EXPLORING THE LIMITS OF THE
RESTORATIVE JUSTICE PARADIGM:
RESTORATIVE JUSTICE AND
WHITE-COLLAR CRIME

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PREAMBLE

Sixty-three-year old advertising executive Paul Coffin stood up in a Quebec Superior Court room and apologized “to all Canadians.” In his emotional testimony in mid-August 2005, Coffin stated: “I realize what I have done. . . I know I have tarnished my family name. I know I have disappointed all Canadians.” What Paul Coffin had done was to defraud the Canadian government of over a million and a half dollars. It was not a crime of passion or one committed on impulse. Instead, it was the result of careful planning and premeditation which allowed Coffin to receive money from the government from 1997 to 2002 for an advertising campaign he never executed. After pleading guilty to the fifteen fraud charges related to the scandal, Coffin mortgaged his house, cashed out retirement funds, and borrowed $500,000 from friends and family in order to repay the government one million dollars. Apparently, his genuine remorse and reparative actions were especially convincing because his sentencing judge, Superior Court Justice Jean-Guy Boilard, decided to reject the prosecutor’s request for a thirty-four month prison term, and sentenced Coffin

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1 See Nelson Wyatt, Paul Coffin, Convicted of Fraud in the Sponsorship Scandal, Makes Restitution, CAN. PRESS NEWS WIRE, Aug. 16, 2005.
2 Id.
3 Id.; see also Sentence on Hold for Scandal Figure; Curfew Lifted, Ethics Speeches Suspended as Crown Appeals Term of Community Service, RECORD (Kitchener-Waterloo, Ontario), Oct. 22, 2005.
to two years of community service, where he would give lessons on business ethics.\(^5\)

Since the prosecution was given permission to appeal this sentence,\(^6\) it is safe to assume that the final word is yet to be said in this case. Nevertheless, Paul Coffin’s story raises many interesting questions as to the appropriate response to white-collar crime. Here, for instance, the offender confessed to the crime, apologized to his victims – the Canadian people – and repaired the harm caused by the crime. Does that justify the lenient response of community service instead of harsh imprisonment? Obviously, Justice Boilard believes it does. The many angry editorials published in the Canadian press in response to Coffin’s sentence prove that many others fiercely oppose that belief.\(^7\)

It may be argued that the problem with this case is that while the apology was definitely warranted, it should have been made in a more appropriate forum, and not as a justification for such a lenient sentence. One possibility for such a forum is a restorative justice intervention. In this type of process victims and offenders meet in the aftermath of crime and discuss how the offense affected their lives and how to repair the harm caused by the offense. Quite often these proceedings lead to an apology.\(^8\) Restorative justice processes are known to receive high satisfaction rates from most participants and to promote healing and rehabilitation for both victims and offenders.\(^9\)

But is restorative justice applicable to all types of criminal misconduct? Is restorative justice limited only to certain types of street crimes or juvenile offenses? And more specifically, are these processes applicable to white-collar crime cases? In order to explore the limits of restorative justice in this area of crime, I will largely focus on the less common high-profile Enron-type white-

\(^5\) Id.
\(^6\) See Record, supra note 3.
\(^8\) According to the Reintegrative Shaming Experiments (RISE), conducted in Canberra, Australia between 1995 and 2000, eighty-six percent of “victims attending restorative justice conferences received apologies from their offenders, in comparison to only sixteen percent of victims whose cases were disposed of in court.” Heather Strang & Lawrence W. Sherman, Repairing the Harm: Victims and Restorative Justice, 2003 Utah L. Rev. 15, 28.
\(^9\) See Mark S. Umbreit, Robert B. Coates & Betty Vos, Victim-Offender Mediation: Three Decades of Practice and Research, 22 Conflict Resol. Q. 279 (2004) (summarizing studies from different sites, different types of offenders and victims from different cultures, that all reported high levels of participants satisfaction).
collar crime scandals that affect thousands of people and cause colossal harm. Answering the question of whether restorative justice applies in these cases will contribute to a better understanding of the restorative justice paradigm in general and to its possible role in the criminal justice system in particular.

The article argues that restorative justice interventions are warranted and possible even in high-profile white-collar crime cases where restorative justice has not been applied to date. However, the article also demonstrates that the conventional restorative justice process models such as victim-offender mediation, group conferencing and circles\textsuperscript{10} are inapplicable in high-profile white-collar crime cases, and that a different, innovative model inspired by the South African Truth and Reconciliation can offer a preferable solution.

Part I of this article introduces the restorative justice paradigm. It defines restorative justice and its basic values and principles and presents two theories which illustrate the goals of restorative interventions and the basic requirements for their commencement. Part II introduces white-collar crime and focuses on high-profile white-collar crime committed by corporate executives. This part discusses the centrality of white-collar crime within the criminal justice system and society in general and reviews the latest developments in legislation and sentencing policies on white-collar crime. Part III argues that the restorative justice paradigm should be applied to high-profile white-collar crime as a matter of principle, and as part of the sentence imposed on the offender, not instead of it. Part IV presents a model for restorative responses to white-collar crime inspired by the South African Truth and Reconciliation Commission, and demonstrates how this process model fulfills the important themes and conditions required of such an intervention. The article concludes by calling upon the criminal justice system and restorative justice advocates to combine efforts and examine the applicability and appropriateness of integrating a restorative component within the public response to white-collar crime.

\textsuperscript{10} For a brief description of these process models, see Mary Ellen Reimund, \textit{The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice}, 53 \textit{Drake L. Rev.} 667, 673–680 (2005) (reviewing victim-offender mediation and its basic stages, family group conferencing, circles and reparative boards and provides examples of different restorative justice programs in the United States implementing these process models).
I. THE RESTORATIVE JUSTICE PARADIGM: DEFINITION, VALUES AND THEORIES

Before examining the applicability of restorative processes to white-collar crime cases, it is important to ascertain what restorative justice actually is. Although there is no consensus among restorative justice practitioners and scholars on a definition of restorative justice, the definition offered by Paul McCold and Ted Wachtel seems most appropriate. According to McCold and Wachtel, “Restorative justice is a process involving the direct stakeholders in determining how best to repair the harm done by offending behavior.” However, this definition cannot stand alone, since its building blocks are unclear and vague: Who are the “direct stakeholders,” what is the meaning of “repairing the harm,” and what is considered “offending behavior?” Furthermore, the definition of restorative justice only provides a skeleton, a technical and dry description of what restorative justice may look like to a distant observer, without revealing the spirit and soul of the process.

In addition to its procedural aspect, the restorative justice paradigm consists of a set of principles and values. John Braithwaite, a prominent restorative justice advocate, compiled three lists of values which he referred to as (1) constraining values, (2) maximizing values, and (3) emergent values. According to Braithwaite, “list one are values that must be honored and enforced as constraints; list two are values restorative justice advocates should actively encourage in restorative processes; list three are values we

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11 John Braithwaite, Restorative Justice and Responsive Regulation 11 (Oxford University Press, 2002).


13 Id.

14 For a broad discussion on each of the different groups, their rationale and role in restorative processes, see John Braithwaite, Setting Standards for Restorative Justice, 42 Brit. J. Criminology 563 (2002) (listing, among the constraining values the following: non-domination, empowerment, honoring legally specific upper limits on sanctions, respectful listening, equal concern for all stakeholders, accountability and appealability and respect for the fundamental human rights specified in different internationally recognized declarations; among the maximizing values Braithwaite lists the restoration of human dignity, property loss, safety/injury/health, damaged human relationships, communities, the environment, emotional restoration and the restoration of freedom, compassion, peace, a sense of duty as a citizen, the provision of social support to develop human capabilities to the full and prevention of future injustice; among the emergent values Braithwaite identifies remorse over injustice, apology, censure of the act, forgiveness of the person and mercy).
should not urge participants to manifest – they are emergent properties of a successful restorative process.” 15

The first list consists of values such as non-domination, empowerment and equal concern for all stakeholders. 16 The second list includes basic kinds of emotional and monetary restoration, prevention of further injustice and similar principles. 17 The third list includes remorse, apology, censure of the act, forgiveness, and mercy. 18

Combined, the definition and the values mentioned above provide a useful basis for understanding what restorative justice is. The definition provides the basic structure and procedural context, and the values provide the goals and constraints of the process. What is missing, however, is a systematic connection between them – an underlying theory of restorative justice. While attempts to arrive at an agreed-upon definition and basic set of principles for the restorative justice paradigm continue, 19 there have been very few attempts to offer a comprehensive theory of restorative justice. One of the more noteworthy of these endeavors is Paul McCold’s causal needs-based theory (hereinafter “casual theory”). 20 Another important theoretical model is the “making amends” model, developed by Andrew von Hirsch, Andrew Ashworth and Clifford


16 Id. at 8–9 (explaining the meaning of these terms and their role in restorative processes).

17 Id. at 11.

18 Id. at 12.

19 See, e.g., Volume 3, No. 4 (2000) of the CONTEMPORARY JUSTICE REVIEW, dedicated to the academic discussion regarding the restorative justice paradigm; see Paul McCold, Toward A Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model, 3(4) CONTEMP. JUST. REV. 357 (addressing the need to identify the exact elements of restorative justice, offering a “Purist Model” of restorative justice which aims to include only elements of the restorative paradigm while excluding elements based on the retributive, deterrent and treatment paradigms. The model itself is based on the same premises and elements as McCold’s needs-based theory, as described and discussed in this article); see also Lode Walgrave, How Pure Can A Maximalist Approach to Restorative Justice Remain? Or Can A Purist Model of Restorative Justice Become Maximalist? 3(4) CONTEMP. JUST. REV. 415 (for a response of one of the developers of the “maximalist” model of restorative justice, reviewing common grounds shared by both the “maximalist” and “purist” models and continues to justify his proposed model and clarify its unique aspects).

Shearing. Together, the two theories provide a comprehensive understanding of what restorative justice processes strive to achieve.

McCold’s causal theory is premised on two postulates: That crime harms people and relationships and that justice requires repair of these harms. McCold further develops these precepts by asserting that the harm caused by crime creates needs. A restorative response is one that meets these needs and thereby repairs the harm. The key questions McCold identifies are: (1) who is harmed, (2) what are their needs, and finally (3) how can those needs be met?

In answering the first question, McCold distinguishes between primary or direct stakeholders (victims, offenders, their families and communities of care) and secondary or indirect stakeholders (neighbors, local community members, local governmental organizations and more). Based on this distinction, McCold identifies different types of restorative practices, ranging from “fully restorative,” when all participants are primary stakeholders, to “partly restorative,” depending on the degree of primary stakeholder participation and the inclusion of secondary stakeholders.

Unlike McCold, the three scholars who proposed the “making amends” model do not claim to be experts in the area of restorative justice. Von Hirsch, Ashworth and Shearing are prominent scholars in the area of retribution, criminal sentencing, and alternative sanctioning, respectively. Interestingly, although their goal – to formulate a theory that clarifies the aims and limits of restorative justice – is similar to McCold’s, the “making amends” model is

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22 McCold, A Causal Theory, supra note 20, at 1.
23 The concept of ‘community’ in the restorative justice paradigm has various different meanings and roles. In discussing these different meanings, Paul McCold distinguishes between “local communities” and “personal communities,” defined as “individuals who know and are personally involved in the lives of the victim and/or the offender.” For the purpose of this article, the latter form “communities of care.” See Paul McCold, Restorative Justice: The Role of the Community. Paper presented to THE ACADEMY OF CRIMINAL JUSTICE SCIENCES ANNUAL CONFERENCE, Boston, MA, Mar. 1995, available at http://www.restorativepractices.org/library/community3.html.
24 McCold, A Causal Theory, supra note 20, at 2–3; see also McCold & Wachtel, supra note 12, at 114.
quite different from the causal needs-based theory, probably due to the very different perspectives.

According to von Hirsch, Ashworth and Shearing, a restorative response is one that involves a negotiation between the offender and his victim, in the course of which the following occurs: “(1) [an] implicit or explicit acknowledgement of fault and (2) an apologetic stance on the part of the offender, ordinarily conveyed through having him undertake a reparative task.”26 However, the theory also takes into account situations in which one of these may not occur (for example, the offender does not apologize or agree to repair the harm). Even in those instances, the process will still be considered a restorative response so long as it was consistent “with the primary making-amends focus.”27 That said, von Hirsch, Ashworth and Shearing emphasize that not all kinds of intervention promote this aim, and it is up to each restorative justice program and the restorative justice community to develop guiding principles to that end.28 Finally, as articulated by its formulators, “the making-amends model is addressed to a certain kind of case: One in which there is an identifiable person who is the offender, another identifiable person who is the victim, and a victimizing act which infringes the latter’s rights.”29

In my opinion, restorative justice is a different approach to criminal justice. While the system today is offender-oriented and focused on punishment, the restorative justice paradigm offers a more balanced view of the appropriate public response to crime. It maintains the public aspect of criminal law but introduces the victims’ perspective and the reparation of the needs created by the offense as an inseparable aspect of justice. The contents of this approach are revealed through the definition of restorative justice, its values and its theories as reviewed in the previous passages. The question examined in this article is whether this approach, this paradigm, is applicable to white-collar crime.

27 Id. at 26.
28 Id. at 27–28.
29 Id. at 28.
II. White Collar Crime: Definitions, Importance and Current Trends

A. Defining White-Collar Crime

Before attempting to match the restorative justice paradigm with white-collar crime, the type of criminal misconduct included in the phrase “white-collar crime” must be clarified. The first to coin the phrase and offer a definition was Edwin Sutherland in a famous address to the American Sociological Society in Philadelphia on December 27, 1939. Sutherland defined white-collar crime as “a crime committed by a person of respectability and high social status in the course of his occupation.” Unsurprisingly, this definition was subject to various critiques, as were many of the other suggested definitions for this term. For example, Sutherland’s definition limits white-collar offenders to a particular social stature and class. This, of course, is extremely problematic from a jurisprudential perspective which focuses on the qualities of the conduct, not those of the offender. Criminal liability cannot be determined based on a defendant’s social status; that would be blunt and unjustified discrimination.

For this reason, among others, the United States Department of Justice (DOJ) adopted a different definition for the term. According to the DOJ, white-collar crime is nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone

30 Edwin H. Sutherland, White Collar Crime ix (Yale University Press, 1983).
31 Id. at 7.
32 See Stuart P. Green, White Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002: The Concept of White-Collar Crime in Law and Legal Theory, 8 Buff. Crim. L. Rev. 1 (exploring various aspects and possible meanings of the term “white-collar crime” and analyzing the use of the term in the Sarbanes-Oxley Act of 2002, which the author refers to as “the most significant piece of legislation ever to use the term ‘white collar crime.’”). For a description of the general confusion regarding the definition of “white-collar crime” see David Weisburd & Elin Waring, White-Collar Crime and Criminal Careers 6–7 (Cambridge University Press, 2001)).
33 Green, supra note 32, at 8–9.
having special technical and professional knowledge of business and government, irrespective of the person’s occupation.  

This definition opens the door to a wide array of offenders that fit an entirely different profile than the one Sutherland probably had in mind.

A study structured to discover recidivism patterns among white-collar offenders sentenced in federal courts used a previously selected sample labeled by its assembler “a broad sampling of white collar offenders in the federal courts.”  

Contrary to the common perception of white-collar criminals, the sample consisted mostly of “offenders who are very similar to average or middle class Americans.” In fact, eight percent of the offenders in the sample were unemployed at the time they committed the offense, and only a third were officers or owners of businesses. This data should not be surprising since “the vast majority of federal economic crime defendants are low-level offenders whose crimes caused only modest losses.” Many of these cases involve checks stolen from the mail (hence a federal offense), small embezzlements by employees of federally insured banks, health care fraud, student loan fraud and Social Security fraud.

Nevertheless, it is the white-collar criminal that Sutherland described that is of interest for the purposes of this analysis. There is nothing new or challenging about applying a restorative justice process to a widow who continues cashing her husband’s Social Se-

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35 David Weisburd, Elin Waring & Ellen Chayet, Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33(4) Criminology 587, 591 (citing Wheeler et al., Sentencing the White Collar Offender: Rhetoric and Reality, 47 AM. SOC. REV. 641–659 (1982). The sample examined eight typical federal white-collar crimes from seven federal judicial districts, chosen for their geographical spread and reputation for substantial amounts of white-collar crime cases, during the years 1976 to 1978.).

36 Weisburd et al, supra note 32, at 591.

37 Id.


security checks for several months after he passes away. The Polk County Attorney’s Office in Des-Moines, Iowa, for example, first began experimenting with restorative justice interventions in 1991 in unemployment fraud cases, where offenders received benefits illegally.\textsuperscript{40} In 1998, the County Attorney’s Office instituted the “Welfare Fraud Program” which offers offenders charged with welfare fraud the opportunity to participate in a restorative justice program instead of court trial.\textsuperscript{41} Such cases are referred to restorative justice interventions just like other low-level property offenses, which are the most common offenses to be referred to restorative justice programs in the United States.\textsuperscript{42} These types of fraud cases fall under this same category.\textsuperscript{43} Admittedly, it has been argued that the restorative justice paradigm is also not foreign to white-collar offending in the more lucrative corporate environment. In his book “Restorative Justice and Responsive Regulation,” John Braithwaite argues that restorative justice measures are in fact commonly used in many countries to regulate corporate and white-collar workers’ conduct.\textsuperscript{44} However, as critics point out, Braithwaite completed his book before Enron, WorldCom, Arthur Andersen and other massive corporate scandals that changed the way public companies are regulated in the United States. In the post-Enron era, the relevancy of restorative justice as a way of regulating the behavior of corporate executives is highly questionable due to the heavy reliance on punitive and regulatory measures.\textsuperscript{45}

This is the question I wish to address: Is it appropriate and justified to apply restorative justice processes to the white-collar criminals that Sutherland had in mind? The mental image of

\begin{itemize}
  \item \textsuperscript{40} Fredrick Gay, \textit{Restorative Justice and the Prosecutor” 27 Fordham Urb. L.J. 1651, 1653, 1656–1657 (2000).}
  \item \textsuperscript{41} \textit{Id.} at 1656–1657.
  \item \textsuperscript{43} The fact that the Federal Sentencing Guidelines consolidated the sentencing schemes for fraud and theft supports this view. For a broader discussion on the connection between fraud and theft, see Frank O. Bowman, \textit{The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History}, 35 IND. L. REV. 5, 13–17, 24 (2001) [hereinafter Bowman, “Economic Crime Package”].
  \item \textsuperscript{44} JOHN BRAITHWAITE, \textit{Restorative Justice & Responsive Regulation} 16, 128 (Oxford University Press, 2002).
  \item \textsuperscript{45} See Peter C. Yeager, \textit{Law Versus Justice: From Adversarialism to Communitarianism: John Braithwaite}, Restorative Justice and Responsive Regulation, 29 LAW & SOC. INQUIRY 891, 908 (2004).
\end{itemize}
white-collar criminals that I would like the reader to have is one of “crooked corporate tycoons, document-shredding Big Five accountants, and devious fat cats with offshore accounts.”46 They are typically high-ranking executives in large corporations who acted fraudulently in order to promote the value of their companies’ shares and for their own profit. Does restorative justice overreach with this kind of offender?

B. Centrality of White-Collar Crime

Over the years, white-collar crime has emerged as an important area of criminal law. As Frank Bowman reports, there are hundreds of federal economic offenses, which constitute over twenty-five percent of all federal offenses sentenced according to the sentencing guidelines.47 Adding to the centrality of this criminal category is the fact that economic crimes cover an extremely wide range of conduct and the legal provisions in this area protect a wide spectrum of important interests that go beyond the direct economic and physical interests of victims, such as the integrity of financial and commodity markets, the integrity of the judicial and political systems and more.48 Therefore, the harm caused by economic offenses “often extends far beyond monetary losses to loss of jobs, homes, solvency, access to health care or financial security in retirement.”49

One of the most infamous examples of the harmful effect of white-collar crime is, of course, the corporate executive misconduct that led to the fall of Enron in December 2001. As a result of the company’s fraudulent insider deals and accounting, thousands of people lost their jobs and often their life savings as well. In every possible way, this episode was nothing short of a disaster.50

What makes things even worse is that this was not an isolated incident. In recent years, the American people have been exposed

46 Bowman, Excerpts of Statement, supra note 39, at 2.
48 Id.
50 John R. Kroger, Enron, Fraud, and Securities Reform: An Enron Prosecutor’s Perspective, 76 U. Colo. L. Rev. 57, 58–59 (2005) (explaining that as a result of Enron’s fraudulent insider deals and accounting, approximately 4,500 Enron employees lost their jobs in Houston Texas alone. Many of them lost their life savings as well, since Enron encouraged its employees to invest their retirement savings in Enron stock. This, in return, led to the aggregated loss of $1.3 billion in savings accounts. Enron’s countless investors lost approximately $61 billion.).
to a series of corporate scandals that led, in the more severe cases, to the bankruptcy of major corporations. In most of these scandals top executives were allegedly engaged in criminal misconduct that ultimately caused extensive harm to their companies, employees and creditors and to the credibility and stability of the financial market. In addition to Enron, companies such as WorldCom, Tyco, Adelphia, Global Crossing and other large and influential corporations were involved in major scandals.51

Additionally, white-collar crime takes a substantial toll on the criminal justice system. In general, white-collar crimes, especially those of the type and magnitude discussed above, are costly and time consuming. They necessitate police officers and prosecutors to acquire special skills, their investigation and trial are often complex and lengthy, and even when they do not go to trial they “consume disproportionate amounts of judicial resources.”52

It has also been argued that the criminal justice system as a whole has been inadequate in its treatment of crime victims, its ability to reduce crime and its capability to fulfill public expectations of fairness and justice.53 As Bowman clearly and simply put it, “theft and fraud are never victimless crimes,”54 and the Enron scandal exemplifies just how many people white-collar crime can victimize. In other words, if the criminal justice system has a general problem with addressing victims’ needs, this problem is intensified and multiplied when it comes to white-collar crime. At the same time, there is no question that the criminal justice system is as deeply concerned with reducing and preventing white-collar crime as it is with the public’s perception of its response to white-collar crime.55 Therefore, if there were a better way to achieve these goals, this would surely be of interest to the criminal justice system.


52 Bowman, Excerpts of Statement, supra note 39, at 5; see also Robert G. Morvillo, Barry A. Bohrer & Barbara L. Balter, Motion Denied: Systemic Impediments to White Collar Criminal Defendants’ Trial Preparation, 42 Am. Crim. L. Rev. 157, 157–158 (discussing the difficulties and complexities of prosecuting white-collar crime); Leo Romero, Procedures for Investigating and Prosecuting White Collar Crime, 11 U.S.-Mex. L.J. 165 (reviewing the most common tactics and procedures used by prosecutors to overcome the unique difficulties of investigating and prosecuting white-collar crime cases).


54 Bowman, Excerpts of Statement, supra note 39, at 4.

55 See Daniel A. Berman et al., summer 2002: The Genesis of the Sentencing Provision of the Sarbanes-Oxley Act, Are We Really Getting Tough on White Collar Crime? Hearing Before the
Elsewhere I have argued that when applied appropriately, restorative justice processes can improve these shortcomings and can even strengthen fundamental principles of punishment. Since white-collar crime is such an important component of criminal law, takes up so much of the criminal justice system’s resources and has such a dramatic and extensive impact on society as a whole, it is crucial to determine whether the benefits and achievements of restorative interventions in other areas of criminal law can also be achieved here.

C. Current trends in responding to white-collar crime

As mentioned previously, America experienced an unusual wave of corporate scandals that caused massive harm between late 2001 and 2003, and public response did not wait long to follow. For those who followed the news in the United States in recent years these names and facts will undoubtedly be familiar: Bernard Ebbers, Chief Executive and founder of WorldCom, one of the largest telecommunication companies in the United States, was convicted of masterminding an $11 billion accounting fraud relating to the company’s earnings and was sentenced to twenty-five years in prison; Scott Sullivan, the company’s CFO, was sentenced to five years in prison for his role in the fraudulent scheme; Dennis Kozlowski, the former chief executive of Tyco International and Mark Swartz, his chief lieutenant, were convicted of fraudulently stealing $150 million from the company, and were sentenced to eight to


50 Gabbay, supra note 53, at 375–390 (demonstrating the compatibility of restorative justice with basic retributive and utilitarian principles); see also Zvi D. Gabbay, Justifying Restorative Justice: A Practical and Theoretical Justification for Restorative Practices, Paper presented at The 7th International Conference on Conferencing Circles and Other Restorative Practice, The Next Step: Developing Restorative Communities, Manchester, England, Nov. 9–11, 2005, available at http://fp.enter.net/restorativepractices/man05/man05_gabbay.pdf (citing and reviewing empirical evidence that demonstrates the superiority of restorative justice processes compared to the formal criminal justice system in reducing recidivism rates, saving valuable judicial resources and promoting the appearance of justice and a sense of fairness. It then turns to the two prevailing theories of punishment, retribution and utilitarianism, and finds their basic principles that correspond with the basic premises of the restorative justice paradigm).

57 See Jennifer Bayot & Roben Farzad, WorldCom Executive Sentenced, N.Y. Times, Aug. 12, 2005.
twenty-five years in a New York State prison;\textsuperscript{58} eighty-year-old John Rigas, founder and chairman of Adelphia Communications Corp. and his son, Timothy Rigas, former CFO of the company, were convicted of stealing $100 million from Adelphia for personal luxuries. John Rigas was sentenced to fifteen years in prison and his son was sentenced to twenty years in prison;\textsuperscript{59} and of course Jeffrey Skilling and Kenneth Lay, former Enron chief executives, were accused of overseeing “a massive conspiracy to cook the books at Enron and to create the illusion that it was a robust, growing company. . . when, in fact, Enron was an increasingly troubled business kept afloat only by a series of deceptions.”\textsuperscript{60} Ultimately, Enron collapsed, leaving behind a long trail of victims and substantial harm. Skilling and Lay were convicted in May 2006. Kenneth Lay died unexpectedly two months after his conviction of heart-related problems. Jeffery Skilling was sentenced in October 2006 to twenty four years and four months in prison.\textsuperscript{61}

Those mentioned above are merely a sample of what seems like a larger wave of powerful corporate executives exploiting their high positions and causing society substantial and long lasting harm.\textsuperscript{62} Their stories, however, exemplify another trend as well: white-collar offenders are being indicted and sentenced to long prison terms, in sharp contrast to the practice just a few years ago. Prior to November 2001, people suspected of committing white-collar offenses were rarely even prosecuted, which is exactly what white-collar defense attorneys wanted – and usually did – achieve.\textsuperscript{63} But even when white-collar offenders were charged and convicted, their sentences, in comparison with convicted “street”

\textsuperscript{58} See Andrew R. Sorkin, Ex-Tyco Officers Get Eight to Twenty-five Years, N.Y. TIMES, Sept. 20, 2005.


\textsuperscript{60} M. Rozen & B. Sapino Jeffreys, Ken Lay’s Defense Strategy: Come Out Fighting, Seek Speedy Trial, TEX. LAW. 3 (July 12, 2004) (quoting statement of Deputy Attorney General James B. Comey, head of the president’s Corporate Fraud Task Force).

\textsuperscript{61} Alexei Barrionuevo and Thayer Evans, Skilling Sentenced To Twenty-four Years, N.Y. TIMES, Oct. 24, 2006.

\textsuperscript{62} See K. Eichenwald, Even if Heads Role, Mistrust Will Live On, N.Y. TIMES, Oct. 6, 2002 (portraying the deep mistrust in corporate leaderships and financial markets due to these types of misconduct. At the end of the article, the author provides a more detailed list of some of the corporate executives accused of criminal misconduct).

\textsuperscript{63} Elizabeth Szoczyk, Imprisoning White-Collar Criminals? 23 S. ILL. U. J.L. 485, 487–488 (1998) (especially Kenneth Mann’s words cited by the author: “Though it may seem inappropriate, white-collar defense attorneys tend to regard the case that extends past the pre-charge state as a failure.” Id. at 488).
offenders, were more likely to be fines, probation, or community service rather than prison sentences.64

This reality seems to have changed. State, and mainly federal,65 law enforcement agencies are clearly adopting stricter policies to combat white-collar crime. The question is, why? One possible answer could be that the government was compelled to get “tougher on white-collar criminals” because of a “rising tide of economic crime.”66 Although it may certainly seem that way, especially in light of their publicity, statistics published by the DOJ prove otherwise. According to Frank Bowman, the number of referrals of white-collar cases by federal investigative agencies to U.S. Attorney’s Offices has “declined steadily, dropping by 5,155 or 15% between 1994 and 2000.”67 At the same time, the number of defendants charged with economic crimes in federal courts remained roughly steady between 1994 and 2001. This means that federal prosecutors must be declining fewer economic crime cases, and “dip[ping] ever deeper into a shrinking pool of offenders to hold roughly constant the flow of economic crime defendants through the federal courts.”68 In other words, not only is there no “tide of economic crime,” but the records show an actual reduction in white-collar crime rates.69

A possible explanation for the dramatic increase in the sentences imposed on convicted corporate executives may be that the government is responding to growing public pressure to punish white-collar offenders more severely. Studies conducted as far back as the pre-Watergate era have revealed that the public perceives some of the most typical white-collar crimes, such as misrep-
resenting the value of an investment to a potential investor, forgery, bribe and tax fraud, among the “most morally condemned behaviors” out of a list of fifty types of misconduct. A number of studies from the late nineteen fifties and sixties found that members of the public believed that certain types of white-collar offenders should be subjected to heavier penalties. Not surprisingly, these punitive attitudes have increased in the post-Watergate era.

In fact, one of the most interesting conclusions derived from the many studies that examined this question is that “the community perceives many forms of white-collar crime as more serious, and deserving of more severe punishment, than most forms of common crime.” At the same time, a national survey on white-collar crime conducted during 1999 found “a serious confidence gap between public demand for ‘just deserts’ for white-collar offenders and the perception of the criminal justice system’s ability, or willingness, to administer adequate punishment.” Highly publicized prosecutions and lengthy prison sentences for convicted corporate executives may very well be the criminal justice system’s attempt to answer public demand.

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70 John Braithwaite, Challenging Just Deserts: Punishing White-Collar Criminals, 73 J. CRIM. L. & CRIMINOLOGY 723, 732–733 (1982) (summarizing, in a chapter titled “Public Attitudes to White-Collar Crime,” numerous studies and polls that examined this subject. Among other studies, the author cites the study above by Rettig & Pasamanick (id. n. 47)).

71 See supra nn. 48–55 and accompanying text.

72 See supra nn. 56–75 and accompanying text (citing studies from the 1970s indicating that the public perceived certain types of white-collar crimes to be less serious than violent crimes, but more serious than all property crimes). For a more recent study see Donald J. Rebovich & Jenny Layne, The National Public Survey on White Collar Crime, NATIONAL WHITE COLLAR CRIME CENTER (2000), available at www.nw3c.org/downloads/research_monograph.pdf [hereinafter: the White Collar Crime Survey] for a more recent study (finding that over a third of the 1,169 participating American households considered themselves to be victimized by white collar crime in the last year, however very few (less than ten percent) of these crimes were actually reported. On the other hand, the survey found that “the level of moral condemnation of non-violent white-collar crimes was higher than expected, particularly when the crimes involve both monetary loss and the corruption of public trust.” Id. at 17).

73 Braithwaite, supra note 70, at 738.

74 The White Collar Crime Survey, supra note 72, at 17.

75 See I.H. Nagel and W.M. Swenson, The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future, 71 WASH. U. L. Q. 205, 224 (1993) (citing a study published by the Bureau of Justice Statistics, The United States Department of Justice, showing that sixty-five percent of Americans viewed sentences for white-collar defendants as too lenient (id. n. 94), and demonstrating the direct relation between this public perception, the Sentencing Commission’s mandate to adjust the Guidelines accordingly and Congress’ motives to introduce new legislative measures in prosecuting and sentencing white-collar offenders and corporations).
On the other hand, this answer is not based on sound and conclusive empirical evidence. John Coffee cited studies that show that “the public learns what is criminal from what is punished, not vice versa.”76 If this is true, then the public may be getting its retributive attitude toward white-collar offenders from the severe sentences pursued by prosecutors for such crimes. Either way, one thing is certain: It is by no means an accident or coincidence that white-collar offenders are being punished more often and more severely. It is the product of deliberate governmental policies and seems to be the wish of the American public. The legislative history and development of white-collar crime sentencing policies in the United States are the manifestation of these trends. Since any discussion on sentencing white-collar offenders must take these developments into account, they will be briefly reviewed here.

D. The history and development of white-collar crime sentencing policies and legislation

The first substantial development in sentencing white-collar offenders occurred with the enactment of the Sentencing Reform Act of 1984 and the formulation of the Federal Sentencing Guidelines.77 Through the guidelines, the Sentencing Commission strove to stop the common practice of nearly automatic probation for economic crimes, and impose “short but certain terms of confinement for many white-collar offenders, including tax, insider trading, and antitrust offenders, who previously would have likely received only probation.”78 The second significant landmark in prosecuting and sentencing white-collar criminals came in November 2001, when the “Economic Crime Package,” passed by the Sentencing Com-

76 John C. Coffee, Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It, 101 YALE L.J. 1875, 1888, n. 39 (1992) (citing a 1965 article by Harry Ball & Lawrence Friedman analyzing “the interactive role between the use of criminal punishment and the public’s perception of what is criminal.” Coffee argues that this evidence demonstrates how the use of criminal sanctions helps formulate public perceptions regarding severity and inherent culpability of certain offenses).

77 For a more detailed account of the history of the sentencing guidelines see S.L. Kaufman, The Federal Sentencing Guidelines: A Formulaic and Impersonal Approach to Dispensing Justice, 7 NEV. LAW. 18 (1999); see also Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1 (1988) (explaining the rationales behind the guidelines and discusses the various compromises which were embedded in the final version of the Guidelines. One of those compromises had to do with appropriate sentencing for white-collar crimes (see id. at 20–23)).

78 See Breyer, supra note 77, at 20–21.
mission in April of that year, went into effect. The revised guidelines consolidated the sentencing schemes for fraud and theft and, among other things, redefined the term “loss” and increased sentences for “high-loss offenders.”

Given the amount of time, thoroughness and effort invested in putting the “Economic Crime Package” together, it would have been quite reasonable to assume that the amended sentencing guidelines would last for at least a few years before being modified again. However, the great bankruptcies and corporate scandals of Enron, Global Crossing, Adelphia, WorldCom and others gave rise to yet another change in white-collar crime sentencing policies. In response to the disturbing business practices revealed by these scandals and the harm they caused to the credibility and stability of the financial market, Congress and the Bush Administration enacted the Sarbanes-Oxley Act (SOA), which went into effect on July 30, 2002. While the SOA targets and regulates many different aspects of business and accounting practices, its criminal provisions are of most interest and relevance to our discussion. These provisions include the creation of a number of new offenses to strengthen the enforcement power of federal prosecutors and other federal regulatory agencies. But these provisions are probably most known for the severe prison terms imposed on white-collar crime offenders. Finally, the SOA directed the Sentencing...
Commission to amend the Federal Sentencing Guidelines so that they “reflect the serious nature of the offenses and the penalties set forth in this Act” in order to “deter, prevent and punish such offenses.”

The next development in sentencing white-collar offenders related to a dramatic change of policy regarding offender confinement facilities. Up until December 2002, the sentencing federal judge recommended the specific type of confinement imposed on white-collar offenders (similar to penalties for other first-time non-violent offenders) – most frequently halfway houses or other community confinement centers. However, in a memorandum issued by the DOJ to the director of the Federal Bureau of Prisons (BOP), this practice was deemed “unlawful.” Instead, the BOP was instructed to place all defendants sentenced to a term of imprisonment, including all low-level, non-violent offenders, in prison, as opposed to halfway houses or community confinement centers. In its final passage, the memorandum uncovers the rationale underlying the sudden policy change:

BOP’s current placement practices run the risk of eroding public confidence in the federal judicial system. White collar criminals are no less deserving of incarceration, if mandated by the Sentencing Guidelines, than conventional offenders. . . As many studies have shown, the prospect of prison - more than any other sanction – is feared by white collar criminals and has a powerful deterrent effect. Moreover, white collar crimes often involve not only a high level of intent and calculation, but are committed over an extended period of time, making the punitive dimension of prison especially deserved in many cases.

The final development to date in sentencing corporate white-collar defendants came in November 2003 in the form of a second round of permanent amendments to the Federal Sentencing Guide-

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89 SOA, supra note 84, Section 905(b)(1).
91 Id. For a more extensive review and discussion on the legality of the new policy see Jennifer Borges, The Bureau of Prisons’ New Policy: A Misguided Attempt to Further Restrict a Federal Judge’s Sentencing Discretion and to Get Tough on White Collar Crime, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 141, 175 (2005).
92 The Memo, supra note 90.
lines, as a direct response to the directives contained in the SOA. Pursuant to the prior trend of aggravation described above, the Commission increased the penalties for fraud committed by corporate officers or directors, offenses that endanger the solvency or financial security of large numbers of victims and certain types of obstruction of justice. Based on these last amendments, it opined that in cases in which the loss is $2.5 million or more and there is a large number of victims, the new guidelines will “virtually mandate a sentence of thirty years to life for every defendant – a sentence of unprecedented severity for first-time, non-violent offenders”.

So how did these developments actually impact on white-collar defendants? Statistics demonstrate an increase in the percentage of defendants guilty of economic crimes sentenced to prison and an increase in the length of the prison terms imposed. In a letter to the United States Sentencing Commission, prior to the November 2003 sentencing guidelines amendments, Bowman predicted that the severity and length of sentences imposed on white-collar crime offenders would escalate even higher “as the sentence increases built into the 2001 Economic Crime Package begin to take effect.” The November 2003 amendments leave little room for doubt this prediction will be realized.

III. Restorative Justice and White-Collar Crime: An Appropriate, Useful, and Justified Match

As will be demonstrated, adding a restorative intervention to the public response to high-profile white-collar crime is not only appropriate and theoretically justified but technically possible and pragmatically useful as well. True, in this area of white-collar crime restorative justice does not offer an alternative to the existing system as may be with other types of criminal misconduct. Neverthe-

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93 See SOA, supra note 84; see also SOA, supra note 84, Section 805 (Review of Federal Sentencing Guidelines for Obstruction of Justice and Extensive Criminal Fraud) and Section 1104 (Amendment to the Federal Sentencing Guidelines).

94 See Elkan Abramowitz & Barry A. Bohrer, White Collar Crime: Throwing the Book (The Guidelines) at Corporate Criminals, 229 N.Y. L. J. 3 (col. 1) (more broadly discussing the November 2003 amendments).

95 Practitioners Advisory Group (PAG), Letter to Hon. Diana E. Murphy, Chair, U.S. Sentencing Commission, Dec. 12, 2002, as cited by Abramowitz and Bohrer, id.

96 See Bowman, supra note 39, at 3 (citing statistics reported by the U.S. Sentencing Commission regarding the years 1994 to 2001).

97 Id. at 3.
less, it will be argued that restorative justice has much to offer to
the current criminal justice system in its response to white-collar
crime.

First and foremost, the reason restorative justice is important
and relevant to white-collar crime is because it promotes justice in
a more complete way. This is true even when the restorative inter-
vention is added to the current response to white-collar crime, as
opposed to a restorative intervention that replaces the existing re-
sponse. It is also true regardless of strong retributive notions justi-
fying harsh punishments for these offenders or restitution
mechanisms that the criminal justice system already implements
with regard to white-collar crime victims. Simply put, restorative
justice seeks to do justice as a matter of principle. According to the
restorative justice paradigm, “crime is more than lawbreaking” and
it therefore requires a response that does “more than punish-
ing or treating those found guilty of lawbreaking.”

This is the reason for the two postulates upon which McCold
premises his theory of restorative justice: Crime harms people and
relationships and justice requires repair of these harms. This is
also the first core principle of restorative justice proposed by
Daniel Van Ness and Karen Strong and cited with assent by
Gordon Bazemore, all prominent restorative justice advocates.
The second proposed core principle is equally important. Accord-
ing to Van Ness and Strong, “victims, offenders and communities
should have opportunities for active involvement in the restorative
justice process as early and as fully as possible.” Empowerment,
respectful listening and equal concern for all stakeholders are
among Braithwaite’s most important constraining values. In
other words, if justice requires repairing harm and empowering
stakeholders to participate in the justice process, then an appropri-
ae and just public response to white-collar crime should include a

98 Gordon Bazemore, Rock and Roll, Restorative Justice, and the Continuum of the Real
World: A Response to “Purism” in Operationalizing Restorative Justice, 3(4) CONTEMP. JUST.
REV. 459, at 464.
99 Id.
100 McCold, A Causal Theory, supra note 20, at 1.
101 According to Van Ness and Strong, as cited by Bazemore, supra note 98, “[j]ustice requires
that we work to heal victims, offenders and communities that have been injured by crime”; see also
Daniel Van Ness, The Shape of Things to Come: A Framework for Thinking About A Restorative Justice System, in
RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 1, 2
(Weitekamp & Kerner eds., 2002).
103 John Braithwaite, “Restorative Justice and Therapeutic Jurisprudence” 38 CRIM. L. BULL.
244, 247.
restorative component. According to this approach to justice, the government should continue to do its best to preserve order and to ensure retribution, but at the same time it should enable processes that promote justice in a broader sense and should address the needs and expectations created in the aftermath of crime. White-collar crime does not differ from street crime in this sense and should not be left beyond the reach of restorative processes.

The main problem with this argument is that not everyone thinks that justice requires attending to the needs created by crime, and many may not view the inclusion of restorative processes as a justice promoting matter. The current criminal justice system in the United States, for example, is offender-oriented, focusing on punishing convicted offenders rather than healing crime-affected stakeholders. However, this in itself does not make the punishment-based approach to criminal justice preferable to the restorative approach to justice. A study that explored the public reaction to restorative sentencing based on research published in English over a period of twenty years (1982-2002) found that “there is clearly strong public support for restorative concepts such as compensation, restitution and community work.”104 But more important is the authors’ explanation for the popularity of restorative sentencing options:

The idea that the offender has made amends to the individual victim or the larger community clearly carries considerable popular appeal. . . [which] may reflect both a desire on the part of the public to assist victims of crime, as well as the belief that by making compensation, the offender is taking an important step toward his or her rehabilitation and restoration to the community.105

Admittedly, the ultimate decision is left in the hands of legislatures and policy makers. However, this evidence suggests that it may be time to reconsider the current governing perception of justice, and that there is considerable public support for an alternative understanding of the appropriate response to crime.

104 Julian V. Roberts & Loretta J. Stalans, Restorative Sentencing: Exploring the Views of the Public, 17(3) SOC. JUST. RES. 315, 328.
105 Id. at 329.
A. Justification problems concerning the proposition of responding restoratively to white-collar crime

In addition to the problem discussed above, responding restoratively to white-collar crimes is also problematic in terms of the two main theories of punishment that govern sentencing policies in most of the modern world – retribution and utilitarianism. The question arises whether the application of restorative justice to white-collar crime is justified in terms of the tenets of these punishment theories. Elsewhere I have argued that although restorative justice and these theories of punishment seem, at first, to contradict each other, they are in fact compatible and share many fundamental principles. However, since the differences between the various paradigms seem harder to bridge when it comes to high-profile white-collar offenders, the justification question requires a closer analysis in this context.

1. Restorative justice and retribution

Under a retributive theory, offenders must be punished according to their just deserts. This notion incorporates two important premises in the retributive ideal: first, that punishment is the goal, not the means for achieving some other social objective; second, that offenders should be punished in proportion to their wrongdoing, not more, not less. These two premises create a real problem for the implementation of the restorative justice paradigm in response to white-collar crime.

Shifting from a philosophical perspective of retribution to a practical one, it is necessary to determine what a “deserved” punishment actually consists of for each offense and for each offender. In the United States, this is determined by a judge, sometimes guided by specific sentencing guidelines, subject to legislative determinations of maximum and minimum penalties for each offense. The purpose of this mechanism is to capture and reflect “the will of


107 Gabbay, supra note 53.

As demonstrated above, there is little doubt about the kind of punishment which the public wants; it wants harsher punishments and longer incarceration periods.110 Similarly, there is little doubt about what the legislature wants, as reflected in the Sarbanes-Oxley Act and the Federal Sentencing Guidelines.111 Clearly, “soft” and “weak” restorative responses112 to white-collar crime are not on their agenda.

The possibility that the public and its representatives demand harsher sentences for white-collar offenders creates a genuine justification problem for restorative interventions. Under a retributive sentencing regime, white-collar offenders must be punished according to their “just deserts.” If it is true that the public feels strongly that this means long imprisonment and harsh sentencing for white-collar offenders, rather than an apology and symbolic restitution, then restorative responses to white-collar crime are simply unjust.

The way to solve this problem is to employ restorative measures in response to white-collar crime in addition to traditional punishment and not instead of it. This is commonly the practice when applying restorative justice to violent and severe crime cases.113 In other words, white-collar offenders would face their “just deserts,” which would include some restorative component among the other components of the punishment.

The trouble is that this model compromises many vital restorative justice values and tenets. John Braithwaite, for example, believes that a restorative regime can be extremely effective in responding to white-collar crime and preventing it in the future.114

109 Braithwaite, supra note 39, at 732.
110 See supra notes 68–73, and accompanying text.
111 See supra note 89 and accompanying text.
112 As Braithwaite calls them in his book RESTORATIVE JUSTICE & RESPONSIVE REGULATION, supra note 44, at 109–110.
113 In most jurisdictions, when restorative justice is applied to serious crimes it is done so in addition to the regular sentence imposed on offenders by court. See, e.g., Gay, supra note 40, at 1653–1655 (describing the way victim-offender meetings are included in the criminal proceedings in Polk County, Iowa, as a complementary component of the usual disposition of cases by the courts); Mark Umbreit et al. (2002) Victim Offender Dialogue in Crimes of Severe Violence: A Multi-Site Study of Programs in Texas and Ohio, CENTER FOR RESTORATIVE JUSTICE AND PEACEMAKING, SCHOOL OF SOCIAL WORK, UNIVERSITY OF MINNESOTA, available at http://2ssw.che.umn.edu/rjp/Resources/Resource.htm (describing two programs, in Texas and Ohio, where victims are provided with the opportunity to meet with their offenders, if the latter voluntarily agree. These meetings are conducted after the criminal justice system disposed of the cases conventionally, usually during the imprisonment of the offender. The meetings are intended mainly for healing and rehabilitation purposes for both victims and offenders).
114 Braithwaite, supra note 44, at 16–18.
However, that regime cannot be “corrupted” with unnecessary coercive measures. In Braithwaite’s words:

[R]estorative justice works best with a specter of punishment in the background, threatening in the background but never threatened in the foreground. Where punishment is thrust into the foreground even by implied threats... This is not the way to engender empathy with the victim, internalization of the values of the law and the values of restorative justice, the sequences of remorse, apology, and forgiveness.

In their theory of restorative justice, Paul McCold and Ted Wachtel distinguish restorative responses from other means of social discipline through their collaborative nature, since they empower those primarily affected by a crime to come together and work with each other in order to develop a plan to repair the harm or prevent its recurrence. Conversely, the punitive approach to social discipline is characterized by the state’s authoritative stance toward offenders, determining what should be done to them, as opposed to with them. When inserting a restorative process within the framework of other punitive components of a sentence, it would be unconvincing, and probably wrong altogether, to argue that the restorative segment of the sentence involves working with the offender when it is drowned in a sea of punitive measures primarily intended to inflict pain. It is far more likely that the inclusion of such a restorative component would merely be seen as another means of “doing things to the offender, admonishing and punishing,” hardly what McCold and Wachtel had in mind.

On the other hand, even though many restorative justice proponents may feel extremely uncomfortable with this, reality has it that in certain types of criminal misconduct such as violent and severe crime, restorative justice “is not intended to be a substitute for the criminal penal system. Rather, it offers a way to link together the other aspects of justice including victim fulfillment and appropriate offender retribution.” In light of the studies showing a public demand for harsh punishments and the harsh legislative attitude towards white-collar crime, it is most appropriate to conclude

115 Braithwaite, supra note 44, at 34.
116 Braithwaite, supra note 44, at 35–36.
117 McCold & Wachtel, supra note 12, at 113.
118 Id. at 112–113.
119 Id. at 114.
that here, just as in violent crimes, restorative measures must come in addition to the retributive response, not instead of it. This structure answers retributive-oriented concerns regarding the application of restorative justice to white-collar crime, but at the same time provides victims and offenders with a meaningful mechanism for repairing the harm caused by the offense.

It is important to note, however, that adding a restorative component to the public response to white-collar crime will change its traditional component as well. One of the most fundamental principles of retribution is proportionality: Imposing on offenders exactly what they deserve, not more or less.\(^\text{121}\) Take for example Bernard Ebbers, former chief executive of WorldCom, who was sentenced to a record twenty-five years in prison. Theoretically, this is his “deserved” sentence. If, hypothetically, Ebbers were to participate in a restorative justice process in which he would be confronted by his victims, as part of his sentence, the prison component would have to be reduced to some extent. Otherwise, Ebbers would be subject to a punishment that exceeds his “desert.” In other words, the restorative component is to be seen as another form of punishment, not an alternative to punishment,\(^\text{122}\) and, as such, must be taken into consideration in the overall calculation of an offender’s “deserved” sentence.

2. Restorative justice and utilitarianism

According to a utilitarian theory of punishment, criminal sanctions are justified primarily if they can benefit society by deterring the offender and others from committing future crimes.\(^\text{123}\) Specific and general deterrence are key motifs in the current public response to white-collar crime, and are probably superior even to retribution. As explicitly stated in the Sarbanes-Oxley Act, harsher punishment of white-collar offenders is necessary in order to “deter, prevent and punish such offenses.”\(^\text{124}\)

\(^{121}\) See Kant, supra note 108 and accompanying text.

\(^{122}\) See Walgrave, supra note 19, at 423 (citing with assent R.A. Duff and Kathleen Daly who argue that restorative interventions should be seen as “alternative punishments” and not as “alternatives to punishment.”).

\(^{123}\) Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 165 (J.H. Burns & H.L.A. Hart eds., 1982) (1783); see also Luna, supra note 106, at 208–9 (reviewing the basic tenets and objectives of the utilitarian theory of punishment, adding a few of the most distinct utilitarian goals such as rehabilitation and incapacitation as ways of preventing future crime).

\(^{124}\) SOA, supra note 84, Section 905(b)(1) (interestingly, deterrence and prevention – two distinctive utilitarian objectives – are mentioned before the retributive purpose of punishment).
It has long been held that white-collar offenders are particularly susceptible to deterrence, since their misconduct can often be regarded as rational, especially in comparison to street offenders. White-collar offenders are usually motivated by the prospects of monetary profits as a result of their actions, and are perceived as risk averse due to their status and achievements. These are people who presumably would not want to go to prison and would be deterred from committing crimes if they perceived their chances of imprisonment to be substantial.¹²５

It is also widely agreed that “[d]eterrence is predicated on three factors: severity, celerity, and certainty of punishment.”¹²⁶ Evidently, severity of punishments for white-collar crimes in the United States is currently at its all-time high. Additionally, due to new legislation, current law enforcement policies, and the latest developments of the Sentencing Guidelines regarding white-collar crime, these severe punishments have become practically mandated in some cases.¹²⁷ This last development is particularly important since certainty of punishment is empirically known to be a far better deterrent than its severity.¹²⁸ The inevitable conclusion is that today’s white-collar crime sentencing policies seem to achieve two of the three major components of deterrence in an area of law in which deterrence is presumed to be especially effective.

Furthermore, it is reasonable to associate deterrence with the sentences imposed on some of the defendants involved in the corporate scandals of 2001-2002. The twenty-five year prison sentence for WorldCom Chief Executive Bernard Ebbers, the fifteen- and twenty-year prison sentences for Adelphia executives John and Timothy Rigas, respectively, as well as some of the other sentences specified earlier in this article, have a real impact on business exec-

¹²⁵ See Szockyj, supra note 63, at 492; see also United States Attorney for the Southern District of New York, James B. Comey, Jr. in his testimony before the Subcommittee on Crime and Drugs, Senate Judiciary Committee, in Berman, supra note 554, at 3:

Certainty of real and significant punishment best serves the purposes of deterring white collar criminals, in fact to a greater extent than this principle applies to other types of offenders. People with a lot to lose, especially people who have never been in trouble with the law before, don’t want to go to prison.


¹²⁶ Szockyj, supra note 63, at 492.

¹²⁷ See, e.g., supra note 93 and accompanying text.

utives in the United States. No one wants to be the next Bernard Ebbers or the next Skilling. As expressed by one of New York’s leading white-collar criminal defense attorneys, Elkan Abramowitz, “Where once white-collar defendants, particularly those who occupied executive suites and boardrooms, could previously rely on under-enforcement and relative leniency, they can [now] expect to have the book thrown at them. . . .” Admittedly, it will take a few more years to empirically prove the deterrent effect of such punishment. Nevertheless, even at this point, it may be concluded that long prison sentences have at least some deterrent effect on white-collar offenders.

For better or worse, the same cannot be said about restorative justice. Sitting in a restorative conference and being confronted by angry victims and community members for a few hours may be an unpleasant experience, but it cannot be compared to sitting in a jail cell, surrounded by inmates convicted of the worst crimes possible, for a substantial number of years. Unlike the former experience, the latter experience physically scares many potential offenders, hence deterring them from committing a crime. As mentioned above, a restorative intervention would come as part of the public response to white-collar crime, not as the response, but it would have some effect on the punishment inflicted upon white-collar offenders as well. It may be argued that if the restorative intervention decreases the deterrent effect of the sentence, then restorative justice in these cases may be rendered unjustified from a utilitarian perspective.

However, this argument is premised on the assumption that deterrence can only be achieved through intimidation associated with harsh punishment. Undoubtedly, the thought of serving a long prison sentence in an overcrowded federal penitentiary scares potential white-collar offenders. In fact, the thought probably scares many street offenders as well. But the question is whether this thought actually deters potential white-collar offenders. Unfortunately, the answer to this question remains unclear. On the one hand, it is logical to assume that frightening potential offenders would deter them and that this fear would manifest itself in their abstention from committing crimes. On the other hand, there is no decisive evidence to support the conclusion that harsh sentences

129 See Supra notes 57–61 and accompanying text.
130 Abramowitz & Bohrer, supra note 94, at 1.
131 This view is commonly voiced by prosecutors, as exemplified in the statement of U.S. Attorney for the Southern District of New York Comey, supra note 125 and accompanying text.
actually have a general and specific deterrent effect on potential white-collar offenders. In fact, when criminal sanctioning was found to have such an effect, it was accompanied by informal sanctions (such as social censure, shame, and loss of respect) which were equally important in producing the deterrent outcome.

One possible explanation for the inconclusive empirical data regarding the deterrent effect of imprisoning white-collar offenders is that these studies did not include recent developments in white-collar sentencing, which raise the maximum punishments for certain crimes tens and even hundreds of percents higher. While this is true, some commentators still have reservations about the difference these recent developments will actually make. Michael Perino, for example, believes the Sarbanes-Oxley Act has very little impact, if at all, on increasing deterrence; Geraldine Szott Moohr has opined that criminal law in itself, even after the Sarbanes-Oxley Act, is insufficient to prevent business misconduct. In short, it is not clear whether future studies, even those that will reflect the current harsh sentences, will find such sentences to be justified in terms of a substantially higher deterrent effect.

See Szockyj, supra note 63, at 493–495 (citing a study by Michael K. Block et al. that demonstrated the superiority of civil suits in deterring potential offenders from price-fixing; a study by Braithwaite and Makkai that concluded that deterrence is not effective in encouraging compliance with regulatory law; a study by Simpson and Koper that found that deterrence had little effect on antitrust violators); see also Weisburd et al., supra note 32, at 601 (concluding that “prison does not have a specific deterrent impact upon the likelihood of re-arrest over a 126 month follow-up period”).

See Raymond Paternoster & Sally Simpson, Sanction Threats and Appeals to Morality: Testing A Rational Choice Model of Corporate Crime, 30 Law & Soc’y Rev. 549 (1996) (testing the role of the “Rational Choice Theory” in corporate crime and exploring different means for preventing it. The researchers conducted their study on a sample of first and second year graduate students in M.B.A. programs at three different universities and a group of corporate executives attending a business school executive education program at a fourth university. All students intended to pursue corporate and business careers, and the vast majority of them had been employed in business for at least a year prior to the study).

See Michael A. Perino, Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002, 76 St. John’s L. Rev. 671, 698 (2002) (reviewing the various substantive and procedural provisions of the Sarbanes-Oxley Act, compares them to the applicable law that existed prior to its enactment, and concludes that Congress “trumpeted its new crimes and new enhanced penalties as providing significant deterrence for securities fraud. In reality, these provisions are unlikely to have much real impact on deterrence”).

See Moohr, supra note 87, at 975 (reviewing the criminal law landscape before and after the Sarbanes-Oxley Act, discusses the role of criminal law in achieving compliance with the law among business people and concludes that the criminal law is limited in this aspect and must be combined with “market-motivated gatekeepers, private remedial suits, [and] government administrative actions”).
Although the federal government seems to view harsh punishment as the primary method for fighting white-collar crime, this is not the only way of preventing such misconduct. In fact, some believe other means to be as effective if not better deterrents than punishment. According to Dan Kahan and Eric Posner, shaming, by way of publicizing the identity of the offender and the details of the offense, can be just as effective in preventing white-collar crime.\textsuperscript{136} Dan Kahan also emphasizes the important role of peers and the close community in one’s decision to commit a crime or refrain from doing so.\textsuperscript{137} Harold Grasmick and Robert Bursik have found through their studies that self-imposed shame can often be viewed as more certain and more severe than state-imposed punishment.\textsuperscript{138} Grasmick and Bursik also mention embarrassment – a socially imposed punishment\textsuperscript{139} – as another potential deterrent. Similarly, Raymond Paternoster and Sally Simpson, who studied the factors contributing to corporate offending, found that informal sanctions such as social censure, shame, loss of respect and moral considerations have a substantial effect on decisions to commit these types of crimes, at times entirely independent of rational cost benefit considerations.\textsuperscript{140}

Group conferences and circles, which are common restorative practice models involving a broad group of participants, exemplify the way restorative interventions foster these deterrents.\textsuperscript{141} Many restorative justice advocates associate these processes with “reintegrative shaming,”\textsuperscript{142} which dictates “disapproval of the act within a


\textsuperscript{137} Dan Kahan, Social Influence, Social Meaning, and Deterrence, 83 VA. L. REV. 349, 350 (1997) (describing and explaining the dominant roles of “social influence” and “social meaning” in crime prevention. According to Kahan, these terms refer to the way “individuals’ perceptions of each others’ values, beliefs, and behavior affect their conduct, including their decisions to engage in crime”) (citation omitted).


\textsuperscript{139} Grasmick and Bursik mention significant others, friends, family, employers and others “whose opinions about an actor are considered important by that actor” as potential “punishers.” Id. at 840.

\textsuperscript{140} Paternoster & Simpson, supra note 133, at 549, 561–62 (describing the elements of “informal sanctions”) and the summary of the study’s findings at 579–80.

\textsuperscript{141} For a brief description of the most common restorative practice models Victim Offender Mediation; Group Conferencing; Circles; and Reparative Boards see Mary Ellen Reimund, The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice, 53 DRAKE L. REV. 667, 673–680 (2005) (Victim Offender Mediation; Group Conferencing; Circles; and Reparative Boards)).

\textsuperscript{142} As explained by Braithwaite in his book, supra note 44, at 74.
continuum of respect for the offender and terminated by rituals of forgiveness.”

To exemplify how this theory works, Braithwaite mentions circles of support and accountability which bring together community volunteers with convicted sex offenders in Canada. In one of the cases described by Braithwaite, the volunteers were explicit in their condemnation of the act, but maintained a long-term relationship with the offender in order to help him successfully reintegrate into the community. Through their work with the offender, these community members strengthen normative behavior and encourage law-abiding behavior through positive influence. Especially in the area of high-profile white-collar crime, where “[t]he population of top corporate executives in America can be characterized as living in an exclusive small town”, shame can be used to deter criminal behavior and peers can take on an important role in reinforcing normative behavior and censuring criminal misconduct that affects the entire business community. Restorative interventions, which provide an opportunity for white-collar offenders to meet their peers and members of their “exclusive small town,” can put these effective deterrents to use.

As suggested in this part, introducing restorative justice to high-profile white-collar crime must be coupled with the current traditional responses. Only through such a structure can the use of restorative interventions be justified from both a retributive and a utilitarian perspective. The challenge, of course, is to structure a response to white-collar crime that provides the ultimate deterrent effect (whether through incarceration, fines, shaming or peer pressure) together with a restorative component (that addresses the needs created by the crime and the ways of repairing the harm), while also complying with the retributive demand for “just desert” and proportionality.

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143 Id.
144 Id. at 75–76.
146 See Floyd Norris, Why His Peers Say Kozlowski Got Off Easy, N.Y. TIMES, Sept. 23, 2005 (demonstrating the effect white-collar crime has on the entire business community and the involvement and opinions held by peers of some of the convicted offenders associated with the corporate scandals of 2001-2002. The article indicates that peers are definitely stakeholders in white-collar crimes and can take an important and positive role in restorative interventions); see also Barnard, supra note 145, at 967 (citing a number of studies that suggested that some top-level managers and members of their social class fear being shamed before their family members and peers more than they fear criminal prosecution and civil lawsuits).
B. Restorative justice and white-collar crime: the offender’s perspective

Another argument against the introduction of a restorative response to white-collar crime is that white-collar offenders are different from street offenders, who are currently referred to restorative justice practices, making these types of interventions inappropriate.

Restorative justice theorists have long held the notion that “crime is a dysfunctional way of saying something, and punishment...is an equally dysfunctional way of answering.”147 But what are criminals trying to say? What is that “something”? According to many criminologists, crime is partially motivated by needs;148 offenses may be seen as attempts to satisfy needs. This theory of crime ties in with McCold’s causal theory of restorative justice, since meeting participants’ needs, according to McCold, is the essence of a restorative response and a key element in achieving justice.149

The problem, as articulated by Braithwaite, is that “white-collar crime highlights the fact that illegitimate opportunities are grasped not only to satisfy need but also to gratify greed.”150 In his account of the reasons that led to the great corporate scandals of 2001 and 2002, Professor John Coffee places responsibility upon three different groups: The gatekeepers (mainly the big five, now big four, accounting firms), the managers of big corporations, and the shareholders (particularly institutional investors).151 As for the role of managers in the financial collapse of their corporations, Coffee emphasizes the dramatic increase in the use of stock options as executive compensation, and their unique ability to liquidate them immediately.152 This combination provided a strong incentive for managers to “engage in short-term, rather than long-

150 Braithwaite, supra note 148, at 39.
152 Id. at 297–298; see also John C. Coffee, Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U.L. REV. 301, 328 (2004).
term, stock price maximization because executives can exercise their stock option and sell the underlying shares on the same day.” Moreover, these incentives made it “rational for corporate executives to use lucrative consulting contracts, or other positive and negative incentives, to induce gatekeepers to engage in conduct that assisted their short-term market manipulations.”

One may argue that the role of greed in white-collar crime differs from that in street crime because the needs that motivate the latter are often associated with basic necessities as opposed to luxuries. There are numerous studies that point to the connection between poverty and crime, whereas high-profile white-collar offenders are often in an entirely different financial situation. This may render restorative justice interventions in white-collar crime cases irrelevant. According to the National Survey of Victim-Offender Mediation in the United States, the three most common offenses referred to the programs in the survey, in order of frequency, are vandalism, minor assaults, and theft. The next most frequent is burglary. Together, these four offenses account for the vast majority of offenses referred to restorative interventions, with a small number of other property-related offenses and a few severely violent offenses also being identified.

These are all common street crimes, typically committed by indigent offenders with needs that are very different from those of the executives described by Coffee.

Additionally, white-collar offenders may differ from street offenders in another way. Two of Braithwaite’s most important restorative values are non-domination and accountability. The constraining principle of non-domination compels restorative justice programs to counter and prevent “any attempt by a participant...

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153 Coffee, supra note 151, at 297–298.
154 Id. at 298.
156 The National Survey, supra note 42.
157 Braithwaite, supra note 15, at 8–10.
at a conference to silence or dominate another participant.” 158 In fact, this principle is so important that “a programme is not restorative if it fails to be active in preventing domination.” 159 The second principle – holding offenders directly accountable for their actions – is one of the most basic and widely agreed-upon tenets of the restorative justice paradigm. 160 Given the unique characteristics of the typical corporate executive white-collar offender, it may be argued that two of these important and central values will not be sustained in a restorative response to the wrongdoing.

A study conducted by Peter Cleary Yeager and his colleagues found that managers of large corporations completely disregard the interests of shareholders in their decision-making. Moreover, a top manager who executed an accounting trick aimed at falsifying the firm’s reported profits rationalized his behavior and argued it was justified for numerous reasons. 161 In other words, these offenders stand by their actions and do not perceive them as harmful even to the owners of their firms – the shareholders.

An empirical study conducted by Alex Stein and Uzi Segal in the United States aimed at explaining criminal defendants’ decisions to opt for a trial (as opposed to pleading guilty) found that high trial rates are found when accusations are “thiny evidenced”. 162 It is a well-known fact that high-level white-collar crime cases are extremely complex and document-intensive, involving financial records and corporate materials that are intentionally ambiguously drafted (usually by the defendants). 163 Additionally, these cases hinge on the question of intent, which is difficult to prove and is usually based on circumstantial evidence. 164 The involvement of highly-paid defense attorneys in these cases

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158 Id. at 9.
159 Id.
160 Id. at 7 (“[w]ith values against which restorative justice should be evaluated, there are some general ones – like accountability – that must apply to restorative justice in all domains.”); see also Mark S. Umbreit, The Handbook of Victim Offender Mediation: An Essential Guide to Research and Practice 2 (Jossey-Bass Inc., 2001), available at: http://media.wiley.com/product_data/excerpt/18/07879549/0787954918-L.pdf; Zehr, Changing Lenses, supra note 149, at 200-201 (where the author, one of the most important restorative justice theorists and practitioners, discusses the importance of accountability in restorative justice).
161 Yeager, supra note 45, at 909 (“the top manager who executed the particular accounting trick rationalized it as necessary to avoid the possibility of other poor outcomes, such as laying off employees to generate adequate profits.”).
163 See John Hasnas, Ethics and the Problem of White Collar Crime, 54 Am. U.L. Rev. 579, 593 (2005); Romero, supra note 52, at 165; Morvillo et al., supra note 52, at 157-158.
164 See Morvillo, supra note 52.
leaves very little room for doubt about the readiness of white-collar offenders to be held accountable for their actions. What are the chances that these offenders would actually accept responsibility in a restorative justice process and allow themselves to be held accountable by their victims without dominating the conversation?\textsuperscript{165}

Furthermore, white-collar offenders may not correspond well with restorative justice in another somewhat surprising way. In Howard Zehr’s seminal book \textit{Changing Lenses}, the archetypical offender is portrayed as a sixteen-year-old teenager, “who came from an unhappy – probably abusive – home situation,”\textsuperscript{166} with no record of violence. After deciding to run away with his girlfriend and discovering he does not have the necessary money, he decides to rob a young woman in the neighborhood. The event turns violent, and the juvenile offender winds up stabbing his victim a number of times, including in the eye.\textsuperscript{167} As discussed above, white-collar offenders tend to differ considerably from Zehr’s archetypical offender in almost every aspect possible. However, sometimes they differ in another meaningful way that Zehr and his colleagues may not have even considered - sometimes offenders in white-collar crime cases are not even human.

Although not many corporations are indicted and sentenced in the federal system, especially not large, publicly traded companies, corporate criminal liability is an inseparable part of white-collar crime.\textsuperscript{168} In fact, one of the most famous criminal proceedings ever initiated against a corporation came in the aftermath of Enron, in

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\textsuperscript{165} Indeed, criminologists have found that “the upper-class use their resources to ensure that their power is unaccountable.” Braithwaite, \textit{supra} note 148, at 44; see Braithwaite, \textit{supra} note 70, at 753–754 (reviewing the complexity of typical white-collar crime cases, and the fact that white-collar offenders take advantage of that in avoiding being held accountable); see also Szockyj, \textit{supra} note 63, at 487–488 (reviewing the various ways white-collar offenders use their power, influence and resources to prevent being prosecuted for their misconduct).
\textsuperscript{166} \textit{Changing Lenses}, \textit{supra} note 149, at 16.
\textsuperscript{167} \textit{Id.}
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the prosecution of the big auditing firm Arthur Andersen.\footnote{Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (Arthur Andersen, formally among the “Big 5” auditing firms, was convicted of obstruction of justice and witness tampering, but was ultimately acquitted by the United States Supreme Court on May 31, 2005).} In many high-level corporate scandals, the United States Attorney investigating the case has held the corporation accountable as a separate entity, making it a primary target of the investigation.\footnote{Compare the case of the accounting firm of KPMG (Hasnas, supra note 163, at 626) with the case of Bristol-Myers Squibb, the pharmaceutical company, and its deferred prosecution agreement, available at: http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/06/bristol_myers_s.html.}

According to von Hirsch and his colleagues, restorative justice interventions require an “identifiable person” as the offender.\footnote{See supra note 29 and accompanying text.} Admittedly, corporations are independent legal entities capable of performing many types of tasks. However, they are not people and most probably do not qualify as appropriate offenders under the “making amends” model. It is quite clear that offending corporations do not have the same needs as offending persons. They do not need to feel empathy, to reconcile with the victim, to be forgiven, or to regain a sense of self-worth.\footnote{See McCold supra note 20, at 2 (listing of typical offenders’ needs).} Their financial need to resolve disputes is something very different from the moral need for reconciliation and forgiveness. The fact that the restorative justice literature constantly relates to the latter needs makes it clear that the restorative justice paradigm has human beings in mind, not fictional legal entities.

On the other hand, both arguments do not justify the categorical exclusion of restorative justice from the public response to white-collar crime. As identified by McCold, offenders experience a variety of harmful outcomes in the aftermath of their own crimes, including diminished integrity, loss of standing, loss of connectedness, loss of self-control, shame, diminished personal and social prospects, moral debt and a sense of obligation to their victims.\footnote{Id.} White-collar offenders are no different and they too can benefit from a restorative needs-based process aimed at repairing that harm, thereby helping society as a whole.

Former Enron CEO Jeff Skilling, for example, was often caricatured as “the greedy, arrogant executive with a Darwinian view of the world.”\footnote{Alexei Barrionuevo, Which Picture of Skilling Will Enron Jurors Believe?, N.Y. TIMES, Apr. 21, 2005, at C1.} On the other hand, there is evidence indicating that Skilling was emotionally distressed, felt lonely and lost the
drive to work during his short tenure as CEO. Presumably, this would be something Skilling would wish to relate to the many Enron victims, regardless of whether he is found guilty or not. Indeed, Skilling tried to convey this through his testimony in court, but with so much at stake, this was not the secure and supportive environment needed for sharing such emotions.

Another example of a senior corporate executive that might find a restorative intervention useful is former CEO of Krispy Kreme Doughnuts, Inc., Scott Livengood. The company’s internal investigation found Livengood responsible for manipulating the company’s earnings to please Wall Street. Livengood’s attorney denied all responsibility in his client’s name, but added “Mr. Livengood devoted his heart and soul to Krispy Kreme for 27 years.” Presumably, this is one of the main issues that troubles Livengood. A restorative intervention can provide him with the opportunity to talk about his feelings.

Similarly, the argument that white-collar offenders tend to disregard the interests of their potential victims is not convincing. If these restorative deliberative processes carry an increased risk of domination, then it is the responsibility of the facilitators to be more alert and active in preventing the risk from materializing. Furthermore, silencing white-collar crime victims altogether by denying them the opportunity to be heard in a restorative process is not the solution to the problem of disregarding the interests of potential victims. On the contrary, these victims should be given the opportunity to be heard precisely by the very people that thoughtlessly and uncaringly hurt them. A process in which victims confront their offenders directly seems to be an effective way of making the offenders care. Restorative justice processes can have such a transformative effect on offenders.

Furthermore, one of the main critiques of the restorative justice paradigm is that it strives to produce internal moral changes in

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176 See Barrionuevo, supra note 174 (summarizing Skilling’s testimony in his trial and analyzed the impression Skilling managed to make).
178 See Mark S. Umbreit, Victim Meets Offender: The Impact of Restorative Justice and Mediation 101–104 (Criminal Justice Press, 1994) (describing positive themes common to offenders who participated in restorative justice processes. One of these themes, directly related to the discussion above, was “learning about the victims’ feelings.”).
offenders who are morally immature in their development. 179 As Richard Delgado states: “Most offenders...” 180 While this is probably true in juvenile crime, where restorative justice is most common, and in many cases of adult street crime, it is unlikely to be true in high-end white-collar crime. In these latter crimes, the offenders are usually middle aged and often older adults, highly educated and experienced in managing huge corporations. Of course this does not necessarily mean they are all morally mature, but it is pretty safe to assume they know and understand the difference between right and wrong well enough to participate in a restorative justice process.

Finally, as mentioned above, the fact that at times, white-collar offenders are not humans but rather corporations, should not preclude the possibility of applying restorative justice to white-collar crime. Admittedly, an offending corporation does not experience the same harmful outcomes as a human offender and therefore does not need a restorative needs-based process to restore that harm. But corporations do not act on their own; they have real people behind them. Even if these individuals are not criminally liable for the corporation’s actions, the Organizational Sentencing Guidelines recognize their role in criminal proceedings carried out against the corporation. 181 It is understood that this involvement, manifested through the compelled appearance of the company’s CEO or highest ranking employee in court for the sentencing hearing, has three purposes: “To impress upon the CEO the gravity of the corporation’s wrongdoing; to signify to the community that the leadership of the corporation has accepted responsibility for the crime; and to extract some indication that the corporation intends to comply with the law in the future.” 182 All three purposes actually accomplish the same thing: They put a human face on the corpora-

180 Id.
   In making a determination with respect to subsection (g) [point subtractions for “Self-Reporting, Cooperation, and Acceptance of Responsibility”] the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.
tion’s abstract name. And once there is a human face, even if the person is not criminally liable for the misconduct, many of the harms and needs mentioned above, such as shame, diminished integrity and more, become relevant once again.\(^{183}\)

But even if corporations are not exactly the typical offenders the forefathers of the restorative justice paradigm had in mind, this does not mean a restorative intervention cannot take place. These offenses have victims and victims have needs,\(^{184}\) therefore a needs-based response is appropriate. True, one of the primary stakeholders – the offender – does not answer the traditional characteristics of offenders in restorative justice processes. However, many important restorative justice advocates such as Braithwaite and McCold believe that “mostly restorative” or even “partly restorative” processes are better than non-restorative responses to crime.\(^{185}\) In the case of a corporation, an offender exists, is available and is able to participate in the process, at least to some extent, based on the inherent limits associated with the use of representatives and with the fact that “corporations are soulless... [and] cannot be damned.”\(^{186}\) As evident in the Sarbanes-Oxley Act and the Organizational Guidelines, corporations have many avenues to compen-

\(^{183}\) *Id.* at 966–67 (this procedure, referred to as the “corporate icon provision,” is argued to be extremely effective due to its shaming features, which are regarded as especially relevant among the population of top corporate executives in the United States).


\(^{185}\) For example in The Resolve to Stop the Violence Project (RSVP), implemented through the San Francisco Sheriff’s Department, community volunteers who are victims and survivors of violent crimes visit a jail once a week and meet with inmates partaking in the Project. In other words, these are restorative processes conducted without the actual victim of the offense. *See*, e.g., James Gilligan & Bandy Lee, *The Resolve to Stop the Violence Project: Reducing Violence through a Jail-Based Initiative,* available at [http://www.annalsnyas.org/cgi/content/full/1036/1/300](http://www.annalsnyas.org/cgi/content/full/1036/1/300) (for a detailed description of the program). Surrogate victims are also used in Victim Impact classes, which are part of the restorative justice program in Prince William County, Virginia. *See* interview with Vickie Shoap, Program Coordinator, (Mar. 26, 2004) (on file with author). Vickie Shoap, *Restorative Justice in Prince Williams County*, available at [http://www.courts.state.va.us/drs/resolutions/march2003/restorative.html](http://www.courts.state.va.us/drs/resolutions/march2003/restorative.html) (for a detailed description of the program). Similarly, restorative processes can commence without the actual offender. *See* Braithwaite, *supra* note 44, at 138 (describing a proposal raised in a community consultation on restorative justice in Darwin, Australia in 2000, intended to resolve the problem of victims without offenders and offenders without victims under a restorative regime. According to this proposal, “healing circles could be held in prisons for offenders without willing victims and in the community for victims without known offenders, and that every now and then a visitor could move from one circle to the other.”).

sate victims and to restore their tangible and economic harm. Their participation in a restorative justice process can help restore some of the non-monetary harm caused to victims as well, while fostering a more law-abiding and caring “corporate culture,” which is precisely what the criminal justice system is after.

To sum up, white-collar offenders, whether corporate executives or corporations, can both participate in and benefit from a restorative justice process. Indeed, while their differences from street offenders pose certain challenges, they do not justify the categorical preclusion of a restorative response. Additionally, just as in the case of street crime, white-collar offenses include victims, which can benefit from restorative processes even if the offender does not exist at all. The fact that offenders do exist in our case only strengthens the conclusion that restorative responses should be made available in white-collar crime cases as well.

C. Restorative justice and white-collar crime: the victim’s perspective

It may be argued that even if justice requires some kind of restorative response to white-collar crime, and even if these offenders are suitable for such a process, such a proposal is impractical due to the unique harm caused by this type of criminal misconduct and the vast number of victims it creates.

The definition of restorative justice speaks of “direct stakeholders” and reparation of “the harm.” In his causal theory, McCold emphasizes the importance of identifying the victims of the crime and determining their harm. In the “making amends” model, these elements are of crucial importance. As von Hirsch and his colleagues explicitly state:

There are . . . a variety of cases which seem less well suited to this kind of response. One ‘unsuitable’ category . . . would consist of

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187 See Drew & Clark, supra note 168, at 291–293 (reviewing provisions of the Organizational Guidelines regarding mandatory restitution and even community service intended to restore the harm caused to victims and the community).

188 See Ramirez, supra note 186, at 964, 997–99 (for a deeper discussion about the role of “corporate culture” in corporate crime and in the Sentencing Guidelines); Braithwaite, supra note 44, at 17, 22 (presenting some empirical evidence regarding the effectiveness of restorative interventions involving corporations and describing his involvement in trade practices enforcement in Australia).

189 See supra note 12 and accompanying text.

190 McCold, supra note 20, at 2.
In light of the above, the presence of an identifiable victim and tangible harm are prerequisites for a restorative intervention. However, these elements do not always exist in white-collar crime cases.

Based on his research of white-collar crime and its comparison with street crime, Stuart Green argues that in the former, the harms “tend to be more diffuse and aggregative than in the case of conventional crime; and it is often harder to say who (or what, in the case of governmental institutions or corporations) has been victimized, and how.”\(^{192}\) John Braithwaite illuminates the difficulties of measuring the harm caused by white-collar crime and notes that “many types of harm are not objectifiable – such as the impact that white-collar crimes like tax evasion have in undermining the trust and integrity essential for the effective functioning of the economy and polity.”\(^{193}\) Clearly, the same goes for accounting manipulations intended to inflate stock price or defrauding investors through misleading statements regarding the company’s financial stability, which were key features of the corporate scandals of 2001-2002. But according to Braithwaite, it is not only the harm which is difficult to measure. The victims of white-collar crimes are mostly diffuse, at times unidentifiable, and in some cases are even unaware that they have been victimized.\(^{194}\)

Testifying before the Senate Judiciary Committee’s Subcommittee on Crime and Drugs, John Coffee addressed some of the problems associated with calculating the loss caused by offenders convicted of securities fraud and “cooking the books”\(^{195}\) for the purpose of sentencing. Coffee argued that in these types of offenses, it is extremely difficult to assess who the victims are, and the extent of the harm caused by them.\(^{196}\) As stated by Coffee, in cases such as Enron or WorldCom,

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191 Von Hirsch et al, supra note 21, at 28.
192 Green, supra note 32, at 33.
193 Braithwaite, supra note 70, at 742.
194 Id. at 747.
195 See Coffee, supra note 128, Introduction.
196 See Coffee, supra note 128, Recommendation Two (“Congress should instruct the Sentencing Commission to develop a special guideline for securities fraud cases involving accounting irregularities.”).
[T]he broader social injury needs to be recognized; that is, the victims are not just the shareholders of Enron, but shareholders in all other public corporations whose share prices have also been discounted because investors no longer trust the credibility of reported financial results. Indeed . . . the victims include not only investors, but employees, creditors, other stakeholders, and citizens generally – all of who suffer a loss when securities fraud erodes investor confidence and thereby produces an increase in the cost of capital.197

How can a restorative intervention take place if victims do not know they are victims and if the harm is difficult to determine? And even if the victims and the harm are identifiable, is it realistically possible to facilitate a restorative justice process for thousands of victims, who are most probably scattered across the globe?

Furthermore, it may be argued that this is not merely a technical or practical issue; it is one of principle as well. Among Braithwaite’s constraining values of restorative justice are non-domination, empowerment, respectful listening, and equal concern for all stakeholders.198 With so many people and organizations affected by white-collar crime, it is clear that not everyone will be able to participate. Imagine a hypothetical restorative response to Enron. It seems impractical to allow anyone who claims to have suffered some kind of actual harm to participate in the process. At some point a decision would have to be made as to which categories of victims and stakeholders would be included within the list of participants and which would be categorically left out.

In addition to the serious question of who would decide this, it is quite clear that some of the victims would not be granted “equal concern,” would not be empowered, would not be listened to and would be subjected to the domination of other points of view by being left out of the process. In short, a majority of Braithwaite’s list of the most important restorative justice values would simply crumble to the ground.

A possible solution to this latter problem may be the use of representatives. Assuming that the technical difficulties of choosing and gathering the representatives can be overcome, this kind of process may have a chance. It can provide all primary stakeholders with the opportunity to participate in a fully restorative response, while upholding the fundamental restorative principles identified

197 See Coffee, supra note 128, following “Recommendation Two.”
198 Braithwaite, supra note 15, at 8–9.
by Braithwaite. The problem with this solution is that restorative responses do not, generally, lend themselves to the use of representatives. In fact, as Braithwaite states, “the most influential text of the restorative tradition has been Nils Christie’s, which defined the problem of criminal justice institutions ‘stealing conflicts’ from those affected.” Christie argued that “modern criminal control systems represent one of the many cases of lost opportunities for involving citizens in tasks that are of immediate importance to them.” In other words, Christie, along with many other prominent restorative justice theorists, believes that stakeholders affected by crime should be allowed to participate in the public response to crime themselves, personally, and not through representatives.

In his causal theory, Paul McCold specifies different needs of victims and offenders, mentioning the victims’ need “to tell their story, to be heard,” and the offenders’ need for “reconciliation with victims, to be forgiven.” Although this determination is overly generalized, studies suggest it is true to some extent. In any case, these needs cannot be met without direct and personal interaction. The current criminal justice system is largely based on representatives (prosecutors and judges) voicing the public’s interest in the aftermath of the crime. But as articulated by Christie, this impersonal system is precisely one of the factors that first contributed to the emergence of the restorative justice paradigm. This paradigm attributes major importance to personal and direct

199 See Braithwaite, supra note 44, at 11.
200 Dzur & Olson, supra note 147, at 91 (citing Nils Christie, Conflicts as Property, 17 Brit. J. of Criminology 1 (1977)).
201 McCold, supra note 20, at 2 (table of victims’ harms and corresponding needs).
202 Id. (table of offenders’ harms and corresponding needs).
203 In studying victim-offender mediation programs that deal with crimes of severe violence, Mark Umbreit and his colleagues found that one of the main reasons for victims to participate in such a process is to show offenders “the human impact of their actions,” and to tell the offenders their own story. In many cases, they wanted “offenders to know who the person was that was harmed.” See Mark S. Umbreit et al Executive Summary: Victim Offender Dialogue in Crimes of Severe Violence, A Multi-Site Study of Programs in Texas and Ohio, 7 Center for Restorative Justice & Peacemaking (2002), available at http://rjp.umn.edu/Copy_of_Restorative_Justice_Principles-43ea0fa8ecf2f1f.html (last visited Apr. 22, 2006) (finding that one of the main reasons for offenders to agree to meet their victims was to apologize and help the victims heal, but also to seek forgiveness).
204 In fact, “having some form of human contact with the person responsible for the crime” was the third most frequent reason victims gave for wanting to meet their offenders. Id. at 7.
205 See Dzur and Olson, supra note 147, at 93.
interaction between those effected by crime, and considers the alienated and estranged nature of the criminal justice system to be one of the primary reasons for opting for a restorative justice alternative. We already have a system based on representatives. There is little logic in replacing it with an alternative based on the same thing. According to the causal theory of justice and the restorative justice paradigm, the use of representatives in a restorative process would be highly questionable.

It is necessary then to provide victims with the opportunity to actively participate in the restorative process. Moreover, from a restorative justice perspective, wherever there are victims seeking to repair their harm, justice requires that “we work to heal victims, offenders and communities that have been injured by crime.”

The problems associated with opening the process to all white-collar crime victims are technical in nature and do not impact the relevancy of the restorative justice paradigm.

The first and most evident component of the harm suffered by white-collar crime victims is their financial loss. The way to repair that harm is through the restoration of that loss, which is “a basic feature of restorative justice, both as restitution and as a signal way of vindicating the victim.” Monetary loss can easily be restored.

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206 See McCold & Wachtel, supra note 12, at 115 (“[t]he very process of interacting is critical to meeting stakeholders' emotional needs. The emotional exchange necessary for meeting the needs of all those directly affected cannot occur with only one set of stakeholders participating. . . . The most restorative processes involve the active participation of all three sets of direct stakeholders.”).

207 There are many different manifestations of this view in restorative justice literature. See Zehr, supra note 149, at 66–73 (describing the way the justice system views the concept of guilt and categorizes offenders):

The legal concept of guilt which guides the justice process is highly technical, abstracted from experience. This makes it easier for offenders to avoid accepting personal responsibility for their behavior. It also frustrates victims, who find it difficult to match the legal description of the event with their own experience. Both victim and offender are forced to speak the language of the “system,” to define their reality in its terms instead of their own.

Id. See Sir Charles Pollard, If Your Only Tool Is a Hammer, All Your Problems Will Look Like Nails, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 165, 173–175 (H. Strang and J. Braithwaite Eds., 2001) (describing the “failings” of the criminal justice system, in particular the trial and sentencing stages, and illustrating the impersonal features of these stages as the partial cause for the criminal justice’s shortcomings, comparing them with the direct and personal interactions facilitated in restorative interventions).

208 This was proposed as one of the core principles of restorative justice by Van Ness and Strong. See Bazemore, supra note 98, at 464 (citing proposal by Van Ness and Strong).

LIMITS OF RESTORATIVE JUSTICE

by any type of willing and able offender, whether human or corporate, warm and considerate towards victims or cold and indifferent to their fate. Furthermore, unlike most street offenders who simply do not have assets from which to compensate their victims, white-collar offenders are often financially able to do so, at least to some extent.

Admittedly, the current federal criminal justice system already has different victim restitution provisions and the civil justice system provides victims with legal proceedings to pursue their rights against their offenders. A restorative intervention can help facilitate this, but it can also accomplish what the current system cannot. While restitution and compensation provisions help victims and restore some of their financial harm, they cannot match the restoration victims receive through restorative justice processes. First, as Strang and Sherman have found: “When victims are asked, they indicate a strong preference for compensation directly by the offender,” which is the case only in restorative interventions. Compensation in the current criminal justice system is indirect and facilitated by the government: Law enforcement agencies seize money and assets connected to the offense and distribute them among victims and creditors.

Second, and perhaps more importantly, restitution and compensation are limited to financial loss. Restorative justice processes offer non-monetary restoration for victims as well. As mentioned above, financial loss is only one type of harm caused to victims and therefore monetary restitution answers only one need. Victims typically have many other needs associated with other types of harm such as loss of trust, loss of control and even self-blame. Restorative interventions adopt a much broader and inclusive view, acknowledging all types of harm caused to all of the stakeholders and striving to answer the different needs created by these harms. This is done by allowing victims to speak about how the crime affected

210 Id. at 24.
211 See, e.g., Section 308 of SOA, supra note 84 (15 U.S.C.S. § 7246 titled “Fair funds for investors”).
212 See Romero, supra note 52, at 166.
213 Strang & Sherman, supra note 209, at 23 (in studying victims’ attitudes towards restorative processes and conventional criminal justice processes, the authors found that victims suggest different amounts as appropriate restitution, depending on the identity of the payer – a lower sum, when the offender is the one paying, and a higher sum, if they are receiving restitution from a governmental agency).
214 McCold, supra note 20, at 2 (listing typical harms caused to victims and the needs they create. In addition to the above, McCold mentions loss of faith, sense of isolation, disbelief in experience, cognitive shock, enmity, indignation and fear).
their lives, about their fears and personal aspirations, without restricting them to providing information regarding their financial or tangible harm. The criminal justice system lacks this perspective and clings to a much narrower view.

Also, the possibility of receiving restitution through separate civil proceedings does not help victims in the same way as restorative processes. In securities fraud cases, for example, the Private Securities Litigation Reform Act of 1995 places many procedural and substantive burdens on plaintiffs, effectively limiting successful lawsuits. Along with other statutory provisions, the law places a heavy burden on victims, making the possibility of a civil lawsuit impractical and even unrealistic at times. Telling crime victims they will be able to receive restitution for their harm through civil proceedings and then effectively blocking that possibility not only leaves victims without restitution, but subjects them to the risk of revictimization by the justice system. Restorative justice offers victims and offenders a direct and natural process for discussing the harm caused by the offense and an effective process for ensuring that the harm is indeed repaired. In this aspect, white-collar crime cases are no different.

215 See Umbreit et al., supra note 203, at 11 (describing what the participants talked about during the mediation. Victims and family members mostly focused on “the impact of the crime: on themselves, on the direct victim. . . and on other family members and persons connected to the victim.” Offenders mostly shared information about the crime, but also about their life before the crime).

216 See Ramirez, supra note 125, at 403 (describing the limits placed by the Sentencing Commission on loss calculations according to the Sentencing Guidelines, excluding “emotional distress, harm to reputation, or other non-economic harm.” According to the author, these limits were placed precisely in order to limit the scope of the criminal trial, leaving out reasonably foreseeable harms “that would be more aptly addressed as civil damages.”).


218 See Ramirez, supra note 125, at 403–404.

219 This phenomenon, also referred to as “critogenic” (law-caused) harms, is found both in civil and in criminal legal proceedings. See Thomas G. Gutheil, Harold Bursztajn, Archie Broidsky & Larry H. Strasburger, Preventing “Critogenic” Harms: Minimizing Emotional Injury From Civil Litigation, 28 J. Psychiatry & Law 5 (2000) (identifying various types of “critogenic” harms such as delay, adversarialization, retraumatization, violation of boundaries, loss of privacy and arrested healing and offer approaches for minimizing the impacts of these harms on litigants); see Mary P. Koss, Karen J. Bacher & C. Quince Hopkins, An Innovative Application of Restorative Justice to the Adjudication of Selected Sexual Offenses, in CRIME PREVENTION—NEW APPROACHES 7 (H. Kurz & J. Obergfell-Fuchs eds., 2003) (“criminal justice response often disappoints and traumatizes victims”).

220 See Braithwaite, supra note 44, at 51–52 (citing a wide variety of studies demonstrating the superiority of restorative interventions in terms of the percentage of cases in which offenders fully comply with their restitution obligations); see also Mark Umbreit, Robert B. Coates & Betty Vos, CENTER FOR RESTORATIVE JUSTICE & PEACEMAKING, THE IMPACT OF RESTORATIVE
D. Pragmatic considerations supporting restorative responses to white-collar crime

Another possible argument against the application of restorative processes to white-collar crime is that it is just not needed in these types of cases. Elsewhere I have argued that the criminal justice system suffers from certain shortcomings regarding its treatment of crime victims, its effectiveness and efficiency and its perception by the public. I have further argued that restorative interventions outperform the criminal justice system in these areas, and that by integrating restorative processes, the criminal justice system can improve itself and advance the justice it strives to provide to the public.221 However, when examining the current state of white-collar crime and the criminal justice system’s response to it, these shortcomings and the possibility of overcoming them by means of restorative justice seem somewhat irrelevant.

First of all, victims who do not even realize they were victimized do not have the same needs as victims of street crime. The same can be said about victims who are aware of their victimization but are among thousands of others in the same situation.222 For example, one of the most basic needs of crime victims is for financial reparation and compensation for the harm they suffered.223 While these are rarely available through the criminal justice system in street crimes, the converse is true in white-collar crimes. The vast majority of white-collar crime cases are tried and sentenced under federal law which provides for mandatory restitution for all property and violence crimes. The Federal Sentencing Guidelines...
emphasize remedying the harm caused by the offense through restitution, community service and other remedial measures, and provide incentives for corporate defendants to pay restitution to their victims. In addition, federal prosecutors encourage white-collar offenders capable of compensating their victims to do so. And even if compensation is not obtained in the criminal proceedings, white-collar criminal cases often involve parallel civil proceedings intended for the sole purpose of restoring the monetary harm caused to the victims. If non-monetary damage or direct compensation is not important to these victims, it may be argued that restorative justice does not have a lot to offer them.

Additionally, most scholars believe that white-collar criminals are unlikely to re-offend after getting caught for their first crime, thus excluding any concern for recidivism. At the same time, as discussed above, the criminal justice system has impressively signaled to potential white-collar offenders that the price for their misconduct will be unbearable. Since these types of offenders are believed to be rational individuals, it may be argued that the criminal justice system has created an effective general deterrent. Admittedly, it may be contended that there are other methods to reduce crime, more effective than deterrence, which are employed in restorative processes. However, especially in white-collar and corporate sentencing, the law and the Sentencing Guidelines arguably provide judges and prosecutors with a variety of options that are based on those alternative methods in addition to the conventional sanctions. Again, restorative justice may not have much to contribute.

Finally, the criminal justice system seems to be moving in the direction the public expects, by subjecting white-collar offenders to harsher sentences. Since the public probably perceives the current response to this type of crime to be fair and justified and given that

224 See Drew & Clark, supra note 168, at 291.
225 See Berman, supra note 55, at 3.
226 See Romero, supra note 52, at 166.
227 See Weisburd & Waring, supra note 32, at 3.
228 See e.g., Kahan and Posner, supra note 136 (the authors argue that shaming, when used correctly, is far more effective and efficient than incarceration for white-collar offenders.) As mentioned above, shaming is a dominant element in restorative practices. See Braithwaite, supra note 44, at 74 (describing the connection between the Reintegrative Shaming Theory and restorative justice).
229 See John B. Owens, Have We No Shame?: Thoughts on Shaming, “White Collar” Criminals and The Federal Sentencing Guidelines, 49 ASS. U.L. REV. 1047 (2000) (arguing that conventional sentencing consists of effective shaming and that the courts are free to use their discretion in sentencing white-collar offenders in order to include shaming when appropriate and effective).
the criminal justice system is doing so well in its response to white-collar crime on all three parameters, it is seriously doubtful whether restorative justice can make a positive contribution in this type of criminal misconduct. In other words, unlike the case of street crime, restorative justice may be unnecessary when it comes to the public response to white-collar crime.

The first response to this argument is that the implementation of restorative justice in white-collar crime cases is primarily a matter of principle, a requirement of justice. In this case, it does not necessarily matter whether restorative justice is needed in improving the effectiveness of the system, since it is needed in the system’s quest for justice.

The second response is that even when it comes to white-collar crime, not “everything’s coming up roses” for the criminal justice system. As previously mentioned, white-collar crimes are extremely difficult to investigate and prosecute, and trials are unusually costly and complicated.230 In order to overcome some of these difficulties, the government relies heavily on the cooperation of “insiders” willing to testify against their superiors. In most cases, this willingness is the product of a plea bargain in which the cooperating witness is guaranteed a substantially mitigated sentence or immunity.231 A direct result of this policy is the evident and substantial disparity in penalties imposed on white-collar defendants.232 On the one hand, some receive staggeringly harsh punishments involving long prison terms such as in the cases of Bernard Ebbers and John Rigas; on the other hand, others receive minimal sentences such as Michael Martin, former CFO of HealthSouth Finance, sentenced to a week in prison due to his cooperation with the FBI, or David Radler, COO of Hollinger

230 See Hasnas, supra note 163, at 592–593; see also Morvillo et al., supra note 52, at 157–158.
231 See Romero, supra note 52, at 167–168; see also Alexei Barrionuevo & Thayer Evans, Witness in Enron Trial Struggles With Emotions; Koenig Talks of Decision to Plead Guilty, N.Y. Times, Feb. 6, 2006 (reporting about the cross examination of the first witness in the trial of Kenneth Lay and Jeffrey Skilling, former Enron chief executives who are standing trial for their alleged central responsibility in the collapse of the company. During his questioning by Skilling’s defense attorney, the witness – Mark Koenig, the former head of investor relations in Enron – was asked about his motives in testifying against his bosses in order to show “that Mr. Koenig was willing to say almost anything to avoid a long prison term and to protect the $5 million in salary and bonus in 2000.” Koenig is one of the sixteen insiders the government relied on in proving its accusations against the defendants).
International, sentenced to twenty-nine months in jail in exchange for his cooperation in the prosecution of his former boss, Conrad Black.\textsuperscript{233} Ironically, this stands in direct contradiction to the original goal of the Sentencing Guidelines – reducing unwarranted disparity in sentencing.\textsuperscript{234}

And that is not the only problem with relying so heavily on plea bargaining. Although perceived as a practical necessity by prosecutors and judges,\textsuperscript{235} plea bargains and immunity deals have been heavily criticized by scholars and practitioners. From a retributive perspective, plea bargaining is extremely problematic since it allows culpable offenders to get away with disproportionately light punishments that do not fit their wrongdoing and promotes inequality by allowing similarly situated offenders to receive very different sentences.\textsuperscript{236} Although plea bargains are primarily justified as promoting utilitarian goals,\textsuperscript{237} it may be argued that plea bargains and immunity deals diminish the deterrent effect of criminal sanctioning as well. For example, a corporate executive may rationalize committing a crime by assuming that if the crime is discovered, he could save himself by striking a deal with the prosecution and testifying against his boss. Plea bargains are also criticized for pressuring innocent defendants into guilty pleas for fear of the possible outcome of a conviction after a trial\textsuperscript{238} and for negatively affecting the fairness of the criminal justice system.\textsuperscript{239}

Applying restorative justice to white-collar crime cannot magically solve these problems, but it can mitigate them. Introducing a restorative response as part of plea bargains in white-collar crime cases would reduce the disparity in outcome among these offenders

\begin{itemize}
\item \textsuperscript{233} See National Briefing, \textit{WASH. POST}, Sept. 21, 2005.
\item \textsuperscript{236} See \textit{Russell L. Christopher, The Prosecutor’s Dilemma: Bargains and Punishments}, 72 \textit{FORDHAM L. REV.} 93, 119–122 (2003) (reviewing a few basic retributive principles violated by “bargain justice.” The article continues and reviews in depth other aspects in which plea bargains contradict retributivism).
\item \textsuperscript{237} Id. at 115–116.
\item \textsuperscript{238} See \textit{Jeff Palmer, Abolishing Plea Bargaining: An End to the Same Old Song and Dance}, 26 \textit{AM. J. CRIM. L.} 505, 518–519 (1999).
\item \textsuperscript{239} Id. at 520–521.
\end{itemize}
by holding them accountable through a similar process in which they confront their victims. This common denominator would be morally justified as well. It would ensure that all corporate employees who were involved in the crime – whether senior or middle-ranked executives – would participate in restorative processes as part of their sentence. In cases where there are many mid-level executives, as in Enron, a restorative justice process will commence for each offender. This provides additional opportunities for more victims to confront at least one of the people involved in the offense that harmed them. In other words, the addition of an across-the-board restorative component to the public response to white-collar crime would mitigate the disparity found in sentences.

At the same time, the frequency of plea-bargain negotiations in white-collar crime cases (just as in other criminal cases) offers a pragmatic opportunity for introducing systematic restorative interventions. One of the prerequisites for the commencement of a restorative justice process is that offenders acknowledge their wrongdoing and responsibility. Similarly, plea bargains usually entail a guilty plea or at least a concession to the factual basis of the charges. This common characteristic makes the restorative processes within white-collar plea bargaining both practical and technically convenient.

Furthermore, merging the two can benefit both the restorative justice paradigm and the criminal justice system. From a restorative perspective, more stakeholders will be able to address their needs in the aftermath of crime in a systematic way. From a criminal justice perspective, restorative interventions can be used to justify mitigated sentences and to justify plea bargains. As suggested by Donald Schmid, a federal prosecutor:

If an agreement is reached and fulfilled, then, the prosecution and defendant could jointly report on the conference and the agreement to the sentencing court. The parties could also in some cases seek a ‘downward departure’ (that is, reduction in guideline sentence range) based on the defendant’s successful participation in a restorative justice process.241

240 See Gabbay, supra note 53, at 364 (describing the frequency of guilty pleas and plea bargains in the criminal justice system as opportunities for integrating restorative justice within the system).

In other words, introducing restorative responses as part of the plea bargain process benefits the stakeholders affected by the crime, mitigates some of the problems associated with the extensive use of plea bargains and is procedurally feasible under current federal law.

The lateral impact of incapacitation is yet another problem encountered by law enforcement agencies in the context of white-collar crime. The criminal justice system relies heavily on incapacitation — disabling offenders from committing future crimes, which in its most common form is manifested through imprisonment. At the same time, punishment is rarely free of side effects. Imprisoned offenders often leave behind dependents, sometimes the victims of the crime, without their main source of livelihood. The system seems willing to accept this kind of ripple effect when imposing prison sentences. In white-collar crime, however, things are not that simple. When the offender is a corporation, for example, incapacitation can be achieved by disabling it from conducting its business, but may also result from commencing criminal proceedings against it or imposing heavy fines and restrictions. The ripple effect here is far more substantial. Depending on the size of the corporation and the volume of business it conducts, many innocent people and organizations may be affected by the corporation’s incapacitation: Shareholders, creditors, employees, communities in which the employees lived, other businesses that relied on the incapacitated corporation and many more. The same can happen if the accused are the managers and executives rather than the corporation itself, in cases where the organization is not strong enough to survive such a blow. Therefore, the use of incapacitation in white-collar crime, even of individual corporate executives, must be careful and selective in order to minimize unwanted harm to innocent parties.

Evidence of the caution employed by law enforcement agencies in dealing with corporate crime is found in the deferred indictments of KPMG and Bristol-Myers Squibb. Both corporations

242 See Luna, supra note 106, at 209 n. 10 and accompanying text (providing a brief review of the role of incapacitation within utilitarianism).

243 Braithwaite, supra note 70, at 729.

244 See, e.g., Carrie Johnson & Ben White, No Safety at the Top for Corporate Leaders, WASH. POST, July 9, 2004 (citing the critique of several defense attorneys linking the prosecution of Arthur Andersen to its 2002 collapse).

245 These restrictions can be imposed as conditions of probation, see Drew and Clark, supra note 168, at 292.

246 See McCold, supra note 20.
were charged with committing criminal offenses but were granted
the opportunity to undergo reforms that would ensure the non-re-
currence of this type of misconduct. Clearly, the federal prosecu-
tors did not wish to be responsible for turning the once “Big Five”
and today’s “Big Four” into tomorrow’s “Big Three.” Therefore,
their response to the criminal offenses of KPMG was more remi-
niscent of an integrative and restorative mindset than a retributive
or deterring one.

Another sign of the difficulty of law enforcement agencies to
respond retributively to white-collar crime is found in the prin-
ciples that govern the imposition of financial penalties on fraudulent
corporations by the Securities and Exchange Commission (SEC).
These principles were largely created in order to respond to the
SEC’s need to avoid hurting shareholders in the course of disciplin-
ing companies.247 Among these principles, the two most important
considerations in determining whether to seek monetary penalties
against companies are “the presence or absence of a direct benefit
to the corporation as a result of the violation” and “the degree to
which the penalty will recompense or further harm the injured
shareholders.”248 Limiting financial penalties only to “egregious
circumstances, where the culpability and fraudulent intent of the
perpetrators are manifest”249 exemplifies the difficulties associated
with conventional punishment.

Here too restorative interventions can be used as a pragmatic
law enforcement tool, while providing affected stakeholders the
known benefits of restorative justice. In addition to requiring cor-
porations to change their management and implement work proto-
cols intended to minimize the risk of reoffending, as done today,
law enforcement agencies can request that accused corporations
participate in restorative justice processes and help repair the harm
they caused before agreeing to withdraw the deferred indictments.
Similarly, instead of avoiding fines altogether in an attempt to min-
imize the ripple effect of financial sanctions, the SEC can ask cor-
porations that answer the appropriate criteria to participate in a
restorative intervention aimed at making amends. Restorative in-
terventions are especially appropriate in these scenarios since they

247 See Floyd Norris, Crime and Consequences Still Weigh on Corporate World: S.E.C Agree
on Set of Principles for Fining Companies for Fraud, N.Y. TIMES, Jan. 5, 2006 (reviewing some
of the main criteria for imposing fines on corporations and examples of corporations that were
subjected to fines and corporations that were not).
248 Id. (quoting S.E.C. Chairman Christopher Cox).
249 Id.
broaden the courses of action available to law enforcement agencies in an area of law that demands precaution.

IV. What Would a Restorative Response to White-Collar Crime Look Like?

The first condition for a restorative justice process in response to a white-collar offense is the existence of direct, human (not corporate) victims. White-collar offenders, especially in the high-profiled accounting frauds mentioned in this article, commit their crimes in order to gain profits. Clearly, this money has to come from somewhere, usually someone, and that someone is the victim. However, in some cases, such as the Paul Coffin case, the money comes from the government; in other cases, the money may come from victimized corporations. In cases where the government is the primary and direct target, the crime does not lead to the harm, and thereby the needs, experienced by direct victims, the citizens who pay for government. Governments do not lose trust or faith in the aftermath of crime, do not feel a sense of isolation or disbelief in the experience, do not experience cognitive shock or fear and do not have the same needs as individual victims.250 In the same way, tax paying citizens do not usually experience these harms when the government is the target of the crime. The same can be said about corporations that are the primary victims of white-collar offenses. In the absence of such needs, it may be safe to conclude that there are no direct victims under these circumstances, rendering restorative interventions “unsuitable.”251

At the same time, any proposal for a restorative response to white-collar crime must deal with vast numbers of victims and the difficulty of assessing the harm caused by these crimes. The restorative intervention must include mechanisms for identifying and reaching victims and facilitate a process for calculating and agreeing on the harm which offenders will then be obligated to repair.252 Additionally, the restorative intervention must provide the direct victims an opportunity to meet with the offender and tell their

250 McCold, supra note 20, at 2.
251 Von Hirsch et al., supra note 21, at 28.
252 Indeed, in some cases identifying and locating all the victims may prove extremely difficult, such as in certain market fraud cases or certain environmental offenses. However, a restorative justice intervention does not necessitate all of the victims for its commencement. Rather, it requires a victim, at least one, whether human or corporation, that suffered direct and actual harm as a result of the offense.
story in person. A representative-based process is not an appropriate solution for the practical problems associated with empowering so many victims to confront their white-collar offenders.

Another important condition for the commencement of a restorative intervention in the aftermath of a white-collar offense is the existence of an offender willing and able to participate in such a process.\textsuperscript{253} As in most restorative justice practices today, here too, the offender must be willing to accept responsibility for the offense as a condition for participating in the process.\textsuperscript{254} The main reason for this is to reduce the risk of revictimization that can be caused by offenders telling their victims they did nothing wrong. In addition, according to the “making amends” model, a restorative response is based on the offender’s “implicit or explicit acknowledgement of fault” and “an apologetic stance on the part of the offender.”\textsuperscript{255} This is true of individual offenders as well as corporations, as exemplified by the “corporate icon provision” in the Sentencing Guidelines applicable when corporations plead guilty and seek to mitigate their sentence.\textsuperscript{256} Due to the large number of plea bargains in high profile white-collar crime cases, finding offenders who take responsibility for the offense, even if they are not the highest ranking executives in their companies, should not be difficult. Participating in the restorative intervention would become part of these offenders’ plea bargain. Offenders who do not assume responsibility for their misconduct and are found guilty after trial, especially if they maintain their innocence after their conviction, seem inappropriate for participation in a restorative intervention.

Additionally, it is important that the restorative component to the public response to white-collar crime does not infringe on important retributive notions such as condemnation and censure of

\textsuperscript{253} It may be argued that the defense attorneys of these white-collar offenders would be suspicious of such a process and would advise their clients against their participation. The answer to this argument is that this issue would not be negotiable. According to the proposal offered here, restorative interventions would be integrated as an inseparable part of the plea bargain and as a precondition for a “downward departure” in the expected sentence.

\textsuperscript{254} See Umbreit, supra note 42, at 8 (stating that in sixty-five percent of the programs interviewed in the survey, offenders were required to admit their guilt to the specific offense that led to their referral to the victim offender mediation program); in Recommendation No. R(99) 19, Chapter IV §14, the Committee of Ministers of the Council of Europe recommended the following: “The basic facts of a case should normally be acknowledged by both parties as a basis for mediation.”

\textsuperscript{255} Von Hirsch et al., supra note 21, and accompanying text.

\textsuperscript{256} See Elton & Roybal, supra note 182; supra note 183 and accompanying text.
the act, and of course on punishment of the offenders according to their “just deserts.” In the same way, the restorative response must not lessen the deterrent effect of the overall response, which requires it to promote some of the alternative deterrents mentioned in this article. On top of all of this, it must also still strive to offer participating stakeholders everything that is offered by the more “conventional” restorative justice processes, while upholding the restorative values specified by Braithwaite. Is all of this even possible?

A. The Truth and Reconciliation Commission Model

The unique characteristics of white-collar crime – its offenders, victims and the harm it causes – dictate the need for a different and innovative restorative process model. The common models such as victim offender mediation, group conferencing, and even circles are simply not applicable under these circumstances. They cannot accommodate large numbers of victims, are more intimate and private in spirit and are better suited for typical street offenders and juvenile delinquents. The South African Truth and Reconciliation Commission (TRC) may inspire a different restorative response to white-collar crime which is both feasible and appropriate.

However, before describing the proposed restorative response to white-collar crime, a short description of the South African TRC is in order. The South African Parliament established the TRC in 1995, as the state’s primary institution for dealing with its recent past and the gross human rights violations committed under the apartheid regime. The Commission consisted of three committees: (1) the Human Rights Violations Committee, responsible for conducting victim hearings, collecting their statements and establishing eligibility for government reparations; (2) the Reparations and Rehabilitation Committee, which facilitated the reconciliation process and made recommendations to the government regarding victim reparation and rehabilitation; and (3) the Amnesty Commit-

257 See Delgado’s critique of restorative processes, supra note 179, at 769–770 (arguing that victim offender mediation neglects to pay appropriate attention to the public interests in criminal punishment and to the symbolic elements of a public trial).

tee, responsible for determining offender eligibility for the amnesty provided by the country’s interim Constitution. 259

Through these committees, the TRC held hearings for numerous crimes that were committed during the apartheid regime, providing thousands of victims with the opportunity to come forward and tell their stories in a non-adversarial, respectful and supportive forum. 260 At the same time, offenders were granted amnesty as an incentive to disclose their side of the story in full so that their victims and the people of South Africa would learn the truth about what happened and why. 261 The TRC’s underlying commitment was to restoration over retribution, a commitment to understanding communities as an integral part in the creation and solution of the social phenomenon of crime... to look at the implications of offences for the future and to bring together all those who have a stake in the development of that future. 262

The TRC in its South African structure and format is unsuitable as the restorative response to white-collar crime committed in the United States. However, it is an excellent model for designing such a restorative response. In fact, the TRC has been used as a model for the creation of the Peruvian Truth and Reconciliation Commission, aimed at investigating murders, kidnappings, torture and other violations of rights of the Andean and native communities in Peru, 263 and for a proposed response to battering and domestic violence in the United States. 264

The TRC model has a number of important advantages that make it appropriate and relevant to the type of white-collar crime addressed in this article. First, it is an innovative public process. The work of the South African Commission was broadcast on television and radio and drew a wide audience and much public attention. 265 This feature contributes to the transparency of the process and therefore to its credibility. In addition, the publicity and exposure of the process guarantee censure and public condemnation of the criminal acts and accountability of offenders. It also provides

259 Bhargava, supra note 258, at 1306; Llewellyn and Howse, supra note 258, at 367.

260 Llewellyn & Howse, supra note 258, at 386.

261 Bhargava, supra note 258, at 1306–1307.

262 Llewellyn & Howse, supra note 258, at 385.


265 See Llewellyn & Howse, supra note 258, at 386.
an important deterrent in the form of public shaming. Other advantages of the TRC model include its ability to deal with large numbers of victims and offenders, its ability to include peers and members of the community in the process, its mechanism for calculating the amount of financial reparation due to victims, and its sole focus on restoration of all types of harm caused by certain types of offenses as opposed to retribution or adjudication.

As discussed previously, this article does not call for the replacement of the existing justice system for white-collar crime, but rather for its amendment. Therefore, in structuring a Truth and Reconciliation Commission to deal with white-collar crime in the United States, pardoning offenders categorically as in South Africa is simply out of the question. Moreover, even the general amnesty granted in the South African TRC was heavily criticized. Thus, the Peruvian TRC does not pardon offenders and is not intended to replace the prosecution or judicial branch. The same should apply to the restorative response to white-collar crime in the United States. The Truth and Reconciliation Commission will only focus on restoration and “making amends,” leaving retribution and adjudication to the conventional criminal justice system.

Another difference between the South African model and the one proposed here is that unlike the former, white-collar offenders in the United States would come in direct contact with their victims, and restitution would be made by the offenders and not by the government. This is because the physical separation between victims and offenders and the extraction of reparation out of their relationship in the South African model prevents full restoration of the harm caused by the crime to both victims and offenders. As discussed previously, direct contact between stakeholders is essential to the restorative process, as is the offender’s undertaking of “a reparative task.” Admittedly, white-collar offenders may find themselves sitting long hours, day after day, listening to victims as

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266 See Kahan & Posner, supra note 136 and accompanying text.
267 See Llewellyn & Howse, supra note 258, at 380.
268 Id. at 369–370; see Sherrie L. Russell-Brown, Out of the Crooked Timber of Humanity: The Conflict Between South Africa’s Truth and Reconciliation Commission and International Human Rights Norms Regarding “Effective Remedies,” 26 HASTINGS INT’L & COMP. L. REV. 227 (2003) (arguing that due to the amnesty granted to offenders in the TRC, it may not constitute an “effective remedy” under various Human Rights treaties and therefore it contradicts certain international law principles).
269 See Falcon, supra note 263, at 1.
270 See Llewellyn & Howse, supra note 258, at 387.
271 Von Hirsch et al., supra note 21, at 25.
they tell their stories, something which is both inconvenient and difficult to do. However, time spent this way is far more beneficial than time spent idly in prison. Moreover, the message conveyed to offenders is straightforward: “You hurt these people, now you will hear what they have to say.” This may well be an indispensable aspect of doing justice.

Workshops aimed at eliciting the views of victims and survivors regarding their experience with the TRC in South Africa found a number of recurring themes that support these last two aspects of the proposed white-collar crime TRC.\textsuperscript{272} The first theme is that the truth is a pre-condition for reconciliation. Under this theme, victims expressed their need for offenders to come forward and “tell how and why they committed certain acts”\textsuperscript{273} as the first step in the long and complex reconciliation process. This is precisely what offenders will be asked to do in the restorative response to white-collar crime. They will be asked to publicly talk about their wrongdoing, not as testimony or as part of a fact-finding procedure, but to further the restorative goal of allowing offenders and victims to begin addressing their harms and to reconcile with the criminal event that affected their lives. Many restorative processes begin with the offenders telling their story since this was found to be effective in promoting the discussion and helping victims confront their offenders.\textsuperscript{274} Admittedly, white-collar crime victims are in an entirely different situation than apartheid victims and have different needs with regards to hearing the offender’s side of the story. Nevertheless, the same process of storytelling should apply to white-collar crime.

\textsuperscript{272} Brandon Hamber, Traggy Maepa, Tlhoki Mofokeng & Hugo van der Merwe, Survivors’ Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report, \textit{The Centre for the Study of Violence and Reconciliation & The Khulumani Support Group, Survivors’ Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report}, \textit{available at} http://www.wits.ac.za/csvr/papers/papkhu.htm (report submitted to the Truth and Reconciliation Commission). (The study explains that the eleven workshops were conducted between August 7, 1997 to February 1, 1998, and involved 560 participating victims and survivors from rural and urban areas in South Africa where conflict and oppression were especially dominant.) [hereinafter: CSVR workshop submission].

\textsuperscript{273} \textit{Id.}

\textsuperscript{274} See, e.g., the Real-Justice (an international organization promoting restorative justice practices) script for a restorative justice conference begins with the following questions directed to the offender: What happened? What were you thinking at the time? What have you thought about since? Who has been affected by what you did? In what way? What do you think you need to do to make things right? See Terry O’Connell, \textit{Why the Real Justice Script?} (2005), http://www.restorativepractices.org/man05/man05_papers.html; then follow “Why the Real Justice Script” hyperlink (last visited Mar. 29, 2006).
The second theme ties reconciliation and reparation to financial and material contributions by offenders, and stresses the importance of punishment in pursuit of justice. In the proposed white-collar crime TRC, the restorative component would be additional to the punishment in order, among other things, to facilitate the direct payments of restitution to victims as the means for “making amends.” As mentioned above, the criminal justice system in the United States already has restitution provisions aimed at compensating white-collar crime victims. However, studies have found that allowing victims to participate in the process of determining the amount of restitution increases the chance they will believe the amount is just and fair.

The third theme is that reconciliation is an individual process, and that “perpetrators must be held accountable individually and be accessible to the victims to meet them.” Unlike the South African model, the proposal illustrated here combines a restorative process with punishment, thus holding white-collar offenders accountable for their action in the traditional way. In addition to traditional punishment, the white-collar crime TRC would hold offenders personally accountable in a different and possibly more meaningful way for their victims. In writing about the September 11th Victim Compensation Fund of 2001 (the Fund), Tom Tyler argued that some victims were initially reluctant to sign up for the Fund because they felt they would thus forgo their opportunity to get an “apology or acknowledgment of fault and responsibility from some group or organization.” Tyler explains that when victims believe their offenders acted immorally, they will often prefer to confront them with the intention (and hope) of getting an apology rather than settle for monetary compensation. The white-collar crime TRC would provide victims with the opportunity to confront their offenders and demand (and hopefully receive) their much-needed apology.

After the South African TRC concluded its work and determined victim eligibility for reparations, approximately 18,000 vic-
tims and survivors received a one-time payment of approximately $4,000. A study aimed at assessing the impact of these payments on victims and survivors found that “by failing to consult with survivor groups before deciding on the final amount for reparations, government wasted an opportunity to learn about the different survivor needs, which would have helped in designing a more comprehensive reparation policy with potential to optimize its effectiveness.” The study found that survivors felt less frustrated with the amount of money they received than with the government’s failure to address their most crucial needs such as acknowledgement of wrong done, revelation of the truth, pension rights, medical and educational services, housing and restoration of reputation.

This demonstrates the importance of structuring a restorative process that enables attentiveness to the totality of needs expressed by victims, not just the financial ones, and reiterates the importance of integrating victims’ views in shaping the appropriate restorative response to white-collar crime. As in the 9/11 Victim Compensation Fund, the white-collar crime TRC will have to assess both the legitimacy and value of the various claims, perhaps in conjunction with the courts, but that is a matter for a different discussion. The main principle here is that victims will be encouraged to address every aspect of their harm and their different needs, whether monetary or others, in a non-adversarial and supportive environment.

Although different groups that focused on different aspects of the Commission’s work heavily criticized the South African TRC, a study that surveyed victims and survivors who testified before the Commission several years after their participation, revealed three substantial benefits of testifying. First, participants attributed great value to finally learning the truth about past events (“what I did not know I know now”). Second, the rare occasions during which personal meetings between victims and perpetrators oc-

281 See CSVR research, supra note 280.
282 Id. at “Survivors’ actual needs.”
curred were regarded as crucial and extremely effective (“I wanted to see those people”).284 Third, participants who testified at the hearings highly valued the opportunity to finally tell their story to the public (“I wanted the world to know”).285 These findings support the arguments made in favor of a restorative response to white-collar crime based on the TRC model. They demonstrate that this type of response answers important needs expressed by victims merely by allowing them to personally listen to their offenders, learn what happened and tell their own story.

Admittedly, in many white-collar crime cases, the victims may be wealthy investors that lost highly speculative investments they intentionally risked losing or mutual funds or large financial institutions. These victims would be welcome to come forth and participate in the process if they wish to do so. However, it seems likely that these victims are not the type of victims who would consider participating in such a restorative intervention since they often do not share the needs mentioned above. The proposed model for a restorative response to white-collar crime provides white-collar crime victims, who have a need to be heard, to see their offenders and hear their side of the story, and who wish to participate in such a process, the same opportunities.

It may be argued that this structure opens the door to too many victims, which may lead to a possible collapse of the system. While this is theoretically true, especially given the fact that so many people and organizations are directly affected by white-collar crime, it is not unrealistic to assume that such a system overload will not occur. The South African Commission, for example, operated under the assumption that “virtually every black South African can be said to be a victim of human rights abuse,”286 and that “those who came before the Commission are only a subset of a much larger group.”287 Reality dictates that there are those who come forth and those who do not. But can the same be said about American white-collar crime victims?

284 Id.
285 Id.
287 Id. According to reports, the South African TRC took 22,000 apartheid victims’ statements over two years, and received thousands of amnesty application from offenders (See Robyn Dixon, South Africa: A Decade After Apartheid; The Official Truth Falls Short for Many, L.A. TIMES, May 30, 2004.
Potentially yes. As previously mentioned, the current justice system attempts to define the financial harm caused by individual white-collar offenders, and direct victims have legal recourses through which they can receive at least some restitution. Through the mechanism provided in the PSLRA, for example, victims can file class action suits in securities fraud cases. Theoretically, given Coffee’s description of the volume of direct victims affected by white-collar crime, each of the large corporate scandals mentioned in this article should have produced large numbers of lawsuits clogging the federal court system. Indeed, these scandals did produce large numbers of legal proceedings, but not everyone that suffered some kind of harm eventually initiated legal actions. Some did not take any action and some decided to join others. This is the reality, and it is reasonable to predict that the same would be true regarding the proposed restorative intervention.

Although structured as a more formal process than most common restorative justice intervention, the Truth and Reconciliation Commission model is very much a restorative process. It is focused on McCold’s three important questions: Who is harmed? What are their needs, and how can those needs be met? It provides victims with the opportunity “to tell their stories, to be heard and acknowledged, and, eventually... to be compensated,” in a way unparalleled in criminal prosecutions. It provides offenders with an equal opportunity to tell their side of the story, express remorse and undertake obligations to “make amends.” It allows for, and even encourages, the participation of other stakeholders such as the offender’s peers, business colleagues, friends and family, neighbors and community members of the victims, and other individuals and organizations affected by the crime. And it does all of this

288 See supra notes 224–226 and accompanying text.
289 See PSLRA, supra note 217 and accompanying text.
290 See Coffee supra note 197 and accompanying text.
291 It may be argued that allowing victims to decide voluntarily whether they wish to participate and commencing a process in which only few victims testify will lead to a distorted and inaccurate historical account of the offense and of the true magnitude of the harm it caused. While this argument is undoubtedly true, it must be noted that the restorative intervention proposed here is not intended to create an accurate historical account of the crime. This process is structured to supplement the current system, not to replace it. The task of creating a historical record of the offenders and the harm they caused will be left in the hands of the courts.
292 See Llewellyn & Howe, supra note 258, at 356.
293 Id. at 364 (although the author mentions this in the context of war crime tribunals, the same can be said about the conventional criminal justice system in prosecuting regular offenses).
294 See McCold & Wachtel, supra note 12, at 115 (listing the various direct and indirect stakeholders affected by crime).
through a forward-looking process aimed at the restoration of people and communities. Undoubtedly, structuring such a formal process as the restorative intervention carries the risk of gradually turning into another court and losing some of the advantages of restorative justice processes. This is partially what occurred in South Africa. However, what determines whether a process is restorative is not how a process is structured, but rather its aims and underlying tenets. The directors and facilitators of the proposed process would have to deal with the risk of transforming the commission into a court, but as long as they focus on the restorative justice paradigm as manifested in its definition, values and theories, they should be just fine.

CONCLUSION

Restorative justice practices are currently being applied to many local criminal justice systems in the United States and around the world. They are applied to juvenile crime and adult crime, to property crime and to violent crime. One of the only areas of criminal law to which they have not yet been applied is high-profile white-collar crime. The idea of responding restoratively to white-collar crime raises a multitude of challenges. The unique characteristics of white-collar crime cases pose practical difficulties for the very initiation of such an intervention. Moreover, the dominant punishment theories question the legitimacy of the application of restorative justice to white-collar crimes.

On the other hand, as demonstrated in this article, there are many good reasons for changing the current public response to white-collar crime to include a restorative component. A restorative intervention roughly structured according to the Truth and Reconciliation Commission model and held in addition to court proceedings, would better address the needs of victims, increasing their chances of restoring their financial and non-financial harm. At the same time, it would address the needs of other stakeholders affected by the crime including the offenders themselves, which are currently left out of today’s public response to white-collar crime. But more importantly, it would promote justice by broadening the objectives sought by the current public response. It would provide

295 See Llewellyn & Howse, supra note 258, at 386 (see especially the third specified aim).
retribution and deterrence, while, at the same time, providing justice for victims and offenders by addressing their needs in the aftermath of white-collar crime.

Finally, responding to white-collar crime restoratively empowers stakeholders to reflect on the current response to this type of criminal misconduct and to propose other ways in which white-collar offenders can be held accountable for their actions. The public nature of the white-collar crime TRC can turn these proposals into a broader public discussion on today’s methods of response to white-collar crime and even to crime in general, such as the extensive use of incarceration. Therefore, this process has the potential not only to promote justice but to promote democracy and public debate about policy as well.