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White Collar Crime: A Legal Overview

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WHITE COLLAR CRIME: A LEGAL OVERVIEW*

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I. INTRODUCTION

In recent years, the number of white collar criminal prosecutions[1] has increased greatly in both state and federal jurisdictions.[2] The

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1. These crimes are called "white collar" because they often involve business persons and are normally non-violent. The category includes offenses such as fraud, bribery, embezzlement and securities thefts.

2. *See Control of Organized Crime in the United States: Hearings on S.30, and related proposals, Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2nd Sess. 27 (1970). As stated in *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229 (1979): "During the last decade, however, in areas ranging from tax, securities, and antitrust to the newer fields of environmental control, safety regulation, and the prevention of corrupt practices, the federal government has come to rely more and more on the deterrent effect of criminal punishment to shape corporate action.

The costs of white collar crimes are staggering. *See, e.g., White Collar Justice*, 19 CRIM. L. REP. (BNA) 3 (April 14, 1976), *reprinted in* P. MARCUS, THE PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 1.04[3], at 1-24 n.27 (1978):

THE ANNUAL COST OF SOME WHITE-COLLAR CRIMES
(Billions of Dollars)

Bankruptcy Fraud		$ 0.08
Bribery, Kickbacks, and Payoffs		3.00
Computer-Related Crimes		0.10
Consumer Fraud, Illegal Competition, Deceptive Practices (excluding price fixing)		21.00
Consumer victims:	$ 5.5	
Business victims:	$ 3.5	
Government revenue loss:	$12.0	
Credit Card and Check Fraud		1.10
Credit Card:	$ 0.1	
Check:	$ 1.0	
Embezzlement and Pilferage		7.00
Embezzlement (Cash, goods, services)	$ 3.0	
Pilferage	$ 4.0	
Insurance Fraud		2.00
Insurer victims	$ 1.5	
Policy holder victims	$ 0.5	
Receiving Stolen Property		3.50
Securities Thefts and Frauds		4.00
TOTAL (billions)		$41.78

writers participating in this symposium[3] are all outstanding legal professionals in the criminal justice field who have had considerable exposure to the problems central to white collar criminal prosecutions. While they come from very different backgrounds and, in this symposium, focus on very different issues, one common theme runs throughout each of the articles: Effective prosecution of white collar crime requires rules and techniques that will allow the government to deal with groups of persons, rather than with individual defendants. James Holderman,[4] an experienced federal prosecutor and criminal defense lawyer, analyzes the RICO statute[5] to determine whether it transcends traditional notions of substantive criminal responsibility. Dan Webb[6] and Scott Turow,[7] both of the United States Attorney's Office in Chicago, evaluate a new tool under RICO that is available to federal prosecutors in the battle against white collar crime, the forfeiture.[8] Professor Kathleen Brickey[9] looks to a very different question. She considers the application of traditional criminal law principles to the corporate defendant. Finally, the concluding commentators, Professor Nagel and Dean Plager,[10] neatly tie together many of the issues raised in the articles.

II. GROUP DANGER

The principal rationale given for rules that establish group criminal responsibility is that, with more than one actor involved in the crime, there is a greater chance that the crime and perhaps other crimes will be completed.[11] While this reason is given for the crime of solicitation

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3. The participants in this symposium appeared in a panel discussion of the Criminal Justice Section at the annual meeting of the Association of American Law Schools, which was held in Cincinnati in January of 1983. This writer had the good fortune to moderate that discussion.

4. Partner in the Chicago firm of Sonnenschein, Carlin, Nath & Rosenthal.

5. Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961-1968 (1976 & Supp. V 1981).

6. United States Attorney, Northern District of Illinois.

7. Author of the best-selling book, *One L*, and Assistant United States Attorney for the Northern District of Illinois.

8. Forfeiture is also available in those states that have their own RICO statutes. *See, e.g.*, COLO. REV. STAT. §§ 18-17-101 to -109 (Supp. 1982); N.M. STAT. ANN. §§ 30-42-1 to -6 (Supp. 1980).

9. Washington University School of Law.

10. Both of the School of Law, Indiana University, Bloomington.

11. Although this is the principal rationale, it is not the only one. Conspiracy, for instance, is often emphasized as an inchoate crime. *See generally* Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957 (1961).

and for principles of accountability, the rationale is stated most often and most clearly in the conspiracy area:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.[12]

The consequences of utilizing the group danger rationale are great. Defendants can be joined together for trial,[13] each defendant is responsible for crimes committed by co-defendants,[14] and evidence of one defendant's activities may be admissible to prove the guilt of another.[15] These consequences are often difficult to criticize when true group danger is involved. In those situations, the defendants really do band together and actually are responsible for the actions of one another. When no imminent group danger exists, however, one should be reluctant to impose such harsh consequences on individual

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12. United States v. Rabinowich, 238 U.S. 78, 88 (1915); *see also* Krulewitch v. United States, 336 U.S. 440, 448-49 (1949) (Justice Jackson's famous concurring opinion: "It is not intended to question that the basic conspiracy principle has some place in modern criminal law, because to unite back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a long wrongdoer."). *But see* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959):

> Though these assumed dangers from conspiracy have a romantically individualistic ring, they have never been verified empirically. It is hardly likely that a search for such verification would end in support of Holdsworth's suggestion that combination alone is *inherently* dangerous. This view is immediately refuted by reference to our own society, which is grounded in organization and agreement..More likely, empirical investigation would disclose that that there is as much reason to believe that a large number of participants will increase the prospect that the plan will be leaked as that it will be kept secret; or that the persons involved will share their uncertainties and dissuade each other as that each will stiffen the others' determination. Most probably, however, the factors ordinarily mentioned as warranting the crime of conspiracy would be found to add to the danger to be expected from a group in certain situations and not in others; the goals of the group and the personalities of its members would make any generalization unsafe and hence require some other explanation for treating conspiracy as a separate crime in all cases.

(emphasis in original).

13. Under FED. R. CRIM. P. 8(b), two or more defendants may be joined together for trial "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

14. In the conspiracy area, the major limitation is that the crimes must be reasonably foreseeable. Pinkerton v. United States, 328 U.S. 640, 647-48 (1946).

15. The most discussed example of this consequence is the rule that admits statements by co-conspirators made in furtherance of the conspiracy. *See* FED. R. EVID. 801(d)(2)(E).

defendants. This, no doubt, explains the harsh attacks made on the "unilateral approach" to conspiracy proposed in the Model Penal Code.[16] Under this approach, a single defendant may be convicted of conspiracy even if no other person conspired with her, so long as she believed that a conspiracy existed. This writer previously has questioned the purpose for such an approach:

> The so-called unilateral approach does make some sense. As the supporters say, the unsuccessful conspirator did try to conspire so his state of mind is clearly a criminal one. True enough, but did he enter into a conspiracy? After all, the conspiracy charge subjects a defendant to criminal liability at a stage earlier than any other inchoate offense and may raise grave procedural problems at the time of trial. And, the reason for such results is that there is a special, added danger, resulting from group planning. Yet, in the unilateral situation there is no conspiracy, no added group danger, for the fact remains there was not an agreement between two persons. The defendant may have wanted to agree, may have intended to agree, and may have even believed he had agreed; but there was not agreement, no true planning by two or more persons, no meeting of the minds between the parties.[17]

Mr. Holderman's article levels much the same criticism at the expansive reading given to the federal RICO statute by some courts. As he cogently points out, these courts have viewed the enterprise elements of RICO as replacing the inadequate wheel and chain rationales of conspiracy law.[18] Holderman contends, however, that this is a mistaken reading of RICO and that courts should maintain traditional conspiracy precepts in analyzing multi-defendant complicity in the RICO context.[19] Unless there is in fact an association of persons united for the same goals, there cannot be the kind of group danger that conspiracy law and the RICO statute should be used to combat.[20]

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16. The Illinois Criminal Code is based upon the Model Penal Code. ILL. ANN. STAT. ch. 38, § 8-2 (Smith-Hurd 1972) states: "A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense." The key language is that the defendant "agrees with another," which sharply contrasts with the usual requirement that there be a "combination between two or more persons." *See* IOWA CODE ANN. § 706.1 (West 1979). The problem is raised most often in cases where there are only two "conspirators," and one is actually feigning agreement. *See, e.g.*, People v. Berkowitz, 50 N.Y. 2d 333, 406 N.E.2d 783, 428 N.Y.S.2d 927 (1980); State v. St. Christopher, 305 Minn. 226, 232 N.W.2d 798 (1975).

17. P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.04, 2-11 to 2-12 (Cum. Supp. 1979).

18. Holderman, *Reconciling RICO's Conspiracy and 'Group' Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. CIN. L. REV. 385 (1983).

19. *Id.* at 402-03.

20. The RICO statute was enacted "to seek the eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923.

The courts increasingly are recognizing Mr. Holderman's position. Few judges expressly call for a broad theory of liability under the RICO statute.[21] In many cases, of course, a broad reading is not needed because traditional application of the conspiracy doctrine would be sufficient to deal with the group danger posed by the defendants.[22] Courts should follow the guidelines proposed by Mr. Holderman in the RICO area, as well as under other statutory provisions enacted for dealing with white collar crime.[23] Without such careful applications, we will be faced with "the due process violation of associational guilt."[24]

III. New Remedies

Traditionally, white collar criminals, if convicted, faced the prospect of imprisonment or fine. As Mr. Webb and Mr. Turow note in their article,[25] however, the RICO statute has designed a new weapon in the fight against white collar crime.[26] This penalty, just now being

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21. At least one court, in fact, has noted to the contrary. *See* United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir. 1982) ("The Act was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes.").

22. *See* United States v. Errico, 635 F.2d 152, 155-56 (2d Cir. 1980); United States v. Anderson, 626 F.2d 1358, 1368-69 (8th Cir. 1980).

23. Numerous other recent statutory enactments are designed to deal with organized or white collar crime. Two of the most famous are the continuing criminal enterprise act, 21 U.S.C. § 848(a) (1976), and 18 U.S.C § 1955 (1976) of the Organized Crime Control Act of 1970. Section 848(a)(1) provides that "[a]ny person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to a forfeiture prescribed in paragraph (2) . . . ." Section 1955 provides:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
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> (1) "illegal gambling business" means a gambling business which—
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> (i) is a violation of the law of a State or political subdivision in which it is conducted;
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> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
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> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

24. Holderman, *supra* note 18, at 390.

25. Webb & Turow, *RICO Forfeiture in Practice: A Prosecutorial Perspective*, 52 U. Cin. L. Rev. 404 (1983).

26. The weapon is new but not unique, as the forfeiture remedy may be found in other statutes. *See, e.g.*, 18 U.S.C. § 1955(d) (1976); 21 U.S.C. § 848(a)(2) (1976); 49 U.S.C. § 782 (1976).

widely used throughout the country,[27] is the mandatory forfeiture.[28] Not only the remedy of forfeiture, but also the type of forfeiture is new. Under common-law rules, property forfeited went to the victim of the defendant's actions. Here, the property passes directly to the government.[29]

The remedy of forfeiture may prove to be a potent weapon in the government's arsenal, but it is simply too early to decide. As RICO prosecutions increase, however, the legal issues raised will become ever more complex. In their article, the authors carefully evaluate three major legal issues which will continue to be raised in the RICO forfeiture context: application of forfeiture to the profits of the racketeering; the time at which the government may have the right to forfeiture; and, perhaps most confusing, the question of whether the statute requires tracing of forfeited property to its present form or is more fully effected by allowing a choice of remedies.[30] We can fully expect these issues to be widely litigated in the coming years.

IV. The Corporate Defendant

Professor Brickey's article unravels many of the mysteries surrounding the relationship of the conspiracy doctrine to the corporate defendant.[31] Her article analyzes the difficulties encountered in applying general rules of criminal law to the corporate defendant.[32] In particular, she focuses attention on two important questions: whether two corporations possess the legal capacity to conspire with one another through a single agent who acts on behalf of both corporation entities, and whether acquittal of the corporate agents through whom the corporation is alleged to have conspired requires acquittal of the corporate entity itself.[33]

As the article correctly points out, the answers to questions concerning corporate conspiracy prosecutions may require reliance on considerations not present either in antitrust actions or in other conspiracy cases. The goals of this area of criminal law are hardly clear. Professor

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27. Webb & Turow, *supra* note 25, at 406.

28. *See* United States v. L'Hoste, 609 F.2d 796, 809-13 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

29. Webb & Turow, *supra* note 25, at 405-06 n.78.

30. *Id.* at 408.

31. Brickey, *Conspiracy, Group Danger, and the Corporate Defendant*, 52 U. Cin. L. Rev. 431 (1983).

32. For instance, she discusses the important question of "the relationship between antitrust conspiracy theory and traditional substantive criminal law." *Id.* at 437-40.

33. *Id.* at 440-42.

Brickey's article provides a workable analytical framework and a policy justification for analyzing these goals and applying them to the corporate criminal defendant action.

V. Conclusion

This symposium is an important contribution to the continuing debate over the proper way to prosecute white collar criminals. By looking to broad policy as well as specific statutes and cases, the authors have analyzed difficult issues and have raised important questions. These articles provide considerable guidance to judges and lawyers who must deal with the legal problems involved in prosecuting white collar criminals.

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34. *Id.* at ___.