Of Crime - And Punishment: Sentencing the White-Collar Criminal

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I. INTRODUCTION

Move over all you thugs with primed Saturday night specials. A new whipping boy, the white-collar criminal, has appeared on the horizon and seems destined to share a large portion of the law enforcement heat.

Perhaps that is as it should be. The most notorious street criminals did not approach white-collar criminals in either the magnitude of their crimes, or the human carnage left in their wakes. Thus, it is high time

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1. Incidences of "computer criminals" siphoning off hundreds of thousands and even millions of dollars of corporate funds are surfacing with increasing frequency, even though it is widely rumored that most such crime goes unreported because of institutional embarrassment and the fear that publicity will trigger yet more of these difficult-to-detect crimes. The complex, interlocking corporate structures of our large businesses, and the storage of critical information on easily alterable magnetic discs, make detection of even staggeringly large losses difficult and prosecution and conviction arduous.

The recent Ford Motor Company suit involving alleged suppression of information disclosing the hazards of the Pinto automobile, the Buffalo Creek disaster where more than 125 people died as a result of a mining company's use of an illegal earthen dam, and the Love Canal incident involving the burial of toxic waste material adjacent to a suburban development, disclose how corporate activities in covering up known defects can result in more deaths than those caused by our most notorious mass murderers. It is probable that scores of defects in items ranging from can openers to airplanes have been spotted during the design and early production stages and such information suppressed for economic reasons, resulting in a great deal of human injury and death; and that thousands of persons have continued to be exposed to known lethal work and environmental conditions deemed too expensive to remedy. If these acts are criminal in the legal sense, some of our great industrial institutions seem destined to replace Jack the Ripper and the Boston Strangler in lurid criminal lore.

In one recent study, extensive statistical evidence is cited as support for the conclusion that "although the criminal justice system largely ignores business crime, the direct short-term economic impact of this type of crime is at least ten times greater than that attributable to 'street crimes' against property, and it frequently results in serious bodily harm." Harris & Dunbaugh, Premise for a Sensible Sentencing Debate: Giving Up Imprisonment, 7 Hofstra L. Rev. 417, 437 (1978). See also Ogren, The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White-Collar Crime, 11 Am. Crim. L. Rev. 959, 965 (1973) ("Some white-collar crimes may be more vicious, calculated and exploitive than street crimes, which are penalized far more severely") [hereinafter cited as Ogren].

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we concern ourselves with these crimes, often the most serious and
gross of those committed in any community, and cease pretending that
the duty to make our streets safe to traverse at night is of any greater
importance. But if we are to concentrate efforts toward controlling
white-collar crimes, we must additionally deal with the sentencing of
those convicted of such transgressions. And here, the waters muddy.

The United States Department of Justice, which has until recently
devoted a small percentage of its budget to controlling such crimes,²
has apparently changed direction. It has affirmatively recognized the
threat such crimes pose to our existence and has proposed that the
perpetrators of economic transgressions be dealt with as severely as
all other criminals. Thus, former Attorney General Griffin Bell, in a
widely quoted speech, stated:

We must increase the cost to the offenders of committing such crimes
[white-collar crimes] by ensuring his or her detection, quick prosecution
and punishment more severe than only the possible loss of reputation and
community standing. Imposition of prison sentences joined with ap-
propriate fines should be the rule, with probation and early parole reserved
only for the most exceptional cases.³

His successor has adopted those views, adding that the imposition of
"heavy" prison sentences should be the rule.⁴ In an economy that has
turned suddenly sour, heavy handedness toward those economic
criminals who gouge a share of ever decreasing real incomes is sure to
strike a responsive populist strain. Broad support, however, makes it
no more likely to be correct than were the previous decades of broad
neglect. If increased penal sanctions are to be imposed upon white-
collar criminals, it must be because doing so fulfills legitimate and pro-
ductive goals of the criminal justice system. There is no indication that
increased use of imprisonment as we today perceive that term will
fulfill those goals.

To deal rationally with the problem of sentencing white-collar
criminals, it is first necessary to ascertain who are the white-collar

². See COMPTROLLER GENERAL OF THE UNITED STATES, RESOURCES DEVOTED BY THE
DEPARTMENT OF JUSTICE TO COMBAT WHITE-COLLAR CRIME AND PUBLIC CORRUPTION 2 (1979)
(indicating that 5.1% of the Department of Justice Budget for the fiscal years 1977 and
1978 was spent combating white-collar crime and public corruption). However, more re-
cent statistics as to criminal filings in the federal courts indicates a trend away from the
prosecution of street-type crimes and a heavier emphasis on organized and business-type
crimes. See generally 1979 ANNUAL REPORT OF THE DIRECTOR-ADMINISTRATIVE OFFICE,
UNITED STATES COURTS; LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF
LABOR, PROSECUTION OF ECONOMIC CRIME (1976).

³. Address by then Attorney General Griffin B. Bell to the United States Chamber

⁴. The comments were made by the present Attorney General Benjamin Civiletti
when he was Deputy Attorney General. See TRIAL, Oct., 1978, at 41.
criminals and what are white-collar crimes. Neither task is simple. Edwin H. Sutherland, the originator of the term, thought of white-collar crime as a "crime committed by a person of respectability and high social status in the course of his occupation." Another commentator stressed the need to broaden the class while still focusing on the status of the offender more than the nature of the offense, defining white-collar crime as referring "to a broad sweep of offenses committed by those who have had all the advantages that society can offer, including a good education, a good home, and the remarkable opportunities of the land. It includes securities fraud, embezzlement, bribes and kickbacks, criminal tax evasion, and a wide range of business crimes." Yet another commentator seems willing to deviate from social status to the actor's relationship with the victim, proclaiming that white-collar crime "is a breach of a fiduciary duty sufficient to warrant the intervention of society."

None of those attempts entirely fill the bill if the term is to prove helpful to the sentencing process.


8. The difficulty in defining white-collar crime is reflected by the fact that none of the current rash of adopted and proposed sentencing guidelines specifically deal with the white-collar offender on the offense/offender scoring grids. Some guidelines do, however, permit the commission of economic offenses to be considered as an aggravating factor by the sentencing judge. One such provision is contained in the recently promulgated Minnesota sentencing guidelines which list as an aggravating factor the commission of a major economic offense. The specific provision in the Minnesota guidelines reads as follows:

The offense was a major economic offense, identified as an illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:

(a) the offense involved multiple victims or multiple incidents per victim;
(b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;
(c) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time;
(d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or
(e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of professional sanctions.

The Philadelphia guidelines project, apparently stung by criticism that it favors the well
To focus only on the status of the person committing the transgression is patently invalid. One need not wear expensive clothes or be socially prominent to commit crimes which do not fit neatly into those categories traditionally occupied by street criminals. Unscrupulous owners of small automobile and television repair shops, who have wrongly dipped as deeply into the pockets of consumers as have the most prominent of offenders, deserve to be punished for such transgressions. Yet, the type of economic harm they inflict clearly sets them apart from the popular conception of street criminals and compels us to consider them separately when determining the sanction to be imposed. And, even during the course of their business and professional pursuits, the socially prominent may engage in activities that reek more of violence than of sharp business practices. Consider, for example, those misguided psychiatrists who, under the guise of therapy, have committed what can most plausibly be described as rape upon their hapless patients. Are such transgressors street criminals or white-collar criminals?9

Similarly, the nature of the crime alone is not a sure clue as to how a criminal should be classified. There is little functional difference between a thief who steals a social security check from a mailbox and cashes it, thereby causing an elderly person to go without food, heat or shelter, and an economic criminal whose unscrupulous and illegal acts result in the same consequence. And, if one who kills or maims the proprietor of a small grocery to facilitate a robbery of the daily receipts is to be labeled a thug, is it rational to treat as somehow less culpable or more respectable one who consciously places a dangerous product into

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9. The extent of the confusion that can be spawned by attempting to clearly separate white-collar and street crime is reflected by a recent feature article in The Pittsburgh Press, headlined “Hottest White-Collar Crime: Arson for Profit.” See Pittsburgh Press, July 13, 1980, § B, at 1, cols. 1-6. It would be difficult to fit arson within the scope of most current definitions of white-collar crimes. Yet, when arson is committed to defraud an insurance company, it is clearly different from street crime and, as the cited article states, it may indeed be “monopolized by the white-collar class.”
the stream of commerce because it is more profitable to pay damage claims to those whom he knows will be killed or maimed than to jettison the project?

The above illustrations suffice to show that much so-called "economic crime" is not sufficiently sanitized to distinguish it from street crime, which also is often, if not usually, economically motivated, and that it can impact directly and sometimes violently on victims, whether they be specifically ascertainable persons or anonymous members of a statistical probability grouping. Other white-collar crimes are more nearly victimless—not because they will in fact cause no harm to specific persons, but because that harm will be so dispersed that it is difficult to ascertain the precise impact upon each affected group member. Income tax fraud and embezzlement from large banks are examples. As citizens and consumers, we all will ultimately be required to pay more to offset the loss, and as a result will find our standards of living that much lower than they might otherwise have been—just as would be the case if we had been robbed of such sums at gun point.

Yet, notwithstanding more similarities than we might like to admit, street crimes and criminals are different than a host of offenses and offenders we have come to label "white-collar," or economic, offenses and criminals. While street crime may be economically motivated, white-collar crime is almost always so motivated. And, even economically motivated street crime frequently results in physical harm to the victim because it is committed in situations where direct confrontation with victims is a real, and not a remote possibility; and it is frequently committed by persons whose own fears or repressed hatreds make that confrontation particularly perilous. Judge David Bazelon, whose first-hand experiences, personal sensitivity and outstanding abilities place him in the first rank of amateur sociologists, has recognized this difference, describing the world of violent street crime as

one of savage deprivation. Virtually all street crime comes out of wretched poverty, broken families, malnutrition, mental and physical illness, mental retardation, racial discrimination, and lack of opportunity. Street crime springs from the anger and resentment of those who have been twisted by a culture of grinding oppression. The roots of street crime are thus embedded deep within the inequities of our very social structure. So long as these inequities remain, the roots will be continually refreshed and rejuvenated. To speak of incapacitation and deterrence in this context is to consign oneself to a treadmill, unable to stem the increasing crime rates despite a succession of repressive measures.10

While white-collar criminals too can be forged in the same cauldrons,

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they usually are products of better environments and, even if not, their defects are usually traceable to other causes; and although the threat to society they pose may be just as great, or even greater, than that of the street criminal, the infliction of physical harm is not a direct cause of the act even though it may be a most foreseeable consequence. Moreover, and perhaps most importantly, it is highly likely that those who may be lumped under the admittedly unsatisfactory and nebulous rubric of “white-collar criminal” can be deterred from pursuing their criminal proclivities by the implementation of meaningful nonimprisonment sanctions that would have little or no effect on preventing the commission of most violent street crimes.11

Perhaps, then, white-collar crime has not been more clearly defined because it is an indefinable blend of offense and offender characteristics which, at least at the peripheries, shades imperceptibly into some types of street crime. Yet, the term has been accepted because, at least for purposes of imposing criminal sanctions, it serves a most useful function.12 That we have been unable to define white-collar crime more precisely has not prevented the courts from recognizing its existence, nor has it prevented an ever growing segment of the public and the law enforcement community from becrying the fact that it has long been treated as somehow less odious than street crime. In short, while the theorists haggle over terminology, the practitioners usually know white-collar crime when they see it.13 Where the uncertainty arises is in fashioning an appropriate sanction.

11. Some believe that white-collar criminals should be identified so they can be treated more harshly than street criminals, since they have had many of the advantages this society has to offer yet have violated the system that has treated them relatively well. Others isolate white-collar criminals, believing that they should be treated more leniently than street criminals, since they pose a lesser threat to the physical well-being of other members of society. I cannot accept either premise. If it is yet necessary to identify white-collar criminals, and I believe it is, it is because they—and many others who run afoul of the justice system—can most probably be deterred from criminal activity by implementation of a broad array of nonimprisonment sanctions. Thus, the legitimate societal goal of cutting down the incidences of certain types of crime can be effectively achieved without the economic and human losses occasioned by the unnecessary imprisonment of convicted persons. Subsequent portions of this article deal with the need to identify those criminals who can be punished effectively without incarceration, and with developing alternatives to incarceration that will effectuate the desired amount of deterrence.

12. See note 11 supra.

13. Perhaps, then, white-collar crime is somewhat akin to hard-core pornography, which Mr. Justice Stewart doubted he could ever intelligently define, but nonetheless had no hesitation in observing: “I know it when I see it.” Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
II. IMPRISONMENT AS A SANCTION

The most frequently heard indictment of the handling of white-collar criminals is that they are not often enough incarcerated and, when sentenced to imprisonment, the terms are far too short. In order to determine whether that indictment is warranted, it is necessary to examine the purposes of the imprisonment sanction and the impact its use will have upon white-collar crime.

Generally, imprisonment has been justified by one or a combination of the following purposes: deterrence, rehabilitation, incapacitation and retribution.\textsuperscript{14} Each of those purposes, if fulfilled, will result in a benefit to the community. Imprisonment, however, is not cost free. Initially, it takes great sums of money to construct and maintain prison facilities.\textsuperscript{15} Then, it is expensive to keep prisoners incarcerated\textsuperscript{16} and, while they are incarcerated, they are for the most part economically un-


\textsuperscript{15} See N. Singer & V. Wright, Cost Analysis of Correctional Standards: Institutional-Based Programs and Parole 17-18 (1976). This study indicates that the then per-prisoner cost of constructing jails was as high as $57,000 per prisoner space. See also Orland, From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation, 7 Hofstra L. Rev. 29, 51 (1978) (stating that the then current cost for the construction of a new prison bed in Connecticut was approximately $50,000) [hereinafter cited as Orland]. A recent magazine article noted that it would cost five billion dollars to construct the eight hundred local, state, and federal facilities planned for construction as of January, 1977, to house an additional 200,000 prison beds. The Christian Century, March 19, 1980, at 323.

\textsuperscript{16} Professor Orland stated that the annual maintenance cost for a Connecticut prisoner was $9,000. See Orland, supra note 13, at 51. A study of the per-prisoner maintenance costs in the City of New York for the year ending June 30, 1976 disclosed that in some institutions the cost exceeded $26,000. See Coopers & Lybrand, The Cost of Incarceration in New York City 5 (1978). Since there is an historical tendency to fill available prison space, the prisoner-maintenance costs per useful life of each newly constructed prison bed could, even at present costs, easily exceed $1,000,000. See W. Nagel, Prisionia: America's Growing Megalopolis 3 (1979), (presented at Seminar for Legislators on Alternatives to New Prison Construction at the Brookings Institution). There, the President of the American Foundation Inc., Institute of Corrections, noted that an informal study disclosed that the fifteen states which had done the most prison construction during the past twenty years had the highest percentage increases in prison population, and that a more formal study conducted for the Congress in 1979 by Apt Associates of Boston concluded that:

[T]he most important single contributor to prison population was not crime, or unemployment, or family breakdown, or race, or inflation. It was simply the availability of cells. Judges, prosecutors, police, parole boards all adjust their practices to the availability of prison space. It seems that we Americans would find tens—even hundreds—of thousands of other Americans to lock up if we only had the cells.
productive members of society, directly and indirectly draining assets and returning nothing.\textsuperscript{17} Moreover, we can no longer ignore the fact that whatever benefits imprisonment provides to the free members of society are often won at the expense of exposing the incarcerated to extreme degradation and abuse.\textsuperscript{18} Such treatment often results in yet another cost—returning to society a person who has been so warped

\textsuperscript{17} There have been moves to provide prisoners with productive employment opportunities that would enable them to pay the costs of their own incarceration. \textit{See}, \textit{e.g.}, van den Haag, \textit{Punitive Sentences}, 7 \textit{HOFSTRA, L. REV.} 123 (1978) [hereinafter cited as van den Haag]. Professor van den Haag states that:

Prisoners are not given productive work and they are not allowed to earn enough to pay for their keep. Most legal experts are in favor, as I am, of normal wages and work opportunities for prisoners, and of incentive pay. Even nonmonetary work incentives, such as shortening of sentences according to work performed are not altogether inconsistent with deterrent punishment, if kept within narrow limits. ... \textit{[P]risons are costly only because we insist on making them costly. They could be self-supporting, and, if prisoners become taxpayers, they could increase government revenue.}

\textit{Id. at 137.} While it is difficult to mount arguments against such a theory, it is probable that implementation cannot readily be achieved. Professor van den Haag notes that obstacles "come from labor unions and business." \textit{Id.} And, it is probable that the private sector is far better equipped to run profitable businesses than government bureaucracies, and that inefficiently run governmental attempts to enter the business field might well result in losses that are even greater than the present costs of incarceration. Moreover, the prisoners whose skills and drives are likely to make them the best candidates for filling such prison jobs are also likely to be the best candidates for nonimprisonment alternative sanctions. Use of alternative sanctions could permit these persons to be even more productive while being meaningfully punished, thus achieving that effect without the damaging collateral consequences of even the best run prison operation. While imprisoned—even if employed in a prison job—the prisoner's dependents are likely to suffer adverse social and economic consequences, especially if the convicted felon was formerly a person of some means; during incarceration, the defendant is likely to be degraded as a human being, thereby returning a psychologically damaged person to society; and, after release, the felon will have to attempt to start from scratch in finding new employment and in otherwise rejoining the environment from which he was involuntarily removed.

Many prisoners can indeed be permitted to become or remain economically productive by simply using forms of punishment that, although meaningful and real, are not life-disruptive. In this manner the convicted criminal can be a productive, taxpaying member of society while being punished. The hypothesis Professor van den Haag poses should be reserved only for those criminals who cannot be dealt with in a meaningful alternative manner. And, as to most of them, it is likely to be found that no rehabilitative effort will be overly effective.

\textsuperscript{18} The nationwide rash of actions brought by prisoners under 42 U.S.C. § 1983 (1976), alleging violations of constitutional rights, clearly divulges that prison conditions throughout the United States leave much to be desired. And, even a casual perusal of newspapers and magazines forcefully drives home the fact that all is not well within prison walls. For example, one trial judge, imposing sentence on a prisoner convicted of raping another inmate, said: "I have never been impressed with the claim that these sexual attacks go on in every institution and there is nothing you can do about them. ... From the testimony I have heard there must be these sexual vultures in every corner of
or untracked by the prison experience that he finds it difficult to "fit in" or to pick up the pieces of a shattered and disrupted career, and is thus far more likely to again turn to a life of crime, or, at the very least, never realize his maximum socially beneficial capacities. If any criminals, including white-collar criminals, are to be imprisoned, it must be shown that imprisonment serves a legitimate purpose and that the benefits society will gain outweigh the costs it will inflict. An examination of each of the justifications for imprisonment strongly indicates that neither contingency occurs with the imprisonment of most "white-collar" criminals.

A. Deterrence

It is probable that the threat of imprisonment does deter the commission of some types of crimes. And, even though there is little em-
pirical confirmation, it is also probable that white-collar criminals are among the most sensitive to the threat of the imprisonment sanction and among those most able to rationally conclude that the threatened loss makes the unlawful benefit unworthy of the risk.\textsuperscript{21} To so conclude, however, is not necessarily to condone the use of imprisonment as the primary sanction for the commission of white-collar crimes. It must

On balance, recent evidence tends to suggest that special deterrence which observationally is difficult to distinguish from other forms of “rehabilitation,” is not operating. This tentative conclusion is suggested by the apparent invariance of recidivism to any type of special rehabilitative program. . . . The figures suggest that recidivism rates cannot be affected by varying the severity of punishment, at least within acceptable limits.

\textit{Id.} at 95-96. He adds, however, that the evidence “is still only preliminary.” \textit{Id.} at 96.

The second type of deterrence, called general deterrence, is the effect use of sanctions has on other potential criminals. See Tullock, \textit{Does Punishment Deter Crime?}, 36 PUBLIC INTEREST 103 (1974) (concludes that incarceration does serve a general deterrent effect). See also van den Haag, note 15 \textsuperscript{supra}; Forst, Rhodes & Wellford, \textit{Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines}, 7 HOFSTRA L. REV. 355, 362-364 (1979). However, a thoroughly detailed study concludes that “despite the intensity of the research effort, the empirical evidence is still not sufficient for providing a rigorous confirmation of the existence of a [general] deterrent effect. Perhaps more important, the evidence is woefully inadequate for providing a good estimate of the magnitude of whatever effect may exist.” Nagin, \textit{supra} at 135.

Professor von Hirsch, although recognizing the empirical evidence to be sketchy, believes that some types of offenses may be deterrence-sensitive, and concludes that “a penalty still may deter better than none.” \textsc{von Hirsch, supra} note 14, at 41. Professor von Hirsch points out that general deterrence is usually difficult to measure since there is a reluctance to eliminate the penalty to ascertain if the incidence of crimes increases; and since increasing an already existing meaningful penalty does not normally have a dramatic impact on decreasing its incidences. \textit{Id.} at 37-44. There is some evidence, however, that making criminal an act which was formerly not deemed criminal—such as Britain did in 1967 by making it a crime to drive with more than a stated amount of alcohol in the blood—does reduce the consequences criminalization was intended to control. Thus, there was a sharp decrease in night-time traffic fatalities immediately following the British criminalization of driving under the influence.

It is significant that the punishment of many white-collar and public trust criminals is done largely to effectuate a retributive purpose or a general deterrent effect, since their indictments and/or conviction make it unlikely they will be given the opportunity to again commit similar crimes. Thus, if the public censure and removal from positions of power and influence has a general deterrent effect among that category of people \textit{in a position to commit such crimes}, general deterrence may not compel a greater sanction. Some further “punishment” may, however, be justified as filling a special deterrence function so that the defendant is not encouraged to engage in illegal activities still available to him, and so that the public perceives he is in fact not being favored because of his status. This “public perception” justification may be a broader form of general deterrence than described by Professor Nagin.

\textsuperscript{21} See Bazelon, \textit{supra} note 10, at 59 (“while the concept of deterrence may have application in the area of white collar crime, it has little or no meaning in the alienated world of violent street crime”). See also Geis & Edelhertz, \textit{Criminal Law and Consumer Fraud: A Sociolegal View}, 11 AM. CRIM. L. REV. 989, 1005 (1973).
first be determined whether the costs of imprisonment are worth the deterrent benefits that are derived; and whether there are available other meaningful sanctions which provide the same general and special deterrent effects without such severe societal losses.

To derive the full deterrent benefits of imprisonment, there must be a willingness to increase prison terms to extraordinarily high levels; and, perhaps, a willingness to routinely incarcerate white-collar criminals in institutions housing street criminals, knowing full well that this will subject them to physical abuses and degradation that are most probably feared as much as or even more than the possibility of incarceration itself. Thus, if deterrence is thought a sufficient reason to warrant imprisonment, it must further be decided just how much deterrence we desire and the price we are willing to pay for that amount of deterrence. It must be emphasized here that deterrence is not so clear that increasing the already stringent penalties for more serious crimes of violence and passion would have the same deterrent effect, and the probability is that any decrease in the commission of such "unthinking" crimes that would occur as a result of increasing the punishment would be less than dramatic.

22. It is probable that some nonviolent crimes could be almost completely eliminated if the punishments were made sufficiently severe. Thus, by way of illustration, if speeding on the interstate highways carried a mandatory twenty-year prison sentence, it is unlikely there would be many speeding offenses and probable that, within a short time, all cars would be equipped with governors prohibiting the exceeding of the proscribed speeds. It is unlikely, however, that the public would tolerate so harsh a penalty for what is perceived as being a minor offense. Similarly, many types of business crime could likely be eradicated if those responsible received long, and mandatory, prison sentences. It is questionable, however, whether the short-term punitive impact on the convicted persons would warrant so drastic a "cure." And, in any event, the legitimate societal goal of deterrence cannot be permitted to override an individual's right not to be excessively punished for a transgression. Such a practice would make the government more culpable than the accused, and cannot be condoned in a democratic society.

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24. While deterrence is undoubtedly a legitimate function of the justice system, it cannot justify any more imprisonment than is warranted by the offense. See VON HIRSCH, supra note 14, at 61-65. While it is believed that we humans are incapable of determining what is in fact a "just" sentence for a particular offense and a particular offender, it is probable that we can sense when a punishment is so great as to be manifestly unfair and, as a consequence, reject it out of hand even though it can be statistically shown to serve a deterrent function. Thus, deterrence—which is a legitimate function of a justice system—must of necessity be limited at the upper end by basic concepts of individual freedom and dignity. But see Gregg v. Georgia, 428 U.S. 153, 183 (1976), where Justice Stewart implied that retribution can justify capital punishment. If that is so, it is not inconceivable that a future Supreme Court might hold that general deterrence justifies a punishment more harsh than the offense itself might otherwise warrant. For judicial authority that retribution is not a valid basis for sentencing a defendant in Pennsylvania, see Commonwealth v.
solely for the benefit of society, and that concept cannot justify harming the criminal if the harm does not result in a benefit to society. The free members of our society must, therefore, determine exactly how much deterrence we desire, and that determination will obviously be tempered by the costs, both to society and to the criminal, of the sanction that will provide the deterrence.

The longer the sentence and the more harsh the prison environment the greater the deterrent effect will likely be. Since white-collar crimes by definition are not likely to be crimes of passion, it is probable that sufficient increases in the sentence and routine use of hard-core prison facilities will entirely wipe out some, if not all, types of white-collar crimes. This obviously beneficial end, however, would be won at a price it is doubtful we are willing to pay. It is probable, therefore, that any imprisonment sanction we ultimately choose will be one that is not likely to eliminate white-collar crime entirely but, instead, will evidence a willingness to tolerate some such crime simply because the societal and individual costs of complete deterrence are likely to be greater than the perceived worth of the benefits received.

Thus, acceptable levels of imprisonment as a deterrence factor are not


25. As illustrated in the preceding note, even socially beneficial deterrence should not be permitted to override the interests of the affected individual in receiving no greater sanction than could conceivably be warranted by the nature of the offense committed, with all errors as to what that punishment could permissibly be decided in the individual's favor. Thus, there must be a "lid" on deterrence as a punishment basis. If incarceration provides no societal benefits other than those which could be obtained with nonimprisonment sanctions, incarceration is patently indefensible even though the involved individual may find it more onerous than a nonimprisonment alternative sanction which achieves the same deterrent effect.

26. See note 22 supra.

27. Our past reluctance to imprison convicted white-collar criminals is somewhat illustrative of this unwillingness. Complete deterrence, which is likely to result in the short-term imposition of exceedingly long prison sentences for crimes that do not warrant such treatment, involves high direct costs in constructing and maintaining prisons and in keeping economically productive human resources inactive and useless for long periods of time; plus large indirect costs of maintaining the dependents of the incarcerated individual and making it more difficult for him to become a productive member of society upon his ultimate release. In addition, should the public perceive that unjust punishments that do not fit the crime are being meted out by government, a great deal of governmental respect is destroyed. Moreover, it is probable that large numbers of those with criminal inclinations who are deterred by the imposition of unduly harsh punishments will turn their efforts to other areas — illegal, but not as severely punished, or "barely legal" because the legislatures have not yet recognized such activities as criminal—and simply shift the areas in which their activities cause widespread public loss. In short, it is difficult, and probably most ineffective, to use criminal sanctions to upgrade moral behavior.
likely to ever achieve the ultimate goal of preventing white-collar crime because it is probable that we, as a humane people, will be unwilling to pay or impose the extreme costs prevention will require. What we seek, then, is enough punishment to deter at least some who might otherwise engage in criminal activity, even though the level of punishment chosen will not completely rid us of the economic criminal.

Once we are willing to admit that complete deterrence cannot be our goal, we are well on the road to rejecting imprisonment as the appropriate sanction for large numbers of offenders and offenses. That statement can be safely made because it is probable that imaginative and consistent use of nonincarceration sanctions can provide us with just as much deterrence as will the amount of imprisonment this society is willing to impose, and that it will achieve that degree of deterrence without many of the direct and indirect costs of imprisonment. If that is so, deterrence simply cannot justify the use of imprisonment as a sanction for white-collar crime because there are less costly methods of achieving the same degree of deterrence. And, since deterrence is a societal benefit and not at all related to the need to punish the individual wrongdoer, it is imperative that the benefit be achieved at the lowest cost to society and without the infliction of any unnecessary injury or suffering upon the individual criminal.

While even die-hard adherents of deterrence as the primary justification for imprisonment might theoretically agree with the above statements, they will undoubtedly challenge the use of the alternative sanctions on the ground that we do not know the deterrent effect that each such alternative might provide, while we can more accurately assess the deterrent effect of imprisonment. We do know, for example, the sentences that are currently being levied upon white-collar criminals and we can somewhat accurately assess the incidences of such crimes. Thus, we can roughly predict that codifying the present practices will result in maintaining a status quo, and that increasing the use of the imprisonment sanction will lower the incidence of white-collar crimes, although it is not certain how much lower the score will

28. The phrase "less costly" is used in the sense that the alternative means have fewer direct and indirect monetary costs, and that they are less damaging to the affected individual and his dependents. These human costs, although difficult to translate into economic terms, are as debilitating a consequence of imprisonment as are the "real" economic costs.

29. But see note 20 supra, which strongly indicates that the empirical evidence available as to the deterrent effects of incarceration is far from conclusive. It is probable that the existing data pertaining to white-collar criminals is even less conclusive since so few white-collar criminals have been ferreted out, prosecuted and imprisoned in the past. See Seymour, Social and Ethical Considerations in Assessing White-Collar Crime, 11 AM. CRIM. L. REV. 821, 833-34 (1973).
Conversely, shortening the imprisonment sanction is likely to somewhat increase the incidence of such crime, again by an indefinable extent. Thus, at least theoretically, those charged with designing sentencing guidelines can, by codifying the present practices, work from that basis in determining whether more or less deterrence is in the best interest of society, and can even project the costs that will be incurred or saved by deviating from that base. We cannot start from so comfortable a base if we use alternatives to incarceration because there is simply no existing data upon which we can draw and thus we will have to begin with assumptions unsupported by solid empirical data.

We are not, however, forced to start completely in the dark. We do know that any form of punishment will likely have some deterrent effect, even though we cannot be sure of the extent of that effect until the nonincarceration punishment is put into actual use and measured against the continued incidences of specific white-collar crimes. Thus, while initially we will not be able to predict with any certainty whether the nonimprisonment sanctions chosen will maintain the status quo, cause an increase in the incidence of white-collar crimes, or cause such crimes to decrease, within a relatively short time data which could provide rather precise answers to that question will become available. Moreover, use of the nonimprisonment sanction will create a system in which prosecutors are not tempted to accept pleas to reduced charges and where judges can more securely impose meaningful sanctions on a broader range of white-collar criminals because they will know that imposition of such sanctions will not cause spouses and children to suffer the economic consequences that imprisonment indiscriminately imposes upon innocent and guilty alike. And, meaningful nonimprisonment sanctions will not, as imprisonment has a tendency to do, increase the likelihood that the white-collar criminal will upon release resort to more vicious types of crime to support himself because of the disruptive and dislocative effect of the imprisonment sanction. Thus, the adoption of nonincarceration sanctions is very likely to have the desirable effect of increasing the likelihood that a

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30. Even if there is a broad enough sampling to enable us to make useful predictions as to the deterrent effect of incarcerating white-collar criminals, the statistics are sure to be too sketchy and incomplete to enable us to predict the impact of a worsening economy on the commission of such crimes. Thus, for practical purposes, the statistical information we currently possess may be no more useful than the complete dearth of information as to the deterrent effect of nonimprisonment alternative sanctions. By far the sounder approach would be to choose that method which theoretically make the most sense, and then to begin collecting and collating more complete and "cleaner" statistics that could in the future provide the basis for sound adjustments.
meaningful sanction will be imposed upon one found guilty of white-collar crime rather than a mere judicial slap on the wrist. In that manner, consistent application of nonimprisonment sanctions may prove to have even greater deterrent effects than the occasional imposition of relatively stiff prison terms.\textsuperscript{31} To the intelligent, nonvicious, calculating white-collar criminal, the certainty of a meaningful nonimprisonment sanction may prove far more threatening than the remote possibility of a stiff prison sentence. Thus, unless we are ready to throw white-collar criminals to the prison wolves in such numbers as to make jail a sure risk for all economic transgressions—which I doubt very much to be the case—nonimprisonment sanctions may well prove to be even more of a deterrence to criminal activity than incarceration.

Nonimprisonment sanctions, just as imprisonment, can be adjusted upward or downward to implement the desired deterrent effect. And, it is probable that the very same degree of deterrence that can be achieved by imposition of those prison sentences society is willing to accept for economic transgressions can be achieved by consistent use of alternative sanctions, without either the direct cost of feeding and housing a nonproductive criminal in a corrective institution or the considerable indirect costs to society that the imprisonment of an economically useful person entails. If that is so, deterrence simply cannot justify incarceration of the white-collar prisoner, or of any other prisoner who is sensitive to nonimprisonment sanctions.

\textsuperscript{31} It is probable that the certainty of a meaningful sanction if caught, even though that meaningful sanction is something other than imprisonment, will have a more deterrent effect than the remote spectre of incarceration. White-collar criminals, being somewhat sophisticated almost by definition are likely aware of the fact that few even very violent first offenders are given prison sentences and are thus likely to regard the threat of probation or a flat-rate fine as a risk worth taking. They might not be so emboldened if, from the first offense on, a meaningful, punitive sanction would almost certainly be levied, and this is a more likely contingency if the sanction will not result in the total disruption and degradation of the individual that is the usual result of imprisonment. As one commentator has stated:

The threat of incarceration is the major deterrent of the criminal sanction. In business crime cases, however, prevailing sentencing practices make the only certain sanctions upon conviction a suspended sentence or a very short prison term. While for some white-collar offenders who occupy positions of social, economic or professional status, mere indictment or conviction can have enormous consequences and may themselves be credible and effective threat, the elimination of the serious possibility of jail from the calculus of potential offenders, by any rational standard, diminishes the seriousness of the threat.

\textsuperscript{Ogren, supra note 1, at 961-62. The patent difficulty with this conclusion is that it fails to recognize the existence of meaningful nonimprisonment sanctions that, if consistently employed, would deter many potential white-collar criminals.}
B. Rehabilitation

Rehabilitation offers the least justification for the imprisonment of white-collar criminals. Virtually all such criminals, by definition, have marketable skills and are capable of being productively and gainfully employed. Indeed, many are already members of learned professions and have been educated to a far greater degree than are those whose task it may be to provide rehabilitation. Any rehabilitation that may be required is more likely to be moral or ethical rather than vocational, and prisons simply lack the facilities and the resources to accomplish such tasks. Moreover, even assuming moral and ethical rehabilitation to be possible, its cost would undoubtedly be so prohibitive as to make its availability exceedingly unlikely.

The problem is not to retool the white-collar criminal, but to induce him to put his already acquired skills to legitimate uses. This is far more likely to be accomplished by increasing efforts in detecting, prosecuting and effectively punishing economic crimes than by providing moral guidance to those who are convicted.

By no stretch of the imagination is rehabilitation, especially as practiced in correctional institutions geared primarily to deal with those who are often incapable of performing any but the most menial tasks, a legitimate basis upon which to justify the imprisonment of white-collar criminals. This questionable justification for imprisonment of any offenders is simply inapplicable to the white-collar criminal and is deserving of no further comment here.32

C. Incapacitation

The desire to protect society by incapacitating those found guilty of criminal activity has a long, if checkered, history. One who is imprisoned for his transgression will not be able, during the course of that imprisonment, to inflict harm upon the nonprison population and, in that manner, a measure of protection is afforded the free public that might not otherwise exist. However, the cost of such protection is high.

Initially, the imprisoned transgressor is not completely isolated, but is still permitted some contact with other members of the prison population. And, if he is inclined to continue his lawless ways, there is still the opportunity to inflict the consequences of that lawlessness

32. For general indictments of rehabilitation as a justification for imprisonment, see Von Hirsch, supra note 14, at 10-18. But see Orland, note 15 supra (illustrates that the past ineffectiveness of rehabilitation is no justification for jumping aboard the retributive bandwagon).
upon this captive segment of society. Thus, it is not a complete incapacitation that is provided but only a narrowing of the field within which future criminal activity can be practiced. Moreover, if incapacitation is a justification for imprisonment, there is no way it can be limited to those who will in fact inflict further harm upon society if released, since we cannot predict with any great degree of certainty which convicted persons will repent and which will continue on their lawless ways. Thus, to make incapacitation effective we will have to imprison both those who will again transgress the law and those who, if returned to a free society, would commit no further crimes. In short, to effectuate an incapacitation policy we will have to strip away the presumption of innocence as to future criminal activity and replace it with a presumption that the transgressor will continue along his illicit path. That presumption of future culpability even before there is an opportunity for future criminal activity is, to say the least, troublesome and is in patent conflict with the presumption of innocence that prevails at all other levels of the criminal law. And, it will result in many cases of unnecessary imprisonment so that the free

33. See note 18 supra. Increased use of the imprisonment sanction to punish white-collar criminals, who are most probably ill-equipped to cope with the street criminals whom they will likely be thrown in contact with, will in all probability increase the crime that already flourishes within prison walls. While this threat could be minimized by the construction of new prisons designed only to house white-collar criminals, the high costs of new prison construction and the public perception that such criminals are not being truly punished will likely moot that contingency.

34. See Task Force on the Role of Psychology in the Criminal Justice System, Report, 33 AM. PSYCHOLOGIST 1099 (1978):

It does appear from reading the research that the validity of psychological predictions of violent behavior, at least in the sentencing and release situations we are considering, is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments.

Id. at 1110. It is probable that determining when white-collar criminals will recidivate is at least as difficult. See Underwood, Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment, 88 YALE L.J. 1408 (1979).

35. See von Hirsch, supra note 14, at 19-26. The predictive capabilities as applied to white-collar criminals are likely to be even less reliable than those applicable to violent criminals, since so few such criminals have been prosecuted in the past and even fewer incarcerated. Thus, the available statistical samplings are small:

If the conduct to be predicted occurs rarely in the sample, the crudity of these inputs takes its toll. With a predictive instrument of so little discernment and a target population so small, the forecaster will be able to spot a significant percentage of the actual violators only if a large number of false positives is also included. The process resembles trying to hit a small bull's eye with a blunderbuss: to strike the center of the target with any of the shot, the marksman will have to allow most of his discharge to hit outside it.

Id. at 22 (emphasis added).
public is spared the impact of the would-be recidivists included in the broad imprisoned grouping.

Where the danger sought to be prevented is immediate violent impact upon the nonprison population—as is the case with the rapist, murderer, etc.—the benefit sought may at least arguably merit the high costs both to society and to the incarcerated individual predictive imprisonment inflicts. It is doubtful, however, whether incapacitation warrants the use of imprisonment for the economic criminal.

This conclusion is not made because it is believed that white-collar criminals are any less likely to become recidivists than street criminals, or because it is believed that the impact of their criminal activities is any less damaging to their victims. It results instead from the realization that the damaging impact of economic crimes is usually less direct than that of the murderer or rapist, and from a belief that there are effective nonimprisonment methods of incapacitating white-collar criminals that do not presently exist for controlling violent crime.

There are, by way of illustration, no workable and acceptable nonimprisonment restraints to prevent one with a proclivity toward violent assault from engaging in that crime. Once an individual is released, all we can attempt to do is monitor his activities by having him report to a probation officer and attempt to prevent his consorting with known criminals or carrying a weapon. We cannot watch over him twenty-four hours a day. A violent crime can be committed far too quickly and with too little advance preparation to make this limited type of surveillance at all effective. The economic criminal, however, cannot usually commit crime quite so quickly and sporadically. He frequently must set the stage for such activity—if he is an embezzler, for instance, he must obtain a position of trust with a business or institution. If he is a home-repair cheat, he must set up a business and advertise the availability of his services. It is far easier to detect when the convicted economic criminal is again in a position where he can follow whatever dishonest proclivities he may have, and to monitor those activities more closely, thus ensuring that the chances of his again engaging in economic crime are limited. Moreover, it is probable that the areas of his future criminal activity can be severely curtailed by making as part of the sentence a requirement that he refrain from those types of business activity that have in the past spawned his illicit behavior—such as the condition attached to the release from imprisonment of Jimmy Hoffa.36

36. Just as Hoffa was prevented from mismanagement of union funds by being precluded from engaging in union activities, it is possible to impose as a condition of sentence similar restrictions on those white-collar and political criminals who have used their positions of influence and trust to illicitly further their own means. Such relatively easily monitored restrictions seem far preferable to incarceration, and are just as likely to eliminate the perceived risk.
If a person is to be punished, it should be for what he has done and not for what he may do in the future. If it is ever proper to deviate from that standard, it is probable that the justification exists only to prevent the almost certain risk of severe physical harm which can in no other way be obviated. This type of gross "prior restraint" should not be based upon the threat of an indirect injury which can in many instances be minimized by effective controls that do not completely curtail the convicted felon's freedom.

D. Retribution

The fourth justification for imprisonment is that one who transgresses the law should be punished for his action. It is difficult to think of retribution as a wholly separate justification for imprisoning criminals, because incarceration for the purpose of punishment also results in incapacitating the convicted person and as a deterrence to others who might also be inclined to transgress the law. If it is decided that incapacitation and deterrence are not in and of themselves sufficient bases to justify incarceration of a particular individual, however, it must further be resolved whether retribution provides such justification. For, it seems reasonable to conclude that factors which in and of themselves do not justify imprisonment are not likely to provide such justification simply when added to other factors also lacking justification.

Initially, I am fully in agreement that one convicted of transgressing the law should be punished. Moreover, I strongly believe that the punishment should be meaningful and that it should transcend a mere judicial warning or use of a probation system so overworked that the sanctions it can reasonably impose are only theoretically observed. One who commits a crime and as a practical matter receives no sanction is likely to be encouraged to commit yet another transgression; and, most certainly, the public will perceive that crime does indeed pay. No system can long endure such practices.

To say that I believe in punishment, and that the punishment should indeed be meaningful and onerous, however, is not at all the same as saying that the punishment must in all instances be incarceration. There are undoubtedly persons who must be imprisoned simply because they are insensitive to other types of punishment or pose a real danger to the safety of other members of society. Obviously, a fine

37. I do not believe, however, that the punishment can ever legitimately exceed that which is necessary to provide either special or general deterrence; and, even if harsher punishment would serve an undoubted deterrent function, I do not believe it can be so harsh as to be disproportionate to the offense. Thus, deterrence is not an open-ended justification for punishment, but must be limited by individual concerns and rights.
is an ineffective remedy against one without the ability to pay it; and no system can long endure if it takes two probation officers to make sure that a convicted felon reports to a detention or work center every evening to serve a sentence depriving him of his leisure time. That alternative punishments will not work in all instances, however, does not obviate the fact that for many convicted felons they represent real and substantial punishments and serve a valid retributive and deterrent function.

Much is made of the fact that punishments must be equal—that it is somehow unfair to sentence one person who commits a crime to a term of imprisonment and another to an alternative nonimprisonment sanction. However, punishment can never be equal. To some, a year in jail is no big deal. To others, it is a horrendous punishment that may drive the recipient to or over the suicidal brink. To say that sentencing each of those very different felons to one year in prison is to punish them equally ignores reality. Equal sentences have nothing to do with equal punishment and everything to do with providing only the outward appearance of equal punishment. Punishment is a subjective thing, and the extent of the punishment differs with regard to the sensitivity to a particular punishment of the person we seek to punish. Thus, even assuming that it is possible precisely to quantify various criminal acts to assess their wrongful worth, we are not ever likely to be able to punish the like crimes identically, because the person punished will in each instance differ. We can strive, then, for a system that seeks only to provide the outward appearance of equal punishment, even though it will compel us to assess far more punishment to some than to others found to have violated the same or similar laws; or we can seek to individualize punishment, by assessing each convicted person's tolerance to punishment, and adjusting the sentence upward or downward to accommodate that tolerance. The first solution is easily workable, but totally at odds with either a true retributive model or with a just deserts model, because the actual punishment inflicted will bear no relationship to the degree of punishment that is believed deserved.38

38. Unfortunately, most sentencing guidelines that have been adopted or proposed opt for this easily workable solution. Even more unfortunately, attempts to use social stability factors as mitigating criteria—which might at least partially achieve a most desirable "individualization" for sentencing purposes—have been attacked as impacting most severely upon those unfortunate members of society who are poor, ill-educated, and unemployed or unemployable. On that ground, they have been—I believe unfairly—condemned as racially biased, since large numbers of convicted persons who would not benefit by the proposed mitigating factors are members of racial minorities. Thus, while such factors are most probably helpful in determining which convicted persons are plausible candidates for nonimprisonment alternative sanctions, it is likely that political pressures will prevent their incorporation in many sentencing guidelines presently being
The second solution pays respect to the retributive purpose, but is difficult, if not impossible, to administer because we have no valid way of measuring an individual's punishment threshold.

Retribution is a tricky business, best left to the Almighty who does not function with our limited capabilities. As children we are admonished against the propriety of playing God. Apparently, the retributionists have forgotten those lessons.

I am uncomfortable in ridiculing the retributionists because I believe most crime is wrong, and that wrongdoers should be punished. But, I am aware that the punishment must be assessed by mortals who are by nature of that fact incapable of determining what are just punishments for such transgressions. Perhaps theologians could arrive at just sanctions for illicit acts, but I cannot. And, I am firmly convinced that "just punishment" is not something that can be fitted upon each convicted criminal as is a rack suit—we differ more internally and emotionally than physiologically, and what will be a severe punishment for one is likely to be relatively meaningless to another. Even if we could internalize and individualize punishment, I would be uncomfortable in attempting to provide a moral grid for white-collar criminals—deciding, for example, that an embezzler is morally bound to serve five years and a bad check artist only two. By what justification? By whose fiat? By virtue of what moral insight are we to arrive at the appropriate punishment; whose perspective of a crime's seriousness should we incorporate?

We, as mortals, can determine what acts we believe detrimental in a free society and attempt to reduce the incidents of such acts. Moreover, we can take those steps likely to deter such acts, including the use of imprisonment. There, we are on firm ground, attempting to perform a socially useful task by coercing behavior we believe to be in the best interest of us all. When we go beyond that, and seek to punish for the sake of punishment, we transcend both our abilities and our roles. Retribution and just deserts is the role of the gods, not of the Justice Department. Deterrence is our task, and punishment that exceeds the
deterrence function is a dangerous fiction that should be indulged in only by the omniscient, the wicked or the foolish.39

E. A Caveat on Retribution

I am uncomfortable in criticizing the retributionists because their approach has some plausibility as applied to many violent crimes and criminals. Deterrence is of admittedly limited use in controlling many such crimes, and the broad array of nonimprisonment sanctions which are effective in dealing with many white-collar criminals is not likely to work. While all such defendants are usually in dire need of meaningful vocational rehabilitation, the fact that such programs have so low a success rate militates against use of the imprisonment sanction to fulfill a rehabilitative purpose. And, although incapacitation of persons insensitive to deterrence would be a more legitimate purpose of the incarceration sanction, as applied it is suspect both because it punishes for crimes that have not yet been committed; and because we simply lack the ability to accurately ascertain who should be incapacitated and, as a consequence, usually err on the side of including too broad a percentage of the convicted population in the category. Thus, as is so often the plight of the parent with a recalcitrant child, out of frustration we are left with no plausible recourse.

If the retributionists would limit their scope to those crimes and criminals incapable of being effectively handled in any more constructive manner and recognize it as a sanction derived from the utter frustration of being unable to rationally deal with a severe problem, they would be on solid—if not entirely justifiable—ground. Not content to leave well enough alone, however, the retributionists have sought to extend their theories uniformly across the criminal law field. And, in that manner, they demand equal treatment for criminals who are indeed different and with whom we are capable of dealing rationally and effectively by resorting to more humane and less costly sanctions. In the name of equality, the retributionists are willing to throw out the baby with the bath water. I am not. Punishment for the sake of punishment should be resorted to, if at all, only when no constructive alternatives are available. It should not be uniformly applied when unnecessary or, as is so often the case, when actually counterproductive.

III. ALTERNATIVES TO IMPRISONMENT

The basic premise of this article is the belief that many criminals can be effectively deterred by the imposition of meaningful sanctions; and that there are available a broad array of nonimprisonment sanctions which will achieve the desired deterrent effect with far less cost to society and less damage to the convicted felon. Moreover, these sanctions can be made sufficiently meaningful and deleterious to convince society that the convicted person is being justly dealt with and is not “beating the rap” because of his wealth, status or influential position. The latter factor is important, since no society can long endure if the majority of its members perceive, whether rightly or not, that its most favored members are above the law. That is undoubtedly why it is often thought necessary to imprison politicians who abuse their positions of trust even though exposure and removal from office is most probably sufficient to fulfill a pure deterrent function. If the latter admission smacks of “retribution” it is a limited type of retribution, not intended to punish for the sake of punishment, but to punish for the broader deterrent purpose of convincing all that none among us is above the law, and that rich and poor, influential and unknown will alike be held accountable for their transgressions. Thus, the alternatives to imprisonment we select must serve the dual purpose of actually deterring those who might be inclined to and who are in a position to commit the types of crimes we seek to limit and, additionally, of persuading all other members of society that the sanction is truly meaningful. While that may seem a tall order, imaginative use and publicizing of the nonimprisonment sanctions can fulfill that dual burden.

The traditional alternatives to imprisonment have been probation and fines. Neither sanction, as normally used, has fulfilled the above dual function. Most people—both those whom we seek to deter and those whose sense of justice we wish to satisfy—perceive probation as no sanction whatsoever, often viewing it as “simply ‘reporting’ to a

40. If a person is sufficiently well known, and his conviction sufficiently publicized, the onus that attaches may even fulfill a true retributive function, since the shame and embarrassment may be as severe punishment as a jail sentence imposed upon one whose life-style is not dramatically altered by the fact of imprisonment. As a young lawyer representing indigent drug addicts I was often amazed at how lightly some of my less successful clients treated imposition of an imprisonment sentence, knowing full well that the prison “underground” would enable them to continue their drug addiction while imprisoned and that, in many other respects, they would find their lives considerably less burdensome. See Bridges, Gandy & Jorgensen, The Case for Creative Restitution in Corrections, 43 FEDERAL PROBATION 28 (1979) (“Incarceration, for many, is actually less harsh than hustling the unsafe streets of the inner city”) [hereinafter cited as The Case for Creative Restitution].
probation officer." Far too frequently that is an accurate observation, since the swollen caseloads of probation workers often preclude them even from making meaningful checks on the activities of those whom they are charged with supervising. Similarly, fines are meaningless when assessed against those unable to pay and against those whose wealth makes the penal consequences so slight as to constitute no more than a minor nuisance. Thus, whether a flat stipulated fine in fact constitutes a meaningful sanction in a particular case is pure happenstance. There is little we can do to effectively put teeth in probation, and it is recommended that its use be either greatly curtailed or completely eliminated. Fines, however, offer a great deal more potential, especially if coupled with other sanctions which are both more meaningful to the convicted person and more visible and onerous appearing to the public. Here, only a bit more imagination and legislative and judicial cooperation can provide meaningful alternatives to imprisonment that fulfill both the desired deterrent and public perception goals.

Fines, for example, need not be set in flat amounts or limited to certain flat sum ranges—i.e., a fine of from $1,000 to $10,000 for each count of the indictment. So structured, the fine is usually so oppressive and unlikely of collection as to be meaningless, or so light as to have little direct or collateral deterrent effect. Fines might better be set on a graduated percentage scale of the defendant's net worth and operate as an automatic lien against his assets. Thus, for a particular offense it would be possible to impose a fine equal to twenty percent of the net worth of an embezzler whose assets are less than $10,000 and as much as ninety percent of the net worth of an embezzler whose assets exceed $1,000,000. Such a fine would, in both instances, be meaningful in that it would be assessed against assets which could be levied upon and would represent a sizeable percentage of the felon's assets. If the defendant has no or very limited assets, but does have a job, the fine can be a percentage of his monthly salary for a definite future period, again with the percentage increasing depending upon the amount of the monthly salary. If the defendant loses his employment through no fault of his own, alternative nonimprisonment sanctions can be imposed. If, however, the defendant attempts to avoid the fine by voluntarily terminating his employment, or by intentionally committing acts that lead to his dismissal, he could be compelled to serve the remainder of the sentence in jail. Used in these, and many other, manners, fines have vast potential as meaningful punishments quite likely to deter many types of white-collar crimes, whether used

41. Id.
as the sole punishment or coupled with other nonimprisonment sanctions.

Another sanction that has great potential with many persons convicted of crimes is deprivation of leisure time, especially when coupled with a work or service requirement. For example, an individual could be sentenced to report to a detention center from 5:00 p.m. to 11:00 p.m. each evening and for much longer periods on Saturdays and Sundays so that during the period of his sentence he will not be able to socialize with friends, golf, bowl, read, watch television or otherwise participate in the numerous leisure-time activities that make life enjoyable. Preferably, he could also be assigned work activities beneficial to the community during the same hours. The work activities could make use of the defendant's talents if there is a need for them, or could be of a nature the defendant would find somewhat demeaning or which would expose him to embarrassment among his peers. For example, a doctor convicted of medicare fraud might be assigned to spend his leisure time providing free medical care in a community that has no doctor; or be assigned to work as an orderly in a hospital; or compelled to sweep streets or paint park benches. Again, failure to perform the assigned tasks would subject the defendant to having to serve the remainder of his term in a prison facility.42

Another sanction might be personal service restitution to the victims of crime. Defendants could be assigned to a labor pool and compelled to perform chores—from cutting the grass to running errands—for victims of crimes other than their own.43 In that manner, one who has been victimized by a crime would receive some compensation—at little expense to the state—for his injury, and the state would benefit from inflicting a meaningful punishment upon the defendant.44

42. Those individuals who are deemed candidates for such nonimprisonment sanctions could, at sentencing, even be given the choice of serving a specified sentence in jail or a specific nonimprisonment alternative. At that time, it could be made clear that failure to fulfill the alternative sanction would subject the defendant to serving the remainder of his time in a prison facility.

43. Such services could also be offered to persons on fixed incomes, who would not otherwise be able to afford them. Retired persons now qualify for rent or property tax rebates and free or low cost meals in some jurisdictions, so providing them with tangible home repair help does not constitute a quantitatively "great leap." For a study on the role of private organizations in providing services in concert with correctional facilities, see U.S. DEPT OF JUSTICE, CONTRACTING FOR CORRECTIONAL SERVICES IN THE COMMUNITY (1978). See also NATIONAL INSTITUTE OF MENTAL HEALTH, COMMUNITY BASED CORRECTIONAL PROGRAM (1971).

44. Where feasible, portions of any fines levied and collected that exceed administrative costs could be given to crime victims to compensate them for their losses. Since no such monies could be collected from most convicted felons, the fines collected could be pooled and distributed equally among all crime victims.
If the work is not done to the victim's reasonable satisfaction, the effort would not count as "good time" and the sentence could be extended. If the defendant repeatedly fails to perform satisfactorily, he could be compelled to complete his sentence in jail.

The alternatives to incarceration listed here barely scratch the surface of those which, with serious thought, can be structured. They are not intended to represent a complete listing, but are merely illustrative of the available alternatives. Obviously, not all convicted criminals are good candidates for such alternatives to imprisonment. Many such persons, however, can be effectively punished without totally removing them from society; and, in the process, they can be assigned constructive tasks and not simply "warehoused" at considerable expense to the already overburdened taxpayer. Merely because there presently exist no truly meaningful alternative punishments for all convicted felons is no reason to ignore the fact that for many, including

45. Judges from coast to coast—dissatisfied with the traditional alternatives or probation or incarceration—have begun structuring a broad and innovative array of non-imprisonment sanctions for use in particular cases. For an evaluation and summary of alternatives to incarceration, see Law Enforcement Assistance Administration, U.S. Dept of Justice, Instead of Jail (1977); Law Enforcement Assistance Administration, Dept of Justice, Alternatives to Institutionalization (1979) (definitive bibliography).

Glimpses of this practice frequently surface in reported decisions and news articles. See, e.g., Albuquerque Journal, May 27, 1978, at A-8 (describing a sentence by District Judge James Maloney). Judge Maloney sentenced three young men convicted of a $1.5 million arson arising out of a dispute between their family and a lumber company to payment of forty percent of their gross salaries over the next four years plus a one day per week work obligation at the University of New Mexico's burn and trauma unit. The payments—which represent substantial sums for the youths who earn between $4 and $7.50 per hour—should be much more punitive than court-ordered restitutionary sums of such magnitude as to be uncollectable. Cambria County, Pennsylvania Common Pleas Judge Joseph F. O'Kicki has made a practice of rendering innovative work-related sentences. For his efforts, the local newspaper has opposed his current retention election, stating that this hard-working, inventive and sensitive judge is "soft on crime." For a more formalized discussion of one type of alternative, see The Case for Creative Restitution, note 40 supra.

Some experience with alternatives to institutionalization has been gained from the development of effective community juvenile programs. See generally National Institute of Mental Health, Community Based Correctional Programs: Models and Practices (1974). One small Allegheny County, Pennsylvania community—Kennedy Township—has created an entire alternative system for handling juvenile offenders outside the court system, and has processed an average of one hundred young offenders annually during each of the past four years. The offenders, who are permitted to work off fines and penalties at a rate of two dollars per hour, paint, clean and maintain township property and perform needed clerical services. An offender must opt for inclusion into the program as an alternative to more formal sanctions imposed by Juvenile Court, and the program is buttressed with tutorial services and guidance counseling. For a description of this program, which is operated without outside funds, see Pittsburgh Post-Gazette, Nov. 5, 1979.
the large majority of white-collar criminals, these sanctions are both punitive and constructive, in that they deter crime and fulfill community needs without destroying the economic usefulness of the defendant and without the huge direct and collateral costs incurred by imprisonment. To continue to ignore such potential solutions while vocally espousing the populist threat to lock-up political and business criminals may itself be consumer fraud of a criminal dimension.

A. The "It's Nice, But Can't be Done" Syndrome

The most frequently encountered reaction to the proposals for alternative sanctions is that they cannot be effectively implemented—that it would require so large an administrative and supervisory force as to be economically and logistically impracticable. While that "spectre" is likely to remain until large-scale implementation is attempted, it is believed to be largely illusory. Initially, the alternatives to imprisonment can only work with those who are—or are perceived to be—sensitive to deterrence factors. Many convicted felons, including those described earlier by Judge Bazelon, are not easily, if at all, deterred by increasingly harsher and more repressive sanctions. They are not responsive to deterrence measures for a complex multitude of reasons, including the uncomfortable fact that often the most repressive measures we are willing to mount are not materially worse than their already harsh, unpromising and unfulfilling existences. That social problem, as reprehensible as it may be and as in need of revamping as it undoubtedly is, cannot be permitted to drag down to the lowest common denominator the entire sentencing process. We must accept the fact that there are those whom, by a creative, humane and pragmatic

46. If relatively small communities with limited resources can structure effective alternative programs, it seems almost axiomatic that concerted efforts by state and federal governments to implement similar broader-based programs have an excellent chance of succeeding. Interestingly, the Law Enforcement Assistance Administration only "tipped its hat" to the concept of deriving alternatives to incarceration. Instead, LEAA emphasized bricks and hardware, with billions of dollars being spent on computers, electronic equipment and various surveillance devices. THE CHRISTIAN CENTURY, March 19, 1980, at 323.

47. See text accompanying note 10 supra.

48. An interview with a prison counselor at a local prison points out how easy it often is for prisoners to continue drug habits while incarcerated and how, for many, imprisonment does not materially alter their normal existence. He concluded that some prisoners continue to be involved in criminal activity because the lack of freedom and the violence of the prison environment simply do not bother them. See Duquesne Duke, Oct. 4, 1979, at 9. A virtually identical statement was contained in another part of the former prisoner's letter to a fellow member of the Pennsylvania Commission on Sentencing quoted in part at note 18 supra.
sentencing policy, we can effectively control without destroying and others with whom, at least at the present time, we lack the ability to more rationally deal. For those who are perceived to be sensitive to punishment, the spectre of ultimate imprisonment if they fall off the nonimprisonment sanction wagon will in and of itself largely be sufficient to assure compliance with truly meaningful nonimprisonment sanctions. If, for example, a doctor or lawyer convicted of insurance fraud is clearly apprised of the fact that a failure to pay a large graduated fine based upon net worth or income and to perform needed community services in a workmanlike and diligent manner will result in hard time imprisonment, compliance will quite likely be the rule and noncompliance the exception. Thus, it is not likely that completion of performance of assigned duties will require close and constant supervision but instead could be accomplished by the routine logging of payments and the filing of work completion reports by the recipients of the mandated services. These could be administratively handled in central offices with a minimum of personnel.

What will undoubtedly take more time and creative effort is the structuring of a sufficient range of needed services to be assigned to those convicted of crimes so that the sentencing judge can select the appropriate punishment from a list of tasks the convicted person is capable of effectively performing. But this too is a not unmanageable task. Government bureau heads could be instructed to report to a central agency needed tasks that cannot be performed by available work staff or which is routinely subcontracted to nongovernment personnel. And, groups such as the Society of Friends and the Council of Churches—which have long worked toward more humane sentencing policies—could be enlisted to provide that agency with sufficiently supervised work alternatives to keep large numbers of convicted persons productively busy during what would be their leisure time. Moreover, victims of crimes and those persons living on extremely low incomes could be instructed to make their service needs known to such an agency, and those needs and the available skills could be matched by computers. And, even if there were no useful tasks that a deterrable convicted felon could be assigned, “warehousing” him for a few hours every evening and on weekends in a local detention center—thereby depriving him of his leisure time without the severe direct and collateral economic disruption occasioned by actual imprisonment—would serve to deter without the huge social and material costs of imprisonment. I find it difficult to believe that such measures are logistically impracticable or even as expensive as just the direct costs of imprisonment. And, when the indirect costs of imprisonment are factored in, the cost of these more humane yet true punishments are almost certain to be considerably lower. If this is in
fact true, and if the deterrent effect of their use is the same as or similar to incarceration, failure to use nonimprisonment sentencing alternatives simply cannot be supported on either logical or moral grounds.

There is a high probability that, with less cost and effort than is presently being expended on the totally wasteful warehousing of convicted felons, large numbers of persons can be productively yet effectively punished for their transgressions. It is time for the "it can't be done" school to step aside so that creative, innovative penologists can at long last set about to move criminal sentencing into the twentieth century.

B. Who Should Be the Recipients of Nonimprisonment Alternatives?

Meaningful, carefully constructed alternatives to the imprisonment sanction can fulfill the legitimate societal goal of deterring crime in some, but most certainly not all, cases. Thus, it is necessary to isolate those criminals and offenses to whom such sanctions can safely and effectively be given. It is here that the cries of unequal treatment and elitism are most likely to be heard, and it is those condemnations which have to be rationally and effectively defused if legislators, the judiciary and the public are to accept a more humane approach to sentencing.

The use of nonimprisonment alternatives when dealing with purely economic crime—especially when committed by those who abuse the public trust or take advantage of their economically powerful positions — is both the most logical and yet the most incendiary starting point. It is logical that nonimprisonment sanctions be used when dealing with such felons because they usually have the most to lose by imposition of meaningful graduated fines; have the most to offer in the way of useful skills that can be turned to a beneficial public purpose; and are the individuals who, since they would suffer the most direct and collateral consequences of imprisonment, are the most likely to fulfill the alternative sanctions with a minimum of supervision and a maximum of public benefit. Moreover, it is quite probable that others in a position to commit similar crimes will quickly become aware of the consistent use of such sanctions, and find them to have as much or more deterrent effect as the sporadic use of rather limited jail sentences. It is an incendiary starting point in that such felons are

49. For many criminals, including the great bulk of those who commit crimes that have to be carefully thought out in advance and which do not result from instant provocations, the fear of a relatively certain sanction is probably a more meaningful deterrent than the remote possibility of a prison sentence. It is common knowledge that few first of-
usually of a somewhat "higher profile" than the average street criminal and a failure to imprison could give renewed impetus to the belief that people of wealth and status can commit crime with relative impunity. If in fact the sanction is severe, and if it does serve the necessary deterrent function as well as imprisonment, the government should not buckle to potential public misconceptions, but should instead attempt to convince the public that the punishments are truly meaningful as applied and that use of the imprisonment sanction is not only unnecessary but, since it is harsher than required to fulfill society's needs, morally reprehensible. Moreover, the public should be made aware that the punishment is being achieved at no or a very low cost to them, and indeed that society may in fact derive an economic benefit as a result of the sanction, while the imprisonment alternative causes the already harmed public to foot the bill for still more direct and indirect economic costs.²⁰ If the public can be made aware that the judicial system is in fact inflicting a meaningful punishment upon the felon, that it is at the same time lessening the likelihood of the crime's repetition to the same extent as would be the case if the felon were imprisoned, and that in the process it is saving the taxpayers several tens of thousands of dollars in each case, it is probable that the bulk of

fenders who do not inflict significant personal injury upon a victim are imprisoned. Thus, many economic criminals proceed on their illicit paths secure in the belief that, if caught, they will receive no meaningful sanction. We can, without severely damaging the defendant and at an acceptable governmental cost, impose meaningful nonimprisonment sanctions upon virtually all first offenders, including those convicted of business crimes or breaches of the public trust. The alternative would be to incarcerate all first offenders—at prohibitive cost in new prison construction and prisoner maintenance—or to incarcerate only those first offenders whose imprisonment would serve a "sure"-special or general deterrent function, which would result in treating white-collar criminals far more harshly than street criminals. While the latter alternative has been recommended because such criminals have had more societal benefits than have street criminals, it smacks more of vengeance than of fulfilling a legitimate need and is not here condoned. It seems both more humane and in keeping with the legitimate goals of society to use the imprisonment sanction only when no legitimate and effective alternatives are available, and to use meaningful nonimprisonment sanctions to achieve the desired deterrent effects.

²⁰ Even when we have used the imprisonment sanction to punish "high profile" political and economic criminals, we have not often placed them in institutions where they rubbed shoulders with hardened street criminals, but have instead incarcerated them in minimum security prisons. We have done this out of the realization that many such criminals—such as former presidential counsel John Dean and former Attorney General John Mitchell—would be subjected to such abuses from the general prison populations of hard core institutions as to jeopardize their safety. Yet, the punishments inflicted were perceived by many to be less than severe, and in effect many such individuals were provided with an opportunity to write highly profitable books at government expense. Heavy fines and a requirement to perform time and energy consuming public services might well have been a more severe sanction in such cases, and it is conceivable that the public would have perceived this to be the case.
These misconceptions will dissolve and the punishment will be accepted as a reasonable and rational solution to an admitted problem. I am simply not ready to concede that a properly informed public will demand of any convicted person, including one of status or influence, more punishment than is necessary to achieve the legitimate requirements of society. And, to the extent some members of the public might desire to punish an offender more severely than necessary simply to sate their own hatreds, prejudices or jealousies, those desires should be ignored.

Economic criminals who are not in a position of influence or possessed of wealth can also be safely dealt with by use of the nonincarceration sanctions, even though their lack of status and money narrows the range of available sentencing alternatives. The home repair cheat or the “paper hanger,” by way of illustration, while not likely to have a sufficient net worth to make a graduated fine meaningful, may have skills that can be put to productive public purposes; most likely has leisure time activities that he would not relish having curtailed; and is not an immediate threat to commit violent physical crimes upon other members of society if in fact he does not truly alter his lawless behavior. Thus, as to such persons, the further risk that his nonimprisonment causes is probably offset by the benefits to society of permitting him to remain productive during the time he is being punished. Moreover, since failure to fulfill the mandated alternative sanctions could result in the actual imprisonment of such felons, and since such persons are usually not fully equipped to deal with the harsh realities of communal living with violent street criminals, there is a built-in incentive to fulfill the work sentence imposed and to abandon criminal activity.51

Another group of logical candidates for alternative sanctions are those “street criminals” who have no history of violence and those who, because of the paucity of their prior records or otherwise, would fall into the “out” category on any applicable sentencing guideline grid. Clearly, imposition of any type of meaningful nonimprisonment sanction upon convicted felons is preferable to the nonpunishment that is so often the true effect of probation.52 No convicted person should be

51. As indicated earlier, it is also easier to monitor the activities of such felons to make sure that they do not again engage in similar crimes during their period of “alternative sanctions,” since they usually have to advertise or “set the stage” for repetitions of the activities that resulted in their conviction. Thus, while out of prison, they do not create the same threat to society as is true of those disposed toward violent street crime.

52. Both present sentencing practices and those sentencing guidelines that have been proposed do not provide for the incarceration of most first offenders, including many who commit burglaries, robberies and other “street crimes.” It makes far more sense to at least attempt to impose nonimprisonment sanctions which could be meaningful upon such felons than to let them off virtually scot free. One possible problem with our present
given one or more "free crimes," and establishment of a broad range of nonincarceration sanctions will encourage judges to sentence those street criminals who are presently being released on probation or given suspended sentences to more meaningful, yet not life-disruptive and physically and emotionally damaging, sanctions. If for no other reason, the ability to drive home to those whom we presently merely slap on the wrist that crime is regarded seriously and will be dealt with severely would warrant the creation of a readily available range of nonimprisonment sanctions.

It is probable that many others who commit more violent crimes could also be effectively deterred by use of nonimprisonment sanctions. However, without increased ability to predict future behavior and without adequate psychological testing, counseling and treatment services available, I would not advocate extending the concept too far at this time.

Beyond the above are the broad range of violent criminals we simply are not capable of dealing with, and who are impervious to all acceptable deterrences including, in most instances, the threat or actuality of imprisonment. For lack of a better solution, I too would incarcerate such persons when convicted of serious crimes. Those felons, however, should not be the norm by which all sentences are measured, and their imprisonment should be recognized as a "non-solution" resulting from the utter frustration of our own ineptitude in dealing with a serious and frightening problem.

IV. CONCLUSION

Jails are deplorable places largely because we have used them to house large numbers of people who pose real dangers to society and with whom we have not yet learned to rationally deal. We cannot let the practices spawned by that failure serve as the benchmark for the whole sentencing process and, under the rubric of equal treatment, subject those with whom we can effectively deal to unnecessary, expensive and counterproductive punishments.

With an increasing frequency innovative and creative judges, dissatisfied with the traditional alternatives of imprisonment or probation sentencing policies is that we warn transgressors repeatedly, leading them to believe we are not serious, and then suddenly impose the extremely harsh sanction of imprisonment. Some street criminals might take the law more seriously if, from the outset, it attempted to inflict meaningful sanctions. It must be admitted, however, that the first offender street criminal is highly likely to fail to fulfill assigned nonimprisonment sanctions, and would undoubtedly require very close—and expensive—supervision. Attempts to impose such punishment, however, seem preferable to the "non-punishment" that all too frequently is the real effect of probation. The increased use of trial diversionary programs undoubtedly reflects a limited governmental implementation of this thesis.
tion, have structured sentences which, although punitive and serving a deterrent function, do not unnecessarily degrade the criminal and disrupt his life and the lives of those dependent upon him for support. It is high time this practice be formalized so that definitive empirical studies can be made to determine when this more humane and less costly form of punishment can safely be used and whether its use fulfills the legitimate need of our society to reduce crime. As the prosecutorial focus shifts from the street criminal to the economic criminal the choice of sanctions must also shift, or the crimes of society’s protectors will become as severe as those of the criminals they pursue.