PUNISHING THE SWINDLER: SENTENCING WHITE-COLLAR CRIMINALS

Abstract: Sentencing for white-collar criminals remains unsatisfactory and inequitable when compared to sentencing for their blue-collar counterparts. Although there are many distinctions between the two types of defendants, namely their socioeconomic statuses and backgrounds, two major problems—judicial leniency and the loss table calculation—within the current sentencing regime add to these sentencing disparities. This Note argues that it is not the Sentencing Guidelines that need to be changed, but the context of their application. This Note suggests introducing a new bench of judges with experience handling white-collar cases, either in their careers as lawyers or since they ascended to the bench. This would theoretically assist judges in avoiding the typical pitfalls and biases that may contribute to shorter white-collar sentences. Although this solution may prove difficult for numerous reasons—the difficulties of categorizing white-collar crimes and the potential to further stigmatize and isolate blue-collar criminals, for example—the current sentencing regime needs reform, and a new white-collar bench could be the very thing needed to properly enact this change.

INTRODUCTION

Robbery by banks is costlier than bank robbery.[1] Dating back to the 1890s, the Robber Barons engaged in unethical practices, exploiting employees and corrupting politicians all to amass massive amounts of wealth and power.[2] In 2001, the Enron Scandal revealed a series of corporate misdeeds by

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[1] *See* Hazel Croall, *What Is Known and What Should Be Known About White-Collar Crime Victimization?*, *in* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 59, 66 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen, eds., 2016) (noting the longstanding adage that robbery by banks is costlier than bank robberies).

[2] *See* Edmund A. Opitz, *The Robber Barons and the Real Gilded Age*, FOUND. FOR ECON. EDUC. (Aug. 1, 1984), https://fee.org/articles/the-robber-barons-and-the-real-gilded-age/#:~:text=They%20connived%20with%20politicians%20to,virtually%20everyone%20knew%20about%20it [perma.cc/3ZGV-KMVW] (discussing how the Robber Barons would use ill-begotten gains to influence politicians to gain advantages); Bob Adelmann, *Railroads, Robber Barons, and Unbridled Capitalism*, NEW AM. (July 16, 2010), https://thenewamerican.com/us/culture/history/railroads-robber-barons-and-unbridled-capitalism/ [perma.cc/5FEX-P472] (describing how Robber Barons would exploit workers and engage in antitrust practices to garner massive amounts of wealth); *infra* note 34 (discussing the history of the Robber Barons and their various exploitative tactics and activities). The most famous robber barons include Andrew Carnegie, Cornelius Vanderbilt, and John D. Rockefeller, all of whom were criticized for being greedy monopolists who provided unsafe working conditions for their employees while maintaining relationships with politicians in hopes of receiving economic benefits. Robert F. Zeidel, *Introduction: Capitalists and Immigrants in Historical Perspective, 1865–1924*, *in* ROBBER BARONS & WRETCHED REFUSE 1, 2–3 (N. Ill. Univ. Press ed., 2020); Will Kenton, *Robber Barons: Definition, Impact, and Criticism in the Gilded Age*, INVESTOPEDIA, https://www.investopedia.com/terms/r/robberbarons.asp#

top executives and officers.[3] In 2010, a collective investigation by several federal agencies, known as Operation Stolen Dreams, led to 485 arrests related to mortgage fraud, the largest targeted effort against it at the time.[4] These mortgage scams, along with pig butchering scams, romance scams, cryptocurrency scams, and Ponzi schemes, have all been perpetrated by white-collar criminals, though few receive comparable consequences to their blue-collar counterparts.[5]

:~:text=%22Robber%20baron%22%20is%20a%20term,Rockefeller [perma.cc/V3AQ-ES7N] (Aug. 25, 2024).

[3] *See Enron*, FBI, https://www.fbi.gov/history/famous-cases/enron [perma.cc/6KCD-XAP4] (recounting the Enron case that involved top officers and executives engaging in various corporate frauds, including false accounting practices). The fraud perpetrated by Enron executives was first uncovered after the company declared bankruptcy. John Gledhill, *The Enron Scandal: Global Capitalism Against Society*, 47 SOC. ANALYSIS 130, 130 (2003). Enron had been hiding its debts by generating false documents that inflated its profits to throw shareholders and government officials off its trail. *Enron*, *supra.* Arthur Andersen, one of Enron's accountants, was indicted later for "knowingly, intentionally and corruptly" telling employees to shred any documents that could connect the company to their fraudulent accounting practices. Gledhill, *supra*, at 130. This investigation resulted in twenty-two convictions of top Enron executives as well as changes to federal law, such as the Private Securities Litigation Reform Act. *Portraits in Oversight: Congress and the Enron Scandal*, LEVIN CTR., https://levin-center.org/what-is-oversight/portraits/congress-and-the-enron-scandal/ [perma.cc/95R6-CF2T]; *Enron*, *supra*. Many of Enron's employees—victims of the scandal as it had led them to losing their livelihoods, pensions, and insurance—had relied on Enron stock for their retirements, which became worthless. Wade Goodwyn, *Ex-Employees Fight for Shreds of Enron Pensions*, NPR (May 26, 2006), https://www.npr.org/2006/05/26/5435098/ex-employees-fight-for-shreds-of-enron-pensions [perma.cc/9GRH-276E]. The Enron scandal impacted many people, even leading to the suicide of Cliff Baxter, an Enron executive and friend of CEO Jeff Skilling, who knew that Enron was breaking the law. *Id.*

[4] *See Operation Stolen Dreams*, FBI, https://www.fbi.gov/history/famous-cases/operation-stolen-dreams [perma.cc/5TZX-Z7BW] (recounting the multi-agency investigation into mortgage fraud). The investigation was an effort to achieve both civil remedies and victim restitution. *Id.* Investigators identified certain "hot spots" across the United States and set up task forces to root out individuals who were committing mortgage fraud. *Id.* Some of those crimes included a developer using straw buyers to artificially inflate the housing market in California so he could get greater returns on investment for his new homes and exploiting the Haitian-American community in Miami to acquire their personal information to fraudulently obtain mortgages in their names. *Id.*

[5] *See infra* note 34 (defining white-collar crime). For purposes of this Note, white-collar crime will be distinguished from other types of crime by referring to all other kinds as "blue-collar" crime. *See* Peter Olszewski, *The Many Colors of Collared Crime*, SCARTELLI OLSZEWSKI, P.C., https://www.scartelli.com/the-many-colors-of-collared-crime/ [perma.cc/TRL7-NTRP] (defining blue-collar crime as those crimes committed by middle and lower class individuals). Pig butchering is a reference to the colloquialism of fattening up a pig before the slaughter. *Pig Butchering Scams*, OFF. OF INSPECTOR GEN., https://www.fdicoig.gov/pig-butchering-scams [perma.cc/HFN3-ZGM4]. Fraudsters often target victims using texts or social media to convince them to deposit money into shell companies or cryptocurrency exchanges by claiming they are investment opportunities. *Id.* Romance scams often target individuals by convincing victims that they are in committed relationships with the scammer. *Romance Scams*, FBI, https://www.fbi.gov/how-we-can-help-you/scams-and-safety/common-frauds-and-scams/romance-scams [perma.cc/KH83-2NZU]. After gaining the victim's trust, the scammers will ask the victim to send them money or will ask for bank account information to steal the victim's money before disappearing. *Id.* In 2021, the Federal Trade Commission (FTC) received 56,000 complaints about romance scams, with a total reported loss of approximately $547 million. *Romance Scams*, FLA. DEP'T OF AGRIC. & CONSUMER SERVS., https://www.fdacs.gov/Consumer-

White-collar crime typically results in loss of funds, but the consequences are often expensive in many other ways, with victims potentially suffering from long term costs, such as losing their savings, homes, or ability to take care of themselves or their families.[6] These crimes particularly affect the elderly.[7] Elderly victims often do not recover financially, emotionally, or psychologically at any point following their victimization.[8] In extreme cases, these frauds have also led to depression, divorce, or suicide.[9]

Though robbery and fraud are similar crimes to the extent that they both involve improperly acquiring funds through nefarious means, white-collar criminals do not face as heavy of sentences as blue-collar criminals.[10] In 2023,

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Resources/Scams-and-Fraud/Romance-Scams [perma.cc/W554-PQAG]. Cryptocurrency scams may involve fraudsters asking to be paid cryptocurrency in return for a good or service only to never provide that good or service, or they will ask victims to send them money on the promise of investing those funds in lucrative cryptocurrency investment schemes. *What to Know About Cryptocurrency and Scams*, FED. TRADE COMM'N (May 2022), https://consumer.ftc.gov/articles/what-know-about-cryptocurrency-and-scams [perma.cc/B66K-HFRU]. Ponzi schemes proceed by using money from new investors to pay back old investors after the original investors' money had been stolen or used for unapproved purposes. *Business and Investment Fraud*, FBI, https://www.fbi.gov/how-we-can-help-you/scams-and-safety/common-frauds-and-scams/business-and-investment-fraud [perma.cc/FS8B-HV52]. Pyramid schemes often proceed by telling a victim they can make money by selling a product but, in reality, their salary is dependent on the number of people they recruit. *See Multi-Level Marketing Businesses and Pyramid Schemes*, FED. TRADE COMM'N, https://consumer.ftc.gov/articles/multi-level-marketing-businesses-pyramid-schemes [perma.cc/N5JP-42T9] (explaining how many multi-level marketing businesses are pyramid schemes).

[6] *See supra* notes 1–5 (discussing the many examples of exploitation across the twentieth and twenty-first centuries and how they resulted in lost funds, lost livelihoods, lost retirements, and in one case, suicide); Croall, *supra* note 1, at 66 (stating the consequences for white-collar victims that go beyond losing money and can affect their quality of life, including limiting their independence); *infra* notes 95–115 (discussing the myriad of consequences on white-collar victims).

[7] *See* Croall, *supra* note 1, at 69 (noting how the stereotypical victim of white-collar crime, the little old lady, is an accurate depiction of actual victims of white-collar crime); *infra* notes 95–115 (discussing the victims of white-collar crime and how that demographic is changing as new types of white-collar frauds are exposed).

[8] *See* Victoria McKenzie, *Fighting Fraud Against the Elderly*, CBS NEWS (Mar. 2, 2017), https://www.cbsnews.com/news/fighting-fraud-against-the-elderly/ [perma.cc/C97U-SBAB] (noting how the victims of white-collar crime suffer beyond mere financial loss and can have diminished quality of life in everything from mental to physical health).

[9] *See* Croall, *supra* note 1, at 67 (discussing potential mental health effects and impacts on life after victimization by white-collar crime); Goodwyn, *supra* note 3 (recounting the tragic suicide of Cliff Baxter, an Enron executive who had been aware of the company's illegal activities).

[10] *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2023, SECOND CIRCUIT 1–16, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2023/2c23.pdf [perma.cc/R3NB-BVAP] (noting that sentencing statistics show that white-collar criminals typically receive lower sentences). Fraud and theft are not identical crimes, though they both involve acquisition of property that does not belong to the fraudster or thief—fraud does so through trickery and theft does so through nonconsensual taking. *Fraud vs. Theft*, FRAUDNET, https://www.fraud.net/glossary/fraud-vs-theft [perma.cc/226T-YM7W]; *see Fraud*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining fraud as involving a misrepresentation or concealment to induce another person to engage in a certain behavior); *Theft*, BLACK'S LAW DICTION-

the crime of robbery in jurisdictions across the country carried a mean sentence of 110 months in prison, while fraud/theft/embezzlement carried a mean sentence of twenty-two months in prison.[11] There were 5,205 reported fraud/theft/embezzlement sentences across the United States in 2023, preceded in number only by immigration, drug trafficking, and firearms offenses.[12]

Arguably, the way white-collar and blue-collar criminals are sentenced is not equitable, nor is our current sentencing scheme a deterrent for white-collar criminals.[13] There is pushback on this idea, though: many white-collar criminals are considered first-time offenders as they often do not have prior experience with the legal system, and many high-profile white-collar offenders have received lengthy sentences, sometimes described as "draconian."[14] Some ex-

ARY, *supra* (defining theft to involve taking the property of another without consent and with the intention of depriving their use of it).

[11] U.S. SENT'G COMM'N, *supra* note 10, at 7. When analyzing sentencing data throughout the year, the Commission does not specify "white-collar" crimes; instead, it categorizes by crime type, with fraud/theft/embezzlement being the grouping that best reflects what we consider to be white-collar crimes. *See id.* at 1–16 (using fraud/theft/embezzlement when analyzing data). For purposes of this Note, the fraud/theft/embezzlement category as used by the Commission to reflect stereotypical white-collar crimes will serve as the source of white-collar crime statistics. *Id.*

[12] *Id.* The greatest number of reported offenses in 2023 came from immigration offenses, with 19,226 offenses reported. *Id.* at 3. Drug trafficking came in at second most with 19,007, and firearms offenses came in at third with 8,832 total reported offenses in 2023. *Id.*

[13] *See* John L. Hagan & Ilene H. Nagel, *White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York*, 20 AM. CRIM. L. REV. 259, 264–65 (1982) (writing on the lack of equality in white-collar sentencing in terms how judges perceive criminals' identities when considering sentencing); *infra* notes 123–156 (discussing how race and class play a major role in not only who is committing white-collar offenses but also in how judges perceive and sentence those individuals); *infra* note 54 (noting that deterrence is a major goal in criminal prosecution).

[14] *See* Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 733 (2007) (referring to the loss table calculation and how it is disproportionate to the sentences judges are willing to mete out); *infra* notes 157–165 (discussing criticisms of the current sentencing regime with special focus on the loss table calculation that is known to be outsized and does not match the sentences given by judges). For example, Bernie Ebbers, CEO of WorldCom, received a twenty-five-year sentence for "a smorgasbord of manipulative schemes" leading to major accounting fraud that, at the time, was longer than sentences for some violent crimes. Podgor, *supra*, at 733 n.10; Jim Zarroli, *Bernard Ebbers, Telecom CEO Sent to Prison in Accounting Scandal, Dies*, NPR (Feb. 3, 2020), https://www.npr.org/2020/02/03/802288166/bernard-ebbers-telecom-ceo-sent-to-prison-in-accounting-scandal-dies [perma.cc/J7R5-N78E]. Sam Bankman-Fried, who defrauded customers of $8 billion in the FTX cryptocurrency exchange, received a sentence of twenty-five years, with the maximum Guidelines sentence sitting at 110 years for his crime. David Yaffe-Bellany, *How Sam Bankman-Fried's Sentence Compares with Other White-Collar Cases*, N.Y. TIMES (Mar. 28, 2024), https://www.nytimes.com/2024/03/28/technology/sam-bankman-fried-white-collar-sentences.html#:~:text=New%20York%20Times-,Mr.,in%20prison%2012%20years%20later [perma.cc/SNH5-UEXM]. Jeffrey Skilling, CEO of Enron during the Enron scandal, was sentenced to twenty-four years, though he only served twelve in prison. *Id.* Bernie Madoff, responsible for the largest Ponzi scheme in history, was sentenced to 150 years in prison when he was in his seventies—he died twelve years into serving his sentence. *Id.* Elizabeth Holmes, who defrauded customers of her company's apparently life-saving blood-testing product, was sentenced to eleven years. *Id.*

perts distinguish high-profile white-collar criminals like Bernie Madoff from others whose frauds resulted in lesser losses, noting that the latter simply folded to the pressures of a high stakes environment and the whims of human greed.[15] Those critics argue that, because of the social standing and economic power of white-collar criminals, in particular corporate white-collar criminals, they have "farther to fall" than their blue-collar counterparts.[16] Additionally, because many of these offenders lose their occupational licenses as a consequence of their crimes, they are unable to return to the jobs and lifestyles that they grew accustomed to prior to being caught.[17]

Further, because the Sentencing Guidelines (Guidelines) have a caveat for those who abuse a position of trust or use of a "special skill," these white-collar criminals are punished for having education and power.[18] A "special skill" has been described as involving, "substantial education, training, or licensing."[19] Those with special skills may include, but are not limited to, "pilots, lawyers, doctors, accountants, chemists, and demolition experts."[20] But it is not the simple fact that corporate white-collar criminals have these special

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[15] *See* Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1002 (2010) (discussing the case of Richard Adelson, who discovered fraud to inflate stock while Impath's president).

[16] *See* Podgor, *supra* note 14, at 739 (stating that white-collar criminals often fall from grace when their crimes are exposed because of their privileged positions in society); *see infra* note 18 (explaining that corporate white-collar criminals are those who exploit a special skill, such as a lawyer or an accountant). Podgor suggests that those who commit crimes who are not economically and socially advantaged are closer to the bottom and thus have a much shorter fall from grace. *See* Podgor, *supra* note 14, at 739 (arguing that the advantaged position of corporate white-collar criminals makes their fall from grace harder).

[17] *See* Podgor, *supra* note 14, at 739 (discussing consequences for white-collar criminals after having been caught and serving their full sentences).

[18] *See id.* (discussing how the Guidelines' additional level increase for those abusing their positions or special skills may be unfair); U.S. SENT'G COMM'N, GUIDELINES MANUAL § 3B1.3 (2024) [hereinafter U.S.S.G.] (codifying the statutory level increases for those individuals who have special skills or abuse positions of power when sentencing). The Sentencing Guidelines (Guidelines) are the outcome of the statutory requirement that the U.S. Sentencing Commission (Commission) create a set of parameters for judges to follow when sentencing criminal defendants. U.S.S.G. ch. 1, pt. A, introductory cmt.; 28 U.S.C. § 994. The Guidelines categorized types of behaviors along with characteristics of offenders to be used in tandem to determine the appropriate length of time for each person set to be sentenced. U.S.S.G. ch. 1, pt. A, introductory cmt.

[19] United States v. Lee, 296 F.3d 792, 797 (9th Cir. 2002) (quoting United States v. Petersen, 98 F.3d 502, 507 n.5 (9th Cir. 1996)). Special skills do not necessarily require a license; for example, in *United States v. Petersen*, the defendant was characterized as an expert hacker with, "extraordinary knowledge of how computers work." 98 F.3d at 506. The defendant in *United States v. Lee*, however, who had created a fraudulent website to induce Honolulu Marathon entrants to pay him a "registration" fee had no special skills. 296 F.3d at 799. He simply copied an already existing website. *See id.* The defendant had also pled guilty to a separate, "unrelated count of selling Viagra without a prescription." *Id.* at 794.

[20] U.S.S.G. § 3B1.3 cmt. n.4. The Commission describes a special skill as "not possessed by members of the general public and usually requiring substantial education, training or licensing." *Id.*

skills and knowledge that leads to their punishment; rather, it is that they knowingly used those skills and knowledge to harm others.[21]

The question of how to sentence white-collar criminals has long been argued.[22] Whether it should involve a fine, a period of incarceration, some combination of the two, or another solution entirely, remains an important question to answer.[23] In addition to analyzing the existing issues with the current sentencing regime, this Note will address an alternative solution in hopes of closing sentencing disparities between white-collar and blue-collar criminals: a new bench of judges with expertise in white-collar crime.[24]

Part I of this Note addresses the framework surrounding white-collar sentencing, including the federal statutory scheme and the demographics of white-collar criminals and their victims.[25]

Part II of this Note discusses two outstanding problems with white-collar sentencing.[26] The first being that the current sentencing framework is focused on judicial discretion; and the second being that judges typically use that discretion to be lenient on white-collar criminals.[27] It also discusses the loss table in the Guidelines and how it has been the mechanism the U.S. Sentencing Commission (Commission) has tried to use to lessen this disparity.[28]

Part III argues that changing the loss table may not fix the problem.[29] This Note proposes creating a separate bench of judges who only hear cases falling within the ambit of white-collar crime. [30] In the current era of extreme judicial discretion under *United States v. Booker*, and with it being unlikely that the Guidelines will create a satisfying new sentencing regime, this separate bench

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[21] *See* Podgor, *supra* note 14, at 739 (noting that those who have a position of authority in public or private trust and those who have used those positions in furtherance of their crime are subject to a level increase).

[22] *See* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980) (arguing that white-collar criminals should only be punished by fines and not incarceration). Posner argues that a fine is a better solution because, as white-collar criminals' social devaluation comes from theft of funds, the only way to balance on the opposite side is to have them pay the fine. *Id.* A sentence of incarceration would not balance the social benefit scales. *Id.* Another argument is that the Guidelines require reform because of its overemphasis on the amorphous concept of "loss." Vollrath, *supra* note 15, at 1005.

[23] *See* Posner, *supra* note 22, at 410 (discussing potential punishments for white-collar criminals); *infra* Part III and accompanying text.

[24] *See* COURTNEY SEMISCH, U.S. SENT'G COMM'N, 2009 REPORT: ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (2009), https://www.ussc.gov/research/research-publications/2009-report-alternative-sentencing-federal-criminal-justice-system [perma.cc/XE78-GF4T] (noting that white-collar criminals tend to be sentenced to prison alternatives unlike their blue-collar counterparts); *infra* Part III and accompanying text.

[25] *See infra* Part I and accompanying text.

[26] *See infra* Part II and accompanying text.

[27] *See infra* notes 123–156 and accompanying text.

[28] *See infra* notes 157–165 and accompanying text.

[29] *See infra* Part III and accompanying text.

[30] *See infra* notes 174–188 and accompanying text.

could be useful.[31] It is possible that having separate judges, like those that can be found in the Tax Courts, would result in sentences that better reflect the severity of white-collar crimes.[32] This Note also addresses potential limitations to this solution.[33]

I. WHITE-COLLAR SENTENCING

So-called "white-collar crime" is generally nonviolent and fraud-based, commonly associated with healthcare fraud, securities fraud, or public corruption.[34] When calculated against conventional street crime, however, the costs of white-collar crime are far greater.[35] White-collar criminals target retirement funds, employment, trade, and commerce, disproportionately affecting the elderly.[36] In 2023, fraud/theft/embezzlement made up 8.1% of national criminal convictions and money laundering made up 2.0% of federal criminal convictions.[37]

This Part discusses white-collar sentencing, white-collar criminals, and their victims.[38] Section A discusses the federal sentencing procedure and the

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[31] *See infra* notes 123–165 and accompanying text; 543 U.S. 220, 245 (2005) (holding that, although the Guidelines should be considered, they are now advisory).

[32] *See infra* notes 174–188 and accompanying text.

[33] *See infra* notes 189–218 and accompanying text.

[34] *See What Is White-Collar Crime, and How Is the FBI Combating It?*, FBI, https://www.fbi.gov/about/faqs/what-is-white-collar-crime-and-how-is-the-fbi-combating-it [perma.cc/6BFD-BAAL] (describing how the FBI considers white-collar crime as categorization by type of criminal rather than by type of crime). The term "white-collar crime" is attributed to Edwin Hardin Sutherland, the twenty-ninth President of the American Sociological Society. *Id.*; *Edwin H. Sutherland*, AM. SOCIO. ASS'N, https://www.asanet.org/edwin-h-sutherland/?hilite=edwin+sutherland [perma.cc/2EV6-M6E2] (June 16, 2009). In Sutherland's 1939 Presidential Address to the Sociological Association, he sought to combine economics and sociology to understand the crime of business, that he termed "white-collar crime" due to its being committed by those in the upper class—the "white-collar" class. Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOCIO. REV. 1, 1 (1940). Sutherland distinguished those crimes committed by "respectable" men against those crimes committed by the "lower class" and shed doubt on the traditional conceptions of crime being associated with the poor. *Id.* at 1–2. He was influenced at least in part by the backdrop of the 1890s' "robber barons." *Id.* at 2; *see supra* note 2 (discussing the activities of the Gilded Age's Robber Barons).

[35] *See* Croall, *supra* note 1, at 71 (discussing the consequences of white-collar crime); *infra* notes 111–115 (discussing the aftereffects of white-collar crime on victims and society at large). White-collar crime is costlier in the literal sense than blue-collar crime—each year, white-collar crime exacts approximately $300 billion to $800 billion in losses, with blue-collar crime generally resulting in losses totaling about $16 billion. James B. Stewart, *Why We Let White-Collar Criminals Get Away with Their Crimes*, N.Y. TIMES (Sep. 29, 2020), https://www.nytimes.com/2020/09/29/books/review/big-dirty-money-jennifer-taub.html [perma.cc/GK5T-8DAD].

[36] Croall, *supra* note 1, at 71. In 1985, in *State v. Rosenberger*, the court wrote that one of the major motivating factors for committing a white-collar crime is greed, and white-collar criminals "act[] willfully with premeditation, perspicacity and deliberation to consciously disobey the law." 504 A.2d 160, 163 (N.J. Super. Ct. 1985).

[37] U.S. SENT'G COMM'N, *supra* note 10, at 3. This percentage greatly increased in the Second Circuit—including Connecticut, New York, and Vermont—to 17.6% for fraud/theft/embezzlement and 3.7% for money laundering. *Id.*

[38] *See infra* notes 78–115 and accompanying text.

importance of the loss calculation.[39] Section B discusses the types of individuals that commit white-collar crimes and how stereotypical depictions of these criminals as wealthy, older, white men tend to be true.[40] This Section further discusses how judges have admitted that the profile of these white-collar criminals affects their sentences.[41] Finally, Section C discusses the victims of these crimes and how, given the expansive nature of the types of white-collar crimes available, virtually everyone can be affected and targeted, even unwittingly.[42]

A. How We Sentence

The Commission is the federal agency responsible for encouraging proportional and transparent sentences.[43] It distributes a Guidelines Manual (Manual) each year to assist judges and attorneys in their pursuit of fair and just sentencing.[44] Congress initially vested the Commission with the power to

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[39] *See infra* notes 43–74 and accompanying text.

[40] *See infra* notes 75–94 and accompanying text.

[41] *See id.*

[42] *See infra* notes 95–115 and accompanying text.

[43] *About the Commission*, U.S. SENT'G COMM'N, https://www.ussc.gov/ [perma.cc/42Y4-2GWV] (stating that the Commission is responsible for ensuring fair sentencing practices across the United States).

[44] *See* U.S.S.G. ch. 1, pt. A, introductory cmt. (stating that the Commission attempts to use the Guidelines to assist in creating fair sentencing practices). Sentencing may either follow a trial or the entry of a guilty plea. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 8 (2020) [hereinafter FEDERAL SENTENCING: THE BASICS]. Sometimes a guilty plea agreement will include a sentence recommendation from defense counsel and the prosecution. *Id.* at 9. If the court accepts a plea agreement, or if the defendant is found guilty by a jury of his peers, the process will continue to a presentence interview. *Id.* at 9–11; *see* Kaleb Byars, *Recidivist Organizational Offenders and the Organizational Sentencing Guidelines*, 66 B.C. L. REV. 745, 753 (2025) (discussing the popularity and use of deferred prosecution agreements and non-prosecution agreements in place of plea agreements for organizations such as banks). The presentence interview is conducted by a federal probation officer who provides a report of this interview to the parties. FEDERAL SENTENCING: THE BASICS, *supra*, at 9–11. The report will include personal characteristics that may be relevant to a judge's consideration of the Guidelines and section 3553(a) factors, such as substance abuse. *Id.*; *see* 18 U.S.C. § 3553(a) (requiring the court to consider facts including the defendant's characteristics and nature, the four purposes of punishment, types of sentences available, the Guidelines range, and any relevant policy statements). The defendant is not required to speak and may invoke his Fifth Amendment right, but this may affect his ability to use the "acceptance of responsibility" credit that could lower his sentence later. FEDERAL SENTENCING: THE BASICS, *supra*, at 9–10; *see* U.S. CONST. amend. V (guaranteeing the right against self-incrimination). After the interview, the probation officer will provide the presentence report to the parties to be filed under seal. FEDERAL SENTENCING: THE BASICS, *supra*, at 10. Finally, a sentencing hearing occurs, and a judge will consider the presentence report, arguments from counsel, and testimony from relevant witnesses to determine the appropriate sentence. *Id.* at 11. After this hearing, the judge will announce the sentence, including mention of any variances or departures from the recommended Guidelines' range. *Id.* He releases two reports, the Judgement in a Criminal Case and the Statement of Reasons forms, that lay out in writing the term and type of sentence the offender will serve. *Id.* A defendant may then choose to appeal his sentence. *Id.* at 12. The court is also required to submit the presentence report, Statement of Reasons, and the Judgement in a Criminal Case to the Commission within thirty days of entry. *Id.*

outline mandatory sentences for federal crimes, keeping in mind the four core purposes of punishment: deterrence, incapacitation, just punishment, and rehabilitation.[45] Prior to the Commission's creation by the Sentencing Reform Act of 1984 (SRA), there was considerable disparity in sentencing.[46] Congress

[45] *See* 28 U.S.C. § 994 (1984) (vesting the newly created Commission with the authority to create the Guidelines); U.S.S.G. ch. 1, pt. A, introductory cmt. (noting that the Commission has the authority to make the Guidelines). Just punishment, or retribution, is likely the oldest purpose of punishment, tracing its roots back to the philosophies of Immanuel Kant and Georg Willhelm Frederich Hegel. *Topic Two—Justifying Punishment in the Community*, U.N. OFF. ON DRUGS & CRIME (Mar. 2019), https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-7/key-issues/2—justifying-punishment-in-the-community.html [perma.cc/8SUX-C6LS]. Retributivism can be understood through the use of three premises: (1) all convicted criminals deserve punishment, (2) only the convicted deserve punishment, and (3) the punishment should not be lesser or greater than the crime. *Id.* The rationale of incapacitation is premised on the idea of protecting the public; criminals cannot recidivate and harm more of the public if they are isolated from the community. *Id.* Incapacitation as a policy rose in popularity in the 1970s after a widespread belief grew that rehabilitation did not work. Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, 5 CRIME & JUST. 1, 2 (1983); *see* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 48–49 (1974) (examining various rehabilitative methods in prison and concluding that currently available studies do not indicate that any of those rehabilitative methods work). The "nothing works" pedagogy learned from Martinson was further expounded upon when assessing recidivism rates after release. Peter B. Ainsworth & Ken Pease, *Incapacitation Revisited*, 20 HOW. J. PENOLOGY & CRIME PREVENTION 160, 160 (1981). The American Penal system as a whole, however, has been criticized as not being rehabilitative: approximately 600,000 individuals are released from prison each year and roughly two-thirds return within three years of their release. Jeffrey Shockley, *Why Prisons Fail to Rehabilitate People*, PRISON JOURNALISM PROJECT (June 22, 2023), https://prisonjournalismproject.org/2023/06/22/why-prisons-fail-to-rehabilitate-people/ [perma.cc/LN9E-J6EM]. Criticisms of the prison system include the fact that psychological evaluations are not conducted to benefit the prisoner and that deep-seated traumatic issues are not addressed by prison psychologists, nor is there any effort to prepare prisoners for re-entry. *Id.* American prisons are overpopulated, and, because of the lack of staffing, prisoners are often exposed to physical and sexual violence. Shon Hopwood, *How Atrocious Prisons* [sic] *Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe [perma.cc/PA83-CL8R]. Finally, deterrence is future-looking and hopes to discourage both the prisoner (specific deterrence) and others (general deterrence) from committing similar crimes in the future because they are able to see the consequences of their potential actions. *Topic Two—Justifying Punishment in the Community*, *supra*. Deterrence theory has been criticized on several grounds, including that it assumes individuals will see the punishments of others and proceed to act rationally and avoid acting the same way. Kevin C. Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 7 (1983). Each of these four purposes of punishment are mentioned by name in the Commission's initial 1987 Guidelines Manual introduction. U.S.S.G. ch.1, pt.A, introductory cmt. (1987).

[46] *See* 18 U.S.C. § 3582 (giving courts authority to impose sentences); Burns v. United States, 501 U.S. 129, 133 (1991) (discussing the state of affairs prior to the enactment of the Sentencing Reform Act of 1984). When passing the Sentencing Reform Act (SRA), Congress stated that, at least in part, it was motivated by an effort to close the gap between white-collar and blue-collar sentencing. Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 948–49 (2017); *Executive Summary*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/executive_summary_and_preface.pdf [perma.cc/4J3W-TQET] (noting that when drafting the Guidelines, Con-

provided very broad sentencing ranges for crimes via statute and federal judges had considerable latitude in deciding what sentence to impose.[47] Additionally, judges were not required to explain their reasoning for imposing sentences, making them very difficult to appeal.[48] Ultimately, the Parole Commission determined most sentencing durations.[49]

The Commission promulgated its first Guidelines in 1987, but they were not fully implemented until 1989.[50] The Commission developed those Guidelines by looking at ten thousand presentence reports and over one hundred thousand federal sentences, then determining the average sentence imposed for certain types of crime.[51] The Guidelines used that data to identify offense-specific factors that might warrant an upward or downward variance from the suggested base level offense.[52]

In 2005, in *United States v. Booker*, the Guidelines became advisory.[53] The Court held that 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e), statutes

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gress tended to rely on past practices except in a few circumstances, like white-collar crime, because of a perceived previous overreliance on non-prison sentences like probation).

[47] *See Executive Summary*, *supra* note 46 (noting that before the SRA, the sentencing regime was based on broad ranges included in federal criminal statutes).

[48] *See id*. (stating that a judge's sentence before the SRA was hard to appeal).

[49] *Id.*; *see* United States v. Kunz, 68 F.4th 748, 765 (2d Cir. 2023) (holding that a court may not delegate authority to the parole office where the issue would control the defendant's freedom, though it may delegate certain details). The Parole Commission not determining a criminal defendant's sentence is also consistent with Federal Rule of Criminal Procedure Rule 32, that states that after the presentencing report is provided to the judge, he must then consider it along with the probation officer's initial investigation to determine the defendant's sentence. FED. R. CRIM. P. 32. Further, 18 U.S.C. § 3553 vests the court, not the probation officer, with the power to impose a sentence. *See* 18 U.S.C. § 3553 (stating that the court must consider all factors included in the statute, including the nature and characteristics of the defendant, the four purposes of punishment, available types of sentences, the Guidelines range, and policy statements).

[50] *Executive Summary*, *supra* note 46. Conflict between lower federal courts prevented the Guidelines' full implementation until 1989. *Id.* In 1989, in *Mistretta v. United States*, the Supreme Court held that the Commission was constitutionally valid because Congress had not delegated too much power to it nor had Congress infringed on the separation of powers by asking judges to serve on the Commission. 488 U.S. 361, 371 (1989).

[51] *Executive Summary*, *supra* note 46.

[52] *Id*. In the context of white-collar crimes, an offense-specific factor could be inappropriate use of trade secrets. U.S.S.G. § 2B1.1(14). In drafting the Guidelines, the Commission also considered the Parole Commission's policies as well as other relevant statistics and data. U.S.S.G. ch.1, pt.A, introductory cmt. (1987). Using this myriad of sources allowed the Commission to find disparities in sentencing, including attempting to close the gap between economic crimes that were punished less harshly than other similar behavior. *Id.*

[53] 543 U.S. 220, 245 (2005). *Booker* was the finale of the "Apprendi Revolution." *Id.*; John H. Chun, *Setting Post-Booker Sentencing on a New Course*, 41 MD. BAR J. 62, 63 (2008). The Supreme Court held that any upward variances from the then-mandatory Guidelines maximum sentences needed to be submitted to a jury in *Apprendi v. New Jersey*. 530 U.S. 466, 490 (2000). The Justices stated that if a jury is not consulted on facts that would lead to upward variances, it would be a violation of the Sixth and Fourteenth Amendments. *Id.* at 476; Chun, *supra*, at 53; U.S. CONST. amend. VI; U.S. CONST. amend. XIV. According to the Court, to be in alignment with the Sixth Amendment, if the Court wanted to impose an upwards variance, that should have been included in the indictment and

that made the Guidelines mandatory, were incompatible with the Sixth Amendment to the U.S. Constitution.[54] Therefore, those sections were excised and the Guidelines were rendered advisory.[55] When imposing a sentence, district court judges must now consider the Guidelines as one of many factors alongside the factors identified in 18 U.S.C. § 3553(a).[56]

The § 3553(a) factors are: (1) the nature of the crime and the defendant's character; (2) the four rationales for punishment; (3) the type of sentence available; (4) the Guidelines' sentencing range; (5) any policy considerations; (6) the need to avoid sentencing disparities with other convicted defendants committing similar crimes with similar characteristics; and (7) victim restitution.[57] Appellate courts must review sentences for "reasonableness."[58] Sentencing courts are then required to consider 18 U.S.C. § 3553(b), a statute that permits upward and downward variances based on the defendant's circumstances or the circumstances of the offense.[59] Judges must also state their ra-

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proven to the jury beyond a reasonable doubt as all other elements of the crime are required to be. *Apprendi*, 530 U.S. at 490; U.S. CONST. amend. VI. The Supreme Court later decided in 2004, in *Blakely v. Washington* that a "statutory maximum" is predicated only on those facts that are presented to the jury or directly admitted by a defendant, not by any additional facts that a judge has found. 542 U.S. 296, 303 (2004); Chun, *supra*, at 53. Finally, the Supreme Court decided *Booker*, holding that the Guidelines are advisory rather than mandatory. 543 U.S. at 245; Chun, *supra*, at 53.

[54] *Booker*, 543 U.S. at 223–24; *see* U.S. CONST. amend. VI (requiring that all criminal defendants receive a fair jury trial). Justice Breyer, delivering the opinion of the Court in part, wrote that the Guidelines' mandatory nature caused a Sixth Amendment issue because, when a trial judge uses his discretionary power to impose a sentence, the criminal defendant is denied the right to a fair trial as is required by the Sixth Amendment. *Booker*, 543 U.S. at 233; U.S. CONST. amend. VI.

[55] *Booker*, 543 U.S. at 245. *Booker* required that the language in § 3553(b)(1), making the Guidelines mandatory for district court judges, be excised to render the Guidelines advisory. *Id.*; 18 U.S.C. § 3553(b)(1) (2000). *Booker* also required that 18 U.S.C § 3742(e)—governing how sentences are reviewed—remove its language requiring a *de novo* appeal on Guidelines departures to resolve these Sixth Amendment issues. 18 U.S.C § 3742 (2000); 543 U.S. at 245; U.S. CONST. amend. VI.

[56] *See* Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J.F. (Aug. 5, 2006), https://www.yalelawjournal.org/forum/what-yogi-berra-teaches-about-post-booker-sentencing [perma.cc/NF9P-TKS9] (discussing the *Booker* regime and how now that the Guidelines are advisory, they must still be considered, but only as one of many § 3553(a) factors); Chun, *supra* note 53, at 64 (stating that in the *Booker* era, there are several factors laid out in 18 U.S.C. § 3553(a), including the Guidelines range, that should be considered); 18 U.S.C. § 3553(a) (listing out the factors that a court must consider when imposing a sentence on a defendant).

[57] 18 U.S.C. § 3553; Chun, *supra* note 53, at 64.

[58] Gertner, *supra* note 56. Appellate review of federal sentences proceeds under an abuse of discretion standard. Gall v. United States, 552 U.S. 38, 51 (2007). It first addresses any potential procedural issues; for example, if the court calculated the Guidelines range incorrectly. *Id.* It then considers the substantive reasonable sentence, which it does by using a totality test to consider all the circumstances of the sentence and the crime. *Id.* The reviewing court may, though is not required to, presume reasonableness if the sentence falls within the Guidelines range, though it is not allowed to consider the sentence presumptively reasonable if there is a variance outside of the Guidelines. *Id.* The simple fact that a reviewing court may have determined another reasonable sentence is not enough to consider the trial court judge's sentence unreasonable. *Id.*

[59] 18 U.S.C. § 3553(b); U.S.S.G. ch. 1, pt. A, introductory cmt.

tionales for imposing a certain sentence in open court and must specifically state any upward or downward variance considerations.[60] Despite the Guidelines being made advisory, they continue to reign supreme in most judicial sentencing considerations.[61]

Pre-Guidelines, blue-collar crimes involving similar monetary loss were punished much more harshly than their white-collar equivalents, like fraud and tax evasion.[62] Additionally, white-collar criminals tended to receive probation—the Commission sought to rectify this issue by limiting the availability of probation in favor of brief but certain incarceration.[63] The Guidelines also include caveats for variances due to sophistication and large amounts of monetary loss.[64]

In 2000, Congress submitted additional amendments to the SRA, including the Economic Crime Package, that introduced the most significant change to the Guidelines to date.[65] At a high level, the major changes were to: (1) collapse the fraud and theft Guidelines into one guideline; (2) adjust the "loss table" in the Guidelines; and (3) redefine "loss."[66] The definition of loss is particularly important because monetary loss is the first step of sentencing in any economic crime.[67] "Loss" has also recently been redefined as actual loss, in-

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[60] 18 U.S.C. § 3553(c).

[61] *See* Chun, *supra* note 53, at 64 (noting how the Guidelines remain the dominant element of the sentence calculation even though they have been made advisory by *Booker*). Though, per *Gall*, the Court is not required to give a Guidelines sentence a presumption of reasonableness, many judges did so on the view that the Guidelines incorporate the important purposes of sentencing and the § 3553(a) factors. 552 U.S. at 51; U.S.C. § 3553(a); *see also* Chun, *supra* note 53, at 64 (stating that many judges thought the Guidelines and § 3553(a) factors assessed the relevant purposes of punishment when applied, so they were entitled to a presumption of reasonableness).

[62] *See* U.S. SENT'G COMM'N, *supra* note 10, at 1–16 (showing how white-collar crimes, as opposed to other crimes, are given more lenient sentences across the board).

[63] *See id.* (noting that the effort to close the sentencing disparities between white-collar and blue-collar crime included attempting to limit probation as an option and replace it with short carceral terms).

[64] *Id.*

[65] JOEL M. ANDROPHY, LUKE V. CASS & MICHAEL E. CLARK, WHITE COLLAR CRIME § 34:3 (3d ed. 2025); Frank O. Bowman, III, *The 2001 Economic Crime Package: A Legislative History*, 13 FED. SENT'G REP. 3, 3 (2000). The Commission had not yet attempted to redefine a crime category at that point and, given that economic crimes make up a substantial portion of the federal docket, these changes were significant. Bowman, *supra*, at 3.

[66] Bowman, *supra* note 65, at 3. The Economic Crime Package was the result of six years of study and research conducted by the Conaboy and Murphy Sentencing Commissions in tandem with the defense bar, the Justice Department, probation officers, and the Criminal Law Committee of the U.S. Judicial Conference. *Id.* There were additional money laundering elements that, although not a part of the Economic Crime Package itself, were relevant to adjusting the way that economic crime is managed in the United States. *Id.*; *see infra* note 126 (describing how the loss table works); *infra* notes 157–163 (explaining the Guidelines' loss table and why it is so important).

[67] *See* William C. Athanas, *Sentencing Commission Rejects Actual Versus Intended Loss Distinction*, BRADLEY (May 9, 2024), https://www.eyeonenforcement.com/2024/05/sentencing-commission-rejects-actual-versus-intended-loss-distinction/ [perma.cc/52WX-QS3F] (noting how determining the amount of loss is the first step in determining an appropriate sentence under the Guidelines).

tended loss, pecuniary harm, reasonably foreseeable pecuniary harm, or unlawful gain.[68]

Another major change to sentencing developed out of the Sarbanes-Oxley Act (Act) of 2002.[69] After the Act passed, the Commission introduced an amendment that would add enhancements for crimes involving large numbers of victims or crimes that threatened the financial stability of companies or victims.[70] Enhancements were added for the "destruction alteration, or falsification" of documents or records.[71] Additionally, the amendment added Guidelines recommendations for two newly-created white-collar crimes: securities fraud and failure of corporate officers to certify financial reports.[72]

On the whole, when sentencing white-collar criminals, loss is king.[73] Guidelines calculations begin by valuing loss and that calculation is used to determine a starting sentence level and any subsequent level increases.[74]

B. Who We Sentence

White-collar criminals, as Edwin Sutherland described, are those individuals who are a part of the "white-collar" community—generally upper class or "respectable."[75] Being a member of the so-called upper class is not a prerequi-

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[68] *Amendment 827*, U.S. SENT'G COMM'N, https://www.ussc.gov/guidelines/amendment/827 [perma.cc/YD5C-DNHQ]; U.S.S.G. § 2B1.1. This change was to resolve an ambiguity, as pointed out by the Third Circuit in 2022, in *United States v. Banks*. 55 F.4th 246, 257 (3d Cir. 2022). In that case, the Third Circuit noted that since the Guidelines did not make clear if it was actual loss or intended loss that guide loss calculations, only actual loss should be used. *Id.*

[69] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002); ANDROPHY ET AL., *supra* note 65, at § 34:4. The Sarbanes-Oxley Act was passed after the fraudulent practices of major companies—Enron, WorldCom, Global Crossing, Adelphia Communications, and Tyco—were exposed. Brian Kim, *Sarbanes-Oxley Act*, 40 HARV. J. ON LEGIS. 235, 235 (2003). The Sarbanes-Oxley Act created the Public Company Accounting Oversight Board that would be responsible for overseeing accounting at certain public companies. *Id.* at 236; *see supra* note 3 (discussing the conditions of the Enron Scandal).

[70] ANDROPHY ET AL., *supra* note 65, at § 34:4.

[71] *Id.*

[72] *Id.*; 18 U.S.C. § 1350 (2018) (codifying criminalization of false certification of financial reports); *id.* § 1348 (codifying criminalization of securities fraud).

[73] *See* Timothy P. Crudo & Graham Ravdin, *What Really Counts in White-Collar Sentencing: The* Galleon *Cases*, 41 LITIG. 22, 22 (2015) (noting how the loss calculation governs the Guidelines' level determinations and is the most important element for white-collar sentencing).

[74] *Id.* When looking at the Guidelines, the second step after deciding that the crime committed suits the behavior described in a Guideline is determining the amount of loss to begin the level calculation. U.S.S.G. § 2B1.1. The amount of loss affects the level increases—if the loss is calculated to be $65,000 or less, there is no level increase; but if, for example, the loss is more than $150,000, ten levels are added. *Id.* If there were, for example, many victims or damage to property, other additional level enhancements are added. *Id.*

[75] Sutherland, *supra* note 34, at 1. Upton Sinclair is credited with coining the term "white-collar" to refer to office workers who had to wear white collared dress shirts every day as part of their jobs. Ulster Folk and Transport Museum, *White Collar*, BBC, https://www.bbc.co.uk/ahistoryoftheworld/objects/1AhY3K_mSwqaEBvZaN5eYw#:~:text=The%20term%20'white%20collar'%20is,wear%20

site to being a white-collar criminal: in October 2024, a doorman of a New York City building was indicted for stealing an estimated $377,685 from a retired teacher.[76] Yet, the former CEOs of Enron, President Donald Trump, and Martha Stewart remain emblematic of the white-collar criminal.[77]

It is generally agreed that white-collar criminals differ dramatically from blue-collar criminals in terms of their sociodemographics and experiences with sentencing and incarceration.[78] White-collar criminals tend to be white males, educated, mature adults, gainfully employed, sometimes married, and often without a previous criminal record.[79] Additionally, they tend to have stronger ties to their communities, religious organizations, and individuals outside of prison than their blue-collar counterparts.[80] White-collar criminals often do not

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white%2C%20collared%20dress%20shirts [perma.cc/6726-FXS8]. It is possible that the term was used as early as 1910 in a newspaper article in Logansport, Indiana, to refer to an individual going into the office wearing his white collar. *White-Collar*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/white-collar_n?tab=meaning_and_use#14377473 [perma.cc/KY2C-QZ6Y]. Sinclair was later credited with using the term in 1919 in *The Brass Check: A Study of American Journalism*. *Id*. Sinclair used the term to describe exploited workers:

> It is a fact with which every union workingman is familiar, that his most bitter despisers are the petty underlings of the business world, the poor office-clerks, who are often the worst exploited of proletarians, but who, because they are allowed to wear a white collar and to work in the office with the boss, regard themselves as members of the capitalist class.

UPTON SINCLAIR, THE BRASS CHECK: A STUDY OF AMERICAN JOURNALISM 77–78 (6th ed. 1920).

[76] *See Our Work: White Collar Crime*, MANHATTAN DIST. ATT'Y'S OFF., https://manhattanda.org/our-work/white-collar-crime/ [perma.cc/9BVJ-P6XF] (explaining the case of a New York City doorman stealing from teachers as part of a fraud along with other notable cases pursued by the Manhattan D.A.'s office).

[77] *See id.* (describing Donald Trump's conviction for falsifying business records as pursued by the Manhattan D.A.'s office, leading to a conviction by jury trial); Peter J. Henning, *The DNA of White-Collar Crime*, 11 NEW CRIM. L. REV. 323, 323 (2008) (discussing notable white-collar criminals, including Martha Stewart and Jeffrey Skilling). President Trump was convicted of thirty-four counts of falsifying business records by a jury of his peers. *Our Work: White Collar Crime*, *supra* note 76. Martha Stewart served five months in federal prison for making false statements to the Securities and Exchange Commission (SEC) during an insider trading investigation. Henning, *supra*, at 325.

[78] *See* Joshua Long, Matthew W. Logan & Mark A. Morgan, *Are White-Collar Prisoners Special? Prison Adaptation and the Special Sensitivity Hypothesis*, 77 J. CRIM. JUST. 1, 1 (2021) (noting that white-collar criminals are more likely to have better experiences with the judicial system because of their sociodemographics that are broadly different from blue-collar criminals).

[79] CYNTHIA BARNETT, U.S. DEP'T OF JUST., THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA, https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf [perma.cc/NZS6-NFAX]; State v. Rosenberger, 504 A.2d 160, 162 (N.J. Super. Ct. 1985); Paul M. Klenowski & Kimberly D. Dodson, *Who Commits White-Collar Crime, and What Do We Know About Them?*, *in* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME, *supra* note 1, at 101–02.

[80] Long et al., *supra* note 78, at 2; Klenowski & Dodson, *supra* note 79, at 102. White-collar criminals tend to have more legal know-how and interpersonal skills and are good at currying favor with guards and other inmates. Andrzej Uhl, *Carceral Experiences of White-Collar Offenders: Qualitative Research Design Utilising the Offender-Based Definition and Pierre Bourdieu's Capital Theory*, 70 CRIME L. & SOC. CHANGE 129, 129 (2022). Knowing how to follow rules and separate them-

have a previous white-collar criminal history, typically committing that first crime between their late thirties to early forties, though they may have other criminal histories, ranging from traffic citations to street crimes.[81] White-collar criminals are not limited to middle-aged, white, men; in recent years, there has been an increase in women and minority perpetrators.[82] One white-collar criminal described his fellow white-collar criminals as ambitious to their detriment, neurotic, and less conscientious than the average person.[83]

It appears that a white-collar criminal's background and life experience also assist him in faring better while incarcerated.[84] According to one study, white-collar criminals appear to be more deferential to authority, have an easier time making friends, and are less likely to experience "prison anxiety."[85] White-collar criminals are generally sentenced to minimum-security prisons, colloquially and derisively known as "Club Fed."[86] White-collar criminals do

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selves from other criminals in the eyes of guards gave them the social capital of being thought of as people who ended up in prison by "mistake." *Id.*

[81] Klenowski & Dodson, *supra* note 79, at 102–03. Although age is a good indicator of when a criminal may stop his behavior for general street crimes, the opposite seems to be true for white-collar criminals. *Id.* at 108. White-collar criminals often commit their first reported offense between their late thirties to early forties. *Id.* at 102. To commit many types of white-collar crimes, such as embezzlement, one must have been educated and experienced enough to be hired into a position affording that type of access. *Id.* at 108; *see also* Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOCIO. 552, 560, 571, 572 n.13 (1983) (discussing how the age-crime curve demonstrates how criminal activity reaches a peak and then begins a "continuous, monotonic decline" and finding the age of onset to be around thirteen and the peak age around seventeen or nineteen); Francis Ricciardone, Creating an Age-Crime Curve for Embezzlers (2023) (B.A. thesis, University of Maryland) (on file with University of Maryland), https://ccjs.umd.edu/sites/ccjs.umd.edu/files/Francis_Ricciardone_thesis.pdf [perma.cc/E4AS-DPNJ] (explaining the results of a study of seventy-nine individuals convicted of embezzlement and finding the median age for male offenders was forty-seven and female offenders as thirty-nine).

[82] *See* Klenowski & Dodson, *supra* note 79, at 119 (noting that the demographics of white-collar criminals are changing from solely white men to more women and minorities).

[83] *Id.* at 103; Evan Osnos, *Life After White-Collar Crime*, NEW YORKER (Aug. 23, 2021), https://www.newyorker.com/magazine/2021/08/30/life-after-white-collar-crime [perma.cc/SER9-PH65]. He described his fellow criminals as "successful, controlling, and perhaps narcissistic." Osnos, *supra.*

[84] *See* Long et al., *supra* note 78, at 2 (stating that because white-collar criminals typically have better education and support systems, they tend to fare better than blue-collar criminals).

[85] *See id.* at 2–3 (stating that while in prison, white-collar criminals isolate themselves from other criminals and then use that differentiation to support themselves, causing them to experience less anxiety and hopelessness than the other inmates). Prison guards also consider white-collar criminals somewhat less of a liability, so they typically leave them alone to fend for themselves. *Id.*

[86] *Surprising Facts About Prison for White-Collar Criminals*, EVANS BULLOCH PARKER PLLC ATT'YS AT L. (Mar. 17, 2021), https://www.bfhelaw.com/blog/2021/03/surprising-facts-about-prison-for-white-collar-criminals/ [perma.cc/YET3-N6XC]. Minimum security prisons may either be attached to a higher-level security prison or be a standalone facility, but all are generally known to be nonviolent, and the prisons tend not to have border security, such as patrolling border guards or even fences. Christopher Zoukis, *Minimum-Security Prisons | Federal Prison Camps*, ELIZABETH FRANKLIN-BEST APP. & FED. CRIM. L., https://federalcriminaldefenseattorney.com/prison-life/prison-security-levels/minimum-security-prisons/#:~:text=What%20is%20a%20minimum%2Dsecurity,of%20minimum%2Dsecurity%20federal%20prisons [perma.cc/47CT-JMCJ] (May 16, 2025). The earliest

not only receive prison sentences, though; they may receive prison alternatives, probation, or fines.[87] Of note, white-collar criminals receive more sentences of only fines or probation than other types of criminals.[88]

Just like other criminals, white-collar criminals have a readjustment period after being released from their term of imprisonment.[89] As part of their sentence, they may have expensive fines to pay or may have lost their license(s)

known use of the phrase "Club Fed" came in the 1970s in a magazine called *Crawdaddy*. *Club Fed*, OXFORD ENG. DICTIONARY (2024), https://www.oed.com/dictionary/club-fed_n?tl=true#:~:text=Where%20does%20the%20noun%20Club%20Fed%20come%20from?&text=The%20earliest%20known%20use%20of,is%20from%201977%2C%20in%20Crawdaddy [perma.cc/F7ZX-A6DG]. Actress Felicity Huffman served her fourteen-day sentence at Dublin Federal Correctional Institutions' satellite camp for her role in the Varsity Blues scandal, with her daily schedule including sunbathing, seeing visitors, cross-stitching, origami, and bingo, and the menu including Salisbury steaks and bran flakes. Rose Minutaglio, *Inside 'Club Fed,' Where Felicity Huffman Served Her 14-Day Prison Sentence*, ELLE (Oct. 25, 2019), https://www.elle.com/culture/celebrities/a29567743/felicity-huffman-jail-stay/ [perma.cc/UW6R-TMDQ]; *see* Kase Wickman, *Felicity Huffman Speaks Out on College Admissions Scandal: "I Felt Like I Would Be a Bad Mother If I Didn't Do It,"* VANITY FAIR (Dec. 1, 2023), https://www.vanityfair.com/style/2023/12/felicity-huffman-college-admissions-operation-varsity-blues-scandal-speaks?srsltid=AfmBOorWcHWXbNkXlQPCNTrcWfU3RuRrHZ39gVsb7SC_6RaeO5wau_n_ [perma.cc/TFV3-HV8C] (describing the Varsity Blues scandal involving celebrities, like Felicity Huffman, and other wealthy individuals, paying Rick Singer to falsify credentials for their children to be admitted to various prestigious universities). Martha Stewart spent her five-month sentence at "Camp Cupcake" in Alderson, West Virginia, a prison that allows inmates to take classes including horticulture and cosmetology. Helena Andrews-Dyer & Emily Heil, *What It's Really Like Inside 'Club Fed' Prisons*, WASH. POST (Jan. 5, 2015), https://www.washingtonpost.com/news/reliable-source/wp/2015/01/05/what-its-really-like-inside-club-fed-prisons/ [perma.cc/L9XT-NX95]. One former federal white-collar inmate suggests, however, that Club Fed no longer exists and perhaps never did. Walter Pavlo, *Gone Are America's Cushiest Federal Prisons*, FORBES (Nov. 26, 2023), https://www.forbes.com/sites/walterpavlo/2023/11/26/gone-are-americas-cushiest-federal-prisons/ [perma.cc/Z4VC-8P66]. Discussing Pensacola Federal Camp in Pensacola, Florida, Pavlo wrote that prisoners live in dormitory style barracks with communal bathrooms, eat lackluster food, and experience very hot temperatures. *Id.* Prisoners must wake up and go to bed at the same time, are not allowed to use cell phones, and could not decide what rooms they wanted to live in. *Id.* Despite these challenges, the former inmate does admit that there is little violence to contend with in the prison, and a sentence at Pensacola may include activities like racquetball, volleyball, and horseshoes. *Id.*

[87] U.S. SENT'G COMM'N, *supra* note 10, at 8.

[88] *Id.* In 2023, national statistics from the Commission revealed that 5,205 individuals were sentenced with fraud/theft/embezzlement, and 3,656 of them received a prison sentence only. *Id.* The average duration of a sentence was twenty-two months, and the median sentence was twelve months. *Id.* Out of 5,205 white-collar criminals, 229 received probation or another alternative, and the next closest crime group for this metric was drug trafficking, with 113 of 19,007 sentences resulting in probation and alternatives to incarceration. *Id.* Additionally, white-collar criminals received the most probation-only sentences, with 1,076 receiving probation only; the next closest group being immigration violations at 681 out of 19,226 sentences receiving probation only. *Id.* Finally, of those crimes that received a fine only, the "other" category topped white-collar crimes with forty-three sentences as a fine only. *Id.* Virtually no other crime group had even a single offender who received a fine only sentence. *Id.*

[89] *See* Podgor, *supra* note 14, at 740 (noting that like all criminals, when white-collar criminals are released from jail, they must reacclimate to the outside world).

and, therefore, their livelihood.[90] Nevertheless, more high-profile white-collar criminals are often eager to reassimilate to their old lives.[91]

Though it was once thought that white-collar criminals do not commit similar crimes after conviction, this is not necessarily true.[92] Though it is inconclusive as to if white-collar criminals generally tend to be "career criminals," they may be recidivists, either from having a previous blue-collar offense, or sometimes a white-collar offense.[93] Ultimately, recidivism for white-collar criminals is comparatively low, because white-collar crime is often a crime of opportunity, and being stripped of licensure after being caught often precludes a white-collar criminal from committing another such crime.[94]

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[90] *See id.* at 753 (discussing the consequences to white-collar criminals, including having to pay fines or restitution after release and having to find new jobs because they were disbarred or lost some important licensure).

[91] Osnos, *supra* note 83. After Stewart was released in 2005, she started a television show, *The Martha Stewart Show*, and released a book advising how to start a new business, *The Martha Rules*. Rafly Gilang, *Everything Martha Stewart Has Done Since Her Prison Release*, THETHINGS (Aug. 19, 2021), https://www.thethings.com/everything-martha-stewart-has-done-since-her-prison-release/ [perma.cc/ZC6R-MGW5]. She also formed a new, public business relationship and friendship with rapper, Snoop Dogg. *Id.* Her current net worth is estimated to be approximately $400 million, admittedly a decline as she became the first female billionaire prior to her conviction. Emma Banks, *Why Did Martha Stewart Go to Prison?*, INSTYLE (Oct. 30, 2024), https://www.instyle.com/why-martha-stewart-went-to-prison-8736794#:~:text=The%20full%20story%20behind%20the%20cookbook%20author's%20now%2Dinfamous%20conviction.&text=Martha%20Stewart%20has%20never%20shied,infamous%20stint%20in%20prison%2C%20explained [perma.cc/AK2E-G9D8]; Hiranmayi Srinivasan, *Martha Stewart's $400 Million Net Worth: How She Continues to Grow Her Businesses*, INVESTOPEDIA (Nov. 24, 2024), https://www.investopedia.com/martha-stewart-net-worth-8748144 [perma.cc/E7J6-39DD]. Martha Stewart is not the only convicted white-collar criminal to continue to succeed in the public eye after conviction: Donald Trump won a second term in office and Teresa Guidice went on to film several more seasons of the popular show *The Real Housewives of New Jersey*. Ben Protess & Kate Christobek, *Judge Upholds Trump's Conviction but Signals No Jail Time*, N.Y. TIMES (Jan. 3, 2025), https://www.nytimes.com/2025/01/03/nyregion/trump-sentencing-hush-money-case-ny.html [perma.cc/EM39-3X9A]; Mike Vulpo, *From Bankruptcy to Prison: A Timeline of Teresa and Joe Giudice's Legal Troubles*, E! NEWS (Mar. 14, 2019), https://www.eonline.com/news/1023591/from-bankruptcy-to-prison-a-timeline-of-teresa-and-joe-giudice-s-legal-troubles [perma.cc/U62N-3LFJ].

[92] *See* Klenowski & Dodson, *supra* note 79, at 114 (noting that there is a small body of research looking into if white-collar criminals recidivate and suggesting there may be a small subgroup of white-collar criminals who have previously committed or will go on to commit blue-collar crimes).

[93] *Id.* at 120. Some studies have suggested that the white-collar criminals who would be societally considered blue-collar and end up committing white-collar crimes are often those with prior criminal histories. *Id.*

[94] *See infra* notes 141–143 (noting how white-collar criminals often do not recidivate, at least with white-collar crimes because they are crimes of opportunity, and loss of licensure, for example, may preclude them from having the access necessary to commit those crimes again).

C. Who Suffers?

Over the years, white-collar crimes, unlike other types of crimes, have increased in frequency in Western nations.[95] White-collar victims are indiscriminately chosen in terms of age, gender, and socioeconomic status, and are especially varied given the range of crimes that fall within the ambit of white-collar crimes.[96] Stereotypically, white-collar victims are the vulnerable elderly who have their retirement savings stolen from them.[97] Retirement scams remain popular, but as new fraudulent scams develop, younger individuals who may be more willing to take investment risks that turn out to be scams are equally in danger.[98] The middle-aged are also more likely to be exposed to mortgage fraud scams that may not affect younger people who do not own homes.[99]

Women are at risk for many different types of white-collar scams, including product scams or car repair frauds, but men are vulnerable to high-level investment scams in greater proportion.[100] In terms of socioeconomic status,

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[95] *See* Klenowski & Dodson, *supra* note 79, at 101 (discussing how white-collar crime has not become less, but rather more, common throughout the decades).

[96] *See* Croall, *supra* note 1, at 68 (noting that anyone at any time can be victimized by white-collar crime and that victims are not limited to a certain area or demographic).

[97] *See id.* (noting that the stereotype of the white-collar victim is the little old lady who is swindled out of her retirement savings and that this stereotype is accurate but not exclusive). Elders who are not simply lonely, but socially isolated, are likely to be vulnerable to financial crimes. Lee-Ann Fenge & Sally Lee, *Understanding the Risks of Financial Scams as Part of Elder Abuse Prevention*, 48 BRIT. J. SOC. WORK 906, 909 (2018). Experiencing the loss of a spouse, divorce, or isolation from friends or family may lead to this social isolation. *Id.* at 913. There is also a severe underreporting problem with elders and this category of crimes, however, there was still an estimated 101,000 individuals who reported being victimized in 2023. *Elder Fraud in Focus*, FBI (Apr. 30, 2024), https://www.fbi.gov/news/stories/elder-fraud-in-focus#:~:text=Scams%20targeting%20individuals%20aged%2060,impacted%20by%20scams%20and%20fraud [perma.cc/Q38C-P7UN]. These elders may also fear that control of their homes or retirement funds will be taken away from them. *Chapter 16 Financial Crimes*, NAT'L VICTIM ASSISTANCE ACAD., https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/OVC_Archives/nvaa2000/chapter16.htm#:~:text=Impact%20on%20family%20and%20friends.&text=Victims%20may%20also%20experience%20separation,or%20another%20debilitating%20medical%20condition [perma.cc/A3RF-XBM6]. They may also suffer physical effects, such as mental health problems that may increase risk of substance abuse or suicide. *Id.*; *see infra* note 152 (discussing the physical effects that white-collar crime may have on victims including increased risk of stress that could result in a heart attack).

[98] *See Chapter 16 Financial Crimes*, *supra* note 97 (discussing how new scams have led to victimization of new populations and people and that certain groups are victimized by certain types of scams because they may be willing to behave in certain types of behavior or only certain age groups have access to the types of things fraudsters want to exploit).

[99] *See id.* (noting that only certain groups may be ripe to be scammed in certain areas—for example, middle-aged adults are more prone to mortgage scams because they may already have a house or be in the market for a new home, but older and younger populations who could not afford houses would not be good targets).

[100] Croall, *supra* note 1, at 69.

white-collar crime in its variety affects everyone from the poor to the wealthy to business corporations.[101]

As economic frauds develop with new discoveries, cryptocurrency scams targeting young people have become particularly pernicious.[102] Cryptocurrency scams may simply be folded into pre-existing scams, like romance scams, for example, because a romance scammer may try to suggest his target invest in a fraudulent cryptocurrency investment scheme.[103] Crypto-scammers may also draw in victims by offering them a risk-free way to earn large returns on investment.[104] Some scammers have started to use social media apps or other websites, like Discord or X, to convince victims to engage in their investment

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[101] *Id.* The effects of tax evasion on the economy often go under the radar, but the poorest individuals often suffer profound consequences. *Inequality and Poverty: The Hidden Costs of Tax Dodging*, OXFAM INT'L, https://www.oxfam.org/en/inequality-and-poverty-hidden-costs-tax-dodging [perma.cc/5A78-AYQK]. Tax evasion means that there are fewer public funds for poor communities who rely on vital government aid for hospitals, schools, and safe roads. *Id.*

[102] *See Cryptocurrency and Scams*, *supra* note 5 (noting the different types of cryptocurrency scams); Daniel Moss & Abby Stephan, *Scams and Online Deception: How to Protect Yourself and the Younger Adults in Your Life*, NAT'L COUNCIL ON AGING (Aug. 16, 2024), https://www.ncoa.org/article/scams-and-online-deception-how-to-protect-yourself-and-the-younger-adults-in-your-life/ [perma.cc/4G3A-3R8D] (stating that cryptocurrency scams tend to prey on the ambition and inexperience of youth using modes of attack such as texts or social media). Cryptocurrency is an alternative form of money that fully transacts online without the need for paper money. *Cryptocurrency and Scams*, *supra* note 5. Because cryptocurrency does not have a physical representation, the only place it can be stored is on a computer or an external drive in what is called a "wallet," a long string of numbers unique to the user—a drawback to this process is that if someone gets their hands on an owner's cryptocurrency wallet, it is very easy for them to transfer the cryptocurrency into a different one. *Id.* And, because these wallets are so difficult to track, it is highly unlikely that a cryptocurrency purchaser would ever be able to receive those funds back. *Id.* Alongside this drawback, cryptocurrency's value is highly volatile and is not backed by any government, so if the price drops intensely or if the coin goes under, the government cannot step in and assist you in reacquiring your lost funds. *Id.* Popular cryptocurrency coins include Bitcoin, Etherium, Tether, and Dogecoin. Logan Jacoby, *12 Most Popular Types of Cryptocurrency*, BANKRATE (Aug. 29, 2025), https://www.bankrate.com/investing/types-of-cryptocurrency/ [perma.cc/Q6JQ-DXTG].

[103] *Cryptocurrency and Scams*, *supra* note 5. Scammers can use online dating websites or other means to engage in romance scams, and instead of demanding the transfer of money from bank accounts as the scam is typically performed, the scammer will demand cryptocurrency. *Id.* And, as discussed above, because cryptocurrency is so difficult to track and these cryptocurrency transactions are typically irreversible, the victim of one of these scams is likely to never recover. *Id.*

[104] *Id*. Scammers may reach out to victims with a text from an unknown number or a message over a social media app, or they may impersonate a celebrity to draw in the victim. *Id.* The FTC warns that celebrities are generally not reaching out to individuals through social media direct messages offering a get-rich-quick scheme with payment through a QR code—therefore, it is easy to spot and ignore these scams. *Id.* Another surefire way of spotting an investment scam is by scammers claiming that they can guarantee large payouts with no risk or "free" money with little explanation. *Id.* Investors should know that there is no such thing as a guaranteed investment—all investments have risk, and a good money manager will ensure that a potential client is aware of this. *Id.*

frauds.[105] Most users on Discord are between age twenty-five and thirty-four, with the average age being sixteen.[106]

Given these changes in scam strategies, it is no surprise that victims are getting younger and younger—as of 2021, the Federal Trade Commission reported that younger people were more likely than older people to report victimization by various scams.[107] Older populations, however, were more likely to report higher losses than younger individuals.[108] Elder fraud remains extremely insidious and often goes unreported.[109] In 2023, an estimated $3.4 billion was stolen from individuals over the age of sixty, with each elder losing approximately $33,915.[110]

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[105] *How to Spot a Cryptocurrency Scam on Discord Servers and Telegram Groups*, NEBEUS (July 5, 2022), https://blog.nebeus.com/how-to-spot-a-cryptocurrency-scam-guide-on-discord-servers-and-telegram-groups/ [perma.cc/S82N-Z4ZA]. In 2022, someone impersonating Elon Musk sent out a tweet stating, "I decided to randomly choose 1000 new followers, who can participate to the biggest crypto giveaway. Hurry up to join at [url removed]." Christopher Boyd, *The Fake Elon Musk Bitcoin Giveaway Marathon Will NOT Make You Rich*, MALWAREBYTES LABS (Apr. 20, 2022), https://www.malwarebytes.com/blog/news/2022/04/the-fake-elon-musk-bitcoin-giveaway-marathon-will-not-make-you-rich [perma.cc/Z9RX-FW2Z]. The scam marketed itself as a cryptocurrency giveaway organized by Tesla and directed users to send "from 0.02 to 1 BTC to the address below and get from 0.10 to 10 BTC back." *Id.* This offer had all the hallmarks of a crypto investment scam, including the promise of large, immediate returns on investment with no risk involved. *See id.* (stating that the cryptocurrency scam promised 10 BTC for every 1 BTC returned immediately); *Cryptocurrency and Scams*, *supra* note 5 (noting that cryptocurrency investment scams tend to guarantee big and immediate payouts with little explanations while impersonating a celebrity on a social media site). Additionally, the scammers included a fake countdown bar to show how much of the 5,000 BTC remained to create a sense of urgency in victims—the faster that potential victims moved to take advantage of the deal, the less likely they were to think carefully about the potential ramifications. Boyd, *supra.*

[106] *An Introductory Look into Discord: How to Leverage the Platform to Connect and Build a Digital Community for Your Brand*, SUPER LEAGUE, https://www.superleague.com/post/an-introductory-look-into-discord#:~:text=Who%20uses%20Discord?,user%20is%2016%20years%20old [perma.cc/SV53-N2TB]. In 2024, 53.4% of Discord users were between the ages of twenty-five and thirty-four, 26% were between the ages of thirty-five and forty-four, and 20.6% were between the ages of sixteen and twenty-four. *Discord Statistics and Demographics 2024*, BLAZE (July 6, 2024), https://www.withblaze.app/blog/discord-statistics-and-demographics-2024#:~:text=%E2%80%8D-,Average%20Time%20Spent%20by%20US%20Users%20on%20Discord,%2C%20gaming%2C%20and%20community%20discussions [perma.cc/V85V-FNQ5].

[107] *See Who Experiences Scams? A Story for All Ages*, FED. TRADE COMM'N (Dec. 8, 2022), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/12/who-experiences-scams-story-all-ages [perma.cc/YA3D-VFX5] (noting that younger people are more likely to report being victimized than older people, though all age groups are affected by white-collar fraud). In 2021, people ages eighteen to fifty-nine were thirty-four percent more likely to report fraud to the FTC than people aged sixty and older. *Id.*

[108] *Id.* In 2021, the average reported median loss was $800 for victims between the ages of seventy and seventy-nine, and $1,500 for those eighty and over. *Id.*

[109] *See Elder Fraud in Focus*, *supra* note 97 (noting that elder fraud is dangerous and greatly impacts the quality of life of the elderly who are targeted, but these crimes often go unreported).

[110] *Id.* There are many different types of scams that elders may fall victim to, but chief among them are tech support scams, personal data breaches, confidence and romance scams, non-payment and non-delivery scams, and investment scams. *Id*. Investment scams caused the most amount of reported loss in 2023, at $1.2 billion. *FBI Releases 2023 Elder Fraud Report with Tech Support Scams*

Ultimately, poor individuals suffer the most from white-collar crimes for a myriad of reasons.[111] Tax evasion disproportionately affects lower income individuals who rely on welfare programs funded by taxes.[112] These individuals are also more likely to suffer from employment exploitation or environment-based white-collar crime.[113] All people who are victimized by white-collar criminals suffer, but the diminishing marginal utility of income plays a large role in the longstanding effects on them.[114] When a lower income person is defrauded of their hard earned funds, this loss is felt more acutely than when a wealthier individual or a corporation is scammed.[115]

II. JUDGING THE GUIDELINES

This Part discusses two major issues with the current sentencing regime: judicial discretion and the Guidelines' loss calculation.[116] Section A refers to

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Generating the Most Complaints and Investment Scams Proving the Costliest, FBI (May 2, 2024), https://www.fbi.gov/contact-us/field-offices/losangeles/news/fbi-releases-2023-elder-fraud-report-with-tech-support-scams-generating-the-most-complaints-and-investment-scams-proving-the-costliest [perma.cc/88ZU-CZY4].

[111] *See* Croall, *supra* note 1, at 70 (discussing how the aftereffects of white-collar crime disproportionately affect the poorest populations because they are the most likely to need programs like welfare or health insurance that are funded by taxpayer dollars).

[112] *Id.*

[113] *Id.* White-collar environmental crime occurs when typical white-collar crimes, such as money laundering or tax evasion, result in dangerous effects on the environment. U.N. ENV'T PROGRAMME, *White Collar Environmental Crimes*, *in* THE RISE OF ENVIRONMENTAL CRIME 64–65 (2016), https://www.un-ilibrary.org/content/books/9788269043419c011/read [perma.cc/8DDK-QTHA]. For example, a white-collar criminal may try to abuse the market for forest certificates. *Id.* Forest certificates mean that landowners who may otherwise be tearing down trees or vegetation on their land do not have to reforest but can pay for someone to do so on their behalf elsewhere. *Id.* When these certificates are abused, this harms the environment because landowners are not offsetting their deforestation activities with new growth. *Id.*

[114] *See* Mark S. Stein, *Diminishing Marginal Utility of Income and Progressive Taxation: A Critique of the Uneasy Case*, 12 N. ILL. U. L. REV. 373, 374 (1992) (discussing how the value of a dollar is very different for lower income individuals than higher income individuals in the taxation context). The diminishing marginal utility of income (DMUI) is the concept rooted in the idea that those who have less income make a greater "sacrifice" than those with more income, because the value of that amount is more impactful to a poorer individual. *Id.* Poorer individuals also spend more of their money proportionally on the bare essentials like housing and food. Josh Zumbrun, *How Rich and Poor Spend (and Earn) Their Money*, WALL ST. J. (Apr. 6, 2015), https://www.wsj.com/articles/BL-REB-31713 [perma.cc/3GN7-VAEJ]. In 2015, 60% of the bottom 10%'s salaries went to housing and food in the United States, as opposed to the top 10%, whose expenditures on housing and food equaled only 40% of their total expenditure. *Id.*

[115] *See* Stein, *supra* note 114, at 374 (discussing how the DMUI exacts a greater sacrifice on poorer individuals than wealthier individuals). In *State v. Rosenberger*, the defendant fraudulently deposited two checks from his employer: one in the amount of $175,000 and the other for $200,000. 504 A.2d 160, 162 (N.J. Super. Ct. 1985). There, the court noted that it was not the defendant's employer that would truly suffer from the defendant's theft and fraud, but customers who would have to pay higher prices to compensate for the funds stolen. *Id.* at 163.

[116] *See infra* Part III and accompanying text.

judicial discretion and how it has led to large amounts of leniency toward white-collar criminals.[117] This leniency may exist for many reasons, including judicial consideration of non-traditional, yet somewhat punitive consequences of white-collar crime, like disbarment or losing a special license issued by a regulatory agency.[118] A judge may consider the loss of one's license to practice law as so severe that it may be regarded as part of his punishment; this may come from a judge being better able to identify with a white-collar criminal who is an attorney than a blue-collar criminal who is not.[119]

Section B of this Part discusses the loss table found in the Manual.[120] The loss table has been the primary source of criticism and the primary means by which the Commission has attempted to close the sentencing disparity between white- and blue-collar defendants.[121] It has not been successful to date, despite repeated amendments.[122]

A. Leniency: The Problem with Judicial Discretion

White-collar sentencing has long been criticized for being too lenient compared to blue-collar sentencing.[123] Empirically, sentences for white-collar criminals tend to be lower and remain firmly beneath the minimum Guidelines recommendations.[124] Nevertheless, one common counterargument takes the opposite approach, stating that the sentencing regime is too harsh and creates disproportionately larger sentences for white-collar criminals.[125] The Guide-

[117] *See infra* notes 123–156 and accompanying text.

[118] *See infra* notes 136–142 and accompanying text.

[119] *See infra* notes 133–134 and accompanying text.

[120] *See infra* notes 157–165 and accompanying text.

[121] *See infra* notes 157–165and accompanying text.

[122] *See infra* notes 157–158 and accompanying text.

[123] *See* Harriet Pollack & Alexander B. Smith, *White-Collar v. Street Crime Sentencing Disparity: How Judges See the Problem*, 67 JUDICATURE 175, 176 (1983) (noting that disparities in white-collar and blue-collar sentencing were criticized as far back as 1961). In the 1970s, George Jackson, a Black man, was given a one-year to life sentence for stealing seventy dollars from a gas station. *Id.* Comparatively, in 1961, forty-five electrical manufacturing executives were exposed for rigging bids for government contracts and fixing prices. *Id.* The most severe sentence set down on these executives were thirty days in jail and a fine. *Id.* Approximately fifty years later, white-collar sentencing is still receiving the same criticism: when Paul Manafort, the chairman of President Trump's 2016 campaign, was sentenced for tax fraud in the millions of dollars, he received only forty-seven months in prison (four years and nine months). George Pierpoint, *Is White-Collar Crime Treated More Leniently in the US?*, BBC (Mar. 11, 2019), https://www.bbc.com/news/world-us-canada-47477754 [perma.cc/X5CZ-9MDW]. The forty-seven-month sentence was less than even what Mr. Manafort's attorney had argued he should serve, and the recommended Guidelines range was nineteen and a half to twenty-four years. *Id.*

[124] *See* Bennett et al., *supra* note 46, at 960 (noting that as of 2012, the average sentence for a white-collar crime had not reached the minimum Guidelines sentence since 2004).

[125] *See* Vollrath, *supra* note 15, at 1005 (discussing how in recent years the Guidelines sentences have substantially increased since they were initially drafted).

lines' "loss table" is the source of much of this debate.[126] Regardless of which side of the debate one falls on, what remains true is that judges have the final say on all sentences.[127]

When considering white-collar sentences, it is easy to focus on the extreme, headline-catching examples, like Bernie Madoff or Sam Bankman-

[126] *See id.* at 1018–19 (criticizing Guidelines recommendations because they overemphasize loss that is poorly defined and very challenging to calculate in certain situations, especially where publicly-traded companies are implicated). A recommended Guidelines sentence is calculated by determining an offense level, which is a numerical value assigned depending on various factors. *Id.* at 1016. First, the convicted offense must be matched to the Guidelines provision. U.S.S.G. § 1B1.1. The Guidelines provision will provide a base level offense and then any adjustments based on various cross references should be applied. *Id.* For white-collar criminals, the base level is either six or seven, and then level increases may be applied depending on the amount of loss, as determined by the loss table. *Id.* § 2B1.1. For example, if the loss associated with the crime exceeded $6,500, two levels should be applied, with loss and level increasing incrementally to the largest loss denomination of $550,000,000, resulting in a thirty-level increase. *See id.* (listing the offense level increases depending on the amount of money stolen). After the loss is calculated, other level increases may result, having to do with the amount of victims or trade secrets, among many other characteristics of the crime. *Id.* Once all enhancements and adjustments have been applied, the court will use that number to determine the applicable Guidelines range and potential sentencing options. *Id.* § 1B1.1. Finally, the court will then consider the 18 U.S.C. § 3553(a) factors and determine if an upward or downward variance is warranted. *Id.*; 18 U.S.C. § 3553(a). By way of example, most white-collar crimes result in a loss of approximately $200,000, which would result in a four-level increase according to the loss table. *See* U.S.S.G. § 2B1.1 (stating that a four-level increase is warranted for any loss greater than $15,000); *Quick Facts: Theft, Property Destruction, & Fraud*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/quick-facts/theft-property-destruction-fraud#_ftn1 [perma.cc/32WR-ZCPB] (stating the average loss in 2023 for white-collar crime was $200,000). For the sake of this example, if a base offense level of six is assumed, no enhancements or adjustments apply, and assuming the defendant has no criminal history points, his Guidelines level would be ten, which provides a Guidelines range of six to twelve months. *See* U.S.S.G. § 2B1.1 (stating that base level for offenses under this section can either be six or seven depending on the circumstances of the crime); *id.* at ch.5, pt.A (providing various Guidelines ranges depending on a defendant's criminal history and offense level calculation).

[127] *See supra* note 53–74 (discussing the sentencing procedure in the United States and how judges are guided by the Guidelines and other considerations but ultimately use their discretion when determining the appropriate sentence); Bennett et al., *supra* note 46, at 956 (discussing how the *Booker* era restored much of the judicial discretion that judges had in sentencing prior to the Sentencing Reform Act, specifically arguing that a criminal's future ultimately lays in the hands of the judge, his impression of the case, and his impression of the defendant); United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the Guidelines are advisory only); Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (discussing how judges have always had broad discretion in sentencing and how that has never been in doubt); Rita v. United States, 551 U.S. 338, 341 (2007) (holding that, when reviewing sentences, appellate courts may presume the sentence imposed by the district court was reasonable); Gall v. United States, 552 U.S. 38, 51 (2007) (holding that appellate courts should use an abuse of discretion standard when reviewing all district court sentences whether they fall within the suggested Guidelines range or not); Kimbrough v. United States, 552 U.S. 85, 110 (2007) (holding that courts do not abuse their discretion when they consider the differences between powder and crack cocaine when sentencing a defendant, even if the sentence is higher than § 3553(a) would require). The *Booker* era refers to *Booker* and its progeny, *Rita*, *Gall*, *and Kimbrough*. HENRY J. BEMPORAD, AN INTRODUCTION TO FEDERAL SENTENCING 2–3 (10th ed. 2008), https://www.nvp.uscourts.gov/downloads/presentence-investigation/intro_to_federal_sentencing.pdf [perma.cc/T5M3-JU57].

Fried, each of whom defrauded clients and consumers of billions of dollars.[128] When the Commission analyzed the 4,904 reported theft, property destruction, and fraud crimes, the median loss calculation in 2023 came out to just $200,000.[129] And, of those reported 4,904 crimes, just under half of those individuals received a lesser sentence than what the Guidelines recommended.[130] This trend is not consolidated to 2023, nor has it only begun in recent years: in 2014, the median loss calculation was $118,081 and sentences trended below Guidelines recommendations as well.[131]

Historically, there has been a perception that judges give white-collar criminals more leniency when sentencing.[132] Some judges themselves have

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[128] *See* Press Release, U.S. Dep't of Just., Justice Department Announces Distribution of Over $158.9M to Nearly 25,000 Victims of Madoff Ponzi Scheme (Dec. 11, 2023), https://www.justice.gov/archives/opa/pr/justice-department-announces-distribution-over-1589m-nearly-25000-victims-madoff-ponzi [perma.cc/HGZ2-QNBZ] (discussing Bernie Madoff's 2011 sentence charging him with a $64 billion Ponzi Scheme); Press Release, U.S. Dep't of Just., Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes (Mar. 28, 2024), https://www.justice.gov/archives/opa/pr/samuel-bankman-fried-sentenced-25-years-his-orchestration-multiple-fraudulent-schemes#:~:text=%E2%80%9CSamuel%20Bankman%2DFried%20orchestrated%20one,Southern%20District%20of%20New%20York [perma.cc/YUM8-JM9H] (stating Samuel Bankman-Fried's conviction for his FTX cryptocurrency exchange-based scheme that cost his customers $8 billion).

[129] *Quick Facts: Theft, Property Destruction, & Fraud*, *supra* note 126 (stating that the average loss for white-collar crime in 2023 was $200,000). Theft, property destruction, and fraud all fall underneath U.S.S.G. § 2B1.1, along with "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States." *See id.* (highlighting statistics related to the median loss amounts); U.S.S.G. § 2B1.1 (describing the statutory Guidelines recommendations for the crimes included under this statute).

[130] *Quick Facts: Theft, Property Destruction, & Fraud*, *supra* note 126. Of the collected 4,904 crimes, 66.4% were given a Guidelines range sentence, but of those remaining 44.1% who received a variance, 95.5% of those variances were downward. *Id.* The average variance reduction was 57.2%. *Id.*

[131] Bennett et al., *supra* note 46, at 964.

[132] *See* Pollack & Smith, *supra* note 123, at 176 (discussing how judges have had difficulty with adequately sentencing white-collar criminals). *See generally* ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUD. CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974) (discussing the results of a study where judges were given limited fact situations and generally tended to sentence more harshly for blue-collar fact patterns than white-collar, though this difference was not statistically significant). In this study, two of thirty provided fact patterns were used to try to root out if there was a disparity between how judges treat white versus blue-collar crime. *Id.* at 53. Fact pattern 29A stated that the defendant had been convicted of selling heroin but was a high school dropout from a stable working-class family. *Id.* at 54. Fact pattern 29B was for the same crime, but the defendant's father was a businessman and the defendant himself had graduated from college. *Id.* Fact pattern 30A was a conviction for false claims by a physician for Medicare fraud. *Id.* Fact pattern 30B had to do with the same defendant physician from fact pattern 30A, except instead of false claims for Medicare fraud, he had transported and conspired to sell securities in the same amount that the Medicare fraud had been. *Id.* In both of these situations, the judges surveyed, all from the Second Circuit, were somewhat more severe with the "A" fact patterns, though the study noted that this difference was not statistically significant. *Id.* Of note, these judges did tend to include a probation sentence instead of a prison sentence. *Id.* The differences between the A and B fact patterns appeared to try to get at the two warring definitions of "white-collar," some using the term to

admitted that they either have difficulty with sentencing white-collar criminals or consider extrajudicial factors when determining a sentence.[133] One area of concern is that judges and white-collar defendants tend to come from similar socioeconomic and racial backgrounds, that may make judges subconsciously more prone to empathy toward them.[134] Of course, judges are both trained and ethically required to be neutral participants in the justice system, but implicit biases may still unintentionally appear.[135]

Further, judges tend to consider nontraditional punitive results of white-collar crime when imposing sentences.[136] Committing a white-collar crime

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refer to the "type" of criminal and others using it to refer to the type of crime. *See id*. at 53 (using fact pattern 29A & B to get at the "person" as the white-collar criminal and fact pattern 30A & B to get to the type of crime definition of white-collar criminal); Sutherland, *supra* note 34, at 1 (defining white-collar crimes as crimes committed by more "upper-class" individuals); *What Is White-Collar Crime, and How Is the FBI Combating It?*, *supra* note 34 (stating the FBI's position that white-collar crime is associated with the type of criminal rather than type of crime).

[133] *See* Bennett et al., *supra* note 46, at 947 (discussing how judges consider the particular attributes of white-collar criminals and their relationships to those attributes).

[134] *Id*. A survey conducted in the 1980s revealed that many judges perceived white-collar criminals differently than blue-collar criminals and, in fact, gave them "special empathy." *Id.* This is a known psychological phenomenon: people are more likely to feel greater empathy for in-group members than for out-group members. *Id.* at 951 n.53. Of the 1,457 sitting judges in federal courts, 64% were male and 74% were white. *Judges*, A.B.A. (Nov. 18, 2024), https://www.americanbar.org/news/profile-legal-profession/judges/ [perma.cc/H8N7-B8ET]. As discussed above, white-collar criminals are overwhelmingly white men, meaning it is possible that white-collar criminals receive greater empathy from judges because they tend to have a similar socioeconomic status and racial identity. *See supra* notes 78–83 (discussing how white-collar criminals tend to be educated, older white males, though these demographics are changing to include more women and minority populations).

[135] *See generally Code of Conduct for United States Judges*, U.S. CTS., https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges [perma.cc/2XAM-C25E] (providing the ethical canons judges must follow as part of their role on the bench, including remaining neutral and not exerting bias over proceedings). Additionally, judges, despite being well-trained to remain neutral, have been found to fall victim to similar cognitive heuristics that affect other professionals, including doctors, leaders of the armed forces, and psychologists. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging by Heuristic, Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 44 (2002). Judges in particular may fall victim to an "egocentric bias," meaning that they are more likely to overestimate their own ability within a certain activity. *Id.* at 49. For example, 56.1% of the judges in one study stated that their judicial decisions were unlikely to be reversed on appellate review, which, although statistically unlikely, demonstrates a judge's bias toward his own capability. *Id.* at 50. This suggests that even if a judge were able to keep out his implicit racial or socioeconomic biases from his sentencing, there may be other forms of cognitive heuristics that could impact the way he hears and imposes his sentence. *See id.* (discussing judges' general proclivities toward egocentric bias).

[136] *See* Bennett et al., *supra* note 46, at 947 (discussing how judges consider the loss of prestige, jobs, licenses, or status as part of the punitive effect on white-collar criminals); One judge described this phenomenon:

> If a man who has gone through three years of law school, and then gone through a bar review course and taken the bar review exam, and has a nice practice, and is making—I think in this case—something like $40,000 a year and suddenly he is disbarred, I would consider that a stiffer punishment than anything I would be likely to impose . . . . And those fellows, unless the conviction is reversed, are going to be automatically disbarred

requires a certain amount of access or opportunity.[137] It follows logically that to be in a position to embezzle millions of dollars from a corporation, one must first have the credentials to get access to the company's money.[138] Therefore, some judges think that when a white-collar criminal is caught, the fact that he loses his prestigious job or license to practice is a significant enough consequence to be part of his punishment.[139] Additionally, because white-collar criminals tend to hold more prestigious positions in society, judges may consider any jail time to be more consequential to them than other defendants.[140] Finally, a judge may be less concerned with recidivism because white-collar criminals tend to be less prone to recidivate.[141] This is in part because once a

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> . . . . And their career is shot. And I don't know what in the world I will do by way of sentencing those fellows, but certainly the law which provides for automatic disbarment is a stiffer sentence than any I could think of imposing.

Kenneth Mann, Stanton Wheeler & Austin Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 485 (1980). The judges also pointed out the significance of the injury to a white-collar criminal's "relationship to the community, to his family" along with his "loss of credit, a loss of bank credit, a loss of friends, social status, occasionally loss of a wife, members of the family, children around the father." *Id.* at 484–85. Another judge even admitted:

> I think the first sentence to a prison term for a person who up to now has lived and has surrounded himself with a family, that lives in terms of great respectability and community respect and so on, *whether one likes to say this or not I think a term of imprisonment for such a person is probably a harsher, more painful sanction than it is for someone who grows up somewhere where people are always in and out of prison*. There may be something racist about saying that . . . .

Id. at 486–87 (emphasis added).

[137] *See* Petter Gottschalk, *Organizational Convenience for White-Collar Crime: Opportunity Expansion by Offender Behavior*, 32 CRIM. JUST. STUD. 50, 50 (2019) (discussing the concept of organizational opportunity and how it is a prerequisite to many white-collar crimes). Organizational opportunity within white-collar crime has three elements: (1) legitimate access; (2) the victim being geographically distant; and (3) the act appearing legitimate. *Id.*

[138] *See id.* at 54–55 (discussing a case study of a CFO in Norway whose access first as an accountant for a company and later as CFO gave him the chance to shape accounting procedures so he could later exploit them to embezzle funds from the company). An element of organizational opportunity is the criminal having "lawful and legitimate" access to the thing being exploited, along with a geographical distance between the offender and victim, and apparent legitimacy. *Id.* at 50.

[139] *See* Bennett et al., *supra* note 46, at 947 (discussing how some judges perceive loss of prestige as part of a white-collar criminal's sentence); Podgor, *supra* note 14, at 753 (discussing how reputational loss or public embarrassment can be so severe for white-collar criminals that it can be considered to be part of their sentence).

[140] *See* Podgor, *supra* note 14, at 739–40 (discussing how a prison sentence may feel harsher to a white-collar criminal); Mann et al., *supra* note 136, at 485–87 (providing quotes from judges explaining how the loss of reputation, family, money, or prestige can be harsher than a sentence imposed by a judge). The idea that a white-collar criminal suffers "more" from a sentence may be at least in part predicated on the idea that, because white-collar criminals are wealthy and from upper classes, the concept of prison is foreign to their privileged lives. *See* Bennett et al., *supra* note 46, at 947 (discussing the impact of the position these white-collar criminals have on their outlook in life).

[141] *See* Lauren F.E. Galloway, An Investigation of White-Collar Criminal Sentencing Disparities in Six Federal District Courts (2020) (Ph.D. dissertation, University of Nevada, Las Vegas) (noting

white-collar criminal is caught and stripped of his position or licensure, he is generally precluded from having the opportunity to commit a similar crime again.[142] Sentencing judges' philosophies are impacted by these low recidivism rates, that in turn affects how they choose to prioritize either general or specific deterrence.[143]

Finally, judicial leniency for these types of crimes may be influenced by the general presupposition that, because white-collar crimes are nonviolent, white-collar criminals are less dangerous.[144] Although the nonviolent classification for white-collar crimes makes them not dangerous in the physical sense, they can still pose a danger to society at large.[145] Though white-collar crimes—like fraud—pose less of an immediate physical danger than violent crimes—like murder or rape—fraud is best analogized to robbery.[146] When

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that being stripped of employment or licenses can contribute to low recidivism rates); Podgor, *supra* note 14, at 758 (noting judges can further reduce future dangerousness by preventing white-collar criminals from serving in positions of power in corporations, for example, as part of their sentences).

[142] Podgor, *supra* note 14, at 758. According to a study conducted in 2016 by the Commission, fraud offenses, which include those crimes under U.S.S.G. § 2B1.1, resulted in a 34.2% recidivism rate, which was the lowest of all the studied crimes. KIM STEVEN HUNT & ROBERT DUMVILLE, U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, at A-1 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [perma.cc/GU4F-B2S6]; U.S.S.G § 2B1.1. Additionally, rearrest and reconviction rates for fraud were the lowest of all studied crimes. HUNT & DUMVILLE, *supra*, at A-1.

[143] *See* Pollack & Smith, *supra* note 123, at 177–78 (discussing results of a survey given to federal judges in which nearly all surveyed stated that the number one priority in white-collar sentencing is deterrence). General deterrence was a priority for most judges and many also stated that they were concerned with specific deterrence—despite which of the two they preferred, deterrence rather than the other rationales for punishment were the priority. *Id.*

[144] *See* Stewart, *supra* note 35 (discussing how judges may consider the relative lack of dangerousness of white-collar criminals when sentencing). This is not to say that violence is not involved in white-collar crime—in fact, the term "red collar crime" refers to when a white-collar crime becomes violent. *Do White-Collar Crimes Ever Turn Violent?*, MERANDA L. FIRM (May 8, 2023), https://www.columbusattorneycriminal.com/law-blog/2023/may/do-white-collar-crimes-ever-turn-violent-/ [perma.cc/WB3E-M75D]. In the process of committing a white-collar crime, a criminal may commit violent acts, such as murder, to further his white-collar intentions. *Id.*

[145] *See* Stewart, *supra* note 35 (considering the nonviolent nature of white-collar criminals); *supra* notes 111–115 (discussing the threats white-collar criminals pose to society, especially harm toward elderly populations, poorer individuals, the environment, and society at large); J. Scott Dutcher, *From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L.J. 1295, 1300 (2005) (discussing how white-collar criminals have historically been punished more leniently than blue-collar criminals because of their nonviolent nature). Hand-in-hand with the idea of non-violence, white-collar criminals also do not strike fear into the general public in the same way a violent criminal might. Dutcher, *supra*, at 1301. Blue-collar crimes are different than white-collar crimes in the way they are committed—a robbery often involves a face-to-face interaction that can be violent and cause the victim to fear for their safety. *Id.* at 1301 n.43. This is in contrast to white-collar crime, which tends to designedly be committed from a distance. *Id.* at 1301.

[146] *See* Bennett et al., *supra* note 46, at 950–51 (discussing how legislators considered the gap between blue-collar theft and white-collar fraud when attempting to resolve the sentencing disparity, despite the apparent similarities of the two crimes). Consider robbing a federally insured bank, a vio-

considering the effects of an armed bank robbery, tellers and the individuals within the bank are the most impacted.[147] After a bank robbery, however, whatever amount of money the robber was able to steal is often covered by insurance, and the bank has no problem making up the difference.[148]

When comparing the consequences of a bank robbery to that of financial elder abuse, for example, the consequences seem comparable, if not more severe.[149] Because the elderly are often living off of fixed incomes, their quality of life is significantly diminished when they suffer from scams as they may have limited or no access to additional funds.[150] This means they may not be

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lation of 18 U.S.C. § 2113. 18 U.S.C. § 2113. In November 2022, Miquel Antonio Jones and several co-conspirators traveled to Martha's Vineyard and robbed the Rockland Trust Bank in Vineyard Haven. Staff Report, *Man Who Conspired with CT Resident for Brazen Martha's Vineyard Armed Bank Robbery Gets Prison*, HARTFORD COURANT (Dec. 19, 2024), https://www.courant.com/2024/12/19/man-who-conspired-with-ct-resident-for-brazen-marthas-vineyard-armed-bank-robbery-gets-prison/ [perma.cc/4A88-DEYF]. The perpetrators bound the hands of the bank's employees and used handguns to scare them and ultimately stole $39,000. Press Release, U.S. Att'y's Off., Dist. of Mass., *Man Who Robbed Martha's Vineyard Bank at Gunpoint Sentenced to Decade in Prison* (Dec. 18, 2024), https://www.justice.gov/usao-ma/pr/man-who-robbed-marthas-vineyard-bank-gunpoint-sentenced-decade-prison [perma.cc/B5SM-U85M]. Jones was sentenced to ten years in federal prison to be followed by three years of supervised released by the U.S. District Court of Massachusetts. *Id.*

147 Nicola Mucci et al., *Predictors of Trauma in Bank Employee Robbery Victims*, 11 NEUROPSYCHIATRIC DISEASE & TREATMENT 2605, 2606 (2015) (describing how individuals can experience PTSD symptoms after being party to a bank robbery, including anxiety, intense fear, and depression).

148 *See Financial Products That Are Not Insured by the FDIC*, FDIC, https://www.fdic.gov/resources/deposit-insurance/financial-products-not-insured#:~:text=Stolen%20funds%20may%20be%20covered,other%20causes%20of%20disappearing%20funds [perma.cc/9HZG-4BMV] (Apr. 1, 2024) (describing the banker's blanket bond, a type of insurance that a bank often has to cover various emergencies, including natural disasters, embezzlement, or robberies). Rockland Trust Bank's Holding Company, the Independent Bank Corporation, reported that their 2024 fourth quarter income was a net $50 million. Press Release, Indep. Bank Corp., Independent Bank Corp. Reports Fourth Quarter Net Income of $50.0 Million (Jan. 16, 2025), https://indb.rocklandtrust.com/press-releases/news-details/2025/Independent-Bank-Corp.-Reports-Fourth-Quarter-Net-Income-of-50.0-Million/default.aspx [perma.cc/6CVJ-H6AU]. Banks typically also do not keep a large amount of money on hand at any given moment. Abha Bhattarai, Talia Trackim & Martin Tognola, *What Banks Do with Your Money*, WASH. POST (July 6, 2023), https://www.washingtonpost.com/business/interactive/2023/what-banks-do-with-your-money/ [perma.cc/T92M-HQW5]. Pre-pandemic, banks tended to keep roughly 3% to 10% of deposits on hand at any given moment; however, now, larger banks are typically only required to have enough money on hand to meet withdrawal and payment requests for thirty days. *Id.*

149 *See Chapter 16 Financial Crimes*, *supra* note 97 (discussing impacts of financial abuse on elder victims, including fear of embarrassment, losing financial independence, or having their home signed away). Vidal Roquez was convicted of defrauding thirteen elderly people by posing as friends of their relatives and claiming they were in trouble and immediately needed bail money. Press Release, U.S. Dep't of Just., Providence Man Sentenced for Scamming Rhode Island and Massachusetts Seniors (May 3, 2024), https://www.justice.gov/usao-ri/pr/providence-man-sentenced-scamming-rhode-island-and-massachusetts-seniors [perma.cc/K9NL-N78Z]. He pled guilty to wire fraud and was sentenced to twelve months and one day in prison, $130,300 in restitution, and sixty hours of community service by the U.S. District Court for the District of Massachusetts. *Id.*

150 *See* ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2023, BD. OF GOVERNORS OF FED. RSRV. SYS. (2024), https://www.federalreserve.gov/publications/2024-economic-well-being-of-us-households-in-2023-retirement-investments.htm#:~:text=Social%20Security%20remained%20the%

able to take care of themselves, they may lose their financial independence completely, or they may suffer more severe effects, including depression or suicide.[151] It has also been well established that psychological trauma may lead to physical effects, ranging from headaches to a heart attack.[152] For the remainder of a victim's life, he must handle the potentially devastating impacts of having limited funds—funds that he likely spent years collecting—to support himself.[153]

Ultimately, white-collar crime is different from blue-collar crime, as seen by their terminological distinction: most white-collar crimes are considered *malum prohibitum,* not *malum in se*.[154] Neither of these designations should be

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20most,labor%20income%20(table%2036) [perma.cc/V6AT-WHTS] (discussing sources of retirement income for retirees from 2023 to May 2024); Silvia Fraga Dominguez, Bee Ozguler, Jennifer E. Storey & Michaela Rogers, *Elder Abuse Vulnerability and Risk Factors: Is Financial Abuse Different from Other Subtypes?*, 41 J. APPLIED GERONTOLOGY 928, 928–29 (2022) (discussing effects of financial elder abuse, including inability to care for themselves because they do not have the financial means to, hindered quality of life, psychological distress, depression, and suicide). The most common form of income for retirees was social security, with ninety-two percent of individuals over age sixty-five having received social security. ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2023, *supra*. Nevertheless, eighty percent of individuals had a secondary, private source of income, including pensions, interest, dividends or rental income, and labor income. *Id*.

[151] Dominguez et al., *supra* note 150, at 928–29 (reporting dangerous effects on elders and how their quality of life can be seriously diminished).

[152] *Stress Effects on the Body*, AM. PSYCH. ASS'N (Oct. 21, 2024), https://www.apa.org/topics/stress/body [perma.cc/S7Z9-94SN] (discussing the effects of stress on the body, including headaches, muscle pain, shortness of breath that can worsen existing respiratory problems like asthma, or constricted blood vessels that long term may lead to more serious effects like a heart attack or stroke).

[153] *See* Fidelity Viewpoints, *How Much Do I Need to Retire?*, FIDELITY (Feb. 14, 2025), https://www.fidelity.com/viewpoints/retirement/how-much-do-i-need-to-retire [perma.cc/A4ST-E6NF] (noting that if a person starts saving at age twenty-five, the goal is to reach ten times their income by age sixty-five). The "normal retirement age" as determined by the Social Security Administration is sixty-seven. *Normal Retirement Age*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/progdata/nra.html [perma.cc/32W8-947Q].

[154] *See* Michael Levi, *Suite Revenge? The Shaping of Folk Devils and Moral Panics About White-Collar Crimes*, 49 BRIT. J. CRIMINOLOGY 48, 49 (2009) (noting how white-collar criminals have previously avoided such titles as "criminals" as well as other kinds of moral outrage); *The Process of Othering*, MONTR. HOLOCAUST MUSEUM, https://museeholocauste.ca/en/resources-training/the-process-of-othering/ [perma.cc/57UR-K9GH] (defining the process of othering where one group is treated differently than others based on some fundamental characteristic or designation); *Malum Prohibitum*, BLACK'S LAW DICTIONARY, *supra* note 10 (defining crimes that are *malum prohibitum* as an act that is decided to be illegal but is not in and of itself immoral); *Malum in Se*, BLACK'S LAW DICTIONARY, *supra* note 10 (defining crimes that are *malum in se* as crimes that are inherently evil or immoral). Save for fraud, white-collar crimes like tax evasion are considered *malum prohibitum* and thereby avoid the *malum in se* categorization because they tend not to be violent. Pedro Gerson, *Less is More?: Accountability for White-Collar Offenses Through an Abolitionist Framework*, 2 STETSON BUS. L. REV. 144, 171 (2022). But even though these crimes are not defined as inherently evil, we as a society have decided they are not allowed and this distinction between crimes should go no further than a general categorization. *See* Richard L. Gray, Note, *Eliminating the (Absurd) Distinction Between* Malum In Se *and* Malum Prohibitum *Crimes*, 73 WASH. U.L. REV. 1369, 1372 (1995) (arguing that the distinction between *malum prohibitum* and *malum in se* crimes should be abolished because it arbitrarily allows judges to impose their own moral wills on criminals).

grounds for judicial leniency, though.[155] Despite white-collar criminals' best efforts to avoid garnering similar stigmatization as other criminals, their committed crimes still harmed individual victims and society as a whole.[156]

B. The Draconian Loss Calculation

Perhaps the most commonly raised criticism when discussing the Guidelines' method of sentencing white-collar criminals is the "loss table."[157] For decades, legislators have looked to the loss table as a fix for the sentencing disparity but, in the process, they have gone far beyond what sentences many judges are willing to impose.[158] For example, the current loss table has the highest amount of loss at over $550,000,000.[159] As established, the average amount of loss in a white-collar crime is $200,000.[160] This itself is not inherently problematic, but the level increases that go along with these amounts lead to the high sentencing recommendations that usually result in judges either sentencing at the bottom of or below those recommendations.[161] Given these high recommendations, it appears the Commission may have overcorrected in an effort to close the sentencing disparities between white-collar and other types of crime.[162]

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[155] *See* Mann et al., *supra* note 136, at 486–87 (providing quotes from judges explaining how they consider other factors when sentencing white-collar criminals).

[156] *See* Levi, *supra* note 154, at 52 (noting how achieving moral panic status may be preempted for white-collar criminals in some sense because society has primed its citizens to believe that white-collar individuals are aspirational and deserve admiration). Helpful to causing public outrage is being a "visible minority," that is, physically different in terms of race or some other physical difference. *Id.* Though not a hard and fast rule, white-collar criminals tend not to be minorities, something that helps them in front of their audience—judges—who are also overwhelmingly white males. *See supra* note 134 (discussing judicial demographics and how that may assist white-collar criminals when being sentenced); *supra* note 79 (describing the typical demographics of white-collar criminals being overwhelmingly educated, older, white males).

[157] *See* Podgor, *supra* note 14, at 734 (referring to the loss calculation as draconian because the levels are not proportional to the conduct the criminals engage in and sometimes exceed the life of white-collar criminals); *supra* notes 53–74 (discussing the importance of the loss calculation, the definition of loss, and recent amendments to the Guidelines regarding this definition); U.S.S.G. § 2B1.1 (listing the loss table and the increase in levels that correlate to the amount of loss).

[158] *See* Bennett et al., *supra* note 46, at 950–51 (discussing how, when the Commission was handling the creation of white-collar sentences, it immediately turned to the loss as a guiding factor, and how it has continued to use the loss table to guide increases in suggested sentences).

[159] U.S.S.G. § 2B1.1.

[160] *Quick Facts: Theft, Property Destruction, & Fraud*, *supra* note 126.

[161] *See* Bennett et al., *supra* note 46, at 989 (discussing how judges tend to sentence below Guidelines recommendations because they lack faith in the sentencing ranges and purported policies associated with them).

[162] *Id.* at 983 (noting that the loss calculation has not served as the panacea that the Commission hoped it would be); Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169 (2008) (referring to post-*Booker* cases as providing sentences that are far too high for economic crimes as informed by the loss table); United States v. Corsey, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., concurring) (discussing how the loss table is "fundamentally flawed," especially as it relates to intended loss and as loss amounts become greater and greater).

Keeping in mind that the loss calculation is the "single most important factor in the application of the Sentencing Guidelines" and that the Guidelines still remain extremely influential, the loss calculation should rule the white-collar criminal's entire sentence.[163] It does not, however.[164] If the loss table was truly so draconian as to lead to unreasonable sentences within the Guidelines, then *all* white-collar criminals would receive extreme sentences, and they patently do not.[165]

III. A NEW KIND OF JUDGE

As discussed in this Note, the Guidelines' loss table has generally been the problem that critics and the Commission alike have looked to as a cure-all for sentencing disparities.[166] This Note proposes that the loss table is not the issue, but rather its judicial application.[167] A potential solution to the judicial application could be designating a special bench of judges who only hear white-collar crime issues.[168]

Of course, creating this special bench might surely result in a host of complications: categorizing an informal "white-collar" designation and potentially adding to a further perception that white-collar criminals receive better treatment.[169] But given that judges tend to act outside of the bounds of the Guidelines, it may be that the solution lies not with the Guidelines, but within the context in which white-collar criminals are sentenced.[170]

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[163] *See* Vollrath, *supra* note 15, at 1016 (quoting Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 767 (2006)) (noting the importance of the loss calculation to white-collar sentencing); Chun, *supra* note 53, at 64 (noting that, even though the Guidelines are now advisory, they remain a very important guiding factor for the judge in sentencing); Isaac M. Gradman, *Hot Under the White Collar: What the Rollercoaster in Sentencing Law from* Blakely *to* Booker *Will Mean to Corporate Offenders*, 1 N.Y.U. J.L. & BUS. 731, 744 (2005) (discussing how the loss table was the most important factor in determining sentence length for fraud cases). The loss table and the Guidelines have repeatedly been referred to as the single most important factor in sentencing because the Guidelines are still considered to be the baseline source for most judges. *See* Gertner, *supra* note 56 (discussing how, though *Booker* made the Guidelines advisory, judges will not necessarily stray from them). Additionally, 18 U.S.C. § 3553(a)(4) refers to the Guidelines and requires that Courts look to them as part of their entire analysis. 18 U.S.C. § 3553(a)(4). Even in *Booker*, the Supreme Court was careful not to completely discredit the Guidelines and specifically stated that the ruling required courts to still consider them, even though they were able to adjust the sentence in light of other considerations. 543 U.S. 220, 245 (2005).

[164] *See* Bennett et al., *supra* note 46, at 960 (stating that the average sentence does not even reach the minimum recommended Guidelines sentence for most white-collar crimes).

[165] *See supra* note 88 and accompanying text (noting how white-collar crimes historically and contemporaneously receive sentences much lower than blue-collar crimes).

[166] *See supra* Part II (discussing the challenges associated with white-collar sentences as they relate to judicial discretion and Guidelines loss table calculations).

[167] *See supra* notes 123–156 (discussing judicial discretion and how it has led to the disparate treatment of white-collar and blue-collar criminals).

[168] *See infra* Part III and accompanying text.

[169] *See infra* notes 174–209 and accompanying text.

[170] *See infra* Part III and accompanying text.

Section A of this Part discusses the potential benefits of creating a separate bench of judges with specialized knowledge in white-collar cases.[171] Section B discusses limitations to this solution, including the challenge of categorizing white-collar crimes and the potential for further isolation of blue-collar criminals from white-collar criminals.[172] Finally, Section C poses the counterargument that white-collar sentences and the current framework are appropriate, but ultimately argues the pitfalls outweigh the benefits.[173]

A. A Specialized Bench

Because white-collar sentencing is so slanted toward judicial discretion in the face of the proposed Guidelines sentences, a potential solution to the existing sentencing disparities may not lie in the Guidelines at all.[174] Instead, a potential solution may be to carve out an additional specialized bench that only focuses on white-collar crime, and defendants could opt into having their cases heard in front of these courts.[175] Another iteration of this could be creating a bench similar to the Judicial Panel on Multidistrict Litigation.[176]Courts that only handle certain issues are certainly not unheard of: the Tax Court handles only tax matters, and the Court of Appeals for the Armed Forces hears only issues relating

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[171] *See infra* notes 174–188 and accompanying text.

[172] *See infra* notes 189–209 and accompanying text.

[173] *See infra* notes 210–218 and accompanying text.

[174] *See supra* notes 123–156 and accompanying text.

[175] *See About U.S. Federal Courts*, FED. BAR ASS'N, https://www.fedbar.org/for-the-public/about-u-s-federal-courts/ [perma.cc/5KSW-DMLX] (discussing the different types of specialized courts in the United States, including the U.S. Courts of Special Jurisdiction). The U.S. Courts of Special Jurisdiction include the "U.S. Court of Appeals for the Armed Forces, the U.S. Court of Federal Claims, the U.S. Court of International Trade, the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, and the Judicial Panel on Multidistrict Litigation." *Id.* The U.S. Court of Appeals for the Armed Forces, for example, hears cases having to do with military disciplinary actions. Gregory R. Hargis, *A Bridge Too Far: Terminating the United States Court of Appeals for the Armed Forces Would Harm National Security and Cause Inefficient Administration of Military and Civilian Justice*, 24 J. APP. PRAC. & PROCESS 169, 171 (2024). The U.S. Court of Federal Claims hears a broad array of cases against the U.S. government, including contract claims, tax claims, patents, and vaccines. *Court of Federal Claims Litigation*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/jm/civil-resource-manual-47-court-federal-claims-litigation#:~:text=The%20United%20States%20Court%20of,pay%20cases%2C%20and%20vaccine%20cases [perma.cc/ZLC2-87KM]. The Judicial Panel on Multidistrict Litigation is a panel of seven judges formed to hear lawsuits arising out of different jurisdictions. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 842 (2017). To have a case heard before the Judicial Panel on Multidistrict Litigation, one of the parties must move to be heard in the court. *Id.*

[176] *See* Bradt, *supra* note 175, at 834 (discussing the origin and development of multidistrict litigation and the use of a panel of judges). One-third of the federal docket was consolidated into multidistrict litigation cases. *Id.* at 843. The Judicial Panel on Multidistrict Litigation decides to hear multidistrict litigation cases, depending on if it decides hearing it would "be for the convenience of parties and witnesses and will promote the just and efficient conduct of [the] actions." *Id.* at 842 (quoting 28 U.S.C. § 1407(a)).

to members of the U.S. military.[177] Additionally, U.S. federal agencies also have a number of administrative courts that address particular crimes associated with particular agencies.[178]Introducing a new white-collar court would not seek to eliminate the existing fact-finding structure where each defendant is entitled to a trial before a jury of his peers.[179] The aim would be solely to have a particular set of judges, who have specific expertise in white-collar crimes,

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[177] *See About U.S. Federal Courts*, *supra* note 175 (discussing the existence of many different types of U.S. Courts of Special Jurisdiction, including the U.S. Court of Appeals for the Armed Forces, the U.S. Court of Federal Claims, the U.S. Court of International Trade, and the Panel on Multidistrict Litigation, among many others). Tax litigants are not limited to the Tax Court alone—a tax issue may be heard in front of the U.S. Tax Court, a U.S. District Court, or the U.S. Claims Court. Thomas M. Brinker, Jr. & James J. Tucker, *The Decision to Litigate*: *A Choice of Forum*, CPA J. ONLINE (Feb. 1993), http://archives.cpajournal.com/old/13808649.htm [perma.cc/3H2C-7PNX]. These three courts have different requirements for their judges and the types of cases that they can hear: for example, the Tax Court can only hear disputes about income tax, estate tax, gift tax, and a limited range of excise taxes. *Id.* When filing in Tax Court, the litigant is not required to pay the tax prior to having his case heard, which is a significant advantage. *Id.* Tax Courts have a limited bench with only nineteen judges who serve fifteen-year terms. *Id.* In 2023, 21,882 cases were filed with the Tax Court, and it closed 31,585 cases. U.S. TAX CT., CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2025 (2024). Having a tax case heard before a U.S. District Court gives the litigant an option for a jury trial or a non-jury trial. Brinker & Tucker, *supra*. The taxpayer, however, must first pay the tax and then sue for a refund. *Id.* Finally, the U.S. Claims Court is also a refund court, so the taxpayer must pay the tax, like in District Court. *Id.* The Claims Court is comprised of sixteen judges serving fifteen-year terms. *Id.* Approximately one-third of the Claims Court docket is made up of tax cases. *Id.* In the twelve months preceding September 30, 2023, sixty-five new tax cases were filed in the Federal Claims Court, seventy-five were terminated, and the fiscal year ended with 107 tax cases total. U.S. TAX CT., TABLE G-2A U.S. COURT OF FEDERAL CLAIMS—CASES FILED, TERMINATED, AND PENDING, https://www.uscourts.gov/sites/default/files/data_tables/jb_g2a_0930.2023.pdf [perma.cc/VZ7B-4XZ4]. The U.S. Court of Appeals for the Armed Forces hears cases about active-duty members of the Armed Forces, as well as other individuals who are beholden to the Uniform Code of Military Justice. *Home*, U.S. CT. OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/ [perma.cc/J67R-ABJR]. Court martialing has existed in the United States since as early as 1775, but a dedicated court to hear each of these issues was not established until 1920. *About the Court*, U.S. CT. OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/about.htm [perma.cc/AKC2-Q79P].

[178] *See generally* Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765 (2021) (discussing the general importance of administrative courts). In the United States, most agency disputes are handled within agency courts. *Id.* The SEC also has its own small bank of administrative judges who handle matters in house. Michelle Price & Chris Prentice, *Explainer: What Is the US SEC's In-House Court Under Supreme Court Review?*, REUTERS (June 27, 2024), https://www.reuters.com/world/us/what-is-us-secs-in-house-court-under-supreme-court-review-2024-06-13/#:~:text=WHAT%20IS%20THE%20SEC'S%20IN,have%20expertise%20in%20securities%20law [perma.cc/YV9N-3QFA].

[179] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."). A criminal defendant must have the choice to be heard by a jury on every element of the crime and must also be found guilty on every element beyond a reasonable doubt. United States v. Gaudin, 515 U.S. 506, 509–10 (1995). Justice Story described the purpose of a criminal jury trial to "guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1773–1775 (1833), https://press-pubs.uchicago.edu/founders/documents/a3_2_3s19.html [perma.cc/6KJM-VTGM].

presiding over these jury trials.[180] The benefit of judges with experience is their special knowledge in the subject area over which they preside and the greater likelihood that they are primed to answer complicated questions quickly and efficiently.[181] Having a judge with credentials and a background in white-collar crime theoretically would produce this very result.[182]

Further, these judges' expertise puts them in a better position to understand the cascading effects of white-collar crime.[183] By virtue of careers or special knowledge working with these crimes, the judges would be more able

[180] *See* Todd Phillips & Connor Raso, *Debates Over Agency Judges Should Focus on Functions, Not Job Titles*, BROOKINGS (Nov. 17, 2020), https://www.brookings.edu/articles/debates-over-agency-judges-should-focus-on-functions-not-job-titles/ [perma.cc/6QN2-9KA7] (discussing the benefits of administrative law judges—including the ability to quickly decide complex, detailed cases—and criticisms and drawbacks—that they tend to decide in favor of the agencies over which they preside). A court of special jurisdiction is distinct because of the reasons they are created: when there is a need for intricate technical knowledge of specific subject areas, when intricate issues require discretion, or if the amount of cases would overwhelm the judicial system. Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUS. SYS. J. 135, 136 (2005). White-collar cases could fall within the first category where there is a need for discretion in a specialized subject area. *See id.* (noting that Tax Courts fall within the ambit of the category because of the complicated tax code and policy considerations). This comparison is not one-to-one because it is not the case that needs to be decided, but rather, only the sentencing that requires specialized notice from specialized judges. *See id*. at 136–37 (discussing how Tax Courts are helpful because of the complexity of the tax code).

[181] *See* Phillips & Raso, *supra* note 180 (discussing the benefits of administrative judges, including their ability to quickly decide cases because of their expertise in subject areas, and how moving cases out of administrative courts would result in a judicial administrability problem because the number of cases would be overwhelming). Tax judges, for example, are more likely to respond to cases based on their facts and ideology—district court judges showed a greater propensity to rely on IRS guidance as opposed to a nuanced understanding of our extremely complex tax system. Howard, *supra* note 180, at 138.

[182] *See* Phillips & Raso, *supra* note 180 (discussing how administrative judges quickly and efficiently decide complicated cases); Debra Cassens Weiss, *Judges with Corporate and Prosecution Backgrounds Are More Likely to Rule Against Workers, Study Says*, ABA J. (Feb. 26, 2021), https://www.abajournal.com/news/article/judges-with-corporate-and-prosecution-backgrounds-are-more-likely-to-rule-against-workers-study-says [perma.cc/B56S-Z6TS] (stating how a judge's background and experience as an attorney can affect how they rule once on the bench). Judges are influenced by their careers as attorneys; for example, judges who previously worked as prosecutors or corporate attorneys were less likely to find in favor of employees in employment cases. Weiss, *supra.* Tax Court judges tend to have previously worked as tax attorneys—sixteen of the seventeen judges sitting on the Tax Court's 2015 bench had previously worked as government tax attorneys and fourteen had previously specialized in tax private practice. BARRY J. MCMILLION, CONG. RSCH. SERV., IF10331, U.S. TAX COURT: A BRIEF INTRODUCTION (Dec. 2, 2015), https://crsreports.congress.gov/product/pdf/IF/IF10331/3 [perma.cc/SN3T-BV7E]. Many also had worked in private practice as tax attorneys. *Id.* Indeed, one of the benefits of filing a case in Tax Court as opposed to the alternatives is the judicial expertise in these complicated matters. Caleb Smith, *The Benefits of Tax Court . . . Designated Orders April 22–26, 2019*, TAXNOTES (June 12, 2019), https://www.taxnotes.com/procedurally-taxing/benefits-tax-court-designated-orders-april-22-26-2019/2019/06/12/7h6h0 [perma.cc/TJ9R-YD4K].

[183] *See* Phillips & Raso, *supra* note 180 (discussing the benefit of specialization for administrative law judges).

to understand appropriate sentences for these defendants.[184] The particular issues of white-collar cases, like the remoteness of victims; the fact that white-collar criminals tend to be educated, white-males; or the skewed loss calculations from the Guidelines would not be as impactful on them as they would be on other judges.[185]

Additionally, knowledge may curb bias.[186] A judge with experience may better know common stereotype-based arguments of which to remain vigilant.[187] Judges with experience can both prevent lawyers from achieving success with these arguments and ensure that the judges themselves do not allow their implicit biases to leak into their sentencing decisions.[188]

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[184] *See* McMillion, *supra* note 182 (stating that Tax Court judges usually practiced as tax attorneys for several years in the IRS, Department of Justice, Department of the Treasury, or in private practice); Smith, *supra* note 182 (stating how having a judge in tax court with special knowledge in tax is beneficial). The concept of the generalist judge has long been praised by the judiciary and many are very proud to be considered as such. Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 520–21 (2008). One of the benefits of specialization is that when technical decisions need to be made, judges with specialized knowledge arguably are more likely to come to better decisions. *Id*. at 524. There has been a historical staunch opposition at the federal level to the specialization of judges, especially because there is such an overwhelming number of litigants that seek to be heard before the federal docket. *Id*. There are many ways a judge can be specialized, including prior subject matter experience, judicial experience, or opinion specialization. Brett Curry & Banks Miller, *Judicial Specialization and Ideological Decision Making in the US Courts of Appeals*, 40 LAW & SOC. INQUIRY 29, 30 (2015). Judges who are opinion specialists are those who tend to write many opinions in a specific area of law out of the relative norm for judicial opinions. *Id*. at 37. Subject matter experience is related to the judge's experience before rising to the bench. *Id*. at 36. Judicial experience relates to experience while on the bench. *Id.* at 37. At least in the context of anti-trust laws, judges who are specialized in some form tend to resolve cases in a more ideologically consistent way than their non-specialized counterparts. *Id.* at 43; *see supra* notes 123–156 (noting judges' pitfalls when sentencing white-collar criminals, such as taking disbarment or loss of licensure into consideration, or identifying with white-collar criminals because they share sociodemographic identities with them).

[185] *See supra* notes 123–156 (discussing some of the problems with judges when they must sentence white-collar criminals, including their potential to be skewed by subconscious biases toward them, and an impulse to consider external factors when sentencing).

[186] *See* Bernice Donald, Jeffrey Rachlinski & Andrew Wistrich, *Getting Explicit About Implicit Bias*, 104 JUDICATURE 75, 78 (2020–2021) (stating that a potential guard against implicit bias is being aware of implicit biases and judges taking an active role in ensuring attorneys that appear before them know that they should not employ tactics that promote implicit biases). One study reported that 97% of judges stated they were better than the median judge at avoiding racial implicit biases in their decision-making. *Id.* Judges, as previously mentioned, are prone to overconfidence in their own judgment—therefore, it is important that judges constantly remain aware of biases that actively play a role in their courtroom conduct. *Id*.; *see* Guthrie et al., *supra* note 135, at 49–50 (noting that judges are prone to egocentric bias and, in one study, a group of judges reported their decisions were less likely than the average judge to be overturned on appellate review, which was a statistically unlikely result).

[187] *See* Rachlinski et al., *supra* note 186, at 78 (stating that it is important for judges to prevent lawyers from raising stereotype-based arguments).

[188] *See id.* at 79 (noting that judges should also remain vigilant against the risks of implicit bias in their own decision-making).

B. Potential Bars

Although having a set of white-collar judges with specialized knowledge could resolve these sentencing disparities, a whole host of other problems may arise.[189] Among those issues could be the further isolation and separation of white-collar criminals from their blue-collar counterparts.[190] Additionally, because "white-collar" is not an official crime and has a complicated sociological definition, it could be hard to decide which crimes would be eligible to go to these specialized courts.[191]

1. Further Isolating White-Collar Criminals

As discussed earlier in this Note, white-collar criminals have been separated from blue-collar criminals in a myriad of ways.[192] First, the mere fact that white-collar criminals have their own name and designation makes them appear different.[193] White-collar criminals also go to "Club Fed" because they are nonviolent.[194] Having a dedicated set of judges that only white-collar criminals

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[189] *See supra* notes 174–185 (discussing the potential benefits to sentencing of having specific white-collar judges).

[190] *See infra* notes 192–198 (stating how giving white-collar criminals their own judges could result in further stigmatization of blue-collar criminals, further adding to the perception that white-collar criminals are treated better than blue-collar criminals). Some typical arguments raised by defense attorneys in sentencing include discussion of the defendant's personal history. Sanford A. Schulman, *Key Factors That Influence Sentencing in White-Collar Criminal Cases*, FED. CRIM. ATT'YS OF MICH. (Sep. 10, 2024), https://federalcriminalattorneysofmichigan.com/key-factors-that-influence-sentencing-in-white-collar-criminal-cases/#:~:text=The%20type%20of%20offense%2C%20the,when%20determining%20the%20appropriate%20punishment [perma.cc/WTK2-C4NV]. The personal history of a defendant may include a history of unethical behavior in his professions, personal involvement, or references for his good character. *Id.* Lawyers may also note a defendant's cooperation with investigations or acceptance of responsibility. *Id.*; *see* Joseph Abrams, *Sentencing Advocacy in Federal White Collar Criminal Cases*, LAW OFF. OF JOSEPH ABRAMS (May 1, 2021), https://www.josephabramslaw.com/sentencing-advocacy-in-federal-white-collar-criminal-cases/ [perma.cc/LA2W-BTDB] (stating that judges find it very important that defendants take responsibility for their crimes so long as it is earnest and does not sound attorney-scripted). Victim impact statements are also considered by judges during the sentencing phase as part of the presentencing report, and these statements can be very impactful. Schulman, *supra*; *see Victim Impact Statements*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal/criminal-vns/victim-impact-statements [perma.cc/JQP9-LP6C] (noting that victim impact statements usually include the victim's experience of the crime, financial losses, effect on him and his family, and for white-collar crimes, a financial loss statement).

[191] *See infra* notes 199–209 (discussing complications with defining white-collar crime, including having to decide if white-collar crime is decided by criminal or type of crime, and turning a sociological distinction into a legal distinction).

[192] *See supra* notes 123–188 (explaining how the demographics of white-collar criminals separate them from other types of criminals, how judges treat them differently, and how they experience the judicial system differently).

[193] *See supra* note 156 (discussing how the mere name "white-collar crime" gives white-collar criminals more public legitimacy than blue-collar or street criminals).

[194] *See supra* note 86 (describing Club Fed and how these federal prisoners appear to be better off than prisoners in other federal penitentiaries).

are allowed to use may add to the perception that white-collar criminals are treated better than their blue-collar counterparts.[195]

Additionally, as judges are more prone to identify with white-collar criminals on socioeconomic and racial grounds, having a separate bench may further add to the stigmatization of blue-collar criminals.[196] A way to mitigate this would be to prioritize diversifying the bench.[197] This would have the dual benefit of providing additional, essential perspectives on the bench and ensuring that subconscious biases have less of an opportunity to seep into sentencing decisions.[198]

2. Defining White-Collar Crime

Another difficult issue that may arise is categorizing white-collar crime.[199] "White-collar" is not a legal distinction, but rather a criminological

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[195] *See* William J. Brennan, *Understanding the Difference: Blue Collar & White Collar Crimes*, BRENNAN L. OFFS. (Oct. 1, 2022), https://www.philadelphiacriminallaw.com/understanding-the-difference-blue-collar-white-collar-crimes/ [perma.cc/6PKQ-53DR] (noting that white-collar criminals generally have higher socioeconomic statuses because it is necessary in order to have the opportunity to commit a white-collar crime and they are also in better positions to avoid criminal stigmatization where blue-collar criminals are not); *supra* note 142 (discussing low recidivism rates for white-collar crimes); *supra* notes 137–138 (discussing the organizational opportunities necessary to commit many white-collar crimes, including legitimate access).

[196] *See supra* note 134 (discussing how the American judiciary is overwhelmingly white men, and that these individuals are far more prone to identifying with white-collar criminals, who are also overwhelmingly white men, which inherently benefits white-collar criminals).

[197] *See* Alicia Bannon & Douglas Keith, *Diversity on the Bench*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/diversity-bench [perma.cc/PJR5-YBMQ] (discussing how a diverse judiciary is important for neutral and fair decisions to be made by attorneys); Hannah Hayes, *Diversity on the Bench: Why It Matters in a Polarized Supreme Court*, A.B.A. (Aug. 17, 2022), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2022/august/diversity-the-bench-why-it-matters-a-polarized-supreme-court/ [perma.cc/5ANE-KEK7] (noting how women and minority Supreme Court judicial nominees tend to receive more rigorous lines of questioning than their white male counterparts and how both professional and life experiences can directly inform judicial philosophies). Justice Sonia Sotomayor stated that "personal experiences affect the facts that judges choose to see." Hayes, *supra*. Justice Ketanji Brown Jackson's experience as a public defender shapes the way that she approaches justice. *Id.* Justice Ruth Bader Ginsburg was rumored to be very influential on her colleagues when the bench heard *Safford United School Dist. No. 1 v. Redding*, a case about a young girl being strip searched. *Id.*; *see* 557 U.S. 364, 368, 374–75 (2009) (holding that the defendant's school principal's search of thirteen-year-old Savana Redding's underwear violated the Fourth Amendment as an unreasonable search and seizure and noting that this search would have violated her subjective expectation of privacy as "embarrassing, frightening, and humiliating"). Justice Ginsburg later explained that her colleagues—all men—were unable to understand what it was like to be a thirteen-year-old girl. *Hayes*, *supra*.

[198] *See* Bannon & Keith, *supra* note 197 (noting the importance of diverse opinions on the bench to ensure fairness); *supra* note 134 (noting how white, male judges are more likely to be subconsciously biased toward in-group members—other white males—who overwhelmingly make up the demographic of white-collar criminals).

[199] *See supra* note 34 (discussing how there is not clear agreement on if it is the type of crime or type of criminal that distinguishes between white-collar crime and blue-collar crime).

categorization.[200] To decide what crimes are sent to be heard by specialized white-collar judges, an agreement would need to be reached on whether white-collar crimes should be categorized by the type of crime or the type of person who commits the crime.[201] But, between the two options, the better distinction would be to delineate white-collar crimes by type of crime.[202] This is for two reasons: first, making an arbitrary distinction about *who* is white-collar would require messy categorizations on the basis of social class or profession that would appear as though the government is preferring one social class or profession over another.[203] "White-collar" is a term that historically referred to white-collar workers—those with professions like lawyers, accountants, and executives: all titles that typically come with large salaries and a certain degree of education.[204] To continue to define white-collar by this metric, when the vast majority of criminal defendants across the United States have not received comprehensive education and are low income, would be patently classist.[205]

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[200] Pollack & Smith, *supra* note 123, at 182.

[201] *See supra* note 34 (stating the difficulty in distinguishing between white-collar and blue-collar crimes, notably the distinction between type of crime and type of criminal).

[202] *See What Is White-Collar Crime, and How Is the FBI Combating It?*, *supra* note 34 (defining white-collar crime by type of criminal).

[203] *See* Sutherland, *supra* note 43, at 1 (describing white-collar criminals as those from the white-collar class).

[204] *See* Adam Hayes, *White-Collar: Definition, Types of Jobs, and Other "Collar" Types*, INVESTOPEDIA, https://www.investopedia.com/terms/w/whitecollar.asp [perma.cc/UE86-N97X] (Mar. 10, 2025) (noting how white-collar workers are typically desk workers and not physical laborers, tend to be more educated, and earn more money than blue-collar workers). The mean annual wage for a chief executive officer in the United States in 2023 was $258,900. *Occupational Employment and Wage Statistics, May 2023*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/oes/2023/may/oes111011.htm#(5) [perma.cc/2AHS-74DQ] (Apr. 3, 2024). The median wage for accountants and auditors in 2024 was $81,680, with the top ten percent of workers earning more than $141,420. *Accountants and Auditors*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm#tab-5 [perma.cc/LR32-RBAA] (Aug. 28, 2025). Entry level requirements to become a lawyer typically include a four-year undergraduate degree, three years of education from an American Bar Association-accredited law school, and passing the Bar Exam. *Lawyers*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/ooh/legal/lawyers.htm#tab-4 [perma.cc/23D4-27MQ] (Aug. 28, 2025). The average cost to attend law school including tuition and living expenses is $217,480 total, with the average tuition for all three years at $138,088. Melanie Hanson, *Average Cost of Law School*, EDUC. DATA INITIATIVE, https://educationdata.org/average-cost-of-law-school [perma.cc/FBG7-QJCX] (July 6, 2025).

[205] *See* Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html [perma.cc/SBK9-L9JU] (noting that most criminal defendants are undereducated and much poorer than non-incarcerated individuals). In 2015, it was found that the median income of incarcerated persons was $19,185. *Id.* The median household income in 2015 was $55,775. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY HOUSEHOLD INCOME: 2015, https://www.census.gov/content/dam/Census/newsroom/press-kits/2017/esri/esri_uc2017_household_income_acs15.pdf [perma.cc/789U-8VTH]. When comparing incarcerated individuals to non-incarcerated individuals of similar ages, incarcerated individuals' incomes were forty-one percent lower than their non-incarcerated counterparts. Rabuy & Kopf, *supra*. As to education, the average incarcerated individual did not even have a high school diploma. *Id.* at n.2.

Second, the Guidelines have implicitly adopted the concept of categorizing crimes by type, rather than perpetrator.[206] Because "white-collar" is a criminological distinction, a judgement would need to be made about what crimes fall within this category.[207] Definitions of white-collar crime generally include those that are nonviolent and involve some kind of fraud.[208] U.S.S.G. § 2B1.1 is generally cited when discussing white-collar crimes, but it is far from an exhaustive list.[209]

C. A Currently Apt Sentencing Regime

There has been much discussion that sentencing disparities between white-collar crimes and blue-collar crimes require adjustment.[210] But the possibility remains that white-collar criminals are receiving these below-Guidelines sentences because they are appropriate for the crime.[211] Perhaps there is an argument that because of the socioeconomic status of white-collar criminals, they feel the stigmatizing effects of incarceration sentences more acutely, and therefore these short sentences are indeed appropriate.[212] Alternatively, these lower sentences may be a harbinger of a broader trend in sentencing to reduce prison sentences based on the presumption that prison does not actually serve the purposes of punishment that it seeks to resolve.[213] Perhaps

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[206] *See* U.S.S.G. ch. 1, pt. A, introductory cmt. (showing how crimes are categorized by type rather than by who commits them).

[207] *See* Pollack & Smith, *supra* note 123, at 182 (describing white-collar versus blue-collar as a sociological distinction).

[208] *See What Is White-Collar Crime, and How Is the FBI Combating It?*, *supra* note 34.

[209] U.S.S.G. § 2B1.1. The crimes that this statute covers are: "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States." *Id.*

[210] *See supra* note 46 and accompanying text (discussing how the Commission has gone out of its way to try to close the gap between white-collar and blue-collar sentencing).

[211] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20–21 (1988) (discussing how an initial goal of the Guidelines was to provide "short but certain" prison sentences instead of probation that white-collar criminals typically received pre-Guidelines).

[212] *See* Pollack & Smith, *supra* note 123, at 178 n.6 (discussing the writings of Ernst van der Haag, who stated that the impact of a sentence increases proportionally with the criminal's socioeconomic status).

[213] *See* Liz Komar, *The First Step Act: Ending Mass Incarceration in Federal Prisons*, SENT'G PROJECT (Aug. 22, 2023), https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/ [perma.cc/XYG8-XSF5] (explaining how sentencing in the 1980s and 1990s was very harsh and measures such as the First Step Act were taken to try and mitigate those effects); Ram Subramanian & Ames Grawert, *What Can Federal Courts Do About Extreme, Outdated Sentences?*, BRENNAN CTR. FOR JUST. (Feb. 17, 2023), https://www.brennancenter.org/our-work/analysis-opinion/what-can-federal-courts-do-about-extreme-outdated-sentences [perma.cc/RFQ7-BE47] (noting that decisions such as *Concepcion v. United States* have opened the door to retroactively shorten the long sentences received under federal mandatory minimums, especially in drug cases); 597 U.S. 481, 488–89 (2022); *supra* note 45 (discussing how prisons are unsafe and dan-

white-collar crimes and white-collar criminals do deserve lesser sentences because their crimes are not innately violent.[214] Or perhaps these distinctions are arbitrary because they require judges to impose their moral judgments on the crime and the person to be sentenced.[215]

Nevertheless, white-collar sentences have long provided a visual disparity that has drawn deserved criticism and requires adjustment.[216] The counterarguments that advocate for the current sentencing regime help solidify the innately classist distinction between white-collar and blue-collar defendants, something that impacts the way judges view and sentence those in front of them.[217] Having judges with specific expertise in white-collar cases may be a way to leap over the issues with the Guidelines and the loss table and eliminate such disparities.[218]

CONCLUSION

The sentencing disparity between white-collar and blue-collar crimes may require a novel solution to cut through the existing societal protections that prop up white-collar criminals. When white-collar criminals are sentenced, they benefit from several institutional protections that they may not even realize they have. A white-collar criminal's class and race are a benefit to him in sentencing because of a judge's potential inherent implicit biases. The very distinction between white-collar and blue-collar crimes is a benefit to him because white-collar crimes are perceived by society and judges, at least subliminally, to be "less criminal" than blue-collar crimes.

Despite these distinctions, white-collar criminals should still receive an adequate punishment proportional to their crime. The large sentencing disparity between white-collar and blue-collar further demonstrates this point. The

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gerous for prisoners and are typically not as rehabilitative as they could be in terms of education and may also not have a positive effect on recidivism).

[214] *See supra* notes 144–145 (discussing the general perception that as white-collar criminals do not commit white-collar crimes, they are not dangerous).

[215] *See* Gray, *supra* note 154, at 1396 (arguing that the foundation of *malum prohibitum* versus *malum in se* designations are a matter of morality that should be decided by the legislature only at the time of drafting certain statutes, rather than by judges at the time of sentencing).

[216] *See supra* Part I (outlining the sentencing disparities between white-collar and blue-collar criminals).

[217] *See supra* Part III, Section C (explaining potential counterarguments to a new, white-collar bench, that advocate for the judiciary to stay the same).

[218] *See supra* note 14 (discussing how white-collar sentencing disparities are unequal and have repeatedly drawn criticism over the years); *supra* Part III (explaining how a new bench of white-collar judges may be helpful to resolve existing sentencing disparity issues because their expertise may allow them to more clearly and efficiently understand the issues before them); *supra* notes 157–165 (discussing the issues with the loss table calculations in the Guidelines and how they do not accurately reflect the actual loss numbers in the average white-collar crime, and also produce very outsized sentencing ranges).

lack of visual parity is problematic because it does not purport to follow the goals of the Commission: to make sentencing fair for all, not just for a specific criminal, but also the broader justice system. The Commission has grappled with this for years, attempting to adjust the Guidelines' loss table, but this has only resulted in judges who sentence at the bottom or below the outlined ranges.

Given that the loss table calculations have not given the Commission the disparity-closing cure-all it was hoping for, this Note argues for a different solution. Namely, it argues that there could be a major benefit to creating a specific bench of judges that hear white-collar cases. These judges, with their years of experience working with white-collar crimes, would be in the best position to understand the full impact that white-collar crimes have on society and their victims and would be in the best position to determine appropriate sentences for these defendants.

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