LESS IS MORE?: ACCOUNTABILITY FOR WHITE-COLLAR OFFENSES THROUGH AN ABOLITIONIST FRAMEWORK

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ABSTRACT

White-collar crime is underenforced: not enough cases are brought, not many convictions are secured, and when they are, those who were convicted usually benefit from leniency not seen in other kinds of criminal wrongdoing. Calls for accountability center on strengthening the traditional tools of criminal law enforcement to reach actors that have so far eluded criminal liability. These responses, however, risk further entrenching the systems that have led the United States to mass incarceration and its many real and tangible harms. In this Article, I question whether an abolitionist framework is possible for white-collar crime. First, I argue that given the type of perpetrator and conduct involved in white-collar offenses, it seems as though white-collar offenses cannot be addressed under an abolitionist framework. I then show, however, that traditional justifications for incarceration are no more valid in the white-collar context than in other ones. Finally, I suggest how non-carceral responses may better ensure accountability for white-collar wrongdoing. My goal is not to suggest that we should embrace these responses immediately but that they are possible and worth building.

INTRODUCTION

The prison abolition movement is grounded, in part, on three related but separate principles.[2] The first is that incarceration does

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2. At the outset, I recognize that as Dorothy Roberts wrote, "it is hard to pin down what prison abolition means." Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L.

not adequately serve any of the purported goals of punishment, namely: deterrence, incapacitation, rehabilitation, expressivism, and retributivism.[3] Second, incarceration—and policing[4]—create tangible and significant harms both at the community and the individual levels.[5] Third, the institutions of incarceration and policing in the United States are a continuation of a history of racial oppression.[6] The criminal legal system as currently constituted, in turn, perpetuates this oppression but under the veneer of legality and legitimacy.[7] In the language of law and economics, abolitionists argue that both the benefits of incarceration are at best much smaller, and the costs of this tool of social control are far greater than what most people—from lay persons to lawmakers—assume.

As a result, abolitionists have proposed that crime control and the redressing of social harms more generally be delegated to other social institutions besides jails and prisons. Restorative and transformative justice models, for example, seek to change how we respond to crime through methods that re-envision what accountability means while repairing community fissures that are

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REV. 1, 6 (2019). This is because prison abolition is a movement that seeks to reimagine much of our social infrastructure and, as such, many people of that movement are invested in different aspects of that infrastructure. However, as further explained in Part I, for purposes of this essay, I will refer to abolitionism as the effort to eliminate prisons as tools of social control (or the "prison industrial complex"). *See Critical Resistance: Beyond the Prison Industrial Complex 1998 Conference*, CRITICAL RESISTANCE, http://criticalresistance.org/critical-resistance-beyond-the-prison-industrial-complex-1998-conference [https://perma.cc/2AF5-A2ET] (last visited Oct. 15, 2022).

3. *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20–21 (2003); Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1149 (1990) (interviewing inmates at Lorton Prison and in Washington D.C. and arguing that prison only serves for incapacitation).

4. PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE AND THE NEXT WAR ON VIOLENCE (2018) (arguing that the great crime decline was made possible by a model of aggressive policing that perpetuates urban social and economic inequality and that leaves communities vulnerable to the abuse of law enforcement).

5. *See, e.g.*, NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (The National Academies Press ed. 2014), https://www.nap.edu/read/18613/chapter/11 (showing that incarceration strains family relationships, decreases welfare and increases incidence of depression and anxiety of the children of incarcerated parents, and creates economic insecurity for entire families).

6. Incarceration, of course, has many more costs, such as: the administration of law itself, the cost of incarceration itself, the destruction of the incarcerated persons nonmonetary wealth, etc. For a fuller accounting of the costs of incarceration see Peter Salib, *Why Prison?: An Economic Critique*, 22 SSRN JOURNAL 111, 113 (2017).

7. *See generally infra* Part I.B.

caused by social harm.[8] However, abolitionists are not only, or even primarily, interested in reactive institutions. Rather, they ask us to shift criminal law and policy to preventive measures that "strengthen the social arm of the state and improve human welfare"[9] such that many of the social and environmental factors that make people vulnerable to criminality are eliminated.[10]

Catalyzed by the 2020 uprising against police violence across the United States, abolition scholarship has moved from the fringes of the legal academy to the center of much of recent criminal law scholarship. This Article engages with that scholarship by analyzing responses to white-collar crime—and the issues of enforcement—through an abolitionist lens.

As discussed *infra*, both from an *ex-ante* and *ex-post* perspective to crime, white-collar crime presents particular challenges to prison abolition frameworks and justifications. In short, it is hard to see how the preventive tools advocated by abolitionists will do much to prevent white-collar crimes, as the people engaged in that behavior are not typically the ones made vulnerable to crime by their material or social conditions. Furthermore, current alternative models of justice are not easily applicable to white-collar criminals because either the victims lack personhood or, more importantly, are not as easily visible and/or are often dispersed across various communities. Moreover, much of abolition scholarship is sustained by descriptive claims about unequal access to justice and law enforcement suffered by people facing criminal prosecution.[11] However, traditional white-collar defendants, as defined in this Article,[12] rarely confront a system that is designed against them. Rather, because of their race and wealth, they are at the top of the "penal pyramid" and thus are protected from suffering grave injustices at the hands of the criminal legal system.[13] Furthermore, precisely because these

8. *See infra* Part IV.

9. Allegra M McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

10. *See, e.g.*, JESSICA SIMES, PUNISHING PLACES: THE GEOGRAPHY OF MASS IMPRISONMENT (2021).

11. *See generally infra* Part I.B.

12. *See generally infra* Part I.A.

13. THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovitch and Alexandra Natapoff eds.) 72 (2017) (describing the criminal legal system operates as a "penal pyramid" where the majority of defendants at the bottom are not given the same procedural and substantive protections that the idealized version of criminal law and process envisions, which those at the top do get) [hereinafter NATAPOFF, *Penal Pyramid*].

defendants have a lot of economic and human capital, punishment in the form of incarceration may seem more morally justified and desirable.[14] This mismatch between moral blameworthiness and current severity of punishment, as well as the relative inability to prevent white-collar harm through current preventative justice policies,[15] calls into question whether white-collar criminal enforcement is compatible with abolitionism.

However, as discussed in Part III, using a carceral approach to respond to white-collar crime is not unproblematic. First, incarceration causes tremendous individual and community harm, so any argument to increase its use must show that the benefits of incarceration outweigh these costs. By analyzing white-collar crime through the lens of the "traditional" justifications of punishment, I argue that this is not the case. Moreover, as discussed in both Parts III and IV, there are abolitionist responses that may be better able to guarantee accountability than continuing to use the carceral model. These responses do not exclude a role of punishment necessarily, just the role of incarceration. I by no means intend the proposals outlined in this Article to be definitive. Rather, I hope to start a conversation about the frontiers of prison abolition and white-collar crime.

The stakes of this debate are not merely academic. As outlined in Part I B and Part III, incarceration has real, tangible harms on individuals and communities. The fundamental question is do we want to keep pursuing policies that entrench the use of imprisonment and thereby perpetuate these harms, or do we want to explore other avenues for accountability and redress. At a minimum, it means that reformers within the current criminal legal framework need to do more work of explaining why increasing the role of incarceration for white-collar offenses is justified. Meanwhile, for abolitionists, it means also answering questions and thinking about how to address crimes that are currently excluded from the abolitionist paradigm.[16]

To take abolitionism seriously is to probe it in all directions and try to understand its limitations. Abolitionism is, after all, a

14. *See generally infra* Part II.

15. *See generally infra* Part III.

16. In so far as there is a paradigm, most abolitionist literature is focused on harms caused by people in marginalized communities. This makes sense both from a policy as well as a theoretical perspective. After all, most of the resources in our carceral system are devoted to policing and incarcerating individuals from those communities.

process of re-education and re-questioning.[17] Abolitionists like to start from the premise that they do not have all the answers.[18] I do not, either. This Article is written in that spirit. It is a quest to find and probe the limits in the hopes of articulating priorities and answers to questions of abolitionism that may come from reform-oriented and politically liberal factions.

This Article is organized as follows: the first section defines white-collar crime and explains the broad contours of prison abolition. Part II outlines the particular challenges of thinking about white-collar crime through an abolitionist lens. Part III then compares the current approach to an abolitionist approach to white-collar crime. This illustrates that abolitionist responses can indeed achieve goals of both deterrence and retribution. Finally, Part IV argues that accountability can be achieved through an abolitionist framework and practice and may do so better than current carceral models.

I. TWO DEFINITIONAL NOTES: WHITE-COLLAR CRIME AND PRISON ABOLITION

A. White-Collar Crime

As can be gleaned from the other essays in this Symposium, there is great definitional indeterminacy around the term white-collar crime. For this reason, it is important to start with what I mean by white-collar crime and why I am using this definition. The National White Collar Crime Center defined white-collar crime as: "illegal or unethical acts that violate fiduciary responsibility of public trust, committed by an individual or organization,[19] usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain."[20] Notably this definition is not only concerned with the nature of the criminal act, but also the kind of actor committing it.

17. *See* MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (ABOLITIONIST PAPERS) (2021).

18. *Id.*

19. The fact that an organization can be considered the perpetrator of white-collar crime makes the idea of criminal punishment in general even more complicated.

20. Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It's Going*, 28 NOTRE DAME J. OF L., ETHICS & PUB. POL'Y 481, 487 (2014) (citing Gary R. Gordon, The Impact of Technology-Based Crime on Definitions of White Collar/Economic Crime: Breaking Out of the White Collar Paradigm, UTICA COLLEGE OF SYRACUSE UNIVERSITY 143, 144 (1996).

This emphasis on what kind of actor is committing it is unusual in that no other category of criminal conduct is defined by the socioeconomic status or educational level of the perpetrator. However, it harkens back to sociologist Edwin Sutherland's definition of white-collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation."[21]

There are two things to note about defining white-collar crimes by the type of conduct and the kind of perpetrator.[22] First, the kind of act that we consider to be white-collar crime is expanding and therefore a list of crimes that count as white-collar crime will be under-inclusive. As Gerald Cliff and Christian Desilets have shown, "computers and the Internet have opened up an entirely new realm of possibilities for the commission of white collar crime."[23] Therefore, we can expect that new ways of achieving the social harms of financial, property and/or identity theft and various forms of losses of privacy will continue to grow. Second, the individual who commits the crime is important. The definition that I use is more expansive than Sutherland's because white-collar crime is now not only perpetrated by people of high socioeconomic capital but also people of high human capital.[24] What both of these groups share is the ability to satisfy their (and their family's) material wants and necessities, and ideally derive meaning[25] from legal enterprises. In short, a person who can

21. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983). Sutherland is the person who coined the term and for him, as a sociologist, defining white-collar crime with regards to the social status of the perpetrator made sense as a way to understand why these people committed crime when they were not prone to any criminogenic factors.

22. One objection to only focusing on the type of actor is that how would you treat actors that become very wealthy through crime and could thus continue growing their wealth through legitimate means instead. While this is true, it is fundamentally a different problem. The kind of actor that interests me is the one that did not need crime to gain economic, human, and cultural capital. Actors who use crime to gain any of these forms of capital may find it hard to move into legitimacy for a number of reasons.

23. Cliff & Desilets, *supra* at 20, at 504.

24. Human capital refers to the abilities and qualities of people that make them productive. It is usually tied to education, family, and health. *See* GARY S. BECKER, HUMAN CAPITAL 9 (1975).

25. An explanation may be that people engage in this criminal conduct because they derive more than pecuniary value from this conduct.

launder money[26] or develop a phishing[27] scheme can use those skills for legitimate business activities.

An important caveat to note at the outset is that this definition of white-collar crime is significantly narrower than the one used by law enforcement, which focuses on the type of offense and centers on crimes of "deceit, concealment or violation of trust" without the use of force.[28] Unfortunately, the data we have on white-collar criminal enforcement (and crime more generally[29]) is rather sparse. However, an FBI report from 2000 showed that the median property lost in "white-collar crime incidents" was $210.[30] The same report also showed that convenience stores suffered 300% more economic crimes than banks; while this may be attributable to the fact that there are many more convenience stores with less security than banks, crimes at convenience stores do not fit in with cultural constructions of what white-collar crime is. As Ben Levin wrote about this study: "[T]he scale of the incidents and what they included (low-level property crimes, check fraud, etc.) fails to jibe with the dominant cultural (and legal) imagination of 'white-collar crime.'"[31]

In focusing on high wealth, status, and/or human-capital defendants this Article is explicitly addressing the distributive concerns of greater criminalization.[32] In essence, this Article

26. The organization Financial Action Task Force defines money laundering as: "the processing of these criminal proceeds to disguise their illegal origin." *See Money Laundering*, FINANCIAL ACTION TASK FORCE (FATF), https://www.fatf-gafi.org/faq/moneylaundering/ (last visited Oct. 16, 2022).

27. Merriam-Webster defines phishing as: "the practice of tricking Internet users (as through the use of deceptive email messages or websites) into revealing personal or confidential information which can then be used illicitly." *Phishing*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/phishing (last visited Oct. 16, 2022).

28. White-collar crime is defined by the Department of Justice as "those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. These acts are committed by individuals and organizations to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage." *See* U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, *White Collar Crime: A Report to the Public* 3 (1989).

29. Matthew Hutson, *The Trouble with Crime Statistics*, THE NEW YORKER (Jan. 9, 2020), https://www.newyorker.com/culture/annals-of-inquiry/the-trouble-with-crime-statistics.

30. Cynthia Barnett, *The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data*, U.S. DEP'T OF JUST. (2000), https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf.

31. Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV.1429, 1483–84 (2021).

32. *Id.* at 1481–88 (arguing that the criminalization of wage theft and other white-collar crime can negatively impact marginalized communities more than wealthy ones because this is often the trajectory of even "progressive" criminalization but also because

imagines the type of law enforcement that scholars such as Jennifer Taub and politicians like Elizabeth Warren have sought,[33] where actors are not "too big to jail."[34] The goal of focusing on this type of idealized white-collar crime enforcement is not to side with it, but to contrast one ideal with another: abolition. This exercise will therefore put two possible futures against each other.

B. Prison Abolition

Because there is no unified theory of prison abolition, it is impossible to properly discuss all aspects of abolition in this space, and therefore what follows is necessarily a simplified summary. The "abolition movement is complex and multi-faceted, resists theoretical uniformity, and is irreducible to a single reproach or demand."[35] Some writers focus on abolition as a means of achieving racial justice,[36] others as a tool to construct a society that does not rely on prisons as institutions of social control,[37] and others see closing prisons as part of a larger project to end racial capitalism.[38] Moreover, many write about abolition in the context of dismantling other institutions and systems beyond jails.[39] Of course, these focus points are not necessarily in tension and can in fact be

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the breadth of what counts as white-collar crime permits law enforcement to target easier to get low-level offenders).

33. *See* S. 1010, 116th Cong. (2020) (expanding corporate liability but only to officers with decision-making capacity in corporations that generate over $1 billion in revenue); JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME 218–23 (2020) (arguing for more traditional criminal law tools such as greater power for prosecutors, more transparency, and more protections and incentives for whistleblowers to curb white-collar crime).

34. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014) (showing the great power asymmetries between prosecutors and corporations, in favor of the latter).

35. Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 127 (2019).

36. *See* ANGELA DAVIS, ABOLITION DEMOCRACY (2005) (drawing a connection between structural racism and the prison industrial context).

37. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 3–4 (2007) (making the case that the United States has ceded governance to criminal law and policy).

38. *See* DAVIS, *supra* note 36; RUTH WILSON GILMORE & GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

39. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019) ("Abolitionist organizers understand their work to be related to . . . historical struggles against . . . imperialism and its legacies in more recent practices of racial capitalism, and against immigration enforcement and border fortification.").

complimentary.[40] What unites all different visions of abolition is a "vision of a world without prisons."[41] However, abolition is not only negative. Paraphrasing abolitionist organizer and thinker Mariame Kaba: abolition is about both ending the prison industrial complex and about building new ways and institutions to relate to one another.[42] Therefore, in this Article I explicitly interpret abolitionism as eliminating the use of carceral institutions and of building new ways of either preventing social harm or holding people accountable for committing social harms.

Much of abolitionist scholarship is grounded in theoretical, sociological, and/or historical analyses of prisons and the societies that construct and enable them.[43] These viewpoints give abolitionism much of its intellectual and moral strength and enable organizers to connect abolitionist goals with community histories and futures. However, many of these analyses and interpretations are also limiting in that they center the movement to a particular geographical place.[44] Of course, understanding *mass* incarceration requires an understanding of the history of the United States. However, viewing punitive[45] prisons as

40. *See, e.g.*, ABOLISHING CARCERAL SOCIETY 4 (Abolition Collective ed., 2018) (a manifesto for abolishing "all systems of oppression" drawing inspiration from those that have sought that fight).

41. *See* Roberts, *supra* note 2, at 44.

42. *See* KABA, *supra* note 17.

43. Abolitionist writings will point to works of history and sociology to substantiate their claims such as: ELIZABETH KAI HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–2 (2016) (linking mass incarceration to public policies starting in the 1960's expanded both the definition and the targets of criminalization); MICHAEL H. TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA at x–xi (2011) (attributing mass incarceration to a lack of white empathy and the desire for the white majority to "maintain social, economic, and political dominance over blacks"); CALEB SMITH, THE PRISON AND THE AMERICAN IMAGINATION 23 (2009) (discussing how the prison is "a central institution in the building of the modern order" that both reflects and is reflected in the broader political and social cultures of the United States); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 7 (2017).

44. This is especially true of abolitionist theory that is grounded in the history of slavery, its abolition, and the enactment of Jim Crow. *See, e.g.*, Kim Gilmore, *Slavery and Prison — Understanding the Connections*, 27 SOC. JUST. NO. 3 195, 195–96 (2000) (linking, but also differentiating, the prison industrial complex to chattel slavery); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1–2 (2010) (showing how mass incarceration is a tool of social control which is born out of and replicates the racial inequities of the Jim Crow era).

45. Institutions that are devoted to rehabilitation like in Scandinavia are excluded from this definition. *See, e.g.*, Emma De Carvalho, *What Norway Can Teach Us About Prison Abolition*, THE JFA HUM. RTS. J. (June 03, 2021), https://www.thejfa.com/read/what-norway-can-teach-us-about-prison-abolition. However, those penal institutions are the exception, not the norm.

fundamentally destructive institutions that are ill-suited to respond to social harms is a universal claim. For this reason, I will be focused mainly on "universal" justifications for eliminating prisons. These are: first, incarceration is unable to deter, incapacitate, or rehabilitate individuals.[46] Second, the modern prison is a place that causes tremendous social harm,[47] shortens lifespans[48], destroys communities[49] and families[50], and greatly reduces both individual and social wealth.[51] Finally, incarceration sucks up resources that could be used to provide care or services for individuals and communities that would actually reduce social harm.[52]

I focus on this perhaps narrower justification of abolition because it forces us to contend with both the real and opportunity costs of incarceration that I just outlined while also expanding the

46. *See infra* Part III.

47. *See, e.g.*, Blecker, *supra* note 3, at 1187–92 (depicting the daily violence within one prison and presenting testimonies that in fact some people worry about imprisonment mainly due to safety concerns regarding corrections officers). *See also* Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM J. & BEHAV. 588, 595 (2007) (finding that that physical assault against a male is roughly 18 times more likely in prison than in the general population); *No Escape: Male Rape in U.S. Prisons*, HUM. RTS. WATCH, (Apr. 01, 2001) https://www.hrw.org/report/2001/04/01/no-escape-male-rape-us-prisons (finding that between 10 and 30% of incarcerated men in the United States had been sexually assaulted).

48. Christopher Wildeman, *Incarceration and Population Health in Wealthy Democracies: Incarceration and Population Health*, 54 CRIMINOLOGY 360, 373–74 (2016) (each year in prison reduces an individual's life expectancy by roughly two years).

49. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (summarizing research showing the community effects of mass incarceration to conclude that "mass imprisonment damages social networks, distorts social norms, and destroys social citizenship"). There have been many more recent studies confirming the studies Roberts used in her article. *See, e.g.*, Mark L. Hatzenbuehler et al., *The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods*, 105 AM. J. PUB. HEALTH 138 (2015) (showing people who live in neighborhoods with a higher proportion of incarcerated people have a higher probability of having a depressive or generalized anxiety disorder); *The Intergenerational Impact of Carceral Punishment*, LPE PROJECT (Sept. 22, 2020), https://lpeproject.org/blog/the-intergenerational-impact-of-carceral-punishment/ (interviewing a former incarcerated man who describes the meaning and scale of impact that mass incarceration had on him and his community).

50. Ram Sundaresh et al., *Exposure to Family Member Incarceration and Adult Well-being in the United States*, 4 JAMA NETWORK OPEN (2021) (explaining that people with a family member in prison have 2.6 fewer years of life expectancy); Christopher Wildeman & Hedwig Lee, *Women's Health in the Era of Mass Incarceration*, 47 ANN. REV. OF SOC. 543–65 (2021) (summarizing literature on the effects of incarceration on women's health and its limitations).

51. *See* Salib, *supra* note 6, at 125 (arguing that prisons should be closed because they impose massive social costs).

52. *See, e.g.*, KABA, *supra* note 17; McLeod, *supra* note 39.

debate beyond the borders of the United States. This means that people interested in more criminal enforcement must articulate why increasing social harm through incarceration is necessary to eliminate or reduce white-collar crime. It very well may be that it is justified, but to know we must openly confront the social harms inflicted by incarceration.[53]

If descriptive claims about what abolitionism means are varied, then normative claims about what should be done are even more so. With that in mind, in this Article I will pull from a range of abolitionist scholarship to articulate visions of what abolitionism could mean in the context of white-collar crime. My focus, as mentioned above, is narrow: ending the use of prisons to address white-collar crime. Importantly, I do not meaningfully engage[54] with the idea that eliminating prisons involves overhauling capitalism entirely and replacing it with a communist or socialist economic system.[55] Under this view, perhaps, the issue of white-collar crime may be taken care of by this economic transformation.[56] However, it is not clear that a different economic paradigm would necessarily end white-collar harm, therefore this Article assumes that prison abolitionism can occur without transforming the current economic paradigm in its entirety.

53. One potential response is to decrease the social harm caused by prison. It has been shown, for example, that prisons in Norway do not lead to recidivism. *See infra* note 169. If the social harm of prison were lowered, then maybe it would be a more justifiable tool of social control. This would not go in line with more forceful critiques of prison as a tool. However, perhaps not so much. If an alternative prison were to *fully* internalize the social and personal costs of incarceration and respond to them to truly minimize or eliminate them, then that is a project that I believe is close to what many abolitionists seek.

54. Admittedly, fully engaging with a Marxist critique of white-collar crime is a much larger project.

55. *See, e.g.*, GILMORE & GULAG, *supra* note 38.

56. Part of the cause of white-collar crime after-all is that extreme wealth concentration is criminogenic. Following this logic, if we were to live in a society with equally distributed welfare and material conditions then the incidence of social harms of the type caused by white-collar crime would not exist. This is partly the argument in Frank Pearce's classic *Crimes of the Powerful: Marxism, Crime and Deviance* where he argued that corporate malfeasance was inseparable from capitalism and, in fact, corporations saw criminal conduct as one more tool for wealth accumulation. As such, criminal conduct becomes an integral part of capitalistic endeavor, not an aberration of it. *See* FRANK PEARCE, CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE (1976).

II. THE CHALLENGE OF WHITE-COLLAR CRIME & ABOLITION

White-collar crime is underenforced.[57] We do not know exactly how much,[58] but we do know that there is a large amount of corporate wrongdoing for which no one is held accountable. This matters because "[b]y failing to maintain an atmosphere of legality, law enforcement turns its back on victim classes twice: first, by denying them material protective resources, and second, by depriving them of a robust, responsive legal system."[59] In terms of white-collar offenses, the damage is also in the signal that wealthy offenders are protected from the criminal legal system in a way marginalized groups and persons are not.[60]

The underenforcement of white-collar offenses is attributed to a number of factors: fear,[61] cozy relationships between prosecutors and corporations (and careerism of the former),[62] an asymmetry of resources between private defendants and public prosecutors,[63] no protection or incentives for whistleblowers,[64] ineffective fines,[65] a lack of corporate transparency,[66] and the inexistence of centralized

57. *See* WARREN, *supra* note 33; JOHN COFFEE, CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020); GARRETT, *supra* note 34.

58. Joe McGrath & Deirdre Healy, *Theorizing the Drop in White-Collar Crime Prosecutions: An Ecological Model*, 23 PUNISHMENT & SOC'Y 164, 165 (2021) (suggesting that the drop in prosecutions was caused in part by the DOJ focusing on fewer but more serious cases).

59. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1718 (2006).

60. *But see* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001) (attributing white-collar underenforcement to other means of accountability, not to an absence thereof).

61. JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2018) (arguing that prosecutors lack the courage to take on tough cases).

62. *See, e.g.*, The Revolving Door Project, www.therevolvingdoorproject.org (last visited Dec. 29, 2022) ("scrutiniz[ing] executive branch appointees to ensure they use their office to serve the broad public interest, rather than to entrench corporate power or seek personal advancement.").

63. COFFEE, *supra* note 57 (showing the vast amount of financial and manpower resources needed to carry out just one investigation to suggest that the DOJ simply cannot compete with private actors); GARRETT, *supra* note 34 (arguing that some corporations are too valuable to the economy for them to be held accountable).

64. COFFEE, *supra* note 57; GARRETT, *supra* note 34; TAUB, *supra* note 33 (arguing for more rewards for whistleblowers, either through direct incentives or through expanding their ability to bring *qui tam* complaints, and also more protections for them).

65. COFFEE, *supra* note 57 (showing that fines levied have no impact in companies stock prices); TAUB *supra* note 33 (showing that many fines are not even collected).

66. *But see* Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2010) (arguing that sunshine policies have largely been unsuccessful in ensuring greater accountability).

data about white-collar criminal enforcement.[67]All of these factors matter and the particular policy prescriptions will depend on which one policymakers prioritize. However, at bottom, all these diagnoses lead to prescriptions that hope to increase the use of carceral institutions to punish corporate wrongdoers. As Jennifer Taub put it "[t]he only way to stop their behavior is through sure and painful enforcement. Take their money, take their liberty, set an example."[68]

Recognizing that the policy proposals imply the expansion of the carceral state, should the abolitionist demand for a world without jails exclude white-collar crime? There are several reasons to think so.

First, traditional white-collar defendants rarely confront a system that is designed against them.[69] Quite the contrary, these defenders are usually wealthy, white, and well-represented, and so they face a system on—at a minimum—a level playing field.[70] If abolitionism is justified by the injustices suffered by people at the base of the "penal pyramid,"[71] then its claims are weakened for those confronting the system from a position of privilege.[72]

Second, abolitionist organizers in the United States have tied their movement to the historical struggle against slavery and

67. *See* TAUB, *supra* note 33 (articulating the need for centralized data to track white-collar offenses to better understand enforcement and improve it).

68. *Id.* at 219.

69. NATAPOFF, *Penal Pyramid*, *supra* note 13 (describing the criminal legal system as a pyramid in which the majority of defendants at the base—who are generally poor and marginalized people of color—are not afforded substantive and procedural rights and protections while confronting the criminal process, while those at the top—the wealthy, white, and well-represented—get the highest protections that the law allows). Pedro Gerson, *Crooked Politicians: Elusive Criminal Punishments and Paths to Accountability*, 54 LOY. L.A. L. REV. 1013 (2021) (showing how the Supreme Court enforces a maximalist view of criminal law protections for powerful defendants).

70. Some may use this to argue that the way in which white-collar crime is prosecuted can be interpreted as something closer to abolition than how most other forms of crime are enforced. After all, white-collar crime defendants are often given many alternatives to jail, and severe punishment is often eluded. However, this is a fundamental misunderstanding of abolition. The movement is about a different conception of accountability and justice, not about impunity, which is how much of white-collar crime is treated. *See* McLeod, *supra* note 39. "Justice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably." *Id.* at 1615.

71. *See, e.g.*, Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156–1239 (2015); Roberts, *supra* note 2.

72. It is this symmetry that may explain why the Department of Justice has embraced deferred prosecution agreements over criminal liability. These "allow the company to avoid a conviction but which impose fines, aim to reshape corporate governance, and bring independent monitors into the boardroom." GARRETT, *supra* note 34, at 6.

racial oppression.[73] As Dorothy Roberts put it: "The pillars of the U.S. criminal punishment system—police, prisons, and capital punishment—all have roots in racialized chattel slavery."[74] This is a positive claim that I do not contest; however, what happens to the abolitionist demands when the majority of offenders are white and wealthy?

Third, both criminal law and abolitionism are expressions of morality. They differ in terms of what it means to deal with the problems of social harm, but they both translate moral intuitions into law and policy. Morally, white-collar criminals are indefensible or inexcusable because their wealth, education, and/or social capital make their actions repugnant. If we agree with this, should we not punish them?

Finally, white-collar offenders are so far outside abolitionists preoccupations that to center the discussion of abolitionism on white-collar crime seems misconstrued, or even offensive. Abolitionism should first and foremost be a movement of liberation. It should not be coopted to insulate corporate wrongdoers from accountability. Or, at a minimum, the abolitionist demands should not apply to corporate wrongdoing until they apply to those at the base of the moral pyramid.

On the other hand, by pushing for greater criminal enforcement for white-collar offenses there is a risk that we entrench the carceral state. In other words, to uncritically embrace most anti-white-collar crime policy prescriptions, risks propping up even more the use of incarceration as a response for social harm. If abolitionism can be justified for crimes of violence, then should it not also extend to corporate crimes, regardless of the characteristics of the defendant?

Moreover, as mentioned *supra*, prison is a place of enormous social harm.[75] Regardless of our moral intuitions about the wrongfulness of privileged actors using their knowledge and status to commit crimes, is inflicting more social harm the best response we have? In the next section, I try to answer these questions. In doing this analysis, I point out the limitations of abolitionist responses but emphasize that perhaps they will be better in

73. Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1587 (2019).

74. Roberts, *supra* note 2, at 20.

75. *See supra* Part I.B.

preventing white-collar offenses and prompting accountability and justice than our current carceral model.

III. CARCERAL VS. ABOLITIONIST RESPONSES TO WHITE-COLLAR CRIME

The goal of this section is to question the role of incarceration as a means of controlling white-collar crime and contrast it with abolitionist responses that may better attain criminal law's own stated goals.[76] Because my focus is on incarceration, I focus on white-collar crime that can be attributed to individuals—not corporate criminal wrongdoing. Although I mention other theories of punishment, I focus mainly on deterrence and retribution because both in theory[77] and in policy,[78] carceral responses to white-collar crime are most justified by appealing to these values. Because the American criminal legal system has abandoned rehabilitation, I will not discuss it.[79] In each subsection I argue

76. I am referring here to the traditional justifications of punishment articulated in American and English jurisprudence: retribution, deterrence, incapacitation, rehabilitation.

77. Levin, *supra* note 31 (showing that enhanced wage theft enforcement is better justified by retributivism than by any other deterrence, incapacitation, rehabilitation, or expressivism).

78. *See, e.g.*, Taub, *supra* note 33 *(*advocating for more enforcement to both "make it hurt" (retributivism) and "send a message" (deterrence)).

79. As a penological theory, rehabilitation has been questioned for a long time. So much so that over thirty years ago the Supreme Court found rehabilitation to be "an unattainable goal for most cases." *Mistreta v. United States*, 488 US 361 (1989). The reality of American incarceration is that prison is not structured to rehabilitate offenders. From the strict scheduling to environmental factors such as the use of uniforms, and abusive disciplining practices such as solitary confinement, incarceration does not enable people to lead better lives after release, and in fact makes it even harder for them to. *See* Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands*, 27 FED. SENT'G REP. 33–45 (2014) (comparing prison practices in Europe and in the United States and showing that American prisons are not designed to rehabilitate; *see also* LEONARDO ANTENANGELI & MATTHEW R. DUROSE, DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 24 STATES IN 2008: A 10-YEAR FOLLOW-UP PERIOD (2008–2018) (2021) (showing that the Bureau of Justice Statistics found that in a sample looking at 24 states, 82% of prisoners released in 2008 were rearrested within 10 years, and 66% were re-arrested within 3 years. If prison was rehabilitative, we would see much lower levels of recidivism). Moreover, addressing white-collar crime specifically, it is hard to see how prison could be rehabilitative. One argument may be that the simple experience of prison may make these offenders realize that crime does not pay. However, this is more of a specific deterrence argument than a rehabilitative one. Even assuming that programming in jail serves rehabilitative purposes, precisely what kind of program is there or would there need to be in order to rehabilitate white-collar offenders? Moreover, not even the prosecution of these crimes is justified in terms of rehabilitation, precisely because the offenders are of high human capital. It is not that by punishing these offenders they will

that there are abolitionist means of achieving each objective of punishment. However, I concede that these non-carceral responses may not be enough to properly respond to white-collar crime, especially from a retributivist perspective. This signals, however, that incarceration of white-collar crime is more a reflection of a *moral* position than a functionalist or pragmatic one. This forces both reformers and supporters of the status quo to frame their arguments in terms of normative commitments about punishment. In the subsequent section I argue against retributivism and for accountability because, as Martha Nussbaum has suggested, retributivism depends on a type of anger that hinders emancipation because it focuses societal efforts on pain rather than constructive accountability.[80]

A. Deterrence

Deterrence is a both a formally[81] and intuitively attractive model for criminal policy. Make the cost of crime high enough, the logic goes, and crime will not occur.[82] As former prosecutor Mary Jo White put it "[t]here's no bigger deterrent than a jail sentence."[83] However, there is not very good empirical evidence of how much deterrence imprisonment accomplishes.[84] Rather, the evidence shows that certainty and celerity of interdiction, not the severity of punishment, has a greater impact on crime reduction.[85]

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become better people. In short, imprisoning white-collar crime offenders cannot serve rehabilitative purposes.

80. *See* Martha Nussbaum, *The Weakness of the Furies*, BOS. REV. (Feb. 19, 2020), https://bostonreview.net/articles/martha-c-nussbaum-tk/; MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE (2016) (Nussbaum suggests that there is a distinction between transition anger and retributive anger. The former is anger that pushes us to look forward to demand change, the latter is "the wish for payback for commensurate pain to befall the aggressor." Transition anger, for Nussbaum, is useful because it is a catalyst for protest and social change.).

81. One can have issues with Gary Becker's construct of criminal behavior, the cogency and strength of the model as a formal matter, however, is not one of them.

82. Gary Becker, *Crime and Punishment: An Economic Approach*, J. OF POL. ECON. (Mar. – Apr. 1968). This model has been updated to incorporate opportunity cost Ehrlich 1973, time-allocation Burdett et al. 2004.

83. Mary Jo White, *What I've Learned About White-Collar Crime*, HARV. BUS. REV., (July–Aug. 2019), https://hbr.org/2019/07/what-ive-learned-about-white-collar-crime.

84. Whatever evidence there has been found in favor of the effect of incarceration on deterrence, it was mostly in general regression analyses that failed to properly identify and isolate causality. *See* Steven D. Levitt & Thomas J. Miles, *Economic Contributions to the Understanding of Crime*, 2 ANN. REV. L. SOC. SCI. 147, 153 (2006).

85. Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. OF ECON. LITERATURE 5–48 (2017); *see also* Daniel S. Nagin, *Deterrence in the*

Psychologists and criminologists critical of deterrence as a justification for incarceration have argued that people's behavior does not comport with the model's economistic assumptions. In other words, people are not rational actors when they decide to commit crime.[86] Behavioral economists have arrived at similar conclusions when suggesting that bounded rationality, bounded willpower, and behavioral biases make people discount the cost of severe punishment or ignore it entirely.[87] Moreover, given that people do not know the law, much less the consequences for criminal acts, they have no basis to properly evaluate the relative cost of committing a crime.[88]

While these limitations may be true for general criminal behavior, it is possible that white-collar crime is much more susceptible to deterrence because the perpetrators do carry out cost-benefit analyses when deciding whether to commit crime.[89] The problem at present is that the benefit is too great and the cost is too little because the likelihood of prosecution is small—and of punishment even smaller.[90] To compensate for this, the theory goes, it is important to make the punishment more costly through incarceration.

Twenty-First Century, 42 CRIME AND JUST. 199–263 (2013) (showing mixed evidence of the effect of deterrence but finding more support that crime is more responsive to certainty than to severity of punishment).

86. *See* Glenn D. Walters, *The Decision to Commit Crime: Rational or Nonrational?*, 16 CRIMINOLOGY, CRIM. JUST. L., & SOC. 1–18, (2015) (arguing that crime responds to both rational and nonrational forces); *see also*, John S. Carroll, *A psychological approach to deterrence: The evaluation of crime opportunities*, 36 J. OF PERSONALITY AND SOC. PSYCH. 1512–20 (1978) (presenting evidence that people who commit crimes weigh benefits more heavily benefits than costs and arguing wrongdoing decisions operate at most with limited rationality when they act).

87. *See, e.g.*, Richard H McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics* (John M. Olin Program in L. and Econ. Working Paper No. 440 (2008)) (describing how prospect theory, cognitive biases, and other motivations besides selfishness can alter traditional deterrence theory); Blecker*, supra* note 3, at 1176 ("conscious calculation is not so much of punishment as of pulling it off and escaping.").

88. Benjamin van Rooij, *Do People Know the Law? Empirical Evidence about Legal Knowledge and Its Implications for Compliance*, THE CAMBRIDGE HANDBOOK OF COMPLIANCE 467–88 (2021) (concluding that neither laypersons nor specialists know the law, and reporting studies showing that people often replace what they believe the law to be with their own moral intuitions); *see also* John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 L. & SOC. REV. 165, 175 (2001) (studying four different states in the United States and showing that "people do not seem to be aware of the laws of their state.").

89. Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. OF CRIM. L. & CRIMINOLOGY 491 (2019).

90. *See* GARRETT, *supra* note 34; *see also* TAUB, *supra* note 33.

However, a large problem with using incarceration as a deterrent is that it may in fact decrease the certainty and celerity of punishment, which can reduce the deterrence effect of enforcement.[91] If white collar criminal actors are rational, why should they be more influenced by the threat of longer incarceration sentences rather than less punitive but potentially more certain and immediate interdiction? In other words, incarceration need not be used in order to achieve deterrence. As articulated in Part II, prosecuting white-collar crime is notoriously complicated. White-collar malfeasance responds to regulation and is planned and executed in such a way as to avoid detection and minimize liability. Meanwhile, criminal law's procedural protections are high and enforced to their maximum by white-collar crime defendants.[92] We can therefore expect these prosecutions to be lengthy and for many to fail.[93] In fact, we have evidence that the famous prosecution drop for white-collar crime[94] was caused by focusing resources on larger cases—which we can safely presume are harder to win—and "bottlenecks in the criminal justice process."[95] If incarceration reduces the probability of punishment then it is not an effective deterrent.

These arguments are not theoretical. Almost 20 years ago, Sally Simpson presented compelling evidence that neither corporations nor their officers have been deterred by the criminalization of corporate governance.[96] This is because, first, she found no evidence that expanding criminal liability leads to a reduction in wrongdoing. Second, she points to evidence that "challenges the rational-choice foundation upon which corporate

91. As noted above, celerity and certainty of punishment are more important for deterrence. It can also be counterproductive generally because, as the National Institute of Justice wrote, "persons who are incarcerated learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment." NAT'L INST. OF JUST., *Five Things About Deterrence* (2016), https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

92. NATAPOFF, *Penal Pyramid*, *supra* note 13.

93. This is a descriptive claim. Unfortunately, we do not have good data on the success of these prosecutions and we cannot rely on government statistics as they report all cases they categorize as white-collar, not only the ones of interest here.

94. WHITE-COLLAR CRIME PROSECUTIONS FOR 2021 CONTINUE LONG TERM DECLINE, TRAC REPORTS, https://trac.syr.edu/tracreports/crim/655/ (showing a drop by about 50% in the number of white-collar crime prosecutions over the last decade).

95. Joe McGrath & Deirdre Healy, *Theorizing the Drop in White-Collar Crime Prosecutions: An Ecological Model*, 23 PUNISHMENT & SOC. 164, 164 (2021).

96. SALLY SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL (2002).

deterrence rests."[97] A more recent meta-analysis found that the evidence that punitive sanctions, including the likelihood of prosecution, reduced corporate crime was mixed and the effects when they were positive (meaning crime was deterred) were small.[98] Finally, interviews with corporate wrongdoers have shown that they are not as forward-looking or as rational as utilitarians believe.[99]

By refocusing our efforts away from incarceration, we can imagine a system with a lot more monitoring and regulatory oversight that quickly identifies instances of wrongdoing and imposes smaller penalties achieving greater deterrence. These smaller penalties would be the equivalent of quick and certain interdiction and could potentially deter more bad actors from crime. A recent study, for example, found that jurisdictions where the FBI shifted attention from white-collar crime to counterterrorism in the wake of 9/11 saw an increase in wire-fraud, illegal insider-trading, and fraud with financial institutions.[100] Importantly, this was not because changes in FBI oversight led to fewer convictions, but the mere fact of oversight was acting as a deterrent.[101] Other studies have shown more intense SEC

97. *Id.* at 6.

98. Sally S. Simpson et al., *Corporate Crime Deterrence: A Systematic Review*, 10 CAMPBELL SYSTEMATIC REVS. 1, 8 (2014).

99. EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 99 (2016) (one man convicted of insider training told Soltes, "I never once thought about the costs versus the rewards," and another one said, "I just never really thought about the consequences . . . because I didn't think I was doing anything blatantly wrong.").

100. Trung Nguyen, *The Effectiveness of White-Collar Crime Enforcement: Evidence from the War on Terror*, 59 J. OF ACCT. RSCH. 5, 8-9 (2021) (using size of Muslim populations to identify jurisdictions where the FBI shifted its focus from white-collar crime to antiterrorism and finding that "A one-standard-deviation increase in Muslim population density is associated with a 40 percent greater increase in the rate of wire fraud . . . [and] a 4.2 percent greater increase in the volume of opportunistic trades.").

101. This finding is consistent with research showing that police presence acts as a deterrent generally. *See, e.g.*, Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 THE J. OF L. AND ECON. 267–79 (2005) (reporting a 15% drop in crime when police is increased by 50%); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270–90 (1997) (showing that greater police presence in election years leads to lower crime rates); Rafael Di Tella & Ernesto Schargrodsky, *Do Police Reduce Crime? Estimates Using the Allocation of Police Forces After a Terrorist Attack*, 94 AM. ECON. REV. 115–33 (2004) (finding that increase law enforcement in Argentina lead to less car theft); Philip J. Cook & John MacDonald, *Public Safety through Private Action: an Economic Assessment of BIDS**, 121 ECON. J. 445–62 (2011) (concluding that more police presence in Los Angeles neighborhoods led to a reduction in crime). For a general review of the literature

oversight leads to less wrongdoing overall[102] and even that greater social media presence from regulators works as an incentive against malfeasance or incompetence.[103]

An objection to this may be that oversight only works if there is punishment at the other end. However, as addressed in the next subsection, a lack of incarceration does not mean a lack of punishment. Accountability and consequences need not mean jail. And, as just mentioned, the severity of punishment seems to have no added deterrence effect. Therefore, greater oversight with some punishment at the end can be effective in reducing white-collar crime.

Another objection may be that oversight is just a different word for surveillance, a measure that abolitionists reject because it is another way to repress entire communities. This repression has a negative impact on the community's social fabric and thus erodes the very connections that create community.[104] And so, while surveillance can bring about temporary peace, it can also create the conditions for even greater levels of violence in the future.[105]

However, there are reasons to think that concerns over mass monitoring do not apply to white-collar offenders. White-collar crime does not happen *within* a community. Quite the contrary, white-collar crime is multi-jurisdictional, with social harms that are often invisible or very diffuse.[106] To the extent that we can talk

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see Aaron Chalfin & Justin McCrary, *The Effect of Police on Crime: New Evidence from U.S. Cities, 1960-2010*, NAT'L BUREAU OF ECON. RSCH. (2013).

102. Terrence Blackburne, *Regulatory Oversight and Financial Reporting Incentives: Evidence from SEC Budget Allocations*, PUBLICLY ACCESSIBLE PENN DISSERTATIONS (2014), https://repository.upenn.edu/edissertations/1209 (when SEC oversight is more intense, managers report lower discretionary accruals, managers are less likely to issue financial reports that will be subsequently restated, and firms' bid-ask spreads decrease. Overall, the results suggest that SEC oversight plays an important role in shaping managers' reporting and disclosure incentives).

103. Jinjie Lin, *Regulating via Social Media: Deterrence Effects of the SEC's Use of Twitter* (Nov. 1, 2021) (Ph.D. dissertation, Yale University) (SSRN) (showing that SEC regulators being active on Twitter reduced opportunistic trades, complaints against investment advisors and misreporting).

104. *See, e.g.*, Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123 (2017) (showing how mass monitoring is an extension and substitution of mass incarceration). *See also* Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform may Lead to a For-Profit Nightmare*, 20 U. PA. J. L. & SOC. CHANGE 125 (2017) (discussing how alternatives to incarceration in the form of supervision and surveillance perpetuates mass incarceration).

105. SHARKEY, *supra* note 4 (showing how the great crime decline was obtained at the expense of the health of communities, creating the conditions for future violence).

106. *See infra* Part IV.

about a community in the context of white-collar crime it is the corporate community, which is not characterized by its strong social fabric (or its contribution to broader community stability).[107] Moreover, many of the characteristics of the crime minimize the types of harms associated with community surveillance. White-collar crime is transactional, usually through electronic means, and without any physical confrontation between assailant(s) and victim(s). All of this means that oversight will also be carried out in this non-personal way. It is difficult to see how this type of surveillance will cause the same community harm that over-policing and monitoring can.

Beyond oversight, however, it does not seem that there are currently[108] many preventative non-carceral tools for white-collar crime. Even these non-carceral tools however are not truly abolitionist. Abolitionists do not write about deterrence, rather they challenge us to build a system "aimed at [the] prevention of interpersonal harm, along with other social problems, that might operate without enlisting criminal law enforcement."[109] In other words, the goal is to prevent social harm by focusing on the material conditions and social and environmental environments that often lead to it. Investing in communities through

107. In fact, despite corporate personhood, law recognizes that businesses are not people and treats them as such. We see this across areas of corporate law, from liability to bankruptcy law.

108. This does not mean that others may not arise. In this Symposium there is a proposal from Mihailis Diamantis and Will Thomas that could be seen as satisfying both deterrence and retribution for corporations. They argue in favor of branding that indicates whether a company has engaged in corporate malfeasance. This type of branding could effectively deter corporations from wrongdoing as well as punish them for it. Of course, this is outside the scope of this essay as it does not apply to individuals. Nonetheless it points in the direction of what measures could be taken other than the ones that currently exist.

109. McLeod, *supra* note 39, at 1219.

education,[110] health care,[111] public infrastructure,[112] and employment programs,[113] becomes important not only in-and-of-itself but also as a tool to guarantee public safety.

Additionally, abolitionists also emphasize the need to have a different "form of social organizations that enables vulnerable persons and communities to care for themselves."[114] This means displacing police as the *sine qua non* institutional response to crime with community organizations that are designed by communities to attend to the problems that those communities face, whether it be gang violence, domestic abuse, or drug dependency.[115] Relatedly, preventive justice focuses on

110. *See, e.g.*, JAMES J. HECKMAN, GIVING KIDS A FAIR CHANCE (2013) (showing that expanding early childhood education is the best policy tool to reduce inequality and break the cycle of poverty); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155–89 (2004) (finding that schooling significantly reduces the probability of incarceration and arrest); Brian Bell, Rui Costa & Stephen Machin, *Why Does Education Reduce Crime?* 63 (2018) (arguing that education reduces crime partly through incapacitation).

111. *See* Samuel R. Bondurant, Jason M. Lindo & Isaac D. Swensen, *Substance Abuse Treatment Centers and Local Crime* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22610, 2016), *available at* https://www.nber.org/papers/w22610 (finding that an increase in the number of treatment facilities causes a reduction in both violent and financially-motivated crime); Jacob Vogler, *Access to Health Care and Criminal Behavior: Short-Run Evidence from the ACA Medicaid Expansions*, SSRN J. 54 (2017) (showing that Medicaid expansion led to a reduction in violent and property crime).

112. *See, e.g.*, James J. Feigenbaum & Christopher Muller, *Lead Exposure and Violent Crime in the Early Twentieth Century*, 62 EXPLORATIONS IN ECON. HIST. 51, 51 (2016) (showing that "lead service pipes considerably increased city-level homicide rates" and suggesting lead abatement as a tool in crime prevention); Mardelle Shepley et al., *The Impact of Green Space on Violent Crime in Urban Environments: An Evidence Synthesis*, 16 INT'L J. OF ENV'T RSCH. AND PUB. HEALTH 5119 (2019) (carrying out a literature review concluding that "access to nature has a mitigating impact on violence in urban settings" and thus pushing for more greening infrastructure); Aaron Chalfin et al., *Reducing Crime Through Environmental Design: Evidence from a Randomized Experiment of Street Lighting in New York City*, CRIME LAB NEW YORK (Apr. 24, 2019), shorturl.at/ablDP (finding that "communities that were assigned more lighting experienced sizable reductions in crime").

113. *See* McLeod, *supra* note 39, at 1226 (citing research from the U.N. Office on Drugs and Crime suggesting that "transition to alternative crops is associated with a significant reduction in threats of violence due to the insecurity that accompanies narcotics trafficking.") However, *see also* Manuela Nilsson & Lucía González Marín, *Colombia's Program to Substitute Crops Used for Illegal Purposes: Its Impact on Security and Development*, 15 J. OF INTERVENTION AND STATE-BUILDING 309 (2021) (showing that agricultural substitution programs are hampered by continuous violence which impedes peacebuilding operations).

114. McLeod, *supra* note 39, at 1227.

115. It would be impossible to list all the types of organizations and programs that conform "abolitionist alternatives." As an example, however, we can point to the Creative Interventions, an organization dedicated to redress domestic abuse and violence through early intervention, education, and community transformation. Another example is the Bay Area Transformative Justice Collective which focuses on alternative responses to child

decriminalization[116] as a tool to "displace criminal law administration as a primary mechanism for social order maintenance."[117]

In all, this agenda focuses on responding to crime by addressing the various deprivations of at-risk individuals and communities. This is in-line with much of criminology that suggests that poverty, inequality, and prior exposure to violence are criminogenic. While I agree with many scholars that this is a much better way to attend the problem of social harms, this type of preventive justice model is not going to mitigate white-collar crime.

As noted *supra*, white-collar criminals are—in general—people whose material well-being is guaranteed. In other words, these are individuals who are turning to crime in-spite of, not because of, their material and environmental conditions. In fact, part of what makes white-collar crime so morally reprehensible is precisely that the perpetrators are abusing a system of which they are already at the top. So, there is really no role for what Allegra McLeod calls preventive justice. However, that does not mean that there is no role for a greater emphasis on prevention[118] nor that focusing on oversight will not achieve more or at least equal deterrence than incarceration. Rather, I am simply recognizing that the abolitionist arsenal for deterrence is limited.

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sexual abuse. Violence Interrupters is a national organization focusing on gang mediation on stopping retaliation. It is worth noting that the evidence that these programs "work" either has not been gathered or is mixed (see this meta-analysis of Violence Interrupters type programs showing mixed success: Jeffrey A. Butts et al., *Cure Violence: A Public Health Model to Reduce Gun Violence*, 36 ANN. REV. OF PUB. HEALTH 39 (2015)). Mixed results aren't a reason to abandon these programs—in fact they support more investment in them, as their mixed success can be seen as a result of lack of resources not transformational possibilities.

116. This is most obvious in the case of narcotics. Drug decriminalization can lead to ending the criminality of buying, selling, and using drugs, as well as the violence surrounding the drug trade. For a nuanced discussion see ANGELICA DURAN-MARTINEZ, THE POLITICS OF DRUG VIOLENCE: CRIMINALS, COPS AND POLITICIANS IN COLOMBIA AND MEXICO (Oxford University Press ed. 2018) (showing that legalization is not a cure-all for drug violence but can help in reducing prison populations). It need not, however, be focused only on narcotics.

117. Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 110 (2013).

118. Many anti-white-collar crime policies already focus on prevention. For example, greater transparency from financial institutions, closing tax and other legal loopholes exploited by corporate wrongdoers, and closing revolving doors between corporate actors and regulators. How successful any of these are, however, is questionable. *See, e.g.*, Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2010) (arguing that sunshine policies have largely been unsuccessful in ensuring greater accountability).

In sum, it is not evident that incarceration works as a deterrent for white-collar crime. Moreover, it could be counter-productive. For this reason, if deterrence is the goal, then policymakers should look to other tools besides incarceration to decrease white-collar crime. Especially in light of the social costs that prison imposes. Even if these are not technically within the framework of abolitionism, they are still non-carceral and worth pursuing.

B. Retribution

Retribution has been described as the central aim of punishment.[119] So much so that some researchers have concluded that "people are intuitive retributivists."[120] However, what people mean by retribution can often be conflated. There are two separate dimensions of wrongdoing that figure prominently in retributivism: the harm or wrong inflicted and the culpability of the wrongdoer for bringing it about. For a retributivist, the goal is to calibrate the punishment to be proportional to, ideally, the harm caused and/or the actor's culpability.

There have been many critiques of the usefulness of retributivism as an actual limiting and guiding principle for punishment. For example, what is the relationship between the size of harm and the intent of the actor?[121] Or, does the wrongdoer's

119. Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J. L. & PUB. POLICY 19 (2003) (a "criminal unfairly usurps liberty to pursue his own interests and plans in a manner contrary to the common boundaries delineated by the law. . . . [d]epriving the criminal of this ill-gotten advantage is therefore the central focus of punishment.").

120. Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 *in* ADVANCES IN EXPERIMENTAL SOC. PSYCH. 193, 211 (2008); *see also* Geoffrey P. Goodwin & Dena M. Gromet, *Punishment*, 5 WIREs COGNITIVE SCI. 561–72 (2014) (showing that although most research has found laypersons to understand retributivism as the main goal of punishment, there are other goals—such as restorative justice—that are based on the same notions as retribution). *But see* Mathias Twardawski, Karen T. Y. Tang & Benjamin E. Hilbig, *Is It All About Retribution? The Flexibility of Punishment Goals*, 33 SOC. JUST. RES. 195–18 (2020) (arguing that people report to be retributivist only because that is the justification with most saliency, if other justifications are prompted then people report to pursue other justifications of punishment).

121. *See, e.g.*, Larry Alexander et al., CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009) (because the primary objective of criminal law is to prevent harm, punishment should not take into consideration the wrongdoer's intent); Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action That Causes It*, 24 L. & PHIL. 263, 265 (2005) (arguing that people assume the risks of their actions so they deserve a punishment for whatever harm they risked, regardless of their

background affect their culpability?[122] Moreover, how do we anchor and justify what proportionate punishment is?[123] Regardless of these and other theoretical or conceptual limitations, courts have consistently accepted retributivist arguments both for explaining substantive criminal law and sentencing. Therefore, despite personal reticence about the usefulness of retributivism as a concept, the critique in this Article does not rely on these fundamental questions about the value of retributivism. My goal is, rather, to engage with retributivist ideas on their own terms.

Under either the harm or the culpability dimension, it is intuitive to understand why incarceration is justified—and desirable even—for white-collar criminals. In terms of the former, corporate malfeasance has resulted, among many other things, in high incidence of substance use disorder and death,[124] the emission of harmful chemicals and the destruction of the environment and human life,[125] and airplane accidents.[126] In these cases it will be

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intentions). For an opposing view see the Model Penal Code which tries on tying up liability to *mens rea* much more closely than the common law.

122. *See, e.g.*, David L. Bazelon, *Foreword—The Morality of the Criminal Law: Rights of the Accused*, 72 J. CRIM. L. AND CRIMINOLOGY 1143, 1148 (1981) (arguing in favor of recognizing the actor's background when meting out punishment, for "[t]he real sources of street crime are associated with a constellation of suffering so hideous that society cannot bear to look it in the face."). For a somewhat different view see Stephen J Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. CIV. RTS & CIV. LIBERTIES L. REV. 147, 148 (2011) (arguing that environmental deprivations cannot be used as a defense to crime both because it is unjustified and unworkable).

123. *See e.g.*, Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 THE MOD. L. REV. 216, 221 (2015) (claiming that proportionality is not a natural or abstract idea but rather a "product of political and social construction, cultural meaning-making, and institutional building"); Greg Roebuck & David Wood, *A Retributive Argument Against Punishment*, 5 CRIM. L. & PHIL. 73–86 (2011) (arguing that punishers have the burden of proving that punishment is proportional but ultimately holding that punishment cannot be justified).

124. PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021).

125. There are many examples, *see, e.g.*, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), https://www.bbc.com/news/business-34324772 (outlining the details of Volkswagen's practice of cheating in its carbon emissions; *see also* Vanessa Romo, *PG&E Pleads Guilty On 2018 California Camp Fire: 'Our Equipment Started That Fire,'* NPR (June 16, 2020), https://www.npr.org/2020/06/16/879008760/pg-e-pleads-guilty-on-2018-california-camp-fire-our-equipment-started-that-fire (detailing that the California Gas & Electric Company plead guilty to 84 counts of involuntary manslaughter for having faulty equipment that started the 2018 Camp Fire).

126. *See, e.g.*, Press Release, U.S. Dep't of Justice, Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion (detailing an admission of guilt from Boeing for lying to government regulators that lead to its aircraft crashing twice in the same year).

"simple"[127] to mete out proportional punishment against corporations and their officers.[128]

However, despite repeated assertions that "white-collar crime . . . costs society untold billions of dollars—far more than street crime,"[129] it is actually difficult to assess the true size of the social harm of white-collar crime. This is partly because, as criminologists complain, scholars have largely abandoned the victims of white-collar crime.[130] Part of the problem is that it is not clear how each instance of white-collar crime contributes to social harm.[131] In 2018[132] and 2019,[133] for example, the British bank HSBC and the Department of Justice entered into deferred prosecution agreements for tax evasion and fraud. In both instances the bank was forced to pay over $100 million fines. However, in both cases there was no one who directly suffered as a result of HSBC's actions. That is not to say that there was no one affected; if there is less tax collection then that has an impact on

127. I acknowledge the difficulties in proportional punishment that I outlined *supra*.

128. As shown by the backlash against the insulation of the Sackler family from criminal penalties, it is important for retributivists that liability is faced not only by corporations but by the individuals running them. *See, e.g.*, Brian Mann, *The Sacklers, Who Made Billions From OxyContin, Win Immunity From Opioid Lawsuits*, NPR (Sept. 1, 2021), https://www.npr.org/2021/09/01/1031053251/sackler-family-immunity-purdue-pharma-oxcyontin-opioid-epidemic; Sissi Cao, *Critics Rage as Purdue Pharma Settlement Won't Send Sacklers to Jail*, OBSERVER (Oct. 21, 2020), https://observer.com/2020/10/purdue-pharmaceutical-settlement-no-jail-time-sacklers-outrage/.

129. *Bazelon, supra* note 122, at 1147.

130. Hazel Croall, *Who is the White-Collar Criminal?*, THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 157, 158 (2016) (arguing that victimology has neglected victims of white-collar crimes).

131. This is not to say that white-collar crime is victimless. As many have argued, the idea that any crime is actually victimless is fraught. *See, e.g.*, Levin, *supra* note 31 (arguing that wage-theft for example, is clearly not victimless).

132. Press Release, U.S. Dep't of Justice, HSBC Holdings Plc Agrees to Pay More Than $100 Million to Resolve Fraud Charges (Jan. 18, 2018), https://www.justice.gov/opa/pr/hsbc-holdings-plc-agrees-pay-more-100-million-resolve-fraud-charges.

133. Press Release, U.S. Dep't of Just., Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA (Dec. 10, 2019), https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa (These are not the most egregious crimes committed by HSBC. In 2012 the bank and the DOJ entered into a deferred prosecution agreement where the company agreed to pay $1.9 billion after being accused of money laundering for Mexican and Colombian drug cartels.); Aruna Viswanatha & Brett Wolf, *HSBC to pay $1.9 billion U.S. fine in money-laundering case*, REUTERS (Dec. 11, 2012), https://www.reuters.com/article/us-hsbc-probe/hsbc-to-pay-1-9-billion-u-s-fine-in-money-laundering-case-idUSBRE8BA05M20121211. I focus on the fraud and tax evasion claims because there is a more direct line between social harm and act in the cause laundering money for drug cartels and the violence that those cartels unleash.

state capacity, which affects public service provision, among many other things. Nevertheless, we do not know how much the state actually lost for these instances of tax evasion and fraud. The size of the settlements are an indication of a negotiation, not harm.

Even more starkly, perhaps, HSBC also agreed to pay a $1.9 billion fine for providing money laundering services to Colombian and Mexican drug cartels.[134] Evidently these activities contributed to the wealth of these criminal enterprises, which facilitated their brutality[135] however, how much of the harm inflicted by the cartels can be attributed to HSBC? This question is not trivial for retributivists. If the punishment is meant to fit the harm, then we need to know what harm there is. Unfortunately, as these examples show, in several cases we simply do not know.

Fault-based retributivism is largely intuitive. This is not meant as a critique but rather a descriptive assertion of how individuals assess wrongdoing.[136] That these intuitions about relative blameworthiness are widely shared across multiple countries and groups should temper the critique that culpability assessments are random.[137] This may be surprising given the great degree of subjectivity involved in ranking wrongdoing, as well as the wide discrepancy in punishment[138] and the prevalence of certain crimes around the world;[139] however, the evidence that people agree at least about *mala in se* crimes is compelling.[140]

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134. Viswanatha & Wolf, *supra* note 133.

135. BENJAMIN T. SMITH, THE DOPE: THE REAL HISTORY OF THE MEXICAN DRUG TRADE (2021) (detailing the history of the drug trade in Mexico and its brutality).

136. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL L. REV. 1, 3 ("social science evidence suggests that judgments about justice, especially for violations that might be called the core of criminal wrongdoing, are more the product of intuition than reasoning.").

137. Paul H. Robinson & Robert O. Kurzban, *Concordance & Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1832 (2007) (summarizing social science research to conclude that "Intuitions of justice among laypersons exist on a wide variety of liability and punishment issues. They are quite nuanced, no matter a person's level of education. They produce specific directions regarding deserved punishment, not simply broad generalities or outer limits. And there is a good deal of agreement on intuitions of justice regarding a wide range of liability and punishment issues and across all major demographics.").

138. People do differ on severity of punishment, but not on the relative blameworthiness of conduct. *Id.* at 1881.

139. *See, e.g.*, Anna Persson et al., *Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem*, 26 GOVERNANCE 449, 455 (2012) (detailing studies showing that no matter what the level of corruption in a country actually is, individuals think the corrupt behaviors are wrong).

140. *See* Robinson & Kurzban, *supra* note 137, at 1880 (reporting 3 different studies where people ranked wrongdoing showing an agreement 94% of the time).

Nonetheless, this level of agreement falls apart when looking at "wrongdoing outside the core of physical aggression."[141]

White-collar crime is evidently not within the core of crimes of physical aggression. Except for fraud, white-collar crime is more appropriately described as *malum prohibitum* than *in se.* [142]This is especially true for crimes such as tax evasion or insider trading where the harm is more remote than fraud. Because the harm is remote, it is difficult to determine the blameworthiness of any crime, complicating fault-based retributivist justifications for incarceration. Or, at a minimum, for determining levels of incarceration.

Nevertheless, what is wrong about white-collar crime, as I have defined it in this Article, is not really about the type of particular conduct, but rather the perpetrator. In a sense, because white-collar crime is one of people with high human, educational or cultural capital, it is similar to political corruption, a crime widely recognized to be very morally blameworthy.[143] Corruption is defined as the "abuse of entrusted power for private gain."[144] Many forms of white-collar crime fall into this definition: insider trading and embezzlement, for example, are uses of entrusted information (power) for pecuniary gain. The focus of corruption, as opposed to white-collar crime, however, is malfeasance from public officials or involving government affairs.[145] Nonetheless, at bottom they are both crimes about abuse of power.

In this view, white-collar crime is morally wrong because the actors abused their position in society (their cultural, economic, and/or human capital) to enrich themselves. This is very similar to corruption, except that the illicit goods are not public resources. This may make white-collar crime relatively less blameworthy than corruption, but not ranked too far away from it. This is especially so because capitalism affords many opportunities for risk-taking without any punishment. Bankruptcy law, for

141. *Id.*

142. *Malum Prohibitum* is an act rendered illegal through positive law; *malum in se* is defined as an offense that is evil or wrong from its own nature irrespective of statute. *See Malum in se*, MERRIAM WEBSTER, https://www.merriam-webster.com/legal/malum+in+se (last visited Oct 30, 2022).

143. *See* Anna Persson et al., *supra* note 139, at 455.

144. Anne Peters, *Corruption as a Violation of International Human Right*, 29 EUR. J. INT'L L. 1251, 1254 (2019).

145. That is, it is not only a crime involving public officials, because private actors can be guilty of it too. *See* Kevin E. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EUR. J. INT'L L. 1289, 1290 (2019).

example, allows individuals to draw a clean slate after numerous losses.[146] If losses are fine and forgiven, and risk-taking is legitimized and valued, there is even less justification for skirting corporate law for the sake of enrichment.

In sum, from both a harm and fault-based perspective, retribution for white-collar crime is justifiable. The question is then, does retribution need to be carceral? As discussed *supra* the critique of contemporary white-collar criminal enforcement is that it is far too weak and lax. Even if the policies suggested are not asking for higher maximum sentences, they are advocating for more people to be incarcerated for longer periods of time. Abolitionism is not embraced by all who have criticized mass incarceration or overcriminalization.[147] However, if there are concerns about the abuse of incarceration as a tool of social control, [148] even when there is some moral justification for it, does it make sense to advocate for expanding imprisonment? As Ben Levin has argued, if abolitionist models have been embraced for serious violent crime—the sort that most people around the world agree is morally blameworthy—why should it be impossible to implement for non-carceral responses to white-collar crime?[149] Is white-collar crime harmful or blameworthy enough for an institution as destructive as incarceration? Can the harms, given that they are mostly economic, not be remedied through non-carceral means?[150] At bottom, this is a normative judgment, and I by no means intend to provide an answer here for all. However, getting to this question

146. I am not suggesting that bankruptcy law cannot be punitive or that it cannot be improved, but rather that corporate law is not *premised* on punishment. *See* MARTHA MINOW, WHEN SHOULD LAW FORGIVE? (2019) (exploring what it would mean to have a system like bankruptcy for criminal law).

147. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259–318 (2018) (discussing different advocacy positions on criminal legal reform, contending that reform is necessarily hampered by the elision between structural and practical critiques).

148. Over the past decade, legal academics, policymakers, and a growing consensus among the public—from across the political spectrum—have openly advocated for criminal law reform. Although, as shown by Levin, the consensus over what to do to reduce the imprisonment is very narrow, that imprisonment should not be used as much as it is today is uncontroversial among various groups of advocates. Levin, *supra* note 31, at 1492.

149. *Id.* at 1451–52 ("From institutions rooted in Indigenous approaches to wrongdoing and reparations, or the radical visions advanced by INCITE!, Survived and Punished, Critical Resistance, and other abolitionist groups, the move away from carceral victims' rights is gaining ground . . . If [a] restorative, transformative, or noncarceral approach could be used to deal with intimate partner violence and police violence, then why couldn't it be used to deal with economic harms?").

150. *See generally* Part III.

allows us to see more clearly what we are debating when we talk about white-collar crime and abolition.

As mentioned *supra*, abolitionists do not imagine a society without social harm.[151] In fact, victims are at the center of both abolitionist practice and scholarship in that the enterprise is constructed around the idea that societies need to build institutions that respond more effectively to prisons than to social harm.[152] In the long term, this means creating a radically different "society that has no need for prisons."[153] This attention on radical transformations of what a justice system is and/or can achieve has meant that prison abolitionism scholarship has undertheorized punishment theory.[154]

Rafi Reznik has argued in favor of an abolitionist retributivism that recognizes crimes as moral wrongs and embraces the role of punishment in expressing public and community values.[155] For Reznick, this non-carceral punitivism could take the form of what has been labelled collateral consequences, which is an expansive term that includes, but is not limited to:

> [D]isenfranchisement; exclusion from jury service; prohibitions on holding public office and serving in the military; inability to legally obtain firearm; occupational restrictions; limitations on parental rights; withholding of welfare benefits; mandated regular registration with authorities, exclusion from certain living areas, and further restrictions for sex offenders; deportation for non-citizen, offenders; restrictions on name-changing, which may have grave implications for some people such as transgender individuals; monitoring and surveillance.[156]

Reznik proposes reconceptualizing collateral consequences in such a way that they are no longer hidden avenues for "civil

151. That many people assume that they do is one of the reasons why abolitionism is often confused with utopia.

152. This is another sense in which abolitionism is creative rather than destructive.

153. Roberts, *supra* note 2, at 6.

154. Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 125 (2019) (arguing that abolitionism can be justified through a retributivist lens through "[i]nclusive, caring, non-carceral punishment.").

155. *Id.* at 145.

156. *Id.* at 176–77.

death,"[157] but that they are still used as means of punishment. Reznik's goal is not to hide that these measures are punishment, but rather to center criminal law on deciding which of these measures are justified and useful on retributivist terms. These punishments are not incompatible with the prevention and accountability mechanisms outlined in this section. As Reznik puts it: "[e]x ante prevention, ex post restoration and enduring transformation should not be abandoned, but they must be combined with some version of retribution that recognizes and responds to blameworthiness and desert."[158]

The inclusion of all these measures is not meant to suggest that they are all desirable means of punishing corporate wrongdoers, but rather that non-carceral retributivism can go beyond monetary sanctions.[159] Imprisonment has been justified as a way of punishing insolvent parties[160] or those that figure out ways to avoid paying fines.[161] However, there is no reason why any of the measures outlined above cannot be part of an arsenal of potential punishments to white-collar wrongdoers. In particular, occupational restrictions and surveillance are punitive measures that can signal the community's moral reprobation of white-collar malfeasance. Using these means of punishment in place of

157. There is vast literature discussing the inefficiency and injustice, as well as the illegality, of collateral consequences of criminal involvement. This literature discusses collateral consequences as forms of civil death for constraining perhaps for life the ability of anyone with a criminal conviction to ever fully participate in society. *See, e.g.*, Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Lark Mulligan, *Dismantling Collateral Consequences: The Case for Abolishing Illinois' Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647 (2017); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

158. Reznik, *supra* note 153, at 159.

159. There are expressivist concerns over doing this. After all, even big fines can be morally reprehensible when the wrongdoers are very wealthy. The outrage around the Purdue Pharma settlement, where the company agreed to pay $4 billion is instructive.

160. Jonathan S. Masur & Christopher Buccafusco, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law,* 87 S. CAL. L. REV. 274, 284–85 (2014) (presenting a law and economics justification for criminal law stating that imprisonment is a way to ensure accountability for "defendants [that are] insolvent or otherwise unable to satisfy a civil judgment.").

161. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 950 (2007) (finding that the labor movement has been unable to collect after judicial findings of corporate wrongdoing due to the latter's abilities in resisting payments).

imprisonment can also preserve the role that criminal law currently plays in ensuring civil compliance.[162]

Some may object to these measures pointing out the inability of "[a]dministrative agencies [collecting] the vast brunt of regulatory and criminal penalties."[163] If they cannot collect fines, how will they enforce non-carceral retributivism? However, this is an argument in favor of alternative punishment. If law enforcement is focused mostly on incarceration, then that means that other punishment is de-prioritized. Government agencies follow suit figuring that their role is helping the investigation but not in enforcing the punishment.[164] Focusing more attention on collection as an important form of punishment, not an incidental one, will better align incentives to enforce monetary penalties.

C. Incapacitation

"Incapacitation as a goal of punishment is in many ways the cleanest form of individual prevention. Its objective is to deny, or at least greatly reduce, the opportunity to commit future offenses."[165] Its logic is simple, prison may not serve to deter or rehabilitate, and we may disagree with its punitivism, but at least the incarcerated person will not hurt society[166] while they are detained.[167] For this reason, incapacitation is seen by many as

162. *See* Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 38 (2020) (explaining how criminal law is instrumental in ensuring that victims are compensated by insurance companies).

163. Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 456 (2011) (finding that under-collection is widespread and is caused by agencies de-emphasizing collection as an integral part of their mission).

164. *Id.* at 457.

165. PETER W. LOW, JOHN CALVIN JEFFRIES JR., & RICHARD J. BONNIE, CRIMINAL LAW CASES AND MATERIALS 24 (1982).

166. This argument is limited by the fact that social harm is rampant *within* prisons themselves. *See supra* note 79 and accompanying text.

167. There is good evidence that incapacitation works. The debate is about the size of the effect. *See* Gary Sweeten & Robert Apel, *Incapacitation: Revisiting an Old Question with a New Method and New Data*, 23 J. QUANTITATIVE CRIMINOLOGY 303, 314 (2007) (estimating that each additional year in prison leads to ten fewer crimes a year); Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996) (estimating that 15 to 20 felony crimes were prevented by each additional year in prison); Alessandro Barbarino & Giovanni Mastrobuoni, *The Incapacitation Effect of Incarceration: Evidence from Several Italian Collective Pardons*, 6 AM. ECON. J. 1, 29 (2014) (finding similar estimates as Levitt by looking at the release of prisoners after "collective pardons" in Italy). More recent studies have suggested smaller effects, theorizing that as mass incarceration increased, the marginal effect of incapacitation reduced. *See* STEVEN RAPHAEL & MICHAEL A. STOLL,

prison's ultimate justification.[168] Incapacitating white-collar criminals should be no different to incapacitating other kinds of offenders.

Incapacitation, however, is a very costly way to reduce crime. This of course applies to all kinds of offenders, which is why it should make us rethink whether in fact incapacitation is a valid justification for punishment. First, unless prison sentences are for life, then incapacitation is at best a temporary solution.[169] This is especially problematic in the United States given that in this country the likelihood of offending *increases* after a spell of imprisonment.[170] Second, studies of incarceration show relatively low estimates of crime prevented per each additional year of incarceration.[171]

THE HAMILTON PROJECT: BROOKINGS INST., A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LOW RATES OF CRIME (2014) (looking at U.S. states from 2000 to 2010 finding fewer than five crimes prevented for each additional year of incarceration); Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?,* 55 J.L. & ECON. 275, 302-303 (2012) (finding each additional year reduces only about 2 crimes per year). However, Binder & Notterman, *infra* note 168, present arguments that incapacitation effects are overestimated. First, they point to the fact that social harm is prevalent in prisons and, furthermore, it is not clear that sentencing as we practice it can properly predict the likelihood of reoffending. Empirical assessments of incapacitation are difficult because measurements are very noisy given the many multicollinearity issues of studying incapacitation. In light of this uncertainty, it is hard to know the precise size of the incapacitation effect, however it is safe to assume that some crime is reduced.

168. The Supreme Court embraced this view in *Ewing v. California* when they upheld the validity of California's "Three Strike" laws on the grounds that incapacitation was sufficient justification for imprisonment. This argument tacitly assumes that incapacitation works. Notably, the opinion did not present evidence for this. *See* Ewing v. California, 538 U.S. 11, 30 (2003); *see also* Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 7 (2017) (discussing how the court in *Ewing* treats incapacitation effect as common sense).

169. Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, (2015) (unpublished manuscript) ("incarceration generates net increases in the frequency and severity of recidivism").

170. Other countries, which treat incarceration rather differently, do not see such a rise. *See* Manudeep Bhuller et. al., *Incarceration, Recidivism and Employment*, 128 J. POL. ECON. 1269, 1271 (2020) (finding that recidivism rates in Norway fall after incarceration). The difference between the U.S. and Norway can be explained by the far more rehabilitative and less punitive approach taken in the latter. *See* David J. Harding et al., *Imprisonment and Labor Market Outcomes: Evidence from a Natural Experiment*, 124 AM. J. OF SOC. 49, 80 (2018).

171. Older studies find 10-15 crimes reduced but newer studies find an effect of at most only 2 crimes reduced per each additional year of incarceration. *See* Johnson & Raphael, *supra* note 167.

All of this should make one reticent about just how much imprisonment is justified by incapacitation in general.[172] In the case of white-collar crime specifically, there are much more cost-efficient tools to incapacitate someone than prison. White-collar crime depends on individuals participating in complex networks of legitimate business. As such, these networks are already highly regulated.[173] Moreover, participation in them depends on the use of technologies, licenses, institutions, and personal contacts. To incapacitate white-collar offenders, one could limit or prohibit the use or access to any of these technologies to ensure the actor will not re-offend. This could be achieved, for example, by taking away professional licenses, limiting access to particular software, barring people from certain industries, or even through greater individual surveillance. Which of these measures is (or are) merited will of course depend on things like the likelihood of recidivism, the ease with which the harm can be repeated, available professional alternatives for the wrongdoer, etc.

All of these measures are costly, of course. Depriving someone of their profession eliminates their capability of producing wealth which carries social and personal costs as well. However, these pale in comparison to the social welfare losses of incarceration. More importantly, they are all rather effective ways to incapacitate offenders. At least in so far as incapacitation relates to the particular social harm that the wrongdoer effected.

One concern is, therefore, what about incapacitating offenders from committing other crimes? This seems unlikely.[174] First, we know that it is rare for white-collar offenders to recidivate.[175]

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172. There is a stronger argument for incapacitation in the case of high-frequency offenders. However, given the small number of people that fit into this category, it is—at most—an argument in terms of the usefulness of prisons to incapacitate.

173. BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 47 (2011) (showing the illusory nature of free markets).

174. It is worthwhile to recognize that we cannot know this for certain as, to my knowledge, there are no studies analyzing whether incapacitation or deterrence effects apply to one crime but not others as noted in the deterrence subsection, differentiating incapacitation effects from deterrence effects is hard enough. It is hard to see how a study could be designed. At most, studies have analyzed the effect of incapacitation looking only at the commission of felonies (as opposed to misdemeanor).

175. U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 17 (2016) (finding that only 4.9% convicted of a federal crime of fraud reoffended, compared with 23% for assault and 11.5% with drug trafficking). What counts as fraud is obviously wider than what I have described as white-collar crime. However, that only serves to reinforce the argument. If one were narrower about the offense, then we would see even less recidivism.

Which means that it is also not probable that they will move to other forms of crime after being caught. Second, given the particular *kind* of criminal act, the likelihood that white-collar offenders will move to other types of crimes is low.[176] This is, at least in part, the rationale for some of the relatively low sentences handed down in white-collar criminal cases.[177] Judges routinely accept that white-collar offenders are not dangerous to society and are unlikely to commit other crimes. Therefore, incapacitating them for long periods of time is not necessary.[178] It follows therefore, that the concern that white-collar offenders will turn to other criminal enterprises if they are not incapacitated is relatively small.[179]

This is not to say that incapacitation arguments are only invalid in the context of white-collar crime. On the contrary, much of the literature discussed in this section points to the limitations of incapacitation as an argument for incarceration in general. My only objective here is to show the particular limitations of incapacitation arguments in favor of further using the carceral state to control white-collar crime, as many reformers want to do.

176. *See* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 114 (Shanna R. Van Slyke, Michael L. Benson, & Francis T. Cullen eds., 2016) (showing that white-collar crime has a low recidivism rate and that because of the sociodemographic and/or social, cultural, economic capital characteristics of the defendants, it is unlikely that these actors will turn to a life of illegality).

177. Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1040–42 (2016) (showing how white-collar offenders have been routinely getting lower sentences than what the U.S. Sentencing Guidelines suggest ever since *Booker* was decided. The author observes a much more pronounced trend in the Southern District of New York, but the relationship is true everywhere. Hewitt argues that this is because the Guidelines are unduly harsh, not because judges do not believe in the rationales for punishment).

178. In fact, following this logic, it seems that incapacitation is not a rationale for any portion of the imprisonment of white-collar offenders.

179. Of course, like with other offenses, there are concerns about higher-rate offenders. Most criminologist agree that a small minority of offenders is responsible for a majority of crimes. If incapacitation serves as a justification for imprisonment, then it really is only for these kinds of offenders. "Selective incapacitation" focuses precisely on incapacitating only high-rate individuals. Of course, knowing who those people are is prospective and there are many concerns about type I errors. *See* PETER W. GREENWOOD & ALLAN ABRAHAMSE, SELECTIVE INCAPACITATION (1982). *But see* Kathleen Auerhahn, *Selective Incapacitation and the Problem of Prediction*, 37 CRIMINOLOGY 703 (1999); Binder & Notterman, *supra* note 168, at 8.

D. Expressivism

One important justification of incarceration is that it serves to express or symbolize moral condemnation for the actions that led to social harm.[180] Using this theory, incarceration for white-collar crime is justified because it sends the message that fraud, money laundering, etc. is unacceptable, and we care about protecting people from these crimes. Moreover, and perhaps more detrimentally, the under-enforcement of white-collar criminal laws undermines the legitimacy[181] of law enforcement agencies and the judicial system as it routinely allows individuals with a lot of resources to avoid grave criminal consequences.[182] In other words, the need for incarceration in these types of crimes has both a moral and a distributive expressive function.

As Ben Levin points out, more robust law enforcement has been justified when there has been a history of state abandonment of a particular kind of victim and "the victim is framed as somehow weak, powerless, or otherwise marginalized, so prosecution and state violence are necessary to level the playing field."[183] We see the same arguments in the case of white-collar crime. The victims are weak because either the harm is too spread out, or it is hard to articulate who the victim is, and there is a history of law

180. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591, 635 (1996) (explaining why alternatives to imprisonment are often not satisfying for many people and thus arguing in favor of public shaming). Of course, expressivism as a theory is not only applicable to punishment, but rather it is to law in general. *See, e.g.*, RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES & LIMITS (2014) (suggesting laws by themselves—through whichever mechanism it may be—are not solely responsible for their own compliance); Cass R. Sunstein *On the Expressive Function of Law,* 144 U. PA. L. REV. 2021 (1996) (questioning how law's expressive function may be used to change social norms).

181. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (noting that "the public is very sensitive to the manner in which authorities exercise their authority . . . [v]iews about legitimacy are rooted in the judgment that the police and the courts are acting fairly." Tyler was referring to actual physical interactions with police, however it follows that if people perceive a fundamental unfairness in the administration of justice then this will negatively impact law enforcement's legitimacy).

182. This concern may be expressed simply in terms of fairness or, it has been used to advance a more Marxist critique of the criminal legal system where relatively lax sentencing of white-collar offenders is seen as a reflection of class solidarity between the defendants, prosecutors, and judges. Something that does not occur in the context of other crimes. *See* John Hagan & Alberto Palloni, *Toward A Structural Criminology: Method and Theory in Criminological Research*, 12 ANN. REV. SOC. 431 (1986) (urging criminologist to study crime as a product of power relations).

183. Levin, *supra* note 31, at 1468–70 (pointing to hate crime legislation and laws addressing intimate-partner violence as examples of this dynamic).

enforcement not taking white-collar crime seriously. To reverse these trends, incarceration needs to be expanded.

There are many philosophical limitations of expressivism.[184] Most relevant to the discussion here however is why should society express its disapproval of crime through "the intentional infliction of the suffering that is punishment."[185] Note the answer cannot be utilitarian or retributivist, otherwise expressivism is just the mechanism through which those goals are achieved. In other words, what is the expressive function of having state-sponsored prisons, and do we want to perpetuate it? I would argue that if we recognize the harms caused by incarceration in the United States, then in its current form at least, the intentional infliction of trauma by the State is expressive of a negative value and thus is capable of undermining the State's legitimacy. Can an expressivist justification of punishment survive in these conditions?

More practically, perhaps, as Ben Levin has argued, expressivism relies on the belief that "members of the public: (a) are aware of legislative activity, (b) view the passage of legislation as embodying community norms, and (c) wish to conform their behavior to community norms."[186] In other words, expressivism—like deterrence—depends on people knowing the law and understanding its implementation. And, as Levin shows, we have good evidence that this is not the case.[187]

Moreover, a continuation of current criminal carceral policies will not be easy. Even assuming all the reforms sought are passed, convicting white-collar offenders will continue to be difficult because wrongdoers will continue to be sophisticated and the criminal legal system will continue to offer many procedural protections. Continuing to fail to secure convictions and long sentences for white-collar offenders may backfire in terms of expressive goals. After all, would that not signify that indeed the system is stacked in favor of the wealthy? A worst-case scenario is that the legitimacy of law enforcement is questioned even more after the proposed reforms fail to put more people behind bars.

The limitations on expressivism as an argument should not mean that white-collar offenders should not face opprobrium.

184. For a philosophical critique of expressivism see Heidi M. Hurd, *Expressing Doubts about Expressivism*, 2005 U. CHI. LEGAL F. 405 (2005).

185. *Id.* at 428.

186. Levin, *supra* note 31, at 1471–72.

187. *Id.*

Quite the contrary, as explained in this section, the failure of accountability does carry the risk of delegitimizing the State. To whatever extent it is possible for laws to express the morals of the community, we should use those tools to express condemnation against white-collar crime. However, the key word here is accountability. It may make more sense to rethink, as I argue in the next section what non-carceral accountability could look like than to further entrench the carceral regime to dismantle it later when all the necessary conditions are met.

IV. ABOLITIONIST ACCOUNTABILITY

The normalization of carceral punitivism impairs our ability to imagine accountability as anything other than incarceration. However, abolitionists have pushed us to reimagine what accountability can look like. There is, evidently, no single abolitionist model of accountability.[188] Restorative justice processes, for example, focus on ways to examine who is harmed, what are their needs, and whose obligation is it to fill those needs.[189] Closely related, are transformative justice practices which in addition to focusing on harm seek to remediate the conditions that lead to it.[190] At a larger scale than these are transitional justice frameworks which aim to establish accountability for mass (frequently state-sponsored) harm.[191]

These frameworks are then translated into many different practices. Some of these are fairly similar like healing circles,[192] circles of support and accountability, peacemaking circles, victim-offender dialogues, and, probably the most common one in the

188. Given the focus of this Article I will not attempt a complete summary nor a typology of all of the different abolitionist models, frameworks, or practices.

189. SUJATHA BALIGA ET AL., RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST'S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 2 (2017).

190. *See, e.g.*, Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMATIVE HARM (2018), https://transformharm.org/transformative-justice-a-brief-description/.

191. *See* THEORIZING TRANSITIONAL JUSTICE, (Claudio Corradetti, Nir Eiskovits, & Jack Volpe Rotondi eds., 2015).

192. Healing circles are used in many contexts. They are spaces where people sit together to talk and "help[] one another and to each other's healing." Lewis Mehl-Madrona & Barbara Mainguy, *Introducing Healing Circles and Talking Circles into Primary Care*, 18 PERMANENTE J. 4, 2 (2014). They have been used, for example, by the Ella Baker Center for Human Rights in the Bay Area to address social harm in a different way than incarceration. *See Healing Through Action,* ELLA BAKER CTR. FOR HUM. RTS., *https://ellabakercenter.org/healing-through-action/* (last visited Nov. 4, 2022).

criminal legal space, restorative community conferences, which "involve an organized, facilitated dialogue in which young people, with the support of family, community, and law enforcement, meet with their crime victims to create a plan to repair the harm done."[193] Others, the more large-scale harm frameworks, will be reflected in truth and memory commissions,[194] the drafting of new laws, and reparations.[195] These practices are sometimes carried out by state-actors,[196] but more frequently by third-sector organizations under the auspices[197] or even outside of the state. At bottom, the many diverse abolitionist frameworks and practices center on the recognition of the harm caused, on asking for forgiveness, and on proactively taking steps to ensure that the harm is not repeated. Another key characteristic is that these processes are painful and difficult, although in very different ways than incarceration, for both parties involved.[198]

It is possible to take these principles to develop a model for what abolitionist white-collar criminal accountability could look like. In instances where wrongdoing and responsibility is clear, one could imagine creating a forum, akin to a community circle or a truth-commission depending on the scale of the crime, where white-collar offenders would admit the harm they caused, hear from people who suffered as a result of their actions, and establish

193. BALIGA ET AL., *supra* note 189, at 2.

194. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2010) (establishing four key characteristics of these commissions: they deal with the past, investigate continued patterns of abuses and not specific cases, operate for up to two years and then submit reports summarizing their findings and, are usually official bodies sanctioned by the state).

195. *See* THEORIZING TRANSITIONAL JUSTICE, *supra* note 191; *see also* ELISABETH BUNSELMEYER, TRUTH, REPARATIONS AND SOCIAL COHESION (2021) (questioning whether reparations programs can indeed serve to repair the harm of mass atrocities).

196. Transitional justice frameworks in particular are sometimes carried out by State institutions as a process of gaining legitimacy or separating from a previous regime that sponsored or tolerated mass human-rights violence.

197. Different counties in California, for example, collaborate with the aforementioned organizations to implement restorative justice models as diversionary programs for youth. *See e.g., Restorative Justice*, S.F. DIST. ATT'Y, https://www.sfdistrictattorney.org/policy/restorative-justice/ (last visited Nov 4, 2022). Many countries who undergo transitional justice processes collaborate with civil society to create programs and gain legitimacy. *See, e.g.*, HAYNER, *supra* note 194 (noting the work of independent actors with the state in truth and memory commissions).

198. Contrary to expectations, many people that have been involved in these processes of dialogue, report that the experience of dialogue with the victim or their families is very difficult for offenders. *See* JOANNA SHAPLAND ET AL., RESTORATIVE JUSTICE IN PRACTICE: EVALUATING WHAT WORKS FOR VICTIMS AND OFFENDERS (2011) (reporting case studies about the experience of restorative justice for both victims and offenders).

ways to remediate the harm.[199] This last part can be crucial. First, by working directly with, not against, offenders, many of the collection issues addressed earlier could be sidestepped, thus ensuring reparations. Furthermore, in so far as guaranteeing the non-repetition of the harm is crucial to a process of accountability, white-collar offenders are in very good positions to work with other actors to design systems that prevent the very harm they caused.[200]

One potential objection about applying any of these models, or similar ones, to white-collar crime is that often the victim in those cases is invisible. When the social harm is diffuse, who sits in the seat of the victim in a non-adversarial proceeding for accountability? After all, alternative models of justice depend on victims voicing the harm they suffer with the people they hurt.[201] Is this possible when we cannot pinpoint a particular victim? For example, who would speak up in cases of tax evasion? However, if a prosecutor is supposed to speak for the community in an adversarial setting, there is no reason why there could not be a similar community representative in different accountability processes when the victim is not evident.

Even when we can identify victims, however, there are issues. One salient one is that victims may be too numerous to effectively engage in the types of accountability processes that are grounded in communities.[202] White-collar crimes often have victims that span across many jurisdictions and often include non-human

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199. Calls for incorporating some of the elements of these alternative modes of justice, even if not articulated in that language, have been made for over two decades. *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85, 109 (2004).

> If you are mugged or your car is broken into, you are distressed not just because you lose the money in your wallet or must pay to replace your radio. You likely feel violated and belittled by the perpetrator and his act. . . . crime also carries a symbolic message from the wrongdoer that the community's norms do not apply to him and that he is superior to the victim and others like him.

Id.

200. If, for example, an individual charged of money laundering worked with government officials to create better prevention or detection mechanisms as part of their accountability process.

201. *See* SHAPLAND ET AL., *supra* note 198, at 115.

202. Abolitionist models of justice are bottom-up rather than top down. They come from the community to serve the interests of the community. I am not objecting to this model of justice, rather I am thinking about its limitations.

animals and living organisms. Without a unified community it is difficult to build a consensus approach as to what counts as accountability for these harms. However, transitional justice shows us that this is not an unsurmountable obstacle. Of course, when the harm is so diffuse accountability for all wrongdoing is difficult, but it is not clear that that is any different when the punishment is carceral.

Another potential objection is that transitional justice itself is contested.[203] If it is not clear that transitional justice can redress the harms that it was designed to, why try to apply a similar model in a different context? However, most critiques (and defenses) of transitional justice have more to do with expectations about what can be achieved through transitional justice, more than whether these processes are useful at all. Critics for example have pointed out that transitional justice is internally inconsistent[204] and incapable of achieving full social cohesion[205] in the wake of mass harms. This may well be true; however, in this context we are not demanding a system of justice to re-weave all of society's threads. Rather, applying these frameworks to white-collar crime is a way to provide more accountability for these harms than our current carceral framework.

In cases where there is a dispute about wrongdoing, both in the sense of whether there was harm and who is responsible for it,[206] we can imagine a greater role for civil and administrative accountability mechanisms than we currently do for white-collar crime. One important advantage of doing this is that, as explained

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203. *Compare* Bunselmeyer, *supra* note 195 (arguing that reparations were incapable of achieving social cohesion) *with* Elsa Voytas, More than Money*:* The Political Consequences of Compensation 6 (Aug. 9, 2021) (unpublished draft), (available at https://osf.io/akz26/) (using the case of Chile to show how reparations can be useful in politically empowering victims of human rights abuses).

204. Nir Eisikovits, *Transitional Justice*, THE STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE, https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/ (last visited Nov. 4, 2022).

205. Bunselmeyer, *supra* note 195.

206. Criminal law also adds another layer of difficulty in the sense of assigning responsibility. One issue is that the corporate vehicle is used to escape liability. The law enforcement response is then to use vicarious liability to find corporate managers responsible, however that sits uncomfortably with traditional notions of criminal law. *See* Barry J. Pollack, *Time To Stop Living Vicariously: A Better Approach to Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1393, 94-95 (2009) (arguing that the current regime of vicarious criminal liability for corporations is unduly broad, and that corporate liability should be tied more directly to the intent of senior management); *see also* TAUB, *supra* note 33, (arguing for reforms to corporate personhood so that law enforcement can pierce the veil more easily for cases of egregious malfeasance).

above, white-collar crime is difficult to prosecute. A non-carceral model will lower procedural protections and requirements to find liability, whether it is civil or administrative.[207] While civil or administrative accountability is not of the transformational kind imagined by abolitionists, it is a step in the direction of ensuring harms are recognized and remediated.

Once liability is imposed, then the wrongdoers would enter an alternative accountability process in the vein of restorative or transitional justice. This step is crucial because it is paramount to not equate monetary damages or professional repercussions with accountability. These types of penalties may be desirable, as seen in the previous section, however even assuming that fines are appropriate to the level of wrongdoing,[208] and that they are collected,[209] the monetization of justice is anathema to abolitionist objectives. This is not only because, many scholars tie ending prisons to ending capitalism, but also because paying a fine is a way to easily evade actual justice.

Non-carceral accountability may sound insufficient or fanciful. However, by all accounts, current efforts to curtail white-collar crime are failing.[210] If the current system of punishment is failing, why not try to envision a different one. I do not mean to suggest that the models outlined here are definitive, but to propose that models built in the same spirit can deliver true and long lasting accountability.

Before concluding, it is important to emphasize the distributional and legitimacy concerns about embracing an abolitionist approach for white-collar crime. From a distributional point of view, it would be detrimental to explore abolitionist models of justice for corporate wrongdoing without first doing it for other crimes. As mentioned in Part II, white-collar crime as I have discussed it here, is a crime of the powerful. As such, it is a crime that is afforded all the procedural protections of the criminal law and, in fact, where often the asymmetry between the state and the

207. I have previously argued that this is a reason for expanding administrative accountability for crimes of corruption. *See* Gerson, *supra* note 69.

208. A common complaint from people who study white-collar criminal practice is that wrongdoers often pay large fines that pale in comparison to the amount of wealth created by their crimes. *See, e.g.*, Mann, *supra* note 128 (4 billion settlement for over 10 billion dollars in gains).

209. Ross & Pritikin, *supra* note 163*; see also* Masur & Buccafusco, *supra* note 159 (justifying incarceration in cases of insolvency).

210. *See supra* Part II.

defendant skews in favor of the latter.[211] This has led to a greater use of alternative sanctions in the white-collar realm than in any other area of criminal law. If even more alternatives are created for white-collar criminals, then this will further accentuate the disparities between the top and bottom of the "penal pyramid."

This in turn will call into question, even more, the legitimacy of the criminal legal system.[212] Some abolitionists may believe that this is not a problem. However, our ability to redesign systems of punishment will depend, at least in part, on how our ability to resolve conflict, guarantee accountability, and hand out punishment is perceived because we cannot socially engineer away people's intuitions about just punishment.[213] Therefore, it will be very difficult to transition to an alternative if the whole project of imparting justice is delegitimized.

V. CONCLUSION

In this Article I have presented evidence that the current carceral approach to white-collar crime is failing. For some, this may not be tied to the criminal legal system itself, or of prisons, but rather either to the unwillingness of authorities to prosecute these cases or the difficulty in securing convictions. Instead of trying to change how we punish white-collar crime, therefore, we need to better use the system we have. Only after we have tried and failed should we move to create new institutions.

However, as reasonable as that proposition sounds, one goal of this Article was to show that it also further entrenches our carceral reality. Advocates of expanding criminal liability to more white-collar offenders thus need to justify their policy proposals not only in terms of redressing or preventing harms, but also considering the effects on mass incarceration and the real harms caused by imprisonment. This is especially so, because, as I argued, responding to white-collar crime can be done from an abolitionist ethic. This is not to suggest that we must quickly embrace abolitionists modes of justice for white-collar crime, but rather that it is possible we do so. If so, then we should explore these models rather than further validating the role of prisons as our *sine qua non* response to social harms.

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211. *See supra* Part II.
212. Tyler, *supra* note 181, at 284.
213. *See* Robinson & Kurzban, *supra* note 137, at 1892.