## Comment

## The "Green" Effect on White Collar Sentencing: An Analysis of the Impact of the Economy on Imprisonment Lengths of Sentences for Federal White Collar Defendants

On June 29, 2009, Bernard L. Madoff was sentenced to 150 years in prison for his creation and perpetration of an unprecedented, worldwide "Ponzi" scheme, which caused an ultimate loss to thousands of investors totaling upwards of \$65 billion.<sup>1</sup> Although Madoff's Ponzi scheme caused more investor losses than any one similar scheme in American history, many were shocked by the severity of Madoff's sentence.<sup>2</sup> As a man in his seventies, a sentence of 150 years incarceration is well beyond a life sentence and serves as a symbol to deter those who would engage in similar conduct in the future.

<sup>1.</sup> Transcript of Sentencing Hearing at 43, 49, United States v. Madoff, No. 09 CR 213 (S.D.N.Y. June 29, 2009). Though the ultimate loss number has yet to be determined with certainty, estimates range between \$13 billion to \$65 billion. *See id.* at 43.

<sup>2.</sup> Tomoeh Murakami Tse, *Madoff Sentenced to 150 Years*, WASH. POST, June 30, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/29 /AR2009062902015.html.

After the passage of the Sentencing Reform Act of 1984,<sup>3</sup> federal judges were bound by the United States Sentencing Guidelines sentencing ranges.<sup>4</sup> Since 2005, however, the Guidelines are no longer mandatory, and federal judges currently have a large amount of discretion when determining sentences for violators of federal law.<sup>5</sup> Exemplary of this discretion is the wide variance in sentence severity for white collar criminals.<sup>6</sup> Indeed, even during the period in which the Guidelines were mandatory, federal judges used their discretion to depart, either upward or downward, from the Guidelines range when addressing white collar crimes.<sup>7</sup> As a result, white collar sentencing can be unpredictable despite the Guidelines' arithmetic formula for determining sentencing ranges.<sup>8</sup>

Since the fall of 2008, worldwide financial systems have been on the brink of complete collapse. In the midst of this economic turmoil, one of the leaders of the Wall Street brigade was discovered to have committed the largest Ponzi scheme in American history and was sentenced to a prison term lasting nearly twelve times his remaining life expectancy.<sup>9</sup> These parallel events raise the question of whether sentences for white collar crimes increase in severity as the economic health of the country decreases. First, because the Guidelines are extremely influential in a federal judge's determination of punishment, this Article will discuss the Guidelines' creation, modification, judicial review, and effects on white collar sentencing. Second, because Madoff's activities and subsequent sentencing were the inspiration behind this Article, it will consider Madoff's sentence as an illustrative example of the application of the Guidelines. Third and finally, the Article will compare the incarceration length of "white collar" criminals with various measures of the health of the United States economy at the time of their sentencing to determine whether there is any correlation between economic turmoil and sentence severity.

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<sup>3.</sup> Pub. L. No. 98-473, tit. II ch. 2, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3673 (2006) and 28 U.S.C. §§ 991-998 (2006)).

<sup>4.</sup> Casey C. Kannenberg, Note, From Booker to Gall: The Evolution of the Reasonableness Doctrine as Applied to White-Collar Criminals and Sentencing Variances, 34 J. CORP. L. 349, 353–54 (2008).

<sup>5.</sup> See United States v. Booker, 543 U.S. 220, 245 (2005).

<sup>6.</sup> See Ellen S. Podgor, The Challenge of White Collar Sentencing, 97 J. CRIM. L. & CRIMINOLOGY 731, 731 (2007).

<sup>7.</sup> Daniel A. Chatham, Note, *Playing with Post-Booker Fire: The Dangers of Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 620–21 (2007).

<sup>8.</sup> See Podgor, supra note 6, at 755-56.

<sup>9.</sup> See Transcript of Sentencing Hearing, supra note 1, at 49.

#### I. EVALUATION OF THE UNITED STATES' SENTENCING GUIDELINES

Prior to the enactment of the Guidelines, federal judges had wide sentencing discretion because many federal criminal statutes only stated a maximum term of imprisonment or probation.<sup>10</sup> Thus, a federal judge could sentence a defendant to probation or any term of imprisonment up to the statutory maximum with virtually no appellate review.<sup>11</sup> As judges exercised their discretion, punishments became increasingly variable for defendants convicted of similar crimes.<sup>12</sup> This indeterminacy resulted in reformers expressing substantial criticism of a system that relied solely on judicial discretion to determine prison sentence.<sup>13</sup> First, indeterminacy caused unnecessary prisoner anxiety because of uncertainty regarding release dates and disparity in sentence length compared with other, similar offenders.<sup>14</sup> Second, variations in sentence severity between defendants who have committed like offenses is contrary to the idea of equality and the rule of law.<sup>15</sup>

Indeed, sentence disparity between similarly situated defendants inspired Marvin Frankel, a former United States District Judge in the New York District and a Columbia University law professor, to advocate for a more uniform, predictable sentencing system.<sup>16</sup> Judge Frankel spoke against the "wholly unchecked and sweeping" power of district judges to determine punishment and called such a system "terrifying and intolerable for a society that professes devotion to the rule of law."<sup>17</sup> Judge Frankel continued, stating that resolution would only be achieved through a "Commission on Sentencing" that possessed the "function of actually enacting rules . . . [and] making law."<sup>18</sup>

Eventually, the pleas of Judge Frankel and additional legal scholars caught the attention of Senator Edward M. Kennedy.<sup>19</sup> As early as 1975, Senator Kennedy began to draft legislation with the purpose of

14. *Id.* 

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<sup>10.</sup> Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 WAKE FOREST L. REV. 223, 225 (1993).

<sup>11.</sup> Id. at 225–26

<sup>12.</sup> Id. at 227.

<sup>13.</sup> Id.

<sup>15.</sup> *Id*.

<sup>16.</sup> Id. at 228.

<sup>17.</sup> Id. (internal quotation marks omitted) (quoting MARVIN E. FRANKEL, CRIMINAL SENTENCES 5 (1973)).

<sup>18.</sup> Id. (alterations in original) (internal quotation marks omitted) (quoting FRANKEL, supra note 17, at 122).

<sup>19.</sup> Id. at 230.

initiating sentencing reform.<sup>20</sup> However, for nearly a decade, Senator Kennedy's efforts made little progress.<sup>21</sup> Generally, sentencing reform measures often hit a "brick wall" due to the polar opposite positions of the Senate and the House of Representatives.<sup>22</sup> Furthermore, the House Judiciary Committee had significant concerns about dramatically limiting the judicial discretion historically possessed by district judges.<sup>23</sup>

The tide began to change, however, in the 1980s when Republicans assumed control of the Senate.<sup>24</sup> This era greeted legislators with the public's growing concern about crime and a president interested in toughening existing laws and expanding anti-crime measures.<sup>25</sup> In 1983 two bills were introduced to the Senate. The first bill was introduced by Senator Kennedy and solely addressed sentencing reform.<sup>26</sup> The second bill, called the Comprehensive Crime Control Act of 1983,<sup>27</sup> was introduced by Senator Strom Thurmond and Senator Joseph Biden Jr.<sup>28</sup> Although this bill addressed many areas of the criminal code, it also contained a sentencing reform provision that was identical to the one drafted by Senator Kennedy.<sup>29</sup> Initially, it appeared that both bills would follow the path of their precursors and meet their demise in the House Judicial Committee. However, in a parliamentary coup d'état, House supporters of the Comprehensive Crime Control Act attached the bill to an urgent funding bill pending before the House.<sup>30</sup> On September 25, 1984, the bill passed the full House.<sup>31</sup> The Senate voted to approve the bill on October 4, 1984.<sup>32</sup> On October 12, 1984, President Reagan signed the bill into law and expressed such enthusiasm for the tougher crime provisions that the bill became known as "Mr. Reagan's Bill."33

- 22. Id.
- 23. See id. at 251.
- 24. See id. at 258.
- 25. Id.
- 26. Id. at 261; see Sentencing Reform Act of 1983, S. 668, 98th Cong.
- 27. S. 1762, 98th Cong.
- 28. Stith & Koh, supra note 10, at 261.
- 29. Id.
- 30. Id. at 265.
- 31. Id.
- 32. Id.

<sup>20.</sup> Id.

<sup>21.</sup> See id. at 258.

<sup>33.</sup> Id. at 266 (internal quotation marks omitted) (quoting Stuart Taylor Jr., New Crime Act a Vast Change, Officials Assert, N.Y. TIMES, Oct. 15, 1984, at A1).

As part of the Comprehensive Crime Control Act of 1984,<sup>34</sup> the Sentencing Reform Act of 1984<sup>35</sup> established the United States Sentencing Commission and charged it with the task of creating sentencing guidelines that would enhance the individualization of sentences compared to the current law.<sup>36</sup> The guidelines created by the Commission would generally be mandatory for the courts.<sup>37</sup> Contained within the new legislation was the directive that "the court 'shall impose a sentence of the kind, and within the range' established by the guidelines."38 The Sentencing Reform Act provided that the Commission would be comprised of seven persons, including three active federal judges.<sup>39</sup> The federal judges would be chosen by the President from a list of six judges created by the Judicial Conference.<sup>40</sup> Finally, all members of the Commission would be appointed by the President and needed to be approved by the Senate, each member would serve a term of six years, and the Attorney General and the Chairman of the United States Parole Commission would serve as nonvoting members.<sup>41</sup>

In 1986, with the members of the Sentencing Commission chosen and approved, the Commission began proceedings to create the United States Sentencing Guidelines.<sup>42</sup> The purpose of the Guidelines was to create sentences that would:

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.<sup>43</sup>

37. Id.

39. Stith & Koh, supra note 10, at 279-80.

<sup>34.</sup> Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended in scattered sections of the U.S.C.).

<sup>35.</sup> Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3673 (2006) and 28 U.S.C. §§ 991–998 (2006)).

<sup>36.</sup> Kannenberg, *supra* note 4, at 352.

<sup>38.</sup> Booker, 543 U.S. at 234 (quoting 18 U.S.C. § 3553(b) (2000 & Supp. IV)).

<sup>40.</sup> Id. at 279.

<sup>41.</sup> Id. at 280.

<sup>42.</sup> Introduction to UNITED STATES SENTENCING COMMISSION: UNPUBLISHED PUBLIC HEARINGS 1986 (1988).

<sup>43.</sup> Id.

William W. Wilkins, Chairman of the Sentencing Commission, emphasized that "unwarranted disparity... is the single major problem in our system"<sup>44</sup> and occurs when "similar defendants commit similar crimes, ... and yet these defendants receive greatly disparate sentences."<sup>45</sup> Moreover, the Commission sought to create a system which would be understandable and would articulate to the general public why a particular sentence was appropriate.<sup>46</sup> On November 1, 1987, the Guidelines became effective.<sup>47</sup>

Although federal judges immediately resented the constraints on their judicial discretion presented by the mandatory Guidelines, the mandatory nature of the Guidelines remained in effect until 2005.<sup>48</sup> In 2005 the United States Supreme Court, in United States v. Booker, 49 abolished the mandatory requirements of the Guidelines.<sup>50</sup> The Court in Booker addressed the question of whether the mandatory Guidelines violated a defendant's right under the Sixth Amendment of the United States Constitution<sup>51</sup> to a trial by a jury.<sup>52</sup> Booker was charged with possession with intent to distribute at least fifty grams of cocaine and, therefore, could be sentenced to between 210 to 262 months incarceration under the Guidelines. However, during the sentencing hearing, the judge found that Booker actually was in possession of 566 grams of crack cocaine, which mandated a sentence between 360 months and life. Therefore, instead of sentencing Booker to twenty-one years imprisonment, the judge sentenced Booker to thirty years imprisonment. The facts regarding the higher amount of crack cocaine were never presented to the jury.<sup>53</sup>

The Court, in a two-part opinion, held that the Guidelines, as written, violated a defendant's Sixth Amendment rights because they required a sentencing judge, rather than a jury, to make determinations of facts affecting the severity of a defendant's sentence.<sup>54</sup> The Court reasoned that although judicial fact finding is the most expedient and efficient means of sentencing defendants, the right to a jury trial outweighs any

- 51. U.S. CONST. amend. VI.
- 52. Booker, 543 U.S. at 226.
- 53. Id. at 227.
- 54. Id. at 229.

<sup>44.</sup> UNITED STATES SENTENCING COMMISSION, *supra* note 42, at 2–3 (statement of William Wilkins, Chairman, U.S. Sentencing Comm.).

<sup>45.</sup> Id. at 3.

<sup>46.</sup> Id.

<sup>47.</sup> Kannenberg, supra note 4, at 353.

<sup>48.</sup> Id. at 353–54.

<sup>49. 543</sup> U.S. 220 (2005).

<sup>50.</sup> Id. at 245.

interest of expediency.<sup>55</sup> Therefore, the Court required that any fact other than a prior conviction, which is necessary to support an enhanced sentence, must be either established by a guilty plea or proved to a jury beyond a reasonable doubt.<sup>56</sup> Essentially, the Court determined that the Sixth Amendment requires juries, and not judges, to find facts relevant to sentencing.<sup>57</sup>

In the second part of the Supreme Court's opinion, Justice Breyer explained how to remedy the Guidelines to comply with the Court's constitutional holding.<sup>58</sup> First, Justice Breyer noted that the basic goal in passing the Sentencing Act was "to move the sentencing system in the direction of increased uniformity."59 However, Justice Brever acknowledged that this uniformity does not solely consist of identical sentences for those convicted of violations of the same statute.<sup>60</sup> Instead, the uniformity sought requires consistency "between sentences and real conduct."<sup>61</sup> Therefore, the Sentencing Act could not remain intact in light of the Court's interpretation of the Sixth Amendment.<sup>62</sup>

The Court held that 18 U.S.C. § 3553(b),<sup>63</sup> which made the Guidelines mandatory, operated as a necessary condition of the constitutional violation and therefore must be severed and removed.<sup>64</sup> However, 18 U.S.C. §  $3553(a)^{65}$  operated independently and would not affect the ultimate goal sought to be achieved by the Sentencing Commission.<sup>66</sup> Even without the mandatory provision of § 3553(b), the remainder of the Sentencing Act nonetheless requires the sentencing judge to consider the Guidelines range for the category of offense, the types of sentences available, the Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to the victims.<sup>67</sup> Furthermore, this modified version of the Sentencing Act would still require judges to "impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public,

55. Id. at 238.

- 56. Id. at 244.
- 57. Id. at 245. 58. Id.
- 59. Id. at 253.
- 60. Id.
- 61. Id. at 254.
- 62. Id. at 258.
- 63. 18 U.S.C. § 3553(b) (2006).
- 64. Booker, 543 U.S. at 259.
- 65. 18 U.S.C. § 3553(a) (2006).
- 66. Booker, 543 U.S. at 259.
- U.S.C. § 3553(a); Booker, 543 U.S. at 259-60. 67

and . . . provide the defendant with needed educational or vocational training and medical care."<sup>68</sup> The excision of 18 U.S.C § 3553(b)(1) also mandated the additional removal of 18 U.S.C § 3742(e),<sup>69</sup> which provided the standard of review of the sentence on appeal.<sup>70</sup> Despite this excision, the act still set forth an implicit "unreasonableness" standard of review for sentences on appeal.<sup>71</sup> Therefore, a sentencing judge should look first to the Guidelines, and then take into consideration the factors of 18 U.S.C § 3553(a) when determining a sentence.<sup>72</sup> An appellate court reviewing the sentence will turn to the factors of 18 U.S.C § 3553(a) for determination of whether the sentence was "reasonable" and therefore valid.<sup>73</sup>

In the cases following *Booker*, the Supreme Court explained the reasonableness standard and appellate review of district court sentences. In *Rita v. United States*,<sup>74</sup> the Court held that appellate courts may use a presumption of reasonableness when reviewing sentences that fall within the Guidelines range.<sup>75</sup> In *Rita* the defendant was charged with perjury as a result of statements that he made during grand jury testimony on a collateral matter. After being convicted by a jury, the district judge sentenced the defendant to thirty-three months imprisonment, which was the bottom of the Guidelines range. The defendant appealed, stating that the sentence was unreasonable because it did not take into account the defendant's history and characteristics and was greater than necessary to satisfy the purposes of sentencing.<sup>76</sup>

The Court rejected both of the defendant's arguments, instead resolving the circuit split in favor of the presumption of reasonableness standard of review.<sup>77</sup> To support the presumption of reasonableness for sentences within the guideline range, the Court emphasized that the Sentencing Commission "examined tens of thousands of sentences and worked with the help of . . . others . . . over a long period of time in an effort to fulfill" the mandate that the sentence would be sufficient, but not more severe than necessary.<sup>78</sup> Therefore, a district judge who imposes a sentence within the guidelines "makes a decision that is fully

- 77. Id. at 347.
- 78. Id. at 349.

<sup>68.</sup> Booker, 543 U.S. at 260; accord 18 U.S.C. § 3553(a)(2).

<sup>69. 18</sup> U.S.C. § 3742(e) (2006).

<sup>70.</sup> Booker, 543 U.S. at 259.

<sup>71.</sup> Id. at 261.

<sup>72.</sup> Id. at 264.

<sup>73.</sup> Id.

<sup>74. 551</sup> U.S. 338 (2007).

<sup>75.</sup> Id. at 341, 347.

<sup>76.</sup> Id. at 341-46.

consistent with the Commission's judgment in general."<sup>79</sup> However, the Court cautioned appellate courts about the use of a presumption of "unreasonableness" for sentences that fall outside of the guideline range.<sup>80</sup>

Furthermore, the Court considered in what manner district judges must demonstrate that they adequately considered all relevant factors in determining a defendant's sentence.<sup>81</sup> According to 18 U.S.C § 3553(c),<sup>82</sup> a district judge must "state in open court the reasons for its imposition of [a] particular sentence."<sup>83</sup> However, a full opinion is not required in every case.<sup>84</sup> Instead, the sentencing judge is only required to set forth enough information to satisfy the appellate court by demonstrating that he or she has considered the parties' arguments and has a reasonable basis for exercising his own discretion.<sup>85</sup> Even when a judge imposes a sentence outside of the Guidelines range, he will only be required to explain the reasoning.<sup>86</sup> In fact, "an ordinary explanation of judicial reasons as to why the judge has, or has not, applied the Guidelines triggers no Sixth Amendment 'jury trial' requirement."<sup>87</sup>

In *Kimbrough v. United States*,<sup>88</sup> the Court reinforced a district judge's discretion when sentencing, even when the punishment is outside of the Guidelines range.<sup>89</sup> In *Kimbrough* the defendant pleaded guilty to conspiracy to distribute crack and powder cocaine, possession with intent to distribute more than fifty grams of crack cocaine, possession with intent to distribute powder cocaine, and possession of a firearm in furtherance of a drug trafficking offense. To determine the appropriate sentence, the district judge first calculated the sentence under the Guidelines. Then the district judge increased the defendant's offense level after finding that he testified falsely at his codefendant's trial. The final calculation of the sentence under the Guidelines mandated imprisonment for nineteen to twenty-five years. However, the district court found that the Guidelines punishment would be greater than necessary to accomplish the purpose of the Sentencing Act and, taking

- 81. Id. at 356.
- 82. 18 U.S.C. § 3553(c) (2006).
- 83. Rita, 551 U.S. at 356 (quoting 18 U.S.C § 3553(c)).
- 84. Id.
- 85. Id.

87. Id.

89. Id. at 90.

<sup>79.</sup> Id. at 350.

<sup>80.</sup> Id. at 355.

<sup>86.</sup> Id. at 357.

<sup>88. 552</sup> U.S. 85 (2007).

into account the nature and circumstances of the offense, reduced the sentence to fifteen years imprisonment.<sup>90</sup>

The Supreme Court affirmed the district court's downward variance from the Guidelines.<sup>91</sup> The Court reiterated that district courts must first start with the Guidelines for determining a defendant's sentence; however, because the sentencing judge has greater familiarity with the individual case and the defendant, the judge is in a superior position to weigh the importance of the facts and circumstances under 18 U.S.C. § 3553(a).<sup>92</sup> The Court expressed that punishments varying from the Guidelines will be given the greatest respect when the sentencing judge finds a particular case "outside the 'heartland' to which the Commission intends individual Guidelines to apply."93 In contrast, sentences that vary from the Guidelines based solely on a judge's cursory determination that the Guidelines range fails to accurately reflect the factors of 18 U.S.C. § 3553(a) may be subjected to closer review.<sup>94</sup>

In Gall v. United States,<sup>95</sup> the Court confirmed that the standard of review for district judge sentencing decisions should be an abuse of discretion standard.<sup>96</sup> Defendant Gall pleaded guilty for being responsible for distributing 2500 grams of ecstasy. In the plea agreement, Gall indicated that he withdrew from the conspiracy and had stopped using ecstasy. The district judge deviated completely from the Guidelines range and sentenced Gall to probation for a period of three years.<sup>97</sup> The district judge explained that he determined that no imprisonment was necessary because "'[t]he Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society."<sup>98</sup> The United States Court of Appeals for the Eighth Circuit reversed, and the defendant appealed.<sup>99</sup>

The Supreme Court reversed the Eighth Circuit and upheld the sentence, stating that appellate review of the sentencing court's determination of appropriate punishment should be limited to abuse of discretion.<sup>100</sup> The Court expressly rejected an appellate rule that

99. Id. at 45.

<sup>90.</sup> Id. at 91-93.

<sup>91.</sup> Id. at 111-12.

<sup>92.</sup> Id. at 109.

<sup>93.</sup> Id. (quoting Rita, 552 U.S. at 351).

<sup>94</sup> Id

<sup>95. 552</sup> U.S. 38 (2007).

<sup>96.</sup> Id. at 59-60.

<sup>97.</sup> Id. at 42-43.

<sup>98.</sup> Id. at 44 (quoting United States v. Gall, 374 F. Supp. 2d 758, 763 (S.D. Iowa 2005)).

extraordinary circumstances must be found by the sentencing judge in order to completely deviate from the Guidelines range.<sup>101</sup> Instead, an appellate court must give due deference to the district judge's decision that the 18 U.S.C. § 3553(a) factors merit the extent of the deviation, even though an appellate court should take into consideration the extent of the deviation from the Guidelines range.<sup>102</sup> In light of the proximity of the district court to the defendant and the circumstances of the case, the Court held that it is not an appellate court's position to conduct a de novo review as to whether the justification for the deviation from the Guidelines range is sufficient and whether the sentence in reasonable.<sup>103</sup>

The *Booker* decision and the cases decided in its wake established the proper procedure for a district judge when determining the appropriate sentence for a defendant. First, a district judge should begin all sentencing procedures by correctly calculating the applicable Guidelines range.<sup>104</sup> Next, the judge should give due consideration to the arguments of both of the parties.<sup>105</sup> Then, the judge should consider all of the factors discussed in 18 U.S.C. § 3553(a) to determine whether they support the sentence proposed by either party.<sup>106</sup> The factors to be evaluated under 18 U.S.C. § 3553(a) include the following:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to accurately reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .

(5) any pertinent policy statements—(A) issued by the Sentencing Commission . . . and (B) . . . is in effect on the date the defendant is sentenced[;] (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of

106. Id. at 49-50.

 $<sup>101. \</sup>quad Id. \text{ at } 49.$ 

<sup>102.</sup> Id. at 51.

<sup>103.</sup> Id. at 51–52, 59–60.

<sup>104.</sup> Id. at 49.

<sup>105.</sup> Id.

similar conduct; and (7) the need to provide restitution to any victims of the offense.  $^{107}\,$ 

If a district judge determines that a punishment outside of the Guidelines range is warranted, it must ensure that the extent of the deviation from the Guidelines is justified by sufficiently compelling reasons.<sup>108</sup> Any major variance must be supported by a more significant justification than a minor variance.<sup>109</sup> In any event, a district judge must adequately explain the chosen sentence to permit meaningful appellate review and promote the perception of fair sentencing.<sup>110</sup>

Despite the passage of the White-Collar Crime Penalty Enhancement Act of 2002 (WCCPE),<sup>111</sup> district judges have immense discretion when determining punishment for white collar criminals.<sup>112</sup> There are several possible theories explaining district judges' increased willingness to vary from the Guidelines range when sentencing white collar criminals. First, with the passage of the WCCPE, which dramatically increased the maximum punishment for violators of several white collar crimes, district judges may exercise their discretion to vary downward from the Guidelines range in an attempt to mitigate the harshness of the statutory maximum contained in the WCCPE.<sup>113</sup> Second, judges may not perceive white collar crime as equally harmful as other forms of crime.<sup>114</sup> Third, judges may undervalue the moral and social harms caused by white collar offenders.<sup>115</sup> Fourth, many white collar offenders are educated, professional individuals, and district judges may believe that the deterrent purpose of punishment would be equally achieved in these individuals through a lighter sentence. Although within the Guidelines range, the sentencing of Madoff is illustrative of a district judge's discretion under the Guidelines when formulating punishment for white collar criminals.

115. Id. at 1742.

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<sup>107. 18</sup> U.S.C. § 3553(a).

<sup>108.</sup> Gall, 552 U.S. at 50.

<sup>109.</sup> Id.

<sup>110.</sup> *Id*.

<sup>111.</sup> Pub. L. No. 107-204, tit. IX, 116 Stat. 804 (2002) (codified at 18 U.S.C. \$ 1341, 1343, 1349–1350 (2006) and 29 U.S.C. \$ 1131 (2006)).

<sup>112.</sup> Note, Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act, 122 Harv. L. REV. 1728, 1731–33 (2009).

<sup>113.</sup> See id. at 1733–34.

<sup>114.</sup> Id. at 1742.

#### II. BERNARD L. MADOFF'S CRIMES AND PUNISHMENT

#### A. Nature of Madoff's Crimes and Counsels' Requests for Punishment

On December 11, 2008, Bernard "Bernie" Madoff was arrested and charged with a multitude of felonies, including investment advisor fraud, mail fraud, wire fraud, money laundering in perpetuation of fraud, false statements to securities and exchange regulators, perjury, filing false statements with the Securities and Exchange Commission (SEC), and theft from an employee benefit plan.<sup>116</sup> As determined by the SEC and the Federal Bureau of Investigation, Madoff's fraud began in the mid-1980s when he created Bernard L. Madoff Investment Securities (BLMIS) and began to solicit prospective clients to open trading accounts.<sup>117</sup> Madoff told prospective investors that he would invest their money in a basket comprised of between thirty and fifty common stocks of companies listed on the Standard & Poor's 100 Index.<sup>118</sup> He also said that he would occasionally remove funds from the stock market and instead invest in United States Government issued securities such as treasury bills.<sup>119</sup> He promised limited risk and high returns.<sup>120</sup>

Indeed, Madoff delivered these returns and gained the trust of his clients, which enticed additional prospective clients to invest.<sup>121</sup> But Madoff had not engaged in actual trading operations for thirteen years prior to his arrest.<sup>122</sup> Instead, Madoff was using the funds of subsequent investors to satisfy the redemption requests of other investors, to make loans to his friends and family, and to serve as his trading commission.<sup>123</sup> To hide his fraud, Madoff created false portfolio

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<sup>116.</sup> See Transcript of Sentencing Hearing, *supra* note 1, at 2, 15. This Article focuses on Madoff's sentence for his crimes, not the methodology used to perpetrate these crimes. Therefore, the exact details of Madoff's fraud are beyond the scope of this Article. Instead, the general nature of Madoff's offenses will be discussed, along with a detailed analysis of his sentence.

<sup>117.</sup> Government's Sentencing Memorandum at 2, United States v. Madoff, No. 09 CR 213 (S.D.N.Y. June 26, 2009).

<sup>118.</sup> Jeff Sonn, Ponzi Schemes—Picking Up the Pieces from a Fallen House of Cards, in SECURITIES ARBITRATION IN THE MARKET MELTDOWN ERA 443, 448 (PLI Corp. Law & Practice, Course Handbook Series No. 1755, 2009). The Standard & Poor's 100 Index is "a collection of the 100 largest publicly traded companies in terms of their market capitalization." Id.

<sup>119.</sup> Id.

<sup>120.</sup> Id.

<sup>121.</sup> Id.

<sup>122.</sup> Id.

<sup>123.</sup> Id.; Government's Sentencing Memorandum, supra note 117, at 2-3.

statements for his clients, which actually reflected the market activities for the stock he was supposed to purchase for the investor.<sup>124</sup> He created and filed false statements to the SEC.<sup>125</sup> He also filed false financial statements for his company, including balance sheets, statements of income, statements of cash flows, and reports on internal controls.<sup>126</sup> Eventually, Madoff's consistently high returns raised suspicions within the financial community.<sup>127</sup> In order to quell these suspicions, Madoff voluntarily testified in 2006 before the SEC.<sup>128</sup> When asked how it was possible to achieve such consistently high returns, Madoff merely replied, "Some people feel the market. Some people just understand how to analyze the numbers that they're looking at."<sup>129</sup>

In late 2008, as the economy crashed and individuals needed more liquid assets, BLMIS clients began to request redemptions of their investments.<sup>130</sup> Madoff began to witness his scheme unraveling, despite his best efforts. For example, even though BLMIS account statements for November 2008 indicated that his clients held a total balance of \$64.8 billion, on December 1, 2008, he was unable to meet his client's redemption requests.<sup>131</sup> At this point, Madoff confessed the scheme to his sons, who subsequently contacted the authorities, and Madoff was arrested.<sup>132</sup> On March 12, 2009, Madoff pleaded guilty to the eleven-count criminal information.<sup>133</sup>

Defense counsel for Bernie Madoff, Ira Sorkin requested a sentence of twelve years or, in the alternative, a fifteen to twenty year prison sentence.<sup>134</sup> In his letter to the sentencing judge, the Honorable Denny Chin, Sorkin cited Madoff's advanced age as a reason for the reduced sentence,<sup>135</sup> stating that "Mr. Madoff is currently 71-years old and has

131. Id.

132. Letter from Ira Sorkin, Dickstein Shapiro LLP, to Hon. Denny Chin, United States District Judge for the Southern District of New York 2, United States v. Madoff, No. 09 CR 213 (S.D.N.Y. June 22, 2009).

135. Id. at 2.

<sup>124.</sup> Sonn, *supra* note 118, at 448.

<sup>125.</sup> Government's Sentencing Memorandum, supra note 117, at 3.

<sup>126.</sup> Id.

<sup>127.</sup> Sonn, supra note 118, at 449.

<sup>128.</sup> H. DAVID KOTZ, Sec. & Exch. Comm'n Office of Inspector Gen., *Executive Summary* to INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME 19 (SEC Case No. OIG-509, 2009).

<sup>129.</sup> Id. (internal quotation marks omitted).

<sup>130.</sup> Government's Sentencing Memorandum, supra note 117, at 2-3.

<sup>133.</sup> Id. at 3.

<sup>134.</sup> Id.

an approximate life expectancy of 13 years."<sup>136</sup> Sorkin also asked Judge Chin to take into account Madoff's guilty plea and his subsequent cooperation with authorities during forfeiture and restitution proceedings.<sup>137</sup> Finally, Sorkin submitted the affidavit of Herbet Hoelter from the National Center on Institutions and Alternatives, which stated that the average prison sentence for white collar criminals who have committed crimes totaling over \$400 million and who subsequently confessed is 96.6 months, or 8.05 years.<sup>138</sup>

In contrast, the United States Attorney's Office (USAO) focused on the prevailing and massive nature of Madoff's crimes and requested that Judge Chin issue a more severe sentence.<sup>139</sup> Specifically, the USAO emphasized that Madoff had defrauded thousands of investors, including individuals, financial institutions, and charitable foundations.<sup>140</sup> In addition, the USAO contended that the nature of the defendant did not merit a lenient sentence.<sup>141</sup> Madoff's crimes were "the product of a series of decisions made over the course of years, and it was within his power to stop his crimes at any point in time."<sup>142</sup> Furthermore, Madoff waited until he was absolutely unable to maintain his fraud to confess and, on the days prior to his arrest, Madoff made plans to distribute any remaining assets to his family and friends.<sup>143</sup> The USAO contended that these factors, combined with the need to deter future similar criminal conduct, merited a maximum prison sentence.<sup>144</sup>

#### B. Judge Denny Chin's Sentencing of Bernard L. Madoff

Judge Chin sentenced Madoff to the statutory maximums for all counts contained in the criminal information.<sup>145</sup> The sentence total was 150 years, plus probation and forfeiture of assets.<sup>146</sup> In determining the appropriate sentence, Judge Chin considered "the presentence

146. Id. at 49-51.

<sup>136.</sup> Id. at 3.

<sup>137.</sup> Id. at 2.

<sup>138.</sup> Affidavit of Herbert Hoelter at 3, United States v. Madoff, No. 09 CR 213 (S.D.N.Y. June 19, 2009). The affidavit was attached to Sorkin's letter. Letter from Ira Sorkin to Hon. Denny Chin, *supra* note 132, at 3.

<sup>139.</sup> Government's Sentencing Memorandum, supra note 117, at 1.

<sup>140.</sup> *Id.* at 6. One of the charitable foundations that invested money with Madoff was the Elie Wiesel foundation, a foundation dedicated to Holocaust survivors; the foundation invested over ten million dollars with BLMIS. *Id.* at 9.

<sup>141.</sup> Id. at 9.

<sup>142.</sup> Id. at 10.

<sup>143.</sup> Id. at 10–11.

<sup>144.</sup> *Id.* at 12.

<sup>145.</sup> See Transcript of Sentencing Hearing, supra note 1, at 4, 49.

report, the parties' sentencing submissions, and the e-mails and letters from victims."147 Judge Chin rejected the defense's argument that the request for a severe prison sentence was the reaction of "mob vengeance."148 Instead, Judge Chin relied on the "extraordinarily evil" nature of the crimes, the massive amount stolen, the effects and breach of trust for the victims, and Madoff's use of the money to support a lavish lifestyle.<sup>149</sup> Judge Chin also rejected the majority of the Madoff's mitigating factors.<sup>150</sup> Although Madoff confessed, he did so only because "with the turn in the economy, he was not able to keep up with the requests of customers to withdraw their funds, and it [was] apparent that he knew he was going to be caught soon."151 Furthermore, the significance of Madoff's confession was diminished because the court was advised that "Madoff [was] not . . . helpful" in the investigation and that he tried to resist forfeiting the necessary assets for restitution to his victims.<sup>152</sup> Indeed, Justice Chin noted that just days before his arrest, Madoff made substantial loans to family members and transferred \$15 million of corporate funds to his wife.<sup>153</sup> Also of importance was the complete absence of letters from friends or family speaking for the character of Madoff and requesting a lighter sentence.<sup>154</sup>

Even though Judge Chin agreed with Madoff's life expectancy analysis, Judge Chin stressed that Madoff's crimes were not comparable in size and scope to any other white collar crime.<sup>155</sup> Although any sentence over twenty years would be symbolic, Judge Chin stressed the importance of such symbolism for future white collar offenders and the victims of Madoff's crimes.<sup>156</sup> Judge Chin stated that the "crimes were extraordinarily evil, and that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place just on paper, but that it is instead, as we have heard, one that takes a staggering human toll."<sup>157</sup> Judge Chin continued, stating that "the symbolism is important... because the strongest possible message must be sent to those who would engage in similar conduct."<sup>158</sup> Finally,

 147.
 Id. at 42.

 148.
 Id.

 149.
 Id. at 45, 47.

 150.
 Id. at 45.

 151.
 Id.

 152.
 Id. at 45-46.

 153.
 Id. at 46.

 154.
 Id.

 155.
 Id.

 156.
 Id. at 47.

 157.
 Id.

 158.
 Id.

Judge Chin took into consideration the victims of Madoff's crimes and that "[a] substantial sentence, the knowledge that Mr. Madoff has been punished to the fullest extent of the law, may, in some small measure, help the victims in their healing process."<sup>159</sup> Therefore, Judge Chin determined that the statutory maximum for all counts would be an appropriate sentence.<sup>160</sup> In doing so, he used the Guidelines to set the parameters of the sentence and the statutory maximums for each count to determine the duration.<sup>161</sup>

Although the Guidelines are no longer mandatory, federal judges are required to begin their sentencing determination with consideration of the offense level set forth in the Guidelines.<sup>162</sup> The appropriate Guidelines section for Madoff was section 2B1.1,<sup>163</sup> which includes larceny, embezzlement, and other forms of theft involving fraud and deceit.<sup>164</sup> Under this section, the base offense level is "7, if (A) the

162. Gall v. United States, 552 U.S. 38, 49 (2007).

163. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2009).

164. Letter from Lev L. Dassin to Ira Sorkin, *supra* note 161, at 5; *see* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1.

<sup>159.</sup> Id. at 49.

<sup>160.</sup> Id.

<sup>161.</sup> Id. Specifically, count one charged Madoff with securities fraud, a violation that carries a maximum imprisonment sentence of twenty years. Letter from Lev L. Dassin, Acting United States Attorney, to Ira Sorkin, Dickstein Shapiro LLP 1 (Mar. 10, 2009); see 15 U.S.C. § 78j (2006). Count two charged Madoff with investment advisor fraud, which requires a sentence of imprisonment that is not more than five years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 2; see 15 U.S.C. §§ 80b-6, 80b-17 (2006). Count three charged Madoff with mail fraud, which carries a maximum sentence of imprisonment of thirty years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 2; see 18 U.S.C. § 1341 (2006 & Supp. I). Count four charged Madoff with wire fraud, which has a statutory maximum of twenty years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 2; see 18 U.S.C. § 1343 (2006 & Supp. I). Count five charged Madoff with international money laundering, which carries a statutory maximum of twenty years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 2; see 18 U.S.C. § 1956 (2006). Count six also charged Madoff with international money laundering, carrying a maximum sentence of twenty years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 2-3; see 18 U.S.C. § 1956. Count seven charged Madoff with domestic money laundering, which carries a maximum sentence of ten years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 3; see 18 U.S.C. § 1957 (2006). Count eight charged Madoff with making false statements, which carries a maximum sentence of five years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 3; see 18 U.S.C. § 1001 (2006). Count nine charged Madoff with perjury, which carries a statutory maximum of five years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 3; see 18 U.S.C. § 1621 (2006). Count ten charged Madoff with making a false filing with the SEC, for which he faced a statutory maximum of twenty years imprisonment. Letter from Lev L. Dassin to Ira Sorkin, supra, at 3; see 15 U.S.C. §§ 78q, 78ff (2006). Count eleven charged Madoff with theft from an employee benefit plan, for which the statutory maximum is five years. Letter from Lev L. Dassin to Ira Sorkin, supra, at 3-4; see 18 U.S.C. § 664 (2006).

defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more."<sup>165</sup> The base level is increased in accordance with the loss.<sup>166</sup> For losses of more than \$400 million, the base level is increased by thirty.<sup>167</sup> If the crimes involved more than 250 victims, the adjusted level is then increased by six levels.<sup>168</sup> Since a substantial portion of Madoff's crimes were committed from outside of the United States and involved sophisticated means, the adjusted level was increased by an additional two levels.<sup>169</sup> Furthermore, because Madoff was the leader and organizer of the criminal activity, his adjusted offense level was increased by another four levels.<sup>170</sup> Finally, even though Judge Chin exercised some skepticism regarding Madoff's guilty plea, he reduced Madoff's sentence by three levels because he accepted responsibility and gave timely notice of his intention to plead guilty.<sup>171</sup> Therefore, Madoff's total offense level, as calculated under the Guidelines, was fifty-two.<sup>172</sup>

After the offense level was calculated, Judge Chin next took into account the criminal history of Madoff.<sup>173</sup> Since Madoff had no criminal history prior to the current charges, he was placed in Category I.<sup>174</sup> According to the sentencing table, individuals with an offense level above forty-three and a criminal history in Category I should be sentenced to life imprisonment.<sup>175</sup> However, because none of the statutory crimes for which Madoff was charged carried a life sentence, Judge Chin could not issue a life sentence.<sup>176</sup> Instead, in accordance with section 5G1.2(d),<sup>177</sup> because the sentence imposed on the highest count was less than the total punishment, "the sentence imposed on one

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<sup>165.</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a).

<sup>166.</sup> See id. § 2B1.1(b)(1).

<sup>167.</sup> Id.

<sup>168.</sup> Id. § 2B1.1(b)(2).

<sup>169.</sup> Letter from Lev L. Dassin to Ira Sorkin, *supra* note 161, at 5; *see* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(9).

<sup>170.</sup> Letter from Lev L. Dassin to Ira Sorkin, *supra* note 161, at 5; *see* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a) (2009).

<sup>171.</sup> See Transcript of Sentencing Hearing, supra note 1, at 3; Letter from Lev L. Dassin to Ira Sorkin, supra note 161, at 5–6; see also U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a)–(b) (2009).

<sup>172.</sup> Transcript of Sentencing Hearing, supra note 1, at 3.

<sup>173.</sup> See id.

<sup>174.</sup> Letter from Lev L. Dassin to Ira Sorkin, supra note 161, at 6.

<sup>175.</sup> U.S. SENTENCING GUIDELINES MANUAL § 5A1.1 (2009).

<sup>176.</sup> Transcript of Sentencing Hearing, *supra* note 1, at 3; *see* U.S. SENTENCING GUIDELINES MANUAL § 5G1.1 (2009).

<sup>177.</sup> U.S. SENTENCING GUIDELINES MANUAL § 5G1.2(d) (2009).

or more of the other counts shall run consecutively."<sup>178</sup> Therefore, in order to calculate the Guidelines, the statutory maximums for each count were added together, amounting to 150 years imprisonment.<sup>179</sup> Since the Guidelines apportion punishment in terms of months, Judge Chin converted the 150 year sentence to months.<sup>180</sup> Thus, Madoff was sentenced to 1800 months in prison.<sup>181</sup> This unprecedented sentence length correlates with a decline in the overall health of the economy and begs the question, to what extent does the state of the economy affect the sentence of white collar criminals? To answer this question, an analysis of the four primary economic markers, along with sentence lengths, must be conducted.

#### III. ANALYSIS OF FOUR RELEVANT ECONOMIC MARKERS TO DETERMINE ECONOMIC HEALTH

Economic statistics allow economists to assess and predict fluctuations in the economy to determine both the current state of the economy and to predict the future activities of the commercial market.<sup>182</sup> Of the thirty-five statistics generally analyzed by economists, four are considered the major economic indicators.<sup>183</sup> These four include the real gross domestic product, the consumer price index, the unemployment rate, and the Dow Jones Industrial Average.<sup>184</sup> The background and relevance of each of the economic markers are discussed in turn below.

#### A. Real Gross Domestic Product

Real gross domestic product (RGDP) is the primary measure of overall economic and business activity.<sup>185</sup> Fluctuations in RGDP are the most important gauge of good or bad economic times.<sup>186</sup> Gross domestic product (GDP) consists of the "market value of all final goods, services, and structures produced in one year by labor and property located in the

186. Id.

<sup>178.</sup> Id.; accord Transcript of Sentencing Hearing, supra note 1, at 3.

<sup>179.</sup> Transcript of Sentencing Hearing, *supra* note 1, at 3–4. Other punishment, including restitution, was imposed on Madoff. *See id.* at 50–51.

<sup>180.</sup> Transcript of Sentencing Hearing, supra note 1, at 49.

<sup>181.</sup> Id.

<sup>182.</sup> GARY E. CLAYTON & MARTIN GERHARD GIESBRECHT, A GUIDE TO EVERYDAY ECONOMIC STATISTICS 1 (4th ed. 1997).

<sup>183.</sup> See id. at 2.

<sup>184.</sup> Id.

<sup>185.</sup> Id.

United States."<sup>187</sup> RGDP is the GDP adjusted for inflation and, therefore, gives a base number for comparison across different years.<sup>188</sup>

Determination of RGDP is a three step process.<sup>189</sup> First, a sampling count of the number of final goods, services, and structures is produced.<sup>190</sup> Next, a dollar value adjusted for distortions due to inflation is assigned to the output.<sup>191</sup> Finally, these two figures are multiplied together and summed to get a measure of the total output.<sup>192</sup> Since the numbers used in calculating RGDP already take into account inflation, if RGDP changes by one or two percent, then any change must be due to changes in the number of goods and services produced and not to the change in price levels.<sup>193</sup>

Increases and decreases in RGDP between quarters and years indicate whether the economy is experiencing a period of growth or a period of shrinkage.<sup>194</sup> For example, a recession is defined by a decline in RGDP for two consecutive quarters.<sup>195</sup> RGDP does not take into account composition of the goods, services, or structural output; nor does it take into account nonmarket activities such as the services people provide for themselves.<sup>196</sup> Even though RGDP directly measures the value of the output of goods, services, and structures, it also indirectly depicts consumer activity.<sup>197</sup> If the population reduces the amount of consumption for any reason, then production of goods, services, and structures will halt or reduce because producers will not continue to create goods or services that no one is buying.<sup>198</sup> Therefore, RGDP will decrease.

#### B. Consumer Price Index

The consumer price index (CPI) is a measure of the average change in prices for a fixed "market basket" of goods and services used by the average consumer.<sup>199</sup> The market basket includes sample products for things such as housing, food and beverages, apparel and upkeep,

187. Id. at 15.
 188. Id. at 16.
 189. See id. at 15.
 190. Id.
 191. Id.
 192. Id.
 193. Id. at 17.
 194. Id. at 19.
 195. Id.
 196. Id.
 197. Id. at 22–23.
 198. See id.
 199. Id. at 89.

transportation, medical care, and entertainment.<sup>200</sup> After the average prices are determined for each item in the market basket, the averages are added up and expressed as a percentage of a select base period cost.<sup>201</sup> For example, if someone wanted to compare the CPIs for 1990 and 1996, then the CPI for 1996 would be divided by the CPI for 1990.<sup>202</sup> The result would be a percentage.<sup>203</sup> This percentage would indicate that a representative item costing \$1 in 1990 would cost that percentage more in 1996. Thus, the price of the item has increased for the consumer.<sup>204</sup> Generally, two overlapping measures of the CPI are created by the Bureau of Labor Statistics.<sup>205</sup> First, the CPI for all urban consumers covers about 80% of the population, and the market basket contains those goods most likely consumed in urban environments.<sup>206</sup> Second, the CPI for all urban wage earners and clerical workers covers about 32% of the population and the market basket contains goods most likely used by blue collar workers.<sup>207</sup>

The CPI can indicate inflation rates because it is essentially a measure of the level of prices of goods.<sup>208</sup> Therefore, in order to determine inflation estimates, economists calculate the change in the CPI from one period to another.<sup>209</sup> History indicates that inflation grows worse in the later stages of an expansion period, and the inflation rate will slow when in periods of recession.<sup>210</sup>

#### C. Unemployment Rate

The unemployment rate is determined by dividing the number of unemployed civilians by the civilian labor force.<sup>211</sup> Data are collected monthly by the Bureau of Labor Statistics through a survey of 50,000 households in over 2000 cities across all fifty states.<sup>212</sup> From this survey, the Bureau calculates the civilian labor force, which consists of civilians sixteen years or older who are available to work (meaning not confined to an institution, including mental hospitals or prisons) and

 200.
 Id. at 90.

 201.
 Id. at 91 n.4.

 202.
 Id.

 203.
 Id.

 204.
 Id.

 205.
 Id. at 89.

 206.
 Id.

 207.
 Id.

 208.
 Id. at 91.

 209.
 Id.

 210.
 Id.

 211.
 Id. at 63.

 212.
 Id. at 60.

who did any work at all as a paid employee during the survey week.<sup>213</sup> In contrast, an individual is considered unemployed if he or she was not employed during the survey week, was available for work, and had made specific efforts to find a job during the past month.<sup>214</sup> Not everyone is included in the determination of the unemployment rate.<sup>215</sup> Specifically, discouraged workers—that is, workers who wanted to work, were available for work, but who had stopped actively looking for jobs in the past twelve months because they believed no jobs were available for them—are not included in the labor force.<sup>216</sup> In addition, marginally attached workers—workers who wanted to work, were available for work, but had stopped looking for work for other reasons than the belief that no work was available—are also not included in the labor force.<sup>217</sup>

The unemployment rate can indicate the state of the economy because the rate fluctuates in accordance with the fluctuations in the economy.<sup>218</sup> For example, in periods of economic expansion, the unemployment rate begins to fall.<sup>219</sup> In contrast, in periods of recession, unemployment rates begin to rise.<sup>220</sup> In periods of severe and dramatic recession, unemployment rates will rise rapidly.<sup>221</sup> In most cases, the unemployment rate will begin to increase shortly prior to a period of recession.<sup>222</sup> Therefore, an increase in the unemployment rate is a leading indicator for economists to predict that a recession will commence in the future.<sup>223</sup>

#### D. Dow Jones Industrial Average

The Dow Jones Industrial Average (DJIA) includes thirty representative stocks traded on the New York Stock Exchange and serves as a proxy for the price movements of all stocks traded on the New York Stock Exchange.<sup>224</sup> The prices of stock from the thirty companies are averaged and reported every five minutes during market hours.<sup>225</sup> If the average prices of the select thirty stocks are increasing, then the

213. Id. at 62.
214. Id.
215. Id.
216. Id.
217. Id. at 63 n.1.
218. Id. at 64–65.
219. Id.
220. Id.
221. Id. at 65.
222. Id.
223. Id.
224. Id. at 109.

DJIA increases, and the market is presumed to be going up.<sup>226</sup> In contrast, if the average price of the select thirty stocks is decreasing, then the DJIA goes down, and the market is presumed to be going down.<sup>227</sup> Not only does the DJIA indicate the current state of the market, but it is also regarded as an indicator of future economic activity.<sup>228</sup> Generally, the average decreases before a recession begins and increases before a period of economic expansion.<sup>229</sup>

#### IV. ANALYSIS OF EACH OF THE ECONOMIC MARKERS WITH LENGTH OF SENTENCES OF IMPRISONMENT UNDER GUIDELINES

The United States Sentencing Commission publishes annual reports depicting the average imprisonment lengths for sentences in each primary offense and each criminal history category.<sup>230</sup> Because the data contained in the reports are separated by specific offense, and not by relevant Guidelines section, the provided lengths of imprisonment for offenses generally considered "white collar" were averaged to determine the average annual imprisonment lengths. Specifically, the mean incarceration lengths for criminals who were convicted of larceny, fraud, embezzlement, forgery, bribery, tax, and money laundering with a criminal history in Category I were averaged. The data were limited to those with a criminal history in Category I because this better reflects the majority of white collar criminals.<sup>231</sup> The process was repeated for all data retrieved for the survey years.<sup>232</sup>

231. See Podgor, supra note 6, at 732.

232. These data are presented in Appendix A. This Article compares incarceration lengths from 1995 to 2008. All data regarding the incarceration lengths were retrieved from the United States Sentencing Commission website. The Commission provides such data in its Annual Survey Reports. See U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2008), available at http://www.ussc.gov/ANNRPT/2008/Table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2007), available at http://www.ussc.gov/ANNRPT/2007/Table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2006), available at http://www.ussc.gov/ANNRPT/2007/Table14.pdf; U.S SENTENCING STATISTICS (2006), available at http://www.ussc.gov/ANNRPT/2006/Table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History STATISTICS (2006), available at http://www.ussc.gov/ANNRPT/2006/Table14.pdf; U.S

<sup>226.</sup> Id. at 109.

<sup>227.</sup> Id.

<sup>228.</sup> Id. at 113.

<sup>229.</sup> Id.

<sup>230.</sup> See United States Sentencing Commission, Annual Reports and Statistical Sourcebooks, http://www.ussc.gov/annrpts.htm (last visited May 26, 2010).

As discussed in Part II of this Article, the United States Supreme Court's decision in *United States v. Booker*<sup>233</sup> signified a dramatic change in federal sentencing jurisprudence and made the Guidelines advisory rather than mandatory.<sup>234</sup> In order to compensate for this

233. 543 U.S. 220 (2005).

234. See id. at 245.

Criminal History Category by Primary Offense Category, Fiscal Year 2005, Post-Booker, in 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2005), available at http://www.us sc.gov/ANNRPT/2005/table14\_post.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, Fiscal Year 2005, Pre-Booker, in 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, supra, available at http://www.ussc.gov/ANNRPT/2005/table14\_pre.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, Fiscal Year 2004, Post-Blakely, in 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2004), available at http://www .ussc.gov/ANNRPT/2004/table14post.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, Fiscal Year 2004, Pre-Blakely, in 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, supra, available at http://www.ussc.gov/ANNRPT/2004/table 14pre.pdf: U.S SENTENCING COMM'N. Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2003), available at http://www.ussc.gov /ANNRPT/2003/table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2002), available at http://www.ussc.gov/ANNRPT/2002/table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2001), available at http://www.ussc.gov/ANNRPT/2001/table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2000), available at http://www.ussc.gov/ANNRPT/2000/table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1999), available at http://www.ussc.gov/ANNRPT/1999/table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1998), available at http://www.ussc.gov/ANNRPT/1998/table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category, in 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1997), available at http://www.ussc.gov/annrpt/1997/table14.pdf; U.S SENTENCING COMM'N, Table 14: Average Length of Imprisonment by Primary Offense and Criminal History Categories, in 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1996), available at http://www.ussc.gov/annrpt/1996/tab-14.pdf; U.S SENTENCING COMM'N, Table 19: Average Length of Imprisonment by Primary Offense and Criminal History Categories, in 1995 ANNUAL REPORT 62, 62 (1995), available at http://www.ussc.gov/ANNRPT/1995/anntb95.pdf. Data from the 2004 reports were averaged.

change in jurisprudence, two analyses were conducted to better observe any relationship between incarceration lengths and changes in the economy.

# A. Comparison of Real Gross Domestic Product and Average Length of Imprisonment

1. Methodology. The RGDP for the years 1995 through 2008 were retrieved online from the United States Department of Commerce, Bureau of Economic Analysis.<sup>235</sup> All amounts were given in chained 2005 dollars.<sup>236</sup> The percentage of change in the RGDP from the prior years were calculated by subtracting the prior year's RGDP from the observed year's RGDP and then dividing by the prior year's RGDP and multiplying by one hundred.<sup>237</sup> The percentage of change from year to year better reflects whether the economy is in a period of expansion or regression because the less the RGDP increases, the more likely the economy is in or entering a period of recession.<sup>238</sup>

After determining the percent change in RGDP for each year, a regression analysis was conducted of the incarceration lengths corresponding with the percent increase in the RGDP for each year from 1995 to 2008. A separate regression analysis was conducted for years pre*Booker* and post-*Booker*. The percent increase in RGDP served as the independent variable (x-axis), and the average incarceration lengths served as the dependent variable (y-axis). After the data were charted, a trend line was created for the data points. The slope of the data points was generated from the trend line. A regression analysis summary was generated to obtain the probability-value (p-value), and a correlation analysis summary was generated to determine the correlation coefficient.<sup>239</sup>

<sup>235.</sup> See Bureau of Econ. Analysis, U.S. Dep't Commerce, Current-Dollar and "Real" Gross Domestic Product, http://www.bea.gov/national/xls/gdplev.xls (last visited May 26, 2010).

<sup>236.</sup> See id. "Chained" dollars account for the inflation rate. See CLAYTON & GIESBRECHT, supra note 182, at 16. Therefore, all amounts are standardized to the value of the 2005 dollar.

<sup>237.</sup> These data are presented in Appendix B.

<sup>238.</sup> See CLAYTON & GIESBRECHT, supra note 182, at 19.

<sup>239.</sup> The slope of a regression line depicts the type of relationship between the variables. See MARIJA J. NORUVSIS, SPSS INTRODUCTORY STATISTICS STUDENT GUIDE 127, 184–88 (1990). For example, if variables have a direct relationship (that is, one variable increases while the other variable increases), then the slope will be positive. See id. In contrast, if variables have an inverse relationship (that is, if one variable increases while the other variable decreases), the slope will be negative. See id. The p-value determines the strength of the relationship between the variables. See THOMAS H. WONNACOT &

**2. Results.** The regression analysis and trend line for the comparison of percent change in RGDP and average incarceration lengths pre-*Booker* is depicted below:

The slope of the regression line is negative and therefore indicates an inverse relationship between the percent change in RGDP and average incarceration lengths. Specifically, as the percent of change in RGDP decreases per year, the average incarceration lengths for white collar crimes increase. Furthermore, the correlation coefficient for these data points is -.48, indicating that the inverse relationship between the percent change in RGDP and incarceration lengths for white collar criminals is relatively weak. Finally, the p-value for the correlation coefficient is .128 or 12.8%. Because the p-value is over 5%, these results are not statistically significant.

RONALD J. WONNACOTT, INTRODUCTORY STATISTICS FOR BUSINESS AND ECONOMICS 246–48 (2d ed. 1977). Specifically, the p-value indicates the probability that any observed relationship occurred by chance. *See id.* Generally, the higher the p-value, the less likely the observed relation between the variables is indicative that the relationship would be the same for all future variables. *See id.* P-values that are higher than .05 are not considered statistically significant. *See id.* at 243–44. P-values that are less than .05 are considered borderline statistically significant. Finally, p-values that are less than .05 are considered highly significant. *See id.* at 244–45.

The regression analysis and trend line for the comparison of percent change in RGDP and average incarceration lengths post-*Booker* is depicted below:

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Again, the slope of the regression line is negative, which indicates an inverse relationship between percent change in RGDP and average incarceration lengths. This means that as the percent change in RGDP decreases, the average incarceration lengths increase. The correlation coefficient between these data points is -.92, which indicates that the inverse relationship is strong. However, the p-value is .07 or 7%, which indicates that the relationship is not statistically significant. This is most likely due to the lower number of data points rather than a lack of relationship. Thus, although not statistically significant, there is a visible trend that with the passage of time and the collection of additional data, may prove to be statistically significant.

# B. Comparison of Consumer Price Index and Average Length of Imprisonment

1. Methodology. The website for the Bureau of Labor Statistics provided the yearly averages for the urban CPI for the years 1995 to 2008 and the annual percent changes.<sup>240</sup> The percent change between each year was calculated by subtracting the previous year from the current year, then dividing by the previous year and multiplying by one hundred.<sup>241</sup> Just as with RGDP, the percent change better reflects any

<sup>240.</sup> See Bureau of Labor Statistics, U.S. Dep't of Labor, Consumer Price Index: All Urban Consumers, ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (last visited May 26, 2010).

<sup>241.</sup> These data are presented in Appendix C.

increase or decrease in inflation, and thus, any increase or decrease in the value of money.  $^{\rm 242}$ 

The percent change in CPI served as the independent variable and was graphed on the x-axis. The average incarceration length served as the dependent variable and was graphed on the y-axis. A regression line was generated to show any relationship between the data sets. The slope from the regression line indicates whether the relationship between the variables is positive or negative. Finally, a regression analysis and a correlation summary were generated to determine the correlation coefficient and probability value of the correlation coefficient.

**2. Results.** The regression analysis, correlation analysis, and trend line for the comparison of percent change in CPI and average yearly incarceration length pre-*Booker* is depicted below:

The slope of the regression line is negative, which indicates that any relationship between the percent change in CPI and average incarceration length is an inverse relationship. Specifically, as there is a greater percent change in CPI between years, the incarceration length decreases. However, the p-value of the correlation coefficient is .73, which means that there is no statistically significant relationship between the data points because there is a greater than a 5% chance that any relationship

<sup>242.</sup> If the inflation rate is high, then the value, or spending power, of one dollar is less than if the inflation rate was low. CLAYTON & GIESBRECHT, *supra* note 182, at 91 n.4. The CPI is set at a base of 100 for 1982 to 1984. *See id.*; Bureau of Labor Statistics, *supra* note 240. Thus, all numbers and percent changes are calculated with respect to this 100 base in 1984.

is due to a coincidence. Finally, the correlation coefficient is -.11, which indicates an inverse, or negative relationship.

The regression analysis, correlation analysis, and trend line for the comparison of percent change in CPI and average yearly incarceration length post-*Booker* is depicted below:

The slope of the regression line is positive, which indicates that as the percent change in CPI increases, the average incarceration length increases. The correlation coefficient is .18, which indicates that the relationship is positive, but it is not very strong. Finally, the p-value is very high at .81, or 81%. Although the very high p-value may be due to the small amount of data points, it may also be due to the fact that there is no relationship between CPI and average incarceration length. The pre-*Booker* data show a negative relationship, which is apparently at odds with the positive relationship shown by the post-*Booker* data. Clarity as to the existence and nature of any relationship will come with additional data.

C. Comparison of Unemployment Rate and Average Length of Imprisonment

**1. Methodology.** The Bureau of Labor Statistics provided the annual average unemployment rate data for the years 1995 to 2008.<sup>243</sup> No additional calculations were conducted to prepare the annual average unemployment rate for analysis.

<sup>243.</sup> Bureau of Labor Statistics, U.S. Dep't of Labor, Where Can I Find the Unemployment Rate for Previous Years?, http://www.bls.gov/cps/prev\_yrs.htm (last visited May 26, 2010). These data are presented in Appendix D.

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A regression analysis of the annual average unemployment rates and the average incarceration lengths for white collar criminals was conducted for both pre-*Booker* and post-*Booker* data. The annual average unemployment rate served as the independent variable (x-axis). The average length of incarceration served as the dependent variable (yaxis). The variables were charted, and a regression line was created to determine the slope of the lines for each graph. A correlation analysis and summary was created to determine the correlation coefficient and the strength of any relationship between the variables. Finally, a regression summary was generated to reveal the P-value for the correlation coefficient for both sets of data.

**2. Results.** The regression analysis, correlation analysis, and trend line for the comparison of annual average of unemployment rate and average incarceration length pre-*Booker* is depicted below:

The slope of the regression line is positive, which indicates a direct relationship between the unemployment rate and the average length of incarceration for white collar criminals. Specifically, as unemployment rates increase, the average length of incarceration for white collar criminals increases. Furthermore, the correlation coefficient is .559, suggesting that there is a positive correlation, and the relationship is strong. Finally, the probability-value of the correlation coefficient is .07 or 7%. This probability-value means that the relationship is almost statistically significant. Thus, even though there is not a statistically significant relationship, analysis of the data does show a trend that as unemployment rates increased, the severity of sentencing pre-*Booker* increased.

The regression analysis, correlation analysis, and trend line for the comparison of annual average of unemployment rate and average incarceration length post-*Booker* is depicted below:

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The slope of the regression line is positive, which indicates that there is a positive relationship between the unemployment rate and sentences for white collar crimes. The correlation coefficient is .41, which confirms that there is a positive relationship, but that the relationship is not very strong. Furthermore, the probability-value is .58, or 58%, which indicates that any relationship present is not statistically significant. Again, this could be due to the small amount of data points and the small range of variation.

#### D. Comparison of Dow Jones Industrial Average and Average Imprisonment Length

**1. Methodology.** Yahoo! Finance provided the adjusted close rates of the Dow Jones Industrial Average (DJIA) for the years 1995 through 2008.<sup>244</sup> Since the adjusted close rates were provided on a monthly basis, the average of all twelve months for each year was calculated in order to determine annual percent change. The annual percent change was calculated by subtracting the prior year's average DJIA from the observed year's average DJIA and then dividing by the prior year's DJIA and multiplying by one hundred.<sup>245</sup>

<sup>244.</sup> See Yahoo! Finance, Dow Jones Industrial Average, http://finance.yahoo.com/q/ hp?s=%5EDJI (last visited May 26, 2010).

<sup>245.</sup> These data are presented in Appendix E.

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A regression analysis of the annual percent change of the DJIA and the incarceration lengths for white collar criminals was conducted to determine the presence of any relationship. The percent change for the DJIA served as the independent variable (x-axis), and the average incarceration lengths served as the dependent variable (y-axis). The variables were charted, and a regression line was created to determine the slope. A regression summary was generated, which revealed the pvalue of the correlation coefficient. Finally, a correlation analysis and summary was generated to determine the correlation coefficient.

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**2. Results.** The regression analysis and trend line for the comparison of percent change of the DJIA and average incarceration lengths for white collar criminals pre-*Booker* is depicted below:

The slope of the regression line is negative, which indicates that there is an inverse relationship between the percent change in the annual DJIA and the average incarceration lengths for white collar criminals. Therefore, as the percent change in the annual DJIA decreases, the average incarceration length for white collar criminals increases. Furthermore, the correlation coefficient is -.51, which confirms that there is an inverse relationship and that the relationship is moderately strong. The probability-value for the correlation coefficient is .10 or 10%, which indicates that, although the results are not statistically significant, there appears to be an observable trend. The regression analysis and trend line for the comparison of annual average of the DJIA and average incarceration lengths for white collar criminals post-*Booker* is depicted below:

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The slope of the regression line is negative, which indicates that there is an inverse relationship between the percent change in the DJIA and the average incarceration lengths for white collar criminals. However, the correlation coefficient is -.38, which confirms an inverse relationship, but indicates that the relationship is not very strong. Finally, the pvalue is .61 or 61%, which means that the relationship is not statistically significant. However, this might be due to the small amount of data available, and additional research is needed to more accurately observe any relationships.

#### V. DISCUSSION OF RESULTS

None of the variables analyzed in the previous section revealed a statistically significant relationship. But for the comparisons of RGDP, unemployment, and DJIA, there were obvious trends. With regard to the analysis of sentences given after the Court's decision in *United States v. Booker*,<sup>246</sup> the limited data available most likely affected the reliability of the results. However, the comparisons of pre-*Booker* sentences, unemployment rates, and percent change in DJIA both yielded correlation coefficients that indicate the presence of an observable trend.<sup>247</sup> These relationships indicate that as the economy

<sup>246. 543</sup> U.S. 220 (2005).

<sup>247.</sup> See supra Part IV.C and Part IV.D.

worsens, the length of imprisonment for white collar crimes increases. This trend may continue as district courts continue to sentence white collar criminals post-*Booker*. However, at this point, the data included in the above analysis is too limited, and additional research must be conducted in the future to enable firm concllusions to be drawn. Also, the comparison between RGDP and post-*Booker* sentences indicated the presence of a relationship. Specifically, as the percent change in RGDP decreased, the length of incarceration periods for white collar criminals increased. This, again, suggests that a change in the economy may affect judicial discretion in white collar sentencing.

Often, a judge's political or ideological preferences can affect the severity of sentences under the Guidelines.<sup>248</sup> For example, Democratic judges generally give less severe punishments under the Guidelines than Republican judges.<sup>249</sup> If a judge, whether consciously or unconsciously, allows his or her political affiliations and ideologies to affect discretion under the Guidelines, then it is reasonable to assume that a judge would also allow the nation's economic status to affect the sentencing of white collar criminals. This is particularly true given that, by definition, white collar criminals' actions directly affect the finances of their victims. A victim's life savings or investments may have been completely wiped out by the white collar criminal just when the economy is experiencing a period of recession and the victim needs the money the Of the factors listed in 18 U.S.C. § 3553,<sup>250</sup> a judge is most most. likely to account for the state of the economy through the need for the sentence to accurately reflect the seriousness of the crime, the need for the sentence to afford adequate deterrence to similar criminal conduct, and the need to protect the public from further crimes. Since the Court's decision in *Booker*, reliance on these factors permits a judge to exercise personal discretion. When the victim of a white collar criminal has experienced this double dosage of economic hardship through no fault of their own, a district judge may deem the crime more severe and may see more of a dire need to protect the public and deter future criminals.

Also, the existence of a recession may motivate white collar criminals to commit more egregious crimes in an effort to maintain investor confidence or hide already existing frauds. For example, "cookie jar fraud," a common form of accounting fraud, is likely more prevalent in

<sup>248.</sup> See Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. CHI. L. REV. 715, 725 (2008).

<sup>249.</sup> Id.

<sup>250. 18</sup> U.S.C. § 3553 (2006).

times of recession.<sup>251</sup> A "cookie jar fraud" occurs when a corporate accountant sets aside surplus revenue from periods in which the company is doing well in mislabeled accounts that do not generally appear on a corporation's financial records.<sup>252</sup> Then, when the corporation enters a period of decline, as when the economy enters a period of recession, the previously set aside corporate funds are shifted to accounts, that indicate the corporation is still doing well.<sup>253</sup> The motivation behind this sort of fraudulent activity is most likely panic and fear that investors will withdraw their money if the corporation looks unhealthy. Such creative accounting practices defraud investors and prevent victims from making the wisest and safest choice for their money. Thus, when the economy enters a period of recession, fear, greed, and panic motivate criminal activities that would not have occurred and are more severe than those occurring during a period of economic expansion.

Finally, incarceration periods may be longer for white collar criminals sentenced during periods of recession because corporate crimes may be more frequently discovered during such periods. For example, Bernie Madoff's Ponzi scheme was uncovered largely because his investors needed to liquidate assets after economy crashed in 2008.254 Only when he was asked to return fraudulent investments was he forced to admit to his criminal activity.<sup>255</sup> Thus, when the economy places financial constraints on corporations and individual investors, and these investors seek to liquidate assets to compensate for these constraints, fraudulent financial activity is more likely to be discovered. This additional likelihood could affect the average severity of punishment for white collar crimes because, faced with an influx of similar criminals, federal judges may deem more severe punishments necessary to deter future crimes and to protect the public.

#### VI. CONCLUSION

The United States Sentencing Guidelines were created with the goal of making punishments for federal crimes more uniform and predictable.<sup>256</sup> However, after the decision in *United States v. Booker*,<sup>257</sup>

<sup>251.</sup> See Richard G. Frohling, Fraud and Other Issues on the Horizon, in BASICS OF ACCOUNTING FOR LAWYERS 2009, at 481, 484 (PLI Corp. Law & Practice, Course Handbook Series No. 1752, 2009).

 $<sup>252. \</sup>quad Id.$ 

<sup>253.</sup> See id.

<sup>254.</sup> See Transcript of Sentencing Hearing, supra note 1, at 45.

<sup>255.</sup> Id.

<sup>256.</sup> Stith & Koh, supra note 10, at 225.

federal judges now have more discretion when determining punishments for particular crimes.<sup>258</sup> Although more data are needed to reach a statistically significant conclusion, this Article has shown the overall health of the economy may correlate with the lengths of sentences of incarceration for white collar criminals. Whether this correlation is manifested because of judges' beliefs that financial crimes are more egregious in times when individuals are placed under additional constraints or whether the correlation is a result of more financial crimes being committed and uncovered has yet to be determined.

JESSICA P. MORGAN

258. Chatham, supra note 7, at 619.

<sup>257. 543</sup> U.S. 220 (2005).

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## Appendix A

## Average Yearly Imprisonment Lengths

Pre-Booker

Year	<u>Average (Months)</u>
1995	16.5
1996	17.8
1997	17.4
1998	16.2
1999	17.3
2000	17.4
2001	18.3
2002	19.1
2003	19.5
2004	19.1
2005	17.1

### Post-Booker

Year	<u>Average (Months)</u>
2005	20.5
2006	21.3
2007	22.1
2008	22.7

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## Appendix B

### Percent Change in Yearly Gross Domestic Product

<u>Year</u>	<u>Yearly RGDP</u>	Percent Change
1995	1994 = 8870.7	2.5
	1995 = 9093.7	
1996	1995 = 9093.7	3.7
	1996 = 9433.9	
1997	1996 = 9433.9	4.5
	1997 = 9854.3	
1998	1997 = 9854.3	4.4
	1998 = 10,283.5	
1999	1998 = 10,283.5	4.8
	1999 = 10,779.8	
2000	1999 = 10,779.8	4.1
	2000 = 11,226.0	
2001	2000 = 11,226.0	1.1
	2001 = 11,347.2	
2002	2001 = 11,347.2	1.8
	2002 = 11,553.0	
2003	2002 = 11,553.0	2.5
	2003 = 11,840.7	
2004	2003 = 11,840.7	3.6
	2004 = 12,263.8	
2005	2004 = 12,263.8	3.1
	2005 = 12,638.4	
2006	2005 = 12,638.4	2.7
	2006 = 12,976.2	
2007	2006 = 12,976.2	2.1
	2007 = 13,254.1	
2008	2007 = 13,254.1	0.4
	2008 = 13,312.2	

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### WHITE COLLAR SENTENCING

## Appendix C

### Percent Change in Yearly Consumer Price Index

<u>Year</u>	Yearly CPI	Percent Change
1995	1994 = 148.20	2.8
	1995 = 152.40	
1996	1995 = 152.40	3.0
	1996 = 156.90	
1997	1996 = 156.90	2.3
	1997 = 160.50	
1998	1997 = 160.50	1.6
	1998 = 163.00	
1999	1998 = 163.00	2.2
	1999 = 166.60	
2000	1999 = 166.60	3.4
	2000 = 172.20	
2001	2000 = 172.20	2.8
	2001 = 177.10	
2002	2001 = 177.10	1.6
	2002 = 179.88	
2003	2002 = 179.88	2.3
	2003 = 183.96	
2004	2003 = 183.96	2.7
	2004 = 188.90	
2005	2004 = 188.90	3.4
	2005 = 195.30	
2006	2005 = 195.30	3.2
	2006 = 201.60	
2007	2006 = 201.60	2.8
	2007 = 207.34	
2008	2007 = 207.34	3.8
	2008 = 215.30	

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## Appendix D

## **Unemployment Rate**

Year	Average Unemployment Rate
1995	5.6
1996	5.4
1997	4.9
1998	4.5
1999	4.2
2000	4.0
2001	4.7
2002	5.8
2003	6.0
2004	5.5
2005	5.1
2006	4.6
2007	4.6
2008	5.8

## WHITE COLLAR SENTENCING

## Appendix E

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### Percent Change in Dow Jones Industrial Average

<u>Year</u>	Average Yearly DJIA	Percent Change
1995	1994 = 3,792	19.5
	1995 = 4,534	
1996	1995 = 4,534	27.5
	1996 = 5,780	
1997	1996 = 5,780	28.7
	1997 = 7,438	
1998	1997 = 7,438	15.8
	1998 = 8,610	
1999	1998 = 8,610	21.7
	1999 = 10,475	
2000	1999 = 10,475	2.0
	2000 = 10,688	
2001	2000 = 10,688	-5.1
	2001 = 10,140	
2002	2001 = 10,140	-9.5
	2002 = 9,181	
2003	2002 = 9,181	-1.8
	2003 = 9,018	
2004	2003 = 9,018	14.5
	2004 = 10,326	
2005	2004 = 10,326	2.0
	2005 = 10,529	
2006	2005 = 10,529	9.0
	2006 = 11,472	
2007	2006 = 11,472	15.0
	2007 = 13,198	
2008	2007 = 13,198	-15.0
	2008 = 11,224	

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