

IS DETERRENCE RELEVANT IN SENTENCING WHITE-COLLAR CRIMINALS?

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I. INTRODUCTION

Consider, for a moment, a case involving a seventy-one-year-old defendant who has no prior convictions and turned himself in before the authorities had any inkling of his criminal conduct. He agreed quickly to plead guilty to all charges filed by the government, and none of the offenses involved violence or physical threats. He cooperated with the authorities by explaining his misconduct and turned over assets tied to his crimes. There was virtually no chance he would be trusted again, so there is no likelihood of recidivism; nor did he pose any future physical danger to society. Prior to disclosing his crimes, he was a well-respected figure on Wall Street who had a history of charitable acts along with providing generous benefits to his employees. This sounds quite a bit like the usual white-collar defendant who would be an unlikely candidate for a significant prison term¹—unless that defendant is Bernie Madoff.

Of course, Madoff is not the typical white-collar criminal, although he bears a surface resemblance to others convicted of crimes involving fraud. At his sentencing hearing, Madoff’s own lawyer described him as “deeply

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1. See Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 732–33 (2007) (“The corporate white collar offenders of today are typically individuals who have never been convicted of criminal conduct and are now facing incredibly long sentences as first offenders.”).

flawed,” a point affirmed by the many victims who provided letters and testimony about the devastation he caused while personally assuring the security of their investment.² His wife said she felt “betrayed and confused. The man who committed this horrible fraud is not the man whom I have known for all these years.”³ The federal probation office recommended a sentence of fifty years,⁴ effectively a term of life imprisonment for a seventy-one-year-old man.

But when Judge Denny Chin went even higher by imposing a 150-year sentence, the maximum allowable punishment, he spoke of its symbolic effect as reflecting retribution for the violations.⁵ He said that a “message must be sent that Mr. Madoff’s crimes were extraordinarily evil, and that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place just on paper, but that it is instead . . . one that takes a staggering human toll.”⁶ The judge went on to address a second consideration, however, discussing the deterrent effect of such a significant prison term.⁷ Judge Chin pointed out that “the symbolism is important here because the strongest possible message must be sent to those who would engage in similar conduct that they will be caught and that they will be punished to the fullest extent of the law.”⁸

There exists virtually no published criticism of the Madoff sentence, even from those who decry the lengthy incarcerations imposed on defendants convicted of drug dealing and child pornography. A news article about reforming sentences for white-collar crimes went out of its way to distance itself from Madoff and corporate executives convicted of wrongdoing, stating that “[n]o one is seeking leniency for imprisoned financier Bernie Madoff, who’s serving a 150-year sentence for bilking

2. Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 30, 2009), <http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all>.

3. *Ruth Madoff Finally Breaks Her Silence*, N.Y. TIMES DEALBOOK (June 29, 2009, 1:14 PM), <http://dealbook.nytimes.com/2009/06/29/ruth-madoff-finally-breaks-her-silence/?ref=business>.

4. Tom Hays, *Bernie Madoff Gets Maximum 150 Years in Prison*, MASS LIVE (June 29, 2009), http://www.masslive.com/news/index.ssf/2009/06/bernie_madoff_gets_maximum_150.html.

5. Sentencing Hearing Transcript at 47, *United States v. Madoff*, (No. 09-CR-213) (S.D.N.Y. June 29, 2009), <http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf>.

6. *Id.*

7. *Id.*

8. *Id.*

thousands of people of nearly \$20 billion, or fallen corporate titans whose greed drove their companies into the ground.”⁹

Who did Judge Chin intend to receive this message of deterrence—other Ponzi scheme perpetrators, and perhaps the Wall Street executives and so-called sophisticated investors who once viewed Madoff as an innovator in the stock market who was worthy of their respect? By their nature, those who consider themselves well-versed in the ways of Wall Street are unlikely to think that they would ever be in a situation like Bernie Madoff, being convicted for substantial criminal charges and facing a federal judge for sentencing. Similarly, scam artists presumably will not pause to consider a potential life sentence for their misconduct as they seek to bilk others. Thus, the deterrent effect of the 150-year prison term may never be felt by its intended targets.

If the evilness of Madoff’s scheme justifies the exorbitant prison sentence he received, then notions of deterrence would seem to be irrelevant when a crime like his causes such significant harm. Casually referring to the goal of deterring others did not seem to have an appreciable impact on the ultimate punishment, but it does hint that others should not dare to engage in a multi-year, multi-billion dollar Ponzi scheme—a warning to which no one will pay any heed.

One can argue that the crimes of Bernie Madoff were *sui generis*, so his sentencing does not contribute to our understanding of the role of deterrence in punishing white-collar offenders. So, consider the case of another defendant, Ty Warner, the billionaire owner of Ty, Inc.—the company that makes “Beanie Babies,” fueling a brief craze in the late 1990s that led collectors to pay hundreds of dollars for droll plush toys with little inherent value.¹⁰ In 2013, Warner pleaded guilty to hiding a Swiss bank account for a number of years that, at its peak, held about \$100 million, evading about \$5.5 million in taxes on its earnings.¹¹ He paid the back taxes, plus a penalty, in a civil settlement with the Internal Revenue Service. Rejecting the government’s recommendation that the court impose a prison sentence of at least some modest length for the tax

9. Eric Tucker, *Sentencing Changes Sought for Business Crimes*, DAILY NEWS (Aug. 13, 2014), <http://www.memphisdailynews.com/news/2014/aug/14/sentencing-changes-sought-for-business-crimes>.

10. See Bryan Smith, *Behind the Beanie Babies: The Secret Life of Ty Warner*, CHICAGO (Apr. 12, 2014, 10:25 AM). See generally Ellen S. Podgor, *Do We Need A “Beanie Baby” Fraud Statute?*, 49 AM. U. L. REV. 1031 (2000).

11. See David Voreacos & Andrew M. Harris, *Beanie Baby Maker Ty Warner Tax Sentence Appealed by U.S.*, BLOOMBERG BUS. (Feb. 13, 2014, 4:04 PM), <http://www.bloomberg.com/news/articles/2014-02-13/beanie-baby-maker-ty-warner-tax-sentence-appealed-by-u-s->.

violation, Judge Charles Kocoras instead opted for only probation.¹² During the sentencing hearing, the judge said that he was persuaded by a number of letters submitted on the defendant's behalf in finding that "Mr. Warner's private acts of kindness, generosity and benevolence are overwhelming. Never have I had a defendant in any case—white-collar crime or otherwise—demonstrate the level of humanity and concern for the welfare of others as has Mr. Warner."¹³

Judge Kocoras discounted the deterrent effect a prison sentence might have on others, noting that Warner's case was "highly-publicized" and "the public humiliation and reproachment Mr. Warner has experienced is manifest. Only he knows the private torment he has suffered by the public condemnation directed at him."¹⁴ In imposing a two-year term of probation and 500 hours of community service, along with a \$100,000 fine, Judge Kocoras said, "One of the considerations for me is whether society would be better off with Mr. Warner in jail or whether it would be best served by utilizing his talents and beneficence [sic] to help make this a better world."¹⁵

The Seventh Circuit affirmed the probationary sentence, finding that "[w]hile incarcerating Warner undoubtedly would have sent a *stronger* message, the message sent by his existing sentence is, in our view, strong enough"¹⁶ The circuit court tried to avoid the impression that the sentence meant that white-collar criminals will receive lighter punishment when they make a good impression, asserting that "other, more typical defendants should take no comfort in the fact that Warner avoided punishment."¹⁷ Of course, that's exactly what other defendants will do by proclaiming how close they are to a defendant like Warner, and how far away from the likes of a Bernie Madoff they are. Justifying a sentence as

12. *Id.*

13. Sentencing Hearing Transcript at 50–51, *United States v. Warner*, (No. 13 CR 731) (N.D. Ill. Jan. 14, 2014), copy on file with *Wayne Law Review*. The Judge noted that in looking at Mr. Warner's charitable contributions, he "did things that I am not aware anyone else does. Certainly, not anyone before me. And it would be unjust for me to ignore that, not measure it and say, in the end, that trumps all of the ill-will and misconduct he engaged in." *Id.* at 52.

14. *Id.* at 50.

15. *Id.* at 51. The Department of Justice filed an appeal of the sentence imposed on Warner. Matthew D. Lee, *Justice Department Files Appeal Brief in Beanie Babies Case*, TAX CONTROVERSY WATCH (May 21, 2014), <http://taxcontroversywatch.com/2014/05/21/justice-department-files-appeal-brief-in-beanie-babies-case/>.

16. *United States v. Warner*, No. 14-1330, 2015 WL 4153651, at *12 (7th Cir. July 10, 2015).

17. *Id.* at *13.

a one-off circumstance does not work very well in a system that relies on precedents for guidance and tries to treat like defendants alike.

Was the sentencing of Bernie Madoff too harsh? Was the punishment of Ty Warner too light? It is difficult to criticize Madoff's punishment when the harm suffered by the victims was so devastating, and yet 150 years was a largely meaningless gesture when a prison term of thirty or forty years would have the same effect by condemning him to spend the rest of his life behind bars. Thus, the symbolism Judge Chin referred to is not so much about general deterrence as it is about the need for retribution: society's interest in punishment is vindicated by such a prison term, even if its length has no additional impact on the defendant. In contrast, did the punishment of Warner reflect a balanced view of a wealthy individual whose otherwise exemplary life was marred by engaging in just a single instance of misconduct, albeit one that lasted over a decade? Or did his sentence send the message that the wealthy can receive a lighter punishment so long as they are reasonably generous and generate a measure of public goodwill that can be tapped if necessary? The answer is that the law tells us precious little about what is an appropriate sentence, especially for a white-collar offender.

One of the primary justifications for imposing a prison term after a conviction is that it will deter both the defendant (called "special deterrence") and those similarly situated (called "general deterrence") from engaging in future violations because the cost of committing a crime will exceed the benefit.¹⁸ But is deterrence relevant in the sentencing of white-collar defendants? It is certainly questionable whether a punishment imposed on one white-collar criminal has an impact on others because the violations are usually the product of a unique set of circumstances that allowed the crime to occur, and the offenders often do not believe they engaged in wrongdoing that needs to be deterred. General deterrence is about sending out a message, but it is one that may not be heard by its intended audience.

18. See Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 43 (2008) ("Utilitarian (or consequentialist) purposes of punishment focus on the desirable effects (mainly, future crime reduction) which punishments have on the offender being punished, or on other would-be offenders, and on the costs and undesired consequences of punishments. The most widely accepted of these purposes are the following: special (or individual, or specific) deterrence, incapacitation, and rehabilitation of the offender (because he is thought likely to commit further crimes); general deterrence of other would-be violators through fear of receiving similar punishment; and a more diffuse, long-term form of deterrence (sometimes referred to as expressive or denunciation purposes) which focuses on the norm-defining and norm-reinforcing effects that penalties have on the public's views about the relative seriousness, harmfulness, or wrongness of various crimes.").

The Supreme Court has given federal judges broad discretion in deciding the appropriate punishment for someone convicted of a crime. Congress requires judges to “impose a sentence sufficient, but not greater than necessary” to address a range of factors that includes “the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”¹⁹ These lofty considerations provide little concrete guidance to the judge contemplating the appropriate sentence. For most white-collar offenders, there are no mandatory minimum prison terms, unlike drug and child pornography cases,²⁰ so it is possible in some cases that a defendant need not be incarcerated, and only be subject to restrictions like home confinement. So we are left with the question: How much and what type of punishment is sufficient for a white-collar offender who poses little risk to the physical safety of others, often with no prior record of illegal conduct, and is, historically, a productive member of society? If the parameters for punishment in white-collar prosecutions lie somewhere between the sentences meted out to Bernie Madoff and Ty Warner, then we have almost no guidance for the appropriate punishment for this type of criminal.²¹

White-collar crimes put judges in a particularly difficult position because in most cases there will be at least some evidence to support finding that the defendant is worthy of mercy so that imposing a term of imprisonment will not improve or protect society. It is at this point that general deterrence has an important role to play, even if it may be ineffective in reaching the stated goal of convincing others not to engage in wrongdoing. Deterrence has value in the process of imposing punishment because it works to keep judges from succumbing to the impulse to see white-collar defendants in the warm light of a contrite individual who engaged in aberrational conduct but is unlikely to offend again.²² If the message of a criminal sentence is one delivered to society and not just the particular individual before the court, then deterrence

19. 18 U.S.C. § 3553(a) (West 2014).

20. *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf> (last visited Apr. 2, 2015).

21. See STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 10 (1988) (“Even though some minimal consensus on the legitimate purposes of sentencing has been reached—the usual litany includes deterrence, incapacitation, rehabilitation, and some form of either ‘desert’ or ‘retribution’—there are no standards by which these purposes can be graded and combined in individual cases.”).

22. *Id.* at 165 (“In sentencing white-collar offenders, judges are torn between leniency and severity. While deterrence pulls judges in the direction of incarceration, consideration of the effects of incarceration on the offender and on his immediate social network pulls in the opposite direction.”).

provides a meaningful avenue to ensure that punishments reflect the judicial goal of preventing future crimes regardless of whether there is any real impact on those who might succumb to the temptation to commit a crime.

II. THE CHALLENGE OF WHITE-COLLAR CRIME

Offenders that come within the category of “white-collar criminals” are generally quite different from most of those who commit ordinary street crimes. They are, for the most part, older and better educated, with no appreciable history of prior convictions or incarceration,²³ with a higher percentage of white males than the overall federal prison population;²⁴ the offenses are predominantly non-violent,²⁵ and the collateral consequences of a violation are thought to be much greater due to the likely loss of employment, social status, and the like.²⁶ As Professor Brown pointed out, “White-collar offenders, . . . except for those white-collar crimes that plainly mimic street crimes—for example, embezzling from an employer is stealing, and credit card or insurance fraud are just other forms of theft—are more reasonable, mainstream people.”²⁷

Sentencing white-collar offenders presents vexing issues in determining the appropriate punishment for conduct that may not immediately appear criminal, or that may involve amorphous victims,

23. J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1273 n.48 (1999) (“Studies have shown that white collar defendants are more likely to be white and male, better educated, and older than other defendants.”).

24. See E. Ann Carson, *Prisoners in 2013*, BUREAU OF JUSTICE STATISTICS 8 (Sept. 2014) (“Black males had higher imprisonment rates across all age groups than all other races and Hispanic males. In the age range with the highest imprisonment rates for males (ages twenty five to thirty nine), black males were imprisoned at rates at least 2.5 times greater than Hispanic males and 6 times greater than white males.”) <http://www.bjs.gov/content/pub/pdf/p13.pdf>; see also Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of A Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 774–75 (2006) (finding that 64% of the white-collar defendants sentenced were male, and 54% white, with an average age of thirty-eight years old.)

25. See STUART P. GREEN, LYING CHEATING, AND & STEALING: A MORAL THEORY OF WHITE COLLAR CRIME 35 (2006) (“White-collar crime . . . often is committed through non-violent means; causes harm that is incorporeal, such as financial loss or injury to an institution; and occurs at a nonspecific physical location over a difficult-to-define period of time.”).

26. See WHEELER et al., *supra* note 21, at 65 (“The absence of violence in white-collar cases has the additional consequence of requiring judges to distinguish between levels of harm without the benefit of the dimension of violence. This has the effect of elevating the significance of the other attributes of white collar offenses for sentencing purposes.”).

27. Darryl K. Brown, *Street Crime, Corporate Crime and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1315 (2001) [hereinafter “Brown, *Street Crime*”].

such as the “market” or a faceless organization that does not suffer in the same way that one who is robbed or assaulted would. Moreover, the defendant may pose little risk of recidivism, at least for violations that are one-time transgressions rather than a systematic theft or fraud scheme, so the notion of specific deterrence to keep the person from violating the law again can be largely irrelevant.²⁸ The need for rehabilitation is also minimal because the offenders readily grasp the seriousness of the violation—assuming they agree that a crime has been committed—and the harm resulting from the conviction on the offender, as well as third parties, may equal to or exceed the impact of the sentence.²⁹ The requirement to protect society by isolating offenders is equally minimal because there is little physical threat posed by their presence.³⁰

28. It has been noted that recidivism rates for white-collar offenders may understate the actual rate at which they violate the law, due to the complexity of pursuing these offenses. See Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286, 291 (2007) (“It is also worth noting that recidivism rates may underrepresent the actual rate at which white-collar defendants have engaged in repeated offenses. White-collar prosecutions are notoriously difficult to pursue successfully because they depend on complex financial records and often arcane regulatory schemes, and white-collar defendants are often represented by skilled and well-financed attorneys. As a result, a “first time” white-collar offender may have engaged in prior frauds without being detected, charged, and convicted.”).

29. See Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 870 (2014) (“The street offender confronts lots and lots of police officers but—aside from the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and Immigration and Customs Enforcement—no specialized police forces, no major considerations about how to deal with problems of parallel proceedings, including civil litigation, and (except with immigration offenses) no employer-sponsored policing program. Of course, the average street offender would be unlikely to care about civil liability. He lacks the assets, economic standing, and social position that typically make civil enforcement matter to a person. His additional problems--and they are serious and growing--come after conviction, in the form of extensive collateral consequences of a felony record--which also of course apply to convicted white collar offenders, who can face additional collateral effects such as professional or industry debarment.”); Podgor, *supra* note 1, at 739 (“Unlike the plumber or gardener, a white collar offender is often unable to return to his or her livelihood after serving imprisonment. Licensing, debarment, and government exclusion from benefits may preclude these professionals from resuming the livelihoods held before their convictions.”).

30. Cf. Elizabeth Fuebacher, *Fuebacher '13.5: Reduce jail time for white-collar crime*, BROWN DAILY HERALD (Feb. 21, 2014), <http://www.browndailyherald.com/2014/02/21/reduce-jail-time-white-collar-crime/> (“Theoretically, prison serves two purposes: to contain an offender so he cannot harm others and to provide a sufficiently unpleasant experience so he is deterred from undertaking future felonious actions. . . . For securities fraud or RICO Act violations, treble damages can be imposed against perpetrators. These people are required not only to compensate the government for misappropriated profits or avoided losses but also to pay hefty penalties. Hence, incarceration for people who have already returned their gains is inordinate. This assessment is particularly relevant for the majority of insider traders,

People who operate in the white-collar world seem to be the likeliest candidates to be aware of a prison sentence imposed on someone in the same industry, and to respond by avoiding future misconduct, even for actions that may appear to be typical in the modern business environment. Headline generating punishments like the 150-year prison term for Bernie Madoff,³¹ to the eleven years given to Raj Rajaratnam for insider trading,³² ought to have a substantial deterrent effect because the business community pays attention to what happens to its members. Of course, there is no way to measure the amount of actual deterrence, because there are no reliable statistics which show how many crimes do not occur because of a fear of being caught and punished. Those who obey the law, for whatever reason, constitute the great majority of individuals, and it is difficult to assess what role prosecutions and punishments play in their decision to live law-abiding lives.

For those who do engage in white-collar crimes, a recent study of sentences given for insider trading shows a 31.8% increase over a five-year period ending in December 2013, as compared to the previous five years.³³ It should be noted that the average insider trading sentence moved from 13.1 months to 17.3,³⁴ which is not exactly draconian when compared to the prison terms handed out for drugs and child pornography. The average sentence for fraud has increased by about 30% between 2006 and 2013, increasing from 18.6 months to 24 months.³⁵ Spending eighteen months to two years in prison is no picnic, especially when many are first-time offenders who have never had a serious brush with the law before and are unaccustomed to prison life.³⁶

whose gains are inconsequential in terms of harming society. Let's be honest: A few million dollars generated in profits from private information is insignificant in the grand scheme of things. So long as they return their ill-obtained funds and are fined, these individuals do not need to be jailed.”).

31. See *supra* note 5 and accompanying text.

32. Susan Pulliam & Chad Bray, *Trader Draws Record Sentence*, WALL ST. J. (Oct. 14, 2011), <http://www.wsj.com/articles/SB10001424052970203914304576627191081876286>.

33. Nate Raymond, *Insider Traders in U.S. Face Longer Prison Terms*, REUTERS (Sept. 2, 2014), <http://www.reuters.com/article/2014/09/02/us-insidertrading-prison-insight-idUSKBN0GX0A820140902>.

34. *Id.*

35. Mark H. Allenbaugh, “*Drawn From Nowhere*”: A Reivew of the U.S. Sentencing Commission’s White-Collar Guideines and Loss Data, 26 FED. SENT. R. 19, 19 (2013).

36. Consider the view of Richard Bistrong, who was sentenced to prison for paying overseas bribes in violation of the Foreign Corrupt Practices Act, about the impact of prison on a white-collar offender:

The loss of liberty, even for my own fourteen and a half-months, is an awful experience, and no amount of personal financial or corporate upside is worth that price. While my time at the Federal Camp at Lewisburg passed without incident, and

But the increased sentences for a quintessential white-collar crime like insider trading, whose perpetrators have included corporate chieftains³⁷ and billionaire investors,³⁸ should be expected to have an appreciable deterrent effect on others. One might surmise that there would be a sharp—or at least perceptible—decline in the number of offenses involving economic crimes as the punishments imposed have increased, which in a few cases have amounted to effectively imposing a life sentence.³⁹

The general perception that the amount of white-collar crime is on the increase is, conversely, quite apparent—at least if one looks at the attention lavished by the media on prominent cases involving insider trading, interest rate manipulation, and the like.⁴⁰ The United States

I used my time to help others with their educational challenges as a GED and English as a Second Language instructor, the time away from family and friends can never be replaced. I missed events in the life of my family from which there are no “re-enactments.”

The impact of saying good bye to a wife and children knowing that your only remaining contact will be in a visiting room for an extended period of time is nothing but traumatic. Trying to “coach” my children through their college and grad-school application processes via time delayed e-mails and limited phone calls, was difficult at best. Using up phone minutes before the end of a month knowing you won’t get to hear the voices of loved ones until they re-up next month was a gut-wrenching experience. It is not worth it, not even close.

Richard Bistrong, *Deterrence, You Had Me At “Being Caught”*, RICHARD BISTRONG FCPA BLOG (July 7, 2014), <http://richardbistrong.blogspot.com/2014/07/deterrence-you-had-me-had-likelihood-of.html>.

37. See, e.g., *United States v. McDermott*, 245 F.3d 133 (2d Cir. 2001) (Prosecution of the former president, CEO and Chairman of investment bank Keefe Bruyette & Woods).

38. See, e.g., *United States v. Rajaratnam*, 719 F.3d 139, 144 (2d Cir. 2013) *cert. denied*, 134 S. Ct. 2820 (U.S. 2014) (Prosecution of the fraud of hedge fund Galleon Group, which “at its pinnacle . . . employed dozens of portfolio managers, analysts, and traders, and invested billions of dollars of client funds.”); see also *S.E.C. v. Cuban*, 620 F.3d 551 (5th Cir. 2010) (The SEC pursued civil insider trading charges against Mark Cuban, the billionaire owner of the Dallas Mavericks, but a jury ultimately ruled in his favor after a trial).

39. In addition to Bernie Madoff, others receiving significant prison terms for large scale frauds that in all likelihood exceed their reasonable life expectancy include R. Allen Stanford (110 years), Scott Rothstein (50 years), and Thomas Petters (50 years). See Joe Palazzolo, *A Reordering of the Top 10 White Collar Prison Sentences?*, Wall St. J. (Dec. 11, 2013, 6:16 PM), <http://blogs.wsj.com/law/2013/12/11/a-reordering-of-the-top-10-white-collar-prison-sentences/>. The longest fraud sentence appears to be the 835-year prison term imposed on Sholam Weiss for perpetrating a fraud that led to the collapse of a life insurance company, costing customers \$125 million. See Middle District of Florida U.S. Attorney’s Office, *Court of Appeals Affirms Sholam Weiss’ Convictions on Racketeering, Fraud, and Money Laundering Charges*, FED BUREAU INVESTIGATION (Sept. 24, 2013), <http://www.fbi.gov/tampa/press-releases/2013/court-of-appeals-affirms-sholam-weiss-convictions-on-racketeering-fraud-and-money-laundering-charges>.

40. See DAVID WEISBURD, STANTON WHEELER, ELIN WARING & NANCY BODE, *CRIMES OF THE MIDDLE CLASS: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS* 183 (1991)

Attorney for the Southern District of New York, Preet Bharara, was pictured on the cover of *Time* magazine behind the headline “This Man is Busting Wall St.”⁴¹ The ignominious “perp walk” once used for mobsters is now applied to defendants from the business world who present no apparent risk of violence—although it makes for a nice picture on the front page of the newspaper. The widespread view that white-collar crime is on the rise is further reinforced by the absence of criminal cases from high profile events like the financial crisis. Many lament the lack of prosecutions related to the creation and marketing of subprime mortgage-backed securities, contending that much less money would have been lost if not for the fraudulent acts of Wall Street executives.⁴² Add to that the belief that white-collar crimes usually have a much greater economic impact because of the large number of potential victims, and the view that it poses a significant threat to society is easily understood.⁴³

Gathering reliable data on white-collar crime is difficult because there are so many different offenses that fall within the category, at least as compared to the traditional common law crimes like murder, robbery and assault. The primary statistical reporting system for crimes focuses mainly on street crimes that are prosecuted at the state and local level, not white-collar crimes that are more often the subject of federal investigation.⁴⁴ Part

(“We believe that ordinary people are committing white-collar crime in increasing numbers. One reason is that ordinary people now have greater access to the white-collar world of paper fraud.”); Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 L. & CONTEMP. PROBS. 53, 54 (2013) (“Whether driven by public interest or schadenfreude, media coverage gives these cases of financial scandal and public corruption a profile disproportionate to their number.”) [hereinafter “Richman, *White Collar Sentencing*”].

41. *This Man Is Busting Wall Street*, TIME (Feb. 13, 2012), <http://content.time.com/time/covers/0,16641,20120213,00.html>.

42. As Professor Richman put it quite well:

Once we put bad analogies aside and squarely try to figure out whether widespread criminal misconduct drove—or was even associated with—the financial crisis, we face one of the classic accountability problems in federal criminal law: since a financial collapse is not itself evidence of criminal conduct, and white collar criminal activity is rarely revealed with any clarity except by those responsible for prosecuting crimes, how does one assess the adequacy of those prosecutorial efforts?

Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 268 (2014).

43. See WHEELER et al., *supra* note 21, at 2–3 (“But white-collar crimes are probably *more* significant than street crimes from a purely economic perspective, and such crimes often have the capacity to weaken trust and faith in the basic institutions of society.”).

44. See CYNTHIA BARNETT, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA, http://www.fbi.gov/stats-services/about-us/cjis/ucr/nibrs/nibrs_wcc.pdf (last visited Apr. 10, 2015) (“The preference toward street crime reflected in [the National Incident-Based Reporting System] is a result of the fact that state and local agencies, not federal agencies, were originally surveyed during the

of the problem is the inadequacy of measures typically used to track crime, such as police crime reports and victim surveys. There are no calls to the local police to report tax evasion, and it is the rare case in which inflated corporate revenue or misreported costs are noticed until long after the filing of an audit report.⁴⁵ These are crimes built on deception, and their commission is rarely apparent to the casual observer, unlike when a package of heroin is intercepted or a body is found with multiple gunshot wounds, so that it is obvious a crime took place.

Even looking at those cases that develop to the point at which charges are filed, white-collar crimes are relatively small in number. For example, at the federal level, in April 2014, the Department of Justice reported filing 640 new prosecutions for white-collar crimes, and the peak number in the past few years has been about 1,000 cases in a month.⁴⁶ In 2010, fraud offenses constituted approximately 10% of the arrests for federal crimes, totaling 15,685 individuals, while arrests for immigration (82,438) and drug (28,850) offenses constituted approximately 62%.⁴⁷ State prosecutions focus more on common street offenses involving property theft, drugs, and familial violence than more sophisticated economic crimes, although there are exceptions, such as the New York City District Attorney.⁴⁸ For a crime like obstruction of justice, the volume of

development stage. White collar crime usually falls under the jurisdiction of federal agencies, and so specialized offenses (i.e., those not considered fraud, embezzlement, counterfeiting, or bribery) are not as well represented in NIBRS offense categories as are street crimes.”).

45. See Richman, *White Collar Sentencing*, *supra* note 40, at 64 (“This is a world where reporting ‘victims’ have often not suffered their losses as a result of criminal conduct, and where real ‘victims’ of crimes are often unaware.”).

46. See *White Collar Crime Prosecutions for April 2014*, TRAC REPORTS, http://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthlyapr14/fil/ (last visited Apr. 10, 2015).

47. MARK MOTIVANS, U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2010 – STATISTICAL TABLES (2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

48. See Martin F. Murphy, *No Room at the Inn? Punishing White-Collar Criminals*, 40 JUN B. B.J. 4, 16 (“So long as local district attorneys’ offices and local police departments see that street crime is the public’s top priority, there is no reason to believe that they will be able to devote more than a small fraction of their limited resources to the investigation and prosecution of white-collar crime. The defendants that state court judges are likely to see, and have occasion to sentence, will continue to be mostly armed robbers, drug dealers, house-breakers, and rapists, not white-collar defendants.”). The New York District Attorney’s Office in Manhattan helped investigate money laundering and violations of the economic sanctions laws, participating in settlements along with the Department of Justice and civil regulatory agencies. See Susanne Craig & James C. McKinley Jr., *BNP Paribas Guilty Plea Is Latest Big Settlement to Bolster New York State’s Fiscal Position*, N.Y. TIMES (July 2, 2014), <http://www.nytimes.com/2014/07/02/nyregion/bnp-paribas-guilty-plea-is-latest-big-settlement-to-bolster-new-york-states-fiscal-position.html> (noting that

prosecutions for crimes in the federal system is fairly small, usually numbering less than 200 per year, as compared to the thousands of drug and immigration offenses. So the reduced number of cases is unlikely to have much deterrent effect unless one case happens to catch the general public's attention.⁴⁹

That is not to say white-collar crime is unimportant or not worthy of the attention prosecutors and investigators give it. Ponzi schemes that are modest compared to Bernie Madoff's multibillion dollar fraud still affect thousands of individuals who lose a significant portion of their life savings, along with similar scams involving advanced loan fees and worthless investments that routinely inflict enormous damage on individuals and small businesses. The FBI estimates that fraud affects from three to ten percent of health care billings, which are over \$500 billion a year.⁵⁰ What might look like modest accounting maneuvers can lead to significant losses in a company, which can trigger the loss of thousands of jobs. While one might have little sympathy for the government when it loses tax revenue, or for a defrauded insurance company or bank, the costs of white-collar crimes are spread throughout the economy so that everyone feels the effect.⁵¹

the New York District Attorney received \$2.2 billion from a settlement with BNP Paribas for violating economic sanctions law); Jessica Silver-Greenberg, *HSBC to Pay Record Fine to Settle Money-Laundering Charges*, N.Y. TIMES DEALBOOK (December 11, 2012, 2:17 p.m.), <http://dealbook.nytimes.com/2012/12/11/hsbc-to-pay-record-fine-to-settle-money-laundering-charges/> (noting that a HSBC money laundering settlement included a deferred prosecution agreement with New York District Attorney).

49. See Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 741–42 (2013) (“Following the passage of Sarbanes-Oxley, there was only an average of 182 prosecutions per year in which obstruction of justice was the most serious offense charged. While this was significantly more than during the period before 2002, this is hardly a number that will convince potential offenders that the risk of apprehension outweighs the potential gains from their conduct. While Congress may have intended a much larger increase in focus on obstruction offenses, such focus did not materialize; consequently, these reforms are unlikely to yield substantial results. If Congress truly wanted to deter obstruction of justice offenses, it should have dramatically increased funding for law enforcement focus and casework in this area, rather than turning to overcriminalization once again.”).

50. See FEDERAL BUREAU OF INVESTIGATION, FINANCIAL CRIMES REPORT TO THE PUBLIC, 2010-2011, <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011>.

51. See Jorgen Wouters, *One in Four Households Victim of White Collar Crime: Report*, DAILYFINANCE (Dec. 13, 2010, 3:23 PM) (noting that white-collar crime affects more Americans than any other type of crime).

III. DETERRENCE AND RETRIBUTION

“[T]here can be no case in which the law-maker makes certain conduct criminal without his thereby showing a wish and purpose to prevent that conduct. Prevention would accordingly seem to be the chief and only universal purpose of punishment.”⁵²

The two primary justifications cited for imposing punishment for conduct deemed criminal are deterrence and retribution, sometimes called “just deserts.” While other rationales have been offered, such as incapacitation and rehabilitation, most theories of punishment revolve around these two concepts. Deterrence, which is an expression of utilitarianism, is a determination that a particular punishment will be sufficient to create a benefit to society by preventing future misconduct over the costs of investigating, prosecuting, and (where necessary) incarcerating.⁵³ Under an economic analysis of the criminal law pioneered by Professor Becker in 1968,⁵⁴ deterrence occurs where a potential offender will commit a crime only if the benefits exceed the expected sanction, so that increasing the likelihood and amount of punishment should reduce the rate of offenses.⁵⁵

There are two types of deterrence: specific and general.⁵⁶ The former focuses on limiting the defendant’s recidivism by incapacitating the person for a period of time and demonstrating the cost of future violations, especially under statutes that impose enhanced punishment on repeat offenders.⁵⁷ The latter is concerned with preventing others from engaging in similar misconduct in the future, focusing on communicating a message that other violators will be punished similarly.⁵⁸ There are three

52. O.W. HOLMES, JR., *THE COMMON LAW* 46, 1 (1881).

53. See Darryl K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 AM. CRIM. L. REV. 73, 74 (2012) (“Utilitarianism, the most prominent version of a consequentialist theory, assesses acts and institutions on whether they produce a net benefit, and this is the typical consequentialist ground by which criminal punishment is assessed—whether gains in crime reductions are greater than the costs of punishment policy.”) [hereinafter “Brown, *Criminal Law Theory*”].

54. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

55. See Murat C. Mungan, *The Law and Economic of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 170 (2012).

56. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution As an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (“Deterrence treats punishment as a tool of social control and protection, employing its threat as a disincentive to dissuade potential criminals from offending (*general* deterrence), or its experience to dissuade a particular criminal from reoffending (*specific* deterrence).”).

57. See *id.*

58. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 425 (1999) (“Deterrence theorists typically assess the efficiency of a punishment for its

components to an effective deterrent: “The greater the perceived certainty, severity, and swiftness of punishment, the lower the crime rate will be.”⁵⁹ Studies have shown that certainty of punishment is the principle factor in assessing the success of a deterrent, so that increased spending on detection will have more of an appreciable impact on the crime rate than increasing the level of punishment imposed on those convicted of a violation.⁶⁰ Even a greater likelihood of being caught will not have much impact in deterring a violation if the timing of a prosecution is delayed long enough so that the miscreant discounts the effect of any punishment.⁶¹

Unlike the consequentialist approach, retribution mirrors society’s moral judgment that certain conduct deserves punishment that reflects the seriousness of the crime, usually measured by the harm it caused.⁶² The punishment imposed demonstrates the community’s disapproval of the conduct, so what is communicated to the defendant, and society at large, is the extent of disapprobation—and even indignation or anger—at what the person did and how others suffered because of the misconduct.⁶³ The proposed revision to the Model Penal Code provides that sentencing starts from the premise that punishment for a crime should be “proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders,” while other goals, such as rehabilitation or incapacitation, should be considered “within the boundaries of

contribution to both ‘general deterrence,’ which refers to the effect that punishing a particular offender has on the behavior of the population generally, and to ‘specific deterrence,’ which refers to the impact of a punishment on the offender’s own behavior, a usage that brings the aim of incapacitation within the ambit of deterrence broadly understood.”).

59. Gary Kleck, Brion Sever, Spencer Li & Marc Gertz, *The Missing Link in General Deterrence Research*, 43 *CRIMINOLOGY* 623, 625–26 (2005).

60. See Carlton Gunn & Myra Sun, *Sometimes the Cure is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet*, 38 *HUM. RTS.* 9, 12 (2011) (“A wealth of studies suggest, perhaps especially in the case of white-collar offenders but also more generally, that it is the certainty of punishment, i.e., the certainty of being caught, that deters more than the extent of punishment once caught.”).

61. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 *GEO. L.J.* 949, 954 (2003) (“[A] delay between violation and punishment can dramatically reduce the perceived cost of the violation. Even if the punishment is certain, the more distant it is, the more its weight as a threat will be discounted.”).

62. See Cotton, *supra* note 56, at 1315–16 (“[P]unishment is directed at imposing merited harm upon the criminal for his wrong, and not at the achievement of social benefits.”).

63. See Joel Feinberg, *The Expressive Function of Punishment*, *WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT* 113 (Michael Tonry ed. 2011) (“[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of either the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”).

proportionality.⁶⁴ Retribution is more emotive than deterrence, reflecting a judgment of the offender's character as interpreted through the person's choice to engage in criminal conduct and the resultant harm; that character judgment leads to the determination of a reasonable punishment, even if there is no broader benefit to society from imposing a sanction.⁶⁵

Victim impact statements can be an important component to the sentencing process because they help the court assess the actual harm resulting from the illegal conduct.⁶⁶ Nine victims spoke at Madoff's sentencing, telling of the pain his actions caused them.⁶⁷ When Judge Chin spoke about the symbolic meaning of the 150-year sentence, he pointed out that it was not "mob vengeance," but that the punishment "may, in some small measure, help these victims in their healing process."⁶⁸ Thus, the prison term was largely an appeal to the retributive demand of society for the harm Madoff inflicted.

If deterrence were the sole, or even primary, goal of punishment, then a reasonable argument can be made that a system of fines would be more efficient than incarceration, at least for white-collar offenders. As then-Professor Posner (before his appointment to the federal bench) once put it, "[F]ining the affluent offender is preferable to imprisoning him from society's standpoint because it is less costly and no less efficacious."⁶⁹ At

64. See Alice Ristroph, *How (Not) to Think Like A Punisher*, 61 FLA. L. REV. 727, 728–29 (2009) ("When the Code retreats to retributive or desert theory as a source of sentencing reform, it appeals to indeterminate and unpredictable principles that threaten to undermine the new provisions' more salutary proposals.").

65. See Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 765 (2005) ("A venerable deontological tradition with roots in Kantian retributivism holds that punishment is justified only as a response to wrongdoing by the offender and not by its consequential effects."); Cotton, *supra* note 56, at 1315–16 ("Retribution, as distinguished from utilitarian purposes, is conceived as necessary even when social benefit will not be achieved."); Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1025 (1991) ("Retributivism . . . displays its Kantian roots in that it rests on a foundation of respect for persons as beings capable of directing their actions through the exercise of reason.").

66. See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM L. 611, 632 (2009) ("Victim impact statements reveal information about the crime—and particularly about the harm of a crime—which makes them quite relevant to a core purpose of sentencing: ensuring that the punishment fits the crime. Proper punishment cannot be meted out unless judges and juries know the dimensions of the crime and the harm it has caused.").

67. Madoff Sentencing Transcript, *supra* note 5, at 4.

68. *Id.* at 49.

69. Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980). He explained the reasoning in this way:

its core, the consequentialist approach to punishment relies on the ability of similarly situated individuals to comprehend when the costs of illegal—or at least highly suspect—conduct outweigh the benefits and then react rationally to that determination.⁷⁰ Of course, the rational decision-maker may view the fine as a form of taxation and so will factor in that cost in deciding whether to act, unless it is so expensive as to render any decision to proceed uneconomical; however, that could violate the constitutional prohibition on excessive fines.⁷¹ Unlike the moral underpinnings of retribution, deterrence is a more neutral assessment of costs and benefits, so that a significant punishment, including long prison terms, can be justified without regard to a defendant's circumstances, so long as the benefit to society is sufficient.⁷²

In a social cost-benefit analysis of the choice between fining and imprisoning the white-collar criminal, the cost side of the analysis favors fining because . . . the cost of collecting a fine from one who can pay it (an important qualification) is lower than the cost of imprisonment. On the benefit side, there is no difference in principle between the sanctions. The fine for a white-collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would have been imposed instead.

Id.

70. See Brown, *Street Crime*, *supra* note 27, at 1325 (“[D]eterrence rhetoric implies that defendants are rational, reasonable actors who can be expected to respond sensibly to incentives. This is one reason why, for corporate wrongdoing, civil sanctions often seem appropriate substitutes for criminal sanctions. When all we are trying to do is deter bad conduct and foster socially desirable behavior, a civil fine can prompt a rational response from actors as well as a criminal one.”).

71. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). See Michael D. Silberfarb, Note, *Justifying Punishment for White-Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act*, 13 B.U. PUB. INT. L.J. 95, 102 (2003) (“Although properly distributed criminal fines are perhaps the most efficient and effective means of deterring corporate crime and expressing society’s condemnation, Congress must supplement these fines with other forms of punishment. Otherwise, potential offenders will view the fines as a mere tax.”).

72. See Brown, *Street Crime*, *supra* note 27, at 1296 (“Deterrence . . . has no role for judgment of an offender’s fault or culpability except to the extent that expressing such judgments furthers the deterrent effect of punishment.”). A retributivist argument against the consequentialist approach is that it can be used to justify imposing punishment on an innocent person. See Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 870–71 (2002) (“Because retributivism’s justification for punishment is based on the desert of the punished, and an innocent presumably does not deserve to be punished, it would seem that retributivism cannot justify punishment of the innocent. Consequentialist theories are susceptible to the criticism precisely because they justify punishment by the good consequences to be attained by punishment. If one of the good consequences sufficient to justify punishment, for example, general deterrence, may be attained by punishment of the innocent, then punishment of the innocent is justified under consequentialism.”).

IV. DOES DETERRENCE WORK FOR WHITE-COLLAR CRIMES?

*“Seeing many things, but thou observest not; opening the ears, but he heareth not.”*⁷³

In the federal system, Congress has directed sentencing judges to consider both deterrence and retribution when imposing punishment on the convicted defendant. The factors the court must take into account, after first ascertaining the recommended range of punishment provided by the Federal Sentencing Guidelines, are the need for a sentence to be a “just punishment for the offense” while affording “adequate deterrence to criminal conduct . . .”⁷⁴ The judge should also look to “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,”⁷⁵ so that there is a measure of uniformity among sentences. Professor Brown noted that the “debate tends to center on the relative weight that should be accorded to desert and to deterrence or incapacitation when making punishment decisions.”⁷⁶

Talk of deterrence seems to be the primary reason for the imposition of a range of increasingly harsh punishments in white-collar cases, including fines doled out to corporations for civil and criminal violations. Even before the advent of the Federal Sentencing Guidelines, federal judges viewed the punishment imposed for white-collar crimes almost exclusively in terms of deterrence.⁷⁷ The sentences imposed today for white-collar offenses are much higher, and judges continue to justify them on the basis of deterrence.⁷⁸ For example, Peter Madoff received a ten year prison term for his role in the massive Ponzi scheme of his brother, Bernie Madoff, although he claimed ignorance to what was actually going on—something the government seemed to accept in agreeing to let Peter plead guilty to charges of filing false documents and lying to regulators, but not helping perpetrate the fraud.⁷⁹ At the sentencing hearing, Judge Laura

73. *Isaiah* 42:20 (King James).

74. 18 U.S.C. § 3553(a)(2)(A)–(B) (West 2014).

75. *Id.* § 3553(a)(6).

76. See Brown, *Criminal Law Theory*, *supra* note 53, at 75.

77. See Kenneth Mann, Stanton Wheeler & Austin Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 482 (1980) (“In the white-collar area, . . . the sentencing purpose and rationale tends to be unidimensional: judges are concerned with general deterrence, deterring other persons in similar positions from engaging in the same or like behavior. They tend not to be concerned at all with rehabilitation or incapacitation and . . . only minimally with punishment.”).

78. See *infra* note 80 and accompanying text.

79. See Peter Lattman & Diana B. Henriques, *Peter Madoff Is Sentenced to 10 Years for His Role in Fraud*, N.Y. TIMES DEALBOOK (Dec. 20, 2012 5:59 PM),

Taylor Swain noted that he had “been an inspiration and a witness for faith and selflessness in the lives of many, that is clear,” and found no likelihood that he would ever engage in misconduct again.⁸⁰ Yet, Judge Swain imposed a significant prison term because “[t]he consequences of such behavior must be harsh to help deter others from taking the path of dishonest and theft.”⁸¹

A. Corporate Deterrence

On the corporate front, there have been a number of significant penalties accepted by banks in settlements with the Department of Justice and other agencies for their role in shoddy subprime mortgage lending and the packaging of those loans into securities sold to other investors. Among the fines are \$5 billion paid by Bank of America⁸² and \$2 billion from J.P. Morgan.⁸³ The head of the S.E.C.’s Enforcement Division talked about seeking increased civil monetary penalties from companies for securities law violations, stating that “[m]onetary penalties speak very loudly and in a language any potential defendant understands.”⁸⁴

At least where corporate misconduct takes place, the deterrent message from a fine, even one counted in the billions of dollars, will not necessarily be heard outside of the particular industry in which the company operates. It is certainly true that companies have responded to how prosecutors and civil regulators have stepped up policing of corporate misconduct by ramping up compliance programs, even creating separate

<http://dealbook.nytimes.com/2012/12/20/peter-madoff-is-sentenced-to-10-years-for-his-role-in-fraud/>.

80. Sentencing Hearing Transcript at 28–29, *United States v. Peter Madoff*, No. 10-CR-228 (LTS) (S.D.N.Y. Dec. 20, 2012), *available at* <http://www.justice.gov/usao/nys/madoff/cckfinads.pdf>.

81. *Id.* at 29; *see* WHEELER et al., *supra* note 21, at 131 (“When harsher criminal penalties are called for, it is almost always in the belief that potential criminals, acting rationally, will be deterred from committing crimes by the threat of heavier penalties. Judges are not immune to these influences, and it is not surprising that general deterrence is often an important goal for them in their sentencing.”).

82. Press Release, U.S. Dept. of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), <http://www.justice.gov/opa/pr/2014/August/14-ag-884.html>.

83. Press Release, U.S. Dept. of Justice, Justice Department, Federal and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), <http://www.stopfraud.gov/iso/opa/stopfraud/2013/13-ag-1237.html>.

84. Jean Eaglesham, *SEC Ramps up Fine Amounts to Deter Misconduct*, WALL. ST. J. (Oct. 1, 2013, 3:38 PM), <http://online.wsj.com/news/articles/SB1000142405270230391880457910955414946053>.

departments to handle this function.⁸⁵ But whether management at one company knows what actually happened in another organization or will internalize the threat of sanctions by altering operations is at least an open question. Unlike an individual who can visualize being in a similar position to someone who is punished, it is unlikely corporate officers will consider themselves comparable when only the organization is punished.

The business operations that generate such large penalties usually involve hundreds or even thousands of workers, few of whom may see a fine imposed on one company as having much effect on their personal actions, even though the company itself may be penalized for their misconduct. And the paradox of a fine imposed on a public corporation is that current shareholders pay the price for misconduct, not the officers or directors responsible for the violations. The violation usually occurred years in the past, well before many shareholders acquired their stake, so the notion that a monetary penalty will have any deterrent effect by encouraging companies to monitor management more closely creates a “mismatch between the shareholders that benefit from misconduct and those that are ultimately punished [that] undermines this rationale.”⁸⁶

B. The Impact of Longer Sentences

Even if organizations and their agents are unlikely to be deterred by criminal punishments imposed only on the company, one might expect that individuals would be influenced by the sentences imposed on others and thereby avoid engaging in conduct that can trigger a prosecution. Research shows, however, that the deterrent effect of punishment is minimal for both street crimes and white-collar offenses,⁸⁷ while the likelihood of

85. See Michele DeStefano, *Creating A Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 72–73 (2014) (“Over the past few decades, as corporate criminal liability rules, sentencing guidelines, and settlement incentives have changed, there has been increased emphasis on and resources devoted to the compliance function at large publicly held companies. What might have been thought of twenty years ago as a basic corporate governance function is now being ceded to compliance departments. These compliance departments are generally in charge of monitoring and ensuring compliance with legal obligations and ethical standards beyond those legally required.”).

86. David B. Rivkin Jr. & John J. Carney, *Corporate Crime and Punishment*, WALL ST. J. (Mar. 14, 2013, 7:22 PM), <http://online.wsj.com/news/articles/SB1000142412788732412850457834450242081548>. The authors go on to point out that “[i]n the large number of settlement scenarios where actual guilt isn’t the most pressing or relevant consideration, the fines don’t by definition deter any future misconduct.” *Id.*

87. See Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 493 (1999) (“Empirical support regarding deterrence of conventional street crimes is inconclusive . . . Although the subject has been researched less extensively, the results of

detection and swift adjudication has a far greater impact.⁸⁸ It is the likelihood of a conviction, not just the severity of the punishment, that influences how individuals act when deciding to pursue a criminal aim.⁸⁹

But at least those who operate in the white-collar world seem to be prime candidates for the message of deterrence from increased punishment, given their education, higher social and economic standing that would be negated upon conviction, and greater fear of incarceration.⁹⁰ As Professors Robinson and Darley noted, “We can expect greater deterrent possibilities when dealing with more rational target audiences, such as white collar offenders.”⁹¹ If that supposition is correct, then one might surmise that white-collar crime would start to decline, or at least level off, in response to increased sentences for economic offenses and high-profile signature punishments like the 150-year prison term imposed on Bernie Madoff.

Yet the number of prosecutions for economic crimes, coupled with continuing media attention, would seem to indicate there has been little appreciable impact from the hefty sentences meted out for white-collar crimes. In 2005, the chief executive of WorldCom, Bernie Ebbers,

white-collar crime deterrence studies show a similar inconsistent pattern. There is lukewarm support for the position that criminal penalties effectively deter corporate crime.”).

88. *Id.*

89. *Cf.* Sally S. Simpson & Christopher S. Koper, *Deterring Corporate Crime*, 30 CRIMINOLOGY 347, 348 (1992) (“[C]ertainty of sanction is more important than severity.”); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 61 (2003) (“Under deterrence theory, severity is only one of three factors that affect a sanction’s deterrent value; certainty and celerity (or swiftness of punishment) are equally, if not more, important.”).

90. *See* David Weisburd, Elin Waring, & Ellen Chayet, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 CRIMINOLOGY, 587, 589 (1995) (“White-collar crime is seen as a highly rational form of criminality, in which the risks and rewards are carefully evaluated by potential offenders, and white-collar criminals are assumed to have much more to lose through sanctions than more common law violators.”); NEAL SHOVER & ANDY HOCHSTATLER, CHOOSING WHITE COLLAR CRIME 172–73 (Alfred Blumstein & David Farrington eds., 2006) (“There is reason to suppose . . . that white-collar offenders may be positioned ideally for learning the lessons of imprisonment. Prison is painful for them in ways that differ from the pains of the typical street offender If nothing else, it shocks and forces them to confront the fact that many people take their crime seriously.”); Carl Emigholz, Note, *Utilitarianism, Retributivism, and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement*, 58 RUTGERS L. REV. 583, 609 (2006) (“White-collar offenders are considered to be more deterrable than their street-crime counterparts; they have more to lose monetarily and in community standing, and their crimes are often calculated to bring about a specific profit.”).

91. *See* Robinson & Darley, *supra* note 61, at 956.

received a twenty-five-year prison sentence for accounting fraud that contributed to the company's downfall.⁹² A decade later, the chief executive of ArthroCare, Michael Baker, was sentenced to twenty years for orchestrating a fraudulent scheme to inflate revenue, which, when revealed, caused the company's shares to lose \$750 million in value.⁹³ Corporate executives intent on playing with the company's books seem to pay little heed to the possibility of being sent to prison for a number of years.⁹⁴ As two practitioners pointed out, "At some point, piling on even stiffer maximum sentences for financial crimes produces diminishing, if any, deterrence results; after twenty-five years for securities fraud, what is left—'life' imprisonment?"⁹⁵ And the impact of prison sentences on the recidivism rate is no greater for white-collar offenders than for those who commit street crimes.⁹⁶

Deterrence has little impact for economic crimes when there is a low probability of being caught.⁹⁷ In nineteenth-century England, crowds at public executions of those convicted of pickpocketing were often the

92. See *United States v. Ebbers*, 458 F.3d 110, 117 (2d Cir. 2006) ("WorldCom disclosed the fraud to the public on June 25, 2002. WorldCom's stock collapsed, losing 90% of its value, and the company filed for bankruptcy.").

93. Press Release, U.S. Dept. of Justice, Former ArthroCare Executives Sentenced for Orchestrating \$750 Million Securities Fraud Scheme (Aug. 29, 2014), <http://www.fbi.gov/sanantonio/press-releases/2014/former-arthrocare-executives-sentenced-for-orchestrating-750-million-securities-fraud-scheme>.

94. See A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 12 (1999) ("[F]or individuals who commit white-collar crimes, the disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment. Thus, such individuals are likely to be risk preferring in imprisonment, which suggests that less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal.").

95. Daniel V. Dooley & Mark Radke, *Does Severe Punishment Deter Financial Crimes?*, 4 CHARLESTON L. REV. 619, 657 (2010).

96. See WEISBURD et al., *supra* note 40, at 598 ("In comparing groups of offenders who did and did not receive a prison sanction, we find little impact of prison on the long-term likelihood of reoffending."). One reason for the minimal impact of a prison sentence may be that "a short prison stay . . . may not provide more than a marginal impact beyond the experience of prosecution, conviction, and sentencing." *Id.* at 599.

97. *But see* Pamela H. Bucy et al., *Why Do They Do It?: The Motives, Mores, and Character of White Collar Criminals*, 82 ST. JOHN'S L. REV. 401, 435 (2008) ("The insight that there are two general groups, 'leaders' and 'followers,' is significant. Followers, who, by their very nature, tend to be passive, naïve, less confident, and non-aggressive people, are more susceptible to deterrence. Effective corporate governance, accepted and adopted by corporate boards and senior management, that educates, monitors, and rewards law abiding behavior is more likely to deter 'followers' than leaders simply because of the personalities of followers."). Although the assertion that "followers" may be more easily deterred could be correct, it is unclear whether many in the business world would select that designation, which carries a negative connotation.

victims of pickpockets who plied their trade despite the obvious potential consequence of their action taking place right in front of them.⁹⁸ Professors Robinson and Darley criticized the formulation of criminal law rules based on what they call “deterrence speak,” which can be employed to support a wide variety of prohibitions, including white-collar crimes such as “tampering with private records [and] corruption in sporting events”⁹⁹ They argue that there is usually no real cost-benefit analysis supporting the invocation of deterrence as a rationale for a prohibition, and instead “such deterrence language simply may reflect what has come to be the common mode of expression in modern criminal law analysis.”¹⁰⁰ So deterrence may explain why society prohibits certain forms of conduct and authorizes the state to proceed against a defendant for a violation, but it is not a good means to formulate the appropriate punishment for a violation if the goal is to prevent others from engaging in the misconduct.¹⁰¹

Why is it that white-collar defendants do not seem to hear the deterrence message that these significant punishments are intended to communicate? One possibility is that the message is simply ignored, especially by those in the upper reaches of management who are the least likely to be prosecuted and therefore may be more willing to engage in risky conduct. A person who consciously chooses to cross the line into illegality, even for a good reason—like trying to keep the company afloat through tough economic times—will pay little heed to the potential punishment. For others, like those trading on inside information, they usually succumb to greed, and thoughts of a potential punishment are heavily discounted, especially if they believe themselves to be smarter than those who have been caught and better able to avoid detection.¹⁰²

98. See David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 295 (2002) (“Undeterred by the fate of their colleagues, pickpockets routinely worked the crowds at public hangings.”).

99. Robinson & Darley, *supra* note 61, at 971–72.

100. *Id.* at 972.

101. See *id.* at 976 (“While deterrence may be a good reason for having a criminal justice system that punishes violators, it is at best ineffective as a guide for distributing liability and punishment within that system.”).

102. For example, Matthew Kluger received the longest prison term given out for insider trading when it was imposed—twelve years. In an interview, he explained why he did not think he would ever be caught:

[Question:] Back before you were ever arrested, was there a time when it occurred to you that you might end up in jail?

[Answer:] No. Well, I always knew that I was committing crimes that could land me in jail, but when I got arrested, this scheme was over. We were done. I had moved on. I wasn't working in the law business anymore. So I had put it behind me and was going off into the sunset. We unfortunately did one or two too many. But no, I really did fully believe that I was going to be able to ride off into the sunset and that no one would ever know that it happened.

Some may convince themselves that the conduct is benign, like taking an extra serving of ice cream, without considering the consequences of their conduct.¹⁰³ Regardless of the reason for violating the law, a potential prison term has no appreciable deterrent effect on these white-collar offenders because “the anticipation of rewards and punishments in the future has startlingly little effect on human behavior when compared to rewards and punishments in the present.”¹⁰⁴

C. Rationalizations of White-Collar Offenders

The “hardened criminal” view of white-collar offenders does not explain why most of these individuals engage in conduct that results in a criminal conviction. Instead, as Edwin Sutherland once noted, “Businessmen develop rationalizations which conceal the fact of crime.”¹⁰⁵ One reason why otherwise law-abiding persons run afoul of the law appears to be that they engage in a process of “neutralization” to minimize their misconduct.¹⁰⁶ This means that “the individual uses words and phrases during an internal dialogue that makes the behavior acceptable in her mind (such as by telling herself she is ‘borrowing’ the money and will pay it back), thus keeping her perception of herself as an honest citizen

I never thought that if I did get caught and if we did get in trouble that it would be a twelve year sentence and quite as life-changing as it’s been.

Daniel Roberts, *Life Behind Bars: Matthew Kluger Reveals All*, FORTUNE (July 7, 2014 9:50 AM), <http://fortune.com/2014/07/07/matthew-kluger-talks/>.

103. For example, Scott London was a partner at accounting firm KPMG who passed on information about clients to a friend from his golf club whose jewelry business suffered during the financial crisis in 2008 and needed to generate some income. In an interview, he explained how he came to commit the crime:

MarketWatch: I find this fascinating: There was never a moment where you decided, “This is where I am going to break the law.”

London: It happened so slowly, there wasn’t really a moment. It was about a year and a half from when it went from him asking for public information, saying, “Would you be willing to...” to, “Can you give me non-public information?” Then I thought, ‘Oh, s***. I really shouldn’t be doing this.’ I thought, ‘Would the friendship withstand me saying no?’ I think we still would have been friends today. I was not sticking up (for myself) when I should have. But I agreed to do that. I take the blame.

Quentin Fottrell, *Confessions of Insider Trader Scott London*, MARKETWATCH (June 25, 2014, 12:01 PM), <http://www.marketwatch.com/story/confessions-of-an-insider-trader-2014-06-21>.

104. Robinson & Darley, *supra* note 61, at 200. In a corporate organization, the “individual who commits a crime often does not psychologically understand his first actions to be criminal.” *Id.* at 199.

105. EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME* 222 (1949).

106. See Todd Haugh, *Sentencing the Why of White Collar Crime*, 82 FORDHAM L. REV. 3143 (2014).

intact.”¹⁰⁷ Thus, as Professor Darley points out, what looks in hindsight like the outcome of a rational, deliberative process may in fact be quite different, so that “the person or group acted impulsively in a way that, at the time, did not appear to be wrong. In retrospect, however, those initial questionable actions set off a chain of conduct that ultimately crossed the line into criminal behavior.”¹⁰⁸

Although these explanations may look like typical post-hoc rationalizations to justify or excuse intentional misconduct, for white-collar defendants, they are an integral part of the reason for pursuing the course of conduct. By creating the rationale, it helps the person understand the conduct and integrate it into his life as something that is not aberrational.¹⁰⁹ This allows the offender to maintain a sense of dignity to avoid the label of “criminal,” a type of impression management technique.¹¹⁰

Depending on the type of violation, the white-collar defendant may use a variety of excuses to deflect responsibility for the offense. Professor Benson noted a consistent pattern involving “denial of criminal intent, as opposed to the outright denial of any criminal behavior whatsoever.”¹¹¹ Professor Coleman points to techniques like denying harm from the conduct or claiming that the law is unnecessary or even unjust, or that, in business organizations, there is a need to conform and meet economic goals.¹¹² For crimes in a corporate setting, Professors Kieffer and Sloan note that “learning neutralizations may take place as part of routine professional socialization processes that occur in complex organizations.”¹¹³

Unlike street crimes, in which defendants may deny being the perpetrator, white-collar defendants never offer an alibi defense by

107. *Id.* at 3161.

108. John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL’Y 189, 199 (2005); see also Larry E. Ribstein, *The Perils of Criminalizing Agency Costs*, 2 J. BUS & TECH. L. 59, 60 (2007) (“Even if we could increase criminal liability enough to achieve significant marginal deterrence for the most aggressively overconfident managers, it still may be a bad idea because of the risk of deterring beneficial corporate conduct.”).

109. See James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 AM. J. SOCIOLOGY 406, 411 (1987) (“To interactionists, a rationalization is not an after-the-fact excuse that someone invents to justify his or her behavior but an integral part of the actor’s motivation for the act.”).

110. See Michael L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, 23 CRIMINOLOGY 583, 587 (1985).

111. *Id.* at 589.

112. Coleman, *supra* note 109, at 411–12.

113. Scott M. Kieffer & John J. Sloan III, *Overcoming Moral Hurdles: Using Techniques of Neutralization by White-Collar Suspects as an Interrogation Tool*, 22 SECURITY J. 317, 324 (2009).

claiming that someone else engaged in the conduct while they were elsewhere, passing the time with innocent pursuits.¹¹⁴ So cases involving the trading of stock, corporate accounting entries, or filing relevant documents is often promptly acknowledged by the defendants.¹¹⁵ Instead, the key issue is proving the person's *intent* when engaging in those acts, whether it is use of material nonpublic information in breach of a fiduciary duty by trading, knowledge of the accounting rules for recording a transaction, or the completeness of a disclosure in a public filing.¹¹⁶ Thus, the explanation offered by a defendant in a white-collar case will be much different from those advanced in a street crime prosecution. Moreover, the rationalization that allows an otherwise law-abiding person to engage in criminal conduct usually begins with small steps that can be easily explained, at least at first.¹¹⁷

The white-collar defendant might claim to have simply been following established rules as he or she understood them, or that technical compliance with some provisions shows the person did not want to commit a crime.¹¹⁸ Any number of defendants accused of white-collar crimes will claim they are in fact innocent of any wrongdoing because no harm was intended, or that a violation never really occurred, so their conviction is a matter of misguided (and overly aggressive) prosecutors who do not understand how businesses operate and venal associates who cut deals to avoid prison time by pointing the finger at them.¹¹⁹ For example, Joseph

114. Cf. FRANK J. DIMARINO & CLIFF ROBERSON, INTRODUCTION TO CORPORATE AND WHITE-COLLAR CRIME 32 (2013) ("Few white-collar crime cases involve the identity of the perpetrator, or whether or not the perpetrator had an alibi.").

115. See *id.* ("Henning states that white-collar crimes are fundamentally crimes of intent because the defendants in such cases freely acknowledge their involvement in the transactions or events.").

116. See *id.* ("The issue is generally what the defendant knew, or wanted, or failed to disclose, which raises an issue as to whether a crime actually took place.").

117. See Scott Killingsworth, "C" Is for Crucible: Behavioral Ethics, Culture, and the Board's Role in C-suite Compliance (May 29, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271840 ("If we can dodge or obfuscate the ethical implications of our actions, we can take what we want and still hold ourselves in high regard. We may reason that a small infraction does no one harm, that it solved an urgent problem, that the general rule was not meant to apply to our specific situation, that it's expected and everyone does it, that we had no choice, or that another, more important rule or value takes priority (such as loyalty over compliance). A suitable rationalization resolves the cognitive dissonance between our positive self-concept and the reality that we have violated a rule for selfish reasons."). *Id.*

118. See WHEELER, *supra* note 21, at 18 ("[I]n white-collar cases, far more often than in common crimes, the very existence of a crime may be in dispute, and matters of intent and motive are often ambiguous.").

119. See Benson, *supra* note 110, at 597 ("Typically, they claim to have been set up by associates and to have been wrongfully convicted by the U.S. Attorney handling the case. One might call this the scapegoat strategy. Rather than admitting technical wrongdoing and

Nacchio, former chief executive of Qwest Communications, was convicted of insider trading and served over four years in prison for selling \$52 million in company shares before disclosure of significant financial problems.¹²⁰ He claims that he never committed a crime when selling his shares and the prosecution was in fact retaliatory for his refusal to comply with National Security Agency requests to access customer phone records.¹²¹ A former mortgage company chief executive, convicted for his role in an extensive multi-billion dollar fraud, filed a motion to set aside the conviction and sentence on the ground that “Lee Farkas, *who is actually innocent*, has been sentenced to prison for 30 years as a result of a trial and appellate process that were heavily freighted with errors and failings,” including ineffective assistance of counsel.¹²²

D. Questionable Criminality

Even focusing on neutralizations used by individuals to justify misconduct assumes that the person realizes—at least on some level, if not consciously—that his actions are criminal. But some white-collar criminals may not comprehend that their actions are illegal, even if they might somehow be viewed as wrongful. This is not a neutralization employed to justify misconduct by claiming that the person was convinced that it was not harmful or the conduct was justified by other considerations. Instead, it is a rational conclusion that the conduct came within the bounds of the law and did not approach the line between permissible and illicit actions that might call for a rationalization to explain the reason for what took place. It is not a situation in which someone ignores warning signs that they are about to cross over into illegality, because the conduct is clearly wrongful. In other words, the defendant is not deluding himself that an illegal act “really” is not all that bad, but instead has reached a reasonable, if later shown to be flawed, conclusion that the conduct does not violate the law.

then justifying or excusing it, the offender attempts to pain himself as a victim by shifting the blame entirely to another party. Prosecutors were presented as being either ignorant or politically motivated.”).

120. See *Former Qwest CEO Nacchio Gets 6 Years in Prison*, SEATTLE TIMES (July 27, 2007 4:47 PM), <http://www.seattletimes.com/business/former-qwest-ceo-nacchio-gets-6-years-in-prison/>.

121. Dionne Searcy, *Former Qwest CEO Joseph Nacchio: Tales From a White-Collar Prison Sentence*, WALL ST. J. (Sept. 30, 2013), <http://online.wsj.com/news/articles/SB1000142405270230398390457909317379771278>.

122. Memorandum of Law in Support of Amended Motion Under 28 U.S.C. § 2255 at 35, *Farkas v. United States* (E.D. Va. 2013), (No. 1:10-cr-00200) (emphasis added).

A frequent assumption in the literature about how white-collar defendants explain the reasons for engaging in misconduct is that they must know, somewhere deep in their hearts, that their actions were criminal, so that proclamations of innocence are a product of the neutralizations used to maintain one's self-image. But what if there is a small subset of perpetrators who can plausibly—even if mistakenly in the eyes of the factfinder—claim they did not know the conduct was illegal? The source of this understanding could come from laws that can be construed so broadly, or the rules governing transactions are so general, that conduct not previously thought to be illegal turns out to be the basis for a criminal conviction.¹²³ In addition, many violations are subject to civil sanctions along with criminal prosecution, and it may be that an area of the law traditionally enforced by regulatory agencies has shifted over to criminal prosecution, an unexpected change in how the law is applied.¹²⁴

Many white-collar offenses do not provoke the type of moral opprobrium attached to a crime like murder or assault, so individuals may not comprehend how their conduct can be viewed as criminal or subject them to a conviction rather than, at most, a civil penalty.¹²⁵ And when the violation revolves around the application of technical rules, one can readily see how a defendant might reasonably conclude that there was no criminal conduct involved. This is more than just not knowing the law, because the person may have a reasonable view of what comes within the scope of the law, which may subsequently change because of a new enforcement initiative or a broader interpretation of regulations that can subject a violator to criminal sanctions in addition to a civil penalty.

Consider the prosecution of Prabhat Goyal, the former chief financial officer of Network Associates, Inc., for directing how the company accounted for sales to its largest customer that purportedly inflated its revenue at the end of fiscal quarters.¹²⁶ The case revolved around whether using “sell-in” accounting for software sales, which allows recognition of revenue at an earlier point in time, constituted fraud when “sell-through”

123. See Sandeep Gopalan, *Skilling's Martyrdom: The Case for Criminalization Without Incarceration*, 44 U.S.F. L. REV. 459, 466 (2010) (noting that a claim by white-collar defendants that the conduct was legal “is particularly plausible in cases involving the interpretation of complex accounting rules or risky business decisions”).

124. For example, a violation of the federal securities laws, including the rules adopted by the SEC, can be the subject of a criminal prosecution if the government can show the defendant acted “willfully.” See 15 U.S.C.A. § 78ff(a) (West 2014) (“Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required . . .”).

125. See GREEN, *supra* note 25, at 1 (“What is interesting and distinctive about white collar crime is that, in a surprisingly large number of cases, there is genuine doubt as to whether what the defendant was alleged to have done was in fact morally wrong.”).

126. *United States v. Goyal*, 629 F.3d 912, 913 (9th Cir. 2010).

accounting allowed recognizing revenue at a later point that did not require a company to incorporate estimates of future rebates to customers for unsold products.¹²⁷

A “jury convicted Goyal of one count of securities fraud and seven counts of making false filings with the SEC,”¹²⁸ even though the “sell-in” method did not violate the accounting rules.¹²⁹ In overturning the convictions, the Ninth Circuit found a number of problems with the prosecution, including a lack of any evidence of a fraudulent intent: “Goyal’s desire to meet NAI’s revenue targets, and his knowledge of and participation in deals to help make that happen, is simply evidence of Goyal’s doing his job diligently.”¹³⁰ This was the rare case in which the government’s evidence was so insufficient that no reasonable juror could convict the defendant. In a concurring opinion, Chief Judge Kozinski went a step further in assailing the government’s prosecution as “just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds.”¹³¹ He concluded:

The government shouldn’t have brought charges unless it had clear evidence of wrongdoing, and the trial judge should have dismissed the case when the prosecution rested and it was clear the evidence could not support a conviction. Although we now vindicate Mr. Goyal, much damage has been done. One can only hope that he and his family will recover from the ordeal. And, perhaps, that the government will be more cautious in the future.¹³²

127. The Ninth Circuit explained the accounting issue this way:

The government maintained that NAI violated GAAP by using “sell-in” accounting to recognize revenue from these deals earlier than it should have and thereby overstated its revenue. Under sell-in accounting, a manufacturer like NAI recognizes revenue when it ships products to its distributors (i.e., “sells in” to the distribution channel). The manufacturer must estimate the amount of future rebates, discounts or returns and then reduce its stated revenue by this amount.

By contrast, a company using “sell-through” accounting recognizes revenue when its distributors sell the product to a reseller (i.e., “sells through” the distribution channel). Sell-through accounting recognizes revenue later than sell-in accounting does and nets out rebates, discounts, and returns. Thus the manufacturer does not need to estimate their effect on its revenue.

Id. at 914 (9th Cir. 2010).

128. *Id.*

129. *See id.* at 917 (“It is undisputed, however, that future contingencies do not render sell-in revenue recognition improper if the seller can reasonably estimate the effect of the contingencies and set aside reserves adequate to cover them.”).

130. *Id.* at 919.

131. *Id.* at 922 (Kozinski, J., concurring).

132. *Id.*

The prosecution of Goyal rested on the application of imprecise accounting principles to ordinary business transactions in an effort to prove a criminal violation that required proof of knowledge of wrongdoing and an intent to defraud. It is an understatement to say there are gray areas in those principles, and using them to the benefit of one's employer can be considered the conduct of a good employee, not a criminal. It is unlikely that Goyal viewed his conduct as coming close to the line of a criminal violation, even if the accounting treatment was aggressive under the rules. Someone in his position who interprets the applicable rules and principles in a way that permits a rational conclusion that the conduct is not illegal, even if it comes close to the line, would not be deterred by a sentence given to another defendant for the same conduct—except perhaps if it involved the same underlying transactions in the same industry, so that the underlying principles changed to make it clear that the conduct was illegal.

Not every case of evidentiary insufficiency means the defendant did not know—or at least had any inkling—that he approached the line of criminality. But for white-collar violations, there can be any number of situations in which individuals have no conception that what seem to be ordinary business decisions can subject the person to criminal prosecution in addition to potential civil liability. So talk of deterrence in this context is largely meaningless because the very notion requires an awareness of some risk of engaging in misconduct, which is missing for the offender who has reached a reasonable conclusion that the conduct is not criminal.

V. CONCLUSION: DETERRENCE STILL MATTERS

*“Imposing a sentence on a fellow human being is a formidable responsibility.”*¹³³

Just because deterrence does not seem to have an appreciable impact in reducing the amount of white-collar crime does not necessarily mean it is unimportant and should be discarded from the process of imposing punishment. As an initial matter, federal law requires judges to take into consideration whether the sentence imposed will “afford adequate deterrence to criminal conduct,” so no court can slight the congressional mandate.¹³⁴ More importantly, deterrence can act as a restraint on judges who might otherwise consider only the retributivist assessment of whether a sentence reflects a just desert for a crime. Retribution can be a two-way ratchet: it can decrease sentences when the crime is not considered

133. Judge Jed S. Rakoff, Sentencing Memorandum and Order at 350, *United States v. Gupta*, 848 F. Supp. 2d 349 (S.D.N.Y. 2012).

134. 18 U.S.C.A. § 3553(a)(2)(B) (West 2014).

significant and the defendant is an upstanding member of society, like Ty Warner's tax evasion; or, when the crime causes significant harm, retribution can have the effect of inflating sentences, such as the punishment for Bernie Madoff's Ponzi scheme. Considering deterrence, however, can temper the retributive impulse by causing judges to incorporate into the punishment a message to the rest of society about acceptable conduct.

In the context of contentious legal issues like capital punishment, gun control, and hate crimes, Professor Kahan argued that deterrence serves a moderating influence on social discourse by mitigating some of the emotionalism these topics can provoke from both supporters and opponents.¹³⁵ While there can be no clear empirical evidence that punishments have any real deterrent effect to establish which position is correct, "[t]he idiom of deterrence avoids triggering the injunction against contentious public moralizing."¹³⁶ He discussed the "cooling effect" that making reference to deterrence can have by moving the debate from moral conflict to one of a more dispassionate discussion of evidence that appears to support (or undermine) one side's position—a more scientific approach, even if it is devoid of any empirical evidence to help decide the issue.¹³⁷

Deterrence serves as a factor in ascertaining what type of punishment a defendant should receive, but it cannot be the featured player in the assessment of a penalty.¹³⁸ So judges should consider whether a sentence will send a message about what types of conduct should be deterred and how important deterrence is to the goal of imposing a punishment that mirrors to some extent the harm inflicted by the conduct and the need to remove the defendant from society. There is also the issue of whether white-collar defendants are treated more favorably than those from lower economic classes and racial minorities because of their typically unblemished records and charitable and community involvement.¹³⁹ Reference to the deterrent message of a sentence informs the public that this is conduct that must be prevented and that some measure of punishment is appropriate, even taking into consideration the positive attributes and contributions of an individual offender. The probationary sentence imposed on Ty Warner incorporates a message that deterrence

135. See Kahan, *supra* note 58.

136. *Id.* at 446.

137. *Id.* at 448.

138. See Richman, *White Collar Sentencing*, *supra* note 40, at 63 ("Assumptions that sanctions deter do not necessarily yield a particular sentence or even a sentencing range.").

139. See *id.* at 72 ("Devising sentences for well-heeled defendants who have made undeniable contributions to society even as they have abused the positions of trust and power they have occupied would be a challenge, even if one put aside the issues of power allocation and political economy.").

played no appreciable role in the decision, or at least was sufficiently devalued that there is no need to look at how others might view the sentence in assessing the costs and benefits of tax evasion. The Seventh Circuit's warning that other defendants looking at the case "should take no comfort in the fact that Warner avoided imprisonment"¹⁴⁰ is exactly opposite of what every white-collar defendant, and their lawyers, will draw from the punishment. When Bernie Madoff received a 150-year prison term, the reference to deterrence was largely meaningless because giving out a lengthy punishment was largely a reflection of the harm caused to his victims, with the punishment unlikely to impact anyone else who might decide to engage in such conduct in the future.

Deterrence should not be the driver of the decision about the appropriate punishment, but it should not simply be ignored. Judges should be aware that there is little deterrent impact from a sentence, especially in cases involving white-collar crimes. Yet they should understand that consideration of it can provide, along the lines offered by Professor Kahan, a moderating influence on the discussion of what constitutes the proper punishment.¹⁴¹ Even if it does not *actually* deter other potential defendants, it can deter judges from going to one extreme or the other in imposing a sentence because it requires consideration of the impact on society and not solely the particular offender. Thus, one should not ask whether a particular sentence will deter others from committing white-collar crimes, because it will not. Instead, ask whether there is a message in the sentence to society that the court views this violation as serious enough that it ought to be deterred, and how much deterrence is appropriate when taking into account the cost of incarceration and the impact of others, regardless of whether anyone will actually hear that message.

140. *United States v. Warner*, No. 14-1330, 2015 WL 4153651, at *12 (7th Cir. July 10, 2015).

141. Kahan, *supra* note 58.