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A Normative Approach to White-Collar Crime

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The study of white-collar crime has been primarily the province of two fairly distinct academic disciplines. In the 1940s, sociologists and criminologists began to focus on the causes and effects of white-collar crime and the social status and circumstances of the offenders who commit such offenses.¹ A generation or so later, academic lawyers began directing their attention to the complexities of white-collar crime doctrine, the policies and procedures that underlie such offenses, and the sentencing of white-collar offenders.²

Curiously, however, the subject of white-collar crime has mostly escaped the notice of criminal law theorists. Such scholars have tended to focus their attention on “general part”³ concepts such as act and omission, harm and culpability, and justification and excuse, as well as on a few specific core offenses such as murder and rape. To the extent such theorists have thought at all about what can fairly be described as white-collar crime, it has been almost exclusively in connection with the question of corporate criminality and with a handful of relatively exotic offenses such as blackmail and extortion.⁴ My goal in this essay (which is excerpted from a book-length monograph on the moral theory of white-collar crime) is to begin to remedy this neglect.

So what is criminal law theory? The term is broad enough to encompass inquiry into matters such as what distinguishes the criminal from the civil law, the purposes of punishment, the proper scope and limits of the criminal law, the question of criminalization, and the manner in which the criminal law should address the citizenry. For present purposes, I shall be particularly interested in the task of describing the relationship between the criminal law and moral norms. Most criminal law theorists now agree that retribution is a necessary, if not sufficient, goal of criminal sanctions.⁵ Although there are many versions of retributivism, the core notion is that punishment is justified when it is deserved, and that criminals deserve punishment when they are morally at fault.⁶ Thus, much of my focus here will be on determining whether, and in what manner, the commission of white-collar crime entails moral fault.⁷

In undertaking such a project, we face an initial question about exactly what should count as a white-collar crime. While acknowledging the controversy surrounding this issue,⁸ I shall for present purposes simply assume that the white-collar crime consists of those offenses typically dealt with in American law school white-collar crime courses and categorized as such by agencies,
such as the Department of Justice’s Bureau of Justice Statistics, which compile statistics concerning the incidence of crime. As such, my concern will be with offenses such as fraud, perjury, false statements, obstruction of justice, bribery, extortion and blackmail, insider trading, tax evasion, and certain regulatory crimes. Moreover, I shall regard an act as a white-collar offense only if it is actually treated by the law as a “crime” (rather than merely as a civil violation or mere “deviance”) and regardless of the socio-economic or professional status of its alleged perpetrator or the particular social setting in which it was allegedly performed.

My approach here will consist of three basic steps. First, it will be necessary to say something about the moral content of criminal offenses generally. To that end, I offer a brief description of three different kinds of moral content that can be found in most criminal offenses, which I shall refer to as mens rea (or the mental element required to commit a crime), harmfulness, and moral wrongfulness. The second step is to show the distinctive forms of mens rea, harmfulness, and wrongfulness that are characteristic of this area of criminal law. In this context, we will observe certain patterns of moral “ambiguity” that seem to inhere in many white-collar crimes. The third step reflects the recognition that any adequate assessment of the moral content of white-collar crimes will ultimately require an offense-by-offense analysis. Although any such comprehensive assessment is beyond the scope of this chapter, I will offer, as an illustration of the approach I have developed in more detail elsewhere, a brief description of the moral content of the offenses of fraud and insider trading.

Finding Fault in Criminal Conduct

In determining whether and to what extent a given crime (whether or not a white-collar crime) entails moral fault, there are at least three basic kinds of moral element that need to be considered: mens rea, harmfulness, and moral wrongfulness.

Three Kinds of Moral Content

Mens rea is perhaps the most familiar element of moral content in criminal offenses. The term is used here in its narrow “elemental” sense to refer to the particular mental state required in the definition of an offense or with which a defendant actually commits a crime. The Model Penal Code famously provides a concise list of mens rea terms—“purposely,” “knowingly,” “recklessly,” and “negligently”—though there are also many other such terms (including “intentionally” and “willfully”) that are in regular use in non-MPC jurisdictions as well.

Assessments of mens rea are crucial to determining the extent to which an act entails fault and is therefore deserving of punishment. Other things (such as the amount of harm caused) being equal, we say that a criminal act committed purposefully or intentionally is more blameworthy (and therefore more deserving of punishment) than one committed recklessly, and that a criminal act committed recklessly is more culpable than one committed negligently.

The second basic kind of element in the moral content of criminal offenses is “harmfulness”—i.e., the degree to which a criminal act causes (or risks causing) harm. And what is harm? For present purposes, we can look to Joel Feinberg’s