

# FEDERAL WHITE COLLAR SENTENCING IN THE UNITED STATES: A WORK IN PROGRESS

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## I

### INTRODUCTION

At first blush, it seems odd for an American contributor to an international conference on sentencing to focus on “high end” federal white collar sentencing. After all, federal cases make up a relatively small part of the U.S. criminal justice system. (Between October 2005 and September 2006, about 1,132,290 people were sentenced for a felony in state courts,<sup>1</sup> and 73,009 in federal courts.)<sup>2</sup> Even within the federal system, white collar cases of all sorts are a relatively small part of a criminal docket dominated by immigration, drug, and gun cases, which together comprised nearly 73% of all federal cases in 2009.<sup>3</sup> And the “crimes involving fraud, deceit, theft, embezzlement, insider trading, and other forms of deception” that accounted for 9.5% of 2009 cases includes a great many offenders and offenses of the middling sort.<sup>4</sup> Moreover, what is meant by “high end” anyway? Does a vague directional reference allow one to sidestep the longstanding scholarly debate about defining “white collar crime?”<sup>5</sup>

The provisional answer is “yes,” at least when broadly speaking of sentencing policy. One need not be either rigorous or comprehensive in defining the relevant class of cases to appreciate the outsized role that the

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1. SEAN ROSENMERKEL, MATHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES (2009).

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 225711, FEDERAL JUSTICE STATISTICS 2006—STATISTICAL TABLES tbl5.1 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjs06st.pdf>.

3. U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2009, at 1 (2010).

4. *Id.* at 10.

5. See generally Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1 (2005).

sentences given to the well-off and well-placed play in perceptions about the fairness and efficacy of American criminal justice. Whether driven by public interest or schadenfreude, media coverage gives these cases of financial scandal and public corruption a profile disproportionate to their number. And the work of Tom Tyler and others<sup>6</sup> suggests that this profile and the impressions it leaves will potentially play a critical role in the legitimization of enforcement efforts more generally. Indeed, while I make no rigorous argument of historical connection, it is worth noting that federal sentencing reform has coincided with an intensification in the federal commitment to pursue the grander white collar offenders—not simply bank embezzlers, con artists, and corrupt line actors in the public and private sector—and that both occurred during the same post-Watergate period of destabilized governmental authority.<sup>7</sup> In both projects, one sees strains of the “leveling down” that Jim Whitman has found characteristic of American punishment practices.<sup>8</sup>

The story of how the federal system has dealt with high end white collar offenders is worth telling. After all, sentencing stories are one of the United States’ most valuable exports—generally ones that teach other countries what not to do. This one will show the convoluted path we have taken to come—at least with respect to doctrinal regulation—nearly full circle, the closest we’ve come to the 1980s in the last three decades. Given how much judicial, adversarial, and legislative energy has been spent to go what seems like such a short distance, a clear-eyed assessment of the project seems in order for Americans. Perhaps others can profit from our experience as well.

After briefly sketching out this story, I hope to explore the lessons, with particular attention to the interaction between institutional and procedural structures and theoretical white collar sanctioning goals. The precise nature of these institutional and procedural structures is jurisdiction-specific, and my references will be exclusively U.S. federal.<sup>9</sup> But I hope to highlight the need to consider such structures when considering how to sentence in cases that will regularly test the perceived commitment of any jurisdiction’s sentencing regime to both equity and equality.

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6. See generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

7. See Tony G. Poveda, *White Collar Crime and the Justice Department: The Institutionalization of a Concept*, 17 CRIME L. & SOC. CHANGE 235 (1992); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

8. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 42–43 (2003).

9. Cases like *Reeves v. Indiana*, in which the Supreme Court of Indiana upheld a fifty-four-year sentence for a defendant convicted of a church-bond Ponzi scheme that resulted in a loss of \$13,149,000 lost by 2,904 victims, serve as a reminder that the issues discussed here are arising in state courts with increasing frequency. 953 N.E.2d 665, 672 (Ind. 2011).

## II

## THE NEARLY CIRCULAR ROAD TAKEN

Back in the 1970s, Kenneth Mann and his Yale colleagues—who presciently studied white collar sentencing just as the area started to attract prosecutorial attention—did a lovely job capturing how judges approached these cases in a regime of unbounded discretion: judges certainly considered general deterrence in all their sentences, but in white collar cases that single goal loomed largest.<sup>10</sup> And while the need to promote general deterrence often counseled the imposition of prison time, class considerations counseled restraint: “Most judges share a widespread belief that the suffering experienced by the white collar person as a result of apprehension, public indictment and conviction, and the collateral disabilities incident to conviction—loss of job, professional licenses, and status in the community—completely satisfies the need to punish the individual.”<sup>11</sup> Indeed judges had a special empathy for defendants “whose position in society may be very much like their own.”<sup>12</sup>

These judicial tendencies were of explicit concern to Congress when it passed the Sentencing Reform Act in 1984. As the Senate Report explained:

[It is our] view that in the past there have been many cases, particularly in instances of major white collar crime, in which probation has been granted because the offender required little or nothing in the way of institutionalized rehabilitative measures . . . and because society required no insulation from the offender, without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance. The placing on probation of [a white collar criminal] may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact.<sup>13</sup>

Once it set to work drafting the Federal Sentencing Guidelines, the Sentencing Commission—as Commissioner and then-Judge Stephen Breyer later explained—found that in white collar fraud cases

courts granted probation to offenders more frequently than in situations involving analogous common law crimes; furthermore, prison terms were less severe for white collar criminals who did not receive probation. To mitigate the inequities of these discrepancies, the Commission decided to require short but certain terms of confinement for many white collar offenders, including tax, insider trading,<sup>14</sup> and antitrust offenders, who previously would have likely received only probation.

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10. Kenneth Mann, Stanton Wheeler & Austin Sarat, *Sentencing the White Collar Offender*, 17 AM. CRIM. L. REV. 479, 482 (1980). *See also* United States v. Bergman, 416 F.Supp. 496, 500 (S.D.N.Y. 1976) (sentencing a nursing home operator, prominent sentencing reformer Judge Marvin Frankel noted, “[W]e continue to include among our working hypotheses a belief (with some concrete evidence in its support) that crimes like those in this case—deliberate, purposeful, continuing, non-impulsive, and committed for profit—are among those most likely to be generally deterrable by sanctions most shunned by those exposed to temptation.”).

11. Mann, Wheeler & Sarat, *supra* note 10, at 483–84.

12. *Id.* at 500.

13. S. REP. No. 98–225, at 91–92 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3274–75.

14. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which*

The Guidelines that emerged were primarily driven by the economic “loss” that judges were charged with calculating, a task that turned out to be enormously complex, challenging courts to devise methodologies for calculating “intended” or “actual” loss and, sometimes, gain.<sup>15</sup> Before long, responding to complaints from the Justice Department, the Judicial Conference of the United States, and many probation officers that “sentences for some mid- to high-level economic defendants remained too low in relation to the seriousness of their offenses,”<sup>16</sup> the Sentencing Commission embarked on an extensive consultative project that culminated in the 2001 Economic Crime Package. The new regime was designed to slightly lower the sentences of some classes of low-loss offenders—allowing judges to impose probation in comparatively less serious cases—while raising significantly the sentences of most mid- to high-loss offenders.<sup>17</sup>

A dog that did not bark in the white collar area—neither back in the 1980s nor (for the most part) since—was statutory mandatory minimums. The point becomes clear only when one notices that, in 1984, without even waiting for the Commission to formulate and implement guidelines for narcotics and violent offenses, Congress established mandatory minimum sentences for a variety of drug and gun crimes, and has continued to do so every few years thereafter.<sup>18</sup> Perhaps Congress had more confidence in how judges would sentence white collar offenders. More likely, the issue simply lacked political salience at the time.

The collapse of the Enron Corporation at the end of 2001—“barely a month after the new economic crime guidelines became effective”<sup>19</sup>—brought just this salience. While Congress did not reach for mandatory minimums, the mandatory status of the Federal Sentencing Guidelines provided the necessary bite for the Sarbanes–Oxley Act of 2002, which ordered the Sentencing Commission to consider a variety of enhancements to the Guidelines.<sup>20</sup> As a result of this legislative intervention, base offense levels were increased in most fraud prosecutions, and the loss table was yet again extended to increase the

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*They Rest*, 17 HOFSTRA L. REV. 1, 20–21 (1988).

15. See Daniel C. Richman, *Calculation of Loss Under Fraud Guidelines*, in 2 WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES 18 (Otto G. Obermaier & Robert G. Morvillo eds., 1998); Frank O. Bowman, *Coping with “Loss”: A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461 (1998).

16. Frank O. Bowman III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 388 (2004) [hereinafter *Pour Encourager*].

17. *Id.* at 389.

18. U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ch. 2 (1991).

19. *Pour Encourager*, *supra* note 16, at 392.

20. Pub. L. No. 107–204, § 1104(a), (b)(1), 116 Stat. 745, 808–09; see also Stephanos Bibas, *White Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 726–27 (2005).

presumptive sentence for defendants to whom the largest losses could somehow be attributed.<sup>21</sup>

The bite of the Guidelines increased over time, as Congress moved to limit judicial discretion legislatively. While the Justice Department's political leaders similarly sought to tie the hands of line prosecutors, demanding that they hew to the available facts in their Guidelines calculations, the net result appears to have been an increase in prosecutorial bargaining leverage, and in sentencing severity.<sup>22</sup> Jamie Olis soon became the poster child for the harshness of the Guideline regime for white collar cases. A tax lawyer at Dynegy convicted after trial for his role in a scheme to misrepresent the company's cash flow, Olis (who had not directly profited from the illegal transactions) initially received a sentence of more than twenty-four years' imprisonment because of a loss computation driven by the \$105 million stock loss suffered by one shareholder, the University of California Retirement System.<sup>23</sup>

The rigid Guidelines regime soon crumbled, however, thanks to the Supreme Court's 2005 intervention in *United States v. Booker*,<sup>24</sup> which held the mandatory application of the Guidelines unconstitutional and converted the scheme into an advisory regime. Sentencing judges were to consider Guidelines sentencing ranges, but only in the context of the more general goals set out in 18 U.S.C. § 3553(a)—the general sentencing statute. While the *Booker* Court, invoking Blackstone, celebrated the role of juries as the “sacred bulwark of the nation,”<sup>25</sup> district courts were the primary beneficiary of the decision. Yet they did not rush to claim the discretionary power that *Booker* re-allocated to them. The reasons for this reticence varied across circuits and within districts.<sup>26</sup> Appellate courts were often slow to grant sentencing judges the freedom envisioned by *Booker*. Prosecutors sought to prop up the Guidelines regime by hewing to it in their sentencing advocacy. And sentencing judges themselves may have come to appreciate the informational value and safety of the Guidelines.

Still, the world indeed changed after *Booker*, particularly as the Supreme Court drove the message of sentencing judge discretion home in a series of

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21. See U.S. SENTENCING COMM'N, LOSS PRIMER (2011) (explaining how losses are calculated under the Federal Sentencing Guidelines).

22. See Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L. J. 1375, 1388–90 (2008); see also Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1472–77 (2008); Bibas, *supra* note 20, at 728–30.

23. See Simon Romero, *Revision of 24-Year Prison Term Ordered in Accounting Fraud*, N.Y. TIMES, Nov. 2, 2005, at C3, available at [http://www.nytimes.com/2005/11/02/business/02dynegy.html?\\_r=1](http://www.nytimes.com/2005/11/02/business/02dynegy.html?_r=1) (noting how Olis had “become the poster child for excessive punishment for white collar crime”); see also *United States v. Olis*, 429 F.3d 540, 548–49 (5th Cir. 2005) (describing misapplication of federal sentencing guidelines in case and remanding for re-sentencing).

24. 543 U.S. 220 (2005).

25. See *Booker*, 543 U.S. at 244 (quoting BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 343–344 (1769)).

26. See Richman, *supra* note 22, at 1411–18 (elaborating on post-*Booker* dynamics).

follow-up cases—with *Pepper v. United States*<sup>27</sup> the most recent.<sup>28</sup> The ebb and flow of white collar sentencing doctrine is highlighted in cases like *United States v. Tomko*,<sup>29</sup> where a plumbing contractor pleaded guilty to tax evasion, admitting to having falsely made the invoices submitted for the construction of his home seem like a business expense. In 2005, having calculated Tomko’s (advisory) Guideline range to be between twelve and eighteen months, the district judge, citing Tomko’s “negligible criminal history, his record of employment, his support for and ties in the community, and the extensive charitable work he has done,” sentenced him to “three years of probation (the first of which would be served as home detention), participation in an alcohol treatment program, 250 hours of community service, full restitution, and the statutory maximum fine of \$250,000.”<sup>30</sup> The government appealed the sentence and a Third Circuit panel reversed, noting,

We share with the Government concern about the message a sentence of probation for the indisputably serious offense of willful tax evasion sends to the public at large and would-be violators. Tomko’s sentence of probation included home confinement in the very mansion built through the fraudulent tax evasion scheme at issue in this case—an 8,000-square-foot house on approximately eight acres, with a home theater, an outdoor pool and sauna, a full bar, \$1,843,500 in household furnishings, and \$81,000 in fine art. The perverse irony of this gilded cage confinement was not lost on the Government, it is not lost on us, and it would not be lost on any reasonable public observer of these proceedings, including those would-be offenders who may be contemplating the risks associated with willful tax evasion.<sup>31</sup>

Soon thereafter, the Supreme Court handed down *Gall v. United States*,<sup>32</sup> and admonished appellate courts not to apply a presumption of unreasonableness when a district court imposes a sentence outside the Guideline range. Rather, appellate courts were to “consider the extent of the deviation,”<sup>33</sup> giving “due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”<sup>34</sup> The Supreme Court explained:

The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. . . . The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. . . . [Moreover,] [d]istrict courts have an institutional

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27. 131 S Ct. 1229 (2011).

28. See also *Kimbrough v. United States*, 552 U.S. 85 (2007); *Rita v. United States*, 551 U.S. 338 (2007); *Spears v. United States*, 555 U.S. 261 (2009) (per curiam).

29. 562 F.3d 558 (3d Cir. 2009) (en banc).

30. *Id.* at 563–64.

31. *United States v. Tomko*, 498 F.3d 157, 166 (3d Cir. 2007), *vacated and different results reached on rehearing*, 562 F.3d 558 (3d Cir. 2009).

32. 552 U.S. 38 (2007) (internal citations omitted).

33. *Id.* at 47.

34. *Id.* at 51.

advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do.<sup>35</sup>

Not long thereafter, the Third Circuit took Tomko's case en banc and reinstated his sentence. The Court noted that

a significant number of us, if we were sitting as the district judge, might have applied the § 3553(a) factors differently had we been the sentencing court. But this disagreement does not, by itself, demand reversal. *Gall*, 128 S. Ct. at 597; *see also United States v. Schweitzer*, 454 F.3d 197, 204 (3d Cir. 2006) (“That we may ourselves have imposed a sentence different from that of the district court, based on our own de novo assessment of the evidence, is no basis to overturn the judgment.”). We reverse only when we discern an abuse-of-discretion. Looking at the record before us, we fail to see one here.<sup>36</sup>

Case-mix variation—particularly the constant increase in immigration cases—makes it hard to quantify the aggregate effect of the new discretionary regime on sentencing. As Frank Bowman has noted,

[T]he marked decline in average federal sentence beginning in 2008 correlates directly with the recent explosion in relatively low-sentence immigration prosecutions . . . FY 2008 may have been the year in which judges reading *Kimbrough* and *Gall* first understood that they had a green light to vary from the guidelines at will, but probably more importantly it also marked the beginning of a huge upsurge in immigration cases, which went from 17,592 or 24.2% of all federal cases in 2007 to roughly 30,000 or 35.2% of all cases in 2011. Given that the average sentence for an immigration case is 16.3 months, as compared to 70.2 months for drug trafficking, 82.7 months for firearms, and 22.7 months for fraud, the downward pressure<sup>37</sup> exerted on the federal average sentence of this one change in case mix is immense.

There is some evidence that both inter-district and intra-district sentencing variations have increased.<sup>38</sup> Yet the extent of such variation—which one would

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35. *Id.* at 51–52.

36. *Tomko*, 562 F.3d at 574. For a similar case, see *United States v. Trupin*, 475 F.3d 71, 76 (2d Cir. 2007), where the panel initially reversed a tax sentence as “unreasonable.” Subsequently, the Supreme Court and then the Second Circuit vacated and remanded Trupin's sentence in the wake of *Kimbrough* and *Gall*. *United States v. Trupin*, 291 F. App'x 449 (2d Cir. 2008). *See also United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008) (upholding probation for a tax conviction). *But see United States v. Engle*, 592 F.3d 495 (4th Cir. 2010) (reversing a probation and home detention sentence in tax evasion case, finding that district court had failed to consider the relevant policy statements issued by the Sentencing Commission, which treat tax evasion as a serious crime, emphasize the importance of general deterrence, and reflect the view that under pre-Guidelines practice too many probationary sentences were imposed for tax crimes).

37. Frank O. Bowman III, *Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT. RPTR. 5, 7 (2012).

38. *See* Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1 (2010) (finding that, at least in the District of Massachusetts, inter-judge disparity has significantly increased since *Booker*); *see also United States v. Whigham*, 754 F. Supp. 2d 239 (D. Mass. 2010) (Gertner, J.) (critiquing the Scott article); *Surprising Judge-to-Judge Variations Documented in Federal Sentencing*, TRAC REPORTS (Mar. 5, 2012), <http://trac.syr.edu/tracreports/judge/274/> (a widely covered judge-by-judge review by the Transactional Records Access Clearinghouse for federal sentencing in 2007–2011 that found “extensive and hard-to-explain differences in the sentencing practices by the judges working in many federal districts”). *But see* Amy Baron-Evans, Jennifer Coffin & Paul J. Hofer, *TRAC's Report Claiming “Surprising Judge-to-Judge Variation” Fails to Compare Similar Cases, Relies on Poor Quality Data, Uses an Unreliable Method of Identifying Case Type, Uses Incorrect Methods of Reporting Sentence Length, and Contains Numerous Errors*, SENTENCING RESOURCE COUNSEL PROJECT, FEDERAL PUBLIC AND COMMUNITY DEFENDERS, <http://www.fd.org/>

certainly expect to occur with the reduction of the Guidelines to advisory status and the substantial relaxation of appellate review—is difficult to determine. Moreover, as Amy Baron-Evans and Kate Stith have explained, figuring out what variation is normatively troubling is even harder.<sup>39</sup>

To what extent have sentencing judges made use of their new discretionary license in white collar cases? In October 2011, the Chair of the Sentencing Commission, Judge Patti Saris, reported: “In the Post-*Gall* Period the rate at which courts imposed a non-government sponsored below range sentence [in fraud cases] varied from a high of 46.8[%] in the district with the highest rate to a low of 1.4[%] in the district with the lowest rate, representing a range of 45.4 percentage points.”<sup>40</sup> Yet perhaps because finding a useful quantitative metric is difficult, or because stable patterns have yet to emerge, assessments of the new regime have largely been driven by anecdote and rhetoric. In a June 28, 2010 letter to the chair of the Sentencing Commission, Jonathan Wroblewski, the official who represents the Justice Department on the Commission, focused on high-loss fraud cases as one area in which many judges were imposing sentences “inconsistently and without regard to the federal sentencing guidelines.”<sup>41</sup> At a January 26, 2011 Senate Judiciary Committee hearing on new fraud legislation, Republican Senator Charles Grassley observed:

I would like to note that regardless of the substantive laws we pass, the investigative and law enforcement resources appropriated and the prosecutions brought so far, criminal fraud will not be [adequately] deterred unless we revisit the Supreme Court’s decision in *United States v. Booker*. . . . Now that the Guidelines have been held to be merely advisory, the disparity and unfairness in judicially imposed sentences that we sought to eliminate on a bipartisan basis are returning, especially in two areas: child pornography and fraud cases of the type we are discussing today. If potential fraudsters view the lenient sentences now being handed down as merely a cost of doing business, efforts to combat criminal fraud could be undermined.<sup>42</sup>

In February 2011 testimony to the Sentencing Commission, Preet Bharara, the U.S. Attorney for the Southern District of New York, observed:

There is concern, based on the experience of some Districts, that more and more, particularly in the context of high-loss, large-scale fraud cases, there are not consistently tough and fair outcomes. We have observed—and the Commission’s data have confirmed—that district courts are relying less and less on the sentencing guidelines, which are now advisory. Some are voicing concern that the fraud guidelines counsel sentences that are inappropriate to the crime committed . . . . Others have expressed frustration that the guidelines provide inadequate assistance in

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docs/latest-news/src-trac-report.pdf?sfvrsn=8.

39. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631 (2012).

40. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker: Hearing Before the Sumcomm. On Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary*, 112th Cong. 59 (2011) (prepared testimony of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n).

41. Letter from Jonathan J. Wroblewski, Office of Pol’y & Leg., Crim. Div., U.S. Dept’t of Justice, to the Hon. William K. Sessions III (June 28, 2010), available at 23 FED. SENT’G REP. 282, 285.

42. *Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) (statement of Sen. Charles Grassley).

developing intelligent and consistent sentencing decisions in certain white collar cases.<sup>43</sup>

Calls from both the Administration and legislators for reining in judicial discretion have continued into 2012. In October 2011, a House Judiciary Committee Hearing titled “Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*,” led off with the subcommittee chair, Representative James Sensenbrenner, condemning post-*Booker* “sentencing disparities” and the “increasing frequency of downward departures” that favored fraud defendants among others.<sup>44</sup> In November 2011, the head of the Justice Department’s Criminal Division complained that “[w]ith increasing frequency, federal judges have been sentencing fraud offenders—especially offenders involved in high-loss fraud cases—inconsistently.”<sup>45</sup> And these departmental complaints have continued into 2012.<sup>46</sup>

Yet others have either tentatively or wholeheartedly embraced the new discretionary regime. After sentencing the defendant in a faith-based hedge-fund fraud to sixty months imprisonment, instead of the 210–262 months suggested by the Guidelines, Judge John Gleeson—a respected Brooklyn judge and part-time academic—took issue with the Departmental complaints raised in Wroblewski’s letter:

I don’t know why the Department has chosen to complain about fraud sentences to the Commission but not to the circuit courts of appeals. It has no reason to believe such appeals would be futile—in the handful of cases in which the government has challenged sentences based on the sentencing judges’ application of the § 3553(a) factors, it has prevailed two-thirds of the time. Perhaps, as in this case, the prosecutors who are actually handling the cases in the courtrooms do not regard the sentences as unacceptable simply because they are below the advisory Guidelines ranges. In any event, if the problem the DOJ Letter identifies in this area of federal sentencing in fact exists, there is no need for reform, as the solution is already available.<sup>47</sup>

Our story thus ends without resolution or promise of stability. That federal white collar sentences have become more severe since the 1980s is clear.<sup>48</sup> Equally clear is our failure to devise an institutional framework for them that is

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43. Statement of Preet Bharara, U.S. Attorney, S.D.N.Y., Before the U.S. Sentencing Comm’n, Hearing on Proposed Amendments to the Federal Sentencing Guidelines 3–4 (Feb. 16, 2011).

44. See *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, H. Comm. on the Judiciary*, 112th Cong. (2011).

45. Lanny A. Breuer, Assistant Attorney Gen., Address at the American Lawyer National Law Journal Summit (Nov. 15, 2011).

46. See Statement of Matthew Axelrod, Assoc. Deputy Attorney Gen., Before the U.S. Sentencing Comm’n, Hearing on Federal Sentencing Options After Booker: Current State of Federal Sentencing, 19–21 (Feb. 16, 2012).

47. *United States v. Ovid*, No. 09-CR-216, 2010 U.S. Dist. LEXIS 105390, at \*29 (E.D.N.Y. Oct. 1, 2010).

48. See, e.g., Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279 (2007); Andrew Weissmann & Joshua A. Block, *White Collar Defendants and White Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007) (responding to Podgor’s claims as to sentencing patterns in the last two decades).

both appropriately nuanced and fair and that also reflects reasonable enforcement priorities.<sup>49</sup> This seems like a good time to return to first principles, perhaps ones with transnational application. I make no claim to comprehensive coverage. Someone who, for instance, believes that the government should play a minimal role in policing the financial markets will get an argument from me in person but not here. Nor will I take on finer line-drawing projects, like figuring out what should count as criminally corrupt.<sup>50</sup> Rather I take the substantive prohibitions of federal criminal law for granted—fully aware that a high degree of discretionary enforcement was intended—and explore how we might structure the current interaction of political and legal actors so as to serve the basic goals of deterring white collar crime and promoting some level of retributive justice.

### III

#### THE TENSION BETWEEN DETERRENCE AND POLITICAL ECONOMY CONSIDERATIONS

##### A. How Should Deterrence Considerations Affect the White Collar Sentencing Calculus?

Deterrence considerations certainly loom large in discussions of white collar sentencing, albeit often with limited rigor. The intuition—and intuition it remains, for lack of clear empirical evidence, particularly with respect to crimes committed in the corporate setting—is that word of sanctions gets out pretty quickly to the relevant community and affects behavior. Sometimes, the government makes affirmative efforts. For example, the chief criminal tax enforcement official recently spoke of “marketing Justice Department convictions and sentencing to the tax preparation community,”<sup>51</sup> and prosecutorial indictment and conviction press conferences will regularly speak of “sending a message.” But the general assumption seems to be that not much officially sponsored advertising is needed. Certainly, the government has not found the need to gather executives in a room to hear about the precise sentences received by their peers—an approach successfully used for targeting gun crime.<sup>52</sup>

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49. Statement of Professor Samuel W. Buell, Duke Univ. Sch. of Law, Before the U.S. Sentencing Comm’n, Public Hearing on Proposed Amendment to the Federal Sentencing Guidelines 12 (March 14, 2012) (noting that “[w]hite collar sentencing is tougher, and more predictably tough, than it was before the Sentencing Reform Act. But there is increasing evidence of large gyrations in federal white collar sentences that, given the lengthy terms of imprisonment at stake, are perhaps more costly than the variations that gave rise to federal sentencing reform in the first instance.”).

50. See Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815 (2011).

51. Mark E. Matthews, *New IRS Publicity Strategy*, 49 U.S. ATT’YS’ BULL. 15, 17 (July 2001).

52. See generally Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL L. STUD. 223 (2007).

Assumptions that sanctions deter do not necessarily yield a particular sentence or even a sentencing range. When, in the course of sentencing an executive convicted of accounting fraud, a New York federal judge noted, “the Government at no time here presented any evidence or cited to any studies indicating that a sentence of more than three-and-a-half years was necessary to achieve the retributive and general deterrence objectives applicable to a case like this one,” he was surely aware of the paucity of evidence pointing any particular direction.<sup>53</sup> To impose a rigorous burden of proof in this area is (for better or worse) to predetermine the result.

In the absence of data, the argument is frequently made that “even relatively short sentences can have a strong deterrent effect on prospective ‘white collar’ offenders.”<sup>54</sup> To this is often added the point, made long ago by Beccaria and sharpened more recently by Becker and others, that increasing the frequency of enforcement would lead to more deterrence than increasing the severity of sentences for those actually prosecuted.<sup>55</sup> Out of these premises comes a cogent argument for a regime of frequent enforcement with relatively short prison sentences, which (at least to me) seems intuitively right. A more complete model would have to consider whether white collar offenders have idiosyncratic subjective expectations of the likelihood of enforcement. It may be, for instance, that “those most likely to have access to white collar crime opportunities” may be particularly prone to believe there is “little chance of getting caught and receiving a severe penalty.”<sup>56</sup> For now, however, let us declare the model complete.

Yet even if, through a combination of theory, intuition, and maybe a little data, a high frequency and low severity regime emerges as the winner in our deterrence laboratory, we are far from finished, at least in a world in which that regime’s fundamental premise of frequency is effectively unattainable—that is, the world we live in. For once one turns from deterrence theory to the domain of political economy, it becomes clear that—at least under all realistic scenarios—white collar prosecutions will always be pretty rare. Can I prove this? Not at all. A rigorous demonstration that such prosecutions are rare (or

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53. *United States v. Adelson*, 441 F. Supp. 2d 506, 514–15 (S.D.N.Y. 2006), *aff’d*, 301 F.App’x 93 (2d Cir. 2008).

54. *Id.* at 514 (citing Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 80 (2005); Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 S. ILL. U. L.J. 485, 492 (1998). *Cf.* U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 56 (2004) (noting that the Sentencing Guidelines were written, in part, to “ensure a short but definite period of confinement for a larger proportion of these ‘white collar’ cases, both to ensure proportionate punishment and to achieve deterrence”).

55. *See generally* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, AND OTHER WRITINGS, (Richard Bellamy ed., Richard Davies et al. trans., 1995) (1767); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45 (2000); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

56. Andrea Schoepfer, Stephanie Carmichael & Nicole Leeper Piquero, *Do Perceptions of Punishment Vary Between White Collar and Street Crimes?*, 35 J. CRIM. JUSTICE 151, 160 (2007); *see also* Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1310–12 (2008) (discussing interaction between deterrence and legal uncertainty in white collar area).

frequent) requires data on the rate of white collar offending—how much fraud or corruption has occurred in any particular period. To be sure, thanks to tax authorities' audit capabilities, we have some interesting data with respect to tax evasion;<sup>57</sup> market surveillance gives us a sense of insider trading rates; and reporter polling sheds light on the prevalence of local political corruption.<sup>58</sup> But the focus on criminal intent that dominates most inquiries into white collar crime has always posed an insurmountable challenge to aggregate data collection and base-rate determination.<sup>59</sup> Suffice it to say that intelligent and adequately funded enforcers have never wanted for instances of financial fraud or political corruption to pursue.<sup>60</sup>

The same detection issues that stymie data collectors are also a dominating feature of white collar enforcement dynamics that, whatever the base offending rate, ensure that white collar prosecutions will comprise only a small—albeit much talked about—part of the criminal docket. This is a world where reporting “victims” have often not suffered their losses as a result of criminal conduct, and where real “victims” of crimes are often unaware. It is also a world where, absent some conspicuous scandal or perceived crisis, the political pressure on enforcement agencies to pursue these cases is limited, and the demand for “restraint” or “moderation” in the service of capital formation or local norms is great. And it is one in which the opportunity costs with respect to other criminal priorities—whether violent crime, drugs or immigration—almost always seem more salient.<sup>61</sup>

Even in the face of the political economy challenges, one could imagine a variety of institutional design features that would ensure that zealous and well-funded prosecutors and enforcement agencies regularly pursued serious cases of financial fraud, health care fraud, and political corruption regardless of the political climate or public clamor.<sup>62</sup> One could even imagine civil regulators closely coordinating with the criminal enforcers, contributing their institutional

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57. See U.S. DEP'T OF TREAS., I.R.S., REDUCING THE FEDERAL TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE (2007).

58. The State Accountability Project is currently (as of February 2011) drawing on a network of political reporters to survey and rank all fifty states with respect to corruption. See Steve Behrens, *What Do Statehouses, City Halls Do About Corruption?*, CURRENT.ORG (Feb. 22, 2011), <http://www.current.org/wp-content/themes/current/archive-site/news/news1104statecorruption.html>.

59. See Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1627 (2007) (noting that “the more sophisticated the fraud, the more difficult it is to identify as fraud (which is, in essence, the wrong of taking or attempting to take another’s property by deceptive means structured so as not to fall within the basic prohibition against theft.)”); see also PWC, CYBERCRIME: PROTECTING AGAINST THE GROWING THREAT, GLOBAL ECONOMIC CRIME SURVEY 16–27 (2011) (providing a recent global survey on the incidence of fraud).

60. See James E. Alt & David Dreyer Lassen, *Enforcement and Public Corruption: Evidence from U.S. States* (Feb. 2011) (unpublished manuscript), available at <http://epstein.usc.edu/research/LPE.Alt.pdf> (finding that greater prosecutor resources result in more convictions for corruption, other things equal).

61. See Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2108–14 (2009).

62. See *id.* at 2016–19.

competence to prosecutorial efforts and picking up those cases meriting less punitive treatment.<sup>63</sup> Some may even believe we live in such a world, and that, were we to reduce white collar sentences, we could seamlessly increase enforcement frequency to make up the difference on the deterrence curve. For my part, I do not see anything close to that happening now or in the foreseeable future. And if my deep skepticism about the possibility of a stable commitment to white collar enforcement is warranted, we should not expect that increased certainty will accompany decreased severity.

Rest assured that I make no claim that current white collar sentences are at some normatively “right” level. Indeed, a consequence of the dysfunctional political economy of white collar enforcement is that when Congress *does* decide to “go after” white collar crime, generally in the wake of some well-publicized scandal, it does so by hiking sentences without doing much in the way of ensuring that the resources hurried to the area will stay there. This is the story of the Sarbanes-Oxley sentencing provisions and, as Carol Steiker has written,<sup>64</sup> of other sentencing debacles as well. It may also be the story behind the Justice Department’s dogged advocacy (against all odds, in a number of district courts) for adherence to highly punitive guidelines. To the extent that macro political dynamics drive sentencing levels (as opposed to judicial discretion or the decisions of an insulated commission), there can be only one direction for sentencing: up, at an unreasonably steep gradient. The point for now is simply that, given political realities, the deterrence curve offers but limited support for lower sentences.

#### IV

#### SENTENCING ACTORS OR POTENTIAL ACTORS

If the foregoing political and enforcement realities make it so difficult to appropriately incorporate deterrence considerations into white collar sentencing, how can one devise an optimal sentencing regime, which would presumably consider not just deterrence but other traditional sentencing goals like desert, individualized treatment, and proportionality?<sup>65</sup> The short answer is that I have no idea. The longer answer is that in this second—or third—best world, we can start by identifying the contributions and pathologies of a regime’s actual or potential parts—Congress, prosecutorial hierarchs committed to wholesale management, and the plea bargaining system that resolves most

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63. See Daniel Richman, *Overcriminalization for Lack of Better Options*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* (Michael Klarman et al. eds., 2011).

64. See Carol S. Steiker, *Lessons From Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 *LAW & CONTEMP. PROBS.*, no. 1, 2013 at 27.

65. For a bracing exploration of current theories of punishment and their all-too-frequent failure to engage the problem of mass incarceration, see Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 *MARQ. L. REV.* 1203 (2012).

cases at the retail level—and try to balance one troubling tendency against another.

Let us start with Congress, whose tendency to hike sentences when it is outraged, and not to lower them after the outrage subsides, has already been noted. When these responses take the form of legislative “noise”—like increases in statutory maximums that do not affect actual sentences<sup>66</sup>—we ought not be too quick to condemn. To be sure, such measures are often just a species of campaign literature. Yet given that every legislative enactment has some political opportunity cost, perhaps we ought to embrace these as useful signals to prosecutors and even judges of political priorities and commitments. Particularly once we move away from a formal deterrence model and consider a messy world in which general jurisdiction prosecutors have to allocate scarce enforcement resources and in which years of imprisonment are supposed to, at least in part, convey societal condemnation, weak signals of this sort can help align the preferences of insulated decision makers with those of the larger community.

What about strong legislative signals that take the form of mandated guidelines or mandatory minimums? Here we need to weigh the value of democratic accountability against the pathologies of wholesale legislative sentencing (of which we have considerable evidence). As Carol Steiker explains,<sup>67</sup> the U.S. federal experience has been not only that legislatively set sentences are carelessly chosen to begin with but that, once set, such benchmarks will thereafter provide easy access points for further intervention. Such intervention will always ratchet upward, as legislators will rest secure in the often unrealistic expectation that prosecutorial discretion will prevent conspicuous injustices. Or at least that Congress will not take political heat for such injustices.

It has been argued, and perhaps we will soon see, that the vast expenditures required by a high incarceration regime can restrain legislators’ punitive tendencies.<sup>68</sup> No such restraining effort ought to be expected in the white collar area, however, given the relatively small numbers involved and the extent of prosecutorial discretion. Indeed, against the costs of incarceration, a fiscally focused legislator will consider the adjudicative and investigative savings that will flow from the coupling of a harsh mandatory sentencing regime with a plea bargaining system. In a system in which legislative provisions ostensibly threatening sentencing outcomes are really just an “assignment of bargaining resources to the executive authorities,”<sup>69</sup> even the legislator not caught up in

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66. See, e.g., The White Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107–204, 116 Stat. 804 (codified in scattered sections of 15, 18, & 29 U.S.C.).

67. See Steiker, *supra* note 64, at 49–50.

68. See generally PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009); VERA INSTITUTE OF JUSTICE, THE CONTINUING FISCAL CRISIS IN CORRECTIONS: SETTING A NEW COURSE (2010).

69. DONALD A. DRIPPS, *The Substance–Procedure Relationship in Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 409, 415 (R.A. Duff & Stuart P. Green eds., 2011).

symbolic politics will be tempted to “print” freely the sentencing leverage that prosecutors will use to “buy” information and guilty pleas from defendants. The expense of pursuing white collar investigations and prosecutions against well-resourced defendants makes this temptation particularly great. All of these factors strongly counsel against resort to statutory mandatory minimums or indeed to any unmediated legislative intervention.

Prosecutors, of course, will have similar reason to seek plea-bargaining leverage, at least as an institutional matter. Indeed, the Justice Department’s forbearance in seeking mandatory minimums in financial fraud cases is remarkable for this reason.<sup>70</sup> Perhaps the Department’s June 2010 letter to the Sentencing Commission was intended to signal a readiness to reassess this forbearance in light of the sentencing leniency permitted by *Booker*. Yet Judge Gleeson’s opinion in *United States v. Ovid*—responding to the Department’s complaints about low white collar sentences by noting prosecutorial participation in them—reminds us that prosecutorial interests are not monolithic, and that the negotiation positions that line prosecutors take (which may actually reflect the exercise of this leverage) can undercut the Department’s efforts to advocate at the wholesale level.<sup>71</sup> While the Bush Justice Department made a concerted effort, via the “Ashcroft Memorandum” and other measures, to prevent line prosecutors from reducing ostensibly rigid and severe sentencing provisions to bargaining chits,<sup>72</sup> its lack of success and the inherent challenges of hierarchical supervision of the adjudicative process make it inevitable that any mandatory system will be mediated by, and needs to be viewed through the prism of, line-actor negotiations.

The inevitable intermediation of plea bargains poses a challenge not just to the project of top-down legislative control but to the legitimacy of the sentencing numbers that the project specifies. When severe ranges are set with an eye to their reduction via bargaining—for cooperation or a mere guilty plea—the sentences of defendants with the least to offer can end up outrageously high. This was the story—initially at least—of Jamie Olis. Yet if they are not, prosecutors’ ability to extract guilty pleas and information from defendants may be reduced. The justice of a regime that treats punishments so instrumentally is of course contestable. What cannot be contested, however, are the unique enforcement opportunities that such a regime creates in the United States and that no other system has (in my opinion) duplicated. There is a cold brutality and inherent risk of unreliability in the way we use the threat of vastly

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The path-breaking work on this point was done by Bill Stuntz. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

70. See John Esterhay, “Street Justice” for Corporate Fraud—Mandatory Minimums for White Collar Crime, 27 REGENT U. L. REV. 135 (2009) (arguing for the deployment of mandatory minimums in the area).

71. See *United States v. Ovid*, No. 09-CR-216, 2010 U.S. Dist. LEXIS 105390, at \*4–6 (E.D.N.Y. Oct. 1, 2010).

72. See Richman, *supra* note 22, at 1388–90; see also Stith, *supra* note 22, at 1469–70.

greater prison time to squeeze information out of culpable defendants. But no equally effective tool for prying closely held information about corrupt dealings or other, less genteel forms of organized crime, has been devised.<sup>73</sup> Although, in the white collar area, the clientele probably would be ready to cooperate even without the kind of massive sentencing exposures they face today, some degree of prosecutorial leverage (of the sort recognized everywhere except criminal procedure doctrine as “coercion”) is needed.

Another source of the prosecutorial interest in rigidity takes us right back to Kenneth Mann’s work in the 1980s and the perspectives of sentencing judges. To be sure, judicial attitudes towards white collar crime have doubtless changed considerably since then. I suspect, for instance, that the new crop of judges is far more likely to treat fraud and corruption as “real” crime than those on the bench in the 1970s. It may also be that egalitarian sensitivities drive judges more now than before to use the sentences given to violent or “blue collar” offenses as reference points in white collar cases.<sup>74</sup> Still, there is some, but far from conclusive, evidence that some of the troubling factors influencing sentencing in the 1970s remain active today. I am especially struck by the sentencing statistics in tax cases: of the 660 tax offense sentencings in fiscal year 2010, almost half were “non-government sponsored below range.”<sup>75</sup> My focus on these is contestable, since tax enforcement is a politically fraught subject and so few tax cases are brought that any prosecution may seem arbitrary. But in other respects they seem like the quintessential white collar cases: no identifiable victim, a defendant who can purport to be otherwise upstanding (particularly

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73. See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L. J. 69 (1995); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292 (1996); see also JAMES B. STEWART, *TANGLED WEBS: HOW FALSE STATEMENTS ARE UNDERMINING AMERICA: FROM MARTHA STEWART TO BERNIR MADOFF* 3–120 (2011) (providing a painstaking account of the process by which a trading assistant came to cooperate against Martha Stewart).

74. *United States v. Vanderbrake*, 771 F. Supp. 2d 961, 1005–06 (N.D. Iowa 2011), *aff’d*, 679 F.3d 1030 (8th Cir. 2012). In *Vanderbrake*, Judge Mark Bennett—a regular source of thoughtful sentencing opinions—explained why he had given a price-fixing defendant an above-Guidelines sentence. He noted,

What the court finds most disquieting about Vandebroke’s history and characteristics is that Vandebroke was already wealthy when he embarked on and engaged in the charged conspiracies. Vandebroke can make no claim to be a latter-day Jean Valjean, the unemployed protagonist in Victor Hugo’s *Les Miserables* who was imprisoned for stealing a loaf of bread to feed his widowed sister’s seven children. . . . Equally troubling is the fact that Vandebroke is one of the few white collar defendants I have sentenced where the sentencing record is totally devoid of *any* community work, participation in any service organizations, or charitable giving. There is no record evidence of even a single good deed done by Vandebroke for anyone other than his family. Vandebroke makes a mockery of the adage that “to whom much is given, much is expected.

*Id.*

75. See U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.27A, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/SBTOC10.htm](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm) (Of 660 tax sentences in fiscal year 2010, 279 (42.3%) are non-government-sponsored below range. Child pornography is the only close one, with 42.7% of sentences non-government below range.).

now that the IRS has endeavored to bring fewer “Al Capone” style pretextual prosecutions and more tax-gap cases),<sup>76</sup> and diffuse benefits that do not flow to any particular district.<sup>77</sup> An even starker pattern emerges from criminal antitrust cases, where below-Guidelines sentences have become the norm since *Booker*.<sup>78</sup> Recent complaints from the Justice Department and legislators about leniency toward the well-heeled are probably overstated. But there is not nothing to them.

## V

### THE PROMISE OF ADVISORY GUIDELINES

Reasonably soft sentencing guidelines—of the sort envisioned by the Supreme Court’s latest opinions—seem to offer the promise of a happy middle: loose strictures that force judges to think hard about categorical deterrence and retributive determinations, but that leave decent space for well-reasoned retail sentence tailoring. Yet finding the appropriate metrics has been, and may inevitably be, a challenge, particularly when one moves away from “off the rack” cases such as internet or credit card frauds.<sup>79</sup>

Consider the recent options-backdating prosecutions. Does one look to the stock drop when the fraud was discovered? The loss to the firm, if there is one? The gain to the backdating executive?<sup>80</sup> In 2010, after initially getting a twenty-one-month sentence, winning on appeal, and getting convicted again, the Chief Executive Officer (CEO) of Brocade Communications Systems was sentenced to eighteen months in prison.<sup>81</sup> That same year, in another options-backdating case, the prosecutor sought a six-and-a-half-year sentence for a CEO and noted, “To promote respect for the law, the public must be assured that a wealthy, well-connected individual, regardless of his station, array of prominent friends and associates, history of private success or acts of public largesse, will be subject to the same standard of criminal justice as those less fortunate.”<sup>82</sup>

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76. For data on legal versus illegal source tax evasion cases brought in the last decade, see TREASURY INSPECTOR GEN. FOR TAX ADMIN., REP 2010–30–074, TRENDS IN THE CRIMINAL INVESTIGATION DIVISION’S ENFORCEMENT ACTIVITIES SHOWED IMPROVEMENTS; HOWEVER, SOME GOALS WERE NOT ATTAINED (2010).

77. Richman, *supra* note 22, at 1410–11.

78. See *United States v. Vandebroke*, 679 F.3d 2030 (8th Cir. 2012) (collecting data for 2005–11).

79. These cases probably comprise a larger part of the federal docket than most realize. See U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2009, at 16 (2010). In 2009, for example, the losses in federal cases “involving fraud, deceit, theft, embezzlement, insider trading, and other forms of deception . . . ranged from less than \$100 to more than \$400 million,” but “[m]ore than half . . . involved a loss of less than \$70,000.” *Id.* See also *United States v. Manatau*, 647 F.3d 1048 (10th Cir. 2011) (demonstrating that a relatively straightforward identity-theft case can easily involve \$30,000 of intended loss, and perhaps even \$70,000, depending on “intent” findings).

80. See Pamela A. MacLean, *Lawyers “Fly Blind” on Options Penalties: Debate Over How to Calculate Losses and White Sentencing Guidelines Should Apply*, NAT’L L.J., Aug. 20, 2007, at 1.

81. See Bob Egelko, *18 Months for Ex-Brocade CEO; Securities Backdating*, S.F. CHRON., June 25, 2010, at D6.

82. Edvard Pettersson & Tori Richards, *Karatz Gets Five Years Probation in KB Home Backdating Case*, BLOOMBERG BUSINESSWEEK, Nov. 11, 2010.

District Judge Otis D. Wright II called the prosecution remarks “mean-spirited and beneath this office,” and sentenced the defendant to eight months of home detention, a \$1 million fine, and 2,000 hours of community service.<sup>83</sup> Whether the Sentencing Commission’s 2012 effort to address this particular loss calculation problem<sup>84</sup> will be successful remains to be seen.

The problem with using loss (or gain) as a sentencing metric is not simply that arriving at such amounts can be difficult but that the time and effort spent at arriving at them will cast a shadow over the entire sentencing process, at the expense of other factors, even those whose consideration is legally required. One can only speculate on this anchoring bias. Perhaps it will be counteracted (depending on the procedural framework and appellate case law) by a sentencing judge’s embrace of qualitative factors in which she enjoys a special competence. Either way, there is a substantial likelihood that a preliminary quantifiable task will distort the larger qualitative project in which it is embedded.<sup>85</sup>

Back in 2004, Judge Gerard Lynch (a Columbia colleague) critiqued the inadequate guidance that the loss-driven Guidelines provided for his sentencing of a securities trading assistant who defrauded his firm by making unauthorized trades for his own accounts. Specifically, he noted,

All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the guidelines provisions for theft and fraud place excessive weight on this single factor, attempting—no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes—to assign precise weights to the theft of different dollar amounts. In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence. To a considerable extent, the amount of loss caused by this crime is a kind of accident, dependent as much on the diligence of the victim’s security procedures as on Emmenegger’s cupidity. Had Emmenegger been caught sooner, he would have stolen less money; had he not been caught until later, he would surely have stolen more. Nothing about the offense indicates that Emmenegger set out to steal \$300,000, no more and no less.<sup>86</sup> Rather, he took advantage of his position to steal various amounts from time to time.

Yet once one moves away from formulaic metrics like “amount of loss,” assessments of culpability are slippery.<sup>87</sup> The lack of a clear metric for severity will not always redound to a defendant’s favor. The involvement of identifiable and grievously injured victims in the sentencing process may well have a significant effect.<sup>88</sup> But victims will not always be so identifiable or sympathetic.

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83. *Id.* (noting that Karatz’s acquittal on significant counts may have substantially affected the sentencing calculus).

84. See U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 1–2 (2012).

85. Note that similar (but not identical) problems occur with the focus on drug quantity in the narcotics sentencing regime.

86. *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004).

87. See David Debold & Matthew Benjamin, “*Losing Ground*”—*In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. PENNUMBRA 141 (2011) for a thoughtful analysis and suggestions.

88. Although obviously an extreme case, the Madoff sentencing powerfully illustrates this. See

And a court's inability to adopt some pre-specified measure to fit a crime can heighten the salience of a defendant's personal background (such as his deep roots in the community or acts of charity), with the letters from well-wishers far outnumbering those from victims.

Furthermore, that the defendant's conduct likely could have been pursued as a regulatory matter of civil enforcement and that similarly situated individuals will surely have escaped criminal prosecution will also complicate culpability assessments. Not only will a defendant be able to plausibly suggest that (notwithstanding the technical violation of the relevant criminal statutes) this is "really" a civil case, but he can also equally note that the regulatory punishment will be sufficient. Moreover, while one hopes that the government will have had good reason to select the defendant for prosecution, explaining the selection basis on the record may be difficult.<sup>89</sup> The absence of a rigorously demarked divide between the civil and the criminal sides of federal white collar enforcement, however bewailed,<sup>90</sup> is thus bound to exert a gravitation pull downward on sentences.

One can easily imagine a thoughtful judge arriving at an appropriate "all things considered" sentence in a world of non-binding or vaguely framed guidelines. The challenge, however, is whether there can be any consistency across judges and more than a pretense at intellectual rigor across cases.

The obvious solution to this problem would rely on the traditional common law method, and look to iteration and deferential appellate review to shape legal development. That current appellate opinions are rife with evidence or at least allegations of inconsistency and inadequacy<sup>91</sup> may simply be the product of the advisory regime's novelty, the disproportionately small number of white collar sentences (particularly the contested ones that follow a trial), and the failure of the Justice Department to fully engage in collaborative norm

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Benjamin Weiser, *Judge Explains 150-Year Sentence for Madoff*, N.Y. TIMES, June 28, 2011. For more on the issues raised by increased victim participation, see Michael O'Hear, *Punishment, Democracy, and Victims*, 19 FED. SENT'G REP. 1 (2006); Julie Kaster, *The Voices of Victims: Debating the Appropriate Role of Fraud Victim Allocation Under the Crime Victims' Rights Act*, 94 MINN. L. REV. 1682 (2010).

89. See Ilene H. Nagel & John L. Hagan, *The Sentencing of White Collar Criminals in Federal Court: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427, 1441 (1982). Nagel and Hagan note that

a substantial likelihood of selection bias characterizes studies of the sentencing of white collar offenders. For one thing, the fact that administrative proceedings and civil remedies exist as viable alternatives to criminal prosecution may mean that the less egregious offenses and the higher status offenders may never face criminal charges. If so, those cases in the criminal court files represent a biased sample of offenses and offenders. The possibility that the existence of corporate codefendants may lead to greater administrative and judicial sympathy for individual white collar defendants introduces yet another possible source of selection bias.

*Id.*

90. See Richman, *supra* note 63.

91. See, e.g., *United States v. Vandebroke*, 679 F.3d 1030 (8th Cir. 2012) (Beam, J., dissenting); *United States v. Edwards*, 622 F.3d 1215, 1217 (9th Cir. 2010) (Gould, J., dissenting from denial of en banc review) (noting that "[t]his case is just the latest example of our circuit's pattern of approving unreasonably lenient sentences for serious white collar offenses").

articulation. Perhaps we are simply in an unsatisfying transition period that will end once prosecutors—in those relatively few, but very important, cases in which they are not aligned with defendants trying to sell a plea deal to judges—have useful things to say that go beyond the loss-driven conversational rules of the Guidelines. Such nuanced conversations have surely started to occur, but they cannot be managed or structured from afar. A decision to acquiesce in or even encourage them would therefore require a formal allocation of authority to line actors, and away from Washington. We should embrace this diminution of perceived “national uniformity,” as such “uniformity” has always been illusionary, particularly in non-fungible white collar cases.

The relative infrequency with which non-fungible white collar cases are brought will always limit our ability to develop stable, transparent, and fair sentencing doctrine. So will the populist outrage that often attends—or sparks—bursts of white collar enforcement. The media lead-up to the recent sentencing of Raj Rajaratnam, convicted after a much publicized insider-trading trial, drives the point home. Would he get the 19.5 to 24 years sought by the government or the six years suggested by defense counsel?<sup>92</sup> What would the “message” be about the seriousness with which his crimes would be taken and those of like offenders pursued? So long as our political leadership is incapable of sustained support for white collar enforcement, the main communicative tool available to enforcers to show how “seriously” we take insider trading is a “serious” sentence. In a federal system of sentencing inflation, where going rates are set by the crimes that *are* regularly prosecuted, six years is not much, and ten years just does not seem that high.<sup>93</sup> And so we back our way into a world where anything less than ten or more years gets taken as a signal of toleration. (Rajaratnam ultimately was sentenced to eleven years, a \$10 million fine, and the forfeiture of \$53.8 million by a judge who noted the defendant’s good deeds and health issues.)<sup>94</sup>

## V

### CONCLUSION

Devising sentences for well-heeled defendants who have made undeniable contributions to society even as they have abused the positions of trust and power they have occupied would be a challenge, even if one put aside issues of power allocation and political economy. Yet one cannot put aside such issues,

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92. See Kara Scannell, *Rajaratnam Sentence To Set New Standard*, FIN. TIMES, Oct. 9, 2011.

93. In fiscal year 2011, the mean federal sentence figure of forty-three months (the median was twenty-one) was heavily affected by immigration defendants (more than a third of the total) who received a mean sentence of sixteen months (median of ten). Going in decreasing numbers of defendants: the median for drug trafficking defendants was seventy months (median of fifty-one); for fraud defendants, twenty-three months (median of twelve); for firearms defendants, eighty-three months (median of fifty-seven), and child pornography, 119 months (median of eighty-four). U.S. SENTENCING COMM’N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2011, at 31 (2012).

94. Peter Lattman, *11 Years in Jail for Fund Chief in Stock Deals*, N.Y. TIMES, Oct. 14, 2011, at A1.

particularly in a system in which punitive white collar criminal enforcement takes an outsized role in governmental responses to political and economic corruption and in which white collar sentences are imposed in the context of a larger sentencing regime that is primarily devised for those who have had fewer advantages and far fainter political voices. Having returned to a world of considerable judicial discretion, all sentencing actors would do well to attend to all these challenges. This is likely to be a long (and, one hopes, uninterrupted) haul.