

**PUNISHING WHITE-COLLAR CRIME IN CANADA:
ISSUES WITH THE ECONOMIC MODEL
OF CRIME AND PUNISHMENT**

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White-collar crime differs from other types of crime in both how the public perceives it and the socio-economic standing of the typical perpetrators. Nevertheless, white-collar crime has significant negative social and economic effects. In formulating deterrents against white-collar crimes, economic models using cost-benefit analyses that fix relative values to fines and incarceration have been influential. However, these economic models are not in keeping with judicial sentencing in Canada and do not accurately reflect current criticisms about the social inequalities associated with fines and incarceration. Economic models contend that large fines reinforced by possible incarceration are the best sentencing deterrent for white-collar crimes in Canada. Yet, as this article argues, a better approach is preventing white-collar crimes through government regulation and corporate structures that eliminate opportunities for criminal conduct.

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I. INTRODUCTION

Criminal activity in Canada is often perceived by the public as behaviour that is associated with those who are from the lowest socio-economic stratum or simply thoughtlessly irresponsible. Crime is typically not associated with those from the middle and upper strata who are characterized as hard-working, privileged, and intelligent. This may inform why, throughout history, society has struggled in perceiving white-collar crime as true criminal activity and prosecuting it accordingly. However, white-collar crimes can have devastating impacts on society and the economy, as is made evident in cases such as the Enron and WorldCom scandals. Economists are of the view that when people make decisions to commit crimes, at least to some degree, they weigh the relative costs and benefits of their behaviour.¹ This belief suggests that, in order to prevent white-collar crimes, policy-makers need to ensure that anticipated punishment is high enough to exceed the expected benefit. Since white-collar offenders often have significant resources, large-scale fines backed by incarceration are the optimal deterrent.²

The economic stance on fines and incarceration presumes that both sufficiently deter criminal behaviour; however, this presumption is rooted in very little empirical evidence, which suggests that expanding responses to criminal behaviour could have a greater impact on crime reduction than these two options. This article proceeds as follows: Part II examines the economic perception of white-collar crime and criminal punishment and deterrence; Part III explores the legal and judicial responses toward white-collar crime in Canada; Part IV considers the destructive impact of an economic response to white-collar crime; and finally, Part V discusses and suggests alternatives to fines and incarceration, including government regulation aimed at enforcing corporate accountability and improving corporate culture, which may better address the underlying environmental and social factors which incentivize criminal behaviour.

II. ECONOMICS AND WHITE-COLLAR CRIME

A. DEFINING WHITE-COLLAR CRIME

White-collar crime, a term coined by Edwin Sutherland in 1939,³ has no strict legal definition. Sutherland described white-collar crime as offences which consist of a violation of trust committed by the upper class, who are respectable and professional businessmen.⁴ Some scholars define white-collar crime based on the affluent economic status of the perpetrators,⁵ while others focus on the action itself, which is one of deceit for the purpose

¹ Gary S Becker, "Crime and Punishment: An Economic Approach" (1968) 76:2 J Political Economy 169 at 176, 207–208; Thomas J Miceli, "The Economic Model of Crime" in *The Economic Approach to Law* (Stanford, CA: Stanford University Press, 2004) 288 at 288–90.

² Briana L Campbell, "The Economy of the Debtors' Prison Model: Why Throwing Deadbeats into Debtors' Prison is a Good Idea" (2015) 32:3 Ariz J Intl & Comp L 849 at 852; Miceli, *ibid* at 293–95.

³ Eugene Soltes, *Why They Do It: Inside the Mind of the White-Collar Criminal* (New York: Public Affairs, 2016) at 17; John M Ivancevich et al, "Deterring White-Collar Crime" (2003) 17:2 Academy Management Executive 114 at 114.

⁴ Edwin H Sutherland, "White-Collar Criminality" (1940) 5:1 American Sociological Rev 138 at 138 [Sutherland, "Criminality"]; Ivancevich et al, *ibid* at 114–15.

⁵ Richard A Posner, "Optimal Sentences for White-Collar Criminals" (1980) 17:3 Am Crim L Rev 409 at 410.

of financial gain.⁶ Presently, however, white-collar crime is a colloquial term that can include a wide variety of offences, but typically refers to non-violent financial crimes committed by a corporation or affluent individuals and business professionals who hold a position of power.⁷ One of the most common types of white-collar crime is fraud, but others include embezzlement, insider trading, money laundering, cybercrime, and identity theft.⁸

White-collar crimes are typically committed by educated people with well-paying jobs or by corporations, as opposed to low-income offenders.⁹ Consequently, for many years white-collar crimes were not considered “criminal” at all, both by perpetrators, society, and law enforcement; therefore, businesspeople were free to conduct their affairs as they saw fit. In fact, Sutherland’s introduction of the term “white-collar crime” in 1939, where he argues that some of the most serious crimes were being committed by respectable businessmen, was viewed as provocative and in some cases ill received.¹⁰ Sutherland’s follow-up book on white-collar crime, published a decade later, advocates for the proposition that white-collar offences are in fact criminal due to the harm they impose on society and the moral violation necessary to commit such offences.¹¹ In the United States, despite social backlash towards business elites in response to the stock market crash in the 1920s, government regulators and law enforcement did not perceive white-collar offenders as fitting into the criminal mould since the majority of documented crimes were committed by people in lower economic classes.¹² Both Sutherland and Eugene Soltes suggest that policy-makers and law enforcers also either feared or admired the white-collared accused due to their status, power, and respectability in society; a notion which eventually shifted over time as politicians in both the US and Canada began to take tougher stances on white-collar offences in the 1970s and more substantially in the early 2000s.¹³ The position of power and respectability that once operated as a safeguard from criminal liability soon became a source of vulnerability, as society began to expect a high standard of ethical conduct from those in positions of power.¹⁴

B. HIGH COST OF WHITE-COLLAR CRIME

Sutherland emphasizes the moral culpability of white-collar criminals on the basis that such crimes violate ethical beliefs of “practically all” Americans.¹⁵ However, despite their breach of morality, white-collar crimes are also incredibly economically harmful to society.

⁶ Donn B Parker, “Computer-Related White-Collar Crime” in Gilbert Geis & Ezra Stotland, eds. *White-Collar Crime: Theory and Research*, vol 13 (Beverly Hills: Sage Publications, 1980) 199 at 199 (white-collar crime defined as nonphysical illegal acts committed for the purposes of obtaining money, property, or business advantage).

⁷ Posner, *supra* note 5 at 410; Cathleen H Douglas, “White Collar Crime: Proposed Solutions” (1978) 7:2 *Police LQ* 11 at 16; Ivancevich et al, *supra* note 3 at 155. See also Sutherland, “Criminality,” *supra* note 4 at 138.

⁸ *Criminal Code*, RSC 1985, c C-46, s 380. See also Halsbury’s Laws of Canada (online), *Criminal Offences and Defences*, “Property Offences: Fraud and False Pretences: Fraud” (X1.6.(1)) at HCR-363 (2020 Reissue).

⁹ Canada, Department of Justice, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives* (18 Jan 2018) at s 2.3, online: <www.justice.gc.ca/eng/tp-pr/csj-sjc/jsp-sjp/tr03_2/p01.html>; Posner, *supra* note 5 at 410, 417.

¹⁰ Soltes, *supra* note 3 at 17.

¹¹ Edwin H Sutherland, *White Collar Crime* (New York: Holt, Rinehart and Winston, 1949) at 31–45 [Sutherland, *Crime*].

¹² *Ibid* at 47; Soltes, *supra* note 3 at 22.

¹³ Soltes, *ibid* at 37–41.

¹⁴ *Ibid* at 41; David Weisburd, Elin Waring & Stanton Wheeler, “Class, Status, and the Punishment of White-Collar Criminals” (1990) 15:2 *Law & Soc Inquiry* 223 at 232–234.

¹⁵ Sutherland, *Crime*, *supra* note 11 at 45.

Experts estimate that white-collar crime produces between 17 and 31 times more economic loss than common crimes.¹⁶ Likewise, in addition to destroying shareholder value, white-collar crime has steep indirect costs, including increased insurance premiums, increased cost of goods, decreased consumer and investor confidence, psychological impacts due to trust violations, lower productivity, and even higher taxes.¹⁷ To make matters worse, many white-collar criminals are recidivists, meaning they will likely be undeterred by criminal punishments, resulting in subsequent criminal offences.¹⁸ Therefore, although throughout history people have had a difficult time accepting white-collar crimes as “crimes,” addressing them as crimes for the purposes of deterrence and accountability remains an important policy objective today. From an economic perspective, Thomas Miceli and Gary Becker offer some insight on how to avoid the social costs and deter offenders from committing white-collar crimes.

C. BECKER’S ECONOMIC MODEL OF CRIME AND PUNISHMENT

Becker’s economic model contends that individuals, in all aspects of life, make rational choices in order to maximize their expected utility.¹⁹ In deciding whether to commit a crime, an individual offender will compare their expected benefits and expected costs and choose to commit the crime if their expected gain exceeds their expected costs.²⁰ Becker argues that people do not commit crimes because of personal inherent criminal propensity but rather simply because their benefits and costs differ.²¹ Of course, we know that not all criminals conduct rational cost-benefit analyses, especially where crimes are not premeditated and driven primarily by emotional rage or mental illness.²² Therefore, the economic model of crime and punishment may be an inappropriate lens through which to assess certain violent criminal behaviour. By contrast, it is more reasonable to view white-collar criminals as rational cost-benefit analyzers as many white-collar crimes necessarily involve the thoughtful and sophisticated planning one would expect from a rational person inclined to weigh costs and benefits. As such, white-collar criminal activity fits more appropriately within the economic model of crime and punishment.²³ Therefore, in order to deter the commission of a crime, economists contend that policy-makers ought to either raise the cost of commission — through harsher punishments — so that it outweighs the expected benefits for the offender or decrease the expected benefits.²⁴

¹⁶ Ivancevich et al, *supra* note 3 at 117.

¹⁷ *Ibid.* See also Paul Healy & George Serafeim, “Who Pays for White-Collar Crime?” (2016) Harvard Business School Working Paper No 16-148 at 2, online: <www.hbs.edu/ris/Publication%20Files/16-148_fdda8213-730c-4929-bf3b-bf077666c1a3.pdf>.

¹⁸ Ivancevich et al, *ibid* at 118.

¹⁹ John J Donohue III, “Economic Models of Crime and Punishment” (2007) 74:2 Social Research 379 at 381.

²⁰ Becker, *supra* note 1 at 176; Donohue, *ibid* at 381; Miceli, *supra* note 1 at 288.

²¹ Becker, *ibid* at 176.

²² See e.g. *R v Desjardins* (1986), 77 AR 1 (QB) (striking and killing infant while under influence of alcohol viewed as “crime of passion” and not deliberate, thus deterrence was not a factor in sentencing); *Gardiner v R* (1981), 23 CR (3d) 190 (BCCA) (attempted murder of wife viewed as spur of the moment, with no rational deliberation). But see *R v Gill*, (2015), 374 Nfld & PEIR 328 (repeated harassment was not spur of the moment or driven by emotional frustration, but rather involved consistent harassment at para 52).

²³ Miceli, *supra* note 1 at 289; Posner, *supra* note 5 at 411.

²⁴ Donohue, *supra* note 19 at 381.

From a policy perspective, according to the economic model of crime, the optimal punishment for criminal activity involves maximizing social welfare by weighing the cost and probability of apprehension, the benefit of the crime to offenders, the cost to victims, and the price of punishment.²⁵ Society could combat and reduce criminal activity by either lowering the benefits or increasing the costs expected, or both, from criminal behaviour in order to deter such activity.²⁶ The economic model calculates the cost of committing a crime as the probability of apprehension (“p”) multiplied by the actual punishment, which comes in the form of either a fine (“f”) or imprisonment (which is the dollar cost “c” per unit of time “t”), or both.²⁷ According to this model, an offender will commit the crime if their expected gain is greater than the probability of apprehension multiplied by the actual punishment.²⁸ Mathematically, increasing either the probability of punishment or the magnitude of the punishment will raise the cost of criminal activity, thus resulting in greater deterrence (for example, a higher gain would be required for the cost-benefit analysis to weigh in favour of criminal activity). Where complete deterrence is the policy objective, the cost of punishment should be set at the offender’s expected gain divided by the probability of apprehension; this way convicted offenders must give up more than just their criminal gains — they must also pay the price for offenders who successfully evaded detection. Since the punishment is set higher than an offender’s expected gain, the punishment should deter criminal activity and efficiency in this context should lead to no criminal conduct.²⁹ However, since the choice of punishment has variable implementation costs on society, economists suggest that other factors, such as an offender’s monetary resources, ought to play a part in determining the most cost-effective punishment for their criminal activity.

D. THE EFFICACY OF FINES AND INCARCERATION

Economic theorists have generally supported the idea that fines are an “underused” and preferable response to general criminal activity because they have comparable deterrence while being less costly to implement when compared to imprisonment.³⁰ However, there is one caveat: the offender must be able to pay the fine. Advocating for fines over incarceration only works if the offender has sufficient resources to comply with monetary punishments, and thus is of little value for the majority of offenders who would be judgment-proof due to lack of resources if there were not an alternative accessible punishment, such as incarceration.³¹ This makes economic sanctions an ideal punishment for white-collar offences, which are typically committed by more affluent members of society.³² Economists argue that fines work like a transfer payment — they pass the cost of the crime from the offender to the victim or state, nearly perfectly offsetting the harm caused by the offence.³³ In this way, fines generate a social revenue and fully compensate society for criminal harm.

²⁵ Miceli, *supra* note 1 at 288.

²⁶ Donohue, *supra* note 19 at 381.

²⁷ Miceli, *supra* note 1 at 289.

²⁸ *Ibid* at 289 (i.e. if their gain is greater than $p(f+ct)$).

²⁹ *Ibid* at 292.

³⁰ Max Schanzenbach & Michael L. Yaeger, “Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity” (2006) 96:2 *J Crim L & Criminology* 757 at 768, 771; Posner, *supra* note 5 at 410.

³¹ Donohue, *supra* note 19 at 381.

³² Posner, *supra* note 5 at 413.

³³ *Ibid* at 410.

On the other hand, the social cost of probation and incarceration are incredibly high. Prison sentences yield no comparable monetary revenue and instead require significant government expenditures, including the cost of hiring guards, providing prisoners with food and clothing, supervisory personnel, and maintenance of the physical premises, among others.³⁴ In Canada, the total expenditures on federal correction from 2017 to 2018 was approximately \$2.68 billion,³⁵ and provincial and territorial expenditures totaled \$2.55 billion.³⁶ In the same year, the annual cost of keeping an inmate incarcerated was \$121,339 for males and \$212,005 for females.³⁷ What is striking is that the cost of keeping an offender in the community, such as on probation, is only \$32,327 per year — about 74 percent less than the cost of incarceration.³⁸ To put this price into perspective, the median total income for Canadians in 2018 was just over \$60,000 per household,³⁹ and the average cost of undergraduate tuition fees for students in the same year was \$6,463;⁴⁰ accordingly, the cost of one (male) federal inmate per year could pay for the costs of three or four offenders on probation, the income of two average families, or the tuition of about 19 undergraduate students.

In addition to fully compensating for harm, Becker's cost-benefit analysis suggests that fines ought to sufficiently deter white-collar criminals (if they are set at a proper price) while also being socially costless to impose and providing revenue to the state.⁴¹ From a potential criminal's perspective, the price of committing the crime is based on the cost of possible punishment — where the punishment is incarceration, this includes foregone earnings, the value of freedom, and the stigma of going to jail; and where the punishment is a fine, this includes monetary hardship.⁴² It follows that, where criminals are incarcerated, the cost to the wealthy offender would be greater since their foregone earnings and the value they place on their social status and freedom may be higher.⁴³ Moreover, a prisoner's lost earnings is also a social cost because, being in prison, that person is unable to participate in and contribute to the economy — a social cost that increases relative to the offender's wealth.⁴⁴ Therefore, since the disutility of spending time in jail rises with an offender's net worth, economists believe that the threat of incarceration will generally work as a greater deterrent for offenders who earn higher incomes outside of prison.⁴⁵ As such, it is not imprisonment

³⁴ *Ibid* at 410; Becker, *supra* note 1 at 180.

³⁵ Public Safety Canada, *Corrections and Conditional Release: Statistical Overview 2019* (Annual Report), Catalogue No PSI-3E-PDF (Ottawa: Public Safety Canada, 2020) at Figure B1, online: <www.publicsafety.gc.ca/cnt/rsres/pblctns/ccrs-2019/index-en.aspx> [Public Safety Canada 2019] (this was an 11.0 percent increase in total federal expenditures compared to the prior year).

³⁶ *Ibid* at Figure B1.

³⁷ *Ibid* at Figure B3.

³⁸ *Ibid*.

³⁹ Statistics Canada, *Canadian Income Survey, 2018*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 24 February 2020), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/200224/dq200224a-eng.htm>.

⁴⁰ Statistics Canada, *Tuition Fees for Degree Programs, 2019/2020*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 4 September 2019), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/190904/dq190904b-eng.htm>. For the 2018–2019 academic year, undergraduate tuition was \$6,838, not including fees. Statistics Canada, *Tuition Fees for Degree Programs, 2018/2019*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 5 September 2018).

⁴¹ Becker, *supra* note 1 at 180; Donohue, *supra* note 19 at 382; Schanzenbach & Yaeger, *supra* note 30 at 771; Posner, *supra* note 5 at 410.

⁴² Becker, *ibid* at 179; Ivancevich et al, *supra* note 3 at 120.

⁴³ Becker, *ibid* at 180; Ivancevich et al, *ibid* at 120.

⁴⁴ Donohue, *supra* note 19 at 382; John Collins Coffee Jr, "Corporate Crime and Punishment: A Non-Chicago View of Economics of Criminal Sanctions" (1980) 17:3 *Am Crim L Rev* 419 at 424.

⁴⁵ Becker, *supra* note 1 at 179–80.

itself (which is an economic drain on society), but the threat of incarceration which deters crime for white-collar offenders.⁴⁶ Thus, the economic model of crime and punishment finds that fines should be backed by the threat of incarceration in order to incentivize and enforce payment for white-collar crime.⁴⁷

Deterrence is further strengthened by the nature of the crime itself, which in the context of white-collar crime often requires creative intellectual scheming. As such, white-collar offenders will likely have the appetite to consider the trade-off between the perceived benefits and costs of crime commission, whether it be a prison term or a hefty fine.⁴⁸ Mainstream crimes, including theft, assault, and robbery, are often associated with some underlying social or psychological driver, including mental illness, poverty, family trauma, or discrimination, among others.⁴⁹ By contrast, white-collar offenders typically have some degree of social privilege and education, as well as crime-free juvenile histories.⁵⁰ With this in mind, white-collar offenders are the optimal class of criminals who might truly embody Becker and Miceli's vision of fines as a deterrent for criminal activity due to both their ability to pay the punishment as well as the rational forethought necessary for the commission of white-collar crimes. This model, of course, hinges on the threat of incarceration as being an effective deterrent, sufficient to prevent criminals from either committing crimes or defaulting on fine payments. In Canada, the potential deterrent effect from the sentencing for white-collar crimes has historically been shaped by prevailing perceptions of the perpetrators.

III. CANADIAN PRACTICE REGARDING WHITE-COLLAR CRIME

A. WHITE-COLLAR SENTENCING IN CANADA

Historically, white-collar crimes in Canada have not been aggressively prosecuted, often resulting in infrequent and small monetary fines.⁵¹ It appears that in Canada, much like in the US, there is a struggle over whether to consider white-collar offences actual crimes. As such, cases involving white-collar criminals are often appealed, and perhaps partially due to the white-collar criminal's ability to pay for better legal counsel, their sentences are often reduced or the offender acquitted.⁵² Moreover, early cases often focus on the impact of

⁴⁶ Campbell, *supra* note 2 at 852.

⁴⁷ *Ibid* at 852.

⁴⁸ Posner, *supra* note 5 at 411.

⁴⁹ Stephen Allen, "Mental Health Treatment and the Criminal Justice System" (2008) 4:1 J Health & Biomedical L 153 at 153–59; Correctional Service Canada, *National Prevalence of Mental Disorders Among Incoming Federally-Sentenced Men*, Research Report R-357 (Ottawa: Correctional Service Canada, February 2015), online: <www.csc.scc.gc.ca/research/005008-0357-eng.shtml>.

⁵⁰ Sutherland, "Criminality," *supra* note 4 at 152; Joost HR van Onna & Adriaan JM Denkers, "Social Bonds and White-Collar Crime: A Two-Study Assessment of Informal Social Controls in White-Collar Offenders" (2019) 40:10 Deviant Behavior 1206 at 1218–20.

⁵¹ See e.g. *R v McNaughton* (1976), 43 CCC (2d) 293 (Qc CA) [*McNaughton*]; *R v Park*, 2010 ABCA 248 [*Park*]; *R v Lord*, 2013 NBCA 51 [*Lord*].

⁵² See e.g. *R v Littler* (1975), 65 DLR (3d) 467 (Qc CA) [*Littler*]; *R v Riordan* (1974), 15 CCC (2d) 219 (NSSC) [*Riordan*]; *R v Hinch and Salanski* (1967), 62 WWR 205 (BCCA) [*Hinch*]; *R v Doren* (1982), 135 DLR (3d) 258 (ONCA) [*Doren*] (sentence of two years and a fine amounting to \$123,750 for counts of conspiracy and fraud were reduced to six months incarceration and a fine of \$51,250 at para 33); *McNaughton*, *ibid* (accused was convicted of conspiracy to defraud public by affecting share prices, sentence of one year imprisonment and a \$25,000 fine was reduced on appeal to one day imprisonment and a \$10,000 fine at para 5); *R v Benson*, 2012 MBCA 94 (acquittal of two counts of forgery and one of fraud upheld at Court of Appeal, but accused found guilty of two other counts of forgery and

punishment on the offender, emphasizing their importance in society, the workplace, or in their family life, ultimately resulting in low fines or short prison terms.⁵³ For example, in *Littler*, a businessman fraudulently undervalued shares resulting in him making over \$1 million and being found guilty of three counts of fraud.⁵⁴ Though initially sentenced to five years in prison, his sentence was reduced to two years on the basis that he had been “a man who was honest and respectable until he succumbed to a temptation,”⁵⁵ and that a shorter sentence would serve an exemplary purpose to prevent re-offending by the perpetrator and discourage similar conduct from other potential criminals.⁵⁶ Similarly, in *Hinch*, two contractors were sentenced to one month in prison and a fine of \$2,000 for a fraudulent scheme which obtained over \$20,000 through false invoices to BC Hydro.⁵⁷ The respondents had been persuaded by a third party to bill BC Hydro in excess of actual work and supplies used and to pay an Alberta company in exchange for the promise of future contracts.⁵⁸ Calling the respondents “victims” of deception, the Court reasoned that it must consider “the terrific loss of pride that each of these previously unblemished charactered people have suffered already.”⁵⁹ The Court went on to call the respondents good and hard-working citizens upon whom any additional conviction or imprisonment would be destructive to their position in the community.⁶⁰ Likewise, in *Riordan*, a case involving the sale of fraudulent hearing aids, the accused was initially sentenced to six months in jail, but on appeal his sentence was reduced to 30 days in prison, ten months of probation, and a restitution payment.⁶¹ Interestingly, the Court noted that for a first-time offender, a substantial fine might have been more appropriate in the circumstances, but, due to the fact that the accused had seven previous convictions, in this case at least some prison time was merited.⁶² Still, the Court held that the desired deterrence effect could be achieved through a shorter period of incarceration, despite the accused’s numerous previous convictions.⁶³

This is in line with Sutherland’s reasoning for why conceptualizing white-collar crimes as “criminal” can sometimes be challenging: the stigma around being called a criminal is a label usually given to lower social class offenders. Therefore, as with juvenile delinquency, the process of criminal law is modified for those who commit white-collar crimes so that the criminal stigma does not attach to the offender.⁶⁴ Moreover, these cases demonstrate that despite economic reasoning advocating that fines and incarceration are of equal cost to offenders, in Canada, to some degree, policy-makers and the judiciary consider the threat of incarceration to be harsher and more deterring than the threat of a monetary fine.⁶⁵ It is perhaps for this reason that Canadian courts appear to be quite keen to incarcerate, at least

sentenced to a fine of \$1,500 and forfeiture of house fraudulently acquired); *Lord*, *ibid* (acquittal of three counts of fraud upheld); *Park*, *ibid* (acquittal of 41 counts of fraud upheld); *Ontario Securities Commission v Tiffin*, 2020 ONCA 217 [*Tiffin*] (sentence of six months imprisonment set aside as being demonstrably unfit, probation and restitution orders upheld).

53

See e.g. *Littler*, *ibid*; *Hinch*, *ibid*; *Riordan*, *ibid*.

54

Littler, *ibid* at 467.

55

Ibid at 470.

56

Ibid at 471.

57

Hinch, *supra* note 52.

58

Ibid.

59

Ibid at 41.

60

Ibid at 41, 46.

61

Riordan, *supra* note 52 at 223.

62

Ibid at 222.

63

Ibid.

64

Sutherland, *Crime*, *supra* note 11 at 43–44.

65

See e.g. *R v Williams*, 2007 CanLII 13949 (Ont SC) at para 40.

for a short period of time, white-collar criminals where the offence is severe or perpetrated by individuals with a position of trust or authority.

B. WHICH WHITE-COLLAR OFFENDERS CANADA INCARCERATES: LARGE-SCALE OFFENCES

Canadian case law dating as far back as the 1940s demonstrates that in response to white-collar crimes, including fraudulent transactions, tax evasion, embezzlement, and fraudulent misrepresentation, both fines and incarceration were used as punishment, depending on the seriousness of the offence.⁶⁶ Incarceration is generally required, in addition to some sort of fine or restitution payment, where there is large-scale fraud, especially involving market manipulation or phony investment opportunities.⁶⁷ Courts have emphasized the severity and harm caused by large-scale fraud, which calls for incarceration in order to achieve goals of deterrence, denunciation, and public confidence in the criminal justice system.⁶⁸ This is illustrated in *McNabb*, which involved a fraudulent investment scheme whereby 22 people were defrauded of about \$2,500 each. Though the accused had no prior criminal record, the Court found this scale of fraud, which was meticulously planned and deliberate, amounted to a heinous crime which required incarceration.⁶⁹ Imprisonment was necessary for proper deterrence of other potential offenders as well as to maintain public confidence in the criminal justice system.⁷⁰ Similarly, due to mitigating factors, the accused in *Murdock* was initially sentenced to a fine and probation for defrauding the public of amounts ranging from \$400 to \$3,000, a crime that the Court noted would typically call for imprisonment.⁷¹ However, the Saskatchewan Court of Appeal amended the sentence to two years imprisonment on the basis that it was necessary to “make it known that the perpetrators cannot escape with a monetary penalty alone.”⁷² Likewise, in *R. v. Fichter*, the Saskatchewan Court of Appeal upheld sentences of four and two years respectively for two accused charged with 12 counts of fraud amounting to a loss of over \$2 million.⁷³ Therefore, contrary to Becker’s model, Canadian courts have long determined that incarceration serves as a greater deterrent for serious white-collar crimes and used prison sentences as a tool to send a message to individuals in similar situations that criminal conduct will not be tolerated.

⁶⁶ See e.g. *R v Frank*, [1945] 3 DLR 516 (PEISC) (convicted of making false statement on income tax return); *R v Brown* (1946), [1947] 1 DLR 286 (Ont CA) [*Brown*] (selling defective mattresses to the army).

⁶⁷ *R v McNabb* (1979), 49 CCC (2d) 263 (Sask CA) [*McNabb*]; *R v Murdock* (1980), 42 NSR (2d) 90 (SC) at paras 14–16 [*Murdock*]; *R v Redmond* (1988), 82 NSR (2d) 173 (CA) at para 6 (sentence increased from 90 days to eight months imprisonment for defrauding bank of \$42,910).

⁶⁸ *R v Drabinsky*, 2011 ONCA 582 at para 160 (“[d]enunciation and general deterrence most often find expression in the length of the jail term imposed” at para 160); *R v Chicoine*, 2012 QCCA 1621 at paras 65, 126 [*Chicoine*]; *R v Coffin*, 2006 QCCA 471; *R v Rubenstein* (1986), 2 WCB (2d) 202 (Ont PC) at para 30; *R v Harpman* (1990), 63 Man R (2d) 78 (CA) at 2 [*Harpman*].

⁶⁹ *McNabb*, *supra* note 67 at 276.

⁷⁰ *Ibid.*

⁷¹ *Murdock*, *supra* note 67 at para 14.

⁷² *Ibid* at para 16.

⁷³ (1984), 37 Sask R 126 (CA) at para 7 [*Fichter*].

C. WHICH WHITE-COLLAR OFFENDERS CANADA INCARCERATES: POSITIONS OF TRUST

In addition to the perceived deterrence value of incarceration, a 1990 study by David Weisburd, Elin Waring, and Stanton Wheeler found that those of higher status were more likely to be imprisoned for committing a crime and serve longer prison terms compared to offenders of a lower status. The distinguishing factor amongst the convicted in this study was not in fact the offender's economic or corporate status, but rather whether or not they held a position of trust and authority.⁷⁴ A study of fraud penalties from 2012 to 2018 also found that sentencing was greatly influenced by the status of the perpetrator — people in a position of trust were given harsher sentences.⁷⁵ The study also found that greater damage occurred in frauds committed by those in a position of trust due to their large influence and authority and that such perpetrators were often repeat offenders.⁷⁶ Canadian legislators and courts have held a similar view; the *Criminal Code* requires that courts increase or decrease a sentence based on certain mitigating factors, including evidence that the accused “abused a position of trust or authority in relation to the victim.”⁷⁷ Likewise, the courts have often found that the general policy goal of deterrence might necessarily require harsher sentences where the individual offender was in a position of trust.⁷⁸

This hostility towards trust violations is not new in Canadian law, and it has remained a consistent sentencing factor to date. As early as 1946, in the Ontario case *Brown*, the respondent was convicted of deliberately defrauding the government during a time of war and at the expense of the armed forces.⁷⁹ Being that the respondent had entered into important war-time contracts with the government for the supply of mattresses for the army, his offence was considered especially serious. In this case, the fine imposed by the trial court was viewed as “merely a return of part of the unlawful gain,” and thus on appeal, the sentence was increased by an additional three years imprisonment.⁸⁰ Similarly, in *McEachern*, an Ontario case involving a theft of \$77,000 from the Bank of Montreal by a branch's assistant manager, the Court emphasized that, as an assistant manager, the respondent was in a position of trust. More importantly, it had “long been established that the most important principle in sentencing a person who holds a position of trust is that of general deterrence.”⁸¹ The trial judge had ordered restitution and community service. However, the Court of Appeal for Ontario held that at the trial level too much emphasis had been placed on restitution rather than general deterrence, and the gravity of the offence actually called for 18 months imprisonment.⁸² In a similar vein, the Court in *MacIsaac*, a case

⁷⁴ Weisburd, Waring & Wheeler, *supra* note 14 at 224.

⁷⁵ MNP LLP, “Fraud Aware 2019: National Study on Reported Fraud Cases in Canada” at 5, online: <www.mnp.ca/Style%20Library/mnp/pdf/analytical-fraud-report.pdf>.

⁷⁶ *Ibid* at 6.

⁷⁷ *Criminal Code*, *supra* note 8, s 718.2(a)(iii).

⁷⁸ *R v Aubichon* (1992), 100 Sask R 268 (CA); *R v McDougall* (1992), 105 Sask R 71 (CA); *R v Steeves and Connors*, 2005 NBCA 85 [Steeves]; *R v Little* (1981), 34 NBR (2d) 503 (CA) at para 6 [Little]; *R v McEachern* (1978), 42 CCC (2d) 189 (Ont SC) at para 8 [McEachern]; *R v MacIsaac* (1988), 84 NSR (2d) 152 [MacIsaac] (breach of public trust is more serious than private trust at para 61); *R v Bogart* (2002), 61 OR (3d) 75 (CA) at paras 25–26; *R v Gray* (1995), 26 WCB (2d) 209 (Ont CA).

⁷⁹ *Brown*, *supra* note 66.

⁸⁰ *Ibid* at 290.

⁸¹ *McEachern*, *supra* note 78 at para 8. See also *Little*, *supra* note 78 at para 6; *Steeves*, *supra* note 78 at para 1. This principle widely applied today. See e.g. *R v Chernyakhovsky*, 2018 ONCJ 54; *R v Connell*, 2015 NSSC 11.

⁸² *McEachern*, *ibid* at paras 9–10.

which involved charges of forgery and fraud by a member of the Legislature amounting to a loss of \$7,000 of public funds, found that the dollar amount of the fraud was of little concern when the breach involved a serious violation of public trust.⁸³ Rather, general deterrence and maintaining public faith was of paramount importance in sentencing in order to demonstrate that such conduct would not be tolerated, especially amongst officials elected in good faith.⁸⁴ The accused was sentenced to 12 months in prison and a restitution payment of \$6,860.⁸⁵ Again, in *Harpman*, the accused was the head trader in a company he defrauded through a complex scheme of 650 fraudulent trades over the period of four and a half years resulting in a loss to the company of over \$500,000.⁸⁶ The appeal court found his initial sentence of 30 months to be “grossly inadequate” due to both the breach of trust and premeditation required in such a complex scheme, and therefore increased the sentence to four years.⁸⁷

D. THE PRESENT-DAY PERCEPTION OF WHITE-COLLAR CRIME

The perception towards white-collar crime, both by policy-makers and society, has evolved over time in Canada, and white-collar crime has become increasingly viewed as unacceptable and truly criminal behaviour. With the enactment of the *Standing Up for Victims of White Collar Crime Act* in 2011, legislators amended the *Criminal Code* to provide a mandatory minimum sentence of two years for fraud of over \$1 million;⁸⁸ consider aggravating factors for sentencing which include the magnitude, complexity, duration, and degree of planning of the fraud;⁸⁹ provide that a court shall not consider as mitigating circumstances the offender’s employment or reputation;⁹⁰ and insist that during sentencing a court shall consider making a restitution order.⁹¹ Moreover, Bill C-10, which came into force in November 2012 under the *Safe Streets and Communities Act*, imposed restrictions on the use of conditional sentences, whereby an offender serves their sentence in the community under specific conditions imposed by section 742.3 of the *Criminal Code*.⁹² This amendment made conditional sentences unavailable for indictable offences with any minimum prison term or those with a maximum prison term of 14 years or more; this includes several white-collar crimes, including large-scale fraud and theft over \$5,000.⁹³ Similarly, the *Corruption of Foreign Public Officials Act* was amended in 2013 to increase the maximum sentence for bribing foreign public officials to 14 years.⁹⁴ Imposing a

⁸³ *MacIsaac*, *supra* note 78 at paras 1, 61.

⁸⁴ *Ibid* at para 61.

⁸⁵ *Ibid* at paras 65, 66.

⁸⁶ *Harpman*, *supra* note 68 at paras 1–2.

⁸⁷ *Ibid* at para 4.

⁸⁸ *Criminal Code*, *supra* note 8, s 380(1.1).

⁸⁹ *Ibid*, s 380.1(1)(a).

⁹⁰ *Ibid*, s 380.1(2).

⁹¹ *Ibid*, s 380.3(1); *Standing Up for Victims of White Collar Crime Act*, SC 2011, c 6.

⁹² *Safe Streets and Communities Act*, SC 2012, c 1, s 34. See also Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1st Sess, 41st Parl, 2012, cl 34 (assented to 13 March 2012), SC 2021, c 1.

⁹³ *Criminal Code*, *supra* note 8, ss 742.1(b)–(c) (conditional sentence not available where offence is punishable by a minimum term of imprisonment or by a maximum of 14 years).

⁹⁴ Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act*, 1st Sess, 41st Parl, 2013, c 26 (assented to 19 June 2013) SC 2013, c 26; *Corruption of Foreign Public Officials Act*, SC 1998, c34, s 3(2).

mandatory minimum of incarceration and restricting conditional sentences demonstrates that, despite Miceli and Becker's calculated assertion that fines and incarceration can hold a similar value or cost to an offender, Canada still views incarceration as a harsher punishment than economic sanctions, the threat of which ought to increase criminal deterrence.⁹⁵

There is evidence in several more recent cases in the past decade involving individual perpetrators committing white-collar crimes and ultimately ending up in jail. Take, for example, *R. v. Atwal*, a 2016 case involving forgery and fraud by an external accountant for a large corporation, resulting in \$1 million lost in eight weeks.⁹⁶ The accused was incarcerated for three years for fraud charges, nine months for forgery, and ordered to pay \$35,000 in restitution.⁹⁷ Likewise, the 2015 case *R. v. Piccinini* involved a telephone scam whereby the accused would pretend to be the victim's grandchildren needing bail money, resulting in \$900,000 defrauded. The accused was sentenced to six years in prison.⁹⁸ As well, in the 2017 case *R. v. Roberts*, a bank employee found guilty of fraud amounting to \$277,787 in losses from the bank was sentenced to two years in prison and a restitution payment for the amount lost.⁹⁹ More recently, in *R. v. Bebawi*, a former SNC-Lavalin (SNC) executive was found guilty of fraud and bribery of foreign public officials. The offences were considered "extremely serious" and the accused was sentenced to eight and a half years in prison.¹⁰⁰

That said, Canadian courts have not been consistent in this regard, and they in some circumstances settle for monetary penalties for white-collar offences. This is especially prominent in securities fraud, which includes offences such as insider trading and market manipulation. For instance, a 2018 securities fraud case resulted in the accused being subject to administrative penalties of \$600,000 and a lifetime trading ban.¹⁰¹ Similarly, in *Finkelstein v. Ontario Securities Commission*, the Court of Appeal for Ontario upheld the imposition of \$150,000 per violation for breaches of insider trading and tipping provisions in the *Securities Act*.¹⁰² In the 2020 case *Ontario Securities Commission v. Tiffin*, the accused exploited a position of trust for financial gain of \$700,000 by illegally trading securities and committing three offences under section 122(1) of the *Securities Act*.¹⁰³ The accused was originally sentenced to six months imprisonment, 24 months of probation, and a restitution order.

⁹⁵ *R v Proulx*, 2000 SCC 5 at para 29 (incarceration is more punitive than other punishments due to restrictions on an offender's liberty); Posner, *supra* note 5 at 413.

⁹⁶ 2016 ONSC 3668 at para 4.

⁹⁷ Aggravating circumstances included misappropriation of funds from an employer — a position of trust (*ibid* at para 30).

⁹⁸ *R v Piccinini*, 2015 ONCA 446.

⁹⁹ 2017 ONSC 1071. See also *R v Walker*, 2016 ABQB 695 (four counts of fraud over \$5,000 received a sentence of three years concurrent for each); *R v Cunsolo*, 2014 ONCA 364 (mortgage scheme defrauding over \$4 million, sentenced to 18 months in prison and a restitution payment of \$250,000); *Ontario Securities Commission v DaSilva*, 2017 ONSC 4576 (sentence of three months for securities violations and defrauding investors of over \$2,000,000 upheld on appeal).

¹⁰⁰ *R v Bebawi*, 2020 QCCS 22 at paras 9–13, 51. See also *Chicoine*, *supra* note 68 at 126 (sentence of seven years imprisonment for fraud and money laundering deemed "appropriate" on appeal); *R v Weber*, 2019 ONSC 5050.

¹⁰¹ *North American Financial Group Inc v Ontario Securities Commission*, 2018 ONSC 136 at paras 2, 217, 2018 ONCA 61. See also *Re Paul Azeff* (24 August 2015), 38 OSC Bull 7351; *Furtak v Ontario (Securities Commission)*, 2018 ONSC 6616 at para 3; *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at 2–3.

¹⁰³ *Tiffin*, *supra* note 52 at para 21.

However, on appeal the six-month prison sentence was set aside on the grounds that it was “demonstrably unfit” and “clearly excessive” in the circumstances.¹⁰⁴

Moreover, when violations are made by and attributed to corporations, courts cannot materially incarcerate them and therefore impose monetary punishments or restrictions on their activity within the market place.¹⁰⁵ In the corporate context, amendments to the *Criminal Code* in 2018 suggest that Canada is taking a stance more consistent with Becker’s economic model of relying on economic sanctions, where misconduct is perpetrated by a corporation rather than an individual. These amendments, under sections 715.3 to 715.43, established “remediation agreements” for white-collar crimes committed by “organizations” in Canada, commonly referred to as deferred prosecution agreements (DPA) in the US and United Kingdom.¹⁰⁶ The purpose for the establishment of remediation agreements is set out in section 715.31 of the *Criminal Code*: to denounce wrongdoings, to hold organizations accountable through imposing penalties, to establish corrective measures and promote a culture of compliance, to encourage voluntary disclosure of wrongdoings, to provide reparations to victims, and to reduce the negative consequences on individuals who did not engage in the wrongdoings (such as employees).¹⁰⁷ Under these agreements, an organization with a reasonable prospect of conviction for an economic offence, such as fraud, bribery, or insider trading, can avoid a criminal conviction by entering into an agreement with a prosecutor to complete specified tasks in exchange for a stay of proceedings.¹⁰⁸ Such tasks can include paying a fine, victim reparations, independent monitoring, or enhanced compliance measures and internal control procedures.¹⁰⁹ This option is only available for financial crimes where it is found to be in the public interest and where the Attorney General has consented to the negotiation of the agreement; it is not available where the alleged crime likely resulted in death or bodily harm to a victim or one that was committed with or in association with a terrorist group.¹¹⁰

While remediation agreements are new to Canada, DPAs are not uncommon in the US and UK. In the US, DPAs or similar programs have been used to resolve criminal liability as far back as the 1960s, though they were historically meant as a rehabilitation-oriented tool for vulnerable or low-level offenders to avoid the harms associated with criminal convictions, not corporations.¹¹¹ The goal behind DPAs was to avoid the collateral consequences of criminal convictions by eliminating criminal punishments for individuals who no longer pose a threat to society.¹¹² There is some evidence which shows that DPAs and other behaviour-

¹⁰⁴ *Ibid* at paras 65–67.

¹⁰⁵ See e.g. *1205676 Alberta Ltd., Re*, 2010 ABASC 544 (illegal trade and distribution of securities amounting to harm of over \$15 million resulted in temporary removal from market).

¹⁰⁶ *Criminal Code*, *supra* note 8, s 715.31.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*, ss 715.3(1), 715.37(7).

¹⁰⁹ *Ibid*, ss 715.34(1), 715.34(3).

¹¹⁰ *Ibid*, ss 715.32–715.33; Canada, Department of Justice, *Remediation Agreements and Orders to Address Corporate Crime*, (11 September 2019) online: <www.canada.ca/en/departement-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html> [DOJ, *Remediation Agreements and Orders*].

¹¹¹ Robert J Ridge & Mackenzie A Baird, “The Pendulum Swings Back: Revisiting Corporate Criminality and the Rise of Deferred Prosecution Agreements” (2008) 33:2 U Dayton L Rev 187 at 197; Peter Spivack & Sujit Raman, “Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements” (2008) 45:2 Am Crim L Rev 159 at 163; Andrea Amulic, “Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States” (2017) 116:1 Mich L Rev 123 at 125–28.

¹¹² Amulic, *ibid* at 128.

based criminal diversion programs benefit society. For instance, Andrea Amulic points to projects such as the Manhattan Court Employment Project in New York and Project Crossroads in Washington, DC from the 1970s, which successfully reduced unemployment and recidivism through the use of criminal diversion programs for individuals.¹¹³ In the US, since the early 2000s, the use of DPAs has grown immensely in the context of corporate white-collar criminal activity, and they are now rarely used for individual offenders.¹¹⁴ In the corporate context, DPAs allow a company to avoid a formal criminal conviction by agreeing to aid in the prosecution of individual employees and implement specified internal compliance programs, in addition to the payment of punitive monetary penalties and restitution payments to victims.¹¹⁵

The impact of Canada's adoption of remediation agreements remains unknown, as Canada has yet to enter into such an agreement.¹¹⁶ However, in 2018, an affiliate of SNC was denied a remediation agreement after being charged with bribery under section 3(1)(b) of the *Corruption of Foreign Officials Act* and fraud under section 380(1) of the *Criminal Code*.¹¹⁷ Instead, pursuant to a plea bargain, SNC was required to pay a fine of \$280 million and to have its ethics and compliance program monitored by an independent firm for three years.¹¹⁸ This plea bargain also allows SNC to avoid a criminal conviction and prevents their debarment under the Integrity Regime.¹¹⁹ Despite some controversy surrounding this case, the resulting plea bargain appears to resemble what remediation agreements envision: a hefty fine and a commitment to monitoring and repairing the corrupt internal systems that facilitated the criminal activity.

The remediation agreement regime could result in a rather soft stance on white-collar crime, as some perceive it as a means for white-collar criminals to pay their way out of jail.¹²⁰ This could be especially concerning considering the enormous impact that large corporations can have on the economy. Although it may appear unjust to charge an entire corporation for the fraudulent efforts of one rogue employee, and there are obvious restrictions to imprisonment given a corporation has no body or brain, providing corporations with a means of avoiding accountability may disincentivize self-regulation and instead motivate corporations to turn a blind eye to questionable behaviour. Moreover, as remediation agreements are available to organizations generally, which, in addition to corporations, may

¹¹³ *Ibid* at 129.

¹¹⁴ Spivack & Raman, *supra* note 111 at 159; Amulic, *ibid* at 128; Ridge & Baird, *supra* note 111 at 197.

¹¹⁵ Jennifer Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements" (2016) 8:1 J Leg Analysis 191 at 198.

¹¹⁶ However, DPAs generally have been the subject of debate. *Ibid* (arguing that DPAs violate the rule of law); Sara George, Alan Ward & Richard McGarry, "Deferred Prosecution Agreements – In Jeopardy of Falling Short?" (2014) 15:2 Bus L Intl 115 (interplay of DPA regimes in the UK and US results in forum shopping); Spivack & Raman, *supra* note 111; Amulic, *supra* note 111 (arguing that DPAs improperly 'humanize' corporations while ignoring the collateral harms of criminal sentences dehumanizes individual offenders); Ridge & Baird, *supra* note 111.

¹¹⁷ SNC's application for judicial review of the decision not to invite SNC to enter a remediation agreement was struck. *SNC-Lavalin Group Inc v The Director of Public Prosecutions*, 2019 FC 282 ("[W]hether to invite an organization to enter into negotiations for a remediation agreement — clearly falls within the ambit of prosecutorial discretion" and "the law is clear that prosecutorial discretion is not subject to judicial review" at para 8).

¹¹⁸ Ken Jull, "SNC-Lavalin: The Final Chapter" (2020) Toronto LJ 1, online: <grllp.com/misc/pdf/57-Jull SNC The Final Chapter.pdf>; Kate Bezanson, "Constitutional or Political Crisis? Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair" (2019) 52:3 UBC L Rev 761.

¹¹⁹ Debarment would prevent SNC from entering any future government contracts.

¹²⁰ Bezanson, *supra* note 118 at 774.

also include partnerships or other associations of persons created for a common purpose, the reach of the new provision may be significant. Holding organizations or corporations, rather than individuals, responsible for white-collar crimes committed within an organization can incentivize greater internal control and employee discipline.¹²¹

However, some scholars argue against DPAs as being inherently unfair or too onerous in the corporate context. As DPAs are simply a contract between the prosecutor and a corporation, there remain potential issues related to abuse or misconduct in the negotiation process.¹²² Some scholars caution that the discretionary nature of DPAs could result in the imposition of disproportionate monetary penalties which unjustly penalize innocent shareholders or employees, who bear the ultimate cost.¹²³ Moreover, favouritism or political incentives may unfairly weigh on decisions about the availability and terms of DPAs.¹²⁴ Some also argue against DPAs as being contrary to the rule of law because they allow for the imposition of discretionary and arbitrary decisions backed by criminal sanctions.¹²⁵ For instance, Jennifer Arlen suggests that DPAs intervene too deeply in the internal affairs of a company by imposing new requirements not mandated by law which intrude on the private internal workings of the company and are backed by the threat of serious sanctions.¹²⁶

On the other hand, remediation agreements can be good economically, as they keep large corporations active in the market, noting that winding up or corporate liquidation in the face of criminal sanctions can be damaging not just to the corporation, but to the economy more generally, and can result in large-scale unemployment or other social harms.¹²⁷ In fact, the fear of economic collapse resulting from the collateral effects of corporate criminal convictions was a significant driving factor in the movement towards DPAs in the US in the early 2000s.¹²⁸ Remediation agreements typically require organizations to change their internal business practices and implement measures to prevent similar conduct in the future.¹²⁹ Though the effectiveness of this in Canada remains to be seen, some studies suggest that DPAs do help deter criminal conduct, as companies are incentivized to adopt effective compliance programs and self-report internal misconduct.¹³⁰ As there are clear obstacles and economic implications that come with corporate criminal responsibility, it is important to be mindful of the impact that the law has on shaping incentives of decision-makers within organizations.

Nevertheless, being that remediation agreements apply only to organizations, tougher sentencing for individual offenders remains available in Canadian jurisprudence. Although the economic model favours fines over incarceration where the offender has the ability to

¹²¹ Coffee, *supra* note 44 at 421.

¹²² Ridge & Baird, *supra* note 111 at 200.

¹²³ *Ibid* at 200; Spivack & Raman, *supra* note 111 at 182; Bezanson, *supra* note 118 at 769.

¹²⁴ Ridge & Baird, *ibid* at 201.

¹²⁵ Arlen, *supra* note 115 at 192.

¹²⁶ *Ibid* at 199–201.

¹²⁷ DOJ, *Remediation Agreements and Orders*, *supra* note 110. Avoiding these types of harms are one of the purposes of remediation agreements under section 715.31(f) of the *Criminal Code*. However, the fear of economic collapse resulting from criminal convictions in the corporate context has been criticized (Amulic, *supra* note 111 at 138).

¹²⁸ *Ibid*.

¹²⁹ DOJ, *Remediation Agreements and Orders*, *ibid*; Arlen, *supra* note 115 at 192; Spivack & Raman, *supra* note 111 at 160–61.

¹³⁰ Arlen, *ibid* at 203.

pay, it also advocates that it is more efficient to raise the severity of punishment than it is to crack down on the probability of conviction.¹³¹ With white-collar crimes most often being difficult to detect due to their deceptive and calculated nature, harsher economic punishments are then justified. Though legislation now protects corporate executives with the most power and influence who are capable of committing large scale corporate crimes, individual white-collar offenders who are not eligible for these contracts may face harsher punishments today than they have in the past few decades. Today, with both *Criminal Code* amendments and the increased trend in sentencing towards incarceration, individual white-collar criminals may face a real chance of imprisonment. However, the impact of such a change may be less potent than it appears due to the economic resources, and thus access to better legal services, that white-collar criminals possess. This is perhaps why cases concerning white-collar offences are often appealed, at which time the sentences are lowered or reversed.¹³² Still, the current Canadian utilization of the economic model is not without its difficulties.

IV. PROBLEMS WITH THE ECONOMIC MODEL

A. NON-INTERCHANGEABILITY OF FINES AND INCARCERATION

The first issue with the economic model, which favours fines over incarceration where the offender has the resources to pay the fine, is that it necessarily leads to inequities in terms of criminal punishment between the wealthy and the poor. Economists justify this on the basis that the amount of the fine should equal the “value” the offender places on the associated prison term.¹³³ Therefore, from the offender’s perspective, they are of equal cost; it is only the cost on the rest of society that differs, depending on what form of punishment is chosen. In fact, Becker and others suggest that comparable terms of incarceration are more costly for the wealthy than for the poor because their time is worth more, they contribute more to society economically, and the social stigma of being labelled a criminal might have a harsher impact due to their perceived high social status.¹³⁴ Similarly, Bridget McCormack suggests that wealthy offenders may consider incarceration to be worse than a fine, whereas poorer people do not — for those with few economic resources, finding the money to pay a fine is a “pure impossibility” and therefore not considered frightening, but, in contrast, going to prison is a real possibility.¹³⁵

However, as Canadian case law demonstrates, although fines and prison can sometimes be interchanged, generally speaking Canadian courts do not consider monetary penalties and incarceration to be inherently equivalent. John Collins Coffee addresses a “collectability boundary” which speaks to the disparate cost between being deprived of wealth versus liberty.¹³⁶ Coffee reasons that incarceration is inherently more costly than any economic

¹³¹ Coffee, *supra* note 44 at 421. Becker, *supra* note 1 at 178.

¹³² See e.g. Littler, *supra* note 52; Riordan, *supra* note 52; Hinch, *supra* note 52; Doren, *supra* note 52; Tiffin, *supra* note 52.

¹³³ Schanzenbach & Yaeger, *supra* note 30 at 771.

¹³⁴ Becker, *supra* note 1 at 179–80; Ivancevich et al, *supra* note 3 at 120; Lance Lochner & Enrico Moretti, “The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports” (2004) 94:1 *Am Economic Rev* 155 at 157.

¹³⁵ Bridget McCormack, “Economic Incarceration” (2007) 25:2 *Windsor YB Access Just* 223 at 241.

¹³⁶ Coffee, *supra* note 44 at 434.

sanction because, in addition to the stigma and humiliation of being labelled a “criminal,” in the most extreme case a life sentence deprives an offender of all of their liberty.¹³⁷ By contrast, wealth is not something that can be completely taken away — though current assets can be seized and future income can be restricted through the revocation of a licence or other means, generally future earnings are beyond the reach of the law.¹³⁸ Therefore, though it is possible for monetary equivalents to incarceration to exist theoretically, in practice it would only occur for very small sentences. The economic rationale for fines over incarceration is dependent on both types of punishment having equal deterrence and equal punitive impact on the offender; however, as does Canadian jurisprudence, Coffee’s position suggests that prison would in fact be harsher and thus act as a greater deterrent than monetary penalties.

As such, the problem with the economic model is twofold: first, research has shown that incarceration has a disproportionately destructive impact compared to other types of punishment (like fines), and second, there is no evidence that the threat or experience of incarceration actually deters crime in the first place. This is important because, although Canadian courts have been keen to incarcerate certain white-collar criminals, especially those in a position of trust, it remains that our prison system is disproportionately filled with poor people. Even for charges of fraud, which is typically considered a white-collar offence, offenders with less resources are more likely to face incarceration due to their inability to pay a high fine. For instance, in *R. v. Walker*, the accused was sentenced to nine months in custody for tax fraud over \$5,000, and the Court denied the Crown’s requested fine of almost \$70,000 due to the economic circumstances of the accused.¹³⁹ The impact of incarcerating poor people and fining rich people is an important issue that policy-makers face. The negative impact of incarceration can increase disparities between classes, which perpetuates, rather than reduces, both poverty and crime.

B. DISPROPORTIONAL HARM CAUSED BY PRISON VERSUS FINES

Although the economic perception that fines and incarceration have comparative value balances mathematically, the impact of incarcerating can be truly devastating in practice. Social scientists have recognized that there is some relationship between an accused’s criminal conviction, their mental state, and subsequent destructive behaviour.¹⁴⁰ Some scholars have noted that, regardless of the magnitude of one’s criminal conviction, or how long ago it occurred, a criminal conviction “scars one for life.”¹⁴¹ Psychologists have examined the impact of criminal stigmas on offenders, noting that offenders often internalize negative evaluations of themselves, which lowers their self-esteem and fuels self-destructive behaviour.¹⁴² Moreover, internalizing and self-identifying as a “criminal” also materializes into decreased social interaction, self-concealment, and marginalization; these effects hinder

¹³⁷ *Ibid.*

¹³⁸ *Ibid* at 433.

¹³⁹ [2011] OJ No 6727 at paras 1, 17.

¹⁴⁰ Ruthanne DeWolfe & Alan DeWolfe, “Impact of Prison Conditions on the Mental Health of Inmates” (1979) 4:4 S III ULJ 497 at 501.

¹⁴¹ Thomas P LeBel, “‘If One Doesn’t Get You Another One Will’: Formerly Incarcerated Persons’ Perceptions of Discrimination” (2012) 92:1 Prison J 63 at 66. See also Amulic, *supra* note 111 (on the use of DPAs to mitigate harmful impacts).

¹⁴² LeBel, *ibid* at 69–79.

successful social reintegration for offenders, reduces employment opportunities, and consequently can lead to increased substance abuse, mental illness, and poverty in the long run.¹⁴³ As well, the internalization of stigmas associated with a prison conviction are magnified due to isolation from friends, family, and the community.¹⁴⁴ Such results include increased stress and aggression and resistance to behavioural change.¹⁴⁵ Ruthanne DeWolfe and Alan DeWolfe explain how inmates experience extreme stress from being confined, which prevents them from making constructive adjustments to their behaviour. An individual requires that certain environmental conditions be met so that they can engage in “adaptive” responses (which alter criminal behaviour) rather than “defensive” responses (which resist behavioural change).¹⁴⁶ These factors include the freedom from strong emotions of fear, shame or frustration, correct information, and some freedom to select or choose between potential solutions.¹⁴⁷ Absent these factors, people engage in defence mechanisms, such as aggression or denial, which leads to the inability to properly cope and prevents them from adapting their behaviour.¹⁴⁸

C. DISPROPORTIONATE IMPACT OF JAIL ON THE POOR

Because fines are favoured by those that can afford to pay them, this shields wealthy people from the impact of incarceration, while marginalized defendants tend to get either a mix of fines and imprisonment or just prison.¹⁴⁹ It is therefore important to assess the impact that the economic model would have on society, whereby poor offenders are subject to the harsh after-effects caused by incarceration, which impacts their rehabilitation, while well-off offenders are free from these constraints. Lost earnings may weigh more heavily for a wealthy offender, but a wealthy offender will still have the knowledge, skills, and education that helped place them in that income bracket to begin with. They may have other assets or skills which, despite a tarnished reputation, can help them support themselves post-incarceration and reintegrate into society. By contrast, poor people have smaller or no safety net to fall back on while they try to recover after being incarcerated. Often, even securing an entry-level minimum wage job can be difficult for offenders and self-perpetuating destructive behaviour only serves to increase economic disparities.¹⁵⁰ Though some still argue that poverty amongst previous offenders may be a condition of their own making, the public is presently more aware that poverty is not so much an individual choice, but often the result of public policy or historic systemic issues which require constructive, rather than punitive, measures to reduce wage disparities in society. More importantly, poverty is economically costly, as it can lead to a variety of social costs, including larger health care expenditures, lower productivity and lower spending, and less investment activity.¹⁵¹ As such, the issue of

¹⁴³ *Ibid* at 67, 79. See also Francis T Cullen, Cheryl Lero Jonson & Daniel S Nagin, “Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science” (2011) 91:3 Prison J Supplement to 91(3) 48S at 54S (labelling theory); Amulic, *supra* note 111 at 125.

¹⁴⁴ Cullen, Jonson & Nagin, *ibid* at 54S.

¹⁴⁵ DeWolfe & DeWolfe, *supra* note 140 at 514.

¹⁴⁶ *Ibid* at 515.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid* at 515–16.

¹⁴⁹ Schanzenbach & Yaeger, *supra* note 30 at 772.

¹⁵⁰ Statistics Canada, *Economic Profiles of Offenders in Saskatchewan*, by Jillian Boyce, Sun Te & Shannon Brennan, Catalogue No 85-002-X (Ottawa: Statistics Canada, 6 September 2018) (notes that finding employment can be difficult for previous offenders); DeWolfe & DeWolfe, *supra* note 140 at 508–13.

¹⁵¹ Harry J Holzer et al, “The Economic Costs of Poverty in the United States: Subsequent Effects of Children Growing Up Poor” (January 2007) National Poverty Center Working Paper No 07-04 at 3.

poverty perpetuation through economic disparities in the prison population is as much of an economic issue as it is one of morality, fairness, and social policy. The disproportionate impact that incarceration has on the poor has no counteracting benefit, as the goals of rehabilitation and deterrence are surely not met through poverty perpetuation and incarceration.

D. INCARCERATION AND FINES FAIL TO ACHIEVE DETERRENCE

The theory that punishment deters wrongdoings and changes future behaviour has been around for many years; however, it is not rooted in any empirical findings.¹⁵² Rather, studies have shown that the opposite is true: punishment does not teach individuals to modify their behaviour but merely to suppress it as needed in the presence of their punisher.¹⁵³ In the case of incarceration, there is little empirical evidence to support the deterrent effect of incarceration, apart from “anecdotal experiences and personal beliefs.”¹⁵⁴ In fact, a study from 2002 found that not only did criminal sanctions have little to no impact on recidivism rates in Canada, but that there was no “empirical rationale for criminal justice sanctions to suppress criminal behaviour in the first place.”¹⁵⁵ Rather, it is common among criminologists to predict that offenders will generally become more, rather than less, criminally inclined due to their experience in jail.¹⁵⁶ For instance, a study by Keith Chen and Jesse Shapiro found that the likelihood of re-offending increased with the harshness of punishment.¹⁵⁷ As Francis Cullen, Cheryl Jonson, and Daniel Nagin put it, the threat or experience of prison does not have “special powers” in persuading people to avoid criminal activity.¹⁵⁸ In reality, the only benefit to incarceration is its incapacitation function — prison works wonderfully to keep an offender segregated and prevent them from harming the community while they are in custody.

Similarly, for fines, though many are enthusiastic about the potential of monetary penalties to dissuade criminal behaviour, evidence of its effectiveness is unclear. A study from Sweden established that, in order to create lasting deterrence to reduce drunk driving, what was required was expensive and intrusive law enforcement, such that evading detection was incredibly difficult.¹⁵⁹ Naturally, however, this high level of enforcement is normally too costly to maintain in the long run. In the context of white-collar crime, Soltes argues that criminal sanctions, regardless of severity, are “just too far removed and remote to become relevant to executives in their everyday decision making.”¹⁶⁰ Regulations and criminal

¹⁵² Public Works and Government Services Canada, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, by Paula Smith, Claire Goggin & Paul Gendreau, Catalogue No JS42-103/2002 (2002) at 20 [Smith, Goggin & Gendreau]; Donohue, *supra* note 19 at 386; Coffee, *supra* note 44 at 423; Ezra Stotland et al, “Do Convictions Deter Home Repair Fraud?” in Geis & Stotland, *supra* note 6, 252 at 252–53.

¹⁵³ DeWolfe & DeWolfe, *supra* note 140 at 513. See generally Smith, Goggin & Gendreau, *ibid*.

¹⁵⁴ Coffee, *supra* note 44 at 425. See also Smith, Goggin & Gendreau, *ibid* at 20.

¹⁵⁵ Smith, Goggin & Gendreau, *ibid* at 20.

¹⁵⁶ Cullen, Jonson & Nagin, *supra* note 143 at 53S.

¹⁵⁷ Keith M Chen & Jesse M Shapiro, “Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach” (2007) 9:1 *Am Law & Econ Review* 1 at 22–24. See also Cullen, Jonson & Nagin, *ibid* at 57S.

¹⁵⁸ Cullen, Jonson & Nagin, *ibid* at 51S.

¹⁵⁹ Soltes, *supra* note 3 at 323.

¹⁶⁰ *Ibid* at 324.

sentences aimed at punishing offenders do very little in the way of furthering criminal deterrence; however, regulations aimed at improving and strengthening norms of corporate behaviour may be a more constructive method of addressing the issue of white-collar crime.¹⁶¹

V. ALTERNATIVES TO FINES AND INCARCERATION

As John Donohue states, “crime is too complex a phenomenon to think that a simple model of ‘raise the price and you will get less of it’ will have complete explanatory power.”¹⁶² Section 718 of the *Criminal Code* sets out six objectives that sentencing is intended to achieve, which include denouncing the unlawful conduct, deterrence, separating offenders from society where necessary, rehabilitation, reparations to victims, and the promotion of a sense of responsibility on offenders.¹⁶³ Moreover, the *Criminal Code* sets out the fundamental principle in sentencing that the punishment must be “proportionate to the gravity of the offence and the degree of responsibility of the offender”¹⁶⁴ and that all available sanctions other than incarceration should be considered for all offenders, so long as the considered sanctions are “reasonable in the circumstances and consistent with the harm done to victims.”¹⁶⁵ With this in mind, it is worth considering what objectives both fines and incarceration are achieving in the context of white-collar crime, or criminal activity more generally. If fines can meet the goals of the *Criminal Code*, economic literature has demonstrated that they would be the best form of punishment due to the cost of alternative sentences. Of course, we know that fines provide revenue and can compensate victims, and incarceration has obvious incapacitating effects. Moreover, both fines and incarceration serve to denounce criminal conduct. However, neither appear to have a meaningful impact on criminal deterrence or rehabilitation, which begs the question of how policy-makers can truly disincentivize and prevent criminal conduct.

Crime can be created by law and public policy when people are driven into situations which incentivize criminal behaviour. The difficulty with combatting white-collar crime is that often the best preventor is privatized — in the context of corporations, the organizations themselves are in the best position to self-regulate to prevent misbehaviour like fraud or insider trading.¹⁶⁶ That said, often companies who discover white-collar criminal conduct internally do not report the crimes to law enforcement. For instance, in the US, studies have found that companies will likely fire the individual in about 75 percent to 93 percent of cases, whereas only between 17 percent and 40 percent are reported to the police.¹⁶⁷ Companies are more likely to seek punishment and opt for harsher punishment of individuals where the crime involves stealing directly from the company (such as misappropriation of funds), as opposed to crimes which might benefit the company (such as industrial espionage).¹⁶⁸ Internal punishment decisions are driven by a wide variety of considerations, including social

¹⁶¹ *Ibid* at 324–25.

¹⁶² Donohue, *supra* note 19 at 387.

¹⁶³ *Criminal Code*, *supra* note 8, s 718.

¹⁶⁴ *Ibid*, s 718.1.

¹⁶⁵ *Ibid*, s 718.2(e).

¹⁶⁶ Michael Levi, “Social Reactions to White-Collar Crimes and their Relationship to Economic Crises” (2011) 16 *Sociology of Crime, L & Deviance* 87 at 101.

¹⁶⁷ Healy & Serafeim, *supra* note 17 at 4.

¹⁶⁸ *Ibid* at 6, 32.

stigma, bad publicity, the cost of replacing an employee, commitment to codes of conduct, or other managerial self-interests.¹⁶⁹ Moreover, many white-collar crimes start small, but fall down a fast and slippery slope to large-scale criminal activity.¹⁷⁰ For individuals operating outside of the corporate context, perceived norms of acceptable behaviour are driving factors in the decision to commit a crime.¹⁷¹ A better approach to dealing with white-collar crime likely involves letting go of archaic and naive approaches to human behaviour which incorrectly believe that harsh punishments can change human behaviour and focusing instead on ways in which policy-makers can make meaningful and constructive improvements to the social and corporate environment which induces criminal activity in the first place.

On an individual level, government regulations and social programs aimed at reducing poverty and marginalization, as well as strengthening social bonds may be an economic way to prevent both white-collar and violent crime. Studies have shown that increasing spending on social programs and education, rather than on systems of punishment, has a greater impact on crime reduction.¹⁷² Though society emphasizes success, when an individual's social and economic circumstances prevent them from pursuing growth towards their personal goals in legitimate ways, they are motivated to engage in criminal behaviour as an alternative means of achieving such goals.¹⁷³ Increasing levels and access to education can reduce crime, not just by raising the opportunity cost of crime, but also by providing people with legitimate means of achieving personal goals, increasing social bonds, and increasing risk aversion.¹⁷⁴ Therefore, education is not only beneficial to individuals but is also likely to have even greater social returns and utility.¹⁷⁵

More importantly to the context of white-collar crime, a study by Joost van Onna and Adriaan Denkers found that white-collar criminals tended to have weaker social bonds compared to control groups with similar social and demographic backgrounds.¹⁷⁶ Types of social bonds included relationships with the community, economic institutions, and within the workplace. Therefore, the propensity to commit white-collar crimes can perhaps be understood through social relations and informal control mechanisms.¹⁷⁷ Frail social bonds make people more inclined to give in to business temptations and therefore more likely to engage in criminal opportunities when they arise.¹⁷⁸ As many white-collar offenders do not have a long history of crime, van Onna and Denkers suggest that environmental changes and socialization that occur within an organization result in either bolstering or dismantling an offender's social bonds, thereby influencing their willingness to pursue criminal conduct.¹⁷⁹ This is in line with Sutherland's observation that systematic criminality is learned through exposure to those who already engage in or are inclined to engage in criminal behaviour.¹⁸⁰

¹⁶⁹ *Ibid* at 8–11.

¹⁷⁰ Levi, *supra* note 166 at 99.

¹⁷¹ Soltés, *supra* note 3 at 134–38; James E Sorensen, Hugh D Grove & Thomas L Sorensen, "Detecting Management Fraud: The Role of the Independent Auditor" in Geis & Stotland, *supra* note 6 at 231.

¹⁷² Donohue, *supra* note 19 at 391–405.

¹⁷³ Edward Gross, "Organization Structure and Organizational Crime" in Geis & Stotland, *supra* note 6, 52 at 61.

¹⁷⁴ Lochner & Moretti, *supra* note 134 at 157–83.

¹⁷⁵ *Ibid* at 183.

¹⁷⁶ van Onna & Denkers, *supra* note 50 at 1215.

¹⁷⁷ *Ibid* at 1220–21.

¹⁷⁸ *Ibid* at 1206–20.

¹⁷⁹ *Ibid* at 1220–23.

¹⁸⁰ Sutherland, "Criminality," *supra* note 4 at 153.

A potential criminal's decision to engage in criminal activity is determined by the "comparative frequency and intimacy" of their contact with persons engaging in certain types of behaviour, a process he calls "differential association."¹⁸¹ This line of thinking points to the importance of environmental norms¹⁸² and the possible efficacy of other developing processes such as restorative justice, whereby the primary focus is on offender responsibility and harm reparation.¹⁸³

It is up to governments to enact rules that incentivize organizations to prevent the manifestation of internal environments which lead to white-collar crimes, rather than to simply implement reactive legislation to address post-criminal conduct. From a corporate perspective, there are plenty of opportunities for internal controls to provide accountability mechanisms which make white-collar crimes difficult, if not impossible, to commit. For instance, regulations requiring certain internal governance systems are important for both setting strategic goals and providing an accountability mechanism in corporations.¹⁸⁴ In larger organizations, agency costs can be significant due to the price of monitoring and controlling behaviour; therefore, demonstrating that corrupt behaviour will not be tolerated is especially important.¹⁸⁵ Business professionals, board members, and auditors have recognized that a corporate culture catered toward setting an expectation of zero tolerance for white-collar crime is essential, and many companies have therefore adopted codes of conduct toward such ends.¹⁸⁶ Naturally, however, people can always be influenced by self-serving incentives, as evidenced by the corporate tendency to prefer reporting crimes that result in corporate loss rather than corporate gain.¹⁸⁷ In light of this, government regulations enforcing ethical behaviour and providing methods of monitoring and accountability in the corporate context may help overcome this issue. Stimulating a shift toward a culture of corporate criminal prevention and accountability may be furthered, for example, by enhancing whistleblower protection at the federal and provincial levels.¹⁸⁸ Likewise, enacting a regulatory system whereby auditors can catch early red-flags associated with fraud or other misconduct may be a cost effective and preventive method of disincentivizing criminal activity.¹⁸⁹ John Ivancevich et al. suggest that the creation of a national code of conduct of business executives regulated through a professional government agency may provide a

¹⁸¹ *Ibid* at 153.

¹⁸² Soltes also speaks about the importance of cultural norms which influence decision making (Soltes, *supra* note 3 at 134–35).

¹⁸³ Canada, Department of Justice, *What We Heard: Transforming Canada's Criminal Justice System* (Report) Catalogue No J2-455/2017E-PDF (Ottawa: Department of Justice Canada, March 2018) online: <www.justice.gc.ca/eng/rp-pr/other-autre/tcjs-tsjp/p1.html>.

¹⁸⁴ Ivancevich et al, *supra* note 3 at 120.

¹⁸⁵ Healy & Serafeim, *supra* note 17 at 6.

¹⁸⁶ *Ibid* at 8–9, 22–23. See also Ivancevich et al, *supra* note 3 at 120.

¹⁸⁷ Healy & Serafeim, *ibid* at 13.

¹⁸⁸ Some whistleblower protection exists in Canada: the Ontario Securities Commission launched a whistleblower protection program in 2016; section 425.1 of the *Criminal Code* provides that employers cannot take disciplinary action against an employee for reporting an offence to law enforcement; and public sector employees are protected under the *Public Servants Disclosure Protection Act* (federal) and the *Public Service of Ontario Act, 2006* (Ontario), which require employers to include civil protections for whistleblowers in their codes of conduct: *Criminal Code*, *supra* note 8, s 425.1; *Public Servants Disclosure Protection Act*, SC 2005, c 46; *Public Service of Ontario Act, 2006*, SO 2006, c 35, Sched A. However, employees are not protected under section 425.1 of the *Criminal Code* if they divulge wrongdoings indirectly through media leaks, and generally private-sphere whistleblower protection in Canada has been criticized as ineffective. See e.g. Siavash Vatanchi, "Whistleblowing in Canada: A Call for Enhanced Private Sector Protection" (2019) 9:1 *Western JL Studies* 1; Norm Keith, "Will DPAs Lead to Better White Collar Compliance" (2017) 64:1–2 *Crim LQ* 225 (arguing that DPAs may incentivize whistleblowing at 232).

¹⁸⁹ Sorensen, Grove & Sorensen, *supra* note 171 at 231.

source of oversight and accountability sufficient to limit opportunities to commit crimes like fraud.¹⁹⁰ This would be reinforced by independent evaluators who would grade companies each year, similar to the way we already enforce food safety standards through regular auditing of food-serving establishments.¹⁹¹

This is supported by literature on psychological biases, whereby people inaccurately perceive others as behaving more poorly than themselves — what Robert Cooter, Michael Feldman, and Yuval Feldman refer to as the “others-are-bad” perception.¹⁹² At the same time, these authors also found that people often change their behaviour to align with misperceived realities, resulting in more people behaving badly.¹⁹³ To justify this behaviour, individuals project their own beliefs onto society, therefore overestimating the amount of people who are willing to engage in similar bad behaviour.¹⁹⁴ As such, in some circumstances, disincentivizing wrongful behaviour can be as simple as providing accurate information about the amount of wrongdoing and the cultural perception towards criminal conduct.¹⁹⁵ Moreover, Soltes emphasizes the important role that normative rules play in guiding human behaviour. When faced with tough or tempting decisions, instead of making rational cost-benefit analyses, humans use their intuition and moral compass to choose their course of conduct.¹⁹⁶ Normative rules become increasingly important in the corporate context in light of research indicating that people with psychopathic traits tend to have less empathy but stronger skills in creative and strategic thinking — characteristics that are also prevalent and sought after in high-level management positions.¹⁹⁷ Unsurprisingly, the same study found a prevalence of psychopathic traits among high-level executives.¹⁹⁸ Therefore, government regulation necessarily requires co-operation by individuals tasked with training new employees and breeding a strong ethical culture in order to avoid defensive and resistant responses to government policy and truly modify human behaviour.¹⁹⁹

VI. CONCLUSION

Economic theories of crime and punishment operate under the assumption that humans are adequately deterred from committing criminal acts if the expected harm exceeds their expected utility. However, human decision-making, especially in the context of criminal activity, is often much more complicated than a simple cost-benefit analysis.

The *Criminal Code* sets out various incentives for sentencing in the Canadian criminal justice system, which include more than mere punishment but also focus on deterrence and rehabilitation. Currently, both fines and incarceration appear to fail to sufficiently meet these goals. Studies have shown that incarceration results in harmful collateral consequences

¹⁹⁰ Ivancevich et al, *supra* note 3 at 122.

¹⁹¹ *Ibid* at 122.

¹⁹² Robert Cooter, Michael Feldman & Yuval Feldman, “The Misperception of Norms: The Psychology of Bias and the Economics of Equilibrium” (2008) 4:3 *Rev L & Economics* 889 at 893.

¹⁹³ *Ibid* at 893.

¹⁹⁴ *Ibid* at 897.

¹⁹⁵ *Ibid* at 907–908; See also Ivancevich et al, *supra* note 3 (suggests that in addition to stronger regulations concerning internal controls, official newsletters or publications calling out bad behaviour could enforce the notion that wrongful conduct will not be tolerated and thus incentivize self-regulation at 125).

¹⁹⁶ Soltes, *supra* note 3 at 133–139.

¹⁹⁷ *Ibid* at 61.

¹⁹⁸ *Ibid*.

¹⁹⁹ DeWolfe & DeWolfe, *supra* note 140 at 513–16.

which fuel destructive behaviour and hinder successful rehabilitation. Accordingly, in distinguishing between offenders based on their ability to pay, the economic model of crime and punishment results in disproportionate harm on poor offenders, as wealthy offenders can evade the damaging effects of prison through monetary fines. The goals of the *Criminal Code* are evidently not met through increasing economic inequality and marginalization.

In the context of corporate criminality, reactive financial penalties and ex post internal behavioural reforms may provide some relief from the harms of future white-collar crimes. However, proper deterrence and prevention of white-collar crime likely involves more proactive government regulation aimed at monitoring human conduct, increasing accountability, and creating an environment where the incentivizing factors for white-collar crime commission are not born and spread. Federal monitoring programs, deep internal reforms, and rigorous compliance programs, such as those required by DPAs, may be more beneficial as pre-emptive measures intended to prevent, rather than to punish, corporate crimes. If Canadians are serious about the goals of rehabilitation and deterrence in the criminal justice system, a shift away from ancient and ineffective perceptions on the utility of punishment and incarceration is required. Instead, a focus on the relationship between crime and government regulation, corporate culture, human relations, and social bonds would be a more economical use of public resources in order to properly address the issue of white-collar crime in Canada.