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Criminal Consumer Fraud: A Victim-Oriented Analysis

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CRIMINAL CONSUMER FRAUD: A VICTIM-ORIENTED ANALYSIS

*Donald P. Rothschild** and *Bruce C. Throne***

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Beyond the cash he stole, [the offender's] crime lies in smashing the delicate patterns of an elderly person's life. . . . A lifetime of thrift, of small, hard-won advances and setbacks painfully overcome left [the victim] with a tiny niche in the world. Now she finds herself computing on the backs of envelopes the money she has left against the years she might live. "I'm using up my savings and I'm worried about running out of money," she said. "How many years will I have something to take care of me?"†

[The Lilliputians] look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege that

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† Saar, "Crime in the Suites" Held Epidemic, Washington Post, April 13, 1975, at A1, col. 1.

care and vigilance, with a very common understanding, may preserve a man's goods from theft, but honesty has no defense against superior cunning . . . ††

THE poor and the elderly are the principal victims of the high-pressure and often sophisticated sale techniques of criminal consumer fraud in this country.¹ The problem is compounded when the poor and the elderly live in inner cities where legal assistance is costly and inadequate, and the courts, prosecutors, and investigators are overburdened.² Yet the executive and legislative agencies responsible for law enforcement continue to assign a low priority to criminal consumer fraud. President Ford has reflected this orientation: "For effective management [of law enforcement], we first have to have some hard decisions on priorities. As a starter, I would suggest a high priority on violent crime and street crime in the inner-city. There is where crime does the most damage to our whole urban structure. There is where crime hurts the poor who already suffer enough."³ The cruel irony of this statement is that one of the most significant causes of this suffering is criminal consumer fraud. The statement implicitly presumes that the economic impact of criminal fraud on low-income consumers is negligible because they are not consumers of expensive durable goods. But this presumption "overlooks that rapidly expanding American institution, the installment plan and the special forms it takes in low-income areas."⁴ The harm resulting from the low-income family's lack of shopping sophistication and its vulnerability to "easy credit" does not end merely with higher prices and heavy indebtedness. Repossession, creditor harassment, and garnishment of wages take their greatest tolls on the poor. Her-

†† J. SWIFT, *GULLIVER'S TRAVELS* 56 (Everyman ed. 1965). Although few governments have embraced this fictional solution to the problem of combatting consumer fraud, it has been reported that the U.S.S.R. has come close. See Feifer, *Russia Shoots Its Business Crooks*, N.Y. Times, May 2, 1965, § 8 (Magazine), at 32-33, 111-12.

1. H. EDELHERTZ, *THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME* 9 (1970). Robert W. Ogren, Chief of the Fraud Unit of the United States Attorney's Office for the District of Columbia, adds that the metropolitan Washington, D.C., area has been plagued by a number of so-called "itinerant" or "gypsy" consumer-fraud offenders who operate out of motels and direct their schemes almost exclusively toward the elderly. Interview with Robert W. Ogren, Chief of the Fraud Division of the United States Attorney's Office for the District of Columbia, in Washington, D.C., April 16, 1975 [hereinafter Ogren Interview].

2. See *Hearings on Paralegal Assistants Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., at 214 (1974).

3. Remarks, 81st Annual Convention of the International Association of Chiefs of Police, Sept. 24, 1974, reported in 10 WEEKLY COMP. OF PRES. DOCS. 1187, 1188 (1974).

4. Caplovitz, *The Merchant and the Low-Income Consumer*, in *WHITE-COLLAR CRIMINAL* 237, 241 (G. Geis ed. 1968).

bert Edelhertz notes: "A surprisingly large number of people living in ghettos do have something to lose, but unlike the established middle classes the asset in jeopardy is very often the only asset which stands between its owner and utter destitution."⁵

It is not accurate, however, to allege that both the executive and the legislative departments of our government have callously disregarded this problem. Until recently, criminal consumer fraud has been submerged within the concept of "white-collar crime." In order to place criminal consumer fraud in its proper perspective within our criminal justice system, it is essential that it first be defined and that the full range of law enforcement problems connected with it be explored. Earlier writers have proposed definitions deriving from the status of white-collar crime offenders or the nature of their acts;⁶ we conclude that the problem of criminal consumer fraud can best be approached through a definition focusing on its victims. This definition suggests a different set of solutions, and these may warrant new priorities.

I. DEFINING CRIMINAL CONSUMER FRAUD

It has been said that an effective law enforcement approach to the problem of white-collar crime does not require a precise definition of that concept.⁷ Whether or not this is so with regard to the general problem, we believe that this same proposition cannot be applied to the specific phenomenon of criminal consumer fraud. Each year, numerous complaints are lodged with consumer protection groups and offices throughout the country. Some of the grievances are meritorious, some are not. Some may be resolved by a simple phone call and others may require some sort of quasi-legal or administrative response. Criminal consumer frauds, however, require an appropriate law enforcement procedure; they must be quickly identified and segregated by the complaint-receiving outposts. Before this can be accomplished, criminal consumer fraud must be defined.

Eric Steele's recent study of one state consumer-fraud bureau⁸ offers an instructive example of how a law enforcement approach to criminal consumer fraud breaks down if the personnel at complaint-intake centers are not provided with a practical means of identifying

5. H. EDELHERTZ, *supra* note 1, at 10.

6. See text at notes 25-29, 34-35 *infra*.

7. See Ogren, *The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White-Collar Crime*, 11 AM. CRIM. L. REV. 951, 959 n.1 (1973). But see H. EDELHERTZ, *supra* note 1, at 3-4.

8. Steele, *Fraud, Dispute and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975).

whether complaints received are actually civil or criminal in nature. The study reveals that, despite the "quasi-criminal law enforcement [role] envisioned in its empowering statute," the bureau served primarily as an institution providing "a more informal level of problem solving and concrete dispute resolution."⁹ His description of the institution suggests possible explanations for this apparent disparity between theory and practice. He notes that the bureau's hearing officers initially treat all consumer grievances as essentially two-party disputes to be resolved without resort to legal sanctions.¹⁰ Apparently, only a combination of chance and timing determines whether the litigation arm of the bureau will take action in a particular case.¹¹ The bureau's bilateral-dispute approach at the complaint-reception and hearing stages is ill-suited to allow recognition of the intricate patterns of deceptive conduct that must quickly be identified and analyzed to permit effective law enforcement. Even though it is proper for an enforcement agency to heed the individual complainant's desire for dispute resolution, it cannot afford to ignore the broader law enforcement implications of each complaint. Criminal consumer fraud cannot be combatted successfully by either simple dispute resolution or an ad hoc approach.

A. *A Proposed Definition*

"Fraud," like "privity," is a generic term almost incapable of specific definition. The problem of defining the equally general concept "consumer fraud" is compounded by the present-day inclusion of the phrase under the rubric of "white-collar crime."¹² Combining a standard definition of fraud with one of white-collar crime

9. *Id.* at 1180. Steele concluded from his study and reports from the Illinois Attorney General's Division of Consumer Fraud and Protection that "[t]he Bureau's stance has shifted in the course of a decade (or perhaps it shifted in the process of implementing the statute and setting up the bureau) from 'rid[ding] the State of merchants who habitually employ fraud' by law enforcement to 'righting the wrong and recovering the individual's money whenever possible' by acting as the legal representative of the consumer." *Id.* at n.99.

10. *Id.* at 1149, 1168.

11. *Id.* at 1169. By not systematically monitoring the number of complaints that are lodged against particular merchants or businesses, the bureau minimizes its ability to determine whether an individual complaint concerns criminally fraudulent conduct that should be segregated from civil contract-type disputes.

For a description of how several state attorney general's offices process and dispose of consumer fraud complaints, see NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, REPORT ON THE OFFICE OF THE ATTORNEY GENERAL 418-21 (Feb. 1971) [hereinafter NAAG REPORT].

12. Sociologist Edwin H. Sutherland first coined the term "white-collar crime" in his presidential address to the American Sociological Society in 1939. See Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

produces what might be considered a general definition of consumer fraud: "an intentional perversion of the truth"¹³ "by a person of respectability"¹⁴ "to induce another in reliance upon it to part with some valuable thing"¹⁵ But this is hardly a term of art! We would instead define "criminal consumer fraud" as an intentional act of lying to, cheating, or stealing from a consumer (or attempting to do so), which is punishable as a crime in any jurisdiction. By defining criminal consumer fraud in this manner, we hope to distinguish it from civil fraud, which lacks the key element of criminal intent, and to liberate it from the catch-all concept of white-collar crime, which only serves to camouflage it in the field of law enforcement.¹⁶

In order further to hone this definition into a workable tool for law enforcement agents, it is necessary to consider (1) the development of the concept of criminal consumer fraud; (2) how it differs from white-collar crime; and (3) its impact on our society. There is a paucity of empirical data and expositive legal writing purporting to deal specifically with these three topics. Almost without exception, scholarly analyses of criminal business behavior have been aimed at the very broad range of commercial crime and corruption that is generally denominated white-collar crime.¹⁷ From an analytical standpoint, many of the identified characteristics of white-collar crime can be attributed to the more narrowly defined problem that we have termed criminal consumer fraud. We take the view, however, that this latter sort of crime is clearly distinguishable from the former; it constitutes a unique category in the criminal law and, as such, it

13. See BLACK'S LAW DICTIONARY 788 (rev. 4th ed. 1968).

14. Sutherland originally defined white-collar crime "approximately" as a "crime committed by a person of respectability and high social status in the course of his occupation." E. SUTHERLAND, WHITE COLLAR CRIME 9 (1949).

15. See BLACK'S LAW DICTIONARY 788 (rev. 4th ed. 1968).

16. This definition of criminal consumer fraud is not intended to embrace violations of purely economic regulations such as price control restrictions and antitrust laws, *i.e.* what Professor Sanford Kadish calls "those which impose restrictions upon the conduct of business as part of a considered economic policy." Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 424 (1963). In stating that criminal sanctions for many economic crimes may be inappropriate, Kadish clearly distinguishes fraud offenses from those offenses, such as violations of health and safety regulations, to which he does not apply his thesis. The authors believe that this distinction is important for investigatory and complaint-processing purposes and that consumer frauds can in no way be considered "morally neutral conduct" for which penal sanctions could not be justified.

17. Reliance has been placed principally upon the following sources in order to capsule the current approaches and attitudes toward white-collar crime: H. EDELHERTZ, *supra* note 1; PRESIDENTS COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT (1967) [hereinafter 1967 TASK FORCE REPORT]; *A Symposium—White-Collar Crime*, 11 AM. CRIM. L. REV. 817 (1973).

deserves specialized attention and a specialized response.

B. *The Historical Development of the Concept*

Consumer fraud has been debated as an issue of public concern since Biblical times.¹⁸ Only within the past fifteen years, however, has American law vigorously begun to embrace the current phenomenon known as "consumerism." The call for tougher criminal sanctions for white-collar offenders has been attracting attention only recently. Concern with consumer fraud, therefore, antedated the currently popular concept of white-collar crime. In early society, the shopkeeper-marketplace encouraged face-to-face resolution of disputes between consumers and merchants. The development of the legal concept of commercial fraud was the outgrowth of the rise of a new middle class in fifteenth-century England that had trade interests similar to those of the Crown.¹⁹ The concept was designed to protect the rich and powerful, and the plight of the common consumer was rarely recognized. Underlying this trend in the mercantile law was the widespread belief in the supremacy of property rights—a belief that reached its zenith in nineteenth-century England with the arrival of laissez-faire capitalism.²⁰ The Industrial Revolution broke the pattern of bilateral dispute resolution, and the doctrine of *caveat emptor* dictated that merchants unilaterally determined the buyer's rights.²¹

The English law's one-sided sensitivity to the property rights of merchants was passed on to the leaders of the American colonies. The American situation remained unchanged until the early twentieth century when the "muckrackers," a group of articulate writers who observed the problems created by a rapidly expanding economy, exposed the misfortune of the "little man" caught in the grip of big business and the industrial system.²² But government response was slow, and it took two wars, the Depression, and the return of prosperity before government began vigorously to enter into the dynamics of consumer protection. The eventual response of both the federal government and the states, although by no means uniform, was a

18. See *Micah* 1:1-16, 2:1-12.

19. See Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133, 1144-53 (1931).

20. *Id.* at 1171-78, 1183.

21. *Id.* at 1156-58. Cf. D. ROTHSCHILD & D. CARROLL, *CONSUMER PROTECTION REPORTING SERV.* § 1.02, at 4 (1973).

22. Historian Richard Hofstadter has traced the theoretical roots of the American consumer movement to Jacksonian democracy, populism, progressivism and the New Deal. R. HOFSTADTER, *AGE OF REFORM: FROM BRYAN TO F.D.R.* 18 (Vintage ed. 1955).

proliferation of protective legislation aimed at eliminating the unilateral arbitrariness of the doctrine of *caveat emptor*.²³

C. *The Submersion of Criminal Consumer Fraud Under White-Collar Crime*

In the 1940's, sociologist Edwin Sutherland examined the consumer exploitation exposed by the "muckrakers" of his day and was outraged over an American criminal justice system that ignored the criminal activities of the white-collar members of society.²⁴ Thus, the coincidence of federal and state regulation of business excesses, exposés of consumer exploitation, and a double standard of criminal justice led to a sociological classification of serious consumer fraud as a form of white-collar crime.

Sutherland was one of the first American scholars to maintain that the traditional crime-causation theories of his day, based on factors such as psychiatric disabilities, poverty, and broken homes, were not necessarily applicable to the problem of white-collar crime. He originally defined white-collar crime as a "crime committed by a person of respectability and high social status in the course of his occupation."²⁵ Gilbert Geis and Herbert Edelhertz have observed that Sutherland, from his sociological point of view, had no qualms about loosely defining "white-collar crime" to encompass a broad range of unethical business practices because he never intended that a particular action or statute be the focal point of the classification.²⁶ On the contrary, Sutherland used the social position of the offender as his reference point.²⁷ Sutherland believed that the legal distinction between civil and criminal cases based on whether the injury involved was to the public in general or to an individual in particular was sociologically unsound and merely compounded the problem of attacking white-collar crime.²⁸ The essence of white-collar crime, he wrote,

23. See, e.g., D. ROTHSCHILD & D. CARROLL, *supra* note 21, at § 1.01. For examples of the new trend in the protective roles being played by state law enforcement agencies, see Bowley, *Law Enforcement's Role in Consumer Protection*, 14 SANTA CLARA LAW. 555 (1974); Saxbe, *The Role of Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968); Note, *The Role of California's Attorney General and District Attorneys in Protecting the Consumer*, 4 U. CAL. DAVIS L. REV. 35 (1971); Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030 (1974).

24. See Sutherland, *supra* note 12.

25. E. SUTHERLAND, *supra* note 14, at 9.

26. Geis & Edelhertz, *Criminal Law and Consumer Fraud: A Sociological View*, 11 AM. CRIM. L. REV. 989, 996-97 (1973).

27. E. SUTHERLAND, *supra* note 14, at 9.

28. E. SUTHERLAND, CRIMINOLOGY 17-18 (1924).

is that it thrives in situations where the powerful and the professional have ample opportunity to exploit the weak and the uneducated.²⁹

Ironically, Sutherland's focus on the status of the offender has reinforced the view that white-collar criminals should not be treated as ordinary criminals. There are four reasons for this. First, white-collar offenders do not conceive of themselves as criminals. Second, white-collar offenses, unlike the so-called "natural" or common-law crimes such as murder, assault, rape, and so on, appear to violate a somewhat arbitrary set of legislative enactments that are addressed to the peculiar economic problems of the day. Third, there is no organized effort on the part of civic leaders, churches, schools, the press, or even governmental agencies to apply social condemnation to these violations. Finally, if all persons who violated traffic and health ordinances and administrative regulations were prosecuted as criminals, the criminals in the population would greatly outnumber the law-abiding citizens.³⁰ These observations, however, provide little support for any attempt to establish broad distinctions for penal purposes between so-called "economic crime" and street crime. If white-collar offenders do not currently perceive themselves to be common criminals, it is because they have not heretofore been treated as such by the law. Furthermore, while the "traditional" offender may have a greater appreciation than does the white-collar criminal for the "establishment's" condemnation of his conduct, the former may more easily rationalize his behavior as a product of societal ill treatment.³¹

Nonetheless, the socioeconomic distinction between offenders has served to protect the white-collar criminal. And, since there is a lack of sufficient empirical data on the socioeconomic status of the criminal consumer-fraud offender, he has been thrown into this classification. This lumping together of the issue of consumer fraud with the popular and much-discussed concept of white-collar crime has merely submerged the former in our criminal jurisprudence, and has thereby made analysis and treatment of criminal consumer frauds more difficult.

If there is good reason to doubt the utility for law enforcement purposes of Sutherland's socioeconomic definition of white-collar

29. Sutherland, *supra* note 12, at 9, quoted in Geis & Edelhertz, *supra* note 26, at 999.

30. See Burgess, *Comment—White-Collar Offenses in the Wholesale Meat Industry in Detroit*, 56 AM. J. SOC. 32 (1950).

31. For one account of how traditional offenders rationalize their criminal behavior based on consumer fraud, see T. PARKER & R. ALLERTON, *COURAGE OF HIS CONVICTIONS* 98-99 (Arrow ed. 1969), cited in Geis & Edelhertz, *supra* note 26, at 1004-05 n.73.

crime,³² there is even better reason to refrain from attempting to find a place for criminal consumer-fraud offenses within that concept. Sutherland's definition will not help an investigator or prosecutor who must categorize consumer-fraud complaints both according to the likelihood that the conduct complained of has occurred (or is continuing to occur) and according to the probable extent of victimization. Acceptance of the idea that most of the fraud in our marketplaces is perpetrated by a definable class of white-collar offenders has permitted our law enforcement and consumer-protection authorities to segregate most fraud complaints from street-crime cases without further scrutiny. This approach is comparable to advising a prosecutor faced with a recent rash of sophisticated house burglaries to be on the lookout for someone who needs money and has his nights free. It offers a potential group of offenders, but does not aid in finding the guilty party.

Edelhertz credits Sutherland with exposing for the first time the double standard that permits our law enforcement system to punish crimes committed by the poor more harshly than those committed by the affluent.³³ But Edelhertz is reluctant to employ Sutherland's concept of white-collar crime as a legal definition since he believes that discriminatory application of penal sanctions would flow from the personalization of our conceptions of any type of crime.³⁴ Instead, Edelhertz would employ a definition that concentrates on the nature of the crime.³⁵

This criticism of Sutherland's focus on the offender is well taken; but Edelhertz's concentration solely on the nature of the particular act is also not useful in a law enforcement model dealing with criminal consumer fraud. His analysis translates into a case-by-case approach by law enforcement authorities, who, reflecting the thinking of a large segment of the public, in practice shrink from criminalizing the exploitive conduct of the white-collar members of society. Because these authorities thus view law enforcement as an inappropriate response to consumer complaints, the bilateral dispute-resolution

32. For criticism of this definition, see R. CALDWELL, *CRIMINOLOGY* 144-46 (2d ed. 1965); Tappan, *Who is the Criminal?*, 12 *AM. SOC. REV.* 96, 99 (1947). Some authorities recognize that Sutherland's socioeconomic definition of white-collar crime submerges meaningful distinctions. Herbert Edelhertz, for example, defines white-collar crime as "an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage." He believes Sutherland's definition is too narrow to comprehend many crimes that would fall into the "white-collar" category. H. EDELHERTZ, *supra* note 1, at 3.

33. H. EDELHERTZ, *supra* note 1, at 3-4.

34. "White-collar crime," he states, "is democratic." *Id.* at 3.

35. *Id.*

model, appropriate for civil grievances, has been adopted in many jurisdictions to handle civil and criminal cases alike. The result has been haphazard handling of serious criminal consumer-fraud cases from beginning to end.

In order to facilitate systematic sorting of potential criminal offenders from purely civil disputants, the offense must be defined in a way that commands law enforcement authorities to take into proper account the impact of such conduct on our society. From the vantage point of victimization, it is difficult to make a meaningful distinction between the mugger on the street and the white-collar merchant who adulterates a drug to cut his costs or the "singles club" operator who deceives his customers. Criminal consumer fraud is neither nonviolent nor victimless. It presents us with a foe more formidable than the street criminal. While the wealth, background, and attire of these offenders may be distinguishable, the economic loss and personal misery inflicted upon the unwary victims of their crimes is equally tragic. It is equally important to deter a white-collar crime, a consumer fraud, and a street crime when the offense has a similar and undesirable impact upon the victim. A white-collar criminal's relatively high socioeconomic status should affect the citizenry's perception of him only in that it may make his conduct seem particularly outrageous. Therefore, the fact that our criminal system in practice recognizes the different economic origins of various types of criminals should not obscure the need to focus upon impact and victimization in order to design appropriate solutions. Only impact analysis can translate the significance of criminal conduct into an empirical base from which effective law enforcement may develop.

As Edelhertz notes, Sutherland's status-oriented definition of white-collar crime is not adequate to allow prosecutors to deal with every variety of criminal conduct in which criminal-fraud offenders engage.³⁶ But concentration on new act-oriented legal definitions quickly bogs down under subjective notions of business morality. There is good reason to believe that focusing on the victim is a useful tool for categorizing the phenomenon of criminal consumer fraud.

D. *The Incidence of Criminal Consumer Fraud*

Just as the complexity of the marketplace has increased since 1940 when Sutherland first studied white-collar crime, so have the problems and impact of criminal consumer fraud. This phenomenon

36. Edelhertz is rightfully concerned that it would not cover, for example, a scheme whereby assets are concealed in a personal bankruptcy.

is not one susceptible of easy identification or elimination; the public's exposure to criminal consumer fraud increases with each new product and service that is put on the market. The tradition of the small-scale, face-to-face American marketplace has given way to an impersonal transactional environment dominated by large conglomerates and chain organizations. Yesterday's shopkeeper has been replaced by a sophisticated system of third-party credit granting. Our economy is no longer geared merely to meet the basic needs of the majority of the population; advertising has skillfully employed the mass media to create public needs and desires in service to an economy bent on expansion. "The juxtaposition of these desires with our credit economy," Edelhertz writes, "intensifies the incentive and opportunity for fraud in the marketing of consumer goods and services."³⁷

The hard-core consumer-fraud offender knows that he can feed upon technologically induced patterns of conspicuous consumption by employing advertising techniques that utilize the simplest of deceptive devices, all the while operating under the media's air of legitimacy. There are strong indications that economic "hard times" and high unemployment rates also contribute to an increased rate of crime, including fraud offenses. "With tight money, everybody has to keep his bubble from bursting," one Justice Department official recently stated. "[P]eople who have always operated in the gray, or marginal area (of business activity) usually fall over the line at this time."³⁸ Recent statistics seem to support this statement: The chief of the Postal Inspection Service, reporting a rise in the incidence of mail fraud in the last six months of 1974, noted that "one major reason is the recession."³⁹

Any examination of the impact of criminal consumer fraud is subject to several problems that are somewhat unique to this area of law enforcement. To begin with, it is particularly difficult to estimate the incidence of criminal fraud because the line dividing it from civil fraud requires proof of criminal intent—an element that is difficult to establish. There is a dearth of systematic data available regarding crimes perpetrated by fraud offenders. There are, for

37. H. EDELHERTZ, *supra* note 1, at 6. One authority on consumer debt points out that the proliferation of consumer credit in the United States has served to magnify the impact of frauds in the marketplace today as compared with the situation thirty years ago. The total amount of consumer installment credit in 1945 was a negligible \$2.5 billion. By 1973, the total amount of consumer credit outstanding, including noninstallment debt, was about \$129 billion, a figure that averaged to almost \$2,000 of debt for each American household. D. CAPLOVITZ, *CONSUMERS IN TROUBLE* 1 (1974).

38. Calame & Morgenthaler, *Crime Rate Is Rising as Joblessness Spreads and the Economy Recedes*, *Wall St. J.*, Feb. 25, 1975, at 1, col. 6 (eastern ed.).

39. *Id.* at 31, col. 4.

example, no consolidated statistics comparable to the FBI Uniform Crime Reports covering traditional crimes. There are sporadic data, however, that indicate that the economic loss resulting from consumer frauds may be far greater than that produced by the traditional common-law theft offenses—robbery, larceny, and burglary.⁴⁰ According to the 1967 study by the President's Commission on Law Enforcement and Administration of Justice, frauds cost the consumer an estimated \$1,350 million annually, as compared with a cost to the public of \$200 million for embezzlement, \$100 million for tax fraud, \$27 million for robbery, \$251 million for burglary, and \$150 million for auto theft.⁴¹ The Commission's report went on to state: "A conservative estimate is that nearly \$500 million is spent annually on worthless or extravagantly misrepresented, drugs and therapeutic devices. Fraudulent and deceptive practices in the home repair and improvement field are said to result in \$500 million to \$1 billion in losses annually; and in the automobile repair field alone, fraudulent practices have been estimated to cost the public \$100 million annually."⁴² In 1965, the Post Office Department reported that in fraud cases it actually prosecuted the public lost some \$92 million; only about \$3.2 million was recovered.⁴³ The Depart-

40. The statistics gathered from complaints made to George Washington University's Consumer H-E-L-P Center in Washington, D.C. (see D. ROTHSCHILD & D. CARROLL, *supra* note 21, at § 28.13) provide a startling estimate of the economic impact of consumer frauds in the Washington metropolitan area. During a seven-month period between June and December of 1974, Consumer H-E-L-P received a total of 104 fraud complaints, 92 of which estimated the dollar amount involved. The complainants claimed to have been defrauded of over \$37,000, an average of over \$410 per individual complaint as compared to \$88 per complaint for contract-type complaints.

Compare the above statistics with the National Opinion Research Center's national survey of households, which "asked whether individuals had been cheated by anyone misrepresenting what he was selling or charging a higher price than he first quoted. The responses indicated a rate of about 120 cases per 100,000 population with an average loss of \$99, an average recovery of \$20 and an average net loss of \$78. This would give a national total of about \$18 million a year—a figure that is almost certainly understated." 1967 TASK FORCE REPORT, *supra* note 17, at 50, citing P. ENNIS, CRIMINAL VICTIMIZATION IN THE UNITED STATES; A REPORT OF A NATIONAL SURVEY 42 n.4 (1967).

41. 1967 TASK FORCE REPORT, *supra* note 17, at 44, 46, 49. The report concedes that the \$1,350 million figure is, at best, an "unreliable estimate" because of the non-systematic manner in which most criminal-fraud cases are handled. The Commission's estimate of the cost of fraud "covers any method of obtaining money or property by cheating or false pretenses, except through forgery or counterfeiting." It includes the intentional passing of bad checks and consumer fraud. *Id.* at 49.

42. *Id.* at 104. See also *White Collar Crime: Huge Economic and Moral Drain*, 29 CONG. Q. 1047, 1049 (1971).

43. U.S. POST OFFICE DEPT., 1965 ANN. REP. 142. The Department received more than 115,000 complaints in 1965 and procured 607 convictions. In its 1970 Report, the Department reported that it had received over 125,000 complaints from which it obtained 910 convictions and halted over 5,500 fraudulent or borderline-fraudulent promotions. U.S. POST OFFICE DEPT., 1970 ANN. REP. 21.

ment estimated that mail frauds are costing American consumers over \$500 million a year.⁴⁴ Ralph Nader, pleading for tougher penalties for white-collar crimes such as fraud and corruption, told a Senate subcommittee that the United States is currently engulfed in a white-collar crime wave that costs Americans at least \$4 billion over a period of 18 months.⁴⁵

While these figures are impressive, the impact of criminal consumer fraud cannot be viewed as a problem affecting merely money or property rights.⁴⁶ Like the more visible street crime, criminal consumer fraud has an impact that is as much personal as it is financial: It causes untold individual suffering and eats at the very fiber of our economy and business community.⁴⁷ Such individual suffering has been chronicled in David Caplovitz's study of another intimately related phenomenon—default debtors. Consumer-fraud offenders often take advantage of the low-income consumer through credit sales, which both lend an air of legality to specious sales schemes and enable low-income people to overextend themselves financially. Caplovitz analyzed the plight of over 1000 urban debtors not only as consumers, default-debtors, and defendants to lawsuits, but also as individuals whose lives may be permanently and radically changed by the one-two punch of fraud and indebtedness.⁴⁸ He relates the horrors that may befall defaulting low-income consumers, ranging from costly and time-consuming efforts to salvage bad debts,⁴⁹ to garnishment, unemployment,⁵⁰ loss of health,⁵¹ nervous

44. *Id.*

45. N.Y. Times, July 20, 1974, at 39, col. 2 (late city ed.).

46. H. EDELHERTZ, *supra* note 1, at 9.

47. See, e.g., Saar, "Crime in the Suites" Held Epidemic, Washington Post, April 13, 1975, at A1, col. 1. "White-collar crime," said a senior metropolitan (Washington, D.C.) police officer, "causes people more anguish and agony than anything else. When a man works all his life to build a home and someone through the manipulation of paper literally destroys him, the family disintegrates." *Id.*, at A14, col. 1.

48. See D. CAPLOVITZ, *supra* note 37, at 8-10.

49. *Id.* at 286-89.

50. Default on a debt is often followed by an attempt by the creditor to garnish the debtor's wages. Caplovitz reported that 8 per cent of the debtors in cities allowing garnishment of wages to satisfy a debt (19 per cent of those who were garnished) lost their jobs. Thirty-five per cent of those who were garnished but did not lose their jobs reported that their employers had threatened to fire them if they did not settle the debt problem. Furthermore, 20 per cent of the employed garnishees lost at least one day of work because of the debt-garnishment problem, a figure revealing still another substantial unpublicized cost to the economy. *Id.* at 238, 276.

The data obtained in the Caplovitz report also supported the hypothesis that those who lose their jobs because of their debt problems clearly have a more difficult time in the job market than others not employed, a fact that indicates that credit problems contribute to the "welfare crisis" in America today. *Id.* at 237-42.

51. Based on his index of the psychosomatic symptoms reported by the debtors interviewed and upon direct questions about the impact of the debt on the consumer's health, Caplovitz concluded that debt problems also contribute to poor health. Even

depression,⁵² and even family disintegration.⁵³ While Caplovitz by no means suggests that these low-income consumers were all victims of consumer fraud, the debt problem is a common by-product of unconscionable consumer sales schemes.

Criminal consumer fraud may also result in physical harm to its victims.⁵⁴ For example, serious injury may result from the sale of adulterated products that fail to meet federal or local statutory health standards. Violations of occupational safety regulations and building code provisions may expose the consumer to unnecessary risk of fire, fatally poisonous wall paints, or other serious health hazards.⁵⁵ This type of fraud on the consumer, while it constitutes only a small portion of the total amount of criminal consumer fraud, is currently receiving a great deal of publicity and legislative attention.⁵⁶

Criminal consumer fraud, like while-collar crime, endangers the moral values of society. Geis and Edelhertz point out that, while "[o]ne tenet of classical sociology is that traditional crime binds society together" by allowing society to share moral sentiments,⁵⁷ white-collar crime frequently has a corrosive effect. "The trusted prove untrustworthy; the advantaged dishonest. It shows the capability of people with better opportunities for creating a decent life for themselves to take property belonging to others. As no other crime, it questions our moral fiber."⁵⁸

In 1966, the President's Committee on Consumer Interests found that one in thirty of the letters it received from consumers throughout the country conveyed "an attitude of frustration, anger, and displeasure with the 'system.'"⁵⁹ One committee member commented: "The

though 50 per cent of the debtors interviewed did not believe there was a connection between their health and their debt problems, 49 per cent felt there was such a link, 23 per cent of whom claimed health problems sufficiently serious to warrant consulting a physician. *Id.* at 280-83.

52. *Id.* at 280.

53. Caplovitz claims that his data established a strong interaction between the problems of health and marriage that were created by debt trouble. *Id.* at 283-85.

54. According to the National Commission on Product Safety, 20 million serious injuries associated with consumer products occur each year in the United States. "Of these 20 million injuries, approximately 110 thousand result in permanent disability and 30 thousand result in death. The cost of these injuries to the nation each year is over \$5.5 billion." Remarks by R. David Pittle, Commissioner, Consumer Product Safety Commission, Consumer Product Safety Workshop, Buffalo, N.Y., Nov. 8, 1974. Although these figures do not refer exclusively to injuries resulting from criminal consumer frauds, they illustrate the potential magnitude of a problem whose impact cannot be accurately computed.

55. See 1967 TASK FORCE REPORT, *supra* note 17, at 104.

56. See Part III *infra*.

57. Geis & Edelhertz, *supra* note 26, at 1004.

58. R. CLARK, CRIME IN AMERICA 38 (1970), *quoted in* Geis & Edelhertz, *supra* note 26, at 1004.

59. *Id.*

most striking feature, in our opinion, is not the allegations of criminal fraud that occasionally have been made to us by correspondents. Rather, it is the sense of unfairness, of disregard of the individual by the organized business community, of lack of effective recourse, and of a feeling that the marketplace is unethical."⁶⁰ Lurking behind this anti-business attitude is the potentially explosive reaction of the affected consumers. Given the day-to-day frustrations and indignities of ghetto life, the victim of criminal consumer fraud in the inner city may come to perceive street crime as his only means of economic survival, emotional escape, or moral retribution. Mass violence may also result from a combination of the impact of consumer frauds with the other problems found in ghetto communities. Testimony before the McCone Commission, appointed by the Governor of California to investigate the 1965 Watts riots, suggested that the violence in that area was, in part, a response by the community to a perceived pattern of consumer exploitation.⁶¹ These same sentiments were expressed in a Detroit Urban League survey of black Detroit residents following the 1967 riots in that city. Forty-three per cent of the respondents replied that anger toward the local business people had "a great deal" to do with the riot, thirty-one per cent more thought it had something to do with the violence, and only eighteen per cent felt this factor was unrelated to the riot.⁶²

It is a mistake to assume that violence is an abreaction to frustration by fringe members of our society. The impact of business immorality on a community may be much less visible than that of street crime, but it can be even more dramatic. A case in point is the Monarch Construction Company home-improvement fraud scheme, perpetrated in the Washington metropolitan area in 1963. Consumer-author Jean Carper made a number of enlightening observations about its significance to the community.⁶³ She quotes Postal Inspector Jason Souder as saying:

60. Letter from Mrs. Esther Peterson, Special Assistant to the President for Consumer Affairs, to James Vorenberg, Executive Director of the President's Commission on Law Enforcement and Administration of Justice, March 25, 1966, reported in 1967 TASK FORCE REPORT, *supra* note 17, at 104.

61. See CALIFORNIA GOVERNOR'S COMM. ON THE LOS ANGELES RIOTS, VIOLENCE IN THE CITY—AN END OR A BEGINNING? 62 (1965), cited in 1967 TASK FORCE REPORT, *supra* note 17, at 104.

62. Detroit Free Press, Aug. 20, 1967, at B4, col. 5. These sentiments were reiterated eighteen days after the Detroit riots by Detroit Mayor Jerome P. Cavanagh: "The deep resentment of those who take advantage of the slum dweller's lack of sophistication in handling money, in selling shoddy goods, in over-charging for what he gets is a source of discontent." Speech, President's National Advisory Comm. on Civil Disorders, Aug. 15, 1967.

63. See J. CARPER, NOT WITH A GUN (1973).

Monarch was a terribly important case to the community . . . [f]or this reason: Our major premise was the fact that Monarch and all of these [fraudulent home-improvement companies] are symptoms of a more malignant condition, and that is, the rotten condition of the financial community that will permit loans to be made at the behest of such fraudulent operators as Monarch. Until somehow or other we are able to dig into that and expose it, we are only treating symptoms.⁶⁴

Carper also quotes former prosecutor Seymour Glanzer: "A crime like [Monarch's] strikes at the very structure of people's lives; it is long-lasting; it takes a toll day in and day out." Glanzer, says Carper, "sees a great difference between a consumer crime and a street crime which is over fast, usually involves small amounts of money and produces some trauma, although the victim usually recovers. 'It's the difference between having measles and getting over it,' he says, 'and having long-term cancer.'"⁶⁵

Carper adds that the social costs of such frauds are large: "The courts are jammed for years in slow, cumbersome efforts to make some small adjustments for the victims The great majority of the injured will never sue, or, having sued, will never recover their money; most will consider it a victory if they can hold on to their homes."⁶⁶ She notes that a Federal Housing Authority report indicated that Monarch's fraud probably cost consumers over \$6 million, and asks: "Where did all that money go? Most of it certainly was dissipated in company waste—construction materials, salaries, overhead, advertising, and selling expenses—just to keep the company alive. The other money, drained from the poor was distributed throughout the community. It went into interest, fees and commissions to noteholders, the banks, the finance companies, the title-settlement companies, real-estate brokers, the collection lawyers."⁶⁷

Carper concludes that the irony of the Monarch scenario and others like it is that, without the unwitting cooperation of the community's noncriminal elements, such massive frauds on the consumer could never succeed.⁶⁸ Consumer-fraud criminals frequently operate freely in the marketplace. The responsible business and legal com-

64. *Id.* at 181.

65. *Id.* at 203.

66. *Id.* at 204.

67. *Id.* at 204-05.

68. *Id.* The business community is as susceptible to damage from this type of "collusion" as is the consumer. For an example of how the "good faith" transactions between fraud offenders and our major lending institutions can have a tremendous financial impact on lenders that eventually trickles down to the consumer, see Paul, *You Have a Friend: How Chase Manhattan and Others Dropped Bundle in Puerto Rico*, Wall St. J., Sept. 19, 1975, at 1, col. 6 (eastern ed.).

munities are often too willing to accept the machinations of fast-buck operators without first questioning their propriety. Banks and finance companies too frequently close their eyes to specious transactions, which depend upon the negotiability of commercial paper, in the interest of promoting business. Lawyers have, until recently, failed to respond to the legal challenge posed by criminal consumer fraud and, in some cases, have contributed to the problem by unethical practices.⁶⁹

II. IMPEDIMENTS TO LAW ENFORCEMENT

A. *Confused Priorities*

The absorption of consumer fraud into the category of white-collar crime has created a problem much greater than that of lack of precision. It has enabled petty hoodlums and fly-by-night operators to operate under the guise of respectable and established members of the community.⁷⁰ The American public and its representatives have long been loathe to support any legislation that would threaten members of the business community and other professionals with a prison sentence. The incarceration of such individuals, it is assumed, would offend our perceptions about the societal values of hard work, efficiency, profits, and success. Professor Sanford Kadish, for example, has observed that it may be inappropriate to apply criminal sanctions to certain business offenders who violate regulatory laws, particularly where the line between shrewd practice and outright deception cannot always be clearly drawn.⁷¹

While there may be some merit in Kadish's observation if it is directed toward the broad range of marketplace conduct that seems to have fallen into the category of white-collar crime, his argument is inappropriate to criminal consumer fraud. There is good reason to believe that most of the criminal consumer fraud in this country is a product of fly-by-night operations and shaky businesses rather than of

69. See M. FRIEDMAN, *LAWYERS' ETHICS IN AN ADVERSIAL SYSTEM* 113-14 (1975).

70. The persistence of our lawmakers in legislating distinctions between punishment of white-collar crimes and punishment of crimes committed by other types of offenders can only incite the public's contempt for our criminal justice system. Whitney Seymour, Jr., former United States Attorney for the Southern District of New York, maintains that this disparity in the treatment of criminals, as was evident from a 1972 sentencing study of the Southern District of New York, has generated "a practical threat to society in the form of unrest and bitterness." Seymour, *Social and Ethical Considerations in Assessing White-Collar Crime*, 11 *AM. CRIM. L. REV.* 821 (1972).

71. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 *U. CHI. L. REV.* 423, 446 (1963).

large well-established corporations. Despite their often impersonal treatment of customers and oligopolistic positions in the marketplace, the largest corporations in America today realize that they cannot prosper in the long run by defrauding the consumer. The hard-core consumer-fraud offender, on the other hand, is usually interested in short-term profit from schemes that are often hastily devised to take in the uneducated and the unwary. He may be an itinerant offender who thinks in terms of exploiting an area or a segment of the population and then moving on to virgin territory, or he may be the owner of a shaky business who hopes that his scheme will keep it from going into the red.⁷²

In our opinion, focusing on the background of white-collar offenders has impeded the entire gambit of law enforcement, from investigation to law reform, because it has permitted racketeers to profit from society's reluctance and inability to deal with the white-collar criminal. It has diverted our law enforcement priorities away from criminal consumer fraud toward street crime even though an effective attack on criminal consumer fraud may provide a far greater marginal return to the American public than can any "war" on street crime. Law enforcement priorities should be sensitive to impact analysis, yet criminal consumer fraud has been assigned a low priority that is manifested by a lack of operating and research funds and a lack of personnel available for the difficult investigations necessitated by this type of crime.

B. Investigation

The task of detecting and investigating criminal consumer fraud is made difficult because these schemes are often camouflaged in the trappings of day-to-day commercial transactions and therefore may not be easily distinguishable from noncriminal business activities.⁷³ The camouflage is more deceptive because of the "mix" of consumer fraud complaints. They generally break down into three categories: (1) complaints requesting information (usually in search of adversarial answers); (2) complaints alleging a "civil" dispute (contract-type complaints); and (3) complaints alleging a consumer fraud that has the elements of a crime.⁷⁴ The last category, consumer fraud, com-

72. The empirical data gathered by Consumer H-E-L-P reveal the large economic impact caused by criminal consumer-fraud offenders. See notes 40 *supra* & 74 *infra*.

73. Prosecutor Robert Ogren has reported that only about a dozen consumer-fraud cases were prosecuted in the District of Columbia during the three-year period from 1970 to 1972, a figure which, he suggests, is unrepresentative of the magnitude of the existing fraud problem in that jurisdiction. Ogren, *supra* note 7, at 973.

74. A breakdown of complaints received indicates that 8 per cent are inquiries

prises the smallest percentage of complaints. The enormous number of complaints inundates the investigative capacity of most agencies, and the third category is obscured by the other two if it is not sorted out.⁷⁵

Steele's recent study of one bureau of the Illinois Attorney General's Division of Consumer Fraud and Protection illustrates the inevitable result of attempting to deal with this "mix" without an adequate sort.⁷⁶ The problems he describes probably are not uncommon among those of our nation's law enforcement agencies charged with consumer protection.

Where financial-fraud and mail-order schemes are alleged, the crime may be so technical that its detection is possible only after a detailed and lengthy audit or economic analysis by specially trained law enforcement personnel.⁷⁷ In contrast with street crimes, which normally have a visible and immediate impact upon their victims even where the offender escapes detection, criminal consumer fraud presents society with an offender whose crime may, if at all, be uncovered only after delay. Many consumer-fraud schemes are calculated to exploit delays in their victims' awareness of the deceit involved, thereby frustrating detection and investigation efforts.⁷⁸ Even where these types of frauds are detected, the investigation

that request no action, 84.5 per cent are nonfraud complaints, and 7.5 per cent are complaints that are classified as possible criminal fraud. These statistics were derived from a sample file of 1,312 complaints compiled for the United States Attorney's Consumer Fraud Project. Our estimates, based on 35,000 complaints received since 1970, lead to our projection that the range of fraud complaints is between 8 per cent and 15 per cent.

75. Consumer H-E-L-P's estimate is that, of the 25,000 anticipated yearly complaints of types (b) and (c), a maximum of 3,750 will fall into the fraud category.

76. See Steele, *supra* note 8; text at notes 8-11 *supra*. Steele's study analyzed 59 per cent of the consumer complaints received by the bureau and concluded that confusion existed over the role of the bureau as well as over the proper handling of serious nonresolvable fraud complaints. *Id.* at 1170-71. The bureau's hearing officers apparently attempted, whenever possible, to categorize all complaints received as civil disputes. "They make no investigation of the business or other consumers, nor do they check Bureau files or other files about past complaints or investigations This screening is not made from a law enforcement stance, where the criterion for decision would be the normative quality of the seller's past conduct." *Id.* at 1148. Steele also observed that one important complaint-screening criterion used by the bureau's hearing officers at the initial stage of investigations was the "standard of dispute solvability."

If it appears that the action of the Bureau will help the complainant to settle the dispute without too much effort, the Bureau will intervene even if the complaint is not serious and does not involve a high probability of fraud; the standard of solvability leads the Bureau to act on some cases where the complaint is not strong and not to act where strong complaints appear difficult to resolve. *Id.* at 1150. This type of screening standard is incompatible with the sorting out of complaints at initial stages of processing that we feel proper law enforcement requires.

77. See Wall St. J., Feb. 25, 1975, at 25, col. 2 (eastern ed.).

78. For examples of such schemes, see H. EDELHERTZ, *supra* note 1, at 23-24.

problems often are compounded by jurisdictional disputes among local, state, and federal agencies with overlapping authority,⁷⁹ inadequate provisions for compensating witnesses for their cooperation,⁸⁰ and interview techniques that generally have been ineffective in the inner city where those victimized by fraud commonly distrust law enforcement authorities.⁸¹ Whereas speed and timing are normally of the essence in the investigation of common forms of street crime, the investigation of criminal consumer frauds often requires a more thorough and painstaking approach, not only to discover the existence of the illegal act itself, but also to establish the requisite element of criminal intent and the extent of victimization caused by the fraud.

The investigation necessary to establish criminal intent is complicated by the burden of proof in criminal consumer-fraud cases. Under traditional notions of criminal law and most, if not all, of the criminal statutes in this country, any fraud offense that carries a criminal sanction requires proof beyond a reasonable doubt that the defendant intended to do the prohibited act.⁸² As a practical matter, this standard poses difficult problems for the prosecutor in terms of the quantity and quality of evidence needed to establish his *prima facie* case.

The best examples of the burden of proof problem arise in cases under the Federal Mail Fraud Act.⁸³ Like most criminal-fraud and deception statutes, this act requires proof of criminal intent as an essential element of the offense.⁸⁴ When an alleged fraud making some use of the mails comes to the prosecutor's attention, the most difficult task that he faces is gathering sufficient evidence to prove that the person or persons involved acted with intent to defraud. This

79. *See id.* at 21, 27-28.

80. *See id.* at 32-33.

81. *See id.* at 35-36.

82. *See* 37 C.J.S. *Fraud* § 157 (1943).

83. 18 U.S.C. § 1341 (1970). This statute is used by prosecutors to reach fraudulent conduct where the mails have been used to further a scheme with the intent to defraud. *See, e.g.,* *United States v. Shavin*, 287 F.2d 647, 648-49 (7th Cir. 1961); *United States v. Pisciotto*, 469 F.2d 329, 330 (10th Cir. 1972).

84. 18 U.S.C. § 1341 (1970). *But see* N.Y. EXEC. LAW § 63 (McKinney 1972), which authorizes the New York State Attorney General to initiate injunctive proceedings "[w]hensoever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business . . .," regardless of proof of scienter. *See* *Lefkowitz v. Bull Inv. Group, Inc.*, 46 App. Div. 2d 25, 26, 360 N.Y.S.2d 488, 491 (Sup. Ct. 1974). Although this is not, strictly speaking, a criminal-fraud statute (since it does not authorize the imposition of a prison term), its language appears to comprehend the kind of fraudulent conduct that could be classified as criminal. The *Bull Investment* case involved a marketing operation that bore the markings of a fraudulent pyramid scheme, which the court called "inherently fraudulent." 46 App. Div. 2d at 28, 360 N.Y.S.2d at 492. Unfortunately, there is a good deal of inherently fraudulent conduct transpiring each day that goes untouched by our tougher criminal laws.

may be particularly troublesome where the complaint is directed toward a recently established corporation or a small group of itinerant "businessmen" who keep few or no records of their operations. Furthermore, where the sale of a consumer item is the basis for the fraud complaint, prosecutors are often required to make the difficult distinction between mere puffing, which is not prohibited by the Mail Fraud Act (or other fraud statutes), and fraud.⁸⁵

Because there is little direct evidence bearing upon intent in many criminal-fraud cases, investigators are forced to search for so-called "badges of fraud"—that is, "a series of seemingly isolated acts" that allow a judge or jury to draw an inference of fraudulent intent.⁸⁶ If our law enforcement authorities had to contend with only a few serious criminal consumer-fraud cases each year, they probably would have little difficulty in undertaking the kind of thorough investigation in each case that this method of proof requires. However, limited enforcement and investigative resources and the increasing frequency of criminal-fraud offenses will not permit this luxury. Law enforcement authorities are at a serious disadvantage if they do not have ready access to data concerning the nature and frequency of past complaints against particular businesses or business persons. Monitoring of such data would seem to offer clear investigatory advantages and little potential for abuse. To a great extent, the investigatory problem arising from the burden of proof in criminal consumer-fraud cases is one of resource management rather than of legal rigidity.

There are, of course, other proof problems in this area of criminal law that may call for legal rather than administrative reform. The rather hazy chain of command that often connects individuals involved in particular consumer-fraud schemes frequently makes it difficult to find and convict the "brains" of the operation. In order to reach the principal behind a fraudulent scheme, the criminal law requires that the prosecution prove, beyond a reasonable doubt, that the defendant knew about the conduct and participated in it in some way.⁸⁷ Where the scheme is "sheltered" by a complex corporate

85. *See, e.g., United States v. New South Farm & Home Co.*, 241 U.S. 64, 71 (1916).

86. *See Aiken v. United States*, 108 F.2d 182, 183 (4th Cir. 1939). It is clear that direct proof of intent to defraud is not necessary in a mail-fraud prosecution; this element may be established circumstantially from the activities of the parties, including prior similar transactions. *See, e.g., Bass v. United States*, 409 F.2d 179, 180 (5th Cir. 1969) (submission of false financial statements); *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967) (fraudulent referral-selling plan). However, the courts have strongly suggested that "mere 'involvement in an unsavory, high-pressure, fly-by-night scheme' is not sufficient to establish 'knowing participation in a scheme to defraud.'" *United States v. Piegras*, 425 F.2d 194, 199 (9th Cir. 1970).

87. *See United States v. Interstate Engr. Corp.*, 288 F. Supp. 402, 412 (D.N.H.

structure, the task is particularly arduous. Professor Alan Dershowitz believes that, because "the law has yet to develop an effective method of pinpointing criminal responsibility in the corporate hierarchy,"⁸⁸ more severe penal sanctions will do little to deter criminal consumer fraud in such cases. He points out that in the absence of a specific command from a superior the criminal law has traditionally refused to look beyond the subordinate who played the key role in a fraudulent corporate scheme. Yet, he notes, a subordinate will generally act only as he believes his superiors would expect him to act under the circumstances.⁸⁹ Therefore, Dershowitz concludes, it is a questionable legal principle that so often immunizes corporate executives.

The fact that many simple consumer transactions in a complex economy have potentially far-reaching effects should have some impact upon the law regarding proof of criminal intent in criminal consumer-fraud cases. As entrepreneurs, manufacturers, and designers introduce ever more sophisticated goods and services, the law should simultaneously require such persons to assume at least some degree of fiduciary responsibility to the public. Some recent case law suggests that the courts are moving in this direction in order to give the consumer the full protection that regulatory legislation is designed to afford. For example, in *United States v. Park*,⁹⁰ the Supreme Court affirmed the conviction of an executive of a national retail food chain for a violation by his company of a provision of the Federal Food, Drug, and Cosmetic Act⁹¹ despite his defense that he was not personally responsible for the action constituting the basis for the charge.⁹² The Court based its holding upon its reading of *United*

1967). *Contra*, *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966). The *Andreadis* case involved the sale of diet pills that were misbranded and deceptively advertised. Judge Waterman stated that the president of a corporation should not be able to "insulate himself" from liability under the mail-fraud statute by contending that he was not told that the product claims made by his advertising agencies were false, even if that contention were true. The court intimated that, even though the jury had sufficient evidence to infer that the defendant had actual knowledge of the false claims, the defendant could also have been held responsible under the theory that he had a duty as president to verify his company's claims. 366 F.2d at 430.

88. Dershowitz, *Increasing Community Control over Corporate Crime: A Problem in the Law of Sanctions*, in *WHITE-COLLAR CRIMINAL* 136, 142 (G. Geis ed. 1968).

89. *Id.* at 145.

90. 421 U.S. 658 (1975).

91. 21 U.S.C. § 331(k) (1970). This section basically prohibits the adulteration or misbranding of any food, drug, device, or cosmetic that is held for sale after shipment in interstate commerce.

92. At issue was the validity of the trial judge's jury instruction, which was quoted, in part, as follows: "The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets." 421 U.S. at 665 n.9.

States v. Dotterweich,⁹³ where the Court had closely examined the test for culpability under the statute. The *Park* Court noted that, in affirming the defendant's conviction in *Dotterweich*,

th[e] Court looked to the purposes of the Act and noted that they "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." It observed that the Act is of "a now familiar type" which "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."⁹⁴

The drafters of any new consumer-fraud statute who wish to provide meaningful criminal sanctions⁹⁵ should examine the *Dotterweich* and *Park* decisions for guidance in dealing with the standard of culpability for corporate officials who claim responsibility only for major managerial decisions.

C. Prosecution

Once the prosecutor feels that he has sufficient evidence to establish the government's prima facie case and rebut any anticipated defenses, the criminal consumer-fraud case can go to trial. At this point a number of obstacles to the prosecution come into play, making the prognosis for success poor. Prosecutor Robert Ogren cites the "ponderous character of the criminal process" as one of the basic impediments to the successful disposition of "commercial" white-collar crime (consumer-fraud) cases:

Few white-collar crime cases are simple; their prosecution entails an enormous expenditure of the resources of the criminal justice system in relation to the number of cases prosecuted. As a result, comparatively few commercial cases are prosecuted, and those which are proceed at a snail's pace. The infrequency of prosecution means that most offenders who have been prosecuted are treated as first offenders even though their lives may have been spent in serious crime. . . . Ultimately, if the criminal justice system is to fashion a credible deterrent to commercial and economic crime, the prosecution of white-collar crime must become more than an empty gesture or a sporadic act of vengeance.⁹⁶

One of the major problems is simply delay. An astute and experienced counsel can attempt to protect his client by requesting numerous conferences with the prosecutor and his superiors, by making desperate motions with little chance of success, and by making

93. 320 U.S. 277 (1943).

94. 421 U.S. at 668.

95. See text at notes 144-47 *infra*.

96. Ogren, *supra* note 7, at 960.

extensive discovery requests that have a purpose more dilatory than informational.⁹⁷ Long delay in major criminal consumer-fraud cases places a severe strain on the limited manpower and resources available to the prosecutor. Even worse, the criminal system's failure to bring such cases to a speedy resolution allows offenders to continue their operations.⁹⁸

When and if a criminal consumer-fraud case is ready to go to trial, attempts to plea bargain and pleas of *nolo contendere* are common.⁹⁹ The practice of plea bargaining presents troublesome problems in these cases. Prosecutors' limited resources require that they engage in this practice, yet it has, of late, become a well-popularized defense tool in consumer-fraud cases.¹⁰⁰ Defense attorneys are aware of the obstacles that prosecutors face in most fraud cases, and they realize that the government generally would prefer an immediate guilty plea rather than an extended court battle. Ironically, an offender faced with a thirty-count indictment under the federal mail-fraud statute¹⁰¹ has more pleading options, and therefore a better chance of a successfully bargained plea, than does a bank robber.¹⁰² Moreover, if the prosecution accepts a plea to relatively few counts of a multi-count indictment, the court, when sentencing, may not recognize the severity of the accused's actions.

An offer by a criminal consumer-fraud defendant to plead *nolo contendere* presents the prosecutor with an even more troublesome decision. Not only might the judge respond to this sign of apparent contrition with a light sentence, but the plea enables the offender to deny the guilt admitted in the criminal trial in any civil litigation growing out of the same offense. Former federal prosecutor Herbert Edelhertz maintains that pleas of *nolo contendere* are difficult to justify in most white-collar criminal cases,¹⁰³ and this holds true in

97. H. EDELHERTZ, *supra* note 1, at 45. While any competent defense counsel would be expected to take advantage of these techniques, former prosecutor Edelhertz relates that defense attorneys for "big time" white-collar offenders generally are more vigorous, dedicated, and probably better paid than their counterparts in minor fraud and traditional theft cases. *Id.* at 45-46.

98. For suggestions for improving the handling of major white-collar crime cases, see *id.* at 49-53.

99. *Nolo contendere* pleas appear in virtually every fraud case handled by the U.S. Attorney's Office, District of Columbia, in which pleas are entered yet no trial occurs. Ogren Interview, *supra* note 1.

100. It is doubtful, after federal income tax charges against former Vice-President Spiro Agnew were plea-bargained away, that any potential fraud offender is unaware of the utility of the plea bargaining process if he is ever caught. It is also reasonable to expect that the popularization of this procedure will have an appreciable effect upon the deterrence factor that any criminal sanction might embody.

101. 18 U.S.C. § 1341 (1970).

102. See H. EDELHERTZ, *supra* note 1, at 54.

103. *Id.* at 56.

criminal consumer-fraud cases as well. Sound prosecutorial discretion at the investigatory stage of a criminal consumer-fraud case should usually eliminate the value of the nolo plea in the bargaining process. If the prosecution believes that it cannot develop a strong case against a fraud offender prior to trial, a dismissal is warranted.¹⁰⁴

D. Sanctions

If the threat of a substantial period of incarceration is necessary to deter effectively criminal consumer frauds, the accomplishment of this goal is hindered by the prosecutors' frequent decision to plea bargain with known offenders.¹⁰⁵ In addition, the sentencing options currently available under both state and federal law may generally be insufficient, either in substance or in practice, adequately to deter criminal consumer fraud. A sampling of the basic fraud and theft-by-fraud statutes (false advertising, false pretenses, and larceny by trick) in five states and the District of Columbia reveals an entire gamut of sanctions. The periods of incarceration allowed by some statutes are surprisingly long, while others are relatively short. For example, the penal sanctions made available to the sentencing judge for the offenses of larceny by trick and false pretenses in Alabama,¹⁰⁶ California,¹⁰⁷ Massachusetts,¹⁰⁸ Ohio,¹⁰⁹ Wisconsin,¹¹⁰ and the District

104. *Id.*

105. *Id.* at 55. See also Ogren, *supra* note 7, at 966.

106. See ALA. CODE tit. 14, § 209 (1959) (providing that any person found guilty of obtaining property under false pretenses shall be punished as if he had stolen the property); ALA. CODE tit. 14, § 331 (Supp. 1973) (defining the crime of grand larceny and providing for imprisonment of from one to ten years if the value of property stolen is five dollars or more).

107. See CAL. PENAL CODE §§ 484, 487, 488, 489, 490, 532 (West 1970). These sections cover theft by fraud and false pretenses and, if the value of the property stolen is greater than \$200, provide a penalty of imprisonment for not more than one year in city jail or not more than ten years in state prison. If the value is less than \$200, the penalty is a maximum of \$500 or incarceration in jail for six months, or both.

108. See MASS. ANN. LAWS ch. 266, §§ 30, 75 (Supp. 1974). These sections make larceny by trick punishable by up to five years' imprisonment or a \$600 fine and two years in jail when the value of the property stolen is over \$100. If the value is under \$100, the maximum penalty authorized is a \$300 fine or one year in jail.

109. See OHIO REV. CODE ANN. §§ 2913.102, 2929.11, .21 (1975). These sections punish theft "by deception" with a maximum fine of \$1,000 and/or maximum imprisonment of six months if the value of the property stolen is less than \$150 (petty theft, a misdemeanor of the first degree). If the value of the property stolen is greater than \$150 (grand theft, a felony of the fourth degree), imprisonment may range from a minimum of six months to a maximum of five years and the offense may carry a maximum fine of \$2,500.

110. See WIS. STAT. ANN. § 943.20 (Supp. 1975). This section punishes theft by false pretenses with a minimum fine of \$200 and maximum imprisonment for six months, or both, if the value of the property taken is less than \$100. If the value of the property taken is over \$100 but less than \$2,500, a maximum fine of \$5000 and/or five-years imprisonment is imposed. If the value of the stolen property is

of Columbia¹¹¹ appear to be substantial on their face. The penal sanctions provided in these jurisdictions for fraudulent and deceptive advertising are generally less severe.¹¹² However, even where the statutes giving a sentencing judge the authority to impose lengthy imprisonment, substantial prison terms are rarely meted out in criminal consumer-fraud cases. This is so both because the statutes have been narrowly construed and because judges have treated white-collar offenders leniently.¹¹³

The federal statutes similarly do not appear to provide the potential perpetrator of criminal consumer fraud with a realistic expectation of substantial incarceration. Robert Ogren, Chief of the Fraud Unit of the United States Attorney's Office for the District of Columbia (which can bring criminal fraud prosecutions under both district and federal statutes) notes that most of the federal statutes pertaining to fraud offenses provide for a prison term of no more than five years.¹¹⁴ Even though his list of ten federal statutes with five-year maximums might appear to provide the fraud unit with an impressive law enforcement arsenal, the truth is that even these federal weapons cannot counter the barrage of criminal consumer frauds in the District of Columbia. Ogren laments that, even when a conviction is obtained under one or more of these statutes, the sanction finally

over \$2,500, the statutory maximums are raised to \$10,000 or fifteen years' imprisonment, or both.

111. See D.C. CODE ANN. §§ 22-1301, -2201 (1973). Section 22-1301 punishes theft by false pretenses with imprisonment for from one to three years if the property stolen is worth \$100 or more. If the value is less than \$100, the maximum penalties are \$1,000 and one year in prison. Section 22-2201 covers grand larceny and punishes an offender convicted of larceny by trick with from one-to-ten-years imprisonment if the value of the property taken is \$100 or more.

112. See ALA. CODE tit. 14, § 211(f) (1959) (making false advertising a misdemeanor punishable by a fine of not less than \$25 nor more than \$1,000 or sixty days in jail, or both); CAL. CIV. CODE §§ 3369, 3370.1 (West Supp. 1975) (providing only a maximum fine of \$2,500 as a civil penalty for deceptive advertising); D.C. CODE ANN. §§ 22-1411 to -1413 (1973) (providing a maximum fine of \$500 and incarceration for up to 60 days, or both, for persons, firms, and associations, and, if the offender is a corporation, providing that its present or other officials responsible may be imprisoned for up to 60 days); MASS. ANN. LAWS ch. 266, § 91 (1968) (providing a fine of not less than \$500 nor more than \$1,000 for false and deceptive advertising); OHIO REV. CODE ANN. §§ 4165.02 to .04 (1973) (covering various deceptive trade practices including false advertising, but providing an injunctive remedy only); WIS. STAT. ANN. §§ 100.18, .26 (1973) (covering a variety of fraudulent advertising practices, most of which are punishable by a maximum fine of \$200 or up to six months imprisonment, or both).

113. For an example of the problems of prosecuting criminal consumer frauds under the traditional false pretenses, larceny by trick, and false advertising statutes in Ohio, see Saxbe, *The Role of the Government in Consumer Protection: The Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968).

114. Ogren, *supra* note 7, at 964.

imposed generally serves only "a symbolic purpose."¹¹⁵

Meaningful sanctions do not automatically follow from a successful criminal consumer-fraud prosecution, particularly if the presiding judge is not adequately informed of the severity of the crime's impact upon both its individual victims and the community. Because of the rippling impact of criminal fraud, the prosecutor is rarely able to bring most of a scheme's victims into the courtroom to describe its effect upon them. Furthermore, the defendant's counsel will generally recommend a guilty plea to the original or a reduced charge¹¹⁶ if he anticipates that a full-blown trial will reveal the full extent of the harm inflicted by the offense. If such a plea is entered, the judge may look only at the bare language of the indictment plus a pre-sentence report before deciding upon an appropriate sentence.¹¹⁷ Prosecutors, perhaps out of sympathy for the defendant's devastated family, are often reluctant to make stiff sentencing recommendations even where such recommendations are permitted. The feeling among prosecutors seems to be that once the case is properly presented at trial their role ends and it is the court's responsibility to see that justice is done.¹¹⁸ All of these factors contribute to the unfortunate lack of communication that is largely responsible for the failure of many judges to treat major consumer-fraud offenders as dangerous criminals.¹¹⁹

Even where the sentencing judge imposes a substantial penal sentence, the criminal consumer-fraud offender rarely remains confined for more than the minimum term prescribed.¹²⁰ Observes Ogren, "If the assumption that many white-collar criminals are sophisticated offenders is accurate, then they have probably discerned that it is rare to serve more than three years in prison, and virtually impossible to serve that much time if they plead guilty to the charges."¹²¹ There is no question that when a major fraud offender is convicted after victimizing an entire community, and then serves

115. *Id.* at 960. Ogren reports that, out of a total of 82 persons sentenced in significant fraud or corruption felony cases in the United States District Court for the District of Columbia during a recent three-year period, only 20 were given maximum prison sentences in excess of three years. Of this group, no defendant has yet served more than one-third of his imposed sentence. *Id.* at 962.

116. See text at notes 101-02 *supra*.

117. See H. EDELHERTZ, *supra* note 1, at 61 n.8. Edelhertz suggests that, since the vast majority of criminal consumer-fraud defendants have no prior criminal records, the pre-sentence reports could be most useful in fraud cases to inform judges of the full economic and human impact of the crime. *Id.* at 63.

118. Ogren Interview, *supra* note 1.

119. Cf. H. EDELHERTZ, *supra* note 1, at 43.

120. For an account of various sentence-reduction provisions under federal law, see Ogren, *supra* note 7, at 963.

121. *Id.* at 963-64.

only a light sentence, the word gets out to the rest of the extra-legal community that deception remains a profitable enterprise.

The imposition of penal sanctions in criminal consumer-fraud cases may be subject not only to these practical problems, but also to a theoretical challenge. It has been argued that such sanctions do not adequately serve the needs of the victims. The victims' primary need, posits the argument, is compensation rather than retribution. A related controversy exists over whether the costs of further criminalizing consumer fraud will actually be borne by those victimized. Together, these concerns may suggest that the focus in dealing with consumer fraud should be on other than criminal prosecution.

Ogren observes that, from the victim's standpoint, a criminal prosecution may seem futile; it will merely delay his own prospect of recovery in exchange for what usually amounts to a slap on the wrist for the convicted offender. Since all parallel proceedings are commonly stayed once a criminal case is initiated,¹²² victims of criminal consumer-fraud who become aware of a pending prosecution against the perpetrator commonly pursue one of two avenues for a remedy—settlement or restitution. Unfortunately, there are practical problems with both.

Edelhertz points out that, for several reasons, a civil settlement between a fraudulent merchant and his victims during a criminal investigation or prosecution may have an adverse effect on the public interest. The prosecutor faced with the possibility of a civil settlement may doubt the desirability of a lengthy prosecution that will not offer the victims any substantial relief. Victims are less enthusiastic about testifying for the state once settlement has been made, and defense attorneys in their appeals for leniency often attempt to bring a settlement to the attention of the court or jury.¹²³ Furthermore, settlement during the investigatory or early prosecutorial stages of a criminal consumer-fraud case may prevent the unearthing of additional facts that might have revealed that the scope of the fraud was broader than was originally thought. The end result is that the law may become party to a bargain with the offender at the public's expense. Law enforcement should not end at the identification of a consumer-fraud victim or class of victims; it should go on to ensure that such victimization will not recur.

The victim's other common recourse, "restitution" in the criminal case,¹²⁴ has been touted as the most effective method of achieving the

122. *Id.* at 980.

123. H. EDELHERTZ, *supra* note 1, at 29-31.

124. The idea is to give the convicted offender a suspended sentence with probation conditioned upon payment of monthly installments into a restitution fund.

combined goals of deterrence and compensation.¹²⁵ Ogren, however, based on his first-hand experience with this remedy, believes that for several reasons it is "an unrealistic objective."¹²⁶ First, criminal consumer-fraud offenders rarely have sufficient assets to comply with a post-conviction restitution order.¹²⁷ Second, even where assets can be found, American courts are limited in the restitution procedure to ordering the payment of "reasonable" amounts even though the fraud may have made it impossible for a victim to live comfortably. Third, the limited experience of the District of Columbia courts with court-ordered restitution has shown that a great many administrative problems must be ironed out before its utility can be fully determined.¹²⁸ Finally, despite the fact that compensation is usually as difficult to achieve in civil cases as it is in criminal cases, what little restitution is made in a civil case after settlement or judgment will at least reach the victim more quickly than any relief deriving from a criminal prosecution.

Considered by themselves, these points suggest that the law should rely more heavily upon a civil approach to criminal consumer fraud in order better to serve the needs of its victims. Certainly, the tension between criminal and civil sanctions would require statutory balancing to achieve the dual purposes of deterrence and compensation. However, if the argument means that the enactment of stiffer criminal sanctions is not an appropriate response to the criminal consumer-fraud problem, it takes too narrow a view. If the victims are presented with a choice not between quick but token compensation and a prosecution with only symbolic effect, but rather between token relief and a prosecution that will place the offender where he

125. When the *Monarch* problem first arose, see note 127 *infra*, the United States Attorney's Office believed restitution was the most effective remedy. It now regards it as a "Rube Goldberg contraption," where the fraud perpetrator steals from new victims to repay old. Ogren Interview, *supra* note 1. See also J. CARPER, *supra* note 63, at 196-98.

126. Ogren, *supra* note 7, at 979.

127. The *Monarch Construction Co.* fraud case, prosecuted in the District of Columbia, see *United States v. Cohen*, Crim. No. 412-70 (D.D.C., Jan. 8, 1971); *United States v. Clark*, Crim. No. 472-70 (D.D.C., Jan. 8, 1971); *United States v. Greenfield*, Crim. No. 715-70 (D.D.C., Jan. 11, 1971), provided a good example of this "empty pockets" phenomenon. Although hundreds of victims were swindled out of hundreds of thousands of dollars in the form of promissory notes and mortgages, the masterminds of that home repair racket had comparatively little to contribute to a court-ordered restitution fund after they were convicted. See generally J. CARPER, *supra* note 63. To date, six years after their scheme was uncovered, the three defendants have paid only about \$60,000 into the restitution fund, and it is not expected that they will ever pay more than \$90,000. Prosecutor Robert Ogren concluded that "the restitution order in the *Monarch* case has proven to be frustrating for the victims and a headache for the courts." Ogren Interview, *supra* note 1.

128. See Ogren, *supra* note 7, at 980 n.63.

can do no further harm in the community, it is likely that they will opt for the latter. Under this broader view, the interest of victimized consumers in deterring criminal fraud parallels that of society as a whole.

E. *Deterrence—The Central Goal*

Reconciliation of the apparent conflict between further criminalizing consumer fraud and compensating those who are victimized can be accomplished by considering the problem in terms of the central goal—deterrence. In the final analysis, the question facing both legislator and judge is this: If we begin putting hard-core business-fraud offenders behind bars for substantial periods of time, will this deter others from engaging in similar unconscionable conduct? Unfortunately, no hard data exist that can provide an easy answer to this question. This is in part due to the fact that legislators and prosecutors in most jurisdictions have not yet begun to treat the habitual criminal consumer-fraud offender like the professional criminal that he is. While the nation's law enforcement authorities do not all agree that stiffer penal sanctions will rid our cities of the criminal consumer-fraud problem, most would probably agree that our current methods do not accomplish this goal.

At a time when criminal consumer fraud is reaching epidemic proportions, legislators and judges cannot afford to ignore the arguments of the sociologists that this type of offender can be deterred, perhaps even more effectively than can traditional common-law offenders, by a realistic threat of imprisonment. Ogren questions the ability of the criminal sanction to deter the illegal conduct of fraud offenders who are motivated by "economic necessity."¹²⁹ There is, however, a distinct difference between the inept businesspersons who occasionally commit frauds when caught in the competitive crunch of an unhealthy economy and those offenders who make consumer fraud their business. And it is likely that most serious consumer frauds are committed by the latter, narrow, fringe element in the business community.

The habitual criminal consumer-fraud offender can and should be isolated from the larger group. It is his decision intentionally to defraud the public on a day-to-day basis that transfers him from the

129. *Id.* at 974. In his discussion of the motivations of white-collar criminals, Ogren states: "The population of fraud offenders includes stable, well-educated corporate executives, but it also includes struggling entrepreneurs, hucksters, 'rain makers,' promoters of fly-by-night stocks, alcoholics, psychopaths, and a heavy sprinkling of bad businessmen and persons caught in serious economic distress." *Id.*

illusory white-collar category to the caste of the "con artist," the petty hoodlum, and the fly-by-night operator. This district type of fraud offender should be the focus of a program of tough criminal sanctions. Substantial prison sentences would keep the hard-core consumer-fraud offender off the streets, just as other offenders who continue to pose a threat to the public are removed, at least temporarily, from society.¹³⁰ Moreover, further criminalization of fraudulent conduct in the marketplace would probably have a broad deterrent effect. While it might not deter those who negligently or mistakenly exploit consumers, it would put the merchant or professional intending to profit from misrepresentation and deceit on notice that such conduct will no longer be tolerated.

III. SOLUTIONS TO THE PROBLEMS OF LAW ENFORCEMENT

There is at present no ascertainable concerted effort to deal with criminal consumer fraud at any level of government, and the enigmatic nature of the offense creates many enforcement problems. Nevertheless, select police departments, prosecutors, and judges have become sensitized to the problems caused by this crime and are developing effective solutions. Researchers, aided by institutions such as the Law Enforcement Assistance Administration (LEAA), are also working in the area. Legislators, reacting to the adverse impact of criminal consumer fraud, are proposing new legislation codifying both tested and newly proposed solutions. The authors are participating in one local prototype effort.¹³¹ This section categorizes some of the prominent local efforts to provide solutions to the previously discussed problems of investigation, prosecution, restitution, and sentencing. These examples illustrate our thesis about solutions to these problems.

A. Investigation

Perhaps the most frustrating obstacles to the attack on criminal consumer fraud are those encountered in investigation, the *sine qua non* of any successful prosecution of criminal consumer fraud. A promising method of overcoming many of these obstacles has been

130. The drafters of the 1967 *Presidential Task Force Report on Crime and Its Impact* appeared to recognize that deterrence may work with at least certain types of consumer-fraud offenders. They concluded that, while long periods of incarceration are probably not needed to protect the public from the further criminality of many kinds of white-collar offenders, "among some classes of white-collar offenders, such as those guilty of cheating consumers, recidivism may be a serious problem." 1967 TASK FORCE REPORT, *supra* note 17, at 104.

131. See note 181 *infra* and accompanying text.

implemented in the District of Columbia's newly created fraud division. This is a three-pronged effort, funded by the Office of Criminal Justice Plans and Analysis (LEAA) through the District of Columbia, that consists of developing new methods of complaint-screening and data-dissemination, establishing a team of prosecution-oriented personnel, and using local police to assist in flushing out major offenders.

Personnel in all of the existing Washington metropolitan area offices that receive consumer complaints (either by mail, phone, or in person) are being trained to use a questionnaire designed to permit determination whether a complaint alleges an apparent intention to lie, cheat, or steal. If it appears from the response that such an allegation is contained in the complaint, a special complaint form is filled out for data processing. This form is coded and then batch-processed and stored in Justice Department computers.¹³² This data can be instantaneously retrieved through an on-line computer terminal by lawyers in the fraud division of the United States Attorney's office. This retrieval system is designed to convey a large amount of information in a variety of ways: It saves time in the initial pre-investigation screening of complaints, and then assists law enforcement authorities in their actual investigation by enabling them to discern "patterns or profiles" of fraud alleged in a specific jurisdiction.

The hub of this fraud team is the Fraud Division of the Office of the United States Attorney for the District of Columbia. Until 1967, when a number of home repair rackets rocked the metropolitan area, the office had no fraud division. At that time, the United States District Attorney established one and designated Seymour Glanzer, a member of the office's white-collar crime division, as its chief and sole attorney. The Department of Justice then sent one of its attorneys over to join Glanzer. Robert Ogren has since taken over as director, and the fraud division now consists of nine full-time attorneys. The division's attorneys utilize the information received from the participating agencies to investigate and prosecute consumer-fraud cases; priority is given to cases that illustrate either a single shocking example of criminal consumer fraud or a pattern of fraudulent practices.

There have been some clear indications that the division has already achieved considerable success in curtailing the proliferation of criminal consumer frauds in the District of Columbia. There is room, however, to increase its effectiveness. Although the division

132. The coding system was developed by Consumer H-E-L-P under an LEAA grant.

theoretically should be able to draw upon the investigatory arms of a number of federal agencies, to date it has had to rely chiefly upon the assistance of the District of Columbia Metropolitan Police Department and, to a lesser extent, upon the aid of the FBI, the Postal Inspection Service, and the SEC. The division remains hopeful that, in addition, federal agencies such as the FTC, the FDA, and the Department of Agriculture will play an increasing role in bringing major fraud cases to its attention. Success breeds cooperation.

The fraud division advocated the establishment of the third part of the fraud team, a special "bunco squad" in the District police department. The squad, designed to specialize in fraud investigation free from the time-consuming check cases that continue to bog down the department, was finally established in the spring of 1975 and has just begun work in cooperation with the division. The squad consists of five detectives who are being specially trained in accounting and consumer schemes under an LEAA grant. The bunco squad concept, pioneered in Los Angeles, is simple and effective: It brings into a consumer fraud investigation the expertise necessary to determine whether there is probable intent to lie, cheat, or steal, while at the same time accumulating evidence to that effect. For example, the Los Angeles Police Department Fraud and Bunco Squad has attacked the problem of crooked auto repair shops by rigging vehicles operated by undercover officers with easily detectable defects and then tape recording conversations with garage operators.

The newly developed cooperative effort among the fraud division, the police department, and local government offices of consumer affairs is certain to improve investigation and promote the successful prosecution of criminal consumer-fraud offenders. The news of successful prosecutions quickly filters down to the marketplace level and has a marked impact upon potential offenders. Ogren cites, for example, the fact that his office has had to indict for only one home improvement scheme since 1968 (one under indictment at this writing)—a statistic that he attributes to the successful prosecution of a number of such schemes in the District of Columbia in the late sixties.¹³³ Both Ogren and Glanzer agree that the key to ridding the community of criminal fraud activity is to "put the heat on"—to place the potential offender on notice that if he pursues a deceptive course of business, he will be put out of business and into jail.¹³⁴

133. Ogren Interview, *supra* note 1.

134. Interview with Seymour Glanzer, former Chief of the Fraud Division of the United States Attorney's Office for the District of Columbia, in Washington, D.C., Nov. 25, 1974 [hereinafter Glanzer Interview].

B. Prosecution

Examples are abundant of the importance for effective prosecution of obtaining an overall profile of significant criminal consumer fraud. Careful priorities for targeting prosecutions must be developed in order most effectively to utilize prosecutorial resources. Ogren feels that *United States v. Sells*,¹³⁵ for example, was a significant case for his office because it was resolved through the use of an economical pre-indictment technique. The offender was a member of a group of itinerant consumer-fraud offenders that operated out of a Virginia motel and preyed upon the elderly in the District of Columbia area by promising roofing work, obtaining payment in full by check, and delivering nothing. After receiving between 400 and 500 complaints during the summer and fall of 1974, totaling almost \$250,000 in losses, the fraud division brought Sells into its office and, after describing its case, induced him to plead guilty to an information for conspiracy to commit interstate transport of stolen property. The prosecutors persuaded the defendant to return the money that he had stolen and the judge sentenced him to five-years imprisonment. Ogren maintains that this kind of pre-indictment disposition is particularly effective in the case of first offenders, who may be offered a chance to avoid conviction if the offense is not too severe and the offender is willing to make restitution. "Rapid turnover of cases is the name of the game in this area of the law," says Ogren. "The pre-indictment disposition is designed to help maximize our case load whereas full-blown prosecutions in which multiple victims must be sought out to prove criminal intent merely exhaust our manpower."¹³⁶ Almost fifty per cent of the cases that come to the District of Columbia fraud division are now disposed of in this manner.

Also crucial to effective prosecution, because of the existing absence of a criminal definition of consumer fraud, is the prudent selection of statutes under which to prosecute. The fraud division has targeted prosecution toward the most serious offenses by using a combination of techniques that employ both local and federal statutes. For example, *Green v. United States*¹³⁷ involved a "bait and switch" scheme in which the defendant advertised that he had new sewing machines available for immediate delivery at a price of \$63. He failed to disclose that customers responding to the ad would be

135. Crim. No. 74-953 (D.D.C., Jan. 10, 1975).

136. Ogren Interview, *supra* note 1. For an example of another recent pre-indictment disposition by the fraud division, see *United States v. Gochoel*, Crim. No. 75-241 (D.D.C., May 9, 1975).

137. 312 A.2d 788 (D.C. App. 1973).

told that "the base and the foot pedal, needed to turn the machine on and off and to regulate the speed of the motor, had to be obtained at additional cost."¹³⁸ Says Ogren, "This man lived off 'bait and switch.' He couldn't survive in business in any other way."¹³⁹ The defendant was charged and convicted on a sixty-count indictment for violating the fraudulent advertising statute of the District of Columbia,¹⁴⁰ which makes each publication of a fraudulent advertisement punishable by a fine of not more than \$500 or imprisonment for sixty days, or both. He was fined \$24,000 and sentenced to sixty days in jail.

C. Restitution

The fraud division's successful prosecutions of home-improvement schemes in the *Monarch Construction Co.* case¹⁴¹ and in *United States v. Shulman*¹⁴² have had an *in terrorem* effect on potential fraud offenders of the same ilk. This illustrates the importance of concentrating prosecutorial resources upon those criminal consumer-fraud cases that have a significant adverse impact on the community, particularly where those who are victimized are low-income consumers.

Such cases, however, pose the dilemma between criminal prosecution and consumer recovery. In the *Monarch* case, the principals behind a scheme that defrauded hundreds of people of hundreds of thousands of dollars pleaded guilty to mail fraud and received suspended sentences of from one to five years, conditioned upon restitution being made to the victims. Although the court's restitution order initially appeared to be a major breakthrough in the largely unexplored area of victim compensation, the hopes of the judge, prosecutors, and victims were quickly shattered by seemingly insurmountable administrative problems. Ogren now believes that, at most, \$80,000 to \$90,000 of the losses will be repaid. The prosecutors, who had assembled a well-developed case against the offenders, could only watch in frustration as the judge set free those convicted while most of the victims were left with a ninety-per cent loss.¹⁴³

138. 312 A.2d at 791.

139. Ogren Interview, *supra* note 1.

140. D.C. CODE ANN. § 22-1411 (1973).

141. *United States v. Cohen*, Crim. No. 412-70 (D.D.C., Jan. 8, 1971); *United States v. Clark*, Crim. No. 472-70 (D.D.C., Jan. 8, 1971); *United States v. Greenfield*, Crim. No. 715-70 (D.D.C., Jan. 11, 1971).

142. Crim. No. 147-68 (D.D.C., March 21, 1969), *affd. per curiam*, No. 23,009 (D.C. Cir., June 25, 1970).

143. Furthermore, at least one of the defendants in the *Monarch* case is now, five years later, under investigation for subsequently engaging in questionable business practices. See *Washington Post*, March 8, 1975, at A1, col. 1.

There is no reason why a tough penal approach to criminal consumer fraud cannot accommodate an effective restitution order. In fact, the threat of prolonged incarceration can provide sufficient incentive for the fraud offender to make vigorous efforts to return to the community that which he stole. If probation is to be used successfully to provide restitution for low-income consumers who have incurred severe economic injury, the compensation must be tied to actual losses. Innovation is needed to deal with the plethora of administrative problems that the restitution remedy poses, but solutions are not unattainable. We suggest that the courts might profitably appoint special masters to develop flexible responses to the demands of each case. This would relieve presiding judges of a substantial post-sentencing supervisory burden and would allow the courts to exercise greater vigilance over their fraud probationers.

D. Sentencing

Prosecution inevitably lays bare not only the issue of repayment, but also the problems of sentencing and underlying statutory inadequacies. For example, the defendant in *Shulman* cheated about seventy District of Columbia residents out of over \$250,000 by forging second mortgages. His victims included the elderly, the poor, and the handicapped, many of whom were forced to sell their homes in order to pay off their unexpected debts. Although the fraud unit staff knew that Shulman had been associated with similar home improvement schemes before, they had previously been unable to obtain a conviction.¹⁴⁴ This time the defendant was convicted of mail and wire fraud.¹⁴⁵ Although the sentencing judge could have imposed consecutive sentences for separate counts of mail and wire fraud, the defendant was sentenced concurrently on the multiple counts to from twenty months to five years in prison.¹⁴⁶ No restitu-

144. Ogren, *supra* note 7, at 965 n.26.

145. Shulman was convicted under 18 U.S.C. §§ 1341, 1343 (1970).

146. Other examples of lenient sentencing of white-collar criminals abound. For example, in *United States v. Ferebee*, Crim. No. 259-71 (D.D.C., March 3, 1972), the defendant billed customers for automobile parts that he never installed and installed new parts when repairs were not needed. After defrauding a large number of customers out of an average of \$300 per car, complaints were made to the FTC that finally put him out of business. After destroying his business records, Ferebee set up shop once again under an assumed name, and, when Neighborhood Legal Services started receiving complaints, the fraud division stepped in with an arrest for violations of the mail fraud, larceny by trick, and false pretenses statutes. Despite the clear-cut case against the offender, all but three months of his 1- to 4-year sentence was suspended by the presiding judge. In *United States v. Cherry*, Crim. No. 68-70 (D.D.C., Feb. 10, 1970), after the defendant's furniture, moving, and storage scheme was uncovered by the fraud division, he was prosecuted under the mail-and wire-fraud statutes. Even though he stole almost all of the property of one hapless

tion was ever made. The punishment simply did not fit the crime.

While both Ogren and Glanzer can proudly point to a record of prosecution that has rid the District of Columbia and its environs of a great deal of criminal consumer fraud, they both readily admit that the problems hindering its effective prosecution are far from resolved. Glanzer explains that there is not only a general need for more effective sanctions, but that the prosecution of consumer-fraud cases is needlessly complicated by the existence of archaic theft statutes that lack real deterrent value and are ill-designed for the task of attacking an endless variety of fraudulent schemes.¹⁴⁷ Even though the District of Columbia fraud division continues to operate as a sound law enforcement model, actual deterrence does not stop with the prosecutorial function. A general consumer-fraud statute that clearly defines the criminal conduct and provides for substantial penal sanctions is necessary to solve the existing deterrence problem.

E. *Statutory Reform*

There are currently before Congress two proposed versions of a new federal criminal code that would replace title 18 of the current United States Code. Each would make substantial organizational changes affecting the kinds of theft that we have denominated criminal consumer fraud.

Representative Kastenmeir's proposal, H.R. 333,¹⁴⁸ embodies the provisions set forth in the final report of the National Commission on Reform of Federal Criminal Laws.¹⁴⁹ One of the major reforms proposed by the Commission is the consolidation and unification of the dozens of existing provisions dealing with the taking of property of another. The resolution provides: "Conduct denominated theft in sections 1732 to 1734 constitutes a single offense designed to include the separate offenses heretofore known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses,

family by padding charges and making fraudulent misrepresentations, the presiding judge imposed a penalty of unsupervised probation for one year.

According to a 1972 sentencing study of the Southern District of New York, "[t]here are plain indications that white-collar defendants, predominantly white, receive more lenient treatment as a general rule, while defendants charged with common crimes, largely committed by the unemployed and undereducated, a group which embraces large numbers of blacks in today's society, are more likely to be sent to prison." Seymour, *Social and Ethical Considerations in Assessing White-Collar Crime*, 11 AM. CRIM. L. REV. 821, 827-34 (1973).

147. Glanzer Interview, *supra* note 134.

148. H.R. 333, 94th Cong., 1st Sess. (1975).

149. FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971) [hereinafter FINAL REPORT].

extortion, blackmail, fraudulent conversion, receiving stolen property, and the like."¹⁵⁰ Theft under these sections is graded according to the seriousness of the threat, if one is involved, and the value of the property or services stolen.¹⁵¹ Class B felonies are punishable by not

150. H.R. 333, 94th Cong., 1st Sess. § 1731(1) (1975).

Proposed sections 1732 to 1734 provide:

§ 1732. Theft of property

A person is guilty of theft if he—

(a) knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;

(b) knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat; or

(c) knowingly receives, retains, or disposes of property of another which has been stolen, with intent to deprive the owner thereof.

§ 1733. Theft of services

A person is guilty of theft if—

(a) he intentionally obtains services, known by him to be available only for compensation, by deception, threat, false token, or other means to avoid payment for the services; or

(b) having control over the disposition of services of another to which he is not entitled, he knowingly diverts those services to his own benefit or to the benefit of another not entitled thereto.

Where compensation for services is ordinarily paid immediately upon their rendition, as in the case of hotels, restaurants, and comparable establishments, absconding without payment or making provision to pay is prima facie evidence that the services were obtained by deception.

§ 1734. Theft of property lost, mislaid, or delivered by mistake

A person is guilty of theft if he—

(a) retains or disposes of property of another when he knows it has been lost or mislaid, or

(b) retains or disposes of property of another when he knows it has been delivered under a mistake as to the identity of the recipient or as to the nature or amount of property,

and with intent to deprive the owner of it, he fails to take readily available and reasonable measures to restore the property to a person entitled to have it.

151. H.R. 333, 94th Cong., 1st Sess. § 1735 (1975). Proposed section 1735 pro-

vides:

§ 1735. Grading of theft offenses under sections 1732 to 1734

(1) CLASS B FELONY.—Theft under sections 1732 to 1734 is a class B felony if the property or services stolen exceed \$100,000 in value or are acquired or retained by a threat to commit a class A or class B felony or to inflict serious bodily injury on the person threatened or on any other person.

(2) CLASS C FELONY.—Theft under sections 1732 to 1734 is a class C felony if—

(a) the property or services stolen exceed \$500 in value;

(b) the property or services stolen are acquired or retained by threat and

(i) are acquired or retained by a public servant by a threat to take or withhold official action, or (ii) exceed \$50 in value;

(c) the property or services stolen exceed \$50 in value and are acquired or retained by a public servant in the course of his official duties;

(d) the property stolen is a firearm, ammunition, explosive, or destructive device or an automobile, aircraft, or other motor-propelled vehicle;

(e) the property consists of any government file, record, document, or other government paper stolen from any government office or from any public servant;

(f) the defendant is in the business of buying or selling stolen property and he receives, retains, or disposes of the property in the course of that business;

(g) the property stolen consists of any implement, paper, or other thing uniquely associated with the preparation of any money, stamp, bond, or other document, instrument, or obligation of the United States;

more than fifteen years' imprisonment¹⁵² and a fine not to exceed \$10,000.¹⁵³ Class C felonies are punishable by imprisonment for not more than seven years¹⁵⁴ and by a fine not to exceed \$5000.¹⁵⁵

(h) the property stolen consists of a key or other implement uniquely suited to provide access to property the theft of which would be a felony and it was stolen to gain such access; or

(i) the property is stolen from the United States mail and is first-class mail or airmail.

(3) CLASS A MISDEMEANOR.—All other theft under sections 1732 to 1734 is a class A misdemeanor, unless the requirements of subsection (4) or (5) are met.

(4) CLASS B MISDEMEANOR.—Theft under sections 1732 to 1734 of property or services of a value not exceeding \$50 shall be a class B misdemeanor if—

(a) the theft was not committed by threat;

(b) the theft was not committed by deception by one who stood in a confidential or fiduciary relationship to the victim of the theft; and

(c) the defendant was not a public servant or an officer or employee of a financial institution who committed the theft in the course of his official duties.

The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

(5) INFRACTION.—Theft under section 1733 of services of a value not exceeding \$10 shall be an infraction if the defendant was not a public servant who committed the theft in the course of his official duties. The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

(6) ATTEMPT.—Notwithstanding the provisions of section 1001(3), an attempt to commit a theft under sections 1732 to 1734 is punishable equally with the completed offense when the actor has completed all of the conduct which he believes necessary on his part to complete the theft except receipt of the property.

(7) VALUATION.—For purposes of grading, the amount involved in a theft under sections 1732 to 1734 shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which were stolen by the actor, or which the actor believed that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved. Thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons may be charged as one offense and the amounts proved to have been stolen may be aggregated in determining the grade of the offense.

The comment to section 1735 in the report points out that, under existing law, the value distinction in grading is \$100, *see* 18 U.S.C. §§ 643-49 (1970): "In this [proposed] section, three values are mainly employed: \$100,000 for the line between Class B and Class C felonies; \$500 for the felony-misdemeanor line (reflecting the realities of inflation); and \$50 for the Class B misdemeanor conditions set forth in subsection (4). . . . [T]he values of separate properties can be aggregated for grading purposes." FINAL REPORT, *supra* note 149, at 210.

The continued reliance by the drafters of the two proposals upon the value of the property taken in order to determine the grade of the offense is questionable. An elderly couple who loses its life savings of \$5,000 is arguably victimized more seriously than the businessman defrauded of \$100,000 in a stock swindle. This criterion cannot accurately reflect the impact of a serious fraud on the individual consumer and the surrounding community.

152. H.R. 333, 94th Cong., 1st Sess. § 3201(1)(b) (1975).

153. H.R. 333, 94th Cong., 1st Sess. § 3301(1)(a) (1975).

154. H.R. 333, 94th Cong., 1st Sess. § 3201(1)(c) (1975).

155. H.R. 333, 94th Cong., 1st Sess. § 3301(1)(b) (1975).

This bill also provides an alternative means for determining the fine to be imposed:

§ 3301. Authorized fines

. . . .

Under the sentencing structure set forth in H.R. 333, the court's power to impose a mandatory minimum sentence would be more restricted than it is under existing law. The court could not impose a minimum term unless certain procedural requirements are satisfied, and "unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case, such as warrant imposition of a term in the upper range under section 3202."¹⁵⁶ Section 3202 allows "imposition of a term in the upper range" if the convicted felon is a "dangerous special offender"; among the various criteria for determining whether a convicted felon may be treated as a "dangerous special offender" is whether "he committed such felony as part of a pattern of criminal conduct which constituted a substantial source of his income, and in which he manifested special skill or expertise . . ."¹⁵⁷ To complement the restrictions on minimum terms, the resolution permits parole "at any time" where there is no minimum sentence.¹⁵⁸

Although it generally treats all forms of theft similarly, H.R. 333 does take special notice of the problem of white-collar crime. It would enable the court to impose a special sanction on corporate executives and other business officials who are convicted of business-related offenses:

An executive officer or other manager of an organization convicted of an offense committed in furtherance of the affairs of the organization may, as part of the sentence, be disqualified from exercising similar functions in the same or other organizations for a period not exceeding five years, if the court finds the scope or willfulness of his illegal actions make it dangerous for such functions to be entrusted to him.¹⁵⁹

(2) Alternative Measure.—In lieu of a fine imposed under subsection (1), a person who has been convicted of an offense through which he derived pecuniary gain or by which he caused personal injury or property damage or loss may be sentenced to a fine which does not exceed twice the gain so derived or twice the loss caused to the victim.

Furthermore, a defendant convicted of three or more class A misdemeanors within five years could be sentenced as though convicted of a class C felony "if the court is satisfied that there is an exceptional need for rehabilitative or incapacitative measures for the protection of the public." H.R. 333, 94th Cong., 1st Sess. § 3003(1) (1975).

156. H.R. 333, 94th Cong., 1st Sess. § 3201(3) (1975). The comment to section 3201 in the report notes that, under existing law, 18 U.S.C. § 4208 (1970), all prison sentences include a minimum term that must be served before the prisoner can become eligible for parole *unless* the court takes affirmative action. FINAL REPORT, *supra* note 149, at 286.

157. H.R. 333, 94th Cong., 1st Sess. § 3202(2)(b) (1975).

158. H.R. 333, 94th Cong., 1st Sess. § 3401(1) (1975).

159. H.R. 333, 94th Cong., 1st Sess. § 3502 (1975). The comment to this section in the report points out that this language goes beyond the current standard

Additionally, H.R. 333 would empower the courts to order an organization convicted of an offense to inform those who were victimized about that conviction "by mail or by advertising in designated areas or by designated media or otherwise."¹⁶⁰

An alternative proposal for a revised federal criminal code is H.R. 3907,¹⁶¹ introduced by Representative Wiggins. Unlike H.R. 333, which incorporates false pretense and fraudulent conversion into theft,¹⁶² H.R. 3907 takes the approach of a general fraud statute.¹⁶³ A scheme or artifice to defraud or obtain property of another by false pretense is a class D felony that would be punishable by a prison term not to exceed seven years regardless of the value of the property involved.¹⁶⁴ Section 2301(d) of this proposal would give a court

for criminal liability for an agent's misdeeds, *i.e.*, it is not limited to those offenses committed "within the scope of his employment." Final Report, *supra* note 149, at 307.

160. H.R. 333, 94th Cong., 1st Sess. § 3007 (1975). The comment to this section in the report states that the drafters intentionally omitted a provision for court-ordered restitution because of congressional consideration that was being given to this remedy in independent proposals for consumer class-action legislation. FINAL REPORT, *supra* note 149, at 276.

161. H.R. 3907, 94th Cong., 1st Sess. (1975). This proposal grew out of S. 1400, 93d Cong., 1st Sess. (1973), and is very similar to its predecessor.

162. H.R. 333, 94th Cong., 1st Sess. § 1731 (1975).

163. See H.R. 3907, 94th Cong., 1st Sess. § 1734 (1975), which provides:

§ 1734. Executing a Fraudulent Scheme

(a) Offense.—A person is guilty of an offense if:

(1) having devised a scheme or artifice:

(A) to defraud; or

(B) to obtain property of another by means of a false or fraudulent pretense, representation, or promise; he engages in conduct with intent to execute such schemes or artifice; or

(2) he transfers, or receives anything of value for, a right to participate in a pyramid sales scheme, or receives compensation from a pyramid sales scheme.

164. H.R. 3907, 94th Cong., 1st Sess. § 1734 (1975), *quoted in* note 163 *supra*. Section 2301(b)(4) of the proposed act provides for the seven-year maximum sentence. Section 2301(c) further authorizes "extended terms of imprisonment for felonies committed by dangerous special offenders" of up to 14 years for class D felonies.

Section 2302(b) sets forth the criteria for determining whether the defendant is a "dangerous special offender":

§ 2302. Imposition of a Sentence of Imprisonment

(b) Criteria for Imposing an Extended Term of Imprisonment.—The court, after the hearing required by Rule 32.1 of the Federal Rules of Criminal Procedure, shall impose an extended term of imprisonment, within the range authorized by section 2301(c), if it finds that the defendant is a dangerous special offender, and that, considering the nature and circumstances of the offense and the history and characteristics of the defendant, such an extended term is warranted to protect the public from further crimes of the defendant. A defendant is a dangerous special offender if:

(1) he has previously been convicted of two or more felonies committed on different occasions; one or more of such felonies resulted in his being in imprisonment prior to the commission of the current offense; one or more of such felonies was committed within, or resulted in his being in imprisonment or on probation or parole within ten years of the commission of the current offense; and no such felony was charged to be a basis for in-

discretion to impose a twenty-one-month period of "parole ineligibility" on a person convicted of executing a fraudulent scheme. Like section 3201(3) of H.R. 333,¹⁶⁵ this section would require the court to make certain affirmative findings. If a defendant convicted under section 1734 were found by the court to be a "dangerous special offender," the maximum term of parole ineligibility would be ten years.¹⁶⁶ If no minimum term were set by the court, a convicted section 1734 offender could be released on parole after serving six months.¹⁶⁷

Section 2201 of this proposal would also authorize the imposition of criminal fines for a violation of section 1734—fines that are significantly heavier than those authorized by H.R. 333—and would distinguish convicted individuals from convicted organizations.¹⁶⁸ Like Section 3301(2) of H.R. 333, H.R. 3907 establishes a "double damage provision," permitting as an alternative to other authorized

creasing the grading of the current offense under section 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1813 (Possession of Drugs), 1814 (Violating a Drug Regulation), or 1823 (Using a Weapon in the Course of a Crime);

(2) he committed the current felony as part of a pattern of criminal conduct from which he derived a substantial portion of his income, or in which he manifested special skill or expertise—such as unusual knowledge, judgment, ability, or manual dexterity—in facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution, or concealment of criminal conduct, the enlistment of accomplices in such conduct, the avoidance of detection or apprehension of such conduct, or the disposition of the fruits or proceeds of such conduct; or

(3) the current felony constitutes, or was committed in furtherance of, a conspiracy with three or more other persons to engage in a pattern of criminal conduct; the current felony was not charged to be an offense, or an attempt or conspiracy to commit an offense, under section 1801 (Operating a Racketeering Syndicate) or 1802 (Racketeering) or 1803 (Washing Racketeering Proceeds); and he initiated, organized, planned, financed, directed, managed, or supervised, all or part of such conspiracy or conduct, or agreed to do so, or gave or received a bribe or used force in the course of such conduct.

For purposes of paragraphs (2) and (3), criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, accomplices, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

165. See text at note 156 *supra*.

166. H.R. 3907, 94th Cong., 1st Sess. § 2301(d) (1975).

167. H.R. 3907, 94th Cong., 1st Sess. § 3831(a)(2) (1975).

168. H.R. 3907, 94th Cong., 1st Sess. § 2201 (1975) provides:
§ 2201. Sentence of Fine

(b) Authorized Fines.—Except as otherwise provided in subsection (c) or any other provision of law, the authorized fines are:

- (1) if the defendant is an individual:
 - (A) for a felony, not more than \$100,000;
 - (B) for a misdemeanor, not more than \$10,000;
 - (C) for an infraction, not more than \$1,000;
- (2) if the defendant is an organization:
 - (A) for a felony, not more than \$500,000;
 - (B) for a misdemeanor, not more than \$100,000;
 - (C) for an infraction, not more than \$10,000.

For fines imposed under H.R. 333, see text at notes 153 and 155 *supra*.

fines "a fine that does not exceed twice the gross gain derived or twice the gross loss caused, whichever is the greater."¹⁶⁹

The two resolutions differ somewhat in their provision of sanctions of a "civil" nature. Like H.R. 333, H.R. 3907 contains a provision authorizing the court to order an individual convicted of a fraud offense to give notice of that conviction to his victims.¹⁷⁰ Section 4021 of H.R. 3907 authorizes the Attorney General to bring an action in federal district court to enjoin any person from engaging in any act that could constitute a fraudulent scheme under section 1734, but this proposal has no provision for special injunctive sanctions for convicted corporate managers comparable to that found in H.R. 333. H.R. 3907 would, however, break some new ground by making pyramid sales schemes a class D felony, punishable by a maximum of seven years imprisonment.¹⁷¹ H.R. 333 contains no such provision.

Both H.R. 333 and H.R. 3907 would simplify the prosecutor's task of choosing the appropriate statute to use against a seemingly endless variety of fraud offenses. Nevertheless, both of these proposals fall short from the standpoint of deterrence. Under both proposals, most criminal consumer-fraud offenses carry potential seven-year prison sentences, an increase of two years over the available sanctions for fraud under existing federal statutes. But this term fails to reflect the gravity of schemes that inflict such heavy damage upon society.¹⁷² Furthermore, taken in conjunction with the liberal parole provisions and the limited authority to impose minimum terms found in both versions, the proposed seven-year sanction fails to create a more credible threat of significant punishment for fraudulent conduct than does existing law. In short, both H.R. 333 and H.R. 3907 offer too little to cope with a problem on which society can no longer afford to compromise. The drafters of these two proposals would deny the judiciary, as well as law enforcement agencies, the ability to employ the threat of a heavy prison sentence in those cases that merit it. Judicial flexibility demands more. By increasing the maximum pen-

169. H.R. 3907, 94th Cong., 1st Sess. § 2201(e) (1975).

170. Compare H.R. 3907, 94th Cong., 1st Sess. § 2004 (1975), with H.R. 333, 94th Cong., 1st Sess. § 3007 (1975). Section 2004 is somewhat broader in its coverage than section 3007 in that it would apply to individuals convicted of fraud offenses and organizations convicted of any offense.

171. H.R. 3907, 94th Cong., 1st Sess. § 1734 (1975).

172. Although H.R. 3907 has a provision for special offenders that carries a potential sentence of greater than seven years, see note 164 *supra*, the current reluctance of the judiciary to impose stiff penal sanctions on so-called white-collar criminals causes doubt that this discretionary provision will be frequently used. If the judiciary becomes more sensitive to the victimization caused by criminal consumer frauds, perhaps this provision will have some deterrence value.

alties for these theft offenses to ten years, the law would, at the very least, create more of an *in terrorem* effect upon potential offenders than that provided by existing statutes. At the same time, the judiciary would remain free to stay the heavy hand of such a statute in appropriate cases. So long as the conduct made criminal by the statute is clearly and narrowly defined, there is little chance that such judicial latitude will be abused.

In addition to the two proposed versions of a revised federal criminal code, Congress now has before it a proposed consumer-fraud act¹⁷³ designed to prohibit unfair and deceptive practices in commerce. As one justice department spokesman has described it, the proposed consumer-fraud act is aimed not at the businessman who makes an honest mistake, but "squarely at the fast-buck artists, the sucker schemes, the quick rip-off operators who do not have customers, only victims."¹⁷⁴ The bill would impose a fine of not more than \$10,000 or imprisonment for not more than three years, or both, on persons who commit one or more of the enumerated unfair consumer practices. The list of unfair consumer practices in the proposed act is an extensive one. It would criminalize a broad range of business conduct that falls over the line distinguishing shrewd practice from fraud. For example, the bill would put the business community clearly on notice that the federal government would no longer tolerate "bait and switch" schemes, deceptive advertising concerning the quality, safety, or actual cost of goods or services, fraudulent schemes in which performance of services or delivery of goods is never intended, misleading prize offerings, pyramid sales schemes, techniques of harassment, and any other practices that are unfair to consumers.¹⁷⁵

The proposed consumer-fraud act, in attempting to plug the jurisdictional loopholes left by existing federal fraud statutes,¹⁷⁶ represents a step in the right direction. But, for two reasons, it is nevertheless an insufficient response to the criminal consumer-fraud problem. First, the bill is not simply a proposal for a general fraud

173. S. 670, 94th Cong., 1st Sess. (1975).

174. *Hearings on S.642 and S.670 Before the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 87 (1975) (statement of K. Clearwaters, Deputy Assistant Attorney General, Antitrust Division) [hereinafter *1975 Senate Hearings*].

175. The act would criminalize unfair and deceptive trade practices falling within section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970). The Justice Department believes that this provision would create only confusion between the courts and the FTC, which is charged with interpreting and enforcing that section. See *1975 Senate Hearings*, *supra* note 174, at 84.

176. See, e.g., 18 U.S.C. § 1341 (1970). For an explanation of the jurisdictional limits of the federal mail-fraud statute, see *United States v. Maze*, 414 U.S. 395 (1974).

statute. It seeks to serve as a broad consumer-fraud and unfair-trade-practices statute, arguably applying to some conduct not heretofore made criminal. From the merchant's standpoint, the proposed act is too indefinite in its description of the conduct proscribed. For the same reason, it is unlikely that in its present form it will be welcomed by conscientious federal prosecutors or accepted by the legislators. It has, in fact, been criticized by spokesmen for the Justice Department and the United States Attorney's Office for the District of Columbia for going too far beyond the scope of consumer protection, and for being potentially unconstitutionally vague.¹⁷⁷ If both potential abuse of the statute by overzealous prosecutors and constitutional challenge are to be avoided, more specific delineation of the unlawful conduct is required.

Second, the three-year penal sanction offered by the proposed act is inadequate to meet the requirements of justice and deterrence. Incredibly, it is the position of the Justice Department that a first offense under this proposed act should be only a misdemeanor (punishable by imprisonment for a maximum of one year and a \$1,000 fine) and that the felony sanction should be retained only for second offenses. The Department reasons that this provision would impart to the bill greater credibility for local judges, juries, and the community as a whole.¹⁷⁸ This position appears to underestimate the public's unwillingness to tolerate deceit in the marketplace any longer. To allay the business community's fear of an unwarranted attack on those committing honest mistakes and marginal indiscretions, the most appropriate response would be not to water down the potential penalties, but rather to tighten up the language of the bill in order to delineate clearly the conduct that is proscribed. Otherwise, the proposed consumer-fraud act would be just another toothless law, inadequate to deal with the problems for which it was designed.

IV. CONCLUSION

A decision to rely more heavily on the penal sanction to regulate marketplace conduct involves costs that must be carefully weighed against the gains to be achieved and the utility of alternative methods of social control. There is undoubtedly room for consumer-protection innovations not relying on the penal sanction. Many such innovations presently being considered are intended either to restrain offenders from continuing specific deceptive practices or to publicize

177. Ogren Interview, *supra* note 1.

178. 1975 Senate Hearings, *supra* note 174, at 83.

findings of fraudulent conduct.¹⁷⁹ The injunctive remedy would enable the authorities to put the fraudulent operator temporarily out of commission. It is, however, a stopgap measure that offers little long-term relief to the community and places the burden of action upon the consumer and enforcement authorities.¹⁸⁰ Required public apologies, publication of violations, and media exposés help to improve the consumers' bargaining position by educating them to recognize specific schemes. Consumer H-E-L-P, for example, has cooperated with the television and radio media in producing prime-time shows dealing with frauds involving record clubs, land investments, employment services, dating and singles clubs, and auto, electronics, and home repairs.¹⁸¹ These programs have the dual advantage of informing consumers quickly and soliciting support for needed local law enforcement and reform. This sort of remedy, however, is responsive only to the comparatively few criminal consumer-fraud violations that are either rampant or painstakingly uncovered; it does little to deter innovation by fly-by-night operators. For these reasons, these remedies should be considered supplements to and not substitutes for conscientious law enforcement.¹⁸²

If law enforcement is to play more than a symbolic role in curbing criminal consumer fraud, several changes must be made in our law enforcement priorities and procedures. First, they should recognize the impact of fraud on the consuming community and how it occurs. Second, investigatory resources should be allocated with regard to patterns of victimization that extend beyond the bilateral dispute. A systematic record of complaints should also be maintained. Third,

179. See Geis & Edelhertz, *supra* note 26, at 1003.

180. Stiff criminal sanctions for consumer fraud offenses would shift some of the burden of action back on to merchants by notifying them of the high costs of pursuing deceptive practices. A remedy that allows the law to intervene only after fraud has occurred places the public in a defensive posture and forces the public, rather than the business community, to absorb the costs of law enforcement.

181. The Consumer H-E-L-P Center has worked closely with WTTG-TV Metro-media and WRC/TV-NBC in producing consumer-abuse news stories for broadcast in prime-time. The impact of these one-to-six-minute documentaries is substantial. First, they provide another way in which the media can expose consumer abuses and offer protection to a large segment of the population. Second, the mere threat of mass exposure is often sufficient to correct fraudulent practices. Finally, the documentary serves as a consumer education device that helps steer people away from specious operators and toward legitimate businesses. The effectiveness of the H-E-L-P program is greatly enhanced by television's broad reach. Law students at the H-E-L-P Center take complaints and provide consumer expertise; the stations provide the publicity. This combination of legal expertise and television exposure has contributed to establishing responsibility in Washington metropolitan area marketplaces. See TV Guide, Sept. 20-26, 1975, at 7.

182. For a recent discussion of the merits of employing state registration and licensing of businesses that have generated a high frequency of consumer dissatisfaction, see Ogren, *supra* note 7, at 977-78 n.54.

law enforcement authorities and local consumer groups should cooperate in sorting out potential criminal offenses from the civil disputes reported. Finally, a general consumer-fraud statute should be enacted that carries penal sanctions reflecting the extent of victimization in a given case. These innovations would not require a massive infusion of additional resources; on the contrary, they could be instituted by planned resource reallocation.

In the final analysis, the problems posed by criminal consumer fraud are not ones that can be successfully attacked by any single type of remedy alone. Required is "that mix of criminal, civil, administrative and private remedies which will provide the greatest deterrence of economic offenders, the maximum protection and benefits to victims, and the best satisfaction of the public need to perceive that justice is being done."¹⁸³ Each of the various approaches is peculiarly adapted to cope with particular facets of the offense and the victimization that results from it; each can fulfill its function if appropriately applied. Prosecutors appear to be ready and able to use their available resources to attack the most serious criminal consumer-fraud offenses. New and innovative methods of accomplishing the enforcement task are available. Desperately needed, however, is a reorientation of our criminal enforcement priorities to permit the utilization of these means.

The criminal consumer-fraud problem requires of the nation's lawmakers and judiciary greater sensitivity to both the long-term interests of society and the short-term interests of the victimized consumer. Their present insensitivity has forced prosecutors to choose between remedies that benefit the public at the expense of the victim and those that accomplish the reverse. If legislators recognize that victimization will be prevented in the long run only when future deceptive conduct is effectively deterred, they will arrive at the inescapable conclusion that it is necessary to enact stronger penal sanctions for criminal consumer fraud.

183. Geis & Edelhertz, *supra* note 26, at 1010.

