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Challenging the Criticism of Federal Prosecutors in 'Chicken---- Club'

BY CARRIE H. COHEN

For almost all federal crimes, prosecutors must prove that the defendant had mens rea, or a guilty mind. In the 1952 case, *Morissette v. United States*, the U.S. Supreme Court highlighted the historical footing for this principle.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion," the court noted. "It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent duty of the normal individual to choose between good and evil."

No doubt, mens rea makes it more difficult to prove certain kinds of criminal wrongdoing and to prosecute individuals for particular types of conduct. But is such difficulty a bad thing? There are many important reasons why our system of criminal justice typically requires mens rea. The mens rea requirement protects individuals from government overreach and mob justice. And, it helps ensure that only the appropriate type of conduct is prosecuted criminally.

The intent requirement has, at times, been the cause of public frustration, especially following the financial crisis of 2008. In an interview with The New Yorker published last year, former U.S. Attorney for the Southern District of New York, Preet Bharara, acknowledged those feelings when confronted with criticism regarding why more financial executives were not criminally prosecuted.

"There's a natural frustration, given how bad the consequences were for the country, that more people didn't go to prison for it, because it's clearly true that when you see a bad thing happen, like a building go up in flames, you have to wonder if there's arson," he said.

He added: "Now, sometimes it's not arson, it's an accident. Sometimes it *is* arson, and you can't prove it."

But that hasn't stopped critics from suggesting that the Justice Department could have and should have done more to prosecute individuals for their role in the financial crisis. Jesse Eisinger, a Pulitzer Prize-winning business reporter at ProPublica, is among those who suggest that with respect to the financial crisis, it was arson and there was a way for criminal prosecutors to prove it.

After reporting on some of the causes of the financial crisis, Eisinger shares that he was sure that criminal indictments would follow. But, to his amazement, they never materialized. In his book, "The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives," Eisinger digs for an explanation. His primary thesis: Federal prosecutors have lost the skill

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and will to prosecute complex white-collar crime.

This alleged lack of will is reflected in the title of Eisinger's book, which comes from a speech delivered by James Comey to federal prosecutors in 2002. Before he became the FBI Director, Comey served as U.S. Attorney for the Southern District of New York.

After being on the job for several months, Comey addressed the prosecutors in the criminal division of the Southern District of New York. Comey, according to Eisinger, asked everyone in the room to hold up their hand if they had never experienced a hung jury or an acquittal.

When many eager hands shot up, Comey delivered a punch to their egos: "Me and my friends have a name for you guys," he said. "You are members of what we like to call the Chickenshit Club."

By all accounts, Comey was imploring the prosecutors not to worry about losing a case but to focus on whether individuals or corporations deserved to be prosecuted based on the facts and the law. But that message would go unheeded when it came to complex white-collar crime related to the financial crisis, claims Eisinger. Around the time of the Comey speech, a "dramatic and little-understood shift in how the government prosecutes white-collar crime" was beginning to take shape.

According to Eisinger, high-profile government losses in court, coupled with other fiascos, including cases of prosecutorial abuse and corporate lobbying, caused prosecutors to "ease up." Further, he notes, the skills required of prosecutors to take complex white-collar cases to trial eroded as the Justice Department began favoring negotiated settlements with large corporations over prosecuting individuals.

No question, Eisinger has produced a deeply reported book that offers a compelling narrative for those frustrated that few Wall Street executives were prosecuted for their role in the financial crisis. But what Eisinger misses is a full appreciation and understanding of the difficulties of proving a criminal case and what evidence may or may not have existed to determine whether a criminal prosecution was warranted as well as the standard of proof prosecutors face and the various legal limitations of certain statutes and interpretations thereof.

What exactly did prosecutors investigate? What evidence was obtained by grand juries? Due to grand jury secrecy laws, the answers to these questions will never be known, but it is unfair to assume no such investigations existed or that they were not aggressively pursued.

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To be sure, Eisinger does not blame only the Justice Department for what he considers lackluster white-collar crime enforcement. He acknowledges, for example, that appellate decisions increasingly have overturned jury convictions on various legal grounds. He also notes that Congress has not stepped in to make certain statutory changes that might help prosecutors bring the very cases he complains are not brought.

But the courts and Congress take a backseat to the criticism Eisinger lobs at prosecutors, especially in the Southern District of New York where many banks and financial institutions are headquartered. Eisinger asserts that prosecutors and Justice Department officials both lost the nerve to take on powerful executives. This view does not reflect what I experienced as a federal prosecutor in the Southern District for nearly nine years and what I see now as a white-collar defense lawyer. Eisinger also fails to appreciate the complexity of the insider trading cases he claims were a "prosecutorial non sequitur," and ignores the many complex financial crime and other financial fraud cases that have been brought both by the criminal and civil divisions of the Southern District of New York and other U.S. Attorney Offices as well as state prosecutors throughout the country.

I am aware of no prosecutor "easing up" on investigating executives for potential white-collar criminal conduct or fearful to take a case to trial. To the contrary. What I saw from the inside and now see on the outside are federal and state prosecutors aggressively pursuing white-collar investigations without fear or favor guided by the facts and the law. The results of those inquiries should not, as some have suggested, be influenced by the aftermath of a calamity or public opinion. That is not the way justice is delivered nor served.

The power a prosecutor wields is awesome. We should take comfort that Justice Department policies and our criminal laws help prevent that power from being misused to satisfy public opinion. We also should also be thankful for those government attorneys who resist the klaxon call for some sort of instinctual justice. They are not chickens, much less chicken—. They are courageous.

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