Introduction

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NEVER GO TO JAIL?

Son: "Dad, I'm considering a career in organized crime."

Dad: "Government or private sector. . .? I personally would suggest government for you, my son. They never go to jail."

Text of a popular comic cartoon
(Author unknown)

1.1 PROBLEM STATEMENT

Whether tacked onto a bumper sticker, T-shirt, comic strip, or witty cartoon, humor offers laconic, entertaining, and simple snapshots of the issues and problems that plague societies. The text of the cartoon in the epigraph presents a humorous take on the main topic of the book, distilling a larger conversation on the limits of justice mechanisms and crimes of government officials into a monochromatic depiction of a serene chat between a father and his son. Contemplating the prospects of different career paths, the boy announces his budding interest in organized crime to his dad. Straight-faced and without missing a beat, his father responds, "Government or private sector?," which draws on a long-standing perception that associates the incriminating behavior of government officials and private sector executives with unchecked impunity. A spin-off of the original cartoon emphasizes the latter,

with the father recommending, "I personally would suggest government for you, my son. They never go to jail."

While the well-crafted punch line of the cartoon is witty and entertaining, the underlying sentiment of the joke mirrors the unfortunate reality – those in positions of political power, the ones who generally receive a well above-average compensation, may choose to abuse their office and the public trust to enrich themselves and may not stand to account for their criminal conduct. History is full of lessons demonstrating how access to state resources and privileges that accompany most top-tier public offices empowers political elites to bend the law and sidestep accountability for most egregious law-breaking. Hiding behind the virtues of official mandate and legitimate authority to obscure outright criminal acts from law enforcement and the eyes of the public makes a mockery of good governance, the rule of law, and the work of criminal justice agencies and courts. Capable of evading justice even if caught red-handed, political elites are often emboldened by structural elements of the justice system that favor the interests of the wealthy and powerful over the ordinary and powerless. This is how some political elites seize the reins of political leadership, become criminally super-rich, and rupture accountability mechanisms initiated against them for years, if not decades.

The impunity of maliciously acting political elites is not confined to the country where they source their illegitimate power and illicit wealth but also in jurisdictions of other states. International law prohibits the exercise of jurisdiction over foreign state officials without the consent of their home states. *Foreign official immunity* or immunity of public officials from foreign jurisdiction is available to a vast range of public officials who assume positions as heads of state, heads of government, ministers of foreign affairs, and senior diplomats and high-ranking civil servants of international organizations. The immunity protection afforded to these categories of public officials prevents them from being subject to legal proceedings in foreign jurisdictions, making them unreachable for prosecution before the courts of another state. In addition, the immunity entitlement typically comes together with certain inviolabilities, such as freedom from search and arrest.

For example, the police of the receiving state cannot detain, arrest, or search the body or private premises of top-level foreign diplomats. No criminal charges may be brought against incumbent diplomats, and they cannot be forced to appear in a foreign court. Aside from their personal, nonofficial involvement in specific business, real estate, or inheritance-related matters, or their independent professional activities, senior foreign diplomats

are also immune from civil suit. The highest level of immunity akin to diplomatic immunity is granted to heads of state, heads of government, and ministers for foreign affairs during their official and private visits abroad. The head-of-state immunity doctrine maintains individuals in these prominent offices are exempt from the legal authority of a foreign state's courts for official and private acts performed, possibly no matter how egregious the behavior, while they are in office. State officials assigned to international organizations typically have the same level of immunity as diplomatic agents. Similarly, whereas most employees of international organizations only have immunity for acts taken as part of the official mandate, the upper leadership echelon of some international organizations, such the Secretary-General and all Assistant Secretaries-General of the United Nations (UN), have immunity comparable to that of ambassadors.

The precise scope of these different immunity regimes under international law varies depending on the immunity-holder's position when legal proceedings are launched and on the nature of the acts under consideration. The differences can be illustrated based on the widely recognized dichotomy between personal immunity (immunities *ratione personae*) and functional immunity (immunities *ratione materiae)*:

- *Personal immunity*, attached to the status of the immunity-holder, is extensive in its material scope and applies to both official and private acts. Yet, its substantive and temporal dimensions are constrained. This immunity is available only to a few categories of officials. It lasts only so long as the immunity-holder is in office.
- *Functional immunity*, attached to the function of the immunity-holder, is granted to all state officials but only for "acts performed in an official capacity."[1] The temporal scope of this immunity is unlimited, excluding acts performed prior to taking office.

With such broad protections under international law available to political elites in foreign states and at international organizations, attempts to bring public officials suspected of serious wrongdoing to account in a court of another state have often ended in a triumph of impunity. The present book is about the challenges encountered in such attempts to prosecute high-level public officials for profit-motivated crimes in foreign courts.

[1] ILC, *Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Special Rapporteur Concepción Escobar Hernández*, Document No. A/CN.4/701 (International Law Commission, 2016), paras. 21–33.

1.2 INTELLECTUAL ORIGINS OF RESEARCH ON ELITE DEVIANCE

Despite a pervasive trend in analyzing and redefining "banal forms of law-breaking"[2] – street crimes committed by and against members of lower-class society – social scientists have worked to shed light on the dark and often hidden aspects of crimes by individuals with substantial social, economic, or political capital and resources. There is no consensus on the exact meaning of elite deviance and the crimes that fall into this category. Scholars have offered myriad different terms that are meant to grasp the phenomenon. These terms are not always related, because they were developed in a different time and in different contexts. Yet they serve a complementary purpose of conceptualizing the dimensions of elite deviance, setting the intellectual backdrop of the book.

In 1956, sociologist Charles Wright Mills wrote *The Power Elite*, inventing the term that linked certain unethical, corrupt, and illegal acts to maldistributed power gained by political, corporate, and military elites through institutional and structural arrangements in the United States.[3] The influential monograph implicated social class as a criminogenic force and, consequently, shaped several generations of scholarship on the crimes of the powerful. In the book, Mills focused on a small circle of affluent and prominent Americans who were at the helm of society, largely because of the significant political, cultural, and financial capital they wielded:

> By the powerful we mean, of course, those who are able to realize their will, even if others resist it. No one, accordingly, can be truly powerful unless he has access to the command of major institutions, for it is over these institutional means of power that the truly powerful are, in the first instance, powerful.[4]

The power elites pursue what Mills calls a "moneyed life" as the commanding value, because "a million dollars [can] cover a multitude of sins."[5] The author asserts:

> Whenever the standards of the moneyed life prevail, the man with money, no matter how he got it, will eventually be respected. . . . It is not only that men want money; it is that their very standards are pecuniary. . . . [S]o men easily

[2] Dawn L. Rothe, "Moving beyond Abstract Typologies? Overview of State and State-Corporate Crime," *Journal of White Collar and Corporate Crime* 1, no. 1 (January 1, 2020): 7.
[3] C. Wright Mills, *The Power Elite*, New Edition (with a new afterword by Alan Wolfe) (New York: Oxford University Press, 2000).
[4] Ibid., 9.
[5] Ibid., 346.

become morally ruthless in the pursuit of easy money and fast estate-building.[6]

Yet, within the Millsian perspective, political elites exercise power not just through their financial capital but also through their ability to institutionalize and thus legitimize the practices that empower them, furthering their ability to impose their own standards and, if need be, circumvent recognized rules of behavior, including those prescribed by law. Mills notes that individuals of the higher circles accumulate wealth, develop a "higher immorality," and benefit from the "total power of the institutional domains over which they rule."[7] In this way, when individuals with uncontrolled power are capable of redefining legality, the outcomes of such acts can inevitably twist circumstances to benefit the ruling classes. As such, the elites are very unlikely to criminalize their own behavior or make themselves vulnerable to the clasp of justice. In the most extreme cases, Mills asserts, the prospects for true democracy are depleted as the scale of power and influence enjoyed by a select few grows.[8] This argument was later echoed in the works of Richard Quinney and Frank Pearce, who – albeit through a Marxist prism – expressed that in a capitalist society, law reflects the elite class's control over the state and is intended to serve the purposes of that dominant class.[9] This way of thinking about the power elites has become widely adopted by scholars of critical criminology who commonly understand elite deviance both as the product and ongoing element of capitalist society.[10]

The conceptual roots of elite deviance are also grounded in the mid-twentieth-century writing of Edwin Sutherland on high-status offenders, in what became a scholarly breakthrough in the study of economic crimes committed by elites. In 1940, Sutherland coined the term *white-collar crime*, referring to it "as a crime committed by a person of respectability and high social status in the course of his occupation."[11] Sutherland noted that gangsters and racketeers were relatively "immune" to the rule of law because they

[6] Ibid.
[7] Ibid., 357.
[8] Ibid., 353.
[9] Richard Quinney, *Critique of Legal Order* (Boston, MA: Little, Brown and Company, 1974); Frank Pearce, *Crimes of the Powerful: Marxism, Crime and Deviance* (London: Pluto Press, 1976).
[10] See, for example, Walter S. DeKeseredy and Molly Dragiewicz, eds., *Routledge Handbook of Critical Criminology* (Routledge, 2018); Walter S. DeKeseredy and Barbara Perry, eds., *Advancing Critical Criminology: Theory and Application* (Lexington Books, 2006); Russell Hogg and Kerry Carrington, eds., *Critical Criminology* (Routledge, 2013).
[11] Edwin H. Sutherland, *White Collar Crime: The Uncut Version* (New Haven: Yale University Press, 1983), 7.

could evade justice through exerting "pressure on prospective witnesses and public officials," which was reinforced with (threat of) violence or bribes.[12] Drawing a parallel between the nature of these offenses and the devious behavior of political elites, he pointed to the "relative impunity" enjoyed by the latter "because of the class bias of the courts and the power of their [high] class to influence the implementation and administration of the law."[13] In addressing the skewed power dynamic that shapes the law in favor of elites, Sutherland's argument captures the essence of the institutional failures, unwritten norms, and injustices that guarantee top-level political leaders and senior government officials receive preferential treatment in the criminal justice system. White-collar offenders are often part of powerful networks of partners and friends – which might make the police hesitate to launch a criminal investigation against them. If legal action is nevertheless initiated, their ability to retain high-powered and well-paid attorneys from prestigious law firms ensures their legal counsel exhausts every legal defense imaginable to have the charges against their client dropped or dismissed. This makes the trials of wealthy and privileged defendants often become lengthy and protracted with defendants turning to a broad range of legal defenses that frequently and rather frustratingly create ample opportunities for them to derail the case. When the dismissal of charges becomes unrealistic or unlikely, well-connected defendants may go to great lengths to make the wheels of justice move at a glacial pace – taking years, if not decades.

The discussion of the intellectual origins of elite deviance would be incomplete without the mention of William J. Chambliss and his concept of *state-organized crime*. In 1988, in his presidential speech at the annual meeting of the American Society of Criminology (ASC) in Chicago, he defined state-organized crime as "[criminal] acts ... committed by state officials in the pursuit of their job as representatives of the state."[14] He criticized criminologists for persistently excluding high-class criminality from criminological scholarship, transporting the audience back to the sixteenth and seventeenth centuries with his vivid examples of state complicity in maritime piracy and other crimes. In his view, maritime piracy was one of the first kinds of state-organized crime, underpinned by evidence that corrupt rulers collaborated with pirates in Ancient Greece and Rome and that Vikings functioned as

[12] Edwin H. Sutherland, "White-Collar Criminality," *American Sociological Review* 5, no. 1 (1940): 7.
[13] Ibid.
[14] William Chambliss, "State-Organized Crime (The American Society of Criminology, 1988 Presidential Address)," *Criminology* 27, no. 2 (1989): 184.

pirates on behalf of Scandinavian kingdoms during the Middle Ages. Moving away from maritime piracy, Chambliss cited other examples of state-organized crime, including contraband smuggling, assassinations, selling armaments to sanctioned countries, and sponsoring terrorism – ultimately bringing the narrative to the twentieth century, where state-organized crime was arguably spread far and wide.[15]

The work by Mills, Sutherland, and Chambliss, among those by other authors, inspired the writing of the present book. Drawing from the study of elite deviance, the book scrutinizes the impunity for serious profit-driven crimes addressed under the rubric of *transnational crime* perpetrated by high-profile public officials entitled to immunity from foreign jurisdiction.

I.3 TRANSNATIONAL CRIME

Virtually all serious profit-motivated criminal acts involving more than one state are generally considered to be transnational crimes. In the 1970s, and even more so following the end of the Cold War, the intensification of cross-border criminality with grim implications for public safety, public health, democratic institutions, and economic stability came to the attention of the international community. This was the time when Gerhard Mueller – a renowned criminologist and then chief of the UN Crime Prevention and Criminal Justice Branch – coined the term *transnational crime*, first presenting it in his Executive Secretary address at the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders in Geneva in 1975.[16] The topics categorized under the umbrella of transnational crime at the time were: (a) crime as business, organized crime, white-collar crime, and corruption; (b) offenses involving works of art and other cultural property; (c) criminality associated with alcoholism and drug abuse; (d) violence of transnational and comparative international significance; and (e) criminality associated with migration and flight from natural disaster and hostilities.[17]

[15] Ibid.

[16] Secretariat, "Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders," UN Doc. A/CONF.56/10 (Geneva, Switzerland, 1975).

[17] Ibid., paras. 48–115. For more details about Mueller's contribution to the development of the international response to transnational crime, see Mangai Natarajan, "Gerhard Mueller's Role in Developing the Concept of Transnational Crime for the United Nations," in *Histories of Transnational Criminal Law*, eds. Neil Boister, Sabine Gless, and Florian Jeßberger (Oxford: Oxford University Press, 2021), 70–83.

This new pedigree of crime became perceived by the majority of states as a threat warranting urgent concerted action at the international level.[18]

As transnational crime expanded in scope, frequency, and severity, increasing efforts at the international level have been made to bridge the gaps between the criminal laws of different states. Doing so acquired somewhat of a chameleonic appearance over the years, shifting in focus from drug trafficking in the 1980s and organized crime in the 1990s to corruption in the 2000s and "emerging" crimes (e.g., wildlife crime and cybercrime) in the 2010s. Today, in most states, domestic laws contain provisions criminalizing in some form or another the participation of individuals in these crimes.[19] This is the result of the implementation of multilateral crime suppression treaties, such as the United Nations Convention against Transnational Organized Crime (UNTOC),[20] the United Nations Convention against Corruption (UNCAC),[21] and the UN drug control conventions.[22] These treaties are nearly universally ratified international instruments constructed by the international community of states to establish some common minimum criminalization standards across domestic laws and to strengthen international cooperation in criminal matters. The obligations of states parties pursuant to these conventions consist of adopting legislative or other regulatory measures in their domestic laws that would prevent, suppress, and punish crimes that transcend national borders and constitute a threat to the international community. These and other treaties form the foundations of

[18] See, for example, United Nations General Assembly, Naples Political Declaration and Global Action Plan against Organized Transnational Crime, Resolution 49/159 UN Doc. A/RES/49/159 (1995). For an historical account of the work of the United Nations in countering organized crime, see M. Cherif Bassiouni and Eduardo Vetere, *Organized Crime: A Compilation of U.N. Documents, 1975–1998* (Leiden, Netherlands: Brill Nijhoff, 1998), 1975–98.

[19] Valsamis Mitsilegas, "Legal Responses to Transnational Crime: A Global Perspective," in *Research Handbook on Transnational Crime*, eds. Valsamis Mitsilegas, Saskia Hufnagel, and Anton Moiseienko (Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing, 2019), 5–7.

[20] United Nations Convention against Transnational Organized Crime, November 15, 2000 (entered into force on December 2, 2003), 2225 UNTS 209.

[21] United Nations Convention against Corruption, October 31, 2003 (entered into force on December 14, 2005), 2349 UNTS 41.

[22] Single Convention on Narcotic Drugs, March 30, 1961 (entered into force on December 12, 1964), 520 UNTS 151; Convention on Psychotropic Substances, February 21, 1971 (entered into force on June 21, 1985), 1019 UNTS 175; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 20, 1988 (entered into force on November 11, 1990), 1582 UNTS 95.

the so-called *transnational criminal law*.[23] Accordingly, the very essence of this emerging body of law has been to achieve "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effect."[24] It is concerned with the enforcement of horizontal international obligations of states to criminalize and cooperate certain conduct and "the vertical application of criminal law and procedures by those states to individuals in order to meet these international obligations."[25]

Despite the rapid expansion of the multilateral crime suppression regime, the concept of transnational crime remains elusive and a proverbial "tiger of many stripes." Most essentially, it boils down to conduct constituting "a law violation that involve(s) more than one country in its planning, execution, or impact."[26] Many of the transnational crimes involve actual or potential cross-border ramifications.[27] UNTOC dictates that an offense is "transnational" if it meets one of the following four conditions: "(a) if it is committed in more than one state; (b) if it is committed in one state but a substantial part of its preparation, planning, direction, or control takes place in another state; (c) if it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; and (d) if it is committed in one state but has substantial effects in another state."[28] Although the transnational element seems to be at the core of the criminalization of transnational crime, UNTOC requires each state party to criminalize certain conduct even if no transnational element is present.[29]

The most common forms of transnational crime involve trafficking in regulated and illegal goods (e.g., drug trafficking) and providing illegal services (e.g., labor, services, or commercial sex) to consumers. Given the complexity and scope of cross-border criminality, the great majority of transnational crimes simply cannot be carried out efficiently by solitary offenders or by those with no ties in foreign locations. Therefore, transnational crimes are

[23] Neil Boister, "Transnational Criminal Law?" *European Journal of International Law*, no. 5 (2003): 953–76.
[24] Ibid., 955.
[25] Neil Boister, Sabine Gless, and Florian Jeßberger, "Introduction," in *Histories of Transnational Criminal Law*, eds. Neil Boister, Sabine Gless, and Florian Jeßberger (Oxford: Oxford University Press, 2021), 3.
[26] Jay S. Albanese, "Deciphering the Linkages between Organized Crime and Transnational Crime," *Journal of International Affairs* 66, no. 1 (2012): 1.
[27] Charles Chernor Jalloh, "The Nature of the Crimes in the African Criminal Court," *Journal of International Criminal Justice* 15, no. 4 (September 1, 2017): 800.
[28] UNTOC, art. 3(2).
[29] Ibid., art. 34(2).

almost always committed by groups of two or more individuals who form a criminal conspiracy to plan and perpetrate crimes with the goal of making pecuniary profits.[30]

There is no definition of organized crime in the convention. A consensus over a precise definition of organized crime was problematic, because the phenomenon has many components that might not always be present, and it may change over time. The convention, however, defines "an organized criminal group" in its place. Under UNTOC, an "organized criminal group" is defined with the following four criteria: (a) It is a structured group of three or more people; (b) it has existed for some time; (c) it operates with the intent to commit at least one serious crime; and (d) it seeks to gain, directly or indirectly, a financial or other material gain.[31] A "structured group" is defined as a group that does not have to have a formal hierarchy or continuous membership. This feature broadens the definition to cover loosely associated groups that do not have an established structure or specific roles assigned to members. For the purposes of the convention, a serious crime is one that carries "a maximum deprivation of liberty of at least four years or a more serious penalty."[32] While acknowledging that national criminal codes differ greatly in the severity of punishment for various offenses, four years was chosen by international consensus at the time of negotiation as a reflection of the seriousness of the offenses covered by UNTOC. No state party is required to adopt the definition of serious crime provided in the convention. This definition is mainly used for purposes of international cooperation, such as extradition. What is required is that each state party establishes the convention's criminal offenses – participation in an organized criminal group, money laundering, corruption, and obstruction of justice, as provided in articles 5, 6, 8 and 23 – in its domestic law, regardless of whether the crime involves an organized criminal group or not.[33] In other words, all crimes that are not committed by a group of people must be subject to the same level of criminalization as required by the convention.

The conceptualization of transnational crimes is commonly confined to profit-driven crimes, and the majority of these crimes are perpetrated by individuals who are interested in the pecuniary rewards of offending (be they receiving illegal profits or avoiding losing money or property, or any other

[30] Albanese, "Deciphering the Linkages between Organized Crime and Transnational Crime," 3.
[31] UNTOC, art. 2(a).
[32] Ibid., art. 2(b).
[33] Ibid., 34(2).