CHAPTER 37

"WHITE COLLAR" CRIMES

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1. White-Collar Crime's Definition Problem

While the phenomenon of "white collar" crime is relatively modern, it existed in Western law well before an American sociologist of the 1930s famously coined the odd but now entrenched term.[1] Once the phrase appeared, however, legal observers began endlessly grappling with the meaning of so-called white-collar criminality. This area of criminal law, unique among regions of the special part, seems never to quite get past its definitional task.

This impediment might be surprising given the massive attention paid to this sphere of criminality, attention that increases year over year across the developed world. But the definitional sticking point appears natural once one appreciates that legal doctrine itself faces a stiff challenge in using rules to specify these types of unwanted behaviors.

All of substantive criminal law, like all law, confronts boundary problems. White-collar crime, however, is dominated by boundary problems and, ultimately, defined by them. If one wants to appreciate why this subject has been hard to understand, white-collar crime should be conceived as crime committed in social settings in which seriously unwanted behaviors are embedded within

* For very helpful comments on a draft, many thanks to Deborah DeMott and Julie O'Sullivan.

[1] Edwin H. Sutherland, *White Collar Crime* (1949).

desirable ones—and are difficult to set apart and extract through clearly specified ex ante rules of law.

This chapter will argue this definitional claim and illustrate it through discussion of some prominent offenses and common contemporary enforcement practices. It will conclude by linking the theoretical–definitional discussion to ambivalent public attitudes toward white-collar crime in the United States.

1. Demography

The "white collar" neologism was designed to call attention to the legal relevance of a social class. Edwin Sutherland, the American sociologist, pursued a project that had an explicit normative bent. The United States had not paid attention, he said, to a problem he designated as "white collar" crime and defined as "crime committed by a person of respectability and high social status in the course of his occupation."[2] Sutherland suggested that Americans had been allowing their management class to get away with the economic analog of murder. He called for aggressive criminalization in the business realm, including of many behaviors treated even today as regulatory concerns but not crimes.

Sutherland's term stuck. But, as many have observed, his definition of the term does not work. Persons of upper social strata, however defined, commit plenty of murders, use and sell drugs, can be rapists, are just as prone to assault as anyone, and so on. Meanwhile, financial crimes are not limited to the socially privileged. Grafters, scam artists, con men, and even sophisticated Ponzi schemers can emerge from humble beginnings.[3] And the business management class, though no model of aspirational diversity, is far more open to strivers than when Sutherland wrote.[4]

Demography, at least correlated with social class, is not a fruitful method for drawing boundaries around the realm of white-collar crime. Such a method also threatens to drain legitimacy from the project of criminalizing nonviolent economic wrongs. It would be anathema to the Anglo-American legal tradition to determine that a particular social class needed more criminal punishment and then to design substantive crimes toward that end. Although some would argue that is precisely what has been done with drug criminalization,[5] liberal legal systems claim to reject such reasoning.

[2] Sutherland (n. 1) 9.

[3] Tamar Frankel, *The Ponzi Scheme Puzzle: A History and Analysis of Con Artists and Victims* (2012); Frank Partnoy, *The Match King: Ivan Kreuger, The Financial Genius Behind a Century of Wall Street Scandals* (2010); Mitchell Zuckoff, *Ponzi's Scheme: The True Story of a Financial Legend* (2006).

[4] Anita Rhagavan, *The Billionaire's Apprentice: The Rise of the Indian-American Elite and the Fall of the Galleon Hedge Fund* (2013).

[5] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

2. Economic activity

Instead of focusing on class, one could define white-collar crime as crime committed in a certain economic realm: banking, or "Wall Street," or "corporate America," or "business" in some wider sense. One might include within this realm a variety of professionals and other service providers and gatekeepers, such as lawyers and accountants, who are integral to the corporate world. This kind of definition tracks many public discussions of white-collar crime. But the designation does not fit well with substantive criminal law and its enforcement.

Data show that the majority of prosecutions of white-collar offenses in the United States involve conduct outside the realm of the large corporation (the Fortune 500 and like firms).[6] This has been demonstrably true since the 1970s and probably has been the case since the late 1800s, when industrialization and the emergence of a consumer economy gave rise to the first concerted national efforts to combat fraud.[7]

White-collar prosecutions generally draw the attention of the press, and therefore the public, when the accused work for large firms. As measured by numbers, however, this is not a representative sample of the thousands of criminal cases that involve actors at every level and in every sector of the sprawling modern economy. To pass a $50 bad check is, by some reasonable conceptions, to commit a white-collar crime.

A further problem with limiting white-collar crime to the realm of corporate activity is that doing so excludes many crimes, such as bribery and obstruction of justice, that involve government functions and are generally treated as part of the white-collar field of law practice. Many people would also apply the white-collar label to certain offenses commonly committed in mostly private settings, such as blackmail, extortion, and embezzlement.[8]

It is helpful to distinguish the broad realm of white-collar crime from a narrower category of activity best termed corporate crime. Corporate crime is the field of law enforcement and practice that concerns criminal offenses, and closely related civil regulatory violations, committed by sizeable business firms and their managers and employees. In this area, individual and firm liability overlap and are linked in many important ways, as a matter of both substantive criminal law and criminal procedure. The investigation, enforcement, and defense of matters of corporate crime now comprises a major field of U.S. and European law practice, is emerging in Asia, and draws the constant attention of both general media and a growing cadre of specialized financial reporters.

[6] David Weisburd et al., *Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts* (1991).

[7] Edward J. Balleisen, "Private Cops on the Fraud Beat: The Limits of American Business Self-Regulation, 1895–1932," (2009) 83 *Business History Review* 113 ff.

[8] Stuart P. Green, "The Concept of White Collar Crime in Law and Legal Theory," (2004) 8 *Buffalo Crim. LR* 1 ff.

3. Victimization

It often has been said that white-collar crimes differ from other criminal offenses in the relationship between offender and victim. Unlike the victims of violent crime, victims of white-collar crime rarely suffer from direct physical harm or the apprehension of such injury. White-collar crimes, unlike for example vice or "public order" offenses, usually do have identifiable victims. In large cases, however, the class of victims is typically diffuse, in the senses of being spread far and wide and standing at some remove in a chain of causation from the acts of the principal offender, whom the victims may never see, deal with, or even identify.

These features of white-collar crime are important to legal theory because they call attention to the complicated relationship of these offenses to the harm principle. White-collar offenses are diverse and straddle several categories of harm. Sometimes they involve simple and direct financial injury: investment advisor A persuades investor B to supply funds to A for investment on B's behalf; A then runs off to Bora Bora with the funds.

At other times these crimes involve harm spread across large classes of persons, including cases of lots of small harms aggregating to major wrongdoing: public company executive A lies to the company's thousands of shareholders to boost the firm's stock price and thus the value of A's stock options; many small shareholders lose a few hundred or thousand dollars, adding up to hundreds of millions in loss. The question of victimization is further complicated in such cases by the fact that only those who purchased at the inflated price and held their shares through revelation of the fraud have been hurt by the fraud, while those whose purchases were timed differently may have profited from fraudulent inflation of the price.

Finally, sometimes white-collar offenses involve the sort of general harm said to victimize society at large: bank manager A embezzles depository funds that are insured by a government guarantee. This may undermine confidence in and reliance on vital social institutions and therefore the effectiveness of those institutions. This concern is frequently offered as a reason to criminalize insider trading and obstruction of justice.

Complexity and subtlety in accounts of victimization is a common feature of white-collar crimes. As Stuart Green has said, it may be that white-collar crime can be defined only by a kind of family resemblance method, by which each offense in the category shares with others some but not necessarily all of a set of common characteristics, such as diffuse victimization.[9]

If we are seeking a definition that helps us better understand white-collar crime, however, it is not enough to have some criteria that sort individual crimes, one at a time, into or out of the category. After all, there must be something about white-collar crimes as a whole or we would not have spent so much time and energy

[9] Green, (2004) 8 *Buffalo Crim. LR* 1 ff.

talking about them as if they are distinct from the rest of criminal law's special part, which has no similar conceptual subcategories. That is to say, "blue collar" crime is not a helpful term.

4. Offenses

One could, of course, abandon the project of conceptual definition and organize white-collar crime according to a list of offenses that belong in the category. It is useful to do this for clarity purposes, and we should do so. It is also relatively easy to get agreement about the great majority of individual offenses. The most common white-collar crimes in the United States are fraud (in its many statutory forms, and including insider trading), embezzlement and misappropriation (but not plain old theft), bribery and related corruption violations, tax crimes, offenses involving interference with the administration of justice, violations of the many requirements of the modern administrative state ("regulatory offenses"), and extortion (including blackmail).

However useful a list might be for data collection and other purposes, a list is not a definition. If all we needed to do were to draw some lines for purposes of understanding each other when we say "white collar," we could quibble some over the precise location of those lines but not much would turn on our disagreements.

5. Problem of legal specification

White-collar offenses are best defined by what makes them difficult. Without question, they present legal problems of greater complexity than with old-fashioned crime of the "core," "street," "violent," "vice," or whatever-we-might-want-to-call-it type. Difficulty is what makes these offenses so interesting.

The challenge of white-collar crime arises from, if you will, its embeddedness. Embeddedness is the extent to which an activity subject to criminal prohibition is enmeshed within, closely related to, and not readily distinguishable from socially acceptable or even welcome conduct. Think of murder. Only in rare cases does the law of homicide confront such problems—as, for example, when a doctor is challenged for discontinuing life-saving measures in a jurisdiction that has not settled its rules on the matter.

Criminally prohibited activities are arranged on a spectrum in this regard, with murder the easy case, assault a bit more likely to involve such difficulties, theft usually straightforward but sometimes not (as evident in the development of the common law of larceny), and so on. Rape, for example, is an offense that has a large proportion of violations that are not the least bit ambiguous with respect to critical elements such as forced and/or nonconsensual sexual penetration. But in many cases, as Peter Westen develops in an important book on consent, the law must make difficult determinations about what counts as "valid" or "expressed" or "lawful" consent.[10] These decisions often involve contested matters of fact. They can also require legal resolution of disputed normative questions involving permissible versus criminal sexual conduct.

White-collar offenses tend to fall toward the end of this spectrum at which application of criminal prohibitions, as often as not, requires the legal system to make difficult determinations about when behaviors involving commercial transactions, political activity, adversarial litigation, and the like "cross the line" from "aggressive" or "sharp" to criminal. Consider fraud, for example. Virtually all fraud, and especially frauds that draw greatest public attention, are embedded within ordinary national commerce. Sometimes frauds jump out from their commercial surroundings and are easy to see. Infamous Ponzi schemes, such as those pursued in the 2000s by the likes of Bernard Madoff and Allen Stanford, do not present hard legal questions. Outright lies, absence of real investments, extensive efforts to perpetuate and cover up the schemes—all make clear that such cases are only slightly different than simple thefts.

But, to take a common contemporary case, what of the executives of the public company who pursue novel and questionable interpretations of accounting rules in reporting their company's finances, to avoid recognizing losses that would depress their firm's stock price? The legal system must make difficult decisions about where to draw the normative line. An example is a famous 1969 opinion of the American federal judge Henry Friendly that ruled that accountants can be criminally liable for securities fraud for intentionally helping a client to use its financial statements to paint a misleading picture for its shareholders—even if the accountants fully complied with the technicalities of accounting rules.[11] Four decades later, this decision was naturally applied to public company executives who similarly use accounting technicalities as a shield. Former WorldCom CEO Bernard Ebbers, who offered a defense of technical rule-compliance to a charge of massive accounting fraud that triggered what was then the largest bankruptcy in U.S. history, failed to persuade an appellate court that his jury should have been told that rule-compliance was an absolute defense.[12]

White-collar criminal law must deal with this sort of problem all the time. When does a payment to a politician constitute criminally corrupt influence in a system in which monetary contributions to campaigns are not only welcome but enjoy constitutional protection? When does an attorney's joint representation of and coaching of multiple witnesses constitute obstruction of justice in an adversarial legal system that mandates zealous lawyering? When do a corporation's payments in a foreign

[10] Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (2004).

[11] *U.S. v. Simon*, 425 F.2d 796 (1969).

[12] *U.S. v. Ebbers*, 458 F.3d 110 (2006).

country to facilitate the construction of a power plant constitute violations of the Foreign Corrupt Practices Act in the midst of rapid and complex processes of globalization? When does a threat to bring legal action constitute extortion in a society that welcomes and even lauds the sharp negotiator? And so on.

This feature of embeddedness in routine activities that are mostly conducted within legitimate and important social institutions—commerce in corporations, politics in government, dispute resolution in agencies and courts—produces acute problems of legal specification. It is difficult to articulate such close distinctions within generalized legal rules that must serve to address many and varied cases.[13] This is true even if normative disagreements about precisely what kinds of behaviors should be criminalized in commercial, political, litigation, and like activities have been settled. Often they have not been. Making the problem more difficult, white-collar prohibitions deal with sectors of social activity in which technologies and norms evolve rapidly, potentially leaving each new move of legal regulation one step behind.[14]

A natural response to these pressures is to take resort in open texture in criminal law. Legislation cannot fully specify white-collar crimes ex ante because language is limited in its precision and social planners lack perfect foresight, to say the least. The result is generalized criminal prohibitions of very broad scope. Fraud statutes typically prohibit "fraud."[15] Obstruction of justice statutes prohibit "corruptly interfering with the due administration of justice."[16] Bribery statutes prohibit payments to "influence" public officials.[17] Extortion statutes prohibit obtaining things of value "against the will of another" by means of "coercion."[18] Statutory law describes legal concepts rather than behaviors.

The problem with open-textured offenses, of course, is the strength of the professed Anglo-American commitment to the legality principle. This commitment purports to reject, among other things, law that defines criminality ex post, on the run, and through adjudication—rather than ex ante, through policy deliberation, and by legislation. (Civil law systems typically express stronger forms of this commitment.) Thus, from the problem of embeddedness, which is a result of social norms and social facts, arises a legal problem of specification that is highly distinctive of, though not unique to, white-collar crime. The problem of specification, in turn, explains the instability of the law in this area relative to other regions of the criminal law's special part, and the persistent contestation over white-collar crime, both inside and outside the processes of legislation and adjudication.

[13] Samuel W. Buell, "The Upside of Overbreadth," (2008) 83 *New York University LR* 1491 ff. More generally: H. L. A. Hart, *The Concept of Law* (2nd ed., 1994), 128; Frederick Schauer, *Playing by the Rules* (1991), 3; Friedrich Waismann, "Verifiability," in Anthony Flew (ed.), *Essays on Logic and Language* (1951), 117 ff.

[14] Samuel W. Buell, "Novel Criminal Fraud," (2006) 81 *New York University LR* 1971 ff.

[15] 18 USC §§ 1341, 1343, 1348; U.K. Fraud Act 2006.

[16] 18 USC §§ 1503, 1505.

[17] 15 USC §§ 78dd-1, 78dd-2, 78dd-3, U.K. Bribery Act 2010.

[18] 18 USC § 1951.

We thus arrive at explanations for two commonly observed features of white-collar criminal cases. The first is that white-collar cases, in contrast to cases of "street" crime, more often involve the question of whether conduct, the facts of which may not be in serious dispute, constitutes a crime than they do the question of whether someone was the true perpetrator or what happened at the scene of the crime. The second is that white-collar cases much more often turn on questions of *mens rea*—what precisely was in the defendant's mind at the relevant moment—than on questions of *actus reus*—what exactly did the defendant do.

A typical pattern in fraud cases, for example, is that the defendant's possession of a document or presence at a meeting will not be in dispute but the defense will vigorously contest that the defendant was aware, much less intended, that anyone would be misled by the document or the decision taken at the meeting. In the absence of the foolish "smoking gun" email to a colleague, which surprisingly continues to turn up in some cases at major financial institutions, arguments about lack of *mens rea* can be persuasive. In the recent scandal involving LIBOR interest rates, for example, bank employees messaged each other about making sure that the borrowing rates their bank reported to the British Banking Authority were not "too false," lest the numbers attract suspicion. Likewise, in the huge insider-trading investigation involving the SAC Capital hedge fund owned by Steven Cohen, a group of traders shared tips through an email group that started with the statement "the first rule of email club is that there is no email club." Just as wizened cops will say that it is the dumb bank robbers who get caught, it could well be that enforcement patterns in white-collar crime are explained as much by the government's luck as its strategy.

These two features of white-collar crime—difficulty in identifying criminality and challenges in proving mental state—are symptoms of the legal system's struggle in this field to manage high tension between the need for flexible law capable of addressing novel, diverse, and unanticipated forms of conduct and the desire to adhere to rule-of-law commitments. Even though we are told that in modern U.S. law "there is no such thing as a common law crime," inevitably adjudication of these offenses includes a kind of lawmaking in which police, prosecutors, judges, and jurors decide what really counts as fraud, bribery, or obstruction of justice. Intense focus on *mens rea* is a means of making those decisions in a way that relieves the anxiety of legal actors that vague law and novel interpretations of law will land the unsuspecting, law-abiding, blameless person in prison.[19]

White-collar crimes are not the only criminal offenses that exhibit the features just discussed, nor do they always work this way. But the dominance of these features, and the discomfort and difficulties they produce, perhaps explain why this part of the special part has long been viewed as standing apart, earning its own special designation. In the absence of a definition of white-collar crime that achieves

[19] Samuel W. Buell and Lisa Kern Griffin, "On the Mental State of Consciousness of Wrongdoing," (2012) 75 *Law & Contemporary Problems* 133 ff.

complete fit, it may be most fruitful see the category as crime committed in social settings in which undesirable behaviors are embedded within desirable ones—and are difficult to set apart and extract through clearly specified ex ante rules of law.

6. Economic theory

Before turning to enforcement matters, note a paradox. The methodology of law and economics has struggled to produce satisfactory descriptive or normative accounts of white-collar criminalization. It is not overly difficult to construct a hypothesis, such as that criminal law ought to be used when monetary sanctions cannot adequately deter activities that produce externalities, or that punishment is warranted for those behaviors that ought to be prohibited rather than merely "priced" because they "bypass markets."[20] But such formulations map poorly onto existing and long-established patterns of criminalization and fail to provide sufficient justification for the great regulatory leap from monetary liability to imprisonment.[21] (In contrast, criminal liability of corporations, for which there can be no imprisonment, has been highly amenable to economic analysis.[22]) In the realm of white-collar crime, economics can explain a great deal more about fact than law.

II. White-Collar Crime's Enforcement Realities

In one way, white-collar crime's definitional problem fades in significance when observing the present enforcement landscape in the United States and Europe. There is no confusion nowadays about where the action is in white-collar enforcement. One only need look to the growth of bureaucracies such as the U.S. Securities and Exchange Commission, the U.K. Serious Fraud Office and Financial Conduct Authority, the U.S. Department of Justice, the U.S. Environmental Protection

[20] Gary Becker, "Crime and Punishment: An Economic Approach," (1968) 76 *Journal of Political Economy* 169 ff.; Richard Posner, "An Economic Theory of Criminal Law," (1985) 85 *Columbia LR* 1193 ff.; John C. Coffee, Jr., "Does 'Unlawful' Mean Criminal? Reflections on the Disappearing Tort/Crime Distinction in American Law," (1991) 71 *Boston University LR* 193 ff.

[21] Gerard E. Lynch, "The Role of Criminal Law in Policing Corporate Misconduct," (1997) 60 *Law & Contemporary Problems* 23 ff.

[22] Jennifer H. Arlen, "Economic Analysis of Corporate Criminal Liability: Theory and Evidence," in Alon Harel and Keith Hylton (eds.), *Research Handbook on Criminal Law* (2012), 144 ff.

Agency, and their many offices devoted to criminal enforcement or the enforcement of closely related civil regulatory matters. Equally telling is massive growth in the practices of the world's largest law firms devoted to "government enforcement and white-collar crime" and like descriptions. These practices include more work doing compliance and internal investigations for large organizations seeking to police themselves than defense of people charged with crimes.[23] It was recently reported that 1,500 lawyers appeared at an annual U.S. conference devoted to the defense practice that had attracted only a few dozen attorneys when it began convening in the late 1980s. Legal practitioners in this field are not confused about which criminal offenses draw the keen attentions of both prosecutors and corporate managers.

Still, a look at the substantive offenses that dominate the current enforcement picture underscores the field's definitional and conceptual challenges. It happens that virtually all of the most active areas of enforcement, at least when it comes to the major cases, involve the problem of embeddedness and resulting contestation over how to define boundaries of criminality. Perhaps this is no coincidence. Lawyers can be entrepreneurial, even those who work for governments. It may be habitual for practitioners of white-collar crime to sally and skirmish along the frontiers of offense definition.

1. Major realms of enforcement

In briefly describing the main areas of white-collar enforcement in the United States, it will be useful to organize the discussion around the concept of fraud. Fraud is meant, for these purposes, as a loose conceptual category of behaviors involving deception. As such, the category is much broader than strict doctrinal definitions of the offense of fraud itself. Three species of fraud, and a fourth category of conduct, occupy the majority of white-collar criminal cases: business fraud, fraud against government, fraud in government, and harm to public health and the environment.

a) *Business fraud*

A very large proportion of white-collar prosecutions have to do with fraudulent behavior by the managers and employees of businesses in their conduct of business affairs, typically those of corporations and partnerships. In the United States, United Kingdom, and many other countries, such conduct is subject to overlapping, or parallel, regimes of criminal and civil regulatory enforcement. This sort of fraud generally can be punished criminally, sanctioned civilly, or both—with the

[23] Charles D. Weisselberg and Su Li, "Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms," (2011) 53 *Arizona LR* 1221 ff.

mix often determined not so much by legal doctrine as by prosecutor and enforcer discretion. These kinds of cases can be divided into four subcategories.

First there is what might be called investment fraud. Investors, such as shareholders of a company or investors in a hedge fund or mutual fund, are lured by lies and other forms of deception to entrust monies in the hopes of returns. With private funds, such fraud typically involves more or less direct misappropriation of investor monies. With public companies, such fraud is less direct because managers of a firm issuing securities traded in large liquid exchanges do not receive the investors' funds. This is usually called accounting fraud, which can take almost as many forms as there are accounting rules but essentially involves manipulation of figures in the reported financial statements that are the primary source for analysts and investors to assess the value of the firm. In these cases, managers are motivated by gains in their own compensation and prestige that flow from increases in the company's value generated by fraud on the market. (Indeed, some argue that the latter frauds do not really harm the diversified investor because, over time, she as often realizes gains as losses from fraud in the market.[24])

All of these cases are typically prosecuted under the U.S. securities fraud law ("Rule 10b-5") and the general federal prohibition against fraud committed through the use of the mails and interstate wires ("mail and wire fraud"). Some state prosecutors, especially New York's, also pursue such cases via similar state statutes.[25] Controversy often arises over which of these kinds of cases are "really criminal," rather than more appropriate for civil regulatory treatment and private lawsuits. There is much, and sometimes total, overlap in criminal and civil antifraud regimes.

Harm, flagrancy, level of intent, and similar factors are likely to influence prosecutorial discretion. Paradigm cases for criminal treatment have included, in the case of misappropriation of investor funds, the prosecution of Bernard Madoff for a massive Ponzi scheme and, in the case of accounting fraud, the prosecutions of former WorldCom chief Bernard Ebbers and the former managers of the Enron Corporation.[26] More ambiguous matters include trading of derivative securities relating to the mortgage market in the lead up to the global financial crisis that began in 2008. Many have argued that these activities should have been prosecuted aggressively as criminal offenses, beyond the many public and private civil suits that have been filed. Others have said that a high level of culpability might be absent, or at least difficult to prove, in such cases given the sophistication of counterparty traders and the widespread knowledge of relevant risks among professionals in the banking and housing sectors.

[24] Amanda Rose, "Fraud on the Market: An Action Without A Cause," (2011) 160 *University of Pennsylvania LR Pennumbra* 87 ff.

[25] New York General Business Law § 352-c.

[26] *U.S. v. Ebbers*, 458 F.3d 110 (2006); *U.S. v. Skilling*, 554 F.3d 529 (2009); "The Madoff Affair," *PBS Frontline* broadcast, May 12, 2009.

Secondly, there are cases of business managers and employees pilfering the assets of their own employers. In simple scenarios, these cases are familiar as iterations of the long-standing legal concept of embezzlement. More often than not, the misappropriation involves deception and concealment and therefore these can be viewed (and prosecuted) as fraud. Federal criminal law in the United States includes no general embezzlement offense and would treat such cases as bank frauds, securities frauds, or mail and wire frauds.

In more complex corporate scenarios, these diversions of assets are called cases of corporate "looting" or, in the academic literature, "tunneling." Looting cases can be circuitous and can involve gray areas in the distinctions between corporate and personal assets and the structure and processes around executive compensation and corporate governance, including interactions between boards of directors and corporate officers. The prosecutions of former Tyco head Dennis Kozlowski and former Hollinger International executive Conrad Black produced hotly contested trials in which the defendants, operating in an era of lavish and complex executive compensation, argued that the benefits they received had been duly approved and were appropriate. (Both men lost, with Black serving a relatively short sentence and Kozlowski a very long one.[27])

Thirdly, there are cases in which businesses defraud their counterparties in transactional activity. Perhaps the most common scenario here is the large consumer fraud, with many small victimizations summing to a major case. These frauds more often involve fly-by-night operations that dissolve before, or as soon as, the fraud is discovered than established businesses with significant reputational capital. Large, sophisticated companies certainly defraud each other from time to time. But authorities rarely treat these cases as criminal, being content to leave resourceful and well-counseled entities to sue each other. Generally speaking, cases of counterparty fraud less often present difficult problems of distinguishing criminality from appropriate business activity than do other types of fraud.

Fourthly, there is the special case of insider trading, a sort of stepchild of fraud. There are few specialized laws banning insider trading in the United States. Rather, the federal courts have ruled that insider trading is a form of securities fraud. This has proved an awkward idea.

Most people who think insider trading is wrong think it is wrong because it is a kind of cheating that erodes confidence in markets: the offender plays the stock market with secret information no one else has, like an ace hidden up the sleeve in a game of poker. As a theory of fraud, the argument proves too much. In investment markets, informational resourcefulness and advantage are not only permissible but encouraged. No such market could function well under a rule that guaranteed

[27] *U.S. v. Black*, 625 F.3d 38 (2010); *People v. Kozlowski*, 11 N.Y.3d 223 (2008).

equality of information. Such a rule would eliminate the incentive to produce the knowledge that makes prices more accurate.

The courts have worked around this problem by saying that the corporate insider who trades using information gained on the job, without saying so, defrauds the company's own shareholders, with respect to whom she is a fiduciary owing heightened duties of candor.[28] The same rule applies to a "tippee," a person who acquires information from a corporate insider knowing that the insider has provided it in breach of a duty not to disclose it.[29] Of course, this theory leaves out all cases not involving a corporate insider, or her tippee, trading directly with the firm's own shareholders. So the courts have invented a companion "misappropriation" theory, whereby the person who trades using nonpublic information gained on the job is guilty of defrauding her own employer, to whom she owes a duty not to use secretly purloined business information for personal gain.[30] The misappropriation theory enables prosecution of many cases that intuitively strike observers as insider trading, such as a lawyer who purchases equity of a target corporation that he knows his client is preparing to acquire. But the theory is strained and seems to treat the problem of insider trading more as one of looting (of information) than as one of fraud on other investors.

Notwithstanding the awkward legal regime governing insider trading, enforcement of the crime has been continually on the rise, especially in a recent wave of prosecutions in which the government for the first time used wiretaps to net some very large Wall Street investors.[31] As prosecutions extend into the realm of the modern hedge fund, the cases bear increasing features of embeddedness. Hedge funds have the production of informational advantage as the core of their business models. They leverage creativity and facility with data to produce that advantage. Under positive law, such industriousness is not criminal insider trading unless fund managers obtain information from individuals who have taken it from their employers in violation of duties, and fund managers know that to be true. Still, prosecutors seem to find insider-trading cases more straightforward to investigate and bring than cases of complex corporate investment fraud. The relevant documents and witnesses are fewer and the crime is usually more intuitive for the layperson who is impressed into jury service.

Insider trading provides an excellent example of the legal fluidity of white-collar crimes. Most people nowadays would quickly identify insider trading as both a seriously wrongful behavior and a crime. But it is not clear how much of that belief is attributable to the law having taught people to think that way. Before the 1970s, there was no solid legal theory of insider trading as a form of securities fraud and there were no such criminal prosecutions. There remains substantial academic debate about whether prohibitions on insider trading have social benefit.[32] And, if

[28] *Chiarella v. U.S.*, 445 U.S. 222 (1980).
[29] *Dirks v. SEC*, 463 U.S. 646 (1983).
[30] *U.S. v. O'Hagan*, 521 U.S. 642 (1997).
[31] *U.S. v. Rajaratnam*, 719 F.3d 139 (2013).
[32] Dennis W. Carlton and Daniel R. Fischel, "The Regulation of Insider Trading," (1982) 35 *Stanford LR* 357 ff.

really asked, the public might struggle to explain exactly why it thinks the employee of the big corporation who buys stock because of something she heard at work is a clear wrongdoer, while the fellow who beats the house by counting cards at the casino, or the amateur investor who buys a rail company's stock after tracking passenger volume at the station, has done nothing wrong.

A final word should be inserted here on the subject of antitrust violations, which are not exactly a form of business fraud but bear some structural resemblance to the subject. Civil and criminal antitrust enforcement has always involved exceptionally large measures of enforcer discretion and economic policy considerations. Anticompetitive conduct in large industries is not often treated as criminal and is typically left for civil regulatory enforcement or private litigation. Here there is a serious problem of embeddedness. How in the world do we distinguish in any bright-line way between the taking of competitive advantage and anticompetitive behavior? The question has had decorated economists at odds, which has probably steered authorities away from criminal punishment. Naked price-fixing conspiracies are treated criminally but typically involve activities that can be difficult to unearth, so such prosecutions are infrequent, at least against major corporate actors.[33]

b) *Fraud against government*

Another category of white-collar crime involves what might be called fraud against government, again using fraud as a broad concept encompassing deceptive behaviors. The larger the modern regulatory state grows, and the more funds it collects and dispenses, the more opportunities arise to cheat it.

Contracting fraud of course dominates this category, especially fraud in the pursuit of contracts related to enormous modern defense budgets. These cases range from relatively simple instances of rigging bids to borderline situations involving conflicts of interest in the awarding of subcontracts. Another massive realm of criminal enforcement activity in recent decades, leading to billions of dollars in settlements with corporations, has been fraud by hospital corporations, pharmaceutical manufacturers, and other firms doing business in whole or in part through government-supported healthcare programs.

Tax evasion and tax fraud comprise another major area in which the criminal law addresses cheating of the government. Two things are unusual, and perhaps somewhat surprising, about criminal tax prosecutions in the United States. Both have to do with the fact that tax laws have grown increasingly complex and are filled with somewhat arbitrary lines that are the product of compromises in legislation, rule-making, and ever more contentious budgetary negotiations.

First, cheating on taxes is prosecuted relatively rarely. The government prefers to handle these matters civilly. Out of all those audited and discovered to have violated

[33] Harry First, *Criminal Antitrust Enforcement* (1991), 1 ff.

the law, the government typically chooses for criminal prosecution only those taxpayers who have not just failed to report income or taken excessive deductions but who have pursued affirmative measures to hide and misrepresent their finances before the Internal Revenue Service. One explanation for the small number of prosecutions has been that the government relies intuitively on an idea that has been explored in academic theory: that too many prosecutions for tax evasion could send the signal to the public that cheating is rampant and that those who continue to pay their taxes are "chumps." It cannot be disputed that the government has very limited resources relative to the enormity of the taxation system and that tax compliance in the United States is in reality, though not in law, essentially dependent on the people's good faith.[34]

Secondly, the courts have developed special *mens rea* rules for criminal tax cases. The principle that ignorance of the law is no excuse has been relaxed in tax cases by means of the federal courts' interpretation of Congress's use of the term "willfully" in tax statutes to mean the intent to violate a known legal duty.[35] The complexity and lack of simple logic in tax law have been said to defeat the usual rationale that people are fairly expected to know the law. Such rulings obviously deter prosecutors from bringing criminal tax cases. However, it must be noted that the government has been willing to take on, with some success, the lucrative and aggressive tax shelter industry with criminal prosecutions, including of advisors employed by major law and accounting firms.[36] Particularly in view of the theme of embeddedness, it is no trifle that the government has sent more than one partner of a national law firm off to prison for giving opinions on tax shelters that were found to have crossed the line from legal advice to counseling crime.

Another category of fraud against the government, again speaking broadly, includes offenses against administration of judicial and regulatory systems. Federal prosecutors generate a relatively large number of cases annually involving charges of perjury, obstruction of justice, false statements in official government matters, contempt, and the famously amorphous "conspiracy to defraud [the government of] the United States."[37] As with tax evasion, the proportion of such prosecutions to the likely incidence of, for example, lying in the courts must be quite low. Perhaps here too prosecutors are reluctant, in their efforts to manage perceptions about deterrence, to bring too many cases.

Prosecutorial discretion in this area is exceptionally broad and, frankly, unprincipled, generating consistent criticism.[38] The government does not in any systematic way police the administration of justice. Rarely if ever is someone prosecuted

[34] Eric A. Posner, "The Case of Tax Compliance," (2000) 86 *Virginia LR* 1782 ff.; Dan M. Kahan, "The Logic of Reciprocity: Trust, Collective Action, and Law," (2003) 102 *Michigan LR* 71 ff.

[35] *Cheek v. U.S.*, 498 U.S. 192 (1991).

[36] *U.S. v. Pfaff*, 407 Fed. Appx. 506 (2010).

[37] 18 USC § 371.

[38] Daniel C. Richman and William J. Stuntz, "Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution," (2005) 105 *Columbia LR* 583 ff.; Julie R. O'Sullivan, "The Federal

just because she happened to give false testimony or withhold a document in, for example, a civil lawsuit or a routine regulatory hearing. Instead, prosecutors appear to pursue such cases for two reasons that sometimes overlap. First, the strength of the human impulse to lie and cover up nearly guarantees that, once prosecutors begin any serious investigation, they will end up with some evidence of perjury, obstruction of justice, or false statements that can support a criminal prosecution even if the matter that started the investigation never bears evidentiary fruit or was not a crime in the first place. Secondly, prosecutors seem to favor pursuit of such cases, rather than declination, when the potential defendants are famous or likely to garner media attention, perhaps in the belief that deterrence is hard to come by in this area so message considerations should dominate. Martha Stewart, I. Lewis "Scooter" Libby, and (almost) Bill Clinton are the most frequently cited examples of this.

The law governing crimes against the administration of justice, which is exceedingly broad, contributes to problems of prosecutorial discretion and line-drawing. The general federal obstruction statute makes it a crime to interfere with "the due administration of justice."[39] Another famous statute treats as a felony any false oral or written statement in any federal government matter, whether or not the defendant knew of the government's involvement.[40] A recent statute, enacted after disputes in the early 2000s over document shredding and deletion in a couple of major accounting and securities firms, similarly criminalizes the destruction of any document relevant to a federal government matter.[41] (Perjury statutes, on the other hand, retain roots in the common law and are narrowed by their requirement that a tribunal have administered an oath.)

Prosecutions under these laws produce a myriad of questions about what ought to be a crime, questions that have been neither asked nor answered in the legislative process. Should prosecutors be allowed to treat as a felony a simple, impulsive denial that a person utters when a government agent asks whether she has committed a crime?[42] If a lawyer in business with his client files frivolous requests for injunctions to slow a criminal investigation of his client that would bring their business down, has the lawyer obstructed justice?[43] What about the lawyer who, on retainer to the target of an investigation and paid to represent others who are witnesses, advises them all to assert their constitutional right to silence in the grand jury, at the direction of the target?[44] When does a company's use of its long-standing policy on document retention and destruction become obstruction of justice because the company steps up "compliance" with the policy just when it learns that

Criminal 'Code' is a Disgrace: Obstruction Statutes as Case Study," (2006) 96 *Journal of Crim. Law & Criminology* 643 ff.

[39] 18 USC § 1503.
[40] 18 USC § 1001.
[41] 18 USC § 1519.
[42] *Brogan v. U.S.*, 522 U.S. 398 (1998).
[43] *U.S. v. Cueto*, 151 F.3d 620 (1998).
[44] *U.S. v. Cintolo*, 818 F.2d 980 (1987).

a government investigation is brewing?[45] Has a lawyer committed obstruction of justice if she destroys a hard drive given to her by a client when the hard drive contains images of child pornography that are a crime to possess? Federal case law is increasingly filled with such tricky questions of the borderline between crime and adversarial litigation or ordinary interaction with government.

c) *Fraud in government*

Just as a bigger government supplies more opportunities to cheat the state, a bigger government employs more people who may include not only the public-spirited but also the venal. Corruption, whether covered by bribery, extortion, or other laws, has been commonly criminalized since at least the nineteenth century.[46] But the matter has grown much more complex with the scale of private financing of contemporary U.S. politics.

U.S. criminal law has dealt with the line-drawing problem in this realm through doctrine that identifies corruption, under the most commonly deployed statutes, as the giving of something of value with the intent to influence official action pursuant to a "quid pro quo," that is, a contract-like understanding that payment *x* is in return for official decision *y*.[47] In recent reforms to its bribery laws, the United Kingdom has followed a similar approach.

Given the practical difficulties of proof that attend such quid pro quo requirements, this might be a workable means of filtering cases. But it is an imperfect solution to the boundary problem in corruption. Conceptually, if not doctrinally, it remains difficult to explain the difference between these two cases: paying a member of Congress to vote against a proposed law to regulate banks more strongly; and regularly sending heaps of campaign contributions to the same member with the reasonable expectation, based on past performance, that the member will vote against all such proposed laws.

Probably this is because Americans do not have a clear idea of how to specify what they think corruption really is, in spite of the constant use of casual metaphors about "clean government," "sewers," and the like. The result is uneven exercise of prosecutorial discretion, which swings between cases of flagrant organized graft, such as that involving former Congressman Randy "Duke" Cunningham of San Diego, and cases of ethical missteps, such as that of the home renovations accepted by former Senator Ted Stevens of Alaska, a criminal conviction the government ultimately abandoned due to serious prosecutorial errors.

Two more features of contemporary criminal enforcement involving government officials are especially interesting. First, in the United States this field presents

[45] *Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005).

[46] James Lindgren, "The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act," (1987) 35 *UCLA LR* 815 ff.

[47] *U.S. v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999).

challenging and hotly debated issues of federalism. The Department of Justice has for many decades viewed its mandate as including the policing of state and local corruption. Protecting citizens from corruption in government institutions that fail meaningfully to represent them or police themselves, the argument goes, is akin to using federal power to protect citizens from violations of their civil rights when states fail to provide that assurance.

Because Congress lacks the constitutional power to regulate state and local government directly, pursuit of this agenda has required legislative and prosecutorial creativity. Federal bribery statutes are applied to state and local government institutions that use federal funds. Or federal fraud statutes are applied on the theory that state and local officials owe a "duty of honest services" to their constituents. Some believe, with occasional sympathy from the Supreme Court, that these extensions of federal criminal law, rather than protecting citizens from state and local graft, threaten to deprive the people of their rights and authority to control their own governance.[48]

Secondly, the law of bribery is venturing more frequently into international waters, where it is encountering strong and unpredictable cross currents. The Foreign Corrupt Practices Act and the U.K. Bribery Act 2010, along with similar laws adopted by other developed economies pursuant to treaty obligations, appear to seek to eradicate the sort of rent-seeking by officials in developing economies that had long been an accepted cost of doing business abroad. Indeed, the Department of Justice has said that its aggressive recent enforcement activity in this area is intended to change international business culture.

The complication, of course, is that legal lines that are difficult to draw become even trickier to make out as one carries doctrine around the globe, traversing diverse normative environments. One country's idea of graft may be another country's idea of efficient bureaucracy. Corruption in government can be entrenched and difficult to dislodge. Social norms are even harder to alter quickly.

Complicating matters are confusing questions about whose interests are advanced by a global campaign against corruption in the conduct of business with governments. Citizens of successful market economies that have been relatively free of corruption? Those who yearn to have such economies? Businesses venturing forth with good intentions but loathe to cede competitive advantages? Businesses trying to get off the ground in markets that have previously tolerated bribery? Free-riding countries that do not pursue enforcement against their own firms but would like the field of competition cleared by enforcement against the firms of other countries? It will be some time before we know what the public and private effects have been of the increased presence of criminal enforcement in the international business realm.

[48] Roderick M. Hills, Jr., "Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?," (2005) 6 *Theoretical Inquiries in Law* 1565 ff.

d) *Harm to health and the environment*

The final major sector of white-collar criminal enforcement encompasses activities that harm, or threaten to harm, public health and the environment. Instrumentalist thinking dominates the crafting and enforcement of these offenses, as it is often difficult to construct strong or fully coherent accounts of moral blameworthiness in such cases. Typically the law takes what are simply regulatory violations of a civil nature and layers on top of them criminal offenses that carry much more severe penalties for violations committed with heightened forms of *mens rea*.

Of course, as in other areas of white-collar crime, there are plenty of egregious cases that lack any ambiguity about criminality: the global oil company that recklessly allows a tanker or an offshore well to fail, ruining an ecosystem; or the landlord who disregards fire codes and then sees a nightclub packed with clients engulfed in flames. Sometimes prosecutors use old-fashioned homicide statutes to pursue such cases, along with charging criminal offenses relating to environmental harm or public safety.

Regulatory offenses, however, more commonly involve debatable choices about where to set the line between crimes and civil penalties. Consider two common examples. The Clean Water Act, a landmark environmental legislation of the 1970s, includes provisions criminalizing the violation of discharge permits.[49] In other words, it is not necessarily a crime to release pollutants into public waterways. (Sewage management, among other things, would be impossible if it were.) It is a crime to release more of something than one has been given a license to release, after complicated processes of application and approval. Doing so with intent can be a felony.

Somewhat similarly, the Federal Food, Drug, and Cosmetic Act, which regulates the pharmaceutical industry, makes it a crime to market drugs for purposes other than those approved by the government after an even more complicated process of application and review.[50] Nothing in criminal law prevents a physician from treating her patient with lawful drugs as she sees fit, including by prescribing a medicine to treat something for which the medication has not been tested. But if a drug company representative informs a doctor of a medicine's possible effectiveness for an illness for which the government has not approved the drug, the representative and his employer have engaged in criminal marketing of the drug.[51] In doctrinal terms, they have committed the crime of "misbranding." This type of prosecution, and threats to bring it, have yielded billions of dollars in payments to the government by pharmaceutical manufacturers over the last two decades.

[49] 33 USC § 1319. [50] 21 USC § 331.

[51] An emerging line of First Amendment reasoning threatens to complicate the government's efforts in this area. *U.S. v. Caronia*, 703 F.3d 149 (2012).

2. Responses to the problem of legal specification

As with virtually any significant matter of law, it is essential to the understanding of substantive white-collar crimes to have in view their institutional dimensions. In terms of this chapter's theme, the object is to see how major legal institutions cope with the problem of embeddedness and its production of line-drawing challenges. The institutional dimensions of white-collar crimes are rich subjects of economic, political, legal, and normative inquiry that can only be flagged here.

a) *Legislation*

Many who enter debates about white-collar crime, especially defense advocates engaged in the task of litigation, argue for a seemingly simple response to the problem of embeddedness. The criminal law, carrying the severest public sanctions short of war craft, ought to stay well back from boundary regions, applying itself only to "core" white-collar crimes that engender little or no disagreement: premeditated Ponzi schemes, outright embezzlement of corporate assets, deliberate perjury before enforcement tribunals, and the like. As long as the criminal law keeps its eye on its core task, the argument goes, legislation can clearly and precisely describe prohibited behaviors.

The problem is that behaviors in the competitive realms of economics and politics evolve and diversify too rapidly for such approaches to be effective. The modern administrative state, with its massive rule-making bureaucracies, ameliorates the problem to some degree. But even these executive branch institutions can be lethargic and inefficient, and many believe as a normative matter that they should not substitute too often for legislatures.

Positive law supplies considerable evidence of the seriousness of this difficulty. Common law systems have repeatedly opted in the realm of white-collar crime for broad legislative prohibitions that are tacitly or explicitly meant to be filled in by courts through the process of adjudication. Fraud statutes prohibit "schemes to defraud." Obstruction of justice statutes prohibit "interference with the administration of justice." Corruption statutes prohibit "payment with intent to influence." Extortion statutes prohibit "coercion." There are many such examples. In spite of abundant rhetoric about the constitutional allergy to criminal liability in uncertain circumstances, most white-collar criminal law in the United States cannot be understood fully without the help of lawyers and judicial opinions.

Some scholars have argued that this feature of criminal legislation is a function of the economy of politics.[52] There is much truth in what they have said. Except when legislators see anti-corruption prosecutors headed their own way, they have little incentive to narrow the substantive criminal law. The least-cost option is to vote in

[52] William J. Stuntz, "The Pathological Politics of Criminal Law," (2001) 100 *Michigan LR* 505 ff.

favor of each new, broad prohibition and let prosecutors—who are keen to husband public support for their actions lest their legal weapons be taken away—choose to use broad statutes to punish the "bad" while leaving the "good" alone. Perhaps surprisingly, this dynamic has affected not only politically powerless street offenders but also well-represented corporate criminals, whom the public often wants to see treated severely.

There is more to the story, however. Even life-tenured judges, who are not subject to electoral politics, have been full participants in filling in white-collar criminal law case by case. Statutes are infrequently narrowed by interpretation in criminal cases. They are almost never ruled unconstitutionally vague or broad. Going back centuries, Anglo-American courts have said that prohibitions against fraud, obstruction of justice, and other behaviors must be left somewhat open-ended, lest the crafty wrongdoer too easily evade punishment.

The fact is that the political economy is not the only economy influencing white-collar criminal legislation. There is also an economy of law compliance, law violation, and law enforcement, which is exceedingly competitive in the corporate sector, whose occupants devote massive resources to planning in the shadow of law. To take just one example, several prominent frauds of the early 2000s (Enron, WorldCom, etc.) were based on sophisticated manipulations of the U.S. accounting regime, which can be similar to tax law in its specificity and arcana. Without general prohibitions against deceiving shareholders, well-counseled public companies could engineer misleading financial statements around, and through the gaps in, accounting rules—especially given the argument that reliance on professional advice ought to be a defense to fraud. For good or ill, lawmakers and the public have concluded that broad antifraud prohibitions are necessary to deter such behaviors and that civil enforcement alone cannot adequately protect the public.

b) *Prosecution*

The persistence of open texture in white-collar criminal laws surely rests in part on the pattern by which prosecutors enforce those laws. If prosecutors pushed the major statutes to their full logical limits in too many cases, especially in the realm of routine business activity, support for such laws would likely drain away. Prosecutors are not naïve about this, nor are the many well-intentioned officials among them uninterested in questions of public welfare. The result has been the development of informal practices of charging white-collar cases when the facts are "bad" or "egregious"—as measured by the level of venality in mental state, the kind or amount of harm inflicted on the public, or more often some combination of the two. Plenty of disputable cases still enter the system, but far less than the logic of the law would allow.

Strong evidence for this dynamic in prosecutorial decisions can be found by examining the contemporary practice of white-collar criminal defense. Business is booming. And this form of law practice consists largely of what the bar refers to as "conference room litigation," that is, a process of negotiation and contestation during the investigative phase that is designed to persuade authorities that the case is not "really criminal" at all, or at least merits a lesser form of conviction and sentence.[53] This informal litigation before actual criminal charges even includes forms of appeal. The Department of Justice routinely affords defense counsel the opportunity to argue to supervisory personnel that "line" prosecutors are preparing to make the wrong decision about whether to charge a case criminally.

c) *Adjudication*

Finally, the judiciary plays an important role in managing the boundaries of white-collar criminal law. The motivations for this behavior are not entirely clear. But the results are easily observable. The federal courts generally take one of two approaches when confronted with difficult questions of line-drawing in cases prosecuted under white-collar statutes. Occasionally courts (more often the Supreme Court than the lower appellate courts) will narrow a statute through judicial interpretation to limit its application to a somewhat more predictable class of cases. The most prominent recent such example was the Supreme Court's ruling that a federal fraud statute, which has been frequently used to deal with public corruption and nonmonetary frauds involving violations of corporate fiduciary duties, could no longer be applied in the absence of proof of payment of a bribe or kickback to the defendant.[54]

More often, courts rest rulings on the facts of white-collar cases, finding that a particular defendant's level of wrongful intent makes irrelevant any concern about the statute's potential application to "innocent-minded" persons.[55] In fraud and other cases, this approach can often involve implicit or explicit findings that the defendant was "conscious of wrongdoing" or "knew what she was doing was wrong." This idea has origins in very old jurisprudence about how "badges of fraud," such as active steps to conceal evidence, marked out cases of fraudulent conveyance in debtor–creditor law. (Lord Coke talked about it in a seventeenth-century case involving a debtor who craftily shifted his sheep over to another man's pasture.[56])

The idea seems to be that even though mistake of law is not generally a defense to white-collar crimes, genuine concerns about unfair notice fall away if the defendant had some sense that her behavior was normatively wrong. There is reason to believe that this idea is rooted in extra-legal social norms because of evidence that jurors may approach deliberations in white-collar cases with similar criteria in mind.

[53] Gerard E. Lynch, "Our Administrative System of Criminal Justice," (1997) 66 *Fordham LR* 2117.

[54] *Skilling v. U.S.*, 561 U.S. __ (2010).

[55] *U.S. v. Dial*, 757 F.2d 163 (1985).

[56] *Twyne's Case* (1601) 3 Co. Rep. 80b, 76 E.R. 809 (K.B.).

Jurors typically want to see that "smoking gun" email or memo in which a businessperson worried aloud about whether anyone might go to jail.

III. Punishment and Public Attitudes

It remains to conclude by tying the preceding discussion of law to the broader social context of white-collar crime. There is substantial ambivalence in the United States about how to treat white-collar criminals. Although the point is necessarily speculative, it stands to reason that instability and contestation along the borders of doctrinal crime definitions is at least related to, if not symptomatic of, clashing social attitudes.

The phenomenon is more likely one of genuine ambivalence than of political dispute. Although individuals on the left are well known to be less tolerant of harm resulting from aggressive business conduct than those on the right, it is difficult to say that fixed patterns of attitude toward white-collar crime predictably correlate with demographic and other attributes. Consider, for example, the seeming aggressiveness of U.S. white-collar prosecutors during the George W. Bush administration in contrast with repeated criticisms of Obama administration prosecutors for "failing to put bankers in jail" and the like. More predictable are differing attitudes depending on whether individuals are considering the problem of white-collar crime from a general ex ante perspective or are, ex post, confronting individuals who are candidates for potential punishment in cases of less than flagrant wrongdoing.

1. White collar sentencing in the United States

Evidence of ambivalence is most prominent in the area of sentencing law and practice. Impatience, both within and outside legal institutions, with lenient sentences for white-collar crimes, which often included substitution of fines, probation, and community service for imprisonment, was one of the primary drivers of the U.S. sentencing reform movement of the 1970s and 1980s. The result was the production of constricting sentencing guidelines systems that made it much more difficult for defense counsel and sympathetically inclined judges, especially in federal court, to avoid imposition of prison sentences for white-collar criminals.

As public concern with misconduct in the corporate sector increased during the 1990s and 2000s, legislatures and sentencing commissions steadily harshened sentencing guidelines for financial crimes, to the point at which notional sentences for serious frauds equated to common sentences for murder.[57] At about the same time, the Supreme Court ruled as a matter of constitutional law that guidelines could no longer legally restrain sentencing judges.[58] Not surprisingly, the white-collar sentencing pendulum began immediately to move a bit in the other direction, at least to the extent that few judges in relatively routine cases imposed the exceedingly lengthy sentences—up to and including life imprisonment—that current U.S. law authorizes in white-collar cases involving sizeable losses.

It is much easier to say that a relatively faceless class of corporate executives should be subject to long prison sentences than it is to lock away a particular individual who typically stands before the court with a long record of professional success, no record of criminal activity, a history of charitable works, and a story about her ability to contribute in some substantial way to social welfare if spared prison. The general problem of "corporate criminals" becomes more complex when individualized, for judges of all political stripes. There is reason to believe that jurors may be subject to something of the same dynamic. When a remarkably accomplished, up-by-the-bootstraps member of the Goldman Sachs board of directors was recently prosecuted for insider trading, the jurors reported that they searched for any possible grounds in the evidence on which to acquit the man and send him home, but to their regret found none.

2. Absence of equilibrium

Two major influences likely perpetuate ambivalence towards white-collar crime, and thus contribute to boundary problems in crime definition and pendulum swings in sentencing law and practice. First, a capitalist economic system—and the United States is history's leading example—by definition requires citizens to believe in two conflicting ideas at once. Entrepreneurs must be unleashed to create wealth but penned in lest their pursuit of self-interest generate regrettable and harmful externalities. In the morally charged realm of criminal law, this makes likely a public belief that pursuit of wealth can be either worthy or repulsive, and difficulty in clearly understanding or seeing the difference between the two. Greed is both good and bad.

Secondly, robust U.S. discourse about the idea of equality plays out in complicated ways when it comes to white-collar crime. On the one hand, law should treat no one more favorably because of her social class. As the criminal justice system has grown

[57] Daniel C. Richman, "Federal White Collar Sentencing in the United States—A Work in Progress," (2013) 76 *Law & Contemporary Problems* 53 ff.; Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, (2006) 28 *Cardozo LR* 1611 ff.; Frank O. Bowman, III, "*Pour Encourager Les Autres?*: The Curious History and Distressing Implications of the Sarbanes–Oxley Act and the Sentencing Guidelines that Followed," (2003) 1 *Ohio State Journal of Crim. Law* 373 ff.

[58] *U.S. v. Booker*, 543 U.S. 220 (2005).

notoriously intrusive and punitive toward common criminals, the belief has grown that white-collar criminals ought not be treated any less severely than anyone else. This logic can lead to a kind of doubling-down on incarceration strategies. On the other hand, it can be difficult to ignore real differences that distinguish white-collar crimes—and often but not always the persons who commit them—from murders, rapes, robberies, burglaries, and assaults.

It is hard not to conclude that instability in the law of white-collar crime will persist as long as Western societies have not quite resolved their attitudes toward white-collar criminals and business activity in general. It is not only challenging to say what white-collar crime is; it is also hard to find precisely where it fits in the architecture of contemporary morality. So it remains intensely interesting.

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