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The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity

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THE SENTENCING OF WHITE-COLLAR CRIMINALS IN FEDERAL COURTS: A SOCIO-LEGAL EXPLORATION OF DISPARITY†

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As early as 1939, the perception of white-collar crime as a national problem had emerged. Edwin Sutherland, for example, compared the crime and punishment of the white-collar class, composed of respected businessmen and professionals, with that of the lower class.[1] His work, which he viewed less as a call for policy reform than as a contribution to theoretical criminology, stimulated succeeding decades of research. A consistent theme, whether stated explicitly or implicitly, runs through this body of research: laws and sanctions are differentially applied, to the benefit of the white-collar offender.[2] Sutherland argued that this differential treatment did not reflect important distinctions between the types of offenses committed by the two classes.[3] Rather, he emphasized that the disparate

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1. *See* Sutherland, *White-Collar Criminality,* in WHITE-COLLAR CRIME 38 (G. Geis & R. Meier rev. ed. 1977).

2. *See, e.g.,* W. CHAMBLISS, CRIMINAL LAW IN ACTION (1975); R. HOOD & R. SPARKS, KEY ISSUES IN CRIMINOLOGY (1970); Cressey, *Crime* in CONTEMPORARY SOCIAL PROBLEMS 136 (R. Merton & R. Nisbet eds. 1966); Green, *Race, Social Status, and Criminal Arrest,* 35 AM. SOC. REV. 476 (1970); Tittle & Villemez, *Social Class and Criminality,* 56 SOC. FORCES 474 (1977).

3. According to Sutherland, white-collar crimes in business and the professions consist principally of violation of delegated or implied trust. Many of them can be reduced to two categories:
(1) misrepresentation of asset values and (2) duplicity in the manipulation of power. White-collar criminality in business might include misrepresentation in financial statements of corporations, manipulation in the stock exchange, commercial bribery, bribery of public officials directly or indirectly in order to secure favorable contracts and legislation, misrepresentation in advertising and salesmanship, embezzlement and misapplication of funds, tax frauds, and misapplication of funds in receiverships and bankruptcies. White-collar crime in the profes-

treatment of white-collar and common criminals reflected differences among *offenders* and in the administration of criminal justice. While most researchers presume that this pattern of differential treatment accurately models social realities of the 1930s, the factual premise of its continued applicability poses an unanswered question.

This Article addresses that question by examining judicial sentencing philosophy as applied to white-collar criminality and reporting data that illuminate the operation of that philosophy. Part I of the Article argues that the traditional purposes and limits of criminal sentencing may plausibly justify either disparate or comparable sentences in cases of white-collar and common criminality. Part II describes the obstacles to an accurate empirical inquiry into how judges resolve these uncertainties in the theory of punishment. Part III presents a study designed to overcome as many of these obstacles as possible. What is most dramatic is that the resulting data do not appear to support the oft-presumed hypothesis that judges impose lighter sentences on high-status individuals convicted of white-collar crimes than they impose on lower-status individuals convicted of common crimes.[4] The data, however, suggest that a significantly increased emphasis on the prosecution of white-collar crimes may encourage sentencing disparities in favor of those convicted as a result. These findings form the Article's conclusion and a foundation for further research.

I. Judicial Sentencing Philosophy Regarding White-Collar Criminality

Widely accepted justifications for punishing criminals include retribution against, and specific deterrence, incapacitation, and rehabilitation of the offender, as well as denunciation and general deterrence of the offense.[5] As a justification of punishment, retribution derives from the moral conviction that those who violate society's fundamental norms deserve to suffer painful consequences. Punishment also serves the moral purpose of denouncing criminal conduct, thus expressing society's outrage at the offense. Rehabilitation and

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sions might include illegal sale of narcotics, abortion, fraudulent reports and testimony in accident cases, and the like. Sutherland, *supra* note 1, at 40.

4. When we discuss common crimes, we refer to such crimes as burglary, murder, assault, rape, robbery and other "street crimes."

5. This Article defends no particular position regarding the justification for punishment. We only note that almost all authorities adopt some combination of these purposes as the rationale for sentencing. For example, the Model Penal Code, perhaps the most authoritative restatement of accepted sentencing theory, provides that

> (1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the

specific deterrence offer the utilitarian advantage of decreasing the probability that the offender will commit additional crimes, either because of the fear that recurrent criminal behavior will trigger recurrent punishment or because treatment succeeds in imbuing the offender with a sincere disinclination to antisocial activity. General deterrence offers the same advantage of reduced crime, but on a larger scale, for the presumed deterrent effect operates not just on the individual punished, but on all who learn that crime may lead to consequences severe enough to outweigh its rewards.

In addition to the empirical and moral uncertainties surrounding them, certain fundamental principles limit the application of these justifications. One such generally accepted principle limits the just pursuit of these purposes to punishing only individuals who render themselves blameworthy by committing an offense.[6] A correlative principle requires some proportional relation between the gravity of the offense and the severity of the punishment.[7] Whether out of moral revulsion or the apprehension of entrusting excessive power to those who control the administration of justice, contemporary

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crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime.

MODEL PENAL CODE § 7.01(1) (Proposed Official Draft, 1962). "Depreciating the seriousness of the offense" elegantly incorporates the deterrent, retributive and denunciation justifications for punishment. Although it rejects rehabilitation as independent justification for confinement, the American Bar Association's Standards for Criminal Justice largely echo these provisions. *See* III ABA STANDARDS FOR CRIMINAL JUSTICE § 18-2.5 (1980).

For an introduction to the ethical dimensions of punishment, *see generally* THE PHILOSOPHY OF PUNISHMENT (H. Acton ed. 1969); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 63-201 (2d ed. 1969). For a general introduction to the theoretical and empirical dimensions of deterrence, *see, e.g.*, J. ANDENAES, PUNISHMENT AND DETERRENCE (1974); G. HAWKINS & F. ZIMRING, DETERRENCE (1973). For a discussion of incapacitation, *see* J. WILSON, THINKING ABOUT CRIME 200 (1975). *Cf.* Van Dine, Dinitz, & Conrad, *The Incapacitation of the Dangerous Offender: A Statistical Experiment*, 14 J. RES. CRIME & DELINQUENCY 22 (1977). For recent research on both deterrence and incapacitation, *see* DETERRENCE AND INCAPACITATION (A. Blumstein, J. Cohen & D. Nagin eds. 1978). The contemporary disenchantment with rehabilitation reflects both ethical and empirical objections. For a sensitive exploration of the former, *see* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981). Robert Martinson's review of the literature probably remains the most devastating example of the latter type of objection. *See* Martinson, *What Works? - Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974). For a fair sample of the prior enthusiasm for rehabilitation, *see* R. CLARK, CRIME IN AMERICA 212-38 (1970).

6. *See, e.g.*, H.L.A. HART, *supra* note 5, at 11-13; Allen, *The Law as a Path to the World*, 77 MICH. L. REV. 157, 159-66 (1978).

7. *See, e.g.*, H.L.A. HART, *supra* note 5, at 25; A. VON HIRSCH, DOING JUSTICE 66-76 (1976). Imposing a penalty proportional to the offense requires some approximate determination of the gravity, *i.e.*, blameworthiness, of the offense.

thought about punishment refuses to accept either punishing the innocent or imposing draconian sanctions for trivial offenses, whatever short-term beneficial consequences may result. The ideal of equality, in the criminal sentencing context itself intimately connected with the culpability principle,[8] further constrains the scope of justifiable punishment.[9] Since justice requires treating like cases alike, only meaningful differences between two offenders or their offenses can justify imposing a severe sentence on one and a lenient sentence on the other.[10] Recognizing the tremendous difficulty of satisfying these various concerns across the wide variety of criminal convictions, mainstream perspectives on punishment entrust the trial judge with great discretion to mete out individualized justice.[11] These elements of sentencing theory, concerning both the purposes and limits of just punishment, may derive plausibly from either utilitarian or categorical moral systems.[12]

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8. The equality principle requires like sentencing for like offenses and/or offenders. Determining how alike two offenses or offenders are amounts to assessing their relative blameworthiness. The difficulty of identifying like cases has been noted by Hart and recently explored by Peter Westen. *See* H.L.A. HART, THE CONCEPT OF LAW 155-67 (1961); Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982).

9. *See* M. FRANKEL, CRIMINAL SENTENCES 10-11 (1973); H.L.A. HART, *supra* note 8, at 155-63. The general sympathy for the equality principle finds perhaps its clearest expression in a standard approved by the American Bar Association:

> A just sentencing system should strive to treat like cases alike; when compelling reasons do require inequality between similarly situated offenders, it is important for the appearance of justice that special justification be provided and that the disparity be minimized . . . .

III ABA STANDARDS FOR CRIMINAL JUSTICE § 18-3.2(a)(iii) (1980).

10. *See* III ABA STANDARDS FOR CRIMINAL JUSTICE § 18-3.2(a)(iii) (1980), *supra* note 9.

11. A cursory inspection of typical American criminal codes reveals the enormous variations between the minimum sentence the trial judge may impose (typically a suspended sentence) and the maximum, which frequently provides for very extended terms of imprisonment. The possibility of consecutive sentences for each count in the indictment further expands judicial discretion. *See* M. Frankel, *supra* note 9, at 8 ("sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all"). The Supreme Court has endorsed the rationale of this discretion:

> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions — even for offenses today deemed trivial. Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences the ultimate termination of which are sometimes decided by nonjudicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

Williams v. New York, 337 U.S. 241, 247-48 (1949) (citations omitted).

12. At a sufficiently deep level of rule-utilitarian abstraction, almost any categorical norm

These theoretical strands in the gestalt phenomenon of criminal sentencing suggest that each sentencing decision requires "a compromise between distinct and partly conflicting principles."[13] These principles conflict "nowhere more often than in white-collar cases."[14] Consequently, mainstream sentencing theory neither requires nor precludes disparate sentencing for white-collar and non-white-collar cases.[15] Trial judges must therefore reach white-collar sentencing decisions according to their own lights. This discretion follows from both the broadly ethical and narrowly utilitarian dimensions of the conventional rationale of sentencing.

A. *Moral Dilemmas in White-Collar Sentencing*

Throughout the mainstream rationale of punishment runs a serious tension between the social interest in punishing the *offense* and the concern flowing from individualized justice for the particular *offender*.[16] The tension becomes especially acute in the context of white-collar criminality.[17] This dichotomy offers profitable insights into both of the major moral challenges to the philosophy of punishment posed by white-collar criminality — the need to proportion the penalty to the culpability of each defendant, and the demand for equality in sentencing.

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may be justified by utilitarian reasoning. For example, while punishing even the innocent arguably might exert a net-happiness-producing deterrent effect on potential wrongdoers, compelling utilitarian concerns weigh against such an institution, such as the risk that such a system would break down in the face of popular revulsion. *See, e.g.*, Lyons, *Deterrent Theory and Punishment of the Innocent,* 83 ETHICS 346 (1974).

13. H.L.A. HART, *supra* note 5, at 1.

14. Linman, *The Paper Label Sentences: Critiques,* 86 YALE L.J. 619, 619 (1977).

15. A sense of the sentencing judge's dilemma in the light of the foregoing analysis emerges from a comparison of the justification of leniency offered in Renfrew, *The Paper Label Sentences: An Evaluation,* 86 YALE L.J. 590 (1977), with the rationale of Browder v. United States, 398 F. Supp. 1042, 1046-47 (D. Ore. 1975) (upholding 25-year prison sentence for pledging stolen securities).

16. Punishment imposed for general deterrent purposes, for example, serves the social interest in preventing crime regardless of the convicted individual's particular circumstances. *See, e.g.*, G. HAWKINS & F. ZIMRING, *supra* note 5, at 38-42 ("why should [the convict's] grief pay for [others'] moral education?").

17. *See, e.g.*, United States v. Alton Box Board Co., [1977] TRADE CAS. (CCH) ¶ 61, 336 at 71,166

> [W]hen imprisonment is, as Dr. Menninger has stated, to make an example of an offender so as to discourage others from criminal acts, then we make a defendant suffer not for what he only has done but because of other people's tendencies.);

United States v. Braun, 382 F. Supp. 214, 215 (S.D.N.Y. 1974)

> [I]t remains a source of queasiness to realize that deterrence means "making examples" of people (despite the moral and philosophic questions that raises); that our relatively anonymous defendant adds at most to a mass of indistinguishable examples. . . .);

Linman, *supra* note 14, at 619; Pelaez, *Of Crime — and Punishment: Sentencing the White-Collar Criminal,* 18 DUQ. L. REV. 823, 835 (1980) ("deterrence is a societal benefit not at all related to the need to punish the individual wrongdoer").

Retributivist justifications for punishment have far less difficulty in identifying offenders as morally deserving of punishment than in specifying the precise degree of punishment necessary to expiate the malefactor's guilt and express society's outrage at the crime.[18] If social harm alone measures the blameworthiness of an offense, certain white-collar *offenses* surely deserve more severe punishment than any street crime.[19] If the sentencing court looks to the cumulative blameworthiness of individual defendants, however, the white-collar offender may point to a lifetime of social productivity to weigh against his first transgression.[20] Conversely, the privileged position of these offenders suggests that their decision to violate the law constitutes a more deeply reprehensible betrayal of social norms than does the illegal behavior of the ignorant or impoverished.[21] On the other side of the equation, the privileged status of white-collar offenders renders identical punishments, measured by lost happiness, more onerous for them than for less privileged defendants.[22] And

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18. *See, e.g.*, H.L.A. HART, *supra* note 5, at 25 (The proportional scale of blameworthiness "draws rough distinctions like that between parking offenses and homicide, . . . but cannot cope with any precise assessment of an individual's wickedness in committing a crime. (Who can?)"); A. VON HIRSCH, *supra* note 7, at 79-83.

19. *See* Harris & Dunbaugh, *Premises for a Sensible Sentencing Debate: Giving Up Imprisonment*, 7 HOFSTRA L. REV. 417, 437 (1978) ("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 crime' against property, and it frequently results in serious bodily harm"); 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"); Pelaez, *supra* note 17, at 823 ("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 wake.").

20. United States v. Paterno, 375 F. Supp. 647 (S.D.N.Y.), *affd.*, 798 F.2d 1396 (2d Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975), involved fairly typical facts:

> The defendants, . . . have led exemplary lives. . . . They have built stable families and a stable business. People of distinction and more humble workers in their enterprise write letters of sincere praise, devotion, and appreciation on their behalf. The defendants have not been ungenerous in dealing with friends, employees, family members, and charitable agencies. It may be predicted with reasonable confidence that neither defendant will ever run afoul of the law again. The fall from untarnished eminence in their communities has been an irreparably grievous blow. The defendants, in the frequently heard but still pertinent appeal, "have been punished enough already." It is urged earnestly that a sentence of imprisonment would serve ends only of vengeance.

375 F. Supp. 647, 648. In spite of sensitivity to these concerns, Judge Frankel imposed brief prison sentences in the case.

21. "I cannot reconcile a policy of sending poorly educated burglars from the ghetto to jail when men in the highest positions of public trust and authority receive judicial coddling when they are caught fleecing their constituencies . . . ." United States v. Browder, 398 F. Supp. 1042, 1046 (D. Or. 1975), *affd.*, 544 F.2d 525 (9th Cir. 1976).

22. *See, e.g.*, Mann, Wheeler & Sarat, *Sentencing the White Collar Offender*, 17 AM. CRIM. L. REV. 479, 483-84 ("Most judges share a widespread belief that the suffering experienced by a white-collar person as a result of apprehension, public indictment, and conviction, and the collateral disabilities incident to conviction — loss of job, professional licenses, and status in the community — completely satisfies the need to punish the individual."); Pelaez, *supra* note

even in the age of its renaissance, many will view retribution beyond narrowly utilitarian parameters as mere revenge.[23]

Given these ambiguities and paradoxes, examples of very different sentences for similar white-collar cases should occasion small surprise.[24] Even a Dworkinian Hercules would have great difficulty in "correctly" sorting out these competing concerns to fashion an appropriate sentence. In such cases, mortal judges have little on which to rely but experience and intuition.

Whether responding to the blameworthiness conundrum with a severe or lenient sentence, the judge likely will confront the moral demand for equality in sentencing. If stern, the sentence will provoke the defense to comparisons with prior lenient sentences for similar defendants.[25] If merciful, observers will condemn the unjust

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17, at 842 ("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.").

23. *See* Mann, Wheeler & Sarat, *supra* note 22, at 482-86 (arguing the nearly exclusive role of general deterrence in motivating judges to incarcerate white-collar offenders); Pelaez, *supra* note 17, at 841-44, 844 ("Punishment for the sake of punishment should be resorted to, if at all, only when no constructive alternatives are available."). *See also* United States v. Braun, 382 F. Supp. 214, 214 (S.D.N.Y. 1974):

> The defendant before us, . . . is a man of 35. He has no prior criminal record. He is talented, gainfully employed, earnest in the discharge of family obligations, and entitled to hope for a bright, if unsung future. He needs no "rehabilitation" our prisons can offer. The likelihood that he will transgress again is as close to nil as we are ever able to predict. Vengeance, the greatest text tells us, is not for mortal judges . . . .

24. *See, e.g.,* note 15, *supra.*

25. It is not uncommon for white-collar offenders to point to past practices of leniency for other white-collar offenders, either as a justification for a sentence other than imprisonment in their own case, or as a rationale for an appeal and a motion to reduce the sentence as initially meted out. In United States v. Browder, *supra* note 21, the petitioner challenged the sentence imposed on the grounds that it constituted cruel and unusual punishment and denied the petitioner equal protection of the law:

> The basis for petitioner's claim is a study he conducted of 100 cases involving similar white-collar crimes. . . . Of the 100 defendants studied, 20% received fines, probation, or suspended sentences only for acts involving $350,000,000 or more. The others studied received light sentences for a variety of swindles in which the public became victim to members of the Mafia . . . and others . . . .

398 F. Supp. at 1046. Similarly, in United States v. Alton Box Board Co., (1964) Trade Cas. (CCH) ¶ 71,163, a memorandum was submitted to the Court, on behalf of the defendants, arguing:

> In numerous other price-fixing cases of equal or greater magnitude, some involving more aggravated circumstances than alleged in this indictment, no jail sentences were imposed.

(1964) Trade Cas. (CCH) ¶ 71,163 at app. II n.2 § IB. In United States v. Prince, 533 F.2d 205 (7th Cir. 1976), defendants sought to withdraw their pleas of nolo contendere on the grounds that they had relied on their counsel's computations "that in 93% of the antitrust cases in which the defendants plead nolo, the resulting fines were minimal and no actual imprisonment resulted." 532 F.2d at 207. And, in United States v. Kahn, 367 F. Supp. 959, 960 (S.D.N.Y. 1973), a motion to reduce a sentence of five years imprisonment was considered by Judge Motley, in view of a survey of sentencing disparities in the Southern District of New York:

> [A] survey made by the United States Attorney for this District revealed that there appears to be disparities [sic] in sentencing in this court between different classes of defendants. More specifically it appeared that whitecollar criminals are dealt with more leniently than non-whitecollar criminals convicted of crimes which did not involve the use of violences. But it further appeared from the survey that the sentence given to Mr. Kahn

solicitude for the offender's social rank or choice of criminal methods.[26] Like the blameworthiness issue, these demands suggest no clear resolution. Again, exploring the offender/offense dichotomy offers useful insights.

The broadest and most compelling version of the equality claim argues that justice requires the like treatment of like cases.[27] The equality argument for severe punishment of upper-class perpetrators of white-collar crimes focuses on the offense. Equally criminal acts

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> was substantially greater than the average sentence given to so called whitecollar criminals and, more particularly, to persons convicted of bribery and perjury in this District and somewhat greater than the national averages for these crimes. In view of the foregoing, it appeared to the court that this latter fact might be a basis for reduction of sentence.

Perhaps the stongest such comparison occurred in United States v. Braun, 382 F. Supp. 214 (S.D.N.Y. 1974), where Judge Frankel suspended the initial prison sentence he imposed. He did so, however, for political considerations not necessarily relevant to all historical periods. The defendant had been sentenced to a short term of imprisonment plus a fine on a plea of guilty to charges of attempting to evade the paying of federal income taxes. On motion for reconsideration of sentence, Judge Frankel recited the standard litany for leniency in white-collar cases, and coupled this with a comparison of the defendant's sentence with the pardon of former President Nixon that occurred four days after the initial sentencing pronouncement. Judge Frankel said:

> But how do we reconcile the application of these factors to our unknown defendant with the pardon granted last Sunday? In the case at bar, the defendant's crime may have involved as much as $22,000 or as little as $2500 in evaded taxes. The alleged crimes embraced by the recent pardon may have included among the lesser items tax evasion to the extent of several hundreds of thousands of dollars. . . .
>
> The court concludes that in the particular case at bar, at this particular time, the prison sentence cannot justly be executed.

382 F. Supp. at 215-17.

In addition to white-collar criminals making reference to the practice of preferential treatment, nonwhite-collar criminals, on occasion, make reference to the same practice for similar purposes. In United States v. Rodriguez, 496 F. Supp. at 930 (S.D.N.Y. 1980), the defendant filed a motion for a reduction of sentence on the ground that Judge Brieant, in an unrelated case, sentenced a white-collar offender to a fine, whereas Rodriguez was sentenced to 18 months incarceration. In a supplemental submission to the court, counsel for the defendant argued:

> I fervently believe that equality under the law invites comparison. . . . Your Honor saw fit to sentence that captain of commerce to a mere fine, and a suspended jail term of one year. . . . My client Mr. Rodriguez, a modest Puerto Rican mailman . . . submitted no such testimonials [of his virtues as a civic leader].

While the Court held that "disparity in sentences has always been a troublesome business for the community to understand," the motion for sentence reduction was denied. 496 F. Supp. at 931. One justification for the denial was a misrepresentation of the facts in the related case as presented in the memorandum by Rodriguez' counsel. *See* United States v. Rodriguez, 496 F. Supp. 930, 931 n.1.

26. "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." Pelaez, *supra* note 17, at 829. *See* United States v. Blitstein, 626 F.2d 774, 780 (10th Cir. 1980), *cert. denied,* 101 S. Ct. 898 (1981); United States v. Egan, 459 F.2d 997, 998 (2d Cir. 1972); United States v. Paterno, 375 F. Supp. 647, 648 (S.D.N.Y. 1974); United States v. Bengimina, [1971] Trade Cas. (CCH) ¶ 73,474, at 89,925; United States v. National Dairy Prods. Corp., [1964] Trade Cas. (CCH) ¶ 71,163. *See also* United States v. Browder, *supra* note 21, at 1046.

27. *See* notes 8-9, *supra.*

of like social harm, the argument goes, merit like punishment.[28] This contention begs two questions. The classification of white-collar and street crimes as "like" assumes the conclusion to the culpability problem outlined above.[29] If the white-collar crimes of upper-class individuals deserve less blame than the common crimes of lower-class individuals, the same sentence in the two cases will not qualify as like punishment. The categorization of *identical sentences* as *like punishment* depends on the further assumption that all individuals experience punishment in the same way.[30] If upper-class criminals suffer more severely from a prison sentence than lower-class criminals, like punishment would require leniency for the upper-class defendant. These assumptions about crime and punishment cannot be verified independently. Yet such assumptions inhere in any moral argument predicated on equality.[31]

The equality argument for leniency focuses on the offender. The defense points out prior lenient sentences for white-collar offenders and claims the right to like treatment. This argument suffers from two weaknesses. If prior leniency followed from a mistaken or obsolete culpability calculus, the cases are not in fact alike.[32] If white-collar and common criminals deserve equal punishment, the prior injustice of failing to recognize this principle should not preclude the courts from correcting that mistake. Errors in the exercise of judicial discretion cannot justify their own perpetuation. More pointedly, enough white-collar offenders have been incarcerated by now to make "like treatment for like cases" a risky argument for the defense. Thus, neither argument for sentencing equality, nor the

28. *See* note 26, *supra*.

29. *See* notes 18-23, *supra*, and accompanying text. If white-collar offenders deserve less blame for their behavior than other criminals deserve for theirs, disparate sentences would not offend the equality principle.

30. *See* note 22, *supra*. Pelaez makes the point clearly:

> 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.

Pelaez, *supra* note 17, at 842-43.

31. *See* Westen, note 8, *supra*.

32. "The defect in [defendant's] argument is his conclusion that because other white-collar criminals have been receiving disparate treatment, he should too." United States v. Browder, 398 F. Supp. at 1046.

blameworthiness calculus that they ultimately depend on, does much to guide the trial judge.

B. *Policy Dilemmas in White-Collar Sentencing*

The central policy issue in white-collar sentencing concerns general deterrence, for incapacitation, rehabilitation and specific deterrence ordinarily fail to justify incarceration in such cases.[33] Given that, due to the lack of both inclination and opportunity, most white-collar defendants present little risk of recidivism, the policy focus in sentencing such offenders turns to general prevention. The general deterrence issue pits the suffering spared the offender by leniency against the suffering inflicted on society by future offenses that leniency might fail to deter.[34] The result of this calculus turns on a broad array of imponderables.

The calculated planning of white-collar offenses suggests their comparative susceptibility to general deterrence.[35] The magnitude of social harm such crimes inflict further bolsters the case for deterrence.[36] But disagreement arises as to whether deterrence requires imprisonment for maximum success.[37] Nor can judges ignore, or precisely weigh, the cost of excessive incarceration in human degradation and lost potential.[38]

Thus, neither the moral nor the pragmatic elements in the current orthodox view of criminal sentencing offers clear implications for

33. *See, e.g.,* Mann, Wheeler & Sarat, *supra* note 22, at 482-86; Pelaez, *supra* note 17, at 829-44; Renfrew, *supra* note 15, at 542.

34. *See* note 17 *supra.*

35. *See, e.g.*, United States v. Kahn, 367 F. Supp. 959, 961 (S.D.N.Y. 1973):

> [T]he bribery scheme was carefully planned and elaborately executed. It was not a thoughtless, spur of the moment, criminal act. Consequently, the societal interest in deterring such criminal activity was made manifest in this case, and the need for an effective deterrent by the imposition of a substantial prison sentence was clear . . . .

36. From a utilitarian standpoint, the more unhappiness spared society by the deterrent impact of punishment, the more unhappiness may be ethically inflicted to secure the preventive result. *See* note 19 *supra.*

37. *Compare* United States v. Nu-Phonics, Inc., 433 F. Supp. 1007, 1014-15 (E.D. Mich. 1977) (quoting a report of the Committee on Economic Crime of the ABA Section on Criminal Justice) ("the most effective punishment for the economic crime offender is incarceration . . . ."); Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions,* 17 AM. CRIM. L. REV. 419 (1980), *with* Pelaez, *supra* note 17, at 845-54; Posner, *Optimal Sentences for White-Collar Criminals,* 17 AM. CRIM. L. REV. 409 (1980); Renfrew, *supra* note 15.

38. *See* Pelaez, *supra* note 17, at 829-32. Bentham's concern for the unhappiness inflicted by punishment is especially relevant here: "[A]lthough it has been too frequently forgotten, . . . the delinquent is a member of the community, as well as any other individual . . . and . . . there is just as much reason for consulting his interest as any other. His welfare is proportionately the welfare of the community — his suffering the suffering of the community." 1 J. BENTHAM, WORKS 398 (1843).

sentencing white-collar criminals. Morally, the absolute or even comparative blameworthiness of the white-collar offender eludes easy determination. Pragmatically, identifying the minimum degree of pain necessary to achieve acceptable levels of general deterrence of white-collar offenses involves comparable difficulty. In combination, these ethical and practical uncertainties locate the white-collar sentencing decision deep in a gray area far beyond the easy condemnation of the crimes themselves. Contemporary research into white-collar criminality has taken the resolution of these uncertainties as one of its objectives.

C. *Summary: Recurring Tension and the Need for Empirical Study*

Three recurring value conflicts appear throughout the foregoing discussion. First, the principle of equality competes with the principle of individualized sentencing. Our system is based on a fundamental belief in the benefit of judicial discretion, especially as it relates to the tailoring of individual sentences to individual offenders. Yet an equally important value — the treating of like cases alike — constrains judicial discretion. Defining equality, however, poses obvious problems. Moreover, assuming that equality could be defined, no equation yet put forth accounts for all of the differentials between white-collar criminality and nonwhite-collar criminality. Thus it is no surprise that judges continue to vacillate between the variety of positions reviewed, that judicial views do not always coincide with public judgments as to the severity of sentencing outcomes, and that the philosophy of sentencing, especially as it relates to white-collar criminality, continues to be a hotly debated issue.

Second, an underlying tension inheres in all discussions about sentencing purposes. Discussions about white-collar criminality exacerbate these tensions because the justification for harsh sentences sometimes differs from the justification for similar harsh sentences for nonwhite-collar criminality. Stating the case in somewhat simplistic terms, for nonwhite-collar criminals the most oft-cited justifications for a sentence of imprisonment include specific deterrence, incapacitation, or punishment. Little faith seems to remain in the proposition that prisons serve a rehabilitative function. These reasons, however, all relate to the behavior of the convicted offender and predictive judgments about the effect of the sentence on his or her future behavior. For white-collar criminals, the primary justification for imprisonment is general deterrence, perhaps regardless of the effect the sentence will have on the particular offender who serves it.

Third, there is the seemingly insoluble problem of separating the dancer from the dance. If the sentence responds to the offense, arguments can be made for considerations of general deterrence and the need for public denunciation of a serious offense. If, however, the sentence responds to the offender, consideration of his or her heretofore exemplary life leads almost inevitably to the debate as to whether this otherwise unblemished record should serve to mitigate the sentence, or whether this privileged position in society, free from the burdens of poverty, should serve to underscore even more the inexcusability of the criminal act.

Given the inherent ambiguities and contradictions of sentencing theory, empirical study of white-collar sentencing offers significant potential for clarifying these uncertainties. Critics cannot debate sentencing discretion with much intelligence until they know how judges exercise it. Such knowledge could contribute by itself to the debate on sentencing, by revealing how judges trained to the task and possessed of the facts tend to resolve the dilemmas they confront. Numerous obstacles, however, restrict the potential of such a study. The next section addresses these challenges.

II. Inherent Problems of Comparison Research on White-Collar Criminality

Various difficulties limit the potential for empirical research comparing the punishment meted out to white-collar offenders with that meted out to those found guilty of traditional or common crimes.[39] These include definitional, methodological, technical and political problems. While none of these challenges raises an insurmountable barrier to meaningful research, each deserves close examination.

A. *Definitional Problems*

Despite the fact that Sutherland, in inaugurating the concept, went to great lengths to define white-collar crime,[40] both through elaboration and by example, debate continues as to the proper definition of the term.[41] In 1978, the Ninety-fifth Congress held hear-

39. *See* note 4, *supra*.

40. *See* E. Sutherland, White Collar Crime (1949).

41. *See, e.g.,* A. Bequai, White-Collar Crime: A 20th-Century Crisis 1, 11 (1978); A. Reiss & A. Biderman, Data Sources on White-Collar Law-Breaking 4 (1980).

ings before the Subcommittee on Crime on the Committee of the Judiciary in the House of Representatives, and introduced the session on white-collar crime by seeking to define the terms.[42] In 1980, the United States Department of Justice introduced a comprehensive bibliography on white-collar crime by stating that "[t]here is no universally accepted definition of white-collar crime."[43] Clearly there remains uncertainty and lack of agreement about what the rubric of white-collar crime properly includes. The fact that persons of lower socioecomonic background commit many of the offenses traditionally thought to be white-collar compounds the problem. Tax evasion, for example, while meeting the definitional criterion of an economic crime, may or may not be committed pursuant to a profession or by persons of high social status. Moreover, not all white-collar criminals commit white-collar offenses. While the cases of Jean Harris or Patty Hearst represent the celebrated exceptions,[44] they do not stand alone in the category of white-collar offenders.

The relevance of these definitional problems is that the particular definition of white-collar used to determine sample inclusion very much affects research seeking to compare the sanctioning of white-collar offenders to that of nonwhite-collar offenders. Two recent studies of the sentencing of white-collar offenders,[45] for example, arrive at somewhat divergent conclusions. Yet a close examination of the offenses included by each in the category of white-collar[46]

42. *White-Collar Crime: The Problem and The Federal Response, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 95th Cong., 2d Sess. 2 (1978).

43. *Id.*, at v.

44. *See, e.g.,* Hearst v. United States, 563 F.2d 1331 (1977), *cert. denied,* 435 U.S. 1000 (1978).

45. Hagan, Nagel & Albonetti, *The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts,* 45 AM. SOC. REV. 802 (1980); S. Wheeler, D. Weisburd & N. Bode, Sentencing the White-Collar Offender: Rhetoric and Reality (1981) (unpublished manuscript from Yale Law School) (copy on file with the *Michigan Law Review*).

46. *See* Hagen, Nagel & Albonetti, *supra* note 45, at 80 n.6; Wheeler, Weisburd & Bode, *supra* note 45, at 4 n.4. The following offenses are included in the former study but not the latter: 18 U.S.C §§ 152, 209, 286, 643, 648, 657, 658, 664, 1342 (1976) (bankruptcy — concealment of assets, false oaths and claims, bribery; bribery, graft, and conflict of interest — salary of government officials and employees payable only by U.S.; claims and services in matters affecting government — conspiracy to defraud the government with respect to claims; embezzlement and theft — accounting for public money; embezzlement and theft — custodians, generally, misusing public funds; embezzlement and theft — lending, credit and insurance institutions; embezzlement and theft — property mortgaged or pledged to farm credit agencies, embezzlement and theft — theft or embezzlement from employee benefit plan; mail fraud — fictitious name or address; respectively); 29 U.S.C. § 501 (1976) (fiduciary responsibility of officers of labor organizations); 38 U.S.C. § 3502 (1976) (fraudulent acceptance of payments — veteran's benefits). The following offenses are included in the latter study but not in the former: 15 U.S.C. § 77(a) (1976) (securities regulation); 18 U.S.C. §§ 495, 1708 (1976) (forgery — false, altered or forged deed, contract, etc.; theft or receipt of stolen mail; respectively); 26 U.S.C. § 7207 (1976) (fraudulent returns, statements or other documents).

reveals some differences in the respective sample inclusion definitions. This may account, in part, for the slight differences in findings reported.

Importantly, until researchers agree on the proper definition of white-collar crime, especially as to whether white-collar crime includes only white-collar offenses committed by white-collar persons, research seeking to compare sanctions meted out to white-collar criminals to those meted out to nonwhite-collar criminals will be seriously limited.

B. *Methodological Problems*

While some methodological problems plague all research on criminal justice outcomes[47] the particular research problem at hand presents four distinctive difficulties. First, the vast majority of white-collar cases prosecuted and brought to the sentencing stage proceed through the federal district courts. However, with only a few notable exceptions,[48] the bulk of research that seeks to ascertain whether upper-class defendants fare better than lower-class defendants because of their privileged background has dealt with data collected in state courts, where middle- and upper-class defendants constitute a practical and statistical minority.[49] Since social scientists only recently have begun to work with federal court data, much of the potential for determining whether white-collar crimes receive treatment different from that of nonwhite-collar crimes remains more promise than realized potential.

Second, while researchers enjoy relative ease of access to data on sanctioning decisions for traditional criminals, they face considerable difficulty in obtaining data on white-collar crimes.[50] This difficulty stems partly from the resolution of many disputes involving white-collar crimes through civil litigation or administrative proceedings rather than through criminal proceedings.[51] Moreover,

47. For a review of methodological problems in court research, *see* Presentation by I. Nagel & J. Hagan, Process and Outcome in the Study of Judicial Decisions: Multiple Methods and Theoretical Transformation (May 1978) (Meeting of Law & Soc. Assn.).

48. *See, e.g.,* Hagan & Nagel-Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts,* 13 LAW & SOCY. REV. 467 (1979); Katz, *Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes,* 13 LAW & SOCY. REV. 431 (1979); Mann, Wheeler & Sarat, *Sentencing the White-Collar Offender,* 17 AM. CRIM. L. REV. 479 (1980); Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial,* 4 J. LEGAL STUD. 369 (1975).

49. *See, e.g.,* Chiricos & Waldo, *Socioeconomic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition,* 40 AM. SOC. REV. 753 (1975).

50. A. BEQUAI, WHITE-COLLAR CRIME: A 20TH-CENTURY CRISIS 9 (1978).

51. *Id.*

many of these proceedings, or at least the outcomes of the preliminary procedural stages, are kept secret.[52]

Third, and very much related to the above, a substantial likelihood of selection bias characterizes studies of the sentencing of white-collar offenders. For one thing, the fact that administrative proceedings and civil remedies exist as viable alternatives to criminal prosecution may mean that the less egregious offenses and the higher status offenders may never face criminal charges. If so, those cases in the criminal court files represent a biased sample of offenses and offenders. The possibility that the existence of corporate codefendants may lead to greater administrative and judicial sympathy for individual white-collar defendants introduces yet another possible source of selection bias.[53] Furthermore, findings of differences in studies of sentencing merit considerable caution because sentencing decisions are the outcome of a process with numerous early screening decisions. Studies of the prosecution of white-collar cases[54] have presented data to support the thesis that pre-sentencing screening pervades white-collar cases in particular. Since white-collar prosecutions involve persons of distinction, and since prosecution itself can severely damage a person's reputation, the pre-indictment investigation tends to be more lengthy and more complete than the pre-indictment investigation of more traditional crimes. This suggests that prosecutors may pursue only those cases characterized by strong evidence and likely convictions. Since white-collar cases often involve complex litigation and the use of potential defendants willing to turn state's evidence as witnesses, the likelihood increases that only the most culpable in multi-defendant cases will reach the adjudication decision stage. The government will likely reward others for their cooperation with some form of pre-adjudication diversion.[55] This greater potential for selection bias suggests that those white-collar cases that appear in the sentencing files may reflect only the most culpable white-collar cases. If the bias operates in the direction we expect, *i.e.*, that only the best cases against the most egregious offenders of lesser status come to the sentencing stage, we also

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52. *Id.*

53. *See* Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 13 (1980).

54. *See, e.g.*, Hagan & Nagel-Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 LAW & SOC. REV. 467 (1979); Katz, *Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes*, 13 LAW & SOC. REV. 431 (1979).

55. Hagan & Nagel-Berstein, *The Sentencing Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 LAW & SOC. REV. 467 (1979).

should expect smaller rather than larger differences among the sentences for white-collar criminals and nonwhite-collar criminals.

Finally, variations in measurement procedures and in the contexts in which sentencing is observed present methodological problems. With respect to measurement, comparisons of sentences will prove meaningful only if the analyses measure sentence severity in the same or comparable ways, and if they include the same variables, apart from the white-collar nature of the offense and the offender. With respect to variation in context, sentencing, like other criminal justice outcome decisions, responds to changes in public opinion, changes in historical periods, political philosophy, and the priorities of the judge and jurisdiction in which the government prosecutes the case. Thus, the findings we report here cannot pretend to hold for all time, or to provide the basis for comparisons with findings reported for earlier periods in history. Ongoing dramatic shifts in public and private attitudes toward white-collar crime emphasize this caveat.[56] Whereas the Carter Administration heralded the prosecution of white-collar crime as a public priority,[57] the early statements of representatives of the Reagan Administration seem not so inclined to make crime in the suites a national priority. In sum, the problems associated with having large samples of white-collar cases to compare to nonwhite-collar cases, gaining access to these case proceedings, early selection biases, and variation in measurement procedures and research context, all contribute to make the methodological problems of this kind of research serious and substantial.

C. *Technical Problems*

White-collar cases may also differ from nonwhite-collar cases in their manner of prosecution. A federal investigative office in Washington pre-screens a substantial number of white-collar cases before the local United States Attorney's office reaches a final decision to prosecute. This procedure frequently governs cases involving alleged violations of the tax laws and cases alleging criminal violation

56. Project, *White-Collar Crime: Second Annual Survey of Law,* 19 AM. CRIM. L. REV. 266 n.757 (1981) (indicating wide historical variations in the intensity of prosecution of white-collar crime).

57. *Id.* Moreover, as part of the research on which we here report, we collected interview data from United States Attorneys and Assistant United States Attorneys in the ten districts in which we conducted our research. Interview data were collected in the Fall of 1977 and Spring of 1978. In all ten jurisdictions, the perception of the United States Attorneys was that the prosecution of white-collar criminality was a major priority.

by public officials.[58] Moreover, the national rather than local interest in some of these cases sometimes leads the United States Department of Justice to send specially experienced litigators to the local district offices of United States Attorneys to take responsibility for these cases. The practice of sending federal prosecutors with specialized experience seems particularly common in cases alleging violations of antitrust statutes. Finally, in cases involving multiple defendants drawn from multiple jurisdictions, the Department of Justice often selects the particular jurisdiction in which the cases will be brought. To the extent that these technical differences involve a more careful pre-selection of cases, greater pre-indictment investigatory work, the use of more experienced prosecutors, and a more concerted interest in case outcomes, the conviction and sentencing decisions that follow may differ from those that follow less intense prosecutorial efforts.

D. *Political Problems*

Addressing the question of whether white-collar criminals receive preferential treatment in sentencing decisions because of their privileged background confronts head-on the issue of equality.[60] Equality, however, conflicts with the view that crime should fit the offender, not the offense. Merely raising this issue may risk political unpopularity. This may partially explain why researchers have for so long shied away from direct comparisons. Additionally, the feeling persists, at least on the part of some, that white-collar offenses really do not amount to crimes, but rather reflect a natural extension

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58. In interviewing United States Attorneys and their assistants, we were repeatedly told that allegations concerning tax violations as well as those alleging misconduct by public officials were cleared first, respectively, by the Internal Revenue Service and by the U.S. Department of Justice.

59. For example, according to our interview data, one district was deliberately chosen as the jurisdiction in which to prosecute a major antitrust case.

In response to our question — why was this district the chosen site for the prosecution — our interviewees stated the following:

> [1] [The U.S. Attorney] made the pursuit of official corruption and white-collar crime a priority. . . .
>
> [2] We had a better relationship . . . with the Strike Force. . . . This accounted for more leads to white-collar crime. . . .
>
> [3] Postal inspectors here are more receptive to helping investigators. . . .
>
> [4] Our United States Attorney's Office had a professional prosecutor who was independent and a white-collar crime prosecutor.

The thrust of the comments was that this district was chosen because its attorneys could be expected to do a highly professional job on the prosecution. Moreover, it was thought that the Judiciary had an attitude of "trust busterism". The combination of presumed sympathy of the prosecutor and the judiciary for the government's case allegedly led to the selection of the district for the price-fixing prosecution.

60. M. FRANKEL, CRIMINAL SENTENCES 10 (1973).

of our competitive economic structure.[61] Finally, dating back to when Sutherland first raised the issue, there exists a guardedness in executing research whose results may contribute to a policy reform that would thereafter deny the upper class an advantage to which they have become accustomed. Sutherland handled the problem by limiting his stated interest to academic criminology.[62] Bequai forthrightly denounces this guardedness as deference to the political and economic power structure.[63] Scholars may detach themselves from such political labels only with difficulty. To the extent that ideologies impose themselves on the results of sentencing studies, they present an additional obstacle to research of this kind.

To summarize, definitional, methodological, technical, and political problems all limit comparative research on sentencing. These limits serve not to dissuade us from moving forward with the task, but rather to sensitize us to the preliminary nature of any reported results, and to affect, in part, the way we design our research.

III. Data on the Sentencing of White-Collar Criminals in Ten Federal District Courts

A. *Data Collection and Distribution Among Districts*

The quantitative data we analyze in this paper involve 6,518 offenders sentenced over a period beginning in 1974 and ending in 1977. The Administrative Office of the United States Courts collected these records and premised our use of them on an agreement not to identify individual districts in our analyses.[64] Collectively, the ten districts and their principal cities include: Eastern and Southern New York (Brooklyn and Manhattan), Northern Illinois (Chicago),

61. *See* Geis, *The Heavy Electrical Equipment Antitrust Cases of 1961*, in WHITE-COLLAR CRIME 21 n.40 (G. Geis & R. Meier eds. 1977).

62. "This comparison is made for the purpose of developing the theories of criminal behavior, not for the purpose of muckraking or of reforming anything except criminology . . . ." Sutherland, *supra* note 1 at 38.

63. The crimes of the upper classes were viewed in terms of politics rather than law. They were the acts of an immoral ruling elite rather than the illegal acts of a strata of society. In many instances, these ideologues were justified, for in nineteenth century Europe, the upper classes deemed themselves as being above the law. Well into the twentieth century, crimes by the professional and affluent sectors of society were viewed through a political prism. Those who attacked such acts did so along political lines; they, in turn, were labeled Communists and Socialists . . . .

A. BEQUAI, *supra* note 50, at 7.

64. The data were collected with special provisions for quality control and comprehensiveness made possible through a mandate of Title II of the Speedy Trial Act of 1974 to evaluate the experimental bail reform program established under this Act. All but 88 cases (which came into the data set in 1974) are from the years 1975 through 1977. The provisions of the evaluation were that a population of cases was to be collected during this period. Our interviews in all ten districts indicated full cooperation in the fulfillment of this mandate.

Eastern Pennsylvania (Philadelphia), Maryland (Baltimore), Northern Texas (Dallas), Western Missouri (Kansas City), Northern Georgia (Atlanta), Central California (Los Angeles), and Eastern Michigan (Detroit). To supplement the quantitative record data, both authors made site visits to each district. During the site visits we observed approximately 200 hours of court proceedings and conducted approximately 600 hours of interviews with the following court personnel: 9 Chief Judges and 42 Presiding Judges, 8 United States Attorneys and 48 Assistant United States Attorneys, 14 Probation Officers, 15 Administrators of Pre-Trial Services Agencies, 31 Magistrates, and 10 Chiefs of Public Defender Offices.[65] Before beginning our analyses, we want first to return to some of the issues of measurement and definition of white-collar crime raised above.

As indicated, although the term "white-collar crime" has gained currency in several languages and in popular thought, disagreement and confusion regarding its meaning continue.[66] Much of the problem centers around the kinds of *crimes* and kinds of *people* involved. We approach this problem by adopting an operational definition that considers both the offender *and* the offense.

We began by listing offenses against the United States Code that might plausibly fall within the category of white-collar crimes. We refined this list by asking United States Attorneys and Assistant United States Attorneys in the ten districts in which we conducted our research whether they would include or exclude the listed offenses.[67] We retained thirty-one offenses that elicited considerable consensus as white-collar crimes.[68] We designated the other offenses

65. Our interviews were conducted over a ten week period, with one week spent in each of the ten districts. The ten jurisdictions comprise a purposive sample selected by the Supreme Court (under provisions of the Speedy Trial Act, as explained in note 64 *supra*) and intended to maximize the representation of major metropolitan and geographic areas across the United States. The authors of this paper conducted the interviews together, using a set of structured, open-ended interview schedules that are available upon request. Our purpose was to interview a cross-section of court personnel across the ten districts. Unedited excerpts from these interviews are quoted in this Article. One Chief Judge refused to be interviewed and two U.S. Attorneys were not available for interviews. However, the first Assistant to each of these U.S. Attorneys was interviewed and our coverage otherwise was quite comprehensive.

66. *See* WHITE COLLAR CRIME (G. Geis & R. Meier rev. ed. 1977)

67. U. S. Attorneys were asked to identify offense codes that were almost always white-collar, sometimes white-collar, and almost never white-collar.

68. A short description follows of these offenses, 15 U.S.C. § 1 (1976) (antitrust violations); 18 U.S.C. §§ 152, 201, 209, 287, 643, 648, 657, 658, 664, 1001, 1005, 1006, 1010, 1012, 1014, 1341, 1342, 1343 (1976) (bankruptcy — concealment of assets, false oaths and claims, bribery; bribery, graft, and conflicts of interest — bribery of public officials and witnesses; bribery, graft, and conflict of interest — salary of government officials and employees payable only by U.S.; bribery, graft, and conflict of interest — offer to procure appointed public office; claims and services in matters affecting the government — false or fraudulent claims; embezzlement and theft — accounting for public money; embezzlement and theft — custodians, generally,

as common crimes.[69] We then cross-classified white-collar crimes and common crimes with two separate measures of the offender's social standing: education (high school or less, and college or more) and income (less than $13,777 and $13,777 or more, per year, in 1974-1977 dollars; this equates with a cut-off point of well over $20,000 in 1982 dollars). These points correspond to the highest grouping of occupations considered in recent American stratification research.[70] Similar analyses performed separately for the education and income measures have reached substantially similar results.[71] We present here only the results involving education.[72]

The resulting cross-classification that forms the central part of our analysis includes the following four kinds of cases: *the common crimes of the less educated; the common crimes of the college educated; the white-collar crimes of the less educated; and the white-collar crimes of the college educated.* The last category interests us most, particularly in comparison to the first, because it designates the "purest" form of white-collar crime we can identify. We expect prosecution and sentencing of this type of case to exhibit the most interesting variation across jurisdictions.

In the first step of our analysis, we examined the distribution of cases sentenced for the four offender-offense combinations in all ten districts, as presented in Table 1 in the Appendix. The most right-

misusing public funds; embezzlement and theft — lending, credit, and insurance institutions; embezzlement and theft — property mortgaged or pledged to farm credit agencies; embezzlement and theft — theft or embezzlement from employee benefit plan; fraud and false statements — statements or entries generally; fraud and false statements — bank entries, reports, or false transactions; fraud and false statements — federal crime institutions entries, reports, and transactions; fraud and false statements — HUD and FHA transactions; fraud and false statements — loan and credit applications generally, also renewals and discounts, crop insurance; mail fraud — frauds and swindles; mail fraud — fictitious name or address; mail fraud — fraud by wire, radio, or television; respectively); 26 U.S.C. §§ 7201, 7203, 7206 (1976) (attempt to evade or defeat tax; failing to file tax return; fraud and false statements; respectively); 29 U.S.C. § 501 (1976) (fiduciary responsibility of officers of labor organizations); 38 U.S.C. § 3502 (1976) (fraudulent acceptance of payments — veterans' benefits). Four additional offenses (18 U.S.C. § 2073 (1976); 26 U.S.C §§ 7207, 7262 (1976); 49 U.S.C. § 322 (1976)) were designated as white-collar by U.S. Attorneys in our interviews. These offenses, however, did not result in convictions for college educated offenders in our data.

69. *See* note 4, *supra*.

70. That is, for example, in D. FEATHERMAND & R. HAUSER, OPPORTUNITY AND CHANGE (1978), these education and income divisions correspond to the socioeconomic classification called "upper nonmanual," which includes the following occupational categories: self-employed and salaried professionals, managers and salesmen.

71. *See* Hagan, Nagel & Albonetti, *The Social Organization of White-Collar Sanctions: A Study of Prosecution and Punishment in the Federal Courts*, in WHITE COLLAR AND ECONOMIC CRIME (P. Wickman & T. Dailey eds. 1982).

72. Education was selected over income for two reasons: it allows us to consider women without reported income in a more meaningful manner, and it avoids the problem of correcting for a deflating dollar over the period of the study.

hand column of this Table indicates that less than five percent of the cases sentenced in these courts involve college educated persons convicted and sentenced for white-collar crimes, while nearly three quarters of these cases involve less educated persons convicted and sentenced for common crimes. Looking across the Table at the ten districts represented in our data, we see that the distribution of cases within districts appears, with the notable exception of District III, rather consistent, particularly in terms of the proportion of college educated persons sentenced for white-collar crimes.

Nearly 12 percent of the cases sentenced in District III involve college educated persons convicted of white-collar crimes. The figures for the remaining districts range from 2.5% to 5.4%. In other words, District III sentences more than twice the proportionate number of college-educated persons for white-collar crimes as do the other districts. While District III sentences only 10.6% of the cases handled in all ten districts, it sentences 25.5% of the white-collar cases involving college educated persons. This implies that District III has been considerably more active, or in other words *pro* active,[73] in its prosecution of white-collar crime than the remaining districts. The observation of one District III U.S. Attorney effectively captured this proactive attitude: "We don't sit back and wait for cases to walk in the door. We go out and make them."[74] Even in District III, however, the absolute *volume* of these cases sentenced remains undramatic; only 80 college educated persons convicted for white-collar crimes were sentenced in District III during the period considered. Nonetheless, pursuing even this number of cases probably requires substantial reallocation of resources.[75] Since white-collar

73. For further discussion of the proactive and reactive patterning of criminal justice, see A. REISS, THE POLICE AND THE PUBLIC (1971); Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125 (1973).

74. The statement is taken from an interview with District III prosecutors conducted pursuant to this study.

75. The following excerpts from interviews with three different U.S. Attorneys from our ten districts make this point clear.

> [1] It is . . . hard to . . . successfully prosecute these kinds of cases. They [U.S. Attorneys] shouldn't go in unless they know how to do it, and they frequently don't know how to do it. Some of them haven't got the manpower to do it. It is a very time-consuming kind of work, and some of these offices have five or six people who are just buried. How are they going to free up people . . . ? They [have] only got six people in the offices.
> [2] It would be nice to investigate let's say public corruption. "Okay, FBI, I want you to go out and develop snitches in all the HEW places where they might be taking bribes." . . . But God knows how much time [that would take], and we don't have the resources to do that. If I had some prosecutors or some agency to whom I could say, "Okay, I don't mind your wasting a year investigating this because we want it looked into," then I could see doing that, but if you don't have the resources to do it — I just don't feel you are using your resources right.
> [3] It is difficult — it is a very difficult process of trying to do everything that should be done and yet still allowing yourself to free up enough resources to do the cases that are

cases require a disproportionate investment of resources, the doubling of the proportionate number of cases (albeit still not large) in District III probably reflects a more dramatic difference than might otherwise appear.

Returning to Table 1, we note that in none of the districts does the conviction and sentencing of white-collar crime predominantly involve white-collar individuals. In all of the districts, college educated persons sentenced for white-collar crimes constitute a minority. Many of these districts sentenced less educated persons more than twice as frequently as college educated persons for white-collar crimes. Thus, although District III again demonstrates a more proactive emphasis on the white-collar crimes of white-collar persons, this emphasis by no means excludes other offenders: While 11.6% of the offenders in this district are college educated individuals convicted of white-collar crimes, 12.2% are convicted of white-collar crimes but have not been college educated.[76] Federal prosecutors pursue, for example, large numbers of bank clerks for small-scale embezzlements and less educated citizens for relatively small-scale income tax violations.[77] Conversely, college educated persons are convicted and sentenced for common crimes. Such individuals constitute 14% of those sentenced for common crimes in all ten of the districts.

Summarizing this phase of our analysis, the most consistent finding across the districts concerns the large number of cases involving less educated persons sentenced for common crimes. District III deviates most significantly from this pattern, with 63.7% of its cases involving less educated persons sentenced for common crimes. The remaining cases in this district fall fairly equally into the other three offender-offense combinations, with the *relative* concentration of cases in the white-collar crimes committed by college educated persons category making this district most unique.

B. *Methods and Measurement*

Table 2 presents the variables considered in the analyses that fol-

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more difficult and need to be done but aren't so obvious. There's always a balancing act that is very difficult.

76. *See* Geis, *Avocational Crime*, in HANDBOOK OF CRIMINOLOGY 289 (D. Glaser ed. 1974) ("white-collar crimes can be committed by persons in all social classes"); Katz, *Legality and Equality: Plea Bargaining in the Prosecution of White Collar and Common Crimes*, 13 LAW & SOC. REV. 431, 433 (1979) ("There are relatively few crimes that can be committed only by those in white-collar occupations.").

77. *See, e.g.*, Long, The Internal Revenue Service: Examining the Exercise of Discretion in Tax Enforcement (1979) (paper presented at the Annual Meeting of the Law and Soc. Assn., San Francisco).

low. The research literature commonly regards the independent variables in Table 2 as partially explanatory of variations in sentencing outcomes.[78] This familiar list of variables includes: A number of prior adult felony convictions, maximum prescribed statutory seriousness of the offense,[9] number of charges for which the defendant was convicted, ethnicity, sex, age, and employment status. We also consider treatment of the defendant for physical or mental illness. Our interviews with judges suggested that these last two variables might exert particular influence in white-collar cases. In addition, our sensitivity to the impact of prior processing decisions on sentencing suggested the inclusion of pretrial release status (ordinally ranked on the basis of our interviews and on an evaluation of the fiscal and personal constraints involved), and whether the defendant pleaded guilty. The next three variables we consider (numbers 13, 14, and 15) represent the offender-offense combinations introduced earlier. The last three variables in this table, numbers 16, 17, and 18, are our dependent measures of sentence outcome: the in/out decision about imprisonment, a sentence severity scale, and, for those imprisoned, the length of imprisonment as measured in months. We include these various measures of our dependent variable because the sentencing decision may have several dimensions.[80] The *"In/Out"* measure responds to the initial and most difficult decision judges regard themselves as making: whether to send the person to prison or to impose a noncustodial sentence.[81] Our second measure, a *sentence severity scale*, derives from the efforts of Tiffany *et al.* to devise an interval scale that approximates the severity of different sentencing options.[82] This scale attempts to combine the different types and amount of sentence on a common dimension. Third, we use a measure of the *length of confinement (in*

78. *See, e.g.*, Bernstein, Kelly & Doyle, *Societal Reaction to Deviants: The Case of Criminal Defendants,* 42 AM. SOC. REV. 743 (1977); Burke & Turk, *Factors Affecting Post-Arrest Dispositions: A Model for Analysis,* 22 SOC. PROBS. 313 (1975); Chiricos & Waldo, *Socioeconomic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition*, 40 AM. SOC. REV. 753 (1975); Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC. REV. 357 (1974); Swigert & Farrell, *Normal Homicides and the Law*, 42 AM. SOC. REV. 16 (1977).

79. This variable is measured in terms of the maximum prison sentence provided in the United States Code for the charge initially placed against the offender.

80. Wheeler, Weisburd & Bode make a compelling argument for multiple sentencing measures. *See* Wheeler, Weisburd & Bode, Sentencing the White-Collar Offender: Rhetoric and Reality (unpublished manuscript, Yale Law School, 1981) (copy on file with the *Michigan Law Review*).

81. *See* Wheeler, Weisburd & Bode, *supra* note 80.

82. Minimal revisions in this scale derive from our interviews and are intended to reflect further gradations in the severity of sentences imposed.

months) for an analysis limited to those whose sentence includes some term of imprisonment. The factors that influence these three distinctive outcome measures may or may not be the same. Thus, our analysis, among other things, will compare the determinants of these decisions.

We analyzed the data using conventional multiple regression procedures.[83] Multiple regression analysis offers the advantage of providing precise and quantitative estimates of the effects of different factors on a dependent variable (for example, the In/Out decision). In multiple regression, one first specifies the major variables that are believed to influence the dependent variable, as we have done for sentencing decisions above.[84] Relationships between the dependent variable and the independent variables of interest are then estimated by extracting from each the effects of the other major variables. The regression coefficients express these "net" relationships, and offer the best substitute available for a controlled experiment which may manipulate the values of the independent variable to determine their influence. The results of multiple regression analyses show the effects of each independent variable on the dependent variable, while holding the effects of other independent variables statistically constant. These results also allow statements about the probability that any effect described has occurred merely as a result of chance.

We can now indicate how we introduce our offender-offense combinations into the analysis. Through an approach termed dummy coding,[85] we created three separate "dummy variables" to represent three of the four categories created earlier in the cross-classification of the offender's education and offense. The omitted category, in this instance less educated persons sentenced for common crimes, becomes a reference point for considering the effects of the remaining offender-offense combinations. Thus each of the dummy variables, when included in the regressions that follow, yields a coefficient that represents the differences in sentence outcome for cases classified in the specified offender-offense groupings compared to the

83. *See, e.g.,* Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases,* 80 COLUM. L. REV. 702 (1980); Fisher, *Multiple Regression in Legal Proceedings,* 80 COLUM. L. REV. 702 (1980).

84. There inevitably will remain a number of unspecified minor influences that in combination also have a nonnegligible effect on the dependent variable. These minor influences are handled by combining them in what is referred to as a random disturbance term; their joint effect is then assumed to be unsystematically related to the major variables being investigated. On this point, and for a more general and excellent review of multiple regression in legal research, see Fisher, *supra* note 83.

85. For a discussion of dummy coding, see F. KERLINGER & E. PEDHAZAR, MULTIPLE REGRESSION IN BEHAVIORAL RESEARCH 185-86 (1973).

less educated person sentenced for common crimes grouping, with all other variables in the regression analysis taken into account. This approach enables us to address the issue of whether a disparity exists in the sentences received by college educated persons sentenced for white-collar crimes as compared to less educated persons sentenced for common crimes, that persists after acounting for the other independent variables. This is precisely the kind of issue raised by Sutherland's initial studies and discussed in the introduction of this Article.

In the analyses that follow, we are presenting multiple regressions for our three dependent measures of sentence outcome, first for all ten districts taken together, second for District III, and third for the remaining nine districts.

C. *The Analyses*

Table 3 presents the results of the first part of our analyses. This table results from regressing our three dependent measures of sentence outcome on our independent variables in all ten districts taken together.[86] Our primary interest in these regressions concerns whether — other variables held constant — college educated persons are sentenced more leniently for their white-collar crimes than less educated persons are sentenced for common crimes. *For all ten districts taken together in Table 3, there is no indication that this is the case.* The only offender-offense combination that has a significant effect involves the months of imprisonment imposed on college educated persons sentenced for *common* crimes. The unstandardized coefficient (b=6.19) for this grouping merits a very explicit interpretation: on average, and with all other independent variables in this regression held constant, college educated persons sentenced for common crimes who are imprisoned receive sentences more than six months shorter than less educated persons sentenced for common crimes. The F-value for this coefficient is 5.53, indicating that the probability of this finding resulting from chance is less than five in one hundred (*i.e.,* this finding is statistically significant at the .05 level). This is, however, the only dependent measure of sentence

86. One of our dependent variables, the In/Out decision, is a binary, variable and there has been some concern about the use of regression techniques in these circumstances. However, it also has been demonstrated that when the distribution of the dependent variable is not extreme (and here the distribution is nearly perfectly balanced) that the results are substantively unaffected. *See* Knoke, *A Comparison of Log-Linear and Regression Models for Systems of Dichotomous Variables*, 3 SOC. METHODS & SOC. RESEARCH 416 (1975). For a discussion of the *advantages* of using regression procedures in these circumstances, see Gillespie, *Log-Linear Techniques and the Regression Analysis of Dummy Dependent Variables*, 6 SOC. METHODS & RESEARCH 103 (1977).

outcome for which the data reveal such a disparity. No significant difference exists for the In/Out decision, or the sentence severity scale, and the remaining offender-offense combinations also do not show significant disparities. Otherwise these regressions contain some expected findings: prior convictions, statutory seriousness, and pretrial release status produce consistently strong effects on sentence outcome, however measured. Some indication exists that whites, women, the employed, defendants who act alone and those who plead guilty receive some leniency in sentencing. However, our primary interest lies with the sentencing of white-collar cases. The question remains as to how the sentencing of these cases might vary in terms of the district variation noted earlier.

To deal with this issue, we turn to Tables 4 and 5. Table 4 presents the regressions for District III only, the district that we identified as most proactively pursuing white-collar crime. The most striking feature of this table, particularly in contrast to Tables 3 and 5 reflects the *prevalence* of white-collar effects. *Both college and less educated persons sentenced for white-collar crimes in District III, as indicated for all three dependent measures, receive more lenient sentences than less educated persons sentenced for common crimes.* College educated persons sentenced for common crimes also receive more lenient treatment than the latter group, in terms of the sentence severity scale and months of imprisonment, but not in terms of the In/Out decision. All of these differences are significant at the .01 level, meaning that each would have occurred less than one in a hundred times by chance. Some of these effects are quite pronounced. For example, the average college educated person sentenced for a white-collar crime, again with all other independent variables held constant, receives a sentence more than two years shorter ($b = -24.31$) than the average less educated person sentenced for a common crime in District III. Less educated persons sentenced for white-collar crimes receive comparable leniency in terms of the sentence severity scale and months imprisonment, and they receive even greater leniency than college educated persons sentenced for white-collar crimes in the In/Out decision (the appropriate comparison here is between the B's: $-.12$ and $-.22$). This means that less educated persons sentenced for common crimes are more likely to go to jail than *both* college and less educated persons sentenced for white-collar crimes, but that the latter group is *least* likely to meet this fate in District III.

In contrast, Table 5 indicates no significant differences for any of the offender-offense groupings in the remaining districts. This implies that the differential sentencing of white-collar offenders may only become apparent in those districts which pursue white-collar crime aggressively, *i.e.*, proactively. Said differently, an inverse relationship may exist between the volume of white-collar convictions and the severity of white-collar sentences.

SUMMARY

Our research produced four sets of findings that we consider dramatic and important to reiterate. First, of the 6,518 defendants sentenced in our sample, only slightly less than 5% are college educated persons convicted of white-collar crimes. Thus, despite all the recent emphasis on the importance of cracking down on white-collar crimes, the absolute numbers remain very small. Of the other persons sentenced, 8% are less educated persons convicted of white-collar crimes, 14% are college educated persons convicted of common crimes and 73% are less educated persons convicted of common crimes. Even aggregating all persons convicted of white-collar crimes, the college educated and less educated together still yield only 13% of the total convictions.

Second, of the persons convicted of white-collar crimes, the less educated outnumber the college educated. This underscores the importance we earlier attributed to varying definitions of white-collar criminality, and especially to cross-classification of the offense with the offender.

Third, setting aside for the moment jurisdictional comparisons, when we consider the sentences meted out in all ten jurisdictions taken together, controlling for all the independent variables, in addition to the white-collar of the offense and offender earlier identified, *the purest form of white-collar criminality — college educated persons convicted of white-collar crimes — does not receive preferential treatment in terms of the decision to incarcerate or not (the In/Out decision) nor in terms of our measure of sentence severity.* This is a most dramatic finding. Furthermore, only the category of *college educated persons convicted of common crimes* receives preferential treatment. This is only true when considering the length of sentence for those sentenced to a period of imprisonment. College educated persons sentenced for common crimes receive six months less time than their less educated counterparts similarly convicted of common crimes. At least for those convicted of common crimes, a college education appears to have some positive benefit.

Fourth, the possibility of jurisdictional variation produces substantial departures from these results in District III. District III had a higher rate of sentencing of college educated persons convicted of white-collar crimes than all other nine districts. In fact, of all the college educated persons convicted of white-collar crimes across the ten districts, 25% were convicted and sentenced in District III, even though District III did not have the largest case base of the ten districts.

In District III, unlike the case for all ten districts considered together, persons convicted of white-collar crimes, whether college educated or not, fared better in sentencing outcomes than those convicted of common crimes, especially the less educated convicted of common crimes. The advantage of the less educated persons convicted of white-collar crimes becomes pronounced when considering the decision to imprison or not. Finally, persons convicted of white-collar crimes, in District III, whether college educated or not, received sentences more than two years shorter (24 + months) than the average term of imprisonment for the less educated person convicted of common crimes.

Three potential explanations may provide some insight into these findings. First, with respect to our finding of no preferential treatment for both college and less educated persons sentenced for white-collar crimes, across the ten jurisdictions, differences in the time, effort, and care in the prosecution of these cases may result in only the most egregious offenses of the most culpable offenders coming to the sentencing stage.[87] Preferential treatment may occur at the earlier processing stages, but once the most serious offenders and offenses have been weeded out, the courts treat those remaining like all other cases.

Second, with respect to the marked contrast noted for District III, we have argued elsewhere that a highly proactive attitude toward the prosecution of white-collar crime may lead to a higher rate of conviction coupled with a pattern of sentence leniency.[88] We explain this by emphasizing that white-collar cases present special evidentiary problems and often involve multiple defendants, some of whom may testify for the state. In the bargaining for testimony, the government may exchange sentence leniency for needed evidence.

Third, our interviews with judges and United States Attorneys in District III lead to the identification of several factors that might contribute to increased convictions and lighter sentences. These factors include expanded manpower enabling more numerous prosecu-

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87. *See* notes 52-55 *supra* and accompanying text.

88. Hagan, Nagel & Albonetti, *The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts,* 45 AM. SOC. REV. 802, 818 (1980).

tions; a deliberate emphasis by the U.S. Attorney on public corruption, and sophisticated trial lawyers working closely with other law enforcement agencies.[89] Judges in District III expressed considerable sentiment against imprisoning white-collar offenders, emphasizing many of the arguments for leniency that elsewhere evoke a greater skepticism.[90] Preferential sentencing appears to be the price paid for expanded prosecution of white-collar crime.

CONCLUSION

Researchers and judges generally presume that white-collar crime is preferentially treated. This assumption pervades the calls for policy reform that repeatedly have sought to reduce sentencing

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89. Since there were no published data or descriptive research to help us illuminate the reasons for the uniqueness of District III, we posed the question to the judges and the United States Attorneys of this District. From some Assistant United States Attorneys we learned:

[1] "Before 1971, our office was sorely understaffed. When X took office, we doubled in size. Since then we have doubled again. As our manpower increased, so did our potential for proactive prosecution."

[2] "We wanted to become the best United States Attorneys office in the country. It was a feeling, an attitude, that we are going to be the best, regardless of other districts."

[3] "Official corruption cases can't just be found. They have to be there but you have to go out and find them."

[4] "X (U.S. Attorney) made the pursuit of official corruption and white-collar crime our top priority. We put aside the attitude that public officials and white-collar criminals should be left alone after allegations."

[5] "We had good relations here with the Strike Force. . . . Our postal inspectors were more receptive to help investigators."

90. From interviews with some judges in District III we learned:

[1] "We were suffering from a collective prosecutorial guilt about our inattention to white-collar crimes."

[2] "The Justice Department saw a sophisticated judiciary here and an attitude of trust-busterism."

[3] "Our judges are not going to wink away anti-trust cases. We love them . . . we find them challenging."

As to why the jurisdiction produces a high rate of convictions coupled with a pattern of preferential treatment at sentencing for white-collar criminality, the judges suggested:

[1] "The white-collar offender can do community service . . . the postal guy stealing watches, what can he teach?"

[2] "A badge of guilt is enough for a white-collar offender. He doesn't need jail. A badge of guilt doesn't, however, punish the nonwhite-collar offender."

[3] "I start with probation. Jail is for violence, harm done to others, danger to hard working people. I identify with the victim. But also know the ramifications of punishment for establishment persons."

[4] "If you give a white-collar guy a long sentence and he goes to the wrong place, he can't cope. They'll totally destroy the guy. The lower class, especially the recidivist, he can cope."

And finally, linking the preference for tough prosecution and modest sentences, one judge said:

> In blue-collar cases, you go after the defendant. In white-collar cases, you're after the system — the industry — the defendant may be less important. The sentence may be less critical than the processing — the prosecution. The publicity of the prosecution may achieve the desired impact. You don't need quite the Greek tragedy of a whole viking funeral.

disparities.[91] Yet, with the exception of only one of the ten jurisdictions studied, we do not find empirical support for this long standing assumption. We are not prepared to argue that the problem of sentence disparity for white-collar crime is trivial or imaginary. At the same time, we are not prepared to affirm the proposition that persons convicted of white-collar offenses uniformly receive preferential treatment in sentencing. Our research suggests a complex pattern, tied, in some ways, to the pattern of prosecution. While we do report some evidence of preferential sentencing of persons convicted of white-collar crimes, this pattern appears only in one federal district, the same district distinguished by its proactive prosecutorial policy toward white-collar crime and its resultant greater number of white-collar convictions. There is an absence of clear evidence of sentence disparity in the other nine districts. This evidence may suggest the need to rethink some of the assumptions behind the contemporary critique of white-collar criminal sentencing, as well as the policy proposals that critique has engendered.

We leave the question for the future whether this reflects an effort to correct prior sentence leniency for persons convicted of white-collar crimes, a temporary accommodation to the Watergate scandal, or the beginning of a major trend. Additional research will help to clarify these persistent questions. We offer this study as a foundation for the work to come.

91. As early as 1877, reformers had called for explicit standards to minimize sentencing disparities. *See* E. COX, PRINCIPLES OF PUNISHMENT AS APPLIED IN THE ADMINISTRATION OF THE CRIMINAL LAW BY JUDGES AND MAGISTRATES (1877). Contemporary reformers have renewed the attack on sentence disparities. *See, e.g.*, M. FRANKEL, CRIMINAL SENTENCES (1973); Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978); Kaufman, *The Sentencing Views of Yet Another Judge*, 66 GEO. L.J. 1247 (1978).

The reformers' antipathy to presumed sentencing disparities found legislative expression in the various efforts to codify the federal criminal law. In particular, the compromise codification bill that passed the Senate, S. 1437, 95th Cong., 2d Sess. (1978), included a number of provisions designed to reduce sentence disparities and made particular provisions for white collar criminal sentencing. *See* 124 CONG. REC. S860 (1978) for the Senate's approval. The bill, however, never became law.

Specifically, the bill included a Sentencing Commission to recommend appropriate, determinate sentences for various categories of offenses. Judges who imposed a sentence other than that which the Commission's guidelines recommended would have to state their reason for this deviation, and their decision and its rationale would be subject to appellate review. *See* S. REP. No. 605, 95th Cong., 1st Sess. 922 (1977); S. 1437, 95th Cong., 1st Sess. §§ 2003(b), 3725 (1977). The findings reported here suggest that the assumption of significant sentencing disparities underlying such proposals should not be casually adopted.

Table 1. Distributions of Offender-Offense Combinations in Ten Federal District Courts*

Offender-Offense Combinations	District										Row Total
	I	II	III	IV	V	VI	VII	VIII	IX	X	
Less Educated/	12.2%	7.0%	9.2%	8.9%	9.0%	4.9%	8.9%	12.4%	11.2%	16.2%	
Convicted of a	72.7%	74.5%	63.7%	82.3%	77.7%	70.0%	70.2%	74.7%	68.8%	76.1%	73.0%
Common Crime	8.9%	5.1%	6.7%	6.5%	6.6%	3.6%	6.5%	9.1%	8.2%	11.8%	
	(582)	(333)	(438)	(424)	(428)	(233)	(422)	(592)	(535)	(769)	(4756)
College Educated/	13.9%	8.9%	9.3%	4.3%	6.8%	4.6%	12.3%	11.3%	11.0%	17.6%	
Convicted of a	16.0%	18.3%	12.5%	7.8%	11.4%	12.6%	18.8%	13.1%	13.0%	16.0%	14.1%
Common Crime	2.0%	1.3%	1.3%	0.6%	1.0%	0.6%	1.7%	1.6%	1.5%	2.5%	
	(128)	(82)	(86)	(40)	(63)	(42)	(113)	(104)	(101)	(162)	(921)
Less Educated/	11.6%	3.2%	15.9%	5.9%	6.6%	8.3%	7.2%	10.2%	20.5%	10.4%	
Convicted of a	7.6%	3.8%	12.2%	6.0%	6.4%	13.2%	6.3%	6.8%	13.9%	5.4%	8.1%
White-Collar	0.9%	0.3%	1.3%	0.5%	0.5%	0.7%	0.6%	0.8%	1.7%	0.8%	
Crime	(61)	(17)	(84)	(31)	(35)	(44)	(38)	(54)	(108)	(55)	(527)
College Educated/	9.6%	4.8%	25.5%	6.4%	8.0%	4.5%	8.9%	13.7%	10.8%	8.0%	
Convicted of a	3.7%	3.4%	11.6%	3.9%	4.5%	4.2%	4.7%	5.4%	4.4%	2.5%	4.8%
White-Collar	(30)	(15)	(80)	(20)	(25)	(14)	(28)	(43)	(34)	(25)	(314)
Crime											
Column Total	12.3%	6.9%	10.6%	7.9%	8.5%	5.1%	9.2%	12.2%	11.9%	15.5%	
	(801)	(447)	(688)	(515)	(551)	(333)	(601)	(793)	(778)	(1011)	(6518)

*Each cell of this table is first percentaged by row (percent of that offender-offense combination), second by column (percent of offenders in that District), and third in relation to the full table. The actual number of cases in each cell is indicated in parentheses.

Table 2. Variables, Values and Descriptive Statistics*

Variables	Values	$\bar{X}$	s	N	Adjusted %
1. Prior Convictions	Actual Number of Adult Felony Convictions	.99	2.05		
2. Statutory Seriousness	Maximum Sentence Allowed by Statute	7.77	5.82		
3. Number of Charges	Actual Number	2.12	1.92		
4. Multiple Defendants	No = −1	−.47	.88	4784	73.4%
	Yes = 1			1734	26.6%
5. Ethnicity	Nonwhite = −1	.33	1.00	3153	48.4%
	White = 1			3365	51.6%
6. Sex	Male = −1	−.68	.73	5471	83.9%
	Female = 1			1047	16.1%
7. Employment	Unemployed = −1	.02	1.00	3207	49.2%
	Employed = 1			3311	50.8%
8. Physical Illness	Not Under Treatment = −1	−.62	.79	5268	80.8%
	Under Treatment = 1			1250	19.2%

Table 2. Continued

Variables	Values	$\bar{X}$	s	N	Adjusted %
9. Mental Illness	Not Under Psychiatric Treatment = −1	−.94	.34	6320	97.0%
	Under Psychiatric Treatment = 1			198	3.0%
10. Age	Actual Age	31.70	10.09	6518	
11. Bail Status	Personal Recognizance = 1	4.28	2.95	1331	20.4%
	Unsecured Bond = 2			838	12.9%
	Unsecured Bond plus supervision or other conditions of bail = 3			1664	25.5%
	10% Cash deposit = 4			316	4.8%
	10% Cash deposit plus supervision or other condition of bail = 5			405	6.2%
	Collateral = 6			16	.2%
	Collateral plus supervision or other conditions of bail = 7			33	.5%
	Surety Bond = 8			1089	16.7%
	Surety Bond plus supervision or other condition of bail = 9			700	10.7%
	Remand = 10			126	1.9%

Table 2. Continued

Variables	Values	$\bar{X}$	s	N	Adjusted %
12. Plea	Pleaded Not Guilty = −1			797	12.2%
	Pleaded Guilty = 1			5721	87.8%
13. College Educated/ White-Collar Crime	Dummy Variable with Less Educated/Reasons Sentenced for Common Crime as Reference Category	.05	.21	314	4.8%
14. Less Educated/ White-Collar Crime	Dummy Variable with Less Educated/Reasons Sentenced for Common Crime as Reference Category	.14	.35	921	14.1%
15. College Educated/ Common Crime	Dummy Variable with Less Educated/Reasons Sentenced for Common Crime as Reference Category	.73	.44	4756	73.0%
16. In/Out Decision	Non-Custodial Sentence = −1	.06	1.00	3060	46.9%
	Custodial Sentence = 1			3458	53.1%
17. Sentence Severity	Suspended Sentence or Probation w/o Supervision = 0	6.96	6.24	98	1.5%
	Fine and/or Restitution = 1			143	2.2%
	Probation or Probation plus fine and/or Restitution 1-12 months = 2			523	8.0%
	Probation or Probation plus fine and/or Restitution 13-36 months = 3			1679	25.8%

Table 2. Continued

Variables	Values	$\bar{X}$	s	N	Adjusted %
	Incarcerated in Custody of Attorney General 1-6 months or Incarcerated in Custody of Attorney General 1-6 months plus fine and/or Restitution or Probation or Probation plus fine and/or Restitution 37 months or more = 4			876	13.4%
	Split Sentence or Split Sentence plus fine and/or Restitution (6 months or less) = 5			755	11.6%
	Incarcerated in Custody of Attorney General 7-12 months or Incarcerated in Custody of Attorney General 7-12 months plus fine and/or Restitution = 6			206	3.2%
	Mixed Sentence 6-12 months = 7			139	2.1%
	Incarcerated in Custody of Attorney General 13-24 months or Incarcerated in Custody of Attorney General 13-24 months plus fine and/or Restitution = 8			437	6.7
	Mixed Sentence 13-24 months = 9			61	.9%
	Incarcerated in Custody of Attorney General 25-36 months or Incarcerated in Custody of Attorney General 25-36 months plus fine and/or Restitution = 10			396	6.1%
	Mixed Sentence 25-36 months = 11			37	.6%
	Incarcerated in Custody of Attorney General 37-48 months or Incarcerated in Custody of Attorney General 37-48 months plus fine and/or Restitution = 12			194	3.0%
	Mixed Sentence 37 months or more = 13			51	.8%

Table 2. Continued

Variables	Values	$\bar{X}$	s	N	Adjusted %
	Incarcerated in Custody of Attorney General 49-60 months or Incarcerated in Custody of Attorney General 49-60 months plus fine and/or Restitution = 14			249	3.8%
	Incarcerated in Custody of Attorney General 61-84 months or Incarcerated in Custody of Attorney General 61-84 months plus fine and/or Restitution = 17			266	4.1%
	Incarcerated in Custody of Attorney General 85-120 months with or without fine and/or Restitution = 21			220	3.4%
	Incarcerated in Custody of Attorney General 120 months or more or Incarcerated in Custody of Attorney General 120 months or more plus fine and/or Restitution = 30			188	2.9%
18. Length of Imprisonment		44.41	59.73		

*The following symbols are used in this table: Mean ($\bar{X}$), standard deviation (s), number of cases (N).

Table 3. Regression of Sentencing Decisions on Independent Variables in Ten Federal District Courts*

Independent Variables	In/Out Decision (N=6518)					Sentence Severity Scale (N=6518)					Months of Imprisonment (N=3387)				
	r	b	B	F	S	r	b	B	F	S	r	b	B	F	S
Prior Convictions	.22	.06	.13	117.57	.01	.23	.39	.13	136.44	.01	.14	2.31	.09	32.93	.01
Statutory Seriousness	.14	.01	.07	42.80	.01	.29	.22	.21	383.00	.01	.35	2.83	.31	393.37	.01
Number of Charges	.07	.04	.07	40.36	.01	.05	.21	.07	39.30	.01	.03	2.13	.07	22.26	.01
Multiple Defendants	.09	.09	.08	49.29	.01	.09	.48	.07	43.15	.01	.02	1.36	.02	1.86	NS
Ethnicity	−.03	−.03	−.03	9.24	.01	−.07	−.39	−.06	35.12	.01	−.07	−3.62	−.06	14.96	.01
Sex	−.20	−.19	−.14	145.64	.01	−.16	−.84	−.10	85.02	.01	−.10	−6.88	−.07	18.92	.01
Employment	−.14	−.08	.08	52.09	.01	−.17	−.52	−.08	59.10	.01	−.11	−2.35	−.04	6.04	.05
Physical Illness	−.01	−.01	.00	.10	NS	−.02	−.01	.00	.01	NS	−.01	.70	.10	.34	NS
Mental Illness	.01	.01	.00	.14	NS	.00	−.07	.00	.15	NS	−.01	−1.87	−.01	.53	NS
Age	.00	.00	−.01	.29	NS	−.05	−.02	−.03	6.30	.05	−.07	−.19	−.03	2.99	NS
Bail Status	.41	.11	.33	785.51	.01	.48	.80	.38	1197.98	.01	.32	4.98	.25	236.91	.01
Plea	−.11	−.16	−.05	23.45	.01	−.14	−1.46	−.08	55.56	.01	−.13	−14.25	−.09	32.30	.01
College Educated/White-Collar Crime	−.07	−.01	.00	.01	NS	−.09	.05	.00	.03	NS	−.09	−2.05	−.01	.15	NS
Less Educated/White-Collar Crime	−.10	−.01	−.01	.02	NS	−.12	.09	.00	.12	NS	−.12	−.46	.00	.01	NS
College Educated/Common Crime	−.00	.02	.01	.22	NS	−.03	−.24	−.01	1.60	NS	−.05	−6.19	−.04	5.53	.05
	R^2=.23 Intercept=−.56					R^2=.32 Intercept=2.45					R^2=.23 Intercept=−2.47				

*The following symbols are used in this table: Pearson product-moment correlation coefficient (r), unstandardized regression coefficient (b), standardized regression coefficient (B), F-value (F), significance level (S), proportion of variance explained (R^2).

Table 4. Regression of Sentencing Decisions on Independent Variables in District III*

Independent Variables	In/Out Decision (N=688)					Sentence Severity Scale (N=688)					Months of Imprisonment (N=398)				
	r	b	B	F	S	r	b	B	F	S	r	b	B	F	S
Prior Convictions	.19	.06	.11	8.45	.01	.24	.47	.14	16.50	.01	.17	1.90	.09	3.56	.05
Statutory Seriousness	.11	.00	−.02	.34	NS	.21	.05	.05	2.08	NS	.25	.96	.12	6.28	.05
Number of Charges	.00	.03	.07	3.43	NS	−.02	.11	.05	1.85	NS	−.08	−.33	−.02	.15	NS
Multiple Defendants	.02	.08	.07	4.28	.05	−.03	.27	.05	1.95	NS	−.06	−.34	−.01	.03	NS
Ethnicity	−.08	−.02	−.02	.33	NS	−.03	.35	.06	3.18	NS	.06	5.69	.14	8.34	.01
Sex	−.09	−.13	−.08	4.84	.05	−.10	−.57	−.06	3.42	NS	−.10	−3.47	−.05	1.02	NS
Employment	−.28	−.19	−.19	23.09	.01	−.26	−.67	−.12	11.25	.01	−.16	−2.64	−.06	1.77	NS
Physical Illness	.06	.03	.02	.42	NS	.08	.29	.04	1.34	NS	.09	3.97	.08	2.62	NS
Mental Illness	.05	.14	.05	2.09	NS	.04	.55	.04	1.16	NS	.04	5.28	.05	1.26	NS
Age	−.08	.00	.01	.08	NS	−.09	.00	−.01	.04	NS	−.05	.10	.03	.21	NS
Bail Status	.21	.06	.15	16.37	.01	.37	.72	.30	76.62	.01	.37	4.93	.27	34.65	.01
Plea	−.13	−.18	−.06	3.14	NS	−.20	−2.02	−.13	13.97	.01	−.18	−13.58	−.12	7.39	.01
College Educated/White-Collar Crime	−.14	−.37	−.12	7.95	.01	−.22	−2.79	−.16	16.52	.01	−.20	−24.31	−.16	9.04	.01
Less Educated/White-Collar Crime	−.23	−.67	−.22	32.48	.01	−.18	−2.84	−.17	21.26	.01	−.16	−24.46	−.14	8.97	.01
College Educated/Common Crime	−.02	−.11	−.04	1.07	NS	−.08	−1.66	−.10	8.58	.01	−.14	−16.59	−.13	8.25	.01
	R^2=.19 Intercept=.23					R^2=.29 Intercept=6.46					R^2=.27 Intercept=25.38				

*See Table 3 for definition of symbols.

Table 5. Regression of Sentencing Decisions on Independent Variables in Remaining Districts*

Independent Variables	In/Out Decision (N=5830)					Sentence Severity Scale (N=5830)					Months of Imprisonment (N=2989)				
	r	b	B	F	S	r	b	B	F	S	r	b	B	F	S
Prior Convictions	.23	.06	.13	109.67	.01	.23	.37	.12	118.50	.01	.13	2.33	.09	29.06	.01
Statutory Seriousness	.15	.01	.08	50.36	.01	.29	.24	.22	395.59	.01	.36	2.96	.32	376.98	.01
Number of Charges	.07	.04	.07	38.34	.01	.06	.22	.07	37.09	.01	.04	2.45	.08	23.72	.01
Multiple Defendants	.10	.08	.07	38.18	.01	.10	.49	.07	38.63	.01	.03	1.72	.03	2.41	NS
Ethnicity	–.02	–.03	–.03	7.58	.01	–.08	–.46	–.07	43.10	.01	–.09	–4.72	–.08	21.17	.01
Sex	–.20	–.19	–.14	134.52	.01	–.17	–.86	–.10	80.98	.01	–.10	–7.35	–.07	18.27	.01
Employment	–.12	–.07	–.07	34.44	.01	–.16	–.49	–.08	46.91	.01	–.10	–2.24	–.04	4.60	.05
Physical Illness	–.02	–.01	–.01	.15	NS	–.02	–.03	–.00	.11	NS	–.02	.49	.01	.14	NS
Mental Illness	.00	.00	.00	.00	NS	–.00	–.13	–.01	.44	NS	–.02	–2.88	–.02	1.00	NS
Age	.00	.00	–.01	.70	NS	–.04	–.02	–.03	7.50	.01	–.06	–.25	–.04	4.43	.05
Bail Status	.43	.12	.35	827.43	.01	.49	.82	.39	1135.84	NS	.31	5.04	.24	206.08	.01
Plea	–.11	–.15	–.05	16.83	.01	–.04	–1.37	–.07	42.42	.01	–.12	–14.96	–.09	29.34	.01
College Educated/White-Collar Crime	–.06	.02	.01	.12	NS	–.08	.36	.01	1.00	NS	–.08	–.90	.00	.02	NS
Less Educated/White-Collar Crime	–.08	.10	.03	4.35	.05	–.12	.50	.02	3.41	NS	–.11	2.99	.01	.40	NS
College Educated/Common Crime	–.00	.03	.01	.59	NS	–.02	–.10	–.01	.25	NS	–.04	–4.67	–.03	2.67	NS
			R^2=.25 Intercept=–.65					R^2=.34 Intercept=2.06					R^2=.24 Intercept=–3.81		

*See Table 3 for definition of symbols.