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**SENTENCING THE WOLF OF WALL STREET:
FROM LENIENCY TO UNCERTAINTY**

LUCIAN E. DERVAN[†]

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ABSTRACT

This Article, based on a presentation given by Professor Dervan at the 2014 *Wayne Law Review* Symposium, examines the Jordan Belfort (“Wolf of Wall Street”) prosecution as a vehicle for analyzing sentencing in major white-collar criminal cases from the 1980s until today. In Part II, the Article examines the Belfort case and his relatively lenient prison sentence for engaging in a major fraud. This section goes on to examine additional cases from the 1980s, 1990s, and 2000s to consider the results of reforms aimed at “getting tough” on white-collar offenders. In concluding this initial examination, the Article discusses three observed trends. First, today, as might be expected, it appears there are much longer sentences for major white-collar offenders as compared to the 1980s and 1990s. Second, today, there also appears to be greater uncertainty and inconsistency regarding the sentences received by major white-collar offenders when compared with sentences from the 1980s and 1990s. Third, there appear to have been much smaller sentencing increases for less significant and more common white-collar offenders over this same period of time. In Part III, the Article examines some of the possible reasons for these observed trends, including amendments to the Federal Sentencing Guidelines, increased statutory maximums, and judicial discretion. In concluding, the Article offers some observations regarding what the perceived uncertainty and inconsistency in sentencing major white-collar offenders today might indicate about white-collar sentencing more broadly. In considering this issue, the Article also

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briefly examines recent amendments adopted by the U.S. Sentencing Commission and proposed reforms to white-collar sentencing offered by the American Bar Association.

I. INTRODUCTION

During the 1990s, Jordan Belfort led Stratton Oakmont Inc., a Long Island brokerage firm described by prosecutors in 1998 as “the most infamous boiler-room firm in recent memory.”¹ According to federal prosecutors, Belfort and others at the firm engaged in an audacious multi-year stock manipulation scheme involving at least thirty-four companies.² Through these actions, alleged prosecutors, Jordan Belfort, who has now popularly come to be known as the “Wolf of Wall Street,” defrauded investors out of over \$200 million.³ In 1998, Belfort was indicted on securities fraud and money laundering charges in the Eastern District of New York.⁴ He eventually pleaded guilty, cooperated with authorities, and received a prison sentence of almost four years.⁵ In the end, however, Belfort served just twenty-two months in a federal prison camp in Taft, California.⁶ In a style commensurate with the image Belfort created with the Wolf of Wall Street, he shared a bunk with

1. See Edward Wyatt, *Stratton Oakmont Executives Admit Stock Manipulation*, N.Y. TIMES, (Sept. 24, 1999), <http://www.nytimes.com/1999/09/24/business/stratton-oakmont-executives-admit-stock-manipulation.html>; see also JORDAN BELFORT, *THE WOLF OF WALL STREET* (2007).

2. See Wyatt, *supra* note 1.

3. See *id.* (“In most cases, the shares sold to the public by Stratton Oakmont are now worthless.”); see also Christina McDowell, *An Open Letter to the Makers of The Wolf of Wall Street, and the Wolf Himself*, L.A. WEEKLY, (Dec. 26, 2013), <http://www.laweekly.com/news/an-open-letter-to-the-makers-of-the-wolf-of-wall-street-and-the-wolf-himself-4255219> (“Belfort’s victims . . . don’t have a chance at keeping up with the Joneses. They’re left destitute, having lost their life savings at the age of 80. They can’t pay their medical bills or help send their children off to college because of characters like the ones glorified in Terry Winters’ screenplay.”); Sheelah Kolhatkar, *Jordan Belfort, The Real Wolf of Wall Street*, BLOOMBERG BUS. (Nov. 7, 2013, 3:41 PM), <http://www.bloomberg.com/news/articles/2013-11-07/jordan-belfort-the-real-wolf-of-wall-street>; *Penny-Stock Profiteer Turns Witness*, L.A. TIMES, (Oct. 30, 2000), <http://articles.latimes.com/2000/oct/30/news/mn-44164> (“Belfort estimates he cheated investors out of as much as \$200 million in the early 1990s. He spent his \$55-million profit on a 166-foot yacht--which sank--a \$175,000 sports car, prostitutes, gambling sprees and drugs for his gaggle of Gen-X pitchmen.”).

4. See Kolhatkar, *supra* note 3. (“Stratton employed more than 1,000 brokers at its peak, before the Securities and Exchange Commission shut down the company and the FBI arrested Belfort, in 1998.”)

5. See *id.*

6. See *id.*

Tommy Chong, of the Cheech and Chong comedy duo, during his incarceration.⁷

In today's world of centuries-long white-collar sentences, twenty-two months for a fraud involving hundreds of millions of dollars seems outrageous.⁸ At the time of the Belfort prosecution, however, sentences in this range were consistently handed out in major white-collar prosecutions.⁹ Through examination of the Jordan Belfort case and similar fraud prosecutions from the 1980s until today, this Article, which is based on a presentation by the author at the 2014 *Wayne Law Review* Symposium, analyzes white-collar sentencing from the perspective of where we once were, where we have gone, and where we might be moving in the future.¹⁰

Part II of this Article examines the Belfort case and his relatively lenient prison sentence for engaging in a major fraud. This section goes on to examine additional cases from the 1980s, 1990s, and 2000s to consider the results of reforms aimed at "getting tough" on white-collar offenders. In concluding this initial examination, the article discusses

7. See Joanna Robinson, *The Real Wolf of Wall Street, Jordan Belfort, Call Prison a "Boy's Club" and "Totally Mellow"*, VANITY FAIR, (Feb. 27, 2014), <http://www.vanityfair.com/vf-hollywood/jordan-belfort-prison-boys-club> ("Belfort had Tommy Chong (of *Cheech and Chong* fame) for a bunkmate and says the whole experience was 'completely mellow.' He says, 'I played tennis three hours a day, and I'd write for maybe 12. How's that for justice?"). For a discussion of the "Real Wolf of Wall Street" by the prosecutor in the case, see Joel M. Cohen, *The Real Belfort Story Missing from "Wolf" Movie*, N. Y. TIMES DEALBOOK (Jan. 7, 2014), http://dealbook.nytimes.com/2014/01/07/the-real-belfort-story-missing-from-wolf-movie/?_php=true&_type=blogs&_r=1.

8. See Diana Henriques, *Madoff Sentenced to 150 Years for Ponzi Scheme*, N. Y. TIMES (June 29, 2009), <http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all> ("Mr. Madoff . . . stood impassively as Federal District Judge Denny Chin condemned his crimes as 'extraordinarily evil' and imposed a sentence that was three times as long as the federal probation office suggested and more than 10 times as long as defense lawyers had requested.").

9. See *infra* Part II.

10. It is important to note that this Symposium Article is based on a presentation by the author at the *Wayne Law Review* 2014-15 Symposium entitled "Sentencing White Collar Defendants: How Much is Enough?" In preparing both his remarks and this Article, the author did not undertake a large-scale empirical examination of white-collar cases from the 1980s until today. Rather, the author examined several dozen cases and made observations based on these cases, along with his experience and knowledge of white-collar sentencing generally. While many comments from judges, academics, and practitioners made during the Symposium supported the validity of these observations, further empirical study must be conducted to validate the accuracy of these observations. The observations serve here, however, as a starting point to further our discussion of these important sentencing issues and begin a dialogue that encourages further exploration and study of these issues.

three observed trends. First, today, as might be expected, it appears there are much longer sentences for major white-collar offenders as compared to the 1980s and 1990s. Second, today, there also appears to be greater uncertainty and inconsistency regarding the sentences received by major white-collar offenders when compared with sentences from the 1980s and 1990s. Third, there appears to have been much smaller sentencing increases for less significant and more common white-collar offenders over this same period of time. In Part III, the Article examines some of the possible reasons for these observed trends, including amendments to the Federal Sentencing Guidelines, increased statutory maximums, and judicial discretion. In Part IV, the Article offers some observations regarding what the perceived uncertainty and inconsistency in sentencing major white-collar offenders today might indicate about white-collar sentencing more broadly. In considering this issue, the article also briefly examines recent amendments adopted by the U.S. Sentencing Commission and proposed reforms to white-collar sentencing offered by the American Bar Association.

A. Revisiting White-Collar Sentencing from the 1980s Until Today

The idea of focusing enforcement efforts on the activities of Wall Street came to prominence in the 1980s, as reflected in the movie *Wall Street*.¹¹ In fact, one of the main characters from the movie *Wall Street*, Gordon Gekko, was based on the activities of infamous inside trader Ivan Boesky.¹² Boesky was once considered one of the most powerful individuals on Wall Street and a master stock speculator.¹³ According to the government, however, Boesky's success was less a result of skill and more a result of his participation in "unlawful agreements with others in order to trade in securities on the basis of inside information and to avoid certain regulatory restrictions on his brokerage business."¹⁴ These illegal

11. WALL STREET (Twentieth Century Fox 1987); see also *Wall Street* (1987), IMDb, <http://www.imdb.com/title/tt0094291> (last visited Mar. 10, 2015) (providing information regarding the film).

12. Myles Meserve, *Meet Ivan Boesky, The Infamous Wall Streeter Who Inspired Gordon Gekko*, BUS. INSIDER (Jul. 26, 2012), <http://www.businessinsider.com/meet-ivan-boesky-the-infamous-wall-streeter-who-inspired-gordon-gecko-2012-7> ("Ivan Boesky is the money-loving inside trader whose behavior in the 1980s inspired the famous fictional *Wall Street* character Gordon Gekko").

13. James Sterngold, *Boesky Sentenced to 3 Years in Jail in Insider Scandal*, N.Y. TIMES (Dec. 19, 1987), <http://www.nytimes.com/1987/12/19/business/boesky-sentenced-to-3-years-in-jail-in-insider-scandal.html>.

14. Memorandum for Government at 2, *United States v. Boesky*, 674 F. Supp. 1128 (S.D.N.Y. 1987) (No. 87 CR. 378), available at <http://3197d6d14b5f19f2f440->

securities activities allegedly netted Boesky over \$80 million in profits.¹⁵ Boesky was eventually charged in the matter, and pleaded guilty to conspiring to file false stock trading records.¹⁶ Boesky, who cooperated extensively in the government's investigation and prosecution of others involved in insider trading schemes, was sentenced to three years in prison.¹⁷ According to the federal prosecutor in the case, Rudy Giuliani, the sentence was "a heavy" one that "amply satisfies both important policy goals: to deter white-collar crime and to encourage people to cooperate in revealing serious criminal activity."¹⁸ These sentiments were echoed by the judge in the case, who stated during sentencing, "Some kind of message must be sent to the business community that such activities cannot be wholly repaired simply by repaying people after the fact."¹⁹ Boesky was released after serving just twenty-two months in prison, the exact same amount of time Jordan Belfort served.²⁰

A similar example of a major white-collar criminal prosecution and sentencing from the 1980s era is the case of Michael Milken, known as the "Junk Bond King."²¹ Milken was well known on Wall Street at the time as a leading dealer in junk bonds, which are bonds that carry a high

5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1987_1214_BoeskySentencingGovernmentT.pdf.

15. See Sterngold, *supra* note 13 (noting that Boesky paid a \$100 million fine to the SEC).

16. *See id.*

17. *See id.*

18. *See Boesky Gets 3-Year Prison Term for Insider Trading*, ASSOCIATED PRESS, Dec. 20, 1987, http://articles.latimes.com/1987-12-20/news/mn-29960_1_guilty-plea.

19. *See id.*; *see also* Sterngold, *supra* note 13 ("Ivan Boesky's offense cannot go unpunished," Judge Lasker said. 'Its scope was too great, its influence too profound, its seriousness too substantial merely to forgive and forget.' 'Recent history has shown that the kind of erosion of morals and standards and obedience to the law involved in a case such as this is unhappily widespread in both business and government,' he added. 'The time has come when it is totally unacceptable for courts to act as if prison is unthinkable for white-collar defendants but a matter of routine in other cases. Breaking the law is breaking the law.'" (quoting Judge Lasker)).

20. *See* Chad Bray and Rob Barry, *Long Jail Terms on Rise*, WALL ST. J. (Oct. 13, 2011),

<http://www.wsj.com/articles/SB10001424052970204774604576626991955196026>; *see also Boesky Gets 3-Year Prison Term for Insider Trading*, *supra* note 18 ("U.S. Atty. Rudolph Giuliani said after the sentencing that Boesky would be eligible for parole after serving one-third of his sentence but will most likely serve 22 months to 24 months. He said no determination has been made on where Boesky will serve his sentence.").

21. *Milken Gets 10 Years: Must Serve One-Third of Sentence*, L.A. TIMES (Nov. 21, 1990), http://articles.latimes.com/1990-11-21/news/mn-4764_1_michael-milken.

rate of default but, in return, much higher yields.²² According to authorities, Milken profited from various illegal securities activities, including filing false statements to government regulators and inflating the price of a stock.²³ He eventually pleaded guilty to six felony charges of securities fraud and conspiracy and agreed to pay a \$600 million fine.²⁴ Milken had earlier agreed to establish a \$400 million restitution fund for the victims of his schemes.²⁵ In sentencing Milken, the judge stated, “I believe that a prison term is required for the purposes of general deterrence.”²⁶ She went on to say that the offense was a serious one, “warranting serious punishment and the discomfort of being removed from society.”²⁷ Milken was sentenced to ten years in prison, though he eventually served twenty-four months, only slightly longer than the prison sentence of Boesky.²⁸

While the sentences Boesky and Milken received in the 1980s appear to be common for major white-collar offenders who pleaded guilty and cooperated during this era, those who went to trial did not fare as well. As two examples, consider the cases of Charles Keating and Barry Minkow. Each received significantly longer prison sentences, despite their cases having many similarities to Boesky’s and Milken’s.²⁹

Charles Keating became a symbol of the 1980s’ \$150 billion savings and loan crisis.³⁰ Keating’s link to the scandal began in 1984 when he

22. See Kurt Eichenwald, *Milken Defends ‘Junk Bonds’ as he Enters His Guilty Plea*, N.Y. TIMES (April 25, 1990), <http://www.nytimes.com/1990/04/25/business/milken-defends-junk-bonds-as-he-enters-his-guilty-plea.html>.

23. See *id.*

24. See *id.*

25. See *The Milken Sentence; Excerpts from Judge Wood’s Explanation of the Milken Sentencing*, N.Y. TIMES (Nov. 22, 1990), <http://www.nytimes.com/1990/11/22/business/milken-sentence-excerpts-judge-wood-s-explanation-milken-sentencing.html> (describing that the defendant has established a \$400 million restitution fund for the victims of his crimes).

26. *Milken Gets 10 Years*, *supra* note 21.

27. See *id.*; see also *The Milken Sentence*, *supra* note 25 (“Your crimes show a pattern of skirting the law, stepping just over to the wrong side of the law in an apparent effort to get some of the benefits from violating the law without running a substantial risk of being caught.”).

28. See Pat Widder, *Cut in Milken Sentence Draws Fire*, CHI. TRIB. (Aug. 6, 1992), http://articles.chicagotribune.com/1992-08-06/business/9203100898_1_michael-r-milken-boesky-and-milken-fellow-inmates (“He had been expected to be jailed for three to four years. But Wood’s ruling Wednesday granting his request for sentence reduction will cut his prison time to 24 months . . .”).

29. See *infra* notes 30–46 and accompanying text.

30. See Robert D. McFadden, *Charles Keating, 90, Key Figure in ‘80s Savings and Loan Crisis, Dies*, N.Y. TIMES (April 2, 2014), <http://www.nytimes.com/2014/04/02/business/charles-keating-key-figure-in-the-1980s-savings-and-loan-crisis-dies-at-90.html>.

purchased the Lincoln Savings & Loan in Irvine, California.³¹ After taking control of the association, Keating allegedly engaged in a series of risky investments and violations of federal restrictions on outside investment of funds.³² At the same time, he paid himself and his family \$34 million in salary, bonuses, and stock.³³ Eventually, Lincoln Savings & Loans became insolvent and, in April 1989, federal authorities raided the company, and the company entered into bankruptcy.³⁴ As a result of the collapse, tens of thousands of people lost their savings.³⁵ Eventually, Keating was convicted at trial of federal racketeering, fraud, and conspiracy charges.³⁶ He was sentenced to twelve years in prison, though he only served fifty months before his sentence was overturned on appeal.³⁷ Prior to his federal retrial, Keating and the government reached an agreement and he pleaded guilty in return for a sentence of time served.³⁸ When compared with the sentences of those who pleaded guilty during the 1980s, such as Boesky and Milken, Keating's original sentence of ten years and even his negotiated sentence of fifty months are significantly longer.

Another example from the 1980s of a defendant convicted at trial receiving a remarkably longer sentence than those who pleaded guilty in similar cases is Barry Minkow. Minkow began an after-school cleaning business when he was just fifteen years old and eventually turned the enterprise into a \$100 million carpet-cleaning empire.³⁹ In 1988, however, the government charged Minkow with multiple counts of

31. *See id.*

32. *See id.*; *see also* Matt Schudel, *Charles H. Keating Jr., Central Figure in Savings-and-Loan Scandal, Dies at 90*, WASH. POST (April 2, 2014), http://www.washingtonpost.com/national/charles-h-keating-jr-central-figure-in-savings-and-loan-scandal-dies-at-90/2014/04/02/a53cf6f6-ba81-11e3-9c3c-311301e2167d_story.html.

33. *See* Schudel, *supra* note 32.

34. *See id.*

35. *See* Nathaniel C. Nash, *Collapse of Lincoln Savings Leaves Scars for Rich, Poor and the Faithful*, N.Y. TIMES (Nov. 30, 1989), <http://www.nytimes.com/1989/11/30/us/collapse-of-lincoln-savings-leaves-scars-for-rich-poor-and-the-faithful.html>.

36. *See* McFadden, *supra* note 30.

37. *See* Charles Keating, *Financier at Center of Savings and Loans Scandal, Dead at Age 90: Media Reports*, REUTERS, (Apr. 1, 2014), <http://www.reuters.com/article/2014/04/02/usa-charles-keating-idUSL1N0MU08820140402>.

38. *See id.*

39. *See* *Fraud Trial Begins on ZZZZ Best*, N.Y. TIMES (Aug. 24, 1988), <http://www.nytimes.com/1988/08/24/business/fraud-trial-begins-on-zzzz-best.html>; Bray, *supra* note 20.

securities fraud, credit card fraud, and mail fraud.⁴⁰ According to the prosecution, Minkow encouraged investment in his company by creating fictitious building renovation deals.⁴¹ The government alleged that he went as far as to take investors on “tours” of fake renovation sites.⁴² In 1988, Minkow was convicted at trial and sentenced to twenty-five years in prison.⁴³ He was also required to pay \$26 million in restitution.⁴⁴ At the sentencing, the judge stated, “You’re dangerous because you have this gift of gab, this ability to communicate You don’t have a conscience.”⁴⁵ Though Minkow was actually released from prison in 1995, his seven-and-a-half years in prison is still significant when compared to the prison sentences of Boesky and Milken.⁴⁶

The same pattern of lenient sentences for major white-collar defendants who pleaded guilty and cooperated is found when examining cases from the 1990s. As has already been discussed, Jordan Belfort, the “Wolf of Wall Street,” served twenty-two months in federal prison for his role leading a \$200 million stock fraud.⁴⁷ Belfort’s sentence was exactly the same length as that of Boesky, who was alleged to have made over \$80 million through his illegal securities activities, and only slightly less than Milken’s sentence, whose fraud was so large that he was required to establish a \$400 million restitution fund.⁴⁸

Another example of a relatively lenient sentence for a major white-collar defendant who pleaded guilty during the 1990s is Chris

40. *See Fraud Trial Begins on ZZZZ Best*, *supra* note 39.

41. *See id.* (“Mr. Minkow’s business empire collapsed in the summer of 1987 when allegations of fraud and impending bankruptcy forced his resignation from the company he started in a garage in the suburban San Fernando Valley.”).

42. *See id.*

43. *See Minkow of ZZZZ Best Gets 25 Years*, N.Y. TIMES (Mar. 28, 1989), www.nytimes.com/1989/03/28/business/minkow-of-zzzz-best-gets-25-years.html.

44. *See id.*

45. *See id.*

46. *See* Beth Barrett, *Barry Minkow 2.0*, L.A. WEEKLY (Oct. 14, 2010), <http://www.laweekly.com/news/barry-minkow-20-2167321>. Interestingly, Minkow was later convicted of other white-collar offenses. In 2011, he pleaded guilty to charges he engaged in a conspiracy to commit “securities fraud by allegedly disseminating false information in 2009 about home builder Lennar Corp.” Robbie Whelan, *Barry Minkow Charged in Fraud Against Lennar*, WALL ST. J. (March 25, 2011), <http://www.wsj.com/articles/SB10001424052748704438104576219662795056534>; *see also* E. Scott Reckard, *Barry Minkow Gets 5 Years for Embezzling from San Diego Church*, L.A. TIMES (Apr. 28, 2014), <http://www.latimes.com/business/la-fi-minkow-sentence-20140429-story.html>. In 2014, he was sentenced to five years in prison for stealing \$3 million from his San Diego church, where he served as the head pastor. *See id.*

47. Kolhatkar, *supra* note 3.

48. *See supra* notes 11–28 and accompanying text.

Bagdasarian.⁴⁹ Bagdasarian was indicted in the Southern District of New York in 1996 and charged with fraud and conspiracy.⁵⁰ The allegations related to an attempted \$200 million public stock offering for his Nebraska-based reinsurance company.⁵¹ According to authorities, Bagdasarian lied to a New York bank to secure over \$24 million in loans from 1992 to 1994.⁵² The funds were then used to purchase luxury goods, such as houses and planes, instead of for legitimate business purposes.⁵³ Further, in 1994, Bagdasarian formed Normandy America and sought to raise capital for the firm through an initial public offering (IPO) of stock.⁵⁴ During the IPO process, Bagdasarian allegedly engaged in deceptive practices, such as conscripting an employee to pretend to be an investor receiving 20% returns during a telephone call with an investment bank.⁵⁵ Though the IPO occurred, the stock offering was withdrawn within a day.⁵⁶ In describing Bagdasarian's investment record, the SEC stated, "It was just fiction."⁵⁷ Shortly after his indictment, Bagdasarian "pleaded guilty to fabricating his money management success to lure investors" and "defrauding Chemical Bank of \$24 million by overstating his net worth."⁵⁸ He was sentenced to twenty-four months in prison.⁵⁹

Just as those major white-collar offenders who pleaded guilty during the 1990s received similar sentences to those in the 1980s, the same is true of the increased sentences received by those who proceeded to trial during this period. As an example, consider Jordan Belfort's co-defendant, Dennis Gaito.⁶⁰ Gaito served as an accountant for Belfort's

49. See Thomas S. Mulligan, *Normandy CEO Indicted on Fraud, Conspiracy Charges*, L.A. TIMES (Sept. 27, 1996), http://articles.latimes.com/1996-09-27/business/fi-47934_1_fraud-charges.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. See Stephanie Strom, *U.S. Charges a Money Manager with Fraud in Stock Offering*, N.Y. TIMES (Sept. 27, 1996), <http://www.nytimes.com/1996/09/27/business/us-charges-a-money-manager-with-fraud-in-stock-offering.html>.

57. *See id.*

58. See *Spotlight: Normandy America Chief Pleads Guilty to Fraud*, L.A. TIMES (Nov. 14, 1996), http://articles.latimes.com/1996-11-14/business/fi-64503_1_pleads-guilty-fraud.

59. See *United States v. Bagdasarian*, Docket Sheet, Southern District of New York, Crim. Docket 1:96-cr-00901-JES-1 ("The dft. is hereby committed to the custody of the U.S. Bureau of Prisons to be imprisoned for a total term of 24 months.").

60. See Kati Cornell Smith, *Stock-Bilk Accountant Gets 10 Yrs*, N.Y. POST (Nov. 10, 2001), <http://nypost.com/2001/11/10/stock-bilk-accountant-gets-10-yrs/>; see also Penny

Stratton Oakmont and allegedly assisted in the laundering of more than \$100 million for the firm.⁶¹ While Belfort, the head of the scheme, served only twenty-two months in prison after pleading guilty and cooperating, Gaito received a sentence of ten years in prison after being convicted at trial.⁶²

Another example of a defendant from the 1990s who received a lengthy sentence after losing at trial is Thomas Rittweger.⁶³ Rittweger worked for Credit Bancorp, Ltd., “a group of related United States and foreign business organizations that purported to provide ‘financial engineering’ and investment services.”⁶⁴ According to the government, Rittweger and others defrauded investors out of \$210 million by encouraging them to invest in a Credit Bancorp investment vehicle that was actually a Ponzi scheme.⁶⁵ In 2003, Rittweger was charged with various offenses, including conspiracy to commit securities fraud and wire fraud.⁶⁶ He was convicted at trial the same year and sentenced to 135 months in prison.⁶⁷

In reviewing major white-collar criminal prosecutions from the 2000s, two trends presented themselves. First, in examining well-publicized securities cases with similar loss amounts from this era, there is a clear indication that sentences were much longer in the 2000s than in the 1980s and 1990s. Further, this trend of significantly longer prison sentences appears to be true regardless of whether the individual pleaded guilty. Second, there appears to be an increase in inconsistency and volatility in sentencing major white-collar offenders during the 2000s. While many of the cases from the 1980s and 1990s fell neatly into similar sentencing ranges depending on whether the defendant pleaded guilty, the major white-collar cases reviewed from the 2000s appear more difficult to categorize. Instead of defendants who pleaded guilty receiving relatively uniform sentences for similar white-collar offenses, one begins to observe that drastic differences arise from one case to the

Stock Profiteer Turns Witness, L.A. TIMES (Oct. 30, 2000), <http://articles.latimes.com/2000/oct/30/news/mn-44164>.

61. See Smith, *supra* note 60.

62. See *id.*

63. See *United States v. Rittweger*, 259 F. Supp. 2d 275 (S.D.N.Y. 2003).

64. See *id.* at 279-80.

65. See *id.* at 280.

66. See *id.* at 279.

67. See Patricia Hurtado, *Ex-Credit Bancorp Officials Will Pay \$329 Million in SEC Lawsuit*, BLOOMBERG BUS. (Feb. 4, 2012, 12:01 A.M.), <http://www.bloomberg.com/news/articles/2012-02-03/ex-credit-bancorp-officials-ordered-to-pay-329-million-in-sec-lawsuit> (“Rittweger and Brandon were convicted at trial in 2003 of defrauding clients, including the chairman of Vintage Petroleum Inc., of \$210 million, prosecutors said.”).

next. The same thing occurred for those who proceeded to trial. As examples of these trends, consider the following four cases from the 2000s, which, though similar in nature to the cases examined from the 1980s and 1990s, paint a starkly different picture of sentencing length and consistency.

In 2010, James Nicholson was sentenced to forty years in prison after pleading guilty to defrauding investors out of \$141 million, almost \$60 million less than was allegedly involved in the Belfort case.⁶⁸ Nicholson, founder of Westgate Capital Management hedge fund, was alleged to have overstated his firm's assets and the performance of the firm's funds.⁶⁹ Further, alleged the government, Nicholson used his firm to lure investors into a massive Ponzi scheme that eventually unraveled.⁷⁰ In another example from the 2000s, William Chapman, founder and owner of Alexander Capital Markets, pleaded guilty to fraud charges in 2013.⁷¹ According to authorities, Chapman engaged in a \$270 million stock loan scheme that resulted in losses to his clients of more than \$35 million.⁷² Chapman was sentenced to 144 months in prison.⁷³ In each of these cases, the sentences for the defendants, after pleading guilty, were significantly higher and less uniform than the sentences observed in comparable cases from the 1980s and 1990s.

Similarly, the sentences were large and erratic for those convicted at trial of committing major white-collar offenses during the 2000s. As an example, Timothy Durham, who once served as CEO of National Lampoon, Inc., was convicted at trial of "defrauding investors in an unrelated company he partly controlled."⁷⁴ Similar to many of the cases

68. See *The Price of a Ponzi Scheme: 40 Years in Prison*, N.Y. TIMES DEALBOOK (Oct. 29, 2010), http://dealbook.nytimes.com/2010/10/29/the-price-of-a-ponzi-40-years-in-prison/?_r=0 ("These tough sentences in federal court are a far cry from the five-year federal prison term given to the real Mr. Ponzi in 1920. Charles Ponzi served only three and a half years of that sentence. But he was also convicted of larceny in Massachusetts and did spend another seven years in state prison before being deported to Italy.").

69. See Press Release, Westgate Capital fund Manager Sentenced in Manhattan Federal Court to 40 Years in Prison for \$133 Million Ponzi Scheme, United States Attorney, Southern District of New York (Oct. 18, 2010), <http://www.justice.gov/usao/nys/pressreleases/October10/nicholsonjamesentencingpr.pdf>.

70. See *id.*

71. See Press Release, Virginia Man Sentenced for Conducting \$270 Million Investment Fraud Scheme, Dept. of Justice (Dec. 6, 2013), <http://www.justice.gov/opa/pr/virginia-man-sentenced-conducting-270-million-investment-fraud-scheme>.

72. See *id.*

73. See *id.*

74. See Andrew M. Harris, *Ex-National Lampoon CEO Tim Durham Gets 50 Years in Prison*, BLOOMBERG BUS. (Nov. 30, 2012, 5:58 PM),

examined above, Durham deceived investors regarding the financial health of his venture and used the money from investors for personal expenditures and for loans to other entities controlled by him and his codefendants.⁷⁵ According to the government, he took \$208 million from investors.⁷⁶ The judge sentenced Durham to fifty years in prison.⁷⁷ In one final example, Mathew Martoma, a portfolio manager, received a nine-year sentence for “making illicit trades in pharmaceutical stocks, generating some \$275 million in profit and avoided losses for the firm.”⁷⁸ In sentencing Martoma, the court stated, “[t]he sums here are staggering, and the size of the punishment must be sufficient to deter others.”⁷⁹ Interestingly, however, the sentence received in this case, though lengthy, was less than that received in the other three cases discussed from the 2000s.

Regarding the first trend, about the increasing length of sentences in major white-collar cases during the 2000s, there appears to be support for this proposition in sentencing data from securities fraud cases during this period.

<http://www.bloomberg.com/news/articles/2012-11-30/ex-national-lampoon-ceo-tim-durham-gets-50-years-prison>.

75. *Id.*

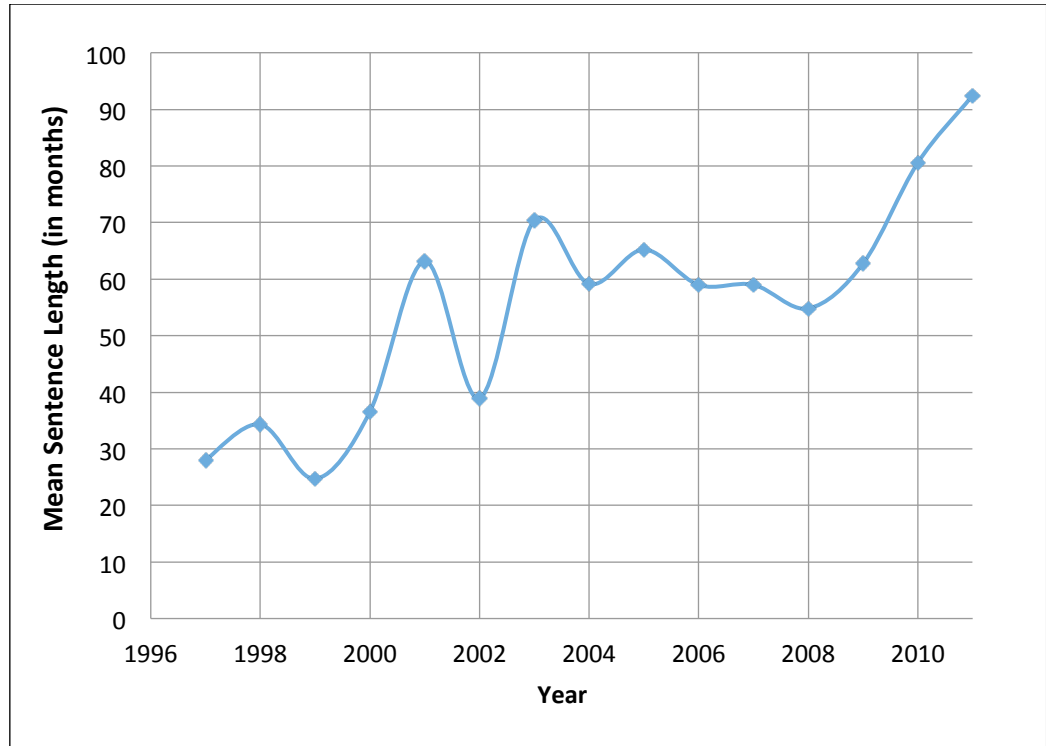
76. *Id.*

77. *Id.*

78. Christopher M. Matthews, *Insider Martoma's Sentencing Highlights White-Collar Crime Debate*, WALL ST. J. (Sept. 7, 2014, 4:13 PM), <http://www.wsj.com/articles/insider-martomas-sentencing-highlights-white-collar-crime-debate-1410120826>; see also Nathan Vardi, *Mathew Martoma Sentenced to Nine Years for Insider Trading*, FORBES (Sept. 8, 2014, 4:44 PM), <http://www.forbes.com/sites/nathanvardi/2014/09/08/mathew-martoma-sentenced-to-nine-years-for-insider-trading/>.

79. See Mathew Goldstein, *Martoma, SAC Capital Ex-Trader, Gets 9 Years in Prison*, N. Y. TIMES DEALBOOK (Sept. 8, 2014, 1:02 PM), <http://dealbook.nytimes.com/2014/09/08/hours-before-sentencing-u-s-judge-says-cohen-trades-should-count-against-martoma/>.

Graph 1: Mean Length of Sentence (in months) for Defendants Convicted of Securities Fraud Under 15 U.S.C. § 78j



As the graph above demonstrates, the mean sentence for those convicted of securities fraud under 15 U.S.C. § 78j increased significantly during the 2000s.⁸⁰ In 1997, for example, around the time of Jordan Belfort's sentencing, the mean sentence was twenty-eight months.⁸¹ By 2011, the mean sentence had increased to ninety-two months for securities fraud.⁸²

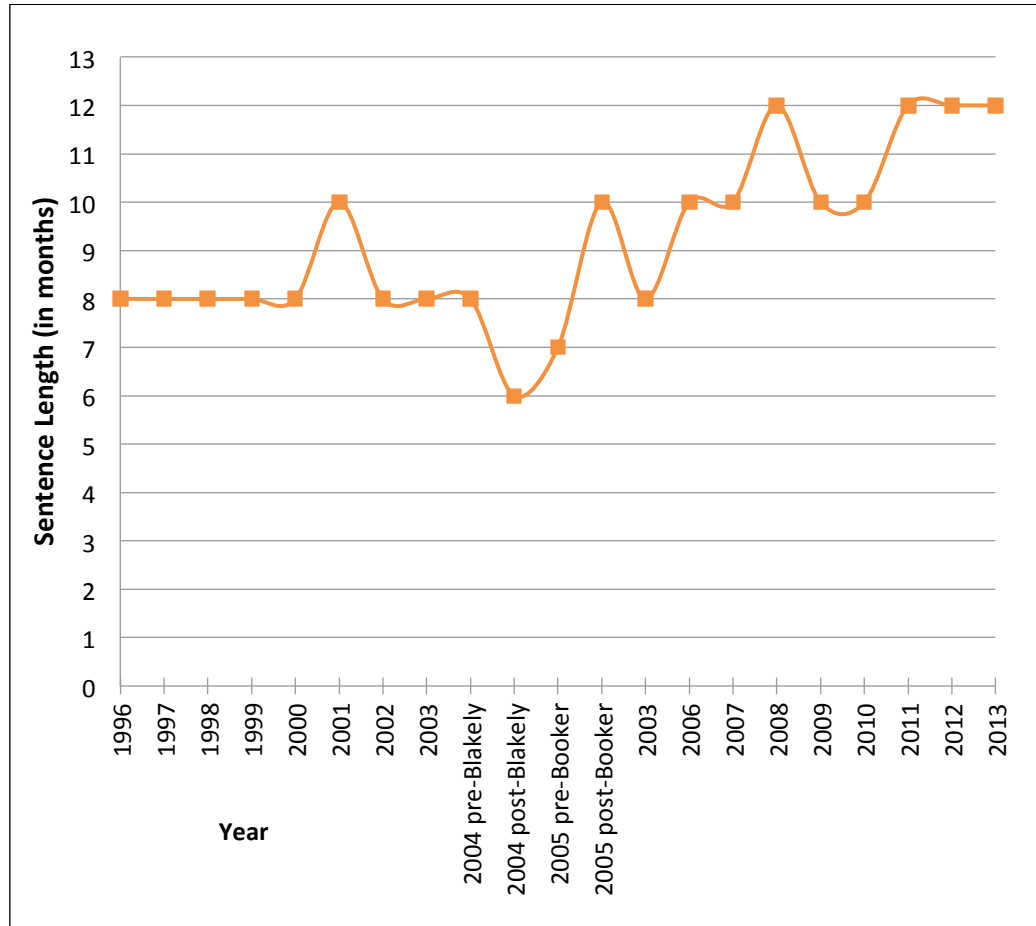
Interestingly, at the same time securities fraud sentences were dramatically increasing, the median sentence for fraud generally had only slightly risen.

80. See *Federal Criminal Case Processing Statistics*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/fjsrc/> (last accessed Apr. 1, 2015).

81. See *id.*

82. See *id.*

Graph 2: Median Sentence Length (in months) for Federal Defendants Convicted of Fraud Offense



As the graph above demonstrates, the median sentence for fraud in 1996 was eight months.⁸³ By 2013, that number had increased to only twelve months.⁸⁴ As will be discussed in greater detail later in this Article, the dichotomy between the sharp increases in securities fraud sentences and fraud sentences generally during the 2000s may be reflective of the disproportionate impact of reforms during this period on

83. *Annual Reports and Sourcebook Archives*, U.S. SENTENCING COMM'N SOURCEBOOK 1997-2013, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/annual-reports-sourcebooks-archives> (last visited June 3, 2015).

84. *Id.*

large loss amount cases, such as securities fraud matters.⁸⁵ By comparison, perhaps those engaged in more modest and more common frauds during the 2000s were not witnessing as significant an increase in sentence, thus accounting for the small increase in median sentences for fraud generally.

Regarding the second observed trend, about a perceived increase in inconsistency and volatility in sentencing major white-collar offenders during the 2000s, a table listing the cases reviewed in this article thus far is helpful in articulating the issue.⁸⁶

Table 1: Sentences of Defendants Examined in Each Era

Pled Guilty		Trial Conviction	
<i>1980s</i>			
Michael Milken	22m	Barry Minkow	96m
Ivan Boesky	22m	Charles Keating	120m
<i>1990s</i>			
Jordan Belfort	22m	Dennis Gaito	120m
Chris Bagdasarian	24m	Thomas Rittweger	135m
<i>2000s</i>			
James Nicholson	480m	Timothy Durham	600m
William Chapman	144m	Matthew Martoma	108m

As demonstrated above, the sentences in the previously discussed cases from the 1980s and 1990s were similar if the defendant pleaded guilty. In the 2000s, however, the numbers simply stopped lining up, despite the fact that these were cases prosecuted under the same or similar statutes, and involving comparable facts and loss amounts.⁸⁷

85. See *supra* notes 15, 25, 35, 44, 58, 61, 65, 68, 76 and accompanying text (offering examples of the large loss amounts present in many securities fraud matters).

86. With regard to the sentences discussed in this Article and appearing in this chart, it should be noted that some sentences were handed down prior to the abolition of parole from the federal system in 1987. Therefore, the author has attempted to create some uniformity by using available information to indicate how long defendants sentenced before the abolition of parole actually served in prison. For those sentenced after the abolition of parole, the sentence is the sentence handed down by the court. In some cases, these defendants may have served slightly less time because of the application of “good time” credits.

87. See *Annual Reports*, *supra* note 83.

As mentioned earlier in this Article, this piece is not intended to definitively answer the question whether the above-described phenomena are representative of white-collar prosecutions in the United States generally during these periods. For that reason, the review of cases for the author's *Wayne Law Review* symposium lecture and subsequent Article was not exhaustive, nor was it sufficient to state that the above-observed trends are statistically significant. However, these observations are offered in this symposium format to spark debate and contemplation of whether these trends might be widespread and what, if anything, that might mean about white-collar sentencing today. In considering whether these trends are reflective of something broader occurring in the federal system, it is worth noting that the trends described above, regarding the increasing length of sentences for major white-collar offenders and, at the same time, a growing inconsistency and volatility in the sentencing of major white-collar offenders, have been observed by others, including those on the federal bench.⁸⁸

In a recent *Newsweek* article entitled "Nonsensical Sentences for White Collar Criminals," Judge Jed S. Rakoff of the Southern District of New York and others commented on the phenomena.⁸⁹ Judge Rakoff stated that the federal sentencing guidelines are "just too goddamn severe."⁹⁰ According to Judge John Gleeson of the Eastern District of New York, "Over the past twenty-five years, the way the political winds were blowing, whenever there was a change, it was a change to add severity."⁹¹ According to the article, the ever-lengthening sentences have resulted in some judges "pushing back."⁹² The article then goes on to quote Judge Patti Saris, Chair of the U.S. Sentencing Commission, as stating, "[t]here are troubling trends in sentencing, including growing disparities among circuits and districts and demographic disparities, which the commission has been evaluating."⁹³

If the observations regarding increases in sentence length and inconsistency in major white-collar prosecutions during the 2000s are accurate, one must wonder whether these trends are related to one another. Is inconsistency in sentencing major white-collar offenders growing because of the increasing length of such sentences? Are a

88. See Leah McGrath Goodman, *Nonsensical Sentences for White Collar Criminals*, NEWSWEEK (June 26, 2014, 3:18 PM), <http://www.newsweek.com/2014/07/04/nonsensical-sentences-white-collar-criminals-256104.html>.

89. *See id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

significant number of judges beginning to “push back” on the length of sentences proposed by the Federal Sentencing Guidelines in these cases, thus creating disparities between judges and districts? If so, how does this speak to the issue queried in the title of this Symposium, regarding how much is enough in sentencing major white-collar offenders?

II. THE FORCES OF CHANGE IN WHITE -COLLAR SENTENCING

Before considering the above questions further, it is important to better understand what might be driving the observed significant increase in sentences for major white-collar offenders during the 2000s, while more common white-collar defendants appear to have experienced only a relatively modest increase in sentences. Two forces are most likely driving these phenomena. First, amendments to the Federal Sentencing Guidelines for economic crimes since 2000 have dramatically increased the advisory sentencing ranges for those defendants with high loss amounts.⁹⁴ Second, amendments to many statutory maximums over the same period of time have allowed for much longer sentences for those convicted of these offenses today as compared with those convicted in the 1980s and 1990s.⁹⁵

To understand the significance of the reforms to the Federal Sentencing Guidelines in the 2000s, let us return to the Jordan Belfort case. Using select facts from the Belfort prosecution and applying them to the 1997⁹⁶ and 2013⁹⁷ Federal Sentencing Guidelines for demonstrative purposes, one is able to observe how starkly the outcome changes over the course of just a few years.⁹⁸

94. See Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 459–62 (2007).

95. See *id.* at 54–56.

96. See *1997 Federal Sentencing Guidelines Manual*, U. S. SENTENCING COMM’N., <http://www.ussc.gov/guidelines-manual/1997/1997-federal-sentencing-guidelines-manual> (last visited May 31, 2015). The 1997 Federal Sentencing Guidelines were used because the appropriate guideline for determining a defendant’s sentence is the guideline from the time of the offense conduct. Belfort was indicted in 1998, the 1997 guidelines appear to be appropriate for this calculation.

97. See *2013 Federal Sentencing Guidelines Manual*, U. S. SENTENCING COMM’N., <http://www.ussc.gov/guidelines-manual/2013/2013-ussc-guidelines-manual> (last visited May 31, 2015).

98. These calculations are intended for demonstrative purposes only and do not reflect the actual sentencing guidelines calculations from the Belfort case. Where necessary, assumptions were made regarding the applicability of these guideline provisions in this case. Further, only select guideline provisions were considered. See *1997 Federal Sentencing Guidelines Manual*, *supra* note 96; see also *2013 Federal Sentencing Guidelines Manual*, *supra* note 97.

Table 2: Belfort's Hypothetical Federal Sentencing Guideline Range in 1997 and 2013

	1997 Federal Sentencing Guidelines	2013 Federal Sentencing Guidelines
Base Offense Level	6	7
Loss of \$110 Million ⁹⁹	18	26
Number of Victims	2	6
Violating an SEC Order	2	2
Broker/Dealer ¹⁰⁰	n/a	4
Total Offense Points	28	47
Advisory Sentencing Range	78-97 Months	Life in Prison (Statutory Maximum of 240 Months)

Applying select facts from the Belfort prosecution to the 1997 Federal Sentencing Guidelines results in an offense level of twenty-eight and an advisory sentencing range of seventy-eight to ninety-seven months.¹⁰¹ Applying these same facts to the 2013 Federal Sentencing Guidelines, Belfort's offense level increases to forty-seven points and his advisory sentencing range becomes life in prison without the possibility

99. See Susan Harrigan, *The Real "Wolf of Wall Street"*, CNN (Oct. 25, 2013; 11:19 PM), <http://www.cnn.com/2013/10/25/opinion/harrigan-wolf-of-wall-street/> ("When Belfort was sentenced in 2003 to four years in prison, Judge John Gleeson ordered him to pay about \$110.4 million to a victims fund, in installments equal to 50% of his monthly gross income, after his release from jail.").

100. This provision did not exist in the 1997 Federal Sentencing Guidelines.

101. See *1997 Federal Sentencing Guidelines Manual*, *supra* note 96 at Section 2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other Than Counterfeit Bearer Obligations of the United States).

of parole.¹⁰² As securities fraud does not carry a life sentence, Belfort's advisory sentencing range becomes the statutory maximum for the statute of conviction. Here, we will use the statutory maximum for securities fraud under 15 U.S.C. § 78j, which is currently 240 months.¹⁰³ This represents an increase of 143 months (or almost twelve years) in his advisory sentencing range because of the amendments to the sentencing guidelines since the 1990s. Importantly, much of this increase in the advisory sentencing range has been driven by increases in the number of points awarded for the loss amount in the case.¹⁰⁴

At the same time, the amendments in the 2000s that might have led to an advisory sentencing range of 240 months for the "Wolf of Wall Street" in 2013 had a much smaller effect on less significant white-collar offenders. As an illustration, consider a white-collar case involving \$1 million in loss, which is actually a higher loss amount than is the average in most U.S. districts, and assume the fraud involved ten victims.

102. See *2014 Federal Sentencing Guidelines Manual*, U. S. SENTENCING COMM'N, Section 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit), <http://www.ussc.gov/guidelines-manual/2014/2014-ussc-guidelines-manual> (last visited May 31, 2015).

103. See 15 U.S.C.A. § 78j (West 2015).

104. See *2014 Federal Sentencing Guidelines Manual*, *supra* note 102 at Section 2B1.1(b) (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit).

Table 3: Hypothetical \$1 Million Fraud under the 1997 and 2013 Federal Sentencing Guidelines

	1997 Federal Sentencing Guidelines	2013 Federal Sentencing Guidelines
Base Offense Level	6	7
Loss of \$1 Million	11	14
Number of Victims	2	2
Total Offense Points	19	23
Sentencing Range	30-37 Months	46-57 Months

In 1997, such a defendant would have a sentencing range of thirty to thirty-seven months.¹⁰⁵ By 2013, that same defendant would have a sentencing range of forty-six to fifty-seven months, a much more modest increase.¹⁰⁶ This represents just over a fifty percent increase in the low end of the advisory sentencing range from 1997 to 2013. In the Belfort hypothetical sentencing calculations above, the increase in the advisory sentencing range from 1997 to 2013 was over 300%. It is in this manner that amendments to the Federal Sentencing Guidelines since 2000 likely explain why major white-collar offenders have seen a dramatic increase in sentences, while many average white-collar defendants with more modest fraud loss figures appear not to have experienced the same level of increase.

Importantly, the above-described amendments to the Federal Sentencing Guidelines were likely assisted in significantly increasing sentences for major white-collar offenders by amendments to the statutory maximums for offenses often charged in white-collar cases. In 1997, federal mail and wire fraud offenses carried a statutory maximum term of five years in prison.¹⁰⁷ Today, that statutory maximum has risen

105. See *1997 Federal Sentencing Guidelines Manual*, *supra* note 96.

106. See *2013 Federal Sentencing Guidelines Manual*, *supra* note 97.

107. See 18 U.S.C.A. § 1341 (West 2014); see also Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 455 (2007) ("SOX's first sweeping reform was to impose a fourfold increase in the maximum punishments for mail and wire fraud. Prior

to twenty years.¹⁰⁸ Similarly, the statutory maximum for securities fraud under 15 U.S.C. § 78j increased from ten years to twenty years during this time period.¹⁰⁹

As demonstrated in Graph 2 above, lower level offenders have never brushed up against the statutory maximums for crimes such as these.¹¹⁰ This is true even after the amendments to the Federal Sentencing Guidelines during the 2000s.¹¹¹ Recall from Graph 2 that the median sentence for fraud in the United States has hovered between eight and twelve months for almost two decades.¹¹² Further, for securities fraud, even the average sentence in 2011 of ninety-seven months did not exceed the old statutory maximum under 15 U.S.C. § 78j of 120 months.¹¹³

Where these types of amendments to the statutory maximums appear to be of greater significance is for major white-collar offenders because these defendants have loss figures that propel them into the higher levels of the sentencing guidelines. This is once again demonstrated by using the hypothetical Belfort guidelines calculation above. Under the 1997 Federal Sentencing Guidelines, Belfort's advisory sentencing range did not exceed the statutory maximum for securities fraud.¹¹⁴ By 2013, however, his advisory sentencing range grew so large that his guideline's range actually became whatever the statutory maximum was at the time.¹¹⁵ By 2013, the statutory maximum had doubled from ten years to twenty years using 15 U.S.C. § 78j, thus resulting in a hypothetical 2013 Federal Sentencing Guideline's advisory sentencing range of 240 months. In this case, increasing the statutory maximum made the much higher sentence possible in combination with the amendments to the Federal Sentencing Guidelines in the 2000s.

Amendments to the Federal Sentencing Guidelines and particular statutory maximums may explain why sentences appear to have increased for major white-collar offenders, while average fraud sentences have risen less dramatically. However, such amendments do not directly explain the growth in divergent sentences. Perhaps, these are related issues as alluded to in the *Newsweek* article discussed above.¹¹⁶ The

to SOX, the maximum penalty for these commonly charged fraud statutes was five years. Under the revised statute, the maximum penalty skyrocketed to twenty years.”).

108. See 18 U.S.C.A. § 1341 (West 2014).

109. See 15 U.S.C.A. § 78j (West 2014).

110. See *infra* Graph 1 and accompanying text.

111. See *id.*

112. See *id.*

113. See *infra* Graph 2 and accompanying text.

114. See *1997 Federal Sentencing Guidelines Manual*, *supra* note 96.

115. See *2013 Federal Sentencing Guidelines Manual*, *supra* note 97.

116. See Goodman, *supra* note 88.

Newsweek article stated both that some judges were upset with the severity of sentencing in major white-collar cases and that there was a perceived increase in sentencing “disparities among circuits and districts.”¹¹⁷ The growth in inconsistency from case to case may be the result of a significant number of judges, though certainly not all, concluding that the increases evidenced from the examples above are too great and result in sentences inconsistent with the purposes of punishment.¹¹⁸

The theory that growing inconsistency in the sentencing of major white-collar offenders is linked to increases in the applicable advisory sentencing ranges for these defendants is a difficult one to test and even more challenging to prove. This Article will not attempt to do either. However, this piece will briefly discuss some preliminary information that might support these ideas and that might add weight to the argument that this theory deserves consideration and more study in the future.

First, since *United States v. Booker*,¹¹⁹ it is clear that judges are increasingly exercising their discretion to sentence outside the applicable sentencing range in all manner of cases.

Table 4: Federal Sentences within the Guideline Range

1997	67.9%
2013	51.2%

Table 5: Federal Fraud Sentences within the Guideline Range 1997 and 2013

1997	74.4%
2013	47.4%

117. *Id.*

118. See 18 U.S.C.A. § 3553(a) (West 2014) (describing the federal purposes of punishment during sentencing).

119. 543 U.S. 220 (2005).

Table 6: Federal Variance in Fraud Cases in 2013

Upward Variances	136 (1.8% of Cases)
Downward Variances	1,726 (22.9% of Cases)

In 1997, 67.9% of cases were sentenced within the guideline range.¹²⁰ That has now dropped to 51.2% of cases.¹²¹ But in fraud cases, the drop has been even more significant. In 1997, 74.4% of fraud cases had sentences within the guideline range.¹²² Today, that number has dropped to 47.4%.¹²³ Further, as might have been suspected, almost all of these variances are in the downward direction. The same is true of departures.

There is additional support for the notion that today's downward variances and departures in fraud cases are in some ways linked to the exponential growth in the advisory sentencing ranges for major white-collar offenders with large loss amounts. Though this is extremely difficult to examine on a national basis, it is worth at least considering data from two districts for comparison—California and Arkansas in 2012.

120. See *1997 Sourcebook of Federal Sentencing Statistics*, U. S. SENTENCING COMM., Appendix B, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1997/Nat97.pdf> (last visited May 31, 2015).

121. See *2013 Sourcebook of Federal Sentencing Statistics*, U. S. SENTENCING COMM., Appendix B, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/stats_Nat.pdf (last visited May 31, 2015).

122. See *1997 Sourcebook of Federal Sentencing Statistics*, U. S. SENTENCING COMM., Departures and Sentences Within Guideline Range, Table 27 (Offenders Receiving Departures Within Each Primary Offense Category), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1997/TABLE27.pdf> (last visited May 31, 2015).

123. See *2013 Sourcebook of Federal Sentencing Statistics*, U. S. SENTENCING COMM., Departures and Sentences Within Guideline Range, Table 27 (Sentences Relative to the Guideline Range by Each Primary Offense Category), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table27.pdf> (last visited May 31, 2015).

Table 7: Fraud Cases in California and Arkansas in 2012

California	Arkansas
Median Loss - \$906,728	Median Loss - \$66,995
Mean Loss - \$6.19 million	Mean Loss - \$320,684
Percentage of Fraud Cases Receiving Departure/Variance: 53.8%	Percentage of Fraud Cases Receiving Departure/Variance: 31.3%

While one must be cautious with the above data, as it is only a small snapshot of the larger federal system, it is interesting to at least consider how this information relates to the theories contemplated herein. In California, the median and mean loss amounts in fraud cases is relatively high, meaning that this jurisdiction encounters cases falling into the top echelons of the sentencing guidelines more regularly than others.¹²⁴ In Arkansas, by comparison, the median and mean loss amounts are significantly less and fall squarely into the areas of the sentencing guidelines only modestly amended since the 1990s.¹²⁵ Looking at the percentage of fraud cases in each district receiving a departure or variance, one observes that the percentage is considerably higher in the jurisdiction with the higher loss amounts and, therefore, the higher advisory sentencing ranges.

The United States Sentencing Commission itself recently provided further support for this theory in a series of PowerPoint slides entitled *Economic Crime Public Data Briefing*.¹²⁶ In one graph, the commission charted the manner in which the percentage of sentences falling within

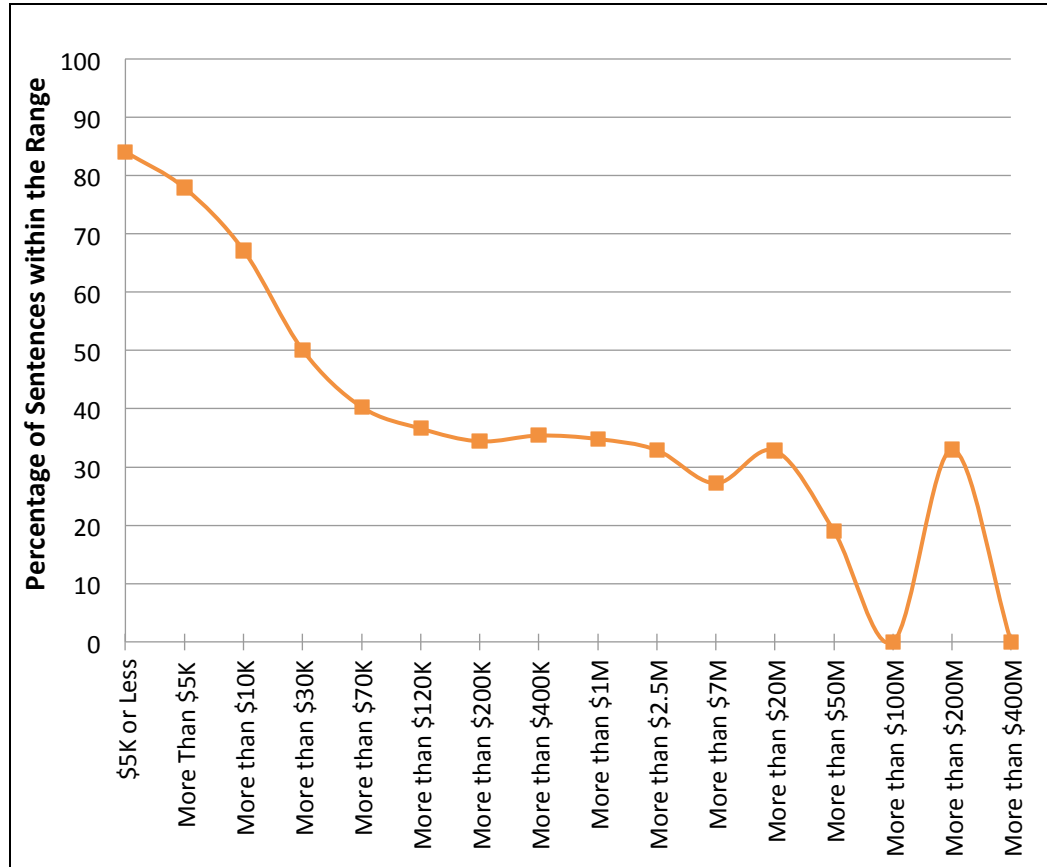
124. See *Symposium on Economic Crime 2013*, U. S. SENTENCING COMM'N. § 2B1.1 (Cases in Each Federal Judicial District With Mean and Median Loss Amounts), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Number_of_Cases_FY2012.pdf (last visited May 31, 2015). Though published in 2013, this data is reflective of sentencing from fiscal year 2012 (October 1, 2011 – September 30, 2012). See *id.*

125. See *id.*

126. See Courtney Semisch, *Economic Crime Public Data Briefing*, U. S. SENTENCING COMM'N. (Jan. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf.

the guideline range dropped sharply as the loss amount increased.¹²⁷ Below is a reproduction of the relevant portions of the graph.

Graph 3: Percentage of Sentences within the Range Relative to the Offender's Applicable Loss Table Category – Fiscal Year 2012



While this and the other data presented herein does not definitively demonstrate that there is a causal relationship between loss amounts and departures and variances, these types of illustrations once again support the notion that further study is warranted into this possible link and its significance for white-collar sentencing more broadly.¹²⁸

127. See *id.* The data presented related to sentences under section 2B1.1 of the Federal Sentencing Guidelines.

128. Regarding Graph 3, it should be noted that the number of cases involving the highest loss amounts was relatively small. For example, while there were 1,274 cases

If, as is theorized herein, the perceived growth in inconsistency in the sentences of major white-collar defendants is linked to a growing number of federal judges rejecting the applicable advisory guideline range and departing or varying downward, then it is appropriate to consider recent amendments and proposals to the Federal Sentencing Guidelines to examine whether these changes might counter this trend. A recent proposal by the American Bar Association and recent amendments adopted by the United States Sentencing Commission have dominated the discussion of how sentencing in economic crimes cases might be conducted in the future.¹²⁹

The American Bar Association (ABA) Criminal Justice Section's Task Force on the Reform of Federal Sentencing for Economic Crimes released a proposal in final draft form on November 10, 2014.¹³⁰ The ABA proposal significantly alters the structure of calculating a sentence in a white-collar offense by proposing entirely new guidelines.¹³¹ First, the proposed guidelines reduce the impact of loss amounts by reducing the existing sixteen loss categories down to only six.¹³² Further, while the highest loss category under the existing Federal Sentencing Guidelines adds thirty points to a defendant's offense level, the ABA proposal sets the maximum increase based on loss at fourteen points.¹³³ Second, the ABA proposal focuses less on specific offense characteristics and more on three fundamental aspects of the offense—loss, culpability, and victim impact.¹³⁴ For culpability and victim impact, the proposed guidelines require the court to consider a number of factors before determining where the defendant falls on a range from low to high.¹³⁵ For example, victim impact is determined to be one of the following—

falling into the "\$5K or Less" category, 973 cases falling into the "More than \$4K" category, and 169 cases falling into the "More than \$7M" category, there were only three cases falling into the "More than \$300M" category. For information regarding the number of cases in each category, see Courtney Semisch, *Economic Crime Public Data Briefing*, U. S. SENTENCING COMM'N. (Jan. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/fraud_briefing.pdf.

129. See *A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes*, AM. BAR ASS'N CRIMINAL JUSTICE SECTION (Nov. 10, 2014), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf [hereinafter *A Report on Behalf of The American Bar Association*].

130. *Id.*

131. *Id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

”Minimal or none,” “Low,” “Moderate,” or “High.”¹³⁶ This determination is made using factors such as vulnerability of the victims, significance of loss, other non-economic harm, victim inducement of offense, and other relevant information.¹³⁷

While some of the information contained in the ABA report is still in draft form, the current proposal contains enough specific information to contemplate the potential impact of these reforms on a major white-collar case such as Jordan Belfort’s.¹³⁸

136. *See id.*

137. *See id.* at 6.

138. At this time, the ABA proposal does not contain definitive point allocations. Rather, the report contains draft ranges of points for consideration. For purposes of the analysis of Belfort’s sentence under these proposed guidelines, the median of the range of potential point allocations was used as a reasonable estimate of what his sentencing range might be under the current version of this proposal. *See A Report on Behalf of the American Bar Association, supra* note 129 (“First, we feel more strongly about the structure of the proposal than we do about the specific offense levels we have assigned. We assigned offense levels in the draft because we think it is helpful in understanding the structure, but the levels have been placed in brackets to indicate their tentative nature.”).

Table 8: Belfort’s Hypothetical Federal Sentencing Guideline Range in 1997 and Under the American Bar Association Proposed Reforms

	1997 Federal Sentencing Guidelines	ABA Reforms to Federal Sentencing Guidelines
Base Offense Level	6	7
Loss of \$110 Million ¹³⁹	18	14
Number of Victims	2	n/a
Culpability	n/a	8 (Highest)
Victim Impact	n/a	6 (High)
Violating an SEC Order	2	n/a
Total Offense Points	28	35
Sentencing Range	78-97 Months	168-210 Months

While the ABA proposal reduces the impact of loss as compared to the current Federal Sentencing Guidelines, the proposal still increases the sentence in the Belfort case from where it stood in the late 1990s. Instead of an estimated advisory sentencing range of seventy-eight to ninety-seven months, the ABA proposal would present a judge in the Belfort case with an estimated advisory sentencing range of 168–210 months. While the estimated advisory sentencing range for Belfort under the ABA report is clearly an increase over the estimated 1997 sentencing range in the case, it is a more modest increase as compared with the 2013 guidelines. It appears, therefore, that this proposal contains amendments that would likely impact the portions of the Federal Sentencing

139. See Susan Harrigan, *The Real “Wolf of Wall Street”*, CNN (Oct. 25, 2013, 11:19 PM), <http://www.cnn.com/2013/10/25/opinion/harrigan-wolf-of-wall-street/> (“When Belfort was sentenced in 2003 to four years in prison, Judge John Gleeson ordered him to pay about \$110.4 million to a victims fund, in installments equal to 50% of his monthly gross income, after his release from jail.”).

Guidelines theorized to be contributing to the growth in inconsistency and volatility in the sentences of major white-collar offenders.

On April 9, 2015, the United States Sentencing Commission adopted *Amendments to the Sentencing Guidelines (Preliminary)*.¹⁴⁰ These amendments will be transmitted to Congress on May 1, 2015, for review.¹⁴¹ If Congress fails to disapprove of the amendments, they will become effective on November 1, 2015.¹⁴² These amendments include many changes to the economic crimes sentencing guidelines.¹⁴³ First, the amendments propose making inflationary adjustments to the loss table under § 2B1.1 of the Federal Sentencing Guidelines.¹⁴⁴ This particular reform, however, would have little meaningful impact on the issues discussed herein. Second, the amendments propose revising the definition of “intended loss,” by, among other things, focusing on the pecuniary harm the “defendant purposefully sought to inflict.”¹⁴⁵ While this might impact the loss amount in some white-collar cases, it is unlikely to address the larger issues facing judges in major white-collar sentencing. Third, the amendments propose revising the victims table to incorporate “substantial financial hardship” as a factor.¹⁴⁶ If anything, it would appear this proposed amendment would exacerbate the issues discussed in this piece, because this new enhancement would likely apply in most major white-collar prosecutions and further increase the applicable advisory sentencing range. Fourth, the amendments propose changing the “specific offense characteristics for sophisticated means,” by requiring that the “offense otherwise involved sophisticated means *and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.*”¹⁴⁷ While this amendment might impact some cases, it is likely that defendants in most major white-collar crime cases would continue to receive this enhancement.

The final adopted amendment from the Sentencing Commission seeks to offer judges increased discretion in calculating loss in cases involving the “fraudulent inflation or deflation in the value of a publicly

140. *Amendments to the Sentencing Guidelines (Preliminary)*, U.S. SENTENCING COMM’N. (April 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150409_PRELIM_RF_Amendments.pdf.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.* at 36.

145. *See id.* at 62–63, 66.

146. *See id.* at 63, 65.

147. *Id.* at 63–65. The italicized portion represents the proposed addition to the existing guideline.

traded security or commodity.”¹⁴⁸ As written in the current Federal Sentencing Guidelines, there is a rebuttable presumption that “the actual loss attributable to the change in value of the security or commodity is the amount determined by:

(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and

(II) multiplying the difference in average price by the number of shares outstanding.¹⁴⁹

Under the adopted amendment, courts would be permitted to “use any method that is appropriate and practicable under the circumstances,” though the above formula would remain in the Federal Sentencing Guidelines as “one such method.”¹⁵⁰

This adopted amendment for fraud on the market offenses is significantly different from the original draft amendment released by the Sentencing Commission in January 2015.¹⁵¹ The January 2015 draft amendment proposed utilizing “gain, rather than loss,” with a minimum enhancement of between twelve and twenty-two points.¹⁵² In rejecting this initial proposal, but adding language indicating that judges may use any method appropriate, the Sentencing Commission appears to be signaling that using “gain” is now an available option for those judges who believe this methodology is more “appropriate and practicable under the circumstances.”

While the adopted amendment for fraud on the market has the potential to impact major white-collar cases, it is unclear whether it will actually diminish the observed growth in inconsistency and volatility in these sentences. First, as noted in the Sentencing Commission’s January 2015 comments to the initial draft amendments, there are likely only a small number of cases for which an amendment to the fraud on the market provisions would apply.¹⁵³ The report noted that in 2012 and

148. *Id.* at 64.

149. *Id.* at 66.

150. *Id.* at 64, 66.

151. *Proposed Amendments to the Sentencing Guidelines (Preliminary)*, U. S. SENTENCING COMM’N. (Jan. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150109_PRELIM_RF_amendments.pdf.

152. *Id.* at 88.

153. *Id.*

2013, there were only seven cases where this would be applicable.¹⁵⁴ Second, because the adopted amendment does not create a new rebuttable formula or eliminate the old one, this amendment may actually result in more inconsistency in sentencing. As written, judges who believe the Federal Sentencing Guidelines are too harsh in these cases are free to utilize a different methodology, while those who believe the Federal Sentencing Guidelines satisfactorily deal with loss in these matters will likely continue to use the old methodology. Rather than an amendment to encourage and increase consistency in sentencing, therefore, this amendment might actually have the opposite effect.

No one wants to return to the days when the Jordan Belforts of the world received less than two years in prison for their egregious crimes. However, if as is theorized herein, an increasing number of federal judges are rejecting the advisory sentencing ranges in major white-collar cases because of a belief that the pendulum has swung too far in the opposite direction, this is a matter that warrants further examination. This Article does not seek to answer all of the questions posed, nor has this piece presented sufficient evidence with which to answer all of these questions. However, it is hoped that this Article has presented ideas for further consideration —ideas that might help ensure that the federal sentencing system is one where differences in sentences reflect important nuances between cases, rather than deep divisions within the judiciary regarding how much is enough.

154. *Id.*