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White-Collar Defendants and White-Collar Crimes

At the margins, the current Federal Sentencing Guidelines for fraud and other white-collar offenses are too severe. Even when a corporate leader has engaged in massive fraud affecting thousands of people, such as what occurred at Enron, sentences of twenty or more years hardly seem necessary to satisfy the traditional sentencing goals of specific and general deterrence—or even retribution.¹ But we disagree with Professor Podgor’s essay *Throwing Away the Key* to the extent it contends that white-collar defendants are subjected to uniquely harsh penalties under the current Guidelines and that incarceration is inappropriate for such defendants because it does not make us feel “safer” when we walk down the street.²

In criticizing the current treatment of white-collar criminals, Podgor implies that penalties for white-collar crimes have recently become disproportionately more severe than the sentences meted out to other defendants for non-economic crimes such as terrorism and murder. With respect to federal sentencing, that is wrong. In fiscal year 2005, the average federal sentence for fraud was 23.6 months’ imprisonment.³ In contrast, the average sentence for crimes related to national defense was 126.7 months, and the average sentence for murder was 228.4 months.⁴

1. For thoughtful criticism of the Guidelines’ current approach, see *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (Rakoff, J.); Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines* § 2B1, 18 FED. SENT’G REP. 330, 334 (2006).

2. Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279 (2007), <http://thepocketpart.org/2007/02/21/podgor.html>.

3. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FISCAL YEAR 2005 § 3, tbl.7 (2006), available at <http://www.ussc.gov/JUDPACK/2005/1c05.pdf>. These statistics reflect sentences imposed after *United States v. Booker*, 543 U.S. 220 (2005). From October 1, 2004 through January 11, 2005, the average sentence for fraud was 21.3 months’ imprisonment. *Id.* § 2, tbl.7.

4. *Id.* § 3, tbl.7.

Even in the post-Enron period, federal sentences for white-collar crimes have not increased as dramatically as Podgor implies. In 1995, the average federal sentence for persons convicted of fraud was 18.3 months' imprisonment, and the median sentence was 12 months.⁵ By 2005, the average had increased to 23.6 months and the median had increased to 15 months.⁶ That represents an increase of only 5.3 months for the average fraud sentence.⁷ In contrast—although the sample set is smaller for crimes related to terrorism or national security—the average sentence for such non-white-collar crimes increased six-fold during the same time period, from 20.8 months' to 126.7 months' imprisonment.⁸

It is especially odd that Podgor would highlight white-collar crimes as an example of “throwing away the key” given that white-collar sentencing is less harsh than the Guidelines' treatment of certain drug crimes, such as crack

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5. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FISCAL YEAR 1995, at tbl.7 (1996), <http://www.ussc.gov/judpack/1995/first95.pdf>.
 6. U.S. SENTENCING COMM'N, *supra* note 2, at § 3, tbl.7 (2006), *available at* <http://www.ussc.gov/JUDPACK/2005/1c05.pdf>.
 7. Professor Podgor argues it is “naïve” to cite fraud statistics because those statistics do not capture the full range of white-collar offenses. *See* Podgor, *supra* note 2, at 282. But other categories of white-collar crimes reflect a similar trend of only a modest increase in the average length of imprisonment. In 1995 the average sentence for embezzlement was 7.6 months' imprisonment. U.S. SENTENCING COMM'N, *supra* note 5, at tbl.7. In 2005, the average sentence for embezzlement rose only to 13 months' imprisonment. U.S. SENTENCING COMM'N, *supra* note 6, at § 3, tbl.7. During that same time period, the average length of imprisonment for antitrust offenses increased from 9.2 months to 10.3 months, and the average length of imprisonment for money laundering increased from 40 months to 46 months. *Compare* U.S. SENTENCING COMM'N, *supra* note 5, at tbl.7, *with* U.S. SENTENCING COMM'N, *supra* note 6, at § 3, tbl.7. The average term of imprisonment for environmental and wildlife crimes *decreased* from 13.4 months to 10.5 months. *Compare* U.S. SENTENCING COMM'N, *supra* note 5, at tbl.7, *with* U.S. SENTENCING COMM'N, *supra* note 6, at § 3, tbl. 7. Even for RICO convictions—which Podgor argues distort white collar crimes statistics by using fraud counts as a predicate offense—the average length of imprisonment increased only slightly, up from 83.4 months in 1995 to 86.2 months in 2005. *Compare* U.S. SENTENCING COMM'N, *supra* note 5, at tbl.7, *with* U.S. SENTENCING COMM'N, *supra* note 6, at § 3, tbl.7. In any event, Podgor offers no better measure to counter the statistics that we have from the Sentencing Commission.
 8. *Compare* U.S. SENTENCING COMM'N, *supra* note 5, at tbl.7, *with* U.S. SENTENCING COMM'N, *supra* note 6, at § 3, tbl.7.

cocaine offenses.⁹ Unlike white-collar crimes, drug laws often carry mandatory minimum sentences that eliminate a judge's sentencing discretion altogether.¹⁰

Professor Podgor may be correct that the federal sentences for white-collar crimes "seem out of line when compared with many state sentences for murder, rape, robbery, or burglary."¹¹ But comparing federal and state sentences is comparing apples to oranges. Federal crimes are often punished more severely than state ones. Whether that is bad policy or not, it is not unique to white-collar sentencing.¹²

Podgor claims that the real time served for sentences is longer now that Congress has abolished parole. But that is a red herring: the Guidelines in fact lowered the face value of sentences in order to take the abolishment of parole into account. Congress abolished parole in order to improve transparency so that observers would not be "aghast" at ten-year sentences when the anticipated jail time is actually only two years' imprisonment, as it was in Milken's case. Contemporary news reports indicated that Michael Milken would have served exactly the same jail time had he been sentenced under the Guidelines instead of the pre-Guidelines sentencing regime.¹³ The fact that white-collar sentences have increased slightly in the years since Milken was sentenced has nothing to do with the abolition of parole.

Most troubling are Podgor's arguments with respect to white-collar *criminals*. It is one thing to say that certain criminal *acts* are not as bad as others. But it is quite another to argue that *people* who commit white-collar crimes as a generalized group should be punished differently from those who commit other crimes. Any such differences often correlate in fact to race and

9. See Larry Schwartztol, *Rocks and Powder: Will Congress Listen to the Courts and Fix Drug Sentencing?*, SLATE, Aug. 26, 2006, <http://www.slate.com/id/2148269> (noting that courts and the Sentencing Commission have frequently criticized the fact that "crack offenses generate sentences 100 times greater than comparable powder-cocaine crimes").

10. See, e.g., *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (imposing the mandatory minimum sentence of 55 years for a first-time offender who possessed—but did not use—a firearm while selling marijuana, despite the sentencing judge's concern that "to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational"), *cert. denied*, 127 S. Ct. 723 (2006).

11. Podgor, *supra* note 2, at 282.

12. See generally Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 COLUM. L. REV. 2095 (2006).

13. See Kurt Eichenwald, *Business and the Law: Rationale Behind Milken Sentence*, N.Y. TIMES, Dec. 10, 1990, at D2 (noting that under parole guidelines, Milken would serve between twenty-four and fifty-two months' imprisonment before becoming eligible for release, while under the Sentencing Guidelines, Milken's sentence would have been between twenty-one months' and fifty-seven months' imprisonment).

almost always to class. One of the laudatory goals in promulgating the Sentencing Guidelines was to remedy the potential for hidden – or unhidden – bias in favor of “white collar” defendants. After studying past sentencing practices, the Sentencing Commission made a considered decision to recommend jail time in more white-collar cases in order to equalize the treatment of white-collar crimes with comparable offenses, such as theft.¹⁴

Reasonable minds can differ with regard to how much flexibility judges should have in providing an individualized sentence for each defendant. But whether addressed to a judge meting out an individualized sentence or to the Sentencing Commission when it sets guideline ranges for judges, Podgor’s contention that white-collar defendants should be treated with special leniency is unpersuasive.

In order to justify disparate treatment in favor of white-collar defendants, Podgor argues that “[t]hose convicted of white collar crimes suffer the shame of the community,” while those convicted of other crimes suffer sufficiently less community shame to warrant the disparate sentencing treatment.¹⁵ She can find support in the remarks of the sentencing judge in the Enron-related case of *United States v. Bayly*, who voiced a similar intuition. Citing convicted Watergate felon Chuck Colson, the judge reasoned that a white-collar defendant should receive reduced prison time because “[t]he ignominy of a conviction and a sentence by one person who commits a crime of this type is quite different from what is tolerated with respect to other offenses where the ignominy of conviction is not that serious.”¹⁶

14. Commissioner and then-Judge Stephen Breyer explained,

The Commission found in its data significant discrepancies between pre-Guideline punishment of certain white-collar crimes, such as fraud, and other similar common law crimes, such as theft. The Commission’s statistics indicated that where white-collar fraud was involved, courts granted probation to offenders more frequently than in situations involving analogous common law crimes; furthermore, prison terms were less severe for white-collar criminals who did not receive probation. To mitigate the inequities of these discrepancies, the Commission decided to require short but certain terms of confinement for many white-collar offenders, including tax, insider trading, and antitrust offenders, who previously would have likely received only probation.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20-21 (1988) (footnotes omitted).

15. Podgor, *supra* note 2, at 284.

16. See Loren Steffy, *What Was Not Said on a Day of Judgment*, HOUSTON CHRON., May 13, 2005, at Business 1.

Such remarks were roundly criticized by commentators and could easily be viewed as not-so-veiled racism.¹⁷ Even if one believed the underlying factual assumption that white-collar criminals experience more community shame when they are convicted – and the corollary that having a criminal conviction is no big deal for defendants who come from non-white-collar communities – is this really a legitimate distinction for the law to take into account? If so, the argument would not be limited to white-collar crimes. Under Professor Podgor's reasoning, someone from society's elite would suffer more shame and ignominy if the underlying crime were murder or arson instead of embezzlement or fraud. Such a system would in our view unfairly favor rich white defendants (and correspondingly disfavor poorer or non-white ones).

Podgor also seeks to justify special solicitude for white-collar defendants by alleging that such defendants are somehow better able to rehabilitate themselves or less prone to recidivism. Of course, whether an individual defendant has a criminal history should be – and in fact is – taken into account by the Guidelines. But Podgor's essay cites little evidence for the claim that, as a generalized group, persons convicted of white-collar crimes are less likely to recidivate. In fact, the Sentencing Commission's studies have shown that "[e]ven though fraud and larceny offenders have lower recidivism rates" for first time offenders, for offenders with a criminal history, "the recidivism rates of these offenses exceeds 50 percent," which is comparable to the recidivism rates for robbery and firearm offenders.¹⁸ In contrast, when they have a prior criminal history, "drug trafficking offenders have the lowest, or second lowest rate of recidivism."¹⁹

Moreover, civil penalties and criminal sanctions (at least before Enron) did not apparently deter many white-collar offenders. The rampant white-collar crime seen at Enron and the litany of corporate crime exposed thereafter is testament to the fact that the old sentencing regime was an insufficient deterrent. Indeed, one of Podgor's own examples, Chalana McFarland, Esq.,

17. See *id.* (criticizing the judge's sentencing rationale and arguing that "[p]unishment shouldn't be determined by social standing.")

18. See also U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 13 (2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf. It is also worth noting that recidivism rates may underrepresent the actual rate at which white-collar defendants have engaged in repeated offenses. White-collar prosecutions are notoriously difficult to pursue successfully because they depend on complex financial records and often arcane regulatory schemes, and white-collar defendants are often represented by skilled and well-financed attorneys. As a result, a "first time" white-collar offender may have engaged in prior frauds without being detected, charged, and convicted.

19. *Id.*

after she was disbarred, continued her fraudulent mortgage scheme by moving to Florida and setting up deals through straw purchasers.²⁰

By the same token, as long as we are dealing in generalizations, one could credibly argue that steeper penalties should be imposed for white-collar defendants because there are typically certain aggravating factors that are associated with much white-collar crime. White-collar offenses are not generally crimes of passion. CEOs who receive top Guideline sentences may often be motivated by greed, not by economic need or drug addiction. To the extent that a white-collar defendant is surrounded by a stable and affluent social group, he or she has less ability to attribute some blame to upbringing or social environment.

In short, we welcome Professor Podgor's essay as a useful reminder that some top corporate executives have received sentences that should cause the Sentencing Commission and Congress to rethink the fraud Guidelines.²¹ But it is important not to legislate or sentence based on anecdotal evidence. Stiff sentences for corporate fraud are at times entirely appropriate to deter the kind of conduct that prevailed at Enron and in the spate of corporate scandals uncovered in its wake. A thoughtful reexamination of the fraud guidelines should be based on more than gut instincts that, even when used with the best of intentions, can result in hidden favoritism based on class and race.

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20. See *Chalana McFarland Sentenced to Thirty Years in Prison*, The Mortgage Fraud Blog, Aug. 26, 2005, http://www.mortgagefraudblog.com/index.php/weblog/comments/georgia_hands_down_longest_mortgage_fraud_sentence/.

21. The fraud penalties are not the only ones that could benefit from considerable rethinking. See Lynette Clemetson, *Congress Is Expected To Revisit Sentencing Laws*, N.Y. TIMES, Jan. 9, 2007, at A1.