POLSKA AKADEMIA NAUK • INSTYTUT NAUK PRAWNYCH

ZAKŁAD KRYMINOLOGII

ARCHIWUM
KRYMINOLOGII

PL ISSN 0066-6890

DOI 10.7420/AK2020Y

2020 • T. XLII • NR 2 • s. 27–47

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Punishing white-collar offenders: Theory and function[1]

Karanie sprawców w "białych kołnierzykach": Teoria i funkcja

Abstract: The most prominent sentencing theories, also known as justifications for punishment, were developed long before white-collar crime entered mainstream criminology. Not surprisingly, the literature still focusses on the phenomenology of white-collar crime rather than on the issues of punishment. As a growing number of respectable offenders face criminal prosecution or even incarceration, the application of traditional sentencing rationales proves problematic in practical, ethical, and terminological terms. The article first explains how the debate on punishing upper-world offenders in Europe is inhibited by the offence-based nomenclature of economic crime or 'collaring the crime, not the criminal'. Thereafter, a review and discussion of relevant English-language literature on the subject is offered, leaving open some questions as to its applicability to the Central-eastern European context. White-collar offenders were traditionally viewed as the perfect target for general deterrence, yet the body of evidence challenges this hypothesis. The theory of positive general prevention seems promising with regard to reinforcing business ethics and counteracting the spiral effect. It is hardly clear what the rehabilitation of middle-class convicts should mean in practice, while incapacitation is reinvented as business debarment and the loss of licences. There is often a glaring discrepancy between retributive and preventive ends in white-collar cases, which also features the political dimension of class inequalities in the criminal justice system. A short excursus provides insight into neoliberal criticisms of punishing white-collar offenders, revealing its unintentional similarities to penal abolitionism. Finally, empirical findings on subjects relevant to punishment theories, such as fair sentencing, public attitudes, and the effectiveness of deterrence, are reviewed with special attention given to Central and Eastern European research.

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[1] This article is an expanded version of my master's thesis completed under the supportive supervision of Prof. Krzysztof Krajewski. I am also much indebted to Anunita Chandrasekar, whose insightful remarks on the manuscript ensured the clarity of argument. The usual disclaimer applies and all remaining errors are my own.

Keywords: white-collar crime, punishment theory, sentencing rationales, just deserts

Abstrakt: Najważniejsze teorie kary zostały sformułowane na długo zanim przestępczość "białych kołnierzyków" wkroczyła do kryminologii głównego nurtu. Literatura przedmiotu wciąż skupia się raczej na fenomenologii tego typu przestępczości niż na kwestiach karania. Przy wzrastającej liczbie skazanych lub nawet uwięzionych sprawców z klasy średniej i wyższej zastosowanie istniejących teorii kary napotyka na problemy natury praktycznej, etycznej i terminologicznej. Artykuł wyjaśnia, jak oparta na cechach czynu nomenklatura "przestępczości gospodarczej" utrudnia naukową dyskusję na temat karania "białych kołnierzyków". Następnie zaprezentowany jest przegląd prac anglosaskich i ich omówienie w kontekście środkowo- i wschodnioeuropejskim. Sprawców w "białych kołnierzyków" uważa się powszechnie za właściwych adresatów prewencyjnej funkcji kary, co jest jednak tylko częściowo potwierdzone w badaniach empirycznych. Teoria prewencji pozytywnej wydaje się z kolei obiecująca w aspekcie utwierdzania etycznych postaw w biznesie i przeciwdziałania efektom spiralnym. Pozostaje niejasne, co mogłaby oznaczać resocjalizacja "białych kołnierzyków", podczas gdy funkcja uniemożliwiająca spełniona jest przez środki w postaci zakazu prowadzenia działalności gospodarczej. Wymóg sprawiedliwości często koliduje z względami prewencji, co ma swój wymiar polityczny w postaci nierówności klasowych w systemie sprawiedliwości karnej. W krótkim ekskursie omówiona zostaje neoliberalna krytyka karania "białych kołnierzyków" – krytyka przywołująca w sposób niezamierzony argumenty zbliżone do postulatów abolicji penalnej. Przy szczególnym uwzględnieniem prac z Europy Środkowo-Wschodniej podsumowane są także wyniki badań empirycznych w obszarach istotnych z punktu widzenia wybranych teorii kary: spójności orzekanych kar, postaw społecznych czy skuteczności prewencji.

Słowa kluczowe: przestępczość, przestępczość gospodarcza, teoria kary, funkcje prawa karnego, sprawiedliwa odpłata

1. Introduction

Over the centuries, lawyers and philosophers have formulated various justifications for criminal punishment, also known as sentencing rationales, functions of criminal law, or punishment theories. The most important of these precede the 'discovery' of white-collar crime by Sutherland and require major adjustment when faced with it. White-collar crime has been known as a minefield for criminological theories, and the same could be true, at least in part, for theories of punishment (Croall 2001: 133). On the other hand, some discredited doctrines of street crime control may be effectively applied to 'upper world' offences (Braithwaite, Geis 1982). This paper discusses the literature on how the existing theory fits the problem of white-collar crime. As an increasing number of 'respectable' offenders face criminal prosecution and trial, that question is gaining importance in sentencing practice. While some solutions have already been put forward in the English-language literature, the subject is almost unheard of in Central and Eastern Europe (CEE). Therefore, examining the applicability of these solutions to the European legal and social context constitutes the second goal of this article. Moving beyond review and discussion, the question of the most appropriate theory is raised. That question

is rather one of the premises underlying various theories. These premises may be accurate to a degree varying from case to case, white-collar crime being a very distinctive one. And so, the model of just deserts presumes an offender's freedom of action, rehabilitation – shortcomings in their socialization, deterrence theory – and a rational calculation before committing a crime. Since penal law is broadly agreed to serve more than one function, various types of crime can and should be examined against each of them. A similar analysis was conducted on the disparate fields of crimes of misery, proving poor ethical justification for prosecuting such offences (Mitchell 2012). The selection of punishment theories discussed below is conventional but not incontrovertible – distinctively, the shaming of white-collar offenders is excluded as the means rather than a goal of punishment, which can serve preventive as well as retributive functions. The German criminal law was selected for a legal framework because it is the one which governs the largest CEE economy and is highly influential in many CEE criminal codes. Though diverse white-collar offences are imputable to legal persons, the discussion of punishing organisational crime touches on the very nature of criminal responsibility and could not be reasonably studied here.

2. Definition and why it matters

Two competing concepts of white-collar crime are Sutherland's offender-based definition and the offence-based one given by Edelhartz (Benson, Simpson 2009: 9). The former characterises white-collar crime as being 'committed by a person of respectability and high social status in the course of his occupation' (Sutherland 1983: 4) whilst the latter shifts the emphasis from the offender's social standing towards the use of deception in committing non-violent illegal acts (Edelhertz 1970: 3). In Germany and CEE, Sutherland's original definition was met with a cool reception and the domestic offence-based term of 'economic crime' was developed, stressing the affected legal good rather than any particular qualities of the perpetrator (Meier 2016: 315). Edelhartz's approach was criticised for its definitional trivialisation of white-collar crime and for bringing it back within the boundaries of the legal system (Shover, Hochstetler 2006: 160). It fails to recognise that a privileged social position enables some forms of criminality (Braithwaite 1985). The offence-based classification enables the authorities to declare war on white-collar crime without cracking down on upper-world criminals. Instead, 'small fries' such as car mechanics engaging in repair fraud fill the white-collar crime statistics (Shover, Hochstetler 2006; Geis 2016). While a huge part of business wrongdoing remains unpunished, if not perfectly legal (Reiman, Leighton 2017), the publicly funded research adopting offence-based definitions can claim that white-collar defendants receive harsher sentences than street offenders on average (Wheeler et al. 1982).

It can be argued that the offence-based approach to white-collar crime, however useful within law enforcement practice, proves ill-suited to the context of criminal punishment. Much as the unlawful act is highlighted in the course of court proceedings, any penalty is imposed on a particular offender with the sentencing and penitentiary law being clearly more concerned with individual conditions, needs, and danger (§ 46 StGB, § 2 StVollzG). Although researchers may be tempted to 'widen the net' and find any significant number of offenders (Braithwaite 1985), a few studies on punishment which have adopted the offence-based definition have ended up with samples of multiple recidivists often struggling with substance dependence (Weisburd et al. 1995; Logan 2015). The prison population convicted of 'economic crimes' is a heterogeneous group that includes genuine upper-world offenders alongside penniless straw men at the head of fake companies. Nothing cutting-edge can be discovered in such a category that is not already known to general criminology. Given that fact, it is unsurprising how little has been written on white-collar punishment in CEE, where the juridical offence-based terminology seems to inhibit any academic debate on the subject. Therefore, this paper experiments with the offender-based approach and applies it to the European context.

3. Utilitarianism? – Clarification needed

Does it pay to punish white-collar offenders? And should they enjoy impunity if that is not the case? One of the most influential papers on penal theory and white-collar crime calls for strictly utilitarian sentencing; the prosecutors should concentrate on a selected number of evident cases which would be subject to extremely harsh penalties and act as a deterrent, regardless of whether the sentence would be served by a figurehead. Alternatively, prosecution could be foregone in exchange for information or victim compensation (Braithwaite 1982). Not only does the second solution contradict the first, but the first one also seems hopelessly self-defeating. Firstly, no explanation is provided as to why potential offenders should notice the harshness in a few cases and ignore the overall leniency in most. Secondly, the gravest violations are often the most complex, if not by their nature then due to the effective legal representation and political power of the perpetrators (Gottschalk 2020). Thus, the 'utilitarian' policy would hit the least serious white-collar crime and prevent only them (von Hirsch 1982), which is more or less consistent with the definitional trivialisation mentioned earlier. Thirdly, the practical out-of-court trade-offs favoured by Braithwaite may actually impair the already modest deterrent effect (Reiman, Leighton 2017: 137). Moreover, the practice of overtly punishing a few not necessarily blameworthy individuals may violate the principles of human dignity and equality underlying continental constitutions (GG 1,3; Hörnle 2017: 48) as well as the principle of legality, which requires all officially known crimes to be prosecuted

(§152 StPO). Going a step further, a utilitarian could generally oppose punishing white-collar offenders as a waste of their economic potential; many in fact do (Posner 1980; Wheeler et al. 1980). Taking a position closer to retributive principles, she could demand severe sanctions that would meet public demands and result in the greater satisfaction of victims and other concerned citizens. It is broadly agreed that penal law should only be employed to achieve certain ends and should do so in a few accepted ways exclusively. Thus, utilitarianism should be dismissed as being too broad a principle to justify punishing white-collar offenders.

4. General prevention – Towards the positive alternative

General deterrence constitutes one of these ends. Under deterrence theory, a punishment imposed on an individual is intended to serve as a disincentive to crime for others. The central premise lies in the rational-choice approach, which understands crime as a result of a cost-benefit calculation (Roberts, Asworth 2012). While that assumption is often criticised regarding street offenders who reportedly lack self-control and favour instant reward, white-collar crime was traditionally seen as a promised land of deterrent policies. In his seminal paper, Chambliss (1967: 713) wrote enthusiastically about preventing 'low-commitment instrumental' misdeeds of the elite as opposed to the expressive violence of recidivists with a criminal lifestyle. The key role of general deterrence in white-collar sentencing was broadly accepted among many scholars (Braithwaite 1982; Hennig 2015) and most practitioners (Wheeler et al. 1980; Levi 2016). This section examines the conditions under which the refined science of general prevention could work.

The model of rational choice theory weighs the benefits of criminal behaviour against the costs of punishment multiplied by the detection rate coefficient (Becker 1968). Later research identified the conditions under which that equation may apply to criminal decision-making. The most basic condition is the offender's capability to act rationally – which is seriously impaired in many street criminals. White-collar offences, on the contrary, include premeditation and risk assessment (Paternoster, Tibbets 2016) though some might be committed out of risk-seeking behaviour, uncontrolled greed, or whilst facing bankruptcy. Individuals will abstain from crime if they are offered a genuine alternative to their former criminal career; businesspeople, whose crimes are not integrated into their lifestyle, may serve as a suitable target for general prevention (Chambliss 1967; Friedrichs 2010: 357). The deterrent message must reach potential offenders in order to influence their actions, which is likely to be accomplished since white-collar cases receive a great deal of publicity among the well-informed business community (Renfrew 1977; Carlsmith et al. 2002). Furthermore, that message has to be clear and translatable to the decision-making process of those who are deterred, which is not always the case

with white-collar crime, as it often occurs on the brink of legitimacy (Hennig 2015). The deterrent effect has also been proved to be stronger if the punishment is delivered in immediate reaction to the rule-breaking (Robinson 2004). This cannot be expected from the lengthy white-collar proceedings that often result in a sentence long after the initial scandal has cooled down (Podgor, Dervan 2016). Nevertheless, the premises of rational-choice theory are mostly true as far as white-collar crime is concerned.

Turning back to the original equation, one must take notice of the substantial benefits luring potential white-collar offenders. It would require more severe punishment and high detection rates to outweigh the temptation of virtually unlimited gains available to embezzlers or inside traders (Bagaric, Alexander 2014). There is an ongoing discussion as to whether they receive harsh penalties and whether the same sentence causes more distress in upper-world defendants than in street criminals. For the purposes of general deterrence, it is sufficient to establish that offenders of high status perceive criminal punishment as extremely harmful and certainly fear it (Chambliss 1967; Benson, Cullen 1988). This may be less true in Europe, where probation is nearly the default sentence for most white-collar offences. The largest hurdle to effective deterrence is nevertheless the low probability of the sanction measured by discovery rates but also conviction rates (Shover, Hochstetler 2006: 148; Gottschalk 2020). Upper-world offenders mostly go undetected or their cases do not reach the sentencing stage due to complexity, a lack of tangible evidence, or the political power of the perpetrators (Gottschalk 2020; Podgor, Dervan 2016; Reiman, Leighton 2017: 132–156). The costs of prosecuting even a significant minority of white-collar offences are seen as prohibitive by some (Croall 2001: 134) and morally indispensable by others (Reiman, Leighton 2017: 204). Theoretically, the gap in prosecution could be balanced by draconian penalties imposed on a few convicts as Braithwaite (1982: 751) recommends. Moving beyond the vision of *homo economicus*, research has identified the essential role of certainty that can be hardly replaced by more severe punishment (Robinson 2004). The intelligent, highly narcissistic white-collar offenders in particular may overoptimistically believe they are too smart to join the small group of convicted fraudsters (Hennig 2015). Empirical evidence confirms these assumptions in large part. A limited deterrent effect of legal sanctions was found in some vignette studies (Ugrin, Odom 2010; Piquero 2012). The opposite was reported by Makkai and Braithwaite (1991) and Smith et al. (2015) in their investigations of managers' decision-making. The tax fraud rates in Australia remained unaffected by criminal penalties, including prison sentences (Bagaric et al. 2011). The highest deterrent effect was attributed to informal sanctions external to criminal law (Makkai, Braithwaite 1994). The law had an indirect effect of shaping ethical valuations in a way that could be classified as positive general prevention, discussed below (Smith et al. 2015). A comprehensive review of existing literature on the subject can be found in Paternoster and Tibbets (2016).

The discussion on general deterrence may be summarised in the following way: it is not that white-collar crime is undeterrable, but that the criminal justice system is unable or unwilling to effectively deter it. The remaining deterring potential is wasted by unduly lenient sentences (Dutcher 2005) and the state sending signals of permissiveness in a world where the supply of opportunities for white-collar offenders grows steadily (Shover, Hochstetler 2006: 167). Alternatively, the show trials of a few unfortunate figureheads have led to great injustice without much effect on the big players (von Hirsch 1982), a scenario known to Polish readers familiar with the Warsaw meat scandal in the 1960s[2]. Furthermore, the focus on the deterrist paradigm blurs the line between white-collar *mala per se* and so-called regulatory offences of a purely preventive function (Rich 2016). Translated into European jurisdictions, this could mean the further overcriminalisation of economic life against the *ultima ratio* principles of penal law.

Faced with the poor results of traditional general deterrence, German penology developed the theory of positive general prevention. According to this, the punishment conveys a message to law-abiding citizens, which reaffirms the prestige of the norm and consolidates confidence in the legal order (Hörnle 2017: 28–32). Although empirically unverifiable in its nature, positive general prevention may seem to offer a rationally convincing solution to white-collar crime. Firstly, it counters the spiral effect of white-collar crime, namely, that some intrinsically honest businesspeople may perceive the scale of corruption to be so large that it is impossible for them to survive on the market without adopting morally questionable practices themselves (Zirpins, Terstegen 1967: 32). The spiral effect, conceived by German theorists, materialised as a firsthand experience of many upcoming entrepreneurs in CEE. Especially in countries where corruption and graft have established themselves as culturally embedded institutions (Fürstenberg 2020), the outright condemnation of corrupt practices is at least as important as effective deterrence. Punishing white-collar offenders could strengthen the compliance of honest entrepreneurs and assure them of the fact that they are doing the right thing by playing by the rules. This is especially true in the areas where the state has to depend largely on voluntary compliance, such as tax collection (Leighton 2010). Secondly, the prosecution of crime 'at the top' affirms the legitimacy of penal law, largely applied to underprivileged social classes (Reiman, Leighton 2017: 79). Otherwise, the poor can excuse their transgressions with the impunity of corrupted elite and lower-level occupational crime could be encouraged as 'the fish rots from the head down' (Moore, Mills 1990: 415; Brown 2001). Thirdly, since white-collar crime is still an underpublicised phenomenon in CEE economies, the sanctions can contribute to raising public awareness and defining the boundaries for business

2 The show trial of singled-out public officials which resulted in a death sentence for mismanagement of the meat supply is nowadays seen as an attempt to assuage the social discontent with food shortages and pervasive corruption inherent in a centrally planned economy.

activities (Shover, Hochstetler 2006: 148). Positive general prevention may thus enhance the moral inhibitions which are already found to be among the strongest disincentives (Paternoster, Tibetts 2014).

5. Rehabilitation at a crossroads

Under the theory of rehabilitation, the punishment serves as an opportunity to reform the offender and to reintegrate them back into society (Roberts, Asworth 2012). For that purpose, corrective treatment provides convicts with job training and education. The paradox of white-collar crime lies in the fact that professional skills and a stable social position not only fail to act as protective factors, but rather provide the very key to its perpetration. Besides, prisons do not offer programmes advanced enough to improve the competencies of this minor group of inmates, even if some lose their licences by court order (Friedrichs 2010: 358). Put into standard treatment, white-collar offenders feel infantilised and lose respect for the criminal justice system (Mason 2007). Therefore, some practitioners doubt the relevance of the rehabilitative function in white-collar sentencing (Renfrew 1977; Dutcher 2005). The preliminary findings from my ongoing research show that incarcerated Polish politicians were either not offered any treatment or they participated in standard programmes only 'for the sake of peace and quiet'. If they report any inner transformation it was more an appreciation of the time to reflect on their previous busy life or an urge to help disadvantaged people who they encounter behind prison walls.

Some original approaches try to link the idea of the resocialising white-collar offenders with retributive and restorative justice. Friedrichs (2010: 358) put forward the 'old notion of expiation … that is a personal realisation of the wrongfulness of their conduct and a wilful repudiation of such conduct in the future' thereby expecting a moral transformation from a deserved punishment. Some memoirs by imprisoned managers do in fact provide accounts of insight and repentance (Dutcher 2005). The limitations of this highly idealistic approach include the unverifiable nature of such declarations as well as the marginal role of prison in white-collar sentencing. The other reinvention of rehabilitative principle does not necessarily require imprisonment and claims victim compensation as the best method to reintegrate white-collar offenders (Croall 2001). As most white-collar crimes are committed 'from a distance', which encourages neutralisation techniques, encountering the victim may shorten that distance and impress the harm of such offences on their perpetrators (Luedtke 2014). The contact with their so far 'invisible' victims can have a much deeper transformative effect than dealing with lawyers and institutions (Shover, Hochstetler 2006: 157). The common point of both these ideas is their ambitious goal, quite different from the modern rehabilitative objective of

plain desistence from crime: white-collar offenders are expected to understand the consequences of their actions and become more socially conscientious. However, these expectations may be justified by the criminal's privileged position, responsibility, and intellectual capacities. Lastly, the rehabilitative principle may be viewed in a somehow negative sense; research suggests that the inmates convicted of white-collar crime do not undergo a hardening effect over the course of imprisonment (Braithwaite, Geis 1982; Weisburd et al. 2001). If other objectives require a harsh penalty, a sentence could be meted out without the worry that a prison term would turn non-violent white-collar offenders into dangerous recidivists.

6. Individual deterrence – The process as a punishment

Alongside the deterrent message to the general public, the punishment should discourage offenders from criminal acts in the future. The effect on criminal careers can be measured by the recidivism rate, with validity determined by the rate of detection. Research on individual deterrence is highly dependent on what is considered a white-collar crime (Szockyj 1999: 494). Studies adopting the offence-based definition found the recidivism rate to be approx. 15% in various follow-up periods (Weisburd et al. 1995; Shover, Hochstetler 2006: 139). No cases of reoffending were found in the 'purer' sample of antitrust violators (Enloe 2000: 17). Some argue that the probability of a repeated sentence is negligent due to the high dark figure of white-collar crimes (Shover, Hochstetler 2006: 140). However, the convicted white-collar offenders are unlikely to rebuild the position required for further breaches of trust (Luedtke 2014). The deterrent potential is attributed mostly to the criminal process, which is a punishment in itself for defendants unaccustomed to the criminal justice system (Wheeler et al. 1980; Levi 2002). Hence, the objectives of specific deterrence might already be achieved at the sentencing stage, favouring increased leniency. The significance of individual deterrence is also overshadowed by the availability of more 'mechanical' incapacitative tools to secure the future compliance of convicted white-collar offenders.

7. Incapacitation reinvented

Once the behavioural premises of deterrence and rehabilitation are doubtful, preventionists pursue a far less ambitious goal of incapacitation, which aims to render the offender incapable of committing further crimes (Roberts, Asworth 2012). While incapacitative measures usually include lengthy prison terms, white-collar criminals may be prevented from reoffending by disqualification, known in

German criminal law as the prohibition to work in one's profession (§ 70 StGB). Incapacitation without custody has gained huge support in the subject literature (Braithwaite 1982; Croall 2001: 135; Levi 2016). Unlike a prison term, the costs of disqualification are borne by the offender and the problem of crime within prison does not occur. This 'tailor-made' incapacitation seems appropriate since those who commit white-collar offences do not engage in other serious crimes (Braithwaite, Geis 1982; Weisburd et al. 2001). On the other hand, they can, for example, commit further fraud through straw men. Some believe that disqualification impedes victim retribution, as the offender's earnings are limited (Posner 1980). If no general deterrent effect is achieved, any disqualified businessperson may be replaced by another equally willing to violate the law (Braithwaite, Geis 1982), as happens in the illegal drug trade. Last but not least, the simple loss of a job, also experienced by incompetent employees or unfortunate entrepreneurs, clearly does not suffice as a response to heinous white-collar crime. The incapacitation theory is promising in this regard but can by no means be considered exclusively.

8. Excursus: Is there a white-collar abolitionism?

When studying white-collar punishment, one cannot overlook some of the more lenient approaches. Criminal sanctions for intelligent, educated defendants are thought by some to be a loss for society, each prison term could be replaced by a fine, and sensitive upper-world offenders should not be stigmatised (Posner 1980). After all, they are 'good people' (Hennig 2015), so prosecutors should not engage in 'witch-hunting' and pay more attention to 'bandits on the streets' (Magnuson 1992). If any harm was done, it is attributed to a 'weak organisational culture' which excludes individual accountability (critically: Shover, Hochstetler 2006: 161). Without discussing the futility of prison in general, incarceration of white-collar offenders is outright unadvised (Ugrin, Odom 2010) and decriminalisation is seen as the optimal solution, because victims can reach an agreement with the offender by themselves (Posner 1980). The author better known for titles such as 'More Guns, Less Crime' claims white-collar defendants *should* manipulate the proceedings to minimise the devastating effect of prosecution which the under-class is simply accustomed to (Lott 1987). Although disproved by a series of studies (Benson, Cullen 1988; Logan 2015), the hypothesis of white-collar criminals' special sensitivity to imprisonment remains a neoliberal dogma.

All in all, conservative authors fall into the trap of presenting nothing more than a perverse version of abolitionism only limited to offenders from privileged backgrounds. We see most of Scotts' (2013) abolitionist theses – such as questioning individual culpability, criticising penal excess, and favouring dialogue with victims in lieu of state punishment. That astonishing change in rhetoric has been named 'the

switch hypothesis'; conservatives, traditionally tough on crime, show leniency as far as white-collar offenders are concerned, with the opposite being true for progressive voters (Kroska et al. 2019). The sympathy for those 'fallen from grace' is all too seldom extended to those 'who have no grace to fall from' (Willott et al. 2001). The next section discusses whether there are moral grounds to prosecute upper-world criminals alongside street offenders.

9. Retributivism – An approach based on justice

The term retributivism, dubbed 'just deserts', refers to several theories that see punishment as legitimate only as a morally appropriate response to crime. The justification for punishment is found only in the past offence with its harm and blameworthiness providing the exclusive determinant for the severity of the penalties (Roberts, Asworth 2012). The revival of this classical thought was caused by increasing disillusionment with positivist ideals in the 1970s, but retributive policies soon attracted fierce criticism for a number of valid reasons. An ethical one was retributivists' refusal to apply their harsh philosophy to privileged offenders (Leighton 2010). This section examines whether the opposite is possible and to what extent the conditions for justifying retributive punishment are met in white-collar cases.

In line with the German Penal Code (§ 46), retributive theory sees an individual's guilt as the legitimisation of their punishment and the limitation of its severity. Wrongful acts may be blameworthy to varying degrees depending on the offender's motivation and freedom of action. Unlike most criminals, well-educated, affluent white-collar criminals are given every opportunity to adhere to social norms. The crimes of those who 'have capacity to behave honestly but choose not to do so' evoke particular revulsion from the general public (Wheeler et al. 1982). Though some may argue that they are also determined by their environment, there is a hierarchy to socially recognised justifications. Corrupt business culture cannot serve as an excuse in a society punishing crimes of misery or migration from destitute countries[3]. The strict responsibility of an elite is assumed under the concept of *noblesse oblige*; white-collar offenders are particularly contemptible for breaking the rules of an economic system which favours them anyhow. The theory of the social contract, often raised by retributivists, delivers an ethical legitimisation of these expectations. Mitchell (2012) has shown how homeless panhandlers and trespassers hardly owe anything to society and cannot be rightfully punished under just deserts theory. The opposite can be argued for beneficiaries of the political and economic system

[3] Another, perhaps less judgemental argument is that self-control and the autonomy of action lie along a continuum where white-collar criminals are higher than average offenders (Paternoster, Tibetts 2016).

making a sober decision to engage in rule-breaking (Braithwaite 1982). The retributive theory that emphasises restoring the balance of benefits and burdens disrupted by the criminal act fits the context of political corruption, where officials entrusted with power use their position to accrue advantages unavailable to those whom they allegedly represent (Adams 2012). The duty of loyalty towards a system that guarantees freedom and the satisfaction of human needs is particularly clear among the privileged (Hörnle 2017). To sum up, the objection to 'just desert in an unjust society' does not apply to white-collar sentencing.

Another objection pertains to the practical issues of establishing individual guilt in the corporate context of many white-collar offences. Braithwaite (1982) argues that the prosecution would often fail to find those responsible for criminal actions and certain persons should be punished on preventive grounds only. Such strict liability is irreconcilable with the principle of guilt and can be only imposed within the regulatory regime. Moving sanctions detached from individual guilt outside criminal law saves business life from overcriminalisation and the regulatory agencies from the legal barriers inherent to criminal procedure. It is also the duty of business regulation to enforce rules making corporate structures more transparent and an individual wrongdoer easier to identify. The utilitarian criticism of just deserts seems to ignore fundamental constitutional principles of criminal law as well as the criminal/regulatory distinction.

Turning to the second prerequisite of retributive punishment, the harm of white-collar crime should be briefly addressed. Payne (2017: 36) divides it into categories of 1) individual economic losses, 2) societal economic losses, and 3) emotional and 4) physical harm. There is a huge body of literature addressing the dire consequences of white-collar offences that are generally assumed to exceed by far the total cost of other crimes against property (Moore, Mills 1990: 411; Dutcher 2005: 1298). Furthermore, collective values such as trust in the economy and politics are undermined (Croall 2001: 130). This threat is at least equally serious in CEE, where entire societies are considered to fall prey to state capture and high-level corruption (Pleines 2016). The victims not only suffer no less than those affected by violent crime, but many actually experience the direct physical effects of safety violations, unsafe products, or environmental pollution (Shover, Hochstetler 2006: 153). Thus, 'suite crimes' can no longer be viewed as abstract operations and their substantial consequences call for reaction from the state.

The greatest promise of retributivism is restoring the justice element to the criminal justice system. No-one should be punished for their lifestyle and personality, and the same offence deserves equal punishment regardless of who commits it (von Hirsch 1982). Therefore, the penalties for white-collar offenders should not only fit the crime, but should also remain proportional to the sentences meted out for other similarly blameworthy offences (Reiman, Leighton 2017: 202). Crimes such as the illegal drug trade and selling unsafe products correspond in almost all offence-related aspects but still receive disparate sentences (Osler, Johnson 2015).

The intensity of the ongoing attack on conventional crime creates a moral obligation to also prosecute white-collar offenders (Moore, Mills 1990). If the poor effectiveness of criminal law did not keep the penal state from incarcerating larcenists and burglars, no exception should be made for insider traders and embezzlers (Cullen et al. 1983). This moral objection is perhaps best expressed by one of Renfrew's (1977) respondents: 'I would be unable to sleep nights if I continued to imprison blacks for nonviolent felony offences, as is often necessary, and put white "white collar" offenders on the street.'

The elite's access to legal counsel – cheered by neoliberals – and diverse trade-offs – praised by utilitarians – is simply not available to street criminals (Friedrichs 2010: 329). The political protection of some perpetrators in CEE constitutes yet another obstacle to fair treatment (Inzelt 2019). Their joint effect is a deep inequality undermining the legitimacy of the criminal justice system (Brown 2001; Croall 2001: 131). To apply just deserts to white-collar criminals is to extend the principles of individual responsibility and self-control to the social classes which largely promoted them but do not necessarily live by them. Garland (2001: 99) shows how a neoliberal state eagerly imposed moral discipline upon 'dangerous classes' while the well-off enjoyed more and more freedoms within a deregulated economy. If their conduct violates the law, a number of obstacles appear for a successful conviction (Reiman, Leighton 2017; Gottschalk 2020) and the usual punitive rhetoric changes beyond recognition (Kroska et al. 2019). The idea of treating executives and politicians like people expectedto act responsibly should not appear revolutionary. It cannot be excluded that a criminal justice system applying retributive philosophy to white-collar crime would be considerably less exposed to the censure of critical criminology.

Under retributive theory, at least three aspects of punishment are to be empirically examined. Firstly, the penalties imposed on white-collar offenders need to be confronted with incurred loss and sentencing patterns in other non-violent crimes against property. In Poland, the sentencing bias for large fraud was established in a quantitative analysis (Czarnocki et al. 2019). Also, the Russian criminal justice system was not successful in appropriately responding to white-collar crime (Kleimenov, Meško 2019). In Hungary, corruption is punished disproportionately to the harm caused and is consequently still 'worth a go' (Inzelt 2015). Secondly, the severity of the sentence should not exceed the level of guilt. Unlike the consequences brought about by white-collar criminals, the harm experienced by them through punishment is an under-researched subject. If the sentence's severity should fit the crime, one must recognise the varying degrees to which the same penalty affects different people (van Ginneken, Hayes 2017). White-collar offenders widely use their resources to reduce the inconvenience of process and punishment (Gottschalk 2020). Existing studies have refuted the 'special sensitivity hypothesis': incarcerated white-collar offenders do not suffer more than other inmates in objective terms (Benson, Cullen 1988; Logan 2015). The research by Kotowska (2017) suggests the

same to be true in CEE. These findings deny the last valid reason for differential treatment relevant to the approach based on justice. They are also of importance for a legal system requiring sentencing to take account of the penalty's effect on the future life of the offender in society (§ 46 StGB). The third relevant subject of empirical studies is societal attitudes towards white-collar crime. Since concepts such as guilt and social harm are constructed, the general public should not be ignored in the process of policy-making. Many authors in fact stress the importance of discharging the moral outrage triggered by misdeeds of political and economic elites (Friedrichs 2010: 347; Hennig 2015). The myth of community tolerance towards white-collar crime was dispelled in a series of surveys (see van Slyke and Rebovich [2016] for review). In Carlsmith et al. (2002) the perceived punishment deservedness had a much higher impact on the punishment demanded for embezzlers and polluters than any preventive concerns. Polish respondents demanded harsher penalties for large frauds with consistency found otherwise only in rape and voluntary manslaughter (Siemaszko et al. 2018). In Croatia, the public demands of bringing the profiteers of the transition era to justice led to a lifting of the statute of limitation for economic crimes committed in that period (Vidlicka 2017).

10. Restorative justice in the search of the victim

Restorative justice is not, strictly speaking, a theory of punishment (Asworth, Roberts 2015), yet jurisprudence and positive law habitually consider it along with other sentencing rationales (§ 46 StGB). Issues of restitution and reparation are linked with rehabilitation, retribution, and positive general prevention and face particular challenges with white-collar crime as well. Their complementary role alongside traditional sentencing rationales, particularly just deserts, is acknowledged in the legal literature on punishment for upper-world criminals (Bagaric, Alexander 2014; Rich 2016). Unfortunately, the scarcity of research on the victims of white-collar crime hinders any evidence-based discussion about appropriate restoration. Sutherland (1940) describes them as unorganised, uninformed, and defenceless as opposed to the wealthy and powerful offenders. This section explores what impact these features might have on restorative justice.

Although white-collar offenders can do more harm than ordinary property offenders, their capability to repay society is also considered greater (Dutcher 2005). Some authors praise monetary compensation, which is regarded as a cost-saving alternative to imprisonment (Posner 1980; Wheeler et al. 1982). Sentencers all around the world find creative ways of utilising the skills of white-collar offenders in service to the community (Croall 2001: 138; Friedrichs 2010: 330). In his classic work, Braithwaite (1989: 124–151) advocated a dialogue with offenders as a means to ensure future compliance, to identify gaps in oversight rules, and to prevent the

growth of a subculture of resistance in business. Luedtke (2014) believes restorative practices improve the social conscientiousness of privileged criminals and thus contribute to their successful rehabilitation. As a bilateral endeavour, restorative justice could also be an advantage to those affected by white-collar crime.

Secondary victimisation by white-collar crime does occur and could be dealt with by restorative practices. Repeatedly, victims are held at fault for alleged gullibility or even greed (Croall 2016), as in the case of the Romanian Ponzi schemes (Verdery 1995). Some engage in harmful self-blaming (Schichor et al. 2000), which could be counteracted by the recognition of their status as victims. In line with the switch hypothesis, their suffering was often overlooked by the conservative-dominated victim rights movement (Moore, Mills 1990). Those victims, often 'invisible' to their perpetrators, would certainly like to receive apologies from the people who had abused their trust. Restorative justice could empower the defenceless victims and instil a sense of agency. This, however, requires restorative practices to go beyond purely financial restitution. While white-collar crime has sweeping ramifications in multiple aspects, compensation in lieu of more direct criminal sanction could overemphasise the economic dimension (Friedrichs 2010: 362). The proposals to decriminalise white-collar crime and focus on monetary damages (Posner 1980) mean that those affected by fraudulent practices or safety crimes are denied victim status and treated just like any other claimant.

The restorative justice agenda has sometimes been challenged on ethical and practical grounds. Investors who faced bankruptcy themselves as a result of their own mismanagement are unlikely to compensate for the huge losses of the victims. Those victims in turn prove far less encouraged to continue dialogue and take punitive stances if no compensation is offered (Chiste 2008). As white-collar crime usually affects large groups, it is hardly feasible to reach reconciliation with all stakeholders (Luedtke 2014). A lack of remorse and the advanced use of neutralisation techniques by white-collar offenders are well-studied phenomena and do not bode well for dialogue with the victims (Willcott 2001). Tactical or formalistic apologies might be given, along with excuses and reservations (Chiste 2008). Shover and Hochshetler (2006: 157) expressed doubts that there could be genuine communication between the guilty powerful and their victimised subordinates. Furthermore, restorative agreements might be perceived unfair by street offenders who lack the resources to compensate their victims (von Hirsch 1982). Notably, offences such as corruption inflict damage on all of society and state agencies seem authorised to represent this collective victim. No 'property of conflict' can be taken away from the dispersed and unaware victims of price-fixing and no broken relationship requires reconciliation between tax evaders and the relevant authorities. Not every serious white-collar case is suitable for restorative practices and not every offender proves eager to engage in dialogue with their victims. Therefore, reparation and restitution appear to be promising tools to tackle some problems arising from white-collar crime, but do not offer an all-embracing solution to it.

11. Conclusion

An objective of this article was to investigate the relevance of traditional punishment theories in the distinctive context of white-collar crime. New chances and challenges were found in almost all aspects of sentencing theory. General prevention remains the main rationale behind criminal legislation, but its significance for sentencing an individual white-collar offender is limited on a number of legal, moral, and practical grounds. Rehabilitation only remains relevant if reframed as a moral transformation of the guilty criminal, which links it closely to the retributive and restorative approaches. Incapacitation and specific deterrence are achieved during the early phases of prosecution and lose their significance at the sentencing stage. Just deserts theory, challenged for disregarding the social context of street delinquency, might be surprisingly adequate as an answer to white-collar crime.

With increasing awareness of political corruption and other privileged crime in CEE, an appropriate response to privileged offenders will be a criterion for the legitimacy of criminal justice systems in the region. Theoretical writings, however, cannot replace the empirical research on the social reality of white-collar crime. The lessons from the experience made by the Western world may only play an auxiliary role in the adjustment of the domestic responses to that threat. This paper showcases several studies already conducted in our region, but more importantly identifies the gaps in knowledge that should be addressed in further literature. The quick transition to market economies, the emergence of the middle and upper class, as well as criminal opportunities absent in the previous socialist system left CEE societies with unanswered questions as to how they should deal with their most prominent members who violate the legal order.

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