WHITE-COLLAR CRIME
WHAT IS IT?

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No more than a cursory glance through Australian newspapers for a brief time period is needed to reap a harvest of stories about behaviours related to the phenomenon of white-collar crime. During late April and May of 1990, for instance, among the news reports was one that the *Daily Telegraph* headlined as "Minister Slams Shonky Builder". The lead paragraph noted that "[a]n unlicensed builder who claims to rectify poor and shoddy work on behalf of the government's watchdog, the Building Service Corporation, is a charlatan..."[1] The *Australian* at about the same time was reporting that three men at Steigers Meats, including a director, had been jailed and two others fined more than $50,000 because they had substituted pet meat, unfit for human consumption, for prime lamb and beef. The publicity concerning what they had done was said to have "nearly lost the US market" to the Australian meat industry.[2]

In the same period, the *Sydney Morning Herald* was reporting that several criminal charges under the Company Code had been laid against the founding officer of Spedley Securities for altering account statements.[3] Meanwhile, the *Townsville Bulletin* was informing its readers about a police investigation of an alleged racket relating to cut-price liquor. Advertisements had been placed in the name of the Queensland Wine and Beer Club offering low-priced liquor to anyone joining the club for $5. The money was to be sent to a Post Office Box.[4] Another story, this in the *Melbourne Sun*, indicated that investors in a $13 million property scam had been sucked "into a whirlpool of false financing" and "kept in a state of perpetual deception". The ruse had been perpetrated against members of the Italian communities in Melbourne and Sydney. The major operator of the scheme faced 151 charges in what was described as a classic Ponzi tactic[5], with newly-raised money being used to pay off the interest to earlier investors rather than to purchase the property that had been promised.[6] Finally, among many other press items, there was a story in the Age reporting that a television retail promoter had been fined $5,000 for showing a 15-second commercial that appeared to offer two sorts of "stylish cheval mirrors" for $29.95. When a customer tried to buy the product at that price, however, she had been told that it would cost $139.[7]

Obviously, the half-dozen offences briefly described in the foregoing paragraphs represent a wide range of infractions against the law, and have been committed by

1 Morris, L, "Minister Slams Shonky Builder", *Daily Telegraph*, 24 May 1990 at 5.
2 "Meat Substitution Gang Nearly Lost US Market", *Australian*, 16 May 1990 at 6.
3 Armitage, C, "Spedley's Manager Faces Seven Charges", *Sydney Morning Herald*, 17 May 1990 at 31.
4 "Liquor Advertising Racket Investigated", *Townsville Bulletin*, 28 April 1990 at 3.
5 See Dunn, D H, *Ponzi!: The Boston Swindler* (1975).
6 Jackson, I, "Investors Out $13m in Scam, Court Told", *Melbourne Sun*, 8 May 1990 at 18.
7 "Copperart Fined Over TV Ads", *Age*, 23 May 1990 at 6.

persons of difference social standing, though all the offenders presumably wore the requisite "white-collar" or a reasonable facsimile. Most persons working in the field of white-collar crime probably would agree that the pet meat fraud and the Spedley case represent clear and classic instances of alleged white-collar crime. The television advertising scam is, perhaps, more arguable; it stands as a common and petty consumer crime — known as a "bait and switch" tactic[8] — and seems to lack an element of "evil grandeur" to meet what some persons hold out as the proper standard for classification as a white-collar crime. The remaining three behaviours — the shonky builder, the con game involving the come-on of cheap liquor, and the Ponzi scheme against members of the Italian community are, at best, arguably congruent with the "proper" definition of white-collar crime. Some persons would include them; others would not.

These cases, then, can serve to illustrate part of the difficulty surrounding the definition to be given to that category of illegal behaviour that has come to be designated as white-collar crime. Few, if any, terms used in legal and criminological writing and research arouse as much agitation and dispute as the white-collar crime concept. Sociologists, who dominate the field of academic criminology, are wont to insist that by white-collar crime they mean to pinpoint a coterie of offences that are committed by persons of reasonably high standing in the course of their business, professional, or political work. Especially clear illustrations would be an anti-trust conspiracy among vice presidents of several major corporations, the acceptance of a bribe by a member of the national cabinet, or medi-fraud by a surgeon.

Persons with criminal law or regulatory law backgrounds, for their part, are likely to point out that there is no such designation as "white-collar crime" in the statute books and that the kinds of criminal offences that sometimes are embraced within the term — such as insider trading and other securities violations, embezzlement, and a large variety of frauds — are committed by persons who might be located anywhere on the scale in terms of their social status. While antitrust conspiracies are not likely to be carried out by lower echelon employees (though they could in theory involve the executives' secretaries), bribery transactions often include lower-level go-betweens, and medi-fraud is undertaken by pharmacy employees and ambulance drivers as well as medical doctors. Why, it is asked, should any distinction be drawn between persons who have committed the same type of offence merely because they hold different occupational positions? This is but one of a considerable number of disputes about definition that both plague and invigorate research and writing regarding white-collar crime.

Cynics are apt to view jousting about the definition of white-collar crime the same way they regard disputes about the definition of pornography: we all can recognize it when we see it, why bother overmuch with attempting to pinpoint precise parameters for a subject that by its nature is apt to have a certain fuzziness about it? Those rejecting that viewpoint maintain that it is vital to establish an exact meaning for a term so that everyone employing it ends up talking about the same thing, and so that scientific investigations can build one upon the other rather than going off in diverse directions because of incompatible definitions of their subject matter.

8 See Blumberg, P, *The Predatory Society: Deception in the American Market Place* (1989).

On the debit side in this long-standing debate lies the fact that a great deal of energy and ingenuity have been dedicated to defending one or another of the supposed characteristics of the term "white-collar crime" that could have been employed to increase our understanding of the behaviours involved and determining more satisfactory methods for dealing with them. On the credit side of the ledger lies the better insight and understanding that inevitably result when good minds ask hard questions regarding precisely what is meant by words and terms that seem to be employed imprecisely. In the remainder of this chapter, I will indicate the course of the intellectual fray regarding the definition of white-collar crime so that readers might be enabled to decide for themselves what resolution best satisfies them.

SUTHERLAND AND HIS EARLY DISCIPLES

The term "white-collar crime" was introduced to the academic world by Edwin H Sutherland in 1939 during his presidential address to the American Sociological Society in Philadelphia. Fifty-six-years old at the time, Sutherland was at the peak of a distinguished career marked primarily by his authorship of a sophisticated textbook, *Criminology*, that had first been published in 1924. Though he had lapsed from the orthodox religious faith of his father, a Baptist minister and college president, Sutherland had intensely strong moral convictions about commercial, political, and professional wrongdoing. He also had been deeply influenced by the populist ideas that permeated the Nebraska of his youth,[9] ideas that depicted corrupt business practices as undermining the livelihood and independence of the hard-working, god-fearing frontier people among whom Sutherland had been brought up.[10]

In Sutherland's presidential address, he insisted that he had undertaken his work on "crime in the upper, white-collar class, which is composed of respectable, or at least respected, business and professional men" only "for the purpose of developing the theories of criminal behaviour, not for the purpose of muck-raking or of reforming anything except criminology".[11] This patently disingenuous disclaimer was primarily a bow to the ethos of sociology at the time, an ethos that insisted on a "value-free" and "neutral" research stance. A proper definition of his subject matter did not occupy Sutherland's attention in this paper; rather, he used anecdotal stories of rapacious acts by America's notorious "robber barons" and their successors to flay then-popular explanations of criminal activity such as poverty, low intelligence, and offender psychopathy.

Ten years later, in his classic monograph, *White-collar Crime*, Sutherland fleshed out the material from his presidential address, but did very little to pin down with any precision the definition of his subject matter. That he buried part of his definitional attention in a footnote attests to his indifference to the issue. In the text Sutherland

9 See Cherny, R W, *Populism, Progressivism and the Transformation of Nebraska Politics, 1885-1915* (1981).

10 For biographical details regarding Sutherland, see Geis, G and Goff, C, "Introduction" in Sutherland, E H, *White-collar Crime: The Uncut Version* (1983) at ix-xxxiii.

11 Sutherland, E H, "White-collar Criminality", (1940) 5 *American Sociological Review* 1.

declared that a white-collar crime "may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation".[12] He then added that the definition consequently "excludes many crimes of the upper class, such as most of their cases of murder, adultery, and intoxication, since these are not customarily a part of their occupational procedures".[13] The footnoted observation added that the term "'white-collar' is used here to refer principally to business managers and executives, in the sense that it was used by a president of General Motors who write *An Autobiography of a White-collar Worker*".[14] However, within two pages of this pronouncement Sutherland illustrated white-collar crime with examples of thefts by employees in chain stores and overcharges by garage mechanics and watch-repairers. It may have been the dearth of material at his disposal that led Sutherland to use these illustrations; more likely, it was the inconstancy of his definitional focus. Sutherland believed that all crime could be understood by a single interpretative scheme — his theory of differential association — and therefore, this being so, he saw no compelling reason to differentiate sharply between various forms of illegal activity.

Besides the ill-considered use of fudge words such as "approximately" and "principally" in his definition — with no clear indication of what the exceptions might be — Sutherland further muddied the semantic waters by planting here and there a number of other equally amorphous clues to what he might have had in mind. The year before he published *White-collar Crime*, in a speech in the spring of 1948 at DePauw University in Indiana that was published only after his death, Sutherland had said:

> I have used the term white-collar criminal to refer to a person in the upper socioeconomic class who violates the laws designed to regulate his occupation. The term white-collar is used in the sense in which it was used by President Sloan of General Motors, who wrote a book titled *The Autobiography of a White-collar Worker*. The term is used more generally to refer to the wage-earning class which wears good clothes at work, such as clerks in stores.[15]

That Sutherland, usually a meticulous scholar in such matters, mis-cites the Sloan book (it was *Adventures of a White-Collar Man*)[16] and that Sloan's book offers no further definitional enlightenment that I was able to discover adds to the confusion. A strict constructionist might well argue that the fact that Sutherland abandoned the final sentence in the foregoing quotation about the waging-earning class and its dress when he incorporated this segment of material into his monograph the next year indicates that he had second thoughts, and the he intended to confine his focus to upperclass offenders committing crimes against others (rather than their employer) in the course of their work.

The most straightforward definition that Sutherland offered has rarely been noted. It appeared in the *Encyclopedia of Criminology* almost co-terminously with the public-

12 Sutherland, Edwin H, *White-collar Crime* (1949) at 9.
13 Ibid.
14 Ibid.
15 Sutherland, E H, "Crimes of Corporations", in Cohen, A K, Lindesmith, A and Schuessler, K (eds), *The Sutherland Papers* (1956) at 79.
16 Sloan Jr, A P and Sparkes, B, *Adventures of a White-Collar Man* (1941).

ation of *White-collar Crime*. Here Sutherland wrote that "the white-collar criminal is defined as a person with high socio-economic status who violates the laws designed to regulate his occupational activities". Such laws, Sutherland added, might be found in the penal code but also included federal and state trade regulations, as well as special war regulations and laws regarding advertising, patents, trademarks, and copyrights. Thereafter, he observed:

> The white-collar criminal should be differentiated, on the one hand, from the person of lower socio-economic status who violates the regular penal code or the special trade regulations which apply to him; and, on the other hand, from the person of high socio-economic status who violates the regular penal code in ways not connected with his occupation.[17]

It requires a jesuitical or rabbinical mind to comb these variant proclamations to determine which was "truly" meant as the definition of a phenomenon Sutherland had so effectively called to academic and public attention. Certainly, the definitions are uncrystallized and, at times, contradictory. For me, what stands out is the sense that Sutherland was most concerned with the abuse of power by upper-echelon businessmen in the service of their corporations, by high-ranking politicians against their codes of conduct and their constituencies, and by professional persons against the government and against their clients and patients. Particularly significant, I find, is Sutherland's specific exclusion, in the last of the definitions that I have quoted, of a person from the lower socioeconomic class who violates "special trade regulations which apply to him". It must be granted, however, that this phrase too has its ambiguities. Did Sutherland mean to include lower socioeconomic class persons who violated regulations that applied *both* to them and to those above them in the power structure — such as the printer's devil and the corporate president who trade on insider information? Was it the law or the status of the perpetrator — or both linked together — that concerned him? It has been reported that Sutherland once was asked by Edwin Lemert, a noted criminologist, whether he meant by white-collar crime a type of crime committed by a special class of people, and that he replied that "he was not sure".[18] Given its progenitor's alleged uncertainty, it is not surprising that those who try to perform as glossarists on the Sutherland definitional text often are befuddled. Besides, it should be stressed that Sutherland's definition, whatever its essence, has no necessary standing if more useful conceptualisations of the subject matter emerge.

This chapter on definitional matters regarding white-collar crime will focus almost exclusively on sources from the United States because most writers outside of America have rather sanguinely ignored the question of the "proper" parameters for white-collar crime. In part, this is probably because it typically requires a rather large corps of communicants for some to devote their time to matters which have no immediate utilitarian component. Also, criminology outside the United States has only recently emerged as a social science enterprise distinctive from law and medical faculties — and the concept of white-collar crime is a characteristically social science formulation.

17 Sutherland, E H, "The White-collar Criminal" in Branham, V C and Kutash, S B, *Encyclopedia of Criminology* (1949) at 511.

18 Sparks, R F, "'Crime as Business' and the Female Offender" in Adler, F and Simon, R J, *The Criminology of Deviant Women* (1979) at 171.

The term "white-collar crime" itself has been widely incorporated into popular and scholarly language throughout the world, though the designation "economic crime" tends to be preferred in socialist countries and is also widely used elsewhere. The United Nations, for its part, has adopted the phrase "abuse of power" for those behaviours that correspond to white-collar crimes. In addition, other designations, such as "upperworld crime", "crimes by the powerful", "crime in the suites", and "organisational crime" have their devotees.

Sutherland's position on white-collar crime almost immediately elicited some stinging but off-target critiques from two sociologists, both of whom also held law degrees. Rather than focusing on Sutherland's definitional imprecision, both castigated him for what they saw as his anti-business bias and his use of a conceptual brush to tar persons who had not been convicted by a criminal court.[19] Sutherland got much the better of this debate by arguing that it was what the person actually had done in terms of the mandate of the criminal law, not how the criminal justice system responded to what they had been done, that was essential to whether or not they should be regarded as criminal offenders.[20]

The pioneering empirical studies that followed in the wake of Sutherland's enunciation of a new area of inquiry did little to clarify the definitional uncertainty. Marshall Clinard, studying black market offences during the second World War, devoted his attention to the secondary issue of whether what he had investigated truly was a crime rather than whether it might mesh with the ingredients necessary to characterize the behaviours as white-collar crime. Clinard also argued that the personalities of the perpetrators — such as egocentricity, emotional insecurity, and feelings of personal inadequacy — were at least as significant as differential association in accounting for the black market violations.[21] Donald Cressey's interviews with embezzlers in federal prisons led him to question whether these offenders met the criteria for categorisation as white-collar offenders, since they typically cheated their employers, and "[w]hile, with a few exceptions, the persons interviewed were in no sense poverty stricken, neither can they be considered as persons of high social status in the sense that Sutherland uses the phrase".[22]

Frank Hartung, in the third major study of white-collar crime by a follower of Sutherland, as had Clinard, addressed almost all of his definitional remarks to the debate over whether or not what the violators of the wartime regulations in the meat industry had done could be considered criminal (he believed, with solid evidence, that they could), and not whether, if so, they were white-collar criminals.[23] What particularly

19 Tappan, P W, "Who is the Criminal?" (1947) 12 *American Sociological Review* 96-102; Caldwell, R G, "A Re-Examination of the Concept of White-Collar Crime", (March 1958) 22 *Federal Probation* 30-36.

20 Sutherland, E H, "Is 'White-Collar Crime' Crime?" (1945) 10 *American Sociological Review* 132-139. Cf Pepinsky, H E, *Crime and Conflict: A Study of Law and Society* (1976) at 26-35.

21 Clinard, M B, *The Black Market: A Study of White-Collar Crime* (1952).

22 Cressey, D R, *Other People's Money: A Study in the Social Psychology of Embezzlement* (1953). Daniel Bell similarly excluded embezzlers from the white-collar domain, see "Crime as an American Way of Life" in (1960) *The End of Ideology* 382.

23 Hartung, F E, "White-Collar Offenses in the Wholesale Meat Industry in Detroit" (1950) 56 *American*

marked Hartung's contribution, however, was the feisty response it drew from a preeminent sociologist, Ernest Burgess. Burgess insisted that persons violating regulatory laws, such as black marketers, could not be regarded as criminals because they did not so view themselves and were not so viewed by the public. Beside, Burgess maintained, this would mean that half the country's population, given the widespread disregard of rationing during the war, were criminals, a conclusion he apparently found intellectually intolerable.[24] Hartung tried to assuage Burgess, a power in the discipline, but had understandable difficulty with the idea that a person is not a criminal unless that person thinks of himself or herself as a criminal.

Summarizing these early days of white-collar crime scholarship, Donald Newman maintained that the chief criterion for a crime to be white-collar is that it occurs as a part of or as a deviation from the violator's occupational role. "Technically," Newman insisted, "this is more crucial than the type of law violated or the relative prestige of the violator, although these factors have necessarily come to be major issues in the white-collar crime controversy".[25] This had happened, he argued, because most of the laws involved were not part of the traditional criminal codes, and because most of the violators were a cut above the ordinary criminal in social standing. Yet, in the same article, Newman notes that "[w]hether he likes it or not, the criminologist finds himself involved in an analysis of prestige, power, and differential privilege when he studies upperworld crime".[26] Writing slightly later, Richard Quinney maintained that the concept of white-collar crime lacked conceptual clarity, and thought that it ought to embrace the derelictions of persons in all kinds of occupations. Then, however, he faced another dilemma: What is an occupation? Is the filing of a tax return part of a person's occupation?[27] Is a welfare recipient who cheats the social services engaged in a white-collar crime because being on the dole is an occupational pursuit? Quinney, thus, added some more riddles, but, like those who had written before him, he was unable to put forward a definitional manifesto that could elicit widespread agreement.

THE MIDDLE YEARS

After the first burst of creative research on diverse aspects of white-collar crime, during the 1960s the subject was virtually abandoned by scholars in the United States, where virtually all the work had been carried out. Undoubtedly, this was in large part because of the reluctance to tackle iconoclastic ventures with the threat of McCarthyism hanging over the country.[28] Ultimately, the cooling off of the cold war, the surge for power by blacks, the challenge to the Vietnam war, Watergate, and similar events served to

Journal of Sociology 25-34.

24 Burgess, E W, "Comment" and "Concluding Comment" (1950) 56 *American Journal of Sociology* 32-34.

25 Newman, D J, "White-Collar Crime: An Overview and Analysis" (1985) 23 *Law and Contemporary Problems* 737.

26 Id at 741.

27 An argument that tax evasion ought to be regarded as a white-collar crime and all perpetrators as white-collar criminals is put forth in Mason, R and Calvin, L D, "A Study of Admitted Tax Evasion" (1978) 13 *Law and Society Review* 73-89.

28 See Schrenker, E W, *No Ivory Tower: McCarthyism and the Universities* (1986).

refocus attention on abuses of power. At the same time, as the study of crime in countries other than American moved away from being solely an enterprise conducted by black-letter lawyers and medical doctors, scholars throughout the world began to turn their attention to white-collar crime.[29]

On the definitional front, there was, first, an ineffectual and ill-conceived attempt by the present author in 1962 to restrict the term white-collar crime to the realm of corporate violations.[30] Then, in 1970, Herbert Edelhertz, at the time the chief of the fraud section of the federal Department of Justice, offered a definition that drew exclusively upon legal understanding and, as he indicated, one that differed "markedly" from that advanced by Sutherland, which Edelhertz believed was "far too restrictive". "White-collar crime is democratic," Edelhertz asserted, and "can be committed by a bank teller or the head of his institution."[31] Edelhertz proposed that a useful definition of white-collar crime would be:

> ...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.[32]

He set out four subdivisions to embrace diverse forms of white-collar crime: (1) crimes by persons operating on an individual, ad hoc basis, for personal gain in a non-business context; (2) crimes in the course of their occupations by those operating inside businesses, government, or other establishments, or in a professional capacity, in violation of their duty of loyalty and fidelity to employer or client; (3) crimes incidental to and in furtherance of business operations, but not the central purpose of such business operations; and (4) white-collar crime as a business, or as the central activity of the business. The last, Edelhertz indicated, referred to confidence games as forms of crime.[33]

Criticism of the Edelhertz position predictably came from sociologists who regretted his slighting of the idea of abuse of power as the key aspect of white-collar offences and his expansive extension of the term to such a variegated range of behaviours. They were puzzled by the excision of violence from the realm of white-collar crime, noting that crimes such as unnecessary surgical operations, the manufacture of unsafe automobiles, and the failure to label poisonous substances at the workplace could be regarded as white-collar crimes with a strong component of violence. Miriam Saxon, for instance, in challenging Edelhertz' viewpoint, noted that the MER/29 case involved a pharmaceutical corporation that knowingly sold an anti-cholesterol drug that subjected at least 5,000 persons to such serious side effects as cataracts and hair loss.[34] Later, the

29 A brief sample of the non-American writings includes Dong-Mao, L, *The Study of Economic Crime* (Taipei, 1984); Hopkins, A, *Crime, Law & Business: The Sociological Sources of Australian Monopoly Law* (Canberra, 1978); Kellens, G, *Banqeroute et Banqueroutiers* (Brussels, 1974); Levi, M, *The Phantom Capitalists: The Organisation and Control of Long-Firm Fraud* (London, 1981). The most comprehensive white-collar crime bibliography has been produced in Germany, Liebl, H and Liebl, K, *Internationale Bibliographie zur Wirtschaftskriminalitat* (Pfaffenweiler, 1985).

30 Geis, G, "Toward a Delineation of White-Collar Offences" (1962) 32 *Sociological Inquiry* 160-171.

31 Edelhertz, H, *The Nature, Impact and Prosecution of White-Collar Crime* (1970) at 3-4.

32 Id at 3.

33 Id at 19-20.

34 Saxon, M S, *White-collar Crime: The Problem and the Federal Response* (1980) at 3. Cf Rheingold,

American Bar Association would adopt the term "economic offense" for behaviours within the white-collar crime realm enunciated by Edelhertz and would modify the term "non-violent" with the footnoted observation that it referred to "the means by which the crime is committed" though it was acknowledged that "the harm to society can frequently be described as violent".[35]

In 1973, sociologist Ronald Akers portrayed what he called "occupational crime" in the following terms:

> ...occupational crime (white-collar crime) is defined here as *violation of legal norms governing lawful occupational endeavours during the course of practicing the occupation.*[36]

The reference to norms governing occupations, Akers pointed out, was meant to exclude violations of the "usual criminal law," such as arson and murder.[37]

Also during 1973, Clinard and Quinney put forward what has become a widely-accepted and important distinction within the world of white-collar crime, that between (1) occupational criminal behaviour and (2) corporate criminal behaviour. The former, in line with Akers' contribution, was meant to include persons at all levels of the social structure, and was defined as the "violation of the criminal law in the course of activity of a legitimate occupation".[38] The category included offences of employees against their employers. Corporate crime for its part was to consist of offences committed by corporate officials for their corporation and the offences of the corporation itself.[39]

Seven years later — in 1980 — Albert Reiss and Albert Biderman, two particularly sophisticated scholars, suggested the following definition of white-collar crime in a monograph which sought, with a singular lack of success, to establish some basis for counting in a systematic manner and number of such offences committed annually:

> White-collar violations are those violations of law to which penalties are attached that involve the use of a violator's position of significant power, influence, or trust in the legitimate economic or political institutional order for the purpose of illegal gain, or to commit an illegal act for personal or organizational gain.[40]

P D, "The MER/29 Story: An Instance of Successful Mass Disaster Litigation" (1968) 56 *California Law Review* 116-148.

35 Id at 5.

36 Akers, R L, *Deviant Behaviour: A Social Learning Approach* (1973) 179.

37 Ibid.

38 Clinard, M B and Quinney, R, *Criminal Behaviour Systems: A Typology* (2nd edn, 1973) at 188. The two American textbooks devoted to white-collar crime have employed slight variants on the Clinard and Quinney position to define their material. James S Coleman defines white-collar crime as "a violation of the law committed by a person or group of persons in the course of their otherwise respected and legitimate occupation or financial activity" (*The Criminal Elite* (2nd edn, 1989) at 5. Gary S Green entitled his text *Organizational Crime* (1990) and defined its subject as (1) acts punishable by law; and (2) that are committed through opportunity created by an occupational role that is legal (at 13).

39 Clinard and Quinney, above n38.

40 Reiss, Jr, A J and Biderman, A, *Data Sources on White-Collar Law-Breaking* (1980) at 4.

What is notable about this stab at achieving definitional order is the return to what I see as Sutherland's clarion point, that he offence involve "the use of a violator's position of significant power, influence, or trust".

A further contribution of note was that by Richard Sparks, who preferred to abandon the law as the essential ingredient of a white-collar offence and, instead, to incorporate both deviancy and illegality within its purview. By white-collar crime (or, as he preferred "crime as business"), Sparks wrote, he meant acts possessing "all or most of the following features":

1. They are carried out primarily for economic gain, and involve some form of commerce, industry, or trade.

2. They necessarily involve some form of organisation, in the sense of more or less formal relationships between the parties involved in committing the criminal acts. This organisation is either based on, or adapted to, the commission of crimes.

3. They necessarily involve either the use or the misuse, or both, of legitimate forms and techniques of business, trade, or industry. What distinguishes such things as price-fixing conspiracies, invoice faking, and bankruptcy fraud from robbery, burglary and shop-lifting is that the former do, but the latter typically do not, involve methods and techniques that are also used for legitimate business purposes.[41]

The most interesting aspect of Sparks' definitional venture is his explicit linking of what has been called "organized crime" with white-collar crime. Dwight Smith, in particular, has long insisted, though for the most part he has remained a lone voice, that conceptually there is little to distinguish the two forms of law-breaking.[42]

CURRENT CONTROVERSIES

Sentencing Studies

Scientific work takes a number of forms. Case studies, ethnographic field work, surveys, and similar inquiries all have the potential to add to the stockpile of knowledge. but science — both the social and natural varieties — most fundamentally progresses by testing ideas and hypotheses empirically, preferably by experimental means that utilize control or comparison groups. Some ideas — that there is resurrection after life, for instance — remain impervious to scientific scrutiny; others can be tested with greater or lesser difficulty. The field of white-collar crime, for its part, is particularly resistant to experimental work. In some measure, this is because the standing of the perpetrators protects them from the kinds of manipulations that constitute so large a portion of experimental research.

41 Sparks, above n18 at 172.

42 Smith, Jr, D C, "White-Collar Crime, Organized Crime, and the Business Establishment: Resolving a Crisis in Criminological Theory" in Wickman, P and Dailey, T (eds), *White-Collar and Economic Crime: Multidisciplinary and Cross-National Perspectives* (1981) at 23-38.

A number of Sutherland's ideas concerning possible judicial favoritism towards white-collar offenders, however, have recently been converted into testable propositions in ways that have had an important impact on the manner in which white-collar crime is defined. In these instances, the nature of the available information dictated the definition employed. One of the major studies by John Hagan, Ilene Nagel, and Celesta Albonetti, used college education and income as proxies for white-collar status in their review of the sentences handed out in ten American federal courts. Their roster of white-collar offences was initially derived intuitively from all acts in the statute books that plausibly might fit the category. Then it was refined by asking US Attorneys for their views. Ultimately, thirty-one offences came to be regarded as white-collar offences. The list included such arguable acts as failure to file a tax return, embezzlement or theft by bank employees, mail fraud swindles, and fraudulent acceptance of veteran's benefit payments.[43] The research then was directed toward determining whether offenders convicted of committing such acts got tougher sentences than person who had committed non-white-collar offences — it was found that they did. In the other major sentencing study, Stanton Wheeler, David Weisburd, and Nancy Bode employed eight broad categories of federal offences for their representation of white-collar crime — securities fraud, antitrust violations, bribery, tax offences, bank embezzlement, postal and wire fraud, false claims and statements, and credit and lending institution fraud. They directed their inquiry toward discovering whether persons with higher social status were sentenced more leniently for such offences than those with lower social status — it was found that they were not.[44]

The conclusions have been disputed on the ground, among others, that they fail to take into account the considerable screening that takes places in regard to white-collar offences prior to the point where the remaining perpetrators go to court to plead or to be tried and, if found guilty, to be sentenced[45]. Perhaps a more basic issue is whether or not either team of researchers truly was studying persons who might reasonably be regarded as white-collar criminals. Kathleen Daly, re-analyzing the data used in the Wheeler et al investigation to determine the fate of women who committed white-collar crimes came to the paradoxical conclusion that it was "occupational marginality" that best explained such offences; virtually all of the bank embezzlers in her sample, for instance, were clerical workers, and as many as a third of the women in some offence categories were unemployed. For the men, Wheeler and his colleagues had reported that among the credit fraud, false claim and male fraud offenders, fewer than half were steadily employed and a quarter were unemployed at the time fo their offences[46]. At the end of

43 Hagan, J, Nagel, I H, and Albonetti, C, "The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts" (1980) 45 *American Sociological Review* 802-820.

44 Wheeler, S, Weisburd, D and Bode, N, "Sentencing the White-Collar Offender: Rhetoric and Reality" (1982) 47 *American Sociological Review* 641-649. A replication of study using different courts came to somewhat different conclusions: Benson, M and Walker, E, "Sentencing the White-Collar Offender" (1988) 53 *American Sociological Review* 294-302.

45 Shapiro, S, "The Road Not Taken: The Elusive Path to Criminal Prosecution of White-Collar Offenders" (1985) 19 *Law and Society Review* 179-217. For a defense of the Wheeler et al sample, see Wheeler, S and Rothman, M, "White-Collar Crime: The organization as Weapon in White-Collar Crime" (1982) 80 *Michigan Law Review* 1403-1426.

46 Wheeler, S, Weisburb, D, Waring, E and Bode, N, "White-Collar Crimes and Criminals" (1988) 25 *American Criminal Law Review* 346.

her study, Daly, in an aside almost plaintive in nature, mused: "The women's socio-economic profile, coupled with the nature of their crimes, makes one wonder if 'white-collar' aptly describes them or their illegalities".[47]

Responding in part to the criticism that he had corrupted the essential nature of white-collar crime in his sentencing study,[48] Hagan, in collaboration with Patricia Parker, later refocused his attention on securities violations during a 17-year period in the province of Ontario in Canada. He now employed as the determinant of white-collar power what he called "relational indicators", such as ownership and authority, which located individuals in class positions directly relevant to the perpetration of their offences. Hagan and Parker also turned from the criminal courts to look at regulatory enforcement under the Securities Act, arguing that the majority of the offences in which they were interested never came before the criminal courts. This research overturned the earlier counterintuitive conclusion that white-collar offenders are treated more leniently; instead, it was found that employers often escaped both criminal court appearance and regulatory punishment for Securities Act violations and that managers bore the heaviest burden of the sanctioning process. After the Watergate scandals, however, employers' cases were more frequently being routed to the criminal court. In terms of the importance of their different definitional focus, Hagan and Parker noted: "Empirical results of our work suggest that the substitution of class for status measures [for example, education and income] is crucial".[49]

ORGANISATIONAL FOCI

Parallel to the contretemps regarding the definitional boundaries of white-collar crime elicited by the sentencing studies, there has been an increasing focus on offences by organisations as part of the territory of white-collar crime. Sutherland himself had devoted a major portion of his monograph to a compilation of the officials records of wrong-doing by the seventy largest American corporations (and, as a result, had labelled most of them as "criminal recidivists"), and Clinard and Quinney had established corporate crime as a separable unit of white-collar crime analysis.

Chief among the proponents of an organisational focus are M David Ermann and Richard Lundman who note in their definitional framework that, among other things, deviant organisational acts must be contrary to norms maintained outside the organisation and must have support from the dominant administrative coalition of the organisation.[50] Laura Schrager and James F Short Jr define organisational crime in the following manner:

47 Daly, K, "Gender and Varieties of White-Collar Crime" (1989) 27 *Criminology* 769-793. Another writer has more aptly described such offenders as "frayed-collar criminals". Chapman, J R, *Economic Realities and the Female Offender* (1980) at 68.

48 Geis, G, "White-Collar Crime and Corporate Crime" in Meier, R F (ed), *Major Forms of Crime* (1984) at 146.

49 Hagan, J and Parker, P, "White-Collar Crime and Punishment: The Class Structure and Legal Sanctioning of Securities Violations" (1985) 50 *American Sociological Review* 302-316.

50 Ermann, M D and Lundman, R J, "Deviant Acts by Complex Organizations: Deviance and Control at the Organizational Level" (1978) 19 *Sociological Quarterly* 56-67.

> the illegal acts of omission or commission of an individual or a group of individuals in a formal organization in accordance with the operative goals of the organization, which have a serious physical or economic impact on employees, consumers, or the general public.[51]

The inclusion of a measure of the consequence of the offence ("a serious...impact") as an aspect of its definition seems puzzling, since various forms of illegal economic activity, such as some kinds of antitrust activity (for example, pooling resources by different companies to finance research on serious diseases), are at best arguably detrimental to economic health and vitality, but have been outlawed as a consequence of the force of a particular marketplace philosophy.[52]

Attention to organisational activity in white-collar crime studies drew heavy criticism from Donald R Cressey, who argued that the idea that corporations commit crimes is merely a legal fiction. Organisational and corporate crime, Cressey insisted, involved acts that are committed by executives in these groups, not by the organisations.[53] Cressey's position, for its part, was criticized by John Braithwaite and Brent Fisse. They argue that "sound scientific theories can be based on a foundation of corporate action," and noted that "[b]ecause the makeup of a corporation is different from that of a human being, it can do things that are not humanly possible, such as growing from infant to adult in a year, securing immortality".[54] The essence of Braithwaite and Fisse's position appears in the following paragraph:

> The notion that individuals are real, observable, flesh and blood, while corporations are legal fictions, is false. Plainly, many features of corporations are observable (their assets, factories, decisionmaking procedures), while many features of individuals are not (for example, personality, intention, unconscious minds).

Finally, Braithwaite and Fisse argued that "[t]he products of organisations are more than the sum of the products of individual actions".[55] Albert K Cohen, a pre-eminent criminologist, recently has seconded the Braithwaite and Fisse viewpoint, and offered some guide-lines to white-collar crime students for a better understanding of the "organisation as an actor".[56]

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51 Schrager, L S and Short Jr, J F, "Toward a Sociology of Organizational Crime" (1977) 25 *Social Problems* 55-67.

52 Kadish, S H, "Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations" (1963) 30 *University of Chicago Law Review* 423-449.

53 Cressey, D R, "The Poverty of Theory in Corporate Crime Research" in Laufer, W S and Adler, F (eds), *Advances in Criminological Theory* (1989) Vol 1 at 31-55.

54 Braithwaite, J and Fisse, B, "On the Plausibility of Corporate Crime Theory" in Laufer and Adler (eds), (1990) 2 *Advances in Criminological Theory* 15.

55 Ibid. See also Braithwaite, J and Fisse, B, "Varieties of Responsibility and Organizational Crime" (1985) 7 *Law & Policy* 315-343.

56 Cohen, A K, "Criminal Actors: Natural Persons and Collectivities" in School of Justice Studies, University of Arizona (ed), *New Directions in the Study of Justice, Law, and Social Control* (1990) at 101-125.

GENERAL THEORY AND ABUSE OF TRUST

Two major forays, quite distinctive from each other, into the definitional realm regarding white-collar crime have emerged in the past few years. Both offer strong arguments for the idiosyncratic stances they adopt. Whether either will have more than a passing influence on the manner in which white-collar crime comes to be viewed seems uncertain.

Travis Hirschi and Michael Gottfredson maintained that white-collar crime is nothing more than another form of law-breaking, like rape, vandalism, and simple assault, and readily can be incorporated into an explanatory framework that accounts for the causes of all criminal behaviour. For them, there is no relevant distinction that would necessitate white-collar crime being regarded as a special category of offence, and they argue that focusing on the class position of the offender precludes all but theories based on psychological differences between law-breakers as an explanation for what they have done. Hirschi and Gottfredson insist that person studying juvenile delinquency have found no utility in examining as separate entities vandalism, arson, rape, or burglary, and that, therefore "there is little reason to think that the idea of specialisation in white-collar offences will bear fruit".[57] Hirschi and Gottfredson also argue, apropos white-collar crime, that crimes have in common features that make those engaging in any one of them extremely likely to engage in others as well, a proposition that only could be upheld in regard to white-collar offenders if the category of behaviour as it is by these authors is defined extremely broadly. Critics of Hirschi and Gottfredson maintain that the pursuit of a single explanation that will permit understanding of all forms of criminal activity is a chimera, doomed to eternal failure.

The second call to reconceptualise white-collar crime — or, as she terms it, to "liberate" the term — is that offered by Susan Shapiro, who insists that white-collar crime ought to refer specifically and only to the violation of trust by which persons are enabled "to rob without violence and burgle without trespass".[58] Such persons manipulate norms of disclosure, disinterestedness, and role competence. Their behaviours involve lying, misrepresentation, stealing, misappropriation, self-dealing, corruption, and role conflict. As a whimsical example of misrepresentation, Shapiro tells the story of "Zoogate" — that the zoo in Houston advertised live cobras but actually displayed rubber replicas, since live cobras could not live under the lights in the area where they would have to be kept. Prosecution of crimes involving abuse of trust is handicapped, Shapiro points out, because of the ambiguity that renders victims unwitting and therefore unable to assist in prosecution, and the fact that the suspects tend to have custody of the crucial evidence against them. Shapiro grants that the Sutherland definitional heritage is not readily cast aside, because the concept of white-collar crime is "polemically powerful" and "palpably self-evident".[59] She also grants that her

57 Hirschi, T and Gottfredson, M, "Causes of White-Collar Crime" (1987) 25 *Criminology* 957. For a critique see Steffensmeier, D, "On the Causes of 'White-Collar' Crime" (1989) 27 *Criminology* 345-358.

58 Shapiro, S, "Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime" (1990) 55 *American Sociological Review* 346.

59 Id at 357.

redesign of the concept has its problems — for instance, that it excludes antitrust crimes as well as corporate violence that grows out of deliberate decisions or negligence. Nonetheless, Shapiro concludes with a resounding indictment of the consequences of the usual way of looking at white-collar collar crime, which is said to have:

> created an imprisoning framework for contemporary scholarship, impoverishing theory, distorting empirical inquiry, oversimplifying policy analysis, inflaming our muck-raking instincts, and obscuring fascinating questions about the relationships between social organization and crime.[60]

CONCLUSION

Earlier in this chapter, I proposed to set forth a sample of the major contributions directed toward providing a satisfactory definition of white-collar crime so that readers might be helped to adjudicate the debate for themselves. Most certainly, I also have intruded into the presentation of viewpoints a relatively strong indication of my personal preferences. In this final section, I want to formalize how I see some of the issues that have been considered in this chapter.

In writing for newspapers, reporters often strive to tie what they cover into a more significant or at least more recognizable story. This search for a "new peg" has its analog in scientific work — all of us generally attend more readily to things that relate to matters about which we already are concerned rather than to unfamiliar issues. The extensive and excellent work of Wheeler and his colleagues at Yale University was funded by the US Department of Justice as a response to its and the public's concern with what was known as white-collar crime. Therefore, it was incumbent upon the grant recipients to place their research under that heading and, when they gained access to federal court data, to insist that such data be formulated to represent white-collar crime rather than to be regarded as a collection of information about certain kinds of offences against federal law.

Similarly, Shapiro's contribution most basically asks that a new line of inquiry, that focused on abuse of trust, be pursued in scholarly work. There is no compelling reason that this call-to-arms be allied to the abandonment of traditional research on white-collar crime. Her blueprint may produce a better structure, but that conclusion is not obvious, any more than is the truth of the argument that our bounty of knowledge would be improved if demographers undertook ethnographic studies or psychologists changed to sociological pursuits. Put another way, Shapiro's argument against the traditional study of white-collar crime seems gratuitous, since it is not — and probably cannot — be accompanied by a demonstration of the truth of the assertion that intellectual, political, or social life would be better served by attending to abuses of trust rather than abuses of power.

My personal belief is that, whatever the loss incurred by the mounting of wayward inquiries, the preferred situation is that which encourages research and policy people to

60 Id at 362.

pursue those kinds of inquiries which strike them as offering the greatest personal, professional, and public reward. That position, of course, so stated, has elements both of the platitudinous and the pious, but I know of no other way to convey it. In regard to white-collar crime, I remain persuaded that Sutherland, however errantly, focused on a matter of singular practical and intellectual importance — the abuse of power by persons who are situated in relatively high places where they are provided with the opportunity for such abuse. The excellent study by Hagan and Parker of the punishment of securities fraud in Canada, to my mind, illustrates how adherence to the Sutherland tradition can produce valuable findings. In my more ardent, youthful days I predicted that unless the term white-collar crime was accorded a tighter definition it would remain "so broad and indefinite as to fall into inevitable desuetude".[61] Instead, as this chapter indicates, in my more ancient state, almost thirty years down the line, the concept remains vital and compelling. I find myself today in agreement with John Braithwaite's low-key suggestion that "[p]robably the most sensible way to proceed...is to stick with Sutherland's definition". This, he points out, at least excludes welfare cheats and credit card frauds from the territory.[62] Thereafter, Braithwaite would "partition the domain into major types of white-collar crime" in order to generate sound theory.[63] If this were a parliamentary motion, and I a member, I would second it. During debate, I would be certain to read into the record Robert Nisbet's advice:

> Beyond a certain point, it is but a waste of time to seek tidy semantic justifications to concepts used by creative minds. The important and all-too-neglected task in philosophy and social theory is that of observing the ways in which abstract concepts are converted by their creators into methodologies and perspectives which provide new illumination of the world.[64]

Then, when it was time, I would register a rousing vote in favour of the motion.

61 Geis, G, above n30 at 171.

62 Braithwaite, J, "White-Collar Crime", in Turner, R H and Short Jr, J F (eds), *Annual Review of Sociology* (1985) Vol 11 at 19.

63 Id at 3.

64 Nisbet, R, *Emile Durkheim* (1965) at 39.