Better Differentiating White Collar Crimes

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The following is very much a set of (at best) half-baked ideas about how we should look at white collar crime. This thinking builds from an article I wrote not long after the blowout of BP’s Macando well in the Gulf Mexico that spilled billions of gallons of oil into the ocean. ¹

In that article, I argued:

Despite the potential appeal of dramatically increased liability and sentences, and perhaps even strict criminal liability (which means that no proof of intent is necessary to convict), this Article argues that more aggressive criminal provisions and enforcement related to environmental harms, up to and including strict criminal liability, are not likely to protect the environment better or lead to safer work environments. . . . [Instead,] rather than reducing mens rea standards and increasing criminal liability, U.S. energy and environmental law needs to focus on encouraging proper risk assessment and risk management to promote safe and effective energy extraction and production while encouraging and protecting both the environment and the economy. ²

I am not anti-punishment. I just think we can be more effective in establishing prophylactic policies that retain the ability to punish wrong doer while increasingly the likelihood punishment will actually occur.

Maybe All White-Collar Crime Is Not the Same

When we talk about white-collar crime, there are a few different types of scenarios to consider. The FBI explains white-collar crime as follows:

Reportedly coined in 1939, the term white-collar crime is now synonymous with the full range of frauds committed by business and government professionals. These crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage. ³

However, that 1939 definition, almost certainly from sociologist Edwin Sutherland, defined the term more broadly: “a crime committed by a person of respectability and high social status in the

² Id. at 3.
³ https://www.fbi.gov/investigate/white-collar-crime
course of his occupation.”\textsuperscript{4} This broad definition can include simple crimes – such as a bank employee forging a signature card – and much larger crimes, like those claimed against Enron’s Ken Lay and Jeff Skilling.

I agree that all of these crimes are “white collar,” but I suggest that we should be looking at different types of crime differently. This is not because I think one type is less culpable than another, but because I think certain crimes are harder to pursue (and disincentivize) if we think if think of all such crimes the way the FBI frames them. That is, it is not clear to me that the FBI is always right that “[t]he motivation behind these crimes is financial.”

To help explain my thinking on this, please consider the following, which I wrote for the Business Law Prof Blog:

Tuesday, November 17, 2015
As Blankenship Trial Rests, Follow the Coal, Not the Money
By Joshua Fershee

The defense for Don Blankenship, former CEO of Massey Coal, rested today without putting on any witnesses. Blankenship is on trial because he is charged with conspiring to violate federal safety standards. Investigators believe that Blankenship’s methods contributed to a mine disaster that killed 29 people at the Upper Big Branch mine in West Virginia.

One part of the trial has an interesting business law component. Prosecutors have tried to show the Blankenship’s interest in making more money was a key factor in cutting corners. One West Virginia news paper reported it this way:

“The government is using his compensation package as an indication of how much production mattered to Don,” said Mike Hissam, partner at Bailey & Glasser.

“They’re using his compensation to establish a motive for him lying and making false statements to investors, their theory being his compensation was so tied up with company stock he had a motive for lying to the SEC and the public to protect his own personal net worth.”

It’s possible that this is accurate, but I am leery of that line of thinking. It's not that I don't think it's possible Blankenship cut corners because it cost money, but it's not clear to me that would be the main of even a significant reason, if he did. The problem with this line of thinking is that Don Blankenship has tons and tons of money. So the risk is that the jury looks at and says, "Nope -- he's already rich. Why would that motivate him so much?" Further, while

Blankenship stood to make money when things went well, his net worth was tied to company stock, so bad outcomes hurt him, too. The incentive story is not as easy as it seems.

My theory for the jury on this point would be more like this: Blankenship played the game to win. He liked winning, and he was used to winning, and he would not stop. His winning made him rich. And what was it that made him a winner? More coal coming out of the ground. His coal. Coal, not money, earned points. Coal, not protecting lives, earned points. Safety measures and slow downs or shut downs lost points. And Blankenship was about scoring points. If the rules didn't help him, he tried to change the rules. And who was hurt along the way did not matter. Because hurt people don't score points. Only coal matters in Blankenship's game.

Anyway, there's a reason I'm not a prosecutor, but I put my theory forth because I am a little skeptical that the money-as-the-goal message will resonate with a jury the way prosecutors hope. (To be clear, this is not the only theory prosecutors put forth -- it's just the one I am focusing on.) My colleague Pat McGinley explained the challenges with Blankenship this way:

"There are a considerable number of people who view Mr. Blankenship in his role as the Massey CEO as arrogant and dismissive of criticism," he said. "But the jury hasn't seen that side of him. And don't forget he's embraced by many people, including many powerful people; he's not universally viewed as arrogant or in a negative light. What's important here is what assessment is the jury going to have? Had Blankenship testified, we'd have a better sense of what the jury might think of him, because we'd at least have his testimony to assess. We'd know at least part of what the jury knows. But he didn't. No witnesses for the defense, and no insight for those watching.

It should be an interesting few days.

Ultimately, my (I think modest) suggestion is that the crimes we see from people like Blankenship, Lay, and Skilling, and the potential crimes committed by VW in their work to avoid emissions restrictions, are not really the same as those from the bank teller, or a rogue trader, or the promoter of the Ponzi scheme. At this point, I am not even sure if I am suggesting the law needs to change or if I am merely advocating a change of how we think about current law.

Because the motivation is not always financial – at least not in the same way – I am arguing that we need to look differently at the high-level crimes and how we pursue them. If we do so, we may do a better job of appropriately punishing such crimes, and perhaps even deterring them in the future.