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# PROGRESSION IN THE AGE OF RECESSION: RESTORATIVE JUSTICE AND WHITE- COLLAR CRIME IN POST-RECESSION AMERICA

## INTRODUCTION

In 1960, Bernard Lawrence Madoff started a small investment firm on Wall Street, trading large quantities of penny stocks for over-the-counter businesses.<sup>1</sup> It was a legitimate and successful venture.<sup>2</sup> Shortly thereafter, he began a side project: managing the money of friends and family.<sup>3</sup> Though his system was a mystery, it never lost capital, or at least not at first.<sup>4</sup> Word got out about Madoff's success and soon the investments came flying in.<sup>5</sup> For years the circle of investors expanded, providing an exponential increase in cash flow.<sup>6</sup> Madoff's success continued, until he encountered one slight problem—he started losing money.<sup>7</sup> To compensate for his losses, he took money from new investors and used it to fund the returns of older accounts.<sup>8</sup> This practice continued until the financial crisis of 2008, when countless people lost their investments as a result of plummeting housing prices and the collapse of Lehman Brothers Holdings Inc. (and substantial degeneration of four other major U.S. investment banks).<sup>9</sup> This prompted scores of customers to withdraw their investments.<sup>10</sup> Despite this global catastrophe, Madoff's firm appeared to remain strong.<sup>11</sup> For many other firms, they were unable to match these withdrawals, and the system collapsed, leaving numerous clients in a state of financial ruin.<sup>12</sup> It was at this point Madoff finally admitted to his loved ones that the entire institution was nothing but a Ponzi scheme.<sup>13</sup> Madoff's sons reported him to

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1. Julie Creswell, *The Talented Mr. Madoff*, N.Y. TIMES, Jan. 25, 2009, at BU1.

2. *Id.*; Liaquat Ahamed, *Leading the Blind*, N.Y. TIMES, May 15, 2011, at BR30.

3. Ahamed, *supra* note 2.

4. *Id.*

5. *Id.*

6. *See id.*

7. *Id.*

8. *Id.*

9. Jeff Holt, *A Summary of the Primary Cause of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper*, 8 J. BUS. INQUIRY 120 (2009); Geoff Williams, *Anniversary of the Great Recession: What's Changed, What Hasn't*, US NEWS AND WORLD REPORT (Sept. 17, 2013), <http://money.usnews.com/money/personal-finance/articles/2013/09/17/anniversary-of-the-great-recession-whats-changed-and-what-hasnt>.

10. James Bandler & Nicholas Varchaver, *How Bernie Did It*, CNN MONEY (Apr. 30, 2009, 3:45 PM), <http://money.cnn.com/2009/04/24/news/newsmakers/madoff.fortune/>.

11. *Id.*

12. *Id.*; Robert Chew, *Madoff's Victims: Finding Meaning in the Devastation*, TIME (Dec. 30, 2008), <http://content.time.com/time/business/article/0,8599,1869043,00.html>.

13. David Voreacos & David Glovin, *Madoff Confessed \$50 Billion Fraud Before FBI Arrest (Update 3)*, BLOOMBERG (Dec. 12, 2008, 3:29 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYzclQY1HkVE>.

the federal authorities, which brought retribution to Madoff, shame to his family, and nothing to his victims.<sup>14</sup>

Madoff swindled thousands of investors out of tens of billions of dollars in what has come to be known as one of the largest, if not the largest, financial fraud scandals in history.<sup>15</sup> He did not go to trial, but rather pled guilty to eleven counts of fraud, money laundering, perjury, and theft, resulting in the maximum sentence of 150 years in federal prison.<sup>16</sup> He was sentenced on June 29, 2009.<sup>17</sup> He was 71 years old at the time.<sup>18</sup> How is justice served when Madoff will likely die within the first 30 years of his sentence?

The story of Madoff's Ponzi scheme, arrest and subsequent conviction is meant to illustrate the offender-oriented nature of the criminal justice system, specifically within the scope of white-collar crime.<sup>19</sup> While the victims are acknowledged, they largely serve to reinforce the depravity of the offender's actions and inspire an impassioned call for retaliation. The story demonstrates the inherent drawback of American criminal justice: the goal to punish is primarily driven by the need for retribution.<sup>20</sup> This motivation funnels the means of punishment into a rather narrow set of solutions that emphasize increasingly strict measures like "mandatory minimum sentences, broader prosecutorial discretion . . . [and] the demise of parole."<sup>21</sup> This system is problematic because, aside from possibly providing cathartic relief, this system does little to benefit the victims.<sup>22</sup>

Just as criminals deserve to be punished, victims deserve to be made whole. Through restorative justice, not only are these two goals achieved, but the community at large benefits as well.<sup>23</sup> With white-collar crimes in particular, victims suffer a specific type of harm that is arguably more susceptible to restitution than victims of other crimes.<sup>24</sup> Additionally, white-collar crimes can harm people of varying socioeconomic statuses, further

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14. *Id.*

15. Bandler & Varchaver, *supra* note 10.

16. *Id.*; Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 29, 2009), <http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all>.

17. Henriques, *supra* note 16.

18. *Id.*

19. Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313, 323 (2006).

20. Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1303 (2000).

21. *Id.* at 1304.

22. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 21 (1999).

23. Patricia Hughes & Mary Jane Mossman, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses*, 13 WINDSOR REV. LEGAL & SOC. ISSUES 1, 81 (2002).

24. See Katherine B. Chiste, *Retribution, Restoration, and White-Collar Crime*, 31 DALHOUSIE L.J. 85, 108-09 (2008).

suggesting that a greater emphasis be placed on restoring the victims rather than punishing the offender.<sup>25</sup>

Part I of this Note explores the continuing struggle towards a universal definition for white-collar crime. It also discusses the steps that have been taken in addressing white-collar crime from both a judicial and legislative perspective. Lastly, it explains post-recession changes to regulatory and prosecutorial policy as it relates to white-collar crime and financial service institutions as a whole. Part II focuses on the increasing popularization of restorative justice around the world, as well as its relative absence in the field of white-collar crime. Part III argues the benefits of employing a restorative framework within the world of white-collar crime and the advantages it has over traditional criminal prosecution. Part IV argues the drawbacks of introducing restorative justice to white-collar crime. It analyzes the various complications in cases involving insufficient restitution, vengeful victims, and remorseless offenders. Part V proposes a solution, using the issues raised in Parts III and IV to create a theoretical framework for restorative justice's application to white-collar crime. The ultimate proposal is to bring victims, offenders, and the community together to decide how to balance judicial sanctions and restorative practices. This Note concludes that there are simply too many questions to answer and too many variables to address at this point in time. Therefore, this Note is meant to provide a workable foundation on which to build, one that works in tandem with, rather than independently of, the criminal justice system. If nothing else, this Note hopes to inspire scholars to think differently about how to approach white-collar criminal offenders in a struggling economy.

## I. WHITE-COLLAR CRIME: A BUMPY JOURNEY

### A. WHITE-COLLAR CRIME DEFINED

In 1981, the United States Department of Justice defined white-collar crime as:

Nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation.<sup>26</sup>

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25. Madoff's victims are a perfect example of this. They run the gamut "from an out-of-work actress to the owners of the New York Mets." Diana B. Henriques, *A Lasting Shadow*, N.Y. TIMES, Dec. 11, 2011, at BU1.

26. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (2d ed. 1981).

This is the closest America has come to providing an official definition since Edwin H. Sutherland first coined the term “white-collar crime” in 1939.<sup>27</sup> Despite the fact that this description has held strong for the last thirty-three years (barring a slightly modified version of this definition by the Federal Bureau of Investigation in 1989),<sup>28</sup> it has come under fire for being too limiting, as non-entrepreneurial, professional or semi-professional individuals are capable of committing white-collar crimes.<sup>29</sup> Despite the limitations of offender characterization, the scope of offenses covered is quite broad, including, but not limited to, “business crime, consumer fraud, . . . tax violations, bankruptcy fraud, [and] insurance fraud.”<sup>30</sup>

While the movement towards a universally accepted definition of white-collar crime has been slow, the topic has seen remarkable development in scholarship, legal practice, and even legislation.<sup>31</sup> Many law firms claim to be specialists in white-collar criminal defense, even though its definition varies across firms.<sup>32</sup> As for legislation, the term “white-collar crime” has begun to appear in newly enacted laws—the most significant of which is in the Sarbanes-Oxley Act (SOX), a federal law passed in 2002 increasing the regulation and punishment of illicit corporate conduct.<sup>33</sup> These developments suggest a movement towards a universal definition of white-collar crime, though at this point it is difficult to predict when that time will come.

## B. THE SENTENCING HISTORY OF WHITE-COLLAR CRIME

Considering the vast scope of offenses covered under white-collar crime, the potential for harm suffered by victims can vary widely in both kind and degree. For example, the range of harm suffered by the victims of the Madoff scandal was contingent on the size of one’s investment and which accounts Madoff decided to fund.<sup>34</sup> This means that while some lost their entire life savings, others actually came out ahead.<sup>35</sup> However, when examining the total harm suffered, commentators believe that the overall impact of white-collar crime surpasses the impact of other offenses.<sup>36</sup> John

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27. J. Kelly Strader, *The Judicial Politics Of White Collar Crime*, 50 HASTINGS L.J. 1199, 1205 (1999).

28. CYNTHIA BARNETT, U.S. DEP’T OF JUST., *THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA* (2000).

29. Strader, *supra* note 27, at 1208.

30. *Id.*; BUREAU OF JUST. STATISTICS, *supra* note 26.

31. Stuart P. Green, *White Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002: The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 1 (2004).

32. *Id.* at 13–14.

33. *Id.* at 22; Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at C5.

34. Henriques, *supra* note 25.

35. *Id.*

36. Strader, *supra* note 27, at 1266.

Braithwaite, an English criminologist who is at the forefront of restorative justice scholarship, argues that the objective harm inflicted by white-collar crime is greater than the objective harm inflicted by other crimes.<sup>37</sup>

It is first important to note that judicial treatment of white-collar crime has taken a turn for the draconian over the years. Prior to 1987, white-collar criminals were given considerable leniency, with offenders frequently being granted immediate probation.<sup>38</sup> In 1984, however, the United States Sentencing Commission was created.<sup>39</sup> The Commission put in place a series of Sentencing Guidelines meant to increase the severity of punishment for various crimes, placing a particular emphasis on white-collar crime.<sup>40</sup> Thus, from 1987 to the early 2000s, white-collar criminal offenders were increasingly sent to prison.<sup>41</sup> A major turning point for sentencing outcomes came in response to the high-profile accounting scandals of 2001 and 2002 concerning Enron, WorldCom, Arthur Andersen, and other major companies, which led to the passing of SOX.<sup>42</sup> Title IX of the Act creates more severe sentencing practices for white-collar crimes, such as increasing maximum penalties.<sup>43</sup> This effort was intended to deter potential future offenders.<sup>44</sup>

The irony in all of this is that many judges treat victims of white-collar crime with less sympathy than victims of non-white collar crime, which has had an impact on sentencing practices.<sup>45</sup> This is because many judges think about crime in terms of physical danger, in which case those who inflict economic harm through deception are doing less damage than those who inflict harm through violence or under threat of violence.<sup>46</sup> This has led many to argue that despite increased legislative measures, many white-collar criminals are not being given their just deserts, resulting in continued corporate misconduct.<sup>47</sup> Some commentators have proposed a solution in the form of mandatory minimum sentences imposed by Congress, arguing it would increase deterrence while decreasing sentencing disparities amongst offenders convicted of the same crime.<sup>48</sup> Such thinking falls in line with that

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37. John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 743 (1982).

38. *Are We Really Getting Tough on White Collar Crime?: Hearing Before the Subcomm. on Crime and Drugs, S. Comm on the Judiciary*, 107th Cong. 235 (2002) (statement of Frank O. Bowman, III, M. Dale Palmer Professor of Law at Indiana University School of Law).

39. John D. Easterhay, "Street Justice" for Corporate Fraud—Mandatory Minimums for Major White-Collar Crime, 22 REGENT U. L. REV. 135, 140 (2009–2010).

40. Bowman, *supra* note 38, at 238.

41. *Id.*

42. Easterhay, *supra* note 39, at 137–38.

43. *Id.* at 138.

44. *Id.* at 143.

45. Strader, *supra* note 27, at 1267.

46. *Id.*

47. Easterhay, *supra* note 39, at 137–38.

48. *Id.* at 138, 165, 169; Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 784–85 (2006).

of the general public, which finds its condemnation of white-collar criminals at its peak following major scandals like Enron and Madoff.<sup>49</sup> The problem is that disconnect between public perception, judicial customs, and legislative actions makes it impossible to determine the general attitude towards white-collar crime. Taking a restorative justice approach to white-collar crime limits the discretionary tactics of the courtroom and the increasingly harsh actions of the legislature, all while lending credence to public values.

### C. WHITE-COLLAR CRIME IN THE AGE OF RECESSION

The collapse of major investment firms and the housing market in 2007 and 2008 has had a lasting and debilitating impact on the economy.<sup>50</sup> Reduced capital and commercial investment has resulted in widespread unemployment and struggling corporations.<sup>51</sup> Ever since the recession hit, white-collar crime has been subject to greater public, media, and judicial scrutiny, which has exposed a dense world of corporate crime.<sup>52</sup> This has raised several questions that have yet to be answered: Did white-collar crime contribute to the economic collapse? Has there been an increase in white-collar crime since the collapse or does it only appear that way because the world is paying closer attention?<sup>53</sup> What is undeniable is that white-collar crime has garnered considerable attention in recent years.<sup>54</sup> What is odd is that despite the increased awareness, prosecution rates have dropped by 45.2 percent over the last decade.<sup>55</sup> Considering the devastating impact the actions of large corporations have had on the economy, it is interesting that they are subjected to less judicial discipline now than they were before the recession.

However, this is not to say that the government has failed to respond to this trend of troublesome corporate conduct. In July, 2010 Congress approved the Dodd-Frank Act, a bill meant “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive

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49. Carl Emigholz, *Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement*, 58 RUTGERS L. REV. 583, 585 (2006).

50. Binyamin Appelbaum, *Recession's Lasting Effects*, N.Y. TIMES (Mar. 23, 2012, 1:18 PM), <http://economix.blogs.nytimes.com/2012/03/23/recessions-lasting-effects/>.

51. Josh Bivens, *A Major Cause of Persistent Unemployment*, N.Y. TIMES (Feb. 6, 2013), <http://www.nytimes.com/roomfordebate/2013/02/06/are-government-layoffs-the-problem/government-layoffs-are-a-major-cause-of-persistent-unemployment>.

52. Ellen S. Podgor, *White-Collar Crime and the Recession: Was the Chicken or Egg First?*, 2010 U. CHI. LEGAL F. 205, 205–06 (2010).

53. *Id.* at 207–08.

54. *Id.* at 205–06.

55. Walter Hamilton, *FBI Recommending Fewer White-Collar Crime Cases*, L.A. TIMES (Sept. 24, 2013, 11:57 AM), <http://www.latimes.com/business/money/la-fi-mo-fbi-recommending-fewer-whitecollar-crime-cases-20130924,0,458121.story>.

financial services practices.”<sup>56</sup> The bill focused on providing sweeping regulations for American financial service institutions, while only minimally expanding the scope of criminal sanctions.<sup>57</sup> Most of the expansion was concerned with criminalizing conduct that was not criminal prior to the bill’s passage.<sup>58</sup> For example, Section 731 of the Dodd-Frank Act criminalized “acting as a swap dealer . . . unless registered as such with the [Securities and Exchange] Commission.”<sup>59</sup> Unlike SOX, these criminalization sections are for regulatory rather than retributive purposes.<sup>60</sup>

While these reforms carry issues of their own (specifically with regards to constitutionality and abstract language), the Dodd-Frank Act signals a shift from overly harsh sentencing practices towards deterrence by regulation.<sup>61</sup> If looked at in tandem with the reduction in prosecution of white-collar crime, one notices a greater opportunity to explore a restorative paradigm. The prospect of a reduced sentence may encourage offenders to plead guilty rather than pursue long and expensive trials.<sup>62</sup> In turn, this would bring faster relief to victims, which would help mitigate the long-term impact of the offender’s actions. In an economy where people everywhere are struggling to stay one step ahead of their mortgage payments, taking advantage of these rare openings can truly make a difference.

## II. RESTORATIVE JUSTICE: A BURGEONING PRACTICE BASED ON ANCIENT IDEALS

### A. RESTORATIVE JUSTICE DEFINED

The concept of restorative justice actually rests on ancient models of conflict resolution that placed an emphasis on offender/victim

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56. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

57. Damiean Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL ST. J. (July 16, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704682604575369030061839958>; see also Tiffany M. Joslyn, *Criminal Provisions in the Dodd-Frank Wall Street Reform & Consumer Protection Act*, THE FEDERALIST SOCIETY (Dec. 10, 2010), <http://www.fed-soc.org/publications/detail/criminal-provisions-in-the-dodd-frank-wall-street-reform-consumer-protection-act>.

58. Joslyn, *supra* note 57.

59. *Id.*

60. *Id.*

61. *Id.* This is not to say that white-collar criminals are no longer excessively punished, as evidenced by Bernard Madoff (150 year sentence) and Allen Stanford (110 year sentence). Walter Pavlo, *Allen Stanford Sentenced to 110 Years in Prison*, FORBES (June 14, 2012, 1:12 PM), <http://www.forbes.com/sites/walterpavlo/2012/06/14/allen-stanford-sentenced-to-110-years-in-prison/>.

62. Laurie S. Kohn, *What’s so Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 544 (2010).



communication and forgiveness.<sup>63</sup> While the practice as it exists today varies greatly across countries, cultures, and circumstances, John Braithwaite perhaps provides the best definition of the core objective of restorative justice:

Restorative justice is a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process.<sup>64</sup>

This definition, however, is not only one of many, but also a definition provided merely by one individual. A more official definition of restorative justice was agreed upon at a Delphi forum in 1997 convened by Paul McCold: “Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.”<sup>65</sup> As Braithwaite points out, this definition is too vague with regards to restitution.<sup>66</sup> Healing, rather than being a central element of the definition, is merely implied, leaving the coming together of stakeholders an open-ended objective.<sup>67</sup> While Braithwaite’s definition omits key elements as well (such as apology and forgiveness), it places emphasis on communication between offender and victim and the healing that should come from it, which, for the sake of this Note, is more appropriate.<sup>68</sup>

In order for victim-offender communication to be effective in restorative justice, the needs of both victims and offenders must be addressed.<sup>69</sup> If restorative justice disproportionately favors the victims, then an important element of the system is lost: rehabilitation.<sup>70</sup> In order to achieve this goal, offenders “need to have their stereotypes and rationalizations . . . about the victim and the event challenged.”<sup>71</sup> This process can leave the offender with strong feelings of guilt, anger, and insecurity—all of which need to be managed rather than ignored.<sup>72</sup>

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63. Braithwaite, *supra* note 22, at 1–2.

64. John Braithwaite, *The Good Society: Restorative Justice and De-Professionalization*, 13 GOOD SOC’Y 28 (2006); Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL’Y & L. 142, 142 (2008).

65. Braithwaite, *supra* note 22, at 5 (quoting Tony Marshall).

66. *Id.* at 6.

67. *See id.*

68. *See id.*

69. *See* Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 393 (2007).

70. *See* Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1715 (2009).

71. HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 200 (1990).

72. *See id.*

Unfortunately, in light of the public's general disdain for white-collar criminals, giving offenders' needs the consideration required may prove difficult, as will be addressed in Part IV.

### B. EMPLOYMENT OF RESTORATIVE JUSTICE IN AMERICA

The United States has become increasingly active in alternative methods of conflict resolution over the past several decades. In 2011, it was reported that twenty-nine states recognize and encourage the use of restorative intervention in criminal cases.<sup>73</sup> Many of these states have actually recognized restorative justice through legislative action.<sup>74</sup> For example, Missouri has a statute that grants the court discretion to send felony offenders to restorative justice programs.<sup>75</sup> The California Penal Code has endorsed the use of "community-based corrections programs" to reduce recidivism ("a person's relapse into criminal behavior") rates, with restorative justice being listed as a possible solution.<sup>76</sup> Even the federal government has acknowledged this movement through legislation by authorizing the Attorney General to provide grants to states that seek to strengthen their juvenile justice systems through restorative justice.<sup>77</sup> While these statutes do little more than acknowledge the existence of these programs, this is still a remarkable development considering the modern restorative justice paradigm emerged as recently as the late 1970s.<sup>78</sup>

Restorative justice in America is largely applied in cases of juvenile crimes and other minor offenses.<sup>79</sup> The most popular form of intervention is through victim-offender mediation, with three hundred such programs in operation in the United States.<sup>80</sup> This method is particularly popular because it seeks to accomplish two essential goals: restitution and emotional healing.<sup>81</sup> Victims often claim being able to meet with the offender and express themselves is the most beneficial part of the process.<sup>82</sup> Other methods of intervention that are gaining traction in America are circles and family group conferencing.<sup>83</sup> While all three strategies stress

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73. Christopher D. Lee, *They All Laughed at Christopher Columbus When He Said the World Was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 537 (2011).

74. *See id.*

75. MO. REV. STAT. § 558.019 (2013).

76. CAL. PEN. CODE § 17.5 (Deering, LEXIS through 2014).

77. 42 U.S.C. § 3796ee (2012).

78. James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 243 (2004).

79. Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 240 (2000).

80. *Id.* at 268.

81. *Id.* at 270.

82. *Id.*

83. Coben & Harley, *supra* note 78, at 240.

communication and healing, each one is uniquely tailored to suit particular offenses.<sup>84</sup>

With so many different approaches, it is important to know which one is most appropriate for a given situation. Howard Zehr, a professor of restorative justice, provides a practical blueprint in the form of six questions: “[1.] Who has been hurt? [2.] What are their needs? [3.] Whose obligations are these? [4.] What are the causes? [5.] Who has a stake in this situation? [and 6.] What is the appropriate process to involve stakeholders in an effort to address causes and put things right?”<sup>85</sup> Such an approach may not be necessary to deal with minor offenses, but if one puts white-collar crime under the umbrella, with all of its nuances and complexities, having a manageable framework to adhere to is essential.

### C. EMPLOYMENT OF RESTORATIVE JUSTICE INTERNATIONALLY

#### i. The Revolutionary: New Zealand and Canada

While America has made great strides in the field of restorative justice, the programs that practice it employ methods derived from more developed programs in other countries, many of which embrace a democratic approach to conflict resolution.<sup>86</sup> Perhaps the most noteworthy specimen of this progression is New Zealand, a nation that has experienced considerable success with restorative justice, garnering widespread support from both the general public and law enforcement.<sup>87</sup> Internationally, New Zealand’s methods of restorative intervention have served as a model for programs in other countries, specifically in the practice of family group conferencing.<sup>88</sup> The system works by bringing together victim, offender, families, and supporters to determine a sanction for the offender that serves to both punish him/her as well as benefit all parties involved.<sup>89</sup> Driven by a desire to avoid criminal records and labeling, conferences emphasize repairing relationships between victims, offenders, and communities, and they often serve as trial and sentencing alternatives.<sup>90</sup> Even though the model was introduced rather recently (1989), it is now the primary juvenile justice system in the county.<sup>91</sup> New Zealand demonstrates how progressive ideas of societal repair can be more effective than traditional notions of retribution.

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84. *See id.* at 240–43.

85. Howard J. Vogel, *Healing the Trauma of America’s Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing*, 55 BUFFALO L. REV. 981, 1011 (2007).

86. Braithwaite, *supra* note 22, at 77.

87. *Id.*

88. *Id.* at 16–17.

89. Jennifer M. Cunha, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States*, 13 EMORY INT’L L. REV. 283, 286 (1999).

90. Kurki, *supra* note 79, at 273.

91. Coben & Harley, *supra* note 78, at 242.

Canada is similarly advanced in the area of restorative justice, adhering to a philosophy that seeks to rectify the “over-representation of aboriginal men and women in prisons.”<sup>92</sup> This has resulted in a restorative system that balances the offender’s past victimization with the current victim’s needs.<sup>93</sup> As in New Zealand, Canada’s restorative intervention programs generally deal with minor offenses, but there has been a movement towards extending the practice to include more serious crimes.<sup>94</sup> This growing popularization has resulted in legislative and judicial support for incarceration alternatives, with the Supreme Court of Canada now pushing for sentencing practices to incorporate restorative principles.<sup>95</sup> In the case of *R. v. Gladue*, a woman was charged with second-degree murder for stabbing her husband in the heart.<sup>96</sup> The case was ultimately reviewed by the Supreme Court, and while it determined that imprisonment was a reasonable punishment, the opinion encouraged sentencing judges to consider restorative values and the needs of the victims when making a decision.<sup>97</sup> This landmark case shows how powerful the impact of restorative justice has been on the Canadian judicial system.

It is important to note that despite Canada’s development in restorative justice’s far-reaching application to crime, it has been largely underutilized in cases of white-collar offenses.<sup>98</sup> This is due in part to Canada’s low prosecution rates for white-collar criminal offenders.<sup>99</sup> It is also due to the fact that corporate offenders may see restorative justice as an “escape valve.”<sup>100</sup> If they know how to manipulate the system, they can get away with their crimes without being properly punished.<sup>101</sup> This presents a very troublesome obstacle when applying restorative justice to white-collar crime, one that will be addressed in Part IV.

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92. Hughes & Mossman, *supra* note 23, at 18.

93. *Id.*

94. There currently exist two programs in Canada that handle serious crimes. One of them offers traditional techniques like mediation and reconciliation, with the added safety of a day treatment program. The other offers a more holistic approach, focusing on the needs of the parties to determine the best course of action. THE CANADIAN RES. CTR. FOR VICTIMS OF CRIME, RESTORATIVE JUSTICE IN CANADA: WHAT VICTIMS SHOULD KNOW (2011).

95. *R. v. Gladue*, [1999] 1 S.C.R. 688 (Can.); Hughes & Mossman, *supra* note 23, at 88. Court-mandated mediation in Canada started in 1974 when two men who were arrested for vandalizing 22 homes were ordered to meet with the owners of the vandalized properties and work out a settlement. Katherine B. Chiste, *The Origins of Modern Restorative Justice: Five Examples from the English-Speaking World*, 46 U.B.C. L. REV. 33, 58 (2013).

96. *Gladue*, 1 S.C.R. at 688.

97. *Id.*

98. Chiste, *supra* note 24, at 116.

99. *Id.*

100. *Id.* at 118.

101. *Id.*

## ii. The Unconventional: South Africa and Saudi Arabia

Restorative justice as applied in New Zealand and Canada was built on the idea that all parties involved should benefit, while other countries have developed the concept as one that emphasizes healing victims and the community. For example, following the collapse of the apartheid regime in South Africa in 1994, the South African Parliament enacted the Truth and Reconciliation Commission (TRC).<sup>102</sup> The TRC was meant to investigate and address the gross human rights violations that occurred under the oppressive rule of the regime.<sup>103</sup> This was accomplished by encouraging full disclosure by those who participated in the subjugation in return for amnesty.<sup>104</sup> Moreover, those who had been victimized were allowed to confront the offenders and express the ways in which the former was harmed by the latter's actions.<sup>105</sup> This approach has been touted by its chairperson, Archbishop Desmond Tutu, as a restorative justice process.<sup>106</sup>

While the TRC has been praised in restorative justice circles for being a success, some believe that granting amnesty cut against the fundamental idea of justice.<sup>107</sup> Amnesty was granted to those who met certain requirements, with the ultimate objective of ascertaining the truth.<sup>108</sup> This took power away from the victims, for if the offender was officially pardoned, no legal recourse could be taken against them.<sup>109</sup> Further distancing the victims from any sense of control was the creation of the Reparation and Rehabilitation (R&R) Committee, which was responsible for aiding a victim's recovery by requesting reparations from the government.<sup>110</sup> Effectively, this meant that the only punishment an offender endured was public condemnation.<sup>111</sup> Not only did this take the victim's needs out of the equation, but it also ran the risk of demonizing the offender, having an adverse effect on his/her reintegration into society.<sup>112</sup>

Where the TRC of South Africa made victims a more peripheral player in the process, some parts of the Middle East take a much more victim-

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102. See Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 ILSA J. INT'L & COMP. L. 41, 53-60 (2005).

103. *Id.* at 260.

104. *Id.*

105. *See id.*

106. Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 372 (1999).

107. *Id.*; Lin, *supra* note 102, at 68-69.

108. The requirements for each individual were that "[s]uch acts must have been committed in pursuit of a political objective; must have occurred before the cut-off date provided for in the Act; application must have been made before the deadline; and individuals were required to offer full disclosure to the Commission." Llewellyn & Howse, *supra* note 106, at 367.

109. *Id.* at 369.

110. *Id.* at 368.

111. *See id.* at 385-88.

112. *Id.* at 388.

oriented approach in alternative sentencing practices.<sup>113</sup> Countries like Iran and Saudi Arabia have in place a system, the law of *qisas*, where the victims of violent crimes are given the opportunity to determine the fate of the offender.<sup>114</sup> The victim is allowed one of three choices: they may forgive the offender, receive payment as compensation, or demand equivalent retaliation.<sup>115</sup> Interestingly, while the purpose of *qisas* is to encourage forgiveness, the name itself has come to mean “retaliation in kind.”<sup>116</sup> Still, with the emphasis being on reconciliation, it is argued that the law of *qisas* should serve as inspiration for the restorative justice movement.<sup>117</sup> This is not to say that victims should be allowed to “retaliate in kind.” Rather, they should have the power to decide whether to forgive the offender through restorative intervention or leave the offender in the hands of the criminal justice system.

#### D. RESTORATIVE JUSTICE’ S EMPLOYMENT IN WHITE-COLLAR CRIME

White-collar crime is considered particularly loathsome by the general public.<sup>118</sup> A 2010 study by the National White Collar Crime Center and the Bureau of Justice Assistance found that “[n]early one in four households was victimized by white collar crime within the previous year.”<sup>119</sup> As such, it has remained relatively untouched in the area of restorative justice, with the public stressing the importance of harsher and harsher punishments.<sup>120</sup>

### III. THE BENEFITS OF APPLYING A RESTORATIVE PARADIGM TO WHITE-COLLAR CRIME

#### A. INCREASES DETERRENCE AND REDUCES RECIDIVISM

Increased regulatory and sentencing guidelines may have little long-term effect on the white-collar criminal landscape. A criminology study determined that the threat of prison time fails to deter potential white-collar offenders from committing crimes.<sup>121</sup> It also concluded that prison

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113. Susan C. Hascall, *Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 35, 37 (2011).

114. *Id.*; CLARISA BENCOMO, HUMAN RIGHTS WATCH, THE LAST HOLDOUTS: ENDING THE JUVENILE DEATH PENALTY IN IRAN, SAUDI ARABIA, SUDAN, PAKISTAN, AND YEMEN 5, 7 (2008).

115. Hascall, *supra* note 113, at 37–38.

116. *Id.* at 56.

117. *Id.* at 78.

118. Braithwaite, *supra* note 37, at 736–37.

119. RODNEY HUFF ET AL., U.S. DEP’T OF JUST., THE 2010 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME (2010), available at <http://www.nw3c.org/docs/publications/2010-national-public-survey-on-white-collar-crime.pdf>.

120. Chiste, *supra* note 24, at 87.

121. Jamie L. Gustafson, *Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers*, 40 SUFFOLK U. L. REV. 685, 699 (2007).

sentences increase recidivism rates in white-collar offenders.<sup>122</sup> In order to bring about lasting change, there needs to be effective strategies for turning people away from white-collar crime.

Applying restorative justice to white-collar crime may have an increased likelihood of deterring possible offenders than traditional criminal prosecution. According to Professor Jayne W. Barnard, corporate officers are deeply entwined in a community of family, colleagues, and peers, all of whom rely on the officer's reputation.<sup>123</sup> The disgrace that comes with being exposed deters potential offenders from committing crimes, a prospect that exists independently of incarceration.<sup>124</sup> In effect, the extreme prison sentences encouraged by law-making bodies primarily serve the retributive objective of judicial punishment rather than appealing to the balance of retribution and utility for which the system strives.<sup>125</sup> The benefit is that this opens the door for restorative justice to fill the utilitarian role of the criminal justice system. White-collar offenders are highly narcissistic, which is characterized, in part, by a need for admiration.<sup>126</sup> If offenders know that they may be forced back into their community to suffer the shame and disapproval of their family and colleagues, they may rather choose to preserve their reputation than to commit a crime.<sup>127</sup>

Restorative justice also has greater potential to rehabilitate white-collar offenders. It is first important to mention that this Note is not concerned with recidivism. After all, those who are convicted of white-collar crimes rarely reacquire the power and influence necessary to commit the same or similar crime.<sup>128</sup> What is more important for consideration is restorative justice's goal of infusing empathy in offenders and turning them into productive members of society.<sup>129</sup> Restorative intervention thrusts offenders into their victims' pain in order to instill feelings of compassion and remorse.<sup>130</sup> This is especially important in white-collar crime, where offenders often commit crime from a distance, rarely (if ever) having to see

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122. *Id.*; *Recidivism*, U.S. DEP'T OF JUST. (May 12, 2010), <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx>.

123. Chiste, *supra* note 24, at 115; Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959 (1999).

124. Chiste, *supra* note 24, at 115.

125. Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 632 (2004).

126. Chiste, *supra* note 24, at 95.

127. *Id.* at 115.

128. Ellen S. Podgor, *The Challenge of White-Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 758 (2007).

129. Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 53 (1998); Lode Walgrave, *Restorative Justice: Investigating the Potentials of Restorative Justice Practice*, 36 WASH. U. J.L. & POL'Y 91, 125 (2011).

130. Walgrave, *supra* note 129.

their victims.<sup>131</sup> This dehumanizes the process, making it easier for the offender to deny any responsibility.<sup>132</sup> Restorative intervention requires offenders to not only get close to their victims, but also to understand what brought them to this juncture.<sup>133</sup> Thus these meetings would serve as a wake-up call, forcing the offenders to see the damage they have caused, rendering them exposed and vulnerable, unable to hide from their victims as they have done in the past. This would then inspire in the offender a need to make amends and seek forgiveness.<sup>134</sup> Once the intervention is completed, the offender could be reintegrated, taking the lessons learned through the program into the world.<sup>135</sup>

## B. HIGH VICTIM SATISFACTION

### i. Restitution—A Bigger and Faster Solution

The primary harm suffered by victims of white-collar crimes is economic loss, making restitution an essential element of any restorative approach.<sup>136</sup> Compensating victims through restorative justice has several advantages over court-ordered restitution. In 1996, Congress passed the Mandatory Victims Restitution Act (MVRA), which requires restitution in cases where victims suffer monetary and/or property loss.<sup>137</sup> The primary goal is to make the victims whole, without any regard for the offender's ability to meet such a demand.<sup>138</sup> While this aggressive solution has resulted in an overall increase in restitution collection, collection rates have decreased compared to policies that were in place prior to the MVRA's enactment.<sup>139</sup> This is because the net amount recovered is far outweighed by the amount ordered.<sup>140</sup>

While it may appear that the fundamental flaw of this system lies in the offender's inability to make full restitution, the primary issue is one of enforceability.<sup>141</sup> This is because enforcement problems exist regardless of whether offenders are financially capable of compensating victims.<sup>142</sup> Focusing on white-collar crime, a 2005 study conducted by the Government

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131. Neil Vance & Brett Trani, *Situational Prevention and the Reduction of White Collar Crime*, J. LEADERSHIP, ACCOUNTABILITY & ETHICS, Fall 2008, at 9, 14, available at [http://www.na-businesspress.com/jlae/template\\_fall08.pdf](http://www.na-businesspress.com/jlae/template_fall08.pdf).

132. *Id.*

133. Lee, *supra* note 73, at 541–42.

134. *Id.* at 531.

135. *See id.* at 530.

136. BRIAN K. PAYNE, WHITE-COLLAR CRIME: A TEXT/READER 47 (2012).

137. *See* 18 U.S.C. § 3663A (2012).

138. 18 U.S.C. § 3664f(1)(A)–(B).

139. Dickman, *supra* note 70, at 1693.

140. *Id.* at 1693–94.

141. At the bill's outset, the Judicial Conference warned Congress that a complete disregard for an offender's ability to pay would make the act unenforceable. *Id.* at 1700–01.

142. *Id.* at 1711.



Accountability Office (GAO) reported the status of five criminals convicted of financial fraud—all given jail time and ordered to pay restitution.<sup>143</sup> Prior to judgment, all five offenders reported possession of substantial financial resources.<sup>144</sup> However, after sentencing, they claimed they were unable to fulfill their restitution obligations, despite clear evidence that they were withholding assets.<sup>145</sup> The problem is that “it is not a crime to willfully fail to pay restitution debt,” meaning any available recourse would be minimal and thus, a preferable alternative to compensation.<sup>146</sup> With such limited accountability, what incentive is there to do the right thing?

This is where restorative intervention has an advantage. As mentioned above, a goal of any restorative program should be rehabilitation,<sup>147</sup> which requires the offender to take responsibility for his/her actions. This sense of accountability helps inspire the offender to work with the victims to decide on an agreeable restitution system. Whereas court-ordered restitution is seen as yet another punishment, an obligation established through restorative means gives the offender a sense of control coupled with a feeling that the arrangement is just.<sup>148</sup> This approach has produced profoundly successful results, with over ninety percent of the restitution agreements being completed within one year.<sup>149</sup> By contrast, only twenty-to-thirty percent of all court-ordered restitution is completed.<sup>150</sup>

That restorative justice can have such successful restitution programs is particularly relevant in a post-recession economy. With income rates 8.3% lower now than they were before the recession, 46.5 million Americans living in poverty, and tightening loan regulations, the average American is suffering from considerable financial hardship, especially in areas such as home financing.<sup>151</sup> People cannot afford to have their restitution delayed due to lax enforcement policies and uncooperative offenders. The faster and

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143. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 2-3 (2005).

144. *Id.* at 3.

145. *Id.* at 3-4.

146. *Id.* at 4.

147. Dickman, *supra* note 70.

148. Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, DISPUTE RESOLUTION MAGAZINE, Fall 2001, available at <http://www.vorp.com/articles/justice.html>.

149. *Id.*

150. *Id.* An earlier study conducted in 1992 by Mark Umbreit and Robert Coates determined that restitution through restorative intervention had a completion rate of 81% while court-ordered restitution had a completion rate of 58%. Braithwaite, *supra* note 22, at 24.

151. Steve Hargreaves, *Poverty Rate 15%, Median Income \$51,017*, CNN MONEY (Sept. 17, 2013, 3:33 PM), <http://money.cnn.com/2013/09/17/news/economy/poverty-income/>. “In the second quarter of this year, the U.S. homeownership rate was 65.1 percent.” Jake Grovum, *A New Normal: The Great Recession's Lingering Effects*, REPORTER HERALD: BUSINESS (Sept. 5, 2013, 10:31 AM), [http://www.reporterherald.com/business/ci\\_24022917/new-normal-great-recessions-lingering-effects](http://www.reporterherald.com/business/ci_24022917/new-normal-great-recessions-lingering-effects).

more complete the compensation, the more financially secure the victims become—an outcome that bodes well for an economy that is still struggling to recover from a recession that technically ended over four years ago.<sup>152</sup>

## ii. Symbolic Reparation—Healing the Deeper Wounds

Monetary loss may be the principal harm suffered by victims of white-collar crimes, but it is not the only harm. There are a host of deeper injuries that can have widespread and devastating consequences. On an individual level, victims suffer considerable emotional damage, experiencing feelings of “violation, stress . . . anger . . . shame, embarrassment, and self-blame.”<sup>153</sup> Restorative justice strives to heal these deeper wounds through symbolic reparation, which stresses apology and forgiveness to help mend the bonds that were broken in commission of an offense.<sup>154</sup> This is achieved by having victims play an active role in the healing process.<sup>155</sup> Giving control to vulnerable victims vastly improves their chances of getting the closure they need to heal.<sup>156</sup>

On a collective level, white-collar crime has a pervasive social impact, eroding the public’s trust in the economy, leadership, and societal values.<sup>157</sup> Madoff, for example, was deeply engrained in the Jewish community.<sup>158</sup> By using his heritage and professional reputation, he got people to invest without asking too many questions.<sup>159</sup> When he was exposed, the effects of his betrayal were so potent that many believed he had “shaken the bonds of trust that bind Jewish communities.”<sup>160</sup>

With trust in financial and political institutions having plummeted as a result of the recession, every effort should be made to avoid causing further damage.<sup>161</sup> Vying for extreme prison sentences encourages a vengeful mentality that would rather condemn an offender than repair a broken relationship, which only serves to contribute to this ongoing trend of mistrust and skepticism. White-collar offenders are able to sustain their

152. See Grovum, *supra* note 151.

153. Mary Dodge, *The Importance of Integrating Victimology in White-Collar Crime: A Targeted Comment on Barak’s Analysis in Theft of a Nation*, 14 W. CRIMINOLOGY REV. 27, 28 (2013).

154. Braithwaite, *supra* note 22, at 24; Rodogno, *supra* note 64, at 145.

155. Kohn, *supra* note 62, at 566.

156. *Id.* at 517, 566.

157. Elizabeth Moore & Michael Mills, *The Neglected Victims and Unexamined Costs of White-Collar Crime*, 36 CRIME & DELINQUENCY 408, 414 (1990).

158. Christine Hurt, *Evil Has a New Name (and a New Narrative): Bernard Madoff*, 2009 MICH. ST. L. REV. 947, 957 (2009).

159. *Id.* at 957–58.

160. Robin Pogrebin, *In Madoff Scandal, Jews Feel an Acute Betrayal*, N.Y. TIMES, Dec. 23, 2008, at A13.

161. Prior to the recession, “75% of Americans said that they had confidence in financial institutions or banks. Following the financial crisis, that number has fallen dramatically, to 45%.” Justin Wolfers, *Mistrust and the Great Recession*, FREAKONOMICS (Mar. 9, 2011, 1:00 PM), <http://freakonomics.com/2011/03/09/mistrust-and-the-great-recession/>.

illegal activity by exploiting the trust they build with their victims.<sup>162</sup> As a result, those who have been victimized by fraud are more likely to hoard their money, which in turn has contributed to the post-recession stagnation of economic growth.<sup>163</sup> Thus the goal of any restorative program as applied to white-collar crime should be to distinguish the offense at issue from the greater societal implications. Helping people understand that an individual offender's actions are not reflective of the greater financial market could reduce mistrust in the economy. It could also serve to educate people so they know what steps to take in order to avoid being victimized in the future. Traditional criminal justice merely removes the individual offender. It does little to fix the greater social damage caused by the offense beyond increasing public safety.<sup>164</sup> However, even this benefit is of minimal value with regards to white-collar offenders: "it is highly unlikely that they can continue to cause the same level of damage, because as felons they would not be able to achieve the same level of public trust as they commanded before."<sup>165</sup>

#### IV. DRAWBACKS OF RESTORATIVE JUSTICE AS APPLIED TO WHITE-COLLAR CRIME

##### A. RESTITUTION MAY NOT MEET THE NEEDS OF THE VICTIMS

Those who steal money can also lose it. How then is the victim to be repaid? This is where applying a restorative framework to white-collar crime runs into a concerning obstacle. This Note has argued several advantages to restorative intervention over traditional criminal prosecution, but one area where the former can fall short is in cases of white-collar crimes where the offender lacks the assets to properly compensate the victims. For example, in the Enron scandal, many of the perpetrators were bankrupted by their actions, leaving the victims with severely limited means of obtaining financial restitution.<sup>166</sup> Restorative justice deemphasizes the

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162. See Stanton Wheeler et al., *White Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331, 355–56 (1988), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5132&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5132&context=fss_papers).

163. See Peter Darke & Jennifer Argo, *The Numbers (Never) Lie: Corporate Fraud, Generalized Suspicion and Investment Behavior*, 7 EUROPEAN ADVANCES IN CONSUMER RESEARCH, 2006,, available at [http://www.acrwebsite.org/volumes/eacr/vol7/EuropeanVolume7\\_149.pdf](http://www.acrwebsite.org/volumes/eacr/vol7/EuropeanVolume7_149.pdf); see also Robert Johnson, *Rebuilding Trust in Finance: We Can Do Better*, INST. FOR NEW ECON. THINKING (Oct. 25, 2013), <http://ineteconomics.org/blog/institute/rebuilding-trust-finance-we-can-do-better>.

164. Easterhay, *supra* note 39, at 171.

165. *Id.* at 171–72.

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Where the white-collar criminal has lost everything, other parties complicit to a white-collar crime may be coerced by legal action into compensating victims. Enron itself being bankrupt, Enron investors sued the banks they accused of helping the company

role of retribution by encouraging alternatives to imprisonment.<sup>167</sup> If white-collar offenders are able to avoid prison without having to pay restitution, they gain at the expense of the victim. Thus in circumstances where victims and offenders are financially ruined through the latter's actions, a restorative system could disproportionately favor the offender.

While it is true that restorative justice is primarily concerned with emotional healing,<sup>168</sup> it is immaterial in instances where victims only seek monetary compensation. Granted, some may accept or even prefer purely symbolic reparation, as is often the case with crime victims.<sup>169</sup> However, this would undermine those who may only benefit from restitution. Furthermore, as financial loss is the main harm suffered in white-collar crime, the priorities of a restorative model may need to be modified to place a greater emphasis on restitution.<sup>170</sup> For example, some of the offenses addressed by restorative justice, "vandalism, theft, and minor assaults," cause comparatively little economic harm and are thus better suited for a restorative approach.<sup>171</sup> Any solution would have to weigh victims' needs against the core objectives of restorative justice.

## B. VICTIMS MAY OVERWHELMINGLY REJECT A RESTORATIVE APPROACH

In order for a restorative program to take effect, both victim and offender must agree to participate.<sup>172</sup> Getting victims of white-collar crimes to agree to restorative intervention may prove difficult considering their growing advocacy for more severe sentencing practices.<sup>173</sup> This is further complicated in cases of multiple victims, which runs a high risk of diverging viewpoints. Whereas with juvenile crimes, where victims and the greater community see the value in reintegrating the offender, white-collar criminals are seen as people who need to be removed from society.<sup>174</sup> Getting victims to see the value of rehabilitating white-collar offenders could be prohibitively difficult to accomplish. However, it is more

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perpetuate its crimes and received a \$ 7.2 billion settlement (with a demand by their lawyers for a \$ 700 million legal payment).

Chiste, *supra* note 24, at 109. This example illustrates an advantage litigation has over restorative justice. A lawsuit is a civil action, one that is not subject to restorative measures (though alternative measures such as mediation and arbitration would still be available).

167. Kelse Moen, *A Choice in Criminal Law: Victims, Defendants, and the Option of Restitution*, 22 CORNELL J.L. & PUB. POL'Y 733, 765 (2013).

168. See Braithwaite, *supra* note 22, at 6.

169. *Id.* at 24.

170. See PAYNE, *supra* note 136.

171. See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 952 (2007).

172. *Pre-Sentence Restorative Justice Court Process*, N.Z. MINISTRY OF JUST., <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice/restorative-justice-process-pre-sentence>.

173. See Gustafson, *supra* note 121, at 697–99.

174. See *id.* at 689.

important to preserve the victim's right to decide then to take their power away in the interest of social reform. Concluding otherwise would effectively gut the victim-oriented nature of restorative justice.

### C. A RESTORATIVE SYSTEM WOULD NOT DETER THE REMORSELESS OFFENDER

A restorative approach to white-collar crime may be less effective in deterring remorseless offenders than traditional criminal prosecution. Deterrence from a restorative perspective is grounded in the reinforcement of social norms.<sup>175</sup> The idea is that offenders should be discouraged, not by fear of legal retribution, but by fear of earning the community's disapproval.<sup>176</sup> This clashes with the general psychology of white-collar offenders, who tend to justify their actions by arguing a lack of criminal intent.<sup>177</sup> Oftentimes offenders will assert their innocence even after they admit their actions and are publicly convicted.<sup>178</sup> Moreover, white-collar offenders are characterized by a lack of empathy for others, further removing them from any culpable state of mind.<sup>179</sup>

Offenders who lack this "social conscientiousness"<sup>180</sup> may actually be more likely to commit a white-collar crime if they know that punishment via restorative means is an option. The threat of a long prison sentence is objectively undesirable and can act as a powerful deterrent for any offender. However, for someone who does not care about the pain his/her actions inflict on others, a restorative program would be an easy road to a lenient sentence. Though it is obvious that such offenders should be ineligible for restorative intervention, if they know how to manipulate the system, they could use it to their advantage at the expense of both the victims and the court. Such an egregious violation of trust would undermine restorative justice's entire purpose.

### V. A WORKING SOLUTION

This section outlines a three-stage proposal that operates on a case-by-case basis, loosely structured around Professor Zehr's six questions in order to maintain a manageable framework for applying restorative justice to white-collar crime. It attempts to reconcile the benefits and drawbacks discussed in prior sections by allocating decision-making authority equally amongst the courts, victims, offenders, and communities. In light of the dearth of scholarship available on restorative justice's application to white-

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175. Gabbay, *supra* note 69, at 387.

176. *Id.*

177. Chiste, *supra* note 24, at 92-93.

178. *Id.* at 92.

179. *Id.* at 95.

180. *See id.*

collar crime, this proposal is meant to serve as a theoretical framework upon which more practical developments can be made.<sup>181</sup>

#### **A. WHO IS AN APPROPRIATE CANDIDATE FOR RESTORATIVE JUSTICE?**

The analyses in Part IV show that not every white-collar offender is a suitable candidate for restorative justice. Thus, the first step in this proposal involves a comprehensive assessment of a series of pertinent elements. While any given case may present a multitude of unique factors that need to be addressed, there are four universal issues that must be of primary concern: the overall impact of the crime committed (e.g., number of victims, degree of harm suffered by each victim, and the long-term ramifications of the offense); viability of restitution; probability of symbolic reparation; and the psychology of the offender or offenders. If these conditions are satisfied, then the ultimate decision to proceed with a restorative program is in the hands of the victims.<sup>182</sup> If they choose to opt out of the process, the case goes through the criminal justice system for prosecution and/or sentencing.

In order to achieve the goals set out by restorative intervention, all four factors must pass a certain threshold. Starting with the “overall impact” element, white-collar crimes can have sweeping ramifications, including “(1) individual economic losses, (2) societal economic losses, (3) emotional consequences, [and] (4) physical harm.”<sup>183</sup> Furthermore, it is often difficult to identify the victims of white-collar crime.<sup>184</sup> This can make a restorative program difficult to implement. If addressing the needs of victims is unmanageable, the program loses all meaning. This issue should be left to an outside party composed of court officials and professional mediators/arbitrators. It would be their job to decide whether the scope of a crime’s impact renders it unsuitable for a restorative program.

With financial loss being an inevitable consequence of white-collar crime, the feasibility of making full restitution is an important consideration in deciding to take a restorative approach. Victims should have a voice in how much weight this factor is given. For example, if victims of an offense suffer great emotional harm, they may be willing to accept reduced compensation in exchange for emotional healing.<sup>185</sup> Similarly, if victims overwhelmingly seek restitution from an offender who is unable to pay,

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181. Most research on this topic was conducted before the recession. In an economy that is still struggling to recover, people’s perceptions, priorities and mentalities have changed. Therefore it is difficult to predict what the outcome of any given solution would be.

182. *Pre-Sentence Restorative Justice Court Process*, *supra* note 172.

183. PAYNE, *supra* note 136.

184. Green, *supra* note 31, at 33.

185. Victims engaged in restorative intervention find that symbolic reparation is often more important than material reparation. Braithwaite, *supra* note 22, at 24.

they may feel a restorative approach would be meaningless. It is also important to restate that offenders who participate in restorative intervention are more likely feel a moral obligation to comply with a restitution agreement.<sup>186</sup> This should be considered when making initial assessments of an offender's financial resources.

In addition to restitution, any restorative approach should seek symbolic reparation.<sup>187</sup> While this is primarily for the victim's benefit, it is important for the offender as well. Restorative justice encourages offenders to "take responsibility for their crime by making amends to victims."<sup>188</sup> This helps repair trust between the parties and reintegrate the offender. So even if the victims in a case only want material compensation, it is still important to address the offender's needs.

Finally, the psychological underpinnings of a white-collar offender can make the difference in whether they should be allowed to participate in a restorative program. As mentioned in section IV, a pervasive trend amongst white-collar criminals is to deny culpability.<sup>189</sup> If an offender pleads guilty merely to qualify for a restorative program without genuine remorse, then the program becomes an "escape valve" for offenders to exploit.<sup>190</sup> Thus, a psychological examination should be conducted on all potential candidates to determine whether they are mentally suited for restorative intervention. One of the benefits of restorative justice is that it can facilitate feelings of guilt by exposing offenders to the pain they have caused others.<sup>191</sup> Only criminals who are incapable of experiencing guilt should be ineligible for restorative intervention.

## **B. WHAT TYPE OF RESTORATIVE PROGRAM SHOULD BE EMPLOYED?**

Once a case is deemed eligible for a restorative program, the next step is to determine what type of intervention is compatible with the needs of the stakeholders. This requires balancing the objectives of the victims, offenders, and the community.<sup>192</sup> Furthermore, certain types of white-collar crime may be better suited for specific restorative approaches. For example, affinity fraud "targets members of a particular group and is perpetrated either by members of that group or by those claiming to advance its

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186. Price, *supra* note 148.

187. Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 233 (2003).

188. Hughes & Mossman, *supra* note 23, at 59.

189. Chiste, *supra* note 24, at 91.

190. *See id.* at 118.

191. Walgrave, *supra* note 129.

192. *See* Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 268 (2005).

interests.”<sup>193</sup> Even though the community itself may not be a direct victim of these crimes, they can be weakened by the offenders’ actions.<sup>194</sup> In such cases, the establishment of a community reparative board (rather than victim-offender mediation) may be appropriate, as any agreed-upon punishment would be in the best interest of the community.<sup>195</sup>

It is important that the stakeholders in a case are not limited in what approach they can take to restorative justice. Some may wish to combine elements of South Africa’s TRC, Saudi Arabia’s *qisas*, and New Zealand’s family group conferencing in order to fit their unique situation. This is particularly important in white-collar crime, where the impact of an offender’s actions can vary drastically amongst victims, communities, and society as a whole. Granting parties this freedom puts the power back in the participants’ hands without forcing them to modify their needs to suit a given approach.

### C. HOW TO BALANCE RESTORATIVE INTERVENTION WITH CRIMINAL SANCTIONS?

Once the stakeholders agree on what approach to take, a decision about the offender’s punishment needs to be made. While restorative justice “seeks to minimize the role of the prison,”<sup>196</sup> the severity of white-collar crimes cannot be ignored. Thus, it is important that there still be retribution brought about through traditional criminal sentencing practices. Otherwise, the program would undermine less-serious offenses that are not yet eligible for restorative justice. Also, white-collar crime does considerable social harm beyond the communities directly impacted by the offender.<sup>197</sup> Punishing the offender through the criminal justice system gives society a voice that it would otherwise lack in a purely restorative solution.

Offenders should initially be sentenced as though they are ineligible for restorative justice. Any imposed sentence would be modified by the stakeholders prior to the initiation of a restorative program. This agreement would be subject to change depending on fulfillment of the promises made at the beginning of the process. For example, if the condition was that Madoff’s sentence would be reduced from 150 years to 12 years provided full restitution was made to the victims, anything short of completion would

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193. Lisa M. Fairfax, “*With Friends like These...: Towards a More Efficacious Response to Affinity-Based Securities and Investment Fraud*,” 36 GA. L. REV. 63, 64–65 (2001).

194. *Id.* at 97. Remember that after Bernie Madoff was arrested, the blowback against the Jewish community was particularly severe. Pogrebin, *supra* note 160.

195. Community reparative boards are panels devised of groups of citizens who meet with the offender to determine an agreeable punishment. This restorative program requires heavy community involvement. Gordon Bazemore & Mark Umbreit, *Juvenile Justice Bulletin: A Comparison of Four Restorative Conferencing Models*, U.S. DEP’T OF JUST. 4 (Feb. 2001), <https://www.ncjrs.gov/pdffiles1/ojdp/184738.pdf>.

196. Moen, *supra* note 167.

197. Moore & Mills, *supra* note 157.



negatively impact his prison sentence.<sup>198</sup> This would provide Madoff with greater incentive to comply with the arrangement. This approach bolsters rather than impedes the twin aims of the criminal justice system. White-collar offenders are still punished through incarceration, while restorative intervention increases deterrence and reduces recidivism. The hope is that this process heals victims, rehabilitates offenders, unites communities, and stimulates economic growth.

## CONCLUSION

Applying restorative justice to white-collar crime in post-recession America is a difficult proposal to make. The public despises white-collar offenders—they cause substantial social and economic harm, and their psychology may be incompatible with a restorative philosophy. However, a restorative approach has significant advantages that are unavailable in the criminal justice system: it addresses the needs of the victims and the greater community, it increases deterrence while reducing recidivism, and it can help restore the public's faith in political and financial institutions. These advantages are particularly notable as America is still recovering from the financial crisis of 2007 and 2008.<sup>199</sup> Unemployment is high and people are hesitant and/or unable to reinvest in the economy, which in turn slows the process of economic recovery.<sup>200</sup>

By distributing power amongst the courts, victims, communities, and offenders, there is great potential for everyone's voice to be heard. However, it is impossible to say whether such an approach would produce successful results without practical application. For now, what matters is that authoritative entities take notice of alternative means to conflict resolution. By observing how restorative philosophies have developed around the world, one sees a deep and rich well to draw from. Hopefully, in time, white-collar crime and restorative justice will work together in a way that will not only facilitate healing amongst the stakeholders, but will help bring the economy back from the recession.

*Daniel Luedtke* \*

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198. A test determined Madoff was expected to live for only another 13 years, so his attorney felt it would be just to give him one year of freedom before he died. Bruce Golding, *Lawyer Urges 12-Year Prison Term for Madoff*, N.Y. POST (June 23, 2009, 1:42 PM), <http://nypost.com/2009/06/23/lawyer-urges-12-year-prison-term-for-madoff/>.

199. Johnson, *supra* note 163.

200. *Id.*

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