THE BALLAD OF THE "WHITE" COLLAR CRIMINAL: AN EXAMINATION OF THE INTERSECTION OF RACE AND GENDER IN FEDERAL WHITE-COLLAR SENTENCING AND POSSIBLE IMPLICATIONS OF THE FINDINGS

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INTRODUCTION

The college admissions scandal captivated the nation when it broke. More than forty wealthy parents were charged in the operation, including actresses Felicity Huffman and Lori Loughlin.[1] The allegations were almost unbelievable: in an FBI investigation dubbed "Operation Varsity Blues," streams of wealthy parents were alleged, and indeed, many subsequently pled guilty to, bribing and cheating their kids' way into elite colleges and universities, including Yale, Stanford, Georgetown, the University of California Los Angeles, the University of Southern California and the University of Texas.[2] The investigation uncovered that the children sometimes faked learning disabilities so that they would be able to take the tests at facilities where staff had been paid off: parents paid between $15,000 and $75,000 a test to participate in this cheating scheme.[3] For another part of the scheme, college coaches allegedly received bribes to designate applicants as recruited athletes—a status which gives them a leg-up in admissions —regardless of their athletic ability, and sometimes when they didn't even play the sport they were supposedly recruited for.[4]

After the operation was uncovered, the indicted parents faced a variety of charges for their non-violent crimes related to the plot, including that of mail fraud, wire fraud, racketeering and money laundering.[5] There was immediate and swift public condemnation of these parents' actions, particularly so because the children of wealthy parents already have an advantage in gaining admission to these elite schools, simply from being born into such immense privilege and opportunity. However, at the same time, attention was being called to certain cases of black mothers charged with similar crimes.[6] Like their counterparts in the scandal, these mothers' crimes

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1 *See* Owen Daughetry, *Story of mother sentenced to jail for enrolling child in different district resurfaced amid college scandal*, THE HILL (March 14, 2019, 12:05 PM), https://thehill.com/blogs/blog-briefing-room/news/434051-story-of-mother-sentenced-to-jail-for-enrolling-child-in.

2 *See* Erin Durkin, *US college admissions scandal: how did the scheme work and who was charged?*, THE GUARDIAN (Mar. 13, 2019), https://www.theguardian.com/us-news/2019/mar/12/college-admissions-fraud-scandal-felicity-huffman-lori-loughlin.

3 *See id.*

4 *See id.*

5 *See id.*

6 *See generally* Ashira Prossack, *The College Admissions Scandal: A Study in Privilege*, FORBES (Mar. 23, 2019), https://www.forbes.com/sites/ashiraprossack1/2019/03/23/college-admissions-scandal-privilege/?sh=214d67ca24be; *See also generally* Derrick Z. Jackson, *White privilege and hypocrisy are at the center of college admission scandal*, THE UNDEFEATED (Mar. 14, 2019), https://theundefeated.com/features/white-privilege-and-hypocrisy-are-at-the-center-of-college-admission-scandal/.

were also aimed at helping their children get ahead: they were crimes comparable to their wealthier counterparts in the basic sense, but immensely less drastic in scope and degree.[7] Two of these mothers in particular were Tanya McDowell and Kelley Williams-Bolar.[8]

It first should be noted that the media's treatment and reporting of the Tanya McDowell case is and was slightly misleading.[9] Yes, McDowell was sentenced to five years in prison for the charge of grand larceny, in part, due to her enrolling her five-year-old son in a neighboring, better school district in Connecticut.[10] However, it should be distinguished that the five-year sentence she received was given in conjunction with drug charges she simultaneously pled guilty to.[11] The case of Williams-Bolar, on the other hand, is worth taking a look at for comparison purposes. Although convicted at the state level, Williams-Bolar served nine days in jail and was ordered to pay $30,000 in restitution in 2011, when she was found guilty of using her father's address, instead of her own, in an attempt to enroll her daughters in a better school district than the Akron, Ohio one they would have otherwise been zoned for.[12]

The duration of the sentence imposed and the amount of restitution ordered to be paid by Williams-Bolar is similar to Felicity Huffman.[13] However, in comparison to Williams-Bolar, Huffman's misdeeds were arguably far more brazen: she paid $15,000 to have someone correct her daughter's answers on the SAT examination, in a bid to boost her scores and presumably give her a further competitive edge over other applicants.[14] The parallels of these two mothers, regardless of their circumstance and

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7 *See* Ashley Alese Edwards, *This Mom Went To Prison For Enrolling Son In A School Outside Her District*, REFINERY29 (Mar. 15, 2019), https://www.refinery29.com/en-us/2019/03/227024/tanya-mcdowell-college-admissions-scandal-arrested-privilege; *see* Daughetry, *supra* note 1.

8 *See* Edwards, *supra* note 7; *see* Daughetry, *supra* note 1.

9 *See* Edwards, *supra* note 7.

10 *See id.*

11 *See id*. The mention of this fact is not to pass judgement or impose criticism on Tanya McDowell. Many attributed her drug dealing during this time to the fact she was homeless and trying to provide for herself and her son as best as she was able to. The misconceptions are just noted for purposes of comparison, particularly to the sentences received by parents involved in the College Admissions Scandal.

12 *See* Daughetry, *supra* note 1; *see also* Edwards, *supra* note 7.

13 *See* Daughetry, *supra* note 1; *see also* Joey Garrison, *Felicity Huffman sentenced: 2 weeks in prison, $30,000 fine for college admissions scandal*, USA TODAY (Sept. 13, 2019), https://www.usatoday.com/story/entertainment/celebrities/2019/09/13/felicity-huffmans-sentenced-college-admissions-scandal/2284438001/.

14 *See* Garrison, *supra* note 13.

opportunity, was not lost on anyone, even the prosecutors in Huffman's case: in fact, they mentioned Williams-Bolar by name in their arguments.[15]

In the wake of the scandal, many took to social media to vent their frustrations regarding the vast discrepancies of race, wealth and opportunity that were put so clearly on display.[16] However, such a blatant display of disparate treatment is, unfortunately, nothing new in the criminal justice system.[17] There are countless articles aimed at this very idea: the idea that at almost every juncture of the criminal justice system, there is starkly different treatment of defendants along racial lines.[18] However, one area of study paid considerably less attention is possible disparate treatment within the white-collar defendant community itself, including at the federal level. Such a lack of attention may be explained by the commonly held belief that these defendants are really just white men, and moreover, white men who are treated too leniently in the system anyway.[19] This belief, and the lack of easily ascertainable study regarding disparate treatment within the white-collar defendant community, both pose important questions. These questions include: whom exactly is committing these crimes, and what, if any, resulting disparate sentencing treatment actually exists? These questions are especially pertinent in light of the noted comparison of defendants like Felicity Huffman, when compared to her counterpart, Kelley Williams-Bolar, and this country's history of disparate treatment in the criminal justice system more generally.[20]

This Note seeks to clarify some of these questions. This Note will first seek to define what exactly white-collar crime is. It will move on to examine

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15 *See* Kate Taylor, *By Turns Tearful and Stoic, Felicity Huffman Gets 14-Day Prison Sentence*, N.Y. TIMES (Sept. 31, 2019), https://www.nytimes.com/2019/09/13/us/felicity-huffman-sentencing.html.

16 *See generally* Daughetry, *supra* note 1; *see also generally* Derrick Z. Jackson, *White privilege and hypocrisy are at the center of college admission scandal*, THE UNDEFEATED (Mar. 14, 2019), https://theundefeated.com/features/white-privilege-and-hypocrisy-are-at-the-center-of-college-admission-scandal/.

17 *See generally* Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf; *see also generally* Robert D. Crutchfield, *From Slavery to Social Class to Disadvantage: An Intellectual History Of The Use Of Class To Explain Racial Differences In Criminal Involvement*, CRIME & JUST. 1 (2015), https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)&bhcp=1.

18 *See generally* Hinton, Henderson & Reed, *supra* note 17.

19 *See generally* Joseph Martinez, *Unpunished Criminals: The Social Acceptability of White-Collar Crimes in America*, EASTERN MICH. U. Senior Honors Theses & Projects (Apr. 11, 2014), http://commons.emich.edu/honors/382; *see* George Pierpoint, *Is white-collar crime treated more leniently in the US?*, BBC NEWS (March 11, 2019), https://www.bbc.com/news/world-us-canada-47477754; *see generally* Investopedia, *Sentences for White-Collar Criminals: Too Harsh or Too Lenient?,* Forbes (June 8, 2012), https://www.forbes.com/sites/investopedia/2012/06/08/sentences-for-white-collar-criminals-too-harsh-or-too-lenient/?sh=21c59599275b.

20 *See* Daughetry, *supra* note 1; *see also* Garrison, *supra* note 13.

the demographics of the offenders in the white-collar community, including through a racial and gendered lens. It will attempt to examine sentencing patterns at the federal level across these lines as well, and particularly, if there is any indication of sentencing discrepancies between defendants of different races and genders. This examination will lead to the understanding that there is an apparent lack of information regarding the federal sentencing patterns of Black women, and other women of color, particularly those who commit white-collar crimes.

The inadequacy of research regarding this group of individuals poses more questions—do these particular individuals simply never commit these crimes? What exactly is ascertainable given the current information will be examined, and ultimately, the information found available (and lack thereof) will be shown to have more than one explanation. One explanation of noted discrepancies in sentencing could possibly be due to plea bargaining, and the way in which this practice may set black female white-collar defendants up for a disadvantage. However, rather than racial or gendered bias, a more accurate and all-encompassing explanation of apparent sentencing discrepancies will be shown to be the discretion given to all federal judges at the sentencing stage, in a post-*Booker* era, and the disparate sentencing practices and climate that the *Booker* decision ultimately helped to create.

In response, this Note will first urge for further and more concrete research to be conducted on discrepancies of the sentences of white-collar defendants across racial and gender lines, given the scarcity of currently available scholarship dedicated to the topic. Additionally, this Note urges more overall reform at the federal sentencing stage. It will suggest two in particular: both that are plausible and realistic, and modeled after the practices of the recently retired Judge Jack B. Weinstein of the Eastern District of New York. This Note will propose for the federal sentencing statute, 18 U.S.C. § 3553, to be altered slightly: specifically, it will suggest requiring that a statement of reasons regarding the imposed sentence be mandated in *each* case, not just in cases where the imposed sentence falls outside the Sentencing Guidelines ("Guidelines") range.[21] Additionally, this Note will suggest a more comprehensive, and arguably modern, approach for federal judges to undertake prior to imposing a sentence, a practice similar to Judge Weinstein's. The two reforms proposed would hopefully lead to a more easily ascertainable and coherent sentencing method among federal

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21 *See* 18 U.S.C. § 3553 (1986).

judges, which could aid the public in understanding why each federal defendant is sentenced in the way in which they are. The two reforms could also aid federal judges themselves, when they are imposing sentences at the federal sentencing stage—including the sentences of black female white-collar defendants.

BACKGROUND

Defining White-Collar Crime

In the late nineteenth and early twentieth centuries, the theoretical constructs used by sociologists to understand crime focused on it as a problem of poverty and of personal characteristics believed to be associated with poverty, such as broken homes, mental illness, association with criminal subcultures, and living in slum housing.[22] Less understandable, therefore, was white-collar crime, as those acts were and are less often performed by individuals associated with poverty.[23] In the midst of all this confusion, it was the sociologist Edwin Sutherland who first coined the term "white-collar crime," in a speech given to the American Sociological Society in 1939, explaining it to be a crime "committed by a person of respectability and high social status in the course of his occupation."[24]

A definition and model of white collar crime that leant itself more to empirical data analysis was Herbert Edelhertz's 1970 definition: "[a]n illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage."[25] Edelhertz identified four main types of white collar offenses: (1) personal crimes, or crimes by persons operating on an individual, ad-hoc basis, for personal gain in a non-business context, (2) abuses of trust, or crimes in the course of their occupations by those operating inside businesses, government, or other establishments, or in a professional capacity, in violation of their duty of loyalty and fidelity to employer or client, (3) business crimes, or crimes incidental to and in furtherance of business operations, but not the

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22 *See* Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is And Where It's Going*, 28 NOTE DAME J. OF L., ETHICS & PUB. POL. 482, 484 (2014).

23 *See id.* at 484.

24 *See* Mirko Bagaric, Jean Du Plessis & Jaclyn Silver, *Halting the Senseless Civil War Against White-Collar Offenders: "The Conduct Undermined The Integrity Of The Markets" And Other Fallacies*, 2016 MICH. ST. L. REV. 1019, 1025 (2016).

25 Cliff, *supra* note 22 at 483-84.

central purpose of such business operations, and (4) con games, white-collar crime as a business, or as the central activity of the business.[26]

The Federal Bureau of Investigation ("FBI") employs a similar definition: "those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage."[27] In 1996, the National White-Collar Crime Center convened a group of noted academics specifically to address this definitional dilemma.[28] In the end, those in attendance ultimately agreed that white collar crime should be defined as "illegal or unethical acts that violate fiduciary responsibility of public trust, committed by an individual or organization, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain."[29]

Demographics of White-Collar Offenders

The overall demographics of white-collar offenders prove incredibly interesting. White individuals in general have long been overrepresented in white-collar crime, especially in its elite forms, such as corporate crime, investment fraud, and securities fraud.[30] Much of the scholarship and study dedicated to white-collar crime concerns the what, the why, and the how: the research examines what crimes these defendants committed, why they carried out such actions, and how they went about their misdeeds.[31] Unfortunately, there is much less scholarship aimed at the who—specifically, at the different demographics within this specific offender community.[32]

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26 *Id.*

27 *Id.*at 485.

28 *Id*. at 486.

29 *Id.*

30 *See* Tracey Sohini & Melissa Rorie, *The whiteness of white-collar crime in the United States: Examining the role of race in culture of elite white-collar offending*, THEORETICAL CRIMINOLOGY, 66 (2019).

31 *See id.*

32 *See generally* Ernest Poortinga, Craig Lemmen & Michael Jibson, *A Case Control Study: White-Collar Defendants Compared With Defendants Charged With Other Nonviolent Theft*, 34 J. AM. ACAD. PSYCHIATRY AND L. 82, (2006); Ilene Nagel Bernstein, John Hagan & Celesta Albonetti, *The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts*, 45 AM. SOC. REV. 802 (1980); *see generally* Stanton Wheeler, David Weisburd, Elin Waring & Nancy Bode, *White Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331, (1987-1988); Joe McGrath, *Why Do Good People Do Bad Things?: A Multi-Level Analysis Of Individual, Organizational*, *And Structural Causes Of White-Collar Crime*, 43 SEATTLE U. L. REV. 525, (2020); Mark W. Bennett, Justin D. Levinson & Koichi Hioki,

Historically, studies of white-collar defendants have consistently detailed that white male offenders represent the largest demographic.[33] Likely due to this, these white male offenders are the particular subjects that much of the research and scholarship in this field is aimed at dissecting. However, and although by no means a majority, individuals of minority races and women commit white-collar crimes as well.[34] Some of the most deficient areas of white-collar crime research concern black and other defendants of minority races, particularly those who are also female. While many authors and researchers have dedicated time and effort into examining female white-collar defendants, most of the studies fail to touch on race as well, and are instead aimed at examining broad gender implications.[35]

Sentencing of White-Collar Offenders, Including Post-Booker

The lack of research and study undertaken thus far, on the intersection of race and gender of white-collar defendants, makes attempting to discern sentencing disparities between different defendants all the more difficult. However, it is important to note what, albeit minimal, studies have been performed regarding the topic, as well as the steep implications and effects of the Supreme Court decision in *United States v. Booker*.[36]

One important study set out to examine the sentencing disparities between minority white-collar defendants and their white counterparts. The study concluded that both black and hispanic federal white-collar defendants receive longer prison sentences than their white counterparts.[37] However, the study also noted such disparity may not be entirely race-based, and that

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Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform, 102 IOWA L. REV. 939 (2017).

33 *See generally* Cynthia Barnett, *The Measurement of White-Collar Crime Using Uniform Crime Reporting*, UNIFORM CRIME REPORTS, https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf; Donald A. Mason, *Tracking Offenders: White Collar Crime*, BUREAU OF JUST. STAT. SPECIAL REP. (Nov. 1986), https://www.bjs.gov/content/pub/pdf/to-wcc.pdf.

34 *See generally* Mason, *supra* note 33.

35 *See generally* Mary Dodge, *From Pink to White with Various Shades of Embezzlement: Women Who Commit White Collar Crimes*, INT'L HANDBOOK OF WHITE COLLAR AND CORPORATE CRIME, 379-404 (2007), https://page-one.springer.com/pdf/preview/10.1007/978-0-387-34111-8_18; Rich Morin, *Even in white collar crime, female crooks face a glass ceiling*, PEW RSCH. CTR. (August 5, 2013), https://www.pewresearch.org/fact-tank/2013/08/05/even-in-white-collar-crime-female-crooks-face-a-glass-ceiling; 2005-2012; *see also generally* William Rhodes, Ryan Kling, Jeremy Luallen & Christina Dyous, *Federal Sentencing Disparity: 2005-2012*, Bureau of Just. Stat. Working Papers 1, 74 (2015) (explaining "[w]e find that females receive sentences that are less harsh than their male counterparts, but curiously we find that black and white females receive similar sentences. Something other than skin color and racial prejudice per se is driving these results." However, this study did not explicitly detail which specific crimes the authors looked to when conducting their analysis, and there is no mention of white-collar offenses or defendants in the study. The piece was seemingly more aimed at discerning sentencing trends along racial and gendered lines more broadly).

36 *See generally* United States v. Booker, 543 U.S. 220 (2005).

37 *See* Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM L. AND CRIMINOLOGY757, 758 (2006).

> [A] large portion (up to one-third) of the estimated disparity is driven by the ability to pay a fine. Similarly, income is also shown to be an important factor, and it is poorly measured in the data…Our results call into question traditional studies of sentencing disparities, and we conclude that the estimation of racial disparities… is more complicated than previous work indicates.[38]

Other noted studies have examined how, in general, women tend to be treated more favorably at the federal sentencing stage when compared to men.[39] One study explained that one interpretation of these results could be that "[s]ex effects are real; they reflect unknown, but perhaps unwarranted, sources of gender disparity (e.g., favoritism toward women, protection of women from the hardship of jail, views of women as weaker than men)."[40]

Federal sentencing disparities have been argued to have been exacerbated by the Supreme Court ruling in *United States v. Booker*.[41] In 1987, the first Federal Sentencing Guidelines came to fruition, in large part due to a desire to eliminate unwarranted sentencing disparities between different judges.[42] The process now includes the following: at the federal sentencing stage, a judge is mandated to look to § 3553, the statute that imposes the federal sentencing power, to calculate and impose an acceptable prison sentence on the defendant in the case.[43] As was explained in *Booker*, "[w]hile subsection (a) of § 3553 of the sentencing statute lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws."[44] This "shall" language had been interpreted, pre-*Booker,* to mean such an undertaking was mandatory, and as the *Booker* Court further explained, prior to the decision, "departures [were] not available in every case, and in fact [were] unavailable in most."[45]

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38 *Id.*

39 *See id.* at 781; *see also* Kathleen Daly, *Gender and Sentencing*, 8 FED. SENT'G REP. 163, 164 (1995).

40 Daly, *supra* note 39 at 164.

41 *See generally* Michael M. McConnell, *The Booker Mess*, 83:3 DENV. UNIV. L. REV. 665 (2006).

42 *See* Schanzenbach & Yaeger, *supra* note 37, at 757-758; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2A1.1-§ 2X7.2 (U.S. SENTENCING COMM'N 2018) (this is the current version of the Sentencing Guidelines).

43 *See* 18 U.S.C. § 3553 (1986).

44 *Booker*, 543 U.S. at 233-234.

45 *Id.*

The Court went on to describe a sentencing judge's process, using Booker's case as an example: "[u]nder these facts, the Guidelines specified an offense level of 32, which, given the defendant's criminal history category, authorized a sentence of 210-to-262 months. *See* USSG § 2D1.1(c)(4). Booker's is a run-of- the-mill drug case…The sentencing judge would therefore have been reversed had he not imposed a sentence within the level 32 Guidelines range."[46] However, the Supreme Court in *Booker* found that it was a violation of the Sixth Amendment for the Sentencing Guidelines to be rendered mandatory, and instead declared that the Guidelines are merely advisory at the federal sentencing stage.[47] Overall, the *Booker* decision did not render the Guidelines unimportant, but rather opened the door to some discretion on the part of a federal judge at sentencing.[48]

PROBLEM

The current overall research, knowledge and understanding regarding the sentencing of white-collar defendants, particularly those defendants whom cross racial and/or gender lines, is immensely lacking. Although there are indeed some instances of black female and other minority federal defendants getting seemingly harsher sentences in comparison to their white male or white female counterparts, a more accurate explanation of such a finding is that there is a general lack of overall uniformity at the federal sentencing stage altogether. This is an immense problem for the U.S. criminal justice system—a system that strives to be fair and impartial. Such ideals suffer if there are unbalanced prison sentences being handed down in different federal districts for the very same crimes.

Looking to actual case law in a post-*Booker* world perhaps paints a clearer picture, regarding just how disparate sentencing can be and indeed has become. In regards to white-collar defendants, other than those involved in the College Admissions Scandal, there are Black female defendants like Tessicar Karelle Jumpp*,* sentenced to six years for conspiracy to launder approximately $385,000;[49] Jamila Davis, sentenced to twelve and a half years for defrauding Lehman Brothers for more than fourteen million;[50] and

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46 *Id.*

47 *See* Schanzenbach & Yaeger, *supra* note 37, at 763; *see also Booker*, 543 U.S. at 220.

48 *See generally Booker*, 543 U.S. at 220; *see* Schanzenbach & Yaeger, *supra* note 37, at 763.

49 *See Jamaican Woman Sentenced For Lottery Scam Targeting Elderly Victims*, DEP'T OF JUST. (Aug. 13, 2008), https://www.justice.gov/usao-edva/pr/jamaican-woman-sentenced-lottery-scam-targeting-elderly-victims.

50 *See* Walter Pavlo, *The Woman Who Brought Down Lehman, Or So You Were Told*, FORBES (March 30, 2015, 6:31 AM), https://www.forbes.com/sites/walterpavlo/2015/03/30/the-woman-who-brought-down-lehman-or-so-you-were-told/#74bf920d2a59.

Corrine Brown, a former politician sentenced to five years for eighteen counts, charges which involved wire and mail fraud, conspiracy, concealing income and filing false tax returns.[51] On the other hand, there are white female defendants like Jennifer Dwyer, sentenced to six years for embezzling approximately two million;[52] Leona Hemlsey, sentenced to four years for thirty-three charges, including conspiracy, tax evasion, filing false tax returns, and mail fraud;[53] and Joann Crupi and Annette Bongiorno, two white female members of the "Madoff Five," or what has become known as perhaps the most infamous and catastrophic Ponzi scheme in history, sentenced to a mere six years each.[54]

Additionally, there are white male defendants like Jack Abramoff, sentenced to just six years various forms of fraud and tax evasion, despite allegations he stole in total approximately twenty-three million;[55] Paul Manafort, sentenced to mere forty-seven months for tax and bank fraud relating to more than thirty million dollars he made in the Ukraine;[56] and Daniel Bovnrentre, a close confidant of Bernie Madoff, who initially faced 220 years in prison only to eventually receive ten, for twenty-two counts of securities fraud, bank fraud, tax fraud, falsifying the books and records of Madoff Securities, conspiracy, and making false filings with the Securities and Exchange Commission.[57]

Looking to the above-mentioned cases, and noticing the overall lack of uniformity at the federal sentencing stage, there has been widespread

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51 *See* Christoper Hong, Nate Monroe & Steve Patterson, *Former U.S. Rep. Corrine Brown sentenced to five years in prison*, FLA. TIMES-UNION (Nov. 30, 2017, 3:08 PM), https://www.jacksonville.com/news/20171130/former-us-rep-corrine-brown-sentenced-to-five-years-in-prison.

52 *See Jennifer Dwyer Sentenced to 51 Months For Embezzling Over $2 Million From Northeast Kingdom Employer*, DEP'T OF JUST (Feb. 11, 2020), https://www.justice.gov/usao-vt/pr/jennifer-dwyer-sentenced-51-months-embezzling-over-2-million-northeast-kingdom-employer.

53 *See* Dodge, *supra* note 35.

54 *See* Richard Behar, *THE MADOFF FIVE: History's Greatest Fraud Yields One of the Greatest Legal Slugfests of Our Time*, FORBES (Dec. 31, 2014, 11:48 PM), https://www.forbes.com/sites/richardbehar/2014/12/31/the-madoff-five-. . .-yields-one-of-the-greatest-legal-slugfests-of-our-time/#189cff7eaf2d.

55 *See* Donna Smith, *Lobbyist Abramoff gets 4 more years in prison*, REUTERS (Sept. 4, 2008, 3:19 PM), https://www.reuters.com/article/us-crime-abramoff/lobbyist-abramoff-gets-4-more-years-in-prison-idUSWBT00964020080904; *see also Former Lobbyist Jack Abramoff Sentenced to 48 months in prison on Charges Involving Corruption, Fraud, Conspiracy and Tax Evasio*n, DEP'T OF JUST. (Sept. 4, 2008), https://www.justice.gov/archive/opa/pr/2008/September/08-crm-779.html.

56 *See* Dennis Romero, *Manafort's light sentence slammed as 'disrespectful,' 'lenient,' 'an outrage,'* NBC NEWS (Mar. 7, 2019, 7:50 PM), https://www.nbcnews.com/politics/politics-news/manafort-s-light-sentence-criticized-disrespectful-lenient-outrage-n980821; *see also* Andrew Prokop, *All the crimes Paul Manafort was just convicted of*, VOX (Aug. 21, 2018, 5:32 PM), https://www.vox.com/2018/8/21/17692626/manafort-guilty-charges-verdict.

57 *See* Behar, *supra* note 54; *see also* U.S. DEP'T OF JUST., FORMER DIRECTOR OF OPERATIONS FOR BERNARD L. MADOFF INVESTMENT SECURITIES, DANIEL BONVENTRE, SENTENCED IN MANHATTAN FEDERAL COURT TO 10 YEARS IN PRISON FOR HIS ROLE IN THE MASSIVE FRAUD (2014).

scholarship on what has been dubbed the post-*Booker* "mess."[58] As one author even argued, "as the Guidelines have become harsher and crimes both more complex and involving larger loss amounts, judges regularly sentence economic criminals well below the minimum guideline in all but the smallest of loss cases."[59] Unfortunately, and as mentioned, much of the study detailing the so called post-*Booker* "mess," in the white-collar context, does not touch upon the race nor gender of these defendants, and what, if any, part that may play.[60]

However, there are certain cases that raise red flags, particularly with defendants like Tessicar Karelle Jumpp[61] or Jamila Davis.[62] This is especially so when these defendants are compared to those like Jennifer Dwyer,[63] or even a defendant as notorious and brazen as Jack Abramoff.[64] These particular defendants' seemingly harsher treatment also does not seem to be explainable by their underlying crimes or conduct. However, given the limited amount of study and attention paid to this topic thus far, to call these noted separate instances a pattern of disparate treatment, due to a defendant's race or gender, would at this point be premature. Instead, the clearest inference from all the cases mentioned in this Note is that the current methodology employed at the federal sentencing stage is not working.

The current methodology employed at the federal sentencing stage is not working because there is a noticeable lack of consistency in sentences, even within the white-collar defendant community. This lack of uniformity seems to cross both racial and gender lines. Due to this, it is plainly untenable to accept the notion that courts should strive to be "places of fairness and equality; we must give life to the notion that they are "the people's courts."[65] This is because it begs the question: how can courts really be the "people's courts" when there are noticeable disparities in criminal sentencing for

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58 *See generally* Joshua M. Divine, *Booker Disparity and Data-Driver Sentencing*, 69 HASTINGS L. J. 771 (2018); *see also* McConnell, *supra* note 41; *see generally* Bennett, Levinson & Hioki, *supra* note 32, at 944.

59 Bennett, Levinson & Hioki, *supra* note 32, at 944.

60 *See generally*. Divine, *supra* note 58; *see generally* McConnell, *supra* note 58; *see generally* Bennett, Levinson & Hioki, *supra* note 32, at 944.

61 *See Jamaican Woman Sentenced For Lottery Scam Targeting Elderly Victims*, *supra* note 49

62 *See* Pavlo, *supra* note 50.

63 *See Jennifer Dwyer Sentenced to 51 Months For Embezzling Over $2 Million From Northeast Kingdom Employer*, *supra* note 52.

64 *See generally* Smith, *supra* note 55; *see generally Former Lobbyist Jack Abramoff Sentenced to 48 months in prison on Charges Involving Corruption, Fraud, Conspiracy and Tax Evasio*n, DEP'T OF JUST. (Sept. 4, 2008), https://www.justice.gov/archive/opa/pr/2008/September/08-crm-779.html.

65 Judy Perry Martinez, *How lawyers and judges can help build public trust and confidence in our criminal justice system*, A.B.A. J. (Aug. 9, 2018), https://www.abajournal.com/news/article/how_lawyers_and_judges_can_help_rebuild_public_trust_and_confidence

different people? This is even so in the case of white-collar defendants, an area of crime that has been historically criticized as being too lenient on its offenders.[66]

PROPOSAL

The Need for Further Research and Study

White-collar crime has long posed various questions, and provoked certain debates, within the legal community. Many commentators and scholars have argued that white-collar criminals are treated too leniently, however the focus of these commentators' criticism are often white male defendants.[67] However, some have argued that white-collar criminals are actually treated too harshly. For example, one such article proposes that "there is no rational basis for subjecting white-collar offenders to long prison terms. This is especially the case in relation to stock market offenders."[68] However, when making such an argument, the subjects of these articles are often, if not always, male offenders, particularly white male offenders.[69] Given the historically disparate treatment of people of color in the criminal justice system, such a dearth of attention is concerning.[70]

Such a lack of attention is also peculiar, given the various studies and research that has been carried out towards examining other instances of disparate treatment at the federal sentencing stage. For example, there have been certain studies aimed at examining disparities with male defendants.[71] The study did not, however, focus on any specific criminal defendant, or subset of criminal activity, as the authors explained, "…neither the crime of conviction nor the presumptive sentence is an exogenous measure of criminal

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66 *See generally* Pierpoint, *supra* note 19; *see generally* L. Renee Chubb, *The 'OK' Criminal*, DEMWRITE PRESS (March 16, 2019), https://demwritepress.com/2019/03/16/the-ok-criminal-white-collar-crime-stats-that-will-surprise-you/; *see generally* Tracy Sohoni & Melissa Rorie, *The whiteness of white-collar crime in the United States: Examining the role of race in culture of elite white-collar offending*, THEORETICAL CRIMINOLOGY, 1, 1-20 (2019).

67 *See generally* Pierpoint, *supra* note 19; *see generally* Chubb, *supra* note 66; *see generally* Sohoni & Rorie, *supra* note 66.

68 Mirko Bagaric, Jean Du Plessis & Jaclyn Silver, *Halting the Senseless Civil War Against White-Collar Offenders: "The Conduct Undermined The Integrity Of The Markets" And Other Fallacies*, 2016 MICH. ST. L. REV. 1019, 1021 (2016).

69 *See generally id*.; *see also* United States v. Contorinis, 692 F.3d 136 (2d Cir. 2012) (defendant convicted of conspiracy to commit securities fraud and insider trading); United States v. Martoma, 48 F. Supp. 3d 555 (S.D.N.Y. 2014) (defendant convicted of securities fraud and conspiracy to commit securities fraud); United States v. Nacchio, 573 F.3d 1062 (10th Cir. 2009) (defendant convicted of insider trading).

70 *See generally* Hinton, Henderson & Reed, *supra* note 17.

71 *See generally* M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 MICH. J. POL. ECON. 1320 (2014).

conduct. Each is the product of highly discretionary and negotiated processes, including charging, plea bargaining, and sentencing fact-finding. These processes are carried out in expectation of their sentencing consequences and potentially involve racial disparities of their own."[72] The study instead constructed a linked multiagency data set that followed federal cases from arrest through to sentencing, with the authors arguing such a process would then not be distorted, by having allowed in discretionary charging, plea bargaining, and fact-finding practices.[73]

Importantly, and while by no means comprising a majority, women of color do in fact commit white-collar crimes.[74] As noted, they are a minority of the overall offenders, and there is seemingly lack of attention paid to those that do exist. However, all the more alarming are the certain inconsistencies in sentencing that can be seen in certain cases, specifically those like Jamila Davis[75] and Tessicar Karelle Jumpp.[76] These defendants' sentences, when compared to some of their white counterparts, both male and female–Jack Abramoff[77] and Leona Helmsley,[78] for example–may leave one feeling unsettled.

An explanation, including in regards to the *Jumpp* and *Davis* cases specifically, could concern the practice of plea deals.[79] Plea deals, including at the federal sentencing stage, are extremely commonplace, with Justice Anthony Kennedy once noting, "[c]riminal justice today is for the most part a system of pleas, not a system of trials."[80] A recent study from the Pew Research Center noted that, of the roughly 80,000 federal prosecutions

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72 *Id.* at 1321 (2014).

73 *See id.* at 1320 (2014) (Also, the authors did find that "[u]sing rich data linking federal cases from arrest through sentencing, initial case and defendant characteristics, including arrest offense and criminal history, can explain most of the large raw racial disparity in federal sentences, but significant gaps remain. Across the distribution, blacks receive sentences that are almost 10 percent longer than those of comparable whites arrested for the same crimes. Most of this disparity can be explained by the prosecutors' initial charging decisions, particularly the filing of charges carrying mandatory minimum sentences).

74 *See generally* Pavlo, *supra* note 50; *see generally* United States v. Davis, No. 05-482 (JLL), 201 U.S. Dist. LEXIS 122028 (D. N.J. Oct. 21, 2011); *see Jamaican Woman Sentenced For Lottery Scam Targeting Elderly Victims*, *supra* note 49; *see generally* Barry L. Paschal, *Chicago women sentenced to federal prison for stealing identities of Savannah residents*, *corporation*, U.S. DEP'T OF JUST. (Sept. 17, 2020), https://www.justice.gov/usao-sdga/pr/chicago-woman-sentenced-federal-prison-stealing-identities-savannah-residents; *see generally* Hong, Monroe & Patterson, *supra* note 73.

75 *See* Pavlo, *supra* note 50; *Davis*, No. 05-482.

76 *See Jamaican Woman Sentenced For Lottery Scam Targeting Elderly Victims*, *supra* note 49.

77 *See* Smith, *supra* note 55.

78 *See* Dodge, *supra* note 35, at 379-404 (2007) (It should be noted Helmsley was sentenced in the pre-*Booker* era, although that fact should not diminish the apparent leniency of her sentence for comparison purposes, especially since judges are granted more discretion now).

79 *Davis,* No. 05-482; *Jamaican Woman Sentenced For Lottery Scam Targeting Elderly Victims*, *supra* note 49.

80 Lafler v. Cooper, 566 U.S. 156, 157 (2012).

initiated in 2018, just two percent went to trial.[81] For many white-collar criminals, such a practice can actually be used advantageously. Since many white-collar crimes are expansive, and often involve various high-ranking co-conspirators, cooperating with authorities can prove to be a useful tool for those looking to minimize their sentencing exposure—by providing the government with incriminating information regarding other key players. Such a practice has repeatedly been upheld on appeal.[82] As explained in *United States v. Jones*, "a sentencing difference is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation…"[83]

Providing the Government with useful, valuable, and incriminating information, particularly about one's co-conspirators, is one tool used by those white-collar defendants at the top of the totem pole or corporate hierarchy, in order to gain a more lenient sentence for themselves. Such a practice could also possibly explain why some women of color, particularly those like Jumpp and Davis, were given lengthier sentences, at least compared to some of their white counterparts. People of color, and especially women of color, are vastly underrepresented in the corporate world.[84] It has been previously noted that even white women's roles in these white-collar criminal conspiracies are usually inferior to their male counterparts, as

> They typically hold inferior positions to men in the criminal conspiracies in which they are engaged, rarely lead a fraud ring, and make significantly less money for their dirty deeds than their male accomplices…Females in the conspiracy also occupied lower rungs of the corporate ladder—often in accounting or finance positions—and played similarly secondary roles in the conspiracy.[85]

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81 *See* Clark Neily, *Prisons are packed because prosecutors are coercing plea deals. And yes, it's totally legal*, NBC NEWS (Aug. 8, 2019, 7:33 PM), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201.

82 *See generally* United States v. Jones, 792 F.3d 831 (7th Cir. 2015); United States v. Solomon, 892 F.3d 273 (7th Cir. 2018); United States v. Kuhrt, No. 13-20115 (5th Cir. 2015); United States v. Orlando, 810 F.3d 1016 (7th Cir. 2016).

83 *See Jones,* No. 14-3103, quoting United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006).

84 *See* Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As big corporations say 'black lives matter,' their track records raise skepticism*," WASH. POST, (June 13, 2020, 6:21 PM), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/; *see* Chris Isidore & Matt Egan, *Wells Fargo CEO apologizes for saying the Black talent pool is limited*, CNN (Sept. 23, 2020, 11:28 AM), https://www.cnn.com/2020/09/23/business/wells-fargo-ceo-bias/index.html; *see Being Black in America: An Intersectional Exploration,* CTR. FOR TALENT INNOVATION, (2019), https://coqual.org/wp-content/uploads/2020/09/CoqualBeingBlackinCorporateAmerica090720-1.pdf.

85 Morin, *supra* note 35.

Given that black women and other women of color are even less represented than their white female counterparts, it would be fair to assume that they too fall lower on the corporate ladder, and respectively, on a lower level in any corporate crime. As another study noted, "[w]e take it as no accident, but a powerful statement regarding sex discrimination in employment, that women offenders surveyed are concentrated in both bank embezzlement and to a lesser extent in the lower level frauds."[86]

Thus, perhaps one reason Jump and Davis fared differently at their respective sentencing stages was due to the unfortunate fact that they were without heavy-hitting co-conspirators to provide information to the Government about.[87] For comparison, Abramoff, who spent approximately six years in prison for various counts of fraud, had his sentence vastly reduced due to prosecutors' recommendation for leniency, "due to Abramoff's cooperation in pursuing corruption cases against lawmakers and former Bush administration officials."[88] Although, in the case of *Jumpp*, one may argue her lengthy sentence concerned the fact that her fraudulent scheme preyed on the elderly, it should be noted that figures like Paul Manafort,[89] or even Abramoff,[90] who defrauded millions from Native American tribes, are hardly sympathetic defendants themselves.

However, and again looking more broadly, the incongruity noticed when examining all the cases mentioned in this Note, including *Jump*[91] and *Davis*,[92] can most accurately be explained as being a result of the discretion and practices of different federal judges in a post-*Booker* world.[93] Federal white-collar defendants, no matter their race or gender, are usually not the most sympathetic of criminal defendants. Their crimes are often expansive, irreparably damaging, and perhaps worst of all, inherently greedy. However, at a time where the public seems to have reached a pinnacle in regards to a

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86 Wheeler, Weisburd, Waring, & Bode, *supra* note 32, at 352–353.

87 *Jamaican Woman Sentenced For Lottery Scam Targeting Elderly Victims*, *supra* note 49. *see generally* Pavlo, *supra* note 61; *see generally Davis*, No. 05-482.

88 Smith, *supra* note 55.

89 *See* Manuel Roig-Franzia, *The Swamp Builders: How Stone and Manafort helped create the mess Donald Trump said he'd drain*, WASH. POST (Nov. 29, 2018), https://www.washingtonpost.com/graphics/2018/politics/paul-manafort-roger-stone/.

90 *See* Smith, *supra* note 55.

91 *See generally Jamaican Woman Sentenced For Lottery Scam Targeting Elderly Victims*, *supra* note 49.

92 *See generally Davis*, No. 05-482.

93 *See generally Booker*, 543 U.S. at 220; 18 U.S.C. § 3553 (1986); U.S. SENT'G COMM'N §§ 1-8 (2018); Demographic Differences in Sentencing: An Update to the 2012 Booker Report, U.S. SENT'G COMM'N. (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf; Bennett, Levinson & Hioki, *supra* note 32.

lack of trust in the criminal justice system,[94] any disparate sentencing treatment, including that of these white-collar defendants, remain an issue that must be adequately addressed.

The Need to Reform Judicial Practices at the Federal Sentencing Stage

Unfortunately, it does not seem at all realistic, or even helpful, to completely do away with the *Booker* decision as a solution to this lack of uniformity at the federal sentencing level. The Court in *Booker* went into great detail explaining the pitfalls of sentencing when the Guidelines are not advisory, but instead mandatory.[95] For one, mandated Guidelines would, in tried cases "effectively deprive the judge of the ability to use post-verdict acquired, real conduct information; it would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge; and it would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest." [96]

Plea-bargained cases, on the other hand, "would likely lead to sentences that gave greater weight not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime."[97] Lastly, prosecutors' role and power in sentencing would be unjustly heightened, with the Court explaining, "[u]ntil now, sentencing factors have come before the judge in the presentence report. But in a sentencing system with the Court's constitutional requirement engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely."[98] The *Booker* Court explained this would lead to prosecutors, and not judges, having the "power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment."[99]

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94 Doug Dennis, *40 percent of black Americans distrust the criminal justice system: Why I'm one of them*, VOX (Dec. 21, 2016, 8:00 AM), https://www.vox.com/first-person/2016/12/21/13854666/criminal-justice-police-distrust.

See generally Poll: Young Americans have "little confidence" in justice system, CBS NEWS (Apr. 30, 2015, 6:00 AM), https://www.cbsnews.com/news/poll-young-people-have-little-confidence-in-justice-system/ (also noting "Two-thirds of young blacks lack confidence in the ability of the judicial system to judge fairly; 43 percent of white young adults polled agreed with the statement that the judicial system did not fairly judge people."); *see also generally* Dennis, *supra* note 94.

95 *See generally Booker,* 543 U.S. at 256.

96 *Id.*

97 *Id.*

98 *Id.* at 256–257.

99 *Id.*

In light of this, one alternative viable method to ensure transparency, promote public trust, and ideally create uniformity at the federal sentencing stage—including for Black women and other women of color—could be to mandate federal judges to adopt a practice of outlining each of their individual sentencing decisions. In fact, one judge had done just this: Judge Jack B. Weinstein, formerly of the Eastern District of New York.[100] Judge Weinstein, after *Booker*, "began writing and publishing a statement of reasons (a written articulation of each sentence) for each sentence he imposed—uncommon among federal district judges—aiming for transparency in his decision-making and consistency in his sentencing considerations."[101] Judge Weinstein attempted to use such a methodology to ensure uniformity within his own imposed sentences, as "[h]e attempt[ed] to ensure that each person receives an individualized sentencing determination, and that comparable cases and sentencing factors are treated with some degree of consistency."[102]

Under the applicable statute, § 3553(c), any judge at sentencing would normally have to provide a written articulation of the sentence they imposed only if it is not "…of the kind, or is outside the range" of the Guidelines referred to in § 3553(a)(4) .[103] However, by explaining his sentencing decision in each and every case, Judge Weinstein created an ascertainable and coherent approach, one easy for both the defendant and members of the public to absorb and understand. Understanding why a federal judge sentenced in the way in which they did in every case, not just the outlier cases, could be one small step in creating more transparency for the public. This is especially so because the Guidelines suggest a sentencing range, rather than one exact number: given this fact, an explanation as to why a particular judge ended up at either the low-end or the high-end of such a range could aid in promoting understanding and clarity.[104]

A way in which this could be achieved would be to slightly tweak § 3553(c), and require judges to state in open court *and* provide a written statement of their reasons for the impositions of the sentence, no matter whether the sentence falls within or outside the applicable Guidelines

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100 *See* Caroline E. Geuntert & Ryan H. Gerber, *A Judge's Attempt at Sentencing Consistency After Booker: Judge Jack B. Weinstein's Guidelines for Sentencing*, 41 CARDOZO L. REV. 1 (2019).

101 *Id.* at 12–13.

102 *Id.* at 15.

103 18 U.S.C. § 3553(a)(4) & (c).

104 *See Federal Sentencing,* FED. DEFENDERS OF N.Y., https://federaldefendersny.org/information-for-client-and-families/federal-sentencing.html. The Guidelines are calculated utilizing both the offense level of the crime and the criminal history category calculated for that particular defendant.

range.[105] Federal judges would also, theoretically, be able to use such a requirement to see whether any unconscious or difficult-to-ascertain bias played a role in any of their sentencing decisions. For example, a judge would have an easy way of determining whether one particular type of defendant was prone to a different consideration of § 3553(a) factors in their courtroom.[106] Similarly, this hypothetical federal judge could realize, through this now-required articulation of reasons, that they tended to emphasize one of the considerable § 3553(a) factors at the expense of others.[107] Such a practice could even inspire judges to potentially adjust their sentencing practices as they feel is warranted. Most importantly, this could be an easy way to ensure that judges have overall uniformity in both their methods and considerations at sentencing, and for the public to be aware of at least what was ultimately driving each of a judge's sentencing decisions, not just the sentencing decisions that land somewhere outside the fray.

Judge Weinstein's sentencing methodology could further be helpful at the federal sentencing stage, especially nowadays, at a time in which society seems to have reached the peak of contempt towards many aspects of the criminal justice system. This is because Judge Weinstein "…relied on the testimony and expertise of social workers, medical experts, probation officers, and family members to understand what sentence might best serve each defendant and aid in rehabilitation and integration into lawful society."[108] Such a practice was and is not mandated: at sentencing, a federal judge must merely consider the applicable Guidelines range, as well as the Presentencing Report prepared by a probation officer assigned to the case.[109] However, Judge Weinstein went way beyond that, as he invoked alternatives to incarceration, such as pretrial or post-sentence treatment programs, and also looked to other countries' standards for alternative models of punishment and rehabilitation.[110] Furthermore, **"**[o]ut of the nearly 600 sentences he has imposed since 2006, approximately eighty percent have been below the Guidelines' recommendations…the Judge [was] a hero to

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105 *See generally* § 3553(a)(4) & (c).

106 *See generally* § 3553(a).

107 *See generally* § 3553(a).

108 Geuntert & Gerber, *supra* note 100, at 15.

109 *See Federal Sentencing, supra* note 135. In addition to the guidelines being merely advisory, a federal judge does not have to follow the recommendation of a probation officer; ultimately it is the judge, not the prosecutor nor the probation officer, who decides the sentence.

110 Geuntert & Gerber, *supra* note 100, at 15.

some, lawless to others."[111] This Note would regard Judge Weinstein as closer to the former.

One example of Judge Weinstein's methods can be seen in the 2019 case *United States v. Luthmann,* in which Judge Weinstein sentenced a former attorney for fraud and extortion: in explaining the imposed sentence, forty-eight months rather than the fifty-seven to seventy-one months suggested by the Guidelines, Judge Weinstein detailed the defendant's strong familial ties, noted mental health issues, and substance abuse issues as his reasoning for the departure from the Guidelines' recommendation.[112] Judge Weinstein even remarked on the mental health struggles most lawyers, including the defendant in the case, come to face due to the demanding aspects of their jobs.[113] Ultimately, Judge Weinstein clearly laid out what exact factors led him to his imposition of a punishment that was "sufficient, but not greater than necessary" under § 3553(a).[114]

Another example is *United States v. Butler*, where Judge Weinstein went so far as to convene an advisory panel of judges to meet with him and ultimately advise him on the appropriate sentence for a defendant, in light of the severity of the defendant's actions and the complexities of the case.[115] Judge Weinstein consulted with the panel and ultimately went on to explain that a steep departure from the Guideline's recommendation was warranted, due to this particular defendant's young child and loving wife, his need to support his family, his supportive extended family and colleagues, and the defendant's positive reaction to supervision since his arrest, which indicated a high likelihood of rehabilitation.[116] However, Judge Weinstein also wrote at length about the players in the case not on trial before him, all of whom aided and abetted this defendant's fraud, particularly "…the pernicious and pervasive culture of corruption in the financial services industry."[117] Judge Weinstein detailed why he decided a departure from the Guidelines was warranted clearly and concisely. Both these examples show that a judge need

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111 *Id.* at 26–33.

112 *See* United States v. Luthmann, No. 17-CR-664, at *3, *8–11 (E.D.N.Y. 2019).

113 *See Luthmann,* No. 17-CR-664, at *11.

114 *See Luthmann*, No. 17-CR-664, at *11–12.

115 *See* United States v. Butler, 264 F.R.D. 37, 38 (E.D.N.Y. 2010).

116 *See Butler*, 264 F.R.D. at 38.

117 *See Butler,* 264 F.R.D. at 37, 40. Judge Weinstein explained that "[t]he blame for this condition is shared not only by individual defendants like Butler, but also by the institutions that employ them, those who carelessly invest, and those who fail to regulate…The staggering sums involved in this case reflect more than the magnitude of the defendant's fraud. They also evince an industry beset by avarice that has been allowed to run rampant by regulators and negligent supervisors alike. Multiple failures have contributed to the present situation…"

not discuss their reasoning for the imposed sentence for pages and pages on end: a judge's statement of reasons can be somewhat short, even a mere five pages, yet still explain the most important points adequately.[118]

Overall, Judge Weinstein consistently strived to be transparent in his use of § 3553(a) factors, especially in the post-*Booker* landscape; he also employed a comprehensive system of considerations in imposing sentences for each individual defendant that came before him.[119] It should be recognized that this suggested reform would by no means be perfect, or a complete solution to the criminal justice system's noted inadequacies and instances of disparate treatment. For example, it is always possible that these federal judges will be able to craft lofty and exhaustive, yet also disingenuous opinions, as to why exactly they are sentencing one particular defendant in the way in which they are. This hypothetical judge could carefully articulate their sentencing decision in a way that may make it seem, to the average reader, that such decision was in fact not driven by any bias, and that the sentence imposed was justified. Given this potential dilemma, it would perhaps be helpful for the public and the media to play a part in a solution.

Federal judges are, of course, not susceptible to monitoring and accountability from the public in the way in which elected officials are: federal judges are appointed for life, and are thus not held accountable through the usual democratic processes.[120] However, there have been instances of strong backlash, and responding reformative proposals, to certain federal judges' actions in the past.[121] For one example, federal judges, including Supreme Court justices, have faced public and media criticism for the thousands of free trips they take annually, often to exotic locales and resorts.[122] Two instances of particular note include the attention directed towards the circumstances surrounding the late Antonin Scalia's stay at a luxury hunting resort owned by one John B. Poindexter;[123] another example

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118 *See generally Luthmann*, No. 17-CR-664; *Butler*, 264 F.R.D. at 37.

119 *See* Geuntert & Gerber, *supra* note 100, at 123.

120 *About Federal Judges*, OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited April 13, 2021).

121 *See generally* Patricia Barnes, *The Irony Of A Bill To Force Federal Judges To Obey Ethic Rules*, FORBES (Oct. 18, 2019), https://www.forbes.com/sites/patriciagbarnes/2019/10/18/the-irony-of-a-bill-to-force-federal-judges-to-obey-ethics-rules/?sh=2c29660365dc; Ann E. Marimow, *Judging the judges: Legal experts call for more accountability, openness on misconduct complaints*, WASH. POST (Oct. 30, 2018), https://www.washingtonpost.com/local/public-safety/judging-the-judg. . .mplaints/2018/10/30/8fecce5a-db99-11e8-b3f0-62607289efee_story.html; Linda Greenhouse, *Federal Judges Take Steps To Improve Accountability*, N.Y. TIMES (Sept. 20, 2006), https://www.nytimes.com/2006/09/20/washington/20judges.html.

122 *See* Barnes, *supra* note 121.

123 *See id.*

is the backlash Justice Clarence Thomas received when he attended fundraisers hosted by the Koch brothers.[124] Members of the public and those in the media were gravely concerned with these trips, especially given the fact that months prior to Scalia's stay, the Court had declined to hear a discrimination case filed against one of Poindexter's companies; likewise, many were concerned with Thomas' meetings because the Koch brothers are some of the Republican Party's largest and wealthiest donors.[125] It was instances like this, and the eyebrows they raised for members of the public, that ultimately lead Congress to propose the Judicial Travel Accountability Act.[126] Although such act has yet to pass, it does show that public backlash and concern can get the ball rolling towards judicial accountability and solutions.[127]

Yet another example would be the backlash the federal judiciary faced when it was revealed to the public that Alex Kozinski—once a prominent appeals court judge in California—had been accused of misconduct by fifteen different women throughout his career on the bench.[128] The fact that Kozinski had been insulated and allowed to act so egregiously towards so many women angered the public and even lead to a day-long, heavily-covered hearing in Washington, regarding the way workplace harassment claims are handled by the federal judiciary; additionally, Chief Justice John Roberts Jr. proposed a revamping of the federal judiciary disciplinary system altogether.[129] These instances show that when federal judge's proverbial feet are held to the fire, by members of the public and by those in the media, acknowledgement of transgression and even change can plausibly occur. Perhaps the same could happen in our situation: if a hypothetical judge, masking their true intentions in their sentencing decisions, was then, in turn, forced to face a similar sort of public reckoning. Such a reckoning would, of course, only occur if this particular judge's disparate or biased sentencing patterns were actually picked up upon by the public and the media; in this way, it would be great for individuals to focus on the sentences of various federal defendants, including those who are white-collar defendants. One should not just pay attention to defendants as notorious and high-profile as

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124 *See id.*

125 *See id.*; *see generally* Joseph Zeballow-Roig, *How the Koch brothers used their massive fortune to power a conservative crusade that shaped American politics*, BUS. INSIDER (Nov. 13, 2020), https://www.businessinsider.com/koch-brothers-fortune-power-conservative-crusade-american-politics-2019-8.

126 *See* H.R. 4715, 116th Cong. (2019).

127 *See generally* H.R. 4715., *supra* note 126

128 *See* Marimow, *supra* note 121.

129 *See id.*

say, Paul Manafort, whose case received endless amount of media and public attention.[130] It would be beneficial for individuals, especially individuals with a platform and a far-reaching voice, to focus on the smaller-scale, lesser known cases, where they would hopefully obtain a clearer picture of this hypothetical judge's unequal and partial sentencing patterns, an in turn be able to better call attention to it.

Regardless of the ways in which the federal sentencing practices of certain judges can or would come to light, the fact remains that Judge Weinstein's methods are a somewhat simple, straightforward, and arguably easy way that federal judges from all over this country could, either directly or inadvertently, work to help restore a lost public faith. At the very least, such a practice could perhaps lead to a better understanding of why exactly federal judges sentence in the ways in which they do, a better understanding perhaps even to the judge's themselves. Honest, thorough, and detailed candor from even some federal judges regarding their considerations in imposing a sentence—preferably in writing, where one would have more opportunity to thoroughly lay out their ideas— may not be agreed upon by all who read it, but perhaps will aid with an overall acceptance of the process. This is likely so in white-collar cases: cases long associated with criticisms of overly lenient treatment by federal courts, yet also cases where there appears such a lack of consistent sentencing patterns.

Manafort's sentence was blasted as lenient, disrespectful, an outrage;[131] Lori Loughlin's was deemed a joke on social media.[132] Perhaps, if judges were to give access to the more detailed, inner-workings of their minds, and their corresponding decisions, on a consistent and mandated basis, this repeated outrage—outrage at sentences deemed a "slap on the wrist," sentences often imposed on white, wealthy white-collar offenders—would not be quite as commonplace. The hope would also be that, in an ideal world, these federal judges would have a clear, coherent method, capable of being followed by both themselves, and ultimately, by one another. That way, one defendant will not be sentenced more leniently due to one particular judge's own personal views concerning an "excessive" Guidelines range, while

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130 *See generally* Romero, *supra* note 56; Prokop, *supra* note 56; Katelyn Polantz, *Why Judge T.S. Ellis gave Paul Manafort only 47 months in prison*, CNN (Mar. 11, 2019, 12:46 PM), https://www.cnn.com/2019/03/09/politics/judge-ts-ellis-paul-manafort-sentence/index.html.

131 *See* Romero, *supra* note 56.

132 *See* Jessica Napoli, Twitter reacts to Lori-Loughlin's 2-month prison sentence: *'I've studied for the SAT longer'*, FOX NEWS (Aug. 21, 2020), https://www.foxnews.com/entertainment/twitter-reactions-lori-loughlin-prison-sentence/.

another defendant, in a separate district, is not given the same consideration.[133] At the very least, such blatant inconsistency, including in white-collar cases, will never go as easily unnoticed or uncritiqued by those who routinely read such decisions. This would be especially so, if, as mentioned, the media, journalists, and members of the public paid more attention to a wider variety of federal white-collar defendants, not just those defendants as high profile and notorious as Paul Manafort and Lori Loughlin.

Sentencing will never be a perfect science. There will likely never be a feasible way to perfectly ensure universal uniformity throughout this country, especially in a way in which everyone agrees on. This Note does not seek to diminish the true hardships and challenges that federal judges face, both professionally and personally, at the sentencing stage of their cases. However, given the point that we as a society have seemingly reached as of late, regarding both distrust and even condemnation of our criminal justice system, a push towards a more mandated form of judicial transparency could perhaps be one small step in the right direction.[134]

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133 *See* Polantz, *supra* note 56 ("Ellis said in court several times that he believed the advisory sentence for Manafort was overkill, with a recommended punishment of decades being far too harsh." Clearly the guidelines were way out of whack on this, as the history of the sentences in this area show," the judge said near the end of Thursday's hearing. "It's a fundamental principle of justice that like cases should be treated alike, and if they're treated differently, there ought to be a good reason for it." Generally, he added, he believed the sentencing recommendations for fraud on tax and foreign banking disclosures are too high… The guidelines can help judges standardize the sentences they give. But, as Ellis pointed out, they're merely suggestions."); see also Henning, supra note 27 (Explaining the case of Matthew Sample, a defendant who, after pleading guilty to wire fraud, which defrauded investors out of over $1 million dollars, was sentenced to probation, even though five years was recommended. On appeal, the Tenth Circuit reversed and remanded for re-sentencing, noting "[W]e are puzzled by the court's implicit suggestion that if the defendant were poor and unemployed, he might get a prison term."; United States v. Sample, 901 F.3d 1196 (10th Cir. 2018), cert denied, 139 S.Ct. 1545 (2019); compare with McConnell, supra note 41 at 675-676 ("Upward departures and variances are much rarer, but as Figure 10 shows they too exhibit a striking difference among the circuits. The district courts in the Tenth Circuit, which were below the national average in departures under the pre-Booker system, showed little inclination to change. This suggests that the district courts in the Tenth Circuit tend to adhere to the Guidelines whether they have to or not, and whether the defendant or the prosecution would benefit. The district courts in the First Circuit, by contrast, which showed the greatest percentage increase in propensity to sentence below the Guidelines range, also showed by far the greatest percentage increase in propensity to sentence above the Guidelines range. This suggests that, after Booker, the district courts in the First tend to flex their discretion to vary from the Guidelines more than the national average both in favor of defendants and in favor of the prosecution…The Second Circuit, which exhibited higher-than-average levels of downward departures before Booker and the nation's highest levels of downward departures and variances after Booker, has been well below the national norm in upward departures and variances, both before and after the decision…The Fifth and Eleventh Circuits, by contrast, are below the national norm for post-Booker downward departures and variances, but are second and third highest in post-Booker upward departures and variances… One clear effect of Booker, then, is to produce a greater degree of regional non-uniformity in sentencing practices.").

134 *See generally* Romero, *supra* note 56; *Building Public Trust in the American Justice System*, AM. B. ASS'N (June 24, 2020), https://www.americanbar.org/groups/leadership/office_of_the_president/publictrust/ (explaining "[t]he ABA created the task force in July 2016 in the face of increasing racial tensions, retaliatory violence against police officers, and a growing sense of public distrust in our nation's justice system"); CBS NEWS, *supra* note 94; Martinez, *supra* note 65; Peter

CONCLUSION

Judges entrusted with instituting sentences, including federal judges at the federal sentencing stage, are certainly tasked with no easy feat. The sentences they hand down to individuals will have a ripple effect, impacting not only the defendant's life, but the lives of everyone connected to that individual. They are, in many ways, really holding someone's life in their hands. In this way, judges, including federal judges, are instilled a tremendous amount of power. But with this power comes great responsibility. Such a responsibility that is especially important in our present time. The United States is currently at a peak, in regards to distrust in societal institutions, especially the criminal justice system. Such distrust is only strengthened when there is a lack of transparency and understanding as to why certain federal judges impose the particular sentences that they do.

While now is the time of deep anger and frustration by many, such sentiments also present an opportunity for improvement. One way in which to do this would be to dedicate new and additional resources to examining the plight of black women in the criminal justice system, especially so at the federal sentencing stage, where such in-depth research is lacking. This is especially important in the white-collar defendant community, where these particular offenders seem to comprise some of the smallest numbers, and also some of the least amount of scholarship and attention. In a criminal justice system that has long subjected minorities to harsher treatment, such a lack of understanding and attention in this particular area is troubling, to say the least.

Another way in which improvement can be advanced would be to instill some sort of reform at the federal sentencing stage as a whole. There have been ample amounts of time and research dedicated to examining the lack of uniformity at this stage, particularly in a post-*Booker* world. Given the pitfalls and risks discussed in this article, particularly involving what would come if the *Booker* decision was thrown out altogether, one straightforward way to strive towards uniformity would be adopt a practice similar to that of the newly retired Judge Weinstein of the Eastern District of New York.

The methods employed by Judge Weinstein, in his in-depth detailing of how exactly he arrived at a sentencing decision in each of his criminal cases, could provide the judiciary with a useful tool for promoting and encouraging

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Moore, *Millennials lack trust in American justice*, YOUGOV (Feb. 9, 2016, 10:30 AM), https://today.yougov.com/topics/politics/articles-reports/2016/02/09/millennials-lack-trust-american-justice.

public trust through transparency. Such a practice would also, hopefully, encourage greater uniformity not only for each specific federal judge, but the federal judiciary more generally: the hope would be that judges of different districts and circuits would have a clear, coherent and somewhat straightforward way to work towards a better system of consistency, particularly so at the sentencing stage. Additionally, members of the public would be able to more quickly pick up on sentencing disparities by particular federal judges, and hold them accountable by at least speaking out about such observations.

This would be no complete, quick or easy fix, nor is there any guarantee that such widespread practice would successfully accomplish these aims. But perhaps it would be a start, and one step in the right direction. One step in this direction would be one step away from the unfortunate but noticeable low that society seems to have reached, in regards to its faith in the criminal justice system, and the actors within such a system. There seems to be little to lose by something like this, yet something very important to gain: that something being some restored sense of confidence.