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DISCRETION AND DISPARITY ON THE CRIMINAL SIDE OF THE SUPREME COURT IN NEW YORK COUNTY

HAROLD BAER, JR.* and RICHARD S. MILLS**

Legislators and governors frequently adhere to the views of their constituencies. Necessarily, this blurs the truth. For example, determinate sentencing and the committee appointed to plan how the concept should be applied in New York¹ was, in part, an effort to placate the public. Unfortunately, public placation alone is rarely a sound reason for implementing sweeping public policy changes.

Public concern about chronic social problems is often ignited by vivid or gruesome events which tend to obscure functional and systemic realities. The crash of a passenger jet obliterates from the public mind the functional reality that hundreds of thousands of aircraft take off and land safely each year and inevitably the cry goes up for system-wide reforms, for tighter controls, in short, for certainty.

The paradigm also applies in the field of criminal justice, in which, unlike air-traffic safety, the relative success of the system is far from certain. In this article, we address the issue of whether disparity in the sentencing of white-collar criminals and in the sentencing of white-collar criminals vis-à-vis what we have denominated "other," "street," or "common" criminals may be attributed to untrammelled judicial discretion. Our "plane crash" is analyzed in the academic literature and reported in the popular media on a regular basis:

Two criminal defendants have committed similar crimes. Defendant A is sentenced by Judge Right to 5 years in prison; Defendant B is sentenced by Judge Left to 100 hours of community service. The cry goes up: "Reign in those renegade judges. Eliminate sentencing discretion and you will eliminate sentencing disparity!"

Usually the focus of public outrage is not a denial of equal protection for Defendant A, but is Judge Left's failure to lock Defendant B away for five years as well.

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1. The New York State Committee on Sentencing Guidelines was created in 1983 to develop recommendations for establishing a determinate sentencing system. It consists of 14 members appointed by the Governor and the Legislature. N.Y.L.J., Jan. 16, 1985, at 17, col. 1.

This article scrutinizes the questionable premise that disparity in sentencing, or put more crassly, the abuse of judicial discretion by New York judges, is a good reason to adopt determinate sentencing. We do not address the advisability of adopting the determinate model for other reasons, e.g., to assure certainty for the defendant as to the time he will serve or to secure increases in the frequency and duration of incarceration.² Rather, we suggest that sentencing disparity may not be reduced by the adoption of a determinate model. We are also hopeful that our findings will assist in dissolving the general misconception promoted by determinate sentencing's proponents—that judges are somehow responsible for “turnstile justice.”³

Without question, the sentencing decision is the most vulnerable to the sort of attack identified by Chief Judge Wachtler as “judge bashing.”⁴ The decision to arrest, the decision to prosecute, and the decision to convict usually do not take place in a public forum. But sentencing occurs in open court, often after the drama of a jury trial and its attendant publicity. The jury has convicted, and the judge is called upon to deliver justice or mercy as the law, the facts, and her discretion direct. If she fails to punish the convict to the satisfaction of the public, then she is accused of surrendering in the war on crime.⁵

It was in part a reaction to the cry of the citizenry that judges were soft on crime that prompted the appointment of a committee to investigate and develop a system of determinate sentencing for New York; this occurred even though perpetrators of common crime are already subjected to relatively harsh mandatory minimum sentences by our legislators.⁶ The public insists on even greater punishment, or what many criminologists characterize as throw-away-the-key “justice.” When critics raise the point that this type of justice would also empty the treasury, proponents of determinacy reply, “so be it.”

That attitude made it possible for the New York Legislature to move toward a determinate sentencing model, a concept made manifest in a sentencing grid that would specify the sentences judges would be permitted to mete out for each and every crime. Although white-collar crime is responsible for the theft of far more dollars annually

2. Wachtler, *Dealing with Crime: Need More Judges, More Resources, Not More Judge Bashing*, N.Y.L.J., Aug. 11, 1986, at 21, col. 1. Chief Judge Wachtler points out that with 38,000 prisoners, New York's prisons are currently at 110% of their capacity, making more frequent and fervent incarceration by judges a specious goal. *Id.*

3. *Id.* at 22, col. 2.

4. *Id.* at 21, col. 1.

5. Starr, *Crime: How It Destroys, What Can Be Done*, N.Y. Times, Jan. 27, 1985, § 6 (Magazine), at 19, 60.

6. See Schwartz, *New York Sentence Charts 1987*, reprinted in N.Y. PENAL L. (West 1987).

than common crime,⁷ and despite its more serious hallmark, i.e., the deterioration of the moral fiber of American society, white-collar crime was barely discussed in the Report of the sentencing guidelines committee.⁸ White-collar crime was apparently thought to be less of a community concern, the perception being that the public was most concerned with violent crime.

Of even more concern is the absence from the Report of any significant comment respecting sentencing goals.⁹ Without regard to which goals, if any, are "right" or "wrong," the fact that little attention was paid to the issue of the objectives of sentencing is distressing. A number of questions—What do judges intend to accomplish in sentencing?; What affects their decision to incarcerate?; As between white-collar and common criminals, is sentencing truly disparate?—were never addressed. Traditionally, sentencing goals have included retribution, incapacitation, deterrence, and rehabilitation.¹⁰ As a tentative step in looking at these important questions—but with no professional training in the preparation of scientific surveys—a class at New York Law School studying white-collar crime and correctional philosophy concluded that much information might be obtained by going directly to the judiciary.¹¹

THE STUDY

In November of 1984, the forty-five justices sitting on the criminal side of the New York State Supreme Court for New York County were mailed a questionnaire.¹² The survey was an attempt to measure the

7. In 1976, the United States Chamber of Commerce estimated that white-collar crime costs American business some \$40 billion annually. Heymann, *White-Collar Crime Symposium*, 17 AM. CRIM. L. REV. 271, 272 (1979).

8. N.Y. STATE COMM. ON SENTENCING GUIDELINES, DETERMINATE SENTENCING REPORT AND RECOMMENDATIONS (1985) [hereinafter DETERMINATE SENTENCING REPORT AND RECOMMENDATIONS].

9. N.Y. Times, Feb. 8, 1985, at B2, col. 6. In commenting on the preliminary report of the Sentencing Guidelines Committee, Archibald Murray, Executive Director of the Legal Aid Society, labeled the sentencing grid "draconian." He pointed out that the report rejected the concept of rehabilitation. *Id.*

10. For a discussion of the traditional goals of sentencing, see *infra* note 20.

11. It would be unconscionable to fail to point out the sophisticated work conducted in this corner of the law by Professors John L. Hagan and Ilene H. Nagel. See, e.g., Hagan & Nagel, *White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York*, 20 AMER. CRIM. L. REV. 259 (1982) [hereinafter Hagan & Nagel, *White-Collar Crime, White-Collar Time*]; Hagan & Nagel, *The Sentencing of White-Collar Criminals in the Federal Courts: A Socio-legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982) [hereinafter Hagan & Nagel, *Socio-legal Exploration*].

12. For a full text of the questionnaire, which was prepared by New York Law School students in conjunction with a course taught by Justice Baer, see *infra* Appendix.

effect of various factors upon the exercise of sentencing discretion.¹³ By early 1985, some nineteen justices had completed and returned the questionnaires,¹⁴ providing a statistically significant sample of the attitudes and opinions of experienced¹⁵ judges who regularly sentence for white-collar¹⁶ and common crimes¹⁷ in New York County.

Although judicial discretion is frequently limited, as noted above, by mandatory minimums imposed by the state legislature,¹⁸ many sentencing decisions continue to involve a significant measure of judicial discretion.¹⁹ Undoubtedly there are judges who agonize over how to exercise their discretion; just as, assuredly, there are judges who decide upon an appropriate sentence with a minimum of deliberation. Regardless of particular temperament, it is the sentencing judge who must

13. Discretion is defined as follows:

When applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. As applied to public officers means power to act in an official capacity in a manner which appears to be just and proper under the circumstances.

BLACK'S LAW DICTIONARY 419 (5th ed. 1979). Judicial and legal discretion are defined somewhat differently:

These terms are applied to the discretionary action of a judge or court, and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances

Id.

14. For the individual results of the study and a summary of the same, see *infra* Appendix, parts I-III.

15. See *infra* Appendix, part II, no. 11. The judges answering the survey fell into the following categories of experience according to years on the bench:

1. less than 1	5%
2. 1 to 5	47%
3. 6 to 10	26%
4. 10 to 20	21%

16. For the number of white-collar criminals sentenced by the 19 judges who responded, see *infra* Appendix, part II, no. 12.

17. The terms "common" or "street" crime refer to charges such as burglary, murder, assault, rape, and robbery. See Hagan & Nagel, *Socio-legal Exploration*, *supra* note 11, at 1428 n.4.

18. See Schwartz, *supra* note 6, at 6-11 (a listing of possible sentences for convicted felony offenders in New York State).

19. See, e.g., *People v. Selikoff*, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623, *stay denied sub nom. Selikoff v. New York*, 419 U.S. 1086 (1974), *cert. denied*, 419 U.S. 1122 (1975). For a discussion of judicial discretion in sentencing decisions, see S. KRANTZ, *THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS* 22 (3d ed. 1986) ("The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits they are effectively subject to no law at all."). For an enlightening and chilling example of a successful challenge to judicial sentencing discretion, see *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960).

exercise at least some discretion as to the length and conditions of sentence. Judges appear then to be a rich and valuable source of information regarding the relative importance of various identified goals.²⁰ Thus it seemed almost elementary to plum those factors that influence how this discretion is exercised. It is from this enigmatic and highly human resource—the judges themselves—that we have drawn the information relied upon and interpreted below.

The students that contributed to the survey were not without preconceptions. The majority believed that the essence of a judge's role in the sentencing process is the exercise of discretion—else why need there be a judge at all? Some questioned how disparate sentencing really was from judge to judge. It is preposterous, one student argued, that sentencing should be a mechanical process performed by a machine. It is no less preposterous to argue that judges should behave as automatons in the selection of appropriate sentences. These notions influenced and helped to frame our inquiry.

If judges make the sentencing decision on the basis of purely subjective criteria, then any attempt to integrate public policy concerns into the decisionmaking process would be pointless. If, alternatively, judges are concerned with the social goals of the community, then a sentencing model that ignores sentencing goals—such as the proposed determinate sentencing scheme—is pointless. Our study indicates that judges pay little attention to subjective factors in sentencing. But our examination of the priority that judges assign to various sentencing goals in different situations (white-collar vs. common crime), and the strength of this judicial prioritization indicate that sentencing goals play an important part in the exercise of judicial sentencing discretion. The body of this article examines, we believe for the first time, the impact of subjective, economic and social factors, and sentencing goal

20. In this study, "goals" refer to those subjective conscious desires and objectives either passively or actively pursued and/or actualized by a judge during the course of the sentencing decision. For the purposes of this study, the following goals have been identified:

1. *Incapacitation*: denoting the exclusion of an offender from society for the dual purpose of protecting the community and deterring that specific offender from committing subsequent offenses.
2. *Retribution/Punishment*: denoting the purpose of inflicting harm or undesirable restrictions upon the offender to satisfy an expectation of justice or fairness.
3. *Restitution*: denoting the imposition of a financial or service burden upon the offender for the purpose of compensating or making the victim(s) whole.
4. *Rehabilitation*: denoting treatment of the offender in order to modify undesirable behavior or traits for the purpose of restoring the offender to the community.
5. *General Deterrence*: denoting the imposition of a sanction upon the offender for the purpose of frightening other potential offenders such that they do not commit similar offenses.

selection upon the exercise of judicial discretion.

Such an examination implies the existence of certain questions. First, does the selection of a particular sentencing goal or priority of goals by an individual judge affect the sentencing decision? Second, if so, how does the selection of one sentencing goal, or the priority given to that goal, vary from white-collar crime to common crime? Third, does the selection of particular sentencing goals in white-collar crime and different goals for common crime account for disparity found in white-collar and common criminal sentences? Finally, should major modifications be made in the sentencing process to reduce or eliminate disparity, even if sentences are predicated upon rational judicial decision? The study was undertaken to provide information and an analysis of the data gathered and to amplify the issues presented by these questions.

ETIOLOGICAL CONCERNS

While drafting the survey, the students who designed the study became concerned that the term "white-collar criminal" might be subject to misinterpretation by the survey group.²¹ Edwin Sutherland originated the term "white-collar crime" in his seminal work on the subject published in 1939.²² White-collar crime can be defined as a nonviolent crime committed by a person of high social status in the course of his occupation. Academic confusion aside, the students reasoned that this definition was sufficiently precise and exclusive in its meaning and was so broadly accepted as accurate that it would serve well as an operational definition for the purposes of the study.²³

21. The cognoscenti in the field of white-collar criminal research have so expanded the original meaning of the term as to render it inclusive of all nonviolent crime, and therefore, meaningless. See Hagan & Nagel, *White-Collar Crime, White-Collar Time*, *supra* note 11. Hagan and Nagel state:

[T]he question of just what constitutes white-collar crime remains open. A 1980 annotated bibliography on white-collar crime published by the United States Dept. of Justice concluded that "[t]here is no universally accepted definition of white-collar crime." Although much literature is beginning to shed some light on this definitional issue, a consensus has yet to emerge.

Id. at 262 (footnotes omitted).

22. Sutherland, *White-Collar Criminality*, in *WHITE-COLLAR CRIME* 38 (rev. ed. 1977). Sutherland compared and contrasted white-collar and common criminality in order to demonstrate that criminal behavior cannot be explained simply by use of economic or social criteria. *Id.* at 39. He further noted that the two types of criminality are distinguished primarily by the manner of treatment given to each under the criminal law. *Id.* at 45.

23. It should be noted that the cognoscenti in the field of white-collar criminal research have dismissed as unreliable "empirical studies which employ[ed] alternative operational definitions to address issues of sentencing disparity." See Hagan & Nagel, *White-Collar Crime, White-Collar Time*, *supra* note 11, at 262.

In order to integrate this definition of white-collar crime into their survey, the students included it in the first paragraph of a letter of introduction requesting judicial participation in the study. Therefore, our operational definition of white-collar crime was within the cognizance of those justices who participated in the study. To that extent, at least, the results of the survey are consistent from justice to justice. To the extent that the definition touches a gut-level understanding of an increasingly disturbing aspect of crime in America, the survey measures some of the factors that impact upon the judicial decision to impose sanctions upon those individuals who have criminally exploited their occupations for some sort of illicit gain.

The social context in which this survey was prepared, distributed, and analyzed was, as it always is, an important element to be considered. While the survey was being drafted, the celebrated entrepreneur, John DeLorean, was acquitted of charges that he conspired to purchase and sell cocaine in a scheme to recapitalize his failing automobile manufacturing company. DeLorean's acquittal was predicated upon the entrapment defense which essentially requires an admission of criminal acts on the part of the defendant.²⁴

During distribution of the survey, John Zaccaro, a prominent New York real estate broker and husband to vice-presidential candidate Geraldine Ferraro, was indicted and convicted on charges that he participated in a scheme to defraud a New York bank into financing a multi-million dollar real estate transaction. Zaccaro was sentenced to perform 150 hours of community service, but was permitted to take a Caribbean vacation prior to its commencement.²⁵

While the responses to the survey were coming in and being compiled and analyzed, Secretary of Labor Raymond Donovan was forced to take a paid leave of absence in order to defend against a 137 count indictment charging him with larceny and fraud when he served as vice-president of a New Jersey construction company. While this article was being drafted, a New York Supreme Court justice found that the charges in the indictment, if proven at trial, would demonstrate "a carefully contrived scheme to steal property."²⁶

And so, we accepted the challenge to study sentencing practices to determine if there is an identifiable paradigm regarding the exercise of judicial sentencing discretion from judge to judge, and what, if any,

24. *DeLorean is Freed of Cocaine Charge by a Federal Jury*, N.Y. Times, Aug. 17, 1984, at 1, col. 6.

25. *Judge Sentences Zaccaro to Work in Public Service*, N.Y. Times, Feb. 21, 1985, at 1, col. 2.

26. *Judge Refuses Bid to Dismiss Donovan Case*, N.Y. Times, Mar. 16, 1985, at 1, col. 4.

remedial measures should be instituted.²⁷

Since the public perception of disparity in sentencing between white-collar and common criminals appears to be an accepted fact,²⁸ and since the resources necessary to test that fact were not available, we tried to measure the extent to which individual judges hold the same views regarding the reasons for sentencing disparity (real or perceived). The impact of three factors, two subjective and one objective, believed to have a significant effect on the sentencing decision are discussed in Part I. Some of the salient judicial perceptions which demonstrate the confusion underlying the call for limiting judicial discretion are examined in Part II. The impact of various sentencing goals upon the sentencing decision are considered in Part III. Finally, recommendations for reducing the perception of sentencing disparity are presented in Part IV.

I. THE EFFECT OF SUBJECTIVE FACTORS ON THE EXERCISE OF JUDICIAL DISCRETION IN SENTENCING WHITE-COLLAR CRIMINALS

Most of the students who compiled the survey anticipated that they would uncover evidence supporting what many critics believe to be a pervasive inequity in the criminal justice system: that judges ignore facts and rely on "totally subjective concerns"²⁹ when sentencing white-collar criminals. These critics urge that the exercise of unbridled judicial discretion in sentencing white-collar criminals is largely to blame for "the already marked disparity between the sentences served by rich and poor defendants."³⁰ A survey that would measure the impact of "subjective factors," and reveal the underlying goals of judges sentencing both white-collar and common criminals would afford some basis for an intelligent discussion regarding limitations on judicial discretion.

In order to obtain an indication of the impact of subjective factors upon the sentencing decision, the survey included ten hypothetical fact patterns describing crimes committed by first offenders. Since white-collar defendants are predominantly first offenders, and since the reverse is true of common or street criminals, one way to control for the

27. See Pollack & Smith, *White-Collar v. Street Crime Sentencing Disparity: How Judges See the Problem*, 67 JUDICATURE 175 (1983). Pollack and Smith reported the results of an informal survey of seven state and seven federal judges, all sitting in New York. The questions were designed to elicit the criteria and reasoning each judge used in sentencing white-collar criminals. *Id.* at 177-81. The authors acknowledged that their "survey was designed to be no more than a pilot study indicating the direction for future research." *Id.* at 182.

28. Seymour, *Social and Ethical Considerations in Assessing White-Collar Crime*, 11 AM. CRIM. L. REV. 821 (1973).

29. See Press Release of New York Attorney General Robert Abrams (Feb. 7, 1985).

30. *Id.*

effect of recidivism was to make all defendants first offenders. None of the hypothetical defendants were identified by race, sex, national origin, or creed.³¹ After detailing the circumstances of the criminal act and indicating that the offender was convicted following trial,³² each justice was asked to choose the most and least appropriate sanction³³ from a range which did not vary from hypothetical to hypothetical. The choices included: incarceration of six months to one year, incarceration of one to five years, incarceration of five years or more, loss of employment and income, and probation and full restitution.

Nine of the hypothetical fact patterns were designed to measure one of three variables while controlling for the other two. The subjective variables sought to be measured were: (1) the effect of the socioeconomic status of the white-collar criminal on the sentence given (Table A); and (2) the effect of the status of the victim of the offense (*e.g.*, individual, small or large business) (Table B). The objective variable was the amount of money taken by the offender (Table C).

While the hypothetical questions may not measure actual sentencing options,³⁴ clearly the subjective factors (*i.e.*, the offender's socioeconomic status and the sympathetic nature of the victim) have very little effect on the judicial sentencing decision in the Supreme Court in New York County, at least in white-collar cases. As set forth in the tables below, for the most part, the criminal bench was incarceration oriented and closely clustered within two sentencing options on each of the hypothetical questions dealing with the two subjective factors.

The data from the hypothetical questions suggest that the only tested variable which had a substantial impact on the sentencing decision was the amount of money involved in the crime. The data set forth in Table C provide a clear indication that sentences decrease as the amount of money involved decreases.

31. One justice who declined to respond to the hypotheticals noted rather poignantly: "There are no hypotheticals that can include sufficient information for determining an opinion on sentence."

32. The decision to go to trial has a significant impact on the sentencing decision. REPORT OF THE N.Y. ADVISORY COMM. ON CRIM. SANCTIONS, CURRENT SENTENCING PRACTICES pt. 2. (Dec. 28, 1982) [hereinafter N.Y. ADVISORY COMM. REP.]. Although the report does not directly deal with how sentencing duration is affected by the decision to go to trial, there is ample evidence contained in the report to suggest that the effect is severe.

33. The term "sanction" was used for the purpose of alerting the justices to possible alternatives to incarceration. The justices were specifically instructed to assume that all sanctions were possible individual choices. See *infra* Appendix, part III.

34. As one incensed justice felt compelled to point out: "This questionnaire's hypotheticals are foolish. Current sentencing parameters in New York, with all their limitations, give more scope for appropriate sentences than do these options." In fact, this is probably only marginally correct, but it is true that the use of a 1-5 year range as an option can hardly provide precise data.

TABLE A

Effect of Economic Social Status
of *White-Collar Criminal* on Sentence³⁵

Case #	Eco-social status of offender	Most frequent sentence	Strength of response	Calling for prison
1	high	1-5	(8) 42%	
		6m-1	(7) 37%	89%
9	middle high	1-5	(9) 47%	
		6m-1	(5) 26%	79%
7	middle low	1-5	(10) 52%	
		6m-1	(3) 15%	73%
8	low	1-5	(11) 58%	
		6m-1	(5) 26%	84%

TABLE B

Effect of Economic Social Status of the
Victim on White-Collar Criminal on Sentence

Case #	Economic status of victim	Most frequent sentence	Strength of response	Calling for prison
3	large	+5	(7) 37%	
		1-5	(8) 42%	89%
5	medium	1-5	(7) 37%	
		6m-1	(9) 47%	84%
2	small	1-5	(7) 37%	
		6m-1	(6) 32%	68%
		probation	(4) 21%	

35. We note that the "strength of response" increases for the more stringent sentence as the socio-economic status of the offender decreases.

TABLE C

Effect of Amount of Money Involved
on White-Collar Criminal on Sentences

Case #	Amount of loss	Most frequent sentence	Strength of response	Calling for prison
6	large.....	+5	(5) 26%	84%
		1-5	(9) 47%	
10	medium	1-5	(9) 47%	78%
		6m-1.....	(4) 21%	
4	small	1-5	(8) 42%	58%
		6m-1.....	(3) 16%	
		probation	(5) 26%	

Individual tracking of the justices' responses substantiates this trend as consistent from justice to justice. That is, those justices who selected the higher sentences in case #6 generally selected the higher sentences in case #10 and case #4. As the amount of money decreased from case to case, the sentences selected by the justices decreased both individually and as a group, demonstrating consistency.

Oftentimes, the amount of gain realized by the offender is staggeringly less than the loss to the victim, especially in white-collar crime situations. Since our survey only measured the effect of the amount of the loss, there is clearly a need for further detailed study of this trend. An analysis of the effect of the amount of gain and loss as it impacts upon the length of sentence could afford interesting insights as to the effect of the monetary factor in sentencing.

II. FACTORS AFFECTING JUDICIAL PERCEPTION AND THE POTENTIAL FOR CONFUSION IN THE EXERCISE OF DISCRETION

In this part, we have again employed the notion of disparity between white-collar and common criminal sentences, as a device to afford a descriptive analysis of our sample group, and to suggest some of the confusion which we believe exists, both on the bench and off, regarding the exercise of judicial discretion in the sentencing process.

Given the academic study and media attention devoted to judicial discretion in the sentencing decision, it is not surprising that judicial discretion has increasingly become the target of numerous attacks. What is a little surprising is that a large number of judges share the perception of the general public that white-collar criminals rarely receive a punishment commensurate with their crime.

When we asked the justices sampled to select one or more statements which most nearly represented their personal sentiments regarding the administration of justice as it affects white-collar criminals,³⁶ the most popular response³⁷ was: "White-collar criminals rarely receive punishment commensurate with their crimes." Fully fifty-three percent of the participating justices selected this response. The second most popular statement, selected by thirty-seven percent of the justices, was: "They generally take advantage of the criminal justice system by using their economic resources (*e.g.*, they are able to retain more experienced and influential counsel)."³⁸ Does white-collar crime pay? According to sixteen percent of our participants, white-collar criminals "generally profit from their criminal conduct." We consider such responses to be indicative of general dissatisfaction with the administration of justice insofar as white-collar criminals are concerned, and refer to such statements as negative indicators.

In contrast, the selection of positive indicators—statements indicating satisfaction with the sentences received by white-collar criminals—was significantly lower. Only twenty-one percent of the justices surveyed said that they believed that white-collar criminals "generally get what they deserve." Sixteen percent of the sample group chose the statement: "They suffer the consequences of their crimes more than common criminals do." A mere five percent of the justices indicated that they believed that white-collar criminals "generally regret their criminal conduct and are reformed."

Considering the judicial sentiments expressed above, one might reasonably draw the conclusion that judges are dissatisfied, in some way, with the sanctions that are imposed upon white-collar criminals. It is illogical to assume that this dissatisfaction is self-directed. Presumably, when a judge passes sentence upon a defendant, she conforms the sentence to her own notions of justice or the goals of the system and is satisfied that her decision is appropriate under the circumstances. This dissatisfaction is likely to be resolved only in the legislative process.³⁹

Two survey questions asked the justices to locate themselves with

36. For a complete breakdown of the responses to this question, see *infra* Appendix, part II, no. 10.

37. By "popular" we mean the response selected most frequently. It should be emphasized that the justices were invited to choose as many as all and as few as none of the statements provided. We received 28 responses from the 19 participants. Each justice selected at least one response. None selected more than three. See *id.*

38. *Id.*

39. The New York State Committee on Sentencing Guidelines has recommended the recodification of the penal law so as to ensure that "economic, or so-called white-collar, crimes [are] treated as severely as some violent street crimes." DETERMINATE SENTENCING REPORT AND RECOMMENDATIONS, *supra* note 8, at 42.

respect to their judicial colleagues on a scale of five levels of sentencing severity, ranging from "much harsher" to "much more lenient" in sentencing for white-collar crimes in the first question, and in sentencing for common crimes in the second question. Table D illustrates the responses to these questions.

TABLE D

Sentencing Severity Scales

PERCEIVED RELATIVE HARSHNESS IN
SENTENCING WHITE-COLLAR CRIMINALS

much harsher	somewhat harsher	about the same	somewhat more lenient	much more lenient
0	6 (40%)	8 (53%)	1 (7%)	0

PERCEIVED RELATIVE HARSHNESS IN
SENTENCING COMMON CRIMINALS

much harsher	somewhat harsher	about the same	somewhat more lenient	much more lenient
0	5 (31%)	5 (31%)	6 (38%)	0

The data set forth in Table D above are valuable for they allow a measurement of judicial self-perception, as well as a non-judgmental assessment of the relative harshness of the rest of the bench. Standing alone, the data measuring perceived harshness with respect to sentencing white-collar criminals indicate that most judges see themselves as being no more or less harsh than their peers. Viewed as a whole, the data indicate that no judge perceives himself to be very different from his brethren in either white-collar or common criminal sentencing. Still, when sentencing white-collar criminals, forty percent of the justices perceive themselves as being "somewhat harsher" than their peers, and seven percent believe they are "somewhat more lenient."

By correlating the location that each judge selected on the severity scale with the type of response(s)—positive or negative indicators—reflective of his personal sentiments regarding the treatment of white-collar criminals,⁴⁰ we discovered a direct correlation between judicial dissatisfaction and a higher level of perceived harshness. Those judges who perceived themselves as "somewhat harsher" than their colleagues selected exclusively negative indicators for their personal

40. See *supra* notes 36-38 and accompanying text.

sentiments regarding the treatment of white-collar criminals. Such a correlation, we submit, leads to the conclusion that part of the sampled group is dissatisfied with what they perceived to be a lack of severity on the part of some of their colleagues. By our reckoning, this suggests a certain degree of intramural dissatisfaction directed by these judges against justices perceived by them to be more lenient. Such dissatisfaction proved, at least in this study, to be unsupported.

Other elements of the survey indicate that any presumption by the dissatisfied judges that their colleagues are "soft" on white-collar criminals is a relative misperception. Further testing revealed that when confronted with hypothetical white-collar sentencing decisions, those justices who considered themselves to be "somewhat harsher" than their colleagues consistently⁴¹ selected sentences which were the same as, or lighter than, the sentences selected by the rest of the responding justices. Still, as detailed below, when the justices were asked to select appropriate sentences for white-collar criminals, the survey revealed a cohesive, incarceration oriented bench.⁴² These misperceptions may result from the fact that harshness and leniency are relative terms. As Professors Pollack and Smith point out: "What judges say and what they do may be two different things. If Judge A tells us he believes in a heavy sentence and Judge B believes in a light sentence, both, for all we know, may be referring to a one year sentence."⁴³ Further, any labeling of themselves or their colleagues as "heavy" or "light" sentencers and the factors affecting such designations suffer, at least in part, from a lack of communication among members of the bench.⁴⁴ Indeed, it might be helpful if sentencing information was provided to justices throughout the state.

It may well be that disparity in sentencing between white-collar and common criminals does not exist, but if it does, it may well be predicated upon factors rationally related to sentencing goals. In either case, eliminating judicial discretion will not reduce the public perception that some criminals go unpunished, or underpunished.

41. Of the group who viewed themselves as "somewhat harsher" than their peers (40% of those surveyed), 43% misperceived their actual position in all 10 hypothetical cases, and 14% imposed the same or a more lenient sentence in seven out of 10 cases. The remaining 42% of the justices misperceived their relative harshness in 20% to 50% of the cases.

42. In over 80% of the hypothetical situations calling for the justice to pass sentence upon a first-time white-collar criminal, a term of incarceration was selected. See *supra* Tables A, B, and C.

43. For a discussion of the subjective aspects of judicial sentencing decisions and the subjective goals of sentencing, see *supra* note 20.

44. One justice, in declining to answer the series of questions relevant to perceptions of relative severity, frankly noted: "Don't know, no exchange of information."

A prior empirical study⁴⁵ of sentencing practices among New York State judges prepared under the direction of Justice Peter J. McQuillian, demonstrated that there was virtually no geographical disparity in the great majority of criminal sentences imposed in New York State.⁴⁶ Given the results of the McQuillian Commission's study and the results obtained in our examination, there is at least some support for the contention that any serious sentencing disparity in New York is, in fact, a myth. Disparity, if it does exist between white-collar and common criminal sentencing in New York's present system, may be a response to the type of rational, cognizant judicial decisionmaking that our society and political tradition demand. In short, if different crimes threaten different social concerns, then it is perfectly appropriate that the sentencing goals should differ. If sentencing goals differ, it is axiomatic that the sentences imposed should differ as well.

III. THE EFFECT OF JUDICIAL SENTENCING GOALS ON THE SENTENCING DECISION

By far the most enlightening information supplied by the justices who responded to our survey indicated a primary preference for one or another of the classical goals of sentencing: general deterrence, retribution, rehabilitation, restitution, and incapacitation.⁴⁷ The justices were asked to respond to four questions, two of which made reference to a white-collar criminal and two of which made reference to a "street" criminal. The first two questions were straightforward requests that the justice select the sentencing goal he or she considered paramount in sentencing a white-collar and a common criminal. The third and fourth questions asked the justices to select a response to the following: "If only one good thing could come as a result of my sentencing a white-collar/common criminal I would choose to" The choices consisted of the following six statements, each of which is identified below with the goal, in brackets, to which it corresponds:

- a. Rehabilitate the criminal and restore him/her to a productive role in society. [Rehabilitation]
- b. Deter other persons from committing similar crimes. [General Deterrence]
- c. Prevent the criminal from victimizing others in the future. [In-

45. N.Y. ADVISORY COMM. REP., *supra* note 32.

46. *Id.* at 9. The study "found no significant disparity in average maximum prison sentences for class D and E felonies among the three geographic areas of the State. With respect to some class B and C felonies there are measurable differences, although not as great as expected." *Id.*

47. See generally W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5, at 21-25 (1972) (discussing the judicial motives underlying each of the principal theories of punishment).

capacitation or Specific Deterrence]

- d. Restore the loss sustained by the victim. [Restitution]
- e. Punish the criminal in a way which would satisfy the victims. [Retribution]
- f. Other (specify if you wish)

The responses to these two sets of questions are set forth in Tables E and F, respectively.

TABLE E

Paramount Goal in Sentencing

White-Collar Criminals

Goal	Responses	% of Total Responses
General Deterrence	14	64
Retribution / Punishment	3	14
Restitution	2	9
Rehabilitation	2	9
Incapacitation	1	5

Street Criminals

Goal	Responses	% of Total Responses
Incapacitation	9	33
Retribution / Punishment	9	33
General Deterrence	5	19
Rehabilitation	3	11
Restitution	1	4

TABLE F

Single Most Desired Result

White-Collar Criminals

Goal	Responses	% of Total Responses
General Deterrence.....	13	72
Incapacitation	2	11
Rehabilitation	1	6
Retribution / Punishment.....	1	6
Restitution	1	6
No Response	1	6

Street Criminals

Goal	Responses	% of Total Responses
Rehabilitation	12	63
Incapacitation	5	25
General Deterrence.....	2	11
Restitution	0	
Retribution / Punishment.....	0	
No Response	2	11

By compiling the responses to the four questions, we achieve a ranking of sentencing goals for the surveyed jurists as a group, represented by the comparison in Table G.

TABLE G

A Comparison of the Preferred Sentencing Goals
for White-Collar and Common Criminals

WHITE-COLLAR	COMMON
1. General Deterrence	1. Rehabilitation
2. Retribution	2. Incapacitation
3. Incapacitation	3. Retribution
4. Rehabilitation	4. General Deterrence
5. Restitution	5. Restitution

We note that the judges were consistent in selecting their preferred goal for white-collar criminal sentencing (*i.e.*, general deterrence). This consistency appears to be lacking in the responses for

common criminal sentencing goals. For white-collar crime, the overwhelming preference for general deterrence⁴⁸ indicates that to a certain extent judges are sentencing white-collar criminals as a warning to others. The overwhelming selection of this goal would also seem to indicate that the judges surveyed are well aware of the increasing incidence of white-collar crime and the public perception that white-collar criminals are going unpunished.

With respect to common criminals, the conclusions to be drawn from the responses received are less clear. Although tempting, it would be unfair to find that the justices are closet proponents of the rehabilitation theory. An analysis shows that an equal number of the judges who selected rehabilitation as the most desired result of the sentencing process, selected either retribution, incapacitation, or deterrence, or a combination of these goals as their paramount goal in sentencing.

This dichotomy may suggest that while judges recognize that the protection of society requires them to punish the wicked, most justices, given a more perfect world in which to operate, would advocate rehabilitation rather than punishment.⁴⁹

In the final analysis, it must be recognized that the sentencing goals of judges may vary from crime to crime based upon the results they hope to achieve by sentencing a particular offender. In truth, we do not seek to do abstract justice mechanically, arbitrarily, or by the numbers. We punish the violent more than the nonviolent because in our society, indeed throughout western civilization, crimes against people are more abhorred than crimes against property. We punish first-time offenders less severely than recidivists because we believe that human beings can change for the better if given the opportunity and direction. In sentencing criminals, we measure the harm done to victims as well as the possibility of salvaging the violator. We measure, survey, and balance all of these interests and aspects against what we believe are the best interests of our society. Put another way, we found precious little disparity in New York County, and the kind we did find is the kind we may be proud of—certainly it is not the kind for which we should revamp the pivotal sentencing aspect of our criminal justice system.

IV. CONCLUSIONS AND RECOMMENDATIONS

Given the fundamental importance of the sentencing decision and the study and analysis of those factors which impact upon it, it is diffi-

48. See Mann, Wheeler & Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 482-86 (1980).

49. See *United States v. Braun*, 382 F. Supp. 214 (S.D.N.Y. 1974) (discussing many factors relevant to the sentencing of the white-collar criminal).

cult to understand why there is no formal forum for discussion, debate, and exchange of information between jurists on sentencing. The specific challenge sentencing presents to the judiciary includes an examination of sentencing discrepancy affecting different types of offenders, and the alleged abuse of judicial discretion in particular. The Model Sentencing and Corrections Act of 1978 provides a possible format.⁵⁰ A judicial sentencing institute would not only provide other state officials with valuable insight into judicial experience with the myriad problems of sentencing, but would provide a forum for the exchange of ideas among jurists.

One of the initial tasks of such a sentencing institute would be the formulation of statewide policy regarding the goals to be achieved by sentencing. A comprehensive set of true policy guidelines, not strict statutory rules, could suggest appropriate objectives and goals for sentencing different types of offenders, and even provide proposed sentences which might help to achieve such goals. This approach would further several purposes including flexibility, standardization, notification, and reevaluation.

For the judiciary to be able to respond appropriately to sentencing problems as they arise, it is necessary to have some sort of formal articulation of policy to ensure that a problem will be met with a response that is both timely and relatively uniform. Since statutory enactments by the legislature require both time for enactment and post-enactment interpretation, it is doubtful that legislation alone is the best response to a new sentencing challenge. Moreover, the judiciary should have a larger role in setting sentencing policy.

A judicial articulation of sentencing policy should be made within a brief time following recognition of a problem such as perceived disparity between white-collar and common criminal sentences. Because judges must also implement the policy, they will be in the best position to evaluate and modify it if the means selected to pursue the suggested sentencing goals are not having the desired effects.

In conclusion, it is clear that in the absence of legislative reforms, it is essential that the New York courts develop a body of enduring

50. MODEL SENTENCING AND CORRECTIONS ACT § 3-110 (Nat'l Conf. of Comm'rs on Uniform State Laws 1978). Section 3-110 provides for the creation of a sentencing commission with members to be appointed by the Governor. The commission "consists of the director of corrections and [eight] additional members appointed by the Governor [with the advice and consent of the Senate]. Three members must be active trial judges of courts having criminal jurisdiction" *Id.* For New York, a state in which active judges cannot sit on policy-making commissions in another branch of government, "the [Chief Judge of the Court of Appeals] shall appoint a judicial advisory panel consisting of [three to five] active trial judges of courts having criminal jurisdiction. The panel shall meet with the [Governor's sentencing] commission and advise it on the discharge of its responsibilities." *Id.* § 3-110 (alternative A(b)).

sentencing jurisprudence. One way such a jurisprudence could be developed would be to require that all criminal sentences along with a brief fact pattern be rendered in writing and made available to the bench and bar. This is neither a new nor a radical idea,⁵¹ but merely an idea whose time has come. It is clear that whatever the truth about sentencing disparity and discretion in this state may be, as of now, the *facts* on which to base conclusions and draft legislation are not readily available.

51. See Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 IOWA L. REV. 205 (1974).

APPENDIX

This appendix consists of a copy of the questionnaire. Responses are tabulated following each part.

INTRODUCTION

Each year, billions of dollars are lost as a result of so-called "white-collar criminal" transactions. White-collar crime may be roughly defined as a nonviolent crime committed by a person of respectability and high social status in the course of his occupation.

There is a great divergence of opinion among legal scholars about how white-collar criminals should be treated following apprehension, trial and conviction. Some commentators believe that white-collar criminals are not really criminals at all. Many believe that white-collar criminals should be treated more leniently than "street" criminals, primarily because the white-collar criminal rarely has a record of prior criminal activity and statistically is not likely to be a recidivist. On the other end of the spectrum, it has been suggested that white-collar criminals should be treated harshly by the courts in part because of the public's perception that these influential, successful individuals with high priced lawyers are beyond the reach of the law. Some believe that this attitude is destroying the moral fiber of our country and warrants strict treatment by the court at the time of sentencing. In any event, it is safe to say that there is no single prevailing theory on how white-collar criminals should be treated. Commentators often speculate about the thought processes of the judges that eventuate into sentencing decisions for both white-collar and street criminals.

The following questionnaire is meant to elicit answers to some of the questions most frequently raised by these commentators. It is being sent, at least in the first instance, to all Supreme Court Justices in New York County and to those Acting Supreme Court Justices who have sat on the criminal side of the court for any appreciable period of time. The questionnaire was prepared by a class at New York Law School who are enrolled in a course entitled "White-Collar Crime and the Correctional System." The course is taught by the Honorable Harold Baer, Jr., a Justice of the Supreme Court. Although we have no formal training in the science of drafting questionnaires, we have expended a great deal of time and energy on this project and hope that you will take a few minutes from your busy day and respond as soon as conveniently possible. You will, of course, receive a copy of the result of this survey. The questionnaire will be anonymous unless you choose to sign your name. For your convenience, an addressed, stamped envelope has been provided.

QUESTIONNAIRE

This questionnaire is comprised of three parts: Agree-Disagree Statements, Multiple Choice Questions, and Hypothetical Questions.

I. *Agree-Disagree Statements*

Instructions: Consider each statement separately. Indicate whether you agree or disagree with the statement.

1. White-collar criminals are treated more leniently than street criminals because they seldom have prior criminal convictions while many street criminals are repeat offenders.
2. Generally speaking, a white-collar criminal is punished enough if the publicity resulting from his apprehension and conviction causes him to lose self-respect and the respect of his social peers and his business associates.
3. White-collar criminal defendants are often found not guilty because the issues involved in these cases are too complex for the average juror to understand.
4. The citizens who make up our society are more concerned about violent crime than white-collar crime, so it is appropriate to treat white-collar criminals more leniently than street criminals.
5. Special consideration should be given to the white-collar criminal's civic, family, and business relationships.
6. The best treatment for convicted defendants in white-collar criminal cases generally would be to require a restoration of the financial value of the proceeds of the crime to the victim(s).
7. Alternatives such as community service, fines, and restitution are more appropriate than incarceration for white-collar criminals.

No.	AGREE		DISAGREE		NO RESPONSE	
		%		%		%
1.	16	84	3	16	—	—
2.	2	10	17	90	—	—
3.	5	26	14	74	—	—
4.	5	26	11	58	3	16
5.	6	32	13	68	—	—
6.	4	21	14	74	1	5
7.	9	47	6	32	4	21

II. *Multiple Choice Questions*

Instructions: Circle the letter or letters that most clearly represent your view.

1. Whom do white-collar criminals harm the most?
- Society, by the erosion of public trust.
 - The injured party itself/himself.
 - The State, and thereby the public at large, through the costs of detection, prosecution, and possible incarceration.
 - The family of the white-collar criminal.
 - Society, by the loss of a productive worker, namely the white-collar criminal.

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	13	54	68
b	8	33	42
c	1	4	5
d	2	8	24
e	—	—	—
no response	1	—	5

2. In your opinion, most white-collar criminals engage in criminal conduct to:
- Support their luxurious lifestyles.
 - Offset financial setbacks.
 - Provide basic needs for their families (food, clothing, etc.).
 - Take the challenge of trying "to get away with it."
 - Meet the demands imposed upon them by their superiors (job "forced" them to do it).
 - Other (specify if you wish).

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	8	30	42
b	6	22	32
c	1	4	5
d	5	19	26
e	—	—	—
f	7	26	37
no response	2	—	11

3. Which of the following do you consider paramount in sentencing a white-collar criminal?
- Retribution/punishment.
 - Rehabilitation.
 - Incapacitation.
 - Deterrence of others.
 - Restitution.

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	3	14	16
b	2	9	11
c	1	5	5
d	14	64	74
e	2	9	11
no response	3	—	16

4. Which of the following do you consider paramount in sentencing a street criminal?
- Retribution/punishment.
 - Rehabilitation.
 - Incapacitation.
 - Deterrence of others.
 - Restitution.

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	9	33	47
b	3	11	16
c	9	33	47
d	5	19	26
e	1	4	5
no response	3	—	16

5. In determining the severity of sentence for a white-collar criminal, which among the following factors do you consider the most important. With "1" being the most important factor, please number in descending order of importance.
- Nature of the act.
 - Amount of money involved, if any.
 - Nature of the injured party (*i.e.*, corporation or person).
 - Number of people affected, if any.
 - Background and education of white-collar criminal.
 - Position held by white-collar criminal.
 - Impact on white-collar criminal's family.
 - Other (specify if you wish).
6. If only one good thing could come as a result of my sentencing a white-collar criminal, I would choose to:
- Rehabilitate the criminal and restore him/her to a productive role in society.
 - Deter other prospective white-collar criminals from committing similar crimes.
 - Prevent the criminal from victimizing others in the future.
 - Restore the loss sustained by the victim(s).

- e. Punish the criminal in a way which would satisfy the victim(s).
 f. Other (specify if you wish).

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	1	6	5
b	13	72	68
c	2	11	11
d	1	6	5
e	1	6	5
no response	1	—	5

7. If only one good thing could come as a result of my sentencing a street criminal, I would choose to:
- Rehabilitate the criminal and restore him/her to a productive role in society.
 - Deter other persons from committing similar crimes.
 - Prevent the criminal from victimizing others in the future.
 - Restore the loss sustained by the victim(s).
 - Punish the criminal in a way which would satisfy the victim(s).
 - Other (specify if you wish).

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	12	67	63
b	2	11	11
c	3	17	16
d	—	—	—
e	—	—	—
f	1	6	5
no response	1	—	5

8. How do you view yourself, as compared to your brethren, in terms of the severity of sentences you impose on white-collar criminals?
- Much harsher.
 - Somewhat harsher.
 - About the same.
 - Somewhat more lenient.
 - Much more lenient.

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	—	—	—
b	6	40	32
c	8	53	42
d	1	6	5
e	—	—	—
no response	4	—	21

9. How do you view yourself, as compared to your brethren, in terms of the severity of sentences you impose on street criminals?

- a. Much harsher.
- b. Somewhat harsher.
- c. About the same.
- d. Somewhat more lenient.
- e. Much more lenient.

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	—	—	—
b	5	31	26
c	5	31	26
d	6	38	32
e	—	—	—
no response	3	—	16

10. Which of the following statements reflect your sentiments on how white-collar criminals are currently treated?

- a. They generally get what they deserve.
- b. They suffer the consequences of their crimes more than street criminals do.
- c. They rarely receive punishment commensurate with their crime.
- d. They generally regret their criminal conduct and are reformed.
- e. They generally profit from their criminal conduct.
- f. They generally take advantage of the criminal justice system by using their economic resources (*e.g.*, they are able to retain more experienced and influential counsel).

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	4	14	21
b	3	11	16
c	10	36	53
d	1	4	5
e	3	11	16
f	7	25	37
no response	1	—	5

11. How many years collectively have you sat on the criminal side of the Supreme Court?

- a. Less than 1
- b. 1-5
- c. 6-10
- d. 10-20
- e. More than 20

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	1	5	5
b	9	47	47
c	5	26	26
d	4	21	21
e	—	—	—
f	—	—	—
no response	—	—	—

12. How many white-collar defendants have you sentenced?

- a. Less than 1
- b. 1-5
- c. 6-10
- d. 10-20
- e. More than 20

	# OF RESPONSES	% OF TOTAL RESPONSES	% OF PARTICIPANTS (19)
a	—	—	—
b	5	26	26
c	6	32	32
d	3	16	16
e	5	26	26
no response	—	—	—

III. Hypothetical Questions

Instructions. For each hypothetical case:

1. Assume the defendant has no prior criminal record.
2. Indicate the most and the least appropriate sentence or sanction for each defendant.
3. Base your selections on your own notions of justice and fairness as opposed to statutory sentencing guidelines.
4. Assume all sentences and sanctions are feasible.

Case No. 1

Defendant, an attorney admitted to practice in New York, while employed as comptroller of an insurance company, authorized \$300,000 in loss payments to uninsured paper corporations owned—through an elaborate corporate structure—by defendant. Defendant lost the money by investing in silver futures. Defendant was found guilty of grand larceny after trial. The appropriate Disciplinary Committee has been advised of the verdict.

- a. Incarceration of 6 months - 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	7	(37%)	1	(5%)
1 - 5 yrs	8	(42%)	—	(—%)
5 yrs or more	2	(11%)	4	(21%)
Loss of Employment	—	(—%)	4	(21%)
Probation	—	(—%)	5	(26%)
No Response	2	(11%)	5	(26%)

Case No. 2

Janice and Tarzuk own and operate a busy wicker furniture store in lower Manhattan. Janice and Tarzuk are both getting on in years, so they recently hired an accountant, Terry Cheta. Terry notices that Janice and Tarzuk pay little attention to the financial matters of the store so Terry arranges with the wicker distributor to have the store double billed for all deliveries. Janice and Tarzuk lose \$25,000 which Terry shares with the participating distributors. Terry is convicted.

- a. Incarceration of 6 months - 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years

- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	6	(32%)	1	(5%)
1 - 5 yrs	7	(37%)	—	(—%)
5 yrs or more	—	(—%)	4	(21%)
Loss of Employment	—	(—%)	4	(21%)
Probation	4	(21%)	5	(26%)
No Response	2	(11%)	5	(26%)

Case No. 3

P.J. Doe is the CEO of XYZ Corp., a multinational computer software manufacturer. The Board of Directors of XYZ Corp. has authorized Doe to locate a site for a plant that will ultimately produce several billion dollars worth of floppy discs per year. Doe finds a site and a contractor to build the plant. The plant will be one of the largest in the world. Doe, however, tells the contractor to overstate estimated construction costs by \$190,000,000. Doe and the contractor split this money. Doe is convicted.

- a. Incarceration of 6 months - 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	2	(11%)	3	(16%)
1 - 5 yrs	8	(42%)	—	(—%)
5 yrs or more	7	(37%)	2	(11%)
Loss of Employment	—	(—%)	7	(37%)
Probation	—	(—%)	2	(11%)
No Response	2	(11%)	5	(26%)

Case No. 4

Defendant, while employed as comptroller of a small savings and loan association, embezzled corporate funds amounting to \$15,000. The comptroller had been using this scheme over a period of several months by manipulating a complicated, bank-accounting procedure to

his advantage. The defendant is convicted.

- a. Incarceration of 6 months - 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	8	(42%)	2	(11%)
1 - 5 yrs	3	(16%)	—	(—%)
5 yrs or more	—	(—%)	4	(21%)
Loss of Employment	1	(5%)	3	(16%)
Probation	5	(26%)	5	(26%)
No Response	2	(11%)	5	(26%)

Case No. 5

Pat Low is the Shipping Department Manager for Cornleco Toys. Cornleco is based on the east coast and, until recently, was considered a small regional toy maker-distributor. Their most recent new creation, the Lettuce Head Doll, has changed all that. The dolls are simply too popular to keep in stock. Just before the Christmas sales season, Low arranges to have 10,000 Lettuce Head Dolls shipped to various co-conspirators. These dolls are then sold at flea markets. The retail value of the dolls sold at flea markets is \$200,000. Pat Low pockets 25%, is discovered, tried and convicted.

- a. Incarceration of 6 months to 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	9	(47%)	1	(5%)
1 - 5 yrs	7	(37%)	—	(—%)
5 yrs or more	—	(—%)	3	(16%)
Loss of Employment	—	(—%)	6	(32%)
Probation	—	(—%)	4	(21%)
No Response	3	(16%)	5	(26%)

Case No. 6

The Director of Operations of a small subsidiary of a large corporation had payments from the subsidiary's debtors directed to his personal account. His scheme lasted for 6 months before the corporation's auditors discovered his defalcations amounting to \$1,300,000. He was convicted.

- a. Incarceration of 6 months to 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	2	(11%)	1	(5%)
1 - 5 yrs	9	(47%)	1	(5 %)
5 yrs or more	5	(26%)	2	(11 %)
Loss of Employment	—	(—%)	8	(42%)
Probation	—	(—%)	2	(11 %)
No Response	3	(16%)	5	(26%)

Case No. 7

Defendant, a high school graduate, while employed as head teller of a bank, cashed spurious checks presented by defendant's spouse in the aggregate amount of \$296,850. Defendant's spouse lost the proceeds of the crime through compulsive gambling. Defendant was convicted after trial of grand larceny.

- a. Incarceration of 6 months to 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	3	(16%)	2	(11%)
1 - 5 yrs	10	(53%)	—	(—%)
5 yrs or more	1	(5%)	2	(11%)
Loss of Employment	1	(5%)	5	(26%)
Probation	1	(5%)	5	(26%)
No Response	3	(16%)	5	(26%)

Case No. 8

Defendant, an unemployed graphic-artist, obtained the coding information contained on credit cards by stealing credit card forms from restaurant tables. Defendant used the information to create counterfeit cards which defendant used to obtain \$235,000 in cash advances. Defendant spent the proceeds to support an advanced drug dependency. Defendant was convicted after trial of grand larceny.

- a. Incarceration of 6 months to 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	5	(26%)	2	(11%)
1 - 5 yrs	11	(58%)	1	(5%)
5 yrs or more	—	(—%)	2	(11%)
Loss of Employment	—	(—%)	5	(26%)
Probation	—	(—%)	4	(21%)
No Response	3	(16%)	5	(26%)

Case No. 9

Defendant, the holder of a masters degree in computer programming, while employed as branch manager of a local bank, created \$280,000 in unauthorized electronic funds transfers to an account in defendant's name. Defendant spent the proceeds, in part, to pay off the mortgage on defendant's family home. The remainder of the proceeds were paid to discharge other debts. Defendant was convicted of bank embezzlement following trial.

- a. Incarceration of 6 months to 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	5	(26%)	2	(11%)
1 - 5 yrs	9	(47%)	—	(—%)
5 yrs or more	1	(5%)	4	(21%)
Loss of Employment	—	(—%)	6	(32%)
Probation	1	(5%)	2	(11%)
No Response	3	(16%)	5	(26%)

Case No. 10

The Treasurer of a mid-sized corporation diverted corporate funds of \$160,000 to his personal account during the corporation's tax-minimization scheme devised for the repatriation of funds from a foreign subsidiary. The Treasurer had been diverting these funds for one-half a year before his chicanery was discovered by independent accountants.

- a. Incarceration of 6 months to 1 year
- b. Incarceration of 1 - 5 years
- c. Incarceration of 5 or more years
- d. Loss of employment and income
- e. Probation and full restitution

	Most Appropriate Sentence		Least Appropriate Sentence	
Sentence				
6 mos. - 1 yr	5	(26%)	2	(11%)
1 - 5 yrs	8	(42%)	—	(—%)
5 yrs or more	2	(11%)	2	(11%)
Loss of Employment	—	(—%)	8	(42%)
Probation	1	(5%)	2	(11%)
No Response	3	(16%)	5	(26%)

