HOT UNDER THE WHITE COLLAR

WHAT THE ROLLERCOASTER IN SENTENCING LAW FROM *BLAKELY* TO *BOOKER* WILL MEAN TO CORPORATE OFFENDERS

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What a wild ride it has been over the last five years for white collar defendants facing federal criminal charges in the United States. In 1987, federal judges in the United States began sentencing criminal defendants—including those charged with white collar crimes—in compliance with the fact-specific and mandatory ranges stipulated by the Federal Sentencing Guidelines ("FSGs"). Promulgated by the United States Sentencing Commission ("USSC"), which had been established by Congress in 1984 as part of the broader Sentencing Reform Act ("SRA"), these guidelines were intended to "inject transparency, consistency, and fairness into the sentencing process" that many members of Congress found to contain unwarranted disparity among courts and categories of defendants.[1] For most criminals, this change from the preceding indeterminate sentencing system of nearly complete judicial discretion generally meant more certain and more severe punishment.[2] This was the result, in part, of the establishment of "truth-in-sentencing," which eliminated parole entirely. However, the USSC also found that "the sentencing guidelines themselves made a substantial and independent contribution" to increased sentences.[3]

The advent of the FSGs increased the likelihood that white collar criminals, in particular, would serve significant time in prison.[4] As white collar offenses constituted the second largest portion of the federal criminal docket and the USSC's studies of past sentencing practices revealed significantly lower sentences for white collar crimes than for other

1. U. S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, at iv (2004) [*hereinafter* "USSC FIFTEEN YEAR ASSESSMENT"].

2. *Id.* at vi.

3. *Id.* at v-vi.

4. *Id.*

forms of theft involving similar monetary loss, the USSC and Congress were both committed to ensuring more certain and proportionate punishment for white collar offenders.[5] Many mitigating factors that had often been considered for these criminals during sentencing were rendered impermissible considerations under the guidelines. After 2001, the USSC effectively raised white collar penalties with a comprehensive economic crime package after studies showed that, for perpetrators involved with moderate and high loss amounts, punishments remained too low.[6] White collar penalties were effectively raised again after the huge accounting scandals of 2002, including Enron, WorldCom and Tyco, with the passage of the Sarbanes-Oxley Act and its mandate to the USSC to ensure that white collar criminal penalties properly accounted for the growing incidence and seriousness of corporate crimes.[7]

Concurrently with the efforts of Congress, the executive branch turned its focus to corporate crime in 2002, as well. On July 9, 2002, President George W. Bush announced the creation of the Corporate Fraud Task Force by Executive Order 13271, saying, "[I]t is time to reaffirm the basic principles and rules that make capitalism work—truthful books and honest people, and well-enforced laws against fraud and corruption."[8] As of May 31, 2004, prosecutors and investigators, working hand in hand with the Task Force, had obtained over 500 corporate fraud convictions or guilty pleas and charged over 900 defendants and 60 corporate CEOs and presidents with some type of corporate fraud crime.[9]

In response to this increased attention on corporate crime, criminal defense attorneys have naturally seen more corporate clients walking through their doors with legal troubles. One business executive who felt the brunt of these in-

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5. *Id.* at vii.

6. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY 61 (2001) [*hereinafter* "2001 GUIDELINES AMENDMENTS AND COMMENTARY"].

7. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002 app. A at A-2 (2003) [*hereinafter* "2003 USSC REPORT TO CONGRESS"].

8. CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT at 2.2 (2004).

9. *Id.* at 2.3.

creased penalties and eventually came to symbolize the magnitude of the legislature's corporate crackdown was Jamie Olis, a former mid-level executive at Dynegy Corp.[10] Olis was convicted for his role in a fraud that sent Dynegy and its stock price into a tailspin, and was sentenced to 24 years in prison in March 2004. Though the basic crime for which Olis was convicted carried minimal prison time, the federal judge's determination that Olis caused $105 million in loss—calculated from the amount lost by shareholders when the stock dropped—added more than ten years to his sentence.[11] This sentence was much higher than any handed out to corporate executives in recent memory, despite the fact that Olis was not a top executive, never amassed a large profit from the fraud, and had no previous criminal record.[12] Moreover, this sentence was handed out under the 2001 version of the Guidelines, before the even stiffer penalties of the 2003 Amendments went into effect.[13]

Many saw this corporate crackdown as a much-needed and long-awaited counterbalance to the historically lax penalties received by white collar criminals. However, as we will see, the category of white collar defendants is never precisely defined and the trend in recent years has been towards a broadening of the umbrella of corporate crime. Whereas white collar crime was originally considered to involve only wealthy or high-ranking individuals within corporate schemes, many now consider the defining feature to be the complexity of the methodology used in the criminal scheme.[14] No longer does white collar sentencing concern merely CEOs and CFOs. Thus, as the increasingly stringent penalties that Congress intended for "white collar criminals" began to be applied more

10. Laurie Cohen & Gary Fields, *Balance of Power: High Court Declares Guidelines On Sentencing Violate Rights*, WALL ST. J., Jan. 13, 2005, at A1, ¶ 21.

11. *Id.* at ¶ 22.

12. Simon Romero, *Stiff Sentence is a Possibility for a Name Not So Known*, N.Y. TIMES, Mar. 24, 2004, at A1-2, *available at* http://www.nytimes.com/2004/03/24/business/24corporate.html?ex=1395464400&en=411cd2cea8e2d30f&ei=5007&partner=USERLAND.

13. *Id.* at 2.

14. *See, e.g.*, Paul Rosenzweig, *Sentencing of Corporate Fraud and White Collar Crime*, at 3 (Mar. 25, 2003) *at* http://www.heritage.org/Research/Crime/test032403.cfm.

frequently to less prominent figures like Olis, defendants and defense counselors alike had a reason to be concerned.

However, two watershed Supreme Court cases handed down within the last eight months have turned federal criminal sentencing on its head, returning the structure to one more closely resembling the indeterminate system that existed before the FSGs were implemented and giving white collar defendants some wiggle room within a formerly inflexible system. Though a number of past Supreme Court cases had hinted that the Guidelines stood on shaky footing, it was not until *Blakely v. Washington* invalidated a Washington state system of guidelines in June 2004[15] that legal practitioners and scholars alike realized that the system based on the Federal Sentencing Guidelines faced substantial risk of being invalidated completely. After a chaotic period of disagreement among lower courts trying to interpret *Blakely's* impact on the FSGs, the Supreme Court ultimately put a number of questions to rest when it handed down *United States v. Booker*, declaring that the FSGs as applied were unconstitutional in violation of the Sixth Amendment, and that the guidelines would henceforth be considered merely advisory.[16]

In this nascent and uncharted world of federal sentencing that has emerged since *Booker*, numerous questions remain about the potential impact on federal white collar offenders. This note will examine the process by which the determinate sentencing system to which judges had become accustomed over the past two decades was overhauled by the Supreme Court during the past year. In particular, this note will focus on the potential changes wrought to the treatment of white collar criminals, about which Congress and the USSC took specific interest. This perspective on the history of the sentencing landscape is crucial to obtaining a full understanding of the current penalties faced by prospective defendants. After reviewing the impact of *Blakely* on lower courts and the various solutions that were suggested or applied, this note will analyze the surprising outcome of *Booker* and the immediate changes it has fashioned. Finally, this note will examine the particular characteristics of white collar crime that could engender unique consequences arising out of *Booker*, as well as the man-

15. 124 S. Ct. 2531 (June 24, 2004).
16. 125 S. Ct. 738 (Jan. 12, 2005).

ner in which courts and commentators have thus far reacted to these issues. This should give white collar practitioners adjusting to this latest scheme a good foundation for advising clients about potential sentencing scenarios and deciding how to approach plea bargain negotiations.

Though it will become apparent that white collar defendants will enjoy moderate benefits under this new system, the extent of this impact and the desirability of these changes are open questions. Ultimately, this note will argue that there are good reasons for viewing an alleviation in white collar penalties as potentially justifiable, and that it is prudent to wait and evaluate the development of the new system before rushing to overhaul it.

I.
WHITE COLLAR CRIME: A BRIEF HISTORY

When discussing white collar crime—also known as "corporate crime" or "business crime"—it is important first to define what type of crime this is referring to. Coined in 1939 in a speech given by Edwin Sutherland to the American Sociological Society, the term "white collar crime" was originally defined as "crime committed by a person of respectability and high social status in the course of his occupation."[17] However, as the term's usage has evolved and expanded, a more nuanced and admittedly less concise definition must be developed. First off, in the overwhelming majority of cases, white collar crime involves some sort of fraud, which may appear on the surface to be extremely similar to any common law fraud. Often, white collar fraud is distinguishable from common law fraud because it involves substantially higher monetary losses, and the actors tend to have higher socioeconomic backgrounds. However, according to a number of scholars, the key distinction between white collar frauds and other types of fraud is the methodology of the perpetrators.[18] White collar criminals tend to use more sophisticated and complex means, frequently taking advantage of or violating the American regu-

17. *See White-Collar Crime: An Overview*, Legal Information Institute, *available at* http://www.law.cornell.edu/topics/white_collar.html (May 5, 2005).

18. *See, e.g.*, Paul Rosenzweig, *Sentencing of Corporate Fraud and White Collar Crime*, at 3 (Mar. 25, 2003) *at* http://www.heritage.org/Research/Crime/test032403.cfm.

latory structure.[19] It is for this reason that prosecutors have had a more difficult time unraveling and prosecuting these crimes, causing Congress to take a special interest in deterring them.[20] Though this distinction is not always readily apparent or well-delineated, for the purposes of this note, the term "white collar crime" is defined to include frauds which either tend to employ complex and novel means, generate unusually large economic losses, or involve perpetrators and/or victims engaged in high-level corporate or financial activities.

Prior to the passage of the SRA and the promulgation of the Federal Guidelines, judges operated in a world of extremely broad sentencing discretion. They were free to choose sentences they felt would be most appropriate between wide statutory maxima and minima determined by Congress. These judges were not required to explain their reasoning, or list factors used to determine such sentences. Moreover, these sentences were largely immune from appeal.[21] Determined to change a system that suffered from unwanted disparity and disproportionate sentencing between courts, Congress passed the SRA in 1984, establishing the USSC and leading to the eventual promulgation of the Federal Sentencing Guidelines in 1987.[22]

The Commission took special interest in "economic offenses" (used interchangeably with "white collar cases") because its study of past sentencing practices revealed that sentences for fraud, embezzlement, and tax evasion generally received less severe sentences than crimes such as larceny and theft, even when they involved similar monetary losses.[23] In response, the Commission wrote the guidelines to "reduce the availability of probation and to ensure a short but definite period of confinement for a larger percentage of these 'white collar' cases, both to ensure proportionate punishment and to achieve adequate deterrence."[24] The Fifteen Year Assessment released by the USSC later found that the FSGs had been suc-

19. *Id.* at 3-4.

20. *See id.* at 3-4.

21. USSC FIFTEEN YEAR ASSESSMENT, *supra* note 1, at iv.

22. *Id.*

23. *Id.* at vii.

24. *Id.*

cessful in achieving this goal of assuring short but definite confinement for white collar offenders.[25]

However, the USSC found cause to revise the FSGs with respect to fraud cases in 2001 after receiving the results of a multi-year study of economic crime issues.[26] Though the 2001 Amendments included enhancements for large numbers of victims and the consolidation of the guidelines for larceny, theft and fraud, the most significant change for white collar offenders was the introduction of revised loss tables which provided "substantial increases in penalties for moderate and higher loss amounts."[27] These new tables were promulgated to reflect the Commission's determination that the sentences of defendants convicted of federal crimes should reflect the nature and magnitude of the loss caused or intended by their crimes, as well as to respond to comments received from the Department of Justice and the Criminal Law Committee of the Judicial Conference that the guidelines under-punished individuals involved with moderate and high loss amounts.[28] As a result, white collar offenders now faced the prospect that their punishments would be mechanically and significantly increased within a broader range of intended or actual losses than ever before.

Building on the economic crime package of 2001, Congress added even stiffer penalties for white collar criminals in 2002 in response to the massive corporate and accounting scandals that rocked the American financial markets. In passing the Sarbanes-Oxley Act of 2002, Congress issued specific mandates to the USSC to ensure that the guidelines "reflect[ed] the serious nature of white collar offenses, the growing incidence of serious fraud offenses, and the need to modify the guidelines and policy statements to deter, prevent, and punish such offenses."[29] The Act also contained specific directives to the USSC to review the sentencing guidelines applicable to securities and accounting fraud, consider the promulgation of new guidelines to provide enhancements for officers or directors of publicly traded corporations who commit fraud,

25. *Id.*
26. 2001 GUIDELINES AMENDMENTS AND COMMENTARY, *supra* note 6, at 57.
27. *Id.* at 61.
28. *Id.* at 32, 61.
29. 2003 USSC REPORT TO CONGRESS, *supra* note 7, at app. A, A-2.

and ensure that sentencing guidelines reflected the serious nature of securities, pension and accounting fraud and the need for aggressive law enforcement to prevent such offenses.[30]

In response, the USSC approved an emergency amendment on January 8, 2003, later incorporated into a permanent amendment, which promised to significantly increase penalties for criminals who committed corporate crime and serious fraud.[31] The changes to the FSGs included enhancements for offenses which involved 250 or more victims, endangered the solvency or financial security of a publicly traded corporation or large employer, or caused catastrophic loss in excess of $200 million.[32] These enhancements reflected the USSC's concern for the significant impact such serious frauds had on victims, for the fact that such offenses undermined the public's confidence in securities and investment markets, and for particularly extensive and serious fraud offenses which resulted in losses greater than previously anticipated, respectively.[33] Furthermore, the amendment targeted offenses committed by officers or directors of publicly traded companies for especially severe penalties because of the statutory fiduciary duties imposed on such individuals.[34]

Thus, by early 2003, white collar offenders faced the most extensive and severe tableau of punishments ever prescribed for corporate fraud. These sentencing enhancements were aimed at deterring and fully punishing crimes which heretofore had often gone undetected, undeterred, unpunished, and even unfathomed. However, the effects of the new guidelines were only beginning to be felt when the entire world of federal criminal sentencing was heaved on its side by the nation's highest court during the summer of 2004.

II.
THE SUPREME COURT DROPS THE *BLAKELY* BOMB

The Supreme Court handed down *Blakely v. Washington* on June 24, 2004,[35] and promptly recessed for the end of the

30. *Id.* at app. A, A-3.
31. *Id.* at i.
32. *Id.* at ii.
33. *Id.* at 3, 6.
34. *Id.* at 4.
35. *See Blakely*, 124 S. Ct. at 2531.

2003-2004 term a week later. Though commentators and practitioners would come to realize that this case was possibly the most important federal criminal justice ruling in decades,[36] the result was so unexpected that the case failed to be included in numerous year-end Supreme Court reviews.[37]

Growing out of the broad interpretation of the scope of the Sixth Amendment established in *Apprendi v. New Jersey*,[38] *Blakely* struck down an upward departure pursuant to the Washington State sentencing guidelines because it was based on facts not found by a jury beyond a reasonable doubt.[39] In *Apprendi*, a case involving a New Jersey statute that authorized sentences above the statutory maximum for hate crimes, the Court concluded that, except for recidivism, every fact that increased a defendant's sentence above the statutory maximum had to be proven to a jury beyond a reasonable doubt.[40] *Blakely* took this holding one giant step further, determining that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[41]

Ralph Howard Blakely, Jr. pleaded guilty in Washington state court to second-degree kidnapping involving domestic violence and the use of a firearm, a crime for which Washington's statutory sentencing guidelines prescribed a presumptive range of 49 to 53 months.[42] The judge in that case determined at sentencing that Blakely had acted with "deliberate cruelty," thereby imposing an upward departure to 90 months.[43] Despite the fact that this sentence was below the 10-year statutory maximum for the crime of second-degree kidnapping, the Supreme Court reversed, 5-4.[44] Writing for the Court, Justice Scalia found that the state's sentencing proce-

36. *See* Gerald Shargel, *Run-on Sentencing*, SLATE.COM (July 12, 2004), *available at* http://www.slate.com/id/2103754 (noting that "no ruling since the time of the Burger Court has had a more profound and immediate effect on the federal criminal-justice system").

37. *See, e.g.*, CATO INSTITUTE, SUPREME COURT REVIEW, 2003-2004 (2004).

38. 530 U.S. 466 (2000).

39. *Blakely*, 124 S. Ct. at 2537.

40. *Apprendi*, 530 U.S. at 490.

41. 124 S. Ct. at 2537 (citations omitted).

42. *Id.* at 2555.

43. *Id.* at 2557.

44. *Id.* at 2543.

dure did not comply with the Sixth Amendment, and was therefore invalid.[45] Seeking to give "intelligible content" to the Sixth Amendment right to a jury trial,[46] the Court held that the relevant statutory maximum sentence for *Apprendi* purposes was "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[47]

Though the Court in *Blakely* explicitly reserved its holding to the Washington state sentencing guidelines, the dissenting Justices in the case felt that no cognizable distinctions could be drawn between that system and the Federal Sentencing Guidelines.[48] If anything, the dissent concluded, any structural differences that did exist between the two systems made the Federal Guidelines *more* vulnerable to attack.[49]

Thousands of defendants were potentially affected by *Blakely* and its aftershocks. Defendants who had already pleaded to certain charges but were awaiting sentencing found themselves in a particularly volatile situation as courts tried to adapt *Blakely* to their ongoing cases on the fly. For defendants who had not yet reached trial, the decisions surrounding the option to strike a plea bargain with prosecutors or go to trial and face an unknown sentencing system were fraught with uncertainty. For all involved, the $64,000 question, as one commentator called it,[50] was whether *Blakely* applied to the Federal Sentencing Guidelines. If it did, a more important question was what sort of sentencing phoenix would arise out of the Guidelines' ashes.

III.
THE VARIOUS PLAYERS WEIGH IN

The Department of Justice

Justice Scalia made it patently clear that the holding in *Blakely* was only addressing Washington's state sentencing regime when he wrote in his opinion, "[t]he Federal Guidelines

45. *Id.* at 2538.
46. *Id.*
47. *Id.* at 2537.
48. *Id.* at 2549 (O'Connor, J., dissenting).
49. *Id.*
50. Stephanos Bibas, Blakely's *Federal Aftermath*, 16 FED. SENT. REP. 333, 333 (June 2004).

are not before us, and we express no opinion on them."[51] The dissent, however, could find no rational basis to distinguish the two systems.[52] If anything, the degree of discretion for judges acting within the invalidated Washington state guidelines was higher than that granted to federal judges by the hard constraints in chapters 2 and 3 of the Federal Sentencing Guidelines.[53]

Despite these ominous signs, the Department of Justice ("DOJ") maintained that the two systems were distinguishable in the immediate aftermath of *Blakely*. The agency rested its conclusion on the fact that the federal guidelines were not "legislatively enacted," as the Washington guidelines were, but instead were "a unique product of a special delegation of authority" to an independent Commission in the judicial branch.[54] However, this position seemed untenable, even at the time. Despite the fact that the federal guidelines were not statutes, they had been held to be binding on sentencing courts by previous Supreme Court decisions.[55] None of the cases cited by the Department of Justice in support of a meaningful distinction between guidelines and statutory maxima[56] addressed a constitutional challenge based on the Sixth Amendment.[57]

Moreover, the SRA directed that a sentencing court "*shall* impose a sentence of the kind, and within the range" established by the guidelines, unless the court found an aggravating or mitigating factor not given adequate consideration by the Commission.[58] To a number of commentators and courts, it seemed illogical to conclude that Congress could delegate to the Sentencing Commission a power it could not constitutionally exercise itself, namely the ability to fetter judicial discre-

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51. *Blakely*, 124 S. Ct. at 2538.

52. *Id.* at 2549.

53. *Id.*

54. *See* Department of Justice Sample Brief at 16-18, *available at* http://www.ussguide.com/members/BulletinBoard/Blakely/DOJ-SampleBrief.pdf [*hereinafter* "DOJ BRIEF"].

55. Mistretta v. United States, 488 U.S. 361, 391 (1989); Stinson v. United States, 508 U.S. 36, 42 (1993) (citations omitted).

56. *See* DOJ BRIEF, *supra* note 54, at 2 (*citing* Edwards v. United States, 523 U.S. 511, 514-15 (1998); Witte v. United States, 515 U.S. 389, 399-401 (1995); United States v. Watts, 519 U.S. 148, 156-57 (1997)).

57. Bibas, *supra* note 50, at 334.

58. 18 U.S.C. §§ 3553 (a)(4), (b) (emphasis added).

tion based on facts not found by a jury.[59] Finally, as Justice O'Connor pointed out in her dissenting opinion, Washington's sentencing scheme was more flexible and less specific than the federal guidelines or any other imaginable guidelines scheme.[60] Therefore, the weight of Supreme Court precedent and the logic behind the structure of the guidelines indicated that the DOJ's position was on shaky ground. Indeed, in the wake of *Blakely* and the release of the DOJ Brief, no commentator could be found who had considered the issue and agreed with the DOJ stance.[61]

LOWER COURT DECISIONS POST-*BLAKELY*

The majority of lower court decisions after *Blakely* held that the Federal Sentencing Guidelines were either invalidated or seriously altered pursuant to that decision. Utah District Court Judge Paul Cassell was the first to hold that the federal guidelines suffered from the same *Blakely* infirmities as Washington's guidelines, and found the former to be unconstitutional.[62] Despite having "searched diligently" for a way around the "cataclysmic implications" of such a holding, Cassell determined that "there is no way this court can sentence [defendant] Croxford under the federal sentencing guidelines without violating his right to a trial by jury as guaranteed by the Sixth Amendment."[63] Soon after, Judge Glasser from the Eastern District of New York came to the same conclusion, citing the reasoning in *Croxford* with approval.[64]

Subsequently, a number of appeals courts also determined that *Blakely* applied to the Federal Sentencing Guidelines. In the Seventh Circuit, Judge Posner concluded that defendant Freddie Booker's Sixth Amendment rights were violated when a judge found the sentence-enhancing facts that he had distributed more cocaine than the jury had found and

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59. Bibas, *supra* note 50, at 335 (*citing* United States v. Booker, 375 F.3d 508, 512 (2004)).

60. *See Blakely*, 124 S. Ct. at 2549-50 (O'Connor, J., dissenting) (finding the invalidated Washington scheme "as inoffensive to the holding in *Apprendi* as a regime of guided discretion could possibly be").

61. *See* Bibas, *supra* note 50, at 334.

62. United States v. Croxford, 324 F. Supp. 2d 1230 (C.D. Utah June 29, 2004).

63. *Id.* at 1231, 1238-39.

64. United States v. Medas, 323 F. Supp. 2d 436 (E.D.N.Y. July 1, 2004).

that he had obstructed justice.[65] The court held that the federal guidelines could only survive *Blakely* in cases where they did not limit defendants' rights to a jury and to have facts proven against them beyond a reasonable doubt.[66] Therefore, though *Blakely* applied to the federal guidelines, the Guidelines could survive if no enhancements were found, or if a sentencing jury was empanelled to find enhancements.[67] In the Sixth Circuit, Judge Merritt held that the Federal Sentencing Guidelines could no longer be thought of as a mandatory system of fixed rules, but had become "simply recommendations" that the judge should consider but may disregard.[68] Such holdings gave early hope to white collar defendants that judges would have an avenue to depart from the strict and mechanical sentencing stipulations of the Guidelines.

A circuit split emerged on July 12, 2004, however, when the Fifth Circuit determined that *Blakely* did not extend to the federal guidelines.[69] Writing for a unanimous court, Chief Judge King found that there were "constitutionally meaningful differences between Guidelines ranges and United States Code maxima."[70] Though *Blakely* had clearly weakened that distinction, the court held that the Guidelines did not establish maximum sentences for *Apprendi* purposes.[71] That same day, seeking to avoid what it saw as an impending crisis, the Second Circuit, sitting *en banc*, took the rare step of certifying three case-specific questions to the Supreme Court regarding the impact of *Blakely*.[72] Detailing arguments on both sides of the debate, the Second Circuit asked the Supreme Court to promptly adjudicate the threshold issue of whether *Blakely* applied to the Federal Sentencing Guidelines.[73]

If courts did find that the Sixth Amendment infirmities raised in *Blakely* carried over to the FSGs, as well, they next had to determine how to treat the Guidelines going forward. Three basic options were available to courts to address this is-

65. *Booker*, 375 F.3d at 518-19.
66. *Id.* at 516.
67. *Id.* at 520.
68. United States v. Montgomery, 377 F.3d 582 (6th Cir. 2004).
69. United States v. Pineiro, 377 F.3d 464, 465 (5th Cir. 2004).
70. *Id.* at 470.
71. *Id.* at 473.
72. United States v. Penaranda, 375 F.3d 238 (2d Cir. 2004).
73. *Id.* at 248.

sue. First, courts could decide to save the Guidelines by bringing juries into sentencing, a response that *Blakely* seemed to have envisioned.[74] This could be done by recalling the jury that convicted the defendant to determine whether enhancing facts have been proven,[75] by bifurcating trials, or by impaneling special sentencing juries. Bifurcating trials such that juries first determined guilt and then considered the facts of sentencing was an idea cited with approval by Judge Posner.[76] Judge Cassell suggested sentencing juries as the first option for remedying aggrieved criminal defendants in *Croxford*, but ultimately rejected it because it would involve judicial redrafting of the sentencing statutes and implementing Guidelines.[77] Since the current sentencing regime required judges to make extensive and consequential findings, Cassell argued that only Congress could implement a transfer of this authority to juries.[78] Moreover, many of the findings required by the Guidelines were nuanced and would be difficult for a jury to determine.[79]

Ultimately, this argument was raised by Solicitor General Paul Clement during oral arguments for *Booker/Fanfan* in the context of large fraud cases to make the case that juries would be ill-equipped to determine loss amounts in these situations.[80] This issue was particularly relevant to white collar criminal cases where the amount of loss was often higher than in typical fraud cases, and where that amount was often the most important determinant of the length of sentence.

The second option—one that many courts chose to adopt—was to sentence defendants solely upon the facts found beyond a reasonable doubt in a jury verdict or admitted in a plea allocution. Anticipating the invalidation of the Fed-

74. Bibas, *supra* note 50, at 339.

75. *See Penaranda*, 375 F.3d at 247 (suggesting recalling juries as a possible technique for judicial compliance with *Blakely*).

76. *See Booker*, 375 F.3d at 514 (noting that separate hearings before a jury are common in civil cases for damages and capital cases for sentencing).

77. *Croxford*, 324 F. Supp. 2d at 1242.

78. *Id.* at 1242-43.

79. *Id.* at 1242 (citation omitted) (asking whether a jury could determine the mental state of the defendant or order a psychiatric or psychological examination).

80. *See Booker*, 125 S. Ct. at 738 (citing to the Oral Argument before the Court).

eral Sentencing Guidelines before *Blakely*, the court in *U.S. v. Green* found that the best remedy was to "*Apprendi*-ize" the Guidelines, rather than reject them altogether.[81] Therefore, in order to honor Congress' intent to drastically reform the prior indeterminate sentencing system, Judge Young sentenced the defendant based only upon the offense of conviction and prior convictions.[82] After *Blakely*, District Judge Joseph Goodwin, while recognizing that the approach was an artificial application of the Guidelines, nevertheless felt constrained to re-sentence a defendant based only upon facts admitted in his guilty plea.[83] Goodwin found that the Federal Sentencing Guidelines should be applied to the extent that they were consistent with the Sixth Amendment.[84] District of Columbia District Judge Thomas Penfield Jackson also reluctantly reduced the sentence of a defendant he had previously sanctioned, finding he was constrained by *Blakely*.[85]

This severance issue was critical for many white collar defendants who had already signed plea agreements when *Blakely* came down, but were still awaiting sentencing. For defendants in this in-between stage, severing the Guidelines looked as though it would result in lower sentences, as judges would likely find that no enhancements had been proven beyond a reasonable doubt so as to raise the offense level from the base level. However, for those white collar defendants who had yet to sign a plea agreement, *Blakely* did not look like it would affect their plea outcomes. This was because the government could require defendants from then on to plead to any facts it felt were relevant for increased sentences.

Finally, if courts found that *Blakely's* requirements were incompatible with and non-severable from the FSGs, they were forced to invalidate the Guidelines completely. The Sixth Circuit took this position, finding that while *Blakely* invalidated mandatory systems where judges found automatic sentence-enhancing facts, indeterminate sentencing systems did not vio-

81. 346 F. Supp. 2d 259 (D. Mass. June 18, 2004).

82. *Id.*

83. United States v. Shamblin, 323 F. Supp. 2d 757, 766 (S.D. W.Va. June 30, 2004).

84. *Id.* (citing *Blakely*, 530 U.S. at 490).

85. Carol D. Leonnig & Neely Tucker, *U.S. Judge Cuts Farmer's Sentence In Mall Standoff*, WASHINGTON POST, July 1, 2004, at A1.

late the Sixth Amendment.[86] Judge Merritt went on to say that the Federal Sentencing Guidelines would become simply recommendations that the lower courts should apply only if they were appropriate and in the interests of justice.[87] District Judge Howard Sachs echoed this reasoning in stating that "we have a constitutionally failed system of sentencing, and must disregard both base offense levels and enhancements as mandatory calibrators at sentencing in the wake of *Blakely*."[88] Finding Guideline provisions incapable of being sensibly severed, Judge Sachs anticipated returning to pre-Guideline methods of sentencing.[89]

White collar defendants facing judges who adopted this approach would be at the mercy of the complete discretion of those judges to sentence them to any amount of time between the statutory minimum and maximum. If the sentencing judge decided to use the Guidelines as recommendations, sentences would remain similar to those issued before *Blakely*, complete with the tougher sanctions coming out of the 2001 Amendments and Sarbanes-Oxley. On the other hand, a judge could determine that the invalidation of the Federal Sentencing Guidelines had rendered their corresponding sentences irrelevant. In those cases, the white collar defendant could hold out hope that the judge might find that the Guidelines had been overly punitive. Thus, the judge could look at the specific facts of the case, sentences of other similarly situated defendants, or any other information he or she deemed relevant to determining the sentence. It was this potential split among judicial approaches to sentencing—and the disparity that would result—that led many to predict that the Supreme Court would not reinstate indeterminate sentencing. However, they would soon find out how wrong they were.

The Supreme Court would ultimately take on the issues raised in *Blakely* and the subsequent lower court decisions. On August 2, 2004, the Supreme Court announced that it was granting certiorari to two lower court decisions where *Blakely*

86. *See Montgomery*, 377 F.3d at 584-85 (quoting *Blakely*, 530 U.S. at 490).

87. *Id.* at 585.

88. United States v. Lamoreaux, 2004 WL 1557283, at *1 (W.D. Mo. July 7, 2004).

89. *Id.*

questions were at issue. The first, docket number 04-104, was an appeal of the aforementioned Appeals Court case of *United States v. Booker*,[90] involving an increase in defendant Freddie Booker's sentence of more than eight years above the suggested Guidelines range based on a judicial finding by a preponderance of the evidence that Booker possessed additional amounts of crack cocaine and that he had obstructed justice. The second, docket number 04-105, was an appeal of the district court case *United States v. Fanfan*.[91] While the judge in that case found during sentencing, by a preponderance of the evidence, that defendant Duncan Fanfan had possessed additional amounts and types of drugs and had been an organizer, leader, manager or supervisor of the criminal activity, he imposed a sentence based solely on the guilty verdict in that case in light of the Supreme Court's holding in *Blakely*. Oral arguments for these two cases were scheduled to begin on October 4, 2004, bringing a ray of hope to lower courts and commentators which had been scrambling to find answers in the wake of *Blakely's* tidal wave.

In the meantime, many lower courts held off on directly addressing *Blakely* questions until the Supreme Court had spoken.[92] Other courts chose to take the approach of handing down two sentences: the defendant's actual sentence under a Guidelines regime and an alternative sentence treating the Guidelines as merely advisory.[93] Still, despite this circuit split and the contentious questions it raised, most federal courts that acted during this post-*Blakely* period chose to apply *Blakely* to the Guidelines and begin implementing their interpretations of the new system rather than waiting for the Supreme Court to act.[94]

90. 375 F.3d 508 (7th Cir. 2004).

91. 2004 U.S. Dist. LEXIS 18593 (D. Me. 2004)

92. *See, e.g.*, United States v. Mincey, 380 F.3d 102, 105-06 (2d Cir. 2004).

93. *See, e.g.*, United States v. Hammoud, 381 F.3d 316, 353-54 (4th Cir. 2004) (instructing district courts within the Fourth Circuit, in the interests of judicial economy, to continue sentencing defendants in accordance with the guidelines, but also to announce an alternative sentence treating the guidelines as advisory).

94. Bibas, *supra* note 50, at 336-337 (citations omitted).

IV.
THE SUPREME COURT HANDS DOWN *BOOKER*

On January 12, 2005, the Supreme Court issued its long-awaited opinion in the case of *United States v. Booker*.[95] In a pair of rulings written by separate 5-4 majorities, the court ruled that the Sixth Amendment, as construed in *Blakely*, applied to the Sentencing Guidelines, rendering them unconstitutional, and that the remedy for this infirmity was to invalidate the provisions of the SRA that made the Guidelines mandatory.[96] The first opinion, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, concluded what many courts and commentators had already guessed—that there was no distinction of constitutional significance between the FSGs and the Washington State Guidelines at issue in *Blakely*.[97] This meant that the practice of judges imposing upward enhancements in sentencing based on facts not reflected in the jury verdict or admitted in a plea violated a defendant's Sixth Amendment right to a jury trial.[98] The majority determined that if the FSGs as currently written could have been read as merely advisory provisions, their use would not implicate the Sixth Amendment.[99] However, based on the court's reading of the language in the SRA and its holdings in *Mistretta* and *Stinson v. United States*, it found that the Guidelines, as written, were mandatory and binding on all judges.[100] Therefore, the Guidelines, as applied, were unconstitutional.

As discussed above, this part of the Supreme Court's decision had been widely anticipated. It was the second part, however, that surprised many in the legal world. Justice Ginsberg joined the four dissenting Justices from the Court's first opinion to form a new majority, and thus wound up being the only Justice in both majorities. Writing for this second majority, Justice Breyer held that the remedy for the Guidelines' constitutional infirmities was the severance and excision of the provisions of the federal sentencing statute that made the FSGs

95. 125 S. Ct. 738 (2005).
96. *Id.* at 746.
97. *Id.* at 749.
98. *Id.*
99. *Id.* at 749-50.
100. *Id.*

mandatory.[101] Rejecting the approach of Justice Stevens to engraft the jury trial requirement onto the existing system of guidelines, Breyer opted to maintain "a strong connection between the sentence imposed and the offender's real conduct" by making the Guidelines system merely advisory.[102] Following the tenets of *Regan v. Time*[103]—which counsels courts to retain portions of an Act which are constitutionally valid and refrain from invalidating more of a statute than necessary[104]—the majority removed §§ 3553(b)(1) and 3742(e) of the SRA, which required sentencing courts to sentence within the Guidelines and allowed for appellate view of departures from the Guidelines range.[105] What was left was a system of advisory guidelines that still provided for appeals from sentencing decisions under the standard the court implied from past appellate practice: review for "unreasonableness."[106] The district courts must continue to consult the Guidelines and take them into account when sentencing, but they are no longer bound by these ranges.[107]

The majority's reasoning on the remedy issue rested on its finding that Congress would have preferred the total invalidation of the SRA to maintaining the statute with *Blakely's* constitutional jury trial requirement engrafted onto it, because the latter would undermine the statute's basic aims of uniformity in sentencing and strong ties between real conduct and sentencing.[108] The Court then went on to analyze whether Congress would prefer the majority's severance and excision remedy, resulting in advisory Guidelines, to the total invalidation of the SRA, and found that Congress would have preferred the former as more consistent with its initial and basic sentencing intent.[109] On the issue of retroactivity, the majority conceded that the *Booker* holding applied to all cases on direct review, but that reviewing courts should use prudential doctrines to determine whether the issue was addressed in the lower court

101. *Id.* at 756-57.
102. *Id.* at 757.
103. 468 U.S. 641, 652-53 (1984).
104. *Id.* at 652-53.
105. *Id.* at 764.
106. *Id.* at 765.
107. *Id.* at 767.
108. *Id.* at 758-61.
109. *Id.* at 758-61, 767.

and whether it failed the "plain-error" test.[110] Finally, the Court left the door open for the national legislature to construct a new, long-term sentencing system consistent with the Constitution, stating: "[t]he ball now lies in Congress' court."[111]

V.
A New Landscape for White Collar Sentencing

The Supreme Court's decision in *Booker* answered a number of questions that had been troubling courts and commentators alike since the *Blakely* decision shook the foundations of the sentencing world. However, by no means is the structure and future of federal criminal sentencing any more lucid. For white collar defendants, the new system brings a whole new set of questions and potential problems. With the Court's invitation for Congress to step in and revise the system looming over the heads of the legal players in this new scheme of advisory guidelines, courts and commentators are treading carefully. However, certain significant changes are clearly in store for white collar defendants facing federal sentencing.

This section will detail the likely impact of the *Booker-Blakely* saga on white collar defendants in three important areas. First, in plea bargaining, these changes will result in greater leverage for defendants and less pressure to cooperate with the prosecution's demands in order to receive a 5K1.1 downward departure from the court.[112] Second, during sentencing, the advisory guidelines regime will allow judges to take a wider variety of factors into account, the majority of which will result in more favorable sentences for white collar defendants. Finally, in appeals, the plain error review standards being adopted by most courts should give convicted

110. *Id.* at 769.

111. *Id.* at 768.

112. United States Sentencing Guidelines § 5K1.1 states, "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1. Under the mandatory Guidelines, while judges were not required to grant this motion (though they usually would), they were prohibited from departing downward in sentencing for substantial assistance absent such a motion from the government. *See* Marcia Coyle, *Federal appeals courts may now hold key to sentencing*, Nat'l L. J., Jan. 17, 2005, at 1.

white collar criminals an additional chance to have their sentences reevaluated and possibly reduced. On the whole, I will argue that the sentencing landscape post-*Booker* is considerably sunnier for white collar defendants than it was under the Federal Sentencing Guidelines regime.

Plea Bargaining

Immediately apparent to many commentators and practitioners after the ink had dried on the *Booker* decision was that the out-of-court repercussions of the holding would be at least as great as the changes wrought within the courtroom. Specifically, with white collar defendants facing the prospect of being sentenced under an entirely new scheme, the plea bargaining process undertaken before the start of the trial will be inevitably and accordingly altered. Since most white collar cases proceed through an agreement of the parties,[113] a change in the plea bargaining dynamic could have a dramatic impact on white collar sentencing. Moreover, it is reasonable to expect this change to almost uniformly benefit white collar defendants by simultaneously improving their prospects for lower sentences from judges while taking away the prosecution's main tool to engender cooperation.

First, *Booker* will likely give more leverage to white collar defendants in plea negotiations due to defendants' modified expectations for lower overall sentences. As "jurists will have far greater power to set jail time . . . criminal defendants may feel empowered to take tougher negotiating stances in plea-bargain talks."[114] Paul McNulty, U.S. Attorney for the Eastern District of Virginia, echoed this point in noting that "the [*Booker*] ruling will make it difficult to convince defendants to plea bargain, because they may think they'll get a better deal from a judge."[115] This will result in "the probability of more trials, particularly in the white collar area where defendants once faced very tough sentences depending on the amount of

113. White Collar Crime Prof Blog, "Booker—What is a Reasonable White Collar Sentence?" (Jan. 13, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/sentencing/index.html.

114. Lorraine Woellert & Mike France, *Corporate Cases: Time to Cut a Deal?*, BUS. WK., Jan. 24, 2005 at 43, ¶ 5.

115. Douglas A. Berman, *Thinking about what DOJ is thinking about*, SENTENCING LAW AND POLICY, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2005/week4/index.html (Jan. 30, 2005).

loss."[116] Gregory Wallance of New York's Kaye Scholer pointed out that "[u]nder the guideline system, you get one bite . . . [y]ou get convicted and your goose is cooked. Now you get two bites: a trial and a second opportunity to argue for lower sentences that otherwise were not available."[117]

Such strategic determinations will likely be made by the white collar defendant and his or her counsel based, in part, on their assessment of what the particular judge in their jurisdiction tends to do in sentencing similar defendants. Thus, defendants will likely refrain from striking a bargain until the filing of charges and assignment of a judge has occurred; if a particular case is subsequently assigned to a judge known to be less stringent in sentencing, the defense may be more willing to drive a hard bargain over the terms of the plea and run the risk of going to trial.[118] For white collar defendants, this newfound leverage should only be intensified, as they are more likely to have the means to credibly threaten to go to trial with highly qualified counsel. Moreover, as pre-Guidelines surveys demonstrated a markedly lower percentage of criminal cases resolved by plea bargains under the indeterminate sentencing regime than under the Guidelines regime,[119] it appears safe to assume that this new, quasi-indeterminate system will result in some decrease in the consummation of plea bargains for white collar defendants.

Second, any discussion of *Booker's* impact on plea bargaining must involve the government's use of 5K1.1 motions for downward departures based on "substantial assistance." Previously, prosecutors could persuade defendants to plead guilty and cooperate by promising to reward them with such a motion, which judges would usually grant under the mandatory guidelines.[120] Frank O. Bowman III, a former federal prosecutor who teaches law at Indiana University, bluntly assessed the post-*Booker* situation, saying that "[t]he Justice Department has

116. Marcia Coyle, *Federal appeals courts may now hold key to sentencing*, NAT'L L. J., Jan. 17, 2005, at 1.

117. *Id.*

118. Irvin B. Nathan, *Supreme Court Gives the Defense a Boost in Plea Bargaining*, BUS. CRIMES BULL., March 2005, at 1, 6 (L. J. Newsls.).

119. *See id.* at 2.

120. Laurie Cohen & Gary Fields, *Balance of Power: High Court Declares Guidelines On Sentencing Violate Rights*, WALL ST. J., Jan. 13, 2005, at A1, ¶ 21.

been using guidelines to induce pleas. If the guidelines are advisory, that leverage is markedly diminished."[121]

While a judge was prohibited from departing downward for substantial assistance under the old mandatory guidelines system, judges no longer have to follow this rule.[122] Indeed, judges can now depart downward based on any "reasonable" factor, and it is logical to expect many who felt constricted by the Guidelines regime to take advantage of this newfound freedom. A judge could even grant a downward departure for cooperation, even without the government's concurrence, upon finding that a defendant had cooperated with prosecutors, other authorities, or even with the victim of the crime.[123]

Thus, while a defendant may still choose to cooperate to gain favor in the eyes of a judge, he or she would have little incentive to jump at an unfavorable plea agreement. This leaves the DOJ in a much tougher position. U.S. Attorney McNulty pointed out that "[i]f the bad guys believe that they're better off going to a judge to get sentenced rather than agreeing with the government to cooperate . . . then our ability to get cooperation is going to go down substantially."[124]

Yet, some argue that talk of the Justice Department losing all 5K1.1 leverage is premature.[125] Ellen S. Podgor, of the White Collar Crime Prof Blog, notes that *Booker* does not appear to remove the government's ability to file a 5K1.1 motion and, as they are still required to consider the Guidelines, judges are unlikely to haphazardly depart downward absent such a motion.[126] Moreover, Podgor points out that many defendants would still choose the certainty of a plea over the chance that a judge could depart down *or up* in sentencing, and that judges were likely to honor such an agreement.[127] White collar defense attorney Irvin Nathan from Arnold and Porter, LLP in Washington, D.C. points out that most district court judges were appointed since the Guidelines went into

121. Woellert & France, *supra* note 114, at ¶ 5.
122. Coyle, *supra* note 116.
123. Nathan, *supra* note 118, at 6.
124. *See* Berman, *supra* note 115.
125. *See* Ellen S. Podgor, *5K1.1 Post-Booker*, White Collar Crime Prof Blog, *at* http://lawprofessors.typepad.com/whitecollarcrime_blog/sentencing/index.html (Jan. 13, 2005).
126. *Id.*
127. *Id.*

effect, and thus are familiar and comfortable with the regime and unlikely to stray widely from FSG ranges.[128] Moreover, "most judges are likely to realize that conspicuous downward departures might incite Congress to impose even more restraints on judicial discretion than the pre-*Booker* system."[129]

However, while these logical arguments demonstrate that loss of prosecutorial leverage might be somewhat mitigated, there's little denying that the net effect of the post-*Booker* regime will be to take power away from the DOJ. White collar defendants now have little incentive to accept unfavorable plea agreements, as they are more likely to have the means to continue on to trial and seek the lowest possible amount of jail time. This development will be doubly difficult for the DOJ to handle in the white collar arena, as they are forced to lean heavily on defendants turning in their cohorts to help unravel increasingly complex schemes. Yet, such a trend might restore some semblance of balance to a system that often seemed to grant too much discretion to the prosecution. As "[p]rosecutors will no longer be able to determine the sentence by their charging decision,"[130] we should expect to see the number of plea bargains decrease, and the terms of those pleas shift in favor of the defense post-*Booker*.

Sentencing Considerations

Another area where *Booker* should have a significant impact on white collar sentencing is in the factors considered by judges when determining sentences. For defendants in white collar cases, the most critical question post-*Booker* is whether judges will choose (or be permitted by higher courts) to consider a defendant's socioeconomic characteristics that were barred from consideration under the Guidelines. As a group, white collar defendants tend to have a higher socioeconomic status and stand to benefit the most from consideration of factors such as family life, community involvement and occupational reputation. Some scholars have argued in favor of decreasing prison time for high status offenders based on the

128. Nathan, *supra* note 118, at 2.

129. *Id.*

130. *Id.* at 6.

greater "collateral penalties" that they suffer.[131] Though this consideration could work against white collar criminals if, for example, more affluent upbringing increased culpability,[132] it generally would open up avenues of argument for sentence mitigation that would be otherwise unavailable. Indeed, a review conducted by District of Massachusetts Judge Nancy Gertner of downward departures in her district during the Guidelines regime demonstrated that white collar criminals were disproportionately likely to benefit.[133] Though white collar offenses comprised only 27% of sentencings in that district in the five years from 1997-2001, they accounted for over 60% of the downward departures.[134]

Thus, the decisions of lower courts as to how to treat such characteristics in a post-*Booker* world take on the utmost significance to white collar defendants. Thus far, district courts have tended to divide themselves among one of two disparate approaches. The first, espousing strict loyalty to the guidelines, was released the day after *Booker* came down by Judge Paul Cassell, one of the influential judges in our previous discussion of post-*Blakely* interpretations, in the case of *United States v. Wilson*.[135] Holding that the Guidelines fully reflected congressional purposes of punishment, Cassell concluded that considerable weight should be given to the FSGs in determining which sentence to impose.[136] Finding that the Guidelines were the only way to create consistent sentencing and to meet the congressionally-mandated goal of achieving uniformity, the court sentenced defendant James Wilson to the term of imprisonment prescribed by the Guidelines.[137] Cassell went

131. *See* John R. Lott, Comment, *Optimal Penalties Versus Minimizing the Level of Crime: Does it Matter Who is Correct?*, 71 B.U. L. REV. 439, 442 (1991) (noting that collateral penalties, including loss of licenses, loss of legitimate income after returning to the work force, and loss of reputation impact white collar criminals more than ordinary criminals).

132. *See* United States v. Wilson, 355 F. Supp. 2d 1269 (C.D. Utah Feb. 2, 2005) (noting defendant Wilson's suggestion along the lines that those whose upbringing society failed to provide for deserve lighter sentences because they have no debt to society to pay).

133. United States v. Thompson, 190 F. Supp. 2d 138, 145 (D. Mass. 2002).

134. *Id.*

135. 350 F. Supp. 2d 910 (D. Utah Jan. 13, 2005).

136. *Id.* at 912.

137. *Id.*

on to note that the court should only depart from the Guidelines in "unusual cases for clearly identified and persuasive reasons."[138]

Once a split among district court approaches to post-*Booker* sentencing emerged, Cassell reaffirmed this holding in denying defendant Wilson's motion to reconsider.[139] Cassell noted that other courts were giving too much effect to offender characteristics not justified by the FSGs, while not offering any real basis for determining which characteristics to consider and how much weight to give them.[140] According to Cassell, the Guidelines, as written, allow for a limited review of a number of offender characteristics.[141] However, though he disagreed with other district courts giving emphasis to rehabilitation and paying too little attention to avoiding disparity in sentencing, where Cassell broke most sharply from his colleagues in other courts was over whether the consideration of socioeconomic status was allowable at all.[142] Cassell held that this characteristic was forbidden by Congress, and that consideration of a defendant's socioeconomic status would lead to racial disparities in sentencing and contradict Congress' mandate to treat rich and poor equally.[143]

The other approach, allowing for a much broader consideration of factors, was established, in fact, in a white collar criminal case from the Eastern District of Wisconsin released days after *Booker* and *Wilson*. In *United States v. Ranum*, District Judge Lynn Adelman took a divergent route from that of Cassell, creating a split among district courts and engendering the debate referenced above.[144] In *Ranum*, Adelman rejected *Wilson's* constraint to give heavy weight to the Guidelines, instead opting to consider the FSGs as "just one of a number of sentencing factors."[145] Since *Booker* rejected mandatory guideline sentences and directed courts to consider all of the SRA

138. *Id.*
139. *Wilson*, 355 F. Supp. 2d at 1269.
140. *See id.* at 1275-76.
141. *Id.* at 1277.
142. *See id.* at 1275, 1277-80.
143. *Id.* at 1278-80.
144. 353 F. Supp. 2d 984, 985 (E.D. Wis. Jan. 19, 2005).
145. *Id.*

§ 3553(a) factors[146]—many of which the guidelines either reject or ignore—Adelman read the opinion to expand allowable sentencing considerations dramatically.[147]

Ranum involved a defendant loan officer, Mark Ranum, who was convicted of misapplying bank funds by failing to notify the bank of extensions of credit to a customer, making false statements to the bank's credit committee, and exceeding his loan authority.[148] Judge Adelman calculated the defendant's applicable offense level and guideline range in the usual manner, but then proceeded to consider all of the factors set forth in § 3553(a).[149] First, Adelman considered the fact that Ranum had not acted for personal gain or for improper personal gain of another as mitigating against the mechanical correlation between loss and offense level in the Guidelines, which treated stealing the same as misappropriation.[150] This portion of the decision could have dramatic collateral consequences on white collar sentencing, as corporate defendants were often exposed to hefty penalties under the Guidelines' loss tables.[151]

Second, Adelman took the history and character of the defendant into account, finding notable his lack of prior criminal record, solid employment history, devotion to family, credible character references from friends and business associ-

146. 18 U.S.C. § 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." § 3553(a)(2) states that such purposes are: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.*

147. *See Ranum*, 353 F. Supp. 2d at 985-87.

148. *Id.* at 987-89.

149. *Id.* at 989.

150. *Id.* at 990.

151. *See id.* (noting that one of the primary limitations of the guidelines—particularly in white-collar cases—is their mechanical correlation between loss and offense level). *See also* United States v. Emmenegger, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) ("Were less emphasis placed on the overly-rigid loss table, the identification of different types of fraud or theft offenses of greater or lesser moral culpability or danger to society would perhaps assume greater significance in assessing the seriousness of different frauds.").

ates, and the fact that he provided care and support for elderly and ailing parents.[152] From this, Adelman concluded that the defendant's absence would have a profound effect on his family and parents, that his conviction would have serious collateral effects on him, and that he was not a danger to society or likely to reoffend.[153] Again, these considerations would have heightened applicability to white collar defendants, as they are more likely to have noteworthy employment histories and professional character references.

Finally, the court considered the needs of the public and the victim, determining that a prison sentence would have little deterrent value due to the unusual nature of the case and that the defendant's ability to pay restitution to the victim bank would be enhanced by a shorter prison term.[154] Though the Guidelines range was 37-46 months, Adelman ultimately decided to sentence Ranum to twelve months and a day, followed by five years of supervised release.[155]

This decision soon received considerable attention due to its novel approach to sentencing, as well as a significant following among other district courts. In the white collar case of *United States v. West*, for example, the court observed that distinct viewpoints had emerged among district courts regarding how much weight to grant the FSGs in sentencing calculations.[156] However, after noting that § 3553(a) required a sentencing court to consider a host of individual variables and characteristics excluded from Guidelines consideration, the court took the defendant's history, characteristics, and recognition of responsibility for the offense into account when determining his sentence.[157] Though the defendant ended up receiving a sentence of 60 months, which was within the Guidelines' range of 57 to 71 months as calculated under the old system, the court made it clear that due consideration would be granted in sentencing hearings to all of the factors

152. *Id.* at 990-91.

153. *Id.*

154. *Id.* at 991.

155. *Id.*

156. *Unites States v. West*, 2005 U.S. Dist. LEXIS 1123 (S.D.N.Y. Jan. 27, 2005).

157. *Id.* at *6, *12-13, *18.

identified in § 3553(a), as well as to the purposes for sentencing set forth in § 3553(a)(2).[158]

This case demonstrates the fact that consideration of these non-Guidelines characteristics may not always result in significant mitigation for a white collar defendant. However, it seems rare that such considerations would ever increase such a defendant's sentence, and in this particular case it seems likely that consideration of these factors resulted in a sentence at the lower end of the Guidelines' range.[159]

The day after *West* was decided, the Southern District of Iowa explicitly adopted Judge Adelman's view of *Booker*. In *United States v. Myers*, the court chose to follow *Ranum's* approach to the Guidelines, noting that if a presumption in favor of a FSG sentence remained, the factors in § 3553(a) would be overshadowed and the Guidelines would, in effect, still be mandatory.[160] In his opinion, Judge Robert Pratt remarked that "[t]his Court views *Booker* as an invitation, not to unmoored decision making, but to the type of careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty."[161] In answering the objections made by Judge Cassell and others that the FSGs were the only way to achieve uniformity, the court noted that *Booker* reminded courts that true uniformity is not found in a one-size-fits-all scheme, but in equivalent relationships between sentence and real conduct.[162] Thus, though the recommended Guidelines range was 20 to 30 months in prison, the court considered a variety of non-Guidelines factors[163] in sentencing the defendant to a three-month term of probation.[164]

158. *Id.* at *19.

159. *See id.* at *19-20.

160. United States v. Myers, 353 F. Supp. 2d 1026, 1027-28 (S.D. Iowa Jan 26, 2005).

161. *Id.* at 1029 (citation omitted).

162. *Id.* at 1030 (citing *Booker*, 125 S. Ct. at 738).

163. The court considered the aberrant nature of the conduct, the law-abiding character of the defendant, the almost innocent circumstances surrounding his actions, the defendant's background, the dependence of his family on his income, the lack of any need for rehabilitation on the part of the defendant, his undergoing significant alcohol evaluation and treatment, his compliance with authorities, and his excellent record during pre-trial release in determining the defendant's sentence. *Id.* at 1032.

164. *Id.*

Soon, Federal Circuit Courts of Appeals got involved in this debate. The Fourth Circuit, in *United States v. Hughes*, held that while a district court should first calculate the range prescribed by the Guidelines, it should then consider that range as well as other relevant factors set forth in § 3553(a) before imposing the sentence.[165] The court also noted that any court imposing a sentence outside of the guideline range should explain its reasons for doing so.[166] Though not citing any lower court decisions on either side of the aforementioned debate, this opinion seems to fall squarely into the *Ranum* approach as it does not grant heavier weight to the Guidelines.

In the most detailed analysis of district court sentencing post-*Booker* by a circuit court thus far, the Second Circuit, in *United States v. Crosby*, laid out the proper place of the FSGs in sentencing.[167] While district courts remained duty-bound to "consider" the Guidelines, the Second Circuit deferred to district courts to decide what degree of consideration would be required, and expected the concept to evolve as judges carried out their statutory duties.[168] However, such consideration would normally require determination of the applicable Guidelines range (though specific calculation may not be necessary in some complicated matters, such as determination of monetary loss),[169] as well as a consideration of applicable policy statements and the factors of § 3553(a).[170] At that point, a judge could decide whether to impose the sentence that would have been imposed under the Guidelines or to impose a non-Guidelines sentence.[171] The Second Circuit made it clear that a district court was permitted to find *all* facts appropriate for determining either a Guidelines or non-Guidelines sentence, now that the mandatory use of the Guidelines had been excised, and no Sixth Amendment objections should be encountered.[172] Once again, while never mentioning *Ranum* by

165. United States v. Hughes, 396 F.3d 374, 377-78 (4th Cir. 2005) (citations omitted).

166. *Id.* at 378 (citing *Booker*, 125 S. Ct. at 790 (Scalia, J., dissenting), *quoting* 18 U.S.C.A. § 3553(c)(2)).

167. 397 F.3d 103 (2d Cir. 2005).

168. *Id.* at 111-13.

169. *Id.* at 112.

170. *Id.* at 113.

171. *Id.*

172. *Id.* at 111-13.

name, the court's opinion in *Crosby* follows its reasoning closely in permitting courts to determine what amount of weight to give the Guidelines in proportion to the other factors of § 3553(a).

A third approach to post-*Booker* sentencing has emerged that, while not followed by a large number of courts, is worth mentioning for its novelty. In *United States v. Huerta-Rodriguez*, the District Court of Nebraska first refused to adopt the position that a criminal sentence should fall within the Guidelines range absent highly unusual circumstances, or that a Guidelines sentence should be afforded a presumption of reasonableness.[173] However, the court also rejected the position of *Crosby* and other courts that Sixth Amendment conflicts were not engendered by judicial finding of sentence-enhancing facts by a preponderance of the evidence.[174] In order to adopt sentencing procedures that would lessen the potential that a sentence would later be found unconstitutional, the court held that it would continue to require that facts that enhance a sentence be properly pled in an indictment, and either admitted or submitted to a jury for determination by proof beyond a reasonable doubt.[175] Interestingly, this approach effectively eschews the *Booker* remedial majority in favor of the remedy favored by the *Booker* merits majority.[176] Though the court in *Huerta-Rodriguez* held that *Booker* neither required nor precluded this approach,[177] at least one other court has adopted a similar protocol, claiming that it fully protects defendants' Sixth Amendment rights under *Blakely* and *Booker*.[178] Such a system, if adopted by a larger number of courts, would tend to drive sentences downward, especially for white collar defendants. As mentioned above, calculations of monetary loss and number of victims involved in a fraud—often critical to the

173. *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. Feb. 1, 2005).

174. *See id.* at 1028 (noting that "it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proved beyond a reasonable doubt.") (citations omitted).

175. *Id.* at 1028-29.

176. *See Booker*, 125 S. Ct. at 779 (Stevens, J., dissenting).

177. *Huerta-Rodriguez*, 355 F. Supp. 2d at 1029.

178. *See* United States v. Barkley, 2005 U.S. Dist. LEXIS 2060, at *25-28 (N.D. Okla. Jan. 24, 2005) (holding that the court will only accept sentence-enhancing facts that were admitted to in a plea or proven to a jury or judge beyond a reasonable doubt).

length of a defendant's sentence—are usually complex and extremely difficult to prove beyond a reasonable doubt. This fact would give white collar defendants more leverage during plea bargaining and a greater chance of avoiding sentence enhancement at trial.

If the majority of lower court decisions post-*Booker* is any indication, however, most courts will likely begin opening up the floor to a much wider variety of considerations, including socioeconomic status. As demonstrated by Judge Gertner's study in *Thompson*, Judge Adelman's opinion in *Ranum*, and many of the court cases following *Ranum's* approach, such considerations will likely lead to greater leniency by judges in sentencing white collar defendants. Though Congress has clearly been concerned with this possibility for some time,[179] it's unclear that such a development will be problematic. Under the directives of the SRA, a host of different factors *should* be taken into account by judges when determining sentences, including those speaking to a criminal's motives, likelihood of reoffending, and culpability. Opening up the judge's permissible considerations will simply allow that judge a fuller and more complete picture of the individual in question and allow a more appropriate sentence to be constructed. If judges determine, after such a review of all relevant factors, that white collar criminals tend to deserve more lenient sentences than they were receiving under the Guidelines, perhaps we should trust their determinations. Moreover, it is entirely possible that broader considerations of socioeconomic factors could work in the opposite direction, exposing a wealthy criminal to increased condemnation or, as in the case featuring Gertner's study, allowing a disadvantaged criminal more leniency and understanding from the court.[180] Thus, while white collar defendants are likely to see a decrease in sentences post-*Booker* due to the broader spectrum of considerations judges are allowed to take into account, there is no reason to believe that

179. *See Thompson*, 190 F. Supp. 2d at 145 (citing S. Rep. No. 98-225 at 175, reprinted in 1984 U.S.C.C.A.N. at 3358; Susan E. Ellingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 973 (1992)).

180. *Id.* at 146 (noting defendant's stability and responsibility remarkable considering his family circumstances, but refusing to depart downward as defendant did not meet the applicable standard of being "irreplaceable").

such a downward trend will be effected by judges in an unmitigated or unjustified manner.

Review for Plain Error

A final area in which white collar criminals are likely to see an impact from *Booker* is in the review of sentences issued under the Guidelines regime for plain error. Though all criminals convicted under the old system stand to benefit from the chance to challenge their sentences on review, white collar criminals may end up having more success in this capacity. This is largely due to the fact that the mechanical and highly punitive loss tables that were used to calculate their sentences often resulted in higher penalties for such defendants than judges may otherwise have handed down. Thus, if an appellant has his or her case remanded to the sentencing judge, that judge could take the opportunity to hand out a more favorable (and in the eyes of the judge, more appropriate) sentence. Moreover, as will be discussed below, some courts have held that defendants must first show that they received a different sentence under the mandatory guidelines regime than they otherwise would have been entitled to before having their sentence reviewed by the sentencing court. The dramatic increase in a white collar sentence resulting from the application of the loss tables would likely be strong evidence in such courts that a sentence would have been different under an advisory regime.

Yet, the impact of *Booker* in this regard turns entirely on the plain error standard of review that courts adopt to deal with such cases—an issue which has engendered much debate among appellate courts. Circuits have thus far generally agreed that the first two steps of the Supreme Court's established four-part plain error test from *United States v. Olano*[181] are met by the use of mandatory guidelines or judicial fact-finding to sentence a defendant: that there was an error and that it was plain.[182] The real debate centers on the third and fourth prongs of the test: whether the error "affects substantial rights" and whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."[183]

181. *See* United States v. Olano, 507 U.S. 725, 732 (1993).
182. United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005).
183. *Olano*, 507 U.S. at 732-36.

Thus far, the circuits have split into three categories in approaching this issue.[184] The first and most difficult standard to meet has been labeled the "defendant must prove" plain error standard because it places the burden on the defendant to make a specific showing of prejudice from the application of mandatory guidelines.[185] The First Circuit adopted this view in *United States v. Antonakopoulos*, holding that a defendant wishing to meet the requirements of an unpreserved plain error claim must point to circumstances creating a reasonable probability that the district court would impose a more favorable sentence under the new advisory guidelines.[186] In doing so, the court followed the flexible standard for plain error articulated in *United States v. Dominguez Benitez*,[187] and rejected rules requiring automatic reversal or remand for *Booker* or *Blakely* errors.[188] The 11th Circuit approach to plain error review can also be placed in this category, as the court in *United States v. Rodriguez* held that the defendant bears the difficult burden of persuasion with respect to prejudice, which can be met only by a showing of reasonable probability of a different and beneficial result had the guidelines been applied in an advisory manner.[189]

The second category of approaches to plain error has been labeled the "let's ask when in doubt" plain error standard.[190] Courts which have adopted this standard will remand a case to the sentencing judge for determination of prejudice whenever the impact of the advisory guidelines on a sentence is unclear. The Second Circuit was the first to adopt this standard of review in *Crosby*, discussed above. In that case, the court found that even if a sentence is reasonable in length, the method of selection is cause for concern because it is often impossible to tell whether the judge would have imposed a different sentence had he or she not been bound by the

184. Douglas A. Berman, *Three-ring circus . . . err, three-way circuit split*, SENTENCING LAW AND POLICY, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2005/week9/index.html (Mar. 6, 2005).

185. *Id.*

186. *Antonakopoulos*, 398 F.3d at 1296-99.

187. 124 S. Ct. 2333 (2004).

188. *Id.*

189. 398 F.3d 1291, 1296-99 (11th Cir. 2005).

190. Berman, *supra* note 184.

mandatory guidelines.[191]The court went on to note that, as in *Antonakopoulos*, plain error analysis would be satisfied if the sentence imposed under the correct guidelines system would have been materially different.[192] However, because it is often unknown whether a different result would have been achieved, *Crosby* held that it would remand such cases to the district court to make that determination (and thus determine whether the plain error test is met).[193]

Soon after this decision was handed down, the Seventh Circuit followed suit. In *United States v. Paladino*, the appeals court held that unless any of the district judges in the cases before the court had said in sentencing that they would have given the same sentence had the guidelines been merely advisory, it is impossible for a reviewing court to determine plain error.[194] The only way for this question to be solved, therefore, was for the reviewing court to remand the case back to the sentencing judge for determination of whether he would impose his original sentence if required to resentence.[195] If he would have imposed a different sentence, the Seventh Circuit held it would vacate the original sentence and remand for resentencing.[196] Note that this final step was different from that advocated in *Crosby*, where the district judge would vacate the original sentence himself if he chose to resentence the defendant. Thus, this category of decisions strikes a middle ground between placing an extremely difficult burden on the defendant to prove a different sentence would have resulted under an advisory system, and remanding every case sentenced under the mandatory system to the district court for resentencing.

The third and final category of plain error approaches has been termed the "presumption of prejudice" standard.[197] This standard, most clearly articulated by the Sixth Circuit, adopts a general presumption that a defendant was prejudiced by a sentence imposed under the mandatory guidelines system. In *United States v. Oliver*, the court held that when the district

191. *Crosby*, 297 F.3d at 118.
192. *Id.* at 118.
193. *Id.*
194. United States v. Paladino, 2005 U.S. App. LEXIS 3291, at *27-28.
195. *Id.* at *32 (citing *Crosby*, 397 F.3d at 108-9).
196. *Id.* at *33.
197. Berman, *supra* note 184.

court unconstitutionally sentenced the defendant to a level beyond that which was supported by the jury verdict or the defendant's criminal history, it violated the defendant's substantial rights (thus satisfying the third prong of the plain error test).[198] Such an error would "diminish the integrity and public reputation of the judicial system [and] also would diminish the fairness of the criminal sentencing system."[199] Thus, the court remanded the case to the district court for resentencing consistent with *Booker*.[200]

The Fourth Circuit, in *Hughes*, also concluded that the district court plainly erred in imposing a sentence on the defendant that exceeded the maximum allowed based on the facts found by the jury alone.[201] While reserving the discretion to determine whether such errors warranted reversal, the court in *Hughes* held that the defendant's sentence placed the fairness and integrity of judicial proceedings in jeopardy and remanded the case to the district court for resentencing.[202]

A white collar defendant sentenced under the advisory guidelines system could be significantly impacted by which standard of plain error review is chosen in his or her jurisdiction. Clearly, the "defendant must prove" standard will be the least beneficial to offenders, as it requires the highest burden of proof to achieve a remand for resentencing. The second category, "let's ask when in doubt," will place defendants in a very good position to have their sentence reviewed by the district court, but there is little guarantee that resentencing will be granted. The third standard, "presumption of prejudice," will be the most beneficial to offenders, as district courts will commonly be asked to resentence a defendant based on the advisory guidelines system. There is no guarantee that a district court will not resentence an offender to a greater sentence upon remand,[203] but more lenient plain error review

198. United States v. Oliver, 397 F.3d 369 (6th Cir. 2005).

199. *Id.* at 380 (*quoting* United States v. Bostic, 371 F.3d 865, 877 (6th Cir. 2004) (internal quotation and citation omitted)).

200. *Id.* at 381.

201. *Hughes*, 396 F.3d at 378.

202. *Id.* at 379-80, 384.

203. *See, e.g.*, Press Release, U.S. Attorney's Office for the Southern District of Texas, "Judge Increases Prison Terms of Former Public Officials Sentenced for Bribery Convictions" (Jan. 20, 2005), *available at* http://www.usdoj.gov/usao/txs/releases/January2005/050120-VasquezSegredo.htm.

standards certainly provide white collar offenders with an opportunity to argue for a reduction.

Moreover, white collar criminals in general will likely derive a relatively greater benefit from this opportunity for review due to the use of the mechanical loss tables to calculate stringent penalties. One example of a high-profile defendant in such a position is former Dynegy Corp. executive Jamie Olis.[204] As discussed in the introduction, Olis was sentenced to 24 years in federal prison for a crime that ordinarily would have carried minimal prison time. However, based upon the federal judge's determination that Olis caused $105 million in loss (deriving this number from the drop in Dynegy's stock price), Olis received a much stiffer penalty than many higher-ranked corporate executives convicted of fraud, many of whom profited immensely from their crimes.[205] Such disproportionate sentences engendered by the judicial application of the loss tables from the FSGs seem ripe for resentencing after the *Booker* revolution.[206]

VI.
CONCLUSION

The road from the introduction of the Federal Sentencing Guidelines in 1987 to the *Booker* decision in 2005 has been long, winding, and unpredictable for white collar sentencing. As increasingly severe and sometimes-draconian penalties were built upon the original FSGs by the 2001 Amendments and Sarbanes-Oxley mandates, white collar criminals appeared likely to bear the brunt of the wrath of the public and Congress for the scandals of the early 21st Century. However, the Supreme Court's surprise decision in *Blakely* sent all federal criminal sentencing into a six-month period of relative chaos, inviting commentators and jurists to speculate on the potential impact on white collar law enforcement. Finally, *Booker* has put some of this speculation to rest, but in introducing the novel advisory guidelines system, has caused a whole new set of questions to be raised. Furthermore, there is no guarantee

204. Cohen & Fields, *supra* note 120, at ¶ 15.

205. *Id.* at ¶ 22.

206. *See* Ann Woolner, *Olis's 24-Year Prison Sentence Due for a Shave*, BLOOMBERG, (Feb. 11, 2005), *available at* http://quote.bloomberg.com/apps/news?pid=10000039&refer=columnist_woolner&sid=AShzYLtLup.k.

that the current state of affairs will last as a long-term solution to criminal sentencing. Given the Supreme Court's invitation to Congress to reassess the federal sentencing system and Congress' perceived proclivity to do so, we could soon see another complete overhaul of the system from the national legislature.[207]

However, in the interim, several concrete aspects about the material impact of *Booker* on white collar sentencing are beginning to emerge. These should aid white collar practitioners in advising clients facing criminal charges and plea bargain negotiations against this new sentencing backdrop. First, in the context of plea bargaining, white collar defendants will find themselves in much better bargaining positions. With judges now having the option to grant lower sentences than they otherwise could have under the Guidelines, defendants may choose to take their chances in court, or at least wait for the assignment of a judge before pursuing a plea agreement. Prosecutors will consequently suffer a loss of power in negotiations based on the reduced attractiveness of a 5K1.1 letter, and thus might find it more difficult to ensure cooperation and unravel complex white collar schemes. However, this shift in power may have been necessary, given the fact that prosecutors could often unilaterally determine sentences faced by defendants based on charging decisions. For white collar defendants, this impact will likely be even greater, as they are more likely to have the means to go to trial with highly qualified counsel, making their threats to do so in bargaining more credible.

Second, in the context of judicial sentencing, white collar defendants should benefit on the whole from the broader range of characteristics judges are allowed to take into account. Though courts are not unified over which factors to consider or how much weight to grant them, it seems plausible that socio-economic factors will come into play more often in more courtrooms across the county after *Booker*. This should

207. *See, e.g.*, Coyle, *supra* note 120 (quoting Paul Rosenzweig of the Heritage Foundation's Center for Legal and Judicial Studies as saying, "[w]hat strikes me as most remarkable about this is that in the name of the right to a jury trial, we've got complete judicial discretion, and in the face of the one thing we know absolutely about this Congress—it thinks courts have had too much discretion—courts have taken discretion completely for themselves.").

result in more leniency for white collar defendants in general, as they are more likely to have better employment histories, more credible character references, greater community involvement, and less pronounced criminal records. Though some would argue that this creates unfair disparity in the sentencing system, the greater collateral penalties suffered by white collar defendants and their lower relative likelihood to reoffend persuade me that consideration of these characters should lead to more appropriate sentences.

Finally, in the context of plain error review, *Booker* has presented white collar criminals with an opportunity to challenge their sentences. While the three-way circuit split in approaches to the standard of review prevents a precise prediction to be made in their chances for success, such white collar appellants will at least have an opportunity to argue that their sentences would have been different under an advisory system. Moreover, regardless of the standard chosen by a particular court, white collar appellants should have a relative advantage due to the often dramatic penalties imposed upon them by the mechanical application of the loss tables under the mandatory regime.

Though it appears from this assessment that white collar defendants will enjoy disproportionate benefits across the board from the post-*Booker* sentencing regime, the courts and Congress should not overreact in attempts to counter such a trend. For one, the size of any such benefit could be relatively small and insignificant in the greater scheme of federal sentencing. How great a boon these defendants actually receive is yet to be seen, and it seems advisable to wait and observe how this novel regime develops before jumping to conclusions. Second, it's not clear that these benefits to white collar criminals are undeserved. If it is true that their socioeconomic characteristics as a group make them less likely to reoffend or more likely to suffer collateral penalties, shouldn't their punishments be reduced accordingly? Moreover, given the significant upward trend in white collar sentencing over the past five years, it is possible that the increased judicial flexibility will allow judges to mollify a system that had become overly punitive on this category of offenders. Finally, with the net of penalties targeted at "white collar offenders" widening with time to capture defendants of all backgrounds, the judicial consideration of a broader set of background factors is necessary to ensure

that the appropriate defendants receive the higher penalties Congress intended.

Ultimately, the post-*Booker* system has the potential to achieve the elusive balance in sentencing that the legal community has sought for so long—uniformity stemming from the Guidelines, but flexibility stemming from judicial interpretation of all relevant factors. It is this overarching goal, not a primordial desire to avenge the scandals of the early 21st Century, upon which we should focus as we evaluate and explore this uncharted world of federal sentencing.