Teaching White Collar Crime

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I. INTRODUCTION

Teaching a seminar course on white collar crime is a mixed blessing. On one hand, it offers the instructor the opportunity to introduce a set of statutes, procedures, and practices that are only tangentially mentioned in foundational courses such as criminal law and corporations. At the same time, the lack of a familiar canon can be unnerving. Although the material may not serve as the core component of a state's bar exam, it is inherently challenging, and has evolved considerably in response to federal and state enforcement trends.

This task becomes even more difficult if one enlarges the course to include white collar crimes that have little to do with corporate misconduct. Most corporate and white collar crime courses already introduce concepts such as internal compliance, corporate investigations, and the growth and use of deferred prosecution agreements between government prosecutors and corporations. A more broadly conceived white collar crime course, however, includes the study of crimes such as perjury, bribery and public corruption, and false statement offenses. These crimes, which can occur inside or outside of business organizations, demonstrate white collar crime's conceptual and socio-economic expanse. Its perpetrators include not only well-known celebrities and corporate titans, but also middle and working-class offenders. Thus a white collar crime course may study individuals as well as corporations, and it may examine statutes that ostensibly have little to do with "business," although the possibility of financial profit often lurks somewhere in the background.

II. WHITE COLLAR CRIME AS A SEMINAR

I teach my class as a seminar, which meets once a week for fourteen weeks. I divide the semester into three "units." The first, which is the longest, focuses on substantive federal criminal statutes. We study mail and wire fraud, securities fraud and insider trading, perjury and false statements, the anti-money laundering statutes and Bank Secrecy Act, and the bribery and gratuities statutes. The second unit focuses on white collar criminal procedure. We read several articles on undercover practice in corporate settings, and we study the government's ability to compel documents from corporations through subpoenas, as well as the emergence of the "business records exception" to the Fifth Amendment's privilege against

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self-incrimination, which greatly eases the government's ability to subpoena documents from individuals.

Whereas the first and second units interweave discussions of corporations and individuals, the third unit—what I refer to as "white-collar and corporate criminal practice"—focuses primarily on how the government uses criminal law to regulate corporations. This is primarily a study of law on the ground rather than law on the books. We study deferred prosecution agreements, compliance programs and monitors, and address more structural issues such as parallel prosecutions and enforcement proceedings, as well as the comparative benefits and drawbacks of our decentralized enforcement system that includes the DOJ, the SEC, and state attorneys general. The final week of class is reserved for a practitioner, for whom I create some scenario involving substantive criminal liability within a corporation. Through a series of questions, we probe the practitioner on a number of doctrinal and policy-driven questions regarding the prosecution of a corporation and its employees.

Because it is a seminar, the course includes a cross-section of readings. Each week, students read a statute and several cases; newspaper articles; excerpts of law review articles; and pertinent statutory and regulatory materials. For some statutes, I also provide annotated jury instructions, which help the students digest multiple doctrinal issues in a single week.

Students must choose four out of the fourteen weeks to write a 5-7 page response paper, or they may write a longer 25-page paper on an approved white collar crime topic. In addition, students are divided in pairs and must "present" one week's worth of reading. They can do so creatively, or they can ask a series of provocative questions and bring up newspaper articles or recent cases that they think are relevant. I require the presenters to meet with each other and then meet with me the day before class. On only one occasion have I been disappointed by a student presentation.

III. MAJOR THEMES

Since this is an upper level course, all of the students have a working knowledge of criminal law. Many have taken classes involving the study of securities regulation, corporations, and administrative law. Knowing my students have studied these subjects, I ask them to consider how white collar crime differs from these subjects.

For example, criminal law—at least the way most casebooks portray it—envisions a discrete *actus reus*. Murder, rape, and robbery all entail singular acts with identifiable victims and specific results. Because these crimes rely on the existence of some outcome (which in turn comes about because the defendant expends some amount of time and energy), the law must deal with those situations in which the offender engages in conduct that falls just short of producing such outcomes. Thus, the first year criminal law course spends some time introducing

students to the concept of attempt, and to the distinction between "attempt" and "completed crimes," and between "mere preparation" and criminal attempt.

White collar crime by contrast, is often inchoate, particularly if one focuses on one of its core offenses: fraud. Fraud arises with a "scheme," which can be formed in little more than an instant. Thus, the law of attempt all but drops out of fraud cases. Meanwhile, at the back end, fraud is often never really "complete." Particularly for ponzi schemes and similar ongoing frauds within the securities context, there is rarely a final stage that ends the crime. Instead, the fraud continues until someone detects the fraud, if not the offender. Indeed, a single fraud often begets the need for future frauds. For example, if an inventor seeks investors in his medical device start-up company, his lies about the company's results in year one necessitate ongoing lies about those results in years two and three. This temporal elasticity renders the deterrence of fraud more complicated. Increasing enforcement activity and sanctions for a given type of fraud may reduce bad behavior among those merely considering fraud, but it may also drive "mid-fraud perpetrators" further under ground.[1]

Another theme that arises is whether white collar crime properly sorts bad behavior from worse. This issue has attained particular salience in the securities fraud context, where the same conduct can trigger liability pursuant to a private cause of action, civil enforcement actions by the SEC, or criminal prosecutions by federal prosecutors. The statutory term distinguishing "civil" and "criminal" liability is the term "willful" as used in 15 U.S.C. 78ff(a). As Professor Buell's excellent article on securities fraud points out, lower and appellate courts have largely failed to adopt either a uniform or coherent definition of this term, other than to say that it does not require proof that the defendant was aware of the specific rule or regulation he was violating.[2] Accordingly, it is unclear whether reckless behavior can trigger criminal liability, or whether a finding of "willfulness" requires evidence that the defendant at least knew—or consciously avoided the fact—that she was engaging in generally wrongful conduct.[3]

Similar problems arise when we compare the federal bribery statute (which criminalizes "quid pro quo" deals intended to "influence" an official's future behavior) with the gratuity statute (which, after *Sun-Diamond*, criminalizes reward payments "for" official conduct that either has already occurred or will occur).[4] As

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[1] For a more detailed discussion of these distinctions see Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295 (2008).

[2] *See* Samuel Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 556–60 (2012) (cataloguing judicial interpretations of the term "willful" in securities fraud cases).

[3] "[T]he courts have made virtually no effort to distinguish between the goal-oriented mental state involved in a defendant's purpose to deceive and the knowledge-based mental state involved in a defendant's awareness of the falsity of her representation or the tendency of her conduct or omission to mislead." *Id.* at 559.

[4] *See generally* United States v. Sun-Diamond Growers, 526 U.S. 398, 405–08 (1999) (explaining that the less serious gratuity statute applies to "a reward for some future act that the

critics have pointed out, it is awfully difficult (if not impossible) to locate the conceptual distinction between a "forward looking" gratuity and a bribe.[5]

As the above examples show, across a number of dimensions, the law fails to sort white collar criminal offenses. It ignores temporal distinctions between completed crimes and preparatory actions; it collapses familiar *mens rea* categories into a singular category of "reckless and above;" and it permits confusing overlaps between similar statutes. This statutory and doctrinal vacuum leaves prosecutors in the familiar position of deciding degrees of liability and punishment, and doing so in an entirely opaque and unsupervised way.[6] It is therefore impossible to teach the white collar crime course without exploring the normative implications of prosecutorial discretion.

The discussion of prosecutorial discretion, in turn, leads back to a discussion of corporate crime and the normative and descriptive components of corporate prosecutions. Because the law permits corporations to be found criminally liable for many of their employees' crimes, prosecutors must decide which companies to indict, or monitor under some probationary regime, or leave completely untouched.[7] This topic in particular invites a discussion and analysis of white collar *lawyering* as opposed to white collar criminal *law*. Prosecutors must make decisions according to some metric, most likely a variant of the deterrence and retribution arguments students encountered during their first year of law school. Meanwhile, the white collar defense practitioner must expand her toolkit beyond brief-writing, oral advocacy, and case analysis and synthesis. She must become a skilled negotiator, lobbyist, businessperson and problem solver. She must understand organizational dynamics as well as she grasps *mens rea* and criminal discovery. Granted, many of these skills are beyond the scope of a 14-week seminar, but a white collar course highlights their importance; students interested in pursuing a career in this area can develop these skills further through practice-based courses and externships.

IV. CLOSING THOUGHTS

White collar crime is a broad topic that has and will continue to grow in importance and complexity. Its complexity reflects an increasingly technology-driven, rapidly changing business world. Its importance reflects society's growing discomfort with non-violent, morally ambiguous behavior that threatens highly

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public official will take (and may already have determined to take), or for a past act that he has already taken").

[5] *See, e.g.*, Charles B. Klein, *What Exactly Is an Unlawful Gratuity After* United States v. Sun-Diamond Growers?, 68 GEO. WASH. L. REV. 116 (1999).

[6] Judge Lynch describes this process at length in *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2126–30 (1999).

[7] On the breadth of the corporate criminal liability doctrine, see Miriam H. Baer, *Insuring Corporate Crime*, 83 IND. L. J. 1035, 1049 (2008).

negative and far-reaching effects. Regardless of how it is taught, a single course can only scratch the surface of many of these issues. Even so, it offers a much-needed platform for students to develop a deeper and broader understanding of the laws and legal institutions that protect our markets, businesses, and daily interactions with each other.