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JUSTIFYING PUNISHMENT FOR WHITE-COLLAR CRIME: A UTILITARIAN AND RETRIBUTIVE ANALYSIS OF THE SARBANES-OXLEY ACT

I. INTRODUCTION

In December 2001, Enron Corporation, one of the largest energy companies in the United States, filed for bankruptcy amid highly publicized accounting scandals.¹ In the months following the Enron collapse, several major corporations suffered similar fates largely as a result of accounting irregularities, insider trading, and corporate officers' mishandling of funds.² The national economy took sharp blows as stock market indices and consumer confidence fell and countless employees, investors, and pension holders suffered tremendous losses in the value of their shares.³ In response to these market failures and the resulting harm, several members of the media,⁴ academic community,⁵ and government⁶ called for

¹ See generally Holman W. Jenkins, *Business World: Enron For Beginners*, WALL ST. J., Jan. 23, 2002, at A23; Anita Rahavan, Michael Schroeder & Jason Sapsford, *SEC Examines Ties Between Banks and Enron*, WALL ST. J., Jan. 15, 2002, at C1; *Review of What Was News: One Year, Two Worlds: What Was News in 2001*, WALL ST. J., Jan 2, 2002, at R12.

² Among others, large industry-dominant companies such as Xerox, WorldCom, Adelphia, Tyco, and Dynege were decimated by highly publicized financial scandals. Laura Saunders Egodigwe, John C. Long & Nima Warfield, *A Year of Scandals & Sorrow*, WALL ST. J., Jan. 2, 2003, at R10.

³ See *Democrats Ponder How Wide a Net to Cast*, N.Y. TIMES Jan. 2, 2002; Steve Liesman, *Enron Fallout May cut Stock Prices In General*, WALL ST. J. Jan 22, 2002, at A1. See also *For First Time, More Than 50% Of U.S. Households Own Stock* Jan. 22, 2003, N.Y. TIMES, at A1.

⁴ See e.g. Burton Malkiel, *Watchdogs and Lapdogs*, WALL ST. J., Jan. 16, 2002, at A16; Hedrick Smith, *Market Crisis Management*, N.Y. TIMES, June 20, 2002, at A25; *Cleaning Up the Boardroom*, N.Y. TIMES, Mar. 8, 2002, at A20; Frank Rich, *The Two-Enron System*, N.Y. TIMES, Feb. 16, 2002, at A19.

⁵ Pub. L. No. 107-204; Tom Redburn, *Many Strands: The Week That Was; A Suicide and a Resignation as the Formal Inquiries get Under Way*, N.Y. TIMES, Jan. 27, 2002, at sec 1, p. 32.

⁶ Smith, *supra* note 4, at A25; *For First Time, supra* note 3, at A1 (President Bush both called for change and the executive branch developed the "President's Plan to improve Corporate Responsibility and Protect America's Investors", which were introduced in March, 2001 and outlined a "path by which corporations and their investors can continue

immediate action to punish the responsible corporate officers and enact measures to deter future wrongdoing.⁷ Congressional hearings began immediately, and on July 30, 2002, the Sarbanes-Oxley Act (the "Act") became law amid expressions of hope by lawmakers that it would restore both public confidence in the economy and investor confidence in the stock market.⁸

This Note analyzes the Act's criminal provisions (in Section 906) to determine whether these provisions are justifiable under the theory of "purposes of punishment." Section II presents a brief description of the Act's criminal provisions, which are meant to curtail misstatements in corporate accounting reports. Section III sets forth a framework under which Congress should justify white-collar crime statutes using the theories of punishment. Finally, Section IV analyzes each provision of Section 906 to determine whether it is justifiable under this framework.⁹ This final section also presents present several modifications to the Act that would allow it to conform to this framework.

II. THE SARBANES-OXLEY ACT

The Sarbanes-Oxley Act is a compilation of restrictions and regulations through which Congress meant to address the type of accounting irregularities made apparent by the corporate scandals of 2001 and 2002.¹⁰ It bans loans to corporate officers,¹¹ accelerates the output of insider trading reports,¹² increases regulation of auditors,¹³ and protects informants from retaliation by employers.¹⁴ The Act

their partnership in growing the nation's economy, and do so on fair and equal footing); John McCain, Editorial, *The Free Market Needs New Rules*, N.Y. TIMES, July 8, 2002, at A19; Michael Schroeder & Tom Hamburger, *Lieberman to Hold Hearings As Party Aims to Play Up Company's Ties to GOP*, WALL ST. J., Jan. 3, 2002, at A10.

⁷ McCain, *supra* note 6, at A19; Schroeder & Hamburger, *supra* note 6, at A10.

⁸ Jackie Calmes & Tom Hamburger, *Cast Prepares for Congressional Curtain to Rise on Enron Scandal*, WALL ST. J., Jan. 3, 2002, at A24; Tom Hamburger, *Enron CEO Declines to Testify at Hearing*, WALL ST. J., Dec. 12, 2001, at B2; Michael Schroeder, *Enron Debacle Spurs Calls for Control*, WALL ST. J., Dec. 14, 2001, at A4; Editorial, *What Was Enron?*, WALL ST. J., Dec. 12, 2001, at A18.

⁹ This Note does not take the position Sarbanes-Oxley Act was created precisely with these goals in mind. However, it is the position of the author that these goals are the best manner to justify the criminal provisions in Section 906 and therefore the Act can be justified under this theory.

¹⁰ For more background on the provisions of the Act, see John J. Falvey Jr. & Matthew A. Wolfman, *The Criminal Provisions of Sarbanes-Oxley: A Tale of Sound And Fury Andrews* WHITE-COLLAR CRIME REP. Oct 2002, at 4; Neil H. Aronson *Preventing Future Enrons: Implementing the Sarbanes-Oxley Act of 2002*, 8 STAN J.L. BUS. & FIN. 127 (2002); Joel M. Androphy & Thomas Graham, *White-Collar Crime Update*, 66 TEX B.J. 66 (2003).

¹¹ 15 U.S.C. § 2214.

¹² *Id.* § 2543.

¹³ See, e.g., *id.* § 7217 (giving the SEC responsibility to oversee an oversight accounting board); § 7212 (requiring accounting firms to register with a oversight board in order to "prepare, issue, or to participate in the preparation or issuance of any audit reports with

includes an obstruction measure, which criminalizes the destruction or alteration of documents when such destruction or alteration results in the impairment of federal agency or departmental matters.¹⁵ Additionally, the Act directs the Securities and Exchange Commission (“SEC”) to enact civil remedies that plaintiffs can use against corporate officers who violate the statute.¹⁶ It directs the SEC to enact a rule requiring chief financial and executive officers to certify quarterly and annual financial reports filed in accordance with the Security Exchange Act of 1934.¹⁷ The Act also holds agents liable for violations of the section, when the former statute only punished senior officers.¹⁸

The Act’s key provision is Section 906 which provides criminal penalties for corporate reports filed for public information that improperly state a company’s financial position.¹⁹ Prior to the Act’s passage, corporate officers without knowledge of accounting irregularities were not liable.²⁰ Hence, financial officers could claim ignorance of such irregularities and escape liability. Under such a scheme, the suspicious or prudent corporate officer could shield himself from accounting information in order to avoid liability.

Section 906(a) addresses this willful blindness problem. It requires officers of most public companies to review corporate records and to issue statements certifying that information contained in financial reports properly reflects the “financial condition and results. . . of the issuer.”²¹ This certification statement must include the officer’s affirmation that, to his knowledge, each report is in no way misleading, does not contain any material misstatements, and accurately indicates the *true* financial state of the corporation.²² Therefore, corporate officers can no longer claim the defense of ignorance to accounting irregularities because they must read and verify each statement. A corporate officer who willfully blinds himself to such information can receive up to one million dollars in fines, ten years in prison, or both.²³

respect to any issuer.”); § 7213 (indicating that the board shall establish certain rule designed to increase the “auditing, quality control, and ethics standards” for accounting firms.”); § 7214 (detailing regular inspections of accounting firms to insure compliance with accounting rules; § 7215 (creating punishments for those accountants who violate the regulations created by the board).

¹⁴ 18 U.S.C. § 1513 (2002); Falvey & Wolfman, *supra* note 10, at 8.

¹⁵ 18 U.S.C. § 1519; Falvey & Wolfman, *supra* note 10, at 4.

¹⁶ 18 U.S.C. § 2243; Falvey & Wolfman, *supra* note 10, at 4.

¹⁷ 15 U.S.C. § 7241(2).

¹⁸ § 7252(2); *see also* Falvey & Wolfman, *supra* note 10, at 8.

¹⁹ 18 U.S.C. § 1350.

²⁰ *See* Falvey & Wolfman, *supra* note 10, at 4.

²¹ This section only applies to those companies that report under §§ 13a and 15d of the Securities Exchange Act of 1934. 18 U.S.C. § 1350(b).

²² 15 U.S.C. §§ 7241(2)-7241(3). Additionally, the signing officers must establish internal procedures which will allow the officers to have *knowledge* of information so that these certifications will be accurate. 15 U.S.C. § 7441(4).

²³ 18 U.S.C. § 1350(c)(1).

Additionally, Section 906 provides that an officer who *willfully* certifies a statement *knowing* that it does not comport with accounting requirements in the Securities Exchange Act of 1934 will receive penalties of up to twenty years in prison, or five million dollars in fines, or both.²⁴ This section punishes the corporate officer who intentionally signs the statement *knowing* that it contains material misstatements.²⁵ Simply put, this provision addresses fraudulent misrepresentations of officers in accounting statements.

Section 906 also lowers the proof requirements for violations so that prosecutors no longer have to show that a misrepresentation was made solely to raise the stock price through defrauding investors.²⁶ The following sections discuss the complicated relationship between of the purposes of punishment justifying criminal sanctions and the criminal provisions in Section 906.

III. FRAMEWORK FOR CORPORATE CRIME STATUTES

A. Purposes of Punishment

Because the criminal justice system “inflicts pain on persons convicted of criminal conduct,” Congress must justify all criminal punishment within the purposes of punishment.²⁷ Theorists have developed two dominant theories to justify punishment.²⁸ First, retributive theorists assert that the law should punish actors because their acts *merit* punishment.²⁹ Retributive theories have two key features. First, the law should punish only those who deserve punishment because of the acts that they have committed. Secondly, punishment must be proportional to the offense.³⁰

The second dominant theory of punishment is utilitarianism. Utilitarian theorists assert that curtailing future harm to society is the purpose of punishment.³¹ Further, they argue that lawmakers should calculate severity and form of punishment for particular acts using a cost-benefit analysis to determine the most efficient manner of limiting future undesirable acts.³²

B. The Framework

White-collar crime statutes can and should be justified under both utilitarian and

²⁴ *Id.* § 1350(c)(2).

²⁵ *Id.*

²⁶ Falvey & Wolfman, *supra* note 10, at 4.

²⁷ See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 11 (3d ed. 2001).

²⁸ See generally JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 33 (3d ed., 2000).

²⁹ *Id.*

³⁰ *Id.* at 35.

³¹ *Id.* at 33.

³² *Id.* at 37 (citing JEREMY BENTHAM, THE THEORY OF LEGISLATION 322-324, 338 (1931)).

retributive theories. If corporate criminal statutes and other societal forces contribute to a change in corporate culture that results in less corporate crime, then those statutes are justified under a utilitarian theory. In order for such a justification to apply to a particular corporate crime statute, that statute must unequivocally express to corporate actors that society condemns corporate crime, which will cause these actors to modify their behavior in order to avoid this condemnation.³³

However, changes in corporate culture will take a significant amount of time to occur, if they occur at all.³⁴ Until then, corporate crime statutes can be justified using the utilitarian concept of deterrence.³⁵ Under such a system, corporate officers will not violate the law because they hope to avoid the statutory penalties for violations. Deterrence legitimately justifies a corporate crime statute only if potential offenders will endeavor to avoid punishments and reasonably believe that they will, in fact, be punished for violating the statute.

Although a utilitarian approach should be effective in curtailing white-collar crime in the short and long-term, retributive values must limit these utilitarian justifications so that society punishes only those who actually commit acts which it condemns.³⁶ Otherwise, punishment will be unjust.³⁷ In sum, Congress should justify white-collar criminal statutes such as Section 906 under a framework that uses both long-term and short-term utilitarian justifications with a retributive base.

IV. SARBANES IS THE FIRST STEP, BUT IT COULD BE BETTER.

The following sections will apply the foregoing framework to Section 906 to determine whether it meets the framework's goals. I will argue that some

³³ *Id.* I acknowledge that a goal of contributing to a change in corporate culture is a lofty goal. However, even if this never takes place, the punishments will still be justified under the short-term goal of deterrence and the underlying retributive values. In addition to criminal punishment, education, the media, and non-criminal governmental action can all contribute to such a change.

³⁴ It may be impossible to change the mores of corporate culture through expressing condemnation by criminal statutes alone; however, along with other societal changes (including media and governmental pressure and education), these statutes can provide significant incentives to corporate officers to change their culture. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420-25 (1999) (indicating that social discourse is controlled by many factors and will be difficult to necessarily control with criminal punishment alone).

³⁵ Empirical studies reveal that specific deterrence may be effective in deterring white-collar crime. Elizabeth Szockyj, *Imprisoning White-Collar Criminals*, 23 S. ILL. U. L.J. 485, 493 n.57 (1999). However, the empirical effects of deterrence are difficult to measure and are often expensive to enforce.

³⁶ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 67-71.

³⁷ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 67-71. See also George B. Wall, *Cultural Perspectives on the Punishment of the Innocent*, 11 PHIL. F. 492-93 (1971) (discussing a highly effective utilitarian system which is inherently unjust because the people are not punished for their actions).

provisions of the Act promote these framework values effectively while others should be modified or amended to do so.³⁸

A. Criminal Monetary Fines

As mentioned above, judges can assess fines of up to five million dollars for violations of Section 906.³⁹ The monetary fine provisions have two related problems that are detrimental to utilitarian and retributive justifications. First, the "inflationary problem" occurs because the statutory amount is not indexed for inflation. Second, the "meaningful fine problem" occurs because the fines are not properly tailored to punish the most likely offenders of Section 906 — the wealthy.

The inflationary problem results from Congress's failure to index the monetary fines in Section 906 to inflation.⁴⁰ This structure causes the fines to lose their value as the real value of the dollar decreases, which occurs regularly (albeit at different rates).⁴¹ With respect to retributive and deterrent values, the Section 906 fines have a built-in time bomb. The inflationary problem negatively affects the Act's deterrent function, especially if its contributions to changing corporate culture take a long time to occur.⁴² Even if fines are set at the proper rate to deter potential offenders as of the statute's enactment, they are less likely to deter future offenders⁴³ and the deterrent effect diminishes over time.⁴⁴

The inflationary problem will also have a significant impact on the long-term justification of contributing to changes in corporate culture. Assuming that the fines were set at a proper rate to reflect society's condemnation at the time of enactment, inflation would cause this condemnative effect to diminish over time.⁴⁵ This would weaken the long-term utilitarian purpose of contributing to a change in corporate culture, because corporate officers would not realize the true level of society's condemnation for their acts and would not be compelled to modify their behavior.⁴⁶

³⁸ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35, 67-71.

³⁹ 18 U.S.C. § 1350(c).

⁴⁰ *Id.* § 1350(c).

⁴¹ Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. J. CRIM. L. 409, 411 (1980) (discussing the inflationary problem with regard to white-collar crime statutes.)

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Note that deterrence is only the short-term justification and if corporate culture changes relatively quickly, a diminished deterrent effect from inflation may have a relatively minor effect on the utilitarian purpose of punishment.

⁴⁵ Recall that utilitarian punishments require that punishment be tailored to those punishments which will have the optimum punishments with the fewest costs. Therefore, punishments must be the most least severe that will accomplish Congress' utilitarian goal because such a punishment will be the least costly. KAPLAN WEISBERG & BINDER, *supra* note 28, at 37.

⁴⁶ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 37.

Finally, the inflationary problem weakens retributive justifications. Offenders who violate Section 906 now will receive higher fines with respect to real dollars than those who violate it later. Hence, two offenders committing the same crime with the same degree of severity would receive disproportional punishments.⁴⁷

The meaningful fine issue is also problematic. The fines in Section 906 will have a minor effect in deterring the actions of corporate officers who earn a significant amount of money relative to these fines.⁴⁸ The perceived loss from a fine of five million dollars is not high enough to deter potential corporate offenders making many times more than that amount.⁴⁹ The gain from cheating clearly outweighs the loss from the fines. Hence, the statute will not deter wealthy and rational corporate officers.⁵⁰

The meaningful fine problem is also troublesome for the long-term utilitarian goal of contributing to a change in corporate culture.⁵¹ The power of a fine to express society's condemnation is directly related to the pain that it causes the offender. Although a fine of five million dollars will have a significant condemnative effect on an offender with an income of \$50,000, the same fine will not have a condemnative effect on a person with an income of ten million dollars.⁵² Because Section 906 is meant to deter the latter offender, it will not contribute to a change in corporate culture because these fines are not high enough to express society's condemnation for the offense.⁵³ Therefore the meaningful fine problem curtails the statute's ability to express condemnation for the violations of Section 906, and a modification of corporate culture through condemnation will not occur.

Lastly, the meaningful fine problem has retributive concerns. White-collar offenders who cause as much harm to society as street offenders would be receiving significantly lower punishments relative to their income. Set fines cannot be proportional to varying offenses, so these fines violate retributive values.

Because monetary fines are the most efficient and effective means of criminal punishment, Congress should modify the monetary fine provisions in Section 906 to address the above concerns.⁵⁴ To avoid the inflationary problem, Judge Posner

⁴⁷ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

⁴⁸ In 2001, the chief executive officers of major companies in the United States earn on average approximately \$15.5 million dollars per year. LAWRENCE MISHEL, JARED BERNSTEIN & HEATHER BOUSHEY, *THE STATE OF WORKING AMERICA 2001-2002* 213 (2003); Monetary fines will not be a significant deterrent against those with significant wealth because people who have little to lose from punishment will not be deterred by that punishment. See Posner, *supra* note 41, at 413 (indicating that statutes may require significantly high fines in order to deter white-collar criminals because of their substantial wealth.).

⁴⁹ See Posner, *supra* note 41, at 413.

⁵⁰ See Posner, *supra* note 41, at 413.

⁵¹ See Posner, *supra* note 41, at 410-18.

⁵² DRESSLER, *supra* note 27, at 19-20.

⁵³ See Posner, *supra* note 41, at 413.

⁵⁴ For further explanations of why monetary fines are the most efficient and effective penalty, see Dan Kahan, *Alternatives to Incarceration*, 111 HARV. L. REV. 1877, 1897 (1998); Posner, *supra* note 41, at 410; see generally Gary Becker, *CRIME AND PUNISHMENT*:

suggests that instead of setting fines by statute, Congress should index them to inflation.⁵⁵ This solution does not address the meaningful fine problem because the wealthy would still receive fines that are low relative to their income.⁵⁶

Another partial solution to the two problems is to increase the fines in the Act, making them so high that absolutely no one would break the law.⁵⁷ This solution would preserve — but invert — the meaningful fine problem. Rather than imposing fines which are too low for wealthy offenders, it would impose fines that are too high for the non-wealthy.⁵⁸ Further, the inflationary problem would still affect the statute.

Professor Dan Kahan suggests Congress could calculate monetary fines as a percentage of the offender's income or wealth.⁵⁹ Obviously, this solution will solve the inflationary problem because the fine will no longer be at a set rate. As an offender's income adjusts to inflation, so will his fine. Proportional fines would eliminate the inflationary problem and the resulting utilitarian and retributive concerns.

Proportional fines would also solve the more pressing meaningful fine problem. Fines based on percentage of income or wealth would be high enough to deter and condemn even the wealthiest of offenders, but not so high that they would overdeter the less wealthy excessively.⁶⁰ Furthermore, the fines would affect all offenders equally, which would strengthen a retributive justification.

B. Incarceration

Although properly distributed criminal fines are perhaps the most efficient and effective means of deterring corporate crime and expressing society's condemnation,⁶¹ Congress must supplement these fines with other forms of punishment.⁶² Otherwise, potential offenders will view the fines as a mere tax.⁶³

AN ECONOMIC APPROACH, 76 J. POL. ECON. 169 (1968).

⁵⁵ Posner, *supra* note 41, at 411.

⁵⁶ Posner, *supra* note 41, at 411.

⁵⁷ See Posner, *supra* note 41, at 413 (suggesting that raising fines will increase the ability of a statute to deter).

⁵⁸ See KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35-37. Retributive theories obviously should not punish more than to express condemnation which high fines would on the non-wealthy. They also note that overly deterring — i.e., causing too much pain to defenders — may be more expensive to society to be cost effective. Therefore, under the high fines solution, the fines would have a negative effect on both retributive and utilitarian justifications.

⁵⁹ Kahan, *supra* note 54, at 1897 (1998) (noting that these types of fines are utilized effectively in Europe and other American jurisdictions for non-white-collar crimes).

⁶⁰ BENTHAM, *supra* note 32, at 322 (stating that “[p]unishments are misapplied. . . where the evil is more than compensated by an attendant good, as in the exercise of political authority.”).

⁶¹ See Posner, *supra* note 41, at 410-18.

⁶² Dan Kahan, *What Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591, 591 (1996)

⁶³ *Id.*; see also Dan Kahan, *New Voices in Criminal Theory: Punishment*

From a deterrent perspective, corporate officers are paid to make decisions and take risks,⁶⁴ and an affirmative decision to pay taxes is a reasonable decision in many situations.⁶⁵ Therefore, deterrent justifications require additional forms of punishment. Similarly, in order to contribute to a change in corporate culture, the punishment must indicate society's condemnation and a mere tax would not perform this function.

From a retributive perspective, a fine may not punish a violator of Section 906 because it is not proportional to the criminal act.⁶⁶ Such violations cause significant harm to society, and a mere tax will not punish the offender proportionally to this harm. Therefore, other punishments must supplement fine provisions.⁶⁷

Incarceration is the most widely used supplemental punishment and is also one of the more controversial. The value of incarceration for white-collar offenders has been the subject of much controversy. Observers generally take one of two positions regarding incarceration. First, based on retributive ideals, proponents argue that the criminal justice system should punish corporate criminals in a similar respect to the manner in which it punishes "street criminals" because the level of harm caused by the two types of crime is similar.⁶⁸ Implicit in this argument is that prison will affect white-collar and street criminals equally.⁶⁹ Moreover, proponents of incarceration justify its use with deterrent values because the threatened removal of a corporate officer's liberty will have a significant impact on his determination of whether to violate Section 906.⁷⁰ Because statutes require incarceration for street offenses, proponents argue that white-collar statutes should require similar punishment.

Alternatively, opponents argue that the criminal justice system should not incarcerate white-collar offenders because they cause indirect and less violent harm

Incommensurability Punishment, 1 BUFF. CRIM. L. REV. 691, 701 (1998) (expressing for example that although fines and imprisonment may cause equal "pain" to offenders that they that do not express the same condemnation by society and therefore are not commensurate under an retributive system).

⁶⁴ Corporate law generally encourages corporate officers to be risk takers. *See, e.g.*, WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS, 280-297 (4th ed. 1997) (indicating that corporate officers are expected to be risk takers as a result of the "business judgment doctrine").

⁶⁵ *See* Kahan, *supra* note 63, at 691.

⁶⁶ *See* Kahan, *supra* note 63, at 691.

⁶⁷ *See* Kahan, *supra* note 63, at 691.

⁶⁸ *See, e.g.*, RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE 25 (1988). William Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate insiders*. 8 STAN. J.L. BUS. & FIN. 69, 121. (observing that "Enron's top insiders walk[ed] away with hundreds of millions of dollars. . .[W]hat will it matter if their reputations are ruined and they serve short-terms in "Country Club Prisons?"); Szockyj, *supra* note 35, at 497.

⁶⁹ Szockyj, *supra* note 35, at 497.

⁷⁰ *See, e.g.*, MOKHIBER, *supra* note 68, at 25; Lerach, *supra* note 68, at 121; Szockyj, *supra* note 35, at 497.

to society than street offenders.⁷¹ Furthermore, opponents argue that prison affects white-collar criminals more severely than it does "street criminals."⁷² Therefore, from a retributive perspective, incarceration of white-collar criminals is not justifiable because it imposes an extraordinary amount of pain with respect to the act committed.

The following sections will address both of these perspectives and indicate the manner in which Section 906 will affect them. First, this section will analyze the incarceration provisions of Section 906 with regard to utilitarian and retributive values assuming that incarceration is a valuable tool to curtail white-collar crime. Second, it will analyze these same provisions assuming incarceration is not a justifiable tool to curtail white-collar crime.

Incarceration Is Beneficial

Assuming that incarceration is itself justifiable, this section will indicate three general problems with incarceration of white-collar offenders. It will then determine whether these criticisms are valid and accordingly analyze whether and how Section 906 addresses them. Critics assert that the criminal justice system incarcerates white-collar offenders for shorter periods of time than street offenders.⁷³ Second, they assert that the criminal justice system does not incarcerate white-collar criminals as often as other criminals.⁷⁴ Finally, they argue white-collar criminals are usually sent to minimum-security prisons.⁷⁵

⁷¹ Kahan, *supra* note 63, at 591 (asserting that incarceration of white-collar criminals is both "extraordinary" and "inefficient"; see Szockyj, *supra* note 35, at 497 (noting that the white-collar crime is of a less "predatory nature" than street crime even if it does cause the same amount of harm and also indicating that white-collar offenders, "may be older, well-regarded in the community, economic supporters of their families, unprepared for the emotional and physical trauma of prison, and without previous criminal records); see generally STANTON WHEELER ET. AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* (1988).

⁷² Kahan, *supra* note 65, at 591.

⁷³ See, e.g., COLEMAN, *THE CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME* 150-151 (2001); KATHERINE JAMIESON, *THE ORGANIZATION OF CORPORATE CRIME* 64 (1994) (arguing that white-collar criminals receive shorter sentences than "common criminals."); John Hagan & Alberto Palloni, 'Club Fed' and the Sentencing of White-collar Offenders Before and After Watergate, 24 *CRIMINOLOGY* 603, 603-21 (1986) (indicating that since Watergate, sentences for white-collar criminals have increased in length but are still generally for shorter terms than those given to "street" criminals).

⁷⁴ See, e.g., MOKHIBER, *supra* note 68, at 25-29 (discussing cases in which corporate criminals are not sentenced to prison after causing significant societal harm); Szockyj, *supra* note 35, at 489. This argument addresses the problems associated with sentencing guidelines with prisoners not being sent to prison at all. This is distinct from the argument that white-collar offenders in general are not discovered violating the law or effectively prosecuted. Those arguments will be addressed in the next section.

⁷⁵ See, e.g., MOKHIBER, *supra* note 68, at 25; Lerach, *supra* note 68, at 121; Szockyj, *supra* note 35, at 497.

In the federal system, the argument that white-collar offenders receive shorter sentences than street criminals who commit proportional crimes has strong empirical backing.⁷⁶ The United States Sentencing Commission reports that between 1991 and 2001, the annual average length of sentence for white-collar criminals always fell between 19.0 and 20.8 months.⁷⁷ However, during the same period, violent offenders received sentences ranging between 89.5 and 106.7 months, and drug offenders received sentences ranging from 71.7 months to 88.2 months.⁷⁸

Assuming that white-collar criminals deserve the same punishment as street criminals, this trend is problematic for retributive values because white-collar criminals receive shorter sentences than street criminals.⁷⁹ This means that either white-collar offenders should receive longer sentences or street criminals should receive shorter sentences.⁸⁰ Assuming that the criminal justice system punishes street crimes properly to encourage modification of behavior, the long-term goal of contributing to a change in corporate culture would require Congress to lengthen incarceration time for white-collar criminals. Under such a system, these offenders would realize that their crimes receive as much condemnation as street crimes and would, in theory, tailor their behavior accordingly.

Section 906 has several provisions designed to increase prison time for offenders. First, it increases the maximum potential incarceration time, which, will allow prosecutors to begin plea bargains at a higher starting position and therefore lead to longer sentences.⁸¹ Second, Sections 805, 906, and 1104 of the Act direct the United States Sentencing Commission to raise suggested punishments for fraud and obstruction of justice offenses.⁸²

These changes will have a significant and beneficial impact on the ultimate goal of justifying Section 906 through retributive and utilitarian values. The increase in incarceration to levels equivalent to those of non-white-collar crimes will express society's condemnation for violations of Section 906. Such an expression should contribute to a change in corporate culture. From a deterrent perspective, corporate

⁷⁶ See U.S. SENTENCING COMMISSION, MONITORING DATA FILES 1995-2002, available at <http://www.ussc.gov/LINKTOJP.HTM> [hereinafter "Commission Data"]. Some studies contradict this premise. See Szockyj, *supra* note 35, at 489-90. (giving examples of empirical studies showing that white-collar criminals, once sentenced receive equal sentences to street crimes). However, since these studies are isolated, I accept the Commission's reports as determinative.

⁷⁷ Commission Data at 1995-2001. This does not include actual time served.

⁷⁸ *Id.*

⁷⁹ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

⁸⁰ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

⁸¹ *Recent Legislation*, 116 HARV. L. REV. 728, 734 (2002)

⁸² The commission acted quickly and increased the suggested length or incarceration for several criminal offenses related to § 906. For a detailed explanation of the increases in penalties, see U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT, 2 available at http://www.ussc.gov/r_congress/S-Report.pdf.

officers will realize that if they violate the provisions of Section 906, they will spend more time away from their families, unable to earn a living, and burdened with the stigma that incarceration carries. Hence, this aspect of Section 906 will be an effective deterrent.

The second criticism of incarceration of white-collar offenders is that they do not receive prison sentences in the first place.⁸³ Empirically, this is a questionable premise. Sentencing Commission data indicate that when federal statutes provide for optional incarceration, courts sentence white-collar and non-white-collar offenders at an almost equal rate. For example, in 2001, nearly 40 percent of offenders convicted of embezzlement, fraud, drug trafficking, simple possession of narcotics and fire arms were sentenced to prison.⁸⁴ There are, however, some empirical data indicating that the criminal justice system incarcerates white-collar offenders less frequently than street criminals.⁸⁵ Even if the empirical data are questionable, the perception of corporate officers is that this frequency is low.⁸⁶

Assuming that the criminal justice system incarcerates white-collar offenders at a low frequency, such a trend is problematic. It lacks retributive justification because society is not meting out proportional punishment for equal harm.⁸⁷ Disproportional incarceration also weakens the utilitarian value of contributing to a change in corporate culture because potential criminals will not realize that society condemns their behavior. Additionally, disproportional incarceration will be costly to deterrent values because offenders will not perceive potential pain and will not be deterred from violating the statute.⁸⁸

The heightened maximum sentences in Section 906, the Sentencing Commission's heightened suggested penalties, and the eased evidentiary requirements in the Act will make incarceration more likely by giving prosecutors more bargaining power to have incarceration.⁸⁹ As such, the Act strengthens the

⁸³ KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

⁸⁴ Commission Data, *supra* note 76, at 2002, fig. F, available at <http://www.ussc.gov/LINKTOJP.HTM>. In fact, excluding immigration offenses, all offenders of every crime type were sentenced to prison at rates between approximately 19 and 40 percent. The statistics indicate similar trends all the way back to 1996. *Id.*

⁸⁵ Szockyj, *supra* note 35, at 489 (discussing studies that show that certain white-collar criminals are rarely sent to prison).

⁸⁶ See KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

⁸⁷ See KAPLAN, WEISBERG & BINDER, *supra* note 28, at 33. See generally MOKHIBER, *supra* note 68; JAMIESON, *supra* note 73, at 64; COLEMAN, *supra* note 73, at 150-151; Darryl Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability* 149 U. PA. L. REV. 1295, 1295 (2001).

⁸⁸ Brown, *supra* note 87, at 1295.

⁸⁹ Some have suggested that mandatory minimum incarceration would make things even more equal from a retributive point and also work as a greater deterrent. However, mandatory minimums do not protect utilitarian goals because they are not effective from a cost benefit analysis. See, e.g., JONATHAN CAULKINS, ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR TAXPAYERS' MONEY (1997), arguing that a cost benefit analysis of minimum sentences for cocaine distribution would reveal that minimum

utilitarian and retributive justifications by making incarceration more likely than it previously was.

A third criticism of white-collar crime statutes is that offenders are usually sent to minimum-security prisons.⁹⁰ Critics argue that minimum security prisons weaken deterrent justifications because minimum security prisons are not “scary” enough to deter potential white-collar offenders.⁹¹ From a retributive perspective, critics argue that minimum security prisons for white-collar offenders are problematic because they do not express the same condemnation as maximum security prisons.⁹²

Neither of these arguments is persuasive. From a deterrent perspective, incarceration does not deter white-collar criminals with the fear of violence. Instead it deters with the offender’s fear of the potential inability to support his family,⁹³ with the loss of his prestige, with a stigma of prison, and with the loss of freedom.⁹⁴ Thus, the provisions of Section 906 are an effective deterrent even if the prisoners are sent to minimum security prisons. Similarly, with respect to contributing to a change in corporate culture, the removal of one’s liberty is quite a significant expression of society’s condemnation of actions, and therefore will be sufficient to contribute to a modification in corporate behavior.

From a retributive perspective, sending criminals who commit similarly condemned acts to different prisons is extremely problematic.⁹⁵ Under such a system, non-violent street criminals will suffer a more severe incarceration than white-collar criminals even though they are equally condemned. However, Congress should not address this problem by eliminating minimum security prisons. It should expand the use of minimum security prisons to all non-violent offenders so that punishment will be proportional.⁹⁶ Such a system would eliminate

sentences should not be used).

⁹⁰ See KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

⁹¹ See, e.g., Michael A. Perino, *Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes Oxley Act of 2002*, 78 ST. JOHNS L.R. 688 (arguing that perception that minimum are not a deterrent because they are perceived as less painful).

⁹² See KAPLAN, WEISBERG, & BINDER, *supra* note 30, at 35.

⁹³ See Szockyj, *supra* note 37, at 489.

⁹⁴ *Id.*

⁹⁵ KAPLAN, WEISBERG & BINDER, *supra* note 30, at 33.

⁹⁶ For a more developed argument on this subject, see generally, Brown, *supra* note 87, at 1342-43, 1345-1350 (arguing that because we cannot control certain factors such as political influence and favored status of white-collar criminals, we can only equalize punishment by treating “street criminals” more like white-collar criminals). Whereas only 5.6 percent of 143,197 federal prisoners who committed non-violent crimes are white-collar prisoners, minimum security prisoners make up 21 percent of total prison population. Therefore, not only white-collar criminals are already being sent to minimum security prisons. FEDERAL BUREAU OF PRISONS, QUICK FACTS, Jan. 2003, available at <http://www.bop.gov> (percentages of white-collar calculated by adding categories of “extortion, fraud, bribery” category with “banking, insurance, counterfeit, and embezzlement” and dividing by total number of non-miscellaneous crimes). Note that the above statistics include “obstruction of justice” and “property offenses” as non-white-collar crime; one disturbing trend is the increased

the retributive concern of disproportional sentencing for proportional crimes. Assuming that incarceration is a justifiable tool in punishing white-collar criminals, the Act sufficiently addresses both retributive and utilitarian concerns.

Alternatives to Incarceration

Although the above arguments suggest that society can justify the incarceration of white-collar criminals under utilitarian and retributive values, many critics argue that incarceration should not be used.⁹⁷ Assuming that incarceration is not a justifiable punishment for white-collar criminals, this section will suggest that Congress should enact other supplemental punishments to § 906.

Judge Posner argues that monetary fines are sufficient to deter potential white-collar offenders and that incarceration is a drain on resources.⁹⁸ Professor Dan Kahan adds that incarceration is an inefficient and perhaps unjust deterrent because it is costly and an “extraordinary disposition to the offender.”⁹⁹ Therefore, from a utilitarian perspective, prison is problematic because it is not cost efficient.¹⁰⁰ From a retributive perspective, incarceration for white-collar criminals is problematic because although offenders appear at first blush to receive equal sentences, white-collar criminals suffer more pain from incarceration than street criminals.¹⁰¹ Also, prison carries a greater stigma for white-collar criminals than it does for other criminals who commit proportional crimes and therefore it is problematic from a retributive perspective.¹⁰²

incarceration of white-collar criminals in higher security prisons. Thanassis Cambanis, *US halts terms in halfway houses: Ashcroft order irks some judges, attorneys*, BOSTON GLOBE, Feb. 16, 2003, at A1 (discussing Attorney General Ashcroft’s stripping of federal judge’s ability to sentence white-collar criminals to half-way houses).

⁹⁷ See generally Posner, *supra* note 41 (arguing that incarceration is not cost effective); Dan Kahan, & Eric Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999) (implying that shaming is inhumane); Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1884. (1991) (observing “many people, including judges, doubt the effectiveness and humanity of prison”); Linda G. Morrissey & Vickie S. Brandt, *Community Sentencing in Oklahoma: Offenders Get a Second Chance to Make a First Impression*, 36 TULSA L.J. 767, 780 (2001).

⁹⁸ Judge Posner sets forth a scheme in which a person will view certain fines as too high and therefore will not break a law because it is not cost effective. Posner, *supra* note 41, at 410.

⁹⁹ Such a system will not serve deterrent values because its enforcement is prohibitively expensive under a cost benefit analysis. Furthermore, such a system is problematic to retributive values are because they are extraordinary. Kahan & Posner, *supra* note 97, at 365-368.

¹⁰⁰ Kahan & Posner, *supra* note 97, at 365-368.

¹⁰¹ Kahan & Posner, *supra* note 97, at 365-368.

¹⁰² The argument assumes that in a retributive system, proportional punishment should be based on the offender’s place in society. Because a significant stigma will be attached to white-collar criminals who are incarcerated, such a punishment may not be as justified for

Kahan and others suggest that shaming may be a proper alternative to incarceration.¹⁰³ Corporations and corporate officers are highly sensitive to their public image so shaming can be an effective tool for punishing white-collar crime.¹⁰⁴ Shaming could require convicted corporate offenders to speak about and apologize for their offenses on television.¹⁰⁵ The statute could also require that the offenders pay for the television time themselves.

Such a system would serve both long and short-term utilitarian values because shaming is inexpensive and efficient.¹⁰⁶ One could imagine that a corporate officer values his "good name in society" and that the potential of shame would deter such penalties.¹⁰⁷ Thus, shaming would further the short-term goal of deterrence. One problem for deterrence by use of public apologies is that eventually, apologies could become commonplace, eroding their deterrent effect. Congress can address this problem by using the punishments only when offenders commit the most severe crimes.

In the long-term, shaming will express strong condemnation toward, and therefore, would contribute to a change in corporate culture.¹⁰⁸ The eroding effect discussed in the previous paragraph will have a similar effect on the long-term goals. If the value of public apologies erodes, these apologies will not be strong enough to express society's condemnation. Again, Congress can address this problem by only using these shaming penalties for the most severe violations of

white-collar criminals. Kahan & Posner, *supra* note 97, at 366.

¹⁰³ See generally Kahan *supra* note 63, at 365-88; Massaro, *supra* note 97, at 1880-86. (1991). One danger of shaming penalties for retributive values is that they must be narrowly tailored to specific situations which could cause uniformity and proportionality problems. There is always some danger in using such penalties. However, penalties suggested in this section will be applied uniformly and therefore thus avoid these problems. See Kahan, *supra* note 63, at 385.

¹⁰⁴ See Massaro, *supra* note 97, at 1941.

¹⁰⁵ Massaro, *supra* note 97, at 1888-89 (suggesting that public apologies can be a very effective means of criminal punishment).

¹⁰⁶ Massaro, *supra* note 97, at 1896. Remember utilitarian concerns underlie any deterrent theory and therefore we want the most efficient form of punishment available in the attempts to deter. KAPLAN, WEISBERG & BINDER, *supra* note 28, at 37.

¹⁰⁷ See Massaro, *supra* note 97, at 1896; KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

¹⁰⁸ Another problem for the purposes of punishment is apparent under such a system. See, e.g., Aaron S. Book, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative*, 40 WM. & MARY L. REV. 653, 685 (1999) ("explaining that a DUI convict whose picture was placed in the local newspaper committed suicide after his mother discovered the crime and informed him of her shame regarding the punishment"). Book's example indicates that shaming punishments can have effects on third parties associated with the offender. Neither theory of punishment would allow for someone who has not committed harm to be punished for someone else's harm. Any type of punishment if enforced in a certain manner against a certain offender may cause great pain to the third parties. For example, a wife might commit suicide if her husband is sent to prison or is fined a significant amount. No one suggests we eliminate prison or criminal fines for this reason.

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Shaming might also be problematic for retributive values because such punishments might distribute unequal pain to offenders for crimes that society condemns equally.¹⁰⁹ However, proper sentencing guidelines could tailor shaming punishments to each offender and avoid this problem. Further, all punishments are subject to the criticism that judges will not distribute them properly, but this is a concern for the criminal system in general. Properly tailored and enforced shaming penalties could be an effective means for Congress to justify punishment for violations of Section 906.

Other methods of supplementing monetary fines are possible. One solution is to eliminate offenders' ability to perform their chosen profession.¹¹⁰ The Act could establish a corporate self-regulatory body that would only allow corporate officers to practice if they are members akin to the Bar for the legal profession. The body would require officers to pass an ethics and qualifications exam in order to practice their profession. Subsequent to admission, if a corporate officer were to violate white-collar crime statutes or commit an ethics violation, he would no longer be able to practice as a corporate officer.

This method would be effective in enforcing both short- and long-term utilitarian values. From a deterrent perspective, being barred from performing one's chosen profession would be analogous to a tremendous fine and stigma. Such a fine could deter even a risk-taking corporate officer, who might not risk present and future income and prestige to violate Section 906. Furthermore, the stigma associated with not being able to practice one's profession could itself act as a deterrent to violating Section 906.¹¹¹

From a long-term utilitarian perspective, barring an offender from practicing his chosen profession is extremely effective because it expresses condemnation for the officer's decision. This type of provision would contribute to a change in corporate culture because such a statute would express society's condemnation so severely that corporate culture would inevitably adopt these societal beliefs. Therefore, removing the offender's ability to practice as a corporate officer would serve both utilitarian and retributive values.¹¹²

Although alternatives to incarceration are intriguing, incarceration is likely to remain the dominant form of punishment in the criminal justice system. Ideally, Congress could attempt to enact some of the punishments that this section suggests in order to determine whether they are more effective in furthering both deterrent

¹⁰⁹ See Massaro, *supra* note 97, at 1889.

¹¹⁰ See Posner, *supra* note 41, at 234.

¹¹¹ Kahan & Posner, *supra* note 97, at 365-68.

¹¹² Community service has been suggested as a third type of punishment. However, community service is a voluntary "honor" in society and should not be demeaned by using it as a punishment to express society's disdain. Because of this, community service would express, at best, an ambiguous message of shame and condemnation and therefore not be an effective punishment in an expressivist system. For a deeper discussion of why community service should not be used as punishment under an expressive theory, see Kahan, *supra* note 63, at 693.

and retributive values.

C. Discovering Violations and Effective Prosecution

Another general criticism of white-collar crime statutes is that law enforcement does not discover and prosecutors do not effectively prosecute white-collar offenders.¹¹³ This section will discuss these problems as they relate to utilitarian and retributive values. It will then discuss the manners in which the Act addresses these problems. Finally, it will make suggestions to improve the discovery of violations of Section 906.

If risk-taking potential corporate offenders believe that law enforcement agents will not discover their actions or that prosecutors will not effectively prosecute them, the statute will not have a deterrent effect no matter how high the penalties.¹¹⁴ Furthermore, if the statute does not actually punish white-collar crime, the long-term goal of contributing to a change in corporate culture will not be met.¹¹⁵ Lastly, lack of discovery or prosecution will be problematic for retributive values because the criminal justice system will not punish white-collar criminals as often as other criminals who cause equal damage.

Although critics forcefully argue that the criminal justice system does not discover or prosecute white-collar offenders as effectively as it does non-white-collar offenders, this premise is extremely difficult to prove. Ideally, the criminal justice system could discover and effectively prosecute all offenders of crime without punishing anyone who does not deserve punishment. This would be perfect enforcement. However, some offenders will inevitably escape discovery and prosecution (false negatives) while some non-offenders will inevitably receive punishment that they do not deserve (false positives). If the rates of false negatives and false positives for white-collar offenses roughly equal those for non-white-collar offenses, then enforcement is proportional (even if it is not perfect) and thus acceptable under a retributive system. Critics suggest that enforcement is not proportional and that the percentage of false negatives is far greater for white-collar offenders than it is for non-white-collar offenders. However, because data of false positives and negatives are not available, this argument is virtually impossible to prove.¹¹⁶

¹¹³ See, e.g., JAMIESON, *supra* note 73, at 64-92 (discussing studies and empirical information indicating that corporate crime is not properly prosecuted); COLEMAN, *supra* note 73, at 130-73 (discussing limited enforcement and discovery of corporate crime); see also MOKHIBER, *supra* note 68, at 26; Brown, *supra* note 87, at 1295.

¹¹⁴ See KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35 (indicating that a criminal must feel he will be discovered if he is to be deterred.) KLEIN, RAMSEYER & BAINBRIDGE, *supra* note 63, at 280-97 (indicating that corporate officers are expected to be risk takers as a result of the "business judgment doctrine.").

¹¹⁵ See KAPLAN, WEISBERG & BINDER, *supra* note 28, at 35.

¹¹⁶ For a similar argument regarding the disproportionate enforcement critique of criminal laws, see Frederick M. Lawrence, *Enforcing Bias Crime Laws Without Bias: Evaluating the Disproportionate Critique*, 66 J.L. & CONTEMP. PROBS. 49 (2003) (discussing the reasons

Even so, experts argue that law enforcement officers do not discover most white-collar crime.¹¹⁷ Although no definitive proof of disproportional enforcement is available, the empirical data available indicate that the criminal justice system rarely discovers or effectively prosecutes white-collar offenders.¹¹⁸ Furthermore, the mere perception that this is so weakens the statute's utilitarian function. The Act has several provisions to increase discovery and effective prosecution of violations of Section 906.

D. Discovery

First, the Act contains provisions that increase the independence and effectiveness of auditors.¹¹⁹ Prior to the Act, corporations could hire accountants to perform numerous functions in addition to auditing. Under this system, auditors had the incentive to cover up accounting irregularities in order to receive more business from the corporation. By increasing auditor independence and restricting the number of additional functions that accounting corporations can perform, the Act limits the incentive for accountants to cover up corporate crime.

A second aspect of the Act that will improve discovery of white-collar offenders is the obstruction of justice provisions.¹²⁰ These provisions are meant to deter

that it is impossible to empirically prove disproportionate enforcement of a particular crime without knowing how many people commit that crimes).

¹¹⁷ See, e.g., Szockyj, *supra* note 35, at 487; see also JAMIESON, *supra* note 73, at 64-92 (discussing studies and empirical information indicating that corporate crime is not properly prosecuted); COLEMAN, *supra* note 73, at 130-173 (discussing limited enforcement and discovery of corporate crime); MOKHIBER *supra* note 68, at 25; Brown *supra* note 87, at 1295.

¹¹⁸ Commission Data, *supra* note 76, at 1995-2002 (indicating that white offenders make up a significant minority of offenders in the federal system); see Szockyj, *supra* note 35, at 487 (citing studies which illustrate that discovery and effective prosecution are low). Furthermore, because prosecutors have discretion regarding whether to prosecute white-collar offenders and because the prosecution of white-collar offenders is excessively expensive, white-collars will often go unprosecuted. See *ICC v. Bd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (holding that it is "clear" that prosecutorial discretion is not subject to judicial review); *U.S. v. Warrant*, 186 F. 3d 358, 361 (3d Cir. 1999) (declaring that the court will not second-guess decisions of United States Attorneys to seek or decline to seek indictments); Szockej, *supra* note 35, at 487 (indicating that white-collar crime prosecution is excessively expensive and prosecutors will only prosecute in the strongest cases).

¹¹⁹ See, e.g., 15 U.S.C. § 7217 (giving the SEC responsibility to oversee an oversight accounting board); § 7212 (requiring accounting firms to register with an oversight board in order to "prepare, issue, or to participate in the preparation or issuance of any audit reports with respect to any issuer."); § 7213 (indicating that the board shall establish certain rule designed to increase the "auditing, quality control, and ethics standards" for accounting firms"); § 7214 (detailing regular inspections of accounting firms to insure compliance with accounting rules); § 7215 (creating punishments for those accountants who violate the regulations created by the Board).

¹²⁰ 18 U.S.C. § 1519; For a discussion of the enhanced obstruction of justice statutes, see

employees of the corporation from destroying evidence and therefore assist SEC auditors in discovering accounting irregularities and violations of Section 906.

Lastly, the Act strengthens the informant protection provisions of federal law.¹²¹ The new statute punishes anyone who intends to retaliate against informants by causing them harm and specifically mentions interference with lawful employment or livelihood.¹²² Strengthened protection for informants clearly heightens incentives to inform.¹²³ Informant protection has been extremely effective in increasing monitoring and discovery of crime in other white-collar sectors.¹²⁴ This provision is important because it will encourage an effective means of discovery. Discovering corporate crime at a higher rate will clearly have a beneficial impact on both utilitarian and retributive values.

These aspects of the statute will have a beneficial impact on retributive and utilitarian values because they will increase discovery of corporate crime. They do not, however, appear to be strong enough. Informants do not receive enough protection. Also, the modifications of the audit system *still* allow corporations to compensate their auditors, and thus do not eliminate all incentives to cover up irregularities. The following paragraphs address these concerns, and suggest amendments to increase the likelihood of discovering violations of Section 906.

First, the Act should further increase its protection for informants. For example, whistleblowers should receive limited immunity from prosecution if they have a complicit roll in committing some of the offenses.¹²⁵ Furthermore, Congress should consider compensating informants for their information. Although Section 1107 gives some protection to informants, it will not help them to attain new employment, which will be difficult with informant status. Therefore, a compensation and limited immunity scheme would further encourage informants and would be helpful in increasing the discovery of corporate crime.

Congress could also improve the discovery function of the Act by partially funding a self-run body to regulate corporations. This body would perform several functions, discussed below. In return for joining this organization, corporations would receive special certification of membership, which would be attractive to investors because it would indicate that member corporations had more accurate accounting reports.

This regulatory body could have several functions to improve the discovery of violations of Section 906. For example, member organizations would contribute

Recent Legislation, *supra* note 81, at 730-31.

¹²¹ 18 U.S.C. § 1513; *Recent Legislation*, *supra* note 81, at 730.

¹²² 18 U.S.C. § 1513.

¹²³ See generally George Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*. 69 GEO. WASH. L. REV. 798.

¹²⁴ See, e.g., *id.*

¹²⁵ In other white-collar crimes, informant amnesty has been used widely by prosecutors to both catch and gain evidence against corporate criminals. See, e.g., U.S. DEP'T OF JUSTICE, STATUS REPORT: CORPORATE LENIENCY PROGRAM (2001) (indicating that over a five year period use of informants was five times more likely to be responsible for detecting and prosecuting cartels than any other tool used; see also Spratling, *supra* note 123, at 798.

money to fund a pool of auditors. Permanent employees of the body would randomly select auditors from the pool to audit each participating firm's accounting records. If an accountant audited a certain corporation from the pool, the body would not permit that accountant to perform other accounting tasks for that firm for a set period of time. Such a provision would eliminate the incentives for accountants to cover up accounting irregularities in the corporations they audit. Furthermore, if a pool accountant recklessly, knowingly, or purposely covered up corporate accounting irregularities, the pool administrators could prohibit him from reentering the pool.

This type of pool is vulnerable to a few criticisms. Because of recent mergers, few accounting companies can actually perform the accounting for major companies, so conflicts would be difficult to eliminate. One solution to this problem would be to increase the amount of firms with these capabilities. Another potential problem with this system would be antitrust violations, as the pool could engage in price fixing. This may be a case where the government should allow a monopoly because the benefits it provides would outweigh the costs. The prices and services offered by the pool would be heavily regulated to insure that the costs of trusts do not outweigh the benefits of the pool.

Other requirements for membership would be an increase in the frequency of audits, an increase in direct monitoring by the SEC, and more detailed accounting statements. Lastly, membership in the body would require officers of member corporations to take continuing education courses to learn important new developments in corporate law and to remind them of the requirements of Section 906 and other corporate laws.

In addition to strengthening the utilitarian and retributive functions of the Act, the self-regulatory body could contribute independently to changing the mores of corporate culture. Although it would be non-criminal, it would establish an inherent level morality within the corporations. Such contributing forces are necessary in a scheme meant to change corporate culture.

Clearly, Congress must amend the Sarbanes-Oxley Act to address the discovery problems that critics associate with white-collar crime. In order to be truly effective in this respect, Congress must further decrease the incentives for auditing accountants to hide corporate irregularities and further increase the incentives for informants to report potentially problematic behavior.

E. Effective Prosecution

As mentioned above, effective prosecution and the perception of effective prosecution are important to retributive and deterrent values. The Act has several provisions that will improve the effectiveness of prosecutions and therefore benefit the retributive and utilitarian values. First, the obstruction of justice and informant provisions will increase effective prosecution by strengthening evidence for prosecutors.¹²⁶

¹²⁶ The provision increases punishment for those who destroy evidence. 18 U.S.C §§

Additionally, the Act increases the maximum fines and potential length of incarceration.¹²⁷ These provisions will give the prosecutors more leverage during plea bargaining.¹²⁸ Furthermore, the Act improves evidence collection by requiring accountants to retain corporate "audit or review work papers for a period of 5 years."¹²⁹ Lastly, the Act lowers evidentiary requirements for conviction, which will, itself, make prosecution an easier and more desirable task. The Act clearly addresses the need for more effective prosecution, and in doing so creates the perception among corporate officers that effective prosecution will be more likely.

The Sarbanes-Oxley Act will have a significant and beneficial impact on the discovery and prosecution of white-collar crime. However, more provisions are necessary in order to increase the ability of the criminal justice system to discover such crimes. Both the provisions in the Act itself and the improvements that this Note suggests will increase the ability of Congress to justify the act with utilitarian and retributive value.

V. CONCLUSION

This Note sets forth a framework for justifying punishment for corporate crime. In the long term, society's goal should be to modify harmful corporate acts. Legislative enactments cannot be the sole means of accomplishing this goal. Instead, several institutions in society must indicate to corporate officers that they condemn such behavior. Ultimately, in an effort to avoid such condemnation, the corporate officers will begin to avoid and condemn white-collar crime, and corporate culture will change. Until that time, statutes should curtail corporate crime with deterrent values. Further, retributive ideals must act as a limit to these utilitarian justifications.

The Sarbanes-Oxley Act is a significant step forward. It addresses several general concerns of justifying punishments for white-collar crime within the utilitarian and retributive theories of punishment. However, Congress must go even further if it truly wants to stop corporate crime with utilitarian justifications. This note has made several suggestions as to how to amend the Act in order to further accomplish the utilitarian and retributive values. These suggestions are not meant as a manifesto of the sole means possible for amending the Act. Instead, they are meant to illustrate the manner in which a utilitarian and retributive framework can apply to Section 906.

Ideally, Congress will address the retributive and utilitarian concerns discussed in this note, and financial tragedies like the Enron scandal will not occur again on such a grand scale.

Michael D. Silberfarb

1512-1513.

¹²⁷ 18 U.S.C. § 1350; *Recent Legislation*, *supra* note 81, at 734.

¹²⁸ See *Recent Legislation*, *supra* note 81, at 734.

¹²⁹ 18 U.S.C. § 1520.

