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## GO DIRECTLY TO JAIL: WHITE COLLAR SENTENCING AFTER THE SARBANES-OXLEY ACT

*We begin with the principle that the certainty of real and significant punishment best serves the purposes of deterring white collar criminals . . . . [I]f it is unmistakable that the automatic consequence for one committing a significant white collar offense is prison, then many will be deterred.*

— James B. Comey, Jr., *United States Attorney for the Southern District of New York, explaining the rationale behind the White-Collar Crime Penalty Enhancement Act of 2002.*<sup>1</sup>

In 2002, reacting to the devastating collapse of Enron and other major American corporations,<sup>2</sup> Congress enacted the Sarbanes-Oxley Act<sup>3</sup> (“Sarbanes-Oxley” or “the Act”). Passed hastily by a shaken legislature, the Act included a multitude of reforms aimed at preventing another meltdown.<sup>4</sup> One particular area of reform was white collar criminal sentencing: included in the Act was the White-Collar Crime Penalty Enhancement Act of 2002<sup>5</sup> (WCCPA), which sharply increased penalties for various forms of fraud. Unfortunately, both the Act and the WCCPA have proven overly rushed and insufficiently prescient to deal with the changing face of business crimes in America.<sup>6</sup> This Note argues that a major reason for this result is that judges have reacted to the harsher WCCPA sentences by increasingly departing from the Federal Sentencing Guidelines. For this reason, WCCPA-enhanced sentences have become at least as disparate and unreliable as white collar sentences were in the past. Instead of deterring crime, the WCCPA has made criminal punishment less of a fear for those who would commit fraud. In order to remedy the damage caused by the

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<sup>1</sup> *Penalties for White Collar Offenses: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 104 (2002) [hereinafter *Subcomm. Hearing*] (statement of James B. Comey, Jr., United States Attorney for the Southern District of New York), reprinted in *Summer 2002: The Genesis of the Sentencing Provisions of the Sarbanes-Oxley Act*, 15 FED. SENT. R. 234, 235 (2003).

<sup>2</sup> Enron, WorldCom, Tyco, Adelphia, and Xerox were among the corporations that failed or were otherwise struck by scandal during the year leading up to the passage of Sarbanes-Oxley. See Ann Marie Tracey & Paul Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging: The Criminalization of the Sarbanes-Oxley Act*, 25 N. ILL. U. L. REV. 125, 127 (2004).

<sup>3</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

<sup>4</sup> See Tracey & Fiorelli, *supra* note 2, at 129–33.

<sup>5</sup> Pub. L. No. 107-204, tit. IX, 116 Stat. 804 (codified in scattered sections of 15, 18, and 29 U.S.C.).

<sup>6</sup> See Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 672–74 (2002).

last seven years of unpredictable sentences, either Congress or the United States Sentencing Commission must take steps to stabilize and rationalize the white collar sentencing system. This Note proposes that the best way to achieve this goal would be to tie Guidelines sentencing levels to actual loss,<sup>7</sup> rather than intended loss, which would better mirror the social impact and perceived moral culpability of white collar crimes. Only with a sentencing scheme that encourages judges to sentence systematically and consistently can the deterrence desired by the drafters of the WCCPA be accomplished.

This argument requires two brief qualifications. First, for the purposes of this Note the term “white collar crime” will be limited to the crimes covered by name in the WCCPA: false and incomplete SEC filings,<sup>8</sup> and mail and wire fraud.<sup>9</sup> Second, this Note assumes that individuals who contemplate broad-scale white collar crimes are sophisticated actors, familiar with the law and current events. As such, they know the available punishments and recent comparable sentences for their contemplated crimes, and they incorporate those potential downsides into their decisionmaking process.<sup>10</sup>

This Note proceeds in three Parts. Part I lays out a basic flaw in modern white collar criminal sentencing, discussing how the current sentencing scheme neither deters crime nor requires a just level of punishment, and is thus an ineffective and perhaps retrograde method of achieving societal goals. Part II proposes two possible reasons that this problem has arisen: First, from an institutional perspective, judges may perceive white collar crime as less dangerous and prone to recidivism than other crimes. Second, from a personal perspective, judges may be hesitant to impose upon a white collar criminal the same sentence they impose upon the murderers, rapists, and armed robbers they

<sup>7</sup> See *infra* note 91.

<sup>8</sup> See White-Collar Crime Penalty Enhancement Act § 906, 18 U.S.C. § 1350 (2006).

<sup>9</sup> See *id.* § 903, 18 U.S.C. §§ 1341, 1343. In general, the crimes discussed by this Note include those actions punishable under Guidelines section 2B1.1, and will occasionally be referenced as “2B1.1 crimes.” Note that this definition excludes such stereotypical business crimes as tax fraud, insider trading, and money laundering, except insofar as they incorporate the listed forms of fraud. Though these other crimes can be dangerous and destabilizing to the business world, mail, wire, bank, and securities fraud are the “classic” examples of business crimes. See Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 757 (2007). Thus, observations about these four classes of fraud can safely be analogized to the remainder of “white collar” crimes.

<sup>10</sup> See Podgor, *supra* note 9, at 745 (noting that “those [executives] prosecuted after the[] first few offenders have the benefit of hearing about the [other] prosecutions to realize the impropriety of these acts”). The text of Sarbanes-Oxley validates this assumption at the same time as it makes it necessary: one of the Act’s requirements is that officers be familiar with the legalities that make up the corporate system. See Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241(a) (2006); Byron F. Egan, *Congress Takes Action: The Sarbanes-Oxley Act*, 22 CORP. COUNS. REV. 1, 29–30 (2003).

regularly see before them. Part III proposes several solutions to these problems, including alteration of the loss calculation mechanism.

### I. THE PROBLEM

With the passage of the Sarbanes-Oxley Act and the WCCPA, Congress sharply raised penalties for many white collar criminal activities.<sup>11</sup> In so doing, Congress attempted to deal with a growing rash of major business crimes.<sup>12</sup> However, judges seem to be unwilling to consistently impose the higher sentences required by the WCCPA<sup>13</sup> — departures<sup>14</sup> from the Guidelines have increased since the WCCPA was passed.<sup>15</sup> This is a dangerous trend, not only because the deterrent effect of the higher penalties is lessened if they are so rarely imposed,<sup>16</sup> but also because it leads to problematic inter- and intra-jurisdictional sentencing disparities. Finally, even as the new system underdeters massive fraud, it simultaneously overdeters the much more common minor white collar crimes, such as low-value check forgery or minor Form 10-K undervaluation.

Before 2001, when the reforms that influenced the WCCPA began, white collar sentencing was flexible at best. The creation of the Federal Sentencing Guidelines in 1984 had been intended to standardize

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<sup>11</sup> See Egan, *supra* note 10, at 88 (noting that penalties increased between 200% and 400%). For a detailed description of Sarbanes-Oxley and the changes it implemented in business practices, see generally *id.*

<sup>12</sup> See *Subcomm. Hearing, supra* note 1, at 103–04 (statement of James B. Comey, Jr., United States Attorney for the Southern District of New York); cf. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165 (2004). A frequent problem with the previous white collar system was that sentences could be quite minimal, see Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing after Booker*, 47 WM. & MARY L. REV. 721, 723 (2005), leading to a disincentive for prosecutors looking for more convictions and stiffer sentences to pursue white collar cases. One of the goals of the WCCPA was to reverse that disincentive by increasing the seriousness of punishment and the likelihood of conviction.

<sup>13</sup> See *infra* Part II, pp. 1739–44.

<sup>14</sup> In the wake of recent sentencing cases, see *infra* pp. 1735–36, the line between formal departures and less formal variances has become blurred. Accordingly, this Note may also at times blur that distinction.

<sup>15</sup> Sentencing within the Guidelines initially rose slightly with the introduction of Sarbanes-Oxley, but decreased substantially in the years after *United States v. Booker*, 543 U.S. 220 (2005). From 2000 to 2002, approximately 28–30% of white collar sentences departed from the Guidelines range. In 2003 and 2004, the percentage fell to an average of 24.2%. However, with the ruling in *Booker*, departures spiked to an average of 36.4% — a rise of over twelve percentage points — where they have held steady. See Beryl A. Howell, Comm’r of U.S. Sentencing Comm’n, Presentation for the ABA Sentencing Advocacy, Practice and Reform Institute 5 (Oct. 24, 2008) [hereinafter Howell Presentation] (on file with the Harvard Law School Library) (PowerPoint presentation by Commissioner Howell based on yearly and quarterly datafiles collected by the United States Sentencing Commission since 2000).

<sup>16</sup> See *Subcomm. Hearing, supra* note 1, at 104–05 (statement of James B. Comey, Jr., United States Attorney for the Southern District of New York).

sentencing,<sup>17</sup> but even as of 2001 many white collar offenders faced no prison time at all.<sup>18</sup> The first version of the corporate reform bill that would become Sarbanes-Oxley, originated by the White House in early 2002, merely proposed to make disqualification from future fiduciary service mandatory in white collar sentencing.<sup>19</sup> Even this seemingly minor requirement, however, was a large step past the lenient sentences that previously characterized white collar sentencing.

Sarbanes-Oxley, in its final form, went much further. It quadrupled the maximum sentences available for mail and wire fraud (the most common forms of fraud) and criminalized certain actions that had previously been regulated by agencies.<sup>20</sup> Where previously such frauds had merited a maximum sentence of five years, after the WCCPA an identical crime could bring up to twenty years in prison. Or it could bring none at all — there was no floor set. The bill had a similar effect on securities and bank fraud sentencing. However, neither the Act nor the Commission took any steps toward actually standardizing punishment for white collar offenses — instead, they dramatically increased the range of sentencing without providing much guidance as to how to use that range to effectively punish and deter crime.<sup>21</sup> Within the range of permissible sentences, judges' discretion is almost absolute,<sup>22</sup> making the prediction of individual sentences a difficult, if not impossible, task.<sup>23</sup> This broad range with little guidance renders the legitimacy of the sentencing system suspect.

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<sup>17</sup> See John H. Chun & Gregory M. Gilchrist, *Challenges for White Collar Sentencing in the Post-Booker Era*, CHAMPION, May–June 2008, at 36. Before the Guidelines, white collar sentencing was often no more than a slap on the wrist. For example, Michael Milken, convicted nearly twenty years ago in one of the largest white collar crimes to that date, served only two years of a ten-year sentence. See Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279, 279–81 (2007), <http://yalelawjournal.org/images/pdfs/104.pdf>.

<sup>18</sup> In 2001 only about 65% of white collar offenders faced prison time. By 2007 that number had risen only slightly to 68%; in 2008, after the holding in *Gall v. United States*, 127 S. Ct. 2456 (2007), the number was around 71%. See Howell Presentation, *supra* note 15, at 6.

<sup>19</sup> See Jennifer S. Recine, Note, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 39 AM. CRIM. L. REV. 1535, 1545 (2002). Currently, a future-service bar for executives is a discretionary addition to sentencing. See Podgor, *supra* note 9, at 758.

<sup>20</sup> See Sarbanes-Oxley Act of 2002 §§ 903, 906, 18 U.S.C. §§ 1341, 1343, 1350 (2006). Penalties for failure to properly certify financial reports, covered by the new § 906, were set at “not more than 20 years” in prison. *Id.* § 906, 18 U.S.C. § 1350.

<sup>21</sup> One of the major Sarbanes-Oxley reforms involved changing the financial calculations that went into the Guidelines levels so that they would reach life in prison much more easily than before. While the highly regimented levels do facially provide guidance, they are manipulable in order to conform to the judge's sentencing instincts. It is precisely this kind of guidance that has caused major trouble over the last seven years. See *infra* Part II, pp. 1739–44.

<sup>22</sup> See Casey C. Kannenberg, Note, *From Booker to Gall: The Evolution of the Reasonableness Doctrine As Applied to White-Collar Criminals and Sentencing Variances*, 34 J. CORP. L. 349 (2008).

<sup>23</sup> See Chun & Gilchrist, *supra* note 17.

A. *The WCCPA-Enhanced Penalties Are Not Effective Deterrents*

1. *The Theory Behind the Current System Does Not Ensure Deterrence.* — The current system of sentencing has led to a growing number of departures from the Guidelines.<sup>24</sup> The high rate of departures naturally means that sentences are not consistent. An individual who contemplates committing a crime has no way of predicting whether he will face ten, twenty, or more years in prison, or receive merely a slap on the wrist for his actions.<sup>25</sup> Indeed, this broad range is one of the worst problems with the WCCPA: rather than acting upon the base Guidelines<sup>26</sup> and average sentences for white collar crime,<sup>27</sup> the bill simply increased the maximum sentence, thereby expanding the range within which judges may sentence.<sup>28</sup> An expanded range, without a rubric for sentencing within that range, invites unfair disparity between sentences for similarly situated offenders.

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<sup>24</sup> See, e.g., Posting of Ellen Podgor to White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2008/10/aba-sentencing.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/10/aba-sentencing.html) (Oct. 26, 2008) (noting an increase in upward departures since 2000). Upward departures rose to an average of 2% of cases through 2008 (a 100% rise from the 2000–2002 average) and downward departures rose by 12.5%. See Howell Presentation, *supra* note 15, at 5.

<sup>25</sup> This diversity in sentencing can arise at both the prosecutor's level, where the individual can bargain for a lower-penalty charge, or at the judge's level, where the judge may decline to impose the full rigor of the statutory sentence against the offender. The statistics in this Note correct for charging variations, thus reflecting judges' actions rather than those of prosecutors.

<sup>26</sup> The Guidelines calculation begins with a base number of levels associated with a particular crime, to which loss and other enhancements are later added. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2008) [hereinafter GUIDELINES MANUAL]; see also *infra* note 87. White collar offenders typically begin with six levels. See GUIDELINES MANUAL, *supra*, § 2B1.1(a)(2). The Commission could have required Guidelines-compliant sentences to begin at ten levels or more, rather than manipulating the number of levels associated with a particular loss amount.

<sup>27</sup> In the seven years since the passage of the Sarbanes-Oxley Act, the average fraud (2B1.1) sentence has been on a slight upward trajectory, gaining about one month per year. In fiscal year 2008, it was between twenty-one and twenty-two months, U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT: 4TH QUARTER RELEASE 31 tbl.19 (2008), available at [http://www.uscc.gov/sc\\_cases/USSC\\_2008\\_Quarter\\_Report\\_4th.pdf](http://www.uscc.gov/sc_cases/USSC_2008_Quarter_Report_4th.pdf); in 2007, it was approximately nineteen months, U.S. SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2007) [hereinafter 2007 SOURCEBOOK], available at <http://www.uscc.gov/ANNRPT/2007/Table13.pdf>; in 2001, it was fourteen months, U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2001), available at <http://www.uscc.gov/ANNRPT/2001/Table13.pdf>. However, even this upward trend does not begin to approximate the sentences contemplated by the Act: though possible sentences quadrupled from five to twenty years, average sentences have increased by (at the most) eight months. Even seven years after Sarbanes-Oxley, judges are not sentencing to the level that the Commission indicated is proper.

<sup>28</sup> Unlike crimes such as narcotics possession and murder, in which mandatory minimums and narrower statutory ranges prevent large disparities, white collar sentencing is highly discretionary.

Deterrence works best when punishment is swift and certain.<sup>29</sup> White collar sentencing in the years since Sarbanes-Oxley, however, has been anything but. Given the broad range of potential sentences provided by the WCCPA, within which judges now have essentially complete discretion,<sup>30</sup> the sentence can range from mere months in prison to decades.<sup>31</sup> Moreover, unlike the average aspiring criminal actor, white collar offenders usually know that they will have access to a lenient plea bargaining system. They are also often well aware of instances in which a court has departed downward from a Guidelines sentence that “shock[ed] the conscience of th[e] [c]ourt.”<sup>32</sup>

There is, of course, the alternative argument that deterrence is at its height when potential punishments are severe but unpredictable.<sup>33</sup> Such punishments may be imposed relatively randomly against some perpetrators but not others, and would theoretically provide a greater deterrent effect than a predictable but lower sentence — the probability of sentencing might be lower, but the risk would be much higher. An adherent to this view would see the Sarbanes-Oxley system, with all its disparities and broad-ranging discretion, as a step in the right direction, though one that perhaps does not go far enough.<sup>34</sup> However, that argument ignores the perceived justice aspect of deterrence: arguably the best deterrent (both the most effective and the most just) is one that has perceived legitimacy among both the regulated parties

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<sup>29</sup> As James Comey noted shortly before Congress enacted Sarbanes-Oxley, “[f]or white collar offenses, certainty of punishment and appropriate severity are vitally important.” *Subcomm. Hearing, supra* note 1, at 118 (statement of James B. Comey, Jr., United States Attorney for the Southern District of New York); see also Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 957 (2006) (noting that certainty is of far greater value than severity in creating deterrent sentences). For the purpose of this Note, the term “certainty” is not used to denote certainty of detection, cf. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), but certainty of punishment — the assurance that at least a minimal, and likely a substantial, amount of punishment will follow conviction of a criminal act.

<sup>30</sup> See Kannenberg, *supra* note 22.

<sup>31</sup> For example, HealthSouth, a major insurance corporation against which fifteen or so executives perpetrated a \$400 million fraud, was nearly bankrupted by that fraud in 2005. Of the first ten executives sentenced in the case, one received a five-month prison sentence followed by home detention, and the other nine received “some combination of probation, home detention, and fines.” J. Scott Dutcher, Comment, *From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L.J. 1295, 1312–13 (2005).

<sup>32</sup> Transcript of Sentence at 65, *United States v. Kumar*, CR-04-864 (E.D.N.Y. Nov. 2, 2006). In sentencing Sanjay Kumar, ex-CEO of Computer Associates, who pled guilty to a two billion dollar fraud scheme, Judge Glasser departed from the Guidelines calculation of life imprisonment to a much more lenient sentence of twelve years. *Id.* at 74–75.

<sup>33</sup> See generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) (evaluating and explaining various theories of criminal deterrence).

<sup>34</sup> See Perino, *supra* note 6, at 674–76, 698.

and the communities within which the parties live. Where those affected by a law perceive it as unjust, disobedience is more likely.<sup>35</sup> Conversely, when a law is perceived as fair and just, it is more likely that individuals will follow it.<sup>36</sup> A fairer law is more likely to have the support of the community, leading to social stigmatization of law-breakers. In the white collar context, a more legitimate law is likely to be more vigorously pursued by prosecutors and more consistently and harshly applied by sentencing judges, leading to even further deterrence.<sup>37</sup>

Moreover, the idea that uncertainty increases deterrence is, though reasonable, countered by the mindset — especially prevalent among white collar criminals — by which defendants “overoptimistically” anticipate “abnormally low sentences” in their own cases.<sup>38</sup> Importantly, this phenomenon would have an even greater effect on sophisticated parties, such as prospective large-scale white collar offenders, who know how to use each available loophole and sentence-reducing argument. When the range of possible sentences for the same action is vast, this problem is magnified even further: potential offenders fall prey to the optimism fallacy and assume that they will receive a sentence in the lower part of the range. The WCCPA was intended to alleviate precisely this fallacy and strengthen the predictability of sentencing;<sup>39</sup> the evidence, however, suggests that it has not lived up to its intentions.

2. *The Evidence Indicates that Actual Deterrence Is Not Occurring.* — Recent events in the banking and finance world make it painfully obvious that frauds on or past the scale of the Enron scandal are still occurring, despite the higher sentencing ranges. It seems that every few months another potential fraud is discovered: AIG,<sup>40</sup> ImClone,<sup>41</sup> HealthSouth,<sup>42</sup> Bernard L. Madoff Investment Securi-

<sup>35</sup> In the white collar context, “disobedience” will more likely take the form of pushing the limits of permissible practice. Because the line between acceptable but edgy business strategies and actual criminal activity is often substantially blurred, a law that lacks legitimacy might lessen corporate officers’ scruples about pushing that line even further. Cf. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997). See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

<sup>36</sup> Bibas, *supra* note 29, at 950.

<sup>37</sup> Cf. *infra* section II.A, pp. 1740–42.

<sup>38</sup> Bibas, *supra* note 12, at 731.

<sup>39</sup> See, e.g., *Subcomm. Hearing, supra* note 1, at 101–18 (statement of James B. Comey, Jr., United States Attorney for the Southern District of New York).

<sup>40</sup> See John Christoffersen, *Judge Says Loss in AIG Scheme Exceeds \$500 Million*, ASSOCIATED PRESS, Nov. 3, 2008, available at <http://www.ibtimes.com/articles/20081103/judge-says-loss-in-aig-scheme-exceeds-500-million.htm>.

<sup>41</sup> See Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime after Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 app. at 392 (2003).

<sup>42</sup> See *supra* note 31.

ties,<sup>43</sup> and many other corporations, small and large, have fallen prey to scandal in the years since Sarbanes-Oxley was enacted.

Additionally, the number of white collar criminal convictions has not fallen since the WCCPA was passed; on the contrary, 2B1.1-crime sentencings have increased. In fiscal year 2002, prior to the introduction of the Sarbanes-Oxley amendments, there were 6154 2B1.1 sentencings.<sup>44</sup> In fiscal year 2007, there were 8777.<sup>45</sup> These numbers suggest that, whatever the increased sentences are doing, they are not deterring the kind of criminal activity that the WCCPA was enacted to prevent.<sup>46</sup>

### B. The WCCPA Regime Allows and Encourages Unjust Outcomes

1. *The Broad Range of Possible Sentences Is Inherently Unjust and Encourages Unfair Disparities.* — In addition to the deterrence problem, the mere existence of such a broad range of punishment options permits sentences to rest on impermissible factors, and is thus in and of itself an injustice. Recent sentencing jurisprudence has increased judicial discretion to an extent that was clearly not intended by the framers of the WCCPA. When the WCCPA was enacted, it made changes to the *mandatory* Federal Sentencing Guidelines. After *United States v. Booker*,<sup>47</sup> though, judges are not limited to the stiff sentences imposed by the WCCPA, but instead can choose sentences ranging from nominal to severe. Although judges must still begin the sentencing process by calculating the Guidelines level,<sup>48</sup> no further interaction with the Guidelines numbers is required.<sup>49</sup> The effects of *Gall v. United States*<sup>50</sup> and *Rita v. United*

<sup>43</sup> Bernard L. Madoff Investment Securities is the firm directed by Bernie Madoff, who was accused of causing the loss of approximately \$50 billion through a decades-long Ponzi scheme. See Posting of Dan Slater to The Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2008/12/30/madoff-civil-case-moving-swiftly-the-50-billion-question> (Dec. 30, 2008, 09:15).

<sup>44</sup> U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.17 (2002), available at <http://www.ussc.gov/ANNRPT/2002/Table17.pdf>.

<sup>45</sup> 2007 SOURCEBOOK, *supra* note 27, at tbl.17, available at <http://www.ussc.gov/ANNRPT/2007/Table17.pdf>.

<sup>46</sup> This rise is not due to prosecutorial activity — on the contrary, the frequency of white collar prosecutions is slightly on the decline. For comprehensive statistics on the rate of white collar prosecutions over the last five years, see TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, WHITE COLLAR CRIME PROSECUTIONS FOR AUGUST 2008 (2008), [http://trac.syr.edu/tracreports/bulletins/white\\_collar\\_crime/monthlyaug08/fil](http://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthlyaug08/fil).

<sup>47</sup> 543 U.S. 220 (2005). For a brief overview of recent developments in federal sentencing, see Kannenberg, *supra* note 22, at 354–58.

<sup>48</sup> See Kannenberg, *supra* note 22, at 374.

<sup>49</sup> See *Kimrough v. United States*, 128 S. Ct. 558, 564 (2007) (noting that “the Guidelines, formerly mandatory, now serve as one factor among several that courts must consider in determining an appropriate sentence”).

<sup>50</sup> 128 S. Ct. 586 (2007) (holding that appellate courts may not apply a presumption of unreasonableness to sentences below the Guidelines).

*States*<sup>51</sup> on this issue are difficult to determine just yet, as the decisions are still quite new; however, the two cases certainly will encourage the further expansion of judicial discretion.

Although judges often still sentence within the Guidelines range,<sup>52</sup> the Guidelines are no longer mandatory, and many judges depart from them at some time or another — meaning that the full range of Guidelines and non-Guidelines sentences are available to a judge otherwise unconstrained by statutory limitations. The Guidelines were originally intended to standardize sentencing and reduce disparities, in turn decreasing reliance on individualized factors such as financial position. A system that both permits and encourages departures from the standard allows judges to sentence based upon factors that were explicitly excluded as irrelevant, prejudicial, or unjust by the Commission's massive study of national sentencing practices.<sup>53</sup> More pragmatically, the broader the range of punishments, the broader the discretion, and the more opportunity there is for injustice to slip into the sentencing process. The availability of such an enormous sentencing range, coupled with the removal of almost every restraint on judicial discretion to an extent not seen in many other sentencing schemes,<sup>54</sup> virtually ensures that the legitimacy of sentencing will be called into question.

2. *The WCCPA Unfairly Overdeters Small-Scale White Collar Criminals and Permits Unjust Outcomes.* — The increased penalties from the Sarbanes-Oxley Act not only underdeter major fraudsters, but they inevitably also overdetter those individuals who commit small-scale crimes covered by the WCCPA. As has been discussed, the WCCPA penalties were rushed onto the books immediately after the discovery of several major white collar crimes affecting many people and billions of dollars. However, the WCCPA has a far broader effect — one that was perhaps not even considered by Congress when pass-

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<sup>51</sup> 127 S. Ct. 2456 (2007) (holding that appellate courts may apply a presumption of reasonableness to sentences within the Guidelines).

<sup>52</sup> See *supra* note 15.

<sup>53</sup> For example, large-scale white collar offenders are often more likely to have strong ties to the community, whether through family or through charitable works. See Podgor, *supra* note 17. These were excluded from the permissible factors for consideration by the Guidelines, but after *Booker* and *Rita* they have now begun to reenter the realm of sentencing factors. The vast range of sentences allowed by the WCCPA gives judges broad latitude to incorporate such factors.

<sup>54</sup> Generally, ranges are restricted much further than they are for white collar offenses, either through a lower maximum or through the use of mandatory minimums. Although this Note does not argue for the imposition of mandatory minimums, such sentences are certainly one reason that a problematic range of discretion has not arisen in other areas such as murder, drug offenses, and weapons possession, even though their upper ranges are comparable to the post-WCCPA white collar ranges under Sarbanes-Oxley. See, e.g., Podgor, *supra* note 9, at 733 (comparing sentencing levels). This point is especially strong as the Commission has recently reevaluated the sentencing options available for drug and other crimes; it has not looked at the white collar guidelines since *Booker*, and thus those guidelines still reflect a mandatory-sentence mentality.

ing the legislation. Jeff Skilling and Bernie Ebbers were not the only people committing wire, mail, and securities fraud: individuals with far fewer resources commit correspondingly smaller crimes every day.<sup>55</sup>

Prior to Enron and the WCCPA, Congress apparently thought that five years in prison was an appropriate maximum sentence for mail fraud. Given the context of the legislation, the drastic increase in sentences was seemingly not primarily intended to deter the minor criminals who make up the vast majority of white collar fraud offenders.<sup>56</sup> Nevertheless, because of the actions of a few high-profile criminals, those individuals are punished on the same scale as the Enron offenders. The nature of the typical mail fraud case is no different than it was when Sarbanes-Oxley was written — the only thing that has changed is the penalty. The numbers illustrate this point neatly: In fiscal year 2008 there were 7713 sentencing for criminal fraud under 2B1.1.<sup>57</sup> Of those, likely few made the national news at all, let alone became a headline. The remainder, primarily minor frauds, simply do not induce the social stigma and fear that is created by the massive frauds that catalyzed Sarbanes-Oxley. It seems inherently unfair to drastically increase the punishment for a crime merely because some individuals have used the particular crime to perpetrate vast frauds.<sup>58</sup>

One of the legacies of the rushed passage of the Act is the overbreadth of the statute itself. Not only does the Act capture corporate frauds both large and small, but it also extends to such frauds as telemarketer scams, e-mail spam, and incomplete personal bankruptcy filings. These types of crimes have long been sentenced under the fraud guideline, and are indeed forms of wire and mail fraud — but they are nothing like the types of corporate crimes to which Congress was responding when it passed the WCCPA. Whether these crimes deserve increased punishment when considered in a vacuum is not the ques-

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<sup>55</sup> See *Subcomm. Hearing*, *supra* note 1, at 82 (statement of Frank O. Bowman, III, Associate Professor of Law, Indiana University School of Law) (“The mental images of ‘white collar criminals’ that gave birth to this hearing are probably those of crooked corporate tycoons, document-shredding Big Five accountants, and devious fat cats with offshore accounts. Such folks surely exist . . . but the rank-and-file federal economic felon is usually a much less interesting fellow.”).

<sup>56</sup> There is no evidence in the congressional record that the overall value of higher sentences for white collar criminals was discussed — the conversation focused almost exclusively on the massive frauds discovered in the year before the Act was passed. The Act’s impact on smaller-scale criminals appears to have been a secondary effect.

<sup>57</sup> U.S. SENTENCING COMM’N, PRELIMINARY QUARTERLY DATA REPORT: 4TH QUARTER RELEASE 13 tbl.5 (2008), available at [http://www.ussc.gov/sc\\_cases/USSC\\_2008\\_Quarter\\_Report\\_4th.pdf](http://www.ussc.gov/sc_cases/USSC_2008_Quarter_Report_4th.pdf).

<sup>58</sup> Although it seems likely that judges are using their discretion to reduce these sentences, the fact remains that the average sentence for white collar crime is inching up, slowly but steadily. See *supra* note 27. The higher maximums, though they may almost never be used, seem to be having a trickle-down effect on sentences for small- and moderately-sized frauds.

tion at issue: they were caught up in Congress's push to penalize corporate fraud, making their thoughtless enhancement seem unjust.

Moreover, many of these lower-value fraudsters are unlikely to be aware of the increased penalties they face for their actions. Big firm CEOs have lawyers and boards of directors to inform them of the dangers they face should they stray from Sarbanes-Oxley's strictures (and to illuminate for them the many ways in which they can avoid stiff penalties). Minor white collar criminals, in contrast, likely neither know the possible penalties nor have access to the type of legal counsel that produced such good results for the HealthSouth defendants.<sup>59</sup> Fairness and deterrence seem to require individuals subject to sentencing to be aware of *both* the wrongness of their actions and the relative severity of sentences they might face;<sup>60</sup> it seems wrong to impute this knowledge to the more minor fraudsters. If the penalties were enhanced in order to deter mega-frauds, a correspondingly increased level of knowledge should be required of the penalties' recipients.

Looking at the above problem from a different angle, one must remember that reducing disparities among individuals who have committed the same quantum of harmful activity was a primary goal of the Guidelines.<sup>61</sup> However, the effects of the WCCPA have undermined this goal for white collar criminals. Not only do ordinary fraudsters bear the brunt of society's anger toward the infrequent-but-public Enron-level crimes, but even major criminals receive disparate sentences for substantially similar crimes.<sup>62</sup> Indeed, there is a perverse incentive to the Guidelines structure as it stands currently. The individuals who are the most morally culpable for a fraud will often also be the most knowledgeable parties, and thereby most useful to prosecutors seeking to "flip" a member of a conspiracy in order to procure testimony against the other members. For this reason, the individuals who most deserve punishment for a fraud are the ones who are most likely to escape it.<sup>63</sup> The current system rewards those criminals who

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<sup>59</sup> See *supra* note 31.

<sup>60</sup> See, e.g., Robinson & Darley, *supra* note 33, at 953.

<sup>61</sup> See Chun & Gilchrist, *supra* note 17, at 36 (noting that the Guidelines were created to ensure that economic crime was punished as severely as other types of crime).

<sup>62</sup> A prime example of this sort of outcome is another individual convicted in the Computer Associates case, Lloyd Silverstein. Silverstein, the former finance senior vice president of the company, was the "whistleblower" in his case, and received a short sentence of home confinement and a \$5,000 fine for his early cooperation. *No Jail for CA Exec Who Confessed*, AUSTRALIAN IT, Feb. 6, 2007, <http://www.australianit.news.com.au/story/0,24897,21174269-15319,00.html>. Although he was involved with millions of dollars worth of fraudulent activity, he received none of the WCCPA penalties for his actions, unlike Sanjay Kumar.

<sup>63</sup> The Silverstein sentence, among others, illustrates the dangers inherent in the unpredictable sentencing under Sarbanes-Oxley. Certainly it is arguable that the system should be set up in such a way as to encourage individuals involved in a fraud to expose the illegal activity. If this is to be encouraged, however, it must be factored into the penalty scheme in order to ensure that

planned most effectively to avoid the consequences of their actions, and who had the most access to legal help in those plans, while punishing the least sophisticated actors at the top of the scale.

## II. WHY IS THIS HAPPENING?

In order to begin solving the problems posed in Part I, the reasons behind the disparities must be discerned and understood. Part I has already discussed the theoretical reasons for the failure of deterrence and the increase in injustice; Part II elaborates upon the practical role of the judge in implementing the highly variable sentencing ranges. The nearly unlimited discretion given to judges would be less of a problem if judges engaged in self-limiting; however, there is every reason to believe that they do nothing of the sort. Instead, they shy away from the harsh sentences required by the Guidelines — both for small-scale crimes and for multi-billion dollar frauds.<sup>64</sup> However, they do not do so in any systematic manner. Where one judge might depart from a life sentence to a fifteen year term, another might go to thirty years, and still another to probation. Thus, any inquiry into the legitimacy of the white collar sentencing guidelines must begin with the judges themselves, asking two fundamental questions: why do judges fail to sentence at the level provided by the Guidelines, and what does that failure tell us about the flaws in the WCCPA?

This Note argues that judges are reluctant to impose the types of sentences called for by the Sarbanes-Oxley Act for two reasons: First, on an institutional level, they may believe that the punishment does not fit the crime and that the sentences as applied are simply too high. Second, on a more personal level, they may be reluctant to impose upon individuals convicted of business crimes the same types of sentences that they impose upon murderers, felons-in-possession, and the like. Unfortunately, obtaining data about judicial attitudes toward white collar sentencing can be difficult — although 18 U.S.C. § 3553, the sentencing statute, requires judges to articulate a reason for their sentences,<sup>65</sup> it is fairly unusual for that articulation to come in written form. Instead, the majority of judges simply discuss their reasoning in open court, producing no paper opinion memorializing those reasons.<sup>66</sup>

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individuals cannot escape all punishment merely by confessing. The moral hazard problems created by the lenient “flipping” standards are obvious: an individual who engages in a fraud, profits by it, and has no qualms about “selling out” his associates, can escape the consequences of his illegal actions any time that the fraud ceases to make financial or other sense.

<sup>64</sup> Whereas Guidelines-recommended sentences reach easily into the realm of decades, the average actual sentence is measured in months or years. *See supra* note 27.

<sup>65</sup> 18 U.S.C. § 3553(c) (2006).

<sup>66</sup> *See id.* (requiring that judges “shall state in open court the reasons for [their] imposition of the particular sentence”). Often, in such high-profile cases as are discussed in this Note, the

It is rare for a judge to put into writing his objections to specific sentences — indeed, sometimes a judge might not even realize that he harbors objections that are subconsciously incorporated into a departure. Nevertheless, a judicial skepticism toward the high sentences in the WCCPA seems clear from the evidence discussed so far.

In part, this disparity is the fault of the current confusion in federal sentencing. As was discussed in Part I, given the recent decisions in *Rita* and *Gall*, and dating back to *Booker*, judges have little guidance as to how, and to what extent, they are to incorporate the Guidelines into their own sentencing plans. Departures in many areas of white collar criminality have increased,<sup>67</sup> despite *Booker*'s instruction to judges to begin with the Guidelines. Thus, it seems clear that judges, though given general instructions by § 3553, have been left without a definite rubric by which to narrow and standardize their sentencing options — a very dangerous position when sentencing ranges are as broad as they are in white collar cases.<sup>68</sup>

*A. Judges May Perceive White Collar Crime As Less Harmful than Other Forms of Crime, and Sentence Accordingly*

Judges who sentence white collar offenders are faced with a difficult problem: in many cases the harsh recommended punishment does not seem to accomplish the purpose for which the additional severity of the WCCPA was intended. Judges sentencing white collar offenders have a docket filled to bursting with other crimes — drug distribution, rape, murder, and more. In context, relatively “victimless” business crimes<sup>69</sup> look less problematic. Recidivism may also factor into the calculation: a judge who has spent her day handing down stiff sentences to people whose crimes are likely to be repeated<sup>70</sup> may well be

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judges' comments can be recovered from a contemporaneous news article; however, in the vast majority of white collar cases there is limited press attention, giving researchers only minimal ways of procuring this kind of data.

<sup>67</sup> The fraud departures are discussed *supra* notes 15, 24, and 27.

<sup>68</sup> This lack of guidance is, of course, also a problem for sentencing in areas other than white collar crime. Defendants across the board are subject to wide initial sentencing ranges. However, the problem is mitigated in the vast majority of cases by much narrower bands of possible sentences, backed up by mandatory minimums. See *supra* note 54.

<sup>69</sup> See Carl Emigholz, *Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement*, 58 RUTGERS L. REV. 583, 611 (2006). Of course, in recent months the human cost of massive white collar crimes has become more apparent; however, it is essential to realize that the vast majority of white collar crimes are nowhere near so serious. Of over 8700 white collar crimes sentenced in 2007, see *supra* p. 1735, likely no more than a hundred have been so serious that they have made the national news. The avid follower of current events must be cautious not to fall prey to the same fallacy that drove Congress to rush the passage of the Sarbanes-Oxley Act in 2002: the bulk of white collar crimes are still so relatively minor that they pass without widespread notice.

<sup>70</sup> A recent Department of Justice study of state recidivism rates indicated reoffenses for drug offenders at over 66%; for homicide, 40%; for robbery, over 70%. PATRICK A. LANGAN &

reluctant to impose a similar sentence upon an individual with no prior criminal record<sup>71</sup> who will almost certainly not have the opportunity to commit such a crime again.<sup>72</sup> From a purposive view, a judge may not see much difference between sentencing a white collar offender to ten years or to twenty — both accomplish Sarbanes-Oxley's goal of imposing prison time on financial crimes, and both seem initially quite harsh.<sup>73</sup> Because of the vast range of possible sentences available for white collar offenses, and the complete freedom granted by *Booker*, the judge does not need to overcome her gut reaction — she can, and will, depart (sometimes quite drastically) from the Guidelines sentencing structure.<sup>74</sup>

Judges likely perceive only minimal marginal utility in the extended sentence statutorily imposed upon the crime. There is an argument to be made that the bare fact of a prison sentence, be it five months or five years, is a sufficient of a deterrent to make an impact on the mind of a potential fraudster, and that enhanced sentences are simply not useful at the margins for increasing deterrence. Proponents of this position reason that when a potential sentence goes from ten to twenty years, the marginal deterrent value of those additional ten years diminishes, causing each additional year to be more fruitless in the overall goals of the sentencing scheme than the last.<sup>75</sup> This argument can be reworded as follows: as the marginal utility of each year decreases, the perceived marginal unfairness of each added year increases. Such an insight is a useful way of framing judges' reactions to the stiff sentences imposed by the WCCPA. Moreover, whereas the judge is used to sentencing individuals who, were they let out of

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DAVID J. LEVIN, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 8 tbl.9 (Bureau of Justice Statistics: Special Report, NCJ 193427, 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

<sup>71</sup> Cf. Podgor, *supra* note 9, at 733 (“The sentences imposed on these first offenders for economic crimes can exceed the sentences seen for violent street crimes, such as murder or rape.”).

<sup>72</sup> In contrast to the crimes cited *supra* note 70, white collar offenders, especially major ones, tend not to recidivate — if only because a common element of a white collar sentence is a bar against further participation in corporate governance, thereby stopping schemes before they start. Podgor, *supra* note 9, at 758.

<sup>73</sup> See *Subcomm. Hearing, supra* note 1, at 103–04 (statement of James B. Comey, Jr., United States Attorney for the Southern District of New York).

<sup>74</sup> Indeed, 22% of judges who sentenced below the Guidelines in 2007 cited the “nature and circumstances of the offense” in their reasoning; over 12% cited the “seriousness of the offense” in theirs. See Howell Presentation, *supra* note 15, at 11. Moreover, although departures slightly decreased immediately after Sarbanes-Oxley was passed, after *Booker* judges began to depart significantly more than before. See *supra* note 15. The sizeable increase in departures after *Booker* suggests that judges desired to depart during 2003 and 2004 as well, but simply lacked the legal capacity to do so.

<sup>75</sup> For a law and economics analysis of the utility of additional prison time and prison versus fines, see Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

prison, could easily be back before the bench within the year, the judge is well aware that a white collar offender is unlikely to be in a position from which he can commit further frauds — the individual offender need not be kept imprisoned in order to protect society.<sup>76</sup> When a judge sees many additional years of punishment with little deterrent payoff, those additional years can, as they did for Judge Glasser, shock the conscience of the court.

An interesting exception to the general rule that judges will sentence significantly below the Guidelines is in high-profile cases. A quick glance at some high sentences in white collar crime gives a strong sense of familiarity: Bernie Ebbers, twenty-five years; Jeff Skilling, twenty-four years; Timothy Rigas, twenty years; Chalana McFarland, thirty years.<sup>77</sup> Many of these individuals are still household names even years after sentencing. More importantly, their sentences are broadly known. Such severity for high-profile cases might be seen as evidence that the WCCPA is actually working — after all, it was enacted to prevent these major frauds, and surely these large and heavily publicized sentences were perfect for that purpose. Moreover, in these cases, there is no question that the punishment fits the crime — judges need not concern themselves with the ethical debate that is entailed by a criminalized regulatory case. Of course, the “success” angle is proven suspect by the continuing, regular discovery of additional massive white collar frauds. The justice of raising the punishment of all in order to provide an example to the few is questionable at best.

*B. Judges Typically Undervalue the Moral and Social Harms Caused by White Collar Offenders*

Judges might be sentencing lower not only because they find white collar crime to be less harmful, but also because they find the individuals who commit such crimes to be less worthy of moral condemnation than other criminals. There has been no physical harm, no bereaved family — in all but the worst frauds, the witnesses are pieces of paper.<sup>78</sup> For these reasons, judges (and society as a whole) seem to systematically undervalue the social and moral harms caused by white collar criminals relative to other criminal actors. The social damage and moral stigma of failing to sign an SEC filing, for example, initially

<sup>76</sup> See *supra* note 72.

<sup>77</sup> See Podgor, *supra* note 9, at 731–32 (Skilling, Ebbers, and Rigas); John Leland & Tom Zeller Jr., *Mortgage Suit Says ‘Trust Us’ Led to Fraud*, N.Y. TIMES, Sept. 28, 2006, at A19 (McFarland). For a list of other prominent offenders, see Brickey, *supra* note 41, at 382–401.

<sup>78</sup> See Podgor, *supra* note 9, at 730 (“Sentencing white collar offenders is difficult in that the economic crimes committed clearly injured individuals, but the offenders do not present a physical threat to society.”).

seem minimal. Unlike punishments for most actions associated with minimal visible social damage, however, prison sentences as derived from the WCCPA can now stretch into decades.<sup>79</sup> Thus, one major factor in judges' decisions to depart may be that they simply cannot justify long sentences for individuals whose actions seem barely criminal.

Making judges' perception of white collar crime more problematic, such "criminal activities" after Sarbanes-Oxley can look very different from the classical definition of white collar crime: modern white collar crime includes many acts that, before the Act, would have been regulatory offenses.<sup>80</sup> Whereas before Sarbanes-Oxley white collar criminal liability required some sort of action that was clearly fraudulent — check fraud, for example — after the Act passed, the definition of fraud was expanded to include omission of material information, failure to sign an SEC disclosure, and other activities that in previous years would have carried no more than a civil penalty. Because the norms of moral condemnation vary tremendously between civil and criminal violations, making a civil violation criminal merely by changing its location in the statute books runs the risk of losing legitimacy and thus decreasing enforcement.<sup>81</sup>

When a crime is particularly well known, it is often (though not always) the case that the criminal has also inflicted a high degree of social harm.<sup>82</sup> However, the public may often perceive white collar crime as causing a similar level of social harm as, for example, a drug offense,<sup>83</sup> which has, in reality, far less of an impact than the well-known white collar offense. Because this undervaluing affects judges as well as ordinary citizens, one can extrapolate its effects upon white collar sentencing — and indeed, the visible differences between high-profile cases and small-scale individual criminal sentences seem to in-

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<sup>79</sup> If it is true that punishment serves a signaling function by indicating the actions that society chooses to stigmatize and the degrees to which "bad acts" bear moral condemnation, it seems that the Sarbanes-Oxley scheme has failed in this aspect as well. It is intuitive that, on average, a rapist or arsonist will face greater social stigma than the average white collar criminal; however, under Sarbanes-Oxley, the signal of higher sentences is reversed. See Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines* § 2B1, 18 FED. SENT. R. 330, 334 (2006) (describing the WCCPA as "purport[ing] to make white-collar crime the most severely punished class of non-capital offenses known to federal law"); Podgor, *supra* note 9, at 733. Unfortunately, a fuller discussion of this phenomenon is outside the scope of this Note; however, interested readers may see, for example, Kahan, *supra* note 35, at 362–65.

<sup>80</sup> See Emigholz, *supra* note 69, at 611. See generally Tracey & Fiorelli, *supra* note 2. For example, the filing of a materially incomplete 10-K form was previously the focus of mere civil penalties. It was made criminal by the Sarbanes-Oxley Act, 18 U.S.C. § 1350(a) (2006), carrying heavy fines and a potential ten-year jail sentence.

<sup>81</sup> See Emigholz, *supra* note 69, at 611–12; see also *supra* pp. 1733–34.

<sup>82</sup> Such frauds include the Madoff scandal, Enron, and Adelphia.

<sup>83</sup> Cf. Bibas, *supra* note 12, at 735–38 (noting strong similarities between prosecution and sentencing of drug and white collar offenses).

dicade that this phenomenon is quite active in the judicial mindset. The treatment of highly public cases<sup>84</sup> turns out to be the exception that proves the rule: What these cases have in common is that each was a major news story during its heyday, and each had a major impact on its victims' social and financial situations. Though the crimes were white collar and thus hurt people's pocketbooks, not their persons, they shocked the communities in which they occurred. Members of the community, including judges, were aware of the terrible harms perpetrated by the white collar criminals, and were willing to impose stiff penalties. On this view, the high sentences do not represent the success of the WCCPA, but a general public (and judicial) imposition of sanctions based upon perceived harm.

### III. SOLUTIONS

If the problem with modern white collar penalties is that judges reject them as unreasonable, the best way to standardize punishment would be to increase the perceived reasonableness of recommended sentences. The Guidelines, despite the fact that they are no longer mandatory after *Booker*, are still the required starting point for all federal sentences.<sup>85</sup> This is primarily because the Guidelines, for all their flaws, are (at least theoretically) meant to represent the considered judgment of highly informed individuals as to the "reasonable" level of punishment for various crimes. Whether or not judges actually take into account the Guidelines' strictures, it is certain that sentencing courts are familiar with the Guidelines and consider their recommended range for a given crime. Accordingly, in order to standardize white collar sentencing and thereby create a legitimate, deterring system, one could begin by making the Guidelines more accurately reflect what judges find to be a reasonable level of punishment.

In the process of creating the Guidelines, the Sentencing Commission pored over thousands of records from various crimes.<sup>86</sup> By looking at those materials, the Commission extracted what it believed were the most standardized, reasonable, and fair sentencing ranges for each crime, and instituted those ranges as the end of the Guidelines calculation. Although the original intent of the Guidelines was to be a mere restatement of reasonable sentencing practices as they already existed, Sarbanes-Oxley has removed white collar Guidelines sentencing from that realm. If the Guidelines were amended to produce more reason-

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<sup>84</sup> See *supra* p. 1742.

<sup>85</sup> 18 U.S.C. § 3553 requires judges to include in their sentencing process a calculation of the Guidelines penalty. See 18 U.S.C. § 3553(a)(4)(A) (2006). Even though the Guidelines are no longer mandatory, they heavily influence most judges' consideration of the base sentence. See Podgor, *supra* note 9, at 732.

<sup>86</sup> See GUIDELINES MANUAL, *supra* note 26, § 1A1.3.

able-looking sentences upon first calculation — in other words, if judges were anchored to a more reasonable punishment level from the beginning of their sentencing process — judges would have less need to deviate from those sentences. Punishment would become more equal and more predictable, meaning that both fairness and deterrence would increase.

There are several options for revising the current system, plausible and implausible, simple or difficult to implement. The easiest would of course be either to simply cut each Guidelines level by a given multiplier (keeping the various levels proportional to each other), or to revert to the pre-WCCPA levels.<sup>87</sup> However, the reasons for the departures, the too broad range of punishments and the disparities between similarly situated individuals, would not be remedied by such changes. One somewhat better option would be to change the way in which loss figures or the Guidelines sentences themselves<sup>88</sup> are calculated; such a change could reduce the ease with which an individual's Guidelines range can reach life in prison. The remainder of this Note proposes a revision of the Federal Sentencing Guidelines along the lines of the latter option and responds to some of the more important counterarguments to the proposed revision.

#### A. *Basing Loss Calculation on Actual Loss and Actual Culpability*

In order to avoid “shocking the conscience” of the courts, Congress should consider changing the reason that the Guidelines for white col-

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<sup>87</sup> In the Guidelines calculation, the judge must determine the number of “points” attached to the crimes of which the defendant has been convicted, as well as factors such as criminal history, acceptance of responsibility, substantial assistance in the government's investigations, and role in the offense. See 18 U.S.C. § 3553(a). However, this is not the end of the sentencing inquiry: the judge must also incorporate the number of “points” deriving from the losses caused by the illicit scheme. This stage is where the sentence can cross the line into unreasonable — even a moderately-sized loss can lead to steep sentences ranging into several decades, or even to life in prison. See Bowman, *supra* note 79, at 333–34. It is these sentences that trigger the departures discussed in note 15.

<sup>88</sup> This option would act on the “twenty-five percent rule,” under which the months of incarceration attached to each additional Guidelines level increase at a logarithmic rate, rather than an incremental rate. See Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 200. This rule causes lower-numbered Guidelines to be far less influential than higher-numbered — for an individual with no criminal history, the first eight levels may impose no prison time at all; at nine levels, an individual faces four to ten months in prison, and at ten levels, six to twelve. However, at the high end, an individual with a Guidelines level of thirty-four might face 151–188 months (for example, a corporate officer whose \$2.5 million fraud affected 250 people), whereas one with thirty-five would face 168–210. At higher levels, the difference is starker still. If the twenty-five percent rule were eliminated, the exponential rise could become incremental instead, and reaching the highest sentences would become more difficult (requiring far more serious offenses). Eliminating the rule is a promising method of decreasing the harshness of white collar sentences, in addition to the other methods proposed in this Part.

lar offenders are so high: the loss calculation metric. Recognizing that sentences tend to deviate from the given starting point, this Note proposes to reduce that deviation by making the starting point more attractive. If judges are given a starting point that does not immediately give them pause, they may be more likely to build their sentences more closely around that starting point — even though those starting points would be no more mandatory than they are now.<sup>89</sup> Judges would have less need to depart substantially, as they currently do in a significant minority of cases,<sup>90</sup> since the probable sentence would be lower to begin with. On the other hand, when necessary, they would have the authority to depart upwardly. Disparities would still happen, but they would happen relative to a more uniform beginning, and would thus be less dramatic. In fact, average sentences might even rise, as judges become increasingly motivated to comport with the more reasonable Guidelines. Though this proposal would not solve the problem altogether, it would make manifestations of the problem less extreme, and would serve as a starting point for future reforms.

Currently, the loss calculation is based not on the actual loss but on the intended loss, which can dramatically overrepresent the amount of monetary loss and social harm caused by the crime.<sup>91</sup> Intended loss is a double-edged sword — on the one hand, it encompasses the full extent of potential damages that could have arisen from the scheme; on the other, it “includes intended pecuniary harm that would have been impossible or unlikely to occur.”<sup>92</sup> The intended loss paradigm, which in many cases is substantially higher than the actual loss,<sup>93</sup> should be

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<sup>89</sup> This outcome is a manifestation of the phenomenon of “anchoring.” Judges who are given a higher initial Guideline-level sentence from which to depart are likely to depart more, percentage-wise, than those given a lower initial level. See Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 533–36 (2007). For additional theory on anchoring, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2515–19 (2004) (discussing the anchoring effects of initial charges on plea bargains); and Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1536–37 (2001).

<sup>90</sup> See *supra* notes 15, 74.

<sup>91</sup> “(A) *General Rule*. — . . . loss is the greater of actual loss or intended loss. (i) *Actual Loss*. — ‘Actual loss’ means the reasonably foreseeable pecuniary harm that resulted from the offense. (ii) *Intended Loss*. — ‘Intended loss’ (I) means the pecuniary harm that was intended to result from the offense . . .” GUIDELINES MANUAL, *supra* note 26, § 2B1.1 cmt. n.3.

<sup>92</sup> *Id.* § 2B1.1 cmt. n.3(A)(ii).

<sup>93</sup> See, e.g., *United States v. Piggie*, 303 F.3d 923 (8th Cir. 2002); *United States v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998); *United States v. Yellowe*, 24 F.3d 1110 (9th Cir. 1994). Intended loss is often higher than actual loss in minor frauds, in which the scheme was so small that it could never have lost the amount of money “intended” to be affected. See, e.g., *United States v. Johnson*, 941 F.2d 1102 (10th Cir. 1991); *United States v. Westmoreland*, 911 F.2d 398 (10th Cir. 1990). For broader debate on actual versus intended loss, see generally John D. Cline, *Should the Sentencing Commission Adopt the Economic Reality Doctrine?*, 10 FED. SENT. R. 141 (1997); and James Gibson, *How Much Should Mind Matter? Mens Rea in Theft and Fraud Sentencing*, 10 FED. SENT. R. 136 (1997).

replaced by a sentencing factor more sensitive to the actual effect of the crime: actual loss. A calculation based on actual loss would better reflect not only socially perceived culpability, but also *actual* culpability. If a new system required judges to calculate sentences based on the actual loss caused by an individual's actions, it would be far more difficult for even the most well-informed member of a conspiracy to avoid prison time.<sup>94</sup> Moreover, if the loss calculation were calibrated such that it rested on real-world factors such as personal profit and actual loss, the new system could *decrease* losses. Structuring a crime so as to maximize the amount of money missing from the company upon discovery would be made less attractive by a loss calculation that incorporates actual, rather than intended, losses.

The precise effect that this change will have on average sentences is unclear. Because departures happen in approximately 36% of cases,<sup>95</sup> many of the sentences in the remaining 64% will decrease. However, deterrence as a whole will not decrease: it will instead be redistributed to those criminals against whom Congress originally intended to direct the WCCPA. Frauds that cause large actual losses — the Bernie Madoffs and the Enrons of the next decade — will be the ones in which moral corruption and social harm will be quite clear. In these frauds, judges will feel little need to depart. These offenders will experience the full force of the WCCPA, more so than they do in today's scheme — their sentences will be high, and rightfully so. On the other hand, frauds that cause minimal actual loss are almost certainly the frauds in which departures are more common under the current sentencing scheme. These frauds will be sentenced lower, but again judges will feel minimal need to depart — their feelings of injustice are not triggered by a high-intended-loss-increased sentence. Sentences should thus begin to track the Guidelines, becoming far more consistent and predictable. Though sentences in the latter cases might drop slightly, the perception of fairness and the certainty of punishment will rise.<sup>96</sup>

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<sup>94</sup> See *supra* pp. 1738–39. Of course, bargaining will still be a part of the system: even a new system cannot, and should not, entirely eliminate the bargaining system. Without such a system, prosecutors would have to expend vastly more resources on criminal investigations and, given the sophistication of their targets, might not succeed even so. See, e.g., Recine, *supra* note 19, at 1564 (noting that prosecutors' resources are limited and that, when white collar prosecutions are inordinately expensive, prosecutors will often choose not to pursue them). However, a new system must seek to reduce the drastic range of sentences available so that the sentence of a well-represented officer would still be within a range determined by Congress to adequately reflect the seriousness of the offense.

<sup>95</sup> See *supra* note 15.

<sup>96</sup> Additionally, by tying punishment to actual loss, the community can see that its degree of moral outrage is being mirrored in the defendant's outcome. The community is thus more likely to accept the punishment as legitimate, with the concomitant benefit of greater obedience in the community as well. See Bibas, *supra* note 29, at 950 ("When citizens see that the law reaches sub-

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In addition to increasing deterrence against white collar crimes both large and small, the actual loss standard would mitigate the unfair effects of the hypercriminalization that the WCCPA imposed upon mail, wire, and other types of fraud. Instead of being treated like the Ebberses of the world, Joe the check forger or low-level spammer would be treated more in accordance with the nature of his own crime. Because his actions did not affect the lives and livelihood of hundreds or thousands of people, and because the amount of money lost to his actions is minuscule in proportion to that lost by the major fraudsters, a minor criminal would face only the base penalty for bank and mail fraud, as well as any minimal enhancement for the relatively very minor nature of his actions. Because the base level of punishment would not be eliminated, future Joes are still deterred; because the hasty overreaction of Congress to the Enron losses is no longer being held against Joe the minor criminal, justice is being better served.

Importantly, such a change would not decrease society's ability to punish white collar crimes that are begun but fail to come to fruition. Attempt is criminalized in white collar crime as it is for other crimes. However, just as attempt in other crimes is generally punished less than the completed crime in order to reward would-be criminals for aborting their efforts, imposing an actual loss calculation on white collar attempt would ensure fairness in that area as well. Attempt should begin from a Guidelines level higher than zero and add loss figures to accommodate the actual harm caused by the attempt. Punishment under an actual loss scheme could not be avoided by failing to complete the crime — if anything, an actual loss scheme would be an inducement to abandon the activity before completion.

### *B. Increasing Financial Penalties*

In conjunction with any of the above suggested changes, there is another aspect of punishment that may in fact be a stronger deterrent than any other factor: increased fines. The vast majority of white collar fraud cases arise out of an officer's desire to acquire more money than can be gotten legitimately in his or her position — in short, greed may be the biggest motivator behind white collar crime. Perhaps the best way to counter greed is the knowledge that, if caught, the offender will be required to disgorge all profits *and* be fined a substantial additional amount of money. More so than most other crimes, the financial calculation is strongly at the front of the minds of white collar criminals; theoretically, these individuals are sufficiently sophisti-

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stantively just outcomes, the law earns moral credibility that persuades citizens to obey the law in other cases.”).

cated to take into account the risk of steep financial loss, and to factor that risk into their decisions as to whether to break the law.

Hefty fines beyond reparations not only permit the corporation or individuals harmed to begin rebuilding after the discovery of the crime, but also provide a disincentive to commencing the criminal course of action in the first place. Of course there is the risk that a fine will be so heavy as to make the offender effectively judgment-proof; however, as a criminal fine cannot be discharged in bankruptcy,<sup>97</sup> individuals contemplating fraud will know they run the risk of becoming permanently impoverished. Many scholars have discussed the prospect of supplementing or replacing prison time with fines;<sup>98</sup> however, for the purposes of this Note it is sufficient to acknowledge the utility of punitive fines as a factor in white collar sentencing: even if the marginal disutility of additional prison years decreases, for almost all potential white collar offenders the marginal disutility of additional fines is bound to be high.

#### CONCLUSION

If the purpose of the WCCPA was to deter white collar crime, the statute's harsh penalties have not achieved their goal. Moreover, by introducing the potential for enormously disparate sentences for precisely the same crime, the WCCPA detracts from just punishment. This Note has proposed merely one way of reforming the sentencing process, in hopes that sentencing will become more consistent and predictable across judges and jurisdictions. The goal of this system would not be to make things easier for white collar criminal defendants. Instead, the goal would be to return potential prison sentences to their proper role as deterrent and punishing forces — sentences that would be low and reasonable enough that judges would impose them, but high and harsh enough that they would both deter future crimes and serve society's sense of justice. Though it may be that no system will ever be perfect or completely remove disparities, it is essential to continue reforming in response to the realities presented by the system at hand. This Note is meant to serve as one step in the long ascent toward a fair, effective, and legitimate justice system.

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<sup>97</sup> See 11 U.S.C. § 523(a)(7) (2006).

<sup>98</sup> See, e.g., Kenneth Mann, Stanton Wheeler & Austin Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479 (1980); Posner, *supra* note 75; Recine, *supra* note 19.