Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002

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The collapse of Enron in the fall of 2001 left investors, creditors, former employees, and legitimate business leaders asking whether the bankruptcy[1] of the company was solely the product of bad business practices or the consequence of criminal conduct.[2] Deregulation in the energy and telecommunications industries, special access to politicians through lawful generous campaign contributions, and civil litigation "reforms" limiting private securities litigation permitted Enron's

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1. At the time of Enron's filing for bankruptcy on December 2, 2001, it was the largest corporate bankruptcy ever, with pre-bankruptcy assets, based on Securities and Exchange Commission filings, of $63.4 billion. Tammy Williamson, *Largest Bankruptcy*, CHI. SUN-TIMES, Dec. 9, 2002, at 8, *available at* 2002 WL 6481808. Within eight months of Enron's bankruptcy, WorldCom eclipsed Enron as the largest bankruptcy filing in the history of the United States, with listed assets valued at $107 billion, although some analysts believe the assets were worth less than $15 billion at the time of the bankruptcy filing. Shawn Young et al., *Leading the News: WorldCom Files for Bankruptcy*, WALL ST. J., July 22, 2002, at A3, *available at* 2002 WL-WSJ 3401243.

2. Rick Bragg, *Enron's Collapse: Workers Feel Pain of Layoffs and Added Sting of Betrayal*, N.Y. TIMES, Jan. 20, 2002, § 1, at 1, *available at* LEXIS, News Library, The New York Times File. Certainly, some of the acts that led to the energy giant's demise were lawful. In particular, the use of the same internal auditor accounting firm to conduct the external audits raised the eyebrows of the collective public but was not prohibited either by general accounting practices or by law. Pamela Barnett, *Corporate Reform Bill Headed to Bush*, NAT'L J., July 27, 2002 (reviewing proposed legislation to address corporate accountability and accounting reform legislation, which includes a proposal to establish an independent accounting oversight board and severing auditing from consulting services), *available at* 2002 WL 7095409. The Sarbanes-Oxley Act of 2002 was passed on July 30, 2002 and did indeed include such provisions. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101–109, 116 Stat. 745, 750–71 (to be codified at 15 U.S.C. §§ 7211–7219) (Public Company Accounting Oversight Board); *id.* §§ 201–209, 116 Stat. 745, 771–75 (to be codified at 15 U.S.C. §§ 7231–7234) (Auditor Independence).

conduct to continue unabated by either government regulation or private enforcement. The public stood as the shipmen on lookout on the *Titanic*: it spied the tip of the iceberg and recognized that the iceberg signaled trouble, but had no idea how large the iceberg might be. Nevertheless, as the Enron debacle continued to spread, some elements of probable criminality came to light.[3]

The staggering economic losses from Enron's demise are reminiscent of the insider trading scandals of the 1980s and 1990s, as well as the Savings and Loans failures from that same period.[4] Michael Milken, Ivan Boesky, and Charles Keating were financial giants when the businesses with which they were involved collapsed under the weight of questionable financial practices and personal financial self-dealing. Plea agreements, departures from the Sentencing Guidelines, and appeals resulted in the three each serving less than five years in prison, despite their actions causing billions of dollars of losses to investors and taxpayers.[5] History has a way of repeating itself,[6] and one must consider whether the corporate executives of today will fare as well as the economic criminals of the past.

Recent changes to the Federal Sentencing Guidelines have focused on appropriate sentencing of economic crime offenders like Milken,

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3. For example, the sale of millions of dollars worth of Enron securities by senior executives in the weeks and months before the collapse of the company's stock, with many Enron employees losing their life savings invested in retirement plans dominated by Enron shares, prompted at least four separate Congressional inquiries. Kurt Eichenwald, *Enron's Collapse: Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, § 1, at 1, *available at* LEXIS, News Library, The New York Times File. The sales of stock occurred while the same insiders continued to advocate the purchase of Enron stock to its employees. Executives instituted policies that kept employees from selling their investments during time periods when significant losses in shareholder value may have been anticipated; they also employed "creative" record keeping which hid large business losses from shareholders and securities regulators. *See* Michael A. Hiltzik & E. Scott Reckard, *The Enron Inquiry: Enron Chairman Urged Employees to Buy Stock*, L.A. TIMES, Jan. 19, 2002, at A1, *available at* 2002 WL 2447528.

4. *See* Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1089–91 (1999) (arguing against relaxing private civil remedies for securities fraud in light of the rampant financial market fraud of the 1980s and 1990s).

5. *See infra* note 268 (discussing in more detail the individual results of the criminal prosecutions).

6. In reaction to the Savings and Loans scandals, President George H. W. Bush promised, "We will not rest until the cheats and chiselers and the charlatans spend a large chunk of their lives behind the bars of a federal prison." Kitty Calavita & Henry N. Pontell, *The State and White-Collar Crime: Saving the Savings and Loans*, 28 LAW & SOC'Y REV. 297, 301 (1994) (citing to the speech given by President Bush to United States attorneys in June 1990). Twelve years later, in a speech delivered at the signing into law of legislation to fight corporate fraud, President George W. Bush warned, "No more easy money for corporate criminals—just hard time." Mike Allen, *Bush Signs Corporate Reforms Into Law; President Says Era of 'False Profits' Is Over*, WASH. POST, July 31, 2002, at A4, *available at* 2002 WL 24824663.

Boesky, and Keating. Consolidation of competing guidelines, consideration and clarification of loss calculations for the purpose of measuring economic harm by such criminal conduct, and careful explanation of sentencing enhancements and departures for such crimes are all part of the United States Sentencing Guidelines ("Sentencing Guidelines" or "Guidelines") 2001 Economic Crime Package,[7] effective as of November 1, 2001.[8] Concurrent amendments to the Money Laundering Guidelines[9] address the disparity in white-collar crime sentences based on prosecutorial discretionary authority over charging decisions. Taken together, the amendments should provide greater clarity to sentencing courts, uniformity in longer terms of imprisonment for moderate and high levels of pecuniary harm, and specific deterrence to economic crime offenders.

In response to the corporate and accounting scandals that began with Enron, but appear to have no end in sight, the legislature attempted to restore faith in America's financial markets by enacting new criminal statutes and mandating stiffer penalties for economic crimes.[10] Specifically, the Sarbanes-Oxley Act of 2002 was the result of a series of scandals and the precipitous decline of investor confidence in the summer of 2002. Included in the legislation were directives for the United States Sentencing Commission ("Sentencing Commission") to promulgate any amendments to the Guidelines necessary to effect the purposes of the legislation and, in particular, to "reflect the serious nature" of corporate fraud.[11]

This Article lauds the United States Sentencing Commission for the dramatic undertaking that culminated in the Economic Crime Package. This Article addresses two Guidelines-related issues that will impact sentencing of the new millennium's economic criminals: first, whether substantive changes in the Sentencing Guidelines based on the new

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7. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (and scattered provisions throughout) (2002) [hereinafter U.S.S.G.]; *id.* app. C, amend. 617, at 134–91.

8. Guideline amendments are effective only as to criminal conduct that occurred on or after the effective date of the amendments or charged criminal conduct that began before and continued after the effective date of the revised Guidelines. To the extent that criminal conduct by Enron executives occurred prior to November 1, 2001, much of the amendments will not technically apply. U.S.S.G. § 1B1.11(b)(1), (3). Nevertheless, to the extent that the amendments better define terms like "loss" to resolve splits in circuit court interpretations of such terms under the Guidelines, courts are directed to "consider subsequent amendments, to the extent such amendments are clarifying rather than substantive changes." *Id.* § 1B1.11(b)(2).

9. *Id.* § 2S1.1.

10. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 801–1107, 116 Stat. 745, 800–10 (to be codified in scattered sections of 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

11. *Id.* § 905(b)(1), 116 Stat. 745, 805; *id.* § 1104(b)(1), 116 Stat. 745, 809 (to be codified at 28 U.S.C. § 994 note).

legislation are needed given the recently adopted Economic Crime Package; and second, whether the increased trend in downward departures under the Guidelines can be curbed to affect the nature of the Economic Crime Package and corporate fraud reforms in light of the broad discretion permitted sentencing judges as acknowledged by the Supreme Court.[12]

This Article considers the application of the Federal Sentencing Guidelines to current economic crime. Part I reviews the historical development of the Guidelines, particularly the treatment of economic crime.[13] Part II considers the likely effect of the 2001 Economic Crime Package on future economic crime sentences, including the countervailing effects of the Money Laundering Guidelines amendments.[14] Given the extensive changes to the sentencing of white-collar criminals under the 2001 Economic Crime Package, Part II also questions the sagacity of promulgating substantive changes to the Fraud and Theft Guideline in response to legislative action on corporate and accounting fraud.[15] Part III identifies the continued threat of unwarranted downward departures under the Guidelines, both through substantial assistance departures and judicially imposed departures.[16] Finally, Part IV examines whether movement toward longer incapacitation is justified in light of the availability of civil remedies.[17]

Milken, Boesky, Keating, and now, perhaps, the former officers of Enron, Adelphia,[18] and WorldCom[19] all demonstrate the need for

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12. *See* Koon v. United States, 518 U.S. 81, 98 (1996).

13. *See infra* Part I (providing a history of the U.S. Sentencing Guidelines).

14. *See infra* Part II.A–B (discussing the goals and effects of the 2001 Economic Crime Package and the Money Laundering Control Act of 1986).

15. *See infra* Part II.C (describing penalties for white-collar crime).

16. *See infra* Part III (discussing the role of judges in determining departures from the Guidelines and the threat of those departures to the effectiveness of sentences).

17. *See infra* Part IV (providing suggestions for reforming white-collar criminal penalties).

18. *See* Daniel Eisenberg, *Jail to the Chiefs?*, TIME, Aug. 12, 2002, at 24 (reporting early morning "perp walks" for WorldCom executives Scott Sullivan and David Myers upon their arrest for corporate fraud, only a week after Adelphia Communications' founder and his two sons received similar "star treatment"), *available at* 2002 WL 21959750.

19. WorldCom filed for bankruptcy one month after it announced the need to restate earnings for 2001 and the first quarter of 2002 because it misstated $3.8 billion in expenses to mask a $1.2 billion loss for that same period. Young et al., *supra* note 1, at A3. The earnings and expense manipulation has been described as "what could turn out to be the biggest accounting fraud ever." *Id.* Bernard Ebbers, WorldCom's CEO during the period of fraudulent accounting practices, was ousted in April 2002 after the financial irregularities became apparent. *Id.* Prior to his departure from the company, Ebbers had received a $408 million loan from WorldCom. *Id.* Market capitalization for WorldCom had dropped to $280 million at the time of the bankruptcy filing. *Id.* WorldCom employees had noted accounting irregularities as early as 2000, a fact noted by congressional committees probing WorldCom's financial fiasco. *Upheaval at WorldCom:*

deterrence. Currently, either because of deregulation or litigation "reform," the civil deterrence matrix is insufficient.[20] History has shown that it is not just the consumers, the investors, and the employees who are harmed. The business community itself cannot function with companies like Enron slowly eroding the confidence in our financial markets.[21] While the revisions to the fraud section of the Guidelines are a start, this Article suggests that the use of downward departures in economic crime cases must be restricted to rare instances when the Sentencing Guidelines do not adequately take into account extraordinary circumstances. In that vein, this Article sets forth a "guided" departure scheme for sentencing economic crimes so that the basis for departure is not permitted to alter the sentencing range by more than a fraction of the overall term of imprisonment.[22] Having locked the front door through the Economic Crime Package, we must now turn our attention to closing the backdoor.

Congress Calls for Documents of 2 Employees, WALL ST. J., July 22, 2002, at A6, *available at* 2002 WL-WSJ 3401223. Executives at WorldCom have been criminally charged. *See infra* note 21 and accompanying text (discussing the poor image of the business world in the wake of the WorldCom collapse).

20. *See* Ramirez, *supra* note 4, at 1089–93 (urging more stringent civil remedies for securities fraud). The threat of traditional civil remedies has failed to restrain corporate leaders, whose interest in short-term personal profit has overshadowed their interest in sound accounting practices and long-term corporate profit. *See* Richard A. Oppel, Jr., *Enron's Many Strands: Capital Rule Makers; Democrats Try to Surpass Bush in Tough Post-Enron Fraud Laws*, N.Y. TIMES, Mar. 13, 2002, at C1 ("'Enron has shown more than anything that the arsenal of weapons to prevent securities fraud is lacking.'" (quoting Professor Donald C. Langervoort of the Georgetown University Law Center)), *available at* LEXIS, News Library, The New York Times File.

21. "I cannot think of a time when business over all has been held in less repute." Henry M. Paulson, Jr., chairman and chief executive officer of Goldman Sachs, *quoted in* Patrick McGeehan, *Goldman Chief Urges Reforms in Corporations*, N.Y. TIMES, June 6, 2002, at A1, *available at* LEXIS, News Library, The New York Times File. Indeed, on the heels of WorldCom's admission of significant losses hidden by falsely reported profits over five previous quarters, foreign investors began withdrawing from United States markets. Edmund L. Andrews, *Turmoil at WorldCom: The Overseas Reaction; U.S. Businesses Dim as Model for Foreigners*, N.Y. TIMES, June 27, 2002, at A1 (reporting the lowest level of the dollar, compared to the euro, in twenty-eight months), *available at* LEXIS, News Library, The New York Times File. Wolfram Gerdes, chief investment officer for global equities at Dresdner Investment Trust in Frankfurt, Germany, stated, "This is the most pessimistic sentiment against the United States that I have ever experienced in my career. . . . There is unanimous agreement that the U.S. is not the best place to invest anymore." *Id.*

22. *See infra* Part IV.D (providing guidance for departures from the Guidelines).

I. THE EVOLUTION OF THE FEDERAL SENTENCING GUIDELINES

A. Historical Development of the Sentencing Reform Act

The Sentencing Reform Act of 1984[23] ("SRA") was the result of over a decade of legal wrangling to reform federal criminal law.[24] Although initially proposed as advisory sentencing guidelines, amendments resulted in a system of presumptive sentencing rules in 1978.[25] After having been debated over in four Congresses, between 1977 and 1984,[26] the SRA was finally passed through legislative fiat when it was attached to the Senate's version of the Comprehensive Crime Control Act[27] in a continuing appropriations resolution.[28] Prior to its enactment, the SRA enjoyed broad political support from leading members of both political parties[29] and little opposition from the judiciary.[30] The SRA created a Sentencing Commission[31] to develop the Sentencing Guidelines. The

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23. Sentencing Reform Act ("SRA") of 1984, 18 U.S.C. §§ 3551–3552, 3554–3559 (2000 & West Supp. 2002); 18 U.S.C. § 3553 (2000 & West Supp. 2002), *amended by* 21st Century Department of Justice Appropriations Act, No. 107-273, § 4002(a)(8), 116 Stat. 1758, 1807 (2002); 28 U.S.C. §§ 991–998 (2000 & West Supp. 2002).

24. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 39–48 (1998).

25. *Id.* at 41.

26. *Id.* at 40.

27. Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C.).

28. STITH & CABRANES, *supra* note 24, at 47.

29. *Id.* at 39, 46–47. The "liberal" side of the aisle was concerned that the disparity in sentencing might reflect conscious or unconscious discrimination against minority groups and women. *See* Joseph S. Hall, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1339 (1999) (discussing influences on sentencing reform). The "conservative" side of the aisle was concerned with getting tough on crime, which was viewed as an increasing problem. *See* STITH & CABRANES, *supra* note 24, at 39–40.

30. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 251–57 (1993) (arguing that the judicial branch had little impact on sentencing reform). In 1973, Judge Marvin E. Frankel called for an end to discretionary sentencing. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5–6 (1973) (advocating an end to indeterminate sentencing in reaction to the disparity in federal sentences and the lack of predictability in sentencing outcomes).

31. "The United States Sentencing Commission ('[Sentencing] Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members." U.S.S.G. ch. 1, pt. A.1. The commissioners serve staggered terms of six years each. 28 U.S.C. § 992 (2000). The voting members are appointed by the President, with Senate confirmation, and include three federal judges selected by the President "after considering" a list of six judges submitted by the Judicial Conference. *Id.* § 991(a). The Attorney General or his or her designee and the Chairman of the United States Parole Commission sit as *ex officio* members. *Id.* The SRA prospectively abolished parole; consequently, the parole commission position is only temporary. *See* Parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, §§ 1–3, 110

original Commissioners, confirmed in 1985,[32] were charged with developing the Sentencing Guidelines to achieve three congressional objectives.[33]

The first objective was "honesty in sentencing," that is, imposing a sentence that would reflect the actual amount of time an offender could expect to be imprisoned.[34] This objective was in response to the pre-Guidelines system of indeterminate sentencing. With indeterminate sentencing, a judge sentenced a convicted offender either to a particular number of years or to a range of years.[35] Once sentenced, the offender's fate lay in the hands of administrative bodies. The criminal sentences were often shortened by as much as two-thirds as a result of either "good time" credits[36] against the sentences or the decisions of the United States Parole Commission[37] permitting early release.

The second objective sought was "reasonable uniformity in sentencing," which would narrow the disparity in sentences for similar criminal conduct by similar offenders.[38] In the pre-Guidelines era, the sentencing judge had unlimited discretion to impose any sentence that

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Stat. 3055, 3055-56 (extending the period that parole remains in effect after Nov. 1, 1987, to fifteen years) (setting the number of members on the Parole Commission at five), *amended by* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 11231(d), 111 Stat. 251, 745–46 (codified as amended at 18 U.S.C. § 4201 (2000)); Sentencing Reform Act ("SRA") of 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 1837, 2027; Stith & Koh, *supra* note 30, at 280 & n.361.

32. *See* STITH & CABRANES, *supra* note 24, at 49.

33. U.S.S.G. ch. 1, pt. A.3.

34. *Id.*

35. *See* Frank O. Bowman III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 302 n.12 (2000) (summarizing the three options available to a district court when imposing a sentence of imprisonment, as follows: the court could set a maximum term of imprisonment (1) of which the offender would be required to serve one-third before being eligible for parole (18 U.S.C. § 4205(a) (2000) (repealed 1984)); or (2) which specified a minimum term that was less than one-third of the maximum (*Id.* § 4205(b)(1) (repealed 1984)); or (3) which specified that the Parole Commission may determine when the prisoner may be released on parole (*Id.* § 4205(b)(2) (repealed 1984))) [hereinafter Bowman, *Fear of Law*].

36. "Good time" credits were a statutory entitlement that permitted prisoners to receive a reduction of up to nearly one-third of a stated sentence for good behavior. 18 U.S.C. § 4161 (repealed 1984). Federal inmates may still earn good time credits under the current system; however, the rate of accumulation is much lower. 18 U.S.C. § 3624(b) (2000).

37. In 1930, Congress created the United States Board of Parole, which later became the United States Parole Commission. *See* DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING 2 (1978). The statutes that set forth the powers of the Parole Commission were in 18 U.S.C. §§ 4201–4218 (repealed 1984). Bowman, *Fear of Law*, *supra* note 35, at 302 n.11. Prior to 1930, each federal prison had its own parole board, which had discretionary power to release any prisoner who served one-third of his original stated sentence so long as the board was satisfied that "there [was] a reasonable probability" that the prisoner could "remain at liberty without violating the laws." *Id.* (quoting Act of June 25, 1910, ch. 387 § 3, 36 Stat. 819, 819).

38. U.S.S.G. ch. 1, pt. A.3.

fell at or below the statutory maximum for that particular crime. Moreover, no limitation existed on the type of information the court could receive or consider in assessing the sentence to be imposed,[39] nor was the court required to issue findings indicating which factors led to a particular sentencing decision.[40] As long as a district court's sentence did not violate broad notions of due process, it was unreviewable on appeal.[41] Congress provided for limited appellate jurisdiction to review federal sentences under the SRA.[42]

The Sentencing Guidelines were enacted to address disparity in sentencing.[43] Sentences before the enactment of the Guidelines tended

39. *See* 18 U.S.C. § 3661 (2000) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

40. *See* Bowman, *Fear of Law*, *supra* note 35, at 303–04 (discussing the breadth of a sentencing judge's discretion).

41. Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."); Dorszynski v. United States, 418 U.S. 424, 431 (1974) (stating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end"); United States v. Tucker, 404 U.S. 443, 449 (1972) (vacating sentence on due process grounds where court relied upon prior uncounseled convictions in sentencing); United States v. Rosenberg, 195 F.2d 583, 604 (2d Cir. 1952) (recognizing the precedent of the trial court's discretion); PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 3 (1977) (quoting the appellate court's finding in *Rosenberg* that it "'ha[d] no control over a sentence which is within the limits allowed by a statute'"); *see also* Stith & Koh, *supra* note 30, at 226 ("For over two hundred years, there was virtually no appellate review of the trial judge's exercise of sentencing discretion."); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988) (noting the extent of judicial discretion in sentencing prior to the SRA). Under the SRA, sentences imposed by the district courts are subject to appellate review. 18 U.S.C. § 3742(a), (b) (2000).

42. *See* 18 U.S.C. § 3742 (2000).

43. The Sentencing Guidelines have no shortage of critics. In particular, some commentators assert that although the Guidelines give lip service to the theoretical justifications for punishment, the application of the Guidelines to individuals is rigid, and the preference for imprisonment is often harsh. *See* STITH & CABRANES, *supra* note 24, at 82–85 (likening the sentencing process under the Federal Sentencing Guidelines to Kafka's parable, in which "the real power of the court has receded into an impenetrable state agency"); Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 59–60 (2000) (discussing the inflexible nature of the Guidelines); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1718–20 (1992) (asserting that rigidity of the Guidelines has caused the actors in the criminal process to seek out intentional disparity in sentencing); Nancy Gertner, *Federal Sentencing Guidelines*, 29 HUM. RTS. 6, 7–8, 23 (2002) (criticizing the Sentencing Commission for not providing justification for changes to the Guidelines); Lawrence S. Lustberg, *The Importance of Purposes in Choosing Between Prison and Probation*, 3 FED. SENT. REP. 334, 334 (1991) (criticizing the Guidelines for assuming that incarceration will be imposed); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 861–63 (1992) (discussing

to be harsher for crimes frequently committed by offenders in lower socio-economic backgrounds, compared to sentences for "white-collar" crimes that frequently included little, if any, imprisonment.[44] Even as the Sentencing Guidelines attempted to eliminate racial and socio-economic effects, Congress effectively widened the gap in some areas, most notably the sentencing disparity between offenders convicted of cocaine offenses compared to offenders convicted of crack-cocaine offenses for which the ratio of drug quantity for purposes of sentencing is 100:1.[45] Sentencing statistics reveal that an overwhelming

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the Guidelines' inflexibility toward departures); Stith & Koh, *supra* note 30, at 267–69, 284–85 (discussing the increase in prison terms as a result of sentencing reforms); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. REP. 355, 356 (1992) (criticizing the rigidity of the Guidelines). *But see* Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 719–20, 736–40 (supporting the predictability of the Guidelines) [hereinafter Bowman, *Quality of Mercy*]; William W. Wilkins, Jr., et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 326–27 (1993) (concluding that the Guidelines have been a successful innovation in reducing unwanted disparity).

This Article focuses on the application of recent economic crime reform measures to address economic crime. While the critics of the Sentencing Guidelines raise numerous legitimate concerns, Judge Frankel's observation that "[t]he idea of . . . guidelines was not meant nor expected to remedy every defect in our sentencing practices" should be kept in mind. Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 655 (1993) (providing basic principles of sentencing). Aggressively punitive laws by our legislatures, intended to showcase their "tough on crime" stance, *see* Marie Gottschalk, *Review Article: Black Flower: Prisons and the Future of Incarceration*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 207–11 (2002), has led to the ignominious distinction for the United States as having the highest incarceration rate among developed countries, Frankel & Orland, *supra*, at 655; *see also* ANDREW R. KLEIN, ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION § 1.01, at 4 (2d ed. 1997) (noting that the high rate of incarceration in the United States surpasses that of all other developed countries). The Sentencing Commission has attempted, at times, to deflect or suggest correction of this trend.

44. U.S.S.G. ch. 1, pt. A.4(d); *see* STITH & CABRANES, *supra* note 24, at 106–12 (providing a critical view of the assessment of disparity in pre-Guidelines sentencing).

45. For example, the Guidelines provide the same base offense level of thirty-eight for both a defendant convicted of possession of 150 kilograms or more of cocaine and a defendant convicted of possession of 1.5 kilograms or more of cocaine base (that is, crack cocaine). U.S.S.G. § 2D1.1(c)(1). For an eye-opening description of the legislative history of crack-cocaine sentencing, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293–98 (1995). Judge Frankel's observation made over twenty-five years ago that "[m]any of our criminal laws are enacted in an access of righteous indignation, with legislators fervidly out-shouting each other, with little thought or attention given to the large numbers of years inserted as maximum penalties" holds true today. *See* FRANKEL, *supra* note 30, at 9.

The Sarbanes-Oxley Act of 2002 also supports Judge Frankel's observation. Increased statutory maximums for mail fraud and wire fraud were first proposed to double from five years to ten years. *See* Floyd Norris, *Corporate Conduct: Hard Talk, Softer Plans*, N.Y. TIMES, July 10, 2002, at A1, *available at* LEXIS, News Library, The New York Times File. As reports of additional corporate misdeeds surfaced and the stock market tumbled, politicians embraced the quadrupling of the maximum terms from five years to twenty years. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (to be codified at 18 U.S.C. § 1341 note).

percentage of crack-cocaine offenders are black[46] and that the offenders of economic crime are overwhelmingly white.[47] Comparing these statistics[48] to those of the general prison population supports the notion that race may still be a factor in sentencing; however, it is now codified in the Sentencing Guidelines because through determinate sentencing the legislature can target particular crimes and more narrowly define the parameters of sentences.[49] Thus, targeting certain crimes through mandatory minimum sentences or punishing more harshly certain non-violent crimes that are more frequently committed by minorities are decisions by the legislature embedded within the Guidelines in the base offense levels assigned to those crimes.[50]

Finally, as its third objective, Congress sought "proportionality in sentencing," by implementing a system in which criminal conduct of varying degrees of severity would be appropriately sentenced.[51] This

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Senator Phil Gramm, the sole dissenting voice as House and Senate conferees prepared to vote on the compromise bill, complained that the bill was "too inflexible for business," stating, "I want to make it clear that this bill could have been a lot worse.... In the environment that we're in, virtually anything could have passed the Congress." David S. Hilzenrath et al., *How Congress Rode a "Storm" to Corporate Reform*, WASH. POST, July 28, 2002, at A1 (describing the swift passage of the Sarbanes bill, made stronger on the Senate floor with new penalties for financial fraud), *available at* 2002 WL 24823954. The bill passed in the House with a 423-3 vote, and the Senate approved it 99-0. Allen, *supra* note 6.

46. In 1995, the United States Sentencing Commission recommended to Congress an amendment to the Guidelines that would reduce sentencing disparity for possession of cocaine and cocaine base in the Drug Quantity Table of the Guidelines. Congress affirmatively disapproved the amendment. Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (codified at 28 U.S.C. § 994 note (2000)); *see also* KLEIN, *supra* note 43, § 1.01, at 3 (presenting statistical information to support the claim that the drug crimes "punished most severely are those most available to and used by minorities").

47. *See* UNITED STATES SENTENCING COMMISSION, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 14 (2000) [hereinafter 2000 SOURCEBOOK].

48. While one might be tempted to make the argument that the over-sentencing of non-violent drug crimes does not necessarily support the position that white-collar sentencing is out of alignment, the corollary to that argument is that the over-sentencing of non-violent drug offenders is evidence of a sentencing system out of alignment with proportionality principles. *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, 1127–34 (2001) (discussing possible explanations for the decline in drug sentences).

49. *See* KLEIN, *supra* note 43, § 1.01, at 1–8.

50. *Id.* § 1.01, at 3–4, 7–8. *But see* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1795–98 (1998) (asserting that disproportionate punishment for drug crimes may appear racist but is actually paternalistic in that it seeks to protect urban minorities from the havoc wreaked on their communities by the drug trade).

51. *See* U.S.S.G. ch. 1, pt. A.3. Unlike many state sentencing guideline schemes, the Sentencing Guidelines do not place all categories of crime into an overall classification scheme, such as Class 1 felonies being the most serious felony offenses, Class 2 felonies being secondary in seriousness, and so forth. Moreover, Congress routinely ignores proportionality by passing legislation that reacts to the crime of the week rather than legislation that interacts with the

objective has led to extensive criticism that the Guidelines are too complex and cumbersome.[52] Given the wide range of criminal conduct punishable by federal statute,[53] the Sentencing Commission strove to arrive at a sentencing scheme that could take into account the diversity of various crimes.[54] The Sentencing Commission sought to meet this goal of proportionality by separating the crimes into categories,[55] such as offenses against the person, offenses involving property, and offenses involving drugs. The categories were separated further into subcategories, including homicide, assault, and criminal sexual abuse.[56] Once a category was broken down into subcategories, a numeric base level was assigned. The Sentencing Commission provided for that base level to be adjusted upward or downward, depending on specific characteristics of the offense,[57] and included victim-related, role-in-the-offense-related obstruction of justice, as well as acceptance of responsibility adjustments.[58] Finally, the Sentencing Commission factored the offender's prior criminal history into the sentencing analysis by placing the adjusted number, known as the "offense level," on the vertical axis of a sentencing table grid,[59] in which the horizontal

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current sentencing guideline scheme. Professor Frank Bowman has described the effect on proportionality as seemingly "whimsical." Frank O. Bowman III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 18 (2001) [hereinafter Bowman, *2001 Reforms*]. The increase in maximum sentences for mail fraud and wire fraud under the Sarbanes-Oxley Act of 2002 is another example of reactive legislation. *See infra* notes 146–47 (discussing the effect of the Sarbanes-Oxley Act on maximum sentencing guidelines).

52. *See* STITH & CABRANES, *supra* note 24, at 3, 91. The Guidelines have been compared to the tax code in complexity. *Id.* at 3.

53. *See* U.S.S.G. app. A; Bowman, *2001 Reforms*, *supra* note 51, at 17 (identifying "roughly 970 criminal statutes" prescribing federal criminal penalties within the Sentencing Guidelines).

54. "Simple uniformity—sentencing every offender to five years—destroys proportionality." U.S.S.G. ch. 1, pt. A.3. *See generally* Sir Leon Radzinowicz & Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288 (1970) (describing Victorian efforts to consolidate the hodge-podge of statutes and common law that changed the body of English law into a single collection of criminal law).

55. The Guidelines provide "Application Instructions" which explain how to calculate an offense level for a particular offender. U.S.S.G. § 1B1.1. A concise description of the application of the Guidelines is set out in Bowman, *Fear of Law*, *supra* note 35, at 305–09, 358 nn.28–50. For an illustration of how the Guidelines are used to calculate an offender's sentence, see Steven Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6–8 (1988) [hereinafter Breyer, *Key Compromises*].

56. *See* U.S.S.G. ch. 2, pt. A.1–3.

57. *Id.*

58. *See id.* ch. 3, pts. A–E.

59. *Id.* ch. 5, pt. A.

axis reflected the prior criminal history of the offender.[60] The point at which a perpetrator's offense level intersected with the prior criminal history level corresponded to a sentencing range[61] for that individual. The higher the offense level number or the more extensive the criminal history, the longer the mandated sentencing range.[62] With the sentencing table in place, the Sentencing Commission could better gauge similar characteristics of crimes, such as violence or criminal history, on a single scale, while creating distinct areas that could be tailored as experience with application of the Guidelines might later necessitate.

B. Incorporating the Purposes of Sentencing into the Federal Sentencing Scheme

Key to attaining the objectives of the Guidelines was the aim for certainty[63] and fairness[64] in sentencing; "justice must not only be done, but must appear to be done."[65] Congress statutorily required that in determining the appropriate sentences under the Sentencing Guidelines, the Sentencing Commission was to take into account the purposes of sentencing.[66] Thus, in determining the particular sentence to be

60. *See generally id.* ch. 4 (defendant's past record of criminal conduct relevant to sentencing); *id.* ch. 5, pt. A, cmt. n.1 (intersection of offense level and criminal history displays a guideline range in months of imprisonment).

61. The sentencing range is limited by the 25% rule: The maximum of any range cannot exceed the minimum by more than the greater of 25% or six months. 28 U.S.C. § 994(b)(2) (2000), *amended by* 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 11008(e), 116 Stat. 1758, 1819 (2002).

62. *See infra* notes 164–83, 219, 221 and accompanying text (discussing the circumstances under which the sentencing court can depart from this sentencing range).

63. Even when convicted, white-collar offenders receive fewer sentences and shorter terms of imprisonment than non-violent common criminals. Among white-collar offenders, antitrust violators (at the upper end of the social strata of white-collar criminals) receive the most lenient sentences. *See* DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS 130–32 (1991).

64. While the commissioners were seeking to develop the fairest system possible, nothing in the Guidelines could alter one factor that has influenced the outcome of nearly all criminal cases from the outset of the judicial system in this country: the benefit of good legal counsel. White-collar offenders enjoy that benefit at the earliest point in their cases. One study found that when compared to common crimes, 60% of white-collar offenders retain private counsel, whereas only 16% of common criminals are so represented. *Id.* at 100–01. This statistic is not to disparage appointed counsel in any manner. Appointed counsel, however, does not come into the legal play until the offender is arrested or charges have been brought against him. The goal of defense counsel in white-collar cases is to prevent charges from being filed at all. KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 9–10 (1985).

65. *See* FRANKEL, *supra* note 30, at 24.

66. *See* 18 U.S.C. § 3553(a) (2000 & West Supp. 2002). This Article takes the position that economic crimes have been under-punished and that the Sentencing Commission's Economic Crime Package is a considered and measured response to deter a recurring problem.

imposed, the courts must consider, among other things, "the need for the sentence imposed ... [t]o provide just punishment for the offense; ... afford adequate deterrence to criminal conduct; ... [p]rotect the public from further crimes of the defendant; and ... [p]rovide ... educational [training], ... vocational training, ... medical care, ... or other correctional treatment."[67] Prior to the Guidelines, retributive and utilitarian purposes of sentencing had been long-recognized as appropriate considerations in sentencing;[68] however, they had not been codified as a cohesive plan for sentencing. Pre-Guidelines sentencing determinations did not require federal district judges to consider or identify[69] which, if any, justifications for punishment the sentence aimed to achieve. By acknowledging that each of the purposes was worthy of consideration, the Sentencing Commission recognized that, as to the competing philosophies[70] underlying the purposes of punishment, different purposes have greater or lesser value with different defendants.[71]

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67. 18 U.S.C. § 3553(a)(2)(A)–(D).

68. SANDFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS 101, 134 (7th ed. 2001).

69. *See* FRANKEL, *supra* note 30, at 7, 38.

70. *See* Breyer, *Key Compromises*, *supra* note 55, at 15–18 (stating that when faced with advocates of deterrence and those of "just deserts," listing criminal behavior in rank order of severity and applying punishment, the Sentencing Commission focused on typical, or average, actual past practice in punishment).

71. Indeed, when it comes to deterrence, criminologists frequently consider the "backfire" effect of some punishments, particularly imprisonment. While one offender may find a short prison sentence to be an effective deterrent to future criminal behavior, another offender may find that having served the prison sentence has removed the "fear factor" of facing prison. Thus, with nothing to lose, the second offender might as well continue the criminal behavior post-imprisonment. *See* DAVID WEISBURD ET AL., WHITE-COLLAR CRIME AND CRIMINAL CAREERS 91–92 (2001); *see also* Ted Bartell & L. Thomas Winfree, Jr., *Recidivist Impact of Differential Sentencing Practices for Burglary Offenders*, 15 CRIMINOLOGY 387–96 (1977) (finding probation more likely to deter future incarceration than imprisonment in burglary offenses, which was recognized for a high rate of recidivism).

C. Establishing "White-Collar"[72] Sentences

The underlying concern of proportionality begs the question of which crimes are to be punished more severely and which, therefore, should have higher offense levels assigned to them. In setting base-level offenses, the Sentencing Commission used historical sentencing patterns as a starting point.[73] The Sentencing Commission then

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72. Edwin H. Sutherland, a criminologist/sociologist coined the term "white-collar" in 1939. Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 1 (Feb. 1940) (discussing the crimes committed by those in the upper or white-collar class versus crimes committed by those in the lower classes); *see also* TONY G. POVEDA, RETHINKING WHITE-COLLAR CRIME 31 (1994); EDWIN H. SUTHERLAND, WHITE-COLLAR CRIME: THE UNCUT VERSION 7 (1983) (defining white-collar crime as "crime committed by a person of respectability and high social status in the course of his occupation"); Edwin H. Sutherland, *Is "White-Collar Crime" Crime?*, 10 AM. SOC. REV. 132, 137–39 (Apr. 1945) (noting that the criminality of white-collar crimes is blurred by special procedures in enforcement, punishment, or "lack of moral culpability" that reduces the stigma of white-collar crime).

However, definitions of the term vary. *See* David O. Friedrichs, *White-Collar Crime and the Definitional Quagmire: A Provisional Solution*, 3 J. HUM. JUST. 5 (1992); Gilbert Geis, *White-Collar Crime: What is It?*, *in* WHITE-COLLAR CRIME RECONSIDERED 31 (Kip Schlegel & David Weisburd eds., 1992) (discussing the origin and evolution of the definition of "white-collar"); *see also* Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 486–87 (1999) (noting that not only do the definitions of "white-collar crime" vary, but the harm inflicted by white-collar crime varies as well in that it may be financial, physical, or social). An academic workshop co-sponsored by the National White-Collar Crime Center and West Virginia University took three days to reach a definitional consensus that white collar crime is "[i]llegal or unethical acts that violated fiduciary responsibility or public trust, committed by an individual or organizations, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain." NAT'L WHITE COLLAR CRIME CTR., PROCEEDINGS OF THE ACADEMIC WORKSHOP: WHITE COLLAR CRIME DEFINITIONAL DILEMMAS 33 (1996).

The Sentencing Guideline Manual does not identify particular crimes as "white-collar." The 2000 Sourcebook provides some statistics using "white collar offenses" as a category label. Included in that category are the following offense types: fraud, embezzlement, forgery/counterfeiting, bribery, tax offenses, and money laundering. *See Average Length of Imprisonment in Each General Crime Category*, 2000 SOURCEBOOK, *supra* note 47, at 32 n.1 fig.E; *Distribution of Offenders in Each Primary Offense Category, Fiscal Year 2000*, 2000 SOURCEBOOK, *supra* note 47, at 11 n.1 fig.A.

Antitrust offenses inexplicably are not included. *See id.* Presumably, antitrust, tax fraud, securities fraud, and insider trading should be included. Indeed, the most difficult problem with the term "white collar" is that no single definition is widely accepted, so the list of white-collar crimes can be cast either narrowly to include only the above or widely to include telemarketers and credit card fraud.

The changes to the Sentencing Guidelines that are addressed in this Article do not depend upon a precise definition of "white-collar crime." The Guidelines base imprisonment levels for economic crimes on the degree of either loss to the victim or gain to the offender. *See infra* Part II (identifying and discussing the 2001 amendments to the Sentencing Guidelines). This Article uses the term "white-collar crime" interchangeably with the term "economic crime."

73. *See* U.S.S.G. ch. 1, pt. A.3; Breyer, *Key Compromises*, *supra* note 55, at 7 (noting that the Sentencing Commission was guided by past practice when it created categories and determined sentence lengths); *see also* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 160–63, 192–93 (1988); Steven Breyer, *Justice Breyer: Federal*

adjusted these historical bases to reflect Congress's concerns[74] that crime was out of control and that greater punishment was needed, as well as the concerns of the Sentencing Commission that white-collar crimes were grossly under-sentenced.[75]

The Sentencing Commission used an empirical approach to initiate the starting point for the Guidelines.[76] The Commission "analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions

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Sentencing Guidelines Revisited, 14 CRIM. JUST. 28, 30 (1999) [hereinafter Breyer, *Guidelines Revisited*]. In its third entry of four in the Yale Studies on White-Collar Crime, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS, *supra*, the authors conducted probing interviews of fifty-one sitting federal district judges from seven districts around the nation, districts in which there is a relatively high proportion of white-collar cases. The purpose of the study was to "extend current thought about sentencing and its underlying rationale." WHEELER ET AL., *supra*, at 193. While the judges reached a consensus on the general factors to consider in sentencing, including the dimensions of harm, blameworthiness, and consequence, the weight accorded to each factor led to the variance in sentences in general. *Id.* at 192. These three factors were also recognized by the authors of the study and the judges as having the greatest import on the sentencing of all criminals, common and white-collar alike. *Id.* at 192–93. Nevertheless, the study revealed the single "major exception" to the general conclusion:

> [J]udges often show a special sensitivity to white-collar offenders. The white-collar offender may remind the judge of a colleague or neighbor, while the street offender is no more than a stranger. This may make it easier to conclude that one offender is more deserving of probation than the other.

Id. at 192. The authors went on to speculate that "[i]n a fully articulated sentencing system, this exception would be reduced." *Id.* The Guidelines are a much more "fully articulated sentencing system" than the one in place at the time the interviews were taken, those interviews having occurred prior to the implementation of the federal Sentencing Guidelines. *See id.* The authors further recognized that the interviews were just the "talk" of judges, without an analysis of actual sentencing results by each of them; what the judges *said* and what they actually *did* could be significantly different. *Id.* at 161 n.11. The fact remains that at least some of the judges were willing to *say* that the background of the white-collar offender made the question of imposing a sentence of imprisonment a much more difficult decision to contemplate. *Id.* at 161–63.

74. STITH & CABRANES, *supra* note 24, at 60–61.

75. *Id.*; *see also* 28 U.S.C. § 994(m) (2000) (stating that current sentences do not reflect the serious nature of the offenses, and the Sentencing Commission must determine the average sentences imposed in those sentences to the actual prison time served), *amended by* 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 11008(e), 116 Stat. 1758, 1819 (2002). At the time the Guidelines were enacted, about half of all federal white-collar criminals (fraud, embezzlement, forgery/counterfeiting, bribery, tax offenses, and money laundering) were sentenced to probation only. Since the Guidelines have gone into effect, the trend to imprison such offenders has increased to just over 60%, sentences of probation have dropped to nearly 20%, and sentences of probation and other sentencing alternatives have increased from less than 5% to just under 20%. Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENT. REP. 12, 15 (1999) (stating that use of probation under the Guidelines was dramatically cut).

76. *See* U.S.S.G. ch. 1, pt. A.3.

were important in pre-guidelines practice."[77] The Sentencing Commission's study of these data revealed that "white-collar crimes," such as fraud, were punished less severely than common law crimes, such as theft.[78] In particular, the courts granted probation to white-collar offenders more frequently, and prison terms were less severe for those white-collar offenders who did not receive probation.[79] Armed with this knowledge, the Sentencing Commission set about to target "the most important source of sentencing disparity—the decision of whether or not to imprison."[80]

In establishing the appropriate Guidelines range for "white-collar" sentences, the Sentencing Commission, relying on the language of the SRA,[81] determined that, for all but the least serious cases, short but certain terms of confinement would be the norm.[82] Imprisonment at the lower levels of the Guidelines could take the form of confinement of twelve months or less, with the discretion of the sentencing court to impose intermittent confinement, community confinement, or full imprisonment.[83] Thus, although the potential for imprisonment for

77. *Id.*

78. *See* Breyer, *Key Compromises*, *supra* note 55, at 20 & 192 n.50 (describing the Sentencing Commission's model of current sentencing practices). Justice Breyer worked for the Senate Judiciary Committee when Congress considered sentencing reform and was a member of the original Sentencing Commission from 1985 to 1989. *See* Breyer, *Guidelines Revisited*, *supra* note 73, at 28 (discussing problems that the original Sentencing Commission attempted to solve and making several recommendations to address contemporary criticisms); *see also* U.S.S.G. ch. 1, pts. A.3, A.4(g) (comparing pre-Guidelines sentencing practice and sentences under the Guidelines); U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 26–29 (1987); Hofer & Semisch, *supra* note 75, at 13–15 (noting that the use of simple probation was dramatically cut under the Guidelines, but the shift was mostly to intermediate sanctions and not to imprisonment).

79. *See* Breyer, *Key Compromises*, *supra* note 55, at 20 (noting the Sentencing Commission's finding of significant discrepancies in pre-Guideline punishment of certain white-collar crimes and common law crimes).

80. Michael E. Smith, Book Review, 91 HARV. L. REV. 896, 898 (1978) (reviewing PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977)).

81. "[I]n many cases, current sentences do not accurately reflect the seriousness of the offense." 28 U.S.C. § 994(m) (2000), *amended by* 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 11008(e), 116 Stat. 1758, 1819 (2002).

82. U.S.S.G. ch. 1, pt. A.4(d); *see also* Breyer, *Key Compromises*, *supra* note 55, at 22 (noting how pre-Guidelines judges could impose probation without any term of confinement to certain white-collar offenders).

83. The Sentencing Table is separated into four "zones" that cut diagonally across the upper section of the table. *See* U.S.S.G. ch. 5, pt. A, Sentencing Table. In zone A, all of the sentencing ranges are zero to six months. *Id.* In zone B, the ranges begin with at least one month, and no range in the zone goes beyond twelve months. *Id.* In zone C, sentencing ranges begin at eight or nine months, and the highest end ranges for the zone are up to fifteen to sixteen months. *Id.* In zone D, the lowest sentencing ranges begin with twelve months, and the highest ranges are life

most white-collar crimes was increased under the Sentencing Guidelines, the length of the terms and the severity of the sentencing options were just a small step toward proportionality, providing expanded options to impose punishment greater than a fine and probation, but still less than full imprisonment.[84]

In addition to an appropriate exercise of caution in increasing the white-collar sentencing practices under the Guidelines, the statutory directives constrained the Sentencing Commission by requiring it to consider the impact of its sentencing recommendation upon the prison population.[85] Although the authorizing statute did not restrict the Sentencing Commission from increasing penal sanctions, the limitations on the resources of the penal system needed to be considered.[86]

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imprisonment. *Id.* Zones A, B, and C provide various sentencing options that do not require imprisonment or at least do not require it for the entire sentencing period (except in the case of a statutory mandatory minimum sentence). *Id.* § 5C1.1(b). In zone D, imprisonment is mandated. *Id.* § 5C1.1(f). Thus, for example:

> If the applicable guideline range is in zone B of the Sentencing Table, the minimum term may be satisfied by—
>
> (1) a sentence of imprisonment; or
>
> (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
>
> (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according the schedule in subsection (e).

Id. § 5C1.1(c).

84. See *id.* §§ 5F1.1–5F1.7, Sentencing Options, which provides alternatives to straight confinement, such as community confinement, *id.* § 5F1.1, home detention, *id.* § 5F1.2, community service, *id.* § 5F1.3, order of notice to victims, *id.* § 5F1.4, and occupational restrictions, *id.* § 5F1.5.

85. 28 U.S.C. § 994(g).

86. The Sentencing Commission initially estimated that the Guidelines (excluding legislated mandatory minimum or career offender sentences) would lead to a projected increase in prison population of approximately 10% over a period of ten years. U.S.S.G. ch. 1, pt. A.4(g). The Sentencing Commission has been criticized for adding in the projected increase in prison population as a result of the concurrently legislated mandatory minimum and career offender sentences prior to making its projections of prison population increases based upon its own initiatives. *See* STITH & CABRANES, *supra* note 24, at 64–65. With subsequent statutory mandates for increased sentences of certain crimes and the Sentencing Commission's own subsequent increases in various sentences, the Sentencing Commission's 1987 projection with respect to the Guidelines' impact on prison population lost its relevance. *See* 28 U.S.C. § 994(h) (2000 & West Supp. 2002) (requiring sentences "at or near the maximum term authorized" for repeat violent offenders and drug offenders), *amended by* 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 11008(e), 116 Stat. 1758, 1819 (2002); *id.* § 994(i) (requiring "substantial term of imprisonment" for drug offenders); *id.* § 994(j) (presuming imprisonment for crimes of violence); *see also* STITH & CABRANES, *supra* note 24, at 64–65.

Statutory mandates not only increased the sentences over pre-Guidelines sentences, they also added new "federal" crimes to the books for which Sentencing Guidelines had to be created. *See,*

Desiring to increase white-collar sentences but lacking any historical measure upon which to base such sentences, the Sentencing Commission approached the task cautiously, looking to the general purposes of punishment[87] to guide its way. In the end, the Sentencing Commission was seeking "modest, incremental improvements in the status quo"[88] as "the first step in an evolutionary process."[89] In 2001, fourteen years after taking that first step,[90] the Sentencing Commission approved, a group of amendments to the Sentencing Guidelines that substantially revised some sections of the Guidelines applicable to the sentencing of economic crimes.[91] In light of the financial market scandal of 2002, the amendments are, arguably, unlikely to vindicate the underlying policy purposes of the Sarbanes-Oxley Act of 2002 because of the danger of excessive departures.[92]

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e.g., Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (2000 & West. Supp. 2002); Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2000); Anti-Car Theft Act, 18 U.S.C. § 2119 (2000); Violence Against Women Act, 18 U.S.C. § 2261 (2000); *see generally* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Court*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 43 (1996) (reviewing the recent federalization of crimes).

87. "The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." U.S.S.G. ch. 1, pt. A.4(d).

88. *Id.* ch. 1, pt. A.3.

89. *Id.* Even under the Sentencing Guidelines, white-collar criminal sentences were criticized as "often too short in relation to their moral seriousness, in relation to the harm they cause, and in relation to the investment of resources required to prosecute them." Bowman, *Quality of Mercy*, *supra* note 43, at 740.

90. This is not to say that there have been no adjustments to the white-collar sentencing scheme since the formulation of the original Guidelines. For example, the Antitrust Offenses at U.S.S.G. § 2R1.1 were amended November 1, 1989, U.S.S.G. app. C, amends. 211, 303, and effective November 1, 1991, U.S.S.G. app. C, amends. 377, 422. The Fraud Guidelines, U.S.S.G. § 2F1.1, were previously amended in 1988, 1989, 1990, 1991, 1992, 1993, 1995, 1997, 1998, and 2000. U.S.S.G. app. C, amends. 30, 154–56, 303, 317, 364, 393, 470, 481, 482, 513, 551, 577, 587, 595, 596, 597.

91. U.S.S.G. § 2B1.1 and various provisions scattered throughout; Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30,512, 30,527-46 (June 6, 2001). As this Article went to press, the Sentencing Commission issued temporary guidelines, promulgated under the emergency amendment authority granted by Congress, implementing provisions under the Sarbanes-Oxley Act of 2002. The temporary guidelines affect several sections of the United Sates Sentencing Guidelines, in particular sections 2B1.1, 2T4.1, and 3D1.2. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002, at i (2003), *available at* http://www.ussc.gov/r_congress/S-Oreport.pdf (last modified Jan. 2003) [hereinafter USSC REPORT TO CONGRESS]. The temporary amendment expires on November 1, 2003, when a permanent amendment becomes effective. *Id.*

92. The Economic Crime Package is a strong and well-considered amendment. Unfortunately, as a result of vacant positions on the Sentencing Commission, the amendment process took six years. Bowman, *2001 Reforms*, *supra* note 51, at 33–36. The deterrent benefit of the amendments is too late to avert the current financial scandals; as noted and discussed in Part IV.B.1, *infra*, however, the retributive purpose of the amendments should apply to many of the accounting scandals. U.S.S.G. § 1B1.11 (use of Guidelines manual that is in effect on the

II. ECONOMIC CRIME REFORM

A. The 2001 Economic Crime Package: Consolidation, Clarification, and Certainty

The 2001 amendments to the Sentencing Guidelines, collectively referred to as the "Economic Crime Package,"[93] consist of six major parts:

> (1) [c]onsolidation of the theft, property destruction, and fraud guidelines; (2) a revised, common loss table for the consolidated guideline, and a similar table for tax offenses; (3) a revised, common definition of loss for the consolidated guideline; (4) revisions to guidelines that refer to the loss table in the consolidated guideline; (5) technical and conforming amendments; and (6) amendments regarding tax loss.[94]

One key factor driving the amendments was the recognition that, where "pecuniary harm is the major factor in determining offense level,"[95] two sections of the Guidelines were at issue. Section 2B1.1,[96] entitled "Theft, Embezzlement, Receipt of Stolen Property, and Property Destruction," and section 2F1.1,[97] entitled "Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States," contained substantial overlap in the types of criminal conduct that could fall under

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date of sentencing); *supra* note 8 and accompanying text (discussing the effective date of the Guidelines). If the prescribed Guidelines sentences are imposed, punishment based on the changes in the Guidelines should deter future white-collar criminals. Perhaps because work on the amendment began before *Koon v. United States*, 518 U.S. 81 (1996), was decided or the effects of that decision became apparent, the issue of downward departures was not considered in developing the Economic Crime Package. *See infra* notes 185–216 and accompanying text (discussing *Koon* and downward departures following the decision). Ironically, the higher terms of imprisonment, while purposefully based, will likely lead to greater pressure to depart downward. This Article proposes addressing the extent of departures directly, in order to effect the purpose of the Economic Crime Package of 2001 and the recently enacted Sarbanes-Oxley Act of 2002. *See infra* Part II.C (discussing the Sarbanes-Oxley Act).

93. Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30,510, 30,540 (June 6, 2001).

94. *Id.* For an inside review and analysis of the Economic Crime Package amendments, see generally Bowman, *2001 Reforms*, *supra* note 51, at 32–85 (reviewing the history behind the 2001 sentencing reform initiative, summarizing the most pertinent provisions of the reforms, and highlighting the most contentious areas of the reform while addressing the rationale underlying their resolutions).

95. Sentencing Guidelines for United States Courts, 66 Fed. Reg. at 30,512, 30,540 (June 6, 2001).

96. U.S.S.G. § 2B1.1.

97. *Id.* § 2F1.1.

either section for the purposes of sentencing.[98] Disparate sentencing outcomes may result, however, depending upon the loss tables contained within each section.[99] The competing sections also suffered from the same frailties in that courts struggled with defining "loss" for purposes of applying the loss tables in each section.[100] The calculation of loss under both sections of the Guidelines, as well as other sections that referred back to the loss tables of sections 2B1.1 and 2F1.1, became "one of the most commonly litigated issues in federal sentencing law."[101] Splits in the circuit courts had developed concerning factors to consider in calculating losses, such as whether interest should be included[102] and whether "net" versus "gross" loss controlled.[103]

The consolidation of the loss tables of sections 2B1.1 and 2F1.1 into the revised section 2B1.1 ("Fraud and Theft Guideline") reflects a principle feature of the Economic Crime Package. At the low end of the loss table, offenders should receive lower base-level offense assignments, intended by the Sentencing Commission to permit the courts greater flexibility in sentencing to more ably meet purposes of punishment and the goal of facilitating restitution payments.[104] The

98. Sentencing Guidelines for United States Courts, 66 Fed. Reg. at 30,512, 30,540 (June 6, 2001).

99. *Id.*

100. Bowman, *2001 Reforms*, *supra* note 51, at 26–27 (citing MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY (1997) (reporting that a 1996 survey of the attitudes of federal judges and probation officers revealed that those surveyed found the fraud guideline lacking in clarity)); *see also* Diane E. Murphy, *Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond*, 87 IOWA L. REV. 359, 364–66 & nn.28–29 (2002) (providing an insider's view of the factors impacting the Commission's decisions regarding the 2001 amendments to the Sentencing Guidelines, including the resolution of circuit conflicts in the calculation of loss under the combined theft and fraud guideline).

101. Bowman, *2001 Reforms*, *supra* note 51, at 25 ("loss" in the original Guidelines could increase offense levels dramatically depending on the amount of "loss" found by the court); *see also* U.S.S.G. 2001 supp. to app. C, amend. 617, at 185–90 (identifying conflicts between circuits and citing to conflicting cases concerning a variety of "loss" issues, including intended versus actual loss, causation and forseeability of loss, "consequential damages," interest on loss, how to credit payments made to victims as against loss, use of gain when no loss can be determined, and treatment of diversion of government program benefits).

102. Bowman, *2001 Reforms*, *supra* note 51, at 56–57 (noting that the Sentencing Commission excluded interest because it did little to make loss more accurately reflect the level of the offense).

103. *Id.* at 57–61 (discussing the problem of accounting for net or gross loss of money or property transfer, that is, whether to credit the defendant for repayments prior to detection but after "completion" of the offense).

104. *See, e.g.*, Barry Boss, *Do We Need to Increase the Sentences in White-Collar Cases? A View from the Trenches*, 10 FED. SENT. REP. 124, 125 (1997) (asserting that increasing sentences for economic crime offenders, such as those who forge endorsements on low-dollar United States Treasury checks, is an unwarranted reaction to long imprisonment terms for drug offenders).

most significant change in the Fraud and Theft Guideline, however, is the intent that the new loss table will engender "substantial increases in penalties" for those offenders whose criminal conduct resulted in "moderate and higher loss amounts."[105] The Sentencing Commission's purpose in effectuating this change was to respond to criticism that "the offenses sentenced under the guidelines consolidated by this amendment under-punish individuals involved with moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness sentenced under other guidelines."[106] Similar changes reflecting the concern of under-punishment were also affected in the revised loss table for tax offenses resulting in "significantly higher penalty levels" for offenses causing moderate and high tax losses.[107]

Professor Bowman characterizes the Economic Crime Package as a "milestone in the history of the Federal Sentencing Guidelines," not only because he estimates that economic crimes comprise between one-fifth and one-quarter of all federal sentencings, but also because the package represents the first time in the "history of the guidelines that the Sentencing Commission has thoroughly rewritten the guidelines governing a major crime category."[108] From the outset, the Guidelines were intended to be evolutionary and thus revised over time based upon "research, experience and analysis."[109] Having arrived at the point of a "thorough" rewriting, will the Guidelines influence sentencing decisions and the deterrence of economic crimes? Or will the discretionary

105. Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30,512, 30,542 (June 6, 2001). The temporary amendment to U.S.S.G. § 2B1.1 further adds two additional loss levels above the previous high end of losses more than $100,000,000. The amendment increases the specific offense characteristics level to twenty-eight (from twenty-six) for losses of more than $200,000,000 and to thirty for losses of more than $400,000,000. U.S.S.G. ch. 1, § 2B1.1(b)(1)(O)–(P) (Supp. 2002) (effective Jan. 25, 2003), *available at* http://www.ussc.gov/2002supp/2b1_1.htm (last visited Mar. 4, 2003).

106. *Id.* Additionally, the "more than minimal planning" was eliminated as a separate specific offense characteristic and merged into the base level for the offense because it was found to be present in 80% of the fraud cases prior to the Guidelines' change. *See* Bowman, *2001 Reforms*, *supra* note 51, at 30; U.S.S.G. §§ 2B1.1(b)(4)(A), 2F1.1(b)(2)(A) (2002).

107. Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30,512, 30,542 (June 6, 2001); U.S.S.G. § 2T4.1. To maintain parity with the Fraud and Theft Guidelines levels in section 2B1.1, the temporary amendment to the Guidelines also added two additional levels to the top end of the loss table for tax offenses. U.S.S.G. ch. 1, § 2T4.1 (Supp. 2002) (effective Jan. 25, 2003), *available at* http://www.ussc.gov/2002supp/2t4_1.htm (last visited Mar. 4, 2003); *see also supra* note 105 (discussing the additional levels created by the temporary amendment to the Guidelines).

108. Bowman, *2001 Reforms*, *supra* note 51, at 8.

109. U.S.S.G. ch. 1, pt. A.2 (2002).

application of the Guidelines by prosecutors, in selectively charging[110] and negotiating pleas, and by judges,[111] in handing down sentencing decisions on matters like departures and enhancements, hinder the newly adopted Economic Crime Package in influencing future criminal behavior?

The Economic Crime Package illustrates the Sentencing Commission's continued willingness to move sentencing of high-dollar economic criminal offenses toward more severe terms of imprisonment. The Sentencing Commission sought feedback on the proposed Guidelines amendments from federal judges, prosecutors, and the criminal defense bar so that the amendments to the Guidelines would encompass the collective experience of those who use the Guidelines. Notably, the amendments were urged not only by prosecutors at the Department of Justice, but also by the Criminal Law Committee of the Judicial Conference.[112] The significance of such support cannot be ignored. Fourteen years ago, historical sentencing patterns revealed probation to be the norm in the sentencing of white-collar criminals.[113] Judicial attitudes toward the sentencing of economic offenders were lax.[114] Lessons learned by all concerning the need for participation and

110. *See infra* Part II.B (discussing the use of money laundering charges in large-scale fraud cases); *see also* Bowman & Heise, *supra* note 48, at 1119–22 (describing the creative charging decisions of prosecutors to avoid the mandatory minimum sentences imposed by Congress in narcotics cases); *infra* notes 305–18 and accompanying text (describing the defendant's ability to provide reasons to reduce sentencing to a lower offense level).

111. *See infra* Part III (addressing the role of departures in sentencing).

112. Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30,512, 30,542 (June 6, 2001).

113. *See supra* Part I.C (discussing the history of lenient treatment of white-collar criminals as compared to common law criminals).

114. Unlike the many street crime offenders standing before the court, economic crime offenders did not appear to have the characteristics that warranted terms of imprisonment; they were not physical dangers to others, and they were stable members of their communities with families, homes, and jobs. Probation was the primary term to which these offenders were sentenced, supported by the rationalization that they had been sufficiently punished by the shame of the process and the label of convicted criminal. John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047, 1056–57 (2000). "The criminal process is an inherently public and humiliating experience." *Id.* at 1053. Owens' essay describes the numerous opportunities for an economic crime offender to be shamed, beginning with a visit to his home or business by law enforcement armed with a search warrant and continuing through to sentencing, and highlights the options for sentencing in Chapter 5 of the Sentencing Guidelines. *Id.* at 1053–55. Courts have concluded that community service and restitution are the better ways to remedy the wrongs committed. *See supra* note 73 and accompanying text (discussing historical sentencing patterns). In contrast, the Judicial Conference Committee was behind the move toward greater severity in imprisonment terms for economic crimes under the 2001 Economic Crime Package. *See supra* note 112 (discussing feedback that the Sentencing Commission received on proposed harsher amendments to the Sentencing Guidelines).

the opportunity to tap the experience and expertise of the judges most likely contributed to the change in Sentencing Commission perspective on the value of the Judicial Conference's recommendations.[115] Additionally, fourteen years of turnover on the bench, increased publicity regarding the financial costs of economic crime to the economy, and conditioning from years of sentencing economic criminals to terms of imprisonment made such changes more acceptable.

The Economic Crime Package is propitious given the recent accounting scandals in the financial markets that virtually coincided with the November 2001 effective date of the amendments.[116] The losses to shareholder equity and the gains to some high-level executives, if proven to be unlawful, support the longer terms of imprisonment for moderate and high-dollar losses in the Economic Crime Package. Nevertheless, terms of imprisonment imposed after the implementation of the Economic Crime Package may not result in longer prison terms than those previously imposed for some economic crime offenders also charged with money laundering offenses. Concurrent with the passage of the Economic Crime Package, changes were made to the Money Laundering Guidelines[117] that could eliminate any "gains" to lengthy imprisonment terms for economic crime offenders.[118] Additionally, the frequency of downward departures under the Guidelines continues to increase so that many sentences are being imposed outside the applicable Guidelines ranges.[119]

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115. Proposals to place the initial draft of the Sentencing Guidelines with the Judicial Conference were rejected, and legislators appeared to ignore the potential contribution that would be made if those charged with actually sentencing convicted criminals took part in creating the scheme that would, ultimately, direct and affect their discretion. *See* Stith & Koh, *supra* note 30, at 275–79 (noting that the Senate believed that judges contributed to the problem and did not deserve to play a role in creating the solution). *But see infra* note 286 and accompanying text (suggesting that although the judges on the Criminal Law Committee of the Judicial Conference may support the amendments, the actual sentencing practice of their brethren is not necessarily reflective of the committee's view).

116. Although the activities of Enron may not fall within the scope of the new amendments because they were discovered and ended prior to the effective date of the Guidelines amendments, many companies "fell" after the effective date, which should subject their executives to the new Guidelines. U.S.S.G. § 1B1.11.

117. *Id.* § 2S1.1.

118. *See infra* notes 132–34 and accompanying text (discussing how the 2001 amendments to the Money Laundering Guidelines effectively eliminated the use of money laundering charges to lengthen terms of imprisonment for high-loss economic crimes).

119. *See infra* Part III (discussing the role of departures in sentencing).

B. The Money Laundering Guidelines Amendment: Clarity Replaces Disparity

The Money Laundering Control Act of 1986[120] ("MLCA") imposes criminal liability for monetary transactions conducted with funds knowingly derived from illegal activity. Although the Act was originally intended as anti-drug legislation,[121] prosecutors seized upon the broad language[122] of the MLCA to enhance imprisonment terms of economic crime offenders by charging them with money laundering,[123] which carried stiffer penalty ranges,[124] as well as with forfeiture provisions,[125] particularly when the resulting Fraud and Theft Guideline

120. Money Laundering Control Act ("MLCA") of 1986, 18 U.S.C. §§ 1956–1957 (2000 & West Supp. 2002), *amended by* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §§ 4002, 4005, 116 Stat. 1758, 1807–13 (2002).

121. *See* G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 AM. CRIM. L. REV. 149, 206–07 (1989) (surveying the doctrinal development of money laundering legislation).

122. The MLCA, under § 1957, bars all monetary transactions exceeding $10,000 in "criminally derived property." 18 U.S.C. § 1957(a). The Antiterrorism and Effective Death Penalty Act, 18 U.S.C. § 1956(c)(7), added more crimes to the list of "specified unlawful activity." The financial transactions covered under the MLCA have been construed to include many crimes unrelated to drugs or gangs. *See* United States v. Deeb, 175 F.3d 1163, 1167–68 (9th Cir. 1999) (involving the sales of securities); United States v. Cavalier, 17 F.3d 90, 92 (5th Cir. 1994) (submitting a false claim to an insurer); United States v. Edgmon, 952 F.2d 1206, 1210–11 (10th Cir. 1991) (involving the conversion of cattle, when such cattle was used to secure a federal Farmers Home Administration ("FMHA") loan); *see also* Kirk McCormick & Brian Stekloff, *Money Laundering*, 37 AM. CRIM. L. REV. 729, 743–45 (2000) (discussing financial transactions by surveying the meaning of "financial transaction" as used in the MLCA Act).

By 1997, the Sentencing Commission had become increasingly concerned with the broadening of the application of the Money Laundering Guidelines. *See* U.S. SENTENCING COMM'N, SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DEPARTMENT OF JUSTICE REPORT 5 (1997), *available at* http://www.ussc.gov/r_congress/LAUNDER.PDF [hereinafter MONEY LAUNDERING REPORT].

123. *See* Elkan Abramowitz, *Money Laundering: The New RICO?*, N.Y.L.J., Sept. 1, 1992, at 3, *available at* LEXIS, News Library, The New York Law Journal File (recognizing the upward trend in charges of money laundering in connection with white-collar crimes and away from RICO prosecutions).

124. MONEY LAUNDERING REPORT, *supra* note 122, at 7–9 (considering sentencing disparities for white-collar criminals when charges are brought under the MLCA). Penalties under 18 U.S.C. § 1956 include imprisonment terms of up to twenty years; those under § 1957 include imprisonment terms of up to ten years. *See* 18 U.S.C. §§ 1956–1957 (West Supp. 2002).

125. 18 U.S.C. § 982(a)(1) (2000 & West Supp. 2002) (providing that the court shall order forfeiture to the United States of any real or personal property involved in or traceable to the offense when imposing a sentence based upon a conviction under section 1956 or section 1957), *amended by* International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Pub. L. No. 107-56, § 372(b)(2), 115 Stat. 272, 339; *see also* Abramowitz, *supra* note 123, at 3 (reviewing the use of forfeiture in non-drug or organized crime related convictions under the MLCA).

did not support a length of imprisonment reflective of the criminal conduct.[126]

The 2001 amendment to the Money Laundering Guidelines[127] consolidated two previous guidelines, section 2S1.1, entitled "Laundering of Monetary Instruments," and section 2S1.2, entitled "Engaging in Money Transactions in Property Derived from Specified Unlawful Activity," both of which applied to convictions under the MLCA.[128] The money laundering amendment is not part of the Economic Crime Package but is closely tied to its purpose in that the amendment promotes proportionality in sentencing so that those cases perceived to be more serious or egregious, such as drug trafficking, crimes of violence, and fraud offenses generating relatively high-loss amounts, yield longer terms of imprisonment than basic fraud offenses generating relatively low-loss amounts.[129] To that end, the amendment directs determination of the base-level offense calculation back to the underlying conduct of the offense that generated the laundered funds.[130] Also significant, at least with respect to white-collar crimes, the amendment resolves a split in the circuits regarding the grouping of closely related counts under the Guidelines.[131] Under the amendment, the Sentencing Commission requires that a defendant convicted of a money laundering offense and an underlying offense that generated the funds group those counts together.[132]

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126. *See* U.S. SENTENCING COMM'N, MONEY LAUNDERING WORKING GROUP REPORT, FEDERAL SENTENCING GUIDELINES 2 (1995) (reporting that the addition of a money laundering charge increased the offense level 94.5% of the time in fraud cases), *available at* http://www.ussc.gov/moneylau/monilaun.htm (last modified Feb. 28, 1995).

127. U.S.S.G. app. C, amend. 634, at 218–25 (2001).

128. MLCA, 18 U.S.C. §§ 1956–1957 (2000 & West Supp. 2002), *amended by* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §§ 4002, 4005, 116 Stat. 1758, 1807–13 (2002). The Sentencing Commission previously proposed changes to the Money Laundering Guidelines, which were affirmatively rejected by Congress. *See* Federal Sentencing Guidelines, Amendment, Disapproval, Act of 1995, Pub. L. No. 104-38, 109 Stat. 334; *see also* 28 U.S.C. § 994 (2000 & West. Supp. 2002) (historical and statutory notes), *amended by* 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 11008(e), 116 Stat. 1758, 1819 (2002); H.R. REP. NO. 104-272, at 14–15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 348–49.

129. U.S.S.G. app. C, amend. 634, at 222.

130. *Id.* § 2S1.1(a)(1). Often such conduct is the subject of other criminal charges.

131. *Id.* app. C, amend. 634, at 224. The Sentencing Commission compared the Third, Fifth, and Seventh Circuits, whose courts found that fraud convictions should be grouped with money laundering convictions, and the First, Second, Eighth, Ninth, and Tenth Circuits, whose courts refused to deem such crimes "closely related" for purposes of the Sentencing Guidelines. *Id.*

132. *Id.* § 2S1.1, cmt. n.6, Grouping of Multiple Counts (directing application of § 3D1.2(c), Groups of Closely-Related Counts).

When counts of conviction are grouped together for Guidelines calculations, the resulting sentencing range will usually be *less* than if counts were not grouped. Closely related counts are grouped "[i]n order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct."[133] When there is more than one group, the additional groups will either increase the offense level (and, therefore, the sentencing range) or have no effect on the offense level. By requiring that the money laundering counts and any charges for which the underlying conduct is the source of the laundered funds be grouped together as closely related counts, the Guidelines eliminate the possibility of additional groups that could increase the sentencing offense level. The amendment effectively

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133. *Id.* ch. 3, pt. D, Multiple Counts. When convicted of multiple counts, the most serious offense is used as the starting point in calculating the sentencing range. *Id.* If the counts are not grouped together as "closely-related counts," then they are grouped separately, and the starting point is the group with the most serious offense level. *Id.* The other groups are assigned "units" based on the relative seriousness of those offenses compared to the initial group. Section 3D1.4 provides:

> The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:
>
> | Number of Units | Increase in Offense Level |
> |---|---|
> | 1 | none |
> | 1 1/2 | add **1** level |
> | 2 | add **2** levels |
> | 2½-3 | add **3** levels |
> | 3½-5 | add **4** levels |
> | More than 5 | add **5** levels |
>
> In determining the number of Units for purposes of this section:
>
> (1) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from **1** to **4** levels less serious.
>
> (2) Count as one-half Unit any Group that is **5** to **8** levels less serious than the Group with the highest offense level.
>
> (3) Disregard any Group that is **9** or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

Id. § 3D1.4.

In combination, the "units" may add as many as five additional levels or no additional levels to the offense level calculation for sentencing purposes. Groups that have an offense level that is 9 or more levels less serious than the initial group are completely disregarded, except to guide discretion for sentencing within the range. The grouping of offenses blunts the discretion of individual prosecutors. For example, each mailing in a mail fraud scheme may support a separate charge of mail fraud. In a scheme with ten mailings, one prosecutor might file a single charge based on all ten mailings, whereas another prosecutor might seek ten charges of mail fraud. Upon conviction under either charging scheme, the sentence calculation under the Guidelines would yield the same sentence as a result of grouping closely related counts. *See id.* ch. 3, pt. D, Multiple Counts.

removes the money laundering charge as a source of longer imprisonment terms in high-loss economic crimes, although the forfeiture provision is a continued incentive for including such a charge.[134]

The frequent use of departures threatens the overall success of the Sentencing Guidelines by undermining the goal of uniformity. The Sentencing Commission identified downward departure rates for non-drug money laundering offenses from 1992 to 1997 as 32% higher than for all other crimes.[135] Sentencing ranges outside the "heartland"[136] of the underlying offenses as a result of the inability to group money laundering charges with the underlying offenses have been identified as one of the reasons courts in white-collar cases tended to depart from guideline sentencing ranges.[137] Now that sentencing under the Money Laundering Guidelines will be based upon the underlying offense and grouped with such offenses, the applicable sentencing range cannot be viewed as outside the heartland of the offense, and the impetus to depart downward should be alleviated. Nevertheless, not only are departures in non-drug money laundering cases high, but the rate of non-substantial assistance departures in fraud offenses has been rising over the last several years.[138]

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134. Given reported levels of financial gain by some corporate executives and directors in the recent scandals, forfeiture may be desirable. *See infra* notes 223–25, 243–44, 277 and accompanying text (discussing the fact that many victims will remain uncompensated in large corporate cases).

135. *See* MONEY LAUNDERING REPORT, *supra* note 122, at 9.

136. The Guidelines describe the "heartland" as "a set of typical cases embodying the conduct that each guideline describes." U.S.S.G. ch. 1, pt. A.4(b), at 6. Atypical cases, which appear by the language of a guideline to fall within its parameters but "where conduct differs significantly from the norm," may be considered to fall outside the heartland and, therefore, be subject to departure considerations. *Id.*; *see also* Frank O. Bowman III, *Places in the Heartland: Departure Jurisprudence After* Koon, 9 FED. SENT. REP. 19, 19–22 (1996) (criticizing the Supreme Court's decision favoring increased district court departure authority) [hereinafter Bowman, *Places in the Heartland*].

137. Jonathan H. Hecht, *Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 AM. U. L. REV. 289, 319–21 (1999) (examining judicial dissatisfaction with Money Laundering Guidelines in connection with white-collar crimes).

138. *See infra* notes 183, 201–02, 206–07, 209 (citing to statistics on downward departures).

C. Enhancing White-Collar Crime Penalties and Accountability for Corporate Fraud

On July 30, 2002, President George W. Bush signed into law the Sarbanes-Oxley Act of 2002.[139] The legislation, intended to address corporate irresponsibility and to inhibit and punish corporate fraud, sailed through to passage on a wave of public outrage and a plunge in the stock market, which convinced politicians that political action was necessary to shore up confidence in the American economy before the election season in September.[140]

Title IX of the Act concerns penalty enhancements and increases the maximum terms of imprisonment for some white-collar crimes, creates criminal penalties for knowingly or willfully fraudulent certified financial reports, and directs the Sentencing Commission to review and amend the Guidelines within 180 days to "reflect the serious nature of the offenses and penalties set forth in this Act."[141] Title XI of the Act, directed specifically at corporate fraud, addresses obstruction of justice, protection of whistle-blowers, increased criminal penalties under the Securities Exchange Act of 1934, and the Securities and Exchange Commission's ("SEC") authority to freeze assets and bar persons from serving as officers or directors.[142] It also directs the Sentencing Commission to review and amend the Guidelines to reflect the legislation.[143] With concerns that the rush to implement the legislation

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139. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. Title IX of the Act covers penalty enhancements, *id.* §§ 901–906 (to be codified at 18 U.S.C. § 1341), and Title XI addresses corporate fraud accountability, *id.* §§ 1101–1107 (to be codified at 15 U.S.C. § 78).

140. *See* Hilzenrath et al., *supra* note 45 (describing the events that shaped the Sarbanes-Oxley Act of 2002, which, as proposed by Sarbanes, was given little chance of success until WorldCom's troubles crushed remaining opposition by illuminating the need for political expediency); Alison Mitchell, *G.O.P. Lawmakers Bolt Bush's Herd*, N.Y. TIMES, July 20, 2002, at A1, *available at* LEXIS, News Library, The New York Times File; Gerald F. Seib & John Harwood, *Rising Anxiety: What Could Bring 1930s-Style Reform of U.S. Businesses?*, WALL ST. J., July 24, 2002, at A1, *available at* 2002 WL-WSJ 3401584 (reporting on public opinion polls showing that Americans want the President and Congress to focus on prosecuting corporate wrongdoers).

141. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 902–904, 116 Stat. 745, 805 (to be codified at 18 U.S.C. § 1341) (enhancing penalties); *id.* § 905 (to be codified at 28 U.S.C. § 994 note) (directive to Sentencing Commission); *id.* § 906, 116 Stat. 745, 806 (certification of financial reports).

142. *Id.* § 1102, 116 Stat. 745, 807 (to be codified at 15 U.S.C. § 78a note) (obstruction of justice); *id.* § 1103 (asset freezing authority); *id.* § 1105, 116 Stat. 745, 809 (to be codified at 28 U.S.C. § 994 note) (authority to bar individuals from serving as directors and officers); *id.* § 1106, 116 Stat. 745, 810 (increased criminal penalties); *id.* § 1107 (protection of whistle-blowers).

143. *Id.* § 1104, 116 Stat. 745, 808 (to be codified at 28 U.S.C. § 994 note) (directive to Sentencing Commission).

was politically motivated,[144] one must ask first, whether the enhanced penalties will deter future criminal conduct, and second, whether the directive to the Sentencing Commission should result in technical changes or in substantive changes to the recently reformed Fraud and Theft Guideline.

1. Enhanced Penalties

Under the Guidelines, a sentence may not exceed the maximum sentence for that statute; thus, the upper end of any sentencing range for an offense is capped by any limit set forth within the statute under which the defendant is convicted.[145] For example, prior to the Sarbanes-Oxley Act,[146] the maximum term of imprisonment for a single conviction of mail fraud was five years,[147] and any sentencing range for a mail fraud conviction that provided for a term of imprisonment beyond sixty months was disregarded beyond the sixtieth month. Additionally, while multiple counts of mail fraud are grouped together under the Guidelines, the statutory maximum is available for each count. In practice, any complex fraud scheme would easily support more than one count of fraud.[148] Thus, if the level of loss would support a Guidelines range of over sixty months, more than one count of mail fraud usually could be charged so that the statutory maximum was not a barrier to sentencing. Notably then, the Sarbanes-Oxley Act of 2002, which quadrupled the statutory maximum penalty for mail and wire fraud in light of the accounting scandals, is largely an empty measure with no probable change to the actual sentences. Likewise, as will be discussed in Part III, the enhancement is ineffectual if the

144. *See supra* note 140 (discussing the political storm behind the Sarbanes-Oxley Act); *supra* note 45 (discussing Judge Frankel's concern with criminal penalties created in a politically-charged environment).

145. U.S.S.G. § 5G1.1(a).

146. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (amending 18 U.S.C. § 1341(a)–(b)) (increasing the maximum penalty for a single count of mail fraud or wire fraud from a five-year to a twenty-year term of imprisonment); *see also* 18 U.S.C. § 1341 (2000) (mail fraud statute), *amended by* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; 18 U.S.C. § 1343 (2000) (wire fraud statute), *amended by* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903(b), 116 Stat. 745, 805.

147. *See* 18 U.S.C. § 1341 (2000) (mail fraud statute), *amended by* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903(a), 116 Stat. 745, 805.

148. For example, any United States postal mailing made in furtherance of a scheme to defraud could be charged as a separate count; under the previous mail fraud statute, if ten mailings were made in furtherance of the scheme to defraud, then ten charges of mail fraud could be brought, with a total statutory maximum sentence of fifty years imprisonment if sentences were imposed consecutively, albeit limited by the calculated Guidelines range. *Id.*

sentencing court sentences at the low end of the range, or departs altogether.[149]

2. Review of the Sentencing Guidelines

The directive to the Sentencing Commission to review the Guidelines to ensure that they reflect the nature of the Sarbanes-Oxley Act does not mandate that the recently imposed Economic Crime Package, effective November 1, 2001, be substantively altered. By the expiration of the 180-day limit in the Sarbanes-Oxley Act,[150] the Economic Crime Package reforms will have been in effect for fourteen months. The *ex post facto* limitation on the Guidelines requires that they apply only to conduct that occurred after the effective date of the amendment, when the resulting sentence will be higher than it was prior to the amendment.[151] Because of the time it takes to investigate, prosecute, and sentence white-collar crime, few white-collar crime cases will have been sentenced under the amendment within the first year it is in effect.[152] As discussed in Part II.A, in constructing the Economic Crime Package, the Sentencing Commission labored for six years and incorporated the expertise of federal prosecutors, defense attorneys, and the federal judiciary to reflect their experience with white-collar crime and the Sentencing Guidelines and to impose higher penalties believed to appropriately reflect the purposes of punishment as required by the SRA.[153] It would seem ludicrous, after this careful process, to hastily create further punishment enhancements without first determining

149. *See infra* note 215 (discussing the low end of range); *see also infra* notes 183, 201–02, 206–07, 209 (citing to departure statistics).

150. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 905(c), 1104(c), 116 Stat. 745, 806, 809.

151. *See* Miller v. Florida, 482 U.S. 423, 432–33 (1987); U.S.S.G. § 1B1.11(b)(2) (requiring that the "Guidelines Manual in effect on a particular date shall be applied in its entirety").

152. In adopting the temporary guidelines amendments, the Sentencing Commission recognized the difficulty in enhancing penalties in light of the recent 2001 amendments:

> The difficulty of assessing the impact and desirability of changes to the loss table is further compounded by the fact that the same amendment that consolidated the theft, property destruction, and fraud guidelines also made significant changes to the loss table effective November 1, 2001, and the Commission currently does not have available sentencing data reflecting the impact of those changes . . . .
>
> Because of *ex post facto* concerns and the significant lag time between the commission of these types of offenses and the sentencing of such offenders, the Commission has just begun to receive court documents for defendants sentenced under the loss table effective November 1, 2001, and cannot yet determine the impact of the effectiveness of these changes.

USSC REPORT TO CONGRESS, *supra* note 91, at 7.

153. *See supra* Part II.A (discussing the history of the Economic Crime Package).

whether the current fix is sufficient.[154] While it may appear over time that the Economic Crime Package does not go far enough, the Sentencing Commission is isolated from public pressure to randomly increase terms of imprisonment.[155] Rather than enhance penalties, the better course to effect current reforms is to shut the backdoor to the Sentencing Guidelines, that is, to address downward departures.

III. DEPARTURES

A. The Concession to Discretion

The complexity of the Guidelines reflects the Sentencing Commission's attempt to obtain uniformity among sentences for similar crimes. Thus, among the specific offense characteristics, adjustments, and mitigating factors, the expectation was that many individually

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154. For example, the Sarbanes-Oxley Act specifically directs the Sentencing Commission to consider fraud cases when there are fifty or more victims. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1104(b)(5), 116 Stat. 745, 809 (to be codified at 28 U.S.C. § 994 note). The current applicable guideline under the Economic Crime Package already provides for a four-level upward adjustment when the "offense involved 50 or more victims." U.S.S.G. § 2B1.1(b)(2)(B). The four-level adjustment became effective November 1, 2001, nine months prior to passage of the Sarbanes-Oxley Act. The temporary amendments to the Guidelines address victim impact by providing a six-level enhancement for offenses involving 250 or more victims, increasing the penalty by 25% over the 2001 amendments. U.S.S.G. ch. 1, § 2B1.1(b)(2)(C) (Supp. 2002) (effective Jan. 25, 2003), *available at* http://www.ussc.gov/2002supp/2b1_1.htm (last visited Mar. 4, 2003); USSC REPORT TO CONGRESS, *supra* note 91, at i. Proposed amendments or modifications to the Sentencing Guidelines are submitted to Congress by May 1 of each year and become effective by November 1 of that same year, generally, unless Congress disapproves of such amendments or modifications. 28 U.S.C. § 994(p) (2000), *amended by* 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, § 11008(e), 116 Stat. 1758, 1819 (2002). Congress has exercised its power to disapprove amendments, including a prior submission of a modification to the Money Laundering Guidelines. *See supra* note 115 (discussing the judicial conference's recommendations). Additionally, the upward departure considerations presently within the theft and fraud application notes include endangering "the solvency or financial security of one or more victims" *and* causing or risking "substantial non-monetary harm." U.S.S.G. § 2B1.1, cmt. n.15(A)(v) & (u) (2002). The temporary amendments to the Guidelines adds to this provision as well, with a four-level enhancement and a minimum offense level of twenty-four for "offenses that endanger the solvency or financial security of (1) a publicly traded corporation, (2) an organization that employs 1,000 or more employees, or (3) 100 or more individual victims," increasing the punishment by 50% over the 2001 amendments. USSC REPORT TO CONGRESS, *supra* note 91, at i.; U.S.S.G. ch. 1, § 2B1.1(b)(12(B) (Supp. 2002) (effective Jan. 25, 2003), *available at* http://www.ussc.gov/2002supp/2b1_1.htm (last visited Mar. 4, 2003).

155. The Sentencing Commission has been criticized as being "perhaps the least politically accountable of all administrative agencies." Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1224–55 (1999) (discussing the lack of a provision for judicial review of the Sentencing Guidelines). Nonetheless, the Sentencing Guidelines were held to be constitutional after the Supreme Court considered a challenge on the basis of the delegation of Congressional authority. Mistretta v. United States, 488 U.S. 361, 371–79 (1989).

encountered factors would be anticipated in the sentencing equation.[156] The sentencing table provides a range of months from which the judge is expected to exercise discretion in selecting the appropriate term of imprisonment or alternative to imprisonment, if the range permits that option.[157] Ordinarily, the sentencing court must impose a sentence within the sentencing range. Congress recognized, however, that not every case will fit neatly into the Guidelines' regimen.[158] Consequently, the sentencing court retains some discretion through the Guidelines' backdoor, also known as "departures."

Departure from a recommended guideline range takes one of three forms: (1) an upward departure,[159] whereby the sentencing judge may determine that the recommended range of sentencing does not adequately take into consideration the level of harm and the sentence should be higher than the prescribed sentencing range; (2) a downward departure for substantial assistance,[160] whereby the prosecutor recommends[161] to the sentencing judge a lower sentence than the prescribed sentencing range based on substantial assistance by the defendant to the prosecution in the investigation or prosecution of criminal activity; or (3) a downward departure,[162] whereby the sentencing judge may determine that the sentencing range overstates the level of harm or seriousness of the offense and that a lower sentence is

156. "[T]he guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice." U.S.S.G. ch. 1 pt. A.4(b) (2002).

157. *See supra* notes 55–62, 83–84 and accompanying text (describing sentencing calculation under the Guidelines).

158. "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234–37; *see also* United States v. Lara, 905 F.2d 599, 604 (2d Cir. 1990) ("The legislative history reflects that it was not Congress' aim to straightjacket a sentencing court, compelling it to impose sentences like a robot inside a Guidelines' glass bubble, and preventing it from exercising discretion, flexibility or independent judgment.").

159. U.S.S.G. §§ 5K2.0, 5K2.1–5K2.9, 5K2.14, 5K2.17, 5K2.18, 5K2.21.

160. *Id.* § 5K1.1.

161. Only the prosecution in its discretion and only for a downward departure reducing the sentence may bring a motion under U.S.S.G. §5K1.1 for a departure from the Guidelines' sentencing range. Once such a motion is made, a district court is given broad discretion in the decision to grant or deny the motion, and such decision is, essentially, unreviewable. *See, e.g.*, United States v. Busekros, 264 F.3d 1158, 1159 (10th Cir. 2001); United States v. Laney, 189 F.3d 954, 963 (9th Cir. 1999); United States v. Fortier, 180 F.3d 1217, 1231 (10th Cir. 1999); United States v. Newman, 148 F.3d 871, 875 (7th Cir. 1998); United States v. Khalil, 132 F.3d 897, 898 (3d Cir. 1997); United States v. Nesbitt, 90 F.3d 164, 166 (6th Cir. 1996).

162. U.S.S.G. §§ 5K2.0, 5K2.10–5K2.13, 5K2.16, 5K2.20.

warranted under the circumstances of the case. Departure cases are intended to be the extraordinary circumstance.[163]

Setting aside for the moment departures based on substantial assistance, the Sentencing Commission did not leave the backdoor open as widely as it may first appear. The Sentencing Commission identified certain factors that the judge should never take into account in determining whether to depart from the Guidelines, including race, gender, national origin, creed, religion, socio-economic status,[164] and lack of guidance as a youth or disadvantaged upbringing.[165] The Guidelines also specify characteristics and attributes that are deemed "not ordinarily relevant" in determining whether a sentence should be awarded outside of the applicable sentencing range.[166] Those factors include: age;[167] education and vocational skills;[168] mental and emotional conditions;[169] physical condition, including substance abuse or dependency;[170] employment record;[171] family ties and responsibilities;[172] community ties;[173] and military, civic, charitable, or public service.[174] Courts have determined, largely on a case-by-case basis, whether one of these considerations is an extraordinary circumstance and, while "not ordinarily relevant," applicable to warrant a departure in a particular case. Consequently, resulting sentencing decisions have been disparate; courts have arrived at different and potentially inconsistent conclusions regarding consideration of, for example, the charitable works of defendants,[175] family ties,[176] and employment responsibilities[177] in granting or denying departures.[178]

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163. The Commentary to U.S.S.G. § 5K2.0 notes that "the Commission believes that such cases will be extremely rare." *Id.* § 5K2.0, cmt.

164. *Id.* § 5H1.10.

165. *Id.* § 5H1.12.

166. The sentencing court may consider these factors, however, for determining the appropriate sentence *within* the sentencing range. *Id.* ch. 5, pt. H.

167. *Id.* § 5H1.1.

168. *Id.* § 5H1.2.

169. *Id.* § 5H1.3.

170. *Id.* § 5H1.4.

171. *Id.* § 5H1.5.

172. *Id.* § 5H1.6.

173. *Id.*

174. *Id.* § 5H1.11.

175. *Compare* United States v. Serafini, 233 F.3d 758, 775 (3d Cir. 2000) (upholding a downward departure based upon charitable works of politician defendant convicted of perjury), *and* United States v. Crouse, 145 F.3d 786, 790 (6th Cir. 1998) (deferring to the district court's finding that the offender's civic involvement was sufficient to warrant a downward departure), *with* United States v. Guidry, 199 F.3d 1150, 1161–62 (10th Cir. 1999) (upholding a district court's refusal to depart downward for defendant's community service to groups and individuals in the black community).

In addition to the above considerations, a primary offense guideline can identify factors that may be considered as supporting an upward or downward departure. For the recently consolidated Fraud and Theft Guideline, factors previously identified as departure considerations in either section are now all present within the consolidated guideline. Thus, under the new guideline, the "non-exhaustive list" of seven factors[179] that a court may consider in determining whether an upward departure is warranted includes conduct by the defendant that endangered "the solvency or financial security of one or more victims"[180] and conduct that "caused or risked substantial non-monetary harm,"[181] such as physical or psychological harm. Amended guideline section 2B1.1 also indicates that a downward departure may be warranted when "this guideline substantially overstates the seriousness of the offense."[182] Historically, in economic crime cases, upward departures from prescribed sentences have been rare compared to downward departures.[183] The Supreme Court approved the exercise of

176. *Compare* United States v. Haversat, 22 F.3d 790, 797 (8th Cir. 1994) (affirming decision to depart downward, insofar as it was based upon severe psychiatric problems of antitrust defendant's wife), *with* United States v. Sweeting, 213 F.3d 95, 112–13 (3d Cir.), *cert. denied*, 531 U.S. 906 (2000) (reversing twelve-level downward departure based upon defendant's status as a single parent whose oldest child suffered from a neurological disorder).

177. *Compare* United States v. Olbres, 99 F.3d 28, 35–37 (1st Cir. 1996) (applying *Koon* to vacate and remand for resentencing, where district court categorically excluded tax defendants' departure argument that absence from business to serve sentence would cause twelve innocent persons to lose their jobs as a result of business' failure), *and* United States v. Milikowsky, 65 F.3d 4, 9 (2d Cir. 1995) (upholding downward departure where antitrust defendant's absence from business could have caused the loss of 150 to 200 jobs), *with* United States v. Sharapan, 13 F.3d 781, 786 (3d Cir. 1994) (reversing downward departure by a district court based upon a finding that defendant's absence from business could have caused the loss of thirty jobs).

178. *See* Berman, *supra* note 43, at 56 (observing that district courts spend a great deal of attention on whether to depart, but very little, if any, on the relationship of a departure to the purposes of sentencing).

179. U.S.S.G. § 2B1.1 cmt. n.15(A)(i)–(vii). The amended guideline has eliminated the requirement that endangering the solvency of one or more victims be "knowing." *Id.* § 2B1.1 cmt. n.15(A)(v). The elimination of the "knowing" requirement should provide support for seeking upward departures in cases of loss of shareholder equity based upon self-dealing and accounting misrepresentations. *Compare id.* § 2B1.1 cmt. n.15(A)(v) (2001), *with id.* § 2F1.1 cmt. n.11(f) (2000) ("[T]he offense involved the knowing endangerment of the solvency of one or more victims.").

180. *Id.* § 2B1.1 cmt. n.15(A)(v).

181. *Id.* § 2B1.1 cmt. n.15(A)(ii) ("For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).").

182. *Id.* § 2B1.1 cmt. n.15(B).

183. For example, in the fraud primary offense category, 18.8% of the cases received substantial assistance departures, 11.6% received other downward departures, and only 1.1% received upward departures. 2000 SOURCEBOOK, *supra* note 47, at 56 tbl.27. Fraud is an unusual

broad discretionary power by the district courts over departure determinations[184] with its decision in *Koon v. United States*,[185] when it held that such determinations were to be reviewed by the appellate courts under an abuse of discretion standard, thus resolving a split in the circuits.[186]

Koon and three co-defendants were police officers involved in a widely publicized, videotaped beating of Rodney King, an African-American man, by a group of white Los Angeles police officers. A federal court convicted Koon and one of the three other defendants of violating King's civil rights.[187] The sentencing court in *Koon*

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primary offense category because it encompasses a wide range of criminal behavior, such as racketeering and narcotics related criminality, as well as corporate corruption. Thus, the statistics can be misleading. In the Tax primary offense category, 14.4% received substantial assistance departures, 14% received other downward departures, and 0.3% received upward departures. *Id.* In the Antitrust primary offense category, 47.4% received substantial assistance departures, 7.9% received other downward departures, and there were no upward departures. *Id.* The overall upward departure rate for all primary offense categories was 0.7%. *Id.* Thus, although this Article is concerned with strengthening the Guidelines with respect to economic crimes (where upward departures account for between only 0.0% and 1.2% of those cases), upward departures are infrequent in nearly all primary offense categories except Murder (9.5%) and Manslaughter (12.8%). *Id.*

184. Bowman & Heise, *supra* note 48, at 1116 (concluding that *Koon* was "intended as a signal to district court judges . . . [to] be more open to the . . . [use of] their departure power . . . [and] to appellate courts to be less restrictive in reviewing departures"); Michael Goldsmith & Marcus Porter, *Lake Wobegon and the U.S. Sentencing Guidelines: The Problem of Disparate Departures*, 69 GEO. WASH. L. REV. 57, 59–60 (2000) (arguing that the defense bar, district judges, and some appellate courts have read *Koon* as restoring broad sentencing discretion where other appellate courts have read *Koon* more narrowly).

185. Koon v. United States, 518 U.S. 81, 113 (1996).

186. The Supreme Court's ruling in *Koon* has been roundly criticized. *See, e.g.*, Berman, *supra* note 43, at 74 (describing the Court's approach in *Koon* on the issue of discretion as "schizophrenic"); Bowman, *Places in the Heartland*, *supra* note 136, at 19 (concluding that conflicting signals by the Court regarding standards of appellate review make it "virtually impossible" to predict *Koon*'s effect on lower federal courts); Goldsmith & Porter, *supra* note 184, at 59 (arguing that *Koon* failed to resolve problems regarding which standard of review to apply to district court decisions); Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of* Koon v. United States, 58 OHIO ST. L.J. 1697, 1751 (1998) (noting that the Court's ruling in *Koon* is a potential impediment to appellate review of sentencing departures); Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENT. REP. 14, 14–18 (1996) (describing *Koon* as a puzzling decision that has not really altered the discretion of sentencing judges). *But see* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1466 (1997) (viewing the Supreme Court's holding in *Koon* as an attempt to override the rigid application of the Sentencing Guidelines in appellate cases).

The SRA provides that a court of appeals "shall accept the findings of fact unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e) (2000). Thus, it would appear that departure determinations are given even broader discretion.

187. *Koon*, 518 U.S. at 88.

determined that an eight-level downward departure from a sentencing range of seventy to eighty-seven months down to thirty months was warranted in the defendants' case based upon five factors: (1) the victim's wrongful conduct; (2) the likelihood of abuse in prison due to the publicity surrounding the case; (3) the collateral employment consequences of Koon's conviction; (4) the burden of successive trials, in that Koon had been prosecuted by the state on charges of assault and excessive use of force but had been acquitted prior to the federal trial; and (5) a finding that the defendants were not "violent" or "dangerous" and, thus, were unlikely to engage in criminal conduct.[188] The district court granted a five-level downward departure for the first factor and found that the four other factors in combination warranted an additional three-level departure.[189] The Court of Appeals for the Ninth Circuit reviewed the departure decision de novo and reversed the district court's decision concerning the downward departures.[190] That decision was appealed.

The Supreme Court's decision in *Koon* set forth the relevant appellate standard of review when considering departure decisions: abuse of discretion by the sentencing court.[191] Had the Court ended the analysis there, the message would have been clear. The abuse of discretion standard would have returned to the district courts a substantial degree of the discretionary authority that was lost as a result of the enactment of the SRA and the subsequent development of the Sentencing Guidelines. The Supreme Court, however, continued its analysis; it stressed the necessity for sentencing courts to retain discretionary authority in sentencing determinations,[192] but then went forward,

188. *Id.* at 89–90.

189. *Id.*

190. *Id.* at 90.

191. *Id.* at 91. The Court's emphasis on district court discretion is clear:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt.

Id. at 113; *see also* U.S. SENTENCING COMM'N, 2000 ANNUAL REPORT, at 25 (incorporating the *Koon* holding into discretionary sentencing decisions), *available at* http://www.ussc.gov/ANNRPT/2000/ar00toc.htm (last visited Feb. 24, 2003) [hereinafter 2000 ANNUAL REPORT].

192. *Koon*, 518 U.S. at 92.

independently evaluating each factor relied upon by the sentencing court.[193]

The Court found that victim misconduct was a factor to be considered in departure decisions and, further, that King's misconduct, which provoked an aggravated assault under color of law, took the case out of the "heartland"[194] of the applicable guideline, thus supporting a downward departure.[195] The Court next considered the remaining four factors relied upon by the sentencing court, reiterating that the Guidelines do not restrict the number of factors a court may consider for purposes of departures,[196] nor may a court conclude categorically that a factor may never be considered.[197] The Court applied the abuse of discretion standard, reviewing each of the four factors. The Court affirmed the appellate court's ruling with respect to the prospect of employment termination and low risk of recidivism because the Guidelines took into account both factors—the former falling within the heartland of the offense[198] and the latter a consideration within the criminal history category.[199] The Court sided with the sentencing court with respect to the two remaining factors of susceptibility to abuse in prison and successive prosecutions, finding that the emotional outrage that accompanied the case took it outside the heartland and reversing the court of appeals decision holding that emotional outrage based upon the egregiousness of the crime fell squarely within the heartland.[200]

The trend toward more frequent downward departures continued unabated in the wake of *Koon*,[201] with virtually no limit on a district

193. *See id.* at 101–12.

194. *See supra* note 136 (defining "heartland").

195. *Koon*, 518 U.S. at 105.

196. *Id.* at 106 ("The Guidelines, however, 'place essentially no limit on the number of potential factors that may warrant a departure.'" (quoting Burns v. United States, 501 U.S. 129, 136–37 (1991))).

197. *Id.* at 106–07, 109. Of course, as stated previously, the Guidelines do prohibit consideration of sex, race, socio-economic status, and so forth as bases for *departure* from prescribed sentences. *See supra* note 164 and accompanying text (identifying the factors prohibited by the Guidelines for use when considering sentencing).

198. *Koon*, 518 U.S. at 110.

199. *Id.* at 111.

200. *Id.* at 111–12.

201. *See* 2000 SOURCEBOOK, *supra* note 47, at 51 fig.G (bar graph reflecting five-year trend from 1996 to 2000 in departure sentencing showing that within range sentences steadily decreased from 69.6% to 64.5%, and downward departures not based upon substantial assistance increased from 10.3% to 17% during that same period; upward departures lessened slightly over the same five-year period from 0.9% to 0.7%); U.S. SENTENCING COMM'N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 51 fig.G (showing that overall downward departures not based upon substantial assistance increased as follows: 6.6% in 1993, 7.6% in 1994, 8.4% in 1995; overall upward departures remained a minor percentage of departures: 1.1% in 1993, 1.2%

court's discretion as to the extent of a departure, once the court made the determination to depart. Those circuits that supported broader exercise of sentencing discretion through departures from sentencing ranges read the *Koon* decision to authorize the practice, whereas those circuits that narrowly interpreted departure authority under the Sentencing Guidelines read the *Koon* decision restrictively. The disparity between the circuits on departure rates is wider, but the overall trend is toward more downward departures.[202] One district court judge, who supports departures as necessary to a just system of sentencing, concluded that "the same risk of disparity that existed under the pre-[G]uidelines regime exists today because those two [departure] provisions [in sections 5K1.1 and 5K2.0] give judges as much discretion in imposing sentences as they had before the Sentencing Guidelines."[203]

B. The Rising Tide and the Tidal Wave

The disparity in departure practices under the Guidelines threatens to undermine their effectiveness in white-collar sentencing.[204] In the wake of the United States Supreme Court decision in *Koon v. United*

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in 1994, and 0.9% in 1995); Berman, *supra* note 43, at 73–79 (arguing that the Court's efforts in *Koon* failed to create a more effective departure method and instead produced greater confusion and disparity in the lower courts); Goldsmith & Porter, *supra* note 184, at 59–60 (asserting that *Koon* compounded confusion in appellate courts over the appropriate review of departure decisions perpetuating unwarranted sentencing disparity); *see also* Berman, *supra* note 43, at 84, 85 & nn.250–57 (collecting cases approving disparate extent of downward departures); Bowman & Heise, *supra* note 48, at 1105 (arguing that U.S.S.G. § 3E1.1, which allows a reduction for "acceptance of responsibility," is merely an institutionalized incentive to accept guilty pleas).

202. A comparison of the 1995 Sentencing Commission statistics for the rate of non-substantial assistance departures with the 2000 statistics supports this conclusion: in 1995, the overall rate was 8.4%, the Ninth Circuit rate was 16.8%, and the Fourth Circuit rate was 3.9%; in 2000, the overall rate was 17.0%, the Ninth Circuit rate was 37.9%, and the Fourth Circuit rate was 5%. *See* 2000 SOURCEBOOK, *supra* note 47, at 53–55 tbl.26; U.S. FED. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, 1995 FISCAL YEAR, *available at* http://www.ussc.gov/judpack/jp1995.htm (last visited Feb. 24, 2003); *see also* Berman, *supra* note 43, at 80–81 ("Post-*Koon* decisions reveal that *Koon* has liberalized the use of departure authority only in courts already receptive to departures, while it has barely changed the status quo in other circuits.").

203. John S. Martin, Jr., *Foreword, The Role of the Departure Power in Reducing Injustice and Unwarranted Disparity Under the Sentencing Guidelines*, 66 BROOK. L. REV. 259, 262–63 (2000) (observing the great disparity in the way individual judges grant downward departures in cases not involving motions to depart for substantial assistance and comparing the Ninth Circuit's 36.4% rate of departures to the Fourth Circuit's 4.6% rate of departures in non-substantial assistance cases).

204. *See, e.g.*, *supra* notes 135, 137 and accompanying text (discussing the high rate of departures in white-collar cases where the defendant was also convicted of money laundering charges).

States,[205] the overall departure rate from Guidelines sentences has increased nearly 17% from 1996 to 2000.[206] In fiscal year 2000, over 30% of the sentences for fraud convictions included downward departures and, thus, were outside the calculated sentencing range of the Guidelines.[207] Post-*Koon*[208] statistics reveal that the greatest increases in departures are in the non-substantial assistance cases.[209] The downward departure change in substantial assistance fraud cases increased 27.7%, while for non-substantial assistance fraud cases the increase was 42.3%.[210] In fiscal year 2000, over 30% of the fraud sentences included downward departures outside the recommended sentencing range of the guideline.[211] When the court grants downward departures in white-collar crime cases, the median percent decrease from the Guidelines minimum is often significant,[212] with 99 to 100%

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205. Koon v. United States, 518 U.S. 81 (1996).

206. *See Percent of Offenders Receiving Each Type of Departure, Fiscal Year 1996–Fiscal Year 2000*, 2000 SOURCEBOOK, *supra* note 47, at 51 fig.G. Overall departure rates have risen over five percentage points, from 30.4% in 1996 to 35.5% in 2000. *Id.*

207. *Id.* at 56 tbl.27. Of the 5775 fraud offenders, 68.6% of convictions listed in the primary offense category of fraud were sentenced within the range; 18.8% received departures based on substantial assistance, and 11.6% received other downward departures. U.S.S.G. § 5K2.1

208. *See supra* Part III.A (discussing *United States v. Koon*).

209. The percentage of other downward departures increased from 6.7% in fiscal year 1995 to 11.6% in fiscal year 2000, while the percentage of upward departures in fraud cases barely changed, ranging from a low of 0.7% in fiscal year 1999 to a high of 1.6% in fiscal year 1998. Substantial assistance departures for fraud fluctuated over the period 1995 to 2000 from a low of 14.6% in fiscal year 1998 to a high of 18.8% in fiscal year 2000, or just over 4%. *See Percent of Offenders Receiving Each Type of Departure, Fiscal Year 1996–Fiscal Year 2000*, 2000 SOURCEBOOK, *supra* note 47, at 51 fig.G; U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT, AND CIRCUIT, 1995 FISCAL YEAR, at 14 tbl.9, *available at* http://www.ussc.gov/linktojp.htm; U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, 1996 FISCAL YEAR, at 14 tbl.9, *available at* http://www.ussc.gov/ linktojp.htm; U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, 1997 FISCAL YEAR, at 14 tbl.9, *available at* http://www.ussc.gov/ linktojp.htm; U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, 1998 FISCAL YEAR, at 14 tbl.9, *available at* http://www.ussc.gov/ linktojp.htm; U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, 1999 FISCAL YEAR, at 14 tbl.9, *available at* http://www.ussc.gov/linktojp.htm.

210. *Supra* note 209 (of 5664 defendants convicted of fraud in 1995, 850 received substantial assistance departures, whereas in 2000, 1084 of the 5775 defendants convicted of fraud received such departures).

211. 2000 SOURCEBOOK, *supra* note 47, at 56 tbl.27. Of the 5775 fraud offenders, 1084 (18.8%) received departures based upon substantial assistance, and 669 (11.6%) received other downward departures. U.S.S.G. § 5K2.1.

212. The median percent decrease from the Guidelines minimum in non-substantial assistance departures for white-collar crimes is astounding: Fraud 99.2%, Embezzlement 99.7%, Antitrust 60% (only three cases), and Tax 100%. 2000 SOURCEBOOK, *supra* note 47, at 62 tbl.31. The median decrease in terms of months from the Guidelines' minimum ranges from six months to twenty-four months, with a median sentence of zero months imprisonment for any of the above categories except Antitrust (which had a median sentence of eight months but included only three

decreases, resulting in no term of imprisonment for those white-collar offenders awarded departures.[213] Thus, if departure trends continue, even though the Fraud and Theft Guideline was revised to take into account sentencing factors that are identified as relevant under the particular guideline, it is probable that nearly one-third of defendants will escape the more severe punishment of the amended Guidelines. Notably, only sixty-one defendants, or 1.1% of those sentenced under the fraud guideline in 2000, received upward departures.[214] In fact, the United States Sentencing Commission 2000 Sourcebook of Federal Sentencing Statistics reveals that even when sentenced within the Guidelines' recommended range, white-collar offenders consistently found themselves sentenced at the lowest end of the range.[215]

The downward departures include both those recommended by prosecutors[216] and those determined otherwise. At least two studies of sentencing statistical data suggest an inverse relationship between the number of substantial assistance departures and judicial departures.[217]

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defendants). *Id.* The median percent decreases from the Guidelines' minimums for substantial assistance departures reveal similar results: Fraud 99.7%, Embezzlement 99.6%, and 100% for Tax and Antitrust. *Id.* at 61 tbl.30. The decreases in sentences ranged from six months to twelve months, with a median sentence of zero months. *Id.* By contrast, for these offense categories, there were upward departures in only forty-eight Fraud cases (where defendants in 4922 of the cases were sentenced within or below the sentencing range). *Id.* at 59–63 tbls.29–32.

213. In *United States v. Thompson*, 190 F. Supp. 2d 138 (D. Mass. 2002), Judge Gorton found that "[o]f the 48 cases [in the District of Massachusetts] in which downward departures were given, just over 60% were in white collar cases, largely involving defendants with advantaged backgrounds." *See* Gertner, *supra* note 43, at 23 (noting that poor defendants were less likely to receive downward departures than more advantaged white-collar defendants).

214. 2000 SOURCEBOOK, *supra* note 47, at 56 tbl.27. The 1.1% figure is high relative to other historical white-collar crimes: Embezzlement (0.2%), Bribery (0.9%), Tax (0.3%), and Antitrust (0.0%). *Id.*

215. *Id.* at 59 tbl.29. Statistics show the percentage of offenders sentenced at the Guidelines' minimum for the following primary offenses to be as follows: Fraud 61.4%, Embezzlement 68.1%, Bribery 76.7%, Tax 76.1%, and Antitrust 100%. *Id.* By contrast, those offenders sentenced at the Guidelines' maximum were as follows: Fraud 12.1%, Embezzlement 4.1%, Bribery 1.7%, Tax 5.4%, and Antitrust 0.0%. *Id.* In comparison, the overall percentage of offenses sentenced at the Guidelines' minimum is 62.7%; the percentage of those sentenced at the Guidelines' maximum is 13.2%. *Id.*

216. *See* U.S.S.G. § 5K1.1 (setting forth the policy for departures for substantial assistance); *Id.* § 6B1.2(b)(2) (providing that a recommended sentence or agreed upon sentence may depart from the applicable Guidelines range "for justifiable reasons").

217. *See* Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 630, 631 (1998) (Connecticut prosecutors were less likely to seek departures as a result of the judiciary's willingness to depart); Ian Weinstein, *Substantial Assistance and Sentence Severity: Is There a Correlation?*, 11 FED. SENT. REP. 83, 84 (1998) (noting that the pattern of departures suggests that judges balance judicial use of departures under § 5K2.0 with prosecutorial use of departures under § 5K2.1); *see also* Frank O. Bowman III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7,

The studies do not concentrate solely on economic crime sentencing data; the overall picture, however, is one of chaos and disregard for the intended limited opportunity for departures in sentencing of federal criminal cases.[218] Even where case law appears to provide some guidance as to when a factor should be persuasive support for departure, the abuse of discretion standard affords no true review of whether a particular court identified a compelling reason to depart.[219]

60–62 (1999) (examining the apparent inverse relationship between the number of substantial assistance departures and the number of non-5K1.1 judicial departures in a district or region) [hereinafter Bowman, *Departing Is Such Sweet Sorrow*].

218. Although not limited to economic crime cases, statistics reveal that plea agreements were the leading reason given (18.3%) for downward departures in cases in which departures were *not* a result of substantial assistance. 2000 SOURCEBOOK, *supra* note 47, at 52 tbl.25. Thus, the substantial assistance statistics do not reveal the entire picture of cooperation among the prosecutors, judges, and defendants in avoiding the "mandated" results of the Guidelines. *See id.* (providing the statistics for downward departures not based on substantial assistance).

219. The Supreme Court expects comparison among cases for purposes of determining when a factor falls outside the heartland of the Guidelines. *See* Koon v. United States, 518 U.S. 81, 98 (1996) ("District courts have an institutional advantage over appellate courts in making [departure] determinations, especially as they see so many more Guidelines cases than appellate courts do."). For example, a key factor apparently relied upon by courts in granting downward departures for the care of a family member appears to be the indispensability of the defendant in the care-taking responsibilities. *See, e.g.*, United States v. Pereira, 272 F.3d 76 (1st Cir. 2001) (denying downward departure to a defendant convicted of tax offenses and commercial bribery offenses, where there were alternative sources of care available for elderly parents); United States v. Sweeting, 213 F.3d 95 (3d Cir.), *cert. denied*, 531 U.S. 906 (2000) (reversing a twelve-level downward departure based upon defendant's status as a single parent whose oldest child suffered from a neurological disorder); United States v. Saffer, 118 F. Supp. 2d 546, 550 (E.D. Pa. 2000) (denying defendant's motion for downward departure, reasoning that while a "defendant's indispensable role in caring for a seriously ill relative may be grounds for a departure[,] . . . [w]here . . . the defendant's role may be filled by another person, a departure is not warranted"); United States v. Wehrbein, 61 F. Supp. 2d 958 (D. Neb. 1999) (where defendant had already served state term of imprisonment for criminal actions, court granted departure sufficient to avoid incarceration on federal criminal conviction where child suffering from major mental illness was especially dependant upon defendant); United States v. Lopez, 28 F. Supp. 2d 953 (E.D. Pa. 1998) (granting downward departure where seven-year-old daughter had attempted suicide several times after her mother was arrested); Julian Abele Cook, Jr., *Gender and Sentencing: Family Responsibility and Dependent Relationship Factors*, 8 FED. SENT. REP. 145, 145 (1995) (noting that departure jurisprudence does not allow for considerations of culpability in light of family circumstances).

Nevertheless, care for a family member was cited in part in the departure granted to Michael Milken. In 1990, Michael Milken pled guilty to six counts of securities fraud violations and was sentenced to ten years imprisonment under the Federal Sentencing Guidelines. *See Milken's Prison Term Reduced, Parole Possible in Seven Months*, FINANCIAL POST (Toronto), Aug. 6, 1992, at 7; Thomas S. Mulligan, *The 50 People Who Most Influenced Business This Century; Legitimizing Junk Bonds Will Be Milken's Legacy; Michael Milken (1946 -), Junk Bond Impresario*, L.A. TIMES, Oct. 25, 1999, at 46, *available at* 1999 WL 26189115 (noting that Milken served twenty-two months at a federal prison camp and paid $1.1 billion in fines and penalties). Less than two years after he began serving his sentence, he was released to a half-way house as a result of a federal district judge's decision to reduce the minimum amount of time from three years to two years that Milken would be required to serve before being considered for

Nevertheless, it is extremely likely that if past statistical trends are an indicator, at least 30% of the cases that will fall under the 2001 Economic Crime Package will never encounter the greater severity in sentencing for moderate and high-loss cases, escaping, instead, out the backdoor of departure jurisprudence. Given that the sentencing factors that may be considered are infinitely innumerable,[220] defense counsel would be well advised to seek downward departures in every case.[221]

The rising tide of departures continues to erode the foundation of the Sentencing Guidelines, while a tidal wave looms over the goal of uniformity in sentencing, threatening to wash it away. As the stream of reports of deceptive accounting scandals rocks the American financial markets, two questions emerge: first, whether the pursuit of punishment against those who fostered the accounting scandals restrains the ever-expanding departure practices, and second, whether the amendments in

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parole. The judge based the departure upon a finding of substantial assistance by Milken in an ongoing investigation into corruption on Wall Street, despite a letter from the head of the SEC's enforcement division informing the judge that he did not believe Milken had fully cooperated by disclosing all the wrongdoing of which he was aware. *See* Jill Dutt, *Milken's Term Cut; Tycoon Could Be Halfway Out Next Month*, NEWSDAY, Aug. 6, 1992, at 32. The judge relied upon a statement from the United States Attorney's Office that Milken had provided substantial assistance and found that "Milken was a 'model prisoner,' that he was 'the chief catalyst' in the bankruptcy settlement of his former employer, Drexel Burnham Lambert, and that a member of his immediate family is ill." *Id.*

It is not extraordinary to have a white-collar criminal who is a "model prisoner." *See* Michael L. Benson & Francis T. Cullen, *The Special Sensitivity of White-Collar Offender to Prison: A Critique and Research Agenda*, 15 CRIM. JUST. 207, 212 (1988) (observing that white-collar criminals tend to adjust well to prison life once they overcome the initial shock of the experience). Moreover, Milken, renown for his ability to negotiate deals, was also the chief catalyst in the events leading to his employer's bankruptcy. Finally, it is rare for an inmate to be released early from imprisonment because of the illness of an immediate member of the family. Given Milken's vast wealth, the need to act personally as caretaker of a family member is an incredible justification for early release. The "extraordinary" factors led to an 80% reduction in Milken's total imprisonment term. *Id.*

220. *See supra* note 196 and accompanying text (explaining that the Guidelines place no limit on the number of potential factors that may warrant a departure).

221. *See* 1 ABA SECTION OF CRIMINAL JUSTICE, PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES 5-5 (Phylis Skloot Bamberger & David J. Gottlieb eds., 4th ed. 2001) (recognizing the "expanding bases of departure under § 3553(b) and § 5K2.0 . . . [as] the principal escape hatch from the guideline grid"). The authors further advise that:

> Creative counsel should strive to develop a record of mitigating factors relating to the defendant's criminal conduct, extraordinary personal characteristics, and any other unusual circumstances that take a case outside the "heartland" for which a guideline was drafted. Conversely, counsel should oppose upward departures by arguing that the aggravating factor relied on by the court was taken fully into account in formulating the applicable guidelines and it constitutes an abuse of discretion to depart upward because the factor was not present in a substantially greater than normal degree.

1 *Id.* at 5-5 to 5-6.

the Guidelines actually lead to retribution in the form of longer terms of imprisonment and, ultimately, deterrence of future economic crime.

IV. GUIDING ECONOMIC CRIME REFORM

A. Economic Crime and Capitalism

The justice system, government, and economy in the United States are closely intertwined; each sector influences the other. Cases like Enron dramatically illustrate the overlap among the sectors. The collapse of Enron sent shock waves through the economy. Investigation into the aftermath of Enron's bankruptcy revealed the corporation's dogged use of political campaign contributions to influence energy industry regulation and to gain special access to key political leaders in the legislative and executive branches of government.[222] Over time, Enron's collapse uncovered and exposed a deeply rooted disease infecting the overall health of our economy.

Large corporations like Enron are prized clients to accounting firms, brokerage houses, and banks.[223] Their business is so valued that companies in the financial services industries willfully bend their fiduciary responsibilities to maintain a satisfactory business relationship. Thus, Arthur Andersen willingly structured off-the-books transactions to hide losses and enhance earnings for Enron.[224] Andersen's willingness to keep its clients happy, lest it lose their business, was not an unfounded concern. In 2000, Xerox dismissed

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222. Eichenwald, *supra* note 3.

223. *See generally* David Barboza & Barnaby J. Feder, *Enron's Many Strands: The Transactions; Enron's Swap with Qwest Is Questioned*, N.Y. TIMES, Mar. 29, 2002, at C1, *available at* LEXIS, News Library, The New York Times File (reporting on investigation into whether deals between Enron and Qwest Telecommunications to swap fiber optic network capacity and services "were legitimate transactions or sham deals meant to lift revenues artificially"); *see also* Gretchen Morgenson, *Telecom, Tangled in Its Own Web*, N.Y. TIMES, Mar. 24, 2002, § 3, at 1, *available at* LEXIS, News Library, The New York Times File (reporting on the interlocking relationships among telecommunications companies including transactions involving swapping network capacity, and reporting that a few bankruptcies are fueling a larger number of bankruptcies, which threaten the collapse of the industry).

224. For example, Andersen external accountants willingly accepted the face value placed by Andersen internal accountants on market-to-market trades, permitting current earnings to be recognized for speculative future gains. Michael Brick, *What Was the Heart of Enron Keeps Shrinking*, N.Y. TIMES, Apr. 6, 2002, at C1, *available at* LEXIS, News Library, The New York Times File; *see also* Kurt Eichenwald, *Negotiations by Andersen with KPMG Fall Apart*, N.Y. TIMES, Apr. 3, 2002, at C1, *available at* LEXIS, News Library, The New York Times File (reporting on e-mail exchanges between Andersen's Chicago and Houston offices in 1999, where the Chicago office concluded that the accounting of a complex Enron transaction was not permissible, but the Houston office refused to tell Enron to go back on the deal because there would be a $30 million to $50 million charge).

KPMG as its auditor and hired rival PricewaterhouseCoopers after KPMG forced Xerox to restate financial results for that year, reducing shareholder equity by $137 million and tangible net worth by $76 million.[225] Likewise, UBS PaineWebber fired a broker in its Houston office within hours of receiving a complaint from Enron concerning the broker's August 2001 recommendation to clients to take some money invested in Enron "off the table" because of the company's deteriorating financial situation.[226] PaineWebber informed Enron of the firing, apologized for the broker's conduct, and sent a message to the broker's clients that evening, retracting the broker's advice and attaching a report with a "strong buy" recommendation for Enron.[227] PaineWebber had an exclusive arrangement with Enron concerning Enron employees' stock option and deferred benefit plans, which may explain, though not excuse, the complicity of PaineWebber in protecting Enron's financial reputation despite its responsibilities to investors relying on PaineWebber's advice.[228] The incestuous role of investment bankers in the corporate scandal is only beginning to be unveiled.[229]

B. Civil Recovery and Its Limits

The Economic Crime Package limits the calculation of loss to the greater of intended loss and actual loss, which is the "reasonably foreseeable pecuniary harm" resulting from the offense.[230] In defining

225. Floyd Norris & Claudia H. Deutsch, *Xerox to Restate Results and Pay Big Fine*, N.Y. TIMES, Apr. 2, 2002, at C1, *available at* LEXIS, News Library, The New York Times File. This Article reports Xerox's agreement to pay a $10 million fine to settle an SEC fraud investigation, the largest civil fine ever reportedly paid by a company in an accounting case. *Id.* The previous record was a $3.5 million civil fine paid by America Online in a 2000 settlement with SEC. *Id.* In 2001, Arthur Andersen settled civil fraud allegations involving audits of its client, Waste Management, agreeing to pay a $7 million fine. *Id.*

226. Richard A. Oppel, Jr., *The Man Who Paid the Price for Sizing Up Enron*, N.Y. TIMES, Mar. 27, 2002, at C1, *available at* LEXIS, News Library, The New York Times File. The fired broker's recommendation occurred only four months before Enron became the largest corporation at that time to declare bankruptcy. *Id.*

227. *Id.*

228. *Id.*

229. Corporations that generate large profits present lower investment risk. Thus, complex financial relationships between investment bankers and corporations like Enron are expected. The revelation that bank loans were provided for off-the-books partnerships and that bankers engaged in self-dealing by personally investing in the partnerships that operated to move "hundreds of millions of dollars in loans off [Enron's] books" was disturbing because of the self-dealing and the magnitude of the personal gains, both of which suggest an abdication of any fiduciary responsibility to the banks they represented or the investors in both the banks and Enron. Kurt Eichenwald & David Barboza, *Enron Criminal Investigation is Said to Expand to Bankers*, N.Y. TIMES, June 26, 2002, at A1, *available at* LEXIS, News Library, The New York Times File.

230. U.S.S.G. § 2B1.1 cmt. n.2(A)(i).

"pecuniary harm," the Guidelines specifically exclude "emotional distress, harm to reputation, or other non-economic harm."[231] The Sentencing Commission placed this limit on loss calculations to address the desire that courts not assign monetary value to intangible, but reasonably foreseeable, harms in criminal cases that would be more aptly addressed as civil damages.[232]

While avoiding non-pecuniary harms in criminal sentencings may be an efficient use of resources, civil litigation is limited both in redressing such harms and in providing real deterrence. Even when economic crime has been criminally prosecuted, the materials gathered in support of such prosecutions are often protected under Federal Rule of Criminal Procedure 6(e) as grand jury materials subject to secrecy so that parties must still wade through the civil discovery process.[233] While a plea of guilty may establish wrongdoing, the civil plaintiff must still establish that the wrongdoing directly caused her harm and must still prove her damages.

Recovery for pecuniary and non-pecuniary harms through the civil laws for conversion, fraud, breach of contract, and securities fraud poses a host of problems for victims. First, the law must actually provide for civil recovery in a meaningful manner. The litigation "reform" movement of the past decade has, in general, continuously reduced the availability of civil remedies. For example, while an individual may sue for securities fraud, the Private Securities Litigation Reform Act of 1995[234] ("PSLRA") has effectively limited successful lawsuits by placing on plaintiffs various procedural burdens, such as heightened pleading requirements in federal courts that act as barriers to suit.[235] Further restricting civil remedies, the Securities Litigation Uniform

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231. *Id.* § 2B1.1 cmt. n.2(A)(iii).

232. Bowman, *2001 Reforms*, *supra* note 51, at 50. Professor Bowman notes that throughout the five-year debate over the economic crime package, "there was never any support for including non-economic harms in loss." *Id.* at 49.

233. FED. R. CRIM. P. 6(e).

234. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

235. *See* Ramirez, *supra* note 4, at 1072–79 (discussing the heightened pleading standards as a result of the PSLRA). In addition to the heightened pleading standard under the PSLRA, courts must impose sanctions for failure to comply with Federal Rule of Civil Procedure 11, which includes awarding attorney's fees and costs; heightened causation standards tighten the ability to wage class actions lawsuits. *Id.* Professor Ramirez concludes that such reforms have led to "the *de facto* de-federalization of private securities claims." *Id.* at 1080 (discussing the effects of the PSLRA). States have followed the lead of the PSLRA in enacting similar legislation. *Id.* at 1081 (noting the desire of states to encourage business development within their borders and stating that Arizona has already passed legislation modeled after the PSLRA).

Standards Act of 1998[236] precluded state court securities litigation involving publicly traded companies by requiring such suits to be brought in federal courts.[237] The recently enacted Sarbanes-Oxley Act does not provide a real expansion for private civil remedies to corporate fraud.[238] Second, legislative barriers to lawsuits and limited liability provisions increase both the cost and the risk of filing lawsuits and thereby exacerbate other impediments to civil remedies. Thus, the victim must have the resources to investigate, initiate, and maintain the lawsuit, or convince a lawyer to take the risk on a contingent basis. Meanwhile, although the loss to one victim might not be enough to justify the cost of a civil suit, the gain to the offender from the combined loss to many victims may satisfy or justify the risk of the cost of a criminal suit.[239] Finally, even a successful civil action is useless against those offenders with few or hidden resources.[240]

Historically, the economic arguments against prison terms for economic crime offenders have been plentiful.[241] One argument against

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236. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (amending scattered sections of 15 U.S.C. §§ 77–78).

237. *Id.* § 101 (amending 15 U.S.C. §§ 77p, 78bb); Steven A. Ramirez, *Depolitizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 533 (2000) (discussing the effects of enacting the Uniform Act).

238. *See generally* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 801–1107, 116 Stat. 745, 800–10 (to be codified in scattered sections of 18 U.S.C. and 28 U.S.C.); *see* Steven A. Ramirez, *Fear and Social Capitalism: The Law & Macroeconomics of Investor Confidence*, 42 WASHBURN L.J. 31, 65 (2002).

239. The gain to the offender may justify the risk of the cost of a criminal suit particularly because most securities litigation settles before trial for pennies on the dollar. Dan Carney, *Don't Toss this Stock-Fraud Law. Just Fix It*, BUS. WK., Aug. 5, 2002, at 86 (showing average settlements on private stock fraud litigation of 7.2% of estimated shareholder loss), *available at* 2002 WL 9362591. The slow dance of contemporary federal litigation gives the advantage to the defendant who has the use of the fraudulently obtained resources both to enjoy for the present and to pay for a well-heeled defense. *See* Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 9 (1984) (comparing federal civil litigation to a dance marathon where the object of the contest is to be the last party standing).

240. The problem with collecting individually obtained civil judgments is also seen in the area of criminal fines and restitution and in disgorgement. *See* John D. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 437 (1980) (observing that large fines can be avoided by hiding assets, diverting expected income, overstating expenses, or hiring "superior legal talent to resist collection efforts"). Although the SEC won disgorgement orders of $632 million in 2002, only $73 million (or 12%) has been collected, the remainder either spent on legal fees or hidden from access. Paula Dwyer et al., *Making Execs Give Back the Cash*, BUS. WK., Aug. 26, 2002, at 36, *available at* 2002 WL 9362737. Attorney Robert J. Mintz notes that an "unintended consequence of the [Sarbanes-Oxley Act of 2002] . . . is that it could encourage CEOs to move funds offshore without a trace—just in case." *Id.*

241. *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 31–34 (1997) (observing that corporate misconduct is particularly suitable to civil sanctions because monetary sanctions are available, corporate plaintiffs are

"lengthy" imprisonment for white-collar offenders is that such offenders will realize a greater level of "loss" compared to the average offender because of lost earnings while incapacitated, and possibly a long-term loss of ability to earn top dollar as a result of the perception that the offender is a criminal.[242] Another argument is that it costs tax dollars to imprison a person, and the longer the sentence, the more it costs. Requiring economic crime offenders to pay large fines and restitution in lieu of imprisonment gives back to the victim and the community in a way that imprisonment cannot.[243] Imposing a term of imprisonment, however, does not exclude the opportunity to impose other sanctions.[244]

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abundant, and public agencies exist to enforce such sanctions). *See generally* Richard A. Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980) (asserting that white-collar criminals should be punished only by fines and not imprisonment because fines are an equally effective deterrent). *But see* Coffee, *supra* note 240, at 434–35 (noting that there is a practical "boundary" on the ability to collect fines large enough to deter white-collar crime).

242. *But see* WEISBURD ET AL., *supra* note 63, at 118–125 (finding little difference on the toll taken by the judicial process on white-collar criminals compared to common criminals, but white-collar offenders suffer more extra-judicial punitive effects); Benson & Cullen, *supra* note 219, at 212 (concluding from interviews with previously imprisoned white-collar criminals that, as a group, they were able to adjust well to prison life).

243. *See* Lynch, *supra* note 241, at 31–33 (discussing the question of why corporate misconduct is a suitable area for the application of civil sanctions); Posner, *supra* note 241, at 410 (explaining why fines rather than prison sentences should be given to white-collar criminals). *But see infra* note 264 (comparing white-collar crime to other types of crime).

244. The Guidelines provide for mandatory restitution for "offenses committed against property, including any offense committed by fraud or deceit" unless "the number of identifiable victims is so large as to make restitution impracticable . . . [or determining such] losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." U.S.S.G. § 5E1.1(b)(1)–(2). Restitution shall be included so long as such order is authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, 3663A(a), or 21 U.S.C. § 853(a), or if not authorized under 18 U.S.C. § 3663(a)(1), but otherwise meets the criteria for an order of restitution under that section. Additionally, it can be difficult to collect fines and restitution, adding one more opportunity for the offender to avoid punishment even after he is detected and convicted. *See* KLEIN, *supra* note 43, at 163–69 (discussing restitution as an alternative in federal sentencing).

In fact, there are numerous sentencing options that can be imposed in addition to imprisonment. Part F of Chapter 5 of the Guidelines provides additional "Sentencing Options." The Background Commentary to U.S.S.G. § 5F1.4 provides, in part:

> In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S.C. § 3555. The court may order the notice to be given by mail, by advertising in specific areas or through specific media, or by other appropriate means. In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S.C. § 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than $20,000 to give notice.

U.S.S.G. § 5F1.4, cmt. Community service provides an excellent opportunity for the court to require the offender to give back to the community from which she wrongfully took in

committing her crime, as well as to reconnect to the community. Creative placement of white-collar offenders, such as requiring physicians convicted of health care fraud crimes to provide free medical care in clinics and requiring accountants convicted of tax crimes to keep books for charitable organizations, may be a marriage made in crime and punishment heaven—so long as the offender does not transfer her criminal skills to the task assigned. Szockyj, *supra* note 72, at 498–99 (discussing alternatives to serving prison sentences).

U.S.S.G. § 5F1.5(a) provides for the imposition of occupational restrictions:

> The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:
>
> (1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and
>
> (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

U.S.S.G. § 5F1.5(a).

The Commentary following § 5F1.5 cautions that imposition of occupational restrictions should be used for the sole purpose of protecting the public and not "as a means of punishing the convicted person." U.S.S.G. § 5F1.5, cmt. The Sarbanes-Oxley Act also provides for occupational restrictions to prohibit persons from serving as officers or directors, although the power to do so under the Act is granted to the SEC. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1105, 116 Stat. 745, 809–10 (amending the Securities Exchange Act of 1934, 15 U.S.C. § 78u-3, and the Securities Act of 1933, 15 U.S.C. § 77h-1). The Sarbanes-Oxley Act grants authority to the SEC to prohibit persons from serving as officers or directors

> of any issuer that has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or that is required to file reports pursuant to section 15(d) of that Act, if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.

Id. 116 Stat. 745, 810 (amending 15 U.S.C. § 77h-1). The imposition of occupational restrictions as a condition of probation or supervised release has been upheld by the circuit courts when challenged. *See, e.g.*, United States v. Clark, 195 F.3d 446, 452 (9th Cir. 1999) (preventing defendant from working in law office or "any institution in the business of providing legal services"); United States v. Choate, 101 F.3d 562, 566–67 (8th Cir. 1996) (preventing defendant from maintaining self-employment); United States v. Whitlow, 979 F.2d 1008, 1012 (5th Cir. 1992) (preventing defendant from working in used-car industry); United States v. Burnett, 952 F.2d 187, 190 (8th Cir. 1991) (preventing defendant from working in business that requires travel or selling vending machines). Such restrictions may be appropriate in fraud and insider trading cases.

Forfeiture under U.S.S.G. § 5E1.4, as discussed in Part II.B, *supra*, may be sought in connection with money laundering charges. Disgorgement and debarment are civil sanctions that may be imposed by governmental agencies as a consequence of a criminal conviction. For example, in 1985, E. F. Hutton & Company, Inc. ("EFH"), one of the largest securities dealers in the United States, pleaded guilty to 2000 counts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. Kathleen F. Brickey, CORPORATE WHITE COLLAR CRIME CASES AND MATERIALS 640 (1990) (reproducing Department of Justice Press Release dated May 2, 1985, and portions of EFH's 1985 10-k report). Subsequently, the United States Department of Labor notified EFH of its inquiry into whether debarment provisions of Section 411 of the Employee Retirement Income Security Act of 1974 should be implemented to "restrict EFH from acting as an administrator or investment advisor to employee benefit plans." *Id.* at 646 (reproducing portions of EFH's 1985 10-k report). Disgorgement is available to the SEC as an equitable remedy under the Securities and Exchange Act of 1934, 15 U.S.C. § 77g.

C. Purposeful Punishment

As America's ship neared the iceberg, the immensity of the situation became apparent. Each week brought headlines of another corporation "restating" earnings to reflect billions of dollars in losses.[245] More Americans were invested in America's financial markets than at any time in its history.[246] The implosion of the financial markets rocked the very foundation upon which middle-class America rests its future. American financial markets rely upon accurate and honest information. When civil remedies cannot protect the goals of government, the criminal process provides both the additional incentive to follow the rule of law and the measured force to chastise those who do not.

Economic crime offenders pose a threat to the efficiency of the business and financial markets,[247] confidence in government, and faith in the justice system. In our complex society, people must rely upon the professionalism of others to accomplish their goals.[248] Nearly overnight, our political leaders awoke to the realization that harsher penalties for economic criminals were needed.[249] Just as the politicians used the "scorched earth" approach in the war on drugs,[250] it is now the corporate executive who darkens the driveways of modern suburbia.

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245. *See, e.g.*, Barnaby J. Feder & Seth Schiesel, *WorldCom Finds $3.3 Billion More in Irregularities*, N.Y. TIMES, Aug. 9, 2002, at A1, *available at* LEXIS, News Library, The New York Times File; Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow $3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1, *available at* LEXIS, News Library, The New York Times File.

246. N.Y. STOCK EXCH., FACT BOOK FOR THE YEAR 2000, at 55 (2000) (finding that 43.6% of the United States adult population owned stock directly or indirectly as of 1998, up 21% from 1995); Edward Wyatt, *Share of Wealth in Stock Holdings Hits 50-Year High*, N.Y. TIMES, Feb. 11, 1998, at A1, *available at* LEXIS, News Library, The New York Times File (reporting that Americans have more of their assets invested in the stock market than at any time in the last fifty years, and perhaps ever).

247. *See* Jeffrey Rubin, *Ahead of the Curve: Companies Still Can't Shake Off Corporate Credit Blues*, TORONTO GLOBE & MAIL, Jan. 6, 2003, at B7 (reporting that "[c]redit spreads, or the extra interest that corporate borrowers must pay compared with government borrowers, are the widest they have been for some time. Before the recent credit rally in late fall, they were basically at the widest levels since the Depression of the 1930s."). The article attributes the wide spreads to the corporate malfeasance and accounting scandals beginning with Enron and WorldCom. *Id.* The article further reports a six-quarter decline in bank lending to the United States business sector. *Id.*

248. *See* Ramirez, *supra* note 4, at 1056–57 (discussing the need for public "confidence in the integrity of our financial markets in order to insure a stable and inexpensive source of capital for American business growth").

249. *See supra* Part II.C (discussing the political process leading to passage of the Sarbanes-Oxley Act of 2002).

250. The percentage of the federal prison population in Federal Bureau of Prison facilities for sentenced drug offenders compared to the total sentenced population has increased steadily over the past three decades from 16.3% in 1970, to 24.9% in 1980, to 52.2% in 1990, and to 56.9% in

The Economic Crime Package recognizes that for large-dollar economic crime offenders a fine without imprisonment fails.[251] With scandal upon scandal, the public cannot afford to ignore the nefarious nature of economic crime and blindly disregard the human fallout from economic harm imposed on victims.[252] The United States taxpayer continues to pay for the bailout of the Savings and Loan industry,[253] while Medicare recipients get no relief on prescription medicine costs because of a national budget that cannot afford to assist them.[254] The dual purposes of retribution and deterrence support longer terms of imprisonment developed in the Economic Crime Package for large pecuniary fraud.

1. Retribution

Criminal law "defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility."[255] When a law is violated, the ability of the offender to disregard the rules

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2000, with a high of 61.3% in 1994. Federal Bureau of Prisons Quick Facts, May 2002, *at* http://www.bop.gov/fact0598.html#Drug (last visited Jan. 18, 2003).

251. [P]rison is the distinctive sanction of the criminal law because it fulfills a pedagogical function that fines do not. Not only are prisons highly visible reminders of the deterrent threat of the law, but the use of imprisonment broadcasts a special communitarian message about the equality of all citizens before the law. Because of the wealth differences among offenders and the declining marginal utility of money, fines cannot communicate this message, and, when used as an alternative to imprisonment, may undercut it.

John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 224 (1991) (discussing how criminal law is a system of moral education).

252. A comparison of the economic loss/gain for conventional crimes versus white-collar crimes revealed that just over 2% of conventional non-violent crimes involved more than $110,000, whereas nearly 30% of white-collar crimes involved at least that amount. Stanton Wheeler et al., *White-Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331, 337–38 (1988) (contrasting white-collar and conventional crime); *see also* STEPHEN M. ROSOFF ET AL., PROFIT WITHOUT HONOR: WHITE-COLLAR CRIME AND THE LOOTING OF AMERICA 409–14 (1998) (estimating that the economic cost of white-collar crime is more than $40 billion for personal fraud alone).

253. The Savings and Loans bailout has been variously estimated at between $200 and $500 billion, with a conservative estimate that at least $6 billion was attributed to fraud. POVEDA, *supra* note 72, at 11 (discussing definitions of white-collar crime).

254. *See, e.g.*, ROSOFF ET AL., *supra* note 252, at 410 (noting that the Savings and Loan bailout forced reductions of government spending on social services); Robert Pear, *Senate Kills Plan for Drug Benefits Through Medicare*, N.Y. TIMES, Aug. 1, 2002, at A1, *available at* LEXIS, News Library, The New York Times File (discussing the Senate's 2002 failure to pass legislation providing prescription drug benefits promised to the elderly).

255. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 410 (1958) (discussing why it is difficult to have only one theory of criminal law).

and get away scot-free has a negative effect on the public at large.[256] Offenders breach their responsibility to society to conform to and abide by its rules. Faith in the system is eroded, and the willingness of others in that society to follow rules that are unenforced is discouraged. "Law must not only preserve the society; it must, in addition, serve its ideals and values. . . . One overriding value [is that of] justice."[257] Proponents of the retributive theory assume that those who commit crimes choose evil over good and that, as responsible moral agents for their acts, those offenders deserve punishment.[258] Moreover, retribution stamps upon the offender the title of criminal, a sanction in itself in that it stigmatizes the offender.[259]

Some critics of the retributive theory view vengeance as its primary motivation and, as such, maintain that it lacks moral justification for punishment because it "invites the public and the legal system to indulge the passion for revenge untroubled by moral qualms."[260]

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256. ROSOFF ET AL., *supra* note 252, at 414–15 (discussing the social costs of white-collar criminality as promoting "disrespect for the law among ordinary citizens and . . . ready rationalizations for potential street criminals seeking to justify their misconduct"); *see also infra* note 273 and accompanying text (discussing the ways that criminals deny their conduct).

Steven Box writes that "too many people have been socialized to see crime and criminals through the eyes of the state." STEVEN BOX, POWER, CRIME, AND MYSTIFICATION 14 (1983). Because the state perpetuated and publicized the view that street crime was the criminal force in society, corporate crime was largely ignored. *Id.* at 3–4, 12–15. Since the growing recognition that victimization from corporate crime is far more devastating than "conventional" crime, the drive to place effective controls on corporate crime has been accelerated. *Id.* at 12–15 (discussing the commonly unknown effects of corporate crime). The rapid passage of the Sarbanes-Oxley Act of 2002, cheerfully signed into law by a conservative president, addressing corporate fraud and conflicts of interest, is a testament to the speed with which measures are taken when attention is drawn to the widespread devastation of alleged corporate crime. *See also* POVEDA, *supra* note 72, at 4.

257. WILLARD GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING 5 (1974).

258. *See* CRIMINAL LAW 3–4 (Richard J. Bonnie et al. eds., 1997).

259. *See* Hart, *supra* note 255, at 404 ("What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.").

260. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1652 (1992). Certainly, if the justice system merely replaced the victim in imposing vengeance through punishment, one could be satisfied with the assertion that retribution encourages indulgence in the passions of revenge. Moreover, those who committed crimes like murdering a child rapist would go free entirely, assuming community support for such action, since there would be no personal anger to avenge. The system of "just deserts" permits the law to temper the flashes of anger that lead to tar and feathering and other tortuous punishments imposed by communities or victims and replace such vengeful acts with a system of imprisonment and fines. Additionally, while the reaction of a victim to a particular crime might range from mildly upset to murderous anger, the law of retribution diffuses a single crime victim's reaction and intermingles it with the community's range of reactions to that type of crime to arrive at a sentence that has community acceptance, while at the same time taking into account the particular circumstance of that particular instance of crime and, possibly, its victim.

Retributive theory has been further criticized as focusing too much on the ethical or moral basis for law, thereby punishing those who, as a result of "physiological, psychological, environmental, cultural, educational, economic, and hereditary factors,"[261] may not commit crimes because of their choice of evil over good but because of desperate conditions like poverty or racial discrimination.[262] While such concerns may undercut a retributive theory of punishment for general crimes, they enhance the justification for punishment of those offenders who commit white-collar crimes.[263] Those offenders whom society has welcomed into its personal or financial affairs based upon the façade of respectability and trustworthiness projected by the offenders seem the most culpable under a system of retribution. These offenders, with the presumed ability to make the "right" choice knowingly, demonstrate their unwillingness to make that right choice by choosing evil over good.[264]

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261. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 396 (1976) (asserting that criminal law lacks a moral basis when it accepts social injustice).

262. *Id.* at 389, 401–02; *see also* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 10 (1985) (stating that, unless we agree that offenders are criminals because they are poor, we must consider that they may turn to crime because of their economic circumstances).

263. *See* Hart, *supra* note 255, at 415 (discussing the minimum obligations of responsible citizens).

264. In an article addressing the issue of welfare criminology, Professor Stephen Morse concluded:

> [T]here is no scientifically dictated cutting point where legal and moral responsibility begins or ends. Nor is there a higher moral authority which can tell society where to draw the line. All society can do is determine the cutting point that comports with our collective sense of morality. The real issue is where society ought to draw the line of responsibility—and by whom it should be drawn.

Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1253 (1976). Critical race and feminist scholars have refocused Morse's question, asserting that affluent white males are the ones who have drawn the lines to serve their own political and economic self-interests—to the detriment of the poor, minorities, and women. *See supra* note 238 and accompanying text (discussing how the Sarbanes-Oxley Act does not provide an expansion to allow for private civil remedies).

A study of the crimes of the middle classes gives some support to this idea, finding that white-collar crimes committed by whites cause more harm than white-collar crimes committed by non-whites. *See* WEISBURD ET AL., *supra* note 63, at 83; *see also* Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 780, 794–801 (1991) (recognizing that "for the most part, prosecutors are a group of relatively privileged insider white males" and proposing that prosecutorial research, information and reporting boards act as a check and balance to prosecutorial discretion and as an informational source for the legislature and the public); Francisco Valdes, *Diversity and Discrimination in Our Midst: Musings on Constitutional Schizophrenia, Cultural Conflict, and "Interculturalism" at the Threshold of a New Century*, 5 ST. THOMAS L. REV. 293, 346–47 (1993) (contrasting the jurisprudential legalistic tradition that historically benefits favored groups in the United States—"white, male, affluent, and heterosexual"—with the humanistic tradition

Unfortunately, wealth heavily influences the use of legal process to avoid indictment because it is often tied to the ability to hire excellent counsel to address criminal allegations before they become criminal charges.[265] Civil fines, restitution, and agreements to cooperate have all been used to avoid imprisonment or criminal punishment altogether.[266] Failing to secure complete avoidance, good counsel can limit the effects through skillful negotiation of pleas. Faced with limited resources and an uncertain outcome, prosecutors must consider resolutions without trial. The Economic Crime Package recognizes the need to redress the harm to victims of economic crime, tying the length of imprisonment to both the number of victims harmed and the size of the loss imposed on them. The retributive stamp of imprisonment recognizes the need to "avenge" the devastation that economic crime can create but meets that need with proportionality based on harm.

2. Deterrence

The potential for economic crime to find its way into every nook and cranny of the United States capitalist system, with far-reaching and devastating results, suggests that deterrence must be stepped up. Arguably the Enrons of the new millennium are the reaction to the perception of the insider trading and Savings and Loan scandals of the 1980s.[267] When the dust settled on those scandals, the famed actors

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that benefits "people of color, women, the poor, and sexual minorities"). Women also have had less of an opportunity to commit high-level white-collar criminality due at least in part to their lack of representation in the upper hierarchies of organizations. *See* Kathleen Daly, *Gender and Varieties of White-Collar Crime*, 27 CRIMINOLOGY 769, 775 (1989) (contrasting the natures of men's and women's white-collar illegalities).

265. *See* MANN, *supra* note 64, at 9 (noting that white-collar defense attorneys spend the largest percentage of their work hours on precharge matters).

266. The history of imposing large fines or restitution in lieu of punishment for those with wealth and power extends at least back to 2100 B.C. KLEIN, *supra* note 43, at 152. The Code of Hammurabi provided for restitution for theft with a repayment of thirty-fold if the victim was "a god . . . [or] . . . a palace," tenfold if the victim was "a villein," or, if the thief lacked means of repayment, "he shall be put to death." *Id.* (quoting Cook, *The Code of Hammurabi 2100 B.C.*, in TREASURY OF RULE OF LAW 25 (R. Nice ed. 1961)). King Louis IX of France perfected the fine as an escape clause for a Sire DeCoucy, allowing him to avoid hanging after his fellow knights exerted "enormous pressure." *Id.* at 153 (quoting B. TUCHMAN, A DISTANT MIRROR 12–13 (1978)). Apparently the King recognized the dependency of his royal treasury on DeCoucy and his fellow lords. *Id.* at 153–54.

Unfortunately, fines for pecuniary frauds undermine retributive goals. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 245 (5th ed. 1998) (recognizing that "the stigma effect of being sentenced merely to pay a fine is slight").

267. See Calavita & Pontell, *supra* note 6, at 306–08, who posit that stepped-up enforcement of white-collar crime is consistent with the structuralist theory that the state, in working to maintain and protect economic stability, enjoys a greater measure of autonomy from the individual elites and their consequential political pressure. The authors recognize, however, that

walked away with little jail time and millions of dollars, while the taxpayers continue to bail out the victims.[268] As discussed below, the

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the state's inability to redress the Savings and Loan crisis early on suggests that autonomy comes only when the immensity of the disaster becomes apparent. *Id.* at 306. Further, such autonomy is short-lived in that its support dwindles as the crisis fades from public visibility. *Id.*

Manipulation of earnings by top corporate managers was already worrisome in 1999, prompting Arthur Levitt, as chairman of the SEC, to announce in 1999 that he was committing the agency to a high-priority attack on earnings management. Carol J. Loomis et al., *Lies, Damned Lies, and Managed Earnings: The Crackdown Is Here*, FORTUNE, Aug. 2, 1999, at 74, *available at* 1999 WL 7940605. In an interview with *Fortune*, Levitt identified the current corporate practices as threatening "the credibility of the U.S. financial-reporting system, traditionally thought to be the best in the world." *Id.*

The initial reactions of politicians to the Enron collapse were outrage and disgust. *See, e.g.*, Richard A. Oppel Jr. & Joseph Kahn, *Enron's Many Strands: The Hearings; Enron's Ex-Chief Harshly Criticized by Senate Panel*, N.Y. TIMES, Feb. 13, 2002, at A1, *available at* LEXIS, News Library, The New York Times File (reporting on a "bipartisan oral barrage" from United States senators directed at Kenneth L. Lay, former chairman of Enron, appearing before the Senate Commerce Committee; one senator "told Mr. Lay he was 'perhaps the most accomplished confidence man since Charles Ponzi. . . . I'd say you were a carnival barker, except that wouldn't be fair to carnival barkers.'"). Nonetheless, many of the reforms proposed to correct some of the issues, such as lack of truly independent auditors and investment advisors and lack of accounting regulation, have been left in the hands of the SEC through passage of the Sarbanes-Oxley Act. *See* Ramirez, *supra* note 238, at 31–77. The risk in leaving such reforms to another day—and to the oversight by the SEC—is that after the crisis fades, pressure can be brought to bear on an agency that can cause a relaxation of regulatory oversight. *See, e.g.*, Ramirez, *supra* note 237, at 562 n.356 (describing the SEC's reversal of position opposing private securities litigation reform after "[s]enators 'threatened to turn off the lights' at the SEC").

268. In a plea agreement, Michael Milken, attributed with creating the junk-bond market, agreed to pay over $600 million in fines and serve a ten-year term of imprisonment. He spent only twenty-two months in jail as a result of a later sentencing departure by the court. *Supra* note 219 and accompanying text (discussing Milken's decreased sentence).

Ivan Boesky, under federal investigation for insider trading, cooperated with the government in the criminal investigation, pled guilty, agreed to pay $100 million in fines and restitution (having made an estimated $203 million in illegal securities trades), and received a three-year term of imprisonment. ROSOFF ET AL., *supra* note 252, at 151–52.

Charles Keating's fraudulent conduct in the collapse of Lincoln Savings & Loan cost investors more than $250 million and the taxpayers $3.4 billion. Prior to the federal indictment, Keating called upon five United States senators to whom he had made substantial campaign contributions to intervene with regulators on his behalf. The five senators became known as the "Keating Five." *Id.* at 214–17. Keating was convicted on state charges related to the sale of junk bonds and sentenced to the maximum term of ten years imprisonment; he was also convicted of federal charges of racketeering, bank fraud, and other crimes and received a twelve year, seven month term of imprisonment (less than half of the twenty-five to thirty year term requested by federal prosecutors). The federal courts overturned both convictions on appeal. In a petition for habeas corpus relief, the federal appellate court overturned the state conviction on an error in the jury instructions; and the federal conviction was overturned when the appellate court held that the federal jury had improperly learned about the prior state court conviction. *Id.* at 218–19. With his convictions overturned, Keating was released in 1996. In 1999, Keating struck a deal with federal prosecutors and pled guilty to wire fraud and concealment of assets with intent to defeat provisions of the Bankruptcy Code. He was sentenced to time already served in prison on the overturned convictions (less than five years); no fine or restitution was imposed, and the court dismissed pending charges of fraud against Keating's son. Resolution Trust Corp. v. Keating,

financial and reputational harm to the offenders was significantly outweighed by their financial gain; meanwhile, the costs were born primarily by the taxpayers, thus affirming to those who might otherwise be deterred, that crime *does* pay.

Michael Milken, Ivan Boesky, and Charles Keating faced the criminal process in highly publicized cases intended not only to deter those charged, but also to generally deter other white-collar criminals.[269] Similarly, the recent, publicized arrests of executives at Adelphia and WorldCom for fraud were intended both to deter others and feed the retributive call for justice.[270]

Robert Merton, a contemporary of Edwin Sutherland,[271] wrote, "contemporary American culture continues to be characterized by a heavy emphasis upon wealth as a basic symbol of success, without a corresponding emphasis on the legitimate avenues on which to march toward this goal."[272] Where moral culture fails to impede criminal conduct,[273] the law must step in to deter illegal conduct. According to

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186 F.3d 1110, 1115 (9th Cir. 1999); Press Release, United States Department of Justice, United States Attorney's Office, Central District of California, Charles Keating Pleads Guilty to Federal Fraud Charges, Four Criminal Convictions Resolve 10-Year-Old Case (April 6, 1999) (on file with author), *available at* http://www.usdoj.gov/usao/cac/pr/072.htm (last visited Aug. 15, 2002).

269. *See supra* note 266 and accompanying text (discussing the history of imposing large fines or restitution).

270. Executives at WorldCom and Adelphia have been criminally charged. *See supra* note 18 and accompanying text (discussing the arrest of WorldCom executives). When the media portray economic crime offenders as avoiding serious punishment, escaping justice, or receiving easy sentences, the message communicated is that crime *does* pay. Media reports concerning Michael Milken, for example, trumpet his twenty-two month prison stint despite a ten-year sentence imposed. *See, e.g.*, *Milken Released from Jail*, FINANCIAL POST (Toronto), Jan. 5, 1993, at 9; *Milken to Pay $47M in Civil Case*, the Associated Press, NEWSDAY, Feb. 27, 1998, at A4; Mulligan, *supra* note 219. Professor Coffee observes that media coverage reveals public support for harsh prison terms for white-collar offenses. Coffee, *supra* note 251, at 236 (referring to the media coverage of the criminal cases against Ivan Boesky and Michael Milken).

271. *See supra* note 72 (discussing the work of Edwin Sutherland).

272. Robert K. Merton, *Social Structure and Anomie*, *in* SOCIAL THEORY AND SOCIAL STRUCTURE 131, 131–160 (1957). Robert Merton describes the strain toward anomie as follows:

> When . . . the cultural emphasis shifts from the satisfactions deriving from competition itself to almost exclusive concern with the outcome, the resultant stress makes for the breakdown of the regulatory structure. With this attenuation of institutional controls, there occurs . . . a situation in which calculations of personal advantage and fear of punishment are the only regulating agencies.

Id. at 157.

273. Whether one's motivation is to support a drug habit or a lavish lifestyle, the victims in both instances suffer an economic loss. Likewise, the defenses of criminality by the offenders are the same. In *Profit Without Honor*, the authors describe five commonly recognized "neutralization techniques" used to justify criminal conduct. *See* ROSOFF ET AL., *supra* note 252, at 401. A comparison of these techniques for both economic and street crimes yields similar results: (1) Denial of responsibility: the economic offender asserts that there were overriding

one commentator, "deterrence makes the most sense in situations where the likelihood of apprehension is high, or where the targeted population fears the prospective penalty and conforms its conduct accordingly."[274]

Creating an empirical study to measure the effect of deterrence[275] and thereby determine the optimal punishment or term of imprisonment for an offense is difficult. Those who reject criminal conduct, despite temptation and opportunity, are the true indicators of the success of

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factors beyond her control, whereas the street crime offender asserts that no one would hire her; (2) Denial of injury: the economic offender asserts that the crime caused no direct or overt suffering, whereas the street crime offender asserts that he sells only to people who want to use; (3) Denial of victim: the economic offender asserts that the victims deserved it because they did not take care against crime, whereas the street crime offender asserts that the victims deserved it because they should not have left their keys in a car in this neighborhood; (4) Appeal to higher loyalties: the economic offender claims that the crime was an attempt to actualize a higher value (for example, Oliver North and patriotism), whereas the street crime offender rationalizes that selling drugs served a greater good because he was out of work and the money made paid the heating bill and kept his children warm; (5) Condemning the condemners: both the economic offender and the street crime offender claim to be victims of regulators, politicians, and prosecutors. *Id.*; *see also* POVEDA, *supra* note 72, at 4–9 (comparing the myths of the "criminal type" and the "law-abiding citizen").

274. Freed, *supra* note 43, at 1707 (discussing the ineffectiveness of punishment as a deterrent when the offender does not believe that significant punishment is likely). *See generally* POSNER, *supra* note 266, at 249 (constructing an economic equation to consider the effect of the probabilities of apprehension and convictions on the marginal deterrence of increased terms of imprisonment). One study has shown that in cheating on income taxes, the income most easily traceable is the least likely to go unreported. In contrast, cash receipts that are difficult to trace are the most likely to be unreported or under-reported. Steven Klepper & Daniel Nagin, *Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecutions*, 23 LAW & SOC'Y REV. 209, 210, 237–38 (1989) (discussing a model constructed to test the influence of the offender's perception of the probability of detection and criminal prosecution on intended behavior).

275. The success of efforts to deter white-collar criminals cannot be measured by looking to rates of prosecution because there are more white-collar crimes being committed than can be prosecuted as a result of the level of resources devoted to that area of crime. This is true generally throughout the criminal justice field as well. Indeed, while some may have looked to the 1970s and 1980s as a white-collar crime wave, the real reason for the notoriety of white-collar crime during that era was that the detection and prosecution of white-collar crime was made a priority. *See* Kip Schlegel et al., *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 140 (2000–2001) (study of securities violations from 1984 to 1991 to determine whether there has been increased use of criminal sanctions and severity of punishment concluded length of imprisonment remained relatively constant over period studied, fines imposed actually decreased over the same period, and there was overall little support for the position that there is an overcriminalization of business malfeasance). There was a "dramatic increase in securities-related cases received during [that] time period, from 129 matters in 1984 to 424 in 1991," along with a doubling in the number of securities offense-related convictions, but the authors note that the increase in total volume could be the result of increased illegal behavior during the time period studied or an increase in initiative by the SEC in investigating such crime. *Id.* at 133, 139–40; *see also* John Braithwaite & Gilbert Geis, *In Theory and Action for Corporate Crime Control*, *in* ON WHITE-COLLAR CRIME 189, 192–94 (Geis ed., 1992) (discussing the costs involved in getting a conviction for white-collar crimes).

deterrence. People deciding *not* to engage in criminal conduct ordinarily do not announce such decisions; thus, gathering empirical evidence of successful deterrence is challenging. White-collar crime is difficult to detect,[276] time-consuming to investigate, and costly to prosecute, all resulting in less certainty of punishment.[277] If the government meets its burden of proving every element of the crime beyond a reasonable doubt[278] and the defendant is convicted, low rates of imprisonment or meager terms, as a result of departures, undermine the message of deterrence directed at those who willingly and knowingly have participated in similar activities but were not criminally charged.[279] Thus, it is more reasonable for criminal sanctions to be structured to encourage as much compliance with the law as possible.

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276. *See* WEISBURD, ET AL., *supra* note 63, at 96 (the long duration of some white-collar crimes supports theorists who have argued that many white-collar crimes go undetected for years because their victims are unaware that they have been victimized); *see generally* Braithwaite & Geis, *supra* note 275, at 190–91 (comparing the detectability of white-collar and traditional crimes).

277. *See* MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 29 (1973) (certainty of punishment rather than severity of punishment is the key influence in deterring crime).

278. *In re* Winship, 397 U.S. 358, 361–64 (1970) (requiring proof beyond a reasonable doubt in juvenile cases, just as in cases involving adults).

279. Several of the key officers and directors in the corporations, banks, and investment firms that fell prey to accounting scandals were financial benefactors of the corporations at a time when investors were losing the shirts off their backs. For example, Gary Winnick, Chairman of Global Crossing and the former head of the convertible bonds department at Drexel Burnham Lambert (who worked alongside Michael Milken), along with four of Winnick's former Drexel colleagues at Canadian Imperial Bank of Commerce, walked away with millions of dollars in profits and fees from Global Crossing, leaving the corporation bankrupt and the shareholders empty-handed. Geraldine Fabrikant & Simon Romero, *How Executives Prospered as Global Crossing Collapsed*, N.Y. TIMES, Feb. 11, 2002, at C1, *available at* LEXIS, News Library, the New York Times File; Christopher Palmeri et al., *The Drexel Connection at Global Crossing*, BUS. WK., Mar. 11, 2002, at 34, *available at* 2002 WL 9360257. A *Financial Times* investigation reports that executives at the twenty-five largest United States public companies to go bankrupt since January 2001 pulled in a cool $3.3 billion over two years. Ien Cheng, *Inside Track—Survivors Who Laughed All the Way to the Bank—Barons of Bankruptcy Part 1*, FINANCIAL TIMES, July 31, 2002, at 8, *available at* 2002 WL 24873617. "The earnings figures comprise salary, bonuses, other cash payments and share sales between January 1999 and December 2001." *Id.* (presenting the *Financial Times* investigation into executive and director earnings at the twenty-five largest United States public companies to go bankrupt since January 2001, including 181 executives and twenty-seven directors). The top five earners averaged $255.6 million. *Id.* Large financial gains alone are not proof of criminal conduct, but in the context of the unexpected bankruptcies and devastating losses of these corporations, there is cause for concern about the legitimacy of the personal gains of these actors. If economic crime reform is to be successful, it will have to convey a tough-on-crime message to the would-be economic criminals. *See* Braithwaite & Geis, *supra* note 275, at 195–200 (setting forth the dual propositions that deterrence is stronger for corporate crime than traditional crime because economic criminals tend to be calculated risk-takers and that incapacitation can be highly effective with economic criminals because their criminal activity is dependent upon maintaining "legitimacy in formalized roles in the economy").

The theory of general deterrence operates on the assumption that if society punishes offenders who violate the law, others will not violate the law because they do not wish to be punished.[280]

Longer imprisonment terms for white-collar offenders communicates to the offender and others that the offender's behavior is not only wrongful but also criminal, that it will not be tolerated by the community, that the offender will now have to suffer the consequences, and that such consequences will be severe. In contrast, "affirmance" uses little or no imprisonment, communicating to the individual that even when wrongful conduct is detected and successfully prosecuted, the offender will endure a brief and unpleasant experience with the legal process but will enjoy the handsome rewards of the profits derived from the criminal venture. Affirmance thereby reinforces acceptance and, perhaps, even envy of the criminal conduct. Obviously, affirmance is not desirable in a sentencing scheme and conveys the worst message to economic criminals. The principle explaining affirmance relies upon the same theory supporting deterrence through longer terms of imprisonment for white-collar offenders: the offender must not be told simply that society has been wronged and that the offender must pay, but rather that the offender is the wrongdoer and will suffer dire consequences if such course of criminal action is pursued.

Key to the success of general deterrence is the act of punishment.[281] Liberty cannot be bought. Thus, imprisonment has a far greater bite than fines.[282] The threat of losing privacy, freedom of movement, and

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280. Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act. If the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.

JEREMY BENTHAM, *Principles of Penal Law*, pt. II, bk. 1, ch. 3, *in* J. BENTHAM'S WORKS 396, 402 (J. Bowring ed. 1943), *reprinted in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 116 (7th ed. 2001).

Even deterrence theory has its limits. *See* John J. DiIulio, Jr., *Help Wanted: Economists, Crime and Public Policy*, 10 J. ECON. PERSP. 3, 16–18 (1996) (discussing the failure of contemporary law and economic theory to consider the psychological characteristics of young street criminals and the "intellectually idle" assumption that such criminals will analyze criminal punishment by engaging in a rational cost-versus-benefit analysis worthy of "middle-aged economics professors").

281. Punishment does not automatically entail imprisonment, nor solely require it. *See supra* note 244 and accompanying text (discussing additional forms of punishment).

282. *See* Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 200 (1965)

the inability to determine one's daily routine for a term of years can be an extraordinarily powerful deterrent.[283] Indeed, under an economic theory, substantial prison terms as a general deterrent are more justifiable in the white-collar crime arena than in a general crime arena where many criminals engage in crimes because of economic necessity or cultural mores.[284]

The Economic Crime Package purports to provide longer sentences for those economic criminals who cause substantial harm; however, for the reforms to be effective, courts must impose terms of imprisonment that honor the carefully considered Guidelines amendments. Downward departures that allow offenders to avoid imprisonment will disembowel the economic crime reforms. The Sarbanes-Oxley Act directs the Sentencing Commission to review the Guidelines and amend them as necessary to reflect the nature of the Act. Rather than a wholesale change in the loss table, without an opportunity to observe the success of the recently enacted reforms, this Article suggests that any additional reform focus on downward departures as a means of providing the deterrent effect that Congress is seeking.

D. Guided Departures

No matter what changes in criminal statutes are proposed or what amendments to the Guidelines might follow, one thing is certain: so long as unlimited departures from the applicable ranges from the Guidelines are available, such changes will be largely ineffective. Prior to adoption of the Economic Crime Package, courts imposed sentences at the bottom end of the range for the majority of white-collar crimes,[285] suggesting that, while sentencing judges had adapted to the Guidelines' sentencing ranges (at least when offered no plausible reason to depart

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(observing that the question of imposing criminal sanctions for white-collar crime necessarily involves the question of imprisonment compared to fines because fines can be imposed civilly and, therefore, whether a monetary penalty is criminal or civil is irrelevant); Coffee, *supra* note 240, at 468 (finding that fines lack the deterrent value available through imprisonment because of the ability to avoid payment, the difficulty in assessing a fine that meets the sanction of imprisonment, and the ability of the defendant to pass on the cost).

283. "It is generally accepted today that fear of criminal prosecution is an effective deterrent to businessmen, professional men, and the middle class." Ball & Friedman, *supra* note 282, at 216.

284. *See* DiIulio, *supra* note 280, at 16–17 (observing that for the street criminal who does not expect to live to the age of thirty, an imprisonment term of thirty years for a crime will not act as a general deterrent).

285. *See supra* note 241 and accompanying text (discussing support for imposing only civil penalties for white-collar crimes).

from them), they apparently were not prepared to impose the significantly longer sentences recently adopted for mid- and high-dollar crimes.[286] Moreover, while politicians seeking election vie to outdo each other when addressing the evils of economic crime, district court judges, who are not elected officials but are appointed for life, are responsible for *imposing* sentences on the individual economic criminals. Judges may not be comfortable with harsher terms of imprisonment, especially if they view such convictions or harsher terms as politically motivated rather than rational under traditional justifications of retribution and deterrence.

The Economic Crime Package is supported by the purposes of punishment. The meltdown in the financial markets over the spring and summer of 2002 provides ample proof that economic crime has extensive and costly consequences.[287] If the amended Guidelines are

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286. As discussed above, the Criminal Law Committee ("CLC") of the Judicial Conference supported the amendments. *See* Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30,512, 30,542 (June 6, 2001); Bowman, *2001 Reforms*, *supra* note 51, at 33–36, 37 & n.179 (describing the CLC's active participation in shaping the Economic Crime Package). The fact is, however, that although the CLC strongly supported longer sentences, the Sentencing Commission's data on economic criminals in theft, fraud, and tax cases where the loss exceeded $1.5 million showed that judges more often did not "sentence these 'fat cat' defendants at the top of the guideline range." Boss, *supra* note 104, at 125 (discussing data on sentences received in theft and fraud cases). Approximately 25% of the defendants receive sentences in the bottom quarter of the range, and less than 15% receive sentences in the top quarter of the range. Boss cautions that these 1995 statistics do not reflect those sentenced under the Money Laundering Guidelines, which result in more severe sentences. *Id.* at 125–26. As noted in Part II.B, there is a high rate of downward departures in money laundering cases in which the underlying offense is fraud. *See supra* notes 135, 137 and accompanying text (discussing downward departure rates for non-drug related money laundering offenses).

In districts where downward departure rates are high, amendments imposing harsher terms of imprisonment can be equally disregarded, resulting in sentences comparable to those imposed prior to the Economic Crime Package as a result of the lack of guidance on the extent of departures. *See* 2000 SOURCEBOOK, *supra* note 47, at 53–55 tbl.26 The percentage of cases in each federal district sentenced within the sentencing range and the percentage in which a departure was applied, for example, the district of Arizona had a non-substantial assistance downward departure rate of 63.5% and the southern district of California had a non-substantial assistance downward departure rate of 48%. *Id.* By contrast, districts in the Fourth Circuit had an average non-substantial assistance departure rate of 5%. *Id.*; *see also supra* Part III (discussing the disparity in sentencing among districts and circuits); Bowman & Heise, *supra* note 48, at 1131–34 (suggesting that the high rates of departure in mandatory sentences for drug crimes is related to the perception by judges and prosecutors that the sentences are too long and disconnected from the purposes of punishment).

287. *See, e.g.*, David Henry et al., *The New Pinch from Pensions*, BUS. WK., Aug. 5, 2002, at 44 (noting that the dramatic drop in stock market value wiped out surpluses in many pensions and will require larger contributions to meet commitments: "'The squeeze on U.S. pension funds has the potential to be the defining U.S. financial crisis of the 2000s, like the savings and loan squeeze of the 1980s'" (quoting Bob Prince, director of research and trading at money manager Bridgewater Associates)), *available at* 2002 WL 9362554; Steven Rosenbush et al., *Inside the Telecom Game*, BUS. WK., Aug. 5, 2002, at 34–40, *available at* 2002 WL 9362549 (describing

applied to corporate executives who are convicted of fraud, theft, or insider trading, then the resulting terms of imprisonment will be serious,[288] at least if individual criminality can be proven beyond a reasonable doubt and the losses being reported in the newspapers[289] are attributed to the individuals.

Unless departures can be limited, however, there is reason to believe that the current trend toward increased departures will continue.[290] A sentence is imposed upon an individual, and, as the Court in *Koon* recognized, personalized sentencing is fundamental to the "federal judicial tradition."[291] Nonetheless, departure practices undermine the Sentencing Guidelines when used so frequently that over one-third of the cases are considered sufficiently extraordinary to support a downward departure, with virtually half of those departures not based on substantial assistance. The goal should be to narrow the extent of downward departures applied to prescribed economic crime sentences by limiting their use. One approach is to guide departures by limiting the extent of the departure from the calculated offense level without removing the discretionary authority of the judge to depart.

Under the SRA, Congress provided for limited appellate review of sentences imposed under the Sentencing Guidelines.[292] Upon appellate review, a court of appeals must determine whether the sentence "was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, . . . [or] . . . is outside the applicable guideline range and is unreasonable," giving "due regard to the opportunity of the district court to judge the credibility of the witnesses, [and] due deference to the district court's application of the guidelines to the facts."[293] Only the defendant may appeal an upward departure decision, and only the government may appeal a downward

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how a small group of insiders made billions of dollars as the telecom industry collapsed, with stock prices falling over 95% from their highs and causing $2 trillion in investor losses).

288. For example, a conviction for insider trading has a base offense level of eight. U.S.S.G. § 2B1.4. If there is a gain over $5000, the amended loss table in § 2B1.1 is applied. *Id.* § 2B1.1(b)(1). If the gain is more than $20 million, the offense level is increased by twenty-two levels to thirty. An offense level of thirty with no prior criminal history yields a sentencing range of ninety-seven to 121 months. One might argue that eight to ten year's imprisonment is not sufficiently harsh under a retributive theory for a crime worth $20 million; this Article, however, addresses the need to make the current amendments to the Guidelines stick rather than the need for higher levels of punishment.

289. *See, e.g.*, *supra* note 238 and accompanying text (discussing remedies under the Sarbanes-Oxley Act).

290. *See supra* Part III (discussing trends in sentencing departures).

291. *See* Koon v. United States, 518 U.S. 81, 113 (1996).

292. 18 U.S.C. § 3742 (2000).

293. *Id.* § 3742(d), (f)(1)–(2).

departure decision.[294] Such appeals, however, are limited to the decision to depart rather than to the extent of the departure from the prescribed sentencing range.[295] The court's unfettered discretion regarding the extent of a departure harkens back to the pre-Guidelines era. A guided departure would not limit a court's discretion to depart, but rather would guide the permitted degree of variance from the prescribed sentencing range.[296]

Under the guided departures proposed here, a justification that warranted departure would permit the court to exercise discretion and depart downward but would guide such departure by restraining the court from departing downward by more than 20% from the bottom end of the recommended range[297] or by two offense levels, whichever is less.[298] A 20% guide would be a marked restraint in economic crime

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294. *Id.* § 3742(a)(3), (b)(3).

295. The decision against departure is wholly within the district court's discretion unless such a decision is based upon a mistaken interpretation of the law. United States v. Atkinson, 259 F.3d 648, 652–53 (7th Cir. 2001); United States v. Browning, 252 F.3d 1153, 1160–61 (10th Cir. 2001); United States v. Timbana, 222 F.3d 688, 699 (9th Cir.), *cert. denied*, 531 U.S. 1028 (2000); United States v. Graham, 146 F.3d 6, 12 (1st Cir. 1998); United States v. Khalil, 132 F.3d 897, 898 (3d Cir. 1997).

The Guidelines include "numerical or non-numerical suggestions" by the Sentencing Commission as guidance for some departures, with the expectation that appellate courts "may prove more likely to find departures 'unreasonable' where they fall outside suggested levels." U.S.S.G. ch. 1, pt. A.4(b). Nevertheless, the Sentencing Commission recognizes that these are "suggestions" only, that there are other grounds for departures, and that there may be reasons not to follow the Sentencing Commission's suggestions. *Id.*

296. Guided departures would, therefore, virtually eliminate 100% departure medians. *See supra* note 295 and accompanying text (citing examples of courts' departure from sentences based on discretion).

297. The bottom end of the range is used because if the court is considering a downward departure, presumably the court finds that the lowest end of the range is higher than the term of imprisonment the court deems appropriate in the case.

298. At the upper levels of the sentencing table, guided departures would result in a decrease in the offense level by two levels. For example, at an offense level of thirty with no criminal history, the range would decrease from a minimum sentence of ninety-seven months to a minimum sentence of seventy-eight months. Thus, the departure would lessen the sentence by up to nineteen months. Practically applied, the 20% guide would be applied at the lower end of the sentencing table. At an offense level of nine with no criminal history, the range would decrease by twenty-four days from a minimum term of four months to just over three months. *See* U.S.S.G. ch. 5, pt. A, Sentencing Table; *id.* § 5B1.1. Such a term would fall between offense levels eight and nine and between zones A and B. *Id.* § 5B1.1. Thus, a guided departure schedule would need to specify whether such a departure should fall into zone A, which would make a defendant eligible for probation only, or zone B, which would permit probation, but only in conjunction with imposition of "a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention." *Id.* § 5B1.1(a)(2). Within zone A, the sentencing ranges are zero to six months. *Id.* If the sentence falls below zone B's lowest sentence of 4 months, the upper end of the range from which to depart should apply the 20% limitation as well. *Id.* In the example above, the upper end of the offense level nine range is ten; if reduced by 20%, the upper end would be eight. *Id.* Under guided departures, the 20%

sentences, given the median departure rate of virtually 100%.[299] The purpose of the guided departures, however, is to limit the nullification of terms of imprisonment for economic crime offenders. Based upon the revised loss table of the Fraud and Theft Guideline, those offenders who commit relatively minor pecuniary frauds would fall in or near the zones eligible for imprisonment alternatives. For those whose crimes involve greater amounts, the guided departures would impose greater restraint. Because it is the deterrent effect that is most sought out in this area of crime, certainty of punishment is critical.[300] Moreover, the 20% guide would not, practically speaking, be the limit for some offenders, because, as the Sentencing Commission Sourcebook reveals, multiple reasons are applied in some departure cases.[301] Needless to say, those offenders most able to afford good defense counsel to raise reasons for departures are the white-collar criminals whom the guided departures would seek to restrain.[302]

The *Koon* case highlights the fact that a court may find several reasons[303] to support a downward departure. Under such circumstances, each supported reason for a departure would permit an

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downward departures should remain in the higher zone until the full range falls within the lower zone's outer perimeter. In this example, that would be six.

299. In fact, nearly all of the primary offense categories listed in Table 31 of the 2000 Sourcebook reflect median percent decreases from the Guideline minimum of greater than 20%. *Downward Departure Cases: Degree of Departure for Offenders in Each Primary Offense Category, Fiscal Year 2000*, 2000 SOURCEBOOK, *supra* note 47, at 62 tbl.31 (reviewing only non-substantial assistance downward departures, with medians ranging from a low of a 19.6% decrease in the Kidnapping/Hostage Taking primary offense category up to a 100% decrease for the Auto Theft primary offense category). This Article focuses on white-collar crime and does not examine the application of guided departures to all primary offense categories; the departure medians, however, arguably support consideration of guided departures or a reconciliation of sentencing guidelines and sentencing practices. Guided departures may be too limiting in instances of mandatory minimum sentencing cases, such as some narcotics offenses. *See, e.g.*, United States v. Lopez, 28 F. Supp. 2d 953 (E.D. Pa. 1998) (granting a mother, with no prior criminal history and no relatives available who could care for children, a six-level downward departure to an eighteen to twenty-four month term of imprisonment from mandatory minimum of five years, where her seven-year-old daughter had repeatedly attempted suicide in the foster care system after her mother's arrest for a minor role in a drug trade).

300. *See* MAESTRO, *supra* note 277, at 29.

301. *See* 2000 SOURCEBOOK, *supra* note 47, at A-9 (explaining that "courts often provide more than one reason for departure"). The Sentencing Commission Sourcebook reported 10,288 reasons for non-substantial assistance downward departures in 8903 cases in fiscal year 2000. *See id.* at 52 tbl.25 n.2 (Reasons for Downward Departures).

302. *See supra* notes 64, 219, 265 and accompanying text (discussing the prevalence of private counsel for white-collar criminals and the district courts' ability to depart from sentencing subject only to an abuse of discretion standard of review by appellate courts).

303. *See* 2000 SOURCEBOOK, *supra* note 47, at 52 tbls.24, 25 (listing the reasons given by sentencing courts in fiscal year 2000 for upward and downward departures in cases in which substantial assistance was not the reason for downward departure).

additional downward departure so that two reasons might result in up to a four-level decrease in the offense level.[304] Again, at the lower ranges of the sentencing table, the 20% rule would apply. Two independent justifications for a downward departure, however, would not equal a 40% decrease. Rather, the range would be decreased by 20%, and then the new range would be eligible for a decrease of up to 20% if the court deemed that the facts supported a second basis for departure.[305]

Alternatively, the guided departure scheme proposed above could apply only to substantial assistance departure cases. Indeed, substantial assistance departures account for just over half of all departures from the Sentencing Guidelines. Commentators, like Professor Frank Bowman, have suggested that prosecutors were given a great deal of power in the federal sentencing scheme as a result of the section 5K1.1 substantial assistance departure and have not used such authority judiciously.[306] On the other hand, the conventional wisdom is that

304. Applying guided departures to the *Koon* case, there would be a six-level decrease because the Court affirmed three independent reasons for a downward departure: (1) victim misconduct; (2) susceptibility to abuse in prison; and (3) successive prosecutions. Koon v. United States, 518 U.S. 81, 111–12 (1996). The original sentencing range was seventy to eighty-seven months. For the first reason, fourteen months (70 x 20%) would be the maximum departure, resulting in a lower end of fifty-six months. A two-level decrease in the Sentencing Table would result in a lower range of fifty-seven months. Since fifty-seven is a lesser departure than fifty-six, the two-level decrease would be applied, and the range would now be fifty-seven to seventy-one months. For the second departure, the 20% calculation would result in a low-end range of 45.6 months, whereas the two-level decrease would be forty-six months, so the two-level decrease would be applied for a sentencing range of forty-six to fifty-seven months. If the court wished to depart further (and given that the sentencing court departed down to thirty months, it can be assumed that the court would), the third reason would be employed as a basis for a downward departure from the forty-six to fifty-seven month range. Twenty percent would yield a thirty-seven month lower end, and a two-level departure would yield a thirty-seven month lower end. Thus, the final sentencing range, applying all three bases for departure, would be thirty-seven to forty-six months, or seven months higher than the *Koon* court determined was appropriate.

305. Continuing the example in footnote 298, a defendant would have to provide at least three reasons for departure to bring an offense level of nine down to zone A. The sentencing range for an offense level of nine, with no criminal history, is four to ten months. The first reason for departure would result in a range of ninety-six days to eight months; the second reason would yield a range of seventy-seven days to 192 days; and the third reason would yield a range of sixty-two days to 154 days. At this point, the entire range would fall within zone A (zero to six months), and the defendant would be eligible for probation only. *See supra* note 298 and accompanying text (discussing the application of downward sentencing departures).

306. Bowman, *Departing Is Such Sweet Sorrow*, *supra* note 217, at 49 nn.238–39, 62–66 (noting that there has been some suggestion that external limitations be imposed upon prosecutorial discretion in bargaining with potential cooperating witnesses). The Sentencing Commission gathers the statistical data on sentencing for review on a national basis and also separates the statistics on a district-by-district basis. 2000 SOURCEBOOK, *supra* note 47, at 53–55 tbl.26. Those individual district statistics reveal that sentencing range departures based upon substantial assistance vary considerably, from a low of 7.2% in the District of Arizona to a high

some authority to negotiate punishment must be available to prosecutors as an effective tool in law enforcement to enlist the cooperation of otherwise unwilling witnesses or participants.[307] Given the present climate of widespread disgust with white-collar criminals, there should be external pressure on prosecutors to avoid deal cutting and, perhaps, a greater expectation that juries will be less forgiving of corporate misdeeds. Even if a similar guided departure system were implemented in substantial assistance departures, such a guide would differ[308] from the proposal here in order to take into account the extent of assistance provided and the cooperating witness' role in the criminal conduct. As discussed above, statistics show a 42.3% increase in downward departure rates in non-substantial assistance fraud cases.[309] The complexity of developing a guide that would account for various levels

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of 50.9% in the Northern District of New York. *Id.* This broad range suggests at a minimum that the Department of Justice is not applying similar standards for substantial assistance departures throughout the country. Martin, *supra* note 203, at 262 (noting the wide disparity in the exercise of departure power under sections 5K1.1 and 5K2.0). Moreover, it is beyond belief that one out of every two cases brought in the Northern District of New York warrants a substantial assistance departure. *See, e.g.*, Bowman, *Departing Is Such Sweet Sorrow*, *supra* note 217, at 59–60 (discussing the failure of government lawyers to use substantial assistance motions across districts).

307. *See, e.g.*, Bowman, *Departing Is Such Sweet Sorrow*, *supra* note 217, at 49–50 (suggesting that the social utility of obtaining convictions outweighs the costs of deviations from substantially proportional sentencing); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7–8 (1992) (tracing back to English roots the legal history of sentence bargaining to enlist the cooperation of co-defendants); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 547–550, 552 (1992) (identifying charge bargaining and Guidelines factor bargaining by prosecutors, but cautioning that "[*i*]*n a clear majority of cases AUSAs negotiate plea agreements in compliance with the tenets of the guidelines. . . . Guideline circumvention is not the norm.*"); Ronald S. Safer & Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?* 12 FED. SENT. REP. 41, 42 (1999) (describing the "confluence" of section 5K1.1 substantial assistance departures and the mandatory minimum drug sentences as creating "powerful incentives" for witness cooperation despite the risk of retaliation by gangmembers in the Chicago crackdown on the "Gangster Disciple" street gang); David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 526 (1999) (asserting that the need for accomplice testimony in the prosecution of certain kinds of cases has been "conventional wisdom for generations").

As Judge Frankel has observed, "The people who always hated plea bargaining and wanted it abolished [in the pre-Guidelines era] still hate it. But now they hate bargaining under the guidelines and talk as though this strengthens their position." Frankel & Orland, *supra* note 43, at 666.

308. *See* Bowman, *Departing Is Such Sweet Sorrow*, *supra* note 217, at 64–66 (suggesting that the Justice Department should adopt internal guidelines for substantial assistance cases before Congress moves in to restrain federal prosecutorial power).

309. *See supra* notes 209–15 and accompanying text (discussing sentencing departure rates in fraud convictions). The 17% non-substantial assistance departure rate encompasses all offense categories, not just white-collar offenses. *See* 2000 SOURCEBOOK, *supra* note 47, at 51 fig.G.

of cooperation is beyond the scope of this Article. Instead, the guided departures proposed here would be limited to non-substantial assistance downward departures. Arguably then, this proposal closes the door only halfway, because it leaves open opportunities for the substantial assistance departure.

One concern with guided departures is the potential for defense counsel and judges to create or accept more reasons for departure so that the combination of reasons will substantially lower the ultimate sentence.[310] Certainly, creative defense lawyers will advance justifications to lower the sentences of their clients, but convincing a court that several "extraordinary" reasons are applicable in a single case should present a greater obstacle than establishing a single basis for an *unlimited* downward departure.[311] Guided departures would permit a court to deviate from the strictures of the Guidelines without entirely abandoning the underlying goals of uniformity and fairness.

Those critics who already despair over the rigidity of the Sentencing Guidelines will no doubt shudder at the prospect of restraining one of the few remaining strongholds of judicial discretion in federal sentencing practice.[312] This proposal, however, is purposefully based and judicially efficient. As discussed above, the recent enactment of the Sarbanes-Oxley Act is a clear message from Congress that economic crime offenders should be punished with imprisonment.[313] Moreover, the Economic Crime Package was a considered acknowledgment that longer sentences are needed to deter and punish economic crime. Imposing terms of imprisonment that truly communicate the message of deterrence and affect the aims of retribution are precisely what guided departures ought to do. Permitting unrestrained and extensive departures will, over time, obliterate the uniformity of the Guidelines. Allowing appellate review of every departure decision will overwhelm

310. The 2000 Sourcebook identified twenty-seven frequently specified reasons given for the downward departures, in addition to 1077 "other" less-commonly given reasons. *See* 2000 SOURCEBOOK, *supra* note 47, at 52 tbl.25. A reason was specifically identified when there were at least twenty cases in which that reason was noted as supporting the departure. "The 'other' category includes all reasons provided fewer than twenty times among relevant cases." *Id.* at 55 n.2.

311. The more extreme or outrageous the departure reason, the greater the likelihood it could be determined to be an abuse of discretion by the appellate court. Koon v. United States, 518 U.S. 81, 113 (1996); *see supra* notes 187–200 and accompanying text (discussing the Supreme Court's decision in *Koon*).

312. *See supra* note 43 (providing a survey of commentators attacking the rigidity of the Guidelines).

313. *See supra* Part II.C (discussing the purpose of the Sarbanes-Oxley Act).

the judiciary.[314] In 2000, non-substantial assistance departures were the second highest Guidelines-related issue raised on appeal by either the defendant or the government.[315]

The guided departure proposal presented above strives to reflect the intent of Congress in enacting the SRA, as well as the Supreme Court's concern that the Sentencing Guidelines are a constitutional exercise in federal authority that respects the due process concerns of its citizens. Early attacks on the constitutionality of the Sentencing Guidelines were put to rest in the case of *Mistretta v. United States*,[316] which upheld the constitutionality of the delegation of Congressional authority in the formulation of the Sentencing Guidelines under the SRA. In creating the Sentencing Guidelines, the terms of the SRA recognized the need to consider individual circumstances in sentencing procedures[317] where "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[318]

With the enabling statute, Congress established the Sentencing Commission, giving it the authority to develop sentencing guidelines, policy statements, and official commentary for courts to consider in determining when a factor is sufficiently unusual to support a departure. As discussed above in Part III, the Sentencing Commission exercised

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314. *See* Berman, *supra* note 43, at 100–04. Professor Berman presents a compelling argument for refocusing departure jurisprudence on the extent of the departures rather than on the decision to depart. He argues that the current sentencing matrix causes too much wasteful effort on scouring the Guidelines for loopholes that can be used to affect targeted sentences and neglects the opportunity to return sentencing analysis to traditional criminal theory addressing the purposes of punishment. *Id.* at 69–72. Berman suggests that minor departures from the sentencing table "create no greater disparity concerns than the unregulated discretion that district judges already have to select sentences from within applicable sentencing ranges." *Id.* at 98. Even with a two-level departure, however, Berman cautions that the sentencing court must be required to articulate a purposeful reason for the departure and that such a departure should not escape appellate review. *Id.* at 100. Such a review would extend the limited appellate review permitted by Congress under the SRA, 18 U.S.C. § 3742 (2000). As discussed in Part I, *supra*, the SRA provided for limited appellate review where virtually none existed before. This Article posits that broadening appellate review would overrun the courts with appeals, without necessarily providing greater guidance as to appropriate levels of departure. *See supra* notes 175–77 (citing the disparate findings in assessing matters like family ties and charitable service as support for a departure).

315. *See Guideline Involved in Issues Appealed by the Defendants*, 2000 SOURCEBOOK, *supra* note 47, at 108 tbl.57; Guideline Involved in Issues Appealed by the Government, 2000 SOURCEBOOK, *supra* note 47, at 109 tbl.58.

316. Mistretta v. United States, 488 U.S. 361, 371–79 (1989).

317. 28 U.S.C. § 991(b)(1)(B) (2000 & West Supp. 2002); *see also Koon*, 518 U.S. at 92.

318. 18 U.S.C. § 3553(b) (2000 & West Supp. 2002).

such authority in limiting certain factors that could never be the basis for departure,[319] as well as factors that should not "ordinarily" be considered.[320] Thus, the SRA does not prevent the proposed limitations on departure authority.

Further, the SRA established that appellate courts may review sentencing decisions.[321] This limited appellate review permits defendants to appeal upward departures and the government to appeal downward departures[322] but does not permit appellate courts to infringe upon the "traditional deference" afforded a district court's exercise of discretion.[323] Providing for guided departures would not take away a court's ability to determine that a departure is warranted by the existence of a particular fact that falls outside the heartland of a guideline given all of the facts of a case.[324] In a guided departure, the extraordinary circumstance would still serve as the basis of the departure, with the Guidelines merely placing an outer limit on how far the departure could deviate from the sentencing range.[325]

V. CONCLUSION

The 2001 Economic Crime Package amendments to the Sentencing Guidelines coincided with the revelation of widespread corporate fraud that has caused the value of America's financial markets to plunge, sending shock waves through the country. Lost pensions, jobs, and trillions of dollars in market value highlight the need for criminal sentences that reflect the retributive purposes of America's justice

319. *See supra* notes 164–65 and accompanying text (listing factors that should never be taken into account for departing from the Guidelines).

320. *See supra* notes 166–75 (discussing factors not ordinarily relevant in determining if a sentence should be outside the applicable range); *see also Koon*, 518 U.S. at 93 (determining what factors should be considered in downward sentencing departures).

321. 18 U.S.C. § 3742 (2000 & West Supp. 2002).

322. *Id.* § 3742(a)–(b); *Koon*, 518 U.S. at 96.

323. *Koon*, 518 U.S. at 97 (quoting Williams v. United States, 503 U.S. 193, 205 (1992)); *see also* Mistretta v. United States, 488 U.S. 361, 367 (1989) (upholding the congressional authority to formulate sentencing guidelines).

324. *Koon*, 518 U.S. at 99–100 (identifying the relevant question in determining appellate standard of review).

325. The guided departure would be a measure of discretion in addition to the sentencing court discretion encompassed within each offense level range. *See* Bowman, *Quality of Mercy*, *supra* note 43, at 713. Each sentence imposed within the calculated offense level would provide 25% movement within the upper and lower ends of that range to accommodate individual considerations of the unique "human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue." *Koon*, 518 U.S. at 113; *see* 28 U.S.C. § 994(b)(2) (2000), *amended by* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11008, 116 Stat. 1758, 1819 (2002); *see also* U.S.S.G. ch. 1, pt. A(2) (discussing the statutory mission of the guidelines).

system, as well as the need for specific and general deterrence of economic crimes. The diminishment of civil remedies for economic wrongdoing has created a vacuum in restraint through civil enforcement; criminal enforcement must now replace the deterrent effect lost in the remedial shuffle. The 2001 amendments to the loss table of the combined fraud and theft sentencing guidelines, enacted to promote longer terms of imprisonment for high-dollar economic crime, are carefully crafted and purposefully based. The Sarbanes-Oxley Act, addressing corporate and accounting fraud, directs the Sentencing Commission to review and amend the Guidelines to reflect the nature of the Act. Rather than further enhance well-considered increases in imprisonment terms for large-scale fraud, the Sentencing Commission should address the rise in non-substantial assistance downward departures, which threatens the effectiveness of the reforms. Implementing a system of guided departures for economic crimes, as proposed above, would lessen the thundercloud posed by the increase in downward departures, strengthen the amendments, and support the new legislation's battle against economic crime.