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The Concept of White Collar Crime in Law and Legal Theory

Stuart P. Green†

Use of the term "white collar crime" to refer to some category of illegal, or at least deviant, conduct is now a common feature of our linguistic landscape. Sociologists and criminologists, though disagreeing among themselves about exactly what the term means, have been talking about white collar crime for more than sixty years. The majority of American law schools have a course in the subject. Journalists and politicians refer to it regularly. Law enforcement agencies, prosecutors, and defense attorneys all claim expertise in the area. And the term is increasingly being used outside the United States, both in English and in translation.

Yet, despite its currency in the academic, professional, and popular culture, the term "white collar crime" occurs only rarely in substantive criminal law. The term appears in only a handful of relatively obscure criminal statutes, and the question whether an offense should be considered a white collar crime is one that has arisen in even fewer cases. Or at least that was the case until recently. For it is striking that, in the recently-enacted Sarbanes-Oxley Act—one of the most important pieces of federal criminal law legislation in many years, and the subject of this symposium—the term makes a prominent appearance.

The aim of this article is to inquire into the many meanings of white collar crime. I begin by identifying three fault lines upon which disagreement over use of the term has developed, particularly among social scientists. Here, we find a remarkably wide range of both proposed definitions and terminological alternatives. I then turn to the various ways in which the term has been used by law

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enforcement officials, prosecutors, and the defense bar, and in law school curricula and legal scholarship. In these contexts, we find a much narrower range of variation than in the social sciences. Next, I consider the use of the term in substantive criminal law, including under the Sarbanes-Oxley Act. I identify five such contexts in which the term has been used, and argue that in only one, or possibly two, of these is such use unproblematic. Finally, I inquire into the appropriate use of the term in the context of legal theory. My contention is that, despite the various problems it poses, the term "white collar crime" remains indispensable. But, I suggest, it needs to be used with care. To this end, I offer the legal theorist a preliminary, context-specific, "family-resemblance"-based framework for thinking about "white collar crime."

I. THE MEANINGS OF "WHITE COLLAR CRIME"

The meaning of white collar crime, like that of other abstract terms in legal, social science, and philosophical discourse (think, for example, of "coercion," "violence," "victim"), is deeply contested.[1] Definitions vary both across and within disciplines and linguistic practices. White collar crime scholars have sometimes sought to find an agreed-upon meaning of the term; other times, they have looked for substitutes. But none of these efforts has been successful: Whatever definitions have been offered have failed to find general acceptance; whatever alternatives have been suggested have proved inadequate. Despite its fundamental awkwardness, the term "white collar crime" is now so deeply embedded within our legal, moral, and social science vocabularies that it could hardly be abandoned. The term persists and proliferates not so much in spite of

1. Kip Schlegel has compared the controversy over the meaning of "white collar crime" to that over the meaning of "privacy." Recalling Status, Power and Respectibility [*sic*] in the Study of White-Collar Crime, at 98, in National White Collar Crime Center Workshop, Definitional Dilemma: Can and Should There be a Universal Definition of White Collar Crime?, at http://www.nw3c.org/research_topics.html (last visited Oct. 22, 2004).

its lack of definitional precision, but because of it. Speakers attribute to it those meanings that correspond to their own particular analytical or ideological concerns.

My aim in this part is to examine several contexts in which the term "white collar crime" has been used: by social scientists; among law enforcement officials, prosecutors, and defense attorneys; in the law schools; and in substantive criminal law legislation.

A. Critical Issues in the Battle over the Definition of "White Collar Crime"

One interesting difference between white collar crime and many other contested concepts in law, the humanities, and the social sciences is that its origins are so easily known and so widely acknowledged. The term was first used only sixty-five years ago by Edwin Sutherland, the most influential American criminologist of his day, in a presidential address to the American Sociological Association.[2] Sutherland was famously vague and inconsistent in saying exactly what the term should mean. But even if he had been precise and consistent in his usage, it seems likely that the term would still have generated uncertainty and misunderstanding among other users of the term. The concept that Sutherland was the first to put a label on is one that is so inherently complex and multi-faceted that it seems unlikely that one single definition could ever prevail.

The story of how the social sciences have used the term "white collar crime" has been told on many occasions.[3]

2. Edwin H. Sutherland, White-Collar Criminality, 5 Am. Soc. Rev. 1 (1940), reprinted in White-Collar Crime (Gilbert Geis & Robert F. Meier eds., rev. ed. 1977); see also Edwin H. Sutherland, White Collar Crime: The Uncut Version (1983).

3. See, e.g., Gilbert Geis, White-Collar Crime: What Is It?, in White-Collar Crime Reconsidered 31-52 (Kip Schlegel & David Weisburd eds., 1992); David Weisburd et al., Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts 3-9 (1991); Stanton Wheeler & Dan Kahan, White-Collar Crime: History of an Idea, in 4 Encyclopedia of Crime & Justice (2d ed. 2002); Proceedings of the Academic Workshop, National White Collar Crime Center,

Rather than repeating that history here, I would like to focus on three critical issues that have arisen in the battle over the meaning of white collar crime: (1) Should the term refer only to activity that is actually criminal, or also to other forms of non-criminal "deviance"?; (2) Should the term refer to behavior (whether criminal or not) engaged in exclusively or primarily by particular kinds of actors, such as those who occupy certain jobs or have a high socio-economic status; or should it refer instead to some particular kinds of acts?; (3) Assuming that the term should refer to a particular category of criminal acts or other deviant behavior (rather than to actors), what factors should determine which such acts will be included?

1. Should "White Collar Crime" Refer Only to Activity That Is Actually Criminal or Also to Other Forms of Non-Criminal "Deviance"?

To lawyers, the term "crime" denotes a legal category. It refers to particular kinds of conduct that our legal institutions recognize as "criminal." Such conduct must be defined in a particular manner, employing certain characteristic concepts such as actus reus and mens rea; it must have a certain "public" character in the sense that a wrong is committed against the public as a whole and charges are brought in the name of the government or the people; the question whether a crime has been committed must be adjudicated in a particular manner, with various actors playing distinctive roles, employing distinctive procedures and burdens of proof, and recognizing distinctive procedural rights; and it must entail certain characteristic forms of punishment.[4] To lawyers, therefore, it seems obvious that when one talks about "white collar

Definitional Dilemma: Can and Should There Be a Universal Definition of White Collar Crime? (1996).

4. See generally Antony Duff, Theories of Criminal Law, Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/entries/criminal-law (last substantive content change Oct. 14, 2002).

crime," one should be talking about some subcategory of conduct that reflects such criminal law-like characteristics.

To social scientists, this point is less clear. Sociologists and criminologists are concerned less with legal labels and categories than with describing patterns of behavior, its causes, and society's attitudes towards it. Thus, for Sutherland and many of his fellow sociologists, white collar crime is not "crime" in the legal sense of the term.[5] At the time he was writing, much of the activity he was concerned with—such as restraint of trade, violation of patents, unfair labor practices, and adulteration or misbranding of food and drugs—either was not subject to criminal sanctions at all, or, if it was, was rarely prosecuted as such. Indeed, this was precisely Sutherland's point: a good deal of conduct that is at least as, or even more, harmful or wrongful than what has traditionally been viewed as criminal is subject to a range of procedures and penalties that differ from those used for (and is largely excluded from official statistics on) traditional crime.

This is not to say, however, that everyone has agreed with Sutherland's approach to defining white collar crime. Indeed, there have been two distinct responses to the confusion caused by including in the notion of white collar "crime" conduct that is not regarded as criminal by the law. The first is simply to insist, as Paul Tappan and others have done, that only conduct regarded as criminal by the law should be included in the notion of white collar crime.[6] The second is to set aside the term "white collar crime" and instead use terms such as "elite deviance" to refer not only to actual crimes committed by the elite but also to deviant activities of the elite that do not violate the criminal law.[7]

5. Sutherland acknowledged this point in his essay, Is "White Collar Crime" Crime?, 10 Am. Soc. Rev. 132 (1945).

6. Paul W. Tappan, Who Is the Criminal?, 12 Am. Soc. Rev. 96 (1947); see also Robert G. Caldwell, A Re-Examination of the Concept of White-Collar Crime, in White-Collar Criminal: The Offender in Business and the Professions 376 (Gilbert Geis ed., 1968); Herbert Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime (1970).

7. See, e.g., David Simon & D. Stanley Eitzen, Elite Deviance (1982).

From a sociological perspective, this second alternative makes some sense. Much of the conduct we are dealing with here could be treated either as: (1) a crime (whether a serious felony or a relatively minor misdemeanor); (2) a non-criminal violation of law (e.g., a tort, breach of contract, or statutory violation); or (3) a merely "deviant," aggressive, or anti-social act which is violative of some informal norm but is not contrary to either criminal or civil law.[8] For example, there is a great deal of conduct falling within the scope of the Securities Exchange Act of 1934, Sherman Act, Clean Water Act, Bankruptcy Code, Tax Code, Truth in Lending Act, False Claims Act, and Federal Food, Drug and Cosmetic Act in which precisely the same conduct can be treated either as a crime or as a civil violation.[9] In light of such overlaps, one can easily imagine a sociological study in which the distinction between deviant activity that is criminal and that which is not would seem arbitrary.

Moreover, to the extent that one is concerned with *reforming* the criminal law—so that currently non-criminalized behavior is made criminal, or currently criminalized behavior is decriminalized—there is much to be said for a general term that refers to both kinds of conduct. Indeed, there is a significant polemical or reformist strain that runs through a good deal of the sociological literature on white collar crime.[10]

8. I have previously described the wide range of means—informal, institutional, civil, and criminal—with which society deals with the "deviant" act of plagiarism. Stuart P. Green, Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights, 54 Hastings L.J. 167 (2002). On the narrower overlap between civil and criminal law, see John E. Conklin, "Illegal But Not Criminal": Business Crime in America (1977); Stuart P. Green, Moral Ambiguity in White Collar Criminal Law, 18 Notre Dame J.L. Ethics & Pub. Pol'y 501 (2004).

9. See, e.g., Margaret V. Sachs, Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934, 2001 U. Ill. L. Rev. 1025, 1027. See also Andrew Ashworth, Is the Criminal Law a Lost Cause?, 116 L.Q. Rev. 225, 234-35 (2000) (on blurring of civil and criminal categories in intellectual property and competition law); Lawrence M. Solan, Statutory Inflation and Institutional Choice, 44 Wm. & Mary L. Rev. 2209 (2003).

10. See, e.g., Susan P. Shapiro, The New Moral Entrepreneurs: Corporate

From the perspective of law and legal theory, however, the term "elite deviance" is highly problematic. The discipline of criminal law is defined by what is criminal. A wide range of critically important procedural questions turns on whether conduct alleged is violative of the criminal law. To replace the concept of white collar crime with the concept of deviant behavior is thus to blur a distinction that, at least in legal discourse, is foundational.

Moreover, not only is there deviant behavior that is not criminalized, there is also criminal activity that is not generally regarded as deviant. For example, a good deal of regulatory crime involves so-called *malum prohibitum* conduct, which is wrongful only, or primarily, in virtue of its being prohibited.[11] And there are other forms of conduct that may well be regarded as deviant in one social setting (e.g., courtside at Wimbledon), but not in another (say, the trading floor of the Chicago Board of Trade).

A final problem with substituting the term "elite deviance" for "white collar crime" is that much white collar crime is not committed by elites at all. For example, many people would consider insider trading to be the quintessential white collar offense. Yet, as one scholar has noted, the Supreme Court first addressed the subject in a case in which the defendant was not a high-level corporate executive, but rather a "markup man" for a printing press.[12] It thus seems obvious that many cases not only of insider

Crime Crusaders, 12 Contemp. Soc. 304 (1983) (criticizing this tendency). Although Sutherland himself claimed that his theory was "for the purpose of developing the theories of criminal behavior, not for the purpose of muckraking or reforming anything except criminology," see Sutherland, White-Collar Criminality, supra note 2, at 1, his real motives surely included the latter. To be sure, many students of white collar crime cannot help but be incensed by the fact that such conduct, which is often more harmful than traditional street crime, has traditionally been dealt with more leniently.

11. I have explored this concept in Stuart P. Green, Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 Emory L.J. 1533 (1997); see also Douglas Husak, *Malum Prohibitum* and Retributivism, in Defining Crimes: Essays on the Criminal Law's Special Part (R.A. Duff & Stuart P. Green eds., forthcoming 2005).

12. J. Kelly Strader, The Judicial Politics of White Collar Crime, 50 Hastings L.J. 1199, 1207 (1999) (citing United States v. Chiarella, 455 U.S. 222 (1980)).

trading, but also of perjury, obstruction of justice, mail fraud, bribery, extortion, and tax fraud involve defendants who cannot be said, in any meaningful sense of the term, to be elite.

2. Should "White Collar Crime" Refer to Conduct Engaged in by Particular Kinds of Actors, or Only to Particular Sorts of Acts?

To refer to a crime as "white collar" is to draw attention to the characteristics of the person (or entity) that committed it. Indeed, it was the qualities of the offender, rather than those of the offense, that were the main focus of Sutherland's critique. Sutherland sought to question the then-prevalent theory that associated crime with the activities of the lower classes and emphasized poverty as its principal cause. He argued that because there is a significant category of crimes that are committed by persons of wealth, "respectability," and social status, poverty cannot be viewed as the sole, or main, cause of crime.[13] And, in fact, recent cases involving the likes of super-wealthy alleged white collar criminals such as Martha Stewart, Kenneth Lay, Bernard Ebbers, Richard Scrushy, and Dennis Kozlowski seem to demonstrate the truth of such an assertion.

From the perspective of the criminal law, however, such an approach is once again problematic. Deeply rooted equal protection-type norms forbid us from distinguishing among offenders on the basis of wealth, occupation, race, gender, ethnicity, or other personal characteristics.[14] To be sure, there are special immunity rules that apply to certain kinds of governmental actors. But outside of such narrow exceptions, the law is not ordinarily permitted to take

13. Sutherland, White-Collar Criminality, supra note 2.

14. Cf. Kenneth S. Abraham & John C. Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth, 18 J. Leg. Stud. 415, 423 (1989) ("Punishment based on the characteristics of the actor, rather than on specific misconduct, threatens fundamental notions of freedom from governmental constraint.").

account of a defendant's social status in determining criminal liability. Nor, ordinarily, is legal theory.

One alternative is to change the focus of the inquiry from social class to occupation. Thus, Marshall Clinard and Richard Quinney suggest that the term "white collar crime" be replaced with two constitutive terms: "corporate crime" and "occupational crime."[15] The first category is meant to include offenses committed by corporations and their officials for the benefit of the corporation.[16] The second kind of crime is defined as that which is committed "in the course of activity in a legitimate occupation" and is meant to apply to offenses involving persons at all levels of the social structure. As such, occupational crimes can be committed by employees against employers (as in the case of embezzlement), employers against employees (as in the case of workplace safety violations), and by those who provide services and goods to the public (e.g., consumer fraud, health care fraud, procurement fraud, and environmental pollution).[17]

In somewhat more precise legal terminology, we might say that white collar crimes are those offenses that require, as an element, that the offender be (1) a corporate entity or officer of such entity, or (2) performing a particular job or serving in a particular position at the time she committed the offense. And, indeed, such an approach is not at all foreign to the criminal law. For example, one cannot commit the offense of receiving a bribe unless one is performing an act as a member of Congress, a juror, a witness, or "an officer or employee or person acting on behalf of the United States, or any department, agency or branch of Government thereof."[18]

15. Marshall B. Clinard & Richard Quinney, Criminal Behavior Systems: A Typology (2d ed. 1973); see also Gilbert Geis, Toward a Delineation of White-Collar Offenses, 32 Soc. Inquiry 160 (1962).

16. Geis, supra note 15, at 189. I address the limits of corporate criminality in Stuart P. Green, The Criminal Prosecution of Local Governments, 72 N.C. L. Rev. 1197 (1994).

17. Geis, supra note 3, at 39-40.

18. 18 U.S.C. § 201(a)(1) (2004). I address the question of who can be a "bribee" more generally in Stuart P. Green, What's Wrong With Bribery, in

Such an approach would likely forestall the anomaly of having to include under the category of white collar crime cases in which a person of high social status and wealth commits a presumptively non-white collar crime such as murder, rape, or possession of a controlled substance. But it would at the same time create a host of other problems. Much of what could presumably be included within the category of "occupational" crime—including theft of office equipment, workplace assaults, police brutality, and serial killings of patients by doctors and nurses—would not ordinarily be regarded as white collar crime.[19] Even more problematic is the fact that a great many white collar crimes have nothing at all do with either corporations or a defendant's occupation. Indeed, perjury, obstruction of justice, the offering of bribes, extortion, false statements, criminal contempt, tax evasion, and most intellectual property offenses are only rarely committed by employees against employers, employers against employees, or by those who provide goods and services to the public; and only rarely involve corporations. [20] In short, there is a vast range of presumptively white collar crime that falls outside the categories of both corporate and occupational crime.

Defining Crimes: Essays on the Criminal Law's Special Part, supra note 11.

19. Here, it should be pointed out that there is a range of ways in which the term "occupational crime" has been used. For example, David O. Friedrichs has suggested that the term should be restricted to illegal and unethical activities committed for individual financial gain in the context of a legitimate occupation—thereby excluding crimes such as workplace assault. Occupational Crime, Occupational Deviance, and Workplace Crime: Sorting Out the Difference, 2 Crim. Just. 243 (2002). Others, such as Gary Green, have used the term much more broadly. Occupational Crime (2001). My point is simply that the term is a poor substitute for "white collar crime."

20. Cf. Edelhertz, supra note 6 (arguing that we ought not to exclude from the definition of white collar crime offenses such as tax evasion, receiving illegal social security payments, and consumer fraud).

3. Assuming that "White Collar Crime" Should Refer to Some Particular Group of Criminal Offenses, What Factors Should Determine Which Offenses Will Be Included?

For the remainder of this article, let us assume that, at least in the limited context of law and legal theory, the term "white collar crime" should refer neither to non-criminalized, deviant behavior, nor to crimes committed by offenders holding particular kinds of jobs or enjoying a particular social status. Instead, let us use "white collar crime" to refer exclusively to a category of criminal offenses that reflects some particular group of legal or moral characteristics.

Not surprisingly, this is the approach taken by various lawyers and law enforcement officials interested in formulating a standard definition of white collar crime. For example, in 1970, U.S. Department of Justice official Herbert Edlehertz described white collar crime as "an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, or to obtain business advantage."[21] Nineteen years later, the FBI defined white collar crime as

> those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.[22]

One of the most influential formulations has been offered by the U.S. Department of Justice, Bureau of Justice Statistics, which defines white collar crime as:

21. Id. at 3 (emphasis omitted).

22. U.S. Department of Justice, Federal Bureau of Investigation, White Collar Crime: A Report to the Public 3 (1989).

> [n]onviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crimes for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation.[23]

From the perspective of legal analysis, an act-focused definitional approach such as these is much preferable to the actor-focused approach discussed above.[24] Nevertheless, each of the particular definitions offered presents significant problems: First, it is unclear what it means to commit a crime by "nonphysical" means, since it is generally assumed that every crime commission requires, at a minimum, a physical act.[25] Nor is it clear even what is meant for a crime to be "nonviolent."[26] For example, would the release of toxic chemicals into a public water source in violation of the Clean Water Act, or the sale of adulterated drugs in violation of the Federal Food, Drug, and Cosmetic Act, qualify as such?

Second, there is virtually no explanation for why the definition of white collar crime should be limited to those offenses committed for the purpose of obtaining "money," "property," or "services," or to secure "financial gain" or "business advantage." To the extent that such an approach would exclude many cases of presumptively core white collar offenses such as perjury, bribery, and obstruction of justice; and at the same time include presumptively non-white collar offenses such as larceny, robbery, and embezzlement, it would seem to require some justification.

23. Bureau of Justice Statistics, U.S. Dep't of Justice, Dictionary of Criminal Justice Data Terminology 215 (2d ed. 1981).

24. Cf. Susan P. Shapiro, Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime, 55 Am. Soc. Rev. 346 (1990) (endorsing act-based approach).

25. See generally Michael Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law (1993).

26. "Violence," of course, is another famously contested term. See, e.g., C.A.J. Coady, The Idea of Violence, 3 J. Applied Phil. 3 (1986); Robert Paul Wolff, On Violence, 66 J. Phil. 601 (1969).

Indeed, this may explain why some scholars now prefer the term "economic" or "business" crime to "white collar crime."[27]

Third, and even more problematic, is the unexplained use of the terms "deception," "concealment," "guile," and "violation of trust." Even if the meaning of such terms were not highly contested (as it is), one could not help but wonder whether this limited list of moral wrongs would fully capture the moral content of white collar offenses such as insider trading, tax evasion, extortion, blackmail, obstruction of justice, and many regulatory and intellectual property crimes. This is a question that I have addressed extensively elsewhere and to which I return briefly at the end of this article.[28]

B. Law Enforcement, Prosecutors, and the Defense Bar

Having looked broadly at the kinds of definitional issues that have revolved around the term "white collar crime," we can now focus more narrowly on how the term is used in a number of important, specifically law-related contexts which the definitional literature has, for the most part, ignored.[29] Let us consider, first, the defense bar. Hundreds of law firms and thousands of private lawyers throughout the United States and, to a lesser extent, Great Britain, now hold themselves out as specialists in what they refer to as "white collar" criminal defense work (although there does not yet appear to be any official

27. See, e.g., Harry First, Business Crime: Cases and Materials (1990); Frank O. Bowman, III, Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes under the Guidelines, 51 Vand. L. Rev. 461 (1998); Jayne W. Barnard, Allocution for Victims of Economic Crimes, 77 Notre Dame L. Rev. 39 (2001). In my view, the problem with the term "economic" crime is that it fails to capture the crucial moral distinction between presumptively white collar crimes such as fraud and ordinary street crimes such as larceny. For a discussion of this distinction, see Stuart P. Green, Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of *Crimen Falsi*, 90 J. Crim. L. & Criminology 1087, 1093-94 & n.21 (2000). For a contrary view, see Bowman, supra, at 490-97.

28. See infra note 95 and accompanying text.

29. See sources cited supra note 3.

certification as such).[30] One indication of the prominence of white collar crime as a criminal law subspecialty is the existence of the American Bar Association's Section on Criminal Justice Committee on White Collar Crime. Another is the monthly column on white collar crime in the *Champion*, the magazine of the National Association of Criminal Defense Lawyers. Moreover, there is a growing industry in continuing legal education programs, newsletters, books, and other materials designed for the white collar criminal law practitioner.[31]

The emergence of white collar crime as a distinct practice area can also be seen among prosecutorial offices and law enforcement agencies.[32] Specialists in white collar crime can be found in numerous prosecutorial offices at the federal, state, and local level;[33] at the FBI and in local police

30. See generally Larry Smith, Jury Split on Status of White-Collar Practice at Major Firms, 10 Inside Litig. 1 (1996); Larry Smith, Fastest-Growing Practice Areas, 17 Of Counsel 1 (1998). Even elite corporate firms that have not traditionally been engaged in criminal defense work now claim expertise in white collar criminal law. See, e.g., David Polk & Wordwell, White Collar Crime, at http://www.dpw.com/practice/litwhitecollar.htm (last visited Dec. 1, 2004); and Arnold & Porter, White Collar Crime, at http://www.arnoldporter.com/practice.cfm?practice_id=34 (website of Arnold & Porter) (last visited Oct. 25, 2004).

31. See, e.g. White Collar Crime Reporter (published by Thomson West legal publisher); see also Business Crimes Bulletin (published by Law Journal Newsletters); Practicing Law Institute, Advanced White Collar Criminal Practice (1983); American Bar Association, White Collar Crime (1997); Joel M. Androphy, White Collar Crime (2003); F. Lee Bailey & Henry B. Rothblatt, Defending Business and White Collar Crimes (2d ed. 1984); Otto G. Obermaier & Robert G. Morvillo, White Collar Crime: Business and Regulatory Offenses (2001).

32. As the Supreme Court recognized in Braswell v. United States, 487 U.S. 99, 115-16 (1988), white collar crime cases present distinctive challenges to government prosecutors in terms of discovery and proof. Thanks to Peter Henning for bringing this case to my attention.

33. See, e.g., Norfolk District Attorney's Office, White Collar Crime Unit, at http://www.state.ma.us/da/norfolk/special_whitecollarcrime.html (Norfolk District Attorney's Office, Massachusetts) (last visited Oct. 25, 2004); Thirteenth Judicial Circuit District Attorney, White Collar Crime Team, at http://www.mobile-da.org/team-white_collar.htm (Mobile, Alabama, District Attorney) (last visited Oct. 25, 2004); City of St. Louis Circuit Attorney, White Collar Crime and Fraud Unit, at http://stlcin.missouri.org/circuitattorney/wcfraud.cfm (St. Louis Circuit Attorney) (last visited Oct. 25, 2004) (white collar crimes defined as theft and embezzlement, identify theft, elder abuse, bribery and kickback schemes, computer crimes, and public integrity crimes).

departments;[34] and in the U.S. Department of Justice Criminal Division's Section on Fraud, which is "charged with directing the Federal law enforcement effort against fraud and white-collar crime."[35] The National White Collar Crime Center, a federally funded, non-profit corporation whose membership comprises primarily law enforcement agencies, state regulatory bodies with criminal investigative authority, and state and local prosecution offices, has as its focus the assistance of state and local prosecutors in the battle against high tech and economic crime.[36] And some agencies, including the Department of Justice, even have offices that deal specifically with the *victims* of fraud and other white collar offenses.[37]

Not surprisingly, the definition of exactly what constitutes "white collar crime" tends to vary within and among these various constituencies, though to a lesser extent than in the case of the social scientists. Law enforcement officials, prosecutors, and defense attorneys are all more inclined than sociologists to use the term to refer to acts rather than actors, and to real crime rather than mere deviance.[38]

34. See, e.g., Federal Bureau of Investigation, Phoenix Division, White Collar Crime Program, at http://phoenix.fbi.gov/pxwcc.htm (Phoenix, Nevada, FBI office, focusing on bank, telemarketing, and bankruptcy fraud) (last visited Oct. 25, 2004); Dakota County Sheriff Department, Criminal Investigation—White Collar Crime Division, at http://www.co.dakota.mn.us/sheriff/investigation/whitecollar.htm (Dakota County, Minnesota, Sheriff Department) (last visited Oct. 25, 2004).

35. U.S. Dep't of Justice, Criminal Division, Fraud Section, at http://www.usdoj.gov/criminal/fraud.html (last visited Oct. 25, 2004).

36. See NW3C, National White Collar Crime Center, at http://www.nw3c.org (last visited Oct. 25, 2004). The NW3C also sponsors a White Collar Crime Research Consortium, whose members are mostly social scientists. See NW3C Research, at http://www.nw3c.org/research_wccrc.html (last visited Oct. 25, 2004).

37. U.S. Dep't of Justice, Office for Victims of Crime, White Collar Crime, at http://www.ojp.usdoj.gov/ovc/help/wc.htm (last visited Oct. 25, 2004).

38. Of course, to the extent that highly paid white collar criminal defense practitioners wish to have clients who are wealthy enough to pay their bills, they will give some attention to the socio-economic status of the alleged offender. And their legal strategy may well be to convince jurors and the public that the conduct in which their clients engaged was not criminal, but at most deviant. See Green, Moral Ambiguity, supra note 8, at 517.

Some white collar criminal defense lawyers emphasize their experience in representing individual and corporate defendants in criminal cases. Others highlight their skill in establishing and administering corporate compliance programs and conducting internal investigations. Almost all claim expertise in dealing with the complex procedural and evidentiary contexts in which many white collar crime prosecutions occur. Among the specific "white collar" areas in which expertise is frequently claimed are securities fraud and insider trading; health care fraud and False Claims Act cases; antitrust; banking, financial, and accounting fraud; environmental and health and safety violations; RICO; trade secret theft; and customs violations.[39]

A similar range of usage can be observed among prosecutors and law enforcement agencies. The *White Collar Crime Reporter*, perhaps the leading practice-oriented publication in the field, covers insider trading, forfeiture, fraud, money laundering, foreign corrupt practices, health care fraud, perjury, espionage, and trade secrets. The U.S. Sentencing Commission, in its Sourcebook of Federal Sentencing Statistics, defines its "non-fraud white collar category" to "include[] the following offense types: embezzlement, forgery/counterfeiting, bribery, money laundering, and tax."[40] And the Department of Justice speaks of its section on white collar crime as being concerned with various forms of fraud—corporate, financial institution, securities, insurance, telemarketing, government program, Internet, and banking; identity theft; and the bribery of foreign officials.[41]

39. The ABA group sponsors white collar programs on subjects such as health care, tax, bank, insurance, and government procurement fraud, gaming, false claims, money laundering, antitrust offenses, corporate criminal liability, environmental crimes, the federal rules of criminal procedure, forfeiture, and public corruption. American Bar Association, Criminal Justice Section, Substantive Committees, at http://www.abanet.org/crimjust/committees/comlist.html#substantive (last visited Oct. 25, 2004).

40. U.S. Sentencing Commission, 1998 Sourcebook of Federal Sentencing Statistics.

41. According to the Department of Justice's website, the Fraud Section "plays

C. Legal Education and Scholarship

Within the last generation, white collar crime has developed into a standard subject in the curriculum of most American law schools. There are now at least four major casebooks, two hornbooks, an anthology, an annual student-edited law review survey, and scores of law school courses expressly devoted to the subject.[42] Indeed, white collar, federal, business, and environmental crime are among the most rapidly proliferating subjects in the curricula of American law schools.[43]

Law professors are clearly less inclined than their social science counterparts to think of white collar crime in terms of either offender characteristics or mere deviance. Almost all law school courses and texts in white collar crime deal with the general principles of corporate criminality and with the specific offenses of mail and wire fraud, perjury, obstruction of justice, conspiracy, and RICO. But beyond that there is little consensus. Many courses

a unique and essential role in the Department's fight against sophisticated economic crime. The Section is a front-line litigating unit that acts as a rapid response team, investigating and prosecuting complex white collar crime cases throughout the country." U.S. Dep't of Justice, Criminal Division, Fraud Section, at http://www.usdoj.gov/criminal/fraud.html (last visited Oct. 25, 2004).

42. See Kathleen Brickey, Corporate and White Collar Crime: Cases and Materials (3d ed. 2002); Pamela H. Bucy, White Collar Crime: Cases and Materials (2d ed. 1998); Jerold H. Israel et al., White Collar Crime: Law and Practice (2d ed. 2003); Julie R. O'Sullivan, Federal White Collar Crime: Cases and Materials (2d ed. 2003); see also Leonard Orland, Corporate and White Collar Crime: An Anthology (1995); Ellen S. Podgor & Jerold H. Israel, White Collar Crime in a Nutshell (2d ed. 1997); J. Kelly Strader, Understanding White Collar Crime (2002). There are also several casebooks dealing with "federal criminal law" and "business crime" that cover many of the same topics. E.g., Norman Abrams & Sara Sun Beale, Federal Criminal Law and Its Enforcement (3d ed. 2000). The annual student-written white collar crime survey of the *American Criminal Law Review* deals with antitrust, computer crimes, corporate criminal liability, employment-related crimes, false claims, false statements, criminal conflicts of interest, conspiracy, food and drug violations, financial institutions fraud, foreign corrupt practices, health care fraud, intellectual property crimes, mail and wire fraud, money laundering, obstruction of justice, perjury, RICO, securities fraud, and tax violations.

43. Deborah Jones Merritt & Jennifer Cihon, New Course Offerings in the Upper-Level Curriculum: Report of an AALS Survey, 47 J. Legal Ed. 524 (1997).

emphasize white collar crime as a body of substantive law, while others focus on the procedures associated with its prosecution, particularly in the federal courts. Some, but by no means all, of the courses emphasize constitutional issues raised by the supposedly increasing federalization of criminal law. Others cover grand jury and forfeiture proceedings. Still others deal with specific offenses such as insider trading and other forms of securities fraud, computer crimes, bribery, gratuities, money laundering, environmental and other regulatory crimes, extortion, false claims, bank fraud, and tax crimes.

The almost universal inclusion of conspiracy and RICO in the law school white collar crime curriculum is, in some respects, surprising. Both are essentially inchoate or procedural crimes, in which the predicate offense is often far removed from the domain of what would ordinarily be considered white collar crime. (Under RICO, for example, the definition of "racketeering activity" includes, among many other offenses, both sexual exploitation of children and the use of interstate commercial facilities in the commission of murder for hire[44]—neither of which could even remotely be considered a white collar crime.) The reason for such inclusion seems to be simply that such law school courses are designed to prepare students for the complex procedural context in which white collar criminal law is practiced, regardless of the actual substance of offenses studied.

In any event, given the tortuous definitional history of white collar crime in the social sciences, it is somewhat surprising that legal academics have expended relatively little effort in defining white collar crime or explaining the criteria upon which specific offenses are included in a given curriculum. Most of the textbooks and law review literature deal with the definitional question only briefly,[45]

44. 18 U.S.C. § 1961(1)(B).

45. See Israel et al., supra note 42, at 1-9; O'Sullivan, supra note 42, at 1-7; Strader, supra note 42, at 1-3; Podgor, supra note 42, at 1-3. Richard Posner, interestingly, relies on a status-, rather than offense-, based approach to definition. Richard A. Posner, Optimal Sentences for White-Collar Criminals, 17

and some not at all.[46] Rather, there seems to be an assumption that the subject matter of white collar criminal law can be defined simply by reference to the offenses that are actually covered in a given course or casebook.

D. Substantive Criminal Law

In 1992, the sociologist Gilbert Geis, perhaps the most influential scholar of white collar crime since Edwin Sutherland, wrote that "no such designation as 'white collar crime' is to be found in the statute books."[47] By this, Geis presumably meant that "white collar crime" is not a category of offenses in substantive criminal law and has no specific doctrinal significance. But, in fact, Geis was only half right. Though its use as such is admittedly rare, there are at least five contexts in which "white collar crime" appears in substantive criminal law.

First, the term has been used to identify aggravating circumstances that are relevant to sentencing. California Penal Code section 186.11 imposes what it refers to as a "white collar crime enhancement" for "[a]ny person who commits two or more related felonies, a material element of which is fraud or embezzlement."[48] The enhancement consists of potentially higher fines and other penalties than would otherwise apply.[49]

Am. Crim. L. Rev. 409, 409 (1980).

46. See, e.g., Dan M. Kahan & Eric A. Posner, Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines, 42 J.L. & Econ. 365 (1999); Kenneth Mann et al., Sentencing the White-Collar Offender, 17 Am. Crim. L. Rev. 479, 481 & n.8 (1980); Robert F. Meier, Understanding the Context of White-Collar Crime: A Sutherland Approbation, at 204, in National White Collar Crime Center Workshop, "Definitional Dilemma: Can and Should There Be a Universal Definition of White Collar Crime?," at http://www.nw3c.org/research_topics.html (last visited Oct. 25, 2004) ("[Kathleen Brickey] fails to offer a definition of white collar crime; in fact, the term is not even listed in the index of [her casebook]. Neither are the names of Sutherland or Geis.").

47. Geis, supra note 3, at 31 (attributing this view to "[p]ersons with criminal law or regulatory law backgrounds").

48. Cal. Penal Code. § 186.11(a)(1) (2004).

49. Similarly, Alaska Statutes sections 12.55.155(c)(16) and (17) identify as aggravating circumstances that the "defendant's criminal conduct was designed

Second, the term has been used to define a class of victims who are entitled to certain rights. Florida Statutes section 775.0844 authorizes various remedies (including restitution) for victims of "white collar crime," defined as including computer-related crimes, fraudulent practices, issuing worthless checks, bribery and corruption, forgery and counterfeiting, abuse and exploitation of the elderly and disabled, and racketeering.[50]

Third, the term has been used to define the jurisdiction of certain state prosecuting officials. Mississippi Code section 7-5-59(2) gives the Mississippi Attorney General jurisdiction to conduct "official corruption investigations and such other white-collar crime investigations that are of statewide interest or which are in the protection of public rights."[51] Subsection (1) in turn defines "white-collar crime and official corruption" to consist of a range of frauds (mail, wire, radio, television, computer), false advertising, extortion, bribery, and embezzlement by public officials. Similarly, Virgin Islands Code title 3, section 118 establishes within the Department of Law a White Collar Crime and Public Corruption Section "to institute aggressive prosecution of white collar crime and corruption."[52]

Fourth, the term has been used in the creation of funding mechanisms for law enforcement programs and research facilities. Title 42 U.S.C. § 3722(c)(2)(F)

to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight" and "the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income." Alaska Stat. §§ 12.55.155(c)(16) & (17) (2004). The commentary to the code, in turn, declares that the legislature intended these two aggravators to be applied to "white collar" criminals. 1980 Alaska Senate J., Supp. No. 44, at 25 (May 29, 1980), cited in Landon v. State of Alaska, 941 P.2d 186, 193 (Alaska Ct. App. 1997). Thus, in *Landon*, the Alaska Court of Appeals determined that the sentence for a defendant who was convicted of various drug-related offenses was not subject to enhancement because he had not been convicted of a "white collar" crime, which the court, relying on the dictionary, defined as involving "fraud or deceit" or the "surreptitious[] steal[ing of] anyone's property." 941 P.2d at 193.

50. Fla. Stat. § 775.0844 (2004).

51. Miss. Code Ann. § 7-5-59(2) (2004).

52. 3 V.I. Code Ann, § 118 (2004).

establishes a National Institute of Justice within the Department of Justice, which is charged with, among other things, developing programs to improve the ability of states and local governments to "combat and prevent white collar crime," a term that is elsewhere defined to refer to "an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."[53] Similarly, California Penal Code section 13848(b)(1) creates a statewide program to assist local enforcement and district attorneys in the fight against "white-collar crime, such as check, automated teller machine, and credit card fraud, committed by means of electronic or computer-related media."[54]

Finally, the term has been used in the title or section heading of various substantive criminal law provisions. A good example is the District of Columbia Theft and White Collar Crimes Act of 1982, the stated goal of which is to "reform the criminal laws of the District of Columbia relating to theft, receipt of stolen property, fraud, forgery extortion, blackmail, bribery, perjury, obstruction of justice, and criminal libel."[55] Here, the term "white collar crime" has no specific doctrinal significance; rather, it is used a label to signify a general legislative intent that white collar crime be distinguished from mere street crime.

Near the end of this paper, I will offer a critique of each of these five uses.[56]

53. 42 U.S.C. § 3722(c)(2)(F) (2004).

54. See also Cal. Penal Code § 1203.044(g)(1) (2004) (requiring defendants convicted of certain offenses to pay a "surcharge" to the county in which the crime was committed "to be used exclusively for the investigation and prosecution of white collar crime offenses").

55. D.C. Law 4-164 (1982) (codified at D.C. Code Ann. § 22-3201 (2004)).

56. See infra text accompanying notes 88-93.

E. The Sarbanes-Oxley Act

The most significant piece of legislation ever to use the term "white collar crime" is undoubtedly the Sarbanes-Oxley Act. The Act was passed amidst a sense of urgency, one might even say panic, that surrounded a string of spectacular corporate crime scandals that came to light during 2001 and 2002, involving firms such as WorldCom, Adelphia, Tyco, Arthur Andersen, and, most infamously, Enron. The statute enacts a multi-pronged approach to the prevention and punishment of white collar criminality: It creates a variety of new offenses, imposes stiffer penalties for existing offenses, requires companies to have audit committees, creates a board to regulate auditors, imposes new duties on CEOs and CFOs, makes it easier to file class actions against corporations and directors, imposes new regulatory compliance requirements, and expands the authority of the SEC over corporate governance matters.[57]

Title IX of the Act, which has five substantive sections, is entitled "White-Collar Crime Penalty Enhancements." Sections 902, 903, and 904 increase the penalties for attempt and conspiracy, mail and wire fraud, and violation of section 501 of ERISA, respectively. Section 906 makes it a crime for CEOs and CFOs to fail to submit certain financial statements required by the Securities Exchange Act of 1934. Section 905, entitled "Amendment to Sentencing Guidelines Relating to Certain White-Collar Offenses," is the provision that is of particular relevance here.

Section 905 directed the U.S. Sentencing Commission to "review and, as appropriate, amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of this Act."[58] In carrying out this mission, the Commission was specifically instructed to "ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and

57. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745.

58. Sarbanes-Oxley Act, § 905(a).

the penalties set forth in this Act, the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses."[59]

The legislative history to section 905, which was co-sponsored by Senators Orrin Hatch and Joseph Biden, clearly reflects the view that there is a disparity in how white collar and street crimes are treated under federal law, and that such disparity should be reduced or eliminated. According to Senator Biden:

> One thing most of our hearing witnesses agreed on was that there is a "penalty gap" between white collar crimes and other crimes. For example, if a kid steals your car and drives it over the 14th Street Bridge into Northern Virginia, he could get up to 10 years in jail under the Federal interstate auto theft law. Yet, if a corporate CEO steals your pension and commits a criminal violation under ERISA, he is only subject to 1 year in jail.[60]

Earlier, Senator Hatch had remarked:

> A person who steals, defrauds, or otherwise deprives unsuspecting Americans of their life savings—no less than any other criminal—should be held accountable under our system of justice for the full weight of the harm he or she has caused. Innocent lives have been devastated by the crook who cooks the books of a publicly traded company, the charlatan who sells phony bonds, and the confidence man who runs a Ponzi scheme out there. These sorts of white-collar criminals should find no soft spots in our laws or in their ultimate sentences, but all too often have done so.[61]

Whether there really is a disparity in the way comparable street and white collar crimes are punished,[62]

59. Id. § 905(b)(1).

60. Accounting Reform and Investor Protection, S. Hrg. 107-948 (2003), at 1325 (statement of Mr. Biden).

61. Id. at 1318 (statement of Mr. Hatch).

62. U.S. Sentencing Commission statistics indicate that, during 2001, the average sentence for white collar crime (defined to include embezzlement,

and whether title IX and the Sentencing Guidelines that were promulgated in response to it[63] are the right way to deal with such a disparity are surely matters that are open to debate.[64] My concern here, however, is less with

forgery/counterfeiting, bribery, money laundering, and tax evasion) was just over twenty months, while the average sentence for drug and violent crimes was 71.7 and 89.5 months, respectively. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics 32, fig. E (2001). Admittedly, such aggregate figures can tell us only so much. To accurately assess the inconsistent treatment of "comparable" white collar and non-white collar crimes, we would obviously need some reliable measure of "comparability." Cf. National White Collar Crime Center, National Public Survey on White Collar Crime (2000) (asking survey participants to compare seriousness of crimes such as armed robbery causing serious injury vs. neglecting to recall a vehicle that results in serious injury); Francis T. Cullen et al., The Seriousness of Crime Revisited: Have Attitudes Toward White-Collar Crime Changed?, 20 Criminology 83, 88 (1982); Ilene Nagel & John Hagan, The Sentencing of White-Collar Criminals in Federal Courts: A Socio-legal Exploration of Disparity, 80 Mich. L. Rev. 1427 (1982).

63. In 2003, the Sentencing Commission responded to Congress's directive, first in a set of "emergency" sentencing guidelines, see United States Sentencing Commission, Emergency Guidelines Amendments, 15 Fed. Sent. Rep. 281 (2003), and later in more permanent amendments, see U.S. Sentencing Guidelines Manual § 2B1.1(a) (2003). The amendments included significant sentencing enhancements for white collar offenses that affect a large number of victims or endanger the solvency or financial security of publicly traded corporations, other large employers, or one hundred or more individual victims. For example, an officer of a publicly traded company who defrauds more than 250 employees or investors of more than $1 million will receive a sentence of more than ten years in prison, almost double the term of imprisonment previously provided by the guidelines. Officers and directors of publicly traded corporations who commit securities violations are targeted for particularly substantial increases in penalties. The amendments also contain provisions imposing significantly increased penalties for offenders who obstruct justice by shredding either a substantial number of documents or especially probative documents; such offenders will receive a guideline sentencing range of approximately three years' imprisonment, up from as low as eighteen months in prison under prior guidelines. Id.

64. For a critique, see Frank O. Bowman, III, *Pour encourager les autres?* The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed, 1 Ohio St. J. Crim. L. 373 (2004) (arguing that various provisions of Act, including § 905, are vague in their language, overbroad in their scope, detrimental to the Sentencing Commission's independence, and unnecessary in light of earlier sentencing increases). See also Testimony of Frank Bowman before U.S. Senate Committee on the Judiciary, Penalties for White Collar Offenses: Are We Really Getting Tough on Crime?, Committee Print J-107-87, at http://judiciary.senate.gov/print_testimony.cfm?id=280&wit_id647 (last visited Oct. 25, 2004); Jennifer S. Recine, Note, Examination of the White

evaluating the wisdom of the Act than with observing how it deals with the concept of white collar crime; and here I want to make four observations: First, Congress seems to have thought that the concept of "white collar crime" was sufficiently well-recognized that it could be used in the title of an important federal statute. Second, it saw no need to define the concept anywhere in the Act. Third, it did not assign the term any specific doctrinal significance. Finally, its use of the term seems to have been primarily rhetorical—as a way to signal a shift in attitudes towards the disposition of such offenses. As such, the Sarbanes-Oxley Act represents a significant step in the development of the concept of white collar crime.

F. Outside the United States

As we have seen, the term "white collar crime" was invented and propagated primarily by American scholars in the social sciences. Given the serious definitional controversy it has spawned, however, it is surprising that the term has been used so broadly outside the United States as well. The idea that there is some distinct category of crimes that corresponds to one or another conception of white collar crime seems to have struck a chord in a remarkably wide range of legal, academic, and popular cultures.

The term "white collar crime" has been translated literally into French (*crime en col blanc*[65]), German (*Weisse-Kragen-Kriminalität*[66]), Italian (*criminalità dei colletti bianchi*[67]), Norwegian (*hvit krageforbrytelse*[68]), Portuguese

Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act, 39 Am. Crim. L. Rev. 1535 (2002).

65. André Normandeau, Les Deviations en Affaires et la "Crime en Col Blanc," 19 Rev. Intl. Crim. & Police Tech. 247 (1965). This and several of the other citations to older works were taken from Gilbert Geis & Colin Goff, Introduction, Edwin H. Sutherland, White Collar Crime: The Uncut Version xi-xiii (1983).

66. Markus Binder, Weisse-Kragen-Kriminalität, 16 Kriminalistik 251 (1962).

67. La criminalità dei colletti bianchi, at http://criminologia.advcom.it/unaricerca.htm (last visited Dec. 1, 2004).

68. Bill Evans, "My Turn," Says Jon Johansen, P2Pnet (Jan. 28, 2004), at

(*crime branco de colarinho*[69]), and Spanish (*crimen blanco del collar*[70]). In addition, it has appeared in English-language commentary referring to criminal activity in countries as diverse as Australia,[71] China,[72] Greece,[73] India,[74] Israel,[75] Malaysia,[76] Mexico,[77] South Africa,[78] Tanzania,[79] and Zimbabwe.[80]

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http://p2pnet.net/story/656 (last visited Oct. 25, 2004).

69. Claúdia Maria Cruz Santos, O crime de colarinho branco : da origem do conceito e sua relevância criminológica à questão da desigualdade na administração da justiça penal (2001).

70. Mario Permuth and Associates, Other Services, at http://www.permuth.com/newlook/services/other_areas_list.asp (website of Guatemalan law firm) (last visited Dec. 1, 2004).

71. Geis & Goff, supra note 60, at xiii (referring to headline in Sydney Morning Herald: State Attorney General "Predicts Rapid Increase in White-Collar Crime").

72. David Lague and Susan V. Lawrence, White-Collar Crime in China: Rank Corruption, Far Eastern Econ. Rev. (Oct. 31, 2002) at http://www.fsa.ulaval.ca/personnel/vernag/EH/F/noir/lectures/white-collar_crime_in_china.htm (last visited Oct. 25, 2004).

73. Hieros Gamos, Sarantitis and Partners, Law Firm Overview, http://www.hierosgamos.org/hg/db_lawfirms.asp?action=page&pcomp=35418&page=1&country=Greece&SubCategory=White|Collar|Crime (last visited Oct. 25, 2004).

74. DGP Denies Involvement in Stamp Scam, The Hindu, Jan. 22, 2004.

75. See Jerusalem Criminal Justice Study Group, Report on the Jerusalem Criminal Justice Study Group's White Collar Crime Project, at http://law.mscc.huji.ac.il/law1/newsite/CrimeGroup/white/simcha.htm (last visited Oct. 25, 2004).

76. Lim Kit Siang, Will Ministers, Deputy Ministers, Parliamentary Secretaries, Mentri-Mentri Besar and Chief Ministers Be Required to Undergo Psychological Tests to Reduce the Incidence of Corruption?, at http://www.malaysia.net/dap/sg336.htm (last visited Oct. 25, 2004).

77. Symposium, US-Mexico White Collar Crime, 11 U.S.-Mexico L.J. 128 (2003).

78. Lala Camerer, White-Collar Crime in South Africa: A Comparative Perspective 5 Afr. Security Rev., No. 2 (1996), available at http://www.iss.co.za/Pubs/ASR/5No2/5No2/WhiteCollarcrime.html (last visited Oct. 25, 2004).

79. Business Times, Tanzania: Reserve Sharia Law for White-Collar Thieves, Afr. News, Oct. 3, 2003.

80. House Slams Corruption, AllAfrica, Jan. 21, 2004. See also Gilbert Geis & Ezra Stotland, Introduction, White-Collar Crime: Theory and Research 9-10 (1980) (describing studies of white collar crime in Canada, France, Germany, Australia, Asia, Africa, and the former Soviet Union); David Nelken, White-Collar Crime, in the Oxford Handbook of Criminology 892 (Mike Maguire et al. eds., 2d ed. 1997) ("The equivalent term for white-collar crime is also widely found in other languages, and even used in foreign court proceedings."). The 2000 annual meeting of the American Sociological Association included a panel on "White

Outside the United States, however, the term has been favored more by social scientists and journalists than by academic lawyers.[81] Perhaps for the reasons discussed above, foreign legal academics have been reluctant to use "white collar crime" as an umbrella term for a category of crimes broad enough to include the range of offenses dealt with in a typical American law school casebook. Indeed, few British or European law schools offer a course in white collar crime. Instead, the usual practice has been to speak of "corporate," "economic," "business," or "administrative" crime, each as a separate category, rather than of a unified category of white collar crime.[82]

II. SALVAGING "WHITE COLLAR CRIME" AS A CONCEPT OF LAW AND LEGAL THEORY

If one were starting from scratch, "white collar crime" is hardly the term one would choose to describe the concept we have been dealing with here. The term was vague and imprecise when first conceived, and seems even more so today. Frequently, it means exactly the opposite of what it says, as when it is used to refer to merely deviant, non-criminalized activity. Sometimes it has been used overinclusively, such as when it refers to RICO, conspiracy, and corporate homicide. At other times it has been used underinclusively, as when it excludes various regulatory crimes and non-business-related offenses such as perjury and obstruction of justice. It has been used to refer to characteristics of persons rather than of offenses in a manner that is unacceptable within the framework of equal protection norms. Its ideological overtones are significant

Collar Crime in Comparative Perspective," which featured papers and commentaries on white collar crime in the Netherlands, Finland, Taiwan, and Spain. See White Collar Crime in Comparative Perspective, at http://www.asc41.com/www/2000/wc6.htm (last visited Oct. 25, 2004).

81. See, e.g., Hazel Croall, Understanding White Collar Crime (2001) (book by British sociologist).

82. See, e.g., September 25, 2003 email message to the author from Professor Jesper Lau Hansen, Law Faculty, University of Copenhagen (on file with the author) (explaining usage in Denmark and elsewhere in Scandinavia).

and, in the pursuit of objective scientific and legal analysis, unforgivable. And although it was coined only sixty years ago, the point at which all parties might agree on a definition has long since passed.

In light of all these problems, is there any justification for continuing to talk about white collar crime? It would be presumptuous of me, an academic lawyer, to offer advice to social scientists, law enforcement officials, practicing attorneys, social activists, or journalists, among others, on whether and, if so, how, the term should be used. From the perspective of legal theory, however, it seems to me that—in the absence of any viable alternative, and in light of its powerful cultural resonances—the term "white collar crime" *is* worth preserving, provided that certain features are understood, and various caveats observed.

A. "White Collar Crime" as a Family Resemblance Category

We would do better to think of "white collar crime" as entailing a collection of what philosophers call "family resemblances," rather than as susceptible to definition through a precise set of necessary and sufficient conditions.[83] According to linguist George Lakoff, under the traditional, Aristotelian, or classical approach to classification, categories are "assumed to be abstract containers, with things either inside or outside the category. Things [are] assumed to be in the same category if and only if they ha[ve] certain properties in common. And the properties they ha[ve] in common [are] taken as defining the category."[84] Under the classical model, then, categories are thought to have clear boundaries and be defined by common properties. Such an approach seems appropriate in the context of defining criminal offenses.

83. In this paragraph and the next, I rely liberally on my discussion in Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part, 4 Buff. Crim. L. Rev. 301, 305-16 (2000).

84. George Lakoff, Women, Fire, and Dangerous Things 6 (1987).

We want to know, to the extent possible, precisely which acts will fall within the category of, say, "murder," "rape," or "theft," and which will not.

But many concepts in the social sciences, the humanities, the arts, and in our daily lives are simply not susceptible to such precise in-or-out definition. Such concepts have "fuzzy" boundaries that do not fit into the classical model. Wittgenstein gives the example of the category "game"[85]: Some games involve competition and strategizing (like chess and capture the flag). Others involve merely amusement (like ring-around-the-rosy). With categories of this sort, it seems impossible to find any single collection of properties that all members (and only those members) share. Instead, categories like "game" seem to consist of a collection of members who share what Wittgenstein called "family resemblances."[86] Just as family members may resemble each other in a variety of different traits (say, hair or eye color, facial features, or physical stature), what defines the category of games is not some single well-defined collection of common properties, but rather a collection of different resemblances, a whole series of similarities and relationships shared by the class.[87]

It seems obvious that, at least for purposes of legal theory, "white collar crime" is better approached as a family resemblance-, rather than classical-, type category. As the discussion above suggests, it is probably impossible to find consensus on any single, well-defined collection of properties that all members of the category (and only those members) share. Instead, the term "white collar crime" should be understood to refer to a loosely defined collection of criminal offenses, forms of deviance, kinds of offenders, and moral concepts that share a series of similarities and relationships.

85. Ludwig Wittgenstein, Philosophical Investigations 66-71 (G.E.M. Anscombe trans., 3d ed. 1968).

86. Id.

87. Green, supra note 83.

B. Use of "White Collar Crime" in Substantive Criminal Law Legislation

If I am correct that "white collar crime" is best thought of as a family resemblance-type category, then it would seem to follow that the term would be mostly unsuitable in the realm of substantive criminal law. We expect our criminal offense categories to be sharply defined. Citizens and decision makers need to know, as precisely as can be made out, what it is that constitutes "murder," a "felony," or "self-defense," and what does not. We aspire to precision in defining mens rea and actus reus elements, defenses, jurisdictional elements, and procedural rights. The fuzzier the boundaries of such concepts, the weaker, it would seem, is the moral authority of our law.

Let us reconsider each of the five ways in which the term "white collar crime" has been used in substantive criminal law legislation. The first is as a label for aggravating circumstances relevant to sentencing.[88] As a matter of policy, we might well want to enhance punishments for crimes (such as certain thefts) when they are committed by white collar-like means such as deception or breaches of trust. (Alternatively, we might wish to *reduce* punishments for crimes that are committed through white collar-like, non-violent means.) Without a specific provision defining which offenses are to be covered, however, reference to a prototypical category such as white collar crime is likely to lead to obvious problems of legality, as it surely did in the case of the Alaska provision referred to above, in which the court was forced to refer to a dictionary in determining whether to apply the white collar crime aggravator.[89]

A related problem would occur under statutes that use the term to define a class of victims entitled to compensation or other procedural rights.[90] Although the doctrine of *nulla poena sine lege* would not directly be

88. See supra note 48.
89. See supra note 49.
90. See supra note 50.

implicated (since no issue of criminal punishment would be at stake), the vague quality of the term would nevertheless result in a serious problem of statutory ambiguity. Likewise are those statutes in which an otherwise undefined group of white collar crimes delineates the prosecutor's jurisdiction.[91]

In each of these three cases, problems of statutory ambiguity and legality could be avoided only if the term "white collar crime" were defined explicitly, by referring to covered offenses either by name or, better yet, specific statutory provision. (This, in fact, is precisely the approach that has been followed in the Florida and Mississippi statutes, though apparently not under the Virgin Islands and Alaska statutes.) In cases in which the term *is* so defined, it would perform no real doctrinal function, however. Rather, it would be intended primarily to add rhetorical force to the statutes in which it appears.

The problem of definitional ambiguity seems to me considerably less serious, however, in the case of statutes that create funding mechanisms for law enforcement programs and research facilities, as under the federal and California schemes.[92] One can easily imagine why a state or the federal government would want to provide special resources for the fight against some collection of complex business frauds, corruption, and the like. In such circumstances, a strict, classical category would be unnecessary, since no cognizable legal rights would likely be affected by the determination that a particular offense is or is not a white collar crime. Indeed, given the likelihood that some investigations will target persons suspected of committing both white collar and non-white collar crimes, a certain amount of fuzziness in defining an agency's responsibilities would probably be welcome.[93] Thus, this seems to me a sensible use of the term.

91. See supra notes 51-52.

92. See supra notes 53-54.

93. For example, former Tyco CEO Dennis Kozlowski was charged not only with the presumptively white collar offenses of enterprise corruption, securities fraud, conspiracy, and falsifying business records, but also with the more

As for statutes such as the Sarbanes-Oxley and District of Columbia Theft and White Collar Crimes Acts, it appears that the term "white collar crime" is serving what is essentially a signaling or symbolic function, rather than a definitional one. Once again, no specific legal rights are affected by how the term is defined. In each case, the legislature is doing nothing more than sending a message that it regards the offenses covered as part of a loosely defined moral or political, rather than legal, category.

C. Use of "White Collar Crime" in Legal Theory

In this concluding section, I want to consider the extent to which the term "white collar crime" might provide a useful label in criminal law theory. Given the substantial disagreement over its meaning, one might well wonder whether it would make sense to abandon the term entirely and rely instead on some alternative term or collection of terms, such as "economic," "business," "corporate," or "occupational" crime. To put it another way, we need to ask whether there is some defining group of family resemblances that is characteristic of white collar crime and is not adequately captured by the alternatives.

In approaching this question, my aim is not to offer yet another alternative definition of white collar crime. Instead, I want to suggest an appropriate *methodology* for developing such a definition. And, inasmuch as legal theory is concerned with the moral content of criminal offenses, it is in that realm that we will want to look in developing such a methodology.

As I have described elsewhere,[94] the moral content of criminal offenses can be divided into three basic elements: *Culpability* reflects the mental element with which an offense is committed, such as intent, knowledge, or belief. *Harmfulness* reflects the degree to which a criminal act causes, or risks causing, harm to others or self. And *moral*

mundane street offense of grand larceny.

94. See Green, supra note 11.

wrongfulness involves the way in which the criminal act entails a violation of moral norms. Following this approach, then, one way to determine which offenses should be included within the category of white collar crime would be to ask whether—in terms of culpability, harmfulness, and wrongfulness—a particular offense "resembles" other offenses within that category.

Drawing on work I have published elsewhere,[95] I would argue that white collar crime does differ from non-white collar crime in all three of the dimensions identified: First, the harms that white collar crimes cause (think, for example, of bribery, tax evasion, and insider trading[96]) tend to be more diffuse and aggregative than in the case of conventional crime; and it is often harder to say who (or what, in the case of governmental institutions or corporations) has been victimized, and how. Second, white collar crime tends to involve certain distinctive forms of moral wrongfulness: not only deception and breach of trust,[97] but also cheating, exploitation, coercion, promise-breaking, and disobedience. Third, white collar offenses frequently reflect a distinctive role for mens rea: They either require no mens rea at all (as is the case with many regulatory offenses), or make proof of mens rea so important that conduct performed without it not only fails to expose the actor to criminal liability, but may not be regarded as wrongful at all.

My point, of course, is not that all white collar offenses (and only such offenses) exhibit such qualities. If we expect

95. Green, supra note 18; Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements, 53 Hastings L.J. 157 (2001); Cheating, 23 Law & Philosophy 137 (2004); Uncovering the Cover-up Crimes, 42 Am. Crim. L. Rev. (forthcoming 2005); Theft by Coercion: Extortion, Blackmail, and Hard Bargaining, 44 Washburn L.J. (2005). See also my forthcoming book, A Moral Theory of White Collar Crime.

96. In formulating such an argument, we need to acknowledge the serious potential for circularity that exists in any such definitional enterprise: namely, that in deciding which offenses fall within the category of white collar crime, we will be forced to assume that certain paradigmatic qualities define the category; and in determining which qualities define the category, we will be forced to assume that certain offenses fall within it.

97. Cf. sources cited supra notes 21-24.

to find some fixed and universally-agreed–upon collection of necessary and sufficient conditions that define the category of white collar crime across all disciplines, we are bound to be disappointed.[98] Nevertheless, I believe that it would be a mistake to give up on the term entirely. Provided that we recognize its context-specific, family-resemblance-like-quality, "white collar crime" remains for the legal theorist a term both powerfully evocative and ultimately indispensable.

98. Thus, I am in agreement with the sociologist David Friedrichs, who has suggested that any definition of white collar crime is ultimately meaningful only in relation to its stated purpose. David O. Friedrichs, Trusted Criminals 4-12 (2d ed. 2004); David O. Friedrichs, White-Collar Crime and the Definitional Quagmire: A Provisional Solution, 3 J. Hum. Just. 5 (1992).