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## WHITE-COLLAR PLEA BARGAINING AND SENTENCING AFTER *BOOKER*

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Until 2004, white-collar sentencing appeared to exemplify the ratchet effect. As the media exposed ever more corporate corruption and shady dealing, lawmakers competed to prove their toughness on crime by raising sentences. This irresistible force, however, met a seemingly immovable object: the Supreme Court's new Sixth Amendment limits on judicial sentencing. *Apprendi v. New Jersey*,<sup>1</sup> *Blakely v. Washington*,<sup>2</sup> and most recently *United States v. Booker*<sup>3</sup> have upended sentencing law by requiring juries, not judges, to find

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1. 530 U.S. 466, 490 (2000).

2. 542 U.S. 296, 314 (2004).

3. 125 S. Ct. 738, 755-56 (2005).

beyond a reasonable doubt facts that raise maximum sentences. *Booker*'s remedy was to invalidate the binding force of the U.S. Sentencing Guidelines.<sup>4</sup> *Apprendi* and *Blakely* have had large and obvious effects on violent and drug crime prosecutions. These cases, however, also portend a revolution in white-collar plea bargaining and sentencing. This Essay is a brief effort to speculate about federal white-collar plea bargaining and sentencing after *Booker*, now that the U.S. Sentencing Guidelines are no longer binding.

Part I summarizes the criminal law's traditional leniency toward white-collar defendants and how that thinking began to change. Part II notes the U.S. Sentencing Commission's and Congress's efforts to toughen white-collar penalties, culminating in the Sarbanes-Oxley Act of 2002. Part III considers how *Booker* changed this landscape by striking down the Sentencing Guidelines. In the short term, *Booker* restores some judicial power to counterbalance prosecutorial control of plea bargaining and sentencing. The price, however, is that judges have more leeway to show excessive leniency, which will incense prosecutors and prod Congress to act. Part IV discusses Congress's likely responses to this state of affairs. Congress is unlikely to accept the status quo or to entrust cumbersome fact-finding to juries. Rather, Congress will likely either restore binding minimum guidelines or pass mandatory minimum penalty statutes, which will greatly increase prosecutorial power to charge bargain. White-collar sentencing may replicate some of the pathologies of mandatory drug sentencing, although it will never be as draconian in practice. Part V proposes two modest solutions. First, clarifying how to compute losses would reduce prosecutorial manipulation of white-collar sentences based on speculation about the causes of stock-price drops and the like. Second, greater use of shaming penalties could ensure short sentences with bite, to express the community's condemnation while avoiding disproportionate punishment.

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4. See *id.* at 769.

## I. TRADITIONAL LENIENCY TOWARD WHITE-COLLAR DEFENDANTS

Traditionally, penalties for white-collar crimes such as fraud, embezzlement, and insider trading were significantly lower than penalties for violent, drug, or even physical property crimes. White-collar offenders were much more likely to receive probation than thieves who stole equivalent amounts, and when white-collar offenders did go to prison their sentences were substantially shorter.<sup>5</sup> For example, before the Sentencing Guidelines, an average of 59% of fraud defendants received straight probation sentences, and the average prison time served was seven months.<sup>6</sup> For tax defendants, the figures were comparable: 57% received straight probation, and the average prison time served was five and a half months.<sup>7</sup> Generally, these white-collar defendants came from well-off backgrounds, had no criminal histories, and seemed unlikely to recidivate, let alone endanger anyone. So there was little need for specific deterrence, and few people thought retribution required imprisonment. Thus, white-collar criminals usually got probation, community service, restitution, or similar soft punishments.

Our thinking about white-collar crime has undergone a sea change in the last two decades. White-collar crime came to epitomize greed, which increasingly seemed morally wrong and more deserving of retribution.<sup>8</sup> Moreover, the sentencing-reform movement focused on meting out equal sentences for equally bad crimes.<sup>9</sup>

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

6. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 68-69 tbls.2 & 3 (1987). The average prison time served is an average of all offenders, not just those sentenced to prison; in computing the average, the Sentencing Commission coded probationary sentences as zero-month sentences. *Id.* at 69 tbl.3.

7. *Id.* at 68-69 tbls.2 & 3.

8. See BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* 515 (1990) (relating a failed corporate takeover bid at RJR Nabisco and, in the process, critiquing Wall Street's morality); JAMES B. STEWART, *DEN OF THIEVES* 445 (1991) (describing the prosecution of Wall Street brokers who engaged in insider trading and other crimes); *WALL STREET* (Twentieth Century Fox 1987). In *Wall Street*, the villain, Michael Douglas's character Gordon Gekko, intones the famous line "greed is good" and trades on inside information. *Id.* But the hero, Charlie Sheen's character Bud Fox, eventually goes to prison for insider trading and cooperates with the prosecution against Gekko. *Id.*

9. The movement started with Judge Marvin Frankel's call to arms in the 1970s. See

If we imprison the black teenager who steals a \$25,000 car, equal treatment demands that we also imprison the middle-aged white guy who steals \$25,000. Otherwise, sentencing judges may be indulging unconscious racial and class stereotypes by going easy on defendants who remind judges of themselves or with whom judges can identify.<sup>10</sup>

In addition, white-collar crime is more rational, cool, and calculated than sudden crimes of passion or opportunity, so it should be a prime candidate for general deterrence. An economist would argue that if one increased the expected cost of white-collar crime by raising the expected penalty, white-collar crime would be unprofitable and would thus cease.<sup>11</sup>

Nevertheless, many judges lean toward home confinement or probation.<sup>12</sup> Although economists may focus on *ex ante* deterrence, judges may prefer to look *ex post* at the sympathetic, white, educated offender who reminds judges of themselves and seems to pose no danger. Allowing these offenders to escape imprisonment, however, is inequitable and undercuts the law's deterrent and moral message condemning white-collar crime.

## II. CONGRESS AND THE SENTENCING COMMISSION TOUGHEN PENALTIES

In the early 1980s, Congress indicated that it wanted to raise white-collar sentences,<sup>13</sup> and the Sentencing Commission set out to do so. Although the Sentencing Commission based most of its sentencing guidelines on average past sentences, it raised sentencing ranges for white-collar crimes to bring them into line with larceny sentences.<sup>14</sup> By using short but certain terms of imprison-

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MARVIN E. FRANKEL, *CRIMINAL SENTENCING: LAW WITHOUT ORDER* (1973).

10. See Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMMENT. 395, 395 (1991).

11. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 205 (3d ed. 1986). See generally NAT'L BUREAU OF ECON. RESEARCH, *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* (Gary S. Becker & William M. Landes eds., 1974) (examining various economic approaches to combatting crime).

12. See *supra* note 5 and accompanying text.

13. See S. REP. NO. 98-225, at 177 (1983), as reprinted in 1983 U.S.C.C.A.N. 3182, 3360.

14. U.S. SENTENCING COMM'N, *supra* note 6, at 17-18.

ment to deter and punish, the Commission hoped to reduce greatly the percentage of offenders receiving probation.<sup>15</sup>

The Sentencing Guidelines somewhat checked the judicial temptation to leniency but did not stop it. Federal judges continued to give non-imprisonment sentences to more than 30% of fraud defendants and more than 40% of embezzlers.<sup>16</sup> When the Sentencing Guidelines gave judges the option of imprisonment or another alternative, such as probation or home confinement, judges chose the non-prison alternative for about 57% of embezzlers and 65% of fraud defendants.<sup>17</sup> Moreover, judges sometimes departed downward from the Sentencing Guidelines to give probationary sentences to white-collar defendants who would otherwise have received prison terms.<sup>18</sup> For example, when I was a federal prosecutor, I prosecuted one conspiracy that had defrauded the U.S. Postal Service of between \$55,000 and \$91,000. The ringleader of the conspiracy was a young man from a good family who had gone to college and then entered the family business, orchestrating a series of false and inflated billings and records that spanned several years. The Sentencing Guidelines clearly required a short imprisonment term for this cold, premeditated, prolonged fraud. Yet the district judge pitied him, departed downward, and sentenced him to probation. The judge's strained rationale was that the prolonged scheme was supposedly an "aberrant act."<sup>19</sup> Every

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15. See *id.* at 68 tbl.2 (projecting that the proposed Sentencing Guidelines would reduce the percentage of straight-probation sentences from 59% to 24% for fraud and from 57% to 3% for income tax offenses); John R. Steer, *The Sentencing Commission's Implementation of Sarbanes-Oxley*, 15 FED. SENT'G REP. 263, 263 (2003).

16. Frank O. Bowman, III, *A Challenge to the Rationale for General Economic Crime Sentence Increases Following Sarbanes-Oxley: Letter of Frank Bowman to U.S. Sentencing Commission*, 15 FED. SENT'G REP. 284, 286-87 & figs.5a & 5c (2003).

17. U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.F (2003), available at <http://www.ussc.gov/annrpt/2002/sbtoc02.htm>.

18. See *id.* at 56 tbl.27 (reporting non-substantial-assistance downward-departure rates of 8.6% for embezzlement, 9.9% for fraud, 12.5% for antitrust violations, and 17.1% for tax offenders).

19. Such a prolonged fraud should not have qualified for the aberrant-act departure. See *United States v. Eaton*, No. 98-4502, 1999 U.S. App. LEXIS 1423, at \*9 (4th Cir. Feb. 2, 1999) (requiring that the aberrant conduct be a brief departure from a law-abiding life); *Zecevic v. U.S. Parole Comm'n*, 163 F.3d 731, 734-36 (2d Cir. 1998) (same); *United States v. Withrow*, 85 F.3d 527, 531 (11th Cir. 1996) (same); *United States v. Duerson*, 25 F.3d 376, 381 (6th Cir. 1994) (same); *United States v. Carey*, 895 F.2d 318, 325 (7th Cir. 1990) (same). Aberrant-act departures are now limited by U.S. SENTENCING GUIDELINES MANUAL § 5K2.20(b) & cmt. 2

federal prosecutor can tell stories like this one: although the majority of judges generally follow the Sentencing Guidelines, some judges find ways to misapply, twist, or circumvent them.

To counteract judicial leniency, the Sentencing Commission raised sentences for theft and fraud in 1998 and again in its 2001 Economic Crime Package.<sup>20</sup> After Enron filed for bankruptcy at the end of 2001, President Bush, members of Congress, and the Department of Justice called for even tougher penalties,<sup>21</sup> which resulted in the Sarbanes-Oxley Act of 2002. The Act ordered the Sentencing Commission to review and consider enhancing the Sentencing Guidelines to reflect the seriousness of fraud and related offenses.<sup>22</sup> In compliance, the Sentencing Commission raised its penalties for fraud even further and added more enhancements.<sup>23</sup> These enhancements required judges to imprison defendants for moderate to large frauds. Very simple frauds of \$70,000 or less, or \$30,000 or less that involved the use of the mails

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(2004).

20. See Sentencing Guidelines for the United States Courts, 66 Fed. Reg. 30,512, 30,540 (June 6, 2001) (stating the Sentencing Commission's reasons for consolidating guidelines for theft and fraud); Sentencing Guidelines for the United States Courts, 63 Fed. Reg. 65,982, 65,982-92 (Nov. 30, 1998).

21. See generally Frank O. Bowman, III, *The Sarbanes-Oxley Act and What Came After*, 15 FED. SENT'G REP. 231, 231 (2003) (describing how the Bush administration and congressional Republicans felt pressure to address white-collar crime).

Another element of the story is that high drug sentences likely helped to drag white-collar sentences upward. Once drug sentences increased to five, ten, and twenty years, one- and two-year white-collar sentences looked paltry in comparison. Because of the ratchet effect, drug sentences were immovably high. Thus, the only way to keep pace and reduce inter-crime disparity was to raise white-collar sentences to compensate. *Penalties for White Collar Crime: Are We Really Getting Tough on Crime?: Hearing Before the Subcomm. on Crime, Corrections, and Victims' Rights of the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Frank O. Bowman, III, Associate Professor of Law, Indiana University School of Law), reprinted in *Senate Judiciary Committee Hearing, June 2002: Selected Testimony*, 15 FED. SENT'G REP. 234, 238 (2002).

22. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1104(a), (b)(1), 116 Stat. 745, 808-09.

23. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a), (b)(14) (2003) (raising the base offense level from six to seven for offenses with statutory maxima of twenty years or more and adding four-level enhancement for securities and commodities violations by officers or directors); SUPPLEMENT TO THE 2002 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(O), (P) (2003), available at <http://www.USSC.gov/2002Suppb/2002Suppb.pdf> (enhancements for losses above \$200 million); *id.* § 2B1.1(b)(12)(B)(ii), (iii) (adding four-level enhancement for endangering the solvency or financial security of a publicly traded company or one with 1000 employees or endangering 100 victims).

or telephone, however, could still result in probation if the defendants pleaded guilty.<sup>24</sup>

Describing these penalties as mandatory, however, is misleading. Just as so-called mandatory minimum statutes bind sentencing judges but not prosecutors who choose not to charge them, so the Sentencing Guidelines are subject to a host of prosecutorial manipulation. In other words, the Sentencing Guidelines constrain judicial discretion but still leave significant discretion in the hands of prosecutors.

For example, section 2B1.1 of the Sentencing Guidelines keys the base offense level to the statutory maximum sentence of the crime charged.<sup>25</sup> If the prosecutor chooses to file a mail or wire fraud charge, the base offense level is seven, but if the prosecutor chooses instead to charge it as simple embezzlement or false statements to the government, the base offense level is six. This one-level difference frequently means the difference between brief imprisonment and probation and gives prosecutors leverage to extract pleas. Moreover, prosecutors can choose to decline or divert charges for civil resolution or restitution, enter into non-prosecution agreements, or sign cooperation agreements. All of these avenues leave prosecutors the keys to the prison. Alternatively, if prosecutors want to imprison someone for only a short time, they can charge bargain down to misdemeanors or other offenses with low statutory maxima.<sup>26</sup> For example, Jamie Olis's two codefendants in the Dynegy scandal accepted charge bargains that capped their sentences at five years, but Olis insisted on going to trial and lost.<sup>27</sup> His penalty for exercising his constitutional right to trial was steep:

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24. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1)-(2), (b)(1)(D)-(E) (2004) (setting base offense levels and loss enhancements for fraud); *id.* § 3E1.1 (authorizing up to three-level reductions for acceptance of responsibility); *id.* ch. 5, pt. A (sentencing table).

25. *Id.* § 2B1.1.

26. See, e.g., 18 U.S.C. § 641 (2000) (punishing theft of \$1000 or less from the government by up to one year in prison); *id.* § 655 (specifying the same penalties for theft of \$1000 or less from a federally insured bank by a bank examiner); *id.* § 656 (specifying the same penalties for theft, embezzlement, or misapplication of \$1000 or less from a federally insured bank by a bank officer or employee).

27. See Susan Warren, *Refusing to Talk, Dynegy's Olis Goes to Prison*, WALL ST. J., May 20, 2004, at B1 (reporting that Olis's codefendants capped their prison exposure at five years by pleading to one count each whereas Olis did not).



the Sentencing Guidelines demanded a sentence of at least 292 months, more than 24 years.<sup>28</sup>

Moreover, prosecutors have substantial room to bargain over the facts. Fraud sentences depend on the dollar amount of losses.<sup>29</sup> If prosecutors pull out all the stops to dig up every last victim and dollar lost, they can raise sentences substantially.<sup>30</sup> Conversely, prosecutors can lower sentences if they agree not to press arguable but speculative losses and if they terminate investigations after the defendant quickly agrees to plead guilty. Prosecutors can also manipulate other vaguely worded enhancements, such as whether a crime involved sophisticated means, substantially endangered a company's solvency, or abused the company's trust.<sup>31</sup>

Why did prosecutors push for these guideline enhancements? In part, they were understandably frustrated with lenient judges. A minority of judges do not view white-collar crime as serious and refuse to impose jail sentences unless forced to do so. Part of the prosecutors' motivation was to create more specific deterrence and retribution. But prosecutors themselves show enough mercy and carve out enough exceptions through charge- and fact-bargaining that toughness is not the sole explanation.

Rather, these huge penalties give prosecutors, and not judges, control over the key decision: will a defendant be imprisoned? Prosecutors trust their own gatekeeping abilities and sense of justice. Their ability to create huge disparities between post-plea and post-trial sentences allows them to make credible threats and promise huge rewards to induce pleas. White-collar defendants, who might otherwise roll the dice in all-or-nothing gambles to clear

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28. *Id.* Shortly before this Essay went to press, the U.S. Court of Appeals for the Fifth Circuit vacated Olis's sentence and remanded for resentencing under the now advisory Guidelines. *See infra* note 74.

29. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a), (b)(1) (2004) (setting forth a loss table, which gradually increases offense levels from six to thirty-six).

30. Prosecutors use the same tactic in drug cases, bargaining over drug quantities possessed or sold by co-conspirators that may or may not have been reasonably foreseeable to the defendant. *See, e.g.,* Warren, *supra* note 27 (reporting that the judge in Olis's case settled on a loss amount over the \$100 million threshold required to lengthen the sentence to 292 months).

31. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(8)(B) (2004) (sophisticated-means enhancement); *id.* § 2B1.1(b)(12) (substantial-endangerment-of-solvency enhancement); *id.* § 3B1.3 (abuse-of-trust enhancement).

their names, undoubtedly become more pliable when faced with enormous sentencing differentials.

This plea-bargaining leverage is particularly important in cracking large, multi-defendant frauds and conspiracies. Prosecutors have to start with the small fry and flip them to use their testimony in going after the big fish.<sup>32</sup> Lower-level employees may feel loyalty to their bosses, and the code of silence may inhibit them from revealing their crimes. The threat of substantial prison terms makes these employees more willing to cooperate with the government, as section 5K1.1 cooperation letters are often the only way around otherwise mandatory sentencing guidelines.<sup>33</sup> This need for leverage to flip lower-level employees was one of the Department of Justice's justifications for seeking to raise sentences for lower-loss frauds.<sup>34</sup>

To summarize, the increasingly stiff penalties for white-collar crimes, culminating in the post-Sarbanes-Oxley amendments, suited prosecutors just fine. Until January 2005, the Sentencing Guidelines functioned as a massive, intricate, interlocking set of minimum and maximum sentences that bound judges. Although the Sentencing Guidelines purported to base sentences on real-offense conduct, in practice they were quite susceptible to prosecutorial manipulation.<sup>35</sup> Prosecutors could have a field day bargaining over

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32. See *At Last, a Prosecution in the Enron Debacle*, ACCT., Sept. 1, 2002; Mary Flood & Tom Fowler, *Enron from the Inside*, HOUS. CHRON., Sept. 28, 2004, at A1 (describing prosecutors' strategy of building a case against Michael Kopper, who pleaded guilty and testified against Andrew Fastow, who then pleaded guilty, in order to build enough evidence to prosecute Kenneth Lay and Jeffrey Skilling); Michael Hedges, *The Fall of Enron: Targeting Skilling, Lay May Prove Tough*, HOUS. CHRON., Aug. 25, 2002, at A1; Michael Hedges, *Former Enron Executive to Plead Guilty to Wire Fraud, Money Laundering Charges*, HOUS. CHRON., Aug. 21, 2002, at A1.

33. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004).

34. *Public Hearing Before the U.S. Sentencing Commission* (Mar. 25, 2003), available at [http://www.ussc.gov/hearings/3\\_25\\_03/032503ts.htm](http://www.ussc.gov/hearings/3_25_03/032503ts.htm) (statement of William Mercer, U.S. Attorney for the District of Montana and Chair of the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee, on behalf of the Department of Justice), reprinted in *Transcript of U.S. Sentencing Commission Hearing on Amendments in Response to Sarbanes-Oxley, March 25, 2003*, 15 FED. SENT'G. REP. 291, 292 (2003) ("Because investigators must often work their way up the corporate ladder to uncover the extent of the scheme and bring the perpetrators to justice, we have found that the threat of prison time makes lower-level employees more willing to cooperate and provide information to obtain leniency.").

35. See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing*

charges and facts to force pleas, ensure cooperation, and achieve their own sense of just deserts. Because prosecutors had flexibility but judges did not, judges lost the ability to check and balance unilateral prosecutorial charging decisions.<sup>36</sup> If prosecutors thought the penalties were appropriate, they could choose to apply them. If they thought them too harsh or wanted to induce plea bargains or cooperation, they could show mercy. But judges, by and large, could not.

### III. HOW *BOOKER* UPSETS PROSECUTORS' GAME BOARD

*United States v. Booker*<sup>37</sup> changed all of that. Five Justices held that the Sentencing Guidelines violated the Sixth Amendment because they allowed judges, not juries, to raise maximum guideline sentences based on facts proven by a preponderance of the evidence.<sup>38</sup> A very different majority held that the appropriate remedy was to make the Sentencing Guidelines advisory and to allow appellate review of sentences for reasonableness.<sup>39</sup> Much ink has already been spilled on *Booker*'s wisdom and internal (in)consistency, and so I will not wade into that debate here.

Rather, my focus is how *Booker*'s remedial holding will affect white-collar charging, plea bargaining, and sentencing. *Booker*'s scope remains largely unclear. Many district judges are giving "heavy weight" to the newly advisory Sentencing Guidelines and sentencing within them "in all but the most exceptional cases."<sup>40</sup> Others insist that *Booker* gives judges substantially more flexibility to lower sentences that seem unduly harsh.<sup>41</sup> Although it is too

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*Shadow*, 117 HARV. L. REV. 2548, 2557, 2559-60 (2004).

36. See generally GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 205-30 (2003) (discussing the balance of power between judges and prosecutors in setting sentences); Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 299-301 (2004).

37. 125 S. Ct. 738 (2005).

38. *Id.* at 746, 755-56 (Stevens, J., merits majority opinion, joined by Scalia, Souter, Thomas & Ginsburg, JJ.).

39. *Id.* at 756-57, 765 (Breyer, J., remedial majority opinion, joined by Rehnquist, C.J., and O'Connor, Kennedy & Ginsburg, JJ.).

40. E.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 925 (D. Utah 2005).

41. See, e.g., *United States v. Jaber*, 362 F. Supp. 2d 365, 369-75 (D. Mass. 2005)

early to tell who will win this debate, *Booker* clearly has made the rule-driven Sentencing Guidelines at least somewhat more flexible. Preliminary data indicate that 61.4% of sentences still fall within the Sentencing Guideline range, down from 65.0% in fiscal year 2002. However, 36.8% are below the Sentencing Guideline range, up from 34.2%, while 1.8% are above the range, up from 0.8%.<sup>42</sup>

In other words, *Booker* has already made judges' sentences a little less predictable, and this effect will likely grow as judges test their new-found freedom. On the one hand, reduced predictability might undercut general deterrence. This danger is particularly acute because defendants can overoptimistically predict abnormally low sentences for themselves, just as they do under indeterminate sentencing regimes.<sup>43</sup> *Booker* could thus hinder the law's ex ante deterrent effect. Certainty of apprehension and conviction influence deterrence far more than severity of punishment, however, so *Booker's* effect on deterrence may be modest.<sup>44</sup>

On the other hand, *Booker's* flexibility restores some balance of power by preventing prosecutors from unilaterally promising or threatening certain results upon trial and upon plea. Judges regain more power to adjust sentences to fit their ex post perceptions of individual defendants' blameworthiness and need for specific deterrence.

*Booker's* consequences may be dramatic. The sentencing differential between trial and plea will become less predictable and likely smaller. For example, prosecutors can no longer ensure that Jamie

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(disagreeing with *Wilson* and suggesting that the decision accords too much weight to the now advisory Sentencing Guidelines); *United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005) (disagreeing with *Wilson* and holding that courts are free to diverge from the Sentencing Guidelines "so long as the ultimate sentence is reasonable and carefully supported by reasons tied to [statutory] factors").

42. Memorandum from Linda Drazga Maxfield, Office of Policy Analysis, U.S. Sentencing Comm'n, to Judge Hinojosa, Chair, and Tim McGrath, Staff Dir., U.S. Sentencing Comm'n 1 (Apr. 5, 2004), available at [http://www.ussc.gov/Blakely/booker\\_041305.pdf](http://www.ussc.gov/Blakely/booker_041305.pdf).

43. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2500 (2004).

44. *Penalties for White Collar Crime: Are We Really Getting Tough on Crime?: Hearing Before the Subcomm. on Crime, Corrections, and Victims' Rights of the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of John C. Coffee, Jr., Professor of Law, Columbia University Law School), reprinted in *Senate Judiciary Committee Hearing, July 2002: Testimony of Michael Chertoff, John C. Coffee, and Thomas Donaldson*, 15 FED. SENT'G REP. 244, 246 (2003).

Olis's sentence after trial will be 24 years while his codefendants will serve only five. Although judges will probably continue to reward pleas and punish trials to clear their dockets, they can temper at least the most draconian post-trial sentences. Their freedom to do so will turn in part on how stringently appellate courts apply reasonableness review. If the gap between post-trial and post-plea sentences shrinks and becomes less certain, defendants will feel less pressure to plead.

Put another way, defendants can hold out more hope, rational or overoptimistic, of judicial leniency if they go to trial or reject a cooperation agreement. A section 5K1.1 cooperation letter used to be almost the only way around the Sentencing Guidelines, so defendants raced each other to be the first to cooperate.<sup>45</sup> As a result, the cooperation rate was massive: almost one-fifth of defendants received section 5K1.1 departures and more than twice as many unsuccessfully offered assistance.<sup>46</sup> Now, because prosecutors' threats of post-trial harshness are somewhat less credible, and there is more than one way around that fate, defendants may be more likely to roll the dice by risking trial. The cooperation rate will probably go down somewhat. The 6% trial rate<sup>47</sup> will go up unless, as seems likely, prosecutors offer even more generous plea bargains to compensate, driving sentences down. Thus, complex frauds and conspiracies will become substantially harder to prove because small fry are less willing to flip and testify against big fish.

#### IV. POSSIBLE CONGRESSIONAL RESPONSES TO *BOOKER*

*Booker* is so new that we do not know if, when, or how Congress will respond. Right now, opponents of the Sentencing Guidelines are rejoicing because the advisory-guideline system seems to return

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45. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004); Bibas, *supra* note 43, at 2485-86.

46. LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 9-10 (1998), available at <http://www.ussc.gov/publicat/5kreport.pdf>; U.S. SENTENCING COMM'N, *supra* note 17, fig.G.

47. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at tbl.5.17 (2004), available at <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section5.pdf>.

to judges the flexibility for which they have longed. This state of affairs, however, will likely be short-lived. In the long run, even if most judges follow the Sentencing Guidelines most of the time, anecdotes of undue leniency will accumulate, prompting Congress to re-regulate judges in one of three ways.

*Option One: Make the Sentencing Guidelines binding again and require juries to find facts beyond a reasonable doubt.* The *Booker* remedial dissenters would have preferred this option.<sup>48</sup> Justice Scalia and others believe that jury fact-finding is necessary to fulfill the Sixth Amendment's guarantee of jury trial. They would welcome this overt role for juries at sentencing, much as in *Ring v. Arizona*, in which they required a jury finding of an aggravating factor to trigger the death penalty.<sup>49</sup>

Option one would in effect drive a tank through Sarbanes-Oxley. Juries would have to find beyond a reasonable doubt numerous facts to trigger enhancements, in particular the dollar amount of losses. In many of the largest white-collar cases, however, the loss amount is highly speculative. For example, Jamie Olis's loss computation was based on the entire \$105 million loss in value that the University of California's Dynegy stock holding suffered over the course of eighteen months.<sup>50</sup> The judge accepted this figure even though one-third of the loss predated Dynegy's restatement of earnings, and even though an expert attributed most of the loss to the Enron collapse and a failed merger.<sup>51</sup> Proving fraud-on-the-market losses beyond a reasonable doubt may be all but impossible, particularly if sophisticated accounting arguments and maneuvers baffle lay jurors. Thus, sentences for securities and commodities frauds would likely drop significantly. In cases where defendants have taken discrete sums of money from identifiable victims or

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48. 125 S. Ct. 738, 779 (Stevens, J., remedial dissent).

49. See 536 U.S. 584, 609 (2002).

50. Laura Brubaker Calkins, *Ex-Dynegy Finance Exec Gets 24 Years for Fraud*, SEATTLE TIMES, Mar. 26, 2004, at C2; Tom Fowler, *Appeal Calls Dynegy Figure's Sentence Improper*, HOUS. CHRON., Aug. 19, 2004, at B3 [hereinafter Fowler, *Appeal Calls*]; Tom Fowler, *Supreme Court Decision Changes Rules, Lawyer Says*, HOUS. CHRON., Feb. 1, 2005, at B1 [hereinafter Fowler, *Supreme Court*].

51. Calkins, *supra* note 50; Fowler, *Appeal Calls*, *supra* note 50; Fowler, *Supreme Court*, *supra* note 50. Shortly before this Essay went to press, Olis's sentence was vacated and his case remanded for resentencing. See *infra* note 74.

entities, however, jurors would probably still find and apply enhancements.

Jurors might temper sentences even more if they knew the sentencing consequences of their decisions. A jury would likely look *ex post* at the sympathetic, non-dangerous defendant before it and decide that little or no imprisonment is necessary. Juries would not likely inflate sentences to punish defendants for going to trial, for not cooperating, or to send messages and foster general deterrence.<sup>52</sup> The line of cases culminating in *Booker* is premised upon the idea that jurors authorize a certain level of punishment by their guilty verdict.<sup>53</sup> But the idea that juries authorize punishment in any meaningful sense is an unmitigated legal fiction. Courts keep juries in the dark about punishments, forbid lawyers to mention them, and instruct juries not to think about them.<sup>54</sup>

Option one is unlikely to happen because it is too cumbersome. In Kansas, where the state courts require jury fact-finding under sentencing guidelines, prosecutors rarely bother with penalty trials.<sup>55</sup> Instead, when they desire extended sentences, they evade separate penalty trials through creative charging and consecutive sentencing.<sup>56</sup> Juries would struggle with confusing multi-part special verdict forms, as they did in the WorldCom CEO Bernard Ebbers's trial. Moreover, because Congress wants to raise penalties and help prosecutors, it is not about to give defendants added procedural protections that would impede prosecution and gut Sarbanes-Oxley.

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52. Indeed, some courts strongly discourage or forbid prosecutors to argue in closing that jurors should use their verdict to send a message. *See, e.g.*, *State v. Grimes*, No. C-030922, slip op. at 3 (Ohio Ct. App. Jan. 21, 2005); *Commonwealth v. Hall*, 701 A.2d 190, 203 (Pa. 1997).

53. *See, e.g.*, *Booker*, 125 S. Ct. at 742, 749; *Blakely v. Washington*, 542 U.S. 296, 305 & n.8 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 491 n.16 (2000).

54. *See, e.g.*, *Shannon v. United States*, 512 U.S. 573, 586-87 (1994) (repeating "the rule against informing jurors of the consequences of their verdicts"); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1182-83 (2001).

55. Chief Judge Richard Walker, Kan. Sentencing Comm'n, Address at a Stanford Law School Symposium: The Future of American Sentencing: A National Roundtable on *Blakely* (Oct. 9, 2004).

56. *Id.*

*Option Two: Make Sentencing Guidelines minima binding but keep the maxima advisory.* This is sometimes known as “topless guidelines” or “the Bowman proposal” because Professor Frank Bowman initially proposed it<sup>57</sup> (but has since retreated from the idea). Option two takes advantage of *Harris v. United States*, which held that judges may continue to find facts that trigger minima by a preponderance of the evidence.<sup>58</sup> By making maxima advisory, option two prevents judicial fact-finding at sentencing from ever raising penalty ceilings, so it complies with the letter (but not the spirit) of *Booker*. The proposal seeks to restore something like the *status quo ante* before *Blakely* and *Booker* were decided, though removing the ceilings might raise penalties somewhat.<sup>59</sup>

Although at one time option two seemed the most likely response, enthusiasm has waned and even its author has disavowed it. But if Congress were to enact it, it would largely replicate pre-*Booker* plea bargaining. Prosecutors would once again be able to manipulate myriad sentencing rules to induce plea bargains and cooperation and to achieve their own ideas of sufficient punishment. Judges, once again, would be helpless. If a handful of judges abuse their newly won freedom by going easy on many white-collar offenders, the result may be much less flexibility for judges as a whole. The re-regulation may take the form of option two or even stiffer regulation under option three.

*Option Three: Create Mandatory Minimum Penalty Statutes.* If even a few judges seem too eager to give white-collar defendants probation, Congress may set aside the scalpel of guidelines and seize the sledgehammer of mandatory minima. Just as in the drug arena, legislators may try to seem tough by outbidding each other, leading to a ratchet effect. The result may be one-, two-, five-, and ten-year mandatory minima for the crime *du jour*—corporate fraud.

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57. See Memorandum on Legislative Solutions to *Blakely* from Frank Bowman to U.S. Sentencing Comm’n (July 16, 2004), reprinted in *Memorandum Presenting the Case for Rapid Congressional Reaction in Response to Blakely v. Washington*, 16 FED. SENT’G REP. 369, 371, 373 (2004).

58. 536 U.S. 545, 586 (2002). Of course, if the Court were to change its mind about its 5-4 decision in *Harris*, option two would no longer be exempt from *Apprendi* and *Blakely*’s strictures.

59. See Stephanos Bibas, *Blakely’s Federal Aftermath*, 16 FED. SENT’G REP. 333, 337 (2004).



Just as in the drug arena, these penalties will be trumpeted as getting tough on the fat cats at the top of Enron, WorldCom, and the like. But just as in the drug arena, these nets will catch fish far smaller than Ken Lay and Bernard Ebbers. After all, the wider the net, the more leverage prosecutors have in getting smaller fish to cooperate against bigger ones. Widening the punishment net is a low-cost way for Congress to help prosecutors, whereas funding additional inspectors and prosecutors is far more expensive. Thus, Congress has every incentive to give prosecutors more powerful tools; failing to do so risks seeming soft on crime, which voters hate. If a particular prosecutor enforces the minima literally in a way that seems too harsh, voters will blame the prosecutor rather than Congress: witness Ken Starr.<sup>60</sup> In short, Congress has incentives to trust prosecutorial discretion far more than judicial discretion to adjudicate appropriate punishments.

This resulting transfer of power to prosecutors will not fill the prisons with pencil-pushers. Just as prosecutors do not apply mandatory drug penalties in 35% of the eligible cases,<sup>61</sup> prosecutors will charge-bargain away draconian white-collar sentences most of the time. In other words, the statutes will set starting points and high mental anchors, but plea bargaining will establish realistic floors. Because these floors will be hugely discounted below the nominal sticker prices, they will seem like good discounts rather than bad outcomes. Thus, defendants will be more eager to bargain.<sup>62</sup>

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.<sup>63</sup> By forcing

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60. See Stuntz, *supra* note 35, at 2557 (noting that Kenneth Starr received most of the blame for the investigation of President Clinton).

61. MARCL. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 1262 (2d ed. 2003).

62. For a more thorough discussion of how these anchoring and framing effects affect bargaining under determinate or structured sentencing, see Bibas, *supra* note 43, at 2514-15, 2519.

63. See *id.* at 2472 & n.27.

these cases to trial, they earn high-profile notches in their belts and favorable, marketable publicity.<sup>64</sup>

Second, defendants who are too stubborn to bargain or to flip will suffer. Prosecutors may initially charge minnows to get them to cooperate against bigger fish, or overcharge a medium-size fish simply to induce a quick plea. If the minnow thrashes about in the net and puts up a fight, it may antagonize prosecutors, who will probably stand by their threats rather than throw the minnow back into the sea. Some might view the *Olis* case this way; prosecutors were happy to settle for a five-year sentence,<sup>65</sup> but when *Olis* put up a fight, they made good on their threats to inflict 24 years instead.<sup>66</sup> After all, threats made during plea bargaining would lose their effectiveness if defendants learned that prosecutors did not follow through with them. This net-widening effect, including the catching of ever-smaller fish, is one frequent criticism of drug enforcement.<sup>67</sup> Drug laws that were supposed to target kingpins are now used much more often against street-level dealers, who deserve significant punishment but not as much as the kingpins. Once mandatory minima spread to ordinary white-collar crime, white-collar enforcement will suffer some of the same pathologies that drug enforcement does today.

Two significant countervailing forces, however, will ensure that white-collar enforcement never becomes as harsh as drug enforcement. The first is simple human decency. Prosecutors, after all, are human beings, and most of them are good, decent people. At some point, most will recoil from making potentially useful but unconscionable threats, although their tolerance for punishment may be higher than the average person's.<sup>68</sup> As Professor William Stuntz points out, prosecutors do not simply maximize punishment, but

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64. *Id.*

65. See *supra* note 27 and accompanying text (reporting that prosecutors agreed to five-year sentences for *Olis*'s codefendants).

66. See Warren, *supra* note 27.

67. See, e.g., Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (criticizing mandatory minima as heavily penalizing low-level offenders).

68. Cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (upholding a prosecutor's decision to reindict a defendant on heavier charges carrying a possible life sentence because the defendant had refused to take an offered plea bargain).

use a complex calculus that includes their own sense of justice as well as that of voters.<sup>69</sup> Most prosecutors probably view white-collar crime as serious, but not as serious as violent or major drug crime. It deserves months or years in prison, but seldom decades:

Second, white-collar defendants receive better representation from their defense lawyers. Most drug defendants are not well-off and must accept whatever counsel the court appoints for them. Some appointed defense counsel are excellent, but others are not. White-collar defendants, however, frequently can afford to retain experienced private counsel. These lawyers, many of whom used to be prosecutors,<sup>70</sup> know the ropes and have established relationships with their former prosecutorial colleagues. As a result, they may persuade prosecutors before indictment to accept civil settlements and restitution in lieu of criminal charges. Moreover, the prospect of facing an aggressive, well-funded defense lawyer may make prosecutors more flexible in plea bargaining.<sup>71</sup> In contrast, low-level white-collar defendants, such as secretaries, may not enjoy these benefits. Although their employers might pay for good defense counsel, these lawyers may discourage them from taking favorable pleas and cooperating against their superiors.<sup>72</sup>

All in all, while white-collar sentencing will never be exactly like drug sentencing, the parallels are ominous enough to be troubling. One can only hope that Congress does not go far down the drug sentencing road.

## V. A FEW MODEST SOLUTIONS

I do not purport to have a grand solution to the mess created by *Booker*. There are, however, a few more specific things that the

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69. See Stuntz, *supra* note 35, at 2554 (describing the utility function prosecutors use to determine punishment).

70. See, e.g., Ken Belson & Jonathan Glater, *A Folksy Lawyer with a High-Powered Client*, N.Y. TIMES, Feb. 17, 2005, at C1 (discussing Reid Weingarten, defense lawyer for former Secretary of Agriculture Mike Espy, WorldCom's Bernard Ebbers, Tyco International's Mark Belnick, the Teamsters' Ron Carey, and Enron's Richard Causey).

71. See Bibas, *supra* note 43, at 2479, 2481-83 (maintaining that private attorneys who bill by the hour have the incentive and time to defend their clients more effectively).

72. See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 122-26 (1995) (arguing that attorneys will not promote cooperation if they want the client's corporation to recommend them for other cases).

Sentencing Commission can do on its own to improve this area, inflicting punishment with bite without locking most people up for decades.

*First*, the Sentencing Commission should clarify how to compute losses in areas that are currently murky, such as the large accounting-fraud cases premised on drops in a stock's price.<sup>73</sup> In the *Olis* case, Judge Lake treated the loss in value suffered by one shareholder over eighteen months as the loss amount.<sup>74</sup> But surely this is too crude a measure. What if the entire stock market dropped 25% during that time? What if all stocks in that line of business dropped 25%? What if the drop in price might have been attributable to other causes, such as war in the Middle East or a strengthening dollar? What if the defendant's company might have gone bankrupt regardless of the fraud? How can we tell, by a preponderance of the evidence or more, if a defendant could have foreseen such a loss?

The more guidance the Sentencing Commission provides on how to calculate loss, the less flexibility prosecutors have to manipulate loss amounts. Some of the massive but speculative losses alleged in *Olis* and other cases would shrink because prosecutors would be able to prove only the more concrete losses by a preponderance of the evidence.

*Second*, the Sentencing Commission should calibrate white-collar sentences to their core purpose. The prospect of routine probation for white-collar offenders in the old days rightly troubled many people. Fines seemed like a mere tax on business that allowed wealthy criminals to buy their way out of real punishment. Short but certain terms of imprisonment would go a long way toward satisfying the demand for unequivocal condemnation. Few white-collar defendants deserve decades in prison, as if they were three times worse than rapists. Rather, one could add bite to short white-

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73. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 n.3(A)(i) (2004) (defining actual loss as "the reasonably foreseeable pecuniary harm ... result[ing] from the offense"); *id.* § 2B1.1 n.3(A)(iv) (requiring that losses be foreseeable results of the offense).

74. See Warren, *supra* note 27 (reporting that Judge Lake calculated the lost value based on the University of California's retirement fund loss of \$105 million). Shortly before this Essay went to press, the U.S. Court of Appeals for the Fifth Circuit vacated *Olis*'s sentence and remanded his case for resentencing in light of *Booker*. In its opinion, the Fifth Circuit criticized how Judge Lake had computed *Olis*'s loss amount. *United States v. Olis*, No. 04-20322, 2005 WL 2842077, at \*3-7 (5th Cir. Oct. 31, 2005).

collar prison terms by coupling them with shaming penalties. As Professors Dan Kahan and Eric Posner have argued, white-collar offenders have a great deal of reputational capital and are particularly sensitive to shaming.<sup>75</sup> A mere sentence of community service or charitable works would not effectively communicate condemnation of the crime. Felons ought to spend a few years in prison, not home detention or halfway houses. But they should also have to apologize and make restitution to victims and communities, and in appropriate cases they should endure some stigmatizing publicity as well. This combination of punishments might foster deterrence, inflict retribution, express condemnation, and heal victims at a fraction of the cost. It would condemn and deter crime *ex ante* without sacrificing *ex post* individualized justice.

### CONCLUSION

In *Apprendi* and *Blakely*, the Supreme Court purported to strike a blow for juries and populist control of criminal justice. Juries, however, are unlikely to loom large post-*Booker*, and they certainly will not set white-collar sentences in any meaningful sense. Congress is not about to hamper prosecutors by making juries answer complex special verdict questions beyond a reasonable doubt. Rather, Congress will leave power in prosecutors' hands. Prosecutors will keep trying to set sentences, but judges may have modestly more power to counterbalance them. The Sentencing Commission could reduce prosecutorial manipulation by clarifying loss computations and could authorize shaming penalties to complement imprisonment. 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 short, history may be about to repeat itself. Just as judicial inconsistency and perceived leniency led to the Sentencing Guidelines, so post-*Booker* judicial variation may lead Congress to

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75. See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368-72 (1999); see also Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 966-99 (1999) (arguing that shaming procedures at sentencing can deter and induce constructive changes in corporate behavior).

pass even tougher laws. In other words, judges may soon bring even more of a straitjacket upon themselves, to the satisfaction of prosecutors.