Anomalous fraud punishment

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My proposed research project under the auspices of the Elizabeth D. Rockwell Faculty Fellowship is an exploration of anomalous legal punishment of fraud. As a legal category, fraud is a subset of lies & deception.[1] Criminal, civil, and ethical regimes all punish fraud. The standard assumption across these three spheres is that criminal sanctions are devoted to the most serious frauds. Civil sanctions thus apply to a more moderate regime of frauds and the realm of ethics concerns the broadest scope of fraudulent activity. The goal of this proposal is to systematically identify anomalies in this hierarchy: are there significant areas in which this punishment regime deviates from the standard expectations?

The standard hierarchy of penalties for fraud is clear in appellate judicial decisions. In United States v. Weimert, for example, the Seventh Circuit overturned the criminal fraud conviction of a bank vice president who lied to his employer about the difficulty of his job. Although the court acknowledged that the defendant's lies to obtain greater compensation technically satisfied the criminal elements of fraud, it declared that such behavior was better handled as a civil breach of fiduciary duty and overturned the conviction.[2] Similarly, in a civil case against attorneys engaged in a fraudulent transaction, the Fourth Circuit declined to extend civil liability to the attorneys. Even though the Maryland State Bar had established that the attorneys had an ethical duty to disclose the truth regarding the fraud, the court held that an "ethical duty of disclosure does not create a corresponding legal duty" for the attorneys to tell the truth.[3] These decisions reflect a hierarchical Venn diagram of criminal, civil, and ethical rules that are nested: the largest circle are the ethical violations, within which is a smaller circle of civil violations, within which is the smallest circle of criminal violations.

As a practical matter, there are recognized examples in which this hierarchy appears to be subverted. One example is simple, low dollar financial fraud: lying to obtain $50 from a victim. Such scams face criminal liability but often do not face private civil liability. The reason for comparatively limited private civil sanctions is that most victims do not find the litigation effort worthwhile. Thus, the comparative lack of civil sanctions for such low dollar fraud is due to enforcement realities rather than underlying conflicts regarding the severity of the offense. Another recognized example is the comparative breadth of criminal liability over civil liability for aiding & abetting in the securities fraud context.[4] A bank that aids a third party committing securities fraud could face criminal liability for the assistance, but the bank does not face civil liability from the victim of the fraud.[5] Most individuals would fear prison time more than the financial consequences of civil litigation. This unusual result is likely driven by a perception that

[1] See Deception: The Role of Consequences, Uri Gneezy, American Economic Review, Mar., 2005, Vol. 95, No. 1 (Mar., 2005), pp. 384; Sissela Bok, Lying: Moral Choice in Public and Private Life (Vintage Books, 1999). Some key distinguishing characteristics are the importance of causing loss to the listener and the speaker's knowledge of falsity.

[2] See United States v. Weimert, 819 F.3d 351, 366 (7th Cir. 2016).

[3] See Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991).

[4] See Wendy Gerwick Couture, White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable, 72 Alb. L. Rev. 1 (2009).

[5] See Central Bank of Denver v First Interstate Bank of Denver, 511 U.S. 164 (1994).

private parties are too litigious regarding securities fraud; courts are perhaps more trusting of federal prosecutors in exercising discretion as to which entities are the most culpable regarding fraud.

This project is not simply a classification exercise. A more systematic understanding of punishment anomalies in fraud may help us better understand and predict the development of fraud doctrines. These doctrines reflect both popular and legal perceptions of acceptable and unacceptable behavior, and the above judicial decisions demonstrate the importance of moving across various spheres of rules. There is perhaps no more prominent recent example than the former President Trump, whose communication style reflected certain norms of entertainment and business in which "puffery" is accepted.[6] Transplanting such a communication style to the political realm has had a significant impact on political discourse and media.

This proposal fits within my general work on white collar offenses. Moreover, it is a natural extension of my most recent publications. A 2019 piece published in the Georgia Law Review analyzes the lack of clarity in defining white collar offenses such as fraud. A forthcoming piece in the Kentucky Law Journal takes some early steps in measuring and categorizing the harms from fraud.

The publication targets for this research would likely emphasize well regarded law journals that prioritize business law such as the Columbia Law Review, the Virginia Law Review, the Georgetown Law Journal, and the Vanderbilt Law Review.

[6] The legal doctrine of puffery is a well-established defense against fraud, grounded in part on the idea that people do not, or should not, give credence to claims of "the best hamburger ever" in advertisements.