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WHITE COLLAR CRIME FROM SCRATCH: SOME OBSERVATIONS ON THE EAST EUROPEAN EXPERIENCE

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I. INTRODUCTION

When Paul Marcus called about this project, I thought, what can I say that is interesting in eight to twelve pages? I considered untangling the Fifth and Sixth Amendment rights to counsel. I considered scrutinizing the crime of engaging in monetary transactions with property derived from specified unlawful activity. Ultimately, I decided to go with my thoughts on white collar crime in the reorganized countries of Eastern Europe. Because Paul described this as an Essay, I have seized on it as an opportunity to write something other than traditional legal scholarship.

Over the past year, I have been working with an American Bar Association program called the Central and East European Law Initiative ("CEELI"). I was introduced to the program in May of 1992 when a CEELI person called and asked me if I was interested in going to Europe. I was, so shortly thereafter, I was a panelist on white collar crime at a Polish Bar Association meeting in Poland.¹

What I've been exposed to through CEELI is Eastern Europe's conversion to democracy and a market economy. Specifically, I have focused on the role of white collar crime in this conversion. The Poles, with whom I worked to draft white collar crime laws, are starting basically from scratch. Usually we have to imagine the "scratch,"² but many of the Eastern European countries are experiencing it now.

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1. Since that time, I have worked with CEELI in other ways. In October of 1992, I helped to write a paper on comparative money laundering laws for the Bulgarian government, and in February of 1993, Dr. Vinko Hlaca, Dean of the University of Rijeka in Croatia, visited my law school and lived in my home for a week. Additionally, I spent May of 1993 as a law professor at the University of Rijeka in Croatia.

2. See, e.g., Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1 (1991).

Starting from scratch offers Americans an opportunity to gain insight.³ This Essay will talk about Poland, white collar crime laws in Poland, and white collar crime laws in Eastern Europe generally. Along the way, we'll examine what lessons the Poles can teach us about this area of law and about our attitudes toward it.

II. EASTERN EUROPE AND WHITE COLLAR CRIME

The CEELI program, funded by grants, was established in 1989 to encourage contact between American lawyers and lawyers from the emerging Eastern European democracies.⁴ The American Bar Association ("ABA") hopes that by bringing lawyers together, Americans can help the countries establish legal systems suited to their new structures. Specifically, the purpose of my Poland trip was to help that country develop white collar crime laws during the Polish Bar Association's annual conference at a resort in Kiekrz, a suburb of Poznan, and we were scheduled to attend the two-day conference and discuss American white collar crime.⁵

The first day we arrived in Warsaw, we were met by Bozena Sarnecka-Crouch, the CEELI liaison in Poland. She is from Poland and has remarkable American credentials.⁶ A fair number of women lawyers attended the conference, many of whom turned out to be judges. I did not expect this. One of our translators explained that under the Communist system, judges were basically government functionaries, writing up decisions under orders from the state. Judgeships were technical jobs without the discretion and prestige Americans expect. On the other hand, professors had a lot of prestige under the old system because they had greater freedom to say what they thought. Although one therefore might expect to find few women professors, two of the professors working on white

3. See, e.g., Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lesson from Romania*, 1991 U. ILL. L. REV. 1065.

4. See Mark S. Ellis, *The Democratization of Central and Eastern Europe: An Afterword*, 7 AM. U.J. INT'L L. & POL'Y 743, 743 n.* (1992). Mr. Ellis is the Executive Director of CEELI.

5. The others making the trip were Scott Michel, a partner at Caplin & Drysdale, and John Byrne, senior counsel to the American Bankers Association.

6. Ms. Sarnecka-Crouch has a J.D. from Duke, an S.J.D. from Tulane, is a member of the Pennsylvania Bar, and has clerked for a bankruptcy judge in California. Most recently, before joining CEELI, she worked as a senior legal specialist on Poland at the Library of Congress.

collar crime from the University of Adam Mickiewicz in Poznan⁷ were women.

The next day the group traveled to Poznan, where we were met by Professor Ratajczak and Professor Piotr Gosieniecki, law professors at UAM.⁸ Professor Ratajczak, who is also president of the Polish Bar Association, ran the conference. The conference theme was "Law and Lawyers in the Times of the New System." This was only the second time the Polish Bar Association has had an annual meeting. Under the old system, the lawyers did meet, but the meetings were lifeless, government-orchestrated affairs that were not taken seriously.

At a meeting to prepare for the conference, we discussed how Americans might help the Poles. Government corruption now is recognized as a problem in Poland. Before, it was the order of the day: institutionalized and semi-legal.⁹ While government corruption makes Americans mad,¹⁰ Poles seem more inured to it. The country has no tradition of defining white collar crime or prosecuting government officials. At our meeting, the regional chief prosecutor lamented that last year, in the Poznan district covering roughly a quarter of the country, no one was prosecuted for bribery or government corruption.

Moreover, the process of prosecuting criminals is newly complex. Poland lacks experienced agents to investigate fraud.¹¹ In addition, new issues arise because democracy and capitalism respectively mandate a more complicated process and more complicated crimes. As one writer recounted:

7. The University, named for a famous poet, is known as UAM.

8. At this point, we began to realize how difficult the language barrier would be. We spoke no Polish, and only one of the Polish participants spoke any English. The second language for most Poles is Russian, or sometimes German, because when the Soviet Union was in charge, few English classes were offered, and Russian classes were mandatory.

9. Lawrence Weschler, *A Reporter at Large: Deficit*, NEW YORKER, May 11, 1992, at 60, 66.

10. See, e.g., *Your Turn on Ethics Leaders Had Their Chance; Now, Voters Have Theirs*, LEXINGTON HERALD-LEADER, Feb. 23, 1993, at A6; *With Good Guys Like These Even Some of The Best Lawmakers Treat Campaign Funds Like Their Own*, LEXINGTON HERALD-LEADER, Jan. 10, 1993, at F1; Bill Estep et al., *Indictment Details Payoff of \$37,000; Ex-Racing Official Spurrier Indicted; More Are Likely*, LEXINGTON HERALD-LEADER, May 21, 1992, at A1.

11. Weschler, *supra* note 9, at 68.

Economic crime was simpler before capitalism. Workers swiped stuff from state factories. The police persuaded them to confess. How? "By kicking them," says Kazimierz Krasny, deputy head prosecutor at the Ministry of Justice. "Now we have to find out about business, everything about the free market," Mr. Krasny says. "We have to educate ourselves."¹²

After the opening, Professor Gosieniecki drove us out to the resort and conference center in Kiekrz, thirty minutes outside Poznan, where the rest of the conference was held.¹³

The first substantive session of the conference was slated for the discussion of general topics. The Poles reported on the status of their white collar crime laws. They have proposed a long and complex statute protecting economic relations.¹⁴

The next session was on money laundering. I described the U.S. laws on money laundering.¹⁵ After reading part of our complex money laundering statutes aloud,¹⁶ I asked the Polish participants if they would be interested in a general fraud statute, noting that the United States' mail fraud statute has helped us deal with unanticipated fraud schemes.¹⁷ They said "no, thank you," because

12. Barry Newman, *Poland Has Plenty of One Thing: Crooks*, WALL ST. J., Apr. 9, 1991, at 18 (International Section).

13. The name of the conference center is "Osrodek Komendy Wojewodzkiej Policji," and it is one of the nicest facilities in Poland. In the old days, it was used as a state training and vacation center for police. Now, it is struggling to stay afloat, and the proprietors were happy to rent it to lawyers for two days.

14. The statute is entitled, "Statute on the Protection of Economic Transactions." It is difficult to read. For example, Article 1, Section 1, provides:

Whoever for the purpose of acquiring a great material benefit takes advantage of the activity of a legal entity or of an organizational unit not having a legal personality, in agreement with another person commits an offense and by such [offense] causes them or another legal entity or an organizational unit, a person being a member of them, another person or the State Treasury great property damage—Shall be subject to the penalty of deprivation of liberty for from 2 to 12 years.

Statute on the Protection of Economic Transactions, art. 1, § 1 (draft Mar. 12, 1992) (Pol.) At first I thought that we could help the Poles with drafting a clearer statute, however, after having reread the RICO statute, I abandoned that plan.

15. I skipped the reporting laws. Poland is a cash economy, and cash transactions are not suspicious. Thus, I discussed the substantive money laundering crimes, codified at 18 U.S.C. §§ 1956, 1957 (1988), amended by 18 U.S.C. § 1956 (Supp. II 1990).

16. 18 U.S.C. § 1956.

17. Weschler, *supra* note 9, at 68 (discussing the names and multitudes of schemes).

such a general statute would not be useful in a civil code country with no common law to interpret it.

After lunch the topic was tax fraud. The country did not have a personal income tax until 1992.¹⁸ Poles are hostile to the idea of taxes. Tax evasion is considered a heroic act.¹⁹ "Tax-dodging runs deep in the Polish psyche, and was almost a badge of honor under the communist system that was toppled in 1989."²⁰ This attitude has not changed much over four years, but in view of Poland's huge deficit,²¹ it must change soon. When we suggested to a Polish tax fraud prosecutor that American prosecutors often choose prominent targets,²² he rejected the idea immediately. The Polish prosecutor said that prosecuting a high-profile person would only further alienate the people from the tax authorities.

The discussion turned to the corruption of government officials and the investigation of bribery. The other panelists and I described the pyramid method. This method involves getting some leverage over people at the lower levels of power in order to induce them to testify against those higher in the pyramid. In the United States, people who testify against higher-ups generally are described as "cooperating with the government." When the Poles asked questions about this approach, the translators described it as encouraging people to "denounce" each other to the government. This was a novel and chilling way to characterize it. We also discussed stings as a method of investigation, including the contours of the entrapment defense and the use of plea bargaining. The Poles don't use plea bargains, and they seemed interested. I would have liked to have learned more about this, but time was short.

Wprost, the Polish equivalent of *Newsweek* magazine, interviewed me. The main question *Wprost* wanted to ask was, "Why should Poland, a relatively poor country, try to stop large amounts

18. *Government Monitors Collection of New Personal Income Tax*, INT'L FIN. DAILY (BNA), Feb. 25, 1992, available in LEXIS, Nexis Library, BNAIFD file.

19. *Officials Outline IRS Help in Setting up Polish Tax System*, INT'L FIN. DAILY (BNA), Apr. 6, 1992, available in LEXIS, Nexis Library, BNAIFD file.

20. Patricia Koza, *Poland Launches Income Tax*, UPI, Jan. 17, 1992, available in LEXIS, Nexis Library, UPI file.

21. See Weschler, *supra* note 9, at 62 (discussing Poland's suddenly looming huge budget deficit).

22. We were thinking of Leona Helmsley.

of money from passing through the country, even if it is just passing through to be laundered?"²³ This was a reasonable question, especially because Poland does not see much of the harm caused by the underlying drug trade that generates the cash. I proposed to the reporter that because Poland had just shaken off domination by one group, the country should not want to give potentially dominant power to another (arguably less savory) group.

On Monday, after we spoke at the University of Warsaw Criminal Law Society, we explored Warsaw and visited the monuments to the Warsaw Uprising and to the Ghetto. Signs of "baby capitalism" were everywhere. Bozena pointed out a row of stalls. In the old days, the government allocated the stalls to particular farmers who were allowed to sell their produce privately. With the new free market, competition broke out and soaring rents drove the previous tenants out. Finally, ironically we walked through a square where the old Communist Party Headquarters now serves as the stock market.

III. CONCLUSION

I was left with these thoughts.

The "wickedly difficult ongoing transition to capitalism"²⁴ is tough. How do you take a country where everything is owned by the government and convert it to private ownership? There is no helpful analogue. No one has ever done this.

One example of the difficulties is severe inflation. In May of 1992, the conversion rate was about 13,075 zlotys to a dollar. Taxi fares are quoted somewhere between 400 and 600 times the meter amount because constantly changing the meters became too expensive. The meter price times 400 is a good price; the meter price times 600 is getting high.

Along with the difficulties, the conversion to capitalism has produced some comic effects. In Kierzk, the only television programming available in English is CNN, MTV, and reruns of *Bewitched*. In Warsaw, financially strapped Russians hawk used Russian army

23. See generally Grzegorz Cydejko, *Laundering Polish Money: Dash and Deposit*, WARSAW VOICE, Dec. 20, 1992, available in LEXIS, Europe library, WRSWV file (discussing the ease with which people launder money at the Polish borders).

24. Weschler, *supra* note 9, at 62.

uniforms to Westerners on the streets. The Poles have a sharp sense of humor about their situation. When one of the American panelists asked the Polish moderator if he could go back to his room for a minute during the conference, the moderator replied, "It's a free country!" and laughed.

The newspapers have reported on the explosion of white collar crime in Poland since its conversion to capitalism.²⁵ Yet this type of crime is difficult to document. When the Soviets ran the show, fraud and government corruption were neither recognized nor acknowledged.²⁶ Moreover, such crime was not reported, so the statistics for the years before 1989 are suspect.²⁷

As the Poles and other Eastern Europeans convert to capitalism and market economies, the challenge in white collar crime is to define the line between creative and aggressive entrepreneurial activity and fraud. Right now, the Poles have no experience with this line. Even once the line has been defined, it must be explained and communicated so that people to whom capitalism is new can understand it. This is a big assignment. We in the United States still have trouble with the line, and we have been working on it for more than 200 years.

The Poles' attitude toward taxes is an attitude of cynicism resulting from their years of totalitarianism.²⁸ Their attitude has not kept up with the pace of reform. Comparatively, the American attitude is very cooperative, even taking into account Americans' complaints about taxes and their cynicism toward government. Our attitude toward government was one of the most valuable things we had to offer the Poles; it was more valuable than any specific information we possessed.

25. See generally Stephen Engelberg, *Poland's New Climate Yields Bumper Crop of Corruption*, N.Y. TIMES, Nov. 12, 1991, at A1 (discussing Poland's explosion in corruption of government officials); Newman, *supra* note 12 (discussing the expansion of economic crime in Poland).

26. See generally Blanca Jicinska, *Can Communist Crimes Be Punished?*, NAT'L REV., May 25, 1992, at 34 (listing the few meager prosecutions of government officials when countries were under Communist rule).

27. See *Przegląd Tygodniowy*, *About the Economy*, WARSAW VOICE, Apr. 12, 1992, available in LEXIS, Europe library, WRSWV file (quoting a prosecutor from the Ministry of Justice who stated that police statistics before 1989 are not credible because they were bent to political needs).

28. See *supra* notes 18-22 and accompanying text.

I can see how people become addicted to being in foreign places during dramatic change. Watching the Eastern European countries establish white collar crime laws from ground zero is compelling and full of lessons for Americans. Previously I had little bent for comparative law, but now I am converted.