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E UOMO

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— Exploiting White-Collar Criminals' Know-How: Towards a New Way of Punishment

Sfruttare il know-how dei colletti bianchi: verso una nuova strategia punitiva

di Roberta De Paolis

Abstract. In 1939 Edwin H. Sutherland claimed that white-collar crimes represented a real criminality and they should be treated and contrasted as such. Sixty years from that time his warning has found confirmation. Modern era scandals are indeed mainly represented by white-collar criminality, so that governments have opted for a vigorous use of the criminal law. Harsh prison sentences are supposed to refrain individuals from committing crimes (deterrent effect) and reflect the seriousness of the crime (retributive effect). However, analyzing data on final prison sentences from the United States and Italy, severe prison sentences proved ineffective in deterring the white-collar crime commission. Additionally, concerns arise about the usefulness of locking white-collar criminals away. What is the utility of a ten-year prison sentence for individuals who customarily do not pose a danger to public safety? What is the effectiveness of a prison sentence that proves to produce no deterrent effect and does not restore what has been damaged by the crime?

Downstream of such questions, this article argues that a valid response to white-collar crime would be to combine the traditional prison sentence with probation to social services.

Probation tailored specifically to the "white collars" peculiarity would have a double positive effect: deterrence would be guaranteed by public visibility, while the community would be "compensated" by a virtuous use of those skills (know-how) once improperly used.

Abstract. Nel 1939 Edwin H. Sutherland sosteneva la necessità di riconoscere che gli illeciti commessi dai cosiddetti "colletti bianchi" fossero una vera e propria forma di criminalità da dover contrastare. Sessant'anni dopo il suo monito veniva confermato. Difatti, la maggior parte degli scandali dell'era moderna sono attribuibili all'attività criminale dei colletti bianchi, tanto da costringere i governi ad optare per uso vigoroso della legge penale. Si suppone infatti che pene

detentive severe, oltre a riflettere la gravità del crimine commesso, costituiscano anche un valido deterrente per gli individui. Tuttavia, analizzando i dati riferibili alle sentenze definitive degli Stati Uniti e dell'Italia, risulta chiaro come la severità della pena carceraria non rappresenti un efficace fattore deterrente.

Inoltre, si sollevano perplessità circa l'utilità stessa della reclusione per questa tipologia di criminali. Qual è l'utilità di una detenzione di dieci anni per individui che normalmente non rappresentano un pericolo per la sicurezza pubblica? Quale l'efficacia di una pena detentiva che dimostra di non produrre alcun effetto deterrente e di non ripristinare ciò che è stato danneggiato dal crimine?

A valle di simili interrogativi, questo articolo sostiene che una valida risposta alla criminalità dei colletti bianchi potrebbe darsi dall'abbinamento dell'affidamento in prova ai servizi sociali alla tradizionale pena detentiva. Un affidamento in prova specificatamente ritagliato sulla peculiarità del "colletto bianco" ingenererebbe un duplice effetto positivo: se per un verso l'effetto deterrente deriverebbe dalla visibilità pubblica, per altro, la collettività verrebbe "risarcita" dall'utilizzo virtuoso di quelle competenze (know-how) una volta impropriamente impiegate.

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1. Introduction.

Enron, WorldCom, Conseco, Lehman Brothers, General Motors, Wells Fargo, Chrysler, Cirio, Parmalat, etcetera.

These are just some of the names of the financial scandals that have shaken the entire world, creating chasms in which private and taxpayer money, jobs, trust in companies and political institutions have disappeared. In fact, behind the reassuring appearance of white-collars, dangerous criminal opportunities lurk, becoming fundamental and determining variables in the global market. Considering these disastrous events, governments have recognized the seriousness and danger of the economic

criminality and related phenomena. However, designing strategies capable of influencing a criminal category with such blurred contours is fraught with difficulty. For this reason, crime policies proved them poor-effective and white-collar criminality seems to continue unabated.

The first difficulties start right with the challenge of precisely defining what is white-collar crime and who white-collar criminals are. It was the 27 December 1939 when Edwin H. Sutherland for the first time outlined the portray of those men of affairs, of experience, of refinement and culture, of excellent reputation and standing in the business and social world¹ whose criminal conducts would not be prosecuted criminally but only segregated administratively. Sutherland, however, did not provide a comprehensive definition because his primary aim was to include conducts that at that time were not perceived as criminal acts within the criminology's realm. Consequently, a widespread debate has remained regarding which acts, offenders, and responses (criminal, civil, regulatory) capture the phenomenon. Indeed, while developments toward a universally accepted definition of white-collar crimes have been slow, the topic has received remarkable elaboration in scholarship, legal practice and even legislation².

1.1. Defining White-Collar Crimes.

The debate over the definition of white-collar still represents a significant issue in the criminal field because Sutherland's definition, limited to the offender criterion, turned out to be non-exhaustive. It excluded indeed all those illegal conducts made outside the occupation context (such as income tax evasions or credit card frauds) and those offenses undertaken by low-level employees; likewise, it did not distinguish between economic and violent consequences. Therefore, over time, new definitions have spawned to emphasize motivations, means, technique, setting of the criminal behavior, and social responses to it. A wide variety of terms have been used, such as "elite deviance", "power crime"³ or "crimes of the powerful"⁴, until "economic crime" which gained significant popularity within Europe⁵. Considering such overabundance of definitions, some tried to make an order with the so-called "typological approach"⁶, namely a method capable of distinguishing white-collar crimes by the criminal behavior's quality. For instance, one could separate the offenses into types "based on the nature of the employment"⁷, so that it was possible to distinguish corporate crimes from occupational ones. The formers

¹ E. Sutherland, *White-Collar Criminality*, in *American Sociological Review*, 5, 1940, pp. 1-12.

² S.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*, in *Buff. Crim. L. Rev*, 8, 2004, pp. 13-14.

³ V. Ruggiero, M. Welch, *Special Issue: Power Crime*, in *Crime, Law and Social Change*, 51, 2009, pp. 3-4.

⁴ D.O. Friedrichs, D.L. Rothe, *Crimes of The Powerful: White Collar Crime and Beyond*, in *Handbook of Critical Criminology*, Routledge, 2012, pp.241–251.

⁵ L. Korsell, *Three Decades of Researching and Combating Economic Crime: the Swedish Case*, in *White-Collar Crime Research: Old Views And Future Potentials*, National Council of Crime Prevention, 2001, pp. 91-106 ; B. Larsson, *What is 'Economic' about Economic Crime?*, in in *White-Collar Crime Research: Old Views And Future Potentials*, National Council of Crime Prevention, 2001, pp. 121-136; P. O. Johansen, P.J. Ystehede, *Nordic Economic Crime Research: Work in Progress*, in *Okonomisk Kriminalitet Financial Crime*, Nordiske Samarsbejdsrad for Kriminologi, 2010, pp. 7–10.

⁶ D.O. Friedrichs, *White Collar Crime: Definitional Debates and the Case for a Typological Approach*, in *The Handbook of White-Collar Crime*, OUP Usa ,2018, pp. 17-28.

⁷ M. Clinard, R. Quinney, *Criminal Behavior Systems: A Typology*, Holt, Rinehart & Winston,1967, p. 132.

benefit the offending company; in the latter are individuals use their position to gain a self-benefit⁸. In line with the typological approach, others have divided potential white-collar crimes into three categories: business and professional crimes, occupational crimes, and individual frauds⁹. Similarly, someone else has classified offenses based on the “opportunity” that emerges in the occupational context¹⁰.

Unfortunately, also extensive typological classifications were insufficient: they appeared either too narrow or conceptually unclear. It is precisely because of such deficits that the law enforcement apparatus has adopted a somewhat different approach. It considers white-collar crimes neither a legal category nor a specific offense per se. Conversely, white-collar crimes are envisioned as a set of crimes with similar characteristics such as being committed through the breach of fiduciary duty, deception, omission, concealment, misappropriation, and abuse of public trust, even though they can often have violent consequences¹¹. Therefore, as far as law enforcement is concerned, the white-collar criminal’s status is irrelevant as long as the “nonviolent” nature of the crime is detected¹².

All things considered, white-collar crime is a complex area to conceptualize and it poses various problems in the research field in terms of definition and analysis. The difficulties surrounding this criminological context sometimes have led to consider such a study so outdated and redundant to define white-collar crimes simply in negative terms: those illegal or harmful activities that are neither street crimes nor conventional crimes¹³.

However, even though the aspiration for a single, coherent and universally accepted definition of white-collar crime might appear a vain undertaking, the term itself still represents an “umbrella” formula¹⁴ that deserves to be retained because it always signals, at least, that highly respectable individuals and organizations commit a crime other than a conventional one¹⁵. More specifically, it indicates that generally legitimate and seemingly reputable institutions or individuals, through the violation of the private or public trust, have committed illegal and demonstrably harmful conducts, to either gain a financial advantage or maintain and extend their powers and privileges.

⁸ M. Clinard, P.C. Yeager, *Corporate Crime*, Free Press, 1984, *passim*.

⁹ C.F. Wellford, B.L. Ingraham, *White Collar Crime: Prevalence, Trends, and Costs*, in *Critical Issues In Crime And Justice*, 1994, pp. 7-90.

¹⁰ G.S. Green, *Occupational Crime*, Oxford University Press, 1990: organizational occupational crime, state authority occupational crime, professional occupational crime, and individual occupational crime.

¹¹ R.G. Brody, K.A. Kiehl. *From White-Collar to Red-Collar Crime*, in *J. Financ. Crime*, 17, 2010, pp. 351-364.; S. Simpson, *White-Collar Crime: A Review of Recent Developments and Promising Directions for Future Research*, in *Annual Rev. Of Soc.*, 39, 2013, pp. 309-331.

¹² S. Simpson, M. Benson, *White Collar Crime: An Opportunity Perspective*, Routledge, 2009, *passim*.

¹³ V. Aubert, *White-Collar Crime And Social Structure*, in *Am. J. Sociol.*, 58, 1952, p. 264; D.O. Friedrichs, *Trusted Criminals: White Collar Crime In Contemporary Society*, US. Dep. Justice, 2010, *passim*.

¹⁴ H. Mifflin, *The American Heritage Dictionary of The English Language*, Houghton Mifflin Company, 2004, *passim*.

¹⁵ D.O. Friedrichs, *White Collar Crime: Definitional Debates and the Case for a Typological Approach*, in *The Handbook Of White-Collar Crime*, OUP Usa, 2019, pp. 16-31.

1.2. Measuring White-Collar Crimes.

Defining white-collar crimes is not only a theoretical problem, but a rather practical one. Indeed, the broad encompassing formula of white-collar crimes makes statistical sources failing to measure it: how we define white-collar criminality influences, how we perceive it as a subject and, therefore, how we research it¹⁶. In other words, notwithstanding topics such as fraud, bribery, data breaches, and insider trading have become **a topic of almost daily news**¹⁷, since there are still no reliable statistical data, an accurate portrayal of white-collar crimes is not available. Consequently, as long as there is no consensus on the definition, there can be no consensus on the measurement standard¹⁸.

However, the need for well-grounded statistical results does not pertain only to the research field; conversely, estimating the extent of white-collar crimes is also essential for political issues. Indeed, governments are interested in comparing the harm caused by different types of crime, since many rely on victim harm as a criterion for designing criminal sanctions¹⁹ and appropriate preventive policies²⁰.

Frequently difficulties arise in investigating and prosecuting white-collar crimes precisely because victims themselves might be unaware of their status.²¹ Consequently, statistical methods based on white-collar crimes reported by police reflect only a fraction of those that occur²². Such difficulties get harsher within legal systems whereby the prosecution is discretionary. This latter is the United States case, which faces another significant obstacle since an assortment of regulatory agencies – criminal, civil or administrative²³ – handle white-collar crimes. Not to mention those cases in which relationships between white-collar executives, politics and the judiciary are possible and often so close as to allow the former to manipulate the legislative system itself to their favor. What makes it more challenging to appreciate white-collar crimes' scope is that those agencies often require a monetary threshold that determines if a case must be pursued or not²⁴. Therefore, precisely in the latter cases, the partiality of the available data is by no means an exceptional event, but rather the rule.

¹⁶ D. Johnson, R. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, in *Law of Social Inquiry*, 18, 1993, pp. 63–99.

¹⁷ L. Salinger, *Encyclopedia Of White-Collar And Corporate Crime*. CA: Sage, 2005.

¹⁸ M. Cohen, *The Costs of White-Collar Crime*, in *Oxford Handbook on White-Collar Crime*, Oxford University Press., 2016, pp. 78-101; S. Simpson, M. Benson, *White Collar Crime: An Opportunity Perspective*, Routledge, 2009, *passim*.

¹⁹ M. Cohen, *The Costs of White-Collar Crime*, in *Oxford University Press.*, 2016, pp. 78-101.

²⁰ D.A. Anderson, *The Cost of Crime*, in *Foundations and Trends in Microeconomics*, 2, 2012, pp. 209-265.

²¹ J. Albanese, *White-Collar Crime in America*, Prentice Hall, 1995; H. Croall, *Victims of White-Collar and Corporate Crime*, in *Victims, Crime and Society*, Sage, 2007, pp. 88-100.

²² H.M. Shulman, *Measurement of crime in the United States*, in *J. Crim. L. Criminology & Police Sci* 57, 1966, pp. 483 ss.

²³ H. Croall, *Victims of White-Collar and Corporate Crime*, in *Victims, Crime and Society*, Sage, 2007, pp. 88, 108.

²⁴ S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, in *The Ohio State Journal of Criminal Law*. 8, 2011, pp. 484 ss.

1.3. Costs of White Collar-Crimes.

In the absence of longitudinal data and consistent methods to count white-collar arrests and prosecutions, it is burdensome to determine the incidence of such crimes. Lack of statistics is likely to lead to the misleading conclusion that white-collar crimes are not as severe as conventional ones²⁵. However, even partial statistical data prove that the white-collar criminality affects society much more than traditional crimes, since they also bring massive financial, emotional, and even great physical distress to the victims²⁶ (Kane and Wall 2006; Croall 2007). On the latter point, several studies have pointed out that many cases of depression and suicides involve victims of fraud²⁷. Furthermore, social, economic and political drawbacks of white-collar criminality deserve attention. For example, in those regions where white-collar crimes are pervasive and often tolerated, young people can view criminality as a gate for a better life. Likewise, white-collar crimes also contribute to lower social conditions by reducing the available resources because governments may allocate funding to deter, detect and prosecute them in place of granting social programs²⁸. White-collar crimes also cause significant areas of delegitimization: one is the loss of confidence in political institutions, processes and leaders; the second is the reduction of trust in business leaders and economic institutions²⁹.

Essentially, the white-collar crimes issue is essential due to its profound impact on victims, society and the economy. If troubling results arise right from those non-comprehensive data on white-collar crime, there is room for suspecting that a complete estimate might return even more troubling data. Indeed, some of those partials estimates prove that white-collar crimes caused monetary losses to employees and stockholders for hundreds of billions of dollars³⁰, ranging from 300 and 600 billion dollars per year³¹.

If the losses estimates are not sufficiently convincing, there are still clear indications that white-collar criminality should be on the increase³². On the one hand, white-collar crimes generally require significant high levels of education or specialized technical skills which are becoming progressively more available in our society. Indeed,

²⁵ J. Albanese, *White-Collar Crime in America*, Prentice Hall, 1995; M. Dodge, *A Black Box Warning: The Marginalization of White-Collar Crime Victimization*, in *Journal Of White Collar And Corporate Crime*, 1, 2020, pp. 24-33.

²⁶ J. Kane, A. Wall, *The National Public Household Survey 2005*, United States Department of Education, 2006; H. Croall, *Victims of White-Collar and Corporate Crime*, in VICTIMS, in *Crime and Society*, Sage, 2007, pp. 88-100.

²⁷ P. Saxby, R. Anil, *Financial Loss and Suicide*, in *The Malaysian Journal Of Medical Sciences*, 19, 2012, pp. 74-76.

²⁸ E. McFayden, [Global Implications of White Collar Crime](#) (Last Modified: January 3, 2010).

²⁹ S. Shapiro, *Wayward Capitalists*, Yale University Press, 1984; J. Conklin, *Illegal But Not Criminal*. Englewood Cliffs, Prentice-Hall, 1977; T. Dearden, *Trust: The Unwritten Cost of White-Collar Crime*, in *Journal Of Financial Crime*, 23, 2016, pp. 87-101.

³⁰ Public Citizen, [Corporate fraud and abuse taxes. Cost the Public Billions](#), 2002.

³¹ Emily Stewart, [White Collar Crime Costs Between \\$300 and \\$600 Billion a Year](#) (Last modified July 9, 2015).

³² G. Cliff, A. Wall-Parker, *Statistical Analysis of White-Collar Crime*, in *Oxford Research Encyclopedia of Criminology*, Oxford University Press, 2017.

there is an increase in literacy rates, computer use and educational attainment³³. On the other hand, it is the very opportunity to commit white-collar crimes that is increasing. For instance, if far fewer workers had realistic access to corporate information in the past, nowadays, about half of the total workforce is in a position that enables them to sell trade secrets, embezzle funds, or commit other traditional white-collar crimes³⁴.

Furthermore, one should consider that nowadays things of value are frequently intangible and more exposed to attacks³⁵. For instance, when money is contained within digital currencies, it can be stolen by manipulating digital banking information³⁶. As a matter of fact, advanced information and communication devices make white-collar crimes easy and less costly to commit³⁷, enough to say that **in the current society almost all business crime in the 21st century could be termed computer crime, as all major business transactions are carried out with computers**³⁸.

2. Materials and Methods.

The preceding sections have argued that white-collar crimes represent a rather urgent issue to be addressed. Such assumption has been confirmed by the accounting scandals unearthed at many large corporations worldwide, starting most notably with the Enron Corporation's collapse³⁹. Consequently, governments attempted to protect investors through the introduction of higher penalties for white-collar offenses. Such a strategy was driven by the belief that potential offenders would behave consistently with criminal law given the awareness of the extreme risks of disobeying⁴⁰.

It is under this theoretical assumption that rounds of white-collar over-criminalization have started to see the light. Such a policy-making response against white-collar criminality is well-represented by reforms adopted by the United States and Italy.

In the United States, the main representative of this approach is the Sarbanes-Oxley Act, which assumed that increasing statutory maximums resulting in ever-lengthening sentences would act as a deterrent⁴¹. The Sarbanes-Oxley Act resulted from the collapse of Enron, one of the biggest American energy companies, which filed for

³³ UNESCO, *Education: Literacy Rate*, in <http://data.uis.unesco.org/> (Last modified 2016); T. File, C. Ryan, [Computer and Internet Use in the United States: 2013](#) (Last modified November, 2014); C. Ryan, K. Bauman, [Educational attainment in the United States: 2015. U.S. Census Bureau](#) (Last Modified March, 2016.)

³⁴ U.S. Department of Justice, Federal Bureau of Investigation, [Crime in the United States, 2014](#) (Last modified 2015).

³⁵ G. Cliff, A. Wall-Parker, *Statistical Analysis of White-Collar Crime*, in *Oxford Research Encyclopedia of Criminology*, Oxford University Press, 2017, *passim*.

³⁶ U. Apte, K. Uday, H. Nath, *Information Services in the U.S. Economy: Value, Jobs and Management Implications*, in *California Management Review*, 50, 2008, pp.12– 30.

³⁷ K. Zickuhr, A. Smith, [Digital differences. Pew Research Center](#) (Last modified April 13, 2012).

³⁸ H. Pontell, *White-Collar Crime or Just Risky Business? The Role of Fraud in Major Financial Debacles*, in *CRIME LAW AND SOCIAL CHANGE*, 42, 2005, pp. 309-324.

³⁹ A. Davis Thad, *A New Model of Securities Law Enforcement*, in *Cumb. L. Rev*, 32, 2001, pp. 98-99.

⁴⁰ L.H. Nicholson, *Sarbanes-Oxley's Purported Over-Criminalization of Corporate Offenders*, in *J. Bus. & Tech. L.*, 43, 2007, p. 45.

⁴¹ C. Thomsen, L. Norman, D. Norman, *Sarbanes-Oxley Turns Six: An Enforcement Perspective*, in *J. Bus. & Tech. L.*, 3, 2009, pp. 393-394.

bankruptcy due to systemic mechanisms of corruption and fraud that reached the highest level of the corporation⁴². Former President Bush asked for an intervention that would establish a greater deterrence to potential white-collar criminals by increasing the maximum punishments for financial fraud⁴³.

As far as Italy is concerned, the leading policy trend was that of increasing maximums for white-collar offenses. For instance, regarding tax evasion, false accounting⁴⁴ and bribery⁴⁵.

3. Results.

3.1. Theory vs. Practice.

However, there is the theory and there is the practice.

The harshening of penalties is supposed to substantially deter white-collar crimes because white-collar criminals seem to be the likeliest to be aware of the consequences of their conduct, plus the business community pays attention to what happens to its members⁴⁶.

Unfortunately, as mentioned above, this is only the theory. Indeed, notwithstanding the increased punishment imposed should be expected to have an appreciable deterrent effect, data show that often theory and practice are not on the same page. Of course, measuring the actual deterrence is challenging because there is no reliable statistic on individuals that do not commit a white-collar crime because of fear of being caught and punished. Anyhow, the general perception is that white-collar crimes are on the increase.

This paragraph will compare some data concerning the American and Italian legal systems to demonstrate such a perception. Due to the shortage of white-collar researches, this analysis relies basically on secondary data, namely those data collected in a previous moment, but serves the current inquiry's purpose. In this case, they come from national bodies that collect data regarding every offense sentenced each year. On the one hand, there is the U.S. Annual Report of Federal Sentencing Statistics and, on the other, the Italian National Institute of Statistics. White-collar crimes most affected by the waves of over-criminalization have been considered. For the United States system, fraud

⁴² H. Bloomenthal, *Sarbanes-Oxley In Perspective*, Thomson Reuters, 2018.

⁴³ L. E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, in *Okla. L. Rev.*, 451, 2007, pp. 453-67.

⁴⁴ F. Mucciarelli, *Le "Nuove" False Comunicazioni Sociali: Note in Ordine Sparso*, in *Dir. Pen. Con.*, 2, 2015, pp. 159-189.

⁴⁵ F. Mucciarelli, *Le "Nuove" False Comunicazioni Sociali: Note in Ordine Sparso*, in *Dir. Pen. Con.*, 2, 2015, pp. 159-189; G. Balbi, *Alcune Osservazioni In Tema Di Riforma Dei Delitti Contro La Pubblica Amministrazione*, in *Diritto Penale Contemporaneo*, 2012, pp. 4-5; E. Dolcini, F. Viganò, *Sulla Riforma in Cantiere dei Delitti di Corruzione*, in *Dir. Pen. Con.*, 2012, p. 232; F. Viganò, *La riforma dei Delitti di Corruzione*, in *Libro Dell'anno Del Diritto*, 2013, pp. 153-164.

⁴⁶ P. J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, in *Wayne L. Rev.*, 2015, pp. 27-55.

crimes have been taken into consideration; for the Italian system, tax crimes, corporate crimes (of which false corporate communications are a pillar) and corruption. Table 1 and Table 2 show convictions for those specific crimes from 2007 to 2017.

Table 1

Italy	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Corruption	311	338	347	272	265	258	289	260	293	313	291
Corporate Crimes	5653	5654	5524	4269	4221	4159	4360	3855	4416	4767	4904
Tax Crimes	2022	2446	2978	3714	5080	6110	6729	7015	6539	4023	3222

Table 2

United States	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Fraud	7550	7041	7566	8032	8300	8551	7789	7607	7414	6516	6027
Percentage on total convictions	10,7%	9,8%	9,5%	9,7%	9,8%	10,5%	9,8%	10%	10,5%	9,6%	9%

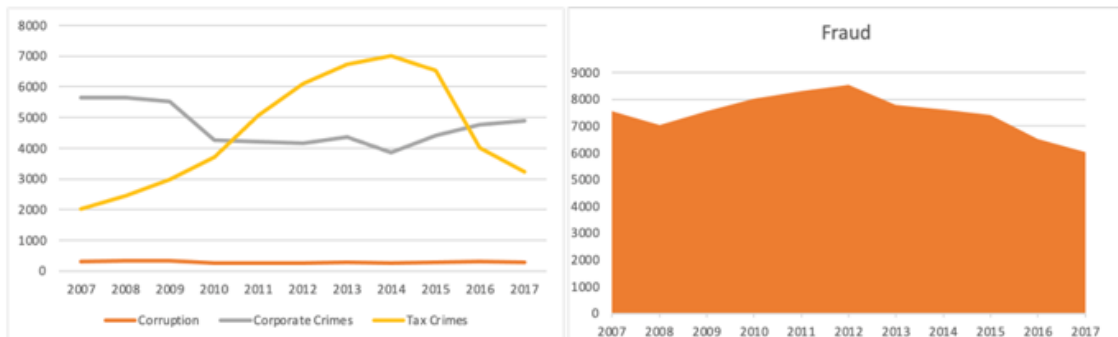


Figure 1. (a) provides a graphical representation of the data contained in Table 1. (b) provides a graphical representation of the data contained in Table 2.

3.2. White-Collar Crimes Over-Criminalization and Criminal Diversions: a Collateral Effect.

Data analyses suggest that increasing sentences is not conducive to the ultimate goal of deterring future criminality.

Final sentences for the crimes considered in the brief examination above have remained constant over ten years and, in some cases, such as tax crimes in Italy, they have even increased.

While the supposed gains from over-criminalization's processes are elusive, varied negative consequences are not⁴⁷: increasing penalties may have created an even greater incentive to perpetuate the symbiotic relationship between over-criminalization and plea bargaining.

On this point, as early as 1970, the U.S Supreme Court stated that plea bargaining serves to those who search for a small benefit in return for preserving judicial and prosecutorial resources in clear cases of guilty. Likewise, Italian scholars have pointed out that the Italian form of plea-bargaining – the so-called “patteggiamento” – represents a renunciation of both the exercise of the criminal cross-examination and to be judged beyond all reasonable doubt, in favor of deflationary purposes of the time and procedural activities⁴⁸. However, if plea bargaining or “patteggiamento” become excessively pervasive, they might prevent defendants from making a thoughtful decision regarding whether to waive their right to trial. In other words, increasing criminal penalties may reinforce the trend to resort to negotiated punishments⁴⁹, generating two troubling outcomes. Either innocent individuals accept the conviction in return for a perceived benefit⁵⁰, or higher penalties end up to corresponding to lower ones because bargained⁵¹.

The very latter circumstance may represent the greatest failure of those policies that “get tough on crime” and the confirmation of the distance between theory and praxis because, in the long run, offenders still enjoy disproportionately light punishments that do not match their wrongdoing due to the plea bargains' resort⁵².

4. Discussion.

4.1. *The Misplaced Reliance on Maximum Sentences and Fines to Deter White-Collar Criminality.*

Data have showed that the desired lengthy sentences imposed on white-collar criminals might not impact as it has been presumed. Various reasons may explain such an effect.

Scholars have noticed that the punitive value of imprisonment is “front-loaded”⁵³. That is to say that, if one is supposed to lose his freedom significantly, the years closest

⁴⁷ S.S. Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, in *Am. U. L. Rev.*, 54, 2005, pp. 747-749.

⁴⁸ G. Piero, *Accertamento del fatto e colpevolezza al di là di ogni ragionevole dubbio*, Aracne, 2011.

⁴⁹ L. Romero, *Procedures for Investigating and Prosecuting White Collar Crime*, in *U.S.-Mex. L.J.*, 165, 2003, pp.165-170.

⁵⁰ L. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, in *Kentucky Law Journal.*, 101, 2013, p.723; J. Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, in *Am. J. Crim. L.*, 25, 1999, pp. 505-519.

⁵¹ D. V. Dooley, M. Radke, *Does Severe Punishment Deter Financial Crimes?*, in *Charleston L. Rev.*, 4, 2010, pp. 619-657.

⁵² M. Russell, *Corporate Crime and Violence: Big Business Power and The Abuse of The Public Trust*, Sierra Club Books, 1988, *passim*.

⁵³ J.C. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, in *Am. Crim. L. Rev.*, 17, 1980, pp. 419-432; E. Szockyj, *Imprisoning White-Collar Criminals?*, in *S. Ill. U. L. J.*, 23,

to the present are those most burdensome. The marginal utility of lengthy terms of imprisonment⁵⁴ gets lower over the time spent in prison because it does not provide a marginal effect beyond the experience of prosecution, conviction and sentencing⁵⁵. In other words, ten years' sentence is not ten times more punitive than a one-year sentence⁵⁶. Therefore, research has proved that whatever specific deterrence is gained by imprisonments adds, it may be already produced before the sanction's imposition itself⁵⁷.

On the other hand, even the prison experience ends up being meaningless. Some other studies have revealed that white-collar criminals -especially senior managers- can better cope with the psychological stress of prison life until becoming "model prisoners"⁵⁸. Consequently, prison officials tend to treat them gentler⁵⁹. Lastly, although massive media attention covers white-collar prosecutions, once they are over, the stigma eventually fades for the offender and the shame message sent by utilizing media scrutiny ends up being forgotten by the public⁶⁰.

Even though these reasons significantly debilitate the hoped-for effect of increased penalties, the principal critical point is upstream. In a word, it lies in theory that such policy-making reasoning relies on, namely the deterrence theory.

"Deterrence" is an expression that pertains to utilitarianism philosophy, pursuant to which a conduct is right just if, among alternatives open to an agent on a given occasion, it leads to the best consequences⁶¹. In light of this, a punishment is deemed valuable and sufficient when capable of preventing future misconducts and reducing costs of prosecuting and incarcerating⁶². In essence, deterrence should occur when it prevents

1999, pp. 485-496; J. Bronsteen, *Retribution and the Experience of Punishment*, in *California Law Review*, 98, 2010, pp. 1463-1496.

⁵⁴ J.C. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, in *Am. Crim. L. Rev.*, 17, 1980, pp. 419-432; M. Polinsky, S. Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, in *J. Legal Stud.*, 28, 1999, pp.1-1228; W. R. Kelly, *The Future Of Crime And Punishment*, Rowman & Littlefield Publishers, 2016.

⁵⁵ M. Benson, *Collateral Consequences of Conviction for a White-Collar Crime*, University Microfilms International, 1982; F. Drago, R. Galbiati, P. Vertova, *The Deterrent Effects of Prison: Evidence from a Natural Experiment*, In *Journal Of Political Economy*, 117, 2009, pp. 257-80.

⁵⁶ J.C. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, in *Am. Crim. L. Rev.*, 17, 1980, pp. 419-432; M. Polinsky, S. Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, in *J. Legal Stud.*, 28, 1999, pp. 1-1228; W. R. Kelly, *The Future Of Crime And Punishment*, Rowman & Littlefield Publishers, 2016, *passim*.

⁵⁷ M.L. Benson, E. Moore, *Are White-Collar and Common Offenders the Same? An Empirical and Theoretical Critique of a Recently Proposed General Theory of Crime*, in *J. Res. Crime & Delinq.*, 251, 1992, pp. 251-272; D. Weisburd, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, in *Criminology*, 33, 1995, p. 587; D. Nagin, *Deterrence in Twenty-First Century*, in *Crime And Justice*, 42, 2013, pp. 199-263.

⁵⁸ M.L. Benson, F.T. Cullen, *The Special Sensitivity of White-Collar Offenders to Prison: A Critique and Research Agenda*, in *J. Crim. Just.*, 16, 1988, pp. 207-211; W. A. Stadler, M. L. Benson, F.T. Cullen, *Revisiting the Special Sensitivity Hypothesis: The Prison Experience of White-Collar Inmates*, in *Justice Quarterly*, 30, 2012, pp. 1-25.

⁵⁹ T. Frankel, *Trust And Honesty: America's Business Culture At A Crossroad*, Oxford University Press, 2006, *passim*.

⁶⁰ L.H. Nicholson, *Sarbanes-Oxley's Purported Over-Criminalization of Corporate Offenders*, in *J. Bus. & Tech. L.*, 43, 2007, p. 45.

⁶¹ R.A. Wasserstrom, *The Judicial Decision*, Stanford University Press, 1961; J. McHugh, *Utilitarianism, Punishment, and Ideal Proportionality in Penal Law: Punishment as an Intrinsic Evil*, in *Journal Of Bentham Studies*, 10, 2008, pp. 1-16.

⁶² D.K. Brown, *Criminal Law Theory and Criminal Justice Practice*, in *Am. Crim. L. Rev.*, 49, 2012, pp. 73-74.

offenses because the crime's benefits do not exceed the expected sanctions. Such a mechanism derives from Professor Becker's deterrence theory, which translated in economic terms the algorithm at the base of Bentham's utilitarian philosophy⁶³. It is precisely the rational calculation so-called "felicific calculus", whereby people are constantly maximizing their wellness through weighing pleasure and pain⁶⁴. Along with this reasoning, increasing the punishment's likelihood and the amount should reduce the rate of offenses because it is supposed to minimize people's gains deriving from the offense⁶⁵.

Taking into account such a paradigm, white-collar crimes are believed to well-fit the deterrence theory because of their intrinsic rational profit-oriented motivation and risk-averse attitude. Even more so when risks and losses come from a criminal conviction⁶⁶. In other words, when white-collar crimes occur, it is automatically believed that offenders have processed available information about alternative courses of action and they have ranked possible outcomes in order of expected utility⁶⁷.

However, is it always the case?

4.2. *What May not Function: the Risk Equation.*

According to those who believe in the deterrence effect of simply harshening sanctions for white-collar crimes, potential offenders pose themselves a simple question that influences their behavior: does the benefit of money outweigh the risk of punishments if caught and convicted? This reasoning has been labeled as the "risk equation", whereby the calculation between possible severe punishments and potential gains often is solved in favor of wrongdoing because people succumb to the temptation of getting somehow rich⁶⁸.

Ultimately, white-collar criminals are deemed as individuals driven by money and the power that comes with it. Two factors are supposed to be crucial: the amount of money involved and the actual or perceived risk of being caught and convicted. Another element capable of influencing the "risk equation" is the extent of potential prison sentences: as the money involved in the white-collar crime grows, as the prison sentences would do.

⁶³ G.S. Becker, *Crime and Punishment: An Economic Approach.*, in *J. Pol. Econ.*, 76, 1968, p.169.

⁶⁴ J. Bentham, *An Introduction to The Principles Of Morals And Legislations (1789)*, Dover Pubns, 2007, *passim*.

⁶⁵ M. Mungan, *The Law and Economic of Fluctuating Criminal Tendencies and Incapacitation*, in *Md. L. Rev.*, 72, 2012, pp. 156-170.

⁶⁶ W.J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, in *Wis. L. Rev.*, 10, 1967, pp. 703-719; J.K. Arnulf, P. Gottschalk, *Principals, Agents and Entrepreneurs in White-Collar Crime: An Empirical Typology of White-Collar Criminals in a National Sample*, in *Journal Of Strategic Management Education*, 8, 2012, pp. 1-22.

⁶⁷ J. Braithwaite, G. Geis, *On Theory and Action for Corporate Crime Control*, in *Crjme& Delinq.*, 28, 1982, p. 292; T. Eaton, S. Korac, *A Criminological Profile of White-Collar Crime*, in *The Journal of Applied Business Research*, 32, 2016, pp. 129-142.

⁶⁸ D.V. Dooley, M. Radke, *Does Severe Punishment Deter Financial Crimes?*, in *Charleston L. Rev.*, 4, 2010, pp. 619-657.

However, when the criminal stake is high, the penalties imposed will not be significant enough to produce the hoped deterrence effect⁶⁹.

The cost-benefit calculation may not be the only reason people pander to the temptation to commit white-collar crimes. Conversely, subjective features often seem to influence people's choices.

Among white-collar criminals, there is often a behavioral spectrum. It ranges from potential offenders less inclined to think about their actions' consequence, up until those such confident in their abilities that are incapable of appreciating the risk deriving from their actions⁷⁰. Moreover, mainly within the middle management class, the "good soldier" phenomenon can occur⁷¹. Namely, those under the senior management's patronage collude with it because they feel themselves as a "cogs in the wheel" , so they hardly ponder the consequences of their actions⁷².

4.3. *Rationalization in Neutralization and Rationalization in Action.*

The argument supporting the fact that prison terms seem not to deter white-collar crimes appreciably is that rationalization processes often do not concern the choice to offend.

Conversely, such processes have to deal with the choice to "conceal" the offenses⁷³.

The "neutralization" reasoning justifies conduct and allows offenders to keep a sense of dignity and elude the "criminal" label⁷⁴.

White-collar criminals' apologetic narrations can range from denying the criminal intent to the denial of the harm⁷⁵ until the claim of being conforming and meeting economic objectives was necessary⁷⁶.

However, it can also occur that individuals involved in white-collar crimes are not aware – at least on some level – that their actions are criminal. Other factors can support

⁶⁹ J.C. Coffee, *Soul to Damn, No Body to Kick: An Unscandalized Essay on the Problem of Corporate Punishment*, in *Michigan Law Review*, 79, 1981, pp.413–24.

⁷⁰ P.H. Robinson, J.M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, in *Oxford J. Legal Stud.*, 24, 2004, p. 179.

⁷¹ J.W. Barnard, *Rule 10B-5 and the Unfitness Question*, in *Ariz. L. Rev.*, 9, 2005, pp. 29-30.

⁷² O. Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, in *Cal. L. Rev.*, 97, 2009, p.440.

⁷³ E.H. Sutherland, *White Collar Crime*, The Dryden Press, 1949.

⁷⁴ M.L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, in *Criminology*, 23, 1985, pp. 583-587; F. J. Dimarino, C. Roberson, *Introduction To Corporate And White-Collar Crime*, Routledge, 2013, *passim*.

⁷⁵ M.L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, in *Criminology*, 23, 1985, pp. 583-587.

⁷⁶ J.W. Coleman, *Toward an Integrated Theory of White-Collar Crime*, in *Am. J. Sociology*, 93, 1987, pp. 409-411; R.V. Aguilera, A.K. Vadera, *The Dark Side of Authority: Antecedents, Mechanisms, And Outcomes of Organizational*, in *Journal of Business Ethics*, 4, 2008, pp. 431-449; J. Heath, *Business Ethics and Moral Motivation: A Criminological Perspective*, in *Journal of Business Ethics*, 83, 2008, pp. 595-614.

the neutralization processes indeed. The law itself can generate such an effect because of its general construction or contents⁷⁷, so that someone may believe that their conduct came within the bounds of the law. For instance, within legal systems like that of the United States, many violations are subjected to civil sanctions and criminal prosecutions, so it can occur an unexpected change in how the law is applied⁷⁸.

Finally, individuals may not perceive the scope of their criminal behavior for two other reasons. Firstly, it happens because many white-collar offenses do not provoke the moral opprobrium that street crimes conversely do⁷⁹. Second, the odds of misestimating criminal behavior increase when the violation revolves around technical rules⁸⁰.

Within the just-mentioned cases, talking of deterrence could appear rather pointless because the notion itself requires awareness of the risk run in engaging in misconduct.

4.4. General Conclusions on Deterrence

The primary justification for imposing a prison term is to control the defendant while deterring others from committing the same offense⁸¹. However, how much is deterrence relevant in sentencing white-collar defendants? How many sentencing imprisonments sentences would prevent offenders from recidivating and others from committing the same white-collar crime?

If general deterrence is about sending out a message, it is often questionable whether its intended audience hears it. Consequently, the central issue in sentencing white-collar offenders is determining the appropriate punishment for offenders and conduct with such peculiar features.

White-collar criminals are mostly older, better educated, generally with no appreciable history of prior convictions or incarcerations⁸². Further, crimes are predominantly non-violent⁸³, although their consequences are often more significant than ordinary offenses because of their widespread victimizing power.

Sentencing white-collar criminals is arduous, particularly when the conduct involved may not immediately appear criminal⁸⁴ and may pose little risk of recidivism, at

⁷⁷ G. Sandeep, *Skilling's Martyrdom: The Case for Criminalization Without Incarceration*, in *U.S.F. L. Rev.*, 44, 2010, pp. 459-466.

⁷⁸ P.J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, in *Wayne L. Rev.*, 27, 2015, p. 55.

⁷⁹ S.P. Green, *Lying Cheating, and & Stealing: A Moral Theory of White Collar Crime*, Oxford University Press, 2006, *passim*.

⁸⁰ P.J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, in *Wayne L. Rev.*, 27, 2015, p. 55.

⁸¹ R.S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, in *U. Pa. J. Const. L.*, 11, 2008, pp. 39-43.

⁸² J.K. Strader, *The Judicial Politics of White Collar Crime*, in *HASTINGS L.J.*, 48, 1999, pp. 1199-1273; L.M. Vasquez, *About Criminals: a View of the Offender's World*, in *Journal Of Criminal Justice Education*, 439-24, 2013, p.441.

⁸³ S.P. Green, *Lying Cheating, and & Stealing: A Moral Theory of White Collar Crime*, Oxford University Press, 2006, *passim*.

⁸⁴ D.K. Brown, *Criminal Law Theory and Criminal Justice Practice*, in *Am. Crim. L. Rev.*, 49, 2012, pp. 73-74.

least when there is a one-shot violation⁸⁵. Moreover, there is a low need to protect society by isolating white-collar offenders because their presence produces minimal physical threat⁸⁶. Likewise, when white-collar criminals agree that a crime has been committed, there is apparently a low need for their rehabilitation because they often readily understand the seriousness of their violations⁸⁷.

Concerning specific deterrence, high sentences for white-collar criminals seem to cause a particular polarization, going from one end of a spectrum to the other.

Two possible scenarios can occur. On the one hand, it is infrequent that white-collar criminals return to jobs akin to those held before conviction, especially when they previously had a high-management position in public institutions⁸⁸. So, the risk of reoffending does not exist precisely because the starting condition that would make it possible is missing. This is the lowest grade of the spectrum.

On the other, when subsisting socio-environmental conditions for carrying out the same illegal conduct, white-collar criminals are proved not to be a "one-shot" offenders⁸⁹. Research has shown that almost 40% of those convicted for bribery, bank embezzlement, income tax evasion, false claims, false claims, and mail fraud had at least one prior arrest. Thus, prison does not have a specific deterrent impact upon the likelihood of reoffending⁹⁰. One potential explanation for such an invaluable impact can lie on the labeling experience⁹¹: once those convicted for white-collar crimes perceive that original prestige and status are lost, recidivism may be more likely. In other words, this is the same phenomenon that occurs for street criminals whereby the specific deterrent effect fails because they have little to lose from the contact with the criminal justice system⁹².

Specific deterrence is ineffective in both scenarios.

On the one hand, when white-collar criminals do not meet the conditions for committing the same crime, specific deterrence loses its usefulness per se. The latter is

⁸⁵ A. Weissmann, J.A. Block, *White-Collar Defendants and White-Collar Crimes*, in *Yale L.J. Pocket Part.*, 116, 2007, pp. 286-291.

⁸⁶ E. Fuerbacher, *Reduce jail time for white-collar crime*, in *Brown Daily Herald*, Feb. 21, 2014.

⁸⁷ P. Bean, *Rehabilitation and Deviance*, Routledge, 1976; D. Lipton, R. Martinson, J. Wilks, *The Effectiveness Of Correctional Treatment: A Survey Of Evaluation Studies*, Praeger, 1977.

⁸⁸ M.B. Benson, *The Fall From Grace: Loss of Occupational Status as a Consequence of Conviction for a White Collar Crime*, in *CRIMINOLOGY*, 22, 1985, p.573; D. Weisburd, E. Waring, *White-Collar Crime And Criminal Careers*, Cambridge University Press, 2001.

⁸⁹ H. Edelhertz, T. D. Overcast, *White Collar Crime: an Agenda For Research*, D.C. Heath, 1982; A. Wheeler, S. Mann Kenneth, *Sitting In Judgment: The Sentencing Of White-Collar Criminals*, Yale University Press, 1988.

⁹⁰ D. Weisburd, E. Waring, E. Chayet, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, in *Criminology*, 33, 2006, p. 597.

⁹¹ L.T. Wilkins, *Social Deviance: Social Policy, Action, And Research*, Prentice-Hall, 1985; B.R. Crank, *Accepting Deviant Identities: The Impact of Self-Labeling on Intentions to Desist from Crime*, in *Journal of Crime And Justice*, 41, 2018, pp. 155-72.

⁹² H. Pollack, A.B. Smith, *White-Collar V. Street Crime Sentencing Disparity: How Judges See The Problem*, in *Judicature*, 67, 1983, pp.175-182; K. Mann, *Procedure Rules and Information Control: Gaining Leverage Over White-Collar Crime*, in *White-Collar Crime Reconsidered*, Office of Justice Programs, 1992, pp 353-365; F. Drago, R. Galbiati, P. Vertova, *The Deterrent Effects of Prison: Evidence from a Natural Experiment*, in *Journal Of Political Economy*, 117, 2009, pp. 257-80.

the case in which white-collar criminal is "one-shot". Secondly, empirical studies proved that imprisonment does not significantly impact the individual crime's history.

As a matter of fact, counting exclusively on harsher sentences to deter potential wrongdoers has many limitations in prompting general and specific deterrence effects.

In conclusion, it may be time to consider a new approach other than resorting solely to tougher imprisonment's provision, but relying on new ways capable of inculcating responsible and honest behavior among white-collars.

4.5. *What Can We Say About Deterrence?*

One may say that deterrence should be discarded from the process of imposing punishments given its non-appreciable impact on white-collars' behavior. However, there is still room for the deterrent paradigm to give its support in the justice system. Conversely, it reveals being somewhat fundamental.

First of all, it works as a balance tool within the sentencing processes: it is a restraint for judges who can potentially let retributive assessments massively influence their judgments. In other words, deterrence can temper the retributive impulse that may lead judges to use punishment mainly to message society regarding what is socially acceptable and what is not⁹³. As someone has noted, the idiom of deterrence avoids triggering the injunction for public moralizing⁹⁴. Essentially, even though deterrence cannot be the pivotal player in assessing a penalty⁹⁵, it still matters in moderating the discussion on the proper punishment for white-collar criminals⁹⁶.

4.6. *Considerations on Retribution.*

Doubts about the effectiveness of deterrence have moved the interest in retribution or "just deserts" as a basis for white-collar sentencing offenders. According to this theory, the amount of punishment should be commensurate with the seriousness of the offense as punishment would represent the public need for condemnation⁹⁷. However, achieving an adequate punishment for white-collar crimes – that is, one that is led by the principle of fairness and equality – is fraught with difficulty. Indeed, determining the appropriate amount of punishments for white-collar criminals seems problematic, especially when needed to assess the culpability and level of its harm. Furthermore, adopting exclusively the just deserts philosophy may result in less public protection because it would overwhelm the system by creating an adversarial environment that does

⁹³ P.J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, in *Wayne L. Rev.*, 27, 2015, p. 55.

⁹⁴ D.M. Kahan, *The Secret Ambition of Deterrence*, in *HARV. L. REV.*, 113, 1999, pp. 413-466.

⁹⁵ D. Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, in *L. & Contemp. Probs.*, 76, 2013, pp. 53-54.

⁹⁶ D.M. Kahan, *The Secret Ambition of Deterrence*, in *Harv. L. Rev.*, 113, 1999, pp. 413-466; P.J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, in *Wayne L. Rev.*, 27, 2015, p. 55.

⁹⁷ K. Schlegel, *Just Deserts for Corporate Criminals*, Northeastern University Press, 1990; S. Zakir, J. Chu, S. Quaisar, Z. Hassan, U. Ghani, *Perceived Public Condemnation and Avoidance Intentions: The Mediating Role of Moral Outrage*, in *J. Public Affairs*, 20, 2019, pp. 1-9.

not improve safety⁹⁸. At the same time, when sentenced to prison, white-collar offenders fare apparently better than it is expected. Indeed, even though they are unaccustomed to the deprivation caused by prison, they have a pretty high capacity for adjustment⁹⁹.

There are even more criticalities on the theoretical level, since relying on the sole "just deserts" would threaten the liberal conception of criminal law itself. Indeed, piling on progressive stiffer maximum sentences betrays the principle of returning a proportionate "payment of some kind" to the "violation of the moral or natural order"¹⁰⁰. It is particularly noticeable when white-collar sentences occur: after twenty-five years for securities fraud, what is left- life imprisonment¹⁰¹? Even though there is a rising tide of white-collar crimes, the government's need to "get tougher" on white-collar criminals cannot end up equalizing their punishments with those for murders, rape or genocides. Such criminal policies would exploit the individual case, pursuing symbolic values that break the proportionality link between crime and punishment¹⁰².

4.8. *The Addition of a Restorative Intervention: a Proposal.*

A desirable correction to the current response to white-collar criminality could rely on the addition of specific restorative interventions within the existing justice system¹⁰³. For restorative intervention, we mean a minimum afflictive punishment that meets the community's needs on both material and symbolic levels, plus pursuing preventive purposes as long as it requires the offender to take an active and solidarity commitment to repair the offense caused.

Such a proposal seems not only theoretically justified, but also technically possible.

On the theoretical level, matching criminal responses with restorative measures would fully promote justice. More specifically, it pertains to a more comprehensive view that considers increasing the severity of prison sentences unlikely to reduce crimes rates because they depend on other factors such as the social surrounding¹⁰⁴.

Also, it conveys the message that justice attends to the needs arising from criminality: those of the harmed people and social relationships¹⁰⁵. Simply put, matching

⁹⁸ E. Bardach, R.A. Kagan, *Going by The Book: The Problem of Regulatory Unreasonableness*, Routledge, 1982, *passim*.

⁹⁹ M.L. Benson, F.T. Cullen, *The Special Sensitivity of White-Collar Offenders to Prison: A Critique and Research Agenda*, in *J. Crim. Just.*, 16, 1988, pp. 207-211.

¹⁰⁰ P.T. Jensen, *A Christian Defense of Retribution*, in *Cnxmrsi Legal Soc'y Q.*, 7, 1986, p. 11.

¹⁰¹ D.V. Dooley, M. Radke, *Does Severe Punishment Deter Financial Crimes?*, in *Charleston L. Rev.*, 4, 2010, pp. 619-657.

¹⁰² A. Alessandri, *Diritto Penale ed Attività Economiche*, il Mulino, 2010, *passim*.

¹⁰³ L. Walgrave, *How Pure Can a Maximalist Approach to Restorative Justice Remain? Or Can A Purist Model of Restorative Justice Become Maximalist?*, in *Contemp. Just. Rev.*, 3, 2000, 228-249.

¹⁰⁴ J.M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, in *J.L. & Pol'y.*, 13, 2005, pp. 189-199.

¹⁰⁵ D.V. Ness, K. Heetderks, *Strong, Restoring Justice*, Taylor & Francis Ltd, 1999; D. Van Ness, *The Shape of Things to Come: A Framework for Thinking About a Restorative Justice System*, in *Restorative Justice: Theoretical Foundations*, Routledge, 2002, pp. 1-21.

traditional criminal responses with restorative tools enhances the understanding that "crime is more than a lawbreaking" and therefore requires a reaction that does "more than punishment"¹⁰⁶. More importantly, it prevents giving the idea of justice that, at the cost of appearing sufficiently severe and swift, agrees to be summary towards those guilty of particular crimes¹⁰⁷.

Furthermore, adding restorative features to white-collar crimes' responses would enhance the objectives pursued by traditional punishment theories¹⁰⁸. As previously mentioned, restorative justice would be employed in addition to traditional punishments and not in place of them: white-collar criminals would certainly fair their "just deserts" that would include some restorative components. As a matter of fact, studies have found that informal sanctions have a substantial deterrent effect, such as, for instance, the shame resulting from the publication of the white-collar's identity. The latter is a variation of the so-called "reintegrative shaming" mechanism: the disapproval of specific social environments appears to affect the decision to commit such crimes. Shame is indeed a crucial feature within peers' censorship because it eventually reinforces normative behaviors that affect the business community entirely¹⁰⁹. It happens especially within white-collar environments, where *the population of top corporate executives can be characterized as living in an exclusive small town*¹¹⁰. In a word, shame – along with social censure, loss of respect and moral consideration- seems to weigh more than the rational cost-benefit considerations¹¹¹.

In view of the above, the ultimate challenge is to conceive a response that combines the deterrent effect with a restorative component, also fulfilling the "just desert" demand.

Technically speaking, legislators should consider that imprisonment was originally conceived for cases in which restoration is no longer available, or is no longer needed because the wrongdoing cannot be restored. Consequently, addressing cases in which the harm derived from the offense can be restored through alternative criminal measures makes full sense¹¹².

¹⁰⁶ G. Bazemore, *Rock and Roll, Restorative Justice, and the Continuum of the Real World: A Response to "Purism" in Operationalizing Restorative Justice*, in *Contemp. Just. Rev.*, 3, 2000, pp. 459-464.

¹⁰⁷ In Italy political debates are frequently focused on the contrast between the so-called "Justicialism" and the "guarantism", where the latter cares to respect criminal procedure rights and to ascertainment the truth of the facts, beyond any manipulation and any arbitrariness by the political or judicial power. On these points: F. Resta, L. Manconi, *I paradossi del garantismo*, Franco Angeli, 2012; M. Volpi, *Istituzioni e sistema politico in Italia: bilancio di un ventennio*, Il Mulino, 2015, pp. 37-38.

¹⁰⁸ E. Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, in *Utah L. Rev.*, 2003, pp. 205-208; M. Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, in *Am. Crim. L. Rev.*, 37, 2000, 1313; Z. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, in *J. Disp. Resol.*, 2, 2005, pp. 349-350.

¹⁰⁹ J.W. Barnard, *Reintegrative Shaming Corporate Sentencing*, in *S.Cal.L.Rev.*, 92, 1999, pp. 959-966; J. Kostelnik, *Sentencing White-Collar Criminals: When Is Shaming Viable?*, in *Global Crime*, 13, 2012, pp. 141-159.

¹¹⁰ R. Paternoster, S. Simpson, *Sanction Threats and Appeals to Morality: Testing A Rational Choice Model of Corporate Crime*, in *Law & Soc'y Rev.*, 549, 1996, pp. 561-562.

¹¹¹ R. Paternoster, S. Simpson, *Sanction Threats and Appeals to Morality: Testing A Rational Choice Model of Corporate Crime*, in *Law & Soc'y Rev.*, 549, 1996, pp. 561-562.

¹¹² M. Donini, *Il delitto riparato. Una disegualità che può trasformare il sistema sanzionatorio*, in *Dir. Pen. Con.*, 2, 2015, pp. 236- 250.

Ultimately, the desirable reform is that of tempering punishments according to the active participation of the offender in the restoration processes. It is not a matter of conceiving alternatives to the existing justice system, but rather another form of punishment that could better-fit specific forms of criminality. Sentences for white-collar crimes should strengthen the convict's motivation to solve the conflict as a part of the punishments and not as an easy way out from jail. They should at one time prevent future crimes and motivate to repair what has been unlawfully done. Only when the restoration is not met, all that remains is to apply imprisonment alone. Such a perspective would return to the criminal tool its intrinsic function of "last resort", whereby imprisonment alone is provided when the offense attaches not-restorable goods or value (such as life or sexual integrity).

4.9. Making Community Service Part of The Punishment.

A viable addition to imprisonment can be the community sentence. Generally speaking, a community sentence is a measure that requires convicted individuals to perform unpaid community work – the “community service” – to repay society for the offense committed.

Community service orders began in England and Wales in 1973 on an experimental basis (Criminal Justice Act 1972¹¹³) and both the United States¹¹⁴ and Italy have a history in dealing with community sentences.

Some reasons justify the spread of community sentences among nations. First of all, there is a cost advantage. Community service is a form of cost-saving because it eases prison crowding by allowing convicted offenders to complete a corrections program. Secondly, community service avoids the so-called “net widening”, namely when judges and prosecutors fill the program spaces with offenders who do not necessarily require such a high level of care or intervention¹¹⁵. With such a mechanism, not only prison-bound offenders cannot get their chance to be placed in appropriate programs and have access to services, but the cost of punishment increases. At last, studies have proved that recidivism rates after first community service are lower than after imprisonments¹¹⁶.

4.10. Community Service for White-Collar Criminals.

Community sentences can represent a complement to prison for white-collar criminals. For sure, this measure must be modeled on the case of white-collar criminality.

¹¹³ Criminal Justice Act 1972, c. 72, § 5, sch. 6. (Eng.).

¹¹⁴ G. Mcivor, *Sentenced to Serve: The Operation and Impact of Community Service by Offenders*, Aldershot, 1992, *passim*.

¹¹⁵ E. Kantorowicz-Reznichenko, [The 'Net-Widening' Problem and its Solutions: The Road to a Cheaper Sanctioning System](#) (Last modified: December 1, 2013).

¹¹⁶ M.S. Bol, J.J. Overwater, *Recidive van dienstverleners: In het strafrecht voor volwassenen*, Staatsuitgeverij, 1986; W. Hilde, A. Blokland, P. Nieuwbeerta, D. Nagin, N. Tollenaar, *Comparing the Effects of Community Service and Short-Term Imprisonment on Recidivism: a Matched Samples Approach*, in *J. Exp. Criminol.*, 6, 2010, pp. 325–349.

Thus, it means changing the basic philosophy of community sentences, intended initially to rehabilitate juveniles or drug addicts.

Alternative measures are effective in fighting white-collar criminality if three objectives are met.

Firstly, ensuring an adequate deterrent effect, both on the convicted and potential white-collar offenders.

Second, ensuring some form of restoration of the harm caused by the white-collar crime.

Third, overcoming the cost of imprisonment and ensure more significant economic benefits.

Matching prison sentences with community sentence appears to achieve the goals mentioned above in two ways.

On the one hand, the prosecutorial process would generate its traditional partial deterrent effects of status degradation, public stigma and shame¹¹⁷. On the other hand, remaining visible in the public domain would lead offenders to be sensitive to the community's loss of reputation and respect. In this latter circumstance, the partial deterrent effect that occurred within the criminal process would be fully accomplished. Furthermore, community service contributes to finalizing the criminal prosecution and conviction objectives while preventing certain distorting effects that often occur. In other words, community service prevents that shame, stigma and detentions are used for the only sake of shaming, stigmatizing and depriving liberty.

To be effective, white-collar criminals must perform community service in an environment similar to that within the crime has been committed—for example, a business, corporation, government institution, etcetera.

Speaking of restitution and reintegration, if monetary punishments compensate individual victims¹¹⁸, community sentences restore systemic consequences. A community service fit with the offense committed contributes to renewing the lost confidence in political and economic institutions. The point is to understand the nature of the correspondence, namely, identifying the community service that would best redress the harm produced by the commission of the crime. Some have suggested relying upon the "moral distress" caused by the community service. Thus, for example, it has been suggested that convicted coal executive might work in mines to experience what their

¹¹⁷ K. Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work*, Yale University Press, 1985; Austin Wheeler, S.M. Kenneth, *Sitting in Judgment: The Sentencing of White-Collar Criminals*, Yale University Press, 1988; M.L. Benson, *Emotions and Adjudication: Status Degradation Among White-Collar Criminals.*, in *Just. Q.*, 7, 1990, p. 515; D. Levine, *Inside Out: An Insider's Account of Wall Street*, Random House Business Books, 1991; L. M. Vasquez, *About Criminals: A View of the Offender's World*, in *Journal of Criminal Justice Education*, 24, 2013, pp. 439-441.

¹¹⁸ R.A. Posner, *Optimal Sentences for White Collar Criminals*, in *Am. Crim. L. Rev.*, 17, 1980, pp. 409-418; Bruce L. Benson, *Let's Focus on Victim Justice, Not Criminal Justice*, in *The Independent Review*, 19, 2014, pp. 209-238.

workers must endure; convicted pharmaceutical executives might serve in rehabilitation centers; convicted auto executives might work in the emergency room to experience the daily sight of humans injured or killed in car accidents, etcetera.¹¹⁹

However, such solutions appear to be purely a less afflictive substitute for vindictive options. In fact, what kind of conscience do we expect a white-collar offender to develop in an environment that is physiologically hostile to him?

What kind of benefit does society get from the sole humiliation of the condemned white collar in the spotlight? Moreover, and most importantly, the risk of such "emotional" solutions is to generate equally "emotional" responses.

On a personal level, white-collars may develop a sense of outrage at the state institution and the exercise of justice. Therefore, the convicted ones, not persuaded by the legality value, are more likely to fall back on breaking the law. On a general level, the community receives the message that the state is an avenging entity and prone to "emotional" actions. In a word, white-collars convicted may feel to undergone community service as a surreptitious shame for the shame sake.

Consequently, the solution for matching community service to white-collar criminals appears to be different.

4.11. A Practical Perspective.

Community service should correspond to the white-collars' cognitive-technical profile, considering they possess highly specialized and unique know-how. The very know-how that has been misused to commit the crime. Essentially, community service for white-collars must allocate most efficiently their specific skills by let offenders be engaged in activities of the same nature as those that led to the crime. This time, however, in a virtuous way.

Moreover, the convicted ones are supposed to perform these services in an environment akin to the one they have frequented before being held accountable. It would generate a double effect. The white-collar criminal would re-build a deeper-rooted awareness regarding the proper use of specific skills and job privileges. Under this point of view, the re-educational effect is evident.

Likewise, it would also constitute an everyday warning for those who work in the same environment about the consequences of misusing their skills and job positions. Therefore, doing community service into white-collars' workplaces would thus decrease the likelihood that potential offenders would be unaware of their action's effect.

¹¹⁹ R. Mokhiber, *Corporate Crime and Violence: Big Business Power and The Abuse of The Public Trust*, Sierra Club Books, 1988, *passim*.

Such a solution would also seem systemically consistent because it portrays a justice system that takes care of the punishment's purpose and avoids disproportionate, unreasonable or emotional drifts.

Finally, one must not ignore the beneficial economic effects of reemploying highly specialized skills.

Indeed, on the one hand, an individual convicted of corruption could, for example, hold compliance and integrity training courses that are now mandatory in public administrations or public companies in many countries. Who better than someone who has circumvented anti-corruption systems, albeit temporarily, knows how to make them work better? Basically, in these cases, the white-collar's contribution would provide a complete learning experience through a concrete and reliable demonstration of the consequences of non-compliant behaviors. In essence, as they say, experience is the most challenging but effective teacher.

In addition, an individual convicted of international bribery could serve growing companies to set the right strategies for expanding into international markets.

It is assumed that a person capable of establishing corrupt dealings in other countries has a thorough knowledge of the socio-cultural context and economical substrate they have established illicit negotiations. This knowledge could assist in expanding companies that, for example, cannot hire marketing consultants due to limited resources.

A person convicted of embezzlement or tax offenses might work in the accounting department of a company or institution—similarly, anyone convicted of bankruptcy. In addition, perpetrators of computer fraud may be hired by the same company they have harmed or companies with similar characteristics to use their knowledge to improve the firm's internal security systems (white hacking).

Individuals convicted of money laundering may work in prosecutors' offices. They would contribute to the investigations by making a full disclosure of money laundering's mechanisms. Indeed, money laundering can be challenging to detect because it is often part of a more extensive criminal activity that can involve multiple markets and, at some time, jurisdictions. To conclude, it is crucial to underlying that all of these options must be designed in a way that prevents white-collars from indulging in manipulative behaviors or delusions of grandeur while doing community service. For the sake of doing so, a monitoring process by a neutral third party appointed by the government might be a helpful solution. The government should disclose the selection process of the monitors and endeavor to ensure a high-quality and personal interests conflict-free monitor's selection. In all cases, submitting the monitor's choice to a judicial assessment and approval might guarantee the fairness and effectiveness of the entire process. Moreover, it must be considered that the monitor's role may vary based on each case and the business environment involved.

5. Conclusions.

White-collar crime has become an endemic phenomenon worldwide, often causing damage beyond the criminals' expectations themselves. Governments have traditionally focused on toughening penalties in the hope of deterring those individuals deemed particularly sensitive to the consequences of criminal law. However, data reported in this study showed that such a strategy had had questionable results in terms of general and specific deterrence on white-collar criminals.

Corruption, bankruptcy, false accounting, tax fraud, insider trading, etcetera, are still commonplace and there is plenty of reasons to fear that they will not diminish. Therefore, the time has come to consider current criminal measures in combating white-collar crimes insufficient. In other words, we cannot combat constantly evolving criminal phenomena with strategies based on anachronistic theories that do not adhere to reality. On the other hand, preparing a theory of punishment specifically designed for white-collar crimes permits to both respond with adequate measures to economic deviance and to act on their systemic consequences.

More specifically, punishing white-collar criminals by matching imprisonment with specific community services allows offenders to carry out the same conduct involved in crime but with a view to the common good. In this context, law enforcement agencies communicate the message that it is not interested in mere punishment/humiliation, but rather in enhancing the specificities of the individual case with a view to overall rehabilitation. Punishment is no longer merely the arm of the criminal law's punitive power.

However, it represents the opportunity to generate a virtuous circle of individual re-education, general deterrence and restitution to the socio-economic system. On this latter point, a strategy of this kind makes it possible to reintroduce in the market qualified and "cleaned up" resources, plus highly specialized know-how.

In addition, and much more importantly, such a "customized" type of justice reinforces confidence in the justice system, both in the citizenry and white-collar criminals themselves. In this latter respect, a very interesting argument finds full support: prohibiting conduct does not prevent people from seeking to engage in that behavior; conversely, legal prohibitions should be consistent with individuals' moral intuitions¹²⁰. Eventually, this approach to white-collar criminality responds to the belief that the tendency to comply with the law has less to do with potential punishment and much more to do with attitudes about the legitimacy of that law.

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¹²⁰ E. Soltes, *Why They Do It: Inside the Mind of the White-Collar Criminal*, PublicAffairs, 2016.

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