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The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate

Lisa H. Nicholson*

*“His crimes have imposed on hundreds, if not thousands,
a life sentence of poverty.”¹*

I. INTRODUCTION

The headline read “Two Enron Chiefs Are Convicted in Fraud and Conspiracy Trial.”² Kenneth L. Lay and Jeffrey K. Skilling, Enron Corporation’s former chief executives, were found guilty in May 2006 of lying to investors, employees, and regulators to cover up the energy-trading giant’s dismal performance.³ So ends the five-year saga of the most notable high-profile corporate fraud scandal that began with the October 2001 public revelation that Enron would restate its earnings downward by \$586 million for the period of 1997 through the

* Associate Professor of Law, University of Louisville, Louis D. Brandeis School of Law. The author thanks all who read and debated the points raised herein-, especially Jayne W. Barnard, Joan MacLeod Heminway, Geraldine Szott Moohr, Camille A. Nelson, as well as her colleagues at the University of Louisville, especially Cedric M. Powell, Samuel A. Marcossou. This article also benefited from comments from participants in the White Collar Crime Panel sponsored by the Women & Corporate Governance Group at Law & Society and the Brooklyn Law School Brown Bag Series. Finally, for their research assistance, the author wishes to acknowledge William C. Ferrell, Dominic M. Moore, Dina A. Shabayek, Roosevelt J. Stennis, and Krsna Tibbs.

1. U.S. District Judge Sim Lake reportedly declared while sentencing Enron Corporation’s former chief executive officer, Jeffrey K. Skilling. Purva Patel & Anastasia Ustinova, *Sentence Not Final Chapter for Some*, HOUS. CHRON., Oct. 24, 2006, at A8.

2. Alexei Barrionuevo, *Two Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1.

3. *Id.* The jury found that both Lay and Skilling orchestrated a conspiracy to artificially inflate profits, hide millions of dollars of debt, and misrepresent the true nature of the company’s finances. As a result, Lay was convicted on six counts of conspiracy, securities and wire fraud and four counts of bank fraud. Skilling was convicted of eighteen counts of conspiracy and fraud and one count of insider trading. *Id.* Lay faced a maximum combined penalty of 165 years for his role, while Skilling at 52 faced a maximum of 185 years in prison. *Id.* See also Kristen Hays, *Lay and Skilling Convicted*, THE COURIER-JOURNAL, May 26, 2006. However, Lay died from heart disease in early July, just weeks after his conviction. As a result, Lay’s criminal convictions were vacated in mid-October, thus negating any punishment. Tom Fowler & Purva Patel, *Judge Voids Conviction Against Lay*, HOUS. CHRON., Oct. 18, 2006, at A1. Skilling, on the other hand, was sentenced to 24 years and 4 months in prison, and ordered to turn over \$45 million. Kristen Hays, Tom Fowler, Purva Patel & Anastasia Ustinova, *Hard Landing for Skilling*, HOUS. CHRON., October 24, 2006, at A1.

first two quarters of 2001 due to accounting irregularities.⁴ This corporate fraud disclosure later proved to be both widespread (among some of the nation's largest and most respected public companies) and quite costly.⁵

Within seven months of Enron's bankruptcy filing, three other major publicly-held corporations sought bankruptcy protection. They were Global Crossing, Adelphia, and WorldCom.⁶ Together with Enron, they constituted four of the six largest corporate bankruptcies in U.S. history.⁷ WorldCom was the largest corporate bankruptcy with \$107 billion in assets protected by its filing, Enron was next with \$63 billion, Global Crossing was fifth with \$25.5 billion, and Adelphia was sixth with \$24.4 billion.⁸ The impact of these bankruptcy filings was enormous. Thousands of investors, employees, retirees, and creditors lost their livelihoods, their life savings, and their retirement benefits. For example, the Enron scandal reportedly resulted in a \$67 billion loss to investors;⁹ and more than 4,000 employees lost their jobs.¹⁰ WorldCom similarly laid off more than 20,000 employees, trimming its overall workforce by ten percent from 2001 to June 2002.¹¹ Indeed, WorldCom shares (once worth over \$100 billion) were collectively worth almost nothing upon filing for Chapter 11 protection;¹² Global

4. See generally Kurt Eichenwald, *Enron's Collapse: Audacious Climb to Success Ended in Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, § 1 (Magazine), at 1. There are allegations that Enron set up complex financial structures in the form of partnerships, limited-liability companies and other affiliates to monetize assets and move debt off its balance sheets. Investors knew little or nothing about the partnerships, which allegedly hid "hundreds of millions" of dollars of losses and debt from public view." John R. Emshwiller & Rebecca Smith, *Murky Waters: A Primer on Enron Partnerships*, WALL ST. J., Jan. 21, 2002, at C1.

5. Ensuing investigations into the seemingly dubious financial reports of some of the nation's other large public companies uncovered accounting irregularities at Kmart Corporation, Qwest Communications International Inc., Global Crossing Ltd., Adelphia Communications Corp., Schering-Plough, WorldCom Inc., Tyco International Ltd., and Xerox Corporation, to name a few. See Stephen Labaton, *Downturn and Shift in Population Feed Boom in White-Collar Crime*, N.Y. TIMES, June 2, 2002, at A1.

6. See Simon Romero & Riva D. Atlas, *WorldCom Declares Bankruptcy; \$107 Billion Filing Largest in U.S. History*, HOUS. CHRON., July 22, 2002, at A1.

7. *Id.* Texaco and Financial Corporation of America, the other two largest filings occurred in the late 1980s. *Id.*

8. *Id.*

9. Marianne Lavelle et al., *The actions of corporate honchos horrified the nation. So when's the day of reckoning*, U.S. NEWS & WORLD REP., Dec. 30, 2002, at 33.

10. *Id.*

11. Louis Uchitelle, *Turmoil at WorldCom: The Workforce; Job Cuts Take Heavy Toll on Telecom Industry*, N.Y. TIMES, June 29, 2002, at C1.

12. Romero & Atlas, *supra* note 6, at A1. By the time that it was de-listed from NASDAQ on July 30, 2002, WorldCom's stock had fallen from a high of over \$60 per share in 1999 to less than a dollar per share. See Jonathan D. Glater, *WorldCom Selects 2 for Reorganization Posts*, N.Y. TIMES, July 30, 2002, at C12.; Robert Manor & Delroy Andersen, *SEC Accuses WorldCom of Fraud*, CHI. TRIB., June 27, 2002, at 1.

Crossing's stock fell from a high of \$64 dollars per share to less than 30 cents per share just before the company filed for bankruptcy;¹³ and Adelphia's shares fell from \$20.39 per share on March 26, 2002 to a low of 75 cents per share on June 3, 2002, the day it was delisted from the Nasdaq and almost three weeks prior to its bankruptcy filing.¹⁴

The resulting decline in investor confidence in the integrity of the capital markets contributed to an \$8 trillion decline in the U.S. equity markets from 2001 to 2002.¹⁵ The public's only solace in the subsequent years of 2002-2004 was to watch in disgust as numerous former executives at these scandal-ridden public corporations eventually each took a turn on the infamous "perp walk," including Lay and Skilling, Enron's two former CEOs;¹⁶ Andrew S. Fastow, Enron's former chief financial officer ("CFO");¹⁷ John J. Rigas, Adelphia's founder and former CEO;¹⁸ L. Dennis Kozlowski, Tyco's former CEO;¹⁹ as well as

13. Rebecca Blumstein et al., *As Global Crossing Crashed, Executive Got Loan Relief, Pension Payouts*, WALL ST. J., Feb. 21, 2002, at B1.

14. Sally Beatty, *Adelphia Details Creditors for Filings for Bankruptcy*, WALL ST. J., June 27, 2002, at B8.; Jerry Markon and Robert Frank, *Adelphia Officials Are Arrested on Fraud Charges*, WALL ST. J., July 25, 2002, at A3.

15. See generally SEC Chairman William H. Donaldson, Remarks at the 2003 Washington Economic Policy Conference (Mar. 24, 2003) (transcript available at www.sec.gov/news/speech/spch032403whd.htm). See also Gretchen Morgenson, *What if Investors Won't Join the Party?* N.Y. TIMES, June 2, 2002, at C4 (reporting that a May 2002 UBS/Gallop poll indicated that "84 percent feel that [the corporate scandal] issue is punishing stock prices . . ."); Alex Berenson, *Hold On for a Wild Ride*, N.Y. TIMES, July 21, 2002, § 4 (Magazine), at 1 (noting that as of July 21, 2002, the Standards and Poor's 500 index was down almost forty-five percent and the Nasdaq was off nearly seventy-five percent).

16. Jeffrey Skilling was indicted in February 2004 on 36 counts, including wire fraud, securities fraud, and insider trading in connection with his role in the fraudulent scheme that brought down Enron in December 2001. At the time, he faced a maximum of 325 years in prison and over \$80 million in penalties if convicted on all counts. See Press Release, Dept. of Justice, Former Enron Chief Executive Officer Jeffrey K. Skilling Charged with Conspiracy, Securities Fraud, Insider Trading (Feb. 19, 2004) (available at 2004 WL 314797); *Ex-Chief of Enron Pleads Not Guilty to 42-Count Indictment*, N.Y. TIMES, Feb. 19, 2004. Lay was charged in the same indictment with securities fraud, wire fraud, conspiracy, bank fraud and insider trading. Dan Ackerman, *Ken Lay Indicted, Fights Back*, FORBES.COM, July 8, 2004. See also Superseding Indictment, U.S. v. Causey, Skilling and Lay (S.D. Tex. 2004) (Cr. No. H-04-25 (S-2)).

17. Andrew S. Fastow, who was originally indicted on 78 counts of wire fraud, conspiracy, money laundering, in October 2002, was named in a 109 count superseding indictment, which also charged securities fraud, and insider trading in connection with his role in the collapse of Enron. See Superseding Indictment, U.S. v. Fastow, et al. (S.D. Tex. 2003) (Cr. No. H-02-0665); Press Release, Dept. of Justice, Justice Dept. Expands Charges Against Former Enron CFO Andrew Fastow, Broadband Execs (May 1, 2003) (on file with author). See also Susanne Pagano, *Fastow Enter Guilty Pleas Over Roles in Enron Financial Fraud*, 36 SEC. REG. & L. REP. 123 (Jan. 19, 2004). Fastow was the principal architect of the fraudulent accounting scheme.

18. John Rigas and his sons were arrested in July 2002 and accused of looting more than \$1billion from Adelphia and of misleading regulators eventually leading to the company's bankruptcy filing in June 2002. See Deborah Adamson & Matt Andrejczak, *From Boardroom to Courtroom*, CBS.MarketWatch.com (Sept. 20, 2002).

Bernard Ebbers and Scott D. Sullivan, WorldCom's former CEO and former CFO, respectively.²⁰

Lay and Skilling's long-awaited convictions should serve as the capstone to the government's successful prosecutions of (or plea agreements with) the many high-profiled corporate fraudsters, including Fastow,²¹ Kozlowski,²² the Rigas,²³ Ebbers²⁴ and Sullivan,²⁵ to name a

19. Dennis Kozlowski was indicted in 2002 on charges of tax evasion, grand larceny, enterprise corruption, falsifying business records, and securities fraud, following allegations that he and his cohorts misused company assets to the tune of \$600 million. Andrew Ross Sorkin, *Ex-Tyco Officers Get 8 to 25 Years*, N.Y. TIMES, Sept. 20, 2005, at A1.

20. See Indictment, U.S. v. Ebbers and Sullivan (S.D.N.Y. 2004) (No. S2-02 Cr. 1144 (BSJ)); Indictment, U.S. v. Sullivan (S.D.N.Y. 2003) (No. S1-02 Cr. 1144 (BSJ)). See also Kurt Eichenwald, *Even if Heads Roll, Mistrust Will Live On*, THE N.Y. TIMES, Oct. 6, 2002, § 3 (Magazine) at 1.; Kurt Eichenwald, *After a Boom, There Will be a Scandal. Count on It*, N.Y. TIMES, Dec. 16, 2002, at C1.

21. Fastow pleaded guilty to two counts of conspiracy to commit wire fraud and securities fraud, admitting to having worked with other senior officers to disguise Enron's deteriorating financial health, and to enrich themselves at the expense of Enron's shareholder. He also agreed to surrender more than 23 million in civil and criminal penalties. See Pagano, *supra* note 17; Kurt Eichenwald, *Ex-CFO of Enron and Wife Plead Guilty*, N.Y. TIMES, Jan. 14, 2004, at C3. See also Plea Agreement, U.S. v. Fastow (S.D. Tex. 2004) (Cr. No. H-02-0665). Prosecutors agreed to recommend that he serve a 10-year sentence, the maximum under the two counts to which he pleaded guilty. They also agreed to dismiss the remaining counts on which Fastow was indicted if the prosecutors determined that he satisfactorily cooperated with the government. *Id.* In the end, however, Fastow was sentenced to six years in prison. Kate Murphy & Alexei Barrionuevo, *Fastow Sentenced to Six Years*, N.Y. TIMES, Sept. 27, 2006, at C6.

22. Tyco's Kozlowski facing up to 30 years in prison was convicted in 2005, after his first trial ended in a hung jury. See Andrew Ross Sorkin, *Tyco Ex-Chief is Humbled But Unbowed*, N.Y. TIMES, Jan. 16, 2005, at A1.; Andrew Ross Sorkin, *How Long to Jail White-Collar Criminals*, N.Y. TIMES, Sept. 16, 2006, at C2. Kozlowski was subsequently sentenced to 8 1/3 to 25 years in prison. Grace Wong, *Kozlowski Gets up to 25 Years*, CNN.com, Sept. 19, 2005.

23. Adelphia's John Rigas and his son Timothy Rigas were convicted in 2004 of using Adelphia's funds as their personal "piggybank," hiding more than \$2 billion in company debt, with John Rigas (at 80 years old) being sentenced to 15 years in prison, while Timothy Rigas was sentenced to 20 years. See *Adelphia Founder Sentenced to 15 Years*, CNN.com, June 20, 2005. Michael Rigas, John Rigas' other son, plead guilty to making a false entry in corporate documents in November 2005, forestalling a trial on more serious charges. See Larry Neumeister, *Adelphia Criminal Case Closed*, THE COURIER-JOURNAL, Nov. 24, 2005, at D3; *Son of Adelphia Founder Guilty of Falsifying Records*, N.Y. TIMES, Nov. 24, 2005, at C9.

24. WorldCom's Ebbers was convicted in March 2005 on all charges – conspiracy, securities fraud and filing false statements with regulators – for his role in the \$11 billion accounting fraud that forced WorldCom to seek bankruptcy protection in July 2002. See Brooke A. Masters, *Bernard Ebbers Guilty on All Counts*, WASH. POST, Mar. 15, 2005, at A1.; Dionne Searcey, Shawn Young & Kara Scannell, *Ebbers is Sentenced to 25 Years for \$11 Billion WorldCom Fraud*, WALL ST. J., July 14, 2005, at A1. Despite facing a purported maximum of 85 years in prison, the 63 year-old Ebbers was sentenced in July 2005 to 25 years. Searcey, Young & Scannell, *supra*. U.S. District Court Judge Barbara Jones noted that "this sentence is likely to be life sentence . . . [but] anything less would not reflect the seriousness of this crime." *Id.* More than 2.5 million investors are estimated to have lost money in the WorldCom fraud, where the fraud and ensuing bankruptcy wiped out stock that at its peak was valued at \$180 billion. *Id.*

25. WorldCom's Sullivan was sentenced to five years in prison – a fifth of his initial exposure – for his role in the \$11 billion accounting fraud. The lighter sentence was based on his plea

few. However, many of these defendants were not immediately imprisoned. Indeed, Lay and Skilling were allowed to go home to their families pending their sentencing, despite facing over 100 years each for their roles in bringing down Enron.²⁶ Ebbers remained free pending the appeal of his 25 year sentence for his role in the \$11 billion fraud that led to WorldCom's bankruptcy;²⁷ and John Rigas, is free pending the appeal of his 15 year sentence for looting Adelphia.²⁸ Only Kozlowski began almost immediately serving time in a New York State prison pending the appeal of his 8 1/3 to 25 year sentence for looting Tyco of \$150 million.²⁹

Neither the indictments of these high-profiled corporate executives, their subsequent convictions, nor their sentences (arguably among the most stringent terms ever imposed on white-collar criminals) will fully assuage victimized investors, many of whom still feel wanting. Congress attempted to respond to the scandals in July 2002 by enacting the Sarbanes-Oxley Act of 2002³⁰ (the "Act" or "SarbOx"), which creates some of the most sweeping changes in the areas of corporate governance, financial disclosure, audit independence, and corporate-criminal liability in recent decades. Unfortunately, the Act's criminal measures³¹ fall short of effectively sanctioning wrongdoers, or giving victimized investors what they want.

agreement and ensuing cooperation in the government's prosecution of Ebbers. See Jennifer Bayot & Roben Farzad, *WorldCom Executive Sentenced*, N.Y. TIMES, Aug. 12, 2005, at C6. He was ordered to report to prison three months after his sentencing. *Id.*

26. See Kristen Hays, *Lay and Skilling Convicted*, THE COURIER-JOURNAL, May 26, 2006. Lay suffered a heart attack at his home in Colorado and died while awaiting sentencing. Carrie Johnson, *Enron's Lay Dies Of Heart Attack*, WASH. POST, July 6, 2006, at A1. Skilling petitioned Judge Lake to allow him to remain free pending his appeal. Instead, Skilling was ordered to home confinement and subjected to electronic surveillance until December 12, 2006 when he reports to prison in Minnesota. See Kristen Hays, *Hard Landing For Skilling*, HOUS. CHRON., Oct. 24, 2006, at A1.; Kristen Hays, *Skilling Ordered to Report to Minnesota Prison by December 12*, HOUS. CHRON., Nov. 16, 2006 at A8.

27. See Carrie Johnson, *Ebbers Asks to Stay Out of Prison During Appeal*, WASH. POST, July 15, 2005, at D2. Remarkably, U.S. District Judge Barbara S. Jones (the presiding judge) said that she would recommend that he serve his time at a low-security facility near his home town if he did not win his bid to stay out of prison. *Id.* Ebbers remained free for eighteen months after his conviction. He was finally ordered to prison to begin his sentence following the Second Circuit's affirmation of his conviction. See *Ex-WorldCom Chief is Ordered to Prison*, N.Y. TIMES, Sept., 8, 2006, at C2.

28. *Id.* See also *Rigases to Be Free Pending Appeal*, WALL ST. J., July 14, 2005, at C3.

29. See *Ex-Tyco Officers File Appeals*, N.Y. TIMES, Oct. 4, 2006, at C6.

30. Sarbanes-Oxley Act of 2002 ("the Act"), Pub. L. No. 107-204, 116 Stat. 804 (2002). The Act's provisions generally apply to all issuers, U.S. and non-U.S., required to file periodic reports with the U.S. Securities and Exchange Commission (the "SEC") pursuant to Section 13(a) or 15(d) of the Exchange Act.

31. The Act's criminal measures, as will be discussed in greater detail in Part III, collectively expand criminal liability for corporate officers and directors, brokers, dealers, and trading advi-

As Senator Paul Sarbanes (D-Md) aptly acknowledged during the floor debates on the Act:

Punishing a bad apple may have something of a deterrent effect, but there is nothing like putting a system into place that gives a heightened assurance that you are going to be accountable. That is what investors are looking for.³²

Increased fines and lengthened terms of imprisonment, therefore, are only the first step towards combating corporate fraud and employing applicable theories of punishment. Representative Richard Baker (R-La) recognized as much during the Act's floor debates when he stated:

there are criminal consequences for [misrepresenting material facts about the company]. In fact, the [pending bill] doubles the penalties for violations of those responsibilities. But it is not enough. . . . *It is not enough that after we catch you we put you away for a long time. We want to go after those ill-gotten gains, that profit you made by misrepresenting the material facts of your corporation while manipulating the books and profiting for your own best interests. We want to make sure those mansions, those benefits, those golden parachutes are collapsed, folded up neatly, put into a closet and sold off so that the shareholders back home can get their hands on their money.*³³

This article accordingly proposes the missing next step for addressing corporate fraud: the mandatory imposition of asset forfeiture sanctions.

Part II of this article re-introduces the white-collar criminal and highlights the government's responses to previous instances of wrongdoing by way of background. The Act's resulting criminal measures are analyzed in Parts III and IV of the article. Part V examines the proposed asset forfeiture sanction, while Part VI makes the case for the application of the asset forfeiture sanction to these particular white collar criminals. Finally, in Part VII, I explain how asset forfeiture can be obtained should Congress fail to enact specific forfeiture legislation directed towards the newly-enacted securities fraud crime.

Asset forfeiture has been a weapon long acknowledged by Congress and relied upon by prosecutors to combat rising drug trafficking and organized crimes in the United States when fines and incarceration

sors, among others, by creating new federal offenses; modifying existing federal fraud statutes to increase criminal fines and terms of imprisonment; and authorizing new amendments to the existing U.S. Sentencing Guidelines. See Titles VIII, IX and XI of the Sarbanes-Oxley Act; Sections 801-807, 901-906, and 1101-1107, respectively.

32. 148 CONG. REC. S6524 (daily ed. July 10, 2002) (testimony of Senator Sarbanes).

33. 148 CONG. REC. H5462 (daily ed. July 25, 2002) (testimony of Rep. Richard Baker (R-La)) (emphasis supplied).

proved ineffective in stemming the tide.³⁴ I propose that Congress similarly act by amending 18 U.S.C. § 1348, the newly-enacted securities fraud statute, to include an asset forfeiture sanction in addition to the existing language “shall be fined under this title, or imprisoned not more than 25 years, or both.”³⁵ Specifically, where the corporation’s managers fraudulently manipulate its publicly-reported financial results to enrich themselves at the expense of corporate shareholders, and in violation of the securities fraud statute, any funds obtained (including any profits gained or losses avoided), as well as any assets traceable thereto, should be forfeited. To enable victimized investors to recover these funds, I also propose that Congress enact legislation which allows these forfeited funds either to be returned to the corporation, or to victimized investors.

In the absence of such legislation, prosecutors routinely should rely on existing legislation to seek the forfeiture of all assets traceable to the corporate actors’ wrongdoing - and not just for those high-profile cases. While it may be true that the harm caused to investors could be larger than any profits forfeitable by those corporate actors who mastermind fraudulent reporting schemes, these individuals will remain willing to gamble on the big payoff in the long run unless the profit incentive is eliminated from the corporate fraud equation. An asset forfeiture provision that is directed towards these corporate fraudsters will give victimized investors the “system” that they want: an adequate means of deterrence and retribution.³⁶

II. THE RE-EMERGENCE OF THE WHITE COLLAR CRIMINAL

The summer of 2002 brought forth a new villain following the wave of corporate scandals that culminated with WorldCom’s bankruptcy filing. The Bush administration, in an about face, eschewed its earlier “leave it to the SEC to punish bad apples” policy in favor of backing

34. See discussion *infra* Part V.

35. See Sarbanes-Oxley Act § 807 (creating 18 U.S.C. § 1348). As will be demonstrated *infra*, the current asset forfeiture statutes are as complex to navigate as the Rubik’s cube (the 1974 mechanical puzzle). See e.g., 18 U.S.C. § 981(a)(1)(C), 18 U.S.C. § 1956(c)(7)(A) and 18 U.S.C. § 1961(1)(B). Moreover, to the extent that any forfeiture of proceeds is currently authorized for violations of the federal securities law in particular, such a penalty is limited to the “fraud in the sale of securities.” See 18 U.S.C. § 981(a)(1)(C), 18 U.S.C. § 1956(c)(7)(A) and 18 U.S.C. § 1961(1)(D).

36. See *Former Enron Employees Cheer Convictions, or Shrug*, BALTIMORE SUN, May 26, 2006 (reporting that after hearing of the convictions, one investor who lost her job and \$1 million in retirement savings stated, “I guess it gives me a little comfort, but it doesn’t put back my retirement money.”).

legislation that would crack down on corporate fraud.³⁷ At the Act's signing, the President declared that corporate executives who engaged in corporate mismanagement could expect "no more easy money, just hard time."³⁸ The corporate executive of a scandal-ridden public company thus became the newly-reviled so-called "white collar criminal."³⁹ This particular white collar criminal had escaped both media and legislative scrutiny in the years leading up to Enron's collapse.⁴⁰

The white collar criminal generally is thought to be an organization, or a person of high or respectable social status, who commits "[i]llegal or unethical acts that violate fiduciary responsibility or public trust [] usually during the course of legitimate occupational activity for personal or organizational gain."⁴¹ Edwin H. Sutherland, a well regarded sociologist, coined the term "white collar crime" over sixty years ago when he sought to counter theories concerning the primary roots of crime by emphasizing the social status and occupation of the offenders, in addition to the circumstances surrounding the crime.⁴² Suther-

37. See Joseph Nocera, *For All Its Cost, Sarbanes Law is Working*, N.Y. TIMES, Dec. 3, 2005, at B1. The administration resisted the tough corporate reform legislation, but subsequently acquiesced in response to reports that corporate fraud was eroding its political support. See Stephen Labaton, *Handcuffs Make Strange Politics, You Say? But Not in Washington*, N.Y. TIMES, Aug. 2, 2002, at C1.

38. See Greg Hitt, *Bush Signs Sweeping Legislation Aimed at Curbing Corporate Fraud*, WALL ST. J., July 31, 2002, at A4 (reporting that the new legislation will stiffen penalties for corporate executives who misrepresent company finances. "Every corporate official who has chosen to commit a crime can expect to face the consequences," according to President Bush, "No more easy money for corporate criminals just hard time.")

39. Generally speaking, the white collar criminal is thought to be an organization, or a person of high or respectable social status, who commits "[i]llegal or unethical acts that violate fiduciary responsibility or public trust [] usually during the course of legitimate occupational activity for personal or organizational gain." National White Collar Crime Center. Proceedings of the Academic Workshop: White Collar Crime Definitional 330 (1996). See Abraham S. Goldstein, *White Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1895 n.2 (1992) (white observing who commits white collar crimes noted that such crimes are those "committed by individuals or organizations, usually in the course of business activity, and usually characterized by fraud or falsehood and by complexity.")

40. In years past, public attention had focused on the insider trading scandals of the 1980s and the savings and loan debacles of the 1990s, which included several money laundering scandals of the 1990s. See discussion *infra*.

41. National White Collar Crime Center. Proceedings of the Academic Workshop: White Collar Crime Definitional 33 (1996). See Abraham S. Goldstein, *White Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1895 n.2 (1992) (observing who commits white collar crimes when defining such crimes as those "committed by individuals or organizations, usually in the course of business activity, and usually characterized by fraud or falsehood and by complexity.")

42. EDWIN SUTHERLAND, WHITE COLLAR CRIME 7 (1949). In 1939, Sutherland contradicted leading theorists who argued that crime resulted from poverty, psychopathic or sociopathic conditions during a speech to the American Sociological Society. See Edwin H. Sutherland, *White Collar Criminality*, 5 AM. SOC. REV. 1, 2 and 9-10 and 12 (1940) (arguing that crime is in fact not closely correlated with poverty or with the psychopathic and sociopathic conditions associated with poverty because, first, the statistical generalizations are derived from a biased sample which

land found that some crimes were “committed by [a person] of respectability and high social status in the course of his occupation” in violation of a public trust.⁴³ He also correctly recognized the substantial impact on society caused by the misdeeds of these trusted individuals, observing that the

financial loss from white collar crime, great as it is, is less important than the damage to social relations . . . [w]hite collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganization on a large scale [while other] crimes produce relatively little effect on social institutions or social organizations.⁴⁴

Nevertheless, as Sutherland also observed, these “white collar criminals [were] relatively immune [from prosecution] because of the class bias of the courts, and the power of the class to influence the implementation and administration of the law.”⁴⁵

Sutherland highlighted the essential nature of the harm (i.e., the breach of trust) inflicted by this class of offenders by linking a particular social class to the crime. Unfortunately, his offender-based definition garnered severe criticism by other sociologists and criminologists who relied on the traditional scope of criminal law because Sutherland’s definition did not differentiate between criminal and non-criminal behavior.⁴⁶ More than twenty years later, Herbert Edelhertz (the former head of the Fraud Section of the U.S. Justice Department), redefined the term white collar crime, placing greater focus on the offense, rather than the offender.⁴⁷ Thus, white collar crime came to describe those “illegal acts committed by ‘nonphysical means and by concealment’ in order ‘to obtain money or property, . . . or to obtain

omits almost entirely the behavior of white collar criminals; second, the generalization that criminality is closely associated with poverty is inapplicable to white collar criminals; and third the conventional theories do not even explain the criminality of the lower class.). See also TONY G. POVEDA, *RETHINKING WHITE COLLAR CRIME* 9, 31-34 (1994); Gilbert Geis & Colin Goff, *Introduction* to EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME: THE UN-CUT VERSION* ix (1983).

43. SUTHERLAND, *supra* note 42, at 7.

44. Sutherland, *White Collar Criminality*, *supra* note 42, at 5.

45. *Id.* at 7.

46. See TONY G. POVEDA, *RETHINKING WHITE COLLAR CRIME* 33 (1994) (noting that Paul W. Tappan and Robert G. Caldwell’s disdain for Sutherland’s definition appears to stem from their inability to see the criminality of white collar offenses, observing that for Tappan, “all [acts] are within the framework of the norms of ordinary business practices.”). See also Richard A. Posner, *Optimal Sentences for White Collar Criminals*, 17 *AM. CRIM. L. REV.* 409, 409 (1980) (“The coiner of the term ‘white collar crime’ defined it ‘as a crime committed by a person of respectability and high social status in the course of his occupation,’ but this is not a good definition. . . . I shall instead . . . use the term white-collar crime to refer to the nonviolent crimes typically committed by either (1) well-to-do individuals or (2) associations, such as business corporations and labor unions, which are generally “well-to-do” compared to the common criminal.”).

47. See POVEDA, *supra* note 46, at 40-42.

business or personal advantage.’”⁴⁸ The Department of Justice has since further refined the definition of white collar crime to include “those classes of non-violent illegal activities which principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge or illegal circumvention.”⁴⁹ This definition better reflects the resulting harms that were highlighted by Sutherland more than sixty years ago.

What specifically sets white collar crimes apart from other types of crimes (including so-called “street crimes”) are that white collar crimes typically occur in the fields of finance and industry where the associated harms are less tangible,⁵⁰ the culpability of defendants is less plain,⁵¹ and the conduct is less obviously immoral to some.⁵² Street crimes, on the other hand, generally entail a “discrete event”⁵³ that is readily identifiable such as the crime of homicide, assault, rape,

48. See Hon. John Conyers, Jr., *Corporate and White Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 287 (1980) (quoting from H. EDELHERTZ, *THE NATURE, IMPACT, AND PROSECUTION OF WHITE COLLAR CRIME* (1970)).

49. See Tony G. Poveda, *White Collar Crime and the Justice Department: The Institutionalization of a Concept*, 17 CRIME L. & SOC. CHANGE 235, 241 (1992) (quoting U.S. DEPT. OF JUSTICE, NATIONAL PRIORITIES FOR WHITE COLLAR CRIME 5 (1977)).

50. Street crimes entail a “discrete event.” Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?* 54 U. PITT. L. REV. 405, 406 (1993).

51. KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 4 (1985). Cf., Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?* 54 U. PITT. L. REV. 405, 408 (1993) (observing that the criminal activity involved in white collar crimes “is much more complex than street crimes, usually consisting of a number of events spread over an extended period of time, with the ‘real’ evidence frequently buried in reams of business and corporate records relating to numerous transactions.”).

52. Abraham S. Goldstein, *White Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1895 n.2 (1992). White collar crime typically includes the following offenses: securities fraud, tax fraud, embezzlement, corruption, bribery, conspiracy to defraud, criminal regulatory violations, antitrust, and bankruptcy fraud. See KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 30 (1985). See also Wheeler, Weisburd, Waring, Bonde, *White Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331 (1988) (including securities violations, anti-trust violations, bribery, embezzlement, mail and wire fraud, tax fraud, false claims and statements, and credit fraud). The thread of Sutherland’s offender-based definition still remains. See Edwin H. Sutherland, *White Collar Criminality*, 5 AMER. SOC. REV. 1, 2-3 (1940) (noting that “[w]hite-collar criminality in business is expressed most frequently in the form of misrepresentation in financial statements of corporations, manipulation in the stock exchange, commercial bribery, bribery of public officials directly or indirectly in order to secure favorable contracts and legislation, misrepresentation in advertising and salesmanship, [and] embezzlement and misapplication of funds, . . . These varied types of white collar crimes in business and the professions consist principally of violation of delegated or implied trust, and many of them can be reduced to two categories: misrepresentation of asset values and duplicity in the manipulation of power.”).

53. Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?* 54 U. PITT. L. REV. 405, 406 (1993).

robbery, or burglary. Additionally, street crimes typically “involve [a] threat and use of physical violence against persons, drug violations, or theft involving use of force and other related crimes.”⁵⁴

Sutherland aptly noted that it is the secretive, non-violent nature of the criminal activities that chiefly separates white collar crimes from street crimes, and not necessarily the nature of the resulting harm. Indeed, in the case of the recent spate of corporate scandals, “the pen [proved] mightier than the sword.”⁵⁵ Corporate executives stole billions of dollars “with the stroke of a pen, or the push of a computer key,”⁵⁶ and harmed a long list of victims, including (in Enron’s case, for example) more than 14,000 employees who lost their retirement savings due to having participated in the firm’s 401K stock plans;⁵⁷ more than 4,000 Enron employees who lost their jobs;⁵⁸ countless indirect and direct investors in Enron securities whose investments were devalued;⁵⁹ and other creditors who never received payment for products sold or services rendered to the company.⁶⁰

There is, interestingly enough, a continuing debate among legal scholars and practitioners over the severity of punishment for white

54. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 4 (1985). Cf., Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?* 54 U. PITT. L. REV. 405, 408 (1993) (The criminal activity involved in white collar crimes “is much more complex than street crimes, usually consisting of a number of events spread over an extended period of time, with the ‘real’ evidence frequently buried in reams of business and corporate records relating to numerous transactions.”).

55. Edward George Earle Lytton Bulwer-Lytton (1803-1873). The quotation is taken from Bulwer-Lytton’s play *Richelieu* (1839), Act II, Scene II. The complete quotation is “Beneath the rule of men entirely great, The pen is mightier than the sword.”

56. See Richard Thornbough, former United States Attorney General, *Forward: Sixth Survey of White Collar Crime*, 28 AM. CRIM. L. REV. 383, 384 (1991) (observing that a “street criminal can steal only what he can carry. With a stroke of pen, or the push of a computer key, white collar criminals can, and do, steal billions.”). Indeed, while the numbers are still coming in on the recent corporate frauds, the cost to U.S. taxpayers for the savings and loan scandals of the late 1980s due to criminal fraud was by the most conservative estimates \$6 billion, while losses from bank robberies in the U.S. in 1989, totaled approximately \$24.6 million, with the average ‘take’ being \$3,951.” TONY G. POVEDA, *RETHINKING WHITE COLLAR CRIME* 11 (1994).

57. Kurt Eichenwald, *Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, at A6.

58. *Id.*

59. Enron’s ten biggest shareholders were money managers of some of the top mutual funds, including Alliance Capital, Janus Capital, Putnam Investments, Barclays Bank and Citigroup. See Kenneth N. Gilpin, *Enron’s Collapse: The Investors*, N.Y. TIMES, Dec. 4, 2001, at C8. Other indirect Enron investors include any investor in a Standard & Poor’s index, before Enron was dropped from the index in late 2001. *Id.*

60. For example, Enron owes Citigroup more than \$1.1 billion, which is less than half of the \$2.6 billion owed to J.P. Morgan Chase. Riva D. Atlas, *Despite Bumps, Citigroup 4th Quarter Was Up*, N.Y. TIMES, Jan. 18, 2002, at C4.

collar criminals, as compared to their street crime counterparts,⁶¹ with some arguing (at least before this last round of white collar sentencing) that white collar criminals have been punished less severely than street criminals despite the harm caused by their offenses.⁶² This de-

61. See e.g., Andrew Ross Sorkin, *How Long to Jail White-collar Criminals?*, NY TIMES, Sept. 16, 2005 (reporting that a UCLA law professor said that Ebbers' sentence was "draconian," adding that 25 years is more than most people would get for rape or a nonaggravated murder"); Daniel Kadlec, *Does Kozlowski's Sentence Fit the Crime?*, TIME, Sept. 20, 2005 (reporting Thomas Curran, a former New York city Prosecutor, response to Kozlowski's 8 to 25 year sentence saying "Tyco is a real company with a real business plan that still employs thousand of people . . . There are no retirees eating cat food because of Dennis Kozlowski."); Brooke A. Masters, *What Does 25 Years Do?* WASH. POST, July 14, 2005 (reporting that "some lawyers were asking whether the pendulum has swung too far," arguing that the convicted corporate executives' sentences were too harsh.)

62. See e.g., Michael D. Silberfarb, *Justifying Punishment for White collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act*, 13 B.U. PUB. INT. L.J. 95, 105 (2003) (citing the U.S. Sentencing Commission, Monitoring Data Files 1995-2001, noted that "the United States Sentencing Commission reports that between 1991 and 2001, the annual average length of sentence for white collar criminals always fell between 19.0 and 20.8 months [while] during that same period, violent offenders received sentences ranging between 89.5 and 106.7 months, and drug offenders received sentences ranging from 71.7 months to 88.2 months."); Kirby D. Behre & A. Jeff Ifrah, *Courts Not Soft on Fraud, Theft Crimes*, NAT'L L.J. at A27 (March 10, 2003) (observing that "reality does not confirm" the Department of Justice's 2002 claim that white collar criminal were treated too leniently; noting that the existing disparities among the federal courts); Michael Higgins, *Sizing Up Sentences*, A.B.A. J., Nov. 1999 (noting the disparity in sentencing white collar criminals); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001) (noting that this conflict is mediated inconsistently, so that criminal liability is distributed more unevenly among white-collar or corporate offenders than it is among street offenders); Elizabeth Szocky, *Imprisoning White collar Criminals?*, 23 S. ILL. U. L.J. 485, 487-89 (1999); Martin F. Murphy, *No Room at the Inn? Punishing White collar Criminals*, 40 BOSTON BAR J. 4, 14 (1996) (observing that prior to 1987, most judges believed that "the suffering experienced by a white collar person as a result of apprehension, public indictment, and conviction as well as the collateral disabilities incident to each - loss of job, revocation of professional license, diminishment of status in the community - itself a kind of punishment"); Deborah Young, *Federal Sentencing: Looking Back to Move Forward*, 60 U. CIN. L. REV. 135, 142-43 (1991) (observing, while critiquing *In Sitting in Judgment: The Sentencing of White-Collar Criminals*, by Wheeler, Mann and Sarat, that the authors do not reach a conclusion about whether there is a judicial bias in sentencing white collar criminals notwithstanding that the judges who participated in their study did in fact employ a different analysis of blameworthiness and the seriousness of the crimes charged).

Some scholars have reasoned that the disparity in punishment may exist because white collar offenders have numerous tools at their disposal to combat allegations of wrongdoing that street crime offenders are without; including expert legal counsel, the financial means to mount effective defenses, political connections, alternate enforcement paths to avoid prison sentences, and social legitimacy. See Elizabeth Szocky, *Imprisoning White Collar Criminals?* 23 S. ILL. U. L.J. 485 (1999). See also Jon J. Lambrias, *White Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 504-525 (2003) (noting that both judges and prosecutors play a part in the wide sentencing disparities of white collar criminals).

Another explanation for the differing criminal penalties may rest in the marked difference in the manner in which white collar crimes and street crimes are investigated and, therefore, prosecuted. Professor Kenneth Mann first set forth the differences almost twenty years ago in his well-regarded work, entitled *Defending White Collar Crime*. See KENNETH MANN, *DEFENDING*

bate on punishment will rage on as more and more offenses are committed by these so-called trusted persons, and they are sentenced accordingly. It is worth noting at this juncture that some of the bank officers and directors who participated in the savings and loan debacle of the 1990s, and the corporate fiduciaries and investment bankers who participated in the insider trading scandals that marked Wall Street during the 1980s, similarly were sentenced to seemingly lengthy prison sentences at the time. In fact, Michael Milken (the so-called “Junk Bond King”) and Charles Keating (the banker) were sentenced to 10 years, and 12.5 years, respectively.⁶³ However, adding fuel to the sentencing debate, neither served his full term – with Milken serving 22 months, and Keating serving 4.5 years.⁶⁴

In any event, the purpose of this article is not to debate the issue of which group of offenders is punished more harshly than the other.⁶⁵ Instead, I seek to highlight the shortcoming of the congressional legislation that followed the wave of corporate accounting scandals. Congress, in response to earlier crime waves, not only legislated enhanced penalties that included high fines and lengthy terms of imprisonment, but also mandated the forfeiture of assets involved in, or traceable to, the wrongdoing.⁶⁶ This time, however, Congress let a viable sanction get away in favor of imposing *just hard time* on those corporate managers who participate in corporate accounting scandals.

III. SARBOX’S CRIMINAL MEASURES: “JUST HARD TIME”

A. *The Climate for Change*

Congress, fueled by investor outrage and market skepticism, began convening hearings in early 2002 to determine who or what was to

WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 9-13 (1985). These differences remain relevant today, particularly from the defense lawyer’s perspective. Defense attorneys handling street crimes usually are not called upon until the client is charged, and is then limited to successfully plea-bargaining away the client’s guilt. See KENNETH MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 4 (1985). In stark contrast, the white collar offender typically retains counsel before the criminal investigation is even completed, and in some cases, even before the investigation gets underway – thereby enabling the white collar offender’s defense counsel to argue the client’s innocence on numerous occasions before any charging decision is made. *Id.* at 5. In fact, counsel’s intensive advocacy continues, even after plea agreements are reached to bring about the desired punishment. *Id.*

63. See Grace Wong, *Kozlowski Gets Up to 25 Years*, CnnMoney.com, Sept. 19, 2005, at http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski_sentence/index.htm (last visited Feb. 16, 2007).

64. *Id.*

65. For an analysis of this debate, see Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1311-60 (2001). See also Russ Mitchell, *White collar Criminal? Pack Lightly for Prison*, N.Y. TIMES, Aug. 11, 2002, at B3.

66. See discussion *infra* Part V.

blame for what would become a steady stream of corporate accounting scandals and the ensuing bankruptcies.⁶⁷ Accountants, corporate officers and directors, investment bankers and Wall Street analysts, and (subsequently) lawyers came under intense scrutiny during these hearings.⁶⁸ The subsequent passage of SarbOx by an almost unanimous vote on July 25, 2002,⁶⁹ and its signing by the president five days later,⁷⁰ was supposed to stem the tide of faltering investor confidence and the declining capital markets through mid 2002.⁷¹

Congress and the president had finally realized, and heeded calls to demonstrate, that governmental regulations and corporate accountability were not inconsistent partners.⁷² What resulted is legislation

67. Congressional inquiries as well as criminal and regulatory investigations commenced in early 2002 to focus on the role of Enron and its outside auditor, Arthur Andersen L.L.P., in connection with the surprise collapse of the energy trading giant. Much of their inquiries focused on Andersen's failure to flag Enron's financial problems during the course of Andersen's audits, and Andersen's failure to disclose details of Enron's controversial financing arrangements. See generally William C. Powers et al., Report of the Special Litigation Committee (Feb. 1, 2002), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/sicreport/sicreport020102.pdf>. Subsequently, the House Financial Services Committee's hearings on the problems at Enron expanded to include accounting irregularities at Global Crossing, and the questionable practices at WorldCom. See Simon Romero, *House to Question Execs of WorldCom*, N.Y. TIMES, July 8, 2002, at C1.

68. *Id.*

69. The Act was approved by both houses of Congress on July 25, 2002, with a vote of 99-0 in the Senate and a vote of 423-3 in the House. See *Landmark Reforms Enacted for Auditing, Corporate Governance*, 71 U.S. L. WK 5 (2002); Richard B. Schmitt, Michael Schroeder & Shailagh Murray, *Corporate-Oversight Bill Passes, Smooths Way for New Lawsuits*, WALL ST. J., July 26, 2002, at A1; Richard A. Oppel, Jr. *Negotiators Agree on Broad Changes in Business Laws*, N.Y. TIMES, July 25, 2002, at A1. See also Commissioner Paul S. Atkins, Remarks at Advanced ALI-ABA Course Study (Jan. 9, 2003) ("In response to investor outrage and political pressure, Congress enacted the Sarbanes-Oxley Act. It is sweeping legislation intended to hold corporate executives and auditors more accountable to the shareholders of public companies. It calls for a re-examination of our corporate governance structure and seeks to fill in the holes that have left investors out in the cold."). The speech is available at <http://www.sec.gov/news/speech/spch010903psa.htm>.

70. See George W. Bush, Statement by the President of the United States Upon Signing Pub. L. No. 107-204 (July 30, 2002), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=73333> (last visited Feb. 16, 2002).

71. See Greg Hitt, *Bush Signs Sweeping Legislation Aimed at Curbing Corporate Fraud*, WALL ST. J., July 31, 2002, at A4 ("Spurred by the public's shaken confidence in the economy, President Bush signed sweeping legislation aimed at curtailing fraud and corruption in corporate America. . . . [This new legislation was ushered in by] a wave of scandals that began with the collapse of Enron last December [2001] and soon widened to include disclosures of accounting irregularities at Global Crossing Ltd., Tyco International, Ltd, Qwest Communications International Inc., and WorldCom Inc, among others."). See also, Richard A. Oppel, Jr., *Negotiators Agree on Broad Changes in Business Laws*, N.Y. TIMES, July 25, 2002, at A1.

72. See Stephen Labaton, *SEC Leader Sees Outside Monitors for Auditing Firm*, N.Y. TIMES, Jan. 18, 2002, at A1; Jenny B. Davis, *The Enron Factor: Experts Say the Energy Giant's Collapse could Trigger Changes in the Law That Make it Easier to Snare Professionals*, 88 A.B.A. J. 40 (Apr. 2002). See also Alex Berenson, *The Biggest Casualty of Enron's Collapse: Confidence*,

aimed at stamping out deceptive accounting and management practices by establishing deeper oversight, holding top executives more directly responsible for corporate public filings, and requiring more transparent corporate books and records.⁷³ In an attempt to demonstrate that they were also tough on corporate crime, the politicians enacted enhanced criminal penalties purportedly to deter and punish corporate fraudsters – but only at the eleventh hour.

The base text for the Act was the “Public Company Accounting Reform and Investor Protection Act of 2002” (“S. 2673” or the “Sarbanes Bill”), sponsored by Senate Banking Committee chairman Paul Sarbanes (D-Md.), which passed the Senate by a bi-partisan vote of 97-0 on July 15, 2002.⁷⁴ The House earlier had passed a version of a competing bill, the Corporate and Auditing Accounting, Responsibility and Transparency Act of 2002 (“H.R. 3763” or the “Oxley Bill”) introduced by Representative Michael G. Oxley (R-Ohio), by a 334-90 vote on April 24, 2002.⁷⁵ The Oxley Bill focused on transparency

N.Y. TIMES, Feb. 10, 2002, § 4, at 1 (“Securities markets are all about numbers, from sales and profits to debt outstanding. If investors cannot believe the figures put out by public companies, they will be much less willing to risk their money on stocks. For two generations, a rigorous system of private disclosure and public oversight has given American investors confidence that they will not be fleeced when they buy stocks. . . . But Enron’s collapse has put that hard-won confidence at risk.” According to the Arthur Levitt, “To restore confidence in American markets, Congress and regulators need to take specific steps to strengthen the disclosure regime.”); Diana B. Henriques, *Enron’s Collapse: Keepers of the Books; Policing the Accountants With a Watchdog From the Accounting Business*, N.Y. TIMES, Jan. 21, 2002, at A12 (quoting Richard C. Breeden, “Congress is ultimately going to have to fashion a solution. We need a national debate on the [accountants’ self-regulation] system and what’s wrong with it because we are well past the point when Band-Aids will work.”). In late July 2002, respondents to a Wall Street Journal/NBC poll reportedly were asked whether they thought most government regulations were “necessary and protect consumers or the environment” or were “unnecessary and harm the economy.” Fifty-two percent of the people polled in the summer of 2002 believed that such regulations were necessary as compared to forty percent of the people polled in January 1995. Ruy Teixeira, *Is the Big-Business Era Over?* 13 AM. PROSPECT, Aug. 26, 2002, at 12.

73. Richard B. Schmitt, Michael Schroeder & Shailagh Murray, *Corporate-Oversight Bill Passes, Smooths Way for New Lawsuits*, WALL ST. J., July 26, 2002, at A1. The Act was enacted “to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.” See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 804 (2002) (preamble).

74. 148 CONG. REC. S6735 (daily ed. July 15, 2002). See *Senate Passes Accounting Reform Bill; Landmark Measure Moves to Conference*, 71 U.S.L.W. 2053 (2002). See also David E. Sanger & Richard Opiel, Jr., *Senate Approves a Broad Overhaul of Business Laws*, N. Y. TIMES, July 16, 2002, at A1 (noting that by approving the Sarbanes Bill, the Senate sought, *inter alia*, to establish an independent accounting oversight board; bar auditors of publicly traded companies from engaging in certain consulting work; require real-time disclosure of insider transactions; preserve securities law judgment or settlements in bankruptcy; and give the SEC greater authority, *inter alia*, to obtain officer and director bars).

75. See Juliet Eilperin & Jackie Spinner, *House Passes Accounting Reform package; Bill May Face Senate Test*, WASH. POST, April 23, 2002, at A1.

in, and oversight of, corporate accounting practices,⁷⁶ but was criticized as not going far enough to punish the corporate fraud occurring at publicly-traded companies.⁷⁷

During the floor debates on the Sarbanes Bill (which was introduced in June 2002 to address corporate fraud more broadly than the earlier Oxley Bill), numerous amendments were introduced to specifically deal with the criminal fraud element of the accounting scandals.⁷⁸ Remarkably, the Act's criminal measures were not even discussed until early July 2002.⁷⁹ Of course, much had happened since the April 2002 passage of the Oxley Bill to explain the renewed interest in corporate responsibility and accountability. First, the capital markets continued to decline.⁸⁰ Second, newly-discovered accounting irregularities at three additional large publicly-held companies – Adelphia, WorldCom and Xerox – reportedly added weight to the argument that any new legislation to address white collar crimes had to have teeth in order to effect any real change in corporate behavior, accountability and transparency.⁸¹ Consequently, the legislation that

76. See generally The Corporate & Auditing Accountability, Responsibility, Transparency Act of 2002, H.R. Rep. No. 107-414 (2002). The Oxley Bill was passed in response to the bankruptcy filings by Enron and Global Crossing as well as the then-recent earnings restatements by several prominent other corporations. See *id.* at 18.

77. See Kurt Ritterpusch, *Retirement Policy: Democrats Criticize GOP Efforts At Pension Social Security Reform*, WASH. INSIDER, May 16, 2002 (noting that Democrats criticized propose House measures as inadequate without plans for tough criminal penalties).

78. Cf. Report of the Committee on Banking, Housing and Urban Affairs to Accompany S. 2673, S. Rep. No. 107-205 (2002). (referencing bill summary and status, 107th Cong. (2002)). See *infra* for a detailed discussion of the Act's criminal measures which arose from these amendments.

79. See generally Report of the Committee on Banking, Housing and Urban Affairs to Accompany S. 2673, S. Rep. No. 107-205 (2002). ACCORD 148 CONG. REC. S6436-01; 148 CONG. REC. S6575-01, Congressional Record – Senate Proceedings and Debates (July 9, 10, 2002). See also, Phyllis Diamond & Brett Ferguson, *Accounting: Key Democrats Urge Bush Support For Bill to Punish Corporate Wrongdoers*, WASH. INSIDER, July 3, 2002. Once WorldCom collapse became public, the move towards strengthening or enhancing criminal penalties took root. See Elisabeth Bemiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 30, 2002, at A1; Simon Romero & Riva D. Atlas, *WorldCom Declares Bankruptcy; \$107 Billion Filing Largest in U.S. History*, HOUS. CHRON., July 22, 2002, at A1; Rachel McTague et al., *Despite Partisan Mood, Senate Votes 97-0 to Add Penalty Measures to Accounting Bill*, WASH. INSIDER, July 11, 2002.

80. This also may be due in part to the fact that the Dow Jones industrial average plunged during a volatile day of trading on the same day as the Senate vote by as much as 440 points, and closed down 45 points and also because the dollar fell below the value of the euro for the first time in two and a half years. See David E. Sanger and Richard Opiel, Jr., *Senate Approves a Broad Overhaul of Business Laws*, N.Y. TIMES, July 16, 2002, at A1.

81. See Richard A. Opiel, Jr., *Negotiators Agree on Broad Changes in Business Laws*, N.Y. TIMES, July 25, 2002, at A1. See also Richard B. Schmitt, Michael Schroeder & Shailagh Murray, *Corporate-Oversight Bill Passes, Smooths Way for New Lawsuits*, WALL ST. J., July 26, 2002, at A1 (“At first, concerns about corporate scandals were contained to Enron and its accounting

emerged from the late July 2002 conference adopted a tougher stance on corporate fraud.⁸²

SarbOx's resulting criminal measures collectively expanded criminal liability for corporate officers and directors, brokers, dealers, and trading advisors, among others, by creating new federal offenses, modifying existing federal fraud statutes to increase criminal penalties, and authorizing the enhancement of existing sentencing guidelines. These measures, which are scattered over three separate titles of the Act – (i) Title VIII, the Corporate and Criminal Fraud Accountability Act of 2002;⁸³ (ii) Title IX, the White collar Crime Penalty Enhancement Act of 2002;⁸⁴ and (iii) Title XI, the Corporate Fraud and Accountability Act of 2002 at Title XI⁸⁵ – were initially introduced by the Senate on July 9, but were strengthened by the House's second bill introduced a week later.⁸⁶ Their eleventh-hour inclusion signals Congress' initial reluctance to wield a big stick to combat corporate fraud,

firm, Arthur Andersen LLP, . . . [b]ut as corporate-governance scandals spread to Global Crossing Ltd., Tyco International Ltd., WorldCom Inc. and others, and the stock market plunged, momentum built quickly for broader reforms.”). See also, Karen Masterson & John C. Henry, *WorldCom Woes Add New Impetus to Reformist Calls*, HOUS. CHRON., June 27, 2002, at A1.

82. See Conference Report to Accompany S. 3763, H. Rep. No. 107-610 (2002). According to Representative Oxley, “The Senate built on the House bill’s chief objectives, strong oversight for accountants, increase corporate responsibility, and improved information for investors.” Transcript of Conference Report on H.R. 3763, Sarbanes-Oxley Act of 2002 (House of Representative – July 25, 2002) at page H5462. The conference report also contains additional provisions offered only by the House, including *inter alia*, provisions to require real-time disclosure of investor information; to toughen punishment for those convicted of corporate fraud; to return ill-gotten gains to investors; and to create a disgorgement fund real-time. *Id.* A second House reform bill (the Corporate Fraud Accountability Act of 2002, H.R. 5118) which provides for even greater criminal penalties for accounting and auditing improprieties at publicly traded companies was introduced by Rep. F. James Sensenbrenner (R-Wis.) on July 15 and was passed by a vote of 391 to 28 in the House the next day. See *id.* at page H5463. See also Congressional Record Daily Digest (July 15-16, 2002). The bill’s stiffer penalties were also subsequently incorporated into the Act when it emerged from the conference on July 24, 2002. See Conference Report to Accompany S. 3763, H. Rep. No. 107-610 (2002).

83. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 801-807, 116 Stat. 804 (2002).

84. Sarbanes-Oxley Act §§ 901-906.

85. Sarbanes-Oxley Act §§ 1101-1107.

86. On July 10, 2002, Sen. Joseph Biden (D-Del) initially proposed what would eventually become the White-collar Crime Penalty Enhancement (WCPE) Act after some modifications. See 148 Cong. Rec. S6524, at S6541-S6542, S6548-S6551 (daily ed. July 10, 2002) (statement of Sen. Biden). What would eventually become the Corporate and Criminal Fraud Accountability (CCFA) Act, after some modifications, was introduced by Senator Patrick Leahy (D-VT) and others on July 9, and 10, 2002. His proposal sought to create a new felony for defrauding shareholders of publicly traded companies; create two new document destruction felonies relating to shredding or altering certain corporate records; mandate a review of the sufficiency of the U.S. Sentencing Guidelines; protect corporate whistleblowers; lengthen the state of limitations for fraud; and provide for the preservation in bankruptcy of debts incurred under securities law judgments or settlements. See 148 Cong. Rec. S6524, at S6538, S6541 (2002).

which seemingly faded in response to voter pressures.⁸⁷ Nevertheless, the Act's criminal measures provide "the absolute minimum protections" to investors.⁸⁸ As will be illustrated, Congress failed to sufficiently close the vault doors to the *easy money*⁸⁹ when it failed to enact legislation that also would reach the *spoils* of the corporate accounting frauds.

B. *The Political Response to Corporate Fraud*

1. Enact New Crimes

Congress created several new offenses to curb abuses by corporate executives of publicly-traded companies in order to close perceived loopholes in the existing federal statutes.⁹⁰ Specifically, Section 807

87. See Transcript of Conference Report on H.R. 3763, Sarbanes-Oxley Act of 2002, 148 CONG. REC. H5462-02, at H5463 (daily ed. July 25, 2002) (statement of Rep. Baker) ("Nothing perhaps made a more visual impact on American investors, shareholders, pensioners and employees than watching the news yesterday as corporate executives were handcuffed and hauled away. The people of America are not only expecting it, they are demanding it."). See also Rachel McTague et al., *Despite Partisan Mood, Senate Votes 97-0 to Add Penalty Measures to Accounting Bill*, WASH. INSIDER, July 11, 2002; Greg Hitt, *Bush Signs Sweeping Legislation Aimed at Curbing Corporate Fraud*, WALL ST. J., July 31, 2002, at A4; David Futrelle, *What is the Government doing to Help?* MONEY, Sept. 2002, at 81.

88. See Transcript of Conference Report on H.R. 3763, Sarbanes-Oxley Act of 2002, 148 Cong. Rec. H5462-02, at H5470 (daily ed. July 25, 2002) (statement of Rep. Julia Carson (D-IN)) ("The conference bill before us today provides the absolute minimum protections to protect investors and restore market confidence. Still this measure could be stronger and certainly disgorging the ill-gotten gains of these criminals and redistributing profits to the victims must be the next step. . . . *Assets [acquired] through fraud and betrayal of confidence should not be allowed to stand when countless Americans close to retirement must now rethink how they will downgrade their retired lives. . . . [I]f crime does not pay, Congress must reaffirm that truth.*") (emphasis added). Accord Transcript of Conference Report on H.R. 3763, Sarbanes-Oxley Act of 2002, 148 Cong. Rec. H5462-02, at H5463 (daily ed. July 25, 2002) (statement of Rep. Baker (R-La)) ("We want to go after those ill-gotten gains, that profit you made by misrepresenting the material facts of your corporation while manipulating the books and profiting your own best interests. We want to make sure those mansions, those benefits, those golden parachutes are collapsed, folded up neatly, put into a closet and sold off so that shareholders back home can get their hands on their money. . . . This bill does not go quite that far, but over the next Congresses we are going to continue to work to make sure that no one who is defrauded by an irresponsible act of corporate abuse does not get full recompense for the wrong.").

89. See Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1 (President Bush reportedly declared at the Act's signing, "Every corporate official who has chosen to commit a crime can expect to face the consequences. No more easy money for corporate criminals, just hard time.").

90. In addition to those new crimes discussed in this article, the Act also creates new federal crimes relating to the destruction of documents or audit work-papers and evidence tampering with respect to documents to be used in an official proceeding. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802 and § 1102, 116 Stat. 804 (2002).

Congress also enacted a separate measure to protect corporate whistleblowers. In order to ensure that employees who unearth corporate fraud at publicly-traded companies either will provide information to, or otherwise assist, a federal regulatory or law enforcement agency, a

provides that any securities fraud involving a public company is a separate and distinct federal crime.⁹¹ The new securities fraud statute mirrors the language of the federal bank fraud statute and is violated when one knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud persons in connection with any security of a publicly held company, or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of such a security.⁹² Any violator of this statute shall be fined or imprisoned up to 25 years, or both.⁹³ Securities fraud prosecutions purportedly will be easier because the new statute does not require proof of a willful violation.⁹⁴ Federal prosecutors need only show a “knowing” intent to defraud. They also need not prove that fraud was made in connection with a “purchase or sale.”⁹⁵

Section 902 criminalizes “attempts and conspiracies to commit” criminal fraud offenses.⁹⁶ “[A]ny person who attempts or conspires to commit any of the offenses under this chapter shall be subject to the same penalties as those prescribed for the offense,” as if the attempts or conspiracies had succeeded.⁹⁷ At first glance, this offense may seem redundant with respect to the existing law that criminalizes conspiracy to commit a federal crime.⁹⁸ It is not; the recently-enacted conspiracy offense is an independent crime that is committed regardless of whether the conspiracy comes to fruition. Conviction under the general conspiracy statute subjects the violator to a maximum five-year sentence.⁹⁹

member of Congress or a “person with supervisory authority” over the employee, Congress also enacted Section 1107 of the Act to protect whistleblowers. *See* Sarbanes-Oxley Act §1107 (creating 18 U.S.C. § 1513(e)). The new law authorizes the imposition of criminal penalties for “any [retaliatory] action harmful to any person.” Section 806 of Title VIII of the Act also protects whistleblowers by providing them a private right of action for compensatory damages. Sarbanes-Oxley Act §806 (creating 18 U.S.C. 1514A).

91. Sarbanes-Oxley §807 (creating 18 U.S.C. § 1348 (2007)).

92. *Id.* Cf. 18 U.S.C. § 1344 (2007).

93. Sarbanes-Oxley § 807 (creating 18 U.S.C. § 1348 (2007)).

94. *Id.*

95. *Id.*

96. Sarbanes-Oxley § 902 (creating 18 U.S.C. § 1349)

97. *Id.*

98. Cf. 18 U.S.C. § 371 (2007). Section 371 provides: “if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.” 18 U.S.C. § 371 (2007).

99. *See id.*

Section 906 provides that corporate executives who certify their companies' publicly-filed financial reports may be criminally prosecuted for those filings that are found not to be in compliance with the federal securities laws, or other statutory requirements. Specifically, a public company's CEO and CFO must certify in writing that the company's periodic financial reports (filed with the SEC pursuant to section 13(a) or 15(d) of the Exchange Act¹⁰⁰) "fairly presents" the company's financial condition and operational results or face criminal penalties.¹⁰¹ Failure to comply with the certification requirements can result in the imposition of monetary penalties up to \$1,000,000 or 10 years imprisonment.¹⁰² Willful failures to comply will result in the imposition of monetary penalties up to \$5,000,000 or 20 years imprisonment.¹⁰³

This new offense forces CEOs and CFOs to take responsibility for the accuracy of the records their company files with the Commission, or be subject to criminal liability for any inaccuracies. Moreover, the statute makes no reference to generally accepted accounting principles ("GAAP").¹⁰⁴ Consequently, a signing officer could be liable under this certification provision if a particular transaction or material liabilities were hidden from investors, even though the company's financials complied with GAAP.

2. Enhance Existing Criminal Penalties

Congress also increased the criminal penalties fourfold for violations of the Employee Retirement Income Security Act ("ERISA"), as well as the mail fraud and wire fraud statutes.¹⁰⁵ Section 903 of the Act increased the maximum prison terms for persons convicted of mail fraud and wire fraud from five years to 20 years each.¹⁰⁶ Con-

100. 15 U.S.C. § 78m(a) or 15 U.S.C. § 78o(d).

101. See Sarbanes-Oxley Act § 906 (creating 18 U.S.C. § 1350). The new section also dictates the contents of the certification. *Id.* Criminal liability will attach for any certification made in connection with a deceptive financial statement. Specifically, anyone who "certifies any statement . . . knowing that the periodic report accompanying the statement does not comport with all of the requirements . . . shall be fined not more than \$1,000,000 or imprisoned not more than 10 years, or both." The criminal penalty increases to \$5,000,000, or 20 years if the CEO or CFO "willfully certifies" any false periodic report. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745 (2002) (to be codified at 15 U.S.C. § 7210) (amending 18 U.S.C. §§ 1341, 1343); Sarbanes-Oxley Act § 904 (amending 29 U.S.C. § 1131 (2002)). See also David E. Sanger, Richard A. Oppel, Jr., *Senate Approves a Broad Overhaul of Business Laws*, N.Y. TIMES, July 16, 2002, at A1 ("Amendments that were considered dead only a few weeks ago passed by comfortable margins.")

106. Sarbanes-Oxley Act § 903 (amending 18 U.S.C. §§ 1341, 1343)

gress selected these particular statutes because it recognized that those offenses are “among the most frequently charged federal criminal statutes” in white collar crime situations.¹⁰⁷ Congress also increased the maximum fine and prison term for individuals who violate the criminal provisions of ERISA from \$5,000 and one year to \$100,000 and 10 years by amending ERISA Section 501.¹⁰⁸ The maximum fine for entities other than individuals is raised from \$100,000 to \$500,000.¹⁰⁹ Similarly, section 1106 of the Act similarly increased the penalties provided by Section 32(a) of the Exchange Act, which established the criminal penalties for numerous securities violations.¹¹⁰ The maximum fine and prison term for individuals was raised from \$1,000,000 and 10 years to \$5,000,000 and 20 years; for entities, the maximum fine was raised from \$2.5 million to \$25,000,000.¹¹¹

3. Amend Existing Sentencing Guidelines

SarbOx’s criminal measures would have had little practical effect without some corresponding adjustment to the Federal Sentencing Guidelines (the “Guidelines”).¹¹² This was, of course, prior to the Su-

107. See Shani S. Kennedy & Rachel Price Flum, *Mail and Wire Fraud*, 39 AM. CRIM. L. REV. 817 (2002).

108. Sarbanes-Oxley Act § 904.

109. *Id.*

110. Sarbanes-Oxley Act § 1106 (amending 15 U.S.C.A § 78ff(a) (2002)).

111. *Id.*

112. In 1984, Congress addressed the issue of fairness in sentencing by passing the Sentencing Reform Act. Pub. L. No. 98-473, 98 Stat. 1987 (1984). This Act created a new federal agency, the United States Sentencing Commission (the “Sentencing Commission”), which was instructed to develop uniform guidelines for sentencing in federal cases. The guidelines were to be fair so that similar offenders convicted of similar crimes would receive similar sentences. The original guidelines became effective November 1, 1987, and apply to all federal felonies and most serious misdemeanors. See generally United States Sentencing Commission Guideline Overview, at <http://www.ussc.gov/general/USSCoverview.pdf> (last visited Feb. 22, 2007). The Guidelines required a sentencing judge to choose a sentence from within a guideline range unless the court identified a factor that the Sentencing Commission failed to consider that should result in a different sentence. Sentences outside the guideline range were subject to review by the courts of appeal for an abuse of discretion, and all sentences could be reviewed for incorrect application of the relevant guidelines or law. *Id.*

The Guidelines were created to take into account both the seriousness of the criminal offense and the offender’s criminal history. Since their creation, courts, as well as prosecutors, were required to arrive at a purportedly fair and consistent sentencing range for an offender by first determining the so-called *offense level* for the criminal offense charged. See generally *id.*

The Guidelines assign one of 43 offense levels to most federal crimes based on the severity of the offense type – the more serious the crime, the higher the “base offense” level. Each offense type typically also carries with it a number of “specific offense characteristics.” These enumerated factors vary from offense to offense, and may either increase, or decrease the base offense level (and perhaps the sentence an offender ultimately receives). There also are “categories of adjustments” (such as victim-related adjustments, offender’s role in the crime, and obstruction of justice), which can either increase, or decrease the offense level. The judge could, as a final step

preme Court's recent decision on the constitutionality of the Guidelines.¹¹³ Congress required the Sentencing Commission to construct sentences that would adequately deter and punish obstruction of justice, extensive criminal fraud, and certain white-collar offenses (including securities and accounting fraud); and ensure that a specific enhancement would be provided for a "fraud offense that endangers the solvency or financial security of a substantial number of victims."¹¹⁴ These amendments were ordered notwithstanding earlier amendments to the Guidelines that were enacted in connection with the comprehensive "Economic Crime Package of 2001,"¹¹⁵ which

towards determining the offense level, decrease a defendant's offense level by at least two notches if, in his or her opinion, the offender has accepted responsibility for the crime. See *id.*

Courts (and other participants) also had to determine the so-called *criminal history* category since the point at which the offense level and criminal history category intersect on the sentencing table determined an offender's sentencing range. To that end, each offender is also assigned to one of six criminal history categories based upon the extent and how recently the crimes took place. Category I is assigned to the least serious criminal record and is typically used for first time offenders, while Category VI is the most serious category, used for offenders with lengthy criminal records. Guideline sentences subjected a defendant to a minimum sentencing range of zero to six months, or a maximum range of 360 months to life imprisonment. See *id.*

113. See *United States v. Booker*, 543 U.S. 220 (2005) (holding that the Guidelines are unconstitutional because they violate a defendant's Sixth Amendment right to be tried by a jury by giving judges the power to make factual findings that increased sentences beyond the maximum that the jury's findings alone would support. The Court, thereafter, held that federal judges should consider the so-called "mandatory" Guidelines merely as a suggestion.) Consequently, *Booker* effectively returns total discretion on sentencing to judges, many of whom will still look to the existing Guidelines for guidance when sentencing offenders.

114. See Sarbanes-Oxley Act §§ 805, 905, 1104. See also United States Sentencing Commission, Proposed Amendments to the Sentencing Guidelines, Existing Guideline §2B1.1(b)(2) (Dec. 20, 2002); United States Sentencing Commission, Supplement to the 2002 Guidelines Manual, Amended Guideline §2B1.1(b)(12) (January 25, 2003), available at http://www.ussc.gov/2002suppa/2b1_1.htm; News Release, "Sentencing Commission Toughens Penalties for White Collar Fraudster," U.S. Sentencing Commission (April 18, 2003), available at <http://www.ussc.gov/PRESS/rel0403.htm>; 2003 Guideline Amendments Sent to Congress (May 2003), available at <http://www.ussc.gov/GUIDELIN.HTM>. The amended Guidelines, which were sent to Congress in May 2003, took effect on November 1, 2003. See News Release, *Sentencing Commission Toughens Penalties for White Collar Fraudster*, U.S. Sentencing Commission (April 18, 2003), available at <http://www.ussc.gov/PRESS/rel0403.htm>

115. Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30,510, 30,540 (June 6, 2001). See also U.S. Sentencing Commission, *Sentencing Commission stiffens Penalties for White Collar Criminals*, at <http://www.ussc.gov/PRESS/rel010803.htm> (last visited Feb. 21, 2007). The "Economic Crime Package of 2001" provided for: (1) a consolidation of the theft, property, destruction, and fraud guidelines; (2) a revised, common loss table for the consolidated guideline, and a similar table for tax offenses; (3) a revised, common definition of loss for the consolidated guideline; (4) revisions to guidelines that refer to the loss table in the consolidated guideline; (5) technical and conforming amendments; and (6) amendments regarding tax loss. The most significant change in the Fraud and Theft Guideline is the modification of the loss table to engender "substantial increases in penalties" for those offenders whose criminal conduct resulted in "moderate and higher loss amounts." *Id.* It is noteworthy that the terms of imprisonment imposed after implementation of these changes are not longer than those previously

were designed to address “high-dollar frauds or thefts” and “sentencing disparities between theft, fraud, tax offenses and property destruction.”¹¹⁶

This time, perhaps, Congress thought it better to focus on the harm caused by the breach of trust, rather than on the criminal offense perpetrated. For example, where the offense tends to harm a large number of victims,¹¹⁷ or “endanger[s] the solvency or financial security of a substantial number of victims”¹¹⁸ the terms of imprisonment would be greater.¹¹⁹ Stated differently, the SarbOx amendments could provide for a 50 percent increase in the term of imprisonment if the offense involved a violation of securities law and the offender was, at the time of the offense, an officer or director of a publicly traded corporation.¹²⁰ All tolled, these changes purportedly will yield “tough, but fair sentences and additional *deterrence* for these types of crimes.”¹²¹ However, (as will be discussed more fully below) even if the courts embrace the SarbOx Guidelines, a wholehearted sole reliance on the effectiveness of high fines and increased terms of imprisonment to deter white collar criminals from seeking unlawful exponential gains is debatable from a crime and punishment standpoint.

imposed for some economic crimes that could have been charged as money laundering offenses. See discussion *infra*.

116. The economic crime package, *inter alia*, consolidated three separate guidelines covering theft, property destruction, and fraud into one guideline, Section 2B1.1, which covers “a wide range of criminal conduct proscribed in over 260 federal criminal statutes,” including securities fraud (18 U.S.C. §. 1348 (2002)), and bank fraud (18 U.S.C. §. 1344 (2002)). See *id*.

117. See United States Sentencing Commission, Proposed Amendments to the Sentencing Guidelines, Existing Guideline §2B1.1(b)(2) (December 20, 2002). A sample of fraud offenders sentenced in 2001 revealed that almost half (42.5 percent) of the securities fraud cases involved 50 or more individuals, while over one quarter (25.7 percent) involved 250 or more victims. See United States Sentencing Commission, Report to the Congress: Increased Penalties Under the Sarbanes-Oxley Act of 2002 [hereinafter “Report”], at 2-3 (Jan. 2003) available at http://www.ussc.gov/r_congress/S-Oreport.pdf.

118. See United States Sentencing Commission, Supplement to the 2002 Guidelines Manual, Amended Guideline §2B1.1(b)(12) (January 25, 2003), available at http://www.ussc.gov/2002suppa/2b1_1.htm. See also Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 805(a)(4), 1104(b)(1), 116 Stat. 804 (2002).

119. See Report, *supra* note 117, at 11 (“For example, the guideline sentence for a defendant who causes more than \$400,000,000 in loss previously was 121 to 151 months (assuming no other sentencing enhancements apply). With the additional loss categories, the guideline sentence will be 188 to 235 months, an increase of more than five years.”).

120. A conviction under a securities law is not required in order for this subsection to apply. See United States Sentencing Commission, Supplement to the 2002 Guidelines Manual, Application of Subsection (b)(13) (January 25, 2003) available at http://www.ussc.gov/2002suppa/2b1_1.htm.

121. See News Release, U.S. Sentencing Commission, Sentencing Commission Toughens Penalties for White Collar Fraudster (April 18, 2003) (emphasis supplied), available at <http://www.ussc.gov/PRESS/rel0403.htm>.

C. *The Presumptive Impact of the Act's Enhanced Criminal Penalties*

Congress stopped short of providing sufficient deterrence because SarbOx's criminal measures focus almost exclusively on long prison sentences and increased fines. The politicians appear to rely on the notion that potential offenders will be deterred from engaging in wrongdoing because they will fear longer terms of incarceration. This rationale relies on a faulty assumption: that these lengthy terms of imprisonment and high fines actually will be meted out. Numerous variables play a role in determining the actual sentence imposed by the courts, including the now advisory nature of the Guidelines which enables greater judicial discretion in sentencing offenders.

Prosecutorial discretion plays a significant role in the sentences imposed.¹²² Federal prosecutors continue to have enormous discretion whether in choosing the applicable legal theories (aided by the vagueness of many federal statutes), or in manipulating the number of counts charged under that particular legal theory. Such charging tactics previously have been employed to obtain a desired sentencing range, or even the plea agreement.¹²³ Prosecutors also could manipulate the sentences by threatening to withhold requests to the sentenc-

122. See Michael Higgins, *Sizing up Sentence*, 85 A.B.A. J. 42, 44 (1999) ("The guidelines give prosecutors leeway on who to charge. . . [how] to classify the amount of money at issue in a case . . . which charges to bring, and which to leave for state authorities. And there are questions of when a defendant will be credited with substantial assistance for aiding a prosecution . . ."). See generally Kirby D. Behre, A. Jeff Ifrah, *Courts Not Soft on Fraud, Theft Crimes*, NAT'L L.J., at A27 (Mar. 10, 2003). The indictment of Lea Fastow serves as an example of the prosecutors' discretion. She was indicted on six felony counts (including conspiracy to commit wire fraud, conspiracy to commit money laundering, and false tax return filing), but was allowed to plead guilty to one misdemeanor tax charge. Cf. Indictment, U.S. v. Lea W. Fastow (S.D. Tex. 2003) (Cr. No. H-03-150); Plea Agreement, U.S. v. Lea W. Fastow (S.D. Tex. 2004) (Cr. No. H-03-150). To support the reduced charges, the government argued that it was justified by reason of Lea Fastow's help in securing her husband's cooperation; the couple's agreement to forfeit more than \$23 million in assets; and the additional cost savings in avoiding trial. Mary Flood, *Lea Fastow Expresses "Regret" at Sentencing*, HOUS. CHRON., Dec. 19, 2005.

123. See Robert G. Morvillo, Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in the Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137 (1995) (arguing that legislation like, *inter alia*, the Racketeer Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968; the Criminal Enterprise Act, 21 U.S.C. § 848; the Criminal Forfeitures Act, 21 U.S.C. § 853; the Money Laundering Control Act ("MLCA"), 18 U.S.C. §§ 1956-1957, have given "prosecutors greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences.").

ing judges for downward departures from the Guidelines.¹²⁴ Rarely will courts intervene with respect to the prosecutors' decisions.¹²⁵

As a case in point, Enron's Andrew Fastow was indicted on 109 counts of fraud, money laundering, and insider trading, among others, in connection with the scheme that led to the eventual collapse of Enron.¹²⁶ Without the benefit of SarbOx, Fastow faced more than one hundred years in prison before he pleaded guilty in January 2004 to only two criminal counts: conspiracy to commit wire fraud and conspiracy to commit securities fraud.¹²⁷ Pursuant to his plea agreement, however, Fastow was expected to forfeit more than \$29 million and to serve a ten-year prison if he cooperated with the government in building its case against other Enron senior officials.¹²⁸ Astonishingly, Fastow was sentenced to six years in prison¹²⁹ – quite a departure from his initial exposure.

Another shortcoming of SarbOx's enhanced criminal penalties is that they address only the maximum allowable fines and sentences for each violation. Sentencing judges had, and continue to have, discretion to impose lower fines or lesser prison sentences.¹³⁰ Indeed, even before the Supreme Court's ruling in *Booker* that the Sentencing Guidelines were merely advisory,¹³¹ the Guidelines themselves provided support for reduced sentences by authorizing judges to engage in downward departures to lessen the sentence range under certain circumstances.¹³²

124. See Kirby D. Behre, A. Jeff Ifrah, *Courts Not Soft on Fraud, Theft Crimes*, NAT'L L.J., at A27 (Mar. 10, 2003) (noting that in 2000, "two-thirds of all departures granted nationwide resulted from recommendations made by prosecutors that the sentencing judge depart downward for 'substantial assistance'").

125. See *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 975 (9th Cir. 2000) (stating "the Guidelines do not give courts the authority to interfere with a prosecutor's exercise of discretion in charging [defendants]"); *United States v. Robertson*, 45 F.3d 1423, 1437 (10th Cir. 1995) (stating "Charging decisions are primarily a matter of discretion for the prosecution"). See also Chris Zimmerman, *Prosecutorial Discretion*, 89 GEO. L. J. 1229, 1230-31 n.636-37 (2001); Stephanos Bibas, *White-Collar Plea Bargaining And Sentencing After Booker*, 47 WM. & MARY L. REV. 721 (2005).

126. See discussion *supra* note 17.

127. See *supra* note 21.

128. See *supra* note 21.

129. Kate Murphy & Alexei Barrionuevo, *Fastow Sentenced to 6 Years*, N.Y. TIMES, Sept. 27, 2006, at C1.

130. See Kirby D. Behre & A. Jeff Ifrah, *Courts Not Soft on Fraud, Theft Crimes*, NAT'L L.J., Mar. 10, 2003, at A27.

131. See *United States v. Booker*, 543 U.S. 220 (2005).

132. For a detailed discussion of downward departures from the U.S. Sentencing Guidelines and the ensuing impact of such actions, see Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359 (2003); Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?* 30 PEPP. L. REV. 459 (2003).

Finally, federal judges (unlike politicians who are elected officials) have lifetime appointments. They, as a result, may not be compelled by public pressure to impose the harsher terms of imprisonment – particularly if the judges believe that such sentences are politically motivated rather than rational under traditional notions of punishment,¹³³ or if they favor alternatives to incarceration.¹³⁴ As a result of these sentencing variables, reliance solely on the possibility of increased terms of imprisonment and fines to enhance the laws' deterrent effect is misplaced. Arguably, the inclusion of an asset forfeiture penalty, on the other hand, would strengthen the Act's overall deterrent impact.

IV. SARBOX'S DISGORGEMENT AND ASSET FREEZE PROVISIONS

Congress appeared willing to take a heavier hand in sanctioning corporate executives who were associated with public companies required to restate their financials due to accounting irregularities; however, they stopped short. Instead, Congress enacted only limited disgorgement and asset freeze legislation. Specifically, the first of the two executive compensation provisions relates to the forfeiture of CEO and CFO bonuses.¹³⁵ The second relates to the U.S. Securities and Commission's authority to apply for a temporary freeze of proposed payments to suspected wrongdoers.¹³⁶

Section 304 (the "claw back" provision) requires the CEO and CFO of any public company that is required to restate its financial statements as a result of financial misconduct to disgorge to the company "any profits realized from the sale" of that company's securities and "any bonus or other incentive-based or equity-based compensation received" during the "12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document."¹³⁷ The SEC is authorized to exempt any person from this provision as it deems "necessary and appropriate."¹³⁸

Correspondingly, Section 1103 (the "bonus freeze" provision) provides SEC with temporary asset freeze authority in those cases where any "extraordinary payments (whether compensation or otherwise)" are proposed to be made by the company to any of its directors, of-

133. See Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 416 (2003).

134. See Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?* 30 PEPP. L. REV. 459, 505-509 (2003).

135. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 304, 116 Stat. 804 (2002) (creating 15 U.S.C. § 7243).

136. See Sarbanes-Oxley Act § 1103 (amending 15 U.S.C. § 78u-3(c)).

137. See Sarbanes-Oxley Act § 304(a)(1).

138. See Sarbanes-Oxley Act § 304(b).

ficers, and certain other affiliated parties during the course of an investigation of the company for possible securities law violations.¹³⁹ Congress requires the SEC to petition a federal district court for such an order, and the order will be effective for up to 45 days (subject to an additional 45-day extension).¹⁴⁰ If the individual affected by the order is charged with a securities law violation within the time period covered by the order, the escrow of such payments can continue, subject to court approval, until the conclusion of any legal proceeding.¹⁴¹

The Senate, during its debate on the claw back provision, noted “Recent events have raised concerns about management benefiting from unsound financial statements, many of which ultimately result in corporate restatements.”¹⁴² Although Congress clearly intended to remove the profit motive from corporate executives who engage in mismanagement to unjustly enrich themselves, these provisions do not go as far as the more general asset forfeiture provisions that will be discussed in Part V of this article. Moreover, there are gaping holes in these provisions that may impact their enforcement.

First, section 304’s claw back provision reaches only the bonuses (and not the salaries purportedly earned) for the particular period tied to the restated financials. All compensation awarded during the period in question should be subject to forfeiture, with the burden on the manager to prove otherwise. Second, section 304’s limited forfeiture exposure might cause the CEOs and CFOs to resist restating the financials – or, at least delay such action during the period in which they could lose the most money. Such inaction could lead to greater losses to investors who are ignorant of simmering problems within the corporation. Moreover, it is unclear from the language of the statute who can sue to enforce the claw back provision. Can investors sue on behalf of the corporation to make the CEOs and CFOs return the funds to the corporation? Finally, it is also unclear from the language of the statute whose misconduct will trigger the disgorgement, and even what is the nature of the misconduct that will serve as the trigger.

There are also concerns with respect to the asset freeze provision. While section 1103 does permit the SEC to seek a temporary asset freeze, such an action will apply only to *proposed* corporate payments to the alleged wrongdoer during the period of the SEC’s investigation. It is not retroactive and, therefore, does not reach payments made

139. See Sarbanes-Oxley Act § 1103(a)(3)(A)(i).

140. *Id.* See also Sarbanes-Oxley Act §§ 1103(a)(3)(A)(iii)-(iv).

141. See Sarbanes-Oxley Act § 1103(a)(3)(B)(i).

142. S. REP. NO. 107-205, at 26 (2002).

before the alleged fraud is discovered. The sooner the executive's assets are frozen, the easier it is to avoid the dissipation of assets.

Moreover, the 45- to 90-day freeze period is particularly limiting. The very nature of white collar crime presupposes that any investigation or ensuing prosecution will take some time. The government rarely will be in a position to charge a white collar defendant within a 45- to 90-day time period. It took almost three years to indict Enron's Kenneth Lay. If Congress was really serious about taking the profit out of corporate fraud, it would have gone a step further and also enacted legislation allowing for both civil and criminal forfeiture of *all* assets involved in, or traceable to, the corporate accounting fraud.

V. ASSET FORFEITURE: THE "SANCTION THAT GOT AWAY"

In its effort to combat rising lawlessness in decades past, Congress enacted enhanced criminal penalties that included not only increased prison sentences and fines, but also asset forfeiture provisions.¹⁴³ Asset forfeiture reaches the spoils of the wrongdoer's illegal conduct, and strikes at the heart of the criminal's economic motive for misusing his corporate status. The failure to include this additional penalty in the Act's criminal measures effectively allows the corporate fraudster to escape exposure to a tried and true method of punishment.

A. Asset Forfeiture in Other Contexts

Forfeiture is a comprehensive term which refers to "[t]he divestiture of property without compensation" to the owner.¹⁴⁴ Applied in the context of punishment, it is

the legal process by which property[,] which was used unlawfully, or is the product of criminal activity, is seized and its title vested in the government: state, local or federal.¹⁴⁵

No general forfeiture law exists. Each federal crime must have its own forfeiture provision written into the law. Today, there are more than 200 federal statutes which authorize a forfeiture sanction.¹⁴⁶ Most forfeiture actions in non-drug cases, however, proceed under ei-

143. See discussion *infra*.

144. BLACK'S LAW DICTIONARY (8th ed. 2004). Asset forfeiture is not the same as restitution, which is an equitable remedy by which a person is restored to his or her original position prior to the loss or injury. See discussion *infra*.

145. Anthony G. Hall, *Q&A on Recovering the Proceeds of Crime/Forfeiting the Instrumentalities of Crime*, 42 *ADVOCATE* 16 (Dec. 1999).

146. See DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS*, (ABA Publishing) (2004); Craig Peyton Gaumer, *When Two Worlds Collide: The Relationship and Conflicts Between Asset Forfeiture and Coordinator*, *AM. BANKR. INST. J.* May 2002, at 10.

ther section 981 of title 18 of the United States Code, which governs civil asset forfeiture actions, or section 982 of the same, which governs criminal asset forfeiture actions.

Asset forfeitures, by way of background, are deeply rooted in American history. The government's seizure of property used in, or derived from, a crime dates back to the Crown. Its use was based on the theory that a breach of common law, an offense to the King's peace, should deprive the transgressor of the right to own property.¹⁴⁷ During the seventeenth century, American colonial courts enforced English and local civil forfeiture statutes. One of the early acts of the First U.S. Congress following the ratification of the Constitution, in fact, was its enactment of forfeiture statutes for vessels and cargo involved in customs violations.¹⁴⁸

Congress re-introduced the asset forfeiture sanction in 1970 in an effort to combat the rising drug trade and crime waves led by organized crime gangs. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act,¹⁴⁹ which authorized drug-related asset forfeiture.¹⁵⁰ In order to wage the war on drugs, Congress sought to strike at the economic roots of the drug trade by divesting drug kingpins of their operating capital and profit. The range of forfeitable property expanded over the years to include all proceeds of a controlled substance transaction, whether direct or indirect, as well as all real property, moneys, negotiable instruments, and securities used or intended for use in the facilitation of the drug violation.¹⁵¹

The Organized Crime Control Act of 1970 (hereinafter "RICO") and related statutes¹⁵² similarly authorized criminal asset forfeiture

147. William W. Taylor, III, *Forfeiture under 18 U.S.C. § 1963 – RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 382 (1980). See also David Benjamin Ross, *Comment, Civil Forfeitures: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 261 (2000-2001).

148. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

149. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codifying civil asset forfeiture at 21 U.S.C. § 881).

150. Civil asset forfeiture of drug-related property is authorized pursuant to 21 U.S.C. § 881(b), which provides for forfeiture in the manner set forth in section 981(b) of Title 18 of the United States Code. Drug-related criminal asset forfeiture also is authorized. See 21 U.S.C. § 853(a). Section 853 of Title 21, United States Code, calls for the forfeiture of property constituting, or derived from drug offenses, or used to commit or facilitate the commission of drug offenses. 21 U.S.C. § 853(a). The statutory definition of "property" potentially subject to forfeiture is very broad and includes "real property, including things growing on, affixed to and found in land," and "tangible and intangible personal property, including rights, privileges, interests, claims and securities." 21 U.S.C. § 853(b).

151. See 21 U.S.C. § 881(a).

152. See Title IX of the Organized Crime Control Act of 1970, commonly referred to as "Racketeer Influenced and Corrupt Organizations" ("RICO"), Pub. L. No. 91-452, §901, 84 Stat. 941 (1970) (codified at 18 U.S.C. § 1961-68, and the Continuing Criminal Enterprise statutes, 21 U.S.C. §§ 848. The Continuing Criminal Enterprise Statute was enacted as part of the Compre-

for any offender who violates RICO section 1962.¹⁵³ In so legislating, Congress sought to expand efforts to combat organized crime's corruption of American businesses. It concluded that courts needed a means of wresting economic control over the victimized business from the convicted racketeer; noting that too often incarcerating or fining defendants had little or no effect on their ability to run the business.¹⁵⁴ To that end, federal prosecutors, armed with RICO section 1963(a)(1), could obtain the forfeiture of "any interest the person has acquired or maintained [both tangible and intangible] in violation of [the prohibited activities of] section 1962."¹⁵⁵ However, since RICO forfeiture actions are *in personam* actions, the defendant must first be convicted of a RICO violation before any forfeiture can be ordered. The RICO conviction requires proof that the defendant used the proceeds of racketeering activity to acquire control of an enterprise, or used the racketeering activity to acquire or maintain control of an enterprise or to conduct its affairs.¹⁵⁶ It also requires proof that the defendant committed the two predicate acts, that those acts were part of a pattern, and that they had a particular impact upon the enterprise.¹⁵⁷ Consequently, use of this asset forfeiture provision may be limited when applied outside a narrow class of wrongdoers.¹⁵⁸

Asset forfeiture also is authorized in money laundering cases. Although the Money Laundering Control Act of 1986 ("MLCA")¹⁵⁹ was

hensive Drug Abuse Prevention and Control Act of 1970. Pub. L. No. 91-513, § 511, 84 Stat. 1276 (1970).

153. 18 U.S.C. § 1963(a)-(b).

154. S. REP. NO. 91-617, at 78-79 (1969). See also William W. Taylor, III, *Forfeiture Under 18 U.S.C. § 1963 - RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379 (1980).

155. 18 U.S.C. § 1963(a)(1). Section 1962(c), the most popular provision employed in white-collar cases, makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." 18 U.S.C. § 1962(c).

156. See 18 U.S.C. § 1962. The "pattern of racketeering activity" element requires at least two of over 143 enumerated state and federal offenses be committed within ten years of each other, and related in a common scheme. 18 U.S.C. § 1961(5). The "enterprise" is defined to include familiar legal entities: individuals, partnerships, corporations, associations, or other legal entities, and any union or group of individuals associated in fact although not a legal entity. See 18 U.S.C. § 1961(4).

157. See *id.*

158. This author does not mean to suggest that RICO statutes cannot be applied to white collar criminals. For an analysis of how RICO can be applied, see L. Gordon Crovitz, *How the Rico Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050 (1990). See also Michael A. DiMedio, *A Deterrence Theory Analysis of Corporate Rico Liability For "Fraud In The Sale Of Securities"*, 1 GEO. MASON L. REV. 135 (1994).

159. Pub. L. No. 99-570, Title I, Subtitle H, 100 Stat. 3207-18 (1986) (codified as amended at 18 U.S.C. §§ 1956-1957).

originally conceived as anti-drug legislation,¹⁶⁰ prosecutors typically rely upon its broad language and accompanying penalties to impose criminal liability on a variety of non-drug related wrongdoers (including white collar criminals).¹⁶¹ Section 981 authorizes the civil asset forfeiture of property (real or personal) involved in, or traceable to, violations of the federal money laundering statutes,¹⁶² among others, while section 982 authorizes the criminal asset forfeiture of property (real or personal) involved in, or traceable to, a money laundering offense.¹⁶³

More recently, Congress employed the asset forfeiture sanction in response to the wave of insider trading scandals that marred Wall Street during the 1980s, as well as the savings and loan debacle of the 1980s and 90s. In each case, Congress enacted specific legislation designed to remove the economic motives of corporate insiders and bank fiduciaries who misuse, or foster the misuse of, their trusted positions for illegal gains. Congress adopted the Financial Institutions Reform, Recovery, and Enforcement Act (hereinafter "FIRREA")¹⁶⁴ in an effort to combat future savings and loan scandals. Viewing banking crimes as grave, Congress enhanced the existing criminal penalties to make those assets involved in, or traceable to, violations of banking crime statutes subject to both criminal and civil forfeitures, rather than only increasing the potential terms of imprisonment.¹⁶⁵ Not only did it amend sections 981 and 982 to require asset forfeitures by violators of the bank fraud and other banking crime statutes, but Congress also made bank fraud a predicate offense under the federal

160. The Money Laundering Control Act is a subset of the Anti-Drug Legislations of 1986. Senator Joseph Biden (D-Del), upon introducing a bill (S. 2683) which through subsequent amendments became law, noted, "Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking [who] need money laundering to conceal the billions of dollars in cash generated annually in drug sales" S. 2682, 99th Cong., 132 CONG. REC. 17571-72 (1986).

161. See 18 U.S.C. § 1956(a)(1)-(2), (c)(7)(A). See also 18 U.S.C. §§ 981-982.

162. 18 U.S.C. § 981(a)(1)(A), (a)(1)(C).

163. See 18 U.S.C. § 982(a)(1).

164. Financial Institutions Reform, Recovery, and Enforcement Act (hereinafter "FIRREA"), Pub. L. No. 101-73, § 963, 103 Stat. 183 (1989). FIRREA is directed towards bank bribery, embezzlement, false statements, mail and wire fraud in connection with banks and savings and loan institutions. Congress also enacted the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, as part of the Crime Control Act. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).

165. See FIRREA § 963 (codified at 18 U.S.C. §§ 981, 982(a)(3)-(4)). These amendments provided for direct criminal forfeiture of proceeds. However, these provisions are limited to cases involving specified crimes that affect financial institutions.

racketeering statute (“RICO”),¹⁶⁶ thus ensuring that asset forfeiture would be ordered for convicted wrongdoers.

This approach had been similarly employed years earlier when Congress sought to combat rampant insider trading on Wall Street. At the time, it enacted the Insider Trading Sanctions Act (“ITSA”)¹⁶⁷ and the Insider Trading and Securities Fraud Enforcement Act (“IT-SFEA”)¹⁶⁸ to combat the abuse of trust by insiders. Again, Congress targeted their economic motives and authorized the recovery of treble damages for profits gained and losses avoided.¹⁶⁹ In other words, violators were made to disgorge (as a monetary penalty) treble profits unlawfully gained, or those losses avoided by wrongdoers who traded while in possession of material nonpublic information obtained in breach of a fiduciary duty. As the aforementioned illustrates, Congress’ failure to enact asset forfeiture legislation following the wave of corporate accounting frauds that occurred earlier this century is a striking departure from its past responses to criminal wrongdoing.

B. *Procedural Requirements*

The government can maintain only two types of asset forfeiture actions. The first, a civil asset forfeiture action, is an *in rem* action where jurisdiction is found not over a specific individual but over the property, based on the legal fiction that the property is guilty of wrongdoing. In this instance, the property becomes a party to the litigation. The other type is the criminal forfeiture action which is an *in personam* action, meaning that such an action requires the property owner’s conviction before the government can proceed against that person’s property. Civil and criminal asset forfeiture also differ in three other key respects: (1) the point in the proceeding at which the property may be seized; (2) the burden of proof necessary to confiscate property; and (3) the type of property interests that can be forfeited.¹⁷⁰

166. See 18 U.S.C. § 1961(1). See also FIRREA § 968, 103 Stat. at 506.

167. Pub. L. No. 98-376, 98 Stat. 1264 (1984).

168. Pub. L. No. 100-704, 102 Stat. 4677 (1988).

169. See Securities Exchange Act of 1934, 15 U.S.C. § 78u-1 (2007).

170. For a detailed discussion of asset forfeiture, see DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS*, (ABA Publishing) (2004). See also Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241 (1994).

1. Civil Asset Forfeiture Actions

The passage of the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”),¹⁷¹ while expanding the number of federal statutes under which the government can seek civil asset forfeiture,¹⁷² also significantly limited the government’s ability to obtain asset forfeiture.¹⁷³ Civil asset forfeiture actions nevertheless offer the government greater flexibility in obtaining the so-called tainted property than would criminal forfeiture actions, which first require the defendant owner’s conviction. In other words, civil asset forfeiture can be used as a pre-indictment tool. The civil action also can be effected through either a judicial or an administrative proceeding. The forfeited property is subject to seizure pursuant to a warrant secured through the same process required for the issuance of a search warrant under Rule 41 of the Federal Rules of Criminal Procedure.¹⁷⁴ The property can be seized without even charging the owner with wrongdoing.

The burden of proof necessary to obtain the forfeiture order is also lower since the government need only prove by a preponderance of evidence that the property, or its proceeds, has been used in criminal activity.¹⁷⁵ The Government also may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture, thus negating the dismissal of any civil forfeiture complaint because the government lacked sufficient evidence of forfeitability at the time of filing.¹⁷⁶ If the Government’s theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.¹⁷⁷

171. 106 Pub. L. No. 185, 114 Stat. 202 (2000).

172. *See e.g.*, 18 U.S.C. § 981(a)(1)(C); *see also* 28 U.S.C. § 2461(c).

173. For example, CAFRA added Section 983 to Chapter 46 of Title 18 of the United States Code, which shifted the burden of proof to the government in any “action brought under any civil forfeiture statute for the civil forfeiture of any property.” 18 U.S.C. § 983(c). The government must establish by a preponderance of evidence, that the property is subject to forfeiture. *Id.* CAFRA also codifies an innocent owner defense, with the claimant bearing the burden of proof, in civil asset forfeiture matters. 18 U.S.C. § 983(d). *See discussion infra.*

174. *See* 18 U.S.C. § 981(b)(3).

175. 18 U.S.C. § 983(c)(1). *See also* *United States v. Lopez-Burgos*, 435 F.3d 1 (1st Cir. 2006) (observing that CAFRA added 18 U.S.C. § 983(c)(1) to increase “the government’s burden of proof at trial from mere probable cause (the old standard) to the preponderance of the evidence . . .”).

176. *See* 18 U.S.C. § 983(a)(3)(D); *see also* 18 U.S.C. § 983(c)(2).

177. 18 U.S.C. § 983(c)(3).

Once established, the burden shifts to the party seeking to retain the property to prove – by a preponderance of evidence – that the property is not subject to forfeiture.¹⁷⁸ The government is given either actual or constructive possession of the property and retains custody of that property pending resolution of the litigation once a civil asset forfeiture order is obtained. Moreover, the “relation back” doctrine allows the government’s right of forfeiture to vest as of the time of the illegal activity, rather than at the time that the government initiates or prevails on the forfeiture action.¹⁷⁹

2. Criminal Asset Forfeiture Actions

Criminal asset forfeitures may be effected only through a judicial process. As such, the criminal forfeiture action is a more limited prosecutorial weapon. Property subject to a criminal forfeiture action must be set forth in the same indictment or information that charges the defendant with the underlying wrongdoing. The court’s jurisdiction over the defendant provides the court with jurisdiction over his property.¹⁸⁰ The government must meet the legal standard of proof necessary to convict the defendant, and then show by a preponderance of evidence that the property was involved in, or traceable to, the criminal activity before a criminal forfeiture order is granted.¹⁸¹

Prosecutors can seek criminal forfeiture of all property traceable directly or indirectly to the illegal activity, including all interest, dividends, income or property derived from the original illegal transaction, including the appreciated value of the property.¹⁸² Thus, no matter how many times the property changes form (e.g., from cash to real estate to artwork to cash), it still will be subject to forfeiture. The government, of course, bears burden of proof in tracing the forfeited funds.¹⁸³ The criminal forfeiture order also may be entered as a

178. The claimant can seek to prove that he or she is an “innocent owner” by a preponderance of evidence. 18 U.S.C. § 983(d)(1).

179. See 18 U.S.C. § 981(f). The relation back doctrine provides that property subject to forfeiture vests in the government at the time of the felonious act giving rise to forfeiture.

180. Unlike civil forfeiture orders that focus on particular property (without regard to ownership), criminal forfeiture orders may be directed against all property held by the convicted offender that is connected to the wrongdoing.

181. See *United States v. Voigt*, 89 F.3d 1050, 1083 (3d Cir. 1996); *United States v. Upton*, 352 F. Supp. 2d 92, 99 (D. Mass. 2005)

182. 18 U.S.C. § 982(a)(1).

183. *United States v. Voigt*, 89 F.3d 1050, 1087 (3d Cir. 1996), *United States v. Day*, 416 F. Supp. 2d 79, 89-91 (D. D.C. 2006).

money judgment, directly against the defendant's assets when the original forfeited property cannot be located.¹⁸⁴

The procedure for obtaining criminal forfeitures under section 982 is governed by the rules set forth in 21 U.S.C. § 853.¹⁸⁵ Section 853 also allows federal courts, upon application of the United States, to enter a restraining order or injunction or take other action to preserve the availability of property for forfeiture.¹⁸⁶ Such an order can be entered, for cause shown and with certain limits, both before and after an indictment or information has been filed. If a restraining order "may not be sufficient to assure the availability of the property for forfeiture," the court may, if requested, issue a warrant authorizing the seizure of the property.¹⁸⁷

Once the conviction has been entered, the district court shall issue a seizure order as warranted.¹⁸⁸ It is the jury's responsibility (generally in a bifurcated proceeding and by special verdict form) to determine whether each specific asset was in fact connected to the criminal violation.¹⁸⁹ A separate proceeding must be held to determine the rights of third parties since the forfeiture adjudicates only the interest of the person convicted.¹⁹⁰

C. *Asset Forfeiture Criticisms – Generally*

Much of the criticisms of forfeiture actions stem from the government's use of civil asset forfeitures; many argue that forfeitures are a draconian form of punishment that hurt innocent parties and that its use is subject to abuse.¹⁹¹ The chief criticisms relate to concerns about the Fifth and Fourteenth Amendments' notice and due process re-

184. See *United States v. Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999); *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996). Substitute property may be forfeited in lieu of traceable property if the government meets the requisites of 21 U.S.C. § 853(p).

185. See 18 U.S.C. § 982(b)(1), which provides that "[t]he forfeiture of property under this section . . . shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853)."

186. See 21 U.S.C. § 853(e).

187. *Id.*

188. Forfeiture orders are imposed in addition to fines and incarceration.

189. See Fed. R. Crim. P. 32.2(b).

190. See Fed. R. Crim. P. 32.2(b)(3). Any party who claims to have an interest in the property subject to forfeiture is not permitted to intervene in the action, or initiate proceedings against the United States. 18 U.S.C. § 982(b)(1).

191. See generally Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241 (1994); David Benjamin Ross, *Civil Forfeiture: A Fiction that Offends Due Process*, 13 REGENT U. L. REV. 259 (2001); Barclay Thomas Johnson, *Restoring Civility – The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045 (2002).

quirements, the Sixth Amendment's right to counsel privilege, and the Eighth Amendment's bar against excessive punishments. The Supreme Court's decisions in this area, as well as the CAFRA amendments have rendered many of the constitutional and procedural concerns moot.

The Supreme Court dealt with the Eighth Amendment¹⁹² concerns in the 1993 case of *Alexander v. United States*¹⁹³ when it concluded that criminal forfeiture under RICO section 1963 is no different than a traditional fine and is therefore subject to the Eighth Amendment Excessive Fine Clause. Five years later, in *United States v. Bajakajian* the Court held that criminal forfeitures under section 982 also were subject to the Excessive Fine Clause.¹⁹⁴ In *Bajakajian*, the government sought forfeiture under 18 U.S.C. § 982 of the entire \$357,144 exported by a defendant who failed to declare that he was leaving the country with more than \$10,000 in cash.¹⁹⁵ Despite analyzing the forfeiture order on the theory of proportionality – the “forfeiture must bear some relationship to the gravity of the offense that it is designed to punish”¹⁹⁶ – the Court limited the forfeiture order, finding that a punitive forfeiture would be unconstitutional if the forfeiture is “grossly disproportional to the gravity of a defendant’s offense.”¹⁹⁷

In any event, the application of forfeiture orders in high-dollar, multiple victim, white-collar fraud cases rarely should raise concerns as such forfeiture will usually be deemed proportional.¹⁹⁸ Moreover, numerous safeguards have been enacted with the passage of

192. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

193. 509 U.S. 544 (1993).

194. See *United States v. Bajakajian*, 524 U.S. 321 (1998). The Court determined that a fine is a “payment to a sovereign as punishment for some offense,” and that forfeitures (as payments in kind) are fines if they are imposed as punishment for the offense. *Id.* at 327-28. It concluded that the forfeitures were considered to be fines within the meaning of the Excessive Fines Clause. *Id.* at 328.

195. *Id.* at 324.

196. See *Bajakajian*, 524 U.S. at 334.

197. *Id.* The Court held that the “full forfeiture of respondent’s currency would violate the Excessive Fine Clause.”

198. In other words, proceeds forfeitures should not be deemed excessive since they are remedial; the government merely seeks to take away the illicit profits from the defendant that he had no legal right to possess. See, e.g., *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001); *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 874-75 (9th Cir. 2001). Cf. *United States v. Halper*, 490 U.S. 435 (1989) (Such actions can raise Double Jeopardy concerns where the defendant was charged in a related civil action after he was convicted of Medicare fraud, sentenced to prison and fined. In that case, the court held that the civil action is punishment if it can only be explained as also serving either retributive or deterrent purposes (rather than being merely remedial). *But see* Double Jeopardy discussion *infra*.)

CAFRA,¹⁹⁹ which provides procedures that courts must follow in determining whether the forfeiture is constitutionally excessive.²⁰⁰

Civil asset forfeiture orders also are similarly subject to the Eighth Amendment Excessive Fine Clause.²⁰¹ The Court in *Austin* noted that civil forfeitures are partly designed to punish, as they are “payment to a sovereign as punishment for some offense. . .,”²⁰² but chose not to set forth a standard for determining when the punishment was excessive, stating instead that “[p]rudence dictates that we allow lower courts to consider the question in the first instance.”²⁰³

The Fifth Amendment Double Jeopardy²⁰⁴ argument also should be inapplicable to civil forfeitures. In *United States v. User*,²⁰⁵ the Supreme Court held that civil forfeitures do not constitute “punishment” for purposes of the Double Jeopardy clause,²⁰⁶ without regard to whether the forfeiture is disproportionate to the harm suffered by the government.²⁰⁷ The Court noted that such orders serve a non-punitive function of disgorgement.²⁰⁸

Defendants have also argued that forfeiture orders also violate their Sixth Amendment right to counsel because such orders disadvantage the defendants who were unable to retain effective counsel as a result of the freeze of their assets. They assert that attorneys will not take cases knowing that their legal fees may be forfeitable, thereby causing such criminal defendants to rely on court-appointed counsel.²⁰⁹ One could further argue that claimants (including innocent third parties) were similarly affected since they could obtain appointed counsel in civil forfeiture actions only under limited circumstances.²¹⁰

199. 106 Pub. L. No. 185, 114 Stat. 202, 209-10.

200. See 18 U.S.C. § 983(g)(1).

201. See *Austin v. United States*, 509 U.S. 602 (1993).

202. *Id.* at 622. Specifically, the Court held that “forfeiture generally and statutory in rem forfeiture in particular, historically have been understood, at least in part, as punishment.” *Id.* at 618.

203. *Id.* at 622-23. (Scalia, J., concurring) (explaining the test of excessiveness should focus “not [on] how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.”) *Id.* at 628 (emphasis omitted).

204. The Double Jeopardy Clause prevents multiple punishments for the same offense. U.S. CONST. amend V.

205. 518 U.S. 267 (1996).

206. *Id.* at 292.

207. *Id.* at 274.

208. *Id.* at 284.

209. See generally Peter J. Henning, *The Conundrum Of Corporate Criminal Liability: Seeking A Consistent Approach To The Constitutional Rights Of Corporations In Criminal Prosecutions*, 63 Tenn. L. Rev. 793, 881-885 (1996).

210. See generally Nancy J. King, *Portioning Punishment: Constitutional Limits On Successive And Excessive Penalties*, 144 U. Pa. L. Rev. 101, 162-63, n. 188(1995)

However, the Court has held – in both *Caplin & Drysdale, Chartered*²¹¹ and *Monsanto*²¹² – that the defendants had no right to hire counsel using monies that the government has claimed forfeited. In *Caplin & Drysdale*, the Court, applying Congress’ relation-back doctrine, held that “[a]ll right, title and interest in property’ obtained by criminals via the illicit means described in the statute ‘vests in the United States upon the commission of the act giving rise to the forfeiture.’”²¹³ The defendant, therefore, could not use property belonging to the government for the purpose of hiring counsel.²¹⁴ Similarly, in *Monsanto*, the Court held that “neither the Fifth nor the Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant’s legal fees.”²¹⁵

Moreover, any claimant must be appointed counsel, at the government’s expense, if a civil forfeiture claimant is financially unable to obtain independent counsel, and is also being represented by appointed counsel in a related criminal case.²¹⁶ Appointed counsel also is authorized if (i) the claimant has standing to challenge the forfeiture; (ii) the claimant is financially unable to obtain counsel; (iii) the claimant requests counsel; and (iv) the forfeiture action concerns real property used as the claimant’s primary residence.²¹⁷

Finally, critics have assailed civil forfeiture orders because they violate constitutional notice and due process protections.²¹⁸ In a leading civil forfeiture case, *Calero-Toledo v. Pearson Yacht Leasing Co.*,²¹⁹ the Supreme Court in 1974 held that the government may seize property for forfeiture without providing notice and a hearing when “extraordinary” circumstances exist.²²⁰ The property in question, a yacht, was properly seized even though no prior notice or hearing had been provided because a yacht can easily be destroyed, concealed, or moved beyond the jurisdiction of the court if the government is re-

211. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

212. *United States v. Monsanto*, 491 U.S. 600 (1989).

213. *Caplin & Drysdale, Chartered*, 491 U.S. at 627 (citing 21 U.S.C. § 853(c)).

214. *Id.* at 628.

215. *Monsanto*, 491 U.S. at 614.

216. 18 U.S.C. § 983(b)(1)(A) (this remedy is provided by CAFRA).

217. 18 U.S.C. § 983(b)(2)(A) (this remedy is provided by CAFRA).

218. The Fifth and Fourteenth Amendments provide that the government may not deprive a person of life, liberty, or property without due process of the law. In other words, a person has the right to reasonable notice and an opportunity to contest forfeiture proceedings convened to deprive him or her of his or her property rights. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

219. 416 U.S. 663 (1974).

220. *Id.* at 678-79.

quired to give advanced warning.²²¹ Accordingly, the government's failure to provide notice and hearing prior to seizure did not constitute a denial of due process.²²²

On the other hand, the Court has also held that the seizure of real property for forfeiture without prior notice, absent exigent circumstances, does violate the Due Process Clause because such property is incapable of movement and the court's jurisdiction can be preserved without prior seizure.²²³ Exigent circumstances, however, could be established only by showing that "less restrictive measures, i.e., *lis pendens*, restraining order, or a bond, would not protect the government's interest in preventing the sale, destruction, or continued unlawful use of the real property."²²⁴ While the Court in *United States v. Monsanto* declined to decide whether a hearing is required under the Due Process Clause before a court may impose such an order in the case of a post-indictment, pre-trial criminal forfeiture restraining order,²²⁵ CAFRA again provides that the government must initiate non-judicial forfeiture actions "as soon as practicable" and no more than 60 days from the date of seizure.²²⁶

While concerns may remain about a defendant or other claimant's property rights, CAFRA and Court precedents have attempted to lessen the harms caused. Reliance on the criminal forfeiture statute, of course, will also minimize the chances for abuse and corruption given the requirement of a defendant's conviction prior to any forfeiture action. Nevertheless, significant concerns will remain about giving prosecutors additional weapons, which have the potential for abuse, even if those weapons will be used to combat corporate fraud.²²⁷

221. *Id.*

222. *Id.* at 681.

223. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 57-59 (1993).

224. *Id.* at 62.

225. 491 U.S. 600, 615 n.10 (1989).

226. See 18 U.S.C. § 983(a)(1)(A). Further, cases must be filed within the applicable statute of limitations – i.e., five years from discovery of the offense or two years from the discovery of the involvement of the property in the offense. 19 U.S.C. § 1621.

227. For a discussion of those significant concerns surrounding prosecutorial discretion, the enforcement of criminal laws affecting white collar criminals, lack of accountability and the abuse of power, see Ellen S. Podgor, *Making 'Materiality' an Element of Obstruction of Justice*, 29 CHAMPION 26 (2005) (observing how a charge of obstruction of justice under 18 U.S.C. § 1512 has the potential to be abused by prosecutors who are unable to prove the underlying more serious charge, and suggesting that "incorporating materiality as an element in obstruction statutes limits prosecutorial discretion to using these charges in instances when it is material to the investigation, but precluding its use when it would be inconsequential"); Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should be Charged with Criminal Conduct?*, 109 PENN ST. L. REV. 1059 (2005) (observing how the prosecutors liberally charge "cover up" crimes, rather than

VI. THE DETERRENT IMPACT OF ASSET FORFEITURE

Although couched in terms of “sentencing,” according to the federal statute, there are four main goals of punishment:

- (A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense [a retributive purpose];
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”²²⁸

Most legislators, however, view punishment solely in terms of fostering deterrence, and satiating society’s need for retribution. These now dominant theories of punishment can be briefly described as follows: The theory of general deterrence operates on the assumption that if society punishes offenders who violate the law, others will not violate the law because they do not wish to be punished.²²⁹ The retributive theory of punishment, in contrast, focuses on making the offender pay for breaching society’s peace. Here, sanctions are imposed because it is morally fitting that a person who does wrong will suffer in proportion to his wrongdoing.²³⁰

Congress apparently believed that exposure to higher fines and increased terms of imprisonment would likely deter future violative behavior and adequately punish corporate fraudsters when it enacted the enhanced criminal penalties. Potentially high fines and lengthy prison sentences alone, as will be demonstrated, may neither deter

proceeding against the more serious and harder to prove underlying conduct); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons From Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165 (2004) (noting that with the increase of prosecutorial power to engage in inquisitorial investigate and enter into non-adversarial plea bargains limits effective deterrence for it fails to “enunciate a standard and produces inconsistent sentences”); Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591 (2006) (uses the Martha Stewart case to raise issues concerning, inter alia, the vagueness of criminal statutes, the merger of civil and criminal standards, and the various sentencing policies.), Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999) (discussing instances of governmental malfeasance with limited judicial review).

228. 18 U.S.C. § 3553(a)(2).

229. See Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 409 (2003).

230. See WAYNE R. LAFAVE, *CRIMINAL LAW* 26 (West 3d ed.) (2000) (observing that under this theory, also called revenge or retaliation, punishment is inflicted by society on criminals in order to obtain revenge because it is only fitting and just that one who has caused harm to others should himself suffer for it). See also Stephen A. Saltzburg, *The Control of Criminal Conduct*, 71 B.U. L. REV. 421, 430 (1991).

these particular offenders, nor sufficiently punish them given the exponential payout such frauds provide.

A. *Why Threats of Imprisonment May Not be Enough*

While the threat of imprisonment may work to deter some potential wrongdoers from unlawful acts, the prevailing crime and punishment literature casts doubt on the effectiveness of reliance on increased terms of imprisonment alone.²³¹ At best, there is only lukewarm support for that position. Indeed, empirical research regarding deterrence of white collar offenders is generally inconclusive.²³²

Society nevertheless continues to favor incarceration as the principal means to punish numerous categories of wrongdoers despite adequate evidence of its impact. Supporters of an economic approach to punishment, however, generally oppose incarcerating white-collar criminals, arguing instead that analyzing the societal cost-benefit of fining versus imprisonment would lead one to favor fining.²³³ These

231. The debates on the punishment of criminals generally and the relative merits of imposing fines versus incarceration as effective criminal sanctions for white collar offenders (in particular), including the impact of their respective severity, has been on-going for almost thirty years. See generally Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. OF LEGAL STUD. 173, 185-93 (2004); Elizabeth Szockyj, *Imprisoning White collar Criminals?* 23 S. ILL. U. L.J. 485, 492 and 495-96 (1999) (citing William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703 (1967); John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 422 (1980) (arguing the threat of incarceration typically will have a greater deterrent value than the threat of fine; more deterrence is generated by penalties focuses on an individual than on an organization; and the certainty of a sanction is more important than the severity); Richard A. Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409, 409-414, 417-18 (1980) (arguing the application of the economic analysis of crime, pioneered by Gary Becker, requires that white collar criminals be punished only by monetary penalties (i.e., fines) rather than by imprisonment); Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

232. See Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 414-15 (2003) (observing that the creation of an empirical study to measure the effect of deterrence or to determine optimal sanctions is near impossible because the target group – people who decide not to engage in criminal conduct – ordinarily do not announce such decisions thus allowing for the gathering of empirical evidence). See also Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. OF LEGAL STUD. 173, 182-85, 189 (2004); Coffee, *supra* note 231, at 425.

233. The economic theory for optimal use of punishment was introduced by Gary Becker at the University of Chicago, who argued for a cost minimization model which takes into account: (1) the social costs that result from illegal conduct; (2) the punishment costs associated with the imposition of sanctions on the wrongdoer; and (3) the transactional cost of judicial administration – i.e., the cost of apprehending and punishing the offenders. See Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker argues that the use of fines as punishment minimizes the social loss resulting from the crime. See also Posner, *supra* note 231, at 410 and 417.

“optimal use” theorists maintain that even if there is, in fact, an optimal term of imprisonment that will engender the desired deterrent effect – because of the brutality of the guards and other inmates, or the accompanying stigmatic impact, or incarceration’s interference with an individual’s sense of freedom – there still exists some monetary equivalent that takes into account all of the factors that can make imprisonment a source of disutility.²³⁴ Proponents further argue that where society stands to benefit from two alternatives, society should opt for the alternative that is the least costly.²³⁵ Stated simply, they believe that fining white collar offenders is a better use of societal resources than is incarceration.²³⁶ The optimal fine, it is argued, should be determined by analyzing the economic harm caused by the wrongdoing, multiplied by a factor which reflects the likelihood of capture, plus the cost of investigating and prosecuting the individual.²³⁷ The greater one’s income, the greater the cost of imprisonment in terms of lost earnings to society.²³⁸ To be effective, of course, these fines should exceed the profit made in the crime, and there must be a high collection rate for them.²³⁹

It goes without saying that there is great resistance to the general notion of fining wrongdoers as a substitute for imprisonment.²⁴⁰

234. See Posner, *supra* note 231, at 414 (observing that “[i]f it is true, for whatever reason, that imprisonment is unpleasant relative to fines . . . this simply affects the exchange rate between dollars of fine and days of imprisonment and not the choice of which method of punishment to use. If we think that the term of imprisonment for a crime provides the correct amount of deterrence, then in computing the fine equivalent we will want to be sure that we take account of all of the factors that make imprisonment a source of disutility. The fine equivalent is still the cheaper punishment methods, however, as long as the fine can be collected from the offender”).

235. *Id.* (arguing that where an equal measure of deterrence can be derived from imposing optimal fines as incarceration, imposing the optimal fine is a more efficient use of societies resources, particularly where society’s cost of incarcerating the criminal is great).

236. *Id.* at 410-12 (arguing that the cost of collecting a fine from one who can pay it is lower than the cost to society of imprisoning the offender. . . . Hence “fining the affluent offender is preferable to imprisoning him from society’s standpoint because it is less costly and no less efficacious”).

237. *Id.* at 410-11; Steven Shavell, *A Note on Marginal Deterrence*, 12 INT’L REV. L. & ECON. 345, 345 (1992).

238. See Posner, *supra* note 231, at 410.

239. Posner, *supra* note 231, at 410 (noting that the “fine for a white collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would be imposed instead”).

240. See e.g., Coffee, Jr., *supra* note 231, at 419; Jennifer S. Recine, *Examination of the White Collar Crime Penalty Enhancements in Sarbanes-Oxley Act*, 39 AM. CRIM. L. REV. 1535, 1566 (2002) (observing that “some effects inherent in the psychological aspects of incarceration simply cannot be achieved through levying fines”); Dan M. Kahan, & Eric A. Posner, *Shamane White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. L. & ECON. 365, 371 (1999) (suggesting that white-collar criminals who were subject to fines (which may require selling everything), still will be able to obtain and spend some money before the state finds out – either by hiding income, or working illegally).

Commentators note that the threat of imprisonment is inherently better than fining because the so-called “optimal fine” may exceed the offender’s ability to pay; the threat of imprisonment still must exist in order to motivate the offender to pay the fine; courts are not properly equipped to determine the trade-offs and would waste considerable time and resources in making such an attempt; reliance on fines would have a discriminatory effect on the poor; and offenders are “risk preferrers” with regard to imprisonment even if they are “risk averters” with regard to fines.²⁴¹

Of the many arguments against fining as a sufficient means of deterring white collar criminals, including that the optimal fine may exceed the offender’s ability to pay,²⁴² the argument that “the deterrent threat of the law comes not from the specific sanction that the court imposes . . . but from the range of possible penalties it could impose” has the most merit.²⁴³ The potential offender’s attitude towards risk will differ according to the *types* of sanctions that *could* be employed, thereby implicating differing levels of marginal disutility. If an offender, therefore, is forced to consider a range of penalties that include both probable imprisonment and something else,²⁴⁴ such as the sanction of asset forfeiture (which not only reaches the unlawful proceeds of the criminal action, but also those assets flowing therefrom), there might be a greater deterrent impact from the imposed punishment. Moreover, the additional forfeiture penalty has an added benefit because it also uniquely offers the possibility of victim compensation.²⁴⁵

Reliance on incarceration alone to deter corporate wrongdoers also is risky because that reliance may be grounded on some faulty assumptions about prison’s impact on white collar offenders. Notwithstanding some disparate impact on white collar offenders (who typically are unaccustomed to the deprivation involved), scholars acknowledge that the punitive value of imprisonment is “front

241. See Coffee, Jr., *supra* note 231, at 419. To determine whether a particular outcome will be selected by a rational actor, one must first determine whether the actor is a “risk averter” or a “risk preferrer.” A risk preferrer will place greater value on the upside chance of additional gain than the downside chance of additional loss; and vice versa for the risk averter. In general, most economists would generally agree that individuals tend to be risk averters. *Id.* at 429-30.

242. *Id.* at 436-39 (arguing that the “collectability boundary” shields wealth and weakens the deterrent impact).

243. *Id.* at 428.

244. The “something else” must be more than the recently-enacted higher fines, which may not sufficiently punish corporate fraudsters. In many instances, the payout from their frauds overshadows even the highest fines imposed.

245. See discussion *infra*.

loaded.”²⁴⁶ That is, if one is to lose his freedom, he will prefer to lose his freedom in the future, and if he must lose his freedom over a significant period of time, the years closest to the present will be the most burdensome.²⁴⁷ The marginal utility of imprisonment therefore diminishes with time spent in prison.²⁴⁸ A ten-year sentence is not ten times more punitive than a one-year sentence.²⁴⁹ The defendant simply adjusts to his or her circumstances after the initial shock wears off.²⁵⁰ Moreover, white collar criminals are more likely to be treated gently by prison officials since they tend to be “model prisoners,” who act in a more pleasant, and obedient manner than other prisoners.²⁵¹

Similarly, although white collar prosecutions generate significant media attention, allowing judges and prosecutors to utilize the media scrutiny to relay a message of shame to the targeted audience so as to discourage others from committing similar offenses,²⁵² the stigma of shame (if it exists at all), and any corresponding reputational loss, also eventually wears off for the offender, or is forgotten by the public.²⁵³

246. See e.g., Coffee, Jr., *supra* note 231, at 432; Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 496 (1999); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. OF LEGAL STUD. 173, 190 (2004).

247. Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable By Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975).

248. See Coffee, Jr., *supra* note 231, at 431 (noting that “[i]n the case of incarceration . . . the declining marginal utility of imprisonment means that each increment of incarceration increases the perceived penalty by a less than proportionate amount.”). See also A. Mitchell Polinsky and Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999) (explaining that the cost of imprisonment to the offender declines over time.); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. OF LEGAL STUD. 173, 189-190 (2004) (observing that each additional unit of prison time will have a near constant cost, but the punitive bite of each unit will become increasingly less.).

249. See *id.*

250. Coffee, *supra* note 231, at 432 (observing that “the psychic injury that accompanies [the] sudden powerlessness can be unacceptable [and even if] the initial socialization to prison is brutal and demeaning, . . . human beings can adapt and endure.”).

251. See TAMAR FRANKEL, *TRUST AND HONESTY* 173 (2006).

252. See Elizabeth Szockyj, *supra* note 231, at 492. See also Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959 (1999).

253. Jack Grubman, for example, is still in demand – or at least his list of contacts. He was once Wall Street’s top telecom analyst but was banned from the securities industry for life. Nevertheless, companies are still looking to hire him. According to one CEO, “I know his whole background, but that’s not enough to keep me from hiring him. . . . This is the kind of business where connections and introductions are the difference between success and failure.” Janet Guyon, *Jack Grubman is Back. Just Ask Him*, FORTUNE, May 16, 2005. See also Randall Smith and Susan Pulliam, *Grubman Still Rates Himself “Buy,”* WALL ST. J., April 2, 2003. Similarly, Michael Milken, the former Drexel junk bond king who plead guilty to six felonies in 1990, served time in prison, and was barred for life from the securities industry, has re-emerged as a deal-maker – all despite being sanctioned by the SEC again in 1998 for allegedly violating the ban. Randall Smith and Susan Pulliam, *Grubman Still Rates Himself “Buy,”* WALL ST. J., April

Focusing entirely on one aspect of punishment therefore may be misplaced. Effective deterrence inevitably comes from the overall criminal process itself – i.e., the charge, trial, conviction, and sentencing, with the actual term of incarceration adding proportionately little.²⁵⁴ Whatever incremental deterrence that may occur will be produced before the imprisonment sanction is imposed.²⁵⁵ Indeed, most students of the criminal process locate the source of the stigma in the fact of conviction rather than in the form of sentence.²⁵⁶ Nevertheless, until detection, apprehension, and prosecution methods are modified with respect to all corporate offenders, the punishment prong – standing alone – must be of the sort to increase the deterrent effect.

B. *Why Asset Forfeiture Makes Particular Sense in Cases of Fraud*

Deterrent-based punishment rests on the economic principle that individuals will engage in utility-maximizing behavior.²⁵⁷ In other words, the rational-choice model of human behavior suggests that individuals “can perfectly process available information about alternative courses of action . . . can rank possible outcomes of expected utility [and can] choose the course of action that will maximize [their] personal expected utility.”²⁵⁸ When applied to criminal law, this model requires potential offenders to weigh the risk of detection, apprehension, and the severity of punishment against any benefits that

2, 2003. Today, Milken is a noted philanthropic who seeking to increase funding for cancer research, using his foundation the Prostate Cancer Foundation, which has raised more than \$210 million from 1993 -2003. Cora Daniels, *The Man Who Changed Medicine*, FORTUNE, Nov. 29, 2004.

254. See generally Szockyj, *supra* note 231, at 495.

255. See Elizabeth Szockyj, *Imprisoning White-Collar Criminals?* 23 S. ILL. U. L.J. 485, 495 (1999). See also Michael K. Block and Robert C. Lind, *An Economic Analysis of Crimes Punishable By Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975) (observing that “[t]his is partly because one adjusts to prison life . . .”).

256. See Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 416-17 (1980).

257. See generally Coffee, *supra* note 231, at 419 (arguing that economists “have begun to analyze aspects of human behavior not characterized by market transactions. In so doing, economists have applied their central premise that individuals engage in utility-maximizing behavior to such diverse fields as family planning, political participation, altruism, and crime.” (citations omitted)).

258. Robert C. Ellickson, *Bringing Culture And Human Frailty To Rational Actors: A Critique Of Classical Law And Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989). See also GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976) (observing “all human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets”).

might result from the purported illegal act.²⁵⁹ Under the circumstances, a rational actor will forgo criminality where the likelihood of apprehension is high, or where the targeted population fears the prospective punishment.²⁶⁰ SarbOx's enhanced criminal penalties were enacted based primarily on the deterrent theory of punishment. In short, the drafters of SarbOx's criminal measures view potential white collar offenders as rational actors, who will undertake the cost-benefit assessments before acting and will decide to forgo the proposed unlawful act in fear of the potential punishment.

The expected penalty must outweigh any benefit to the offender if he is to be deterred. If the benefit is great enough, some actors will be willing to gamble on the outcome. Take for example the payout on which Scott D. Sullivan (WorldCom's CFO) was willing to gamble. During his recent sentencing hearing, U.S. District Court Judge Barbara S. Jones reportedly stated, "In keeping [the WorldCom \$11 billion accounting scheme] going, [Sullivan] was preserving his \$700,000 salary [and] \$10 million bonus and [\$10 million in exercisable] stock options."²⁶¹ While there is no evidence that Sullivan looked at the downside of his involvement in the WorldCom fraud, there are some other potential offenders who can and will reconcile the virtual certainty of spending *some* time in prison (which typically is less in comparison to other criminals and, in any event, rarely the maximum allowable) when caught, against the exponential profit potential from the criminal violation if they have some assurances that their lifestyle upon release will be desirous. To them, the potential incarceration would not diminish the overall benefits obtained through fraud. The prospect of giving up one's freedom without a tangible benefit in the end may change the gambler's odds, however.

All commentators agree that the *certainty* of a sanction is a more important deterrent than is its severity.²⁶² A determinate sentencing

259. See Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 956-59 (2003). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 206 (3d ed. 1986).

260. See Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L. J. 359, 414 (2003); Daniel J. Freed, *Federal Sentencing in the wake of the Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L. J. 1681, 1707 (1992); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 249 (5th ed. 1998).

261. See Jennifer Bayot and Roben Farzad, *WorldCom Executive Sentenced*, N.Y. TIMES, Aug. 12, 2005; Carrie Johnson, *Ex-WorldCom CFO Gets 5-Year Term*, WASH. POST, Aug. 12, 2005.

262. See generally Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice* 1, 30 (2006); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004). See *supra* Part III.C. for a discussion of uncertainty surrounding the imposition of maximum terms of imprisonment.

structure for incarcerative sentences generates more deterrence than an indeterminate one because the former essentially eliminates the gamble the offender wishes to take.²⁶³ Given the variables regarding the imposition of higher fines and lengthier sentences,²⁶⁴ adding a mandatory asset forfeiture sanction to the government's arsenal of criminal sanctions would provide the needed *certainty*, and increase the corresponding deterrent effect.

Having said that, some behavioral economists and psychologists note the limitations of the rational-choice based theory of deterrence. Not all potential offenders are rational actors. Moreover, some potential offenders may engage in imperfect cost-benefit analyses. Individuals differ in their tendencies to be optimistic and confident in their ability to control future events.²⁶⁵ Corporate executives who are overly confident may fail to appreciate the risks that may accompany their actions. Their judgment biases may depend somewhat on their self-esteem, in the sense that those with the highest levels are the most likely to misjudge their control over future events, and even their skill sets.²⁶⁶ As a result, they may assign any resulting success to their inherent skills, while equally assigning failure to just bad luck.²⁶⁷ They may, in other words, persuade themselves that any setback at the company is temporary, so their cover-ups need only work for a while to be successful.²⁶⁸

While potentially lengthy terms of imprisonment alone may not work to deter these particular types of criminal actors, the mandatory asset forfeiture sanction does change the equation if the actor either fails to undertake the cost-benefit analysis altogether, or fails to correctly weigh the equation's multiple prongs. Asset forfeiture becomes a potent weapon, under all of these circumstances. Any purported benefit from the wrongdoing is erased if the offender is caught. The punishment prong is strengthened by this lose-lose proposition. Now,

263. See Coffee, *supra* note 231, at 431.

264. See discussion *supra* Part III.C.

265. See Larry E. Ribstein, *Markets vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 20 (2002) (noting that "there is a large literature on judgment biases that lead at least some people to tend to be more optimistic about the future and more confident in their judgment and ability to control future events, than would an actor who objectively processed the relevant data."). See also Szott Moohr, *supra* note 227, at 958 (2003) ("Biased judgments, over-confidence, and an inflated sense of self-esteem interfere with the capacity to perceive risk."); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competitions: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 969-71 (2002). See also Paul H. Robinson & John Darley, *supra* note 231.

266. Ribstein, *Markets supra* note 265, at 20.

267. See Szott Moohr, *supra* note 227, at 958; Ribstein, *supra* note 265, at 20.

268. Ribstein, *supra* note 265, at 21.

the prospect of giving up one's personal freedom without the ability to return to the lifestyle once led – nor the ability to leave the family in the lifestyle to which they have grown accustomed while the offender is imprisoned – will change the “cost-benefit” equation by heightening the punishment prong.

Increasing the chances of getting caught is obviously better than merely increasing the certainty and severity of punishment. However, since white collar crimes are by definition difficult to detect, and remain more costly and time-consuming both to investigate and prosecute than other crimes, the detection and apprehension prongs of the deterrent equation continually have been devalued by corporate fraudsters. Better detection arguably should now occur in light of the Act's recent transparency provisions, and the SEC's increased budget and staffing.²⁶⁹ But, until the Commission integrates its increased staff and fully engages them into its oversight mission, the focus must continue to be on the punishment prong of the cost-benefit equation. Inserting asset forfeiture into the equation, making it predictable and certain, undoubtedly should significantly strengthen the punishment prong of an individual's cost-benefit calculation and heighten the Act's deterrent effect.

Forfeiture also serves another function: it meets society's retributive goal – which appears to be another aim of SarbOx's criminal measures.²⁷⁰ The retributive notion of punishment reflects the belief that punishment, in whatever form, should be imposed because those who commit crimes choose evil over good and that those offenders, as responsible moral agents, deserve punishment.²⁷¹ Retribution proponents are less concerned with the punishment's deterrent effect. In their view, the purpose of punishment is to demonstrate moral blameworthiness.²⁷²

This so-called “just deserts” rationale connotes that the punishment should reflect the seriousness of the offense, not the characteristics of the offender.²⁷³ Critics of the retributive theory, of course, object to its ethical or moral basis for punishment because that theory ignores “physiological, psychological, environmental, cultural, educational, ec-

269. Between fiscal year 2002 and 2004, the SEC hired more than 1,000 new employees. SEC, 2005 Performance and Accountability Report 2 (2005), available at <http://www.sec.gov/about/secpar2005.shtml>. The SEC also met its Sarbanes-Oxley requirement to review at least once every three years the financial statements of each reporting company and investment company issuer; reviewing over 6,000 reporting companies in fiscal year 2005. *Id.* at 11.

270. See Transcript of Conference Report on H.R. 3763, *supra* note 87.

271. Ramirez, *supra* note 260, at 409.

272. Saltzburg, *supra* note 230, at 430.

273. See WAYNE R. LAFAVE, CRIMINAL LAW 26 (3d ed. 2000).

onomic, and hereditary factors” that may affect one’s conduct.²⁷⁴ These objections should disappear when dealing with corporate offenders. These white-collar offenders are particularly well-suited for retributive sanctions because they have breached their agreement with society; they were let into society’s personal or financial affairs based upon the fiduciaries’ projected façade of respectability and trustworthiness only to betray that trust.²⁷⁵ Asset forfeiture would reach the “spoils” of their illegal acts, and strike at the heart of the criminals’ economic motive for misusing their corporate status.

It is for all of these reasons that I propose that Congress enact specific forfeiture legislation that is directed towards violations of the securities fraud statute.²⁷⁶ Such a provision would require the forfeiture of all assets traceable to the corporate actor’s fraud. Specifically, I propose amending or expanding the scope of 18 U.S.C. § 982(a) to include a provision that reads:

The court, in imposing sentence on a person convicted of an offense in violation of section 1348 of this title, shall order that the person forfeit to the United States any property, real or personal, which constitutes or is traceable to the proceeds obtained, directly or indirectly, as a result of such violation.²⁷⁷

Although not required by law, once the forfeited assets have been obtained by the government, those funds should be placed in a victim-related fund, rather than simply transferred to the U.S. Treasury.²⁷⁸ To that end, Congress may be required to enact further legislation to facilitate the distribution of such forfeited funds into either the newly-created Federal Account for Investor Restitution (“FAIR”) fund (which is intended to assist victims of financial fraud who seek to obtain restitution), or something akin to it.²⁷⁹

274. See Ramirez, *supra* note 260, at 409 (citing David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 396 (1976)).

275. See Ramirez, *supra* note 260, at 409.

276. See discussion of the problems associated with reliance on existing forfeiture legislation, *infra* Part VII.

277. Cf. 18 U.S.C. § 982(a)(2) and (3) (2002). Congress also should similarly expand the scope of 18 U.S.C. § 981(a) to authorize civil asset forfeiture for violations of the securities fraud statute. The existing forfeiture statute for violations of the federal securities law limits such actions to “fraud in the sale of securities.” 18 U.S.C. § 981(a)(1)(C) (2002); § 1956(c)(7)(A); § 1961(1)(D).

278. The distribution of criminally forfeited property is governed by federal statute. See 18 U.S.C. 982(b)(1) (2002); §1963(g); 21 U.S.C §881(e) (2002). The federal government has two funds for forfeited proceeds: (1) Department of Justice Asset Forfeiture Fund authorized under 28 U.S.C. §524(c); and (2) Department of Treasury Forfeiture Fund authorized at 31 U.S.C. §9703(a). See also www.usdoj.gov/jmd/afp/01programaudit/auditreport72002.htm.

279. If in any judicial or administrative action brought by the SEC under the securities laws the SEC obtains an order requiring disgorgement against any person, or such person agrees in settlement to such disgorgement, and the SEC also obtains a civil penalty against such person,

C. *Why Restitution Alone is an Inadequate Solution*

Clearly, it may be difficult to fully compensate all victims of corporate and securities fraud, particularly in the case of issuer financial fraud violations which may cause such huge investor losses that dwarf any funds or profits obtained by the corporate wrongdoers.²⁸⁰ However, the forfeiture sanction increases the potential recovery from those wrongdoers more than a simple restitution order because the forfeiture order reaches (and potentially freezes) more of the offenders' assets. In that manner, asset forfeiture is not the same as, and is more favorable than, restitution.

Restitution is designed to compensate the victims of wrongful acts. It is an equitable remedy by which a person is restored to his or her original position prior to the loss or injury.²⁸¹ Most jurisdictions provide for restitution to the victims of a crime.²⁸² Courts sometimes confuse actions for restitution with disgorgement orders since both pursue a parallel goal of separating the defendant from the benefit of any "ill gotten gains."²⁸³ Disgorgement, nevertheless, is not restitution since disgorgement does not seek to compensate the victims of wrongdoing, but is an equitable remedy meant to prevent the wrongdoer from unjustly enriching himself by that wrong doing.²⁸⁴ As a result, the defendant may be ordered to relinquish an amount that is more or less than is required to make the victims whole. Courts simply need to find a causal relationship to the wrongdoing and the funds

the amount of such civil penalty shall, on motion or at the direction of the SEC, be added to and become part of the disgorgement fund for the benefit of the victims of such violation. Sarbanes-Oxley Act § 308. The SEC is also authorized to accept, hold, administer and utilize gifts, bequests and devises of property to the United States for any such disgorgement fund. *Id.*

280. Case in point, WorldCom's former chief executive officer Bernard Ebbers was found guilty of directing the \$11 billion accounting fraud that led to the company's bankruptcy filing although evidence shows that he profited at a significantly lower amount.

281. RESTATEMENT (SECOND) OF CONTRACTS § 375 (1981).

282. See 18 U.S.C. § 3663. The beneficiary of a restitution order simply registers the restitution order in the same manner as a civil judgment. 18 U.S.C. § 3664(m). However, unlike civil judgments, a criminal restitution order issued under federal law is not dischargeable in bankruptcy. See 11 U.S.C. §§ 523(a)(13), 1328(a)(3) (2002).

283. See SEC Report, Report Pursuant to Section 308(c) of the Sarbanes Oxley Act of 2002, at 3 n.2 (reporting that "[r]estitution is intended to make investors whole, and disgorgement is meant to deprive the wrongdoer of their ill-gotten gain."), available at www.sec.gov/news/studies/sox308creport.pdf.

284. See SEC v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993).

or property sought to be disgorged.²⁸⁵ To that end, disgorgement is similar to the asset forfeiture sanction.²⁸⁶

Forfeiture laws, as illustrated in Part V above, allow for the recovery of more than just the unlawfully obtained proceeds of the wrongful act, but also authorize the recovery of any additional assets traceable to those criminal proceeds. Moreover, forfeiture orders allow governmental investigators and prosecutors to trace and restrain criminally derived property early in the criminal proceedings (and even sooner if the government relies upon the civil asset forfeiture sanction), which can prevent criminal proceeds from being dissipated, transferred, and even hidden offshore.

In this regard, asset forfeiture is more advantageous than mere reliance on criminal restitution. Suppose, for example, that a corporate wrongdoer unlawfully obtains \$5 million through a fraudulent accounting or reporting scheme that harms his company. If that offender subsequently used those illicit funds to place a bet on Giacomo (the 2005 Kentucky Derby winner) to receive a \$20 million payout, he would still be ahead of the game when the fraud was uncovered, as he could expect to disgorge no more than \$5-10 million in restitution and penalties. He, like some other potential offenders, arguably can reconcile the virtual certainty of spending some time in prison if caught against the exponential profit potential from the criminal violation particularly where he has some assurances that he can return to his previous lifestyle upon release. Stated differently, his potential imprisonment and certain restitution payment may not lead to the necessary deterrence where the corporate fraudster is still able to finance his family's pre-sentencing lifestyle, including their use of the mansion and vacation homes, private school for the children, and country club memberships (if not shamed away). Without a forfeiture penalty, the resourceful convicted white collar criminal can seemingly return to his comfortable status upon release.²⁸⁷

285. See *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (requiring a showing that the amount sought is "a reasonable approximation of profits causally connected to the violation.").

286. Of course, disgorgement may not be used punitively. See *First City Fin. Corp.*, 890 F.2d at 1231.

287. Even though he was not criminally prosecuted, Jack Grubman is hardly contrite after being barred from the securities industry and having to pay a substantial \$15 million fine. He reportedly stated that he was going to leave the industry anyway and given that his net worth is somewhere between \$50 million and \$70 million, he will probably continue his earlier lifestyle. See Guyon, *supra* note 253.

VII. HOW ASSET FORFEITURE WOULD WORK IN FINANCIAL FRAUD CASES

Until Congress enacts penalties that also include a forfeiture sanction for violations of the securities fraud statute, federal prosecutors can and should routinely seek to obtain asset forfeiture from financial fraud offenders using the existing forfeiture statutes. The primary forfeiture statutes for non-drug related crimes are found at sections 981 and 982 of title 18 of the United States Code. Unfortunately, given that these provisions are overly complicated to navigate, many prosecutors are led to ignore their utility in most cases. Nevertheless, the easiest way to seize property would be to charge and prove a money laundering violation, while seeking forfeiture under either 18 U.S.C. § 981(a)(1)(A) (the civil forfeiture provision), or 18 U.S.C. § 982(a)(1) (the criminal forfeiture provision).²⁸⁸ It is black letter law that a district court in sentencing a person convicted of money laundering in violation of 18 U.S.C. § 1956 or 1957 “shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.”²⁸⁹

Some may argue that this approach favors overcharging, and forces prosecutors to bring the more serious crime of money laundering rather than the underlying crimes, which typically has been mail fraud or wire fraud.²⁹⁰ However, the SarbOx criminal measures equalize the fines and terms of imprisonment. Moreover, in many instances,

288. See 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1) (2002).

289. 18 U.S.C. § 982(a)(1) (2002). Similarly, § 981(a)(1) provides in relevant part: The following property is subject to forfeiture to the United States: (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property. 18 U.S.C. § 981(a)(1)(A).

290. The mail and wire fraud statutes have long been favored by prosecutors given their relatively straight-forward standards of proof. In fact, prosecutors refer to the statutes as “our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart.” Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980). The statutes proscribe the use of the mails or wires (including faxes, telephones, e-mail) to further fraudulent activity. See 18 U.S.C. §§ 1341 and 1343 (2002). The government need only prove the existence of: (i) a scheme to defraud – i.e., the manipulation of corporate records for personal gain; (ii) committed with the intent to defraud; (iii) while using the United States mails or private interstate commercial carriers in furtherance of the scheme or, in the case of wire fraud, the communication must be transmitted through the wires across state lines. The “scheme to defraud” element has been read broadly. See e.g., *United States v. Mirabile*, 503 F.2d 1065, 1066 (8th Cir. 1974) (noting that language of federal mail fraud statute must be interpreted broadly and liberally to further purpose of statute). The government must simply show that the defendant intended to harm the victim (the corporation and its shareholders) by depriving the victim of money, property, or honest services. Prosecutors need not even prove that the scheme to defraud necessarily came to fruition, nor that the scheme caused any loss. See e.g. *United States v. Falkowitz*, 214 F. Supp.2d 365, 380 (S.D.N.Y. 2002) (citations omitted). The requisite bad intent also can be inferred from circumstantial evidence of the same.

the facts needed to support a mail or wire fraud conviction will also be the facts sufficient to obtain a money laundering conviction. Once the fraud has been perpetrated, as will be discussed below, the offenders often will seek to conceal the nature and source of such proceeds. Further, there is only a limited ability now to obtain the forfeiture of assets for any violation of the mail and wire fraud statutes, particularly if there are no so-called “special circumstances.” In other words, the mail and wire fraud violation must affect a financial institution in order to support an action for criminal forfeiture.²⁹¹

While no such requirement exists for civil forfeiture actions that are brought for violations of the mail and wire fraud statutes, there are disadvantages. First, that statute is difficult to navigate as it does not specifically provide for the forfeiture of property “which constitutes or is derived from proceeds traceable to a violation” of the mail and wire fraud statute.²⁹² Prosecutors are directed from section 981(a)(1)(C) to 18 U.S.C. § 1956(c)(7) where they must search through the list of “specified unlawful activities,” only to be sent to 18 U.S.C. § 1961(1), where mail fraud and wire fraud are finally included within the list of “racketeering activity.”²⁹³ That stated, upon proof of the mail fraud or wire fraud violation, the government can take action against any property that constitutes the proceeds of, or is derived from, the criminal violation – regardless of whether the property owner has ever been charged with a crime.

This potential outcome leads to the other disadvantage of relying solely on section 981 to obtain the forfeiture of the targeted property. Given that there is no requirement of a prior conviction of the property owners, these forfeitures necessarily will lead to increased procedural and substantive criticisms, as well as claims of lack of accountability and corruption on the part of the government.²⁹⁴ The government’s ability also to bring criminal forfeiture actions, on the other hand, purportedly will silence many of these concerns.

Still, neither mail fraud, nor wire fraud violations (as previously stated) can support a criminal forfeiture action unless the fraud effects

291. See 18 U.S.C. § 982(a)(3) (2002). See e.g., *United States v. Grass*, 274 F. Supp. 2d 648, 653 (M.D. Pa 2003); *United States v. Day*, 416 F. Supp. 79, 85 (D.D.C. 2006).

292. See 18 U.S.C. § 981(a)(1)(C) (2002).

293. Subsection (a)(1)(C) includes “any offense constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title)” Section 1957(c)(7) then sets forth a list of crimes that constitute a “specified unlawful activity,” and incorporates by reference the list of offenses that 18 U.S.C. § 1961(1) defines as acts which constitute “racketeering activity” under the RICO statute, and includes several state crimes such as murder, extortion, bribery and gambling as well as mail fraud, wire fraud; a list of other enumerated federal crimes; and certain violations of foreign law. See 18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7), 1961(1) (2002).

294. See *infra* note 227.

a financial institution. Critics may continue to argue that it remains unnecessary to charge a money laundering violation simply to obtain the criminal forfeiture sanction in light of the fact that CAFRA also authorizes criminal forfeiture actions (in accordance with 21 U.S.C. § 853) for any offense which Congress has authorized civil forfeiture but for which no corresponding criminal forfeiture statute exists, and where the defendant is charged and convicted of the underlying crime.²⁹⁵ However, several jurisdictions are split of its application, with several district courts holding that section 2461(c) does not expand the scope of preexisting criminal forfeiture provisions whenever a related civil forfeiture provision is broader.²⁹⁶ Adding fuel to an already simmering fire, Congress recently amended 28 U.S.C. § 2461(c), and seemingly narrowed the scope of forfeitures authorized by the provision,²⁹⁷ which in turn may lead to further uncertainty about its applicability. This uncertainty will once again cause prosecutors to defer to civil asset forfeiture actions (and their attendant criticisms).

The money laundering violation, which will support both a civil and criminal forfeiture sanction, thus remains a viable option. The prosecutor, as a starting point under either forfeiture provision, must prove

295. See 28 U.S.C. § 2461(c) (Apr. 25, 2000, Pub. L. 106-185, § 16). Specifically, Section 2461(c), formerly provided: If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section. *Id.*

296. See *United States v. Day*, 416 F. Supp. 2d 79, 86 (D.D.C. 2006); *United States v. Croce*, 345 F.Supp.2d 492, 496 (E.D.Pa.2004); *United States v. Grass*, No. 02-146, 2002 U.S. Dist. LEXIS 26045, at *15-16 (M.D.Pa.2002); *United States v. Thompson*, No 02-CR-116, 2002 WL 31667859, at *2 (N.D.N.Y.2002); *but see United States v. Schlesinger*, 396 F. Supp. 2d 267, 275 (E.D.N.Y.2005) (“[U]nder the plain terms of [28 U.S.C. § 2461(c)] criminal forfeiture for mail and wire fraud is permitted.”); *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006) (where the court held, “In sum, we reject *Croce II* and read the plain language of 28 U.S.C. § 2461(c) as permitting criminal forfeiture of proceeds from general mail fraud because a statutory provision—18 U.S.C. § 981(a)(2)(C)—permits civil forfeiture of such proceeds and no criminal forfeiture provision applies to general mail fraud.”).

297. See 28 U.S.C. § 2461(c) (Mar. 9, 2006, Pub. L. 109-177, Title IV, § 410). Revised section 2461(c) provides: If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act. *Id.*

a violation of either 18 U.S.C. § 1956 or 18 U.S.C. § 1957. Section 1956, entitled “Laundering of Monetary Instruments,” targets financial transactions²⁹⁸ that involve the proceeds of criminal activities and financial transactions that are intended to cover up the source of the funds,²⁹⁹ while section 1957, entitled “Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity,” targets those monetary transactions in criminally derived funds in amounts over \$10,000.³⁰⁰ Although Section 1956 actually contains three distinct money laundering violations,³⁰¹ this article will target the subsection on which prosecutors chiefly rely when charging white collar defendants: subsection (a)(1), which is violated when one takes part in a financial transaction with criminally-derived “proceeds of specified unlawful activity.”³⁰² As illustrated above, both mail fraud and

298. The transaction must either (i) affect interstate or foreign commerce and involves the movement of funds by wire or other means, or the movement of one or more monetary instruments, or the transfer of title to any real property, vehicle, vessel or aircraft; or (ii) involve a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce, in any way or degree. 18 U.S.C. § 1956(c)(4) (2002). “Monetary Instrument” is defined in § 1956(c)(5) as currency, money orders, checks, travelers checks, or investment securities or negotiable instruments in bearer form (or otherwise in such form that title thereto passes upon delivery).

299. Section 1956 specifically targets efforts (i) to conduct or attempt to conduct a financial transaction involving unlawful proceeds, or (ii) to transfer, transmit, or transport unlawful proceeds or monetary instruments from within the United States to a place outside with the intent to promote the fraud; to conceal or disguise the nature of the unlawful proceeds; or to avoid the transaction reporting requirements under state or federal law. 18 U.S.C. § 1956(a) (2002).

300. It is a felony to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 where the property is derived from the broad array of “specified unlawful activities” that are set forth in section 1956(c)(7). 18 U.S.C. § 1957 (2002). The most significant difference between a section 1956 violation and a section 1957 violation is that the latter has no specific intent requirement, thus making it easier for the government to prevail. It is simply a crime to do virtually anything with the proceeds of a criminal activity if such proceeds exceed \$10,000.

301. Cf. 18 U.S.C. § 1956(a)(1), (a)(2) and (a)(3). Subsection (a)(2) is similar to subsection (a)(1), except the former criminalizes the knowing international movement of funds or monetary instruments. Cf. 18 U.S.C. § 1956(a)(1)-(2). It is also distinct in one key respects: it is unnecessary to prove the existence of a financial transaction as required by subsection (a)(1); the government need only show that a transfer of proceeds occurred either into, or out of, the United. It is worth noting that subsection (a)(3) rarely will be charged in connection with corporate mismanagement violations as that section applies only where there has been a government “sting” operation. In other words, this offense differs from a section 1956(a)(1) offence in that the property involved must have been *represented* by a law enforcement officer (or by a person at the direction of a federal law enforcement officer) to be specified unlawful activity proceeds, but in actuality is not.

302. 18 U.S.C. § 1956(a)(1) provides in pertinent part that “Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . shall be sentenced to a fine . . . or imprisonment for not more than twenty years, or both.” The violative transaction can be a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, use of a safe deposit box, or

wire fraud (among others) can serve as predicate violations for the money laundering violation under section 1956(a)(1).³⁰³

Once the predicate violations (e.g., mail fraud or wire fraud) have been established, the prosecutor must prove the other elements of the money laundering violation. The government has the burden of establishing that the defendant knew that the money involved in the financial transaction represents the proceeds of some form of unlawful activity (e.g., the mail fraud or wire fraud) that constitutes a felony under state, federal, or foreign law.³⁰⁴ Actual proof that the defendant knew from what form of unlawful activity the property was derived, however, is unnecessary. The defendant's knowledge of the source of unlawful proceeds can be established either by evidence of his involvement in the specified unlawful activity, or by other direct evidence. It also can be established circumstantially where the defendant is not the perpetrator of the underlying offense, or where it can be established that the defendant was willfully blind to, or consciously avoided learning, the unlawful source of property involved in a financial transaction.³⁰⁵

The prosecutors must also prove that the defendant acted with a specific intent to promote the fraud; to conceal or disguise the nature, location, the source, the ownership, or control of the criminal proceeds; to engage in a criminal tax violation; or to evade a transaction reporting obligation under federal or state law.³⁰⁶ In this regard, merely proving that the defendant spent illegally-derived funds is not enough to establish a money laundering violation under any section. In the absence of a scheme to conceal the source of the money, no court will sustain a conviction.³⁰⁷ However, making purchases in someone else's name,³⁰⁸ placing funds in third-party accounts³⁰⁹ or trusts, or the creation of sham documentation to mask the source of funds is evidence of concealment.³¹⁰

In the case of corporate financial fraud, many of the defendants in the recent scandals who either designed or facilitated the fraudulent

any other payment, transfer, or delivery by, through, or to a financial institution. 18 U.S.C. § 1956(c)(3) (2002).

303. See 18 U.S.C. §§ 1956(c)(7)(A), 1961(1)(B) (2002).

304. 18 U.S.C. § 1956(c)(1) (2002).

305. See e.g., *United States v. Anderskow*, 88 F.3d 245, 254 (3d Cir. 1996).

306. 18 U.S.C. § 1956(a) (2002).

307. See e.g., *United States v. Sanders*, 929 F.2d 1466 (10th Cir. 1991) (where court reversed a conviction because the government failed to prove sufficient evidence of a "design to conceal" where the defendant purchased a car, in person, in his own name, and openly used the car).

308. *Id.*

309. See e.g., *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991).

310. See e.g., *United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992).

schemes, subsequently tried to cover up their misdeeds and conceal the proceeds acquired therefrom, causing many to be charged with a money laundering violation.³¹¹ Accordingly, despite the extra effort needed to rely on existing forfeiture statutes, prosecutors can use these tools to combat corporate frauds until Congress enacts the forfeiture sanction for violations of the securities fraud statute.

VIII. CONCLUSION

The privileged position of corporate fraudsters under the law exists in contrast to their weakened and unprotected victims, and typically stands in stark contrast to violators of other criminal statutes. SarbOx's enhanced criminal penalties, while slightly more punitive, are nevertheless inadequate to effectively battle and deter the corporate fraud problem. Meaningful asset forfeiture sanctions are needed to shore up the Act's deterrent impact. In its effort to combat rising lawlessness in decades past, Congress focused on the economic motives of wrongdoers and authorized the seizure of those illicit proceeds traceable to their criminal acts to better combat drugs, organized crime, bank fraud, and insider trading (to name a few). Why then should the government limit itself to using such a powerful weapon only against these particular offenders?

The ability to return to the *lifestyle* once led (purchased with funds fraudulently obtained from their former corporation) should be eliminated. While corporate offenders may be willing to reconcile the prospect of spending some time behind bars for the sake of an exponential payout, the prospect of giving up one's personal freedom without some tangible benefit in the end will change the deterrent equation. It is on this basis that I propose that Congress enact specific forfeiture legislation that reaches the property involved in, or traceable to, violations of the newly-enacted securities fraud statute. Congress recognized the economic motive of wrongdoers when it authorized the forfeiture of executive bonuses pursuant to SarbOx section 304. Regrettably, Congress stopped short of enacting meaningful forfeiture legislation. In light of recent forfeiture consents and the successful criminal prosecutions of many of the high-profiled corporate defendants, the time seems right for Congress to take a new look at the Act's criminal measures.

311. See Fastow Indictment, *supra* note 17; Ebbers and Sullivan Indictments, *supra* note 20.

