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Optimal Sentences for White-Collar Criminals

RICHARD A. POSNER*

Those concerned by the growth of white-collar crime disagree over the choice of a fine or imprisonment as the more appropriate sentence. In this article, Professor Posner argues that a sufficiently large fine is an equally effective deterrent that is cheaper to administer and therefore socially preferable.

I have agreed to participate in this symposium because it gives me an opportunity to argue a favorite plank in the economist's platform for reforming the legal system, in a context in which the economic position can be simply but persuasively stated without elaborate argument and evidence. The plank is the substitution, whenever possible, of the fine (or civil penalty) for the prison sentence as the punishment for crime; the appealing context in which to argue the case for such substitution is the punishment of the white collar criminal.

The coiner of the term "white collar crime" defined it "as a crime committed by a person of respectability and high social status in the course of his occupation,"¹ but this is not a good definition. The terms "respectability" and "high social status" are ambiguous, and the definition arbitrarily excludes certain white-collar crimes, such as evasion of the personal income tax, which are not committed in the course of one's occupation. More important, it is not an apt definition from the standpoint of sentencing policy, which is the focus of this article.

I shall instead, for reasons that I hope will soon become clear, use the term white-collar crime to refer to the nonviolent crimes typically committed by either (1) well-to-do individuals or (2) associations, such as business corporations and labor unions, which are generally "well-to-do" compared to the common criminal. White-collar crime in the sense I use it is illustrated by the criminal offenses created by the securities laws, the labor laws, the antitrust laws, other regulatory statutes, and the income-tax laws. But not every offender under such laws is a white-collar criminal as I use the term. A waitress, for example, could commit a criminal violation of the tax laws by not reporting her tips as income; but because, as we shall see, the affluence of the offender is very important to the correct punishment for the offense, I would not describe *her* offense as a white-collar crime. Nor would a murder committed by a wealthy person—or by a criminal gang seeking to monopolize

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1. E. SUTHERLAND, *WHITE COLLAR CRIME* 9 (1961). See also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 534 (1968). The term "white collar crime" is, of course, "not subject to any one clear definition." Edelhertz, *The Nature, Impact and Prosecution of White Collar Crime*, in *WHITE COLLAR CRIMES: DEFENSE AND PROSECUTION* 15, 16 (B. George, Jr. ed. 1971). Edelhertz argues that Sutherland's definition is too restrictive, and proposes the following: "an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage." *Id.* at 16-17. Surely this is too broad—it includes, for example, espionage.

the garbage-collection business of a city, for example—be a white-collar crime; the reason, as again we shall see, is that the proper punishment for a crime of violence raises special questions. To summarize, white-collar crimes are those more likely to be committed by the affluent than by the poor criminal—crimes that involve fraud, monopoly, and breach of faith rather than violence. The white-collar criminal is the affluent perpetrator of those crimes.

The point I wish to argue in this article, an application of the economic analysis of crime and punishment pioneered by Gary Becker,² can now be stated simply: the white-collar criminal as I have defined him should be punished only by monetary penalties—by fines (where civil damages or penalties are inadequate or inappropriate)³ rather than by imprisonment or other “afflictive” punishments (save as they may be necessary to coerce payment of the monetary penalty). In a social cost-benefit analysis of the choice between fining and imprisoning the white-collar criminal, the cost side of the analysis favors fining because, as we shall see, the cost of collecting a fine from one who can pay it (an important qualification) is lower than the cost of imprisonment. On the benefit side, there is no difference in principle between the sanctions. The fine for a white-collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would have been imposed instead. Hence, fining the affluent offender is preferable to imprisoning him from society’s standpoint because it is less costly and no less efficacious.

The reason that the fine is the cheaper sanction is that, unlike imprisonment, it is a transfer payment. Because the dollars collected from the criminal as a fine show up on the benefit side of the social ledger, the net social cost is limited to the costs of collecting the fine.⁴ A term of imprisonment, on the other hand, yields no comparable social revenue if we disregard the negligible, and nowadays usually zero, output of the prisoner. On the contrary, to the social costs of imprisonment must be added the considerable sums spent on maintaining prisoners. To be sure, for a middle-class offender, a short prison term might be the deterrent equivalent of a large fine. But it would not follow that the social costs of the short prison term were correspondingly low, because the greater one’s income, the greater is the cost of imprisonment in lost earnings. As long as these are earnings in legitimate occupations, their loss is a social cost similar to the cost of the prison guards. The large fine avoids these costs.

I anticipate relatively little disagreement with the proposition that fines are cheaper to society than imprisonment when the offender can pay the fine. I expect great resistance, however, to the proposition that the social *benefits* of

2. See Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); for a nontechnical discussion, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 164-72 (2d ed. 1977). Becker argues that the use of fines as punishment minimizes the social loss resulting from crime.

3. See text accompanying notes 24-27 *infra*.

4. The equation is imprecise because it fails to measure completely the disutility to the offender. If a defendant is risk averse—and assuming (realistically) that the probability of apprehension and conviction is less than one—a fine will impose greater disutility on offenders than the dollar amount of the fine, so that the transfer payment is less than the cost of the punishment. See Polinsky & Shavell, *The Optimal Trade-off Between Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880 (1979). But the principle asserted in the text still holds, for in the case of imprisonment there is no transfer payment at all and it is therefore always more costly if the offender can pay the fine.

punishment are no greater when punishment takes the form of imprisonment than when it takes the form of a fine. It will be argued that there is no money equivalent to the pain of imprisonment, perhaps especially to the affluent, educated, "sensitive" person—the white-collar criminal—that would be within his power to pay. (The offender here is necessarily an individual: a corporation or other "artificial" person cannot, of course, be punished by imprisonment.) But whether this is so depends, in a theoretical analysis, on the gravity of the crime in relation to the probability of apprehension and conviction,⁵ and, in a practical analysis, on the severity of the prison sentences actually imposed for white-collar crimes. As to the first, it is no doubt true that very few people would consider a fine of any size to be as severe a punishment as death, or imprisonment for life, or, perhaps, imprisonment for twenty years. Thus, if these are optimal punishments (putting aside the consideration that imprisonment is more costly to administer), it might indeed be difficult to find a monetary equivalent. Perhaps these are optimal punishments for some white-collar crimes. If so, my proposal to substitute fines for prison for white-collar criminals is in serious difficulty—but only in a rather academic sense. For whatever may be theoretically optimal, white-collar criminals, at least in this country, are not punished by death or long prison terms. Table 1 provides some data on the type and length of sentences for various federal crimes.⁶ With the (surprising) exception of securities offenses, the prison sentences for white-collar crimes—when prison sentences are imposed on the perpetrators of such crimes⁷—barely exceed two years. Even this figure greatly exaggerates the actual time served behind bars, which is shortened by parole and time off for good behavior.

Perhaps, as I have suggested, these prison terms are too short given the gravity of the crimes and the difficulty of detecting them. That is a large question that I do not propose to investigate here. I shall instead treat the existing level of imprisonment for white-collar crime as part of the background of the analysis. Given that level, it is highly improbable that there is no fine equivalent to a prison sentence in the amount of disutility it imposes on the offender. An individual who has the boldness, the effrontery, to commit a crime—even of the white-collar variety—will have the capacity and inclination to consider realistic trade-offs between 90 days, or even a year or two, in one of the federal system's minimal security prisons and a hefty fine. If he would be deterred by the threat of such a prison sentence, he would be equally deterred by the threat of a \$50,000 or \$100,000 or \$250,000 fine. (And fines could be indexed to prevent inflation from reducing their bite.)

5. See Becker, *supra* note 2, at 191-92. For further economic analysis of optimal punishment, see Ehrlich, *Participation in Illegal Activities: An Economic Analysis*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 68 (G. Becker & W. Landes ed. 1974); Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 *J. LEGAL STUD.* 259 (1972).

6. Homicide and robbery are not white-collar crimes; they are included for the sake of comparison. Embezzlement is a mixed case—as indeed are virtually all of the other categories—because it fails to differentiate between the affluent and nonaffluent offender. As I have argued in the text, if a waitress evades federal income tax it might be optimal to imprison rather than fine her because the optimal fine (optimal in light not only of the amount evaded but also of the difficulty of detecting such evasions) might exceed her ability to pay.

7. The difference in Table 1 between the number imprisoned and fined and the total number sentenced is the number placed on probation.

Table 1

TYPE AND LENGTH OF FEDERAL PRISON SENTENCES, 1976

Nature of the Offense	Total Def's Sentenced	Number Imprisoned	Average Sentence of Imprisonment (months)	Number Fined Only
Total	40,112	18,478	47.2	3,198
Homicide, total	108	84	125.1	0
Robbery, total	2,286	2,031	134.3	0
Embezzlement, total	1,650	289	22.4	14
Fraud, total	3,691	1,234	22.7	222
Income Tax	1,157	340	15.4	68
Lending Institutions	390	121	18.4	12
Postal	938	404	31.1	37
Securities and Exchange	86	40	45.7	12
Federal Statutes, total	4,208	565	29.7	1,501
Antitrust	175	1	Not shown	137
Food and Drug Act	103	6	Not shown	78
Customs Laws	182	36	19.9	34
Motor Carrier Act	105	0	Not shown	97
Agricultural Acts	459	3.7	20.0	203
Migratory Bird Laws	894	17	Not shown	621
Postal (other than fraud, obscenity, and embezzlement)	1,003	150	7.6	32

Source: 1977 Sourcebook of Criminal Justice Statistics at pp. 552-53 (Table 5.22).

It should be noted also that the affluent offender presents interesting opportunities for society to exercise its ingenuity in the collection of fines. For example, a penalty that takes the form of barring the defendant from pursuing his occupation—a penalty frequently used by the SEC in dealing with securities fraud and by state authorities in dealing with misconduct by lawyers—is the equivalent of a fine. The amount of the “fine” is simply the difference between the defendant’s future income in the occupation from which he is barred and the income in his best alternative occupation, discounted to present value. This device offers a means of collecting a large fine from an individual who has a large earning capacity but little wealth. An alternative possibility is the collection of a large fine in periodic installments. The availability of these devices enables one to contemplate realistically the

possibility of levying very large fines in lieu of the present prison sentences for white-collar crimes.

If it is objected that the schedule of prison-fine equivalences cannot in fact be calculated, there are two replies. The first is that a nice calculation is not required; the prison sentences imposed in white-collar cases—or in any other cases for that matter—are not themselves the product of any nice calculation of the amount of disutility imposed by the sentence on the offender, but are only the roughest of guesses. The second and more interesting reply is that there are in fact methods, imperfect ones to be sure, of empirically tracing out the curve of indifference between fine and imprisonment. One incomplete method would be to calculate directly the costs of imprisonment to the prisoner (primarily in terms of income foregone by him); the other and, I think, more promising method would be to infer statistically the relative deterrent effect of fine and prison. Suppose that in one federal district the average fine for a federal white-collar offense is \$1,000 and the average prison term 30 days, and in another district it is \$800 and 40 days, and so forth. Then, by comparing the incidence of the offenses across districts, we should be able to infer the rate of exchange at which days in jail translate into dollars of fine with no loss of deterrence. (A study of state white-collar prosecutions, conducted along similar lines, might also be feasible.) Since no such study has been attempted, I cannot evaluate the difficulties it might encounter arising, for example, because the incidence of many white-collar crimes (e.g., price-fixing conspiracies) is unknown, or the gravity of the crime may vary across districts or states, which affects the optimal sentence.⁸ Such a study might not produce results entitled to great confidence. Nevertheless, supplemented by the intuition that guides judges today in devising fine-prison “packages” to impose on white-collar offenders, such a study should provide a close enough approximation of the actual fine-prison trade-off that we need not fear that by substituting fines for prison sentences in white-collar cases we would be drastically altering the expected punishment cost, and hence the level, of white-collar crime. The substitution could, of course, be made incrementally, one offense at a time, starting with the least important.

Professor Coffee, in his contribution to this symposium, offers three reasons why the threat of imprisonment is inherently greater than that of a fine.⁹ One is that the optimal fine may exceed the offender's ability to pay.¹⁰ While this is certainly possible, it is no reason to prefer imprisonment to fines in cases where offenders *can* pay the fines. All I am arguing in this paper is that fines are preferable to imprisonment where the fines are collectible.

8. Perhaps this problem could be solved by standardizing for income, which might be a reasonable proxy for the expected gains from the crime.

9. See Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980).

10. *Id.* at 434-36.

Second, Coffee, following Block and Lind,¹¹ argues that in order to be sure that an offender will pay whatever fine is levied, he must be threatened with a prison sentence that is more severe than the fine. If there is no difference in severity, the offender will be indifferent between the two forms of punishment. This point is correct but does not support Coffee's position. The purpose of imprisonment in Block and Lind's analysis is not to deter the offender but to coerce collection of the fine. The very premise of their proposal is thus the superior economic efficiency of fines to imprisonment as a method of punishment.

Third, Coffee erects an elaborate argument on Block and Lind's further point that offenders are risk preferrers with regard to imprisonment even if they are risk averters with regard to fines.¹² Coffee compares two probability distributions of punishment having the same mean, one a distribution of prison sentences and the other a distribution of fines, and argues that the latter distribution will be wider (*i.e.* more dispersed) because there is less difference among individuals in the disutility of imprisonment than in the disutility of fines. Coffee argues that, because the offender is a risk preferrer with regard to imprisonment, the relatively narrow dispersion of the probability distribution of imprisonment will make imprisonment a less attractive form of punishment than its fine equivalent. Of course, if people are risk averse with regard to fines, as Coffee himself had argued initially in his paper,¹³ the greater dispersion of the probability distribution of fines would have a deterrent effect symmetrical to that of the narrower dispersion of the probability distribution of imprisonment. Yet Coffee retracts his earlier point and argues that offenders will also be risk preferring with regard to the fine distribution, because the opportunities to conceal assets are greater at the high end of the distribution. Therefore, he concludes, the narrower dispersion of the probability distribution of imprisonment is unequivocally less attractive to offenders.

Every step in Coffee's complicated argument can be questioned, but it is unnecessary to do so because the argument leads nowhere. If it is true, for whatever reason, that imprisonment is unpleasant relative to fines—because of a "stigma" effect,¹⁴ or because prison guards are brutal, or because imprisonment interferes with an offender's predilection for taking risks more than fines do—this affects simply the exchange rate between dollars of fine and days of imprisonment and not the choice of which method of punishment to use. If we think that the term of imprisonment for a crime provides the correct amount of deterrence, then in computing the fine equivalent we will want to be sure that we take account of all of the factors that make imprisonment a source of disutility. The fine equivalent is still the cheaper punishment method, however, as long as the fine can be collected from the offender.

I turn now to what seems a separate, but is really the same, objection to substituting fines for imprisonment in white-collar crimes: namely, that a

11. *Id.* at 473-77; see Block & Lind, *Crime and Punishment Reconsidered*, 4 J. LEGAL STUD. 241, 244 (1975).

12. Coffee, *supra* note 9, at 430-33; see Block & Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975).

13. See Coffee, *supra* note 9, at 430.

14. See text accompanying notes 23-26 *infra*.

system in which poor offenders were usually imprisoned and rich offenders usually fined would be a system that discriminated against poor people.¹⁵ This argument is just a variant of the fallacy that imprisonment is inherently more punitive than fines. It gains some plausibility only from the ridiculous "rates of exchange" that used to be commonplace in crimes where the criminal had the option of paying a fine or going to jail, a practice that has been invalidated by the Supreme Court under the Equal Protection Clause of the fourteenth amendment.¹⁶ The assumption behind this argument, however, is false. For every prison sentence there is some fine equivalent; if the fine is so large that it cannot be collected, then the offender should be imprisoned. How then are the rich favored under such a system?

A possible answer is that the rich could "buy" more crime under a fine system than under an imprisonment system. Suppose that the expected cost to society of a crime is \$100, the probability of apprehension and conviction is 10 percent, and therefore the fine is set at \$1,000 so that expected punishment cost will be equal to the expected social cost. A rich man would not be deterred from committing this crime as long as the expected benefits to him were greater than \$1000. But now suppose that instead of a fine of \$1000, a prison term of one month is imposed for this crime based on a study which shows that the disutility of a month in prison to an average person is \$1,000. Since the disutility of imprisonment rises with income, this form of punishment will deter the rich man more than the poor one. Stated differently, a nominally uniform prison term has the effect of price discrimination based on income.

But this is not to say that a system of fines discriminates against the poor. It is rather that a *uniform* prison term discriminates against the rich compared with a *uniform* fine. If we want to discriminate against the rich through a fine system, that is easily done by progressively varying the fine with the offender's income.¹⁷ If we want not to discriminate against the rich through an imprisonment system, we can make the length of the sentence inverse to the offender's income.¹⁸ In either case the choice to discriminate is independent of the form of the punishment.¹⁹

15. The argument is made by Coffee, *supra* note 9, at 446-49.

16. The practice has been invalidated in those cases in which the defendant's indigency is a determining factor in his imprisonment. See *Tate v. Short*, 401 U.S. 395 (1971) (inability to pay fine resulting from traffic offense cannot justify imprisonment if affluent offender not subject to possible imprisonment); *Williams v. Illinois*, 399 U.S. 235 (1970) (defendant sentenced to fine and imprisonment may not be imprisoned for period greater than statutory maximum because of his inability to pay the fine). In *Williams*, the choice was a \$500 fine or 100 days in jail. Putting aside all other costs to the individual of imprisonment, and ignoring taxes, someone who earned \$5 a day was better off paying the fine than going to prison, and for an affluent offender there was no semblance of equivalence between the fine and the prison sentence. To take another example (though one not involving a choice by the offender and hence not implicating the constitutional issue decided in *Tate* and *Williams*), the Sherman Act until 1955 provided a maximum prison sentence of one year in jail and a maximum fine of only \$5,000. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890), as amended by Act of July 7, 1955, ch. 281, 69 Stat. 282 (substituting \$50,000 for \$5,000). Today, these maxima are three years and \$100,000, a more reasonable rate of exchange though still one unduly favorable to the fine. 15 U.S.C. § 1 (1976).

17. Varying the amount of the fine with the offender's income was first suggested by Jeremy Bentham. J. BENTHAM, *THE THEORY OF LITIGATION* 217 (Baxi ed., R. Hildreth trans. 1975) ("Pecuniary punishments should always be regulated by the fortune of the offender. The relative amount of the fine should be fixed, not its absolute amount . . .").

18. See Becker, *supra* note 2, at 195.

19. Whether we want to discriminate against the rich in the penal system depends basically on whether

Professor Coffee is of course not alone in disregarding the "equivalence principle" developed above. It is commonly disregarded both in discussions of punishment for white-collar criminals, and in the assumption that only the threat of imprisonment will deter white-collar crime.²⁰ For example, a survey of merchants "revealed that they considered imprisonment [for black market violations] a far more effective penalty than any other government action, including fines."²¹ Findings like these have led some criminologists to consider imprisonment and fines incommensurable sanctions. Yet in the same analysis we read that a company found to have committed black market violations involving 300,000 pounds of meat in a five-month period received a total fine of \$1,500; the profit from the violations seems to have been at least \$25,000.²²

Where fines are trivial, it is natural to suppose that only substantial jail sentences will carry a "stigma" effect which adds to deterrence. Yet even if, improbably, imprisonment produced a stigma effect which no magnitude of fine could duplicate, only the rate of exchange between fine and imprisonment, and not the principle of equivalence, would be affected. The fine equivalent would then be higher than if a fine carried a stigma as well. But, in fact, the presence of stigma is an argument for fines rather than for prison sentences. Most students of the criminal process locate the source of the stigma in the fact of conviction rather than the form of the sentence.²³ The more punishment society obtains simply from the stigmatizing effect of conviction, the smaller the fine that must be imposed to produce the optimal severity of punishment; and the smaller the fine, the less likely it is to exceed the white-collar criminal's ability to pay.

The existence of a stigma of conviction²⁴ bears on the question, why, if a money sanction is adequate, is criminal punishment necessary at all? Why not rely entirely on money damages, as in a civil action? If the stigma arises either because the action is brought by the state and denominated as criminal, or because the higher standard of proof for criminal cases makes it less likely that a convicted defendant is really innocent, then it would be lost if civil penalties were substituted for criminal fines. Of course, the latter aspect of the stigma effect could be preserved simply by increasing the standard of proof in a civil penalty suit to the criminal level.

the optimal incidence of the criminal activity, costs of enforcement aside, is zero or greater than zero. If it is zero, then one possible system of punishment would be to levy a fine equal to the offender's total wealth. This, of course, may be viewed as discrimination against the rich because the fine would increase with the offender's wealth. If, however, the criminal activity is not totally devoid of social utility, so that its optimal incidence is not zero, then the object of punishment is not to deter as such but to make the offender internalize the social costs of his activity, and the case for discrimination is no longer established. For in this case we do not want to deprive society of the utility obtained from the criminal's act, but only to make sure that he pays the costs he imposes on others. See R. POSNER, *supra* note 2, at 166. Some would argue, of course, that the rich should be punished more severely than the poor in order to make the distribution of wealth more equal. Whatever the merits of greater equality of income in general, the criminal justice system seems a haphazard and inefficient device for redistributing income and wealth.

20. See, e.g., Geis, *Criminal Penalties for Corporate Criminals*, 8 CRIM. L. BULL. 377 (1972).

21. M. CLINARD, *THE BLACK MARKET—A STUDY OF WHITE COLLAR CRIME* 244 (1969).

22. *Id.*

23. See, e.g., Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

24. This stigma may be especially pronounced in the case of this "sensitive" white-collar criminal as contrasted with the rough, uneducated, and "insensitive" street criminal.

I am not entirely happy with this answer, however, and not only because I think the stigma or moral revulsion that attaches to certain conduct does so because of the nature of the conduct rather than the fact that it is labeled criminal or proceeded against by the criminal process.²⁵ The economic objection to relying on stigma for deterrence is that, like imprisonment, it is more costly to society than the pure fine (or civil penalty) because it does not yield any revenue. (Stigma, unlike a fine, imposes costs on the criminal with no corresponding gain to society.) Hence, it would seem more efficient to drop the criminal label, and any stigma attached to it, and offset any loss in disutility to the criminal by increasing the size of the civil penalty. In that way, the social revenue can be increased with no loss of deterrence.

In fact a good deal of punishment is meted out in civil penalty suits. The example with which I am most familiar is the treble-damage action in antitrust cases, in which two-thirds of every damage award is in effect a fine—often a much higher one than the statutory maximum for a criminal antitrust suit—albeit the fine is paid to the plaintiff rather than to the state. I am inclined to think that the civil penalty is superior to the criminal fine as a method of punishing white-collar criminals. Whether the penalty should be paid to a private plaintiff or to the state, however, should depend on the relative efficiency of private and public enforcement in particular contexts, an issue discussed elsewhere.²⁶

But I am straying into the question of decriminalization. My subject is the sentencing of white-collar criminals, which assumes that some white-collar offenses should, or at least will, continue to be dealt with by the criminal process. If the criminal sanction is to be retained in this area, then, as I have argued in this article, fines should be substituted for prison sentences when the optimal fine is within the power of the offender to pay. In principle, this position could, and I think should, be extended beyond the white-collar domain to include the non-white-collar crimes that the affluent occasionally commit. The problem is that while some of these crimes, such as murder, are so serious that even the affluent cannot pay adequate fines, not all white-collar crimes are less serious than crimes of violence. Nevertheless, the most serious white-collar crimes are probably committed by corporations rather than by individuals. Within this corporate category, the gravity of the offense is probably more or less proportional to the size of the company, so solvency limitations should not preclude the imposition of very large fines for white-collar crime where such fines are optimal.

The reference to corporations brings me to the final point that I want to make in this article. It concerns the case for a different approach to crimes committed by individuals acting as agents of corporations or other associations rather than acting on their own behalf. There is an argument that I have

25. An intermediate position is that the fact of conviction has a moral effect which can, however, be impaired if the criminal label is attached to conduct that the community does not regard as morally reprehensible. See Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963). The problem with this position is that it implies that the stigma derives from community opinion rather than from the denomination of conduct as criminal. If so, then logically there is no stigmatizing effect of conviction to be blunted.

26. See Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975). In some cases, primarily where the probability of detection and punishment of a wrongful act is near unity without much investment in detection and punishment, such as breach of contract, the optimal "penalty" will be simple damages.

made elsewhere in the antitrust context for confining criminal (or civil-penalty) liability to the corporation, on the theory that if it is liable it will find adequate ways of imposing on its employees the costs to it of violating the law.²⁷ Of course, this assumes the existence of an adequate set of sanctions, capable of hurting the corporation for its violations of the law. Perhaps this is too quixotic an assumption or aspiration (outside of the antitrust context) to support so radical a proposal. I mention it only to make clear that the adoption of such a proposal would still leave a wide area in which one would want to retain criminal or civil-penalty sanctions for white-collar crime as I have defined it; for not all white-collar crimes are the work of corporations—and in the area of income tax, for example, not most. But wherever and for whatever reason it is decided to retain criminal sanctions for individual white-collar offenders, the movement should be toward the abolition of imprisonment and the substitution of fines—albeit fines more severe than those today meted out to such offenders.

27. See R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 225-26 (1976).