford procedural advantages for the hundreds of investors in the Shadow case.

THE DEFENSE

The Criminal Defense Counsel, San Francisco attorney Patrick Hallinan, maintained that his client's former partner held all the blame for Shadow's wrongs. Hallinan portrayed defendant Skolnick as a "victim" who was "deceived in part by his naivete, in part by a market which collapsed without notice to anyone, and in part by his erstwhile-supposed partner and friend, Mr. Post." In 1981-1982, Hallinan asserted, the real estate market hit an "unpredictable wall" when the federal government inhibited loans on second mortgages.

Acting as Civil Defense Counsel, San Francisco attorney Mark Topel added that — unknown to sales manager Skolnick — Shadow's sales force may have misled investors for personal gain. In order to get their

commission for bringing new investors in, the sales people would "enhance" the profitability and safety of investing in Shadow. Management cannot effectively patrol against these exaggerations, Topel insisted. As State Attorney, Chief Assistant Attorney General Richard Martland responded that, in the regulatory arena, the supervisor is usually responsible for misrepresentations made by his sales staff.

Finally, the Civil Defense Counsel blamed the accounting firm that conducted an audit on Shadow for failing to detect the company's weaknesses. Absconded Shadow principal Arthur Post had previously worked at this reputable accounting firm, which issued a certified financial statement showing that all was in order at Shadow. Counselor Topel alleged that Principal Skolnick justifiably relied on that financial report to his own and the investors' detriment.

Prosecutor Judy Hayes intervened to note that the "poor businessman's defense" is a common strategy in fraud cases. As the discussion progressed, Hayes observed, the defense blamed "the regulator for stepping in, the accountant for not doing a particularly good job . . ., the market, and . . . the co-worker, the man [who] has conveniently gone off to Argentina." Criminal Defense Counsel Hallinan stated that his usual fees in a complex mail fraud case are roughly $250,000.

THE ACCOUNTING FIRM

Several important players were apparently misled by the accountant's favorable report of Shadow. For example, at least one regulatory agency which had received complaints from Shadow's investors terminated its investigation after reviewing this report.

Playing the Accountant, Arthur Brodshatzer explained that his firm conducted an audit "in accordance with generally accepted auditing standards," and saw no signs of Shadow's decay. However, Shadow principal Arthur Post arranged to supervise the audit by his former employer. "[A]fter all," the Accountant said, "we knew Mr. Post. We had trained him." Accountant Brodshatzer concluded that Post may have "subverted" the audit through his knowledge of the accounting firm's methods. A negligence suit was filed against the accounting firm, which holds a sizeable liability insurance policy.

THE REGULATORY AGENCY

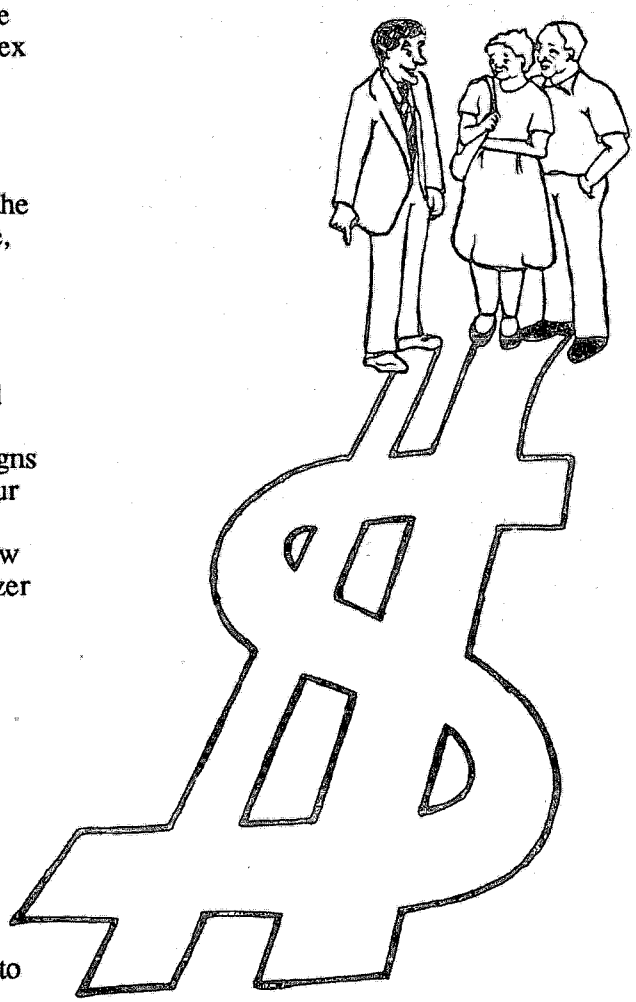
Playing the Regulator, William Black of the Federal Savings and Loan Insurance Corporation (FSLIC) described his agency as "the single largest victim," with $25 million in losses. The only action available to the FSLIC in the Shadow case was to stop the state-chartered savings and loan businesses from funneling money into the company. Had the FSLIC discovered the problem with Shadow sooner, it could have pulled out funding earlier to cause the company's collapse before even more investors entered.

Unlike most other states, California's $300 billion savings and loan industry is larger than its commercial banking industry. With almost one-third of the nation's entire savings and loan industry, California has seen 31 of these businesses fail in the last three years. These failures, Black noted, will cost the federal government over $5 billion.

THE JUDGE

Federal Judge D. Lowell Jensen commented that this was not an "open-and-shut" case. If it were, he said, the defendant would have entered a guilty plea and the matter would not be going to trial. From the basic outline of this case, however, the Judge felt that a jury would be more likely to find the Principal guilty.

Moderator Kaplan asked whether it might weigh in the Principal's favor that he merely "shaded the truth" in an



earnest effort to keep the company afloat. The Judge explained that, if the Principal is found guilty of mail fraud "with this dimension, he's going to go to prison." The court would also order restitution, Judge Jensen continued, and the "real issue" in this case is how to gather enough money from Shadow's wreckage to fulfill the required restitution.

CIVIL REMEDIES

The Panel began answering Judge Jensen's question on how the victims could be compensated for their losses.

Insurance Policies. Shadow carried a $10 million "errors and omissions" insurance policy. However, the policy would not be honored if the Principal were convicted. Civil Defense Counsel Topel noted that insurance companies do not insure "criminals or criminal behavior." Compensation would more likely come out of the negligence suit filed against the accounting firm, which would typically have a professional services liability policy of $100 million.

Bankruptcy Court. Acting as Referee of this debate, attorney Mel CoBen said that any of Shadow's remaining assets could be recouped and distributed among the creditors through bankruptcy proceedings. Since insufficient assets remained, CoBen would ask the court to declare the principals "alter egos" of the Shadow corporation so that their personal assets can be seized and liquidated. Regulator Black protested the costliness of bankruptcy litigation, however, stating that "the attorneys are sucking the remaining carcass of any remaining juice."

RICO Statute. Lawyers on the panel noted that the RICO (Racketeer Influenced and Corrupt Organizations) Act can be used in federal court to give a civil remedy for a criminal act. Plaintiffs may be awarded treble damages plus attorneys' fees. Moreover, RICO allows for injunctive relief; the court can freeze the defendant's assets. In the typical RICO case, the plaintiff's attorney works for a contingency fee and the action usually ends in settlement.

PREVENTIVE MEASURES

Moderator Kaplan asked the State Attorney, played by Chief Assistant Attorney General Richard Martland, how state agencies might detect business malfeasance earlier. Martland responded that the state agency can conduct annual audits, but it would need an enormous staff to audit each of the 70,000-80,000 real estate brokers in California. The state would thus have to target companies for audits by developing criteria based on known risk factors. For example, a new law requires these companies to include in their annual reports the daily cash balance of trust accounts. A seriously depleted trust account should "trigger an investigation" by the regulatory body.

Panelists Martland and Topel noted, however, that the timing of the government action can be crucial. First, if the regulatory agencies move in too quickly, they might diminish the chances of proving fraud. Second, the agencies may unleash a "self-fulfilling prophecy" by prematurely taking action that is too harsh; an investigation can hinder a company's ability to get financing through difficult periods.

Martland also recommended that preventive measures include a well-conceived public information program. Panelists agreed on the importance of educating potential victims. As the Investigative Reporter, journalist Stanley Cohen said the role of the press is to help the public appreciate the risks of investing by reporting on white-collar crimes and governmental responses.

Sociologist Jerome Skolnick stepped out of his role as the Principal to carry the public information concept one step further. If the government cannot effectively regulate industries, Skolnick suggested, it should send out pamphlets warning citizens not to rely on the state's protection (caveat: the government allows "tricky, duplicitous people" to approach you).

"As long as people want to get rich quick," Defense Counsel Hallinan remarked, con artists will step forward to sell them dreams. In this vein, Skolnick asserted that investor fraud involves the "complicity of the victim." Other panelists protested that the victim in no way consents to the fraudulent conduct. Attorneys Hayes and CoBen also countered the assumption which had arisen during the debate that victims who invest at least $100,000, as the Westobys did, are sophisticated enough to appreciate the risk of fraud schemes in the market. To the contrary, many investors are people who suddenly find themselves with $100,000 for the first time, such as widows, personal injury claimants and couples who sell their long-held homes. Like all victims, CoBen stated, these investors are entitled to government protection.

Returning to the question of protecting potential victims, Judge Jensen summarized the key components of the campaign against white-collar crime: The reaction of an informed public, along with a strong government strategy, can deter substantial numbers of these offenses by raising their cost-benefit ratio. In closing, Professor Edwin Epstein observed that identifying this ratio and other quantitative factors stood at the core of the Symposium, for future policy initiatives depend on the systematic generation and analysis of information on white-collar crimes.

SYMPOSIUM 87: TRANSCRIPTS

History and Status of White-Collar/Institutional Crime

Moderator: *Troy Duster*
Presenter: *Gilbert Geis*
Repondents: *John Braithwaite*
Peter Yeager

PANEL MEMBER DUSTER: One of my introductions to this field came when I read Gil Geis' classical work on the conspiracy in the electrical industry back in the early 60s. He would later compose and edit one of the best collections of articles in a pathbreaking book entitled White-Collar Crime. Gil has received numerous awards for his research and scholarship including election to the presidency of the American Society of Criminology.

On the matter of his paper he will, of course, tell you what shifts he's made, what revisions he's done in the last short period. But I'm going to presume that you've all read it and therefore try to keep Gil's remarks down to a bare minimum of about 20 minutes, ask the two respondents to keep their remarks down to about ten minutes each to get the dialogue going.

So, with that introduction I'd like to present Gil Geis, Professor Emeritus at the University of California, Irvine.

PANEL MEMBER GEIS: Thank you, Troy, very much. I really can't pass up the opportunity of expressing as well as two previous persons have my extraordinary sadness at the fact that Don Cressey is not going to be part of this panel. I've known him for 35 years and I very much miss and will continue to miss his crisp extraordinary intelligence and his very forceful understanding of this particular field.

My job this morning, as Troy has explained, is to take approximately 20 minutes to cover the highlights of the paper that I've written about the historical background of white-collar and institutional crime. I approached a colleague for enlightenment on how I might best employ the allotted 20 minutes. He suggested that the common procedure is to use the entire time whining about the limited amount of time that was available to cover the vast amount of material. That's very appealing, but I'm not going to do that.

I want to indicate that the paper in the preliminary distribution to you is less than half of what ultimately found its way into the survey. I hadn't known of the earlier deadline and I sent along only what had been done to that time.

I'm going to go very swiftly through the information that's in the loose-leaf book that you received, abstracting a bit here and there. But I'm going to spend more time on what's been added to the paper and then I'm going to try to attempt a summary of what the material looks like as a whole.

My prelude reference to Mr. North, of course, rather vehemently conveys my feelings; though I must say I deserve credit for resisting the temptation to describe Mr. North as oleaginous. That was a term that was almost irresistible to J. Edgar Hoover. It was one of his favorite words and he used it constantly as an attempt to depict criminals.

My point in the North material essentially is to highlight his repeated reference to his fear of criminal charges. North indicates that he was willing to suffer professional disgrace, he was willing to suffer concomitant agony, but that he drew the line when the threat of criminal indictment appeared. I'm not certain whether I ought to take what he said seriously, but as a theme I find it extremely suggestive.

I might point out to you that the situation of Oliver North is not without precedent in the annals of white-collar crime. You might note, for instance, the following quote from a 1914 report of the Interstate Commerce Commission dealing with railroads. It says:

"In the search for truth the Commission had to overcome many obstacles such as the burning of books, letters and documents, the obstinacy of witnesses who declined to testify until criminal proceedings were begun for their refusal to answer questions."

The examination, which is perhaps the longest section in the material that you've received, of the old offenses of forestalling, regating and engrossing is set out in sufficient detail, I think, in the information that you have to speak for itself.

Gilbert Geis

It says, I think, two important things: First, that there is a long and deep history of protection of the citizens of a commonwealth from exploitation through the abuse of economic power. And, second, is the quote from Sybil Jack that I want to repeat:

"The vigor and efficiency with which regulations about the distribution of scarce grain stock in the time of genuine dearth were enforced is one example of the ability of the government to enforce the laws where there was widespread recognition of the necessity to do so."

The English historical record indicates that white-collar crime was a problem of some significance well before the advent of capitalism. It was dealt with then as it is now by a coalition of forces which had a vested stake in bringing about its control. For some control and reform were essential to survival. Others saw exploitation by those stronger than themselves as unjust and indecent. They were joined in their crusade by forces, particularly in the government and in the church, which had practical historical and moral reasons to provide support. The clash of strengths in that time never came to a definitive conclusion. Ultimately, it was a changed world that made these particular matters, the marketplace offenses, anachronistic.

But what remained was a fixed ethos. However much it waxed and waned over the centuries, that ethos demanded that marketplace forces should and could be monitored.

When industrialism arose then — if the thesis that I'm setting out prevails that marketplace control was characteristic of early periods, indeed as far back as Roman times — what eroded the traditional position and in such terms what can be said to underlie its re-emergence today?

One answer, it seems to me, lies in the fact that with the advent of industrialization and the appearance of the large corporation, methods of infliction of damage upon citizens became much less direct and comprehensible. Structural arrangements for dealing with both street and white-collar crime were slow to adjust to the new conditions. Conklin noted, for example:

"In Great Britain in the eighteenth and nineteenth centuries urbanization and industrialization created a kind of frontier, a transition between social forms."

In regard to corporate wrongdoing, responsibility became more difficult to locate and to pin down. Besides, the newly-formed corporations demonstrated a striking ability to restrict access to potentially discrediting information and thus to mystify the precise nature of their activities.

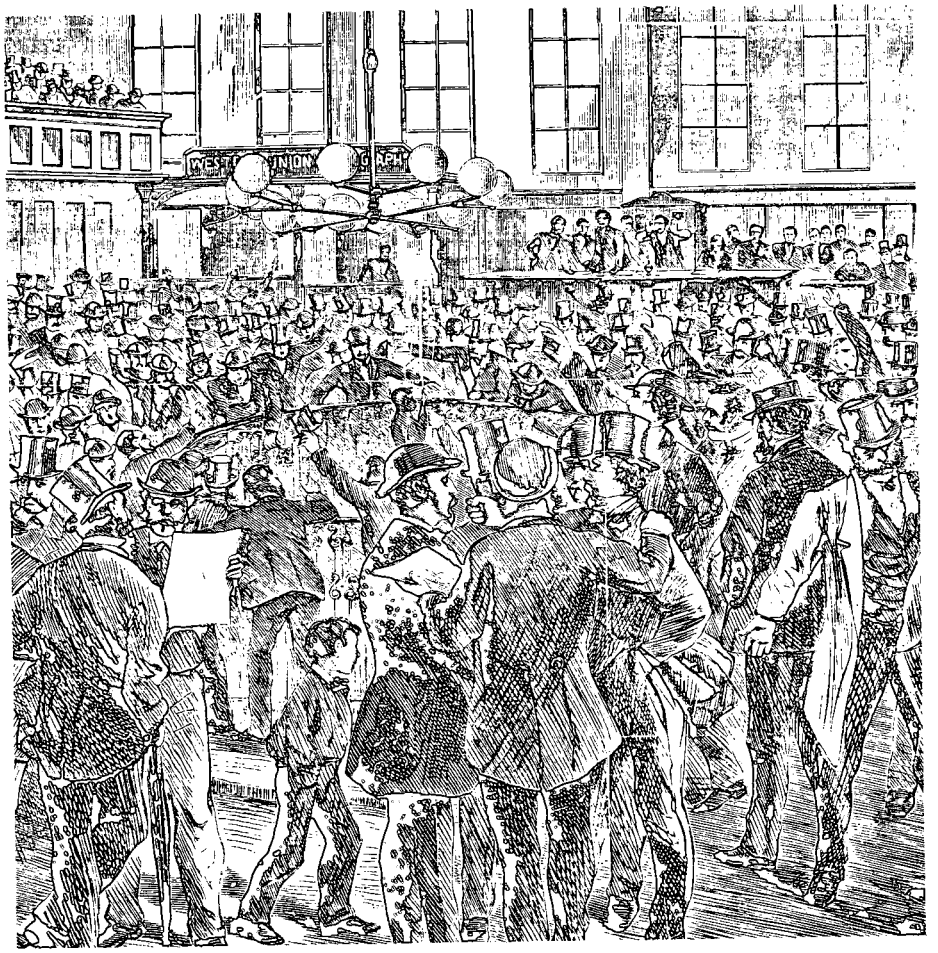
I think that what was basic to the history of institutional crime besides industrialization was not the appearance of capitalistic modes of production and the endemic conflict over whether laborers obtain their fair share of the surplus value. The significant element to me was the rise and fall of a public sense of justice and an ensuant mood of moral indignation, plus, of course, the appearance of routes toward reform.

It took, I think, more than anything else the achievement of widespread literacy and of large circulation mass media to bring the newer subtle and insidious kinds of abuse into the ken of the people and, ultimately, to that of the legislators. So that today, for example, in Fortune magazine Ross can say flamboyantly, "Crime in the executive suites has come to command media attention of a sort formerly reserved for ax murders."

James Reston, who you may know wrote his farewell column this summer, put it another way in the New York Times. "Officials are no worse today than they used to be, but the reporting is better."

The corporation, begun as an efficient tool employed by individuals in the conduct of private business, became an institution with enormous concentration of economic power that at times and for a time allowed it to totally dominate the state. The escape of a corporation from legal reins allowed it to exercise vicious untrammeled exploitation during the period running roughly from 1770 to 1870. It was only as we turned into the most recent century that pre-existing doctrines came into play to provide a basis for harnessing corporate power and for moving toward restoring the interests of the community to a more central position.

In Roman times, when the idea of a construct such as the corporation was first



given legal birth, lawyers had strongly warned about — and I'm quoting — "keeping the corporate form under lock and key." To this end they established what often has been the most significant restraint, the doctrine that corporations can be created and exist only under charter by the state. The Delawarization of corporate control could vitiate the efficacy of this structural arrangement, but its unquestioned legitimacy and its potential as a lever for control are vital to understanding the history of institutional crime.

That corporations got so unconscionably out of control for a century or more and in some views still remain much too powerfully arrogant and unchecked has been traced by Holdsworth to a paradoxical situation:

"They would have continued to increase more rapidly," he says of corporations in the early period, "and in consequence the law on this topic would have developed much more quickly had not the legislature as a result of the episode of the 'South Sea Bubble' deliberately made the assumption of the corporate form difficult."

Chris Stone makes the same point in what I think is an argument worth quoting. He says:

"The pre-eminence of corporations. . . is a state of affairs that the law inherited, but unfortunately did not plan for. When much of the law and political theory was taking shape, there were identifiable humans operating independently of complex institutional frameworks who did things that it was possible for the law to prevent. The law responded with rules and concepts concerning what motivated people and what was possible, just and appropriate toward them. The size and structure of early corporations were so unprepossessing that when a wrong was done, it was usually not hard to locate a responsible individual, a culprit, and to apply the sanctions of the law to him."

The South Sea Bubble, I might point out, was an early 1700 case. It involved the manipulation by a British monopoly of trading in South America. I might add that the famous historian Edward Gibbon's grandfather was central to that affair. He managed to sequester an ill-gotten fortune beyond the reach of the court's fines, which I take as fairly prototypical.

There's another section on the paper that just opens up momentarily — and I shan't do more than that — the issue of the phenomenon of equal justice under law. The argument is made very tentatively that that dictum is enormously favorable to the corporate form and that equal justice under law in many ways can be a very deceptive and very complicated and arguable concept.

I might add that Ken Mann in the recent book on white-collar crime argues and suggests dilution of the Fourth Amendment in the context of white-collar crime investigations. That's essentially where I'll leave the subject for a moment.

Ultimately, in terms of reform a good number of people — Teddy Roosevelt, Brandeis — called attention to what I would call the maleficent misdeeds of railroad magnates. Again, I'm trying to skip fairly hurriedly to the reform movement. These magnates were seemingly larger-than-life individuals who became known as the Robber Barons. The railroads epitomized the whole reform movement. They were the first big business and they made other big business possible and necessary.

Rubin, for example, recently remarks, "In one way or another every new economic disruption that arose was linked to the railroads and their practices." Those manipulations, I might add, were aided by an 1886 Supreme Court decision which applied to the corporations the protections

guaranteed to individuals by the Fourteenth Amendment; which, of course, had been enacted in the wake of the Civil War.

The attitudes of the railroads I will simply transmit to you by one of numerous quotations which appear in the paper. This is George Baier, who was a spokesman for the railroads. He says:

"The rights and interests of the laboring man will be protected and cared for not by labor agitators, but by the Christian men to whom God in His infinite wisdom has given the control of the property interests of this country."

You might be interested in a very brief excursion about the Central Pacific Railroad because it's so local and really almost nostalgic.

In the Far West by 1869 four men, whose names still ring notoriously and famously in California — Collis Huntington, Leland Stanford, Charles Crocker and Mark Hopkins — had gained control of the Central Pacific Railroad and in many ways — in fact, I'd say totally — the economic and political destiny of the state of California. The leading newspaper in California called the Big Four, as they were known, "simply cold-hearted, selfish, sordid men."

The four had come together to plan the building of the railroad in a meeting that took place over a dry goods store operated by Huntington and Hopkins at what now is 200 K Street in Sacramento. All four were local merchants. Huntington, who was later their leader, was notorious for tactics such as sailing out to meet boats in the San Francisco Bay, buying up goods, then withholding them from the market until he could obtain a scarcity-dictated price; which, of course, if you noted the paper, is the old forestalling tactic. Later Huntington would set and rearrange railroad carrying rates at virtually extortionate levels, calculated exquisitely to a point where the shipper could realize only enough to sustain himself.

The character of the railroad builders and Huntington particularly was very aptly summarized by a description of Huntington in two words. It says he was a man who was "scrupulously dishonest."

The renaissance then of the reform movement regarding economic abuses began with the control of the railroads in the early 1900s. It's been noted in some detail in the work of Bellah and his colleagues. They find a strong reformist impulse in America directed against the dominance of business leaders and the rule of technical experts to have taken place during the transitional period at the beginning of the century. The reforms arose, Bellah insists, from "a fundamentally similar political understanding, an animated agrarian populism in the Midwest and Southwest, some aspects of progressivism, and an upsurge of industrial unions in the 1930s." I've got some further long quotes on that which I will spare you.

In an elegant analysis of the drive to check the corporate power, McCormick, in what I still think is the best review of the period, notes that 1904 to 1908 saw the appearance of the muckraking years not only in terms of articles in national magazines, but also in regard to local newspapers and legislative halls across the country.

McCormick notes that in 1905 governors throughout the Midwest suddenly let loose denunciations of corporate bribery, lobbying campaigns and free railroad passes. In Nebraska, where, as you may have noted in the paper, the term and concept of white-collar crime would incubate in the mind and soul of a future renowned sociologist — of course, Edwin Sutherland — the governor attacked "the onslaught of private and corporate lobbyists who seek to accomplish pernicious ends by the exercise of undue influence."

Ultimately, there were four possible conceivable solutions, which are outlined in the paper. The one that was to prevail, of course, was the recourse to regulation and administrative remedy.

The regulatory system primarily was created not in terms of a systematic analysis, but rather as a response to a series of disasters. Ralph Nader cynically observes that the corporate world has shown — and I'm quoting — "a greater absorptive capacity than Mandarin China and more resilience than the Vatican." Corporations yielded, he notes, only when forced to. Along the way Nader believes any real reform came only from disasters. By and large, I think, so it did.

In terms of the review of Sutherland, which is the concluding part of the paper that you have, I would only emphasize the strain that has existed between lawyers and social scientists which is highlighted in that review.

I also have a quote from E. B. White which I think indicates that Sutherland was not alone in comparing the tactics of the corporations to the tactics that occurred in Germany during the Nazi era when they were both writing. E. B. White, for example, who you remember was a New Yorker editor, in 1938 wrote of moral fraudulence in the behavior of Americans, and thought that our advertising bore a, quote, curious resemblance, to the propaganda that sold Naziism in Germany.

I will not go through the review of the twists and turns of academic concern for white-collar crime. That, too, is outlined as fully, I think, as needs be or as I could in the material.

I did want to add a personal note. You may remember that I mentioned the McCarthy period as putting a damper on white-collar crime study and investigation and I wanted to add a personal footnote to that.

In 1953 I gave a talk in Oklahoma where I argued against the deterrent effect of the death penalty. The Associated Press attached a summary of my remarks to a dispatch about an execution that had taken place the same day in Jefferson City, Missouri, of a man involved in a particularly grisly child murder. Both I and the president of my university were deluged by letters which it seemed to me were obviously inspired by the tone of the period.

I still have one and I dug it out and thought I'd read you a little bit of it. "Since you have expressed your communist views," it started out, and it continued with a diatribe against Alger Hiss, Harry Dexter, White and Harry Truman and ended with the observation — again I'm quoting — "it's a disgrace to our institutions of learning that they are festered with red hypos."

That was one of a very large barrage of letters that essentially took the same theme. What I'm trying to recreate for you — and, of course, I can't do it in so brief and cursory an analysis — is the mood of the times as it bore upon the investigation of white-collar crime and concern with the subject.

The last line I've written here is that the experience made at least one young, expendable assistant professor reflect seriously about his research priorities.

Let me read the conclusion then, which attempts to tie up some of the themes that I've addressed.

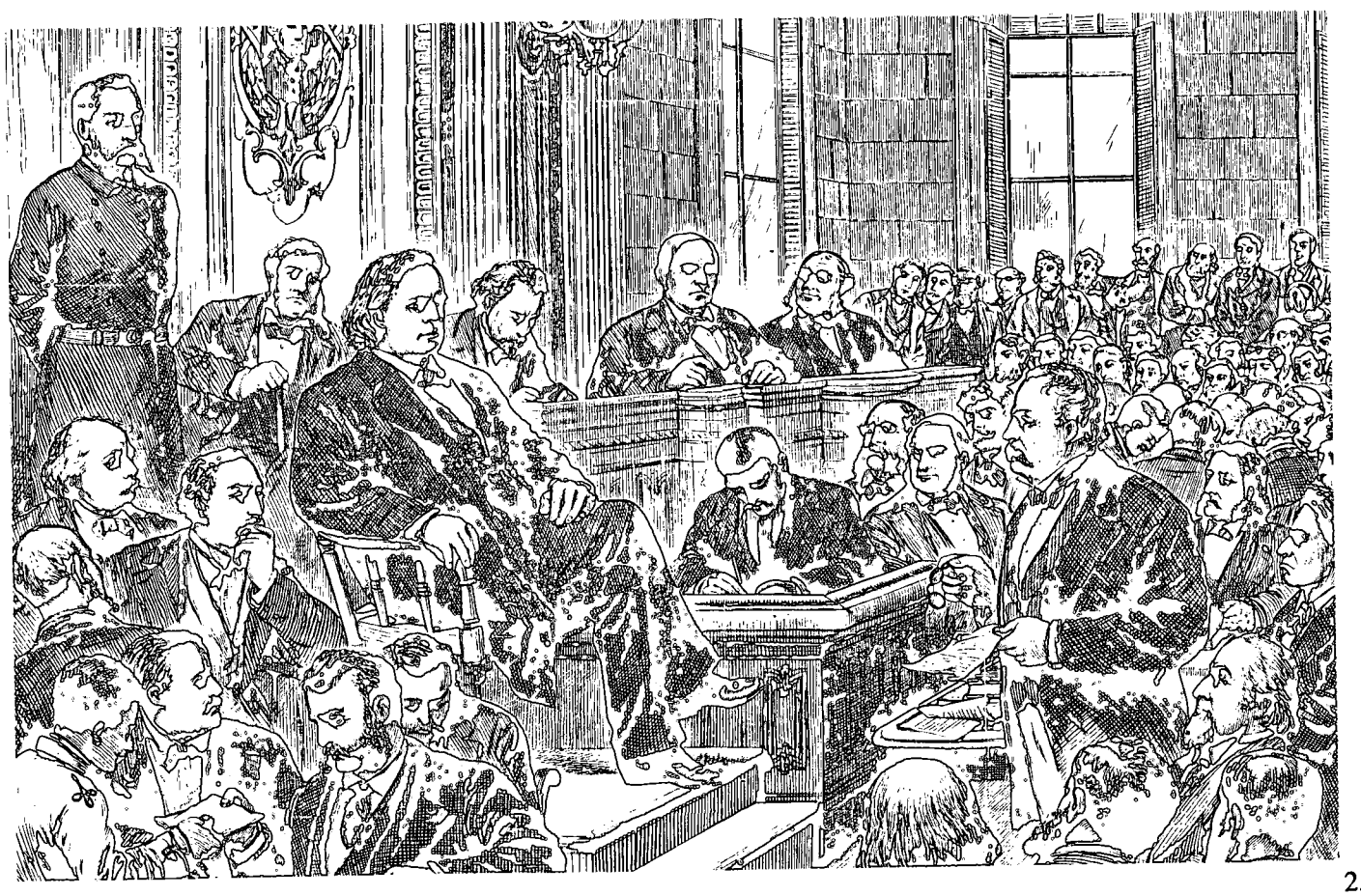
No political entity can exist without the forbearance of its citizens. Such forbearance can be stretched to inordinate lengths by tactics of oppression and disinformation. But it is not infinitely or indefinitely pliant. That is one of the lessons offered by the history of white-collar and institutional crime.

The record further suggests that unharnessed power is not to be trusted, at least in social systems where the desire for personal gain and the opportunity to secure such gain at the expense of others is readily available. Human beings, particularly with strong organizational force behind them, are much too artful in constructing benign, personally lulling explanations for evil actions to be allowed to operate without scrutiny and checks.

It seems essential that efforts need to be directed toward encouraging countervailing centers of power so that the aggrieved and the victimized have access to influential champions of their cause; be it in the courts, the Legislature, the executive or in the forum of public opinion by means of media attention or from other competing forces.

In this sense the symposium here today at Berkeley represents the kind of public spotlight that is essential to efforts to disseminate information and ideas that can serve to inhibit and control the abuse of power that typifies white-collar and institutional crime.

It is in this sense, too, that the views of Supreme Court nominee, Robert Bork, decently and intelligently held, seem to me to be the most threatening. By abdicating responsibility to the legislature as the elected officials, except for the very narrow confines of explicit constitutional statement and judicial courtesy to precedent, Bork virtually removes from the contest one of its major forces. Constitutional democracy, as I understand it, means more than anything else that the will of the majority shall not prevail if it conflicts with the basic spirit, not the specific century-old doctrines, of free society. Totalitarian rule may be



notably benign. Its horror is that it possess unimpeachable power to impose its decisions arbitrarily.

I had not expected when I set out on my excursion, the perlustration of my title, through the historical background of white-collar crime, to discover so much emphasis on the vital role played by particular reformers in the arousal of public outrage and the outlawing of exploitative practices.

I suspect that, unfortunately, it is correct that it often takes an awful tragedy to coalesce reformist impulses. But that such impulses can and often have been aroused indicates that there exists a reasonably strong sense of fairness to go along with their self-interest in protecting themselves in the bulk of the people that can be enrolled in crusades to control white-collar crime.

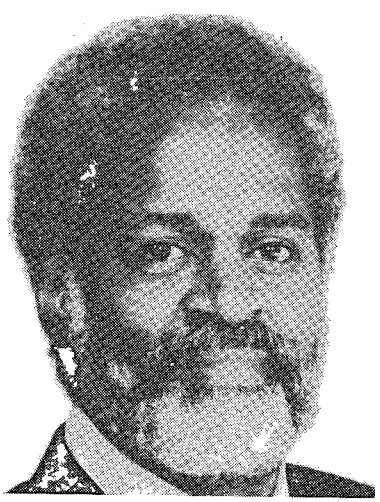
The record of scholarship on white-collar crime indicates rather clearly how closely academic work can parallel political and social climates.

Sutherland, who thrust sociology into the study of white-collar crime, was a child of populism. Thereafter the ebb and flow of research and theory regarding institutional crime was largely dictated by the priorities of the federal government and the spirits of the times, themselves interactive. Yet individuals occasionally nudged the academic agenda a bit in one direction or another. Lloyd Owen, for example, inserted a review of white-collar crime into the brief of the President's Commission on Law Enforcement and Administration of Justice in the mid 1960's, resurrecting academic concern and ultimately bringing back to work on the subject eminent scholars such as Clinard and Cressey, who had moved on to other subjects after initial scholarly work on white-collar crime.

I appreciate that it is necessary to be wary about generalizations based on so brief and selective a survey of so variegated phenomena as those which deal with white-collar crime. Nonetheless, I read the record as indicating the establishment in early times of solid ideological and legal foundations toward the control of business power. At moments this control has been and is muted by the overwhelming and inaccessible positions of the progenitors of exploitative behavior, such as when the corporate form first proliferated.

In all, the situation with regard to white-collar crimes seems much as it is in regard to race relations in the United States — a good deal better than it used to be, not nearly as good as it ought to be. Even that judgment is arguable, of course. There are those who believe that what I find to be improvement is merely cosmetic. I remain, however, persuaded otherwise.

I had not expected to find more than small increments of change over long stretches of time. That the record reflects such change and that overall it is for the better seems to me to be truly encouraging.



Troy Duster

PANEL MEMBER DUSTER: Thank you very much, Gil. Our first respondent is John Braithwaite. John tells me that there's now a direct flight between Sydney and San Francisco. That's 14 hours of flying. So, it's cruel to give you about seven minutes to respond. So, I'm going to make it ten.

John is a Senior Research Fellow at Canberra. He is, I think, fairly described as one of the most important contributors to the study of corporate crime in the English-speaking world. His two major publications in this area are pathbreaking and he's one of the premier contributors to this field. John Braithwaite.

PANEL MEMBER BRAITHWAITE: Thanks, Troy. We've been treated to an erudite and stimulating paper by Gil Geis. It struck me as he was discussing in the paper the history of criminological concern about white-collar crime that there was a major omission. He talked of the central role of Sutherland and of Sutherland's students, most particularly Don Cressey, and then went on to discuss the 1964-75 period as a period when white-collar crime research went into the doldrums.

But it wasn't completely in the doldrums, because it was Gil Geis who kept a flickering flame of white-collar crime research alive during those years; kept it in the criminology textbooks so that when in this country, post-Watergate, there was a new boom of enthusiasm for white-collar crime as a research topic, there was a very strong tradition within criminology that Gil Geis had helped nurture through many wonderful articles during that period.

Gil begins by asking the question: What are the conditions that caused medieval peasants successfully to demand reforms rather than starve to death gracefully? He's led to then ponder about the social conditions conducive to a mood of moral indignation, the importance of scandal. In the written paper he illustrates, for example, with coal mining disasters being the trigger for reforms to enforce safety laws.

There was a paper in the International Journal of Health Services recently by Daniel Curran in which he said, true, reform has been something that's followed in that particular industry from disasters; but we should wait a minute and ponder the fact that most disasters did not lead to reform. So one needs to look more intricately at the processes of legal reform.

As another condition, Curran draws attention to economic factors, to the

proposition that during periods when coal was in great demand and there were great costs to the industry from worker resistance (e.g., strikes over safety matters) there was a willingness of capital to respond to reform movements through granting change. Obviously in periods when miners were being retrenched, the reform efforts arising from disasters could be successfully resisted. We haven't adequate data to thoroughly assess that proposition, but I suspect that might be an important elaboration to the analysis.

Moreover, Curran argues that even when the reform does occur — citing Edelman — the reform is often symbolic, that concentrated interests (in particular, capital) are able to secure tangible rewards; whereas more marginalized interests such as coal miners tend to secure symbolic rewards that don't really change the level of safety in coal miners.

It seemed to me that that latter part of the analysis was overstated. Because even in the United States where coal mine safety regulation is perhaps done less adequately than in most other countries, it is nevertheless true that the reform that has occurred has been much more than symbolic.

Yet all of that leads us to the need for a theory of scandal and reform. The basic point is right; most scandals are one-week wonders. Larry Sherman's work on police corruption scandals was, I think, seminal in that regard in suggesting that while scandal can produce reform, reform will not happen unless some policy follow-through is institutionalized. What is required is that someone pick up the ball and run with it through the policy process.

John Braithwaite

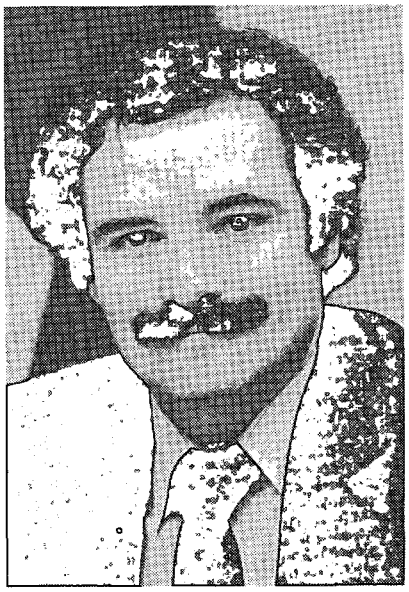
If I can perhaps manifest my unsophisticated understanding of American football and suggest that when scandal occurs, a lot of the defenses get knocked out; but the defenses to reform being down doesn't mean that anything will happen unless there's the capacity of someone to pick up that ball and put it over the try line. You know what I mean.

PROFESSOR WHEELER: Close enough, John.

PANEL MEMBER BRAITHWAITE: Indeed, the work that Brent Fisse and I did on corporate scandals led to very similar conclusions. We think about the very considerable successes that Ralph Nader has achieved. Many failures as well, of course. But I think we can study the successes in terms of a scandal being generated, and scandal in circumstances where a program of reform had been formulated in advance, a program ready to be put on the table and steered through the convoluted policy process to secure reform.

I was impressed by an article in Law and Policy in January of this year by Laureen Snider in which he argued that struggles waged in the community by trade unions, the consumer movement, the environmental movement often achieve real reform by forging change at the ideological level. Adverse publicity over corporate crime can gradually insinuate a redefinition of reasonable business behavior. Shaming of business misconduct can raise the price of legitimacy for corporations by lifting the standards of corporate behavior necessary to secure public acceptance.

So that when these struggles secure victories in the court of public opinion, if business wants to avert a legitimation



Peter Yeager

crisis, new limits on the tactics that are acceptable in the pursuit of profit are required. So that to quote Snider, he says:

"Thus, while ideological structures reinforce the cohesion of the dominant class in most instances, this cohesion does not come without a price. Class and right struggles, by increasing the price the dominant class must pay for legitimacy, create interstices within capitalism whereby meaningful and beneficial change can occur."

It follows from Snider's analysis that even where scandal does not produce public reform or where the public reform is symbolic rather than real, it might still produce valuable private reform.

All of this, it seems to me, opens up exciting new directions for where we might go with white-collar crime research. We need to engage in some lateral thinking about new paradigms of social control and that in the years ahead, all the indications are that that thinking will blossom, and indeed has begun to blossom, and we'll have a generation of white-collar crime research that won't be just pursuing the old well-worn tracks.

Thinking about Snider's point about scandal impacting at the ideological level rather than necessarily at the public reform level opens up the need to study private justice systems, the need to study self-regulation and how that interacts with public regulation. That work has substantially started.

Susan Shapiro's work on the sociology of trust is example of manifestation of the kind of lateral thinking that's needed. The interplay between litigation and negotiation, Al Reiss' work on deterrence and compliance regulatory systems, punitive social control versus moralizing social control. (sic)

It's not a question of making either/or judgments between alternative paradigms of social control. There is a synergy between them. The nut that we've got to crack as white-collar crime researchers is to understand the mechanics of how that synergy is played out. When is it that punitive social control underwrites moralizing social control and how can it be that moralizing social control can make punitive social control more effective, for example.

So, it will be an exciting time to be working in this area in the years ahead and we can learn from the history of scandals which succeed and fail in controlling the abuses of the marketplace.

So that Gil's paper, I think, heads us off in the right direction — in the direction of learning lessons from history about the possibilities for new paradigms of social control being exploited in the future.

PANEL MEMBER DUSTER: Thank you. Our second respondent is Peter Yeager, Boston University, who's written two major works on the topic including co-authoring the standard work with Marshall Clinard on corporate crime. He is now working on a third book on environmental regulations and the business community. Professor Yeager.

PANEL MEMBER YEAGER: I thought what I would do was respond to ideas that Gil's paper brought to my mind regarding the area of white-collar crime research, although my own interest has been more in the area of regulation and law recently. So I thought what I would do was talk about the ways in which the concerns for regulation have evolved in our research for the last decade and some of the implications of that.

Criminology has always been an applied discipline — that is, all the criminologists I've ever met have entered the field with a view toward solving problems of crime rather than creating theories for theory's sake. One of the major benefits, nonetheless, of this resurgence over the last decade in white-collar crime research in the academy has been a growing investigation of the role of law, in terms of both theory and practice. Whereas conventional criminology had for a number of years, it seems to me, left the law behind and assumed law as a relatively non-problematic entity, much of the research in the white-collar crime area has found law to be quite problematic indeed.

One of the issues that Gil's paper suggests to me has to do with the cycles of regulatory passion historically. As he takes us back to the Old Testament and brings us to the future, we see that the clamor for social control of identifiable harmful business behaviors comes and goes.

Another note in his paper, if I read it correctly — and I think I did — suggests something interesting as well as historically: When peasants were starving and market constraints at law were thought necessary to control producer and distributional behavior for these commodities that people needed to survive, the state indeed regulated the market in these initial attempts, but it seemed to more stringently regulate the riots that were occasioned by the hunger. The criminal prohibitions, therefore, weighed more heavily on the peasants than on the producers. That's another reality that seems to recur more often than not.

Now it seems to me that business historically, from Biblical times to the present, has always been viewed ambivalently. We have a two-headed enterprise here, I think, that's lodged in the very nature of competition, long recognized as carrying the potential for both great social good and social ill.

It reminds me of a story some of you may have heard. I picked this up from business school colleagues, a story of two business partners going on a walk in the woods, taking a day off, all decked out in their hiking boots. They come upon a bear in the woods who spots them and becomes very menacing. The two men freeze for a moment. One of them, though, quickly drops to the ground and changes from his hiking boots to the tennis shoes he was carrying in his backpack. The other turns to him in astonishment and says, "What are you doing? If the bear charges, we can't outrun it." The man with the tennis shoes says, "I don't need to outrun that bear, I only need to outrun you."

Competition spurs perhaps the greatest of human accomplishments in many spheres, but it also brings out ill in some endeavors as well. So the large social question before white-collar crime researchers as applied practitioners, and certainly to the legal community, is how to save the beneficial aspects of competitive enterprise while forestalling the other.

Of course, the question beyond that is: What is the other? How do I identify the harmful outfalls of otherwise useful competitive behavior? Ultimately, that's a philosophical and a political question.

The other image that jumps for me out of Gil's paper is this notion of the evolution of regulation over time. Not in terms of cycles of passion necessarily, but in terms of precisely what is regulated. I would characterize it as having been historically a transition from the politics of markets to the politics of production. The evolution in law in that way reflects structural developments, I believe, and economic arrangements.

Historically, the law, as Gil's paper points out, was concerned in the white-collar crime area with systemic market matters. That is, with the way in which the market was structured over the ways in which participants should behave if the market was to be efficient and if community peace was to be ensured.

So responding to competitive relations, what we call economic regulation in the literature, seemed to be the first impulse for white-collar crime regulation. Also, on occasion, acute political crises were able to bring about changes in law. The Pure Food and Drug Laws in the early part of this century were occasioned by certain sociopolitical crises that were also market-related crises. Because as some analysis has shown, an important reason the federal government got into the business of regulating meat was because European markets were collapsing for large American producers. So this law became a market protection device as well as a consumer protection device.

We tend to see the early regulation being market directed. In recent decades, in contrast, we see an increase in social regulation which attempts to address the more chronic effects of harmful business behavior. We see this in the

environmental and in the occupational safety areas, for example, where we're talking about the politics of production now and not the politics of exchange; how material is produced and distributed, how it affects workers and other citizens in its production.

I think that while we have seen a decline in the area of social regulation over the last several years in many venues, we can expect to see greater attention to it in the future. For example, in a paper we'll hear later in these discussions about the way in which prosecutors handle the various kinds of white-collar crime, occupational safety and health enforcement lags behind even environmental regulation, which lags behind market regulation to some extent in the present climate.

But I think occupational safety and health is going to experience a resurgence in political and prosecutorial interests as the way in which American workers produce goods becomes ever more important in the world market. Which is to say that we're going to be needing ever-more skilled and fewer workers to produce goods, and those skilled and fewer workers are going to be paid higher wages to produce refined goods. They are going to need protection if the market is to be stabilized and those goods are to be well-produced without labor disruptions and the rest.

So, as I mentioned, we've had a period of deregulation the last several years that has been of concern to many people who do research in this area. But, if nothing else, the period of deregulation has suggested this to most of us: As in cases of earlier lawmaking, the evidence is that businesses can't self-regulate themselves without a legal constraint. They need something to make the playing field even.

Current research that I'm involved in regarding the ways in which managers make decisions regarding laws and ethics suggests to me that even in the most well-intended companies — and those are the only companies who will let us in to do this kind of research, so we have a biased sample to begin with — even in the most well-intended companies the pressures to violate fairly important laws are immense. Indeed, interviews that we've done with CEOs all the way down to first-line supervisors suggest that these tensions often result in violations, violations that well-intended folks in good companies are willing to admit to interviewers.

We've been interviewing in a large bank and in a large high-tech multi-national company, and found that in both cases, the pressures of the equity markets, the stock markets, lead top managers, for example, to misaccount funds as profits when they should be accounted for as expenses and those sorts of things; clearly violations of law. So we need some sort of constraint other than market forces.

It brings us to the question of the politics of law, and I'll end on this set of remarks. The law is, of course, as Attorney General Van de Kamp indicated, subject to shifting political winds and interests. Gil Geis' paper mentions the dialectic between information, moral indignation and the concern for white-collar crime. Of course, that's quite true that information has brought to public attention the harms done by certain unscrupulous business folk and the need to regulate them. But there are substantial barriers to fully-informed debate on this topic, which is one of the key values of this conference, I believe, to open up some of those barriers. I'll just tell you about some personal experience that we've had in this.

When Marshall Clinard and I did the study in 1979 for the Justice Department, studying the infractions of the Fortune 500 corporations in this country, the Justice Department prepared a large press release when the project was finished and went through two to three weeks of negotiations with us on the content of this press release to be distributed to all major news media. We were, of course, pleased about that.

Once the press release was finalized we waited two to three days expecting its imminent release. Whereupon we received a call from the Department of Justice liaison with whom we were

working, who notified us that the Department of Justice in the fall of '79 was going to quash the release. It was not released to the mass media.

I asked why and my contact said he didn't know why. The National Institute of Justice was very pleased with the report. They were eager to have it disseminated, made publicly available and all the rest. But from on high, at some level which he was not willing to identify to me, it was decided that the government was not going to advertise that it had sponsored this research after having spent a quarter of a million dollars funding it; a form of white-collar "crime" of some sort perhaps, but not technically, of course.

Only one newspaper in the country picked up on the fact that the Justice Department had made the decision in effect to sit on the document, publicly speaking at least. The Washington Post, with an investigative reporter, produced an article on this fact. The article itself was buried on page 16 in a series of advertisements in which you had to look very carefully to find out that there was an article even there.

So it seems to me that there are substantial barriers to communication for fully-informed public debate about these fundamentally political and philosophical questions as to what kinds of behaviors we want to identify as worthy and necessary of control and as to precisely what controls we are going to exert. So that while we have seen a net increase in consumer attention to such problems and certainly labor's attention and the law's attention to such problems, we still, I believe, do not have fully-informed debate on these questions.

Regulation is also subject to shifting political winds. The Reagan administration has not been completely absent of white-collar crime regulation, but it's interesting to point out and to think about the kinds of regulations that have been enforced. The insider trading, the defense contracting and the bank secrecy laws have garnered most of the enforcement resources and the attention in the media. All of them, I think, can be explained as the kinds of regulations that fit particular political interests; in the case of insider trading, a very important area of white-collar crime, the sanctity of fair market information for investment and trade. Defense contracting crime clearly involved a legitimacy problem that needed solving given the high levels of defense spending amidst large budget deficits. The Bank Secrecy Act enforcement is connected to the enforcement of organized crime laws.

Finally, law has another set of traditions that it needs to confront when it tangles with white-collar crime. As Gil's paper suggests, the law typically has been more comfortable with areas of identifiable harm and identifiable offenders, individuals who could be prosecuted.

In research I have had experience with at EPA, I came across memoranda in which Justice Department and EPA did battle over the question of what kinds of water pollution cases would be criminally prosecutable. Under the 1972 Water Law, if a company was in flagrant violation of its dumping permit, it could be criminally prosecuted. No showing of harm was necessary.

It turns out that the Department of Justice, even in a period of relatively stringent regulation in the middle 70s in this country, was denying prosecution of these cases to EPA because there was no demonstrable harm. They said, "we admit that this company is in flagrant violation of its permit, but unless you can show us harm, we don't believe as a matter of fact that we can carry forth a successful prosecution. That is, if the pollution dissipated, we don't *think* we can make the case."

So even when the Congress wrote laws that had elements attempting to deal with the thorny problems of harm and evidence and all the rest that often plague white-collar crime cases, the Justice Department was clinging to certain legal traditions and denying prosecutions of cases at that point in time.

Again, I will conclude only by saying that I think forums like this are vital. This is the first such forum of its kind that I

know of bringing together policy makers and academics for dialogue and debate and I think this is probably a key starting point that may help kick off a new resurgence in this kind of discussion. Thank you.

PANEL MEMBER DUSTER: I'd like to open the floor with some guidelines. First of all, we welcome commentary, not just questions. This is not seen as a question-and-answer period where the panel has expertise and those around the table are raising issues for us to respond to. So, my first guideline is feel free to comment.

Secondly, for the court reporter, as I indicated in my opening remarks, please state your name. Just raise your hand and I'll recognize you and then you can use one of the many microphones around the tables.

Gil Geis will have a chance to respond in this period, but he's waived his immediate response. So the floor's open.

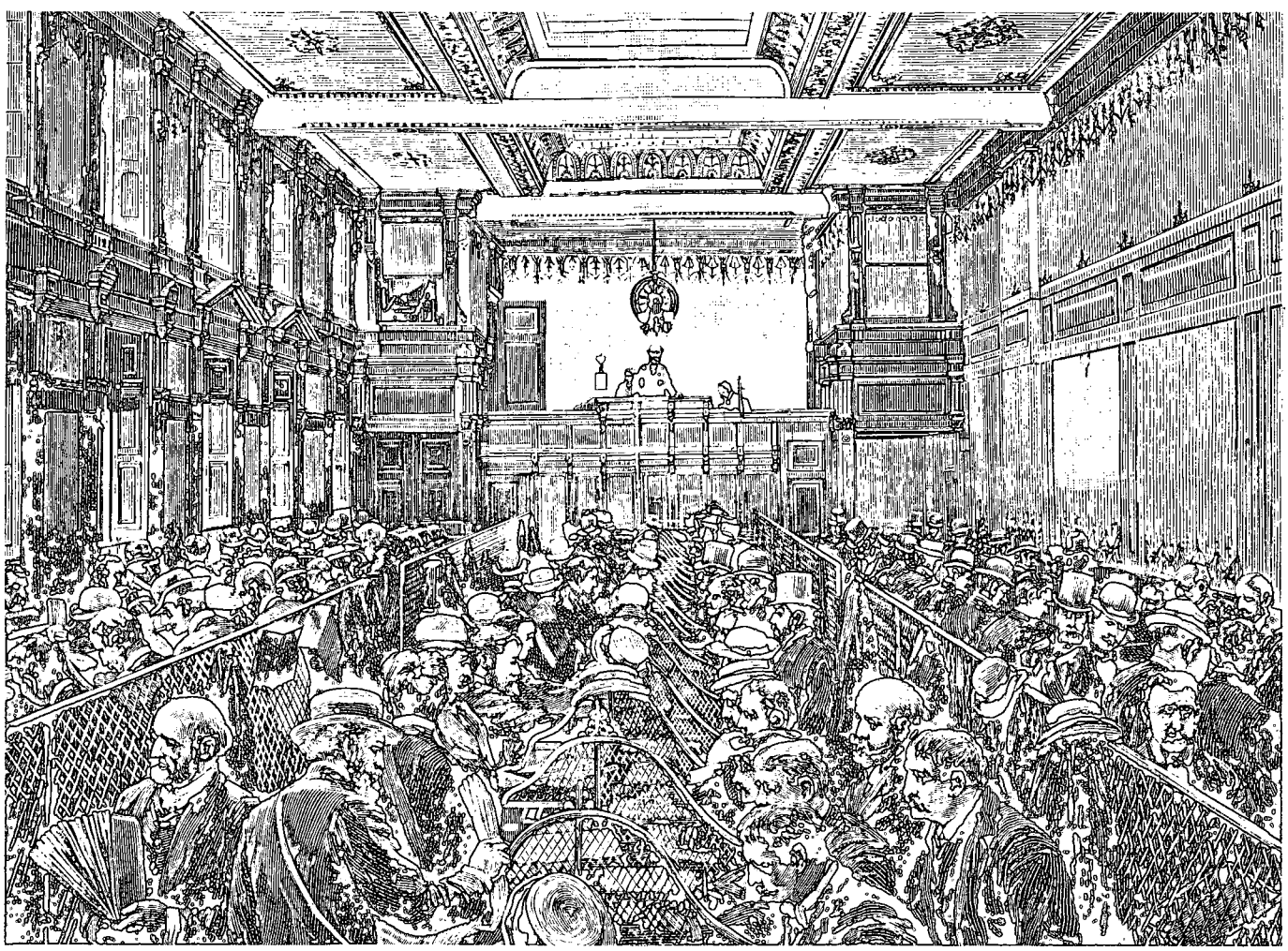
PROFESSOR KAPLAN: I'm John Kaplan, professor at Stanford.

I come at this from having done a lot of work in the drug area. There are a number of interesting things about this. One is that in that area very often what seems to be sociological, legal and in that case medical discourse, is in fact political discourse and that again and again we find moral judgments disguised as medical judgments. Here we find moral judgments disguised as economic judgments.

It's a great irony to my mind that, for instance, the economic arrangements often that were regulatory or reformist, I think by most people's idea, did more harm than good.

In other words, the concept that all reform or regulation is good flies in the face of century-long efforts to enforce the concept of a just price and century-long efforts to prevent the charging of interest which, I think, with the hind-sight of economics, we know did a great deal more harm than good.

The other aspect is the moral tinge of the arguments. I just copied a couple of words that Gil was using — unconscionable, arrogance, comparisons with the Nazis and the McCarthy era. That strikes me as a kind of moral passion. The same kind, by the way, that you hear in the drug area.



Finally, you have the arguments that we in the drug area — that in order to do the job, you've got to get rid of protections. There are people hiding behind the search and seizure laws and, therefore, the constitutional protections shouldn't apply to people involved or accused of some drug offenses. I heard the same thing.

It seems to me there are a couple of things that we should be looking at. One is fraud. I understand fraud. There isn't that much political contact in fraud. I mean, there's some. It's impossible to get out of it.

The second is the thought that we should look at organizations rather than corporations. The concept that corporations have the most power in the United States — I would say government has the most power and I would say that in fact whether or not government would ever bother to pass a law making its own actions criminal — sometimes they do, sometimes they don't. It's always been interesting to me that the exceptions to the fair hiring law are always put in with respect to government. The Congress is not involved and is not subject to all kinds of laws. But I would say, for instance, in the San Francisco Bay, there's no doubt that the biggest polluter, at least when I last looked, was the City of San Jose, not any company.

So I would look at — apart from fraud, I'd look at organizations in general — government, labor unions, nonprofit organizations. It's always interesting to me that the concept that unharnessed power is not to be trusted is wonderful except when you want to apply it to the Supreme Court. When somebody says, well, I want to harness the power of the Supreme Court — don't get me wrong. I have my own views on this. But when somebody says, I don't think the Supreme Court should be so powerful as to override the judgments of elected officials, suddenly we want unharnessed power. If you try to harness it, you get into trouble.

So my guess is that if we look at organizations, fraud and a couple of other little things, we'll do a lot better in terms of thinking straight about this than if we involve ourselves in mostly political kinds of decisions. Though there is, of course, some politics.

PANEL MEMBER DUSTER: Barry.

MR. KRISBERG: I'm Barry Krisberg. I wanted to ask Gil a question of significance to our organization which has to do with sentencing patterns with white-collar offenders.

This is always a hot issue and white-collar offenders are often perceived to receive lesser sentences. They're often the consumers of alternatives to incarceration that was created for often other kinds of offenders. Could you comment on how the use of sanctions has changed over time with the white-collar offenders?

PANEL MEMBER GEIS: Stanton Wheeler has got a book coming out, I suspect, on that particular subject. He really knows a good deal more about it than I do. I really ought to pass that question on. He wrote a classic article on the sentencing of white-collar.

Is that unfair, Stan?

PROFESSOR WHEELER: Partially unfair, but partially fair. I'll just talk about it for a moment. I am going to talk this afternoon, but not really about sentencing patterns.

I have been involved in a long-term investigation of federal sentencing, not state sentencing, of white-collar offenders and we do have a fair body of data on the sentencing of those offenders relative to a very narrow sample of common crime defendants, non-violent common crime defendants. Mostly for postal theft and forgery and so forth.

It's very difficult to make any clear, strong, positive assertion because there are lots of complexities; and I won't try to right now. But I would say that we do have evidence within the white-collar crime sample itself that those who have committed more severe violations and often those who are also of higher status receive stronger rather than less strong sanctions at least for the period we were studying in the federal system.

That is not to deny Attorney General Van de Kamp's assertion that undoubtedly on occasion it goes the other way and for lots of bad reasons. But if you were going to talk about a generalization from our data based on some 1,100 cases sentenced in the federal system, you'd have to say that as you go from at least lower white-collar to higher white-collar the sanctions get more severe rather than less, other things equal.

PANEL MEMBER DUSTER: Other comments?

Governor Brown.

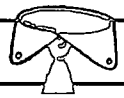
GOVERNOR BROWN: It's been a long time since I've been in law enforcement. But I wonder if any one of the panelists could be a little more specific about the type of crime we're talking about. When you talk about white-collar crime, are you talking about people in public office that violate that trust? We see some of my old friends back in Washington getting into trouble now.

But I wonder if you could analyze, I mean, one, two, three, four, five white-collar crimes. In the defense industry, for example, we see the charge. I see a generality to what we're talking about that somewhat confuses me in my old age.

PANEL MEMBER GEIS: Do you want a stab, Peter?

PANEL MEMBER YEAGER: Let me say that we have in the academic community struggled with this definition. I was reading over the materials for the conference and I think Al Reiss' paper starts with a definition that you will hear and read later on that strikes me as useful and not without some of the problems that we all wrestle with.

But when we talk about white-collar crime, in general we're including a couple of broad categories that involve, first, organizations, public and private — they could be foundations as well as



Lockheed, for example. Second, we're talking about individuals who in — and this is one of the contentious issues: whether or not we want to talk about a class-based definition of white-collar crime, which some of us have moved away from — positions of responsibility in the professions or in business who have used their legitimate positions to commit crimes — i.e., fraud or abuse of some sort. So that would include doctors, lawyers, accountants, judges and what have you.

Well, that leaves the question of plumbers, taxi drivers and auto repair mechanics and whether or not they should be included as well. Because, obviously, people with different colored shirts in various industries are as well able to break laws and defraud the public, auto repair fraud being one of our areas of analysis, as well in this literature.

So I would suggest to you that what we're talking about largely is the abuse of trust and power — and power is a broad-based term. It doesn't mean simply political power; but the power that knowledge confers, the power that position confers. Abuse of power and trust in any legitimate occupation.

Then the question of whether we want to stick with the "white" in white-collar remains unsolved to most of us. I, individually speaking, am not much interested in the color of one's shirt. I am as interested in the auto repair mechanic who might rip me off as I am in the doctor who may perform abusive surgery on me. I'm also interested in the organizational side as well.

So there are two questions, the organizational and individual side of this. The literature of research that we've created has addressed both of those sides.

MR. HALLINAN: Mr. Chairman, my name is Patrick Hallinan. I am one of the panelists tomorrow.

In listening to the discussions I found myself — I read all the literature that was put out for the symposium and I found myself in the same position as the Governor in trying to understand the definitions so that we could formulate workable models.

I, frankly, fall very strongly on the side of Professor Kaplan and I have tried many, many, many so-called white-collar criminal cases. I find that almost universally — and I do accept such things as OSHA regulation violations, technical violations by major corporations of safety rules, many of the EPA regulations. I'm talking about individuals and corporations who steal, who take advantage of the myths and creations of the law which have been formulated to allow business to function in this society who overreach and take advantage of those and what really, when you get down to the bottom line, turns out to be common, ordinary, everyday fraud. It's fraud by an institution or fraud by individuals.

If you approach the problem from that point of view, it becomes much less difficult either to define or to place responsibility and it becomes much easier to talk to the non-sophisticated about what the offenses are.

I, frankly, don't have any problem in handling a definition of white-collar crime on a specific case-by-case basis if it's approached from that point of view and I think it makes it a lot simpler.

I do have, when I read the literature, a lot of problems — I'm not nearly as optimistic as some of the gentlemen who spoke up here about where things are heading. For example, I do not agree with the fact that when you have a highly select skilled group of workers, that you're going to get better care taken of them. I see it just exactly the opposite, because you then have a lot of other workers who don't have the jobs who are willing to work for less and under less pay and under less highly elaborated safety conditions. That's how I see that working.

However, I cannot agree with some of the implications that I saw in some of the literature here that actually takes the mens rea out of the white-collar offenses. That's why as long as we stick to a sort of criminal fraud approach to it, I think it

becomes much more prosecutable, it becomes much more identifiable, and it becomes much easier to talk to the public and to do eventually something about it.

PANEL MEMBER DUSTER: Shelly.

PROFESSOR MESSINGER: I'm Sheldon Messinger from Berkeley.

I understand full well the wish of all of us really to have a clear-cut definition. It would be really neat. I was one of the people, along with Troy and others in this room, who planned this event. Part of the reason for planning it, frankly, was that we thought this was an area in which definitions were muddy and it wasn't so much that we were going to achieve clarity through the process of this conference, but become more and more aware of just how muddy the area in fact is.

I think myself that while I understand how focusing on fraud, as has now been suggested a couple of times, might for purposes of the immediate discussion seem to help things — because, for example, there the question of mens rea at least as traditionally understood is already settled. Usually if you're talking about fraud, there are identifiable people who are perpetrating it and so forth.

I think that the unfortunate consequence of only focusing on that is to mask once again the great difficulty in many of these areas of sticking with such a definition. There are other broad social harms which are perpetrated by organizations where, indeed, it is not clear that one wants to employ a mens rea conception and where it's by no means clear that the harm is perpetrated by identifiable individuals, but instead seems to be perpetrated by a network.

So, again, while I'm willing to go along for whatever that's worth with any working definition that the conference wants to adopt, I think it would be unfortunate if we thought that that settled the issue.

MR. ANDERSON: Gene Anderson, the U.S. Attorney's Office, Seattle.

I think it was Justice Potter Stewart who said about pornography that he knew it when he saw it. I think that in the white-collar crime area it may be an apt analogy to say that although you can't really define it, you know it when you have it as an investigation in your office.

I think half of the problem of white-collar crime is that it is a phrase that was spawned by a sociologist and not an attorney. To marry up a status of a socioeconomic-directed type of definition that Sutherland confronted us with with the conduct-based statute that defines a crime presents a great deal of friction and difficulty.

But aside from that it seems to me like, as a working prosecutor, I'm much more comfortable with a merger of the two. Because people who are buried within powerful organizations who are utilizing that type of power are a significantly different type of criminal target than an individual who is much more exposed.

For instance, I could be a crusading white-collar crime prosecutor by cracking down on welfare recipients who cheat in describing their income and I could rack up statistics and guilty pleas, but I wouldn't be accomplishing a great deal.

On the other hand, I might do two or three vendor fraud cases where doctors or clinics or hospitals are involved dealing with multiple millions of dollars and enormously difficult investigations and well-defended cases and that's when I know that I'm confronting white-collar crime.

So in terms of definition, it seems to me that one must look at what presents difficulty to the criminal justice system in terms of trying to bring to bear the criminal sanctions. Most of what's happened, it seems to me, in this area is because we haven't taken a proper focus on it, we haven't addressed it with adequate resources.

One other observation on the mens rea aspect. I think that evolution in the area of white-collar crime is in the area of duties and responsibilities and moving

away from the hands-on knowledge aspects of the more traditional concepts of criminal responsibility.

For instance, in the Clean Water Act, the criminal sections of the Clean Water Act, Congress has said that if you are a responsible corporate officer, you are a legitimate target and also says that if you negligently violate the statute, which to my mind means you fail in a duty or responsibility, then you're entitled to the criminal sanction.

I think that this is simply a response to the traditional problem that a prosecutor has to find scienter or intent gathered in one or more minds within a large entity. So if we can find the individual who has the duty and responsibility and has failed in that aspect, then we can bring to bear the criminal sanction on the responsible officers.

So I think the mens rea aspect is a dated concept when we're looking at the white-collar offenses.

PANEL MEMBER DUSTER: The next speaker is going to be Al Reiss. But let me just make a comment which hopefully will sharpen some of the issues here.

We have the title of the conference, white-collar and organizational crime, and there we are skipping levels of analysis. With white-collar crime you have the individual where culpability and mens rea are clearly the issue. What we were trying to do is to open up this discussion so that one could consider whether or not the nation was moving in the direction of the prosecution of what's called organizational, institutional, otherwise known as corporate crime in some quarters.

So I think that there's a different analytic and, therefore, legal issue and we'll hear later on in the conference from those who have done research and done prosecutions where the unit of analysis is shifting away from the individual. There are cases which we'll talk about in the next short period.

Al.

PROFESSOR REISS: I don't propose to tackle the question of definition directly. I want to tackle it sort of indirectly through the question of what if we looked at fraud, which has been mentioned. I want to take just one particular type of fraud which might be called tax evasion.

It's something which some of us even in this room may be familiar with since we all file tax returns and we also know not only do individuals file tax returns, but that partnerships do and corporations do. So it's something that runs across the whole segment.

Suppose you're the California Department of Revenue. That's probably what it's called in this state. Or you're the United States Internal Revenue Service and you're faced with this problem and you look at it and you say, gee, in the United States alone the amount of estimated evasion of taxes is more than the indebtedness that we have in a given year. So if we could only collect those taxes, my God, look how we'd be ahead of the game.

It turns out that if you start looking at that problem, it has all of the difficulties that we're talking about. How do you know when evasion occurs? Not only how do you detect it, but how do you make a determination? How do you make a criminal determination that someone deliberately evaded?

It turns out if you're the Internal Revenue Service, the last thing you want to do is bring a criminal case. It doesn't pay. Indeed, we can learn all the things that people are talking about — that the larger the corporation, the less likely it is to pay because they hire lawyers. It pays off much better to go after the person who doesn't hire a lawyer. They're more likely to settle and so on. We can learn all those things.

But the fact of the matter is that in the aggregate the amount of money that's involved from all those people out there who are cheating on their income taxes is far more than what you could gather if you took the whole corporate world.

So, you know, I'm just trying to say something like tax evasion itself or tax fraud or whatever you want to call it is a very interesting area and it's very, very difficult to say when tax fraud does occur.

So I just want us to not even think about fraud, but about particular kinds of fraud if we're going to think that way.

MS. CHATTEN-BROWN: My name is Jan Chatten-Brown. I'm a special assistant to the L.A. District Attorney for environmental protection and OSHA.

I share the view that white-collar crime is an unfortunate term. Like Mr. Yeager, I'm not interested in the color of the collar of the people that we prosecute. Of the 17 cases, 15 of which have involved OSHA fatalities, that we have prosecuted since setting up this section in the district attorney's office, in all but one we did charge individuals as well as corporations. In the majority of those there were several layers of management, including the direct foreman in two of the cases, that were charged.

Our interest is in charging the culpable individual. The reality is it's often much more difficult to trace up the higher you go in the large corporations to identify culpability at the higher levels.

That's always our desire and in many instances — in some instances we've had a direct supervisor or foreman who was obviously culpable and yet at the same time I felt where it's a matter of charging negligence, because of upper management's failure to properly train that particular individual, it was not appropriate to prosecute.

But there have been other instances where it certainly was proper to prosecute. One case that I handled I obtained jail time for a partner — so corporate crime is not an appropriate title either perhaps — very much a blue collar worker, although he had substantial economic benefit from operating a partnership company, that he was on site at the time and responsible for the death of one of his workers. So I encourage you to try to broaden the definition.

MR. MOKHIBER: My name is Russell Mokhiber. I'm the editor of the Corporate Crime Reporter, which is a weekly in Washington D.C.

A question for Professor Kaplan and the gentleman who spoke after him. Why limit the discussion of corporate crime to fraud, as you suggested, when academics studying crime generally would never limit the study of crime to theft and robbery and exclude homicide and assault? It seems to me that the much more serious crimes in society are those that take human life and those that injure human beings and the taking of property is a lesser offense.

A question for the panel. Why is it that the most serious corporate crimes — for instance, the marketing of asbestos where there was clearly corporate knowledge, where there were clear cases of causation, where there was massive death — why has there never been a criminal prosecution against any corporation or any executive in that industry?

Finally, a final question for Professor Braithwaite. If he could discuss the question of why corporations are given rights under the Constitution. Professor Kaplan also mentioned this. For instance, they have Fourth Amendment rights and they have First Amendment rights. Should a corporation be given such rights?

PANEL MEMBER DUSTER: Quick stab, John.

PROFESSOR KAPLAN: I guess the answer, of course, is there is just as good a reason for segregating out fraud as one kind of organizational crime as there is of segregating out corporate crime as one kind of organizational crime. Of course I wouldn't restrict the kinds of things that society should be worrying about to fraud. There are massive numbers of other things. But I'm just using fraud as, first of all, the kind of thing which, I think, covers more of what we're talking about than any other kind of single concept.

On the other hand, as I say, I would just as soon turn the table on somebody who

says why restrict corporate crime to fraud and ask why restrict organizational crime to corporate crime.

MR. HALLINAN: I'd like to make one comment, a very quick one. I'm afraid that the expanded definition of white-collar crime in which everything is lumped in together in the same sort of approach and the same sort of culpability runs a terrible risk of destroying the fundamental concept of what is a crime and what the state has to prove to get a criminal conviction. Because once you remove the question of scienter and mens rea, then, for example, have a heart attack, jump your car over the sidewalk, hit a pedestrian, go to jail. You committed a crime. You killed somebody. You have to have the mental state of mind.

Now I am certainly not advocating that you don't punish people who violate OSHA rules. I think they should be punished. Nor that you don't regulate corporations who overreach, who manipulate, who fix prices, who adulterate pharmaceuticals or whatever. But I don't think that what you have to do is abandon the fundamental concept of what is due process and what the state has to prove in a criminal case because you want to lump everything together and make it easy. I think you separate one out from the other.

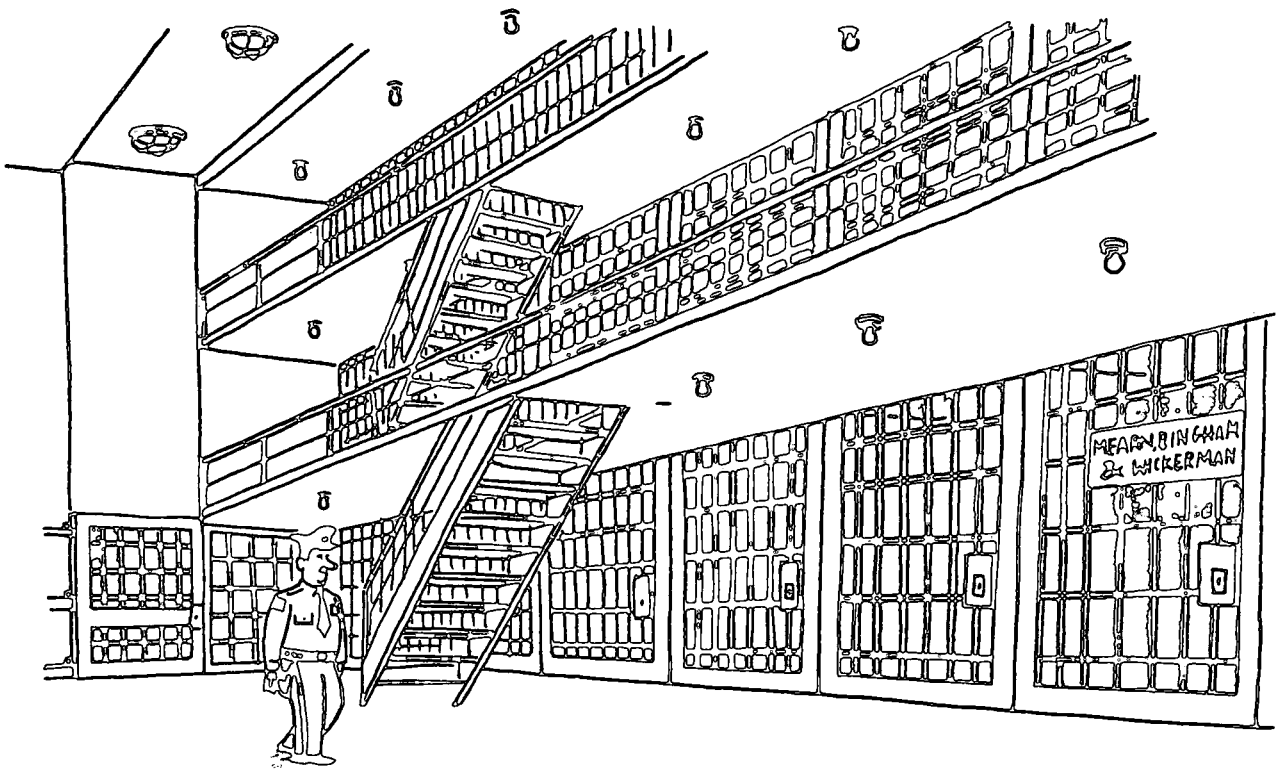
I think that white-collar crime is basically fraudulent and the others are the kind of regulations which the state has to deal with in a special manner.

PANEL MEMBER DUSTER: Do you want to take a stab at it?

PANEL MEMBER BRAITHWAITE: Firstly, on Russell Mokhiber's specific question, should corporations enjoy the same rights as private individuals.

I would have thought that prima facie one shouldn't assume that the same rights would apply to corporate actors as to individual actors. First, one might say that the kinds of exposures through the legal process that corporations can suffer are quite different. One can't put corporations in jail. One can put individuals in jail. So that on the other side of the balance there are very different considerations.

So that I would think that corporate actors being qualitatively so different, that different considerations should be weighed in relation to which rights should apply. I think there are a lot of rights that should apply to both corporations and



individuals. There are a lot of rights that should apply to individuals, but not corporations. Indeed, some rights that apply to corporations, but not individuals — the protection of trade secrets might be an example.

But to think of the right to privacy, for example, it would be adopting a pretty extreme position that a public corporation ought to have the same rights to privacy as a private citizen, that the protections that ought to apply to the minutes of a meeting of the board of a public corporation ought to be the same protections that apply to a private citizen's diary, for example.

On the question of mens rea, my view is that criminal sanctions that threaten depriving citizens of their liberty, the ultimate sanction of imprisonment, ought not to be applied without a demonstration of a guilty mind.

So that while I think that there are a lot of areas with respect to corporate regulation where demonstrating mens rea is almost impossible and there is a need for effective social control, it seems to me that the kinds of social control we ought to look to in those areas are often different kinds of social control such as stiff civil penalties and moralizing social control.

But it seems to me that the greatest abuses of mens rea are to be found in the individual traditional crime area. Now I don't know very much about your drug laws, for example, which were specifically mentioned. But in our country we have these pernicious drug laws which say that a person in possession of quantities of marijuana beyond a certain level is deemed to be intending to sell marijuana; a clear abuse of the notion of demonstrating in a court of law that a person had a guilty mind. People are being locked up all over the place under those kinds of statutes, whereas certainly in our country that's not happening to white-collar criminals without guilty minds.

PANEL MEMBER DUSTER: We're going to limit this now to the last two or three responses because of the hour.

PROFESSOR COFFEE: John Coffee at Columbia Law School.

I want to, as a pettifogger law professor, correct a little bit of misinformation and try to focus this again on what I thought was maybe the central theme on what John Kaplan and Patrick Hallinan were saying.

First of all, let's not get into a long debate on whether corporations should have the same rights as individuals. In fact, they clearly do not. There is a Supreme Court law 80 years old that the corporation does not have the right to the Fifth Amendment. That is, the right to protection against self-incrimination.

It would take a half-an-hour lecture to go through which rights they do and do not have. But it's probably a pointless question. Because although the corporation does have the Fourth Amendment, all its records are basically susceptible to subpoena and you'll get very quick access. Moreover, you don't always have to use the criminal sanction. There are civil penalties available against a corporation that may give you the same level of deterrence when you're dealing with a purely corporate or institutional entity.

I think what was behind some of the comments that we were hearing from John and Patrick was a theme that I suppose is common to all law professors. We get very nervous when the term "white-collar crime" is used in a manner that begins to link without distinction crimes and torts or crimes, torts and other acts of social disutility. Because for the latter the standard for liability tends to be negligence — would a reasonable person have done this. The focus tends to be on who should pay the price. That is, who should pay the compensation as opposed to a focus on deterrence or retribution.

I think those who are closest to the criminal process have a great deal of concern about treating those things similarly without clearly specifying the differences between them.

The other underlying theme in what John, I think, was stressing, which is again

common to all law professors as part of our culture, is a great deal of anxiety about attenuation of the mental element, or mens rea; eliminating that without clearly focusing on a limited range of circumstances.

There may be a case for attenuating the mental element. What I would suggest to you, if we want to focus at any point today on what the frontiers are of the criminal law in this area, is that there appears to be a new concept developing that I'll call corporate mens rea. There have been very important decisions in the last six months, most notably the First Circuit's decision in the Bank of New England case where they develop a new notion of mens rea. That happens to be a bank secrecy case and they, developing on some earlier, more limited precedents, are now saying that you can put together information that Employee X has, Employee Y has and Employee Z has to say that the corporation has knowledge of this. In that case it was different bank tellers taking different receipts and you had to get a certain number of them to know the pattern.

Well, that attribution of everything the individual knows to become a sort of collective corporate knowledge is a very interesting and problematic notion. I'm not fully endorsing it. I think that we do not have a really developed rationalized theory of corporate mens rea. We may need one if we think that the complete diminution of mens rea from the criminal law will scare many of us — or at least the law professors here — on the grounds that crime without a mental element is a very dangerous notion to legitimize. We may want to develop new notions of what mens rea are that are unique to the corporation.

PANEL MEMBER DUSTER: Thank you. Last one, Mr. Clark.

MR. CLARK: My name is Ed Clark. I just wanted to talk about mens rea, which I think crimes without mens rea are an absolute misuse of the process and tend to put all of government and all of criminal law into disrepute. There's no time in the history of our country when the government was in less repute than it is today. People think all politicians are crooks. People think that all big institutions are dishonest, only half the people vote. I think this kind of criminalizing additional conduct tends to illegitimatize society.

The way around that with respect to some of these governmental crimes is to treat governmental matters as property matters, as trespass, as criminal/civil trespass rather than thinking that environmental violations are something brand new. It's just modern industry does different things and the same principles still apply. So that a narrower definition of white-collar crime and more emphasis on things like fraud and trespass, I think, would make it easier for people to understand what's going on and eliminate this tendency to eliminate mens rea from crime.

PANEL MEMBER DUSTER: The hour is signaling, but the last comment was right to your left there.

MR. SNYDER: Thank you. My name is Harry Snyder. I'm with Consumer's Union. Thank you for the opportunity to get in one word before lunchtime.

I think the academic and defense bar attitude towards what should be defined as white-collar crime is why we have government and corporations in disrepute. Even those laws which define what is crime, for example, in the election law area and in other areas do not go as far as the populace in determining what do they think really should be crime. Those things, for example, in the elections area where we have passed laws which say it's okay to do campaign contributions in excessive amounts if you disclose them does not meet at all with what our polling shows people think are illegal and what should be illegal.

So I think the idea of pulling back the definitions of white-collar crime to those areas that really would affect people in the suede shoe operator category and letting everybody else go free gives great comfort to the defense bar and gives great comfort perhaps to academics, but I think the purpose of this is to go further and

take on what are really new problems that we have in society and finding ways of controlling them.

PANEL MEMBER DUSTER: Thank you very much. Just a quick summary about what I think I've heard.

MR. COHEN: I just have one observation which I'd like to make. I'm Stan Cohen. I'm a journalist rather than a lawyer.

But I'm left with a puzzle from this discussion. I have a book in front of me which is a compendium of writing about consumer issues during the 1970s and the first article has to do with General Motors and the Corvair. The man says that he was a former General Motors executive and he's discussing what went on in the company and he says that there wasn't a man in top General Motors management who had anything to do with the Corvair who would purposely build a car that he knew would hurt or kill people. But as part of a management team pushing for increased sales and profits, each gave his approval to decisions which produced the car in the face of serious doubt that was raised about its safety.

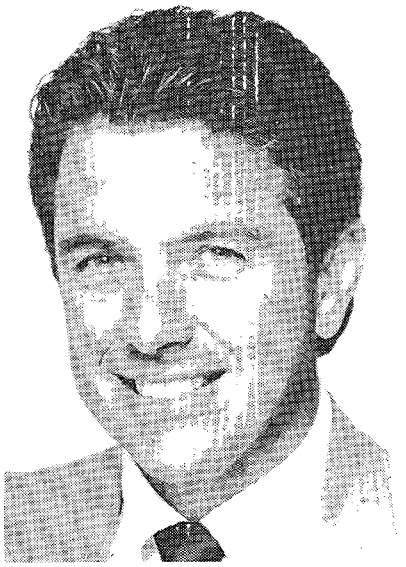
Now in various forms over the years that I was a journalist I've written about corporate activities where precisely the same thing went on. Perfectly decent individuals performed in their corporate roles as a group and made decisions which they wouldn't make as individuals which were in fact crimes. I don't see how you can exclude this kind of behavior from any definition of white-collar crime in the world in which we live and in which we're heading.

PANEL MEMBER DUSTER: Thank you. Just, again, to summarize. My own response here is that I've learned enough about the shifting character of law from Mr. Coffee's remarks to make the conference worthwhile for me. Namely, if there is developing now some notion of mens rea of a corporation, even if it's in its most inchoate form, I think that's a useful thing to discuss here in this next day and a half.

I want to thank you all for your attention and we'll now break for lunch.

Status of Prosecution of White-Collar/Institutional Crime

Moderator: *Steven V. Adler*
Presenters: *John C. Coffee, Jr.*
Richard Gruner
William J. Maakestad
Discussion: *Richard E. Drooyan*
Harry M. Snyder
Edward E. Clark



Steven Adler

PANEL MEMBER ADLER: I'm Steve Adler. I run the Major Fraud Unit in the Attorney General's Office.

We are going to dispense with the elegant introductions of the sort that Professor Duster provided, because I don't know what these gentlemen published. But I have a feeling that they're going to tell you about it.

This is the What's-Happening-Now Panel and we're going to hear about several surveys which will tell us what's happening now. The first pair of illustrious presenters will be Jack Coffee and Richard Gruner and they're going to tell us what United States Attorneys prosecute.

PANEL MEMBER COFFEE: Okay, thank you. To pick up where we left off this morning, I'm not sure that I can define white-collar crime. I'm not even sure that I know it when I see it. But I think I can talk usefully about the prosecution of white-collar crime.

Now that may sound paradoxical, but I think my distinction will become clear in a moment. I make this distinction because I think the area on which policy makers should principally focus — now that I have a podium, I won't reject it. A professor never ignores a podium. I believe that for policy makers the key question is not definition of the crime or even of the criminal, but control over the enforcers.

Now, I hope that I can focus you on the following question: If you accept our view that prosecutors are a unique kind of administrative agency, one characterized by great local autonomy, one buffered by a strong professional culture and one highly resistant to central control and central directives, then you may conclude, as we would, that you need unique kinds of administrative control strategies if you wish to change prosecutorial behavior.

I am not suggesting that you necessarily want to change prosecutorial behavior; but if you do, you may need different kinds of interventions than have been tried to date. In particular, we're going to discuss data that shows that merely specifying priorities, national priorities, for the prosecution of white-collar crime gives little evidence of having produced any observable consequence.

Now, at the outset I must observe this is an area with a great deal of anecdotal information and misinformation. Breathes there an ex-prosecutor with a soul so dead that he does not have war stories to tell about the investigation and discretion that prosecutors have in charging white-collar crime. I doubt it. But, as a result, this is an area much like the proverbial blind men examining the elephant and telling you very different stories based upon their experiences, all of which experiences are real.

My most aggressive contention, I suppose — and this may sound a little petulant — is that the future of this field requires that we escape the tyranny of the anecdote and the war story and see what we can learn from quantitative data.

I have to immediately qualify that, because I don't think quantitative data tells you enough to be a reliable policy guide. But it then focuses you on where you want qualitative interpretations. As we go through this, I think I can show you places where quantitative data raises a very focused question that only qualitative research and investigation can examine.

That's a little bit too long of a preamble, but now let me tell you about our study. We have some hard data. Since 1974 the Department of Justice has maintained the United States Attorney's Docket and Reporting System. We would estimate that it probably reached what I'll call bureaucratic maturity and reliability only around 1980. But I'll defer until later explaining why that's so.

This system is used primarily for logistical and budgeting purposes. Basically, you've got 94 United States Attorney Offices all claiming that they're the busiest in the country and have the greatest need for the next additional person. To resolve those disputes this

kind of budgetary system was put in to see just how busy different offices were.

Now, it works as follows: Each Assistant United States Attorney is required to open a record, which goes on to a computerized tape, for every criminal matter — also for every civil matter, but we're not going to look at the civil data — for every criminal matter that that attorney investigates at any length. In theory, according to the manual, more than one hour of effort is the threshold at which point you open one of these criminal matter reports.

As a result, this system allows us to track the following things: First of all, what happens, prosecution rates. At what rate are different kinds of crimes prosecuted.

Each record in the system contains the following kinds of data. The most important term here is one called the Program Code Category, or PCC. This is a generic description of offense behavior such as drug dealing, organized crime or, you guessed it, white-collar crime/fraud. They actually call it, just as we were doing this morning, white-collar crime/ fraud.

Thus we have a kind of self-described behavior. It may well be that prosecutors do know what white-collar crime is even if they have trouble defining it. In any event, they characterize all of their criminal investigations inside of eight general generic PCCs — public corruption, bank robbery, organized crime, white-collar crime, et cetera.

This data also gives you a statutory offense code — 18 U.S.C. 1341, which is mail fraud, and allows you to do some cross-checking. It gives you some other information such as priority codes and the identity of the, quote, "referring agency," all of which I'll come back to.

Now, our study is broader than simply a study of white-collar crime, but for present purposes it's white-collar crime and that particular PCC on which I wish to focus. We did some cross-checking. Obviously, the first question a methodologist has out there is how do we know that's a real category. Maybe it means different things to different people all around the country.

Well, we tried to examine that by looking at the offense code — that is, the statutory offense code — as a cross-check. To give you one example of the kind of things we're doing, take a look at Table A for the year 1982 new investigations. We are taking this two ways: The program category codes included in a particular statutory offense and mail and wire fraud, which the lawyers in the room recognize, is a particularly broad kind of category.

We see the following: White-collar crime accounted for 77.73 percent of mail and wire fraud. That is, in 77 percent of the cases something that was the statutory offense that the prosecutor thought was the crime that he could prosecute was categorized under white-collar crime and then other categories are fairly small.

For narrower crime categories the rates are even higher. That is, for more specific crimes we find that rates as high as 95 or 96 percent of the time they were always thrown into the same generic PCC category.

That tends to suggest that prosecutors across the nation were behaving fairly similarly. At least to the extent that they had a particular statutory offense in mind. They threw it under, with a fair degree of consistency, the same generic crime codes. Now, that goes, of course, to whether or not this data is meaningful.

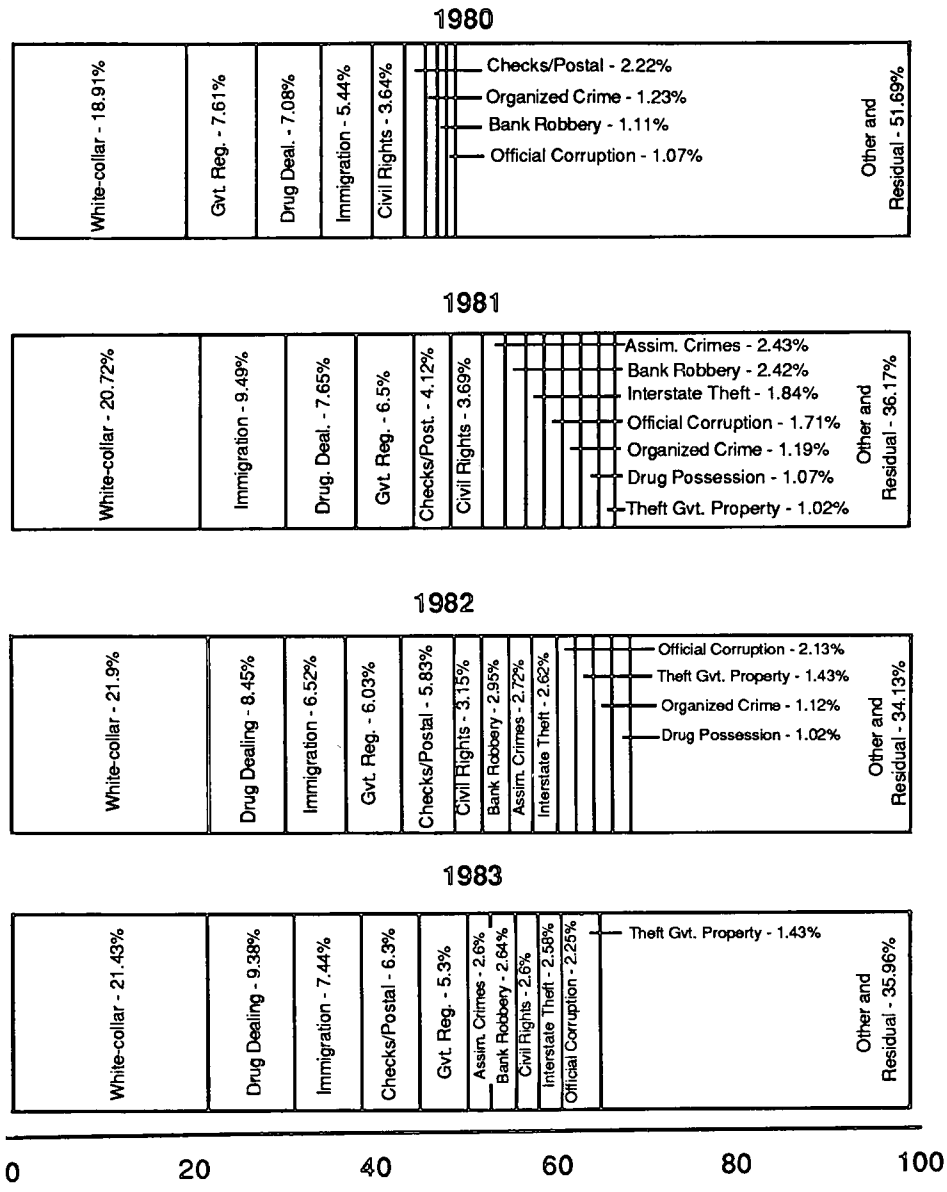
What can we tell you from this data? Let's start out with our basic census data, which is Figure 1, [Graph 1]. Look at the year 1980, the first year in which I am really satisfied with this kind of data. We see that white-collar crime here constituted roughly 18.91 or 19 percent of the total number of investigations that were in the system. That is, new and old in the system that year. It then changes between 1980, 1981, 1982 relatively small amounts and winds up 21.43 percent for 1983, 21.90 percent for 1982.

That seems to go — first of all, that does show that white-collar crime was the highest total number, highest percentage, on this bar chart of all investigations. The

TABLE A
(1982 AND 1983 NEW INVESTIGATIONS)
Program Category Codes (PCC) Included in the
"Mail and Wire Fraud" (M&WF) Violation Code
and vice versa
(ordered by contribution to each PCC)

Program Category Code (PCC)	% of that PCC called M&WF		%of M&WF		Number of New Investigations	
	1982	1983	1982	1983	1982	1983
White-Collar Crime/Fraud	18.97	19.65	77.73	72.71	1792	1878
Official Corruption	10.34	12.49	4.10	4.60	94	118
Organized Crime	3.05	2.91	.46	.30	10	8
Checks/Postal	3.01	4.26	4.43	5.92	104	155
Other	1.89	2.40	11.70	14.40	270	363
Labor/Management	1.38	.68	.13	.08	3	2
Interstate Theft	1.18	1.47	.71	.75	16	19
Motor Vehicle Theft	.49	.53	.08	.08	2	2
Bank Robbery	.34	.06	.26	.04	6	1
Government Regulation	.22	.39	.33	.49	8	13
Civil Rights	.21	.18	.08	.08	2	2
Theft of Government Property	.11	.51	.04	.26	1	7
Drug Dealing	.05	.05	.04	.11	1	3
Immigration	.02	.01	.04	.04	1	1
Assimilated Crimes	.0	.10	.0	.08	0	2
Internal Security	.0	1.03	.0	.04	0	1
Indians	.0	.0	.0	.0	0	0
Drug Possession	.0	.11	.0	.04	0	1
Total					2308	2576

GRAPH 1
PERCENTAGE OF TOTAL INVESTIGATIONS
1980-1983



next highest category at the end was drug dealing, which was only down around nine percent. Moreover, there is no declining trend for white-collar crime. Notwithstanding a lot of national rhetoric about reorienting prosecutors towards drug dealing and notwithstanding the evident attitudes of the Reagan administration, we don't see much change.

There's a possibility that this is biased. Because total investigations are in one sense misleading. White-collar cases tend to remain open longer. They aren't resolved quickly. They in effect stay in inventory.

Thus you get a better sense if you look only at new investigations opened up in that year. That is, here is the federal manpower that's free and available. How is it being allocated to the extent you've got free manhours available.

Well, if we turn to Figure 2, [Table B], take a look now at the line, white-collar crime/fraud. This is the cutting edge. New investigations. You find that it goes in 1980 from 17.16 to 18.19 in 1981 to 18.98 and then it falls in '83 to 17.57. That 17.57 is still, however, higher than the 17.16 in 1980.

TABLE B
CHANGES IN NEW INVESTIGATION DISTRIBUTIONS
1980 to 1983

CRIME CATEGORY	1980	change	1981	change	1982	change	1983
White-Collar Crime/ Fraud	17.16% (8532)	+6% (+16%)	18.19% (9905)	+5% (-5%)	18.98% (9455)	-7% (+1%)	17.57% (9558)
Gov't Regulatory Offenses	8.69% (4319)	-17% (-9%)	7.22% (3838)	-0.1% (-9%)	7.21% (3594)	-16% (-8%)	6.06% (3295)

Frankly, we entered into this study thinking we were going to see a significant transition from the Carter to Reagan administration and a reallocation of resources. Rather, like Sherlock Holmes' dog that did not bark in the night, we found something here that is probably just as probative. We found the lack of a major change. Here we're looking again at the cutting edge. Just new investigations opened in the period, what you're doing with your free manpower.

Now, how you can explain this — this is, of course, where you must go to a qualitative explanation. Possibly you'll stress local autonomy or strong cultures within the local workgroup in one prosecutor's office. Richard Gruner will later talk about the patterns in local offices and how strong and stable they seem to be on a district-wide level.

Maybe you talk instead about a professional culture among prosecutors. Maybe prosecutors have their own priorities and they will resist what outsiders, politicians or the like tell them to do. They know what's important because of a professional culture. That's an alternative theory.

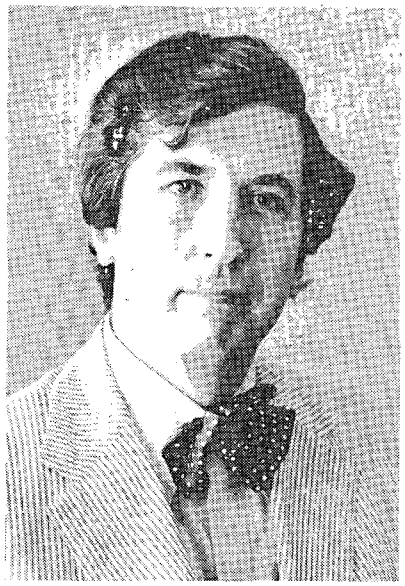
Or you might want to go to a third theory, what I'll call the careerist theory; that there are special payoffs to the young attorney working in one of these offices from trying a public corruption or white-collar case because there are reputational advantages. He gets the big insider trading case, he convicts the governor. Those kind of cases do give you a certain notoriety and professional fame.

Those are all competing explanations. We're not in the position to choose meaningfully between them, but we do see this pattern of stability.

Notice though we're not saying that no changes occur. It's white-collar crime that was stable. If you were to look through this same page and look at government regulatory offenses, you would see that falls off quite significantly from nearly nine percent down to barely six percent. Over a 25 percent decline in government regulatory offenses; which sounds like white-collar crime, but it is significantly different. These can include Smokey the Bear offenses on public lands, shooting ducks out of season, all different kinds of other miscellaneous regulatory offenses.

The next kind of analysis we ran involved creating a cohort group. There's problems with trying to compare things in terms of timing differences. We took, first of all, all new investigations opened in 1980 and then followed them through for four years through '80, '81, '82 and '83 to see what happened to them by these different PCC categories. How do white-collar cases differ from organized crime cases or drug cases.

Before I take you to our results — we did this for two different cohort groups, 1980 for four years, 1981 for three years.



John Coffee

TABLE C
FIRST-YEAR PROSECUTION RATES FOR NEW INVESTIGATIOS
1980 to 1983

CRIME CATEGORY	1980 Pros Rate	Total 1980 New Invstgtns	1981 Pros Rate	Total 1981 New Invstgtns	1982 Pros Rate	Total 1982 New Invstgtns	1983 Pros Rate	Total 1983 New Invstgtns
White-Collar Crime/ Fraud	30%	(8324)	31%	(9609)	31%	(9455)	29%	(9558)

TABLE D
FOUR-YEAR ANALYSIS - DISPOSITION OF 1980
New Investigations through 1980, 1981, 1982, and 1983

Totals

CRIME CATEGORY	Prosecution Rate (%)	Declined (%)	Other Disposition (%)	Pending Year-End 1983 (%)
Official Corruption	35	51	4	10
Organized Crime	45	31	9	15
White-Collar Crime/Fraud	50	34	10	6
Drug Dealing	72	15	8	5
Drug Possession	80	9	8	3
Civil Rights	2	83	4	11
Immigration	95	4	1	0
Government Regulatory Offenses	82	13	4	1
Indian Offenses	77	17	6	0
Internal Security	57	21	10	12
Interstate Theft	55	29	14	2
Labor/Management Offenses	33	45	18	4
Checks Postal	68	15	14	3
Bank Robbery	67	17	10	6
Assimilated Crimes	88	7	4	1
Motor Vehicle Theft	66	13	17	4
Theft of Gov't Property	59	24	13	4
Other	66	18	13	3
OVERALL	**65**	**23**	**9**	**3**

Let me first, however, point out what I think is the remarkable stability across this period in terms of new investigations each year. If you'll look at Figure 3, [Table C]. Here we're talking about not the same sample, but different samples each year; 1980 new investigations. The prosecution rate just in that first year. This is just one-year prosecution rate. In 1980 we find a 30 percent prosecution rate, '81 we find a 31 percent, '82 a 31 percent, '83 a 29 percent. By the way, everything falls in '83 in terms of prosecution rates. It's not a unique factor to white-collar crime. I find that very stable. It seems to be the same percentage, it seems to be the same decline, it seems to be the same prosecution rate in all four of these years on a different data sample.

Now go over to our cohort group in Figure 4, [Table D]. Here we're talking about a four-year analysis, what percentage of these cases are prosecuted at the end of four years.

When you look at white-collar crime/ fraud we get a 50 percent figure. That's neither high nor low. We go up to a high of 95 percent for immigration and then we have this remarkable low that stands out off the charts for civil rights, two percent. This raises very interesting questions, very different possibilities about what that means. It may be in part a statistical artifact that prosecutors uniquely open civil rights investigations any time a citizen complaint appears, whereas they may decline to open an investigation if someone else comes in and complains about white-collar crime or government regulatory offenses.

I am not suggesting that we know how to interpret this extraordinarily low rate for civil rights prosecutions. We do have a sense that it is a very interesting topic for further qualitative research. Why is it that they open the file that they almost never prosecute it at a two percent rate? Maybe it is sensitivity to criticism to eventual public intervention, whatever.

Now, white-collar crime is lower, of course, than things like drug dealing; but it is higher than things like official

corruption. When you look at official corruption, you see a 35 percent rate.

How do you interpret these rates? I think all different kinds of scenarios are possible. I actually suspect that the 35 percent rate for official corruption does not mean that prosecutors prosecute that at a low rate and are not intense about it. I actually suspect that it's purely a heuristic guess that what this really means is that the payoffs are so high from winning an official corruption case, that a prosecutor on a careerist basis might be willing to open cases that they don't really have much reason to suspect they'll get sufficient evidence for. They might proceed and investigate further and open the file on less evidence than they would in some other categories.

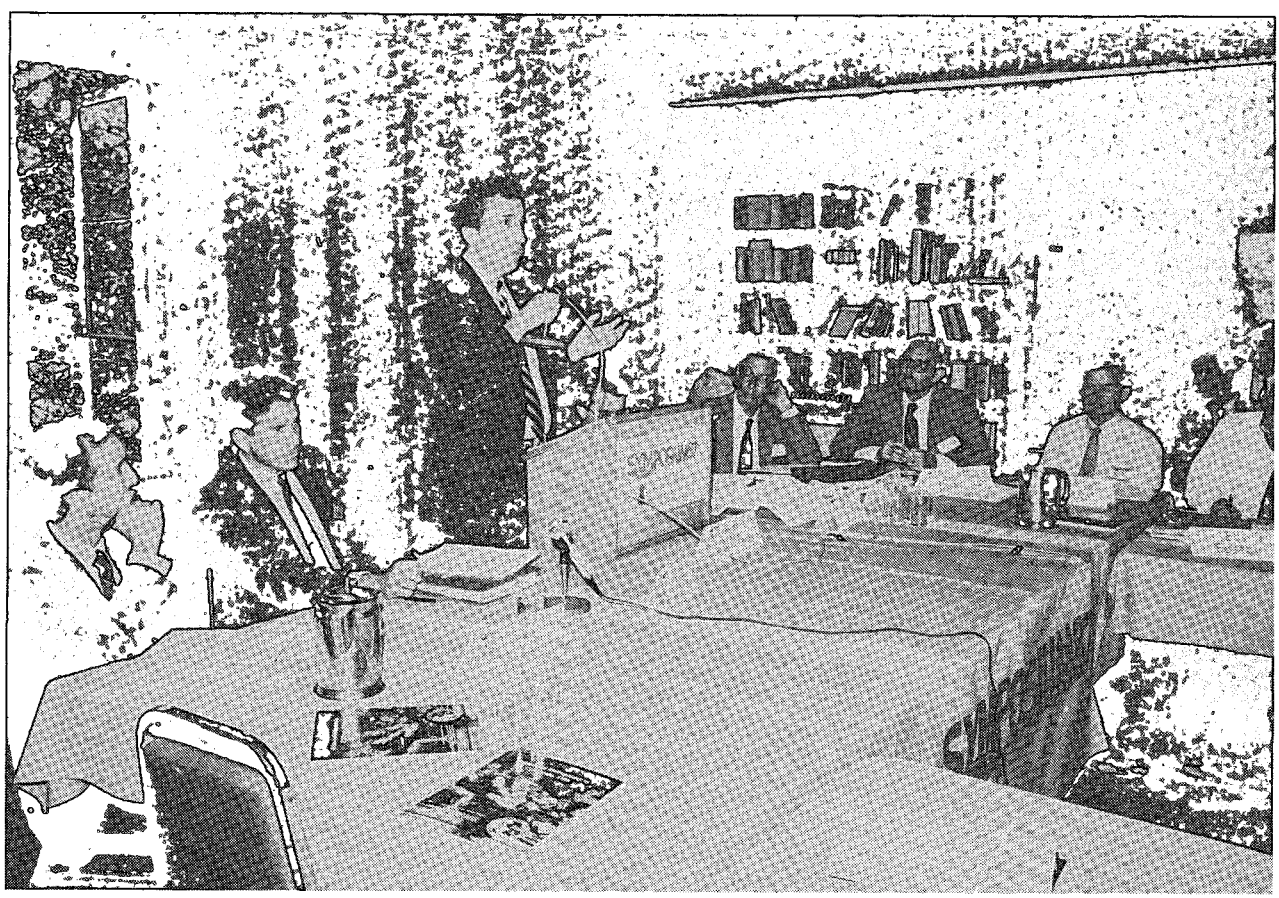
That at least could explain both this kind of rate — because the interesting question here is these are cases that you have opened and pursued for awhile, not cases that you've summarily dismissed at the outset. There's a whole different data set on summary dismissals. We haven't looked at that basically for financial reasons. It's quite expensive to use a computer. Each of these years has a level of criminal matters in the neighborhood of 120,000 a year. When you have that many and each criminal record may have a hundred different bytes of data, you start getting into a very large computer study.

We showed you the aggregate four-year rate. If you go over to Figure 5, we'll break this down year by year where you see some interesting differences. Look at white-collar crime here and you see that a unique feature is the degree to which it is pursued over time, that there is a slower decay. It's not all or nothing in the first year.

White-collar crime has 30 percent prosecution rate in the first year, 13 in the second, four in the third, three in the fourth year. In other words, four years later it's still being prosecuted. Whereas there are many other defenses where you're not above one percent on that last year. It's a little bit like an inspector chasing Jean Valjean. The prosecutor here does seem to go after him fairly steadily. Again, there are other offenses like this, too.

By the way, this Figure 5 is our 1980 data and it shows a total aggregate four-year rate of 50 percent. The 1981 cohort group followed for three years showed a 49 percent aggregate prosecution rate (49-50 percent). Again, seemingly a fairly stable similar pattern.

There is one source of data that we do not include in this material and I think I'm just going to make a reference to it.



We're not competent enough about how to interpret it.

One of the most interesting kinds of data in this study was the identity of the referring agency. We found that prosecution rates even within one PCC — that is, even within the category of white-collar crime — prosecution rates were very sensitive to the identity of the referring agency. That is, was it FBI, DEA, SEC, OSHA. Tremendous differences. You find that some of the more respected white-collar administrative agencies — SEC, OSHA — had extraordinarily low prosecution rates on cases on which they were listed as the referring agency.

The reason why we are reluctant to interpret that data but do point to it as something for further qualitative research is that we're not really sure we know what the word "referring agency" means. It might mean that this case came in because an agency made a formal or an informal reference. Either the kind of formal one that's in official records or an informal one from a low level staff official. Or, quite alternatively, it might mean this was a citizen complainant who came in to the prosecutor and the prosecutor sent it over to the FBI or the SEC for a kind of pre-screening.

The manual requires that you list a referring agency and the U.S. Attorney's manual itself says that the U.S. Attorney should always get in these cases some other agency as its investigative arm. Because U.S. Attorneys themselves have very little investigative resources.

So, it might mean that we're grouping here both true references where the dynamic comes from the agency to the prosecutor and also cases where a citizen complainant comes to the prosecutor and is fobbed off or farmed out to a referring agency which is supposed to do some investigation or pre-screening, but has very little interest in the case.

Because of that we haven't put forward this data, but we do think in terms of what should be researched, the patterns between referring agencies and the prosecutor is one of the most interesting areas. Indeed, we find very different patterns for just different offices. We find that some agencies have very well-developed contacts with one of two parallel offices. The Southern District in New York, it might be that the DEA likes to go to the Eastern District and the SEC to the Southern District and they seem to have their networks there.

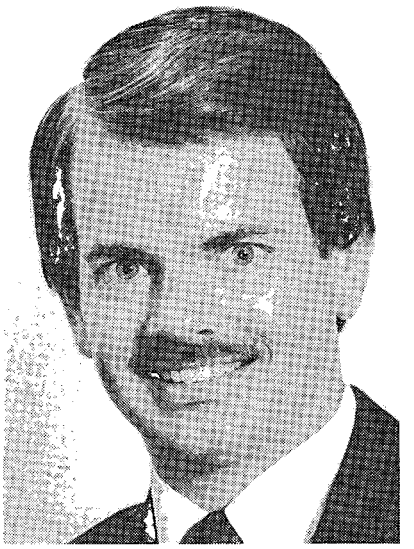
We also find that there are formal memos of understanding between some of these agencies and the various U.S. Attorney Offices; which, again, I think is just the area on which qualitative research should focus.

I'm going to turn this over now to Richard Gruner, who's going to take you through district offices and priority codes. But I'd add one further point. My basic interest here is how do you control prosecutors as a kind of administrative agency.

If you find from the data that Richard will explain that assigning a priority to certain kinds of white-collar crime produces little observable impact — and our experiment really is not controlled here. We just find that for some priorities the prosecution rate is lower than for offenses without priorities. We don't know that there was no impact of assigning priorities, we just don't see a sufficiently high prosecution rate to suspect that the central office would be satisfied.

If you find that that kind of establishing priorities doesn't produce much impact, then you've got to ask what kind of strategy beyond that could you next use. How do you give a payoff to the local official in the field who seems to be extremely decentralized and extremely resistant to central control? I think for policy makers that's the question. Not defining white-collar crime, but how do you motivate and in a sense manipulate prosecutorial behavior. Okay, thank you.

PANEL MEMBER GRUNER: I'm Richard Gruner from the Whittier College Law School in Los Angeles. I'm going to pick up where Jack left off.



Richard Gruner

One further part of our study addressed the handling of cases and investigations designated as priority matters by the Department of Justice. In part to promote stronger efforts by U.S. Attorneys on important cases, the department developed a set of priority criteria in 1980 for various types of white-collar crime. Records within the Docket and Reporting System record whether particular investigations meet those criteria.

With respect to white-collar crimes, the criteria for priority status tend to be the aggregate dollar amounts involved. For example, an investigation involving federal procurement fraud is a priority investigation if it involves $25,000 or more in aggregate losses.

Each investigation recorded in the system since 1980 is flagged as either fitting national priority criteria, fitting similar district office priority criteria, fitting both district office and national priority criteria, or fitting none of these priority criteria. Since this priority information is recorded on each investigation, we were able to track whether matters that were priority matters were prosecuted at different rates than those which were not. The results of that kind of analysis are shown in Figure 9, [Table E].

The third set of data there labeled "white-collar" reflects the handling of new white-collar investigations in 1983 broken down by priority status. Surprisingly, the prosecution rates seemed to be about the same — in fact, almost identical — regardless of whether the investigation was a priority one or not. That's true whether it was a national priority or a district priority.

What does this mean? Well, it means one of two things and, frankly, our data doesn't tell us which of these conclusions is correct. It may mean that the message isn't getting across — i.e., Assistant U.S. Attorneys didn't treat these as involving special priorities and, therefore, didn't attempt to prosecute the ones that were priority matters at a particularly high rate. Alternatively, evidentiary and other factors that were somewhat beyond the control of Assistant U.S. Attorneys may have been so significant in determining the prosecution rates that even though told that certain investigations were priority matters, the prosecutors involved didn't have much ability to change the prosecution rates.

This does suggest that simple bureaucratic control measures such as designating certain matters as priority investigations may not be nearly enough to produce significant changes in prosecution rates. You can see that in the other four categories of criminal behaviors reflected in Figure 9, [Table E], there is a similar uniformity of prosecution rates regardless of their priority status.

Additional portions of our study addressed U.S. Attorney practices in particular district field offices. These field offices range from offices involving no Assistant U.S. Attorneys all the way up to the Southern District in New York with over 100. We expected that there would be a higher percentage of white-collar investigations in the largest offices. Somewhat to our surprise we found that high levels of white-collar investigations were uniformly spread among offices of all sizes.

Figure 19 reflects percentages of white-collar crime in each of the 93 field offices present in 1983. Each plotted point corresponds to one U.S. Attorney field

TABLE E
Priority Codes and the
Disposition of NEW Investigations in 1983

Priority	(Code)	Prosecution Rate (%)	Declined (%)	Other Disposit'n (%)	Pending (%)	Number & % of Total
OFFICIAL CORRUPTION						
National	(N)	29	9	3	59	(229; 34)
District	(D)	12	7	3	78	(94; 14)
Both	(B)	10	11	0	79	(63; 9)
Neither	(X)	11	13	5	71	(296; 43)
All w/Priority Codes		17	11	3	69	(682; 10
All		28	14	4	54	(948)
ORGANIZED CRIME						
National	(N)	38	0	3	59	(34; 15)
District	(D)	24	3	9	64	(33; 15)
Both	(B)	(0)	(0)	(0)	(2)	(2; 1)
Neither	(X)	28	4	5	64	(151; 69)
All w/Priority Codes		29	3	5	63	(220; 1
All		35	4	5	56	(242)
WHITE-COLLAR						
National	(N)	19	5	3	74	(1009; 1
District	(D)	23	5	3	69	(1439; 2
Both	(B)	20	5	2	73	(229; 3)
Neither	(X)	19	9	3	69	(4373; 6
All w/Priority Codes		20	7	3	70	(7059; 1
All		29	7	3	60	(9558)
DRUG DEALING						
National	(N)	43	1	4	53	(191; 5)
District	(D)	47	3	2	48	(1025; 2
Both	(B)	35	2	6	57	(54; 1)
Neither	(X)	45	4	9	43	(2755; 6
All w/Priority Codes		45	3	7	45	(4032; 1
All		58	3	6	33	(5392)

office. You can see that there is a uniform horizontal band there across the middle of the chart and that among the largest offices — say 70 Assistant U.S. Attorneys plus — there are some offices with less than 10 percent of their investigations in the white-collar category and some offices with upwards of 30 percent. This means that percentages of white-collar investigations in a few large offices are above the national percentage of 17.57 percent, but in many large offices the figure is far below this national level.

In the smallest offices with 10 Assistant U.S. Attorneys or fewer, there is again a range of white-collar percentages from below 10 percent all the way up to 50 percent. So, there are some small offices that are devoting a very large percentage of their investigations to white-collar crime.

Figure 20 shows similar data for drug dealing offenses. Again, there are high percentages of investigations devoted to drug dealing in offices of all sizes.

We were also interested in determining whether the type of work undertaken by a particular field office tended to be stable. In other words, does an office adopt certain specialties and maintain those specialties over time.

We performed two types of studies related to this question. First, we plotted investigation data year to year. Figure 12 plots white-collar crime percentages for 81-82 and Figure 13 below it plots white-collar crime percentages for 82-83. The closer the points in these plots are to a 45 degree line, the closer the corresponding percentages were from year to year. You can see that generally the pattern is pretty close to that 45 degree line.

Now, a more systematic way to measure the strength of this relationship is through correlation studies. The results of the corresponding correlation computations are in Figure 16. These correlation figures and coefficients of determination — which are just the squares of the correlation figures — are fairly high. This suggests that if an office is prosecuting a lot of white-collar crime on a percentage basis in one year, it's probably doing so in the next year and the next.

We also were interested in knowing whether there was some sort of uniform pattern of trade-offs between investigations in two or more crime categories. Were offices that tended to investigate high levels of white-collar crime also investigating high levels of government regulatory offenses or high levels of any other particular type of offense? To study this, we computed correlations between different types of offenses for 1981 data. The results are in Figure 18.

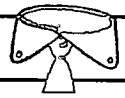
In general the correlations are low. For example, there doesn't seem to be any nationwide pattern such that when an office investigates more white-collar crime, it also investigates more government regulatory offenses. There are some small positive correlations related to white-collar crime, but we don't view them as significantly large. This suggests that the processes used in each office to allocate investigative resources among white-collar and other offenses are peculiar to the separate offices.

In part to get a more detailed look at a few offices and in part because we thought that the largest field offices would be the most comparable in both work encountered and types of resources available to deal with that work, we make a particularly detailed study of investigations and prosecutions in the six largest U.S. Attorney field offices. When I say six largest, I should define our standard. In computing which were the largest offices in terms of total numbers of new investigations, we excluded immigration offenses on the grounds that there are some offices — particularly the Southern District California office in San Diego — that undertake enormous numbers of investigations of immigration matters that probably don't involve the same commitments of investigative time and resource as do other types of investigations. So, backing those out of the totals, the top six offices in new investigations for 1983 were those in Los Angeles, Miami, Chicago, San Francisco, Brooklyn and Manhattan.

For these six offices, we computed both the percentage breakdown of office investigations by crime categories and corresponding office prosecution rates. The investigation breakdowns are in Figure 20. Looking just at white-collar crime for the moment, you will see that there are some striking differences. There are particularly high percentages of white-collar investigations for the Chicago and San Francisco offices. Both New York offices have percentages in the range of the national percentage of white-collar crime investigations. However, these investigations form a lower percentage of all investigations in the Los Angeles and Miami offices than nationally. This suggests that there were some substantial differences from office to office in the fraction of office investigative resources devoted to white-collar crime.

The more interesting figures, though, are the prosecution rates for these six offices. Those are shown in Figure 31, [Table F]. You can see that the Los Angeles, Brooklyn and Manhattan offices prosecuted white-collar crime at substantially above the national rate. The Miami office prosecuted these offenses at just about the national rate and the San Francisco and Chicago office rates were substantially below the national level. Obviously, these figures suggest some differences in how prosecution decisions were made in the offices. For example, in the San Francisco office a relatively high percentage of white-collar investigations were initiated, but then a more drastic declination process than the average produced the low prosecution rates for that office shown in Figure 31, [Table F].

Finally, we were interested in how prosecutions had changed in these six offices over time. We suspected they'd be fairly uniform. In general they were. Figures 37-39, [Graphs 2, 3, 4], indicate how the investigation percentages in those six offices changed in three key categories — white-collar crime, the drug dealing, and the government regulatory crime.



You'll see there was some drop in white-collar investigations in several offices including Los Angeles and Manhattan. However in most offices the remaining percentages, shown in Figures 38 and 39, [Graphs 3, 4], look pretty uniform. One marked exception was the striking rise in drug dealing investigations in the Miami office.

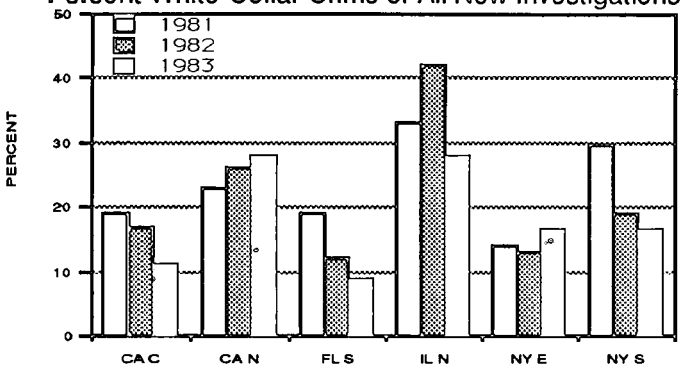
What does this data mean in terms of the study of prosecutorial practices in individual U.S. Attorney field offices? Well, first of all, there's a strong suggestion that the office unit is a stable one to study — that there are separate processes in each office that are worth studying because they seem to be operating on a continuing basis. On the other hand, a uniform nationwide study of decision making by federal prosecutors may be difficult in the sense that we seem to see markedly different patterns of prosecutorial discretion office by office.

We have already obtained some commentary by individuals in some of these several U.S. Attorney field offices on what they view as the source of some of these disparities. We hope to do more interviewing to gain a better understanding of the processes reflected in this data. For now, we feel we've discovered some good directions for further studies in this area. Thank you very much.

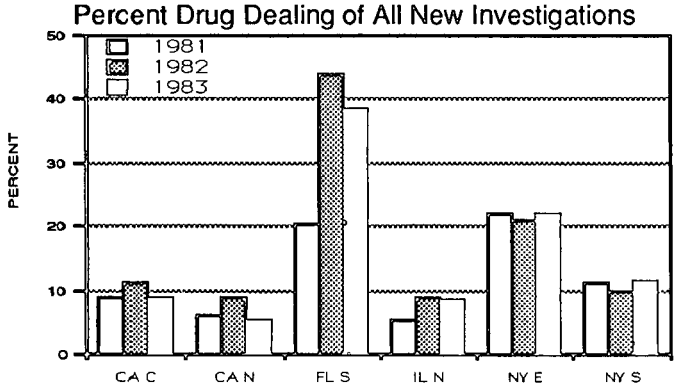
TABLE F
1983 Prosecution Rates
(One-Year analysis)

CRIME CATEGORY	Calif. Central	Calif. North	Florida South	Ill. North	New York East	New York South	Nationa Averag
Official Corruption	33.33	5.88	12.50	36.36	50.00	61.54	28
Organized Crime	0	0	33.33	13.33	40.00	0	35
White-Collar Crime	43.19	15.79	29.23	18.11	49.78	38.64	29
Drug Dealing	52.00	8.42	63.24	40.83	67.23	58.33	58
Drug Possession	0	6.45	76.82	43.59	25.00	70.00	58
Drug Task Force	0	0	0	0	0	50.00	-
Civil Rights	0	0	2.33	1.79	0	0	2
Immigration	74.29	18.18	59.62	31.71	52.63	62.50	90
Government Regulatory	45.35	22.22	53.16	18.75	57.45	56.67	64
Indian Offenses	0	0	0	0	0	0	57
Internal Security	0	0	0	0	50.00	0	12
Interstate Theft	47.69	8.89	18.52	11.32	51.22	25.71	37
Labor/Management	12.50	0	77.78	0	12.50	0	18
Checks Postal	59.17	9.32	50.00	37.39	61.59	49.46	47
Bank Robbery	83.15	20.97	51.52	41.94	52.63	78.79	67
Assimilated Crimes	29.63	17.70	0	100.00	55.56	0	64
Motor Vehicle Theft	33.33	33.33	0	0	57.14	0	49
Theft Gov't Property	38.12	19.35	16.67	23.08	54.19	37.31	45
Other	23.35	26.48	34.51	19.00	30.50	40.25	46
TOTAL	43.27	17.58	49.26	22.64	53.50	44.81	51

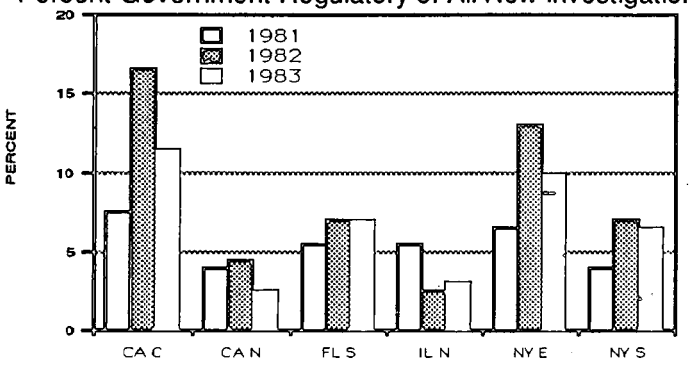
GRAPH 2
NEW WHITE-COLLAR INVESTIGATIONS, 1981-1983
Percent White-Collar Crime of All New Investigations



GRAPH 3
NEW DRUG DEALING INVESTIGATIONS, 1981-1983
Percent Drug Dealing of All New Investigations



GRAPH 4
NEW GOVERNMENT REGULATORY INVESTIGATIONS, 1981-1983
Percent Government Regulatory of All New Investigations



PANEL MEMBER ADLER: Next we'd like to bring up Professor Maakestad — I think I pronounced that wrong, but he will correct me — for his discussion of his survey of California District Attorneys.

PANEL MEMBER MAAKESTAD: Before I give a brief review of the results of the California D.A. survey that we conducted, I'd like to just provide a few introductory comments.

In the spring of 1985 Peter Jones, who's the former general counsel of Levi Strauss, published an article in the Cal Management Review entitled "Sanctions, Incentives and Corporate Behavior." Jones, who is now a business professor — at least last I knew was a business professor at Berkeley — drew on his extensive experience as a legal counsel and executive board member to address the role of legal sanctions in organizational reform.

He had a number of valuable things to say in that article, which I have seen reprinted at least twice since then. But the one that still sticks in my mind was a comment he made about the use of corporate criminal sanctions. He made a very forceful argument for the use of swift and sure criminal sanctions to create incentives for management to address safety issues in workplaces and communities.

He concluded in the article, and I quote, "that criminal sanctions are necessary because then and only then will busy executives feel enough pressure to devote the attention, effort and resources necessary to prevent activities that seriously threaten public health and safety."

I mention this article not only because it had a lot to say, but also because about two months after its publication a Cook County, Illinois judge handed down guilty verdicts for murder against three executives of the Film Recovery Systems Corporation in Elk Grove Village, a suburb of Chicago.

I'm sure most of you heard something about that case. Very briefly, under

William Maakestad

Illinois law they were prosecuted and convicted of murder for causing the death of an immigrant worker who was employed in the plant. They were recovering silver from used film negatives in a very, very disgracefully hazardous work environment.

The immediate aftermath of that decision seemed to prove Jones right, at least in the shortrun. The attention of business executives nationwide was drawn to the implications raised by that case. In Illinois, individual corporations, industry groups and trade associations called meetings and held seminars all over the place. But frequently these meetings raised more questions than answers. During the time following the FRS case, although I suppose I had an inherent bias because I was hired by the Cook County prosecutor as a consultant in that prosecution, I did receive some invitations to speak to business groups and eventually to lead a seminar for corporate executives and plant managers in the Midwest. In these kinds of sessions in the field and also in the college of business where I teach, concern about this new front of regulation by prosecution was expressed again and again by business people.

Now, there's obviously nothing new about hearing executives grumbling about new regulations. That's part of the ballgame. But there seemed to be a different edge to the comments on the aftermath and the FRS decision not only because the stakes were raised, but also because the wide range of discretion traditionally afforded to prosecutors plays havoc with businesses' normal risk assessment calculus.

The questions that were raised were very fundamental and interesting and I'm sure we'll not resolve all the questions today. Some of them included: Would aggressive prosecutorial policies mean that every bad business decision had potential criminal repercussions? If so, how can management effectively function in such an environment? Weren't local law enforcers delving into an area in which Congress delegated primary, if not exclusive, jurisdiction to federal regulatory agencies? Can a comprehensive rule of law be formulated that will indicate when executives and corporations may be held liable under state criminal statutes? And how many local prosecutors are really interested and equipped to pursue such cases?

Our survey grew out of the belief that it might be both interesting and helpful to learn something about the experiences and views of those who will be key actors in determining just how crucial these questions will become over the next few years. Those are the D.A.s themselves.

Now, our data base is quite limited compared to the study that preceded me. Yet we think it was a very appropriate place to start. We consider the study of California D.A.s to be a pilot study. We do hope to conduct a similar study in at least a half dozen other states and include much more qualitative data stemming from intensive interviews in the major metropolitan areas of those states. But still as a starting point, we think it was valuable.

California, I believe, was appropriate for a number of reasons. First of all, the demographics and the variety of the offices that this state has to offer. The offices in California range in terms of the population served in the counties from a few thousand to over eight million people. The budget in the offices that we studied ranged from $75,000 up to over $65 million, and the staffing ranged from where one D.A. basically handled the whole deal to the county where the Assistant D.A.s numbered in the hundreds.

Second, California's reputation as a bellwether state legally is well-deserved. Thirdly, we were aware of corporate prosecutorial activity in certain counties, especially Los Angeles. Although California is not one of the 22 states in this country that have passed a general corporate criminal liability statute, there are numerous judicial precedents that exist for allowing corporate criminal prosecutions for offenses up to and including homicide.

Now for a little bit on the report itself, the preliminary report that you have in your binder. I'd like to point out — particularly apropos to the discussion that ended this morning's session — our definition of corporate crime. The criminologists in the audience will note that we chose the narrower legalistic definition favored by Tappan, and more recently perhaps, Leonard Orland, rather than the broader sociological definitions that would be favored by Sutherland, Clinard, et cetera. So, the definition itself was an attempt to exclude any white-collar offenses such as embezzlement that would be committed against the organization itself.

I'll read you very briefly the definition:

"For the purposes of this survey corporate crime is defined as any violation or violations of an existing criminal statute by corporate entities and/or by individual business executives that are committed on behalf and for the benefit of a corporation or any other form of business association, such as a partnership."

Then we emphasize the significance of that definition.

We finally state that the victims of corporate crime may include individual consumers, employees, other businesses and state, local or federal government.

To break down the types of corporate crimes, we used essentially three categories. One was financial crimes including fraud, consumer and other types; environmental crimes; and workplace-oriented crimes, brought essentially under the Labor Code. We did provide an "other" category, but we didn't get a whole lot of responses there other than for some licensing type violations.

One of the first results of the survey that I think is significant is that for both financial and environmental crimes, as we define them, 100 percent of the District Attorneys believed that they had proper jurisdiction in their offices — in the local D.A.s' offices — to pursue such cases.

For workplace-related prosecutions, by far the newest area, slightly over 81 percent of the California D.A.s believe that it was within the proper jurisdiction of their office to prosecute such cases.

With regard to the level of their activity — and for this you may want to take a look at Tables 1 and 2 at the end of the study — I'm not going to run through the numbers per se, but just give some generalizations.

Within a year and a half period — since January 1986 — we asked how many received actual referrals from either citizens or regulatory agencies. This whole referral issue raises the question as to whether corporate crimes find more difficulty in coming to the attention of the prosecutors than traditional street crimes. Do they present themselves as easily as traditional street crimes, such as murders on the street?

But that aside, approximately three-quarters of the D.A.s had received referrals from citizens stating they would like to have had the D.A.s investigate what they felt to be a crime and approximately 60 percent, or three-fifths, reported receiving referrals from administrative agencies within the state.

With regard to the actual prosecutions, the results showed only about one in five D.A.s in California has not prosecuted any corporate criminal cases in the time period designated in the survey. Three-quarters of the D.A.s have prosecuted financially-oriented corporate crimes, two out of three have prosecuted environmental crimes and slightly under a half had prosecuted workplace-oriented crimes.

There are a couple of limitations I might mention in particular on the level of activity here. First of all, we have no longitudinal data at all that we can use to talk about trends. This is it. There are no previous studies and our instrument did not allow us to go in to investigate records.

The second limitation I would mention is the definition itself. I'm not so sure it's a limitation per se. But in terms of the action in the D.A.s' offices, many D.A.s wrote that our definition prohibited them from including what they considered serious civil penalties. So, here we were again talking strictly about the narrow legal definition of corporate crime and many of them indicated that the numbers would be higher if we had included serious civil penalties along with technical criminal violations.

The next tables, 3 and 4, are, I think, one of the more interesting aspects of this study. We gave the D.A.s a list of 15 factors and then allowed them to write in any others they felt might limit the likelihood of their proceeding with a corporate crime prosecution in their office. It was a four point scale for everything, from definitely would limit to definitely would not limit with two probablies in between — probably would and probably would not.

Table 3 [Table G] is the overall result of this part of the survey. I think you see quite clearly that resource management issues in the offices are the primary factor in the decision as to whether to pursue a corporate criminal case.

I think it's also worth noting that it seems quite plain that institutional and practical considerations and factors are the key, not ideological ones — at least from the data that we have. Also significant are the difficulties in investigating corporate criminal cases. Some D.A.s gave examples of that. In my experience and I'm sure in many D.A.s' experience part of the difficulty stemmed from the fact that it's very unfamiliar territory in many cases for local D.A.s' offices to get involved in.

Some are concerned about the level of information control that business organizations have vis-a-vis the more traditional street criminal. Others have indicated that the investigation of a corporate white-collar crime is more tedious, boring, dull kind of work and, again, it's new territory that they're not familiar with.

TABLE G

Percent of District Attorneys Responding that an Item Would Limit the Likelihood of their Proceeding with a Corporate Crime Prosecution

Item	Definitely or Probably Would Limit	Definitely or Probably Would Not Limit
1) Lack of investigatory and prosecutorial staff	93.3%	6.7%
2) Deference to action by federal prosecutors	83.3	16.7
3) Difficulties in investigating corporate criminal cases	62.2	37.8
4) Deference to a regulatory action	54.5	45.5
5) Strain of a corporate criminal prosecution on the office's budget	51.1	48.9
6) Difficulties in establishing mens rea in a corporate criminal context	43.2	56.8
7) The length of time it takes to prosecute a corporate criminal case	35.6	64.4
8) Inappropriateness of state criminal statutes as applied to corporations	34.1	65.9
9) Lack of expertise in technical issues involved in corporate cases	33.3	66.7
10) State of the economy in jurisdiction	25.0	75.0
11) Lack of experience in prosecuting corporate criminal cases	25.0	75.0
12) Deference to private civil suits filed for damages	22.7	77.3
13) Level of resources that a corporation might have to defend itself	6.8	93.2
14) Lack of public support for prosecuting corporate criminal cases	6.8	93.2
15) The possibility that a corporate criminal prosecution could have an adverse impact on personal career goals	4.4	95.6

In putting this together I'll try to heed Jack Coffee's warning about old war stories; but in working several years ago as an unpaid assistant to the Ford Pinto prosecution in Indiana one of the other assistant prosecutors in that case, a law professor from Valparaiso, made a comment right after Ford had used some of the Warren court decisions like Gideon to support its particular legal point. Professor Berner indicated, gee, in these corporate criminal cases from a D.A.s office you're twice cursed: once for having fewer resources and another time for playing by rules that assume that you have more. I think that might be a problem that is on some district attorneys' minds.

Also, I'm going to mention a little bit later factors such as Numbers 2 and 4, the difference to action by federal prosecutors and by regulatory agencies, which also seem to be significant limiting factors.

Table 4 I'm not going to mention much other than what we did here was use the median population size for a number of reasons. We felt that this was the most significant bit of information we had by which to divide the D.A.s. I might add that even though three of the four of us are midwesterners and I live very close to Peoria, Illinois, there's no truth to the rumor that we used smaller than Peoria or larger than Peoria to divide these up. 200,000 was the true median.

Really, the distinctions are not significant until you get to some of the middle items. In particular I would point out Items 7 and 10 and especially 10, the state of the economy in the jurisdiction. Whereas in the smaller counties it seems to be a fairly significant factor in terms of their decision as to whether to proceed, in the larger counties it's negligible.

The final table, Table 5 [Table H] in this preliminary report, deals with the percent of the D.A.s ranking the four goals of prosecution as most important for traditional street criminals, individual business executives and for the corporate entities themselves, the organizations themselves.

For traditional street criminals D.A.s are very clear about incapacitation being the most important goal of the criminal prosecution, whereas for corporations and for individual executives deterrence is the primary goal. This, as mentioned in the preliminary report, seems to be consistent with the literature on judges' values — at least the literature that appears on federal judges' attitudes with regard to white-collar crime sentencing. The significance of this might well be worth some discussion later on in the conference.

Next, what I'd like to add is something on the written responses. It was a little more qualitative information. These responses were not dealt with in the written report and I think for the richness of the responses they're worth a little analysis.

First of all, with regard to the types of offenses prosecuted, again apropos to the discussion that ended the morning session: If you'll excuse the heartland expression in the land of nouvelle cuisine, these are real meat and potatoes cases that are being taken on by state D.A.s in the State of California.

In the financial crime area, grand theft, false billing, securities, insurance and investment frauds, some antitrust violations, theft by false pretenses and some state tax frauds seemed to be the most significant financial crime cases that were being prosecuted.

Environmentally, illegal storage, labeling, transportation and disposal of hazardous waste under the California Hazardous Waste Control Act, air and water pollution are also quite common.

As I mentioned before, most of the workplace prosecutions in those counties that are pursuing them are under the Labor Code. They range everywhere from knowingly or negligently violating the safety provisions of the Labor Code all the way up to involuntary manslaughter. There were some prosecutions for maintaining substandard conditions for workers and for farm workers as well.

The other qualitative bit of information I think that's worth mentioning is that after reminding them in a very open-ended question — we started off by reminding the District Attorney that many of the corporate criminal prosecutions that have occurred involved activity also regulated by administrative agencies and by private civil suits — we asked the prosecutors to

TABLE H
Percent of District Attorneys Ranking Selected Goals of Prosecution as Most Important for Traditional Street Criminals, Business Executives, and Corporations*

Most Important Goal of Prosecution	Traditional Criminals	Business Executives	Corporations
Deterrence	27.3% (12)	50.0% (22)	60.5% (26)
Incapacitation	68.2 (30)	40.9 (18)	31.0 (13)
Rehabilitation	4.5 (2)	2.3 (1)	14.0 (6)
Retribution	4.5 (2)	9.1 (4)	11.6 (5)

* Percentages do not sum to 100% because some respondents ranked two goals as equal. In these instances, both goals were assigned the higher ranking.

keep that in mind and indicate under what circumstances they felt it was still appropriate for them to take on a case.

The responses to this open-ended question ranged from a few sentences to a few pages. But two dominant views seemed to emerge from the responses that reflected different models for criminal law in the State of California. First of all, the dominant one I think can fairly be categorized as an instrumental or utilitarian model. I'd like to use the word "residual" to describe this use of the criminal law.

This was evidenced by a strong deference to federal prosecutions or regulatory actions, somewhat less so to private civil actions that afforded compensation to victims. In other words, this model seemed to indicate that if the D.A.s felt there were no other appropriate legal or regulatory options that were being exercised and if the benefits outweighed the costs of the prosecution, then it was proper to go ahead.

This was also consistent with responses elsewhere in the survey. We cross-checked this against the quantitative data and it was very clear that deference to federal regulatory and prosecutorial action was consistently demonstrated.

The other model, slightly less prevalent, was what I labeled the traditional moral model for the use of the criminal law. Here corporate crime was seen by the D.A. not only as a legal transgression, but also a violation of the community standards of morality.

These D.A.s paid little attention to whether other alternatives were being pursued — in particular, private civil actions or regulatory actions. Some of them distrusted the motivation behind private civil actions and distrusted the competency of a regulatory agency in doing a good, thorough job of investigation.

Typical of this kind of belief is the following quote from one D.A.:

"Corporate criminal prosecution is mandated where the local community has a heightened awareness of a particular activity which bears directly on everyday life. Federal and state regulatory agencies just can't adequately address these local grievances and the populace expects the D.A. to take strong affirmative action in such cases."

I'd like to conclude with just a few comments more generally on the emerging role of corporate criminal prosecutions in the larger context of business regulation.

In a talk given at Georgetown University last year, Ed Epstein, conference planner and one of tomorrow's participants, stated that throughout our national existence we have relied in this country upon regulation, including both civil and criminal regulation, self regulation and corporate ethics to determine the standards governing business performance. The precise mixture of these three components has varied or shifted over time, as has the application of each of these modes of social control to specific areas of business activity.

Clearly, the reason we're here today is that we've witnessed during recent years — or appear to have witnessed in recent years — just such a shift, initially in the mid to late 70s at the federal level and even more recently in the 1980s at the state and local levels. The new balance has meant a more significant role for the criminal law in establishing responsible levels of business activity. But why now? Why is it occurring in the so-called conservative 1980s? Why do there appear to be increasing environmental prosecutions, occasional dramatic prosecutions of workplace offenses and perhaps the most celebrated insider trading cases in 50 years?

I think the two models that were suggested by the California D.A.s in response to this survey don't provide definite answers, but do provide some light on why they're occurring at this point in history.

From the moral perspective, using an environmental prosecution as an example, prosecutors seem to be responding to and

thus reinforcing society's changed notions of acceptable risk. Perhaps new moral parameters have been established that allow what was once simply called just bad business to be relabeled a criminal act. To use Jack Coffee's comment this morning about the line between tort and crime, perhaps that line has shifted along with — or as a response to — changing notions of acceptable risk.

From the instrumental or utilitarian perspective, the workplace prosecutions that have become institutionalized in cities like Los Angeles, Chicago, Milwaukee, Austin and New York seem to be justified in large part by the failure of policy at the federal level. In these cases, again, the failure of OSHA policy to adequately deal with the dangers in the high-risk workplace in the 1980s has led to D.A.s stepping in.

I think it's safe to say that — and the D.A.s would be the first to admit it — that local prosecutions are not the preferred approach to dealing with some of these problems and it would be folly to expect that they would be in a better position than federal agencies to deal with them. However, there is significance in the fact that local prosecutors are taking on these cases against significant obstacles. Whether this is a temporary symbolic or a long-term response remains to be seen.

PANEL MEMBER ADLER: Thank you. We have three people up here at the table that we'll call on for discussion. First I'd like to call on Rick Drooyan, the number two man in the U.S. Attorney's Office in Los Angeles, who has significant firsthand experience handling both political corruption and white-collar kinds of cases.

Rick.

PANEL MEMBER DROOYAN: Thanks, Steve. I don't really have any prepared remarks; I'm going to respond to a couple of things that were said and I'd like at some point to throw it open for questions if anybody has any.

The one problem in trying to use statistics, as has been pointed out, is it

Richard Drooyan

doesn't tell you much about the quality of the cases. There's no qualitative analysis.

In the absence of information about investigative resources, the crime problem in a particular district, the guidelines of a particular United States Attorney's Office, the statistics really don't tell you very much. In Los Angeles, for example, we have — and this is not white-collar crime, but this is narcotics — we have very high guidelines for the narcotics prosecution cases that we bring in part because we have 14 million people in the district and only 80 Assistant U.S. Attorneys. The District Attorney's Office in Los Angeles County has almost 800 Deputy District Attorneys. They are very good at what they do. They're able to absorb a lot of those cases. So, consequently, in drug dealing we have very high guidelines.

I was told a story about a conversation the chief of our narcotics unit had with the chief of the narcotics unit in Missouri and it was staggering the difference in types of cases that we were prosecuting in our narcotics unit versus the types that they were prosecuting in Missouri. Another instance was in Nevada. Two or three kilo type of cases. A very large case in Missouri. In Los Angeles it's nothing. It

might not even get prosecuted by the U.S. Attorney's Office. It would probably get prosecuted by the District Attorney's Office.

So, if you are trying to look at numbers of new investigations, you have to see what kind of guidelines you have. This cuts throughout Los Angeles. We have very high guidelines in all of our cases in large part because we have insufficient resources to address all of the crimes that are committed in a district that has 14 million people.

The other thing that I think is very important is what kind of investigative resources do you have. Unlike the county district attorneys' and the state attorney generals' offices, the United States attorney offices do not have their own investigators. Therefore, a lot of what occurs and results in the statistics generated by U.S. Attorney's Office, is dependent upon who your investigators are and what kind of resources the investigative agencies have.

One reason why there wasn't a significant shift between the Carter administration and the Reagan administration even though the Reagan administration put a major priority on drug dealing was because it takes awhile to get investigative resources into place. There really shouldn't be a difference between 1981 and 1980 because it's going to take a long time, several years, to develop enough investigators who have enough sources to bring more cases into a U.S. Attorney's Office.

As you see in the statistics, that is starting to shift. There are starting to be more drug prosecutions, because the drug resources have been in place now for several years.

If you want to control a U.S. Attorney's workload, you control the investigative resources and you control the prosecutive resources. If you don't give enough prosecutive resources, it forces high prosecutive guidelines. That's going to cut down on the number of new investigations.

There was one reference in the paper that I read that the executive office of the United States Attorney has managed to equalize the workload throughout the country by analyzing the workload and allocating a sufficient number of prosecutors to each district. I frankly don't think that the executive office in Washington D.C. has anything whatsoever to do with equalizing the resources throughout the country or equalizing the case load. Assistant U.S. Attorneys are only able to handle so many cases at any particular time. It is the resources that determine the number of new investigations that come into an office.

Another way of controlling what U.S. attorney Offices do is through the allocations of investigative resources. If you're going to put in more DEA investigators, you're going to have more drug prosecutions. If you're going to put more FBI agents in New York, you're going to have more white-collar, official corruption, organized crime prosecutions in New York than you're going to have out in Los Angeles or in another jurisdiction that doesn't have the same number of FBI agents.

So, on the federal level I think the U.S. Attorneys have less to say about the case load than perhaps they have on the state level where the district attorney or the attorney general can put his or her own investigators into a particular area.

The other thing I want to note is the notion that priorities somehow should be correlated to prosecution rates. I don't agree with that at all. First of all, I'm not quite sure what is meant by a priority matter. In the U.S. Attorney's Office in Los Angeles what we mean by a priority matter is it's something that we think is important; that is, something that requires the attention of the supervisors and in particular the attention of the United States Attorney. It's something that's going to get press, congressional or community interest at some level and then, therefore, at the highest levels of the office, the United States Attorney has to know what's going on. He's got to be briefed and he's got to have some

input into the ultimate prosecutive decision.

It is true that there are district-wide priorities. We have priorities in white-collar and narcotics in Los Angeles. But that's different than what is considered to be a priority matter within the U.S. Attorney's Office.

If you're looking at district-wide priorities, the priorities may have a low prosecution rate because it's conceivable that you're going to bring in more cases than otherwise. But with limited resources you're only going to be able to prosecute the best of those cases.

So, I'm not sure that there is necessarily a direct correlation between priority and prosecution rate. If you mean priority is what is significant in the office, there should be no correlation whatsoever. Each case has to be independently analyzed and investigated. If the case is there and is worthy of prosecution, it should be prosecuted. If it's not worthy, it should not be prosecuted.

It should not matter whether or not you've described it as a priority matter. In fact, I think it's dangerous to be concerned about prosecuting something simply because it's labeled as a priority matter. It can cause you to make mistakes. If you're thinking that this is something that's going to generate significant publicity and is going to make a name for somebody and that's the reason it's being prosecuted, you're going to have problems and you're going to make a lot more mistakes.

So, when you analyze a case and you decide whether or not it's worthy of prosecution, you really should — a good prosecutor should ignore whether or not he considers it to be a priority matter within the office.

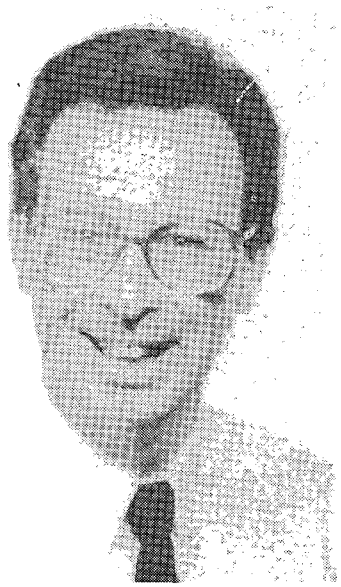
There are a couple of other things that I think are important that I'm just going to touch upon and then I'm going to turn it over to the other members of the panel. Prosecutors have to worry about things like the statistical needs of agencies. Why do we have so many bank robberies in Los Angeles? Well, we have an FBI that wants to prosecute those cases because they generate high statistics. It's also a problem in Los Angeles. There's also a history of prosecuting bank robberies federally.

But the agencies are our clients. The agencies are concerned about the statistics because that's what's going to determine their budget. So, there is an institutional reason for prosecuting certain types of cases.

Another thing that you have to be concerned about is the office morale. The U.S. Attorney's Office in Los Angeles, and I think U.S. Attorney Offices generally, try to pride themselves on being outstanding prosecutive offices, able to handle sophisticated cases. If we were to tell all of our Assistant U.S. Attorneys that we were going to triple the number of new investigations by handling a lot more small treasury check and small counterfeiting cases, we'd have a revolt on our hands. So, we have to be concerned about the philosophy of the office, of prosecuting the sophisticated, major cases.

In addition, if you're going to have an impact, you have to pick and choose. I think that's what the Southern District has done to a large extent. You'll note in the statistics that their number of cases, new investigations, is way down. But yet the Southern District has made a bigger impact than any other U.S. Attorney because they pick and choose. They've gone after the biggest cases, the priority cases and they made a big splash. That's the philosophy the Southern District has adopted and that's what they're going to do.

Frankly, I think that is the right approach; because on the federal level we simply do not have the resources. We're the ones with the $200 billion deficit and we do not have the resources to prosecute every type of case that comes along.



Harry Snyder

PANEL MEMBER ADLER: Harry Snyder from the standpoint of the Consumer's Union. How do you see the status of prosecution of white-collar crime?

PANEL MEMBER SNYDER: Thank you. I'm willing to accept the figures that the prosecution levels have remained flat. But from a consumer viewpoint it's clear that they're not enough. I can't get into figures and quantify what would be enough. But we're looking at deterrents from a consumer's standpoint. We're looking at deterring conduct that is either wrongful from an economic standpoint or wrong from causing harm.

There's a New Yorker cartoon that I think best sums up what I would like to see happen in decisionmaking circles around the country. None of you can see this, but I'll hold it up anyway just for the fun of it. This is a cartoon that shows five businessmen in suits sitting around a business table and one's standing up making a presentation and the one standing up making the presentation says, "There you have it, gentlemen. The upside potential is tremendous, but the downside risk is jail."

Now, if that were the cost benefit analysis that went on in corporate boardrooms, a lot of what we complain about as consumer fraud, consumer-caused damage, injury, birth defects would be eliminated. We do believe that criminal prosecution has a serious deterrent effect in the corporate community.

For purposes of this discussion I don't care whether we're talking about corporations or organizational or individual business wrong-doers. It's all the same to me. It's crime committed in the name of business.

If I slip back and forth between criminal and tort concepts, it's because I don't care how we deter. There is not a bright line anymore. I tried to blur that line and was stopped by business interests when Consumer's Union, along with Senator Petris, tried to move a bill that was labeled by the California Chamber of Commerce "Be a manager, go to jail." I wish that we could have even had such effective language considered. It was far from that.

But when you got down to the issue of what would the corporate managers accept as a level which was unacceptable, criminally unacceptable, morally wrong and we got down to the point of talking to the defense lawyers about mens rea and how would you prove that an individual within an organization had committed a moral crime, they said, well, this is too difficult, the language is too fuzzy. We said at some point in the negotiations, we will take any language that you suggest to define mens rea. And they said, well, nothing is acceptable.

So, I think that's what we're facing from a consumer community. That is, that the true corporate business attitude is that nothing we do in the name of profit should be ever labeled criminally or morally. We don't want to have to go home with that on our conscience. That attitude is reflected in the establishment that makes the laws and I believe to some extent enforces the law at least in this state and as we see it.

There are serious problems when you talk about three formats by which we deter harmful conduct or criminal conduct; one being regulation, one being self-regulation and the other being corporate ethics. I think that we can all agree that the latter two don't exist in terms of deterrence from a consumer standpoint. Self-regulation is in the name of the industry to better the industry. The little bit that we've looked at that makes it clear that self-regulation is always engendered by industry to fight off real regulation. Business ethics, as we are all too recently learning, if taught at all is taught from the wrong perspective in the nation's business schools. Business ethics kind of goes against the whole notion of we're free to go out and get what we can.

There was a recent long discussion in — I've forgotten the name of the financial newspaper — on why we are seeing a rash of insider trading cases and why we're seeing a rash of insider trading. The

ultimate analysis was from one of the insiders who was writing this article that within that community there is a nod towards morals and ethics and then a wink that says go for it.

I don't think that's unusual in just the financial community. We have seen case after case where dangerous products are left on the market for financial reasons where prosecutors — for example, the watermelon case was a great case; watermelon poisoning in California. The CDFA, California Department of Food and Agriculture, declared that they were going to go out and prosecute these people who had intentionally violated the law and used a banned pesticide on watermelons. The next week they issued a press release saying, we don't have adequate laws, but we're sure going to go out and get the Legislature to pass adequate laws to prosecute these guys.

The standards in the business community are low. We had a recent example on Friday. Some of you from this state who read the reports about the run on the tort reform laws of the — the tort laws of the State of California. In the last days of the Legislature the tort laws were changed by an inside deal made by powerful economic interests.

That may be normal legislative process. But in part of that what they did was they probably violated the Elections Code, which says that it's illegal to agree to withdraw an initiative in exchange for anything of value. Part of this deal was that the insurance companies were going to withdraw an initiative that the trial lawyers didn't like and the trial lawyers agreed to go along with this deal. So, that came close, if not over the edge, of violating that law.

What do these powerful business interests do when faced with that possibility of having violated the law? Did they seek further legal counsel? Did they say, hey, jump back; we better not do this? No, they also changed the Election Code.

That's the standard we're up against and I think when we talk about prosecutions from a consumer's standpoint, we're looking at too few and too far between.

PANEL MEMBER ADLER: We have a last minute substitute who I am sure will do an outstanding job. Mr. McCormack of ARCO had to attend, unfortunately, a funeral of a very close friend and in his stead we have Ed Clark, also of ARCO, and the hand grenade has just been tossed.

PANEL MEMBER CLARK: I don't really have a lot of comments on the statistical data. I had not been aware that there was such a thorough federal system of statistical data and I think that is a very valuable tool.

With respect to Mr. Snyder's remarks, I won't really reply to this. But I think in the business community there is a substantial residuum of high levels of conduct and the actual conduct we're talking about here is the exception rather than the rule.

I don't think generally the business community objects to traditional types of criminal sanctions applied to offices or people in companies who have the typical type of criminal mens rea. I think the difficulty may be in drafting legislation, or it may be jockeying. But I don't think that Mr. Snyder's comment is really a true representation. There's something in it for all companies that try to do the right thing to have others also do the right thing, because doing the wrong thing in a business context is usually lowering your costs and giving yourself a business advantage.

PANEL MEMBER COFFEE: I think there's always the possibility of ships passing in the dark here on these discussions. But before it opens to the floor, I want to indicate where I think there are some points of contact between what we're saying and what the commentators are responding.

First of all, the policy implication, I suppose, directly to California of what we are saying in the study Richard and I have done, is that California could, if you wish, implement a system similar to the U.S. Attorney's Docket and Reporting System. It would allow you to know and be susceptible to public criticism by various

Ed Clark

groups what the pie chart is of what district attorneys are doing. That is, what percentage of violent crime, white-collar crime, organized crime, et cetera. Then also you would know the prosecution rates for whatever value you give that information. I agree that's open to varying interpretations. And you would know what referring agencies are listened to. That is, who are the de facto clients.

By the way, I think this system has been shown at the federal level to be feasible as a data gathering system. I should indicate it's not publicly available. The one advantage that Richard and I had as lawyers, even though we're not at all trained statistical researchers, is that we will sue you when you don't give us the data.

Richard brought two lawsuits in federal court and successfully obtained the computer tapes for the years '78 to '83. So, you are looking at data that the Justice Department will not make available to others and that probably is the only advantage lawyers have over other social scientists in terms of being able to conduct empirical research.

PROFESSOR REISS: You're wrong. I had it earlier and without having to sue. So, you can get it.

PANEL MEMBER COFFEE: Okay. We'll talk later about why you aren't presenting this data now, because I do think it tells you something.

In terms of what we are saying as against what I think might have been a common myth, which is prosecutors don't give much attention to white-collar crime, I think we're showing that there is a very — how much is too much, I don't know. I'm not disagreeing with Mr. Snyder or Mr. Clark. I think it's useful to know how much they're doing and in terms of investigations we can show you a fairly stable line over a number of years despite major fluctuations in the level of public attention and public rhetoric.

Prosecutors do prosecute or give attention to a great deal of matters that fall within the category of white-collar crime/fraud at least as prosecutors understand that term. It may, however, be the wrong kind of white-collar crime. We're not taking a position on that.

The white-collar crime/fraud PCC, that crime category, is broken down into eight subcategories; which we haven't presented data to you about, but which we have. When you look at the components of that white-collar crime category, I think you'll find that an awful lot of it at the federal level, as well as the state — and here I'm reinforcing what Professor Maakestad said — does fall into the meat and potatoes category. They are financial frauds, financial scams. Merely looking at the prevalence of the use of the mail and wire fraud statute, which is classic fraud, as opposed to employee safety, consumer safety, other kinds of health or carcinogenic risks or environmental risks. That shows you that it is a traditional kind of white-collar crime that gets most of this or much of this orientation.

Indeed, to implement this — we've heard a lot about the sudden rash of insider trading cases, a subject I know a fair amount about. But on a statistical level be careful of this idea that there's an awful lot of insider trader cases being brought.

Look at the last table we have here, page 28, if you haven't thrown away the materials we gave you. Table B. Page 28. We are now dealing not with the U.S. Attorney Docket System, but with cases actually brought. These are not investigations but indictments brought.

You will see in there a line for securities fraud and you will find from that line that the years 1981 — it's about halfway down. Securities fraud. Right below mail fraud. In 1981 there were 13 indictments filed. That's .05 percent. In 1982 it fell to 8 indictments. In 1983 it was up to 9 indictments. In 1984, 17. In 1985 down to 11.

Now, I agree that this scandal really hit in the last two years. But despite the tremendous level of public attention, actual number of criminal indictments has ranged between 8 and 17. That's a trivial portion of the U.S. prosecutor's total workload.

So, although white-collar crime generates a very high level of interest, the amount given to what I'll call the newer kinds of white-collar crime, which include both securities fraud or insider trading cases and the worker and consumer safety cases, might still be quite low.

We, again, didn't present our data on referring agencies; because we really don't know how seriously to treat the use of the referring agency. But agencies like OSHA, EPA and the SEC, despite their competence — certainly in the case of the SEC, a very high level of respect — have a very, very low rate — below 10 percent in some cases — of their references resulting in an indictment or other criminal prosecution.

Now, what could that mean? I think that one area where Mr. Gruner's comments, I think, are very important and maybe a little revealing is the view of the prosecutor that they are serving their clients, the agencies in the field — the FBI, the DEA, the Bureau of Alcohol and Tobacco, et cetera. Those are the clients. We service the caseload they give us, just as lawyers in private practice also service their caseload.

The caseload that comes from those well-known traditional agencies tends not to be this newer kind of crime on which there's a greater attention today. I suspect a working thesis that deserves closer examination is that these working relationships between the standard federal investigative agencies and the U.S. Attorneys have a great deal to do with the choice of what to prosecute.

That's a difference in perspective. Normatively, do you want the clients to determine the caseload or do you want greater central control from Washington and a greater sort of normative evaluation that we want this to shift? It's difficult to shift when you don't know the investigator who may come in from OSHA or the SEC and you're frankly not sure he's as professional and that kind of an investigator who can prepare an airtight case. Whereas you know those boys at the DEA will always come in with the goods and it will be a wrapped-up lead pipe cinch case.

But I think if you want a change in the prosecutorial mix, an assumption that I think many of you probably share that you do want a change, you've got to look at these working group relationships between the referring agency and the prosecutor.

Now, a last word about priorities. I thought Mr. Gruner was saying two different things that may be a little inconsistent. He was saying that it is a little dangerous to look to priority data. You should really look at the strength, the litigation merits of the case. Priority means only that you should tell the leader in the office or notify him that it's going to be important, but prosecute cases on the more standard basis of litigation merits.

Then I thought I also heard him say that the Southern District in New York is correct. The Southern District in New York looks for the big case; the case that's the cutting edge, a highly-publicized case and they go for that homerun and ignore all the signals.

Now, I do think those ideas exist in some tension. I'm not saying which is right. But it's interesting to see how most of the agencies in the country other than the Southern District are very much marching to the tune of keeping the number of investigations they have level. That is, it may be that the central control is very weak. But they do have control over the budget. By using this system, the docket system, they tend to be assuring that new manpower goes in based on the number of investigations per employee/prosecutor in the office.

It's only the Southern District that seems to be a noteworthy example that it has been able to negotiate ability to get new manpower or hold its manpower even though it's not pursuing a large caseload or equivalent caseload kind of policy.

I think those decisions, which are low-visibility, have a tremendous impact on whether you go after the big complicated case or the smaller case or whether you take new cases on.

PANEL MEMBER ADLER: All right, I'd like to remind people with a question or a comment to give us your name before you start talking. Don't let the microphone get any further than about six inches from your mouth and make sure it's turned on when you talk into it.

Yes.

PROFESSOR FEELEY: Malcolm Feeley, U.C. Berkeley. Jack, this morning before your very interesting remarks I think you issued a gentle reminder of the dangers of the social scientists playing the lawyers. I can't help but gently remind you there's a flip side to that argument.

You talked about the movie, but you gave us a snapshot. By that I mean that you wanted to talk about trend data, but in fact you really gave us only one point in time, although four years.

Any policy analysis would say the big news is that there was any change any time within a few years after some significant policy was being announced, that the typical response is that one shouldn't expect much change. You couched your concerns in a bit of a surprise for the lack of change. Now, I hope you sue these bastards every five years and in 20 years we can determine whether there is some trend in what you're doing.

But I do think there are three very important features of your study. One is, I think, the real variation that you should exploit is the variation among the several districts, looking at the different local cultures to see how different U.S. Attorney Offices handled their mix of problems.

A second one that I hope you can address in a minute is I'm wondering how the Department of Justice uses this fantastically detailed information system as a management tool. Because priorities may be addressed generally, but I'm wondering if this is used in any concrete and direct way of trying to shape and create incentives and continuous oversight.

The third point that I think that your piece addresses marvelously and I think it's part of a new trend is that I think in recent years — and your piece illustrates it nicely — we see a dramatic shift in the way we're talking about prosecutorial discretion. Traditionally — and you can go to any case books or any discussions of prosecutorial discretion — most of them talk about how prosecutors make decisions in the individual case and what you're doing is saying there's a new level of discretion and that is in the setting of priorities, whether it's office guidelines or now in this marvelous device that is in the bowels of the Department of Justice in

Washington across all U.S. Attorney Offices.

But I guess I want to come back to that middle point I made. Is there any evidence and what is it and how is the Department of Justice using this or what plans does it have for trying to control in a more systematic manner the priorities of the 96 separate offices?

PANEL MEMBER COFFEE: Let me begin by saying that I don't think that it has all been connected with the policy formulation process in the Department of Justice. We were talking about white-collar crime priorities.

For those not familiar, the Carter administration under Phil Heyman, who's a Harvard law professor and who became head of the criminal division, elaborately set up white-collar crime priorities; very detailed codes of what should be given priority. This happened to be plugged into the docket reporting system. It was essentially put in place on the logistical side by the budgeting people to see if they could judge which offices were the most undermanned, how do we measure whether or not Iowa deserves one more U.S. Attorney so they'll have six or whether New York deserves five more so they'll have 120 and who has got the greater claim.

Well, we'd look at what you're investigating, not just the number of indictments. It's possible to use this in a more complicated way than we're capable of to get down into the hours that are involved. That is, how much work is going into this, how long has it been open. We were doing our first cut and then we are very financially constrained.

On your first point I think we're talking about the same glass of water and whether it's half full or half empty or two-thirds or one-third. I suspect there's room for reasonable disagreement. It depends on what your background assumptions were. I find it quite amazing that across this country for four years in a row 30 to 31 percent of the white-collar cases got prosecuted in one year and then to find beneath that that it wasn't a case of the East Coast doing 90 percent in one year and the West Coast 10 and flipping over, but fairly stable work cultures.

The rate of change you should expect. We can be guided, I think, by your sense to expect very slow change. Maybe the starting point is where the numbers are. If you think there is no white-collar prosecution, you misunderstand what prosecutors are today doing.

I don't want to sound cynical, but I do think the careerist motives of the young U.S. Attorney, particularly in the urban offices, are a very important part of the culture. They go in for a two- or three-year stay and getting some experience in publicized, sophisticated trials is part of the career credential that they are purchasing by making a very large financial sacrifice. I know that from talking to them. They're fairly open, some of them are, about that.

Now, there was a third question that you raised. What was it?

PROFESSOR FEELEY: Just the point about the shift in the way we're thinking about prosecutorial discretion.

PANEL MEMBER COFFEE: There's a lot more here besides what we have. We're scratching the surface by looking at the statistical data. I do think that there's a very good paper to be written going around among these offices and looking at their formal memorandums of understanding. There were many different offices that had, in effect, treaties. What's happened is one agency has brought in over the years 50 cases and gotten only a few referred. So, they come in and say, look, we don't want to waste our time. Tell us what kind of case you will take and we'll reach a memo that we will only refer to you — this, of course, will change prosecution rates dramatically; because they're only going to refer that which they think will be prosecuted.

I don't say that the prosecution rate data has inherent meaning by itself. I do think it is interesting to know that high-priority cases appear not to be prosecuted as

much as low-priority cases. Although we don't have before and after data, it may be that assigning the priority actually increased the rate at which they were prosecuted. We still find them being prosecuted at a rate that is surprisingly low compared to other cases and that would require, I think, some further investigation.

But on the qualitative level I think these memorandums and treaties, as they're called, are a fascinating topic for research.

PANEL MEMBER ADLER: I have to add an informational point. I think that it's no more reasonable to assume that the 96 U.S. Attorneys are going to necessarily do what the Department of Justice wants them to than the 58 district attorneys are necessarily going to do what the Attorney General expects them to do. In the case of the district attorneys, they are elected at a local level. So, there's no question about it.

My question — and I don't really want an answer, because I want to give some other people a chance to ask questions, but it's a good question to consider — is: why should the 96 U.S. Attorneys necessarily do the same thing?

I'm not necessarily sure that that is a good or appropriate goal and I also wonder whether the right and appropriate thing for them to do should be determined by Washington or can be determined by Washington. I think we have a considerable case history that shows that Washington has difficulty determining much of anything.

PANEL MEMBER GRUNER: Two follow-ups, one on how the system is being used. There are some further aspects of the system not written up in this report that suggest it's not being used as a policy analysis device, but rather in addressing more of the mundane aspects of the "business" of the U.S. Attorneys. For example, several data fields in the data base keep track of whether fines assessed against a defendant have been collected and, if not, how long have those fines been outstanding. There is a strong emphasis on these sorts of business concerns, suggesting that they're not making full use of the data that they might.

The other point about do we want all U.S. Attorneys doing the same things. You don't have to ask the question quite that strictly. I think you can even ask do we want to at least push them all in the same direction and, if so, how could we.

PANEL MEMBER ADLER: Mr. Iglehart.

MR. IGLEHART: Just a comment.

PANEL MEMBER ADLER: Identify yourself.

MR. IGLEHART: Dick Iglehart, D.A.'s Office in Alameda County.

Just a comment on relationships between prosecutors and investigatory resources. I find by and large when we're talking about white-collar crimes, sophisticated investigations and prosecutions and environmental prosecutions, that the investigatory power of the federal government far exceeds that of local government.

When you're talking about — in response to the U.S. Attorney from Los Angeles. When you're talking about not having the resources and local law enforcement having the resources to make these prosecutions, I would suggest that a reverse it true. Amongst the different regulatory agencies of the federal government, there is a lot of wrong-doing that is known, that is investigated and then by way of either declination policy, memorandum or whatever else, there is a decision made not to prosecute. I think there's a vast black hole that these cases go down and no one hears about them.

Now, I would like to suggest — and this would give you an area for some great data gathering sometime in the future. By the way, I appreciate all the discovery on these federal data points, because I can assure you now it will never be adopted at the state level.

I would like to suggest that there be a mix here, that there be a better communication

between the federal prosecutors and state prosecutors, local prosecutors, and when you decide not to prosecute that little 20,000, 50,000 case, that little case of toxic pollution in which just a small creek was polluted instead of a major river or something like that, that you allow us to use those federal investigators, those federal regulatory agencies and let us bring them into state courts and local courts and use that information and prosecute them locally.

What I find happening is — and this is not in any way meant to label any particular federal district. But what I find happening in talking over a beer with some federal investigators is that they investigate a case and they've got a case, it gets declined for whatever reason — either political reason or policy reason or whatever — and then it goes nowhere. These are good cases and good cases that we as local prosecutors would love to prosecute. We don't have — very few police departments have a white-collar crime investigatory agency unit in there. The best we can do is maybe get some administrative crime investigation going from time to time.

We have very little resources amongst prosecutors in our own offices to do investigations. The federal government has vast resources. Give us a little bit of your spillover. All we need is the witnesses, all we need is the evidence and we can put on those little cases.

I find at least within the culture of the federal government that when the federal prosecutors decline, then nobody says anything about the case and it simply goes unprosecuted. Well, the damn prosecutors want some other case and that's the end of it. I would like to suggest that you give them our card.

PANEL MEMBER DROOYAN: I certainly agree with you that simply because it is not prosecuted at the federal level because of a resource problem doesn't mean that it shouldn't be referred to the local and state prosecutors. I think that they are a valuable resource, are able to handle sophisticated cases. The sheer numbers of prosecutors — not looking in terms of investigative resources. There are many more prosecutors on the local and state level than there are on the federal level.

So, I certainly agree with your statements that if it's not going to be prosecuted by the federal government and it is worthy of prosecution, it should be presented to the state prosecutors.

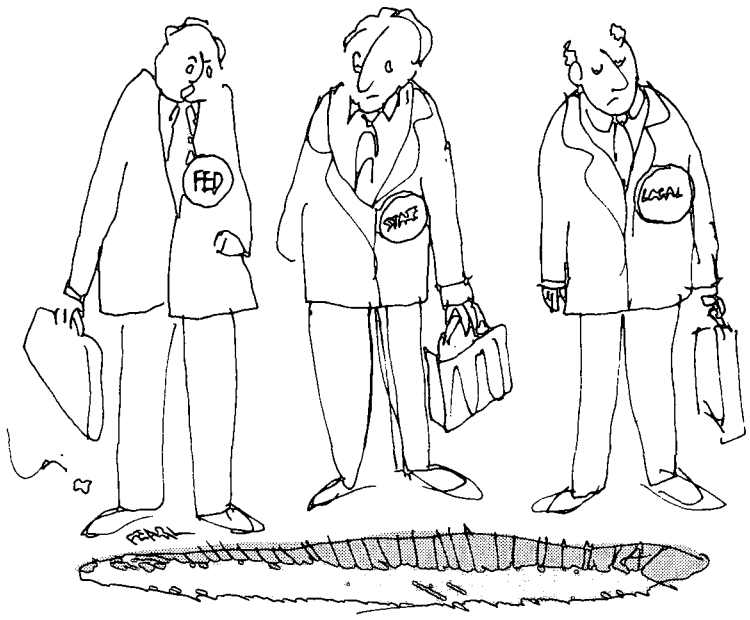
One thing. You suggest that a lot of times these cases are being presented by the agencies to the U.S. Attorney's Office and then for policy or political reasons they're declined. In fact, many cases by the non-criminal investigative agencies — by that I mean the regulatory agencies — never get presented to the U.S. Attorney's Office.

A very significant reason why they don't get presented to the U.S. Attorney's Office for criminal prosecution is because the agency gets no credit for a criminal prosecution. The agency gets credit for a civil action that it can file and that its lawyers can handle, but the agency gets no statistical credit at budget time for a criminal case that has been prosecuted.

The best example is that for the last three years the United States Attorney in Los Angeles, Rob Bonner, has been trying to get the United States government more actively involved in environmental prosecutions. We can't get the EPA to give us criminal investigators. The EPA, I think, in the next year or two will probably assign a couple criminal investigators to Los Angeles. But when the EPA takes a look at a case, very often we never even hear about it. They will handle it either administratively or civilly and they will not bring the U.S. Attorney's Office into it for criminal prosecution.

So, I think that a lot of these things, this black hole that exists — and I agree with you. I think it does exist in the regulatory area. It exists because of institutional and bureaucratic reasons on the part of the agencies and less on a reluctance on the part of the prosecutors to take those cases.

I would like to see that solved. We think we can handle those kinds of cases. We



"Gee . . . whatever happened to all those cases we didn't prosecute?"

think that they're important and I think the federal government should be more involved in health and safety areas. The agencies just have not provided the investigative resources. The FBI, particularly in Los Angeles, is spread very thin. They have so many different areas of primary criminal responsibility that they are not able to devote substantial resources to these health and safety regulatory agencies.

PANEL MEMBER ADLER: Back there.

MS. KAPLAN: I'm Carol Kaplan and I'm from Washington. I'm here to help you answer all these problems. I'm from the Bureau of Justice Statistics, which is a part of the Department of Justice in Washington.

First, let me say we don't have unlimited resources at the federal level. I mean, that just doesn't wash. There have been so many comments about the federal/state or the federal/local area here that I just want to make a few general statements.

The data base, the D&R, the docket and reporting data base, I'm delighted that you're fascinated with it. I don't think it's quite as secret a data base as people seem to indicate here.

It is being used — now, I'm not from the executive office, so I can't speak for its precise use. It is definitely being used for much more macro budget type stuff. Which is to say when you go to Congress and you look for your appropriation, that it is very important even though it may not be being used as a motivating force for each of the individual units among the different U.S. Attorney Offices. But it is definitely being used as an indicator of the volume of work, of the volume of manpower needs.

Ideally, it's also supposed to be used as an indicator to indicate the levels of support services and also what would

come down the pipe; certain numbers of investigations leading to certain numbers of prosecutions which would generate a need for judicial support and ultimately for prison space. So, the data base is being used.

Our office — and I'm the chief of Federal Statistics in the Bureau — has amassed a data base now. We can incorporate both the docket and reporting from the executive office and the several data bases from the administrative office to pick up the conviction rates and the sentencing and another couple of data bases from the Parole Board and the Bureau of Prisons.

What we're attempting to do and have started doing this over the past pretty much four or five years is develop a data base which would trace individual offenses essentially from the investigation through prosecution, conviction, sentencing and time served and then possibly the loop you know as recidivism.

We've come out with several reports on various issues; some on subject matters such as drugs and bank robberies, some on process like pretrial detention. The next one which we are coming out with in the next couple of weeks is going to be on white-collar crime. In fact, I don't have specific findings, which are not going to be released for the next couple of weeks, but they pretty much support the conclusions that Mr. Coffee found.

I would want to say, however, that there is something to be said — we handle the data at a national level. In part it's to avoid the problem of honing in on one or two of the local U.S. Attorneys which might not be representative of the whole nation as a whole. We do feel that using the data at a national level is useful, because it does give you an overall picture of how white-collar or how some other crime area is being handled on an overall basis.

Also, because, as I believe Mr. Drooyan pointed out, the number of variations which impact on the rates within an individual office are so frequently controllable by other factors that we just think it's a little misleading.

The other point I think we should think about is that when you look at prosecution, you also have to look at conviction rates. We found that white-collar conviction rates — and we define it somewhat differently than the category that he used, so they won't be exactly the same — were quite high as compared to the conviction rates in other areas. That's not true for sentence time and time served and all that. But at least the convictions were good.

That did seem to indicate to us, although we don't necessarily go and analyze the why behind the numbers, that there very possibly was a fair amount of manpower support going into those prosecutions.

We particularly found that within the categories, if you looked at certain types of white-collar crime, some of them did stand out as having fairly higher than average conviction rates and some of those did appear to us to be the ones which were more important which might be — in some cases might be cover-ups for drug activity, that kind of thing — which involved tax and generally tax issues, which we thought might be covering for a way to get at other kinds of significant crime.

PANEL MEMBER ADLER: Excuse me. We're running out of time and I saw about five more hands.

MS. KAPLAN: That's about all that I would say.

PANEL MEMBER ADLER: We're going to take them from the back.

MR. WELLS: My name is Joe Wells and I'm Board Chairman for the Institute for Financial Crime Prevention.

First of all, I want to thank you for — Don Cressey was president of our organization. I want to thank you for the nice dedication to his memory.

One quick comment and then I'll get off my soap box. For 10 years I was an FBI agent. I served in seven field divisions of the FBI and worked with seven of these 96 fiefdoms of the United States

Attorney's Office and it's been my observation that there are really two or three individual criteria that determine a successful white-collar crime prosecution.

First of all, in agreeing with the comments of the United States Attorney's Office, they are dependent pretty much on various of the cases that are brought to them by the various investigative and regulatory agencies under their jurisdiction. However, having said that, it is extremely difficult to sell white-collar crime cases to federal prosecutors. You either have to have someone who's extremely prominent so that prosecutor can nail himself a very famous hide or you have to have multiple defendants. Probably one of the easiest cases that I ever prosecuted had 22 defendants and they were all ready to plead guilty and I had absolutely no trouble convincing the prosecutor to take that case.

Thirdly, I think it helps to have a very simple case. If you have a complex case, if you have one that doesn't involve a tremendous amount of money, these cases are very, very hard to sell to prosecutors. I think if my interpretation of the data that is presented means anything, it appears that the greatest rates for the prosecutions are the ones that have the easiest convictions — the drug cases and so on and so forth. So, that's my two cents.

PANEL MEMBER ADLER: Next speaker. Keeping in mind that we're not using a lawyer's definition of brief, but rather a true definition of brief. Go ahead.

MR PAPAGEORGE: My name is Tom Papageorge. I'm wearing two hats today. I'm from the Los Angeles D.A's Office, where I'm in charge of the Consumer Protection Division. I'm also representing the California D.A.s Association.

First of all, on behalf of our Association, I think many of our members are very grateful to both Professor Coffee's group and Professor Maakestad's group for the effort to try to study that which has not been studied satisfactorily before. So, nothing I'm about to say derogates from our appreciation for that very difficult task.

However, as one of the people who filled out Professor Maakestad's form, I have a comment or two and I think it relates to the definitional problem we were wrestling with this morning.

That is this: If we're talking about tools for social control and I think that's what we're talking about here, let's be careful not to fall into what I think is a simplistic trap. That is to assume that if it's fraud, we care about it and we want to engage in tools of social control and if it doesn't fit that technical legal definition, we're not interested.

One of the small quibbles I have with Professor Maakestad's study is that by focusing on corporate crime as such, we ignore a wide range of other tools for social control that D.A.s, state and federal officials use. I'm referring to administrative proceedings and in particular civil, consumer, antitrust and other proceedings.

In my office we bring, for example, about 75 percent of our consumer and antitrust cases in the civil courthouse, imposing substantial civil penalties — restitution recoveries for consumers, permanent injunctions and other very potent remedies. Unfortunately, these are not picked up in the present studies. Obviously, there are limitations. But I think we should bear in mind that we have a wide range of undesirable social behaviors here in the business community and we should remember that there are a number of tools that are available to deal with them, not simply the very potent criminal sanction.

PANEL MEMBER ADLER: Mr. Epstein to wrap it up.

PROFESSOR EPSTEIN: In a sense the last point is a very important one in terms of the comment I was going to make. Because after hearing this panel here my reaction was, in terms of criminal sanctions serving as a deterrent for corporate malfeasance, basically there's virtually no efficacy at all in terms of the numbers of cases that are investigated, the number of investigations that eventually go to trial for the various reasons that have been suggested here.

Yet we've been told that self-regulation and notions of ethics are really irrelevant and absent these types of sanctions, we have no effective means of deterring adverse corporate behavior here.

Much as I subscribe fully to Mr. Snyder's comments, but I think the point that was made here that non-criminal means of — or non-criminal modes of attaching liability or sanctions to business behavior is perhaps the most important way in which legal processes can be utilized.

So, just want to wrap it up in that way.

PANEL MEMBER ADLER: As a prosecutor, I appreciate the two studies that we have. Because this is going to help me answer questions that I am always asked.

I also want to echo the sentiments of the gentleman who said we hope you do this once every five years so that we start to get more than one point on our graph. Although this is more than we had. So, it's quite significant.

Thank you all for your attention. I think we take a 15-minute break. Thank you.

(Thereupon a brief recess was taken.)

Problems and Means of Measuring Incidence, Prevalence and Costs of White-Collar/Institutional Crime

Moderator: *Sheldon L. Messinger*
Presenter: *Albert J. Reiss, Jr.*
Repondents: *Franklin E. Zimring*
Stanton Wheeler

Sheldon Messinger

PANEL MEMBER MESSINGER: I'm Sheldon Messinger from Berkeley. I've been asked to make an announcement which I think will be of considerable interest. Immediately following this panel there will be cocktails and the cocktails will be downstairs in what is known as the Lewis-Latimer Rooms. They will not be hard to find since there aren't many rooms downstairs.

Further, dinner this evening will be served in the Heyns Room, which is where we had lunch, at 7:00. So, there will be cocktails immediately following the panel and dinner at 7:00 in the Heyns Room.

This is the third panel and it's appropriate that I should number it, because this is the panel on counting and statistics.

I'm very pleased that Professor Albert Reiss has agreed to kick off the panel and our more general discussion. Al is on my right. The two discussants on my immediate left are Stanton Wheeler and to his left Frank Zimring. Al Reiss and I have known each other for longer than we now like to remember. He, along with Stan Wheeler, is a professor at Yale and Frank and I are both in the law school here.

Al Reiss has a long history of concern with the area of crime and social control and, indeed, with this specific area of the problems associated with measuring the incidence and prevalence and costs of white-collar and institutional crime.

Let me say one further thing by way of ground rules. We've arranged that Al will have up to 20 minutes, each of the other two discussants up to 15. They're, of course, permitted to take less time. I've agreed simply to monitor the proceedings, although I may jump in for a comment along with the rest of you.

With that, Al Reiss.

PANEL MEMBER REISS: Thank you, Shel.

I want you to know that I do feel that Stan and Frank are hard acts to be before.

I assume, although I have a second version of the paper and one somewhat different from the one you received, that you've all read it and, therefore, I will try not to repeat too much of it.

I want to develop further only two or three themes. I opened my paper with the first one: For what law are violations to be measured? I want to focus only very briefly on what I said in that section and then talk about a special problem on what law violations are to be measured.

As you know, there's been ample evidence here that there is no agreement on what is white-collar crime or what I call white-collar law-breaking. I don't like the term "white-collar" for what I want to talk about. But I can't think of any other term that I like any better.

So, I'm just going to say very simply that if I could legislate or if I could by fiat create a definition, my definition which I have set forward in the paper is as follows: White-collar law-breaking comprises those violations of law to which legal penalties are attached that involve the violator using a position of power, of influence or trust in the legitimate institutional order for a legal, personal or organizational gain. That's a very large class of violations and I would not want to begin to collect statistics under that rubric.

I distinguish white-collar law-breaking from three other classes, one of which is common or ordinary crime, which all of us are familiar with and a second is organized crime. What mainly distinguishes that from white-collar crime is that that is the legitimacy of the institutional order. Both involve illegal gain but in organized crime that gain is made in illegitimate institutional order. Organized crime operates, if you will, an illegal order.

Political crime, the third type, I don't think needs definition. But if I were to illustrate the definitions by examples, I would say that fraud can occur under any

Albert Reiss

of these categories. One can think of voter fraud, for example, as a political crime; it's used to further political power objectives and, therefore, I would call that a political crime.

It's easy to see that fraud can occur without necessarily using positions. So, it could be a common fraud. It should also be quite clear that fraud is practiced by organized crime, as well as in what we might call white-collar law-breaking. So that what are traditional categories of offenses such as fraud in my view could occur under any of these.

Very quickly, what is it that I want to do with a definition like this? I just want to clarify a couple of things that make it difficult to talk about white-collar crime.

One is that whenever you put something into a definition, it becomes rather uninteresting because you can't vary it. It's true by definition. So, when you say white-collar crime is linked to white-collars or occupational status, then that status isn't going to vary for that crime. I want to allow status to vary for I find it very interesting to observe how class position or power position relates to crime.

The second thing I want to clarify by talking about law-breaking rather than crime is that how you process events will determine what the violation is called.

A crime isn't a crime in some definitions until you get a conviction. In fact, what the reality is, we sociologists say, depends on how it's constructed. We know perfectly well that if we believe a crime was committed, but if a jury says it wasn't or that at least X wasn't guilty of it, then X was not guilty of it, even though we may still believe that X was guilty and so on. So, there's constructions of reality. Statistics on crime depend upon who places what construction on an event.

The third thing that I like to think of as varying is the organizational status of victims and violators. So, I very much want to pay attention to differences between organizations who are violators and individuals who are violators. One also wants to pay attention to what extent organizations are victims as well as violators in events. If you were operating in New York City running a subway system, you would soon become painfully aware of a lot of individual acts of turnstile jumping, graffiti, and similar violations which cost the Transit Authority millions of dollars a year. A lot of small crimes thus can be very consequential for an organization. Indeed, a private organization running the New York City subway system, in all likelihood would have long since been out of business. It's only because the Transit Authority can pass on some of those costs to taxpayers and others to subway users that it can bear the cost of crime.

We also want to look at governments as violators. In the area Peter Yeager has worked — water control pollution — I suspect that generally speaking municipal corporations are among the very largest violators but they are never prosecuted. We don't even bother to think of collecting statistics on government violators and violations in many states.

So, what we decide to collect statistics on and for what kind of units is a major issue. The State of California is about to compile statistical information on white-collar law violations. Will it report violations by municipal corporations in the State of California? That's a politically tough question.

How one is going to define violator categories then becomes a very important question in determining what statistics are compiled and reported. The first question compilers must face is: Will statistics be compiled for specific statutory or Penal Code violations?

Everybody in California talks about offenses in terms of a Penal Code number. To an outsider that's an insider's game. But it's very interesting, I'm sure, to collect statistical information on violations by sections of the Penal Code.

John knows perfectly well that if one looks at the prosecution file in detail, there is information on code violations

and that there is considerable variation from year to year in what might be prosecuted.

So, the more detailed you make an offense classification, or the more detailed in terms of specific provisions of the Penal Code, the less and less you will be convinced that it makes any sense to aggregate these offenses because you will see that aggregation masks a lot of variation in specificity. So then the question becomes, at what level do you aggregate?

I think that's a very important question. If one decides to abandon the Penal Code as a basis for reporting, that problem doesn't go away. I include in my paper, for example, Mitch Rothman's classification which he worked out for Stan Wheeler's white-collar crime data set. He developed a kind of major classification system consisting of fraud, keepings, takings and omissions. They're very simple categories and seem logically to cover what one might think of as white-collar crimes. Under them you can classify kinds of offenses like bid-rigging, price-fixing and so on. Rothman's classification illustrates how one can develop a classification system which doesn't necessarily fit a Penal Code system of classification.

Turning to the U.S. Attorney's data, counts or rates may look very stable from year to year, but that statistical stability is at a level of aggregation that can be extremely misleading. Once you disaggregate, it doesn't remain anywhere near as stable from year to year.

What the objectives of reporting are in a statistical system are important and as I would argue that the more you disaggregate, the more difficult it is to develop a notion of whether the rate of white-collar crime is going up or down.

That brings me to my next notion. I think we have learned that probably one of the biggest mistakes we ever made in statistical reporting in the United States was to create something called a UCR index of crime. There are lots of things wrong with it that I'm not going to discuss today. But the UCR index has both aggregation problems and problems of how crimes are to be weighted.

We know perfectly well that most of the change in the UCR index is due to changes in larceny-theft and burglary rates. We can forget about changes in the homicide rate because homicide could change considerably from year to year and yet make no significant difference in the UCR index of crime. Since fraud is a substantial crime it similarly could determine changes in an index of "white-collar crime."

At the outset, in developing white-collar law-breaking statistics, I would advise very strongly against the development of aggregate indexes like the UCR index and avoid saying to the citizens of California (or to the citizens of any state) that white-collar crime is going up or down.

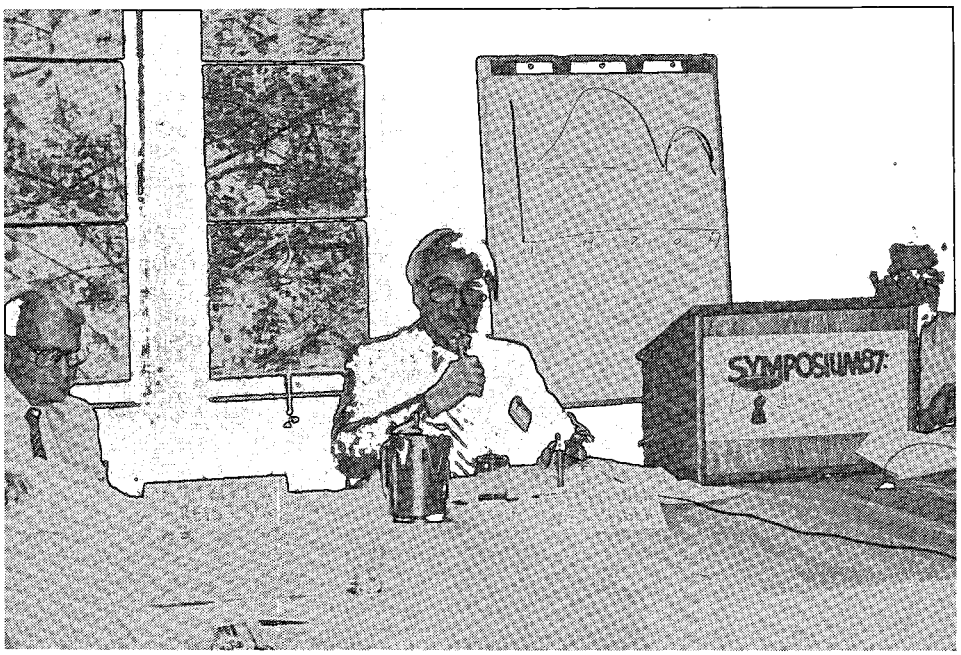
Then finally — and I think I will be within my 20 minutes — I want to say a few words about the topic that was discussed at the previous session, but I think primarily addressed by Gruner. That is the question of how are these statistics generated.

It just happens to be true that part of at least what we're talking about in white-collar law-breaking is generated in a way that is quite different from the way we generate common crime statistics. It is not only because common crime statistics are generated by police, but is also that the bulk of their complaints come from people by way of the telephone. The police are essentially reactive to citizen complaint. For white-collar law-breaking a regulatory agency is mobilized rather than the police. Many regulatory agencies thus generate information which at some point may be considered a crime.

For most of these violations four dispositions are possible. The first is to do nothing — to take no action. The U.S. Attorneys have adopted a very interesting rule, which is that whenever you spend more than an hour on a case, it's an investigation. That's a lovely rule. It solves a problem of how do you decide what to count by defining what's an investigation. An hour or more of a U.S. Attorney's time constitutes a bona fide investigation.

But, how do you decide in each regulatory agency what constitutes a case? Is it a complaint? How does a complaint come to it? How is the agency mobilized in the first place? How it's mobilized will determine to a great extent what's going to be counted.

Notice how that will vary across organizations. I understand in California you call your tax department —



PROFESSOR DUSTER: Franchise Tax Board.

PANEL MEMBER REISS: Franchise. It's a nice old term which went along with things like excise, et cetera.

But be that as it may, most of us don't — I mean, let's put it this way: That department does not learn about tax violations because there's a lot of concerned citizens out there who are reporting their neighbors or their friends or relatives or other people as being tax violators. In fact, it would be a very rare event for them to do that.

What would constitute a tax violation is what the Franchise Tax Board decides to do after beginning with an audit. An audit is not simply an accounting audit. It will be that only in the first instance.

You learn along the way at the federal level and it's also true in a good many states that tax agencies want to invest as little of the agency's money as possible in settling a violation, because the net gain is what you're after in the tax business. That net gain will determine in the long run an awful lot about what events are procured as violations. The first line of action is to settle without constituting a violation.

The second thing an agency may want to do is to institute a civil proceeding to recover. That goes to tax court. The agency doesn't particularly want to risk going to tax court for a determination that is out of the agency's control. Moreover, there is a risk of losing, resulting in an undesired precedent. It is better to have a court decision stand than to have precedent set at a higher level when the decision is unwanted.

For the same reasons and some additional ones, there are two things that happen if it's going to be a criminal case. One is that the nature of the investigation changes when it's going to be a criminal case. The IRS must advise a person when they fall under criminal investigation. Within the organization, it has to go to the Criminal Investigation Division. For criminal prosecution it eventually has to be referred to a prosecutor. The agency gives up control of the case. The last thing most administrators in agencies want is to lose control of their case.

So, what is interesting about law violations then is this dimension of how it is disposed of and what makes it into a particular law violation. What is it that leads the agency to decide they want to refer it to the Attorney General of the state, for example, or to the U.S. Attorney; what is it that leads them to decide to move to a civil proceeding for recovery; what is it that leads them to be under pressure to settle?

Stan, it's over to you.

PANEL MEMBER WHEELER: Thank you. In thinking about what I might possibly do that would be most useful for you and your purposes, it seems to me that I might take a particular project that a number of us have been working on in the white-collar crime area and see if there aren't maybe three or four or five or six points that would be of some use at least for discussion and perhaps beyond that. So, I'd like to begin by telling you very briefly about the project and then draw points from it and relate to some of the points in Al Reiss' paper as I go along.

A number of us have been involved over a number of years in a program of research on white-collar illegality and one component of which is to try to understand more about the nature of white-collar crime by studying convicted federal offenders. There are lots of limitations we can all think of and I won't take the time to recite them, because they will occur to you.

Anyway, just to tell you in brief what we have done is that we have managed to get access through the federal probation system to the pre-sentence investigation reports on well over a thousand persons convicted in the federal system of one or another of eight clearly defined crimes including antitrust violations, securities fraud, tax fraud, bank embezzlement, postal and wire fraud, false claims and statements, credit and lending institution fraud, and bribery. I think I've got most of them there. These are drawn now from seven major federal districts; essentially the cities of New York, Baltimore, Dallas, Los Angeles, Chicago, Seattle and Atlanta. Drawn in part because these are ones that were presumed to have large numbers of white-collar crime cases.

In much of our work we have been interested in the sentencing of white-collar offenders. We are studying individuals. Although, as you well know, many of the prosecutions will have been for corporations along with individuals, I'm talking here about a limited range of the total phenomena that we've been talking about throughout the day. That is, individuals convicted in the federal system of one or another of these crimes.

I think there are a number of points from this work, which we're now finally nearing completion, that do bear some relevance to the discussion. The first is a very simple one. That is, the extraordinary heterogeneity of that population.

Stanton Wheeler

Some of you might or might not wish to count each of the crimes that we're counting in there as white-collar. I think most would certainly agree that securities fraud and antitrust fall there and most of the others as well.

But what is striking — and now we're talking not about the totality of all the persons in the system, including those subject to civil sanctions, as Al was mentioning, administrative sanctions and so forth; only to those who have been in fact through the system and have been convicted. Even there you find just an enormous range within the various categories of white-collar crime.

Just to give you a very, very brief example. The securities fraud cases, at least 68 percent of them committed their offenses over what we call a national range. That is, they were not localized, they were national. The bank embezzlement cases are virtually entirely local, as you would know. With regard to the size of the take, all of the antitrust cases that we studied in this period of time were worth at least $100,000 or more. Five percent of the briberies were worth that amount. We're talking about bread-and-butter cases, a lot of them were bread-and-butter cases, and also relatively small ones in terms of the take.

One of the things that I'll come back to in a moment has to do with whether or not organizational form was used in the commission of the offense. For 85 percent of the securities fraud cases that was true, for 90 percent of the tax fraud cases it was true.

With regard to the backgrounds of the offenders without dwelling on it for a long time, we again define this population on the basis of the nature of the offense and not the color of the collar. When one looks at the color of the collar, however, from the occupational status of the defendants, virtually all of the SEC cases are indeed what anyone would call white-collar offenders. About two-thirds of the mail fraud cases are, but many of them are not.

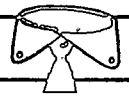
With regard to college graduation, a very high proportion of those in antitrust cases, less than a fifth of the convicted federal bank embezzlers. That includes bank tellers as well as vice presidents and trust officers and so on.

It points, I think, if anything, to the extraordinary need that many of us who are trying to understand that phenomena feel for some way of classifying or typing these offenses to reduce the enormous heterogeneity. If you're trying to understand it, there's simply too much variability in all the statutes and the behavior to work with it without some system even though you lose some degree of reality that will reduce it a little bit.

That's what the classification that Mitch Rothman developed tries to do, focusing on the method by which the crime is committed. If you want to try to reduce it all, one thing is to try to look for what the very different substantive crimes may have in common in their underlying strategies or mode of conduct.

For example, one of the categories that he talked about that Al wrote about but I think might have simply forgotten to mention is collusion. One of the things that's interesting about both antitrust and bribery is that they do involve a fundamental — they involve collusion and not fraud as we were talking about this morning. I was thinking that it would be unfortunate to limit our discussion to fraud, because patterns of collusive activity really do underlie some of the major forms of white-collar illegality that we're talking about.

Other examples: Fraudulent submissions, which bring together things as different as tax evasion and false claims to a government agency. The question is whether one can find anything fundamentally similar underlying things that may fall under very different parts of the criminal code, but yet have similar behavior, so that if you wanted to try to prevent it, you might see that you were looking at things that have something in common; although perhaps it could turn out not to work. That's only one way of looking at it, of course.



One other that we've begun to concentrate on in some of our work is somewhat more pragmatically oriented and it has to do with the size of the take and with the complexity of the offense. Complexity of the offense because it's related to the size of the take.

One of the things that's clearest in our material is that if an offense involves a number of offenders organized in some kind of plan and using a form of organization, the offense nets a lot more money than it does if it's committed by a single individual. So, one of the things we concentrated on was to try to examine the nature of the forms of organization and the role that they play in the commission of the offenses.

Thus, for example, it's clear from this set of offenses that you would probably put together antitrust and securities fraud at the top of the list. They involve by far the greatest take at least among these convicted cases. At the bottom of the list you'd have tax fraud and bank embezzlement; which typically nets far, far fewer dollars in terms of the profit to the defendant at least, again, among those that have been successfully prosecuted and convicted.

If we had more time, I would like to urge you in any case to think about another way of classifying these cases. This is the way that Al Reiss was in part referring to. That is, by the nature of the way they come to the attention of the agency. It's very clear that even within securities fraud, for example, what happens to securities fraud cases, whether they get referred to the prosecutor's office or not, depends very much about how the SEC became aware of the case in the first place. Sometimes from their own staff, sometimes by referral from other agencies, sometimes from computers and so on.

What happens depends an awful lot on how the organization found out about it. If you're setting up a system of data collection, it would behoove you to think hard about how to classify the way the organization first becomes aware of the event, as well as what it later does with it.

Let me stop there with regard to classification, sort of in this more macro sense, and come back to Al's definition with an observation or two that one gets to if one looks very closely at particular acts. Again, let me just use an example.

Suppose we take the crime of bank embezzlement and suppose we take Al's definition — the use of a position of power, influence or trust in the legitimate order for personal gain. Now, the bank embezzlement statute, as those of you who have prosecuted under it know, covers a multitude of sins even though they're all occurring within the banking industry.

A lot of the cases in this sample are relatively lowly-placed persons who are essentially bank tellers and for whom the position — if one asks what does it mean to use the position, what the position does essentially is put them close to the till. It puts them where the money is. As Willy Sutton once said, that's why he robbed banks. That's one of the things that tellers can get, if they're in trouble financially and so on, out of their position. It may not give them a lot else with regard to position. If you look, however, at the trust officer or at the bank vice president, what the position does is to allow one to work out arrangements with people outside the bank so that they may profit from fraudulent applications for loans and so on.

So, you get, even within the sphere of this one statute, an extraordinary heterogeneity of behavior and different ways in which the position is being used.

One comes to the same thing if you look at what is prosecuted in the federal system as bribery. I mean, we think of the glamorous cases and we think of fallen Senators and Congressmen and ABSCAMs and so forth. The federal bribery statute is by and large being used for much more mundane activities.

If we think again about Al's definition, but think about briber and bribee, one might come to very different ideas about the use of it. The bribee is clearly in a position of trust as defined by the statute,

and public trust. But that bribee may be a Congressman. He may also be a low-level federal official — namely, a prison officer who has been bribed by inmates to bring contraband in or take it out or whatever. A good deal of the use of the statutes, if you look at the behavior that's actually being prosecuted under them, is of this more mundane type.

The bribee certainly does, however, have to have a position. Again, almost by definition with regard to the statute. But what about the briber? If we use as a definition of white-collar crime the necessity for the briber to have a position of power or trust or influence, we might be deceiving ourselves or else we might simply want to decide not to call it white-collar crime. What the briber needs is money. If he has money, it doesn't make an awful lot of difference what else he has if the person is in a position to be bribed.

I guess what I'm trying to suggest is that as we really look closely at the behavior and try to differentiate different kinds of offenses, all of which have traveled under this loose umbrella, we may begin to learn something important about it.

I want to come back to just two more primary points. One has to do with the dimensions that Sutherland originally talked about. Status on the one hand and position in the organization on the other. He talked about a lot of other things, I know, but just to come back to that for a moment. We have tried hard to measure the status of defendants in our sample and also to measure this other thing that I referred to earlier; that is, their position in an organization and the way they use that position.

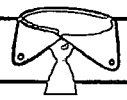
One of the interesting things and most powerful things, I think, that we have found which might not be news to some of you but really wasn't so clear to us, and I think is probably now coming more clearly into view, has to do with the extraordinary power of organization. The highest status offenders in our sample are not those who are getting the greatest money out of their crimes. They may be lawyers, they may be accountants, they may be doctors; but they tend to be marginal in their own professions. They're professional men, but they're really not at the apex of their profession. Their take from whatever their crimes have been tends not to be terrifically great. If you want to look for some of the largest takes, you look for persons in middle management positions in large organizations who have sign-off power for money and so on who themselves may not be high status necessarily — they may be white-collar all right, but they don't occupy the apex of the status order.

We have been led increasingly to look at the position the person occupies in an organization if one wants to think about the net they may gain from it rather than the status that they bring into it.

There are all sorts of examples of that. The simplest, if you want to hold the occupation constant, is simply to compare the doctors in our sample who are arrested as individual practitioners and those that have been part of Medicaid or Medicare clinics. Clinic operations can net, as those of you who have studied it more closely than I have know, millions upon millions of dollars in illegal profits and gains. An individual doctor finds it very hard to do that. It's just another simple example of the power of the organizational form.

But to come back to money again. I guess if I were going to make a recommendation to a state group that was anxious to push white-collar crime by whatever you choose to be the appropriate definition of it, I would take advice I have learned from my spouse, who happens to be an investigative journalist. She has a very simple motto in some of the stories she covers. It's called Follow The Buck.

I guess one of the things I might suggest is that if you really — if you could have a chance to be proactive instead of reactive and be able to organize your white-collar crime effort rather than have, as most agencies do and you may, the lack of resources so that you're very busy putting out fires and responding to requests and not able to move ahead planfully on your own; if you can plan, one of the things



you might try to do is to really do a systematic inventory of where the gatekeepers are, the moneykeepers in the organizations throughout the state that the state runs that are both public now and also corporate organizations. It will be very hard to do in some areas, less hard in others. But you can be fairly sure, I would think, that if you really want to be able to go after where most of the money is, you've got to find out who it is that controls those gates and then that will give you at least one searchlight and a place to look.

I guess one of the things that strikes me after the 30 or 40 years or so of dealing with Sutherland and whether we want to look at status or whether we want to look at position in organization or at harm, however defined, and so on is I guess I come back to one fundamental thing. That is, the fundamental thing you want to look at is money and where it is and how it's stored and who has access to it and who can control it. If you're setting up an investigative unit, that ought to be the central sort of dimension of what you're looking for.

I understand that that's a very big order and not easily done. But I think it recommends itself at least for consideration.

I had just one final thought, maybe two. One has to do with the notion of whether there should be a white-collar crime index. It's very interesting. I come to a somewhat different conclusion than Al, although I agree completely with his assessment of the methodological problems of measurement and all the rest. But I come back to the fact that since I very first came into this field I remember the uniform crime reports as a very powerful sort of symbol. I remember the crime clock and there was one rape every 13 minutes and so forth, the material that you've seen for ages. That gives a public definition of what crime is all about. That definition is that crime equals homicide, rape, robbery, et cetera, and white-collar crime nowhere. By whatever definition you want to adopt, as a rule it simply does not fit into that definition.

If you care about the matter and you want the public to care about it in a discerning way, then it's probably necessary to build a measure that is going to reflect that activity and you might begin by agreeing on what seemed to you to be presumptively white-collar crimes in the California state system and trying to record something about them. Then you may find that since the others are going to be recorded anyway you might want to note that while common crime is on the decline, white-collar crime is rising or whatever.

If you want to increase the public salience — and this is, again, a political rather than a scientific statement — I'm not saying you should. But if you do, you might want to worry less about the niceties of the measurement of the concept and more about getting it in the public minds so that people think about it as one of the kinds of behavior that they should really be concerned about in their communities.

Just one final thought. That is, as I was listening this morning to the wonderful conversation that was for some of us a replay of what Sutherland went through originally and what Tappan went through in responding to Sutherland and so on, with concern for whether we're not using the definition of white-collar crime all over the place and using it anthropologically instead of legally and so on, and when I heard Shelly say that at one time in their planning they were thinking of calling this conference organizational harms and how some of the persons who are charged with lawyering in these matters would have felt about that conception rather than something that's more firmly rooted in criminal law, I was reminded of Wilhelm Aubert, a Norwegian sociologist, who wrote a very interesting article early in the days after Sutherland in which he noted that the concept of white-collar crime was more evocative than scientific, that it had all sorts of ambiguity, it lacked clarity. Yet he argued for all those reasons that it might be better to keep it rather than to get rid of it. Because it does serve a certain function. It does call to attention things that are on people's minds that

seem morally wrong, that upset them a lot, that fall in this vague vicinity of misdeeds by persons of position or organizations of wealth and so on and that there may be some value to even such a fuzzy concept as long as we don't think we're going to use that when we're prosecuting cases in the criminal courts.

Any of us — social scientist, as well as lawyer — I think would want a much firmer definition of crime and of civil and administrative regulation and so forth when we're getting to the actual operation of the system. But I would guess that interest in this conference is drawn in part because we're not just here to talk about the prosecution of fraud in the California state code, but we're here to talk about something that for want of any better general label has been called white-collar crime. Thank you.

Now I hand it over to the good leader here.

PANEL MEMBER ZIMRING: To the Department of Legal Nicety and Urban Renewal.

Let me begin with a brief statement of ambition. I want to talk about only one offense. That is, the offense of insider trading. I'm going to try and give an example of kind of a core definition of the crime and then talk about some issues of both classification and of measurement and the way in which they relate to substantive, even jurisprudential concerns.

Franklin Zimring

I have not one, but three pretentious alternative titles for 15 minutes worth of insider trading discussion.

The most descriptive title is to speak about classification and measurement issues in insider trading. If I had good sense, I'd leave it there. But I was inspired this morning toward a second title. John Van de Kamp was talking about how the computer was multiplying opportunities for law violation in this society. Like a good law enforcement officer, he's always looking at the dark side.

My second title — I want to emphasize the bright side of the computer and I want to call this analysis of insider trading "The Computer Can Be Your Friend." In this case the "your" reference is to law enforcement. I want to talk about some creative ways to measure white-collar harms in the insider trading area that require data processing capabilities to do their work.

So, that left me with two titles by the lunch break. The third title popped out somewhere between Al Reiss' presentation of his paper and the sermonette from Stan Wheeler. That is, in talking about the kind of methodology of measuring insider trading and other white-collar crimes that I'm going to argue for, I could call these remarks "In Praise of Proactive Induction." Proactive because I do think that we have to decide really what forms of white-collar crime we want to measure before we can measure them accurately, and induction because I think we're going to find that the ways we want to go about measuring particular kinds of criminal harm are going to be highly specific to different areas of social and economic behavior; that what we find out about insider trading is not going to be terribly useful in terms of the specific measurement issues in Medicaid fraud and Medicaid fraud may not tell us a great deal about the specifics of doing a good measurement job with respect to environmental pollutions. So, it's in praise of the specific as well.

To do all or, indeed, any of that I'm going to have to have kind of a common core example of what it is that we're talking about when we talk about insider trading. Here's my example: Stanton Wheeler is vice president of the XYZ Company and the XYZ Company sells on a public stock exchange for about $20 a share. That's what the public thinks they're worth.

But Stanton Wheeler finds out by virtue of being vice president of XYZ that they're going to be acquired by ABC. Hostile takeover, friendly takeover, who knows. But they're going to be taken over for $40 a share, which is more than $20 a share.

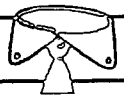
So, what Wheeler decides to do about two weeks before anybody else knows this, he gets his brother-in-law, whose name isn't Wheeler, and who doesn't have to file forms when he buys stock and sells stock, to buy 10,000 shares of XYZ Company at $20 from Van de Kamp, who owns it, but doesn't know anything.

Two weeks later there's the announcement. The stock goes to 40 and the insider trader offense has been committed. It was committed when using or withholding the insider information that XYZ was going to be acquired. Is it using or withholding or both?

I want to just use that core definition of insider trading to explore three classification issues.

Issue number one. Let's take that four-part classification that came out of the Yale project. Is insider trading as I've described it, the Wheeler-Van de Kamp transaction, is that a taking or a fraud? In an important sense I want to suggest that which you want to emphasize, the taking or fraud aspects of the transaction, depends on your own theory of what the core offense is.

What did Wheeler take? Well, he took information from the XYZ Corporation



that it was going to be acquired and used it for his own purpose. Is that a taking like taking dollar bills out of a bank till? No, but you can view it as a violation of a fiduciary duty that he has as a corporate vice president not to use for his own purposes information that comes to him by virtue of his position in the firm. So far it sounds like a taking.

But meanwhile Van de Kamp, the seller, is saying XYZ Corporation's in the same good shape it was before. I'll tell you who got really ravaged by this transaction was me, the seller of the stock, and from the standpoint of my harm this was fraud.

What was the fraud? The fraud was that Wheeler, through his brother-in-law, enters into the transaction just as if he was a stranger and didn't know anything about XYZ Corporation, withholding from the rest of the market, including this seller, the information that that stock was soon to be worth $40. Fraud says that victim, the individual seller, with respect to insider training. Or is it both?

I don't want to try and resolve this. I want to suggest that there is some plasticity that's involved in the categories that have been presented to us and that the best way to resolve it is to ask the people that worry about insider trading and that pass laws against it, to specify the essence of the problem as you folks see it. Is it the fraud element? If so, then maybe we want to change the law in certain respects. Is it the abuse of trust? In which case we're going to limit our definition of the offense to situations where it really is an abuse of trust. Okay, that's classification issue number one.

Classification issue number two I just want to throw out as part of the life-is-complicated curriculum. Is this a victimless crime as I've described it? Is the XYZ Corporation really a victim? Does it lose any dollars from what Stan Wheeler's done to it? Does it lose face? Do we count face as loss in this sense? What is it that Van de Kamp, the seller, has lost? Windfall profits?

If Wheeler without information had bought his stock and made the $20 profit instead of John Van de Kamp making it, nobody's lost anything even though the economic position of both buyer and seller is going to be identical. This is a funny bird, then, this insider trading. It needs a specific set of theories in terms of classification.

I think if we had a lot of time to explore it, that we'd decide that this was not a victimless crime, but it's a crime with funny kinds of victims.

I want to make a distinction between the victimless crime issue and the third classification point I want to make. I do think that insider trading is something that I'm going to call a silent crime. This is why it admirably demonstrates how issues of measurement and classification can be crucial.

You know, John Van de Kamp, the seller in our little transaction, may know that he lost an opportunity to make money on XYZ stock. He may say, boy, I was unlucky. But he's not going to go around unless we all know more about it saying, you know, I was a victim of an insider trading scam. Because he doesn't know this. The crime doesn't tell its victims that they are victims of crime unless and until we suspect that the transaction was indeed an instance of insider trading. We will only define what happened in the transaction that I was talking about as criminal harm if we found some way of measuring the behavior and confidently assessing it.

Now, the measurement issues with respect to insider trading that I want to list now are meant to illustrate simply that there are a lot of different interesting things as criminologists and lawyers we might want to know about insider trading and each of them calls for a different kind of measurement.

Here's my list. One thing that you might want to know if we're interested in whether people in the corporate suites are nasties or law abiding is how many people commit the violations that an insider trading is. Let's say there are 150 people in XYZ Corporation who could have gone out and sold or bought stock.

On the average, how many will go and do it? If we're interested in the law abidingness of corporate executives, it's what percentage or proportion that will be a key term.

That is not the same thing as saying how much of the crime is there, how much insider trading. Because two people with the right connections out of 150 can be three-quarters of the stock volume on the New York Stock Exchange. If Ivan Boesky didn't exist, I'd have to invent him to illustrate the difference between saying how many people violate trust and how big a problem in terms of volume it is.

More questions. How many individuals are in different kinds victims of this crime and what do we mean by victim in this case? How much loss is there? Do we want to call the difference between $20 and $40 a share in the John Van de Kamp transaction the aggregate loss from this? By some economic measures the loss was zero. Morris and Hawkins in the Honest Politician's Guide to Crime Control have one analysis of this. Gary Becker, the economist, has another. So, just, again, a whole list of different kinds of issues.

What kinds of people commit insider trading frauds? There are two different ways you can ask the question. One is the Stanton Wheeler way. Are the people that commit SEC violations likely to have college degrees? Sure, because they're the ones that have the opportunity to commit it.

But another thing we can do is say of the 150 people in XYZ Corporation who had the opportunity to commit this crime, is it the more educated or the less educated, the higher placed or the lower placed who are more likely to become the violators of the norm? That's a different issue. These different questions call for different kinds of measurements.

What kinds of people are victims? Maybe I'd feel differently about the enforcement priority to be given to insider trading if I found out that most of the offenders are arbitragers and most of their victims are also risk arbitragers. There's a sense in which you'd want the economic law of

the jungle to apply there as you might not if it were widows and orphans and the same amount of dollar loss.

Now, I want to draw your attention to a diagram of what looks like a swan meeting a dinosaur here. This is an example of estimating the volume of insider trading which is meant to illustrate my little "The Computer Can Be Your Friend."

Time is on the bottom axis, 21 days before news is announced that XYZ is going to be acquired by ABC, to 7 days after. I'm assuming that we have the capacity to know how much stock, give or take 100,000 shares a day, would be sold if everything was kosher. So that this dotted line is the normal sales we'd expect of XYZ Corporation stock prior to the announcement and then it continues what would happen when the thing's announced. This isn't the price of the stock; this is trends in volume of sales.

Now, the dotted line, I'm suggesting, is the volume we'd expect. The solid line here is the volume that we note during the period just before there is an announcement that XYZ is going to be acquired by ABC.

The point I want to make about the computer being our friend is that subject to our believing we have a good projection of what stock volume would have been, the dinosaur hump in the middle of this scenario looks very much like insider trading had started and would support two different quantitative estimates.

Number one, if I've got to debate somebody about whether insider trading took place, I'd love to have the pattern that I've described here hypothetically. It looks like there has been a substantial amount of law violation.

Number two is a little riskier. In theory, we could estimate how much of the total trading here, if one's measure of the expectable trading or normal trading is correct, how much of the commerce in the stock prior to the announcement was attributable to insider trading.

If you could take that second step, it would be a very important one in defining how much of the losses of sellers could be attributed to insider trading. Because it really doesn't make any difference to a guy who sells 14 days before that merger whether his buyer happens to be one who was on the inside or one who got a rumor or one who happened to be lucky. But in terms of measuring aggregate social loss, before we say that this might be a billion as opposed to a mere 500 million dollars, measuring the proportional impact of insider activity to the total activity is going to be a vital part of that.

I want to make one brief point about the relationship between these technical matters of measurement and classification to what I would call core substantive issues.

First of all, I think that new technical approaches to measurement are of central importance to the recognition and social perception of white-collar crime. I think that if you do kind of two years' worth of work on insider trading, careful and specific measurement work, you're going to know a lot more about the incidence and distribution of this behavior at the end of the study than at the beginning of the two years and that's a good basis for going to the public and educating them about it. It's a much better basis, Stan, than coming up with a J. Edgar Hoover-style index of white-collar crime because it will sell newspapers.

I think that the niceties and rigor of measurement can be creatively applied topic by topic in ways that you couldn't lump them. I couldn't take white-collar crime insider trading and white-collar crime Medicaid fraud and give them the same dollar loss measure. I couldn't do that, by the way, with bribery and bank embezzlement either. Because if a $50,000 bribe results in the building of a bad $2 billion highway, the question of how you want to measure economic loss when you're aggregating them is not an obvious one and doesn't favor the amount of the bribe.

So, you need, I think, technical work that is one-crime-at-a-time work. If that is the case, once you identify specific priority areas for analysis, I think that in almost all of those areas, if you're creative and patient, you can develop good measures. Gil Geis has done work in the Medicaid fraud area. The SEC is doing work on insider trading.

I guess the bottom line substantively for me is that any good work on measurement and on classification on any one of these crimes has got to help us read real precision into the definition of the offense and into the theory of the offense.

One of the things that intrigued me about insider trading is that you really can't decide as a criminologist whether we've got here a fraud or a taking without doing some pretty thoughtful work on what the core theory of harm is that animates the definition of the offense. So, it is one of these situations where you've got to do good jurisprudence to do good measurement and you have to do good measurement to really reflect accurately in what you're trying to measure the sorts of harms that lead us to define the work as criminal in the first place.

So, it's not an uncomplicated area, but it's as good an area where good and rigorous work can be done.

PANEL MEMBER MESSINGER: Yes, John.

PROFESSOR KAPLAN: I'd like to throw in one more complexity in the insider trading problem and it's this: Stan Wheeler is sitting in his office and he finds out that the factory making the key component of your computer has just burned down. He goes out and sells — dumps his shares quickly, a lot of shares, because he was a major executive, and people who bought that find that they paid twice the value and they get screwed.

At the same time Kaplan was flying in an airplane coast to coast and he looks down and he says, good Lord, it's the Wheeler factory burning. I land my plane and I quickly dump all of my shares. I'm not an insider.

Now, the guys who bought shares from you got screwed and are the victims of

illegality; because you had knowledge, you're an insider. I'm not an insider. The people who bought from me equally got done in. No violation of law at all.

Now, what that indicates to me is that we're after — either our laws are crazy, which I would argue that in this case they are most definitely not, or the harm in it is a very peculiar harm that extends only to some of the people who get injured by the practice that — the unfairness that we worry about.

PANEL MEMBER COFFEE: I am fascinated listening to these insider trading scholars, Zimring and Kaplan. I think they are quite correct in emphasizing the complexities of this crime.

PROFESSOR KAPLAN: The only one who really knows anything about the whole field is talking.

PROFESSOR COFFEE: I don't know how much more complicated — but, anyway, I want to make two comments. I think that Frank has done an excellent job of showing us why taxonomic models of crime may not be applied to real-world situations with great competence. I mean, I think this is one where probably just as the briber and the bribee may be closely related, although they're very different in terms of the taxonomy, the tipper and the tipee, many people in this situation have more in common even though they don't fit the taxonomy.

From that standpoint I agree with everything he's saying about this is a case where we really can't easily classify and we have to look very deeply for the crime's root concept. By the way, the facts, I think, are even more complicated because John Van de Kamp in your example would have been just as hurt had you not traded. In fact, he's benefitted; because you probably pushed the market price up a quarter of a point.

But I guess where I want to part company — and this comes back to what you're essentially arguing — is the ease of measurement here. I have greater skepticism than you do. It's for a reason we started out the morning with the significance of the mental element in crime; which is where the lawyers and the sociologists begin to part company a bit.

The actual crime here requires not only that you have possession of material non-public information that comes from a result of a fiduciary breach — that's already three or four elements. Material, non-public and it came from a fiduciary breach, a unique source. It also requires that you know it. When you look at your huge bump there — and, by the way, that bump indicates probably not insider trading. Because it's the wrong pattern. It's going down just before the merger. The actual cases are hyperbolic in going up through the moment of the announcement. The fact that it's going down is a very strange and maybe benign phenomenon or at least the market has changed its mind by no longer trading.

In any event, that bump could be easily explained by a lot of other phenomenon. Someone out there is trading. Other people are beginning to hear rumors. The person who hears rumors on the street secondhand doesn't have the mens rea of the crime. He doesn't know anything more than people are saying that X is in play and that is the real-world scenario. X Corporation is in play, it's a good play, let's put some money in it. Mutual funds are specialized in trading what are thought to be take-over stocks. It is believed that experts in the field may even be able to identify through financial criteria take-over prone companies with a sense of looking at various ratios. So, all of that is one source.

Then there is public information, which is the Wall Street Journal or heard on the street or some other publication said there are rumors about so and so corporation being in play. At that moment Ma and Pa Kettle in Dubuque can also join this game. It's madness, but people have not the mental element even though they may be in possession of the material, non-public information, and it came to them as a result of fiduciary breach.

I could take this out through several more iterations about ways in which you can get this permissably. But it leads me to worry about our ability to measure the amount of criminal activity here even though we cannot measure the amount of abnormal trading. I think you ought to focus on that to tell me how we know that which is criminal from that which is a legal exploitation of your superior skill or foresight.

PANEL MEMBER MESSINGER: Al and then Frank.

PANEL MEMBER REISS: I think this is — it's well to remind ourselves that anything that we want to talk about is very complicated. A homicide is not a homicide is not a homicide and insider trading is not insider trading is not insider trading.

In law we recognize some differentiation in the homicide category even though statistically, we count them all homicides or murders. I happen to think that classification and counting is a fun game to play. The Karen Silkwood death, for example, is not an ordinary homicide. One version of her death contends that powerful persons murdered her because the organization feared her disclosure of corporate illegality. If so, are some homicides white-collar or corporate crimes? Again, isn't it one thing if a prison guard uses the position of guard to assault prisoners and another to assault someone in a local bar during an argument?

So, we can play classification and counting games about when is a crime an assault and whether an assault can be a white-collar or corporate crime. I think that's a kind of fruitless game, however, unless you answer the question: What purposes are those statistics to serve? What information do you want to collect and report about crime events, offenders and their victims and what do you want to report about prosecuting offenders or convicting them.

I therefore would warn against playing the lawyers' hypothetical game of what happens if we add on this or that element to the crime for we can readily think of 50 variables at least that we could vary that would soon lead to a classification

system nobody can deal with very effectively.

I just want to make the point that — and not to overly complicate it as I think you did, Frank, by including detection in your model. Of course, the capacity to detect is related to the nature and amount of the crime itself. When is there pollution? How much pollution depends upon detection devices? The devices to detect air pollution will be different from those to detect water pollution. Whether or not there's nuclear radiation out there will depend on radiation counters. We don't know about asbestos cases or black lung disease until there is a causal theory that can be used to create a corporate health or safety violation. So, I think that we always have to look at each of these violations of law historically and examine how detection is related to defining it as a crime.

So, I think that we always have to look at each of these things in that sense historically and in terms of how the detection thing is related to defining if it's a crime in the first place. It's a causal theory.

PANEL MEMBER MESSINGER: Frank.

PANEL MEMBER ZIMRING: I just want to say something briefly in responding to Al Reiss.

The point that you make quite broadly in relation to asbestosis and a lot of what would be considered 20th century crimes is, I just think, a point of enormous importance from the standpoint of measurement, from the standpoint of comprehending public responses and from the standpoint of understanding the political science of priority setting in public opinion, which is a part of the law enforcement function. That notion and the category of silent crime just strikes me as very important things to talk about. They're not peculiar to insider trading, but I think they're important.

Jack Coffee begins by saying that the hump is probably not characteristic of trading patterns before mergers. I'm sure it isn't. I made the hump downward, because that way most of the volume is pure case criminal insiders. I'm not dealing with the people who catch up on the rumor mill. They're too large a part of the market for that hump to be a good real-world curve.

I'll grant him that and I'll grant him that existing studies do create still situations where you can't exclude plausible rival hypotheses for volume patterns. That is to say innocent patterns, not situations where you can't prove the mens rea. Because I think you're confusing us by bringing that in there.

I suggested if we refine our measures and do better detailed studies of what normal patterns are and use triangulation of proof measures, that we can do a much better job if we want to spend the time.

Also, I don't worry much about the point you're making about mens rea. There is a very substantial difference between measuring the harm due to what I'm ready to assume is criminal behavior in the aggregate and proving the guilt of an individual in a specific case.

Let me give two examples other than insider trading where this is true. They do very good studies now on the incidence of unnecessary operations in Hospital A versus Hospital B without proving any particular operation there was unnecessary by their standard by looking at comparative incidence statistics. That is, I think, one example.

The other, which has to do with a book that we're just issuing, is drunk driving. There's an awful lot that we can tell by just taking a look at blood alcohol counts including those that are below — on dead drivers that are below the legal intoxication limits; .07, .08, and .09 in .10 jurisdictions. We can use these kinds of measurement in the aggregate as expressive of the cost of the criminal harm without any measures of individual guilt in individual cases.

I don't see insider trading as being that different where criminal traders also cause the trades of those who lack the mens rea for personal guilt. I see that as a very different point than the plausible rival hypothesis of people who are innocently responding to other mechanisms.

PROFESSOR COFFEE: I don't mean to discourage further research. I think it's a fine idea to try to do it. But I do think that mens rea is more central than you're giving it credit.

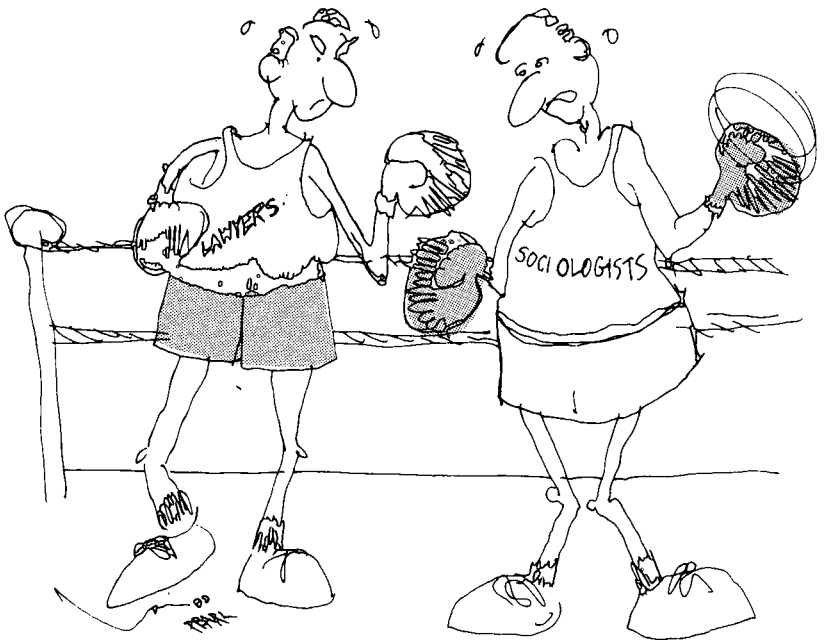
The other hypothesis typically involves people who are engaged in the actus reas of the crime, but do not have that mens rea. They do not know one fact, that this came from an illegal source. It is knowing that you are using information from an illicit source that distinguishes the benign from the malicious.

The problem of the whole harm here is that I don't think you give enough weight to the fact in these cases that these are willing sellers who came to the market because it went up a quarter point. The harm here is that a legal duty was breached, not that they engaged in a sale where they willingly came to the market. That gets us into a very metaphysical world.

PANEL MEMBER MESSINGER: Yes.

PROFESSOR BRAITHWAITE: John Braithwaite from Australia National University.

I don't disagree with the responses that are being made from the front to Jack Coffee in the abstract, but I think we're being altogether too dismissive of the problems here. Al's talking about the problematics of homicide. There are big differences there. I mean, we have a rich qualitative understanding of what happens with homicide. We've got all sorts of case studies in the literature about the different types of modus operandi that are used with homicide. I mean, there are all sorts of reasons for that. When homicide occurs, we are more likely to find out about it. I mean, smelly corpses lie around and people notice them and so on, which doesn't happen very often with insider trading.



It seems to me that in a lot of this — and the insider trading example is a good way to tie down our thinking about where we're going in research in the area — that we're trying to count before we can walk or talk in a lot of this, I think. We should be giving priority to the kind of qualitative work so that we do get an understanding of the range of modus operandi that I used and that does include beginning to come to grips with the subtleties of the mental element and some people being duped into participating in the offense without being the actual participants.

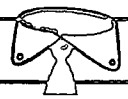
Until we really have that rich qualitative understanding for a more sort of case study, field work driven approach, I think we might be jumping the gun on some of this.

PANEL MEMBER REISS: May I just make one observation? I don't think homicide is as simple as you think. You take the euthanasia end on the one hand, which may be far more common and in some countries is quite common, or you take the child abuse and the way children die, which has long been a neglected problem, then it's by no means simple. We can elaborate for so-called accidental deaths, suicides, and in other ways.

So, I wouldn't want to say that just because we know a lot about homicide we know everything. We could have a big dark figure there as in euthanasia or in child abuse.

PROFESSOR BRAITHWAITE: I'm not saying that it's simple, but I think we have done a lot more qualitative work on it and we know a lot more about it; that's all.

PANEL MEMBER MESSINGER: I would like to add a word on this. I'm not sure that we need to make a choice. But I guess even before that I'd say I'm not aware that much counting is going on. Part of the reason for this conference



was that, at least in the state of California, it's quite impossible to know how many white-collar crimes — you pick the one you want to talk about — are occurring, have occurred this year, last year, whenever.

In addition to that I'd say that the very effort to count drives you to be more specific and may lead you to do more of the kinds of qualitative studies that, I agree, need to be done if only so that you can make some sense of the kinds of numbers that you'd like to collect. At least that's been my experience.

Yes, Barry.

MR. KRISBERG: I'd like Al Reiss to comment on what you think would be the social utility and maybe some of the drawbacks of using victim surveys to get at this white-collar crime question.

PANEL MEMBER REISS: I think a lot of that depends upon what it is that you want to measure. If you're talking about consumer fraud, you get into the whole question of when are we aware of being defrauded? If we're talking about price-fixing, when are we aware that we're buying in terms of a fixed price? It's very, very difficult to detect most of these things in terms of victims. So that I'm not very sanguine about using the victim survey to compile statistics on many kinds of fraud.

But, again, I want to underline what Shelly just said. I'm not trying to discourage it. In fact, I'm saying try to measure crime by crime. Look at what you have now in the case records or try to do a victims survey on some types of law violations. In trying to design and carry out a victim survey you will see what you're up against in conceptualizing and counting and you will learn a great deal. Having helped design the national crime victim survey, I know perfectly well how difficult it is to do it just by trying to get some measures of it. You have to decide what's in and out.

So, yes, some areas you may want to do it. Most areas of white-collar law-breaking I think are not amenable to a victim survey.

PANEL MEMBER MESSINGER: Troy.

PROFESSOR DUSTER: Troy Duster. A parallel to Barry's question has to do with self-report. One of the correlations in index crime is self-report studies. I just throw out to the panel what areas of organizational and corporate crime do you think would indicate anything with self-report studies on the index issue.

PANEL MEMBER REISS: Let me just say that there are only two areas in which we know very much about self-reports of white-collar law-breaking and one happens to be tax evasion. It turns out that there are very low correlations between self-reports of evasion, the official revenue records report, largely due to substantial underreporting on the self-report survey. There may be quite a few types of violations for which it's just not useful to use self-report measures.

PANEL MEMBER MESSINGER: Frank.

PANEL MEMBER ZIMRING: I think that there's a good deal of exploratory work to be done before one gives up hope, particularly when we're dealing with organizational behavior and competitive business.

Clinard at one point was talking to retired business executives and doing a kind of a 10-year lag on self-reported white-collar crime or organizational crime study. That's one very promising technique, a kind of a retrospective.

Another one, of course, is not to do self-report directly, but to do kind of milieu studies in which you ask Macys what Gimbels is doing and Gimbels about Macys. Now, obviously, you're going to have to find some techniques of triangulation of proof and there's a large difference between accusation and confirmation reported. But there is a rich variety of non-conventional measures, which is mostly work waiting to be done and waiting to be done carefully. Only then will we know what we can't do.

PANEL MEMBER MESSINGER: Stan.

PROFESSOR WHEELER: I'd like to make just one brief observation and then ask a question myself if I could.

I guess the brief observation is that I know we have limited resources and we can't do everything. But it seems to me that the needs are so great for doing finely-honed measurement work and also doing qualitative work and all sorts of other kinds. Frank isn't going to put me in the position, I hope, of saying that because I said you might want to have an index of white-collar crime I'm opposed to refined measurement. He knows better.

But I would like to ask those of you who are here in the criminal justice community who are primarily involved in practice rather than research, what your own sense is. I would like to learn from you as to whether you feel the need for a measurement, even crude as it might have to be, of white-collar illegality or of specific kinds of criminal activity that fall into this area and what your own sense is rather than listening to those of us who are primarily involved in doing research on it.

PANEL MEMBER MESSINGER: All the way in the back.

MR. MCDONALD: My name is Bill McDonald. I'm from the California Department of Corporations.

It's a very interesting anomaly. We all have limited resources and whenever we go to the Legislature to get more help, they always say to us, prove what you're not doing. Prove to us that there's a problem you're not addressing. The way you do that is by measures of workload.

Unfortunately, because we're in an era of limits, the way you handle your workload is you continually lop off at the bottom so that you're continually devoting your staff as effectively as you can to the enormous fraud problem that you're up against every single day of your working life, the result of which is all the stuff that you've lopped off at the bottom you have no real ability to measure. I mean, you can say we had so many complaints come in that we simply put below the floor and we haven't done any real research on what those cases would have looked like had we followed up on them.

So, I'm unable to go to the Legislature and say that I need more help because of all these cases that I can't tell you anything about because I didn't work them. So, from my point of view the importance of you guys is you've got to tell them what I'm not doing. You've got to tell them about all that stuff that's under the floor, because I'm too busy.

PANEL MEMBER MESSINGER: Another hand.

MR. ANDERSON: I think that the gentleman made a good point. I think a lot of what the Justice Department has done in developing its statistical data base is because Congress has said, well, you know, what are you doing out there? Where are the figures? So they finally began to compile some.

In any event, my observation was more localized than that. I was interested in the gentleman who was talking about the insider fraud measurements. I was interested in why he left out, for instance, the integrity of the market as being the victim. Because it seemed to me that Van de Kamp and Wheeler are somewhat irrelevant to what's happening here. I mean, the stock market is a national lottery of type that we protect through this construction of controls. We can call it fiduciaries and whatever, but it is to keep that guy from making a whole lot of money off of information that he comes into so that everybody else will feel that they're on a reasonably level field; which, of course, has never been my belief. That's why I stay out of the market.

But, in any event, the phenomena of people finding out about things, you're going to get that kind of configuration. So, I think Professor Coffee's point is a good one. There's always going to be somebody who knows a great deal about what's going to happen legally. But I

think the harm there is basically the integrity of the stock market.

It's interesting that Rudy Guliani, who's in the forefront of the prosecutions here, is probably the reason that there are prosecutions because he's interested, he's committed to them; says, well, one of the prosecutive objectives is this shows me or this shows everyone that insider trading is criminal. Which is interesting, because there's far from a consensus on that.

I wouldn't bring an insider trading case in my district. The measurements that you just went through are in part the reasons. Because I wouldn't have a victim. I wouldn't have any blood on the sidewalk. I wouldn't have a monetary loss that I could explain. I would have to talk about the integrity of the stock market, which is of somewhat a low priority in the northwest as opposed to Manhattan.

So, my own personal measurements — and I think that what the gentleman said comports well with what the real world might be, although our analysis is different. As you look at a situation like that and you say, that's a lousy case, get it out of here, I don't want to waste my time with it because it doesn't stand for anything and I can't do anything with it beyond protect the stock market.

The same way in many antitrust cases. All you're really protecting is the principle of competition. So, you don't have a very good crime.

One of the things that's always perplexed me about white-collar crime — and I think it's Professor Coffee who has written about over-criminalization in the area of white-collar crime — is that often times prosecutors are able to get a conviction out of a jury on a course of conduct that half the community might not agree is even criminal simply because they had the latitude to design the crime and you get instructions and what have you that are based on cases that relate to fiduciary breaches and what have you. In the mash of all that you forget about fraudulent intent and everything else. Because if it's the lawyer who violated his fiduciary duty, that's such a great help to the prosecutor. He doesn't really have to worry too much about fraudulent intent.

In any event, it's in this kind of area that I think that we have so much trouble with measurement. Because we're dealing with such an ambiguous product, which is a crime because the jury said it was. It agreed with my theory of the case. So, it's very difficult to measure these things until you're all kind of done and then you kind of look back on it and say, was that a very good thing to do?

You know, I think the Supreme Court in this recent decision — and I'd like to hear Professor Coffee's analysis of the McNally decision — kind of threw up their hands and said, you know, where in the hell are we going with this intangible rights thing. The prosecutor and the court of appeals get together and out comes a crime that nobody — that half the community didn't even see the bullet coming.

So, it's an interesting kind of area in the sense that it's open-ended, it's evolutionary and it's something that a prosecutor can have a great deal of influence on to make it a crime in the first place.

So, I really feel sorry for you all in the measurement business. Because I think it's going to be a very difficult task.

MR. PAPAGEORGE: Tom Papageorge, once again, with the L.A. D.A.'s Office.

I'd like to respond to the request, I think, of Professor Wheeler about feedback from the law enforcement community; at least speaking for a moment about local prosecutors.

A concern that I think is central to a lot of us who head up or are active with special units in otherwise general purpose district attorneys' offices is convincing not only our senior management in some cases, although we're blessed with many very, very well-attuned D.A.s now on these issues, but also convincing our boards of supervisors and other fund controllers and policy makers that white-collar crime is

worth the investment of the nickel that could just as well be spent, so some say, on street crime, violent crime, more obvious crime.

The victim of the murder, the victim of the rape, the victim of the robbery always is prepared to shout and bring to everyone's attention that there's been a problem. But we who are specializing in this kind of prosecution are very much at a disadvantage in arguing for budget, in arguing to do this kind of work; because our kinds of crimes — antitrust, collusion is a good example — are so very difficult to detect. So few of us in California know that we were the victims of a price-fixing conspiracy by Levi Strauss blue jeans in the 1960s and early 70s, for example.

It's that very practical aspect of budget and policy orientation that I think is a very important vote for your efforts. I have heard now great detail about how difficult a job it is to measure this phenomenon, difficult even to define it. I readily concede all of that. But any effort that you can offer along these lines will, I suspect, help a great many local prosecutors who are trying to elevate white-collar crime in the priority structure of a local community.

PANEL MEMBER MESSINGER: I want to make one comment before I forget it. Then I'll call on Peter. But it really follows on the comments just made about what Frank calls the "silent crime." You're talking about the absence of appreciation that one had been a victim. I guess that all of us agree, although we might go about it in different ways, that some greater effort to talk about the volume and the costs of white-collar crime is indicated and might have a kind of sophisticating effect.

Part of the outcome of this kind of publication activity, if it ever comes to pass, will be a kind of reconstruction of the public consciousness about what constitutes serious criminal activity. Indeed, that in fact has really happened already. Marvin Wolfgang's studies over the years have shown that it is not the case that large numbers of the public think that pollution, for example, is not an important problem. Indeed, it seems to be the case that not only do they think it's an important problem, but a much more serious problem than sticking up stores. That kind of information seems not to have permeated the official community.

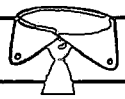
Anyway, Peter.

MR. GREENWOOD: I'm Peter Greenwood from Rand. Before Shelly's comments I was hearing this discussion going back and forth and I missed something. Because I hear the prosecutor and the sociologists putting it off on each other whose responsibility it is to do this measurement and conceptually how difficult it is and I'm missing it. Because it seems to me that there's a partnership here.

Basically, what we're talking about is looking under rocks looking for bugs and there's different kinds of rocks and we don't know how many rocks there are out there. But even including Al Reiss' children who die under mysterious circumstances and trades before mergers and takeovers and bribes that go on in government contracts, in each instance somebody has to do some spade work to find out what's going on there.

If it's left to the prosecutors, they're going to turn over the next most likely rock and under all the other ones they won't know what's going on. To know what's under all those other rocks you have to corral some sociologist to help you draw a sample frame to figure out how to turn them over. But it's got to be a prosecutor who turns them over unless you get an awfully skilled sociologist to do that kind of investigation.

It just seems like some of the investigations here have to be not the most likely next prior topic, but to be done on some research basis as an information gathering way and it's going to take people doing it together and it doesn't seem conceptually difficult. It takes resources to do, but it's the tension between turning over the next most likely rock and turning over a few on a, "random basis" or some scientific basis to tell what's under that and to do that work.



PANEL MEMBER WHEELER: I really think it's fascinating to ask how one would increase the salience of white-collar illegality, however you define that, and how one might go about it. I'm reminded of one of the federal judges in another part of our study that we were interviewing who said this is apropos of the integrity of the market and the integrity of the commercial community generally. Millions and millions and millions of dollars are changing hands on the basis of little pieces of paper and that if people can't have integrity in that system of the flow of the paper, then that whole system is going to break down.

It's very difficult — this gets back to, I think, Shelly's observation about the soft silent crime and so on. It's much easier to raise a sense of consciousness when you've got a bloody body than it is when you've got an integrity and trust damaged and interfered with.

I don't think we know an awful lot about how to go about that. I don't think we know a lot about it in the first place, but I also think we don't know much about how to go about changing it. But that really is, I think, a core problem. How would you, if we were to agree, as I think most around the table would, that there are at least many crimes here that are indeed crimes by anyone's definition and that it's very important to do something about and that they exert a severe economic loss as well as a real damage to the community and to the integrity of institutions of the community. How does one make that idea salient to people who are used to thinking about common crime as all of crime.

PANEL MEMBER MESSINGER: I would like to close this session for the day and let us loose for cocktails. Let me make a closing observation by referring again to Don Cressey. I remember when Don was doing work on organized crime. He told me — and I'm sure he told others here — that one way in which he thought about his research was that he was busy turning into a widely appreciated social reality, something that at that point in time he felt only law enforcement understood to be very real.

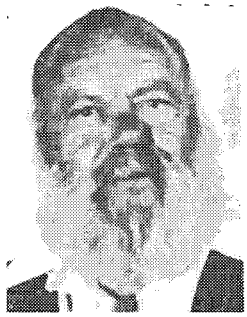
I would answer Stan's implicit query about how you go about raising consciousness about white-collar crime, that that's exactly what we're doing and have been doing all day long. Now, there aren't that many people in this room. But if each of us goes out and talks to two others and they talk to two others, as you know from many Ponzi schemes, it doesn't take long.

So, that's the end for today. There are cocktails available downstairs.

(Symposium adjourned at 5:30 p.m.)

Case Discussion:
"*Silver Shadow* Mortgage Corporation"

Jerome Skolnick
"PRINCIPAL"



Gil Westoby
"VICTIM"

Patrick Hallinan
"CRIMINAL COUNSEL"

Mark Topel
"CIVIL COUNSEL"

Judith Hayes
"CRIMINAL PROSECUTOR"

Richard Martland
"STATE ATTORNEY"

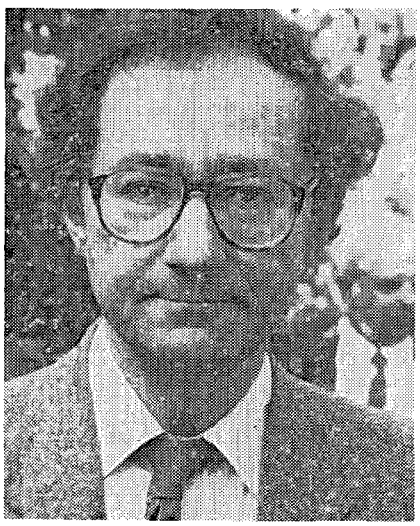
William Black
"REGULATOR"

Arthur Brodshatzer
"ACCOUNTANT"

D. Lowell Jensen
"JUDGE"

Melvyn CoBen
"REFEREE"

Stanley Cohen
"INVESTIGATIVE REPORTER"



John Kaplan
MODERATOR

PROFESSOR MESSINGER: We're about to have a sociodrama. And John Kaplan is kind of the producer-director of this drama. I asked him what he'd like me to say by way of introduction, and he suggested nothing. So, there you are, John, why don't you just begin?

(Laughter.)

PROFESSOR KAPLAN: Knowing Shelly Messinger, the shorter the introduction of me from him, the better.

(Laughter.)

PROFESSOR KAPLAN: I have only one or two bits of information. The first is that the mikes are open, so any whispering among you will be picked up and go over television. So, unless it's extremely flattering of me, don't say anything, or whisper, or anything else during these festivities.

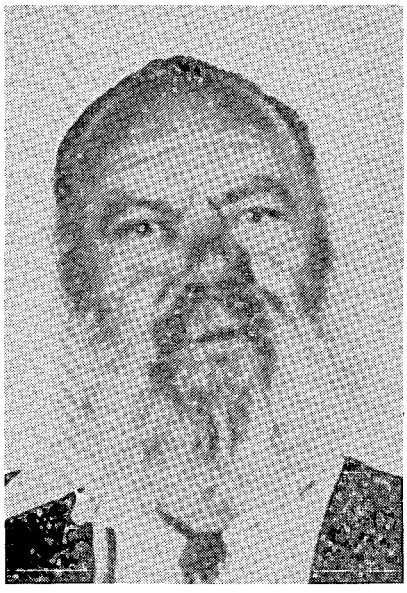
Secondly, from the looks of things, we're going to have to use the names of real people, like Jerry Skolnick is our principal, simply because that's what is there. The original plan was that they would be, as it were, pseudonyms or non de plumes or whatever.

MR. SKOLNICK: I would prefer that.

PROFESSOR KAPLAN: What? Oh, what do you care, Skolnick?

Is there anybody who feels bad about it? If so, we're going to have to get everything changed. Is there anybody who — no, it seems not. I think people will recognize, you know — the only person, you know, who, you know, will get a bad reputation from this is you, Skolnick, and we all know that can't do any harm.

(Laughter.)



Gil Westoby

PROFESSOR KAPLAN: Further on, that is.

Okay, Let us begin.

Mr. Westoby, you lost a certain amount of money in this operation. Can you tell us how that happened?

MR. WESTOBY: That happened by my reading an ad in the paper for the company involved, going to that company and buying a small second deed of trust, examining the paper work that they sent to me, and deciding that it looked good. I checked them out with the Better Business Bureau and some of the governmental agencies, who gave them a clean bill of health.

After we looked at the paperwork we received on the original investment, I went back and dumped in the chunk. And this was —

PROFESSOR KAPLAN: Can you tell us, by the way, the size of this chunk that you're talking about?

MR. WESTOBY: In excess of a hundred thousand dollars in cash. The paperwork that we received from that started out looking real well. We were then rolled over from a company, which was — turned out to be an insider company, because we started to make queries into this company as to who the ownership was, what their financial status was. So they rolled me out of that company to try to, apparently, shut me up with making waves.

And that was right at the time of the collapse. The properties that they were putting me on with that money, two of them they did not even own yet; they were going to own them. One of them was, again, an insider corporation with a different name.

PROFESSOR KAPLAN: Okay.

MR. WESTOBY: And that loan was also never recorded, so I wound up totally unsecured from that transaction.

PROFESSOR KAPLAN: And as far as your losses now, can you make some estimate of what they are?

MR. WESTOBY: In excess of a hundred thousand dollars.

PROFESSOR KAPLAN: I see. Now, what do you know about the people, for instance, who ran this operation?

MR. WESTOBY: The people were very gracious, told very plausible stories, lied through their teeth, were very good to their customers. We find this out after the fact. Their florist bill was humungous. They used to send theater tickets and other types of tickets to some of their better clientele. They were a very smooth group of people.

PROFESSOR KAPLAN: Okay. Now, one of these people was Mr. Skolnick, wasn't it?

MR. WESTOBY: Yes, I believe that's close.

PROFESSOR KAPLAN: Okay. Now, rather than ask him — as you see, he's here — to tell us about himself and perhaps embarrass himself with, you know, details, I'd like to ask his lawyer, Pat Hallinan, to tell us a little bit about him. Could you tell us a little bit about —

MR. HALLINAN: Yes. Mr. Skolnick feels terrible, Mr. Westoby, for you and for all of the other people who lost money in this venture, because Mr. Skolnick, when he went into this venture, was hopeful that he would develop a business which would benefit everybody — himself, the people he brought into it, the people who were in it with him, as well as the — as well as the investors.

Mr. Skolnick — and I point this out to you — you say, "the people." The people is not an accurate description of who committed the fraud in this case. This case — the fraud in this case was committed by a man named Arthur Post. Arthur Post was a canny and wily operator who knew how to manipulate business. And he took my client, Mr. Skolnick, who is naive, who graduated

from school with a degree in drama, who has had no business experience whatsoever. He took him along. And Mr. Skolnick, in fact, Mr. Westoby, is as much of a victim of the fraud of Mr. Post, who is now, by the way, in the Argentine learning how to tango, and spending your money as well as my client's money, which he ran away with.

Mr. Skolnick is a victim with you. And I think that as the facts develop here and as they turn out, you will see that the intent of Mr. Skolnick and everything he did was for the benefit of everyone. And he was deceived in part by his naivete, in part by a market which collapsed without notice to anyone, and in part by his erstwhile supposed partner and friend, Mr. Post.

PROFESSOR KAPLAN: By the way, Mr. Skolnick, where is Mr. Post now?

MR. SKOLNICK: Well, I really don't know. I believe he is in Argentina. And I heard that he had spent some money for dancing lessons.

PROFESSOR KAPLAN: Okay. Have you tried to get in touch with him?

MR. SKOLNICK: I have, but he seems to have disappeared, really. When I ring up one hotel, he's not there. He's at another hotel.

PROFESSOR KAPLAN: I see.

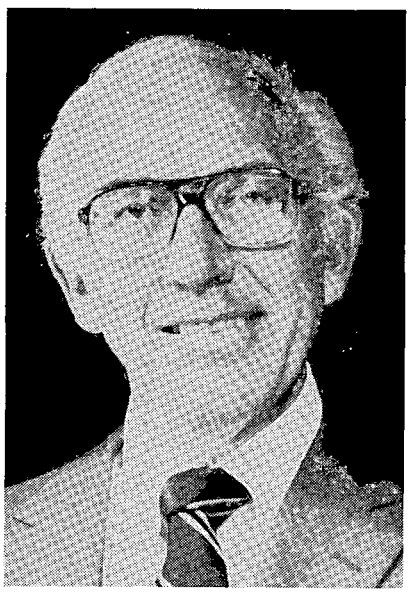
MR. SKOLNICK: So, I can't — I can't locate him.

PROFESSOR KAPLAN: Okay. Can you tell us how you got into this business to begin with?

MR. SKOLNICK: Well, as my attorney told you, I had been a student at the University of Miami. Actually, I had gone to some very good schools before that. Dropped out of a few of them.

Most of my classmates were able to get into Ivy League schools, but I managed to get into the University of Miami. I always wanted to go into business. That was always my ambition. And I took courses in business and finance. I'm sorry to say, I flunked those courses. And I switched to become a drama major. And I'm very good at that. I like people. I like to emote. I like to talk. I can be very gracious; it's true.

I met Mr. Post in 1977, after I had failed in about three different business ventures that I had attempted, because I wanted to go into business. I must say, I still have a lot of money. My family is very wealthy. They left me trust funds. I just wanted to succeed in business.



Jerome Skolnick

Judith Hayes

And when I met Arthur, I recognized him as the fellow who had been at school with me who was the outstanding business student in that school. Arthur left. He worked for the firm of Hawkins and Wells, leading Big Eight accounting firm. And he told me about a wonderful way to go into business. And he outlined this scheme to me. Looked like a terrific business proposition. Looked like it would help the people who were investing. Looked like we could make some money on it. My family would be proud of me. It didn't work out that way, I'm sorry to say.

PROFESSOR KAPLAN: Okay. Now, could you tell us, at least as far as you understood it, what the business was really about?

MR. SKOLNICK: Oh, sure. We were — we were in the business of buying second mortgages. And we would then sell these second mortgages, in effect, to people like Mr. Westoby here. We gave them a terrific interest rate, 20, 25 percent. And, in fact, we didn't make any money on that interest rate. They got that interest. What we made our money on was the cost of the loan to them, which was usually around 10 percent. So, if you borrowed — he borrowed a hundred thousand dollars, we would get $10,000.

Now, we had properties — equities that backed up those loans. Now, we — I thought — I personally thought those were very good equities. I checked with realtors. I checked just the way Mr. Westoby checked. He checked with the Better Business Bureau. I checked with the Better Business Bureau about the realtors we were dealing with. They were reputable realtors.

And I got projections from realtors. And I found that in those years, why, those real estate values were going way up. So, I expected that all of that equity was going to be protected. I never had any question about it. I thought that the real estate market in California was just booming and would continue to boom in this glorious state.

PROFESSOR KAPLAN: And that's basically what you thought, too, Mr. Westoby, wasn't it?

MR. WESTOBY: That's true.

PROFESSOR KAPLAN: Now, as between one person who thought that the market was going to go way up and gave money, and another person who thought that the market was going to go way up and accepted money, why is Mr. Skolnick in legal trouble and you aren't?

In other words, what did he do that was wrong?

MR. WESTOBY: He absconded, along with his partner, with my money, along with the other victims' money.

PROFESSOR KAPLAN: What you really mean is you lost your money.

MR. WESTOBY: Through his manipulations.

PROFESSOR KAPLAN: Well, manipulations is a funny word. Let's ask — Miss Hayes, is there any violation of the criminal law here as far as you can tell?

MS. HAYES: Well, in answer — yes, there is. In answer to your question as to what Mr. Skolnick did wrong, in a word, Mr. Skolnick lied. He lied to obtain people's money, and then the money was lost.

The essence of his crime is — or are his false statements. And in particular, we look at what was told people before they gave Mr. Skolnick their money, and whether or not these statements were true.

In particular, in looking at this business, we want to look at the statements that were made to investors after it was apparent to Mr. Skolnick from the memo that he received from Mr. Post disclosing the commingling of funds; that all the investors' money was going into a single pot, not to finance individual properties, but to pay old investors.

What did Mr. Skolnick do after he received that memo? Because if he continued to sell to new investors — he knew when he told them about protective equity; that is, that these pieces of real estate had so much value in them, that this value exceeded the loans that were outstanding on the properties — he knew, when he said that, that the money was going to be used for a particular property, that there was not sufficient equity to cover the investment, that those statements couldn't possibly be true. That the new investor money was going to have to be used just to keep his business afloat, just to make the next month's bills.

When Mr. Skolnick's salesmen — and he was the manager of the salesmen — represented themselves at dinner seminars to retired people as being impartial financial planners, they were absolutely partial. There was no truth to that statement.

PROFESSOR KAPLAN: So, in other words, there are two quite different arguments. One is that he permitted his salesmen to represent themselves as impartial and solely interested in helping the clients who were going to give money. And two is that at a time he was told that they were running dangerously short, he kept being an optimist and thinking that he could make it.

MS. HAYES: It certainly isn't criminal to be an optimist. The first argument is the failure to disclose the true condition of this company, of Shadow, at the time he took people's money.

Because if people knew that there was no money left in that company and there was no chance of success, they certainly wouldn't have given him their money. Mr. Westoby would still have his life savings.

PROFESSOR KAPLAN: Well, is that really clear? Mr. Westoby, you'd given your money fairly early on in this venture, hadn't you?

MR. WESTOBY: In a small amount, and found out that subsequently the loan that I was put on was, in fact, an insider cash-to-buyer walkaway. And Mr. Skolnick was well aware of it, because this person had, in fact, purchased or sold to them three different loans, and all of them were in default, including the one that I purchased. And I did not know that it was in default. It was not disclosed.

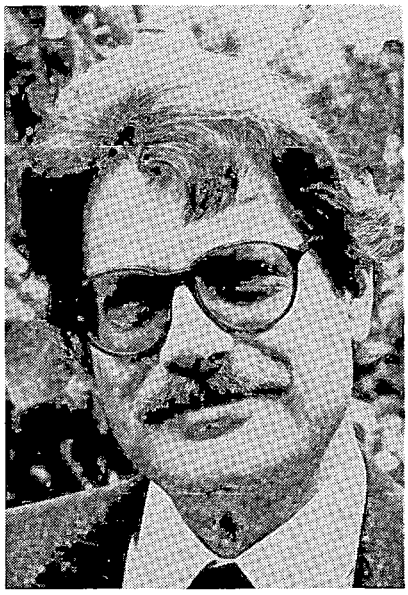
They, in total, lied about everything in the transaction.

MR. HALLINAN: Mr. Kaplan, that's not accurate. None of those statements are accurate, not by the prosecutor, Ms. Hayes, nor by the victim. Because Mr. Skolnick did not possess any of that knowledge. For example, the chief financial officer of this corporation was Mr. Post. It was Mr. Post who drew the plans and the formats of what should be said and how it should be said. He understood the market. Mr. Skolnick never understood it.

Mr. Skolnick simply presented himself to the public virtually as a Trilby for Mr. Post. The prosecutor says, list the various crimes that occurred. What, in fact, did Mr. Skolnick do when he learned that there were economic difficulties? And, by the way, he did not learn that there were economic difficulties which constituted criminal offenses. He learned that there were difficulties in the company. He worked for one entire year free to try to reestablish the economic viability of this company while Mr. Post, surreptitiously and without his knowledge, put his own children onto the payroll, took money as fees and as salary for himself without telling Mr. Skolnick while Mr. Skolnick gave his services trying to protect Mr. Westoby and the other investors.

And Mr. Skolnick went and took his parents' own money and put his parents' own money into the company, because Mr. Skolnick believed that, in fact, the economic realities of the marketplace — which we have shown you by these documents — because everyone is aware of the fact that no one realized that the federal government was going to prevent savings and loan associations in 1981 and 1982 from lending on second

Patrick Hallinan



Mark Topel

mortgages. That dried up all the money in the community, so that the real estate market hit a wall, an unpredictable wall, and real estate values plummeted. That is what Mr. Skolnick ran into without the sophistication, without the knowledge and the understanding of how to deal with it. And he relied upon the real thief and upon the real fraud of this Svengali, who is now in the Argentine.

And the allegations you make, you have no facts and no basis to make the inferences or draw the inferences that connect those events to my client.

PROFESSOR KAPLAN: Okay. I'd like to ask one — okay, Mr. CoBen I mean Mr. Topel?

MR. TOPEL: Yes. This is Mr. CoBen to my right.

PROFESSOR KAPLAN: Yes.

MR. TOPEL: I think there's a couple of other very important things that were going on during this period of time that, to Mr. Skolnick's defense, ought to be aired here.

And, Mr. Westoby, you had one small transaction, admittedly and undeniably very important to you, and worthy of attention on the part of the company that you were dealing with. But Mr. Skolnick had a thousand of, let's say, a thousand Westobys, that he had to assume that the people who were working for him — who had the training and who had an interest in seeing the company succeed — would be doing a correct and legitimate activity, both to protect you and to protect the company.

And to that end, in this period of time, a large accounting firm, one of what we call the Big Eight accounting firms, people who by training and experience are looked upon with respect in the business community, was brought in to look over this company.

Now, Mr. Skolnick looks at their report. And their report has no exceptions. It has no disclaimers. It has no red flags that say, "You guys are going broke. You're going to be in the bankruptcy court. You're going to be out on your rear end if you don't straighten up right away."

He sees this. He knows there are financial problems. But he also sees that the company is able to get an eight million dollar loan. Call it a bridge loan, call it a bail out loan, this means that some other economic institution has put eight million — a very substantial amount of money — into this company, certainly not in the belief that they're going to end up facing the gentleman to my right as on a creditors' committee or with a trustee appointed, fighting out detail questions of whether they have the right to get the money before you, which is something that's going to happen in the civil litigation that goes forward.

So, all of this mix — in an answer to Miss Hayes' assertion of criminal liability — is evidence of reasonableness and good faith on the part of Mr. Skolnick and where he's viewing this case at this time.

PROFESSOR KAPLAN: Now, Mr. Skolnick, I'd like to ask you a question. What did you think when you got the message from your partner as to the bad financial condition you were in?

MR. SKOLNICK: Well, I thought that the real estate market was in a temporary decline. I certainly considered the interests of the people that were investing. I felt very badly about it. But I thought if — if I didn't — if I didn't do something, if I didn't keep this thing going, everybody would lose their money.

So, it was my belief at the time that the real estate market would go up again. You know, that wasn't a belief that was based on unreality. Now, here's a real estate newsletter from a very reputable firm in Marin County, Frank Howard Allen (holding up document). Look what happened. It went back up. So, real estate goes way up — we were in a down period. So what did I do? I did — I did a very — what my conscience told me to do.

I said, I'm going to do everything that I can to get this back on track. I'm not going to take any salary. I even went to my folks. And I love my folks. And I asked them for a loan of $20,000 to help us keep this thing afloat. So, I was trying every way I could to protect those investors.

PROFESSOR KAPLAN: And did you feel that you'd lied to anybody?

MR. SKOLNICK: Oh, no, I didn't lie to anybody. I mean, people were getting their interest payments. And I certainly didn't lie. If — I recognize now in retrospect that — that some of the sales people may have made some exaggerated claims. But I never told them to do that.

PROFESSOR KAPLAN: In fact, did you go any further? Did you tell them not to make any exaggerated claims?

MR. SKOLNICK: Well, I guess I thought — I really believed that this was a good business enterprise and opportunity for the investors. And I told the sales people that. And they told the other people that. Now, I may have been wrong, but I certainly didn't tell them anything I didn't believe.

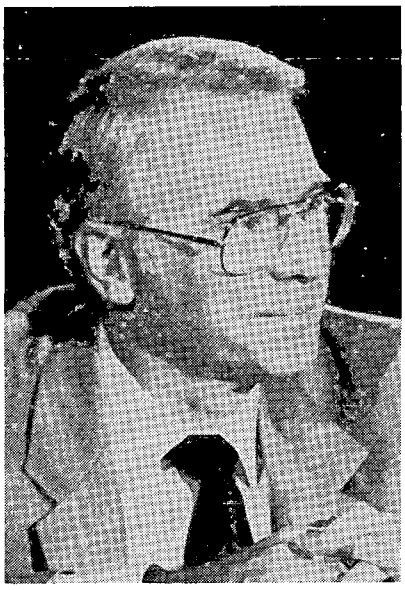
MR. TOPEL: One other point that's important. In all businesses where you have brokers working in a sales capacity and they're being paid on a commission basis, there is always the problem of them attempting to exaggerate the claims of the product that is being sold to the ignorance of the higher management of the company, because they're being paid on a commission basis.

And unless — which is an impossibility — unless higher management is present every time a sales pitch is made or a phone call is made, then they cannot be held certainly criminally responsible for what is said in the context of that interaction.

MR. WESTOBY: Mr. Kaplan —

PROFESSOR KAPLAN: Wait a second. I'd like to ask Mr. Martland a question first. And that's, shouldn't a supervisor of salesmen be responsible for anything that the salesmen say that isn't true? After all, they're his employees. If they say something that isn't true, shouldn't he be responsible?

"You and I have a lot in common, Mr. Westoby. We both want to get rich off your money."



Richard Martland

MR. MARTLAND: In the normal regulatory area, the supervisor is responsible. Whatever Mr. Skolnick's defenses may be in the criminal action, in terms of regulating his activity as a broker, he is responsible for everybody that works under him. So, if they're making misrepresentations, he and his firm are responsible for that and are subject to whatever sanctions the law provides for that.

PROFESSOR KAPLAN: Well, now, in fact, what kind of sanctions does the law provide for that?

MR. MARTLAND: Well, I think you have, of course, to determine first of all what information the regulatory body has when they hear of the problem. In this case, the first time that the regulatory body heard about it was a complaint from a couple of investors who had not gotten their interest payments on time.

The body looked into that, contacted Shadow Mortgage Company, and those people were paid. In addition, we got — you look at the CPA firm's audit report. It was an unqualified audit report. And we got several letters from other investors who were quite happy with the manner in which Shadow Mortgage was operating.

So, at that point, there did not seem to be a problem with Shadow Mortgage Company, and nothing was done. Now, what you've heard so far, of course, are the facts that have developed over time. This was a sudden collapse. This firm had been in business a little over eight years, and it collapsed fast.

In other words, there was no indication to anybody until the day of the collapse. Now, in terms of what you can do if those facts were known to the regulatory body prior to the collapse, then there's a whole host of things they could have done. They could have, for example, issued a cease and desist order with respect to the diversion of money from the trust fund. They could have put the company in receivership if they felt the assets were going to be squandered away, any number of those civil remedies.

Also, they could have sought restitution from the principals involved, if they had the funds, to basically support the investors in their losses.

None of that was known at the time, so basically what you're dealing with now is a company that has gone under, and now you're scrapping over what is left, which is very little.

PROFESSOR KAPLAN: Well, now, as a practical matter, isn't it a better system if you can find out in advance which companies are going to be taking money on irresponsible schemes and prevent all the damage?

MR. MARTLAND: Without a doubt.

PROFESSOR KAPLAN: How could you do that?

MR. MARTLAND: Well, there's a number of tradeoffs here. There's about seventy to eighty thousand brokers, real estate brokers, in the state of California. And a substantial number of those engage in second mortgages in varying degrees; some high volume, some low volume.

They're required to file annual reports. And the question then becomes: How do you target any particular mortgage broker for either an audit or an investigation? And the question becomes at what point, what information tells you that there is a problem here?

Now, as was mentioned here, Mr. Westoby saw an advertisement. Had the regulatory body perhaps seen that advertisement — when we're talking about 20 to 25 percent interest, which even at the time that these rates were offered was high, that begins to appear to be a very speculative operation. And you could make at least an initial inquiry to find out what type of literature they're putting out to the public in terms of trying to sell these notes.

The other action is, if you have complaints from consumers — and again, consumers are not going to complain as long as they get their interest. And this is the problem. They're quite happy to get their 10, 15, 25 percent interest. As long as it comes in every month — they are

unsophisticated. They see no problem in that. That's precisely what was promised them, and they're getting it.

So, you're rarely going to see a consumer come in and complain. When they come in and complain is when it's too late. The company is under. The question is on annual audits. Can you do an annual audit? Well, you can always do an annual audit. The question is what kind of a staff do you have to do that?

When you're talking about 70 or 80,000 mortgage brokers, you cannot — obviously — unless you want to spend unlimited funds, audit every one of those a year. So, you're going to have to target.

So, what you're going to have to develop is a set of criteria as to what may be the problem areas. And that requires information. The question is, do the audit reports they file definitely provide you with, you know, some of that information. Most recently, there have been changes in the law; for example, where they would have to show the cash balance each day in the trust account.

Now, that's important in this case, because as the facts developed, there were three- to four-month periods in which the trust account was basically empty. And that should trigger an investigation by anybody had that been known.

Theoretically, under the audit reports that are required now, you will find out, but you'll find out after the fact, on an annual report that perhaps during the year they had a trust account that was seriously depleted or at least it had assets far less than the liabilities.

PROFESSOR KAPLAN: Okay. Now, there's one other problem here, isn't there? That if you start an investigation of any kind of a going business, you may get complaints from people who don't want you to investigate.

MR. MARTLAND: That is always the problem with any regulatory body.

PROFESSOR KAPLAN: Now, why would they complain? Why would anyone complain if you came in and started looking to make sure that their money was properly protected?

MR. MARTLAND: Well, there's a number of reasons they'll complain. First of all, especially in a situation here where you have a cash shortage. What will happen is the management will generally — of the company — will get a hold of investors and say, basically the state, the federal government, whatever the regulatory body is, is interfering with our operation. And most importantly, we're not able to get the financing that every company needs. You know, it's not — it's certainly not a crime to go out and get financing to finance your company through hard times.

And that's difficult. We can't get the financing, then it's going to jeopardize our ability to pay your interest rates. So, tell them to get off our back. And that is basically what has happened here.

And then the regulatory body has to decide, all right, well, what is the long-term solution here? Is there a real problem here? Can they solve it by financing? Is there some reasonable prospect, for example, that the real estate market will go up and they'll be salvaged? Those are the kind of things they have to weigh. And they have to weigh that basically with limited resources, and they have to make that call within a fairly short period of time.

PROFESSOR KAPLAN: I see. In other words, if they investigate too soon, they may damage going concerns and cost investors their money. And if they investigate too late, investors' money may have already gone down the drain.

MR. MARTLAND: That's right. Just the rumor of an investigation can cause an adverse impact on some businesses.

PROFESSOR KAPLAN: Well, now, there are other kinds of regulations involved here. Mr. Black, you regulate from the point of view of the savings and loan. What could you have done to prevent this?

MR. BLACK: What we could do to prevent it is part of the scam, the fraud that was being used here.

PROFESSOR KAPLAN: Well, no, no, no. I think we're going to decide that at a later time. In any event, part of the operation —

MR BLACK: Part of the fraud that was being used here, because there's no doubt about it, we've got the evidence, was a variant of the pyramid scheme. These loans never made any sense that were being made by Shadow. They were doomed to failure, and they did fail. And it had nothing to do, really, with the real estate market. It was going to fail.

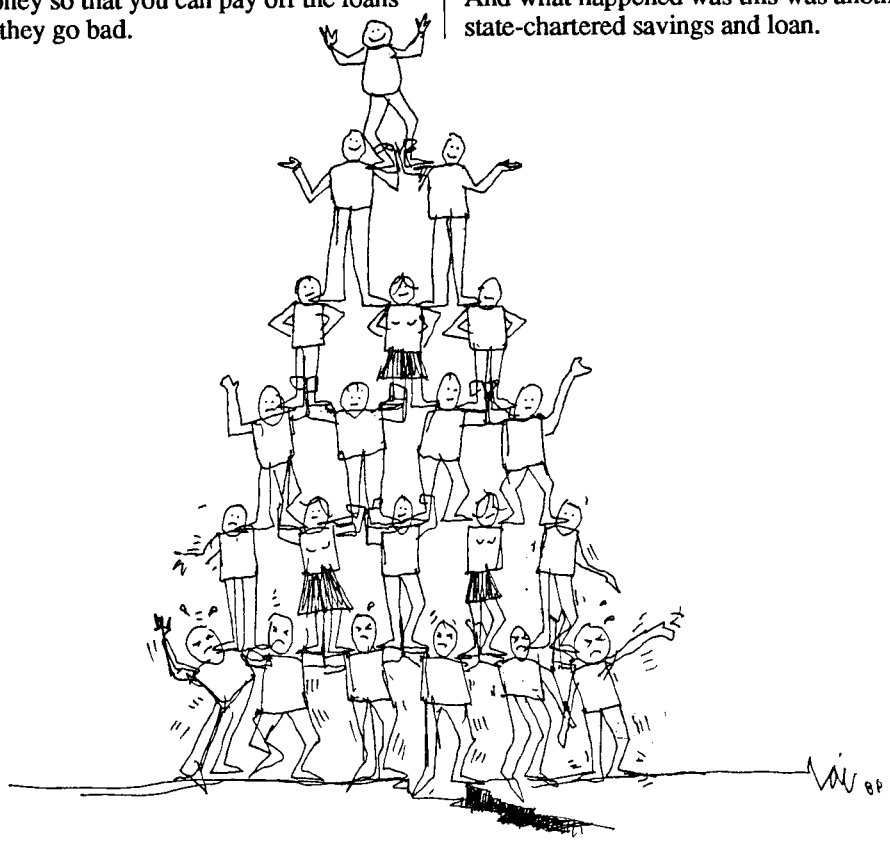
And once you had the failure, you had to make sure, to keep the scheme going, that you could pay off those people. Well, if the only way you could pay off the loans was by bringing more money in, and one of the best ways to bring it in — because there are limits to how many individuals you can sucker — is to get a cash cow. And the best cash cow in the world on mortgage loans is a savings and loan. And that's why people use savings and loans. And they bring in larger amounts of money so that you can pay off the loans as they go bad.

And as long as you can keep growing quickly enough, you can keep this pyramid scheme going. Ultimately, because in part, frankly, the actions of the federal and state savings and loan regulators, when we discovered the role of the savings and loan in funnelling this money, that was stopped. And that's, frankly, one of the reasons this scam collapsed at the point it did.

So, what could we do? We did something. And we, at least, reduced the losses. What we could have done is if we had more folks and if we had, frankly, better accountants out there in the world — including the folks to the left of me — we could have cut it off at an earlier point.

You've got to understand what California is like. We've had 31 failures of savings and loans in the last three years. It's going to cost the federal government more than five billion bucks. Almost one-third of the entire savings and loan industry nationwide is in this state. Over 300 billion. The savings and loan industry is bigger than the commercial banking industry. That's very unusual.

And what happened was this was another state-chartered savings and loan.



California set up this savings and loan. The federal government, FSLIC, the Federal Savings and Loan Insurance Corporation, that I work for has to bear all the risk of financial loss. The theory is that the state will be the primary regulator.

Well, some people blame it on Proposition 13. Some folks blame it on former Governor Brown. It tends to go with their political affiliations which way they do it. In any event, the state regulators, who are supposed to be the primary regulators, went from 120 professionals to regulate this massive 300 billion industry along about '81 down to 42 regulators right during this time period.

PROFESSOR KAPLAN: Now —

MR. BLACK: So, if you had more folks, you could get in earlier. And if you didn't have accountants purportedly certifying fantasy financials as true, it could have been stopped at a lot earlier point, too.

PROFESSOR KAPLAN: But, on the other hand, nothing the Federal Savings & Loan Insurance Company — Corporation could do would have gotten Mr. Westoby his money back.

MR. BLACK: That's correct. We don't regulate. But there would have been more Westobys if the operation had continued to exist longer. And if we could have done it more quickly, there would have been even fewer Westobys.

MR TOPEL: That is an assumption. And that is an assumption that exists every time that you have either a hard asset or a financial instrument market being made by creative financial people; in this case, second mortgages. It could be anything. It could be diamonds. It could be whatever we've seen over the years.

At some point, if the market moves the wrong way, the company begins to look like a pyramid operation, a Ponzi scheme. And always, because they need more and more money to serve the debt that they have. The problem that's created there is that the regulators come in and basically skew the market.

The argument that's always made — and I think Mr. Skolnick could make it here with some validity — is that if you just left it alone, if the market swung back up, if the equity in the property increased, or the price of diamonds increased, or whatever it was, that you would have far less Westobys than are created when the regulators come in, slam the door shut — in this case, on the bail out financing — and push it into Mr. CoBen's court.

PROFESSOR KAPLAN: In other words, your assertion is that the problem is the hard asset regulators.

MR TOPEL: No, it's part of the problem. It's not the only problem. Certainly, the comments that Mr. Martland made are well taken. There should be some earlier monitoring going on, so that you don't allow certain risk factors to get out of hand.

But to say that you, as Federal Home Loan Bank Board, come in and cure the problem is, I think, very misleading, because the reality is that when the regulators come in, their interest is not in protecting the Westobys. Their interest is generally in protecting the fund, the FSLIC or FDIC fund. And as a bottom line, that is going to be their job. Part of the fund's job is to protect covered depositors.

What happens when they come in is they slam the door on any other market forces being able to bail out this operation. And that's what happened here, and it's happened innumerable times.

PROFESSOR KAPLAN: Now, Mr. Skolnick's —

MR. BLACK: It's certainly happened innumerable times. We're the largest victim at this table. We have $25 billion in losses at this table, no doubt about it.

PROFESSOR KAPLAN: It's terrible, except for the one consolation, that it's not your money.

William Black

MR. TOPEL: That's right. It's the taxpayers'.

MR. BLACK: No, it isn't —

MR. HALLINAN: To a great extent, it's self-creative for the very purposes, for the very reasons that Mr. Topel says.

PROFESSOR KAPLAN: Let me just ask Mr. Skolnick a question.

Mr. Skolnick, do you think the market would have gone up if people hadn't interfered in this operation?

MR. SKOLNICK: Well, I — look, I believed that it would have gone up. Now, I may have misbelieved, but, you know, I'm not a — I don't think I'm a crazy person. I picked up last Sunday's New York Times. I knew I was going to be on this show. And I saw — at the head of the business section, there's something that says, "Wall Street's Newest Magic Show."

And the major investment companies on Wall Street, Shearson and Drexel Burnham, they're going to take the debt in Latin America and figure out a way to sell bonds to the American public on the theory that that debt will eventually be paid off. Well, I think we had a better shot at paying off our debt than they do. So, why are you blaming me?

(Laughter.)

PROFESSOR KAPLAN: Now, Mr. Brodshatzer, you are an accountant, and there was a problem of accountancy here. Could you tell us how this could have happened?

MR. BRODSHATZER: Well, let's understand that, as a CPA, all my firm could do is audit in accordance with generally accepted auditing standards. We knew the management; Mr. Post had worked for our firm. We checked into the background of the management. We had nothing to give us a suspicion of any kind of fraudulent, improper accounting. Our audit was conducted in accordance with generally accepted auditing standards. It turned up nothing.

So, there is no way that any CPA, like my firm, can do an audit which is basically a sampling approach, a test, without — and necessarily discover something. We would have had to audit every transaction that company had made from the beginning of its operation in order to find out what was ultimately discovered here.

And I think then the criticism of our firm would have been that we had walked off with all of the funds of the company in terms of an audit fee. So, no company — pardon me — no public accounting firm is ever going to discover what was ultimately discovered here literally by accident. And there's nothing we can do. My profession certainly has looked at this problem. And we don't feel there's ever anything that is going to be capable of being done.

MR. BLACK: Well, with far less, folks, we found —

PROFESSOR KAPLAN: Wait. Let me go on. My question, though, is when you say, "audited in accordance with generally accepted accounting principles" —

MR. BRODSHATZER: Auditing standards.

PROFESSOR KAPLAN: Auditing standards. Nowhere do you say, "And this will be accurate, unless they're lying to us," or unless there is fraud or trickery here. Do you think that most people who get an accounting statement know that there's that kind of a footnote in it?

MR. BRODSHATZER: Well, there isn't such a footnote in it.

PROFESSOR KAPLAN: Well, that there is such an implied footnote in it.

MR. BRODSHATZER: Well, certainly our profession, my firm puts out all sorts of memorandum statements, policy statements, which indicate that an audit in accordance with generally accepted auditing standards will not discover fraud. All we're trying to see is if the statements, based upon our test, seem to be in accordance with generally

accepted accounting principles. And there's no question that if there is a fraudulent management, we will be had just as much as the public has been had. And there's no way that we can keep on issuing statements to warn the public.

I will say this: Because of what's happened generally here, on Wall Street, our profession is now looking to see if we should be making statements which, on the face of it, will point out to the public, beware. But the standard of our profession up to the present has been we don't have to do that, and we certainly try and comply with the standards of our profession.

PROFESSOR KAPLAN: Well, now, in this case, what kind of review would an accountant do when they were called in to do a review?

MR. BRODSHATZER: Well, we don't do a review. A review is another level of engagement, believe it or not. We have three levels of work: A compilation, where literally the accountant does nothing. He just basically puts a statement together. A review is simply where you basically take management's data and you ask them questions about it.

But we did something that is on a much higher standard. An audit in accordance with generally accepted auditing standards means that we checked into management. We looked at the data. We prepared an audit program. We did an internal control review. And apparently nothing came to our attention which would lead us to believe that something was wrong. And we obviously know something was wrong at the time. But doing our audit in accordance with generally accepted auditing standards did not disclose anything. And our profession continuously points out that if there's a fraudulent management, we will be had just as much as the public has been had.

PROFESSOR KAPLAN: Now, what kind of an accounting device would it take to have someone go out and look at some of the properties and check the record to see what the first mortgage is on that property, and check how much the loan is?

MR. BRODSHATZER: Oh, we did all that. We just tested it. And when we did our testing, we found nothing wrong. In other words, we don't test every transaction. We looked at the appraisals. We looked at the documents underlying it. And apparently, whatever we were given satisfied us.

PROFESSOR KAPLAN: In other words —

MR. BRODSHATZER: Presumably we took, I hope, adequate samples.

PROFESSOR KAPLAN: Now, who decided which properties you would look at? The management? Did they say, "Go look at this property and check our appraisal and our mortgages," or did they say, "Here are all the properties. Throw a dart, and wherever it lands, check that one?"

MR. BRODSHATZER: No. Basically our audit senior would have picked the properties to be checked. Now, it's quite possible that when it was inconvenient to find the documents, he might have substituted something. I haven't looked at the records from that point of view, but it's quite possible he was backed into the right properties to look at.

PROFESSOR KAPLAN: How could that be done? How would you sort of — is it like a card trick, where you force a card on somebody and you hold the card so that the only one that comes loose in his hand is the one you wanted?

MR. BRODSHATZER: I assume that anything I say now is not going to be used in the case against me, but —

PROFESSOR KAPLAN: No, certainly not.

"So . . . you want to audit me . . . well, pick a prospectus . . . any prospectus . . .."

Arthur Brodshatzer

MR. BRODSHATZER: Basically, it's what could be called a phenomenon of the naive manager on the job, the phenomenon of the naive senior, who don't understand that they're being had. In other words, it doesn't occur to them, "Gee whiz, if we can't find this document which is the basis of our sample, that there's something rotten afoot," and they allow a substitution. Because, unfortunately, we sometimes put more pressure on our managers and seniors by the budget that we create. They want to get the job done. And I think their thinking becomes very, very fuzzy.

PROFESSOR KAPLAN: And that's how that sort of a thing can happen.

MR. SKOLNICK: I supervised my sales people more effectively than the accounting firm supervised their accountants from what I hear. Is that right?

PROFESSOR KAPLAN: That may be. There will be other people who have to straighten out that mess, too. Right now we sort of have yours to worry about.

(Laughter.)

MR. HALLINAN: Well, our mess is in great part due to the chicanery of, in fact, the employee of this accounting firm.

PROFESSOR KAPLAN: Could you elaborate on that?

MR. HALLINAN: Well, it turns out that our — that the real villain of the piece, Mr. Post, had a friend within the accounting firm who was an old acquaintance of his. He went and he manipulated that friend. He got that friend to help him put together a phony accounting report, which Mr. Post then used to get the $8 million and to deceive Mr. Skolnick as to the quality of the company, to convince Mr. Skolnick that the company was going to turn around, to get an $8 million liability against Mr. Skolnick, who's going to have a lawsuit against him from Bail Out, and to put his parents' own money in.

MR. BRODSHATZER: I resent that implication. First of all, what we did is, I walked into that business operation with my manager. We went over the records. We discussed items with management. There was nothing that we knew of that served as a warning to us that we had to use extended audit procedures. We made up the program. We tested. We did all that we could within our professional ability. And that was the consequence — now we know that things were wrong. But we could not know based upon anything we did at that time.

PROFESSOR KAPLAN: About how many properties did you check when you pick a sample — or should you — of a business this size?

MR. BRODSHATZER: Well, I haven't got my work papers in front of me to come to such a conclusion, but that's basically — there are two ways of doing it. Either a judgment sample or a statistical sample. Based upon the perception of the risk that's inherent there, that determines how much you check.

If you think the internal control is very good, you don't have to check as much. And we thought the internal controls here were wonderful. And after all, we knew Mr. Post. We had trained him. And he certainly — also, by the way, we found out — knew our methods and may have subverted that, as a result, as well.

MR. TOPEL: How hollow it sounds, though, to hear a trained professional licensed by the state, who holds himself out as an expert and charges fees that reflect his license and his expertise to say that, "Gee whiz! Our senior management was naive." These are auditors. They are trained to come in. They have checks and balances. They're trained to come in and look for things. They are, specifically under the accepted accounting procedures, not supposed to take everything at the word of the people that they are auditing. And then, now that the house has fallen apart, they say, "Gee. You know, we were naive. After all, the person in charge of the company was one of our ex-employees, and everybody knows our ex-employees would do no wrong." I submit that that is incredible.

And it certainly is understandable, given the enormous liability your firm now faces for its obvious negligence.

But from our point of view, we had every reason to rely on your expertise.

MR. BRODSHATZER: Remember, we would not have bought a liability of this magnitude for our $10,000 audit fee. We were trying to do the best we could within the reality of the business condition. And all you can do is test and sample.

MR. SKOLNICK: Now I've got to pay even higher fees to these high-priced mouthpieces that are sitting next to me.

(Laughter.)

MR. HALLINAN: I'll get him 10 years if he continues to talk this way.

(Laughter.)

PROFESSOR KAPLAN: Well, it does raise certain problems when a lawyer complains that the state gives accountants a license to, as it were, enrich themselves at the public or, indeed, at the private trough. But we will worry about that at a later time.

MR. TOPEL: And I would like to say that I feel a responsibility to answer the question in light of the comment of our mutual client of what he could expect by way of recovery actions he's anticipating.

PROFESSOR KAPLAN: We will get to that at a later time.

First, I want to go to Miss Hayes.

MS. HAYES: What we've just heard, I think, is — in a very articulate way — a poor businessman's defense. You will have noted, that as we went along, we've heard that it was the accounting firm's fault. It was the fault of the regulator for stepping in, for the accountant for not doing a particularly good job. It was the fault of the market, and it was the fault of his co-worker, the man that has conveniently gone off to Argentina to do whatever he —

MR. SKOLNICK: Tango.

(Laughter.)

MS. HAYES: Dance lessons. This is very common in cases of this sort. And it takes a bit of — it merits a bit of our attention, because the question in this case is what was Mr. Skolnick's intent. Did he have a criminal intent? Can we hold him criminally liable for, as he claims, being a poor businessman? Well, to see what someone's intent was at the time, you have to focus on the facts of the case. As a criminal prosecutor, what I want to do in this case is go back and look at the record to see not what Mr. Skolnick claims now was his intent, but what was his intent while he was the head of Shadow.

Shadow was set up as a — giving Mr. Skolnick the benefit of the doubt — poor business idea to begin with. Misstatements were made to investors concerning the properties they were investing in. In other words, an investor was going to be a mortgage holder. He was going to have a borrower, and he was going to, in fact, be a lender.

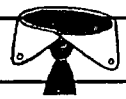
PROFESSOR KAPLAN: Now, one very interesting grammatical thing I noticed about your statement is that you shifted into the passive voice when you started describing statements, "misstatements were made to the investors." Everything else was somebody did something, except when you got to the misstatements. Now, if misstatements were made, but Mr. Skolnick didn't make them, then that does change things, doesn't it?

MS. HAYES: It changes things to this extent. We would have to show that even though Mr. Skolnick didn't personally make that false statement, that he knew about the false statement, and he caused other people — those being his salesmen — to make that false statement.

PROFESSOR KAPLAN: Now, there are two aspects of this, aren't there? One, that he knew this and caused the salesmen to make the statements; and, two, that he knew that the statements were false.

MS. HAYES: That's correct.

PROFESSOR KAPLAN: Now, you're going to have to show both of them.



MS. HAYES: That's correct.

PROFESSOR KAPLAN: How would you do that?

MS. HAYES: We're going to focus, first of all, on the sales materials, because we're going to look at the company when it began. The properties that were used were overvalued by Shadow, seriously overvalued. They already had loans outstanding on them, so if the property had to be sold in foreclosure, the investor would never get his money back. The money would go to people who were holding first mortgages.

PROFESSOR KAPLAN: But then, what did Mr. Skolnick do about that? Did he know that?

MS. HAYES: He wrote up a sales prospectus that showed that money invested with Shadow was safer than money put in a bank.

PROFESSOR KAPLAN: Doesn't that depend on the bank?

MS. HAYES: It depends on the bank. And in this case, the bank — the investor who's loaning money to the borrower, didn't know, first of all, how many loans were outstanding on the property, didn't know the true value of the property, and didn't know the ability of the borrower to pay back the loan.

PROFESSOR KAPLAN: Now, let's ask Mr. Skolnick about this. Did you know that the property was overvalued and that the borrower didn't have much in the way of resources to pay it?

MR. SKOLNICK: Now, the question is of know — I believed that the property was going up in value; that it was reasonably valued. I believed the way all these banks this fellow is talking about that fail believe when they make loans. I'm — I don't say that I'm the smartest guy in the world. But I'm no, you know, I'm no dumber than these bank officers that are making all these loans and these billions of dollars that are failing. I did it the same way. I thought they were going up.

PROFESSOR KAPLAN: How are you going to show that isn't true?

MS. HAYES: Well, let's look first of all at what was told to investors at the time versus what Mr. Skolnick is saying here. Had Mr. Skolnick told investors that he certainly isn't the smartest person in the room and is probably close to the dumbest person in the room from everything I heard.

(Laughter.)

MS. HAYES: In all likelihood, people wouldn't have given him their money, and I think Mr. Westoby wouldn't have given him a hundred thousand dollars.

PROFESSOR KAPLAN: Well, now, we have —

MS. HAYES: But let's go even farther —

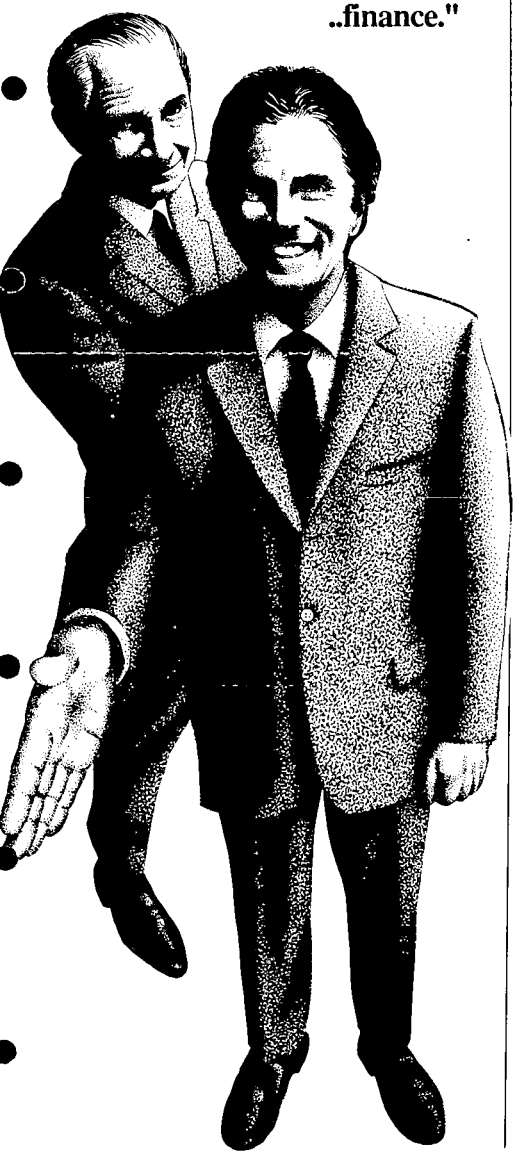
PROFESSOR KAPLAN: But certainly, you will admit that that is a little unrealistic for the law to expect, that we come in and brandish our I.Q.s in front of people.

MR. SKOLNICK: Well, let me say something about that. I mean I'm not claiming that I'm the dumbest person in the room. There may be other people sitting around this table who qualify. What happened is that Arthur Post gave me all the information. Now, I've told you that I believed Arthur. Arthur Post had worked for an accounting firm. These are supposed to be the shrewdest people in the world. They trusted what Arthur Post told them. Well, why shouldn't I trust what Arthur Post told them? I trusted him. They trusted him. And I then told the investors what I genuinely believed.

MR. BRODSHATZER: We hadn't been in touch with Arthur Post for a long time. We had an age-old impression. We came in just to do that 1983 audit.

MR. SKOLNICK: And what did you say about it? You know, Arthur showed that to me. He said — he said, "Jerry," he said, "take a look at this. This is from one of the leading accounting firms in

"Trust your money with Shadow...I was a drama major in college and I flunked my business courses, but my partner here is a real expert in frau..er ..finance."



America. And it says everything is perfectly clear."

And, you know, I said, "Arthur, I flunked the business course, but I'm going to take this to my father's accountant."

And I took it to my father's accountant. And he looked at it and he said, "You know, your accounting firm, Hawkins and Wells, they're a terrific accounting firm. If they say it's okay, it's okay." And from then on, I believed Arthur.

PROFESSOR KAPLAN: How do you handle something like that?

MS. HAYES: Let's continue if we can. Because, again, we're going to focus on two aspects of the case. How did this business begin, and then what happened? What did Mr. Skolnick do when it became apparent that his poor business idea was doomed to failure? Because what happened was that investor money, which had gone in some fashion into some properties, stopped going into some properties at all. It went into no properties. It went into Shadow's general fund. What happened here — and we know — we're looking into intent. How do we know that Mr. Skolnick knew this; that he was aware of the problems? Because the relationship between Mr. Skolnick and Mr. Post — that is, his former accountant — was not as it appears now to be, that they are at odds and in disagreement. They worked, in fact, as a unit to keep this business operating.

Mr. Post sent a memo to Mr. Skolnick, which said, "We have continued to meet our obligations as we have in the past by borrowing whatever cash comes into the company from any available source, including investor funds."

The money that was taken from investors, those investor funds weren't backed up by any real estate. At that point, the brochure that was written up by Mr. Skolnick, which continued to be given to investors, was completely false.

PROFESSOR KAPLAN: Mr. Skolnick —

MS. HAYES: If Mr. Skolnick continued to put on his dinner seminars and, as we know, to be present at the dinner seminars while his salesmen put on slide shows indicating that investments were safer than money put in the bank, then Mr. Skolnick bears responsibility for those, for those false statements.

PROFESSOR KAPLAN: So, in other words, are you going to say that you're willing to give up the part of the case before they dipped into the funds given them for loans, and just concentrate on what happened after he was informed?

MS. HAYES: In the beginning, certain expenses were paid by Mr. Skolnick with company funds which constituted a misuse of company funds. For example, to pay for officers' Mercedes-Benz automobiles, to pay house payments for the principals of the company, and to purchase assets unrelated to these residential properties, such as a thoroughbred horse breeding farm. Certainly speculative enterprises.

PROFESSOR KAPLAN: Could you explain that, Mr. Skolnick, how that happened? Well, before we do that, we will take a brief break while we change film.

(Applause.)

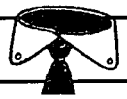
(Thereupon a brief recess was taken.)

PROFESSOR KAPLAN: Mr. Skolnick, how do you explain that horse ranch and a lot of these expenses that Ms. Hayes has mentioned?

MR. SKOLNICK: Oh, that horse ranch and those Mercedes'. Let me tell you something. I hate horses. My wife loves horses. I thought we were buying Arabian horses; they turned out to be Iranians and they all died.

(Laughter.)

MR. SKOLNICK: I hate Mercedes'. The Goddamned Nazis built them. I mean



I like Buicks. I like American stuff. I didn't want that horse ranch. But my wife wanted it, and she said to me, "Look. You don't know much about business. In business, you have to make an appearance. The horse ranch makes us look like prosperous people. The Mercedes makes us look good. You will have a better business. More people will have confidence in you. Why do you think those banks have those big buildings," she said to me.

So, I said, "Okay. Let's go get the horse ranch." And that's why I got the horse ranch. I wasn't that dumb, though, I talked to my counsel. And he said there's no problem with it. He said, "There's no prohibition at all against making loans to officers of the company." He says, "No problem with that."

He said, "The way this horse ranch seems to be financed, it looks fine. It has an 80 to 20 percent debt ratio, just like every other property. It's perfectly reasonable."

And also, he said, "You know, it may be that it's a good idea to have — to finance a horse ranch, because you're diversifying. You're going into other kinds of property."

So, I figured, well, if she wants the horse ranch, let's buy a horse ranch. That's all. That's all. That horse ranch is not important really.

PROFESSOR KAPLAN: I see. Okay, Ms. Hayes?

MS. HAYES: Well, the other matter that I think Mr. Skolnick might want to address is the construction loan that he took out of the business on his house. And the fact that it was taken out in his wife's maiden name and the fact that he instructed those at his business not to be concerned about the loan, that it was none of their concern basically.

MR. SKOLNICK: May I —

MS. HAYES: And the fact — if I can just finish for just a minute. That the way the business was set up, not only were investors acting as lenders to borrowers who had no ability to pay, but when the borrowers did what was fairly predictable, and that is failed to make their payments, Mr. Skolnick didn't tell the investors that the property was in foreclosure and had been lost to them. He told them that although the property was in foreclosure, he would purchase the property back and roll investors over into another property. He would pay investors off from another one of his companies. And that was North American. Now —

PROFESSOR KAPLAN: Okay.

MS. HAYES: — North American —

PROFESSOR KAPLAN: Let's wait. We still — we have two very different things here.

MS. HAYES: Okay.

PROFESSOR KAPLAN: We have one thing involving a loan to his wife, and the other not telling people certain things.

MR. SKOLNICK: Well, let me tell you about the loan to my wife. I know that it looks like I was trying to hide a loan by putting the loan in my wife's maiden name. But, you know, Ms. Hayes, that's not what happened at all. What happened, this was a loan that was taken out in 1980. And my wife had joined a women's consciousness raising group. And she said that she wanted the loan in her maiden name. She didn't want to use my name anymore. And she wanted to develop credit ratings in her name as an individual whole person. And I respect that, Ms. Hayes.

(Laughter.)

MR. HALLINAN: You know, one thing that runs through all of these questions that are being put to my client by the prosecutor is some assumption that there was chicanery in the financing of these loans. And there was not. Every single one of these loans was secured by a piece of property on which a mortgage was taken out in the investors' names. And at the time that the mortgage was taken out, there was an 80 percent debt to value ratio. It was only with the collapse

of the market, in which the prices of property plummeted, that you find that they were over — that they were overencumbered. They were overencumbered when they went into foreclosure and were sold. They were not overencumbered at the time that the loans were taken out.

PROFESSOR KAPLAN: Okay, Now, let me ask you a question, Ms. Hayes. You can see that we're in a — I hate to use the word — cat fight. But we've got a problem here. There are a lot of people who take very different views of a complicated situation. Do you have a prosecutable case here? Are you going to ask for a prosecution of Mr. Skolnick?

MS. HAYES: Absolutely. I think the bottom line question is whether or not there are investors who were lied to, and whether Mr. Skolnick knew of those lies and actively participated in taking people's money and losing it through a scheme to defraud. In this case, there is a scheme to defraud. We will charge Mr. Skolnick, and he will be indicted through the U.S. Attorney's Office, United States Attorney's Office, for mail fraud.

PROFESSOR KAPLAN: Oh, in other words, you will not do this through the state prosecutorial arm in the normal course of business. You would go to the feds with this? Or could you do it yourselves through the state?

MS. HAYES: The case could be prosecuted either in state court or in Federal District Court.

PROFESSOR KAPLAN: Now, in practice, which would you do? You are, after all, a state prosecutor.

MS. HAYES: As a matter of practice, I would take this case to federal court. The traditional fraud statute is the mail fraud statute. The procedural aspects of the case — and in this case, there are hundreds, literally hundreds of investors. The procedural aspects are more favorable to the investors. And so, we're going to take this case to Federal District Court.

PROFESSOR KAPLAN: Now, it's interesting to me that on your left happens to be Lowell Jensen, now a Judge of the Federal District Court, but formerly the top prosecutor in the United States, other than the Attorney General himself. What do you think when the state comes — officials come to the feds and say, "Here. We've got this wonderful case for you. How about trying it?"

JUDGE JENSEN: Am I going to sentence Mr. Skolnick later?

PROFESSOR KAPLAN: You will sentence him later if he is convicted.

MR. TOPEL: He's prejudged this already. Listen to that.

(Laughter.)

PROFESSOR KAPLAN: We have what is known as dual citizenship here.

JUDGE JENSEN: If I'm in my prosecutorial hat, I agree with Ms. Hayes — that if you're going to choose a forum, in effect, if you're going to choose between the state and the federal forum, I think this case lends itself to federal prosecution much more easily, as she points out. There are a number of people, victims, that could be much more easily handled in terms of the victim impact in the federal system, and perhaps move more quickly. And the mail fraud statute adapts very easily to this kind of a situation. So, I would choose in the same fashion that she said, that you'd go into the federal forum rather than state.

PROFESSOR KAPLAN: In other words, it's the prosecutor's choice, not Mr. Skolnick's choice as to where he gets prosecuted.

JUDGE JENSEN: That's correct.

PROFESSLOR KAPLAN: I see. Now, I'm going to ask Mr. Hallinan, a well-known criminal lawyer here, you think you can win the case, Mr. Hallinan?

MR. HALLINAN: I think we have a good chance. I think we have a better chance in the state than we do have in the federal courts to win it.

PROFESSOR KAPLAN: And that's why you're in the federal courts I suspect.

MR. HALLINAN: That's precisely why. You know, there is one thing that has not been considered or talked about by Ms. Hayes, who is making the decision that she is going to prosecute my client. Now, my client — and we have said this from the inception — is deeply concerned and feels very badly about the losses to the people who are out their money.

And, in fact, what surprised me was the vigor of the attitude, the prosecutorial attitude, by the prosecution when the prosecution knew that at the very time that they were considering prosecuting Mr. Skolnick, he was at that time cooperating with the lawyers representing the investors in attempting to get their money back by lawsuits against, for example, the insurance company or the — the accounting firm who defrauded the investors and defrauded him. And his testimony was critical in establishing the fact that there was liability there. And he was cooperating. And they have a $10 million E and O policy which will someday repay the investors the money they owe.

PROFESSOR KAPLAN: Could you — what's the E and O policy?

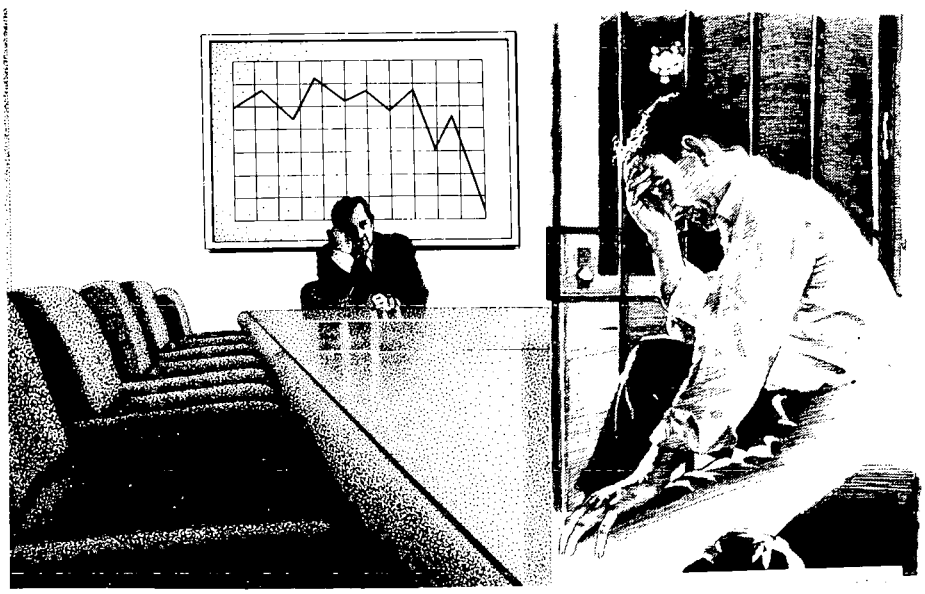
MR. HALLINAN: An Errors and Omission policy. And his testimony will be critical in trying to get the money back. And he wanted to get it back.

Additionally, if there's a prosecution and Mr. Skolnick goes to prison, how's he going to work to put in his own contribution to pay these people back, which he wishes to do? Nor are his trust funds accessible to the prosecution, because they are spendthrift trusts of his parents that his parents set up. And he wishes to contribute some of that back to repay these people. I find it very disturbing that —

MR. TOPEL: I want to add one —

MR. HALLINAN: — the prosecutor — just let me finish this, Mr. Topel. I find it very disturbing that the prosecutor's primary attitude here is let's put someone in jail. When their attitude should be, "Let's rectify a wrong. Let's rectify an injury to a large number of people." And based upon that, I think that the prosecution should sit down and talk with me about what's in the best interest of everybody before they indict Mr. Skolnick.

MR. KAPLAN: One question first, however. Among all of the huge expenses that Mr. Skolnick will have, if he's prosecuted criminally, that can't then go to the people who've lost money, there's one that you've left out. That is, your fees. Now, it's fair to say that they will not be trivial in such a case.



MR. HALLINAN: Well, do I get lunch today?

PROFESSOR KAPLAN: Well, I think —

MR. HALLINAN: That's about it.

PROFESSOR KAPLAN: — with a fee like this, you can afford it. Let me just ask. What in — just tell us; give us a round number what a first-rate lawyer, such as yourself, would have to charge for defending a complex criminal mail fraud case.

MR. HALLINAN: I would probably charge a fee of somewhere in the neighborhood of $250,000 to Mr. Skolnick.

PROFESSOR KAPLAN: Well, now, let me ask. I'll come back to you, Mr. Topel. Let me ask Mr. Westoby, which would you rather have? Your money back or Mr. Skolnick in jail? A hard choice.

(Laughter.)

MR. WESTOBY: As to me personally, we will hang him from the closest rafter or the water pipe up there. But being a representative of the unsecured creditors committee, also have the interest of many people that are old, need their money back, need to be satisfied, I approach this with a totally mixed bag. As far as I personally am concerned, with my politics slightly to the right of Attila the Hun, hang him. But I do have to consider the critical situation of a lot of the investors, and I think we can have both. I think we can have restitution and we can also have the body.

PROFESSOR KAPLAN: I see.

MS. HAYES: If I can respond just briefly —

PROFESSOR KAPLAN: Yes.

MS. HAYES: — to Mr. Hallinan's remarks. It's interesting again that we've had the list of people who are to blame for Mr. Skolnick's predicament. And it's very common in these cases, again, to add to that list the prosecution in some fashion, whether it be that the investigation was improperly conducted or, as Mr. Hallinan has presently argued, the government is in some fashion interfering with Mr. Skolnick's desire to make the investors whole.

Some of the facts he is presuming, however, are that, first of all, the prosecutor puts Mr. Skolnick in jail. That isn't the case. The prosecutor brings the case to court, where Mr. Skolnick will have the pleasure of addressing His Honor in regard to his efforts, the efforts he's made to make the investors whole. Then the court will have the ability to order restitution. That is, assuming we are not willing to trust Mr. Skolnick to make full and complete restitution on his own, and in light of the fact that he has not made restitution to this point, I think that's a valid assumption. But then —

PROFESSOR KAPLAN: Well, Ms. Hayes, let me ask one question. Can the court order restitution of the quarter of a million dollars that Mr. Skolnick is going to pay Mr. Hallinan?

MS. HAYES: Restitution to whom?

PROFESSOR KAPLAN: To the victims.

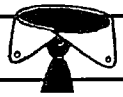
MS. HAYES: The court can order full restitution.

PROFESSOR KAPLAN: Even the court cannot get blood from stone.

MS. HAYES: That's correct.

PROFESSOR KAPLAN: And if Mr. Hallinan's already got it, nobody else is going to get it.

MS. HAYES: Let's address what Mr. Hallinan spoke about before in the nature of trust funds and spendthrift trusts. We have, in fact, in the past attached spendthrift trust disbursals. That is, we may not get to the corpus of the trust, but the court can order that periodic payments be assigned by the defendant into a victims' fund.



MR. HALLINAN: His parents have —

MS. HAYES: Excuse me.

MR. HALLINAN: — his parents have reserved the right to change the payouts.

MS. HAYES: Excuse me, if I may finish —

PROFESSOR KAPLAN: Neither of you will finish, because I want to go on to a different issue right now. There is a dispute here over what's going to happen when a jury gets this case. We now will ask Lowell Jensen to put on his other hat, or actually his robes, as a judge. Do you think this is an open-and-shut case for the prosecution?

JUDGE JENSEN: There are no such things. If it goes to trial —

PROFESSOR KAPLAN: If it goes to trial.

JUDGE JENSEN: Open and shut if you plead. If the case has gone to trial, I don't think it's an open-and-shut case.

PROFESSOR KAPLAN: The defendant might win.

JUDGE JENSEN: It's going to go to a jury; I think that the defendant has an opportunity. We haven't heard the whole case, obviously, and we have to keep an open mind about this. We have to realize that the prosecutor has to be in a situation where when they go into this there is a basic threshold decision they've made that there's sufficient evidence to show to a jury beyond a reasonable doubt that it's true, that he misrepresented, committed a fraud. But we haven't heard the whole case. So we really can't say that. But it is — it's always going to be a question for what the jury does. So, we'll wait upon the jury's verdict.

PROFESSOR KAPLAN: Okay. At least from your experience with juries, when you have one of these cases where one of the partners decamps to Argentina and the other guy, for all his personal attractiveness, doesn't seem awfully bright, the jury can't really be relied on to come in with a guilty verdict.

JUDGE JENSEN: Well, I don't think it would be relied on. Although, as I said, we haven't heard all of it. But from the sort of basic outline of this, I think the jury is more likely to find Mr. Skolnick guilty.

PROFESSOR KAPLAN: Okay. Now, let's assume the jury does find Mr. Skolnick guilty. And now he comes up to you, and you're going to have to sentence him. What do you think about when sentencing him?

JUDGE JENSEN: What's been resolved at that point is a lot of what we discussed here. It's that all of this uncertainty, in a sense, in terms of his culpability has been resolved at that point. We now have before the sentencing judge a person who's been found guilty of, let's say, a mail fraud. And he has been — he now comes before the court as a person who is, in fact, guilty of that criminal offense.

PROFESSOR KAPLAN: And you don't —

JUDGE JENSEN: If I look at this —

PROFESSOR KAPLAN: — sort of look beyond this.

JUDGE JENSEN: Oh, I look — I have to look at the offense, but I look at it in terms of its context. Now, where it's a sophisticated offense, there's a lot of victims out there, these are multiple victims, there is a lot of loss that's there, so it's a very serious offense as far as that's concerned.

PROFESSOR KAPLAN: Let's put this in the context of the prosecutor's main argument, and the thing that the defense can't answer is that Mr. Skolnick saw the business going down the drain and he thought and worried about the people who were going to lose their money. And he decided that the market was going to turn up, and if he could just hold on a little longer, everybody would come out whole, and for that reason he shaded the truth. He didn't tell certain facts that he knew that they would want to know. Technically, he lied, but all in the cause of trying to keep this

business afloat. Does that weigh in his favor?

JUDGE JENSEN: In a sense, if you want to look at it in terms of a level of motivation, it might go into the total context. It doesn't really weigh in his favor. And more and more the decisions that are made in the sentencing process are based upon the offense itself, and then the criminal history and the context of the offense. And so, one could expect a level of determinacy coming out of this. If he's guilty of this mail fraud with this dimension, he's going to go to prison. The question is how much time he's going to do. I may look and see which prison in the Bureau of Prisons has a drama class, but then —

(Laughter.)

PROFESSOR KAPLAN: But you don't, in fact, even make that decision, do you —

JUDGE JENSEN: No.

PROFESSOR KAPLAN: — you just remand him to the custody of the Attorney General —

JUDGE JENSEN: That's correct.

PROFESSOR KAPLAN: — who sends him to prison.

JUDGE JENSEN: That's right. Now, I would be concerned — and I think we've made this point about the whole issue of restitution. That might be a part of how one gets at this. And as you've pointed out, the real problem of restitution in this case is what is available. A court can make orders, and a court would make an order of restitution in this case, but it's a question of how you can get at corpus that will satisfy that. That's the real issue.

PROFESSOR KAPLAN: Now, let's sort of turn to that. Mr. Skolnick, after a long, hard, and close fight, has been convicted. He is going to be sentenced to some prison time by Judge Jensen. But there remains the problem of how we're going to straighten out this mess. Mr. Topel, how are we going to straighten out this mess?

MR. TOPEL: There's a couple of things that — that will add into this. One, the insurance policy that was lurking out there is probably the only real asset that's left for distribution to the people who have a right to the distribution. Judge Jensen can order restitution until the cows come home, but as you said, you can't get blood out of a stone. And the courts are increasingly holding you can't get money back from attorneys for attorney's fees, even in what is commonly called RICO or CCE cases.

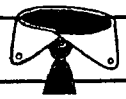
PROFESSOR KAPLAN: Well, there's no problem of that here. I mean this is a mail fraud case.

MR. TOPEL: Well, that's an interesting question. The thing that does leap out of the facts of this case is that it would be a typical RICO prosecution, which would allow for all sorts of remedies, forfeiture, and what have you. But keeping in mind it's a mail fraud, how do you get the insurance policy is really the question. Well, what — there's a tough policy call here. Because when the prosecutor indicted, the insurance company filed a declaratory judgment. And for the lay people, that's really a way the insurance company says, "You paid me a fortune, but I'm not going to pay a thing."

And they say the reason is, "Because we don't insure criminals or criminal behavior. And by your saying he's a criminal by the indictment and presumably by the conviction, the insurance policy can go "poof." It may not, or it may.

But what happens here is Mr. CoBen comes into place, because there was a bankruptcy proceeding here. And the money that went to the horses and the money that went to the construction, and the money that went to the salaries from this company comes back under bankruptcy under preference payments or under state fraudulent conveyance laws. And it will all be available for distribution. And traditionally — I shouldn't use traditionally, because the

D. Lowell Jensen



Restitution Act is very new. What's emerging in these parallel proceedings is that the district court is only too happy, because they're overworked, to let the trustee in bankruptcy do the restitution, in effect, for the court, provided that the parties stipulate.

So, all this money can be brought back in — whatever exists, the thoroughbred horses; you're welcome to them. Or they were nags as Butch Hallinan points out. But beyond that, whatever — whatever deeds of trust or what have you come back to be distributed. Beyond that, there's not much you can do, because this gentleman doesn't have any money. You can appoint receivers. You can do what you want. But if it's not there, it's not there.

MR. BRODSHATZER: They can bring a tort action of any kind.

MR. TOPEL: Sure, they can bring — that's the other thing that we haven't discussed here. It's been alluded to by Pat. There are a million lawsuits going on. First of all, the creditors committee for the investors, for Mr. Westoby, they're fighting the creditor, the Bail Out loan guy, who is traditionally going to be seen as an insider or dominant party, and is going to get shoved, subordinated below the victim investors. Not only that, there's a suit against the accounting firm who has a huge — forget this $10 million E and O policy. They have what's called a professional services liability D and O policy probably of a hundred million dollars. That's where you might get some money back for these people, from the accounting firm. All of this is going on.

PROFESSOR KAPLAN: Okay. Now, in some of these suits, the people trying to get their money back are going to be asking Mr. Skolnick to be a witness for them, aren't they?

MR. TOPEL: Yes. But if he's been convicted, then two things can happen. His — and I'll let Butch talk about this a little bit. But two things will happen. His Fifth Amendment right against self-incrimination becomes greatly limited. And I'm quite sure that Miss Hayes being

PROFESSOR KAPLAN: On the other hand —

MR. TOPEL: If he wants to.

PROFESSOR KAPLAN: On the other hand, he is a convicted felon now and people might not take his word for anything.

MR. TOPEL: Well, I doubt his credibility can suffer greatly by that one act.

(Laughter.)

PROFESSOR KAPLAN: Okay. Now, Mr. CoBen, you're sort of one of the major actors trying to bring order out of this chaos. How do you do it?

MR. CoBEN: Well, let me suggest first of all, I'm assuming the mortgage company itself is going to be either in a Chapter 11 proceeding or in an ordinary bankruptcy Chapter 7 proceeding.

PROFESSOR KAPLAN: Can you tell us the difference?

MR. CoBEN: Well, the difference, in a Chapter 11 proceeding, you're either trying to liquidate assets through reorganization — in this case, there's probably not much likelihood of reorganizing a Ponzi — or you're going to liquidate in a system that's other than auctioning regular arm's length sales. In the Chapter 7, you liquidate primarily by auctioning, which means the return on a Chapter 7 is usually far less than in a Chapter 11.

PROFESSOR KAPLAN: And what do you think this is going to end up as?

MR. CoBEN: This will be a Chapter 11 because of the distribution problems of the notes and deeds of trust, the multiple sales of real property that are going to have to be conducted, and the priorities between creditors that are going to have to be determined.

PROFESSOR KAPLAN: So now, you basically have taken over the firm.

MR. CoBEN: Uh-huh.

PROFESSOR KAPLAN: And you've got massive numbers of mortgages that aren't worth much and a lot of other things. What do you do first?

MR. CoBEN: First of all, I'm probably going to make the two attorneys to my left unhappy, because I'm going to examine as part of the assets of the company those legal fees, because depending on the period of time in which they were paid, the consideration which was given in exchange therefor, the reasonableness of those fees, they may be subject to recapture by the trustee in bankruptcy.

PROFESSOR KAPLAN: If they are unreasonably high. Do you think a quarter of a million dollars for a lawyer, a first-class lawyer, defending a complicated mail fraud case is unreasonable under today's fees?

MR. CoBEN: Well, under bankruptcy proceedings, we have methods by which attorney's fees are measured as a standard. And that is, they look at the ordinary hourly rate. They require detailed time accountings. And that's the type of material I would want to have justification for those fees.

PROFESSOR KAPLAN: But at least as a first approximation, the $250,000 would not strike you as shocking. You wouldn't say, "Aha! I've got him." You might find something.

MR. CoBEN: All payments from an insolvent entity or principals of an insolvent entity within a year or — roughly within a year are considered shocking to a trustee and examined judicially.

PROFESSOR KAPLAN: So you will do your best on that.

MR. CoBEN: Right.

PROFESSOR KAPLAN: Okay.

MR. CoBEN: Now, next, we'll also be able to get to the principal here, because one of the important things to do is to have the principals — both Mr. Post and Mr. Skolnick — determined to be alter egos if that's possible. Because if I can make them alter egos of the bankrupt corporation, then their personal assets, without further action, come under the jurisdiction of the bankruptcy court and can be picked up and turned over for liquidation.

PROFESSOR KAPLAN: Well, now, with respect to Mr. Post, even you will have trouble squeezing assets out of him. Indeed, we can't even squeeze assets out of the whole nation, let alone —

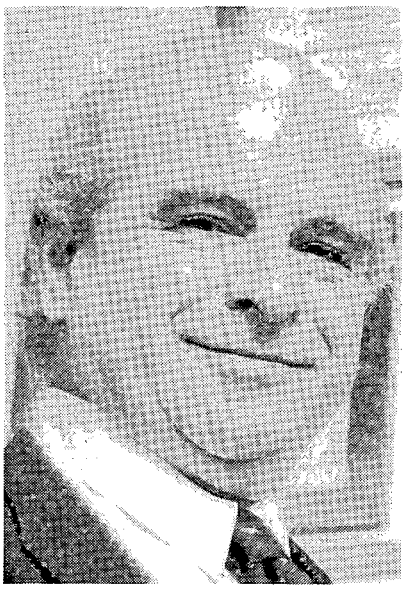
MR. CoBEN: Well, we have Mr. Post sitting down there in Argentina, but nobody's told us about how much of the assets that Mr. Post may have could still be in our jurisdiction through the entire 50 states of the United States with enforcement powers by the U.S. Marshall's Office.

PROFESSOR KAPLAN: If he has anything, you can get it.

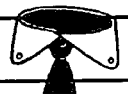
MR. CoBEN: We can get to it. And especially because these were real property transactions, the probabilities are that he or relatives or insiders of his are holding some real property somewhere that we can tap. So, we're going to try to have both Mr. Post and Mr. Skolnick declared alter egos so we can get to those properties.

PROFESSOR KAPLAN: Now, what do you mean? What is this declared alter ego? What's that?

MR CoBEN: We have to go to the bankruptcy court and put on a case to show that for purposes of the operation of the company and the distribution of cash, it was basically an interchangeable relationship between the corporation and these principals, and the distinction between principals and corporation should be eliminated. They should be clumped together and considered the same entity. And, therefore, their assets should be clumped together and brought into that estate.



Melvyn CoBen



PROFESSOR KAPLAN: In other words, this is like taking the stockholders of the corporation and say, "You thought you were stockholders —"

MR. CoBEN: But you're really partners.

PROFESSOR KAPLAN: — "You're really partners, and you're liable for what the debts of the corporation are."

MR. CoBEN: It also should be pointed out that we've got a very long reach in the bankruptcy court, because the bankruptcy court enforces the state fraudulent conveyance rights. And fraudulent conveyance in bankruptcy is just any transfer without adequate consideration received and it can be brought back into the estate. And that can go back three years. So, we can start, bring in those Bel Air houses that may be personally owned, the wives' assets. We can bring in the horses. We can bring in the Rolls Royces, the Mercedes-Benz, the Leer Jet if we can find it, the yachts. We can start accumulating all those personal assets and the distribution benefits from the spendthrift trust. Because we can prevent the parents from changing that trust, depending on its terms, as a post-bankruptcy act. So we have, in the bankruptcy court, the power to start getting to assets of the individuals and freezing people from doing things to get the assets out of the jurisdiction of the court. It's a powerful collection tool.

PROFESSOR KAPLAN: So, in other words, you can get blood from stone.

MR. CoBEN: Well, we can get stone from stone in little pieces.

PROFESSOR KAPLAN: I see. Yes, Mr. Black?

MR. BLACK: FSLIC is — the federal insurer is a large creditor now. The savings and loan has failed. And it's suing, too. And let me give you the practical end of this. I used to be the litigation director. And we have docketed probably 10,000 cases. All these bankruptcy powers are real nice, but this is a China Syndrome. It is cratered, and it's cratered so bad that there ain't nothing left. And the — all those wonderful powers of the bankruptcy court come at the cost of very substantial litigation. And while there are standards, the attorneys are sucking the remaining carcass of any remaining juice. There is only one important suit that exists, one important party to sue, and they are sitting to my left. That's where all the bucks are. And what we have now is the Federal Savings and Loan Insurance Corporation suing from one direction and the trustee suing from the other direction. And that's where all the real resources ought to be going, because that's where the real money is. And that's the only way either FSLIC or the victims are going to get their money back. And we're involved in the great decision, are we going to cooperate in this suit or are we going to fight about who gets precedence in this lawsuit. And the unique powers of the bankruptcy court quash sort of third-party suits.

PROFESSOR KAPLAN: This seems awfully complicated. Who wants money out of this bankruptcy?

MR. BRODSHATZER: I haven't got my fee.

PROFESSOR KAPLAN: I have a feeling that you'd be quite happy —

MR. HALLINAN: They'll sue for that, too.

PROFESSOR KAPLAN: — to forget about the whole thing if they will right now.

But, Mr. Topel, who are the different kinds of people coming in wanting money?

MR TOPEL: The main group is going to be the creditors — well, there's several main groups. The victims, the Westobys, who are either secured or unsecured creditors, depending on the quality of the paperwork and whether certain things were complied with by Shadow. They're going to form a group and they're going to have a committee. And they're going to have their own counsel typically.

PROFESSOR KAPLAN: By the way, what's the difference between secured and unsecured here?

MR. TOPEL: Well, there's different hierarchies of creditors in bankruptcy, in any — in any situation. And you can be secured or you can just be — you can be secured by property. You can be secured by other — other instruments. Or you can just be hanging out there; in other words, not having any security for your obligation. And the Bankruptcy Code ranks people and gives them a priority. You get paid first.

For instance, the most typical example is a person owns a first mortgage. He gets paid before a second mortgage, et cetera, et cetera, et cetera.

PROFESSOR KAPLAN: And that means when the property is sold, you put all the money together and pay it off.

MR. TOPEL: Yes, but to add a layer of complexity, in this situation, the priorities go out the window if people have unclean hands. For instance, Bail Out, who may be a creditor itself, may be in cahoots with Shadow. And while they may have better security, they may be subordinated beneath the victims. Or if the victims are unsecured, they may be advanced ahead of a secured creditor if, in fact, the secured creditor does not have traditionally clean hands.

And then there are the lawsuits against the accounting firm. And FSLIC's lawsuit raises interesting questions, because somewhere — and I don't think at some level, even though we're not getting into complexity, you can ignore RICO here. Because somebody's going to file a civil RICO if, in fact, they —

PROFESSOR KAPLAN: Can you tell us a little about this RICO?

MR. TOPEL: Well, RICO is the major tool that would be used to try to recover money for a group who allege that Shadow was involved in criminal conduct. And what RICO does, RICO is just the initials for the Racketeer Influence Corrupt Organization Act. It allows the civilization of criminal behavior and gives a civil remedy. So if, in fact, criminal acts were done, there is a civil remedy which has as its benefit, you get treble damages, at least until Congress changes the law, and you get your attorney's fees. So, this allows — and what has sprung up, and despite — there are some good-intentioned attorneys who do take cases and do try to do very, very good work for their client, and do attack federal regulators in doing so, and sometimes I think with good cause.

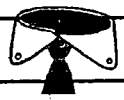
But leaving that aside, an attorney will take this case on a contingency fee for these poor victims, and he will say, "Look. I will get a piece of your recovery and I will get my attorney's fees. And I will bring a RICO action."

But the point is RICO allows certain things to occur. It allows you to get injunctive relief to tie up property. It allows a forfeiture to occur under a relation back doctrine, which says that anything this man has from way back when Shadow started, or anything that could be substituted for what he earned from his bad conduct can be taken in forfeiture.

So, obviously, that is going to be the way that you're going to approach —

PROFESSOR KAPLAN: You're not going about Mr. Hallinan's fee for defending the criminal case, are you?

MR TOPEL: That is — I am indeed. And, in fact, that has been one of the hottest areas of litigation.



PROFESSOR KAPLAN: I can understand why.

MR. TOPEL: And while indeed you can, but I'm happy to say maybe to the — a mixed sense by some other people here — that the courts have uniformly used the Sixth Amendment as the basis for protecting those fees against a statutory act of Congress. And it appears that that battle is now receding into the past.

The Department of Justice, under the, I might say the guidance at this time of Judge Jensen, issued guidelines where I think they avoided the issue. This came out about a year ago. The point is that it's extremely complicated. But RICO will be used. It will come — bring the federal court into it. It will take it out of Mr. CoBen's court, because there's no jurisdiction in the bankruptcy court for RICO suits. He'll retain some of the bread-and-butter bankruptcy stuff. It's very complicated.

But out of it, out of it does come, eventually, settlement. And I don't know — it's not a fair criticism to say that it's a very expensive proposition. There is no other proposition to adjust all of these conflicting needs.

PROFESSOR KAPLAN: Mr. CoBen, how do you handle this when you've not only got all of your own problems, but you've got a RICO case going on in the federal courts?

MR. CoBEN: It won't be a matter for me to handle. because if the RICO action is brought, it will be removed, despite any position I take, to the district court. In the district court — normally I wouldn't take any part in the RICO action itself. But as indicated by Mr. Topel, I would be handling the balance of the bread-and-butter bankruptcy matters.

PROFESSOR KAPLAN: But if the RICO plaintiffs get all of your — the money that was heading to you, there's an empty shell left behind.

MR. CoBEN: They have to, for instance, come to conclusion with their RICO action and get judgments or settlements. Meantime, I'm moving forward on the turnover orders, fraudulent conveyance, and the like. And I'm garnering together those assets. You'll end up with really two pots. You'll probably end up with a RICO pot, and you'll end up with a bankruptcy pot, somewhat differently distributed. One under the jurisdiction of the district court, the other under the jurisdiction and rules of bankruptcy. So, the two pots will be there, and combined they will make up the monies available to compensate victims like Mr. Westoby.

PROFESSOR KAPLAN: Well, it's good to know that our legal system is under complete control. That, you know, this is all very simple. Of course, Mr. Brodshatzer has some other problems.

MR. BRODSHATZER: Well, I'm not so sure that I have such other problems. Unfortunately, I didn't bring my counsel with me. The investors didn't rely upon my financial statement. The only one who may have — I have some concern about is Bail Out. But I think that the investors are looking at a carcass that isn't going to be there in terms of their getting part of it.

MR. BLACK: Well, FSLIC was the other one that was relying — or certainly, the institution — the savings and loan in dealing with us used those audited financial statements. It isn't so obvious as a tactic that you're definitely going to bring a RICO suit, especially when you're suing an insurance company or, in this case, an accountant, or a law firm, or something like that.

The courts are often very antsy about using RICO against entities they consider legitimate. And unless you have excellent evidence of real fraud, it's often a very bad tactic to phrase it as a RICO suit, because you'll be tied up for the next year and a half in procedural motions. Here you have a negligence action against an accountant — accounting firm, which is in many ways much more straightforward and where the accountants may very well want to settle with you, because of their potential liability, sometimes even before you file suit. And it can be very cost-effective. So, you may not be going the

RICO route if you're seeking the most cost-effective recovery.

MR. CoBEN: See, anything — in my cooperation with Bail Out here, I'll probably be wheeling and dealing with them to get their satisfaction exclusively to the E and O policy of the CPA or the attorneys or other E and Os that may be available, so that I get them out of the creditor pot. And to the extent that the general creditors haven't seen those financial statements, they have a better case if they can be paid off from a different source, that makes — although it doesn't increase my pot, it decreases the number of pieces into which it has to be divided. And it makes more for each person.

PROFESSOR KAPLAN: Now, Mr. Westoby, are you sort of comforted by this procedural morass before you can get your money back?

MR. WESTOBY: Not at all.

PROFESSOR KAPLAN: It's dismaying, isn't it?

MR. WESTOBY: Yes. I want a piece of Butch Hallinan.

PROFESSOR KAPLAN: I see. Well, it would have been a very good investment if you made it at the right time.

(Laughter.)

PROFESSOR KAPLAN: You could have checked with the law school, paid his tuition, and it would have been a much better investment than giving the money to Mr. Skolnick.

MR. WESTOBY: That's correct.

PROFESSOR KAPLAN: But you didn't do that. And now you're going to have to negotiate this labyrinth before you come out with any money that's in it.

MR. WESTOBY: So far we've only been at it five and a half years.

PROFESSOR KAPLAN: Oh, I see. Well, then you're just going to have to catch your second wind. Have you gotten any money out of it yet?

MR. WESTOBY: No, sir.

PROFESSOR KAPLAN: Oh, well, that's what happens. Maybe you have to be more careful with your own money.

MR. WESTOBY: That's highly possible.

PROFESSOR KAPLAN: You know, as between you and Mr. Skolnick, you know, he was awfully careless. But weren't you, too?

MR. WESTOBY: Yes.

MS. HAYES: If I can just address that for a moment. There's a qualitative difference here. On the one hand, you have Mr. Westoby who dealt in good faith. And the reason why we have a criminal here and a criminal prosecution here is the false statement aspect of what Mr. Skolnick did in taking Mr. Westoby's money. If Mr. Skolnick had been truthful with Mr. Westoby, Mr. Westoby would have his money as he sits here today. There's a qualitative difference in the conduct.

PROFESSOR KAPLAN: Is even that — if Mr. Skolnick had been truthful in the sense that he had known and told the truth, very possibly, because Mr. Westoby wouldn't have — Mr. Skolnick would have known and told Mr. Westoby. But one of the problems about a case like this is by the time Mr. Skolnick realizes that he's in such terrible trouble that he has to lie to keep the organization going and violate the criminal law, Mr. Westoby's money — or at least the money of a lot of people like him — is already gone.

MR. WESTOBY: There's something totally missing out of this in the fact that Mr. Skolnick was personally handwriting all the prospectuses on the properties of his insider companies. And he knew that he was upgrading the prospectus on each one of those properties after it was foreclosed on. He increased the size of the lots. He increased the houses by a bedroom. He put formal dining rooms

Stanley Cohen

in them. He increased the size of the garages. He increased — he put swimming pools in when there weren't any. And these properties that were rolled through his insider company sometimes were rolled through three, four, and five times. And everytime the handwritten prospectus that was in his handwriting — and is in the hands of the prosecutors — increased the properties substantially in value. So he knew what he was doing. This great pose of innocence is belied by the fact that the handwritten prospectuses, which we did find and which have been proven by the handwriting experts of the FBI to be in his handwriting.

PROFESSOR KAPLAN: Oh, he clearly wrote it. There's no doubt about that. He wrote what Post told him to write.

MS. HAYES: I think what Mr. Westoby is saying here and attempting to say is that the evidence that is developed at trial — and certainly, we haven't heard all of the evidence here today — has proved conclusively not that Mr. Skolnick was a poor businessman, but that he had the intent to defraud and he, in fact, defrauded Mr. Westoby. If it were merely a case of negligence, we would not have been in the criminal courts.

PROFESSOR KAPLAN: Mr. Westoby would have been in probably the same soup.

MS. HAYES: A civil action.

PROFESSOR KAPLAN: And he would have been in the same soup —

MR. HALLINAN: I'm getting very nervous — very, very nervous over here, because everybody's talking about my client as though he's a carcass, and you haven't convicted him yet. These are just questions that are thrown out here for continued discussion. And we don't concede at all that a jury of 12 people would ever convict Mr. Skolnick for the offenses which you've charged him with. And what we've heard mostly is misinformation and prosecutorial hope.

PROFESSOR KAPLAN: Well, put it this way. It'll be a good fight under any conditions. But I want to go to a broader question right now. And I'd like to ask you, Mr. Cohen, is this what we mean by white-collar crime? A guy who isn't very bright and a little shady takes money from a guy who isn't very bright and a little careless?

Is that what all this is about? Is this the sort of thing that the foundations of the Republic are trembling over?

MR. COHEN: Well, it seems to me that it's all right for professors and lawyers to argue about the definition of white-collar crime, because to coin a phrase, it covers a multitude of sins, ranging from these simple frauds, traditional fraud cases to the very sophisticated type of avoidance of responsibility that goes on in corporate structures. So, yeah, this is a white-collar crime case if that's what you want to call it. But it really doesn't matter what you call it. You want to get at this thing and put a stop to it.

PROFESSOR KAPLAN: It would be better if it didn't happen, wouldn't it?

MR. COHEN: Well, that's a given.

PROFESSOR KAPLAN: Yeah. Well, fortunately, we have a distinguished sociologist with us who happens to be one of the nation's experts on white-collar crime, in addition to all kinds of other things. His name is Jerome Skolnick. In other words, he whips off his disguise, after stepping into the telephone booth, and comes out not as a failed business student, but as a thoughtful observer of the current scene, Professor of Sociology and Law at Berkeley. And I'd like to ask him what is this white-collar crime stuff we're talking about?

MR. SKOLNICK: The concept of white-collar crime was developed, oh, around 1940 by a famous sociologist named Edwin Sutherland. And what he was trying to say was what we've observed today — that most of the time when we think about crime, we think about robbery, and theft, and so forth. And thefts or robberies might result in losses to people of hundreds or thousands or maybe five or ten dollars. But poor

people can lose hundreds of dollars, thousands, tens of thousands. People like Mr. Westoby can be victims of crimes committed by people who wear white collars. That's why I wore my white collar today as if I were pretending to be one of them.

Now, I must say, though, that this case poses a real problem for me. And I think poses the problem that Mr. Cohen talked about. That is, it's very difficult to construct typology of white-collar crime. It does cover a multitude of sins. Now, think of the difference between a case where you have consumer victims, each of whom may be losing a very little bit. You know, instead of what's advertised as, "We're going to give you a pound of the product; we're only going to give you 14 ounces if you actually weigh it." And nobody loses very much. It's a white-collar crime. But in the aggregate, the corporation makes a lot of money because they're saving two ounces — there is a difference between cheating the consumer versus white-collar crimes where investors are victims. In other words, there's a real difference between caveat emptor and caveat investor.

This kind of scheme is really a variation of an old con game. And in order to have a con game, you have to have the mark as an accomplice. You were a mark, Mr. Westoby.

MR. WESTOBY: Yes, sir.

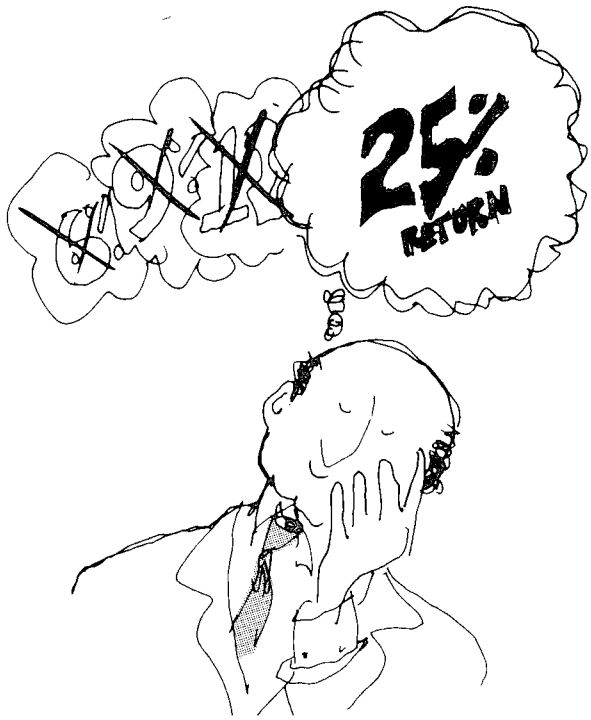
MR. SKOLNICK: You wanted to — you knew you could get six or eight percent in a bank and your money would be safe. You wanted 20 or 25 percent. And you wanted to believe. It wasn't just that the sales people here were telling you stories. You wanted to believe those stories.

PROFESSOR KAPLAN: They were selling dreams.

MR. SKOLNICK: Exactly.

PROFESSOR KAPLAN: At a high price.

MR. SKOLNICK: Well, ultimately at a high price. Now, the fact is if you take



the hypothetical that we took, in fact, if you invested a hundred thousand dollars at 25 percent, every year you got $25,000. And many of those investors, in fact, were getting $25,000 a year. And, indeed, at the end of the four-year period, they were rolling over into a new loan. They wanted that 25 percent. So, there's a sense in which in investor fraud, you have the complicity of the victim. You have to have the complicity of the victim.

Now, what does that suggest for us? It suggests, it seems to me, two things. I also suspect that — Mr. Westoby, I'll ask you this — I suspect that Mr. Westoby, like many of these victims, had the feeling that if it was illegal, we wouldn't allow it, right? If these people could rent halls and have programs, we wouldn't allow it.

PROFESSOR KAPLAN: In other words, the government would protect you.

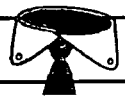
MR. SKOLNICK: Yeah. You had the feeling that the government would protect you.

MR. WESTOBY: It was a regulated industry.

MR. SKOLNICK: Exactly. You had that feeling. Now, it seems to me that we have to go in one of two directions. We have to advertise. If we're going to have ineffective regulation, maybe it would be more effective for the government to send out pamphlets to everybody in the society and say, "Watch your investments. We allow tricky, duplicitous people to talk to you. Okay? Watch yourself. Be very careful."

PROFESSOR KAPLAN: And we can add something else. After it's all over, we may send them to jail if we can. But that won't get you your money back. You rather will be thrust into the labyrinth of Mr. CoBen and RICO suits, and just understanding them will take most of the rest of your life.

MR. SKOLNICK: But the point, Mr. Kaplan, is that we really have to move in one of two directions. We either have to deregulate and tell everybody we



don't have effective regulation, or we have to have effective regulation. There's a sense in which the society is fooling the consumer by pretending to have effective regulation when, in fact, our regulations are quite ineffective as we've seen in this case.

MR. BRODSHATZER: You ought to throw in the fact that probably the same thing could be said about an audit, the point that you made before. I think that in most situations a fraud would be discovered by accident. Probably, if you happened to be lucky, the auditor happened to go out with one of the people who worked there and in a bedroom scene found out that things were awry.

MR. COHEN: It seems to me that this is where we in the press come in. We cannot investigate this scheme while it's underway, because we would not have access to the kinds of information that these other people have had. And it's also risky for us if we print stories which we can't prove. We couldn't help the victims of this case, because they were already victims by the time we knew about it.

The one thing we can do is provide exposure to what's happened so that the public will, first of all, be warned that this kind of thing goes on. But, secondly, we'll have a better understanding of how much protection there really is out there, how their public agencies are functioning. And then perhaps they can make decisions as to whether their government is serving them well, whether they are, in fact, providing the money that's needed to enforce these laws, and whether the laws themselves are being weakened. And so our role is that of an informer and an instructor.

PROFESSOR KAPLAN: In other words, you help lock the barn door after the horse is gone.

MR. COHEN: No, we really have nothing to do with what happened to the victims in this case. We're concerned about — probably about the way our society functions. And we want to help people understand what's really going on so that they can make decisions and perhaps elect the right kind of people or behave individually in a manner that's best for their own good.

PROFESSOR KAPLAN: Well, now, let me ask you, Mr. Martland, do you have any hope that we can actually protect people in all these investment kinds of schemes?

MR. MARTLAND: I don't think any regulatory program, if it's staffed as they currently are today, is ever going to be able to control outright fraud, because generally, it's fairly sophisticated. It requires an enormous level of review, which is not currently present in almost any program. So, I think the short answer to that is, no. If you have actual criminal conduct out there, it's going to be very difficult to ferret out.

PROFESSOR KAPLAN: Well, let me ask you another question, though, following that. What would it take to prevent the fraud? You talk about we can't do it at today's level of funding. What would it take really to prevent this before it happens?

MR. MARTLAND: Well, let's just deal with the brokerages, the real estate brokerages. 70, 80 thousand. The question is, all right, if you're going to give the type of overview that requires an analysis to determine if there's criminal conduct, we're talking basically about very frequent periodic random audits. So, the first question is, all right, what kind of a staff does that take? Currently, I think you'd have to increase that staff clearly three, to four, to five-fold. But you'd, in addition, have to have some kind of a program which could certainly be developed, given the modern day computers, to have certain blips that come across in those reports that would basically enable you to say, "All right. This is a problem area." And conceivably, in that kind of a situation, you might be able to refine the universe of brokerages into a relatively finite group that perhaps you can give special attention to.

That would be a help if you could do that. Trying to get the resources to do

that, competing with all the rest of the resources, is a political problem. But, nevertheless, I mean that is the way to do it. The suggestion perhaps that you should deregulate and go to public information programs, I think, is wrong. I still think that the regulatory program — remember, regulatory programs are set up for inept — really designed to set up for inept practices, not criminal practices. And they do a reasonably decent job in that area. So, they should still stay in place for that. In other words, the negligent operation of a company. But if you combine that with, I think, a public information program, and I think that's excellent — I think those are good programs, and that's money well spent. But you're always going to have the Westobys of the world.

Now, Mr. Westoby was not your average investor. That was a hundred thousand dollars. To the average public, that is a very large sum of money to invest. And while the public is probably entitled to some naivete in investment procedures, when you're talking about sums that large, I think you could expect the public should be a little more aware of what they're doing.

In other words, I don't think you can put the burden on government, the burden on the prosecutors, to protect people from that.

PROFESSOR KAPLAN: Well, now, as a result, what we've got here is a situation where our only satisfaction is going to be to send the principal to jail, and then to throw the efforts of Mr. Westoby into this enormous, confused battle where it's fair to say that the lawyers are like the spectators on the hill during the battle that stand aside and when it's all over, they pillage the dead.

(Laughter.)

MR. TOPEL: It is not fair to say that. I think it's incredibly cynical to say that, although it may be a — I think that human nature being what it is, I think — I think Martland has it exactly right. As long as people want to get rich quick, there's going to be people who want to help them along the way, and along the way make sure that they don't get rich quick, and they get poor quick.

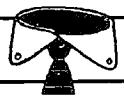
And so long as you have that, you pose the basic question of how much do you want the government to intrude on human affairs. And you're talking about — I think your first point is exactly right, that the victim is in complicity with the victimizer here. And I think the point that you make, Mr. Cohen, is also correct, that fraud takes in the whole range of human behavior. So unless you want an extremely intrusive society that's going to be there at the meeting or the marriage of the victim and the victimizer, and from then forward, you're not going to be able to effectively regulate. And I think that what we do end up with is a very cumbersome system that works perhaps poorly, but does work in the end. And I think that it is helped along by people who are very aggressive and sincere in battling for their client's interests and for the competing interest.

MR. CoBEN: Mr. Kaplan —

PROFESSOR KAPLAN: Yes.

MR. CoBEN: — let me say, I think if you met the victims, a hundred thousand dollars sounds like a lot of money. But let's remember, in the period from the late 1970s through the early 1980s, real property — people's homes, who had had and held those homes for 10 and 15 years, quadrupled in values. Many of the investors in fraudulent mortgage companies were, in fact, sellers of their residential property and were totally unsophisticated, had worked for a living, never handled large sums of money. The sale of the residential home was the first time they ever saw a hundred thousand dollars.

You had another group of investors called widows, and you had orphans. And they received their money through insurance policies. Had no sophistication whatsoever. You have personal injury victims and quadriplegics who had no sophistication.



So, to talk about the responsibility of the victim, I think, is not to recognize the type of people that are victimized by these mortgage companies. They are not the sophisticated persons who earned these funds in a business. They are the happenstance people who came into these funds as a result of this type of unusual circumstance.

Additionally, 25 percent sitting today in an economy where you're getting six percent on interest sounds like a lot of money. But let's go back to the early 1980s when we had 13 percent inflation and we had legitimate institutions paying as high as 16 percent. 25 percent was the elderly's hedge against inflation. It was their opportunity to take this windfall and have a decent recovery and a decent life. So, I really sort of resent the observation that a hundred thousand dollars is a lot of money and the state doesn't have any requirement to protect.

MS. HAYES: I think that's a very accurate comment. These cases don't ordinarily involve people who expect anything greater than the norm at the time for a return on their investment. The perpetrators of these frauds know that people won't invest if it appears to be too risky. So, they want to make it appear as if it's right in the mainstream of investment, secure investment practice. These high returns were common years ago when this happened. The naivete of the investor is that he doesn't want to make more than anyone else, he simply wants to be part of the economy. And what he sees as every day practice are people making large returns on their money.

PROFESSOR KAPLAN: And what we have here, of course, is the principal who has the same idea that he wants to make the money, too, only he's a little more sloppy about his truth-telling, just like the investors are a little bit more sloppy about their investigations.

MR. BRODSHATZER: I think we have to recognize there are really different audiences. Because, Judy, if you remember, in San Diego, which is the home of the scam, we had a fellow by the name of Brownstein, who was able to get some very top people and also Dominelli, who was able to get some very top people at rates far in excess of the current market —

PROFESSOR KAPLAN: Okay.

MR. BRODSHATZER: — and Brownstein was charging interest — paying interest of one percent per week.

PROFESSOR KAPLAN: Okay. Well, I'm sorry. We have now come to the end. What is the situation with our tape? How long will it take you to change the tape?

(Thereupon there was a discussion held off the record about setting up a new tape.)

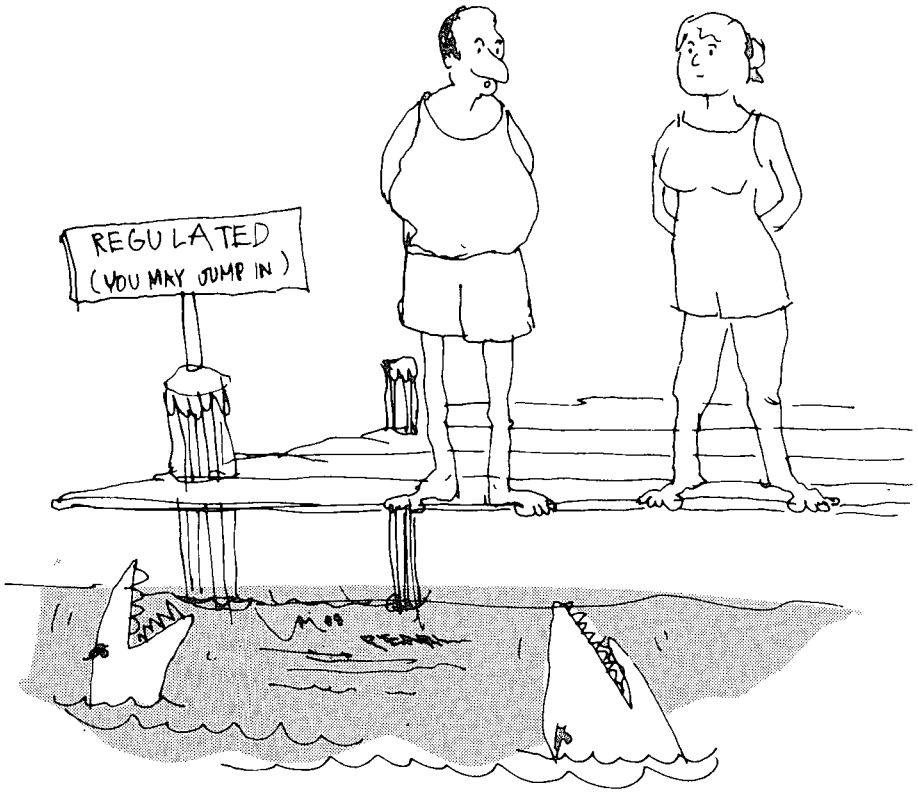
PROFESSOR KAPLAN: Okay. Let's just sit here for the three minutes, let them change the tape, and we will just close the thing off.

(Thereupon, there was a brief recess taken.)

PROFESSOR KAPLAN: Now, I'd like to ask one final question of Professor Skolnick. White-collar crime got named as such because people thought that the public and law enforcement and the society didn't pay enough attention to it; that we were concerned with other kinds of crime. Is that wrong? I mean, shouldn't we be concerned with other kinds of crime?

MR. SKOLNICK: Of course, we should. The point is that we should also be concerned about crimes that are committed against consumers. I think the point that you're asking is which victim feels worse? And I would agree with the implications of your question, that most people, if they were given a choice — I think Mr. Westoby would rather lose some money than be badly beaten, for example. I'm not sure about that. Most people who are burglarized and lose property feel personally violated whether the amount of property was very great or not.

I think that, as a society, we have to be concerned about this. But the real issue is



"They wouldn't let us go in there if it were dangerous, would they?"

how are we to be concerned about it? There is one class of white-collar crime that I think we should be concerned about precisely because the victims are not very clear. That is, in consumer fraud, very frequently the victims don't know that they're being victimized, right? And there the government can step in. In this kind of white-collar crime, we have a real problem, because there is, if not a complicity of the victim, an interaction. The victim plays a part in this thing. The victim agrees to be a victim. Now, I was taken by Mr. Cohen's analysis. I think it's quite right in some respects. But you also have to look back at that time, Mr. Cohen, and realize that people like Mr. Westoby who had a $25,000 house, now had a $125,000 house. They sold it and they had a hundred thousand dollars in cash. And they began to think "Gee, I should have had four of those houses," or, "I should get into the market."

And people like Mr. Post and the character I'm playing could persuade them of this. And they are seriously hurt. There's no question that they're seriously hurt. But the question is, as a matter of public policy, can we effectively regulate these things? And if we cannot effectively regulate it, should we give the impression that we are regulating it? Maybe — I'll ask Mr. Westoby this. Would you have been more careful if you thought that this was unregulated?

MR. WESTOBY: I checked the Department of Real Estate, and they did not have any complaints against this company.

MR. SKOLNICK: Exactly.

MR. WESTOBY: Which was not true. They had many complaints, and they just didn't tell the truth.

PROFESSOR KAPLAN: I see.

MR. SKOLNICK: The Department of Real Estate was complicitous, too.

PROFESSOR KAPLAN: And let me just ask one more question. We're going to put the principals in this thing into prison. We got enough space in our prisons for them, Mr. Jensen? You can always build more.

JUDGE JENSEN: Probably not. Maybe that was one of the considerations to go into the federal system. They probably have more room with the kinds of persons who come out of federal convictions. The real issue there is are we going to limit the sentence or the prison sanction by the space? And if we do have a scheme here and a fraudulent kind of conduct that merits the sanction of going to prison, we should provide the space. And we're going to have to provide sufficient space.

PROFESSOR KAPLAN: And we're going to be building, and building, and building.

JUDGE JENSEN: We would hope that there's a level where this doesn't happen. One of the points that we ought to make here in terms of, Mr. Cohen, in terms of some kind of notion of the public reaction to this, is one of the potential reactions is that others who may choose to act like Mr. Skolnick and his Argentine companion, will choose not to do so if they know that the cost benefit is to go to prison.

PROFESSOR KAPLAN: If they know and if they are forward-looking enough —

JUDGE JENSEN: That's right.

PROFESSOR KAPLAN: — and if they are smart enough, and if we are lucky enough.

JUDGE JENSEN: All of those are factors. But all of these mean that we need to have the system in place.

MR. BLACK: And you don't get them into prison unless you can make the case and unless you can prosecute them. And in white-collar crime, particularly in these financial areas — this was a crude fraud. Most of them are much more sophisticated. It's very hard, and there's a gigantic backlog of cases that are not being prosecuted, because we don't have the FBI agents to put together the case, and we don't have the U.S. Attorney — Assistant U.S. Attorneys to try the cases. And that's the truly sad fact, you may never get them in front of a jury.

PROFESSOR KAPLAN: Okay. Well, I think that will end our discussion for the morning. I'd like to thank you all. You have all performed well and nobly. And, of course, I don't believe Jerry Skolnick would — I won't say I don't believe he would enrich himself. I just don't believe he would be dumb in doing it. Thank you all.

(Applause.)

(Thereupon there was a brief recess taken.)

PROFESSOR KAPLAN: And now it's my happy duty to introduce Professor Epstein, who is going to pronounce the benediction of this whole conference. And, therefore, it behooves us to listen.

PROFESSOR EPSTEIN: Let's see if we can get this started here. My benediction will be a relatively short one. Unfortunately, I missed most of this morning's sociodrama. This, I guess, is news largely for people from the Berkeley campus and academic community. But I want to share with you very briefly what took me out of this morning's session.

Some of you people here knew Milton Chernin, who was for years and years the Dean of the School of Social Welfare at Berkeley, and had been on this campus since 1929 in various capacities — as student, professor, Dean, and et cetera. I used the term "had been" because last night he had a heart attack and he died. And in another role, I was very much involved with him and had to take care of some matters. Sorry to finish this conference on a funeral note. We started on a funeral note when we were making our various recognitions of Don Cressey.

In terms of comments, in trying to pull together this session on White-Collar/ Institutional Crime, Its Measurement and Analysis, after the first session yesterday morning, Shelly Messinger and I were having a conversation in which we said that perhaps an impulse that we had had during the course of the planning of it not to refer specifically to white-collar/ institutional crime, or perhaps white-collar/institutional malfeasance, or white-collar and institutional injury, maybe would have been a better way to go.

We started off by everyone agreeing that still some 40 years or so after the utilization of that terminology by Edwin Sutherland, we have a great deal of disagreement as to what is white-collar crime per se; that is, what is the criminal dimension and who do we want to include within that category?

I look at this question of white-collar malfeasance, put it this way for the moment, in the following fashion. I guess I do it as a result of sort of the glasses through which I view questions of how do we provide effective social controls to avoid and constrain antisocial behavior on the part of business organizations and those who run them.

And criminal sanctions, it seems to me, carries one so far. And part of the interesting aspect of the discussion yesterday involved John Coffee and Bill Maakestad, and those who were critiquing their activities, as well as the session with Al Reiss. And one thing became very apparent when we looked at the statistics in terms of cases that are investigated, ultimately prosecuted, and where the prosecutions go as far as trial and conviction.

And that is, the criminal sanction really lacks the effective capacity to touch more than the very, very tip of the iceberg in terms of various types of what I call corporate and business-related malfeasance. Of a number of questions or a number of issues that appear to be of interest here is one generated by the discussion with Frank Zimring. It occurred to me that we talked about harms. What are we attempting to prevent in terms of prosecutions of such things as price fixing? And it occurred to me that one of the things that — a category that I have not seen used by this terminology — but as much as protecting individual, identifiable victims, one of the things that we were really referring to was what I call "intangible harms." Such things as insider trading. There are a number of aspects of these in the antitrust laws,

particularly price fixing, by which we are attempting to preserve the mechanism or an institution that we call the market and which we perceive to be the most efficient and fairest means of allocating business services in our society.

And I call this intangible harm, because whether someone knows that they have actually been victimized by what we have defined as illegal activity, still we're concerned that the efficacy of the system of market-generated exchange is going to be compromised by certain types of behavior, and we proceeded to criminalize that behavior.

Interestingly enough, in many other advanced industrial societies, this behavior is not criminalized, or the effort is made to either get to it through other types of social sanctions, or to say that people are going to be people and that basically the incidence of market operations that are going to be affected by this sort of activity is relatively small, and we can't effectively control it through the criminal sanctions, so let's not try it in the first place.

It's another way of asking how does one constrain the behavior of business people individually working within organizational context? We have to look at the notion of white-collar crime also in the context of the fact that civil remedies are utilized for a large majority of types of behavior which we are defining as "inappropriate," "illegitimate," "unethical," and frankly, this is likely to be a more effective means in terms of many types of malfeasance than is criminal behavior.

It leads me to another point that actually was brought up by Bill Maakestad in alluding to a particular piece I'd done regarding the relationship of regulation, self-regulation, and ethics as means by which business behavior basically is channeled into — or we attempt to channel business behavior into modes that we view as socially appropriate, socially beneficial, and also publicly accountable.

And I've suggested that the three — regulation, self-regulation, and ethics — are mutually reinforcing, conceptual and operational modes for nurturing business policy and performance which further societal well-being. We used the metaphor of fragments in a total mosaic. And I mention this, because I think there is a certain assumption that operates from time to time that delegalization is both a necessary and a sufficient condition of constraining antisocial business behavior.

I would suggest that is very clearly a necessary condition, but I think frequently we take too seriously the notion it, by itself, is going to accomplish the public policy objectives that we have. Having said this, am I suggesting that it was a fool's errand to have a conference dealing with white-collar and institutional crime, its measurement and analysis? And the answer is, clearly, no. Otherwise, I would think that the effort in which I've been involved for a year and a half was a fool's errand. And I clearly don't think that.

I think John Coffee put his finger on it in suggesting that by attempting to generate better, cleaner, more systematic data about particular types of corporate malfeasance that have been defined as criminal, that maybe what we can do is to utilize this quantitative data for better qualitative analysis and for better public policy formation, perhaps to understand more clearly those aspects of business behavior that are most susceptible to use of criminal sanctions, those where criminal sanctions — either because of the nature of the — the nature of the act, that it tends to be in an organizational form rather than by identifiable actors, also behavior that — in which there's not such clear consensus as to whether it indeed should be criminal in character or be viewed as criminal in character, that we can really understand more clearly the different types of social sanctions that are most amenable to bringing about the objectives that we accomplish here — that we seek to accomplish here.

So, it's all by way of saying that, yes, there's been substantial improvement, if you will, in our understanding of the — of some of the phenomena that we defined under white-collar crime. We still

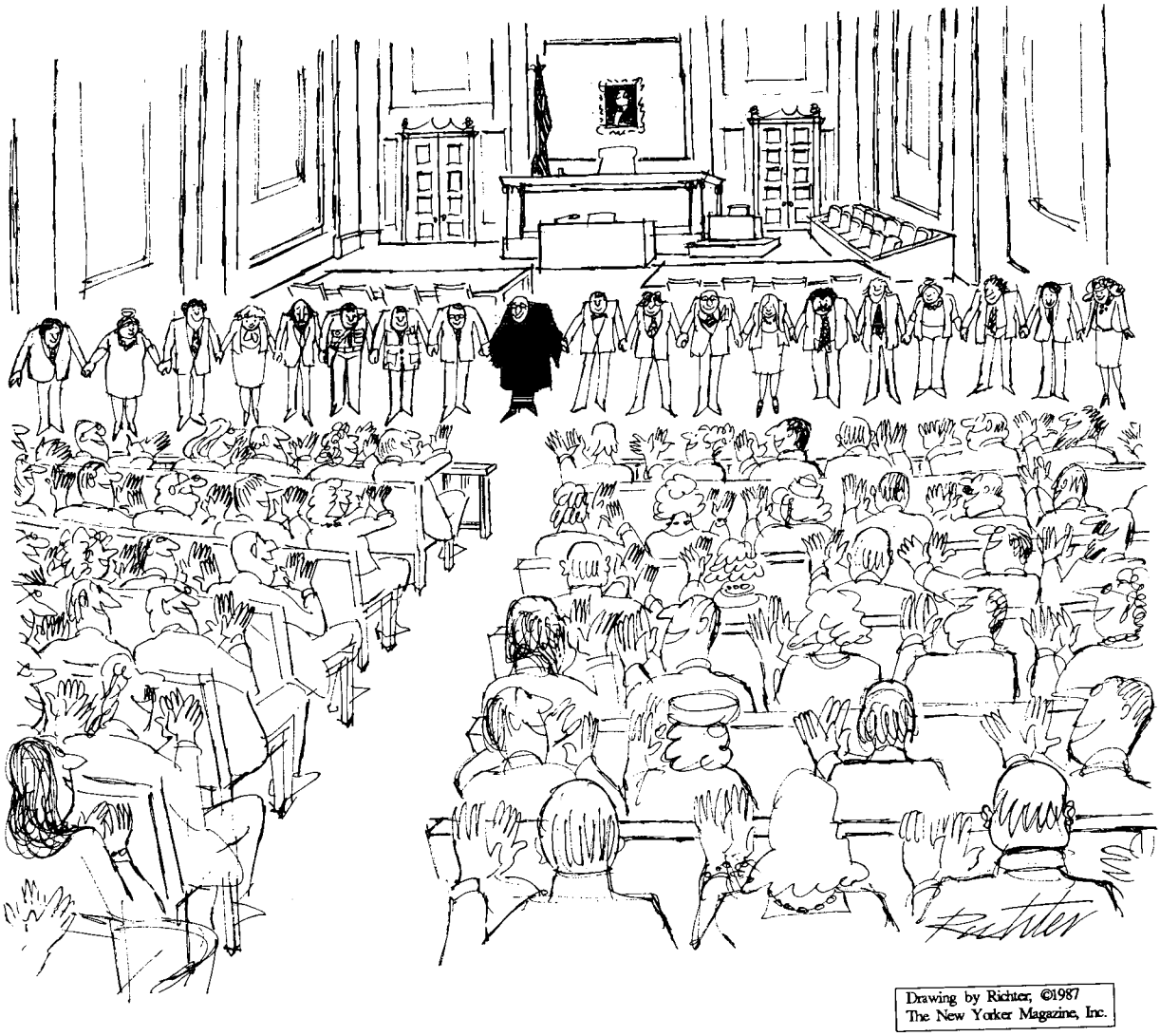
have a very strong definitional problem. We still have a very strong measurement problem, and that the enterprise begun by Sutherland in his efforts is still very much along a path and the — we're on the Yellow Brick Road, but we have hardly reached the Emerald City.

So, I think we've been sitting long enough. And we have been stimulated by our sociodrama here. And I think we are sated in terms of the past day and a half. And some of you are even hungry for lunch.

So, with that, as I had in-gathered you some 26 hours ago, I will say, be gone. Thank you for being here and contributing to this enterprise.

(Applause.)

(Thereupon the conference was adjourned at 11:50 a.m.)



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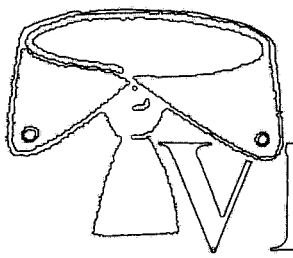

VITAE

STEVEN V. ADLER

Steven V. Adler, Senior Assistant Attorney General, is Chief of the Attorney General's Major Fraud Unit. He received his bachelor's degree from UCLA in 1969 and obtained his law degree from the University of Southern California in 1972.

Mr. Adler has worked in the California Attorney General's Office since 1973. As a specialist in parole and sentencing law, he was counsel to the Women's Board of Terms and Parole. He also participated in the creation and modification of California's Determinate Sentencing Law and in 1984, became the first Chief of the newly created Major Fraud Unit.

WILLIAM K. BLACK

William K. Black is Senior Vice President and General Counsel for Federal Home Loan Bank of San Francisco. Part of his responsibility includes assisting agents of the Federal Home Loan Bank Board for federally insured thrifts in Arizona, California and Nevada, in ending imprudent and unlawful conduct through a range of remedies, including enforcement actions, receivership recommendations and criminal referrals.

Mr. Black has had extensive experience in dealing with Federally insured thrifts. He has served as Deputy Director of the Federal Savings and Loan Insurance Corporation (FSLIC) and as Senior Associate General Counsel of the Federal Home Loan Bank Board. Additionally, he has been a trial attorney for the United States Department of Justice, Civil Division, where he defended the constitutionality of the Iran "hostage deal" and the Black Lung Program. He has also been in private practice.

Mr. Black was educated at the University of Michigan where he received his B.A. in 1973 and his J.D. in 1976.

JOHN BRAITHWAITE

John Braithwaite is a Senior Research Fellow, Department of Sociology, Research School of Social Science, Australian National University, Canberra. His books include Inequality, Crime and Public Policy (1979), Corporate Crime in the Pharmaceutical Industry (1984), and To Punish or Persuade: Enforcement of Coal Mine Safety (1985). He is a part-time Commissioner with Australia's federal antitrust and consumer protection agency, the Trade Practices Commission.

ARTHUR BRODSHATZER

Arthur Brodshatzer is a partner in the accounting firm of Steres, Alpert & Carne of San Diego, California.

He received his MBA from New York University in 1953. In 1964, he received his Ph.D. from the University of Southern California.

In addition to his CPA practice, Mr. Brodshatzer was a Professor of Accounting at San Diego State University from 1956 to retirement in 1986. He has also organized and chaired various informal seminars for the university concerning management of small businesses, professional responsibility and taxes. He was an active participant in the course "Use of Accounting in Detecting White Collar Crime" sponsored by the San Diego U.S. Attorneys' Office and others.

He has on numerous occasions lent his knowledge of tax fraud, bankruptcy, anti-trust and federal securities violations to various attorneys requesting assistance in both preparation of litigation and formulation of expert opinions in court.

MELVYN J. CoBEN

Melvyn J. CoBen is an attorney in private practice. After graduating from UCLA in 1956, he went on to Stanford Law School where he obtained his J.D. in 1959.

Mr. CoBen has taught at the University of the Pacific, McGeorge School of Law and at the University of California at Davis. His lectures covered contracts and legal ethics, consumer bankruptcy and agricultural bankruptcies.

He has served as bankruptcy trustee for a number of mortgage companies including the Capital Mortgage & Loan, Inc. (1981 to present) and the Golden Plan of California, Inc. (1982 to present).

He served on the Board of Governors for the California Trial Lawyers Association and on the Board of Governors for the State Bar Board of Governors. In 1973, he was honored as Member of the Year for the California Trial Lawyers Association.

JOHN C. COFFEE, JR.

John C. Coffee, Jr. is the Adolf A. Berle Professor of Law at Columbia University Law School. After finishing his undergraduate degree at Amherst College, graduating magna cum laude, he went on to Yale Law School where he got his L.L.B. in 1969. In 1976, he received his L.L.M. degree in taxation from New York University Law School.

Professor Coffee has held visiting appointmenst at Stanford Law School, at Virginia Law School and at Michigan Law School. Prior to joining the faculty at Columbia, he was on the faculty at Georgetown University Law School and, prior to that, he was in private practice.

He has served on numerous panels and associations including the National Academy of Sciences Panel on Research on Sentencing, and as vice-chairman for the committee on Criminal Law and Juvenile Justice, Sections of Administrative Law, American Bar Association.

Professor Coffee has published extensively on business and corporate law, focusing on shareholder issues, litigation and corporate management, and corporate punishment.

STANLEY E. COHEN

Stanley E. Cohen is the London-based editor of FOCUS, a monthly business magazine for marketing executives operating in 17 Common Market countries.

His stint in London represents a late-career change. For over 40 years he had been in Washington as Washington editor of Advertising Age, editor of its editorial page, and area manager of Crain Communications' Washington news bureau. His area of special expertise is federal regulatory agencies, particularly the Federal Trade Commission, the Federal Communications Commission and the Food and Drug Administration. He has written extensively on consumerism issues which have emerged from modern marketing practices. Shortly before completing his service in Washington, he was the recipient of the Consumer Federation of America's National Consumer Media award.

After graduating from Cornell University, he completed graduate studies in journalism at Columbia University.

In Washington he was active in the National Press Club. He received numerous awards in business magazine competitions for editorials, weekly columns and news features, and was elected to the hall of fame of the Washington Professional Chapter of Sigma Delta Chi.

RICHARD E. DROOYAN

Richard E. Drooyan is the Chief Assistant United States Attorney for the Central District of California.

He received his B.A. degree, graduating summa cum laude, from Claremont Men's College in 1972. In 1975, he received his Juris Doctor degree form Harvard Law School.

Prior to joining the United States Attorney's Office as an Assistant United States Attorney in the Criminal Division in 1978, he was in private practice. From June 1982 to December 1982, he served as Chief of the Complaints Unit, and from December 1982 until 1984, he was the Chief of the Major Frauds Unit. In September 1983, he was appointed the First Assistant Chief in the Criminal Division. In December 1984, he was appointed as the Chief Assistant United States Attorney.

TROY DUSTER

Troy Duster is a Professor of Sociology and Director of the Institute for the Study of Social Change at the University of California, Berkeley. He graduated from Northwestern University with a B.A. in 1957, obtained his M.A. in 1959 at UCLA and returned to Northwestern University to finish his studies in Sociology, obtaining his Ph.D. in 1962.

He has been a member of the Research Task Panel of the President's Commission on Mental Health, the National Academy of Sciences' Committee on Habitual Behavior and Substance Abuse, and the Committee on Problems of Drug Dependency. He has also served on Review Panels for both the National Institute of Mental Health and the National Institute on Drug Abuse. He is the recipient of a number of research fellowships, including awards from the Swedish Government (1962), the Guggenheim Foundation (1971), and the Ford Foundation (1979).

Professor Duster is the author of a number of books including Cultural Perspectives on Biological Knowledge (co-edited with K. Garrett), Economic Development in Berkeley (co-edited with D. Minkus) and has authored a number of articles on social theories of deviance.

EDWIN M. EPSTEIN

Edwin M. Epstein is Professor of Business Administration and Chair of the Berkeley Division of the Academic Senate at the University of California.

A 1958 graduate of the University of Pennsylvania, he also obtained an L.L.B. from Yale University School of Law (1961) and a M.A. from the University of California, Berkeley (1966).

In 1964, following a brief career as a concurrent practicing attorney and instructor of law at the University of Pennsylvania, Professor Epstein joined the faculty of the University of California School of Business Administration. While specializing in Business and Public Policy, he also held a variety of administrative positions for the school including Associate Dean and Chair, Business and Public Policy Group. Additionally, he was founding director for their Office of Urban Programs.

He has held visiting appointments at Dartmouth College, the University of Reading (U.K.), University of London, Tel-Aviv University and the Hebrew University of Jerusalem.

He has been admitted to the Bar in California, Pennsylvania and the United States Supreme Court. His many memberships include the American Bar Association, the American Political Science Association, American Sociological Association and the Society for Business Ethics.

GILBERT GEIS

Gilbert Geis is Professor Emeritus with the Program in Social Ecology, University of California, Irvine. He received his Ph.D. from the University of Wisconsin in 1953. In 1969, he was named the Outstanding Professor in the California State Universities and colleges system. In 1979, he received the Paul Tappan Award from the Western Society of Criminology for research contributions to the field, and in 1980 was given the Stephen Schafer award by the National Organization for Victim Assistance for "outstanding achievements in victim-witness research". In 1982, he was named by UCI as the Distinguished Faculty Lecturer on the basis of "significant contributions to knowledge through distinguished research."

Professor Geis is a former president of the American Society of Criminology and has held visiting appointments at the Institute of Criminology and at Wolfson College, Cambridge University; the Faculty of Law, Snyder University; Harvard Law School; and the College of Human Development, Pennsylvania State University. He has written extensively on a wide variety of criminological and legal issues.

RICHARD GRUNER

Richard Gruner is an Associate Professor of Law at Whittier College School of Law. After receiving his B.S. at California Institute of Technology in 1975, he obtained his J.D. at the University of Southern California Law Center in 1978 and went on to the Columbia University School of Law to obtain his L.L.M. in 1982.

He served as Staff Attorney for International Business Machines Corporation prior to joining the faculty at Whittier College. He has been admitted to the Bar in California and in New York. He served as a panelist at BNA conference on Affirmative Action in employment. His many scholarly publications include articles on product liability, warranty disclaimers in commercial form contracts, developments in California securities law, and development in corporate law.

PATRICK HALLINAN

Patrick Hallinan is an attorney in private practice in San Francisco. He obtained his law degree, with honors, from the University of California, and was admitted to the Bar in California in 1963. Additionally, he has obtained an advanced degree in archeology and is a Ph.D. candidate in that field.

Mr. Hallinan was named by several publications as the outstanding criminal lawyer in the Bay Area. In addition to criminal law, Mr. Hallinan's practice specializes in complicated white-collar criminal defenses, particularly federal prosecutions.

JUDITH F. HAYES

Judith Hayes began her legal career in the Consumer Fraud Unit of the San Diego District Attorney's Office, where she worked while attending the University of San Diego Law School from 1974-1977. After passing the Bar in 1977, Ms. Hayes worked as a Deputy District Attorney in San Diego through 1980 when she left to join the staff of the San Diego United States Attorney's Office. She worked as an Assistant U.S. Attorney for the Southern District of California, assigned to the Criminal Trial and Fraud Units of that office from 1980 until 1985. She has been a Deputy Attorney General in the Major Fraud Unit since February 1985.

D. LOWELL JENSEN

D. Lowell Jensen is a United States District Court Judge for the Northern California District. A 1949 graduate of the University of California, Berkeley, he continued on to obtain his L.L.B. from the same institution's School of Law (Boalt) in 1952.

Serving Alameda County initially as a Deputy District Attorney and subsequently Assistant District Attorney, he was appointed as the District Attorney of Alameda County in 1969. In 1981 he joined the staff of the United States Department of Justice as an Assistant Attorney General in the criminal division and was promoted to Associate Attorney General in 1983. From 1985-86 he served as the nation's Deputy Attorney General.

Judge Jensen was appointed to the bench in June of 1986.

JOHN KAPLAN

John Kaplan has been teaching law at Stanford University since 1965. He received his B.A. degree in Physics from Harvard University and his L.L.B. degree from Harvard Law School. Prior to joining the Stanford University faculty, Mr. Kaplan served as Professor of Law at the University of California at Berkeley; Associate Professor of Law at Northwestern University; Research Analyst at the Hudson Institute; Assistant United States Attorney, Northern District of California; Special Attorney for the United States Department of Justice; Law Clerk for Supreme Court Justice Tom C. Clark; and a Physicist for the Naval Research Laboratory in Washington. Mr. Kaplan studied criminology at the University of Vienna and was a Fellow at the Institute for the Study of Drug Dependence in London, England. He has written numerous books and articles on the subjects of crime, drugs, and law.

WILLIAM J. MAAKESTAD

William J. Maakestad is an associate professor of management at Western Illinois University. He received his J.D. degree from Valparaiso University and has been a member of the State Bar of Illinois since 1977. Following his participation in two landmark corporate criminal prosecutions of the 1980s — the Ford Pinto "reckless homicide" case in Indiana, and the Film Recovery Systems "corporate murder" trial in Illinois — Maakestad had written, lectured and consulted extensively on corporate criminal liability. He is co-author of Corporate Crime Under Attack: The Ford Pinto Case and Beyond (Anderson, 1987), and is a contributor to Corporations as Criminals (Sage, 1984) and Law: Its Nature, Functions and Limits (West, 1986). In 1986 he was visiting scholar at the Center for the Study of Law and Society at the University of California, Berkeley.

RICHARD D. MARTLAND

Richard Martland received his undergraduate degree from Stanford in 1955 and his law degree from the University of California, Boalt Hall, in 1961. Prior to entering the Attorney General's Office in 1968 he worked for the State Department of Water Resources dealing principally with issues related to the construction of the State Water Project. His responsibilities in the Attorney General's Office have covered the fields of elections, appointments, personnel, budget, public finance contracts and government. As chief of the Attorney General's Civil Division he is responsible for the work of 210 deputies working in the areas of Business and Tax, Government, Tort and Condemnation, Professional and Vocational Licensing, and Health, Education and Welfare.

SHELDON L. MESSINGER

Sheldon L. Messinger is a professor with the School of Law, University of California, Berkeley. He is the chair of the Jurisprudence and Social Policy Program. He received his Ph.D. in Sociology at UCLA in 1969. Professor Messinger has received many honors, including an award for outstanding contributions to the field of criminology, Western Society of Criminology, 1981.

Professor Messinger has served as an advisor to a number of governmental and private agencies. His publications include "The Foundations of Parole in California," Law and Society Review 69 (1985) (with J. Berecochea, D. Rauma and R. Berk); "Prisons as Self-Regulating Systems: A Comparison of Historical Patterns in California for Male and Female Offenders," Law and Society Review 541 (1983) (with Berk, Rauma and Berecochea).

ALBERT J. REISS, JR.

Albert J. Reiss, Jr., is the William Graham Sumner Professor of Sociology at Yale University. He has a Ph.D. from the University of Chicago, a Ph.D. from Marquette University, and M.A. degrees from the Universities of Chicago and Yale.

Professor Reiss received the Bruce Smith, Sr. Award of the Academy of Criminal Justice Sciences and the Edwin H. Sutherland Award of the American Society of Criminology. He was elected a Fellow of the American Statistical Association, and of the American Academy of Arts and Sciences in 1983. He has served on numerous scientific panels and advisory groups and is the author of numerous scholarly publications. He is perhaps best known for his books, The Police and Public, Studies in Crime and Law Enforcement in Major Metropolitan Areas, Data Sources on White-Collar Law-Breaking and Social Characteristics of Urban and Rural Communities and Occupations and Social Status.

JEROME H. SKOLNICK

Jerome H. Skolnick is Professor of Law (Jurisprudence and Social Policy) at the University of California, Berkeley, where he was director of the Center for the Study of Law and Society for 10 years. He holds the highest acheivement awards of the American Society of Criminology and the Academy of Criminal Justice Sciences.

Professor Skolnick is the author of a number of books, edited books and articles including House of Cards: Legalization and Control of Casino Gambling, a highly praised account of the theory and practice of casino gambling; Justice Without Trial, a study of police which won several prizes; Politics of Protest, a report of his task force to the National Commission on the Causes and Prevention of Violence; Criminal Justice: Introductory Cases and Materials, 4th edition (with John Kaplan); and, most recently, with David H. Bayley, The New Blue Line: Police Innovation in Six American Cities.

HARRY M. SNYDER

Harry Snyder has been Director of the West Coast Regional Office of the Consumers Union since 1976. Consumers Union, founded in 1936, is the nonprofit product testing and consumer organization that publishes Consumer Reports magazine.

A graduate of the University of Southern California in Finance, Mr. Snyder went on to receive his law degree from UCLA. In 1963, he joined a law firm specializing in business, real estate and probate law. He became a partner in the firm in 1967, representing clients such as International Business Machines, Century Bank, and Wilshire Insurance Company.

After six years of practicing law, Mr. Snyder, along with this family, joined the Peace Corps. He worked in International Development as an associate Peace Corps Director in India, and then as Peace Corps Director in Western Samoa and Nepal. Returning to the United States in 1976, Mr. Snyder became director of the Consumers Union office in San Francisco. He is responsible for representing consumer interests on state and national issues. This had included litigating actions against state agencies, testifying before Congress and the California Legislature, speaking before various groups and organizations and coordinating workshops on consumer issues. Mr. Snyder also has co-authored a book explaining how to petition the state government and get results.

MARK TOPEL

Mark Topel is a partner in the San Francisco law firm of Topel & Goodman. The firm specializes in complex white-collar criminal and civil litigation.

Mr. Topel received a B.A. from the University of Cincinnati and graduated from the University of California School of Law (Boalt Hall) in 1972 with high honors. He clerked for Chief Justice Donald Wright of the California Supreme Court from 1972-73. After clerking he joined the Federal Public Defender staff in San Francisco for two years.

Since 1975 Mr. Topel has been in private practice in San Francisco and defended white-collar cases across the country. His firm has been selected as one of the top 20 small specialty law firms in the United States by American Lawyer magazine.

GILBERT WESTOBY

Gilbert Westoby is a volunteer field investigator and victim's advocate affiliated with the law office of Mel CoBen, a firm specializing in bankruptcy proceedings.

Prior to his retirement in 1976, he was an independent businessman owning a four-store supermarket chain ("Supersave") in Monterey and Santa Clara counties.

In 1981, to supplement retirement benefits, he and his wife invested heavily with the Golden Plan mortgage brokerage firm. The company collapsed in 1982 and the couple consequently lost over $100,000 in unsecured investments.

As a victim of a Ponzi scheme, Mr. Westoby offers a unique perspective to the analysis of Institutional Crime.

STANTON WHEELER

Vitae not available.

PETER C. YEAGER

Peter C. Yeager is a sociologist at Boston University who has for the last decade been studying aspects of white-collar law-breaking, government regulation, and business ethics. He is co-author of the U.S. Department of Justice study, Illegal Corporate Behavior, and of Corporate Crime (The Free Press). He is presently writing a book on the environmental regulation of business (The Limits of Law), and is conducting research on the ways in which corporate structures and cultures shape managers' handling of ethical dilemmas in their decision making.

He has served as research consultant to such organizations as the National Science Foundation and the Ethics Resource Center in Washington, D.C. He received his B.A. degree in journalism from the University of Minnesota, and his M.S. and Ph.D. degrees in sociology from the University of Wisconsin at Madison. He previously served on the faculty at Yale University, and has given lectures on his research, both in graduate business programs and at the law schools at Yale and Harvard Universities.

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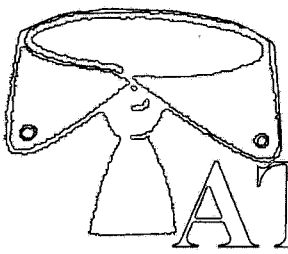
Franklin E. Zimring is Professor of Law and Director of the Earl Warren Legal Institute, School of Law (Boalt Hall), University of California, Berkeley. He obtained his B.A. with Distinction from Wayne State University in 1963 and his J.D. Cum Laude, from the University of Chicago in 1967.

Professor Zimring has served as an advisor to a number of organizations including most recently the National Research Council, working group crime and violence, to the Research Advisory Committee for the California Attorney General and to the Advisory Committee, National Pre-Trial Services Association.

His scholarly work includes a series of studies on violent crime and books on deterrence, firearms, and youth crime.



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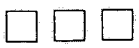

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