White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?

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White Collar Crime Sentences After *Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?

Peter J. Henning*

I. INTRODUCTION

On July 14, 2005, United States District Judge Barbara Jones sentenced former WorldCom CEO Bernard (“Bernie”) Ebbers to a twenty-five year prison term as a result of his conviction on charges of conspiracy, securities fraud, and making false statements in submissions to the Securities & Exchange Commission. The punishment came after a high-profile trial in which Ebbers asserted his innocence based on a lack of knowledge of the accounting fraud at the company, a position he maintained at sentencing when he expressed sorrow for the losses suffered by investors—including himself—but did not convey any contrition for his role in the crime. The sentence was one of the most severe given to a first-time offender for a crime that did not involve violence or trafficking in illegal narcotics. In affirming the sentence, the Second Circuit stated that it was “harsh but not unreasonable.”

The Ebbers sentence came at a time of significant upheaval in the world of sentencing law. The Supreme Court reordered federal sentencing just a few months before the district court sentenced Ebbers, and the prison term largely follows the Federal Sentencing Guidelines even though, after *United States v. Booker*, they are no longer mandatory, but only advisory for federal judges. While the sentence was likely close to the one Ebbers would have received under a mandatory regime, his case provides a vehicle to consider where sentencing may go in the future for white collar crime cases by asking whether the twenty-five year term handed down by Judge Jones, which will require the 63-year old Ebbers to spend most, if not all, of the rest of his life in prison, was too harsh?

The changes wrought by *Booker* make for a daunting task in trying to predict the future when it is not entirely clear where sentencing stands at the moment. One part of *Booker* largely brings to fruition the Sixth Amendment analysis initiated in *Apprendi v. New Jersey* and applied to sentencing guideline regimes in *Blakely v. Washington*, by declaring that the mandatory Federal Sentencing Guidelines violated the jury trial right. The second, so-called remedial part of...
the opinion accepts the Sentencing Guidelines as strongly advisory for the district courts in imposing sentences by holding that only two provisions of the Sentencing Reform Act are unconstitutional. How often do we see the Court find a procedure unconstitutional and, in the same judicial breath (albeit drawn by a different majority), direct the lower federal courts to follow administrative regulations adopted to implement that procedure?

It is with more than a little trepidation that I offer some thoughts on where sentencing in white collar crimes might go after Blakely and Booker because the world of sentencing has been struck by an “earthquake,” and it may be foolish to predict how the system will be rebuilt. As Professor Berman put it so well, “[the] Booker decision, remarkable for many reasons, found a way to make a conceptually muddled constitutional jurisprudence concerning sentencing procedures even more opaque.” In Part I of this essay, I review the sentencing of Ebbers in the context of the Sentencing Guidelines, and consider whether such a sentence is an aberration after Booker. My conclusion is that the Ebbers sentence, which came in below what the Sentencing Guidelines would have permitted, even in their advisory mode, is difficult to assail as “too harsh” without a principle that would grade such offenses outside the Sentencing Guidelines. In Part II, I review issues related to determining loss, a primary driver of white collar crime sentences, and argue that juries should be empowered to decide the amount of loss in fraud cases. Part III recommends that Congress amend the primary federal fraud provisions in Title 18, Chapter 63, by making loss (or gain) an element of the offense to ensure the jury’s role in sentencing, advanced in Apprendi, that allows it to make the crucial factual determination that will affect the defendant’s sentence in a white collar crime prosecution. Part IV addresses the broader issue of whether, under an advisory Sentencing Guidelines system, the problem of disparity will creep back into sentencing, and if so, what are the possible responses. In this new era of advisory Sentencing Guidelines, it may be worthwhile to consider whether mandatory minimum sentences might be useful in fraud cases to incorporate the Sixth Amendment analysis adopted in Apprendi that led to the “earthquake” in the first place.

II. THE SENTENCING OF BERNIE EBBERS

In July 2002, WorldCom, then the second-largest long distance telephone

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company in the United States, disclosed that it had overstated its earnings by approximately $3.8 billion over the previous two years. WorldCom’s stock lost 90% of its value, dropping from $.83 to $.06 within days of the disclosure, and its subsequent Chapter 11 filing made it the largest company to enter bankruptcy in history. The accounting fraud at WorldCom was as simple as it was audacious: in the face of earnings shortfalls, chief financial officer Scott Sullivan had simply reclassified certain operating expenses, called “line costs,” as capital expenditures.\(^\text{10}\) The effect of this accounting legerdemain was that the costs would not be deducted immediately from earnings but instead amortized over a number of years, thereby inflating (in the short term) WorldCom’s earnings.\(^\text{11}\) Sullivan and Ebbers were indicted for the fraudulent accounting, and Sullivan entered into a plea agreement that turned him into the star witness of the government’s case against Ebbers. The jury convicted Ebbers of one count of conspiracy to commit securities fraud, one count of securities fraud, and seven counts of false filings with the SEC related to WorldCom’s quarterly and annual financial statements.\(^\text{12}\)

As part of the sentencing process, the court probation officer prepared a presentence report (“PSR”) on Ebbers that included an analysis of the applicable provisions of the Sentencing Guidelines.\(^\text{13}\) Although the Ebbers PSR was not


Beginning in 2001, rather than continuing to treat line costs as an expense that reduced its ever-dwindling income, WorldCom began to capitalize those costs because the cost of capitalized items can be spread out over many years, thus reducing the immediate impact of the expense on income. One commentator has likened this direct violation of GAAP to the manager of an ice cream parlor pretending that operating expenses for things such as cream, sugar and chocolate syrup really “are part of the purchase price of a new refrigerator.” Because capitalization made its line costs much lower, WorldCom’s income increased by almost $4 billion in the next two years, insuring that the company would meet analysts’ profit expectations and continue to experience surging share prices. This artificial income, along with another $2 billion or so in false revenue entries and various improper accounting adjustments, helped prop up WorldCom through July 2002, when the teetering edifice finally and spectacularly collapsed in bankruptcy. *Id.* (internal citations omitted).


\(^{13}\) Federal Rule of Criminal Procedure 32(d)(1) provides:

The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant’s offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and
made public, the government’s brief, submitted to the district court in response to defense objections that addressed various sentencing issues, summarized the Sentencing Guidelines calculations prepared by the probation office. The applicable Sentencing Guidelines provision for the offenses of conviction was section 2B1.1, which covers most of the economic crimes in the federal criminal code. The base offense level is 6. The next step is the key for fraud offenses: the calculation of the loss from the defendant’s conduct. The loss table provides a sliding scale of offense levels depending on the amount of the harm to the victim, and the applicable provision provides a range from a 2-level increase for a loss greater than $5,000 but less than $10,000 to a 26-level increase if the loss was more than $100 million. The PSR determined that the loss caused by Ebbers was at least $2.223 billion, based on the decline in the value of WorldCom stock suffered by its shareholders. The PSR also found additional increases in the offense level based on there being more than fifty victims (4 levels), deriving more than $1 million from the crime (2 levels), as a leader of the offense (4 levels), and for abusing a position of trust (2 levels). Without these additional increases in the offense level, Ebbers would have faced a sentence range of 121 to 151 months; with the additions, the punishment called for by the Sentencing Table was life imprisonment.

Ebbers disputed the conclusions of the PSR, most importantly arguing that the loss caused by the offenses was zero. If the court had found the loss was zero, then even with the other enhancements—which Ebbers also disputed—the sentence would have been 27 to 33 months. How can two sides reach such divergent conclusions as to the amount of loss, even given the ability of lawyers to argue any point to the limits of the laugh test? The determination of what constitutes the “loss” is open to significant dispute. The Sentencing Guidelines

(E) identify any basis for departing from the applicable sentencing range.

FED. R. CRIM. P. 32(d)(1).

14. Cf. U.S. Dept. of Justice v. Julian, 486 U.S. 1, 12 (1988) (“[I]n both civil and criminal cases the courts have been very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals. As the Government points out, one reason for this is the fear that disclosure of the reports will have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report.”) (citations omitted).

15. Government’s Memorandum of Law in Opposition to Defendant’s Sentencing Motions, United States v. Ebbers, S4 02 Cr. 1144 (BSJ) (June 24, 2005) [hereinafter Government’s Memorandum] (copy on file with the McGeorge Law Review).


17. The fraud loss table in effect in 2001 applied to calculating Ebbers’s offense level because that was more favorable than the amended loss table that went into effect in 2003, which would have permitted a 30-level increase for losses in excess of $400 million.


20. Id. § 3B1.1(a).

21. Id. § 3B1.3.

22. Id. § 5A.

provide the following definition: “[L]oss is the greater of actual loss or intended loss.” Perhaps recognizing the utter circularity of that definition, the Sentencing Guidelines go on to provide a bit more guidance:

**Actual Loss.** “Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

**Intended Loss.** “Intended loss” (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

**Pecuniary Harm.** “Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

**Reasonably Foreseeable Pecuniary Harm.** For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.\(^{24}\)

If those broad standards are still not enough to determine the loss, the Sentencing Guidelines then provide a further backstop by permitting the defendant’s gain as the basis for determining the applicable offense level.\(^{25}\) Throughout all of this, the sentencing judge need only make a “reasonable estimate of the loss.”\(^{26}\) Within these broad parameters, wildly divergent estimates of loss apparently can be reached that pass the laugh test, including a disparity of over $2 billion.\(^{27}\)

After asserting its position in favor of applying the Sentencing Guidelines calculations in the PSR, the government then acknowledged the effect of *Booker* on the process and argued that the court should avoid a sentencing disparity by imposing a substantial, but unspecified, term of imprisonment. By making the Sentencing Guidelines advisory, *Booker* put the government in the ticklish

\(^{24}\) U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.3(A).

\(^{25}\) Id. § 2B1.1, cmt. n.3(B) (“The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.”).

\(^{26}\) Id. § 2B1.1, cmt. n.3(C).

\(^{27}\) I wonder whether Ebbers’ defense counsel might have caused more harm by arguing for a loss calculation of zero. Shareholders certainly lost money, and an accounting fraud is not perpetrated just for the sake of playing around with a company’s books. Staking out such an extreme position on loss may have put Ebbers in the position of essentially conceding a significant amount of loss once the judge determined that there had been harm from the offenses. Would Ebbers have been better served by arguing for a loss amount in the $1-$2.5 million range, which would have resulted in a significantly lower offense level than the billion dollar loss triggered? Given the flexibility in the loss provisions, I doubt it would have been that difficult to reach such a position without undermining Ebbers’ essential contention that he was not guilty of the crime.
position of advocating the application of the Sentencing Guidelines to Ebbers and then making a separate recommendation based on factors that are not necessarily within the current structure. Reflecting the rationale for adoption of the Sentencing Guidelines, the U.S. Attorney’s Office argued that the district court should look to sentences in similar fraud cases for guidance to avoid disparate treatment of similar offenders. The government identified three defendants in fraud cases whose sentences could be used to establish the parameters for an appropriate sentence for a senior corporate officer engaged in financial misconduct:

- John Rigas, the 80-year old former CEO of Adelphia Communications sentenced to a 15-year term of imprisonment;28
- Patrick Bennett, CFO of Bennett Funding Group sentenced to a 22-year term of imprisonment, which involved an upward departure by the district court;29
- Steven Hoffenberg, CEO of Towers Financial Corporation sentenced to a 20-year term of imprisonment.30

The prosecutors argued that “the sentences imposed on Ebbers should therefore be proportionate to the sentences imposed in those cases.”31

In sentencing Ebbers, Judge Jones found that the Sentencing Guidelines called for a sentence of 360 months to life, based on a loss figure of greater than $100 million. She then granted a downward departure in imposing a sentence of 25 years (300 months), which will require Ebbers to serve at least 85% of the term in a federal prison, or more than 21 years. Among the grounds Ebbers advanced for a downward departure were his medical condition and a history of charity and community service.32 Even with the downward departure, Ebbers received one of the longest sentences ever imposed on a defendant in a white collar crime case in which there was no allegation of physical harm to a victim and the defendant was not a recidivist.

Was the sentence Ebbers received too “harsh” or, after Booker, unreasonable? Defense attorneys Robert Morvillo and Robert Anello noted that Booker had not caused judges to impose lower sentences: “The substantial sentences recently handed down in the case of Bernard Ebbers, the former CEO of WorldCom, and to the Rigas father and son team from Adelphia Communications dashed the hopes of many white-collar defense practitioners who may have believed that United States v. Booker signaled the end of harsh

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32. Id. at 48-61. The government opposed all of the asserted grounds for a downward departure. Id.
sentences for business crime.” 33 Another newspaper story talked about the fact that “[t]he unusually harsh prison term is part of a string of penalties against corporate executives who defrauded investors in recent years.” 34 As Professor Frank Bowman noted more generally, “[a]t or near the root of virtually every serious criticism of the guidelines is the concern that they are too harsh, that federal law requires imposition of prison sentences too often and for terms that are too long.” 35

While twenty-five years is a substantial prison sentence, it is not clear what leads to the conclusion that the sentence was “harsh,” much less “too harsh,” when there is no benchmark for determining what is an appropriate sentence in a white collar crime case. As the Supreme Court noted in Blakely v. Washington, “[w]ith too far as the yardstick, it is always possible to disagree with such judgments and never to refute them.” 36 The primary driver of the sentence imposed on Ebbers was the district court’s loss calculation, which was based on a determination of the harm suffered by investors from the revelation of the fraud at WorldCom. The loss calculation is a notoriously slippery determination, particularly for companies whose stock is publicly traded so that market perceptions can aggravate the effects of any accounting misconduct.

Did the district court err in ascribing the collapse of WorldCom to Ebbers, thereby holding him responsible for losses beyond what the accounting fraud would otherwise reflect? In United States v. Olis, 37 the Fifth Circuit dealt with this very issue in reviewing the sentence of Jamie Olis, a former mid-level executive at Dynegy Corporation who received a sentence of 292 months imprisonment (over twenty-four years). Like Ebbers, Olis was convicted of securities fraud, mail and wire fraud, and conspiracy for his work on a transaction called “Project Alpha” that caused the company to improperly record the transaction on its books. 38 Similar to Ebbers, the loss calculation for Olis

33. Robert G. Morvillo & Robert J. Anello, Post-‘Booker’ Sentencing: Not What We Might Have Expected, N.Y.L.J., Aug. 2, 2005, at 3 (emphasis added); see also Ebbers Sentencing Sends Strong Message, 13 MISS. LINK 29 (2005) (“We do not support wrong doings of any kind; however, we think the sentence given to Ebbers was harsh especially considering that he has already settled the civil portion of his case and is in failing health. Ebbers should be punished due to the devastating effects his cover-up had on the lives of many Mississipians, but 25 years is excessive.”) (emphasis added).
37. 429 F.3d 540 (5th Cir. 2005).
38. The Fifth Circuit gave a much-simplified overview of the transaction and improper accounting: The conviction arises from Olis’s position as Senior Director of Tax Planning and International
involved a twenty-six-level enhancement under the loss table in the Sentencing Guidelines because the loss was calculated at $105 million, based on the decline in the value of Dynegy stock held by the University of California Retirement System (UCRS). The court reached that loss figure by looking at the value of UCRS’ Dynegy shares before and after the company restated its financial reports to properly reflect the Project Alpha transaction.

The Fifth Circuit rejected the simplistic approach of the district court by noting that in determining civil damages from securities fraud, courts look at the reasons why shares decline that are traceable to the defendant’s conduct and reasons based more on external market factors. The court stated, “[w]here the

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Id. at 541-42 (internal citations omitted).

39. In Dura Pharmaceuticals v. Broudo, 544 U.S. 336 (2005), the Supreme Court called for a more nuanced analysis of loss in a civil securities fraud action than simply finding an allegedly inflated purchase price as proof that those who sold for a lower price suffered a loss. The Court stated:

[A]s a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that at that instant possesses equivalent value. Moreover, the logical link between the inflated share purchase price and any later economic loss is not invariably strong. Shares are normally purchased with an eye toward a later sale. But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss. If the purchaser sells later after the truth makes its way into the market place, an initially inflated purchase price might mean a later loss. But that is far from inevitably so. When the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. (The same is true in respect to a claim that a share’s higher price is lower than it would otherwise have been—a claim we do not consider here.) Other things being equal, the longer the time between purchase and sale, the more likely that this is so, i.e., the more likely that other factors caused the loss.
The value of a security declines for other reasons, however, such decline, or a component of the decline, is not a ‘loss’ attributable to the misrepresentation.”

The Fifth Circuit found that in a “cook the books” fraud such as Olis’, the “[s]entencing decisions in these cases acknowledge that because a company’s stock price is affected before and after the fraud, by numerous extrinsic market influences as well as the soundness of other business decisions by the company the calculation of loss attributable to securities fraud requires careful analysis.”

Yet, the court distinguished such accounting fraud cases involving companies that continue in business “from the exceptional Enron or WorldCom situation” in which the fraud causes the company to become worthless.

By not taking into account possible extrinsic factors that may have also caused the decline in Dynegy’s stock price, the court remanded the case to the district court for resentencing in which the judge would have to make a more nuanced determination of the amount of the loss caused by Project Alpha.

While the sentence Olis initially received reflected an imprecise calculation of loss, the same cannot be said of Ebbers’ role in the ultimate demise of WorldCom. As the Fifth Circuit noted, when a company collapses due to an accounting fraud, then the loss of the entire investment can be an appropriate measure under the Sentencing Guidelines. WorldCom’s underlying business

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Id. at 1631-32.

40. Olis, 429 F.3d at 546.

41. Id. at 547.

42. Id.

43. Olis was sentenced to a six-year prison term after the remand. The district court determined that it could not ascertain the actual loss to Dynegy caused by Project Alpha, but it did find that the intended loss was $79 million that the program would have cost the United States Treasury in lost taxes. See United States v. Olis, No. Crim. H-03-217-01, slip op. at 24 (S.D. Tex. Sept. 22, 2006). While the Sentencing Guidelines call for a sentence of twelve to fifteen years, based largely on the intended gain calculation, the district court imposed a lower sentence because Olis did not hold a senior executive position at the company and did not profit significantly from the implementation of Project Alpha. The court contrasted his position with that of a person like Ebbers:

Although Olis was intimately involved in the conspiracy and in planning Project Alpha, he did not have the ultimate authority at Dynegy to approve Project Alpha, nor was he responsible for drafting the documents by which the conspiracy was carried out and concealed. Moreover, unlike some other recently publicized corporate fraud cases, the purpose of this conspiracy was not to defraud Dynegy or to enrich Olis. Nor did the conspiracy cause Dynegy to file for bankruptcy. Although Dynegy suffered a loss in its market capitalization after the true facts of Project Alpha became public and paid large amounts to settle the resulting civil cases, the company remains a viable entity. The initial success of Project Alpha brought Olis a promotion and stock options, but it did not result in substantial pecuniary benefits to him. Although these facts do not detract from the seriousness of the crime for which Olis was convicted, they mitigate against the type of harsh sentence that may be deserved in cases where the defendant’s conduct enriched him at the company’s detriment or brought about the downfall of the company.

Id. at 29-30 (emphasis added). Unlike Olis, the twenty-five year sentence imposed on Ebbers is more easily supported after Booker by his position at WorldCom and the harm caused to the company, its employees, and shareholders.
certainly retained some value, witnessed by the fact that it emerged from bankruptcy and announced a deal to be acquired by Verizon Communications Inc. for $6.75 billion in February 2005. But the reaction to the fraud demonstrated that it was no longer a company that could be valued properly by the market. The Second Circuit noted that “revelation of an extended period of fraudulent financial statements may cause losses beyond that resulting from the restatement of financial circumstances because confidence in management and in even the truth portions of a financial statement will be lost.” The loss suffered by investors, measured by the decline in the stock market price, is a reasonable proxy for the effects of the accounting fraud on a company’s owners—its shareholders—who are wiped out in a bankruptcy. While Ebbers also owned a substantial block of WorldCom shares, and not doubt did not intend for the company to collapse and render his investment worthless, harm is not necessarily correlated with intent. A fraud orchestrated by a CEO to cook the company’s books will usually lead to the collapse of the enterprise because fraud at such a high level means the market can no longer trust the company as an investment vehicle.

Even if Ebbers was the instigator of the fraud, he was 63-years old when he received the sentence, so there is a substantial possibility that he could die in prison. He committed the crimes, however, at an older age, and it is unlikely that a person will be in a comparable position to commit a similar crime at a significantly younger age. The 15-year sentence of Adelphia’s John Rigas is even more likely to result in him spending virtually the rest of his life in prison if he

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44. U.S. v. Ebbers, 458 F.3d 110, 127 (2d Cir. 2006).
45. The Second Circuit criticized as “flawed” the method of calculating loss offered by the Probation Office that simply looked at the difference between the stock price the day the fraudulent conduct came to light and the price when the company announced the improper accounting and said it would restate its financial statements. Id. at 128. Even with that problem, “the loss amount is still well above $1 billion, or ten times greater than the $100 million dollar threshold for the 26-level enhancement.”
46. The Second Circuit recognized that the fraud at WorldCom “was not puffery or cheerleading or even a misguided effort to protect the company, its employees, and its shareholders from the capital-impairing effects of what was believed to be a temporary downturn in business.” Id. at 129-30. The collapse of futures-trading firm Refco Inc., which entered bankruptcy only one week after the company revealed that its CEO and largest shareholder had not properly disclosed his role in loan transactions with the company, shows how the market reacts to an accounting fraud by withdrawing from all further transactions with the corporation. See Jenny Anderson, Refco Sells Futures Unit and Seeks Bankruptcy Protection, N.Y. TIMES, Oct. 18, 2005, at C3 ("On Oct. 10, Refco announced that its chief executive, Phillip R. Bennett, was put on indefinite leave. It said Mr. Bennett had hidden a $430 million debt owed to Refco by a company that he controlled . . . Shares of Refco plunged more than 70 percent after the announcement and in the days following. On Thursday, the New York Stock Exchange halted trading in the stock, while the company’s bonds continued to plummet. By the end of the week, Refco had shut its unregulated capital markets business and its regulated broker-dealer operation"). One would be mistaken to view a fraud that effectively puts a company out of business as somehow separate from a fraud that triggers such a negative reaction in the market that the company cannot survive the negative publicity due to the withdrawal of funds by lenders or the loss of customers, even if one accepts that the market (or customers) overreacted and the response to the news was irrational.
47. The district court granted Ebbers’ request to remain on bail pending the appeal of his conviction and sentence. See Ebbers’s Lawyers File Brief in Appeal, N.Y. TIMES, Sept. 30, 2005, at C2.
serves a substantial portion of the term, yet his illegal conduct occurred when he was well into his seventies. CEOs do not give up power easily, and the decision to remain as an officer of a corporation means that the official could engage in serious wrongdoing even at an advanced age. Should the decision to manipulate a company’s books trigger a lighter sentence because the CEO was older? The average age of a CEO of a publicly-traded company is 56 years old, so any substantial misconduct that puts the company at risk or causes significant investor losses can trigger a “death sentence” under the Sentencing Guidelines. Moreover, except when a defendant is elderly and infirm, which is not the case with Ebbers, then the Sentencing Guidelines do not permit a departure based on age. The fact that an older person is in a position to commit a crime is not a principled basis to judge the severity of the sentence when the misconduct results in a criminal conviction.

III. DETERMINING LOSS

The district court’s determination that the loss caused by Ebbers’ crimes was over $2 billion dollars was the single most important factor in the application of the Sentencing Guidelines. While various modifications can have a small effect on the offense level for a defendant in a white collar crime case, the determination of loss can raise a sentence quickly from modest to substantial. Fraud offenses are one of the largest categories of cases prosecuted by the federal government, with defendants in these cases comprising approximately 15% of those involved in federal criminal cases in 2002. The number of defendants sentenced to prison for property offenses has increased since the institution of the Sentencing Guidelines, moving from a little over 40% of defendants to well over 50%.

The calculation of the loss suffered by victims is important because it is both


49. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2004) (“Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.”).

50. The Second Circuit rejected the argument that the disparity between the sentences received by other defendants in the case, which ranged from five years to three years probation, and Ebbers meant that his sentence was improper. The court explained that “a reasonable explanation of the different sentences here is readily apparent, namely, the varying degrees of culpability and cooperation between the various defendants. All of those named above cooperated and pled guilty. Ebbers did not. Moreover, each was a subordinate of Ebbers. Ebbers, as CEO, had primary responsibility for the fraud.” Ebbers, 458 F.3d at 129.


52. Id. at 12 fig. 3.
a measure of the harm caused by the defendant and because it can serve as “a
gauge of the defendant’s guilty mind.”53 As Professor Bowman noted,

[S]tealing more is worse than stealing less and merits greater
punishment, not only because a larger loss inflicts a greater harm, but
also because one who desires to inflict a large harm is customarily
thought to have a more reprehensible condition of mind than one who
desires to inflict a small one. To this extent, actual loss is not a bad proxy
for mental state.54

Intent to cause harm is integral in many white collar crime prosecutions because
the defense in most cases centers on the defendant’s culpable state of mind.
Ebbers presented a defense at trial that his large ownership stake in WorldCom
would have been put at risk if he participated in the accounting fraud, and his
personal risk of loss demonstrated his lack of knowledge or intent to commit a
crime. In deciding whether a white collar defendant is guilty, prosecutors will
focus on the gains reaped by defendants as proof of a motive to engage in
misconduct, thereby establishing criminal intent.

Given the central role of loss in many white collar crime cases,55 the
Supreme Court’s recent sentencing decisions raise a question whether the jury
should play a role in assessing the harm from the defendant’s conduct. The
Court’s decisions in Apprendi v. New Jersey,56 Blakely v. Washington,57 and
United States v. Booker,58 have been thoroughly examined, and I will not repeat
what others have said far better than I ever could.59 The focal point of each
decision is the jury’s role in determining the facts that affect punishment. In
Apprendi, the majority held that “[o]ther than the fact of a prior conviction, any

54. Id. Loss need not be the primary driver of criminal sentences for white collar crimes involving fraud
or pecuniary loss to victims. One can well imagine a system in which other factors, such as abuse of a position
of trust or physical harm from misconduct were quantified in such a way that they would have a greater impact
on the ultimate sentence. That said, the amount of the loss has been used as one aspect of the assessment of the
societal impact of a crime since the Statute of Westminster in 1275 that divided the theft offense into grand and
petit larceny based on the value of the item stolen. That distinction was important for punishment because a
grand larceny was punishable by death, and value was an element of the offense. Id. at 14.
55. See Ebbers, 448 F.3d at 129 (“[T]he Guidelines reflect Congress’ judgment as to the appropriate
national policy for such crimes.”).
56. 530 U.S. 466 (2000).
59. With no intent to insult other scholars, one would do well to review the articles published by
Professors Douglas A. Berman and Frank O. Bowman, III, on this topic for a thorough review and critique of
the Court’s analysis in these cases. See Berman, Modern Sentencing Process, supra note 8; Douglas A. Berman,
Reconceptualizing Sentencing, 2005 U. CHI. LEGAL F. 1 (2005); Douglas A. Berman, Distinguishing Offense
Conduct and Offender Characteristics in Modern Sentencing Reforms, 58 STAN. L. REV. 277 (2005); Frank O.
Bowman, III, Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform, 58
STAN. L. REV. 235 (2005); Bowman, Structural Analysis, supra note 34.
fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.60 The Court reiterated that holding in Blakely: “As Apprendi held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”61 In declaring the mandatory Sentencing Guidelines unconstitutional, the five-justice majority in the first part of the Booker decision stated: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a guilty plea or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”62

The second half of Booker, in which a different five-justice majority of the Court considered the status of the Sentencing Guideline in light of their unconstitutionality as a mandatory sentencing system, permits courts to view them as advisory only. The sentencing judge, however, cannot simply ignore them because the court “must consult those Guidelines and take them into account when sentencing,” and any sentence can be reviewed for “reasonableness” if a party appeals.63 By preserving the Sentencing Guidelines even in a reduced form, the remedial majority in Booker sought to protect the basic goal of the Sentencing Reform Act “to move the sentencing system in the direction of increased uniformity.”64

The issue of sentencing disparity was a primary motivating factor in the adoption of the Sentencing Reform Act.65 Under the indeterminate sentencing system in effect in the federal system until the mid-1980s, the judge could impose any sentence so long as it did not exceed the statutory maximum, assuming there was not a mandatory minimum. The result of this broad judicial discretion led Judge Marvin Frankel to assert, “[t]he evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes.”66

The type of disparity that engendered the greatest negative reaction was in the sentencing in white collar crime cases, which usually involve defendants from middle- and upper-class backgrounds who, quite often, were much like the

60. Apprendi, 530 U.S. at 490.
61. Blakely, 542 U.S. at 313.
62. Booker, 543 U.S. at 244. The Court foreshadowed the approach taken in these three cases in its earlier decisions in Jones v. United States, 526 U.S. 227 (1999), and Almendarez-Torres v. United States, 523 U.S. 224 (1998), but neither of these decisions went as far in applying the Sixth Amendment right to invalidate a statute or set of sentencing guidelines.
63. Id. at 265.
64. Id. at 253.
judges imposing the sentences in terms of education, community involvement, and lifestyle. 67 Senator Joseph Biden summarized the point during the Congressional debate on the Sentencing Reform Act by noting that “the studies show the white middle-class guy gets a more lenient sentence than the black guy, and you know that is kind of disturbing.” 68 In response to the disparity issue, one of the goals of the Sentencing Commission in crafting the Sentencing Guidelines was to assure that white collar crime offenders received a “short but definite period of confinement” for their crimes rather than probation. 69 The Sentencing Guidelines have been successful in that regard for fraud offenses, the most common type of white collar crime, by increasing the rate of imprisonment from approximately 50% in the pre-Sentencing Guidelines era to almost 70% in 2001. 70 Moreover, the number of defendants receiving probation as the punishment for fraud convictions dropped by almost two-thirds under the Sentencing Guidelines. 71

Will a system of advisory Sentencing Guidelines achieve a measure of uniformity and prevent the reappearance of significant sentencing disparity, particularly in white collar crime cases? As with the question about whether a sentence was “too harsh,” one can ask whether the term “disparity” has any real content, or is it just a visceral reaction to punishments that appear inconsistent. 72 To the extent that the individual circumstances of each defendant are relevant to the sentence, disparity is a natural consequence if that term simply means

67. See Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & Criminology 883, 883-84 (1990) (“[T]he disparity found to characterize federal sentencing was thought to sometimes mask, and be correlated with, discrimination on the basis of a defendant’s race, sex, or social class. For a system claiming equal justice for all, disparity was an inexplicable yet constant source of embarrassment.”).


71. Id.

72. See Kevin Cole, The Empty Idea of Sentencing Disparity, 91 NW. U. L. REV. 1336, 1336 (1997) (“[T]he Commission’s central preoccupation—with reducing sentencing disparity—requires a coherent underlying theory of punishment, because disparity is not a self-defining concept.”); SENTENCING COMM’N, FIFTEEN YEARS REPORT, supra note 64, at 79 (“While there is widespread agreement that unwarranted disparity should be eliminated, there is less agreement on how to define it.”).
different sentences for the same offense. The Sentencing Guidelines were not an effort at creating complete uniformity—a system of mandatory minimum sentences would accomplish that goal more efficiently—so any discussion of disparity is really about “too much” disparity, which is similar to asking whether the Ebbers sentence was “too harsh” or appropriate. But after Booker, there is at least a reasonable possibility that judges will diverge from the Sentencing Guidelines as time passes and they become more comfortable with their discretion and the parameters of the appellate standard of reasonableness.\textsuperscript{73}

To the extent that a discussion of disparity has any meaning, for economic crimes—most importantly fraud—the calculation of the amount of the loss will be one likely source of inconsistency. Such calculation is the primary driver of sentences for these offenses. Because judges have the sole authority to determine the loss under the now-advisory Sentencing Guidelines, that determination may engender differences in sentencing based on how a judge decides the loss caused by the crime or whether other factors result in not following the loss table in determining the final sentence. With the greater discretion provided by Booker, trial courts may be able to play with the numbers, or simply ignore them, in determining the sentence that will be reviewed only for its reasonableness. Appellate review may result in lighter sentences, as demonstrated by the Fifth Circuit in Olis, when it rejected the district court’s determination of loss because the judge did not consider other possible explanations for the decline in Dynegy’s share price apart from the accounting misconduct related to Project Alpha. One way to avoid the appellate review of the loss calculation is for the judge to decide that the loss cannot be calculated and pick a figure that approximates the “harm” caused by the defendant’s crime, perhaps noting that “other factors” should mitigate the amount of the loss. In such a scenario, there is little chance that the trial court’s decision can be challenged after Booker if it appears to be “reasonable.”

Should the jury have a role in determining loss as a means to mitigate the possibility of disparity cropping up in white collar crime cases? The sentencing of the defendants in the so-called Enron Nigerian Barge prosecution is an

\textsuperscript{73} See Steven L. Chanenson, The Next Era of Sentencing Reform, 51 EMORY L. REV. 377, 411 (2005) (“Yet fully voluntary systems might not work well—certainly not for the long haul. This is an unusual moment in the history of the federal bench. Judges see the prospect of escaping from the yoke of the pre-Blakely Federal Sentencing Guidelines. It would not be surprising for these federal judges to follow such fully voluntary guidelines closely but not ‘slavishly.’ Fast forward another twenty years and the picture may not be so rosy. The next generation of federal judges would grow up on the fully voluntary guidelines system and never experience the rigid pre-Blakely Federal Sentencing Guidelines. How closely would they follow the fully voluntary guidelines? It is, of course, impossible to say with certainty. It seems, however, that without some galvanizing experience (like toiling under the pre-Blakely Federal Sentencing Guidelines), many judges spread out across the country would start to use more and more of their discretionary powers. The range of sentences would likely expand—both up and down—in a fashion similar to the pre-Guidelines experience, although perhaps not to that same extent.”); COMM’N, FIFTEEN YEARS REPORT, supra note 64, at 80 (“[S]everal studies of preguidelines sentencing found geographical variations in sentencing patterns, suggesting that different political climates or court cultures can affect sentences.”).
example of a trial judge rejecting the jury’s loss determination and substituting his own calculation in order to impose a lighter sentence than what the Sentencing Guidelines would otherwise call for. Five defendants were convicted of conspiracy and wire fraud related to a year-end transaction between Enron and Merrill Lynch that permitted the company to inflate its earnings while the investment banking firm was guaranteed a gain on the transaction. The trial took place after the Supreme Court decided Blakely but before its decision in Booker, so the court conducted a post-verdict proceeding in which the jury determined that the loss caused by the criminal conduct was $13.7 million. At sentencing, however, U.S. District Judge Ewing Werlein held that he could not determine the amount of the loss, and used the amount of the gain from the transaction—$1.4 million—as the appropriate figure in calculating the potential prison term under the Sentencing Guidelines. The judge then departed downward in imposing sentences that ranged from 30 to 46 months, stating at the sentencing hearing for two defendants that white collar offenders cannot “tolerate” long sentences and the fraud involved was “small and benign” when compared to other misconduct at Enron.

While Booker certainly authorized the imposition of a sentence that considered the Sentencing Guidelines as only advisory, the selection of a loss figure that would comport with the judge’s view on the nature of white collar offenders and the scope of the fraud, indicates that perceptions of disparity in sentencing may return to the system. There was no explanation why Judge Werlein rejected the jury’s loss finding, which was based on evidence introduced by the government and defense at a proceeding in which the standard was proof beyond a reasonable doubt, a much higher threshold than required for judicial factfinding under the Sentencing Guidelines. It is difficult to justify simply ignoring a jury’s finding on the amount of loss that would have resulted in a higher sentence on the ground that it conflicted with the court’s notion of what a fair sentence should be in the case. The Sixth Amendment rationale in Booker

76. See Mary Flood & Tom Fowler, Jury Finds Enron Sham Cost $13.7 Million, HOUS. CHRON., Nov. 18, 2004, at B1.
77. See Mary Flood & Purva Patel, Two Enron Case Figures Avoid Long Jail Terms, HOUS. CHRON., April 22, 2005, at A3.
78. Under the 1998 version of the loss table in § 2F1.1 of the Sentencing Guidelines applicable to the defendants in the Enron Nigerian Barge prosecution, a $1.4 million loss results in an 11-level increase in the sentence calculation, while a $13.7 million loss would result in a 15-level increase. Using the higher loss figure would have resulted in at least an additional year of imprisonment, and possibly more depending on other enhancements to the Sentencing Guidelines calculation. U.S. SENTENCING GUIDELINES MANUAL § 2F.1.1(b)(1) (Nov. 1, 1998).
for finding the Sentencing Guidelines unconstitutional, contradicts the rejection
of the jury’s loss finding.

Since *Booker*, the number of sentences below the Sentencing Guidelines
range has increased. Statistics from the United States Sentencing Commission
show that sentences within the Sentencing Guidelines range have dropped from
69.4% in fiscal year 2003 to 61.7% since the Supreme Court decided *Booker* in
January 2005. The number of sentences below the Sentencing Guidelines range
stands at 9.5%, although the number of downward departures has decreased. For
white collar crime cases in which section 2B1.1 is the primary provision of the
Sentencing Guidelines applied at sentencing, 11.2% of the sentences were below
the Sentencing Guidelines range in cases in which the district court referred to
*Booker* or other factors related to sentencing as the basis for the sentence.79
While the trend in sentencing does not show a radical move away from the
Sentencing Guidelines, there are a significant number of cases in which courts
are imposing sentences below what would have been required before *Booker*.80

IV. MAKING LOSS AN ELEMENT OF A FRAUD

Transferring the authority to make that determination from the court to the
jury would fulfill the Court’s analysis in *Apprendi*, *Blakely*, and *Booker* that the
jury and not the court should make decisions that substantially affect a
defendant’s ultimate punishment. While the remedial portion of *Booker*
eliminates any constitutional requirement for juries to decide loss (or gain),
shifting loss from a sentencing factor to an element of the offense would result in
a proceeding that is more consistent with the Sixth Amendment requirement of
having a jury decide the crucial facts that will control the punishment imposed.
Having the jury determine loss would limit, although not eliminate, a source of
potential sentencing disparity that may creep back into federal cases under the
advisory Sentencing Guidelines.

Just as important as the goal of eliminating disparity is the role the jury plays
in legitimizing the decisions made in the criminal justice system. As the Supreme
Court noted in *Duncan v. Louisiana*.81

The guarantees of jury trial in the Federal and State Constitutions reflect
a profound judgment about the way in which law should be enforced and
justice administered. A right to jury trial is granted to criminal

79. U.S. SENTENCING COMM’N, SPECIAL POST-BOOKER CODING PROJECT (Nov. 10, 2005), available at
80. The Sentencing Commission statistics also show that in 1.1% of the cases the district court imposed
a sentence above the one called for under the Sentencing Guidelines, based on the court’s discretion under
*Booker*. Id. Upward departures have always been a must smaller portion of the sentences outside the Sentencing
Guidelines range, even without factoring in government-sponsored departures, such as those for substantial
assistance.
defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

The value underlying the Court’s insistence in *Apprendi* and its progeny that the jury decide all important factual issues that affect punishment reflects the need to empower the community in the decision about not only guilt but also the imposition of a sanction based upon proof of certain facts. Requiring jury participation is not simply a procedural choice between two relatively equal decision-makers, but a reflection on the need to allow a body outside of the government to have a significant voice in the final decision regarding the assignment of blame and the imposition of punishment. The issue of loss is a factual determination that allows the jury to voice its position on the scope of the harm caused by the defendant.82

One argument against making loss an element of a fraud offense that must be proven beyond a reasonable doubt is that juries are not equipped to make such determinations because they require judgments regarding potentially indiscernible financial and other economic factors. Moreover, juries will be subjected to more complex and lengthy proceedings in cases that already may stretch the abilities of a group of men and women untrained in legal or financial matters beyond what can be reasonably expected of them. Juries, therefore, may opt-out of the process by refusing to make the necessary findings, or just adopt one side’s number without real deliberation.

Criticisms of the ability of juries to render fair decisions based on complex factors are frequently made, but judges’ aptitude in this area is not necessarily any greater. A busy district court judge may simply adopt the position of the

82. See George C. Harris, The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused, 74 Neb. L. Rev. 804, 809 (1995) (“While never accorded explicit constitutional status by the courts, the communitarian function of the criminal jury trial is fundamental to our system of justice. The values of participation, education and ritual affirmation that it promotes are each crucial in a democratic society for public acceptance of the administration of criminal justice in particular and the exercise of governmental authority in general.”).
probation office, which in turn may have taken the government’s proposed loss figure without much review of its validity. The benefit of a judicial proceeding on loss is that the parties will have to prepare and present their evidence in open court, rather than to a probation officer to make a recommendation without an opportunity for a full consideration of the information on which the loss decision was based. While juries might be swayed by their sympathies or predispositions in cases involving punitive damages, the loss question is a more narrow one on which a group of jurors can reach a reasonable decision just as well as a district court judge handling a heavy docket. While one might well mistrust the abilities of the judicial system to deal with complex financial questions generally, that does not mean jurors are less able to decide the issue. Moreover, putting the task of determining loss in the hands of the jury lessens the prosecutor’s control over that factual assessment, at least in cases that go to trial.84

With regard to the complexity of the criminal trial, adding loss as an element that must be proven can make the government’s case longer, although that in itself is not a persuasive reason against shifting the loss issue from the judge to the jury. As it stands, the government will often have to call victims of the crime as witnesses to explain what the defendant(s) said or did, and in a fraud case how the representations or omissions caused the victim to part with money or other items of value. As a form of larceny, a fraud case usually requires that the government prove the defendant’s conduct caused harm. The additional element of loss would not necessarily make the case more difficult to prove. Moreover,

83. In the context of the ability of juries in civil cases to assess non-economic damages, Professor Murphy stated:

One might argue that unlike pure factfinding, translating harm into a dollar amount is a task in which the jury does not have any comparative advantage over the judge, because the translation is so subjective. Indeed, one might suggest that the judge can bring greater predictability and uniformity to the task of translating harms into dollar amounts and is therefore the superior decisionmaker. The problem with this line of argument, however, is that the judge does not seem to have any inherent advantage over the jury. The legal experience and expertise of the judge would not seem to provide any benefit over the jury in handling the subjective translation of loss into a dollar award. The judge can gain access to information about awards in similar cases—thus possibly advancing goals of greater predictability and uniformity—but the jury could be given this information as well.

In the absence of compelling arguments that the judge would be the better decisionmaker, there is little to override the historical evidence and functional arguments that the jury should be the body to translate plaintiff loss into a dollar award. Colleen P. Murphy, Judicial Assessment of Legal Remedies, 94 Nw. U. L. REV. 153, 180 (1999).

84. See Bowman, Structural Analysis, supra note 34, at 1336 (“[I]n a fact-driven guideline system, prosecutors gain tremendous influence over sentences inasmuch as prosecutors are the masters of the facts—the primary sources of the evidence necessary to trigger application of guideline rules.”). The vast majority of cases involve plea bargains, so the prosecutor would still maintain a strong measure of influence based on the charging decisions and presentation of the facts. As an element of the crime, however, loss would require proof beyond a reasonable doubt or an admission of the loss by the defendant, a higher standard than the preponderance standard of the Sentencing Guidelines.
arguing loss to the jury could be a benefit to the government because the issue reemphasizes the effect of the criminal conduct. If a fraud case takes weeks to try already, such as the prosecutions of Ebbers and Rigas, it is hard to see how adding in an assessment of loss as an element of the case will have any significant effect on the length or complexity of the proceeding.85

Any change along this line would require Congressional involvement by amending the relevant federal statutes to incorporate loss as an element of the crime, but this is not outside the realm of legislative expertise. For example, the criminal copyright infringement statute requires proof of the value of the items involved in the illegal conduct,86 and the computer fraud statute provides a definition of loss for conduct in that field.87 Congress could add a provision to Title 18, Chapter 63, which contains the mail, wire, bank, health care, and securities fraud statutes, requiring the government to prove the amount of the loss, or in the alternative, the defendant’s gain in any prosecution for a scheme or artifice to defraud.88 The statutes in this Chapter comprise the primary federal crimes used in white collar crime prosecutions involving economic offenses, and are often charged along with more specific criminal provisions because of their breadth. Prosecutors and courts could continue to use the elements of loss provided in section 2B1.1 of the Sentencing Guidelines as a guide to loss because it incorporates different measures of harm, including actual or intended loss in addition to gain if loss cannot be demonstrated adequately.

Most cases are concluded through a plea bargain, so incorporating a loss element into the punishment portion of an offense would also require the defendant to admit to a particular amount of loss. If the government and defendant did not agree on the amount of loss, then the defendant would not have admitted all the elements of the crime to permit the court to accept the plea

85. One benefit to having the jury decide the loss issue would be to extend the procedures of the criminal trial, most importantly the burden of proof, to an important factor for the sentencing judgment. As Professor Berman points out, “Despite creating a significant body of substantive sentencing law, legislatures and commissions in most jurisdictions have left largely unaddressed fundamental issues such as notice to parties, burdens of proof, appropriate fact-finders, evidentiary rules, and hearing processes—even though these procedural matters play a central role in the actual application of general sentencing rules to specific cases.” Berman, Modern Sentencing Process, supra note 8, at 660.

86. 17 U.S.C. § 506(a) (2002) (Infringement “by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000.”).

87. 18 U.S.C. § 1030(c)(11) (2002) (“[T]he term 'loss' means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.”).

88. Similar to 18 U.S.C. § 1346, which defines a scheme to defraud under Chapter 63 to include the deprivation of the right of honest services, a new statute could be added that “[f]or the purposes of this chapter, if the violation results in an actual or intended financial or pecuniary loss, or if a loss cannot be demonstrated, then an actual or intended financial or pecuniary gain, directly or indirectly, to the defendant, the punishment shall be in accord with the amount of loss or gain as determined by the jury, or by the court sitting in a case as trier of fact, or as admitted by the defendant in a proceeding under Federal Rule of Criminal Procedure 11.”
agreement and impose a sentence. This could result in an even greater expenditure of resources if more cases are pushed toward trials rather than settlement because the parties disagree on the effect of the defendant’s conduct. The Supreme Court noted in *Blakely*, however, than it would be permissible under the Sixth Amendment to allow for judicial factfinding on issues relevant to sentencing so long as the parties to the agreement acceded to such a procedure. 89 Similarly, even for a case that goes to trial, the prosecution and defense could agree to waive having the jury make the loss calculation and instead have the court make the determination if there were a conviction. 90

If the jury makes such an assessment, and of course it could find the loss is zero, then would the judge be bound by that decision in imposing sentence? Because the Sentencing Guidelines are now only advisory after *Booker*, a jury’s loss (or gain) determination could be viewed as similarly advisory, much as Judge Werlein did in sentencing the defendants from the Enron Nigerian Barge prosecution when he concluded that the loss was $1.4 million gain and not the jury’s conclusion of a $13.7 million loss. The appellate standard of reasonableness articulated in *Booker* would provide one constraint on judicial rejection of a jury’s loss calculation because the government would have proven the loss beyond a reasonable doubt as an element of the crime and could appeal the sentence as unreasonable. The government could argue that a judge would have to apply the same standard to the jury’s loss determination as to a finding of guilt, that the court must determine that the evidence was insufficient to support a rational finding of the amount of loss. 91 Absent such a finding, the court should use the jury’s decision in making its Sentencing Guidelines calculation.

While outright rejection of the jury’s decision on loss is unlikely if it was based on sufficient evidence, the advisory nature of the Sentencing Guidelines after *Booker* could be interpreted as permitting district judges to use the loss calculation as only one factor among many that can be used in determining the sentence. Under 18 U.S.C. § 3553(a)(2), a court must impose a sentence that will “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense . . . [and] afford adequate deterrence to

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89. *Blakely v. Washington*, 542 U.S. 296, 310 (“If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.”).

90. Creating the opportunity for greater judicial involvement in the loss determination exposes that determination to a more open review than simply bargaining about the amount of loss. As Professor King noted, “Allowing parties to have the last say over sentences and Guidelines calculations without judicial review of the presentence report is bad policy.” Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 305 (2005).

91. Under Federal Rule of Criminal Procedure 29, a judge can overturn a jury’s guilty verdict if it is not supported by sufficient evidence. FED. R. CRIM. P. 29. If a jury’s loss determination was similarly unsupported, the court could apply the same standard and reverse that portion of the verdict, even if the conviction was undisturbed.
criminal conduct . . . “92 If a loss calculation were to result in a sentence that the district judge concluded was too severe, and therefore did not provide for a “just punishment for the offense,” then even a proper jury calculation of loss (or gain) might not be reflected in the punishment imposed for the crime.

If a district court could simply ignore the jury’s loss calculation by finding that the Sentencing Guidelines do not provide the appropriate sentence, then requiring proof of a loss element would be an exercise in futility for the most part. In that case, keeping the loss issue as a sentencing factor rather than an element of the offense would be much simpler and more efficient. Yet, Blakely rejected the perceived expediency of judicial factfinding as a rationale for permitting the court to make crucial determinations about sentencing. As the Court noted, “The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.”93 Requiring the government to prove the amount of loss would enhance the jury’s circuitbreaking function, even at the cost of some of the judicial discretion afforded by Booker.

V. MANDATORY MINIMUM SENTENCES AND THE QUESTION OF DISPARITY

Giving the jury a greater role in the loss determination for fraud offenses would not eliminate disparity in white collar crime sentencing because district judges retain the ultimate authority to impose a sentence that may fall outside what the advisory Sentencing Guidelines otherwise call for. The possibility of disparity does not mean it will occur, although over time it can certainly be expected that judges will deviate by incorporating more of their own views of what is an appropriate sentence for a white collar offender.94 Some judges may take the approach of Judge Werlein in the Enron Nigerian Barge prosecution, finding that sentences for white collar offenders should be shorter than for other crimes, while other judges will take a harder line on white collar offenses, particularly those that involve public corruption.95

95. One of the first sentences handed down after Booker involved an increase in the sentences of three defendants convicted of public corruption offenses in the Southern District of Texas. The defendants had been sentenced to forty-one-month terms of imprisonment the day before the Court announced its decision in Booker, and the trial judge then resentenced the defendants to prison terms that ranged from seven to thirty-one months. A press release issued by the U.S. Attorney’s Office for the Southern District of Texas described the sentencing:

The sentence of former Santa Rosa Independent School District Superintendent David
To the extent there is a concern that sentencing in white collar crime cases will result in disproportionately lighter punishments, one means to eliminate potential disparity is through legislatively-mandated minimum sentences for offenses. Mandatory minimum sentences are almost universally reviled because such legislative action takes all discretion away from the sentencing court to apply the law based on the particular facts of the case and background of the defendant. Moreover, the experience with the most common use of mandatory minimum sentences in drug and gun cases shows that the sentences are viewed by many critics as excessive. Legislative control of sentencing eliminates much of the disparity in sentencing for those offenses that qualify for mandatory minimums. The statutes, however, also give prosecutors significant authority to coerce defendants by offering to charge offenses that do not trigger the automatic prison term or to consider a downward departure for substantial assistance that

Vasquez, 55, of Santa Rosa, was increase an additional 7 months to a total of 48 months in federal prison without parole to be followed by a three year term of supervised release. David Vasquez was also fined $75,000. Former Santa Rosa school board president Guadalupe Vasquez, 50, will now be serving 54 months – 13 additional months – in federal prison without parole to be followed by a three year term of supervised release, and has been assessed a $60,000 fine. Both men, who are brothers, were originally indicted by a federal grand jury in McAllen, Texas in April 2004, and were convicted by a McAllen jury’s verdict in mid-October of conspiracy, extortion and mail fraud. David Vasquez was also convicted of violating the federal Travel Act related to a bribery scheme.

The third public official, Israel Sagredo, 58, the long-time city manager of Alton, Texas, was sentenced to a 72 month prison term – 31 additional months – for extortion and bribery. The prison term will be followed by a three-year term of supervised release. Sagredo’s original fine of $75,000 was increased to $250,000. Indicted by a federal grand jury on March 31, 2004, Sagredo was convicted by a McAllen jury on August 26, 2004 of using his official position to commit extortion and for accepting a $10,000 bribe related to a federally funded Alton city recreation center.


In another sentencing, former Georgia state Senate Majority Leader Charles Walker received a sentence of ten years and one month, and the district judge stated that he gave the long sentence to “make an example” of Walker to other politicians. James Salzer, Federal Prison Awaits Walker, ATLANTA J. CONST., Nov. 30, 2005.

96. See, e.g., Associate Justice Anthony M. Kennedy, Speech at the American Bar Annual Meeting, at 4 (Aug. 9, 2003), available at http://www.supremecourts.gov/publicinfo/speeches/sp_08-09-03.html (last visited Dec. 13, 2005) (“By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”) (on file with the McGeorge Law Review); John S. Martin, Jr., Why Mandatory Minimums Make No Sense, 18 NOTRE DAME J.L.ETHICS & PUB. POL’Y 311, 312 (2002) (U.S. District Court Judge stated, “the vast majority of responsible studies of mandatory minimum sentences suggest they have almost no value in deterring crime and that they result in gross injustice.”).
permits a judge to sentence below the mandated prison term.97

The Sentencing Commission issued a report in August 1991 that analyzed the interplay of mandatory minimum sentences and the Sentencing Guidelines and found, not surprisingly, that mandatory minimum sentences undermined the “real offense” approach of having sentences that reflected both the seriousness of the criminal conduct and the character of the defendant.98 The report asserted that prosecutors did not apply the statutes triggering mandatory minimum sentences uniformly, thereby creating “unwarranted disparity in sentencing,” which effectively transfers “sentencing power from the court to the prosecution.”99 At the same time, the Sentencing Commission criticized mandatory minimums as having an “unintended effect” of creating “unwarranted sentencing uniformity.”100 The report urged Congress to forego mandatory minimums and to rely instead on the development of the Sentencing Guidelines as the better means to eliminate unwanted disparity. Consonant with this approach, Senator Orin Hatch applauded alternative measures to mandatory minimums as a means to create greater uniformity in sentencing that relied on the Sentencing Guidelines as the primary means of limiting disparity.101

Does Booker change the dynamic concerning the appropriateness of mandatory minimum sentences as a means to eliminate disparity in sentencing? Although there are few proponents of mandatory minimum sentences, at least in their current incarnation in the drug and gun statutes, their utility as a means to limit potential disparity may be worth considering for white collar crimes if the minimum sentence is tied to the amount of the loss and the mandated prison term is not onerous. Booker’s remedy means that the inherent conflict between mandatory minimum sentences undermining heretofore obligatory sentencing

97. See 18 U.S.C. § 3553(e) (2002) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”). The Sentencing Reform Act also has a “safety valve” provision that permits a court to sentence below a mandatory minimum for certain drug offenses if the defendant can establish that he meets the statutory criteria set forth in 18 U.S.C. § 3553(f) (2002).


99. Id. at ii-iii.

100. Id. at iii (emphasis in original); see also Paul H. Robinson & Barbara A. Spellman, Sentencing Decisions: Matching the Decisionmaker to the Decision Nature, 105 COLUM. L. REV. 1124, 1152 (2005) (“While mandatory minimums might have been justified in a nonguidelines world— one might argue that they have had a positive, albeit heavy-handed, effect in increasing uniformity—once a guidelines system is put in place, the need for mandatory minimums disappears.”).

101. Orin G. Hatch, The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 WAKE FOREST L. REV. 185, 198 (1993) (“While mandatory minimum sentences yet remain within the legislature’s power and prerogative, Congress should continue to assess the merit of these measures in advancing the objectives of sentencing established in the [Sentencing Reform Act]. In its pursuit of a certain and effective sentencing system, Congress must continue to study these sentencing approaches, seeking a broad spectrum of input.”).
guidelines is eliminated. To the extent that the legislative determination trumps the applicability of “real offense” guidelines for sentences, for the vast majority of crimes the judge need not follow the Sentencing Guidelines so long as the sentence is reasonable and achieves the goals of sentencing.

If a mandatory minimum sentence for fraud offenses were tied to the jury’s loss determination, then the jury’s role would be enhanced because its factual determinations would be related directly to the sentence imposed on the defendant, at least insofar as the mandatory minimum creates a floor for sentencing. Apprendi and its progeny stress the constitutional mandate that facts with important sentencing implications should be determined by the jury, so a mandatory minimum sentence based on a loss determination reflects the unique role of the jury in the process.102

A powerful objection to mandatory minimums is the severity of the sentences meted out for potentially modest crimes, particularly under recidivist provisions or draconian drug laws that make minor participants in wide-ranging drug conspiracies subject to severe penalties. It is not necessarily the case that mandatory minimums need to be harsh, and for fraud offenses the base prison term could be relatively low. The goal of a mandatory minimum sentence in this context would not be strictly for deterrence but more to limit sentencing disparity.103 In that regard, having the sentences tied to the amount of the loss would work to ensure that some prison time will be served by defendants who cause significant losses without necessarily requiring that they serve significant prison terms, i.e., a floor under white collar sentences for fraud offenses.

One significant goal of the Sentencing Guidelines was to create a system in which white collar offenders received “short but definite periods of confinement” and moving away from sentences that did not include at least some term of

102. Mandatory minimum sentences have been a part of the federal criminal code since the nineteenth century. See Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 WAKE FOREST L. REV. 223, 225 n.7 (1993) (“In addition, Congress throughout the 19th and early 20th centuries occasionally imposed mandatory minimum prison terms for crimes that had assumed some particular political visibility.”). There are over 60 federal criminal statutes on the books that contain a mandatory minimum punishment, although most are rarely the subject of prosecutions and the punishments are usually quite minimal as compared to those for drug and gun violations. See Mandatory Minimum Report, supra note 92, at ii (“Only four of these sixty statutes, however, frequently result in convictions; the four relate to drug and weapons offenses.”). For example, the punishment for violating a cease-and-desist order issued by the Commodities Futures Trading Commission related to manipulating the market price of a commodity includes a sentence of “not less than six months nor more than one year,” 7 U.S.C. § 13b (2002), while anyone who refuses to comply with a congressional subpoena to testify or produce documents will be fined “not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.” 2 U.S.C. § 192 (2002).

103. Mandatory minimum sentences in other areas of the law, particularly in the narcotics arena, are designed to deter by imposing significant sentences if certain aggravating factors are present, such as a particular amount of drugs or dealing drugs at a particular location, such as a school. See Gary T. Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 CAL. L. REV. 61, 67 (1993) (“Legislatures have made imprisonment both more certain and more severe in order to respond to constituent concerns about crime and safety, and to fulfill the broad purpose of general criminal deterrence.”).
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They were largely successful in that regard as the Sentencing Commission concluded that “the use of simple probation has been slashed – by about two-thirds for fraud offenders and by about half for embezzlers and tax evaders. For most types of economic crime, the rate of imprisonment has also been substantially increased.”

It is not clear at this point whether judges will revert to the pre-Sentencing Guidelines pattern of giving a greater number of sentences involving only probation for white collar crimes, but that is clearly a possibility. Setting low mandatory minimum sentences for fraud offenses based on the amount of loss is one way of ensuring that defendants continue to receive “short but definite periods of confinement.” Unlike proposals before Congress to restore, at least in part, the mandatory nature of the Sentencing Guidelines as a whole, adopting mandatory minimum sentences based on the loss amount would be consistent with Apprendi, Blakely, and Booker, rather than merely seeking a legislative short-cut around those decisions to restore judicial sentencing discretion. Moreover, a proposal for mandatory minimum sentences based on the amount of loss would require Congress to assess what level of financial harm should trigger a particular punishment, in much the way that such sentences in drug and weapons cases allow for an expression of the legislative assessment of harm. If a certain amount of loss is deemed so significant that it should trigger a specified term of imprisonment, then it is a decision that should be made by Congress explicitly rather than by tinkering with the Sentencing Guidelines or restricting downward departures.

The type of mandatory minimum I suggest would contain two tiers for sentencing. If the amount found by the jury—either loss or gain—were greater than $1 million, then the court would be required to impose a sentence of at least one year. Under the Sentencing Guidelines, a $1 million loss (or gain) would require an offense level increase of 16, resulting in a sentencing range of at least 41-51 months, without considering any enhancements or a decrease for acceptance of responsibility. A district court would be free to follow the Sentencing Guidelines and impose the sentence called for under that system, or could depart downward based on the particular characteristics of the defendant and the offense. The one-year mandatory minimum, however, creates a floor and would eliminate at least the potential for significantly disparate sentences by eliminating the possibility of a short term of incarceration that could be served largely or even completely outside a prison, for example by home confinement.

The second level would impose a three-year mandatory minimum if the loss were greater than $5 million. Once again, this term is below what the Sentencing Guidelines would call for based on such a loss, which would be at least a 51-63 month prison term, and would permit the court to adhere to the Sentencing Guidelines or impose a different sentence that reflected the severity of the crime.

104. See Breyer, supra note 63, at 22.
105. SENTENCING COMM’N, FIFTEEN YEARS REPORT, supra note 64, at 58 (2004).
without allowing for a short prison term or just probation.\textsuperscript{106}

The danger with mandatory minimums is that Congress may increase them substantially, creating a system similar to the drug and gun sentences. If that were to occur, then there would be the type of gaming that occurs with those crimes now, in which prosecutors threaten to charge the crime with the mandatory minimum in order to entice cooperation and permit the defendant who would otherwise have to serve a certain time in prison to plead guilty to a different offense that allows for a shorter prison term. It is not clear, however, that Congress will not try to restore at least in part the mandatory nature of the Sentencing Guidelines, or try to restrict the ability of district courts to depart downward from the Sentencing Guidelines sentence.\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{106} One could add additional levels at $20 million or $50 million, but that is probably unnecessary because few fraudulent schemes occur with a loss at that level. Moreover, should such a case arise, the extensive loss suffered by victims would likely result in a significant sentence above the mandatory minimum, so there is unlikely to be much gain from a more complex hierarchy of minimum sentences tied to higher loss amounts.
\item \textsuperscript{107} See Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong § 12 (2005). One provision of the bill tries to restore at least in part the uniformity of the Sentencing Guidelines by restricting the basis on which a court can grant a departure below the sentence provided in the Sentencing Table by removing a long list of circumstances from the court’s consideration, including charitable contributions, record of prior good works, extreme remorse, family ties and responsibilities, and likelihood of recidivism. Id. § 12(a). H.R. 1528 would also require a court imposing a sentence below the Sentencing Guidelines range must provide “a detailed explanation as to how the sentence avoids unwarranted sentencing disparities among Federal defendants with similar records who have been found guilty of similar conduct, each of which must be supported and shown by clear and convincing evidence . . . .” Id. (emphasis added). The effect of H.R. 1528 would be to make it more difficult for district courts to ignore the Sentencing Guidelines, although it is not clear how carefully the appellate courts would police the decisions of the trial judges imposing sentences, and the “clear and convincing evidence” standard might not be applied as closely as it is in other contexts. Nevertheless, H.R. 1528 would curtail at least some of the sentencing discretion afforded to district judges after Booker. Whether it would pass constitutional muster is a question that cannot be answered at this point. Professor Bowman assailed the proposed restrictions on downward departures as effectively implementing mandatory minimum sentences. In a letter to the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee, he wrote:

As written, Section 12 of the Bill transforms the Federal Sentencing Guidelines into a complex system of mandatory minimum sentences. Section 12(a)(3) of the Bill amends 18 U.S.C. § 3553 by adding a list of thirty-six factors which a sentencing judge could consider in sentencing a defendant within or above the range called for by the Sentencing Guidelines, but which the judge could not consider when setting a sentence below the guideline range. The list includes virtually every commonly invoked ground for downward departure, except government motions for downward departure based on cooperation or on a defendant’s participation in an early-disposition program established by the Attorney General pursuant to section 401(m)(2)(B) of the PROTECT Act (Public Law 108-23). As written, the Bill even seems to prohibit judges from basing a sentence below the guideline range on factors currently enumerated in the Guidelines as warranting a downward departure, e.g., the possibility of a downward departure in a fraud case under 2B1.1 if “the offense level determined under this guidelines substantially overstates the seriousness of the offense.” A system in which judges may freely consider a wide array of factors in setting sentences above the bottom of the guideline range, but may not consider any factor except government motions in setting a sentence below the bottom of the range is, de facto, a system of mandatory minimum sentences.
\end{itemize}
based on the amount of loss for certain types of white collar offenses, if set below the current Sentencing Guidelines range, would be a much less draconian response to the issue of judicial discretion over sentencing.

A set of relatively low mandatory minimums for fraud offenses might take at least some of the pressure off courts (and Congress) to respond to potential disparity in sentencing. If Congress were assured that those convicted of fraud offenses would receive at least some time in prison, then the demand to restore the Sentencing Guidelines might be lessened, at least for white collar offenses. While much of the argument about sentencing revolves around drug crimes and, lately, sex offenses, the legislative fix to curtail judicial sentencing discretion would apply to all offenses. A proposal for mandatory minimum sentences based on the jury’s loss determination might exempt the primary white collar crime section of the Sentencing Guidelines – section 2B1.1 – from any proposal to restrict any downward departures from the sentence called for by the Sentencing Guidelines. Perhaps a concession to the need to limit disparity in sentencing in white collar cases could address the Supreme Court’s concern with the role of the jury in determining facts relevant to sentencing and still maintain a degree of judicial discretion in determining the final sentence.

VI. CONCLUSION

The sentence Bernie Ebbers received was substantial, to say the least, although it is hard to say that it was “too harsh” without a benchmark for that determination. The Second Circuit, in upholding the sentence, noted that “[t]wenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation.”\textsuperscript{108} His sentence in large part conformed to the Sentencing Guidelines based on the judge’s loss calculation and consideration of the relevant factors for a downward departure. That begs the question whether the Sentencing Guidelines provide for appropriate sentences for white collar crimes, or whether sentencing under section 2B1.1 is itself too severe for the types of offenders who come within its scope.

Discussions about disparity in sentencing are often a façade for complaints about low sentences in individual cases without reference to the large number of sentences that are appropriate for the offense and offender. Making policy based on anecdotal evidence is always problematic, and arguing whether a particular sentence is too harsh or lenient is not something that can be resolved. To the extent that there is a concern that the federal judiciary will revert back to a system in which the personal predilections of the judge determine the outcome of


the sentencing, then it is appropriate to seek a means to require some baseline consistency in sentencing. The Sentencing Guidelines are no longer the primary means to achieve that consistency because *Booker* has removed the requirement that judges must adhere to them. The appellate standard of reasonableness is unlikely to ensure the type of consistency that the Sentencing Guidelines provided before *Booker*, so alternatives may have to be considered.

I understand that even suggesting consideration of a mandatory minimum sentence is akin to calling into question “mom and apple pie.” If used properly, however, such a provision could provide the type of floor for sentences that may limit, but not eliminate, concern about disparity creeping back into sentencing in white collar cases. It may be that sentencing for white collar crime is “too harsh” and the prison terms for such offenses should be scaled back. But simply calling for lower sentences is not realistic when Congress is concerned about any perception—real or imagined—that it is being soft on crime.\textsuperscript{109} Mandatory minimum sentences designed to limit disparity rather than to deter crime, which is the case with the drug and gun provisions, may be one means to preserve at least a measure of judicial sentencing discretion after *Booker*. Moreover, such a provision tied to a jury determination of the amount of loss (or gain) from a fraud offense would fulfill the mandate of *Apprendi* and its progeny that call for a restoration of the jury’s role in ascertaining the facts primarily relevant to sentencing.

\textsuperscript{109} See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 508 (2000) (“Normative legal argument makes sense on the assumption that lawmakers care about the merits, that the side with the better policy position has a better chance of getting its preferred rule adopted. But the legislators who vote on criminal statutes appear to be uninterested in normative arguments. To take an obvious example: for the past generation, virtually everyone who has written about federal criminal law has bemoaned its expansion. But the expansion has continued apace, under very different sorts of Congresses and Presidents. Normative argument does not seem to have mattered. One can put the point more generally: American criminal law’s historical development has borne no relation to any plausible normative theory—unless ‘more’ counts as a normative theory.”); Bowman, *Structural Analysis*, supra note 34, at 1345 (“[T]he political forces acting on Congress are so uniformly aligned in one direction—that of increasing penalties . . . being (or at least being seen to be) ‘tough on crime’ has obvious electoral advantages.”); Erwin Chemerinsky, *The Constitution and Punishment*, 56 Stan. L. Rev. 1049, 1071 (2004) (“A legislator who votes for increasing criminal penalties is unlikely to face political opposition for the choice; but being soft on criminals has obvious potential adverse consequences.”).