

Winter 2006

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### Recommended Citation

Russell J. Chibe, Foreword: A Golden Age of White-Collar Criminal Prosecution, 96 J. Crim. L. & Criminology 389 (2005-2006)

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## FOREWORD

### A GOLDEN AGE OF WHITE-COLLAR CRIMINAL PROSECUTION

RUSSELL J. CHIBE\*

The year 2005 began with a Hartford jury considering whether former Cendant Corp. Chairman Walter Forbes was guilty of accounting fraud. The year would close with a second jury reconsidering Forbes' fate after the first trial ended in a deadlock.<sup>1</sup>

The deliberations were fitting bookends to a year in which white-collar crime took center stage in the American media. Former WorldCom executive Bernard Ebbers was sentenced to twenty-five years for conspiracy, securities fraud and false regulatory filings.<sup>2</sup> John Rigas was sentenced to fifteen years in prison while his son was sentenced to twenty for their roles in stealing \$100 million from Adelphia Communications.<sup>3</sup> Dennis Kozlowski, the former CEO of Tyco whose lavish lifestyle, according to the St. Louis Post-Dispatch, "would make a pharaoh blush," was sentenced to between 8.5 and 25 years for looting company funds.<sup>4</sup> Martha Stewart was released from a federal prison after serving five months

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\* Special Sections Editor, on behalf of the *Journal of Criminal Law and Criminology*. J.D. Candidate 2006, Northwestern University School of Law. I would personally like to thank the editors of this journal for working so hard to help put this symposium issue together and edit it on such a tight schedule, particularly Julio Gurdian, Eric Seinsheimer, and Brian Kohn. I would also like to express my gratitude to each of our contributing authors for their patience and thoughtful attention throughout the editing process.

<sup>1</sup> Ann Woolner, *Causey Plea Winds Up Big Year in Corporate Crime*, BLOOMBERG.COM, Dec. 30, 2005, [http://quote.bloomberg.com/apps/news?pid=10000039&refer=columist\\_woolner&sid=at4eMVnFvdX4](http://quote.bloomberg.com/apps/news?pid=10000039&refer=columist_woolner&sid=at4eMVnFvdX4).

<sup>2</sup> See Brooke A. Masters, *WorldCom's Ebbers Convicted*, WASH. POST, March 16, 2005, at A1.

<sup>3</sup> See Editorial, *Pass GO, Collect \$\$\$—Then Go to Jail*, ST. LOUIS POST-DISPATCH, January 2, 2006, at B8.

<sup>4</sup> *Id.*

for obstruction of justice and conspiracy to obstruct justice.<sup>5</sup> Even the year's worst domestic natural disaster, Hurricane Katrina, spawned a wave of white-collar charges.<sup>6</sup>

2006 is promising to outdo 2005. Former Enron officers Kenneth Lay and Jeffrey Skilling are preparing for their 2006 trials in the wake of perhaps the most infamous corporate disaster ever.<sup>7</sup> In Illinois, former governor George Ryan's trial for campaign fraud continues.<sup>8</sup> Lewis "Scooter" Libby, a member of the Bush administration's inner circle, will likely go to trial for obstruction of justice, making false statements, and perjury in the wake of the Department of Justice's investigation regarding the leaked identity of CIA operative Valerie Plame.<sup>9</sup>

It's not difficult to hypothesize why many white-collar cases, with their defendants facing the possibility of trading in their mansions for federal prisons, are attractive to the media. However, the wealth and power of certain white-collar defendants does more than make a good story. While many criminal defendants are represented by public defenders, white-collar cases may be litigated by attorneys making upwards of \$5 million a year.<sup>10</sup> Defense strategies are tested before mock juries at a price tag of \$100,000 a pop.<sup>11</sup> And, of course, the mere presence of certain high-profile defendants can alter the dynamics of the trial. As stated by criminal lawyer Michael Levy: "When the client speaks, that overwhelms the other evidence."<sup>12</sup>

At the same time, white-collar crime is not restricted to wealthy CEO's. Health care fraud is often perpetrated by physicians.<sup>13</sup> Environmental crimes can be committed by anyone who owns property,

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<sup>5</sup> See Press Release, U.S. Dept. of Justice, (Mar. 4, 2005), available at [http://www.bop.gov/news/press/press\\_releases/press\\_stewart.pdf](http://www.bop.gov/news/press/press_releases/press_stewart.pdf).

<sup>6</sup> See Jacqueline L. Salmon, *Fraud Alleged at Red Cross Call Centers*, WASH. POST, Dec. 27, 2005, at A2.

<sup>7</sup> See Press Release, U.S. Dept. of Justice, Former Enron Chief Accounting Officer Richard Causey Pleads Guilty to Securities Fraud (Dec. 28, 2005), available at [http://www.usdoj.gov/opa/pr/2005/December/05\\_crm\\_695.html](http://www.usdoj.gov/opa/pr/2005/December/05_crm_695.html).

<sup>8</sup> See Matt O'Connor, *Juror Issues Worry Judge and Lawyers; Long Holiday Break Follows Conferences*, CHI. TRIB., Dec. 23, 2005, at B16.

<sup>9</sup> See Indictment, United States v. I. Lewis Libby (D.D.C. 2005), available at [http://www.usdoj.gov/usao/iln/osc/documents/libby\\_indictment\\_28102005.pdf](http://www.usdoj.gov/usao/iln/osc/documents/libby_indictment_28102005.pdf).

<sup>10</sup> See Mike Francis, *Defending CEOs: Art, Science, Crapshoot*, BUSINESS WEEK ONLINE, Mar. 29, 2004, [http://www.businessweek.com/magazine/content/04\\_13/b3876102.htm](http://www.businessweek.com/magazine/content/04_13/b3876102.htm).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Kathy Jefcoats & Bill Torpy, *Patients Support Indicted Doctor; Physician May Surrender Today*, ATLANTA J. & CONST., Dec. 22, 2005, at 1D.

including ordinary homeowners.<sup>14</sup> Two defendants charged with fraud in the wake of Hurricane Katrina were actually incarcerated in a Louisiana prison when they allegedly committed fraud.<sup>15</sup> The diversity of those committing white-collar crime, and the diversity of the subject matter itself, is evident in the fact that scholars cannot even agree upon a definition of white-collar crime.<sup>16</sup>

In our 2006 Symposium, "The Changing Face of White-Collar Crime," the editors of this Journal have chosen two paths in assembling the contributions contained herein. Diverse a subject as white-collar crime is, certain common issues span all (or nearly all) of its subcategories. These works address such overarching issues as the Federal Criminal Code, federal sentencing guidelines, and attorney-client confidentiality. At the same time, we believe that thoroughly addressing such a topic also requires examining issues specific to certain types of white-collar crime. As such, other contributions to this issue address such areas of white-collar crime as health care fraud, securities fraud, and environmental crimes.

In our first piece, Kathleen Brickey examines the changing culture of white-collar crime in, "In Enron's Wake: Corporate Executives on Trial."<sup>17</sup> One of the foremost scholars on white-collar crime, and author of the leading casebook on the subject,<sup>18</sup> Professor Brickey has previously written on the "building block technique" of white-collar prosecution whereby lower executives plead guilty, agreeing to testify against their superior executives in exchange for a lenient sentence, and thereby forming the building blocks of the cases against the top executives.<sup>19</sup> Professor Brickey now revisits this technique in the post-Enron environment in which executives are actually going to trial rather than pleading guilty. Her contribution provides a remarkably thorough analysis of three year's worth

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<sup>14</sup> See Dale French, *Adirondack Couple Faces 50 Years in Prison for Leaky Septic System*, LAND RTS. LETTER, Dec. 1996, at 1.

<sup>15</sup> Thomas Frank, *Suspected Scams Tucked into Near-Record Katrina Giving*, USA TODAY, Nov. 14, 2005, at 16A.

<sup>16</sup> For an overview of the legal theory of white-collar crime, including its definitions, see Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. R. 1 (2004). For purposes of assembling this Symposium, this Journal relied on the American Criminal Law Review's *Twentieth Survey of White Collar Crime*, 42 AM. J. CRIM. L. REV. 155 (2005), in determining which crimes fell under the umbrella of "white-collar crime."

<sup>17</sup> See Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006).

<sup>18</sup> Kathleen F. Brickey, *CORPORATE AND WHITE COLLAR CRIME* (3d ed. 2005).

<sup>19</sup> See, e.g., Kathleen F. Brickey, *From Enron To WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 370-75 (2003).

of corporate trials, and casts doubt upon the common belief that lower-level executives who plead guilty become scapegoats while top executives go free.

*The Journal of Criminal Law and Criminology* is privileged to have the Honorable James F. Holderman of the Northern District of Illinois, with co-author and senior clerk Charles B. Redfern, lend his experience to this Symposium. Over twenty-five years ago Judge Holderman published a paper entitled "Preindictment Prosecutorial Conduct in the Federal System"<sup>20</sup> in this very Journal. Having since spent two decades on the federal bench, Judge Holderman has chosen to reinvestigate his prior work and now presents to us "Preindictment Prosecutorial Conduct in the Federal System Revisited."<sup>21</sup> While the threat of prosecutorial misconduct at the preindictment phase remains as heightened today as it was two decades ago, Judge Holderman and Mr. Redfern find that the judiciary's inherent authority to remedy such misconduct has since shrunk and further that defendants are less likely to be granted a motion for summary judgment on grounds of such misconduct than they were at the time of the Judge's first publication.

One significant issue common to all in the practice of white-collar criminal litigation is attorney-client privilege. As corporate scandal after corporate scandal emerged in the first few years of this young millennium, seasoned practitioners William R. McLucas, former Director of Enforcement of the U.S. Securities and Exchange Commission, and Howard M. Shapiro, former General Counsel of the Federal Bureau of Investigation, witnessed what they perceived as an erosion of the attorney-client privilege. Together with associate Julie J. Song, Mr. McLucas and Mr. Shapiro have authored "The Decline of the Attorney-Client Privilege in the Corporate Setting."<sup>22</sup> The thorough investigation presented by Mr. McLucas, Mr. Shapiro, and Ms. Song suggests methods to protect one's clients against the current erosion of attorney-client privilege, making it essential reading for practitioners who serve as in-house or outside counsel to corporations.

Julie R. O'Sullivan, whose experience in white-collar criminal law includes serving as assistant counsel in the Whitewater investigation, gets to

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<sup>20</sup> James F. Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 1 (1980).

<sup>21</sup> See James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527 (2006).

<sup>22</sup> See William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621 (2006).

the heart of the matter by addressing the source of federal white-collar crime: the Federal Criminal Code. In her article, "The Federal Criminal 'Code' Is a Disgrace: Obstruction Statutes as Case Study," Professor O'Sullivan bluntly states that, "the so-called federal penal 'code' is a national disgrace."<sup>23</sup> To support her harsh assessment, Professor O'Sullivan first overviews the Criminal Code itself, revealing its incoherence and redundancies. In the second part of her contribution, Professor O'Sullivan applies this assessment to federal obstruction statutes, noting that obstruction is a common charge in high-profile cases. Ultimately, Professor O'Sullivan theorizes that sentencing guidelines post-*Booker*<sup>24</sup> will expose the flaws of the Federal Criminal Code and lead to reform.

Our first article focusing on a specific subcategory of white-collar crime addresses an area many do not even think of as white-collar: environmental crime. Unlike most types of white-collar crime, environmental crime faces unique jurisdictional issues which often result in several different federal prosecutors pursuing the same investigation. As a defense attorney, John F. Cooney has participated in two such cases which provide context to his article, "Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: the Case for a Consistent Approach."<sup>25</sup> Mr. Cooney considers why environmental crimes should be subject to multiple prosecutions from different districts when Department policy proscribes such prosecutions for non-environmental corporate crimes. Ultimately Mr. Cooney concludes that any uniqueness in environmental crimes fails to justify such unique treatment and subsequently proposes the creation of an internal process by which the Department of Justice can prosecute environmental crimes with greater efficiency.

As white-collar crime becomes an increasingly global concern, this Symposium has chosen to address one of its central statutes, the Foreign Corrupt Practices Act ("FCPA"), in two articles featuring two different approaches. In the first article on the subject, Stuart H. Deming examines one important aspect of the FCPA in his piece entitled, "The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping

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<sup>23</sup> See Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006).

<sup>24</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>25</sup> See John F. Cooney, *Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: the Case for a Consistent Approach*, 96 J. CRIM. L. & CRIMINOLOGY 435 (2006).

Provisions of the Foreign Corrupt Practices Act.”<sup>26</sup> Mr. Deming’s expertise on matters of international anti-corruption law is evident from his past positions with the Department of Justice and the Securities and Exchange Commission as well as his vast experience in private practice. His contribution to this Symposium explores the expansive nature of the accounting and record-keeping provisions of the FCPA and presents legal questions which the judiciary has yet to address.

Frequent co-authors on matters of international law and business corruption, Professors Barbara Crutchfield George and Kathleen A. Lacey thoroughly outline all aspects of the Foreign Corrupt Practices Act in presenting their a comprehensive model of analysis entitled, “Investigation of Halliburton Co./TSKJ’s Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement.”<sup>27</sup> Within their model, Professors George and Lacey examine how recent developments in international anti-corruption law encourage corporations to voluntarily disclose violations and cooperate fully with the Department of Justice.

Like the FCPA, this Symposium also addresses health care fraud in two contributions, one taking a broad approach and the other examining a specific issue. One issue relevant to not only health care fraud but also white-collar crime in general is the constant overlap of criminal and civil liability.<sup>28</sup> As co-director of the Health Law & Policy Institute, Joan H. Krause has taught, written, and lectured on health care fraud in both the criminal and civil contexts. In her contribution, “A Patient-Centered Approach to Health Care Fraud Recovery,” Professor Krause examines whether addressing health care fraud within the traditional framework of

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<sup>26</sup> See Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465 (2006).

<sup>27</sup> See Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ’s Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503 (2006).

<sup>28</sup> As explained by Professor Peter J. Henning:

The expanding jurisdiction of regulatory agencies to monitor markets and investigate possible abuses, with the concomitant increase in the staff needed to conduct extensive regulatory oversight, has created the well-known problem of the so-called “parallel proceeding.” A number of federal statutes have both a civil and a criminal component, raising the possibility of concurrent investigations of the same conduct by different arms of the government.

Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U.L. REV. 601, 604 (1999).

white-collar crime offers sufficient protection to the fraud victims.<sup>29</sup> Ultimately, Professor Krause concludes that civil remedies may better protect patients, whom she sees as the true victims of health care fraud.

As a foremost practitioner in the field of health care law and frequent author on the subject, Robert N. Rabecs addresses a timely new development in health care fraud. His article, "Health Care Fraud Under the New Medicare Part D Prescription Drug Program," seeks to stay one step ahead of white-collar criminals, anticipating the types of fraud and abuse that may await our nation's health care system as the new prescription drug program is implemented.<sup>30</sup> Mr. Rabecs' article serves as a roadmap to both federal prosecutors seeking to prosecute Part D fraud and Part D participants looking to avoid violations in the first place.

While Professor O'Sullivan's contribution to this Symposium has looked to sentencing guidelines as a potential catalyst for reform, Max Schanzenbach and Michael L. Yaeger delve into the statistics of federal sentencing in their criminological study, "Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity."<sup>31</sup> Prof. Schanzenbach and Mr. Yaeger have been using statistical analysis to examine the role of race in federal white-collar criminal sentencing since 2002.<sup>32</sup> In their most recent analysis, the authors conclude that racial disparities in white-collar criminal sentencing can be explained by certain defendants' abilities to pay fines in lieu of incarceration. Prof. Schanzenbach and Mr. Yaeger then suggest that the judiciary's reliance upon fines in the future could drive further discrepancies between the sentencing of whites and minorities in white-collar proceedings.

As the investigation, prosecution, and defense of white-collar crimes continue to evolve, it is the sincere hope of the *Journal of Criminal Law and Criminology* that the scholarship contained herein serves both practitioners and academics alike.

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<sup>29</sup> See Joan H. Krause, *A Patient-Centered Approach to Health Care Fraud Recovery*, 96 J. CRIM. L. & CRIMINOLOGY 579 (2006).

<sup>30</sup> See Robert N. Rabecs, *Health Care Fraud Under the New Medicare Part D Prescription Drug Program*, 96 J. CRIM. L. & CRIMINOLOGY 727 (2006).

<sup>31</sup> See Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757 (2006).

<sup>32</sup> See Max Schanzenbach & Michael L. Yaeger, *Prison Time and Fines: Explaining Racial Disparities in Sentencing for White-Collar Criminals* (Summary), 15 FED. SENT'G. REP. 194 (2002).

