The Future of White Collar Crime

By: Ellen S. Podgor

The future of white collar crime is bleak, at least from the perspective of the use of the term. The term “white collar crime” was coined by Edwin Sutherland in a speech to the American Sociological Society in 1939. Since then many definitions have been given to describe what is encompassed within the term. But the reality is that the lack of a consistent definition raises problems as statistical reporting of white collar crime is skewed by the fact that there is no formal Department of Justice definition and no clear indication of what statutes are encompassed within the term.

As initially a sociological concept with limited legal roots, the term “white collar crime” developed over the years to include different types of criminality. For example, corporate criminality can be traced back to well before the use of the term white collar crime. Today, however, most consider corporate criminality under the white collar crime rubric. Likewise, Ponzi schemes are often thought of as being a form of white collar crime. But the reality is that Charles Ponzi’s criminal activities date back to the 1920s. Thus, many activities that might be considered within the realm of white collar crime happened prior to the coining of this term by Edwin Sutherland.

Throughout the years we have seen an increased number of schools offering white collar crime courses, and several casebooks on the subject have been written. In the law practice we have seen the development of firms with groups now focusing exclusively on white collar crime conduct. From the days of large firms rejecting white collar cases, to the development of “special matters” sections in the firms to handle these cases, to today seeing the wealth of advertisements by large firms of their practice groups in the white collar area, it is clear that the supposed shame of handling a white collar criminal case has dissipated. In fact, it has proven a lucrative area to many law firms. What gets encompassed within white collar crime practice

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1 Gary R. Trombley Family White Collar Crime Research Professor & Professor of Law, Stetson University College of Law.

2 Reprinted in Edwin H. Sutherland, White Collar Criminality, 5 AM. SOC. REV. 1 (1940).

3 See David T. Johnson & Richard A. Leo, The Yale White-Collar Crime Project: A Review and Critique, 18 LAW AND SOC. INQUIRY 63 (1993)(examining different definitions of the term white collar crime); ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL, NANCY J. KING, WHITE COLLAR CRIME 1-3 (2013) (noting the progression from the original definition to how the current term is used in criminal prosecutions).

4 See generally Lucian Dervan & Ellen S. Podgor, White Collar Crime: Still Hazy After All These Years, 50 GEORGIA L. REV. 1 (2016) (discussing how some crimes such as RICO may fall in both the white collar and street crime categories as a result of its predicate acts).


6 The landmark corporate criminality case is New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909), a 1909 decision that allowed for the prosecution of corporations for crimes requiring a mens rea.

7 See Ellen S. Podgor, 100 Years of White Collar Crime in “Twitter”, 30 REV. LITIG. 535, 547-48 (2011) (citing BLACK’S LAW DICTIONARY 1278 (9th Cir. 2009)).
groups continue to vary, with some including public corruption and regulatory work and others focusing on administrative compliance matters. Many of the large law firms are quick to tout the hiring of former Department of Justice (DOJ) attorneys.8

White collar crime is considered a “hot” issue today in that we find blogs, columns, and journals focused exclusively on this subject. We also see the term bandied about in the political rhetoric of candidate’s campaigns. It is the white collar criminals that are blamed for the financial crisis we experienced.9 Likewise, it is the white collar criminals responsible for the corporate fraud and misuse that seems to permeate this realm.

We also see prosecutors espousing strong rhetoric that they will stop white collar criminals.10 Whether it be corporate executives, insider traders, or governors engaging in corruption, prosecutors are quick to take these cases and the statutes used in the indictments often are not crimes exclusive to white collar conduct. This is in large part because prosecutors use short-cuts to obtain pleas and convictions. Thus, charges of false statements,11 obstruction of justice,12 and perjury13 become the tool of choice in the white collar world, as it often does outside the white collar area. After all, Martha Stewart was not charged with insider trading. Rather, prosecutors used crimes such as obstruction of justice and false statements.14

But in examining “white collar crime,” it is also important to note that this term is not a static concept. One need only look at the different task forces created by presidents. For example, in 2002 President Bush established the Corporate Fraud Task Force.15 In November 2009 we see President Obama renaming this the Financial Fraud Enforcement Task Force.16 Each with a focused mission, but perhaps one that came under the umbrella of white collar crime.

So with so much improper conduct, with classes being taught on this subject and books being written, why am I making the bold statement that the future of white collar crime is bleak? The sustainability of this term is questioned here because there is little statistical reporting of this criminality and few boundaries to what is encompassed within the term. Equally important in

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8 The smaller boutique white collar firms come not only from the DOJ, but also from the large firms and from public defender offices.
answering this question is whether the term “white collar crime” should be the term of the future. Here again, my answer is no.

The existence of the term white collar crime was an opportunity to bring together many different forms of fraudulent conduct. It presented the Department of Justice with an ability to increase funding by placing this misconduct under one heading.

But that did not happen. Instead we see U.S. Attorneys bringing cases that make a mockery of the importance of prosecuting white collar criminal activity. Charging a case such as Yates v. United States, a Sarbanes Oxley Act prosecution for obstructing justice in throwing fish overboard when the fisherman was asked to return them to shore is hardly a case to emphasize the importance of prosecuting white collar crime. Likewise, a prosecution under the Lacey Act for importing spiny lobsters in clear plastic bags questions whether white collar crime deserves increased funding. And now pending before the Eleventh Circuit, a case of a 64-year old couple prosecuted for wire fraud for failing to disclose a sink hole on a private home real estate transaction hardly matches the slow prosecution of Bernard Madoff for huge losses to people and entities. The overcriminalized landscape, with statutes often lacking a mens rea, has left the term “white collar crime” as a large target that prosecutors can throw arrows at without accountability.

We need to revise the terminology to reflect the needs of society, and in doing so we need to refocus on new forms of conduct that in the past may have been thought of as white collar crime, but ones that do not offer quick convictions and thus may not have been examined sufficiently. The focus needs to be on these specific forms of conduct in order to hold prosecutors accountable for deterring this conduct.

In this reformation, the three key areas that need to be the focus are: 1) computer and technology related misconduct; 2) corporate compliance, and; 3) financial frauds. Instances of hacking, identity theft, and corporate internet espionage need to be addressed. Likewise corporate compliance needs to be better developed in the law and in teaching in law schools. Finally, financial frauds, whether it be insider trading or bank fraud need to be studied with the aim of curtailing misconduct and illegalities.

In this refocus, the line between criminal and civil regulatory action should be a major aspect of the conversation. The answer to an underfunded regulatory system should not be an indictment. So, too, white collar crime rhetoric should not be used to mask a broken regulatory structure. Finally within the conversation of what should be criminal and what should be civil, needs to be a consideration of education, that is educating business folks of what is proper

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18 See United States v. McNab, 324 F.3d 1266, amended by 331 F.3d 1228 (11th Cir. 2003); see also Paul Rosenzweig and Ellen S. Podgor, Eight years for bagging lobsters? available at http://www.heritage.org/research/commentary/2003/12/eight-years-for-bagging-lobsters.
conduct in their daily transactions. There also needs to be research on how best to deter this conduct.

“White collar crime” as a concept had a bright future in 1939 when the term was coined by Edwin Sutherland. It offered a way to consolidate criminality with rhetoric that would elevate its presence and allow for increased funding and prosecution. But the lack of prosecutorial accountability has led it down a path that fails to address important areas of misconduct. Breaking this term down to its specific conduct and refocusing on three key areas offers a way to achieve better deterrence.