



White-Collar
Crime
Punishment
Too Much or
Not Enough?

WHAT FACTORS SHOULD BE CONSIDERED IN DETERMINING THE LENGTH AND TERMS OF A SENTENCE? SHOULD A CRIME’S VIOLENT OR NON-VIOLENT CLASSIFICATION CARRY THE MOST WEIGHT? FRANK S. PERRI OFFERS THAT FOCUSING TOO MUCH ON A CRIME’S VIOLENT OR NON-VIOLENT NATURE CAN LEAD TO A PUNISHMENT TOO SEVERE – OR NOT SEVERE ENOUGH – FOR THE CRIME COMMITTED.

“I certainly knew it was nefarious, a little wormy, unethical, make no mistake about that ... but criminal? Fraud?”

– Jay Jones, convicted white-collar criminal,
as quoted in *The New York Times Magazine*

Jay Jones lived the good life; unfortunately, he bought it fraudulently. As a result of his behavior, he left at least 4,000 people jobless when the debt collection business he helped co-found went bankrupt, according to a June 6, 2004, article in *The New York Times Magazine*.¹ He pleaded guilty to conspiracy to defraud investors and was sentenced to five years in prison. He also owes about \$1 billion in restitution to the victims of his fraud, according to the article. Was his sentence too light?

Consider the case of real estate attorney Chalana McFarland, who committed a myriad of fraudulent acts, including identity theft, illegal use of Social Security numbers, money laundering, and a mortgage scam that devastated lending institutions and families who bought homes, according to a U.S. Department of Justice press release.² She was sentenced to 30 years in prison, even though she could have been sentenced to a life term and ordered to pay \$12 million in restitution for the scheme that she controlled with the assistance of her co-conspirators, the press release said. Was her sentence too high?

Although it’s reasonable to have a debate on what constitutes a proportionate and fair punishment to a fraud-based crime, anti-fraud professionals must be aware that the manner in which the debate on appropriate punishment is being framed can be misleading. One of the common arguments made by opponents advocating lenient sentences for convicted white-collar criminals is that their crimes are non-violent property crimes, and many are first-time offenders who don’t fit the typical image of a street criminal. In this article, we’ll address:

- The inherent dangers of imposing punishment based on the premise that fraud is a non-violent property crime
- Misperceptions surrounding the first-time offender argument in determining an appropriate punishment
- Why white-collar crime sentencing might have increased over the years

The author’s views aren’t necessarily those of the ACFE, its manager and employees. – ed.

BY FRANK S. PERRI, J.D., CFE, CPA

DANGERS IN PUNISHING CRIME LABELS AND NOT THE HARM SUFFERED

“I had no desire to live, no prospect of earning a living, no way to pay the bills.”

–Retiree and Madoff fraud victim, as quoted in the *Journal of the American Academy of Psychiatry and Law*

This quote exemplifies the voice of thousands recounting the personal and financial losses suffered when a trusted business advisor, professional, employee, business owner or other individual defrauds them. Psychiatrists Drs. Marilyn Price and Donna Norris wrote in their article in *The Journal of the American Academy of Psychiatry and Law*, “white-collar criminals commit crimes that have victims whose lives are significantly affected and, at times, destroyed by these acts.”³ However, there are academicians in law who downplay fraud’s underlying harm by removing the human element and labeling it a non-violent property crime. They have written extensively on the topic, advocating that white-collar criminals should receive more lenient sentences because of the crime’s non-violent distinction, according to law professor Ellen Podgor of Stetson University.⁴

Yet, what’s misleading about their argument is the assumption that only violent criminals inflict harm that’s worthy of extensive punishment. In part, the harm that fraud victims incur is downplayed because the majority of the research on victimology has focused on conventional non-white-collar crimes.⁵

Thus the degree of perceived harm suffered by victims of white-collar crimes is compared to the harms suffered by victims of non-white-collar crimes because they’re the largely accepted conventional construction of crimes in the public conscience.⁶

White-collar crime is considered a special breed in the criminal justice system because there’s a long history of perceived leniency for these criminals; many erroneously believe that white-collar crimes have no victims.⁷

Also, fraud offenses aren’t consistently included in crime victim surveys because criminologist might perceive that there are no visible victims, or the social harm is diluted among a number of people.⁸ Thus, fraud victims whose harm hasn’t been captured by surveys would naturally appear to be victimless when compared to victims of non-white-collar crimes.

For example, in the case involving McFarland (United States v. Chalana McFarland), the argument about whether the 30-year sentence was excessive advanced to a federal judge specifically because the fraud was considered a non-violent property crime.⁹ Yet, numerous studies have revealed that fraud victims experience the same amount – or sometimes greater amount – of trauma as that experienced by victims of a violent act, according to authors Price and Norris.

In one study published in the *International Journal of Victimology*, Dr. Basia Spalek examined the impact of white-collar crime on victims who were elderly pensioners.¹⁰ Through her interviews with the victims, the author revealed that they experienced psychological, emotional, behavioral and financial harm. Her study showed the harmful impacts of the various frauds committed on the victims were similar to those suffered by victims of violent

crimes and property crimes. (The types of violent crimes the victims spoke of were assault and property crimes analogous to burglary.)

Surveys conducted by the National White-collar Crime Center (NWCCC) confirm that the public considers certain white-collar crimes as more serious than some street crimes, according to Price and Norris. As important as these cited studies are to the argument that financial crime victims do experience harm, the debate still has to shift. There must be an assessment of the harm experienced by the victim regardless of the crime’s classification.

Comparing whose harms are more severe based on violent versus non-violent distinctions leads us down a path that’s incredibly difficult to put into practice. It would be more appropriate for the criminal justice system to determine what degree of aggression was perpetrated by the offender against the victim(s) to assess harm. The benefit of focusing on the level of aggression for sentencing purposes is that it’s crime classification neutral. Yet the social harm white-collar crimes cause can be conceptualized for the purpose of punishment, even if – like other non-white-collar crimes – not with exact precision.¹¹

Moreover, the severity of the social harm caused by a particular white-collar crime can be evaluated by several categories: 1) the amount of monetary loss 2) the “spread” of the events over time and place 3) the nature of the victim 4) the presence and nature of violation of trust and 5) the impact on the victim’s quality of life.¹²

Judges routinely consider quality-of-life issues for victims of non-white-collar crime and there’s no plausible reason why these same concerns can’t be part of a victim impact statement as illustrated in the Madoff sentencing hearing. A plausible framework as depicted by the five categories above to evaluate the social harm caused by the white-collar crime provides a starting point for a more substantial basis for imposing punishment than an overreliance on crafting a sentence based on the violent versus non-violent nature of the offense or an inflexible numerical sentencing guideline judges use to justify their sentencing decisions.

By focusing on criminal classification instead of the harm suffered, we fall prey to potentially over-sentencing a violent offender and under-sentencing a white-collar offender. For example, when judges are asked what they take into account before imposing a sentence, a significant factor is the lack of violence inherent in the definition of white-collar crime, according to “Sitting in Judgment” by S. Wheeler, K.Mann and A. Sarat.¹³ Consequently, for some judges, white-collar crimes are perceived as “victimless business crimes.” It’s presumed by judges to be “less problematic,” according to “Go Directly to Jail: White-collar Sentencing After the Sarbanes-Oxley Act,” published in the *Harvard Law Review*.¹⁴

Minimizing the violent versus non-violent comparison is important to getting the judicial system to regard fraud crimes as more than “victimless business crimes.” An interesting criminal concept often overlooked in fraud studies is that of “malicious injury,” as defined in “Black’s Law Dictionary.” Just as the law applies this concept in describing acts of violence that are uncon-

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scionable, the law equally applies this concept to fraud crimes, which can be considered for sentencing purposes.

GOOD PEOPLE WHO COMMIT A BAD ACT

Another popular argument is that white-collar criminals aren't street criminals, especially because many of them are first-time offenders. As any anti-fraud professional will attest, many fraud crimes are the result of perpetrators scheming for months to achieve their goals. Fraud often is more than one criminal act committed on one particular day, which, by the way, is often the case with many street crimes. Moreover, white-collar offenders commonly are thought to be "one-shot" criminals, or not likely to be processed into the criminal justice system following an initial brush with the law.¹⁵ According to David Weisburd, professor of criminology at Hebrew University of Jerusalem and George Mason University in Virginia, the data doesn't support this belief. In fact, adults convicted of white-collar crimes are often repeat offenders.¹⁶

Moreover, according to Glenn Walters and Matthew Geyer, authors of "Criminal Thinking and Identity in Male White-collar Offenders," even though white-collar criminals might be more educated than conventional criminals, they don't "form a homogenous group with respect to patterns of offending, level of deviance, attitudes toward crime, or social identity."¹⁷ There are white-collar criminals whose anti-social, deviant thinking is indistinguishable from street-level offenders.

According to forensic psychologist Dr. Robert Hare from the University of British Columbia, white-collar criminals often share the same exploitative, remorseless traits as other criminals; what distinguishes fraudsters from other criminals are their victims.¹⁸ [See "Identifying Psychopathic Fraudsters: These Men Know 'Snakes in Suits': An Interview with Dr. Robert D. Hare and Dr. Paul Babiak," from the July/August 2008 issue of Fraud Magazine. — ed. www.fraud-magazine.com/article.aspx?id=404]

Furthermore, the argument that their crimes are "out of character" is inaccurate. "We'll be told that he had no prior criminal record, that he had an excellent employment history, perhaps that he was a church or civic leader," according to internationally renowned forensic psychologist Dr. Stanton Samenow, author of the book, "The Myth of the Out of Character Crime."

"When we hear that person did something 'out of character,' there is always more to the story than appears evident," Samenow writes. "There are thinking patterns that long have been present predating the behavior at issue. These thinking patterns express themselves at a moment of opportunity. The crime is very much within the character of the perpetrator."

These assessments by Weisburd, Hare and Samenow, three internationally regarded academicians and practitioners, stand in stark contrast to what law professor Podgor argues when she states, "Another reason to think white-collar criminals should serve shorter sentences than terrorists and violent criminals is differences in recidivism. Because white-collar criminals forfeit their positions of power, experience regulatory restrictions and suffer

community shame, they are unlikely to be repeat offenders."¹⁹ However, according to the Federal Sentencing Commission, studies have shown that "[e]ven though fraud and larceny offenders have lower recidivism rates" when they're first-time offenders, "the recidivism rates of these offenses exceed 50 percent" for offenders with a criminal history, which is comparable to the recidivism rates for robbery and firearm offenders.²⁰

The key is to not confuse being a first-time offender with offending only one time; a lack of a prior record isn't synonymous with a lack of prior offending. The sentencing judge in the McFarland case stated that McFarland showed "no remorse" and did nothing "but tell one lie after another. She's done everything possible to obstruct the investigation in this case. She continues to try to persuade everyone that somehow she just got involved in this thing and didn't know what was going on."²¹ Apparently, after McFarland was disbarred in one state, she continued her mortgage scheme in Florida, according to the 2007 article in *The Yale Law Journal*.

Bernie Madoff can be classified as a first-time offender; yet, his fraud extended over a number of years. According to Arie Freiberg, a professor of criminology, there are factors that tend to aggravate white-collar crimes, especially when it's evident that it can be a crime requiring careful and deliberate planning.²²

Andrew Weissmann, a former U.S. Department of Justice attorney who oversaw the Enron prosecution, further challenges the information published by Podgor, stating in an article in *The Yale Law Journal*, "In criticizing the current treatment of white-collar criminals, Podgor implies that penalties for white-collar crimes have recently become disproportionately more severe than the sentences meted out to other defendants for non-economic crimes, such as terrorism and murder."²³ Citing a few of the well-publicized white-collar crime sentences – such as Madoff, Jeffrey Skilling of Enron, Bernard Ebbers of WorldCom, and Adelphia's John Rigas – as representative of the new norm for all offenders is misleading.

Although overall sentences have increased for fraud offenders, especially high-profile offenders at the federal level, Weissmann wrote in his article in *The Yale Law Journal* that federal sentences for white-collar crimes haven't increased as dramatically as stated by Podgor. In 1995, the average federal sentence for persons convicted of fraud was 18.3 months of imprisonment, and the median sentence was 12 months. By 2005, the average increased to 23.6 months and the median had increased to 15 months. For the same year, average sentences for crimes related to national security were 126 months, and the average sentence for murder was 228 months.

HOW CONVICTED FRAUDSTERS VIEW THEMSELVES

"I have been sitting in jail now for two months and have experienced living in a cell with a poor, ignorant, illegal alien; a career criminal; a drug user and smuggler; and a killer. ... I can tell you without hesita-

tion, I am not at all similar. I don't look the same, talk the same, act the same, or feel the same."

– John Grambling, convicted white collar criminal²⁴

According to a study titled, "White Collar Prisoners' Perceptions of Audience Reaction," by Mandeep Dhama in the *Journal of Deviant Behavior*, white-collar criminals surveyed in prison indicated that they shouldn't be in prison because they perceived "their own behavior as non-criminal."²⁵ Research has confirmed that white-collar criminals, like street criminals, use neutralization techniques to legitimize their behaviors, according to Dhama's article. Neutralization is the process of nullifying internal moral objections. Regardless of the type of fraud, most offenders seem to seek to justify or rationalize their activities. They'll use "vocabularies of adjustment" that manufacture rationale and extenuating circumstances and remove the perception of criminality from the act.

Fraudsters view their crimes as being victimless, not dangerous to society, and causing no visual or physical damage to anyone or anything. The crime is seen as "mostly a financial matter," Dhama wrote. Techniques of neutralization will vary with the type of fraud. For example, frauds against large companies or government departments are often rationalized with the excuse "they can afford it."

The convicted offenders in the survey denied the existence of a victim by arguing that the victim was absent or unknown, or they often blamed the victim, saying the individual somehow deserved to be defrauded. They viewed white-collar crime as both an acceptable and common means to overcome financial difficulties or to make a profit. The fact that these offenders didn't view themselves as criminals or their actions as criminal might explain why many white-collar criminals are repeat offenders.

THE SYMBOLIC NATURE OF CRIMINAL SENTENCING

In the past decade, there has been a shift to more stringent sentencing for white-collar criminals, which is in response partly to a public perception that white-collar criminals had been receiving favorable, disparate treatment, according to Weissmann's article in *The Yale Law Journal*.

As Professor John Poulos of the University of California at Davis School of Law stated in explaining the shift away from leniency for fraudsters, "[W]hite-collar criminals are treated essentially equivalently to violent criminals because there is a recognition that the harm they inflict on society and on the victims is every bit as worthy of our attention as street crime. ... [W]hite-collar crime, in terms of the number of its victims and the devastating impact on its victims, ranks right up there among even the most heinous violent street crimes imaginable."²⁶

However, there's an intangible consideration in determining a sentence that, at times, goes beyond the goal of deterring the individual from committing another crime. There's the symbolic quality of projecting societal condemnation of an act. For example, in a homicide case, a defendant who has no criminal history might receive a sentence that extends well beyond his life expectancy. In these instances, the sentence is not only to punish,

but a statement about the court's participation in upholding a value system that says, "Life is sacred."

Can the same be true about some of the more severe sentences issued to white-collar criminals? Consider Madoff, who received a sentence of 150 years in prison. The judge could have sentenced Madoff to 30 years, and he likely wouldn't survive his prison term, given his age. Judge Denny Chin said in sentencing Madoff in federal court that the "message must be sent that this kind of manipulation of the system is not just a bloodless crime that takes place on paper, but one instead that takes a staggering toll."²⁷

Sometimes, a sentence goes beyond issues that are commonly addressed at a sentencing hearing such as restitution, deterrence and retribution. Perhaps, as New York University legal ethics professor Stephen Gillers has said, "We're making a statement to ourselves about the kind of people we are and what we will not accept."²⁸

Current sentencing trends reflect a growing philosophy that our economic and social fabric suffers when there's an attack on the underlying qualities that make a free-market economy work. In other words, there's a societal value in protecting the economic system that millions rely upon to earn a livelihood, and there's no tolerance for those who attempt to undermine its foundation by interfering with its integrity. Interfering with market capitalism, the foundation of this country's economic system (the "new sacred"), now carries with it a more severe punishment.

The debate on appropriate white-collar crime sentencing has become more intense. To add logic and a sense of proportionality to criminal sentencing, we could tone down the crime classification comparisons and examine the harm a crime exacts on its victim(s). Perhaps by weaning ourselves away from labels, such as violent versus non-violent, we can achieve fairer sentences for both types of classifications. 🔍

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