

## THE CHALLENGE OF WHITE COLLAR SENTENCING

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*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. This Article questions the necessity of giving draconian sentences, in some cases in excess of twenty-five years, to non-violent first offenders who commit white collar crimes. The attempts by the U.S. Sentencing Commission to achieve a neutral sentencing methodology, one that is class-blind, fails to respect the real differences presented by these offenders. As the term "white-collar crime" has sociological roots, it is advocated here that sociology needs to be a component in the sentencing of white collar offenders.*

### I. INTRODUCTION

White collar offenders in the United States have faced sentences far beyond those imposed in prior years.<sup>1</sup> For example, Bernard Ebbers, former CEO of WorldCom, was sentenced to twenty-five years;<sup>2</sup> Jeffrey Skilling, former CEO of Enron, was sentenced to twenty-four years and four months;<sup>3</sup> and Adelphia founder John Rigas received a sentence of

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<sup>1</sup> Ivan Boesky received a sentence of three years and Michael Milken received a sentence of ten years in cases related to insider trading. See Krysten Crawford, *Ebbers: Wrong Place, Wrong Time*, CNNMONEY.COM, July 13, 2005, [http://money.cnn.com/2005/07/08/news/newsmakers/ebbers\\_walkup](http://money.cnn.com/2005/07/08/news/newsmakers/ebbers_walkup).

<sup>2</sup> The Second Circuit upheld the sentence of Bernard Ebbers. See *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006).

<sup>3</sup> See John R. Emshwiller, *Skilling Gets 24 Years in Prison*, WALL ST. J., Oct. 24, 2006, at C1.

fifteen years, with his son Timothy Rigas, the CFO of the company, receiving a twenty-year sentence.<sup>4</sup>

These greatly increased sentences result in part from the employment of the United States sentencing guidelines structure, which includes in the computation of time the amount of fraud loss suffered.<sup>5</sup> Although the sentencing guidelines have some flexibility resulting from the recent Supreme Court decision in *United States v. Booker*,<sup>6</sup> the culture of mandated guidelines still permeates the structure and, as such, prominently advises the judiciary.<sup>7</sup> Equally influential in these sentences is the fact that because parole no longer exists in the federal system, the time given to these individuals will likely be in close proximity to the sentence that they will serve.<sup>8</sup>

Although many are quick to denounce the conduct of these individuals and desire lengthy retributive sentences, their disgust with this criminality often overlooks a commonality among these white collar offenders. Each of these individuals has no history of prior criminal conduct. The corporate white collar offenders of today are typically individuals who have never been convicted of criminal conduct and are

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<sup>4</sup> See Sentencing of John and Timothy Rigas, White Collar Crime Prof Blog, June 20, 2005, available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2005/06/sentencing\\_of\\_j\\_1.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/06/sentencing_of_j_1.html). Although this piece focuses on white collar offenders in the corporate environment, one also finds exorbitant sentences for individuals convicted of white collar activity that did not involve a corporate matter. For example, Chalana McFarland, an individual convicted in a mortgage scheme, received a sentence of thirty years. See also Press Release, U.S. Attorney's Office, N. Dist. Ga., Closing Attorney Sentenced to 30 Years in Prison in \$20 Million Mortgage Fraud (Aug. 24, 2004), available at <http://www.usdoj.gov/usao/gan/press/2005/08-24-2005.html>.

<sup>5</sup> See U.S. SENTENCING GUIDELINES MANUAL 2B1.1. Arguably the sentences in the state system have also increased. L. Dennis Kozlowski, the former CEO of Tyco, received a sentence of eight to twenty-five years. See Posting of Considering the Kozlowski & Swartz Sentence to White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2005/09/considering\\_the.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/09/considering_the.html) (Sept. 25, 2005) (discussing the sentencing of Dennis Kozlowski); see also Dan Mitchell, *Doing Executive Time*, N.Y. TIMES, Sept. 24, 2005, available at <http://www.nytimes.com/2005/09/24/technology/24online.ready.html?ex=1177128000&en=8403d4d0dd1d8f3c&ei=5070>.

<sup>6</sup> 543 U.S. 220 (2005).

<sup>7</sup> U.S. SENTENCING COMM'N, REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING vi (2006) ("The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines.").

<sup>8</sup> Although Michael Milken received a ten year sentence, he only served twenty-two months. See Crawford, *supra* note 1. Charles Keating, who received a twelve and a half year sentence, served four and a half months. *Id.* Keating's conviction was reversed. See *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998).

now facing incredibly long sentences as first offenders.<sup>9</sup> 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>10</sup>

In an effort to crack down on white collar criminality, the courts and legislature have produced draconian sentences that place prominence on the activity involved. In contrast to the approach taken with recidivist statutes such as "three strikes" laws,<sup>11</sup> the focus in white collar sentencing is on the offense, with little recognition given to the clean slate of these offenders.<sup>12</sup>

This Article, in Section II, traces the history of the term "white collar crime," noting its sociological roots.<sup>13</sup> It contrasts this approach with the way the term "white collar crime" is used today. This section recognizes the deficiencies in a biased methodology that uses factors such as a person's wealth to determine whether the person should face criminal charges or punishment. It notes, however, that a rejection of bias in the sentencing process does not necessitate the elimination of all sociological considerations, especially those that might promote legitimate differences.

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<sup>9</sup> This paper is limited to federal corporate white collar offenders. Although it is unlikely that the level of recidivism is comparable to "street crime" in the general category of white collar crime, this paper only looks at corporate-related white collar sentencing. One does find some recidivism in white collar crime cases outside the corporate context. See, e.g., Posting of Arms Export Control Act Conviction to White Collar Crime Prof Blog,

[http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2006/03/arms\\_export\\_con.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/03/arms_export_con.html) (Mar. 22, 2006) (discussing a second prosecution for an arms export violation in which the accused had been deported in 1998 after a first prosecution for a similar offense).

<sup>10</sup> The Second Circuit, in upholding the conviction of former WorldCom CEO Bernard Ebbers, stated that the sentence of "[t]wenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation." See *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006); see also Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. 279 (Pocket Part 2007), available at <http://thepocketpart.org/2007/02/21/podgor.html>.

<sup>11</sup> In *Ewing v. California*, 538 U.S. 11 (2003), the defendant was sentenced to twenty-five years to life for a theft conviction that involved taking three golf clubs worth \$399 apiece. Because he had two or more "serious" or "violent" prior offenses, the recidivist "three strikes" statute was used in sentencing him for the present offense. *Id.* at 18-20.

<sup>12</sup> Arguably the sentence would be higher if the person had a criminal history. But this makes little difference as the individuals receiving the sentence are being given in essence a sentence of spending the rest of their life in prison. These first offenders are thus given little benefit for being in Category One of the federal sentencing guidelines and being a first offender.

<sup>13</sup> See *infra* Section II.

Section III moves to a discussion of the white collar offender in the corporate world.<sup>14</sup> It looks at the realities and risks faced by this offender in light of the federal sentencing system of today. Section IV extends this discussion, looking at factors that could enhance sentencing in white collar cases.<sup>15</sup> Offered are sociological considerations that provide alternatives to the cold numerical system of "loss" as the key element used in determining the sentence of a convicted white collar offender. Although some of this discussion applies equally to other federal offenders, especially those sentenced in drug cases,<sup>16</sup> the focus of this piece is exclusively on white collar crime.

White collar sentences need to be reevaluated. In an attempt to achieve a neutral sentencing methodology, one that is class-blind, a system has evolved in the United States that fails to recognize unique qualities of white collar offenders, fails to balance consideration of both the acts and the actors, and subjects these offenders to draconian sentences that in some cases exceed their life expectancy. In essence, the mathematical computations that form the essence of sentencing in the federal system fail to recognize the sociological roots of white collar crime.

## II. WHITE COLLAR CRIME: DEVELOPING THE SOCIOLOGICAL ROOTS

White collar crime is a relatively new concept. Yet despite its recent vintage, it has not been consistently approached by all constituencies. Initially a sociological concept, "white collar crime" is recognized today as a legal term. Translating the sociological concept into a legal one presents deficiencies when placed in the context of the federal sentencing guidelines structure.

### A. SUTHERLAND'S APPROACH

Crucial to any discussion regarding white collar crime is an understanding of its meaning. This term was initially a sociological term coined by sociologist Edwin Sutherland, whose theme was to recognize crime committed by individuals in positions of power.<sup>17</sup> Although the examples in his initial book were limited to corporations, he argued generically that improper activities in this context should not be

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<sup>14</sup> See *infra* Section III.

<sup>15</sup> See *infra* Section IV.

<sup>16</sup> See generally KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 69-70 (1998).

<sup>17</sup> Sutherland defined white collar crime as "crime committed by a person of respectability and high social status in the course of his occupation." EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 9 (1949).

considered merely civil wrongs.<sup>18</sup> This was criminal conduct, and he wanted it designated as such.<sup>19</sup>

Sutherland looked at the offender in designating the conduct as criminal and used a class-based component in his definition. He factored the individual's "high social status" into his definition. Sutherland's sociological approach to white collar crime emphasized criminal acts by those in the "upper socioeconomic class," advocating that these individuals should not escape criminal prosecution.<sup>20</sup>

What is perhaps the most interesting aspect of Sutherland's work is that a scholar needed to proclaim that crimes of the "upper socioeconomic class" were in fact crimes that should be prosecuted. It is apparent that prior to the coining of the term "white collar crime," wealth and power allowed some persons to escape criminal liability.

#### B. DEPARTMENT OF JUSTICE APPROACH

Since Sutherland's 1939 speech to the American Sociological Society<sup>21</sup> and his later book on the topic of white collar crime,<sup>22</sup> there have been many definitions used to explain this category of crime.<sup>23</sup> In contrast to the offender-based approach favored by Sutherland, the more recent legal definitions of white collar crime focus on the offense. As such, tax evasion can be a white collar crime irrespective if it is the hotel owner who fails to report all of her income or the waiter who fails to report all of his tips. Arguably, an offense-based approach allows for a neutral methodology that is not influenced by a person's class and is not conditioned on political or corporate influence.

What is particularly problematic about the existing offense-based approach is that there is no list of white collar offenses. Thus, arguing that the act determines the designation but having no clear list of crimes

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<sup>18</sup> *Id.*

<sup>19</sup> Sutherland's initial study of white collar crime was presented to show that crime was not "due to poverty and its related pathologies." *Id.* at 10. He stated that a "study of white collar crime may assist in locating those factors which, being common to the crimes of the rich and the poor, are most significant for a general theory of criminal behavior." *Id.*

<sup>20</sup> See *id.* at 264-66.

<sup>21</sup> Edwin H. Sutherland, White-Collar Criminality, Speech at the Thirty-fourth Annual Presidential Address to the American Sociological Society (Dec. 27, 1939), in 5 AM. SOC. REV. 1, 1 (1940).

<sup>22</sup> See SUTHERLAND, *supra* note 17.

<sup>23</sup> See generally David T. Johnson & Richard A. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, 18 LAW & SOC. INQUIRY 63, 65-69 (1993) (describing varying definitions of the term "white collar crime").

included and excluded leaves one not knowing if a crime should or should not be considered when discussing the topic of white collar crime.<sup>24</sup> This problem is perhaps exacerbated by the increasing number of offenses in the federal system, many of which exist outside of Title 18, the federal criminal code.<sup>25</sup>

White collar crime definitions often recognize the economic nature of this type of crime. Key components tend to be "deception and absence of physical force."<sup>26</sup> But when examining a criminal statute such as the Racketeer Influenced and Corrupt Organizations Act (RICO), determining whether the offense fits the white collar crime category may be dependent on the specific conduct involved. If the conduct is fraud and the predicate act is mail or wire fraud, it should be designated as a white collar crime.<sup>27</sup> When, however, the RICO predicate relates to a state-based offense such as murder or robbery, it should clearly be outside the realm of being a white collar crime.<sup>28</sup> As such, looking at the specific statute in the abstract may not determine whether the activity should be called a white collar crime. The circumstances of the conduct may be equally important in categorizing the activity.

One finds a noticeable discrepancy in the way the Department of Justice (DOJ) recognizes white collar crime. First, in DOJ literature, there is no explicit category called "white collar crime," yet there is continual usage of this term.<sup>29</sup> Second, the Trac Reporting System of the DOJ includes antitrust and fraud as white collar crime but fails to include

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<sup>24</sup> The Yale Studies on White Collar Crime conducted in the 1970s used as the basis for its study eight crimes: "antitrust offenses, securities and exchange fraud, postal and wire fraud, false claims and statements, credit and lending institution fraud, bank embezzlement, IRS fraud, and bribery." Stanton Wheeler, David Weisburd & Nancy Bode, *Sentencing the White-Collar Offender: Rhetoric and Reality*, 47 AM. SOC. REV. 641, 642 (1982).

<sup>25</sup> See TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, A.B.A., THE FEDERALIZATION OF CRIMINAL LAW 2 (1998) (discussing how "over forty percent of [criminal statutes] have been created since 1970"). One finds criminal statutes throughout the criminal code, as in, for example, the statutes pertaining to tax, antitrust, environmental, and securities.

<sup>26</sup> JOHN KANE & APRIL D. WALL, THE 2005 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 1 (2006), available at [http://www.nw3c.org/research/national\\_public\\_survey.cfm](http://www.nw3c.org/research/national_public_survey.cfm).

<sup>27</sup> See 18 U.S.C. § 1961(1)(B) (2000) (designating the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, as predicate acts of RICO).

<sup>28</sup> See *id.* § 1961(1)(A) (designating several state offenses as predicate acts for RICO).

<sup>29</sup> See, e.g., U.S. DEP'T OF JUSTICE, FY 2002 PERFORMANCE REPORT/FY 2003 REVISED FINAL PERFORMANCE PLAN/FY 2004 PERFORMANCE PLAN 17 (2003), available at <http://www.usdoj.gov/ag/annualreports/pr2002/pdf/FullReport.pdf> (discussing DOJ priorities including the area of white collar crime).

corruption as well as a host of other criminal activity that most people would consider as belonging to this category.<sup>30</sup> The DOJ also does not include environmental offenses, bribery, federal corruption, procurement corruption, state and local corruption, immigration violations, money laundering, OSHA violations, or copyright violations as white collar crime.<sup>31</sup> Each of these forms of criminal conduct is reported in separate categories exclusive of white collar crime.<sup>32</sup> Thus, when the Trac Reporting System finds a “decline of about ten percent from FY 2003 to FY 2004” in white collar crime, the omission of many categories raises doubts about the accuracy of the reporting methodology.<sup>33</sup>

Even subdivisions of the DOJ do not concur with the existing reporting system. For example, the United States Attorney’s Office for the Northern District of California includes public corruption within its prosecutions of white collar crime.<sup>34</sup> This same office also includes environmental offenses, as well as crimes concerning the Food and Drug Administration as white collar crime, and reports on their white collar prosecutions explicitly using this designation.<sup>35</sup>

### C. AN UNBIASED SOCIOLOGICAL APPROACH

Historically, class was a component of the definition of white collar crime. The offender’s position of power allowed the person committing the crime to be labeled a white collar offender. With the present focus on the offense, the accused’s background, uniqueness, and circumstances often are omitted in categorizing the crime as either a white or non-white collar crime.

An offense-based approach, as opposed to offender-based approach, provides the clearest attempt to achieve neutrality. It eliminates class, political influence, gender, and race from determining whether individuals fall within the ranks of being designated a white collar offender. In omitting these biases, however, it may also fail to account for real

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<sup>30</sup> See Program Category, <http://tracfed.syr.edu/help/codes/progcode.html> (last visited Aug. 14, 2007) (listing designations for reporting criminal conduct).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TIMELY NEW JUSTICE DEPARTMENT DATA SHOW PROSECUTIONS CLIMB DURING BUSH YEARS (2005), <http://trac.syr.edu/tracreports/crim/136/> (reporting that white collar crime prosecutions declined during the stated time period).

<sup>34</sup> See U.S. Attorney’s Office, N. Dist. of Cal., <http://www.usdoj.gov/usao/can/divisions/criminal.html> (last visited Apr. 19, 2007).

<sup>35</sup> *Id.*

differences that might need recognition to fully understand this category of criminal conduct.<sup>36</sup> In moving to a strict offense-based analysis and discarding a sociological approach that is premised on improper biases, the existing system omits consideration of legitimate offender differences. This same problem is reflected in the federal sentencing system.<sup>37</sup>

### III. OFFENDER SENTENCING REALITIES AND RISKS

The white collar offender in the corporate sphere is usually a person with power, although the level of power within the corporate world can be very different depending on the person's rank and the corporate structure.<sup>38</sup> He or she can be a CEO who has delegated the power to underlings or a corporate executive who prefers to maintain a high level of control. The offender can also be a rogue employee who seeks to secure individual profit without consideration of the harm being caused to others. Perhaps the saddest cases are those employees who commit criminal acts in an attempt to please their bosses or show their value to the company. This latter group can include those who receive no direct or consequential benefit from the criminal activity. They have the power to commit the illegal conduct but receive little reward.

This next section starts by looking at the individual offender and his or her culpability. Considered is the role of the offender in the timeline of corporate corruption and whether the individual had a self-profit motive for engaging in the criminal conduct. Finally, the realities of sentencing are discussed, including the risk of proceeding to trial or accepting the sure finality of a plea agreement.

#### A. THE OFFENDER

The defendants in corporate fraud accounting cases are basically law-abiding citizens who have not had criminal problems in the past. For example, both Bernard Ebbers and Jeffrey Skilling were first offenders.<sup>39</sup>

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<sup>36</sup> See also Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 691-98 (2006) (describing inherent gender differences when sentencing men and women the same for identical crimes).

<sup>37</sup> See generally Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37 (2005) (discussing the functions and goals of a sentencing system).

<sup>38</sup> See generally Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397, 401-33 (2006) (providing data of prosecutions of corporate individuals from March 2002 through January 2006).

<sup>39</sup> See Peter J. Henning, *White Collar Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 757-58 (2006) (discussing that Bernard Ebbers had no prior criminal convictions); Douglas Berman, *Enron: The Tale of Two Sentencings*, *Sentencing Law and Policy*, Oct. 19, 2006, available at



If defendants who commit corporate frauds had been caught early in their schemes, the damages might not have been as significant as represented in so many of these cases. The crimes committed by those in the corporate world often present larger social harms because of the great number of victims and the enormous economic loss to these victims.<sup>40</sup> Clearly, many individuals lost pension funds and life savings as a result of these wrongdoings.<sup>41</sup> Likewise, it is evident that sharp punishment is in order to deter this criminal conduct.

Defendants charged with corporate frauds seldom require a court-appointed attorney as their wealth places them in an above-average socioeconomic level. Yet because they are at the top, they have farther to fall.

In addition to the powerful position that these individuals may hold, white collar offenders can often be subject to collateral consequences.<sup>42</sup> If lawyers, they are likely to lose their ability to practice law.<sup>43</sup> If stockbrokers, it is unlikely that they will be able to return to their profession.<sup>44</sup> And if part of the medical field, the government may exclude them from federal programs.<sup>45</sup> Unlike the plumber or gardener, a white collar offender is often unable to return to his or her livelihood after

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[http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/10/enron\\_the\\_tale\\_.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/10/enron_the_tale_.html)  
(last visited April 19, 2007).

<sup>40</sup> See 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, 1298 (2005) (presenting estimates of damage caused by white collar crime). The Federal Bureau of Investigation notes that eighteen cases by themselves have caused investor losses of one billion dollars. See Federal Bureau of Investigation, Taking Stock (Mar. 3, 2004), <http://www.fbi.gov/page2/march04/stock030404.htm> (last visited Aug. 14, 2007).

<sup>41</sup> See *Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the Sen. Comm. on the Judiciary*, 107th Cong. 5, 9 (2002), available at <http://judiciary.senate.gov/hearing.cfm?id=280> (statement of Charles Prestwood, former Enron employee; statement of Janice Farmer, former Enron employee).

<sup>42</sup> See CRIMINAL JUSTICE SECTION STANDARDS, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, available at [http://www.abanet.org/crimjust/standards/collateral\\_blk.html#1.1](http://www.abanet.org/crimjust/standards/collateral_blk.html#1.1).

<sup>43</sup> The ABA Model Rules of Professional Conduct state that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2005).

<sup>44</sup> See, e.g., *Touche Ross & Co. v. Sec. & Exch. Comm'n*, 609 F.2d 570 (2d Cir. 1979) (discussing the right of the Securities Exchange Commission (SEC) to censure and suspend individuals from practicing before the SEC).

<sup>45</sup> See, e.g., *Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990) (upholding the government's right to suspend convicted individuals from participating in the Medicare and Medicaid program).

serving imprisonment. Licensing, debarment, and government exclusion from benefits may preclude these professionals from resuming the livelihoods held before their convictions. White collar offenders often receive a higher sentence for having a skill, and they can suffer additionally by the collateral consequences that accompany that skill.<sup>46</sup>

Re-entry into society can also be problematic for the white collar offender. While some criminal defendants may think of criminal charges as "catching a case," and, as such, acceptable in society,<sup>47</sup> the white collar offender's country club society is often gone when the person completes his or her sentence. Also, because of the power and prestige held by the corporate-related offender, the person is more likely to feel a greater shame in the community.<sup>48</sup> Being a "front-pager" can subject the individual to more scrutiny and negative publicity, something that might not be felt by individuals of lesser status in society.<sup>49</sup>

Clearly these factors are not persuasive to the general public, as wealth, education, and prestige are often cited as reasons for giving white collar offenders a harsher punishment. The lack of sympathy from the general public makes white collar offenders easy targets for increased punishment.

#### B. THE OFFENDER'S CULPABILITY

There are a wide range of different offenders, each demonstrating different levels of culpability. One finds the mid- to upper-level executive who is heavily involved in the criminal conduct but does not hold the

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If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

U.S. SENTENCING GUIDELINES § 3B1.3 (2005).

<sup>47</sup> See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 998 (2004) (describing how catching a case may be thought of as catching a common cold).

<sup>48</sup> The shame may also be felt by the offender's family. See generally Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002) (discussing the consequences to third parties who are associated with an offender).

<sup>49</sup> In this regard, having increased shaming penalties might assist in deterring white collar offenders. See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999).

position of CEO.<sup>50</sup> Then there is the CEO who may not be the one who devises the scheme but tolerates or promotes it by his or her high level in the company.<sup>51</sup> There is also the mid- to lower-level individual who participates in the conduct for personal gain or promotion within the company but is not the key player in devising the corporate scheme. Finally, some white collar offenders commit their acts because they want to impress their superiors by showing inflated company profits. This last type of individual may not actually be receiving a personal benefit beyond company recognition.

An example of such a corporate white collar scenario is found in the story of Jamie Olis, the former Senior Director of Tax Planning and International at Dynegy, who later served as its Vice President of Finance.<sup>52</sup> Olis "was in his third year at [Dynegy]" when he went to work on Project Alpha.<sup>53</sup> "Project Alpha was a plan to borrow \$300 million and make it appear to the outside world (and in particular to Dynegy's auditor Arthur Andersen) as if the money was generated by Dynegy's business operations."<sup>54</sup> The fraudulent accounting scheme came to a halt when the "SEC required Dynegy to restate the cash flow as derived from a 'financing' rather than 'operations.'"<sup>55</sup> The effect was that "Dynegy was now seen to be borrowing rather than earning money from Project Alpha."<sup>56</sup> The scheme, involving special purpose entities, "a parent level hedge," and tear-up agreements, which were meant to protect banks from losing money, was suddenly facing a decreasing stock price.<sup>57</sup>

Olis, along with his boss Gene Foster and co-worker Helen Sharkey, were indicted for their conduct relating to this accounting fraud.<sup>58</sup> Foster, a key witness against Olis at his trial,<sup>59</sup> and the individual who approved his work,<sup>60</sup> received a sentence of fifteen months in return for his plea and

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<sup>50</sup> An example of such an individual would be Andrew Fastow, the former treasurer at Enron. See Brickey, *supra* note 38, at 399 (describing the role of some of the Enron executives indicted).

<sup>51</sup> See *United States v. Adelson*, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006) (noting that Adelson was not the individual who "hatched" the scheme).

<sup>52</sup> *United States v. Olis*, 429 F.3d 540, 541 (5th Cir. 2005).

<sup>53</sup> Mr. Olis' Initial Sentencing Memorandum at 5, *United States v. Olis*, 2005 WL 5568902 (S.D. Tex. Dec. 20, 2005) (No. 03-CR-217).

<sup>54</sup> *Olis*, 429 F.3d at 541.

<sup>55</sup> *Id.* at 542.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* The evidence conflicted as to whether Arthur Andersen and others were aware of the defendant's conduct. *Id.* at 542-43.

<sup>58</sup> *Id.* at 542.

<sup>59</sup> *Id.*

<sup>60</sup> Mr. Olis' Initial Sentencing Memorandum, *supra* note 53, at 5.

cooperation.<sup>61</sup> Sharkey received a sentence of one month.<sup>62</sup> Olis, who did not enter a plea and went to trial, initially received a sentence of 292 months.<sup>63</sup> This over-twenty-four year sentence was given for convictions of securities fraud, mail and wire fraud, and conspiracy.<sup>64</sup>

Despite having no prior criminal record, thus being a level one offender under the sentencing guidelines, Olis received this high sentence because the court determined that he caused a loss of \$105 million to one shareholder, the University of California Retirement System.<sup>65</sup> The high sentence was also in part a function of the court finding that "Olis employed 'sophisticated means' and a 'special skill' to carry out the fraud; and that there were more than fifty victims of the fraud."<sup>66</sup> Although the conviction was affirmed, the case was remanded for re-sentencing.<sup>67</sup> Circuit Judge Edith Jones rejected the "district court's approach to the loss calculation" because it failed to "take into account the impact of extrinsic factors on Dynegy's stock price decline."<sup>68</sup>

Olis was eventually re-sentenced to seventy-two months, with the court concluding "that it [was] not possible to estimate with reasonable certainty the actual loss to shareholders attributable" to the fraudulent scheme.<sup>69</sup> The court chose to base the sentence instead on an "intended loss to the United States Treasury of \$79 million."<sup>70</sup>

In some cases, the defendants will have realized significant personal profits from the criminal conduct.<sup>71</sup> Other cases, like that of Olis, have individuals seeking to enhance a company with insignificant personal

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<sup>61</sup> See Posting of Former Dynegy Executives Receive Lighter Sentences to White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2006/01/former\\_dynegy\\_e.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/01/former_dynegy_e.html) (Jan. 6, 2006).

<sup>62</sup> See *id.*

<sup>63</sup> *Olis*, 429 F.3d at 541.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 542-43.

<sup>66</sup> *Id.* at 542.

<sup>67</sup> *Id.* at 541.

<sup>68</sup> *Id.* at 548-49.

<sup>69</sup> *United States v. Olis*, No. H-03-217-01, 2006 WL 2716048, at \*9 (S.D. Tex. Sept. 22, 2006), *aff'd in part, rev'd in part*, 429 F.3d 540 (5th Cir. 2005).

<sup>70</sup> *Id.* at \*10.

<sup>71</sup> Andrew Fastow's plea agreement called for him to forfeit assets "which have an approximate value of \$23,800,000 and constitute proceeds of the offenses to which he will plead guilty." See Plea Agreement at 8, *United States v. Fastow*, No. H-02-0665 (S.D. Tex. Jan. 14, 2004), available at <http://fii.findlaw.com/news.findlaw.com/hdocs/docs/enron/usafastow11404plea.pdf>.

benefit.<sup>72</sup> The personal benefit may be limited to bonuses, promotions, or raises resulting from high company performance.

When a CEO or high-level executive stumbles onto fraudulent activity, discovering the fraud places the CEO in the difficult position of protecting the company while not perpetuating the activity. The court in *United States v. Adelson* described the former Chief Operating Officer and President of Impath, Inc., a company involved in cancer diagnosis testing, as having been "sucked into the fraud not because he sought to inflate the company's earnings, but because, as President of the company, he feared the effects of exposing what he had belatedly learned was the substantial fraud perpetrated by others."<sup>73</sup> Judge Rakoff, the district court judge authoring the opinion in this case, took the bold step of moving away from the mathematics of the sentencing guidelines to factor in all aspects of offender culpability.<sup>74</sup> The government, however, has filed a notice of appeal in this case.<sup>75</sup>

The convicted defendants in all these cases were clearly speeding down the corporate highway. The fact that others might speed is irrelevant. The fact that there is no intent to hurt someone is also unimportant. The overriding fact is that they engaged in illegalities and a wreck occurred. If the sentencing guidelines are strictly adhered to, the consequences of the wreck determine the sentence imposed.<sup>76</sup>

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<sup>72</sup> In *Olis* the court stated:

Although Olis was intimately involved in the conspiracy and in planning Project Alpha, he did not have the ultimate authority at Dynergy to approve Project Alpha, nor was he responsible for drafting the documents by which the conspiracy was carried out and concealed. Moreover, unlike some other recently publicized corporate fraud cases, the purpose of this conspiracy was not to defraud Dynergy or to enrich Olis.

Memorandum Opinion, *United States v. Olis*, Case 4:03-cr-00217 \*29-30, (9-22-06) available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2006/09/more\\_on\\_olis.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/09/more_on_olis.html) (last visited Mar. 2, 2007).

<sup>73</sup> *United States v. Adelson*, 441 F. Supp. 2d 506, 513 (S.D.N.Y. 2006).

<sup>74</sup> *Id.* at 512-13. The court imposed a "sentence of 42 months imprisonment . . . plus restitution in the amount of \$50 million, immediate forfeiture of \$1.2 million, three years of supervised release to follow imprisonment, and a life-time ban from being an officer or director of a public company." *Id.* at 507.

<sup>75</sup> Tom Perrotta, *Judge Rejects Executive's 85-Year Guideline Sentence as "Travesty of Justice,"* N.Y. L.J., July 27, 2006, available at <http://www.law.com/jsp/article.jsp?id=1154077535388>.

<sup>76</sup> The crimes here are not strict liability offenses, like speeding, but the intent to harm and the intent to profit may also not be required in the white collar crime. The statutes involved usually require an intent to commit the act and knowledge of the illegality occurring within the corporation. These requirements, however, can be inferred from evidence from underlings who testify to the CEO's knowledge of the wrongdoing occurring within the company.

## C. CAUGHT IN THE POST-SARBANES-OXLEY NET

Most criminal laws are written reactively—an event happens, and Congress provides legislation to appease the public. Whether it be the Patriot Act,<sup>77</sup> Megan's Law,<sup>78</sup> or the Sarbanes-Oxley Act,<sup>79</sup> the legislation in these instances was an outgrowth of the public outcry for retribution for criminal conduct.<sup>80</sup> In some cases, the media influence and public desire for legislation are less noted, as when Congress passes laws requested by the DOJ to provide more efficient prosecution. For example, although mail<sup>81</sup> and wire<sup>82</sup> fraud statutes exist, Congress passed a health fraud statute that specifically authorizes prosecutions relating to the health care industry.<sup>83</sup> Although a specific event did not trigger this legislation, the high cost of medical services may have influenced a reexamination of this industry.

The passage of new laws places certain individuals in greater jeopardy for being held criminally culpable. Although the United States prohibits *ex post facto* prosecutions, ongoing activity can become subject to new legislation after its passage. There is no grandfathering in of future criminal conduct. Thus, criminal activity that occurs after the passage of the statute becomes fair game for prosecutors.

Even without new legislation, prosecutors can use generic statutes to reach conduct that may not have been the subject of prior criminal prosecutions. As stated by Chief Justice Burger, "[w]hen a 'new' fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."<sup>84</sup>

Further, when the criminal activity has a historical basis in a corporation or is part of the "corporate ethos," those initially caught in the government net provide the general deterrence for later violators.<sup>85</sup> With

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<sup>77</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>78</sup> Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

<sup>79</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>80</sup> Arguably one could also say that the passage of these pieces of legislation correlates to political influences.

<sup>81</sup> 18 U.S.C. § 1341 (2000).

<sup>82</sup> *Id.* § 1343.

<sup>83</sup> *Id.* § 1347.

<sup>84</sup> *United States v. Maze*, 414 U.S. 395, 406-07 (1974) (Burger, C.J., dissenting).

<sup>85</sup> See Pam Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1095-1147, 1182-83 (1991).

sufficient notice of the criminal activity provided by the very passage of the legislation, the initial group of individuals prosecuted for crimes cannot successfully argue that they were deprived of due process notice. On the other hand, those prosecuted after these first few offenders have the benefit of hearing about the prosecutions to realize the impropriety of these acts. This is particularly important in white collar regulatory offenses, which might not, by their very nature, be immediately seen as criminal activity.<sup>86</sup> This is also true for new business crimes that might, in prior years, have been subject only to civil penalties.

The bottom line is that the prosecution cycle needs to start somewhere and the unfortunate individual who happens to go first is just unfortunate. There is no credit received for being the initial recipient of criminal prosecution. After all, these individuals have engaged in criminal activity.

Those caught in the initial net thrown into the sea of criminal conduct are likely to be offenders who understood their conduct might not be proper but did not realize it could produce criminal charges and draconian sentences. Although the statutes used, such as mail or wire fraud, may have been on the books for many years,<sup>87</sup> the statutes' application to this form of criminality may be new.

It is important to note here that in many instances, if corporate controls had been properly in place, the individual criminality would not have been able to pass under the radar. If, in fact, the corporation had an effective corporate compliance program, the criminality would have been seen well before the government prosecution.<sup>88</sup> The federal sentencing

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<sup>86</sup> When there is a complicated statute, and the conduct might be questionable as legitimate or illegitimate, the Supreme Court has imposed a higher level of mens rea if an individual presents an "ignorance of the law" defense. *See Cheek v. United States*, 498 U.S. 192, 200 (1991) (holding that tax laws are complicated and that a "willful" violation of the law requires the jury be instructed on the requirement of finding a "specific intent to violate the law"); *see also Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) ("To establish that a defendant 'willfully violat[ed]' the antitrust law, the Government must prove that the defendant acted with knowledge that this conduct was unlawful.").

<sup>87</sup> Mail fraud has been a crime since the statute was enacted in 1872. 18 U.S.C. §§ 1341, 1343 (2000).

<sup>88</sup> *See U.S. SENTENCING GUIDELINES MANUAL* § 8B2.1 (2006) (describing the criteria for an effective compliance and ethics program). Paula Desio, Deputy General Counsel of the United States Sentencing Commission, describes the seven key criteria for an effective program as:

- (1) Compliance standards and procedures reasonably capable of reducing the prospect of criminal activity
- (2) Oversight by high-level personnel
- (3) Due Care in delegating substantial discretionary authority

reality, however, is that the guidelines do not consider the existence, or lack thereof, of general deterrent punishment education received by the offender. Although individuals may be at different places along the spectrum of government enforcement against fraudulent activity, this is irrelevant for sentencing purposes.

Individuals are sentenced by looking at the offense, with add-ons<sup>89</sup> for items such as being a skilled person,<sup>90</sup> being an organizer or leader,<sup>91</sup> or obstructing the government's investigation.<sup>92</sup> The guidelines allow for

(4) Effective Communication to all levels of employees

(5) Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal

(6) Consistent enforcement of compliance standards including disciplinary mechanisms

(7) Reasonable steps to respond to and prevent further similar offenses upon detection of a violation.

PAULA DESIO, U.S. SENTENCING COMM'N, AN OVERVIEW OF THE ORGANIZATIONAL GUIDELINES, available at <http://www.ussc.gov/corp/ORGOVERVIEW.pdf>.

<sup>89</sup> See STITH & CABRANES, *supra* note 16, at 69 (Professor Kate Stith and the Honorable José Cabranes note that "the Commission has never explained the rationale underlying any of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic.").

<sup>90</sup> Section 3B1.3 of the U.S. Federal Sentencing Guidelines provides:

§ 3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under § 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role).

U.S. SENTENCING GUIDELINES MANUAL § 3B1.3.

<sup>91</sup> Section 3B1.1 of the U.S. Federal Sentencing Guidelines provides:

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

*Id.* § 3B1.1.

<sup>92</sup> Section 3C1.1 of the U.S. Federal Sentencing Guidelines provides:



an increased sentence when the points accumulated raise the offense level.<sup>93</sup> Although the guidelines provide a downward adjustment for someone in a minimal role, lack of notice of the criminal conduct, or belief that the activity is merely acceptable business conduct instead of criminal conduct, does not diminish the sentence under the guidelines.<sup>94</sup> Culpability is to a large extent an “all-or-nothing” methodology—either the person committed the criminal conduct or did not.

#### D. MOTIVE AS A SENTENCING FACTOR

The individual’s motive in committing the crime may also be overlooked in the federal sentencing process. Although motive has never been a mandate of intent and may not be a factor in determining guilt or innocence,<sup>95</sup> motive can be a consideration in punishment theory.<sup>96</sup> The federal sentencing guidelines, however, do not for the most part examine the accused’s motive, and only creative post-*Booker* courts have chanced

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##### § 3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant’s offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

##### *Id.* § 3C1.1.

<sup>93</sup> For example, in *United States v. Adelson*, the government requested that a first offender have added twenty-four points for the amount of the loss, six points for there being more than 250 victims, four points as the defendant “was an officer of a publicly-traded company,” four points for ultimately playing a leadership role, two points for endangering the financial security of a publicly traded company, two points “because the fraud involved sophisticated means,” and two points for obstructing justice. 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006).

<sup>94</sup> Section 3B1.2 of the U.S. Federal Sentencing Guidelines provides:

##### § 3B1.2. Mitigating Role

Based on the defendant’s role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

##### U.S. SENTENCING GUIDELINES MANUAL § 3B1.2.

<sup>95</sup> See, e.g., *Gilbert v. State*, 487 So. 2d 1185 (Fla. Dist. Ct. App. 1986) (finding premeditated murder for a crime committed with a motive of taking an ill wife out of her pain and suffering).

<sup>96</sup> “Motive may . . . be relevant as a method to distinguish between the relative blameworthiness of individuals at sentencing.” Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 95 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=921111](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921111).

going down this avenue. As such, the accused that causes an astronomical loss to the public but gains no individual profit may be treated in a similar manner to the individual who might be purchasing costly shower curtains for his home from the profits of his or her corporate fraud.<sup>97</sup> Circuit Judge Evans, found in *United States v. Corry* that motive to the victim is "mostly irrelevant" and therefore not something to consider in sentencing.<sup>98</sup> He stated, "[i]f someone steals your wallet and gives the money in it to the Humane Society, rather than blowing it in Las Vegas, that's little comfort as you gaze at your empty pocket."<sup>99</sup>

Some judges, however, do consider the offender's motive in the sentencing computation. For example, in *United States v. Ranum*, the court fully examined the individual defendant, as opposed to merely the offense and the resultant use of a strict numerical computation.<sup>100</sup> Ranum, a senior bank loan officer in charge of "managing a commercial loan portfolio and evaluating loan applications,"<sup>101</sup> was convicted of "misapplication bank funds."<sup>102</sup> He received a year-and-a-day sentence for this criminal conduct, a sentence imposed shortly after the Court's ruling in *Booker*.<sup>103</sup>

The district court rejected the prosecution request for a guideline sentence of thirty-seven to forty-six months and also rejected a defense request for home confinement.<sup>104</sup> The judge specifically noted that the "defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another."<sup>105</sup> Noting the aggravated sentence provided by the loss amount under the guidelines, the court stated that "[o]ne of the primary limitations of the guidelines, particularly in white-collar cases, is their mechanical correlation between loss and offense level."<sup>106</sup> The court noted that "[i]t is true that, . . . from the

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<sup>97</sup> Although L. Dennis Kozlowski was sentenced under state law, as opposed to the federal sentencing guidelines, evidence admitted at his first trial included the alleged purchase of six thousand dollar shower curtains that were expensed to Tyco International. See Kevin McCoy, *Jury Begins Deliberations in Ex-Tyco Execs' Retrial*, USA TODAY, June 3, 2005, at 3B, available at 2005 WLNR 8835521.

<sup>98</sup> *United States v. Corry*, 206 F.3d 748, 751 (7th Cir. 2000).

<sup>99</sup> *Id.*

<sup>100</sup> See *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005).

<sup>101</sup> *Id.* at 987.

<sup>102</sup> *Id.* at 988.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 989.

<sup>105</sup> *Id.* at 990.

<sup>106</sup> *Id.*

victim's perspective the loss is the same no matter why it occurred."<sup>107</sup> The court in *Ranum* then stated that "from the standpoint of personal culpability, there is a significant difference."<sup>108</sup>

In *Ranum*, the court considered the history and character of the defendant.<sup>109</sup> Additionally, factors normally omitted in federal sentencing discussions were mentioned in this case.<sup>110</sup> Significantly, the sentencing decision was not a mathematical equation but rather presented consideration of culpability beyond noting that the individual was within Category One. The court recognized that the accused did not act with a personal motive.

#### E. RISKING TRIAL

In addition to the loss factor being a crucial component in determining a sentence, the extent that a person will be punished is also contingent on whether the individual risks a trial.<sup>111</sup> Those who go to trial and are not acquitted face incredibly high sentences. In contrast, those who work with the government and accept a plea with cooperation can reduce their sentences substantially.<sup>112</sup> One need only look at the disparity in sentences between Jeffrey Skilling's sentence of twenty-four years and four months following a trial and Andrew Fastow's six-year sentence following a plea and cooperation with the government.<sup>113</sup> As such, in

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> The court noted that the defendant was

fifty years old, had no prior record, a solid employment history, and is a devoted family man. He has two children, one of whom is still in school. Prior to his recent marriage, he was a single father who did an excellent job of raising two daughters. He also provides care and support for his elderly parents.

*Id.* at 990-91. The court also discusses other factors of mitigation for this sentence. *Id.*

<sup>111</sup> The former CEO of Rite Aid received eight years in prison when he pled guilty to conspiracy. See Adrian Michaels, *Ex-Rite Aid Chief gets 8-Year Sentence in Fraud Case*, FIN. TIMES USA, May 28, 2004.

<sup>112</sup> See *United States v. Pacheco*, 434 F.3d 106 (1st Cir. 2006), *cert. denied*, 126 S. Ct. 2312 (2006); *United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005), *partially vacated and remanded*; *United States v. Green*, Sentencing Memoranda, 346 F. Supp. 2d 259 (D. Mass. 2004), *partially vacated*. The sentencing memo asserted that "the Department is so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen." *Green*, 346 F. Supp. 2d at 265.

<sup>113</sup> See *United States v. Fastow*, Sentencing Transcript, CR-H-02-665 (Sept. 26, 2006) (on file with the author).

making the decision to proceed to trial, individuals who believe themselves innocent face enormous sentencing risks should the jury think otherwise. Although courts are instructed to "avoid the unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," cooperation can serve as a "reasonable explanation" for a noticeable sentencing differential.<sup>114</sup>

Miami banker Eduardo A. Masferrer is an example of an individual who took the risk of trial. Masferrer was convicted after a jury trial for his role in a twenty million dollar bank fraud that included concealing the criminal activity from regulators.<sup>115</sup> He received a sentence of thirty years, while the bank president, Juan Carlos Bernacé, who took the route of a plea, received a six and a half year sentence.<sup>116</sup> Defense counsel questioned this disparity.<sup>117</sup>

Taking the risk of going to trial may not be a determination solely within the province of the individual defendant. As prosecutors tend to work up the ladder in proceeding against criminal activities, those who are higher in the corporate hierarchy often stand a greater chance of receiving a higher sentence. Likewise, those with little or nothing to offer the government in their plea negotiation may not realize the full benefits that can accompany government cooperation.<sup>118</sup> These factors have been the subject of concern long before the recent sentencing of white collar offenders.<sup>119</sup>

Some cases have defendants arguing that higher-ups knew of the wrongdoing and approved the activity, while other cases have CEO defendants arguing that they did not know the criminality was occurring under their reign. This theme can be seen with defendants such as Bernard Ebbers, former CEO of WorldCom,<sup>120</sup> and Kenneth Lay, former

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<sup>114</sup> United States v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006).

<sup>115</sup> See Press Release, U.S. Attorney, S. Dist. of Fla. (May 10, 2006), available at <http://www.usdoj.gov/usao/fls/PressReleases/060510-01.html>.

<sup>116</sup> See Jane Bussey, *Top Banker Gets Stiff Sentence*, MIAMI HERALD, July 27, 2006, at 1C.

<sup>117</sup> *Id.*

<sup>118</sup> Other considerations can also come into play here. On occasion, there can be a race to the courthouse to secure a plea agreement favorable to an accused. The sooner one arrives, the more chance that the individual will receive the better agreement.

<sup>119</sup> See Honorable Avern Cohn, *The Unfairness of "Substantial Assistance,"* JUDICATURE, Jan.-Feb. 1995, at 186 (describing the many reasons why an individual might not offer substantial assistance to the government).

<sup>120</sup> In *Ebbers*, the court gave a conscious avoidance instruction premised on Ebbers's testimony demonstrating that he was "consciously trying to avoid knowledge that the financial reports were inaccurate." United States v. Ebbers, 458 F.3d 110, 125 (2d Cir. 2006).

CEO of Enron, who were both convicted after a jury trial. Richard Scrushy, former CEO of HealthSouth, was initially acquitted by a jury.<sup>121</sup>

Individuals taking the risk of going to trial are not usually schooled in the realities of the criminal process and the prison system, as they are first offenders.<sup>122</sup> Deciding whether to take the risk may also be a function of money, as the cost of legal counsel can influence the ability to spend the sums necessary for a trial, thus forcing a plea negotiation to preserve assets for the offender's family.<sup>123</sup>

Sentencing in the federal system does not account for the risk taken by the individual who goes to trial. In fact, it works against this person by having him or her receive a higher sentence than could have been obtained if the defendant had not demanded enforcement of the constitutional right to a jury trial.

An additional factor that compounds this risk is the recent flux of deferred prosecution agreements.<sup>124</sup> These agreements provide the corporation with a benefit, often to the detriment of the individual. The government leverages the corporation against the individual, demanding total cooperation in its investigation.<sup>125</sup> Corporations agreeing to deferred

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<sup>121</sup> Following Scrushy's not-guilty finding in the case against him premised on activities at HealthSouth, he was retried along with the former governor of Alabama, Don Siegelman, and convicted after a jury trial. See Posting of Siegleman and Scrushy-Verdicts In to White Collar Crime Prof Blog, [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2006/06/siegelman\\_scrus\\_1.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/06/siegelman_scrus_1.html) (June 29, 2006).

<sup>122</sup> Some may argue that white collar offenders have a better ability to procure a private high-priced lawyer. This author, however, is unconvinced that private counsel is superior to the public defender who operates daily in the criminal courthouse.

<sup>123</sup> News reports suggested that Enron's former chief accounting officer Richard Causey's plea was motivated by the cost of attorney fees and his "diminishing resources." Kristen Hays, *Former Enron Executive Pleads Guilty*, REGISTER-GUARD (Eugene, Ore.), Dec. 29, 2005, available at <http://www.registerguard.com/news/2005/12/29/b1.bz.enron.1229.p1.php?section=business>.

<sup>124</sup> Deferred and non-prosecution agreements operate similarly to plea negotiations in that the two parties are reaching a binding agreement. In deferred or non-prosecution agreements, however, there is no indictment, and if the conditions set forth in the agreement are satisfied, then a criminal case does not proceed. See generally Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863 (2005); Eugene Illovsky, *Corporate Deferred Prosecution Agreements*, CRIM. JUSTICE, Summer 2006, at 36 (discussing corporate deferred prosecution agreements).

<sup>125</sup> One of the guiding principles set forth in the Thompson Memorandum is that:

[i]n gauging the extent of the corporation's cooperation [for purposes of determining whether it should be indicted], the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to

prosecution agreements can sometimes become mini-prosecutors in an effort to appease the government.<sup>126</sup>

#### IV. MEASURING WRONGFULNESS

The United States Sentencing Commission sets the parameters for a sentence. Although post-*Booker* the judiciary has some sentencing discretion, the mathematical equation under the guidelines is, more often than not, the norm. In recent years, sentences have increased for many white collar crimes.<sup>127</sup> The United States Sentencing Commission's *Final Report on the Impact of United States v. Booker on Federal Sentencing* attributes two factors to the increased rate of imprisonment in the fraud/theft category.<sup>128</sup> First is the fact that "statutory and guideline penalties increased for many fraud offenses as a result of the Commission's Economic Crime Package of 2001, the 2002 Sarbanes-Oxley Act and other recent legislation."<sup>129</sup> Second is the increased number of prosecutions.<sup>130</sup> The reality of the sentencing guidelines' uniformity is that new legislation ratchets up sentences to an overall higher level. Also apparent is that imprisonment is the norm, with little respect given to alternatives that might better rehabilitate individual wrongdoers.

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disclose the complete results of its internal investigation, and to waive attorney-client and work-product privilege.

United States v. Stein, 435 F. Supp. 2d 330, 337 (S.D.N.Y. 2006) (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL, § 9-162, § VI, ¶ A).

<sup>126</sup> "[T]he Thompson Memorandum makes clear that the failure of a business organization facing possible indictment to induce its personnel to submit to interviews by the government and to disclose whatever they know may be a factor weighing in favor of indictment of the entity." *Id.* at 4. This Memorandum has now been replaced with the McNulty Memorandum. See Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Head of Department Components and United States Attorneys, Principles Of Federal Prosecution For Business Organizations (2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

<sup>127</sup> When the sentencing guidelines were initially enacted, a goal was to provide uniformity in the sentences and to "require short but certain terms of confinement for many white-collar offenders, including tax, insider trading, and antitrust offenders, who previously would have likely received only probation." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20-21 (1988).

<sup>128</sup> The average sentence pre-Protect Act for the category theft and fraud under United States Sentencing Guideline 2B1.1 was sixteen months. This increased to twenty months post-Protect Act and twenty-three months post-*Booker*. U.S. SENTENCING COMM'N, *supra* note 7, at 71 (2006).

<sup>129</sup> *Id.* at 74.

<sup>130</sup> *Id.* at 74.

This next section starts by looking at a pre-guidelines study of sentencing in white collar cases. It considers the deficiencies of the existing guideline system, a system premised strictly on a mathematical formula with little consideration of the individual and his or her culpability. Argued here is that a system that employs a mathematical calculation to determine an individual's sentence omits proper recognition of the offender, the offense, and the need to protect society from future dangerousness.

#### A. PRE-GUIDELINE SENTENCING OF WHITE COLLAR OFFENDERS

The Yale White Collar Crime Studies of the late 1970s conducted interviews that looked at the judge's rationale in sentencing the non-white collar offender from that of the white collar offender.<sup>131</sup> Professors Kenneth Mann, Stanton Wheeler, and Austin Sarat noted that there was a pronounced difference in the way judges sentenced white collar crime cases, with the focus being on general deterrence as opposed to other methodologies.<sup>132</sup> They noted that "[m]ost 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>133</sup> The study raised issues of "equity in the sentencing process," specifically noting aspects such as the "use of economic sanctions when the defendant can clearly pay for them—sanctions that are unavailable to the defendant who is poor."<sup>134</sup>

In an article authored by Stanton Wheeler, David Weisburd, and Nancy Bode, the odd revelation is presented that "one's socioeconomic

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<sup>131</sup> The study was premised upon interviews conducted with judges. See Kenneth Mann, Stanton Wheeler, & Austin Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479 (1980).

<sup>132</sup> They state:

In non-white-collar cases judges have at least three, if not four, purposes in mind when they impose a sentence—punishment, incapacitation, general deterrence, and occasionally rehabilitation—and they tend to believe that their sentence will serve each purpose, to some extent and however imperfectly. In the white-collar area, in distinction, the sentencing purpose and rationale tends to be unidimensional: judges are concerned with general deterrence, deterring other persons in similar positions from engaging in the same or like behavior.

*Id.* at 482.

<sup>133</sup> *Id.* at 484.

<sup>134</sup> *Id.* at 500.

status is positively related to the severity of the sanction."<sup>135</sup> In a post-Watergate world, judges were increasing the penalties of those who progressed through the system and were charged with a white collar offense.<sup>136</sup>

## B. PURELY MATHEMATICS

Much has changed in the legal landscape since the Yale studies, most notably with the institution of the guidelines. These guidelines have moved sentencing in a direction that embraces "uniformity."<sup>137</sup> Loss controls the determination of the sentence, and there is little recognition given to individual offender characteristics.

In many cases, the high-profile corporate CEO or the individual unwilling to accept a plea and cooperate with the government receives a high sentence.<sup>138</sup> This is in large part because of the fraud guidelines that use "loss" as a key factor in sentencing.<sup>139</sup> As noted by Professor Peter Henning in discussing the sentencing of Bernard Ebbers, former CEO of WorldCom, "the determination of loss can raise a sentence quickly from

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<sup>135</sup> Stanton Wheeler, David Weisburd, & Nancy Bode, *Sentencing The White Collar Offender: Rhetoric and Reality*, 47 AM. SOC. REV. 641, 657 (1982).

<sup>136</sup> Three "interpretations" are presented as possible "hypotheses" for this result: 1) that this correlation is "meaningless or trivial, because the important effects of socioeconomic status occur earlier in the system of criminal justice, at the stages of investigation, arrest or indictment"; 2) that in a post-Watergate world white collar crime was a priority; and 3) that judges and the public had a "strong sentiment against crimes of greed rather than need, against crimes committed by persons in positions of trust and authority." *Id.* at 657-58.

<sup>137</sup> In creating the federal sentencing guidelines, Congress sought to have "honesty in sentencing" and to "reduce 'unjustifiably wide' sentencing disparity." Breyer, *supra* note 127, at 4 (*citing* S. REP. NO. 225, 98th Cong., 2d Sess. 38, 54, 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3221, 3237, 3239).

<sup>138</sup> Prosecutorial power further skews the system in that the government has the ability to offer cooperating individuals a 5K1.1 motion that will take the sentencing outside the formal structure. A 5K1.1 motion, a tool exclusively within the province of the prosecution, provides a basis for the court to automatically sentence below the guideline level. Even the court's ability to depart can be cabined by reasonableness. *See United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006) (finding that a seven-day sentence was unreasonable as not properly reflecting the seriousness of the criminal activity). The 5K1.1 motion serves as important leverage for the government in securing favorable plea agreements from defendants. Additionally, prosecutorial discretion allows the government to pick and choose the charges against an individual. Plea agreements that set specific charges and specific amounts of loss allow for a controlled sentence under the guidelines.

<sup>139</sup> "The medium loss amounts for cases with loss amounts sufficient to trigger a sentence increase from the loss table in USSG § 2B1.1 increased during the three time periods from \$38,060 pre-Protect Act, to \$41,595 post-Protect Act, to \$54,566 post-Booker." U.S. SENTENCING COMM'N, *supra* note 7, at 71 (2006).



modest to substantial.”<sup>140</sup> Despite the uncertainty in determining a “loss” value,<sup>141</sup> the different approaches that exist,<sup>142</sup> and the need to find that the fraud caused the loss,<sup>143</sup> the numerical amount can often equate with a sentence that exceeds the person’s life expectancy.<sup>144</sup>

The “add-ons” to the loss calculation are equally quantitative.<sup>145</sup> For example, a sentence can increase by two levels for ten or more victims, four levels for fifty or more victims, and six levels for 250 or more victims.<sup>146</sup> In some instances, the additional “add-ons” are specific to particular conduct or a particular statute.<sup>147</sup>

In a post-*Booker* world, courts have received some discretion in deciding the unreasonableness of a sentence.<sup>148</sup> The extent to which

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<sup>140</sup> Henning, *supra* note 39, at 767.

<sup>141</sup> In *United States v. Olis*, the Fifth Circuit noted that the “loss guideline is skeletal because it covers dozens of federal property crimes.” 429 F.3d 540, 546 (5th Cir. 2005).

<sup>142</sup> The Guidelines Commentary provides language for determining a loss. It notes that “loss is the greater of actual loss or intended loss.” The Commentary also provides measures for loss in certain cases, how to estimate the loss, exclusions from loss, and credit against loss. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (2006). Case law, however, demonstrates different approaches used by the courts in ascertaining loss. See *Olis*, 429 F.3d at 546-47 (describing different methods use to determine the “loss” figure for sentencing).

<sup>143</sup> *Id.* at 547 (noting that it is important in securities fraud cases to make certain that loss used for sentencing correlates with the “actual loss caused in the marketplace, exclusive of other sources of stock price decline”).

<sup>144</sup> In the case of Richard P. Adelson, the Honorable Jed Rakoff noted that the government computed the offense level to be 55, with everything above 42 being “life imprisonment.” *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D. N.Y. 2006).

<sup>145</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1.

<sup>146</sup> See *id.* § 2B1.1(a)(1).

<sup>147</sup> For example, “theft of, damage to, or destruction of, property from a national cemetery” and certain computer crime offenses require an increase by two levels. *Id.* at § 2B1.1(b)(6), (14).

<sup>148</sup> The *Booker* decision essentially makes the Guidelines advisory. See *United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006) (reversing a seven day sentence given in a white collar case). Courts determine the reasonableness of sentences outside the guidelines range using 18 U.S.C. § 3553(a), which provides in part the following:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

appellate tribunals will permit this discretion to flourish remains to be seen.<sup>149</sup> With white collar offenders bearing the brunt of society's scorn, using a classless charging and sentencing process remains attractive to the public.

### C. DEFICIENCIES OF A STRICT QUANTITATIVE APPROACH

The one-size-fits-all methodology of sentencing white collar offenders seriously diminishes consideration of the individual offender, the nature of the offense, and the level of protection needed to satisfy the public's interest. It provides a mathematical computation for determining the sentence without regard to sociological differences.<sup>150</sup>

#### 1. Failure to Consider the Offender

The federal sentencing guidelines fail to adequately examine the individual offender in determining the sentence. Omitted from consideration are the collateral consequences faced by the offender and the differences he or she faces upon re-entry into society.<sup>151</sup> The specific culpability of the individual also is not considered.<sup>152</sup> Courts do not focus on whether the accused had the benefit of seeing prior individuals receive harsh penalties and thus was able to have the benefit of deterrence prior to

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(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available; . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000).

<sup>149</sup> Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615 (2006).

<sup>150</sup> In *United States v. Adelson*, the Honorable Jed Rakoff states:

As many have noted, the Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear "objective," tend to place great weight on putatively measurable quantities, such as the weight of drugs in narcotics cases or the amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors.

441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (citing STITH & CABRANES, *supra* note 16, at 69). The Sentencing Guidelines have also been criticized as complex. The Constitution Project Sentencing Initiative recommends simplifying the existing advisory sentencing system. The Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT'G REP. 310 (2006).

<sup>151</sup> See *supra* notes 42-49 and accompanying text.

<sup>152</sup> See *supra* notes 50-76 and accompanying text.

their committing the act, or, alternatively, whether the accused was caught committing the crime du jour without realizing that the activity is not acceptable business conduct.<sup>153</sup>

Culpability is basically non-existent as a sentencing concern, with the punishment resting on a numerical figure that correlates with the amount of loss occurring as a result of the crime. Courts seldom consider where the individual may be on the corporate ladder, the extent to which he or she is directly engaged in the criminal conduct,<sup>154</sup> and any individual profit obtained as a result of engaging in the improper activity. In essence, sentencing fails to account for a difference between the CEO heavily entrenched in the criminal behavior and the CEO with little knowledge of criminal wrongdoing. Also omitted from the review process is the motivation of the accused and the actual benefit received by this individual.

## 2. Failure to Consider the Uniqueness of White Collar Crimes

The failure to focus on the offender is exacerbated by the fact that the crimes used in white collar cases have little or no flexibility.<sup>155</sup> Unlike many state offenses, there are no degrees or lesser included offenses to these crimes. For example, a homicide can be many different crimes dependent upon factors such as heat of passion, deliberation, premeditation, cooling off period, or extreme emotional disturbance.<sup>156</sup> Irrespective of the jurisdiction or the grading methodology used, the offense level is adjusted by the culpability of the accused. An unlawful killing can range from being considered murder in the first degree, voluntary manslaughter, or reckless homicide, to perhaps a vehicular homicide, depending on the specific laws of the jurisdiction.

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<sup>153</sup> See *supra* notes 77-94 and accompanying text.

<sup>154</sup> The Federal Sentencing Guidelines do examine whether a person is an organizer or leader when determining whether additional levels should be added for an aggravating role. See U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2006).

<sup>155</sup> The movement away from focusing on the offender and looking more closely on outside constituencies occurred well before the Sentencing Guidelines. Yale University Professor Stanton Wheeler in his presidential address to the 24th annual meeting of the Society for the Study of Social Problems noted that "we have withdrawn attention from the offender to those who are part of the social control network." Stanton Wheeler, *Trends and Problems in the Sociological Study of Crime*, 23 SOC. PROBS. 525 (1976).

<sup>156</sup> Many states have different degrees of crimes such as murder or burglary. For example, when the accused acted with a sudden heat of passion, had no opportunity to cool off, and acted under adequate provocation, states may designate the killing as voluntary manslaughter as opposed to murder. See, e.g., MICH. COMP. LAWS § 750.321 (2004); 18 PA. CONS. STAT. § 2501 (2006).

One does not find these lesser included offenses with white collar crimes as there are no degrees or levels of punishment.<sup>157</sup> The classic white collar crimes—bank fraud, mail fraud, and wire fraud—are not predicated on lower level crimes with a lesser degree of culpability or extenuating circumstances. The individual is either guilty or not guilty of the designated offense.

### 3. Future Dangerousness

Perhaps the most noticeable characteristic omitted by the quantitative approach to sentencing is future dangerousness. White collar offenders, especially those coming from the corporate arena, are usually first offenders.<sup>158</sup> Additionally, there is little likelihood of recidivism.<sup>159</sup> The individual seldom can resume a position of power that would allow for continued criminality of this nature.

The court also has the ability to limit any future dangerousness by precluding the individual from serving in a future corporate position. For example, in his sentencing of Richard P. Adelson, former Chief Operating Officer and President of Impath, the Honorable Jed Rakoff stated that “[w]ith [Adelson’s] reputation ruined by his conviction, it was extremely unlikely that he would ever involve himself in future misconduct. Just to be sure, however, the Court, as part of the sentence here imposed, barred Adelson from ever again serving as an officer or director of a public company.”<sup>160</sup>

If sentencing has as a goal the protection of society, factoring in the future dangerousness of the individual is an important component of the system. With the elimination of the individual’s corporate role, the stripping of the convicted felon’s money, and the accompanying collateral consequences, such as a loss of license or ability to conduct business with the government, future dangerousness is nearly eliminated.

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<sup>157</sup> The leading white collar crimes used in prosecuting this form of conduct are bank fraud and mail fraud. See TRAC REPORTS, WHITE COLLAR PROSECUTIONS FOR APRIL 2006 (2006), [http://trac.syr.edu/tracreports/bulletins/white\\_collar\\_crime/monthlyapr06/](http://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthlyapr06/).

<sup>158</sup> The rare example of a white collar corporate related offender being in a Category Two is seen in the securities fraud case of *United States v. Rosen*, 409 F.3d 535 (2d Cir. 2005).

<sup>159</sup> Fraud offenses were the lowest level of recidivism when compared to robbery, firearms, drug trafficking, larceny, and robbery. See U.S. SENTENCING COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 30 (2004), available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf).

<sup>160</sup> *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006).

## VI. CONCLUSION

All of criminal law revolves around punishment theory. We create laws in order to punish conduct that society finds abhorrent. We then enforce these laws and punish offenders in order to secure adherence to the laws. The classic theories consider utilitarian models that encompass goals of deterrence, both general and specific, rehabilitation, isolation, and education.<sup>161</sup> On the other hand, there is retributive theory that punishes for the sake of "paying the debt to society."<sup>162</sup> Punishment theory is also multi-dimensional, with considerations of communicative retribution looking at not only the specific wrongs to victims but also the repercussions to society and groups within society that might suffer as a result of the wrongful act.<sup>163</sup>

Sentencing of offenders is the last stage of punishment theory.<sup>164</sup> It is the one portion of the criminal process when the court can examine individual culpability in relation to the offense committed. De-emphasizing this consideration because of concerns that class may play a factor in the sentence works to eliminate considerations unique to many corporate white collar offenders. Sentencing needs to remain fluid to account for all considerations and yet also be transparent for review. Most importantly, we need to infuse into the sentencing process some of the sociological teachings that started the discussion of white collar crime.<sup>165</sup> It is important to strive for a sentencing system that is classless, but in doing so it is also important to respect real differences.<sup>166</sup>

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<sup>161</sup> See Ellen S. Podgor, Peter J. Henning, Andrew E. Taslitz, & Alfredo Garcia, *Criminal Law: Concepts and Practice* 4-6 (2005).

<sup>162</sup> *Id.* at 5.

<sup>163</sup> *Id.* at 6.

<sup>164</sup> The prior stages are the creation of the law that defines a criminal act, the police or prosecution's decision to investigate and arrest an individual for the alleged commission of the defined crime, and the eventual prosecution of that individual for the crime. All of these stages act to further punishment theory or are created for the purpose of furthering punishment theory.

<sup>165</sup> Honorable Jed Rakoff refers to using "common sense" to counter the "utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic." *Adelson*, 441 F. Supp. 2d at 512.

<sup>166</sup> Recognizing white collar offenders as criminally subject to prosecution was an important step made by the sociological world in 1939. It is equally important today. In criminalizing this conduct, however, we have gone to the other extreme with sentencing that fails to consider real differences in white collar crime. A biased system premised on the wealth of the accused should not be tolerated, but equally offensive is a system that fails to fully factor into the constellation the characteristics of the offender, the uniqueness of the specific offense, and the future dangerousness of the offender. The deficiencies in the system with respect to non-white collar offenders should not be used as the basis for punishing the white collar offender.