

The Gray Area of White-Collar Crime: It Isn't Black or White

By Stephan G. Schneider

Introduction

White-collar crime is an issue that enralls society. It has been the topic of many successful television shows, books, and movies. Society received one of its most revered movie quotes when Gordon Gekko told a room full of investors that “Greed is good.”¹ Politicians like Elizabeth Warren base entire platforms on it and situations like the *Trump* investigation, the *Iran-Contra* scandal, and the *Enron* fraud dominate news headlines. It is most curious though that although society finds itself constantly entertained at white-collar crime, the study of it is quite lacking. To be fair, this lack of understanding is not for lack of trying. The study of this societal phenomenon has come a long way since the term was introduced by Sutherland in the 1940s.² Criminologists and other social scientists have presented a broad spectrum of literature that narrowly present theories that explain white collar crime.

While the literature and theories presented by these experts go a long way in helping explain white-collar crime, sometimes the best understanding can come from those at the middle of it – convicted white collar criminals. Such a concept is not unusual; as showcased in Netflix’s critically acclaimed docuseries *Mindhunter*, the FBI conducted criminal personality profiling of mass murderers and serial killers to gain a better

¹ Wall Street (20th Century Fox, 1987).

² David O. Friedrichs, TRUSTED CRIMINALS (WADSWORTH CENGAGE LEARNING, Eds., 4th ed. 2010).

understanding of those crimes.³ Such an idea has also been useful in driving plots of entertainment media. In addition to *Mindhunter*, criminal consultants have been featured prominently on USA's television series, *White Collar*, and the hit film classic, *Silence of the Lambs*.

It is thus in that spirit that one should keenly study the words of Andrew "Andy" Fastow. Mr. Fastow is infamous for his role in the Enron scandal. As the chief financial officer (CFO) for the company, he was crucial not only in perpetuating the conspiracy but in helping the government prove its case as a state witness. Since he was released after serving six years in prison,⁴ Fastow has joined the lecture circuit where he has shared his perspective on white-collar crime. It was through his lecture circuit that he came to Florida Atlantic University and gave a presentation that explicated a simple but piercing observation on white-collar crime. In this lecture, he walked the audience through his mind; he explained his thought process in certain situations and he argued that there is a distinction between following the rules and doing the right thing.⁵ He expounded upon the fact that he was named CFO of the year and convicted as a felon for the same behavior. Essentially, Fastow touched on the notion of a gray area.

This paper proffers that white-collar crime can be best explained as a gray area. This area is the manifestation of ambiguity that confounds criminologists, politicians, and agents of our court system. While the

³ Joe Nolfi, *'Mindhunter' Trailer: David Fincher Returns to Netflix with New Drama*, ENTERTAINMENT WEEKLY, <http://ew.com/tv/2017/03/01/netflix-mindhunter-trailer/>.

⁴ Joe Weisenhal, *Andy Fastow, The Architect of The Enron Fraud, Just Left Prison*, BUS. INSIDER (May 11, 2011), <https://www.businessinsider.com/andy-fastow-enron-architect-goes-to-halfway-house-2011-5>.

⁵ Andrew Fastow, Former CFO of Enron, Address at Florida Atlantic University (Nov. 29, 2018).

Gray Area Perspective will not answer questions such why some people commit these crimes and other don't, it serves as a symbolic land survey that will help better identify and define white-collar crime.

This manuscript is divided into several sections. Section One will provide an overview of white-collar crime with a particular emphasis on the plethora of ambiguous definitions when studying it. Section Two will then take a closer look at white collar crime. Specifically, this section will provide an overview of the notable theories used to study white-collar crime. With this in mind, Section Three builds on the foundations laid out by the previous sections to explain the gray area. It will specifically explore what it is, how it is created, and how it plays a role in letting white-collar crime go undetected. Furthermore, it will look to explain why it is so hard to prevent. Finally, Section Four briefly concludes the paper with possible solutions that would help address white-collar crime.

Section One | What Is White-Collar Crime?

The Trouble with Defining White-Collar Crime

Usually, when studying crime, one can straightforwardly note the parameters for that which is being studied. The elements of conventional crime are easily recognizable. Generally, crimes such as murder, assault and battery, possession of drugs, and burglary are crimes that are identified by a colloquial refrain: if it walks like a duck, talks like a duck... it must be a duck. Throughout recorded history, humans have recognized what type of behavior is not socially acceptable and have crafted prohibitions against it. Indeed, one can look at the *Old Testament's* condemnation of Cain's murder of his brother, Abel,⁶ or at

⁶ LIFE APPLICATION STUDY BIBLE (Tyndale House Publishers ed., 1996).

the prohibitions of murder, adultery, stealing, and lying within the *Ten Commandments*⁷ to see how conventional crimes have clear parameters for unacceptable actions and behaviors. Indeed, comment must be made on the very term of “conventional crime.” *Merriam-Webster* defines “conventional” as “formed by agreement or compact; according with, sanctioned by, or based on convention, lacking originality or individuality; ordinary, commonplace.”⁸ The very notion of calling these types of crimes “conventional” points to the fact that there is no question as to identifying these actions and behaviors as crimes.

White-collar crime is somewhat the antithesis of conventional crime in that conventional crime tends to be straightforward and easily recognizable, whereas white-collar crime is a source of considerable confusion.⁹ “Although criminologist Edwin H. Sutherland is generally given credit for introducing the term *white collar crime* into the literature in 1939, recognition of this type of crime extends well back in history.”¹⁰ This is noteworthy in showing how society has differed in observing these two types of crimes. Whereas conventional crime was identified and codified in the *Old Testament*, in *Hammurabi’s Code*, and other doctrines of human society, it wasn’t until 1939 that social researchers were able to even put a name to the issue. This begs the questions of how the law can address any undesirable behaviors if the study of the phenomena is not even methodized. Succinctly, whereas conventional crime has been codified since the beginnings of human society, one could argue that society only started thinking of white-collar crime in a systemic manner as recently as 1939.

⁷ Id.

⁸ *Conventional*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/conventional>.

⁹ Friedrichs, *supra* note 2.

¹⁰ Id.

Compounding its late start, the systemization of white-collar crime still lags behind conventional crime for another reason. “Confusion about the meaning and most appropriate application of this concept continues” to this day.¹¹ Part of the problem in studying and addressing white-collar crime is a result of the fact that the phenomenon’s study is in itself ambiguous. If observers are unable to even agree on definitions, then how can one successfully act against it? David Friedrichs highlights the root of this problem in his textbook, “Trusted Criminals.”¹² He notes:

In some cases, different terms refer to the same activity; in other cases, they refer to specific types of crime. Obviously, the invocation of so many different terms, interrelated in such a bewildering variety of ways, contributes to the general confusion about white-collar crime. Each term is likely to have some unique connotations, and each tends to emphasize a particular dimension of white-collar crime.¹³

Such is the case that one study documented the effect that inconsistent terminology has on responding to incidents. This study demonstrated that product counterfeiting incidents have properties both consistent and inconsistent with white-collar crime as traditionally defined; sometimes they occur concurrently.¹⁴ Furthermore, it found that “failure to embrace [a] broad classification can lead to ineffectively estimating its occurrence

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Justin A. Heinonen, John Spink, & Jeremy M. Wilson, *When crime events defy classification: The case of product counterfeiting as white-collar crime*, SECURITY JOURNAL (2017).

and its effects on the economy, public safety and health, and brand owners.”¹⁵

With that said, there is some agreement among criminologists. For example, they are “in agreement that it (1) occurs in a legitimate occupational context; (2) is motivated by the objective of economic gain or occupational success; and (3) is not characterized by direct, intentional violence.”¹⁶ With these tracks laid in place, formal definitions are provided as follows: *Black’s Law Dictionary* establishes white-collar crime as “[a] nonviolent crime ... involving cheating or dishonesty in commercial matters.”¹⁷ Friedrichs provides a more comprehensive definition as defined by “a group of criminologists who met specifically to address the dispute over the meaning of the term.”¹⁸ Their definition stipulates:

White-collar crimes are illegal or unethical acts that violate fiduciary responsibility of public trust committed by an individual or organization, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain.¹⁹

A Multistage Approach to Defining White-Collar Crime

Such a definition relies on utilizing a multi-stage approach. A coherent and meaningful understanding requires one to approach the issue in

¹⁵ Id.

¹⁶ Id.

¹⁷ *What is white collar crime?*, Black’s Law Dictionary, 2nd ed., <https://thelawdictionary.org/white-collar-crime/>

¹⁸ Friedrichs, *supra* note 2.

¹⁹ Id.

stages.²⁰ As it relates to white-collar crime, scholars rely on three stages to define white collar crime: polemical, typological, and operational.²¹ As its name implies, the first stage is the definitional stage and is controversial.²² Notwithstanding the nuanced controversy, “[i]t is widely accepted today that the characteristics and consequences of corporate crime make it fundamentally different from the range of activities subsumed under the heading of occupational crime.”²³ Moving onto the typological stage, one proceeds with the purpose of organizing patterns of crime and criminal behavior.²⁴ Such patterns are systematically organized into coherent or homogeneous categories with the intention of facilitating the explanation and response to crime.²⁵

Friedrichs compiled and presents the principal criteria for differentiating between the types of white-collar crimes. Broadly defined, they are: (1) the context in which illegal activity occurs, including the setting; (2) the status or position of the offender; (3) the primary victims; (4) the principal form of harm; and (5) the legal classification.²⁶ Even with such typological categories, the patterns of actual lawbreakers are so varied that some commenters are concerned that typologies may distort reality rather than clarify it.²⁷ With that said, Friedrich notes that “one must accept the inevitably arbitrary and limited attributes of any classification scheme” and acknowledge that typologies provide “a necessary point of departure for any meaningful discussion of white-collar crime.”²⁸ Thus,

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

academics have generally applied the following typology to follow activities with a close generic relationship with white-collar crime: (1) corporate crime; (2) occupational crime; (3) governmental crime; (4) state-corporate crime, crimes of globalization, and high finance crimes; and (5) enterprise crime, contrapreneurial crime, technocrime, and avocational crime.²⁹

With typologies established, one can then move to the operational stage. On this level, “the objective of the definition is the provide a point of departure for focused empirical research or comparative critical analysis.”³⁰ Friedrich again compiles a list of eight federal crime categories under one approach at this level: (1) securities fraud; (2) antitrust violations; (3) bribery; (4) tax offenses; (5) bank embezzlement; (6) postal and wire fraud; (7) false claims and statements; and (8) credit and lending institution fraud.³¹ Considering this list, it is important to note that these categories are not exclusive; “many empirical studies of white-collar crime adopt much narrower definitions of specific types of white collar crime for purposes of quantitative analysis.”³²

Trust

Regardless of the scope applied in defining white-collar crime, almost all scholars agree that “trust and its violation are certainly key elements of white-collar crime.”³³ This manuscript derives much of its information from Friedrichs’s critically acclaimed textbook on white-collar crime. In showing how important the notion of trust is, he aptly titled the book

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

“Trusted Criminals.”³⁴ However, one must take care to observe the relationship of trust and white-collar crime with nuance. As explicated by Friedrichs,

The violation of trust has some significant consequences beyond the immediate losses suffered by the victims of crimes. One of the most pernicious consequences of violations of trust – especially when committed by people in high places in government and in the corporate world – is the potential for an increase in distrust. To that extent, people become distrustful and cynical, the likelihood of cooperative and productive relationships is diminished.³⁵

To this point, one research study sought to tie the theoretical link between white collar crime and trust. The study used data from the *Washington Post* and *ABC News Poll* following the savings and loan scandal and the Dotcom bust.³⁶ It found evidence that trust is a strong predictor of belief in investing in a given industry.³⁷ Within the study, results of a series of logistic regressions suggest that trust is impacted by high-profile white-collar crime.³⁸ Conclusively, it found evidence to suggest that high-profile trust breaches lead to resource withdrawal; this adds the economic damages incurred directly from white-collar crime.³⁹

³⁴ Id.

³⁵ Id.

³⁶ Thomas E Dearden, *Trust: the unwritten cost of white-collar crime*, JOURNAL OF FINANCIAL CRIME, (1), 87. (2016), <https://doi-org.ezproxy.fau.edu/10.1108/JFC-02-2015-0007>.

³⁷ Id.

³⁸ Id.

³⁹ Id.

Who Are the Perpetrators?

No definition is complete without an attempt to codify perpetrators. Even though such a task is imprecise due to the nature of white-collar crime's broad spectrum, scholars do accept some valid generalizations. These generalizations are collected and summarized by Friedrichs: White-collar criminals are likely to be middle-aged or older and begin offending at a later age.⁴⁰ They also are significantly more likely to be middle and upper class. In regard to race, whites are overrepresented for middle and high-level offenses whereas African Americans are in the majority for lower level offenses such as welfare fraud.⁴¹ Males greatly outnumber females; Friedrichs cites the dominance of male domination of corporations and outside-the-home occupations as a factor.⁴² That said, women are breaking through the glass ceiling and joining the elite corporate, occupational, and political class; data suggests that as women become more involved in business, their offenses would also rise.⁴³ Generally, white-collar criminals are more likely to be employed, are better educated, have strong community group and church affiliations, and are married with stable family situations.⁴⁴

The Ambiguous Definitions of White-Collar Crime

In summary, the problem with addressing and understanding white-collar crime starts at the definitional level. Whereas conventional crime has firm parameters guiding the labeling of certain actions and behaviors, those governing white-collar crime are ambiguous on multiple levels. In finding a rationale for this, one might look at the fact that it wasn't until 1939 that social scientists labeled the stratum as white-collar crime.

⁴⁰ Friedrichs, *supra* note 2.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

Indeed, an inability to label a category makes it difficult to examine and determine its composition. However, such a theory would not sufficiently explain the ambiguity. It is more likely that the nature of white-collar crimes is inherently ambiguous. As later sections will expand upon, these behaviors and actions are nuanced in such a way that even the most sophisticated system would have trouble defining it. Friedrichs puts it best when he compares the concept of white-collar crime to a Chinese puzzle: “whichever way one turns with it, new difficulties and conundrums are encountered.”⁴⁵

Section Two | A Closer Look at White-Collar Crime

Applying Theories of Criminality

“Only human beings attempt to explain the behavior of others instead of simply responding to it.”⁴⁶ Such manifestation of human ingenuity and creativity is methodized through the creation of theories. These formal explanations attempt to make sense of what happens around us.⁴⁷ With that said, any explanation will be influenced by individual interpretation.⁴⁸ This results in sometimes contrasting explanations of the same event. Any explanation for white collar crime should “explore the interrelationships involved in white collar crime as criminality, as an event, and as criminalized activity.”⁴⁹ This section will highlight several distinguishable criminality theories.

The basic theories of criminality establish that white-collar criminals are different from conventional criminals.⁵⁰ With this in mind, the theories

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id. at 221.

⁵⁰ Id.

seek to identify the nature of these differences.⁵¹ However, there are certain understandings that successful theories must embrace. J. David Singer, a political scientist, notes that “in any area of scholarly inquiry, there are always several ways in which the phenomena under study may be sorted and arranged for purposes of systemic analysis.”⁵² In his paper, he warns that any researcher must balance the need to explain or predict with avoiding distortion at the expense of total representational accuracy.⁵³ Singer ultimately argues that proper explanations require translations between macro and micro levels.⁵⁴ Whereas Singer focuses on international relations, such a quandary exists in the area of law and criminality as well. Indeed, any researcher of white-collar crime must take note of the three different explanatory levels for which to observe white-collar crime. The *Macro-level* focuses on the conditions within a society or the organization that promotes white-collar crime.⁵⁵ The *Micro-level* observes the offenders’ individual choices and predispositions.⁵⁶ Finally, the *Meso-level* studies the situational factors or specific circumstances at play.⁵⁷ Observing and distinguishing each level is essential as the *Gray Area Perspective* will make apparent. The most successful theories are those that are able to attain minimal distortion throughout the various levels as broadly applied to various specific circumstances.

Before looking at the gray area, it is helpful to take note of the existing theories offered by social scientists. One such theory is the *Routine*

⁵¹ Id.

⁵² J. David Singer, *The Level-of-Analysis Problem in International Relations*, WORLD POLITICS, Vol. 14, No. 1. 1961.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

Activities Theory. First proposed in a series of papers by Lawrence Cohen and Marcus Felson, this theory presented that the presence of three components increased the likelihood of crime.⁵⁸ Under this theory, crime was the intersection of (1) the lack of capable guardians; (2) motivated offenders; and (3) suitable targets.⁵⁹ On one end, one must consider the notion of guardianship. “Even the most motivated offenders may ignore valuable targets if they are well guarded.”⁶⁰ In terms of motivation, one may turn to generalizations to find those with a propensity for crime. These then combine with suitable targets for the opportunity of committing a crime.

Another theory is under the umbrella of social structure theories and focuses on the association between social conditions and crime.⁶¹ As its name implies, *Strain Theory* essentially observes the stress faced by frustrated people who desire success but lack the perceived means and opportunity to achieve it.⁶² Thus, they turn to crime. Contemporary *Strain Theory* comes in two distinct formulations: *Structural strain* uses a sociological lens to suggest that economic and social sources of strain shape collective human behavior.⁶³ In contrast, *Individual strain* relies upon a psychological reference to suggest that individual life experiences cause some people to suffer pain and misery; these feelings are then translated into crime.⁶⁴ All in all, strain theories observe phenomena in three stages: (1) the source of the strain; (2) the negative affective states

⁵⁸ Id.

⁵⁹ Friedrichs, *supra* note 2.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

such as frustration, anger, fear, or disappointment; and (3) the antisocial behavior.⁶⁵

The next notable theory is that of the *General Theory of Crime* as proposed by Michael Gottfredson and Travis Hirschi. This theory links the propensity to commit crime to two latent traits: an impulsive personality and a lack of self-control.⁶⁶ Gottfredson and Hirschi attribute the tendency to commit crimes to a person's level of self-control and see such self-control as a stabilizing force.⁶⁷

One can also look at white-collar crime through the lens of the *Social Process Approach*. This approach is the intersection between three theories: (1) *Social Control Theory*; (2) *Social Learning Theory*; and (3) *Labeling Theory*. At the core of this approach is the idea of socialization as a learning mechanism to consider generally accepted norms.

Social Control Theory promulgates that people obey the law because behavior is controlled by internal and external forces.⁶⁸ Such forces include institutions like the family, school, religion, and social circles.⁶⁹ Under this theory, the four tenets of attachment, commitment, involvement, and belief can direct whether an individual will display conforming behavior or criminal behavior.⁷⁰

Similarly, the *Social Learning Theory* holds that criminal behavior is learned. Also called the *Differential Association Theory*, this line of

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

thinking was first proposed by Sutherland in his 1939 text.⁷¹ Sutherland put it succinctly:

Criminal behavior is learned in association with those who define such behavior favorably and in isolation from those who define it unfavorably...a person in an appropriate situation engages in such behavior if, and only if, the weight of the favorable definitions exceeds the weight of the unfavorable definitions.⁷²

Essentially, this theory holds the following principles: Criminal behavior and techniques are learned through interaction; perceptions of the legal code influence motives and drives; differential associations may vary in frequency, duration, priority, and intensity; criminal behavior is an expression of general needs and values but is inexcusable under any circumstance.⁷³

Finally, one can use the *Labeling Theory* to see how self-image plays a role in white-collar crime. Charles Horton Cooley originally presented his idea of the “looking-glass self” where people shape their self-concepts based on their understanding of how they are perceived by others.⁷⁴ From this idea, social scientists started to observe how criminal careers are constructed from the ruins of disparaging interactions with society. Essentially, they accept the label as a personal identity.⁷⁵

Labeling Theory is unique from the others in that it also considers the people who make the rules.⁷⁶ Central to this theory is the recognition that

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

individuals who determine the content of the criminal law and impose sanctions according to their standards of right and wrong shape reactions and definitions in crime.⁷⁷ As such, there are an elite group of people whose social and economic power in society will benefit from any such determinations. Once a definition is applied, any individual stigmatized by the label will endure a negative effect on their self-identity.

In practice, the *Labeling Theory* has many effects on the policing and regulation of white-collar crime. Through differential enforcement, the law is differentially constructed and applied, depending on the offenders.⁷⁸ Diversion programs, non-prosecution agreements, and prosecutorial discretion are policy manifestations of the labeling theory. Such programs are designed to potential offenders from being formally processed and as such, receive a stigmatizing label from society. However, just as such programs can be used to positively deter crime, it can also serve as a double-edged sword. In the same way that the law is interpreted to save low-offense individuals from being processed, it can also save the creators of the law – or as Howard Becker calls them, moral entrepreneurs – from major offenses.⁷⁹ This will be critical to the idea of a gray area and will become most pronounced when looking at corporate and governmental crime.

It is useful to pair this theory with the macro-level *Social Conflict Theory*. Such a perspective understands the impact that the social, political, and economic structure of society has on crime and in the distribution of power. *Social Conflict Theory* argues that the root cause of crime is the social conflict created by the unequal distribution of wealth and power in

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

society.⁸⁰ Such unequal distribution is the result of the political and economic structure of society; such a structure allows the criminal justice system to operate in favor of those who have the power to define the law.⁸¹ One can also use the comparison of *Instrumental Theory* and *Structural Theory*. When considering these theories, one should always consider the ideas of former Labor Secretary for the Clinton administration, Robert Reich.⁸² These theories touch nicely on the argument as to whether our institutions are meant to maintain the long-term interests of the capitalist system and to control members of any class who threaten its existence.⁸³

No overview of criminology theories is complete without *Rational Choice Theory*. Seen as a natural evolution from classical theories, this theory centers on the premise that individuals are rational and coherent actors; each action is willful and determined. Similar to economic theory, a decision to commit crime is shaped by human emotions and thought processes; it is influenced by social relationships, individual traits and capabilities, and environmental characteristics.⁸⁴ Thus, antisocial behavior occurs after a cost-benefit analysis by the offender. Any risk to break the law will consider personal factors that include motivation and analysis of the benefit; it will also consider the situational factors that include guardianship, likelihood of getting caught, and ease of success.⁸⁵ Essentially, this theory holds that offenders have performed a risk analysis and made a rational and conscious effort to engage in such behavior.

⁸⁰ Id.

⁸¹ Id.

⁸² Robert Reich, creator, *Saving Capitalism*, Netflix Film, 2017, *Netflix*, <https://www.netflix.com/title/80127558>.

⁸³ Friedrichs, *supra* note 2.

⁸⁴ Id.

⁸⁵ Id.

Ultimately, while these theories shed great insight on white-collar crime, they merely build upon the ambiguity of the definitions of white-collar crime. The truth is that no single theory fits!⁸⁶ It is for this reason that one must take a holistic look at white-collar crime and apply the proper perspectives that help identify the lay of the land, so to speak. This is where the *Gray Area Perspective* will come in. When in use with a combination of these theories, the gray area of crime will help explain why white-collar crime often goes undetected and is so difficult to stop.

Section Three | The Gray Area Perspective

A Primer from Andy Fastow

Any explanation of the gray area must include a description of the presentation of ideas formulated by former CFO of *Enron*, Andy Fastow. Indeed, it was his lecture at *Florida Atlantic University* that inspired the *Gray Area Perspective*. In a way, that lecture was in some way a guided tour inside what he calls “the gray area of accounting.”⁸⁷ ⁸⁸ As described by Fastow, this is an area often abused that centers around human judgement.⁸⁹ There is perhaps no better motif for the gray area than Mr. Fastow’s presentation of two objects, that at one point, he simultaneously held in each hand: a *CFO of the Year* trophy and his prison identification card. As he explained it, he received both those items for the exact same deals and business practices he practiced as CFO of *Enron*. Such a conflict should evoke intrigue from any social scientist. If traditional notions of crime, particularly those of conventional crime suggest that there is clear distinction between superlative behavior (that deserves

⁸⁶ *Id.*

⁸⁷ Fastow, *supra* note 5.

⁸⁸ This description of Mr. Fastow’s presentation does not presume to speak for Mr. Fastow in his own words.

⁸⁹ Fastow, *supra* note 5.

commendation) and anti-social behavior (that leads to being labeled a criminal and serving in prison), the idea of having a particular action commended and chastised is perplexing. Indeed, we do not give awards to people for breaking into houses, killing innocent people, robbing someone at gunpoint, selling heroin, or driving thirty miles over the speed limit. Simply put, the idea of praising someone for committing an action that is clearly defined as a conventional crime is mostly ludicrous.⁹⁰ And yet, the ambiguous nature of white-collar crime runs counter to *conventional* wisdom.

How does something like this happen? Indeed, Fastow acknowledges that it was not as if he and the rest of *Enron's* chain of command had the intention of acting maliciously and criminally. As Fastow describes it, every single deal he made was reviewed and approved by *Enron* accountants, *Arthur Anderson* accountants, *Enron* attorneys, outside counsel, and finally, the *Enron* Board of Directors.⁹¹ Fastow invokes cognitive dissonance to explain the phenomenon but it is more likely that homogeneity played a bigger role, as will become apparent later. In any case, Fastow presents the audience with what he called “a weird situation where all the individual deals were legal but the aggregation of them all was fraud.”⁹²

Another way he described it was legal fraud.⁹³ And so, “how do all these gatekeepers and really smart people approve all these deals while

⁹⁰ One could take exception to this generalization as sanctioned crimes such as English privateers (monarchy-sponsored piracy against the French and Spanish on the high seas), hackers devoted to helping companies and governmental institutions find software loopholes that are vulnerable to attack for prize money, and whistleblowing do exist.

⁹¹ Fastow, *supra* note 5.

⁹² *Id.*

⁹³ *Id.*

committing the greatest fraud in corporate history?”⁹⁴ As Fastow explains it: by following the rules to the mark. According to Fastow, each of his deals were designed to be technically correct but simultaneously misleading.⁹⁵ He explained that his perceived success as a CFO came as a result of his affinity for loopholes. For him, a successful executive was somebody that could technically follow the rules while intentionally finding ways to avoid their intention.⁹⁶ Of course, a key element of prosecuting criminal behavior is *mens rea*, where prosecutors aim to find criminal intent to break the law. Thus, one would have to seek clarification from Mr. Fastow as to whether his rhetoric implied such a guilty intent or whether there is a better way of explaining it – perhaps he meant that he sought to follow the rules as prescribed while avoiding any of their detrimental effects.

Still, one is likely to agree with Mr. Fastow when he proclaims that *Enron* was not a compliance failure.⁹⁷ From his perspective, it was a culture failure; it was an ethics failure; it was a failure in the gray area.⁹⁸ Fastow admits that there was no set of rules that could have stopped him and others at *Enron*.⁹⁹ He proclaimed, “We loved when new rules were created!”¹⁰⁰ Why wouldn’t he when he saw it as an opportunity for a competitive advantage?¹⁰¹ As he explained, each new rule enacted was a roadblock for his industry and the first company to find the loophole in the rulebook earned the spoils that came with it.¹⁰² Of course, Fastow

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See generally *Id.*

explained that he did not perceive himself or *Enron* as a whole as trying to be misleading; in his eyes and that of his board of directors, he was a genius.¹⁰³ The issue is abridged when Fastow explicates that the risk isn't that someone will make the wrong decision or be told that it is right or wrong; the risk is presented by making the wrong decision without recognizing you are even making the decision.

Such risk is compounded when surrounded by a homogeneous mentality and when that occurs, the problem becomes systemic.¹⁰⁴ Fastow enunciates one more important notion about the gray area: that most of life and business takes place there. In syllogism, George Orwell notes that the only way to combat tribalism is through self-awareness of one's own feelings and through rigorous self-control that few are prepared to make.¹⁰⁵ "The emotional urges which are inescapable, and are perhaps even necessary to political action, should be able to exist side by side with an acceptance of reality. But this...needs a *moral* effort."¹⁰⁶ One can easily take Orwell's words and apply them to the gray area. As with tribalism, the first step at the *micro-level* is to recognize that these tendencies exist. From there, one must enact self-control and act accordingly. That is easier said than done, especially when there are factors at the *macro-level* that contribute to the problem.

Establishing the Gray Area Perspective

Fastow's version of the gray area focus on human judgement and decision making. If one were to summarize his position, it would be that there is a gray area in the middle of what you are and aren't allowed to do. At the core of his assertion is the notion that most of life and business

¹⁰³ *Id.*

¹⁰⁴ See generally *Id.*

¹⁰⁵ George Orwell, Notes on Nationalism, 1945.

¹⁰⁶ *Id.*

relies on ambiguous rules in society. The *Gray Area Perspective* aims to examine this ambiguity and how that will have an effect on white-collar crime. Essentially, this perspective expands on Fastow's description summarized above and bridges the *micro* and *macro* levels of ambiguity. Once the ambiguity is mapped out, one will be able to explain why white-collar crime often goes undetected and why it is difficult to prevent.

The *Gray Area Perspective* starts at the *micro-level* within the business and private world. For this, one must take note of the ideas shared by Mr. Fastow. From there, one can transition to the *macro-level* by recognizing that "corporations are widely regarded as the centerpiece of a free-market capitalist economy and as a powerful manifestation of entrepreneurial initiative and creativity."¹⁰⁷

Morality and the Gray Area

If one were to follow the logical progression by connecting the individual actors of a corporation to the corporation itself and finally to society's capitalist economy (using the logic established above), it would necessarily follow that one would need to consider and judge the very idea of capitalism and how one perceives its inherent morality. It is only through such judgement that one can determine what is to be considered anti-social. To do this, one can look at two contrasting perspectives: that of Karl Marx and that of Ayn Rand. On one end, Marx saw capitalism as a negative force whose emphasis on competition and wealth produces an economic and social environment in which crime is inevitable.¹⁰⁸ It was from Marx's ideas that Marxism evolved to include the belief that society was divided into a ruling class and an inferior class where the one with the wealth and political clout could design the very rules of the system.¹⁰⁹

¹⁰⁷ Friedrichs, *supra* note 2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Marxism also holds that capitalism's inherent propensity to favor individual self-interest rather than the common good naturally results in exploitation.

If one had to focus on one tenet in the debate of capitalism, it would have to be on the notion of individual self-interest. Whereas Marxism sees such a concept as a negative, the flip side would come from Ayn Rand's objectivism. The way Rand sees it, capitalism promotes the ultimate virtues of self-reliance, determination, and rationalism. Indeed, as expressed in her novels, her objectivism sees the individual human as "a heroic being, with his own happiness as the moral purpose of his life, with productive achievement as his noblest activity, and reason as his only absolute."¹¹⁰ It is important to note the contrast between Objectivism and Marxism at almost all levels. Whereas one sees capitalism as a negative, the other sees it as the embodiment of everything positive. Whereas one places emphasis on the collective society, the other holds nothing higher than the individual. It is here at the level of establishing morality where one can argue that the gray area is born.

Regardless of morality, it is clear that both philosophies see man as a rational actor. With this, the Gray Area Perspective adopts the notion that individuals will primarily act in their own self-interest. When combined with a homogeneous group, a culture is born. At the same time, society continues to flip between the notion that business is a force of good and a force of bad. When the two collide, the debate is framed in extremes: either capitalism is good or it is bad. The truth is that capitalism is not perfect and business tends not to have society's interests at heart. Once this notion is adopted, one can see that the gray area is the result of the

¹¹⁰ William Thomas, *What is Objectivism?* THE ATLAS SOCIETY (June 14, 2010), <https://atlassociety.org/objectivism/atlas-university/what-is-objectivism/objectivism-101-blog/3366-what-is-objectivism>.

conflicting forces that result in having individual interests without any overlap with society's.

The Gray Area at the Macro-Level: How Interest Groups Craft Policy

The Gray Area Perspective is wonderfully explained at the micro-level by Mr. Fastow. Through his description, one can see how the *Rational Choice Theory* and *Social Learning Theory*, *Labeling Theory*, and *Routine Activities Theory* combine to explain how individuals must navigate through a gray area resulting in lapses of judgement. However, one must turn to the macro-level to discover how policy in government helps create such an endemic environment. In *Federalist No. 10*, James Madison wrote about the power that individual factions, or interest groups, hold over government.¹¹¹ Per Madison, these factions were inevitable due to human nature and it is inevitable for these interests to interplay with government. He wrote:

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves... The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government... what are the different classes of legislators but advocates and parties to the causes which they determine... It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public

¹¹¹ James Madison, *Federalist No. 10*, in *FEDERALIST PAPERS*, 1787.

good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.¹¹²

Indeed, in 2016, fifty companies and industry groups contributed more than \$716 million to lobby government agencies and congressmen.¹¹³ The general trend in observing interest group power shows that economic and business interests are in the grand majority as it relates to the makeup of interest groups, campaign contributions, and money spent on lobbying. According to *The Center for Responsible Politics*, the top 20 spenders throughout and within 1998-2018 are all business and economic institutions (or fronts for industries) with the exception of *AARP*.¹¹⁴

The advantages of business and economic factions are not just a result of their superior financial resources. They also benefit the fact that they are responsible for giving wages and jobs to those in society. As such, politicians are more likely to put these institutions on a pedestal for the sake of a strong and vibrant economy. Indeed, the linkage and strength between politics and these interest groups manifested in the so-called iron triangle has vast policy effects. In April 2019, an investigation by *USA TODAY*, *The Arizona Republic*, and *the Center for Public Integrity* detailed a vast network of so-called copycat bills throughout all fifty

¹¹² *Id.*

¹¹³ Megan R. Wilson, *Lobbying's top 50: Who's spending big*, THE HILL (Feb. 7, 2017), <https://thehill.com/business-a-lobbying/business-a-lobbying/318177-lobbyings-top-50-whos-spending-big>.

¹¹⁴ *Top Spenders*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s>.

states that were quietly advancing the agenda of the factions who write them.¹¹⁵ The investigation examined nearly one million legislative bills in all fifty states and Congress and found that at least ten thousand bills were almost entirely copied from model legislation and introduced nationwide in the past eight years with more than 2,100 of those bills being signed into law.¹¹⁶ The original authors were always interest groups.

As explicated in the report, the mechanism for this phenomenon was the fact that “copying model legislation is an easy way to get fully formed bills to put [legislators’] names on, while building relationships with lobbyists and other potential campaign donors.”¹¹⁷ Unfortunately, the result of these copycat bills were not to the betterment of society. The investigation found that these were almost entirely drafted with deceptive titles and descriptions to disguise their true intent.¹¹⁸ In addition, interest groups sometimes worked to create the illusion of expert endorsements, public consensus or grassroots support.¹¹⁹ Finally, the investigation established that legislation copied from model legislation have been used to essentially override the will of local voters and their elected leaders; as noted in the story, “Cities and counties have raised their minimum wage, banned plastic bags and destroyed seized guns, only to have industry groups that oppose such measures make them illegal with model bills passed in state legislatures.”¹²⁰

¹¹⁵ Rob O’Dell and Nick Penzenstadler, *Copy, Paste, Legislate*, USA TODAY (April 4, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002/>.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

In addition, one must look at the self-interest of politicians and government officials themselves. If the principle of the rational actor is to hold true, then it would stand that those in government would also generally fall victim to their own interests. It is in this light that one could look at *Public Choice Theory* to see why government is inconsistent in curtailing business interests' influence over law and policy. This theory seeks to explain political behavior through the rational actor theory and by way of game theory. Essentially, proponents of this theory hold that one can explain political decision-making by analyzing the individual interests of each actor. Thus, in this line of thinking, the interests of business and economic factions would tend to draw politicians and bureaucrats that seek financial donations and legitimacy.

All of this culminates with ambiguous policy and law. With one hand, society upholds Randian praise of business while in the other, Marxian distrust in business points at crony capitalism and corrupt government. The end result – an ambiguous system.

The Gray Area in Sum

The Gray Area Perspective ultimately argues that the reason that white-collar crime often goes unnoticed and is hard to stop is because society is not fully committed to it or at a minimum does not see the lay of the land. Testament to society's short attention span is the fact that regulations mostly occur during times of crisis.¹²¹ Such a trend does not go unnoticed, even at the *micro-level*. A key element to Fastow's presentation was the observation that there are two questions asked when it comes to analyzing someone's decisions: (1) "Were you following the rules and; (2) "Would a reasonable person consider this acceptable

¹²¹ Friedrichs, *supra* note 2.

behavior and the right thing to do?”¹²² The thing is, as he notes, they are never asked at the same time. “As long as you’re winning, everyone thinks you’re a hero” but “as soon as something goes wrong, they change questions.”

In other words, society has a tendency to ignore fundamental flaws in our system that allows white-collar crime to take place when times are good and everyone is making money. However, once the party stops, that’s when the complaints start - until the recovery has caused the issue to be almost forgotten. The end result of this is a plurality of interpretations as established in law and policy: either society is hard on crime or it respects due process; there is either an emphasis on meteoric economic growth or a caution for stability; there is a call for unlimited freedom of speech or an emphasis on protecting society; either our system is that of shareholder capitalism or that which focuses on the stakeholders.

The Gray Area Perspective is best described as the embodiment of all ambiguity. This ambiguity commences at the definitional stage where different interpretations conflict as it relates to establishing what white-collar crime is, determining what the right things to do is, and how law should be formed. From there, the ambiguity manifests in whether law can be rafted to adequately keep up with business. As the *Thompson Memorandum* and Cristopher Wren’s law journal entry on it notes, there has been immense difficulty in consolidating a coherent stance on how to deal with corporate crime.

The *Gray Area Perspective* will be useful in identifying zones of ambiguity. “Unlike most conventional crime, white collar crime typically occurs in the context of legitimate and productive activities... And the proper lines of demarcation between acceptable and unacceptable

¹²² Fastow, *supra* note 5.

practices are not always clear.”¹²³ Indeed, a mantra in Silicon Valley is to “fake it until you make it.”¹²⁴ Such words were echoed by the defense attorney for Anna Sorokin. A Manhattan jury convicted her of second-degree grand larceny, theft of services and one count of attempted grand larceny.¹²⁵ However, it appears the jury agreed with her defense attorney’s argument where he noted the distinction between his client’s actions being unethical and orthodox but not a crime.¹²⁶ It’s worth noting that this is not an irregularity. In reading the Mueller Report, one can also see how blurred the lines between acceptable and anti-social behavior is.

To be fair, it is difficult to set a cohesive policy to combat white-collar crime. In the same way that its study must account for multi-level perspectives, one must also note that efforts to stop white-collar crime must also observe the micro-level. It is not enough to set a policy; each case must be won in court. To many, the *Enron* case is seen as the definitive case in white-collar crime. However, as the lead prosecutor against Skilling and Lay described in his publication¹²⁷ in the *American Criminal Law Review*, even the most successful corporate crime case was an uphill battle.

Conclusion

White-collar crime is incredibly complex. With business and society constantly evolving, it is incredibly difficult to keep up with it. The *Gray Area Perspective* aims to draw attention to the ambiguous aspects of our

¹²³ Friedrichs, *supra* note 2.

¹²⁴ *The Inventor: Out for Blood in Silicon Valley*, HBO Documentary Films and Jigsaw Productions, 2019, *HBO*.

¹²⁵ Jan Ransom & Emily Palmer, ‘Anna Delvey,’ *Fake Heiress Who Swindled N.Y.’s Elite, Is Found Guilty*, N.Y. TIMES (April 25, 2019),

<https://www.nytimes.com/2019/04/25/nyregion/anna-delvey-sorokin-verdict.html>.

¹²⁶ *Id.*

¹²⁷ John C. Hueston, *Behind the Scenes of the Enron Trial: Creating the decisive Moments*, AM. CRIM. L. REV. 44, 197 (2007).

society and how this relates to white-collar crime. One must acknowledge that defining white-collar crime requires a consistent set of morality. The reason that white-collar crime went unnoticed for so long is not because there was a lack of criminal activity or a lack of resources to find it; it is because society decided it wasn't anti-social. Even then, as Madison noted, there will always be differing opinions in society.¹²⁸ Thus, stopping white-collar crime must also contend with differing interpretations of society's morals. As noted by Fastow, individual self-interest will always stay one step ahead. The truth is that so long as there is ambiguity, white-collar crime cannot be fully stopped.

¹²⁸ Madison, *supra* note 112.