

## The Changing Atmospherics of Corporate Crime Sentencing in the Post-Sarbanes-Oxley Act Era

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## The Changing Atmospherics of Corporate Crime Sentencing in the Post-Sarbanes-Oxley Act Era

THE SARBANES-OXLEY ACT OF 2002<sup>1</sup> HAS BEEN VIEWED as a watershed event in dealing with corporate fraud. The law requires publicly-traded companies to adopt extensive—some say onerous<sup>2</sup>—internal controls to ensure that organizations cannot again be used to perpetrate the perceived frauds of Enron and WorldCom, regardless of whether that perception reflects reality in any way.<sup>3</sup> In response to questions about who should be held responsible to prevent the next wave of corporate fraud, Congress enhanced the power of auditors to scour corporations for possible material weaknesses and required lawyers for the first time to act as “gatekeepers” for their corporate clients.<sup>4</sup> No Congressional enactment can ever be complete without the seemingly obligatory criminal law provisions that adopt new measures to prosecute corporate miscreants and send them to jail for ever-longer prison terms.

The new criminal laws added by the Sarbanes-Oxley Act did little more than add a few arrows to the bountiful quiver of federal prosecutors—charges that can be added on top of the usual suspects of mail fraud, wire fraud, and false SEC filings in corporate prosecutions. Where the Act actually effected substantial change was in the *sentencing* of defendants convicted of committing crimes through business organizations, especially publicly-traded companies. In a direct way, the Act required the United States Sentencing Commission to ratchet up the potential sentences of defendants by adding new or increased enhancements to the sentencing calculation for fraud offenses.<sup>5</sup> Indirectly, the Sarbanes-Oxley Act changed the

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1. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

2. See Joseph Schuman, *A Corporate Oversight Rule Looks Set to be Eased*, WALL ST. J., Nov. 10, 2006.

3. Sara B. Smith, Note, *Sarbanes-Oxley Act, Section 307—The Price of Accountability: How Will Section 307 Affect the Role of the Corporate Attorney?*, 107 W. VA. L. REV. 901, 931 (2005).

4. Thomas C. Pearson & Gideon Mark, *Investigations, Inspections, and Audits in the Post-SOX Environment*, 86 NEB. L. REV. 43, 58, 62 (2007); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1402–03 (2004).

5. Sarbanes-Oxley Act §§ 903–06, 1104.

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atmosphere of criminal sentencing by signaling to federal judges that the light sentences once meted out to white collar offenders were no longer acceptable.<sup>6</sup>

An emboldened Department of Justice began pursuing executive officers of companies perceived as being enmeshed in fraud, and after the convictions, judges were more than willing to impose substantial terms of imprisonment by following the Sentencing Guidelines. Punishments that would make a few drug dealers blanch became, while not quite routine, at least within the realm of possibility for chief executive officers (CEOs) charged with leading their companies into ruin. For example, Bernie Ebbers, former CEO of WorldCom, received a twenty-five year prison term,<sup>7</sup> while former Enron CEO Jeffrey Skilling received a bit over twenty-four years.<sup>8</sup> Other CEOs who received lengthy prison terms even when their companies did not fail include the twelve-year terms for Sanjay Kumar from Computer Associates<sup>9</sup> and Walter Forbes of Cendant.<sup>10</sup> Prosecutions for leaving a company in shambles still can be seen, such as with David Stockman,<sup>11</sup> but such conduct is no longer a prerequisite for the prosecution of a senior corporate officer. Defendants like Gregory Reyes of Brocade Communications<sup>12</sup> and Conrad Black of Hollinger International<sup>13</sup> were charged with crimes without regard to the health or viability of their companies, which continue in business today.

The changed atmospherics of corporate crime sentencing is not entirely attributable to the Sarbanes-Oxley Act. A significant change in the potential severity of sentences for fraud went into force in November 2001 when the Sentencing Commission adopted changes to the Guidelines that increased the potential sentence based on the amount of the loss (or the defendant's gain).<sup>14</sup> Those changes went into effect almost at the exact time Enron started to implode,<sup>15</sup> a process that led to the adoption of the Sarbanes-Oxley Act the following year. The Act provided a strong impetus toward the substantial sentences we are now seeing in corporate crime cases, making lengthy prison terms for executives (which were once unthinkable) almost commonplace.

In this Essay, I will review briefly the additions to the federal criminal law arsenal adopted by the Sarbanes-Oxley Act, and note its more important sentencing provisions that pushed judges to give longer sentences in corporate fraud cases.<sup>16</sup> To

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6. See *United States v. Ebbers*, 458 F.3d 110, 129–30 (2d Cir. 2006).

7. *Id.* at 112.

8. Alexei Barrionuevo, *Skilling Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, at C1.

9. *Ex-Software Executive Begins Prison Term*, N.Y. TIMES, Aug. 15, 2007, at C5.

10. *Ex-Cendant Chairman Sentenced for Fraud*, N.Y. TIMES, Jan. 18, 2007, at C21.

11. *Collins & Aikman Sues David Stockman, Its Former Chief*, N.Y. TIMES, May 19, 2007, at C4.

12. *Indictment, United States v. Reyes*, 2006 WL 4686714 (N.D. Cal. 2006) (No. CR 06 0556 CRB).

13. *First Superseding Indictment, United States v. Black*, 2005 WL 4659915 (N.D. Ill. 2005) (No. 05 CR 727).

14. U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(1), cmt. n.2(B) (2001), amended by U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2002).

15. Alex Berenson, *S.E.C. Opens Investigation into Enron*, N.Y. TIMES, Nov. 1, 2001, at C4.

16. See *infra* Parts I, II.

illustrate how things have changed since the enactment of the Sarbanes-Oxley Act, I will apply a sentencing analysis to a hypothetical CEO based on the 2000 version of the Sentencing Guidelines and the 2007 version, which incorporates the effects of the Sarbanes-Oxley Act.<sup>17</sup> This comparison demonstrates just how much the Act impels judges to impose significant sentences, even after the Sentencing Guidelines became advisory and no longer bound judges to follow its prescriptions rigidly. The push for higher sentences may be abating, however, or even reversed, now that the Supreme Court has made it clear that federal judges enjoy substantial discretion in crafting sentences that need not adhere strictly to the Guidelines.<sup>18</sup> That process may well lead to lower sentences, largely ending the push for greater punishment embodied in the Sarbanes-Oxley Act.<sup>19</sup>

#### I. THE CRIMINAL PROVISIONS OF THE SARBANES-OXLEY ACT

Congress took three steps in the Sarbanes-Oxley Act to enhance criminal penalties. Specifically, Congress created new criminal offenses, increased the sentences for the fraud provisions most commonly charged in corporate crime prosecutions, and directed the Sentencing Commission to increase the potential penalties for a range of fraud offenses in the Sentencing Guidelines. The criminal provisions of the Sarbanes-Oxley Act created four new crimes and expanded the scope of one other.<sup>20</sup> The new offenses are:

- securities fraud;<sup>21</sup>
- CEO/Chief financial officer (CFO) certification;<sup>22</sup>
- destruction of records in an investigation or bankruptcy;<sup>23</sup> and
- destruction of corporate audit papers.<sup>24</sup>

Congress expanded the scope of one of the obstruction of justice provisions to clarify that it is now a crime to alter or destroy a document to make it unavailable in an investigation, or to otherwise impede an official proceeding.<sup>25</sup> These provisions were viewed by Congress as correcting gaps in the federal criminal firmament to reach the next Arthur Andersen that shreds documents, and the future CEO who perpetrates fraud by plumping up the corporate balance sheet.<sup>26</sup>

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17. See *infra* Part III.

18. *United States v. Booker*, 543 U.S. 220, 245–46 (2005); see *infra* Part IV.

19. See *infra* Part IV.

20. For a thorough review of the criminal law provisions of the Sarbanes-Oxley Act, see Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 338–43 (2007).

21. Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1348 (Supp. V 2007).

22. *Id.* § 1350.

23. *Id.* § 1519.

24. *Id.* § 1520.

25. *Id.* § 1512(c).

26. Gary G. Grindler & Jason A. James, *Please Step Away from the Shredder and the “Delete” Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67, 77–83 (2004).

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Aside from the CEO/CFO financial statement certification provision, the new laws are largely duplicative of other criminal statutes, and indeed the securities fraud provision is narrower than the often-used antifraud provisions of the federal securities laws, such as Rule 10b-5.<sup>27</sup> There have been few criminal prosecutions under these new provisions, and these offenses do not appear to have meaningfully affected prosecutors or the policing of corporations. For example, the new destruction of records provision has been used a few times, but not in corporate fraud prosecutions. Rather, the destruction of records provision has been used most prominently in child pornography cases.<sup>28</sup> Even the certification provision has not been utilized by prosecutors to any great degree, although the SEC has relied on it in civil enforcement actions.<sup>29</sup> The only significant prosecution of a CEO for allegedly certifying false financial statements was the prosecution of former Health-South CEO Richard Scrushy, who was acquitted of the charge.<sup>30</sup>

Along with the new crimes, Congress also increased the sentences for the fraud provisions' most common charges in corporate crime prosecutions. The maximum sentence for mail and wire fraud jumped from five to twenty years,<sup>31</sup> and the maximum sentence for violations of the federal securities laws, which typically involves the antifraud provision in Rule 10b-5, went from ten to twenty years.<sup>32</sup> The penalty for a conspiracy to engage in mail fraud, wire fraud, or for the violation of the new securities fraud provision is now equal to the punishment for the object offense rather than the prior five-year maximum.<sup>33</sup>

Statutory maximums are largely meaningless, however, because under the Sentencing Guidelines the actual recommended term of imprisonment is always far less.<sup>34</sup> So while it makes for a striking media report to say that a defendant faces 100 years in jail for the charges in an indictment, there is no realistic possibility that the

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27. See Phillip Wesley Lambert, Comment, *Worlds Are Colliding: A Critique of the Need for the Additional Criminal Securities Fraud Section in Sarbanes-Oxley*, 53 CASE W. RES. L. REV. 839, 851 (2003) (“[A]n examination of the language contained in [18 U.S.C. § 1348] reveals that it covers virtually identical transactions and conduct as the language in the Securities Act and Exchange Act, and in some cases, is substantially less protective of investors than its counterpart provision in the Securities Act.”).

28. See, e.g., *United States v. Wortman*, 488 F.3d 752 (7th Cir. 2007) (upholding the conviction of Amanda Wortman for violating 18 U.S.C. § 1519 (destruction of records in an investigation) when she broke a CD believed to contain child pornography).

29. See Daphne Eviatar, *Case Closed?*, LITIG. 2007: SUPP. AM. LAW. & CORP. COUNSEL, Fall 2007, at 18.

30. Betty Joan Thurber, *A Behavioral Science Analysis of Sarbanes-Oxley's Certification Requirements—The Right Kind of Deterrence?*, 7 TRANSACTIONS: TENN. J. BUS. L. 123, 140 (2005).

31. 18 U.S.C. §§ 1341, 1343 (2000 & Supp. V 2007).

32. 15 U.S.C. § 78ff(a) (2000 & Supp. V 2007).

33. 18 U.S.C. § 1349 (“Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”). A conspiracy count allowing the government to try all the corporate chieftains together is a common feature of these types of cases.

34. See Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 384 (2004) (“But in federal white-collar cases, the statutory maximum sentence for a single count of conviction usually has no relation to the maximum sentence a judge could actually impose

ultimate sentence—if there is a conviction—will be anywhere close to what Congress authorized as the highest punishment.

The third step in the process of enhancing the criminal penalties was the direction the Sarbanes-Oxley Act gave the Sentencing Commission to increase the potential penalties for a range of fraud offenses in the Sentencing Guidelines. Section 905 of the Act essentially tells the Commission to “do the right thing” in adjusting the Guidelines to increase the potential severity of sentences.<sup>35</sup> Two admonitions in particular send this message to the Commission about sentencing in corporate fraud cases:

- (1) *ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this Act, the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;*
- (2) *consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act . . . .*<sup>36</sup>

Congress could not have been much clearer in asking for increased sentences, and as the next section shows, it got what it wanted by enacting the Sarbanes-Oxley Act: significant—if not draconian—corporate fraud sentences.

## II. CHANGES IN THE SENTENCING GUIDELINES AND THE *BOOKER* EFFECT

After the adoption of the Sarbanes-Oxley Act, the Sentencing Commission took up the mandate to update the Guidelines to reflect the recommended enhanced sentences for corporate crimes. After first adopting emergency amendments in January 2003 to comply with the Act’s 180-day deadline,<sup>37</sup> the Commission adopted permanent amendments that went into effect on November 1, 2003.<sup>38</sup> These changes increased sentences on both the low end of the applicable Guidelines range and allowed for even longer sentences at the higher end of the Guidelines range.<sup>39</sup>

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because a single criminal scheme so often consists of a multitude of acts separately chargeable as federal crimes.”).

35. *Id.* at 405–07, 409–11.

36. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 905(b)(1), (2), 116 Stat. 745, 805 (codified at 18 U.S.C. § 994) (emphasis added).

37. See U.S. SENTENCING GUIDELINES MANUAL (Supp. 2003).

38. See *id.* app. C, vol. II.

39. See Bowman, *supra* note 34, at 431–32. Professor Bowman discusses the effect of Senator Joseph Biden’s insertion of a “legislative history” into the Congressional Record that suggested changes the Sentencing

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The Sentencing Commission's first step to increase prison terms for corporate crime was to increase the base offense level for a fraud offense if the crime was punishable by a term of imprisonment of twenty years or more.<sup>40</sup> This played directly into the provisions of the Sarbanes-Oxley Act that increased the sentences for mail fraud, wire fraud, and securities fraud to twenty years, thus effectively increasing the starting point for a Guidelines sentence. While a one-level increase sounds fairly innocuous, it can have the effect of increasing a sentence by as much as a year or more if the loss from the offense is significant.<sup>41</sup>

Next, the Commission added two levels to the fraud loss table, for losses greater than \$200,000,000 and \$400,000,000, with a two-level increase for each higher amount.<sup>42</sup> This change would have a significant effect on the sentences handed down in cases where a publicly-traded company collapsed due to fraud by the defendants because most such organizations will have a market capitalization greater than those amounts.<sup>43</sup>

Another step to raise sentences in corporate fraud cases was to add an additional enhancement based on a larger number of victims, with a six-level increase if there were more than 250 victims of the crime on top of the two- and four-level enhancements for more than ten and more than fifty victims, respectively.<sup>44</sup> If the shareholders of a company are the victims of the fraud, then it often will be quite easy to establish a large number harmed by the crime because most public companies have thousands of shareholders.<sup>45</sup> For securities law cases, an additional four-

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Commission should make in the Congressional Record right before the Commission decided on the amendments it would adopt in response to the Sarbanes-Oxley Act. *Id.* Professor Bowman concludes:

Senator Biden's "legislative history" is in many respects a curious document. It was written, placed into the Congressional Record, and delivered to the Sentencing Commission nine months after the Sarbanes-Oxley Act was passed, but only days before the Commission was to vote on final post-Sarbanes-Oxley amendments. It is the product of Senator Biden and his staff, not of any committee or even any group of senators. Its obvious purpose was to tell the Sentencing Commission pointedly and publicly what Senator Biden wanted them to do. Faced with the prospect that a Justice Department appeal to Congress would receive support not only from Republicans but also from a prominent Judiciary Committee Democrat, the Commission voted for a broad-based, albeit small and curiously structured, sentence increase.

*Id.* at 432.

40. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1).

41. See Bowman, *supra* note 34, at 433 ("First, though a one-base-offense-level increase may seem insignificant, it actually has profound effects on thousands of individual defendants. It bumps up the sentencing range of every federal fraud defendant by one level, thus increasing the minimum guideline sentence of defendants subject to imprisonment by roughly ten percent.").

42. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2003).

43. See UNITED STATES SENTENCING COMM'N, REPORT TO CONGRESS: INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002 6 (2003). The Commission also included as a new factor for determining loss in a corporate fraud case a reduction in the value of equity securities or other corporate assets that resulted from the offense. *Id.* at 6 n.4. Thus, the loss calculation was expanded to include not just direct harm to the business, but also the more indirect harm to investors by looking to any effect on the market price of the securities.

44. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2).

45. See, e.g., MERGENT FIS, INC., HANDBOOK OF DIVIDEND ACHIEVERS (Brad A. Armbruster ed., 2000) (revealing the number of shareholders and other institutional information for Abbott Laboratories).

level enhancement applies if, at the time of the offense, the defendant was an officer or director of a publicly-traded company.<sup>46</sup> Unlike other enhancements that are more broadly based, this enhancement is limited to prosecutions involving a conviction for violating the federal securities laws.<sup>47</sup>

These changes to the Sentencing Guidelines occurred before the Supreme Court's decision in *United States v. Booker*<sup>48</sup> that changed them from being mandatory to advisory.<sup>49</sup> Two recent opinions applying *Booker* show the continuing battle over how the Guidelines will be applied. In *Rita v. United States*,<sup>50</sup> the Court held that a within-Guidelines sentence can be accorded a presumption of reasonableness by a court of appeals reviewing the district court's punishment determination, at least in what it called the "mine run of cases."<sup>51</sup> In *Gall v. United States*,<sup>52</sup> the Court determined that a sentence *outside* the prescribed Guidelines parameters is not subject to special scrutiny so long as the district court reasonably justified the ultimate sentence.<sup>53</sup> Further, appellate review of non-Guidelines sentences is limited to whether the district court abused its discretion, a particularly forgiving standard that will encourage judges to consider individual factors rather than focusing solely on the Guidelines.<sup>54</sup> District court judges now have much greater flexibility in

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46. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(14)(A).

47. *Id.* Enhancements already in the Guidelines were adjusted to cover the types of corporate collapses that triggered the passage of the Sarbanes-Oxley Act. For example, an existing enhancement for endangering the safety and soundness of a financial institution, which dates back to the savings and loan crises of the early 1990s, was expanded to include offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1,000 or more employees. *Id.* § 2B1.1(b)(12)(B). Along the same lines, if the crime substantially endangered the solvency or financial security of 100 or more victims, regardless of whether a publicly traded company or other organization was affected by the offense, then the same four-level enhancement applies. *Id.* The rationale for these provisions is that crimes require a longer sentence when they jeopardize the financial security of a significant number of people. Of course, if the crime has such a significant effect on a company's financial position, the amount of the loss likely will be substantial, already triggering a significant sentence under the Guidelines. Ultimately, these enhancements likely serve to make a significant sentence even longer, perhaps reaching life imprisonment for a financial crime in which there was no threat to public safety. *See id.*

48. 543 U.S. 220 (2005).

49. *Id.* at 245.

50. 127 S. Ct. 2456 (2007).

51. *Id.* at 2465. The Court stated:

An individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission's judgment in general . . . . [T]he courts of appeals' "reasonableness" presumption, rather than having independent legal effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.

*Id.*

52. 128 S. Ct. 586 (2007).

53. *Id.* at 591.

54. The Court set forth the following standard for all sentencing after *Booker*:

Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he

deciding what sentence to impose than at any time since the adoption of the Guidelines in 1987, but still “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”<sup>55</sup> Thus, the Guidelines remain the starting point of the sentencing process.

### III. A HYPOTHETICAL SECURITIES FRAUD INVOLVING CORPORATE EXECUTIVES

To understand the effect of the various changes adopted in response to the demands for increased sentences embodied in the Sarbanes-Oxley Act, the following hypothetical scenario will be used to analyze how comparable conduct would be treated under the 2000 version and current version of the Guidelines. This illustrates the true effect of the Sarbanes-Oxley Act on the criminal law. As will be shown, the potential sentence in a securities fraud case could equal or exceed what the Guidelines call for in a drug case involving a significant amount of narcotics or child sexual abuse prosecution. After reviewing the scenario, I consider whether the Supreme Court’s recent decision in *Gall* may reverse, at least in part, the trend toward greater sentences generated by the Sarbanes-Oxley Act.

The hypothetical case involves the CEO of a company, Bronco Communications Corp. (BCC), whose stock is traded on the New York Stock Exchange. BCC owns television and radio stations in smaller markets throughout the United States. The CEO, with the board’s approval, decides to sell a number of radio stations due to weakening revenue. Revenue is decreasing because satellite radio services are drawing away listeners from terrestrial radio, and marketers are advertising on the internet rather than in traditional media outlets. The CEO agrees to deals to sell seven stations in the Pacific Northwest to one company, and eleven stations in the Mid-Atlantic area to another company. The CEO and three senior executives, who were responsible for the sale negotiations, ask each of the purchasing companies to insert a clause in the contracts that apports three million dollars from each deal as a payment for a “non-compete” agreement, under which a private company controlled by the CEO and the executives agrees not to purchase a competing radio station in the same markets as the stations being sold. The payment will be made directly to the private company, and the deal agreement makes reference to the payment, but not the recipient. In a presentation to BCC’s board of directors recommending the deals, the CEO generally refers to the non-compete agreements,

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decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

*Id.* at 596–97.

55. *Id.* at 596.

but does not explain that the money will go to a company that he and the other executives own.

Two years after approving the transactions, an internal auditor raises questions about who received the two non-compete payments. A review by the audit committee leads to an investigation by outside counsel, revealing the payments to the private company. The private company's records show that the CEO received half the total payments, and the other three executives split the remaining three million dollars. The BCC board terminates the four executives, and federal prosecutors file charges against the four executives for securities fraud, (based on false financial statements filed by the company that did not reflect the true nature of the non-compete payments), mail fraud (for defrauding BCC), and conspiracy. One defendant pleads guilty and agrees to testify for a reduced sentence of two years, and the three remaining defendants are convicted on all counts after trial.<sup>56</sup>

Under the 2000 Guidelines, the following would be the major components of the sentencing calculation under section 2F1.1, which applies to fraud offenses:

- Base Offense Level: 6.
- Loss Enhancement: 14 (based on a \$6 million loss, or alternatively the defendants' gain from the fraudulent scheme).
- More Than Minimal Planning: 2.
- Abuse of a Position of Trust: 2.<sup>57</sup>

Using an Offense Level of 24, the sentencing range provided in the Guidelines' Sentencing Table is fifty-one to sixty-three months if the defendants are in Criminal History Category I, which is usually a safe assumption in white collar crime cases involving corporate executives.<sup>58</sup> In addition, if any of the defendants testified at trial and denied that they intended to engage in a scheme to defraud, then after the conviction the government usually would seek a two-level enhancement for obstruction of justice.<sup>59</sup> If applied in this case, the resulting sentencing range would be sixty-three to seventy-eight months.<sup>60</sup>

Under the 2007 Guidelines, which incorporate both the 2001 changes to the fraud loss table and the enhancements adopted in response to the Sarbanes-Oxley Act, a much more severe sentence will be available under section 2B1.1:

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56. The scenario is very loosely based on the prosecution of Lord Conrad Black, the former CEO of Hollinger International, and three former executives of the company for siphoning funds from deals by the company through non-compete payments. See Tim Arango, *Black Given Prison Term Over Fraud*, N.Y. TIMES, Dec. 11, 2007, at C1. I have made the facts more clearly a criminal violation to facilitate the Sentencing Guidelines analysis.

57. U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(a) (2000).

58. See *id.* sentencing tbl.

59. *Id.* § 2F1.1(b)(4)(C).

60. See *id.* sentencing tbl.

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- Base Offense Level: 7 (assuming the violation occurred after the adoption of the Sarbanes-Oxley Act's increase in the maximum punishment for mail fraud and securities violations).
- Loss Enhancement: 18 (based on a \$6 million loss, or alternatively the defendants' gain from the fraudulent scheme).
- Sophisticated Means: 2.
- Public Company Officer: 4.<sup>61</sup>

Using an Offense Level of 31, the sentencing range provided in the Guidelines' Sentencing Table is 108 to 135 months.<sup>62</sup> In addition, there are two other enhancements added by the Sarbanes-Oxley Act that could come into play in a corporate crime case such as this. First, if there are more than 250 victims, which could include the shareholders of BCC, then a six-level enhancement can be added.<sup>63</sup> Second, a four-level enhancement can be applied if the crime threatened the financial security of a public company or 100 individuals, which could happen in a case involving the diversion of assets and filing of false financial statements.<sup>64</sup> If the Offense Level was 35, then the sentencing range would be 168 to 210 months,<sup>65</sup> while an Offense Level of 37 triggers a 210 to 262 month sentence.<sup>66</sup> Should both enhancements be applied, which could occur in a future Enron or WorldCom scenario, then the sentencing range would stretch from 300 months to life imprisonment.

The effect of the Sarbanes-Oxley Act on sentencing in corporate crime cases under the Sentencing Guidelines is clear. The sentencing range for fraud offenses since 2001 has at least doubled, and depending on whether the court applies additional enhancements now available for substantial economic crimes, the defendant could face anywhere from twenty years to life in prison. These sentencing ranges are similar to what defendants receive for promoting sexual activity with minors under section 2G1.3,<sup>67</sup> or trafficking in narcotics under section 2D1.1.<sup>68</sup> Can it be that a CEO engaged in accounting fraud or diversion of corporate assets should be punished the same as a person distributing a half-kilo of heroin or seeking to entice a minor over the internet?

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61. *Id.* § 2B1.1.

62. U.S. SENTENCING GUIDELINES MANUAL sentencing tbl. (2007).

63. *Id.* § 2B1.1(b)(2)(C).

64. *Id.* § 2B1.1(b)(13)(B).

65. *Id.* § 5A.

66. *Id.*

67. *Id.* § 2G1.3.

68. *Id.* § 2D1.1.

IV. RESTORING DISCRETION IN SENTENCING AFTER *BOOKER*

Newton's third law of physical motion is that for every action there is an equal and opposite reaction.<sup>69</sup> The Sarbanes-Oxley Act was an effort to rein in some of the more aggressive practices in American business by strengthening the roles of various gatekeepers—directors, accountants, and lawyers—and requiring corporations to adopt much more stringent internal monitoring to ensure there would be no more meltdowns like Enron and WorldCom.<sup>70</sup> Any requirement that companies institute greater internal controls entails significant costs, and there has been a strong push to roll back certain parts of the Act because of the purported negative effects on the capital markets in the United States.<sup>71</sup>

The criticism has not been limited to the corporate governance provisions, with questions being raised about whether corporations and their officers should be prosecuted for what some term as business decisions.<sup>72</sup> The message behind the new criminal laws and increased sentences for corporate fraud in the Sarbanes-Oxley Act was that corporate chieftains, once viewed perhaps as immune to criminal prosecution, should be the focal point of investigations and prosecutions.<sup>73</sup> Punishments akin to what drug dealers and child pornographers can receive because a distinct possibility for corporate executives. Whether a CEO should be viewed as posing the same threat to society as a drug dealer is an open question.

While not strictly Newtonian in response, the Supreme Court's recent sentencing jurisprudence creates the possibility of an opposing reaction to the increased punishments that the Sarbanes-Oxley Act authorized that may effectively change the white collar crime sentencing atmospherics once again. The Sentencing Guidelines deprived federal judges of most of the unfettered discretion they exercised until 1987 in sentencing defendants by requiring courts to apply a prescribed set of rules to calculate a score that was then plugged into a grid to produce a narrow range for a prison sentence.<sup>74</sup> While not completely mechanical, it was a system that treated the judges more as tellers or scribes and less like dispensers of just punishments.

69. Sir Isaac Newton, *Mathematical Principles of Natural Philosophy*, in *THE AGE OF REASON* 108 (Louise L. Snyder ed., 1955).

70. Lynn Stephens & Robert G. Schwartz, *The Chilling Effect of Sarbanes-Oxley: Myth or Reality?*, CPA J., June 2006, available at <http://www.nysscpa.org/printversion/cpaj/2006/606/p14.htm>.

71. Sarah Johnson, *Sarbox Rollback Report Due November 30*, CFO.COM, Nov. 22, 2006, [http://www.cfo.com/printable/article.cfm/8313658/c\\_2984368?f=options](http://www.cfo.com/printable/article.cfm/8313658/c_2984368?f=options). See generally COMM. ON CAP. MKTS. REG., *THE COMPETITIVE POSITION OF THE U.S. PUBLIC EQUITY MARKET* (Dec. 4, 2007).

72. See Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1487 (2006) ("As concerns about the costs and effectiveness of criminal liability and the Sarbanes-Oxley Act of 2002 increase, public demand may build for alternative accountability mechanisms." (citation omitted)).

73. See, e.g., Ann Marie Tracey & Paul Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging: The Criminalization of the Sarbanes-Oxley Act*, 25 N. ILL. U. L. REV. 125, 131 (2004) (commenting on how Sarbanes-Oxley laws are designed to provide prosecutors with the tools to prosecute those who would defraud investors).

74. See generally Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 LAW &

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In 2000, the Supreme Court's decision in *Apprendi v. New Jersey*<sup>75</sup> started a trend toward restoring a measure of the discretion judges should have in sentencing when a jury makes a limited decision on the defendant's guilt without detailed findings to guide a court on what factors should go into the punishment.<sup>76</sup> When the Court held that the Guidelines were no longer mandatory in *United States v. Booker*,<sup>77</sup> the question simply became whether federal district judges would have real discretion in sentencing, or whether the Guidelines still would be the dominant motif for apportioning punishment.

In *Gall v. United States*,<sup>78</sup> the Court made it clear that trial judges have the ultimate control over sentencing, subject to limited appellate review.<sup>79</sup> While the Guidelines "should be the starting point and the initial benchmark" in a sentencing decision, the judge "must make an individualized assessment based on the facts presented."<sup>80</sup> Unlike the more mechanical Guidelines process, federal judges now should "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."<sup>81</sup> *Gall* could not be clearer that the mechanistic force of the Guidelines are to be tempered, and perhaps even dissipated, by the discretion of federal judges who can choose to follow—or ignore—they so long as the decision is reasonably well explained.<sup>82</sup> After *Gall*, appellate courts are to apply the abuse-of-discretion standard, an approach that affords trial judges wide latitude to decide on appropriate sentences.<sup>83</sup>

The upward trend in sentencing since the Sarbanes-Oxley Act may abate, and indeed perhaps even may be reversed due to the influence that *Gall* may have on district courts. The recent sentencing of three former executives of Hollinger International illustrates how lower sentences may become the norm in corporate fraud cases.<sup>84</sup> Lord Conrad Black, Hollinger's former CEO, and three others, Peter Atkinson, Jack Boulton, and Mark Kipnis, were convicted in July 2007 for their roles in diverting from the company funds related to the sale of assets under the guise of

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Soc'y Rev. 789 (1997) (noting that the Sentencing Guidelines were developed to remove judicial discretion in sentencing).

75. 530 U.S. 466 (2000).

76. *Id.* at 497.

77. 543 U.S. 220, 245 (2005).

78. 128 S. Ct. 586 (2007).

79. *Id.* at 596–97.

80. *Id.* at 597.

81. *Id.* at 598 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

82. *Id.* at 596–97.

83. *Id.* at 597. In explaining how the focus is on the sentence and not just the Guidelines, the Court stated, "[i]f the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness." *Id.* (citations omitted).

84. See Leonard N. Fleming & Abdon M. Pallasch, *6 1/2 Years, No Remorse; British Lord Headed to Prison for Fraud After Lecture from Judge*, CHI. SUN-TIMES, Dec. 11, 2007, at 6.

non-compete agreements.<sup>85</sup> The recommended Guidelines sentences for Atkinson, Boulton, and Kipnis ranged from about three to almost five years, even using the more favorable 2000 version of the Guidelines, based on a \$6.1 million loss.<sup>86</sup> But the sentencing occurred the very day the Supreme Court announced its decision in *Gall*, restoring significant discretion to district judges.<sup>87</sup> Rather than apply the Guidelines' sentences, the court sentenced the defendants to twenty-four months (Atkinson),<sup>88</sup> twenty-seven months (Boulton),<sup>89</sup> and probation (Kipnis).<sup>90</sup> Only Lord Black, the CEO, received a sentence within the recommended Guidelines range at six and one-half years.<sup>91</sup> Prior to *Gall*, I would have expected the judge to adhere fairly closely to the Guidelines, and if a below-Guidelines sentence were imposed, then I suspect the prosecutors would have appealed, particularly the grant of probation. Now, it is unlikely that the government will take the time to appeal these sentences because the chances of success are almost nil in light of the abuse of discretion standard. These sentences indicate that federal judges can be expected to use their discretion in sentencing, which in many cases will result in lower sentences.

#### V. CONCLUSION

*Gall* may well be a harbinger of significant changes in the sentencing atmospherics in corporate crime cases.<sup>92</sup> The new criminal provisions adopted in the Sarbanes-Oxley Act will remain, but they are largely meaningless given the broad array of statutes that can be used to reach corporate misconduct. The Guidelines are now truly advisory, and over time I suspect they will have less sway over federal judges, who will use their new-found discretion to individualize sentences. That process of focusing on the individual likely means sentences in white collar crime cases will on the whole be lower in the future. White collar defendants are almost by nature the type of appealing person who can sway a judge to be a bit more forgiving. These defendants are, quite often, just like the judge in terms of social status, background, and interests. Moreover, they can often muster a large number of supporting letters to attest to their prior good works and upstanding community reputation.<sup>93</sup> These defendants are rarely recidivists, and pose virtually no threat to

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85. *Id.*

86. See U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(1)(O) (2000) (recommending an increase of fourteen levels for a loss of more than \$5,000,000).

87. See *Gall*, 128 S. Ct. 586; see also Fleming & Pallasch, *supra* note 84, at 6.

88. Fleming & Pallasch, *supra* note 84, at 6.

89. *Id.*

90. *Id.*

91. *Id.*

92. See *supra* notes 52–55 and accompanying text.

93. David Louis Raybin, *Letters of Support in Criminal Sentencing Hearings*, TENN. B.J., July 2006, at 30.

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the safety of the community<sup>94</sup>—most would welcome them as neighbors and members of the local community. So is this the beginning of the end of the pervasive influence of the Sarbanes-Oxley Act on sentencing in corporate criminal cases?

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94. See Carl Emigholz, *Utilitarianism, Retributivism and the White-Collar Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement*, 58 RUTGERS L. REV. 583, 610 (2006) (commenting on how white collar offenders are ordinarily good citizens in the community).