Make White-Collar-Offenders Pay (Additional) Tax and Subject Them to Technological Incarceration Instead of Being a Tax Burden on Society

MIRKO BAGARIC*
THEO ALEXANDER**
BRIENNA BAGARIC***

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* © 2023 Mirko Bagaric. Professor, Dean of Law, Swinburne Law School, Melbourne. Professor, Dean of Law, Swinburne Law School, Melbourne. This research into criminal justice reform is a part of a research program of the Institute of Public Affairs.
** © 2023 Theor Alexander. Associate Professor of Law, Deakin University, Melbourne.
*** © 2023 Brienna Bagaric. Lecturer, Deakin Law School, Melbourne.

ABSTRACT

White-collar offenders do not scare people. There is no reason to be afraid of them. Yet, they are subjected to the most serious sanction in our legal system–prison. Every white-collar prisoner costs society over $30,000 annually to house. There are more intelligent, evidence-based approaches to dealing with white-collar offenders. The objectives for dealing with white-collar offenders should be to impose penalties that are proportionate to the seriousness of the crimes; ensure that the sanctions do not unnecessarily burden taxpayers and compel offenders to reimburse their ill-gotten gains. The proceeds from greed-motivated offenders can be diverted in a community-enhancing manner by compelling them to pay restitution for their crimes. Rather than punishing white-collar offenders in a way that further depletes the public revenue, we should compel them to remedy the damage they have caused by paying additional tax. Two new sanctions should be developed to deal with white-collar offenders. The first is an offender taxation levy. The levy would operate so that two-thirds of all income derived by the offender would be payable as taxation. The total payable would be double the amount wrongfully obtained by the offender. In addition to this, the offender would be required to pay a one-off fine equal to the amount wrongfully obtained by the offence. The second is technological incarceration for serious white-collar offenses. Modern monitoring and sensor technology can be used to physically confine the movements of offenders to precise locations while monitoring their actions in real-time to greatly diminish the prospect of offending. The sanction can be operationalized in a number of different ways so that it is tailored to match the severity of the crime. Not only can the length of the monitoring be varied but the

area of confinement can also be controlled. These reforms would enhance the integrity of the criminal justice system and increase public revenue–freeing up funding for the provision of important societal services and goods.

I. INTRODUCTION

We dislike white-collar offenders, yet they do not scare us. There is no reason to be afraid of them. Yet, white-collar offenders are subjected to the most serious sanction in our system of law–prison.[1] Every white-collar prisoner costs society over $30,000 annually to house.[2] This is self-defeating. White-collar offenders often evade tax. Imprisoning them further depletes public revenue. Rather than the community paying to punish white-collar offenders, we should compel them to remedy the damage they caused by paying additional tax.

This is especially so in light of a number of other distinguishing aspects of white-collar offenders. These differences provide the basis for the development of new forms of sanctions to deal with them. White-collar offenders do not constitute a risk to the safety of people in the community; their crimes often cause no harm to any individual; they often have assets and high-level skills; they already suffer collateral harm through reputational damage; their crimes often cause no more harm than government waste and we can directly attack the motivation for their crime–greed.

The contrast between white-collar and other offenders is especially important given the current crime-surge in the United States. Violent crime, including homicide, has increased at unprecedented levels in recent years.[3] This has resulted in a large decline in the community's sense of safety and a call for harsher penalties to be imposed on criminals.[4] It is important to demarcate white-collar offenses from the current crime surge.

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1. The obvious exception being capital punishment, which is now rarely used. There were eleven executions in total in 2021: *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf [https://perma.cc/WZ5J-ZC9M] (last updated June 24, 2022).

2. *See infra* Part VII.

3. David Graham, *America is having a Violence Wave, Not a Crime Wave*, ATLANTIC (Sept. 29, 2021), https://www.theatlantic.com/ideas/archive/2021/09/america-having-violence-wave-not-crime-wave/620234/ [https://perma.cc/NHB7-DS2D].

4. Chris Jackson, *As Public Safety Tops the Agenda, Americans Want Both Order and Justice*, IPSOS (July 8, 2021), https://www.ipsos.com/en-us/news-polls/usa-today-crime-and-safety-2021 [https://perma.cc/TTH6-JLNC]; Josiah Bates, *U.S. Crime Is Still*

There are also important differences between the profile of white-collar and other types of offenders. White-collar offenders are typically married; well-educated; middle-class; have strong ties to their community and family; have no prior criminal history and they are in their late thirties or early forties.[5] Hence, they are often in a position where they can reimburse society for their crimes and have a strong motivation to remedy their harm. Violent and sexual offenders, by contrast, are generally young males with poor impulse control, low levels of education and previous convictions for serious offenses.

Moreover, the key sentencing objectives that are used to justify harsh penalties for white-collar offenders are flawed. These objectives are general deterrence and the desire to maintain the integrity of the market system.[6] Empirical data shows that, contrary to common sense, harsh sanctions do not deter crime.[7] The strongest deterrent to crime is a perceived high risk of detection, as opposed to the exact nature of the penalty that can be imposed if an offender is apprehended.[8] Further, the link between the frequency of white-collar offenses and confidence in the market system has been debunked.[9] There is no reduction in market activities as a result of white-collar offenses.

There are more intelligent, evidence-based approaches to dealing with white-collar offenders. The objectives for dealing with white-collar offenders should be to (i) impose penalties that are proportionate to the seriousness of the crimes; (ii) ensure that the sanctions imposed on them do not unnecessarily burden taxpayers and (iii) compel them to contribute ill-gotten gains back to the community.

White-collar offenders are motivated by greed. The proceeds from this motivation can be diverted in a community-enhancing manner by compelling

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Dramatically Higher Than Before the Pandemic, TIME (July 28, 2022), https://time.com/6201797/crime-murder-rate-us-high-2022/ [https://perma.cc/B78F-PZ4F]; Josh Hammer, *Recover the Moral Imperative of Law and Order*, CITY J. (Mar. 18, 2021), https://www.city-journal.org/recover-the-moral-imperative-of-law-and-order?wallit_nosession=1 [https://perma.cc/MY82-7AG5].

5. Paul M. Klenowski & Kimberly D. Dodson, *Who Commits White-Collar Crime, and What Do We Know About Them? in* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 101 (Shanna R. Van Slyke, Michael L. Benson, & Francis T. Cullen eds., 2016), https://academic.oup.com/edited-volume/28134/chapter-abstract/212331292?redirectedFrom=fulltext [https://perma.cc/8PFF-8NAN].

6. *See infra* Part V.

7. *See infra* Part VI.

8. *Id.*; Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349 (2014).

9. *Id.*; Mirko Bagaric, Jean Du Plessis & Jacqueline Silver, *Halting the Senseless Civil War Against White-Collar Offenders: The Conduct Undermined the Integrity of the Markets and Other Fallacies*, 2016 MICH. ST. L. REV. 1019, 1019–90.

them to make additional contributions to the community. This can be achieved by developing two new criminal sanctions.

The first new sanction is a white-collar offender taxation levy. The levy would operate so that two-thirds of all income derived by such offenders would be payable as taxation. The duration of the levy would be commensurate with the severity of the offending and the amount payable would be no less than double the amount wrongfully obtained by the offender. In addition, offenders would be required to pay a one-off fine equal to the amount wrongfully obtained by them. This would mean that, in effect, the offender would be required to pay back at least three times the amount they took.

Further, offenders who commit serious white-collar crimes would be subjected to technological incarceration. The key feature of this sanction is the use of modern monitoring and sensor technology, which can be used to physically confine the movements of offenders to precise locations while monitoring their actions in real-time to greatly diminish the prospect of offending.[10] The sanction would build on the design features of home detention orders, which use Global Positioning System tracking and are already used in many parts of the United States. The equipment would also detect if offenders engage in suspicious movements, and all of the offender's electronic communications would be monitored to ensure that they do not engage in irregular transactions.

The sanction can be operationalized in several different ways so it is tailored to match the severity of the crime. Not only can the length of the monitoring obviously be varied (from say six months to ten years) but the area of confinement can also be controlled. Thus, for example, offenders who have committed relatively serious white-collar offenses would have their movement confined to two kilometres from home (except for their workplace) and within this zone be precluded from places such as restaurants and bars.

The combination of the offender taxation levy and technological incarceration would significantly curtail the freedom of white-collar offenders while ensuring they pay back their ill-gotten gains. In doing so, these offenders can meaningfully contribute back to society rather than being a drain on the community's resources.

In the next part of the Article, we deal with definitional issues–and, in particular, what constitutes white-collar crime. In Parts III and IV, we

10. Mirko Bagaric, Dan Hunter, & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73 (2018).

discuss the distinctive traits of white-collar offenders and white-collar offenses. This is followed in Part V by a discussion of the current approach to sentencing white-collar criminals. These objectives are evaluated in Part VI. Reform proposals are set out in Part VII. In the concluding remarks, the key recommendations of the Article are summarized.

While the focus in the Article is on the approach to white-collar offenses in the United States, we also discuss and evaluate, for comparative reasons, the approach in Australia. It emerges that despite the considerably different sentencing systems, similar inadequacies exist in both jurisdictions, thereby highlighting the need for evidence-based reform in this area.

II. DEFINING WHITE-COLLAR CRIME

In the 1970s and 1980s, offense-based definitions of white-collar crime became more popular. Offense-based definitions included organizational or corporate crime, as well as individual crime.[11] Herbert Edelhertz, a federal prosecutor from the U.S. Department of Justice, argued that white-collar crime should be defined by reference to the modus operandi and objectives of the offenders, rather than the characteristics of the individual offenders.[12] Edelhertz posited that the definition must be broader, because opportunities for white-collar crime offending were no longer confined to the elites and members of the upper middle classes.[13] Rather, society had become much more vulnerable to abuses of trust through the increase in marketing, distribution and variety of media through which consumer needs were being created.[14]

He defined white-collar crime in 1970 as "an illegal act or series of illegal acts committed by non-physical means and by concealment or guile to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."[15] As a starting point, Edelhertz identified four types of white-collar crime:

1. Personal crimes, which are committed by individuals on an individual basis (for example, credit card fraud, welfare fraud, and individual income tax violations);
2. Abuses of trust, which are committed in the course of an individual's occupation and in breach of a duty or loyalty owed to an employer or client (for example, embezzlement

11. John Braithwaite, *White Collar Crime*, 11 ANN. REV. SOC. 1 (1985).
12. *See generally* HERBERT EDELHERTZ, THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME 6 (1970).
13. *Id.* at 3.
14. *Id.* at 6–7.
15. *Id.* at 3.

by employees, insider trading, and bank violations by employees);
3. Business crimes, which are committed in furtherance of business operations, but not as the principal business pursuit (for example, competition law violations, tax violations, and food and drug violations); and
4. Confidence games, which are committed as the principal business pursuit (for example, Ponzi schemes, charity and religious frauds, and personal improvement schemes).[16]

However, Braithwaite contends that a definition limiting white-collar crime to "acts committed by non-physical means" diverts attention away from white-collar crimes that cause physical harm.[17] White-collar crimes that cause physical harm include unnecessary surgery, waste dumping, failure to label poisonous materials in the workplace, and the manufacture of faulty goods.[18] Braithwaite also notes that Edelhertz's definition does not require the criminal conduct to be committed in the course of the individual's occupation.[19] In relation to white-collar crime committed by individuals, Braithwaite argues that the definition should be neutral in terms of social standing, but include an occupational nexus,[20] which would ensure welfare and credit card frauds, or personal crimes as Edelhertz labels them, fall outside the definition.[21]

Geis, who believed that Edwin Sutherland's concept was too broad, and would fall into disuse unless it was tightened, initially attempted to limit the scope of white-collar crime to offenses by corporations, but later revised his definition to include crimes committed by individuals.[22] He also agreed with Braithwaite, suggesting that the offender specific element of Sutherland's definition should be retained, so that welfare cheats and credit card frauds would not be captured by the definition.[23]

16. *Id.* at 19–20, 73–75.
17. Braithwaite, *supra* note 11, at 18.
18. Gilbert Geis, *What is White-Collar and Corporate Crime?*, *in* WHITE-COLLAR AND CORPORATE CRIME: A DOCUMENTARY AND REFERENCE GUIDE 1, 16 (2011).
19. Braithwaite, *supra* note 11, at 18.
20. *Id.*
21. *Id.* at 19.
22. Gilbert Geis, *White-Collar Crime – What Is It?*, 3 CURRENT ISSUES CRIM. JUST. 9, 24 (1991).
23. *Id.*

Geis points out that Edelhertz's definition is not clear on whether an act can be a white-collar crime without formal adjudication.[24] Given the legalistic nature of Edelhertz's definition, it is submitted that pursuant to that definition, an act is only a white-collar crime if formally adjudicated as such. A divide therefore becomes apparent between legal scholars' and sociologists' definitions of white-collar crime. The former tend to be more formal, and the latter tend to be looser and more encompassing.

In their book *Criminal Behaviour Systems: A Typology*, Clinard and Quinney suggest that white-collar crime can be separated into two categories: occupational crime, and organizational or corporate crime.[25] Clinard and Quinney point out that in the decades that followed Sutherland's definition, the concept was gradually expanded to include offenses occurring in the course of any occupation, regardless of social class.[26] Following that trend, they defined occupational crime as crime committed by people at all socio-economic levels, that involve any "violation of the criminal law in the course of activity in a legitimate occupation".[27] This subcategory would therefore catch a photocopy room employee who happens across inside information and violates insider trading laws. Organizational or corporate crime refers to corporate officers offending against their corporation, as well as offenses committed by the corporation itself.

The second subcategory addresses the perceived confusion in Sutherland's definition in relation to corporations. Clinnard and Quinney complain that Sutherland condemned corporations for their crimes, but seemed to focus on the officials.[28] Indeed, Geis also highlighted the confusion in Sutherland's definition, and suggested that Sutherland's solution to the difficulty in deciding which of the corporation and its officials is the criminal, was to say that the crimes of the corporation are the crimes of the executives and managers.[29]

Braithwaite endorses Clinnard and Quinney's approach of separating white-collar crime into occupational and corporate subcategories.[30] He suggests that while the latter category is more homogenous than the former, and is conducive to a useful theory on crime, theories on the former category

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24. Geis, *supra* note 18.
25. *See* MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 64 (2d ed. 1973).
26. MARSHALL B. CLINARD & JOHN R. QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 172 (3rd ed. 1994).
27. *Id.*
28. *Id.*
29. Geis, *supra* note 18.
30. *See* Braithwaite, *supra* note 11.

of white-collar crime could be as elusive as general theories of white-collar crime.[31]

In the 1980s, a bifurcated approach to defining white-collar crime developed. The first approach, espoused by Geis, focused on the "structural positions of white-collar offenders, their control over property and people, and the ways in which those positions allow some to carry out white-collar crimes."[32] This approach does not look at prestige and status, which are mere perceptions in the community. The second approach focused on wrongdoing by corporations and by their officers acting in corporate capacities, along with the harm caused to the environment and to individuals.[33] In the same decade, the U.S. Department of Justice, Bureau of Justice Statistics, conducted research into white-collar crime and defined it as:

> [n]onviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation.[34]

This is an example of the first approach, where the focus is on the offender's special occupational skills and opportunities, rather than their social status. It is also an example of a formalistic/legalistic definition.

In the early 1990s, the Yale White-Collar Crime Project[35] also used a similar definition to Edelhertz's in that it removed the element of high social status, respectability and trust. This study suggested that the opportunities to commit white-collar crime in Sutherland's time were centralized in the hands of the elite. In modern times, with the advent of computers and the internet, increased access to education, and the growth in white-collar jobs, opportunities for white-collar criminality are widespread among the middle class. The authors wrote:

> Contrary to the portrait of white-collar crime generally presented by scholars and in the press, we find a world of offending and offenders that is very close to the everyday lives of typical Americans . . . the majority [of offenders] occupy

31. *Id.*
32. DAVID WEISBURD, STANTON WHEELER, ELIN WARING, &V NANCY BODE, CRIMES OF THE MIDDLE CLASS: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS 8 (1991).
33. *Id.*
34. BUREAU JUST. STAT., U.S. DEP'T JUST., DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (2d ed. 1981) [hereinafter DICTIONARY].
35. WEISBURD ET AL, *supra* note 32, at 8–9.

> positions in society that are neither far above nor far below the middle, and their crimes do not necessitate, nor do their defences rely upon, elite social status. Opportunities to commit these crimes are available to average Americans.[36]

Accordingly, the study defined white-collar crime as "economic offenses committed through the use of some combination of fraud, deception or collusion."[37] This definition lacks a connection to occupation, and therefore expands the study catchment beyond the middle class. Indeed, the study analyzed some offenses which are likely to be committed by many lower socio-economic offenders, otherwise than in the course of their occupation. By removing offender characteristics from the definition of white-collar crime, the investigators were able to select eight offenses that fell within the definition, then include in their study all convictions in relation to those offenses, irrespective of whether the offender was a bank executive or an unemployed person. The eight federal offenses studied were securities law violations, antitrust law violations, bribery, bank embezzlement, mail and wire fraud (offenses where the postal service or other regulated communication systems are used to defraud individuals or organizations), tax fraud, false claims and statements, and credit or lending institutions fraud.[38]

Expanding the definition to include the middle class was an approach favored by Weisburd, Waring and Chayet.[39] They argue that most people who are convicted of white-collar offenses belong to the middle class, and are not people of high status and respectability.[40] A more useful study, they suggest, does not exclude the bulk of people who are prosecuted and convicted of white-collar crimes.[41] Also in the 1990s, Susan Shapiro sought to liberate the concept of white-collar crime from existing the labels of "white-collar", "organizational/corporate", and "occupational".[42] These labels were said to focus on actors rather than acts, and do not provide any guidance on the characteristics of the acts committed or norms violated:

> Sutherland created the white-collar crime concept in order to bring the offenses of the elite into criminological theory and thereby to enrich knowledge in the discipline. Ironically, his pathbreaking work has in part had the opposite effect, segregating the rich and the poor and removing intensive inquiries about those of privilege from mainstream criminology . . . After 50 years, it is time to integrate

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36. *Id.* at 3.
37. DAVID WEISBURD, ELIN WARING & ELLEN F. CHAYET, WHITE-COLLAR CRIME AND CRIMINAL CAREERS 12 (2001).
38. *Id*
39. *Id.* at 9–11.
40. *Id.* at 9–10.
41. *Id.* at 10.
42. Susan Shapiro, *Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime*, 5 AM. SOC. REV. 347 (1990).

> the "white-collar" offenders into mainstream scholarship by looking beyond the perpetrators' wardrobe and social characteristics and exploring the modus operandi of their misdeeds and the ways in which they establish and exploit trust.[43]

This approach resembles Geis's focus on structural positions and opportunities to commit white-collar offenses. After casting aside Sutherland's traditional definition, Shapiro uses a less cited passage of his work as the foundation of her formulation:

> These varied types of white-collar crimes in business and the professions consist principally of violation of delegated or implied trust, and many of them can be reduced to two categories: (1) misrepresentation of asset values and (2) duplicity in the manipulation of power. The first is approximately the same as fraud or swindling; the second is similar to the double-cross.[44]

Thus, Shapiro defines white-collar crime as the violation or abuse of trust. Three possible violations or abuses of trust are offered: deception, self-interest and incompetence. The abuse of trust formulation of white-collar crime is not without its problems. Shapiro concedes that her definition does not completely divert attention away from actors. When analyzing deception, self-interest and incompetence, one must consider offender knowledge, intent and variability of talent and other offender characteristics.[45] Further, many deviant acts that fall within the rubric of white-collar crime under other definitions, such as waste dumping and price fixing, will not amount to white-collar crime under the abuse of trust model.[46]

Other commentators suggested that white-collar crime is just another form of criminal conduct, which should not be treated differently from other criminal conduct, and that "any theory of crime that makes claim to generality should apply without difficulty to the crimes of the rich and powerful, crimes committed in the course of an occupation, crimes in which a position of power, influence or trust is used for the purpose of individual or organizational gain".[47] Hirschi and Gottfredson suggest that analyzing white-collar crime separately from other forms of crime is useful

43. *Id.* at 362–63.
44. *Id.* at 347 (quoting Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 3 (1940)).
45. *Id*. at 357.
46. *Id*. at 354.
47. Travis Hirschi & Michael Gottfredson, *Causes of White-Collar Crime*, 25 CRIMINOLOGY 949, 952 (1987).

for policy purposes, including the control of white-collar crime, however, this does not mean it has different causes.[48]

Thus, we see that a workable and universal definition of white-collar crime has proved elusive.[49] However, "a working definition is crucial to the coherent analysis of existing jurisprudence, as well as to the process of informed decision-making and to any proposals for reform."[50]

Sutherland's formulation has never been abandoned. Instead, It has been refined in various ways. The various definitions that have succeeded Sutherland's definition all intersect with each other in some way.[51] For instance, definitions that focus on respectability or high status, definitions that deal with occupation, and definitions that speak of economic crime committed by non-physical means. People of higher status are more likely to be in white-collar occupations, and people in white-collar occupations are more likely to have the opportunity to commit economic crimes by non-physical means.[52] There is a core group of white-collar criminals who would be labelled as such by all the major definitions.

The tension between offender and offense-based definitions is longstanding. Green notes that lawyers seek definitions that focus on conduct with criminal law like characteristics, while sociologists and criminologists are more concerned with patterns of behavior and their causes.[53] The emerging trend, however, is to define white-collar crime by reference to both offender and offense characteristics. Modern definitions do not focus on the traditional offender characteristics of respectability and high social status, rather they focus on the structural positions, power, influence, and opportunities of the offender.

The most appropriate approach to defining white-collar crime is to follow the modern trend in combining offense and offender characteristics. This is because what are generally considered to be white-collar offenses may in fact be committed by common criminals, and people who are generally considered to be white-collar citizens may commit common offenses. A white-collar criminal is therefore a white-collar citizen who commits a white-collar offense.

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48. *Id*. at 349–50.

49. Mirko Bagaric & Theo Alexander, *A Rational Approach to Sentencing White-Collar Offenders in Australia*, 34 ADELAIDE L. REV. 317, 320 (2013).

50. *Id*.

51. *See* WEISBURD ET AL, *supra* note 32, at 5–9.

52. *See id*. at 5–6.

53. Stuart Green, *The Concept of White-Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 101, 104–05 (2004).

Thus, the appropriate definition of a white-collar crime is:

- The taking of money or property (such as shares) or avoiding a legal obligation (such as a tax liability);
- Without legal justification;
- By an individual in the course of a profession or occupation; and
- Where the individual is in a position of significant influence regarding the relevant transaction.[54]

There are several items to note about the scope of this definition. First, in terms of Edelhertz's four types of white-collar crime, the definition adopted in this Article encompasses abuses of trust, and business crimes. Second, it only includes conduct that amounts to a crime under the law as it stands. This means that conduct punishable by civil penalty only, is not included within the definition. Third, the requirement of *significant* power, trust or influence, excludes from the definition the photocopier who discovers inside information and breaches insider trading laws. Archetypal white-collar offenses are insider trading and taxation fraud.

Finally, it is conceded that white-collar crimes may be committed by corporations, however this definition is limited to individual offenders, due to this article's focus on sentencing trends applicable to individuals.

III. WHO COMMITS WHITE-COLLAR CRIME: THE PROFILE OF WHITE-COLLAR OFFENDERS

A considerable amount of research has been performed examining the profile of white-collar offenders.[55] White-collar offenses can be committed by anyone, however, it emerges that white-collar offenders tend to have the following traits. They:

1. Are married;
2. Are well-educated and have high-level skills;
3. Are middle class and have assets;
4. Have strong ties to their community and family;
5. Have no prior criminal history; and

54. *See* Bagaric & Alexander, *supra* note 49, at 320.

55. *See generally* W. S. Albrecht & M. B. Romney, *Surprising Profile of the White-Collar Criminal*, PROSECUTOR'S BRIEF (1979), https://www.ojp.gov/ncjrs/virtual-library/abstracts/surprising-profile-white-collar-criminal [https://perma.cc/RU55-G55P].

6. Are in their late thirties or early forties.[56]

These traits are different to that of most criminals. World-wide data shows that most crime is disproportionately committed by young men from deprived socio-economic backgrounds, who have little education (generally they have not completed secondary school) and who often have prior convictions.[57] Thus, white-collar offenders are considerably differently situated than other criminals. This is important for several reasons. First, the empirical data shows that offenders tend to age out of crime. Thus, older offenders are less likely to reoffend.[58] Moreover, white-collar offenders are generally middle-class and have assets and financial resources available to them. This means that in terms of punishing them, one option which is available is to extract resources from them, which can be applied to important social endeavors, such as health and education. This is generally not the case with other offenders, whose typical lower-socio economic background means that it is not feasible to punish them by depriving them of any resources.[59]

IV. HOW WHITE-COLLAR OFFENSES ARE DIFFERENT TO OTHER CRIMES

As noted above, white-collar offenders have a different profile compared to most other offenders. In addition to this, white-collar offenses are different to most other offenses. There are several factors which distinguish white-collar offenses from most other offense categories, namely:[60]

a. White-collar offenses often cause no (physical) harm to any individual (especially if they are committed against government revenue or involve manipulation of stocks);
b. We can often precisely measure in dollar terms the benefit from white-collar offenses and can match this exactly with a proportionate response;

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56. Paul M. Klenowski & Kimberly D. Dodson, *Who Commits White-Collar Crime, and What Do We Know About Them?*, *in* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 101, 102–03 (Shanna R. Van Syke et al eds., 2016) [hereinafter Klenowski].

57. Mirko Bagaric, *Rich Offender; Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 MINN. J. L. & INEQ. 1, 4, 11, 48–49 (2015).

58. *See id.* at 24–25; Families for Justice Reform, *The Older You Get: Why Incarcerating the Elderly Makes us Less Safe*, FAMM (last visited Apr. 11, 2023), https://famm.org/wp-content/uploads/Aging-out-of-crime-FINAL.pdf [https://perma.cc/BXW2-9LRA].

59. *See* Bagaric*, supra* note 57, at 10–13.

60. Theo Alexander, *Submission to the Senate Economics References Committee: Penalties for White Collar Crime*, Deakin Univ. L. Sch. 1, 6 (Mar. 30, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102843 [https://perma.cc/E78F-55WX] [hereinafter Alexander].

c. White-collar offenses often involve a breach of trust;
d. White-collar offenses are normally well planned or prolonged as opposed to spontaneous;
e. White-collar offenses often involve quantifiable losses which can be remedied through monetary restitution; and
f. White-collar offenders often face extra-curial sanctions, such as public opprobrium and reduced career or employment prospects, which may not necessarily be felt by offenders who commit more general crimes.

Many of these considerations demarcate white-collar offenses from many other offense types in important respects. More than half of the offenses for which offenders are imprisoned are sexual and violent offenses,[61] which as we discuss below have the greatest detrimental impact on victims.[62] From the perspective of harm caused, white-collar offenses are less serious than most offenses resulting in imprisonment. Moreover, many crimes are spontaneous and there is no way to quantify the harm caused by them, and generally it is impossible to remedy the exact harm–no amount of money can repair the damage inflicted on a rape or homicide victim. This is not the case with white-collar offenses. Most serious offenses are committed by people who have previously been to prison[63] and hence unlike first-time offenders (as is the case often with white-collar offenders), the stigma of a conviction and punishment does not meaningfully damage their (already tarnished) reputation.

Hence, we see that white-collar offenders often have a relatively different profile to other offenders, and white-collar offenders can be distinguished from many other offense types–certainly from the perspective of the type and amount of harm that is typically caused. These offense considerations should inform a different approach to white-collar offenses. This is discussed below.[64] Before moving to that part of the discussion, we provide an overview of the manner in which the sentencing system currently deals with white-collar offenses. In this Article, we focus principally on white-collar offenses in the United States. For comparative purposes, we also

61. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/factsheets/pie2020_allimages.pdf [https://perma.cc/VJ8B-PJUM].
62. *See infra* Part VI.
63. *See infra* Part VI.
64. *See infra* Part VI.

discuss the sentencing of white-collar offenders in Australia. It emerges that despite the strikingly different sentencing regimes in these countries, both systems make similar mistakes in sentencing white-collar offenders. Moreover, an examination of the approach to white-collar offending in Australia enables us to broaden the scope of our empirical analysis so far as relevant sentencing considerations are concerned.

V. THE EXISTING SENTENCING FRAMEWORK AND PENALTIES FOR WHITE-COLLAR OFFENDING

We now examine the legal framework for sentencing white-collar offenders. We start by providing an overview of the general sentencing structure, followed by a closer look at penalties for these offenses.

A. Sentencing Law in the United States: An Overview

Sentencing in the United States is not uniform. Each jurisdiction has its own discrete system. However, all states and the federal jurisdiction have a similar overarching framework. Key to this is their shared main objectives in the form of community protection, rehabilitation, general deterrence, specific deterrence, and retribution.[65] The objective which is accorded most weight is community protection,[66] which has been expressed most prominently through prescribed sentences for a large number of offenses.[67] Presumptive sentences apply in some form in all jurisdictions in United States.[68] These sentences are normally set out in sentencing grids, which list a number of considerations, with the main ones being criminal history

65. Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 3 (2001).

66. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 9 (Jeremy Travis et al eds., 2014).

67. *See id.* at 3.

68. Michael Tonry, *Remodeling American Sentencing: A Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 519 (2014); Presumptive sentencing is also one of the key distinguishing aspects of the United States' sentencing system compared to that of Australia (and most other sentencing systems in the world). *See* CONNIE DE LA VEGA ET AL, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 46–47 (2012) (noting that 137 of 168 surveyed countries had some form of minimum penalties, but none of the others were as wide-ranging or severe as in the United States).

scores[69] and offense severity.[70] Sentences set out in the charts have often being criticized for being too severe.[71]

The most extensively analyzed prescribed sentencing laws are in the *United States Sentencing Commission Guidelines Manual* (the "Federal Sentencing Guidelines").[72] Offense severity and prior criminal history are the main factors that inform the penalty level.[73] Prior criminal history weighs so heavily that in some instances it can nearly double the prescribed penalty. By way of example, an offense at level fifteen in the Guidelines attracts a presumptive penalty for a first-time offender of imprisonment for 18-24 months.[74] For an offender with thirteen or more criminal history points this increases to 41-51 months.[75] In *United States v. Booker*,[76] the Court held that the Federal Sentencing Guidelines are advisory and not

69. This is based mainly on the number, seriousness, and age of the prior convictions. *4 Factors That Affect Federal Sentencing*, HAGER & SCHWARTZ (Mar. 4, 2022), https://www.defendyourbrowardcase.com/blog/2022/march/4-factors-that-affect-federal-sentencing/ [https://perma.cc/S36G-M5YY].

70. Tonry, *supra* note 68.

71. *Id.* at 514; *see also* Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, *in* PREVIOUS CONVICTIONS AT SENTENCING 91 (Julian V. Roberts & Andrew von Hirsch eds., 2010). For further criticism of the Guidelines, *see* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 175 (2010); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006).

72. *See* U.S. SENT'G COMM'N, 2021 GUIDELINES MANUAL ANNOTATED 1 (2021), https://www.ussc.gov/guidelines [https://perma.cc/ 9EX6-FJN9] [hereinafter U.S. SENT'G COMM'N 2021].

73. *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1109 (2008).

74. U.S. SENT'G COMM'N 2021, *supra* note 72, at 407.

75. *Id.* The criminal history score ranges from 0 to 13 or more (worst offending record).

76. United States v. Booker, 543 U.S. 220, 222, 264 (2005) (holding that aspects of the Guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial).

mandatory.[77] Despite this, they are very influential and judges impose sentences within guidelines in approximately half of the cases.[78]

In addition to offense severity and criminal history, aggravating and mitigating factors also impact the choice of sanction.[79] Thus, to determine the appropriate guideline penalty, courts may factor in a number of mitigating and aggravating considerations.[80] Broadly, these come in two main types: adjustments[81] and departures.[82] In addition to this, pursuant to 18 U.S.C. § 3553, considerations that are not set out in the Guidelines can in exceptional cases be applied to justify departing from the sentencing range.[83]

B. White-Collar Sentencing Law in the United States

We now move from general sentencing provisions to look closely at those relating to white-collar offenses. In recent decades in the United States, a growing sense emerged that white-collar offenders were treated too leniently.[84] This understanding underpinned the *Sarbanes-Oxley Act*[85] which increased penalties for white-collar crimes by twenty-five percent.[86] In addition to this, amendments to the Federal Sentencing Guidelines came into effect

77. *Id.* ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); Rita v. Untied States, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 552 U.S. at 49 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); consequently, District Courts are required to properly calculate and consider the Guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. § 3553(a)(4)-(5) (2010).

78. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); *see also* Amy Baron-Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines' Prohibitions and Restrictions on Mitigating Factors* (Nov. 1, 2010) (rev. July 25, 2011), https://fln.fd.org/files/training/no-more-math-without-subtraction.pdf [https://perma.cc/H2TR-WMKU].

79. *See* U.S. SENT'G COMM'N 2021, *supra* note 72, at 406.

80. John B. Meixner Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395 (2022); Paul H. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, 57 HARV. J. ON LEGIS. 219, 220 (2020).

81. *See* U.S. SENT'G COMM'N 2021, *supra* note 72, ch. 3.

82. *Id.* ch. 5, pt. K.

83. *Id.* at 3C.1. commentary § 5; *see also* Gall v. United States, 552 U.S. 38, 40 (2007); Pepper v. United States, 131 S. Ct. 1229, 1247 (2011).

84. *See* Jamie Gustafson, *Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers*, 40 SUFFOLK U. L. REV. 685, 685–86 (2007).

85. *Id.* at 692.

86. *See* U.S. SENT'G COMM'N 2021, *supra* note 72, at § 2(B)(1)(1).

on November 1, 2015[87] which changed the definitions of some offense elements and significantly increased penalties for a range of white-collar offenses, so much so that some prosecutors and judges indicated that they were too harsh.[88]

Section 2B1.1 of the Federal Sentencing Guidelines sets out the framework for the sentencing of white-collar criminals[89] and establishes three main considerations that are relevant to the sentencing of such offenders: economic loss; the effect on the victim, and culpability.[90]

The most important factor that drives sentencing outcomes is loss. This is defined to mean the greater of the actual loss or intended loss.[91] The Guidelines stipulate that the base offense level for white-collar crimes is 6–8 levels.[92] The levels are then adjusted pursuant to a loss table.[93] "'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense."[94] "Intended loss (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation or an insurance fraud in which the claim exceeded the insured value)."[95] The Guidelines then set out the sentencing range based on a combination of the offense level and the offender's criminal history.[96]

The penalty level is directly impacted by the size of the loss. By way of example, if the loss is greater than $6,500, the offense level increases from two levels to thirty levels.[97] If the loss incurred was $6,500 or less an offender with no criminal history could be sentenced to up to six months imprisonment.[98] This escalates significantly as the loss increases. If the

87. *Id.*
88. Dana Liebelson, *Why Nobody Is Really Happy With New Guidelines For Punishing White-Collar Criminals*, HUFFINGTON POST (Apr. 22, 2015), http://www.huffingtonpost.com/2015/04/22/white-collar-sentencing-reform_n_7119826.html [https://perma.cc/TW9F-WXT8].
89. *See* U.S. SENT'G COMM'N 2021, *supra* note 72, § 2(B)(1)(1).
90. *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes*, A.B.A. CRIM. JUST. SEC. 1, 5 (Nov. 10, 2014), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf [https://perma.cc/ZVW4-WDUG].
91. *Id.* at application note 3(A).
92. *See* U.S. SENT'G COMM'N 2021, *supra* note 72, § 2(B)(1)(1).
93. *Id.* § 2(B)(1)(b)(1).
94. *Id.* at application note 3(A)(i).
95. *Id.* at application note 3(A)(ii).
96. *Id.*; *see* U.S. SENT'G COMM'N 2021, *supra* note 72, at 406.
97. *Id.* § 2(B)(1)(1).
98. *Id.* at 406.

loss is more than $550,000,000, then 30 points would be added to the offense level.[99] In penalty terms this entails that an offender with no criminal history could be sentenced to 97–121 months imprisonment.[100] If there are aggravating or mitigating factors present, this can alter the penalty.

The culpability of the offender also informs the penalty level.[101] Unlike the amount of loss, the determination of culpability is not formulaic and involves a degree of judgement. The main considerations that impact the level of culpability are the motive of the offender; the correlation between the loss and offender's gain; the level of planning and sophistication of the offense; the duration of the offending; the extent of the offender's role in the crime; the existence of any extenuating circumstances (such as coercion or distress) and whether the offender took steps to mitigate the offense (for example, voluntary cessation of the crime or restitution).[102] Culpability, unlike loss, does not attract a numeric score, instead it is receives a score of one to five after the above considerations are taken into account.[103]

The level of the penalty can also be escalated on account of the loss incurred by the victim. In particular, the penalty level is increased if there are more than one victim and when the substantial financial hardship is caused by the crime.[104] The penalty is also increased if the defendant targeted the victim as a result of a vulnerability, the defendant's offense level will be increased.[105] The converse also applies—if the victim contributed, this can decrease penalty severity.[106]

Thus, the federal jurisdiction has harsh penalties against white-collar offenders. In 2019, the United States Sentencing Commission released a report, *What Does Federal Economic Crime Really Look Like?*,[107] analyzing sentences for federal economic crime in 2017. This includes white-collar crime, however, the definition is slightly broader and includes: 'Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States'.[108]

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99. *Id.* § 2(B)(1)(1).
100. *Id.* at 406.
101. A.B.A., *supra* note 90, at 1.
102. *Id.*
103. *Id.*
104. U.S. SENT'G COMM'N 2021, *supra* note 72, § 2(B)(1)(1)(b).
105. A.B.A., *supra* note 90, at 5.
106. *See id.*
107. *What Does Federal Economic Crime Really Look Like?*, U.S. SENT'G COMM'N (Jan. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190130_Econ-Crime.pdf [https://perma.cc/Z5JA-SJWL].
108. *Id.* at 1.

It was noted that while convictions under more than 300 federal statutes fall under § 2(B)(1)(1), less than half of the offenders sentenced under this guideline were convicted under a statute that identified precise prohibited conduct and instead most offenders were convicted and sentenced pursuant to a generic statute that prohibits fraud in a general sense.[109]

The report focused on twenty-nine different types of economic crime and noted that the economic crime guideline accounted for approximately ten per cent of the entire federal caseload. Embezzlement and theft offenses comprised the largest portion of economic crimes (27.7%). Other specific offenses that account for five percent or more of the cases were credit card fraud (10%), financial institution fraud (8.8%), government benefits fraud (7.8%), health care fraud (7.4%)), identity theft (6.9%, and mail related fraud (5.8%).[110]

The report noted that economic offenders had a different age and education profile than other offender cohorts. On average, offenders sentenced under § 2(B)(1)(1) were five years older than the general cohort of federal offenders—forty-two years of age compared to thirty-seven years of age. This is underscored by the fact that fifty-two percent of economic crime offenders were older than forty years of age at sentencing, compared to thirty-two percent of all federal offenders.[111] Economic offenders were generally better educated than most other federal offenders. Nearly half (46%) of federal offenders had not completed high school compared to only fifteen of economic crime offenders.[112] Further, twenty-two percent of economic crime offenders had graduated from college; nearly four times the rate of all federal offenders (6%).

In terms of sentences imposed, the median amount of loss was $131,750, which correlated to a 8-level offense level increase. However, there was a considerable divergence in the amount of loss, with median loss amount of $2,105,620 for securities and investment fraud–which equates to a 16-level increase from the loss table. At the other end of the spectrum, the crimes with the lowest median loss amounts were mail related fraud ($1,815) and false statements ($0). Given that these two amounts were under $6,500, the median loss amount did not satisfy the threshold for an offense level increase from the loss table.[113]

109. *Id.*
110. *Id.* at 6.
111. *Id.* at 13.
112. *Id.*
113. *Id.* at 16–17.

Overall, sixty-six percent of economic offenders were sentenced to prison. This rate was considerably higher for the more sophisticated forms of economic crime, with the highest rates of imprisonment for economic offenders being for: identity theft (90.0%), securities and investment fraud (89.8%), advanced fee fraud (86.0%), credit card fraud (83.9%), and financial institution fraud (82.5%).[114]

The average sentence Imposed for economic crime offenders was twenty-three months, however, once again this diverged considerably with the average penalty for securities and investment fraud offenders being fifty-two months; identity theft forty-four months, health care fraud thirty-six months and advanced fee fraud (35 months). These offenses received longer terms than average because of enhancements under the guidelines. Thus, the longer sentences for securities and investment fraud offenders often is because of the greater median loss ($2.1 million), substantial harm to victims (78.1%), and use of sophisticated means to commit the crime (35.4%); and abuse of position of trust (15.4%).[115]

The above data, while relating to a broader category of economic offenses than white-collar crimes (because it includes offenses which are not necessarily committed by individuals in the course of a profession or occupation or those who have a significant influence regarding the relevant transaction), confirms the overall trend that such offenders are older and more educated than most offenders, and are sentenced to considerable periods of prison for their crimes.

In addition to the federal laws proscribing white-collar offending, each state has discrete laws outlawing this conduct. The state laws are generally less prescriptive than at the federal level, but generally consider three main overarching factors at sentencing: (1) economic loss, (2) culpability, and (3) victim impact and provide for strict sanctions against white-collar offenders.[116]

An illustration of the harsh penalties imposed on white-collar criminals stems from insider trading and market manipulation penalties. The general trend is that sentences for these offenses have been increasing. Reuters conducted a five-year study ending in December 2013 that showed insider trading defendants "received an average sentence of 17.3 months, up from

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114. *Id.* at 27.

115. *Id.* at 28–29.

116. See, for example, the provisions in the five largest states by population (California, Texas, Florida, New York, and Illinois): CAL. PENAL CODE § 186.11 (West 2012); TEX. PENAL CODE ANN. § 12.51 (West 2015); FLA. STAT. ANN. § 775.0844 (West 2014); N.Y. PENAL LAW §§ 155–58, 170–77, 180–90 (McKinney 2016); *Illinois Embezzlement Laws*, FINDLAW, http://statelaws.findlaw.com/illinois-law/illinois-embezzlement-laws.html [https://perma.cc/Q3DC-QEZR] (last visited Oct. 24, 2016).

13.1 months during the previous five years, or a 31.8[%] increase."[117] Many insider trading offenders receive far more extensive sentences. Thus, we see that prison terms of more than 10 years were imposed on the offenders in *United States v. Kluger*, 722 F.3d 549 (2013); *United States v. Goffer*, 721 F.3d 113 (2013) and *United States v. Rajaratnam*, 719 F.3d 139, 151 (2d Cir. 2013). These penalties, while harsh, were much more lenient than some penalties imposed for market manipulation offenses. Thus, in U.S. v. Madoff [Unreported, U.S. District Court, S.D.N.Y, June 29, 2009] the defendant was sentenced to prison for 150 years and a twenty year term was imposed in U.S. v. Israel [Unreported, U.S. District Court, S.D.N.Y., June 24, 2008).

The main rationales for these harsh sentences are general deterrence and the need to maintain the integrity of the market system. Thus, in *United States v. Gupta* the court emphasized the importance of general deterrence in such cases:

> As this Court has repeatedly noted in other cases, insider trading is an easy crime to commit but a difficult crime to catch. Others similarly situated to the defendant must therefore be made to understand that when you get caught, you will go to jail. Defendant's proposals to have Mr. Gupta undertake various innovative forms of community service would, in the Court's view, totally fail to send this message. Moreover, if the reports of Mr. Gupta's charitable endeavors are at all accurate, he can be counted on to devote himself to community service when he finishes any prison term, regardless of any order of the Court.[118]

Similarly, in *SEC v. Happ*, the First Circuit noted:

> The Insider Trading and Securities Fraud Enforcement Act ("ITSFEA") authorizes courts to impose a penalty of up to "three times the profit gained or loss avoided" as a result of the insider trading. ITSFEA civil penalties were enacted to "enhance deterrence against insider trading, and where deterrence fails, to augment the current methods of detection and punishment of this behavior.[119]

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117. Nate Raymond, *Insider Traders in U.S. Face Longer Prison Terms, Reuters Analysis Shows*, REUTERS (Sept. 2, 2014, 7:52 AM), http://www.reuters.com/article/us-insidertrading-prison-insight-idUSKBN0GX0A820140902 [https://perma.cc/S7P9-BFP4]. *See also Reuters Analysis Shows U.S. Judges Imposing Longer Prison Terms for Insider Trading*, REUTERS BEST (Sept. 2, 2014), https://www.reutersagency.com/en/reutersbest/article/reuters-analysis-shows-u-s-judges-imposing-longer-prison-terms-for-insider-trading/ [https://perma.cc/J7TN-V3A6].

118. United States v. Gupta, 904 F. Supp. 2d 349, 355 (S.D.N.Y. 2012).

119. SEC v. Happ, 392 F.3d 12, 32 (1st Cir. 2004) (citations omitted).

The supposed need to maintain the integrity of the market was highlighted in *United States v. Goffer*,[120] where the United States Court of Appeals (Second Circuit) stated that "[i]n light of the magnitude of his insider trading, which had major deleterious effects on the market, Drimal was no small-time criminal."[121] Similarly in *United States v. Kurland*, the Court stated:

> Mr. Kurland's actions, stemming from a recognized leader of the industry, compromised the financial market's integrity at a time of financial crises and widespread concern about corruption, rampant recklessness, and arrogant greed at the highest levels of the industry, a culture of oblivion to the meaning of reasonable limits that contributed significantly to bring about the worst economic collapse in the country since the Great Depression.[122]

The above approach to white-collar offenders is broadly consistent with that taken in Australia, to which we now turn.

C. Sentencing Law in Australia: An Overview

Sentencing law differs in each Australian jurisdiction (the six states, the Northern Territory, the Australian Capital Territory, and the federal jurisdiction).[123] However, as is the situation in the United States, there are similarities in the main sentencing objectives of community protection, general and specific deterrence, rehabilitation and retribution.

In Australia, presumptive penalties and rare and judges generally have wide discretion regarding the sentence to be imposed in any particular case.[124] The most important considerations are the maximum penalty for the offense, the offender's prior criminal history, and the presence of any aggravating and mitigating considerations.[125]

The cardinal sentencing considerations regarding white-collar offenses, as is the case in the United States, are general deterrence and the integrity of the market. The principles which are applicable to sentencing for offenses of insider trading were conveniently stated in *R v Rivkin* in which Justice Whealy said:

> [T]he element of general deterrence is important in white collar crimes. It is of course, an important part of the sentencing process in all crimes. It is however, an especially important matter in crimes such as the present because of the need to mark out plainly to others who might be minded to breach their professional

120. United States v. Goffer, 721 F.3d 113, 132 (2d Cir. 2013).
121. *Id*. at 132.
122. United States v. Kurland, 718 F. Supp. 2d 316, 320 (S.D.N.Y. 2010).
123. Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159, 1181 (2014).
124. *Id.* at 1181–82.
125. *Id.* at 1182–95.

> or related obligations that such conduct will generally merit, in appropriate cases, condign punishment.
>
> An important reason why this is so relates to the often remarked difficulty in detecting and investigating white collar crime. Insider trading is particularly hard to detect. It may often go unnoticed but where it occurs it has the capacity to undermine to a serious degree the integrity of the market in public securities. It has the additional capacity to diminish public confidence not only so far as investors are concerned but the general public as well. Moreover, this diminution in confidence may occur subtly and is not confined to the circumstances where a substantial insider trading transaction has taken place. There is a capacity to undermine and diminish public confidence in the market even where the offence may be shown as one which in some respects occupies a lower level of seriousness. This is likely to be particularly so in the case of an offender who occupies a substantial position as a trader and advisor in the market.[126]

In *Hartman v DPP (Cth)*,[127] the Court held that trading in off-market derivatives is serious because of the damage to the institutional integrity of the markets. The Court stated:

> It needs to be remembered that insider trading not only has the capacity to undermine the integrity of the market, it also has the potential to undermine aspects of confidence in the commercial world generally.[128]

The primacy of general deterrence as a sentencing consideration for white-collar offenders is emphasized by the approach of Australian sentencing courts to the offense of taxation fraud. In an unanimous judgment of the Victorian Court of Appeal in *DPP (Cth) v Gregory* Warren CJ, Redlich JA and Ross AJA said that:

> In seeking to ensure that proportionate sentences are imposed the courts have consistently emphasized that general deterrence is a particularly significant sentencing consideration in white collar crime and that good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process. In the case of taxation offences general deterrence is also given special emphasis in order to protect the revenue as such crimes are not particularly easy to detect and if undetected may produce great rewards. "Deterrence looms large" as the present process of self–assessment reposes on the taxpayer a heavy duty of honesty.[129] In many if not most cases, imprisonment will be the only sentencing option for serious tax fraud in the absence of powerful mitigating circumstances.[130]

126. *R v Rivkin* [2003] NSWSC 447, at ¶ 44 (Austl.).
127. *Hartman v DPP* (Cth) [2011] NSWCCA 261 at ¶ 94 (Austl.).
128. *Id*.
129. *DPP (Cth) v Gregory* [2011] VSCA 145, 53 (Austl.).
130. *Id.* at 54.

In *DPP (Cth) v Rowson*, the Court held that in relation to sentencing of revenue offenses, the integrity of the system is an important consideration:

> It is well recognized that those who systematically defraud the public revenue of large sums of money over a substantial period should be sentenced to substantial terms of imprisonment. . . . The courts have a significant responsibility to protect the integrity of the revenue system, by imposing punishments, for deliberate and sustained fraud, which are likely to deter others who may be otherwise tempted to indulge in the type of conduct committed by the respondent.[131]

In addition to general deterrence and the integrity of the system the other key sentencing considerations regarding white collar offenses are the amount of money involved;[132] the level of sophistication;[133] the duration of the offense;[134] and whether the crime involved a breach of trust.[135]

These considerations do not overwhelm all other considerations in the sentencing of white-collar offenders in Australia, as there is scope for the operation of some mitigating factors. In *R v Hay*,[136] where the accused was found guilty of five counts of defrauding the Australian Taxation Office and sentenced to three-and-a-half years' imprisonment with a non-parole period of two years and one month, the Court of Appeal in New South Wales stated:

> It is true that in this sort of "white collar crime" deterrence plays a considerable part in the process while subjective elements play a lesser part. However, subjective elements still come into the equation and here is a case of a 62-year-old man who was guided by his accountant to participate in this illegal scheme.[137]

One potentially mitigating consideration that is given little weight in relation to white-collar offenses is restitution. In respect of the mitigatory impact of restitution, it has been said that placing too much emphasis on restitution risks permitting, or the perception of permitting, offenders to "buy their way out of prison."[138] An empirical analysis of 64 white-collar sentencing cases in Australia[139] demonstrated that restitution was not commonly cited, being raised in less than 35% of cases.

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131. *DPP (Cth) v Rowson* (2007) VSCA 176, 24 (Austl.).

132. Arie Freiberg, *Sentencing White-Collar Criminals*, AUSTL. INST. CRIMINOLOGY 9 (Aug. 24, 2000), http://www.aic.gov.au/media_library/conferences/fraud/freiberg.pdf [https://perma.cc/KDX6-KLNP]; *see also Hoy v The Queen* [2012] VSCA 49, 23 (Austl.).

133. *See Hoy v The Queen* (2012) VSCA 49, 3 (Austl.).

134. *R v Ralphs* [2004] VSCA 33, ¶ 13 (Austl.).

135. *Id*. ¶ 12.

136. *R v Hay* [2009] NSWCCA 228, 10 (Austl).

137. *Id*. at 136.

138. The validity of this argument has been subject to some academic criticism: *see* Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823 (2014).

139. From the years 2005 to 2015, *see* Theo Alexander, A Rational Approach to White-collar Sentencing (2017) (unpublished Ph.D. thesis, Deakin University).

The most common mitigating factor that was applied in the 64 surveyed cases was previous good character, which was applied in 92% of cases. Extra-curial punishments, typically in the form of loss of employment or public opprobrium were also sometimes applied as mitigating factors. Thus, in *McDonald v The Queen* (1994) 48 FCR 555, 564, it was said that "the most serious consequence of the conviction of a 'white-collar' offender. . . must be the loss of his own self-respect and the. . . humiliation [that accompanies]". *McDonald v The Queen* (1994) 48 FCR 555, 564.

However, this approach has generally not resulted in lighter sentences for white-collar offenders. Australian courts must be satisfied that extra-curial punishment is either exceptional or extreme before allowing it to mitigate a sentence.[140] In the examination of 64 Australian white-collar cases,[141] it was found that the reduction of employment or career prospects was more prevalent than public opprobrium as a mitigating factor in relation to white-collar offenders. This may indicate the prevalent view that public shaming is futile as an alternative or ancillary form of punishment.[142] However, where raised, both were treated as mitigatory approximately 70% of the time. The courts have not attempted to state what amounts to exceptional or extreme extra-curial punishment, but rather seem to assess this on a case-by-case basis. Thus, while prison is not an inevitable disposition for serious white-collar offenses, it is only in rare instances where another penalty will be imposed.[143]

The culmination of the application of the above principles to the white-collar offenders in Australia often results in harsh penalties. However, the length of prison terms is typically shorter than in the United States. That said, prison is still a common sanction for such offenses. For example, again focusing on insider trading cases, in *R v Curtis* [2016] NSW 866, the offender received a 2-year term; *R v Xiao* [2016] NSWSC 240 a term of 8 years and 3 months was imposed; in *R v Hartman* [2010] NSWSC 1422, the defendant was sentenced to 4.5 years. Further, in *R v Moylan* [2014] NSWSC 944, a term of 1 year and 8 months was imposed for market

140. *See, e.g.*, *R v Zhu* [2013] NSWSC 127 [218]-[219] (Austl.); *R v Dalzell* [2011] NSWSC 454 [139]–[141] (Austl.); *R v Cassidy* [2005] NSWSC 410 [62] (Austl.).

141. *See* Alexander, *supra* note 139, at 317–18.

142. James Kostelnik, *Sentencing White-Collar Criminals: When is Shaming Viable?*, 13 GLOB. CRIME 141 (2012).

143. For a rare instance of immediate imprisonment not being imposed for a serious white-collar offense–although this was a Crown appeal and the Court noted that if it was sentencing at first instance, imprisonment would have been ordered–see *R v Pogson* (2012), 82 NSWLR 60; 218 A Crim R 396; [2012] NSWCCA 225 [80] (Austl.).

manipulation; while in R v Heath [2015] NSWDC 282 a 9-month term was imposed for the same offence.

Thus, in both the United States and Australia, white-collar offenders often receive severe sanctions in the form of lengthy prison terms, with the main rationales applied to justify these terms being general deterrence and the need to preserve the integrity of the financial system.

VI. EVALUATION OF KEY OBJECTIVES IN SENTENCING WHITE-COLLAR OFFENDERS—GENERAL DETERRENCE AND MARKET INTEGRITY ARE FLAWED RATIONALES

As we have seen, in pragmatic terms, the two key rationales that are advanced for imposing severe punishment on white-collar offenders are general deterrence and the supposed harm their actions cause to the market. A closer analysis of these rationales establishes that neither of them are defensible—they are both debunked by an empirical analysis. We now elaborate on these observations, starting with general deterrence.

A. The Failure of Marginal General Deterrence

General deterrence seeks to dissuade potential offenders with the threat of punishment by illustrating the harsh consequences of offending.[144] There are two forms of general deterrence. Marginal general deterrence is the view that severe penalties reduce the incidence of crime.[145] It contends that there is a direct connection between harsh penalties and a lower crime rate. Absolute general deterrence is the more modest claim. It concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct.[146] Absolute general deterrence does not rely on the imposition of harsh sanctions. For it to be effective, any sanction which people find unpleasant (such as a fine) is sufficient. The evidence suggests that marginal deterrence is a flawed theory, while absolute general deterrence does work.

Marginal general deterrence seems to be flawed in relation to all penalty types—even the threat of capital punishment does not reduce crime. The most wide-ranging recent analysis of the impact of the death penalty on crime is by the National Research Council of the National Academies, which concluded:

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144. FRANKLIN ZIMRING & GORDON HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 72 (1973).

145. *See* Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349 (2014).

146. *Id*.

> The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.[147]

Theoretically, it would seem that in the case of white-collar offenses, general deterrence would be more effective because the offenses are always planned and offenders are better placed to undertake a cost-benefit analysis of their conduct.[148] Yet, there is no evidence to show that even white-collar offenders are influenced by the heavy penalties imposed on others.[149] To this end, Mary Kreiner Ramirez notes that in relation to economic crime, general deterrence is difficult to measure given that most people do not make their decision to avoid illegal conduct publicly known and hence empirical analysis of this issue is difficult to undertake.[150]

While there does not seem to be a link between higher penalties and less crime, it seems that people are not totally irrational when they contemplate committing crime. The evidence shows that to the extent that people make a cost/benefit decision about committing crimes, they generally only weigh up the risk of being caught, not what will happen when they are apprehended. There is a connection between lower crime and the perception in people's minds that if they commit an offense they will be apprehended and subjected to some form of criminal sanction.[151]

Thus, the theory of absolute general deterrence is valid. Marginal general deterrence is not. It follows that the keys to reducing crime are (i) the existence of criminal sanctions (such as imprisonment and fines); and (ii) putting in place systems and investigative processes that will make prospective offenders believe that if they do offend there is a high chance that they

147. NATIONAL RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY (Washington, DC: The National Academies Press., 2012).

148. *See* Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 493–94 (1999).

149. *See* Mirko Bagaric et al, *The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud*, 26 AUSTL. TAX F. 511 (2011).

150. Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 414–15 (2003).

151. Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349, 382 (2014).

will be detected and prosecuted. In short, more police on the street is the best way to reduce crime. Higher, even draconian penalties, will not reduce the incidence of crime, including white-collar crime.

B. The Failure of Market Integrity as a Justification for Harsh White-Collar Penalties

As we have seen, another justification for imposing harsh penalties on white-collar offenders is that such offenses undermine the integrity of the market system and confidence in this system. This rationale is also flawed. It involves an unproven assumption. Moreover, the empirical testing that has been undertaken of this hypothesis suggests that it is incorrect. A study published in 2016 examined the impact of high-profile white-collar offending on the stock market.[152] The study focused on high-profile insider trading and market manipulation offenses in the United States and Australia.[153] The cases that were selected were chosen because they received the highest penalties for cases of their type in the respective jurisdictions. It is assumed that, given these cases involved the highest penalties, they would have attracted a considerable degree of publicity and hence become known to much of the investor community.

The cases were all post-2000, given that it was approximately around this time the Internet had become commonplace[154] and hence the sentences could be widely publicized. Stock market movements were examined on the day of each case; the day each case and a week after each sentence. The value of the stock market was used as a proxy for market confidence. If stock market crime undermines the integrity of the market, this would presumably result in investors and potential investors reducing their involvement in the market. The effect of this would reduce the total value of the stock market. In short, it was assumed that reduced confidence in the stock market would result in a fall in the value of the price of securities listed on the stock market. The analysis showed that in fact there was no such trend. Movements in the Dow Jones, and All Ordinaries,[155] in the surveyed days were statistically identical to the movements in those markets over the fifteen years that the sentences were imposed.

The clearest observation to emerge from the analysis is that an examination of stock market movements in the period shortly after sentences have been

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152. Mirko Bagaric, Jean Du Plessis & Jaclyn Silver, *Halting the Senseless Civil War Against White-Collar Offenders: The Conduct Undermined the Integrity of the Markets and Other Fallacies*, 2016 MICH. ST. L. REV. 1019.

153. *Id*. at 4.

154. Bruce Kogut, *Introduction: The Internet Has Borders*, *in* THE GLOBAL INTERNET ECONOMY 3 (Bruce Kogut ed., 2003).

155. Bagaric, Du Plessis, & Silver, *supra* note 9, at 1071.

handed down in major stock market crime provides no support for the theory that major financial crime undermines the integrity of the market or investor confidence. It follows that unless positive evidence is shown to the contrary, this consideration can no longer be used to justify harsher terms for criminals whose white-collar offenses directly or indirectly relate to financial markets.

As the sentencing rationales for imposing harsh penalties are flawed, we now examine the appropriate approach to sentencing such offenders.

VII. REFORM PROPOSALS: PROPORTIONATE PENALTIES FOR WHITE-COLLAR OFFENDERS

A. Financial Crime is Less Damaging than Sexual and Violent Crimes

In setting penalties for white-collar offenses, the main guiding principle —as with all crimes—is the principle of proportionality. In its simplest and most persuasive form, the proportionality principle is the view that the punishment should fit the crime.[156] The principle of proportionality (at least in theory) operates to "restrain excessive, arbitrary and capricious punishment"[157] by requiring that punishment must not exceed the gravity of the offense, even in order to extend a period of imprisonment to further protect the community from the offender.

As the High Court of Australia stated in *Hoare v The Queen*, "a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances."[158] Proportionality is a requirement of the sentencing regimes of ten States in the United States.[159] The precise considerations that inform the proportionality principle vary in those jurisdictions, but generally there are six relevant criteria:

156. The contours of the proportionality principle are discussed at greater length in Mirko Bagaric, *Injecting Content into the Mirage That Is Proportionality in Sentencing*, 25 N.Z. U.L. REV. 411, 414–15 (2013); *see also* Bagaric, *supra* note 145, at 394–96, 413.

157. Richard G. Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U.L. REV. 489, 492–95 (1994).

158. *Hoare v The Queen* (1989) 167 CLR 348, 354 (Austl.).

159. This is discussed in Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 242 (2012).

1. Whether the penalty shocks a reasonable sense of decency;
2. The gravity of the crime;
3. The prior criminal history of the offender;
4. The legislative objective relating to the sanction;
5. A comparison of the sanction imposed on the accused with the penalty that would be imposed in other jurisdictions; and
6. A comparison of the sanction with other penalties for similar and related offenses in the same jurisdiction.[160]

In addition to this, a survey of state sentencing law by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to prohibiting "excessive penalties or treatment" and twenty-two states have constitutional clauses that "prohibit cruel and unusual penalties, including eight states with a proportionate-penalty clause."[161]

While principle of proportionality has received universal support and endorsement in the legal system, it is observed only in theory. In practice it is not applied because the penalty is distorted by the need to achieve other unobtainable objectives, including general deterrence, specific deterrence, and rehabilitation. The second reason that proportionality is not applied in practice is because the legislatures and courts have not made any serious attempt to match the two limbs of the principle:[162] the seriousness of the crime and the harshness of the sanction. How many years of imprisonment correlate to the pain endured by a rape victim, for example?

The main difficulty here is that the two currencies are different. The interests typically violated by criminal offenses are physical integrity and property rights.[163] When it comes to sanctions however, the main currency is (deprivation of) freedom—by imprisonment.[164] Despite this disjunction there is a solution. Rigor and consistency can be injected into the proportionality principle if both aspects of the equation focus on the extent to which the interests and flourishing of victims and offenders are set back as a result of the crime and punishment, respectively.[165]

The interests and flourishing of victims of serious sexual and violent offenses (based on quality of life indicators (e.g., Health, employment and relationship outcomes) are significantly diminished as a result of the crimes

160. *Id.* at 250.

161. E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 154–55 (2009).

162. Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. Race & L. 349, 401 (2014).

163. *Id.* at 401.

164. *Id*.

165. *Id.* at 401–02.

to which they have been subjected.[166] In short, these offenses significantly damage the lives of victims. Victims of property offenses suffer far less.[167]

In relation to the impact of sanctions, it emerges that prison is burdensome, and in fact to a greater extent than is manifest from the nature of the sanction. Prisoners have a lower life expectancy and their lifetime income levels are greatly reduced compared to individuals with a similar profile who have not been imprisoned.[168] Prison is a considerable deprivation.

Proportionality requires the harshest sanctions to be reserved for the most serious crimes. Financial offenses set back the interests of victims, but they recover quicker than victims of sexual and violent offenses, which is consistent with surveys that show the public tends to view white-collar crime with less anger, distrust, and contempt than violent crimes.[169] The public perception has not been reflected in non-curial judicial or governmental attitude to white-collar offenders.[170] Imprisoning these offenders violates a fundamental tenant stemming from the proportionality principle, which is that the most serious forms of sanctions should be reserved for the most damaging forms of crime.

There is also a loose hierarchy regarding the seriousness of white-collar offenses, which is not always reflected in existing jurisprudence. One interesting matter to emerge from an analysis of the 64 Australian sentencing judgments relates to the manner in which courts evaluated the seriousness of white-collar cases. The crimes in the surveyed cases were directed against public or financial institutions in approximately 30% of cases, while the remaining cases involved harm against individuals.[171]

There was no formal gradation between offenses directed at institutions compared to individuals, however, there was a marked tendency for judges to emphasis the seriousness of crimes against government revenue or institutions. Thus, Ormiston JA stated in *R v Liddell*[172] held that "while the Australian Taxation Office was the ostensible victim in the case, serious

166. *Id.* at 402–03.
167. *Id.* at 403.
168. *Id*. at 406.
169. Brock Bastian et al, *The Roles of Dehumanization and Moral Outrage in Retributive Just.*, 8 PLOS ONE, Apr. 2013, at 3.
170. Patrick Durkin, *Top Judge Takes Aim at White-Collar Criminals*, AUSTL. FIN. REV. (June 10, 2011, 10:18 AM), http://www.afr.com/news/top-judge-takes-aim-at-whitecollar-criminals-20110609-icrc6 [https://perma.cc/TE22-ZWUN].
171. Theo Alexander, A Rational Approach to White-collar Sentencing (Dec. 1, 2016) (Ph.D. dissertation, Deakin University) (on file with Deakin University).
172. R v Liddell [2000] VSCA 37, [74].

tax fraud will inevitably have a flow-on effect to the rate of tax to the honest taxpayer." Most judicial comments identified in the research treat tax evasion as a crime against many victims—the community—as opposed to a single victim. These sentiments were echoed in *DPP (Cth) v Goldberg*, where Vincent JA (with whom Winneke P and Batt JA agreed) referred with apparent approval to the following observation by the sentencing judge in that case:

> Tax evasion is not a game, or a victimless crime. It is a form of corruption and is, therefore, insidious. In the face of brazen tax evasion, honest citizens begin to doubt their own values and are tempted to do what they see others do with apparent impunity. At the very least, they are left with a legitimate sense of grievance, which is itself divisive. Tax evasion is not simply a matter of failing to pay one's debt to the government. It is theft and tax evaders are thieves. . . [173]

There is a pattern of treating white-collar offenses against the revenue or institutions as serious and sometimes more serious than against individuals. This is demonstrably incorrect given that institutions have no feelings and cannot suffer tangible harm. The reverse is in fact true—offenses against individuals are more serious because the victims experience greater suffering. Individual people have actual interests, projects, and feelings. Institutions do not. They are inanimate. They have no preferences, or desires. The only hurt that is felt by them is completely derivative upon harm caused to individuals associated with the institution and this hurt is often dissipated among thousands of individuals. Thus, crimes that deplete public or private revenue are harmful, however, not as damaging as crimes that harm private individuals.

It follows that white-collar offenses rank lower in the harm calculus than sexual or violent offenses, and that the least serious white-collar offenses are generally those not committed against individuals.

B. The Heavy Societal Burden from Imprisoning White-Collar Offenders

In addition to violating the proportionality principle, there is a more pragmatic reason for not sending white-collar offenders to prison: it imposes too great a financial burden on society.

In the United States, the imprisonment rate is the highest in the world—despite the fact that it has been declining in the past ten years. At present, there are approximately two million incarcerated people in the United

173. DPP (Cth) v Goldberg [2001] VSCA 107, [62].

States.[174] Total incarceration numbers peaked at 2,310,000 in 2007[175]—following a four-fold increase in the preceding four decades.[176] The incarceration has dropped in recent years.[177] Between 2006 and 2018, the rate fell by 17%.[178] This decline continued in recent years; in part due to the COVID-19 pandemic. As of mid-2020, approximately 1,311,100 people were incarcerated in state and federal prisons and local jails dropped from 2.1 million in 2019 to 1.8 million in mid-2020.[179] State and federal prisons incarcerated about 1,311,100 people in mid-2020, and the population further declined, leveling out at about 1,249,300 in late 2020.[180] The incarceration level of local jails continued to decline about 17% from mid-2019 to late 2020, with most of the decline coinciding with the first part of the COVID-19 pandemic.[181] In population percentage terms, the rate of people behind bars at state and federal prisons and local jails dropped from 644 people per 100,000 residents to 551 people per 100,000 residents in the first half of 2020.[182]

174. *Incarceration Declined Only Slightly from Fall 2020 to Spring 2021 After an Unprecedented Drop in Incarceration in 2020* (June 7, 2021), VERA, https://www.vera.org/newsroom/incarceration-declined-only-slightly-from-fall-2020-to-spring-2021-after-an-unprecedented-drop-in-incarceration-in-2020 [https://perma.cc/M8KA-N5BS].

175. *See Prison and Jail Incarceration Rates Decreased by More than 10% from 2007 to 2017*, BUREAU OF JUST. STAT. (Apr. 25, 2019), https://www.bjs.gov/content/pub/press/p17ji17pr.cfm [https://perma.cc/6YP2-QVHJ].

176. NATIONAL ACADEMIES OF SCIENCES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1 (Jeremy Travis et al eds., 2014).

177. *See* E. Ann Carson, *Prisoners in 2018*, BUREAU OF JUST. STAT. (Apr. 2020), https://www.bjs.gov/content/pub/pdf/p18.pdf [https://perma.cc/7QL2-PRGT]; *see also Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RES. CTR. (May 6, 2020), https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006 [https://perma.cc/6L2C-93PL].

178. *See* E. Ann Carson, *Prisoners in 2018*, BUREAU OF JUST. STAT. (Apr. 2020), https://www.bjs.gov/content/pub/pdf/p18.pdf [https://perma.cc/7QL2-PRGT]; *see also Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RES. CTR. (May 6, 2020), https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006 [https://perma.cc/6L2C-93PL].

179. Jacob Kang-Brown, Chase Montagnet & Jasmine Heiss, *People in Jail and Prison in 2020* at 1, VERA.ORG (Jan. 2021), https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf.

180. *Id.*

181. *Id.* at 2.

182. *Id.* at 7.

While the prison population rate has reduced, the decline has been slow, and the United States continues to house the most prisoners per capita on earth.[183]

The high incarceration rate not only disproportionately punishes offenders and discriminates against some groups but also causes a number of other societal problems. This first relates to the cost of incarceration. Communities struggling to help their residents through the COVID-19 pandemic have looked for areas where they could cut costs, such as within the incarceration system. According to Pew Charitable Trusts:

> [A] sustained commitment to safely cutting the number of people in jail could provide long-term financial benefits. The recent experience of reducing prison populations offers a glimpse of the potential cost savings: The 9% drop in the prison population from 2008 to 2018 virtually flattened corrections spending, which had averaged 5.4% annual growth from 1991 to 2007.[184]

At the end of 2017, local governments' spending on jail and other corrections "had risen sixfold since 1977, with jail costs reaching $25 billion.[185] Between 2007 and 2017, about "84 cents of every local dollar spent on corrections" was spent on jails, and counties with jails spent about one of every seventeen dollars on jails in 2017.[186] Each year it costs the government approximately $34,000 per person kept in jail,[187] which detracts from the government's capacity to provide productive social services in the form of education and health.

Similar calculations apply in Australia. While Australia has a lower incarceration rate than the United States, the cost of imprisonment per inmate is much higher. Australia has one of the highest prison rates in the world—and it continues to increase. In September 2021, the Australian Bureau of Statistics data shows that from July 1, 2020 to June 30, 2021, the total population of Australian prisoners increased by 5% to 42,970

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183. Nazgol Ghandnoosh, *Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations*, THE SENTENCING PROJECT (Feb 8, 2023), https://www.sentencingproject.org/policy-brief/ending-50-years-of-mass-incarceration-urgent-reform-needed-to-protect-future-generations/; *see also* Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, THE SENTENCING PROJECT 15 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf [https://perma.cc/HHH9-H2NQ] ("The United States holds an estimated 40% of the world's life-sentenced population, including 83% of those serving LWOP.").

184. *Local Spending on Jails Tops $25 Billion in Latest Nationwide Data,* PEW CHARITABLE TRUSTS *1* (2021), https://www.pewtrusts.org/-/media/assets/2021/01/pew_local_spending_on_jails_tops_25_billion.pdf [https://perma.cc/F2A2-AF4M].

185. *Id.* at 2 ("In 2017, local governments spent 521% more on corrections than they did in 1977.").

186. *Id.* at 2, 4.

187. This amount increased about 17% from 2007. *See id.* at 1.

inmates.[188] The imprisonment rate grew from 205 to 214 prisoners per 100,000 adult population.[189] This trend is consistent with the pattern over the past few decades. In 1990, the incarceration rate was 112 prisoners per 100,000 adults.[190] Thus, the prison population across Australia has continued to increase in the past several decades.[191]

Of the 42,970 prisoners in custody in June 2021, 27,680 were sentenced offenders and the remaining were on remand.[192] Violent and sexual offenders accounted for 16,158 prisoners, while the remaining inmates had committed other offenses such as theft, illicit drug offenses and driving offenses.[193] Thus, approximately 42% of prisoners had not committed sexual or violent offenses. There were 537 offenders who were imprisoned for fraud, deception and related offenses, with most of these offenders (419) imprisoned for obtaining a benefit by deception.[194] Thus, it is a myth that economic offenders are dealt with leniently. The cost to the taxpayer of each prisoner is $375 per day ($136,875 annually).[195] In 2020-21, expenditure on corrective services was just under $4.19 billion for prisons. This number was a 5.1% increase from the previous year.[196]

Thus, we see that there is a considerable financial penalty imposed on society for imprisoning white-collar offenders. This money can be applied more intelligently to community-enhancing services such as education and health.

188. *Prisoners in Australia*, AUSTRALIAN BUREAU STAT. (Sept. 12, 2021), https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#data-download [https://perma.cc/Z876-3PN3].

189. From 30 June 2020 to 30 June 2021, Australian prisoners increased by 5% (1,910) to 42,970.

190. *Id.*

191. It took nearly fifty years for the rate to go from 50 per 100,000 (in 1940) to 100 per 100,000 (in 1998).

192. *Prisoners in Australia*, *supra* note 188 (From 30 June 2020 to 30 June 2021, Australian prisoners increased by 5% (1,910) to 42,970.).

193. *Id.* tbl. 23.

194. *Id.*

195. Austl. Gov't Productivity Comm'n, *Report on Government Services: Part C, Section 8 Corrective Services*, tbl. 8A.19 (2022), https://www.pc.gov.au/research/ongoing/report-on-government-services/2022/justice/corrective-services#downloads [https://perma.cc/Q9SD-URNG].

196. *Id.*

C. Legal Luck: Civil Versus Criminal Liability for White-Collar Activity

Another reason for not imprisoning white collar-offenders is that their conduct is in many cases akin to a breach of the civil law. Certainly there is no bright line between criminal conduct and civil breaches in this area.

This issue is best highlighted by the difference in tax avoidance and tax evasion. Tax avoidance is the practice of lessening tax liability and maximizing after-tax income.[197] Tax avoidance is legal. Tax evasion, on the other hand, is the failure to pay or deliberately underpaying tax. Tax evasion is illegal and can be a criminal offense.[198] Tax evasion is rife in the United States. Approximately, one in six dollars owed in federal taxes is not paid. It has been noted that "the amount of unpaid taxes every year is plausibly about three-quarters the size of the entire annual federal budget deficit".[199] Tax evasion is a criminal offense. However, it is often unclear whether underpayment of tax is avoidance or evasion. Thus, it has been noted that:

> Tax evasion can be deliberate or inadvertent and is distinct from tax avoidance. Deliberate evasion occurs when, for example, individuals do not report income or do not pay taxes. But unintentional mistakes made in filing tax returns can also give rise to inadvertent tax evasion. Illegal tax evasion is distinct from tax avoidance, which is taking advantage of legal ways to reduce tax liability, such as using the mortgage interest deduction. However, due to ambiguities in the law, differences in interpretations, the creation of new circumstances, and other factors, there can be some gray areas where it is difficult to distinguish between avoidance and evasion.[200]

Similar ambiguities also apply in relation to insider trading offenses, due to the subtleties involved in determining whether investor decisions have been influenced by confidential information, or information available in the public domain. Thus, it is often unclear whether trading is informed trading or insider trading. It has been estimated that less than 25% of insider trading events are prosecuted.[201]

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197. *Worksheet Solutions: The Difference Between Tax Avoidance and Tax Evasion*, INTERNAL REVENUE SERV., https://apps.irs.gov/app/understandingTaxes/whys/thm01/les03/media/ws_ans_thm01_les03.pdf [https://perma.cc/RP6Y-8UAQ].

198. *Id.*

199. William G. Gale & Aaron Krupkin, *How Big Is the Problem of Tax Evasion?*, BROOKINGS: UP FRONT (Apr. 9, 2019), https://www.brookings.edu/blog/up-front/2019/04/09/how-big-is-the-problem-of-tax-evasion [https://perma.cc/G8VN-SCNM].

200. *Id*.

201. Vinay Patel & Tālis Putinš, *How Much Insider Trading Happens in Stock Markets?*, AM. FIN. ASS'N ANN. MEETING (Jan. 11, 2020), https://ssrn.com/abstract=3764192 [https://perma.cc/G5H6-2RF9].

Accordingly, it is not surprising that prosecution of white-collar offenses has declined in recent years.[202] The reality is that legally the distinction between white-collar offending and sharp, but legal, commercial practices is unclear. Moreover, the rate of prosecution of white-collar offenses is very low. It is often merely a matter of (bad) luck whether or not an individual is prosecuted for a white-collar offense. This should not feature so heavily to potentially deprive a person of all that is meaningful in their lives by being sentenced to prison. The extent to which such fickle decisions and events can impact an individual's prosperity can be moderated by the imposition of proportionate sanctions on such offenders. We now discuss the proposed nature of such sanctions.

D. New Sanctions for White-Collar Offenders

White-collar offenders are, as we have seen, stereotypically, mature people who consciously decide to offend. The threat of imprisonment does not appear to be a factor which inhibits them, despite the fact that they are intelligent enough to process this risk. The strength of the desire to increase their wealth seems often overcomes their fear of apprehension and possible imprisonment. Given that the threat of imprisonment does not discourage white-collar offending and prison itself is a disproportionately heavy sanction for these offenders, it is necessary to consider new sanctions which target the motivation for these offenses, while adequately punishing offenders commensurate with the gravity of their offenses.[203]

As we have seen, the key motivation for white-collar offenses is greed. A means of offsetting this is to put strong financial penalties in place for white-collar offenders. Ideally, this should be done in a manner where the benefits of the sanction can flow to the community, instead of the punishment depleting public revenue—as is presently the situation with prison terms. The way to best accommodate these considerations is to impose an offender taxation levy. The levy should be high, so as to discourage offending, while at the same time not crushing in order to give the offender motivation

202. Ankush Khardori, *The Justice Department Is Turning a Blind Eye to White-Collar Crime*, POLITICO (July 23, 2021, 12:30 PM), https://www.politico.com/news/magazine/2021/07/23/justice-department-financial-crime-prosecution-500650 [https://perma.cc/DA4B-HKN4].

203. According to Michael Welch, greed is a pervasive part of capitalist culture which "drives people of all classes to engage in activities so self-serving that they become socially harmful, including crime" (referring to Marxist ideology); *see* MICHAEL WELCH, IRONIES OF IMPRISONMENT 21 (2005).

to continue to derive income in order to be a productive member of the community and make a contribution to the public revenue.

This can be achieved by imposing an offender taxation levy. The levy would operate so that two-thirds of all income derived by the offender would be payable as taxation. The amount total payable would be double the amount wrongfully obtained by the offender. In addition to this, the offender would be required to pay a one-off amount (the principal sum) equal to the amount wrongfully obtained by their crime. This would mean that in effect the offender would be required to pay back three times the amount taken by him or her.

As we have seen, there are some instances where the gain obtained, or loss caused by white-collar offenders exceeds millions—and sometimes tens of millions of dollars—and in these instances it would be futile to try to compel the offender to effectively repay the amount taken. Moreover, the gravity of these crimes is considerable given the size of loss that is caused. In these circumstances it is appropriate to impose a harsher financial penalty for the principal sum. Instead, a "wealth stripping" sanction should be imposed on offenders. The wealth stripping sanction would strip offenders of all their assets. Imposition of this sanction would mean that all of an offender's assets are seized, including their home and vehicles and they would only be permitted to own goods which form the bare necessities, such as furniture, clothing, fridges, television sets and computers.[204] Offenders who are subject to this sanction would be free to continue to work, however, their future income would be subject to the offender taxation levy, thus they would keep one-third of their future income.

Thus, by way of example, if a person defrauds the tax office in the sum of $100,000, he or she would be required to immediately pay back $100,000 and then pay an additional $200,000 through the offender taxation levy. The amount of taxation that would be attributable to paying off this sum is two-thirds of the income earned minus the normal tax that would have been payable by the offender. Where the extent of the gain exceeds the amount that the offender can repay in his or her lifetime, the offender would continue to pay the higher rate of taxation until retirement. In circumstances where the amount stolen was very high—say $10 million, the offender would have all their assets stripped and then be subjected to the taxation levy.

Financial penalties are only capable of subjecting offenders to a certain level of hardship. As we have seen, people generally bounce back from

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204. This is similar to the property and assets which Australians who are declared bankrupt can retain: *See* Austl. Gov't: Austl. Fin. Sec. Auth., *Consequences of Bankruptcy*, https://www.afsa.gov.au/i-cant-pay-my-debts/bankruptcy/consequences-bankruptcy (last visited Mar. 19, 2023).

property and financial deprivations. Some financial crimes target not only institutions but also the assets of individuals in a profound manner, thereby severely their financial and social freedom. More serious white-collar crimes are generally those which take money or other financial resources from private individuals as opposed to the public revenue or private market. Crimes committed against individuals, especially those who are financially vulnerable or fragile (i.e., the poor and unemployed) cause more direct and much greater harm than crimes committed against wealthy individuals or large corporations.

Thus, for white-collar offenses which target individuals there will often be a need to impose a penalty in addition to the offender taxation levy. This can be achieved through the development and implementation of a sanction which targets an interest in addition to the wealth of the offenders, namely their liberty.[205] Criminal sanctions involve the deliberate infliction of pain on offenders. Criminal sanctions should always be evolving, as with the activities and systems in all other settings and industries. Previously, the human body was regarded as a valid target for criminal sanctions and so too was the right to life. However, capital punishment and corporeal punishment have now been abolished.

While it is important for new criminal sanctions to emerge, they need to be developed in a strategic manner so that they are informed by theoretical imperatives and technological advances. The harshest form of sanction applicable in the current system (imprisonment) targets the right to liberty. New sanctions need to be effective (i.e., target interests that are important to people) and efficient (i.e., not expensive to administer).

As we have seen, the criminal justice system already has a very widely used sanction for targeting the liberty of offenders—in the form of prison. However, as we have seen, prison has numerous disadvantages, including its prohibitive cost to the community and the considerable incidental burdens it imposes on offenders, such as reduced life-expectancy and lower life-time earnings. Technology is now capable of being deployed in a way to considerably curtail the freedom of offenders, while circumventing these problems.[206]

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205. The core features and functionality of this are set out in: *See* Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 73–135 (2018).

206. *See id.* at 110.

To this end, it has been suggested that a new sanction, in the form technological incarceration should be developed.[207] The key feature of this sanction is the use of modern monitoring and sensor technology, which can be used to physically confine the movements of offenders to precise locations while monitoring their actions in real-time to greatly diminish the prospect of offending. The sanction would build on the design features of home detention orders, which use GPS tracking and are already used in many parts of the United States - there are now over 130,000 people under electronic monitoring in the United States.[208] Electronic monitoring works by attaching a transmitting object on the offender that is designed to communicate signals to authorities. Electronic monitoring can be done via radio devices or GPS. In relation to GPS, the subject is monitored 24/7 by satellites receiving transmitted information that is then triangulated to provide data on location and movement.[209] When the subject enters a forbidden territory or leaves a geographic limit, the surveillance officers are alerted via an alarm, which is also sent to the offender. If the offender does not take corrective action, the authorities can order intervention to bring him into conformity.

The main advantage of electronic monitoring is that the process costs far less than imprisonment.[210] The potential for cost savings ranges from six to ten times when compared to the alternatives, and often these fees are partially or totally passed onto the offender.[211] Another considerable advantage of electronic monitoring is that studies indicate that active electronic monitoring reduces recidivism.[212]

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207. *Id*. at 79.

208. *See* Kate Weisburd, *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System*, GEO. WASH. SCH. OF L. 1, 3 (2021), https://carefirstca.org/wp-content/uploads/2021/10/Electronic-Prisons-Report-1.pdf [https://perma.cc/J9Q7-HPLK]; Mike Nellis, *Electronic Monitoring: Exploring the Commercial Dimension*, 58 CRIM. JUST. MATTERS 12 (2004); Matthew DeMichele & Brian Payne, O*ffender Supervision with Electronic Technology: Community Corrections Resource*, OFF. OF JUST. PROGRAMS, BUREAU OF JUST. ASSISTANCE, DEPT. OF JUST. 6, 132 (2009), https://www.appa-net.org/eweb/docs/APPA/pubs/OSET_2.pdf [https://perma.cc/SP4F-QYCM]; see an introduction on electronic monitoring and its use in the United States in: Lars H. Andersen & Signe H. Andersen, E*ffect of Electronic Monitoring on Social Welfare Dependence*, 13 CRIMINOLOGY & PUB. POL'Y 349, 351 (2014).

209. Weisburd, *supra* note 208, at 4, 9.

210. See a review of electronic monitoring of offenders found that the cost is about one-fifth that of imprisonment and "robust" in detecting violations of the term of the order in: *The Electronic Monitoring of Adult Offenders*, NAT'L AUDIT OFF. 1 (2006), https://webarchive.nationalarchives.gov.uk/ukgwa/20170207052351/https://www.nao.org.uk/wp-content/uploads/2006/02/0506800es.pdf [https://perma.cc/QES5-FHZ2].

211. See the average fee passed onto the offender is $3,284 per year in: Weisburd, *supra* note 208, at 16.

212. U.S. Dep't of Just., *Electronic Monitoring Reduces Recidivism*, NAT'L INST. JUST. J. 1, 2 (2011), https://www.ncjrs.gov/pdffiles1/nij/234460.pdf [https://perma.cc/

That said, electronic monitoring also it has its critics. It has been criticized on several grounds including that it undermines family and social relationships (because when the sanction is imposed, limits are often placed on who can live with and visit the household of the offender);[213] the movements of offenders are strictly limited—mainly to the offender's house;[214] the charging requirements for the device are onerous;[215] the sanction impairs the privacy of offenders because offenders can have their residence searched at any time;[216] the data of the offenders' movements is stored for many years and is shared between multiple agencies,[217] and employment opportunities are limited because strict requirements are often placed on the conditions in which an offender can work.[218]

Thus, it has been noted that:

> Short of a prison cell, electronic monitoring is the most restrictive form of government surveillance and control. Like incarceration, the operation of monitoring depends on the loss of liberty, privacy, dignity and autonomy. The surveillance impacts not just the person ordered to wear the monitor, but it affects the lives of their friends, families and employers. Often, the people who are in the best position to support someone returning from custody (such as family and employers) are forced into the position of being de facto supervisors of the person on the monitor. And their lives, like the life of the person on the monitor, are subject to constant surveillance by agency officials.[219]

These criticisms are valid. Electronic monitoring is a burdensome sanction. However, this is not an argument for rejecting it as a criminal sanction. In fact, the reverse is true. Criminal sanctions are designed to inflict hardship on offenders and the fact that this is demonstrated by the research attests to the success of the sanction in question. Moreover, all of the hardships outlined above for offenders subjected to electronic monitoring are much more intense and acute for inmates in actual prisons. Thus, the fact that electronic monitoring does hurt—but is less burdensome than prison—is

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213. Weisburd, *supra* note 208, at 12.
214. *See id.* at 7.
215. *See id.* at 8.
216. *See id.* at 12.
217. *See id.* at. 10, 11.
218. *See id.* at 14.
219. *See id.* at 27.

a basis for expanding its use as a criminal sanction for certain types of offenders.

The key problem with expanding the use of electronic monitoring is not that it is too harsh, but perhaps that it is not harsh enough to match the severity of certain crimes. Moreover, the extent to which electronic monitoring impedes offenders committing other offenses while undergoing the penalty is limited given that the actions of offenders within their geographical confines are not monitored. These problems can be addressed by enhancing the structural aspects electronic monitoring to add a surveillance component.

Technology has already been developed which can enhance the capabilities of electronic tracking by monitoring the movements of people and other moving objects and is in use in several contexts, including systems that detect if a patient falls in a hospital or in direct driverless cars. Tamper proof sensor equipment and visual recording equipment could be attached to the bodies of offenders to monitor their movement. This would supplement GPS technology that monitors the location of offenders. The equipment would detect if an offender engages in suspicious movement (such as picking up a sharp object or applying significant force to a person), and all of the offender's electronic communications could be monitored to ensure that he or she did not engage in irregular transactions.

This sanction has been dubbed "technological incarceration"[220] and it would have significant advantages beyond merely reducing the harm that an offender would cause if his or her actions were not monitored. As noted above, empirical data shows that the greatest deterrent to crime is not the severity of the possible punishment but the belief by offenders that if they commit a crime that they will be detected. Thus, the mere imposition of this sanction would greatly reduce the incidence of reoffending. Moreover, when offenders who are undergoing the monitoring sanction do offend, the sensor equipment will provide cogent evidence regarding their involvement in the offense. The sanction can be operationalized in a number of different ways so that it is tailored to match the severity of the crime. Not only can the length of the monitoring be varied (from say six months to ten years), but the area of confinement can also be controlled.

Thus, for example, offenders who have committed relatively serious white-collar offenses would have their movement confined to two kilometers from home (except for their workplace), and within this zone be precluded from places such as restaurants and bars. White-collar offenders would also be subjected to the offender taxation levy. The combination of the offender tax levy and technological incarceration would significantly curtail their

220. *See* Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 73–135 (2018).

freedom while at the same time ensuring that they pay back their ill-gotten gains and hence meaningfully contribute to society—instead of further depleting the public revenue by housing another prisoner.

VIII. CONCLUSION

White-collar offenders do not scare people. There is no reason to be afraid of them. Yet, they are subjected to the most serious sanction in our system of law—prison. Rather than punishing white-collar offenders in a way that further depletes the public revenue, we should compel them to remedy the damage they have caused by paying additional tax.

There are more intelligent, evidence-based approaches to dealing with white-collar offenders. The objectives for dealing with white-collar offenders should be to impose penalties that are proportionate to the seriousness of the crimes; to ensure that the sanctions do not unnecessarily burden taxpayers and compel offenders to contribute ill-gotten gains back to the community.

The proceeds from greed-motivated offenders can be diverted in a community-enhancing manner by compelling them to make additional contributions to the community. This should be achieved by developing two new criminal sanctions. The first is an offender taxation levy. The levy would operate so that two-thirds of all income derived by the offender would be payable as taxation. The total payable would be double the amount wrongfully obtained by the offender. In addition to this, the offender would be required to pay a one off fine equal to the amount wrongfully obtained by the offender.

The second new sanction is technological incarceration. Modern monitoring and sensor technology can be used to physically confine the movements of offenders to precise locations while monitoring their actions in real-time to greatly diminish the prospect of offending. The sanction can be operationalized in several different ways so that it is tailored to match the severity of the crime. Not only can the length of the monitoring be varied but the area of confinement can also be controlled.

The combination of the offender tax levy and technological incarceration would significantly curtail the freedom of white-collar offenders while simultaneously ensuring that they pay back their ill-gotten gains and meaningfully contribute to society.

The recommendations proposed in this Article would provide proportionate sentences for white-collar criminals, and would result in a reduction in incarceration levels, saving the community large amounts of taxpayer

dollars. In turn, the amount saved could be directed into positive government programs such as education and health. Most of all, there would not be any offsetting disadvantages.