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'White Collar Crime': Still Hazy After All These Years

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“WHITE-COLLAR CRIME”: STILL HAZY AFTER ALL THESE YEARS

Lucian E. Dervan & Ellen S. Podgor***

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I. INTRODUCTION

Seventy-five years ago, Edwin Sutherland, a sociologist, coined the term "white-collar crime" in a speech to the American Sociological Association.¹ Over the years, the term has come to mean more than what it encompassed in its roots, that being criminality in the corporate sphere.² Today, "white-collar crime" is loosely associated with what would be considered non-violent economic crime.³ A vast array of activities is included within the definition, including topics such as mortgage fraud,⁴ Ponzi schemes,⁵ political corruption,⁶ and corporate misfeasance.⁷ The crimes encompassed within the amorphous term—"white-collar crime"—are not pre-designated institutionally by the government, and the criminals are not limited to those who wear white collars to work. What can be agreed upon is that this is a hot area of the law and that the media is vigilant in reporting white-collar criminal activities in the news.⁸

¹ Edwin H. Sutherland, Annual Presidential Address to the American Sociological Association and the American Economic Society: White-Collar Criminality (Dec. 27, 1939), reprinted in 5 AM. SOC. REV. 1 (1940).

² Although Sutherland defined white-collar crime as "crime committed by a person of respectability and high social status in the course of his occupation," the examples he used were corporations. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 9 (1949).

³ See *infra* notes 44–75 and accompanying text (discussing the definition of white-collar crime in depth).

⁴ The FBI webpage for white collar crime includes mortgage fraud under major threats and programs. *White-Collar Crime*, FBI.GOV, http://www.fbi.gov/about-us/investigate/white_collar (last visited June 21, 2016).

⁵ See Ellen S. Podgor, *100 Years of White Collar Crime in "Twitter,"* 30 REV. LITIG. 535, 546–48 (2011) (discussing the origination of the term "Ponzi scheme").

⁶ See generally David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371 (2008) (examining the concept of corruption).

⁷ The President's Corporate Fraud Task Force states that cases involving "[f]alsification of corporate financial information," "[s]elf-dealing by corporate insiders," and "obstruction of justice, perjury, witness tampering, and other obstructive behavior" in connection with investigations of these crimes, receive significant scrutiny. See U.S. Dep't of Justice, *The President's Corporate Fraud Task Force*, U.S. DEPT OF JUSTICE ARCHIVES, <http://www.justice.gov/archive/dag/cftf/> (last visited June 21, 2016) (discussing white-collar crime).

⁸ See generally SUSAN WENNERMARK, DID PRINT MEDIA'S COVERAGE OF WHITE-COLLAR CRIME CHANGE AFTER THE 'BERNIE MADOFF SCANDAL'? (Rhode Island College Digital Initiatives Press 2013), <http://wennermark2013.pressbooks.com/> (discussing the framing of newspaper articles on white-collar crime as either episodic or thematic).

Several commentators have discussed the struggle of providing a definition to what is encompassed within the term “white-collar crime,” with some noting that it has changed over time and has sometimes been dependent on the individual or entity doing the defining.⁹ The lack of an unambiguous definition may not appear bothersome at first blush. For example, Professor Samuel Buell, in discussing the “boundary problems” of white-collar crime, finds that some may be resigned to saying that “instability in the law of white-collar crime will persist as long as Western societies have not quite resolved their attitudes toward white-collar criminals and business activity in general.”¹⁰ Likewise, the lack of a precise definition of “white-collar crime” has not inhibited the Department of Justice from its continual press releases announcing prosecutions of white-collar criminality¹¹ and its priorities in this area.¹² Thus, the lack of a clear consensus on what is encompassed

⁹ See SUSAN P. SHAPIRO, THINKING ABOUT WHITE COLLAR CRIME: MATTERS OF CONCEPTUALIZATION AND RESEARCH 1 (National Institute of Justice, 1980) (reflecting on the various definitions of white-collar crime); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 841–46 (2014) (discussing the definition of white-collar crime); Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It's Going*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 481, 482–87 (2014) (discussing the disagreement over how to define white collar crime); David T. Johnson & Richard A. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, 18 LAW & SOC. INQUIRY 63, 65–69 (1993) (presenting different definitions of white collar crime); Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 734–43 (2007) (discussing the sociology and legal approaches to defining white-collar crime).

¹⁰ Samuel W. Buell, “White Collar” Crimes, in THE OXFORD HANDBOOK OF CRIMINAL LAW 837, 861 (Marcus D. Dubber & Tatjana Hörnle eds., Oxford University Press 2014).

¹¹ See, e.g., Press Release, U.S. Attorney's Office, Middle Dist. Ala., White-Collar Crimes Prosecuted in the Middle District (June 22, 2012), <http://www.fbi.gov/mobile/press-releases/2012/white-collar-crimes-prosecuted-in-the-middle-district> (discussing recent prosecutions of white-collar crimes).

¹² Department of Justice representations often reference white-collar criminality in speeches. See, e.g., Marshall L. Miller, Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program (Sept. 17, 2014), <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller> (“The prosecution of individuals — including corporate executives — for white-collar crimes is at the very top of the Criminal Division’s priority list under Assistant Attorney General Caldwell.”); see also Joe D. Whitley, *White-Collar Crime: A Real Priority*, 16 LEGAL TIMES 6, 6 (1993) (discussing the unique role that federal prosecutors play in the prosecution of white-collar crime due to their ability to access “better statutes and better resources”); *Serving the District of New Jersey*, U.S. ATTORNEY’S OFFICE: DIST. N.J., <http://www.justice.gov/usao/nj/> (last visited June 21, 2016) (“The office is responsible for the prosecution of federal criminal statutes for

within the rubric of "white-collar crime" has not deterred government agencies and individuals from using this rhetoric.¹³

But the lack of a coherent legal definition can present enforcement issues on several levels. A possible problem that can arise involves statutory interpretation, especially when using designated crimes that are perceived to be white-collar in nature. For example, prosecutions under the Sarbanes-Oxley Act of 2002 provision for destruction of documents and tangible objects would appear to fit the definition of being a white-collar crime.¹⁴ Yet, the government's use of this obstruction of justice statute to prosecute a fisherman who threw fish overboard that he was ordered to return to shore would hardly be considered conduct fitting the definition of white-collar crime.¹⁵ Some, however, may argue that statutory interpretation should not be limited by the classification

all of New Jersey, from acts of terrorism to public corruption, white-collar crime, organized crime and gang activities, internet-related crimes, drug importation through New Jersey ports, and many other criminal acts." In some instances, the priorities may be a subset of white-collar crime. For example, in identifying the five top priorities for her district, the United States Attorney for Massachusetts included both aggressively pursuing economic crimes and tackling healthcare fraud among those priorities. *Priority Areas*, U.S. ATTORNEY'S OFFICE: DIST. MASS., <http://www.justice.gov/usao-ma/priorities> (last visited June 21, 2016).

¹³ When the federal government refocused its priorities to combat terrorism, there was mention of white-collar crime matters in a government report. See AUDIT DIV., OFFICE OF INSPECTOR GEN., U.S. DEPT OF JUSTICE, *THE INTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION'S REPRIORITIZATION*, at ii (2004) (listing combatting white-collar crime among the FBI Director's 2002 ranking of priorities).

¹⁴ See 18 U.S.C. § 1519 (2012) (prohibiting, among other things, the destruction or alteration of documents and tangible objects under federal criminal law). Sarbanes-Oxley was passed in the wake of the Enron debacle and provides that:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Id.; see also Allison Fass, *One Year Later, the Impact of Sarbanes-Oxley*, FORBES (July 22, 2003, 7:00 AM), http://www.forbes.com/2003/07/22/CZ_of_0722sarbanes.html (noting that Sarbanes-Oxley was "precipitated by a slew of corporate scandals, including . . . Enron").

¹⁵ See *Yates v. United States*, 135 S. Ct. 1074, 1088–89 (2015) (holding that a fish is not a "tangible object" for purposes of this statute).

of the crime,¹⁶ and in this regard, the normative classification of activities as either white- or non-white-collar crime may have no consequences.

A possible second issue caused by the amorphous nature of the term “white-collar crime” is when funding priorities are tied to the prosecution of the category of activity. With little guidance on what is encompassed within the term white-collar crime, the funding allocations can become problematic. Fortunately, this does not create practical problems in that most funding designations use discrete segments of white-collar criminality as opposed to using the generic term. For example, one might find funding for combatting the Savings and Loan crisis,¹⁷ mortgage fraud,¹⁸ or computer criminality.¹⁹

But a third problem created by the inability to have a consistent definition of white-collar crime is what threatens the use of this terminology. This problem involves the reporting of this type of criminal conduct. The failure to have a clear definition impacts the reporting of these crimes, which in turn can create an unclear picture of actual harms caused by the conduct, and which consequently can cause problems in determining mechanisms to properly address enforcement techniques to combat this form of

¹⁶ For example, in *Yates*, the government argued that “Section 1519 did not narrowly target white-collar fraud, but instead broadly prohibited *any* destruction of evidence for the purpose of impeding the ‘proper administration of *any* matter within the jurisdiction of *any* department or agency of the United States’” Brief for the United States at 31, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451), 2014 WL 4089202, at *31.

¹⁷ See Louise Story, *Why Prosecutors Don't Go After Wall Street*, NPR (July 13, 2011, 2:56 PM), <http://www.npr.org/2011/07/13/137789065/why-prosecutors-don't-go-after-wall-street> (noting that “hundreds of bankers went to jail” in the wake of the savings and loan crisis under federal prosecution).

¹⁸ See Press Release, SEC, SEC Charges Goldman Sachs with Fraud in Structuring and Marketing of CDO Tied to Subprime Mortgages (Apr. 16, 2010), <https://www.sec.gov/news/press/2010/2010-59.htm> (describing SEC filings against organizations that committed mortgage fraud leading up to the 2008 financial crisis).

¹⁹ See Computer Crime Enforcement Act § 2, 42 U.S.C. § 3713 (2012) (describing increased funding to combat and prosecute computer crimes). One may also see budget requests for increased funding to address a particular area encompassed by white-collar crime. See SEC, IN BRIEF FY 2011 CONGRESSIONAL JUSTIFICATION 2–3 (Feb. 2010), <http://www.sec.gov/about/secfy11congbudjust.pdf> (discussing the need for additional resources in the aftermath of the financial crises that began in 2008).

criminality.²⁰ It can also skew sentencing statistics.²¹ This is particularly true when statutory conduct is lumped together without a recognition that different forms of criminality may be prosecuted under generic statutes.²²

When one actually examines criminal statutes used to prosecute non-violent economic crimes, it becomes apparent that certain generic crimes have both white-collar and non-white-collar activities within their midst. Some offenses, like violations of the Foreign Corrupt Practices Act (FCPA)²³ or securities fraud,²⁴ are clearly white-collar crime, and one will seldom find an outlier case that used these statutes to prosecute conduct that might be considered a street crime. But the reality is that many white-collar criminals have been prosecuted using crimes that are "cover-up"²⁵ or "short-cut"²⁶ offenses, such as obstruction of justice²⁷ and making false statements.²⁸ White-collar activity has also been prosecuted using statutes such as the Racketeered Influenced and Corrupt Organization Act,²⁹ an act passed to combat organized

²⁰ One can hardly achieve legal compliance when the expressive nature of the conduct is uncertain. See Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 42–55 (2012) (discussing the use of an expressive model in considering corporate criminal liability). See generally RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015) (discussing the expressive nature of criminal law).

²¹ See BRIAN K. PAYNE, *WHITE-COLLAR CRIME: A TEXT/READER* 43–44 (2012) (identifying the connection between the "conceptual ambiguity surrounding the concept" of white-collar crime and white-collar crime scholars' reluctance to rely too heavily on official crime statistics).

²² See *infra* Part III (discussing at length prosecution of white-collar criminal conduct under generic statutes).

²³ 15 U.S.C. § 78dd-1 (2012).

²⁴ See Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012) (delineating body of law aimed at deterring deceit, misrepresentation, and fraud in the sale of securities); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012) (empowering the SEC to act with broad authority over the securities industry); 18 U.S.C. § 1348 (2012) (defining and prohibiting securities and commodities fraud); see also ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, *WHITE COLLAR CRIME* 103–61 (2013) (discussing the laws of securities within the context of white-collar crime generally).

²⁵ See Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 9 (2005) (discussing examples of how certain federal offenses can be categorized as crimes used to cover up the substantive offenses initially committed).

²⁶ See Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality be an Element of Obstruction of Justice?*, 44 WASHBURN L.J. 583, 584 (2005) (advocating for a method to retrain the use of obstruction of justice as a shortcut to conviction).

²⁷ 18 U.S.C. §§ 1501–1521 (2012).

²⁸ *Id.* § 1001.

²⁹ *Id.* §§ 1961–1968.

crime, but also provides predicate offenses like mail³⁰ and wire fraud.³¹ These statutes demonstrate a hybrid that includes both white-collar and non-white-collar offenses. Finally, sentencing statistics often break out aspects of white-collar crime for reporting purposes, such as having a category for antitrust.³² But the sentencing methodology fails to provide clear indications that they are tracking white-collar criminality, and the use of terminology such as “economic crimes” produces this same distortion created by lumping together hybrid statutes that include both white-collar and street crimes.³³

This Article begins in Part II with a brief historical overview of the term “white-collar crime.”³⁴ It looks at its sociological roots and its transformation into a legal term.³⁵ Part III examines two classes of statutes that may fit white-collar offenses: (1) crimes that are focused on white-collar criminality and (2) generic crimes that are used in the prosecution of white-collar conduct.³⁶ It subdivides this second category into (a) “short-cut” crimes, ones that are used as an efficient prosecution tool in place of proceeding with a complicated substantive crime and (b) actual substantive crimes that mirror the criminality of the conduct.³⁷ Part II of this

³⁰ *Id.* § 1341.

³¹ *Id.* § 1343.

³² See U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 (2013) (defining antitrust offenses), <http://www.ussc.gov/guidelines-manual/2013/2013-2r11> (last visited June 21, 2016).

³³ Reporting by the U.S. Sentencing Commission includes a host of different factors such as circuit and district, guilty pleas and trials, length of sentence, and specific characteristics of offenders. *Id.*; U.S. SENTENCING COMM’N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig.C, tbls.1, 2, 4, 10, 11, 13 (2013), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/sourcebook-2013>. Additionally, there is reporting of offenders by each primary offense category. *Id.* at fig.A. Charts include items like “non-fraud white collar” and “fraud.” *Id.* For example, one chart includes the number of sentences where the primary offense was 2B1.1, which includes “[l]arceny, [e]mbezzlement, and [o]ther [f]orms of [t]heft; and [o]ffenses [i]nvolving [s]tolen [p]roperty; [p]roperty [d]amage or [d]estruction; [f]raud and [d]eceiveit; [f]orgery; and [o]ffenses [i]nvolving [a]ltered or [c]ounterfeit [i]nstruments other than [c]ounterfeit [b]earer [o]bligations of the United States.” *Id.* at tbl.17; see also U.S. SENTENCING GUIDELINES MANUAL, *supra* note 32, § 2B1.1 (defining the offense category).

³⁴ See *infra* Part II (describing white-collar crime and its linear progression).

³⁵ See *infra* notes 44–60 and accompanying text (defining white-collar crime).

³⁶ See *infra* notes 83–90 and accompanying text (classifying white-collar offenses).

³⁷ See *infra* notes 91–117 and accompanying text (dividing generic crimes used in the prosecution of white-collar crimes into two categories).

Article concludes by demonstrating how as a legal term, "white-collar crime" still has remnants of its sociological underpinnings, causing concern when the conduct is prosecuted under a generic statute that includes hybrid white-collar and non-white-collar conduct.³⁸

Part III of this Article empirically examines several specific crimes using two jurisdictions for modeling the unclear focus of the term white-collar crime.³⁹ It targets crimes that are not normatively considered to be white-collar offenses; thus, it omits crimes like securities fraud, violations of the Foreign Corrupt Practices Act, and insider trading. Instead, it examines hybrid crimes that have feet in both the white-collar and non-white-collar worlds.⁴⁰ Using cases from the Seventh and Eleventh Circuits compiled over ten years, this section provides quantitative sampling of three crimes that are "short-cut" offenses: perjury, false statements, and obstruction of justice. Additionally, one substantive crime that was not designed as a white-collar offense but has been used to prosecute economic malfeasance is discussed as well.⁴¹ The results of this empirical research demonstrate the deficiencies of current statistical reporting practices.⁴² This Article concludes in Part IV by suggesting that tracking white-collar crime is important and that providing an accurate taxonomy to white-collar crime requires a multivariate approach that recognizes the hybrid nature of many offenses.⁴³

³⁸ See *infra* notes 109–17 and accompanying text (explaining the concern when prosecuting hybrid generic crimes).

³⁹ See *infra* Part III (analyzing what constitutes a white-collar crime).

⁴⁰ See *infra* Part III (analyzing perjury, false statements, obstruction of justice, and RICO).

⁴¹ See *infra* Part III (examining 283 cases regarding perjury, false statements, obstruction of justice, and RICO).

⁴² See *infra* notes 128–313 and accompanying text (questioning the effectiveness of current reporting of crimes under hybrid statutes).

⁴³ See *infra* Part IV (detailing the future of white-collar crime).

II. WHITE-COLLAR CRIME AND ITS LINEAR PROGRESSION

A. HISTORICAL DEFINITIONS

Although the term “white-collar crime” was first enunciated by Edwin Sutherland in his 1939 sociological speech,⁴⁴ the conduct encompassed behind this term has existed for significantly longer. Corporate criminality, for example, can be traced to conduct well before the Supreme Court allowed for prosecutions of companies for *mens rea* crimes.⁴⁵ Likewise, Ponzi schemes were named after Charles Ponzi, who in the 1920s was convicted and given a five-year sentence⁴⁶ for a scheme that paid initial investors with funds received from later investors and eventually collapsed when new funds were no longer available.⁴⁷ Statutes used in the prosecution of white-collar crime existed well before the term was coined.⁴⁸

Sutherland’s 1939 speech and his later book emphasized the need for white-collar prosecutions.⁴⁹ His argument was a refutation to those who limited crime to individuals coming from a background of poverty or those who suffered from psychopathic and sociopathic conditions.⁵⁰ He aimed for criminal penalties in place of civil fines for those who committed white-collar crime.⁵¹ Sutherland defined white-collar crime in his book as “crime committed by a person of respectability and high social status in the course of his occupation.”⁵² He admitted that “[t]his concept is not intended to be definitive, but merely to call attention to crimes

⁴⁴ Sutherland, *supra* note 1.

⁴⁵ See *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 499 (1909) (finding a corporation criminally liable under the Elkins Act for a crime requiring *mens rea*).

⁴⁶ See Podgor, *supra* note 5, at 546 (discussing the origination of the term “Ponzi scheme”).

⁴⁷ See *id.* (“The scheme collapses when there are no new investors, the market goes down, or it becomes known that the money hold does not satisfy the amount that has been accumulated by investors.”).

⁴⁸ One of the heavily used statutes in the prosecution of white-collar crime is the mail fraud statute, a statute initially passed in 1872. 18 U.S.C. § 1341 (2012); see also Jed S. Rakoff, *The Federal Mail Fraud Statute (Pt. 1)*, 18 DUQ. L. REV. 771, 771–73 (1980) (discussing the history of the mail fraud statute).

⁴⁹ See generally SUTHERLAND, *supra* note 2.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 8–9.

⁵² *Id.* at 9.

which are not ordinarily included within the scope of criminology."⁵³ The definition and use of the term white-collar crime was grounded in sociology, with criteria of class and social status as its attributes.⁵⁴

Sutherland's class-based sociological "offender" approach did not transfer to the legal arena.⁵⁵ This is understandable, as a definition premised on class, wealth, and social status carries certain biases that would make it problematic if used in the legal regime.⁵⁶

Herbert Edelhertz, former chief of the Fraud Section of the Department of Justice, was influential in transforming the term "white-collar crime" into a legal term, one premised on the "offense" as opposed to the "offender."⁵⁷ Edelhertz defined 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."⁵⁸ He used factors that focused on the perpetrator's intent, use of disguise, concealment, and the victim's response.⁵⁹ Much of the Edelhertz approach has been used in later legal definitions.⁶⁰

⁵³ *Id.*

⁵⁴ See Podgor, *supra* note 9, at 734–35 (analyzing Sutherland's approach to defining white-collar crime).

⁵⁵ See *id.* at 735 (noting the contrast between Sutherland's approach and the legal community's tendency to focus on the offense).

⁵⁶ See SHAPIRO, *supra* note 9, at 3 ("Does one want to definitionally discriminate, for example, between the business executive who does not disclose perks in his tax return and the waitress who fails to disclose tips on her return?"). See generally Myrna Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993) (discussing gender in sentencing).

⁵⁷ HERBERT EDELHERTZ, NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUSTICE, *THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME* 3 (1970) ("Sutherland's definition is far too restrictive").

⁵⁸ *Id.*

⁵⁹ *Id.* at 12. More specifically, the four factors are:

- (a) Intent to commit a wrongful act or to achieve a purpose inconsistent with law or public policy.
- (b) Disguise of purpose or intent.
- (c) Reliance by perpetrator on ignorance or carelessness of victim.
- (d) Acquiescence by victim in what he believes to be the true nature and content of the transaction.
- (e) Concealment of crime by—

But bodies that conduct statistical reporting of white-collar crime, such as the Transactional Records Access Clearinghouse (TRAC), which uses data from the Department of Justice, have recognized the complexity of using this term.⁶¹ In considering the boundaries of white-collar crime, TRAC notes the easy categories of white-collar offenders like the “corporate executive who manipulates the stock market” and contrasts this with the “bank robber [or] car thief” who are clearly not white-collar criminals.⁶² TRAC points out, however, that many subcategories are not included as white-collar crimes and that this criminal conduct is being reported separately.⁶³ For example, official corruption and environmental crimes are each listed as separate crimes in the

-
- (1) Preventing the victim from realizing that he has been victimized, or
 - (2) Relying on the fact that only a small percentage of victims will react to what has happened, and making provisions for restitution to or other handling of the disgruntled victim, or
 - (3) Creation of a deceptive paper, organizational, or transactional facade to disguise the true nature of what has occurred.

Id.

⁶⁰ For instance, the Department of Justice has defined white-collar crime as:

[I]llegal acts that use deceit and concealment—rather than the application or threat of physical force or violence—to obtain money, property, or service; to avoid the payment or loss of money; or to secure a business or personal advantage. White-collar criminals occupy positions of responsibility and trust in government, industry, the professions, and civic organizations.

WILLIAM FRENCH SMITH, U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 39 (1983). The Bureau of Justice statistics defines white-collar crime as:

Nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person’s occupation.

BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (2d ed. 1981).

⁶¹ *White Collar Crime*, TRAC REPORTS, http://trac.syr.edu/tracreports/bulletins/white_collar_crime/side_80.html (last visited June 21, 2016) (noting the difficulties of categorizing crimes as white-collar).

⁶² *Id.*

⁶³ *Id.*

Department of Justice reporting systems.⁶⁴ Yet most individuals would consider the "high-level corporate executive who orders his workers to dump illegal toxic materials in a nearby river" to be a white-collar offender.⁶⁵ Likewise, many may consider the governor who is indicted for bribery as part of a corruption scandal to be a white-collar criminal, even though bribery is not reported under the white-collar umbrella.⁶⁶

The federal sentencing structure presents a contrasting breakdown of white-collar conduct. The sentencing guidelines group statutes together so that "economic crimes" are presented in a grouping under Guideline 2B1.1, the fraud guideline.⁶⁷ But this guideline fails to include many white-collar activities. For example, crimes involving bribery, deprivation of honest services, or conspiracies to defraud the government are covered under a different guideline.⁶⁸

Recently, the Sentencing Commission broke down its economic crime statistics under Guideline 2B1.1, examining the underlying conduct for the sentence being given.⁶⁹ For example, of the 8,503 sentences under 2B1.1, 965 were premised on financial institution fraud, and fourteen were premised on intellectual property fraud.⁷⁰ One thousand one hundred ten cases, however, did not fit the thirteen predesignated groups used by the Sentencing Commission.⁷¹ Additionally, one cannot assume that all of these crimes listed under 2B1.1 are in fact white-collar. Although the thief who steals a credit card from someone's purse may be

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2014), <http://www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual> (last visited June 21, 2016) (omitting bribery as a basic economic offense).

⁶⁷ *Id.*

⁶⁸ *Id.* § 2C1.1.

⁶⁹ Courtney Semisch, *Analysis of Federal Sentencing Data for Economic Crime Offenders*, U.S. SENTENCING COMMISSION 1, 18 tbl.2 (Jan. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf.

⁷⁰ *Id.*

⁷¹ *Id.* The types of economic crimes sentenced under 2B1.1 were seen as crimes relating to securities and investment, healthcare, mortgage, credit card, financial institution, procurement, government benefits, identity theft and documents, counterfeiting and forgery, mail related, computer related, intellectual property, and embezzlement and theft, with the remaining sentences falling under a category labeled "all other." *Id.*

sentenced under 2B1.1, he or she may in reality be considered to have committed a street crime. Being charged with a fraud statute when he or she used the card, however, predetermined the activity as an economic crime.

This confusion regarding the white-collar crime category emphasizes the sociological-legal divide in this area. Sociology scholars sometimes criticize the legal approach for its failure to factor into the white-collar crime definition an “abuse of power.”⁷² Legal scholars are quick to note that using sociology as opposed to a legal approach presents what some might consider to be a biased methodology.⁷³ For example, a sociological approach allows for a hotel owner who fails to pay her taxes and is charged with a tax crime to be treated differently from the waitress who is charged with a tax violation for not reporting her tips.⁷⁴ Irrespective of the philosophical approach being used, it is clear that it is difficult to ascertain the conduct encompassed within the definition of white-collar crime.⁷⁵

B. WHAT CRIMES ARE WHITE-COLLAR CRIMES

There is no list of crimes that have been designated as white-collar crimes. In the 1970s when the Yale Studies on White-Collar Crime were conducted,⁷⁶ eight crimes were used for the study.⁷⁷ These crimes consisted of “antitrust offenses, securities and exchange fraud, postal and wire fraud, false claims and

⁷² Gilbert Geis, *White-Collar Crime: What Is It?*, in WHITE-COLLAR CRIME RECONSIDERED 31, 39 (Kip Schlegel & David Weisburd eds., 1992).

⁷³ See, e.g., Podgor, *supra* note 9, at 733 (connecting the sociological roots of “white-collar crime” with the biases in today’s sentencing methodology).

⁷⁴ This example is based on Edelhertz’s proposal of four subdivisions of white-collar crime intended to encourage the embracing of diverse forms of white-collar crime. See Geis, *supra* note 72, at 38–39 (identifying the four subdivisions to embrace diverse forms of white-collar crime).

⁷⁵ Some have also made arguments claiming that certain violent crimes should be considered white-collar crimes. See generally Andrew Verstein, *Violent White-Collar Crime*, 49 WAKE FOREST L. REV. 873 (2014) (examining how crimes of deception can be violent).

⁷⁶ See generally Johnson & Leo, *supra* note 9 (explaining the details of the Yale White-Collar Crime Project).

⁷⁷ See *id.* at 67–68 (“[T]he last two volumes of the Yale Project . . . define white-collar crime not conceptually but operationally, to include eight specific statutory offenses and the criminal convictions resulting therefrom.”).

statements, credit and lending institution fraud, bank embezzlement, IRS fraud, and bribery.”⁷⁸ The FBI today describes white-collar crime as the “full range of frauds committed by business and government professionals.”⁷⁹ The Sentencing Commission, when studying economic crimes under the fraud guideline 2B1.1, broke the cases down, as noted above, into fourteen groupings.⁸⁰ But as previously noted, one cannot be assured that these groups were exclusive to white-collar criminality. They clearly were not comprehensive of all white-collar crimes, as Guideline 2B1.1 does not include many forms of conduct that would be considered white-collar criminality by most, such as insider trading⁸¹ and criminal infringement of copyright or trademark.⁸² ;

Thus, in addition to there being no set definition of what constitutes white-collar crime, there is also no list of offenses that have been endorsed as being the definitive list of crimes fitting this category. Rather, there appear to be certain crimes which tend to be used in prosecutions of economic non-violent crimes. These crimes can be classified into two groups: (1) crimes that are focused on white-collar criminality; and (2) generic crimes that are used in the prosecution of white-collar conduct. These two groups are not distinct, and no formulaic methodology exists for designating a crime into one of these two groups. But recognizing

⁷⁸ Stanton Wheeler et al., *Sentencing the White-Collar Offender: Rhetoric and Reality*, 47 AM. SOC. REV. 641, 642 (1982).

⁷⁹ FBI, *White-Collar Crime*, FBI.GOV, http://www.fbi.gov/about-us/investigate/white_collar (last visited June 21, 2016). Under its “major threats and programs” section, the FBI designation as white-color crime asset forfeiture, bankruptcy fraud, corporate fraud, financial institution fraud, healthcare fraud, identity theft, insurance fraud, market manipulation fraud, mass marketing fraud, money laundering, mortgage fraud, piracy/intellectual property theft, and securities and commodities fraud. *Id.* It also provides a list of frauds from A–Z that contains fifty-eight different frauds. FBI, *Scams and Safety*, FBI.GOV, <http://www.fbi.gov/scams-safety/frauds-from-a-to-z> (last visited June 21, 2016).

⁸⁰ U.S. Sentencing Comm’n, *Economic Crime Public Data Briefing*, U.S. SENTENCING COMMISSION 1, 19 tbl.2 (Jan. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf.

⁸¹ See U.S. SENTENCING GUIDELINES MANUAL § 2B1.4 (2015) (placing insider trading within its own sentencing category, separate from “economic crimes”).

⁸² *Id.* § 2B5.3 (separating criminal copyright and trademark infringement from “economic crimes”). Many other statutes, such as those pertaining to corruption and those that are regulatory offenses, use different categories. See *infra* notes 83–86 and accompanying text (discussing different categories of white-collar crimes).

the overlap of white-collar crimes and street crimes is necessary to fully understand the failure of the current reporting of this form of criminality. Equally important is recognizing that the generic crime group includes crimes that serve as an easy vehicle for prosecuting white-collar conduct, yet also includes other crimes that are substantive offenses focused on the actual criminality that was initially being investigated.

1. *White-Collar-Focused Crimes.* Crimes focused on white-collar criminality would be statutory offenses that were designed to stop non-violent economic crime, as opposed to street crime, and have prosecutions limited to these areas. One might include here antitrust crimes under the Sherman Act.⁸³ Bribery, including conduct under the Foreign Corrupt Practices Act (FCPA),⁸⁴ would also seem to fit this category. Likewise, tax offenses seem like they would be exclusive to being called white-collar crimes.⁸⁵ One would think of crimes like insider trading and security fraud to also be within this group.⁸⁶ Regulatory crimes may also fit this designation. Some of these crimes that are seen as exclusive to white-collar crime are not reported as white-collar offenses by the Department of Justice. For example, environmental crimes are currently reported separately from fraud offenses, which is the category that is often used as a proxy for white-collar crime.⁸⁷ Likewise, government regulatory prosecutions are separately reported.⁸⁸

⁸³ 15 U.S.C. §§ 1–7 (2012).

⁸⁴ 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff (2012).

⁸⁵ 26 U.S.C. §§ 7601–7613 (2012). Although the Racketeered Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961–1968 (2012), was not enacted until 1970, it was historically common to use tax offenses to prosecute individuals engaged in organized criminal activities prior to RICO's passage. See, e.g., *Costello v. United States*, 350 U.S. 359, 364 (1956) (affirming conviction of tax evasion).

⁸⁶ See 15 U.S.C. §§ 77a–77aa (2012) (encompassing the Securities Act of 1933, passed in part to prevent insider trading and securities fraud); *id.* §§ 78a–78pp (encompassing the Securities Exchange Act of 1934, also passed in part to prevent securities fraud and insider trading); 18 U.S.C. § 1348 (2012) (defining the penalty for commodities and security fraud). See generally PODGOR, HENNING, ISRAEL & KING, *supra* note 24, at 103–61 (discussing securities fraud).

⁸⁷ See *supra* notes 67–68 and accompanying text (detailing the differences in sentencing).

⁸⁸ See *Government Regulatory Prosecutions at New Low in December 2014* (Feb. 19, 2015), TRAC REPORTS, <http://trac.syr.edu/tracreports/crim/378/> (noting that within regulatory cases, prosecutors classify the matters into more specific crimes). For example, the overall

Although fraud offenses would seem to be non-violent crimes that should be captured as clear-cut white-collar offenses, the statutes used to prosecute these crimes may prove more problematic. For example, mail and wire fraud cases can include violent conduct.⁸⁹ Likewise, money laundering, a crime that was initially associated with drug trafficking, is now a crime tacked on as an additional charge in some white-collar prosecutions.⁹⁰

2. *Generic Crimes That Are Routinely Used in White-Collar Prosecutions.*

a. *Generic Crimes That Are "Short-Cut" Offenses.* Even more problematic are crimes that do not have a white-collar focus but are routinely used in both white-collar and street crimes cases. These generic hybrid crimes come in two different forms: (a) "short-cut" type crimes, which are crimes that are selected as the prosecution tool because they are easy to prove, especially in contrast to a complicated financial case; and (b) actual substantive crimes that mirror the criminality.

In this first group, one finds the "cover-up"⁹¹ or "short-cut"⁹² types of offenses. These include crimes such as perjury,⁹³ false statements,⁹⁴ false declarations,⁹⁵ and obstruction of justice.⁹⁶ It is common in white-collar cases to charge crimes that are easy to prove and that do not require explaining a complicated

category of government regulatory includes counterfeiting and forgery, customs violations dealing with both duty and currency, energy violations, and other matters. *Id.*

⁸⁹ See, e.g., *United States v. Mikos*, 539 F.3d 706, 708 (7th Cir. 2008) (involving murder and Medicare fraud); *United States v. Farris*, 532 F.3d 615, 619 (7th Cir. 2008) (involving bank robbery and mail fraud); *United States v. Handlin*, 366 F.3d 584, 589 (7th Cir. 2004) (involving arson and mail fraud).

⁹⁰ See Teresa E. Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. ST. U. L. REV. 531, 558–66 (2000) (examining how money laundering has been added as a supplemental charge in white-collar matters).

⁹¹ See Green, *supra* note 25, at 17–24 (reviewing the law surrounding cover-up crimes).

⁹² See Podgor, *supra* note 26, at 584 (advocating for the curtailment of short-cut prosecution availability).

⁹³ 18 U.S.C. § 1621 (2012). There are many different perjury statutes noted throughout the United States Code. See ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 157–58 (4th ed. 2009) (describing the federal perjury and false statement statutes).

⁹⁴ 18 U.S.C. § 1001 (2012).

⁹⁵ *Id.* § 1623.

⁹⁶ *Id.* § 1503. Congress has crafted many different types of obstruction of justice statutes, such as a statute focused on obstruction against a witness, victim, or informant. *Id.* § 1512.

understanding of a corporate structure or scheme to a jury.⁹⁷ Crimes that carry prison time but also can be simply explained as lying (false statements) or destroying evidence (obstruction of justice) are attractive for securing a criminal conviction.⁹⁸ These crimes can offer a reduced sentence, which can be beneficial in a world filled with plea agreements.⁹⁹

In some cases, a prosecutor will deliberately place a person in front of a grand jury to have them commit perjury, in what has been referred to as a “perjury trap.”¹⁰⁰ The simplicity of the lie can offer an easy conviction. This same benefit can be seen when there is a destruction of evidence. For example, Martha Stewart was not charged with insider trading, a crime that might have been difficult to prove.¹⁰¹ The securities fraud count charged against her was dismissed by the court.¹⁰² The remaining “short-cut” offenses served as the basis of her convictions, namely charges like obstruction of justice.¹⁰³

⁹⁷ See PODGOR, HENNING, ISRAEL & KING, *supra* note 24, at 163 (identifying obstruction of justice as a common charge in white collar cases and attributing frequency of the charge to its easy-to-prove and relatively less sophisticated nature, which makes it easier to explain to a jury than sophisticated white-collar crimes).

⁹⁸ See, e.g., *id.* (“It is often easier for the government to prove the destination of documents, lying to investigators, or lying to a grand jury, than to present fraudulent complicated financial transactions.”).

⁹⁹ See Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 56 (“Today, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.”); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 48 (2013) (demonstrating that defendants in a study were willing to forgo opportunities to argue their true innocence and instead falsely condemn themselves to receive more favorable sentencing); Vanessa A. Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining’s Innocence Problem*, 21 CURRENT RES. IN SOC. PSYCHOL. 14, 14 (2012) (finding that the majority of accused but innocent subjects in our experiment accepted plea deals rather than challenge their guilt); Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2010) (noting that, in a system when the risks of trial are very high, the importance of a defendant’s actual guilt or innocence is decreased).

¹⁰⁰ See Bennett L. Gershman, *The “Perjury Trap,”* 129 U. PA. L. REV. 624, 624 (1981) (discussing how the grand jury is used to secure a conviction of perjury).

¹⁰¹ See *United States v. Stewart*, 305 F. Supp. 2d 368, 371 (S.D.N.Y. 2004) (noting that the indictment charged Stewart with conspiracy, obstruction of an agency proceeding, and making false statements to government officials).

¹⁰² See *id.* at 377–78 (finding insufficient evidence for a securities fraud conviction).

¹⁰³ See Podgor, *supra* note 26, at 585–87 (discussing Martha Stewart’s criminal convictions).

Although these "short-cut" crimes serve an important role in the prosecution of white-collar criminality, they are also crimes used in non-white-collar cases. For example, one finds obstruction conduct in street crime cases.¹⁰⁴ Being hybrid crimes to both the white-collar and non-white-collar world skews a statutory reporting process that attempts to categorize this conduct as exclusively white-collar-based.

b. Generic Crimes That Are Substantive Offenses for the Conduct. This next grouping involves substantive crimes that are not clearly delineated as exclusively white-collar crimes. Unlike crimes such as insider trading that are exclusive white-collar substantive offenses, these statutes are hybrid in that they include both white-collar and non-white-collar conduct. These offenses, however, are not generic crimes merely used for efficiency purposes, as seen with the "short-cut" offenses described above.¹⁰⁵ The crimes in this group are those that reflect the actual criminality, such as fraud, that was used by the perpetrator. But like the last category of "short-cut" offenses, these crimes are also used with non-white-collar conduct.

Crimes that may fit this designation are common crimes used in white-collar prosecutions, such as mail and wire fraud.¹⁰⁶ One can easily find cases using these two statutes with activities that would be labeled street crime.¹⁰⁷ For example, a case involving fraudulent conduct accruing from a homicide may include a mail or wire fraud charge for the use of the mails or wire activity that may occur following the homicide.¹⁰⁸

¹⁰⁴ See, e.g., *United States v. Fernandez*, 837 F.2d 1031, 1032–33 (11th Cir. 1988) (describing an obstruction charge under § 1503 involving a threat to an Assistant United States Attorney); *United States v. Johnson*, 713 F.2d 654, 658–59 (11th Cir. 1983) (discussing an obstruction case under § 1503 that included threatening a witness and conduct described as kidnapping).

¹⁰⁵ See Podgor, *supra* note 26, at 584 (describing the quick nature of "short-cut" convictions).

¹⁰⁶ 18 U.S.C. §§ 1341, 1343 (2012).

¹⁰⁷ See, e.g., *United States v. Mikos*, 539 F.3d 706, 708 (7th Cir. 2008) (involving murder and healthcare fraud); *United States v. Farris*, 532 F.3d 615, 619 (7th Cir. 2008) (involving bank robbery and insurance fraud); *United States v. Handlin*, 366 F.3d 584, 586 (7th Cir. 2004) (involving arson and mail fraud).

¹⁰⁸ See, e.g., *United States v. Poole*, 451 F. App'x 298, 304 (4th Cir. 2011) (describing a conspiracy to defraud an estate where the court used the involvement in the homicide in the sentencing).

Many statutes that are used in the prosecution of white-collar conduct are also used for prosecuting street criminality. There are also statutes that take white-collar predicate acts and use them to form a crime with an enhanced penalty. Examples here are the RICO¹⁰⁹ and money laundering statutes.¹¹⁰ RICO provides predicate acts that include nine different state crimes and an even greater number of federal crimes.¹¹¹ These predicates, when part of a pattern of racketeering and meeting the other elements of the crime, allow for enhanced penalties.¹¹² But the predicate acts may be white-collar or street crime activities or statutes. If the predicate pertains to fraud on a financial institution, it is likely to fit the white-collar category.¹¹³ But if the predicate is murder, kidnapping or robbery, it is clear that the essence is street crime.¹¹⁴ As RICO was enacted to combat organized crime, considering a violation of RICO a street crime is justified.¹¹⁵ On the other hand, the Supreme Court has made clear that RICO can be used absent a showing of organized crime, and it has been used well beyond its roots.¹¹⁶

Hybrid generic crimes,¹¹⁷ which crosses over into both white-collar and street crimes, raise concern when considering how best

¹⁰⁹ 18 U.S.C. §§ 1961–1968 (2012).

¹¹⁰ *Id.* § 1956.

¹¹¹ *See id.* § 1961 (listing “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable by [s]tate law” and many federal crimes as “racketeering activity” under RICO).

¹¹² *See id.* § 1963 (providing for up to twenty years of imprisonment for commission of any racketeering activity).

¹¹³ *See* Cliff & Desilets, *supra* note 9, at 483–85 (explaining that definitions of white-collar crime often relate to finances).

¹¹⁴ *See* Dan Silverman, *Street Crime and Street Culture* 1 (Nat’l Poverty Ctr. Working Paper Series, Paper No. 03-3, 2003), <http://www.npc.umich.edu/publications/working-papers/paper4/03-4.pdf> (2003) (giving examples of street crimes).

¹¹⁵ *See* Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 DEL. J. CORP. L. 519, 519 (2002) (expressing that the purpose of RICO was to combat organized crime).

¹¹⁶ *See* *United States v. Turkette*, 452 U.S. 576, 593 (1981) (noting the importance of reading RICO broadly).

¹¹⁷ Throughout this Article, generic crimes are used to describe crimes that cover a broad base of conduct that may fall into many different categories. For example, mail fraud is considered a “stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.” *United States v. Maze*, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting). One finds that mail

to report white-collar criminality. The failure to include RICO activity for purposes of white-collar crime reporting significantly skews the designation, as many predicate offenses to RICO would fit the white-collar rubric. These offenses, however, get excluded because the primary statute failed to be separated by the specific underlying conduct.

III. EMPIRICAL ANALYSIS OF "WHITE-COLLAR" CRIMES

As described in the previous section, academics, policy-makers, law enforcement personnel, and defense counsel have struggled for decades to adequately define what constitutes a white-collar crime. The ability to identify white-collar offenses is vital, as it allows one to track, among other things, the number of these cases prosecuted each year, the frequency with which particular types of charges are brought in these matters, and the sentences imposed on those convicted.

One of the most common approaches to tracking white-collar offenses is to focus on statutes that are traditionally considered "white-collar."¹¹⁸ Given the breadth of many criminal offenses in the United States Code, however, it is unclear how efficient this approach is at isolating actual white-collar cases. In beginning this empirical study, the hypothesis advanced was that, despite the attraction of this approach, focusing merely on statutes perceived as white-collar in nature was not a valid or useful tool for identifying and monitoring actual white-collar cases. This hypothesis was based on two concerns: first, a concern that many traditional "white-collar" statutes are broad enough to be utilized in cases involving conduct that should not be considered white-collar in nature; and second, a concern that many statutes traditionally considered non-"white-collar" are broad enough for

fraud is used to prosecute many different frauds. See Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995) (explaining how mail fraud came to be used as a prosecution tool).

¹¹⁸ See, e.g., DONALD A. MANSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, TRACKING OFFENDERS: WHITE-COLLAR CRIME 2 (1986), <http://www.bjs.gov/content/pub/pdf/to-wcc.pdf> (providing white-collar crime statistics based on commissions of "forgery/counterfeiting, fraud, and embezzlement").

application in cases involving conduct that should properly be considered white-collar in nature.

The above hypothesis was tested using an empirical methodology to examine appellate cases decided from 2002 through 2014. The goal was to ascertain the efficiency of identifying and tracking white-collar crime in America by focusing on particular statutory provisions. The methodology focused on appellate cases from two diverse federal jurisdictions: the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Eleventh Circuit. Within the established temporal and jurisdictional criteria, the study focused on cases involving four hybrid federal crimes: perjury,¹¹⁹ false statements,¹²⁰ obstruction of justice,¹²¹ and RICO violations.¹²²

These statutes were selected because they represent statutes that are not exclusively focused on white-collar crime. Statutes as previously seen in the first category, such as insider trading statutes, clearly involve white-collar crime and thus were not included in the study. Instead, the hybrid generic statutes that cross into both white-collar and non-white-collar activities were considered. Three of the statutes, namely perjury, false statements, and obstruction of justice, were selected because they represent commonly used “short-cut” offenses. The last offense, RICO, was considered to address a generic crime that was not a “short-cut” offense, but rather focused on the substantive criminal activity. RICO provides a unique opportunity because, as previously discussed, it can have predicate acts that are both white-collar and street crimes.¹²³ The data used in the study included all appellate decisions, both reported and unreported, where it was ascertainable that the defendant was charged or convicted of one of these offenses within the temporal and jurisdictional criteria.¹²⁴

¹¹⁹ 18 U.S.C. § 1621 (2012).

¹²⁰ *Id.* § 1001.

¹²¹ *Id.* § 1503.

¹²² *Id.* § 1962.

¹²³ *See supra* notes 111–16 (discussing RICO’s role in white-collar crime tracking).

¹²⁴ The cases for analysis were gathered by running searches of electronic databases, such as Westlaw and Lexis, to identify cases referencing the selected statutes. While it is possible that certain cases were inadvertently excluded from review using this methodology, any errors in

In examining the facts of each case, the study methodology called for categorizing each case into one of three classifications: "white-collar," "non-white-collar," or "mixed/unclear." The statutory basis for conviction was not determinative for purposes of classifying the cases. Rather, the classification determination was made upon careful examination of the facts of each case. For example, a case involving the presentation of false invoices to the government was classified as "white-collar," even if the defendant was charged with engaging in a racketeering enterprise, an offense created to prosecute organized crime.¹²⁵ As an additional example, a case involving a narcotics scheme was classified as "non-white-collar," even if the defendant was only charged with false statements to the government, an offense that could easily be considered white-collar in nature.¹²⁶

Where the facts indicated that the case contained elements of both white-collar criminality and other criminality, the case was marked as "mixed/unclear." An example of such a case is one in which a defendant engaged in Medicare fraud, a traditional white-collar offense, but then attempted to kill a witness against him in the case, a violent crime.¹²⁷ Similarly, where there was insufficient evidence to determine the true nature of the underlying criminal conduct leading to the charges in the matter, the case was also marked "mixed/unclear." Through these classifications, the study sought to identify which cases were truly white-collar in nature and which were not, regardless of the specific charge in the case.

As noted above, the study hypothesis was that focusing merely on statutes perceived as white-collar was not a valid or useful tool

the collection of cases would not impact the validity of the results of this empirical analysis because of the nature of the inquiry. This empirical analysis does not seek to definitively state the precise number of cases in each jurisdiction referencing the selected statutes. Rather, the focus of this study is to better understand the underlying facts and the white-collar or non-white-collar nature of the cases gathered for analysis. Consistent with this focus, there was also no deduplication of cases on appeal. Therefore, it is possible that a single prosecution could have resulted in more than one appeal on different issues during the temporal period. Again, because the focus of the study was not on the number of individual prosecutions, such duplications would not negatively impact the results.

¹²⁵ *Skrzypek v. United States*, 425 F. App'x 516 (7th Cir. 2011).

¹²⁶ *United States v. Iglesias*, 565 F. App'x 857 (11th Cir. 2014).

¹²⁷ *United States v. Mikos*, 539 F.3d 706 (7th Cir. 2008).

for identifying and monitoring actual white-collar cases. This hypothesis is based on a belief that many prosecutions involving traditional white-collar statutes would actually involve criminal conduct by the defendant that was not white-collar in nature. Similarly, this hypothesis is based on a belief that many prosecutions involving non-white-collar statutes would actually involve criminal conduct by the defendant that was white-collar in nature.

In total, 283 cases fell within the methodological paradigm described above.¹²⁸

TABLE 1

Total Number of Cases Reviewed by Jurisdiction and Statute

Offenses	7th Circuit Cases	11th Circuit Cases	Total Cases by Offense
<i>Perjury</i>	2	6	8
<i>False Statements</i>	57	101	158
<i>Obstruction of Justice</i>	14	24	38
<i>RICO</i>	43	36	79
Total Cases by Jurisdiction	116	167	
		Total Cases	283

Of the 283 cases examined, 129 were categorized as “white-collar.” The statute with the largest percentage of cases classified as “white-collar” in nature was the false statements statute, 18 U.S.C. § 1001.¹²⁹ In the Eleventh Circuit, 46% of the cases involving false statements were white-collar. In the Seventh Circuit, 67% of the cases involving false statements were white-collar. When the two jurisdictions were combined, 53% of the

¹²⁸ A complete list of cases reviewed, the underlying facts of each case, and the categorization of each case is on file with the authors.

¹²⁹ 18 U.S.C. § 1001 (2012).

cases involving false statements were white-collar. This is an important statistic, because it draws focus to the concerns described in this study's hypothesis. When the jurisdictions were combined, the percentage of white-collar cases never rose beyond 53% for any of the examined statutes.

Offering further support for the hypothesis in this study, in both jurisdictions, a significant number of RICO convictions on appeal were "white-collar" cases, rather than the organized crime and narcotics cases traditionally associated with the racketeering statute. In the Seventh Circuit, 35% of RICO convictions on appeal were "white-collar." In the Eleventh Circuit, 31% of RICO convictions on appeal were "white-collar." In total, 33% of the RICO cases examined were classified as "white-collar."

TABLE 2

Total Number of Cases by Jurisdiction and Classification

	Traditional White-Collar Case	Not White- Collar	Unclear or Mixed Case	Total
7th Circuit				
Perjury	0	2	0	2
False Statements	38	16	3	57
Obstruction	7	3	4	14
RICO	15	25	3	43
11th Circuit				
Perjury	2	4	0	6
False Statements	46	41	14	101
Obstruction	10	7	7	24
RICO	11	18	7	36

This empirical study does not posit that a review of appellate cases offers accurate insights into the number of prosecutions in the United States each year using these select statutes or the precise percentage of such prosecutions or appeals that are white-

collar or non-white-collar. This, however, is not the purpose of the examination of this data. Rather, the data offers a telling glimpse into the various ways these statutes are used in two geographically distant and diverse jurisdictions. In so reviewing the data, the statistical information speaks strongly to the diverse use of these statutes in both white-collar and non-white-collar cases. While these overall figures speak deeply to the earlier proposed hypothesis regarding the efficiency of relying on particular statutes to capture trends of white-collar crime in America, these general numbers do not capture all the interesting insights that these cases offer unless further examination is conducted. For that undertaking, one must explore in depth the empirical evidence for each category of crime.

Before delving into the cases with greater specificity, however, it is worth mentioning that of the 283 cases examined, only one contained a substantive attempt at defining what made the case white-collar. This glimpse at a court's definition of white-collar crime came in the Eleventh Circuit case of *United States v. Artuso*.¹³⁰ In this case, the defendant was charged with a racketeering offense for conspiring with another to purchase properties owned by his employer, ADT Security Systems, and then leasing them back to the company for a significant profit.¹³¹ In discussing the defendant's motivation for engaging in the illicit behavior, the court offered a passing thought regarding what makes conduct a white-collar crime; the court stated, "[l]ike so many white-collar crimes, the genesis of this case rests in greed—the desire to acquire more at all costs."¹³²

The singular attempt by the court in *Artuso* to capture what makes an offense white-collar is insightful regarding the results of this empirical study. While the *Artuso* court accurately described one motivation for white-collar crime, greed is also a motivation for many other non-white-collar offenses, such as narcotics, guns, and human trafficking. Further, while greed might stand at the heart of the actions of a traditional white-collar criminal, such as

¹³⁰ 482 F. App'x 398 (11th Cir. 2012).

¹³¹ *Id.* at 399–400.

¹³² *Id.* at 399.

Bernard Madoff,¹³³ desperation and ignorance of the law are also certainly at the center of other white-collar crimes. With the Eleventh Circuit's attempt in hand, one must venture deeper into the findings of this study.

A. PERJURY

Many might consider perjury a crime that is always "white-collar." This perspective is supported by the common law definition of perjury, which states that the offense simply means a "false swearing."¹³⁴ What could be more "white-collar" than a lie? Perhaps, then, perjury is the perfect starting place for this study, and perjury is a statute under which the heart of every case is "white-collar" in nature.

For purposes of our examination, the study focused specifically on perjury under 18 U.S.C. § 1621.¹³⁵ To satisfy the elements of

¹³³ Bernard Madoff, a once well-respected financier and contributor to the launch of NASDAQ, was sentenced in 2009 to 150 years in prison for fraud, money laundering, perjury, and theft in what some call "the biggest fraudulent scheme in U.S. history." Stephanie Yang, *5 Years Ago Bernie Madoff Was Sentenced to 150 Years in Prison—Here's How His Scheme Worked*, BUS. INSIDER (July 1, 2014, 6:54 PM), <http://www.businessinsider.com/how-bernie-madoffs-ponzi-scheme-worked-2014-7>.

¹³⁴ CORPORATE COUNSEL'S GUIDE TO WHITE-COLLAR CRIME § 3.2. For a more thorough history of perjury as a crime, see generally Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 AM. J. LEGAL HIST. 145 (1980), which describes the development of perjury statutes, and Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215 (1993), which describes the history of the law of perjury.

¹³⁵ 18 U.S.C. § 1621 (2012).

Whoever—

- (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
- (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both.

Id.

the statute, one must take an “oath before a competent tribunal” and then “willfully and contrary to such oath state[] or subscribe[]” a material matter that he or she “does not believe to be true.”¹³⁶ The United States Supreme Court summarized 18 U.S.C. § 1621 more eloquently in the 1993 case of *United States v. Dunnigan*¹³⁷:

In determining what constitutes perjury, we rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U.S.C. § 1621. A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.¹³⁸

In recent years, there have been several well-publicized examples of white-collar cases based on prosecution under 18 U.S.C. § 1621. For example, both Roger Clemens and Barry Bonds were prosecuted for perjury in relation to the investigation of steroid abuse in Major League Baseball.¹³⁹ While Clemens was

¹³⁶ *Id.*

¹³⁷ 507 U.S. 87, 94 (1993).

¹³⁸ *Id.* The Court stated that “[t]his federal definition of perjury by a witness has remained unchanged in its material respects for over a century.” *Id.* Courts have also expressed the significance of punishing perjury throughout history. *See, e.g., Miles v. State*, 268 P.2d 290, 294 (Okla. Crim. App. 1954) (“This case has been advanced on the docket because of its peculiar importance. Perjury corrupts and defiles the stream of justice. Every effort should be used to thwart the slightest temptation to resort to it. All courts should be vigilant, in their endeavors to punish perjury, and those who seek to make use of it as an instrument of fraud.”).

¹³⁹ *United States v. Clemens*, No. 10-cr-00223-RBW, 2010 WL 3260179, at *17–18 (D.D.C. Aug. 19, 2010) (indicting Clemens on two counts of perjury); *United States v. Bonds*, 580 F. Supp. 2d 925, 931, 933 (N.D. Cal. 2008) (dismissing perjury charge from indictment on Bonds’s motion, but denying motion to dismiss obstruction of justice charge); *see Daniel Healey, Fall of the Rocket: Steroids in Baseball and the Case Against Roger Clemens*, 19 MARQ. SPORTS L. REV. 289, 289–90 (2008) (describing the hearings leading up to Clemens’s perjury indictment); Nicole O. Tupman & Jason Tupman, *No Lie About It, the Perjury Sentencing Guidelines Must Change*, 59 S.D. L. REV. 50, 50 (2014) (discussing the indictments of Bonds and Clemens for perjury).

acquitted at trial,¹⁴⁰ Bonds was convicted and sentenced to thirty days of house arrest and two years of probation.¹⁴¹ Bonds's conviction was later overturned by the United States Court of Appeals for the Ninth Circuit.¹⁴²

While perjury appears very white-collar on its face, a closer examination of the cases from the Seventh and Eleventh Circuits reveals that while the act of making a "false swearing" may always contain elements of "white-collar" conduct, the types of defendants and matters underlying a perjury case are often far from white-collar in nature. For example, few would argue that a terrorist who lied on an immigration form to gain access to the United States should be categorized as a white-collar criminal the same way some people might categorize the acts of Roger Clemens or Barry Bonds.¹⁴³ Yet, just such actions were prosecuted as perjury in the case of *United States v. Hassoun*¹⁴⁴ in the Eleventh Circuit. As this case and other cases examined below illustrate, relying on statutes—even relatively simple statutes like perjury—is inefficient and leads to inaccurate reporting.

In total, the study gathered information from eight perjury cases on appeal in the Seventh and Eleventh Circuits.¹⁴⁵ Of this number, only two, or 25%, of the cases were white-collar.¹⁴⁶

¹⁴⁰ See Lucian E. Dervan, *The Quest for Finality: Five Stories of White-Collar Criminal Prosecution*, 4 WAKE FOREST J.L. & POLY 91, 110 (2014) ("After a nine-week trial, Clemens was found not guilty. According to one juror who was questioned after the proceeding, they 'didn't see anything to be prosecuted.'" (footnotes omitted)).

¹⁴¹ See *United States v. Bonds*, 730 F.3d 890, 893 (9th Cir. 2013) (affirming Bonds's conviction for obstruction of justice).

¹⁴² *United States v. Bonds*, 784 F.3d 582, 582 (9th Cir. 2015).

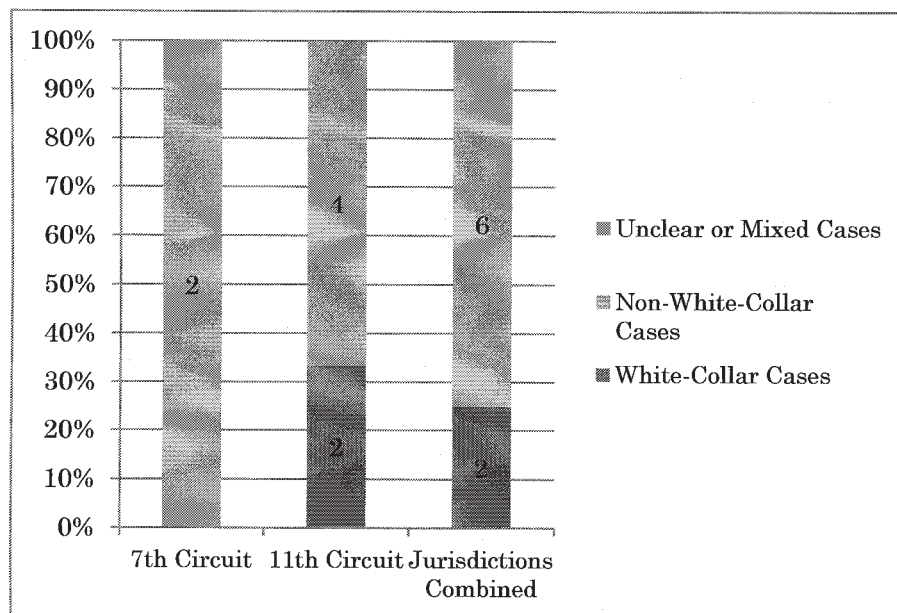
¹⁴³ See, e.g., *United States v. Hassoun*, 477 F. Supp. 2d 1210, 1212 (S.D. Fla. 2007), *rev'd on other grounds*, 476 F.3d 1181 (11th Cir. 2007) (involving a terrorism case against Jose Padilla and others and including five counts of perjury).

¹⁴⁴ *Hassoun*, 477 F. Supp. at 1212–13.

¹⁴⁵ See *supra* TABLE 1 (listing two perjury cases out of the Seventh Circuit and six out of the Eleventh Circuit). While only cases in which defendants were actually charged with perjury under 18 U.S.C. § 1621 were included in the study, it should be noted that there were examples of other cases in which prosecutors used perjury as a sentencing enhancement rather than an independent charge.

¹⁴⁶ See *supra* TABLE 2 (listing two perjury cases, both out of the Eleventh Circuit, as white-collar in nature).

GRAPH 1

Perjury: Classification of Cases Reviewed

Of particular note is that the Seventh Circuit heard no white-collar perjury cases on appeal from 2002 to 2014.¹⁴⁷ In the Eleventh Circuit, only two cases were white-collar in nature.¹⁴⁸ The first was *United States v. DeAngelis*, a case from 2006.¹⁴⁹ In *DeAngelis*, the defendant defrauded seventeen investors of \$1.5 million in a Ponzi scheme.¹⁵⁰ In 2001, DeAngelis was charged with tax evasion related to a separate fraud scheme.¹⁵¹ While being interviewed by pretrial services prior to his bond hearing, DeAngelis lied regarding his assets, information that is used by pretrial services in making bond recommendations to the court.¹⁵²

¹⁴⁷ See *supra* TABLE 2.

¹⁴⁸ See *supra* TABLE 2.

¹⁴⁹ 206 F. App'x 873 (11th Cir. 2006).

¹⁵⁰ *Id.* at 875.

¹⁵¹ *Id.* at 875–76.

¹⁵² *Id.* at 876.

After pleading guilty in the tax matter, DeAngelis provided further false information to probation officers regarding his assets.¹⁵³ Following this initial conviction, investors in DeAngelis's Ponzi scheme complained to the FBI and IRS.¹⁵⁴ Eventually, the \$1.5 million Ponzi scheme was discovered, and DeAngelis was charged with fifty-one counts, including perjury.¹⁵⁵ He was convicted and sentenced to 300 months in prison.¹⁵⁶

The second white-collar perjury case from the Eleventh Circuit from 2002 to 2014 was *United States v. Moses*.¹⁵⁷ In *Moses*, the Securities and Exchange Commission initiated a civil action against the defendant for issuing false press releases in connections with traded securities.¹⁵⁸ During a deposition in the matter, Moses allegedly perjured himself.¹⁵⁹ The United States Attorney's office then opened an investigation into the matter and brought charges against Moses for securities fraud and perjury.¹⁶⁰ That only two of eight perjury cases in these two jurisdictions involved underlying white-collar criminal conduct is a clear indication of the wide applicability of the perjury statute to a myriad of cases.

The remaining cases from the Seventh and Eleventh Circuits during 2002 to 2014 dealt with a host of non-white-collar matters, including cases involving terrorism, immigration violations, identify theft, and even police brutality. For example, in *United*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ 219 F. App'x 847 (11th Cir. 2007).

¹⁵⁸ *Id.* at 849.

¹⁵⁹ *Id.* at 850. The Eleventh Circuit stated:

The SEC had a legitimate purpose in bringing its civil action, and Moses attributes nothing in his deposition to either the direct or indirect influence of the United States Attorney. Moses argues that he would not have perjured himself had he known the United States Attorney was contemplating a criminal investigation, but Moses was given ample warning that civil depositions are often used in criminal prosecutions. Moses was also told his false testimony could lead to a charge of perjury, and he could invoke his Fifth Amendment right against self-incrimination.

Id.

¹⁶⁰ *Id.* at 849.

States v. Burge,¹⁶¹ a Seventh Circuit case from 2013, the defendant was a former Chicago police commander who “presided over an interrogation regime where suspects were suffocated with plastic bags, electrocuted until they lost consciousness, held down against radiators, and had loaded guns pointed at their heads during rounds of Russian roulette.”¹⁶² When deposed about the practices years later, Burge denied any knowledge of the practices.¹⁶³ He was subsequently prosecuted for perjury and obstruction of justice and sentenced to fifty-four months in prison.¹⁶⁴

In each of these non-white-collar perjury cases, the defendants were far from what would typically be characterized as being white-collar criminals. Additionally, the substantive crimes in which they were engaged when they committed perjury were far from white-collar in nature. If one were to attempt to gain insights into white-collar criminality, the frequency of white-collar prosecutions, and the sentences imposed on white-collar offenders, simply examining perjury prosecutions in any given year would likely offer a flawed and shallow image.

B. FALSE STATEMENTS

Another statute commonly referenced as being a “white-collar” crime is the violation of the false statements statute.¹⁶⁵ The making of false statements is an offense similar to perjury in that it deals with a false telling, and the government uses this crime as a “short-cut” to prosecute complex criminal cases that might be difficult for a jury to fully appreciate.¹⁶⁶ As with perjury, the offense has a lengthy history.¹⁶⁷ The earliest statutory version of

¹⁶¹ 711 F.3d 803 (7th Cir. 2013).

¹⁶² *Id.* at 806.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 806–08.

¹⁶⁵ 18 U.S.C. § 1001 (2012).

¹⁶⁶ See 18 U.S.C. § 1621 (2012) (codifying perjury as a criminal offense); PODGOR, HENNING, ISRAEL & KING, *supra* note 24, at 291 (identifying false statement charges as “short-cut” charges).

¹⁶⁷ See *Hubbard v. United States*, 514 U.S. 695, 704–07 (1995) (discussing the history of 18 U.S.C. § 1001); *United States v. Gilliland*, 312 U.S. 86, 90–95 (1941) (discussing the history of 18 U.S.C. § 1001); Alexandra Bak-Boychuk, Comment, *Liar Laws: How MPC § 241.3 and State Unsworn Falsification Statutes Fix the Flaws in the False Statements Act (18 U.S.C. § 1001)*, 78 TEMP. L. REV. 453, 456–57 (2005) (“Over 130 years ago, Congress

the offense was contained in the false claims statute in the Act of March 2, 1863.¹⁶⁸ The Act made it a crime to make a false statement "for the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim."¹⁶⁹ Given this level of specificity, the initial false statements statute tended to focus on false tellings directly related to white-collar false claims offenses.¹⁷⁰ As with so many statutes, however, its breadth and scope of application grew over time.¹⁷¹

The modern version of 18 U.S.C. § 1001 was adopted in 1934.¹⁷² The 1934 version removed the requirement that the false telling relate to a financial fraud and inserted the modern-day jurisdictional language requiring merely that the false statement

passed a law during the Civil War to protect the federal government from a 'spate of frauds' submitted by military contractors and companies scamming the United States War Department.').

¹⁶⁸ *Hubbard*, 514 U.S. at 704; see also PODGOR, HENNING, ISRAEL & KING, *supra* note 24, at 292–93 ("The false statement statute emanates from a 1863 Act that made it a criminal offense for a person in the United States armed forces to make a fraudulent claim against the government." (footnotes omitted)).

¹⁶⁹ *Hubbard*, 514 U.S. at 705.

¹⁷⁰ *Id.* ("The 1863 Act also proscribed false statements, but the scope of that provision was far narrower than that of modern-day § 1001 . . ."); see also Bak-Boychuk, *supra* note 167, at 456–57 (discussing the statute's original focus on pecuniary frauds against the government).

¹⁷¹ The current legal literature on overcriminalization and overfederalization is abundant. See, e.g., Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 608–09 (2011) (discussing the overcriminalization movement); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–19 (2005) (defining the overcriminalization phenomenon); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 729–37 (2012) (discussing the differences between common law and modern criminal law); Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 HARV. J.L. & PUB. POL'Y 57, 57–59 (2014) (discussing evidence of overfederalization of criminal law); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537–40 (2012) (discussing problems associated with overcriminalization).

¹⁷² *Hubbard*, 514 U.S. at 706. A previous amendment in 1918 arguably extended the false statement provision of the 1863 Act to any false statement made to the government. *Id.* at 705–06. However, the Supreme Court stated that the "principal purpose [of the 1918 amendment] seems to have been to prohibit false statements made to defraud [g]overnment corporations, which flourished during World War I." *Id.* at 706. Interestingly, the first attempt to modify the false statements statute in 1934 was vetoed by President Roosevelt because it included language requiring the specific intent to deceive the federal government. *United States v. Vermian*, 468 U.S. 63, 71–72 (1984). The current statute was enacted shortly after and omitted the specific intent language. *Id.* at 72–74.

be made “in any matter within the jurisdiction of any department or agency of the United States.”¹⁷³ In its current form, 18 U.S.C. § 1001 is an extremely broad statute that retains few of its original links to white-collar crime.¹⁷⁴

As observed below, the breadth of 18 U.S.C. § 1001 means it is no longer a statute limited only to false statements regarding underlying white-collar conduct. Rather, it has become a hybrid “short-cut” offense that includes both white-collar and non-white-collar conduct. As a result, it is an example of a statute that tends to mislead if it is used solely as a guidepost to examine white-collar criminals and white-collar criminal conduct.

In total, the study gathered information from 158 false statement cases in the Seventh and Eleventh Circuits.¹⁷⁵ Of this number, eighty-four, or 53%, of the cases were classified as white-collar.¹⁷⁶ While this represents a much higher percentage of white-collar cases than found in the examination of perjury appeals, it is important to note that almost half of the cases involving prosecutions under 18 U.S.C. § 1001, a statute created in response to white-collar frauds during the Civil War, involved underlying conduct that was actually non-white-collar in nature.

¹⁷³ *Hubbard*, 514 U.S. at 706.

¹⁷⁴ The statute provides:

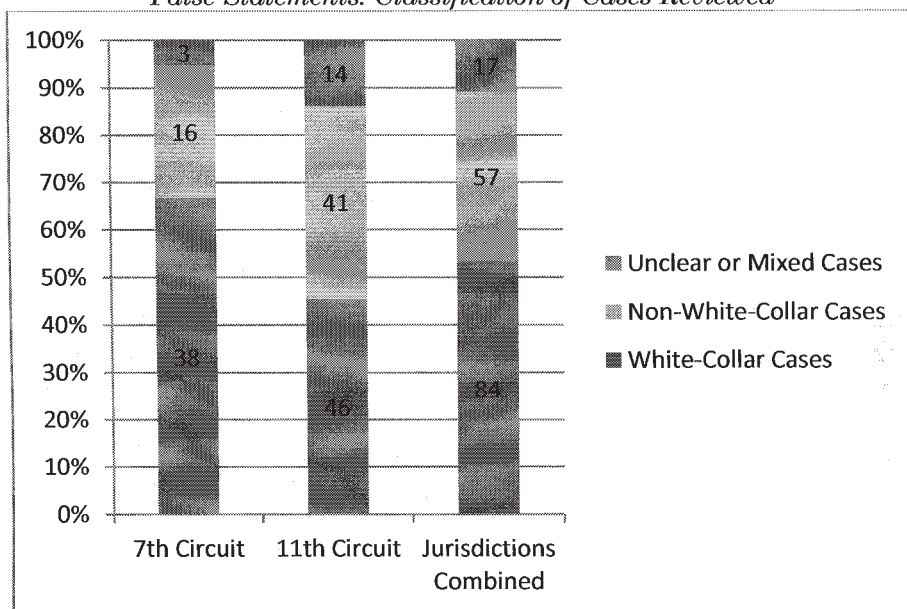
[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, [or] imprisoned not more than 5 years. . . .

18 U.S.C. § 1001 (2012).

¹⁷⁵ See *supra* TABLE 1 (listing fifty-seven false statement cases out of the Seventh Circuit and 101 out of the Eleventh Circuit).

¹⁷⁶ See *supra* TABLE 2 (listing thirty-eight false statement cases out of the Seventh Circuit and forty-six out of the Eleventh Circuit as white-collar in nature).

GRAPH 2

False Statements: Classification of Cases Reviewed

As might be expected, some of the cases examined during the analysis involved scenarios reminiscent of the intent behind the original false statement statute contained in the Act of March 2, 1863. For example, in the 2011 Seventh Circuit case of *United States v. Shah*,¹⁷⁷ the defendant was charged with various offenses, some of which involved the use of false statements.¹⁷⁸ The charges related to a scheme in which Shah allegedly presented invoices for work performed as an engineer for several Illinois governmental entities, though the work was never actually performed.¹⁷⁹ The defendant pleaded guilty in the case and was sentenced to forty-one months in prison.¹⁸⁰ Similarly, in the 2006

¹⁷⁷ 665 F.3d 827 (7th Cir. 2011).

¹⁷⁸ *Id.* at 829.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 834.

Eleventh Circuit case of *United States v. Pirchesky*,¹⁸¹ the defendant was charged with a violation of 18 U.S.C. § 1001 in relation to a scheme of presenting false claims to the government.¹⁸² In *Pirchesky*, the defendant was an accounting manager and comptroller for a group of companies providing services to the Department of Defense.¹⁸³ In her role with the companies, the defendant provided the Department of Defense with false invoices related to construction costs that were never actually incurred by the group.¹⁸⁴ In each of these examples, the defendant engaged in conduct that likely would have violated the original false statements statute's focus on declarations that related to the presentation of a false claim. Under the modern-day version of the false statements statute, however, a myriad of other cases involving underlying conduct of both a white-collar and non-white-collar nature also falls within its parameters.

The additional white-collar schemes present in the appellate cases reviewed in the Seventh and Eleventh Circuits from 2002 to 2014 cover dozens of topics, including workers compensation and social security benefits fraud, environmental crimes, tax evasion, financial records manipulation, corruption, and more. In the 2010 Seventh Circuit case of *United States v. Davis*,¹⁸⁵ for example, the defendant was convicted of mail fraud and making false statements in relation to a Ponzi scheme.¹⁸⁶ When questioned by the government regarding the scheme, Davis falsely stated that he had received funds from one of the investors in return for kitchen design advice, not as part of an investment fraud.¹⁸⁷ In another example from the Seventh Circuit, the 2011 case of *United States v. Reese*¹⁸⁸ involved a defendant charged with making false statements to federal agents during a corruption investigation.¹⁸⁹ Reese was a building inspector for the City of Chicago and

¹⁸¹ 180 F. App'x 838 (11th Cir. 2006).

¹⁸² *Id.* at 838–39.

¹⁸³ *Id.* at 839.

¹⁸⁴ *Id.*

¹⁸⁵ 375 F. App'x 611 (7th Cir. 2010).

¹⁸⁶ *Id.* at 612.

¹⁸⁷ Government's Response to Defendant's Motion for New Trial at 2, *United States v. Davis*, 375 F. App'x 611 (2010) (No. 04-CR-250), 2005 WL 6277737, at *2.

¹⁸⁸ 666 F.3d 1007 (7th Cir. 2012).

¹⁸⁹ *Id.* at 1012.

allegedly provided certain services in return for bribes.¹⁹⁰ He was sentenced to fifty-one months in prison.¹⁹¹

Similar cases were found in the Eleventh Circuit. For example, in the 2014 Eleventh Circuit case of *United States v. Muzio*,¹⁹² the defendant was charged with wire fraud, securities fraud, and false statements related to a securities scheme.¹⁹³ The scheme involved, among other things, the issuance of false and misleading press releases and engaging in "wash trades" to create a false market for shares.¹⁹⁴ He was sentenced to 163 months in prison.¹⁹⁵ In the Eleventh Circuit case of *United States v. John*¹⁹⁶ from 2012, the defendant was alleged to have lied to authorities investigating a wire fraud scheme.¹⁹⁷ The defendant, a bank employee, allegedly accepted a cash payment from another individual engaged in the fraudulent transfer of \$5.7 million from the state treasury.¹⁹⁸ John was sentenced to twelve months of probation in the matter.¹⁹⁹ In one final example from the Eleventh Circuit, in 2013, the case of

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1014.

¹⁹² 757 F.3d 1243 (11th Cir. 2014).

¹⁹³ *Id.* at 1245.

¹⁹⁴ See Superseding Indictment at 5, *United States v. Muzio*, 757 F.3d 1243 (11th Cir. 2014) (No. 09-20327-CR-KING/BANDSTRA(s)), 2009 WL 6826072 (S.D. Fla.). As explained in the indictment,

To further induce investors to buy IBVR common stock, MICHAEL J. MUZIO worked to create the false impression that there was an active market for IBVR's common stock reported through Pink Quote. MUZIO engaged in "wash trades," wherein he simultaneously entered buy orders through one brokerage account under his control and offsetting sell orders at the same price in another brokerage account also under his control. As MUZIO was the only person entering orders to buy and sell IBVR common stock at that price, MUZIO merely transferred shares from one brokerage account under his control to another. While the "wash trades" had no real economic effect on MUZIO's holdings, MUZIO's brokers unwittingly reported the trading activity to Pink Quote. As a result of these "wash trades," potential investors viewing the trading activity online were misled to believe that willing buyers and sellers were actively trading IBVR securities at the quoted prices.

Id.

¹⁹⁵ *Id.* at 1244–45.

¹⁹⁶ 477 F. App'x 570 (11th Cir. 2012).

¹⁹⁷ *Id.* at 571.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

*United States v. Nelson*²⁰⁰ involved a defendant charged with making false statements to the FBI while being asked about a potential bribery scheme.²⁰¹ The defendant, a former member of the Jacksonville, Florida, Port Authority board of directors, was allegedly accepting bribes from a Port Authority contractor.²⁰²

As a result of the increased breadth of 18 U.S.C. § 1001 in 1934, a number of cases involving white-collar schemes that would not have been covered by the original statute now appear in the examined dataset. Similarly, however, a significant number of cases involving underlying conduct of a non-white-collar nature also appear in the dataset, such as offenses involving narcotics, extortion, child pornography, assault, police misconduct, smuggling, and parole violations. As examples, in *United States v. Carpenter*,²⁰³ a Seventh Circuit case from 2014, the defendant was a police officer in East St. Louis.²⁰⁴ During an FBI investigation regarding allegations that Carpenter had stopped a victim's vehicle and coerced her into performing oral sex in return for not being arrested, Carpenter was interviewed by the investigating agents.²⁰⁵ During the interview, Carpenter lied regarding the events alleged by the complainant.²⁰⁶ Carpenter pled guilty to making false statements and received thirty months in prison.²⁰⁷

²⁰⁰ 712 F.3d 498 (11th Cir. 2013).

²⁰¹ *Id.* at 500, 504.

²⁰² *Id.* at 500–06. In discussing the interactions between the FBI and Nelson, the case states,

Before these opportunities materialized, however, Nelson and Young were approached by the FBI and were specifically asked about their relationship. Angela Kapala–Hill, the FBI Special Agent who conducted the interviews, testified that Young initially claimed that the \$50,000 payment was for a “consulting fee,” while Nelson claimed that it was a loan. Nelson also denied having a business relationship with SSI. However, according to Kapala–Hill, Nelson would later acknowledge that the payment was for providing SSI with “access” at JaxPort, and that, without these payments, he would not have helped the company to the extent that he did. Kapala–Hill further testified that Nelson admitted to knowing that the payments were illegal.

Id. at 503–04 (footnote omitted).

²⁰³ 576 F. App'x 610 (7th Cir. 2014).

²⁰⁴ *Id.* at 611.

²⁰⁵ *Id.* at 612.

²⁰⁶ *Id.* at 612–13.

²⁰⁷ *Id.* at 611.

In *United States v. Mondestin*,²⁰⁸ an Eleventh Circuit case from 2013, the defendants were charged with a host of offenses, including making false statements, with regard to an armored car robbery in Florida.²⁰⁹ When questioned about his involvement in the crime, Mondestin lied to authorities and denied ownership of a mobile telephone linked to the incident.²¹⁰ Mondestin was sentenced to 300 months in prison.²¹¹

Clearly, the underlying events and defendants in these and many other cases involving prosecutions for false statements in the Seventh and Eleventh Circuits from 2002 to 2014 are far from white-collar in nature. These examples also offer insights into the significant pitfalls present when simply using "short-cut" statutes with white-collar roots to garner information regarding the prosecution of white-collar crimes. Consider, for instance, the impact of the sentence in the *Mondestin* case. Mondestin was not a white-collar offender sentenced to twenty-five years in prison. Rather, Mondestin was a violent criminal charged with a number of offenses related to a robbery, one of which was 18 U.S.C. § 1001.²¹²

One non-white-collar offense area in which the false statement statute appears to have been used with regularity is firearm violations. In total, of the 158 false statements cases, twenty involved firearms violations. As an example, in the 2008 Seventh Circuit case of *United States v. Chavers*,²¹³ the defendant was charged for bringing a loaded pistol onto an aircraft at the

²⁰⁸ 535 F. App'x 819 (11th Cir. 2013).

²⁰⁹ *Id.* at 820.

²¹⁰ *Id.* at 821. In relaying the facts, the opinion stated:

Like Aurelhomme, Mondestin acted suspiciously when questioned by authorities. For example, Mondestin denied ownership of the phone number investigators had linked to him, claiming instead that it belonged to "Johnny." Yet, upon further inquiry, Mondestin was unable to provide any information to establish "Johnny's" identity. Further, Mondestin initially claimed another phone number belonged to him, but later backtracked and told investigators the phone had been dropped in water and was no longer operable.

Id.

²¹¹ *Id.* at 820.

²¹² *Id.*

²¹³ 515 F.3d 722 (7th Cir. 2008).

Milwaukee County International Airport.²¹⁴ At the airport, the defendant signed a form declaring that the pistol was not loaded, but a subsequent TSA inspection found this to be untrue.²¹⁵ When confronted about the weapon, Chavers falsely claimed that he was a law enforcement officer and entitled to carry the weapon on the plane.²¹⁶

Though the Seventh Circuit had a larger percentage of firearms-related cases, the Eleventh Circuit had a significant number as well. For instance, in *United States v. Ingram*,²¹⁷ a 2006 case, the defendant was charged with a false statements violation in relation to his attempted purchase of a firearm.²¹⁸ Ingram was a felon and allegedly lied on his background check form when asked if he had been convicted of a felony.²¹⁹

Though one may initially think of the false statements statute as focused on white-collar activities and that it might therefore offer the opportunity to identify and analyze white-collar offenses in this area simply by tracking cases involving that statute, this is not the current reality. As was observed with regard to the perjury statute, the breadth of the false statements statute is significant enough today that its use spans a wide range of offenses, many of which are in no way white-collar in nature.

C. OBSTRUCTION OF JUSTICE

One of the most-discussed offenses in the white-collar world is obstruction of justice. Though the idea of obstruction of justice covers a number of different statutes, the premise is the same across each. Obstructive conduct occurs when an individual or entity interferes with the administration of justice, whether that obstructive conduct occurs during an investigation, before a grand

²¹⁴ *Id.* at 723. By coincidence, the plane was heading towards Atlanta, thus from the Seventh Circuit to the Eleventh Circuit. *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ 446 F.3d 1332 (11th Cir. 2006).

²¹⁸ *Id.* at 1334.

²¹⁹ *Id.* The form asked, "Have you been convicted in any court of a crime for which the judge could have imprisoned you for more than one year even if the judge actually gave you a shorter sentence?" *Id.* Ingram said no, though he had been "convicted of several felonies, including grand theft, burglary and possession of cocaine." *Id.*

jury, at trial, or even after the trial is over.²²⁰ Like the perjury and false statements statutes, obstruction of justice is often a "short-cut" offense used as an alternative to charging complex substantive conduct. For purposes of this study, the focus was on a statute encompassing a classic example of obstruction of justice—18 U.S.C. § 1503, the most common obstruction statute.

Known as the "Omnibus Obstruction provision" because of its broad reach and applicability in various situations,²²¹ 18 U.S.C. § 1503 emanates from the Act of March 2, 1831, a contempt statute.²²² The statute had two parts: one that pertained to conduct within the courtroom and the other for conduct outside.²²³ It eventually split into two separate statutes, 18 U.S.C. § 401 for internal courtroom conduct, and 18 U.S.C. § 1503, the current generic obstruction statute.²²⁴ The statute's initial concern was over "preserving the integrity of the jury trial."²²⁵ In focusing on

²²⁰ See, e.g., 18 U.S.C. § 1503 (2012) (influencing or injuring officer or juror generally); *id.* § 1505 (obstruction of proceedings before departments, agencies, and committees); *id.* § 1512 (tampering with a witness, victim, or an informant); *id.* § 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy); see also PODGOR, HENNING, ISRAEL & KING, *supra* note 24, at 163–87 (discussing at length various aspects of the different destruction statutes).

²²¹ See Andrea Kendall & Kimberly Cuff, *Obstruction of Justice*, 45 AM. CRIM. L. REV. 765, 766–67 (2008) (examining the history of 18 U.S.C. § 1503 and noting that the statute applies to a "broad range of conduct"). The authors state:

The structure of § 1503 protects the judicial process in two ways. First the specific language of the statute forbids corruptly influencing or endeavoring to influence any grand or petit juror or officer of the court by threats or force, or by letter or communication. Second, the "Omnibus Clause," includes a broad range of actions and functions and is "a catch-all provision that generally prohibits conduct that interferes with the []due administration of justice" if the defendant's actions have the "natural and probable" effect of interfering with the due administration of justice.

Id. at 768 (footnotes omitted).

²²² Act of March 2, 1831, ch. 99, 4 Stat. 487 (1831), 4 Stat. 487 (1831).

²²³ PODGOR, HENNING, ISRAEL & KING, *supra* note 24, at 165.

²²⁴ *Id.*

²²⁵ *United States v. Osborn*, 350 F.2d 497, 503 (6th Cir. 1965). The obstruction statute reads:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on

ensuring the integrity of the judicial system, 18 U.S.C. § 1503 applies in both civil and criminal proceedings.²²⁶

While obstruction charges have garnered significant attention in recent years, the concept of criminally interfering with the administration of justice is an extremely old one that has been traced back to the eighteenth century in the United States.²²⁷ Because 18 U.S.C. § 1503's age and breadth have made it the focal point of obstruction statutes, it is particularly useful as part of this empirical analysis.²²⁸ Furthermore, this particular form of obstruction is a crime that is common to white-collar activities.

account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. § 1503 (2012).

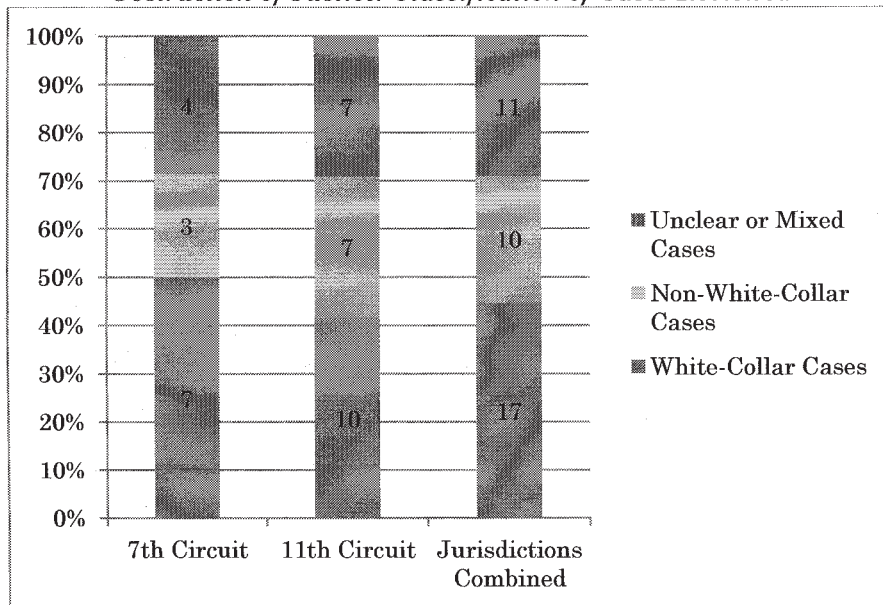
²²⁶ 18 U.S.C. § 1503.

²²⁷ See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1472 (2009) (“[T]he core of obstruction of justice in the federal system can be traced . . . to the Judiciary Act of 1789.”). Barry Bonds is one example of the many high-profile cases in recent years involving alleged violations of 18 U.S.C. § 1503. See *United States v. Bonds*, 608 F.3d 495, 499 (9th Cir. 2010) (“On December 4, 2008, the government indicted Bonds on ten counts of making false statements during his grand jury testimony and one count of obstruction of justice. They included charges that Bonds lied when he 1) denied taking steroids and other performance enhancing drugs, 2) denied receiving steroids from Anderson, 3) misstated the time frame of when he received supplements from Anderson.”); see also Third Superseding Indictment at 6, *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) No. CR07-0732-SI, 2011 WL 479911, at *6 (alleging Bonds violated 18 U.S.C. § 1503). For a discussion of the history of 18 U.S.C. § 1503, see *United States v. Reed*, 773 F.2d 477, 485–86 (2d Cir. 1985) (explaining the legislative history behind 18 U.S.C. § 1503); Brian M. Haney, Note, *Contrasting the Prosecution of Witness Tampering Under 18 U.S.C. § 1503 and 18 U.S.C. § 1512: Why § 1512 Better Serves the Government at Trial*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 57, 60–61 (2004) (chronicling § 1503 from the eighteenth century to present day prosecutions of witness tampering).

²²⁸ See Ellen S. Podgor, *Making ‘Materiality’ an Element of Obstruction of Justice*, 29 CHAMPION 26, 27 (2005) (explaining why § 1503 is the focal point of obstruction of justice statutes).

In total, the study gathered information from thirty-eight cases involving charges under 18 U.S.C. § 1503, fourteen in the Seventh Circuit and twenty-four in the Eleventh Circuit.²²⁹ As with the above discussions of the "short-cut" offenses of perjury and false statements, there is a natural inclination to describe all cases involving an allegation of obstruction of justice as a white-collar matter. Once again, however, upon closer inspection, one learns that of the obstruction of justice cases reviewed for this study, fewer than half involved underlying facts that would lead to a conclusion that the defendant and his or her offense were truly white-collar in nature. Of the total obstruction of justice cases in the two jurisdictions, seventeen cases were categorized as white-collar in nature, which represented only 45% of the total.²³⁰

GRAPH 3

Obstruction of Justice: Classification of Cases Reviewed

²²⁹ See *supra* TABLE 1 (listing thirty-eight total obstruction of justice cases studied).

²³⁰ See *supra* TABLE 2 (listing seventeen obstruction of justice cases as white-collar in nature).

As was present in the perjury and false statements cases, the matters categorized as white-collar in the obstruction of justice review covered a variety of conduct. As an example, consider the case of *United States v. Fassnacht*²³¹ from the Seventh Circuit in 2003. The defendants in the case were under investigation regarding a potential tax fraud.²³² In an effort to conceal their conduct, the defendants allegedly lied to investigators and created and presented investigators with false documentation.²³³ In *United States v. Boender*,²³⁴ a Seventh Circuit case from 2011, the defendant was charged with obstruction of justice as part of a prosecution related to alleged bribery of a Chicago Alderman.²³⁵ In the case, the government argued that Boender spent \$38,000 on home repairs for the Alderman in an attempt to receive favorable treatment in a zoning matter.²³⁶ Once the government began its investigation, Boender created a fake invoice for the expenses and attempted to mask the improper payments.²³⁷ He was sentenced to forty-six months in prison.²³⁸ In both *Fassnacht* and *Boender*, the underlying conduct was clearly white-collar in nature, and the defendants could accurately be described as white-collar criminals.

Similar white-collar cases involving charges of obstruction of justice were present in the Eleventh Circuit. For example, in the

²³¹ 332 F.3d 440 (7th Cir. 2003).

²³² *Id.* at 445.

²³³ *Id.* at 445–46.

Particularly relevant to the obstruction charge in Count Four, Paragraph 9 notes that on or about March 26, 1996, a federal grand jury began an investigation into the alleged tax evasion scheme. Paragraphs 11 through 13 assert that the defendants concocted fictitious explanations, supported by false documents, in an attempt to cover up their alleged tax evasion. Paragraphs 14 and 15 point to interviews of Malanga and Fassnacht, conducted by IRS *Criminal* Investigation Division special agents, in which both made false statements regarding their activities (both interviews occurred on or after the date the grand jury investigation began). Paragraphs 16 through 25 detail further efforts by both defendants to stick with, refine, and support (with false documents) their initial fictitious explanation—again, all after the grand jury began its investigation.

Id. (alteration in original).

²³⁴ 649 F.3d 650 (2011).

²³⁵ *Id.* at 651.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 654.

2007 case of *United States v. McFarland*,²³⁹ the defendant and her co-conspirators were charged with engaging in a mortgage fraud scheme.²⁴⁰ The scheme involved "inflating the fair market values of properties which were then used to secure fraudulent loans for straw buyers."²⁴¹ While the obstruction of justice charges were merely a portion of the larger 170 count indictment,²⁴² the entire case emanated around white-collar conduct.²⁴³ Another white-collar matter from the Eleventh Circuit was the 2009 case of *United States v. U.S. Infrastructure, Inc.*²⁴⁴ In *U.S. Infrastructure*, a corporation and two individuals were charged with various offenses, including obstruction of justice, related to a bribery scheme.²⁴⁵ During the investigation of the alleged bribery scheme, the defendants were alleged to have obstructed justice by "intentionally withholding documents from the grand jury and providing a false letter of compliance with the grand jury's subpoena."²⁴⁶ As with the Seventh Circuit cases, the facts of these cases clearly place them within the white-collar categorization.

While there were many classic white-collar matters discovered during the review of obstruction of justice cases under 18 U.S.C. § 1503, over 25% of the cases were not white-collar in nature when the underlying facts of the cases were examined more closely. Despite the fact they involved charges under what might be considered a white-collar offense, the cases themselves did not fit neatly, and in many cases, at all within this categorization. For example, in *United States v. Polanco*,²⁴⁷ two defendants were charged with arson, and one was also charged with obstruction of justice.²⁴⁸ The charges stemmed from a fire the defendants

²³⁹ 255 F. App'x 462 (11th Cir. 2007).

²⁴⁰ *Id.* at 463.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 465 ("The court distinguished McFarland from her codefendants on the ground that each of them had accepted responsibility for their actions while she had 'shown no remorse, . . . done nothing but tell one lie after another[, and] . . . done everything possible to try to obstruct the investigation in this case.'" (alterations in original)).

²⁴⁴ 576 F.3d 1195 (11th Cir. 2009).

²⁴⁵ *Id.* at 1202-03.

²⁴⁶ *Id.* at 1203.

²⁴⁷ 496 F. App'x 639 (7th Cir. 2012).

²⁴⁸ *Id.* at 640.

allegedly set to an apartment building because they were upset with one of its tenants.²⁴⁹ The fire caused horrific and permanent injury to both the intended victim and her two children.²⁵⁰ During the investigation of the offense, the defendants lied to authorities and attempted to intimidate a cooperating witness by threatening his pregnant girlfriend with a “beating.”²⁵¹ While the *Polanco* case may have involved a traditionally white-collar statute, 18 U.S.C. § 1503, the facts indicate it was anything but a traditional white-collar crime.

Similar non-white-collar cases were found in the review of cases from the Eleventh Circuit. For example, in *United States v. Gonzalez*,²⁵² the defendant was charged with obstruction of justice under 18 U.S.C. § 1503 for offering false information during her grand jury testimony.²⁵³ She was also charged with several counts under what the court called a false statements statute, 18 U.S.C. § 1623.²⁵⁴ The underlying case involved the violent robbery of a Waffle House restaurant and the government’s subsequent investigation of that crime.²⁵⁵ During the robbery, a weapon was used, employees were physically restrained, and a carjacking and firefight with police occurred during the escape.²⁵⁶ While Gonzalez

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 641.

All three suffered serious burns. The three-year-old’s lung collapsed and she was not expected to survive. The two girls remained hospitalized for weeks, and despite lengthy inpatient rehabilitation, both children have lost function in a limb, cannot be exposed to sunlight, must wear special compression garments 23 hours a day, and are permanently, severely scarred on their faces, hands, and bodies. Other residents of the apartment building suffered only minor injuries, but they lost property and their sense of security.

Id.

²⁵¹ *Id.* at 642.

²⁵² 449 F. App’x 841 (11th Cir. 2011).

²⁵³ *Id.* at 843.

²⁵⁴ *Id.* 18 U.S.C. § 1623 is titled “False Declarations” before grand jury or court; and is typically called the false declarations statute. This is in contrast to 18 U.S.C. § 1001, which is typically called the false statement statute and is titled “Statements or entries generally” and is under the Fraud and False Statements section of the United States Code.

²⁵⁵ 449 F. App’x at 843.

²⁵⁶ *Id.*

In the early morning hours of August 18, 2007, Frederick Wardell Mitchell, Leonardo Jackson, and Roberto Amaguer robbed a Tampa Waffle House restaurant at gunpoint. Two of the restaurant’s employees were taken into a back room by Amaguer. The three robbers carjacked a Ford Bronco

was not involved in the robbery itself, she allegedly was in communication with one of the robbers during the morning of the incident and drove him from Tampa, the location of the robbery, to a hospital in Orlando for treatment of a gunshot wound.²⁵⁷ When asked about these events during her grand jury testimony, Gonzalez lied.²⁵⁸ While Gonzalez was not herself held responsible for the robbery, she was considered an accessory after the fact.²⁵⁹

Another case from the Eleventh Circuit involving facts that would not accurately be described as white-collar in nature, though an obstruction of justice count was included, is the 2011 case of *United States v. Marin*.²⁶⁰ In *Marin*, the defendant engaged in obstruction of justice and witness tampering while awaiting "trial on federal money laundering and drug trafficking charges."²⁶¹ The allegations related to Marin's threats to the family of a co-defendant who intended to testify against Marin at trial.²⁶² On these charges, Marin was sentenced to ninety-six months in prison.²⁶³ Though a common white-collar offense was charged, Marin and many of the other defendants examined in this section are far from traditional white-collar criminals—evidence, once again, of the risks of simply focusing on a particular statute to identify and track white-collar offenses in the criminal justice system.

D. RICO

The final statute examined in the empirical study was the Racketeer Influenced and Corrupt Organizations Act, commonly referred to as RICO.²⁶⁴ Unlike the prior statutes, RICO is a

belonging to one of the robbery victims and fled north along the interstate with five police cruisers in hot pursuit.

Id.

²⁵⁷ *Id.* at 843, 846.

²⁵⁸ *Id.* at 843–44 (noting that Gonzalez made a "series of false statements" when testifying and delineating those false statements in detail).

²⁵⁹ *Id.* at 843 ("On appeal, Gonzalez argues that the district court erred by applying a cross-reference in the obstruction of justice guideline, U.S.S.G. § 2J1.2(c)(1), that called for her offense level to be determined using the accessory after the fact guidelines, U.S.S.G. § 2X3.1.").

²⁶⁰ 419 F. App'x 946 (11th Cir. 2011).

²⁶¹ *Id.* at 947.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ 18 U.S.C. §§ 1961–1968 (2012).

substantive offense centrally focused on the actual criminal activity initially instigated;²⁶⁵ in this respect, it is different from perjury, false statements, and obstruction of justice, which allow for prosecutions of peripheral conduct under “short-cut” offenses, oftentimes for efficiency.²⁶⁶

Of all the statutes examined herein, RICO is the least “white-collar” in its traditional application. As originally created in 1970, RICO was intended as a weapon in the war against organized crime in America.²⁶⁷ In the final United States Senate Report accompanying the legislation, the committee commented that RICO was intended to eliminate “the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”²⁶⁸ When considering the bill, Congress expressed concern that RICO would “provide [] too easy a weapon against ‘innocent businessmen.’”²⁶⁹

To achieve the goal of arming law enforcement with a new weapon against organized crime, RICO was drafted broadly and focused on prohibiting criminal enterprises and those associated with such institutions.²⁷⁰ The penalties for violating RICO include

²⁶⁵ See *id.* § 1961 (defining “racketeering activity”).

²⁶⁶ Lucian E. Dervan & Ellen S. Podgor, *Investigating and Prosecuting White-Collar Criminals*, in THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 561 n.19 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen eds., 2016).

²⁶⁷ See G. Robert Blakey & John Robert Blakey, *Civil and Criminal RICO: An Overview of the Statute and Its Operation*, 64 DEF. COUNS. J. 36, 36 (1997) (“[T]he U.S. Supreme Court has stated that the legislative history of RICO ‘clearly demonstrated that . . . [i]t was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.’” (quoting *Russello v. United States*, 446 U.S. 16, 26 (1983))); see also Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661–62 (1987) (describing how, although RICO was passed to combat organized crime, its broad draftsmanship has led to its application in a variety of other matters).

²⁶⁸ S. REP. NO. 91-617, at 76 (1969).

²⁶⁹ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (quoting H.R. REP. NO. 91-1549, at 187 (1970)).

²⁷⁰ One summary of RICO provides:

Section 1962 of RICO prohibits “any person” from (i) using income derived from a pattern of racketeering activity, or from the collection of an unlawful debt, to acquire an interest in an enterprise affecting interstate commerce; (ii) acquiring or maintaining through a pattern of racketeering activity, or through collection of an unlawful debt, an interest in an enterprise affecting interstate commerce; (iii) conducting, or participating in the conduct of, the affairs of an enterprise affecting interstate commerce

up to twenty years in prison, a significant fine, and mandatory asset forfeiture.²⁷¹

As illustrated in the discussions in the above sections, many traditional "white-collar" offenses are written broadly enough to allow their utilization in non-white-collar cases.²⁷² Similarly, the broad language of RICO has allowed its application to expand well beyond organized crime cases over the decades.²⁷³ Today, RICO is commonly used in a host of other situations, including cases involving street gangs, political corruption, and, of course, white-collar offenses.²⁷⁴ It also has a civil component, allowing third parties to bring civil RICO actions to assist the government.²⁷⁵ As the Supreme Court stated in *H.J. Inc. v. North-Western Bell Telephone Co.*²⁷⁶ in 1989, "the argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits

through a pattern of racketeering activity or through collection of an unlawful debt; or (iv) conspiring to participate in any of these activities.

Sean M. Douglass & Tyler Layne, *Racketeer Influenced and Corrupt Organizations*, 48 AM. CRIM. L. REV. 1075, 1078 (2011) (footnotes omitted); see also PODGOR, HENNING, ISRAEL & KING, *supra* note 24, at 265–67 (summarizing the prohibitions outlined in the four sections in § 1962 of RICO).

²⁷¹ Douglass & Layne, *supra* note 270, at 1108.

²⁷² See *supra* Parts III.A–C (discussing how many traditional white-collar statutes are broad enough to be used in cases including conduct that should not be considered white-collar in nature).

²⁷³ See Blakey & Blakey, *supra* note 267, at 42 (noting the activities in addition to organized crime for which RICO has been used). In addition to the broad statutory language of RICO, judicial decisions have also been credited with an ever expanding scope for RICO's application. See Lee Coppola & Nicholas DeMarco, *Civil RICO: How Ambiguity Allowed the Racketeer Influence and Corrupt Organizations Act to Expand Beyond Its Purpose*, 38 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 242 (2012) ("[T]he judiciary has also played a primary role in broadening the scope of civil and criminal RICO by repeatedly interpreting the statute in a liberal, far-reaching manner."). This has resulted, in part, because Congress included express language in the statute that it should be interpreted broadly. *Id.* at 243 ("The provisions of this title shall be liberally construed to effectuate its remedial purposes." (quoting 18 U.S.C. § 1961 (2012))).

²⁷⁴ See Blakey & Blakey, *supra* note 267, at 42 ("Since 1920, criminal RICO has been used effectively against: organized crime groups; political corruption; white collar crime; and violent groups." (footnotes omitted)); see also Pamela Bucy Pierson, *RICO, Corruption and White-Collar Crime*, 85 TEMP. L. REV. 523, 537–39 (2013) (asserting that both the text and legislative history of RICO demonstrate that RICO applies to white-collar crime).

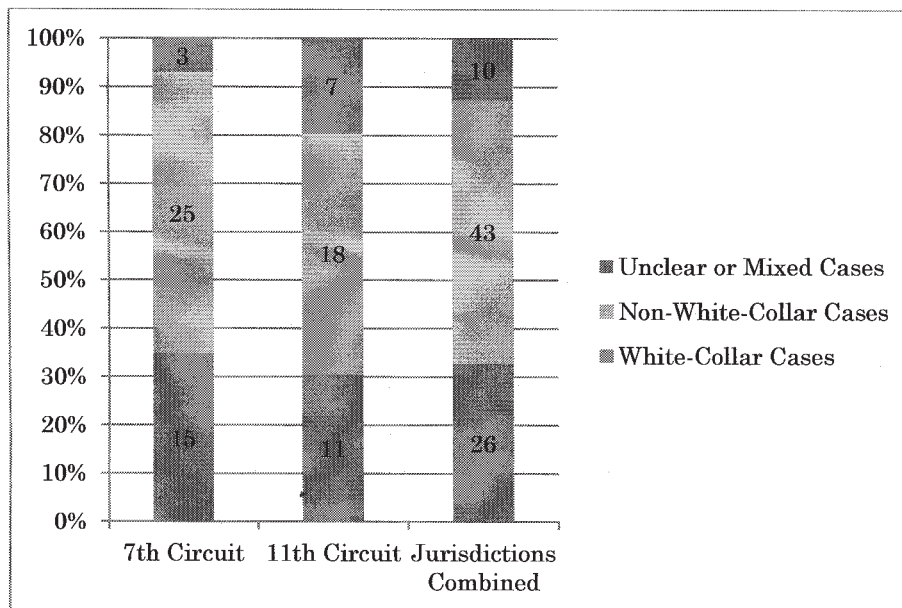
²⁷⁵ See 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains . . .").

²⁷⁶ 492 U.S. 229 (1989).

and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history."²⁷⁷

When considering whether a set of particular statutes might successfully define and track white-collar crime in America, an examination of appeals in RICO prosecutions once again offers compelling evidence of such a methodology's shortfall. In total, the study gathered information from seventy-nine RICO cases in the Seventh and Eleventh Circuits.²⁷⁸ Of this number, twenty-six, or 33%, of the cases contained facts indicating the conduct underlying the charge was white-collar in nature.²⁷⁹

GRAPH 4

RICO: Classification of Cases Reviewed

²⁷⁷ *Id.* at 244.

²⁷⁸ See *supra* TABLE 1 (listing forty-three RICO cases arising out of the Seventh Circuit and thirty-six out of the Eleventh Circuit).

²⁷⁹ See *supra* TABLE 2 (listing fifteen RICO cases arising out of the Seventh Circuit and eleven out of the Eleventh Circuit as white-collar in nature).

As might be expected, some of the RICO cases examined dealt with traditional organized crime, the offense for which RICO was originally created. The Seventh Circuit case of *United States v. Schiro*²⁸⁰ in 2012, for instance, involved the "Chicago Outfit," a criminal organization once headed by Al Capone.²⁸¹ In *Schiro*, the defendant, along with other members of the organized crime syndicate, was charged with committing various RICO predicate activities, including murder, extortion, and obstruction of justice, from the 1960s until 2005.²⁸² Schiro was sentenced to twenty years in prison.²⁸³ Similarly, the Eleventh Circuit case of *United States v. Acuna*²⁸⁴ in 2009 involved an organized crime enterprise known as the "Cuban Mafia" or the "Corporation."²⁸⁵ The court's description of the organization portrays a traditional organized crime ring with a "Godfather" and "soldiers":

[T]he Corporation was run by a Godfather (the Padrino), a Vice Chairman, and a Counselor (Consejero), and was operated by groups known as Divisions and Crews, each of which had Lieutenants, Soldiers and Operators. Criminal activities such as gambling, money laundering, and enforcement, were conducted within geographic areas. "Enforcers" of the Corporation enforced discipline, intimidation of competition and induced fear of physical and financial injury to members of the Corporation as well as outsiders.²⁸⁶

Despite RICO's initial focus on these traditional mafia organizations, only about 4% of the RICO cases decided by the

²⁸⁰ 679 F.3d 521 (7th Cir. 2012).

²⁸¹ *Id.* at 524. According to the court, the Chicago Outfit was the "long-running lineal descendant of Al Capone's gang." *Id.*

²⁸² *Id.* This case is also an interesting example of the breadth of application of obstruction of justice statutes as discussed previously in Part III.C.

²⁸³ *Id.* at 525.

²⁸⁴ 313 F. App'x 283 (11th Cir. 2009).

²⁸⁵ *Id.* at 285.

²⁸⁶ *Id.*

Seventh and Eleventh Circuits from 2002 to 2014 involved what might be considered traditional organized crime entities.

Along with traditional organized crime entities, RICO is now commonly used to prosecute street gangs dealing in violence and narcotics.²⁸⁷ One example was the Seventh Circuit case of *United States v. Perez*²⁸⁸ in 2012. Perez was alleged to have been involved in several attempted murders as a member of the Insane Deuces street gang.²⁸⁹ Perez and fifteen other members of the gang were charged with RICO conspiracy.²⁹⁰ Perez was convicted and sentenced to sixty years in prison.²⁹¹ Similarly, in the Eleventh Circuit case of *United States v. Mazariegos*²⁹² in 2010, the defendant was charged with a RICO violation for his involvement in the Sur-13 street gang.²⁹³ The RICO predicate acts in the case included a drive-by shooting and carjacking, attempted murder, discharging a firearm during an attempted murder, and using and carrying a firearm in connection with a carjacking.²⁹⁴ Mazariegos was sentenced to 160 months.²⁹⁵ From 2002 until 2014, at least twenty-four, or 30%, of RICO appellate decisions in the Seventh and Eleventh Circuits involved violent street gangs.

While organized crime and street gang cases made up a significant portion of the appeals in cases including a RICO charge during the examined period, white-collar cases also constituted an important proportion of the cases. In total, there were twenty-six white-collar cases, representing 33% of the RICO appeals in the Seventh and Eleventh Circuits from 2002 to 2014.²⁹⁶ This is almost the same number as the number of RICO cases dealing with traditional organized crime entities and violent street gangs

²⁸⁷ See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1529–30 (2008) (discussing the use of RICO outside of its original intent, involving policing of gangs and drug-distribution rings).

²⁸⁸ 673 F.3d 667 (7th Cir. 2012).

²⁸⁹ *Id.* at 668.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² 369 F. App'x 67 (11th Cir. 2010).

²⁹³ *Id.* at 68.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See *supra* note 279 and accompanying text (breaking down the RICO cases by category).

during the same period. Within the white-collar crime classification, the majority of cases fell into two categories—corruption and traditional frauds.

The corruption RICO cases involved officials abusing their governmental offices for personal gains. As an example, in the Seventh Circuit case of *United States v. Warner*²⁹⁷ in 2007, former Illinois Governor George Ryan and his associate were charged with engaging in a RICO conspiracy by creating an elaborate scheme to accept bribes in return for awarding lucrative leases and contracts.²⁹⁸ Ryan was sentenced to seventy-eight months in prison.²⁹⁹ In the Eleventh Circuit in 2007, there was a similarly high-profile corruption case involving a RICO charge against former Atlanta Mayor William Campbell.³⁰⁰ Campbell was charged with accepting bribes, tax evasion, and conducting city business "through a pattern of racketeering activity."³⁰¹ He was convicted and sentenced to thirty months in prison.³⁰²

The RICO cases involving traditional frauds included various schemes to defraud others, including Ponzi, embezzlement, and false billing schemes. In one example from the Seventh Circuit in 2011, the defendant, Michael Segal, was charged with a host of offenses, "including [a violation of RICO,] mail and wire fraud, embezzlement, false statements, and conspiracy to impede" the IRS.³⁰³ Segal was alleged to have improperly taken money from his insurance company's trust account and was sentenced to 120 months in prison.³⁰⁴ In the 2010 Eleventh Circuit case of *United States v. Hein*,³⁰⁵ the defendant was alleged to have engaged in a Ponzi scheme.³⁰⁶ The fraud involved claims that, although the defendant's company had appeared to create an internet-based

²⁹⁷ 498 F.3d 666 (7th Cir. 2007).

²⁹⁸ *Id.* at 675.

²⁹⁹ *Id.* at 674.

³⁰⁰ *United States v. Campbell*, 491 F.3d 1306 (11th Cir. 2007).

³⁰¹ *Id.* at 1309.

³⁰² *Id.* at 1309–10.

³⁰³ *United States v. Segal*, 644 F.3d 364, 365 (7th Cir. 2011).

³⁰⁴ *See id.* at 365–66 ("Segal fraudulently represented to the insureds and insurance carriers that he would hold the insurance premiums in trust, but instead took the money on a shopping spree. . . .").

³⁰⁵ 395 F. App'x 652 (11th Cir. 2010).

³⁰⁶ *Id.* at 654.

technology and other software used by clients around the world, the company was merely a front for the criminal scheme.³⁰⁷

Once again, an examination of the appellate cases in the Seventh and Eleventh Circuits from 2002 to 2014 reveals the difficulty in tracking white-collar cases. While the previous sections of this Article examined statutes commonly associated with white-collar offenses, RICO is a statute more traditionally applied to organized and violent crime syndicates.³⁰⁸ Nevertheless, a number of white-collar cases appeared within the examined dataset. The above sections demonstrated that utilizing all perjury, false statements, and obstruction convictions to create a methodology to define and track white-collar offenses and offenders would be inefficient because of the number of non-white-collar cases that would be included. Here, the examination of RICO illustrates the opposite problem with statutorily based white-collar crime definitions and tracking. If RICO were used to define and track white-collar offenses, a number of non-white-collar cases would be inadvertently included. Similarly, if RICO were excluded from such an analysis, a number of white-collar cases, including significant ones such as the Governor Ryan and Mayor Campbell cases, might go unnoticed.

One potential solution to the RICO issue presented above might be to focus more specifically on the predicate acts underlying each RICO case. For example, the organized crime and gang cases might be easily distinguished because they traditionally include murder and drug distribution as predicate RICO offenses.³⁰⁹ Similarly, the white-collar RICO cases tend to rely on more traditional white-collar offenses as RICO predicates, such as mail and wire fraud. Once again, however, the breadth with which federal criminal laws have been drafted allows for the application of even these predicate offenses in ways that would prevent their utilization as a means for defining and tracking white-collar crime. For example, in *United States v. Schiro*,³¹⁰ the Al Capone RICO

³⁰⁷ *Id.*

³⁰⁸ See Lynch, *supra* note 267, at 662 (observing that RICO has a complex history).

³⁰⁹ See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 920 (1987) (explaining that RICO helps prosecutors greatly).

³¹⁰ 679 F.3d 521 (7th Cir. 2012).

case discussed above, one of the RICO predicates was obstruction of justice.³¹¹ By comparison, in *United States v. Skrzypek*,³¹² a corruption case, the defendants were charged with money laundering, an offense also commonly charged in narcotics cases.³¹³ Therefore, even in RICO cases, where the predicate acts offer a further glimpse into the case for purposes of categorization using the charges alone, the predicate acts are insufficient to accurately define and track which cases are white-collar and which involve something quite different.

IV. DEFINING WHITE-COLLAR CRIME FOR THE FUTURE

As demonstrated by the above analysis, utilizing particular statutes to identify and track white-collar offenses is ineffective when using hybrid statutes. The breadth of federal statutes means that statutes that were created to address white-collar crime and that have traditionally been considered white-collar in nature are often used in cases that should not be categorized as such. At the same time, statutes that were created to address non-white-collar conduct and that have traditionally been associated with non-white-collar criminality are utilized in white-collar cases with regularity today.

There are certainly some offenses for which the white-collar nature of the act and the offender are clear. These all fall in the first category described previously as white-collar-focused statutes.³¹⁴ But when one moves to hybrid statutes, either ones that are "short-cut" offenses or generic offenses focused on the substantive crime, it becomes more problematic. For example, it is difficult to imagine an insider trading conviction that would not

³¹¹ *Id.* at 524.

³¹² 219 F. App'x 577 (7th Cir. 2007).

³¹³ *See id.* at 578 ("The Skrzypecks also defrauded the United States of approximately \$2.5 million in taxes by embezzling payroll taxes withheld from their employees and understanding the income derived from their various companies."); *see also Narcotics-Related Financial Investigations – Criminal Investigation (CI)*, IRS.GOV, [https://www.irs.gov/uac/Narcotics-Related-Financial-Investigations-Criminal-Investigation-\(CI\)](https://www.irs.gov/uac/Narcotics-Related-Financial-Investigations-Criminal-Investigation-(CI)) (last visited June 21, 2016) (tying money laundering and drug crimes together).

³¹⁴ *See supra* notes 83–90 and accompanying text (discussing crimes that the general public would agree are "white-collar").

properly be categorized as white-collar.³¹⁵ Given the difficult task of creating a singular definition of white-collar crime and our current inability to effectively track white-collar criminal prosecutions and convictions utilizing statutes of conviction, a new direction is warranted for the future.

While certainly not the only offense for which it is difficult to ascertain an efficient methodology for tracking offenses, white-collar crime stands out as perhaps the most difficult to corral. In examining the four statutes in this study, the only efficient mechanism for properly categorizing the cases was an individual review. Perhaps, then, such an individual examination is the only effective method of tracking white-collar cases each year. While this might appear an insurmountable undertaking, there is already a mechanism in place to make this quite feasible.

Each defendant convicted in the federal system receives a pre-sentence investigation report prepared by the local United States Probation Office.³¹⁶ The creation of this report, used by the judge when determining the defendant's sentence, requires extensive examination of the facts in the case.³¹⁷ Just as this report requires the probation officer to determine the applicable statute of conviction and the applicable offense category under the United States Sentencing Guidelines,³¹⁸ the report should also require the probation officer to utilize his or her knowledge of the case to classify the offense and the offender, as was done in this study. This information could then be passed along to the United States Sentencing Commission and utilized to create a more accurate picture of white-collar crime in America. If such categorizations were made in the pre-sentence report, the United States Sentencing Commission would have the ability to track the number of cases that are truly white-collar in nature each year,

³¹⁵ See Securities Exchange Act of 1934, 15 U.S.C. § 78j-2(a) (2012) (defining insider trading claims).

³¹⁶ See FED. R. CRIM. P. 32(c)-(g) (requiring probation officers to put together presentence reports and submit them to the court and involved parties).

³¹⁷ See OFFICE OF PROBATION & PRETRIAL SERVS., ADMIN. OFFICE OF U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT, at I-2 (March 2006), <http://michaelsantos.com/wp-content/uploads/2013/10/PSI-Report.pdf> ("Every effort should be made to provide the court with reliable information, since inaccurate information that is *relied on by the court* . . . may lead to unfair or unintended results." (emphasis added)).

³¹⁸ FED. R. CRIM. P. 32(d)(1).

the manner in which these cases were disposed, and, importantly, the sentences received by the white-collar offenders. All of this would be done irrespective of the specific statutes charged in the cases.

While the U.S. Sentencing Commission may have the ability to track the number of guilty pleas and the mean and medium sentences for cases in which the primary offense is perjury, false statements, or obstruction of justice,³¹⁹ those statistics can only offer limited insights regarding trends in the prosecution of white-collar crime. Consider, for example, the way in which a conviction and sentencing in an obstruction of justice case involving threats by a narcotics trafficker against the life of a potential witness might impact the average sentence for this white-collar crime and limit one's ability to accurately assess the sentences of actual white-collar criminals engaged in obstruction of justice in the corporate world in recent years.

Similarly, as the available data stands today, a host of white-collar offenders convicted using statutes not traditionally considered white-collar in nature, such as RICO offenses, could be inadvertently excluded from a larger review of trends regarding white-collar prosecutions. Such exclusions could be significant as statutes such as RICO typically carry longer sentences and might be used in efforts to "get tough" on white-collar criminals. Given the limited ability to identify white-collar cases and offenders in RICO cases today, such a trend might go unnoticed and unexamined. By creating a portion of the pre-sentencing report that requires classifying a case and the defendant as white-collar, non-white-collar, or mixed, just as was done in this study, one

³¹⁹ U.S. SENTENCING COMM'N, *supra* note 33, at 1. "For each case in its Offender Dataset, the Commission routinely collects case identifiers, sentencing data, demographic variables, statutory information, the complete range of court guideline decisions, and departure and variance information." *Id.*

This *Sourcebook* [also] contains descriptive statistics on the application of the federal sentencing guidelines and provides selected district, circuit, and national sentencing data. The volume covers fiscal year 2013 (October 1, 2012, through September 30, 2013, hereinafter "2013"). This *Sourcebook*, together with the *2013 Annual Report*, constitutes the annual report referenced in 28 U.S.C. § 997, as well as the analysis, recommendations, and accounting to Congress referenced in 28 U.S.C. § 994(w)(3).

Id.

would be able to gather and examine a wealth of information that has to date been elusive.

In calling for a heightened consideration in determining whether a case is white-collar, non-white-collar, or mixed, it is also important to retain emphasis on the statutory source of the criminality. Knowing whether the crime is one that is clearly white-collar or a hybrid will assist the current use of criminal statutes. Thus, it is particularly important to separate crimes in the hybrid designation into "short-cut" offenses and those with substantive provisions that mirror the activities being prosecuted. Having a multivariate approach that looks at both the statute and the underlying activity provides useful information regarding the best ways to combat the criminality.

V. CONCLUSION

The eradication of criminality, including white-collar crime, is of the utmost importance. Without knowledge of what is encompassed within the term "white-collar crime," it difficult to draw generalizations of sentencing effectiveness and difficult to draft legislation that appropriately focuses on this form of criminality. The fact that many statutes overlap into both white-collar and street crime questions the effectiveness of current reporting and methodologies for eliminating this form of criminality. After seventy-five years of using this term, its accepted normative qualities remain uncertain.

Yet the term "white-collar crime" was used initially as a sociological term and has been used more recently as a legal term tied to specific criminal offenses. Although we have moved away from a methodology that had structural deficiencies, the replacement creates its own set of problems. Loosely using the term white-collar crime creates both substantive and sentencing fallacies that may distort how we evaluate this form of criminality. For example, as the U.S. Sentencing Commission studies economic crimes in an effort to craft guidelines that will better reflect a justified punishment, it is important that they recognize that using these specific fraud crimes in fact provides hybrid offenses entailing both white-collar and non-white-collar crime. The inclusion of several fraud offenses as predicates to RICO

exacerbates this distortion. Clearly designating cases as white-collar or non-white-collar will provide enhanced tracking to determine how specific criminal activity is being charged under specific offenses. It will also provide a stronger base for evaluating better ways to eliminate this form of criminality.

