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Article

*115 EXERCISING DISCRETION: A CASE STUDY OF PROSECUTORIAL DISCRETION IN THE WISCONSIN DEPARTMENT OF JUSTICE[d1]

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I. Introduction

There are two views of white-collar crime, which are as different as night and day. In one view, white-collar crime is the forgotten stepchild of criminal enforcement: ignored and underprosecuted, despite its threat. ***116** By some estimates, the loss from fraud alone is between two and five percent of Gross Domestic Product each year.[1] The Federal Bureau of Investigation does not collect statistics on fraud, nor does the Securities and Exchange Commission track repeat offenders, of which there are many.[2] By one calculation, white-collar crime costs society more than thirty-five to fifty-five times the cost of street crime.[3] Consumer fraud alone costs society between 174 and 231 billion dollars a year, dwarfing the $9 billion dollar cost of street crime.[4] Although some believe white-collar crime's harm is only financial, white-collar crime causes more physical harm than street crime.[5] Approximately 25,000 people die each year in violent crimes; dangerous products cause about the same number of deaths, and 100,000 people die from exposure to dangerous chemicals and other hazards in the workplace.[6]

In the other view, white-collar criminal enforcement is a modern day, Puritan preacher: relentless and unforgiving. Some fear that overaggressive prosecutors will use broadly worded statutes to turn ordinary, law-abiding citizens into criminals.[7] White-collar crime prosecution has become increasingly Draconian, with prosecutors exercising poor judgment in focusing on the exotic over the traditional.[8] In the critics' view, Congress has overcriminalized actions, attaching moral ***117** stigma to private disputes and collapsing the tort and criminal system.[9] Prosecutors aided by Congress, critics fear, have expanded the mail fraud statute to transform a knowing breach of fiduciary duty into a crime.[10] Insider trading is socially beneficial; any system that condemns it is economically naive.[11] Broadening the federal gratuity and bribery statutes allows ambitious United States attorneys to intrude on state government.[12] Others fear that white-collar crime prosecutors are using racketeering-style investigations in regulatory noncompliance cases, transforming corporate error into organized crime.[13]

Generally, the critics blame the breadth of white-collar crime statutes for the injustices they perceive. If these critics are correct, however, the blame lies squarely with prosecutors and their decision-making. Broad statutes alone only create the boundaries of prosecutorial discretion; prosecutors must still choose which cases to charge.[14] In a world of limited resources, prosecutors must choose which violations to pursue; not every violation leads to prosecution. If people are convicted of innocuous or laudable conduct, the prosecutor has failed to exercise discretion appropriately. When critics protest that certain activity should not be criminal, they are implicitly challenging the prosecutorial decision to pursue those cases.

Such broad claims are made with relatively little empirical proof. Rather, the critics of white-collar crime prosecutions rely on anecdotal ***118** evidence and statutory interpretation, arguing based on theory more than facts.[15] None of the critics have analyzed a prosecutorial unit's discretion over a period of time. Empirical research on white-collar crime is sparse.[16] Many of the studies focus on sentencing because sentencing, the final result, reveals more about society's attitude towards crime than statutes and rhetoric.[17]

At least three studies have attempted to analyze prosecutors' discretion in white-collar crime, although in a limited context. Gerard Lynch reviewed 236 appellate court decisions involving criminal racketeering charges through 1985,[18] while Dombrink and Meeker reviewed 80 appellate court decisions involving criminal racketeering charges between 1970 and 1983.[19] Interestingly, neither found widespread abuse; however, both were concerned with more than the decision to charge.[20] As a result, they provide only limited information on the charging decision. To begin with, both studies view the cases through the interpretation of the appellate court, not the prosecutor's eyes. Second, by examining the record on appeal, the studies are judging more than the decision to charge. They are judging, in many instances, the prosecutor's ability to present the case and argue it. Another article, by Rachel Ratliff, relies heavily on two cases and a series of interviews to examine the use of the Money Laundering Control Act of 1986, but it provides no systematic examination of prosecutorial discretion.[21]

Despite the vigorous debate over the value of enforcement of white-collar crime, there is little understanding of what that enforcement entails. Before arguing about what activity should be criminal, it is important to know what activity prosecutors are pursuing. To analyze the criticisms of white-collar crime enforcement, one must first transform them into testable propositions. If the critics of white-collar crime prosecutions are correct, one would expect to find a relatively low percentage of no charges, little distinctions between cases prosecuted criminally and civilly, ***119** but differences among those cases prosecuted criminally. In other words, one defendant commits a regulatory offense without intent and receives a civil sanction; another follows similar conduct and is charged criminally; a third intentionally violates the law and is charged criminally.

Next, one needs a universe of prosecutorial decisions to examine. One could take every white-collar prosecution made by federal prosecutors, but such a study would be time-consuming.[22] Focusing on a state attorney general's office (in this case, the Wisconsin Department of Justice), however, gives a manageable sample of cases, but also one large enough from which to draw conclusions. Between January 1990 and May 1995, the Wisconsin Department of Justice's Criminal Litigation Unit reviewed 124 white-collar cases, taking action in 76 of them.[23] Because most of the work on white-collar crime focuses on federal prosecutions, a study of state prosecutors' discretion adds another dimension to the debate about white-collar crime.[24]

By interviewing prosecutors and examining the criminal complaints (the charging document) one can analyze the prosecutors' justifications and test whether the critics' view of white-collar prosecution is accurate. The white-collar crime cases pursued by the Wisconsin Department of Justice reveal several interesting patterns. Unlike street crime, which is concentrated, the victims in the white-collar crime cases lived everywhere from urban centers to wealthy suburbs to rural

Wisconsin; the victims were both the naive and the savvy; and the crimes ruined people's savings and their lives. These cases disprove the hypothesis underlying the critics' view of white-collar crime. First, the prosecutors chose not to charge a substantial number of cases that they reviewed. Second, they relied on civil penalties when there was no actual harm or the violation was innocuous, reserving criminal prosecution for the most egregious cases. Third, the criminal cases possessed similar qualities. They involved moral as well as legal wrongs; they had actual victims and were generally difficult to detect; and the racketeering cases all involved prolonged ***120** schemes with multiple victims.

II. Methodology

A. Defining Discretion

Discretion has two components: accuracy and judgment. Accuracy is the ability to process information, decide what actually happened, and determine what can be proved in court. For example, if a prosecutor misinterprets a forensic report and charges a person for murder based on that mistake, it is an error in accuracy, not judgment. Judgment is the ability to prosecute the most important cases.[25] In other words, assuming the prosecutor's view of the situation is correct, was the decision either to charge or not to charge the correct one? For example, William Barman, a Wisconsin resident, ran a stop sign and hit another car, killing three people.[26] The press and much of the public criticized the Dane County District Attorney's decision to prosecute for negligent homicide with a vehicle.[27] In their view, an accident became a crime;[28] the line between negligence and criminal negligence was blurred;[29] and publicity determined who got charged.[30] They were attacking the district attorney's judgment in pursuing the case, not his understanding of the case.

Critics of white-collar crime generally attack the decision to pursue the case as opposed to the prosecutor's understanding of the case. In Coffee's view, the civil tort system, not the criminal system, provides the appropriate remedy for a breach of fiduciary duty.[31] He is not worried that prosecutors mistake appropriate fiduciary action for a breach of duty.[32] Similarly, Carlton and Fischel fully admit that people use confidential information to make a profit on the stock market; they just ***121** argue that it should be legal.[33]

To analyze those criticisms, then, this Article focuses on the prosecutors' judgment as opposed to their accuracy. Not only is judgment the more relevant quality for those critics, but examining whether the critics are actually describing judgment is easier than measuring accuracy. Accuracy is always open to debate because the prosecutor, defendant, defense attorney, and victim will invariably view the same facts differently. By contrast, to measure judgment, one interviews the prosecutors and asks for their justifications for the charging decision, and then compares the actual justification with what the critics claim is occurring.

C. Gathering the Information

Within the Wisconsin Department of Justice, three units have responsibility for prosecuting white-collar crime: Medicaid Fraud, Environmental Protection, and Criminal Litigation.[34] For reasons of convenience and manageability, this Article focuses on the Criminal Litigation Unit. In 1995, the unit had nine attorneys, three paralegals, and four secretaries.[35] One attorney and one paralegal worked primarily on drug cases, another attorney and paralegal worked primarily on sex-crime cases, and one attorney and a paralegal worked primarily on antitrust matters.[36] The other attorneys handled a range of cases including white-collar crime cases as well as serving as special prosecutors for district attorneys in street-crime cases.[37]

The information for this study came from four sources. Although the Wisconsin Department of Justice has computer records of its cases, the available information is limited. An April 25, 1995 printout listed every closed case, with the name of the attorney who reviewed the case, the date the file was opened, and a description of the crime. Missing is the date the case was closed and the result of the case. In addition, there were some closed cases that had not been entered into the database. Also, some cases were not officially closed but had reached a conclusion. The case may have been on appeal, the restitution may have been challenged, or the docketing system may not have been up to date. To include these cases, I reviewed the press releases and the Matters of Press Significance between December 1992 and May 1995.[38]

***122** I took all closed cases that were opened between 1990 and April 1995. Interviews with the prosecuting attorney and a

review of the criminal complaints (and in some cases the criminal information) provided the facts for each of the cases.[39] Both the court documents and the interviews were necessary for analyzing the decision to prosecute.[40] The complaints and informations recorded the prosecutor's understanding of the case at the time the case was filed. Interviews provided the prosecutor's justification for bringing the case, choosing a criminal or civil sanction, or charging one crime instead of another. In addition, the complaint may not list all the information the prosecutor possessed. Especially when the defendant committed the same offense multiple times, the prosecutor may not charge every offense because the multiple charges become redundant.[41] Instead, the prosecutor will use the other charges for restitution and sentencing purposes.[42]

Another approach would have been to interview the defense attorney, victim, and defendant; however, their views, although important, would say more about the prosecutors' understanding of the cases than their judgment. No prosecution agency can pursue every violation of the law. By focusing on the prosecutor, the study can identify what criteria convinced the prosecutor to charge these cases over other cases in which the prosecutor believed a violation had occurred.

C. Categorizing the Data

For the purposes of this study, a white-collar crime is any crime that ***123** lacks face-to-face violence or the threat of violence or that is not a drug crime.[43] For example, fraud cases, misconduct by public officials, certain types of theft (like theft by bailee), and economic crimes like price-fixing are all white-collar crimes. Civil enforcement actions pose a classification problem. Although not technically criminal sanctions, a civil forfeiture is often an alternative to criminal prosecution. This study distinguished between two types of civil enforcement. When a civil action was an alternative to a criminal action, the civil action is treated as white-collar crime. Charging a sheriff with an ethics violation instead of misconduct in public office is white-collar crime enforcement because the alternative, misconduct in public office, is a felony.[44] In the second category are civil actions that, for all practical purposes, would never be brought as a criminal action. Challenges to mergers are civil actions and are not included in the calculations on white-collar crime enforcement, although they play an important part of antitrust enforcement.[45] I placed both no action cases and referrals in the no prosecution category because, in both cases, the prosecutor chose not to pursue the case.

A case, as used in this study, refers to the charging decision made against an individual defendant. Consequently, a single complaint with two defendants constitutes two cases. Because this study is concerned with the ***124** decision to charge rather than how to prosecute defendants (jointly or in separate actions), examining the charging decision for each defendant is important. Moreover, just counting criminal complaints undervalues complex cases that involve multiple parties and require more resources.

III. Prosecutorial Discretion: When to Charge

Contrary to fears of runaway prosecutions, the Criminal Litigation Unit has exercised its discretion. An analysis of cases handled by the criminal litigation unit reveals clear patterns in charging decisions. First, when the prosecutors pursued a case, the defendants' actions posed an actual or potential harm to society. Second, the prosecutors have been willing not to charge.

Between January 1, 1990 and May 10, 1995, the Criminal Litigation Unit reviewed 124 cases for white-collar crime prosecution and filed complaints in 76 cases.[46] Fraud, theft, and antitrust--all crimes with victims-- account for two-thirds of all the cases (see fig. 1). Approximately twenty-eight percent were political crimes or public safety actions; political crimes are thefts by public officials of public revenues. In the public safety actions, dairies either used milk with antibiotics when making cheese,[47] or they filed false reports with the Department of Agriculture claiming the milk was free of antibiotics.[48] In either case, the product presented a danger to the health of those who ate it.

Of the seventy-six cases, five are arguably victimless: two gambling cases[49] and three false-testimony cases.[50] The three false-testimony cases, however, arose in connection with an investigation of a larger scheme to defraud the government; in an attempt to cover up their scheme, the defendants lied under oath.[51] One of the two gambling cases had victims because the gambler wrote three bad checks worth $23,700.[52] ***125** That leaves only one victimless case.

Breakdown of Cases Pursued

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Fig. 1[53]

At the same time, the prosecutors decided not to charge in 38% of the cases that they reviewed (see fig. 2). Even excluding the antitrust cases, which have a higher percentage of no action, 28% of the files ended in a no charge or referral to another agency (see fig. 3). Moreover, the decision not to charge occurred in all types of cases (see fig. 4).

***126 Resolution of Closed Cases (Antitrust Included)**

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Fig. 2[54]

Fraud, theft, and political cases all include a significant number of no actions. For example, the Wisconsin Department of Justice pressed charges in only two-thirds of all possible cases.[55] Furthermore, the attorneys interviewed for this study required strict confidentiality regarding any case in which no action was taken. In their view, they should not raise suspicions about someone whom they did not charge.

@Resolution of Closed Files (Antitrust Excluded)

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Fig. 3[56]

***127 Discretion by Type of Case**

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Fig. 4[57]

Of the seventy-one cases in which the prosecutors took action, only two were dismissed. One case was an error in accuracy: the court dismissed the complaint because of insufficient evidence.[58] The other was an error in judgment. The defendant bounced three checks at a racetrack.[59] The court dismissed the case because an old Wisconsin law voided any contract to pay a gambling debt.[60]

In part, juries ensure that prosecutors consider both the legal and moral merits of a case: "What I think keeps prosecutors honest . . . is whether a jury will convict."[61] Once the trial begins, the prosecutor "must convince the jury that [the defendant] did something wrong, and ***128** they have to pay the price for it."[62] Although the percentage of no charges, by itself, does not rebut the concerns of critics of white-collar crime prosecution, that statistic, along with the prosecutors' awareness of the jury suggests that the critics' fears may not apply to the Wisconsin Department of Justice.

IV. Civil Enforcement

Of course, the critics voice deeper concerns than just the percentage of no charges; rather, they worry that white-collar

prosecutors are turning mistakes and torts into crimes. The Wisconsin prosecutors, however, reserved civil sanctions for mistakes and negligence. When there was no actual harm or intent was questionable, prosecutors pursued civil forfeitures, not criminal sanctions. Examining cases with similar circumstances but different charges emphasizes this point.

In the public safety cases, dairies used milk laced with antibiotics in making cheese.[63] Some of those dairies also submitted false reports to the Department of Agriculture, making detection more difficult.[64] In the former cases, the use of antibiotics may have occurred more because of negligence than intent; the owners may not have provided enough training or supervision.[65] The Wisconsin Attorney General charged these cases as civil forfeitures.[66] In contrast, those who submitted false reports knew that using milk laced with antibiotics was illegal and were charged criminally for the false report in addition to the civil forfeiture.[67] In all cases, the state charged the corporation because the dairies were generally ***129** closely held corporations, and the owners took responsibility.[68] By charging the corporation, the prosecutor obtained a fine that hurt the owner; at the same time, the prosecutor saved the individual owners the stigma of a criminal conviction.

In unauthorized practice of law cases, the prosecutors charged criminally when the practice tangibly harmed someone; otherwise, the prosecutor did not try to incarcerate the defendant. When the defendant sold living trusts that were legally insufficient and never told the buyers to fund the trust, the state obtained a ten-year sentence.[69] By contrast, when the defendant had an attorney prepare a legally sufficient living trust and the errors occurred when the defendant filled-in the blanks incorrectly, the state settled the cases upon the defendant making full restitution.[70]

The antitrust enforcement also follows the pattern. With direct evidence of intent and a traditional violation, the Wisconsin Department of Justice pursued the case criminally;[71] otherwise, the prosecutor used civil sanctions. For example, the Wisconsin attorney general along with other state attorneys general brought a multistate action against insurance companies for a horizontal boycott.[72] Insurance companies refused to sell certain insurance to municipalities.[73] As part of their scheme, they threatened to boycott any reinsurer who underwrote any policy.[74] As part of the settlement, the insurance companies agreed to change their practices.[75] In addition, they paid $36,000,000 in damages.[76] Of this, ***130** $26,000,000 went to a fund for municipality liability insurance.[77]

Another multistate action changed the cable industry.[78] In the past, cable operators refused to sell programming from their networks to satellite systems.[79] In addition, they signed exclusive agreements with independent networks like ESPN that forbid ESPN from selling its programming to anyone who competed with a hard-line cable provider.[80] A multistate suit forced the cable companies to disband the practice.[81] The cable operators agreed to offer their programming to satellite systems on a reasonable basis[82] and to avoid exclusive contracts with independent programmers.[83] Because of the settlement, small microwave dish companies could enter the cable market and compete with traditional hard-line cable providers.[84]

V. Criminal Enforcement

Excluding antitrust cases, the Wisconsin Department of Justice sought criminal sanctions in over half of the white-collar cases. Alone, the statistic says little about prosecutorial discretion. A large proportion of criminal charges could support a hypothesis that prosecutors are overcriminalizing conduct; conversely, it could prove that prosecutors have marshaled their limited resources for the most egregious cases. The actual charging decisions support the latter view. First, the schemes had no redeeming value; at their core, and often covered by elaborate subterfuge, they were thefts, without redeeming value. Second, the crimes had real victims who suffered substantial losses either individually or cumulatively. Finally, prosecutors reserved racketeering charges for cases in which the defendants used legitimate business to amplify their crimes.

*131 A. Crimes not Torts

Although critics worry that white-collar crime prosecutors confuse technical regulatory violations and accidents with criminal conduct, the prosecutors in the Wisconsin Department of Justice reserved criminal prosecution for cases where the intent to steal or defraud was obvious. Rather than involving arguably acceptable practices like insider trading, mistakes of poor business judgment, or unintentional failures to follow regulations, the defendants' sole purpose was to rob the victims through promises and paper instead of with guns and knives. The crimes fall into three broad categories: con games, violations of trust, and crimes against the state.[85] The three categories involve three different relationships between the criminal and the victim. Con games are enterprises that are entirely criminal; the victim and the criminal have no or little

relationship beyond the scheme itself.[86] Violations of trust are crimes where the defendant uses an existing relationship (as a lawyer or an employee) to commit the crime.[87] Crimes against the state are those in which the State of Wisconsin was the victim, such as tax fraud or corruption. As citizens, these perpetrators have a long-term relationship with the victim that involves a host of rights and responsibilities, but the relationship is obviously less intimate than those involved in crimes of trust.

The securities fraud cases in Wisconsin were willful thefts, perpetrated by con artists. One scheme involved the Church of God Houston.[88] A "preacher," Doug Nelson, went to northern Wisconsin, spreading Posse Comitatis rhetoric, telling people that banks were worthless and the government was the enemy.[89] If people needed a loan, the Church of God would extend a no interest loan--for a small (a few hundred dollars) fee.[90] The Church also offered investments in gold and silver.[91] To ***132** bolster its legitimacy, the Church recruited locals to work as representatives and solicitors.[92] The Church used the early money to extend some small loans but kept most of the money and denied any substantial loans.[93] Once a person applied for a loan or invested money, the Church encouraged the person to bring in more investors.[94] It was a Ponzi scheme veiled by religious and political rhetoric.[95] People lost thousands of dollars. The state prosecuted Nelson on two counts of securities fraud[96] and one count of unlawful receipt of a payment to obtain a loan,[97] for which he received a five-year sentence.[98] The state also convicted two other local, front people[99] who solicited for the Church and whose local connections gave the Church increased respectability.[100]

Less fantastic stories were just as effective in defrauding people. White-collar criminals often trade upon the trust people have for an institution or a person. For example, a company, Farm Loan Services (FLS), auctioned land, animals, and equipment for farmers who were leaving the business.[101] To avoid a large capital gains tax, the farmers took an unsecured promissory note from the auctioneers, spreading their payments over many years.[102] Technically, the promissory notes were securities, and the auctioneers should have registered them with the Securities Commissioner.[103] Because the company had been in business for forty years, the assistant attorney general did not prosecute the new owners for that technical violation.[104]

When those new owners, Mark Mueller and James Stopple, had financial difficulties, however, they never told the farmers that the promissory notes were in danger; instead, they continued to issue the notes ***133** to farmers.[105] Meanwhile, instead of using Farm Loan Services' revenues to repay the farmers, Farm Loan Services purchased bad debts held by other companies that Mueller and Stopple owned.[106] In other words, they cannibalized FLS to help their other financial interests. At the same time, Mueller and Stopple pushed their salespeople to convince farmers to use the promissory notes.[107] Eventually, the business went bankrupt, and sixty-seven farmers lost $1,500,000.[108]

The attorney general charged the two owners with securities fraud for failing to disclose the state of the business.[109] The prosecutor brought the case because "they were taking money and putting it into play. They had an obligation under the securities law to tell their investors; they had a moral obligation."[110] At trial the defendants claimed it was all poor business judgment, that they were not aware of the impending problems.[111] The bookkeepers, however, continually complained to the owners about cash flow problems.[112]

Although the jury convicted the two on eighteen counts of securities fraud, the judge gave only ten years probation with sixty days in jail.[113] Notwithstanding the judge's sentence, the defendants' crime was not technical, and it was an appropriate case to prosecute. More concerned with their own business than their responsibility to their clients, the auctioneers gave themselves a free loan from the farmers.[114]

Many of the crimes involved violations of a trust-relationship. The defendant, usually a professional, had access and a duty to protect the victim's money; instead, the defendant stole it. Often, white-collar criminals trade upon their professional background or their fiduciary relationship. In one recurring pattern, an insurance agent collects premiums from clients and never gives the money to the insurance company.[115] George Polk received a three-and-a-half year prison term ***134** for stealing $155,000 in insurance premiums.[116] To hide his theft, Polk issued one of his victims a fake insurance policy.[117] In a simpler but more costly crime, Carl Peterson, an attorney for an estate, stole $329,000 from his client.[118] The prosecutor charged three counts of theft by bailee for three separate periods.[119] Peterson eventually pled to fifteen years in prison and agreed to pay restitution.[120]

The client's trust and the professional's expertise give the professional the tools to cover up the crime, making detection more difficult. For example, after one attorney and her husband embezzled $55,000 from her client, she decided she needed more

money, so she overestimated the client's taxes and kept the surplus for her own use.[121] In the end, she stole $122,000.[122] After a trial, she was convicted, sentenced to seven years in prison, and ordered to pay restitution.[123]

In the third category of cases, the State of Wisconsin was the victim. Some of these political crimes, which include crimes committed by public employees, are no different than the private crimes, except for the victim. Like the insurance agents, two fish and gaming agents, Michael and Joanne Kolkovich, sold $11,000-12,000 in fishing licenses and kept the money to help them run their business.[124] The prosecutor charged two specific instances of theft, each of which was a misdemeanor.[125] Because the defendants admitted guilt, the prosecutor did not charge the felony of misconduct in public office.[126]

***135** Although John Steilen used a similar scheme, he faced a more severe penalty because of the amount involved and the lengths to which he went to cover up his crime.[127] As register of deeds in Washington County, Steilen pocketed all cash transactions.[128] Because the register of deeds did not keep a record of which transactions were paid by cash and which by check,[129] it was more difficult to trace the misappropriation.[130] To uncover the scheme, law enforcement agents ran a sting operation in which they paid for copies of death certificates, warranty deeds, and birth certificates with cash.[131] Then, they checked the deposit of the day's receipts with the county treasurer.[132] When Steilen made the deposits, there was no cash or coin deposited; when another employee made the deposits, the cash was included.[133] Over six years, Steilen accumulated $93,000.[134]

The scheme's complexity made detection more difficult; as a result, Steilen faced more severe consequences than the Kolkovichs.[135] In addition to charging Steilen with felony theft by bailee,[136] the prosecutor also charged him with misconduct in public office.[137] As a result, instead of facing no more than nine months in prison, Steilen faced a maximum of ten years.[138] Steilen eventually received a sentence of forty-two months in prison.[139]

Although another set of political crimes involved less money, they undermined the legitimacy of the government and law enforcement officials.[140] In these cases law enforcement officers sold seized evidence, ***136** usually guns.[141] Although the amount in each case was well under $10,000, selling evidence makes the government look like a vulture. In the public's view, the law enforcement agencies have turned criminal justice into an economic venture.

Despite the often complex schemes, these cases were simple thefts. All these defendants share one trait: selfishness. In the defendants' own minds, they deserved the money more than their victim, and any method of obtaining the money was acceptable. Unless one believes only crimes of violence should be pursued, charging these cases criminally was good judgment. In pursuing criminal charges, the prosecutors identified cases where intent was clear.

B. Complexity and Harms of the Crimes

Implicit in the criticisms of white-collar crime prosecution is the assumption that prosecutors would serve the public interest better by pursuing other, more important crimes. Important is a subjective term. For some, any violence may trump all nonviolent crimes; to others, defrauding victims of their life savings may be a worse crime than selling illegal drugs. Without comparing the relative merits of white-collar crime and street crime, one can still identify the importance of the cases charged based on two criteria: actual harm and difficulty of detection. Because white-collar crime is generally economic crime, the cost to the victims is an important measure of its seriousness. Because white-collar criminals rely on deception, not force, detection is difficult; sometimes victims do not know that the crime has occurred. The Wisconsin Department of Justice focused on crimes that cost their victims dearly and on many ***137** schemes that were elaborate and difficult to detect.[142]

Every criminal case involved an actual victim who suffered actual harm. In cases when a private citizen or corporation was the victim, the average loss per victim was $2137, which substantially exceeds the average loss for a victim of street crime.[143] When the state itself was the victim, the amounts were usually significant as well. The defendants in the five tax fraud cases cost Wisconsin almost $1,200,000.[144] For example, Roger Gedig and Paul Kramer developed a scheme that cost Wisconsin almost a million dollars.[145] With a debt to Kramer of over $700,000, Gedig, who ran a fuel wholesale company, took the fuel tax money he had collected from his customers and gave it to Kramer.[146] Gedig, also at the urging of Kramer, issued phony invoices to collect more fuel taxes.[147] Before he was caught, Gedig had stolen $935,297 in fuel tax revenue.[148] He pled to two felony charges of tax evasion.[149]

***138** Average Cost Per Victim

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Fig. 5[150]

In theory, criminal prosecution is more problematic when the crime involves an otherwise legitimate organization or person. Most criticism of white-collar prosecution involves this type of situation. For example, a company errs in disposing toxic waste and, instead of receiving a civil fine, faces criminal prosecution. Certainly, there may be cases where criminal prosecution is unwarranted, but legitimate organizations, as the Wisconsin Attorney General's prosecutions reveal, often use their legitimacy to exacerbate or hide the crime.

When the enterprise is completely criminal, its purpose is usually obvious, and the wary may recognize the scam before being victimized. More dangerous are those cases in which the crime is inseparable from an otherwise legitimate business. Then, the victim may not recognize the crime and may not be aware of the damage. Criminal antitrust cases present this dilemma. For example, two companies, one in Milwaukee and the other in Minnesota, sold hearing testing equipment to Wisconsin school systems.[151] They agreed, by letter, to divide the state into two ***139** territories; that way each had a monopoly over half of the state.[152] From the victim's view, the school system would solicit the business and only one of the two companies would respond.[153] The transaction seems entirely normal. But, because of the market allocation agreement, there is no competition; the schools pay a higher price and receive worse service.[154]

In other cases, the criminals used their position within an enterprise to disguise their crime.[155] William Longdin was a corporate comptroller of Flambeau Paper Company.[156] He wrote checks to a false corporation that was a cover for his brother, Robert.[157] In turn, Robert gave the checks to his wife, Debra, who deposited the checks in a personal account.[158] Usually, a teller would deposit a corporate check in a personal account only if the bank had proof that the business was a sole proprietorship.[159] Although the bank had no such record, the tellers allowed Debra to make the deposits.[160] Because Debra was a loan accounting supervisor at the bank, the tellers assumed the transactions were legal.[161] Debra's position at the bank allowed the trio to complete the crime without raising the bank's suspicion. Debra and Robert would then transfer some of the money to a checking account in a different bank, and, from that account, kick back a portion of the proceeds to William.[162] The prosecutor charged the Longdins with theft by bailee.[163]

In 1995, the Wisconsin Department of Justice convicted Leo **Wanta** of tax evasion and hiding concealed assets, ending a four-year investigation begun by the Department of Revenue.[164] The tax charges were just one ***140** part of a larger criminal scheme.[165] **Wanta** convinced a group of foreign investors to give him $500,000.[166] He converted the money to yen, then transferred it to a Chinese bank, and then back to U.S. dollars.[167] When **Wanta** completed the transactions, the investors would make billions of dollars, or so **Wanta** said.[168] Once he had the money, **Wanta** laundered the money through three banks and into a dummy corporation.[169] That dummy corporation then obtained all of his personal assets.[170] In this way, he hid both the money and his personal assets. **Wanta** then declared that he had no income. Only when the Department of Revenue investigated his taxes did the entire scheme unfold.[171] The prosecutor charged **Wanta** with violating section 71.83(2)(b)(1) of the Wisconsin Statutes.[172] After a long trial in which **Wanta** claimed he was a CIA agent, a jury convicted him.[173]

Consistent with other studies, these white-collar crimes cost their victims more dearly than street crimes did.[174] Detection often required following a circuitous path through a long paper trail. In addition to involving simple, moral wrongs, the crimes were important, if measured by cost or complexity.

C. Charging Racketeering

No criminal statute has received as much criticism as the racketeering statutes. Wisconsin's Organized Crime Control Act (WOCCA) is substantially similar to the federal Racketeer Influenced and Corrupt Organization Act (RICO). Both outlaw three types of conduct and the conspiracy to engage in that conduct. One may not invest the proceeds of a pattern of racketeering in an enterprise, one may not maintain an interest or control of an enterprise through a pattern of racketeering, and one may not conduct the affairs of an enterprise through a pattern of racketeering.[175] Critics complain of the broad definitions for "pattern of racketeering" and "enterprises," worrying that they give prosecutors ***141** unchecked discretion.[176]

Racketeering statutes, in one critic's view, do nothing except enhance penalties for activity that is already illegal.[177] As a result, prosecutors can use RICO, or by implication its state law equivalents, with its broad reach and harsh penalties to force plea bargains and transform minor infractions into serious crimes.[178]

Rather than examine the legislative wisdom in creating racketeering statutes, the study examined the consistency of prosecutorial decisions to charge racketeering. Racketeering charges were rare; only six of the fifty-three criminal prosecutions involved a WOCCA charge.[179] In those cases, the defendants used an enterprise, usually an otherwise legitimate business or a dummy corporation, to amplify the cost and the duration of their crimes. The corporation provided a veil with which to disguise the crime and attract victims.

A scheme to defraud an environmental clean-up program epitomizes the danger and power of using a corporation to commit a crime. Over a period that lasted almost two years, Patrick LeSage and Thomas Paters used two corporations to file false claims on eight different clean-up sites, costing the state over $220,000.[180] Under the Petroleum Environmental Clean-Up Fund Act (PECFA) program, the state reimburses the owner for the costs of the clean-up, beyond a deductible.[181] LeSage and Paters ran two excavating businesses, Creative Home Builders and Excavators and Environmental Excavators, Inc., that supposedly cleaned up waste sites.[182] In the course of cleaning up a site, LeSage and Paters submitted false claims to the state and false invoices for the cost of the clean-up.[183] For example, they would subcontract the actual work to another business and then include charges for work Creative Home Builders never performed.[184] The owner, LeSage, and Paters would split the profits.[185] LeSage and Paters also intentionally contaminated a site in ***142** Seymour, Wisconsin, by pouring fuel on the property.[186]

LeSage and Paters eventually approached an undercover Department of Criminal Investigation agent and offered him a chance to make money by defrauding the fund.[187] The Department of Justice, with the aid of a John Doe proceeding,[188] uncovered the scheme.[189] When those involved realized an investigation was underway, they stonewalled and tried to mislead the prosecutor.[190] During the John Doe investigation, three property owners lied about their involvement and were eventually convicted of false swearing.[191] Another property owner received eight months in jail and paid $25,907 in restitution.[192] After a lengthy trial, the state convicted LeSage of one count of racketeering and seven counts of theft by fraud and Paters of one count of racketeering and eight counts of theft by fraud.[193] LeSage received fourteen years, eight months in prison, and Paters received fifteen years in prison; both must pay restitution to the PECFA Fund.[194]

These were not unintentional regulatory violations; rather, they were a concerted effort to steal from the state and tax payers. By using the two corporations, LeSage and Paters layered their criminal conduct over otherwise legitimate business activity, making detection more difficult and prolonging the length and number of their crimes.

An employee can use his or her knowledge of a corporation to hide the embezzlement, ironically, making the corporation itself an unwitting coconspirator. Donald Wolfgram and Clark Barry used dummy corporations and Wolfgram's position within the victim corporation to steal $1,400,000 over seven-and-a-half years.[195] Barry submitted false ***143** invoices to St. Joseph's Hospital, and his coconspirator and mastermind, Wolfgram, then approved them.[196] Using their expertise, the two prepared the invoices so that they looked legitimate; only a close review of the books would reveal them as fraudulent. Barry created dummy corporations that billed for services that the hospital used; alternatively, Barry had a legitimate corporation that submitted bogus invoices along with valid invoices.[197] The scheme collapsed when a clerk insisted on tracking down a small discrepancy in the books that uncovered the crime.[198] By that time, Wolfgram and Barry had stolen $1,400,000.[199] The prosecutor charged Wolfgram and Barry with racketeering[200] based upon twelve predicate offenses of theft by fraud.[201] After their convictions, Barry received fifteen years in prison, and Wolfgram received eighteen years in prison.[202] Barry and Wolfgram hid their crimes in the stream of commerce.[203]

Although Barry and Wolfgram used a scheme similar to the Longdins,[204] the severity of Barry and Wolfgram's scheme transformed a difference in degree into a difference in kind. Barry and Wolfgram maintained their criminal enterprise more than twice as long (seven-and-a-half years to three years) and stole seventeen times as much ($1.2 million to $75,000) as the Longdins. Finally, Barry and Wolfgram used a more sophisticated scheme. While the Longdins just wrote checks from the victim corporation to dummy companies, Wolfgram made detection more difficult.[205] For example, one of Barry's companies, Air Systems, serviced air compressors.[206] In late 1989, a motor control, which was part of the air compressor system, needed work. In all likelihood, Total Electric, a company unrelated to Barry, did the work.[207] ***144** Air Systems did not do electric work on compressors and lacked a permit to do electrical work.[208] Nevertheless, on behalf of Air Systems, Barry billed the

hospital for the work, and Wolfgram approved payment.[209] Wolfgram used his knowledge of the hospital's procedures and needs to cover up the theft.

Other racketeers used the reputation of a well-known company to lure the victims into their scheme. For example, Ronald Romandine stole $326,000 from eighteen victims over a two-year period.[210] Romandine used the money for his bait shop and to attempt to launch a home shopping network.[211] Romandine would offer his clients an annuity from Banker's Life and Casualty Company.[212] Although he would fill out an application, accept payment, and cash the check, Romandine never transferred the money to the insurance company.[213] Usually, the victim never saw the principal or any interest, but, in a few cases, to placate a curious investor, Romandine paid the client in cash and said it was an interest payment.[214] The prosecutor charged Romandine with racketeering based upon twenty-seven predicate offenses of theft by bailee.[215] The court sentenced him to fifteen years in prison.[216] In the terms of WOCCA, Romandine conducted the affairs, selling insurance policies, of an enterprise, Banker's Life and Casualty Company, through a pattern of racketeering, stealing the premiums. The use of the insurance company provided victims a false sense of security.[217]

Although Peterson[218] stole about the same amount as Romandine, his was a simpler crime.[219] He simply charged the estate for services that Peterson never provided. Unlike Romandine, Peterson did not use a ***145** corporation to disguise his crime. Moreover, his crimes occurred over a shorter period of time and with only one victim. The difference between racketeering and straightforward theft, however, does not necessarily translate into a difference in punishment. Both Peterson and Romandine received fifteen years in prison for their crimes.[220]

Similar to Romandine, Stephen Whiting used legitimate mutual funds to rob his clients.[221] Whiting owned an investment firm.[222] When he moved his offices to Brookfield, he had financial problems.[223] Facing bankruptcy, he stole from his clients. Rather than invest his client's checks in mutual funds, Mr. Whiting used the money to cover his operating expenses.[224] He lied to his own salesmen and ignored other employees' warnings.[225] He even scratched out the dates on the firm's checks to make tracing the money more difficult.[226] Ultimately, Whiting stole over $33,000.[227] The prosecutor charged Whiting with racketeering based upon four predicate acts of theft by bailee.[228] In all, however, Whiting stole over $380,000 from eighteen investors.[229] The court sentenced him to five years in prison, stayed, five years on probation, $2,000 in restitution, and $48,000 in assessments.[230]

In another two cases, the defendants stole smaller amounts from more victims. One woman operated a telemarketing scam that cost consumers close to $4,000,000.[231] Janice Krueger, through her business Traveler's Boutique, sold cruises to telemarketers for $50, which the telemarketers then sold for $350 to $500.[232] Upon purchasing the cruise, the consumer received coupons to be sent to Ms. Krueger.[233] The money Ms. Krueger received from the telemarketers would not cover the cruise's cost, but she ***146** had no intention of redeeming most of the cruises.[234] Once Traveler's Boutique received a voucher, an employee would send a letter confirming the reservation.[235] In most cases, Krueger never booked the cruise and provided customers with false information.[236] Later, Traveler's Boutique would send a letter, saying that the cruise was overbooked.[237] Traveler's Boutique would offer another date, if the customer was willing to upgrade.[238]

Even those who upgraded rarely got the trips they purchased.[239] Approximately four thousand people complained about paying for cruises they never got while only forty to fifty people ever took a cruise provided by Traveler's Boutique.[240] Even in the few cases in which Krueger redeemed the coupons, she did not cover all the costs as advertised, and she demanded more money for port taxes.[241] The state did not have jurisdiction over the telemarketers, but the prosecutor initially charged Ms. Krueger with thirty-four counts of theft by bailee.[242] The prosecutor amended the complaint to charge Krueger with racketeering based on six counts of theft by bailee;[243] Krueger pled guilty and received a ten-year sentence; additionally, the court ordered her to pay $160,000 in restitution.[244] The prosecutor also charged and convicted three other employees who were aware of the scheme.[245]

In prosecuting Wallin Tomlinson, the prosecutor pursued a conman who used a simple scheme, aided by dummy corporations, to steal thousands of dollars from hundreds of clients.[246] Tomlinson put some ***147** chemicals in pails and hauled them around northern Wisconsin in his truck.[247] Supposedly an enamel or a concrete mixture, farmers could coat their barn with it and keep the barn clean with less hassle.[248] Tomlinson sold the enamel to farm product dealers, agreeing to buy back any unsold inventory.[249] When the dealers complained about unsold inventory, Tomlinson would take the returned products, promising to send a refund check, a check that the dealer never received.[250]

So far the story is nothing more than a businessman extended beyond his means; however, Tomlinson, from the beginning, never had any intention of paying back his customers. Rather, he quickly cashed any check he received and planned to discharge his debts in bankruptcy.[251] Furthermore, he used a variety of false corporations to avoid raising suspicion among dealers.[252] Over the course of his scheme, he used three different corporate names, addresses in two cities, and two different names for his product.[253] Tomlinson pled guilty to racketeering based on nine predicate acts of theft by fraud.[254] He received four years in prison.[255]

VI. Conclusion

This study covered only one agency's charging decisions and made no attempt to judge whether the prosecutors correctly analyzed the facts. Nevertheless, if the prosecutors correctly understood their facts, their judgment in choosing what to charge was defensible, if not admirable. Contrary to fears expressed by some, white-collar criminal prosecutions in Wisconsin have not blurred the distinction between tort and criminal liability.[256] The criminal cases did not involve technical violations or cases of negligence; they were willful violations of the law, usually theft ***148** perpetrated on unwitting victims. Whether it was Janice Krueger's sale of imaginary tours, the Church of God's pyramid scheme, or Romandine's pocketing of insurance premiums, these cases involved obvious wrongs and tangible victims.

Nor did the prosecutors focus on minor, relatively harmless crimes; rather, they tackled complex crimes that affected many people, focusing on crimes that posed the most danger to the most people. The victims were tourists, farmers, and investors for whom prosecution provided almost the only recourse and protection. The farmers who took promissory notes from the auctioneer relied on the business's forty-year reputation; they had no idea of the company's troubles. When an attorney decides to steal from a client, the client will not and cannot have any suspicions, until the crime is completed. Those investors who gave their money to Mr. Whiting to deposit in mutual funds had no way of knowing that he was using the money to keep his business afloat. On the surface, Mr. Whiting's actions were no different from any legitimate investment broker. Although one can reduce exposure to street crime by avoiding high-crime areas, not walking alone at night, or buying a home alarm, the white-collar crime victim often cannot identify the source of the crime.

Finally, the prosecutions in these cases dispel the fear of a witch-hunt mentality, a concern of some critics.[257] When a defendant's action, like selling milk with antibiotics, posed a public threat but questions of culpability remained, the Wisconsin Attorney General used civil sanctions, which showed that the prosecutors understood the different roles of civil and criminal enforcement.[258] Furthermore, in almost forty percent of the cases reviewed, the Wisconsin Assistant Attorneys General refused to issue charges.[259] At the same time, the prosecutors were not overly lenient. They requested and received long sentences for the worst crimes.[260] On the whole, they tried to match the punishment to the severity of the crime.

At the same time, this study neither refutes nor supports the other view that white-collar crime is underprosecuted.[261] Over a four-and-a-half-year period, the Wisconsin Department of Justice averaged about seventeen white-collar crime prosecutions (civil and criminal) per year.[262] Only a few of the prosecuted schemes involved an average loss per victim between $1,000 and $10,000, which may suggest that the prosecutors are unwilling or unable to prosecute crimes that involve neither ***149** a large number of victims nor an extremely large loss.[263] Alternatively, it could mean that local prosecutors or federal prosecutors handle those crimes. Whether underprosecution is real depends on the cases that the Wisconsin Department of Justice prosecutors declined to charge and on the cases pursued by other prosecutorial agencies. Because Wisconsin Department of Justice prosecutors would not discuss the facts of any case that they declined to prosecute, the question of underprosecution is beyond the scope of this study.

Although these results support the view that white-collar crime is a real threat and that prosecutors are focusing on that threat, or at least are not overprosecuting, the results say nothing about federal prosecutors or even other state's attorneys general. Whether white-collar crime is the forgotten stepchild of criminal enforcement or a modern day Puritan preacher depends on what crimes are being prosecuted and what cases are not being prosecuted. This answer lies not in theoretical critiques of statutes or in anecdotal evidence; it lies in studying an enforcement agency's charging decisions over a significant period of time.

*150 Appendix A[264]

Case Name	Number	Total Harm ($'s)	Number of Victims	Harm per Victim
Polk	92 CF 4	155,400	13	12,000
Strenn	90 CR 249	38,000	3	12,700
Mueller	91 CF 282	1,500,000	67	22,400
Sweat	93 CF 109	380,000	19	20,000
Krueger	93 CF 116	4,000,000	4,000	1,000
Longdins	91 CF 15	75,110	1	75,000
Wolfgram	91 CF 214	1,200,000	1	1,200,000
McBride	91 CF 146	122,100	1	122,100
Sage	92 CF 473	26,000	10	2,600
Peterson	94 CF 40	700,000	1	700,000
Tomlinson	91 CF 34	15,200	9	1,700
Romandine	93 CF 101	326,000	18	18,100
Zabel	93 CF 183	62,100	17	3,700
Sage	92 CF 472	26,221	8	3,300
Whiting	93 CF 479	350,000	28	12,500
Total		8,976,131	4,196	2,139

Footnotes

d1 The librarians at the United States District Court Library in the Eastern District of Wisconsin were a great help in tracking down source material. I would also like to thank Rosario Vaughn who helped with the research. Michael O'Hear, Mark Malaspina, and Professor Eric Kades all provided helpful comments. Most of all, I would like to thank my wife, Mary Giovagnoli, the best editor I could ever hope to have.

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1 Ian Ratner, Fraud by the Numbers, 5 Bus. L. Today 51 (1995).

2 John R. Emschwiller, Easy Pickings: How Career Swindlers Run Rings Around SEC and Prosecutors, Wall St. J., May 12, 1995, at 1.

3 See Richard Delgado, Rodrigo's Eighth Chronicle: Black Crime, White Fears--on the Social Construction of Threat, 80 Va. L. Rev. 503, app. at 543-46 (1994). Delgado calculates the cost of street crime as $9 billion a year and white-collar crime between 317 and 494 billion dollars a year. Id. Some would exclude insider trading from this calculation because it should be legal. See infra note 11 and accompanying text. Others might question whether Delgado has overestimated the cost of the Savings and Loan Scandal due to crimes, see Tony G. Poveda, Rethinking White Collar Crime 11 (1994), or might exclude the Savings and Loan Scandal because it was a one-time event. Even so, the cost of white-collar crime would be between 295 and 472 billion dollars a year. Delgado, supra, app. at 543-46.

4 See Delgado, supra note 3, app. at 543-546.

[5] See Delgado, supra note 3, at 524-31.

[6] See Delgado, supra note 3, at 547 (citing Russell Mokhiber, Corporate Crime and Violence 16 (1988)). Some studies hypothesize that violation of safety codes cause 45% of those workplace deaths. See Poveda, supra note 3, at 13-14 (citing James W. Coleman, The Criminal Elite (1989)).

[7] See United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1982) (Winters, J. dissenting) ("The limitless expansion of the mail fraud statute subjects virtually every active participant in the political process to potential criminal investigation and prosecution."); James M. Branden, Conspiracy, 24 Am. Crim. L. Rev. 459, 485 (1988) (suggesting the possibility of abuse in using conspiracy in white-collar crime cases).

[8] Robert G. Morvillo & Barry A. Bohrer, Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation, 32 Am. Crim. L. Rev. 137, 137 (1995).

[9] See John C. Coffee, Jr., Does "Unlawful" Mean "Criminal" ?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 194-95 (1991).

[10] See John C. Coffee, Jr., Paradigms Lost the Blurring of the Criminal and Civil Law Models--And What Can Be Done About it, 101 Yale L.J. 1875, 1879 (1992).

[11] See Dennis W. Carlton & Daniel R. Fischel, The Regulation of Insider Trading, 35 Stan. L. Rev. 857, 861, 894-95 (1983) (arguing that insider trading may be an efficient way to compensate corporate managers).

[12] Charles F.C. Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171, 1210-11 (1977).

[13] See Ortho Plea Signals New Enforcement Mentality, 5 No. 4 DOJ Alert 4 (Mar. 6, 1995) [hereinafter Ortho].

[14] Broadly worded statutes are common for street crimes as well. In Wisconsin, causing death by the negligent control of a vicious animal or negligent operation of a vehicle are both felonies. Wis. Stat. §§ 940.07, 940.10 (1997). A person who runs a stop sign and has an accident in which someone dies faces up to two years in prison. See State v. Barman, 515 N.W.2d 493, 498-99 (Wis. Ct. App. 1994) (affirming the exercise of prosecutorial discretion in the prosecution of defendant's failure to stop at a stop sign, which resulted in three deaths). See also Bruce Brown, Note, Negligent Homicide Prosecutions Stemming from Child Passenger Infractions: A Limit to Prosecutorial Discretion, 40 Wayne L. Rev. 201, 202 (1993) (concluding that although manslaughter and negligent homicide charges based on child restraint infractions "are not technically beyond the realm of prosecutorial discretion, they are philosophically beyond the realm of prosecutorial authority").

[15] For example, Morvillo and Bohrer discuss one racketeering case at length, analyze two money laundering cases, and criticize one Criminal Financial Crimes Enterprise Statute case. Morvillo & Bohrer, supra note 8, at 141-42, 143-44, 150.

[16] Poveda, supra note 3, at 79.

[17] See Stanton K. Wheeler et al., Sitting in Judgment: The Sentencing of White Collar Criminals at xi (1988) [hereinafter Sentencing].

[18] Gerard E. Lynch, RICO: The Crime of Being a Criminal (pts. 1-2), 87 Colum. L. Rev. 661, 724 (1987).

[19] John Dombrink & James W. Meeker, Racketeering Prosecution: The Use and Abuse of RICO, 16 Rutgers L.J. 633, 634-35 (1985).

[20] See Gerard E. Lynch, RICO: The Crime of Being a Criminal (pts. 3-4), 87 Colum. L. Rev. 920, 978-79 (1987); Dombrink & Meeker, supra note 19, at 650-51.

[21] See Rachel Ratliff, Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion, 7 Stan. L. & Pol'y Rev. 173, 178-80 (1996).

[22] The author's search revealed no study examining a universe of prosecutorial decisions in white-collar crime cases. One study has found racial prejudice in the investigations of public officials for corruption. See Mark Curriden, Selective Prosecution--Are Black Officials Investigative Targets?, A.B.A. J., Feb. 1992, at 54 (suggesting that black officials are more likely to be targeted for investigation than white officials).

[23] Compiled from Wisconsin Department of Justice, Attorney Workload Report (1995) [hereinafter Attorney Report].

[24] All of the articles cited in supra notes 2-13 and 15-21 ignore state white-collar crime prosecutions entirely. In part, the focus on federal prosecution is justified because states devote less resources to white-collar crime. See Martin F. Murphy, No Room at the Inn? Punishing White-Collar Criminals, 40 Boston B.J. 4, 16 (1996) (noting only seven embezzlement convictions in Massachusetts in 1994).

[25] One other author has analyzed discretion in a similar way. See Herbert Edelhertz, U.S. Dep't of Justice, The Nature, Impact and Prosecution of White-Collar Crime 43-44 (1970) (stating that many factors, including political and personal pressures influence a prosecutor's decision whether to deter action when an "action has been committed which ... would justify criminal sanctions").

[26] Barman Verdict Correct, Wis. St. J., Aug. 17, 1994, at 13A.

[27] Barman Verdict Correct, supra note 26, at 13A. For the definition of negligent homicide using a vehicle, see Wis. Stat. § 940.10 (1997) ("caus [[[ing] the death of another human being by the negligent operation or handling of a vehicle").

[28] See Barman Verdict Correct, supra note 26, at 13A.

[29] See Barman Verdict Correct, supra note 26, at 13A.

[30] See Pat Schnieder, Barman Lawyer Deplores Trial in Road Deaths, Cap. Times, May 12, 1994, at 3A.

[31] See supra notes 9-10 and accompanying text.

[32] See supra notes 9-10 and accompanying text.

[33] See supra note 11 and accompanying text.

[34] Interview with Matthew Frank, Director of Criminal Litigation/Antitrust Division of the Wisconsin Department of Justice, in Madison, Wis. (May 12, 1995) [hereinafter Frank Interview].

35 Frank Interview, supra note 34.

36 Frank Interview, supra note 34.

37 Frank Interview, supra note 34.

38 The Wisconsin Department of Justice issues a press release whenever there is a plea, conviction, or acquittal. Therefore, the press releases cover every case that had reached a plea, conviction, or acquittal but had not been updated in the Attorney Workload Report. There were ten cases in which either the attorney did not remember the case or the attorney who handled the case no longer worked in the office. Because of the difficulty in recalling the files, I excluded them from the study.

39 The complaint initiates criminal proceedings; it lists the specific charges and the factual basis for those charges. See Wis. Stat. § 968.01 (1997). In the case of a felony, an information lists those charges for which a court has found probable cause after a preliminary examination. See Wis. Stat. § 971.01 (1997).

40 Interviews are an accepted method of analyzing the decision-making process of actors in the criminal justice system. See Sentencing, supra note 17, at ix (explaining that a recent study has found a correlation between judge's thinking and actual sentences); see also Michael L. Benson, Emotion and Adjudication: Status Degradation Among White-Collar Criminals, 7 Justice Quarterly 515 (1990), reprinted in White-Collar Crime: Classic and Contemporary Views 316, 317-18 (Gilbert Geis et al. eds., 3d ed. 1995) (interviewing white-collar criminals to determine the impact of sentencing) [hereinafter White-Collar Crime].

41 Interview with Alan Kesner, Assistant Attorney General, Wisconsin Department of Justice, in Madison, Wis. (Apr. 17, 1997) [hereinafter Kesner Interview].

42 Kesner Interview, supra note 41.

43 Others have defined white-collar crime similarly. See Delgado, supra note 3, at 519 n.57 (citing sources); see also Edelhertz, supra note 25, at 3 ("[A]n illegal act or series of acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid payment or loss of money, or to obtain business or personal advantage."). Academics dispute the proper definition for white-collar crime. Edward Sutherland, who coined the term white-collar crime, tied it to the social status of the offender and to antisocial behavior: "a crime committed by a person of respectability and high social status in the course of his occupation." Edward Sutherland, White-Collar Crime: The Uncut Version 7 (1983), cited in Poveda, supra note 3, at 39. Paul W. Tappan, the first to criticize Sutherland's approach, argued that Sutherland's method created chaos in defining crimes because people disagreed about what was antisocial. See Paul W. Tappan, Who is the Criminal, 12 Am. Soc. Rev. 96 (1947), reprinted in White-Collar Crime, supra note 40, at 50, 52-53 (1940). Tappan wanted a legal definition: criminals are only those convicted of crimes. Id. at 54. Although Sutherland would argue that robber barons who were never convicted of any violations were "white-collar criminals," Tappan would disagree. Compare Edwin H. Sutherland, White-Collar Criminality, 54 Am. Soc. Rev. 1 (1940), reprinted in White-Collar Crime, supra note 40, at 29, 30 (1940) ("Conviction, in the criminal court, which is sometimes suggested as the criterion [for a white-collar criminal], is not adequate because a large proportion of those who commit crimes are not convicted in criminal courts."), with Tappan, supra, at 53-54 (preferring the juristic view, where white-collar criminals are only those "who have been adjudicated as such by the courts"). The legal approach, as exemplified by Edelhertz, has dominated. See Poveda, supra note 3, at 41. This Article uses the legal definition over the Sutherland approach because those who criticize white-collar crime prosecutions implicitly reject the Sutherland approach.

44 Wis. Stat. § 946.12 (1997).

45 The study also excluded subpoena enforcement cases.

46 The data refers only to cases officially closed or cases that have reached a conclusion. Not counted are all cases open as of May 1995.

47 E.g., State v. Schneider Cheese, No. 93-CV-500 (Sheboygan County Cir. Ct. July 1, 1993).

48 E.g., State v. Krohn Dairy Prods., No. 93-CM-829 (Kewaunnee County Cir. Ct. June 30, 1993).

49 See, e.g., State v. Gonnely, 496 N.W.2d 671 (Wis. Ct. App. 1992).

50 State v. Boie, No. 93-CF-1161 (Dane County Cir. Ct. Nov. 4, 1994); State v. Allard, No. 93-CF-1162 (Dane County Cir. Ct. Nov. 4, 1994); State v. Neuville, No. 93-CF-1174 (Dane County Cir. Ct. Mar. 1, 1995).

51 For a discussion of the scheme, see infra text accompanying notes 180-194.

52 See Gonnelly, 496 N.W.2d at 672; Kesner Interview, supra note 41. As for citations, the prosecutor provided most of the information on the cases. I also cite the case itself and, for the facts of the case, the criminal complaint or criminal information. Not all of the cases in the computer report listed the case's number. Where they have, I have used that number. Otherwise, I cite the internal number used by the Wisconsin Department of Justice.

53 Compiled from Attorney Report, supra note 23.

54 Compiled from Attorney Report, supra note 23.

55 See Attorney Report, supra note 23.

56 Compiled from Attorney Report, supra note 23. The category "Other" includes three cases. Two cases were dismissed. See text accompanying infra notes 58-60. In the remaining case, the Wisconsin Department of Justice reviewed and approved a district attorney's request to file a racketeering charge. Interview with Judith Schultz, Assistant Attorney General of the Wisconsin Department of Justice, in Madison, Wis. (May 10, 1995) [hereinafter Schultz Interview].

57 Compiled from Attorney Report, supra note 23.

58 State v. Earthworks Excavating, Inc., DOJ No. D920811; Frank Interview, supra note 34.

59 State v. Gonnelly, 496 N.W.2d 671, 672 (Wis. Ct. App. 1992); Kesner Interview, supra note 41.

60 See Gonnelly, 496 N.W.2d at 672.

61 Frank Interview, supra note 34.

62 Frank Interview, supra note 34.

63 Civil Complaint for State of Wisconsin, State v. Schneider Cheese, No. 93-CV-500 (Sheboygan County Cir. Ct. July 1, 1993); Frank Interview, supra note 34.

64 Criminal Complaint for State of Wisconsin, State v. Krohn Dairy Prods., No. 93-CM-829 (Kewaunnee County Cir. Ct. June 30, 1993); Frank Interview, supra note 34.

65 Frank Interview, supra note 34.

66 Frank Interview, supra note 34; Civil Complaint for State of Wisconsin, State v. Thiry Daems Cheese, No. 93-CV-67 (Sheboygan County Cir. Ct. July 7, 1993); Civil Complaint for State of Wisconsin, State v. Carimel Holdings Inc., No. 93-CV-1109 (Brown County Cir. Ct. July 27, 1993); Civil Complaint for State of Wisconsin, State v. Cedar Valley Cheese, No. 93-CV-230 (Ozaukee County Cir. Ct. June 30, 1993); Civil Complaint for State of Wisconsin, State v. Lensmire Cheese Co., No. 93-CV-501 (Sheboygan County Cir. Ct. July 2, 1993); Civil Complaint for State of Wisconsin, State v. Isaar Cheese, No. 93-CV-777 (Outagamie County Cir. Ct. Aug. 17, 1993).

67 Frank Interview, supra note 34. In addition to Krohn Dairy Products, the state also charged VS&R Ellisville Dairy Corporation and S&R Cheese criminally. See Criminal Complaint for State of Wisconsin, State v. VS&R Ellisville Dairy Corp., No. 93-CM-827 (Brown County Cir. Ct. Aug. 4, 1993); Criminal Complaint for State of Wisconsin, State v. S&R Cheese Corp., No. 93-CM-827 (Brown County Cir. Ct. June 30, 1995).

68 Frank Interview, supra note 34.

69 For example, Steven Sage sold invalid living trusts. When Sage gave the trusts to his clients, he never told them to fund the trusts. He pled guilty to the charge of unauthorized practice of law and received a ten-year prison sentence. See Criminal Complaint for State of Wisconsin at 10 (creating imaginary trustees), 11 (providing unfinished documents), 13-14 (admitting trusts were a scam and that no attorney prepared them), State v. Sage, No. 92-CF-472 (Dane County Cir. Ct. Apr. 26, 1993); Schultz Interview, supra note 56.

70 State v. Midwest Academic Resources, DOJ No. D93041916; Schultz Interview, supra note 56.

71 See infra text accompanying notes 151-154.

72 See Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). As mentioned earlier, antitrust cases are difficult to categorize. Some, like price-fixing, bid rigging, and market allocation are clearly criminal violations; others, like mergers, are invariably civil. The insurance case was a horizontal boycott, a per se violation, and as such it can be brought as a criminal violation. At the same time, the insurance industry has certain immunities from the antitrust law, making it unlikely that one would bring a criminal case against its members. Nevertheless, the case involves a pernicious practice and is therefore included as white-collar crime that resulted in civil enforcement.

73 Interview with Assistant Attorney General Kevin O'Connor of the Wisconsin Department of Justice, in Madison, Wis. (May 5, 1995) [hereinafter O'Connor Interview].

74 Hartford Fire Ins. Co., 509 U.S. at 775.

75 Governments, Insurers Settle Six-Year Lawsuit, Seattle Times, Oct. 7, 1994, at F2.

76 Id.

77 See id.

78 Investigation of Cable Companies, DOJ No. D91092701; O'Connor Interview, supra note 73.

79 O'Connor Interview, supra note 73; 65 Antitrust & Trade Reg. Rep. (BNA) No. 1641 (Nov. 25, 1993).

80 O'Connor Interview, supra note 73; 65 Antitrust & Trade Reg. Rep. (BNA) No. 1641 (Nov. 25, 1993).

81 New York v. Primestar Partners, L.P., No. 93-CIV-3858, 1993 WL 720677, at *3-7 (S.D.N.Y. 1993).

82 Primestar, 1993 WL 720677, at *3-7; O'Connor Interview, supra note 73.

83 Primestar, 1993 WL 720677, at *7-8; O'Connor Interview, supra note 73.

84 See O'Connor Interview, supra note 73.

85 These categories are similar to other typologies of white-collar crime. See Poveda, supra note 3, at 68-70 (comparing legalistic typologies, individualistic typologies, and typologies "that take into account the motivation of the offender and the social context of the offense"). Separating crimes against the state is the major difference.

86 Edelhertz, supra note 25, at 20.

87 Edelhertz, supra note 25, at 19.

88 Frank Interview, supra note 34. The investigation led to two cases in two counties. Mr. Nelson, the leader, was prosecuted in both. Frank Interview, supra note 34. In one, John Hau, the local front person, was also prosecuted. Criminal Complaint for State of Wisconsin at 1, State v. Nelson, No. 90-CF-67 (Calumet County Cir. Ct. June 13, 1994) [hereinafter Calumet Complaint]. In the other, Francis Hinrichs, another front person, was prosecuted. Criminal Complaint for State of Wisconsin at 1, State v. Nelson, No. 90-CF-271 (Outagamie County Cir. Ct. Mar. 3, 1991) [hereinafter Outagamie Complaint].

89 Calumet Complaint, supra note 88, at 2; Outagamie Complaint, supra note 88, at 3.

90 Calumet Complaint, supra note 88, at 3, 6; Outagamie Complaint, supra note 88, at 4.

91 Calumet Complaint, supra note 88, at 3; Outagamie Complaint, supra note 88, at 13, 14; Frank Interview, supra note 34.

92 Frank Interview, supra note 34.

93 Frank Interview, supra note 34.

94 Outagamie Complaint, supra note 88, at 11. At one point, Nelson told an investigator that the loan would be available in 6 to 12 months "depending on the so-called 'pool of money.'" Calumet Complaint, supra note 88, at 3.

95 Calumet Complaint, supra note 88, at 7; Outagamie Complaint, supra note 88, at 12, 13; Frank Interview, supra note 34.

96 Wis. Stat. §§ 551.21(1), 551.58 (1997); Outagamie Complaint, supra note 88, at 1, 2.

97 Wis. Stat. § 943.62(2) (1997); Calumet Complaint, supra note 88, at 1.

98 See Frank Interview, supra note 34.

99 The local people were convicted of the same violations as Nelson.

100 See Frank Interview, supra note 34.

101 Criminal Complaint for State of Wisconsin at 7, State v. Meuller, No. 91-CF-282 at 7 (Dane County Cir. Ct. Mar. 29, 1992) [hereinafter Meuller Complaint]; Frank Interview, supra note 34.

102 Meuller Complaint, supra note 101, at 7, 9; Frank Interview, supra note 34.

103 Mueller Complaint, supra note 101, at 7.

104 See Frank Interview, supra note 34.

105 Frank Interview, supra note 34. Between 1981 and 1985, the defendants issued 46 promissory notes but only paid off 21 of them. During this period, Farm Loan Services reported over $100,000 to the Wisconsin Department of Revenue. Mueller Complaint, supra note 101, at 35. By the fall of 1984, the company had cash flow problems and was playing a float game with its multiple bank accounts. Mueller Complaint, supra note 101, at 36. The defendants never revealed the company's financial condition when they convinced farmers to take promissory notes. Mueller Complaint, supra note 101, at 36.

106 Mueller Complaint, supra note 101, at 41-45.

107 Mueller Complaint, supra note 101, at 38.

108 Meuller Complaint, supra note 101, at 2-6; Frank Interview, supra note 34.

109 Frank Interview, supra note 34.

110 Frank Interview, supra note 34.

111 Frank Interview, supra note 34.

112 Meuller Complaint, supra note 101, at 38; Frank Interview, supra note 34.

113 Frank Interview, supra note 34.

114 Frank Interview, supra note 34.

115 See also infra notes 210-217 and accompanying text; Kesner Interview, supra note 41.

116 Criminal Complaint for State of Wisconsin at 1, State v. Polk, No. 92-CF-4 (Jefferson County Cir. Ct. Apr. 7, 1992) [hereinafter Polk Complaint]; Kesner Interview, supra note 41.

117 Polk Complaint, supra note 116, at 2-4; Kesner Interview, supra note 41.

118 Criminal Complaint for State of Wisconsin at 1-2, State v. Peterson, No. 94-CF-40 (Dunn County Cir. Ct. Oct. 20, 1994) [hereinafter Peterson Complaint]; Kesner Interview, supra note 41. Theft by bailee occurs when one has possession or custody of another's money or negotiable security and "intentionally uses, transfers, conceals, or retains possession of such money ... without the owner's consent, contrary to his or her authority and with intent to convert to his or her own use ...." Wis. Stat. § 943.20(1)(b) (1997).

119 Peterson Complaint, supra note 118, at 1-2.

120 Kesner Interview, supra note 41.

121 Criminal Complaint for State of Wisconsin at 1, State v. McBride, No. 91-CF-146 (Door County Cir. Ct. Feb. 19, 1993) [hereinafter McBride Complaint]; Frank Interview, supra note 34.

122 McBride Complaint, supra note 121, at 2-4; Frank Interview, supra note 34.

123 Frank Interview, supra note 34.

124 Criminal Complaint for State of Wisconsin at 3, 5, State v. Kolkovich, No. 92-CF-33 (LaFayette County Cir. Ct. July 20, 1992) [hereinafter Kolkovich Complaint]; Schultz Interview, supra note 56.

125 Kolkovich Complaint, supra note 124, at 3. Theft is a misdemeanor when the value of the stolen property is less than $1,000. Wis. Stat. § 943.20(3)(a) (1997).

126 Schultz Interview, supra note 56. Misconduct in public office occurs when a public officer or employee does an act "which the officer or employee knows the officer or employee is forbidden by law to do." Wis. Stat. § 946.12(2) (1997).

127 Kesner Interview, supra note 41.

128 Criminal Complaint for State of Wisconsin, State v. Steilen, No. 91-CF-39 (Washington County Cir. Ct. Feb. 26, 1992) [hereinafter Steilen Complaint]; Kesner Interview, supra note 41.

129 Steilen Complaint, supra note 128, at 7.

130 Kesner Interview, supra note 41.

131 Steilen Complaint, supra note 128, at 9-10.

132 Steilen Complaint, supra note 128, at 9-10.

133 Steilen Complaint, supra note 128, at 9-10.

134 Steilen Complaint, supra note 128, at 1; Kesner Interview, supra note 41.

135 By contrast, a random audit revealed the Kolkovichs' crime. See Kolkovich Complaint, supra note 124, at 3.

136 If the amount of the theft exceeds $2500, it is a Class C felony. Wis. Stat. § 943.20(3)(c) (1997).

137 Kesner Interview, supra note 41.

138 Compare Wis. Stat. § 939.51(3)(a) (listing the penalty for a Class A misdemeanor as "imprisonment not to exceed 9 months"), with § 939.50(3)(c) (1997) (listing the penalty for a Class C felony as "imprisonment not to exceed 10 years").

139 Kesner Interview, supra note 41.

140 See Criminal Complaint for State of Wisconsin, State v. Enblom, No. 92-CF-93 (Ashland County Cir. Ct. Aug. 6, 1992) [hereinafter Enblom Complaint]; Criminal Complaint for State of Wisconsin, State v. Basting, No. 95-CF-13 (Iowa County Cir. Ct. Mar. 22, 1995) [hereinafter Basting Complaint]; Interview with Thomas Fallon, Assistant Attorney General for the Wisconsin Department of Justice, in Madison, Wis. (May 8, 1995) [hereinafter Fallon Interview]; News Release (Wisconsin Department of Justice, Madison, Wis.), Mar. 22, 1995.

141 Enblom and Delegan stole multiple weapons from multiple investigations. Enblom Complaint, supra note 140, at 1-6. To cover their tracks they lied, encouraged others to lie, and submitted false reports. Id. at 3-5. As a result, they faced felony theft for stealing firearms, Wis. Stat. § 943.20(1)(a), (3)(d)(5) (1997), and misdemeanor charges for misconduct in public office. Wis. Stat. § 946.41(1), (2) (1997); See Enblom Complaint, supra note 140, at 1-6. The prosecutor also charged them for their attempts to hide their crimes. Wis. Stat. § 946.12(4) (1997); See Enblom Complaint, supra note 140, at 1-6. Basting claimed that the owner of the guns gave him permission to sell the guns and use the money for the department. There was no record, however, of either the permission being granted or the money being used for the department. Basting Complaint, supra note 140, at 6, 9-11.

142 See infra text accompanying notes 151-173.

143 See figure 5, infra note 150 and accompanying text.

144 See Criminal Complaint for State of Wisconsin, State v. Walia, No. 91-CF-687 (Dane County Cir. Ct. Dec. 5, 1991) ($230,000); Criminal Complaint for State of Wisconsin, State v. Dahm, No. 94-CF-547 (Dane County Cir. Ct. May 22, 1995) ($7800); Criminal Complaint for State of Wisconsin, State v. Gedig, No. 94-CF-2007 (Dane County Cir. Ct. Nov. 1, 1996) ($935,000)

[[[hereinafter Gedig Complaint]; Criminal Complaint for State of Wisconsin, State v. Buttchen, No. 93-CF-595 (Dane County Cir. Ct. June 1, 1993) ($7100); and Criminal Complaint for State of Wisconsin, State v. **Wanta**, No. 92-CF-683 (Dane County Cir. Ct. Nov. 20, 1995) ($19,100) [hereinafter **Wanta** Complaint].

145 Geding complaint, supra note 144, at 13.

146 Interview with Roy Korte, Assistant Attorney General, Wisconsin Department of Justice, in Madison, Wis. (May 11, 1995); News Release (Wisconsin Department of Justice, Madison, Wis.), Dec. 2, 1994.

147 Geding complaint, supra note 144, at 13.

148 Geding complaint, supra note 144, at 13.

149 Geding complaint, supra note 144, at 13.

150 Statistics on street crime are the average value loss per victim in the United States for 1994. Bureau of the Census, Statistical Abstract of the United States 1996, at 205 (1996). The Wisconsin cases are based on the amounts either charged or alleged in the complaints. Excluded are the antitrust cases because the complaints do not allege the total damage and the Church of God Houston Scheme, see supra notes 88-100 and accompanying text, because the complaint resulted from a sting operation. For a listing of the various crimes and victims, see Appendix A.

151 Criminal Complaint for State of Wisconsin at 1, State v. Medical Tech., Inc., No. 93-CF-850 (Dane County Cir. Ct. Mar. 29, 1993) [hereinafter Medical Tech. Complaint]; O'Connor Interview, supra note 73. Another case involved price-fixing among roofing companies and led to a criminal conviction. See Criminal Complaint for State of Wisconsin, State v. Industrial Roofing Servs., No. 93-CF-343 (Waukesha County Cir. Ct. June 23, 1992).

152 See Medical Tech. Complaint, supra note 151, at 2.

153 O'Connor Interview, supra note 73.

154 O'Connor Interview, supra note 73.

155 Criminal Complaint for State of Wisconsin, State v. Longdin, No. 91-CF-15 (Price County Cir. Ct. Oct. 27, 1992) [hereinafter Longdin Complaint]; Kesner Interview, supra note 41.

156 Longdin Complaint, supra note 155, at 6.

157 Longdin Complaint, supra note 155, at 15.

158 Longdin Complaint, supra note 155, at 15-16.

159 Longdin Complaint, supra note 155, at 16.

160 Longdin Complaint, supra note 155, at 17. Kesner Interview, supra note 41.

161 Longdin Complaint, supra note 155, at 16-17.

162 Longdin Complaint, supra note 155, at 10-11.

163 For the definition of theft by bailee, see supra note 118. Although Robert and Debra never had legitimate custody of the money, they were guilty as parties to the crime. A person is a party to a crime and can be charged as a principal if the person "intentionally aids and abets the commission of [the crime]." Wis. Stat. § 939.05(2)(b) (1997).

164 **Wanta** Complaint, supra note 144; Interview with Douglas Haag, Assistant Attorney General for the Wisconsin Department of Justice, in Madison, Wis. (May 10, 1995) [hereinafter Haag Interview].

165 See **Wanta** Complaint, supra note 144, at 14; Haag Interview, supra note 144.

166 **Wanta** Complaint, supra note 144, at 6-7; Haag Interview, supra note 144.

167 **Wanta** Complaint, supra note 144, at 7; Haag Interview, supra note 144.

168 See Haag Interview, supra note 144.

169 **Wanta** Complaint, supra note 144, at 7-8; Haag Interview, supra note 144.

170 **Wanta** Complaint, supra note 144, at 10-11, 14-16; Haag Interview, supra note 144.

171 See Haag Interview, supra note 144.

172 **Wanta** Complaint, supra note 144, at 1-4.

173 News Release (Wisconsin Department of Justice, Madison, Wis.), May 12, 1995.

174 Poveda, supra note 3, at 12.

175 Compare 18 U.S.C. § 1964 (1997) (RICO), with Wis. Stat. § 946.83 (1997) (WOOCA).

176 See Robert S. Bennett, Forward, Eighth Survey of White Collar Crime, 30 Am. Crim. L. Rev. 441, 447 (1993); Russell D. Leblang, Controlling Prosecutorial Discretion Under State RICO, 24 Suffolk U. L. Rev. 79, 86 (1990).

177 See Craig M. Bradley, Racketeering and the Federalization of Crime, 22 Am. Crim. L. Rev. 213, 257 (1984).

178 See generally Barry Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 Fordham L. Rev. 165 (1980).

179 See Attorney Report, supra note 23.

180 Criminal Complaint for State of Wisconsin at 1-3, State v. LeSage, No. 93-CF-387, 388 (Brown County Cir. Ct. Aug. 16, 1993) [hereinafter LeSage Complaint]; Frank Interview, supra note 34.

181 Wis. Stat. § 101.143(d)(2) (1997).

182 LeSage Complaint, supra note 180, at 9; Frank Interview, supra note 34.

183 LeSage Complaint, supra note 180, at 11-12; Frank Interview, supra note 34.

184 LeSage Complaint, supra note 180, at 14-18.

185 LeSage Complaint, supra note 180, at 19; Frank Interview, supra note 34.

186 LeSage Complaint, supra note 180, at 24; Frank Interview, supra note 34.

187 LeSage Complaint, supra note 180, at 13; Frank Interview, supra note 34.

188 A John Doe investigation is similar to a grand jury investigation; however, a judge, not a jury, oversees the investigation. The investigation has no target and is secret. Unlike the grand jury, which has become a formality in obtaining the indictment, the John Doe investigation remains an important tool in criminal investigations. See Wis. Stat. § 968.26 (1997).

189 Frank Interview, supra note 34.

190 Frank Interview, supra note 34.

191 Frank Interview, supra note 34; Criminal Complaint for State of Wisconsin, State v. Boie, No. 93-CF-1161 (Dane County Cir. Ct. Nov. 4, 1994); Criminal Complaint for State of Wisconsin, State v. Allard, No. 93-CF-1162 (Dane County Cir. Ct. Nov. 4, 1994); Criminal Complaint for State of Wisconsin, State v. Neuville, No. 94-CM-1406 (Dane County Cir. Ct. Dec. 8, 1994).

192 Criminal Complaint for State of Wisconsin, State v. Schwartz, No. 93-CF-1174 (Dane County Cir. Ct. Mar. 1, 1995); Frank Interview, supra note 34.

193 Frank Interview, supra note 34.

194 Frank Interview, supra note 34.

195 See Criminal Complaint for State of Wisconsin at 55, State v. Wolfgram, No. 91-CF-214 (Wood County Cir. Ct. Sept. 3, 1991) [hereinafter Wolfgram Complaint].

196 Wolfgram Complaint, supra note 195, at 55.

197 Wolfgram Complaint, supra note 195, at 21, 23-24.

198 See Frank Interview, supra note 34.

199 Criminal Information for State of Wisconsin at 1-2, State v. Wolfgram, No. 91-CF-213, 14 (Wood County Cir. Ct. Sept. 3, 1991) [hereinafter Wolfgram Information]; Frank Interview, supra note 34.

200 See Wis. Stat. § 946.83(3) (1997) ("No person employed by, or associated with, any enterprise may conduct or participate, directly or indirectly, in the enterprise through a pattern of racketeering activity.").

201 Wolfgram Information, supra note 199, at 1-2; Frank Interview, supra note 34. Theft by fraud occurs when a person "[o]btains title to property by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made." Wis. Stat. § 940.20(1)(d) (1997).

202 Frank Interview, supra note 34.

203 See Wolfgram Complaint, supra note 195.

204 See supra notes 156-163.

205 See Frank Interview, supra note 34.

206 Wolfgram Complaint, supra note 195, at 27.

207 Wolfgram Complaint, supra note 195, at 23-24.

208 Wolfgram Complaint, supra note 195, at 24.

209 Wolfgram Complaint, supra note 195, at 23.

210 Criminal Complaint for State of Wisconsin, State v. Romandine, No. 93-CF-101 (Oconto County Cir. Ct. Jan. 5, 1994) [hereinafter Romandine Complaint]; Kesner Interview, supra 41.

211 Romandine Complaint, supra note 210, at 30-31; Kesner Interview, supra 41.

212 Romandine Complaint, supra note 210, at 6.

213 Romandine Complaint, supra note 210, at 6-7.

214 Romandine Complaint, supra note 210, at 12-13.

215 Romandine Complaint, supra note 210, at 1-2; Kesner Interview, supra note 41. Like Barry and Wolfgram, Romandine was charged under section 946.83(3) of the Wisconsin Statutes. See supra note 200. For a definition of theft by bailee, see supra note 118.

216 Kesner Interview, supra note 41.

217 Although Polk committed the same scheme, stealing $155,000 from 13 victims over 3 years, the total amount was significantly less, he confessed his crime, and received leniency. See Kesner Interview, supra note 41. McBride stole significantly less money. See supra note 121 and accompanying text.

218 See supra note 118 and accompanying text.

219 See supra note 118 and accompanying text.

220 See supra note 120 and accompanying text; see supra note 216 and accompanying text.

221 See Criminal Complaint for State of Wisconsin, State v. Whiting, 93-CF-479 (Waukesha County Cir. Ct. Sept. 14. 1993) [hereinafter Whiting complaint].

222 Whiting Complaint, supra note 221, at 6-7; Fallon Interview, supra note 140.

223 Whiting Complaint, supra note 221, at 7; Fallon Interview, supra note 140.

224 Whiting Complaint, supra note 221, at 16; Fallon Interview, supra note 140.

225 Whiting Complaint, supra note 221, at 10; Fallon Interview, supra note 140.

226 Whiting Complaint, supra note 221, at 16; Fallon Interview, supra note 140.

227 Whiting Complaint, supra note 221, at 1-5; Fallon Interview, supra note 140.

228 Whiting Complaint, supra note 221, at 1-5. For the definition of racketeering, see supra text accompanying note 175; for the definition of theft by bailee, see supra note 118.

229 Whiting Complaint, supra note 221, at 15; Fallon Interview, supra note 140.

230 Fallon Interview, supra note 140.

231 Criminal Complaint for State of Wisconsin, State v. Krueger, No. 93-CF-116 (Marinette County Cir. Ct. Nov. 16, 1994) [hereinafter Krueger Complaint]; Schultz Interview, supra note 56.

232 Krueger Complaint, supra note 231, at 45.

233 Krueger Complaint, supra note 231, at 24.

234 See Schultz Interview, supra note 56.

235 Krueger Complaint, supra note 231, at 24.

236 Krueger Complaint, supra note 231, at 25-26.

237 Krueger Complaint, supra note 231, at 24.

238 Krueger Complaint, supra note 231, at 24.

239 Krueger Complaint, supra note 231, at 2.

240 Krueger Complaint, supra note 231, at 43, 49, 51.

241 Schultz Interview, supra note 56.

242 Krueger Complaint, supra note 231, at 1-21.

243 Krueger Amended Complaint at 1-2, State v. Krueger, No. 93-CF-116 (Marinette County Cir. Ct. Nov. 16, 1994).

244 Schultz Interview, supra note 56.

245 Krueger Complaint, supra note 231, at 4-21.

246 Criminal Complaint for State of Wisconsin, State v. Tomlinson, No. 91-CF-34 (Clark County Cir. Ct. Jan. 21. 1993) [hereinafter Tomlinson complaint]. The Tomlinson case is an example of how a criminal complaint may not tell the entire story. Under WOCCA, only felonies count as racketeering activity. Wis. Stat. § 946.82(4) (1997). Once the prosecutor decided to charge under WOCCA, there was no point in adding the thefts that would only be misdemeanors, although there were many. A court was unlikely to have the misdemeanor sentences run consecutively with the WOCCA count; moreover, the state could bring in the misdemeanor thefts for sentencing and restitution. See Kesner Interview, supra note 41.

247 Tomlinson Complaint, supra note 246, at 6; Kesner Interview, supra note 41.

248 Kesner Interview, supra note 41.

249 Tomlinson Complaint, supra note 246, at 5, 7.

250 Tomlinson Complaint, supra note 246, at 5-6, 9.

251 Tomlinson Complaint, supra note 246, at 26.

252 Kesner Interview, supra note 41.

253 Tomlinson Complaint, supra note 246, at 4 (stating product called Agri-Glass), 7 (stating company called Dairy Manufacturing and Distributors in Chippewa Falls, Wisconsin), 15 (stating company called Agri-Patch in Eau Clare, Wisconsin), 24 (stating company called Action-World Enterprises).

254 Tomlinson Complaint, supra note 246, at 1-3. Theft by fraud includes obtaining money by deceiving a person with "a promise made with intent not to perform it." Wis. Stat. § 943.20(1)(d) (1997).

255 Kesner Interview, supra note 41.

256 See generally Coffee, supra note 210.

257 See Ortho, supra note 213.

258 See supra notes 63-77 and accompanying text.

259 See supra text accompanying note 54.

260 See, e.g., supra text accompanying notes 118, 194, 202, and 216.

261 See supra text accompanying notes 1-6.

262 See supra text accompanying note 23.

263 See infra Appendix A.

264 The numbers are rounded to the hundreds. Most of these cases were discussed in the Article. For example, Sweat was a racketeering case based upon predicate acts of securities fraud. Fallon Interview, supra note 140. Strenn and his coconspirator Horonitz promised to lease cattle to three farmers for $38,000. After receiving the money, the two never delivered the cattle. Kesner Interview, supra note 41. Zabel stole his clients' premiums. Schultz Interview, supra note 56.