SENTENCING WHITE-COLLAR CRIMINALS

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Abstract

The sentencing of white-collar criminals is puzzling to those outside the court system who perceive judges to be endemically lenient. This paper attempts to explain the difficulties faced by the courts by highlighting a series of paradoxes faced by judges in such cases. These paradoxes revolve around the distinctions between the serious crimes committed and the type of people who commit them, the distinctions between property crimes and crimes of violence, the differences between profits and losses, the disparity between the number of offences committed and the crimes actually charged, the various pathways to justice, the exigencies of the criminal justice system and the pragmatics of plea bargaining, the balance between formal and informal punishments, the competing purposes of sentencing and the differences between the real and symbolic aspects of sentences. The paper examines some empirical evidence relating to sentences imposed on white-collar criminals and explores some alternatives to the current system in Australia.

Introduction

The widespread and continuing interest shown by the media in white-collar criminals such as Alan Bond, Brian Quinn, Christopher Skase and others and their fortunes in the courts indicates the extent of public and media fascination with the phenomenon of ‘white collar crime’ and its attendant problems of detection, prosecution and punishment. The prevailing belief appears to be that too few white-collar criminals are caught and convicted and that when they are, the courts are likely to deal with them in an unacceptably lenient manner.

Whether or not the public perception is well-founded is not easy to determine. There are no authoritative statistical indices of white-collar crime primarily because ‘white-collar crime’ is not a scientific term but is, rather, a broad and recently recently-coined description which encompasses the activities of a range of offenders in respect of certain types of offences. Indeed, there are few areas in criminology that are as bedevilled by conceptual ambiguities and lack of research as that of white-collar crime (Shover 1998:133). Discussion of the problem of sentencing ‘white-collar criminal’ is plagued by the initial problem of identifying the subject matter. There is no discrete group of offences which can readily be identified as ‘white-collar crime’. The term has been used to describe crimes committed in the course of their work by persons of high status and social repute in the course of their occupation (Sutherland 1940). These offences range from offences such as obtaining property by deception, embezzlement, fraud, forgery and the like to offences under corporations and securities law, taxation and social security fraud, nursing home legislation, customs laws and breaches of money laundering legislation. However, over recent years, the phrase has been extended from Sutherland’s definition to cover any occupational deviance, whether by persons of high status or not and violation of professional ethics. It would thus extend to cover the case of an academic who demands sexual favours in return for good grades. To some it has come to refer to almost any form of illegal behaviour other than conventional street crimes (Geis 1991). Others see the essence of white collar crimes as lying in the breach of trust involved and are less concerned with the social status of the offender (Shapiro 1990).

As is evident, these broad and loose definitions of white-collar crime make it difficult to speak generically of sentencing ‘white-collar criminals’, particularly because of the tendency to conflate the social status of the offender with the nature of the offence. Thus minor frauds committed by persons of modest social origin against banks and credit card companies may or may not be classified as white-collar crimes depending upon whether the focus is upon the offender or the offence.
This paper deals with one aspect of white-collar crime in the criminal justice system: sentencing. It argues that the empirical evidence for leniency is, at best, equivocal and that the perceptions that the courts are ‘soft’ on white-collar criminals is likely to be the result of a series of conflicts or paradoxes faced by judges in such cases. These paradoxes revolve around the distinctions between the serious crimes committed and the type of people who commit them, the distinctions between property crimes and crimes of violence, the differences between profits and losses, the disparity between the number of offences committed and the crimes actually charged, the various pathways to justice, the exigencies of the criminal justice system and the pragmatics of plea bargaining, the balance between formal and informal punishments, the competing purposes of sentencing and the differences between the real and symbolic aspects of sentences.  

**Empirical Evidence**

Is it possible to determine whether white-collar criminals receive more favourable treatment than ordinary offenders, that is, whether there is any *unjustifiable* disparity (Levi 1989:246)? The difficulty in answering such a question is that it is not possible to compare like with like. Members of different social classes tend to commit different kinds of offences. Nor do members of different social classes necessarily have the same criminal records, so that it is important to ensure that fair comparisons are made. The empirical evidence is weak (Shover 1998:145) not only because of the limited number of studies and their limited range of offenders, but also because of the problem that many of the offenders who might otherwise have come to court are diverted through a number of civil and administrative processes which are outlined further below.

Studies of sentencing disparity reported in the literature to date have returned equivocal results as to the relationship between social class and severity of sentence. Hagan, Nagel and Albonetti (1980) examined data obtained from ten federal district courts in the United States in relation to sentencing white-collar crime to determine whether there was a relationship between the status characteristics of criminal offenders and the sentences they received. Using college education and income as proxies for social status and holding other variables constant, they found that overall white-collar criminals did not receive significantly more lenient sentences than less educated common criminals. Nagel and Hagan (1982) also found that social status was unrelated to the likelihood of imprisonment and length of sentence. Wheeler, Weisburd and Bode (1982) examined eight categories of offences: securities fraud, anti-trust violations, bribery, tax offences, bank embezzlement, postal and wire fraud, false claims and statements and credit and lending institution fraud. Their chief finding was that the probability of imprisonment rises with the occupational status of the defendant. They found that sex was an important variable, with fewer females being imprisoned. Age also had some impact. As for their surprising result relating to social status, they suggested that perhaps some offenders are diverted at an earlier part of the process, that in run-of-the-mill frauds, social class was not important and, more plausibly, that judges were expressing a strong sentiment against crimes of greed rather than need, in particular, crimes committed by persons in positions of trust and authority.

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1. This paper does not address the issue of sentencing the corporate offender, a related topic but one which would extend the topic beyond manageable bounds.

2. These included such offences as failure to file tax returns, embezzlement, mail frauds and social security frauds. Some 31 offences were included in this study.
In 1988 Benson and Walker attempted to replicate the Wheeler et al’s 1982 study and found that socio-economic status was not related to sentence severity. Higher status offenders were no more likely to be incarcerated than low status offenders, nor did they receive longer sentences.

Australian data are difficult to obtain. No published Australian study has examined comparative sentences for blue and white-collar crimes. Issues of ‘leniency’ or ‘severity’ are difficult to determine in the abstract. Whether a sentence for fraud is appropriate can only be determined in the light of circumstances of the offence and the offender. General sentencing levels for offences are likely to be misleading because of the heterogeneity of cases which come before the court and the difficulty in identifying which ones are ‘white-collar’ related.

In attempting to gauge more specifically what is meant by ‘white-collar crime’ and the sentences imposed, this paper draws on two sources. The first is a sample of cases selected from the Commonwealth Director of Public Prosecutions Annual Report of 1999, from a Melbourne daily newspaper in mid-2000 and from cases briefly summarised in the Library Bulletin of the Commonwealth Director of Public Prosecutions. These are presented in Appendix A.

The second source is an analysis of Victorian sentencing data and decisions relating to the offences of theft and obtaining property or financial advantage by deception which is found in a recent sentencing text (Fox and Freiberg 1999). This survey is indicative rather than scientific and no claims are made as to its validity or reliability.

The offences in Appendix A vary widely and include various fraud offences, offences against the Financial Transactions Reports Act (Cth), passport offences, offences against the Corporations Law including offences relating to directors’ duties and prohibitions against insider trading as well as offences against income tax, sales tax, excise duty, the national health scheme, social security, Workcover and state legislation. Most involve multiple counts. Amounts involved range from $3,301 to $11 million. Sentences range from a high of 8 years with a six year non-parole period down to a discharge without conviction. One case, a newspaper report from China, notes that a life sentence was imposed for fraud by a Beijing court and was included to indicate that in some jurisdictions, fraud can be taken very seriously indeed. It is apparent from this sample that in many cases there was a wide gap between the head sentence and the non-parole period and that suspended sentences are not uncommon. From these admittedly thumbnail sketches, is it possible to determine whether sentences for ‘white-collar crime’ are too lenient, too heavy or just right?

Turning to the Victorian data relating to the offences of theft and obtaining by deception. In Victoria, the maximum penalty for an offence of theft is 10 years’ imprisonment and/or a fine of $120,000. The offence is triable summarily. Approximately 2.5% of all theft cases are dealt with in the Supreme Court or County Courts. In the higher courts, a person convicted of theft has an approximately 81% chance of receiving a custodial sentence, of which 20% were suspended in whole or in part. The median total effective sentence was between 2 and 3 years, with the highest sentence for any single count being 10 years. In the Magistrates’ Court, an offender has about a 40% probability of receiving a custodial sentence, of which some 37% are suspended. The median sentence is approximately 3 – 4 months.
The sentences for theft on indictment are the ones likely to catch the public eye, even though they amount to only a small number of sentenced cases. The data show that in relation to theft on indictment, the majority of sentences are under three years. At the top of the range, there are two classes of offences. First, the traditional blue collar criminals who commit a large number of serious thefts and/or other offences and have a significant prior record. Secondly there are the white collar crimes which involve the appropriation of a large amount of money, often as a result of a breach of trust by solicitors, accountants, stockbrokers, bank officers and book-keepers. In the latter category, amounts stolen have ranged up to approximately $9.1 million, but cases considered to be in the higher range are more likely to be under $2m. The top of the sentencing range is about a 8 years maximum penalty with non-parole periods of approximately six years with no remission, but 3 – 5 years would be more typical for the larger amounts. In many of these cases the offender is often middle-aged, of good character, has no prior convictions (or, if any, none for similar offences of dishonesty) and has stolen the money over a period of time, sometimes to feed a gambling addiction. When apprehended, they have been remorseful and cooperative with the police. Where some funds remain, they have offered, or made, restitution. However, this is not a factor which has had a marked impact on the severity of sentence when vast amounts have been stolen.

In relation to the offence of obtaining property by deception (or fraud), it is also the case that only 2.5% of cases are heard in the higher courts. Of the few which were heard in the higher courts, 77% received a custodial sentence, of which 60% were suspended in whole or in part. Median total effective sentences (ie total sentences on all counts) were also around 2 – 3 years. A sentence of 12 years with a 9 year non-parole period was recently upheld by the Victorian Court of Appeal in respect of a 59-year-old investment adviser who, over fifteen years, had defrauded hundreds of investors of $6,480,940 (Gibson (1993) 68 A Crim R 531). He had no prior convictions and pleaded guilty to 35 counts of obtaining property by deception and 16 of false documentation. What particularly aggravated this offence, apart from the large amount of money involved, was number of victims and the effect that the crime had had upon them. Many had lost their life savings and had been reduced to near penury from which they were unlikely to recover. Sentences of between 2 and 8 years are not unknown, but are not common. They usually involve large amounts of money stolen from financial institutions or a range of vulnerable victims. Sentences in the mid-range (1 to 3 years) represent less significant frauds where the amounts taken are substantial, but not spectacular, where the defendant’s prior record is modest and where the relative lack of heinousness allows mitigating factors to be taken into account. The offence may also be mitigated by full repayments of the amounts stolen. Sentences in the lowest part of the range are often imposed for crimes where the defendant’s financial situation has slowly deteriorated, or where the line between crime and poor business management is very fine. A suspended sentence will satisfactorily serve deterrent purposes where the offender has not previously been before the courts and the amounts involved are not great.

Blue and white-collar frauds

Not all frauds appear to be equal. Social security fraud and taxation fraud, though both offences against the state, appear to be dealt with differently by the courts. If judicial pronouncements are anything to go by, both offences are very grave and strike at the heart of the state’s fiscal system. Because of the large number of potential offenders (those on social security, and all taxpayers), deterrence is regarded as being of primary importance. Social security offender tend to have prior records, with approximately 42% of offenders who came before the higher courts in Victoria between 1988 and 1997 having prior convictions (Fox and Freiberg 1999:1040).
However, social security offenders are more likely to face serious financial difficulties, be more
insecure in their employment, suffer from ill-health and have a generally disadvantaged social
background. Females represent over 40% of offenders in the higher courts.

Most social security cases are dealt with by administrative measures and of the rest, the vast
majority are dealt with in the Magistrates’ Court. For the calendar year 1996, the only offence
for which there were sufficient cases to draw valid observations was Social Security Act 1991
(Cth), s. 1350 (knowingly obtaining payment of a benefit not payable). Of the 540 cases
completed, 53 per cent resulted in a sentence of unpaid community work (150 hours median);
19 per cent resulted in a fine ($700 median) and 28% in imprisonment (3 months median).

Higher court statistics are not available in relation to the major social security offences.
However, the Office of the Commonwealth Director of Public Prosecutions has prepared a
table, which summarises the outcomes of 181 cases dealt with on indictment in Victoria
between September 1988 and September 1997. The table indicates that of the 181 cases,
approximately 93 per cent resulted in nominally custodial sentences. However, 44 per cent of
these sentences were fully suspended, while of the remainder, the actual times required to be
served in custody formed only a small proportion of the head sentence imposed by the courts.
Thus 73 per cent of the immediate custodial sentences had head sentences of less than two
years, while 95 per cent of the suspended sentences were two years or less.

In the absence of adequate official sentencing statistics, the Commonwealth Director of Public
Prosecutions’ data provides a useful source of data in relation to taxation offences tried on
indictment in Victoria. Of the 40 cases recorded between late 1986 and March 1997, all but
three were in relation to offences under the various Crimes Act 1914 (Cth) fraud provisions,
mostly s. 29D. Over 40 per cent were cases arising out of a major enforcement operation
against tax evasion in the clothing industry in Melbourne. The amounts of tax evaded ranged
from around $10,000 to approximately $8 million, although in some cases, some or all of the
amounts were recovered either voluntarily or through legislative action. Leaving aside the
outlying case of $8 million because of its special circumstances,3 the average gross amount
evaded was approximately $232,000 (compared with an average for social security fraud of
around $45,000. Of 39 sentences for which reliable information was available, some 30 per
cent were fully suspended, ranging in length from 2 years down. Of the 70 per cent for which
some period in custody was required, the majority were for periods of 2 years or less, with the
actual time required to be served in custody amounting only a small proportion of the head
sentence. The longest nominal sentence was 4 years, with a non-parole period of 3 years.
Taking into account the amounts stolen and the length of the actual custodial times required to
be spend in prison, it would seem that taxation offenders are treated significantly more
leniently than social security offenders, although most taxation offenders do not have prior
records. A similar conclusion was reached by the Queensland Court of Appeal in Wright
(1994) 74 A Crim R 152, 156) where Davies JA and White J concluded:

An analysis of the two categories of cases shows, in our opinion, that it is difficult to
reconcile them. Whereas offenders convicted of social security frauds have generally
been required to serve terms of imprisonment, even where the amounts involved have
been small, the same cannot be said generally of those convicted of tax frauds, even
where the amounts involved have been relatively large.

3 Relating to the promotion of sales tax schemes.
The Sentencing Process

The empirical data, for whatever it is worth, indicates that some sentences for fraud can be at the higher end of the scale, but this begs the question whether the scale itself is high enough. Some may well argue that life sentences are appropriate for the most serious examples of white-collar crime. They also reveal wide variations between cases. With these observations in mind, it is necessary to explore the sentencing process itself in more detail to find possible explanations for this judicial behaviour.

When sentencing an offender, a sentencer attends to three major categories of information (Fox and Freiberg 1999:181). First, there are the general aims of punishment. The purposes of sentencing generally are, in broad terms, to impose a ‘just’ punishment on the offender: in other words, to exact a form of retribution, to deter the offender or others from committing similar offences, to attempt to rehabilitate the offender, to denounce the type of conduct in which the offender engaged and to protect the community (see eg Sentencing Act 1991 (Vic), s.5(1)). In logic, all of these purposes cannot co-exist, but the courts try to reconcile them by attempting to balance the various purposes and factors, offender by offender, offence by offence. Second, there is information about the offence itself, including matters relating to the gravity of the crime as measured by the statutory legislative maximum penalty, its social danger, the harm done, the prevalence of the offence, the degree of participation of the offender and so on. Finally, there is information about the offender him or herself: his or her age, sex, character, mental health, family and employment circumstances and general social history.

A judge will also take into account factors relating to the criminal justice system such as delay, cost and encouraging offenders to inform on others. These factors are complex and contradictory and will carry different weights. Possibly the best way to illustrate the problems of sentencing white-collar criminals is through highlighting a series of paradoxes faced by judges which makes their task difficult and renders the outcomes so puzzling to those outside the courts.

Sentencing Paradoxes

Bad crimes/good people?

One of the features which tends to distinguish the sentencing of white-collar criminals from ‘traditional’ criminals is that the courts are required to sentence offences of high gravity but offenders of low essential ‘badness’.

Bad crimes

Dealing first with the ‘bad crimes’ issue. The legislative view of the gravity of an offence is primarily expressed through the maximum penalty and it is to this that the courts first turn to ascertain the relative heinousness of an offence (see eg Sentencing Act 1991 (Vic), s.5(2)(a)). The maximum penalty also provides the yardstick against which all cases falling within the class of proscribed conduct are measured. In Australia, there has been a general perception that the level of maximum penalties for white-collar crime has not been sufficiently high in such areas of environmental regulation, companies and securities legislation, taxation law, occupational health and safety and trade practices and consumer protection laws. However, over recent years, I think it can be said that in most of these areas, maximum penalties are relatively high and, where there are multiple offences, the law can probably accommodate most cases very serious frauds or other offences. Penalties under the Trade Practices Act (Cth) are, if anything, on the high side. The problem, if there is one, of leniency, lies not in the abstract legislative provisions but in their application.
Bad crimes/worse crimes

Harm is the central feature of the common law of sentencing. Traditional blue-collar crimes, or street crimes, are regarded as relatively serious because violence or the threat of violence increases the potential damage to persons. The fear and anxiety quotient of offences such as burglary, robbery and rape is very high in comparison to financial crimes which, in the main, inflict pecuniary pain.\(^4\) Further, because harm in the white-collar area tends to be diffused among multiple victims, its totality tends to be overlooked. In frauds against the state it has been suggested that no victim can be readily identified. Some years ago I argued that we should identify the state as a primary victim as well as a secondary victim of crime, for while it is true that states do not suffer physical harm in the traditional sense, through offences such as tax evasion and fraud, the state is heavily victimised (Freiberg 1988). The extent of such losses is difficult to gauge, but estimates run into billions of dollars if welfare and medicare frauds are included. There are also indirect losses to be considered such as the commitment of government resources to gain compliance and the diversion of personnel from productive activities.

In assessing the level of harm, the low visibility of crimes against bureaucracies, combined with the unpopularity of the victims results in a failure of the public to stigmatise the perpetrators of those crimes (Smigel and Ross 1970). There are a number of reasons why theft from the state or a large corporation is regarded as less serious, at least by offenders, than theft from an individual. First, there is a psychological distance between the offender and the victim. Secondly, the size of the victim means that the loss is regarded as more easily absorbed. In relation to the state, there is a general antipathy because of its intrusive behaviour. Finally, much of the behaviour is regarded as non-criminal, or morally neutral and offenders are able to ‘rationalise’ their offences against the state.

On the other hand, there are some factors which tend to aggravate white-collar crimes. If a crime is carefully and deliberately planned and executed, courts will generally deal with it more seriously. Offences committed upon impulse may be regarded as uncharacteristic and less likely to be repeated and will, in most cases, be easier to detect than offences which involve considerable preparation and organisation.

The abuse of trust by a criminal is seen as a distinctive feature of white-collar crime (Wheeler et al 1988:76) and has always been regarded as a matter relevant to the question of sentence. Breaches of trust may take the form of abuse of a professional position, by the misuse of a position of authority, by use of special knowledge obtained from employment to facilitate particular types of crime, by defrauding the public or an employer or by abusing a supervisory role. The aggravating factor of abuse of trust is often compounded by the difficulties of detecting offenders who hold privileged positions and have peculiar access to information (Fox and Freiberg 1999:253-4).

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\(^4\) While there is truth in the observation that many white-collar crimes may be non-violent, if violence is defined as the direct infliction of harm, there is mounting evidence that the amount and severity of indirect harm caused by violations of legislation governing factories and workplaces, coal mines, consumer products, automobile safety, food preparation, environmental pollution and the like can be as great as the harms caused by immediate personal violence (Braithwaite 1982: 744). The proposed introduction in Victoria of an offence of ‘industrial manslaughter’ reflects the view that harm in the workplace is as great as harm in the streets.
Money matters: profits and losses

Money does matter. The amount of monetary loss is given substantial weight by judges in sentencing, but there are limits to the relationship between the amount of money lost and the sentence imposed. Although the chances of a person going to gaol increase with increasing losses, the relationship tends to be curvilinear rather than arithmetic. After a certain amount has been reached, the amount lost will not make much of a difference to sentence.

However, losses are not the same as profits. The profit gained from an offence is not necessarily the same as the loss caused to the victim, either because profits may be gained by third parties or losses may have been mitigated by insurance funds or indemnities. In many cases, little may be left of the stolen or misappropriated funds by the time of the trial due to poor investment decisions or general dissipation.

The gap between rich and poor is widened when the matter of restitution arises. A sentence may be reduced from what otherwise might have been imposed if the offender has made restitution. Restitution may be given some weight if it is a genuine indication of remorse or rehabilitation. A pragmatic view is that restitution and compensation to victims is to be encouraged and one way to do this is to offer offenders some inducement by way of a reduction in sentence. On the other hand, courts are reluctant to reward significantly offenders who make restitution in case it is regarded as a mean of permitting the wealth to buy their way out of deserved sentences (Fox and Freiberg 1999:317).

Too many offences/not enough crimes

The sentence finally imposed on an offender will, to a degree, depend upon the number of counts in the indictment. This will be relevant with regard to the possible maximum penalties and the exercise of the court’s discretion as to concurrence and cumulacy. One of the features of trials of white-collar offences relating to fraud and similar offences of dishonesty is the number of possible counts.

It is often the case that the offender has committed numerous similar offences over a long period of time, for example multiple false statements re Medicare fraud (eg Corbett (1991) 52 A Crim R 113: over 700 false statements). In such cases, the prosecution, after notifying the defence, may elect to proceed with a limited number of charges, as specimen or sample counts representing the systematic nature of the criminality. This procedure is also invoked in relation to sex offence where there are multiple counts but where the practicalities of the case require an indictment of a more manageable size.

A similar legal device is that of taking other offences into account which is found in most state law and at the federal level (e.g Crimes Act 1914 (Cth), s.16BA; Sentencing Act 1991 (Vic), s.100). Under this procedure, where the offender admits the offences and wants to have them taken into account, the court may record those offences and ‘take them into account’ in sentencing. What this means is that without recording additional convictions or imposing cumulative sentences, a court can impose a more severe sentence than if it were dealing with the offender only for the offence or offences charged. On the other hand, the offender obtains a lesser sentence than would have been imposed if each pending charge was dealt with in a succession of courts. While any additions made to the offender’s are unlikely to be proportionate to the number and gravity of the additional crimes, all parties benefit by being relieved of the burden of trials overloaded by a multiplicity of counts. Ultimately, to the non-legal observer, what appears to have happened is that the offender has been ‘let off’ a large number of offences. The impact of this process on victims is predictable.
Pathways to justice

The cases which come before the criminal courts represent only a small proportion of cases in which some form of action is taken, let alone of those committed or detected. In the white-collar crime area, the attrition or attenuation process is rendered problematic by the fact that there are usually a range of alternative avenues of enforcement and prosecution available to the authorities. Thus in cases of corporate illegality, the Australian Securities and Investment Commission and the Director of Public Prosecutions will have the choice of civil, disciplinary/administrative or criminal proceedings. Formal guidelines are in place to regulate these decisions. The vast majority of cases are dealt with outside of the criminal courts.

In relation to taxation offences enforcement agencies can choose between administrative, civil and criminal enforcement,\(^5\) between specific and general legislation and between summary and indictable proceedings (Freiberg 1986; Delaney 1990). In Whitnall (1993) 42 FCR 512, 518) Higgins J described the regime as follows:

The same conduct, [i.e. fraud on the revenue] therefore, may be dealt with,

- by administrative penalties only;
- by prosecution under the *Taxation Administration Act 1953* (Cth). The Commissioner may elect to prosecute for a fine only or a fine and imprisonment. A penalty of up to three times tax avoided can also be imposed;
- by prosecution under s. 29B of the *Crimes Act 1914* (Cth). The imprisonment available is a maximum of two years;
- by prosecution under s. 29D of the *Crimes Act 1914* (Cth). The imprisonment available is a maximum of 10 years.

It is also open to the prosecution to proceed by way of indictment or summarily at its option. Again the maximum penalty is affected by that choice. The choice is available where more than 12 months imprisonment is an available penalty…There are Guidelines for the investigation and prosecution of taxation related offences, as between the DPP and the ATO. I have to say that I view the legislative and administrative regime with some disquiet. The Court was urged to have regard to general deterrence. The range of administrative decisions available which will avoid the bringing of charges under s. 29D (the most serious option) must lead taxpayers to hope that the latter option will only rarely be activated. Further, the reasons, if any, for choosing a less serious option are not exposed to public scrutiny as are the reasons for the imposition of a sentence by a court. What the ATO or the DPP regard as a ‘serious offence’ is not really defined.

The framework is similar for social security offenders in relation to the choices available to enforcement authorities (Freiberg 1989). If the concept of ‘sentencing’ white-collar criminals is to make any sense at all, these alternative mechanisms for dealing with offenders must be taken into consideration when weighing the total imposition of punishment on white vs blue collar offenders.

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\(^5\) Offences punishable only by fine are defined by legislation as ‘prescribed taxation offences’, which enables the prosecution of these offences to take the form of a proceeding for the recovery of a pecuniary penalty, *Taxation Administration Act 1936* (Cth), s. 8A.
A bird in the hand is better than one in the too hard basket

White-collar trials are often complex, long and expensive both to the defence and the prosecution (Rozenes 1996). Though most ‘normal’ crimes are resolved through guilty pleas, as are the majority of run-of-the-mill fraud offences, some high profile offenders may choose to fiercely contest the charges because they genuinely believe in their innocence or in order to postpone the day of judgment or possibly to wear the prosecution down. In highly complex cases, steadfast resistance may lead to plea-bargaining negotiations in which a plea of guilty is exchanged for less serious charges, fewer charges or a favourable agreed statement of facts. Where this occurs, the final outcome, including the sentence imposed, may not reflect the ‘true’ facts, or at least those portrayed in the press, giving rise to the impression of leniency. The advantages to the prosecution in term of cost savings and possibly avoiding the chance of an acquittal are seen as failures of the criminal justice system. As a previous Commonwealth Director of Public Prosecutions observed in relation to these pragmatic dimensions of justice (Rozenes 1996:6):

This will mean that not all of the suspected and perhaps provable criminality will be before the courts. If convicted, a defendant will not be sentenced for all the alleged criminal behaviour. These are outcomes that do not sit easily with the prosecutor but must be accepted as an inherent limitation of the judicial system as presently composed and funded.

Good people?

Turning now to the role of the offender, rather than the offence, in sentencing, there are a number of factors which are taken into consideration which tend to mitigate the severity of sentence.

Prior record/prior offending?
An offender’s prior criminality has a powerful influence in sentencing. A first offender, or an offender with an insignificant record, is usually regarded by sentencers more sympathetically and leniency is extended by imposing a non-custodial sentence in place of a custodial one, where such a choice is open to the court, or by directing a shorter period of incarceration or by suspending the sentence of imprisonment in whole or in part.

The absence of a record is seen as a distinctive difference between traditional criminals and white-collar criminals (Wheeler et al 1988:88). This is relevant to assessment of moral character, to the reaction to past sanctions and to the assessment of likely future offending. However, placing a great deal of weight on lack of a prior record can put the judge in a difficult position where it would result in white-collar criminals being treated uniformly more leniently, particularly where it is a case of a lack of a prior record rather than a lack of prior offending which is at issue. It is often the subject of comment, in relation to both white-collar criminals and sex offenders, that many have had a long histories of offending, but are only caught once and then present as ‘first offenders’.

White collar crimes are often, but not always, crimes of the middle aged. Whereas youth and old age may be mitigating factors in sentencing, middle age generally affords no protection (O’Connor [1987] VR 501; Young 18/5/1990, Supreme Court of Victoria). On the other hand the previous good character of an offender is generally a mitigating consideration. Judges must find a proper balance between assessing past conduct and taking into account the greater advantage and social position which may impose on some offenders a special obligation to
obey the law. It can be an aggravating factor if victims have been led to trust the defendant because of the person’s impeccable background or where a background of respectability was used deliberately to deceive. The courts are disinclined to allow good character, good education or lack of economic need to mitigate rational, premeditated and profit-seeking crimes. Nor will they allow a claim of good character where the evidence has disclosed that the offender has been committing a series of undetected offences for a lengthy period of time (Fox and Freiberg 1999:288). However, if they consider that the effect of a conviction and sentence on a person of previously untarnished character will be devastating, either because of the lack of previous contact with the criminal justice system or through loss of reputation, they will give weight to this consideration.

The process is the punishment

A sentencer is placed in an invidious position when faced with a person who it is known will suffer further serious consequences as a result of a conviction having been recorded. Such consequences may include loss of, or disqualification from, employment, loss of pension rights, cancellation or suspension of trading or other licences or the diminution of educational opportunities. The courts have been ambivalent on this issue, sometimes decreasing a sentence to take into account the additional detriment and sometimes refusing to do so. The cases present no clear pattern (Fox and Freiberg 1999:344).

It is often argued, in white-collar crime cases, that condign punishment is not needed because the offender has ‘suffered enough’ through the process of apprehension, public trial and sentencing plus any collateral disabilities of the kind just referred to. In *McDonald* (1994) 48 FCR 555, 564-5, Burchett and Higgins JJ observed, in relation to a fraud case:

… the most serious consequences of the conviction of a ‘white-collar’ offender, as indeed of many other persons…must be loss of his own self-respect and the suffering of disgrace and humiliation, as well as the complete loss of his previous standing in the community, his professional position, and the means of livelihood he has chosen and in which he has acquired expertise. The conviction is a personal calamity. So far as gaol is concerned, to be sent there is also a disaster of the greatest magnitude. These are the considerations that must loom large if a professional person is confronted by a situation inducing thought about the personal cost of committing comparable offences, and a significant period in gaol, attended by such consequences, must constitute a weighty deterrent. Indeed, an equivalent gaol term is plainly a severer punishment … than it would be for many violent criminals, who could take up much the same life upon leaving gaol as they had led before.

This approach implies that the family, social and work ties of blue-collar criminals mean less than those with white collars, and that those who appear to have little or nothing to lose by collateral penalty are more deserving to be punished by incarceration. This may help explain the public perception that white-collar criminals are treated more leniently at sentencing. Yet it is often the same family, social and work ties that allowed the offender to occupy a position of trust that was subsequently breached. In such circumstances, their loss should have little mitigating effect (Fox and Freiberg 1999:346).

Loss of pension rights may sometimes count in mitigation, but under federal law and some state laws relating to confiscation of superannuation benefits, this loss must be ignored in the sentencing process (cf Freiberg and Pfeffer 1993).
The purposes of sentencing: pointing in different directions?

The harm caused by white-collar crime can be serious, calling for a commensurately serious sentence. Proportionality of punishment is a keystone of the Australian sentencing system. Yet the sentencing of white-collar crime produces more paradoxes, for retribution is not the only purpose of sentencing. General deterrence would seem to be particularly applicable to white-collar criminals who are likely to be rational, profit-seeking individuals able to operate Bentham’s hedonic calculus, weighing the benefits of committing the crime against the costs of being caught and punished. White-collar criminals also probably fear gaol more than others, having been less inured to its rigours than those who have come up through state homes and training centres. Secondly, sentences imposed on white-collar criminals are more likely to affect their peers, who, unlike some blue-collar offender, especially those under the influence of drugs, are more likely to read the press and become aware of the fate of miscreants in their midst. On the other hand, special deterrence, that is, the deterrence of the individual before the court, is likely to be given less weight if recidivism is unlikely as is mostly the case with white-collar criminals.

Rehabilitation is not a major issue in most cases and gaol is an unlikely place to receive it. Unless there is some psychological problem which has produced the aberrant conduct, treatment is not likely to be the basis upon which a sentencing decision is made. This leaves the purposes of protection of the community and denunciation. The ultimate aim of the criminal law is to protect the community. However, in specific terms it is unlikely that courts will consider most white-collar criminals as ‘dangerous’ offenders in the same way as they do persons who have committed violent offences over a number of years and who have not responded satisfactorily to previous court orders and certainly would be unlikely to invoke special legislative provisions recently enacted in relation to repeat and violent offenders. It is for this reason also that white-collar offenders are unlikely to be put into maximum security prisons, so that when they are placed in less oppressive environments because of their low risk profiles, the perception that they are given an ‘easy ride’ by the correctional system is exacerbated.

Real or symbolic punishment?

Balancing the real and symbolic aspects of the sentencing process lies at the nub of the problem of sentencing white-collar criminals. Punishment carries a significant symbolic meaning in terms of its emotional and moral messages. The sentence of imprisonment conveys a different message to the community than does, for example, a fine or a community-based order (Garland 1990:256; Durkheim 1983). Section 5(1)(d) of the Sentencing Act 1991 (Vic) recognises the symbolic function of sentencing by requiring a court to ‘manifest the denunciation … of the type of conduct in which the offender engaged’. It highlights the importance that a judicial pronouncement may have in reaffirming shared values and censuring an offender.

Resolution of the bad crime/good criminal paradox is often achieved by the use of suspended sentence of imprisonment, a sentence which is available under federal and most state laws. In theory, a suspended sentence of imprisonment is treated as a real sentence of imprisonment and should not be imposed unless a sentence of imprisonment of the same length is warranted in all the circumstances of the case. Possible lengths of suspended sentences vary between jurisdictions but can range up to five years or longer. In practice, suspended sentences tend to be regarded as ‘soft’ options and sentence lengths may sometimes be covertly inflated to compensate for the fact that the offender does not directly go to prison.
When considering the suspension of a sentence, judges may adopt a two-stage analysis, first considering the objective circumstances of the offence and then considering the personal circumstances of the offender in deciding whether or not to suspend the sentence. Factors which will tend to weigh in favour of suspension include the lack of prior convictions, lack of prior imprisonment, employment prospects, the effect imprisonment may have on third parties and the prospects of rehabilitation (Fox and Freiberg 1999:83-684). All of these would weigh in favour of the white-collar criminal.

In a recent study in the United States, Albonetti (1999) argued that in some United States jurisdictions, suspended sentences were the more likely outcome in complex white-collar litigation as a product of the plea bargaining process. Her contention was that where the bargaining power shifted from the prosecution to the defence, the defence was in a better position to negotiate a suspended sentence. Examining the variables which may influence a judge’s decision to suspend a sentence she found that a defendant’s socio-economic status, as measured by education, financial assets, gender and good reputation were significantly correlated with the likelihood of receiving such a sentence.

Another method of resolving the real vs symbolic sentence dilemma is by manipulating the relationship between the head sentence imposed and the non-parole period. Both the head sentence and the non-parole period must be proportionate to the gravity of the offence and, in Victoria at least, the non-parole period should be proportioned to the head sentence. However, a case for a larger disparity between the sentence of imprisonment and the non-parole period has been argued in relation to ‘white-collar crimes’. In Corbett (1991) 52 A Crim R 112 a doctor convicted of multiple frauds against the Commonwealth was sentenced to a term of 8 years with a non-parole period of 6 years. In reducing the sentence to one of 7 years and 6 months, with a non-parole period of 4 years, the court observed (at p 117):

Nevertheless, a feature of sentencing for ‘white collar’ crimes involving fraudulent abuse of trust, and sometimes involving fraud on the public purse, has been the imposition of lengthy head sentences, but with a substantial gap between head sentence and non-parole periods or minimum terms. This has probably been the consequence of a desire on the part of the courts, on the one hand, to reflect the need for general deterrence and, on the other hand, to give due account to the fact that the offenders involved frequently have no prior criminal history, are unlikely to reoffend, and have good prospects of rehabilitation.

Creative Alternatives

Although unjustified disparity has generally been recognised as a problem in Australia, there is little agreement as to how it should be dealt with. The consensus has been that it can be identified and controlled by the traditional methods of appeal and improving judicial education and knowledge of sentencing law and practice. In some jurisdictions, such as New South Wales, sentencing guideline judgments have been introduced to provide a greater degree of certainty in the sentencing process (Spigelman 1999). No guidelines have yet been issued for any white-collar offences.

In the United States, numerical sentencing guidelines have been developed in many jurisdictions. Under the federal guideline system developed by the United States Sentencing Commission, offences are ranked in 43 degrees of severity, each of which carries six criminal history categories, ranging from no ‘criminal history points’ to 13 or more. Criminal history points relate
not only to prior convictions, but also prior sentences of imprisonment, when the convictions occurred and in what circumstances) eg commission of offence whilst on parole). Each of the 258 resulting 'cells' (43 offence levels x 6 prior criminal history categories) corresponds to a specific sentencing range, from no imprisonment to life. At the lower levels, sentences of probation and supervised release are permitted, instead of, or in substitution for a prison sentence. Fines may also be imposed according to a scale. These much reviled guidelines (Doob 1995) are said to be particularly harsh on white-collar and corporate crime (Balsmeier and Kelly 1996).

The federal guidelines deal with the offences of larceny, embezzlement and other forms of theft as follows. The ‘base offense level’ is level 4, or 0-6 months for the lowest criminal history level to 6-12 months for a Category VI (13 prior history points or more). The base offence level is aggravated by the degree of monetary loss. The base level applies to a loss of $100 or less. Amounts from $100 to over $80,000,000 are divided into a further 20 categories, each of which adds one further offence seriousness category. Thus a loss of $10,000 results in the sentence increasing to 4 – 10 months for a Category I offender to 21 – 27 months for a Category VI offender. A loss of $200,000 increases the sentence to 15 – 21 months for Category I to 37 – 46 for Category VI. At the top of the range (level 24) the sentence is 51 – 63 months for Category I to 100 – 125 (10 years, one month) for Category VI. Further penalty enhancements can be added if the offence involved more than minimal planning (2 levels) or if the offence substantially jeopardised the safety and soundness of a financial institution (minimum level 24).

In relation to offences involving fraud or receipt, the base level offence is level 6, (0 – 6 months to 12 – 18 months) with a base level amount of $2,000. There are 18 levels of aggravation to $80,000,000, up to level 24. Other aggravating features are planning (2 levels), misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, political or government organisation or agency (2 levels, minimum level 10), use of foreign bank accounts to conceal transactions (minimum level 12) and jeopardising financial institutions (4 levels, minimum level 24).

The guidelines also provide for a number of general adjustments such as vulnerable victims (2 levels), role in the offence (2 – 4 levels), abuse of trust (2 levels) and is complicated by problems of multiple counts. In relation to white-collar crimes, where the amount of monetary loss is the key feature, the amount of loss is regarded as the major sentencing factor. Interestingly, the guidelines expressly prohibit certain offender characteristics such as age, employment record, family ties and responsibilities and community responsibilities, military, civic, charitable or public service and prior good works to be taken into account in determining whether a sentence should be outside the applicable guideline range.

Australia is unlikely to follow the pure numerical guideline path for a variety of cultural and jurisprudential reasons but guidance or control is certainly increasing.

A more palatable option to deal with the public perception may be to use more creative sentencing options, or make more creative use of our current options by, for example, requiring white-collar criminals to perform community service by lecturing business school students on ethics or the consequences of committing such crimes (Balsmeier and Kelly 1996:145). White-collar criminals may be liable for sanctions not applicable to other offenders such as disqualification from acting as company officers or in similar capacities. The extent to which this sanction acts as further punishment, a deterrent or has an incapacitative effect is unknown, but the procedure is frequently used in Australia and elsewhere (Cassidy 1995; Levi 1999).
John Braithwaite’s model of shaming has been suggested as a possible additional or alternative sanction in relation to corporate and white-collar crime (Braithwaite 1989: Chapter 9). The argument is that both the process of shaming and the possible economic consequences arising from the adverse publicity would amount to a more potent and effective sanctioning regime, particularly for corporations. It may also be effective in respect of professionals who are brought before disciplinary tribunals made up predominantly of their peers. These non-judicial forums may lack some of the gravitas of the courts, but may make up for it by being highly focused and by having their findings widely circulated to the profession as a whole.

Although shaming and restorative justice programs have been proffered as responses to almost every type of crime, their applicability to individualistic white-collar crime is still to be proved (Levi 1999a). The reasons for this are various: the crimes and the offenders are highly heterogeneous, the professional sub-cultures may or may not be supportive of the conviction or sentence, the techniques of neutralisation are powerful and the impact highly variable, depending upon the status and notoriety of the offence and offender (Levi 1999a). As Levi notes, in this sphere, the people who are to be care about shame are probably humiliated and punished sufficiently (see the Process is the Punishment above) and those who do not are unlikely to respond to, or benefit from, the programs.

Conclusion

It is unlikely that public concern with the sentencing of white-collar criminals will be allayed by this paper. If anything, it is likely to be exacerbated by the illustrations of the wide variety of sentences for the wide variety of offences. While on their face, many sentences imposed appear low in relation to the amount of money involved, it is clear that this is not the only factor that the courts take into account. In the Australian courts it would appear that the personal circumstances of the offender weigh heavily in judges’ minds and that the sentencing paradoxes alluded to above are often resolved in favour of the offender before the court rather than in favour of justice in the abstract or the individual, corporate or state victim. The breadth, intensity and persistence of this sentencing phenomenon, across jurisdictions represents some fundamental features of sentencing, namely that crimes against property are not regarded as seriously as crimes against the person and that sentencing flexibility, or individualised justice, is a core value. In the absence of American style numerical guidelines, it is likely that we will continue to see similar outcomes in the foreseeable future.
BIBLIOGRAPHY


# Recent White-Collar Sentences

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<th>NAME</th>
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<td>Cobb</td>
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<td>Woods</td>
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<td>Bosdovitz</td>
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<td>Reid</td>
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<td>Crichton- Browne</td>
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<td>Gorgy</td>
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<td>Wilson</td>
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