

UNDERSTANDING WHITE COLLAR CRIME

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Chapter 1

INTRODUCTION TO WHITE COLLAR CRIME

§ 1.01 Defining “White Collar Crime”

Criminologist and sociologist Edwin Sutherland first popularized the term “white collar crime” in 1939, defining such a crime as one “committed by a person of respectability and high social status in the course of his occupation.” Sutherland also included crimes committed by corporations and other legal entities within his definition.¹

Sutherland’s study of white collar crime was prompted by the view that criminology had incorrectly focused on social and economic determinants of crime, such as family background and level of wealth. According to Sutherland’s view, crime is committed at all levels of society and by persons of widely divergent socio-economic backgrounds. In particular, according to Sutherland, crime is often committed by persons operating through large and powerful organizations. White collar crime, Sutherland concluded, has a greatly-underestimated impact upon our society.

Sutherland’s definition is now somewhat outdated for students of the criminal law. As white collar crime began to capture the attention of prosecutors and the public in the mid-1970s,² the term came to have definitions quite different from the one Sutherland used. Indeed, studies have shown that crimes we generally consider “white collar,” such as securities fraud and tax fraud, are committed not just by persons of “high social status” but by people of divergent backgrounds.³ Thus, although the term “white collar crime” is a misnomer, it continues in widespread use. This is probably so because “white collar crime” provides a convenient moniker for distinguishing such crime in the public mind from “common” or “street” crime.

¹ Edwin H. Sutherland, *White Collar Crime: The Uncut Version* 7 (1983). Sutherland used the term in a 1939 speech, entitled “The White-Collar Criminal,” he gave to a joint meeting of the American Sociological Society and the American Economic Association. For a further discussion of the definition of “white collar crime,” see J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 *Hastings L. Rev.* 1199, 1204–14 (1999).

² See William J. Genego, *The New Adversary*, 54 *Brook. L. Rev.* 781, 787 (1988) (“In the mid-1970s federal prosecutors became increasingly interested in white collar offenses”); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will The Courts Allow Prosecutors to Go?*, 54 *U. Pitt. L. Rev.* 405, 408 (“Beginning in the mid-1970s . . . the federal government began targeting white collar crime as a high-priority prosecutorial area.”).

³ See John Braithwaite, *Crime and the Average American*, 27 *Law & Soc’y Rev.* 215, 216–224 (1993) (reviewing David Weisburd, *et al.*, *Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts* (1991) (“white collar” defendants are much like non-white collar defendants).

As an alternative to the socio-economic definition, many define “white collar crime” based instead upon the manner in which the crime is committed. In 1981, the United States Department of Justice described white collar crime as

[n]onviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person’s occupation.⁴

This definition focuses on the use of deception as the criminal means. The defendant, however, still must be at least “semi-professional” or have “special technical and professional knowledge.” Thus, in some ways, this definition is still too narrow. Not all defendants in white collar cases have professional or semi-professional status, nor do they necessarily possess special skills. A defendant in a tax fraud or false claims case, for example, might have neither of these characteristics.

Perhaps a better way to look at white collar crime is to focus on the ways that practitioners and judges distinguish white collar crime from common or street crime. A “white collar” prosecutor or defense attorney, for example, would more likely define “white collar crime” as crime that does *not*:

- (a) necessarily involve force against a person or property;
- (b) directly relate to the possession, sale, or distribution of narcotics;
- (c) directly relate to organized crime activities;
- (d) directly relate to such national policies as immigration, civil rights, and national security; or
- (e) directly involve “vice crimes” or the common theft of property.

Sometimes the criminal statute itself will render almost all crimes charged under that statute “white collar” by definition. For example, charges brought under the securities fraud and antitrust criminal statutes are generally “white collar” crimes under the above definition. On the other hand, under some criminal statutes charges can be brought for both white collar and non-white collar offenses depending on the nature of the defendant’s conduct. For example, conspiracy, extortion, and obstruction of justice are charges often brought in both white collar and non-white collar cases.

The most common and notable white collar crimes are covered in the chapters that follow. These include crimes committed both in the corporate and governmental settings, and crimes committed by individuals.

It is important to note that not all court cases relating to white collar crime are criminal cases. As discussed more fully below, some statutes, such

⁴ Bureau of Justice Statistics, United States Department of Justice, Dictionary of Criminal Justice Data Terminology 215 (2d ed. 1981).

as the securities laws, the environmental laws, and the federal racketeering (“RICO”) statute, provide for both civil and criminal liability. In most instances, the statutory interpretations that courts provide in the civil cases will also control in criminal cases brought under those statutes. Therefore, an understanding of the leading civil cases interpreting those statutes is important in determining potential criminal liability.

White collar criminal offenses are, of course, defined by both state and federal law. This text will focus on federal law, and make comparisons to state law where helpful. This coverage is representative of the range of federal — and equivalent state — white collar criminal statutes, but cannot be comprehensive given the hundreds of such statutes in existence.

§ 1.02 Enforcement of White Collar Crime Statutes

[A] The Harm Caused by White Collar Crime

Prosecutors have powerful reasons to target white collar criminals. Most important, white collar crime causes huge financial losses to federal, state, and local governments, to private organizations, and to individuals. In fact, in 1988 the United States Supreme Court acknowledged the severity of the white collar crime problem, stating that white collar crime “is one of the most serious problems confronting law enforcement authorities.”⁵

A few examples tell the story. First, during the 1980s, the country was rocked by insider trading scandals. Subsequent investigations revealed that corporate insiders made huge profits by trading on secret information, to the detriment of ordinary investors who did not have that information when trading.⁶ Further, such fraud threatened to undermine public confidence in the securities markets themselves. Second, in the late 1980s and early 1990s, the savings and loan industry collapsed. This occurred in some substantial part because executives of those institutions engaged in wide-scale fraudulent practices. Thousands of persons lost their life savings as a result.⁷ Finally, in 2002, Wall Street was rocked by corporate accounting scandals. Allegations have been made that this occurred at least in part because of wrongdoing by corporate executives and their accountants.⁸ Large

⁵ *Braswell v. United States*, 487 U.S. 99, 115 (1988).

⁶ For an entertaining and informative overview of the major insider trading scandals of the 1980s, see James Stewart, *Den of Thieves* (1991).

⁷ See James R. Barth, *The Savings & Loan Debacle* 44, 69–78 (1991) (describing the fraudulent practices that helped produce the industry’s collapse, and detailing the billions of dollars of resulting losses).

⁸ Corporate accounting scandals produced a flurry of headlines during 2002, and resulted in notable prosecutions, pleas, and convictions. See, e.g., Kathryn Kranhold & Richard B. Schmitt, *With Andersen Down, Prosecutors Set Sights on Enron*, Wall St. J. C1 (June 17, 2002) (conviction of accounting firm of Arthur Andersen LLP of obstruction charges in connection with Enron matter); Jonathan Weil, et al., *Guilty Plea of Kopper Increases Scrutiny of Ex-CFO*, Wall St. J. A1 (Aug. 22, 2002) (guilty plea of Enron executive to multiple charges); Deborah Solomon & Susan Pulliam, *U.S., Pushing WorldCom Case, Indicts Ex-CFO and His Aide*, Wall St. J. A1 (Aug. 29, 2002) (detailing charges against WorldCom executives).

corporations filed for bankruptcy, causing huge losses to employee retirement accounts and to other investors.⁹ These are just examples. Thousands of white collar crimes are committed each year, causing untold harm.

[B] Difficulties in Enforcing White Collar Statutes

One reason white collar crime remains widespread is that it is often very difficult to detect. Unlike street and common property crimes, white collar crimes are usually committed in the privacy of an office or home; usually there is no eyewitness, and only occasionally is there a “smoking gun.” Instead, the government’s proof is more likely to depend upon circumstantial evidence culled from a complex paper trail.

Moreover, the government’s ability to identify white collar crimes is sometimes hampered by lack of resources and expertise. Particularly with respect to financial crimes such as tax fraud and money laundering, prosecutors may require technical assistance from government entities other than the Department of Justice. Finally, the sheer scope of many white collar crimes taxes many United States Attorneys’ offices. Apart from investigations that often last years, trials in complex white collar cases can easily last weeks or months. This is particularly true as the federal government has expanded its white collar efforts in recent decades to areas previously covered primarily by state and local law enforcement.

§ 1.03 Issues of Federalism in White Collar Prosecutions

[A] Federal and State Overlap

Criminal law in the United States is primarily adopted and enforced at the state level; fewer than one in twenty criminal cases is brought at the federal level. Although most state cases involve street crimes, a large number are white collar cases. Indeed, most states have adopted a wide range of white collar criminal statutes, many of which parallel their federal counterparts.

In many instances, then, white collar criminal activity can be prosecuted at the state level, the federal level, or both.¹⁰ Under the doctrine of dual sovereignty, the state government and the federal government may prosecute the same conduct, assuming that state or federal law provisions do not bar successive prosecutions in the particular instance. As a matter of policy, the Department of Justice will bring a federal action after a state

Largely in response to these scandals, Congress enacted the Sarbanes-Oxley Act, which was signed into law in July 2002. Provisions of the Act relevant to white collar crime are discussed in the materials below.

⁹ See Lee Berton, *Andersen, Rivals Assist with Decades of Deception*, Bloomberg News (Bloomberg, L.P.) March 20, 2002 (“the Enron scandal brought huge losses for investors and others”).

¹⁰ Issues of successive prosecutions are discussed *infra* § 1.04.

action has been brought only upon a showing of specific criteria, such as a substantial federal interest in a second prosecution.¹¹

The largest and most complex white collar cases, however, are usually brought at the federal level. This occurs for at least two reasons. First, many such cases involve wide-ranging activities that spread across state lines and that are, therefore, appropriate for federal prosecution. Second, many of the cases involve highly complex criminal schemes the investigation and prosecution of which require resources that most state law enforcement agencies simply do not possess.

Complementing the federal government's ability to fight white collar crime are the many specialized administrative divisions that investigate, and sometimes bring, the cases. For example, the Securities and Exchange Commission ("SEC"), which cannot itself bring a criminal case, possesses highly sophisticated resources for identifying and investigating instances of securities fraud. Where the fraud is believed to be criminal, the SEC can refer the matter to the United States Department of Justice for prosecution. Otherwise, the SEC can initiate a civil action, as can a private party. Similarly, the Internal Revenue Service and Customs Agency provide expertise and resources for investigating sophisticated money laundering schemes and other financial crimes.

[B] Federal Jurisdiction

Of course, a federal case cannot be brought in the absence of a constitutional basis for federal jurisdiction. Jurisdiction for most federal white collar crimes is based upon the Commerce Clause, which provides that Congress may "regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes."¹² The United States Supreme Court recently voided a non-white collar federal statute for lack of a jurisdictional basis. The Court found that the activity did not meet the requisite requirement of "substantially affect[ing] interstate commerce."¹³ White collar statutes and cases brought under those statutes, however, generally

¹¹ The United States Attorneys' Manual, *Dual and Successive Prosecution* 9-2.031 (2000) provides:

This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. . . .

¹² U.S. Const., art. I, § 8, cl. 3.

¹³ *United States v. Lopez*, 514 U.S. 549, 554–55 (1995) (invalidating the Gun-Free School Zones Act of 1990). In that case, the Court said that Commerce Clause jurisdiction is met even when the activity is purely *intrastate*, so long as an effect on interstate commerce can be proven.

meet the interstate commerce requirement.¹⁴ Other sources of federal jurisdiction include the postal power,¹⁵ and the taxing power.¹⁶

[C] The Debate Concerning the Federalization of Crimes

White collar crime raises issues concerning the “overfederalization” of crime.¹⁷ Chief Justice William Rehnquist, for example, has noted that under “the traditional principle of federalism . . . [criminal matters] . . . that can be adequately handled by the states should be left to them”

Nonetheless, in the 1970s and 1980s Congress began to adopt laws, such as the RICO and money-laundering statutes, criminalizing a broad range of activities that have traditionally been the subject of state law. For example, a federal RICO case can be based not only upon such crimes as mail fraud, securities fraud, and bank fraud, but also upon the commission of state law crimes such as bribery and extortion.¹⁸ Arguably, some federal statutes used in white collar cases reach activities that would more appropriately be handled at the state level. As discussed below, federal prosecutors have, for example, used the mail and wire fraud statutes used in both ordinary fraud¹⁹ and local political corruption²⁰ cases.

§ 1.04 Parallel Civil and Administrative Proceedings

Under statutes that provide for both civil and criminal penalties, the white collar defendant may face successive or concurrent proceedings. For many reasons, including the increased criminalization of regulatory matters, multiple proceedings in white collar cases have become even more common in recent years.²¹

¹⁴ See *United States v. Robertson*, 514 U.S. 669 (1995). In *Robertson*, the Supreme Court overturned an appeals court decision that had invalidated a RICO conviction on the ground that the criminal acts had not substantially affected interstate commerce, and reinstated the conviction.

¹⁵ See *infra* Chapter 4, for a discussion of the mail fraud statute.

¹⁶ See *infra* Chapter 13, for a discussion of the tax fraud statute.

¹⁷ See, e.g., Gerald Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. Va. L. Rev. 789 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979 (1995); Kathleen Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643 (1997); Sanford H. Kadish, *The Folly of Overfederalization*, 46 Hastings L.J. 1247 (1995).

¹⁸ See 18 U.S.C. § 1961(1). For an overview of the RICO statute’s applicability to white collar cases, see Paul Vizcarrondo, Jr., *Racketeer Influenced and Corrupt Organizations (RICO)*, in *White Collar Crime: Business and Regulatory Offenses* §§ 11-1, *et seq.* (Obermaier & Morvillo, eds. 2002).

¹⁹ See, e.g., *United States v. Maze*, 414 U.S. 395 (1974).

²⁰ See, e.g., *McNally v. United States*, 483 U.S. 350 (1987).

²¹ See Jeffrey T. Green, *The Thin Line Between Civil and Criminal Proceedings*, 9 No.3 Bus. Crimes Bull. 1 (April 2002).

Parallel proceedings may be brought in a number of areas, including health care fraud, environmental crime, and securities fraud. In some areas, such as securities fraud, the government (in this instance, the Securities and Exchange Commission) or a private plaintiff may bring a civil action. As a general matter, the substantive legal rules in criminal cases also apply to civil cases; the reverse is also true.

The government has many reasons to institute civil or administrative proceedings in addition to or instead of criminal proceedings. These reasons include the ability to recoup money, to obtain injunctive relief, or to protect the public from further harm. The United States Attorneys' Manual now sets forth methods for coordinating criminal, civil, and administrative proceedings.

The possibility of such proceedings raises important issues in two areas. First, prosecutors have much discretion in deciding whether to leave matters to civil and/or administrative proceedings, or to bring criminal charges. Second, multiple proceedings raise important tactical issues for both sides. A prosecutor, for example, may be unfavorably disposed to a civil proceeding that occurs prior to or concurrently with a criminal case. During the civil case, defense counsel may be able to learn the identity and gain the testimony of government witnesses.²² Pre-trial and trial examination of government witnesses by defense counsel provides the defense with the prosecution's evidence well in advance of the criminal trial, evidence that would not otherwise be available to the defense. Further, that testimony could be used to impeach the government witnesses at the criminal trial should the testimony be inconsistent.

Parallel proceedings also raise difficult issues for the defendant. For example, a defendant in a civil case will face the difficult choice of deciding to testify, thereby waiving the Fifth Amendment privilege against self-incrimination, or not to testify, and thereby allowing that failure to be used in favor of the government in the civil case.²³

§ 1.05 Issues of Prosecutorial Discretion in White Collar Crime

Perhaps in more than any other area of the criminal law, prosecutors in white collar matters have enormous discretion in deciding whether to bring a criminal case, and in deciding what charges to bring if they do decide to indict. This is true for several reasons. First, as noted above, in some circumstances civil penalties may be available. In that instance, the criminal prosecutor must decide whether civil remedies are sufficient in the context of the particular defendant's actions. If so, then the prosecutor might decide that criminal charges are unwarranted.

²² Note that pre-trial depositions of witnesses are available to the defense in civil cases but not in criminal cases.

²³ Of course, no such use may be made in a criminal case.

Second, where parallel state and federal criminal proceedings can be brought, a prosecutor must decide whether additional criminal punishment for the same conduct is appropriate. A state prosecutor may decide to bring a parallel proceeding if there is no statutory or case law prohibiting such a proceeding. In addition, some federal statutes prohibit a prosecution where the defendant has been tried to a verdict in state court. Also, the prosecutorial agency may have policies governing the issue. For example, the United States Department of Justice has a policy against a successive federal prosecution unless the latter is necessary to vindicate a substantial federal interest.

Finally, and most importantly, the nature of white collar statutes often cedes vast discretion to prosecutors. Many of these statutes are at once broad and vague.²⁴ This problem sometimes arises because many white collar crimes encompass economic regulations that some believe are best left to civil enforcement. Indeed, the United States Supreme Court has noted the difficulty in distinguishing criminal acts from those that fall within the “gray zone of socially acceptable and economically justifiable business conduct.”²⁵ The phenomenon of extending the criminal law to areas for which it may not be suited is referred to as “overcriminalization.”

Because many white collar statutes are broad and vague, the task of defining the particular crime falls in the first instance to prosecutors, and ultimately to the courts. Particularly during the 1980s, prosecutors began to read white collar statutes quite broadly, and the courts were required to attempt to set the boundaries of criminal liability.²⁶ As discussed more fully below in connection with the particular white collar crimes, students of white collar crime must remain aware of the often uncertain boundary of criminal liability under these statutes.

§ 1.06 Application of General Criminal Law Principles to White Collar Crime

Of course, white collar crimes are governed by the general principles of criminal law. Thus, with some exceptions, to gain a white collar conviction the government must prove (1) the required mental state, or *mens rea*, (2) the required physical component, or *actus reus* (generally either the defendant’s *conduct*, such as entering into a conspiracy, or a *result* of the

²⁴ See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255–56 (1989) (Scalia, J., concurring) (inviting a vagueness challenge to the federal racketeering statute) (discussed *infra* § 16.06[D][1]); *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002) (holding the mail and wire fraud statutes void as applied to the case before the court) (discussed *infra*, § 4.05[B][1]).

²⁵ *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978).

²⁶ See John C. Coffee, *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193, 198 (1991) (“the federal law of ‘white collar’ crime now seems to be judge-made to an unprecedented degree, with courts deciding on a case-by-case, retrospective basis whether conduct falls within often vaguely defined legislative prohibitions”).

defendant's actions, such as causing damage to a federal computer), and (3) where the crime requires a result, that the defendant's acts *caused* the result. Further, general principles of liability for the acts of others ("vicarious liability") apply in white collar cases, as do principles relating to attempts and other "inchoate," or incomplete, crimes.

[A] Mens Rea Issues in White Collar Cases

With the narrow exception of strict liability crimes, there is a presumption that the elements of any federal crime will include a mens rea requirement. Determining both the level of mens rea required, and whether that level of mens rea has been proven, are difficult issues in many white collar cases. This section highlights these issues. More in-depth discussions are provided in connection with the individual crimes discussed in the chapters that follow.

As in other areas of criminal law, white collar cases often turn upon the factual determination of the defendant's mens rea at the time the defendant committed the actus reus of the crime.²⁷ In *United States v. United States Gypsum Co.*,²⁸ a criminal antitrust case, the United States Supreme Court reviewed the possible levels of mens rea. Relying upon the Model Penal Code, the Court noted that "the Code enumerates four possible levels of intent — purpose, knowledge, recklessness and negligence."²⁹

These four types of mens rea are arranged from the most to the least difficult to prove.³⁰ "Purpose" requires a finding that the defendant has as a conscious objective to commit the act or result proscribed by the crime. "Knowledge" requires a finding that the defendant knew the act or result would almost certainly occur. "Recklessness" requires a finding that the defendant was aware of a substantial and unjustifiable risk that the act or result would occur. Each of these types of mens rea is subjective, requiring that the fact finder conclude that the defendant personally possessed the required state of mind. The fourth level of mens rea — "negligence" — is an objective test judged by the reasonable person standard. "Negligence" requires a finding that the defendant should have known that the act or result would occur.

Finally, in some limited areas generally known as public welfare offenses, the particular statute may eliminate the general requirement that mens

²⁷ For further, in-depth discussion of these issues, see Joshua Dressler, *Understanding Criminal Law* §§ 10.01–07 (3d ed. 2001).

²⁸ 438 U.S. 422 (1978). In this case, the Court used the term "intent" as a synonym for mens rea. This use of the word "intent" can be confusing because "intent" — particularly in the case of "specific intent" — is also used to describe a *particular level* of mens rea. Indeed, courts in general are notoriously imprecise when using mens rea terminology. In many cases, it may be easier to determine the required level of mens rea by looking at the substantive definition the court uses rather than the label it employs.

²⁹ *Id.* at 444, citing the Model Penal Code ("MPC"). The American Law Institute adopted the MPC in 1962. The model code has been enormously influential, prompting at least 37 states to revise their criminal codes. See Dressler, *supra* note 27, at § 3.03.

³⁰ Model Penal Code § 2.02.

rea be proven in order to obtain a criminal conviction. Such offenses are deemed “strict liability” offenses.³¹

[1] Purpose and Knowledge

The most litigated levels of mens rea in white collar criminal cases involve the concepts of “purpose” and “knowledge.” For example, in *Gypsum*, the Court held that mens rea is an element that must be proven in a criminal antitrust case. The Court further found that the required level of mens rea, in cases where anticompetitive effects have been shown, is *knowledge* that the defendant’s actions would have such effects.³² In a footnote, the Court also implied that *purpose* to engage in actions with an anticompetitive effect would suffice in cases where such an effect cannot be proven.³³

Another issue arises in connection with the meaning of the term “knowledge.” In some limited areas, the Supreme Court has held that the government must prove that the defendant knew that the alleged acts violated the law.³⁴ This issue also arises under the terms “willfulness” and “specific intent,” discussed below.

[2] Willfulness

Another mens rea issue that often arises in white collar cases concerns the definition of the word “willfully.” Many white collar statutes require proof that the defendant acted “willfully.” As discussed in various contexts below, the term is interpreted to mean many different things, including recklessness, knowledge, and purpose.

Indeed, the United States Supreme Court has found that “willfulness” sometimes requires that the government show that the defendant actually intended to violate the law. Sometimes termed “specific intent,” this high proof requirement is limited to particular areas of the law, such as tax fraud. In *Cheek v. United States*,³⁵ for example, the Court abandoned the traditional doctrine that “ignorance of the law is no excuse” in connection with tax fraud offenses, and imposed an intent to violate the law requirement. As the Court explained, “[t]his special treatment of criminal tax offenses is largely due to the complexity of the tax laws.”³⁶

³¹ Such offenses are discussed below in connection with corporate and individual offenses, *infra* Chapter 2, and environmental crimes, *infra* Chapter 7.

³² 438 U.S. at 444.

³³ *Id.* at 444 & n.21. The trial judge had instructed the jury that it could *presume* mens rea if an anticompetitive effect were established. Because the jury was not required to *find* proof of mens rea, the defendant’s conviction was reversed.

³⁴ See *Liparota v. United States*, 471 U.S. 419 (1985). See also Richard M. Cooper, *Defining “Knowingly” in Federal Criminal Statutes: A Primer*, 9 No. 1 Bus. Crimes Bull. 1 (Feb. 2002).

³⁵ 498 U.S. 192 (1991).

³⁶ *Id.* at 200. The Court has rendered similar holdings in other areas of white collar crime. See, e.g., *Ratzlaf v. United States*, 510 U.S. 135 (1994) (requiring knowledge that defendant’s activity violated law concerning currency transaction structuring); *Liparotta v. United States*, 471 U.S. 419 (1985) (requiring knowledge that defendant’s activity violated laws or regulations governing food stamps).

[3] Recklessness and Negligence

Either by statutory authority or case law, some white collar convictions may be based upon recklessness.³⁷ This means that the government need not show that the defendant intended or even knew that the harm would occur, but merely was aware of the risk. In some limited areas such as certain environmental crimes, a conviction may be based upon mere negligence.³⁸

[4] Strict Liability

In “public welfare offenses,” a defendant may be liable for a white collar crime absent any showing of mens rea. As discussed in the next chapter,³⁹ the Supreme Court has rejected constitutional challenges to these laws. The Court’s decisions are largely based upon a policy determination that it is within Congress’s powers to dispense with the mens rea requirement where laws (such as food and drug laws) seek to prevent significant physical harm to the public.

[B] Vicarious Liability

As in other areas of criminal law, a white collar defendant may be liable for someone else’s crime. For example, under the law of conspiracy, co-conspirators may be liable for each other’s criminal acts under special rules relating to conspiracies.⁴⁰ Also, the general federal aiding and abetting statute, Section 2 of the federal criminal code,⁴¹ applies in white collar cases. That section imposes liability upon a person who “aids, abets counsels, commands, induces or procures” the commission of a crime by another. Aiding and abetting liability generally requires the government to prove both the act of aiding and abetting, and mens rea as to (a) the act of aiding and abetting, (b) the goal that the object crime be achieved.⁴²

[C] Inchoate Crimes

Many white collar offenses are “inchoate,” that is, the defendant may be criminally liable even though the criminal objective is never achieved. Classic inchoate crimes include both conspiracy and attempts to commit crimes.

³⁷ See Securities Fraud, *infra* Chapter 5, and Environmental Crimes, *infra* Chapter 7.

³⁸ See § 7.01[C], *infra*.

³⁹ Corporate and Individual Liability, *infra* § 2.02.

⁴⁰ See Conspiracy, *infra* § 3.03[D].

⁴¹ 18 U.S.C. § 2.

⁴² The general rule, as articulated in MPC § 2.06, is that the defendant have the purpose to aid and abet the principal, and also have the purpose that the principal succeed in completing the object crime. See Dressler, *supra* note 27, at § 30.05. In certain circumstances, however, many courts, including federal courts, lower the aider and abettor’s required mens rea as to the object crime. See, e.g., United States v. Fountain, 768 F.2d 790 (7th Cir. 1985).

The law of conspiracy is discussed in detail in Chapter Three below. For present purposes, it is sufficient to note that the crime of conspiracy is complete once the defendant has entered into an agreement with one or more persons to commit an object crime or crimes. The actus reus is the act of agreeing to enter into the conspiracy and, under some statutes, an “overt act” towards the criminal objective. Liability for the crime of conspiracy may arise very early on in a criminal venture, long before the goal is achieved.

As to attempts, in most states an “attempt” to commit a crime is itself rendered a crime, assuming the required mens rea and actus reus are present.⁴³ There is, however, no general federal law of attempt. Instead, many white collar statutes themselves provide inchoate liability. Often, this liability arises even before the defendant has committed an “attempt” under the general common law.

There are many examples of white collar statutes that provide for inchoate liability. For instance, an “endeavor” to obstruct justice is sufficient under the primary federal obstruction of justice statute.⁴⁴ The crime of tax evasion reaches “[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof”⁴⁵ Finally, Note that fraud offenses, including those under the mail and wire fraud statutes,⁴⁶ and the various securities fraud statutes,⁴⁷ are complete irrespective of whether the defendant succeeds in defrauding the victim.

Finally, in the Sarbanes-Oxley Act of 2002, Congress enacted an attempt and conspiracy statute, codified at Section 1349 of Title 18, the federal criminal code. The statute provides that “[a]ny person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” Thus, for certain fraud offenses set forth in that chapter of the criminal code, attempts will be punished in the same manner as the completed offenses.

§ 1.07 Application of Criminal Procedure Principles to White Collar Crime

Federal constitutional criminal procedure principles apply to all the crimes discussed below. Principally, the cases raise issues under the Fifth Amendment’s Self-Incrimination Clause and under the Fourth Amendment’s prohibition against unreasonable government searches and seizures. As a general matter, these issues are discussed as they arise in the chapters

⁴³ See Dressler, *supra* note 27, at §§ 27.05–06.

⁴⁴ See 18 U.S.C. § 1503, discussed *infra* Chapter 12.

⁴⁵ 26 U.S.C. § 7201, discussed *infra* Chapter 13.

⁴⁶ 18 U.S.C. §§ 1341, 1343, discussed *infra* Chapter 4.

⁴⁷ Discussed *infra* Chapter 5.

that follow; the exception is Chapter 18's discussion of self-incrimination issues.

As to the Fifth Amendment, Chapter 18 (The Right Against Compelled Self-Incrimination) supplements discussions of the various Fifth Amendment issues that arise in the other chapters below. In particular, Self-Incrimination Clause issues arise in connection with environmental crime (§§ 7.02[D], 7.06[B]), securities fraud (§ 5.05 [B]), obstruction of justice (§ 12.03[A][1][d]), perjury (§ 11.05), and false statements (§ 10.03[B]).

As to the Fourth Amendment, the United States Constitution prohibits the government from conducting "unreasonable searches and seizures."⁴⁸ Most of the evidence in white collar cases is not obtained by searches and seizures, but rather by voluntary responses to grand jury subpoenas. Occasionally, however, a search and seizure issue may arise in a white collar case. On occasions when search warrants are used, they are subject to objection on reasonableness grounds. These issues are discussed below in connection with environmental crimes (§ 7.06[C]), computer crimes (§ 6.05[A]), and grand jury subpoenas (§ 17.04).

⁴⁸ Fourth Amendment doctrine is both vast and complex, and readers should refer to criminal procedure sources for a more in-depth discussion.