Moral Ambiguity in White Collar Criminal Law

Stuart P. Green
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Criminal sanctions, the most serious kind of sanctions we have in a civil society, have traditionally been reserved for conduct that not only causes or risks serious harms but is also unambiguously wrongful. In some unusual cases involving necessity or other justification defenses, a defendant might argue that killing another human being or causing some other serious harm was the right thing to do. But in the typical case of core criminal offenses such as murder, rape, and robbery, there is an underlying assumption that what the defendant did—if in fact she did do it—was, from a moral perspective, a very bad thing.

There is, however, an important collection of criminal offenses that reflects a different pattern. The offenses I have in mind—bribery, extortion, fraud, tax evasion, perjury, obstruction of justice, false statements, insider trading, and various regulatory and intellectual property crimes—tend to be committed without violence; the harms they cause are often diffuse; and the victims they affect are frequently hard to identify. For lack of a better term, and while recognizing its contested nature, I will refer to this rather loosely defined "family" of offenses as "white collar" crimes.3

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1. I have discussed the difference between harmfulness and wrongfulness 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, 1549–52 (1997) (stating that harmfulness reflects the degree to which an act causes harm, defined as an intrusion into a person's interests; wrongfulness involves conduct that violates a moral norm or standard).

2. I have previously discussed the idea of categorizing criminal offenses according to "family" resemblances, with "fuzzy" boundaries and no single collection of properties that all members (and only those members) share. See Stuart P. Green, 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, 307–08 (2000).

3. There is, among sociologists, criminologists, law enforcement officials, the media, social activists, lawyers, law professors, and others, a wide variation in how the term white collar crime is used. For a useful discussion, see David O. Friedrichs, Trusted Criminals: White Collar Crime in Contemporary Soci-
What is interesting and distinctive about this group of crimes is that, in a surprisingly large number of cases, there is a genuine doubt as to whether what the defendant was alleged to have done was in fact morally wrong. In such cases, the issue is not, as it is with necessity, whether the defendant was confronted with some extraordinary choice between either obeying the law, and allowing significant harm to occur; or violating the law, and preventing such harm. Rather, the question is whether the conduct engaged in was more or less acceptable behavior, at least in the realm in which it was performed, and therefore, should not have been subject to criminal sanctions in the first place.

Such ambiguity reflects more than just the effectiveness of white collar defense counsel in promoting their clients’ causes, although the influence of defense counsel in such cases is surely significant. In fact, it reflects a more widespread sense—expressed by judges, jurors, scholars, journalists, and the average citizen—that there is a kind of moral complexity and uncertainty in such offenses that is rarely seen in the case of more traditional crimes. This ambiguity has frequently been remarked upon, but

ETV 4-12 (2d ed. 2004). I will address the definitional question in an article that will appear in a forthcoming symposium issue of the Buffalo Criminal Law Review. For present purposes, it should be clear that I am not using the term white collar crime to refer to offenses committed exclusively by (1) persons of high social standing, (2) either corporations or persons acting within a corporate setting, or (3) persons in the course of their occupations. Rather than using the term to refer to crimes committed by certain types of offenders, I am using it to refer to a certain group of offenses, identified in the text. Cf. Susan P. Shapiro, Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime, 55 AM. SOC. REV. 346, 347 (1990) (“disentangling” the “identification of the [white-collar] perpetrators with their misdeeds”).

4. Of course, this is not to deny that questions of necessity also do occasionally arise in the context of white collar crime.

5. By qualifying my statement with the phrase “in the realm in which it was performed,” I intend to signal my recognition that morality is in some sense context-specific. Thus, what passes for acceptable behavior in the business or litigation context might well not be acceptable in relations between friends, colleagues, or family members.

there have been few systematic attempts to explain exactly how or why it occurs. This essay offers a preliminary attempt at doing so. Part A offers several specific examples—essentially, torn from the day’s headlines—of what I mean by “moral ambiguity” in white collar crime. Part B posits ten overlapping and interrelated factors that help explain both the causes and effects of such ambiguity.

I. EXAMPLES OF MORAL AMBIGUITY

The kind of moral ambiguity I have in mind is illustrated by the following five cases:

• In November 2003, Clarence Norman, chairman of the Brooklyn Democratic Party, and Jeffrey Feldman, the Party’s Executive Director, were indicted on what amounted to charges of extortion. There is little dispute that Norman and Feldman had met with candidates running for civil court judge and told them that they would not receive the party’s wholehearted support unless they used certain selected vendors and consultants. But there is serious disagreement about the criminality of such conduct. According to Brooklyn District Attorney Charles Hynes, such conduct constitutes the very “definition [of] extortion.” According to lawyers for Norman and Feldman, as well as various prominent political figures in Brooklyn, however, there was nothing illegal about what the defendants did. As Norman’s lawyer, Roger Bennet Adler put it,

If you take [the allegations] at face value... imposing certain conditions on candidates running on a joint slate, there was nothing unreasonable about those conditions. Suggesting that if you don’t basi-
cally agree to these expenditures we’re not going to be as effective for you on primary day, I think, is a statement of the obvious. It’s not extortion.\textsuperscript{11}

- In June 2002, the Arthur Andersen accounting firm was convicted of obstructing the Securities and Exchange Commission’s investigation into the collapse of Enron.\textsuperscript{12} Among the pieces of evidence that jurors found most incriminating was an email from in-house Andersen lawyer, Nancy Temple, instructing Andersen partner, David Duncan, to remove language from an internal Andersen memo suggesting that Andersen had concluded that an earlier Enron final disclosure had been misleading.\textsuperscript{13} The email also advised Duncan to remove any reference to consultations with Andersen’s in-house legal team, saying it could be considered a waiver of attorney-client privilege. According to one of the jurors, “[w]e wanted to find Andersen not guilty and find that they stood up to Enron. But it’s clear [that Temple] knew investigators were coming and was telling [Andersen] to alter the evidence.”\textsuperscript{14} Yet not everyone agreed with the jury’s interpretation. Several days after the Andersen trial ended, Stephen Gillers, a leading professor of legal ethics, opined on the op-ed page of the \textit{New York Times} that the advice Temple had given to the accounting firm was not a crime at all, but rather “the kind of advice lawyers give clients all the time.”\textsuperscript{15}

- In 2001, computer programmer Dmitry Sklyarov and his firm, ElcomSoft, became the first defendants charged with violating criminal provisions of the 1998 Digital Millennium Copyright Act (DMCA),\textsuperscript{16} which are intended to prevent the circumvention of technological protections on copyrighted material.\textsuperscript{17} Sklyarov had cracked the technological protection measure used by Adobe Sys-
tems to control access to copyrighted content distributed in its eBook format. The prosecution of Sklyarov was widely criticized by civil liberties groups such as the Electronic Frontier Foundation, who maintained that the DMCA violates First Amendment rights and hinders technological innovation. Sklyarov was successful in having the charges against him dropped in return for his agreeing to testify against ElcomSoft. The case against ElcomSoft proceeded to trial, where the firm was acquitted. The jury believed that ElcomSoft’s product did violate the law, but apparently nullified the verdict based on its belief that ElcomSoft and Sklyarov had done nothing morally wrong.¹⁸

• Between 1995 and 1999, executives at two of the largest seed companies in the world, Monsanto and Pioneer Hi-Bred International, met repeatedly and agreed to charge higher prices for genetically modified seeds.¹⁹ The talks between the two companies involved licenses that allowed Pioneer to sell altered seeds developed by Monsanto. To the extent that the companies discussed prices, swapped profit projections, and talked about cooperating to keep the prices of genetically modified seeds high, one might think that they violated the criminal price-fixing provisions of the Sherman Antitrust Act. Yet, according to a spokesman for Monsanto, “[i]n the context of a potentially new license for technology, it is absolutely within the law to discuss the price and the means of compensation to the licensing party.”²⁰

• In October 2003, Mikhail Khodorkovsky, the chief executive and principal owner of Russia’s largest oil company, Yukos, was arrested and charged with tax evasion and related offenses.²¹ A few days later, Leon Aron, director of Russian studies at the American Enterprise Institute, published an op-ed piece in the New York Times arguing that, while Khodorkovsky may have “broke[n] some laws . . . in the chaotic Russian economy of the [1990s], when the state was privatizing its assets on a grand scale, no large business was ‘clean’—and the larger the company, the greater the chance it committed

¹⁸. See id.
²⁰. Id.
violations." According to Aron, given the tax scheme then in force in Russia, "[t]ax evasion was the only strategy that allowed an entrepreneur to pay salaries and invest in his business."  

II. Ten Factors Associated with Moral Ambiguity

In what sense do the foregoing cases involve moral ambiguity? Are there different forms of ambiguity that they reflect? What causes such ambiguity? What are its effects? Does the ambiguity reflect the way in which we regard the people who engage in such acts, or the way we perceive the acts themselves? Does such ambiguity pose a problem for the criminal law? Can the problem be fixed? Each of the five cases identified above is complex, and generalizations are bound to be difficult. They involve a wide range of quite different statutes, perpetrators, victims, harms, and mitigating and aggravating circumstances. It will not be possible to offer anything like a comprehensive assessment here. Instead, I want to identify ten overlapping and mutually reinforcing factors that are, in an admittedly imprecise way, characteristic of white collar crime more generally.

A. Cases in Which It Is Difficult To Distinguish Between Criminality and "Merely Aggressive" Behavior

Everyone, or almost everyone, would agree that certain core cases of bribery, fraud, tax evasion, obstruction of justice, perjury, and extortion involve conduct that is morally wrongful; and that if such conduct is proven, it should be treated as criminal. For example, if the Brooklyn Democratic Party bosses referred to above had threatened to bankrupt anyone who failed to use their favored vendors, there would be little doubt that they would have committed a serious crime and would deserve to be punished.

The problem is that much white collar crime is not nearly so straightforward. Many instances of alleged extortion, fraud, and similar offenses are difficult to distinguish from conduct that involves "merely aggressive" business, litigation, or political behavior. In such cases, it may seem that: what is alleged to be extortion was nothing more than "hardball negotiating"; what prosecutors call obstruction of justice was actually just "zealous advocacy"; what an indictment refers to as perjury was really just "wiliness" on the witness stand; what is alleged to be fraud was

23. Id.
merely "creative accounting"; what a criminal complaint calls tax evasion was in fact legal tax "avoidance"; what prosecutors consider a bribe was merely a "campaign contribution," and so on. Conventional street crime rarely exhibits such ambiguities. In a forthcoming book, I will offer a detailed discussion of the difficulties involved in drawing lines between criminal and non-criminal behavior of this sort. For the moment, I will merely note that, in such cases, it is often subtle differences in the facts, and in the interpretation of those facts, that determine the moral judgments we make about a defendant's conduct and whether such a defendant should ultimately be convicted.

B. Overcriminalization and the Problem of "Sticky" Norms

In contrast to offenses such as fraud, perjury, and extortion, there is a group of offenses involving conduct that—even in the most hard-core cases—is not universally viewed as morally wrongful. For example, there is significant debate over whether it should be a crime to engage in: (1) insider trading;24 (2) various so-called malum prohibitum regulatory offenses, such as taking sleeping pills without a prescription, carrying a gun without a permit, and selling liquor without a license;25 and (3) various intellectual property offenses, such as criminal copyright and trademark infringement, theft of trade secrets, and the manufacture and sale of devices that can be used to circumvent technological protection measures (the last of which being the offense with which Dmitry Sklyarov was charged).26 All of these are areas in which “overcriminalization” has been said to occur.

The problem is particularly striking in the intellectual property area. Recent studies have shown that more than 70% of people polled do not believe it is wrong to make unauthorized photocopies of a book or magazine, more than half do not regard the unauthorized downloading of music as immoral, 49% do not think it is wrong to make unauthorized copies of CDs and tapes, 35% do not believe it is wrong to make unauthorized copies of videocassettes, and 25% do not believe it is wrong to make unauthorized copies of computer software.27

25. See Green, supra note 1, at 1549–52.
27. See id. at 236–37 (citing studies); Geraldine Szott Moohr, The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory, 83 B.U. L. REV. 731, 767–68 (2003) (citing studies). There is, of course, an inter-
In what sense, then, are offenses like these morally ambiguous? By labeling and punishing certain conduct as "criminal," our legal system sends a message that such conduct is worthy of censure.\(^2\) When such labeling is consistent with what society as a whole regards as morally wrongful, law and norms are mutually reinforcing. But when there is a gap between what the law regards as morally wrongful and what a significant segment of society views as such—that is, where norms become "sticky,"\(^2\) moral conflict and ambiguity are likely to be the result.

C. Complexity of Underlying Activity and Difficulty of Defining Harms and Identifying Victims

Most of the white collar offenses we are concerned with here can be distinguished from traditional street crimes in that they tend to involve more complex forms of underlying activity, harder-to-discern harms, and harder-to-identify victims. Like the alleged price fixing between Monsanto and Pioneer, white collar offenses often occur over an extended period of time and involve elaborate activities such as those associated with manufacturing and industrial processes, marketing, corporate finance, the stock market, so-called document retention procedures, government contracts, financial auditing, trial and litigation procedures, and political fundraising. Such activity frequently occurs within large and complex organizations, involving numerous individuals occupying a wide range of different positions, and many series of complicated transactions. Understanding how such processes work can require a fairly sophisticated understanding of disciplines such as finance, economics, engineering, medicine, political science, organizational theory, management, accounting, environmental science, and information technology. It is often hard enough for the lay public to understand how these processes are supposed to work when they are conducted in a legal manner; it is all the more difficult to understand how they function when they involve criminal activity. Because the context in which white collar crime occurs is often so complex, it can be difficult to understand exactly how a defendant has violated a given criminal provision.

\(^2\) The locus classicus for this kind of argument is JOEL FEINBERG, The Expressive Function of Criminal Punishment, in DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95 (1970).

White collar offenses also tend to involve harms that are more difficult to identify than in the case of conventional street crimes. For example, there is not likely to be much controversy about the proposition that the principal harm caused by homicide is the death of a human being. In the case of crimes such as tax evasion, bribery, and insider trading, by contrast, the identification of harm and victim presents real difficulties. Some direct harms seem relatively straightforward; presumably, tax evasion leads to reduced revenues for the public treasury, bribery to biased governmental decision making, and insider trading to loss of money for some investors. But there are also significant indirect, diffuse, and aggregative harms caused by such conduct, which are much harder to quantify—e.g., loss of investor and consumer confidence, distrust of government, and bad decisions made by public officials.

Given the diffuseness of harms associated with white collar offenses, it is not surprising that identification of affected victims is also harder than in the case of conventional offenses.\textsuperscript{30} For example, while we have no problem in saying that the principal victim of homicide is the decedent,\textsuperscript{31} it is difficult to say exactly which citizens are victimized by environmental violations and government corruption; which taxpayers are victimized by false claims and tax evasion; which employees are victimized by labor law violations and the devastation of their retirement accounts; and which consumers are victimized by price fixing, violations of the food and drug and product safety laws, and fraudulent marketing practices. Many white collar crimes involve small harms to a large number of victims, and are significant only in the aggregate.\textsuperscript{32} And, of course, some victims of white collar crime are never even aware that they have been victimized.


\textsuperscript{31} This is not to say that there are not difficult and interesting questions about the extent to which, say, the family and friends of the principal victim should also be regarded, and perhaps eligible for compensation, as "victims." See generally Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights 245–333 (New York University Press 2002) (analyzing crime from the perspectives of the victim and the offender). My point is simply that the task of determining who is the principal victim of violent crime is generally easier than that of determining who is a victim of white collar crime. For more on this point, see Stuart P. Green, Victim's Rights and the Limits of Criminal Law, Crim. L. Forum (forthcoming 2004) (reviewing Dubber, supra).

All of this complexity of underlying conduct and difficulty in identifying harms and victims contributes inevitably to moral ambiguity. If people find it hard to recognize what kinds of harms a particular offense causes, or who suffers them, they are likely to be less certain that such conduct is wrong and should be subject to sanctions.

D. **Diffusion of Responsibility**

Not only does white collar crime present difficulties in assessing the means by which it is committed, the harms it causes, and the victims it affects, but there are also problems in determining exactly who (or what, in the case of an entity) should be held responsible. Many of the offenses referred to above are most likely to occur within the context of complex institutions, such as large corporations, partnerships, and government agencies. In such organizations, responsibility for decision making and implementation is shared among boards of directors, shareholders, top and mid-level managers, and ground-level employees.\(^33\) As a result, the blame we attribute to an individual actor within the organization in which he works may be less than the blame we attribute to an individual actor committing an equally serious street crime on his own.

Consider again the case of Arthur Andersen.\(^34\) Prior to its demise, Andersen was one of the "big five" international accounting firms, with more than 25,000 employees in the United States alone, and thousands more employees working at affiliated offices around the world. According to the indictment charging Andersen with obstruction of justice, documents were allegedly destroyed not only in Houston, but also in London, Chicago, and Portland, Oregon. The order to destroy the documents came from within a complex corporate hierarchy and was carried out by hundreds of employees. A low-level secretary or clerk who shredded documents knowing that they would be subject to an SEC subpoena would surely deserve blame for his conduct. But our judgment of such a person would likely be tempered—made more ambivalent, I would say—by the fact that the person acted

\(^{33}\) *See generally* Beyond the Law: Crime in Complex Organizations (Michael Tonry & Albert J. Reiss, Jr. eds., 1993) (focusing on organizations as criminal law violators).

within the context of a large organization and shared responsibility with numerous other actors.35

E. Conflation of Liability for Inchoate and Completed Offenses

The criminal law has traditionally distinguished between inchoate and completed forms of criminality. Inchoate offenses, such as attempt, conspiracy, and solicitation, are generally not punished as severely as completed offenses (although there is a lively scholarly debate about whether this should be so36). White collar crime, by contrast, tends to merge complete and incomplete conduct into a single offense, punishable by a single penalty. And it often criminalizes conduct that involves nothing more than the creation of a risk of harm.37

Extortion, such as that which was allegedly committed by top officials of the Brooklyn Democratic Party, provides a good example. Extortion is defined as the “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”38 In order to be convicted under the federal Hobbs Act, however, one need not actually obtain any property from another.39 It is enough that one simply attempt to obtain property in this manner. In other words, federal law merges completed and inchoate extortion into a single, undifferentiated offense, and imposes the same penalty on both.

A similar phenomenon can be observed in the context of other significant white collar offenses as well: bribery is bribery regardless of whether any bribe is actually accepted; fraud is fraud regardless of whether anyone’s property is actually taken;

35. Indeed, it was the diffuseness of responsibility that presumably led prosecutors to name Andersen itself, rather than its individual employees, as the defendant in its indictment for obstruction of justice. My point here is not to engage in the surprisingly still persistent debate over whether corporations and other entities should be subject to criminal liability. For a useful summary, see Wayne A. Logan, Criminal Law Sanctuaries, 38 HAY. C.R.-C.L. L. REV. 321, 348–64 (2005). See also Stuart P. Green, The Criminal Prosecution of Local Governments, 72 N.C. L. REV. 1197 (1994). My point is simply that our judgments of individuals who commit criminal offenses while working in a corporate or organizational setting are likely to be different from our judgments of people who commit equally serious offenses in a non-organizational setting.
38. 18 U.S.C.A. § 1951(b) (2) (West 2000).
39. Id. at § 1951(a).
perjury is perjury regardless of whether a lying witness is believed; and obstruction of justice is obstruction regardless of whether any proceedings are actually hindered.\(^4\) The result is that what is prosecuted as "extortion," "bribery," "fraud," "perjury," or "obstruction" is often, in reality, attempted extortion, bribery, fraud, perjury, or obstruction. By repeatedly using the label of a completed offense to refer to what is actually an attempt, the system dilutes the seriousness with which certain white collar offenses are perceived, and thereby fosters moral ambiguity.

F. Distinctive Role for Mens Rea

Mens rea, or "guilty mind," reflects one of the defining characteristics of criminal law. Many serious harms caused without mental intent provide grounds for civil liability, but they do not traditionally give rise to criminal prosecution. The criminal law has traditionally required not only that the defendant cause a serious harm (the actus reus) but also that she do so with a particular state of mind—criminal intent, purpose, knowledge, belief, recklessness, or the like. People who cause harm without such mental element ordinarily cannot be said to be "at fault" or "deserving" in the way that the just imposition of punishment is thought to require.\(^4\)

In the case of many white collar crimes, however, the requirement of mens rea is stood on its head. Some of the offenses—particularly in the area of regulatory crime—require either no mens rea at all (i.e., they are strict liability offenses), or they require a low level form of mens rea, such as negligence. And because of such dilution of the mens rea requirement, it is difficult to say that the perpetrators of such offenses are morally culpable, or at least culpable to the extent that would justify the imposition of criminal penalties.

Other white collar offenses present a converse problem: proof of mens rea is so crucial to their definition that conduct performed without it not only fails to expose the actor to criminal (as opposed to civil) liability, but is not regarded as wrongful at all. Consider, for example, the case of bribery. Imagine that X, a constituent of Congressman Y, gives Y a certain amount of money (which, we can further assume, falls within the amounts permissible under campaign finance laws). Assuming that X acts


with the expectation of receiving nothing in return, he has committed no offense; he has merely made a legal campaign contribution. X's act of giving money to Y would constitute a bribe if and only if X "corruptly ... inten[ded] to influence" an official act. The problem, however, is that it is notoriously difficult to determine whether an actor acted with corrupt intent. In light of such difficulties, it is not surprising that such conduct is often viewed as morally ambiguous.

G. Value of Surrounding Legitimate Conduct

Most of the offenses I have been considering are committed in the course of conduct that is otherwise legal, and even socially productive. Government officials who accept bribes are frequently also involved in legitimate governmental functions; investors who trade on the basis of inside information tend to be engaged in legal investment as well; and people who commit regulatory and intellectual property crimes are often engaged in the business of producing valuable products and services. Mikhail Khodorkovsky, for example, is not only one of the richest men in Russia and head of its largest oil company, but also an important symbol of Russia's transition to a capitalist economy, and a hero to many. In some cases, such people even use their wealth for worthwhile philanthropic purposes. The same cannot generally be said in the case of drug dealers, burglars, and serial killers (although there are surely exceptions). To the extent that a perpetrator's criminal conduct is likely to be judged in light of, and balanced against, her socially beneficial conduct, ambiguity is once again likely to be the result.


43. Among the central figures in recent white collar crime scandals who also have a distinguished record of philanthropy are Kenneth Lay, former CEO of Enron, and Bernie Ebbers, former CEO of WorldCom. See Heather Bourbeau, The Redemption of Swine: Can Ken Lay Make a Comeback?, SLATE, Sept. 19, 2002, at http://slate.msn.com/id/2071203 ("Lay donated over $2.5 million to more than 250 organizations through his family’s foundation, and he had Enron give 1 percent of profits to mostly Houston-based charities. ... Ebbers raised record sums of money for Mississippi College, arranged scholarships for local children, aided local businesses, gave to churches, [and] helped neighbors become millionaires through WorldCom stock. ... "). Richard Scrushy, founder and former CEO of HealthSouth, is also a benefactor of many worthwhile charities in his native Alabama and elsewhere. See A Biographical Sketch: Richard Scrushy and HealthSouth, RichardMScrushy.com, at http://www.richardmscrushy.com/biography.aspx (last visited on Jan. 31, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).
H. Legislative Attitudes

Our judgment of whether and to what extent various forms of conduct are morally wrong is undoubtedly influenced by how such conduct is treated by the law. Indeed, there are, in addition to the criminalization of ostensibly morally neutral conduct referred to above, at least four other ways in which legislatures have contributed to the phenomenon of moral ambiguity in white collar crime. First, many of the crimes we have been considering are dealt with in specialized, regulatory portions of state and federal law rather than in the criminal law proper. For example, securities fraud is dealt with in the part of the U.S. Code dealing with securities law, tax evasion in sections dealing with tax law, criminal price-fixing in the antitrust provisions, and environmental crimes in the titles dealing with environmental law. Because such offenses are codified separately from "real crimes," they are perhaps less likely to be thought of as real crimes.

Second, most of the offenses we have been talking about are enforceable by means of both criminal prosecution and private or governmental civil actions. Indeed, it has been suggested that, in the case of certain forms of white collar wrongdoing, criminal law may even be the less preferred approach. Such "hybrid" criminal/civil character is particularly evident under regulatory-type statutes such as the Securities Exchange Act of 1934, the Sherman Act, Clean Water Act, Bankruptcy Code, Tax Code, Truth in Lending Act, False Claims Act, and Federal Food, Drug and Cosmetic Act. Under such statutes, precisely the same conduct can give rise to either criminal or civil penalties, with the discretion to pursue one or the other wholly in the hands of prosecuting officials. The result is that the line between white collar crime and non-criminal cases becomes blurred, even arbitrary.

Third, under federal law, some criminal statutes contain a "morally neutral" element that must be satisfied in order for fed-


eral jurisdiction to be established. For example, under the mail fraud statute, the government must prove that the defendant "place[d] in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service." Because the government must present evidence that the defendant engaged in the morally neutral act of mailing a letter, some observers may be left with the impression that the larger mail fraud prosecution itself involves a morally ambiguous act.48

Fourth, a reasonable case could be made that legislatures have tended to authorize (and judges to impose) less severe penalties for white collar offenses than for equally or less serious street crimes.49 Admittedly, comparing white collar and non-white collar crimes in terms of seriousness is bound to be difficult. Nevertheless, one cannot help but be struck by U.S. Sentencing Commission statistics indicating that, during 2001, the average sentence for white collar crime was just over 20 months, while the average sentence for drug and violent crimes was 71.7 and 89.5 months, respectively.50 And there is plenty of anecdotal evidence to the same effect; to cite just one example, in the late 1990s, officials of Archer Daniels Midland were caught red-handed on videotape rigging prices of agricultural products with competitors. The trial judge sentenced the two ringleaders to a mere two years in prison each. An outraged appeals court increased the sentence to the statutory maximum of three years. Even so, as Kurt Eichenwald has put it, the result was that "executives who effectively cheated every grocery store in the country received shorter sentences than if they had robbed just one."51

J. Prosecutorial and Judicial Attitudes

Moral ambiguity in white collar crime is fostered not only by legislative bodies, but also by judges and prosecutors. In the case of judges, one can observe an interesting inversion in attitudes, apparently based on political ideology and class consciousness: "conservative" judges tend to be more aggressive than their "lib-

47. 18 U.S.C. § 1341.
48. Thanks to Rick Garnett for bringing this point to my attention.
eral" counterparts in their attitudes toward the investigation, prosecution, and punishment of street crime; in the case of white collar offenses, just the opposite is true. To the extent that people take their cues from judicial decisions, the result is likely to be a certain amount of confusion.

There is also evidence to suggest that prosecutors are likely to be more lenient with respect to white collar crime than in the case of street crime. A striking example is provided by a recent study of the federal Occupational Safety and Health Administration (OSHA). During the period from 1982 to 2002, the agency investigated 1,242 cases in which it concluded that workers had died because of "willful" safety violations on part of their employers. All of these cases would seem to have involved a violation of criminal law. Yet in ninety-three percent of the cases, OSHA declined to prosecute, apparently owing to a "culture of reluctance [that] rules [the agency] regardless of which party controls Congress or the White House."

Just as the public takes its cues from the legislative treatment of white collar crime, so too is it influenced by how such crime is treated by prosecutors and in the courts. If white collar crime is treated as less serious than street crime, it is not surprising that people tend to think of it as less serious than such crime.

K. The Criminal Defense Bar, Publicists, the Media, and the Academy

Public attitudes towards white collar crime are affected not only by how such offenses are treated by government officials, but also by the criminal defense bar, the media, the public relations industry, and the academy. Defendants in white collar criminal cases are much more likely than those in street crime cases to have the money to hire lawyers, investigators, paralegals, jury consultants, and others to assist in their cause. Highly paid white collar criminal defense lawyers are more successful at almost every stage in the criminal justice process than their public defender counterparts. They do a better job of persuading

52. See, e.g., J. Kelly Strader, The Judicial Politics of White Collar Crime, 50 Hastings L.J. 1199, 1202 (1999) (stating "in a substantial number of the [Supreme] Court's leading white collar criminal cases [during the years 1972-96], ranging from securities fraud to political corruption cases, the 'liberal' justices [such as Brennan, Marshall, and Stevens] have voted to affirm convictions, and the 'conservative' justices [such as Scalia, Rehnquist, and Thomas] to reverse them.").


54. Id.
prosecutors not to indict, preventing the prosecution from obtaining evidence needed to convict, keeping witnesses from talking to prosecutors, presenting their case in the media, obtaining favorable plea bargains, pursuing post-conviction appeals, and arguing mitigation in sentencing. Some white collar defendants even hire publicists and launch websites intended to help repair reputations damaged by allegations of criminal conduct. All of those retained are expert at exploiting the moral ambiguity of white collar crime, whether at trial or in the larger court of public opinion. The seriousness of white collar crime also tends to be minimized by the media. Both newspapers and broadcast media tend to give more attention to conventional, interpersonal, sensational, and violent forms of criminality than to their more subtle white collar counterparts. The more limited media coverage of such crimes seems to be attributable to the complexity and supposed "dullness" of the conduct involved, the more indirect nature of the harm experienced by individual victims, and the fact that such criminality tends to produce fewer striking visual images on which television news in particular thrives. In addition, it may be that media organizations are more likely to be intimidated in their coverage of white collar crime by the possibility that corporate sponsors might withdraw advertising and that deep-pocketed targets of white collar investigations might institute defamation suits.

Finally, it is worth noting that the academic treatment of white collar crime may also contribute to its morally ambiguous character. Criminologists going back to Edwin Sutherland have complained that their colleagues neglect white collar criminality in favor of street crime. A similar phenomenon can be observed in the law schools. White collar offenses are almost never dealt

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57. For a useful discussion of how the media deal with white collar crime, see Friedelichs, supra note 3, at 17–19.
58. Id. at 18–19.
59. Id.
with in introductory courses in criminal law, and are only rarely mentioned in the general literature on criminal law theory. There are of course courses in “white collar” and “federal” crime that deal with offenses such as mail fraud, perjury, and obstruction. But to the extent that law school curricula deal at all with the subject of regulatory crime, it is only in passing, in more general courses on environmental, tax, securities, antitrust, intellectual property, labor, and administrative law. The result is that such offenses (if not white collar crime more generally) tend to be viewed more as “violations” than as genuine “crimes.”

**CONCLUSION**

Assuming that white collar crime really does reflect the kind of moral ambiguity I have been describing, two questions naturally arise: First, is moral ambiguity a bad thing? Second, assuming that it is, what can be done about it? Although ambiguity might in some cases mean flexibility, it is surely not a phenomenon that, as a general matter, should be encouraged. Our system is committed to the notion that only the most clearly harmful and wrongful kinds of conduct should be treated with criminal sanctions. Such sanctions need to be applied sparingly, consistently, and with a clearly articulated rationale. If our attitudes towards white collar crime are too ambiguous, the moral authority of the criminal law will itself be viewed as ambiguous.

How, then, can such ambiguity be reduced? A number of reforms could certainly be considered: We could insist that legislatures avoid criminalizing conduct the moral wrongfulness of which is the subject of serious controversy. We could require legislatures to distinguish clearly between inchoate and completed conduct, and insist on a showing of mens rea for all crimes. We could endeavor to define the harms caused by, and the victims of, white collar crime more clearly than is done under current law. We could seek ways to integrate white collar crime more fully into our criminal codes, create sentencing parity between comparable white collar and conventional offenses, and require greater evenhandedness in terms of prosecutorial and judicial attitudes. We could demand that conduct resulting in criminal liability be distinguished more clearly from conduct resulting in civil liability. And we could formulate rules to determine more clearly how criminal responsibility should be attributed to individuals working within large organizations.

But even if all of these reforms could be effected, there would, I believe, remain an unavoidable element of moral ambiguity deeply embedded in the fabric of white collar criminal law.
Much of white collar crime involves conduct that is hard to define, hard to identify, and hard to prove; yet it is also some of the most harmful conduct our society faces. The answer is not a retreat from the criminalization of such conduct, but rather a recognition of its distinctive character, and a resolve to seek out certainty where ambiguity now prevails.