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John Braithwaite

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In the following exchange Doctors Braithwaite and van den Haag express differing perspectives regarding theories of punishing criminal offenders. Each author comments on an article by the other, and both have been given a final opportunity to reply.

THE EDITORS

CHALLENGING JUST DESERTS: PUNISHING WHITE-COLLAR CRIMINALS*

JOHN BRAITHWAITE**

I. INTRODUCTION

In the wake of growing disillusionment as to the efficacy of deterrence,¹ rehabilitation,² and incapacitation,³ the last decade has seen a resurgence of "just deserts" as the rationale for punishing criminals.⁴ They should be punished because they deserve to be punished. The quantum of their suffering should be in proportion to the seriousness of their crime, not according to any assessment of whether they are rehabilitated or when they no longer pose a threat to the community.⁵ Beyond

* I would particularly like to thank Brent Fisse for his incisive criticisms on earlier drafts of this article. Helpful comments were also made by David Biles, William Clifford, and Ivan Potas.

** Research Criminologist, Australian Institute of Criminology; Ph.D. Queensland University, 1977.

¹ For the most influential reviews of the confusing state of the evidence on the efficacy of deterrence, see D. BEYLEVELD, *A BIBLIOGRAPHY ON GENERAL DETERRENCE RESEARCH* (1980); *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (A. Blumstein, J. Cohen & D. Nagin eds. 1978) [hereinafter cited as A. Blumstein]; J. GIBBS, *CRIME, PUNISHMENT AND DETERRENCE* (1975); F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973).

² See P. BEAN, *REHABILITATION AND DEVIANCE* (1976); D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF EVALUATION STUDIES* (1975) [hereinafter cited as D. LIPTON].

³ See A. Blumstein, *supra* note 1. For the most impressive empirical study and review of previous evidence, see S. VAN DINE, J. CONRAD & S. DINITZ, *RESTRAINING THE WICKED* (1979) [hereinafter cited as S. VAN DINE].

⁴ See R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* (1979); E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); Kellogg, *From Retribution to "Desert": The Evolution of Criminal Punishment*, 15 *CRIMINOLOGY* 179 (1977).

⁵ See generally A. VON HIRSCH, *supra* note 4, at 98-106.

this core area of agreement, there are as many versions of just deserts as there are advocates of it. To avoid allegations that the critique of just deserts launched here is not apposite to the "real" just deserts position, the writings of its most influential spokesman, von Hirsch,⁶ will be the target of attack.

This article does not attempt to be a comprehensive or definitive demolition of just deserts as a basis for criminal sentencing. It is a critique of the concept from one perspective only, the neglected perspective of what just deserts might mean with respect to white-collar crime. White-collar crime is defined, according to the conventional definition of Sutherland,⁷ as "a crime committed by a person of respectability and high social status in the course of his [or her] occupation."⁸ For the purposes of this article, common or traditional crime means all crime which is not white-collar.

The discussion will attempt to show that it follows from the philosophy of just deserts that more white-collar criminals should be in prison than common criminals. It will be contended, however, that the practical exigencies of white-collar crime enforcement make the attainment of such a state of justice impossible under the desert model. Approximate even-handedness in the way the powerful and powerless are punished can be approached, but only if just deserts is rejected as the rationale for punishment. The article will demonstrate a fundamental irony: utilitarian policies potentially can produce a more just and equitable criminal justice system than can ever be achieved by a policy of just deserts. Even though it is the latter policy which sets out with the stronger preoccupation with justice, the empirical realities of its implementation make just deserts in practice the source of profound injustice. Before we can commence this analysis, we must first come to grips with the complexity of fault for organizational crimes.

II. WHO DESERVES TO BE PUNISHED?

A large proportion of white-collar offenses are organizational crimes,⁹ perpetrated by persons acting on behalf of their organization—

⁶ *Id.*

⁷ E. SUTHERLAND, *WHITE-COLLAR CRIME* 2 (1949).

⁸ Following Sutherland, *id.*, white-collar offenses that are normally punished civilly rather than criminally are included as white-collar crimes. The fact that most white-collar crime is punished civilly does not mean that it could not be punished criminally. Rather, as Sutherland pointed out, this state of affairs reflects the success of the powerful in averting the stigma of the criminal label for their illegalities and the temptation for prosecutors to opt for the less onerous burden of proof in civil prosecutions. Nevertheless, conduct that is not "punishable" by law (by fine or imprisonment) but subject only to civil damage awards is not within our definition of white-collar crime.

⁹ See C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BE-*

the executive on behalf of the corporation, the government official for the department, the campaign worker for the campaign committee. Consequently, deciding who deserves to be punished is much more difficult than with common crime. There are a number of potential targets for punishment: a variety of individuals involved in the offense in the sense of doing, ordering, approving,¹⁰ knowing, or negligently failing to know;¹¹ the head of the organization or the directors who have been nominated beforehand as the persons who must bear responsibility for this kind of law observance by their employees;¹² or the organization itself.¹³

The problem of determining just deserts would seem to be straightforward enough with respect to the individuals involved; all who are blameworthy, no matter how many, should be punished in proportion to their blame. Even here, however, there are difficult questions of how much punishment, if any, is deserved by senior individuals who did not know of the offense, yet who had been nominated as accountable for ensuring law observance.¹⁴ The utilitarian rationale for punishing the latter kinds of individuals is clear; doing so encourages those with the power to prevent organizational crime to use that power.¹⁵ Whether individuals who do not know about a crime can ever "deserve" to be punished for that crime is a more knotty problem.¹⁶ While strict liability is clearly anathema to retributivists, it is conceivable that certain kinds of managerial negligence in failing to know of a problem should be blameworthy.¹⁷

The most perplexing conundrum, however, arises from the desert-

HAVIOR (1975); Ermann & Lundman, *Deviant Acts by Complex Organizations: Deviance and Social Control at the Organizational Level of Analysis*, 19 SOC. Q. 55 (1978); Needleman & Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517 (1979); Schragger & Short, *Toward a Sociology of Organizational Crime*, 25 SOC. PROB. 407 (1978).

¹⁰ "[S]ince command differs from authorization only in terms of which party—the superior or the subordinate—initiates the conduct, one who authorizes a crime also acts with specific intent." *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1266 (1979) (footnote omitted) [hereinafter cited as *Developments in the Law*].

¹¹ See Wilson, *The Doctrine of Wilful Blindness*, 28 U.N.B.L. J. 175 (1979).

¹² For a rationale for chief executive officer liability even in the absence of knowledge of the crime, see *United States v. Park*, 421 U.S. 658, 673-74 (1975).

¹³ See Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 ADEL. L. REV. 361 (1978).

¹⁴ The Supreme Court in *United States v. Park*, 421 U.S. 658 (1975) would seem to have eschewed desert-based considerations in favor of utilitarian goals when dealing with chief executives who can act to prevent health-endangering corporate offenses.

¹⁵ See Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099 (1977).

¹⁶ See Wilson, *supra* note 11.

¹⁷ Senior managers frequently set up contingencies for middle managers in the nature of "Achieve this goal but don't tell me how you do it." The senior manager may know full well that the only way the goal can be attained is by breaking the rules, so the wilful blindness

based justification for punishing organizations (mainly business corporations). There are some who argue that because a corporation cannot have a *mens rea*, corporations never deserve to be punished.¹⁸ Nevertheless, most common law jurists, and ordinary folk too, would have little difficulty with a contention that the Ford Motor Company deserves to be punished when it violates environmental laws. French has abstracted this common sense approach:

[C]onglomerate collectivities can be justifiably held blameworthy and hence differ significantly from aggregate collectivities. This accounts for the fact that excuses are often put forth for such collectivities (e.g. the Army in the case of Vietnam atrocities) while when aggregates are blamed the excuses are put forth in the name of individuals (e.g. the members of a lynch mob). Hence when we say that a conglomerate collectively is blameworthy we are saying that other courses of collectivity action were within the province of the collectivity and that had the collectivity acted in those ways the untoward event would not likely have occurred and that no exculpatory excuse is supportable as regards the collectivity. That is not to say that an individual member or even all individual members of the collectivity cannot support excuses.¹⁹

Gross has suggested that criminal responsibility ought to apply to the organization rather than its members when "(1) [w]hat happens represents the outcome of the *pattern* of activities which make up its form; and (2) the quality of the outcome depends minimally on the peculiar qualities of the persons who make it possible. They are following or enacting the patterns."²⁰

One commentary has concluded that "just as an individual's moral blameworthiness depends on his mental processes, corporate moral fault may be said to depend on its internal processes."²¹ For example, a corporation may be culpable for sloppy standard operating procedures (SOPs) which provide inadequate assurances of product safety. These SOPs may have been written by a committee, many of whose members are now retired or employed elsewhere.²² Hence, it can happen that while every individual within the corporation is free of blame, the cor-

strategy shields him from the taint of knowledge. For examples, see C. STONE, *supra* note 9, at 23-69.

¹⁸ See, e.g., Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

¹⁹ French, *Types of Collectivities and Blame*, 56 PERSONALIST 160, 166 (1975).

²⁰ GROSS, *Organizational Structure and Organizational Crime*, in WHITE-COLLAR CRIME: THEORY AND RESEARCH 59 (G. Geis & E. Stotland eds. 1980).

²¹ *Developments in the Law*, *supra* note 10, at 1243.

²² The general problem of aging is a common one with white-collar crimes, which may take many years to come to the surface. In 1975, authorities discovered Gulf Oil's Bahamian slush fund through which the company had channelled \$12.3 million in largely illegal political contributions. Of the eleven executives with direct knowledge of the fund, only two remained with the company; three had died and six had retired. L. SOBEL, *CORRUPTION IN BUSINESS* 126 (1977).

poration as a whole is in a sense blameworthy.²³ More typically, however, there are indeterminate elements of both individual and corporate blame. Who, then, deserves to be punished? Should sanctions be directed at the individuals, the organization,²⁴ or both?

Just deserts as a principle of sentencing provides no guidance as to how to resolve the dilemma of whether to punish the individual or the corporation. Utilitarian principles do.²⁵ A utilitarian decision to punish the corporation rather than the individual might be made on the grounds that it is the corporation which has the power to correct the defective SOPs responsible for the particular type of offense. It is therefore the corporation at which deterrence, rehabilitation (of defective SOPs), and incapacitation²⁶ can be most strategically directed. For other types of offenses it might be determined that the crime produces such a benefit for the corporation that to set a fine sufficient to deter would threaten bankruptcy, and the resultant victimization of innocent people. Individuals acting on behalf of the corporation, in contrast, are not benefitting personally, and are therefore more deterrable. Hence, in such instances the utilitarian analysis recommends the punishment of the individuals rather than the corporation. The judgments involved in deciding whether, on utilitarian grounds, to blame the individual or the organization, are complex and vary with the circumstances. Even though the problems of applying utilitarianism to the allocation of blame are beyond the scope of this article, I would not want to downplay how perplexing they are. The point here is that at least utilitarianism provides a rationale for the judgment to blame individuals or organizations, whereas "just deserts" does not.

The only way out for the disciple of just deserts would seem to be the assertion that it can never be just to blame only the corporation when there are guilty individuals, and it can never be just to blame only individuals when the corporation is also at fault. The question then be-

²³ When the corporation commits a criminal offense, but no criminally culpable individual can be identified, there is a "structural crime." Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353, 358 (1979).

²⁴ Organizations, of course, can be sanctioned in a great variety of ways. For example, they can be fined, put on probation, given a community service order, or have their charter or license revoked.

²⁵ Utilitarianism is defined as the doctrine that the greatest happiness for the greatest number should be the sole end of public policy. Deterrence, rehabilitation, and incapacitation can be intermediate means to that end. See J.S. MILL, *UTILITARIANISM* 288 (S. Gorovitz ed. 1971).

²⁶ Corporations can be incapacitated regarding the commission of future offenses in a given area of business by prohibiting the company from trading in that area. Similarly, they can be incapacitated regarding the passing of bribes through agents by a consent order effectively prohibiting the use of agents to win contracts. See generally Herlihy & Levine, *Corporate Crisis: The Overseas Payment Problem*, 8 L. & POL. INT'L BUS. 547, 623 (1976).

comes, what possible rationale can there be for apportioning the blame between the individuals and the corporation? A conclusion that the corporation is more to blame than individuals cannot be meaningful because corporate blame is incommensurable with individual blame. It cannot be asserted that an individual's mental processes are better or worse than a corporation's SOPs.²⁷ How can it be other than the most crass anthropomorphism to suggest that a corporation is more blameworthy than an individual, that the corporation "deserves" more punishment than the individual?

A tangential problem is that crimes committed on behalf of the corporation are often not in the interests of the corporation, even though the corporation may be blameworthy in the sense of having inadequate SOPs for ensuring compliance with the law. Hence, a scientist in a pharmaceutical company might unlawfully conceal rat studies showing lack of safety for a product which he or she has discovered.²⁸ The chances of the harm to rats also appearing in humans might be only twenty percent. If this happened, say the cost of the disaster to the corporation would be \$100 million. This long term risk might be assessed as a greater liability to the corporation ($^{20}/_{100} \times \$100 \text{ million} = \20 million) than the benefits from an eighty percent probability of problem-free marketing which would rake in \$20 million in profits ($^{80}/_{100} \times \$20 \text{ million} = \16 million). For the individual, however, the revelation that his or her discovery is a failure would certainly cost a promotion. Hence, the rational cost-benefit assessment for the individual is to perpetrate the illegality, while the rational choice for the corporation is to be honest. Even though the corporation has been irresponsible in failing to adequately supervise its scientists, is it just to punish the corporation for a crime which, had it known, it would have halted as against its interests? Would it be less just to do so if the crime actually turns out to be against the company's interests (the effect on rats also appears in humans) than if it happens to redound to the firm's benefit (humans are not affected)?

Corporate crimes are often perpetrated to further the interests of a subunit when that subunit interest is not aligned with the interests of the corporation.²⁹ For example, a crime might be committed to increase the growth prospects for a division when corporate headquarters is attempting to contract that division and redeploy its capital elsewhere. Is it then unjust to punish the corporation as a whole? Would it be more just

²⁷ See *supra* note 21 and accompanying text.

²⁸ For case studies of corporate crimes of this type, see J. BRAITHWAITE, *CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY* ch. 3 (in press).

²⁹ See Gross, *Organizations as Criminal Actors*, in *TWO FACES OF DEVIANCE: CRIMES OF THE POWERLESS AND POWERFUL* 199 (P. Wilson & J. Braithwaite eds. 1978).

to punish the division? Certainly, a fine levied against the latter would constitute an artificial paper transfer of desert. The lost income from the fine will ultimately be debited against the corporation's profits, even though it is imposed on the subunit.

Conversely, a fine imposed on a corporation will harm innocent parties who do not "deserve" punishment.³⁰ The fine might be passed on to consumers in higher prices or to shareholders in reduced dividends. If large enough, it could cause the company to shut down a production line, throwing employees out of work and endangering the livelihood of the community which surrounds it. This, however, is a criticism which is not unique to the imposition of desert on corporations. It is a problem common to all punishment schemes, retributivist or utilitarian. Punishment of corporations is no different from punishment of individuals in the way that harm spills over into individuals with no personal fault. The families of incarcerated common criminals do not deserve to be deprived of their breadwinner.

There are unanswered questions about how much punishment is just when it is an organization which is blameworthy. The philosophical roots of just deserts are in Kant's rationale for punishment as a restoring of the equilibrium between the criminal and law abiding community members.³¹ Von Hirsch explains the Kantian underpinning of his position thus:

To realize their own freedom, [Kant] contended, members of society have the reciprocal obligation to limit their behavior so as not to interfere with the freedom of others. When someone infringes another's rights, he gains an unfair advantage over all others in the society—since he has failed to constrain his own behavior while benefiting from other persons' forbearance from interfering with his rights. The punishment—by imposing a counterbalancing disadvantage on the violator—restores the equilibrium: after having undergone the punishment, the violator ceases to be at advantage over his non-violating fellows.³²

Von Hirsch also approvingly quotes the identical rationale of Herbert Morris:

A person who violates the rules has something others have—the benefits of the system [of mutual non-interference with others' rights]—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. . . . Justice—that is punishing such individuals—

³⁰ See Fisse, *supra* note 13, at 405.

³¹ The core of Kant's retributive position can be found in I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 99-107 (Bobbs-Merrill ed. 1965).

³² A. VON HIRSCH, *supra* note 4, at 47. Von Hirsch was influenced by Murphy's synthesis of Kant's disparate writings on desert. See J. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 109-12, 140-44 (1970).

restores the equilibrium of benefits and burdens.³³

“Restoring the equilibrium of benefits and burdens” has always been a troubling notion. How can we talk of the pauper restoring the equilibrium of benefits and burdens in the same way as does a millionaire? The equilibrium is, in fact, a disequilibrium to begin with.³⁴ Even more fundamentally, the “reciprocal obligations” of self-restraint are rarely reciprocal. As Anatole France pointed out: “The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the street and to steal bread.”³⁵ Obversely, while corporations must restrain themselves from rigging prices, making unsafe products, and polluting the environment, such self-restraints are hardly relevant to the unemployed. Both the equilibrium and the reciprocity which are the foundations of just deserts are farcical when put in their social context. If Henry Ford II were convicted of a white-collar crime, “restoring the equilibrium” between Mr. Ford and the rest of the community would seem to open up some profound questions as to what “equilibrium” means. Restoring equilibrium might be a tall order here, but imagine if it were the Ford Motor Company which was convicted. We cannot talk meaningfully about an “equilibrium of benefits and burdens” between corporations and individuals. Corporations have different types of burdens than do individuals (e.g., fear of a takeover) and enjoy different kinds of benefits (e.g., growth in perpetuity). Again there

³³ A. VON HIRSCH, *supra* note 4, at 48 (quoting Morris, *Persons and Punishment* 52 *MONIST* 475, 478 (1968)).

³⁴ The retributive theory really presupposes what might be called a “gentlemen’s club” picture of the relation between man and society—i.e., men are viewed as being part of a community of shared values and rules. The rules benefit all concerned and, as a kind of debt for the benefits derived, each man owes obedience to the rules. In the absence of such obedience, he deserves punishment in the sense that he owes payment for the benefits. For, as a rational man, he can see that the rules benefit everyone (himself included) and that he would have selected them in the original position of choice. . . . [T]o think that it applies to the typical criminal, from the poorer classes, is to live in a world of social and political fantasy. Criminals typically are not members of a shared community of values with their jailers; they suffer from what Marx calls alienation. And they certainly would be hard-pressed to name the benefits from which they are supposed to owe obedience. If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for.

J. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 107 (1979). Moreover, the assumption of Kant and Rawls that allegiance is owed to the law because of a voluntary acceptance of a social contract is at odds with the empirical reality of existing societies. It is absurd to assert that, having benefited from the rule of law when it was possible for me to leave, I have in any sense consented to the law and its consequences. On this, David Hume was devastating in his essay, “Of the Original Contract”:

Can we seriously say that a poor peasant or artisan has a free choice to leave his country—when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.

Quoted in MURPHY, *supra*, at 108.

³⁵ Quoted in G. LENSKI, *POWER AND PRIVILEGE* 52 (1966).

can be no meaningful balancing between individuals and corporations because there is no commensurability between them with respect to the attributes at issue. It is a nonsense to say of the punishment of corporations that "after having undergone the punishment, the violator ceases to be at advantage over his non-violating fellows"³⁶ where the latter are individuals.

The critique in the preceding paragraph is not relevant to retributivists who eschew the niceties of Kantian or Aristotelean justifications for retribution. Desert can be based on vengeance pure and simple,³⁷ regardless of any pretence of "restoration of equilibrium". For such straightforward retributivists,³⁸ corporations are no less appropriate a target for revenge than individuals. Let us summarize the conclusions of this section. It is agreed that "just as an individual's moral blameworthiness depends on his mental processes, corporate moral fault may be said to depend on its internal processes."³⁹ Such dependency, however, renders corporate moral fault incommensurable with individual moral fault. Moreover, because there is no meaningful equilibrium or reciprocity between individuals and corporations, there is no philosophical basis for calculating a proportional punishment which would restore equilibrium. Just deserts provides no rationale for choosing between punishing the corporation and punishing individuals within it, between punishing the corporation and punishing one of its subunits. Utilitarianism does provide such rationales.

Now we will put aside the question of organizations which deserve punishment, and limit the discussion to the seemingly more tractable problem of consistently administering just deserts to individual white-collar criminals.

III. PUBLIC ATTITUDES TO WHITE-COLLAR CRIME

Whatever the philosophical basis of just deserts, someone has to be responsible for putting it into practice, for judging how much punishment a particular crime deserves. Advocates of desert tend to be against leaving such judgments to philosopher-kings.⁴⁰ Hence, judges are to be denied the discretion to impose their idiosyncratic conceptions of desert (if, in fact, desert is the criterion they would use). Determinate sentenc-

³⁶ A. VON HIRSCH, *supra* note 4, at 47.

³⁷ Or "community vindication," to put a more palatable semantic gloss on the same concept.

³⁸ *E.g.*, Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861 (1975).

³⁹ *Developments in the Law*, *supra* note 10, at 1243.

⁴⁰ *See* A. VON HIRSCH, *supra* note 4, at 98-106.

ing becomes the ideal.⁴¹ Von Hirsch recommends that maximum and minimum penalties be set down for offenses of various types, giving judges only limited discretion within these parameters. In a democratic society it is expected and affirmatively recommended that the courts and legislature reflect the will of the populace as to the punishments deserved. This section therefore proceeds from the premise that the will of the people in a democracy provides the best means of operationalizing just deserts. The next two sections will consider more elitist means.

Contrary to the predictions of conflict theory,⁴² empirical studies demonstrate remarkable consensus within the community concerning the relative seriousness of, and the relative punishments which are appropriate for, different types of crimes, except for victimless crimes.⁴³ This consensus provides a firm foundation for legislators who would wish to reflect the will of the people in determinate sentences. Indeed, one study shows that the responses of people to these surveys conform with the pattern one would expect from a pursuit of just deserts.⁴⁴ Because of the high correlation between ratings of seriousness and ratings of appropriate sentences,⁴⁵ surveys of both types will be reviewed below.

Contrary to a widespread misconception,⁴⁶ there is considerable ev-

⁴¹ Indeed, in practical terms the just deserts doctrine has given impetus to determinate sentencing reforms in many states. See R. SINGER, *supra* note 4, at 139-66.

⁴² See, e.g., R. QUINNEY, *CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY* (1974).

⁴³ See G. NEWMAN, *COMPARATIVE DEVIANCE: PERCEPTION AND LAW IN SIX CULTURES* (1976); T. SELLIN & M. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* (1964); P. WILSON & J. BROWN, *CRIME AND THE COMMUNITY* 53-54 (1973); NEW SOUTH WALES BUREAU OF CRIME STATISTICS AND RESEARCH, *CRIME, CORRECTION AND THE PUBLIC* (1974); Chilton & De Amicis, *Overcriminalization and the Measurement of Consensus*, 59 *SOC. & SOC. RESEARCH* 318 (1975); Figlio, *The Seriousness of Offenses: An Evaluation of Offenders and Non-Offenders*, 66 *J. CRIM. L. & C.* 189 (1975); Hamilton and Rytina, *Social Consensus on Norms of Justice: Should the Punishment Fit the Crime?* 85 *AM. J. SOC.* 1117 (1980); Kutchinesky, *The Legal Consequences: A Survey of Research on Knowledge and Opinion About Law*, in *KNOWLEDGE AND OPINION ABOUT LAW* 101 (A. Podgorski, W. Kaupen, J. Vanhoutte, P. Vinke & B. Kutchinsky eds. 1973); Riedel, *Perceived Circumstances, Inferences of Intent and Judgments of Offense Seriousness*, 66 *J. CRIM. L. & C.* 201 (1975); Rose & Prell, *Does the Punishment Fit the Crime? A Study in Social Validation*, 61 *AM. J. SOC.* 247 (1955); Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 *AMER. SOC. REV.* 224 (1974) [hereinafter cited as Rossi]; Sechrest, *Comparisons of Inmates' and Staff's Judgments of the Severity of Offenses*, 6 *J. RESEARCH CRIME & DELINQ.* 41 (1976); Sinden, *Perceptions of Crime in Capitalist America: The Question of Consciousness Manipulation*, 13 *SOC. FOCUS* 75 (1980); Thomas, Cage & Foster, *Public Opinion on Criminal Law and Legal Sanctions: An Examination of Two Conceptual Models*, 67 *J. CRIM. L. & C.* 110 (1976); Wellford & Wiatrowski, *On the Measurement of Delinquency*, 66 *J. CRIM. L. & C.* 175 (1975).

⁴⁴ Hamilton & Rytina, *supra* note 43, at 1117.

⁴⁵ See the studies cited *supra* note 43.

⁴⁶ Opponents of Sutherland's definition of white-collar crime, notably Burgess, Kadish, and Tappan, have been particularly vocal in asserting that moral indignation against white-collar crime is absent within the community. See Burgess, *Comment*, 56 *AM. J. SOC.* 32 (1950);

idence to support the view that ordinary people subjectively perceive many types of white-collar crime as more serious than most traditional crime. Some of these studies were conducted pre-Watergate. A 1929-1958 longitudinal study⁴⁷ of moral condemnation of fifty types of behavior found that of the nine items which involved white-collar crime, eight were among the twenty-five most disapproved types of behavior (charging interest above a fair rate for loans, misrepresenting the value of an investment to a potential investor, misrepresentation in advertising medicines, maintaining working conditions which are known to be detrimental to employees' health, forgery, acceptance of bribes by legislators, tax fraud, and commission of arson by a landlord to collect insurance). Another early study by Newman⁴⁸ found that most members of the public recommended heavier penalties than in fact had been given to Food, Drug and Cosmetic Act offenders.

A San Francisco survey by Gibbons⁴⁹ found seventy percent of the respondents to favor incarceration for antitrust offenders, with forty-three percent favoring imprisonment for misrepresentation in advertising. For auto theft and assault, seventy and forty-eight percent respectively favored imprisonment. A 1969 Louis Harris poll showed that the sample regarded a manufacturer of unsafe automobiles as worse than a mugger (sixty-eight percent versus twenty-two percent) and a majority viewed a businessman who illegally fixed prices as worse than a burglar (fifty-four percent versus twenty-eight percent).⁵⁰ Harris concluded that "[a]nalysis of this list leaves little doubt that immoral acts committed by Establishment figures are viewed as much worse, by and large, than anti-Establishment figures."⁵¹ Similarly, a survey by the Joint Commission on Correctional Manpower and Training found the public more willing to mete out prison sentences to embezzlers than to burglars, looters in riots, or prostitutes, although the attitude towards armed robbers, murderers, and sellers of narcotics to minors was more punitive.⁵² Reed and Reed⁵³ found that three white-collar offenses (securities fraud, em-

Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Tappan, *Who Is The Criminal*, 12 AM. SOC. REV. 96 (1947).

⁴⁷ Rettig & Pasamanick, *Changes in Moral Values Over three Decades, 1929-1958*, 6 SOC. PROB. 320 (1959).

⁴⁸ Newman, *Public Attitudes to a Form of White-Collar Crime*, 4 SOC. PROBS. 228 (1957).

⁴⁹ Gibbons, *Crime and Punishment: A Study of Social Attitudes*, 47 SOC. FORCES 391, 395 (1969).

⁵⁰ *Changing Morality: The Two Americas; A Time-Louis Harris Poll*, TIME, June 26, 1969, at 93.

⁵¹ *Id.*

⁵² JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, *THE PUBLIC LOOKS AT CRIME AND CORRECTIONS* (1968).

⁵³ Reed & Reed, "Doctor, Lawyer, Indian Chief": *Old Rhymes and New on White-Collar Crime*, 3 INT'L J. CRIMINOLOGY & PENOLOGY 279 (1975).

bezzlement, and failure by a landlord to make repairs which causes death of a tenant) were as likely as bank robbery to elicit a public recommendation for imprisonment. Respondents were, however, more punitive towards the bank robber than towards a bribe-taker, an illegal abortionist, and a price-fixer. Subjects recommended that all of the above white-collar offenders should be sanctioned more severely than a shoplifter.

The final pre-Watergate study was by Rossi, Waite, Bose and Berk.⁵⁴ It revealed the least punitive attitudes towards white-collar crime. Certain white-collar offenses were given extremely low seriousness ratings. Tax offenses were generally rated low in seriousness. Of 140 offenses, "false advertising of a headache remedy" was ranked 132d, and "fixing prices of machines sold to businesses" ranked 127th. On average, the twenty-four white-collar offenses ranked considerably lower than interpersonal offenses involving violence or serious loss of property.⁵⁵ A post-Watergate replication of Rossi by Cullen, Link and Polanzi⁵⁶ found that the punitiveness of attitudes to white-collar crimes had increased both relatively and absolutely between 1972 and 1979, but that on average the twenty-four white-collar crimes still were rated as less serious than interpersonal offenses involving violence or serious property loss. Cullen *et al.* explored this further by breaking the twenty-four white-collar offenses down into types of white collar crimes. They found that "violent" white-collar crimes were regarded as substantially more serious than all other types of white-collar crimes, with tax offenses being regarded as the least serious. While the twelve most serious crimes in the whole survey were different forms of interpersonal homicide, the thirteenth was "Knowingly selling contaminated food which results in death." This was ranked as more serious than homicide "in a barroom free-for-all," of a "pedestrian while exceeding the speed limit," and of a "spouse's lover after catching them together." The latter two types of homicide were also regarded as less serious than "Causing the death of an employee by neglecting to repair machinery" and "Manufacturing and selling drugs known to be harmful to users."⁵⁷ The conclusion of

⁵⁴ Ross, *supra* note 43.

⁵⁵ As will be seen below, however, a reanalysis of the Rossi data by Schrager and Short showed that white-collar crimes which did comparable harm to common crimes were viewed as equal in seriousness to the common crimes. Schrager & Short, *How Serious a Crime? Perceptions of Organizational and Common Crimes*, in G. Geis & E. Stotland, *supra* note 20 at 14.

⁵⁶ Cullen, Link & Polanzi, *The Seriousness of Crime Revisited: Have Attitudes Toward White-Collar Crime Changed?*, — CRIMINOLOGY — (in press).

⁵⁷ Frank Cullen of the Western Illinois University has now completed a further, as yet unpublished, survey on a sample of only 91 in Galesberg, Illinois, which confirms the results of this work. Of 41 offenses, "Knowingly manufacturing and selling contaminated food that results in death" was given the third highest sentence (behind "Assassination of a public official" and "Killing of a police officer in the course of a terrorist hijacking of a plane"). This

these authors is consistent with that reached by Schragger and Short⁵⁸ after a reanalysis of the original Rosi⁵⁹ data: organizational crimes are rated to be as serious as individual crimes when they have comparable impacts.⁶⁰ Organizational crimes which harm persons are viewed as equally serious to individual violent offenses, and organizational economic crimes about as serious as individual economic crimes.

Sinden's data from a student sample are also consistent with the foregoing conclusion, although murder and child beating were viewed as somewhat more serious than any violent white-collar crime.⁶¹ On the other hand, "Employer failing to repair machinery resulting in death" was perceived as more serious than "assault with a gun," "bank robbery (\$10,000)," "armed robbery (\$100)," "assault with fists," and "death from reckless driving."⁶² The economic white-collar crimes were also generally regarded as somewhat more serious than individual property crimes.

An interesting study by Carroll *et al.*⁶³ assessed students' attitudes towards Watergate-type offenses (falsifying government documents, illegal wiretapping, illegal use of campaign funds, etc.). Such offenses were perceived as less serious than violent crimes, but more serious than all property and victimless crimes. Of course, Watergate-type offenses do not involve physical injury or significant loss of property. The fact that the subjects of this study nevertheless rated them as very serious suggests that less tangible types of harm may be important in assessing the seriousness of white-collar crime. White-collar crime may be viewed as particularly serious because of the way it undermines the trust and integrity essential for the effective functioning of major societal institutions.

Wolfgang⁶⁴ has conducted the major post-Watergate study of attitudes towards the seriousness of crime on a national sample of 8,000. Consistent with the earlier studies, Wolfgang found that his respondents

offense was punished more severely than "Killing someone during a serious argument", "Forcible rape of a stranger in a park," and "Armed robbery of a bank". "Manufacturing and selling pharmaceutical drugs known to be harmful to users" was ranked ninth behind all of the above, but ahead of "Assault with a gun on a stranger". I am indebted to Professor Cullen for sending me the raw data from this study.

⁵⁸ Schragger & Short, *supra* note 55.

⁵⁹ Rossi, *supra* note 43.

⁶⁰ See also Sykes & West, *The Seriousness of Crime: A Study of Popular Morality* (paper to annual meeting of Eastern Sociological Society, 1978).

⁶¹ Sinden, *supra* note 43.

⁶² *Id.* at 79.

⁶³ Carroll, Pine, Cline & Kleinhans, *Judged Seriousness of Watergate-Related Crimes*, 86 J. PSYCH. 235 (1974).

⁶⁴ M. Wolfgang, National Survey of Crime Severity Final National Level Geometric Means and Ratio Scores by Offense Stimuli Items (1980) (unpublished manuscript, University of Pennsylvania).

rated white-collar crimes which caused injury to persons as extremely serious. Consider this item: "A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result 20 people die."⁶⁵ This was regarded as more serious than some direct intentional forms of homicide, such as "A person stabs a victim to death."⁶⁶ Even when the last sentence of the same pollution item is changed from "20 people die" to "20 people become ill but none require medical treatment,"⁶⁷ the offense is still regarded as more serious than attempted murder by shooting a gun⁶⁸ and assault with a gun or knife which causes hospitalization.⁶⁹ While bribery offenses are also rated as fairly serious in the Wolfgang study,⁷⁰ tax evasion is rated very low.⁷¹ Embezzlement of \$1,000 from an employer,⁷² although regarded as moderately serious, was rated as less serious than misappropriating \$1,000 by shoplifting,⁷³ burglary,⁷⁴ or robbery.⁷⁵

Evidence from other developed countries also challenges the misconception that the community is not concerned about white-collar crime. Two Australian public opinion surveys both found respondents to react more punitively to items on fraud by company directors than to most other offenses in the surveys.⁷⁶ Scott and Al-Thakeb⁷⁷ have provided the most wide-ranging international survey of attitudes towards the seriousness of white-collar crimes; interviews were conducted in the United States, Great Britain, Finland, Sweden, Norway, Denmark, the Netherlands, and Kuwait. They compared the level of penalty which would be administered for various white-collar crimes with the penalty regarded as appropriate for the seven FBI index crimes. Consistent with the other studies, the white-collar offense which attracted the most punitive response was a crime against the person: "The offender is an executive of a drug company who allows his company to manufacture and sell a drug knowing that it may produce harmful side effects for most indi-

⁶⁵ *Id.* item 150.

⁶⁶ *Id.* item 13.

⁶⁷ *Id.* item 152.

⁶⁸ *Id.* item 17.

⁶⁹ *Id.* item 23.

⁷⁰ *Id.* items 156-62.

⁷¹ *Id.* items 164-65.

⁷² *Id.* item 94.

⁷³ *Id.* item 79.

⁷⁴ *Id.* item 68.

⁷⁵ *Id.* items 53, 55, 57.

⁷⁶ AUSTRALIAN LAW REFORM COMMISSION, SENTENCING OF FEDERAL OFFENDERS: INTERIM REPORT NO. 15, 28 (1980); P. WILSON & J. BROWN, *supra* note 43.

⁷⁷ Scott & Al-Thakeb, *The Public's Perceptions of Crime: A Comparative Analysis of Scandinavia, Western Europe, the Middle East and the United States*, in CONTEMPORARY CORRECTIONS 78 (C. Huff ed. 1977).

viduals.”⁷⁸ In every country, respondents recommended heavier sentences for this than for auto theft, larceny (felony), burglary, aggravated assault, and robbery. The United States was the only country in which it was not also rated as deserving a longer sentence than rape. In Sweden, even murder attracted a lighter average sentence than that recommended for the pharmaceutical executive. A relatively less punitive attitude in the United States was also manifest for “oil price fixing.” United States respondents rated this as deserving less than half the duration of imprisonment than was deserved for rape. For the other countries, the punishment for oil price fixing tended to be about the same as for rape. In all countries income tax evasion and false advertising were rated as the least serious among the white-collar items, although in most cases these offenses evoked a more punitive response than the least serious index offense, auto theft. A replication of Scott and Al-Thakeb, with some minor variations, on 269 Western Australians found a broadly similar rank ordering of offenses.⁷⁹

An interesting feature of the Scott and Al-Thakeb study is that it shows how white-collar crimes can be perceived as deserving more severe punishment even when the objective harm is less than that of a comparable common crime. Taking the sample as a whole, respondents rated an auto repair fraud in which the victim’s out of pocket loss was less than \$300 as demanding a considerably longer period of incarceration than auto theft!

The other important cross-cultural study is Graeme Newman’s *Comparative Deviance*.⁸⁰ Newman’s survey included questions on two white-collar offenses: “A person puts government funds to his own use” (*appropriation*), and “A factory director continues to permit his factory to release poisonous gases into the air” (*factory pollution*). In India, Indonesia, Iran, Italy, and Yugoslavia respondents recommended longer prison terms for appropriation than for robbery (“A person forcefully takes \$50 from another person who, as a result, is injured and has to be hospitalized.”)⁸¹ The United States was the exception here, with robbery being responded to slightly more punitively than appropriation. Iran was also an exception from the pattern showing appropriation to elicit the most punitive responses, in that incest and homosexuality topped the nine offenses in punitiveness. On the other hand, the average prison terms recommended for robbery were higher than those for factory pollution

⁷⁸ *Id.* at 84.

⁷⁹ R. Broadhurst, D. Indermauer & R. Maller, *Crime Seriousness Ratings: The Relationship of Information Accuracy and General Attitudes in Western Australia* (1981) (mimeograph, University of Western Australia) [hereinafter cited as R. Broadhurst].

⁸⁰ G. NEWMAN, *COMPARATIVE DEVIANCE* (1976).

⁸¹ *Id.* at 230.

in all six countries. In part, this was due to considerable proportions of respondents recommending fines for factory pollution.⁸² Such responses were recorded as zeros for the averaging of recommended prison terms. For the Indian and Iranian samples, factory pollution was rated as more serious than robbery.⁸³

To summarize the considerable body of evidence reviewed above: the community perceives many forms of white-collar crime as more serious, and deserving of more severe punishment, than most forms of common crime. There are exceptions to this pattern. Tax offenses and false advertising in most studies are not viewed as serious crimes. Most types of individual homicide are perceived as more serious than all types of white-collar crime. Nevertheless, white-collar crimes which cause severe harm to persons are generally rated as more serious than all other types of crime and even some types of individual homicide.

IV. THE PITFALLS OF MEASURING DESERT BY SURVEYS

Interviewers who go door to door are hardly likely to get the considered assessment of the seriousness of a crime that might result from hours of contemplation or from the real-life experience of sitting through a trial. Respondents are presented with decontextualized crime events which tell them little or nothing about the motives, duress, backgrounds, or intentionality of offenders and victims. While people might be in favor of directing fire and thunder at white-collar criminals in the abstract, when confronted with a remorseful businessman in the dock who puts forth some plausible rationalizations for his wrongs, condemnation mellows.

Surveys tend to generate glib answers to glib questions.⁸⁴ It can be argued that they are meaningful only when they ask people about matters to which they have given considerable thought prior to the arrival of the interviewer. On the other hand, it may be that the punishment of crime is exactly one of those problems that ordinary people do think about.⁸⁵ Certainly the surprising consensus which these studies show on the rank ordering of the seriousness of disparate offenses is inconsistent

⁸² Respondents recommending imprisonment as the appropriate sanction recommended heavier average sentences for factory pollution than for robbery in five of the six countries. *Id.* at 145.

⁸³ *Id.* at 118.

⁸⁴ D. PHILLIPS, KNOWLEDGE FROM WHAT? THEORIES AND METHODS IN SOCIAL RESEARCH 78-98 (1971).

⁸⁵ Certainly public opinion polls indicate that crime is a concern which people worry about more than many other social problems. *See* N. PARISI, M. GOTTFREDSON, M. HINDELANG & T. FLANAGAN, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1978, 296 (1979); Australian Public Opinion Polls, Unemployment and Crimes of Violence Chief Problems Facing Australia, Poll No. 03/2/78 (1978) (unpublished). For an international poll which

with erratic, thoughtless responses from subjects.⁸⁶ Moreover, Sellin and Wolfgang⁸⁷ and Akman, Normandeau and Turner⁸⁸ found strong agreement between the seriousness rankings of ordinary folk and those of criminal justice professionals (police officers, judges), who would not be expected to give unconsidered responses.

Opinion surveys can only provide meaningful guidance on deserved punishments by forcing responses onto a common metric. If all subjects are forced to reply with an appropriate prison term for a given offense, then these responses can be meaningfully averaged across the sample. If, however, some respondents advocate an "eye for an eye"—some the death penalty, some castration, some imprisonment, and others a fine—we cannot meaningfully average eyes, human lives, testes, years in prison, and dollars. Much as econometricians may be willing to dabble with the opportunity cost of a testicle, sensible people are likely to assess the averaging of such punishments as inane.

Even more problematic is the notion that we can represent the democratic will by determining desert on the basis of punishments recommended by survey respondents, some of whom may not subscribe to retribution as a justification for punishment. If I am selected for a survey of community attitudes to crime and I find retributivism morally objectionable, using my responses in determining what are the "deserved" punishments for different crimes hardly represents my voice in the democracy with fidelity. Regardless of the shifting views of professional criminologists, commitment to the utilitarian goals of rehabilitation, incapacitation, and deterrence remains strong in the general community.⁸⁹

Von Hirsch, while essentially advocating the judgment of the people as the operational yardstick of desert, is prepared to countenance corrections to the democratic will when it can be shown to be internally inconsistent:

Certainly, the criteria for seriousness will have to be distilled from the basic norms of conduct of this society. For the standard-setting agency is not deciding in a cultural vacuum: it is deciding seriousness for a system of penalties designed for this culture with its particular moral traditions. But

shows crime ranking lower than many other social problems, see THE BULLETIN, Apr. 9, 1977, at 14-17.

⁸⁶ See empirical studies on this question cited *supra* note 43. Note specially the study by Hamilton and Rytina in which "principled dissent" from average rankings of crimes is modeled. The data from this study are strongly suggestive of thoughtful and consistent responses from survey subjects.

⁸⁷ T. SELLIN & M. WOLFGANG, *supra* note 43.

⁸⁸ Akman, Normandeau & Turner, *The Measurement of Delinquency in Canada*, 58 J. CRIM. L.C. & P.S. 330 (1967).

⁸⁹ See Cullen, Cullen, Sims & Hunter, *The Punishment-Rehabilitation Controversy: Insider and Outsider Perspectives* (unpublished paper, Western Illinois University, 1981).

the question remains: Must the criteria for seriousness reflect community attitudes *in detail*? If survey research shows that most people regard a particular offense as very serious, is the standard-setting agency obliged to reflect that view in classifying its gravity? Or may that agency question the popular view if, for example, it seems to it to be based on misconceptions about the amount of harm involved?⁹⁰

The community assessment in the Scott and Al-Thakeb⁹¹ and Broadhurst⁹² studies—that auto repair fraud deserves more punishment than auto theft—would seem to be a case in point, but this need not necessarily be so. In a principled and consistent fashion the community might be saying that the victimization of powerless consumers by more powerful businesses is a more serious matter than the victimization of one individual by another. As von Hirsch concedes in another context, “[d]ifferent crimes may not be readily comparable in harmfulness, because the interests affected are dissimilar.”⁹³ Because of the expectations we have of parenthood, we might quite reasonably consider it a more serious crime for a father to murder his child than for the child to murder the father. Perhaps we should also have higher expectations of businesses; noblesse oblige can be a factor to be taken into account in the assessment of desert.⁹⁴ After all, most of us did think that the men of Sherwood Forest were deserving of less punishment because they robbed only the rich. On Kantian grounds of reciprocity, perhaps the major beneficiaries of the social order should bear more onerous burdens when they transgress against that order. Certainly, von Hirsch’s standard-setting agency might be taking a lot upon itself in overruling the will of the people when it perceives this to be “based on misconceptions about the amount of harm involved.”⁹⁵

⁹⁰ A. VON HIRSCH, *supra* note 4, at 82.

⁹¹ Scott & Al-Thakeb, *supra* note 77, at 84.

⁹² R. Broadhurst, *supra* note 79, at 18.

⁹³ A. VON HIRSCH, *supra* note 4, at 81.

⁹⁴ The Polish Penal Code, for example, does provide for higher penalties for economic crimes in proportion to the seniority of the offender. Personal communication from Professor Leszek Lernell. “Also it is maintained that positions of social power and prestige, held by many corporate offenders, carry heavier demands for social responsibility.” M. SAXON, *WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE*, Congressional Research Service, Library of Congress 61 (1980). “I believe that white-collar criminals are more culpable than their street counterparts. Having more advantages than other people, they bear more responsibility to set a good example. This idea of noblesse oblige dictates that white-collar criminals get heavier penalties than street offenders for equivalent depredations.” *Comm. Serial No. 69. Oversight Hearings Before the House Judiciary Subcomm. on Crime to Examine the Characteristics, Scope and Ramifications of White Collar Crime and to Assess the Adequacy of Present Federal-State Enforcement Efforts*, 95th Cong., 2d Sess. 30 (1978) (statement of Prof. Gil Geis). The legal systems of some non-literate societies provide for more severe sanctions on powerful than on powerless offenders. L. NADER & H. TODD, *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* 20 (1978).

⁹⁵ A. VON HIRSCH, *supra* note 4, at 82.

Another criticism of public opinion surveys as the basis of determining sentences is that public opinion is fickle in the sense of being more led by criminal justice policy than capable of leading it. Once the criminal justice system starts responding more punitively toward a type of conduct, the community may begin to regard the conduct as more serious. As J.F. Stephen once posited: "Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged."⁹⁶ If it is the case that public opinion is led by the criminal justice system in this way, then there is all the more reason to believe that white-collar crime really is a serious matter. Critics are forever lamenting the fact that white-collar criminals are rarely punished severely.⁹⁷ Scholars have also expressed concern that such permissiveness undermines moral indignation against white-collar crime.⁹⁸ Indeed, the President's Commission on Law Enforcement and Administration of Justice suggested that prison terms for white-collar criminals may be the only adequate way "to symbolize society's condemnation of the behavior in question, particularly where it is not on its face brutal or repulsive."⁹⁹ If this analysis is correct, and if our prisons ever were to become populated by significant numbers of white-collar criminals, one wonders what indignities the public would be prepared to inflict upon them. Perhaps we would approach the situation in the Soviet Union, where according to some reports the majority of executions are for "economic crimes,"¹⁰⁰ or that in Japan, where the public approves of executive suicide to expunge shame for white-collar crime.¹⁰¹

⁹⁶ J. STEPHEN, *A HISTORY OF CRIMINAL LAW IN ENGLAND* (1883).

⁹⁷ S. HILLS, *CRIME, POWER AND MORALITY: THE CRIMINAL LAW PROCESS IN THE UNITED STATES* (1971); R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976); J. REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* (1979); Geis, *Upperworld Crime*, in *CURRENT PERSPECTIVES ON CRIMINAL BEHAVIOR* 114 (A. Blumberg ed. 1974).

⁹⁸ See M. SAXON, *supra* note 94, at 61; McCormick, *Rule Enforcement and Moral Indignation: Some Observations on the Effects of Criminal Antitrust Convictions Upon Societal Reaction Processes*, 25 *SOC. PROBS.* 30 (1977).

⁹⁹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT—CRIME AND ITS IMPACT: AN ASSESSMENT* 105 (1967).

¹⁰⁰ *Soviet Firing Squads Hit Illegal Businesses*, *Los Angeles Times*, Dec. 11, 1963, § IV at 6. This report claims that of 131 death sentences in the USSR in 1962, 90 were for "economic crimes." On the question of working class crimes generating less moral indignation than middle class crimes in the Soviet Union, see generally R. MAKEPEACE, *MARXIST IDEOLOGY AND SOVIET CRIMINAL LAW* (1980).

¹⁰¹ After 93 miners died in the Yubari-Shin Colliery on October 16, 1981, the president of the Japanese company which owned the mine attempted suicide by slashing his wrists. Interview at Japanese Ministry of International Trade and Industry, March 10, 1982. Another recent white-collar crime suicide was that of Mitsushiro Shimada after payoffs to secure air-

Public opinion, especially as represented by social surveys, is fickle. On balance, however, there seems little reason to view the abhorrence of survey respondents for white-collar crime as other than a genuine groundswell of public disapproval. Indeed, the depth of this disapproval could become even greater than that manifest in the survey data.¹⁰²

V. MEASURING DESERT BY OBJECTIVE HARM

There is an alternative to what many would see as the excesses of slavish adherence to the will of the populace or deference to the edicts of philosopher-kings. This is to rally around certain objective measures of harm as the foundation for determinations of desert. The obvious objective measures are number of prior convictions, amount of property lost, and extent of injuries to persons as a result of the offense. Such an approach neglects the importance of the mental element of the offense and leaves us in a quandary as to how to placate community demands for severe punishments for offenses such as attempted murder which do no direct harm to persons or property. Many types of harm are not objectifiable—such as the impact that white-collar crimes like tax evasion have in undermining the trust and integrity essential for the effective functioning of the economy and polity.

Prior record is a slippery criterion when applied to corporate crimes. The data of Sutherland¹⁰³ and Clinard *et al.*¹⁰⁴ suggest that most major corporations are recidivists of some sort. Moreover, counting previous offenses is a meaningless exercise. Do we count a company which violated pollution laws on one day in January, rectified the problem, and then did the same again on a day in December, as having committed two offenses? If so, do we count another company which continuously violated the pollution laws for every day of the year as committing one offense, or 365?¹⁰⁵

The other two common objective bases of seriousness—harm to property and persons—are quite meaningful with white-collar crime.

craft sales by the Grumman corporation were discovered. N.Y. Times, March 25, 1979, § 1, at 7.

¹⁰² Conversely, it might be asserted that the concern over white-collar crime will be a short-lived post-Watergate phenomenon. The evidence reviewed above of considerable pre-Watergate public antagonism towards white-collar criminals, and disapproval in foreign countries which in many respects is stronger than in the United States, tend to be inconsistent with this narrow historical interpretation.

¹⁰³ E. SUTHERLAND, *supra* note 7.

¹⁰⁴ M. CLINARD, R. YEAGER, J. BRISSETTE, D. PETRASHEK & E. HARRIES, *ILLEGAL CORPORATE BEHAVIOR* (1979) [hereinafter cited as *ILLEGAL CORPORATE BEHAVIOR*]. See also M. CLINARD & P. YEAGER, *CORPORATE CRIME* (1980).

¹⁰⁵ Saxon has suggested that, for this reason, the traditional concepts of "recidivist" and "first offender" may not be appropriate to white-collar crime. See M. SAXON, *supra* note 94, at 61.

Just as the subjectively perceived harm of white-collar crime is greater than that of common crime, so is the objective harm to property and persons greater with white-collar crime.

Sutherland is credited as the first to demonstrate that white-collar crime costs the community more than traditional crime:

The financial cost of white-collar crime is probably several times as great as the financial cost of all the crimes which are customarily regarded as the "crime problem." An officer of a chain grocery store in one year embezzled \$600,000, which was six times as much as the annual losses from five hundred burglaries and robberies of the stores in that chain. Public enemies numbered one to six secured \$130,000 by burglary and robbery in 1938, while the sum stolen by Krueger is estimated at \$250,000,000, or nearly two thousand times as much. The *New York Times* in 1931 reported four cases of embezzlement in the United States with a loss of more than a million dollars each and a combined loss of nine million dollars. Although a million-dollar burglar or robber is practically unheard of, these million-dollar embezzlers are small-fry among white-collar criminals. The estimated loss to investors in one investment trust from 1929 to 1935 was \$580,000,000.¹⁰⁶

In fact, at the end of the last century Barrett showed that banks lost more from fraud and embezzlement than from bank robberies.¹⁰⁷ More recently, Johnson and Douglas have pointed out that the losses from the Equity Funding securities fraud alone were greater than the losses from all street crime in the United States for one year.¹⁰⁸ Official inquiries consistently reach the conclusion that the cost to the community of white-collar crime exceeds that of other property crime,¹⁰⁹ with estimates of the cost differential ranging from the House Judiciary Subcommittee on Crime's conclusion that white-collar crime cost the community fifty times as much,¹¹⁰ to the more guarded conclusion of the President's Commission on Law Enforcement and Administration of Justice:

There is no knowing how much embezzlement, fraud, loan sharking, and

¹⁰⁶ E. SUTHERLAND, *supra* note 7, at 121-22.

¹⁰⁷ A. BARRETT, *THE ERA OF FRAUD AND EMBEZZLEMENT* (1895).

¹⁰⁸ J. JOHNSON & J. DOUGLAS, *CRIME AT THE TOP: DEVIANCE IN BUSINESS AND THE PROFESSIONS* 151 (1978).

¹⁰⁹ For example, AMERICAN MANAGEMENT ASSOCIATION, *CRIMES AGAINST BUSINESS: RECOMMENDATIONS FOR DEMONSTRATION, RESEARCH, AND RELATED PROGRAMS DESIGNED TO REDUCE AND CONTROL NON-VIOLENT CRIMES AGAINST BUSINESS* (1977); CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *A HANDBOOK OF WHITE-COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS* (1974); GENERAL ACCOUNTING OFFICE, *FEDERAL AGENCIES CAN, AND SHOULD DO MORE TO COMBAT FRAUD IN GOVERNMENT PROGRAMS: REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES* (1978); JOINT ECONOMIC COMMITTEE OF THE U.S. CONGRESS, *THE COST OF CRIME IN 1976* (1976). For a review of these studies, see M. SAXON, *supra* note 94, at 8-13.

¹¹⁰ Conyers, *Dissenting Views: Report of the Judiciary Committee of the House of Representatives on the Criminal Code Revision Act of 1980*, U.S. Govt. Printing Office (1980).

other forms of thievery from individuals or commercial institutions there is, or how much price-rigging, tax evasion, bribery, graft, and other forms of thievery from the public at large there is. The Commission's studies indicate that the economic losses those crimes cause are far greater than those caused by the three index crimes against property.¹¹¹

Guesswork figures even more prominently in estimating whether white-collar crime costs more lives than traditional crimes. Nevertheless, scattered evidence does seem to be consistent with the picture that law violations by large corporations may be responsible for such massive loss of life and serious injury as to surpass the harm from crime in the streets. In the United States this century, over 100,000 men have died in coal mines. Swartz¹¹² argues that most of these lives could have been saved if mine safety laws were not so flagrantly violated.¹¹³ Moving from safety to health, Swartz points out that in more than half the coal mines in Kentucky the concentration of coal dust was found to exceed the legal limit—in some cases by a factor of ten. Carson's analysis of violations of factory legislation by 200 randomly selected firms in England revealed that over the four and a half year period of the study, 3,800 offenses were recorded against the firms.¹¹⁴ The vast majority of these offenses involved failure to meet mandatory requirements for the physical safety of workers, including 1,451 offenses of "lack of secure and properly adjusted fencing at dangerous machinery," and 460 offenses of "inadequate precautions against fire and explosion." About seventy-five percent of the 200,000 OSHA inspections in the United States in 1977 discovered violations, usually several of them.¹¹⁵ Studies of the proportion of industrial injuries which are caused by violations of the law produce estimates varying between ten and thirty percent.¹¹⁶ Taking the lower figure, industrial safety violations cause some 200,000 disabling injuries in the United States each year.¹¹⁷ In addition, the President's Report on Occupational Safety and Health estimated that something on the order of 100,000 deaths result annually from industrial disease.¹¹⁸

¹¹¹ President's Commission on Law Enforcement and Administration of Justice, *Crime and Victims in a Free Society*, in CRIME AND DELINQUENCY 8 (C. Bersani ed. 1970).

¹¹² Swartz, *Silent Killers at Work*, 3 CRIME & SOC. JUST. 15 (1975).

¹¹³ See also, Lewis-Beck & Alford, *Can Government Regulate Safety? The Coal Mine Example*, 74 AMER. POL. SCI. REV. 745 (1980). It is, in fact, unusual for coal mine fatalities not to be partially explicable by violation of safety regulations. I am currently doing empirical work on this question.

¹¹⁴ Carson, *White-Collar Crime and the Enforcement of Factory Legislation*, 10 BRIT. J. CRIMINOLOGY 383 (1970).

¹¹⁵ J. MENDELOFF, *REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH POLICY* 2-3 (1979).

¹¹⁶ *Id.* at 86-87.

¹¹⁷ There are approximately two million disabling industrial injuries in the U.S. each year. *Id.* at 117.

¹¹⁸ THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH (1972).

Product safety violations are perhaps responsible for more serious injuries than any other type of corporate offense. Magnuson and Carper reported that in the United States each year 150,000 people "suffer excruciating pain and often lifelong scars from fires, resulting from a match or a lighted cigarette dropped on flammable clothing or upholstery."¹¹⁹ The National Commission on Product Safety estimated an annual rate of twenty million serious injuries associated with consumer products, with 110,000 resulting in permanent disability and 30,000 in death.¹²⁰ The way large numbers of people have been killed and injured by misrepresentation in the advertising of drugs has been well documented.¹²¹ One could go on to document the thousands of injuries and deaths caused annually by violations of automobile safety standards, pure-food legislation, pollution laws, and various other laws to protect the safety of consumers and workers. Single crimes on their own can cause massive injury. Consider the thousands of deaths and deformities to infants around the world caused by the fraud of a drug company in the thalidomide disaster¹²² or the 125 persons killed when an unlawfully maintained dam collapsed at Buffalo Creek, West Virginia.¹²³ Geis concludes, after referring to findings such as those of Ralph Nader on the building of potentially lethal cars and electrocution deaths caused by the failure to enforce legal safety requirements on electrical equipment, that "support clearly seems to exist for the view that acts reasonably defined as white-collar crime result in more deaths and physical injuries than acts which have been traditionally defined as murder and manslaughter."¹²⁴

VI. THE VOLUME OF WHITE-COLLAR CRIME

It is not only in terms of the loss of property and injury to persons that white-collar crime constitutes a larger problem than common crime. If we exclude from consideration victimless crimes (for example, drug use or consensual sexual offenses) and traffic violations, it is undoubtedly also true that the volume of offenses is greater for white-collar crime. This proposition can be sustained by showing that certain of-

¹¹⁹ W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE* 125 (1968).

¹²⁰ REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY 1 (1970).

¹²¹ See J. YOUNG, *THE MEDICAL MESSIAH* (1967).

¹²² P. KNIGHTLEY, H. EVANS, E. POTTER & M. WALLACE, *SUFFER THE CHILDREN: THE STORY OF THALIDOMIDE* (1979) [hereinafter cited as P. KNIGHTLEY].

¹²³ G. STERN, *THE BUFFALO CREEK DISASTER: THE STORY OF THE SURVIVORS' UNPRECEDENTED LAWSUIT* (1976).

¹²⁴ Geis, *Victimization Patterns in White-Collar Crime*, in 5 *VICTIMOLOGY: A NEW FOCUS* 89, 95 (I. Drapkin & E. Viano eds. 1973). See also Monahan, Navaco & Geis, *Corporate Violence: Research Strategies for Community Psychology*, in *COMMUNITY PSYCHOLOGY AND CRIMINAL JUSTICE* (T. Sarbin ed. 1980).

fenses which constitute only a minor part of the white-collar crime problem are so common as almost to equal in number *all* the traditional offenses dealt with by the police.

A study of odometer fraud in Queensland, Australia found that over a third of vehicles randomly selected from used car lots had had their mileage readings turned back.¹²⁵ The sample in this study is not sufficient to permit us to assert with confidence that this kind of fraud occurs for a third of the used cars sold in Queensland. Nevertheless, using a third as the best estimate available, there would be about 70,000 odometer frauds in Queensland each year. This is almost equal to the total of 80,181 offenses of all types (including victimless crimes, but excluding public order offenses such as drunkenness and vagrancy) reported to the Queensland police in the year of the study. Moreover, in most odometer frauds there is a conspiracy involving more than one offender.¹²⁶ Moving to a more respectable profession, Quinney¹²⁷ found that twenty-five percent of pharmacists in Albany, New York had been found by government investigators to have violated prescription laws.¹²⁸ Government surveys in two Australian jurisdictions have recently found fifteen¹²⁹ and thirty-two percent¹³⁰ of gas pumps to be giving short-measure gas to motorists.

What then of serious crimes by large corporations, as opposed to the widespread dollars and cents frauds of gas station proprietors, used car dealers and pharmacists? Few crimes could be more serious than bribing government health officials to entice them to allow a drug on the market which is banned in many other parts of the world. Yet in many countries this is common practice by transnational pharmaceutical companies.¹³¹ Nineteen of the twenty largest American pharmaceutical companies have disclosed foreign bribes to the Securities and Exchange Commission.¹³² Every significant coal mine in the United States receives at least a few fines each year for violations of mine safety laws. The Mine Safety and Health Administration fines about 140,000

¹²⁵ Braithwaite, *An Exploratory Study of Used Car Fraud*, in *TWO FACES OF DEVIANCE: CRIMES OF THE POWERLESS AND POWERFUL* 101-22 (P. Wilson & J. Braithwaite eds. 1978) [hereinafter cited as *TWO FACES OF DEVIANCE*].

¹²⁶ *Id.* at 108-09.

¹²⁷ Quinney, *Occupational Structure and Criminal Behavior: Prescription Violation By Retail Pharmacists*, 11 *SOC. PROBS.* 179 (1963).

¹²⁸ See also, Hickie, *Favourite Fiddles of the Crooked Chemist*, *National Times*, January 11, 1981, at 3, col. 1.

¹²⁹ *Sunday Telegraph*, Feb. 3, 1980, at 7, col. 1.

¹³⁰ *Canberra Times*, Jan. 13, 1981, at 1, col. 1.

¹³¹ J. BRAITHWAITE, *supra* note 28, ch. 2.

¹³² *Id.*

offenses annually.¹³³ Looking at a wider range of offenses, Sutherland¹³⁴ and Clinard *et al.*¹³⁵ have been able to show that corporate crime is not a minority phenomenon among large American corporations, but that a majority of top companies violate the law on a fairly regular basis. All in all, this volume of offenses, combined with the high probability of multiple offenders for each offense in a complex organization, is sufficient to invert conventional assessments of the class distribution of crime.

Of course the data we have on the volume of white-collar crime is much less adequate than that on its seriousness. It is much easier to determine how many bank robberies there have been in the United States during a year than it is to count the violations of the Occupational Safety and Health Act.¹³⁶ Victim surveys are possible with common crimes but not for white-collar crimes, which mostly have diffuse, unidentifiable victims or victims who do not know they have been victimized. Antitrust offenses provide the classic illustration. Consider the tetracycline class actions, in which a large proportion of the population of the United States (and indeed the rest of the world) suffered artificially high prices during the 1950s and 60s whenever they consumed broad-spectrum antibiotics.¹³⁷ The many people in the Third World who died because they could not afford the new wonder drugs would never have conceived of themselves as having been victims of a violation of U.S. antitrust laws.

Thus, there can never be a systematic comparison of the volume of white-collar crime with that of common crime. All we can do is demonstrate what we know to be the minimum volume of certain offenses which constitute a minor part of the white-collar crime problem. It is then up to readers to judge whether this enormous volume is sufficient, when put against our knowledge of common crime from reports to the police and victim surveys, to make it plausible that there is more white-collar than common crime. If we exclude victimless crimes and traffic violations, I would think that the inference, even in the absence of systematic data, is not only plausible but obvious.

VII. PITFALLS OF MEASURING DESERT BY OBJECTIVE HARM

To base assessments of desert on objective harm ignores the mental

¹³³ Interview with Office of Assessments, Mine Safety and Health Administration (Nov. 3, 1981).

¹³⁴ E. SUTHERLAND, *supra* note 7.

¹³⁵ ILLEGAL CORPORATE BEHAVIOR, *supra* note 103.

¹³⁶ 29 U.S.C. §§ 651-78 (Supp. 1971).

¹³⁷ J. BRAITHWAITE, *supra* note 28, at ch. 5; Wolfram, *The Antibiotics Class Actions*, 1976 AM. B. FOUND. RESEARCH J. 251 (1976).

element of the offense. Retributivists are not alone in insisting that an intentional offense should attract greater punishment than one arising from negligence or recklessness, perhaps even when the latter does greater harm. A weakness of the argument advanced so far is that many white-collar offenses (e.g., pollution offenses) do not require proof of *mens rea* for a conviction. Of course the fact that *mens rea* is not proved does not necessarily mean that it is not there or that it could not be proved. Standards of strict liability are commonly applied to corporate offenses, however, precisely because of the difficulty of proving intent when it does exist.

There is a considerable difference between convicting a corporation which takes money by fraud and convicting an individual who takes it at the point of a gun. "Criminal intent is not as easily inferred from a taking executed through a market transaction, as it is from a taking by force."¹³⁸ The first reply to the culpability critique is, therefore, that it is naive to assume that white-collar offenders did not have *mens rea* simply because *mens rea* is not proved in many white-collar crime convictions. White-collar criminals use their power to surround their offenses with circumstances of such complexity as to camouflage intent. An intentional price fixing conspiracy can rarely be proved to be such since senior executives can contrive circumstances and timing to render it highly plausible that price increases are a response to cost factors which coincidentally impacted the members of the cartel uniformly at a particular time. There is typically the further stumbling block of an absence of independent witnesses; the only witnesses to the conspiracy may have been conspirators or persons in the employ of the accused. The apparent absence of intent in white-collar offenses therefore may tell us more about the power of white-collar offenders than about the nature of their offenses.¹³⁹

¹³⁸ Geis and Edelhertz, *Criminal Law and Consumer Fraud: A Sociolegal View*, 11 AMER. CRIM. L. REV. 989, 1006 (1973).

¹³⁹ Moreover, as Hopkins has pointed out, we often forget how often the criminal law excuses itself of the need to prove intent in regard to common crimes. Hopkins, *Class Bias in Criminal Law*, 5 CONTEMP. CRISES 385 (1981). Examples discussed by Hopkins include:

- (a) The difficulty of proving that defendants knew that goods in their possession were stolen. Many jurisdictions solve the problem by enabling juries to draw an inference of intent if the defendant has had certain previous convictions. See C. HOWARD, AUSTRALIAN CRIMINAL LAW 248 (2d ed. 1970).
- (b) "It is an offense for a person to be found by night in possession of housebreaking tools without lawful excuse (the proof of which shall lie upon such person)." G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART 897 (2d ed. 1961).
- (c) "In many jurisdictions possession of marijuana for sale is a more serious offence than possession for personal use. But how does one establish that possession is for sale, that is, that someone in possession intends to sell? In the Australian Capital Territory the law solves this problem by simply declaring that possession of more than 100 grams of cannabis will be taken as possession for sale unless the defendant can establish otherwise." Australian Capital Territory Poisons and Narcotics Drug Ordinance, 1978.

Even accepting that a large proportion of white-collar crimes do not involve criminal intent, the claims made in the previous section remain true if the domain of white-collar crime is restricted to intentional wrongs. It remains true, for example, that Equity Funding, with its clear evidence of intent,¹⁴⁰ cost more than the losses from all street crime in the United States for one year. If a third of the used cars in Queensland are having their mileage readings turned back, there is little risk in inferring that dealers do this with intent to defraud customers; indeed my interviews with dealers demonstrate this amply enough.¹⁴¹ The examples of massive white-collar crimes involving intent are so well known that the arguments of the last section do not have to be retraced in detail with reference to them alone. We may safely infer that white-collar offenses involving *mens rea* do more objective harm and are greater in number than all common crimes, with and without *mens rea*.

While the culpability critique does not show the key assertions of my argument to be false, it does weaken their force somewhat. We have seen that survey respondents are often prepared to rate product safety and environmental offenses which cause harm to persons as deserving of more punishment than interpersonal crimes of violence. Undoubtedly, they are responding to the greater objective harm of the white-collar offenses. We know, however, that an executive who kills workers or consumers through an unsafe manufacturing practice may intend to break the law to increase profits, but never intends to kill.¹⁴² The individual murderer, in contrast, does intend to kill, and on these grounds is more culpable. The greater harm done by the white-collar criminal who markets a grossly dangerous product must be weighed against the more malevolent intent of the murderer. A countervailing consideration might be that the intent of the murderer is embraced in a moment of emotional distress in which the consequences of the action are barely considered, while the white-collar criminal coolly and rationally calculates over a long period the risks of injury and punishment against the benefits of the unscrupulous practice. Other mitigating factors, such as provocation and duress, are similarly unlikely to be present in the white-collar crime.

Not all interpersonal violence offenses are crimes of passion, however. It is reasonable to conclude that the most serious crimes are not

¹⁴⁰ D. PARKER, *CRIME BY COMPUTER* 118-74 (1976).

¹⁴¹ Braithwaite, *supra* note 124, at 107-20.

¹⁴² This may be overstated. Executives who do not intend to kill particular persons may still know that their decisions will kill some unknown statistical persons. This was an issue in the Ford Pinto homicide prosecution. Had Ford knowingly increased road fatalities by using cheap and unsafe parts in its Pintos? See L. STROBEL, *RECKLESS HOMICIDE? FORD'S PINTO TRIAL* (1980); Farrell, *Corporate Homicide: Definitional Processes in the Creation of Deviance*, 15 L. & SOC. REV. 161 (1980).

those that do the greatest objective harm, but individual homicides of devastating intentionality and cold-bloodedness. The findings from Wolfgang's study¹⁴³ indicate that the general public takes this view.

What, then, is a balanced response to the culpability critique? First, among that subset of crime which is intentional, white-collar crimes are greater in number and in harm (measured either objectively or subjectively). Therefore, it is reasonable to assert that just deserts, whether based on a subjective or objective calculus, implies that there should be more white-collar criminals sent to prison than common criminals. The criminals who do the greatest harm have white-collars. Even so, these are not the most culpable criminals because while they often intend to break the law, the nature of their crime is not such that they intend to kill. While the average culpability of common criminals may be lower, the upper bound of culpability is higher. A just criminal justice system might see the majority of the prison population white-collar criminals, while those serving the very longest terms would be common killers.

VII. WHY JUST DESERTS IS UNWORKABLE

Having established the enormous volume of white-collar offenses which "deserve" to be punished, we can now come to grips with the impossibility of administering desert to white-collar criminals in a proportion even remotely comparable to that currently administered to common criminals. In California in 1970 only five of the 200,000 industrial safety and health violations reported by state inspectors were prosecuted and fined.¹⁴⁴ Only forty prosecutions of gas station proprietors followed from the aforementioned survey by the New South Wales Department of Consumer Affairs;¹⁴⁵ some particularly bad cases were selected, and the offenders were made examples of for the purpose of achieving deterrence. Meting out "just deserts" to all the offenders would have tied up more of the agency's resources than it could afford. Similarly, continual prosecution of a quarter of the pharmacists or of the autodealers in a jurisdiction would bankrupt the wealthiest of governments. The impossibility of consistent and equitable enforcement becomes more profound with more serious types of cases because these are the ones which are most complex and therefore most costly at both the investigation and litigation stages.

Writers who in other respects have been attracted to "just deserts" as a basis for criminal sentencing have concluded that white-collar

¹⁴³ M. Wolfgang, *supra* note 64.

¹⁴⁴ J. MENDELOFF, *supra* note 114, at 83-85.

¹⁴⁵ See *supra* note 128.

crime is one area where it is undesirable to attempt consistently to administer "just deserts." Norval Morris, who advocates that desert set an upper limit on sanctions, says of tax violations: "Not every tax felon need be imprisoned, only a number sufficient to keep the law's promises and to encourage the rest of us to honesty in our tax returns."¹⁴⁶

For white-collar crimes against the person—the very crimes which the community feels deserve most punishment¹⁴⁷—the case for selective enforcement is strongest. This is because the offense so often poses a continuing danger to the community. "Just deserts" must at times be sacrificed for protection of the public.¹⁴⁸ Regulatory agencies often resist the urge to prosecute guilty parties when the cooperation of those parties is needed to safeguard the public health. If a drug company has criminally negligent quality control procedures which are putting the community at risk, an injunction to close down the plant followed by a criminal prosecution can set company lawyers to work on very effective delaying tactics.¹⁴⁹ Justice delayed is profits retained. The public interest will often be better served by an approach to the company offering immunity from prosecution if it will cooperate in a package of measures which might include a voluntary recall of certain batches of impure drugs from the market, dismissal of certain irresponsible quality control staff, revision of standard operating procedures to improve product quality, and compensation to victims of the impure drugs.¹⁵⁰ In a haphazard fashion, such negotiated settlements foster deterrence, often more so than a paltry fine which might be handed down by a court. But more importantly, they do so while minimizing the risk to consumers. A voluntary recall of drugs already on the market is almost invariably more rapid and efficient (in the sense of maximizing the proportion of the batch which is located) than a court-ordered seizure.¹⁵¹ Only the

¹⁴⁶ N. MORRIS, *THE FUTURE OF IMPRISONMENT* 79 (1974).

¹⁴⁷ See the studies cited *supra* notes 47-80 and accompanying text.

¹⁴⁸ The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 (1976) affirmatively declares that protection of the public is to be given higher priority than justice. Section 336 of the Act states: "Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution . . . minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice or warning."

¹⁴⁹ See the case studies in chapter 4 of J. BRAITHWAITE, *supra* note 28. See also various examples of delaying tactics in M. GREEN, *THE OTHER GOVERNMENT* 104-30 (1978). Former Food and Drug Administration General Counsel, Richard Merrill, tells of one manufacturer with whom the FDA had engaged in "eleven different lawsuits, and each time we have won a lawsuit he has changed the drug a little bit, changed the labelling a little bit and said, 'Aha, it is not the same one you condemned before.'" *Quoted in* R. HUGHES & R. BREWIN, *THE TRANQUILIZING OF AMERICA* 276-277 (1979).

¹⁵⁰ For an example of such a deal, see the "Anonymous Transnational" case study in chapter 4 of J. BRAITHWAITE, *supra* note 28.

¹⁵¹ See Hutt, *Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act*, 28 *FOOD DRUG COSM. L.J.* 177 (1973).

company knows where all of its product has gone. A seizure which is resisted by the company faces considerable practical difficulties.

A classic illustration of the dilemmas in choosing between retribution against alleged white-collar criminals and the wider public interest was the aftermath of the thalidomide drug disaster.¹⁵² Nine executives of Chemie Grünenthal, the manufacturer of thalidomide, were indicted in Germany on charges of intent to commit bodily harm and involuntary manslaughter. After the complex legal proceedings had dragged on for five years, including over two years in court, the charges were dropped as part of a deal in which Grünenthal agreed to pay \$31 million in compensation to the German thalidomide children. The press cried "justice for sale." But the German government had to consider the ongoing misery of the thalidomide families who up to that point had struggled for nine years rearing their deformed and limbless children without any financial assistance. Would retribution against Grünenthal and its executives have justified perhaps another nine years of limbo and deprivation for the victims?

There are many reasons for not prosecuting even some violations which endanger human life. Government safety inspectors have an educative role which is more important than their enforcement role. Many unsafe practices are not covered by the law;¹⁵³ during periods of rapid technological change, perhaps most are not covered. The inspector must build up a store of good will with companies in order to persuade them to change unsafe practices and to improve quality assurance systems when such changes are not really required by law. One very effective way for inspectors to generate the good will necessary to persuade companies to improve their standard operating procedures is to "give a second chance" to company officers who have broken the law. Obversely, prosecuting offenses which were unintentional can foster resentment and dissipate motivation to improve. Another reason for inconsistent enforcement of the law is that it is usually good inspectorial practice not to recommend a prosecution when the company comes forward and admits the violation, even in many circumstances where the offense is serious. The government must encourage companies to confess their safety

¹⁵² P. KNIGHTLEY, *supra* note 121, at 122-36.

¹⁵³ Any attempt to try to cover every unsafe practice by a rule can run into two difficulties. First, such a myrid of rules can be created as to inhibit economic efficiency through tying business in red tape. Second, an increase in the complexity of the web of law can advantage large organizations which can exploit legal complexity in any dispute which goes to court. See Braithwaite, *Inegalitarian Consequences of Egalitarian Reforms to Control Corporate Crime*, 53 TEMP. L.Q. 1127 (1980); Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 19-28, 36-45 (1980); Sutton & Wild, *Corporate Crime and Social Structure*, in TWO FACES OF DEVIANCE *supra* note 124, at 177.

problems so that they can assist in finding solutions and warn the public of the danger.

Although there are many more compelling reasons for not consistently prosecuting white-collar offenders, cost is undoubtedly the most influential reason is practice. Philip Schrag's gripping account of what happened when he took over the enforcement division of the New York City Department of Consumer Affairs¹⁵⁴ underlines the inevitability of a retreat from commitment to consistent and equitable enforcement of the law when dealing with white-collar crime. When Schrag began in the job he adopted a prosecutorial stance. In response, however, to a variety of frustrations, especially the use of delaying tactics by company lawyers, a "direct action" model was eventually substituted for the "judicial" model. Non-litigious methods of achieving restitution, deterrence, and incapacitation were increasingly used. These included threats and use of adverse publicity, revocation of license, writing directly to consumers to warn them of company practices, and exerting pressure on reputable financial institutions and suppliers to withdraw support for the targeted company.

Whether we approve of the retreat from the justice model with white-collar crime, it must be conceded that, given the legal system we have inherited, the public gets most of its protection from extra-legal muscle-flexing by regulators which persuades companies to change their ways. We might shudder at the cavalier disregard of due process by the inspector who says, "fix that up or I'll be back once a month looking for things to nab you on." But to the extent that white-collar crime is prevented in modern societies, such muscle-flexing is the most important way it happens. Moreover, I suspect that most companies would prefer to live with a little of such coercion every now and then than with the legal costs of a more litigious relationship with government agencies.

Consistent administration of justice becomes impossible in the face of the costs of litigating complex white-collar cases. Prosecutors must confront complexity in the accounts,¹⁵⁵ complexity of the law,¹⁵⁶ complexity of organizational realities,¹⁵⁷ complexity of scientific dispute,¹⁵⁸ and jurisdictional complexities in crimes which transcend national

¹⁵⁴ Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 YALE L.J. 1529 (1971).

¹⁵⁵ See A. BRILOFF, UNACCOUNTABLE ACCOUNTING (1972); Sutton & Wild, *Companies, the Law and the Professions: A Sociological View of Australian Companies Legislation*, in LEGISLATION AND SOCIETY IN AUSTRALIA 213 (R. Tomasic ed. 1979).

¹⁵⁶ See Braithwaite, *supra* note 153; Sutton & Wild, *supra* note 153. For a discussion of the complexity of law problem more specifically in relation to tax offenses, see *Simplification Symposium*, 34 TAX. L.R. 1 (1978).

¹⁵⁷ See the references *supra* note 9.

¹⁵⁸ See J. BRAITHWAITE, *supra* note 28, ch. 9.

boundaries.¹⁵⁹ All of these types of complexity are exploited by the talented counsel which white-collar defendants can usually afford to retain, and also by the defendants themselves. For example, books of account are confusing because the white-collar criminal wants them that way. A potentially simple transaction is intentionally concealed by a round robin or daisy chain arrangement through a series of intermediary transactions. The inherent and contrived complexity of white-collar crime makes proof of guilt beyond reasonable doubt an onerous burden indeed.

At the same time, most regulatory agencies are cognizant of the need for a degree of formal and public punishment to maintain the habit-forming value of law and to foster deterrence. These ends can be achieved by highly selective white-collar crime enforcement policies in which only occasional offenders are made an example of. The offenders chosen are usually those for whom none of the aforementioned arguments against prosecution apply. They are chosen not because they are the most deserving of punishment, but because their case would be less costly than others, because their cooperation is not required to retrieve dangerous drugs from the market, and so on.

Even when it is decided that prosecution is warranted, the decision will usually be to convict the corporation while leaving the guilty individuals within it unpunished.¹⁶⁰ The internal secrecy of large organizations makes this inevitable.¹⁶¹ Moreover, in an organizational context it is always possible for every guilty individual to blame someone else in such a way as to create the impression that no individual is to blame (*X* says he was following *Y*'s instructions, *Y* says that *X* misunderstood instructions she had passed down from *Z*, *ad infinitum*). Even if such diffused accountability is not the reality, the prosecution will be hardpressed to prove otherwise. Many corporations present to the outside world a picture of diffused accountability for law observance, while ensuring that lines of responsibility are in fact clearly defined for internal law compliance purposes.¹⁶² Companies have two kinds of records: those designed to allocate fault (for internal purposes), and those for obscuring fault (for presentation to the outside world). In the face of this smokescreen to protect guilty individuals, prosecutors often have little choice but to indict only the corporation.

In the unusual cases in which individuals are called to account, they are rarely the persons most deserving of punishment. Some (at

¹⁵⁹ See Braithwaite, *Transnational Corporations and Corruption: Towards Some International Solutions*, 7 INT. J. SOC. L. 125 (1979).

¹⁶⁰ See, e.g., *Developments in the Law*, *supra* note 10, at 1248-49.

¹⁶¹ See Fisse, *supra* note 13, at 371-73.

¹⁶² See J. BRAITHWAITE, *supra* note 28, chs. 4, 9.

least three) transnational pharmaceutical companies have "vice-presidents responsible for going to jail."¹⁶³ Lines of accountability are drawn in the organization so that if someone's head must go on the chopping block, it will be that of the vice-president responsible for going to jail. This person takes the (very slight) risk in return for promotion to vice-president, and undoubtedly a period of faithful performance in the role would be rewarded by a sideways shift to a safe vice-presidency. This, of course, is only the most blatant manifestation of a wide array of more subtle strategies which corporations have for buying off scapegoats.¹⁶⁴ The selectivity which operates from the prosecutor's end also has little to do with desert. With white-collar crime, it is common that the only witnesses are themselves implicated in the offense. Guilty individuals therefore must be promised immunity from prosecution (or a favorable plea bargain) in order to entice them to testify against their superiors. A Justice Department prosecutor once lamented to the author that working upwards through the organization presents the danger that some of the most blameworthy individuals of all, at middle levels of the organization, will be given immunity in the struggle to reach the powerbrokers at the top. Ogren has observed: "It is no surprise that government witnesses to many fraud cases include the sleazy, the corrupt, and the guilty who were not indicted, a demonstration of the price the government must pay to prosecute its prime targets."¹⁶⁵

For all of the reasons which have been sketched above, most guilty white-collar criminals are never prosecuted even after they become suspects. This will always be the reality, even though we can do much to step up the prosecution of white-collar criminals. Paradoxically, the arguments for doing deals which include immunity from prosecution are typically most compelling in those types of cases which the public see as most deserving of punishment (crimes which threaten the lives of consumers). Second, the bigger the case, the more likely that it will be so complex as to render the costs of prosecution prohibitive. Third, the more ruthless and powerful the criminal, the greater the willingness and the capacity consciously to contrive complexity into the case. All this is part of a more general theorem of criminal justice: *Where desert is greatest, punishment will be least*. Empirical work on system capacity with respect to common crime suggests that those locations where crime is most wide-

¹⁶³ *Id.* ch. 9.

¹⁶⁴ Elzinga and Breit point out that one of the reasons for opting for fining corporations rather than individuals is that corporations may find it cheap to make side payments to "bribe" executives to accept individual liability. K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 133 (1976).

¹⁶⁵ Ogren, *The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White-Collar Crime*, 11 *AM. CRIM. L. REV.* 959, 974 (1973).

spread and serious are precisely the locations where the system resorts to leniency in order to keep cases moving and avert system overload.¹⁶⁶ In the rare cases where individual white-collar criminals are brought to justice, systematic forces make it unlikely that these will be the most blameworthy individuals.

It has been argued here that if just deserts were to work in practice, there would be many more white-collar criminals in prison than common criminals. Putting aside all the other factors which make this impossible, cost alone would prevent any government from processing all the complex cases which would be required to make the majority of our prisoners white-collar criminals. It is not simply that no matter how hard we try consistently to administer just deserts, we can only ever imperfectly achieve the goal. Rather, identifiable structural reasons will cause *any* attempt to administer just deserts to produce precisely the opposite effect: the locations in space, time, and in the class structure where desert is least become the locations where punishment is greatest.¹⁶⁷ Kantian retributivism is a philosophical theory which "may be formally correct (i.e., coherent, or true for some possible world) but materially incorrect (i.e., inapplicable to the actual world in which we live)."¹⁶⁸

VIII. INCOMPATIBILITIES BETWEEN PROPORTIONALITY AND OTHER VALUED GOALS

"Severity of punishment should be commensurate with the seriousness of the wrong," von Hirsch tells us.¹⁶⁹ Von Hirsch does not confront the implications of this bald assertion. Harm done and culpability are defined as the two key determinants of the "seriousness of the wrong." While rank orderings of harm (stealing \$1,000 is worse than stealing \$100 is worse than stealing \$10) and of culpability can be constructed without great difficulty, there is no unique non-arbitrary way to coalesce

¹⁶⁶ See Nagin, *Crime Rates, Sanction Levels, and Constraints on Prison Population* 12 L. AND SOC'Y REV. 341 (1978); Pontell, *Deterrence: Theory Versus Practice*, 16 CRIMINOLOGY 3 (1978); Pontell, *Deterrence and System Capacity: An Ecological Analysis of Crime, Punishment and Court Caseloads* (revised version of paper to American Society of Criminology Meeting, Philadelphia, 1979).

¹⁶⁷ It is also true, of course, that white-collar criminals who are convicted get more lenient sentences than common criminals whose crimes do less harm. See ILLEGAL CORPORATE BEHAVIOR, *supra* note 103, at 109-47; M. SAXON, *supra* note 94, at 30-65. Hagan, *et al.* have shown empirically that districts where white-collar criminals are brought to justice least are those where convicted white-collar criminals receive the heaviest sentences. The interpretation of this finding was that in federal districts which proactively hunted white-collar criminals, deals had to be offered to guilty insiders. This lowers the average sentences for white-collar criminals. See Hagan, Nagel, Burnstein & Albonetti, *The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts*, 45 AM. SOC. REV. 802 (1980).

¹⁶⁸ J. MURPHY, *supra* note 35, at 103.

¹⁶⁹ A. VON HIRSCH, *supra* note 4, at 66.

the two rank orders into a single overall ranking of seriousness. Even if this single ordering of seriousness is obtained, there is no unique non-arbitrary way of translating it into recommendations for the absolute level of sentences.¹⁷⁰ Certainly stealing \$1,000 deserves more punishment than stealing \$100, but does it deserve ten times as much, twice as much, or what? And if it should be ten times, would it be ten years incarceration versus one year, or ten months versus one month?¹⁷¹

Although von Hirsch is exceedingly vague about what "commensurate" or proportional to the wrong should mean, can we imagine any penalty short of revoking the corporation's right to sell drugs which would be commensurate to the harm caused by the fraud and deceit of a thalidomide disaster? Given what we know about how disapproving the community feels toward corporate crime, there may be many situations where the deserved monetary or other punishment bankrupts the company. The community then cuts off its nose to spite its face. The company loses its capacity to compensate victims, unemployment worsens, startled shareholders lose their life's savings, whole communities might lose an industry which is their economic base. The utilitarian has no problem in averting results such as these when they are patently not in the interests of the greatest happiness for the greatest number.¹⁷² Adherents to just deserts, on the other hand, will either have to abandon their principles or go down with the ship.

At the other extreme, just deserts can imply a corporate sentence which is far too lenient for effective deterrence. Consider an accidental oil spillage which is discovered in time to prevent any significant pollution. If there is no harm done and if the corporation was only minimally negligent in taking steps to prevent the violation, then the penalty "commensurate with the seriousness of the wrong" might be a small fine. The utilitarian analysis of the same offense, however, might be

¹⁷⁰ Kleinig would claim to have devised a non-arbitrary basis for the absolute levels of punishments. J. KLEINIG, *PUNISHMENT AND DESERT* 115 (1973). His analysis, however, depends on the (arbitrary) assumptions that the worst crime possible deserves the heaviest morally acceptable punishment, and that the least serious crime possible (whatever that is) deserves the lightest punishment possible. In abstract, I might see no moral objection to life imprisonment. Nonetheless, my arbitrary view might be that no crime committed in the past has ever deserved life imprisonment.

¹⁷¹ This very intractability of a non-arbitrary shift from ordinal to ratio scaling of punishments explains the attractiveness to retributivists of letting public opinion determine absolute levels of punishment. See Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 613 (1978).

¹⁷² Of course, making this utilitarian judgment could be complex and difficult when companies are bidding down legal and regulatory standards by threatening plant shut-downs and the shifting of investment to countries with a climate of regulatory permissiveness. While utilitarianism provides broad principles for balancing the policy considerations, different utilitarians may reach different policy conclusions because of the conflicting nature of these considerations.

that this same minimal negligence is precisely what causes many major oil spills and that a small fine is insufficient because the costs to the company of further checks and balances to reduce risks of spillage are high while the chances of being caught at this kind of minimal negligence are low. If, for example, the probability of being caught is only one in twenty, and the cost of preventive systems to the company is a million dollars, the rational company would not put these systems in place unless a fine exceeded \$20 million. To the follower of just deserts, the \$20 million fine would not be deserved: to the utilitarian, it would be necessary. Moreover, while the utilitarian would advocate a heavier fine for a larger company (\$20 million would be to Exxon as a \$20 traffic ticket to a small company), this would not seem to be possible if fidelity is to be maintained to the principle that the punishment be commensurate with the seriousness of the wrong.¹⁷³

IX. BACK TO UTILITARIANISM

We have seen that at critical points just deserts and utilitarianism imply quite different sentencing policies towards white-collar crime. This article has attempted to show that the choice between the two principles is really a choice between utilitarianism and a hypocritical commitment to just deserts, because just deserts in practice can only increase injustice. By the same token, however, is not a commitment to utilitarianism hypocritical? After all, it was justifiable disillusionment concerning the attainability of the utilitarian goals of deterrence, rehabilitation, and incapacitation which fueled the flight to desert. The difference is that whereas our attainment of utilitarian goals is very imperfect, the quest for just deserts is worse than imperfect; it is counterproductive. Social structural realities allow us to impose desert only when desert is least deserved. Through adopting justice as our goal, we increase injustice.

Certainly utilitarian endeavors can also be counterproductive. Rehabilitative programs can do more harm than good. Across the board, however, the empirical evidence would seem to suggest that rehabilitative programs do about as much good as harm, having an average impact on crime of roughly nil.¹⁷⁴ Within limits, deterrence¹⁷⁵ and incapacitation¹⁷⁶ can have modest, albeit discouragingly modest, positive effects in reducing common crime.

¹⁷³ Von Hirsch seems to favor punishments which would not take account of the means of the offender. See A. VON HIRSCH, *supra* note 4, at 147. It is not clear, however, whether his position with individuals would generalize to corporations.

¹⁷⁴ See the massive review of empirical evidence in D. LIPTON, *supra* note 2.

¹⁷⁵ See reviews cited *supra* note 1.

¹⁷⁶ See S. VAN DINE, *supra* note 3.

To say that just deserts defeats its own purposes, whereas utilitarianism has very limited success in achieving its purposes, is to offer only faint praise for utilitarianism. It also evades the question of how profound is the failure of utilitarianism in achieving justice. The utilitarian can no more fill the prisons with white-collar criminals than can the retributivist. The utilitarian, however, realizing that his utilitarian goals are not being achieved by putting common criminals in prison, can set the common criminals free. A more equitable criminal justice system can be as readily attained by being less punitive to the powerless as it can through increased punitiveness toward the powerful. The desert philosopher cannot accept this, since those who deserve to be punished by imprisonment should be so punished. So the utilitarian has more latitude. He is free to conclude that crime prevention will be no worse if, instead of sending most common criminals to prison, they are given "community treatment" or less punitive deterrents such as community work orders and fines. The utilitarian can also quite readily set upper limits on punishments to ensure that in overzealous attempts to rehabilitate, selected offenders do not have their liberty interfered with for periods so excessively long as to make a mockery of equity as an important sentencing consideration.¹⁷⁷ By doing this, the utilitarian can accept equity (one utilitarian goal)¹⁷⁸ as a constraint on the pursuit of crime prevention (another utilitarian goal).

The utilitarian, applying the principle of parsimony¹⁷⁹ to the punishment of both common and white-collar criminals, will produce a more equitable criminal justice system than the retributivist who, inevitably, applies desert successfully to the poor and unsuccessfully to the rich. In saying that the utilitarian can apply the principle of parsimony to the punishment of white-collar criminals, I am not suggesting that the utilitarian should accept the level of leniency currently proffered to white-collar criminals. On the contrary, by punishing more white-collar criminals more severely, both the goals of preventing white-collar crime

¹⁷⁷ Norval Morris *supra* note 146, at 60, 73-80, has advanced a desert-based rationale for an upper limit on the severity of punishment for each given type of offense. A utilitarian can quite happily adopt Morris's suggestion for reasons other than desert. Recognizing that crime prevention programs can at best have modest impacts, the utilitarian might deem it correct to put an upper limit on the great harm that can be done to the one for a minimal benefit to the many. Moreover, many rule utilitarians believe that consistent adherence to equity is in the interests of the greatest happiness for the greatest number, and that a ceiling must therefore be placed on the possibilities for unequal treatment of convicted criminals.

¹⁷⁸ One must remember that equality has a utilitarian justification. Utilitarians generally assume, for example, that the marginal utility of a dollar taken from a rich person is less than that of the same dollar given to a poor person.

¹⁷⁹ Morris has articulated the principle of parsimony as "[t]he least restrictive—least punitive—sanction necessary to achieve defined social purposes should be chosen." N. MORRIS, *supra* note 146, at 60-61.

and reducing class injustice (by narrowing the punishment gap between rich and poor) can be enhanced. There are practical limits on how far the punishment of powerful criminals can be increased. If, however, the punishment of the powerless is sufficiently reduced, there is no reason why equality cannot be approached through stepping up the punishment of the powerful. The utilitarian is in the happy position of being able to tolerate convergence towards an egalitarian situation where both the rich and the poor are punished less than they "deserve."¹⁸⁰ Put another way, the utilitarian can countenance "mercy" for rich and poor alike, where mercy is, as defined by Alwynne Smart, the "imposition of less than the just penalty."¹⁸¹

To summarize, the utilitarian can accept reducing the punishment of common criminals down to the point to which the punishment of white-collar criminals can practically be raised. Because this policy would inevitably mean that everyone would be punished less than they deserved, it has to be unacceptable to retributivists. The only practical way of approaching equity, given the empirical realities of existing societies, is foreclosed to retributivists. Hence we have the irony: a necessary (though not sufficient) condition for equitable punishment is the abandonment of just deserts and a return to utilitarianism. Under the just deserts model, justice is sociologically impossible; under utilitarianism, it is at least possible.¹⁸²

Of course the utilitarian is concerned to increase the punishment of white-collar criminals above existing levels, not only to increase sentencing equality, but also to reduce white-collar crime. In fact, while the evidence supporting the efficacy of deterrence, rehabilitation, and incapacitation is weak with common crime, there is persuasive evidence that many types of white-collar crime can be effectively deterred, rehabilitated, and incapacitated.¹⁸³ White-collar criminals are more deterrable than common criminals because their crimes are more rational and calculating and because they have more of all of the things that can be lost through criminal justice sanctioning.¹⁸⁴ Defective standard operating

¹⁸⁰ Naturally, the utilitarian would not see it this way, because "desert" is simply not a meaningful concept to the utilitarian.

¹⁸¹ Smart, *Mercy*, 43 *PHILOSOPHY* 345, 355 (1968).

¹⁸² Some might prefer to say that utilitarianism can at best make equal non-justice possible, and that while this is superior to unequal non-justice, it is hardly satisfactory. In a complementary paper I have developed the reasons why the most important injustices in criminal policy are the structural ones based on wealth and power, while those of like offenders being treated differently—though important—are of lesser concern. Braithwaite, *Paradoxes of Class Bias in Criminal Justice*, in *BREAKING THE CRIMINOLOGICAL MOLD: NEW PREMISES, NEW DIRECTIONS* (H. Pepinsky ed., in press).

¹⁸³ For this argument in detail, see Braithwaite & Geis, *On Theory and Action for Corporate Crime Control*, 28 *CRIME & DELINQ.* (forthcoming issue, 1982).

¹⁸⁴ Some of the things of which affluent persons have more are: status, respectability,

procedures can more readily be rehabilitated than defective personalities.¹⁸⁵ Because white-collar crime depends on incumbency in legitimate roles in the economy, white-collar criminals can be incapacitated by prohibiting them from occupying these roles (e.g. the surgeon who does unnecessary surgery can be disbarred from the profession).

All of this would seem to open up another option to the defenders of just deserts. Given that utilitarian goals are achievable with white-collar crime but not so achievable with common crime, and given that just deserts is roughly attainable with common crime but unattainable with white-collar crime, why not adopt just deserts as the basis for sentencing common criminals and crime prevention as the goal in sentencing white-collar offenders? This is precisely what many judges do at the moment,¹⁸⁶ but it is a morally bankrupt escape route. Just deserts for the powerless, and comparative lenience for the powerful, is not just deserts at all. If just deserts means hearing the will of the people concerning how common crimes should be punished, while turning a deaf ear to the voice of the people with respect to the crimes of the powerful, then just deserts is a rationalization for ruling class justice.

X. AFTERWORD ON MIXED RETRIBUTIVIST STRATEGIES

It is possible to accept just deserts as one of several criminal justice goals. The question then becomes how apposite are my criticisms of just deserts to such mixed retributivist strategies. Three broad types of mixed strategies can be identified: those in which (1) utilitarianism provides the goals to be pursued, and desert provides constraints within which utilitarian pursuits must be contained; (2) desert is the goal, and utilitarian considerations are constraints; (3) desert and utilitarian goals are considerations to be weighed conjointly without either acting as a constraint upon the other.

Norval Morris has advanced an influential mixed retributivist strategy of the first type in which utilitarian goals are pursued so long as sanctions do not exceed the punishment deserved.¹⁸⁷ In the last section it was pointed out that such a position is not vulnerable to the critique

money, power, a job, and a comfortable home and family life. All of these can be lost through a criminal sanction.

¹⁸⁵ See Hopkins, *The Anatomy of Corporate Crime*, in TWO FACES OF DEVIANCE, *supra* note 147, at 214.

¹⁸⁶ One study found general deterrence to be the main concern reported by judges as guiding their sentencing of white-collar offenders. Mann, Wheeler & Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479 (1980). One wonders whether general deterrence would have been the major sentencing consideration if common crime had been the focus of the study.

¹⁸⁷ N. MORRIS, *supra* note 146, at 58-84.

advanced in this article.¹⁸⁸ On the other hand, a mixed strategy which also imposes a desert-based lower limit on the range of utilitarian choices most certainly is. If we say that all crimes above a given level of seriousness must be given at least a predetermined level of deserved punishment, then we are headed for endemic inequity. This is because, as we have seen, practical exigencies will preclude adherence to this prescription with white-collar crime, while we can approach it, in a rough and ready fashion, with detected common crime.

By setting just deserts as the goal, but constraining its pursuit with utilitarian considerations, some of the criticisms of this paper seem avoidable. Consider the view that the deserved punishment will be imposed so long as doing so does not pose a threat to the public interest above a defined threshold. This would enable us to excuse dropping charges against the pharmaceutical company whose cooperation is required to recall dangerous drugs from the market. It would excuse a lenient penalty against a company which would be bankrupted were the deserved punishment to be imposed. And it would excuse holding a man in prison beyond the term deserved because he is extremely dangerous, or because, given a few more months of treatment, he would be rehabilitated. The irony of this mixed strategy, as the above examples illustrate, is that it results in even heavier average sentences for common criminals than would follow from a pure retributivist strategy and even lighter sentences for white-collar criminals.¹⁸⁹ It is inconceivable that white-collar criminals will be kept in prison beyond the deserved term to complete their "rehabilitation." Such practices are not only conceivable with common criminals; in the past they have been pandemic.

Conversely, while the power of white-collar criminals in controlling vital productive processes will often make it seem in the public interest to administer less than the deserved punishment, there will be no such rationale for undercutting the deserts of common criminals. As von Hirsch has pronounced:

[R]eleasing an offender early on rehabilitative grounds presents much the same questions as releasing him early on the basis of a prediction that he is not dangerous. Perhaps one could imagine a treatment program that would cure the serious offender of his criminal tendencies in a few weeks.

¹⁸⁸ See *supra* note 177.

¹⁸⁹ The exception to this pattern is illustrated by the oil spill example discussed earlier, in which the culpability of management is not great, but because of the great harm involved and the difficulty of setting a penalty large enough to deter a large company, utilitarianism demands a higher fine than retributivism. The problem exists more in theory than in practice, since more than nominal fines are rarely imposed for pollution offenses. Moreover, the public opinion survey evidence reviewed earlier suggests that, the intentionality of management notwithstanding, pollution penalties could be massively increased on *retributive* grounds because of public perceptions of the magnitude of the harm.

But releasing him as soon as he completes his cure—like releasing him immediately if he is predicted not to offend again—remains objectionable as disproportionately lenient in relation to the gravity of the crime for which he was convicted.¹⁹⁰

Hence, a mixed strategy whereby desert is the goal and utilitarianism the constraint will result in even wider injustices than follow from unadulterated retributivism.

Finally, the implications of the present critique for a mixed strategy in which desert is considered conjointly with other goals, without any of these being constraints, depends entirely on how much weight is given to desert in such deliberations. If desert is a relatively minor consideration, and the main concerns are to keep crime within reasonable bounds while minimizing disparities between the treatment of rich and poor, then we might see criminal justice practices quite similar to the principle of parsimony advocated in the last section. On the other hand, if desert reigns as the pre-eminent rationale, then the critique will remain substantially applicable.

In summary, Norval Morris' mixed strategy of limiting the role of desert to the setting of an upper constraint on the pursuit of utilitarian goals¹⁹¹ is not susceptible to the critique in this article. The critique is, however, even more strongly applicable to a policy of desert as the goal and utilitarianism as a constraint than it is to a policy of pure retributivism.

¹⁹⁰ A. VON HIRSCH, *supra* note 4, at 129.

¹⁹¹ N. MORRIS, *supra* note 146.