MOST OF ALL A FRIEND

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Peter Henning, in addition to extraordinary teaching and service as a law professor, was a prolific writer.[1] I had the pleasure of co-authoring six books with him[2] or twenty-one if you count all the editions of these books.[3] But my story about writing with Peter is much longer.

Earlier in his career, he was an incredible blogger, and together we populated the *White Collar Crime Prof Blog*[4] with numerous posts keeping practitioners current on happenings in the white collar criminal sphere.[5] This time-consuming venture initially included two posts daily with us splitting the days. He wrote hundreds of thoughtful posts that remain on the blog to this day. They offer analysis of Court decisions, the effect of new legislation and regulatory rulings, and Securities and Exchange Commission and Department of Justice actions. His posts provided easy-to-understand explanations of what many times were difficult concepts and practices in the white collar world. It was the blog and not the many books that brought us both into the public arena, as newspaper reporters continually followed our blog and often called for explanations and comment for stories they were writing.

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1. *Peter J. Henning*, SSRN, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=182574 [https://perma.cc/S8QT-MQWH] (last visited Oct. 30, 2022).

2. ELLEN S. PODGOR ET AL., CRIMINAL LAW: CONCEPTS AND PRACTICE (5th ed. 2022); JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE (5th ed. 2022); PETER J. HENNING ET AL., MASTERING CRIMINAL PROCEDURE: VOLUME 1, THE INVESTIGATIVE STAGE (3d ed. 2020); MASTERING CRIMINAL PROCEDURE: VOLUME 2, THE ADJUDICATORY STAGE (3d ed. 2020); ELLEN S. PODGOR ET AL., WHITE COLLAR CRIME (2d ed. 2018); ELLEN S. PODGOR ET AL., MASTERING CRIMINAL LAW (2d ed. 2015).

3. Professor Peter Henning also authored book projects in which I did not participate. *See* PETER J. HENNING ET AL., THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION: THE LAW AND LEGAL STRATEGIES (2022 ed.); PETER J. HENNING ET AL., CRIMINAL PRETRIAL ADVOCACY (3d ed. 2019); MARVIN G. PICKHOLZ ET AL., SECURITIES CRIMES (2d ed. 2013); LINDA E. CARTER ET AL., GLOBAL ISSUES IN CRIMINAL PROCEDURE (2011); LINDA E. CARTER ET AL., GLOBAL ISSUES IN CRIMINAL LAW (2007).

4. *White Collar Crime Prof Blog*, L. PROFESSOR BLOGS NETWORK, https://web.archive.org/web/20221031174115/https://lawprofessors.typepad.com/whitecollarcrime_blog/ (last visited July 28, 2022).

5. Professor Henning eventually left this blog to become an online writer on white collar crime for the *New York Times*. *See White Collar Watch*, N.Y. TIMES, https://www.nytimes.com/column/white-collar-watch [https://perma.cc/2NE9-N6Z6] (last visited July 28, 2022).

Although some may find authoring casebooks a less scholarly endeavor and a more pedantic process, writing with Peter in the criminal law space was always fun, intellectually stimulating, and enormously enlightening. It allowed for the mixing of substantive material with different ways to engage students in the learning of what is far from simplistic material. We had different names for the teams on books—for *Mastering Criminal Procedure* it was *co-conspirators*, and for *Criminal Law* it was *gang*. I don't think the other co-authors ever quite got it, but that was alright.

Peter approached criminal and white collar crime from a government perspective, and I tended to be quick to point out the defense side. So, there were times we were not in agreement. This was easy to accomplish in separate blog posts that allowed us to offer our individual takes on the subject matter, but accomplishing this in books was more challenging. We used three rules that are important for co-authorship—and he was an incredible co-author.

First*, if you don't agree on something, put in both sides and let the reader decide.* This rule, albeit simplistic, is particularly important for criminal law and white collar books. Not because of distinctions like the Model Penal Code and common law but rather to explain the varying views of interpreting statutes, the hallmark of criminal law. One need only look at key criminal cases with split opinions to see the multiplicity of views by Court jurists.[6]

We wrestled with this in writing a passage concerning the "rule of lenity," a topic of notable concern in the white collar arena. The rule, albeit easy to state, provides a different possible result depending on the emphasis of uncertainty or clarity in the statutory language. So, the questions in writing about the rule of lenity included discussions of when it should be used, when is it unnecessary, when it warrants mention, and whether the "rule of strict construction" or "rule of fair import" is the preferred way to approach the concept. Peter, coming from the government perspective, focused on the need not to resort to using the rule of lenity when the statute had some clarity. In contrast, I see the rule of lenity as a key defense tool in arguments of statutory interpretation. In the end, one of the passages in the book provides discussion of the rule of lenity, the rule of strict construction, and the rule of fair import, with

6. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206 (2018) (5-4 decision); Ewing v. California, 538 U.S. 11 (2003) (5-4 decision); McCormick v. United States, 500 U.S. 257 (1991) (6-3 decision); McNally v. United States, 483 U.S. 350 (1987) (7-2 decision); Terry v. Ohio, 392 U.S. 1 (1968) (8-1 decision); Mapp v. Ohio, 367 U.S. 643 (1961) (6-3 decision). Split decisions are not limited to criminal matters as constitutional law issues have been at the forefront of recent Court split opinions.

examples of a Supreme Court case and two different state statutes using the different terms.[7] Compromising perspectives in writing books is best achieved by recognizing the importance of varying perspectives and providing readers with the tools to form their own conclusions. Further, a book is enhanced in value when it presents varying considerations in explaining what may appear as concrete legal doctrine.

Second*, whenever you read an email from each other, know that it was being sent with a positive tone*. When we first started co-authoring books, email communication was not as robust as we find in today's world. Snail mail, faxes, and telephone were often means of conveying information to co-authors.

The use of email initially presented a challenge, especially when communicating quickly in back-and-forth exchanges. The exchanges often included humor and attempts at humor when trying to lighten the enormity of emails being sent and received. But they were also prone to miscommunication, especially with respect to the tone of the conversation. Early on, we realized that neither of us had time for the niceties of formal emails that would soften the exchange. So, in a telephone conversation years back, we agreed that no matter what was said in an email, we would approach it with a positive tone.

This is a simple rule that may seem unnecessary, but it is actually important when you co-author the number of books that we did together. Our success in co-authoring books was in large part because of the enjoyment we both shared for the subjects we covered.[8]

Third*, if it's a case about baseball, like Barry Bonds, or boxing's Don King, Peter gets those*. *Don't touch it, Ellen*. Peter loved sports, especially baseball. When reporters called for comments on white collar cases related to sports, I was always quick to send them to Peter. He also enjoyed finding sports-related cases to insert in the books, and throughout the years, it has been clear the students enjoy learning the legal concepts when placed in the context of a celebrity sports figure.

Most impressive was Peter's ability to use simple analogies to explain difficult concepts, many of which were sports related. Making concepts

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7. PODGOR, MASTERING CRIMINAL LAW, *supra* note 2, at 33–34 ("The *rule of lenity*, sometimes called the *rule of strict construction*, applies to criminal statutes that do not have a clear meaning or are subject to more than one possible constitutional meaning. The rule requires that the statute be interpreted narrowly to favor the accused."). The passage provides the term used in the Supreme Court decision of Cleveland v. United States, 531 U.S. 12 (2000), followed by the codification of the rule of lenity in Florida and the rule of fair import in New York. *Id*.

8. It was certainly not for financial remuneration since Peter always remarked that if we were successful with an edition, it might mean we could get a Big Mac at McDonald's.

understandable, whether it be to practitioners, the media, students, or the general public, was his forte.[9]

Peter was an incredibly fast and gifted writer, but he was also a featured speaker at conferences. He spoke at many a conference of the Southeastern Association of Law Schools (SEALS) and the Association of American Law Schools (AALS), as well as law review symposia across the United States. His articles cover the areas of public corruption, mail fraud, and cryptocurrency, just to name a few topics. The sheer number of blog posts, books, articles, and speeches is daunting, but most importantly, quality was never sacrificed.

I enjoyed many a breakfast, lunch, or dinner with him at SEALS, AALS, American Law Institute, and the dozens of symposia that we did together. It is this part that is really the most important: Peter's top priority was always his family, and in that regard, he always had his priorities in the correct order.

Peter, I miss you as a co-author, but I miss you more as a close and dear friend.

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9. *See, e.g.*, Peter J. Henning, *The Year in White-Collar Crime*, N.Y. TIMES: DEALBOOK (Dec. 29, 2014, 1:06 PM), https://archive.nytimes.com/dealbook.nytimes.com/2014/12/29/the-year-in-white-collar-crime/ [https://perma.cc/6ZQH-NDRX] ("Whistle-blowers appear to have ascended to the level of mom and apple pie as an indisputable good. So we can expect to see Congress expand programs to reward those who report violations, whether the victim is the government or a company."); Peter J. Henning, *Tattletales Embraced as Whistle-Blower Programs Gain Support*, N.Y. TIMES: DEALBOOK (Dec. 1, 2014, 9:38 AM), https://archive.nytimes.com/dealbook.nytimes.com/2014/12/01/tattletales-embraced-as-whistle-blower-programs-gain-support/ [https://perma.cc/8BM3-LGQJ] ("When we were children, one of the worst things to be known as was a tattletale. But as grown-ups, disclosing secrets that get others in trouble goes by a more favorable nickname: whistle-blower."); Peter J. Henning, *Fed's New "Cop on the Beat" Role Puts It in a Bind*, N.Y. TIMES: DEALBOOK (Nov. 24, 2014, 11:35 AM), https://archive.nytimes.com/dealbook.nytimes.com/2014/11/24/the-fed-in-a-bind/ [https://perma.cc/7563-LH7V] ("Unlike the happy ending for George Bailey, the banker in 'It's a Wonderful Life,' last week was not pleasant for Wall Street banks and their primary regulator, the Federal Reserve.").