Sentencing the White-Collar Offender

Stanton Wheeler

Yale Law School
This article is based on a field study of sentencing which is part of a research program on white-collar crime being undertaken at Yale Law School. In this preliminary report, the authors conclude that while judges take a serious view of white-collar crime, they are often influenced by several factors to find a non-incarcerative disposition. They also conclude that judges tend to rely predominantly on general deterrence as a rationale for sentencing in cases of white-collar crime.

I. INTRODUCTION

How do judges go about deciding the appropriate penalty for a particular crime? Questions of equal justice are raised in any comparison of common crime and white-collar crime sentencing, but it is not obvious what equality of sentencing means when one is dealing with offenders as diverse as the unemployed alcoholic who habitually steals and forges checks, and the businessman who commits a single, massive stock fraud or price-fixing scheme. The wide range of criminal behavior and the great differences in type of injury caused make such comparisons extremely difficult. The problem is exacerbated by the existence of very different types of sanctions, ranging from fines and a variety of conditions of probation, to various forms of imprisonment, for there is no single underlying metric that provides a standard of comparison. Yet this is precisely the problem that judges face: meting out fair sentences when choosing from a wide array of sanctions applied to a wide range of offenses and offenders.

At the level of sentencing policy, the choice among alternative punishments is again an important issue. Should imprisonment be a commonly used sentence for white-collar criminals? A mounting body of theory argues that monetary fines can have a deterrent effect equivalent to that of imprisonment for at least certain classes of offenders, and that since it is less costly for the system (saving money through fines rather than paying it out through costs of confinement) the preferred sanction will nearly always be a fine rather than imprisonment.1 Where fines may be inappropriate, the idea of "alternative

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** Associate in Research, Yale Law School; B.A. 1969, University of California at Berkeley; M.A. 1974, Center for the Study of Law and Society; J.D. 1975, Boalt Hall; Member of the District of Columbia Bar.

*** Professor of Law and Sociology, Yale Law School; B.A. 1952, Pomona College; M.A. 1956, Ph.D. 1958, University of Washington.

**** Professor of Political Science, Amherst College; B.A. 1969, Providence College; M.A. 1970, Ph.D. 1973, University of Wisconsin.

sentences”—non-incarcerative sentences other than or in addition to probation—have drawn a great deal of attention.2

These matters of sentencing policy for white-collar offenders have gained increased salience in the post-Watergate era, with its sharp focus on the prosecution of white-collar crime.3 These discussions, however, have proceeded largely in the absence of systematic data from those actually charged with sentencing responsibility, the sentencing judges. In the federal system and in most of our states, it is the judge who must choose among the sentencing alternatives, which usually include fines, imprisonment, and the possibility of special conditions attaching to probation. It is the judge who faces the difficult task of arriving at a particular sanction in each case. If new or modified systems of sanctioning are to be employed, it is the judge who must be convinced of their utility.4 Furthermore, judges deal in the real world of sentencing, and may face considerations unperceived and unattended by those whose concerns are dictated by current academic theorizing.

It is thus important to examine how judges go about the task of arriving at a particular sentence, and in the process to discern through judges' thinking and actions, the relative role given to imprisonment, fines, and other forms of sanctioning. That is our aim in this article, which reports a portion of the results of a study of federal district court judges and their views regarding the sentencing of white-collar offenders. After a brief description of the study, we proceed to report on judges' conceptions of the goals of sentencing in white-collar versus common crime cases, the distinctive traits of white-collar offenders and offenses that influence the choice of sanction, and the limited role perceived for fines in contrast to other sentences. We conclude by suggesting the need for an enlargement of the scope of sentencing considerations if sentencing policy is to reflect the real world concerns of those who impose sentences.

II. THE STUDY

The core material for this presentation is taken from one section of a broadly focused interview study of judicial attitudes toward sentencing white-collar criminals. The study was conducted over the last two years as part of a...
larger project on white-collar crime being conducted at Yale Law School with the support of the Law Enforcement Assistance Administration. In the project, two separate though related studies were designed in the sentencing area. The first, part of which will be reported here, is designed to determine how judges approach sentencing in actual white-collar crime cases. The goal is to learn as much as possible about the judges' thinking process concerning sentencing: the considerations used in selecting and weighing information about the offense and the offender, the sentencing alternatives rejected as well as those used, and the standards of comparison and contrast adopted by judges in arriving at what they consider to be fair sentences. The second study, not reported here,\(^5\) is a quantitative analysis of sentences actually imposed on offenders.

We conducted lengthy interviews\(^6\) with fifty-one federal district judges in seven federal districts, including those with the heaviest “white-collar crime” caseloads.\(^7\) Our interview technique was designed to maximize our respondents' attention to the factual detail of cases over which they presided. We aimed at having the judges reveal their individual views of sentencing by leading us through some of their most recent cases. Thus the interviews were open-ended. We were particularly interested in having respondents explain to us why they arrived at one sentence rather than another, why defendants in a multi-defendant case received different sentences, and why a defendant in one white-collar case received a different sentence from a defendant in a similar white-collar case or in a “comparable”\(^8\) non-white-collar case.

In choosing actual rather than hypothetical cases we had the benefit of discrete factual situations from which to draw answers to general questions. While we were equipped with a systematic interview schedule and a strong sense of significant areas to explore, the interview had its own dynamics depending on the judges’ particular orientation to the case or cases discussed. We did not hesitate either to interrupt the judges where seeming inconsistencies appeared, or to adopt an “adversarial” stance when appropriate.

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5. The quantitative study is based upon a detailed coding of offense and offender characteristics as reflected in the reports submitted to judges by probation officers prior to sentencing decisions. Hypotheses being tested include those suggested by the interview study. Judicial attitudes will thus be compared with judicial behavior.

6. Our interviews were conducted in the judges' chambers. In all but a few instances responses were tape-recorded. The length of the interview averaged approximately 1 1/2 hours. The shortest interview was 30 minutes, the longest 3 1/4 hours. Prior to the interview, judges were told that their responses would not be attributed to them by name and that the interview transcript would remain confidential. Therefore, in order to preserve the judges' privacy this article is not footnoted in the traditional manner, and in the opinion of the authors and the editor its utility is not impaired as a result of the maintenance of this confidentiality.

7. The interview population was chosen from the following U.S. District Courts: Arizona (Phoenix), Central California (Los Angeles), Connecticut, Eastern Michigan (Detroit), Northern Illinois (Chicago), Southern New York (Manhattan), and Washington, D.C. These districts were chosen because of the high concentration of white-collar crime prosecution relative to other districts, and with the aim of obtaining some geographic variation. Because the study focused on white-collar crime, we decided that it was more important to interview judges who handle a large number of such cases than it was to select a representative national sample.

8. Throughout the interviews we attempted to have the judges define the terms we presented. We did not offer a definition of “white-collar crime,” but rather asked judges what cases they considered to be representative of white-collar crime. We would then ask for a general definition. The same was true when we asked about “comparable” non-white-collar cases. We asked judges first to identify “comparable” non-white-collar cases, and then to explain in what sense they were the same or different.
Underlying our questions and interaction was a desire to encourage our subjects to confront overly simple generalizations and to explore otherwise unarticulated reasons and motivations for meting out particular sentences. In what follows we have presented a selection of the actual responses so as to let judges, as much as possible, speak for themselves.

III. General Sentencing Goals

To understand why judges choose or decline to choose a sentence of imprisonment when that option is clearly open to them, it is first necessary to understand the purposes judges hope to serve in sentencing decisions. Our interviews indicate that judges' rationale in sentencing white-collar criminals is significantly different from their rationale in sentencing non-white-collar criminals. In non-white-collar cases judges have at least three, if not four, purposes in mind when they impose a sentence—punishment, incapacitation, general deterrence, and occasionally rehabilitation—and they tend to believe that their sentence will serve each purpose, to some extent and however imperfectly. In the white-collar area, in distinction, the sentencing purpose and rationale tends to be unidimensional: judges are concerned with general deterrence, deterring other persons in similar positions from engaging in the same or like behavior. They tend not to be concerned at all with rehabilitation or incapacitation and (for reasons explored further below) only minimally with punishment. Here is an illustrative response of one judge who was asked about his purpose for the imposition of a sentence in a particular case of bribery of a public official.

In a white-collar crime, particularly one like this, I am often dealing with someone who has never been in trouble before, who comes in with a packet of all kinds of positive information on his background, ministers' letters, public officials' letters. The decision is definitely tougher. You are not putting someone away in order to safeguard the rest of the community from physical harm when you are dealing with a white-collar case, so you simply do not put people away as you do when you are dealing with violent crimes. Now, here I would point out another important factor. Prisons are simply not going to rehabilitate white-collar offenders. In fact, they may have the opposite effect, so I'm not concerned about rehabilitation either.

A judge in another district had a similar comment to make when he volunteered his justification for meting out short prison terms in cases of tax and securities fraud:

In the tax case and in the securities case I'm looking at deterrence. And this is one of the problems I think, because I don't think you deter very much the bank robber by giving a 20-year sentence to another bank robber. That is a hazard of the trade that they accept. They know they are playing a risky game, and a high stakes game on both sides of the equation. Therefore, I don't think deterrence is that significant in that kind of a crime, but in the other two that I
mentioned it is very much so. The income tax case is the one that is most particularly troublesome as far as white-collar crime is concerned, as I say, because every mild sentence that is afforded in an income tax case is an inducement to those who ought to be deterred to go and do likewise.

Another judge, who thinks that prison sentences have only a very small deterrent effect in cases of violent crime, gave one reason why he believes deterrence works in white-collar cases.

When I was still practicing there were the electrical equipment antitrust cases around 1960 or thereabouts in Philadelphia. They made screaming headlines. A few businessmen went to prison for terms like thirty, sixty, ninety days. I thought those were very sound sentences. And as a private practitioner I was made aware that all of a sudden businessmen were running into our firm wanting to know what the hell were the antitrust laws and how do you obey them. It really had an impact. . . . I literally could see it and feel it.

Evidence of the judges’ concern for the impact of a prison sentence in a similar occupational setting is suggested in the following explanation of the sentence in a bank embezzlement:

Another consideration very important to me is a sentence that would act as a deterrent, a deterrent to this man from ever considering doing something like that again—if perchance he got into a position of trust someway. And a deterrent to others knowing what the punishment was, a deterrent to them if they might be considering conduct like that.

Q: So that you have in the back of your mind other persons in similar positions who might be tempted to do this kind of thing, is that what you are saying?

A: Well, I think, let’s say that you got around 100,000 bank employees around the country. For them to know that the top of one of the biggest banks got three years for embezzling from the bank, I think that is a deterrent to people in white-collar jobs in the banking industry, or white-collar jobs with big companies in the financial areas.

For almost all of our respondents, general deterrence emerged as the purpose that quite substantially outweighed any other purpose in sentencing white-collar criminals. But what about the role of punishment for its own sake in the sentencing of white-collar offenders? Judges do give much attention to the role of punishment in the whole criminal process, but its role for white-collar offenders at the time of sentencing is limited. Most judges share a widespread belief that the suffering experienced by the white-collar person as a result of apprehension, public indictment and conviction, and the collateral disabilities incident to conviction—loss of job, professional licenses, and status in the community—completely satisfies the need to punish the
individual. In discussing a case of embezzlement in which a bank manager was sentenced, we asked what effect the defendant's probable loss of employment had on the judge's consideration of sentence. The judge stated that the jail sentence that he did give out would have been longer had the defendant's professional loss not been an almost certain result of the conviction; he implied also that he may not have given any prison sentence had there not been a need for a "deterrent message."

That loss of position as a bank manager was a huge mitigating factor. But for that I would have sentenced him longer . . . it was obvious as night follows day that the minute he pleaded guilty this was all gone, this was all in his past. From now on the only thing he could get is a job as a bookkeeper or maintenance man, or something.

Q: So that is something that you want to take into consideration . . .

A: Mitigation—you bet. My sentence was less as a result of that fact. That was punishment in itself. I had to take into consideration that he had already been punished.

The reason why deterrence tends to get considerable attention by the time the defendant arrives at the sentencing hearing is indicated by these additional views of our respondents on the punishing impact of the criminal process prior to the imposition of sentence. When asked how he reacted to the apparent public perception that white-collar offenders "get off easy," one judge responded:

Well, as I said to you earlier, I don't think a sentencing procedure should be very much concerned with what the public's perception would be. If the public perception is bad it is because some writers or journalists stirred up a concept which isn't valid, made the public believe that. Some branch of the public always thinks the rich are getting away with it. The average white-collar defendant in this court is broke by the time sentence is imposed. He has lost his job. All his debts have come due. Most of them are mortgaged to the hilt. He has had to take care of his family obligations, most of which are heavy. Attorney fees in some of these cases are tremendous, fifty, sixty, eighty thousand dollars for cooperating defendants or for defendants who want to cop out. It is not unusual in this district. So some members of the public look at it and think that the rich are getting away with murder. I think those cases are few and far between.

Another judge focused more on the strong impact that the issuance of an indictment has on the offender in cases of white-collar crime.

There is no doubt about the fact that in most white-collar crimes as such, the return of the indictment is much more traumatic than even the sentence. Pronouncing of the sentence is not as injurious to the person, his relationship to the community, to his family, as the return of the indictment. A loss of credit, a loss of bank credit, a
loss of friends, social status, occasionally loss of a wife, members of the family, children around the father, more when they hear that an indictment has been returned and he has been charged than they do after they have gotten used to the idea and he is sentenced for it. There is no question about the fact that that is much more severe on the white-collar criminal than it is on the blue-collar defendant.

The commencement of the criminal process against a defendant also may cause severe damage to an offender's professional standing. One judge emphasized, for instance, that a lawyer was going to lose his practice as a result of a felony conviction. We asked the judge whether he thought that this was comparable to the kind of punishment suffered by a person who is given a prison sentence. He responded:

Don't you agree? If a man who has gone through three years of law school, and then gone through a bar review course and taken the bar review exam, and has a nice practice, and is making—I think in this case—something like $40,000 a year and suddenly he is disbarred, I would consider that a stiffer punishment than anything I would be likely to impose. I just have gotten through a trial of two young attorneys for perpetrating . . . a fraud, or rather for participating in an attempt to return stolen bonds to the Manufacturers Hanover Trust Company. And those fellows, unless the conviction is reversed, are going to be automatically disbarred, and they are two young fellows in their late 20's or early 30's, just getting started. And their career is shot. And I don't know what in the world I will do by way of sentencing those fellows, but certainly the law which provides for automatic disbarment is a stiffer sentence than anything I could think of imposing.

And a third judge summed up this view in this statement:

Well, you have a person who has a certain status, has surrounded himself with a certain aura, and you strip that aura away and let him stand naked and in front of his peers, that itself is pretty serious punishment.

We do not wish to overstate the point. There are instances in which the judge concludes that the defendant deserves the additional punishment of a harsh sentence in addition to whatever "punishment" accompanied the process of indictment and conviction. A serious breach of public trust is one example. And there are other seriousness factors—amount of monetary damage, type of victims, length of time that the offense continued prior to conviction, and the nature and degree of cover-up and scheme used in the commission of the crime—that can significantly aggravate the seriousness of crimes in the view of judges. Indeed, such questions of seriousness have a

9. The "seriousness" of the crime is an important question for judges in considering whether the factors weighing against a prison sentence will actually call for a non-prison disposition. Thus the outcome of sentencing decisions is reported by judges to be a combination of their judgment about the seriousness of the offense, the culpability of the offender, and the factors, discussed herein, that relate to the effects of the disposition. A monograph based on these interviews will discuss the judges' views on the seriousness of the crime and the culpability of offenders.
central role in sentencing decisions. But the major theme of a recent study of minor offenders in the lower criminal courts would appear to apply as well to these very different types of offenders: the commencement of the criminal process against a defendant is the punishment. And with the limited role seen for both incapacitation and rehabilitation, only general deterrence remains as a primary sentencing goal.

IV. LIMITING THE ROLE OF GENERAL DETERRENCE

If the primary goal at the time of sentencing is general deterrence, one might expect that judges would frequently use imprisonment as a sanction. It is clear from their own testimony that they believe in the deterrent effect of imprisonment and have no confidence that fines or other non-incarcerative sanctions would be as efficacious. Yet they often do not impose a prison sanction. How do they justify or rationalize this seemingly inconsistency?

One factor is implicit from our discussion of punishment. When judges feel an offender has already been punished enough through the process of indictment, trial, and conviction, they find it hard to impose what will be additional punishment for the offender, solely to achieve the aims of deterrence. It is much easier to justify deterrence when the offender also deserves to be punished. Because the deterrent goal of the process is aimed at a public audience while much of the “punishment” suffered by the defendant is incurred prior to sentencing, judges will sometimes give a public incarcerative sentence solely for deterrent purposes. They do not, however, like to do so. Four additional reasons are brought into play to help bring the judge to a lesser sanction than would be called for by the deterrence rationale alone: the judge's perception of a special sensitivity to imprisonment on the part of white-collar offenders, the desire to prevent injury to innocent parties, the facilitation of compensation, and the idea of non-incarcerative “reparations.”

A. SPECIAL SENSITIVITY TO IMPRISONMENT

Most judges we interviewed tend to believe that white-collar defendants are more sensitive to the impact of the prison environment than are non-white-collar defendants. For this reason, they give special consideration to the possibility of not imprisoning the white-collar defendant, even in those instances in which the seriousness of the crime and the need for deterrence would otherwise make it a likely disposition. One judge described a white-collar defendant's special position vis-a-vis the prospect of prison this way:

I think the first sentence to a prison term for a person who up to now has lived and has surrounded himself with a family, that lives in terms of great respectability and community respect and so on, whether one likes to say this or not I think a term of imprisonment for such a person is probably a harsher, more painful sanction than

it is for someone who grows up somewhere where people are always in and out of prison. There may be something racist about saying that, but I am saying what I think is true or perhaps needs to be laid out on the table and faced. Maybe we have to correct that notion and say that that is the kind of contrast that is constitutionally impermissible, and we won't have it. But I haven't seen the doctrine that tells me that yet. And we still live with this kind of idiotic individualization thing where we are going to send somebody to prison, whether he is white-collar or black-collar, we consider whether he is sick, whether he is old, has a family, all kinds of things about him that we believe in a crude way will deliver messages to us about how rough prison is for him as compared with somebody else.

A large number of our respondents felt that prison has a significantly greater impact on white-collar defendants, and that the prison environment has to be compared to the environment from which the defendant comes in order to determine an appropriate sentence. Another judge affirmed the importance of this factor:

There is no getting away from the fact that the type of existence that jail provides is more hard on people who are accustomed to the better existence than it is on people who may not be fed as well in their homes as they are in jail. That is something you really can't articulate. It sounds as though you are penalizing poverty. There is no question that that is a fact. A person who doesn't get three square meals a day, and no possibility of getting it, isn't so seriously hurt by being put in an environment where at least you are to get three meals a day, regardless of what other disadvantages there are, than one who is in the habit of—he is just deprived of—gets no benefit from it—all deprivation. But you can't articulate that. It sounds condescending—but it has to be a factor. . . . I guess there is no getting away from the fact that the judge empathizes more with a white-collar person whose hardships you can understand, because a lifestyle is more like his or her own, than someone whose lifestyle you really can't understand.

Still another judge made the following statement on the same subject:

A white-collar criminal has more of a fear of going to jail than this syndrome we find in the street crime. And I am not saying that if you cut everyone they don't bleed red blood. A person who commits a robbery or an assault, they don't want to go to jail either. But the white-collar criminal has more to lose by going to jail, reputation in the community, business as well as social community, decent living conditions, just the whole business of being put in a prison with a number on his back demeans this tremendous ego that is always involved in people who are high achievers.
B. PREVENTION OF INJURY TO INNOCENT PARTIES

By not imposing a prison sentence, or by imposing only a short one, judges appear to want to avoid eliminating the contribution to community and family that white-collar offenders make in the normal course of their lives. Again, to exemplify, we can look at the judges' responses. When we asked one judge whether there is anything unique about defendants in cases of white-collar crime that bears on sentencing, he answered:

I don't think the defendants in white-collar cases are any more troublesome to the judge in performing the function, but I think that they have a peculiar characteristic to them which is perhaps more challenging to a judge as to what a proper sentence is. . . . Usually the defendant is one who looks as though he can resume his place, if indeed not just continue on his place, in society, as a valuable and contributing member of society. Almost always he is a husband and a father. Almost always he has children who are in the process of becoming what we like to think children ought to be—well brought up, well educated, nurtured, cared for—usually he is a member of the kinds of civic organizations in the community who value his services and derive value from his services. . . . As a result you are up against this more difficult problem in degree in the so-called white-collar criminals as to whether you are not going to inflict a hurt on society by putting such a person in a prison and making him cease to be a good father and a good husband and a good worker in the community.

This perspective on sentencing white-collar offenders carries with it a distinct view of the relationship of the criminal act to the rest of the personality of the white-collar offender. The crime tends to be seen as a separable part of the offenders' total personality; it is one negative characteristic amidst a cluster of other positive characteristics. Judges told us that this is what they most often learn from pre-sentence reports. In a typical case the defendant is married and has children; he is reported to be a good parent, an employer with dependent employees or a professional person with clients dependent on him; he may be active in his church and a fund raiser for local charities. "He just happened to cheat the IRS out of $30,000 in the last three years," as one judge said.

In looking at this white-collar offender, the judge wants to impose a deterrent sentence, but would like to do it without also punishing the defendant's spouse and children who will lose their source of emotional and financial support, his employees or clients who will lose their employment or professional service, and the general community that will lose an otherwise exemplary citizen. Prevention of these potential losses to the defendant's network of dependents and associates is a significant consideration in sentencing white-collar offenders. In sharp distinction, the defendant convicted of bank robbery or a simple theft is typically perceived to be without family and work-related dependents. Being less anchored in a social matrix, less damage is done by sending him away.

In pursuing the question of the effect of family circumstances on the sentence meted out to a white-collar offender, a judge explained his sentence of six months work release given to a defendant who had sold fake automobile...
franchises to many persons in several states, resulting in a loss of tens of thousands of dollars of his victims' investments:

Now the fellow that we have spent most of our time talking about was the ringleader, really put it together. The next in line was the sales manager, and his conduct was pretty bad too. Not as bad as the leader's, but it was calculated and inexcusable. I learned through the pre-sentence report—he did not testify at trial—that he was a very modest man who had never been in trouble before and who miraculously, in my judgment, having raised four youngsters, is succeeding in helping his four kids go to college. He had completed two college educations and was in the middle of a third one, and another one coming along. I think that at the end of the trial he was probably ticketed for a year, maybe eighteen months. But when I learned this about him, and he did have a job, a good one, a good, solid job down in Atlanta, Georgia, then the whole thing came out. I checked with the Bureau of Prisons and found that the only work release program which was available in Atlanta was no more than six months. If I sentenced him to more than six months, they could not put him in this facility. So I made the reduction.

Another judge brought forth the same view with the following statement:

Whether there are people who are dependent on him or her, whether they are really making a contribution to the people, whether there is going to be an injury to others if I incarcerate him: that has a profound effect on me and when I sense that, I am much more inclined to be lenient. In this particular case, the defendant . . . was pleading guilty to a calculated fraud, which you could tell from his own admissions and from what the indictment was, but you also had evidence of his prior background, you had the report on his family, and all that. My recollection is now, although I've sentenced so many people since then, but I think he was separated from his wife. I don't think there was a problem [in this case] where you are taking somebody out of the home and really inflicting the major punishment on innocent people.

The importance of the impact of a sentence on family members may be extended to employees and the larger community. In a major tax evasion prosecution in which the defendants were convicted of understating their corporate income by hiding ownership interest in a significant sector of their actual business, the judge gave the following explanation for a sentence that required the defendants to report to a local prison facility on weekends only:

If you take these two income tax evaders, if you take them and say, "Okay, you are going to spend three years—I am going to throw the book at you—three years to the custody of the Attorney General," forty people, forty of their employees are out of work. I don't know how many hundreds of kids in the ghetto who need jobs to rehabilitate themselves, how many of those will go back to crime because they are not working, you see. Fine, give them three
years, forget all these other salutory purposes that a light sentence in this case—a work release, staying in their own business and working with a charitable foundation—accomplishes.

Another judge, sentencing a defendant convicted of operating fraudulent businesses in which unsophisticated persons were sold machines that would not perform their advertised functions, decided not to impose a prison sentence. He stated:

I felt a jail-type sentence was not called for because if I had sent the person away there would have been dozens of people who would have lost their jobs completely and would not have had any means of finding new employment. I made it a condition of probation that the defendant make all reasonable efforts to find jobs for persons who had been employed in his business, all of whom were going to lose their livelihood when the company would be liquidated. I therefore reserved the possibility of committing this guy if he didn’t comply with this probation condition.

Other judges cited the need for maintaining an individual’s professional contribution to his community as a reason for not imposing a prison sentence. In a conviction for Medicaid fraud, a physician was given probation so that he could continue to practice medicine. The judge stated:

I didn’t want to send him to jail because I felt that it would deprive him and his family of the livelihood he could make as a doctor and it would deprive the neighborhood of his services. So what I was trying to accomplish was to see that to some extent he could repay society. In this particular case there was a way he could do something of social usefulness. I felt that this was a strong enough reason to overcome whatever good would be done for society by imposing a sentence for general deterrence, which is the only justification that exists for sentences in these cases.

Our interviews disclosed a relatively large number of cases in which judges took into account the unique service that professional persons, particularly doctors, and business persons provide to a community. In some of these cases, judges considered the possibility of a non-prison disposition for the reasons cited above but rejected it because of overriding considerations concerning the seriousness of the particular white-collar crime. In particular, there was a strong feeling among many judges that because business and professional persons are vested with public trust, their offenses require sanctions more severe than those meted out where the violation does not entail a breach of public trust. While we do not intend to discuss this issue in detail here it should be emphasized that the desire to avoid hurting family, business, and community may be outweighed by the judges’ belief that persons who breach public trust have to be singled out for exemplary sanctions.11 One judge described the interplay between these two factors this way:

11. The idea of “breach of trust” had a prominent place in a large number of interviews. It took on different meanings in different contexts: a public official is vested with trust vis-a-vis the general public; an executive, vis-a-vis stockholders and customers; a teller, vis-a-vis the bank.
So the way I resolve it, and of course why I would give him prison, is because of the trust issue that I talked about. I believe if someone can come in and commit a crime like that (investor fraud) and go out with nothing but probation people would just laugh off the idea that there is any punishment for those types of activity. And so I balance, I give what I think is a moderate sentence (an investment banker is not going to want to serve a year in jail). To me it is enough, yet it isn’t a lot, it doesn’t keep him out of commission for years and years. He has responsibilities to a family and elderly people and all, and I didn’t want to keep him out of commission for a long time. You know, you weigh these imponderables, the good things in his behalf, the need to get him back functioning. Yet he has committed a serious crime involving the trust other people have put in him, and there is the need to vindicate the law in a gentle way. And you come out with a year. There isn’t any formula. You could come out differently.

C. FACILITATING VICTIM COMPENSATION

Another closely associated reason judges offered for not imposing prison sentences or imposing short terms in cases of white-collar crimes was the defendant’s ability to make restitution to his victims. In certain instances this ability was attributed to the defendant’s potential earning power, in others to the defendant’s financial status at the time of sentencing. What was evident from our interviews was that in either instance restitution was often considered to be a sentence that could replace imprisonment. In other cases, restitution ability was a factor that reduced a penalty either affecting the length of a prison term or the manner in which a prison disposition was to be served (weekend or full-time). Where restitution is dependent on the offender’s continual employment, a prison term would eliminate a potential contribution to the “community of victims” just as a prison term would eliminate the offender’s contribution to family, business associates, and the public community. The following interaction illustrates one judge’s views:

Now if restitution can be made, I think there are many cases where no incarceration is called for. Now here is a man whom I sentenced for a violation of securities laws. He pled guilty. And he had participated in defrauding investors, and in paying under the table commissions to brokers for touting his particular stock. The amount that he made, as it turned out, was something less than the investors lost. He undertook to make full restitution to the investors so that they ended up not losing anything, even though that was more than he made out of the deal. And I suspended the imposition of sentence in this case and placed him on probation with a special condition that he make full restitution to the investors. That in effect punished him because he paid out more than he took in, it helped the investors, and it had the same deterrent effect as a period of incarceration would have.

Q: Could you elaborate more on how restitution has a deterrent impact?
A: Well, he ended up losing about double what he got out of it. He made about $25,000 and ended up paying back about $50,000, as I recall. Those figures may not be quite correct, but that is about the ratio. So he ended up an awful lot out of pocket. And I couldn't have fined him that much but he agreed to work and to pay it back. The investors, believe me, were quite happy with the sentence. He was not terribly happy with it. But he preferred that to going to jail, and I think considering all of the various factors, that it was a better sentence all around.

Another judge stated similar reasons for giving a non-prison sentence to a person convicted of not reporting large amounts of income:

When it came to sentencing, he said "Listen, I'll go and get that money from the Swiss bank, but it can't be gotten out except with me," and I knew that was true and the Assistant U.S. Attorney wasn't willing at all to do that. And he said now make application for probation and take my gamble. Well, there was a lot of publicity about it. I decided to take a chance on him because I believed that he would be back for his child. He went there and withdrew half a million dollars and came back and turned it over to the government. And I proceeded to put him on probation even though he had served one term and he didn't plead guilty in this case either. He had had a trial and there was a jury that found him guilty. But still I said he had served one term, he needs to make a living, but he kept his word with us.

Q: Well, in this case, you must have considered sending him to a term in prison. What made you decide that that wasn't appropriate in this case?

A: Well, the restitution. There is half a million dollars back in the coffers that we wouldn't have got if I had sent him to prison. He would have served his term, and there would have been no way of getting it, and eventually some day or other he would have gotten out of the country somehow or other and gotten that money. That was it.

D. REPARATIONS

Imposition of a sentence that requires the defendant to make payments to the victims of his crime is closely allied to another type of sentence, rooted in the idea of reparations. We found that several kinds of community service obligations are used in lieu of prison by a large number of our respondents and that such sentences are thought to be particularly suited to cases of white-collar crime. Through a community service sentence, the payment is made to the general community rather than the specifically identifiable victim. The notion that the general community has been injured by the wrongs of the offender and that the community as a whole can be repaid is fundamental to the concept of reparation. While restitution and reparations are clearly distinct from deterrence and punishment, interviews with judges indicate they
use community service sentences as a way to impose a deterrent sanction while at the same time effecting repayment.

Our respondents told of sentences that required a dentist to provide free dental care, a physician to provide free examinations, an industrialist to set up a non-profit corporation, a social welfare worker to go on part-time payment at his place of work while continuing to work full-time, and corporate executives to donate time to communal charitable organizations. The following excerpt is from a judge explaining two community service sentences, the first meted out to a partner in a large metropolitan law firm, the second to a dentist, both cases of tax evasion:

Well, I had two ideas in mind, one was I didn't really want to give him straight probation, I thought that was getting away too easily. To consider the taxes involved, it wasn't an enormous sum, but it was a substantial amount. Secondly, the fact that I didn't put him in jail was premised on the idea that if he had an alcohol problem working in the AA (Alcoholics Anonymous) Organization one day a week for three years is going to give him a lot of exposure to the people with the same problem. Meanwhile, it will be helping society generally: in effect he will be making amends for his failure to pay taxes. Now that was only the second time I ever gave a sentence of that nature. On one prior occasion when I was sitting as the visiting judge, I had a dentist who had been convicted of insurance fraud. He had stood trial before another judge once, and it had been a hung jury. Before me, he was convicted, but I must say the government's case wasn't overwhelming. It was a close case. Needless to say, insurance fraud is a very heinous thing. I was torn between giving him jail time and not giving him jail time and I finally settled on giving him an alternative; I sentenced him to six months in jail, but if he chose to he could work one day a week as a volunteer dentist. Needless to say he selected the part of being a volunteer dentist. Those were the two sentences in which I gave what you might call an alternate kind of time.

Q: You didn't feel you needed to mete out a prison sentence for these cases in order to achieve general deterrence?

A: In both instances I thought you could make an argument that deterrence called for a sentence and in both instances, I was reluctant. The lawyer, I don't think too many people knew about his situation. But the dentist case was a big thing and I was conscious of the generally unfavorable reaction that should come from not getting jail time for being involved in the crime, and I hoped to offset that somewhat by giving the alternate sentence so that if you stop and view it, I would guess that a dentist makes in the area of $50 an hour eight hours a day, that is $400 a day. He in effect was going to contribute sixty thousand dollars worth of services before he was done and that is not chicken feed. So you are right, there is a good argument to be made from the other side and I certainly gave substantial consideration to it, I think you have to view the deterrent aspects in every sentence.
The community service sentence represented a compromise for this judge, as it appeared for many. The deterrent goal of criminal law argued for a jail-type sentence; the contribution that the defendant could make to his community, and, we can assume, the other typically exemplary information supplied about the defendant's family and professional contribution argued for a non-prison disposition. In between, the judge found a sentence that he perceived as achieving both deterrence and reparation.

The idea that a community service sentence represents a compromise between these two conflicting goals also comes out sharply in the following interaction:

I have had a man who was the supervisor of a public service agency. He walked off with some $20,000 in funds that belonged to the federal government and he pleaded guilty. He was a man with a Masters Degree. I put him on probation. He knew what he was doing. He did what he did. I put him on probation on the condition, or I asked his attorney to give me a program for an alternative to a prison sentence and then they came up with what I thought was an excellent one, that he would work four hours a day for a charitable organization that could not afford to pay a professional social worker to organize their caseload, their office administration and he would make full restitution of the money that he took and that was the sentence that he received. Probation for a period of three years on condition that he worked the four 4 hours a day, five days a week . . . My philosophy, or one of my philosophies of sentencing is that imprisonment should be the last resort, that if there is some other viable alternative that will help the person who is being sentenced to mend his ways or pay his dues, so to speak, I would prefer that to imprisonment. In the case of defendant with the Masters Degree, to take four hours a day, five days a week out of his hide plus make him pay full restitution, he is being punished and that is certainly a deterrent sanction. He is also doing a very valuable service to a worthy organization that could not afford to pay for his expertise. He is paying back society in that way. Mr. B (a different defendant convicted of securities fraud) could not make restitution nor could he offer a viable alternative to imprisonment so it was either giving him a probation sentence with no good countervailing consideration which would in turn just give him [and] others a license to steal and not just others out in the community who are doing the same thing he is doing.

That the community service sentence is generally dependent on the offender's abilities, and that it is unequally available even to the total pool of offenders, was emphasized with the additional comments of the judge in comparing the Masters Degree defendant (Mr. A) with the securities fraud defendant (Mr. B).

Q: Let's say that Mr. B had come up with a program to work full-time in a charitable organization. There certainly is a vast difference between going to prison and being able to go home at night. Would that not have been an appropriate sentence given what you said about Mr. A?
A: Well, it is hard to talk hypothetically because we are not dealing with hypothetical people, we are dealing with real people. Mr. B could not have come up with an alternative, (1) because of his age, (2) because he was a very sick man, (3) because of the fact that he did not have anything comparable to offer to society except the business of making money by putting together schemes. He was a business broker. The other man had a Masters in social work and was an excellent worker in his job. Did a phenomenal job at that office.

Though we do not have a direct measure of frequency, there is a widespread belief among defense attorneys that the number of community service dispositions is increasing rapidly. We obtained the same impression from our interviews. A good example of this came from a judge who had sentenced executives in two major corporate prosecutions in the last five years. In the more recent case, in which sentences were imposed about six months ago, he gave community service dispositions. Yet four years earlier he gave prison sentences to executives who were convicted of the same crime in nearly the exact circumstances. When asked what explained the difference, he said:

The first time around I didn’t have the community disposition before me as an alternative. I simply didn’t think of it. In the case I sentenced last year the attorneys met with me several times, presented a detailed program of alternative service, and convinced me that I should give it a try. So far it has worked. Had this same program been presented to me five years ago I might have used it then, . . . though the atmosphere is different today, too. I don’t know.

Weighing factors like those described above against the deterrent value of incarceration in white-collar crime cases is facilitated by the fact that most white-collar offenders come before the judge with no prior record. The absence of a prior record to weigh against an exemplary personal background makes the sentencing calculus all the more difficult. Some judges suggested that white-collar offenders are more likely to get prison sentences than non-white-collar offenders when both have no prior record. Yet, this apparent comparative imbalance gives judges a reason to search for other factors, factors relating to the offender and his social network, with which to balance the deterrence calculus. In sentencing white-collar offenders, judges are torn between leniency and severity; they move more toward one disposition and then toward another in their final decision which often results from their ability to justify a non-deterrent, non-incarcerative punishment on grounds uniquely applicable in white-collar cases.

12. Field interviews conducted with defense attorneys indicate that defense attorneys have recently taken an active role in shaping “alternative” dispositions. Some report being asked by judges to propose non-prison “programs” for their clients. These findings are reported from a separate study, also conducted under the auspices of the Yale program on white-collar crime, which is focusing on the emergence of an identifiable group of attorneys who specialize in handling cases of white-collar crime. The study is based on interviews with attorneys, a mail survey, and analysis of the cases of white-collar crime prosecuted in the Southern District of New York from 1974 to 1978. This study will be available in the fall of 1980.
There are strongly divergent views about the role that fines have in cases of white-collar crime within the present statutory framework. We discussed cases where the sentencing judge felt that fines were definitely effective in accomplishing the deterrent aim of sentencing. More generally, however, we found a conspicuous absence of responses by judges that a fine was the appropriate sanction to be imposed on a defendant. Fines clearly had a much more limited role in the view of most of our judges than did prison terms, restitution, or alternative community service. In several cases we were told that fines were imposed but little import was attributed to their impact. Where fines were used in conjunction with another sentence it was generally the other sentence—community service or short prison term—that was thought to have the intended deterrent effect. Where the fine was used alone, the idea that the commencement of the criminal process against the defendant was the punishment seemed to be more important in the judges’ minds than the fine itself.

There appear to be two primary reasons for the belief that fines are ineffective sanctions. On one hand, a substantial number of white-collar defendants are believed by judges to be essentially bankrupt by the time they get sentenced. In many cases detection of the crime was related to failing business situations or desperation at a time of financial hardship. This is perceived to make the imposition of fines impossible. One example of this is the following description:

I think of the individual who had worked at a bank for about thirty-five or forty years, and he got into real financial trouble—he wasn’t a very good financial manager—and got his back to the wall. He was just taking home cash and covering it up by bookkeeping entries, and finally the thing came to a head. I think he admitted to about thirty. They claimed it was more, but they settled for a confession on the basis that it was $30,000. He wasn’t a leader in his community. He wasn’t that high up in the bank. He had been with the bank for forty some years and performed yeoman service. The bank felt very bad about it, but they felt as an example to other employees, as a deterrent and so forth, the federal government should prosecute. And I gave him—I think I gave him six months work release, and I didn’t fine him because he had horrendous financial obligations, and they took this money back out of his pension rights and so forth, so that the bank was made whole, and the bank didn’t want to prosecute. The man was sixty, no danger at all of being a threat to society.

On the other hand, many other defendants are believed to be too affluent to be significantly affected by monetary fines that are permitted under the present criminal code sections. The problem was stated by a judge in this manner:

The one case that I remembered when you asked me about white-collar crime was one that I remembered because I had so little opportunity to have any effect whatsoever by my sentencing
decision. It was some kind of larceny. It involved copyright, deliberate copyright infringement, and the defendant was a corporation. The maximum sentence was a $1,000 fine so I gave the maximum sentence in that case. I had practically no latitude to do anything that I thought would have been more appropriate or more severe which in that case would have been more appropriate.

Q: It should have been more severe than you were permitted under law to mete out?

A: But the particular law provided only a $1,000 fine as the maximum sentence. So my sentencing range since the defendant was a corporation [was limited, it] couldn't be put in jail, the entire range in available sentences was from 0 . . . to $1,000 and that is not much. . . . I am only saying that if I were limited to a fine in that particular case, if the statutory limits had given free reign up to ten or $100,000 I would have imposed a fine that would have been higher than $1,000. One thousand dollars for many corporate entities is like an extra cup of coffee in terms of economic impact. It is of zero significance.

Low maximum fines are an obvious problem in sanctioning corporate entities, but they are a problem for individual defendants as well. The judge in a securities fraud case, in response to a lawyer's plea to sanction with a fine rather than imprisonment, had the following to say:

The problem I come to in this situation, unhappily, is this: the sentencing limits under 371 is five years, and $10,000. Mr. S is in his own name worth $558,000. To him a $10,000 maximum fine is a mosquito bite. It is no penalty whatsoever. It is practically the cost of doing business, taking the risk. It is a situation where chances are, I won't get caught and if I do, I will remain as a background, a pillar in the community to say to the Judge that this should be limited to a fine and an insignificant fine under the circumstances. This sentence has troubled me considerably coming into it. It has troubled me through the day. It is troubling me at this minute. But, a $10,000 fine here is no penalty at all.13

These two types of disparity—between the range of the fine and the financial ability of the defendant—explain partially why judges discounted the significance of fines when disclosing their sanctioning alternatives. Overall it appeared that fines were used much more often than they were considered to be significant; judges' explanation of their rationale for sentencing suggests that a counting of the frequency of fines in white-collar cases would overrepresent their perceived importance as an effective criminal sanction, especially in the context of the range of fines available today.

A clearly contrasting view towards the use of monetary fines was given by a judge who sentenced three executives convicted of bank fraud.

All four of them went to trial. Nobody pleaded guilty. One of them I found not guilty. The other three I found guilty, and gave them probation. And . . . I fined all three of them, too, because one of them, the bank president, I think he had about $75,000 set aside for retirement, I think I fined him $20,000. So that is a good nip when you are facing retirement at 67 years of age, and $75,000 isn't a very big thing to live on for the rest of your lifetime along with your social security, and cut that down by $20,000, I figure that was a pretty good nip. The other fellows were pretty well off and I fined them, I think, maybe $20,000-$30,000 . . . and the fines were based upon their net worth. If one man was wealthier than the others, it would be a larger fine, so the sting would be proportionately the same economically.

Q: Don't these fines produce a public impression of inequality, one defendant gets a high fine, the other a low one, where they have equal culpability?

A: Certainly, but just suppose you and I did exactly the same white-collar crime, and the judge decided that he was going to dispose of it on the basis of probation and a fine and not incarceration. If your net worth is $750,000 and my net worth is $15,000, we are not going to be fined the same amount. . . . If one man's net worth was $15,000, I might fine him $1,000 or I might not fine him anything. Another man's net worth is several hundred thousand, I might fine him $15,000-$20,000 just to let him feel the bite.

If only a hypothetical middle group can be adequately sanctioned with fines it may be the case that some judges have generalized their attitude to fines and have discounted their usefulness. It may also be that the statutory limits, or other as yet unexplored issues, have traditionally kept judges from considering fines as an effective deterrent sentence. We did not ask judges directly to tell us whether they believe a reformed fine system could constitute the kind of deterrent sanctions they are looking for in cases of white-collar crime. But what is clear from our evidence is that many judges do not think fines are an important sanction. If current theory suggests that fines can be a significant deterrent and should be used more often, a major re-education program for judges may be required.

VI. Conclusion

What we have described above is one small portion of a large body of data on the federal judges' experience of the sentencing process. Throughout we have been concerned with their conceptions of the process. We have also stressed major themes and the way those themes get expressed, rather than describing the total range of variation. We have not examined here the importance of the seriousness of the offense or the culpability of the offender, both factors which may dictate a prison sentence. We have not examined here the importance of the seriousness of the offense or the culpability of the offender, both factors which may dictate a prison sentence. That variation,
and many other matters of sentencing policy, will be addressed in a forthcoming monograph. But certain conclusions seem evident to us from even the partial examination of our data.

We are struck by the fundamental tension many judges feel between the aims of general deterrence on the one hand, and the particular attributes of white-collar offenders on the other. This tension is expressed in a variety of ways, but its central core is suggested in one final quotation from one of our judges:

The problem is the tension between use of incarceration for its deterrent factor, and the inclination not to use it because it is too excessive given the non-criminal record of the offender. From the individual standpoint there are good arguments against sentencing; from the societal interest of deterring crime there are some good arguments for using the sentence. And that tension is more pronounced with the white-collar criminal who by and large has in my judgment no prior record so that his personal interests are in his favor but the crime he has committed I tend to think, are the ones that are deterred by sentences more so than the bad check guys and the other guys where I don’t think there is much deterrent effect by incarceration. So the deterrent effect I think is at its highest, the personal situation rather favorable, and so the tension between those two values is very acute.

In seeking to resolve this conflict many judges appear to look for a compromise: A sentence that will have what they perceive to be a deterrent effect, but without imposing the deprivations that would come from an extended stay in prison. The weekend sentence, the very short jail term, and the relatively frequent use of amended sentences (where a judge imposes a prison term and later reduces it) are evidence of this search for a compromise.

We are also impressed by the extent to which considerations other than the usually discussed aims and purposes of sentencing feed into the judges' decision-making process. These considerations would rarely be thought of as primary aims of sanctioning, but they often appear to play a primary role. In carrying out that task judges seem to develop their own common law standard of sentencing. One implicit rule might be formulated as follows: sentence so as to reduce the total social cost of the offense to its victims. This leads to sentences that will facilitate victim compensation and reparations. Another implicit rule would appear to be: sentence so as not to harm innocent parties. This leads to sentences that keep the offender in the home and at work. These and perhaps other implicit principles appear to weigh heavily in the judges' decisions.

The judges, however, rarely formulate these considerations as aims or principles of sentencing. Rather, they arise as practical matters of concern in particular cases. If anything, there would appear to be a predilection against the formulation of abstract sentencing principles, and a strongly felt need to keep the process oriented to the individuals who are most affected by it. This is one reason for their interest in alternative sentences that bring the offender into some relationship with the victim or the community, and for a predisposition against thinking in strict cost-benefit terms with regard to fines.
That these concerns seem more evident in their discussion of white-collar crime than of common crime sentencing may be a result of a prominent “empathy” theme in the white-collar cases. The interview responses repeatedly give evidence of the judges’ understanding, indeed sympathy, for the person whose position in society may be very much like their own. In places, the interviews exude the pain that judges feel in seeing the offender uprooted from his family, humiliated before his friends, and exposed to the degradation of imprisonment. The idea that prison sentences should be avoided so that the offender may continue to make a contribution to the well-being of his community also suggests the special appreciation for the occupational role of white-collar offenders. Whether this empathy plays an active role in influencing the sentencing decision, or only accompanies decisions based on other considerations remains an open question.

Finally, there is the question of equity in the sentencing process. It is difficult to define precisely what disparity in sentencing might mean, let alone provide evidence as to whether there is disparity and in what direction it runs. What is clear is that factors intimately related to the defendant’s social status do receive weight in the judges’ thinking. Sometimes, as in the violation of public trust, the weight goes against the white-collar defendant. But often, because of factors—such as the concern for the special sensitivity of such defendants to imprisonment, and the sense of greater loss to family members and to the community if a white-collar person is sent away—they cut in the opposite direction. Questions are also raised by the predisposition to use economic sanctions when the defendant can clearly pay for them—sanctions that are unavailable to the defendant who is poor. These matters raise questions of fundamental fairness in the sentencing process that we do not attempt to analyze here. They would appear to be of paramount concern to those who would fashion a just as well as an efficient sentencing policy.

14. That question will be addressed in the study of the actual sentences meted out to offenders in the federal court. See note 5 supra and accompanying text.