"STREET JUSTICE" FOR CORPORATE FRAUD—MANDATORY MINIMUMS FOR MAJOR WHITE-COLLAR CRIME

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ABSTRACT

In the midst of one of the worst financial crises in American history, everyone is looking for answers and many politicians are looking to point the blame for failures in institutional safeguards that regulate major investment companies. Although only one small piece of the puzzle, the lack of severe penalties for the most serious white-collar criminals stands out, especially considering the lessons supposedly learned in the wake of the Enron accounting-related scandals of 2001–2002. The breakdown was not for want of strict sentencing statutes and Guidelines; Congress enacted these as part of the Sarbanes-Oxley reform act in 2002, provisions that this Article first reviews in depth. The problem lies in federal district court judges' disdain for imposing the strict penalties recommended by law, especially in light of the new sentencing freedoms accorded to them by the U.S. Supreme Court in *United States v. Booker*. This Article will show, through statistical analysis, the failure of judges to apply the appropriate sentences. In order to achieve appropriate enforcement of corporate regulatory schemes, judges must be persuaded to enact the harsh terms of imprisonment recommended by Congress. Under current law, the best way to accomplish this goal is through mandatory minimums, and this Article advocates for such minimums to be applied to major white-collar fraud in a very specific way. Because of the nature of white-collar crime, many negative aspects of mandatory minimums currently in place for drug and firearm violations are inapplicable when minimums are applied to white-collar offenses. Furthermore, the statutory amendment could be narrowly crafted to ensure only the most deserving violators who perpetrate devastating losses are punished by lengthy statutorily-imposed prison terms. This Article lastly gives a recommendation for such an amendment.

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INTRODUCTION

Coming on the heels of several of the largest bankruptcies in history, allegations of fraud permeating the entire financial services industry, and a precipitous drop in investor confidence, Congress decided to act to stem further losses and abuse.

The sentence above is referring to the Global Financial Crisis of 2008–2009, right? Clearly, the bankruptcies refer to Lehman Brothers and Washington Mutual,[1] the allegations of fraud involve mispriced and inaccurately rated mortgages[2] and sham investment companies,[3] and the Congressional remedial actions occurred through the implementation of the Troubled Asset Relief Program ("TARP").[4] Unfortunately, however, that description could also be a perfect summation of the 2001–2002 accounting scandals involving the now infamous names of Enron, WorldCom, and Arthur Andersen, among others.[5] That crisis, unprecedented at the time, rocked the nation, caused investor confidence to plummet, and led to legislative action in corporate oversight, which President George W. Bush referred to as the "most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[6]

Although there are many differences between the two major financial crises of the past decade, there are enough similarities (as encapsulated by the opening statement) that it raises the question: Why were these supposedly "far-reaching reforms" so ineffective at preventing

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[1] CONG. OVERSIGHT PANEL FOR ECONOMIC STABILIZATION, 110th CONG., QUESTIONS ABOUT THE $700 BILLION EMERGENCY ECONOMIC STABILIZATION FUNDS: THE FIRST REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL FOR ECONOMIC STABILIZATION 2 (Comm. Print 2008).

[2] *Credit Rating Agencies and the Financial Crisis: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 4 (2008) (opening statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Government Reform) ("The story of the credit rating agencies is a story of colossal failure.").

[3] *See, e.g.*, Michael Lewis & David Einhorn, Op-Ed., *The End of the Financial World as We Know It*, N.Y. TIMES, Jan. 4, 2009, at WK9, *available at* http://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html.

[4] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, tit. I, 122 Stat. 3765, 3765–800 (codified in scattered sections of 5, 12, 15, and 31 U.S.C.).

[5] Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 222–23, 234 (2004).

[6] Remarks on Signing the Sarbanes-Oxley Act of 2002, 2 PUB. PAPERS 1319, 1319 (July 30, 2002) [hereinafter Signing Remarks].

corporate misdeeds that led to a widespread economic disaster of even greater severity? The entire spectrum of reform introduced after the 2001–2002 scandals is beyond the scope of this Article. Instead, this Article will focus on a particular title of the Sarbanes-Oxley Act of 2002, Title IX (the "White-Collar Crime Penalty Enhancement Act of 2002" or "WCCPA"), which sought to increase the penalties of major white-collar crime through higher maximum statutory penalties and enhanced U.S. Sentencing Guidelines ("Guideline(s)" or "Sentencing Guidelines"), thus eliminating a disparity between white-collar and "street" crime.[7] Ultimately, however, federal judges have failed to accept these increased penalties, and continue to be more lenient towards serious white-collar fraud than other types of crime, hampering the important objectives of the WCCPA.[8] This Article aims to demonstrate that disparity through examination of federal sentencing data, and then offers mandatory minimums as a suggestion to help provide increased deterrence for would-be white-collar offenders.

Part I of this Article briefly examines the legislative history behind Sarbanes-Oxley and inspects the text of the WCCPA. The context of the Act is important in investigating Congress's reasoning behind the various provisions placed in the WCCPA, as well as providing a baseline for judging the success of these provisions after the Act's implementation. One of the sections in the WCCPA tasked the United States Sentencing Commission ("Sentencing Commission") with enhancing the Sentencing Guidelines for major white-collar crimes, but left the actual responsibility to the Sentencing Commission, so Part I addresses the 2003 amendments as well.

Part II takes a purely quantitative look at sentencing of white-collar defendants after the Sentencing Commission's 2003 Guideline enhancement. This data shows that even after a specific congressional directive, federal district court judges continually refuse to apply high Guideline ranges to major white-collar crimes—especially compared to other offenses involving similar Guideline ranges. The Sentencing Commission provides data to the United States Department of Justice's Bureau of Justice Statistics in bulk form, tabulating every defendant sentenced in federal district court each year. The Bureau then publishes this data, which contains information regarding the offense, the Guideline range, the actual sentence imposed, and the reason(s) for departure from the Guidelines (if there is one). Reviewing the data for all defendants that have been sentenced under rules incorporating the 2003 amendment, Part II shows that not only are major white-collar

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7 White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, 116 Stat. 804, 804–06 (codified in scattered sections of 18, 28, and 29 U.S.C.).

8 *See infra* Parts II.B–C.

crimes granted downward departures with greater frequency than comparable nonwhite-collar offenses, but the departures granted for major white-collar crimes are a much larger percentage of the Guideline minimum. As a result, the WCCPA was a failure.

Part III of the Article presents a solution to judges' leniency: mandatory minimum terms of imprisonment, statutorily set by Congress. This Part explains first why major white-collar criminal activity would be a perfect candidate for imposition of minimum penalties in the statutes by examining the typical rationales for mandatory minimums and individually demonstrating that they apply to white-collar crime. Part III also examines the academic discussion surrounding mandatory minimums—the majority of which is negative—and distinguishes serious white-collar crimes from those federal crimes that have been traditionally subject to mandatory minimums, mainly drug and firearm violations. Much of the negative scholarship on mandatory minimums deals with defendant characteristics, as well as fundamental inequities when severe sentences are imposed in one instance, but not another. White-collar crimes are differentiated both through the status of the defendant and by careful construction of penalties to avoid inequitable effects. Finally, this Part presents an example of the statutory amendments that could be enacted by Congress.

I. THE WHITE-COLLAR CRIME PENALTY ENHANCEMENT ACT OF 2002

The White-Collar Crime Penalty Enhancement Act is the rather grandiose-sounding title that Congress placed on Title IX of the Sarbanes-Oxley Act of 2002,[9] and it contains all the statutory provisions that are the focus of this discussion. It is important to note that the debate about a possible penal disparity between white-collar and "street" crime is practically as old as the term white-collar crime itself, and sentencing is only one aspect of the overall trend.[10] Even so, observers were acutely aware of sentencing disparities prior to the accounting scandals of 2001–2002,[11] and one of the legislative goals stated on the

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9 White-Collar Crime Penalty Enhancement Act of 2002, 116 Stat. at 804–06.

10 In his work, *Defending White-Collar Crime* (part of the influential Yale Studies on White-Collar Crime), Kenneth Mann highlights several differences between the investigation and prosecution of white-collar and "street" crimes. KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 9–13 (1985). Notable among these differences is the involvement of white-collar defense counsel even before the criminal investigation begins, thus allowing for more rigorous advocacy. *Id.* at 4.

11 *See, e.g.*, Michael D. Silberfarb, Note, *Justifying Punishment for White-Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act*, 13 B.U. PUB. INT. L.J. 95, 105 (2003) ("Between 1991 and 2001, the annual average length of sentence for white-collar criminals always fell between 19.0 and 20.8 months; Martin F. Murphy, *No Room at the Inn? Punishing White-Collar Criminals*, BOSTON B.J., May–June 1996, at 4, 14

record for the creation of the Sentencing Commission in 1984[12] was to achieve parity in sentencing white-collar criminals.[13] Famous names from the savings-and-loan scandals of the 1980s, like Michael Milken (served 22 months) and Charles Keating (4.5 years),[14] provide some evidence that there existed a punishment disparity in prior similar financial crises (although both men were sentenced for longer[15]).

Nevertheless, this Article seeks to focus solely on a discussion of the lack of success of the WCCPA as witnessed by the present level of sentencing disparity. Regardless of the previous debate and legislative action over the years, the WCCPA was birthed in the fire of the accounting scandals of 2001–2002, and thus its description must necessarily begin with its legislative history.

("Concerns about the costs of white-collar crime and questions about lenient treatment for white-collar criminals led to major changes in the way federal white-collar defendants are treated under the [F]ederal [S]entencing [G]uidelines, which took effect in 1987."). During the same period, however, violent offenders received sentences ranging between 89.5 and 106.7 months, and drug offenders received sentences ranging from 71.7 months to 88.2 months." (citing U.S. Sentencing Comm'n, Monitoring Data Files 1995–2002, http://www.ussc.gov/LINKTOJP.htm (select the hyperlink for each fiscal year))). Even judges were aware of the disparity. "If [the] study is accurate, the pattern of sentencing revealed is deplorable. . . . I cannot reconcile a policy of sending poorly educated burglars from the ghetto to jail when men in the highest positions of public trust and authority receive judicial coddling when they are caught fleecing their constituencies." Browder v. United States, 398 F. Supp. 1042, 1046 (D. Or. 1975), *aff'd*, 544 F.2d 525 (9th Cir. 1976) (unpublished table decision).

12 Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, § 212, 98 Stat. 1987, 2017–18 (codified as amended at 28 U.S.C. § 991 (2006)).

13 S. REP. NO. 98-225, at 77 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3260 ("[S]ome major offenders, particularly white[-]collar offenders . . . frequently do not receive sentences that reflect the seriousness of their offenses."). Then-Circuit Judge Stephen Breyer, one of the Sentencing Commission's original members, wrote,

> The Commission found in its data significant discrepancies between pre-Guideline punishment of certain white-collar crimes, such as fraud, and other similar common law crimes, such as theft. The Commission's statistics indicated that where white-collar fraud was involved, courts granted probation to offenders more frequently than in situations involving analogous common law crimes; furthermore, prison terms were less severe for white-collar criminals who did not receive probation.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20 (1988).

14 Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 333 (2007) (citing Grace Wong, *Kozlowski Gets Up to 25 Years*, CNNMONEY.COM, Sept. 19, 2005, http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski_sentence/index.htm).

15 *See* Christian Berthelsen, *Keating Pleads Guilty to 4 Counts of Fraud*, N.Y. TIMES, Apr. 7, 1999, at C2 (reporting a twelve-year sentence for Keating); Ronald Sullivan, *Milken's Sentence Reduced by Judge; 7 Months Are Left*, N.Y. TIMES, Aug. 6, 1992, at A1 (reporting a ten-year sentence for Milken).

A. Legislative History

The WCCPA was not originally part of the Sarbanes-Oxley bill. The first bill that would become Sarbanes-Oxley was introduced by Representative Michael Oxley as House Bill 3763 under the title "Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002";[16] it passed the House on April 24, 2002.[17] That bill had no criminal provisions for white-collar penalty enhancements,[18] partly because it was generated by the House Financial Services Committee.[19] The focus instead was to improve "the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . . through increased supervision of accountants that audit public companies, strengthened corporate responsibility, increased transparency of corporate financial statements, and protections for employee access to retirement accounts."[20] Senator Paul Sarbanes, Chairman of the Committee on Banking, Housing, and Urban Affairs, then introduced a competing bill as Senate Bill 2673, entitled "Public Company Accounting Reform and Investor Protection Act of 2002."[21] This bill passed the Senate unanimously on July 15, 2002.[22] The Sarbanes bill also focused primarily on oversight[23] and did not contain any criminal provisions.[24]

As these two regulatory-minded bills were being considered in their respective chambers, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, introduced Senate Bill 2010 with the title "Corporate and Criminal Fraud Accountability Act of 2002."[25] This bill for the first time injected criminal penalties into the discussion, although it originally was narrowly focused on "criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain [f]ederal investigations."[26] But, Senate Bill 2010 did address the Sentencing Guidelines for fraud, creating the section that would ultimately task the

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16 H.R. REP. NO. 107-414, at 2 (2002).

17 H.R. 3763, 107th Cong., 148 CONG. REC. 5548 (2002).

18 Jennifer S. Recine, Note, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 39 AM. CRIM. L. REV. 1535, 1546 (2002).

19 *Id.*; *see also* Ann Marie Tracey & Paul Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging: The Criminalization of the Sarbanes-Oxley Act*, 25 N. ILL. U. L. REV. 125, 130 (2004) (citing Recine, *supra* note 18, at n.94).

20 H.R. REP. NO. 107-414, at 16.

21 S. REP. NO. 107-205, at 1 (2002).

22 S. 2673, 107th Cong., 148 CONG. REC. 12,961 (2002).

23 S. REP. NO. 107-205, at 2.

24 Recine, *supra* note 18, at 1546.

25 S. REP. NO. 107-146, at 1 (2002).

26 *Id.* at 2.

Sentencing Commission with enhancing the white-collar criminal ranges for major violations.[27] Senator Leahy noted on the record the importance of "enhancing criminal penalties in cases involving obstruction of justice and serious fraud cases where a large number of victims are injured or when the victims face financial ruin . . . [in order] to deter financial misconduct."[28]

The bill that *actually* became the WCCPA was introduced by then-Senator Joe Biden and Senator Orrin Hatch in the Senate Judiciary Committee as Senate Bill 2717 on July 10, 2002.[29] Thus, the only testimony on record specifically addressing the white-collar sentencing disparity is in reference to the provisions of Senate Bill 2717.[30] In a hearing before the Senate Judiciary Committee "on white[-]collar crime and the . . . inadequacy of penalties for these offenses"[31] on July 24, 2002, then-Senator Biden stated his concerns:

> Way before the truly mind-boggling events at WorldCom, we were exploring this question of corporate responsibility and the extent to which so called "white[-]collar" offender should be held accountable in the criminal justice system. Embarrassingly, it is a question that has for years evaded this body, the courts, and the overall criminal justice system.
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> I say embarrassingly because the answer to that question strikes me as painfully obvious. Of course *white[-]collar criminals should be treated as harshly under the law as petty thieves or drug dealers*.[32]

To accomplish this goal, then-Senator Biden recommended his provisions "that would enhance the underlying criminal penalties for fraud, for conspiracies to commit certain white[-]collar offenses, and for violations of pension protection measures."[33]

The Senator expounded these views further during testimony on the Senate floor. He described the WCCPA as resulting from "a series of hearings I held this year in the Judiciary Subcommittee on Crime and Drugs in which we heard about *the 'penalty gap' between white[-]collar offenses and other serious Federal criminal offenses*."[34] In describing how

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27 *Id.* at 13.

28 148 CONG. REC. 14,450 (2002).

29 148 CONG. REC. 12,516 (2002).

30 *See Congressional Comments About Sarbanes-Oxley*, 15 FED. SENT'G REP. 252, 252–53 (2003) (providing a summary of congressional comments to date about Sarbanes-Oxley).

31 *Ensuring Corporate Responsibility: Using Criminal Sanctions to Deter Wrongdoing: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 273 (2003) (statement of Sen. Joseph R. Biden, Jr., Chairman, Subcomm. on Crime and Drugs).

32 *Id.* (emphasis added).

33 *Id.* at 274.

34 148 CONG. REC. 14,919 (2002) (emphasis added).

the WCCPA would close that gap, Senator Biden mentioned two examples of equalizing penalties between white-collar and "street" crime, comparing a pension fraudster to "a car thief who committed interstate auto theft"[35] and mentioning that the WCCPA "harmonized conspiracy for white[-]collar fraud offenses with our drug statutes"[36] because "what is good for the drug kingpin is good for the white[-]collar crook."[37] In closing, he argued that white-collar criminal statutes had been ineffective up to that point partly because so few of those criminals were serving hard time; thus, the level of deterrence was too low.[38] As one of the two original proponents of the WCCPA, Senator Biden's message could not have been clearer: serious white-collar offenses need to be punished equally with other serious federal crimes in order to provide the level of deterrence necessary to prevent major financial fraud from disrupting the economy. As discussed in Part II, because of the lack of cooperation by federal judges, the WCCPA has not lived up to the Senator's goals.

The WCCPA in Senate Bill 2717, along with the other criminal provisions in Senator Leahy's Senate Bill 2010, were incorporated into the Sarbanes Senate Bill 2673,[39] which as a more comprehensive act dominated the Oxley bill, House Bill 3763, and provided most of the text for Sarbanes-Oxley when it emerged from the joint conference committee.[40] The Sarbanes-Oxley Act of 2002, containing the WCCPA as Title IX, passed both chambers of Congress shortly thereafter, and was signed into law by the President on July 30, 2002.[41] Although the WCCPA was only one short title of the entire legislation, it was still important enough to generate comment. In testimony on the House floor, Representative Oxley stated, "Investors can be assured that convicted corporate criminals will be sentenced to long jail time. In my view, the prospect of doing time, real time, will serve as an effective deterrent to wrongdoing in the corporate suite."[42] Indeed, the provision that raised the maximum exposure of fraud crimes from five to twenty years (allowing white-collar crime to have greatly expanded Guideline ranges) was singled out by Representative John Sununu in debate on the House

35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.* at 14,920.
39 Tracey & Fiorelli, *supra* note 19, at 133.
40 *Id.*; *see also* Recine, *supra* note 18, at 1547.
41 148 CONG. REC. D866 (daily ed. July 31, 2002).
42 148 CONG. REC. 14,487 (2002).

floor,[43] and President Bush in his signing statement.[44] Once again, it is clear that increased criminal exposure for white-collar offenses was an important component of this legislative reform.

B. Text of the WCCPA

So what does the WCCPA actually say? The following is a summary of the pertinent sections of the WCCPA for the issue of sentencing disparity under examination in this Article.

1. Section 902: Attempts and Conspiracies to Commit Criminal Fraud Offenses[45]

This section declares, "Any person who attempts or conspires to commit any offense under this chapter [that is, interstate fraud] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."[46] In doing so it created a special criminal conspiracy statute for interstate fraud offenses, codified as 18 U.S.C. § 1349, that allowed for punishment of conspiracy and attempt violations at the same level as the underlying fraud.[47] Prior to the WCCPA, conspiracy to commit fraud followed the same rules as general conspiracy, which provides for a maximum imprisonment of five years regardless of the underlying offense.[48] At first glance, it may seem that with this section Congress was actually making fraud penalties more severe than those levied in comparable offenses. As it turns out, however, most of the major federal crimes already operated with their own conspiracy statutes that served the same purpose as § 1349, often with identical language. For example, the major narcotics offenses,[49] Racketeer Influenced and Corrupt Organizations ("RICO") predicates,[50] terrorism offenses,[51] and even (federal) homicide,[52] all have

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43 148 CONG. REC. 15,261 (2002) ("This conference report provides double the jail time that was included in the Senate bill—up to 20 years—for corporate criminals who defraud the public, destroy documents or obstruct justice.").

44 Signing Remarks, *supra* note 6, at 1320 ("And the maximum prison term for common types of fraud has quadrupled from 5 to 20 years.").

45 White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 902(a), 116 Stat. 804, 805 (codified at 18 U.S.C. § 1349 (2006)).

46 *Id.*

47 *Id.*

48 18 U.S.C. § 371 (2006) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . each shall be fined under this title or imprisoned not more than five years, or both.").

49 21 U.S.C. § 846 (2006) ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

50 18 U.S.C. §§ 1962(d), 1963(a) (2006) (stating that "[i]t shall be unlawful for any person to conspire to violate any of the provisions . . . of this section" and "[w]hoever

(and had in 2002) statutes that make conspiracy punishable at the same level as the underlying offense. Thus, in context this section was undoubtedly meant to equalize conspiracy to commit white-collar violations with other serious federal crimes.[53] Of course, acting alone, this section would not have had any effect, considering all the fraud crimes prior to the WCCPA had statutory maximums of five years. That is where the next section comes in.

2. Section 903: Criminal Penalties for Mail and Wire Fraud[54]

Section 903 had the simple effect of raising the statutory maximum penalties on mail and wire fraud from five years to twenty years.[55] But in doing so, this section represents the real core of the WCCPA. Mail and wire fraud are the most important white-collar criminal statutes because they can be used to "provide federal jurisdiction over a broad array of frauds."[56] This section, in combination with section 905 that mandated an increase in Sentencing Guidelines discussed below, actually created a completely new region of *serious* white-collar offenses that would be punished at comparable levels with other major federal crimes. Prior to

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violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment)").

51 18 U.S.C. § 2339B(a)(1) (2006) ("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.").

52 18 U.S.C. § 1117 (2006) ("If two or more persons conspire to violate [the federal homicide statutes], and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.").

53 The statute also created an "attempt" violation that generally does not exist in Title 18. But, "[i]n the case of mail and wire fraud, perhaps this is not exceedingly important considering that mail and wire fraud by their definition (and exposition in case law) include inchoate crimes which have not come to fruition or succeeded." Recine, *supra* note 18, at 1554–55. Furthermore, the statute in its language drops the "overt act" requirement, but this aspect simply serves to make it parallel other conspiracy statutes for major federal crimes, like 21 U.S.C. § 846. *See* United States v. Dempsey, 733 F.2d 392, 396 (6th Cir. 1984) (stating that proof of an overt act is unnecessary with regards to 21 U.S.C. § 846).

54 White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 903, 116 Stat. 804, 805 (codified at 18 U.S.C. § 1341 (2006)).

55 *Id.*

56 Shani S. Kennedy & Rachel Price Flum, *Mail and Wire Fraud*, 39 AM. CRIM. L. REV. 817, 818 (2002); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 57 (1997) (claiming "mail and wire fraud . . . are probably the most important" white-collar offenses); Brian C. Behrens, Note, *18 U.S.C. § 1341 and § 1346: Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 ST. LOUIS U. PUB. L. REV. 489, 526 (1993) ("This 'catch-all' [mail fraud] statute may be the most important tool for apprehending the new breed of crime—white[-]collar crime.").

the WCCPA, the only way for white-collar defendants to receive more than a five year term of imprisonment would be if the district court ordered multiple sentences for fraud counts to run consecutively; however, this rarely happened because defendants often pled guilty to a single count.[57] In theory, after the WCCPA, major white-collar violators could easily receive sentences of as much as twenty years; but, as discussed in Part II, in practice this is still extremely rare.

3. Section 904: Criminal Penalties for Violations of the Employee Retirement Income Security Act of 1974 ("ERISA")[58]

The impact of this section was to raise the maximum statutory penalty for fraud violations under ERISA from one to ten years.[59] This statute is used far less frequently then the mail and wire fraud statutes for the simple reason that it is much more narrowly focused. In any case, the purpose was the same: raising statutory exposure of imprisonment for major white-collar violations.[60]

4. Section 905: Amendment to Sentencing Guidelines Relating to Certain White-Collar Offenses[61]

This section dovetails with section 903 by directing the Sentencing Commission to implement increased Sentencing Guidelines for serious fraud offenses.[62] In doing so, it "filled in" the new region of increased statutory maximums provided by section 903; if there was no increased Guideline exposure to complement the new maximums, it would be almost impossible for crimes to obtain imprisonment of greater than five years[63] (assuming that judges followed the Guidelines[64]). As a broad

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57 Recine, *supra* note 18, at 1551–52.

58 White-Collar Crime Penalty Enhancement Act of 2002, § 904, 116 Stat. at 805 (codified at 29 U.S.C. § 1131 (2006)).

59 *Id.* § 904(2), 116 Stat. at 805.

60 Section 904 was more influential when examined in the context of a companion provision in Sarbanes-Oxley which illegalized insider trading during the "blackout period" of employee pension funds covered by ERISA. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, tit. III, § 306, 116 Stat. 745, 779–84 (codified at 15 U.S.C. § 7244 (2006). "This provision would have criminalized the actions of executives at Enron who unloaded stock while their employees—plan participants—were unable to do so." Recine, *supra* note 18, at 1553.

61 White-Collar Crime Penalty Enhancement Act of 2002, § 905, 116 Stat. at 805–06.

62 *Id.* § 905(a), 116 Stat. at 805.

63 This is for the simple reason that the previous Guidelines for fraud violations contemplated statutory maximums of five years, so Guideline exposure ended there for even the most egregious fact patterns.

64 The WCCPA was passed in 2002, which was prior to the U.S. Supreme Court's decision that made the Guidelines advisory rather than mandatory. United States v. Booker, 543 U.S. 220, 245 (2005) ("[T]he federal sentencing statute . . . makes the Guidelines effectively advisory."). But, even before that holding, judges could and did order

directive to the Sentencing Commission "[p]ursuant to its authority [to] . . . review and . . . amend the Federal Sentencing Guidelines,"[65] section 905 contains no hard numbers. It is useful, however, in providing another window into what Congress hoped to accomplish through the passage of the WCCPA. For instance, this section requires the Sentencing Commission to "ensure that the Sentencing Guidelines and policy statements reflect the serious nature of the offenses[,] . . . the growing incidence of serious fraud[,] . . . and the need to . . . *deter, prevent, and punish such offenses*."[66] The Sentencing Commission's response will be discussed below in Part I.C. For now, it is important to merely point out that Congress unmistakably wanted to augment prison time for serious fraud.

5. Section 906: Corporate Responsibility for Financial Reports[67]

Like section 902, section 906 creates a new criminal statute in the interstate fraud section of the code. But, unlike the new conspiracy statute, this statute, codified at 18 U.S.C. § 1350, is very specific. Section 1350 requires Corporate Executive Officers ("CEOs") and Corporate Financial Officers ("CFOs") of publicly reporting companies under the Securities Exchange Act of 1934[68] to certify in the corporation's periodic report that the report "fully complies with . . . the Securities Exchange Act [o]f 1934 . . . and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer."[69] Thus, if the top executives do not believe the information contained in their public filings is accurate, they will be individually guilty of a crime. The statute sets out two tiers of maximum penalties: ten years and a $1,000,000 fine for "knowing" the reports were inadequate,[70] and twenty years and a $5,000,000 fine for "willfully" certifying reports that are known to be inaccurate.[71] Because this section only affects the top two executives of a corporation, it is perhaps even more singly focused toward major white-collar criminals than other statutes, and shows that Congress meant to provide serious

departures based on Sentencing Guidelines § 5K2.0. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2008). Part II, infra, is a discussion of judges' failure *after* the WCCPA to follow Guidelines for white-collar criminals, regardless of whether the court justifies the departures under Section 5K2.0 or *Booker*.

65 White-Collar Crime Penalty Enhancement Act of 2002, § 905(a), 116 Stat. at 805.

66 *Id.* § 905(b)(1), 116 Stat. at 805 (emphasis added).

67 *Id.* § 906, 116 Stat. at 806 (codified at 18 U.S.C. § 1350 (2006)).

68 Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, tit. I, sec. 13, 15, 48 Stat. 881, 894–96 (codified as amended at 15 U.S.C. §§ 78m(a), 78o(d) (2006)).

69 18 U.S.C. § 1350(b) (2006).

70 *Id.* § 1350(c)(1).

71 *Id.* § 1350(c)(2).

penalties for even the most powerful individuals in corporate America if they act fraudulently.

C. Impact on the United States Sentencing Guidelines

Pursuant to the directive in the WCCPA, the Sentencing Commission initially responded by issuing an emergency amendment effective January 25, 2003.[72] It then permanently incorporated those changes (and others) into the Guidelines for the 2003 Federal Sentencing Guidelines Manual, which went into effect on November 1 of that year.[73] With regard to major frauds, the most significant Guideline provision amended was Sentencing Guidelines § 2B1.1, which provides the base offense level and offense characteristics for embezzlement and fraud, among other crimes.[74] The specific statutes that are governed by § 2B1.1 include the interstate frauds (discussed above in Part I.B) and most offenses under the Securities and Securities Exchange Acts,[75] including insider trading.[76]

Sentencing Guideline ranges are computed using a base offense value for the particular statute violated combined with specific offense characteristics.[77] The § 2B1.1 amendments incorporated alterations in both sections.[78] First, the base offense level was increased for violation of any statute with a maximum penalty of at least twenty years,[79] an obvious reference to the updated interstate fraud statutes. Although the

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72 Notice of Promulgation of Temporary, Emergency Amendments to the Sentencing Guidelines and Commentary, 68 Fed. Reg. 3080 (Jan. 22, 2003). The requirement for an "emergency" stop-gap amendment came from a provision in the WCCPA. *See* White-Collar Crime Penalty Enhancement Act of 2002, § 905(c), 116 Stat. at 806 ("The United States Sentencing Commission is requested to promulgate the Guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act . . . .").

73 Sentencing Guidelines for United States Courts, 68 Fed. Reg. 26,960 (May 16, 2003). Therefore, the data examined in Part II deals specifically with defendants sentenced under the rules of 2003 or later.

74 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (2008).

75 *Id.* § 2B1.1 cmt. statutory provisions (listing securities violations under 15 U.S.C. §§ 77e, 77q, 77x, 78j, 78ff, and interstate fraud violations under 18 U.S.C. §§ 1341, 1344, 1348, 1350, among others).

76 15 U.S.C. § 78j (2006). While technically this statute is covered under Sentencing Guidelines § 2B1.4, that provision actually only refers back to § 2B1.1 for offense characteristics after providing a base offense level that is one point higher. U.S. SENTENCING GUIDELINES MANUAL § 2B1.4(b)(1) (2008).

77 U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(b) (2008) ("Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular [G]uideline in Chapter Two in the order listed.").

78 *Id.* § 2B1.1 (2008).

79 Sentencing Guidelines for United States Courts, 68 Fed. Reg. 26,960, 26,962 (May 16, 2003) (amending U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (2008)).

increase was only one point, it still had the effect of limiting "the availability of a probation only sentence . . . to offenses involving loss amounts of $10,000 or less, assuming a two level reduction for acceptance of responsibility."[80] Second, the loss table (which provides for additional points based on the amount of money involved in the fraud) was expanded to include losses in excess of $200,000,000 and $400,000,000, respectively, as the old table only contemplated losses in excess of $100,000,000.[81] Thus, any loss over $400,000,000 attributed to the defendant gained an extra four points from this adjustment. Also, courts were given the freedom to consider "reduction in the value of equity securities . . . that resulted from the offense" as loss for this table,[82] opening up white-collar criminals to potentially huge valuations of loss based solely on market responses. Third, the Sentencing Commission added an additional two points for frauds involving more than 250 victims, as compared to the prior Guidelines, that contemplated only frauds of more than fifty victims.[83]

Fourth, the amendment augmented a section that is now codified as Sentencing Guidelines § 2B1.1(b)(14), but at the time was listed as § 2B1.1(b)(12).[84] Before the amendment, this section "provided a four level enhancement and a minimum offense level of level 24 if the offense substantially jeopardized the safety and soundness of a financial institution."[85] The update allowed imposition of these same enhancements for (1) jeopardizing the financial security of a financial institution, (2) endangering the solvency or financial security of an organization that was either publicly traded or had at least 1,000 employees, or (3) endangering the solvency or financial security of 100 victims, without any need for endangering an organization.[86] Because this section has some overlap with the section addressing number of victims generally, the amendment capped the enhancement total between the two sections at eight points, although the minimum of twenty-four was unaffected.[87] Fifth, the emergency amendment added a four-point enhancement if the defendant violated the securities laws and was an officer or a director of a publicly traded company at the time; the permanent amendment then added licensed broker dealers and investment advisors to this enhancement, and added violations of the

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80 *Id.* at 26,964.

81 *Id.* The tax table located at Sentencing Guidelines § 2T4.1 was similarly modified for tax frauds. *Id.* (amending U.S. SENTENCING GUIDELINES MANUAL § 2T4.1 (2008)).

82 *Id.*

83 *Id.* (amending U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2)(c) (2008)).

84 *Id.*

85 *Id.* at 26,964–65.

86 *Id.* at 26,965.

87 *Id.*

commodities laws as well.[88] It is important to note that "securities law" for the purposes of this enhancement applies to convictions under general fraud statutes—like wire fraud—if the underlying fraud is a violation of securities law.[89] Finally, the amendment also increased penalties for obstruction of justice along with some additional minor alterations.[90]

1. The "Typical" Major White-Collar Criminal

The impact of the changes can best be assessed by a Guideline calculation for a "typical" serious white-collar offender, both before and after the amendment. By serious, it is meant that the defendant has caused economic damage of at least several millions of dollars, and possibly significantly more depending on his role. "Typical" is more problematic to define, so this exercise will contemplate two types of white-collar criminals: the CEO of a publicly-traded corporation engaged in securities fraud (but not insider trading),[91] and an individual who sets up a sham investment company that solicits clients mainly by word-of-mouth.[92] Under this analysis of "typical," it is assumed that the defendant pled guilty to the charges rather than go to trial.[93] Finally, as a "typical" defendant, none of the other adjustments[94] or departures[95] will apply in this analysis, excluding acceptance of responsibility for pleading guilty.[96] The calculation is laid out in the table below.

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[88] *Id.* (amending U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(16) (2008), which at the time of enactment was codified at § 2B1.1(b)(14) (2003)).

[89] *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. application note 14(B) (2008)).

[90] *Id.* at 26,965.

[91] The CEO is assumed to have caused the loss of over $400,000,000 and affected over 250 victims. In other words, he is the worst possible offender contemplated by the Sentencing Guidelines. *Supra* notes 81–83 and accompanying text.

[92] The sham investor is assumed to have caused the loss of approximately $5,000,000 and affected approximately twenty-five victims. He represents a middle-of-the-road offender.

[93] The Sentencing Commission data suggests that roughly 96% of defendants receiving sentences pled guilty rather than go to trial, and fraud as a primary offense category is no different. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.11 (2008) [hereinafter U.S. SENTENCING COMM'N SOURCEBOOK] , *available at* http://www.ussc.gov/ANNRPT/2008/Table11.pdf. This assumption is important, because a prompt guilty plea usually earns an offender a three point reduction under the Guidelines, which will also be assumed for the purposes of this analysis. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2008).

[94] *See generally id.* §§ 3A–D (listing the several adjustments that can be applied to individual defendants).

[95] *See generally id.* ch. 5, pt. K (listing several circumstances where a judge may depart from Guidelines).

[96] *Id.* § 3E1.1.

Guideline Calculation: Two Typical White-Collar Criminals, Pre-2003[97] & Post-2003 Rules[98]					
Guidelines § 2B1.1		Pre-2003		Post-2003	
(Subsection)	Comment	Sham Investor	CEO	Sham Investor	CEO
(a)	Base Offense Level	6	6	7	7
(b)(1)	Loss Calculation	+18	+26	+18	+30
(b)(2)	Victim Numbers	+2	+4	+2	+6
(b)(12)	Caused Insolvency	-	-	-	+2
(b)(14)	Securities Laws	-	-	-	+4
Subtotal Offense Level		26	36	27	49
Guidelines § 3E1.1		-3	-3	-3	-3
Total Offense Level		23	33	24	46
Guideline Range in Months[99]		46–57	135–168 (60)	51–63	Life (240)

The affect of the 2003 amendment is minor on the "sham investor"; he gets around the same Guideline range, roughly four to five years. But the CEO goes from a Guideline range of around eleven to fourteen years to life in prison! More realistically, the statute the CEO was charged under most likely had a five-year maximum before the 2003 amendment (if it was like mail or wire fraud), and a twenty-year maximum afterward, so his exposure went from five to twenty years. Consequently, the message suggested by this simple example is that Congress, through and by administrative action of the Sentencing Commission, meant to seriously enhance prison time for the most serious white-collar offenders, while keeping the Guidelines consistent for minor and mid-level crimes. Prior to the WCCPA, the worst offenders would probably be capped at a five-year statutory maximum, and even if this maximum was overcome in some way—like through consecutive sentences for multiple counts—the Guideline range could go no higher than fourteen years. This cap of fourteen years existed at a time when the Guidelines were mandatorily

97 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a), (b)(1)(2), (b)(12), (b)(14) (2002).

98 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a), (b)(1)(2), (b)(12), (b)(14) (2003).

99 The calculation assumes that the defendants have no criminal history, which is *very* typical for white-collar criminals. *See* Murphy, *supra* note 11, at 5 (claiming "white[-] collar criminals . . . typically ha[ve] no criminal record").

imposed. After the WCCPA, offenders are capped at statutory maximums of twenty years or more,[100] and can easily have Guideline ranges exceeding life in prison, depending on the overall economic damage wrought by the fraud. Thus, the WCCPA "created" the crime of major frauds, to receive parallel levels of punishment to major drug offenses or organized crime. Regrettably, the judiciary has failed to cooperate through actual imposition of tough sentences, and the deterrence that Congress attempted to provide for these disastrous crimes remains a fiction.

II. SENTENCING DATA FOR SERIOUS WHITE-COLLAR OFFENDERS

This Part presents a discussion of the sentencing data published by the Sentencing Commission, focusing on white-collar defendants sentenced under the Guidelines of 2003 or later. The Sentencing Commission releases data on defendants sentenced in federal court, which is provided to them by the various district courts and magistrates.[101] The data is then published by the U.S. Department of

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[100] Some fraud statutes provide for higher statutory maximums then the basic mail and wire frauds. *See, e.g.,* 18 U.S.C. §§ 1344, 1348 (2006) (providing a maximum of thirty and twenty-five years for bank fraud and securities fraud, respectively). Some of these statutes—like § 1344—existed prior to Sarbanes-Oxley and represented another way to get past the five year statutory maximum of mail and wire fraud. Others—like § 1348—were a creation of a Sarbanes-Oxley, albeit in a separate title from the WCCPA. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, tit. VIII, § 807, 116 Stat. 745, 804 (codified at 18 U.S.C. § 1348 (2006)).

[101] The following is a summary of the data (for fiscal year 2007, the most recent year available) provided, along with the actual database file:

> These data contain records of criminal defendants who were sentenced pursuant to provisions of the Sentencing Reform Act (SRA) of 1984 and reported to the United States Sentencing Commission (USSC) during fiscal year 2007. It is estimated that over 90 percent of felony defendants in the federal criminal justice system are sentenced pursuant to the SRA of 1984. The data were obtained from the United States Sentencing Commission's Office of Policy Analysis (OPA) Standardized Research Data File. The Standardized Research Data File consists of variables from the Monitoring Department's database, which is limited to those defendants whose records have been furnished to the USSC by United States district courts and United States magistrates, as well as variables created by the OPA specifically for research purposes. The data include variables from the Judg[ ]ment and Conviction (J and C) order submitted by the court, background and [G]uideline information collected from the Presentencing Report (PSR), and the report on sentencing hearing in the Statement of Reasons (SOR). These data contain detailed information such as the [G]uideline base offense level, offense level adjustments, criminal history, departure status, statement of reasons given for departure, and basic demographic information. These data are the primary analysis file and include only statute, [G]uideline computation, and adjustment variables for the most serious offense of conviction. These data are part of a series designed by the Urban Institute (Washington, DC) and the Bureau of

Justice, Bureau of Justice Statistics, and is available by year in spreadsheet format for free download off the Internet.[102]

A. Methodology

The analysis in this Part employs sentencing data from 1994 to 2007.[103] But, the focus of this study is on white-collar offenders sentenced under post-2003 amended rules. This class of defendants is fairly homogenous, because the sentencing rules[104] and Guidelines[105] for white-collar offenses have not changed significantly in that time. As a result, serious white-collar defendants sentenced under current rules today are sufficiently described by this group, making it an extremely useful class for study. Merely describing the class as white-collar defendants sentenced under post-2003 amended rules implies two separate distinctions that need to be made, and as a corollary two possible comparisons between classes; this Article scrutinizes both.

1. The "White-Collar" Class Distinction

First, a distinction needs to be made between white-collar defendants and all other defendants. The debate and scholarship on how the term "white-collar" is or should be defined is extensive, partly

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> Justice Statistics. Data and documentation were prepared by the Urban Institute.

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR No. 24232, FEDERAL JUSTICE STATISTICS PROGRAM: DEFENDANTS SENTENCED UNDER THE SENTENCING REFORM ACT, 2007, at ii (2009), *available at* http://dx.doi.org/10.3886/ICPSR24232.

[102] The data files examined in this Article are all available from the Inter-University Consortium for Political and Social Research (ICPSR), located at http://www.icpsr.umich.edu.

[103] The selection of this period was simply dictated by the data that was actually available for study.

[104] There would seem to be a glaring problem in this statement, as it ignores completely the impact of *United States v. Booker*, 543 U.S. 220, 245 (2005), which made the Guidelines advisory rather than mandatory. *But see supra* note 64 (discussing how judges prior to *Booker* provided departures through Sentencing Guidelines § 5K2). As it turns out, judges continue to rely on these § 5K2 departures, and while the departure rates have certainly increased after *Booker*, the reasoning behind a non-Guideline sentence is irrelevant for the purposes of this Article. *See* U.S. SENTENCING COMM'N SOURCEBOOK *supra* note 93, fig.G (detailing a 10–12% decrease in Guideline sentences based on the impact of *Booker*). Indeed, even if *Booker* is the justification that a judge gives for a departure and hence departs more often, it is still part of the phenomenon this Article seeks to document: that judges are departing more often for white-collar crime. Furthermore, the baseline for comparison is other serious crimes that of course are also subject to the ruling in *Booker*.

[105] There have been other amendments to Sentencing Guidelines § 2B1.1 since 2003, but none have altered the provisions that are critical for serious white-collar offenders, namely those now located at §§ 2B1.1(a), (b)(1), (b)(2), (b)(14), and (b)(16). *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2008) *with* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2003).

because it is unclear whether the term refers to the offender or the offense.[106] For the purposes of this study, the definition is necessarily constrained by the information available in the Sentencing Commission data. As detailed below, the data for each defendant contains a variable recording the primary offense with which that defendant is sentenced (that is, the offense with the highest prison term). This variable is the best reference point in an "offense-based" definition, and the data does not contain any "offender-based" information that would be useful towards identifying white-collar criminals. Consequently, the definition of "white-collar" used in this Article's study must be offense-based, and is articulated as follows: "any defendant for whom the primary sentenced offense is *any type of fraud*."

This definition is suitable because all the criminal statutes that were discussed in Part I were frauds, and fraud standing alone is a nonviolent crime. Indeed, in Part I.A's description of legislative history, it was shown that Senators Leahy and Biden and President Bush used the terms "fraud" and "white-collar crime" somewhat interchangeably.[107] While it is certainly possible that a defendant could be sentenced for multiple crimes where only one is a type of fraud, it is highly unlikely that a defendant could be sentenced to a "street" crime, like narcotics or homicide, and a fraud at the same time where the fraud offense results in a higher sentence. The reason for this is that the highest levels of Guidelines for fraud come into play only when the loss amount is in the millions of dollars, meaning that the fraudster must have been in some high position of public trust to have access to such capital. There simply have not been examples of such public figures that are able to maintain drug-distribution or other criminal roles on the side.[108] Toward the lower end of the sentencing spectrum, "street" crimes, like drug dealing and illegal firearm possession, ramp up penalties much more quickly than

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[106] *See* Mark D. Harris & Anna G. Kaminska, *Defending the White-Collar Case at Sentencing*, 20 FED. SENT'G REP. 153, 153 (2008). The man who coined the term, Sociologist Edwin Sutherland, meant it unambiguously to refer to the offender, embracing any crime "'committed by a person of respectability and high social status in the course of his occupation.'" *Id.* (quoting EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 9 (1949)). Of course, such a socioeconomically focused definition, if used in any actual criminal statute or administrative decision, would probably be in violation of the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, and perhaps also the bill of attainder prohibition of the United States Constitution. *Id.* art. I, § 9, cl. 3. Nevertheless, "[o]n any of these definitions, the crimes that fall into the white-collar category today are highly diverse, ranging from a CEO involved in a complex insider trading scheme to a bartender who fails to report all of her tips." Harris & Kaminska, *supra*, at 154.

[107] *See supra* Part I.A.

[108] This is not to say such an intriguing criminal is impossible to imagine. But, for example, if a drug dealer managed to convince directors of a publicly-traded corporation that he or she was a viable candidate for CEO, there would be a strong argument that such a defendant is more white-collar in character than not.

frauds,[109] meaning that if the most serious offense is a fraud, then the defendant can almost certainly be classified as white-collar. Thus, this definition is never over-inclusive.

Conversely, this definition might be slightly under-inclusive if there are other types of violations besides fraud that should be considered white-collar. For the reasons set forth above, however, fraud certainly appears to be the most significant category of offenses describing white-collar crime, and in any case, an under-inclusive definition does not destroy the integrity of the study, because if white-collar defendants are truly getting departures more frequently and in greater magnitude, then the cases that are white-collar but not fraud will be counted along with the general class for comparison, decreasing the observed disparity.

The comparison between post-2003 white-collar offenders and all other defendants sentenced at the same time is fundamental to this study because it demonstrates that white-collar offenses sentenced from 2003 up to and including the present are being treated more leniently than other criminals with similar levels of severity as defined by the Sentencing Guidelines.

2. The "Post-2003" Class Distinction

Second, a distinction needs to be made between pre- and post-2003 white-collar offenders. This distinction obviously does not have the potential for controversy, like the white-collar distinction, but it is an important one to make because the WCCPA drastically changed white-collar Sentencing Guidelines as described in Part I. As detailed below, the data contains a variable recording the Guidelines amendment in the year used for sentencing. There is one small complication in this distinction that was touched on in Part I.C. Several of the WCCPA changes were implemented in an emergency amendment that went into effect on January 25, 2003, with the rest coming into effect in the normal Guideline update on November 1, 2003.[110] But, there is no information in the data regarding emergency amendments, so it is impossible to separate the defendants sentenced under the original 2002 rules from those sentenced under the 2002 rules with the emergency amendment. For the purposes of this study, the impact of the emergency amendment

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[109] As an example, mere illegal possession of a firearm by a convicted felon, which violates 18 U.S.C. § 924(g) (2006), combined with two prior violent or narcotics convictions under the Guidelines achieves an automatic offense level of 24. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2) (2008). On the one hand, a defendant sentenced for drug dealing under one of the provisions of 21 U.S.C. need only deal five grams of crack (cocaine base) to receive that level. *Id.* § 2D1.1(c)(8). On the other hand, for a fraud conviction to have a base offense level of at least 24, the defendant need have caused the loss of at least $2.5 million. *Id.* § 2B1.1(a), (b)(1)(J).

[110] *See supra* notes 72–73 and accompanying text.

is ignored, and only the normal 2003 update is considered. This decision makes sense for two reasons: (1) the emergency amendment only included *some* of the changes in the full amendment, and thus is not as significant; and (2) by leaving those defendants sentenced under the emergency amendment in the comparison pre-2003 class, the post-2003 class maintains its homogeneity and consistency with defendants sentenced under present rules. Such a division slightly distorts the comparison between pre- and post-2003 white-collar defendants, but its overall impact is small considering the pre-2003 amendment class consists of data from 1994 to 2002, and the emergency amendment was in effect for only a fraction of the defendants sentenced under 2002 rules.

The comparison between pre- and post-2003 white-collar defendants is less fundamental to the study, but it is still informative in showing that the changes implemented in the WCCPA have failed to provide the end goal of higher sentences for the most serious white-collar offenses.

3. Detailed Description of the Data

The sentencing data available is for fiscal years 1994–2007, and as provided exists as a separate file for each year.[111] The data is formatted so that a case defines a single defendant sentenced during that fiscal year. There are many variables recorded in the files, but only a few are important for this study. Additionally, all years contain these variables, so the data was first combined into one file for all years, and then stripped of all unnecessary variables. The remaining variables were cleaned up to eliminate any numerical codes[112] or values that would throw off the calculations; these procedures are mentioned in the comments section of the table below, which lists all variables used for the purposes of this Article. Not all defendants have data recorded for every variable, which requires a reduction in the data actually used for the study as discussed following the table.

Variable	**Description**	**Comment**
AMENDYR	Amendment year Guidelines under which the defendant is	This is, with few exceptions, the amendment year Guidelines in operation on the date the defendant was sentenced.[113]

[111] The reference numbers for each year 1994–2007 are, in chronological order, ICPSR 23762, 24013, 24032, 24051, 24070, 24089, 24108, 24127, 24146, 24165, 24182, 24200, 24217, and 24232.

[112] The term "numerical code" refers to the technique of putting values like 9990 into a variable to identify some factor that cannot be conveyed by a regular number. Such values obviously present problems for calculations and need to be modified.

[113] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(a) (2008). One exception is that new Guideline amendments cannot be applied if they would violate the *ex post facto*

	sentenced.	
TOTPRISN	Total prison sentence ordered by the federal district court, in months.	There were some codes in this variable that needed to be modified. All life, death, and 360+ month sentences were normalized to 360 months (30 years) because the Guidelines do not ever contemplate numbers higher than 360,[114] and life/death sentences require a number for calculation purposes. Any codes for less than a day or "time-served" were set at 0 months. Finally, any codes for missing or unknown were simply removed from the data.
XMINSOR	Minimum of the calculated sentencing Guideline range, in months.	The same codes as existed in TOTPRISN were changed in XMINSOR in the same way. Additionally, there were several XMINSOR values in the data that were impossible because they are not valid minimum Guidelines (only about 35 out of more than 800,000 cases). These values were rounded up to the nearest possible Guideline minimum.[115]
SUB_CAT	Bureau of Justice Statistics code for information on the defendant's primary sentenced offense.	The primary offense code records the category of the defendant's most serious offense (that is, the offense with the longest imposed prison sentence). Codes 190, 200, 430, and 600 are frauds. Everything else is not. About 1,700 cases are missing this code, but such cases can still be considered as "general crimes."

prohibition in the Constitution, because, for example, the penalties have been increased for a violation after its completion. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (citing U.S. CONST. art. I, § 9, cl. 3). Another exception is for cases that have been remanded by a Circuit Court of Appeals for resentencing.

114 *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2008).

115 *See id.* (portraying some numbers that simply do not exist as possible Guideline range minimums). This step was important because the calculations are done based on averages for each minimum, so having singular outliers could throw off the data, whereas rounding allows for the use of closely approximated real minimums.

Because the Guideline amendment year is necessary to know whether the defendant was sentenced before or after the 2003 amendments, only cases with a valid AMENDYR could be examined. Furthermore, both TOTPRISN and XMINSOR must be valid, because this study is solely concerned with comparing sentences given their applicable Guideline range. Thus, data missing values for any of those three variables had to be removed from consideration. Finally, only defendants with Guideline minimums of at least one year were considered.[116] The breakdown of the number of cases in significant data segments is tabulated below, including benchmarks for serious white-collar crimes as defined by Guideline range minimums.

Data Segment	**Number of Cases**	**Percent of Total**
Total defendants sentenced, 1994–2007	819,600	100%
Total w/ valid AMENDYR, TOTPRISN, XMINSOR	757,845	92.47%
Total, 1994–2007, valid, 12-month+ minimum	571,348	69.71%
Total defendants sentenced, 1994–2007, valid, 12+	571,348	100%
White-collar defendants, 1994–2007	54,335	9.51%
All defendants, post-2003 rules	180,150	31.53%
White-collar defendants, 1994–2007	54,335	100%
White-collar defendants, pre-2003 rules	42,943	79.03%
White-collar defendants, post-2003 rules	11,392	20.97%
All defendants, post-2003 rules	180,150	100%
All nonwhite-collar defendants, post-2003 rules	168,758	93.68%
White-collar defendants, post-2003 rules	11,392	6.32%
White-collar, post-2003, Guideline minimum 5+ yrs	1,267	0.70%
White-collar, post-2003, Guideline minimum 10+ yrs	304	0.17%
White-collar, post-2003, Guideline	104	0.058%

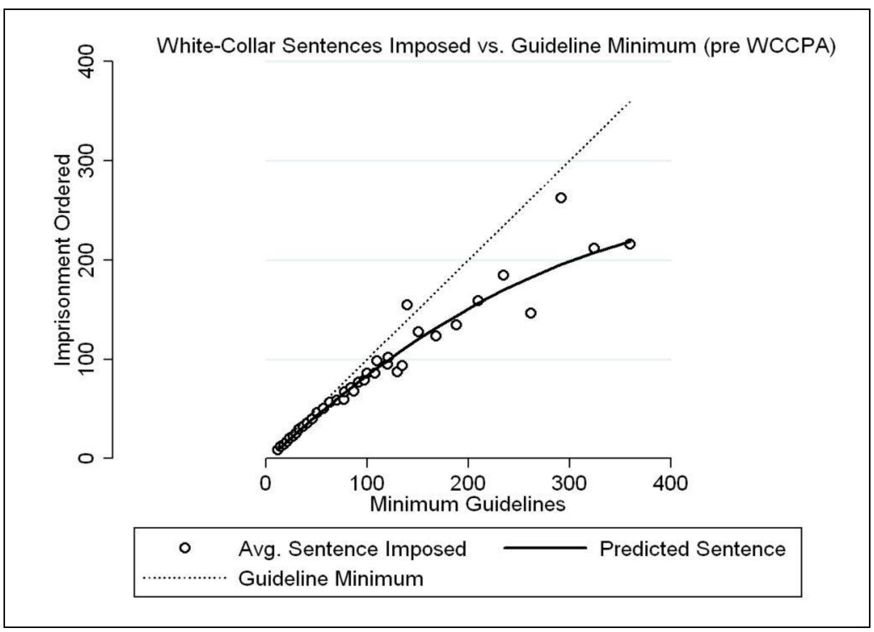
[116] This was done for two reasons. First, this Article's purpose is to examine serious crimes, and anything with less than a one year Guideline minimum is too minor to be applicable. Second, Guideline minimum sentences of one year or more are distinctive because they are Zone D offenses on the sentencing table, and as such can only have their term satisfied by actual imprisonment. *Id.* § 5C1.1(f). Lesser offenses have the option for probation or intermittent confinement. *Id.* § 5C1.1(b)–(e).

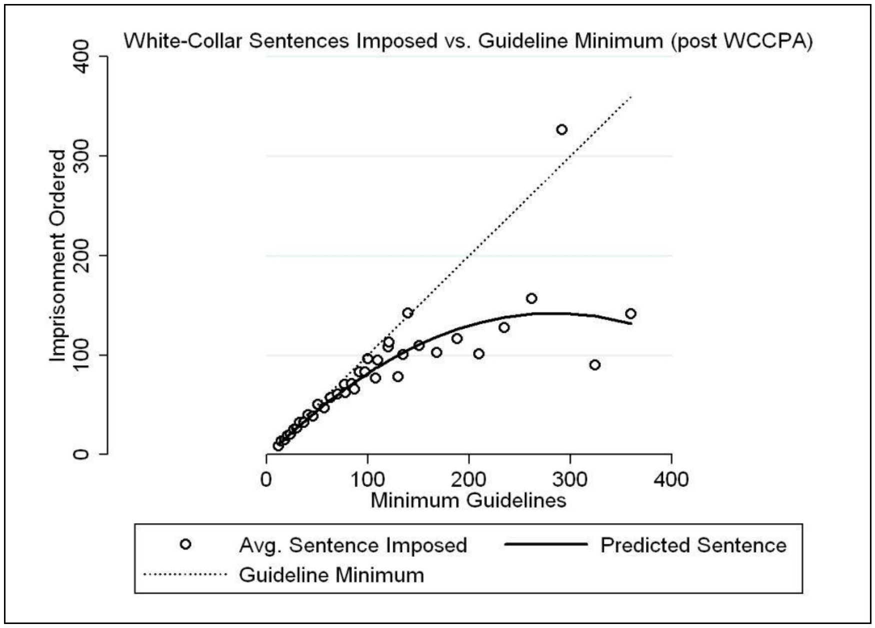
minimum 15+ yrs		
White-collar, post-2003, Guideline minimum 20+ yrs	45	0.025%

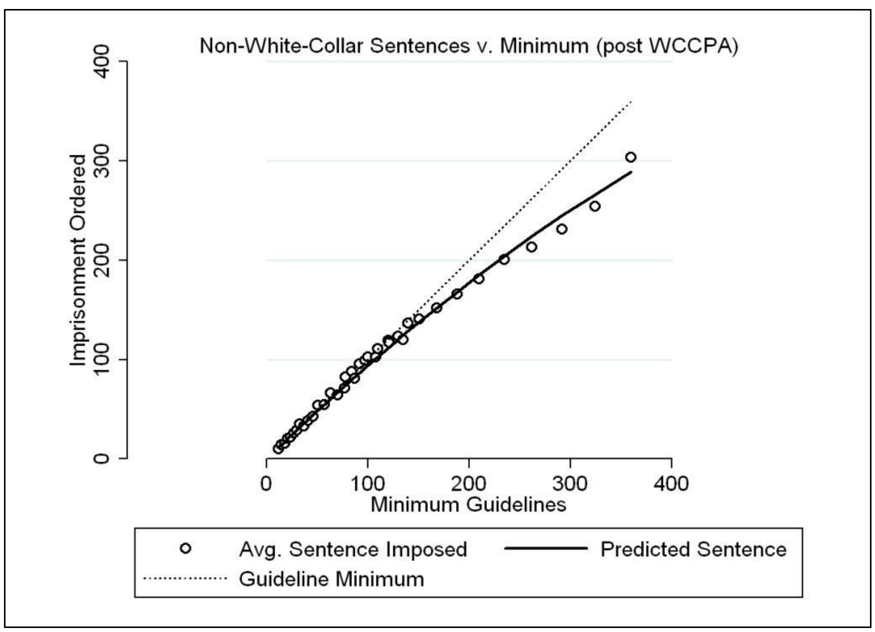
B. Sentence Imposed Compared to Guideline Minimum

The first calculation investigates the sentence given to defendants, based on the minimum suggested Sentencing Guidelines for their crime. White-collar defendants after the WCCPA are compared both to white-collar defendants before the WCCPA, and more importantly, all *other* crimes sentenced contemporaneously. The purpose of this comparison is to show that white-collar criminals are being granted departures more frequently and in higher magnitude, leading to more lenient sentences, given the same Guideline range as other criminals. A secondary purpose is to show that the WCCPA was ineffective in changing sentencing severity for white-collar criminals.

The comparison is done graphically by showing the divergence between sentences imposed from the Guideline minimum for each possible minimum, allowing for a visual representation of actual sentences imposed along a continuum of severity, as defined by the Guidelines. Linear regressions were run on each class of defendants and provide predictions for the sentence that will be imposed, given a specific Guideline minimum. The results are graphed below, followed by a table comparing numerical data for the examples introduced in Part I.C.







It can be seen from the graphs that the expected sentence for all classes of defendants lies below the Guideline minimum, so that the average defendant can expect a sentence with a slight downward departure. There are two important conclusions drawn from this study:

(1) White-collar defendants get sentenced more leniently than nonwhite-collar defendants across all levels of severity, as defined by the Guideline range; and

(2) Disparity increases drastically for the most serious crimes.

Thus, judges are giving breaks to white-collar crime when compared to street crime, and they give the biggest breaks to those defendants that Congress specifically wanted to punish more harshly through the implementation of the WCCPA. As a secondary conclusion, it is easy to see that the WCCPA did not affect the intended change on harsher sentencing for white-collar criminals. The *United States v. Booker*[117] decision has an impact on this conclusion insofar as it had a noticeable impact on departure rates.[118] Nevertheless, the purpose of showing this comparison is not to claim that the WCCPA actually had the opposite effect that it intended, but instead that it just has not had its intended effect. Noticeably, white-collar defendants are not being sentenced more severely at the highest levels, so whether or not this should be partially blamed on *Booker*, the WCCPA was a failure. Numerical data is used in the table below to compare the examples introduced in Part I.C.

All Units in Months		**"Sham Investor"**	**"Fraudulent CEO"**
Pre-WCCPA	**Guideline Range**	46–57	135–168
	Expected Sentence	40	109
Post-WCCPA	**Guideline Range**	51–63	Life
	Expected Sentence	45	132
Change in Expected Sentence		**+5 (+12.5%)**	**+ 23 (+21.1%)**
Exp. Sentence for Equivalent Street Crimes (Post-WCCPA)		49	289
White-Collar Disparity		**-4 (-8.2%)**	**-157 (-54.3%)**

[117] 543 U.S. 220 (2005).

[118] *See supra* note 104 and accompanying text. By increasing departure rates across the board, *United States v. Booker* makes it more difficult to draw conclusions from any comparison between white-collar sentencing under the old and new rules.

From this table, it is shown that both types of "typical" white-collar defendants have their sentences boosted slightly after the WCCPA,[119] but the disparity between white-collar and street crimes is extreme for the most serious crimes—white-collar crimes at the highest Guideline range result in sentences that are, on average, less than half the duration of sentences given for all other violations similarly situated at the highest Guideline range.

C. Magnitude of Departures When Granted

The next calculation takes a different approach and looks at the magnitude of downward departures, when given. It has already been shown above in Part II.B that white-collar crimes, especially the serious ones, are given more lenient sentences. As touched upon above, judges can make downward departures from Guidelines in a variety of ways (as opposed to sentencing a defendant within the Guidelines[120]), and only defendants with downward departures were considered in this study. The purpose of this calculation is to show that white-collar criminals who are given departures are granted deviations that are a much larger percentage of their minimum Guideline-suggested sentence. In this calculation, as opposed to the first, only white-collar and other criminals after the WCCPA are compared, because the WCCPA did not change any departure rules.[121]

The comparison is done graphically by showing the average percent of downward departures for each Guideline minimum, allowing for a visual representation of departure magnitude along a continuum of severity. Regressions were run on each class of defendants and provide predictions for the magnitude of a departure if granted, given a specific Guideline minimum. The results are graphed below, followed by a table with the predicted departure percentage (rounded to the nearest whole

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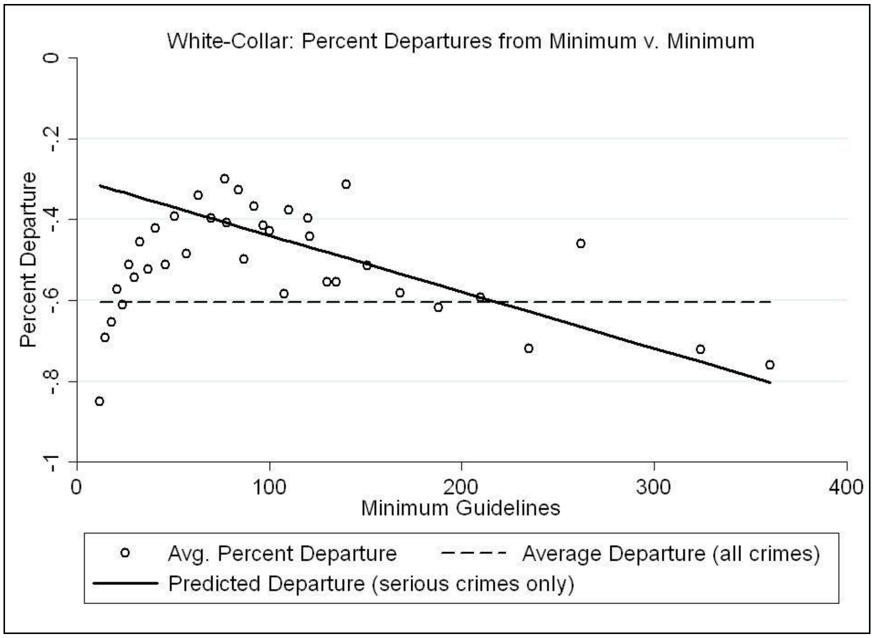
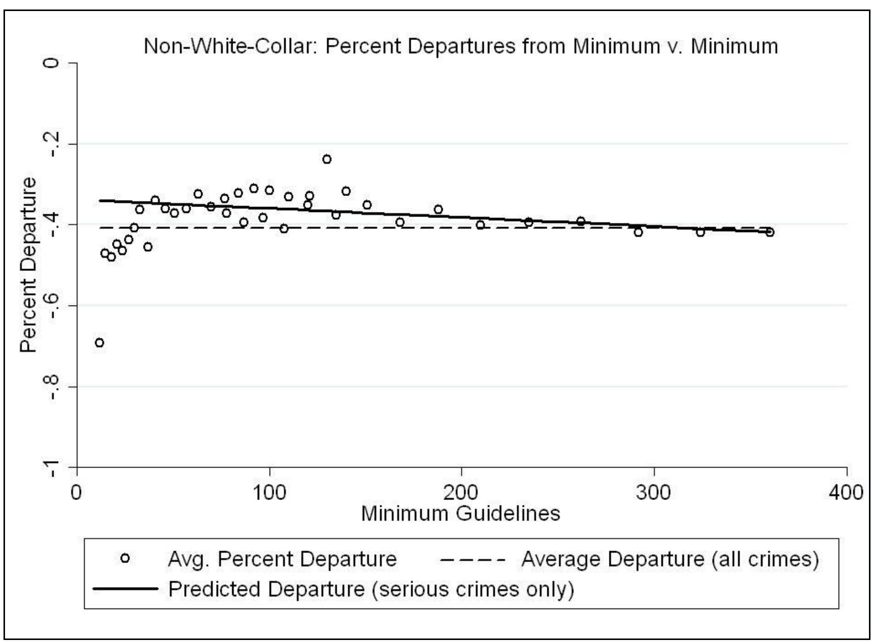
[119] The increase is not nearly to the level desired by Congress, as exemplified by its multiplication of statutory maximums for some frauds by four. *See* White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 903, 116 Stat. 804, 805 (codified at 18 U.S.C. §§ 1341, 1343 (2006)).

[120] Judges can also make *upward* departures under the same reasoning as downward departures. *See supra* note 64. These, however, are comparatively rare. For instance, in fiscal year 2008, only 1.5% of defendants were sentenced above their Guideline range. U.S. SENTENCING COMM'N SOURCEBOOK, *supra* note 93, tbl.N. In comparison, 39% of defendants were given below-range sentences, either on account of departures or the *Booker* decision. *Id.* Thus, upward departures represent relative outliers in sentencing, and by only taking downward departures into account, this part of the study documents a more significant phenomenon.

[121] In theory, the WCCPA could obviously have an indirect effect on judges' decisions for downward departures by simply implying that harsher sentencing procedure was necessary. This point is not crucial to the Article though, because there were no provisions in the WCCPA changing departure rules. Showing whether the WCCPA accomplished something it never attempted to do does not bear on its success or failure.

percent) of the two classes of defendants for each possible Guideline range.





As seen from these graphs, white-collar and nonwhite-collar defendants both benefit from downward departures of substantial magnitude, when given. Even so, white-collar defendants benefit from departures that are a larger percentage of their Guideline minimum at every level of severity, and have an average departure magnitude across all levels that is approximately twenty percent higher. Additionally, the departure percentage increases drastically for white-collar defendants as the seriousness of the crime increases, while the percentage for non-white-collar defendants remains fairly constant. The actual numbers are tabulated below.

Guideline Range (months)[122]	**Expected Departure: Percentage of Guideline Minimum**		
	White-collar	**Nonwhite-collar**	**Disparity**
63–78	-39%	-35%	**-4%**
70–87	-40%	-35%	**-5%**
77–96	-41%	-35%	**-6%**
78–97	-41%	-35%	**-6%**
84–105	-42%	-36%	**-6%**
87–108	-42%	-36%	**-6%**
92–115	-43%	-36%	**-7%**
97–121	-43%	-36%	**-7%**
100–125	-44%	-36%	**-8%**
108–135	-45%	-36%	**-9%**
110–137	-45%	-36%	**-9%**
120–150	-47%	-36%	**-11%**
121–151	-47%	-36%	**-11%**
130–162	-48%	-37%	**-11%**
135–168	-49%	-37%	**-12%**
140–175	-49%	-37%	**-12%**
151–188	-51%	-37%	**-14%**
168–210	-53%	-37%	**-16%**
188–235	-56%	-38%	**-18%**
210–262	-59%	-38%	**-21%**
235–293	-63%	-39%	**-24%**
262–327	-67%	-40%	**-27%**
292–365	-71%	-40%	**-31%**
324–405	-75%	-41%	**-34%**

[122] For this calculation, the Guideline ranges start at 63–78, because due to the nature of the data (as is easily seen from the graphs) the regression is only accurate for—and indeed was only run on—sentences above a minimum of sixty months. As a result, data for this study is not available for less severe Guideline ranges; but the focus of this Article is primarily on serious crimes.

360–life	-80%	-42%	**-38%**
Spread	**41%**	**7%**	
Average Departure—all Guideline ranges	**-60%**	**-41%**	**-19%**

Once again, this data shows that judges are treating white-collar criminals more leniently and are giving enormous departures for the most serious offenses. Moreover, across all levels of severity, the expected departure magnitude for white-collar criminals is significantly greater. Because Guideline sentences are meant to provide sentences that are "'presumptively reasonable'" for any offense,[123] it is damaging to the consistency of the federal sentencing system that judges are so reticent to apply Guideline sentences to serious white-collar crimes.

III. AN ANSWER TO THE DISPARITY: MANDATORY MINIMUMS FOR WHITE-COLLAR CRIME

Mandatory minimum terms of imprisonment enacted by Congress via statute provide the perfect solution to district court judges' refusal to impose harsh sentences through the Guidelines on serious white-collar violators. In general, mandatory minimums exist for a wide array of federal violations and evoke varying levels of controversy. Early in its history, the Sentencing Commission was tasked by Congress to conduct an in-depth analysis into the impact of mandatory minimum statutes on federal criminal sentencing.[124] That report, released in 1991, details the breadth of mandatory minimum statutes in the federal code, with such provisions then-existing in over sixty statutes.[125] Furthermore, the report shows mandatory minimums are not a new concept—mandatory

[123] Rita v. United States, 127 S. Ct. 2456, 2462 (2007) (quoting United States v. Rita, 177 Fed. Appx. 357, 358 (4th Cir. 2006) (unpublished)). This presumption applies to appellate court review. *Id*.

[124] Crime Control Act of 1990, Pub. L. No. 101-647, tit. XVII, § 1703, 104 Stat. 4789, 4845–46.

[125] *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (1991) [hereinafter U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES] ("Today there are approximately 100 separate federal mandatory minimum penalty provisions located in 60 different criminal statutes."). The information in this report is slightly outdated, but it is still useful for examining overall trends and goals, especially since the most frequently applied mandatory minimum offenses have remained consistent. The Sentencing Commission has stated that updating this report is a priority, but unfortunately it has yet to be done. Notice of Final Priorities, 72 Fed. Reg. 51,884 (Sept. 11, 2007).

life sentences have existed for offenses such as piracy and first-degree murder since 1790.[126]

In modern sentencing procedure, the term "mandatory minimum" almost always reflects a more narrow application of statutes, and it is these statutes that also spark the most heated debates over the ultimate impact on different racial and socioeconomic groups. This is primarily due to the fact that more than ninety percent of the sentences imposed with statutorily-mandated imprisonment terms are given for violation of only four different federal laws.[127] These four statutes are the following federal crimes:

(1) Possession with Intent to Manufacture or Distribute a Controlled Substance[128];
(2) Possession of Controlled Substance[129];
(3) Importation or Exportation of Controlled Substance[130]; and
(4) Use of a Firearm During a Drug or Violent Crime.[131]

The importance of emphasizing the high usage of these statutes in mandatory minimum sentencing lies in the fact that most scholarship on mandatory minimums assumes the term itself to refer to one of these crimes. Thus, many of the arguments advanced by opponents of mandatory minimums focus on their application to drug and violent crimes,[132] and do not envision hypothetical application to white-collar violations. For this reason, such arguments are often inapplicable to white-collar crime, as is discussed in Part III.B. This discussion,

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[126] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, app. A; *see also* 18 U.S.C. §§ 1111, 1651 (2006) (setting the mandatory minimum for first-degree murder and piracy, respectively).

[127] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 11. The four statutes listed were responsible for ninety-four percent of the mandatory minimum sentences from 1984 to 1990; in that period, more than half the statutes were never even used once. *Id.* (referencing 18 U.S.C. § 924(c), 21 U.S.C. §§ 841, 844, 960 (2006)). Again, the data is somewhat outdated, but these statutes continue to be frequently used for mandatory minimum sentences.

[128] 21 U.S.C. § 841 (2006).

[129] *Id.* § 844.

[130] *Id.* § 960.

[131] 18 U.S.C. § 924(c) (2006).

[132] In particular, simple possession of controlled substances under 21 U.S.C. § 844 has generated a firestorm of anti-minimum commentary. In fact, the Commissioner of the Sentencing Commission himself recently petitioned Congress for repeal of the mandatory minimum for simple possession of crack cocaine. *See Cracked Justice—Addressing the Unfairness in Cocaine Sentencing: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 43 (2008) (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission) ("[T]he Commission strongly and unanimously recommends that Congress . . . [r]epeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.").

however, will initially focus on why serious white-collar crimes present such ideal targets for application of mandatory minimums.

A. Mandatory Minimums Are Appropriate for White-Collar Crime

To understand why mandatory minimums would be appropriate for serious white-collar crime, it is useful to first examine justifications for mandatory minimums in general. Fortunately, the 1991 Sentencing Commission Report

> conducted a comprehensive review of relevant legislative history, Executive Branch statements, and views expressed in academic literature. The Sentencing Commission [also] conducted and subsequently analyzed field interviews with judges, assistant United States attorneys, defense attorneys, and probation officers to better understand the perceived costs and benefits ascribed to mandatory minimums by those with practical federal criminal justice experience. These analyses identified six commonly offered rationales for mandatory minimum sentencing provisions.[133]

The six rationales, in order from least important to most important according to the Report, are:

(1) Inducement of pleas;
(2) Inducement of cooperation;
(3) Disparity;
(4) Incapacitation, especially of the serious offender;
(5) Deterrence; and
(6) Retribution or "just deserts."[134]

An individual analysis of each of these rationales will show that every one except (4) supports application of mandatory minimums to white-collar crime.

1. Rationales (1) and (2): Inducement of Cooperation and Pleas

Beginning with the least important rationales, (1) and (2), it appears that these relatively straightforward concepts should have equal application to white-collar and street crime. After all, any criminal prosecution, regardless of the crime, can benefit from inducements for greater rates of cooperation and guilty pleas. Mandatory minimums always provide greater cooperation because "cooperation . . . is *the only statutorily-recognized way to permit the court to impose a sentence below the length of imprisonment required by the mandatory minimum sentence*."[135] They provide more frequent guilty pleas as well if the

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[133] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125 , at 12–13.

[134] *Id.* at 13–14.

[135] *Id.* at 13 (emphasis added) (citing 18 U.S.C. § 3553(e) (2006)). This situation has actually changed somewhat since the 1991 Report. The "safety valve" provision added to

prosecution uses the possibility of a mandatory minimum to induce the defendant to plead to a lesser charge,[136] although under current Department of Justice regulations, this type of plea bargaining is not allowed.[137]

Even so, these two rationales actually weigh in favor of application to white-collar crime because of the simple truth that white-collar cases are usually far more complex and costly to prosecute than other crimes.[138] By encouraging more frequent cooperation[139] and guilty pleas,[140] mandatory minimums could greatly ease the burden on federal prosecutors when pursuing major white-collar crimes. White-collar criminal investigations and trials will always be more resource-

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the code allows reduction of sentences for first-time offenders meeting specific qualifications under several drug related statutes, including the first three of the four most commonly imposed. *See* 18 U.S.C. § 3553(f) (2006). But, cooperation is a requirement (among others) of this code provision, so the above statement is still mostly accurate. *See id.* § (f)(5). Section 3553(f) represents a code section in which the controversy over mandatory minimums precipitated actual legislative change.

[136] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 14.

[137] *See Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's Charging and Plea Policies*, 16 FED. SENT'G REP. 129, 130 (2003) ("It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.").

[138] *See* Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 13–17 (2008).

[139] *Id.* at 16 ("[T]he difficult nature of white[-]collar investigation means that it often must be prosecuted bit by bit, as prosecutors unravel the wrongdoing and work their way up the corporate ladder. Charges are first brought against the lower-level employees, who are much more likely to have been caught red-handed, with the hope that their indictment or conviction will lead to cooperation against mid-level management. If this succeeds, the mid-level managers are prosecuted with the hope that they will implicate responsible corporate officers at the highest level."). Increased cooperation, factor (1), would clearly aid in this effort.

[140] *Id.* at 17 ("If the cases are not settled through guilty pleas, each jury trial in a white[-]collar case is likely to be time-consuming and expensive. Prosecutors almost inevitably must introduce a massive amount of documentary evidence, along with the testimony of dozens of witnesses, often including forensic accounting and other experts. Highly paid defense counsel will conduct extensive and often effective cross-examinations of the government's witnesses. After the government rests, the defense is very likely to put on a case of its own. In light of the fact that the defendant probably has no prior criminal record and may even be an upstanding citizen of the community (apart from the criminal conduct alleged in the case), she is free to take the witness stand to proffer her ignorance or good faith defense. Defense experts may be called to rebut the opinions of the prosecution experts. Sometimes, defense counsel will line up a parade of good character witnesses to testify to the defendant's honest, law-abiding nature."). More frequent guilty pleas, factor (2), would reduce the instances of tough trials.

demanding and complicated given the nature of the offenses and the defendants' access to robust defense counsel, but mandatory minimums would at least mitigate that problem to a certain extent. Nonetheless, these two factors are important only ex ante to sentencing, and have no effect on district court judges' decisions. So, even though rationales (1) and (2) support mandatory minimums for white-collar crimes, they are irrelevant to the sentencing disparity and leniency discussed in the rest of this Article.

2. Rationale (3): Disparity

In the Sentencing Commission Report, the term "disparity" refers to the disparity between sentences for the *same* offense rather than the type of disparity observed above in Part II, which is disparity between different offense types—white-collar and nonwhite-collar—with the same Guideline range. Disparity between sentences for the same offense is problematic because it means that offenders are given wide ranges of punishment; thus, the punishment is less accurately fitting the crime. The Guidelines themselves were originally established to eliminate this type of disparity by providing consistency nationwide for every federal offense.[141]

Although the Guidelines provide a starting point, judges' departures still create disparity between punishments for similar conduct. So, mandatory minimums are useful when judges are departing often, and at high magnitudes from the Guideline sentence in a manner that is inconsistent from one case to another. Providing an absolute minimum prevents judges from creating disparity through these departures.[142]

Serious white-collar crimes, perhaps more than any other single category of violations, suffer from a disparity in punishment among similar offenses. This fact is demonstrated succinctly from the data on departure magnitudes in Part II.C. While departures are expected to be around forty percent of the Guideline minimum for the most serious non-white-collar crimes, if a white-collar criminal at the highest Guidelines is granted a departure, he can expect it to be *eighty percent*! This means that there is a huge disparity between judges who accept the sometimes-harsh Guideline sentences and judges who rely on departures. A mandatory minimum could conveniently eliminate this spread.

One need not look only at bulk data to get a sense of the inconsistency among cases. Consider, for example, Lance K. Poulsen and Ronald E. Ferguson, a little-known tale of two major white-collar

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[141] *See* Breyer, *supra* note 13, at 4 ("Congress['s] second purpose [in creating the Guidelines] was to reduce 'unjustifiably wide' sentencing disparity").

[142] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13.

criminals. Poulsen, a former CEO of National Century Financial Enterprises was sentenced to *30 years in prison* on March 27, 2009, for his role as the "architect" of a $1.9 billion fraud.[143] Meanwhile, Ferguson, a former CEO of General Re Corporation, was sentenced to *two years in prison* on December 16, 2008, for his role in a fraud that caused $600 million in shareholder loss.[144] The following table compares the two cases, emphasizing the similarity in Sentencing Guidelines.

	Lance K. Poulsen[145]	**Ronald E. Ferguson**[146]
District of Prosecution	Southern District of Ohio	District of Connecticut
Employment Position	CEO	CEO
Type of Corporation	Privately-held	Wholly-owned subsidiary
Fraud Loss	$1.9 billion	$597 million
Violations	Conspiracy, securities fraud, wire fraud, and money laundering	Conspiracy, securities fraud, mail fraud, and false statements
Guilty Plea or Trial	Trial by jury	Trial by jury
Date of Sentence	March 27, 2009	December 16, 2008

Base Level § 1B1.1(a)[147]	7	7
Loss: (b)(1)	+30 (over $400 million)	+30 (over $400 million)
Victims: (b)(2)	+4 (over 50 victims)	+6 (over 250 victims)
Sophisticated: (b)(9)(c)	+2 (yes)	0 (unclear, assume not)

143 Associated Press, *National Century Chief Sentenced*, L.A. TIMES, Mar. 28, 2009, at B2.

144 Jane Mills & David Voreacos, *U.S. May Appeal Sentence for General Re's Ferguson*, BLOOMBERG NEWS, Dec. 18, 2008, http://www.bloomberg.com/apps/news?pid=20601203&sid=aLFw_VDKXfx0.

145 *See generally* U.S. Sentencing Memorandum for Defendants Poulsen & Parrett, United States v. Poulsen, 2009 WL 1604975 (S.D. Ohio Mar. 17, 2009) (No. 06-129); *National Century Chief Sentenced*, *supra* note 143. Unfortunately, the district court did not publish a ruling on enhancements, but because Poulsen was sentenced to thirty years, the court must have ruled fairly close to what the government proposed. Moreover, the government also only argued for the U.S. Probation Office's calculation in the Pre-Sentencing Report, and nothing more. *See* U.S. Sentencing Memorandum for Defendants Poulsen & Parrett, *supra*, at 6–14.

146 *See* United States v. Ferguson, 584 F. Supp. 2d. 447, 448–49, 456 (D. Conn. 2008); Mills & Voreacos, *supra* note 144. With one exception, if an enhancement is not in this ruling, it is assumed that it was not applied. *See infra* note 148.

147 *See supra* Part I.C (applying this same exercise on sentencing under Sentencing Guidelines § 2B1.1).

Major Fraud: (b)(14)	+2 (over $1 million, (b)(14)(A))	0 (unclear, assume not)
Role: § 3B1.1(a)	+4 (organizer or leader)	+4 (organizer or leader)[148]
Obstruction: § 3C1.1	+2 (yes)	0 (unclear, assume not)
Total Offense Level	51[149]	47
Adjusted Level[150]	43	43
Guideline Sentence	Life	Life
Sentence Imposed	30 years	2 years

These cases are relatively similar and yield identical Guideline ranges. Although Poulsen's violation had a few aggravating factors, like obstruction of justice and a larger monetary loss, both individuals were CEOs responsible for major fraud—over $500 million in losses—that easily maxed out the Guidelines. The two defendants were only sentenced three months apart. Yet one defendant was sentenced to thirty years, and the other was sentenced to only two. The resulting disparity is absurd, but it is indicative of the divide between judges who apply the Guidelines and those who depart. Perhaps unsurprisingly, Poulsen in his sentencing memo even made the claim that "district courts frequently impose sentences within the two to five year range when sentencing defendants charged with securities fraud, even where the [g]uidelines call for a life sentence,"[151] relying partly on the recent sentencing of Ferguson. The court apparently disagreed. A mandatory minimum would help fix such disparity.

3. Rationale (4): Incapacitation of Serious Offenders

Mandatory minimums aim to enhance public safety by incapacitating serious offenders for substantial periods of time.[152] This is the only rationale that does not support application of minimums to

[148] Section 3B1.1(a) is not addressed in the district court's ruling, but it is fairly clear that it would be applied here to a CEO, and the defendant argues against its application in one of his sentencing memos. *See* Defendant Ronald E. Ferguson's Supplemental Sentencing Memorandum at 14–24, United States v. Ferguson, 584 F. Supp. 2d. 447 (D. Conn. 2008) (No. 06-137), 2008 WL 5099456.

[149] The government's brief mentions an offense level of 52, but the math seems to add to 51. *See* U.S. Sentencing Memorandum for Defendants Poulsen & Parrett, *supra* note 145, at 6. In any case, that one point is irrelevant because of the adjustment discussed below. *See infra* note 150.

[150] Offense levels over 43 are treated as 43. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, cmt. application note 2 (2008).

[151] Lance K. Poulsen's Reply to U.S. Sentencing Memorandum at 5, United States v. Poulsen,, 2009 WL 1604975, (S.D. Ohio Mar. 24, 2009) (No. 06-129) (citations omitted).

[152] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13.

white-collar violators. Once serious corporate fraudsters have been caught and convicted, it is highly unlikely that they can continue to cause the same level of damage, because as felons they would not be able to achieve the same level of public trust as they commanded before. Rationale (4) is therefore undoubtedly primarily for drug and violent offenses, where recidivism rates are much higher.[153] Even though this rationale opposes mandatory minimum sentences for white-collar criminals, the strength of the other five rationales significantly outweighs this counterargument, justifying the minimum sentence requirements.

4. Rationale (5): Deterrence

By providing a considerable, guaranteed term of imprisonment, mandatory minimums deter would-be criminals who are anxious about the prospect of serving hard time.[154] The additional deterrence effect of a definite sentence strongly supports statutorily imposed minimums, because the Guidelines alone have been noticeably ineffectual toward that end.

Additional deterrence was cited by members of Congress[155] and President Bush[156] alike as one of the chief motivations for instituting the enhanced penalties under the WCCPA. But, the fact that judges have failed to impose the increased penalties has completely undermined the effectiveness of such deterrence.[157] The data on departure rates and

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[153] *See, e.g.*, J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON. L. REV. 45, 102 (2007) (stating that "because white[-]collar criminals have extremely low recidivism rates, restraint through incarceration arguably provides only marginal societal benefit").

[154] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13. The Sentencing Commission Report talks about specific deterrence (deterring the individual from further criminal activity) versus general deterrence (deterring any potential offenders from that criminal activity). *Id.* Specific deterrence is not relevant to white-collar crime because, as mentioned before, white-collar crime is not plagued by high recidivism. *See supra* note 153 and accompanying text. Thus, this Part focuses on general deterrence only.

[155] *See supra* Part I.A.

[156] Signing Remarks, *supra* note 6, at 1321 ("Every corporate official who has chosen to commit a crime can expect to face the consequences. No more easy money for corporate criminals, just hard time.").

[157] *See* Note, *Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act*, 122 HARV. L. REV. 1728, 1733 (2009) ("Deterrence works best when punishment is swift and certain. White[-]collar sentencing in the years since Sarbanes-Oxley, however, has been anything but. Given the broad range of potential sentences provided by the WCCPA, within which judges now have essentially complete discretion, the sentence can range from mere months in prison to decades. Moreover, unlike the average aspiring criminal actor, white[-]collar offenders usually know that they will have access to a lenient plea bargaining system. They are also often well aware of instances in which a court has

magnitudes presented in Part II shows that serious white-collar criminals can expect a much lower sentence than the Guidelines; these individuals are not deterred because they do not expect the harshest sentences to be applied in their case. This fact was evident in Poulsen's argument in his sentencing memo that white-collar convicts with a Guideline of *life* should instead receive two to five years.[158]

Corporate executives considering illegal behavior with potentially disastrous results should fear the prospect of real terms of imprisonment. Deterrence—if well-constructed and consistent as it would be through mandatory minimums—is more effective against white-collar crime than any other type because individuals who are in a position to commit the most serious offenses have a relatively good understanding of the law.[159] A simple provision, like the one to be discussed in Part III.C, would be internalized rapidly in the business community, without the information problems that usually surround the theory of deterrence.[160] By providing significant and consistent prison sentences, and easily informing the target audience about the applicability of such sentences, mandatory minimums would afford the level of deterrence desired by the legislative and executive branches.

5. Rationale (6): Retribution

According to the Sentencing Commission Report, the most commonly-voiced rationale for mandatory minimums "is the 'justness' of long prison terms for particularly serious offenses. Proponents generally agree that longer sentences are deserved and that, absent mandatory penalties, judges would impose sentences more lenient than would be appropriate."[161] This is exactly the phenomenon observed from the data in Part II.B: judges grant large departures from Guideline minimums so that expected sentence imposed for a white-collar criminal at the most

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departed downward from a Guidelines sentence that shock[ed] the conscience of th[e] [c]ourt." (internal quotation marks and citations omitted)).

158 Lance K. Poulsen's Reply to U.S. Sentencing Memorandum, *supra* note 151, at 5 (citations omitted).

159 *See* Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 159 (2003) ("Deterrence depends partly on the offender's knowledge of the law and its consequences."); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 267 (6th ed. 2003) ("[A] threat that is not communicated cannot deter."). It is almost cliché to say that white-collar violators are more highly educated than other criminal offenders, and they tend to have excellent knowledge of the law in their business area, especially if they are an officer or director of a large corporation where dealing with legal hurdles is part of their job.

160 *See* Stevenson, *supra* note 159, at 162 ("If the legislature hopes to achieve a deterrence effect, policy makers must consider the question of how to make the populace aware of the costs imposed on a given crime.").

161 U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13.

serious Guideline level will be *more than fifty percent less* than comparable crimes that are not white-collar. There is a large disconnect between the sentences that the Guidelines suggest for white-collar criminals, and the sentences they actually receive.

The supporters of the WCCPA spoke on record multiple times about the inadequacy of penalties prior to the Act, often in the context of a disparity between white-collar and nonwhite-collar sentences.[162] By enhancing these penalties, the executive and legislative branches had hoped to ensure that "those who break the law, . . . however wealthy or successful they may be, must pay a price."[163] For various reasons, judges have failed to respond to the new Guidelines.[164] Nevertheless, mandatory minimums must be applied to serious white-collar offenses in order to implement the will of Congress and the President, and also to rectify the injustice of offenders who destroy millions or billions of dollars in wealth for their own gain. That these offenders receive far shorter imprisonment terms than someone who robs a bank for thousands,[165] or merely possesses five grams of crack cocaine,[166] is unconscionable.

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[162] *See supra* Part I.A.

[163] Signing Remarks, *supra* note 6, at 1320.

[164] This Article chooses not to focus on the reasoning behind district court judges' failure to impose harsh sentences, but instead focuses on the impact of their departures and a solution for rectifying the result. There is, however, an implication running throughout this Article that judges are using faulty reasoning in departing so often for white-collar criminals, leading to the inequitable results. For a good overview of judges' reasoning in sentencing post-WCCPA, see Note, *supra* note 157, at 1739–44, which argues that judges significantly undervalue the harm of white-collar crime and believe that the defendants are less worthy of moral condemnation because they have trouble identifying a victim. For an excellent in-depth analysis of judges' reasoning in sentencing white-collar criminals in general (based on actual interviews, among other things), see STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 54–123 (1988) (identifying several offense based and offender based factors in judges' sentencing of white-collar criminals). In summary, it is problematic that judges view white-collar crimes as victimless, fail to take into account the massive economic damage perpetrated by the most severe crimes, and give defendants breaks because of their high social status.

[165] Bank robbery is not a mandatory minimum offense. *See* 18 U.S.C. § 2113(a) (2006). But assuming a Guideline sentence, a first time offender who robs a bank for less than $10,000 with a firearm—but does not use it—would still be looking at an offense level of 27, yielding a range of 70–87 months. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(a)–(b)(1), ch. 5 pt. A (2008).

[166] *See* 21 U.S.C. § 844(a) (2006). ("[A] person convicted under this subsection for the possession of a mixture or substance which contains cocaine base [crack] shall be imprisoned not less than 5 years and not more than 20 years . . . if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams."). At minimum, a first-time offender with this threshold of crack will get five years.

6. Previous Discussion of Mandatory Minimums for White-Collar Offenses

Given that the usual justifications for mandatory minimums overwhelmingly support its application to white-collar crime, it is perhaps telling that there has been almost no debate on this issue. Both academic and political circles have largely ignored the solution proposed in this Part. Their silence can be attributed principally to the present day negative view of mandatory minimums in general. These counterarguments are well-founded in the debate about statutory minimums as applied to the four drug and firearm statutes mentioned at the beginning of this Part. Nevertheless, as will be discussed in the next Part, they are largely irrelevant to white-collar crime. The impressive opposition to mandatory minimums need not extend to white-collar statutes.

Even so, there have been occasional suggestions for mandatory minimums to be applied to white-collar crime, or at the very least, the concept has been acknowledged, and sometimes dismissed. In fact, in 2002, Enron-related testimony before the Senate Judiciary Subcommittee on Crime and Drugs led by then-Senator Joe Biden, one of the legal experts on sentencing for white-collar defendants, advised specifically *against* application of mandatory minimum terms of imprisonment.[167] His alternative recommendation was, however, based on "fair, but certain punishment,"[168] which has obviously not been achieved through the Guidelines. Senator Biden credited his proposals in the WCCPA to what he learned during these hearings.[169] As has been established, there was no mandatory minimum provision in the WCCPA, and no bill since introduced into Congress has contained such a provision for the major fraud offenses.[170]

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167 *Penalties for White Collar Offenses: Are We Really Getting Tough on Crime?: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 230 (2003) (statement of John C. Coffee, Professor, Columbia University School of Law).

168 *Id.*

169 *See supra* note 34 and accompanying text.

170 *But see* S. 1843, 111th Cong., § 2 (2009) (providing for increased penalties for health care fraud; read twice and referred to committee on October 22, 2009). This bill provides for mandatory six-month sentences for defendants who commit health care fraud as defined in 18 U.S.C. § 1347, with losses in excess of $100,000. *Id.* Although the bill does not more generally address the major frauds discussed throughout this Article, it shows that at least some members of Congress have recently become interested in looking at mandatory minimums as a prescription for fraud. Additionally, there are two older fraud-related statutes with mandatory minimums. One is a relatively obscure statute under the Title 12 banking provision that provides a minimum of two years for embezzlement, fraud, or false entries by a banking officer that dates all the way back to 1913. 12 U.S.C. § 630 (2006); *see also* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note

More recently, several scholars have discussed the potential of mandatory minimums for white-collar offenders. For example, a 2007 article examined white-collar sentencing post-*United States v. Booker*, making the observation that "judges continue to grant huge departures and use sentencing variances in white[-]collar cases."[171] Recognizing the potential problem, the article went on to claim that by basic game theory principles, judges would be more successful in maintaining their discretion by avoiding large and frequent departures because Congress will inevitably take away their authority to do so through implementation of mandatory minimums.[172] The article, however, made no normative or legal judgment on mandatory minimums other than to point out that judges' hate having their authority constrained.[173]

In another example, an essay published in 2005 concerning *Booker*'s impact on white-collar sentences identified the same disparity problem and came to the same conclusion that Congress will undoubtedly act to curb increasing judicial variances in sentencing.[174] The essay took a more negative view of mandatory minimums, however, maintaining that only a few high-profile defendants would actually serve the minimums,[175] and that prosecutors would "charge bargain" away the harshest penalties for lower ranked violators.[176] The piece further claimed that some secondary

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125, at app. A. The other is the Continuing Financial Crimes Enterprise Statute, created in 1990 , which is a compound criminal statute providing a ten-year minimum for a series of fraud violations. 18 U.S.C. § 225 (2006); *see also* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at app. A. Neither of these statutes, however, applies to general frauds; § 225 applies only to multiple violators acting in concert against a financial institution and receiving receipts directly from the fraud, and § 630 applies only to banking officials. Yet § 225 does provide a good starting point on how to craft a mandatory minimum fraud statute, discussed *infra* at Part III.C.

171 Daniel A. Chatham, Note, *Playing with Post-*Booker *Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 635–36 (2007).

172 *See id.* at 639 ("Though there are presently no mandatory minimum sentences for federal white[-]collar crimes, Congress need only point to a few instances of district courts returning to the view that white[-]collar defendants do not deserve jail time to justify imposing mandatory minimums for white[-]collar crimes as well.").

173 *Id.* at 623.

174 Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721, 740–41 (2005) [hereinafter Bibas, *White-Collar Plea Bargaining*] ("If, however, judges abuse their new-found freedom, their excessive leniency could provoke a harsh overreaction. Congress would likely step in with more mandatory penalties, causing white-collar prosecution to look more like drug prosecution. . . . In other words, judges may soon bring even more of a straitjacket upon themselves, to the satisfaction of prosecutors.").

175 *See id.* at 736.

176 *Id.* at 735–36. "Charge bargaining" is essentially using the threat of a mandatory minimum to garner favorable negotiating power in a plea bargaining deal. *See id.* at 736. As was previously discussed, however, this type of bargaining has been disallowed under Department of Justice policy since 2003, so the essay was in error on this point. *See*

"defendants who are too stubborn . . . to flip will suffer."[177] Even so, the essay proffered the belief that prosecutors would temper their own actions much like judges, and white-collar defendants' access to more robust defense counsel would ultimately negate some of the effects of having mandatory minimums.[178] The concern that lower-level employees might suffer disproportionately is well-founded, but as will be seen in Part III.C, there are ways to craft mandatory minimum provisions to avoid this issue.

Interestingly enough, an article from 2006 actually advocated for mandatory minimums for white-collar crime,[179] but in a manner much different than this Article. There, the article suggested one- and three-year mandatory minimums for very low thresholds of loss—$1 million and $5 million, respectively.[180] The article was concerned primarily with midrange offenders receiving overly-harsh sentences under the Guidelines, mixed with the reality of judges departing downward and giving almost no prison time.[181] In promoting mandatory minimums, the article was actually suggesting sentences are too harsh, and that the minimum could ease Congress's concern while still allowing judges to depart with frequency.[182] Setting aside this premise, the article's proposal is substantively different from the one advanced here; this Article focuses on the most serious white-collar crimes, attempting to achieve consistency as well as significant terms of imprisonment for major frauds. Furthermore, the 2006 article uses only two relatively low-loss benchmarks, whereas the mandatory minimum proposal in Part III.C incorporates loss calculations in addition to defendant-specific factors in the offense.

Finally, a 2009 student note specifically on the WCCPA and its effects on sentencing recognized that mandatory minimums might reduce the "problematic range of discretion," but declined to consider them as a solution.[183] The note instead argued for a change in loss calculation and increased financial penalties in lieu of prison time.[184]

The fact that no scholar or politician has proposed more severe mandatory minimums for major frauds may be due to apathy about the

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Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's Charging and Plea Policies, *supra* note 137.

177 Bibas, *White-Collar Plea Bargaining*, *supra* note174, at 737.

178 *Id.* at 737–38.

179 Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers too Harsh?*, 37 MCGEORGE L. REV. 757 (2006).

180 *Id.* at 782.

181 *Id.* at 784–85.

182 *Id.*

183 Note, *supra* note 157, at 1736 n.54.

184 *Id.* at 1745–49.

problem—after all, it can be difficult to get incensed over some fraudulent CEOs getting off too easy when economic times are good. That apathy may change in the midst of a new financial crisis with mega-frauds of proportions never before seen.[185] Another factor is the negative view towards mandatory minimums in general, which is addressed in the next section.

B. White-Collar Mandatory Minimums Are Different

To say that mandatory minimums are out of favor with scholars and politicians is an immense understatement. This Part presents the major counterarguments against mandatory minimums, and explains why they are inapplicable to white-collar crime.

1. The Guidelines Are Better at What Mandatory Minimums Are Trying to Accomplish

Senator Orrin Hatch, the "other" sponsor of the WCCPA, had the following to say about mandatory minimums in 1993:

> While the Commission has consistently sought to incorporate mandatory minimums into the Guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. Whereas the [G]uidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the [G]uidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the [G]uidelines incorporate a 'real offense' approach to sentencing, mandatory minimums are basically a 'charge-specific' approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[186]

The lack of mandatory minimums in the WCCPA then is unsurprising, given the views espoused by one of its two initial proposers. This counterargument has been repeated time and time again by many authors, who all have the same fundamental point that the Guidelines accomplish the same goals as mandatory minimums, but will do so with

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[185] Bernie Madoff's alleged $50 billion fraud, for instance, vastly overwhelms the mere $400 million peak in losses set forth in the Sentencing Guidelines. *See id.* at 1735 n.43.

[186] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194–95 (1993) (citations omitted).

flexibility. More recently—but still pre-*United States v. Booker*—Justice Anthony Kennedy remarked that "[b]y contrast to the [G]uidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."[187] Even the Sentencing Commission Report discussed in Part III.A agrees with this sentiment, stating in reference to the six main rationales discussed that "the [G]uidelines are structured so that they are as or more likely to achieve these goals than mandatory minimums."[188]

The fundamental problem with these arguments is that they were made before *Booker* ruled that the Guidelines were merely advisory. These statements may have been convincing before *Booker*, but they fail to acknowledge the ability of a judge today to completely ignore the Guidelines.[189] That leaves mandatory minimums as the *only* legal check on judges' discretion at sentencing.

Specifically, white-collar crime suffers from misapplication of the Guidelines more than "street" crimes, as evident from the data presented in Part II. While the Guidelines would perhaps serve better than mandatory minimums if they were still binding, or at the very least usually applied, the failure of judges to respond to the Guidelines is why mandatory minimums have become a necessity in the first place. This makes the counterargument irrelevant.

2. Mandatory Minimums Cause Inequitable "Cliff" Effects

Another argument against mandatory minimums encountered frequently is that mandatory minimums create "cliff" effects in sentencing by providing a dramatic increase in a sentence for some threshold of violation, in practice usually a quantity of drugs, although the threshold need not be quantitative for the logic to apply.[190]

> For example, a first offender who helps sell 495 grams of cocaine might be thought to deserve anywhere from two to four years of imprisonment. Under the [S]entencing [G]uidelines, his presumptive sentence (after allowance for his acceptance of responsibility and minimal role in the offense) would fall in the range of twenty-seven to

[187] Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

[188] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 32.

[189] To reiterate, judges could always rely on departures before *Booker*. *See supra* note 64. But *Booker* has caused judges to give non-Guideline sentences more frequently, and the Guidelines can be completely cast aside if the judge wishes. *See supra* note 104 and accompanying text.

[190] *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

> thirty-three months, or about two and one-half years. For an identical offender who sold just five grams more, the sentence would double, because the five-year mandatory minimum applicable to sales of 500 grams would kick in.[191]

Conceptually, the problem with a "cliff" effect in sentencing is that two substantially similar violations are forced to have significant differences in sentences applied. It is a problem of disparity that is *caused* by mandatory minimums rather than mitigated by them.

The reason this argument is irrelevant with respect to serious white-collar violations, however, is the fact that the "presumptive sentence" of any top level offender is astronomically high, often life in prison.[192] The mandatory minimum applied, whether five, ten, or even twenty years will be less than this Guideline recommendation. As a result, there is no "cliff" effect. Under mandatory minimums for the most serious frauds, if the judge sentences the violator at the statutorily imposed minimum, the defendant will actually receive a lower sentence than his Guideline range. If the judge chooses to apply a Guideline range, then the sentence will be higher, but the judge already has that option under current sentencing rules. Another way of making this point is to say that if the recommendations of this Article are followed, the sentencing floor will be raised for frauds that satisfy the requirements, but not above the current Guideline ceiling—avoiding the state of affairs responsible for the "cliff" effect in drug and firearm statutes.

The oft-mentioned assertion that mandatory minimums over-punish nonviolent and first-time offenders[193] is actually a subset of this argument, and as such is irrelevant to serious white-collar offenses for the same reason. It is implicitly recognized that white-collar offenders will be *both* first-time *and* nonviolent, and Congress *still* directed the Sentencing Commission to impose severe Guideline ranges in the WCCPA. Because the mandatory minimums proposed in this Article are below those Guideline ranges, that proposal cannot be termed unfair to first-time, nonviolent offenders.[194]

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191 *Id.* (citing 21 U.S.C. § 841(b)(1)(B)(ii)(II) (1988 & Supp. II 1990)).

192 *See supra* Part I.C.1.

193 *See, e.g.*, Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1070 (2001). As mentioned in that article, the "safety valve" provision referenced supra in note 135, was formulated in response to this criticism. *Id.* (citing Vincent L. Broderick, *Flexible Sentencing and the Violent Crime Control Act of 1994*, 7 FED. SENT'G REP. 128, 128 (1994)).

194 That is, unless one is of the opinion that substantial sentences for serious white-collar criminals are generally undesirable. Such an argument would, of course, be an opposing viewpoint to everything presented in this Article. The purpose of this Article, however, is not to delve into the discussion of whether major white-collar criminals normatively deserve or would be deterred by higher sentences. Instead, this Article is satisfied with pointing out that the legislative and executive branches have stated multiple

3. Mandatory Minimums Fail to Distinguish Between Levels of Responsibility

A third common critique of mandatory minimums "is the equal treatment of offenders who played sharply different roles in the offense. The ringleader faces the same sentence as a moderately important underling, who in turn gets the same sentence as a young messenger or secretary who had little responsibility or control over the events."[195] This is an example, however, of a criticism of how mandatory minimums have been constructed for drug and firearm offenses, and not for the concept as it could apply to white-collar or any other crime. In drug and violent crimes, the minimums as they are written in the statutes presently are activated by some combination of quantity of drugs,[196] injury or death to victims,[197] prior convictions,[198] or use of a firearm.[199] Roles of responsibility in commission of the offense do not factor into these mandatory minimum statutes, but instead are relegated to sentencing factors under the Guidelines.[200] The fundamental problem that most commentators have with this aspect of mandatory minimums is that they eschew qualitative culpability thresholds, and instead focus on quantitative measurements than can cause minor participants of major violations to suffer sentences disproportionate to their actual involvement.

In any case, there is no plausible theoretical reason to exclude responsibility from construction of a mandatory minimum statute, and the example introduced in Part III.C provides for just that. As will be seen, the chief "role-in-the-offense trigger" will be the defendant's status as an officer or director of a major corporation who commits the fraud in furtherance of his day-to-day employment.

Even so, quantitative loss calculations continue to play a role, because such calculations are the only way to assess the impact of the overall fraud on the public at large. In combination with the role

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times on record that such sentences are important for both reasons. *See supra* Part I.A. Additionally, this Article emphasizes that would-be major fraudsters, under current practices, have come to expect lenient sentences, which *may be* part of the reason that such fraud is occurring more frequently at more extreme levels.

195 Schulhofer, *supra* note 190, at 210–11.

196 *See, e.g.*, 21 U.S.C. §§ 841(b), 844(a), 960(b) (2006) (awarding five years for five grams of crack cocaine under § 844(a) and ten years for a threshold quantity of drugs under §§ 841(b) and 960(b)).

197 *See, e.g.*, 21 U.S.C. §§ 841(b), 960(b) (awarding twenty years for a threshold quantity of drugs where death or serious injury results).

198 *See, e.g.*, *id.*

199 *See, e.g.*, 18 U.S.C. § 924(c)(1) (providing several thresholds for different types of firearms and usages).

200 *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1–.2 (2008) (defining aggravating and mitigating roles).

assessment, these loss calculations create mandatory minimums that are fair by providing lower tiers for offenders who were not *as* responsible—minimums that are still well below the recommended Guidelines, even assuming a reduction by way of a minimal role in the offense.[201] It is arguable that a defendant who had an *extremely* minimal role in a massive fraud would be unduly harmed by a five-year minimum, but such a defendant has no guarantee whatsoever that the judge will give him a downward departure from his stratospheric Guidelines, anyway. Additionally, in such a case the incentive for cooperation[202] provided by that statutorily required term of imprisonment would be useful to help the government bring the true culprits to justice.

A commonly-articulated subset of this argument, however, is that by allowing below-minimum sentences for defendants who cooperate with the prosecution, statutorily imposed terms make the role-in-the-offense problem even more acute for minor players. This is because

> [d]efendants who are most in the know, and thus have the most 'substantial assistance' to offer, are often those who are most centrally involved in conspiratorial crimes. The highly culpable offender may be the best placed to negotiate a big sentencing break. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss.[203]

Nevertheless, the higher-tier minimums for higher-ranked officials proposed in the following section mitigate this occurrence, whereby the minimums will be at different levels to reflect that disparity in culpability. Additionally, it is unclear that prosecutors would be willing to cooperate with high-ranking corporate officials accused of orchestrating disastrous frauds because such cases are so high profile as to make or break careers, and bringing the chief mastermind to justice is often the point of the entire investigation.[204] Finally, the vertically hierarchical nature of corporations—as compared to a more horizontal

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[201] This is a four-point reduction under Sentencing Guidelines § 3B1.2(a). When combined with the acceptance of responsibility, a three-point reduction under § 3E1.1, a defendant who had a minimal role in a massive fraud would be looking at a final offense level of around 36, § 3B1.1, which results in more than fifteen years for a first-time offender under the Guidelines. *See id.* ch. 5 pt. A.

[202] Recall that cooperation is the only way to get out from under a mandatory minimum. *See supra* note 135 and accompanying text.

[203] Schulhofer, *supra* note 190, at 212.

[204] *See* Bibas, *White-Collar Plea Bargaining*, *supra* note 174, at 736–37 ("A handful of defendants, however, will pay the sticker prices. First, prosecutors hunt famous defendants like big-game trophies. Prosecutors can earn valuable reputations by refusing to bargain away strong cases against prominent corporate CEOs. By forcing these cases to trial, they earn high-profile notches in their belts and favorable, marketable publicity." (citing Stephen Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2472 & n.27 (2004))).

model with a less-strict hierarchy in criminal enterprises—makes it clear that even low-ranking company employees would be taking orders from *somewhere* above them in the chain-of-command; thus, they will be able to cooperate in order to assist the prosecution of the higher-ups. For these reasons the scenario of the cooperating "kingpin" getting less time than the "go-fer"[205] is unlikely to be replicated in the white-collar arena.

4. Mandatory Minimums Result in a Disparate Impact on Protected Classes of Defendants

Perhaps the most frequent criticism of mandatory minimums in their current form is that they result in the imposition of severe sentences disproportionately for defendants in a particular protected class. The arguments vary widely, but authors have argued that mandatory minimums cause a disparate (or at least unreasonable) impact among African-Americans,[206] Hispanic-Americans,[207] women,[208] children,[209] mentally disabled,[210] and indigent defendants,[211] among others. Nevertheless, potential mandatory minimums for white-collar crimes can be distinguished without delving in-depth into these powerfully convincing arguments. This is because all of these viewpoints actually oppose disparate impacts for prosecution of certain crimes which happen to be punished under statutorily imposed minimums. Their anger does not result from the mandatory minimum itself, but instead from the reality that violators are not being treated equally

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205 *See* Schulhofer, *supra* note 190, at 212–13.

206 *E.g.*, William W. Schwarzer, Comment, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 407–08 (1992) (citation omitted).

207 *See, e.g.*, Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 147 (1994) (enhanced penalties are "being imposed on a disproportionate number of Black and Latino cocaine users").

208 *See generally* Shimica Gaskins, Note, *"Women of Circumstance" —The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1533 (2004) (detailing the plight of women who are minimally involved in a crime and yet are subject to "draconian sentences").

209 *See, e.g.*, Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 322–37 (2007) (discussing the various issues children are faced with when a mother is incarcerated).

210 *See generally* Timothy Cone, *Developing the Eighth Amendment for Those "Least Deserving" of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can Be "Cruel and Unusual" When Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35 (2004) (arguing that the imposition of mandatory minimum sentences on mentally retarded offenders violates the Eighth Amendment).

211 *E.g.*, E.E. Edwards, *Equal Justice Under Law—A Concept, Not Reality*, CHAMPION, May 2004, at 4, 53.

because certain violations—the ones with the harsh minimums—are more likely to be perpetrated by specific disadvantaged groups.

As a concrete example, one can examine the statutorily-mandated penalties for crack cocaine, probably the most despised source of sentencing disparity.[212] The fact that crack—by weight—has much harsher statutory penalties than other drugs unsurprisingly causes crack violations to be punished with more severe sentences. More severe sentences for crack lead to longer prison terms for African-Americans and Hispanic-Americans, as those racial groups overwhelmingly represent that substance's direct distributors.[213] This well-documented issue is probably the most frequently-cited example of mandatory minimum failure.[214]

The failure here, though, is not a result of the penalties being statutorily imposed, because all illegal drugs at various quantities are subject to the same mandatory minimums.[215] The failure is a result of the statute treating different drugs differently, especially one that has such a strong racial alignment. It is true that district court judges cannot exercise their discretion and provide a below-minimum sentence, so in the sense that the disparity cannot be rectified in court, the fault lies with the mandatory minimum. But if Congress had provided equal treatment between crack and cocaine powder, there would be no disparate impact whatsoever.

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[212] This disparity stems from the 100:1 ratio between crack and cocaine powder penalties for drug distribution, which is written into the statute as a mandatory minimum. *Compare* 21 U.S.C. § 841(b)(1)(B)(ii) (2006) (including five hundred grams or more of cocaine) *with id.* § 841(b)(1)(A)(iii) (including five grams or more of crack cocaine, thus showing the 100:1 ratio in quantity). Also particularly egregious is the mandatory minimum for simple possession of crack, referenced several times in this Part. *See supra* note 132 and accompanying text.

[213] *See Testimony of Congressman Robert C. "Bobby" Scott* (Mar. 3, 2006), *in Inter-American Commission on Human Rights, Hearing on Mandatory Minimum Drug Sentences in the United States*, 18 FED. SENT'G REP. 293, 294 (2006) ("This, in turn, becomes racially disparate in its penalty application, by law, since the direct distributers of crack cocaine tend be overwhelmingly Black or Hispanic.").

[214] *See id.* ("One of the most egregious reflections of the racially disparate impacts of federal mandatory minimum sentencing can be seen in the sentencing for 'crack' cocaine when compared to sentencing for powder cocaine. There is a statutory mandatory minimum sentence of 5 years for possessing 5 grams of 'crack' cocaine as compared to 500 grams of powder cocaine before that level of sentence is required. This disparity clearly has a racial impact in that 95% of those arrested on crack offenses are Black (88%) or Hispanic (7%), although drug use data indicates that over 60% of those who consume crack cocaine are White.").

[215] *See* 21 U.S.C. § 841(b)(1)(A)–(B) (2006).

Likewise, in white-collar crimes, the criminals, almost axiomatically,[216] are highly-educated, wealthy, and not composed of any particular protected racial or socioeconomic group.[217] The only defendant-specific quality used to trigger a minimum in the proposal below is his status as an officer or director of a major corporation, which is also not aligned with any protected class. Because neither the crimes themselves nor the proposed triggers for statutory minimums are associated with such a group, these arguments—while convincing for statutorily-imposed drug penalties—are inapplicable to white-collar crime.

C. "The White-Collar Crime Mandatory Penalty Act"

This Part presents one plausible example of what mandatory minimum penalties in white-collar crimes could look like. First, the proposed legislation is given, and afterward is a brief discussion on why the act was constructed in such a way, including specific choices that were made.

1. The Proposed Legislation

SEC. 1: SHORT TITLE

This Act may be cited as the White-Collar Crime Mandatory Penalty Act.

SEC. 2: MANDATORY PENALTIES FOR MAJOR FRAUD

(a) IN GENERAL.—Chapter 63 of Title 18, United States Code, is amended by inserting after section 1350 as added by this Act the following:

"§ 1351. Mandatory Penalties for Major Fraud

(a) Any person who is convicted of any offense under this chapter with a maximum allowable sentence of at least 20 years shall be sentenced as follows:

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216 Of course it *is* axiomatic if one uses an "offender-based" definition of white-collar criminals. This Article relies on an "offense-based" definition. *See supra* note 106 and accompanying text.

217 *See* Isaac M. Gradman, Note, *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, 754 (2005) ("As a group, white[-]collar defendants tend to have a higher socioeconomic status and stand to benefit the most from consideration of factors such as family life, community involvement and occupational reputation.").

(1) If the offense occurred in the course of performance of a person's duty as an officer or director of—
   (a) a publicly-traded company;
   (b) a company with at least 1,000 employees; or
   (c) an investment company with at least $100 million under management;

such a person will be sentenced to a term of imprisonment which may not be less than 5 years or more than the maximum provided by the particular statutes violated.

(b) If the fraud for which such a person is convicted resulted in a loss in excess of—
   (1) $20 million, then
      (i) if that person satisfies the conditions set forth in (a)(1), such person will be sentenced to a term of imprisonment which may not be less than 10 years or more than the maximum provided by the particular statutes violated; or
      (ii) such person will be sentenced to a term of imprisonment which may not be less than 5 years or more than the maximum provided by the particular statutes violated.
   (2) $400 million, then
      (i) if that person satisfies the conditions set forth in (a)(1), such person will be sentenced to a term of imprisonment which may not be less than 15 years or more than the maximum provided by the particular statutes violated; or
      (ii) such person will be sentenced to a term of imprisonment which may not be less than 10 years or more than the maximum provided by the particular statutes violated.
   (3) $5 billion, then
      (i) such person will be sentenced to a term of imprisonment which may not be less than 20 years or more than the maximum provided by the particular statutes violated.

(c) Definitions—
   (1) publicly-traded company;
   (2) investment company; and
   (3) officer or director;

all are defined as under the securities laws, title 15, chapters 2A2E.

(d) For purposes of determining loss from the fraud, the same calculation rules will apply as those promulgated for fraud under the Sentencing Guidelines by the United States Sentencing Commission."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

"1351. Mandatory Penalties for Major Fraud."

2. Discussion of Proposed Legislation

Basically, in regular words, the mandatory minimum provision codified here is activated for any Title 18, Chapter 63 fraud which has a statutory maximum of at least twenty years. As discussed in Part I, these are the most important frauds for white-collar law enforcement, and the addition of the twenty-year requirement means only the major frauds will be affected by this new code section.

On the one hand, the effect is to provide a tiered minimum based on three loss thresholds, and these minimum tiers differ depending on whether the offender is an officer or director of a major company, as defined in (a)(1). The business terms in this section, in order to maintain regulatory consistency, are meant to have the same definitions as they have in the securities laws, as evidenced by subsection (c). The actual minimums are five years for any loss amount, ten years for at least $20 million, fifteen years for at least $400 million, and twenty years for at least $5 billion in losses for any officer or director who commits a fraud in the course of his official employment. The requirement that the occurrence be in the course of his executive duties avoids the hypothetical of a CEO committing fraud unrelated to his job and getting punished for it as if he had used his official status to further his offense, which would violate the purpose of this subsection. The scope of that requirement, codified at (a)(1) would, of course, be up to the judge to decide at sentencing, meaning that a legal standard could evolve at the appellate level; the starting point, however, would likely be similar to the agency law "scope of the employment" doctrine.[218]

On the other hand, if the offender is not an officer or director, the tiers are five years for at least $20 million, ten years for at least $400 million, and twenty years for at least $5 billion in losses. The highest tier is the same as the officer/director minimum, because at the point the defendant is responsible for $5 billion in losses, the damage to the public is so high that no distinction is warranted. At lesser loss amounts, officers and directors, as figures in public trust, deserve harsher punishments as they will undoubtedly be more culpable.

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[218] RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

It is important to note that sentencing factors need only be proven to a judge by a "preponderance of the evidence," rather than to a jury "beyond all reasonable doubt."[219] This is not the case if such factors would push the penalty beyond the statutory maximum,[220] but that situation is avoided in the proposed white-collar mandatory minimums because they only apply to statutes with a maximum of at least twenty years, and the highest minimum possible under the new provision would be twenty years. The Supreme Court has repeatedly ruled that mandatory minimum requirements are sentencing factors, and not elements of the crime, and thus are subject to a preponderance of the evidence standard before a judge.[221] The loss calculations, therefore, could function exactly as they do under the Guidelines, and that is the goal of the provision as defined in (b).

The specific thresholds were chosen because: $20 million will yield a Guideline range that is almost always above five years for a first-time offender who pleads guilty (give or take some of the other sentencing factors),[222] meaning the minimum will almost always be below the Guidelines. The highest loss figure contemplated under the Guidelines is $400 million, so that was the next threshold chosen because it provides a minimum punishment for what are currently the most serious frauds in the loss table. Finally, $5 billion was chosen as the highest tier, because, frankly, it is just a really big number above which it becomes difficult to fathom any difference in harm.

It is important to discuss the impact of this proposed legislation on the original examples presented in Part I.C, the "sham investor." On the one hand, the "sham investor" with a fraud loss of $5 million would only be subject to five-year minimum if he is an officer or director of his own investment company and that company manages at least $100 million. Either way, his Guidelines range remains at 51–63 months, just *under* five years. On the other hand, the CEO would be subject to a fifteen year minimum, and possibly a twenty year minimum if the loss from his

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[219] *See* United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam) (discussing the evidentiary threshold difference between statutory elements of the offense and sentencing factors (citing McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986))).

[220] *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (ruling that if a sentencing factor increases the prison term above the statutory maximum, it must be proved beyond a reasonable doubt to a jury, analogous to an element of the offense (citing Jones v. United States, 526 U.S. 227, 243 n.6 (1999))).

[221] *See* Harris v. United States, 536 U.S. 545, 565 (2002) (plurality opinion) (reaffirming that a judge may sentence an individual within the Guidelines range under a preponderance of the evidence standard).

[222] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2008). Note that Guidelines for this loss will also almost always be above *ten* years (give or take some factors) for an officer or director due to § 2B1.1(16)(a), and the role enhancement in § 3B1.1(c), so the reasoning is analogous for the officer/director minimum at the same threshold.

fraud was over $5 billion. His Guidelines remain at a life sentence. Meanwhile, the two parallel fraudsters from Part III.A would both be subject to fifteen year minimums, drastically decreasing the possible disparity in sentences.

CONCLUSION

It would be the height of overstatement to claim that mandatory minimum penalties for white-collar criminals could, by themselves, end the harm of large-scale frauds wreaking havoc on the national economy. Nevertheless, they *would* go far towards deterring potential violators by providing "just hard time" for the type of criminals that have severely damaged public confidence in corporate America, especially in investment services.

Even beyond providing deterrence, however, implementing the proposed legislation would serve the fundamental goals of justice. As it stands, Congress and the President, through passage of the WCCPA, have made it clear that major white-collar criminals deserve to be sentenced to substantial terms of imprisonment. But federal judges have failed to fulfill their end of the bargain, continually ordering lenient sentences for these offenders. Sentencing for major frauds has become like Russian roulette; violators could be sentenced to thirty years or get off with nothing at all. The preceding code section is very fair and not overly-callous—indeed the minimums that would be imposed are less harsh than the currently existing Guidelines in all but a few extreme and rare situations. Moreover, the improved consistency in punishment would do much to reestablish equity between similar cases. There always should be some predictability in punishment, and the proposed act would provide it.

Recent developments and discoveries regarding the economic crisis make it clear that white-collar fraud is a problem that must be examined from every possible angle in order to arrive at a solution. Fair, consistent, and substantial prison terms for the most devastating white-collar offenders compose one part of the solution that leaders of this country can and should immediately implement. The mandatory minimums described in this Article will provide that fairness and consistency.