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JILLIAN HEWITT

Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases

ABSTRACT. Between 1987 and 2005, federal judges sentenced defendants pursuant to binding Sentencing Guidelines that severely curtailed their discretion. In *United States v. Booker*, the Supreme Court held the mandatory Guidelines sentencing scheme unconstitutional and rendered the Guidelines advisory. This Note offers a picture of white-collar sentencing in "shades of gray." It conducts an empirical analysis of sentencing decisions after *Booker* to assess the consequences of the return to judicial discretion. In particular, the Note examines major white-collar cases in the Southern District of New York, where many such cases of national and international significance are prosecuted. The Guidelines instruct judges in white-collar cases to calculate the amount of economic loss attributable to the defendant and apply a sentencing enhancement—often a sizable one—on the basis of that loss. The findings reveal that a significant majority of defendants in these cases receive sentences of imprisonment shorter than those recommended by the Guidelines. Moreover, when judges impose sentences below the Guidelines range, the resulting sentences are often dramatically shorter than those produced under the Guidelines. Based on these findings, this Note argues that the U.S. Sentencing Commission should revise its approach to white-collar cases in three ways. The Commission should amend the Guidelines to reduce the severity of the economic loss table; calculate economic "loss" differently; and add additional, though less severe, enhancements to punish pecuniary gain and intended loss. Absent such changes, judges will—and should—continue imposing sentences far below the Guidelines range. These proposed changes better capture the seriousness of the offense and the culpability of the offender, even if they do not resolve the fundamental tension between individualized sentencing and the rigid quantification that characterizes the Guidelines system.

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INTRODUCTION

Between 2000 and 2002, Jamie Olis, his boss Gene Foster, and his colleague Helen Sharkey orchestrated an illegal transaction at Dynegy Corporation.[1] The transaction would appear to Dynegy's auditors and investors as if it produced income, but it was actually a loan in disguise.[2] All three were indicted on charges of mail fraud, wire fraud, and securities fraud, as well as conspiracy to commit those offenses.[3] Olis was convicted on all counts and sentenced to 292 months, or more than twenty-four years in prison.[4] In contrast, Foster and Sharkey cooperated with the government, testified at Olis's trial, and pleaded guilty to the conspiracy count in exchange for maximum sentences of five years.[5]

The conspiracy, titled "Project Alpha," sought to increase the value of Dynegy's stock; it was "not [meant] to defraud Dynegy or to enrich Olis," and Olis was not meaningfully enriched as a result.[6] Although Olis helped plan the conspiracy, he did not have the authority to approve the project and did not draft the key documents.[7]

So why did Olis receive such a long sentence? Prior to the Sentencing Reform Act of 1984 (SRA), judges exercised discretion in sentencing. But at the time of Olis's original sentencing, the federal Sentencing Guidelines (Guidelines) required judges to impose a sentence within a particular range.[8] To determine the Guidelines range in white-collar cases, judges considered a set of enhancements that are commonly referred to as the economic loss table, which forms part of the Guidelines for white-collar crimes.[9] The loss table increases a defendant's "Offense Level" based on the amount of economic

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1. United States v. Olis (*Olis I*), 429 F.3d 540, 542, 544 (5th Cir. 2005); United States v. Olis (*Olis II*), No. H-03-217-01, 2006 WL 2716048, at *12 (S.D. Tex. Sept. 22, 2006).

2. *Olis II*, 2006 WL 2716048, at *12.

3. *Id.* at *1.

4. *Olis I*, 429 F.3d at 541-42. Even with "good time," Olis would have had to serve eighty-five percent of this sentence, or over twenty years.

5. *Id.* at 542; *Olis II*, 2006 WL 2716048, at *1, *13.

6. *Olis II*, 2006 WL 2716048, at *12.

7. *Id.*

8. *See* United States v. Booker, 543 U.S. 220, 234 (2005) ("In most cases, as a matter of law, the [Sentencing] Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range."). For further discussion of judicial power to depart from the Guidelines sentencing range prior to *Booker*, see *infra* notes 50-59 and accompanying text.

9. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2014).

"loss" attributed to the scheme in which he participated. The Guidelines define what constitutes "loss"—for instance, clarifying that "loss" means the greater of actual or intended loss, and that "actual loss" means "the reasonably foreseeable pecuniary harm that resulted from the offense."[10] The Guidelines then establish the sentencing range based on a combination of the offense level and the defendant's criminal history.[11]

In Olis's case, the loss table provided for a 26-level increase in Olis's offense level, which transformed a 15-21 month sentence into a sentence of 292-365 months.[12] Olis appealed his original sentence.[13] While his appeal was pending, the Supreme Court decided *United States v. Booker*.[14] The landmark case held unconstitutional the two provisions in the SRA that made the Guidelines mandatory.[15] In a remedial opinion, the Court severed and excised those two provisions, rendering the Guidelines effectively advisory.[16] On remand in Olis's case, the judge calculated a Guidelines range of 151-188 months,[17] or about twelve to sixteen years.[18] Twenty-four points of Olis's 34-point offense level derived from the "Intended Loss" to the United States Treasury of $79 million, the entirety of which was attributed to him for sentencing purposes.[19]

Were it not for the Supreme Court's decision in *Booker*—which returned significant discretion in sentencing to federal judges—Olis would have received a sentence of between twelve and sixteen years. But instead, the judge imposed

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10. *See id.* cmt. n.3.

11. *See Sentencing Table*, U.S. SENT'G COMMISSION (2014), http://www.ussc.gov /sites/default/files/pdf/guidelines-manual/2014/2014sentencing_table.pdf [http://perma.cc /4AT7-YHMG]. Sentences are calculated by the Guidelines using a table, one axis of which includes the defendant's "Criminal History Category," and the other of which includes the defendant's "Offense Level." For further discussion of the way the Guidelines operate, see *infra* Section I.A and Section I.B.

12. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2014); *see also id.* ch. 5, pt. A.

13. *See Olis I*, 429 F.3d 540, 541 (5th Cir. 2005).

14. 543 U.S. 220 (2005).

15. *See id.* at 227 (2005); *see also Olis I*, 429 F.3d at 541 (affirming Olis's conviction, but vacating and remanding for resentencing).

16. *Booker*, 543 U.S. at 245.

17. The recalculated Guidelines range was less severe than the original Guidelines range for reasons unrelated to the Court's opinion in *Booker*. *See Olis II*, No. H-03-217-01, 2006 WL 2716048, at *3-11 (S.D. Tex. Sept. 22, 2006).

18. *Id.* at *10. The discrepancy between the original Guidelines sentence imposed (292 months) and the recalculated Guidelines sentencing range resulted from the sentencing judge's determination that the amount of loss attributable to Olis was $79 million, not the $105 million originally attributed to him. *See id.* at *1 n.1, *10.

19. *See id.* at *2-10.

a "non-Guidelines sentence" of seventy-two months in prison.[20] Using his newly authorized discretion, the judge took several factors into account: (1) Olis did not have the authority to approve Project Alpha, (2) Olis did not defraud Dynegy and was not enriched in any significant way by the scheme, (3) Dynegy was not forced to file for bankruptcy, and (4) Olis was born in Korea, was raised by a single mother in the United States, and had no criminal history.[21] To Olis, the discretion afforded to his sentencing judge by *Booker* meant the difference between a six-year sentence and a twelve- to sixteen-year sentence.

Olis's story is noteworthy for two reasons. First, his case illustrates—in dramatic fashion—how the loss table severely punishes even low-level white-collar offenders by ratcheting up defendants' offense levels based on the amount of loss attributed to them. Second, the case demonstrates how *Booker* freed up sentencing judges to use their discretion to consider the appropriateness of applying such severe enhancements where those enhancements do not serve as accurate proxies for culpability.

Although *Booker* rendered the Guidelines advisory, they remain "the starting point and the initial benchmark" in federal sentencing.[22] Judges must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range."[23] So getting the Guidelines right still matters. Although judges may refuse to impose that Guidelines-range sentence, a significant body of scholarship suggests that the Guidelines act as an "anchor" for federal judges in that "[c]omputing the advisory Guideline range so early in the sentencing process strongly anchors a judge's sentence to that range, or close to it."[24] Moreover, studies suggest that "the 'anchor' produces an effect on judgment or assessment even when the anchor is incomplete, inaccurate, irrelevant, implausible, or random."[25] Beginning the sentencing inquiry by calculating the Guidelines range "creates a kind of psychological presumption from which

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20. *Id.* at *13.

21. *See id.* at *12-13.

22. Gall v. United States, 552 U.S. 48, 49 (2007).

23. *Id.*

24. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 492-93 (2014); *see also* Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 439-41 (2011) (reviewing prior scholarship showing that "anchoring has a robust and pervasive effect on judicial decisionmaking, including sentencing").

25. Bennett, *supra* note 24, at 495.

most judges are hesitant to deviate too far."[26] This presumption "operates with particular vengeance in white-collar cases because, at the behest of Congress, the Sentencing Commission (Commission) has steadily increased the severity of the white-collar Guidelines . . . ."[27] Judge Jed Rakoff further explains why judges might still follow the Guidelines or deviate only modestly from them: "[F]irst, it is the path of least resistance: the parties come with a stipulated Guidelines range, the judge can adopt the presentence report's factual findings, and if the judge gives a Guidelines sentence, it is virtually immune from any reversal on appeal—it's the easier way to proceed."[28] Second, imposing a Guidelines sentence "permits the judge to avoid the difficult moral questions that sentencing inevitably presents."[29] Finally, there are "increasingly few judges who have ever had any sentencing experience except under a Guidelines regime."[30]

As such, if the white-collar Guidelines are arbitrary or too severe, many defendants will receive sentences that are arbitrary or too severe. The federal statute governing sentencing, 18 U.S.C. § 3553(a), requires district judges to "impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes of" sentencing, which include the "nature and circumstances of the offense and the history and characteristics of the defendant" and "the need for the sentence imposed . . . to reflect the seriousness of the offense," and to promote general and specific deterrence.[31] To the extent that the Guidelines counsel a sentencing judge to impose a sentence that is "greater than necessary" to comply with the purposes of sentencing, those Guidelines run counter to Congress's directive—even if they are no longer binding.[32] It remains essential, then, that the Commission amend the ill-conceived Guidelines.

Although the existing scholarship on the Guidelines acknowledges that the loss table often produces overly harsh sentences in white-collar cases,[33] it

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26. Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 6, 8 (2013).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 18 U.S.C. § 3553(a)(1)-(2) (2012) (emphasis added).

32. *Id.*

33. *See, e.g.*, Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279, 280 (2007) (describing how reliance on "economic loss," as defined in the Guidelines, can result in "exorbitant sentences" for white-collar defendants); Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286, 286 (2007) ("Even when a corporate leader has engaged in massive fraud affecting thousands of

provides no answer to the crucial empirical question: in the post-*Booker* era, what sentences do judges actually impose in cases where loss table enhancements dramatically increase the Guidelines sentencing range? More specifically, how frequently and to what extent do judges depart from the sentencing ranges recommended by the Guidelines in high-loss white-collar cases? The Commission publishes data on aggregate trends in white-collar sentencing, including the frequency with which judges vary from the Guidelines sentencing range. At present, however, no one has aggregated and analyzed that data to determine the extent to which judges' sentences fall below the Guidelines range. This Note begins to fill that gap.

Part I describes how the Guidelines work, and how the Supreme Court's decision in *Booker* changed the sentencing landscape. Post-*Booker*, sentencing judges must still begin by correctly calculating the Guidelines sentencing range, but may, in their discretion, ultimately impose a sentence longer or shorter than that range.

Against this backdrop, Part II and Part III present my methodology and empirical results. The empirical analysis considers the frequency with which judges depart from the Guidelines, and the extent of those departures, in major white-collar cases in the Southern District of New York (S.D.N.Y.). I also suggest possible explanations for the trends I identify. Those explanations consider the role and behavior not only of defendants and judges, but also of the U.S. Attorney's Office for S.D.N.Y.

First, I analyze how frequently judges depart from the Guidelines-calculated sentencing range before and after *Booker* in major white-collar cases—in other words, how often they impose "below-range sentences." I examine how frequently different kinds of downward departures occur, and how the frequency of non-Guidelines sentences depends upon the loss amount attributed to the defendant. I consider two types of departures. Government-sponsored departures, which are based on cooperation with the government, were available before *Booker* and produce what I refer to as "government-sponsored below-range sentences."[34] In contrast, non-government-sponsored departures became far more common after *Booker* and produce what I refer to as "non-government-sponsored below-range sentences." I find that, following *Booker*, the rate at which judges impose government-sponsored below-range sentences has remained about the same. Strikingly, however, the rate at which judges impose non-government-sponsored below-range sentences has

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people . . . sentences of twenty or more years hardly seem necessary to satisfy the traditional sentencing goals of specific and general deterrence—or even retribution.").

34. Although there are other kinds of "government-sponsored below-range sentences," almost all such sentences in S.D.N.Y. are based on substantial assistance. For more information, see *infra* note 117 and accompanying text.

increased dramatically. As a result, a significant majority of defendants in major white-collar cases today receive sentences shorter than the Guidelines range.

Second, I analyze the extent of the downward departures received by defendants in major white-collar cases. I use data provided by the Commission to calculate how great a departure defendants received, if they received one. As above, I analyze these patterns over time and across departure type. I find that when defendants receive sentences below the Guidelines range, the sentences received are, for the most part, significantly shorter than the Guidelines range.

Building on the empirical findings presented in Part III, Part IV of this Note presents several interrelated normative claims. First, my findings empirically corroborate scholarly criticism that the loss table often vastly overstates the seriousness of an offense. This critique is neither unique to a small number of cases nor embraced by only a few judges. That judges in S.D.N.Y., who have significant sentencing experience in major white-collar cases, find the Guidelines sentencing range inappropriate in the significant majority of such cases suggests that the white-collar Guidelines are flawed. Second, I argue that because the Guidelines remain the starting point in every sentencing and may create an "anchoring effect," it is essential to amend the flawed Guidelines. Amendments to the white-collar Guidelines that took effect in November 2015 (the 2015 Amendments) improve on the status quo, but they do not go far enough in changing the means of assessing culpability.[35]

Accordingly, I argue that the Commission should amend the Guidelines for white-collar crimes to deemphasize the amount of paper loss and consider more heavily the defendant's role in the offense, including any pecuniary gain received. The Commission should reduce the severity of the loss table and define loss to cover only actual, as opposed to intended, financial losses. The Commission should propose additional enhancements to capture culpable conduct that the current Guidelines do not adequately reflect. Unless the Guidelines accurately capture the culpability of defendants in major white-collar cases, judges will and should continue to give little weight to the often-too-severe sentencing ranges produced by those Guidelines. I conclude that white-collar cases are not amenable to the kind of rigid quantification that characterizes the entire Guidelines system—a critique that is not confined to white-collar crime.

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35. *See Amendments to the Sentencing Guidelines*, U.S. SENT'G COMMISSION (Apr. 30, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amend ments/20150430_Amendments.pdf [http://perma.cc/KNB8-XHAH]. For further discussion of the 2015 Amendments, see *infra* Section I.D.

I. FROM JUDICIAL DISCRETION TO MANDATORY GUIDELINES AND BACK AGAIN: A BRIEF HISTORY OF THE SENTENCING GUIDELINES

A. The Advent of the Sentencing Guidelines and the Mandatory Regime

Before 1984, federal sentencing was simultaneously simple and opaque. A judge could impose a sentence of any length—or none at all—"up to the maximums established in the statute defining the crime."[36] Judges were not required to consider any particular circumstances, nor were they required to explain their reasons for imposing a particular sentence.[37]

The SRA radically altered this system by establishing binding Guidelines that greatly reduced judicial discretion. In enacting the SRA, Congress sought to reduce "unwarranted" disparities in sentencing.[38] Congress passed the statute on the heels of a short yet influential book by Judge Marvin Frankel, *Criminal Sentences: Law Without Order*, published in 1973. Judge Frankel argued that unfettered judicial discretion in sentencing produced arbitrary outcomes whereby defendants who committed similar crimes received vastly different sentences. Frankel argued for the establishment of "an administrative sentencing commission 'of prestige and credibility,'"[39] which could create a "detailed chart or calculus" that would weigh the "many elements that go into the sentence"[40] and provide the judge with a narrow sentencing range from which the judge would choose a specific sentence.[41]

The SRA amended the federal sentencing process in several ways. Among other changes, it created the United States Sentencing Commission, an independent agency in the judicial branch. The SRA instructed the Commission to promulgate the Guidelines, which would become binding on sentencing judges with very few exceptions.[42] And the SRA provided the

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36. *See* Daniel C. Richman et al., Defining Federal Crimes 661 (2014).

37. *See id.*

38. *See* S. Rep. No. 98-225, at 38-65 (1983).

39. Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 36 (1998) (quoting Marvin E. Frankel, Criminal Sentences: Law Without Order 119 (1973)).

40. Frankel, Criminal Sentences, *supra* note 39, at 113.

41. *Id.* Frankel's book focused almost exclusively on the problem of sentencing *disparities* rather than on the problem of too harsh (or too lenient) sentences. In fact, a series of compromises made in order to garner Republican support resulted in a provision of the SRA that directed the Commission to increase penalties for violent and white-collar crimes. *See* Richman et al., *supra* note 36, at 669; Stith & Cabranes, *supra* note 39, at 39-48.

42. *See* Stith & Cabranes, *supra* note 39, at 1-2.

government and defendants the right to appeal a sentence on the basis that the judge did not comply with the Guidelines.[43]

The first iteration of the Guidelines promulgated by the Commission went into effect on November 1, 1987. The centerpiece of the Guidelines is the Sentencing Table, a grid consisting of 258 different sentencing ranges.[44] The Sentencing Table's horizontal axis tracks the defendant's "Criminal History Category," which is adjusted based on his criminal history as defined in the Guidelines.[45] A defendant's criminal history category can range from I to VI.[46] The vertical axis tracks "Offense Level," which is determined by starting with a "base offense level" for the crime committed and then adjusting for a variety of "specific offense characteristics" that the Guidelines deems relevant, and may be between one and forty-three points.[47] The portion of the Sentencing Table where the defendant's criminal history category and offense level intersect represents the defendant's Guidelines sentencing range.[48] That range is quite narrow: its maximum "cannot exceed the minimum by more than the greater of" either twenty-five percent or six months.[49]

Under the pre-*Booker* Guidelines, the vast majority of sentences imposed fell within the Guidelines range.[50] But even before *Booker*, there were two means by which a judge could impose a sentence outside that range.[51] First, a court could impose a non-Guidelines sentence if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ."[52] I refer to these sentences as "Guidelines-sanctioned departures." Before *Booker*, Guidelines-sanctioned departures were almost always departures below the

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43. *See* S. REP. NO. 98-225, at 51-52.

44. *See* U.S. SENT'G COMMISSION, *supra* note 11.

45. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(6) (U.S. SENTENCING COMM'N 2014).

46. *See* U.S. SENT'G COMMISSION, *supra* note 11.

47. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(2)-(4) (U.S. SENTENCING COMM'N 2014); U.S. SENT'G COMMISSION, *supra* note 11.

48. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (U.S. SENTENCING COMM'N 2014).

49. *Id.* ch. 1, pt. A(1)(4)(h).

50. For instance, in 2002, 74.5% of all sentences imposed were within the Guidelines range in S.D.N.Y. *2002 Sourcebook of Federal Sentencing Statistics*, U.S. SENT'G COMMISSION 53 tbl.26 (2002), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2002/table26.pdf [http://perma.cc/QPG9-ZUH3].

51. In this Note, I use the term "non-Guidelines sentence" to refer to any sentence imposed that is not within the Guidelines-calculated range as determined by the sentencing judge. A non-Guidelines sentence could either exceed or fall short of the Guidelines sentencing range.

52. 18 U.S.C. § 3553(b)(1) (2012).

Guidelines range, and they "occurred in fewer than 10 percent of cases" nationwide.[53] The second, more common route of departure occurred when prosecutors filed a "substantial assistance motion" pursuant to section 5K1.1 of the Guidelines. The government may file such a motion, which "stat[es] that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense," and which authorizes judges to depart from the Guidelines sentencing range.[54] During the period when the Guidelines were "mandatory," courts imposed such departures in fifteen to twenty percent of cases nationwide.[55]

While some prominent scholars argue that Congress did not intend for the SRA to eliminate judges' discretion to impose individualized sentences,[56] the Supreme Court disagreed. This more restrictive reading of the SRA contemplated a "mandatory" sentencing regime with minimal judicial discretion to depart from the Guidelines. In 1992, the Supreme Court held in *Williams v. United States* that a court's use of a ground for departure that was prohibited by the Guidelines' "policy statements" was an incorrect application of the Guidelines and constituted reversible error.[57] One year later, the Court held that the Guidelines' policy statements were binding on federal courts, and that the Commission's commentary must be "given controlling weight unless it is plainly erroneous or inconsistent with the [statute]."[58] Thus, before *Booker*,

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53. *See* RICHMAN ET AL., *supra* note 36, at 670.

54. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2014). While these kinds of sentences are "government-sponsored," the judge still decides the length of each defendant's sentence.

55. *See* RICHMAN ET AL., *supra* note 36, at 670.

56. Amy Baron-Evans and Kate Stith argue that rather than significantly restricting judges' sentencing discretion, the SRA anticipated that judges would retain broad authority to depart from the Guidelines:

> The judge would first consider the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing, as required by § 3553(a). This consideration would inform the judge's decision as to whether the guideline range adequately reflected the circumstances of the case and whether a different sentence should result, as required by § 3553(b). The judge would then determine the guideline range, and either sentence within the guideline range because it appropriately reflected the relevant factors, or sentence outside the guideline range because it did not.

Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1647-48 (2012) (emphasis omitted) (footnotes omitted).

57. 503 U.S. 193, 200 (1992).

58. Stinson v. United States, 508 U.S. 36, 45 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). In addition to the Guidelines, Congress authorized the Commission to promulgate "policy statements" regarding, among other things, the

sentencing judges' ability to depart from the Guidelines-calculated sentence was quite limited.[59]

B. Booker *and Its Progeny: A Return to Judicial Discretion in Sentencing*

A series of decisions on the constitutionality of the Guidelines culminated in 2005 with *Booker*.[60] In *Booker*, the Court invalidated the provisions of the SRA that made the Guidelines mandatory.[61] The Court found the binding Guidelines scheme unconstitutional because it increased sentences on the basis of judicial fact finding rather than fact finding by a jury. The fix, the Court concluded, was simply to render the Guidelines advisory.

Since *Booker*, federal judges must begin by accurately calculating the Guidelines sentencing range, but may choose to depart from that range. The Court later clarified in *Gall v. United States* that the standard of review for such sentences is reasonableness, meaning abuse of discretion, regardless of whether the sentence falls within or outside the Guidelines range.[62] If the judge imposes a non-Guidelines sentence, the reasonableness standard applies regardless of the extent to which that sentence departs from the Guidelines range.[63] Appellate courts may apply a rebuttable presumption of reasonableness to Guidelines sentences,[64] but may not apply a presumption of *unreasonableness* to non-Guidelines sentences.[65]

"application of the guidelines or any other aspect of sentencing." 28 U.S.C. § 994(a)(2) (2012).

59. Although, as discussed, limited means of departing from the Guidelines sentencing range were available prior to *Booker*, for convenience I refer to the pre-*Booker* regime as "mandatory."

60. 543 U.S. 220 (2005).

61. *Id.* at 227; *see also* Blakely v. Washington, 542 U.S. 296, 312-14 (2004) (holding Washington State's sentencing-guideline system unconstitutional and requiring proof beyond a reasonable doubt for any fact (other than the fact of a prior conviction or one admitted by the defendant) that increases the penalty beyond the statutory maximum); Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) (holding five-four that a statutory hate crime enhancement that increased the statutory maximum was functionally equivalent to an element of a greater offense and, therefore, facts establishing a hate crime should have been submitted to the jury).

62. 552 U.S. 38, 51 (2007).

63. *Id.* at 47 ("We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.").
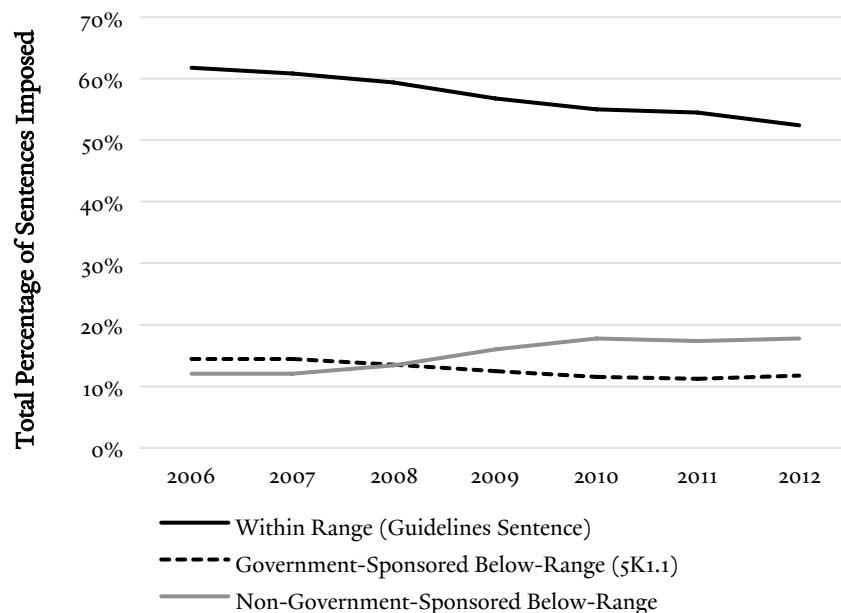
64. *See* Rita v. United States, 551 U.S. 338, 347 (2007).

65. *See Gall*, 552 U.S. at 47.

While the sentencing judge must always use the correctly calculated Guidelines range as her starting point, she may impose a non-Guidelines sentence if she finds that deviating is necessary to "impose a sentence sufficient, but not greater than necessary" to comply with the sentencing factors set out in 18 U.S.C. § 3553(a), discussed in Section I.A.[66] The Court's "resounding overall message [post-*Booker*] is clear: *Booker* did indeed transform the Federal Sentencing Guidelines from 'law' to a lesser species, a form of quasi-law. Using the Court's terminology, the Guidelines are 'advice' that yield sentences that . . . can in most cases be judged 'reasonable.'"[67]

Perhaps unsurprisingly, the percentage of non-Guidelines sentences imposed has increased in the wake of *Booker* and its progeny.

Figure 1.

TYPES OF SENTENCES IMPOSED FOR ALL CRIMES

66. 18 U.S.C. § 3553(a) (2012); *see also* Kimbrough v. United States, 552 U.S. 85, 109 (2007) (discussing the sentencing judge's role in weighing § 3553(a) factors to reach a non-Guidelines sentence).

67. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1492 (2008).

As depicted in Figure 1, after *Booker*, the percentage of cases in which judges imposed a Guidelines sentence fell consistently, while the percentage of non-government-sponsored below-range sentences steadily increased. By 2012, the percentage of "within-range" Guidelines sentences had fallen to just over 52%.[68]

C. The Economic Loss Table

As discussed in Section I.A, judges calculate a defendant's Guidelines sentencing range by first determining the defendant's criminal history category and the applicable offense level, and then identifying the relevant sentencing range from the Sentencing Table.[69] The base offense level for most economic crimes, such as larceny and fraud, is either six or seven levels.[70] The Guidelines include a multitude of factors that can result in enhancements to the offense level for these crimes. For instance, if the offense involved ten or more victims, two levels are added; if the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, two levels are added; if the offense involved "a misrepresentation that the defendant was acting on behalf of a [religious] organization," two levels are added.[71]

Still other enhancements are transsubstantive in that they apply across all types of offenses—not just the financial crimes covered by section 2B1.1. For instance, if the defendant was an "organizer or leader of criminal activity that involved five or more participants," four levels are added.[72] The most significant of these transsubstantive enhancements is the concept of "relevant conduct," explained in the commentary of section 1B1.1 of the Guidelines. The definition of "offense" includes "the offense of conviction and all *relevant conduct* under section 1B1.3."[73] Under section 1B1.3, "relevant conduct" includes not just the defendant's offense of conviction, but all criminal activity that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or

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68. *See* Figure 1.

69. *See supra* notes 44-49 and accompanying text.

70. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (U.S. SENTENCING COMM'N 2014).

71. *Id.* § 2B1.1(b)(2)(B), (b)(4), (b)(9).

72. *Id.* § 3B1.1(a).

73. *Id.* § 1B1.1 cmt. 1(H) (emphasis added). For background on the relevant conduct provision of the Guidelines, see William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

responsibility for that offense."[74] When a judge determines whether a particular enhancement should apply, then, she must consider not only conduct related to the defendant's offense of conviction, but also any criminal conduct not charged — even criminal conduct of which the defendant was acquitted — if she determines by a preponderance of the evidence that such conduct occurred.[75] The Guidelines also import the *Pinkerton* doctrine for sentencing purposes[76]: the relevant conduct provision makes the defendant responsible for all crimes of his coconspirators if those acts were "reasonably foreseeable" to him.[77]

By far the most severe enhancement applicable to white-collar offenders is section 2B1.1(b), also known as the loss table, which provides offense level enhancements on the basis of the amount of loss attributed to the defendant. For example, if the loss exceeded $30,000, six levels are added; if the loss exceeded $2,500,000, eighteen levels are added.[78] The rationale behind the loss table enhancements is simple: as the amount of economic loss caused by the defendant's crime increases, so does the seriousness of the crime and the defendant's culpability.

But the loss table frequently produces arbitrary and unduly severe sentences for two related reasons. First, the loss attributable to the defendant is defined so broadly that it can produce lifelong sentencing ranges for defendants who neither cause much economic harm nor derive much economic benefit from their crimes. Amendments made to the Guidelines in 2001[79]

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74. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENTENCING COMM'N 2014).

75. *See* United States v. Watts, 519 U.S. 148, 148 (1997) (holding that a defendant convicted of possessing cocaine base with intent to distribute, but acquitted of using a firearm in relation to a drug offense, may still be given a higher sentence where the sentencing judge found by a preponderance of the evidence that the defendant in fact possessed the gun).

76. *See* Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). Consider, for example, a defendant whom prosecutors charge as a co-conspirator in a drug conspiracy. Say the jury acquits the defendant on the conspiracy charge: that is, the jury refuses to make the defendant criminally liable for crimes committed by others in the conspiracy. Even in this circumstance, the sentencing judge would be required by the Guidelines to attribute those other crimes to the defendant if the judge found by a preponderance of the evidence that the co-conspirators' criminal activity was in fact reasonably foreseeable to the defendant.

77. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B) (U.S. SENTENCING COMM'N 2014).

78. *Id.* § 2B1.1(b)(1)(D), (J). On November 1, 2015, a round of amendments to the loss table took effect, slightly altering the amount of loss that triggers each enhancement. For instance, the amount of loss that triggers a 2-level enhancement increased from more than $5,000 to more than $6,500. These amendments are meant to account for inflation. *See* U.S. SENT'G COMMISSION, *supra* note 35, at 15-24.

79. *See Amendments to the Sentencing Guidelines*, U.S. SENT'G COMMISSION 19-90 (2001), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly -amendments/20010501_RF _Amendments.pdf [http://perma.cc/79HW-9PRU].

modified the relevant definition of "loss," which is now defined as the "reasonably foreseeable pecuniary harm that resulted from the offense."[80] Pecuniary harm, in turn, is the greater of the "actual loss" or the "intended loss" (the harm that was intended to result from the offense).[81]

Consider a defendant who intended to cause a loss of $1.5 million, but whose conduct did not cause any loss at all. He could receive the same enhancement—sixteen levels—as a defendant whose conduct actually resulted in a loss of $1.5 million.[82] The actual loss includes all "reasonably foreseeable pecuniary harm," or the harm "that the defendant knew or, under the circumstances, *reasonably should have known*, was a potential result of the offense."[83] So the amount of loss attributed to the defendant could either be a real amount (the actual loss) or a hypothetical amount (the intended loss), and may or may not have been foreseen by the defendant. Finally, the relevant loss could accrue to almost any individual or entity, or any group of individuals or entities, including the government and financial institutions.[84] For example, the amount ultimately attributed to Olis was $79 million, which was the loss in tax revenue to the United States Treasury that he intended to cause.[85] The way that "loss" is calculated under the Guidelines—by aggregating the total amount of loss caused (or intended to be caused) to any victim of the offense, and attributing that entire loss amount to the defendant and any co-conspirators— ensures that many defendants subject to loss table enhancements will receive extremely harsh Guidelines sentences. As the Second Circuit noted, "[I]t may well be that all but the most trivial frauds in publicly traded companies may trigger [Guidelines] sentences amounting to life imprisonment."[86]

Second, the loss table's enhancements are so large that, in practice, they dwarf other potentially more relevant considerations. The loss table provides for enhancements ranging from two levels (for a loss of more than $5,000) to thirty levels (for a loss of more than $400 million).[87] In contrast, an "organizer

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80. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (U.S. SENTENCING COMM'N 2014); *see also* Office of Gen. Counsel, *Loss Primer (§2B1.1(b)(1))*, U.S. SENT'G COMMISSION 1 (2013), http://www.ussc.gov/Legal/Primers/Primer_Loss.pdf [http://perma.cc/2LQF -5EMW] (noting that the Commission "modified the definition of loss such that it would be based on reasonably foreseeable pecuniary harm and would include intended loss").

81. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (U.S. SENTENCING COMM'N 2014).

82. *See id.* § 2B1.1(b)(1).

83. *Id.* § 2B1.1 cmt. n.3 (emphasis added).

84. *See id.* § 2B1.1(b).

85. *See Olis II*, No. H-03-217-01, 2006 WL 2716048, at *10 (S.D. Tex. Sept. 22, 2006).

86. United States v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006).

87. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) (U.S. SENTENCING COMM'N 2014).

or leader of a criminal activity involving five or more participants" receives only a four-level enhancement and a "manager or supervisor" of the criminal activity receives a three-level enhancement, while a "minimal" participant receives a four-level reduction and a "minor" participant receives a two-level reduction.[88] The loss table enhancements can overwhelm other factors that are arguably more relevant to the defendant's culpability, including his role in the offense, his criminal history, and the economic benefit he received.

D. The 2015 Amendments

In addition to promulgating the Guidelines, policy statements, and official commentary, the Commission periodically reviews and proposes amendments to the Guidelines to Congress. On November 1, 2015, a new round of amendments took effect, several of which implicate white-collar sentencing.[89]

One change clarified the term "intended loss" by changing the definition from "the pecuniary harm that was intended to result from the offense" to "the pecuniary harm that the defendant purposely sought to inflict."[90] This amendment settled a circuit split over whether a subjective or objective test should be applied when calculating intended loss,[91] favoring the subjective test.[92] The Commission explained that this amendment "recognizes that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant's culpability."[93] Note, however, that this amendment does not affect how severely intended loss, as opposed to actual loss, is punished. As long as the defendant purposely sought to inflict a particular amount of pecuniary harm, he will receive the same enhancement under the loss table as a defendant who actually caused such losses to accrue. And intended loss still "includes intended pecuniary harm that would have been impossible or unlikely to occur."[94]

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88. *Id.* § 3B1.1-2.

89. *See* U.S. SENT'G COMMISSION, *supra* note 35, at 1.

90. *Id.* at 28.

91. *Compare, e.g.*, United States v. Manatau, 647 F.3d 1048, 1048 (10th Cir. 2011) (holding that a subjective inquiry into the defendant's purpose is required), *with* United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) (holding that the loss inquiry should be guided by the objectively reasonable expectations of a person in the defendant's position).

92. *See* U.S. SENT'G COMMISSION, *supra* note 35, at 29.

93. *Id.*

94. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (U.S. SENTENCING COMM'N 2014); *see* U.S. SENT'G COMMISSION, *supra* note 35, at 29 (omitting any changes to the definition of intended loss that would alter this inclusion). Another amendment adds an enhancement of between 2 and 6 levels based on "substantial financial hardship" to a designated number of

E. Gaps in the Literature on White-Collar Sentencing

The existing literature acknowledges that the Guidelines can produce extraordinarily high sentences for white-collar offenders. In particular, scholars have criticized the Guidelines's emphasis on economic loss for producing sentences that fail to capture a defendant's true culpability.[95] In criticizing the Guidelines, authors tend to focus on particular high-profile white-collar cases in which defendants received extraordinary sentences as examples "that should cause the Sentencing Commission and Congress to rethink the fraud Guidelines."[96] As Daniel Richman noted, "[P]erhaps because finding a useful quantitative metric is difficult, or because stable patterns have yet to emerge, assessments of the new regime have largely been driven by anecdote and rhetoric."[97] Moreover, much of the criticism of the white-collar Guidelines regime assumes that Guidelines sentences are actually imposed in most cases.[98]

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victims ranging from 1 or more (2 levels) to 25 or more (6 levels). U.S. SENT'G COMMISSION, *supra* note 35, at 26. These enhancements replace those previously applied based on the total number of victims of the offense without consideration for the hardship suffered by such victims. *Id.* The 2015 Amendments also alter the way that loss is calculated in cases involving fraudulent manipulation of value of a publicly traded security or commodity by removing the rebuttable presumption in favor of applying the "fraud on the market" theory. Under this amendment, courts are free to "use any method that is appropriate and practicable under the circumstances." *Id.* at 30. Finally, the 2015 Amendments change the enhancement applicable to "sophisticated means." *Id.* at 29. The enhancement applicable on the basis of the use of "sophisticated means" will now apply only if the defendant's *own* conduct was sophisticated — not where the offense itself involved sophisticated means. *Id.*

95. *See, e.g.*, Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1001 (2010) ("The U.S. Sentencing Guidelines recommend sentences that are generally too high and place a grossly disproportionate emphasis on the concept of 'loss' . . . . This concept of loss is ill defined, and often artificial to the point of being arbitrary. Moreover, the loss calculation fails to adequately approximate a defendant's culpability, dwarfing traditionally relevant considerations such as the manner in which the defendant committed the crime and the defendant's motive for doing so.").

96. Weissmann & Block, *supra* note 33, at 291; *see also, e.g.*, Podgor, *supra* note 33, at 279-81 (characterizing the sentences imposed on Bernie Ebbers, John Rigas, Timothy Rigas, and Jeff Skilling as examples of the deficiency of the current white-collar sentencing regime).

97. Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 60 (2013).

98. *See, e.g.*, Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 731-32 (2007) ("White collar offenders have faced sentences far beyond those imposed in prior years. . . . Although the sentencing guidelines have some flexibility resulting from the recent Supreme Court decision in *United States v. Booker*, the culture of mandated guidelines still permeates the structure and, as such, prominently advises the judiciary." (citations omitted)); *see also* Vollrath, *supra* note 95, at 1003 ("Despite [their] flaws, the Guidelines continue to dominate sentencing. Although the Supreme Court

To the extent that the literature recognizes the discretion afforded by *Booker*,[99] some scholars assume this discretion will have a limited effect in the area of white-collar crime; others see increased discretion as particularly well-suited to white-collar cases.[100] While some scholarship considers whether judges *should* use their post-*Booker* discretion to impose below-range sentences in major white-collar cases, the literature thus far has not considered the extent to which judges *actually* mitigate the effects of the Guidelines in major white-collar cases by imposing below-range sentences. In particular, no empirical study has explained (1) how often judges impose below-range sentences in major white-collar cases; or (2) when such sentences are imposed, the extent to which those sentences are shorter than the Guidelines sentencing range. This Note seeks to fill that gap.

II. METHODOLOGY

This Part describes the sentencing trend reports published by the Commission, explains why those reports are insufficient for identifying trends in major white-collar sentencing, and describes the methodology for my empirical analysis.

A. The Sentencing Commission's Trend Reports

The Commission releases a limited amount of information on trends in sentencing.[101] This includes annual sentencing "trend reports" organized by

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rendered the Guidelines no longer mandatory in *United States v. Booker*, judges still adhere to the Guidelines with roughly the same frequency as before the *Booker* decision. A culture of mandated guidelines continues to permeate the federal sentencing regime." (citations omitted)).

99. Baron-Evans and Stith offer a comprehensive account of the effects of *Booker* and its progeny, arguing that *Booker* provided the "fix" necessary to change the sentencing process for the better by allowing a return to individualized sentencing that considers "all relevant facts about the offense and the offender." Baron-Evans & Stith, *supra* note 56, at 1742.

100. *Compare* Daniel A. Chatham, Note, *Playing with Post-*Booker *Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 627 (2007) ("[I]t is probable that most of the downward departures have come in drug cases, as the drug guidelines are much higher than white collar guidelines and are more universally decried by district court judges."), *with* Vollrath, *supra* note 95, at 1005 (arguing that the increased discretion afforded to judges by *Kimbrough v. United States* "can and should apply to the sentencing of white-collar criminals, allowing judges to move away from the Sentencing Guidelines' disproportionate emphasis on loss").

101. *See Federal Sentencing Statistics by District, Circuit & State: Geographic Statistics by Fiscal Year*, U.S. SENT'G COMMISSION, http://www.ussc.gov/research-and-publications/federal

federal judicial district and circuit that note, for example, the average length of sentences in that district by crime type compared to national trends.[102]

The trend reports, however, are insufficient to analyze meaningfully the frequency and extent of departures from the Guidelines in major white-collar cases. First, because the Commission organizes the trend reports by individual offense types, one must aggregate data for several offense types to analyze, for example, all white-collar crimes.[103] Second, in cases where the defendant received a non-Guidelines sentence, the trend reports do not identify the corresponding Guidelines sentencing range. As a result, the reports do not indicate how far judges depart from the Guidelines sentencing range when they impose non-Guidelines sentences.[104] And the Commission's district-by-district analysis offers no information on the influence of the loss table on sentences. Although the Commission recently published data on sentencing trends for white-collar offenders nationwide, that data does not show how the amount of loss attributed to defendants affected their sentences.[105]

-sentencing-statistics/federal-sentencing-statistics-district-circuit-state [http://perma.cc/R MZ8-4KCQ].

102. *See id.*

103. The Commission has released some analysis of sentencing trends for all "§2B.1 Offenders." *See Sentencing and Guideline Application Information for §2B1.1 Offenders*, U.S. SENT'G COMMISSION 4 (Sept. 2013), http://www.ussc.gov/sites/default/files/pdf/research-and -publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Sen tencing_Guideline_Application_Info.pdf [http://perma.cc/V4H7-66QR]. But this analysis includes all crimes in which offenders were sentenced under section 2B1.1, regardless of whether they were subject to any loss-table enhancements. Moreover, the offenses of conviction are broader than the ones I analyze.

104. The Commission issued a report on the continuing impact of *Booker* on federal sentencing in December 2012. This report does include some data analysis of the percentage difference between the average Guidelines minimum and the sentence imposed in fraud cases over time. *See* U.S. SENT'G COMMISSION, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 16 (2012), http://www.ussc.gov/sites/default /files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C 10_Fraud_Offenses.pdf [http://perma.cc/W9NP-496V]. However, the data covers only fraud offenses and does not include any other white-collar offenses. Finally, the data includes only the average length of sentences imposed for all fraud cases without differentiating between the kinds of sentence received (e.g., non-government-sponsored below-range sentences and government-sponsored below-range sentences).

105. *See* U.S. SENT'G COMMISSION, *supra* note 103, at 4.

B. White-Collar Crimes Dataset

The Commission provides raw sentencing data on its website.[106] The raw data includes information about each defendant sentenced in a particular district in a given fiscal year. The data includes, for instance, the primary offense charged, the applicable Guidelines sentencing range, the actual sentence imposed, and the type of departure imposed, if any.[107]

To identify changes in white-collar sentencing trends after *Booker*, which was decided in 2005, I reviewed sentencing data for the years 2002 through 2012.[108] Because I focus on sentencing in major white-collar cases—and in particular, sentences imposed in cases with very high loss amounts—I used sentencing data from S.D.N.Y.

By using this data sample, I could ensure that the dataset would include enough high-loss white-collar cases in each year to analyze reliably.[109] Moreover, because New York is home to many major financial institutions, many of the biggest white-collar cases are prosecuted in S.D.N.Y. Lastly, because the behavior of judges and prosecutors varies widely from district to district, it would be difficult, if not impossible, to explain national trends.[110] By

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106. *See Commission Datafiles*, U.S. SENT'G COMMISSION, http://www.ussc.gov/research-and -publications/commission-datafiles [http://perma.cc/8WFK-5KA5].

107. *See Variable Codebook for Individual Offenders*, U.S. SENT'G COMMISSION, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/Individual _Codebook_FY99_FY14.pdf [http://perma.cc/TC5U-BRYZ].

108. *See id.* Data for 2013 and 2014 has since been made available.

109. For instance, in fiscal year 2012, there were 304 offenders sentenced for fraud in S.D.N.Y. *Statistical Information Packet: Fiscal Year 2012, Southern District of New York*, U.S. SENT'G COMMISSION 2 tbl.1 (2012), http://www.ussc.gov/sites/default/files/pdf/research -and-publications/federal-sentencing-statistics/state-district-circuit/2012/nys12.pdf [http:// perma.cc/3CAF-ADUV] [hereinafter *Statistical Information Packet: Fiscal Year 2012, Southern District of New York*]. In the same time period, only 64 offenders were sentenced for the same offense in the Southern District of Ohio. *Statistical Information Packet: Fiscal Year 2012, Southern District of Ohio*, U.S. SENT'G COMMISSION 2 tbl.1 (2012), http://www.ussc .gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-dis trict-circuit/2012/ohs12.pdf [http://perma.cc/VM77-RQ8J]. The only other district with more white-collar cases than S.D.N.Y. is the Southern District of Florida. *Statistical Information Packet: Fiscal Year 2012, Southern District of Florida*, U.S. SENT'G COMMISSION 2 tbl. 1 (2012), http://www.ussc.gov/sites/default/files/pdf/research-and -publications/federal-sentencing-statistics/state-district-circuit/2012/fls12.pdf [http://perma .cc/9KWL-NFJB] [hereinafter *Statistical Information Packet: Fiscal Year 2012, Southern District of Florida*] (reporting 519 fraud cases).

110. An example of interdistrict disparities in prosecutorial and judicial behavior: in fiscal year 2012, non-government-sponsored below-range sentences were imposed in 47.5% of cases in S.D.N.Y., compared with only 17.8% nationally and 23.1% in the Southern District of Florida. *Compare Statistical Information Packet: Fiscal Year 2012, Southern District of New York*,

analyzing data only from S.D.N.Y., I am thus able to offer more reliable possible explanations for my findings. Although below-range sentences are imposed in a higher percentage of all criminal cases in S.D.N.Y. than the national average,[111] this distinction is irrelevant for purposes of my analysis; my research focuses on the kinds of sentences imposed in a specific type of case, and does not address sentencing disparities across jurisdictions. Accordingly, my results and analysis apply only to major white-collar cases in S.D.N.Y.

I analyzed the raw data using SPSS software to isolate and evaluate "major white-collar cases." To identify the subset of cases I classify as "major white-collar cases," I eliminated the sentencing data for all non-white-collar crimes. This left sentences imposed for fraud, embezzlement, bribery, tax offenses, and antitrust violations.[112] Second, to exclude offenses related to drug or organized crime from my dataset, I eliminated any sentences in which the defendant was also convicted of a weapons-related offense. Finally, to focus on only "major" white-collar cases, I eliminated all sentencing data for offenses where the loss amount attributed to the defendant was $30,000 or less. Accordingly, I use the term "major white-collar cases" to refer to this particular subset of offenses.[113]

Examining a very particular subset of offenses offers a more nuanced view of how judges have utilized the discretion afforded by *Booker*. It yields a picture of major white-collar sentencing that considers "shades of gray." Whereas the Commission's trend reports paint in broad strokes, my findings provide as-yet-unavailable information about sentencing trends in high-loss white-collar cases in particular. My findings supplement the information provided by the Commission by filling the gaps identified in Section I.E.

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supra note 109, at 11 tbl.8, *with Statistical Information Packet: Fiscal Year 2012, Southern District of Florida*, *supra* note 109, at 11 tbl.8.

111. In fiscal year 2012, 52.4% of cases were sentenced within the Guidelines range nationally. In S.D.N.Y. for the same time period, only 33.5% of cases were sentenced within the Guidelines range. *See Statistical Information Packet: Fiscal Year 2012, Southern District of New York*, *supra* note 109, at 11 tbl.8.

112. This allowed me to draw conclusions about sentencing trends in major white-collar cases generally rather than specific offenses in particular. By comparison, the Commission's published reports generally provide analysis on an offense-by-offense basis. *See, e.g.*, U.S. SENT'G COMMISSION, *supra* note 106.

113. Although there are reasons to believe that the loss table could also overstate the culpability of defendants with less than $30,000 of loss attributed to them, my concern here is with defendants whose offense levels are subject to significant enhancement on the basis of the loss table.

III. RESULTS AND ANALYSIS: SENTENCING IN MAJOR WHITE-COLLAR CASES IN S.D.N.Y.

Section I.B described how the loss table affects sentences in major white-collar cases by providing for significant enhancements on the basis of broadly defined economic loss attributed to the defendant. This Part provides a step-by-step analysis of sentencing trends in these major white-collar cases. Section III.A illustrates that defendants in these cases often receive a departure from their Guidelines-calculated sentencing range, and considers how the frequency of departures changed after *Booker*. Next, in Section III.B, I consider whether the likelihood of a defendant receiving such a departure is affected by the amount of loss attributed to him via the loss table. In Section III.C, I probe further and determine that the magnitude of such downward departures is quite sizable. Finally, in Section III.D, I consider whether these results might be unique to major white-collar cases and determine that they probably are not.

A. The Decline of Guidelines Sentences: Trends in White-Collar Cases in S.D.N.Y. and Nationally

Before considering the particular effects of the loss table, I analyze how white-collar sentencing practices have changed in general since *Booker*. Figure 2 shows general sentencing trends for major white-collar cases in S.D.N.Y. over time. Before *Booker*, Guidelines sentences constituted about seventy percent of all major white-collar sentences. From 2009 to 2012, however, only about thirty to forty percent of such sentences fell within the Guidelines range.[114] In comparison—based on information provided by the Commission—Guidelines sentences for all economic crimes tied to the loss table nationwide decreased from more than eighty percent of sentences before *Booker* to only 50.6% of sentences in 2012.[115] In other words, judges in S.D.N.Y. apply Guidelines sentences in major white-collar cases at a rate much lower than the national average for similar economic crimes (30.4%, compared to 50.6% nationally, in 2012).[116]

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114. *See infra* Table A2.

115. U.S. SENT'G COMMISSION, *supra* note 103, at 4. Note that the data provided by the Sentencing Commission for economic crimes nationally includes all crimes listed under section 2B1.1 of the Guidelines, and includes all sentences imposed, including those where the defendant was not subject to a loss-table enhancement. That is, the offenses included are broader than the ones I analyzed. As such, the comparisons between national data and data in S.D.N.Y. are inexact.

116. *Compare id.*, *with infra* Table A2.

Figure 2.

TYPES OF SENTENCES IMPOSED IN MAJOR WHITE-COLLAR CASES IN S.D.N.Y.

Guidelines Sentence

Government-Sponsored Below-Range (5K1.1)
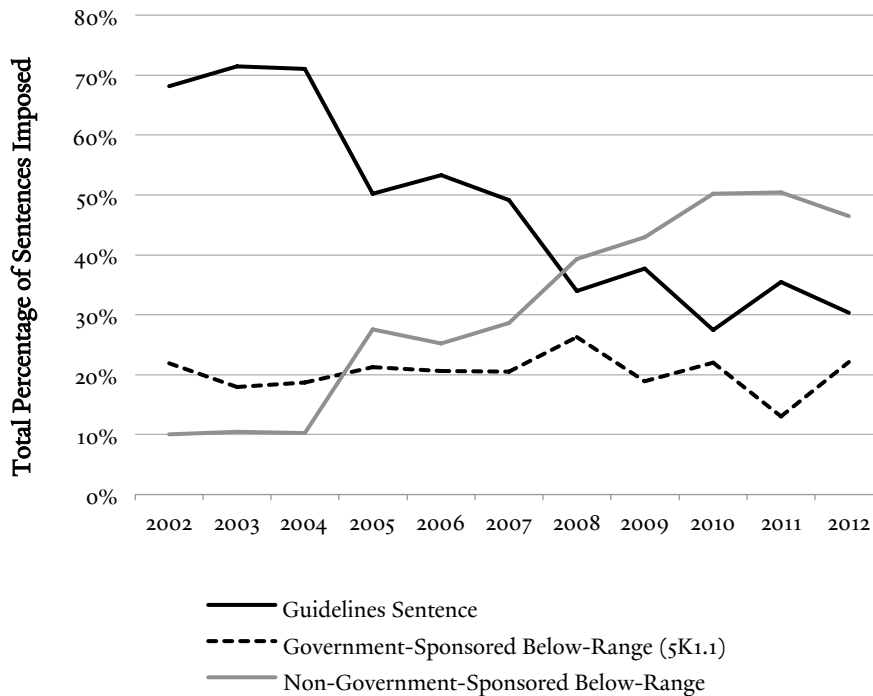
Non-Government-Sponsored Below-Range

Figure 2[117] also reflects the significant increase in the imposition of non-government-sponsored below-range sentences in S.D.N.Y. The percentage of cases in which such sentences were imposed increased from around ten percent before *Booker*, to thirty percent just after *Booker,* to around fifty percent by

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117. The category "government-sponsored below-range (5K1.1)" technically includes other kinds of government-sponsored below-range sentences, but there were virtually no such sentences included in my dataset. The Sentencing Commission's *Sourcebook of Federal Sentencing Statistics* describes this category as including, but not limited to, departures occurring "pursuant to a plea agreement . . . savings to the government, early plea, deportation, waiver of indictment and/or appeal, other government motion, global disposition, [or] . . . stipulations . . . ." *See Appendix A: Descriptions of Datafiles, Variables, and Endnotes*, *in* U.S. SENT'G COMMISSION, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 6 (2013), http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013 /sourcebook-2013 [http://perma.cc/QE9Q-PN56]. In fiscal year 2012, for example, there were only 15 "other government sponsored below range" sentences imposed, compared with 246 departures based on section 5K1.1 substantial assistance. *See Statistical Information Packet: Fiscal Year 2012, Southern District of New York*, *supra* note 109, at 11 tbl. 8.

2010.[118] Note the dramatic combined result: by 2012, nearly seventy percent of defendants in major white-collar cases in S.D.N.Y. received a government-sponsored or non-government-sponsored below-range sentence.[119]

Nationally, about forty-seven percent of white-collar offenders received below-range sentences, and about twenty-five percent received non-government-sponsored below-range sentences.[120] Comparing S.D.N.Y. with national trends, judges in S.D.N.Y. imposed non-government-sponsored below-range sentences at a much higher rate (forty-six percent) than the national average (twenty-five percent). This result is not particularly surprising given that judges in S.D.N.Y. have consistently departed from the Guidelines at rates higher than the national average when one considers all crimes, not just economic ones.[121] Finally, Figure 2 demonstrates that *Booker* apparently had little, if any, effect on the rate at which the government sponsored departures, which hovered around twenty percent for most years.[122]

In the wake of *Booker*, the frequency with which below-range sentences have been imposed has increased steadily such that, by 2012, a significant majority of defendants in major white-collar cases in S.D.N.Y. received below-range sentences. This tells us that judges in S.D.N.Y. are frequently dissatisfied with the sentencing ranges produced by the Guidelines in major white-collar cases, as they impose sentences below the Guidelines range in nearly seven in ten cases. As described further in Part IV, the fact that sentencing judges in S.D.N.Y.—who have significant experience sentencing in white-collar cases—depart with such frequency suggests that the white-collar Guidelines fail to provide tools sufficient to capture defendants' true culpability.

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118. The rate of non-government-sponsored below-range sentences has increased nationwide as well, but it has not increased nearly as dramatically. About 5% of white-collar offenders received such sentences in the years before *Booker*, increasing to roughly 13% after *Booker* in 2005, and increasing further to about 25% by 2012. *See* U.S. SENT'G COMMISSION, *supra* note 103, at 4.

119. *See also infra* Table A2.

120. *See* U.S. SENT'G COMMISSION, *supra* note 103, at 4.

121. *See, e.g.*, *Statistical Information Packet: Fiscal Year 2012, Southern District of New York*, *supra* note 109, at 11 (showing that in S.D.N.Y., Guidelines sentences were imposed in 33.5% of cases versus, nationally, in 52.4% of cases).

122. Nationally, government-sponsored below-range sentences became much more popular over time in white-collar cases, increasing from 9.5% of cases in 2003, to about 22% of cases in 2012. *See* U.S. SENT'G COMMISSION, *supra* note 103, at 4.

B. *Departures Become More Frequent as Loss Amount Increases, Largely Due to Changes in the Rate of Government-Sponsored Departures*

This Section considers whether the loss amount attributed to the defendant affects his likelihood of receiving a below-range sentence. As described in Section I.C, the loss table provides for significant enhancements—up to thirty levels—in the defendant's offense level. As the loss amount increases, so does the severity of these enhancements. For example, a defendant who receives a four-level enhancement under the loss table (for a loss amount greater than $10,000) might end up with a sentencing range of six to twelve months instead of zero to six months, whereas one who receives a twenty-four-level enhancement (for a loss amount greater than $50 million)—as Olis did—may receive a sentencing range of fifteen to twenty *years* instead of ten to sixteen months.[123]

Moreover, the enhancements might not reflect the defendant's actual culpability or the true seriousness of the offense. Recall that, under the loss table, a defendant who intends—but does not actually cause—a particular amount of loss receives the same enhancement as one who actually causes that amount of loss. Judges might impose non-government-sponsored below-range sentences more often in higher-loss cases, where the loss table provides for severe enhancements.[124] My results demonstrate, however, that below-range sentences are more common in higher-loss cases, but only because the *government* is more likely to have sponsored a below-range sentence in higher-loss cases. I present and explain these results below, and follow with a discussion of potential explanations.

To analyze departure rates by loss amount, I analyzed the types of sentences imposed over several different loss categories. I divided sentences

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123. *See* U.S. SENT'G COMMISSION, *supra* note 11 (showing Criminal History Category I, Offense Levels 6, 10, 12, 36).

124. To understand the rationale for this prediction, consider the following hypothetical: a judge may agree that, for example, a defendant who commits a fraud resulting in a $10,000 loss has committed an offense that is about 4 levels more severe than a similar offense that results in a $500 loss. This judge would be unlikely to disagree with the loss-table-suggested enhancement of 4 levels—which could turn what would have been a 0-6 month sentencing range into a 6-12 month sentencing range. *See id.* (indicating that Criminal History Category I, Offense Level 6 results in a 0-6 month sentencing range and Offense Level 10 results in a 6-12 month sentencing range). But that very same judge may hesitate to impose a 24-level enhancement on a defendant like Jamie Olis based on a loss amount greater than $50 million, where such an enhancement could turn a sentence of 10-16 months into a sentence of 15-20 *years*. *See id.* (requiring that Criminal History Category I, Offense Level 12 result in a 10-16 month sentencing range, and that Offense Level 36 result in a 188-235 month sentencing range).

into four categories based on loss amount: (1) between $30,001 and $200,000; (2) between $200,001 and $1 million; (3) between $1 million and $20 million; and (4) greater than $20 million.[125]

Figure 3.

COMPARISON OF GUIDELINES SENTENCES AND NON-GOVERNMENT-SPONSORED BELOW-RANGE SENTENCES IMPOSED BY LOSS AMOUNT

Figure 3 depicts data for Guidelines sentences and non-government-sponsored below-range sentences over time and by loss amount.[126] Figure 3

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125. I divided sentences into categories broader than those provided for in the loss table in order to ensure that there would be a sufficient number of cases in each category to analyze reliably.

126. There were only 18 pre-*Booker* and 58 post-*Booker* sentences involving over $20 million in loss. Moreover, my analysis with respect to the effect of loss amount on sentencing trends is

shows that, both before and after *Booker*, the rate at which judges imposed Guidelines sentences decreased as the loss amount attributed to defendants increased. The findings illustrate another, perhaps more intuitive trend: the percentage of Guidelines sentences imposed in major white-collar cases decreased after *Booker* regardless of the size of the loss amount.[127]

Yet Figure 3 shows that the discrepancy in the percentage of Guidelines sentences imposed in relatively high-loss cases versus lower-loss cases is *not* explained by the rate at which non-government-sponsored below-range sentences are imposed. Although a defendant was much more likely to receive a non-government-sponsored below-range sentence after *Booker* than before, within each time period, the likelihood that a defendant received such a sentence was not affected by loss amount. Before *Booker*, a defendant was about as likely to receive a non-government-sponsored below-range sentence in a relatively lower-loss case as he was in a higher-loss case. The same holds true for sentences imposed after *Booker*.[128] In other words, although defendants were more likely to receive non-Guidelines sentences in high-loss cases, it is not because judges were more likely to grant non-government-sponsored departures.
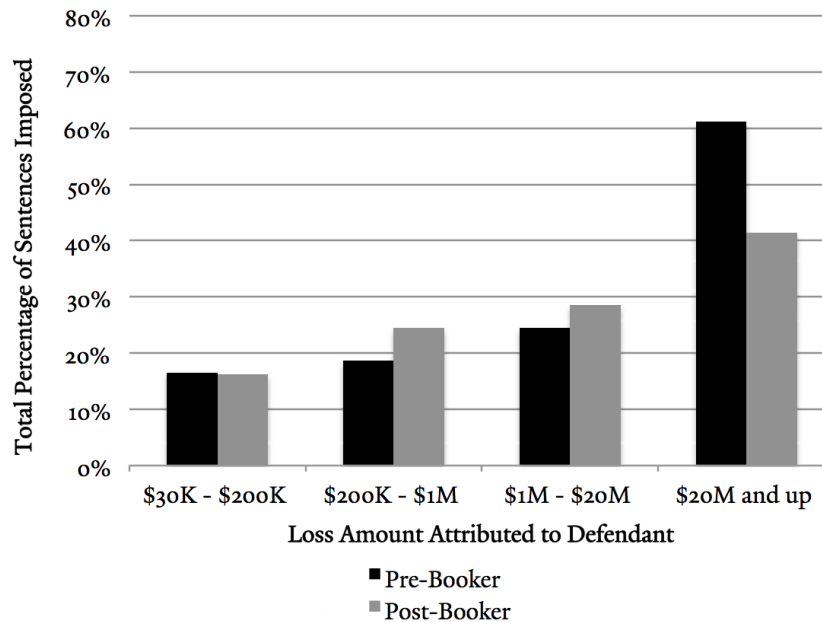
Rather, as shown in Figure 4, the rate of *government*-sponsored below-range sentences explains the change in rates of Guidelines sentences as loss amount increases. Both before and after *Booker*, the government was markedly more likely to sponsor a below-range sentence based on cooperation in cases with relatively more loss attributed to the defendant than in cases with relatively less loss.

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limited by the fact that the loss amount is not available for all sentences. Consequently, those sentences are not included in my analysis. See *infra* Table A3 for more information.

127. This trend is reflected in Figure 3 by the difference between the black and light gray bars. Figure 3 also shows that the percentage of non-government-sponsored below-range sentences increased after *Booker* regardless of loss amount, as reflected by the difference between the dark gray and striped bars.

128. This trend is reflected in Figure 3 by the dark gray and striped bars, which generally remained constant even as the loss amount increased.

Figure 4.
GOVERNMENT-SPONSORED (5K1.1) BELOW-RANGE SENTENCES IMPOSED (BY LOSS AMOUNT)

The government may be more likely to sponsor a below-range sentence in cases with high loss amounts for several reasons. First, cases with extremely high loss amounts could be more complicated, and may involve more defendants, than relatively low-loss cases. So the government might be more likely to need the assistance of one or more defendants, and thus seek cooperation at higher rates.[129] But even assuming that the government is more likely to benefit from the assistance of a cooperator in cases with higher loss

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129. This explanation is only plausible if the government actually needs the cooperation of a higher percentage of defendants in higher-loss cases than in lower-loss ones. For instance, it could be that in less complicated, lower-loss cases, only one of three defendants in a conspiracy might usefully contribute assistance to the government. In contrast, a more complicated higher-loss case might result in up to five defendants of ten contributing substantial assistance. In this example, we would expect to see a 33% government-sponsored departure rate for the first category of cases and a 50% rate for the second category. However, it seems just as likely that the government would only be "substantially assisted" by two of ten defendants in the latter category of cases, in which case the expected substantial assistance departure rate would only be 20%. This is merely to say that it is not necessarily true that more complicated cases involving more defendants should produce a higher percentage of government-sponsored below-range sentences.

amounts, it does not necessarily follow that the statistical chance of a defendant receiving a government-sponsored below-range sentence in those cases should be higher than a defendant's chance of receiving one in a relatively lower-loss case.

Second, defendants in higher-loss cases may be more likely to have better attorneys, particularly ones who have experience interacting with the U.S. Attorney's Office and who are more effective in securing government-sponsored departures for their clients.[130]

Third, in higher-loss cases, the government might actually agree — implicitly or explicitly — that the loss table enhancements overstate a defendant's culpability. On this view, the government may be more likely to sponsor a departure based on cooperation in higher-loss cases not because defendants provide substantial assistance at higher rates, but because the government is more likely to consider the Guidelines sentencing ranges in those cases unacceptably high. That is, the government might be filing "false" section 5K1.1 letters — or at least be more liberal in their assessment of who provides "substantial assistance" — in order to ensure that the defendant receives a sentence much shorter than the Guidelines range.[131]

I find this last explanation exceedingly unlikely. If the government believes the loss table enhancements produce a Guidelines sentencing range that is unreasonable or otherwise unfairly represents the defendant's culpability, the government has several options other than filing a "false" section 5K1.1. First, the prosecutor could engage in "sentencing bargaining" with the defendant, such that the loss amount included in the presentence report — which is produced by the probation officer and relied upon by the judge in determining the Guidelines sentencing range — is lower, thereby resulting in a lower Guidelines range.[132]

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130. *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 17-25 (1988) (explaining the factors implicitly weighed by judges in making sentencing decisions, of which attorney effectiveness is one).

131. As discussed *infra* Section III.C, government-sponsored below-range sentences are generally *much* shorter than the Guidelines sentencing range.

132. *See* Rakoff, *supra* note 26, at 8. However, "negotiating" the loss amount will not always result in a lower Guidelines sentencing range. This is because the judge is instructed to calculate the loss amount based on the information provided to the court in the presentence report produced by the probation officer. Although prosecutors have ultimate authority to decide what facts they will present to a grand jury or jury, and what amounts to include in a charge, they cannot prevent the court from finding during sentencing that the loss attributed to the defendant is greater than what the government suggests. The probation officer "must conduct a presentence investigation and submit a report to the court" that, among other things, provides the court with an advisory Guidelines sentence. FED. R. CRIM. P. 32(c)-(d).

The government could also explicitly or implicitly convey that it supports a non-Guidelines sentence to the judge during sentencing. The policy of the U.S. Attorney's Office for S.D.N.Y. apparently requires an Assistant U.S. Attorney (AUSA) to seek permission from the Chief of the Criminal Division if she wishes to either seek a particular sentence in a given case or request a sentence above or below the Guidelines-calculated range.[133] Based on admittedly anecdotal information, it seems that this specific permission is only infrequently requested, though almost always granted when requested.[134]

AUSAs might also indicate implicitly to the court—without official permission from their Office—that a below-range sentence is warranted. For example, in *United States v. Adelson*,[135] the defendant would have received an effective life sentence under the Guidelines due to a twenty-four-point loss table enhancement. While the government argued officially—in accordance with Justice Department policy—that the Guidelines sentence should be imposed, at the sentencing hearing the AUSA "refused to answer the question [of whether the government was asking for a Guidelines sentence] directly":

The Court:	So you want Mr. Adelson to spend the rest of his life in prison. That's your position, yes?
The Government:	Your Honor, I think our position is slightly more nuanced than that. . . . [W]e respectfully submit that a sentence that is consistent with the terms of the applicable [G]uidelines . . . [a]nd consistent with other sentences in other similar cases [would be suitable]. We think that by coupling those two together, that would be an appropriate reasonable—
The Court:	So you think I should impose a non-[G]uideline sentence?
The Government:	Your Honor, as the Court is well aware, our policy is that the [G]uidelines sentence is—
The Court:	I don't think you can have it both ways. I think you either have to take this position that you seem to be taking in your papers, that this defendant should

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133. Interview with Judge Richard Sullivan, S. Dist. N.Y., in N.Y.C., N.Y. (Jan. 12, 2015).

134. *Id.*

135. 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

> be sentenced to life imprisonment, or not. I don't
> think you can wiggle out of that with this what you
> call "nuanced" equivocation.[136]

Predictably, judges do not appreciate this kind of hedging by the government.[137] AUSAs act on behalf of the government and should prioritize transparency.[138] This is all to say that, when the government believes the Guidelines range is too high, it has multiple means to secure a below-range sentence other than filing unwarranted section 5K1.1 letters.

The final potential explanation for the high rate of government-sponsored departures in higher-loss cases turns the presumed causal relationship on its head. Rather than assuming that the government sponsors departures at higher rates because the loss amount in those cases is higher, this explanation suggests that the loss amount may actually be higher *because* the government sponsored a departure. The U.S. Attorney's Office for S.D.N.Y. appears to require cooperators to pay a "cooperation penalty" by expecting them to reveal, and in most cases plead guilty to, all criminal conduct to receive the benefits of cooperation—regardless of whether that conduct was known to the government prior to the proffer.[139] Moreover, the defendant must disclose the full extent of the charged scheme, including conduct or loss that the government may not have been able to identify or prove.[140] As such, it is possible that government-sponsored below-range sentences are common in very high-loss cases precisely because the loss amount—and thus the

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136. *Id.* at 511-12.

137. When the government officially sponsors a below-range sentence, or officially does not object to a defendant's motion for departure, the judge indicates this in the Statement of Reasons Form. *See Judgment in a Criminal Case – Statement of Reasons*, U.S. CTS., http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO245B.pdf [http://perma.cc/G8JQ-HZSJ]. But when the government only *implicitly* supports a below-range sentence, the sentencing judge is unable to officially indicate the government's lack of objection to the below-range sentence. As such, the Statement of Reasons Form may not accurately reflect the circumstances surrounding the sentence imposed. Moreover, because the Commission's data is based in part on the Statement of Reasons Form, there is no way to know how many sentences categorized by the Commission as non-government-sponsored below-range sentences were, in reality, below-range sentences imposed with the support of, or at least lack of objection from, the government.

138. Moreover, if judges are on the lookout for "a wink and a nod" by prosecutors, the government might fear that a judge will mistakenly interpret an AUSA's behavior as suggesting implicit support of a below-range sentence. I consider this possibility remote.

139. My conversations with Judge Richard Sullivan informed my understanding of this policy. *See* Interview with Judge Richard Sullivan, *supra* note 133. Not every U.S. Attorney's Office employs this policy. *See id.*

140. *Id.*

Guidelines sentencing range—is "inflated" beyond what it would have been had the defendant not cooperated. This theory is described in more detail in Section III.C, where I provide empirical support for the notion that this cooperation penalty exists and inflates cooperating defendants' Guidelines sentencing ranges.
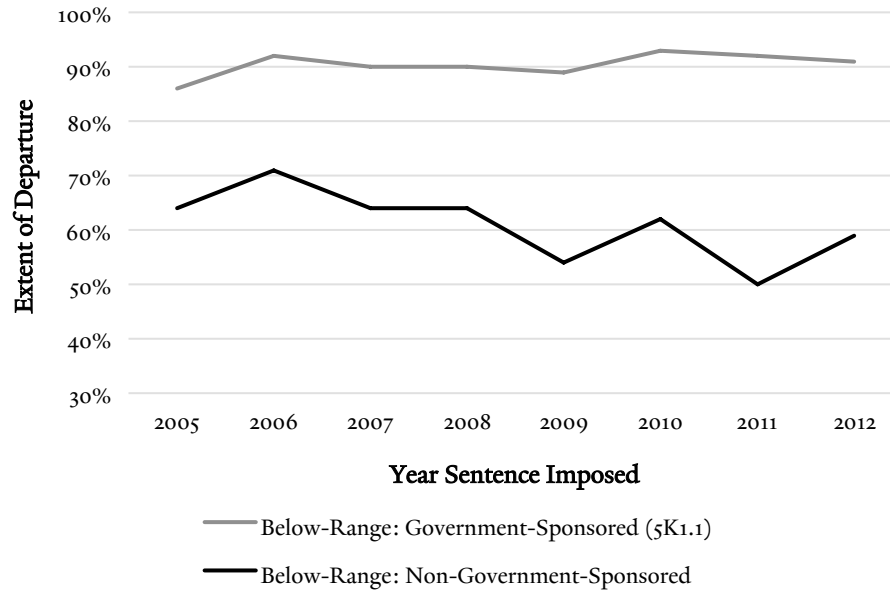
C. Extent of Departures by Departure Type: Defendants Who Receive Below-Range Sentences Derive Significant Benefits

The findings presented thus far demonstrate that judges (and prosecutors, to the extent that they sponsor departures) frequently determine that the Guidelines sentencing range produced in major white-collar cases is inappropriate. But how inappropriate? It is one thing to determine that judges find the Guidelines range too severe in many cases, but it is quite another to determine that judges find the Guidelines range *significantly* too severe in many cases. This Section considers how far "below-range" those sentences actually are. That is, when judges impose such sentences, by how much do they depart from the bottom end of the Guidelines sentencing range (minimum Guidelines range)? The Commission has not released data on this point, and scholars have yet to address this question. Empirical data concerning this issue, however, is essential in assessing just how broken the white-collar Guidelines are—at least in the eyes of judges who must consult them.

I evaluate two kinds of below-range sentences: (1) below-range sentences based on cooperation with the government; and (2) non-government-sponsored below-range sentences, imposed by the court without sponsorship by the government. I consider them separately because these two types of sentences are imposed for different reasons. Judges impose government-sponsored below-range sentences to incentivize cooperation. Cooperating defendants should receive significant departures because white-collar defendants are exceedingly unlikely to have significant criminal histories or to have committed violent crimes. Non-government-sponsored below-range sentences, meanwhile, are imposed when the judge independently determines that the Guidelines sentencing range is inappropriately high relative to the defendant's culpability. Non-government-sponsored below-range sentences thus reflect the judge's determination that the Guidelines-calculated sentencing range does not accurately capture the defendant's culpability.

I reviewed and analyzed each individual government-sponsored below-range sentence and each non-government-sponsored below-range sentence in my dataset, and I compared the sentence that the defendant actually received with the minimum Guidelines range. Figure 5 demonstrates that defendants receiving either kind of departure derive great benefits.
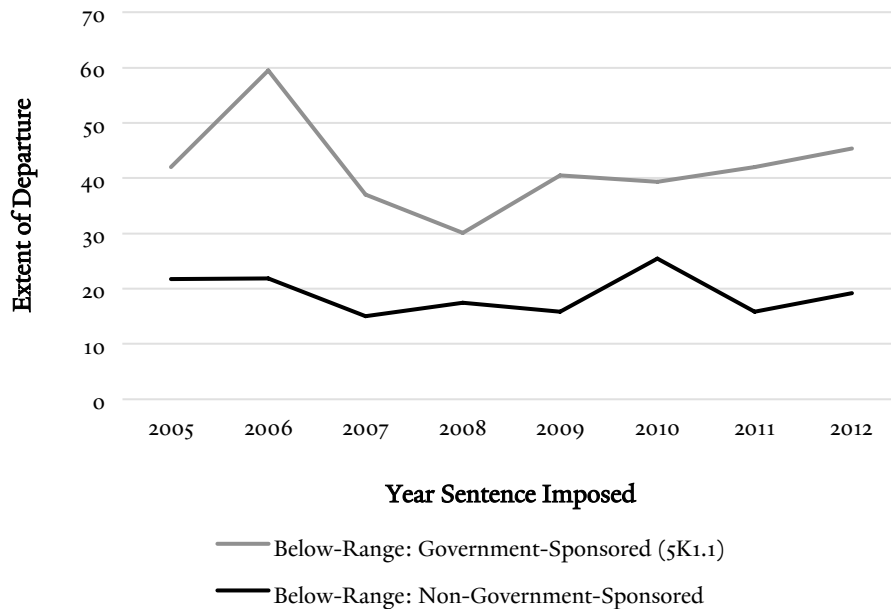
Figure 5.
EXTENT OF DEPARTURE (IN PERCENTAGES) BY DEPARTURE TYPE

Below-Range: Government-Sponsored (5K1.1)

Below-Range: Non-Government-Sponsored

Government-sponsored below-range sentences were consistently 90% shorter than the minimum Guidelines range. The extent of departure for non-government-sponsored below-range sentences was smaller, but still significant: defendants received sentences that were, on average, fifty to seventy percent shorter than the minimum Guidelines sentence. Figure 6 shows the same data, but with departures expressed in months rather than as a percentage of the minimum Guidelines range.[141]

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141. The data presented in Figure 6 represents the average departure in months, based on departure type, with life sentences removed from the dataset to avoid distortion. I removed data for nine sentences total—three from 2008, one from 2009, two from 2010, and two from 2012—from the set of non-government-sponsored below-range sentences. For further information, including the data including such sentences, see *infra* Tables A3, A4.

Figure 6.
EXTENT OF DEPARTURE (IN MONTHS) BY DEPARTURE TYPE

Below-Range: Government-Sponsored (5K1.1)

Below-Range: Non-Government-Sponsored

These results suggest that judges in S.D.N.Y. frequently determine that a departure is appropriate and, when imposing such departures, provide defendants with significant sentencing benefits.

Consider cases in which judges imposed non-government-sponsored below-range sentences. On average, defendants received at least a fifty-percent departure, or more than eighteen months off their sentences. While the average minimum Guidelines sentence in such cases ranged from about thirty to fifty months, the average sentence actually received ranged from about fourteen months to about twenty-six months.[142] Recall that non-government-sponsored below-range sentences have become increasingly common in major white-collar cases, constituting about fifty percent of sentences in the past few years,[143] while government-sponsored below-range sentences routinely comprise twenty percent of such cases. In recent years, roughly seventy percent of defendants in major white-collar cases received a downward departure from

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142. These averages do not include data from 9 life sentences, which I removed to avoid distortion. For further information, including figures that incorporate the life sentences, see *infra* Table A4.

143. *See supra* Figure 2.

their Guidelines-calculated sentencing range, and those departures were, for the most part, quite large. My findings thus demonstrate that sentencing judges in S.D.N.Y. have not shied away from using the discretion afforded by *Booker* to impose sentences significantly shorter than those produced by the Guidelines.

Unsurprisingly, as shown in Figure 5 and Figure 6, the departures given to defendants who provide substantial assistance to the government are generally greater than those given to defendants who do not. The sentence actually received by cooperators is on average about ninety percent shorter than the minimum Guidelines range, or between thirty and sixty months shorter.

There are two plausible explanations for these dramatic findings. First, some judges may simply operate under a rebuttable presumption that a white-collar offender who provides substantial assistance to the government should not serve much (if any) time in prison. Judges understand that the assistance provided by cooperating defendants is invaluable to the government, and no doubt take into consideration the fact that the vast majority of white-collar offenders have no significant criminal history. As such, it is possible that at least some judges nearly always impose sentences of probation, which amount to one-hundred-percent departures, for white-collar cooperators.
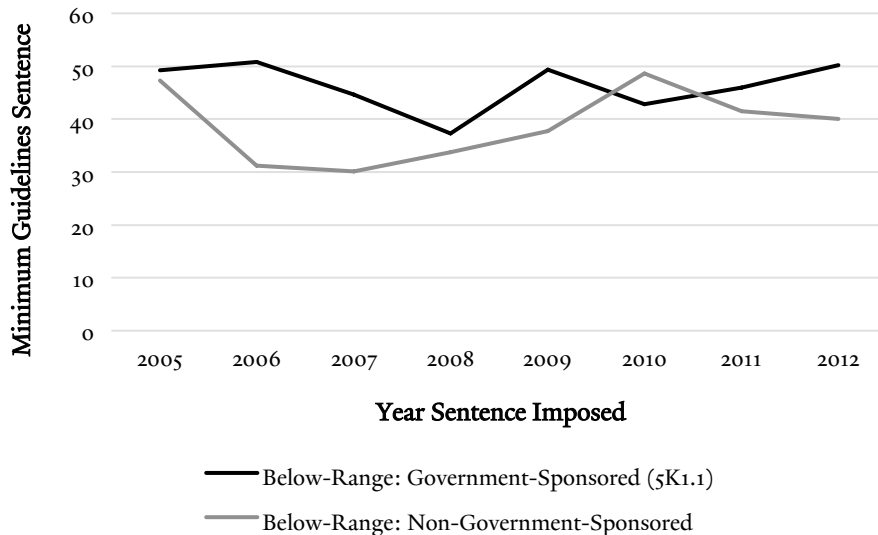
The second explanation draws on the theory posited in Section III.B: that Guidelines sentencing ranges are actually "inflated"[144] in cases in which the defendant receives a government-sponsored below-range sentence. If this is the case, then judges must depart significantly from the minimum Guidelines range to ensure that the defendant benefits from cooperating.[145] If the judge does not depart far enough below the "inflated" Guidelines range, then the defendant may be better off simply pleading guilty and disputing the loss amount.

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144. By "inflated" I mean that the Guidelines sentencing ranges in these cases are higher than they would have been had the defendant not cooperated, due to the U.S. Attorney's Office policy requiring full cooperation. For further discussion of this policy, see *supra* notes 139-140 and accompanying text.

145. Consider a defendant who was a conspirator in a multidefendant fraud. If the defendant refused to cooperate with the government and pleaded guilty, the government might not have enough information to prove more than, say, $100,000 of loss. Likewise, the probation officer might not have enough information to include more than $100,000 of loss in the presentence report. The defendant's sentence would be calculated in part on the basis of that loss amount. Consider, instead, that the defendant cooperated with the government and had to provide all information related to any criminal conduct he committed. The government might then have the information required to prove $500,000 of loss rather than $100,000, and the Guidelines sentencing range produced would be significantly higher. In this case, a sentencing judge would want to make sure that the defendant receives a sentence shorter than what he would have received, had he pleaded guilty, to ensure that defendants are incentivized to cooperate with the government.

This theory is plausible only if the Guidelines ranges are in fact "inflated" compared to ranges for noncooperators. To test this theory, I calculated the average minimum Guidelines range produced in both kinds of cases: (1) cases where the defendant cooperated, and (2) cases where the defendant did not cooperate but still received a below-range sentence. As shown in Figure 7, I found that the average minimum Guidelines ranges in cases where the defendant cooperated were consistently longer than the minimum Guidelines ranges in cases where the defendant received a non-government-sponsored below-range sentence.

Figure 7.

AVERAGE MINIMUM GUIDELINES SENTENCE (IN MONTHS) BY DEPARTURE TYPE

Year Sentence Imposed

⸻ Below-Range: Government-Sponsored (5K1.1)

⸻ Below-Range: Non-Government-Sponsored

The minimum Guidelines sentencing range in cases involving cooperators generally exceeded the range in cases with non-government-sponsored departures.[146] Although it is possible that cases in which the defendant receives a government-sponsored below-range sentence are, on average, more serious than cases where the defendant receives a non-government-sponsored below-range sentence, it seems unlikely for the reasons described in Section III.B. In fact, given that the government often seeks cooperation from less culpable players in order to get at the "higher-ups," we might expect defendants who

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146. The average sentences reflected in Figure 7 do not include nine life sentences, which I removed from the dataset to avoid distortion. See *infra* Table A5 for further information.

cooperate to be charged with less serious offenses than their noncooperating counterparts. On this view, we would expect cooperators to receive shorter Guidelines sentencing ranges. My findings thus suggest that the U.S. Attorney's Office for S.D.N.Y. implements a "cooperation penalty," which results in the "inflation" of Guidelines sentencing ranges for cooperating defendants. Assuming that at least some judges know of and understand this policy,[147] even a relatively harsh sentencing judge should impose sentences that depart significantly downward from the Guidelines range in these cases to incentivize cooperation.[148] My findings demonstrate this trend: defendants who cooperate with the government pay the "penalty" of receiving higher Guidelines sentencing ranges than defendants who receive non-government-sponsored departures, but in turn obtain a massive reduction of their final sentence — receiving sentences that average around just four to nine months.[149]

So far, my results show two significant trends: (1) the frequency with which below-range sentences are imposed in major white-collar cases has continued to increase steadily, post-*Booker*; and (2) below-range sentences imposed in major white-collar cases tend to be significantly shorter than the Guidelines range. As discussed in Part IV, these results suggest that the white-collar Guidelines in general, and the loss table in particular, are insufficient tools for assessing defendants' culpability.

D. The Trouble with the Guidelines Is Not Unique to the Loss Table: Comparing Major White-Collar Cases with All Cases in S.D.N.Y.

Since *Booker*, judges across the country have imposed non-Guidelines sentences with increasing frequency.[150] But judges may be more likely to impose non-Guidelines sentences in major white-collar cases governed by the loss table than they are in the average case. White-collar sentencing may be less amenable to the sort of rigid quantification embodied by the Guidelines in general and the loss table in particular. White-collar cases are particularly heterogeneous. Scholars have noted that "[i]t is harder to speak of a typical bribery or securities fraud than of a typical drug deal or mail theft."[151]

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147. *See supra* notes 139-140 and accompanying text.

148. Based on my findings, I expect that the trend I identify — the existence of relatively high minimum Guidelines-calculated sentences alongside the imposition of extraordinarily large departures in cases involving cooperation — is unlikely to exist in districts where cooperating defendants are not required to reveal all past criminal conduct.

149. *See infra* Table A5.

150. *See supra* Figure 1.

151. WHEELER ET AL., *supra* note 130, at 18.

Moreover, in white-collar cases more than in others, "the very existence of a crime may be in dispute, and matters of intent and motivation are often ambiguous."[152] In addition, white-collar cases "more often are subject to the adversarial efforts of defense attorneys," which "tends to complicate rather than simplify the classification of a case."[153] And in white-collar cases "judges are usually deprived of two of the primary qualities that help the judge decide on a sentence: a violent act and a prior record."[154] These characteristics of white-collar sentencing may make judges more likely to use the discretion returned to them by *Booker* to impose sentences shorter than the Guidelines range.

To test whether defendants in major white-collar cases are more likely to receive below-range sentences than other defendants, I compared sentencing trends for major white-collar cases in S.D.N.Y. with trends for all criminal cases in S.D.N.Y. I examined the percentage of Guidelines sentences imposed, the percentage of government-sponsored below-range sentences imposed, and the percentage of non-government-sponsored below-range sentences imposed for both categories of crimes.

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152. *Id.*

153. *Id.*

154. *Id.*

Figure 8.
COMPARISON OF SENTENCING TRENDS IN S.D.N.Y.

FIGURE 8A: GUIDELINES SENTENCES

All Crimes: Guidelines Sentence
Major White-Collar: Guidelines Sentence

FIGURE 8B: GOVERNMENT-SPONSORED BELOW-RANGE SENTENCES

All Crimes: Government-Sponsored Below-Range (5K1.1)
Major White-Collar: Government-Sponsored Below-Range (5K1.1)

FIGURE 8C: NON-GOVERNMENT-SPONSORED BELOW-RANGE SENTENCES

All Crimes: Non-Government-Sponsored Below-Range
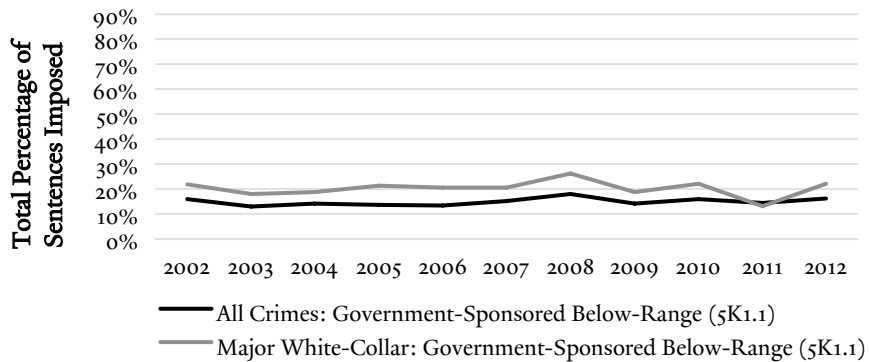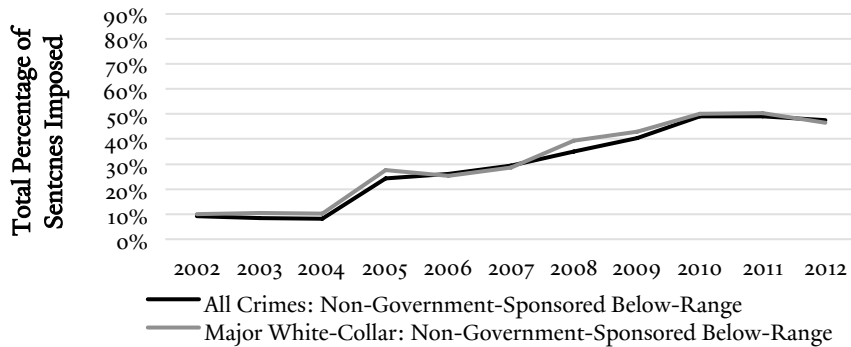Major White-Collar: Non-Government-Sponsored Below-Range

Figure 8 shows that, over time, the percentage of Guidelines sentences imposed fell dramatically, both for all crimes and for major white-collar crimes, in S.D.N.Y. Correspondingly, the percentage of non-government-sponsored below-range sentences increased significantly after the Court decided *Booker* in 2005. For almost all years, the percentage of Guidelines sentences imposed in major white-collar cases was slightly lower than the percentage of Guidelines sentences imposed in all crimes combined. That is, it was slightly more likely that a defendant would receive a non-Guidelines sentence in a major white-collar case than in the average case. However, there is no major difference between the percentage of non-Guidelines sentences imposed in major white-collar cases and in cases generally.

The explanation for this difference is not that major white-collar offenders were more likely to receive non-government-sponsored below-range sentences. They were not: those kinds of sentences were imposed in nearly the exact same percentage of major white-collar cases as cases generally. Instead, the difference in rates of non-Guidelines sentences appears to correspond to the difference in government-sponsored below-range sentences: defendants in major white-collar cases were slightly more likely than the average defendant to receive a government-sponsored below-range sentence. But the difference is slight— only a few percentage points per year.[155]

The government's tendency to sponsor departures based on cooperation more often in major white-collar cases relative to all criminal cases is likely the result of several factors. First, major white-collar cases are more likely to involve multidefendant conspiracies than, say, immigration offenses.[156] As such, the government may be more likely to need a cooperator to prove its case. Second, the government might be more comfortable offering the benefits of cooperation to defendants who are unlikely to have significant criminal histories and even less likely to have committed violent crimes. Third, defendants themselves might be more likely to cooperate in major white-collar cases than than in other kinds of cases. After all, a defendant who cooperates in a major white-collar case is probably less likely to be killed for cooperating than a defendant who cooperates in a gang-related drug conspiracy.

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155. For instance, in 2007, 53% of sentences imposed in S.D.N.Y. were Guidelines sentences, as opposed to 49% of sentences in major white-collar cases. Meanwhile, for the same year, about 15% of defendants received government-sponsored departures overall, while 20.5% of major white-collar defendants received the same. *See infra* Table A1.

156. One of the two Guidelines for immigration offenses—"Unlawfully Entering or Remaining in the United States"—is unlikely to involve co-conspirators. And in the event of a conspiracy, the government would be unlikely to need a cooperator to prove that a defendant unlawfully entered or remained in the United States. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.1-.2 (U.S. SENTENCING COMM'N 2014).

The frequency with which non-government-sponsored below-range sentences are imposed—up to roughly fifty percent of both groups of cases by 2010—suggests that judges in S.D.N.Y. often determine that sentences produced by the Guidelines are inappropriately high. But my findings suggest that judges do not consider the Guidelines ranges objectionable in major white-collar cases much more frequently than they find the Guidelines ranges objectionable in other kinds of cases.[157] Judges often disagree with Guidelines-calculated sentences in major white-collar cases, but there remains little difference between trends for these crimes and for crimes generally, because judges also frequently disagree with the Guidelines-calculated sentences in other kinds of cases.

Consider drug crimes, which make up a significant proportion of the docket in S.D.N.Y.[158] The Guidelines sentencing ranges for these crimes are calculated based largely on the weight of drugs attributed to the defendant under the drug quantity table.[159] This calculation may overstate a drug defendant's culpability, just as calculations under the loss table do for white-collar defendants. Moreover, some judges believe that the Guidelines's sentencing structure for crack cocaine is fundamentally flawed, and therefore they routinely depart from the Guidelines in crack cases.[160] As a result, my criticisms of the loss table—that it relies too heavily on numbers and produces sentences that are too harsh—are likely generalizable to other aspects of the Guidelines.

IV. WHERE DO WE GO FROM HERE?

In 2008, Stith predicted that "[t]he pendulum of sentencing practice may increasingly swing back toward the exercise of informed discretion as newly appointed local decision makers are able to see beyond the narrow and

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157. My results only show how *often* judges depart from the Guidelines sentencing range in major white-collar cases as compared to all cases generally. I make no claim about how *much* judges depart from the Guidelines range when they do depart in all cases in the aggregate.

158. For instance, in fiscal year 2012, drug offenses made up 42% of the docket in S.D.N.Y., as compared with 30.2% of the docket nationally. *Statistical Information Packet: Fiscal Year 2012, Southern District of New York*, *supra* note 109, at 1 fig.A. In comparison, fraud offenses made up 19.8% of the docket, about double the national average of 10.5%. *Id.*

159. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (U.S. SENTENCING COMM'N 2014).

160. *See, e.g.*, United States v. Gardner, 20 F. Supp. 3d 468, 469 (S.D.N.Y. 2014) (stating that "[w]hile, with respect to all offenses involving illegal drugs, the quantity of the drugs is, by far, the single most important component in calculating the applicable Guidelines range, in the case of crack cocaine, but not powder cocaine, the actual quantity is multiplied by a factor of 18" and determining that a one:one, rather than the Guidelines' eighteen:one, crack-to-powder-cocaine ratio should apply in calculating defendant's sentence).

arbitrary 'frame' of the Federal Sentencing Guidelines."[161] My findings suggest that, at least in the realm of major white-collar cases in one of the most prominent judicial districts in the country, Stith's prediction was correct. Defendants in major white-collar cases in S.D.N.Y. are more likely than not to receive a sentence below the Guidelines range. Moreover, when a below-range sentence is imposed, it is generally vastly shorter than the sentence recommended by the Guidelines. The lengthy sentences produced under the Guidelines are rarely actually imposed, at least in S.D.N.Y. Rather, both the government, by sponsoring below-range sentences on the basis of cooperation, and the court, by frequently imposing below-range sentences in cases not involving cooperation, behave in ways that mitigate the often harsh effects of the loss table.

These results suggest that many judges believe the loss table is an ineffective tool for measuring white-collar defendants' culpability because it frequently and vastly overstates the seriousness of the offense. My results further demonstrate that this critique is neither unique to a small number of cases nor embraced by only a few judges. Prior scholarship relies on anecdotal evidence of extraordinarily long sentences imposed in specific white-collar cases to argue that the Commission should reconsider the white-collar Guidelines.[162] My findings provide comprehensive empirical evidence that the white-collar Guidelines are broken: the results indicate widespread judicial refusal to impose the sentences produced under those Guidelines. The fact that my findings pertain to a district in which judges have significant experience sentencing in major white-collar cases reinforces the conclusion that these Guidelines are flawed.[163]

The Guidelines are merely advisory. But as long as they remain the "starting point" in every sentencing, the quality and fairness of the Guidelines

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161. Stith, *supra* note 67, at 1420.

162. For instance, Andrew Weissmann and Joshua Block argue that the extraordinarily high sentences imposed on some corporate executives should "cause the Sentencing Commission and Congress to rethink the fraud Guidelines." Weissmann & Block, *supra* note 33, at 291.

163. One might respond that my findings — rather than supporting the notion that the white-collar Guidelines are flawed and should be amended — support the notion that the problem is with the *judges*. This argument is unpersuasive. The S.D.N.Y. bench is well regarded and includes judges appointed by both Republican and Democratic presidents, including many former prosecutors. Moreover, if anyone should believe that judges in S.D.N.Y. have gone rogue, it should be the U.S. Attorney's Office. Yet the government almost never appeals sentences in S.D.N.Y. *See, e.g., Disposition of Government Sentencing Appeals in Each Circuit and District, Fiscal Year 2010*, U.S. SENT'G COMMISSION 1 tbl.56A (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications /annual-reports-and-sourcebooks/2010/Table56a.pdf [http://perma.cc/9EHT-X6R6].

still matters.[164] Moreover, there is reason to believe that the Guidelines have an "anchoring effect" on judges such that—regardless of the Guidelines's advisory status—many judges will continue to impose sentences within or close to the Guidelines range regardless of whether that range satisfies Congress's directive to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing.[165] Even if this anchoring effect does not exert much influence on judges in S.D.N.Y. in high-loss white-collar cases, it may influence judges elsewhere.[166] In particular, judges with less experience sentencing in these kinds of cases might reasonably rely more heavily on the Guidelines anchor. As such, it remains essential that the "anchor" not produce sentences that are arbitrary or too severe.

A. Proposal One: Reduce the Severity of the Loss Table's Enhancements and Add an Enhancement to Section 2B1.1 Based on the Defendant's Own Pecuniary Gain

Congress and the Commission should reconsider and amend the white-collar Guidelines. I propose a series of amendments that would provide a more nuanced and accurate assessment of white-collar defendants' culpability. First, the Commission should propose an amendment[167] reducing the severity of the loss table enhancements. The loss table currently provides for enhancements ranging between two and thirty levels. As a result, where the loss amount attributed to the defendant is even moderately high, that loss amount will be by far the most significant contributor to the resulting Guidelines sentencing range, dwarfing other arguably more relevant factors including the defendant's role in the offense, the effect of the defendant's conduct on victims, and—for defendants sentenced on the basis of intended loss—the actual financial harm caused by the offense. Moreover, the pure severity of these enhancements is

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164. *See supra* notes 22-32 and accompanying text.

165. 18 U.S.C. § 3553(a) (2012).

166. Although my findings show that many judges feel free to impose sentences below the Guidelines range in major white-collar cases, there may in fact be an "anchoring effect" even in S.D.N.Y. That is, if the Guidelines produced shorter sentencing ranges, it may be that the sentences actually imposed would be even shorter than they are now. Regardless of whether judges impose a sentence inside or outside the Guidelines range, that benchmark may well influence the actual sentence imposed.

167. Each year the Commission publishes proposed amendments, holds a period of notice and public comment, and then promulgates final amendments. Those amendments become effective automatically after November 1 of each year, unless Congress affirmatively disapproves of them. *The U.S. Sentencing Commission's Amendment Cycle,* U.S. SENT'G COMMISSION (2015), http://www.ussc.gov/sites/default/files/pdf/about/overview/InFocus _Amendment-Cycle.pdf [http://perma.cc/V8VN-LWEC].

disproportionate to the harm caused by most white-collar crimes. Section 3553(a) requires the court to impose a sentence "sufficient, but not greater than necessary,"[168] to comply with the goals of sentencing, yet the loss table can provide for what amounts to a sentence of life in prison where the loss amount is high enough—even for first-time offenders. As my results suggest, the sentencing ranges produced as a result of loss table enhancements are out of step with judicial, and likely societal, notions of justice. The Commission should thus reduce the enhancements such that they range from one to fifteen levels, rather than from two to thirty levels.[169]

Second, the Commission should add an enhancement increasing a defendant's offense level based on the amount of pecuniary gain he received as a result of the offense. To avoid the exact problem I identify throughout this Note with the current white-collar Guidelines—that they often produce sentencing ranges that are unduly harsh—this new enhancement should be less severe than those provided by the loss table. Likewise, the change should not be made unless in conjunction with an amendment reducing the severity of the loss table enhancements. The current Guidelines instruct the court to "use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."[170] The Commission's justification is that basing the sentence on gain rather than loss would ordinarily underestimate the loss and, consequently, the defendant's culpability.[171] Under my proposal, the enhancement based on gain would supplement the amount of loss attributed to the defendant under the less severe loss table. This enhancement, in conjunction with my first proposal, better captures the defendant's true culpability. Defendants with significant roles in an offense are likely to have derived significant economic benefits, while low-level players are likely to have benefited only minimally. Accordingly, defendants with the greatest culpability—those whose conduct results in significant financial harm from which the defendant benefits directly—would be punished severely, since they would be subject to both the

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168. 18 U.S.C. § 3553(a).

169. *See also* David Debold & Matthew Benjamin, *"Losing Ground"—in Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. PENNUMBRA 141, 154-55 (2011) (proposing ways to amend the loss table so that the amount of loss has "less significant sentencing input").

170. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(B) (U.S. SENTENCING COMM'N 2014).

171. *See* Office of Gen. Counsel, *An Overview of Loss in U.S.S.G. § 2B.1*, U.S. SENT'G COMMISSION 6-7 (2009), http://www.ussc.gov/sites/default/files/pdf/training/online-learning-center /supporting-materials/Loss_Overview_2009_April.pdf [http://perma.cc/8XRK-PRFH].

loss table enhancements and this separate enhancement.[172] Meanwhile, defendants who gain little or nothing through minimal participation in a fraudulent scheme would be subject only to the loss table enhancements, which would be significantly less harsh under my first proposal.[173]

B. Proposal Two: Apply Loss Table Enhancements Only to Actual Loss

Finally, the loss table enhancements should apply only to losses that have actually accrued, and not to intended loss. In most other areas of criminal law, we punish those who merely attempt to cause a particular harm differently than those who actually accomplish that harm. For example, the Guidelines provide for a base offense level of forty-three for first-degree murder, while the base offense level for attempted first-degree murder is thirty-three.[174] And in insider-trading cases, the Guidelines provide for sentencing enhancements on the basis of the gain resulting from the offense rather than losses caused or intended to be caused.[175] While there is significant disagreement over how to calculate the gain resulting from the offense in the insider-trading context,[176] defendants' sentences are based on some measure of actual gain, not intended gain. In punishing attempted harm less harshly than actual harm, we recognize that the blameworthiness of the defendant's frame of mind affects, but is not determinative of, how harshly he should be punished; we must also consider

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172. Adding a separate enhancement based on individual pecuniary gain would sometimes result in "double counting." For instance, if a defendant defrauds an individual out of $100,000 and pockets that entire amount, he will be punished under the loss table for the $100,000 loss and also receive an enhancement based on the $100,000 gain. Double counting in this situation is appropriate in order to account for the separate harms associated with the loss to the individual—a harm that exists no matter where the money ends up—and with the gain to the defendant.

173. *See* Debold & Benjamin, *supra* note 169, at 155 (proposing that "the amount of the defendant's pecuniary gain should be a more consequential sentencing input"); Letter from Thomas M. Susman, Dir., Gov't Affairs Office, Am. Bar Ass'n, to Patti B. Saris, Chair, U.S. Sentencing Comm'n 1-2 (Aug. 25, 2011), http://www.ussc.gov/sites/default/files /pdf/amendment-process/public-comment/20110826/Susman_ABA_pubcom_priorities.pdf [http://perma.cc/XH38-U59J]] (proposing a similar change).

174. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2A1.1 (U.S. SENTENCING COMM'N 2014), *with id*. § 2A2.1.

175. *Id*. § 2B1.4(b).

176. *See, e.g.*, Danielle DeMasi Chattin, Note, *The More You Gain, the More You Lose: Sentencing Insider Trading Under the U.S. Sentencing Guidelines*, 79 FORDHAM L. REV. 165, 196-215 (2011) (discussing various methods applied by circuit courts to calculate gain in insider-trading cases and proposing restructuring the economic crime Guidelines to deemphasize monetary figures altogether).

the harm caused to society and to the defendant's victims.[177] Intuitively, it makes little sense to apply the same enhancement to someone whose fraud results in the loss of a million dollars of victims' savings as we would to someone who attempts (and fails) to sell the Brooklyn Bridge for a million dollars.[178] Accordingly, loss table enhancements should apply only to actual losses: the reasonably foreseeable pecuniary harm that resulted from the offense. To capture the additional culpability of a defendant who intends more financial harm than he actually causes, the Commission should propose an additional—but less severe—enhancement that would apply to losses in excess of those that actually accrue.

In sum, my proposals would work together as follows. First, the Commission should amend the loss table to reduce the severity of its enhancements. Second, the Commission should redefine "loss" such that only actual losses qualify for loss table enhancements. Third, the Commission should propose two new enhancements to section 2B1.1—one based on the defendant's own pecuniary gain, and another that applies when a defendant sought to inflict more loss than actually resulted.

The proposals outlined above are admittedly imperfect, since they still rely on the sort of quantification that makes the loss table—and the Guidelines more generally—suspect to begin with.[179] In particular, even if enhancements

177. For instance, in explaining the 2015 Amendment, which specifies that "intended loss" covers only the pecuniary harm that "the defendant purposely sought to inflict," the Commission stated: "The amendment reflects the Commission's continued belief that intended loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant's culpability." U.S. SENT'G COMMISSION, *supra* note 35, at 25.

178. Although the 2015 Amendments clarify that the calculation of intended loss should only include the amount of harm that the defendant purposely intends to cause, this amendment does not go far enough in recognizing the difference in culpability between a defendant who causes actual loss and one who does not. Even under the amended definition of intended loss, as long as the defendant *intends* to cause a particular amount of pecuniary harm— regardless of whether that loss is "improbable or impossible"—he will be punished under the loss table just as severely as if he had actually caused such losses. *See id.* at 29.

179. Judge Rakoff proposes eliminating the Guidelines altogether and replacing them with a nonbinding, nonarithmetic multifactor test for this exact reason. *See* Rakoff, *supra* note 26, at 6. Wes Reber Porter proposes a sort of middle ground between Judge Rakoff's proposal and the status quo: maintaining the "structure, organization, and considerations of the Guidelines," but doing away with "the distracting and misleading numbers and calculations that accompany the Guidelines." Wes Reber Porter, *Federal Judges Need Competing Information To Rival the Misleading Guidelines at Sentencing*, 26 FED. SENT'G REP. 28, 30 (2013). I see value in both of these proposals insofar as they direct the judge's discretion without saddling her "with arbitrary weights and measures." *See* Rakoff, *supra* note 26, at 9. But the likelihood of such sweeping change occurring anytime soon is slim. In the

are less severe, at the high end of the loss table those enhancements will still dwarf other relevant considerations, such as the defendant's role in the offense. And although my proposals provide a more nuanced way to assess culpability, they still risk producing overly harsh sentences by increasing the number of enhancements that could apply in a given case. Still, reducing the severity of the enhancements, in conjunction with redefining the loss attributable to the defendant, could go a long way toward improving the white-collar Guidelines.

CONCLUSION

Judges should give little weight to the Guidelines ranges produced under the loss table in white-collar cases. It is true that disregard for the Guidelines could—and probably will—produce interjudge and interdistrict disparities in sentencing. But as Judge Robert Hinkle argued:

> It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences. And it would be better still to have ten good sentences—even if they could be explained only as the considered judgment of a good and honest and experienced district judge whose goal was to get it right, and even if that explanation could not be fit into the grids on a guideline chart.[180]

The fact of difference in sentencing trends between judges or between districts does not mean that *unwarranted* disparities exist. For instance, my results show that defendants who cooperate in major white-collar cases receive drastically shorter sentences than the range produced by the Guidelines. However, my results also suggest that this phenomenon can be explained at least in part by the fact that the U.S. Attorney's Office imposes a "cooperation penalty" on defendants that artificially inflates the Guidelines sentencing range. If prosecutors in other districts do not impose such a "cooperation penalty," we might find that departures for cooperating defendants in those districts are much smaller than they are in S.D.N.Y. This would constitute a "disparity," but not necessarily an unwarranted one: the difference would simply reflect differences in local prosecutorial practices.

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meantime, my more pragmatic potential solution would be an improvement over the status quo.

180. Robert L. Hinkle, Dist. Judge, Statement Before the United States Sentencing Commission 3 (Feb. 11, 2009), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public -hearings-and-meetings/20090210-11/Hinkle_statement.pdf [http://perma.cc/KU28-QPG H].

To the extent we are concerned about unwarranted disparities in sentencing, this concern militates in favor of amending the white-collar Guidelines. Because the anchoring effect of the Guidelines may be stronger in districts where judges see major white-collar cases infrequently, sentences imposed there might be significantly longer on average. Anecdotal evidence suggests this is the case. Mark Harris and colleagues note that "one cannot shake the feeling that an invisible ceiling that formerly blocked off the upper reaches of the Guidelines table has now been breached."[181] "Sentences measured in multiple decades," they explain, are now "dispensed on a daily basis."[182] But with one exception, the cases on which they rely come from judicial districts where major white-collar prosecutions are relatively rare.[183] If the harsh sentences produced by the white-collar Guidelines are rarely imposed in practice, except on the unlucky offenders who are prosecuted in districts with few major white-collar cases, then reforming the Guidelines is even more urgent. To create a more comprehensive picture of post-*Booker* sentencing in major white-collar cases, and to probe the question of unwarranted disparities in sentencing, further empirical research should be conducted using data from other judicial districts throughout the country, including districts with relatively few such cases.

By chaining the defendant's offense level to the amount of loss attributed to him — and by defining "loss" extraordinarily broadly — the Guidelines can produce decades-long sentences even in cases where the defendant's role was minor or the economic harm caused was minimal or nonexistent — as Olis's original sentence made clear.[184] The same characteristic that makes the loss table a bad tool for approximating culpability — its heavy reliance on a

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181. Mark D. Harris et al., *The Current State of White-Collar Sentencing*, 26 FED. SENT'G REP. 1, 1 (2013).

182. *Id.* at 1-2.

183. *See id.* at 1-2, 2 n.3 (2013) (providing as examples a twenty-three-year sentence imposed in the Northern District of Texas; a twenty-year sentence imposed in the Middle District of Florida; a twenty-seven-year sentence imposed in the Northern District of Iowa; and a fifty-year sentence also imposed in the Northern District of Iowa). In 2012, there were only 131 fraud prosecutions in the Northern District of Texas, compared to 304 in S.D.N.Y. *Compare Statistical Information Packet, Fiscal Year 2012: Northern District of Texas*, U.S. SENT'G COMMISSION 2 tbl.1 (2012), http://www.ussc.gov/sites/default/files/pdf/data-and-statistics /federal-sentencing-statistics/state-district-circuit/2012/txn12.pdf [http://perma.cc/HR35 -34VP], *with Statistical Information Packet, Fiscal Year 2012: Southern District of New York*, *supra* note 109, at 2 tbl.1. In the same year, there were twenty-five fraud prosecutions in the Northern District of Iowa. *See Statistical Information Packet, Fiscal Year 2012: Northern District of Iowa*, U.S. SENT'G COMMISSION 2 tbl.1 (2012), http://www.ussc.gov/sites/default/files/pdf /data-and-statistics/federal-sentencing-statistics/state-district-circuit/2012/ian12.pdf [http:// perma.cc/XU96-YN2R].

184. *See Olis I*, 429 F.3d 540, 541-42 (5th Cir. 2005).

quantifiable metric as the primary proxy for seriousness of the offense — plagues other parts of the Guidelines system.[185] Indeed, my results show that judges in S.D.N.Y. do not consider the white-collar Guidelines uniquely problematic.[186]

Using a detailed chart — no matter how complex — will not always produce sentences "sufficient, but not greater than necessary, to comply with" the purposes of sentencing.[187] My findings suggest that the sentencing ranges produced by the Guidelines in major white-collar cases often conflict with this statutory directive. Although the Court in *Booker* and its progeny returned significant sentencing discretion to judges, the Guidelines remain the "starting point" in every sentencing. Until they are amended to capture more accurately the concept of culpability, Congress and the Commission should not be surprised that judges often conclude that the Guidelines's "starting point" should not serve as the endpoint in sentencing.

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185. For instance, the drug quantity table uses the type and quantity of a drug as a proxy for culpability. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (U.S. SENTENCING COMM'N 2014).

186. *See supra* Figure 8.

187. 18 U.S.C. § 3553(a) (2012).

APPENDIX[188]

Table A1.

TYPES OF SENTENCES IMPOSED IN ALL CRIMES AND MAJOR WHITE-COLLAR CRIMES

	Guidelines Sentence		*Government-Sponsored Below-Range (5K1.1)*		*Non-Government-Sponsored Below- Range*	
	All Crimes	Major White-Collar	All Crimes	Major White-Collar	All Crimes	Major White-Collar
2002	74.5%	68.1%	15.9%	21.9%	9.3%	10.0%
2003	78.4	71.5	13.0	18.0	8.3	10.5
2004	76.6	71.0	14.2	18.8	8.1	10.3
2005	59.9	50.2	13.6	21.3	24.2	27.6
2006	58.2	53.3	13.5	20.7	26.1	25.2
2007	53.0	49.2	15.3	20.5	29.4	28.6
2008	44.4	34.0	17.9	26.2	35.0	39.3
2009	42.6	37.8	14.2	18.9	40.4	43.0
2010	32.6	27.4	15.9	22.0	49.0	50.2
2011	34.9	35.5	14.4	13.0	49.0	50.4
2012	33.5	30.4	16.1	22.1	47.6	46.4

All data for "all crimes" comes directly from the Sentencing Commission. For data on "major white-collar" crimes: For the year 2002, there were 224 Guidelines sentences; 72 government-sponsored below-range sentences; and 33 non-government-sponsored below-range sentences. For 2003, in the same order, there were 191, 50, and 30 sentences respectively. For 2004, there were 197, 50, and 26 sentences respectively. For 2005 (post-Booker), there were 111 Guidelines sentences; 46 government-sponsored below-range sentences; and 61 non-government-sponsored below-range sentences. For 2006 in the same order, there were 129, 50, and 72 sentences respectively. For 2007 in the same order, there were 115, 48, and 67 sentences respectively. For 2008 in the same order, there were 83, 64, and 96 sentences respectively. For 2009 in the same order, there were 94, 47, and 107 sentences respectively. For 2010 in the same order, there were 71, 57, and 130 sentences respectively. For 2011 in the same order, there were 98, 36, and 139 sentences respectively. For 2012 in the same order, there were 85, 62, and 130 sentences respectively.

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188. Unless otherwise specified, all Tables reflect sentences from S.D.N.Y only.

Table A2.

TYPES OF SENTENCES IMPOSED IN MAJOR WHITE-COLLAR CRIMES

	Guidelines Sentence Imposed	*Government-Sponsored Below-Range (5K1.1)*	*Non-Government-Sponsored Below-Range*
2002	68.1%	21.9%	10.0%
2003	71.5	18.0	10.5
2004	71	18.8	10.3
2005	50.2	21.3	27.6
2006	53.3	20.7	25.2
2007	49.2	20.5	28.6
2008	34.0	26.2	39.3
2009	37.8	18.9	43.0
2010	27.4	22.0	50.2
2011	35.5	13.0	50.4
2012	30.4	22.1	46.4

For information regarding the number of sentences included in each category, see the note accompanying Table A1. Sentences imposed in other categories—such as above-Guidelines sentences—are omitted.

Table A3.

TYPES OF SENTENCES IMPOSED BY LOSS AMOUNT

	Guidelines Sentence		*Government-Sponsored Below-Range (5K1.1)*		*Non-Government-Sponsored Below-Range*	
	Pre-Booker	*Post-Booker*	*Pre-Booker*	*Post-Booker*	*Pre-Booker*	*Post-Booker*
$30K-200K	72% (N = 244)	44.2% (N = 180)	16.5% (N = 56)	16.2% (N = 66)	10.0% (N = 34)	38.7% (N = 185)
$200K-1M	69.8% (127)	37.5% (135)	18.7% (34)	24.4% (88)	8.2% (15)	37.5% (135)
$1M-20M	58.8% (77)	32.1% (81)	24.4% (32)	28.6% (72)	13.7% (18)	38.1% (96)
$20M and up	22.2% (4)	15.5% (9)	61.1% (11)	41.4% (24)	11.1% (2)	39.7% (23)

In addition to the data included above, there were several sentences that I could not account for in my analysis regarding loss because the loss amount was not included in the dataset. There were 99 such sentences in 2002; 72 in 2003; 49 in 2004; 90 in 2005; 112 in 2006; 87 in 2007; 84 in 2008; 131 in 2009; 123 in 2010; 147 in 2011; and 150 in 2012. It is impossible to say how having the loss amount data for these cases would have affected my findings. Depending on what the real loss amounts for these cases were, the omission of these sentences might not have had much of an effect on my findings. That is, if the omitted cases were generally spread out across loss amounts, then including them in the data analysis would not have had much effect at all. Sentences imposed in other categories—such as above-Guidelines sentences—are omitted.

Table A4.

AVERAGE EXTENT OF DEPARTURE AND AVERAGE MINIMUM GUIDELINES
SENTENCING RANGE BY TYPE OF SENTENCE IMPOSED

	Average Extent of Departure (in Months)			Average Minimum Sentencing Range		
	Government-Sponsored Below-Range (N = 410)	Non-Government-Sponsored Below-Range		Government-Sponsored Below-Range (N = 410)	Non-Government-Sponsored Below-Range	
		With Life Sentences (N = 799)	Without Life Sentences (N = 790)		With Life Sentences (N = 799)	Without Life Sentences (N = 790)
2005	42.0 (N = 46)	21.7 (N = 59)	21.7 (N = 59)	49.3 (N = 46)	47.3 (N = 59)	47.3 (N = 59)
2006	59.5 (50)	21.9 (71)	21.9 (71)	50.8 (50)	31.2 (71)	31.2 (71)
2007	37.0 (48)	15.0 (67)	15.0 (67)	44.6 (48)	30.1 (67)	30.1 (67)
2008	30.1 (64)	67.5 (96)	17.5* (93)	37.3 (64)	88.9 (96)	33.8* (93)
2009	40.5 (47)	29.7 (107)	15.9* (106)	49.4 (47)	53.6 (107)	37.7* (106)
2010	39.3 (57)	39.9 (130)	25.5* (128)	42.8 (57)	63.6 (130)	48.7* (128)
2011	42.0 (36)	31.3 (139)	15.8* (138)	46.0 (36)	62.4 (139)	41.5* (138)
2012	45.4 (62)	29.4 (130)	19.2* (128)	50.2 (62)	51.3 (130)	40.0* (128)

*These figures represent the average departure in months for court-sponsored departures with life sentences removed from the dataset. Three life sentences were removed from 2008; one from 2009; two from 2010; one from 2011; and two from 2012. When compared with the corresponding figures in Table A4, it is clear that the few life sentences included in the data in Table A4 greatly distorted the average (for e.g., the average departure for ninety-six non-government-sponsored below-range sentences in 2008 was 67.5 months, but after removing only three of those sentences, the average dropped to 17.5 months).

The figures for government-sponsored below-range sentencing do not change with the removal of life sentences.

Table A5.
AVERAGE SENTENCES RECEIVED (IN MONTHS)

	No Departure *(N = 786)*	*Government-Sponsored Below-Range* *(N = 410)*	*Non-Government- Sponsored Below-Range* *(N = 790)*
2005	25.2	7.8	25.6
2006	25.9	5.7	13.6
2007	35	7.6	15.2
2008	43.9	7.3	21.5/16.2*
2009	37.4	9.1	23.8/21.8*
2010	53.2	3.5	23.7/23.7*
2011	46.4	4.0	28.9/25.6*
2012	28.1	4.8	22/20.7*

*Figures marked with an asterisk reflect the average non-government-sponsored below-range sentences with life sentences removed from the datasets. Three life sentences were removed from 2008, one from 2009, two from 2010, one from 2011, and two from 2012.