LOSING THE LOSS CALCULATION: TOWARD A MORE JUST SENTENCING REGIME IN WHITE-COLLAR CRIMINAL CASES

DERICK R. VOLLRATH†

ABSTRACT

The sentencing regime that governs white-collar criminal cases requires reform. The U.S. Sentencing Guidelines recommend sentences that are generally too high and place a grossly disproportionate emphasis on the concept of "loss"—the dollar value of the harm that a court finds a white-collar criminal to have caused. This concept of loss is ill defined, and often artificial to the point of being arbitrary. Moreover, the loss calculation fails to adequately approximate a defendant's culpability, dwarfing traditionally relevant considerations such as the manner in which the defendant committed the crime and the defendant's motive for doing so.

Fortunately, the Supreme Court has recently opened the door to systemic reform. In Kimbrough v. United States*, the Supreme Court held that—at least in certain circumstances—a sentencing judge may deviate from a Guidelines recommendation based purely on policy disagreement with that guideline. This Note argues that sentencing judges should adopt an aggressive interpretation of the Supreme Court's* Kimbrough *opinion and exercise their newly rediscovered discretion to deemphasize the loss calculation and restore rationality to the sentencing of white-collar criminals.*

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INTRODUCTION

Richard Adelson is no Bernie Madoff, but the U.S. Sentencing Guidelines don't account for this distinction.

Bernie Madoff will perhaps be remembered as one of the most loathsome white-collar criminals in history. Over the course of twenty years,[1] Madoff ran a Ponzi scheme that defrauded thousands of people of tens of billions of dollars.[2] His conduct was brazen. In addition to stealing from hedge funds and banks, Madoff targeted universities, charitable organizations, and individuals.[3] When meeting with a worried widow whose husband had invested his life savings with Madoff, Madoff put his arms around the widow and assured her that her money was safe.[4] Her concerns assuaged, the widow doubled down, investing both her pension fund and her own retirement savings with Madoff's firm.[5] Now, her money is gone and she has been forced to sell her home.[6] Madoff appears to have been motivated purely by greed. He comingled his victim's investments with his personal accounts and used the funds to pay for lavish personal expenditures, including a Manhattan apartment, two yachts, and four country club memberships.[7]

Madoff was evil, but Richard Adelson was merely weak. Adelson served as president of Impath, a publicly traded company that specialized in the detection and diagnosis of cancer.[8] During the course of his employment at Impath, Adelson uncovered a sophisticated accounting fraud that had been designed by various Impath accounting executives to misstate the company's financial results to inflate the value of the company's stock.[9] Rather than report the fraud, however, Adelson chose to conceal it and thus joined the conspiracy.[10] Adelson was a latecomer to the fraud. His

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1. Transcript of Sentencing Hearing at 43, United States v. Madoff, 626 F. Supp. 2d. 420 (S.D.N.Y. June 17, 2009) (No. 09 Crim. 213 (DC)).

2. *See id.* (observing that estimates of the loss Madoff caused ranged from $13 billion to $65 billion).

3. *See id.* at 44 (observing that Madoff's investors included "individuals, charities, pension funds, [and] institutional clients").

4. *Id.* at 48.

5. *Id.*

6. *Id.*

7. *Id.* at 45.

8. United States v. Adelson, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006).

9. *Id.*

10. *Id.*

participation was not based on greed or a desire to benefit by inflating the company's earnings; rather, "as President of the company, he feared the effects of exposing what he had belatedly learned was the substantial fraud perpetrated by others."[11]

Bernie Madoff and Richard Adelson are different kinds of criminals. Considered through the lens of the U.S. Sentencing Guidelines, however, Adelson's and Madoff's conduct is substantially identical. The amount of loss that a white-collar defendant is found to have caused largely drives the determination of his recommended sentencing range under the Guidelines.[12] Because both Adelson and Madoff committed high-dollar frauds,[13] the lengthy terms recommended by the Guidelines effectively consign both to a lifetime in prison when sentences for multiple counts are imposed consecutively.[14]

Despite these flaws, the Guidelines continue to dominate sentencing. Although the Supreme Court rendered the Guidelines no longer mandatory in *United States v. Booker*,[15] judges still adhere to the Guidelines with roughly the same frequency as before the *Booker* decision.[16] A "culture of mandated guidelines" continues to permeate the federal sentencing regime.[17]

Recent developments, however, may provide an opportunity for systemic change. In December 2007, the Supreme Court's decision in *Kimbrough v. United States*[18] authorized a deviation from the

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11. *Id.* at 513.

12. *See infra* Part II.B.1.

13. In Adelson's case, the sentencing court concluded that Adelson intended a loss of between $50 million and $100 million. *Adelson*, 441 F. Supp. 2d at 510. Bernie Madoff was found to have caused a loss in the tens of billions. Transcript of Sentencing Hearing, *supra* note 1, at 43.

14. In Adelson's case, Judge Rakoff observed at sentencing that the Guidelines yielded an offense level calculation of forty-six, which corresponds to a recommendation of life imprisonment. *Adelson*, 441 F. Supp. 2d at 510–11. Rakoff further observed that a life sentence was effectively available in Adelson's case because Adelson was charged with five separate counts and the penalties could effectively be stacked to yield a sentence of eighty-five years in prison. *Id.* Bernie Madoff was sentenced to 150 years in prison. Transcript of Sentencing Hearing, *supra* note 1, at 49.

15. United States v. Booker, 543 U.S. 220 (2005).

16. *See* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 46 (2006) ("The conformance rate remained stable throughout the year that followed *Booker*."); *see also infra* Part II.A.2.

17. Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 732 (2007).

18. Kimbrough v. United States, 128 S. Ct. 558 (2007).

Guidelines based primarily on a sentencing judge's policy disagreement with their recommendation.[19] The *Kimbrough* holding significantly expands a judge's discretion in sentencing certain drug offenders,[20] and may open the door to policy-based discretion in the sentencing of white-collar criminal defendants.

This Note considers the potential ramifications of the Court's *Kimbrough* holding for the sentencing of white-collar criminal defendants. Specifically, this Note argues that the sentencing regime in white-collar criminal proceedings is deeply flawed. The Guidelines recommend sentences that are generally too severe and place disproportionate weight on the loss calculation—the amount of loss the court attributes to a defendant. *Kimbrough* may provide an important avenue for reform. Whereas *Kimbrough*'s immediate holding concerned crack cocaine offenses,[21] the Court's reasoning can and should be applied to white-collar crime. Such systemic policy-based discretion would permit sentencing judges to deemphasize the loss calculation, and thereby move toward a more just sentencing regime in white-collar criminal cases.

In presenting this argument, this Note will proceed in four Parts. Part I will examine the history of the Guidelines, discussing the Sentencing Commission's policy choices at the Guidelines' inception and the development of the Guidelines governing white-collar crime over the past two decades. Part II will examine the current status of the U.S. Sentencing Guidelines, concluding that, post-*Booker*, the Guidelines' recommendations have remained the most important determinant of a defendant's sentence. Part II will then focus on the Guidelines applicable to white-collar crime, concluding that the most important factor at sentencing is the loss calculation. Part III will make the case that the sentencing regime in white-collar criminal cases is in need of reform. It will argue that the Guidelines recommend sentences that are generally too high and that the

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19. *See infra* Part IV.A.

20. Prior to the Court's *Kimbrough* decision, seven circuit courts of appeal had held that sentencing courts could not deviate from the Guidelines' recommendations based on a disagreement with the disparate treatment of crack and powder cocaine. *See Kimbrough*, 128 S. Ct. at 566 n.4 (observing this holding in *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007) (per curiam), *United States v. Johnson*, 474 F.3d 515, 522 (8th Cir. 2007), *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006), *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006), *United States v. Miller*, 450 F.3d 270, 275–76 (7th Cir. 2006), *United States v. Eura*, 440 F.3d 625, 633–34 (4th Cir. 2006), and *United States v. Pho*, 433 F.3d 53, 62–63 (1st Cir. 2006)).

21. *Id.* at 564.

Guidelines' emphasis on the loss calculation distracts from the purposes of sentencing. Part IV will discuss the Supreme Court's holding in *Kimbrough v. United States*. It will conclude that, even under a narrow interpretation, *Kimbrough* can and should apply to the sentencing of white-collar criminals, allowing judges to move away from the Sentencing Guidelines' disproportionate emphasis on loss.

I. THE INCEPTION AND DEVELOPMENT OF THE GUIDELINES

The U.S. Sentencing Guidelines were developed to achieve greater uniformity among sentences for federal crimes.[22] Although most of the guidelines were calibrated according to the typical past practice of the sentencing courts before the Guidelines era,[23] those governing white-collar crimes were designed to produce short but definite sentences.[24] Since the Guidelines' inception, however, sentences for white-collar crimes have trended dramatically upward,[25] and now bear little relation to their former selves.

A. The Guidelines at Their Inception

1. *The Guidelines Generally*. The U.S. Sentencing Guidelines were developed to remedy the prevalence of unwarranted sentencing disparity.[26] Before the Guidelines, sentences for substantially similar federal crimes varied across regional, racial, and gender lines.[27] To address this concern, Congress passed the Comprehensive Crime

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22. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988).

23. *Id.* at 17.

24. *Id.* at 20–21.

25. *See infra* Part I.B.

26. Breyer, *supra* note 22, at 4–5.

27. For example, defendants convicted in the South were likely to serve a sentence six months longer than the national average, whereas defendants convicted in central California would likely serve a sentence twelve months shorter. Breyer, *supra* note 22, at 5 (citing *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 100th Cong. 676 (1987) (statement of Ilene H. Nagel, Comm'r, U.S. Sentencing Commission)). Female bank robbers were likely to serve six months fewer than similarly situated male bank robbers. *Id.* at 5 (citing *Sentencing Guidelines*, *supra*, at 676). Black defendants faired more poorly in the South than they did in other regions of the country. *Id.* (citing *Sentencing Guidelines*, *supra*, at 676–77). Sentences even varied widely between different judges in the same circuit. One study of judges in the Second Circuit revealed that sentences in identical cases could range from three to twenty years in prison, depending on which judge presided over sentencing. *Id.* at 4–5 (citing S. REP. NO. 98-225, at 41 n.22 (1984)).

Control Act of 1984,[28] which created the U.S. Sentencing Commission (Commission)[29] and charged it with developing a sentencing policy that would achieve greater sentencing uniformity and comport with congressionally prescribed purposes of sentencing. The Act codified these purposes at 18 U.S.C. § 3553(a).[30]

In 1987, the Commission enacted the first U.S. Sentencing Guidelines,[31] which emerged as a compromise among the Commission's members.[32] The Commissioners divided on the purposes of punishment; some wished to emphasize deterrence rationales whereas others focused on punishment's retributive value.[33] Further factions emerged within these camps because neither the proponents of retribution nor the proponents of deterrence could agree on a sentencing regime that adequately met their respective purposes.[34]

In response to these problems, the Sentencing Commission decided to base the Guidelines primarily on the typical past practice of the sentencing courts.[35] The Commission ascertained the factors that drove sentencing before the Guidelines by analyzing approximately 100,000 case histories—10,500 of which probation officers examined in detail.[36] Based on this data, the Commission

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28. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976–2194 (codified as amended in scattered sections of 18 and 28 U.S.C.).

29. *See id.* § 217(a), 98 Stat. at 1976–2026 (codified as amended at 28 U.S.C. §§ 991–98 (2006)).

30. 28 U.S.C. § 991(b)(1)(A). Section 3553(a), discussed in more detail *infra*, Part II.A.2, is a congressional statement of the purposes of sentencing that was enacted as part of the Comprehensive Crime Control Act of 1984. The statute states that sentences should be sufficient but not greater than necessary to achieve the traditional retributive and deterrent aims of the criminal justice system. 18 U.S.C. § 3553(a) (2006) (describing the need for a sentence to "reflect the seriousness of the offense," provide "just punishment," and "afford adequate deterrence to criminal conduct").

31. *See* Breyer, *supra* note 22, at 1 ("Since November 1987, the new Federal Sentencing Guidelines have been law." (footnotes omitted)).

32. *Id.* at 17.

33. *See id.* at 15–16 ("[S]ome students of the criminal justice system strenuously urged the Commission to follow what they call a 'just deserts' approach to punishment. . . . An alternative school of thought recommended that the Guidelines be based on models of deterrence.").

34. *See id.* at 17 (observing that the Commission was "[f]aced, on the one hand, with those who advocated 'just deserts' but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated 'deterrence' but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime").

35. *Id.*

36. *Id.* at 18.

identified the factors that mattered in pre-Guidelines sentencing and calibrated the Guidelines so that the presence or absence of those factors would yield the same sentence as it would have in the typical case before the Guidelines were enacted.[37] In this manner, the Commission was able to achieve greater uniformity in sentencing without confronting the deep-seated philosophical tensions that underlie the criminal justice system.[38]

2. *The Guidelines Governing White-Collar Crime.* The Commission explicitly rejected the typical past practice of sentencing courts in the case of white-collar crime.[39] In its analysis of the pre-Guidelines sentencing regime, the Commission observed discrepancies between the punishment of white-collar crimes and their blue-collar analogues.[40] Simple theft was punished more harshly than fraud, for example.[41] White-collar criminals were also more likely to receive probation and, if imprisoned, generally served shorter sentences than those who committed common law crimes of similar severity.[42] The Commission viewed these discrepancies as unfair.[43] Therefore, rather than codify typical past practice, the Commission calibrated the Guidelines to produce a "short but definite" period of confinement for white-collar criminals.[44] The Sentencing Commission believed that this would deter crime better than a sentencing regime allowing many white-collar criminals to avoid prison time.[45]

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37. *See id.* at 17–18 ("The numbers used and the punishments imposed would come fairly close to replicating the average pre-Guidelines sentence handed down to particular categories of criminals.").

38. *See id.* at 18 ("[T]he Commission's 'past practice' compromise does not reflect an effort simply to reconcile two conflicting philosophical positions. It reflects a lack of adequate, detailed deterrence data, and it reflects the irrational results of any effort to apply 'just deserts' principles to detailed behavior through a group process.").

39. *Id.* at 20 (noting "the Commission's decision to increase the severity of punishment for white-collar crime").

40. *Id.*

41. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 18 (1987).

42. Breyer, *supra* note 22, at 20.

43. *Id.* at 22.

44. *Id.*

45. *Id.*

Because the 1987 Guidelines sought "short but definite" sentences for white-collar defendants,[46] it is not surprising that they were very simple. The Guidelines governing fraud, for example, fit on a single page.[47] Only six specific offense characteristics[48] could increase a defendant's sentence: (1) the amount of the loss caused by the defendant's fraud; (2) the degree of planning that the fraud entailed; (3) the number of victims involved; (4) whether the defendant falsely claimed to be acting on behalf of a charitable, religious, or government organization; (5) whether the defendant violated a judicial or administrative order; and (6) whether the defendant used foreign bank accounts or transactions to conceal his fraud.[49] Subsequent developments, however, would dramatically complicate these Guidelines.

B. The Evolution of the Guidelines Governing White-Collar Crime

The Guidelines governing white-collar crime evolved from a concise regime focused on generating "short but definite"[50] prison sentences to the complicated and severe system of today in three phases.

First, the Commission began to increase the sentences imposed for white-collar crimes almost as soon as the Guidelines were enacted.[51] Between 1987 and 1995, the Commission added numerous additional specific offense characteristics to the Guidelines and amended the loss tables to subject to greater punishment those who caused their victims more than $40,000 in losses.[52]

The second major development was the Commission's adoption of the Economic Crime Package amendments to the Guidelines in

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46. *Id.* ("[T]he Commission believed that a short but definite period of confinement might deter future crime more effectively than sentences with no confinement condition.").

47. Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 170 (2008).

48. The term "specific offense characteristics" describes factual circumstances that, if found to be present by the sentencing judge, can increase or decrease a defendant's sentence. For a more detailed discussion, see *infra* Part II.B.

49. Bowman, *supra* note 47, at 173 n.47.

50. Breyer, *supra* note 22, at 22.

51. Frank O. Bowman III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 387 (2004).

52. *Id.*

2001.[53] As early as the mid-1990s, the Commission decided that comprehensive reform of the white-collar Guidelines was necessary.[54] The Justice Department, the Judicial Conference of the United States, and many federal probation officers believed that sentences for white-collar defendants convicted of high-loss crimes remained too low.[55] Others, including the defense bar, believed that the Guidelines were too harsh to defendants convicted of low-dollar frauds and that judges should be given greater discretion to sentence such offenders to probationary terms.[56] Collaboration among these groups culminated in the 2001 Economic Crime Package amendments to the Guidelines.[57] These amendments slightly lowered the sentences of offenders convicted of low-loss frauds and significantly raised the sentences of offenders convicted of high-loss frauds.[58] The amendments broadened the definition of loss,[59] amended the loss

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53. The Economic Crime Package consists of four amendments to the Sentencing Guidelines. First, the guidelines governing theft and fraud were consolidated into a single guideline. *Compare* U.S. SENTENCING COMM'N, GUIDELINES MANUAL §§ 2B1.1, 2F1.1 (2000) [hereinafter 2000 SENTENCING GUIDELINES] (treating theft and fraud separately) *with* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2B1.1 (2001) [hereinafter 2001 SENTENCING GUIDELINES] (presenting a consolidated guideline for economic crimes). Second, the loss table was modified to provide for lower sentencing ranges for low-value white-collar crimes and to provide higher sentencing ranges for high-value white-collar crimes. *Compare* 2000 SENTENCING GUIDELINES, *supra*, §§ 2B1.1(b)(1), 2F1.1(b)(1), *with* 2001 SENTENCING GUIDELINES, *supra*, § 2B1.1(b)(1). Third, the Economic Crime Package amendments tweaked the definition of loss. *Compare* 2000 SENTENCING GUIDELINES, *supra*, § 2B1.1 cmt. n.1 (defining loss as the "value of the property taken, damaged, or destroyed"), *with* 2001 SENTENCING GUIDELINES, *supra*, § 2B1.1, cmt. n.2 (defining loss as a "reasonably foreseeable pecuniary harm that resulted from the offense"). Finally, the Economic Crime Package amendments tied the sentencing for money laundering offenses more closely to the underlying crime through which the laundered funds were obtained. *Compare* 2000 SENTENCING GUIDELINES, *supra*, § 2S1.1 (making money laundering a level twenty-three offense if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A), and otherwise a level twenty offense), *with* 2001 SENTENCING GUIDELINES, *supra*, § 2S1.1 (making the base offense level for money laundering the base offense level of the underlying offense). For a full account of the history and development of the 2001 Economic Crime Package amendments to the Guidelines, see generally Frank O. Bowman III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. R. 5 (2001).

54. Bowman, *supra* note 51, at 387.

55. *Id.* at 387–88.

56. *Id.* at 388.

57. *Id.*

58. *Id.* at 389.

59. In 2001, the definition of loss under the Guidelines changed from "the value of the property taken, damaged, or destroyed," 2000 SENTENCING GUIDELINES, *supra* note 53, § 2B1.1 cmt. n.2, to "reasonably foreseeable pecuniary harm that resulted from the offense," 2001 SENTENCING GUIDELINES, *supra* note 53, § 2B1.1 cmt. n.2. The 2001 definition is generally

table,[60] and added a special offense characteristic providing for offense-level enhancements based on the number of victims.[61]

The passage of the Sarbanes-Oxley Act of 2002[62] marked the third and most dramatic stage in the evolution of the Guidelines governing white-collar crime. Despite the generally positive reception of the 2001 Economic Crime Package amendments,[63] the Sarbanes-Oxley Act dramatically raised the stakes of white-collar crime.[64] Congress passed the Act in direct response to a wave of corporate scandals that began with the collapse of Enron in December 2001 and continued with breakdowns at WorldCom, Tyco, and Global Crossing.[65] In a speech delivered from Wall Street, President George W. Bush framed these scandals as the result of the individual defendants' moral failings[66] and called for stricter criminal laws to enforce higher ethical standards in American boardrooms.[67] The Sarbanes-Oxley Act, however flawed,[68] accomplished this aim. In

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understood to be significantly broader than the 2000 definition. *See, e.g.*, Bowman, *supra* note 51, at 389 (observing that through the 2001 Economic Crime Package amendments, the Commission "redefin[ed] loss in a way that include[d] more kinds of harm in the loss calculation").

60. The amendments to the loss table lowered the offense level enhancements for low-loss economic crimes, but raised the enhancements for high-loss economic crimes. For example, in 2000, a $4,000 fraud would have resulted in a one-level enhancement. 2000 SENTENCING GUIDELINES, *supra* note 53, § 2F1.1. In 2001, however, this fraud would merit no loss-related offense level enhancement. 2001 SENTENCING GUIDELINES, *supra* note 53, § 2B1.1. Under the 2000 Guidelines, a $100 million fraud would yield an offense level enhancement of eighteen, 2000 SENTENCING GUIDELINES, *supra* note 53, § 2F1.1, whereas under the 2001 Guidelines such a fraud would yield a twenty-six-level enhancement, 2001 SENTENCING GUIDELINES, *supra* note 53, § 2B1.1.

61. Bowman, *supra* note 51, at 388–89.

62. 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.).

63. *See* Bowman, *supra* note 51, at 394–95 (observing that at a Senate Judiciary Committee panel on white-collar crime in 2002, "[n]o one argued that penalties for serious economic crimes were too low under federal law," and that the Justice Department was generally satisfied with the 2001 Guidelines amendments).

64. *See* White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 905, 116 Stat. 804, 805–06 (directing the Sentencing Commission to reevaluate the efficacy of the Guidelines governing white-collar crime).

65. Bowman, *supra* note 51, at 392.

66. Remarks on Corporate Responsibility, 2 PUB. PAPERS 1194, 1195 (July 9, 2002), *available at* www.ustreas.gov/press/releases/docs/potus.doc ("We've learned of some business leaders obstructing justice, and misleading clients, falsifying records, business executives breaching the trust and abusing power.").

67. *Id.*

68. Many commentators have criticized the Sarbanes-Oxley Act for being hastily and sloppily drafted. *See, e.g.*, Bowman, *supra* note 51, at 406 ("[A] number of the specific directives

addition to raising the statutory maximum sentences for various white-collar crimes,[69] the Act prompted the Sentencing Commission to increase the sentencing ranges for white-collar crimes.[70]

The Commission amended the Guidelines to increase the base offense level[71] of offenders convicted of the most common white-collar crimes from six to seven.[72] The Commission also provided for an additional two-level increase to a defendant's offense level for loss calculations exceeding $200 million and another two-level increase for loss calculations exceeding $400 million.[73] Finally, the Commission added variables within the Guidelines to account for the number of victims the defendant harmed and the defendant's rank within an organization. The Commission included a six-level increase for fraud offenses involving more than 250 victims and an additional four-level

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[of the Sarbanes-Oxley Act] reflect a striking unfamiliarity with, or indifference to, existing federal sentencing law and experience . . . ."); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417, 1417 (2007) ("The testimony during this session, convened to give due consideration to [the Sarbanes-Oxley bill], was interrupted so that the members could go to the Senate floor and vote on the very legislation under consideration.").

69. Peter J. Henning, *The Changing Atmospherics of Corporate Crime Sentencing in the Post-Sarbanes-Oxley Act Era*, 3 J. BUS. & TECH. L. 243, 246 (2008). Changes in the statutory maximum are largely superficial, however, as the Guidelines calculations are usually far less than these statutory maximums. *Id.*

70. Specifically, the Act directed the Commission to "ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in [the] Act, the growing incidence of serious fraud offenses . . . and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses." White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 905(b)(1), 116 Stat. 804, 805. Further, the Act directed the Commission to consider "whether the guideline offense levels and enhancements for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in [the] Act." *Id.* § 905(b)(2), 116 Stat. at 805.

71. The Guidelines' sentence recommendation is based on a defendant's "offense level," which is the sum of a defendant's "base offense level" and any offense level adjustment resulting from the defendant's "specific offense characteristics." A defendant's "base offense level" is dictated by the crime of which he is convicted. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1B1.1 (2009) [hereinafter 2009 SENTENCING GUIDELINES].

72. *See* Henning, *supra* note 69, at 248 ("The Sentencing Commission's first step . . . was to increase the base offense level for a fraud offense if the crime was punishable by a term of imprisonment of twenty years or more."). After Sarbanes-Oxley, mail fraud, wire fraud, and securities fraud all carry statutory maximum penalties of twenty years. *Id.* at 246 (citing 18 U.S.C. §§ 1341, 1343 (2006) and 15 U.S.C. § 78ff(a) (2006)).

73. *Id.* at 248 (citing U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2B1.1(b)(1) (2003)).

enhancement for defendants convicted of securities fraud who served as officers or directors of a publicly traded company.[74]

This history reveals the unique nature of the Guidelines governing white-collar crime. Although the majority of the Guidelines were calibrated according to the typical past practice of sentencing judges, those that governed white-collar crime resulted from the Commission's policy choices and subsequent congressional prodding, fueled by a belief that more severe sentences were necessary to deter white-collar crime and to achieve justice in white-collar criminal cases.[75]

II. THE CURRENT SENTENCING REGIME IN WHITE-COLLAR CRIMINAL CASES

Under the current sentencing regime in white-collar cases, the key determinant of a white-collar criminal defendant's sentence is the amount of the loss attributed to that defendant.[76] The Guidelines place incredible emphasis on this so-called loss calculation.[77] Although the Supreme Court's opinion in *United States v. Booker* rendered the Guidelines advisory, the Guidelines continue to drive the sentencing process.[78]

Section A of this Part explores the current status of the Guidelines. It concludes that despite *Booker*'s reduction of the Guidelines' formal authority, sentencing judges still follow the Guidelines' recommendations with roughly the same frequency as they did before *Booker*. Section B of this Part explores the Guidelines governing white-collar crime, concluding that the single most important factor in determining a defendant's sentence is the amount of loss a judge finds the defendant to have caused.

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74. *Id.* at 248–49 (citing U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2B1.1(b)(14)(A)).

75. *See* Podgor, *supra* note 17 (observing that legislation increasing the penalty for white-collar crimes "was an outgrowth of the public outcry for retribution for criminal conduct").

76. *See* Isaac M. Gradman, *Hot Under the White Collar: What the Rollercoaster in Sentencing Law from* Blakely *to* Booker *Will Mean to Corporate Offenders*, 1 N.Y.U. J.L. & BUS. 731, 744 (2005) (observing that in sentencing white-collar criminals, loss is "often the most important determinant of the length of sentence").

77. *Id.*

78. *See infra* Part II.B.

A. *The Sentencing Guidelines' Continued Impact on the Sentencing Process*

1. *The Formal Status of the Guidelines.* As a formal matter, the U.S. Sentencing Guidelines carry significantly less weight today than they did at their inception. The Supreme Court's decision in *Booker* significantly reduced the formal weight of the Guidelines. In *Booker*, the Supreme Court held that the Guidelines violate the Sixth Amendment's guarantee to a jury trial and struck down the statutory provision that made the Guidelines mandatory.[79] Subsequent cases uphold this shift. In *Rita v. United States*,[80] the Court observed that it is now 18 U.S.C. § 3553(a),[81] and not the Guidelines, that guides a judge's hand in sentencing.[82] Additionally, in *Gall v. United States*,[83] the Court observed that the Guidelines are only one of many factors a district court must consider when imposing a sentence.[84]

Section 3553(a) was part of the original Comprehensive Crime Control Act that created the Guidelines system[85] and sets forth factors a court must consider in imposing a sentence. The statute demands that courts impose a "sentence sufficient, but not greater than necessary"[86] to achieve the following aims: (1) reflect the seriousness of a defendant's offense;[87] (2) promote respect for the law;[88] (3) provide just punishment for the offense;[89] (4) afford adequate deterrence to criminal conduct;[90] (5) protect the public from further

79. United States v. Booker, 543 U.S. 220, 259 (2005).

80. Rita v. United States, 127 S. Ct. 2456 (2007).

81. 18 U.S.C. § 3553(a) (2006).

82. *See Rita*, 127 S. Ct. at 2463 (observing that when assessing a sentence's reasonableness, the dominant inquiry is the degree to which that sentence fulfills the objectives Congress set forth in § 3553(a)). *But see* Robert J. Anello & Jodi Misher Peiken, *Evolving Roles in Federal Sentencing: The Post*-Booker/Fanfan *World*, FED. CTS. L. REV., Sept. 2005, at para. III.21, *available at* http://fclr.org/fclr/articles/html/2005/fedctslrev9.shtml (stating that *Booker* "permits" courts to consider statutory concerns such as the § 3553(a) factors).

83. Gall v. United States, 128 S. Ct. 586 (2007).

84. *Id.* at 602.

85. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, §§ 217–37, 98 Stat. 1837, 2017–34 (creating the U.S. Sentencing Commission); *id.* § 212(a)(2), 98 Stat. at 1987–2010 (codifying the purposes of sentencing).

86. 18 U.S.C. § 3553(a).

87. *Id.* § 3553(a)(2)(A).

88. *Id.*

89. *Id.*

90. *Id.* § 3553(a)(2)(B).

crimes of the defendant;[91] and (6) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[92] In devising a sentence that achieves these aims, courts should consider the circumstances of the offense, the history and characteristics of the defendant,[93] and the kinds of sentences available.[94]

In subsequent cases reaffirming and clarifying its *Booker* holding, the Supreme Court has continually emphasized the responsibility of a sentencing court to consider the individual factual circumstances of every defendant before it.[95] In devising a sentence, judges are to "make an individualized assessment based on the facts presented,"[96] and may not presume that a sentence is reasonable merely because it falls within the Guidelines range.[97]

Despite this reduction in formal authority, the Guidelines remain extremely influential at sentencing in that they are the starting point of any sentence determination. As the Supreme Court outlined in *Gall* and *Rita*, a district court begins a sentencing proceeding by correctly calculating the applicable Guidelines range.[98] Next, both parties are afforded an opportunity to argue for the imposition of a sentence that they believe to be appropriate under the circumstances, which the sentencing judge must consider in light of the § 3553(a) factors.[99] If a judge ultimately decides to impose a sentence outside the Guidelines range, the judge must consider the extent of this deviation and ensure that there is a sufficiently compelling justification to support the degree of variance.[100] A judge must explain a sentence that departs from the applicable Guidelines range in order

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91. *Id.* § 3553(a)(2)(C).

92. *Id.* § 3553(a)(2)(D).

93. *Id.* § 3553(a)(1).

94. *Id.* § 3553(a)(3).

95. *See, e.g.*, Gall v. United States, 128 S. Ct. 586, 598 (2007) ("It has been uniform and constant . . . for the sentencing judge to consider every convicted person as an individual and every case as a unique study . . . ." (quoting Koon v. United States, 518 U.S. 81, 113 (1996))).

96. *Id.* at 597.

97. *Id.* at 596–97.

98. *Id.* at 598; Rita v. United States, 127 S. Ct. 2456, 2465 (2007).

99. *Gall*, 128 S. Ct. at 598.

100. *Id.* This consideration of the degree of variance between the Guidelines sentence and the actual sentence imposed, however, cannot take the form of an "exceptional circumstances" requirement or a rigid mathematical formula. *Id.* at 596. Such inflexible approaches, when enforced at the appellate level, are inconsistent with the abuse-of-discretion standard of review that governs sentencing proceedings. *Id.*

to allow meaningful appellate review and promote the perception of fair sentencing.[101]

The Guidelines remain influential due to a widely held assumption that they reflect a "rough approximation" of sentences that comport with the aims Congress set forth in § 3553(a).[102] From its creation, the Commission has been charged with realizing the purposes of sentencing espoused in § 3553(a).[103] In *Rita*, the Supreme Court characterized sentencing judges and the Sentencing Commission as conducting essentially the same § 3553(a) analysis, "the [former], at retail, [and] the other at wholesale."[104]

2. *The Guidelines' Continued Practical Impact*. Evidence of the persistent relevance of the Guidelines calculus can be readily observed. In its *Final Report on the Impact of* United States v. Booker *on Federal Sentencing*, the Commission concluded that in 2006, a supermajority—85.9 percent—of federal sentences conformed to the Guidelines.[105] The Commission found that the severity of sentences did not substantially change after *Booker*.[106]

This continued adherence to the Guidelines has not changed since the Supreme Court clarified its *Booker* holding through its subsequent opinions in *Rita*, *Gall*, and *Kimbrough*. Since the *Gall* and *Kimbrough* decisions in December 2007,[107] the frequency with which district courts have imposed sentences within the Guidelines range has dropped a mere percentage point, from 60.8 percent to 59.8 percent.[108] Of these non-Guidelines sentences, the vast majority are

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101. *Id.* at 597.

102. *See Rita*, 127 S. Ct. at 2464–65 ("[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.").

103. *Id.* at 2463; *see also* 28 U.S.C. § 991(b)(1)(A) (2006) (stating that one of the Sentencing Commission's objectives is to carry out the purposes of sentencing espoused in § 3553(a)).

104. *Rita*, 127 S. Ct. at 2463.

105. U.S. SENTENCING COMM'N, *supra* note 41, at 46.

106. *Id.* Although the report provides no breakdown of sentencing practices in white-collar criminal cases specifically, commentators have observed that sentencing in white-collar criminal cases remains tied to the Guidelines calculations. *See, e.g.*, Podgor, *supra* note 17, at 732 ("Although the sentencing guidelines have some flexibility resulting from the recent Supreme Court decision in *United States v. Booker*, the culture of mandated guidelines still permeates the structure, and, as such, prominently advises the judiciary." (footnotes omitted)).

107. The Supreme Court decided *Rita* in February 2007, one term prior to its decisions in *Gall* and *Kimbrough*.

108. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 240 (4th ed. Supp. 2008).

attributable to downward departures sought by the government.[109] Since *Gall* and *Kimbrough*, the percentage of sentences outside the Guidelines range that are not attributable to government-sponsored departures increased by only 1.4 points, from 12.0 percent before *Gall* and *Kimbrough* to 13.4 percent after.[110]

This data suggests that although *Booker* and its progeny dramatically changed the formal relationship of the Sentencing Guidelines to the sentencing process, as a practical matter the Guidelines calculations remain the key determinant of a defendant's sentence.[111]

B. The Loss Calculation's Dominant Role at the Sentencing of White-Collar Criminal Defendants

In the context of white-collar crime, the loss calculation remains a "critical determinant" of a defendant's sentence[112] and is often the "the single most important factor in the application of the Sentencing Guidelines."[113]

1. *The Context of the Loss Calculation Within the Guidelines*. The calculation of a defendant's sentence under the Guidelines is based on that defendant's offense level.[114] For most white-collar crimes, this determination begins with a base offense level of either six or seven, depending on whether the offense of which the

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109. *Id.* In the year before the *Gall* and *Kimbrough* decisions, 25.6 percent of sentences incorporated a government-sponsored departure from the Guidelines range, compared to 12 percent of sentences that incorporated a variance from the Guidelines range that was not sponsored by the government. In the nearly five months following *Gall* and *Kimbrough* for which data is available, 25.2 percent of sentences were the result of a government-sponsored departure, whereas 13.4 percent of sentences incorporated a variance that was not sponsored by the government. *Id.*

110. *Id.*

111. Indeed, several commentators have reached this conclusion. *See, e.g.*, *id.* at 242 ("[This data] does not support the fear that the sky would fall after *Gall* and *Kimbrough*."); Podgor, *supra* note 17, at 732 ("Although the sentencing guidelines have some flexibility resulting from the recent Supreme Court decision in *United States v. Booker*, the culture of mandated guidelines still permeates the structure, and, as such, prominently advises the judiciary." (footnotes omitted)).

112. United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007).

113. *See* Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 767 (2006) (observing that the loss calculation was the most important factor in the sentencing of WorldCom CEO Bernie Ebbers).

114. *See* 2009 SENTENCING GUIDELINES, *supra* note 71, ch. 5, pt. A (showing a list of offense levels and the sentence ranges to which they correspond).

defendant was convicted entails a statutory maximum term of imprisonment of twenty years or more.[115] The sentencing court then adds additional levels based on the specific offense characteristics of the defendant's case.[116] The loss calculation is the most important of these specific offense characteristics.[117]

In applying the loss calculation, sentencing courts first must determine whether the intended or actual loss is greater.[118] If this figure is above $5,000, then additions are made to the defendant's offense level in accordance with the table found in Section 2B1.1(b)(1) of the Guidelines Manual, which is reproduced here:[119]

Table 1. The Loss Calculation

Loss (Apply the Greatest)	Increase in Level
$5,000 or less	No increase
More than $5,000	Add 2
More than $10,000	Add 4
More than $30,000	Add 6
More than $70,000	Add 8
More than $120,000	Add 10
More than $200,000	Add 12
More than $400,000	Add 14
More than $1,000,000	Add 16
More than $2,500,000	Add 18
More than $7,000,000	Add 20
More than $20,000,000	Add 22
More than $50,000,000	Add 24
More than $100,000,000	Add 26
More than $200,000,000	Add 28
More than $400,000,000	Add 30

As this table from Section 2B1.1(b)(1) indicates, the loss calculation can add up to thirty levels to a defendant's offense level, which can account for up to a 262-month increase in the length of a defendant's recommended sentence, even in the absence of any other

115. *Id.* § 2B1.1(a).

116. *Id.* § 2B1.1(b).

117. *See supra* note 76.

118. *See* 2009 SENTENCING GUIDELINES, *supra* note 71, § 2B1.1 cmt. n.3 ("[L]oss is the greater of actual loss or intended loss.").

119. *Id.* § 2B1.1(b)(1).

sentence enhancing characteristics.[120] The loss calculation alone can transform a sentence from "modest to substantial."[121]

2. *Calculating Loss*. Despite the importance of the loss calculation in determining a defendant's sentence,[122] neither Congress nor the Sentencing Commission has offered courts any real guidance on how to calculate this figure.[123] The commentary to the Guidelines defines loss circularly as "the greater of actual loss or intended loss."[124] It further defines actual loss as the reasonably foreseeable harm that resulted from the offense, when that harm is measurable in terms of money.[125] The Guidelines commentary defines intended loss as the monetary harm that the defendant intended to result from the offense.[126] The Guidelines further instruct courts that in determining these figures, they are to take into account factors such as the "fair market value of the property unlawfully taken, copied, or destroyed,"[127] "[t]he approximate number of victims multiplied by the average loss to each victim,"[128] and "[t]he reduction that resulted from the offense in the value of equity securities or other corporate assets."[129] These definitions and factors are unhelpful and circular, however, because they assume the definition of loss and ignore thorny causation issues inherent in phrases such as "the property unlawfully taken, copied, or destroyed" and "the reduction that resulted from the offense."[130]

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120. *See id*. ch. 5, pt. A (showing that the Guidelines recommend a sentence of between zero and six months for a defendant with no prior criminal history and an offense level of seven, and that the Guidelines recommend a sentence of between 210 and 262 months for a defendant with no prior criminal history and an offense level of thirty-seven).

121. Podgor, *supra* note 17, at 754 (quoting Henning, *supra* note 113, at 767).

122. *See supra* Part I.B.2.

123. *See* Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1628 (2007) ("Congress and the Sentencing Commission have been no help to courts faced with the task of determining loss in cases of financial reporting fraud.").

124. 2009 SENTENCING GUIDELINES, *supra* note 71, § 2B1.1 cmt. n.3.

125. *Id.*

126. *Id.* In most cases involving public companies, actual loss is likely to control at sentencing due to the difficulty in identifying the loss "intended" by a corporate executive who manipulated the corporation for disparate ends such as prestige, job security, and personal portfolio gains. Buell, *supra* note 123, at 1620.

127. 2009 SENTENCING GUIDELINES, *supra* note 71, § 2B1.1 cmt. n.3.

128. *Id.*

129. *Id.*

130. *Id.*; *see also* Buell, *supra* note 123, at 1626 (observing that in accounting fraud cases, "the issues of loss amount and causation get thorny").

Although determining the loss a defendant caused may be straightforward in a simple fraud case,[131] the issue becomes clouded in more typical white-collar cases involving a publicly traded company. In such a scenario, multiple victims trade multiple securities over many months during the perpetration of a fraud. During this period, those securities may change hands several times and fluctuate in value for any number of reasons. The loss calculation therefore becomes extremely difficult.[132] Although the Guidelines require sentencing courts to make only a "reasonable estimate of the loss,"[133] several appellate courts have confirmed that this analysis is nonetheless complex.[134] In *United States v. Olis*,[135] for example, the Fifth Circuit applied the principles of loss causation used in civil securities fraud cases[136] to the criminal context.[137] The court held that for a loss calculation in a securities fraud case to be reasonable, a sentencing court must determine the amount of the decline in the corporation's share price attributable to the defendant's participation in the fraud.[138]

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131. *See* Buell, *supra* note 123, at 1625–26 (observing that when a con man convinces an elderly woman that a $100,000 antique dresser is worth only $500, and purchases it for that amount, the victim's loss is $99,500).

132. *See* United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) ("Determining the extent to which a defendant's fraud . . . caused shareholders' losses inevitably cannot be an exact science."); United States v. Ebbers, 458 F.3d 110, 127 (2d Cir. 2006) ("Determining this [loss] amount is no easy task.").

133. 2009 SENTENCING GUIDELINES, *supra* note 71, § 2B1.1 cmt. n.3.

134. *See, e.g.*, United States v. Olis (*Olis I*), 429 F.3d 540, 546–47 (5th Cir. 2005) (rejecting an oversimplified "market capitalization" approach to the loss calculation whereby the sentencing court based loss on "a gross correlation between stock price decline and the revelation of a fraudulent transaction"); *see also Rutkoske*, 506 F.3d at 180 ("The District Court's basic failure at least to approximate the amount of the loss caused by the fraud without even considering other factors relevant to a decline in [the company's] share price requires a remand to redetermine the amount of the loss . . . .").

135. United States v. Olis (*Olis I*), 429 F.3d 540 (5th Cir. 2005).

136. In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), the Supreme Court held that basic proximate cause principles apply to securities fraud in the same manner that they apply to common law fraud. *See id.* at 338 (observing that "[a] private plaintiff who claims securities fraud must prove that the defendant's fraud caused an economic loss"). In so holding, the Court rejected the Eighth and Ninth Circuits' position that merely pleading that a fraud inflated a stock's purchase price suffices to state a claim. David H. Angeli & Per A. Ramfjord, *Reexamining 'Loss' and 'Gain' in the Wake of* Dura Pharmaceuticals v. Broudo*—New Ammunition for Securities Fraud Defendants*, 30 CHAMPION 10, 10 n.8 (2006).

137. *Olis I*, 429 F.3d at 546.

138. *See id*. ("Where the value of a security declines for other reasons, however, such decline, or component of the decline, is not a 'loss' attributable to the misrepresentation.").

The Second Circuit reached this same conclusion in *United States v. Rutkoske*,[139] as did the Ninth Circuit in *United States v. Zolp*.[140]

Because few district court judges have the necessary training to engage in the intensive economic analysis that *Olis*, *Zolp*, and *Rutkoske* required, the loss calculation in most cases becomes a battle of expert witnesses.[141] In this process, the expert witnesses for the prosecution and the defense invariably arrive at widely divergent estimates of the loss the defendant caused[142] and the judge is left to decide which expert is more persuasive.[143] Faced with this challenge, at least one court has simply given up, deciding that the amount of loss could not be determined in the case before it.[144]

III. THE NEED TO REFORM THE CURRENT SENTENCING REGIME GOVERNING WHITE-COLLAR CRIMINAL CASES

The sentencing of federal white-collar criminal defendants is deeply flawed. The Guidelines recommend sentences that are generally too harsh. Moreover, the Guidelines place undue emphasis on the loss calculation, an imprecise measure that fails to accurately correlate with a defendant's culpability.

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139. *See* United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) ("[L]osses from causes other than the fraud must be excluded from the loss calculation." (quoting United States v. Ebbers, 458 F.3d 110, 128 (2d Cir. 2006))).

140. *See* United States v. Zolp, 479 F.3d 715, 719 (9th Cir. 2007) ("[T]he court must disentangle the underlying value of the stock, inflation of that value due to the fraud, and either inflation or deflation of that value due to unrelated causes.").

141. Examples of such battles abound in white-collar fraud cases. *See, e.g.*, United States v. Ferguson, 584 F. Supp. 2d 447, 449–50 (D. Conn. 2008); United States v. Adelson, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006); United States v. Brown, 338 F. Supp. 2d 552, 558 (M.D. Pa. 2004); United States v. Bakhit, 218 F. Supp. 2d 1232, 1239 (C.D. Cal. 2002).

142. Buell, *supra* note 123, at 1632; *see also, e.g.*, *Ferguson*, 584 F. Supp. 2d at 449–50 ("[The government's expert] opined that his best estimate of the . . . loss was between $1.2 billion and $1.4 billion," whereas the defense expert concluded that "the amount of loss due to the . . . fraud that can actually be calculated is zero.").

143. Buell, *supra* note 123, at 1632.

144. *Id.* at 1633–34; *see also* United States v. Olis (*Olis II*), No. H-03-217-01, 2006 WL 2716048, at *8–9 (S.D. Tex. Sept. 22, 2006) ("[T]he court is compelled to conclude that the confounding announcements and the unprovable assumptions on which [the government's expert] necessarily relied in reaching his estimate of actual loss demonstrate that it is not possible to estimate with any degree of reasonable certainty the actual loss to shareholders caused by [the disclosure of the defendant's fraudulent actions].").

A. The Severity of the Guidelines Governing White-Collar Crime

Since the Sarbanes-Oxley Act of 2001, the Guidelines have recommended excessively high sentences for white-collar crimes. The recommended sentences for high-loss white-collar crimes eclipse the sentences typically imposed for murder[145] and serial child molestation.[146] In some cases, the recommendations are so high that they are "literally[,] off the chart."[147]

United States v. Adelson[148] aptly illustrates this phenomenon. This case concerned Richard Adelson, the president of Impath, a publicly traded company.[149] From 2001 to 2003, Adelson participated in a conspiracy to commit securities fraud and filed several false reports with the Securities and Exchange Commission on Impath's behalf.[150] But Adelson was a latecomer to the conspiracy, which various Impath accounting executives had concocted earlier in response to pressure from the corporation's CEO.[151] Moreover, Adelson was motivated not by greed, but rather by fear. Judge Rakoff found that "Adelson was 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."[152] Nevertheless, the Guidelines calculations imposed upon Adelson an offense level of forty-six, three levels higher than that needed to yield a recommendation of life in

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145. *See Adelson*, 441 F. Supp. 2d at 509 ("[A]n Offense Level of 55 is a level normally only seen in cases involving major international narcotics traffickers, Mafia dons, and the like."); *see also, e.g.*, United States v. Masferrer, 514 F.3d 1158, 1163 (11th Cir. 2008) (upholding a Guidelines sentence of thirty years in prison); *Adelson*, 441 F. Supp. 2d at 511 (observing that the Guidelines recommend life imprisonment). The average murderer is sentenced to less than nineteen years in prison. Bowman, *supra* note 47, at 169 (citing U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 256 (2006)).

146. *See* United States v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006) ("Twenty-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.").

147. *Adelson*, 441 F. Supp. 2d at 509; *see also* Bowman, *supra* note 47, at 168 (observing that the Guidelines "generat[e] sentencing ranges for [white-collar] property crimes from 5 to 14 notches higher than necessary for life imprisonment").

148. United States v. Adelson, 441 F. Supp. 2d 506 (S.D.N.Y. 2006). For additional details regarding this case, see *supra* Introduction.

149. *Id.* at 507.

150. *Id.*

151. *Id.*

152. *Id.* at 513.

prison.[153] Recognizing the excessive nature of this sentence, Judge Rakoff refused to apply it.[154] In his sentencing memorandum, the judge did not mince words, describing the Guidelines' recommendation as "barbari[c],"[155] and "patently absurd on [its] face."[156]

Adelson's case is not unique. Several commentators have expressed frustration with the severity of the current Guidelines. Professor Bowman, for example, has observed that "under the current Guidelines a corporate officer who presides over a fraud involving securities and a loss of only $2.5 million can qualify for life imprisonment."[157] In *United States v. Parris*,[158] Judge Block lamented that the Guidelines effectively recommend life imprisonment when an officer or director of virtually any public corporation is found guilty of securities fraud.[159]

In addition to far exceeding the severity necessary to achieve retributive justice, the Guidelines are much more severe than necessary to effectively deter white-collar crime. Short but certain prison terms provide substantial deterrence for would-be white-collar criminals.[160]

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153. *Id.* at 511 (determining Adelson's offense level to be forty-six, and observing that "the guidelines recommend life imprisonment for every offense level over 42").

154. *See id.* at 507 ("In the end, however, the Court imposed a non-guideline sentence of 42 months imprisonment . . . ."); *id.* at 512 ("[T]he Court, confronted with an absurd guideline result . . . chose to focus its primary attention on the non-guidelines factors set forth in § 3553(a) . . . .").

155. *Id.* at 511.

156. *Id.* at 515.

157. Bowman, *supra* note 47, at 168 & n.20.

158. United States v. Parris, 573 F. Supp. 2d 744 (E.D.N.Y. 2008).

159. *See id.* at 754 ("[W]e now have an advisory guidelines regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment."). Judge Lake expressed a similar sentiment in *United States v. Olis* (*Olis II*), No. H-03-217-01, 2006 WL 2716048 (S.D. Tex. Sept. 22, 2006). In that case—decided prior to the Supreme Court's *Booker* decision—Judge Lake had been forced to impose a Guidelines sentence of 292 months. *Id.* at *1. Reconsidering the sentence following *Booker*, Judge Lake recognized the inappropriate severity of the Guidelines calculation. *See id.* at *13 ("[T]he court concludes that a sentence within the applicable guideline range would not be reasonable . . . ."). Judge Lake therefore deviated from the Guidelines and imposed a sentence of only seventy-two months. *Id.*

160. Members of the Sentencing Commission believed that "short but definite" sentences for white-collar criminals would have high deterrent value. Breyer, *supra* note 22, at 22; *see also Adelson*, 441 F. Supp. 2d at 514 (drawing support for the deterrent value of short but definite

B. The Guidelines' Destructive Focus on Loss

In addition to recommending sentences that are generally too high, the Guidelines attach undue weight to the amount of the loss a defendant causes. The loss calculation is imprecise and correlates poorly with a defendant's real culpability.

1. *The Loss Calculation's Imprecision*. Neither Congress nor the Sentencing Commission has offered sentencing courts any real guidance on performing the loss calculation.[161] This lack of guidance, combined with the inherent complexity of the calculation, means the loss figure often seems arbitrary. It is usually based on the formulations of expert witnesses, and defense and government experts invariably reach widely divergent figures.[162] Even a single expert can produce a wide range of loss figures, depending on the assumptions the expert includes in the model.[163] In *United States v. Ferguson*,[164] for example, the government's expert witness produced several estimates of the loss, ranging from $344 million to $1.4 billion.[165] When the loss a defendant causes is so abstract that not even a court-recognized expert can quantify it with any precision, the figure says little about the moral blameworthiness of a defendant's conduct.

2. *The Loss Calculation's Weak Correlation to a Defendant's Culpability*. Even if the loss a defendant caused could be precisely and reliably determined, it would still only poorly approximate a defendant's culpability. The Guidelines' emphasis on the loss calculation obscures other important indicia of culpability, such as the defendant's position within the company, the extent of the defendant's involvement in the criminal conduct, and the profit that

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prison sentences from Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 80 (2005), and Elizabeth Szockyj, *Imprisoning White Collar Criminals?*, 23 S. ILL. U. L.J. 485, 492 (1998)).

161. *See supra* Part II.B.2.

162. *See supra* Part II.B.2.

163. *See, e.g.*, United States v. Ferguson, 584 F. Supp. 2d 447, 449–50 (D. Conn. 2008) (discussing how different studies used by the government's expert witness to estimate loss produced a wide range of loss figures).

164. United States v. Ferguson, 584 F. Supp. 2d 447 (D. Conn. 2008).

165. *See id.* at 449 ("The Government's expert . . . opined that his best estimate of the . . . loss was between $1.2 billion and $1.4 billion, though he also provided several other loss calculations ranging from $344 million to $598 million.").

the defendant obtained by participating in the fraud.[166] To more clearly illustrate the shortcomings of the Guidelines' focus on the loss calculation, consider the following two hypothetical white-collar criminals.

First, consider John, an accounting executive at a publicly traded corporation. The company's $1 billion worth of stock is held by thousands of people. In the course of his ordinary employment duties, John becomes aware of an ongoing conspiracy to fraudulently inflate the company's earnings. Because of the nature of John's employment, he must either approve these inflated figures and join the conspiracy or report the fraud. He fears that, should he report the fraud, he will lose his job in the aftermath. He expects the corporation's share price to plummet in response to the amended financial statements and its capital to dry up as investors and would-be creditors lose confidence in the firm's management. John therefore joins the conspiracy. John is not a conspiracy leader, and at no point does he derive any personal benefit from the fraud beyond that incidental to the inflated health of the firm. When the fraud is later discovered, John is convicted. The court can precisely determine[167] that the fraud caused a 10 percent drop in the company's share price, producing a loss of $101 million.

Next, consider Robert, the president of an investment firm with three employees. Robert solicits and obtains contributions from 250 wealthy individuals, totaling $101 million. Instead of investing this money, Robert engages in a classic Ponzi scheme. He misappropriates the funds for his own personal consumption and, to discourage his investors from withdrawing their money, falsely reports astronomical returns. The fraud is eventually discovered, but not before the money is spent and the fund is worthless. The court finds that Robert has caused a loss of $101 million, the value of the misappropriated funds.

Although John and Robert behaved very differently, the Sentencing Guidelines fail to reflect this fact.[168] Both John and Robert

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166. *See* Podgor, *supra* note 17, at 756–57 ("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, and any individual profit obtained as a result of engaging in the improper activity." (citations omitted)).

167. This is rarely possible in reality. *See supra* Part III.B.1.

168. John's total offense level would be between forty-seven and forty-nine, depending on whether the sentencing judge found him to be a minor participant in the fraud. John would begin with an offense level of seven, 2009 SENTENCING GUIDELINES, *supra* note 71, § 2B1.1(a), and would be subject to the following offense level increases: (1) twenty-six levels for the $100 million dollar loss, *id.* § 2B1.1(b)(1)(N); (2) six levels for committing a fraud that involved more

begin with the same offense level.[169] They also receive the same offense-level enhancements for the amount of loss they caused and the number of victims they harmed as well as for jeopardizing the health of their respective firms, violating securities laws while holding their respective positions, and abusing positions of trust.[170] Although the Guidelines consider John and Robert's respective roles in the fraud, the effect of considering this factor is minute, accounting for a difference of between two and four offense levels.[171] By comparison, the loss calculation accounts for a twenty-six offense level increase.[172] Moreover, the difference between John and Robert's respective roles has no practical effect given the extreme nature of the Guidelines' recommendations. After either defendant has exceeded a total offense level of forty-two, the Guidelines recommend the maximum statutorily permissible sentence; it makes no difference whether a defendant's offense level is a forty-seven or a fifty-one.

The Guidelines fail to achieve justice in white-collar criminal cases. Their sentencing recommendations are irrationally high and, due to the Guidelines' overemphasis on the loss calculation, fail to accurately reflect a defendant's culpability.

IV. *KIMBROUGH V. UNITED STATES* AS AN AVENUE FOR REFORM

With its opinion in *Kimbrough v. United States*, the Supreme Court has opened the door to systemic change in the way white-collar criminals are sentenced. In *Kimbrough*, the Supreme Court upheld a

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than 249 victims, *id.* § 2B1.1(b)(2)(C); (3) four levels for jeopardizing the financial security of a publicly traded company or financial institution, *id.* § 2B1.1(b)(14)(A)–(C); (4) four levels for violating securities law while an officer of a publicly traded company or an investment advisor, *id.* § 2B1.1(b)(17)(A); and (5) two levels for abusing a position of trust or using a special skill to facilitate or conceal the offense, *id.* § 3B1.3. John's offense level might be reduced by two if the sentencing judge found him to be only a minor participant in the fraud. *Id.* § 3B1.2(b). Robert's offense level would be fifty-one. Robert would also begin with an offense level of seven, *id.* § 2B1.1(a), and would be subject to the same offense level enhancements as John, *id.* §§ 2B1.1(b)(1)(N), 2B1.1(b)(2)(C), 2B1.1(b)(14)(A)–(C), 2B1.1(b)(17)(A), 3B1.3. Robert would not be eligible for the two-level reduction for minor involvement in the offense, *id.* § 3B1.2(b), and would instead be subject to an additional two-level increase for his leadership role, *id.* § 3B1.1(c). The Guidelines recommend a life sentence for all offense levels over forty-two. *Id.* ch., 5 pt. A.

169. *See supra* note 168.

170. *See supra* note 168.

171. John might be eligible for a two-level reduction to his offense level for his minor role in the fraud, 2009 SENTENCING GUIDELINES, *supra* note 71, § 3B1.2(b), and Robert would be subject to a two-level increase for his leadership role, *id.* § 3B1.1(c).

172. *See supra* note 168.

deviation from the Guidelines governing crack cocaine offenses based on a sentencing judge's policy disagreement with those Guidelines' recommendations.[173] If this policy discretion were extended to the sentencing of white-collar criminals, sentencing judges could disregard the strictures of the loss calculation and restore rationality to the sentencing of white-collar criminal defendants.

The *Kimbrough* opinion is subject to two possible interpretations. *Kimbrough* can be read broadly to allow judges unfettered discretion to deviate from any guideline based on the judge's policy disagreement with that guideline.[174] Language in the *Kimbrough* opinion, however, suggests that the Court's holding may be limited in two significant ways. First, some language in the opinion suggests that policy-based discretion may be applicable only to a narrower class of guidelines: those that—like the Guidelines governing crack cocaine offenses—were not calibrated as a result of the Sentencing Commission's reasoned assessment of empirical data and national experience.[175] Second, the Court's opinion raises the possibility that policy-based discretion is not appropriate when guidelines result from an explicit congressional directive.[176]

Despite these potential limitations, sentencing courts can and should use *Kimbrough* to restore rationality to the sentencing of white-collar criminals by recognizing the loss calculation as bad policy and declining to impose the sentences it recommends. This course is possible under the broader reading of the Court's *Kimbrough* holding. This Part will argue, however, that even under a narrow interpretation of *Kimbrough*, the opinion grants sentencing courts discretion to deviate from the Guidelines' recommendations in white-collar criminal cases based purely upon the judge's policy disagreement with the loss calculation.[177]

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173. *See* Kimbrough v. United States, 128 S. Ct. 558, 564 (2007) ("The question here presented is whether, as the Court of Appeals held in this case, 'a sentence . . . outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.' We hold that, under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory." (citation omitted) (quoting United States v. Kimbrough, 174 Fed. App'x 798, 799 (4th Cir. 2006) (per curiam))).

174. *See infra* Part IV.A.

175. *See infra* Part IV.B.1.

176. *See infra* Part IV.B.2.

177. *See infra* Part IV.C.

This Part will proceed in three steps. First, this Part will describe the *Kimbrough* holding at its most broad level.[178] Next, this Part will discuss the language in *Kimbrough* that potentially limits the scope of the opinion.[179] Finally, this Part will argue that *Kimbrough* grants sentencing judges discretion in white-collar criminal cases even if interpreted narrowly.[180] In making this argument, this Part compares the Guidelines governing white-collar crime to those governing crack cocaine offenses and concludes that both sets of Guidelines lack grounding in the Sentencing Commission's assessment of empirical data and national experience. The Part further concludes that neither the 100-to-1 crack/powder cocaine disparity nor the Guidelines' emphasis on the loss calculation was incorporated as the result of a congressional directive.[181]

A. The Supreme Court's Kimbrough *Holding at Its Broadest*

Read broadly, *Kimbrough v. United States* stands for the proposition that a sentencing judge may apply a sentence outside a guideline's recommended range based purely on a policy disagreement with that guideline's calculation.[182]

In *Kimbrough*, a district court judge imposed a sentence for possession of crack cocaine[183] that was far below the recommended Guidelines range.[184] The district court considered the defendant's individual "history and characteristics," but the judge's dominant rationale for deviating from the Guidelines range was the judge's policy disagreement with what he considered to be the "disproportionate and unjust effect" of the Guidelines' disparate treatment of crack and powder cocaine at sentencing.[185] Specifically, the judge disagreed with the Guidelines' treatment of the possession of crack cocaine as tantamount to the possession of one hundred

178. *See infra* Part IV.A.

179. *See infra* Part IV.B.

180. *See infra* Part IV.C.

181. *See infra* Part IV.C.

182. *See supra* note 173.

183. Specifically, Kimbrough pleaded guilty to four offenses: conspiracy to distribute crack and powder cocaine, possession with intent to distribute more than fifty grams of crack cocaine, possession with intent to distribute powder cocaine, and possession of a firearm in furtherance of a drug trafficking offense. Kimbrough v. United States, 128 S. Ct. 558, 564 (2007).

184. *See id.* at 565 (observing that the sentencing judge imposed a sentence of 180 months when the Guidelines called for a sentence of 228 to 270 months).

185. *Id.*

times that much powder cocaine.[186] The district court held that this treatment yielded a sentence greater than necessary to achieve the purposes of sentencing outlined in 18 U.S.C. § 3553(a).[187]

In its *Kimbrough* opinion, the Supreme Court approved the district court's use of discretion on these grounds, holding that a sentence based on such policy disagreement was entitled to the same reasonableness review as any other.[188] According to the Supreme Court, "[t]he ultimate question in Kimbrough's case [was] 'whether the sentence was reasonable—*i.e.,* whether the District Judge abused his discretion'" in applying a sentence he thought just.[189] In reaching this decision, the Supreme Court abrogated contrary holdings in the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits.[190]

Indeed, some appellate courts have already hinted at adopting this broad reading.[191] The Fifth Circuit has gone so far as to state that "*Kimbrough* does not limit the relevance of a district court's policy disagreement with the Guidelines to the situations such as the cocaine disparity and whatever might be considered similar."[192]

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186. *See id.* ("The [district] court also commented that the case exemplified the 'disproportionate and unjust effect that crack cocaine guidelines have in sentencing.'"); *id.* at 566 ("Although chemically similar, crack and powder cocaine are handled very differently for sentencing purposes. The 100-to-1 ratio yields sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs.").

187. *Id.* at 565.

188. *See id.* at 576 ("The ultimate question in Kimbrough's case is 'whether the sentence was reasonable—*i.e.,* whether the District Judge abused his discretion . . . .'").

189. *Id.* (quoting Gall v. United States, 128 S. Ct. 586, 600 (2007)).

190. *See* United States v. Johnson, 474 F.3d 515, 522 (8th Cir. 2007) (holding that courts may not impose a sentence outside of the Guidelines range because of a disagreement with the sentencing ratio); United States v. Castillo, 460 F.3d 337, 357–58 (2d Cir. 2006) (holding that a court could not reject the Guidelines sentencing ratio on purely policy-based reasons); United States v. Williams, 456 F.3d 1353, 1368–69 (11th Cir. 2006) (holding that the district court's disagreement with the policy of employing the crack-to-powder cocaine ratio was not a permissible sentencing factor); United States v. Eura, 440 F.3d 625, 636 (4th Cir. 2006) (holding that variance from the Guidelines cannot be based solely on the court's disagreement with the sentencing ratio); United States v. Pho, 433 F.3d 53, 64–65 (1st Cir. 2006) (holding that a district court could not impose a sentence outside the Guidelines range based on its rejection of the 100-to-1 crack-to-powder cocaine sentencing ratio).

191. *See* Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. (forthcoming 2010) (manuscript at 14–15), *available at* http://ssrn.com/abstract=1433581 (observing that the Second, Fourth, and Fifth Circuits have issued opinions expressing skepticism of the potential limitations alluded to in the Supreme Court's *Kimbrough* opinion). Professor Hessick cites *United States v. Jones*, 531 F.3d 163, 173 (2d Cir. 2008), *United States v. Evans*, 526 F.3d 155, 165 (4th Cir. 2008), and *United States v. Simmons*, 568 F.3d 564, 569 (5th Cir. 2009) in support of this proposition. *Id.* at 15 nn.92–94.

192. Hessick, *supra* note 191, at 15 (quoting *Simmons*, 568 F.3d at 569).

B. *A Narrower Interpretation of* Kimbrough

Although it is evident that *Kimbrough* struck a strong blow in favor of a judge's discretion at sentencing,[193] language in *Kimbrough* suggests that its holding might be limited in two significant ways.[194] First, the Court indicates that a judge's discretion to deviate from the Guidelines for policy reasons might be limited to Guidelines that are not based upon the Sentencing Commission's consideration of empirical evidence and past national experience.[195] Second, language in the Court's opinion indicates that policy-based deviation from a guideline's calculation may be inappropriate when the guideline at issue resulted from an explicit congressional directive.[196]

1. *Guidelines Promulgated Pursuant to the Characteristic Institutional Role of the Sentencing Commission*. Language in the Court's *Kimbrough* opinion suggests that a sentencing judge's policy-based discretion might be limited when the guideline at issue results from the Sentencing Commission's exercise of its discrete institutional role. Writing for the majority, Justice Ginsburg took notice of the characteristic institutional roles played by the Sentencing Commission and a sentencing judge. The Sentencing Commission, Ginsburg observed, "has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'"[197] A sentencing court, on the other hand, is better equipped to evaluate the individual circumstances of a particular defendant before it.[198] Justice Ginsburg

193. *See* United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (observing that with its opinions in *Gall*, *Rita*, and *Kimbrough*, the Supreme Court sent a message that "responsibility for sentencing is placed largely in the precincts of the district courts").

194. *See id*. at 192 ("We do not, however, take the Supreme Court's comments concerning the scope and nature of 'closer review' to be the last word on these questions. More will have to be fleshed out as issues present themselves.").

195. *See Kimbrough*, 128 S. Ct. at 574–75. The opinion observes that the Sentencing Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience,'" *id.* at 574 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)), and that in light of these considerations, "closer review may be in order" when the Guidelines result from the exercise of this characteristic institutional role, *id.* at 575.

196. *See id.* at 570–71 (observing that the government contends that the Sentencing Guidelines carry special weight where they result from a congressional policy directive, but finding that the crack/powder sentencing did not so result).

197. *Id.* at 574 (quoting *Pruitt*, 502 F.3d at 1171 (McConnell, J., concurring)).

198. *Id.*

suggested that the reasonableness of a district court's deviation from the Guidelines range may be evaluated on a sliding scale. A non-Guidelines sentence is more likely to be found reasonable when it is based on the exceptional circumstances of the defendant.[199] When the defendant's circumstances are unremarkable and the Guidelines' recommendation is based on the Commission's assessment of empirical data and national experience, Justice Ginsburg writes that a district court's deviation from the Guidelines range may be subject to "closer review."[200]

Justice Ginsburg did not engage this issue in the Court's *Kimbrough* opinion, however. Instead, she found that the sentencing disparity between crack and powder cocaine was not based on the Commission's reasoned assessment of empirical data and past national experience,[201] and therefore the specter of "closer review" did not apply in *Kimbrough*.[202] Justice Ginsburg observed that although most of the Guidelines' recommended sentencing ranges were calibrated according to the typical past practice of sentencing judges,[203] the sentencing ranges for crack and powder cocaine possession, at the time of their creation, reflected a then-existing sentiment that possession of crack was an especially serious drug offense,[204] and resulted from the Commission's effort to mirror the treatment of crack cocaine under the 1986 Anti-Drug Abuse Act.[205]

Justice Ginsburg's majority opinion therefore leaves open the possibility that a sentencing judge is not entitled to deviate from a

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199. *See id.* at 574–75 ("[A] district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" (quoting Rita v. United States, 127 S. Ct. 2456, 2465 (2007)).

200. *See id.* at 575 ("[C]loser review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' . . . ." (quoting *Rita*, 127 S. Ct. at 2465 (2007))).

201. *See id.* ("The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role.").

202. *Id.*

203. *Id.* at 567.

204. *Id.*

205. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1995) ("The current sentencing structure for cocaine offenses is primarily the result of the Anti-Drug Abuse Act of 1986."); *see also Kimbrough*, 128 S.Ct. at 567 ("The Commission did not use [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

guideline based on pure policy grounds when that guideline was formulated pursuant to the Sentencing Commission's exercise of its characteristic institutional role.[206]

2. *Guidelines Promulgated in Response to a Congressional Directive*. Further language in the Court's *Kimbrough* opinion suggests the potential for an additional limitation where a guideline's recommendation results from an explicit congressional directive.

In *Kimbrough*, the government argued that sentencing judges should not be allowed to substitute their own policy judgment for that of Congress.[207] The government conceded in its brief that sentencing judges have broad discretion to disagree with the Sentencing Guidelines' recommendations on policy grounds in the ordinary case.[208] The government argued, however, that the sentencing disparity between crack and powder cocaine presented a special case because the Sentencing Commission incorporated this feature into the Guidelines to give effect to congressional policy. The government thus argued that the Guidelines governing crack cocaine offenses were entitled to special weight that precluded a sentencing judge from deviating from them based purely on policy grounds.[209]

Although Justice Ginsburg and the *Kimbrough* majority dismissed this argument, the Court declined to engage the government's underlying contention that a congressional directive can trumps a sentencing court's policy discretion.[210] Instead, the Court again sidestepped the issue, finding that the sentencing disparity between crack and powder cocaine did not result from an explicit congressional directive and that the government's contention was therefore irrelevant to Kimbrough's case.[211]

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206. Hessick, *supra* note 191, 11–12 ("[T]he Court has suggested that the level of appellate scrutiny for non-Guidelines sentences that are based on policy disagreement may turn on whether a particular Guideline was derived from 'empirical data and national experience.'" (quoting *Kimbrough*, 128 S. Ct. at 575)).

207. *Kimbrough*, 128 S. Ct. at 570 (citing Brief for the United States at 25, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330)).

208. *Id.* (citing Brief for the United States, *supra* note 207, at 16.

209. *Id.* (citing Brief for the United States, *supra* note 207, at 25).

210. *See id.* at 571 (finding no "implicit directive" in the 1986 Anti-Drug Abuse Act).

211. *Id.*

C. The Case for Deviating from the Guidelines Governing White-Collar Crime Even Under a Narrow Interpretation of Kimbrough

Neither of these potential limitations should apply to the sentencing of white-collar criminals. Like the crack-powder sentencing disparity, the fraud Guidelines resulted neither from the Sentencing Commission's exercise of its characteristic institutional role nor from an explicit congressional directive. This Section examines each of these potential limitations in turn, comparing the origin of the crack-powder sentencing disparity to that of the Guidelines governing white-collar crime. This Section concludes that the rationale employed by the Court in *Kimbrough* should extend equally to the Guidelines governing white-collar crime. *Kimbrough*'s grant of discretion should apply to the sentencing of white-collar criminals even in light of these potential limitations.

1. *The White-Collar Crime Guidelines and the Commission's Characteristic Institutional Role.* Like the Guidelines governing crack cocaine offenses,[212] the Guidelines governing white-collar crime did not result from the Sentencing Commission's exercise of its characteristic institutional role. These Guidelilnes were not calibrated pursuant to the Commission's assessment of empirical data and national experience. Instead, they resulted from a combination of the Commission's policy determinations, reaction to public sentiment, and a desire to implement congressional policy.

In a 1995 report to Congress, the Sentencing Commission recalled the environment in which the crack cocaine Guidelines were enacted. The Commission noted that "[d]rug abuse in general, and crack cocaine in particular, had become in public opinion and in [Congress] members' minds a problem of overwhelming dimensions."[213] Additionally, Congress apparently believed that crack cocaine was significantly more harmful than powder cocaine.[214]

These sentiments led Congress to pass the 1986 Anti-Drug Abuse Act,[215] which strengthened mandatory minimum sentences for

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212. *See supra* Part IV.B.1.

213. U.S. SENTENCING COMM'N, *supra* note 205, at 121.

214. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 90 (2002).

215. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18–21 U.S.C.).

drug offenders.[216] The Anti-Drug Abuse Act manifested Congress's particular apprehension toward crack cocaine. It treated the possession of a gram of crack cocaine as equivalent to the possession of one hundred grams of powder cocaine.[217]

The Sentencing Guidelines, drafted shortly after the 1986 Anti-Drug Abuse Act's passage, were designed to mirror that legislation's disparate treatment of crack and powder cocaine. In *Kimbrough*, Justice Ginsburg explicitly observed that with respect to the crack cocaine Guidelines, the Sentencing Commission deviated from its usual method of calibrating the Guidelines based on the typical past practice of sentencing judges.[218] Instead, "[the Commission] employed the 1986 Act's weight-driven scheme."[219] Justice Ginsburg concluded that, for this reason, "[t]he Commission did not use [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses."[220] Consequently, the Court held that the specter of "closer review" did not apply to the crack-powder sentencing disparity and that sentencing judges could freely deviate from the crack cocaine Guidelines based principally on policy grounds.

Likewise, the Guidelines governing the sentencing of white-collar criminals were not based on the Sentencing Commission's assessment of empirical data and national experience. Rather, the Commission explicitly chose to deviate from its ordinary quantitative approach in calibrating these Guidelines.[221] Instead of basing the Guidelines on the past practice of sentencing judges, the Commission applied its own independent assessment of the severity of white-collar crime.[222] As a result, the Guidelines' recommendations were calibrated to yield sentences higher than those that previously had been imposed on white-collar criminals.[223] Subsequent adjustments to the white-collar crime Guidelines only reinforced this departure from the Sentencing Commission's typical practice.[224]

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216. *Id.* § 1002, 100 Stat. at 3207–2 to –4 (codified at 21 U.S.C. § 841(b)(1) (2006)).

217. *Id.*

218. Kimbrough v. United States, 128 S. Ct. 558, 567 (2007). For a description of the Commission's calibration of the Guidelines, see *supra* Part I.A.1.

219. *Kimbrough*, 128 S. Ct. at 567.

220. *Id.*

221. *See supra* notes 39–45 and accompanying text.

222. *See supra* notes 39–45 and accompanying text.

223. *See supra* notes 39–45 and accompanying text.

224. *See supra* Part I.B.

Neither the Guidelines governing crack-cocaine offenses nor those governing white-collar crime resulted from the Sentencing Commission's consideration of judges' past practice. Instead, these Guidelines are a product of the political environment in which they were promulgated, the Commission's desire that the Guidelines reflect perceived congressional policy, and the Commission's own independent policy determinations concerning the severity of a particular class of conduct. Because neither of these sets of Guidelines stemmed from the Sentencing Commission's exercise of its characteristic institutional role, they are not subject to the "closer review" alluded to in the Supreme Court's *Kimbrough* opinion.

2. *The White-Collar Crime Guidelines and Congressional Directives*. Although the Commission's desire to give effect to congressional policy informed both the Guidelines governing white-collar crime and those governing cocaine offenses, the Commission did not promulgate either set of Guidelines pursuant to an explicit congressional directive.

The crack-powder sentencing disparity originated with the 1986 Anti-Drug Abuse Act.[225] Although Congress viewed the disparity as sound policy with respect to statutory minimums and maximums, the *Kimbrough* Court explicitly noted that the Act states nothing about how the Commission should calibrate Guidelines sentences within these brackets.[226] Consequently, the Court rejected the government's argument, holding that it "lack[ed] grounding in the text of the 1986 Act."[227]

Likewise, the Commission likely did not promulgate the Guidelines governing the sentencing of white-collar criminals in response to an explicit congressional directive. Indeed, the initial white-collar crime Guidelines had no statutory foundation beyond that common to all sentencing guidelines: the 1984 Comprehensive Crime Control Act.[228]

The Sarbanes-Oxley Act prompted the Sentencing Commission to revise the white-collar crime Guidelines, but it did so in the form of an invitation rather than a demand. Sarbanes-Oxley stated that the

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225. *See supra* notes 215–19 and accompanying text.

226. *See* Kimbrough v. United States, 128 S. Ct. 558, 571 (2007) ("The statute says nothing about the appropriate sentences within these brackets. . . .").

227. *Id.* at 571.

228. *See supra* Part I.A.1.

Commission should ensure that the Guidelines "reflect the serious nature of [white-collar] offenses"[229] and should consider whether the then-existing sentencing recommendations were "sufficient to deter and punish such offenses."[230] This language likely does not rise to the level of a true congressional directive.[231] In any event, the Act confers no congressional endorsement of the Guideline's emphasis on the loss calculation. Even if Sarbanes-Oxley is interpreted as truly directing the Commission to ensure severe sentences for white-collar crimes, sentencing judges should still be able to reject this recommendation due to a policy disagreement with the Guidelines' emphasis on the problematic loss calculation and consider other factors they deem more relevant to the seriousness of the crime.

CONCLUSION

Early cases indicate that appellate courts are upholding the decisions of sentencing judges who, based on policy concerns, apply *Kimbrough* to deviate from the white-collar crime Guidelines. If this trend continues, courts could begin to move away from the Guidelines' distracting and destructive emphasis on the loss calculation and toward sentences designed to achieve the purposes set forth in § 3553(a).

United States v. Adelson provides an excellent example of this phenomenon.[232] At sentencing, Judge Rakoff refused to follow the Guidelines' recommendation that Adelson be imprisoned for life,[233] despite the finding that Adelson had caused a loss of between $50

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229. White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 905(b)(1), 116 Stat. 804, 805.

230. *Id.* § 905(b)(2), 116 Stat. at 805.

231. In dicta, Justice Ginsburg's opinion observes that Congress has in the past directed the Sentencing Commission to increase a guideline's recommended sentencing range with respect to Guidelines sentences for serious recidivist offenders. *Kimbrough*, 128 S. Ct. at 571. Ginsburg notes that Congress directed the Commission to promulgate guidelines that yield a "substantial term of imprisonment" to such offenders that is "at or near" the statutory maximum. *Id.* (citing 28 U.S.C. § 994(h)–(i) (2006)).

The language in Sarbanes-Oxley is less forceful. Sarbanes-Oxley instructs the commission to "review" the Sentencing Guidelines, and make amendments "as appropriate." White-Collar Crime Penalty Enhancement Act of 2002, § 905(a), 116 Stat. at 805. The ultimate question of "whether the guideline offense levels . . . are sufficient" is left squarely to the Sentencing Commission to determine. *Id.* § 905(b)(2), 116 Stat. at 805.

232. *See* United States v. Adelson, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006). For a more thorough discussion of *Adelson*, see *supra* notes 148–56.

233. *Adelson*, 441 F. Supp. 2d at 506.

million and $100 million.[234] Although Judge Rakoff's decision was based at least in part upon Adelson's specific circumstances,[235] his opinion contained strong language deriding the Guidelines' severity and emphasis on factors such as the loss calculation.[236] Specifically, Rakoff observed that the Guidelines' recommendation in Adelson's case exposed "the utter travesty of justice that sometimes results from the [g]uidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[237]

The Second Circuit confirmed the reasonableness of Adelson's sentence.[238] The Second Circuit held that in light of *Kimbrough*, Adelson's sentence is a valid result of Judge Rakoff's considered assessment of the propriety of the Guidelines' recommendation in light of the purposes of sentencing codified in 18 U.S.C. § 3553(a).[239] In so holding, the Second Circuit acknowledged the potential limitations of the Supreme Court's *Kimbrough* holding but nevertheless upheld *Kimbrough*'s application to the white-collar crime Guidelines.[240]

This trend should continue. The Sentencing Guidelines pertaining to white-collar crime are deeply flawed. They recommend ranges that are generally too high, and are too narrowly focused on the loss calculation, an imprecise measure that poorly approximates a defendant's culpability.[241] More sentencing courts should therefore follow Judge Rakoff's example, recognize the limitations of the Guidelines regime, and use their post-*Kimbrough* discretion to deviate from the Guidelines when necessary to achieve more just sentencing outcomes.

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234. *See id.* at 510 (finding a Guidelines loss calculation in an amount between $50 million and $100 million).

235. *See id.* at 513 (considering the fact that Adelson joined the conspiracy only because "he feared the effects of exposing what he had belatedly learned was the substantial fraud perpetrated by others").

236. *See id.* at 512–13.

237. *Id.* at 512.

238. United States v. Adelson, 301 F. App'x 93, 95 (2d Cir. 2008), *aff'g* 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

239. *Id.* at 94–95.

240. *Id.*

241. *See supra* Part III.