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Throwing Away the Key

The problem today is not only the draconian sentences that white-collar offenders are receiving, but the fact that because of the elimination of parole they will actually have to serve them. For example, if Michael Milken had been sentenced under today's sentencing regime, and if he had been made to serve his entire sentence, he might not have been able to found the Prostate Cancer Foundation¹ or FasterCures,² two organizations that have made serious inroads in the treatment of diseases. Without the freedom to undertake this extraordinary work in the fight against cancer,³ he might never have earned Fortune Magazine's title of "The Man Who Changed Medicine."⁴

Michael Milken – and the rest of us – are fortunate that his crimes occurred before Congress adopted the Federal Sentencing Guidelines and reformed the federal parole system. Although commentators at the time were aghast that a non-violent first offender would receive such a harsh penalty for a business-related offense,⁵ Milken's ten-year sentence pales in comparison to sentences of today.

The non-violent white-collar offenders sentenced under the modern federal Guidelines will not have the same opportunities provided to Milken. Bernie Ebbers, former CEO of WorldCom, will serve the majority of his twenty-five-

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1. Prostate Cancer Foundation, <http://www.prostatecancerfoundation.org/> (last visited Feb. 19, 2007).
 2. FasterCures, <http://www.mikemilken.com/philcareer.taf?page=fastercures> (last visited Feb. 19, 2007).
 3. MikeMilken.com, <http://www.mikemilken.com/index.taf> (last visited Feb. 19, 2007).
 4. Cora Daniels et al., *The Man Who Changed Medicine*, FORTUNE, Nov. 29, 2004, at 90.
 5. Kurt Eichenwald, *The Milken Sentence: Milken Gets Ten Years for Wall Street Crimes*, N.Y. TIMES, Nov. 22, 1990, at A1.

year sentence.⁶ And absent a reversal, Jeff Skilling, former CEO of Enron, will be looking at only a few years' reduction of his over twenty-four-year sentence.⁷ Those convicted who choose not to cooperate with government investigations,⁸ preferring to test their innocence before a jury, face sentences that match and exceed the sentences given to those who commit violent crimes.

No doubt many of these white-collar offenders committed thefts within companies, and in some cases decimated employees' and investors' savings. But the sentencing Guidelines limit courts' abilities to consider factors such as the motive of the perpetrator, the benefit he or she received, and the extenuating circumstances that caused the harm. Instead, the judge may only consider the sentencing Guidelines' mathematical computation of loss when imposing a sentence. As a result, in some courts the person who steals to benefit the company without personal remuneration can receive a comparable sentence to the rogue employee who cashes in his or her company stock to obtain an immediate personal profit. The accused becomes irrelevant in a sentencing world ruled by the cold mathematical calculations found in the sentencing Guidelines. Not even the Supreme Court's decision in *United States v. Booker*,⁹ which grants trial judges some flexibility after using the Guidelines, provides much relief. The statistics show that judges usually stick to the sentences provided in the Guideline grid.¹⁰

But the exorbitant sentences being given to white-collar offenders are only half of the problem.¹¹ The other half is that once the sentence is rendered, the prison door key is tossed away.

Today, convicted offenders usually serve a greater portion of their sentences than was the case in the pre-Guidelines world. This is in large part because, as part of the Sentencing Reform Act of 1984, parole was abolished in the federal system.¹² The Act's aim was to equalize sentences and time served,

6. Krysten Crawford, *Ebbers Gets Twenty-Five Years*, CNNMONEY.COM, Sept. 23, 2005, http://money.cnn.com/2005/07/13/news/newsmakers/ebbers_sentence/.

7. Carrie Johnson, *Skilling Gets Twenty-Four Years for Fraud at Enron*, WASH. POST, Oct. 24, 2006, at A1.

8. Ellen S. Podgor, *Do Cooperation Agreements Diminish the Right to a Jury Trial in White-Collar Cases?*, LAW.COM, Nov. 1, 2006, <http://www.law.com/jsp/article.jsp?id=1162289116122>.

9. 543 U.S. 220 (2005).

10. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, at vi (2006) ("The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines.").

11. Drug offenses and mandatory minimums can be equally egregious, but that discussion is left for another day.

12. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

but it failed. It failed because it did not eliminate prosecutors' power to manipulate sentencing by offering to charge defendants with less serious offenses in exchange for the defendants' cooperation and guilty plea. After all, it is hard to claim that the system achieves true sentencing equity when Andy Fastow, the CFO and architect of Enron's financial house of cards, receives a sentence of six years because he cooperates with the government while Jeff Skilling faces over twenty-four years because he was not part of the government team.¹³

Milken was fortunate that he was sentenced while the federal parole system still existed. Judge Kimba Wood reduced his ten-year sentence to twenty-four months for cooperating with the government in its ongoing investigation.¹⁴ But even without the cooperation benefit provided to him by the court, Milken would likely have been released after serving thirty-six months, less than one-third of his sentence.¹⁵ That was the standard reduction in time for first offenders in his shoes. This sentence would likely have been reduced even further by the parole board because he performed "extraordinary work such as innovative tutoring of other prisoners."¹⁶ Michael Milken had a safety net to reduce the time he actually would serve, and that net was the parole system that applied to pre-Guidelines sentences.¹⁷

These modern changes in sentencing and parole law have caused the debate to shift: the question is no longer whether white-collar offenders should do less time than street offenders, but whether they should really be treated more harshly than international terrorists and violent criminals.

The sentences given to white-collar offenders seem oddly imbalanced when compared to those given to international terrorists¹⁸ and violent criminals. For example, eighty-year-old Adelphia founder John Rigas received a fifteen-year sentence, and his son Timothy Rigas, the CFO of the company, received a

13. *Fastow Receives a Six Year Sentence*, White Collar Crime Prof. Blog, Sept. 26, 2006, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/09/fastow_receives.html.

14. *United States v. Milken*, No. SS89CR41(KMW), 1992 WL 196797 (S.D.N.Y. Aug. 5, 1992).

15. *Id.* at *1.

16. *Id.*

17. A 1990 article in *The New York Times*, which compares parole guidelines to sentencing guidelines to substantiate a belief that Milken's sentence would have been the same under the guidelines, omits the fact that white-collar sentences have increased since 1990 as a result of Guideline increases and statutory changes. Compare Kurt Eichenwald, *Business and the Law: Rationale Behind Milken Sentence*, N.Y. TIMES, Dec. 10, 1990, at D2, with U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FISCAL YEAR 2005 (2006).

18. TRACFBI, Federal Bureau of Investigation: FY 2001-2006 International Terrorism, <http://trac.syr.edu/tracfb/newfindings/current/include/terrorismtable.html> (last visited Feb. 19, 2007).

twenty-year sentence.¹⁹ The white-collar sentencing figures also seem out of line when compared with many state sentences for murder, rape, robbery, and burglary,²⁰ crimes that find themselves federalized when serving as predicate acts of RICO.²¹

It would be naïve to discount these examples with generic fraud statistics that purport to find that federal sentences for white-collar crimes have not increased. First, there are no accurate white-collar crime statistics because the DOJ does not report this form of criminality as a separate category. Second, fraud is only one crime among the many white-collar offenses.²² Would one dare say that bribery, antitrust, environmental crimes, and embezzlement are not white-collar crimes?²³ Finally, even fraud statistics provide distorted numbers, as fraud is a common predicate act of RICO and is often a crime that is coupled with a higher penalty crime of money laundering.²⁴

The bottom line is that there is more to white-collar crime than cherry-picked fraud statistics, just as there is more to the 2005 FBI statistic proclaiming that the median prison term for international terrorism was eighteen months, down from the forty-one month median of 2004.²⁵

But that said, the sentiment is clearly to have tough federal sentencing Guidelines that satisfy the public's wish that the government get "tough on

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19. *Sentencing of John and Timothy Rigas*, White Collar Crime Prof. Blog, June 20, 2005, http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/06/sentencing_of_j_1.html.
 20. See, e.g., IDAHO CODE ANN. § 18-912 (2006) (providing that a "battery with the intent to commit a serious felony" in Idaho is "punishable by imprisonment in the state prison not to exceed twenty (20) years"); MINN. STAT. ANN. § 609.24 (West 2003) (providing that a simple robbery in Minnesota carries a sentence of not more than ten years imprisonment); N.J. STAT. ANN. §§ 2C:15-1, 2C:43-6 (West 2005) (providing that a basic robbery in New Jersey is a crime of the second degree that is punishable with a sentence of five to ten years imprisonment); WYO. STAT. ANN. § 6-3-301 (2006) (providing that a burglary in Wyoming is punishable for not more than ten years).
 21. See 18 U.S.C. § 1961 (1)(A) (2000).
 22. See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FISCAL YEAR 2005 § 3, tbl.13 (2006) (reporting the average sentence length in each offense category).
 23. See generally *Is DOJ "Cooking the Books" in Its Reporting of White Collar Crime?*, White Collar Crime Prof. Blog, Nov. 14, 2005, http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/11/is_doj_cooking_.html (criticizing the Department of Justice's categorization of white-collar crimes).
 24. See generally Teresa E. Adams, Note, *Tacking On Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. ST. U. L. REV. 531, 558-66 (2000) (discussing how money laundering is added to fraud charges).
 25. TRACFBI, Federal Bureau of Investigation: FY 2001-2006 International Terrorism, <http://trac.syr.edu/tracfbi/newfindings/current/include/terrorismtable.html> (last visited Feb. 19, 2007).

crime.” The very thought that those who are privileged might receive a relatively lenient sentence horrifies a public with no tolerance for lawbreakers. Legislators answerable to this public look for ways to ratchet up sentences to display their support of victims’ rights and to ensure that those who benefit from opportunity are held to a higher standard.

Not surprisingly, the sentences in white-collar cases have matched Congress’s desires. Look at the case of Chalana McFarland, a first-time offender²⁶ who received a thirty-year prison term for her role in a mortgage fraud scheme that skimmed twenty million dollars from the sale of over one hundred homes from 1999 to 2002.²⁷

Congress might want to be tough on crime, but does Congress really want McFarland to serve more time than John Walker Lindh, who received a twenty-year sentence for “supplying services to the Taliban”?²⁸ Is there a legitimate reason for white-collar offenders to receive longer prison sentences than a traitor?²⁹

There are good reasons to think not. One is the differences in the harms caused by white-collar and violent offenders. White-collar offenders, for the most part, can hurt you economically. They can destroy dreams, demolish pensions, cause a loss of jobs, and devastate home values in a community. They are thieves who require punishment, especially when they take away your livelihood.

But even after the damage caused by the white-collar offender, you are still alive. And even their worst acts of criminality never put you in fear of your life.

26. This is not endorsement for merely a civil penalty. There is a vast ocean between no criminal charges and a thirty-year sentence. Further, a collateral consequence of disbarment does not make one a recidivist.

27. *Fraud Conviction Nets Attorney Thirty-Year Prison Term*, White Collar Crime Prof. Blog, Aug. 29, 2005, http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/08/fraud_convictio.html.

28. Plea Agreement, *United States v. Lindh*, No. 02-37A (E.D. Va. undated), http://www.pegc.us/archive/US_vs_Lindh/uslindh71502pleaag.pdf.

29. Attorneys Weissmann and Block respond with concerns of racial bias if we correct this sentencing disparity. See Andrew Weissman & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 *YALE L.J. POCKET PART* 286, 289 (2007), http://thepocketpart.org/2007/02/21/weissmann_block.html. However, Weissman and Block fail to state which race benefits. It could be more appropriately said that by redoing the white-collar offenders’ sentences we would, in turn, correct racial disparity. After all, McFarland, who was sentenced as a white-collar offender to thirty years is an African American, while John Walker Lindh is not. See also Mark Curriden, *Selective Prosecution: Are Black Officials Investigative Targets*, 78 *A.B.A.J.*, Feb. 1992, at 54 (noting that “a 1990 study of the National Council of Churches shows that more than 14 percent of the public corruption cases over the past five years targeted black officials, who make up less than two percent of the country’s elected officials”).

You are safe walking the streets at night despite convicted white-collar offenders being on the loose.

The same is not true of violent offenders, who threaten bodily harm. Do you feel comfortable knowing that a robber or murder might be lurking on your sidewalk?

Another reason to think white-collar criminals should serve shorter sentences than terrorists and violent criminals is differences in recidivism: because white-collar criminals forfeit their positions of power, experience regulatory restrictions, and suffer community shame, they are unlikely to be repeat offenders.³⁰ Unlike violent criminals, white-collar offenders are removed from the positions of authority that enabled them to commit crimes in the first place. Take Bernie Ebbers, for example. Bernie Ebbers roamed the streets freely after being sentenced to twenty-five years in prison because he was no threat to the public.³¹ There was no fear that he would stab someone, or even steal their wallet. His criminal acts were specific to his business career. And like so many white-collar offenders, his removal from power meant that he was no longer dangerous to society. It is unlikely that he will be returning as a CEO of a major company ever again.

White-collar offenders not only lose their positions of power, they can also lose the ability to harm individuals in the same way as their past acts. For example, lawyers lose their law licenses, stockbrokers are precluded from appearing before the Securities Exchange Commission, and doctors face being precluded from receiving federal benefits like Medicare. These collateral consequences prevent many white-collar offenders from recidivating.

Those convicted of white-collar crimes suffer the shame of the community. As stated by defense counsel at the sentencing hearing of Dr. Samuel Waksal, another giant in fighting cancer, “once [the white-collar crime] is discovered, ruination follows irrespective of the length of the prison sentence.”³²

30. Not one person sentenced for an antitrust crime in fiscal year 2005 had a criminal history. In contrast, 636 individuals with significant criminal history were sentenced for drug trafficking; 732 individuals with significant criminal history were sentenced for crimes related to firearms. See U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FISCAL YEAR 2005 § 2, tbl.14 (2006) (showing the numbers of persons with a “Category 5” history who were sentenced between October 1, 2004 and January 11, 2005).

31. *Ebbers To Begin Serving Twenty-Five Year Sentence This Week*, White Collar Crime Prof. Blog, Sept. 25, 2006, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/09/ebbers_to_begin.html.

32. JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE 830 (2d ed. 2003) (citing Transcript of Sentencing Hearing at 28, *United States v. Waksal*, No. 02 CR 1041 (WHP) (S.D.N.Y. June 10, 2003)).

THROWING AWAY THE KEY

Given these differences in harms and in the factors that influence recidivism rates, have these sentencing reforms really made the streets safer?

Eliminating sentencing disparity is an important goal for achieving an equitable judicial process. But increasing white-collar sentences and then throwing away the key does little to benefit society. The stories show the need for a change. And hopefully this time, quantitative analysis and statistics will not drive the Guidelines down the wrong path. The bottom line is that we need to return to individualizing the sentencing process because we do not sentence numbers – we sentence people. If we really believe that the time should fit the crime, then we need to start realizing that not all crimes and not all criminals are alike.

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