

MYTHS AND MISUNDERSTANDINGS IN WHITE-COLLAR CRIME

Myths and Misunderstandings in White-Collar Crime uses real-world examples to explore the pathologies that hamper our ability to understand and redress white-collar crime. The book argues that misinterpretations about federal white-collar crime impede its lawmaking, enforcement, and discourse, leading it to be overcriminalized and under-enforced. Many of these pathologies can be traced to the federal code's failure to subdivide white-collar crimes by degrees of severity, and by the legislature's outsourcing of criminal lawmaking to other institutions. With deep knowledge of the federal code and theories of institutional design and behavioral psychology at her disposal, Miriam Baer offers a step-by-step framework for redressing these problems by paying greater attention to how we write, frame, and lay out our federal criminal code. A clearer, subdivided criminal code, she argues, paves the way for more informed and productive deliberation, and fewer myths and misunderstandings.

Miriam H. Baer is the Vice Dean and Centennial Professor of Law at Brooklyn Law School, where she has taught criminal law and procedure and white-collar crime for over a decade.

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Miriam H. Baer

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Acknowledgments

More than twenty years ago, I was hired as a federal prosecutor and marveled at the enormous power and responsibility that accompanied the position. Although I was keenly aware of the discretion and responsibility that had been delegated to me, I was also cognizant of the ways in which the government often came up short in meeting its enforcement mission.

After I left the US Attorney's Office, I served as an assistant general counsel for compliance at a major American corporation. During that stint, I became intimately familiar with the challenges of serving multiple constituencies while also keeping abreast of major changes in law and enforcement policy. A few months after I entered the world of compliance, I found myself reading law review articles late at night. They focused on topics such as deterrence, corporate crime, and federal criminal law. Long before legal academia was my goal, I had immersed myself in the work of Bill Stuntz, Dan Richman, Kate Stith, Donald Langevoort, and Jennifer Arlen.

Seven months into my in-house tenure, I made the life-changing decision to seek a career in academia. It would be many more months before I became a lawyering professor at New York University (NYU) School of Law and another two years after that before I attained a tenure-track position at Brooklyn Law School. I remain indebted to the many people at NYU who taught me so much as a new academic, chief among them Rachel Barkow (my classmate in law school) and the late James Jacobs, whose mentorship, wisdom, and humor set many junior scholars like me on the right path.

In August 2008, just a few weeks before the collapse of Lehman Brothers, I began teaching at Brooklyn Law School. There, my colleague, Roberta Karmel, became my mentor and a valued friend. My earliest papers focused on corporate crime, organizational compliance, and deterrence theory. Later papers drew on theories of organizational theory, behavioral psychology, and law and economics. I remain immensely grateful to Brooklyn Law School, whose summer teaching and sabbatical

stipends allowed me to research, write, and present my work in venues across the country.

I am thankful to the many colleagues who have been a great support throughout the years and to those who gave me wonderful feedback on this manuscript during a prepublication workshop: Sam Buell, Rick Bierschbach, Mihailis Diamantis, Brenner Fissell, Stuart Green, Todd Haugh, Adam Kolber, Julie O'Sullivan, Lauren Ouziel, Dan Richman, Alice Ristroph, Jessica Roth, and Kate Stith. I owe a debt of gratitude as well to Jennifer Arlen, Claire Hill, Zach Kaufman, Frank Pasquale, David Kwok, Jim Park, Andrew Lund, Darren Rosenblum, Todd Haugh, and Eugene Soltes, who separately read and commented on certain book chapters and offered very helpful research leads. My writing and thinking in this area has been vastly enhanced by conversations with friends and colleagues who teach and write about corporate and white-collar wrongdoing, among them: Donald Langevoort, Veronica Root Martinez, Elizabeth Pollman, Jim Fanto, Andrew Jennings, John Hasnas, Ellen Podgor, Joan Heminway, Greg Gilchrist, J.S. Nelson, Will Thomas, Karen Woody, and the late Peter Henning. Finally, I benefited from comments I received from participants in the Ostrom Workshop in November 2022 at Indiana University's Kelley School of Business, the ComplianceNet Annual Conference in Amsterdam in July 2022, Villanova University School of Law's 2022 faculty workshop, the National Business Law Scholars Conference in 2021, the SEALS annual meeting in 2021, and the Brooklyn Law School 2020 summer workshop.

I am grateful to the Edmond J. Safra Center for Ethics at Harvard University, whose scholars welcomed me as a visiting fellow for the 2021–22 school year and generously provided me with access to Harvard's library resources and a series of workshops while I was in the midst of my sabbatical. I learned a tremendous amount from the Safra Center's resident fellows and affiliated faculty, and their comments greatly improved two of the book's chapters.

It takes a village to publish a book, and my village was fortunate enough to include my law student and research assistant, Robin Berger, who kept the project on track and made sure my footnotes were coherent and in order. Samuel Coffin, Patrick Lin, and Timothy Snyder from Brooklyn Law School, as well as Jordan Dannenberg, a student I met while teaching a semester at Yale Law School, all contributed to the book's early research and writing.

This book's proposal was accepted for publication in the fall of 2019. Seven months later, I was teaching classes from my computer, scouring the Internet for surgical masks, and wiping down my groceries with alcohol wipes. I am accordingly thankful to Matt Gallaway and Cambridge University Press for their patience in the earlier stages of this project and their persistent editorial assistance in the latter stages.

Finally, I remain in awe of my family, whose love, humor, and support have enabled me to grow and thrive. My mother was my teacher long before I was old

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enough to enter first grade, and my late father instilled in me an appreciation for intellectual engagement and inquiry. Today, my husband, daughter, and son continue to teach me the great benefits of being able to keep calm and carry on, to laugh at myself, and to remain true to my principles. And when all else fails, my much beloved dog brings me back down to earth.

It is much easier to tear down a system than it is to fix it, much less live within it. This book is dedicated to the public and private servants who, despite many great challenges, often do their level-headed best to prevent, identify, and redress manifestations of white-collar crime. I hope they find this book's observations and proposals thought-provoking, illuminating, and useful. I also hope that they know that despite the many criticisms commentators rightfully bestow upon the criminal justice system, many of its observers remain just as grateful to the people who staff that system and strive to improve it in ways large and small. This book is for them.

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