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Unintended Beneficiaries?

***White Collar Offenders and California's
Criminal Justice Realignment***

DRAFT FOR COMMENTS

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Summary

“White collar” crime is an unhelpful term. Provocative by design, the term brings to mind images that do not align with the actual list of offenses that the judicial system considers “white collar.” Sutherland used the word in 1939 to jolt the sociological establishment out of its view that criminals were impoverished, psychotic, or geographically or characteristically predisposed to crime. Seventy years later, no one flinches at the idea that white collar offenders are criminals, but that accomplishment has come with a price: confusion. Mail fraud, check fraud, identity theft, mortgage fraud, and many more offenses are committed every day by people who would never have been categorized by Sutherland as white collar criminals. This study offers a history of the term and the development of the definition.

California’s Criminal Justice Realignment designates aggravated white collar crime as one of the offenses that falls outside of the realignment process. Rather than putting the issue to rest, the fact that only offenders charged with a specific *aggravated* white collar crime enhancement were excepted has prompted more questions. Will they be the unintended beneficiaries of realignment? Will they get out early? Will they all get probation? The short answer is that we don’t know yet, but this study gives information on what several of the factors will be in supplying an answer to those questions in the future.

An equally interesting question from a criminal defense/prosecution perspective is “what will happen with the white collar defendants who don’t qualify for the aggravated enhancement and yet are accused of significant amounts of takings or causing significant losses? This study includes a detailed hypothetical argument

between a prosecutor and a defense lawyer concerning the validity of one particular strategy that prosecutors could use to strengthen their cases and keep state prison on the table in plea discussions and trials.

Chapter 1

Introduction

On October 1, 2011, the state of California’s felony sentencing regime changed with the implementation of Criminal Justice Realignment. In part, realignment altered the definition of “felony.” Previous law defined a felony as a crime punishable by imprisonment in a state prison and/or a fine, or death, while the new definition includes certain non-violent, non-serious, non-sex offenses and non-aggravated white collar offenses that are punishable in county jail or subject to other local sentencing alternatives in lieu of state prison. By amending the definition of such a foundational term, the legislature fundamentally changed where felons would be housed.

Accomplishing such a shift in sentencing in a state with an inmate population as large as that of California requires powerful legislation, which in turn requires sustained political pressure. In the same way that necessity is the mother of invention, here internal and external pressure was the mother of sufficient political will.

By designating certain felonies to be punished at the local level, the state aims to shift the burden of supervision of these lower-level offenders from the state prison system to the counties, reserving state prisons for more serious, violent, and special category offenders (those convicted of sex crimes or offenders with an aggravated white collar crime enhancement).¹ The logic continues that the state’s prison budget is better spent on housing and controlling serious, violent, and sex offenders, while other offenders can be housed more cheaply and closer to their homes, families, and social

¹ “Non, non, non” refers to non-violent, non-serious, non sex offense. For more information, see the box entitled “Realignment: The Basics of AB109 and local custody.”

networks in county jails. But as anyone knows who, as a child, ever watched a rising tide fill and overflow the moat around a sand castle, resourceful managers must either find ways to divert the incoming flow or risk a collapse of the entire structure. As local officials, some of whose county jails are rapidly filling in the wake of the October 1 enactment of AB109, look for ways to free up space and relieve pressure, the question has become “who will be the unintended beneficiaries of realignment?”²

The answer to this question requires a detour into the history of the term “white collar crime” and then a closer look at realignment and the California context. Even after dealing with those contextual hurdles, the answer is a resounding and unsatisfying “maybe but maybe not.” Several factors contribute to this lack of a clear answer. First, realignment went into effect less than four months ago, and the data (on offenders, sentences, probation public safety risk assessments, etc) simply do not yet exist to establish trends. Second, white collar crime acts as a catch-all for a host of offenses, many of which have little in common, either in terms of the elements of the crime or the profile of the typical offender. Third, the crimes that state officials most focus on in talking about realignment and white collar crime, namely mortgage fraud and identity theft, have yielded complex (and controversial) prosecution strategies that have not yet been tested. If proven successful, these prosecution strategies may obviate any need to establish that white collar defendants actually benefited from the new realignment reality.

The “why” of California’s criminal justice realignment also sheds light on the relationship with white collar offenders. California was hit hard by the 2008 financial crisis, and state officials scrambled to find ways to steady the ship and avoid the state

² Andrew Blankstein & Robert Faturechi, L.A. County Jails May Be Out Of Room Next Month, L.A. TIMES, Nov. 11, 2011, <http://articles.latimes.com/2011/nov/11/local/la-me-jails-release-20111111>.

falling into bankruptcy. One of the most often cited areas in need of reform was the state prison system, which cost almost \$50,000 per inmate per year. Around the same time, the Jaycee Lee Dugard kidnapping case led many to denounce the probation system as a failure and to demand reform. Finally, the Supreme Court in *Brown v. Plata* upheld the decision of the federal three-judge panel that ordered California to reduce its prison population. This combination of pressures from inside the state and from as far away as Washington, DC, provided the impetus for reform.

White Collar

Conventional wisdom around realignment is that it shifts those who don't need as rigorous a level of supervision out of the state system because the state prisons are overcrowded and expensive. At that level of analysis, white collar offenders would seem to be near the front of the line of ideal candidates for realignment. Their preferred methods generally do not involve physical confrontation with the victim, much less the threat of violence or actual violence against anyone. Also, the types of property crimes that populate a list of typical white collar offenses, whether fraud or embezzlement, fall outside the "serious" designation of California Penal Code §1192.7(c).

However, from a more retributivist perspective, white collar offenders should be nowhere near the front of that line. Even before the \$50 billion in losses to victims of the Madoff Ponzi scheme, white collar crime had lost its former status in pop culture as a "victimless crime." The thousands of victims of mortgage fraud and identity theft, exposés on local and national news programs, stories splashed across the front pages and home pages of newspapers, and increasing idea that "it could happen to anybody" have catapulted "white collar crime" into the front of public consciousness.

Perhaps hoping to address public concerns and plug this hole in the realignment plan, the California Assembly included California Penal Code §186.11, the aggravated white collar crime enhancement, as an exception alongside the non-violent, non-serious, non-sex offender distinctions. Crisis averted, or so it might seem at first blush. However, the aggravated white collar crime enhancement has a limited scope, applying only to offenders who have taken or directly caused the loss of \$100,000 or more while demonstrating a pattern of fraud or embezzlement. In fact, the scope of the enhancement is such that the Assembly's inclusion of it as an exception may have little or no effect on the vast majority of offenders charged with precisely those kinds of white collar offenses that have caused public concern and outcry, begging the question of what happens to the rest of the white collar offenders. The question remains: "Are white collar criminals getting a better deal under the new law, and if so, what, if anything, do we do about it?"

Looking Ahead

When the Assembly decided to include certain white collar offenses alongside the non, non, non exceptions, members looked to the one solitary place in the California Penal Code where the term "white collar" appears. In a slight variation on the saying that "when the only tool you have is a hammer, everything looks like a nail," the Assembly included the one code section that by its own language addresses "white collar" crimes when drafting the legislative language. It is unsurprising, then, that the solution members of the Assembly found is imperfect and imprecise, or that it may cause unintended consequences.

As California moves to meet its incremental deadlines for reducing the prison population, pressures will likely rise on counties to find alternative means to deal with the increased number of offenders. County officials may react by allowing alternative supervised release through electronic monitoring, by weighing parole decisions differently, through the use of prosecutorial discretion or sentencing discretion by judges. While the outcome remains uncertain, the question of how to deal with white collar offenders under realignment will not go away.

Chapter 2

California and Realignment

Over the last two years, California has embarked on a journey (or forced march, depending on the perspective) of self-assessment, asking itself which convicted offenders should go into the state prison system and which should spend their time in the county jails. The process culminated in the April 2011 passage of AB 109, California's prison realignment legislation.

This self-reflection has not come as the result of an enlightened decision to examine the state of California's corrections system but rather finds its roots in several factors. The most publicized reason for the prison reform was the United States Supreme Court decision in *Brown v. Plata* in which the high court upheld the decision of a federal three-judge panel to require California to reduce its prison population to 137.5% of designed capacity by June 27, 2013.³ The California Department of Corrections and Rehabilitation (CDCR) announced in January 2012 that the population of California's 33 prisons on December 28, 2011, was 132,887, or 166.8% of capacity. That announcement signified that the CDCR had met the deadline for the first stage, which required the reduction from 180% of capacity (144,000 inmates) to 167% of capacity (133,016) by December 27, 2011.⁴

If the Supreme Court decision were the only impetus for realignment, the analysis of the relationship between the new legislation and white collar crime might be more straightforward. Two other factors complicate the matter. First came a series a

³ See *Brown v. Plata*, 131 S. Ct. 1910 (2011).

⁴ California Department of Corrections and Rehabilitation, CDCR Meets First Court Benchmark to Reduce Prison Overcrowding, Jan. 6, 2012. <http://cdcrtoday.blogspot.com/2012/01/cdcr-meets-first-court-benchmark-to.html>.

high-profile stories involving Phillip Garrido, the registered sex offender who kidnapped Jaycee Lee Dugard and kept her imprisoned in his home for 18 years, fathered two children by her, and somehow managed to do so while subjected to surprise visits and home inspections by parole officers, at least one visit by police after a call reporting children living in tents in his backyard, at least five visits by paramedics to and while wearing a GPS anklet that tracked his movements. Public outcry over a system in which a convicted sex offender could commit such a crime and remain undetected in the face of ongoing monitoring led to calls for a larger reform of the system.⁵

Other stories, such as that of Dontaye Henderson, who shot and killed his wife in front of their six-year-old daughter as the mother and daughter prepared to leave for church, reinforced the notion that the system was horribly broken in such a way that people were losing their lives as a result. Henderson, who was on parole and avoided having his parole revoked in spite of four separate violations of his parole conditions, pleaded insanity sent back to prison in spite of violations of his parole conditions.⁶

Even in the face of such highly-publicized failures, California's legislators might have engineered a less sweeping change to the system had it not been for two related facts. First, the California prison system was the largest in the nation and also boasted one of the highest cost per inmate, with estimated costs running over \$47,000 per inmate for 2008-09 or around \$53,000 per inmate for 2007-08, depending on the source.⁷ At the same time, California was, in the words of then-attorney general and

⁵ "The Case for Parole Reform," Los Angeles Times, Sept. 01, 2009. <http://articles.latimes.com/2009/sep/01/opinion/ed-parole1>.

⁶ See Jeff McDonald and Kristina Davis, "Four Times, Accused Killer Avoided Return to Prison" San Diego Union-Tribune. Jan. 12, 2011. <http://www.utsandiego.com/news/2011/jan/12/offender-avoided-return-to-prison-four-times/>.

⁷ The California Legislative Analyst's Office reported that the 2008-09 cost per inmate was \$47,102 and offers a cost breakdown via its website, available at http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3. Noted corrections

current-governor Jerry Brown, “deeply in debt. You could say that it’s bankrupt.”⁸ After his election in November 2010, Governor Brown quickly went about promoting his plan to cut budgets across the state, touting the urgent need to reduce the \$26.6 billion state budget deficit. In his State of the State Address in January 2011, he promoted restructuring the criminal justice system as part of his larger initiative to reduce the budget deficit.⁹ This plan culminated in his signing into law 13 bills reducing state expenditures by \$8.2 billion.¹⁰ Because of the budget cuts, local officials from sheriff’s departments and other basic services were left to vie for funds from wherever they could get them, and the pending prison realignment legislation promised to provide opportunities for funding.

This combination of the Supreme Court decision, high-profile failures of the criminal justice system, and the state’s financial woes made California prison realignment about much more than just reducing the number of persons incarcerated. Assembly Bill 109 (AB109), the primary legislative vehicle for realignment, was the Assembly’s attempt to balance the mandate of the three-judge panel with the budgetary needs of the state, the public’s demands for increased public safety, and powerful lobbies such as the California Correctional Peace Officers Association (CCPOA) and the California State Sheriff’s Association.

expert Dr. Joan Petersilia reported in a September 2011 lecture at Stanford University as part of a course on Advanced Criminal Law and Public Policy that the cost per inmate in 2007-08 had hit an all-time high of around \$53,000 per inmate. *See also* Jennifer Warren et al. One in 100: Behind Bars in America 2008, The Pew Charitable Trusts. Available <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

⁸ Wyatt Buchanan, “Has the Golden State Gone Bust” San Francisco Chronicle. February 22, 2010. <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/02/22/MNJ71BUILC.DTL&ao=all>.

⁹ *See* Office of Governor Edmund G. Brown Jr. “Governor Jerry Brown Delivers State of the State Address.” Jan. 31, 2011. <http://gov.ca.gov/news.php?id=16896>

¹⁰ *See* Office of Governor Edmund G. Brown Jr. “Governor Brown Signs Legislation.” March 24, 2011. <http://gov.ca.gov/news.php?id=16954>.

Realignment: The Basics of AB109 and local custody*

Who is eligible for local custody?

1. Non-violent (as defined in California Penal Code §667.5(d)), non-serious (as defined in California Penal Code §1192.7(c)), non-sex offenders (as defined in California Penal Code §13885.4),
2. Offenders whose convictions did not include an aggravated white collar crime enhancement under California Penal Code §186.11, and
3. Whose offenses do not appear in the list of exceptions in California Penal Code §1170(h).

Have the lengths of sentences changed?

- No.

Does that mean that offenses that were felonies are now misdemeanors?

- No. AB109 revised the definition of felony to include certain crimes punishable by jail for more than one year.

*The text of the bill can be found at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110329_enrolled.html.

In the nearly five months since California's criminal justice realignment began, there has been increasing speculation over how white collar criminals fare under the new regime.

In spite of these inherent limitations, this study attempts to shine light on the larger question of how white collar offenders will fare by examining the development of the term "white collar crime," changing attitudes toward the subject, delving into the specific political and social moment in which California developed its realignment legislation, and examining the specifics of the strategies for combating two of the more high-profile examples of the phenomenon, mortgage fraud and identity theft.

Chapter 3

White Collar: History of a Loaded and Unhelpful Term

The uneasiness surrounding the treatment of white collar offenders under California's prison realignment represents another in a long history of complicated, often-contradictory attitudes toward white collar crime and how it should be punished. This study posits that the tension surrounding white collar crime and realignment stems partly from both a misunderstanding of the term and confusion and/or unease about the correct theory of punishment that fits these offenses.

Though the term "white collar crime" was coined and popularized less than a century ago, many of the activities that it describes have been around as long as recorded history. Counterfeit coins from the Roman era and tales of public corruption from India, China, and other ancient societies belie the notion that confidence games and abuse of power are modern afflictions. That being said, the modern era, with its transition from localized and regional economies to global *powerhouses* and later from physical currency into the electronic flows of today, has enabled not only greater scale but opened the door to new and innovative ways of abusing positions of power and taking advantage of holes or blindspots in the financial system. Some white collar offenders sell a dream, as with the multi-*billion* dollar ponzi scheme of Bernie Madoff or the fraudulent offers to renegotiate mortgages that ensnare beleaguered homeowners every day. Others take advantage of relationships of trust, as is the case with identity thieves, hackers, and check *kitters*.

Difficult to define

While isolated examples of white collar offenses come relatively easily, a comprehensive definition of the term has proven elusive. Sociology is rife with complex phenomena that outgrow their definitions or overlap with other concepts, but the difficulty in defining the bounds of white collar crime has caused tension from the outset. As one critique put it, the field is “fraught with ambiguity,” and the term is “selectively defined to fit the ideological biases of individual scholars,” who “disregard[] or argue[] past the work of others.”¹¹ In a review of four studies on white collar crime sharing a common data set, one scholar noted that each of the studies offered a different definition of its subject matter.¹²

These critiques reinforce the difficulty of settling on one definition for an amorphous, shifting term. While the basic arc of the definition has included a shift from the original focus on the social status of the offender to a more offense-centered approach, it is almost impossible to know what the term encompasses when used in popular discourse, on the news, or even in legislation. In California’s penal code, the term appears precisely once, in §186.11, entitled “Aggravated White Collar Crime Enhancement.”¹³ In this instance, the enhancement thankfully provides a definition, or at least a scope, limiting application of the enhancement to “felonies, a material element of which is fraud or embezzlement.”¹⁴

Edwin Sutherland used the term for the first time in his 1939 address to the American Sociological Society. In his address, entitled “The White Collar Criminal,”

¹¹ David T. Johnson & Richard A. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, 18 *Law & Social Inquiry* 1 (Winter, 1993) 64.

¹² *Id.* at 65.

¹³ Cal. Penal Code § 186.11 (West)

¹⁴ *Id.*

Sutherland attempted to shift the focus away from the then-popular “criminal as a product of class and/or psychosis” theory of crime and shine light on the public and corporate corruption perpetrated by pillars of society and well-respected community leaders.¹⁵

The movement toward a more focused study of the white collar criminal did not start with Sutherland. John Braithwaite, in his article “White Collar Crime,” gives several examples of sociologists and others who studied the subject without expressly referring to it by its modern name.¹⁶ Specifically, he mentions the theory of crime developed by Willem Bonger, which incorporated both “crime in the streets” and “crime in the suites.” Braithwaite also considers the journalists, or “muckrakers,” Tarbell, Steffens, Norris, and Sinclair to have laid the groundwork for Sutherland to incorporate their exposés into sociological discourse.¹⁷

Sutherland spent the ten years after giving his groundbreaking address researching specific cases of white collar crimes by corporations, publishing his findings in 1949 in *White Collar Crime*.¹⁸ In doing so, Sutherland followed in the footsteps of the “muckrakers” in exposing misdeeds of major corporations, but Sutherland published his findings within the framework and from the perspective of sociology. In his book, Sutherland argues that “social and personal pathologies” were “not an adequate explanation,” and that those conventional explanations of criminality were flawed by an inability to explain the disparity in criminal activity across genders and by biased

¹⁵ DAVID WEISBURD, ELIN WARING, & ELLEN F. CHAYET, WHITE-COLLAR CRIME AND CRIMINAL CAREERS 139 (2001) (mentioning predecessors such as Lombroso and Durkheim as criminologists who sought to connect the physical, psychological, and geographic traits of criminals to their propensity for crime).

¹⁶ JOHN BRATHWAITE, WHITE COLLAR CRIME 11 ANN. REV. SOC. 2 (1985).

¹⁷ *Id.* at 2-3.

¹⁸ EDWIN B. SUTHERLAND, WHITE COLLAR CRIME (1949).

statistics.¹⁹ Sutherland defines white collar crime as “crime committed by a person of respectability and high social status in the course of his occupation.”²⁰ His definition reflects his attempt to shift the focus from crime as a result of poverty or psychological disposition to a larger view that would include criminals who take advantage of their access to money, the confidence of others, or other aspects of their occupation, for personal gain. Sutherland contends that the main difference between white collar criminals and common criminals lies not in what motivates them to commit the offense but rather in the ways in which society deals with them: criminal law for the common criminals and administrative and regulatory pressure for white collar offenders.²¹

During the 1970s, three events brought a renewed focus to the study of white collar crime. The Watergate scandal shocked the nations, proving that corruption permeated the highest political office in the land.²² Another event (or sequence of events) was the string of Securities and Exchange Commission investigations in the 1970s, during which over 400 companies admitted having made illegal or questionably legal payments to foreign government officials, politicians, and political parties, totaling over US\$300 million.²³ Finally, the consumer rights movement developed, and increased concern by the public over quality and safety issues led to new oversight and regulation of corporations.²⁴

In the 1980s and early 1990s, a new wave of academics and experts again questioned the direction of prevailing definitions of white collar crime in pieces with

¹⁹ *Id.* at 6-8.

²⁰ *Id.* at 9. In footnote 7 on page 9, Sutherland notes that his use of the term “white collar” matches the sense of the term as used by Alfred A. Sloan, Jr. in his autobiography

²¹ *Id.*

²² David Weisburd, Stanton Wheeler, Elin Waring & Nancy Bode, *Crimes of the Middle Classes: White-Collar Offenders In the Federal Courts* 6 1991.

²³ *See Id.* *See also* United States Department of Justice, *Lay Person's Guide: Foreign Corrupt Practices Act, Antibribery Provisions*. <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.

²⁴ Weisburd et al. *supra* note 15 at 6.

provocative titles such as “Crimes of the Middle Classes,” “White-Collar Crime: What Is It?,” “White Collar Crime and the Definitional Quagmire,” and “Collaring the Crime, Not the Criminal.”²⁵ These contributions to the debate over definition sought to enlarge the scope of the term to include new offenses and new offenders outside of the traditional group of white men in positions of power and influence.

Recognizing the different levels of white collar offenses and the difficulties of referring to them as one cohesive set, some experts have broken different offenses into groups. For example, in *Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts*, the authors describe a hierarchy of decreasing complexity of offenses, with securities fraud and antitrust violations at the top, mail fraud, false claims, and bribery in the middle, and tax fraud, credit fraud, and embezzlement at the bottom.²⁶ In separating out the offenses, the authors based their hierarchy on two dimensions: the organizational complexity of the crime and the consequences of the crime for the victims.²⁷ In doing so, they also discovered that the socioeconomic and gender profiles differed within the subcategories. Rather than simply a white male phenomenon, white collar crime at first blush seems a more equal opportunity crime. Women were more heavily represented in white collar offenses than in the general conviction statistics.²⁸ However, within the hierarchy, women were largely absent from the statistics for more complex or more harmful crimes.²⁹ Likewise, though the study reported that the racial characteristics of the offenders in the sample matched the racial demographics for the

²⁵ See *Id.*; See also David O. Friedrichs, “White Collar Crime and the Definitional Quagmire: A Provisional Solution”, 3 J. Hum. Just. 5 (1992); See also Gilbert Geis, “White-Collar Crime: What Is It?,” in *White-Collar Crime Reconsidered* (Kip Schlegel & David Weisburd eds., 1992); See also Susan P. Shapiro, “Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime,” 55 Am. Soc. Rev. 346 (1990).

²⁶ See Weisburd et al., *supra* note 15, at 40.

²⁷ *Id.* at 39.

²⁸ *Id.* at 69-71.

²⁹ *Id.* at 70-71.

geographic area of the study, upon breaking the offenses into the hierarchy, white offenders were “much more likely to be found in the upper ranges” than other racial groups.³⁰

Though far from the nuance of Weisburd et al.’s breakdown by complexity and consequence, today’s definitions have adopted the broader scope of these later definitions and focus on offenses rather than offenders. The Federal Bureau of Investigation’s webpage on white collar enforcement features a cropped picture of a Caucasian man in a suit, silver handcuffs glinting beside the four shining gold buttons adorning his suit cuffs, as he is led away from the camera, one assumes either to court or jail, by another Caucasian man in a similar suit (though this second man, presumably a law enforcement official, has less flashy buttons on his suit).³¹ Beneath the photo is the title “Lying, cheating, and stealing,” and the introductory paragraph “That’s white-collar crime in a nutshell. The term—reportedly coined in 1939—is now synonymous with the full range of frauds committed by business and government professionals.”³²

The term “white collar crime” is still a catch-all designed to encompass a whole host of legal offenses.³³ Precisely because it is a catch-all, the definition shifts depending on the specific offenses that a particular researcher wants to “catch.”

³⁰ *Id.*

³¹ “FBI-White-Collar Crime.” Available at http://www.fbi.gov/about-us/investigate/white_collar/whitecollarcrime.

³² *Id.*

³³ David T. Johnson et al., *supra* note 11 at 65.

Chapter 4

Now What Do We Do with Them?: Purposes of Punishment

In addition to deciding who should be caught, U.S. society has struggled to justify particular punishments for white collar offenders. Whereas deciding to incarcerate someone convicted of armed robbery may seem just in that the offender will be kept from committing that same act against others (incapacitation), the imprisonment will serve to deter similar acts by others (deterrence), the offender may become involved in programs while incarcerated and exit having decided to straighten his or her life out (rehabilitation), and because incarcerating people who rob others while threatening violence with a weapon deserve to be incarcerated (retributivism).

As noted above, Sutherland's coining of the term "white collar crime" was part of his efforts to spur society to take notice of these people whose public image ran counter to the traditional societal notions of a criminal. Instead of the disheveled, shifty-eyed drifter, these offenders were well-dressed church deacons and civic leaders. Even today, with current definitions such as that of the FBI ("lying, cheating, and stealing") that seemingly encompass an almost endless list of offenses, the "poster boys" continue to be white males in suits who occupy positions of power. Part of the reason for this continuing stereotype may be a numbers issue: it was a major news story when, for the first time, 18 of the CEOs from the Fortune 500 were women.³⁴ As for CEOs of color, there are six African-American CEOs and seven Latino CEOs on the Fortune 500 list.³⁵

³⁴ Lyneka Little, *Record Number of Fortune 500 Women CEOs*, ABCNEWS.COM, Oct. 27, 2011, <http://abcnews.go.com/blogs/business/2011/10/record-number-of-fortune-500-women-ceos/>.

³⁵ See the full list of CEOs at <http://money.cnn.com/magazines/fortune/fortune500/2011/ceos/>.

On the other hand, for some of the population, there is a certain degree of cognitive dissonance caused by the image of throwing clean-shaven, seemingly-upstanding and productive members of the community's leading class in the "slammer," and that tension fuels the contradictory opinions over which theory of the purpose of punishment best fits in the white collar context.

This discomfort reflects class and race tensions as well as the stereotypes of who criminals are and what it means to punish them.³⁶ The conundrum of what to do with these offenders was an initial impetus for Sutherland's crusade to shift focus onto white collar criminals as, just that, criminals, rather than simply businessmen who bent and broke rules in the course of their commercial transactions. Even after the concept of white collar crime entered the social consciousness as an acceptable target of the state, questions of how to punish white collar criminals continued. In their 1980 book entitled *A National Strategy for Containing White-Collar Crime*, Herbert Edelhertz and Charles Rogovin argued that the corrections aspect of containing white collar crime could be broken down into two areas. For offenders who would be incarcerated, they emphasized that the challenge for the corrections system would be assuring white collar inmates' safety and helping them cope with the offender subculture. For those who would be under a probation or parole regime, the challenge would be to prevent a return to their former ways (a greater challenge in the white collar context than with most street crimes).³⁷

³⁶ In considering race and class in the white collar context, Weisburd et al. (*supra* note 15 at 69-72) found that, when examining the entire sample outside of the hierarchy of offenses, the sample seemed more balanced along race and gender lines than the overall prison population. For instance, they reported that woman made up almost 15% of their sample, yet accounted for only 9% of the overall convictions for serious crimes. However, after separating out according to level of crime, white males were overwhelmingly represented in the upper echelons (traditional Sutherland-type crimes such as securities fraud and antitrust violations).

³⁷ HERBERT EDELHERTZ & CHARLES ROGOVIN, *A NATIONAL STRATEGY FOR CONTAINING WHITE COLLAR CRIME* 71 (1980).

Two Broad Rationales

In dissecting the different reasons society punishes white collar offenders, it is helpful to look at two broad rationales: Utilitarianism and Retributivism.

Utilitarianism

Deterrence:

The deterrence rationale posits that by punishing those who commit a crime, society or the state can provide a disincentive for those who may consider violating that law in the future. The theory applies to both general (future disincentive for society) and specific (future disincentive for the specific perpetrator) deterrence.

Incapacitation:

The incapacitation rationale simply holds that incarcerating an offender prevents that person from continuing to commit the crime. The popular adage “get criminals off the streets” summarizes this view.

Rehabilitation

Similar to (some argue indistinguishable from) specific deterrence, the rehabilitation rationale maintains that punishment should work to change the offenders character such that, upon reentering society, the person will not violate the law in the future.

Retributivism

Retributivism rejects the social good notion of utilitarianism and instead focuses on the individual, specifically on punishment for the individual according to the crime. Unlike under a utilitarian view, retributivism has as its central focus the concept of justice; it does not seek to deter, incapacitate, or rehabilitate but rather to exact the just deserts against the offender.

Under the utilitarian view of deterrence, prison sentences are often assumed to serve as a disproportionately large disincentive for white collar offenders. The logic seems to be that white collar offenders, as non-violent, non-serious (in a California Penal Code §1192.7(c) sense) offenders perceive incarceration as such a shock and that the damage to their reputation over a prison sentence will be so extensive as to operate as a strong disincentive. At least one reputable study found this theory not to be the

case.³⁸ However, another study, this one of federal judges and white collar sentencing, quoted one such judge who argued “pronouncing of the sentence is not as injurious to the person, his relationship to the community, to his family, as the return of the indictment.”³⁹ The idea that any prison term (as opposed to the imposition of a fine or a restitution order) would serve as an effective deterrent was part of the reasoning behind the Federal Sentencing Guidelines insistence on short but definite prison sentences.⁴⁰

Someone incarcerated after being caught passing bad checks may experience a similar shock to a boardroom executive. The low-level offender may also suffer similar permanent damage to his or her personal reputation. The difference in specific deterrence lies in the amount of influence or confidence necessary for the commission of the crime. Someone who passes bad checks or manufactures fake credit cards does need to reach the upper echelons of a corporate structure in order to secure the opportunity to commit the crime. In that sense, the strength of the specific disincentive differs according to the particulars of the offense.

The argument for incapacitation in white collar offenses is also unclear. For white collar offenders, incapacitation generally works for as long as the person is behind bars. When he or she gets out, the incapacitation rationale gives way to the deterrence theories described above, except insofar as permanent obstacles to a particular offender’s modus operandi, such as a permanent revocation of a license to practice a particular trade as a result of a conviction for fraud, for example.

³⁸ DAVID WEISBURD, ELIN WARING & ELLEN F. CHAYET, *WHITE-COLLAR CRIME AND CRIMINAL CAREERS* 112 (2001).

³⁹ STANTON WHEELER, KENNETH MANN, & AUSTIN SARAT, *SITTING IN JUDGEMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 145 (1988) (quoted in WEISBURD ET AL., *supra* note 15 at 151).

⁴⁰ Isaac M. Gradman, *Hot Under the White Collar: What the Rollercoaster in Sentencing Law from Blakely to Booker Will Mean to Corporate Offenders*, 1 N.Y.U. J. L. & Bus. 731, 736-37 (2005).

The retributivist argument is less difficult to understand: white collar offenders cause massive losses to millions of Americans, and the punishment should be one that fits the magnitude of that crime. There is no other rationale necessary other than the fact that the defendant has been convicted of the crime. Justice demands punishment.

There is no agreed-upon theory of punishment for white collar offenders. Instead, the pendulum swings back and forth from utilitarian to retributivist rationales, generally mixing both but placing more emphasis on one or the other.

Chapter 5

Strange Bedfellows: White Collar and Realignment

As explained above, the state approved realignment in the wake of a series of violent and tragic events in which serious, violent, and sex offenders thwarted the system and its safeguards with seeming ease. The parameters of realignment reflect this context, and the legislation specifically excludes serious, violent and sex offenders.

AB109 also adds a fourth exception, the aggravated white collar crime exception. The legislation stipulates that anyone whose conviction includes the California Penal Code §186.11 enhancement, commonly known as the excessive takings enhancement or the aggravated white collar crime enhancement, cannot be realigned to county jail. Section 186.11 provides, in relevant part, that “any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars (\$100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3).”⁴¹ The inclusion of this specific enhancement within the language of the statute rather than in the list of exceptions under §1170(h) was not accidental but bears noting. One possible source for the inclusion could be the White Paper published by the Los

⁴¹ Cal. Penal Code § 186.11 (West). Paragraphs (2) and (3) establish the duration of the additional term depending on the

Angeles' District Attorney's Office in February 2011.⁴² When Cooley published the paper, the DA had been briefed by the governor's office on the details of the realignment proposal, but many of those details were still in flux. In the white paper, Cooley declared that the realignment proposal was "a public safety nightmare."⁴³ Specifically, Cooley, an out-spoken opponent of Governor Brown's proposal, mentioned the identity theft case *People v. Oluwatosin* and referenced Madoff-like ponzi schemes as examples of lower-level offenses that would be realigned under the governor's plan.⁴⁴ In the March version of the bill, as amended and passed by the Senate, §186.11 had been added.⁴⁵

The inclusion of the white collar enhancement actually makes the discussion of realignment and white collar offenders more complicated rather than less so. While the §186.11 exclusion would apply to the identity theft and ponzi scheme cases referenced to by Cooley in his February 2011 white paper, its very inclusion in the statutory language begs the question, "What about the rest of white collar offenders?" Assuming that California has rates of check fraud and identity theft on par with rates from other states, and that the amount of losses related to those crimes follows national averages, the 2007 average loss for telemarketing check scams was \$3,855, for telemarketing false prizes and sweepstakes it was \$6,601, and for internet fraud-related check scams it was \$3,311.⁴⁶ The FTC reported that the median loss in 2009 for identity fraud was \$399.⁴⁷ With those numbers, a prosecutor would have to join 26 counts of telemarketing check

⁴² Steve Cooley, Governor's Proposed Transfer of Responsibility for Delineated Felons and Parolees to Local Jurisdictions. February 2011. <http://da.co.la.ca.us/pdf/White%20Paper-Realignment.pdf>.

⁴³ *Id.* at 8.

⁴⁴ *Id.* at 4-6.

⁴⁵ Assembly Bill 109. (Draft). March 17, 2011. http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_bill_20110329_enrolled.pdf.

⁴⁶ Office of Justice Programs. 2011 NVCRW Resource Guide. 70. <http://ovc.ncjrs.gov/ncvrw2011/pdf/stat-overviews.pdf>.

⁴⁷ *Id.* at 78.

fraud, 16 counts of false prizes and sweepstakes fraud, 31 counts of internet fraud-related check fraud, or 251 counts of identity theft.

Under realignment, then, the fear on the part of law enforcement and prosecutors is that white collar offenders will slip through the newly legislated cracks and be back out on the streets. Specifically, these officials speak of three ways in which white collar defendants could get a “better” deal than before.

White collar offenders could conceivably benefit from the new prison reality in several different ways. Mid- and low-level offenders (defined as those who have been convicted without an aggravated white collar crime enhancement) who find themselves in (over)crowded county jails could benefit from counties’ public safety risk assessments in deciding who should receive early release, electronic monitoring, or other alternatives. If probation officials base their calculations on traditional public safety concerns, the typical check forger or identity thief would likely win out against a petty thief or someone convicted of assault. Finally, there may be prosecutors at a local level who are mindful of their county jail population and could begin to use their discretion in ways that benefit some white collar offenders. Or judges could use their discretion in sentencing to divert offenders from county jail into a monitoring program or encourage prosecutors to adopt fines or restitution agreements in lieu of incarceration.

Chapter 6

Of Houses and Hancocks: Two Areas of Concern

Two white collar offenses have garnered the attention of top prosecutors in California. Attorney General Kamala Harris has devoted time and resources to making combating mortgage fraud a central focus of her tenure. Likewise, Los Angeles County District Attorney has called identity theft the “greatest threat to financial institutions in the nation” and called Los Angeles “one of the capitals” of identity theft.⁴⁸ Defendants charged with these two offenses would be eligible for realignment unless the §186.11 enhancement discussed previously were to apply.

Mortgage Fraud:

Mortgage fraud is a special case in that Attorney General Kamala Harris has made it a central focus of her time in office, convening community meetings in affected areas, promoting online resources to help homeowners avoid scams, encouraging victims to report fraud, and setting up a Mortgage Fraud Task Force.⁴⁹ Attorney General Harris has taken a national leadership role in prosecuting against those engaged in mortgage fraud, and the initiative has yielded several high-profile, high-dollar cases.⁵⁰

One particular area of mortgage fraud that Attorney General Harris has spoken out against is the glut of fraudulent mortgage renegotiation offers. In a typical scenario, a person knocks on the door of a homeowner, presents himself or herself as someone

⁴⁸ David Colker, *Identity Data Thief Faces New Charges*, L.A. TIMES, Aug. 31, 2005, <http://articles.latimes.com/2005/aug/31/business/fi-choice31>.

⁴⁹ See Alejandro Lazo, *California creating mortgage fraud task force*, L.A. TIMES, May 23, 2011, <http://articles.latimes.com/2011/may/23/business/la-fi-mortgage-fraud-20110523>.

⁵⁰ See Office of the Attorney General, *Attorney General Kamala D. Harris Announces Arrests in Nationwide \$6 Million Loan Modification Scam*, (Dec. 07, 2011), http://oag.ca.gov/news/press_release?id=2592.

with experience negotiating with banks and lending agencies, sometimes adds details about the homeowner's particular situation (many times gained from public records), and convinces the homeowner to pay an upfront fee in exchange for the service of renegotiating the loan.⁵¹ According to an FTC investigation (which then-AG Jerry Brown joined), the advance fees for these scams range from \$1000 to around \$6000.⁵² Based on that calculation, a prosecutor would need to accumulate and prepare somewhere between 17 and 100 cases/victims in order to charge under §186.11 and bypass realignment. Members of the Task Force are currently compiling cases and victims for mortgage fraud and securities fraud prosecutions that include a §186.11 enhancement, but they are also looking for ways to prosecute others for mortgage fraud-related offenses without taking state prison off the table from the outset.⁵³

Identity Theft

The Federal Trade Commission defines identity theft as “fraud that is committed or attempted, using a person’s identifying information without authority.”⁵⁴ The definition of the offense includes credit and debit card theft but is broad enough to encompass other frauds accomplished through the use of personal identifying information, such as driver’s license fraud and business identity theft.

According to the FTC, California’s over 42,000 cases ranked #4 in the number of cases of identity theft reported per 100,000 inhabitants and was #1 in the most cases

⁵¹ Telephone Interview with NL, Mortgage Fraud Task Force (Nov. 16, 2011).

⁵² Federal Trade Commission. Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams. July 15, 2009. <http://www.ftc.gov/opa/2009/07/loanlies.shtm>.

⁵³ Telephone Interview with NL, *supra* note 51.

⁵⁴ Federal Trade Commission, FTC Issues Final Rules on FACTA Identity Theft Definitions, Active Duty Alert Duration, and Appropriate Proof of Identity, October 29, 2004. <http://www.ftc.gov/opa/2004/10/facataidtheft.shtm>.

overall for 2009.⁵⁵ Los Angeles County District Attorney Steve Cooley included identity theft as one of the focuses of his inauguration remarks in 2008.⁵⁶ Cooley's office prosecuted one of the larger identity theft cases in recent memory in California in 2005, when it brought charges against Olatunji Oluwatosin, a Nigerian national living in North Hollywood.⁵⁷ Oluwatosin pleaded guilty to charges of conspiracy and grand theft and was sentenced to over ten years in prison. Also, as part of Cooley's interest in identity theft, he established LA County's High Technology Crimes Division in 2006.⁵⁸

⁵⁵ Federal Trade Commission, *Identity Theft Consumer Complaint Data: California*, <http://www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2009/California%20CY-2009.pdf>.

⁵⁶ *Cooley Sworn In As LA District Attorney, Focuses on Digital Crimes*. KPPC, (Dec. 1, 2008), <http://www.publicradio.org/columns/kpcc/kpccnewsinbrief/2008/12/cooley-sworn-in-as-la-district.html>.

⁵⁷ Oluwatosin's charges included a \$186.11 aggravated white collar crime enhancement.

⁵⁸ Los Angeles County District Attorney's Office, *District Attorney Announces New High Tech Crime Division*, Nov. 07, 2006, <http://da.co.la.ca.us/mr/archive/2006/110706a.htm>.

Chapter 7

From Breaking and Entering to Knocking and Shaking Hands

A brief history

One suggestion for prosecuting mortgage fraud, which could also be implemented in some cases involving identity theft, has been to use California's burglary statute.

At common law, burglary was defined as "a breaking and entering of the mansion house of another in the night, with the intent to commit some felony within the same, whether such felonious intent be executed or not."⁵⁹ Over the next forty years, the statute began to shed elements. In *Barry*, the Court readily admitted that, forty years after the Assembly enacted the burglary statute, "common-law burglary and the statutory burglary of this state have but few elements in common."⁶⁰ Today, the modern statutory language has changed even more from the common law origins. California Penal Code § 459 establishes that "any person who enters any [structure as defined] with intent to commit grand or petit larceny or any felony is guilty of burglary."⁶¹

The broad scope of the statutory definition fits within a nationwide trend. One study of burglary statutes described the crime as surviving a series of attacks during the twentieth century and shedding much of the common law specificity.⁶² The result of the transformation left burglary with a bare set of easily satisfied elements, such that one writer described it as "like an impoverished aristocrat...[able to]...rely on its name and

⁵⁹ *People v. Barry*, 94 Cal. 481, 482 (1892) (quoting "Russ. Crimes," a previous treatise).

⁶⁰ *Id.*

⁶¹ Cal. Penal Code § 459 (West).

⁶² Helen A. Anderson. 2011. "From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law" (unpublished) Available at: http://works.bepress.com/helen_anderson/2.

reputation to keep courts and lawmakers from realizing just how little remains of its former estate.⁶³

The mid-century attacks noted above concentrated their focus on the ways in which statutory burglary increasingly abandoned its common law roots by slowly sloughing off elements such as “breaking,” “nighttime,” and “of another.” One study of the evolution of burglary makes note of the discomfort that the advisory committee and drafting group of the Model Penal Code felt with the continuing expansion of the scope of burglary, noting the incongruity with which adding burglary to another offense could greatly increase the severity of punishment even when the traditional reasoning of protecting an inhabitant did not apply.⁶⁴ Comparing then-new statutory language from several states, the study concluded that the evolution of the concept of burglary had “resulted in drastic enlargement of statutory burglary, arguably into a generalized law of attempts, resulting in chaotic and anomalous theoretical and practical results.”⁶⁵

Another study (this one predating the Model Penal Code) listed fact patterns from cases in which burglary had been charged successfully as a means of showing how stretched the term had become.⁶⁶ The list of fact patterns included a boy who stole from a sidewalk popcorn stand, a man who stole coins from a telephone booth, a man who enters a woman’s house to commit adultery.⁶⁷ Though several of the examples he cites would no longer present problems today, his contention, that burglary has become a much broader used as a catch-all in conjunction with other crimes or the intent to commit other crimes, remains true.

⁶³ *Id.*

⁶⁴ See Susan Bundy Cocke, *Reformation of Burglary*, 11 Wm. & Mary L. Rev. 211, 213-14 (1969).

⁶⁵ See *Id.* at 224.

⁶⁶ Minturn T. Wright III, *Statutory Burglary—the Magic of Four Walls and A Roof*, 100 U. Pa. L. Rev. 411, 440-41 (1951).

⁶⁷ *Id.*

The Evolution of Burglary

Elements at common law:

1. Breaking
2. Entering
3. Mansion house
4. Of another
5. In the night
6. With intent
7. To commit some felony
8. Within the same
9. Whether such felonious intent be executed or not

Elements of California's §459:

1. Entry
2. Structure*
3. With intent
4. To commit petit or grand larceny, or a felony

* the statutory language is "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof" Cal. Penal Code § 459 (West).

As noted previously, common law burglary required elements such as “in the night” because its focus was the danger inherent in a person entering another’s house in order to commit a felony. Danger remained a central focus of the burglary statute in California well into the 20th century.⁶⁸ This focus on danger resolves the tension over the fact that both the entry (a trespass) and the intended felony have criminal sanctions of their own and thus do not need the burglary statute to punish or deter their commission. Instead, this conception of burglary focuses on preventing the

⁶⁸ See *People v. Lewis*, 274 Cal. App. 2d 912, 920 (1969) (stating “burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.”)

combination of the trespass and the intent to commit a felony on one hand and an occupied structure on the other.⁶⁹

While this conception of burglary as primarily about preventing danger to occupants resolves that inherent tension, the danger rationale has been largely abandoned by courts.⁷⁰ California courts have instead focused on burglary as the invasion of a statutorily enumerated structure with the intent to commit a felony and without either an unconditional possessory right to enter as an occupant or an invitation by an occupant who knows of the felonious intent.⁷¹ Breaking that sentence apart, a court held in *People v. Salemm*, a case in which the defendant was charged with burglary having entered the home of a William Zimmerman on two occasions and selling Zimmerman over \$10,000 in fraudulent securities, that the primary purpose of burglary was “to protect a possessory right in property” and an invasion of that right through entry constitutes burglary “regardless of whether actual or potential danger exists.”⁷²

In addition to removing danger from the concept of burglary, the Court of Appeal for the Fourth District also lowered the threshold for what offenses could constitute burglary. The court held that “the Legislature has indicated a clear intent that the term “larceny” as used in the burglary statute should be read to include all thefts, including

⁶⁹ See *Id.* (describing burglary laws as “primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety”).

⁷⁰ See *People v. Nguyen*, 40 Cal. App. 4th 28, 33-34 (1995) (interpreting California Supreme Court precedent to support decision that burglary statute applies even when defendant posed no danger; See also Susan Bundy Cocke, *supra* note 64 at 213 (claiming “There exists persuasive argument that statutory burglary has been enlarged to such an extent that it has become, in reality, a generalized law of attempts, and there exists conclusive support for the proposition that burglary is no longer aimed at the protection of the habitation”).

⁷¹ See *People v. Salemm*, 2 Cal. App. 4th 775, 777-78 (1992); see also *People v. Nguyen*, 40 Cal. App. 4th 28, 31 (1995); see also *People v. Superior Court (Granillo)*, 205 Cal. App. 3d 1478 (Cal. Ct. App. 1988).

⁷² *Id.* at 781.

“petit” theft by false pretenses.”⁷³ By lowering the bar further, the courts have established that an entry that violates a possessory right of an occupant, with the intent to commit a felony or petit or grand larceny, can constitute burglary.

Though an invitation would seem to make burglary unavailable to prosecutors, that excuse only serves as a defense to the crime in limited circumstances. As far back as the 19th century, the California Supreme Court held in *Barry* that a defendant who stole from a store during business hours could be convicted of burglary even though he had an implied right of entry as a customer.⁷⁴ While the California Supreme Court held in 1975 that a person could not burglarize his own apartment on the reasoning that the defendant had an absolute right to enter the apartment as an occupant,⁷⁵ later courts consistently applied the *Barry* standard to non-resident defendants except in cases where the owner or occupant knew of the felonious intent and either endorsed it or acquiesced to entry in spite of that knowledge.⁷⁶

Armed with that knowledge, prosecutors have regularly charged burglary in check fraud cases.⁷⁷ In many check fraud cases (under penal code sections such as Penal Code §470), prosecutors can add commercial burglary, or burglary in the second degree.⁷⁸ The difference between first degree and second degree (apart from the possible jail/prison term), according to Penal Code §460, is that first degree burglary requires that the structure be inhabited and designed for habitation, while second

⁷³ *People v. Nguyen*, 40 Cal. App. 4th 28, 31 (1995).

⁷⁴ *See Barry*, *supra* note 59 at 483 (holding that “a party who enters with the intention to commit a felony enters without an invitation”).

⁷⁵ *See People v. Gauze*, 15 Cal. 3d 709, 710 (1975).

⁷⁶ *See People v. Superior Court (Granillo)*, 205 Cal. App. 3d 1478 (Cal. Ct. App. 1988) (in which an undercover police officer invited defendant into his apartment for the express purpose of committing the offense that fulfilled the burglary statute); *See also People v. Descheneau*, 51 Cal. App. 437 (1921).

⁷⁷ Telephone Interview with TX, San Francisco Public Defender (Jan. 27, 2012).

⁷⁸ Cal. Penal Code § 470 (West).

degree does not.⁷⁹ In cases in which a defendant passes a bad check in a retail establishment, at a check cashing service, or in a bank, second degree burglary attaches because the structure is presumably not inhabited and more probably not designed for habitation.

Under realignment, the main difference between first and second degree burglary is that first degree burglary appears within the list of serious crimes as found in §1192.7(c) while second degree burglary does not.

Burglary against mortgage fraud and identity theft

As prosecutors seek to keep as many options on the table as possible, the opportunity to charge a serious felony and thereby keep prison on the table strengthens their cases and puts them in better positions during the process of negotiating a plea.

In the wake of a 995 motion to dismiss, the following back-and-forth might ensue. In addition to emphasizing the monetary losses caused by mortgage fraud and identity theft each year in California, the prosecution would essentially invoke a “plain language” argument:

1. The elements of burglary have changed over the years. Instead of the common law definition requiring specific characteristics such as the offense occurring during the night and in the “mansion house” of the victim, all that is required under California law according to the statute and to judicial interpretation under *Salemme* and others is the entry in violation of a possessory entry with intent to commit the felony.⁸⁰

⁷⁹ Cal. Penal Code § 460 (West).

⁸⁰ See *Salemme*, *supra* note 71.

2. A defendant who knocks on a door, is invited inside, and then proceeds to convince the occupants to pay an advance fee as part of a mortgage fraud scheme (a felony under §532(f)) or as part of an identity theft scheme (, would fulfill those basic elements for burglary in the first degree.⁸¹
3. Even the invitation by the homeowner would be negated by the felonious intent under *Barry* and *Descheneau's* interpretation of *Gauze*.⁸²

The defense to this argument would take various forms.⁸³

1. The defense would argue that the prosecution is simply trying to shoehorn a low-loss financial crime into a strike. The legislature never intended mortgage fraud to be a strike, as evidenced by the fact that it does not appear in the §1192.7(c).
2. These defendants are not dangerous to the public as long as the conditions of their release (if convicted) take into account certain limitations (such as the use of a computer for some financial or high tech crimes).

The first rebuttal from the prosecution would be:

1. Commercial burglary has already been established as an accepted charge in certain white collar cases (e.g. check fraud). To include burglary of a residence in a case involving a residence instead of a commercial entity should cause no problems. The fact that the house or apartment is inhabited would not be in dispute because the fraudulent transaction took place in person.

⁸¹ Cal. Penal Code §532(f) (West).

⁸² See *Barry*, *supra* note 59; see also *Descheneau*, *supra* note 76.

⁸³ Telephone Interview with TX, *supra* note 77.

Under those facts, burglary would be in the first degree, and thus a serious felony, out of the reach of realignment.

2. Additionally, the prosecution would point out that in at least one case, a California appeals court has upheld the conviction of a defendant accused of identity theft and burglary, so the application of burglary statutes in the white collar context is not a novel idea.⁸⁴

Defense would then argue:

1. The application of first degree burglary to a non-violent, low-level white collar offender flies in the face of congressional intent and the Supreme Court in mandating the reduction in prison inmates in California. The clear congressional intent behind AB109 and the millions of dollars invested in prison realignment has been to divert non-violent, non-serious, non-sex offenders to county jails and alternative sentences. To pervert the will of the legislature by concocting a reality in which this conversation between the defendant and the complaining witness, a conversation that began when the complaining witness invited the defendant into the house and ended when the two shook hands as the complaining witness opened the door to show him or her out, becomes a first degree burglary instead of what it actually was, should not be allowed, and the court should disallow it in no uncertain terms.
2. On a more technical point, the *Andra* case noted by the prosecution was an appeal on which the issue of the burglary charge was never raised, and the burglary was in the second degree, not the first, and thus not constituting a serious felony, a strike.

⁸⁴ See *People v. Andra*, 156 Cal. App. 4th 638, 640 (2007).

The prosecution would make one last argument:

1. Congressional intent actually includes these white collar crimes. The Assembly only named four categories that were explicitly excluded (before appending the list in 1170(h)). The fourth “non” was for the non-aggravated white collar crime enhancement. The clear congressional intent was to make sure that white collar criminals, who have wreaked havoc on the country’s financial system, do not get a pass.
2. The real perversion here is of the American Dream. Just because these criminals choose to use the tools of technology and people’s willingness to trust another human being as opposed to the traditional tools of burglary does not make them less burglars. They are causing people to lose their houses, their savings, their pensions, and their futures.

To which the defense would say:

1. The aggravated white collar crime enhancement under §186.11 has very specific elements, elements that the Assembly was aware of when they passed realignment. They made the deliberate decision to include only high-level offenders above certain legislatively established loss amounts, amounts that do not apply in this case. If the prosecution thinks that these charges should be included, tell her to call her local member of the Assembly.

At this point, the judge would have to decide under the rational basis standard of the Motion to Dismiss whether or not the charges should be set aside. While it is likely that these charges establish a rational basis for the trial to move forward to a preliminary hearing, how the burglary charge would fare at trial could go either way.

History favors the enlargement of the scope of burglary, and the fact that second-degree burglary is already an accepted charge in check fraud and other low-level white collar offenses makes the argument for extending it to these scenarios stronger. Lastly, the fact that white collar crime is specifically dealt with in realignment lends credence to the argument that the Assembly was concerned about these offenders benefiting from realignment. On the other hand, the policy and congressional intent arguments for the defense also ring true, and the stated focus of realignment to lower the prison population and send non, non, nons to the counties did not include these offenders. The aggravated white collar crime enhancement is a fairly straightforward statute, and the legislators would have understood the limits when they wrote §186.11 into the bill.

Chapter 8

Conclusion

In the wake of the financial crisis and the antics of white collar offenders like Bernie Madoff, California excluded a specific aggravated white collar enhancement from the criminal justice realignment enacted by AB109. In doing so, the Assembly caused confusion by remaining mum regarding other white collar offenses. This lack of guidance is compounded by the lack of clarity in the definition of the term “white collar” crime. The term, coined over seventy years ago to refer to a type of offender who today is only a subgroup within the category to which the term currently refers, has had many different definitions and continues to confound at the state and federal level. The inherent confusion over the term “white collar” and the equivocal move by the legislature of only including the aggravated enhancement as an exception to realignment begs the question, “What about all the other white collar offenders?”

The short answer is that some white collar offenders may benefit from prosecutorial and judicial sentencing discretion. Others may benefit from the public safety risk analyses from local parole boards in ways that they did not before, simply because there are now other inmates who pose a greater safety risk and simultaneously less space in which to house inmates.

The more interesting area, at least from a criminal prosecution/defense perspective, will be how prosecutors attempt to build strong cases against low-level (non-§186.11) white collar defendants. What charges will they bring in order to push defendants to plea in the wake of realignment? More specifically, will judges allow prosecutors to charge first degree burglary (a serious felony excluded from realignment)

in white collar cases in which the defendant entered the home of the complaining witness in the course of the transaction?

There are strong arguments on both sides, and history has demonstrated an almost constant enlargement of the scope of burglary. On the one side, defense counsel will focus on policy and congressional intent arguments. On the other, the state will emphasize the “plain language” arguments. Which argument prevails likely depends on the judge or the jury. It remains to be seen whether different districts will split on the issue on appeal, whether the California Supreme Court will have to deal with it, or whether the legislature will amend its language at a future date.