

COMMENT

FROM THE BOARDROOM TO THE CELLBLOCK: The Justifications for Harsher Punishment of White-Collar and Corporate Crime

J. Scott Dutcher[†]

I. INTRODUCTION

Bernie Ebbers,¹ Richard Scrushy,² Dennis Kozlowski,³ Kenneth Lay,⁴ Alfred Taubman,⁵ and Michael Milken.⁶ What is it about this unique group that makes them so special, so famous, or infamous? Unlike many others with tremendous financial power (e.g., Meg Whitman,⁷ Warren Buffet⁸), these individuals broke fiduciary duties in addition to the law, bilked millions of investors for inconceivable sums of money, and then served little time and/or paid monetary fines which pale in comparison to the

[†] Managing Editor, Arizona State Law Journal. J.D. Candidate, May 2006, Arizona State University College of Law; B.S., Brigham Young University, 2002. I would especially like to thank Mary Sigler and John Tuchi for their excellent direction and feedback and my wife, Kyla, for her patience and support.

1. Former CEO of WorldCom, Inc.
2. Former CEO of HealthSouth Corp.
3. Former CEO of Tyco International, Ltd.
4. Former CEO of Enron Corp.

5. As former chairman of Sotheby Holdings, Inc., Alfred Taubman masterminded a price-fixing scheme between Sotheby's and Christie's auction houses, which swindled art sellers out of millions of dollars. Dan Ackman, *Guilty! Jury Drops Hammer On Taubman*, FORBES.COM, Dec. 5, 2001, <http://www.forbes.com/2001/12/05/1205taubman.html>.

6. Nicknamed "The Junk Bond King," Michael Milken "almost single-handedly created a market for junk bonds during the 1970s." WIKIPEDIA, MICHAEL MILKEN, http://en.wikipedia.org/wiki/Michael_Milken [hereinafter MICHAEL MILKEN] (last visited Oct. 21, 2005). See generally Michael Milken, <http://www.mikemilken.com> (last visited Oct. 28, 2005). Milken "financed mergers and hostile takeovers with high yield debt, then raided and destroyed profitable companies in order to pay off the bonds." Victor Rozek, *As I See It: What Might Have Been*, ITJUNGLE, Jan. 21, 2004, <http://www.itjungle.com/mid/mid012104-story05.html>. Milken's financial market manipulations and insider trading cost investors more than a billion dollars. Art Jahnke, *Did Michael Milken Deserve a Pardon?: Clinton Decides Against Exonerating Convicted Financier*, DARWINMAG, Jan. 22, 2001, <http://www.darwinmag.com/connect/opinion/column.html?ArticleID=70>.

7. Current CEO of eBay, Inc.
8. Founder and current CEO of Berkshire Hathaway, Inc.

damage they wrought.⁹ At Michael Milken's sentencing, Judge Kimba Wood told Milken: "You were willing to commit only crimes that were unlikely to be detected When a man of your power in the financial world . . . repeatedly conspires to violate, and violates, securities and tax business in order to achieve more power and wealth for himself . . . a significant prison term is required."¹⁰ Even though the judge recommended a ten-year prison sentence and Milken had to pay approximately \$600 million in fines and settlements, Milken walked out of prison after serving only twenty-two months with nearly \$700 million of his personal fortune intact.¹¹

As Enron collapsed in 2001, the shortcomings in the United States' securities regulatory scheme became very evident.¹² Thus, in the wake of the Enron scandal, Congress, the United States Sentencing Commission, the Securities and Exchange Commission, and other regulators worked to correct these problems.¹³ For example, the 2002 Sarbanes-Oxley Act helps provide a more careful review of Fortune 500 companies' financial filings,¹⁴ and the changes to the federal sentencing guidelines "essentially double the [imprisonment] penalties imposed on defendants who commit large-scale securities fraud."¹⁵ Thus, if Michael Milken had faced similar charges today, he likely would have served a whopping forty-four months, paid back \$600 million in questionable funds, and still retained approximately \$700 million. What kind of justice or deterrent is that? Without real deterrence served through much harsher punishments, white-collar criminals, and more specifically, corporate criminals will continue to wreak havoc by causing tremendous financial injuries to millions of people.

This Comment examines the justifications for harsher punishment of all white-collar crime, but more specifically, corporate crime. Section II

9. MSNBC's Corporate Scandals Front Page provides an excellent overview of many recent corporate criminal and scandalous activities. MSNBC.com, Corporate Scandals, <http://www.msnbc.msn.com/id/3032230> (last visited Oct. 20, 2005).

10. MICHAEL MILKEN, *supra* note 6.

11. *Id.*

12. See John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 112–14 (2005).

13. *Id.* at 60–61.

14. *Id.* at 119. See generally Michael D. Silberfarb, *Justifying Punishment for White-Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act*, 13 B.U. PUB. INT. L.J. 95 (2003) (discussing the Sarbanes-Oxley Act in the context of justifying the punishment of white-collar criminals under utilitarian and retributive theories).

15. Kroger, *supra* note 12, at 115; see also John R. Steer, *The Sentencing Commission's Implementation of Sarbanes-Oxley*, 15 FED. SENT'G REP. 263, 263 (2003) (discussing the Sentencing Commission's conclusion after researching the historical practices in American sentencing).

presents a short discussion of the current state of white-collar crime, including general background on white-collar crime, very brief estimates of the staggering costs and damage that white-collar crime causes, and why white-collar criminals have traditionally been treated less harshly than their “violent” offender counterparts. Section III provides a consideration of five specific justifications for harsher punishment in dealing with white-collar criminals. These five justifications are: (1) deterrence, (2) utilitarianism, (3) retribution, (4) rehabilitation, and (5) incapacitation perspectives. Finally, Section IV summarizes the issues raised and arguments made in this Comment.

II. WHITE-COLLAR CRIME

A. Background

White-collar crime is differentiated from other crimes in a variety of ways: by the type of offender (e.g., high social status), by the offender’s occupation (e.g., one of trust/confidence), and also by the type of offense (e.g., economic crime).¹⁶ For example, the Federal Bureau of Investigation (“FBI”) has defined white-collar crime as “those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.”¹⁷ Thus, white-collar crime generally includes an assortment of non-violent crimes, which are almost always committed in commercial settings for financial gain. These crimes hit hard on both individuals’ pocketbooks and businesses’ balance sheets, through fraud, certain types of theft, bribery, embezzlement, extortion, forgery/counterfeiting, insider trading, money-laundering, and tax evasion.

The actual loss and extent of damage caused by white-collar crime is somewhat difficult to estimate because no one specific government entity provides a comprehensive record of these crimes. For example, in its 2001–2006 strategic plan, the Department of Justice explained that “precise financial losses resulting from White Collar Crime . . . for consumers,

16. John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 585–86 (2005).

17. CYNTHIA BARNETT, U.S. DEP’T OF JUSTICE, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 1, <http://www.fbi.gov/ucr/whitecollarforweb.pdf> (last visited Oct. 21, 2005) (citation omitted).

government, and business are unknown since no systematic data collection exists.”¹⁸ Although the FBI publishes annual Uniform Crime Reports, these reports are limited to only eight crime indexes: murder and manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny/theft, motor vehicle theft, and arson.¹⁹ Because the Department of Justice, and more specifically, the FBI, lacks a congressional mandate to collect data on white-collar crime, the public has no access to good information on this critical nationwide problem—a corporate and white-collar crime wave.²⁰ However, under the traditional Summary Reporting System, the FBI releases a very limited amount of information, which measures four white-collar offenses: fraud, forgery/counterfeiting, embezzlement, and an “all other offenses” category.²¹ Nonetheless, even with this limited data published from the FBI, the Department of Justice still concluded that the arrest rates for the crimes of “embezzlement, fraud, and forgery/counterfeiting are much lower than the arrest rates for property crime or for total crimes in general.”²²

B. Estimates of the Economic Damage Caused by White-Collar Crime

Every year, white-collar crime causes far more economic damage than street crime. For example, in the FBI’s 2001 Crime in the United States Report, the FBI estimated the country’s total economic loss from robbery, burglary, larceny/theft and motor vehicle theft in 2001 was \$17.2 billion²³—less than a third of what Enron’s scandalous collapse cost investors, employees, and pensioners that same year.²⁴

In his book, *The Rich Get Richer and the Poor Get Prison*, criminologist Jeffrey Reiman used conservative numbers issued by the U.S. Chamber of Commerce to estimate that the total cost of white-collar offenses in 1997

18. Citizen Works, Suggestions For Reform, <http://www.citizenworks.org/corp/reforms.php> [hereinafter Citizen Works] (last visited Oct. 21, 2005); Ctr. for Corp. Policy, Corporate Crime and Abuse: Tracking the Problem, <http://www.corporatepolicy.org/issues/crimedata.htm> [hereinafter Ctr. for Corp. Policy] (last visited on Oct. 21, 2005).

19. Federal Bureau of Investigation, Uniform Crime Reports, <http://www.fbi.gov/ucr/ucr.htm#cuis> (last visited on Oct. 6, 2005).

20. Lee Drutman, *Corporate Crime Acts Like a Thief in the Night*, L.A. TIMES, Nov. 4, 2003, at B13.

21. BARNETT, *supra* note 17, at 2.

22. *Id.*

23. U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, 2001, (Oct. 28, 2002), <http://www.fbi.gov/pressrel/pressrel02/cius2001.htm>.

24. Gil Weinreich, *Free Lea Fastow! Society’s Treatment of White-Collar Criminals Benefits no one*, GALE GROUP INC., Sept. 1, 2004, at No. 9, Vol. 27, Pg. 65.

was \$338 billion²⁵—more than eighty times the total value stolen in all reported thefts for that same year according to the FBI.²⁶

The Association of Certified Fraud Examiners' 2004 Report to the Nation on Occupational Fraud and Abuse asserts organizations lose approximately \$660 billion to white-collar abuses and crimes every year, which translates to six percent of the United States' Gross Domestic Product.²⁷ Even though the FBI's statistics show a drop in violent crime, white-collar and corporate crime have reached an all-time high and show few signs of lessening anytime soon.²⁸ This is because:

thanks to mass media, we've learned that the best way to rob a bank is to own one. A thug with a gun will typically net less than \$5,000 in a robbery and will serve at least five years' hard time. But according to the 2004 report, the average fraud is in excess of \$100,000. And not surprisingly, the punishment is usually less than five years.²⁹

Also, fraud and other white-collar and corporate crimes are easy to commit and unfortunately hard to detect after the fact.³⁰ Any auditor can illustrate a myriad of methods to conceal fiscal malfeasance.³¹ This problem is exacerbated in many organizations and government entities that usually do not have enough internal controls or adequate accounting systems.³² For example, NASA has not been able to explain \$565 billion in adjustments to its books at the end of 2003.³³ Additionally, according to the Government Accountability Office ("GAO"), one in ten publicly traded companies had to restate their earnings in between 1997 and 2002 because of "accounting

25. JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* 121 (6th ed. 2000).

26. Ctr. for Corp. Policy, *supra* note 18.

27. Joseph T. Wells, *School Fraud Cases Mirror an Enron World*, *NEWSDAY* (Melville, N.Y.), July 11, 2004, at A53.

28. *Id.*; Citizen Works, *supra* note 18 (quoting Keith Slotter, chief of the FBI's financial-crimes section, as saying that "[a]t this point, [corporate fraud] has not shown any sign of ebbing"). White-collar and corporate crime have become an epidemic all over the world. See Urvashi Gulia, "Soft" Penalties Drive White-Collar Crime, *TIMES OF INDIA*, Jan. 9, 2005 (explaining that white-collar crime is booming in New Delhi and all over India because of the "low risk, high gain" involved).

29. Wells, *supra* note 27.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

irregularities.”³⁴ Are these due to poor accounting, waste, abuse, or fraud? The likely answer is all of the above, at least to some extent.

C. Why White-Collar Crime has been Lightly Punished in the Past

In “The Ballad of Pretty Boy Floyd,” Woody Guthrie sang:

As through this world I wander
I’ve seen lots of funny men.
Some will rob you with [a] six-gun
And some with a fountain pen.³⁵

While the robber with the fountain pen often causes much more economic harm than the man with the six-gun, the fountain-pen robber has traditionally been treated less harshly.³⁶ Historically, white-collar crime in the United States has been punished very lightly in comparison to violent crimes where the victim is physically injured or put at risk to be physically injured.³⁷ “In the federal system, the argument that white-collar offenders receive shorter sentences than street criminals who commit proportional crimes has strong empirical backing.”³⁸ According to the United States Sentencing Commission, the average prison sentence length (not actual time served) every year from 1991 to 2001 for white-collar and corporate criminals was between 19.0 and 20.8 months.³⁹ During the same period, however, violent offenders’ and drug offenders’ sentences ranged from 89.5 to 106.7 months and 71.7 to 88.2 months, respectively.⁴⁰ Often, white-collar

34. GEN. ACCOUNTING OFFICE, FINANCIAL STATEMENT RESTATEMENTS: TRENDS, MARKET IMPACTS, REGULATORY RESPONSES, AND REMAINING CHALLENGES 4 (2002).

35. Doug Page, *Lots of Leaves Shaking Loose from Ohio’s Money Tree*, DAYTON DAILY NEWS, June 23, 2005, at Z4-3.

36. In his 1975 book, Christopher Stone discussed how differently two criminal cases ended on the same day in a Georgia courthouse. CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 63–64 (1975). The first case involved a man who embezzled and stole more than \$4.6 million from a bank. *Id.* In the second, three young men robbed nearly \$14,000 from a bank in a common robbery. *Id.* at 64. When the rulings came down, the embezzler received a ten-year prison sentence, and the traditional robbers were each sentenced to sixteen years, even though they took much less than one percent of what the embezzler stole. *Id.*

37. See, e.g., *id.* See generally Kroger, *supra* note 12.

38. Silberfarb, *supra* note 14, at 105; see also U.S. Sentencing Commission, Federal Sentencing Statistics by State, District, and Circuit 1995–2003, <http://www.ussc.gov/linktojp.htm> (last visited Oct. 29, 2005).

39. Silberfarb, *supra* note 14, at 105.

40. *Id.*

criminals have even been treated more lightly than petty robbers.⁴¹ There is no clear-cut or easy answer why this has been the case. However, there are explanations that have likely played some role.

First, even though the effects of white-collar crimes are so extreme and damaging, most members of the public simply have not feared Michael Milken, Kenneth Lay, or Bernie Ebbers as they would fear most robbers, rapists, and even common thieves.⁴² The American public generally has not been fearful of being victimized by white-collar crime. On the other hand, they perceive an inherent danger posed by “street criminals.”⁴³

Additionally, the law has historically drawn a sharp distinction between civil and criminal penalties, the former being relatively low stakes because “only” money is involved.⁴⁴ Also, the burden of proof is much higher in the criminal context, unlike in civil litigation, which again supports society’s quick pass over money crimes.⁴⁵ Perhaps the historical reaction to white-collar crime reflects a similar discounting of “mere” financial offenses. When only money is at issue, people simply have not been as concerned or upset. Thus, the government has traditionally punished white-collar criminals less harshly.

However, even though so many white-collar and corporate crimes are difficult to detect, harsher punishment will derail this wave. Harsher punishments, especially more substantial civil fines, will deter would-be white-collar criminals, restore equity, and properly incapacitate the offenders.⁴⁶ Furthermore, only harsher punishments will truly fit the devious

41. According to the U.S. Sentencing Commission, average sentences in 2001 ranged widely between traditional robbers (receiving eight years) and those who stole by fraud (receiving 1.6 years). Anne Michaud, *Some Prosecutors Find Fraud Punishments Lacking*, PITTSBURG TRIBUNE-REV., Oct. 13, 2002, available at http://www.pittsburghlive.com/x/search/s_96544.html.

42. Society often holds a moralistic view that armed robbers are generally “bad” people, whereas white-collar offenders are basically “good” people who have simply gone astray. See generally DAVID WEISBURD ET AL., *WHITE-COLLAR CRIME AND CRIMINAL CAREERS* (2001).

43. I would like to thank Mary Sigler, Professor of Law, Arizona State University, for suggesting this line of reasoning. See Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 491 (1999) (explaining that the “predatory nature” of street crime is what separates it from general white-collar crime). Additionally, street crimes involve a personal encounter where a person is usually placed in fear or apprehension. Donald Stern, former U.S. attorney for Massachusetts, explained that “the use of guns or drugs . . . attracts harsher punishment because as a society we believe these things undermine our institutions.” Michaud, *supra* note 41.

44. See Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AM. J. CRIM. L. 115, 116 (1997) (stating that “some believe white-collar crime’s harm is only financial”).

45. I would like to thank Mary Sigler, Professor of Law, Arizona State University, for suggesting this line of reasoning.

46. See *infra* Part III.

and devastating nature of white-collar and corporate crime by serving offenders their just desserts.⁴⁷

D. On the Brink of Change

Prosecutors and government agencies have recently been pushing for harsher punishments in many white-collar and corporate criminal cases.⁴⁸ As a result, on July 13, 2005, Judge Barbara Jones sentenced Bernie Ebbers to a twenty-five-year prison term for orchestrating the largest corporate fraud in the history of the United States.⁴⁹ Additionally, Adelphia Communications founder, John Rigas, and his son, former CFO Timothy Rigas, were also recently sentenced to prison for directing a multibillion-dollar fraud that brought down the cable television company.⁵⁰ For their actions, John received a fifteen-year prison sentence, and Timothy received twenty years.⁵¹ Sadly however, John Rigas was fined only \$2,300.⁵² Also, Tyco's former CEO, Dennis Kozlowski, and CFO, Mark Swartz, were recently convicted on twenty-two of twenty-three counts of grand larceny, conspiracy, securities fraud, and falsifying business records, for looting over \$600 million from their company.⁵³ Like Ebbers, each of them received a twenty-five-year prison term, but Kozlowski and Swartz will actually be eligible for parole after eight years and four months.⁵⁴

47. See *infra* Part III.C; see also IMMANUEL KANT, *The Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 370, 472 (Mary J. Gregor ed., Cambridge Univ. Press 1996) (1797) (“The *right to punish* is the right a ruler has against a subject to inflict pain upon him because of his having committed a crime.”).

48. MSNBC's Corporate Scandals Front Page provides an excellent overview of many recent corporate criminal and scandalous activities. MSNBC.com, Corporate Scandals, <http://www.msnbc.msn.com/id/3032230> (last visited Oct. 20, 2005).

49. *Ebbers Sentenced to 25 Years in Prison: Ex-WorldCom CEO Guilty of Directing Biggest Accounting Fraud*, MSNBC.COM, July 13, 2005, <http://www.msnbc.msn.com/id/8474930>. Additionally, out of 33,820 responses to an online MSNBC.com survey, 76% of respondents believed that “Ebbers’ sentence fit his crimes.” *Does Bernie Ebbers’ Sentence Fit His Crimes?*, MSNBC.COM, <http://www.msnbc.msn.com/id/8475081> (last visited Nov. 17, 2005) (Vote on the “Live Vote: Does Bernie Ebbers’ Sentence Fit His Crimes?” box to see the survey results.).

50. *Adelphia Founder Sentenced to 15 Years*, CNN.COM, June 20, 2005, http://money.cnn.com/2005/06/20/news/newsmakers/rigas_sentencing/index.htm.

51. *Id.*

52. *Id.*

53. *Ex-Tyco CEO Dennis Kozlowski Found Guilty: Former Finance Chief Mark Swartz also Convicted of Looting Firm*, MSNBC.COM, June 17, 2005, <http://www.msnbc.msn.com/id/8258729>.

54. *Ex-Tyco Executives Get up to 25 Years in Prison: Kozlowski, Swartz Punished for Stealing Hundreds of Millions of Dollars*, MSNBC.COM, Sept. 20, 2005, <http://www.msnbc.msn.com/id/9399803>.

Furthermore, Kozlowski and Swartz were ordered to pay a total of \$239 million in restitution and fines.⁵⁵ On the other hand, former CEO of HealthSouth, Richard Scrushy, was acquitted in June 2005 of all charges, even after “all five former CFOs [who previously pled guilty testified] that Scrushy led a scheme to inflate earnings by \$2.7 billion.”⁵⁶

As these cases come to a close, many more high-profile corporate fraud cases will likely arise and move forward in the upcoming months and years. For example, former Enron executives, Kenneth Lay, Jeffrey Skilling, and Richard Causey are scheduled to go in trial in January 2006.⁵⁷ In addition, former executives from Qwest Communications International Inc.,⁵⁸ Fidelity Investments,⁵⁹ and inevitably other companies may face more criminal charges stemming from white-collar and corporate criminal activities.

Harsher punishments in the form of longer prison terms, like the twenty-five-year prison sentences for Ebbers and the Tyco duo, Kozlowski and Swartz, seem like a victory for prosecutors and government regulators. However, the question of how much time each perpetrator will actually serve will be answered in time.

III. THE SPECIFIC JUSTIFICATIONS FOR THE HARSHER PUNISHMENT OF WHITE-COLLAR AND CORPORATE CRIME

A. Deterrence

Broadly speaking, reasonable and appropriate punishments for law breakers are extremely important in furthering a safe and industrious society. Criminal punishment serves to prevent future harm through

55. *Id.*

56. *Ex-HealthSouth CEO Found Not Guilty: Richard Scrushy Acquitted on all Counts in Corporate-Fraud Trial*, MSNBC.COM, June 29, 2005, <http://www.msnbc.msn.com/id/8293846>.

57. *JPMorgan to Pay \$2.2 Billion to End Enron Suit: No. 3 U.S. Bank Was Accused of Helping Energy Trader with Fraud*, MSNBC.COM, June 15, 2005, <http://www.msnbc.msn.com/id/8220771>.

58. The SEC sued former Qwest CEO, Joseph Nacchio, and six other former executives, accusing them of improperly reporting billions in revenue and perpetrating a massive financial fraud on investors. *Former Qwest Exec Settles SEC Allegations: Casey Agrees to Pay \$2.1 Million, Cooperate with Investigators*, MSNBC.COM, July 26, 2005, <http://www.msnbc.msn.com/id/8716097>.

59. Fidelity Investments recently received a notice from SEC regulators regarding an ongoing investigation of trading abuses. *Fidelity Says SEC May Bring Civil Action: Mutual Funds Firm Under Investigation for Trading Abuses*, MSNBC.COM, July 25, 2005, <http://www.msnbc.msn.com/id/8703309>.

deterrence.⁶⁰ “Lawmakers have sought to optimize the control of crime by devising a penalty-setting system that assigns criminal punishments of a magnitude sufficient to deter a thinking individual from committing a crime.”⁶¹ First, the punishment must adversely affect offenders in a way that deters them from committing the specific crime in the future.⁶² In other words, the punishment should be severe enough to remove any incentive not to obey the law. Second, the punishment must send a general message and warning to the community that this particular behavior is unacceptable and that it will be punished harshly.⁶³ This punishment directs the public to conform their actions to legal limits.

If the punishment for a particular crime is too light, however, then neither of deterrence’s primary purposes will be served: the offender will not be reasonably deterred from changing his behavior, and society will learn that the particular criminal conduct may well be worth the risk of the light punishment. Conversely, handing down a capital punishment for every crime would serve as a great deterrence, but would not be proportionate, as it punishes far more than the amount needed to adequately deter almost every crime.

Michael Milken is perhaps the poster-child for a lack of deterrence involving the punishment of a white-collar criminal.⁶⁴ If anything, his punishment provides a blatant incentive for likeminded individuals to commit the same or similar crimes. For manipulating the financial markets over years and causing investor losses in excess of a billion dollars, he was forced to pay back \$600 million and served only twenty-two months of his ten-year prison sentence.⁶⁵ This was likely no deterrent at all—to him or anyone else. How many people would gladly commit the same crimes, serve only twenty-two months in prison and then walk away with nearly \$700 million left over, of which a substantial portion is dirty money?⁶⁶ Likely, far too many people.

60. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 210 (2004); see also 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, 950 (2003) (“For the past several decades, the deterrence of crime has been a centerpiece of criminal law reform.”).

61. Robinson & Darley, *supra* note 60.

62. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 369 (2003).

63. *Id.*

64. See *supra* Part I and *infra* note 66.

65. MICHAEL MILKEN, *supra* note 6.

66. While it is not clear exactly how much of Milken’s \$700 million left over was “clean” money, a substantial portion of it stemmed directly from his market manipulating maneuvers,

Even though the government's recent restructuring of the federal sentencing guidelines provides for longer prison terms (double in most cases), the fines that judges may impose on white-collar criminals are still too low—a maximum of five million dollars for violations of Section 906 of the Sarbanes-Oxley Act.⁶⁷ Moreover, in light of the U.S. Supreme Court's recent decision in *United States v. Booker* rendering the guidelines merely advisory,⁶⁸ federal judges are now free to deviate downward from the new guidelines, all the way to probation. This is an extremely serious problem. If Milken's actual time served in prison were doubled (roughly applying today's sentencing structure), he would have served approximately only forty-four months in prison, yet paid about the same amount in fines. This still lacks sufficient deterrence value because far too many people would likely jump at the chance to walk away with hundreds of millions of dollars after serving forty-four months in prison. Here, the probable economic gain would outweigh the punishment.

Milken's personal income from his criminal actions amounted to more than one billion dollars.⁶⁹ Only the possibility of a truly significant prison term could have deterred someone with no moral compass when the potential gains were so high. If Milken knew beforehand that he would likely serve ten years or more in a federal prison if he were caught, he likely would not have engaged in such illegal activity. Of course, no specific number of years behind bars, whether it is five, ten, twenty, or more, will deter every would-be corporate criminal. However, in sentencing corporate criminals, judges need to consider the total economic loss and especially the potential gains of the criminal conduct,⁷⁰ and then they should determine a punishment that will encourage people to obey the law.

which cost investors more than a billion dollars. Jahnke, *supra* note 6. "At the height of his success in the 1980s, Milken's personal wealth was legend; according to the government, Drexel paid Milken \$296 million in 1986 and \$550 million in 1987." THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001–2005), available at <http://www.bartleby.com/65/mi/Milken-M.html> [hereinafter THE COLUMBIA ENCYCLOPEDIA]. Drexel Burnham Lambert, Inc. is where Milken, as an executive, financed the mergers and hostile takeovers with the high-yield junk bonds and where Milken committed the crimes that he was later convicted of. *Id.* Thus, just before his 1989 indictment, Milken earned \$846 million in 1986 and 1987 alone—\$246 million dollars more than he was forced to pay back! *Id.*

67. 18 U.S.C.A. § 1350(c)(2) (West Supp. 2005); see *supra* note 15 and accompanying text.

68. 125 S. Ct. 738, 756–57 (2005).

69. Milken earned \$846 million in 1986 and 1987 and surely more than \$154 million in 1988 and 1989 combined. THE COLUMBIA ENCYCLOPEDIA, *supra* note 66.

70. The newer Federal Sentencing Guidelines take into consideration (1) how much money was lost, (2) the extent of the planning which the crimes required, (3) the defendant's position of power within the organization, (4) the defendant's prior criminal conduct, and (5) the number of victims harmed. Steer, *supra* note 15; Val Walton, *HealthSouth's Only Prison*

Next, a significant and proportional civil fine must accompany a prison term.⁷¹ Milken won because at the end of the day (after a mere twenty-two months), he walked away with approximately \$700 million of his personal fortune intact.⁷² If he had actually been required to forfeit all of his ill-earned gains and been forced to substantially dip into his other income and savings, then other would-be corporate criminals watching closely may have thought twice. A real deterrent provides a disincentive to act contrary to the law. A corporate criminal will, given the economic analysis, weigh the potential benefits (e.g., economic gain) against the possibility of being caught multiplied by the price of the punishment. Corporate criminals are already difficult to catch, so when the price of the punishment is less than the potential gains, many white-collar and corporate criminals see breaking the law as a great low-risk “investment” opportunity with a potentially high return on investment. The punishment must match the crime as closely as possible, which is why a very high civil fine needs to be imposed in consideration of actual economic gain.⁷³ This fine should not bankrupt the individual, but it should weigh how much he can afford to pay in excess of the ill-gotten gains in order to compensate the victims as much as possible.⁷⁴

The assessment of fines, however, is worthless if they are not enforced and collected. Very recently, the GAO looked into five cases where white-collar criminals pled guilty and were ordered to pay a total of \$568 million in restitution and fines.⁷⁵ Eight years after these offenders were sentenced and fined, the total reimbursement collected amounted to only \$40 million.⁷⁶ Although several of these offenders maintained million-dollar homes and even took trips overseas, all five white-collar criminals alleged they did not have sufficient funds to pay back the assessed fines.⁷⁷ The Associated Press reports that like these five, too many white-collar and corporate criminals

Time So Far Is Over: Former Employee Wonders Why His Punishment Was Worse than Others, BIRMINGHAM NEWS, July 4, 2004.

71. “[M]onetary fines are the most efficient and effective means of criminal punishment . . .” Silberfarb, *supra* note 14, at 101; *see also id.* at 102–03 (warning that potential offenders may view fines as a tax if they are not supplemented with a prison term).

72. MICHAEL MILKEN, *supra* note 6.

73. Currently, fines of up to five million dollars are authorized by section 906 the Sarbanes-Oxley Act for corporate officers who willfully certify statements while knowing that such statements do not comport with accounting requirements in the Securities Exchange Act of 1934. Sarbanes-Oxley Act of 2002 § 906(c)(2), 18 U.S.C.A. § 1350(c)(2) (West Supp. 2005).

74. *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1897 (1998) [hereinafter *Alternatives to Incarceration*] (indicating that some jurisdictions found that fines were more appropriate if calculated as a percentage of criminal offender’s wealth).

75. Editorial, *Our Views: White-Collar Crime*, EL PASO TIMES, Mar. 6, 2005, at 6B.

76. *Id.*; *see also Alternatives to Incarceration*, *supra* note 74, at 1897 (mentioning the difficulty courts have in collecting fines).

77. *Our Views: White-Collar Crime*, *supra* note 75.

are enjoying a life of luxury while not paying their ordered fines.⁷⁸ Obviously, a fine will serve little deterrent effect if it is not strictly enforced. Congress needs to empower federal agents to seize criminals' assets and liquidate them to repay the fines. The money collected through the fines can then be used to form a victim's compensation fund.

In addition to the deterrent value that comes from facing an actual prison sentence, the particular federal prisons where white-collar and corporate criminals are incarcerated can play a strong deterrent role as well.⁷⁹ Many of these criminals, especially corporate criminals, believe that if they get caught, they will not only serve very little time, but they will also be sent to a "Club Fed" prison.⁸⁰ Many of these minimum-security prisons are far less populated and provide better medical treatment and recreational facilities than higher security prisons.⁸¹ More importantly, they are also devoid of violent offenders. To what extent would deterrence increase if many of these criminals were simply thrown into the federal prison system mix just like other convicted felons?⁸² Still, one may ask why these particular

78. *Id.*

79. See Don Oldenburg, *Mr. Liberty—As More White-Collar Criminals Land in Jail, a Sentencing Consultant Finds Himself in Demand*, WASH. POST, June 3, 2003, at C1 ("Besides manipulating jail time, where your client does it is crucial.")

80. After receiving prison sentences, many white-collar and corporate criminals fare far better than many expect. Szockyj, *supra* note 43, at 497. "They are typically sent to minimum security prisons which are disparagingly referred to as 'Club Fed' or 'country clubs.' The amenities and freedoms accorded inmates in minimum security prisons contrast sharply with conditions in maximum or medium security settings overflowing with street offenders." *Id.* Statistics from the Federal Bureau of Prisons show that out of the 156,238 federal inmates in October 2001, 1,021 matched the description for white-collar criminals, "which includes everyone from insurance schemers to bankruptcy fraudsters, counterfeiters to election-law tamperers to postal thieves." Clifton Leaf, *Enough Is Enough, White-Collar Criminals: They Lie they Cheat they Steal and They've Been Getting away with it for Too Long*, FORTUNE, Mar. 18, 2002, at 60. And out of those 1,000 or so white-collar criminals, far more than half are held at minimum-security and "often privately managed 'Club Feds' that are about two steps down the comfort ladder from Motel 6." *Id.*; see also Penelope Patsuris, *Best Places to Go to Prison: Where would Martha Stewart go?*, FORBES.COM, Mar. 9, 2004, <http://msnbc.msn.com/id/4491205> (displaying an online slideshow of the prisons and naming the top five places for white-collar convicts to serve time, namely Eglin in Fort Walton Beach, Fla.; Nellis in North Las Vegas, Nev.; Morgantown in Morgantown, W. Va.; Otisville in Otisville, N.Y.; and Allenwood in Montgomery, Pa.). Federal Prison Camp Nellis in North Las Vegas features such perks as a pool, air conditioning, cardio gym equipment, and even a sports and crafts program. *Id.*

81. See Oldenburg, *supra* note 79.

82. Russell Mokhiber advocates that "minimum security 'country club prisons'" should be abolished, so that white-collar criminals will feel the full severity of their sentences by serving their time alongside street offenders. RUSSELL MOKHIBER, *CORPORATE CRIME AND VIOLENCE: BIG BUSINESS POWER AND THE ABUSE OF THE PUBLIC TRUST* 59 (1988). Otherwise, one message will ring clear: white-collar crime and "corporate crime is not as bad as street crime." *Id.* Many

criminals should be subjected to all of the standard ills of regular federal prisons, including prison rape? After all, the nature of their non-violent crimes suggests that they are among the least prepared to fend for themselves in such a setting.⁸³ However, punishment should not be light if it is to deter, and why should these particular offenders receive such special treatment when so many others are also ill equipped for life in a regular federal prison and do not receive any special treatment?

The potential value for deterrence in the punishment of white-collar and corporate crime is much higher than it is for blue-collar crimes.⁸⁴ It is very difficult to deter crimes of passion, which tend to be spontaneous, and other crimes with very little or no premeditation because most of these offenders simply do not formulate a cost-benefit analysis through which deterrence plays a role.⁸⁵ On the other hand, many white-collar and corporate criminals are very sophisticated, and their crimes generally take much planning, thought, and deliberation. As a result of this sophistication and the nature of their crimes, they have far more time to contemplate what they are doing and the likely consequences if caught. Further, these are generally very educated people who pay attention to current events, and thus, they will receive the deterrence messages and warnings when they are reported in the news.⁸⁶

Accordingly, deterrence can play an important role in preventing future white-collar and corporate crime when punishments for such offenses entail substantial prison terms and the financial penalties are more severe than their economic gains, forcing offenders to dip into their savings to reimburse those they cheated. However, the federal government must do a far better job in collecting these fines. Furthermore, other considerations, such as where these criminals are incarcerated, could do more to deter others.

critics of these “Club Feds” believe that the minimum-security prisons are simply not “‘scary’ enough to [adequately] deter potential white-collar [criminals].” Silberfarb, *supra* note 14, at 107 (citation omitted).

83. See Szockyj, *supra* note 43, at 490 (noting that white-collar offenders may be “unprepared for the emotional and physical trauma of prison”).

84. Walton, *supra* note 70 (quoting Pam Bucy, a University of Alabama School of Law professor and former federal prosecutor, who stated that “[t]he sentences in white-collar crimes have great deterrent value, unlike lots of crimes of passion. It’s hard to deter spontaneous behavior, whereas the people who tend to commit white-collar crimes are the ones who read the newspapers. When light sentences are handed out, that deterrent potential is lost.”).

85. *Id.*

86. *Id.*

B. Utilitarianism

According to utilitarians, the goal of society and government should be to maximize human happiness.⁸⁷ This is done when one focuses solely on maximizing the greatest good for the greatest number of people—increasing overall utility.⁸⁸ “The utilitarian theory of punishment holds that punishment is a necessary evil that is justified if and only if it benefits society.”⁸⁹ Therefore, an appropriate punishment should deter future criminal conduct no more than necessary and should not waste people’s lives or their possible contributions to society.

In 1997, a well-known artist, Peter Max, pled guilty to federal white-collar criminal charges of tax evasion and conspiracy after admitting that he did not pay any income tax on his earnings resulting from trades of his artwork for over \$1 million in real estate.⁹⁰ At the time, even the minimum sentence of four months likely would have shut down his art studio.⁹¹ After receiving Max’s sentencing consultant’s report, U.S. District Judge Kimba Wood, who also sentenced Michael Milken,⁹² sentenced Max to pay the back taxes he owed coupled with a \$30,000 fine, serve two months in a work-release program, and perform 800 hours of community service by teaching art to disadvantaged children in Harlem schools.⁹³

Like Max, other white-collar convicts, including Martha Stewart, have attempted to swing community service instead of a longer prison sentence as part of the punishment for their crimes.⁹⁴ The societal benefits from such punishments are obvious. In referring to Max’s sentence, his sentencing consultant, Herb Hoelter, indicated: “flexibility in sentencing enabled a

87. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–12 (J. H. Burns & H. L. A. Hart eds., University of London The Athlone Press 1970) (1780) (“By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question”) (citation omitted).

88. WIKIPEDIA, UTILITARIANISM, <http://en.wikipedia.org/wiki/Utilitarianism> (last visited Oct. 20, 2005).

89. Andrew R. Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1552 (2002); see generally Silberfarb, *supra* note 14 (discussing problems in and justifications for punishing white-collar crime under utilitarian and retributive theories).

90. Oldenburg, *supra* note 79.

91. *Id.*

92. MICHAEL MILKEN, *supra* note 6.

93. Oldenburg, *supra* note 79.

94. Martha Stewart sought less jail time by offering to help teach underprivileged women how to start and run their own businesses. Keith Naughton, *Martha Holds Out a Helping Hand*, NEWSWEEK, June 7, 2004, <http://www.msnbc.msn.com/id/5092754/site/newsweek>.

talented lawbreaker to repay society rather than just rot in the slammer.”⁹⁵ Moreover, Webster Hubbell, another client of Hoelter, declared that “[t]here were a lot [of] people in prison who had a lot of talent and could have been helping people outside—PhDs who should be teaching math and not mowing lawns, doctors who should be working inner-city clinics and not picking up cigarette butts.”⁹⁶ This line of thinking is very straightforward—forcing these highly capable and more productive people into a prison cell or making license plates does this country a disservice when their skills are needed elsewhere.⁹⁷

However, by their very nature, these community service punishments are easier on the convict than serving time in prison. Otherwise, criminals would not agree to perform the community service. This means that these types of alternate sentences provide less of a deterrent than a standard prison sentence. Additionally, some may claim that this decrease in deterrence works to offset any gain in utility provided through the public service sentence. Unfortunately, there is no way to quantify either of these and come to a firm conclusion. On the other hand, no would-be criminal can be sure to obtain a community service sentence before the commission of a crime, so the possibility of a lengthy prison sentence will hang over everyone’s heads to adequately deter. Furthermore, just because certain people are more skillful or have gone to college, should they be let off more easily just because of an increase in utility? This seems highly discriminatory.⁹⁸

While it is true that some white-collar and corporate criminals already perform community service, not all do, and most do not enjoy being forced to do community service anyway. A balance must be reached when determining the punishment for white-collar and corporate criminals. While it is generally productive in most cases to allow capable individuals to perform some community service, they should still serve actual prison time to provide a deterrent, if deterrence is necessary. Moreover, when these

95. Oldenburg, *supra* note 79.

96. *Id.*

97. See MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AN AMERICAN PENAL CULTURE 3 (2004) (stating that current criminal punishment “policies are too severe [and] waste lives and money”).

98. *Cf. id.* at 3 (discussing how current criminal punishment “policies have disproportionately damaged the lives of black offenders and their families and have undermined black communities”); *id.* at 4 (contrasting the severe federal punishment for crack cocaine versus the much lighter punishment for powder cocaine violations). The few crooks that went to prison for the savings and loan fraud that cost Americans hundreds of billions of dollars were sentenced to an average 36.4 months, whereas burglars convicted for swiping \$300 or less average 55.6 months. Leaf, *supra* note 80, at 60.

punishments are coupled with a substantial fine that actually reduces criminals' total assets to less than what they previously had, then the complete sentence can hardly be considered being let off more easily.

Under the sentencing commission's implementation of Sarbanes-Oxley, "corporate entities and other organizations may be criminally convicted, regardless of whether linked individual actors are prosecuted."⁹⁹ There is no rational basis for imposing fines on any organization or corporation for the fraudulent acts of its officers or board of directors, unless of course the fines forced shareholders to elect officers more carefully.¹⁰⁰ But this argument is tenuous at best. Instead, the officers and/or board of directors should be punished directly. Fining a corporation simply hurts its shareholders after they have already lost considerable sums to the fraud that they took no part in. This would likely decrease community happiness, utility, and equity, and it would likely hold no deterrent value either.

C. Retribution

"A retributivist punishes because, and only because, the offender deserves it,"¹⁰¹ and "the moral [culpability] of an offender is a *sufficient* reason to punish him or her."¹⁰² Thus, the primary goal of retribution is "imposing just, proportional" desserts on the offender.¹⁰³ Moreover, an offender's moral culpability bestows upon society the duty to punish.¹⁰⁴ Even though retribution is often identified with harsh punishment (e.g., "an eye for an eye, a tooth for a tooth"¹⁰⁵), harsh punishments are not required

99. Steer, *supra* note 15.

100. Interview with Myles V. Lynk, Peter Kiewit Foundation Professor of Law and the Legal Profession, Arizona State University, in Tempe, Ariz. (Apr. 13, 2005).

101. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

102. *Id.* at 180.

103. Moehr, *supra* note 60, at 210; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT STUDENT EDITION 269–78 (Peter Laslett ed., 1988) (stating that individuals have right to enforce their governing laws and punish violators in conformity with those laws); *id.* at 272 (stating "but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for *Reparation* and *Restraint*. For these two are the only reasons why one Man may lawfully do harm to another, which is that we call *punishment*").

104. Moore, *supra* note 101, at 182.

105. This approach is often referred to as *lex talionis*.

There are two actions to consider: the act of offending and the act of punishment. [*Lex talionis*] holds that they should be the same; and since the act of punishment is the only one over which we have any control, we should choose a punishment that matches the character of the offense.

Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 26 (1992).

per se.¹⁰⁶ Punishment should simply be proportional to the criminal offense.¹⁰⁷ People often ask what good certain punishments do for society, and a retributivist would answer: “I do not care; the punishment is intrinsically good.” It is morally right and fitting to impose upon people what they deserve. The true purpose of punishment is not to deter future crimes (although that is a bonus), it is simply to punish.¹⁰⁸ After all, proportional punishment is good in and of itself.

A retributivist would argue, because punishment is intrinsically good, very harsh punishments are absolutely appropriate for crimes that cause tremendous damage. After all, retribution calls for proportion in punishment. Those who break the law and financially injure countless people for large sums of money deserve a harsh, just dessert. Because white-collar and corporate criminals play fast and loose with the jobs and retirement savings of hundreds of thousands of people and cause tremendous financial losses for these massive groups,¹⁰⁹ a severe punishment is warranted.

Of the first ten executives sentenced in the HealthSouth fraud cases, which cost stockholders approximately \$400 million, only one “mid-level player” actually received a prison sentence (which also happened to be very light).¹¹⁰ After serving five months in prison, Emery Harris had to serve five more in home detention.¹¹¹ The other nine executives were punished with some combination of probation, home detention, and fines.¹¹² As of July

106. WIKIPEDIA, RETRIBUTIVE JUSTICE, http://en.wikipedia.org/wiki/Retributive_Justice (last visited Oct. 20, 2005).

107. *Id.* (stating that “minor crimes should have mild punishments while major crimes should have harsh punishment”).

108. *See also* Moore, *supra* note 101, at 180 (“That future crime might also be prevented by punishment is a happy surplus for a retributivist, but no part of the justification for punishing.”).

109. *See supra* Part II.B. The financial losses for these criminal acts are often suffered by more than just direct investors and employees. All stakeholders are damaged, including competitors. Geoffrey Colvin, *The Other Victims of Bernie Ebbers’s Fraud*, FORTUNE, Aug. 8, 2005, at 32; *see also* Editorial, *White Collar Crime: WorldCom Guilty Verdicts are Ominous Knell over Other Fraud Cases*, MORNING CALL (Allentown, Penn.), Mar. 17, 2005, at A12 (stating that in the 1990s, “WorldCom’s worth was falsely inflated, leading other companies like AT&T to cut their prices and lay people off trying to compete. It was a sham, and the list of people harmed is far larger than just WorldCom employees and investors.”). AT&T, Global Crossing, Qwest, Sprint, and many smaller players were all forced to frantically cut costs in an effort to match WorldCom’s incredibly low prices. Colvin, *supra*. As a result, Qwest ended up committing accounting fraud. *Id.* Additionally, after being investigated as well, Global Crossing wound up declaring bankruptcy and its market value dropped to zero. *Id.* “Those companies had plenty of their own problems, but the relentless pressure to match a major competitor—which couldn’t be legitimately matched—undoubtedly made matters worse.” *Id.*

110. Walton, *supra* note 70.

111. *Id.*

112. *Id.*

2005, a total of fifteen former HealthSouth executives have pled guilty to various fraud charges.¹¹³ Former CFO, Malcolm McVay, is the highest-ranking former company officer (and one of the latest) to be sentenced thus far—he received six months home detention and five years probation, was fined \$10,000, and ordered to forfeit \$50,000.¹¹⁴ When comparing these sentences to the heavy fraud which brought HealthSouth to the edge of bankruptcy and cost its shareholders an estimated \$400 million, many law professors called the sentences “light.”¹¹⁵ “Light” is an understatement. For the massive losses suffered by so many investors, these executives deserved much harsher punishments. All of them should have been required not only to serve a substantial prison term of at least a few years, but also been fined much more in order to compensate victims as much as possible. Even though the law has routinely deemed the loss of “mere” money less severe than physical harm or danger,¹¹⁶ a harsher punishment for these criminals is just dessert because the basis for this previous supposition is beginning to change. Investors and other stakeholders are now starting to fear corporate officers and directors. This is evident from the pressure they recently put on lawmakers to make corporate officers and directors more accountable.¹¹⁷

Attorney Steve Berman represents approximately 20,000 current and former Enron employees, many of which “lost their retirement nest eggs in the Enron collapse and . . . are financially ruined.”¹¹⁸ When asked about the former Enron executives and other defendants in the lawsuit, Berman said: “There is no question these people have to go to jail They should receive sentences that if not the maximum are on the heavy side.”¹¹⁹ At first glance, these statements seem a little harsh and callous. However, when one reads the personal stories of devastation and lives destroyed directly because of these white-collar and corporate criminals, a severe punishment is the only option that achieves some degree of proportionality to the criminal offenses.

113. *Ex-HealthSouth Boss Wants Suit Thrown Out: Scrushy Urges Court to Dismiss Case After Acquittal of Separate Charges*, MSNBC.COM, July 21, 2005, <http://www.msnbc.msn.com/id/8662682>; *Former HealthSouth Executives Who Have Pleaded Guilty*, USATODAY.COM, May 20, 2005, <http://www.usatoday.com/money/2003-11-05-healthsouth.htm>.

114. Stephen Taub, *Former HealthSouth CFO Avoids Prison: He’s One of Five Former HealthSouth Finance Chiefs to Plead Guilty*, CFO.COM, June 3, 2005, <http://www.cfo.com/article.cfm/3014299?f=related> (subscription required) (article on file with author).

115. Walton, *supra* note 70.

116. *See supra* Part II.C.

117. *See supra* text accompanying notes 12–15.

118. Oldenburg, *supra* note 79.

119. *Id.*

Sixty-four year-old Charles Prestwood of Conroe, Tex., worked for Enron and its predecessor for 33 years. He accumulated \$1.3 million in Enron stock for his retirement. When Enron collapsed, he lost all but \$4,000. “Anybody who had anything to do with the downfall of Enron ought to go to jail for a long time,” he says. “I know there are maximums and minimums that I don’t understand, but I think they ought to get the maximum and with no parole.”¹²⁰

The corporate crime associated with the collapse of Enron “wiped out \$68 billion in market value, destroyed at least 5,600 jobs and vaporized workers’ retirement savings.”¹²¹

What kind of punishment could reasonably be proportional to that kind of loss in order to sentence these criminals to what they truly deserve? Federal prosecutors were originally asking for only ten or fifteen years for many of the guilty parties.¹²²

Opponents to retribution declare that these harsh punishments are nothing more than revenge.¹²³ They claim that the new increase in punishment for white-collar and corporate criminals stems from public outrage and has no firm basis in comparison to the previous punishments for similar crimes. Sure, the white-collar and corporate crimes caused substantial losses, but those are now sunk costs. Why should we extend the damage by destroying the life of one more individual who happens to be very talented and capable? Additionally, when considering punishment, judges should be merciful.¹²⁴ No one is perfect,¹²⁵ and showing mercy does not excuse the crime. Instead, it allows “judge[s] to imagine what it was like to have been that particular offender, facing those particular obstacles with the resources of that history.”¹²⁶ Some of these corporate criminals may have experienced tremendous pressure from shareholders and other officers to produce unrealistic numbers, and they simply broke. Therefore, many should be let off much more easily.

However, even though a few white-collar and corporate criminals may have broken under pressure, that is certainty not the norm—most were

120. *Id.*

121. Weinreich, *supra* note 24.

122. Oldenburg, *supra* note 79.

123. See Edward Rubin, *Just Say No to Retribution*, 7 *BUFF. CRIM. L. REV.* 17, 40 (2003) (“A standard criticism of retributivism is that it is merely a form of revenge, an emotive, atavistic response to wrongdoing that has no place in a modern state.”).

124. See generally Martha C. Nussbaum, *Equity and Mercy*, 22 *PHIL. & PUB. AFF.* 83 (1993) (suggesting that mercy complements justice).

125. *Id.* at 103 (stating that a judge “should remind himself at every turn that he himself is capable of the failings he reproves in others”).

126. *Id.*

motivated by greed and power.¹²⁷ Also, while retribution and revenge share a few similarities, they are not the same.¹²⁸ “A retributivist can justify punishment as deserved even if the criminal’s victims are indifferent (or even opposed) to punishing the one who hurt them.”¹²⁹

D. Rehabilitation

Under a theory of rehabilitation, a proper punishment focuses on effecting a positive change in the life of the criminal offender.¹³⁰ Each offender needs to be reformed and then reintegrated back into society.¹³¹ This requires a willingness and cooperation on the part of the criminal to be most effective.¹³²

Whether they are sitting in a prison cell, performing public service, or otherwise engaged, white-collar and corporate criminals will be forced to evaluate their lives—how their poor decisions led them to such punishment and what they can do to change. Martha Stewart referred to her five months behind bars as “life altering” and said that it has changed her forever.¹³³ Additionally, in talking about the time that he served in prison in 1997 for mail fraud, David Novak said, “To this day, I look back at that time as probably the greatest blessing of my life.”¹³⁴ He continued, “Not the going to prison part. But the opportunity to be still and reflect upon a lot of the poor judgments I made.”¹³⁵ This is the kind of transformation to which

127. Perpetrators, Lifestyles, and Motivations of Financial Criminals, <http://faculty.ncwc.edu/toconnor/350/350lect03.htm> (last visited Oct. 17, 2005) (discussing greed in the context of corporate criminals and saying that “usually the executive is mixing in high-class company and wants to impress such folks as having the trappings of power”).

128. Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1179–80 (2003) (identifying five characteristics that distinguish revenge from retribution).

129. MOORE, *supra* note 101, at 180.

130. See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 757 (1998) (stating that rehabilitation “forestalls future offenses by changing the defendant’s preferences”).

131. *Alternatives to Incarceration*, *supra* note 74, at 1959 (stating that “offenders must be subsequently reintegrated into the community to complete their rehabilitation”) (citation omitted).

132. Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2204 (2003) [hereinafter *Shame, Stigma, and Crime*] (“[A] voluntary rehabilitation program is more likely to work than a mandatory one. Effective rehabilitation requires the offender to participate in good faith—a condition that is less likely when the participation is forced.”) (citation omitted).

133. *Martha Makes Up*, N. TERRITORY NEWS (Australia), Mar. 12, 2005, at 27, available at 2005 WLNR 3800050.

134. *Id.*

135. *Id.*

rehabilitation aspires—achieving a change of heart, a change from criminal behavior to behavior which benefits or at least does not harm society.

For example, since his release from prison, Michael Milken “has remade himself as a philanthropist, pouring money and energy into cancer research and founding a well-known think tank.”¹³⁶ One could argue that these activities result from his self-interest in restoring his image and not from reformation or rehabilitation. However, Milken’s philanthropic behavior has likely been far more than necessary to simply restore his image for most and thus, reveals his change of focus on the betterment of the community over himself.

The longer the prison sentence or other punishment, the more time each individual has to change. On the other hand, if there is little punishment for such crimes or the punishment is weak, then criminals are robbed of the opportunity to reform themselves. Furthermore, substantial public works service builds an appreciation for others in the community, which in turn will help the criminal reintegrate back into society.¹³⁷

In addition to fostering change so the convicted criminals no longer violate the law, punishment can also help teach people responsibility towards others and help restore basic moral values. While all convicted white-collar and corporate criminals broke the law, they more than likely engaged in many additional unethical activities, which could have been just as damaging to others, even though these activities did not violate the law *per se*.¹³⁸ Some corporate criminals are constantly surrounded by “yes” men and often think of little more than themselves. As part of their punishment, they could be forced to confront many of their victims in an informal setting and hear their stories. Being forced to listen and interact with the people whose lives they destroyed will help teach them to be more conscientious of others and evaluate their future decisions ethically and not just simply whether they are in accordance with the letter of the law.

Others may argue that white-collar and corporate criminals are productive members of society and need no rehabilitation because they are

136. *Id.*; see also Jahnke, *supra* note 6 (describing much of the good Milken has done since his release from prison in 1993).

137. See *Alternatives to Incarceration*, *supra* note 74, at 1960 (“[C]ommunity service programs permit offenders to satisfy a psychological need to compensate their victims that undermines a competing need to justify their criminal behavior.”).

138. See, e.g., Citizen Works, *supra* note 18 (stating that “208 executives and directors from the 25 largest U.S. companies that filed for bankruptcy protection between January 2001 and July 2002 walked away with gross earnings of \$3.3 billion, most of it in the form of revenues from stock sold before the company collapsed”).

so unlikely to repeat these crimes.¹³⁹ A felony conviction for these people is a huge wake-up call, and a conviction itself is more than enough to force each individual to stay away from corporate criminal actions in the future.¹⁴⁰ Besides, many argue that plenty of these individuals never committed blatant crimes. They merely selected options in grey areas that turned out to be unlawful. Furthermore, even though the effects of white-collar crimes are so damaging, most people simply do not fear Michael Milken, Kenneth Lay, or Bernie Ebbers as they would most robbers, rapists, and even common thieves.¹⁴¹

However, while not everyone actually needs to serve time in prison to turn their lives around, it is often difficult for judges to distinguish between those who do and those who do not. Moreover, a substantial number of white-collar criminals are repeat offenders.¹⁴² Thus, to ensure that everyone receives the opportunity to change their lives, all corporate and white-collar criminals need to serve a prison term of some sort. More than other punishment, incarceration forces people to reevaluate their lives and hopefully change for the better.¹⁴³

E. Incapacitation

Incapacitation aims to prevent criminal offenders from committing further crimes against society.¹⁴⁴ That is one of the primary purposes of the entire criminal justice system.¹⁴⁵ The most obvious methods to prevent criminals from repeating their crimes are to kill them or incarcerate them. The more time each convict spends in prison, the longer that person is prevented from committing further crimes against society (in theory).

139. WEISBURD, *supra* note 42, at 5 (“[W]hite-collar offenders have generally been assumed to have infrequent contacts with the criminal justice system.”). *Contra* Kades, *supra* note 44, at 116 (stating that many white-collar criminals are repeat offenders). *See generally* WEISBURD, *supra* note 42 (showing that a substantial number of white-collar criminals have multiple contacts with the criminal justice system).

140. *See* Mark H. Allenbaugh, Comment, *What’s Your Water Worth?: Why We Need Federal Fine Guidelines for Corporate Environmental Crime*, 48 AM. U. L. REV. 925, 962 n.218 (1999) (arguing that the stigma associated with criminal convictions will act as a deterrence).

141. *See supra* note 42 and accompanying text.

142. *See supra* note 139.

143. *See supra* notes 130–33 and accompanying text.

144. *See* Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 113 (1998) (“[I]mprisonment is justified because it prevents an inmate from committing crimes against the public during the period of confinement.”).

145. *Shame, Stigma, and Crime*, *supra* note 132, at 2186–87 n.5.

Fortunately, America will never see the day when corporate criminals are sentenced to death. In prison, however, we can rest assured they will not be able to defraud investors or commit other white-collar crimes. A prison sentence for these individuals is important for reasons previously discussed. Also, when considering the nature of white-collar and corporate crime, a few other specialized incapacitating punishments are available, which judges should use every time.

For example, as part of his punishment, Michael Milken was forever barred from participating in the securities industry¹⁴⁶—an excellent way to prevent him from manipulating the markets ever again. Likewise, corporate officers and directors who commit white-collar crimes could be banned from ever holding such an office again in a publicly-traded company as part of their punishment.¹⁴⁷ This way, they are prevented entirely from entering into these fiduciary capacities, which will protect the public in case they ever feel the desire to break the law again. While it may be true that many of these criminals will not reoffend,¹⁴⁸ the potential economic losses are so high that these or similar measures should be required as part of the punishment.

Opponents of these bans, such as those from securities markets or holding the fiduciary positions of an officer or a director, will likely say that these punishments are only necessary in a very small percentage of cases, so they should not be applied to all. Also, opponents may claim that ordering these bans would be too harsh because it would reduce these people's livelihood and opportunities to earn a living. However, nearly all of these

146. MICHAEL MILKEN, *supra* note 6.

147. The Sarbanes-Oxley Act allows the SEC to not only fine offenders, but also prohibit "unfit" individuals from ever again serving as an officer or director. John M. Holcomb, *Corporate Governance: Sarbanes-Oxley Act, Related Legal Issues, and Global Comparisons*, 32 DENV. J. INT'L L. & POL'Y 175, 195–96 (2004). In 2000, the SEC permanently barred thirty-eight former executives from serving as an officer or director of a public company ever again. *Id.* at 207. "[I]n the first two thirds of 2003, that number had increased to 105, including two WorldCom financial executives." *Id.* Additionally, as part of a recent settlement with the SEC regarding a fraud conspiracy, Gregory M. Casey, a former executive of Qwest, agreed to a five-year ban from acting as a director or officer of any public company. *Former Qwest Exec Settles SEC Allegations: Casey Agrees to Pay \$2.1 Million, Cooperate with Investigators*, MSNBC.COM, July 26, 2005, <http://www.msnbc.msn.com/id/8716097>. Another solution along these lines would be to create a self-regulating corporate body and permit members to act as officers or directors of public companies in the same way that the Bar regulates the legal profession. Silberfarb, *supra* note 14, at 110. Such a Corporate Bar could require both officers and directors to pass an ethics and qualifications exam, and the Corporate Bar could later take away the privilege of being an officer or director to any convicted white-collar criminal. *Id.*

148. *Contra* Kades, *supra* note 44, at 116 (stating that many white-collar criminals are repeat offenders).

criminals are highly skilled with great opportunities to do a variety of things. These bans will very slightly modify their career opportunities.

IV. CONCLUSION

White-collar and corporate crime is out of control and causes massive economic losses to hundreds of thousands of Americans.¹⁴⁹ These criminals abuse their wealth, position, power, and fiduciary duties in committing crimes that are difficult to detect. They simply need to be stopped. They need to be deterred from future offenses. They need to be shown that these types of crimes will not yield a good return on investment. White-collar and corporate criminals cause so much damage that they deserve harsher punishments than they have enjoyed in the past. Only harsher punishments, which entail a substantial prison term and financial penalties more severe than their economic gains, will sufficiently deter others, restore equity, properly incapacitate and rehabilitate the offenders, and increase the overall happiness in our society by effecting a positive change in corporate culture. Moreover, only harsher punishments will truly fit the heinous and devastating nature of white-collar and corporate crime by serving offenders their just desserts.

149. *See, e.g.*, MSNBC.com, Corporate Scandals, <http://www.msnbc.msn.com/id/3032230> (last visited Oct. 20, 2005) (providing an excellent overview of many recent corporate criminal and scandalous activities, which cause these massive economic losses for so many people).