

The problem of, and with, financial crime

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Abstract

Financial crime is a term that is widely used, but it is a label or category that is bedevilled by definitional uncertainty and this uncertainty impacts upon how it is perceived and acted upon by law enforcement and other regulatory actors. This is perhaps not surprising and echoes many of the difficulties that have plagued efforts to counter white-collar crime. This article considers the definitional and other ambiguities that have permeated debates about both white-collar and financial crime. The analysis draws on a short survey which asked law enforcement and other regulatory actors in Australia and the UK whose responsibilities included countering behaviours that could be viewed as financial crime, what operational definitions of financial crime they employed in the course of their work. Results indicate that definitional uncertainty ensures that there are numerous understandings of what constitutes financial crime and no immediate prospect of a universal legal definition. However, there are some interesting classification developments for financial crime emerging from the business sciences literature and interdisciplinary approaches would seem to offer the most promise for categorising the suite of evolving behaviours that comprise financial crime.

White-collar crime and problems of definition

In 2012 as the world grapples with the ongoing fallout from the global financial crisis (GFC) – four years and counting so far – the grim prospects of sovereign default and a double-dip recession remain and there is an increased focus on the massive harms that can be wrought by white-collar crime, especially in the financial sector. That increased focus has been paralleled by heavy sentencing imposed upon some of those who have been convicted of what is increasingly referred to as *financial crime*. Perhaps the most well-known example of this is the 150-year term of imprisonment handed to Bernie Madoff by a New York court in June 2009 after he had pleaded guilty to 11 federal felonies he had committed via his wealth management business, which the court-appointed trustee estimated had cost his clients more than US\$18bn. This huge sentence is seen by some commentators as signifying a new post-GFC punitiveness towards financial crime, especially if the offenders are seen as high-ranking financial actors.² However, as with white-collar crime, there is a murkiness

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2 C Hurt, 'Evil Has a New Name (and a New Narrative): Bernard Madoff' [2009] (4) Michigan State Law Review 947.

permeating what financial crime is, how it should be classified, how it should be measured, how it should be countered and how it should be punished. As the GFC repercussions continue it is informative to consider how the structural dilemmas associated with financial crime parallel (perhaps unsurprisingly), those that have clouded the white-collar crime discourse.

In the first decade of the twentieth century the American sociologist and eugenicist Edward Ross wrote of the *criminaloids*, whom he saw as wealthy and influential business people who cultivated public persona of respectability in order to conceal their manipulative and criminal personalities.³ However it was Edwin Sutherland who introduced the term *white-collar crime* in the 1940s. Sutherland's research was in many ways a research report on the criminal behaviour of 70 top US corporations, with many violations stretching back to the mid-nineteenth century.⁴ Nevertheless what has come to be generally understood as white-collar crime has been recognised as a social problem for much longer than a century. It seems to be 'an inevitable concomitant of business, trading and commerce', for example, forgery and counterfeiting posed regulatory problems for Roman and Byzantine administrations almost two thousand years ago.⁵ There are long-established traditions to counter market manipulation that can be traced back to the doctrine of *just price*, which was first adopted during the later Roman Empire by the Emperor Diocletian.⁶ The doctrine of just price held that markets had to be organised in certain ways in order to be just, and so it legitimised interference in the institutional structures of markets to achieve that aim and was backed by the ideology of church law. The common law offences of engrossing, regrating and forestalling were a product of this ideology, and were intended to prevent manipulation of markets in essential goods. It is important to remember this tradition of legitimated interference in markets when trying to understand how white-collar crime, and more latterly, financial crime, have come to be recognised and countered under more modern legal processes.

The label white-collar crime was introduced by Sutherland in the 1940s because he aimed to foster an integrated analysis of 'crime in the upper, or white-collar class'.⁷ He hoped that building a bridge between the economic and sociological disciplines would provide an improved theoretical framework within which to propagate his strong moral convictions about commercial, political and professional wrongdoing. Sutherland's long-held interest in the 'occupational crimes of persons of respectability and high social status' had been evident from research he undertook in the 1920s.⁸ Sutherland believed that higher social status not only facilitated differential implementation of the law, but also offered greater opportunities to commit crime. Sutherland sought to raise, at a very practical level, a greater awareness about the harms caused by those whom he saw as white-collar criminals. However, he also wanted to challenge established criminological theory because he saw white-collar criminals escaping the great criminological sampling net, as well as escaping prison and other sanctions of the legal process. Sutherland perceived the bases of criminological theory and sampling to be hopelessly biased along class lines, and its personal and social pathology as insupportable and unworkable.⁹

3 E A Ross, *Sin and Society: An analysis of Latter-Day Iniquity* (Mifflin 1907).

4 E Gross, 'Organisations as Criminal Actors' in P Wilson and J Braithwaite (eds), *Two Faces of Deviance: Crimes of the Powerless and Powerful* (University of Queensland Press 1978) 198–213, at 204.

5 H Croall, *White-Collar Crime* (Open University Press 1992) 8.

6 B M Mitnick, *The Political Economy of Regulation* (Columbia University Press 1980) 243.

7 E H Sutherland, 'White-Collar Criminality' (1940) 5 *American Sociological Review* 1–12, at 1.

8 K Schuessler, *Edwin H Sutherland On Analyzing Crime* (University of Chicago Press 1973) xix.

9 W G O Carson, *The Challenge of White-Collar Crime* (La Trobe University Press 1983) 2–3.

Many of the theoretical problems associated with the label white-collar crime stem from Sutherland's faith in differential association as an adequate general explanatory framework for all crime, not merely white-collar crime. Under differential association theory, Sutherland asserts that criminal behaviour is learned like any other behaviour and that many types of business career virtually necessitate some form of harmful or criminal activity.¹⁰ Sutherland was unable to adequately substantiate these assertions, so that even though his ideas on the differential implementation of legal processes upon high-status offenders are now widely accepted, differential association theory is not. Sutherland's faith in differential association theory meant that he was not rigorous in his attempts at definition of white-collar crime. In his initial 1940 paper his attempt at definition merited only a footnote.¹¹ In later works Sutherland returned intermittently to issues of definition, but he was unable to produce a universal standard which could gain wide acceptance.¹² As a consequence, problems associated with definition have weakened the legitimacy of white-collar criminology within the discipline by contributing to:

[A] continuing absence of conceptual clarity and consensus in regard to white-collar crime which has tended to stifle creative and replicative research. Paradoxically, this confusion was built into the concept of white-collar crime by Sutherland. By failing to specify precisely and fully what it was that he was concerned with, Sutherland left the door wide open for a barrage of speculative attempts to refine white-collar crime. If the goal were to stimulate definitional debate, Sutherland's rather nebulous definitions of white-collar crime were marvellously attuned to the task. If the aim were to create an aesthetically satisfying typology of mutually exclusive and homogenous categories of white-collar crime, then Sutherland clearly fell short of his goal.¹³

So, it can be seen that white-collar crime is something of 'a taxonomic zoo'.¹⁴ It is a jumbled concept which relies on a rather 'spurious correlation between role-specific norms and the characteristics of the occupants of these roles'.¹⁵ Sutherland himself acknowledged in 1946, in correspondence to one of his sternest critics, Paul Tappan, that 'the concept of white-collar crime is questionable in certain respects and I hope to elaborate on these in a later publication'.¹⁶ Sadly Sutherland never did elaborate on this matter before his death in 1950, but although his theorising bears inherent flaws, it has not prevented his work having influence:

The Sutherland legacy is not easily cast aside. The concept of white-collar crime is polemically powerful and, notwithstanding considerable imprecision, palpably self-evident.¹⁷

Nevertheless, since the early days of the white-collar crime debate there has been criticism of Sutherland's inconsistent theorising. Paul Tappan attacked the 'swampy dogma' of the white-collar crime concept, which depended on *loose, doctrinaire, invective descriptors*, that

10 J W Coleman, 'The Theory of White-Collar Crime, from Sutherland to the 1990s' in K Schlegel and D Weisburd (eds), *White-Collar Crime Reconsidered* (Northeastern University Press 1992) 53–77, at 54.

11 G Geis and C Goff, 'Edwin H Sutherland: A Biographical and Analytical Commentary' in G Geis (ed), *On White-Collar Crime* (Heath & Company 1982) 171–88, at 181.

12 G Geis, 'White-collar crime: What Is It?' in Schlegel and Weisburd (n 10) 31–52.

13 G Geis, and R F Meier, 'Controversy Regarding White-Collar Crime' in G Geis, and R F Meier (eds), *White-Collar Crime: Offenses in Business, Politics and the Professions* (The Free Press 1977) 253–59, at 253–4.

14 H C Finney and H R Lesieur, 'A Contingency Theory of Organizational Crime' in S B Bacharach (ed), *Research in the Sociology of Organizations*, vol 1 (JAI Press 1982) 263.

15 S P Shapiro, 'Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime' (1990) 55 *American Sociological Review* 346–65, at 346.

16 Schuessler (n 8) xxi.

17 Shapiro (n 15) 357.

could lead to a fantastic array of ordinary business practices being classified as white-collar crime.¹⁸ By way of contrast, Aubert felt that criminology should shake off its subservience to legal agencies and that white-collar crime issues provided a focal point for such a development.¹⁹ This did not happen during the late 1950s and early 1960s when there was limited interest in white-collar crime and it remained on the periphery of academic research. However, since the mid-1960s interest in white-collar crime issues has increased and academics have offered differing theoretical approaches to the problems of definition. Quinney wanted to shift the focus from the social status of the offender to notions of occupational crime, which he hoped would stimulate empirical deviancy studies. He opposed Aubert's position, arguing that it was necessary to delineate more homogenous units for study by basing white-collar crime explanation upon the criminal law itself.²⁰ Edelhertz sought to broaden the definitional net of the white-collar crime label even further by removing any occupational criterion.²¹ This approach could be seen to confound the original purpose of the debate, which was to focus upon the harmful behaviour of high-status offenders. Schrager and Short stressed concepts of 'organisational crime', which emphasise the objective features of illegal behaviour.²² Their definitions are still dependent upon the criminal law's interpretation of harmful behaviour, but seek to extend legal sanctions upon the basis of impact without having to prove harm.

Pepinsky wanted to use the white-collar crime debate to move away from the criminal law and indeed the civil law as the medium for classifying undesirable behaviour, and instead adopt exploitation as the preferred measurement variable for the proscription of behaviours.²³ Such an approach of course raises even greater difficulties of definition and classification. Nevertheless, it is political power that ultimately determines the precision of definitions and the measurement of phenomena. Failing to acknowledge the influence of prevalent power relations hinders analysis of socially injurious behaviour by the powerful.²⁴ However, the 'human rights' criminology, as espoused by the Schwendingers, gained limited purchase upon academe in general or the white-collar crime debate in particular. Clarke is dismissive of the Schwendingers and other left-radicals, accusing them of trying to develop a discipline which would be 'divorced from reality' and stuck in an 'idealist limbo'.²⁵

Clinard and Quinney considered white-collar crime too vacuous a term, arguing that it consisted of two distinct types: occupational and corporate.²⁶ Cressey applauds their aims of greater classification, but considers them a failure.²⁷ He criticises Clinard and Quinney and Clinard's later collaborative work with Yeager,²⁸ because they perpetuate the ambiguities established by Sutherland regarding issues of corporate and individual responsibility and liability; in particular, how these are affected by the status of legal and

18 P W Tappan, 'Who Is The Criminal?' (1947) 12 *American Sociological Review* 96–102, 99–101.

19 V Aubert, 'White-Collar Crime and Social Structure' (1952) 58 *American Journal of Sociology* 263–71, at 265.

20 R Quinney, 'The Study of White-Collar Crime: Toward a Reorientation in Theory and Research' (1964) 55(2) *Journal of Criminal Law, Criminology and Police Science* 208–14.

21 H Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime* (US Government Printing Office 1970).

22 L S Schrager and J F Short, 'Towards a Sociology of Organizational Crime' (1978) 25 *Social Problems* 412.

23 H E Pepinsky, 'From White-Collar Crime to Exploitation: Redefinition of a Field' (1974) 65 *Journal of Criminal Law and Criminology* 225–33, at 227.

24 H Schwendinger and J Schwendinger, 'Defenders of Order or Guardians of Human Rights' in I Taylor, P Walton and J Young (eds), *Critical Criminology* (Routledge & Kegan Paul 1975) 113–46, at 122.

25 D H Clarke, 'Marxism, Justice and the Justice Model' (1978) 2(1) *Contemporary Crises* 27–62, at 44.

26 M B Clinard and R Quinney, *Criminal Behaviour Systems* (Holt, Rinehart & Winston 1973).

27 D R Cressey, 'The Poverty of Theory in Corporate Crime Research' in W S Laufer and F Adler (eds), *Advances in Criminological Theory*, vol 1 (Transaction Publishers 1989) 31–55.

28 M B Clinard and P C Yeager, *Corporate Crime* (Free Press 1980).

natural persons. Cressey situates the base cause of these problems of definition with Sutherland. He believes that Sutherland's work was not much of a theoretical contribution and finds it ironic that there was a great difference between what Sutherland said and what he did. This irony is compounded by the fact that Sutherland was something of an academic mentor for Cressey and that after Sutherland's death Cressey edited some of Sutherland's work into one of the standard textbooks on criminology. The disagreement between Cressey and Sutherland typifies the seeming inability of academics to develop an accepted definition of white-collar crime, or to agree on a theoretical basis for the study of white-collar crime. Carson believes that the criminological schools of the 1960s and 1970s for all their novel attempts at definition added little to the white-collar crime debate.²⁹ More than 20 years later, Shover and Hochstetler see theoretical and empirical research on white-collar crime as 'marginal to and largely unaffected by core developments in academic criminology'.³⁰ Agnew, Piquero and Cullen do not favour one definition of white-collar crime over another but argue that general strain theory can provide a useful theoretical lens through which to view white-collar crime phenomena.³¹

The debates about defining white-collar crime have often been polarised, with legal realists such as Tappan at one end of the definitional continuum and left idealists such as Pepinsky and the Schwendingers at the other. The legal realist position wants to focus only on 'crimes' and is plagued by problems associated with weak enforcement, ambiguity and differential censure. The left idealist perspective wants all 'undesirable behaviours' to be sanctioned and this seems an impossible task. Of course these problems of theoretical definition are accentuated by methodological and political difficulties. A three-day academic workshop in 1996 on issues of definition and white-collar crime organised by the National White-collar Crime Center canvassed many of these thorny definitional issues and emerged with the following imperfect but consensual definition:

Illegal or unethical acts that violate fiduciary responsibility or public trust, committed by an individual or organisation, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organisational gain.³²

Law enforcement agencies do not have the luxury of relative academic detachment, of course, and having acknowledged that the definition of white-collar crime is contested, in some cases have made their own specific attempts. For example the US Federal Bureau of Investigation (FBI) has defined white-collar crime as 'illegal acts which are characterised by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence'.³³ This is obviously a relatively vague definition and is testimony to the practical operational realities that a law enforcement agency such as the FBI faces when it seeks to counter the myriad and pervasive behaviours that might fall under a white-collar crime canopy. Such pragmatic realities have motivated commentators such as Benson and Simpson to adopt an *opportunity perspective* to white-collar crime which stresses that there are different opportunity structures for different types of crime and that the opportunities to commit white-collar crime are not randomly or equally distributed throughout society, and so some people will have more opportunity to commit white-collar

29 Carson (n 9) 4.

30 N Shover and A Hochstetler, *Choosing White-Collar Crime* (Cambridge University Press 2006) 157.

31 R Agnew, N L Piquero and F T Cullen, 'General Strain Theory and White-Collar Crime' in S S Simpson and D Weisburd (eds), *The Criminology of White-Collar Crime* (Springer 2009) 35–60.

32 J Helmkamp, R Ball and K Townsend (eds), *White-Collar Crime?* (National White-Collar Crime Center 1996) 351.

33 US Department of Justice, Federal Bureau of Investigation, *White-Collar Crime: A Report to the Public* (Government Printing Office 1989).

crime than others.³⁴ A logical consequence of this approach is to emphasise situational crime prevention strategies to reduce the opportunities for white-collar offending via mechanisms such as improvements in surveillance, accounting protocols, compliance mechanisms and risk-management strategies in general. Such risk-oriented initiatives are widely implemented by organisations, professional associations, national regulatory bodies and multilateral regulatory actors, so that in many instances there can be multiple layers of prophylactic prevention strategies in place at local, regional and international levels. Nevertheless white-collar crime still remains prevalent and notoriously difficult to classify and measure, and, as discussed below, debates about financial crime face similar structural difficulties.

Financial crime – a case of *déjà vu*?

Justice Potter Stewart of the US Supreme Court once famously said of 'obscene material' that he might not know precisely what it was, but 'I know it when I see it'.³⁵ There are similar issues regarding financial crime when individuals and agencies are faced with the problem of defining such activity. Financial crime is a slippery concept, notably resistant to precise definition due to its blurring of activities and structures. So, over the years, there have been many definitions put forward by government agencies and other commentators, but finding a universally acceptable definition has been difficult.

The ubiquitous Wikipedia defines financial crime as: 'A crime against property, involving the unlawful conversion of the ownership of property (belonging to one person) to one's own personal use and benefit. Financial crime often involves fraud'.³⁶ This collapse into the category of fraud, which is in many senses more familiar, is more readily acknowledged under legal codes and by courts, and which therefore can be more easily delineated, is, as we shall see, a feature of debates about financial crime.

For the International Monetary Fund (IMF): 'Financial crime can refer to any non-violent crime that generally results in a financial loss, including financial fraud. It also includes a range of illegal activities such as money laundering and tax evasion'.³⁷ In the view of the government of Liechtenstein: 'There is no generally valid definition of financial crime. At a minimum, it includes money laundering, organized crime, and the financing of terrorism'.³⁸

The UK's Financial Services Authority (FSA) has stated that financial crime includes any offence involving money laundering, fraud or dishonesty, or market abuse and the reduction of financial crime interacts with the FSA's three other core statutory objectives – protecting consumers; market confidence; and public awareness.³⁹ In a further attempt at definition the FSA states that:

Financial crime is any crime involving money. More formally, the Financial Services and Markets Act 2000 defines financial crime 'to include any offence involving (a) fraud or dishonesty; (b) misconduct in, or misuse of information relating to, a financial market; or (c) handling the proceeds of crime'. The use of

34 M L Benson and S S Simpson, *White-Collar Crime: An Opportunity Perspective* (Routledge 2006).

35 *Jacobellis v Ohio*, 84 S Ct 1676 [1964]

36 Wikipedia, 'Financial Crimes' (CIFAS) <http://en.wikipedia.org/wiki/Financial_crime>.

37 International Monetary Fund, *Financial System Abuse, Financial Crime and Money Laundering – Background Paper* (IMF 2001) 3 <www.internationalmonetaryfund.com/external/np/ml/2001/eng/021201.pdf>.

38 Portal of the Principality of Liechtenstein, What is Financial Crime (2007) <www.liechtenstein.li/en/eliechtenstein_main_sites/portal_fuerstentum_liechtenstein/fl-wuf-wirtschaft_finanzen/fl-wuf-finanzdienstleistungen/fl-wuf-finanzdienstleistungen-finanzkriminalitaet/fl-wuf-finanzdienstleistungen-finanzkriminalitaet-was.htm>.

39 Financial Services Authority, *Fighting Financial Crime* (FSA 2012) www.fsa.gov.uk/about/what/financial_crime.

the term 'to include' means financial crime can be interpreted widely to include, for example, corruption or funding terrorism.⁴⁰

This is obviously a pretty broad church and attests to the difficulties of pinning down financial crime into neat classification, even for a large regulatory agency with the resources of the FSA, which has financial crime as one of its four key statutory objectives. Therefore, presumably countering financial crime is one of the FSA's key performance indicators, but if it is not specifically defined, classified and counted, how is it possible to measure and subsequently demonstrate improved regulatory performance on the issue? This is not to say that the FSA is not seeking to counter financial crime. In fact when pursuing its financial crime objective, the FSA's main focus is on firms' risk management, systems and controls. Rather it highlights the lack of empirics in debates about financial crime and one should have some sympathy for the FSA position. For example, in Australia, a search of the Australian Prudential Regulatory Authority (APRA) and Australian Securities and Investments Commission (ASIC) websites did not reveal any specific guides which focused on defining and classifying financial crime, although there are numerous publications by both the ASIC and the APRA which aim to improve how financial actors and markets function in Australia. The Australian Crime Commission (ACC) is not able to offer much definition or measurement specificity either:

Financial crimes can include a wide range of activities from fraud through to active manipulation of the stock market or laundering of the proceeds of crime . . . [and]

It is difficult to fully judge the extent of these activities.⁴¹

This definitional uncertainty at a national level is unsurprisingly reproduced in regional and international contexts: for example, the experience of the European Union (EU) after it formally acknowledged the increasing trend towards international financial crimes on a larger scale. It called for common definitions, common incriminations and common sanctions to be established throughout the EU for these crimes. A Framework Decision on combating fraud and counterfeiting of non-cash means of payment was adopted on 28 May 2001. Under this proposal, fraud and counterfeiting involving any form of non-cash payment is recognised as a criminal offence and punishable by effective, proportionate and dissuasive penalties in all EU member states. A Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime was adopted on 26 June 2001. However, 'The Framework Decision deliberately avoids references to specific offences under the existing criminal law because they do not cover the same elements in the member states. Instead, the proposal merely lists the various types of behaviour, which should constitute criminal offences throughout the EU (i.e. theft or unlawful appropriation of payment instrument, receiving, obtaining, transporting, sale or transfer to another person of a stolen payment instrument in order for it to be used fraudulently etc).'⁴²

The EU has repealed the 2001 Directive on Money Laundering and Terrorist Financing and agreed a new one in 2005, and the financial crime section of the European Commission has produced a string of reports that have largely focused on countering money laundering and terrorist financing.⁴³ The path towards harmonisation unsurprisingly has been difficult

40 Financial Services Authority, *PS 11/15 Financial Crime: A Guide for Firms* (FSA 2011) 61.

41 Australian Crime Commission, *Financial Crimes* (ACC 2011) 1.

42 EUROPA Justice and Home Affairs, *Financial Crime a Priority Area for Approximation of Criminal law in the EU* (EUROPA 2007) <http://ec.europa.eu/justice_home/fsj/criminal/financial/fsj_criminal_financial_en.htm>.

43 European Commission, *The Single Market, Financial Crime* <http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm#3rdcountry>.

and there has been little progress on comprehensive definition and measurement of financial crime as a category. For example, Article 11 §4 of Directive 2005/60/EC contains an obligation for member states to inform each other, the ESAs and the European Commission of cases where they consider that a third country meets EU AML/CFT (anti-money laundering/combating the financing of terrorism) equivalence standards. The commission publishes this list on its website, but stresses that the assessment of third-country equivalence remains a member-state competence. Indeed, Directive 2005/60/EC does not grant the European Commission any mandate to establish a binding 'positive' list of equivalent third countries.⁴⁴

So there is underlying uncertainty globally regarding what financial crime is, and even in a more integrated region of the world such as Europe, a lack of specificity about financial crime offences. This lack of specificity is a problem with respect to establishing baselines about scale of activity and evaluation of law enforcement responses to such activity. These problems appear to be true for approaches towards financial crime by various regulatory actors and across a range of jurisdictions. Many of the behaviours of financial crime may be enacted in multilateral contexts, so this legal and law enforcement uncertainty can make national strategic and operational policing responses to multilateral financial crime more difficult.

The limited number of examples in the academic literature that try to define financial crime reflect the uncertainty shown by regulators. For example, Pickett and Pickett state that financial crime usually entails: 'The use of deception for illegal gain, normally involving breach of trust and some concealment of the true nature of the activities.'⁴⁵ Fleming notes that the array of offences that could constitute financial crime is 'potentially indistinct'.⁴⁶ Gilligan stresses how difficult it is to define and measure financial crime in comparison to *street crime* despite widespread recognition in the media and government policy and decision-making that it, i.e. financial crime, causes substantial harm.⁴⁷ Many academic writers (perhaps understandably given the measurement difficulties) simply accept financial crime as a label, and/or quote an attempt at definition by an organisation such as those listed earlier by the FSA or IMF, then move into a discussion of regulatory models, policy initiatives or other interventions such as AML, insider trading or terrorist financing that have been employed in the general area of corporate/financial crime.

Much of the academic writing on financial crime has come from the disciplines of law, sociology and criminology but, as discussed above, these contributions have not seemed able to move the debate on from relatively vague generalisations about financial crime being difficult to classify and measure. Some more recent contributions from the management field demonstrate potential for fleshing out what actually might constitute financial crime and begin the long process of mapping its content empirically. For example, Gottschalk suggests four major categories of financial crime – corruption, fraud, theft and manipulation – with delineated subsets of behaviours under these four categories – such as kickbacks, bribery, extortion and embezzlement under corruption.⁴⁸ This categorisation process has been built on through a study of Norway's largest business companies which

44 European Commission, *Common Understanding between Member States on the Procedure and Criteria for the Recognition of Third Countries Equivalence under Directive 2005/60/EC on the Prevention and use of the Financial System for the Purpose of Money Laundering and Terrorist Financing* <http://ec.europa.eu/internal_market/company/docs/financial-crime/3rd-country-common-understanding_en.pdf>.

45 K H S Pickett and J M Pickett, *Financial Crime, Investigation and Control* (Wiley 2002).

46 M Fleming, *FSA's Scale and Impact of Financial Crime Project (Phase One)*, Critical Occasional Paper Series 37 (FSA 2009) 2.

47 G Gilligan, 'Financial Crime in Australia' (2007) 27(1) *Journal of the Institute of Economic Affairs* 10–13, at 10.

48 P Gottschalk, 'Categories of Financial Crime' (2010) 17(4) *Journal of Financial Crime* 441–58, at 443.

invited company representatives to report on their organisation's experience with financial crime and asked them which categories of financial crime they were most vulnerable to. Unsurprisingly, numerous types of fraud (loan, credit, fee insurance) and theft (cash, identity) were considered the more prevalent vulnerabilities with other behaviours such as manipulation and extortion also prominent.⁴⁹

This type of bottom-up research probably presents the most fruitful pathway for identifying what does fall under the financial crime rubric and scoping out how much financial crime there may be under different categories and in different sectors. A mosaic model that gradually integrates such information will help to provide a more substantive empirical underpinning of how much of a problem financial crime is in contemporary society. This is a mammoth longer-term task and will require commitment not just from governments, law enforcement and regulatory agencies, but also from business and the professional service actors such as large accounting and consulting firms that service business needs. In order to make a contribution to this discourse I undertook a small-scale study of law enforcement and other regulatory actors in Australia and the UK about whether they utilised working definitions of financial crime and if so what those working definitions were.

How is financial crime defined and classified by law enforcement and regulators?

The study utilised email and telephone to conduct semi-structured interviews with relevant key actors in Australian and UK law enforcement agencies and other regulatory agencies whose operational remit would include countering behaviours that might reasonably be viewed as financial crime. The respondents were invited to comment on how they sought to define and classify financial crime and what they saw as the scale of financial crime. There were four core questions:

1. Does your agency use an operational definition of financial crime, and if so what is it?
2. What is the extent of financial crime in your jurisdiction?
3. If your agency does not use an operational definition of financial crime, what behaviours/offences that your agency seeks to counter could be categorised as financial crime?
4. If your agency does not use an operational definition of financial crime, what is the extent in your jurisdiction of the behaviours/offences that could be categorised as financial crime?

Table 1 details how many agencies were approached in each jurisdiction and the overall response rate of 59 per cent was reasonable given the empirical and other methodological difficulties surrounding the issue of financial crime. A selection of responses to the four specific questions is provided below. It is clear that in both jurisdictions police and other regulatory agencies canvassed had varying degrees of certainty about what their responsibilities for countering financial crime were.

The responses from the Australian sample are summarised first. One state attorney general's office offered this view:

We are not aware of any use of the term *financial crime* in our department. We use other bodies' definitions, such as the Australian Bureau of Statistics for Court statistics or the state police definitions for crime statistics. This provides around 70 groups, none are *financial crime*.

49 P Gottschalk and H Solli-Saether, 'Financial Crime in Business Organizations: An Empirical Study' (2011) 18(1) *Journal of Financial Crime* 76–92.

	Australia	UK	Australia + UK
Agencies approached	20	39	59
Agencies responded	14	21	35
Police forces approached	8	36	44
Police forces responded	5	20	25
Non-police forces approached	12	3	15
Non-police forces responded	9	1	10

Table 1: Responses from agencies approached in small-scale study of law enforcement and other regulatory actors in Australia and the UK

Another state-based regulatory actor gave these insights to the four questions:

1. No, however a working definition could be: ‘Any activity of a financial nature which might constitute an offence against the Criminal Code 1899 or an offence of money laundering against the Criminal Proceeds Confiscation Act 2002.
2. Unable to quantify the extent of ‘financial crime’.
3. Public sector corruption and fraud. Fraud conducted in the context of organised criminal activity i.e. major organised fraud or fraud committed in the context of other organised criminal activity e.g. fraud on financial institutions using false identities, fraudulent misrepresentations etcetera, money laundering.
4. See Q2 above.

Australian police forces that participated also made it clear that financial crime did not exist for them as a distinct operational category or key performance indicator, although they were extremely active in seeking to counter harmful behaviour in areas that reasonably could be considered as financial crime. For example:

1. No
2. We are not in a position to respond to this question. Perhaps a statistical gathering agency such as the Bureau of Crime Statistics and research can assist.
3. We investigate both Commonwealth and State ‘fraud related’ offences. It could be reasonably be asserted that the vast majority of fraud related offences contained in these subdivisions involve some financial aspect/loss to the victim.
4. We are not in a position to answer this question because we do not collect or have access to this type of information.

Another police force had this comment:

We have no operational definition. The Commercial Crime Division investigates serious crimes in business transactions (fraud, stock stealing, gold stealing, computer-aided crime). It has four sections (Computer Crime, Gold, Rural, Major Fraud). The Major Fraud squad investigates crimes related to fraud, stealing as a servant, identity fraud, special commodities.

This absence of financial crime as a separate category was echoed by another Australian police force:

We have no formal definition, it is not used in crime statistics and I am not aware of the use of the term in operations. We classify crimes according to the Standard Offence Table and so keep statistics of fraud, credit card fraud, computer fraud, identity theft and stealing offences.

So in Australia there seems to be no sense of financial crime as a distinct category amongst those law enforcement actors responsible for countering criminal behaviour. That is not to

say that police and other regulatory actors are not trying to prevent fraud and other financial crimes, rather that because the specific classification and sub-categories of financial crime do not exist yet, statistically there is no clear record of their overall efforts in this area. Similarly, there is no clear picture of the scale of the problem that they face as the empirical information is not being collated in ways that could inform performance measurement and policy development on the issue of financial crime.

Responses from agencies in the UK reveal a similar situation. For example, a large regional police force replied in this way:

1. Answer: No we do not.
2. Answer: As mentioned above, we do not specifically categorise financial crime in this police force area. In fact, throughout England and Wales there are many specific crime types or categories that might involve what might be termed 'financial crime'. For example, offences such as theft, deception and offences under the Fraud Act 2006 could involve a financial element, as indeed could offences involving drug trafficking, people trafficking, money laundering and so on. I could not honestly answer as to what the extent of such crime is in our area, although it is fair to say that we have examples of all of these offence types.
3. Answer: Please see the answer to 2 above. The main thrust is in relation to asset recovery (that is to say the recovery of assets from criminals who have been convicted of offences where we seek to remove the benefit of their crimes from them).
4. Answer: As above. We are unable to speculate on the extent of this because what might be termed 'financial crime' may feature in a whole host of different crime-types. Because we do not record this data under a specific category we could not accurately calculate this.

Similar views are evident in the response of a rural police force:

Question 1: We do not have an operational definition of the term 'financial crime'. Under the Proceeds of Crime Act 2002 any crime committed whereby the perpetrator has benefited financially could be construed as 'financial crime'.

Question 2: We are unable to state the extent of financial crime within our jurisdiction as the Force does not have an operational definition for the term 'financial crime' (as per response to question 1).

Question 3: Under the Proceeds of Crime Act 2002, we would look at all crimes where the perpetrator has benefited financially from his/her criminal acts e.g. through money laundering per se or through confiscation of assets post charge.

Question 4: See response to question 3.

Unsurprisingly a police force with both large cities and rural areas in its zone had a similar position:

Question 1. No there is no definition of financial crime per se as the financial investigation unit work primarily to the provisions of the Proceeds of Crime Act 2002 which have a bearing on the terms of reference for the department.

Question 2. The extent of financial crime is not measured as arguably there is a dimension of financial crime in all acquisitive crime which accounts for about 70% recorded crime.

Question 3. Distinct from a general heading of all acquisitive crime, financial crime is investigated predominantly to counter Money Laundering and Fraud.

Question 4. There is no known extent of financial crime let alone the behaviours that could be so categorised. This is not peculiar to us but a national issue.

This reply makes the important point that the lack of clarity around financial crime is a national issue (indeed it is an international one as well). An individual police force or regulatory agency has to operate within its state and national legal structures, as well as deal with behaviours that cross geographical jurisdictional boundaries and this means that its capacity for innovation on offence classification and measurement is limited. A potential national lead actor on this area is the FSA. However, its response to the specific four questions of this study was to reiterate that countering financial crime was one of its four core statutory objectives and state that: 'the extent of financial crime is difficult to determine'. So, in the UK it is clear that although there seems to be an increasing political and regulatory commitment to countering financial crime, there are still major difficulties of definition and evaluation of the scale of the problems. This is despite since January 2007 the FSA establishing the Financial Crime and Intelligence Division (FCID) and launching a dedicated fighting financial crime website to further raise the FSA's capability to counter financial crime.⁵⁰

This small-scale study indicates that the uncertainty and empirical lacuna surrounding financial crime is prevalent in Australia and the UK. It is likely that this is the case in most other jurisdictions as well. First principles would expect that better definition and classification are required in order to develop the necessary adaptive policing strategies to counter financial crime in Australia, the UK and elsewhere.

Conclusions

Many types of crime are relatively easy to define and measure. Much conventional crime falls into this category, for example, burglary, homicide, vehicle theft and arson. However, as we have seen, financial crime, like white-collar crime, is much harder to define and subsequently measure, so in comparison to more conventional or *street* crime there can be a lack of hard data. Compounding this empirical uncertainty is the ambiguity that can sometimes surround financial crime, because its effects can be more diffused. An example of this is the savings and loans scandal in the US in the 1980s and 1990s when more than 700 savings and loans associations failed. Initially most failures were assessed as careless management practices, but later US government reports 'strongly suggest that criminal activity in the form of fraud was a central factor in 70 to 80 per cent of these failures'.⁵¹ Add to this mix the operational reality that law enforcement resources to counter financial crime may be limited in many jurisdictions and it easy to see why much financial crime may not be counted in official crime statistics. This loop effect contributes to what may seem at times to be disjointed law enforcement responses to financial crime.

The emerging regulatory and law enforcement activity around the label *financial crime* has parallels to the white-collar crime discourse and seems likely to suffer from similar definitional ambiguity and ambivalence which can be expected to result in similar difficulties not only in measuring the scale of the activity, but also in evaluating policing and other regulatory responses to such activity. The irony is that all this ambiguity, ambivalence and uncertainty does not seem to be preventing the emergence of something of a growth industry around the label *financial crime*, as regulatory agencies, police bodies and industry actors establish specialist financial crime units, websites and advisory teams. For example, Deloitte has been expanding its advisory services in the area of financial crime.⁵² Similarly

50 <www.fsa.gov.uk/Pages/About/What/financial_crime/index.shtml>.

51 H N Pontell and K Calavita (1992), 'Bilking Bankers and Bad Debts, White-Collar Crime and the Savings and Loans Crisis' in Schlegel and Weisburd (n 10) 195–213, at 196.

52 Deloitte, *Financial Crime, Advisory Services* <www.deloitte.com/view/en_AU/au/services/forensic/financial-crime/advisory/index.htm>.

Dun & Bradstreet have sought to boost its advisory role to business by producing financial crime-related publications.⁵³

The evidence suggests that progressing the definition and measurement of financial crime is unlikely to be achieved by academics working in isolation. The earlier discussion indicates that this seems especially true for academics in the law, sociology and criminology disciplines, despite their long involvement in this area harking back to the 1940s and the legacy of Edwin Sutherland. Rather, an integrated multi-professional, multi-agency as well as multidisciplinary effort is required with an emphasis on *bottom-up research*. Business actors such as advisory firms are likely to have more empirical knowledge of the realities of financial crime in the business world. However, their obligations are largely to their client base and profit-maximisation strategies, and so they will need to be persuaded of the utility of broader-based research strategies. Similarly, police forces will have some awareness of the scale of the financial crime problems that businesses face and records of at least some of the financial offences suffered by individual citizens that have been reported in their jurisdiction. However, they are limited by their jurisdictional remit, whether state, urban or regionally based.

As discussed earlier there is less definitional uncertainty about fraud in comparison to financial crime and so, regarding fraud, there have been some initiatives which combine private and public sector efforts in scoping the problem. For example, in the UK, CIFAS is a not-for-profit association originally created in 1988 by a group of credit retail companies. It now has more than 250 member associations (both public and private agencies) covering an array of business sectors and maintains two substantial databases aimed at fraud prevention – the CIFAS National Fraud Database and the CIFAS Staff Fraud Database.⁵⁴ However, mapping out financial crime and organising data collection is an even greater challenge and so will need to be coordinated by national actors such as the FSA in the UK, or the ASIC and the ACCC in Australia. Realistically these types of agencies are the actors that possess the necessary powers and resources capable of the *heavy lifting* required to persuade advisory firms, police forces, professional associations and other groups to engage in extensive cross-sector and cross-disciplinary research on defining, classifying and measuring financial crime. Methodologies could build on work emerging from the management sciences field by researchers such as Gottschalk discussed earlier.⁵⁵ Also, the small-scale field study discussed above demonstrates that police and other regulatory actors in Australia and the UK do seem to be aware of the weaknesses of existing definitions and categorisations related to financial crime. However, given their existing range of responsibilities most are unable to see how they might contribute to improving the situation.

The political context is crucial and without requisite political commitment nothing is likely to change, except that likely effects of financial crime will continue to grow. Those interested in progressing debates about, and regulatory efforts against, financial crime should lobby to generate that political momentum. This is a big but not impossible challenge. For example, in November 2011, I appeared before the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services as part of its remit of statutory oversight of the ASIC. Part of my evidence drew linkages between regulatory failure and inconsistent definition and measurement of fraud and financial crime. In its subsequent report the Joint Committee has recommended that:

53 Dun & Bradstreet, *Protection Against Financial Crime: Lessons from the Global Experience* (2008) <http://dnb.com.au/Header/News/Reports_and_White_Papers/Protection_against_financial_crimes/index.aspx>.

54 See CIFAS, UK Fraud Prevention Service <www.cifas.org.uk/>.

55 See n 48 and n 49 above.

ASIC take steps to use available information to collate and analyse definitions of, and approaches to, financial crime, with a view to developing standard definitions and classifications that can be used across the Commonwealth.⁵⁶

A recommendation from a Parliamentary Joint Committee is an influential pressure on a statutory agency such as the ASIC, but obviously it remains to be seen how much progress ASIC can make in the future on these thorny issues and whether it grasps the nettle of the research-coordinating role discussed above. Nevertheless, initiatives such as this, in Australia, the UK and elsewhere, allied with continuing profile-raising and field research by academics, business actors, law enforcement and other commentators on the utility of developing meaningful baseline data on financial crime can only be helpful in seeking to counter its harmful effects both to the economy and civic society.

⁵⁶ Parliamentary Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission* (March 2012) 11, <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=corporations_ctte/asic/index.htm>.