Limiting Leukophobia: Looking Beyond Lockup. Debunking the Strategy of Turning White Collars Orange

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I. Introduction

Stealing your elderly neighbor’s life savings is wrong, but not as wrong as raping and murdering his grandchild. When stated simply, few people would argue with this conclusion. Unfortunately, in some cases the United States Federal Sentencing Guidelines would disagree entirely. Assuming that these guidelines function to reflect the will of the community for which they are enacted, this disparity is concerning.

Congress, through the Sentencing Reform Act of 1984, “provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” 1 The sentencing guidelines generated by this same piece of legislation have gone overboard in attempting to achieve these basic goals for the white collar offender. Through a series of widely publicized legislative actions, Congress has distorted these guidelines far beyond their original purpose. The result is a set of recommended sentences for nonviolent fraudsters that surpass that of some of the most hardened violent criminals. This dichotomy hurts communities and families while failing to accurately reflect our social priorities. As such, reform is indicated.

Part II of this article will open by more fully describing each of the stated goals of criminal punishment. Part III describes the current state of the sentencing guidelines as they are applied to white collar crime, and part IV recounts the history of the sentencing guidelines and

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describes how we have found ourselves in our current situation. Part V goes on to critique the current sentencing regime as applied to the white collar criminal. When reviewed at a granular level, the shortcomings of the current system become obvious and the discussion naturally turns to reform. Part VI will discuss a series of previously published reform proposals, followed by this author’s recommendations in part VII.

II. The Goals of Criminal Punishment

The first stated purpose of criminal punishment is deterrence, which can be further broken down into specific deterrence and general deterrence. Specific deterrence seeks to “discourage the defendant from committing further crimes by instilling the fear of receiving the same or a more severe penalty in the future.”

General deterrence on the other hand “seeks to discourage would-be offenders from committing further crimes by instilling a fear of receiving the penalty given to this offender.” The idea that meting out a greater punishment to the defendant in front of the court will result in a deterring effect for the rest of society from engaging in similar behavior is a strongly held belief among some prosecutors at the federal level.

The next stated purpose is incapacitation, which “prevents crime by imprisoning high-risk offenders, thus physically restraining them from committing further crimes against the public.” This purpose is perhaps the most straightforward and uncontroversial aspect of the analysis. While white-collar crime like mail fraud might be more easily committed from within

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2 Id.
4 Id. at 71.
5 Id. at 70.
a jail cell than an equivalent blue collar crime like burglary, the stifling effect of being locked down and closely monitored is almost universally agreed upon.

The third purpose of criminal punishment as described by Congress is rehabilitation. Rehabilitation assumes that the offender has identifiable and treatable problems which cause him to commit crimes, and thus “seeks to reduce the offender’s future criminality by addressing those causes through education and treatment.” Rehabilitation, in combination with incapacitation, constitute the most important sentencing purposes behind traditional indeterminate sentencing.

The last purpose of criminal punishment is referred to by Congress as just punishment, but for the purposes of this article will be referred to by its other common name, retribution. Under the theory of retribution, “offenders should be punished in proportion to their blameworthiness in committing the crime being sentenced.” Retribution, at its most basic level, is simply the idea that when people do bad things to others, bad things should happen to them in return. It represents the manifestation of the community’s moral outrage at the criminal act.

The four purposes of criminal punishment are held in tension against one another and have traditionally been divided into two groups: utilitarian and non-utilitarian. Deterrence, incapacitation, and rehabilitation are categorized as utilitarian, in that they “seek to achieve beneficial effects (or a net benefit) and, in particular, lower frequency and/or seriousness of

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7 Frase, supra note 3.
8 Id.
9 Id.
11 Frase, supra note 3, at 73.
12 Id.
future criminal acts by this offender or others.”¹³ Retribution, on the other hand, is non-utilitarian in that it embodies “principles of justice and fairness which are viewed as ends in themselves, without regard to whether they produce any particular social or individual benefit.”¹⁴

III. The Federal Sentencing Guidelines

The federal system, like most other systems, has adopted a form of what Norval Morris defined as “limiting retributivism”, which defines upper and lower limits on the severity of penalties that may be fairly imposed.¹⁵ Within this range, “case-specific incapacitation, rehabilitation, deterrence and other sentencing goals may be pursued, but only to the extent that they are needed in a given case. Sentences within the [retributive] range should be no more severe than necessary to achieve defined aims, a humane and utilitarian principle of necessity and efficiency which Morris referred to as ‘parsimony’.”¹⁶ This concept of parsimony has been “strongly promoted by utilitarian philosophers as far back as Beccaria and Bentham, and finds support in the Model Penal Code … all three editions of the American Bar Association sentencing standards, and many fields of American law.”¹⁷

Congress further sought three additional objectives in enacting the Sentencing Reform Act of 1984: honesty, reasonable uniformity, and proportionality in sentencing.¹⁸ Honesty and uniformity are easily achieved by a system of standardized sentences based on objective criteria and binding upon the courts that impose sentencing. Proportionality, on the other hand, is a more difficult concept to appropriately administer. Proportionality seeks to apply different

¹³ Id.
¹⁴ Id.
¹⁵ Id. at 76.
¹⁶ Id. at 77.
¹⁷ Id.
penalties to different crimes, thereby giving offenders an incentive to stop their illegal behavior while it is still a lesser crime. 19 “Sentencing proportionality and uniformity … have practical benefits, such as reinforcing public views of relative crime seriousness and maintaining public respect for criminal laws and the criminal justice system” 20 That being said, “some of the most difficult conflicts [under the current system] are between proportionality principles, on the one hand, and case-specific crime-control or restorative-justice purposes, on the other.” 21

When the guidelines were created and implemented, they were designed to be mandatory on the judges passing sentence. While a small range was created, and the judge had discretion within that range, there was little room for a judge to impose greater or lesser sentences. While this did not sit well with convicted white-collar offenders, it didn’t sit well with all federal judges either. In US v. Parris, 22 Judge Block lamented that the guidelines after the passage of Sarbanes-Oxley effectively recommended life imprisonment when an officer or director of virtually any public corporation is found guilty of securities fraud of any but the most trivial kind. This is due in large part to the fact that the loss calculation rules the calculus despite its imprecision and poor correlation to a defendant’s actual culpability. 23

The mandatory nature of the sentencing guidelines has been significantly eased by the Supreme Court in recent cases. “Apprendi v. New Jersey, 24 Blakely v. Washington, 25 and most recently United States v. Booker 26 have upended sentencing law by requiring juries, not judges,

19 Frase, supra note 3, at 74.
20 Id.
21 Id. at 68.
22 573 F.Supp.2d 744, 754.
24 120 S.Ct. 2348 (2000).
to find beyond a reasonable doubt facts that raise maximum sentences. Booker’s remedy was to invalidate the binding force of the U.S. Sentencing Guidelines.”

Despite the invalidation of the binding force of the guidelines, they still control a supermajority of the sentences handed down since Booker. Judges still adhere to the guideline sentences with “roughly the same frequency as before the Booker decision.” In 2006, 85.9 percent of federal offenses conformed to the guidelines. “Perhaps the most significant sentencing trend to emerge post-Booker is that judges have been increasingly receptive to imposing below-Guidelines sentences that are based on a subjective analysis of the factors set forth in the Sentencing Reform Act at 18 U.S.C. § 3553 (known as a ‘downward variance’).” This is a positive start, and something that will be discussed in greater depth later in the article. At the very least, Booker’s flexibility restores some of the balance of power by “preventing prosecutors from unilaterally promising or threatening certain results upon trial and upon plea.” Judges now have more power to adjust sentences to fit their perceptions of “individual defendants' blameworthiness and [the] need for specific deterrence.”

IV. The History of White-Collar Prison Sentences

The current sentencing model for white-collar crime is an overreaction to historically lax standards applied before the implementation of the Sentencing Reform Act of 1984. In order to understand how the guidelines evolved into their current state, how the pendulum has found

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28 Vollrath, supra note 23, at 1003.
29 Id. at 1015.
31 Bibas, supra note 27, at 731.
32 Id.
itself swung to the far end of the retributive scale, one must first examine the preceding model when the pendulum was at its opposite apogee. The first step towards realizing the inherent injustice of the current system is coming to an understanding that the current model is a knee-jerk reaction to the overly lenient days of yore.

Before passage of the 1984 act, long-term incarceration for white-collar crime was unusual. Before the sentencing guidelines were enacted, an average of 59% of fraud defendants received straight probation.\textsuperscript{33} Of those that were sentenced to incarceration, the average prison time served was seven months.\textsuperscript{34} Tax cheats served similar sentences in that 57% received a straight probationary sentence and the average time spent in prison was five and a half months.\textsuperscript{35} Over the two-year period ending in 1980, violations of Fortune 500 corporations resulted in convictions for corporate executives in only 1.5% of all enforcement actions.\textsuperscript{36} Criminologists long blamed the significant resources that white-collar criminals had access to, including skilled legal counsel, political connections, social legitimacy, alternative civil and regulatory enforcement paths, and the finances required to outspend prosecutors.\textsuperscript{37} It was against this backdrop that the Comprehensive Crime Control Act of 1984 was enacted.

In response to the leniency afforded white-collar criminals in the lead-up to the passage of the act, white-collar crimes were singled out for a different sentencing calculus than the rest of the crimes under review. For the initial sentencing guidelines, the sentencing commission decided to base the guidelines on the typical past practices of sentencing courts.\textsuperscript{38} This made sense in applying the goal of reasonable uniformity. The sentence for a crime before the

\begin{itemize}
  \item \textsuperscript{33} Id. at 722.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 272 (1980).
  \item \textsuperscript{38} Vollrath, supra note 23, at 1006.
\end{itemize}
guidelines enactment should at least have a passing resemblance to the sentence for a crime that is handed down after the enactment. Because the white-collar criminal had been so successful in avoiding prison sentences up to that time, he was afforded no such uniformity. The commission “explicitly rejected the typical past practices of sentencing courts” when designing the sentencing guidelines for white-collar crimes.\textsuperscript{39} Rather than codify the typical past practices of sentencing courts, the commission calibrated the guidelines to produce “short but definite” periods of confinement for convicted white-collar offenders.\textsuperscript{40}

The original goal of “short but definite” sentences was quickly subsumed by the political momentum of greater retributive justice. The Sentencing Commission is an ever-evolving “permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years.”\textsuperscript{41} Between 1987 and 1995, the Commission added many additional offense characteristics and amended the loss tables to subject greater punishment on those who subjected their victims to losses in excess of $40,000.\textsuperscript{42} In 2001, the Commission passed the Economic Crime Package amendments to the guidelines that slightly lowered the sentences of offenders convicted of “low-loss frauds” and significantly increased the sentences of those offenders whose victims suffered higher losses.\textsuperscript{43} This represents the beginning of a trend towards calculating the punishment of white collar offenders primarily on the dollar amount lost rather than the actual culpability and actions of the offender.

This trend toward hyper-inflating the sentences of offenders convicted of high-dollar losses continued with the passage of the Sarbanes-Oxley Act of 2002. Despite the generally

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\textsuperscript{39} Id.
\textsuperscript{40} Id. at 1007.
\textsuperscript{41} FCJ Federal Sentencing Guidelines Manual § 1A1 Intro. (11/1/14).
\textsuperscript{42} Vollrath, supra note 23, at 1007.
\textsuperscript{43} Id. at 1010.
\end{flushleft}
positive reception of the 2001 Economic Crime Package amendments, Sarbanes-Oxley doubled down and “dramatically raised the stakes of white-collar crime.”\textsuperscript{44} In response to a wave of high-publicity corporate scandals that began with the collapse of Enron in 2001, and continued with the implosion of Tyco, WorldCom and Global Crossing, the Sarbanes-Oxley Act was a highly visible measure to counter what was being seen as a white-collar free-for-all. President George Bush delivered a speech from Wall Street framing these scandals as “the result of individual defendants’ moral failings” and called for “stricter criminal laws to enforce higher ethical standards in American Boardrooms.”\textsuperscript{45} In response, Sarbanes-Oxley cranked up the retributive justice. The base offense level of the most common white-collar crimes was increased from six to seven, a two-level increase was provided for loss calculations that exceed $200 million, another two-level increase for losses exceeding $400 million, a six-level increase was provided for fraud offenses involving more than 250 victims, and enhancements were added for defendants convicted of securities fraud while acting as officers or directors of publicly traded companies.\textsuperscript{46}

When all is said and done, the sentencing guidelines for white-collar crime are anomalous. Though the majority of the guidelines were calculated by reviewing the typical past practices of sentencing judges, white-collar sentences are now entirely the product of “policy choices, and subsequent congressional prodding, fueled by a belief that more severe sentences were necessary to deter white-collar crime and achieve justice.”\textsuperscript{47} Unlike the rest of the sentencing guidelines, those for white-collar crime have a genesis in policy choices and political rhetoric, and as such retribution for individual moral failings and general deterrence now appear

\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 1011-1012
\textsuperscript{47} Id. at 1012.
the primary goals of sentencing in this realm. As a result, the recommended sentence for high-loss white-collar crime now exceeds the sentences typically imposed for murder and serial child molestation.48

V. Critique of the Federal Sentencing Guidelines as Applied to White Collar Crime

Specific Deterrence

First, white collar offenders are unlikely to be repeat offenders, lessening the need for specific deterrence. Since the 1970’s, criminologists have “consistently shown that those who are sentenced to prison have, at best, about the same rates of recidivism as non-imprisoned offenders, and in some cases, a much higher rate.”49 They speculate that the criminal process itself, being arrested, charged, tried and convicted, has the greatest impact on the offender, and this the length of the sentence adds very little deterrent.50 “Whatever specific deterrence is gained may be produced before the imprisonment sanction is imposed.”51

Specifically, there is no evidence of a specific deterrent effect of lengthier prison sentences for white collar criminals, and a short prison stay may not provide more than a marginal impact beyond the experience of prosecution, conviction, and sentencing.52 Despite this, prosecutors and judges continue to proclaim the opposite. As a singular example, Senior District Judge Jed Rakoff of the US District Court for Southern New York stated in 2006 that “there is considerable evidence that even relatively short sentences can have a strong deterrent

48 Id. at 1021.
49 Szockyj, supra note 37, at 495.
50 Id.
51 Id.
effect on prospective ‘white collar’ offenders.”\textsuperscript{53} That this idea continues to be floated as dogma in the face of contradictory evidence is concerning in that it continues to shape the policy choices that compound the issue at hand.

\textbf{Rehabilitation}

With respect to rehabilitation, the merits of imprisonment are even further afield for white collar offenders. As discussed above, the idea behind rehabilitation is that the offender has specific problems that can be treated and thus prevent the offender from reoffending. In cases of violent crime, the problems are generally anger control, drug and alcohol addiction. In the case of white-collar crime, the specific problem, at least as expressed by our President and Congress, appears to be a lack of proper morals. This article is not going to broach the topic of imposing morals through incarceration, as this is could be the subject of an entirely different piece, but there are factors that can be considered when determining whether or not an offender is capable of reoffending that deserve mention.

While the white-collar offender may not become rehabilitated in the general sense, a long prison sentence is not required to nullify his ability to reoffend. While the violent criminal is significantly less likely to reoffend without addiction or uncontrollable anger clouding his judgment, the white-collar offender is significantly less likely to reoffend once the currency of his trade has been removed. The white-collar criminal cannot offend without the trust of the community that he fleeced. Every dollar that the white-collar criminal pockets is one that was handed to him in the first place. Fraud and securities violations require access to other people’s money, and that access will not be granted without a certain amount of trust. Something as

simple as an arrest can remove the community’s trust in that individual. A conviction certainly will. The length of incarceration plays almost no role at all, as the damage to reputation is all done up front.

**Incapacitation**

There can be little argument that the white-collar offender is not incapacitated during his stay in a federal penitentiary, but once again the length of the sentence does not seem to coincide with the benefit to society. The theory behind incapacitation “assumes not only that such offenders can be reliably identified but also that they are not made worse by imprisonment, and that--while in custody--they are not replaced by other offenders.” The extent to which incapacitation requires a lengthy prison sentence, or any sentence at all, is up for vigorous debate. As mentioned above, once the trust of the community has been taken from the white-collar offender, his reputation has been destroyed, and he has lost his ability to continue making his livelihood in the arena which he abused, he is effectively incapacitated from further crimes of the same sort for the remainder of his life. This damage is done before the prison sentence even begins, so little value comes from forcing the taxpayers to subsidize his housing and feeding for a long period of time in order to keep him from reoffending. Under strict incapacitation reasoning, long sentences result in an injustice is being done to both the offender and the community.

**Retribution**

Punishment meted out as retribution for the violation of a community’s public morals would appear to be the easiest purpose under which to justify long sentences, but even here there

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54 Frase, supra note 3, at 70.
are contradicting theories as applied to white collar offenders. As discussed above, the punitive value of imprisonment is front-loaded. The “marginal utility of incarceration decreases with time spent in prison, thus, a ten-year prison sentence is not ten times as punitive as a one-year sentence.”\textsuperscript{55} To put it another way: “You only do two days no how, the day you go in … and the day you come out.”\textsuperscript{56}

The concept of retributive justice was formed around the typical street-crime model, and as flawed as it is in that regard, those flaws are amplified when it is applied to white-collar crime. Direct comparisons between white-collar offenders and street-crime offenders are often misplaced. Punishment, for the sake of punishment, affects multitudes of innocent bystanders when dished out to street-level offenders. These people may have children, spouses, and friends who rely on them for support, but the white-collar offender almost always has the same and more. The white-collar criminal is “frequently older well-regarded in the community [and] economic supporters of their families.”\textsuperscript{57} As such, the collateral damage to innocent parties can be much greater and must be taken into consideration. “Unless criminal penalties serve valid purposes, they impose useless costs and hardship.”\textsuperscript{58}

The entire concept of retribution is supposed to be based on punishing the offender according to his degree of blameworthiness. Punishment meted out by society has little value and reflects systemic injustice if doled out in a manner disproportionate to the “bad” behavior it attempts to counteract. Two basic elements determine an offender's degree of blameworthiness:

\textsuperscript{55} Szockyj, supra note 37, at 494.
\textsuperscript{56} THE WIRE: Mission Accomplished (HBO television broadcast, Dec 19, 2004).
\textsuperscript{57} Szockyj, supra note 37, at 490.
\textsuperscript{58} Frase, supra note 3, at 69.
“the nature and seriousness of the harm caused or threatened by the crime, and the offender's degree of culpability in committing the crime.”\textsuperscript{59}

Unfortunately for society and the offender, the degree of blameworthiness no longer plays a central role in the length of white-collar prison sentences. As a result of the political and policy choices made throughout the evolution of the white-collar sentencing guidelines, the degree of culpability has been replaced by the number of dollars taken and the number of people from whom they were taken. As such, the very idea of punishment issued as the manifestation of the community’s wrath has been blunted and undermined. The community no longer punishes bad actors for their individual blame or responsibility in the offending behavior; rather it punishes them for the scope of the offense regardless of their role in that action. Retribution has become unhinged from its original justification for being.

\textbf{General Deterrence}

General deterrence is by far the most popular theory advanced by federal prosecutors, judges, and the sentencing commission. The general deterrent effect depends on several factors, including the severity of the punishment, the speed with which it is imposed, the probability of the punishment’s application, the target group’s perception of the severity, speed and probability of the punishment, and the “extent to which these would-be offenders face competing pressures or incentives to commit crime.”\textsuperscript{60} Though it only represents one of the six goals of criminal punishment as outlined by Congress, and memorialized in the criminal code, it continues to consume all the oxygen in the conversation, especially when it comes to white-collar crime.

\textsuperscript{59} \textit{Id.} at 76.
\textsuperscript{60} \textit{Id.} at 70.
There is even a regularly espoused theory that white-collar criminals are especially susceptible to the deterrent effect of lengthy prison sentences.\(^{61}\) This is floated on the premise that the sentencing commission chose long prison sentences for white-collar offenses because of their effectiveness in deterrence.\(^{62}\) This is spite of the fact that the loudest voices at the time were espousing longer sentences for purely retributive effect, essentially forcing morals back into the boardroom. There is even significant fear being expressed that these lengthy prison sentences are the only thing standing between the status quo, and another outbreak of financial catastrophe brought on by avarice.\(^{63}\)

One must first understand who the white-collar offender is before one can evaluate how he or she would react to the length of any given sentence. Federal court statistics show that regulatory offenders are unlikely to have any prior convictions (72%) and are older than the average street-level offender (46% are over the age of forty).\(^{64}\) Fraud offenders are more likely to have a prior criminal record than regulatory offenders, but even then 64% of them have no prior adult convictions.\(^{65}\) The white-collar offender, unlike the street-level offender, is also subject to a multitude of civil and administrative sanctions including “restriction of professional

\(^{61}\) See Adelson \textit{supra}, note 53. \textit{See also} James J. Fishman, \textit{Enforcement of Securities Laws in the United Kingdom}, 9 Int’l Tax & Bus. Law 131, 170 (1991)(“Though it may be small satisfaction to defrauded investors, incarcerating perpetrators of financial misdeeds serves as important deterrence to future violators. The certainly of enforcement and prison for white collar criminals is an effective deterrence.”).

\(^{62}\) \textit{See United States v. Cutler}, 520 F.3d 136, 163 (2d Cir. 2008)(“To the extent that the district court’s views that this ‘type’ of offense did not warrant a long sentence and that the relative length of the sentence was relatively unimportant in providing deterrence were meant to apply to [defendant’s] convictions for tax evasion and tax fraud conspiracy, the court’s views were squarely contrary to the policy judgments articulated by the Sentencing Commission.”).

\(^{63}\) \textit{See Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud}, Hearing Before the S. Comm. on the Judiciary, 112th Cong. 4 (2011) (statement of Sen. Charles Grassley)(“If potential fraudsters view the lenient sentences now being handed down as merely a cost of doing business, efforts to combat criminal fraud could be undermined.”).

\(^{64}\) Szockyj, \textit{supra} note 37, at 494.

\(^{65}\) Id.
licenses or disbarment, censure, fines, injunctions, restitution or rescission, and private suits."66

One also has to account for the punitive effect of publicity and the stigma that comes with a criminal conviction.67 These often have far different effects between the white-collar offender and the street-level offender. As you can see, these two groups have little in common and should not be expected to behave similarly. This seems to be the root of the special sensitivity theory.

The first requirement of a successful general deterrence plan must be that the general population is aware of the likely punishment associated with the improper action, but this requirement fails at both the street and white-collar level. “White-collar crime is believed to be particularly amenable to deterrence due to its rational and profit-oriented motivation.”68 Despite this, a recent study of imprisoned male felons demonstrated that only 22 percent of the inmates believed that they knew “exactly what the punishment would be” for the offense for which they were imprisoned.69 Another 18 percent reported that they had no idea whatsoever of the penalty of their conduct or thought they knew but were just plain wrong.70 A full 35% of the offenders interviewed stated that they did not even think about what the penalty for their behavior might have been before committing the offense.71 The sentencing guidelines have created a system where only 22% of the offenders who are sentenced under their authority are aware of what the punishment might be at the time the offense takes place. This figure may even be low when applied to white-collar crime considering the addition of several series of convoluted

66 Id.
67 Id.
70 Id.
71 Id.
enhancements that are only minimally tied to offender conduct. If the offender does not know the punishment in advance, the general deterrent effect cannot be great.

While the concept of enhanced general deterrence seems to work on paper, the reality is not as neat and simple as one might hope. The very differentiators that coined the term “white-collar,” the fact that the offender is more educated, wealthier, and smarter, would seem to support the general deterrence argument. It has been suggested that “white-collar crime is more rational, cool, and calculated than sudden crimes of passion or opportunity, so it should be a prime candidate for general deterrence.” The assumption being that the white-collar criminal must put more time and effort into the ultimate achievement of his goal, and that this added hurdle leaves plenty of opportunities for a well-educated and intelligent individual to change his mind about the actions he has undertaken.

Since this individual is supposed to be more intelligent and comes from a better background than the street-level offender, the offender is presumed to have a better understanding of the consequences and is expected to do a better job of performing a cost-benefit analysis prior to the offending conduct. An economist could argue that “if one increased the expected cost of white-collar crime by raising the expected penalty, white-collar crime would be unprofitable and would thus cease.” This entire premise is founded on the idea that the white-collar offender is somehow more risk-averse than the street-level offender. When you take into account that the street-level offender often has to include his very life as part of the equation, while the white-collar offender does not, it very well may be true that the opposite is the case. In

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72 Bibas, supra note 27, at 721-722.
73 Id.
any case, there seems to be very little to support the proposition other than good-old conservative “common-sense.”

On the opposite end of the spectrum is the slowly growing trend of downward variances being applied to these lengthy sentences post-Booker, many of them premised on a new theory that white-collar criminals are effectively deterred by any sentence whatsoever. By applying the very same factors as the sentencing committee did, the relative wealth, comfort, intelligence and education of the white-collar offender, it is easy to also return the opposite conclusion, that an individual coming from a more comfortable background will have a disproportionately worse experience in prison, thus necessitating a shorter sentence than is needed with a hardened criminal or an offender from a less comfortable background. This would seem to apply from both a retributive and deterrence standard.

VI. Proposed Reforms in Order for the Sentences of White Collar Offenders to Better Serve the Goals of Criminal Punishment

Several sources have been advocating for reforms in the sentencing guidelines, some even going so far as questioning the application of any length of incarceration. These reforms span the spectrum from modifying the current guidelines in the form of removing or modifying the loss calculation, to replacing imprisonment with restitution and fines, sanctions, or “shaming” penalties.

Removing the Loss Calculation

As previously discussed, calculating the white-collar offender’s sentence primarily on the number of dollars sought to be taken or the number of victims completely ignores almost every

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74 See Newcomer, supra note 30, at 45.
stated goal of criminal punishment. This calculation does nothing to ensure that the retribution applied is proportionate to the culpability of the offender. Any rehabilitative goal would seem independent of the quantum of dollars misappropriated or the number of victims involved in the scheme. There appears to be little correlation, if any, between the length of time an offender should be incapacitated and the amount of the loss. The only argument the loss calculation seems to apply to is the general deterrence argument once again.

The structure of the guidelines seem to be crafted such that it is assumed that an offender would take a moment to consider his actions at the point that the amount stolen inched over the $200 million mark, and again at the $400 million mark, thus deterrence is achieved at this lower level of crime. The absurdity of this assumption is readily apparent. The enhancements at these higher levels are strictly punitive in nature, and political in flavor. They are premised in the assumption that someone who steals $199 million is inherently less “bad” than someone who steals $201 million, and becomes even more culpable if the scheme breaks past the $400 million mark. Culpability is tied to success at the venture, not individual actions or motivations. The corporate executive, who discovers a pre-existing scheme, covers it up, and takes part of the profits is equally culpable as the individual who thinks up the plan and puts it into motion. Even more so if the first plan is more successful or broader in scope.

The real purpose for these enhancements has nothing to do with the stated goals of criminal punishment and have everything to do with forcing plea deals and motivating offenders to roll over on their accomplices. Basing fraud sentences on the dollar amount stolen and the number of victims defrauded places huge amounts of discretion in the hands of the prosecutor. If the prosecutor chooses to “pull out all the stops to dig up every last victim and dollar lost, they
can raise sentences substantially." On the other hand, prosecutors can reduce potential sentences if they “agree not to press arguable but speculative losses and if they terminate investigations after the defendant quickly agrees to plead guilty." When this is added to the vaguely worded enhancements added to the guidelines for things such as “whether the crime involved sophisticated means, substantially endangered a company’s solvency, or abused the company’s trust,” prosecutors can essentially choose whether the defendant is looking at a couple of years or life in prison. These potentially huge penalties put prosecutors in the driver’s seat and give them almost complete control over whether or not the white-collar offender will be imprisoned. “This need for leverage to flip lower-level employees was one of the Department of Justice's justifications for seeking to raise sentences for lower-loss frauds.”

Removing the loss calculation and these vaguely worded enhancements would result in a system that is inherently fairer for the offender, and consequently the taxpayer. Under the current system, the only activity with a proven track-record of deterrence is going to trial and defending against the prosecutor’s case. Indeed, so much so that a sentence reduction for taking responsibility for one’s actions can be taken off the table for the simple act of requiring the prosecutor to prove his or her case. Federal prosecutors are some of the best and brightest lawyers that the country has to offer. Forcing them to prove their case with the same tools available to them as are available for street-level prosecutions will not endanger the republic.

**Fining and Voluntary Restitution**

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75 Bibas, supra note 27, at 728
76 Id.
77 Id.
78 Id.
79 Id. at 729.
There exist strong voices advocating that imprisonment of any kind is inappropriate for white-collar offenders. One such voice is US Court of Appeals for the Seventh Circuit Judge Richard Posner. His stance is that “the white-collar criminal … should be punished only by monetary penalties … rather than by imprisonment or other ‘afflictive’ punishments (save as they may be necessary to coerce payment of the monetary penalty).” 80 It is worth noting that this opinion was published in 1980, in the middle of the golden-age of white-collar crime when very few individuals were being imprisoned anyway.

This reform theory relies heavily on an analysis of utility and the cost-benefit of incarceration versus fines in achieving the goals of criminal punishment. Posner writes that “the fine for a white-collar crime can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would have been imposed instead.” 81 He argues that “fining the affluent offender is preferable to imprisoning him from society's standpoint because it is less costly and no less efficacious.” 82 As far as the deterrence goal is concerned, “if [the white-collar offender] would be deterred by the threat of such a prison sentence, he would be equally deterred by the threat of a … fine.” 83

Judge Posner would go so far as to remove these offenses entirely into the realm of civil liability. “It would seem more efficient to drop the criminal label, and any stigma attached to it, and offset any loss in disutility to the criminal by increasing the size of the civil penalty.” 84 Combining fines with a shaming penalty further increases the utility of the punishment and matches it to the appropriate retribution and incapacitation. “The more punishment society

81 Id.
82 Id.
83 Id. at 411.
84 Id. at 417
obtains simply from the stigmatizing effect of conviction, the smaller the fine that must be imposed to produce the optimal severity of punishment; and the smaller the fine, the less likely it is to exceed the white-collar criminal's ability to pay."\(^85\)

A complementary alternative to fines that has been suggested is the concept of taking into account voluntary restitution on the part of the offender. Professor Stephanos Bibas argues that “combining ‘short but certain terms of imprisonment’ with the use of restitution and other noncarceral sanctions will permit the USSC to ‘foster deterrence, inflict retribution, express condemnation, and heal victims at a fraction of the cost,’ thus ‘calibrat[ing] white-collar sentences to their core purpose.’”\(^86\) This approach seems to take the guidelines back to their original intent before the imposition of politicized and reactionary policy choices.

Professor Bibas focuses on what voluntary restitution accomplishes both for the victim and the offender. “Voluntary restitution is an affirmative act, intended to return ill-gotten gains directly to victims, it is unlike and, from a utilitarian standpoint, superior to the indirect purgation that may occur when an offender performs charitable works.”\(^87\) “Moreover, by drawing upon or, in extraordinary cases, exhausting the offender's financial resources to compensate victims, it ensures that the offender bears at least some of the cost of the harm done. In some cases, this result may be superior to punishment that forces the state to bear the full cost of harm through incarceration.”\(^88\)

Voluntary restitution as a mitigating factor to take into account under the guidelines has the ability to actually succeed in providing relief to the victims of the crime. “While mandatory

\(^{85}\) Id. at 416.
\(^{87}\) Id. at 405.
\(^{88}\) Id. at 406.
restitution is a predictable consequence of white-collar criminal prosecution, actual post-conviction collection is not.”89 In 2002 uncollected federal criminal debt exceeded $25 billion, with mandatory victim restitution making up 70% of that figure.

While the sentencing commission should take the first step in implementing this kind of reform, courts can also begin to take action in this regard. The USSC can add a “restitution-based mitigation framework to the guideline’s sentencing procedure” while courts “also provide an opportunity for offenders to make or offer pre-conviction restitution payments without regard to whether such payments are deemed admissions of guilt.”90 This can be accomplished without any congressional or USSC action simply by “affording pre-conviction restitution payments the protection of Federal Rule of Evidence 408.”91

While not a solution in and of itself, fines and restitution payments support the goals of rehabilitation, deterrence and retribution while actually improving the position of the victim and the taxpayer. The taxpayer doesn’t have to pay for long-term incarceration of a non-violent offender, and the victim finds himself in a much better position when restitution comes voluntarily rather than imposed by the government regardless of ability to actually pay.

**Shaming Penalties**

While it may seem quaint and old-fashioned from the perspective of our relatively advanced society, there remains value in the simple punitive nature of public shaming. “Shaming is the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those

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89 *Id.* at 413.
90 *Id.* at 414.
91 *Id.*
dispositions or engaging in those actions."\(^{92}\) Shame accomplishes something that fines alone do not; it expresses the moral condemnation of a society in a way that enhances a fining penalty.\(^{93}\) Shame can act as a “rough equivalence … to imprisonment as a symbol of disapprobation [that] makes it unlikely that substituting shame under the Guidelines would offend the widespread sensibilities that make merely fining federal white-collar offenders politically unacceptable.”\(^{94}\)

Shaming actually succeeds in achieving the goals of incapacitation and rehabilitation. The shamed white-collar offender will find himself or herself in a position from which it is very difficult to defraud another victim as his untrustworthy nature has been expressed widely to the community.\(^{95}\) In many ways, shaming and imprisonment are very similar when applied to the white-collar offender. These individuals do not pose a physical threat to their victims; the threat they pose is in their ability to abuse trust and cheat victims.\(^{96}\) “If shaming succeeds, everyone knows … that the offender is a bad type, [and] because they will therefore avoid him, he is effectively incapacitated … as though he walks around surrounded by bars.”\(^{97}\) The greatest advantage to the taxpayer is that while incarceration is incredibly expensive, public shaming is cheap and easy to administer.\(^{98}\) At the same time, the offender is still free to support his family and try to contribute to society by whatever means or skills he has available to him without putting the public in any further danger.

From a retributive and deterrence standpoint, shaming succeeds in much the same way as fines would. Shaming is an effective form of fining that reaches an asset of the offender that


\(^{93}\) Id.

\(^{94}\) Id.

\(^{95}\) Id. at 371.

\(^{96}\) Id.

\(^{97}\) Id.

\(^{98}\) Id.
cannot otherwise be reached, his reputation.\textsuperscript{99} One’s reputation is a valuable asset that individuals work hard to protect. As such, the threat of government induced harm to one’s reputation should offer the possibility of a deterring effect at least as effective as fines. Often times an offender will not have the currency with which to pay fines, but one’s reputation is always available to him and a shaming penalty can always be collected.

**VII. Recommendations**

The recommendation of this article incorporates aspects of all three of the above-discussed proposals. To begin, the sentencing guidelines need to be scaled back to ensuring a “short but definite” period of incarceration. This sentence should be no more than 18 months for a first-time offender, and should scale up exponentially for subsequent white collar offenses. The sentence needs to be long enough to ensure that the first period of confinement is meaningful in a deterrent sense, while still short enough to limit the collateral damage to the offender’s family and community and save the taxpayer from paying for his or her support. Sharply ratcheting up the guidelines for subsequent sentences will add a significant level of specific deterrence while also ensuring that the goals of incapacitation and rehabilitation are addressed. If 18 months of incarceration is not a long enough period to preclude recidivism, and the offender has found a way to reoffend despite the stigma of conviction, then the public truly needs to be protected from the offender with a more long-term solution.

In order to encourage restitution for the victims, the mandatory sentence should be reducible for voluntary payments made by the offender before conviction. This will promote the goal of retribution by ensuring that the offender suffers a monetary loss as a result of his or her

\textsuperscript{99} Id.
actions. It would also promote rehabilitation by requiring that the offender make this payment prior to conviction, demonstrating a change of heart from the calculating opportunist who committed the offense. As previously discussed, this is the easiest of the recommendations to implement as it requires nothing more than the sentencing judge’s recognition of the application of FRE 408 to the pre-conviction payments, and a willingness on the part of that judge to deviate from the guidelines as a result.

Lastly, a widespread campaign of public shaming should be instituted at the local and national level. In order to promote the goals of incapacitation and rehabilitation, national and state registries should be instituted and the public should be educated as to how to use them to search for anyone with whom they intend to invest money or release personally identifiable information. To augment the efficiency of the registries, advertising campaigns should be initiated that spread the news of an individual’s conviction throughout his or her community. These should be widespread, but also target the industry that was abused, or the targeted group that was taken advantage of. This could be achieved relatively cheaply on the internet, and any costs borne by the federal government for print advertising and mailing would pale in comparison to the cost of housing and feeding a federal prisoner year after year. This kind of advertising would not only increase the efficiency and range of the registries, but would exert a significant general deterrence effect.

VIII. Conclusion

As applied to the white collar offender, the Federal Sentencing Guidelines no longer serve the purpose for which they were created. The overlong sentences currently imposed are excessive for retributive purposes, and not required for rehabilitative, deterrent or incapacitative
purposes. As such, the incredible cost of maintaining these offenders in a federal penitentiary far outweighs the benefit that society is achieving in the process. While it might feel good to lock someone up and throw away the key, a just and intelligent society has to look at the ensuing result from all angles. The taxpayers are footing the bill for this unnecessary stay, and the community and family that may depend on this provider are suffering from a complete loss of the livelihood they are depending on.

Better alternatives have been suggested, and society as a whole can benefit from their implementation. The generative abilities of the sophisticated offender should not be squandered when they could instead be harnessed towards the better good. The time has come to let go of the outrage at work behind legislation like Sarbanes-Oxley, and to instead act smartly and with a sense of purpose beyond punishment for punishment’s sake. As a country, we cannot afford to continue down a path that has already made us the nation with the highest percentage of incarcerated citizens in the word. We cannot afford to abandon the concept of parsimony, and our morals along with it. Nor can we afford to foot the accompanied high cost in capital and lost production.