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The Sociological Origins of "White-Collar Crime"

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Are millions of middle-class Americans really white-collar criminals? The unauthorized importation of prescription drugs from a foreign country is a federal crime. So is "sharing" copyrighted material without permission. Assisting someone in the commission of a federal crime is also a federal crime. Countless American seniors purchase prescription drugs from Mexican and Canadian pharmacies. Millions of Americans, including teens using family computers, share copyrighted music without paying for it.

According to the Department of Justice, "White-collar offenses shall constitute those classes of non-violent illegal activities which principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge or illegal circumvention." Under that definition, the illegal purchase of prescriptions and music pirating clearly qualify. The Justice Department has recently promoted the idea that enforcement of federal crimes should be uniform. Nevertheless, it is highly unlikely that federal prosecutors will hand down millions (or any) indictments of seniors, parents, and children for these crimes.

Despite the rhetoric, the decision to prosecute is unavoidably discretionary. How do prosecutors determine whom to prosecute? All too often, the choice reflects contemporary politics—and today's criminal *du jour* is the "white-collar" crook. Yet when most people talk about vigorously prosecuting white-collar crime, they don't mean locking up those who purchase medicine from neighboring countries or pirate music over the Internet, despite the fact that such crimes defraud

Talking Points

- Sociologist Edwin Sutherland, who coined the phrase "white-collar crime," attempted to redefine crime according to the alleged perpetrator's class rather than what that person did.
- He disregarded foundational principles of criminal law in arguing that the presumption of innocence and the requirement of a criminal intent do not—or should not—apply to wealthy persons who engage in "economic" crimes.
- Sutherland's influence is clearly evident in federal criminal law today. Many federal offenses prosecuted under the label of "white-collar crime" are regulatory, rather than true crimes, requiring no proof of criminal intent. Under this conception of "crime," white-collar offenders may be sent to prison for harmless mistakes or accidents.
- The result can be the criminalization of productive social and economic conduct, not because of its wrongful nature but because of fidelity to a long-discredited class-based view of society.

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pharmaceutical and music corporations (and thus their shareholders) of billions of dollars.

What accounts for the difference in treatment? The Justice Department's formal definition of white-collar crime disregards class or economic status. But the truth is that in white-collar cases, such distinctions do influence decisions about whether or not to prosecute. Government prosecutors are far more likely to indict the "upper-class" businessman who works for Tyco—or the faceless Arthur Andersen partnership—than a middle-class grandmother who buys medications in Canada. This reflects the socialist origin of the "white-collar crime" concept. The war against white-collar crime thus unwittingly stems from and embraces a class-based sociological concept of crime.

"White-Collar Crime"

The terms "white-collar crime" and its offshoot, "organized crime," reflect a half-century-old movement to remake the very definition of crime. Professor Edwin Sutherland, a sociologist who coined the term "white-collar crime," disagreed with certain basic substantive and procedural principles of criminal law. In his landmark book, *White Collar Crime*,[1] first published in 1949, Sutherland dismisses the traditional *mens rea* (criminal intent) requirement and the presumption of innocence.[2] He suggests that the "rules of criminal intent and presumption of innocence … are not required in all prosecution in criminal courts and the number of exceptions authorized by statutes is increasing."[3] If nothing else, his disregard for age-old foundational principles of criminal law should cast doubt on the balance of Sutherland's work.

Sutherland goes on to construct a class-based definition of "white-collar crime." He is concerned with who the alleged perpetrator was, rather than what that person might have done. "White collar crime," says Sutherland, is "crime committed by a person of respectability and high social status in the course of his occupation."[4] With this radical *re*definition, Sutherland attempted to drain the word "crime" of its meaning. He made distinctions not on the basis of an act or intent, but according to the status of the accused.[5] Professor Sutherland's supporters have stated:

> The term white-collar crime served to focus attention on the social position of the perpetrators and added a bite to commentaries about the illegal acts of businessmen, professionals, and politicians that is notably absent in the blander designations, such as "occupational crime" and "economic crime," that sometimes are employed to refer to the same kinds of lawbreaking….[6]

Even his friends acknowledged that Professor Sutherland was "intent upon … pressing a political viewpoint…,"[7] and that he did so in a "tone … reminiscent of the preaching of outraged biblical prophets."[8]

A Presumption of Guilt

Sutherland relies on the claim that both corporate and individual defendants are routinely deprived of the presumption of innocence in criminal proceed-

1. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION (1983).
2. *See id.* at 52–53. *Mens rea* is Latin for "guilty mind" and generally is used to identify the concept of criminal intent. Traditionally, criminal intent—that is, the requirement for a purposeful wrongful act—was a part of the very definition of a crime. *See* Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, Heritage Foundation Legal Memorandum No. 7 (April 17, 2003).
3. SUTHERLAND, *supra* note 1, at 52–53.
4. *Id.* at 7.
5. *See id.* at 265 n. 7 ("The term 'white collar' is used here to refer principally to business managers and executives, in the sense in which it was used by a president of General Motors who wrote 'An Autobiography of a White Collar Worker.'").
6. Gilbert Geis & Colin Goff, *Introduction* to SUTHERLAND, *supra* note 1, at xviii.
7. *Id.*
8. *Id.*

ings.[9] His corporate examples, however, are nearly all civil and regulatory cases rather than actual criminal prosecutions.[10] Sutherland, perhaps due to a lack of any substantive legal education, conflates all enforcement activity against businesses (such as civil suits and settlement agreements) with criminal prosecution—even where no crime was ever committed. To Sutherland, proof of corporate culpability is unimportant. He justifies his mislabeling by alleging that the powerful—despite the lack of criminal procedure protection that he recognizes and celebrates—receive preferential treatment in the legal system.[11]

Sutherland's updated 1983 treatise on white-collar crime explains:

> The thesis of this book, stated positively, is that persons of the upper socioeconomic class engage in much criminal behavior; that this criminal behavior differs from the criminal behavior of the lower socioeconomic class principally in the administrative procedures which are used in dealing with the offenders; and that variations in administrative procedures are not significant from the point of view of causation of crime.…[12]
>
> [M]any of the defendants in usual criminal cases, being in relative poverty, do not get good defense and consequently secure little benefit from these rules; on the other hand, the commissions [that enforce certain commercial regulations] come close to observing these rules of proof and evidence although they are not required to do so.[13]

Sutherland intended to provide a basis for facilitating more convictions of executives and corporations by reconceptualizing crime through the term "white-collar crime." He began by equating the "adverse decisions" of regulatory agencies with criminal convictions.[14] As to people involved in business, Sutherland sought to deemphasize the presumption of innocence and the *mens rea* requirement to facilitate establishing their criminal liability.[15] Yet what Professor Sutherland called a crime was often only a regulatory violation. Intent is not normally considered in such enforcement actions; thus many of Sutherland's "crimes" may have been inadvertent, unintended acts.[16] Nevertheless, Sutherland was determined to classify such acts as crimes.

Sutherland's influence is clearly evident in the contemporary substance and practice of federal criminal law. Many federal offenses prosecuted under the label of "white-collar crime" are regulatory or public welfare offenses, rather than true crimes.[17] The principal architect of the U.S. Sentencing Commission's guidelines for sentencing organizations cites Professor Sutherland's "social science research," among that of others, to explain the need for the guidelines, namely the "evidence of preferential treatment for white collar offenders."[18]

Stigma Without Sin

Often, when convinced that a person or class of persons is guilty of a crime, people become impatient with legal niceties. Sutherland and others who assume the guilt of much of the business world believe that the ordinary protections of the law need

9. *See id.* at 53.
10. *See id.* at 45.
11. *See id.* at 6.
12. *Id.* at 7.
13. *Id.* at 53.
14. *See id.* at 49–50.
15. *See id.* at 56-57.
16. The same act committed by people with different states of mind traditionally (and morally) has had different legal consequences. Accidentally wandering onto someone else's property on a hike may be a civil tort, requiring compensation to be paid to the property owner if any damage was done, but it is not a criminal trespass. Likewise, an accidental bump in a crowd might constitute a slight civil battery (another tort) but not a criminal battery.
17. *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 54 (2001).

not apply to persons involved in business.[19] When such attempts at pre-judgment are directed at any other group—even at terrorists—civil libertarians cry "tyranny." Yet, a civil libertarian outcry in defense of corporate defendants appears most unlikely. Concluding that those engaged in business do not deserve the presumption of innocence, Professor Sutherland dispensed with the essential (and often most difficult to prove) element of crime: a guilty mind.[20] Although it would be unconstitutional to eliminate the presumption of innocence,[21] Sutherland tries to circumvent this by eliminating the mental element requirement.

Sutherland dismissed the most fundamental principles of criminal law in pursuing his belief that the law unfairly stigmatizes the poor, while it does not stigmatize the rich and powerful enough.[22] Claiming that the law should treat the two classes more equally, he wrote:

> Seventy five percent of the persons committed to state prisons are probably not, aside from their unesteemed cultural attainments, "criminals in the usual sense of the word." It may be excellent policy to eliminate the stigma of crime from violations of law by both the upper and the lower classes, but we are not here concerned with policy.[23]

Sutherland did not seek to eliminate the stigma of crime (although dispensing with the intent requirement should theoretically achieve this goal). Rather, he sought to expand it. The concept of "white-collar crime" has ensured that, in the quest for greater egalitarianism, the stigma of crime has been applied against much of corporate America. But before society stigmatizes and punishes a criminal defendant, the rule of law requires that reliable procedures determine the defendant's culpability. Although some academics might wish it were so, it is not a crime to be wealthy or powerful.

By disregarding culpability, Sutherland sought to apply the stigma usually associated with criminal convictions to businesspeople and corporations in non-criminal regulatory proceedings.[24] His book charged that "70 corporations [discussed in his book] committed crimes according to 779 adverse decisions [although] the criminality of their behavior was … *blurred and concealed* by special procedures."[25] In Sutherland's view, the complexity of business transactions may make it more difficult to prove criminal activity. But it is equally possible that complexity was evidence that in a particular case no criminal conduct occurred. Without requiring proof beyond a reasonable doubt of a clearly stated *criminal* intent, there is no basis for distinguishing guilty from innocent actions. When prosecutors indict corporations or their executives for federal crimes, relaxed standards for proving criminal intent result in convictions where actual innocence has been "blurred and concealed."[26]

Traditionally, and for good reason, the stigma of crime attaches only to individuals proven to have

18. Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 Wash. U. L.Q. 205, 216 & n. 51 (1993). Co-author Winthrop M. Swenson "was responsible for the staff group that developed the basis for the organizational guidelines." Win Swenson, THE ORGANIZATIONAL GUIDELINES' "CARROT AND STICK" PHILOSOPHY, AND THEIR FOCUS ON "EFFECTIVE" COMPLIANCE (Sept. 7, 1995), *in* U.S. SENTENCING COMM'N, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION: PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES (1995), at 29.

19. *See* SUTHERLAND, *supra* note 1, at 60.

20. *See* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.4(a), at 297 (1986).

21. Jackson v. Virginia, 443 U.S. 307, 315-316 (1979).

22. *See* SUTHERLAND, *supra* note 1, at 6.

23. *Id.* at 55.

24. *See id.* at 54–55, 60.

25. *Id.* at 53 (emphasis added).

26. *Id.*

been "morally culpable" by virtue of having acted with a guilty state of mind.[27] In Sutherland's view, this traditional protection is an antiquated technicality. Rather, culpability should involve an externalized standard of whether a defendant's acts violated the "moral sentiments" of the people.[28] Of course, as the Supreme Court has forcefully stated, the most basic "moral sentiment" is that society not stigmatize persons as criminals unless they are proven to have a guilty mind.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to,"....[29]

White-Collar's Sociological Echoes Today

Sutherland and his successors greatly expanded the scope of crime by shifting the focus to corporations and individuals in the upper socioeconomic classes.[30] A lawyer-sociologist critic of Sutherland's work, Paul W. Tappan, long ago noted that Sutherland's definition of crime departed from the legal definition.[31] Tappan charged that this development was a "seductive movement to revolutionize the concepts of crime and [the] criminal...."[32] According to Tappan, Professor Sutherland's definition of "white-collar crime" includes "a boor, a sinner, a moral leper or the devil incarnate but he does not become a criminal through sociological name-calling."[33]

The term "white-collar crime" has expanded even further, to include such an array of crime that it has become too amorphous for analysis.[34] Some sociologists, finding even Sutherland's very loose definition "too restrictive," "have dropped the class of the offender as a relevant element."[35] Thus, "white-collar" crime has now become a division of *organizational* crime.[36] One example is the Justice Department effort to force corporations to waive their privilege against self-incrimination as a condition of pleading guilty. This nascent trend is consistent with and sociologically derived from Sutherland's thesis that "white-collar" criminals are not entitled to the same constitutional protections afforded other defendants. Recently and rather remarkably, the Justice Department has espoused an essentially class-based view of the law in requesting that the Sentencing Commission disallow departures from the sentencing guidelines for "white collar criminal defendants, *who typically have sophisticated counsel*."[37]

In short, Sutherland's influence continues to this day. Indeed, compared to contemporary theoreti-

27. *See* LAFAVE & SCOTT, *supra* note 20, § 3.4(a), at 297.

28. *See* SUTHERLAND, *supra* note 1, at 55.

29. Morissette v. United States, 342 U.S. 246, 250–51 (1952).

30. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, at 278–83 (2d ed. 1960).

31. *See* Paul W. Tappan, *Who Is the Criminal?*, 12 AM. SOC. REV. 96, 98–99 (1947) ("Apparently the criminal may be law obedient but greedy; the specific quality of his crimes is far from clear.").

32. *Id.* at 98. In his foreword to the 1961 edition of Professor Sutherland's book *White Collar Crime*, Professor Donald R. Cressey commented that the book "clearly was *not* an attempt to extend the concept, 'crime,' despite the beliefs of some reviewers." EDWIN H. SUTHERLAND, WHITE COLLAR CRIME iv (2d ed. 1961). He characterized the criticism of Tappan and another critic as "extraneous." *Id.* Professor Jerome Hall, however, has written that "Tappan's attack was devastating." HALL, *supra* note 30, at 276.

33. Tappan, *supra* note 31, at 100.

34. *See* HALL, *supra* note 30, at 275.

35. MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME at 18 (1980).

36. *See id.* at 17.

cians Sutherland might seem to have been a veritable cheerleader for corporate America. Although mentored by a protégé of socialist Thorstein Veblen,[38] Sutherland "fundamentally was an advocate of free enterprise," albeit a highly regulated form thereof.[39] At the conclusion of his book, he said that the upper class commit many crimes, but he could not say whether "the upper class is more criminal or less criminal than the lower class, for *the evidence is not sufficiently precise to justify comparisons* and common standards and definitions are not available."[40]

By contrast and despite a lack of evidence, Sutherland's own protégé, Donald Cressey, has repeatedly preached to college students in his standard college text on Criminology that "*the people of the business world are probably more criminalistic than the people of the slums*."[41] Cressey's views are influential. He was instrumental in the creation of the "enterprise" concept, at the core of the Racketeer Influenced Corrupt Organizations Act (RICO).[42] Supposedly designed to target "organized crime," prosecutors have used this statute to indict all kinds of corporations, and private parties have used it to sue most major corporations as well as the Catholic Church.[43] All have been labeled "organized criminals."[44] And thus, Sutherland's legacy continues to echo today.

Conclusion

The origin of the "white-collar crime" concept derives from a socialist, anti-business viewpoint that defines the term by the class of those it stigmatizes. In coining the phrase, Sutherland initiated a political movement within the legal system. This meddling in the law perverts the justice system into a mere tool for achieving narrow political ends. As the movement expands today, those who champion it would be wise to recall its origins. For those origins reflect contemporary misuses made of criminal law—the criminalization of productive social and economic conduct, not because of its wrongful nature but, ultimately, because of fidelity to a long-discredited class-based view of society.

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37. Letter from Eric H. Jaso, Counselor to the Assistant Attorney General, Criminal Division, DOJ, to the Honorable Diana E. Murphy, Chair, United States Sentencing Commission (Oct. 1, 2002), *at* http://www.usdoj.gov/dag/cftf/sentencing_guidelines.htm (emphasis added).

38. *See* Geis & Goff, *Introduction* to SUTHERLAND, *supra* note 1, at xxv.

39. *Id.* at xvi.

40. SUTHERLAND, *supra* note 1, at 264 (emphasis added).

41. EDWIN H. SUTHERLAND & DONALD R. CRESSEY, CRIMINOLOGY 51 (10th ed. 1978); EDWIN H. SUTHERLAND ET AL., CRIMINOLOGY 66 (11th ed. 1992) (emphasis added).

42. 18 U.S.C. §§ 1961–1968 (2000).

43. *See* Nicholas R. Mancini, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church*, 8 ROGER WILLIAMS U. L. REV. 193, 195–96 (2002) (discussing application of RICO to Catholic Church and other corporations).

44. *See id.* at 232–33.

45. This article is excerpted, with permission, mostly from Professor Baker's article, "Reforming Corporations Through Threats of Federal Prosecution." 89 Cornell Law Rev. 310 (2004).