TRIVIALIZING WHITE-COLLAR CRIME: THEORY, DEFINITION AND PRAXIS

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Building upon a theme introduced by the Harvard sociologist Daniel Patrick Moynihan, who argued that U.S. society "trivializes" a large amount of serious lawbreaking, this chapter has three main thrusts. First, it extends the reach of Moynihan’s conceptualization by focusing on white-collar and corporate crime. Second, it considers criminological definitions and theorizing that trivializes the term white-collar crime itself. Third, it provides a case study of white-collar crime trivialization in the 2008 financial meltdown.

The title of this chapter derives from an observation by Edwin Torres, a judge on the New York Supreme Court, which was highlighted in an article, “Defining Deviancy Down,” by Daniel Patrick Moynihan (1993). Trained as a sociologist, Moynihan would come to serve as a Senator from the state of New York, a post held by, among others, Robert Kennedy and Hillary Rodham Clinton. Torres and Moynihan were expressing their indignation at the way that Americans had come to show a so-what, passive, and shoulder-shrugging indifference about what the two men saw as an intolerable level of criminal behavior. The judge had said that “the slaughter of innocents remains unabated;

subway riders, bodega owners, cab drivers, babies; in laundromats, at cash machines, on elevators, in hallways” the victims and these crime sites were being treated with a “near narcoleptic state that could diminish the human condition to the level of combat infantrymen, who, in protracted campaigns, can eat their battlefield rations seated on the bodies of the fallen, friend and foe alike” (Moynihan 1993, p.19). The grim lesson was that “a country that loses its sense of outrage is doomed to extinction” (Moynihan 1993, p.20).

Moynihan lamented that Americans had gotten “used to a lot of behavior that is not good for us.” True to his disciplinary roots, he harked back to Emile Durkheim to buttress his thesis that crime was being normalized (Durkheim 1982 [1895]). Durkheim had maintained that every society generates a certain level of waywardness and that this aberrancy serves to notify conformists regarding what constitutes acceptable behavior. In one of his best-known canards, Durkheim insisted that even a society of saints would nonetheless label those somewhat less saintly as deviants whose actions provided an object lesson in how not to behave. Moynihan had criticized Durkheim’s idea of a “normal” crime rate, declaring that it failed to attend properly to the fact that at some point the “normal” becomes “abnormal” and unacceptable. For Moynihan the United States had reached that over-the-top level.

Moynihan granted that distinctions must be made between various kinds of acts that are categorized as crime and deviance. Some behaviors, once regarded as wayward, may come to be seen as conventional, no longer objects of social disapproval. He failed to point out that there also was at work a tendency to “define deviancy up,” a pattern illustrated by a panoply of new offenses, such as hate crime, child abuse, and marital
rape. Moynihan maintained that huge amounts of crime result in only the most dramatic acts getting the public’s attention, while the remainder elicit no fanfare, much less any real concern. He argued that Americans were “defining deviancy down.” Judge Torres tagged the phenomenon as “trivializing the lunatic crime rate” (Moynihan 1993, p.20).

Evidence supporting Moynihan’s observations is all around us. Today, there is no crusade against crime. The subject was totally ignored in the last two presidential campaigns in the United States. Hot-button issues such as the national and global economic crisis, health care, and terrorism pushed the issue of crime to the sidelines. Nonetheless, despite a somewhat declining crime rate, there remain stunningly high rates of serious law-breaking in the United States. Gene Voegtlin, legislative counsel for the International Organization of Chiefs of Police, points to just one index—the fact that 99,000 people were murdered in the USA since September 11, 2001 and the fall of 2008. “There is,” Voegtlin noted, “a wide level of frustration that this is not a major topic of conversation” (Jones 2008, p.4). Putting the matter another way, Michael Nutter, the mayor of Philadelphia, says: “Fact is, al Qaeda wouldn’t last a day in parts of Philadelphia. I’ve got gangsters with .44s that would run them out of town” (Jones 2008, p.4).

Moynihan’s position has not gone without critical reactions since it was enunciated. Some said that it was no more than political rhetoric directed against “permissiveness” in society and “leniency” in the criminal justice system, views dear to “law-and-order” conservatives. Moynihan was charged with implying that “the problem is public tolerance of intolerable behavior and that the solution is resuming traditional standards by stepping up repression of underclass conduct” (Karmen 1994, p.105). In an
ironic way that position can be said to reflect poorly on the critics. After all, there are
other possible approaches to reducing crime, including most notably altering elements of
the social system that correlate with and may be causative of law-breaking. Moynihan
was saying that something ought to be done, not what that something might be.

1. Trivializing Lunatic White-Collar Crime

One gap in Moynihan’s position—or perhaps the need to extend its reach—has
not heretofore been noted. Moynihan’s focus on traditional street crimes constitutes a
myopic view of the problem, an astigmatism that characterizes many analysts who
pretend that white-collar law-breaking somehow belongs to a realm other than that of
crime. His analysis totally ignored white-collar and corporate offenses, behaviors for
which “defining deviancy down” and “trivializing the lunatic crime rate” are the norm. A
considerable element in the trivialization of white-collar and corporate crime lies in the
fact that politicians who set the tone and to a large extent dictate the decibel level of the
response to such illegalities depend very heavily on campaign contributions from people
and organizations that supply the roster of white-collar criminals. There is a folk saying
about not biting the hand that feeds you or, in white-collar crime terms, “don’t defeat the
elite.”

Whether called white-collar crime, economic crime, abuse of power, or given
some other label, political, professional, and business delicts typically are complex,
obscure and somewhat esoteric. Unlike street offenses there never has been, or likely
will be, an annual tabulation of the extent of such behavior. As two writers recently
noted: “No one can determine or estimate…costs with confidence; this would require
systematically collected data on the prevalence of white-collar crime, the numbers of
victims and their losses. These data do not exist and would be extremely difficult to
collect in any case” (Shover and Cullen 2008, pp. 162-163).

Three major problems contribute to the trivializing of white-collar crime. First,
white-collar crime is rarely dramatic. The Federal Bureau of Investigation, an
organization famous for its public relations techniques, understands what “sells.” Its
“Famous Cases” page on its web site lists scores of crimes -- Enron is the only white-
collar case. Although some white-collar crimes inflict serious physical harm on
individuals, much of it is what has been characterized as “diffuse” because it affects large
numbers of people only indirectly. In addition to the major scandals that reach the
headlines, the vast hidden bulk result in financial injuries that are “paper crimes.” There
is no chalk outline on the sidewalk, no yellow tape sequestering the crime scene, no
blood-spattered walls. Of late, in what are referred to as “perp walks,” law enforcement
personnel have taken to handcuffing persons arrested for white-collar offenses and
hustling them between figures with POLICE prominently displayed on their jackets while
television cameras record it all. The tactic is an effort to raise the trivialization level a
bit.

Second, numerous important but complex cases by sophisticated white-collar
offenders and organizations never come before a court. This is unlike the lunatic crime
rate that concerned Moynihan. The resources, power, wealth, sophisticated legal talent
available to the well-heeled, the political atmosphere, and the sometimes arcane actions
that are specifically designed to hide intent – especially at the heart of many of the largest
and most costly crimes – come into play in determining whether or not criminal charges
will prevail. The social reality of defining such acts as “criminal” is much more difficult and involved than for common crime. Studies of the savings and loan debacle in the United States empirically demonstrated that law enforcement and criminal justice agencies were not able to investigate and assuredly not prosecute offenses that they were aware of because of a shortage of personnel and resource capacity (Pontell, Calavita and Tillman 1994; Calavita, Pontell and Tillman 1997; Tillman, Pontell and Calavita 1997). Today, offenses associated with the current subprime lending frauds are featured obliquely in political debates but the focus is almost exclusively on the consequent problems for the banking industry and for homeowners undergoing or contemplating foreclosure. The word “speculation” sometimes surfaces and we hear of high-pressure and misleading sales pitches that induced persons to buy a house they could not truly afford. But the word “crime” is not prominent in the discussion, although it permeated the behaviors.

White-collar crimes are very difficult to prove in court as illustrated by the following hypothetical example of the elusiveness of demonstrating intent. “I always intended to sell my options on September first,” says the corporate president accused of insider trading. “It just so happened that just before then, I found out that the company anticipated a considerable downturn. That information had nothing to do with the sale of my stock,” he says, with the subtext: “And I dare you to prove otherwise beyond a reasonable doubt.”

Third, there is a reluctance to define captains of industry as “criminals,” perhaps best illustrated by the odd response of Ernest Burgess, one of the most prominent stars in the sociological firmament, to an article on white-collar crime in which he found it out of
order to label as criminals persons who did not see themselves as such (Burgess 1950). It also is regarded by some as unpatriotic to consider those prominent in their community as law-breakers. And, besides, the media often find it difficult to set out the details of a white-collar conspiracy in a way that will engage readers and, especially, television viewers who respond to visual imagery: the holdup, the auto chase, the murdered corpse (Rosoff, Pontell and Tillman 2010). Filmmaker Michael Moore highlighted this in his Oscar-winning documentary, “Bowling for Columbine,” by lampooning the popular U.S. television show “COPS” with another version called “CORPORATE COPS” depicting police catching an executive on a busy New York City street, tackling him, and tearing off his suit jacket and shirt before handcuffing him face down against a parked car.

Moreover, as Tombs and Whyte (2003) observe, entrepreneurship and market forces provide inherent hurdles that those seeking information have to overcome to learn the details of white-collar crime. Perpetrators often are protected by a battery of powerful lawyers and public relations specialists. The organization often serves as both a weapon and a shield and it is likely to cover the exorbitant legal expenses of its senior officers who may run afoul of the law (Wheeler and Rothman 1982). The New York Post, for instance, had learned that Angelo Mozilo and his co-defendants from the defunct lending company, Countrywide Financial, had hired a brigade of 19 lawyers to mount their defense against criminal charges, and that American taxpayers would foot the estimated $50 million attorneys fees. The Bank of America, which received $45 billion in bailout money, had agreed when taking over Countrywide that for six years it would be responsible for the legal expenses incurred by the company and its officers (Tharp and Scanlan 2009).
II. Definitional Trivialization

Efforts by some in the scholarly community to revise Sutherland’s original definition have had the unintended effect of creating a downward view of white-collar and corporate crimes that neglects serious elite lawbreaking. The redefinition campaign was inaugurated by Susan Shapiro who argued that the term should be “de-collared” (Shapiro 1990). Shapiro cites Merton’s claim that the role of conceptual analysis lies in “exposing specious empirical relationships latent in unexamined concepts and in debunking theories based on these relationships” (Shapiro 1990, p. 346). Merton observed that “conceptual language tends to fix our perceptions and, derivatively, our thought and behavior” and that sociologists often become “imprisoned in the framework of the (often inherited) concepts they use” (Merton 1949, pp. 88-89). Ironically, it was Merton himself who used Sutherland’s introduction of the term “white-collar crime” as an illustration of the defining process, and was laudatory of the contribution, noting that it undercut mainstream theories that saw crime as a result of broken homes, Freudian complexes, and other forms of personal and social malaise. Shapiro granted the revolutionary impact of the emergence of the term, pointing out that “the concept of white-collar crime was thus born of Sutherland’s efforts to liberate traditional criminology from the ‘cognitive misbehavior’ reflected in the spurious correlation between poverty and crime” (Shapiro 1990, p.346). But she maintained that the concept now had become an “imprisoning framework” that “causes sociologists to misunderstand the structural impetus for these offenses” (Shapiro 1990, p. 346). The problem she perceived was that the term white-
collar crime focuses on some combination of characteristics of lawbreakers, specifying that they be upper-class, or upper-status individuals, organizations, or corporations, or incumbents of occupational roles, a position that inherently confuses “acts with actors, norms with norm breakers, the modus operandi with the operator” (Shapiro 1990, p.347).

Neither the reference to Merton’s view as adopted by Shapiro nor her own critique survives close examination. That Merton calls for revision of entrenched but outmoded concepts is not the same as a demonstration that his call is relevant to white-collar crime, a concept he heralded. For her part, Shapiro’s concern that acts and actors and other elements of the traditional white-collar crime approach are “confused” is confusing. What is “inherently wrong” with studying and theorizing about acts carried out by specified actors, be they juveniles, professional athletes, or police personnel?

Separating the crime from the criminal is more problematic than Shapiro and those who have followed her lead have suggested. The element of power is centrally relevant in analyses of white-collar crime. Among other things, it permits only some perpetrators to engage in certain crimes while denying similar opportunities to others.

Removing the notion of status from the definition of white-collar crime effectively skews examination of offenses downward, since power allows perpetrators to more effectively hide their illegalities; they will be more likely to escape detection or prosecution or reach civil settlements, and their offenses will not appear in government databases. Official statistics will therefore necessarily reflect the weakest and/or most careless offenders. Separating status from the offense thus results in the a priori operational trivialization of white-collar crime and more easily allows researchers – and others -- to focus downward in assessing the nature of white-collar criminality. As Braithwaite (1985, p. 131) has
argued, this lowers the conceptual bar to the point where the original term becomes almost meaningless in that it produces a portrait of white-collar crime that includes a sizeable percentage of unemployed persons who have passed insufficient funds checks at the local supermarket.

III. The Yale White-Collar Crime Project

Shapiro’s contribution grew out of her connection with a large research grant awarded to a Yale Law School team headed by Stanton Wheeler to study white-collar crime, a particularly unusual funding development tied to concerns in the Administration of President Carter. Driven to a considerable extent by the need to gather information on a readily-discernible cohort of offenders, some of the Yale group elected to specify selected penal code offenses as constituting the true realm of white-collar crime. Anyone who committed these offenses became by definition a white-collar criminal. The approach ignored regulatory and administrative agency episodes that Sutherland regarded as essentially equivalent to acts proscribed by the criminal code. Nor did it attend to accusations of traditional white-collar crime that rarely show up in court statistics because astute and expensive lawyers negotiate compromise settlements for their wealthy and powerful clients (Mann 1985). The result is that those tried are the “fish that jumped into the boat.”

Most notably, some of the Yale researchers concluded that Sutherland was wrong; that white-collar crime was the work of the middle-class, although their sample inevitably included both upper class and lower class representatives. No longer would it be
necessary to locate a nexus between status, power, and law-breaking (Weisburd et al. 1994).

In a detailed review of the Yale project, David Johnson and Richard Leo note that the four major books produced from it did not attend to the definitional problems or ambiguities inherent in the concept of white-collar crime. Instead, each work offered different definitions that fit with varying approaches to the subject matter (1993, p. 65). But as the authors correctly point out, “How we define ‘white-collar crime’ strongly influences how we perceive it as a subject matter and thus what and how we research” (1993, p. 65). For example, in one of the Yale products which examined presentence investigations of criminals convicted of a collection of federal crimes, Weisburd and his colleagues (1993) find that many offenders do not comport with some definitions of white-collar crime; they are, by and large, middle class. While the researchers claim to not take their data at face value, the problem is with the a priori decision to characterize and contrast Sutherland’s definition through examination of conviction data. They avoid conceptual ambiguity and the definitional issue taking the side of Paul Tappan who had debated Sutherland early on, and who had dubbed the term white-collar crime as “loose, derogatory, and doctrinaire,” and argued that criminologists should confine themselves to the study of those adjudicated as guilty of certain crimes (Tappan 1947).

The definitional issue here is paramount (yet dodged, as Johnson and Leo point out), and the allure of the book (and its title, “Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts”) is that it seemingly challenges common notions that white-collar offenders are necessarily of high status. This is a “challenge” only if one considers official data the true realm of white-collar crime, which many scholars do not.
The work is thus not a treatise on white-collar crime per se, but on occupational or economic crimes that are most easily handled by the criminal justice system, or as Johnson and Leo note, “convictions of the middle classes” (1993, p. 86). Viewed in this light, the book is not a direct challenge to Sutherland’s original formulation, yet it effectively directed attention to the lowest levels of economic criminality (adjudicated cases) and the fact that most of them did not involve persons of particularly high status.

It could reasonably be claimed that the current critique “blames the messengers,” as it wasn’t the researchers who selected the cases that were studied, but rather the enforcement agents who decided to take on non-elite offenders and their less serious crimes. This defense, however, again avoids the central issue of the choices researchers make regarding which definitional approaches they use (in this case Tappan’s, not Sutherland’s) which data they analyze and why, and what conclusions they apply to their findings. The issue not one of internal validity, but of external validity due to the sub-sample of violators. That the offenders in the study did not comport with the traditional definition of white-collar crime comes as no surprise at all, as “operational trivialization” had already occurred through the selection of convicted offenders. So the point here is not to blame the messengers for the bad news they discovered and shared, but rather to identify and understand the misleading nature of the message they chose to deliver. As Johnson and Leo argue, Weisburd and his colleagues were clearly engaged in a classic sociological debunking exercise aimed at showing how criminologists and others had incorrectly defined white-collar crime as an elite offense (1993, p.88). But in stating that the authors “successfully expose and reorient much wrongheaded thinking…”(1993, p. 88) they appear to fall prey to the same conceptual trivialization. While conceding that
there may be particularly harmful elite offenders who were not represented in the sample studied, Johnson and Leo had no hesitation (or any definitive empirical evidence, for that matter) in claiming that, “While it is true that most white-collar criminals are not the elite deviants who so concerned Sutherland and his followers, it is equally true and no less important that a tiny handful of white-collar crimes may be especially harmful and thus deserving of our attention and concern” (1993, p.89). The “tiny handful” estimate appears out of thin air, but they invoke the savings and loan crisis (which resulted in a “tiny handful” of over a thousand major prosecutions of elite offenders and organizations in a single financial scandal) and its poster child, Charles Keating, to remind us that middle class offenses differ greatly. While Johnson and Leo appear to agree with the trivialized portrait of white-collar crime, they also observe that it was a lack of a conceptual definition of white-collar crime up front that more easily allowed for the conclusion of Weisburd and his colleagues that it was essentially a middle class offense. The ad hoc selection of eight specific statutory offenses that the authors believed would fit most conceptions of white-collar crime avoids the definitional issue, but nonetheless puts them squarely in the Tappan camp of focusing on adjudicated offenses as the way to characterize white-collar crime.

Finally, and perhaps most importantly, Johnson and Leo note that after Weisburd and his colleagues acknowledge in the first chapter “that they are only sampling convicted white-collar offenders…they seem to lose sight of this limitation [in subsequent chapters] when they generalize from this sample of convicted offenders to the universe of all white-collar criminals” (Johnson and Leo 1993, p. 89). This external validity issue is overlooked at the expense of trivializing white-collar crime. It also
detracts from the significant, yet more modest contribution of the study which was to
describe and further specify known forms of middle class property offending, a topic
overlooked by criminologists studying both common crime and more elite white-collar
lawbreaking. Considering these acts as the true realm of white-collar crime is at best
misleading; at worst it trivializes the concept of white-collar crime by omitting serious
elite and organizational offenses that are of much greater fiscal and physical
consequence. How and why such crimes are omitted in practice is no mystery. The
importance of status and power in influencing the trivialization of white-collar crime is
clearly demonstrated in a study of arson cases in Boston. Barry Goetz (1997) illustrates
how resource constraints and class bias provides a “structural cloak” that covers white-
collar criminality. The fires were intentionally arranged by landlords in order to collect
insurance. But for years, officials blamed them on lower-class occupants of the buildings.
By keeping arson-for-profit a “non-issue” (and arson-for-profit was not one of the Yale
categories) a significant form of white-collar crime was trivialized.

One need only consider the endemic wave of “collective embezzlement”
(Calavita, Pontell and Tillman 1997) and “control fraud” (Black 2005) in the savings and
loan crisis, the corporate and accounting scandals of 2002 which included Enron, Arthur
Andersen, Worldcom and numerous other companies, and the recent subprime mortgage
crisis that led to the largest global economic meltdown in history to see in each of these
crises the unprecedented financial damage caused by white-collar and corporate crimes of
the “non-middle-class.” The gargantuan losses from fraud in these scandals do not
include those occurring on a regular basis from corporate and elite offending that never
reach the criminal justice system or the final stages of adjudication. Whether or not they
truly constitute a “tiny handful” of white-collar lawbreaking remains to be seen (Rosoff, Pontell and Tillman 2010)

IV. Re-Collaring White-Collar Crime

The traditional status-based meaning of white-collar crime raises important empirical and interpretative questions that avoid the definitional trivialization that the revisionist approach encourages. We are led to determine why persons who live otherwise conventional and law-abiding lives and often have great wealth commit white-collar crimes, and to consider the role of organizational settings. Removing those concerns denies the significance of privileged contexts and organizational structures in producing illegality. The ethos and curricula of business schools, corporate governance structures, bureaucratic considerations, and political power all become matters of interest when traditional definitions of white-collar crime are in play. Separating the crime from the criminal thrusts these matters into the etiological background or, at worst, eliminates them entirely. The “structural impetus” for these crimes emanates from the very institutions of power and privilege that Sutherland made part of his original definition. Denying the tie between “respectability” and “social status” with the commission of these offenses essentially denies the meaning of the term white-collar crime itself.

In a major review of the topic, Braithwaite (1985) concluded that staying with Sutherland’s definition offered the best path to comprehension of an important form of criminal behavior. “This at least excludes welfare cheats and credit card fraud from the domain,” Braithwaite observed (1985, p. 131). Explaining how and why these acts came
about is quite different from identifying who engaged in them. Sutherland’s approach
does not preclude focusing on the relationship between social class and crime and,
indeed, may facilitate it. Failure to appreciate that only some persons can commit certain
forms of criminality because of their social position reduces the likelihood of recognizing
class considerations in law-breaking. This was one of Sutherland’s seminal points.
Most persons can engage in crimes that are predominantly perpetrated by those in the
lower echelons of society. The pattern, however, is not bi-directional.

Finally, Sutherland never conceived of the term white-collar crime as a “legal
term” unlike some scholars who have challenged the idea (Shapiro 1990; Zimring and
Johnson 2007). Rather he saw it as a social science construct that would guide research.
Sutherland had cooperated with Sellin on his classic, Culture Conflict and Crime, (1938)
in which Sellin argued forcefully that social scientists should not adhere to legal
definitions appearing in penal codes. The law, he pointed out, is the product of power,
lobbying, whim, and a host of idiosyncratic inputs that often lack logical coherence.
Many harmful acts never are outlawed because those who commit them or contemplate
doing so see to it that they are not. Sellin notes: “The unqualified acceptance of legal
definitions as the basic elements of criminological inquiry violates a fundamental
criterion of science. The scientist must have freedom to define his own terms based on
the intrinsic character of his material and designating properties in that material which are
assumed to be universal” (1938, p. 31). Sellin’s goal was to identify personal and social
injury and to examine those who inflict it and, in the course of that enterprise, to
determine whether and, if not, why such acts were not forbidden. As Colin Goff and
Gilbert Geis note, “Sellin’s revisionist perspective pervades studies of what is called
‘social deviance’” (Goff and Geis 2008, p.253). For Sutherland, the goal was to shed light on a group of largely overlooked illegal acts that are committed by powerful persons and that generally fall well below the radar of conventional criminological and public attention.

A. Ideological Differences: Populists vs. Patricians

Many scholars, particularly those who might be regarded as “old-timers” in the field, use Sutherland’s definition of white-collar crimes as an illegal act “committed by a person of respectability and high social status in the course of his occupation” (Sutherland 1949, p. 9). The definition contains an element that might reasonably be labeled as propaganda, as it focuses attention on wrongdoing by those in prestigious positions. In its way it is a corollary of street crime that almost exclusively focuses on wrongdoing by underclass persons. As Anatole France (1894, p.117) said: “The law in its majestic equality forbids both the poor man and the rich man from sleeping under the bridge.” He had no need to mention that rich men are not very likely to be sleeping under bridges.

Sutherland’s definition puts white-collar crime into an interpretative context. Removing it from that context—“de-collaring” it—leads to trivializing the structural elements that are basic to such crimes and to overlooking policies that best prevent them in the specific context in which they arise. This results in a failure to consider complex social, political, cultural, and economic settings and the emergence of a focus on heterodox congeries of offenders apprehended for breaking an array of rather amorphous laws that are tagged as “white-collar crime.”
In a recent essay, Shover and Cullen (2008) argue that the two schools of thought regarding the preferable definition of white-collar crime can be seen as a conflict between positions with ideological underpinnings. The first is the “populist” perspective that locates the offenses within the framework of social inequality. The second is what they label the “patrician” view that offers a less politicized and more legal-technical perspective. They note that adherents of the “patrician” bloc tend to be characterized by elitist backgrounds and affiliations. Greatly broadening the embrace of white-collar crime has the effect of deflecting attention from the wrongdoing of elites onto others, those beneath them in the social hierarchy, whose misdeeds are of much greater concern to the general public than should be the case with traditional white-collar crime.

A lunatic rate of white-collar crime is apparent regardless of which prism is used, but the extent of such neglect is a function of the selection of definition. The patrician view minimizes the impact of white-collar crime by considering only those cases found in official statistics. The populist perspective highlights issues of power, of respectability, and privilege as concepts for understanding the phenomenon.

This theoretical element is not unlike the debate between Sutherland and Tappan, the latter trained in both law and sociology, that took place shortly after Sutherland introduced his concept. Representing patricians, Tappan dubbed the term white-collar crime as loose, derogatory, and doctrinaire, and argued that criminologists should confine themselves to the study of those adjudicated as guilty of certain crimes (Tappan 1947). Sutherland, the populist, argued that if criminology confined itself to the well-documented biases that feed into the content of the criminal law, researchers would forfeit claims to pursuing a social scientific enterprise (Sutherland 1945).
B. More Theoretical Maneuvering

White-collar crime has persistently been the graveyard in which theories that sought to explain the entire gambit of criminal behavior were buried. Edwin Sutherland began the interment process when he inveighed against some of the usual and largely unchallenged explanatory shibboleths of his time: "We have no reason to think that General Motors has an inferiority complex or that the Alcoa Aluminum Company of America has a frustration-aggression complex or that U.S. Steel has an Oedipus complex, or that the Armour Company has a death wish or that the Duponts desire to return to the womb," Sutherland wrote. Putting aside the anthropomorphic ingredient in this observation, a matter that had persistently bedeviled attempts to theorize about corporate crime (Cressey 1988; Braithwaite and Fisse 1990), Sutherland’s point is equally applicable to the persons who are responsible for committing crimes in the name of their corporations. He said as much as he concluded the paragraph: "The assumption that an offender must have some such pathological distortion of the intellect or the emotions seems to be absurd," he continued, "and if it is absurd regarding the crimes of businessmen, it is equally absurd regarding the crimes of persons in the lower economic class" (Sutherland 1973, p. 96). Sutherland also decried other interpretations of crime that were unable to explain the law-breaking of persons in the upper classes, such as feeblemindedness, poverty, immigrant status, and backgrounds in families marked by divorce (Sutherland 1949).

In their self-control theory, Gottfredson and Hirschi (1990) sought to avoid the pit dug by Sutherland. They did so by accepting the trivialized definition of white-collar
crime adopted by some of the Yale researchers that focused on all persons who broke specified laws, including grocery shoppers who passed insufficient-fund checks and a considerable corps of unemployed women arrested for petty offenses (Weisburd, et al. 1994; Gottfredson and Hirschi 1989; Daly 1989). This allowed them to portray individuals they labeled as white-collar offenders as recidivists and perpetrators of variegated offenses. Critics wrote that they found it difficult to conceive of corporate CEOs as burglars or robbers, and they noted that it was not the absence of self-control but its abundance that typically had gotten executives, professionals, and politicians to the positions of power that they occupied (Steffensemeir 1989; Benson and Moore 1992; Reed and Yeager 1996).

White-collar crime to a considerable degree suffers not only from trivialization but also to a great extent from a failure of recognition, from invisibility, from its status, in Goetz’s term, as a “non-issue.”

V. The 2008 Global Financial Crisis

The global meltdown of 2008 and 2009 was influenced by a number of factors including flawed financial policies, law-breaking, greed, irresponsibility, and not an inconsiderable amount of concerted ignorance and outright stupidity. To date, the greatest attention regarding that criminality has focused on the $65 billion Ponzi scheme perpetrated by Bernard Madoff, a scam that resembled tactics of con men, not big time corporate financiers (Sander 2009; Strober and Strober 2009). Prototypical corporate frauds such as those perpetrated by Wall Street behemoths American International Group (AIG), Countrywide, Lehman Brothers, and Bear Sterns received much less attention.
(Bamber and Spencer 2009; Kelly 2009; McDonald and Robinson 2009; Michaelson 2009) . These companies, whose balance sheets were saturated with securities containing subprime mortgages, collapsed, were bought by competitors, or were bailed out by the federal government with huge infusions of taxpayer money. For most onlookers, including criminologists and the public in general, their actions represented intricate and arcane business practices that were difficult to fully understand and to portray in sound bytes – and therefore they tended to become trivialized in regard to their criminal components. As of this writing, there has not been a single major prosecution resulting from the largest financial meltdown in world history.

The current worldwide financial problems have their roots in home mortgage lending practices. Many are part of the subprime loans that, at best, were less than prudent, and, at worst, criminally fraudulent. The bursting of the real estate bubble, which had grown quickly to massive proportions, resulted in an unprecedented number of foreclosures, a striking collapse in the market value of homes, and heavy losses for those holding investments involving the bundling of loans and debt. Moreover, some of the most sophisticated financial institutions had allowed—and encouraged—practices that were highly imprudent, despite their world-renowned reputations for expertise in risk management. Well before the bubble burst, a commentator noted the danger signs and diagnosed the risks that these companies faced:

[T]heir CEOs, acting on the perverse incentives crucial to today’s outrageous compensation systems, engaged in practices that vastly increased their corporations’ risks in order to drive up corporate income and thereby secure enormous increases in their own individual incomes. And these perverse incomes
follow them out the door…Pay and productivity (and integrity) have become unhinged in U.S. financial institutions (Black 2007, p.16).

This viewpoint is perhaps over-generous in portraying a need to show a particularly healthy balance sheet in order to justify outrageous pay packages for executives (Friedrichs 2009).

A. Bank of America and Merrill Lynch

A telling illustration of the manner in which white-collar crime has been trivialized in the current crisis unfolded in the wake of the acquisition of the financially beleaguered Merrill Lynch Corporation by the Bank of America in 2008 for $50 billion. The Bank of America had been given some $40 billion by the federal government to keep it from going belly up. When the agreement to take over Merrill Lynch was reached, officials in the Bank of America knew that their acquisition had specified year-end bonus payouts to top-level Merrill Lynch employees totaling some $5.8 billion. Bank of America needed the approval of its shareholders to complete the merger deal. But the proxy statement lied by saying that the bonuses would not be paid so that when they voted, stockholders were unaware that they would be giving up a considerable sum that was going into the pockets of Merrill Lynch executives.

The Securities and Exchange Commission (SEC) negotiated a $33 million settlement with the Bank of America as a penalty for that negligent act. But the agreement had to be endorsed by a federal court. Judge Jed S. Rakoff’s ruling cut to the quick. He refused to approve the settlement saying that it did not “comport with the most elementary notions of justice and morality.” (Securities and Exchange Commission v.
Bank of America 2009, p. 3). He wanted to know why the SEC was allowing the Bank of America to pass off the fine onto its shareholders rather than pinpointing the persons who had violated the law by omitting crucial information from the proxy statement. The Bank of America claimed this was not their doing; it was lawyers who had put together the misleading statement. Then “why not go after the lawyers?” the judge asked. And what about the Bank of America executives, who were presumably being paid very well to see that the company’s affairs were conducted legally (Securities and Exchange Commission v. Bank of America 2009)?

The bank officials also said that they had arranged the settlement because to go to court would cost them more than $33 million. The judge thought that absurd and implied that perhaps they were reluctant to have their own behavior revealed in a public forum. He pointed out, “It is quite something for the very management that is accused of having lied to its shareholders to determine how much of those victims’ money should be used to make the case against the management go away” (Securities and Exchange Commission v. Bank of America 2009, p. 3). The SEC’s action, had it not been challenged, as it very rarely is, would have swept under the carpet what on its face was a very serious violation of the law; in that respect the regulatory agency became complicit in the trivializing cover-up.

Conclusion

The claim that white-collar crime is primarily a middle class offense and that the status of the offender needs to be separated from the act in order to avoid biased social analysis implicitly allows the most consequential forms of white-collar and corporate
lawbreaking to fly well below the political, academic, and policy radar screens. Put another way, such treatment trivializes the nature and extent of white-collar crime. This trivialization ensures that major white-collar crimes remain largely absent in the development of effective regulatory policies and the law more generally. Nor are they included in what Moynihan described as “a lot of behavior that’s not good for us.”

Preventing white-collar and corporate crime in the global economy presents formidable challenges. The proliferation of international business has led to efforts to put in place overarching regulatory bodies to attempt to control cross-border crimes. Neal Shover and Andy Hochstetler have summarized the nature and difficulties that have accompanied these developments: “Global oversight develops in dozens of forms and a complex array of institutions. It relies on criminal prosecution primarily in the nations where crimes originate. Nations, however, are reluctant to grant other nations and international bodies the right to define and pursue global oversight on their soil” (Shover and Hochstetler 2006, p. 108). They note that most international cooperation has occurred in the areas of war crimes and international organized crime, but, quoting Michael Gilbert and Steve Russell (2002, p. 233), they observe regarding white-collar and corporate crime: “All the while avoidable harms (often of equivalent or greater magnitude) by transnational corporations are ignored.”

Trivializing the lunatic white-collar crime rate entails much greater social costs then those related to the crime and deviance considered by Moynihan. As noted by Sutherland and others, the use of significant status, power and privilege needs to be centrally considered – not removed – in both understanding the nature of white-collar and
corporate offending, and in policies designed to prevent them. The most recent financial meltdown provides an excellent case in point.

References


Case Cited