18. SENTENCING

Now we come to the end of the criminal process, at which point someone often goes to prison—except that corporations cannot be imprisoned.

Over the past two decades in the white collar crime area, more people have gone to prison for more time than ever before in the U.S. This has been intentional. Legislators, prosecutors, the public, and many judges coalesced during the 1980s, and continuing through the 1990s and early 2000s, around the view that white collar sentences had been too lenient for too long, and that harsher sentences would promote deterrence and equity in punishment.

Most of this happened during a time when the United States Sentencing Guidelines were virtually mandatory—binding on federal judges as a matter of statute. In 2005, however, the Supreme Court held in *United States v. Booker,* 543 U.S. 220 (2005), that the Sixth Amendment right to jury trial is violated if Congress requires judges to follow any guidelines provision that increases a sentence based on a factual finding made by a judge in connection with a post-trial sentencing hearing (such as the amount of dollar loss in a fraud case, or the weight of the substance in a drug case). Unless sentencing-relevant facts (like dollar loss or drug weight) were proved to a jury beyond a reasonable doubt, the Guidelines would need to be non-binding—advisory only. As a result of the odd split opinion in *Booker* and subsequent inaction by Congress, the latter is what we now have—non-binding Guidelines that federal judges must consult and consider but can deviate from on any reasonable ground.

This state of doctrine has increased pressure on all actors in the system to think about and explain what kinds of sentences are appropriate for white collar offenders and for what reasons—a matter on which Americans as a whole are at least unsure if not downright ambivalent. This chapter will explore this problem, and also discuss how to sentence a corporation in the relatively rare event of a guilty plea or conviction after trial (as opposed to an NPA or DPA settlement).

A. Individual Sentencing

This is the federal sentencing statute. It describes the factors relevant to sentencing. Procedurally, the sentencing judge has to walk through this statute or it is reversible error. Substantively, are these factors simply a statement of what anyone would consider important to a criminal punishment? Are there any factors that the statute left out or should have left out?

18 U.S.C. § 3553

(a) **Factors To Be Considered in Imposing a Sentence**.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(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 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—

(i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(B) that, except as provided in section 3742 (g), 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 similar conduct; and

(7) the need to provide restitution to any victims of the offense. . . .

On the following pages are the most important provisions in the Sentencing Guidelines for individual white collar cases: the fraud guideline and the insider trading guideline. The former controls in virtually all fraud and theft cases of any sort, regardless of the statute charged. The object of the Guidelines is to create a series of metrics and factors that ensure that like cases are treated alike, and different cases are treated differently. Have the drafters chosen the right factors?

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) **7**, if (A) the 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; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$6,500 or less	no increase
(B)	More than $6,500	add **2**
(C)	More than $15,000	add **4**
(D)	More than $40,000	add **6**
(E)	More than $95,000	add **8**
(F)	More than $150,000	add **10**
(G)	More than $250,000	add **12**
(H)	More than $550,000	add **14**
(I)	More than $1,500,000	add **16**

(J)	More than $3,500,000	add **18**
(K)	More than $9,500,000	add **20**
(L)	More than $25,000,000	add **22**
(M)	More than $65,000,000	add **24**
(N)	More than $150,000,000	add **26**
(O)	More than $250,000,000	add **28**
(P)	More than $550,000,000	add **30**.

(2) (Apply the greatest) If the offense–

(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;

(B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by **2** levels; (ii) more than $7,000,000, increase by **3** levels; or (iii) more than $20,000,000, increase by **4** levels.

(8) (Apply the greater) If–

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by **4** levels. If the resulting offense level is less than **12**, increase to level **12**.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended–

(A) that the trade secret would be transported or transmitted out of the United States, increase by **2** levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **4** levels.

If subparagraph (B) applies and the resulting offense level is less than level **14**, increase to level **14**.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(17) (Apply the greater) If–

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by **4** levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed **8** levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(19) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(20) If the offense involved–

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Application Notes: . . .

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

   (A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

      (i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

      (ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

      (iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

      (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

      (v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

         (I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

         (II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.

(iii) The cost of repairs to damaged property.

(iv) The approximate number of victims multiplied by the average loss to each victim.

(v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.

(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(D) Exclusions from Loss.—Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(E) Credits Against Loss.—Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value. . . .

(iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme). . . .

(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which 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.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events). . . .

(C) Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted. . . .

§ 2B1.4. Insider Trading

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the gain resulting from the offense exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level **14**, increase to level **14**.

Commentary

Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(2).–For purposes of subsection (b)(2), an "organized scheme to engage in insider trading" means a scheme to engage in insider trading that involves considered, calculated,

systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

(A) the number of transactions;

(B) the dollar value of the transactions;

(C) the number of securities involved;

(D) the duration of the offense;

(E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);

(F) the efforts undertaken to obtain material, nonpublic information;

(G) the number of instances in which material, nonpublic information was obtained; and

(H) the efforts undertaken to conceal the offense.

2. Application of §3B1.3.—Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee".

Furthermore, §3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant's employment in such a position was used to facilitate significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. *See* §3B1.3, comment. (n.4). . . .

The following general Guidelines provisions potentially apply in all federal criminal cases, including white collar cases.

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

§ 3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

§ 3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Once the total offense level and criminal history have been calculated under the Guidelines, the court must consult the "Sentencing Table" to derive a sentencing range, expressed in months.

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SENTENCING TABLE
(in months of imprisonment)

Zone	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

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Problem 18-1

Your client was convicted of securities fraud for her involvement in an accounting fraud that, when revealed, resulted in a loss of $500 million in market capitalization to a U.S. Fortune 100 public company—as measured by the difference in share price before and after the fraud was exposed publicly. She was the Chief Financial Officer of the company at the time of the fraud and has no prior criminal record.

(a) What sentence might the above Guidelines recommend to the court in her case?

(b) What else would you want to know to determine whether a court is likely to sentence her within the recommended Guidelines range?

Because the Guidelines are not strictly binding, the question of what constitutes a just sentence for white collar offenders can loom large. The following case contains a lively discussion of that matter, as well as some material expanding upon the manner in which the Guidelines remain relevant or, as some have put it, "exert gravitational pull."

UNITED STATES v. TOMKO, 562 F.3d 558 (3d Cir. 2009) (en banc)

SMITH, Circuit Judge, with whom McKEE, BARRY, AMBRO, FUENTES, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges, join.

The Government appeals the reasonableness of William Tomko's below-Guidelines sentence of probation, community service, restitution, and fine for his tax evasion conviction. If any one of a significant number of the members of this Court—including some in today's majority—had been sitting as the District Judge, Tomko would have been sentenced to some time in prison. But "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597, 169 L. Ed. 2d 445 (2007). Gall reminds us that "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id.* (internal quotations and citations omitted); *see also United States v. Dragon*, 471 F.3d 501, 506 (3d Cir. 2006) (we afford "deference to the District Court because it is in the best position to determine the appropriate sentence in light of the particular circumstances of the case." (internal quotations and citation omitted)). This reality is why, post-*Booker*, "the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall*, 128 S. Ct. at 594. Where, as here, a district court decides to vary from the Guidelines' recommendations, we "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 597. These principles require us to affirm Tomko's sentence.

On May 11, 2004, Tomko pleaded guilty to a one-count information charging him with tax evasion in violation of 26 U.S.C. § 7201. Tomko was the owner and Chief Executive Officer of W.G. Tomko & Son, Inc. ("Tomko, Inc."), a plumbing contractor. From 1995 to 1998, Tomko directed numerous subcontractors, who were building his multimillion dollar home in Washington County, Pennsylvania, to falsify information on billing invoices so that the invoices would show work being done at one of Tomko, Inc.'s many job sites instead of at Tomko's home. As a result, Tomko, Inc. paid for the construction of Tomko's home and illegally deducted those payments as business expenses. Tomko also did not properly report those payments as income on his personal tax return. All told, Tomko's tax evasion scheme involved twelve different subcontractors and his general contractor, and resulted in a tax deficiency of $228,557.

The United States District Court for the Western District of Pennsylvania conducted Tomko's sentencing hearing on September 30, 2005. Using the 1997 edition of the United States Sentencing Guidelines Manual, the District Court calculated Tomko's total offense level to be thirteen and his criminal history category to be I. Based on these calculations, the Guidelines recommended a range of imprisonment between twelve and eighteen months and a fine between $3,000 and $30,000.

Tomko, however, proposed that in light of the then-recent Hurricane Katrina catastrophe and his construction expertise, the Court should sentence him to probation and home detention, and require him to work for Habitat for Humanity. The Executive Director for Habitat for Humanity's Pittsburgh affiliate testified that the organization would appreciate Tomko's help in its efforts to rebuild the Gulf Coast and that Tomko had performed well in past projects, including providing onsite assistance and advice.

Tomko also proffered testimony from Tomko, Inc.'s Chief Financial Officer that the company was in danger of losing its line of credit if he were imprisoned. If this happened, Tomko, Inc. would be in dire straits financially and the jobs of its 300–plus employees would be threatened.

Finally, Tomko submitted a Motion for Downward Departure. The motion argued that Tomko should be sentenced below his Guidelines range because 1) his incarceration could cause Tomko, Inc.'s innocent employees to lose their jobs; 2) he has performed exceptional charitable acts and good works; 3) he has demonstrated an extraordinary degree of acceptance of responsibility; and 4) a combination of these three factors. As exhibits, Tomko attached over fifty letters from family, friends, community leaders, and others attesting to his pre-indictment charitable activities and other good works. . . .

In response, the Government insisted that the Court impose a sentence that included a term of imprisonment. The Government did not challenge Tomko's factual assertions or submissions. Instead, it juxtaposed his criminal conduct with the patriotism of American soldiers fighting wars abroad and argued that greed, not community service and philanthropy, defined Tomko's character. It focused on the fact that Tomko coerced his subcontractors to file false documentation, and highlighted the “gilded cage” nature of a sentence of home detention. The Government claimed that it would be “absurd” to sentence Tomko to live in the same multimillion dollar mansion that the illegally obtained tax monies helped fund. According to the Government, the Court's failure to incarcerate Tomko would send a message that a rich defendant can buy his way out of prison, and would compromise the general deterrent effect that tax laws have on potential tax cheats.

Despite the Government's arguments, the District Court did not sentence Tomko to a term of imprisonment. Instead, the Court sentenced Tomko to three years of probation (the first of which would be served as home detention), participation in an alcohol treatment program, 250 hours of community service, full restitution, and the statutory maximum fine of $250,000. The Court explained its sentence with the following colloquy:

> The reason for the sentence is as follows: Defendant stands before us for sentencing after pleading guilty to tax evasion. A review of Defendant's financial condition paints a picture of a very wealthy man who had the means and wherewithal to easily pay whatever tax obligation is owing. He was a successful businessman earning a significant salary. There is simply no reason for him to have done this.
>
> This being said, I also note his negligible criminal history, his record of employment, his support for and ties in the community, and the extensive charitable work he has done. I have also—therefore, I have sentenced him to the period of probation, which I recognize is below the guideline range. I also recognize that the fine is above the guideline range. Given the Defendant's wealth, the guideline range in fines is insufficient deterrence.

> Therefore, I've done this mitigation of the sentence under the provisions set forth in 18 U.S.C. [§] 3553 for the reasons I stated. Taking all these factors into account, the Court sentences the Defendant to a period of probation, a substantial fine, and allows for repayment to the Internal Revenue Service of his outstanding tax obligation. The Court views that this sentence will address the sentencing goals of punishment, deterrence and rehabilitation. . . .

Before the implementation of a Guidelines-based sentencing system in 1984, "[s]tatutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine." *Mistretta v. United States*, 488 U.S. 361, 363, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Reviewing courts, in turn, recognized "that the sentencing judge 'sees more and senses more' than the appellate court; thus, the judge enjoyed the 'superiority of his nether position,' for that court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal." *Id.* at 364, 109 S. Ct. 647 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 663 (1971)). According to the Supreme Court, appellate review "beg[an] with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424, 431, 94 S. Ct. 3042, 41 L. Ed. 2d 855 (1974).

Concerns over sentencing disparities and the continued viability of rehabilitation as a penological objective dogged this sentencing system. *Mistretta*, 488 U.S. at 365, 109 S. Ct. 647. As a result, in 1984, Congress passed the Sentencing Reform Act which, among other things, established mandatory sentencing guidelines. *Id.* at 365–67, 109 S. Ct. 647. This Act, however, "did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams v. United States*, 503 U.S. 193, 205, 112 S. Ct. 1112, 117 L. Ed. 2d 341 (1992). As the Supreme Court explained in *Williams*, "[t]he development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Id.* (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)).

In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Supreme Court concluded that the Sentencing Guidelines could only be advisory, *id.* at 245, 125 S. Ct. 738, and instructed courts of appeals to review the sentencing court's "broad discretion in imposing a sentence within a statutory range," *id.* at 233, 125 S. Ct. 738, for "unreasonableness," *id.* at 260–61, 125 S. Ct. 738. Subsequently, *Gall* made it plain that we assess unreasonableness under the abuse-of-discretion standard. 128 S. Ct. at 591. . . .

District courts must provide their explanations and justifications while going through three steps at sentencing. As we outlined in *Levinson*:

> A district court must begin the process by first calculating the applicable Guidelines range. After that initial calculation, the court must then rule on any motions for departure and, if a

> motion is granted, state how the departure affects the Guidelines calculation. Finally, after allowing the parties an opportunity for argument, the court must consider all of the § 3553(a) factors and determine the appropriate sentence to impose, which may vary from the sentencing range called for by the Guidelines.

Id. at 194–95. "Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 127 S. Ct. at 2465.

Our appellate review proceeds in two stages. It begins by "ensur[ing] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 128 S. Ct. at 597. We do not presume that a district court considered the factors solely because the sentence falls within the Guidelines range. *Cooper*, 437 F.3d at 329–30. If a district court's procedure passes muster, "we then, at stage two, consider its substantive reasonableness." *Levinson*, 543 F.3d at 195. Our substantive review requires us not to focus on one or two factors, but on the totality of the circumstances. *Gall*, 128 S. Ct. at 597; *United States v. Howe*, 543 F.3d 128, 137 (3d Cir. 2008). Indeed, we cannot presume that a sentence is unreasonable simply because it falls outside the advisory Guidelines range. *Gall*, 128 S. Ct. at 597. At both stages of our review, the party challenging the sentence has the burden of demonstrating unreasonableness. *Cooper*, 437 F.3d at 332.

The abuse-of-discretion standard applies to both our procedural and substantive reasonableness inquiries. *Gall*, 128 S. Ct. at 597; *United States v. Wise*, 515 F.3d 207, 217–18 (3d Cir. 2008). For example, an abuse of discretion has occurred if a district court based its decision on a clearly erroneous factual conclusion or an erroneous legal conclusion. *Wise*, 515 F.3d at 217. This also means that, absent any significant procedural error, we must "give due deference to the district court's determination that the § 3553(a) factors, on a whole," justify the sentence. *Gall*, 128 S. Ct. at 597; *see also* *United States v. Bungar*, 478 F.3d 540, 543 (3d Cir. 2007) (stating that, as an appellate court, we are "highly deferential" to the sentencing court's application of the § 3553(a) factors). In other words, if the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.

Ultimately, "[t]he touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Grier*, 475 F.3d 556, 571 (3d Cir. 2007) (en banc); *see also* *Cooper*, 437 F.3d at 330 ("[W]hat we must decide is whether the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in section 3553(a)." (internal quotations and citation omitted)). "An estimation of the outer bounds of what is 'reasonable' under a given set of circumstances may not always be beyond debate, but the abuse-of-discretion standard by which that estimation must be judged limits the debate and gives district courts broad latitude in sentencing." *Levinson*, 543 F.3d at 195. . . .

The crux of the Government's appeal is its claim that Tomko's sentence is substantively unreasonable. At oral argument, the Government reaffirmed that it would not be satisfied even if the District Court corrected the alleged procedural error on remand, but imposed the same sentence. In the Government's view, Tomko's sentence is substantively unreasonable because 1) detention in the house that Tomko partially funded with the illegal tax proceeds is plainly unreasonable, 2) this is a mine-run tax evasion case undeserving of such a lenient sentence, and 3) the statutory maximum fine cannot cure the claimed substantive deficiencies.

We reject the Government's first and third arguments with limited discussion. Concerning the first, the Government has narrowed its objections to too fine a point by focusing its objections solely on the location of Tomko's home detention. The Government admitted at oral argument that had the District Court sentenced Tomko to serve his detention in a different house—for example, as the Government suggested, "one of those Habitat for Humanity buildings that he was building in New Orleans could do," (Tr. of Oral Argument 23)—it may not have appealed. Although we agree with the Government that the sort of "gilded cage" confinement imposed here has a certain unseemliness to it, we do not believe that this condition of sentence, by itself, constitutes an abuse of discretion. Whether detention in a particular home is appropriate punishment is precisely the type of fact-bound inquiry that a sentencing court is better suited to make. Even the Guidelines leave this determination to the sound discretion of the sentencing court. *See* U.S. Sentencing Guidelines Manual § 5F1.2 cmt. 3 (1997) ("The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence ... agrees to any conditions that may be imposed by the court ...." (emphasis added)). We are in no position to second-guess that decision here.

The Government's third claim rests on a perceived link between the District Court's variance to a probationary sentence and its imposition of the statutory maximum fine. According to the Government, the District Court permitted Tomko to buy his way out of prison. This is not simply an overly-pejorative characterization of the sentence; it is a misreading of the record that is unfair to the District Court. Indeed, the record exhibits no connection between the fine imposed and the failure to incarcerate. To the contrary, the District Court explicitly stated that the two served unrelated purposes. On the one hand, probation was warranted because of Tomko's negligible criminal history, his record of employment, his community ties, and his extensive charitable works. On the other hand, the statutory maximum fine was necessary to effect deterrence in light of Tomko's wealth. We cannot conclude that the District Court abused its discretion where there exists nothing more than an implication of impropriety arising out of simple coincidence.

The Government's final argument—that this is an overly lenient sentence in a mine-run case—deserves more attention. At the outset, we address the Government's characterization of this case as a "mine-run" case. To the extent that the typicality or uniqueness of a case is relevant, the Supreme Court has made clear that it does not alter our deferential standard of review when evaluating a district court's sentencing determination. To that end, the Court observed in *Gall* that:

> [i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue. The

> uniqueness of the individual case, however, does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.

128 S. Ct. at 598 (internal quotation omitted). Such deference acknowledges the district court's "institutional advantage over appellate courts," *id.* at 598, or what the Court in *Gall* labeled the "[p]ractical considerations," *id.* at 597. Accordingly, we must apply the abuse-of-discretion standard uniformly, regardless of whether a particular case appears to be a "mine-run" case on appeal.

The Government points out that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails to properly reflect § 3553(a) considerations even in a mine-run case." *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 575, 169 L. Ed. 2d 481 (2007) (internal quotations and citation omitted). This case, however, is different from those like *Kimbrough*, which involved the "district court's authority to vary from the ... Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." *Spears v. United States*, 555 U.S. 261, 129 S. Ct. 840, 843, 172 L. Ed. 2d 596 (2009) (per curiam). Here, the District Court did not vary from the Guidelines range "solely" based on a disagreement with its ability to properly reflect § 3553(a) considerations. *Kimbrough*, 128 S. Ct. at 575. Instead, the Court made an individualized determination that the Guidelines range recommended an excessive sentence in this instance. As a result, we are not reviewing "an 'inside the heartland' departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a 'categorical basis') [that] may be entitled to less respect" in this case. *Spears*, 129 S. Ct. at 843.

In essence, the Government is asking this Court to apply the already-rejected "proportionality test" by a different name. The Government's appeal boils down to a claim that Tomko's criminal history, employment record, community ties, and charitable works do not differentiate him enough from the "mine-run" tax evasion case to justify his below-Guidelines sentence. Similarly, a "proportionality test" rests on "the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance." *Rita*, 127 S. Ct. at 2467. As applied by some courts of appeals, this meant that "a sentence that constitute [d] a substantial variance from the Guidelines [had to] be justified by extraordinary circumstances." *Gall*, 128 S. Ct. at 591. In *Gall*, the Supreme Court explicitly barred the application of such an approach because it necessarily applies a "heightened standard of review to sentences outside the Guidelines range." *Id.* at 596. That, of course, is "inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." *Id.*

To be sure, "we may look for a more complete explanation to support a sentence that varies from the Guidelines than we will look for when reviewing a sentence that falls within a properly calculated Guidelines range." *Levinson*, 543 F.3d at 197. We may also properly consider "the extent of any variance from the Guidelines range." *Gall*, 128 S. Ct. at 597. As the Supreme Court has explained, "it [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Id.* This does not mean, however, that we elevate our review of any variance and its accompanying explanation or justification beyond the abuse-of-discretion standard. The Supreme Court has unequivocally stated that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Id.* at 591. We must remain faithful to that clear instruction.

Based on our review of the record, we conclude that the District Court did not abuse its discretion here. At Tomko's sentencing hearing, the District Court explicitly examined subsections (a)(1), (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(3), (a)(4), and (a)(6) of § 3553. The District Court also ordered full restitution. *See* 18 U.S.C. § 3553(a)(7). After hearing argument from the Government concerning the need for a term of imprisonment, the Court reiterated its reasons for imposing a sentence without one. The District Court gave specific reasons for why Tomko's sentence varies from the Guidelines range. This variance took into account his negligible criminal history, his employment record, his community ties, and his extensive charitable works as reasons for not incarcerating Tomko, while also factoring in his substantial wealth as a reason for imposing a fine far above the Guidelines range. Indeed, the District Court provided more than just a boilerplate recitation of the § 3553(a) factors; it detailed, step-by-step, its individualized assessment of the sentence that it believed appropriate in this particular case.

The District Court's reasons are also "logical and consistent with the factors set forth in section 3553(a)." *Cooper*, 437 F.3d at 330 (internal quotations and citation omitted). They are fully supported by the record. The Government does not dispute that Tomko had a negligible criminal history and that, because of his prominence in the company, his incarceration would threaten the jobs of Tomko, Inc.'s over-300 employees. As for Tomko's charitable works, even the Government conceded at oral argument that "[t]he district court was entitled to give it whatever weight the district court wanted." (Tr. of Oral Argument 17.) Several dozen letters written on Tomko's behalf prior to his sentencing also demonstrate Tomko's community ties and extensive charitable works. These letters indicate that Tomko performed pre-indictment charitable acts that involved not only money, but also his personal time. For several years, Tomko participated in a holiday gift drive in Finleyville, Pennsylvania. He provided Christmas gifts for thirty needy families, provided gloves and scarves to inner city children at a daycare center, and also helped other families in Marianna, Pennsylvania during the holiday season. One letter stated that Tomko performed all of this work anonymously. On a more individual basis, another letter noted how Tomko "helped a woman in the South Park area that had recently lost her husband and was left with four small children to raise by her[self]." He also went out of his way to accommodate his employees who needed extra time off for personal reasons. Tomko participated in other acts of charity for those in need. A pastor in the community noted Tomko's pre-indictment proclivity for aiding the poor, and stated that "[b]y requiring him to perform . . . community service, in lieu of incarceration, not only will you help the impoverished lives of the poor, but you will also transform the life of Bill Tomko."

Additionally, at Tomko's sentencing proceeding, the Executive Director of Habitat for Humanity's Pittsburgh affiliate testified on Tomko's behalf. The Executive Director stated that the Pittsburgh affiliate had been in danger of being closed down by the national Board of Directors because of its precarious financial situation. The Executive Director testified that Tomko became personally involved in the construction and rehabilitation of several houses in the Pittsburgh area. Again, Tomko devoted not only a portion of his wealth, but also his personal time. The Executive Director stated that, for one house that had water runoff problems, "Mr. Tomko came and not only visited with the homeowner, inspected the basement to see what was the matter with the outside of the house, but also worked with the city to determine how best to redirect the water away from the yards. He put in the grading, he completed the front sidewalk, the back driveway, and put in a curb for the city." The Executive Director gave other examples of Tomko's providing his construction expertise to aid the Pittsburgh affiliate. The Executive Director then testified as to how Tomko could benefit Habitat for Humanity's efforts to build houses for poor families whose residences were damaged or destroyed by Hurricane Katrina. The Executive Director of the New Orleans affiliate confirmed that Tomko would be useful in these efforts. The Pittsburgh Executive Director concluded her direct testimony by reading a portion of a letter she wrote to the District Court, which stated that "there is no one like Bill Tomko who provides timely, unselfish, and meaningful contributions to Pittsburgh Habitat for Humanity's construction operations."

. . . The Government claims that affirming Tomko's sentence promotes sentencing disparities and, in turn, undermines general deterrence. Whatever the merits of this possibility, it does nothing to change our disposition. The Government's concern is not new; it has been a point of constant focus throughout sentencing review's evolution. Before the Guidelines existed, "[s]erious disparities in sentences . . . were common." *Mistretta*, 488 U.S. at 365, 109 S. Ct. 647. When Congress created the mandatory Guidelines system, it did so "to 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.'" *Booker*, 543 U.S. at 264, 125 S. Ct. 738 (quoting 28 U.S.C. § 991(b)(1)(B)). When the Supreme Court rendered the Guidelines advisory, it was fully aware that sentencing disparities would likely increase. *See id.* at 263, 125 S. Ct. 738 ("We cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure.").

Despite that awareness, the Booker Court was confident that the advisory Guidelines system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65, 125 S. Ct. 738. In *Gall*, the Court reaffirmed that "a more deferential abuse-of-discretion standard could successfully balance the need to 'reduce unjustified disparities' across the Nation and 'consider every convicted person as an individual.'" 128 S. Ct. at 598 n.8 (quoting *Koon*, 518 U.S. at 113, 116 S. Ct. 2035).

If abuse-of-discretion review cannot strike such a balance, it is not our role as appellate judges to adjust the scales. "The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." *Booker*, 543 U.S. at 265, 125 S. Ct. 738; *see also Gall*, 128 S. Ct. at 603 (Souter, J., concurring) ("I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: reestablishing a statutory system of mandatory sentencing guidelines (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion."). The risk of affirming an unwarranted sentencing disparity in this case is one we must accept while following the Supreme Court's "pellucidly clear" command that we apply the abuse-of-discretion standard of review. *Gall*, 128 S. Ct. at 594. . . .

FISHER, Circuit Judge, dissenting, with whom Chief Judge SCIRICA, Judge SLOVITER, Judge RENDELL and Judge COWEN join.

As the procedural history of this appeal clearly shows, this Court has wrestled with the decision in this case for close to two and one half years, during which time the judges on this Court have tried to determine whether the sentence given for this crime was substantively reasonable. The offense we encounter in this case is no garden variety tax evasion. The conduct underlying the offense involved an intricate scheme spanning several years and involved the coercion and coordination of numerous other individuals, all for the personal gain of one man, William G. Tomko, Jr., a successful business owner with the means to easily pay the taxes he owed to the Government.

Tomko's fraudulent tax evasion scheme revolved around the construction of his luxurious new home in southwestern Pennsylvania. During the construction of this home, Tomko had subcontractors falsify their billing invoices to make it appear their work had been done for his construction company, W.G. Tomko, Inc. ("Tomko, Inc."), at one of its job sites, rather than for Tomko, the individual, at his personal residence. The Internal Revenue Service–Criminal Investigation Division investigators interviewed seventeen individuals with respect to Tomko's scheme. While the details varied from individual to individual, a consistent pattern of conduct emerged: At Tomko's behest, subcontractors who performed work at his residence were instructed to write billing invoices that made it appear that their work had been done at one of five local area schools. Because Tomko, Inc. was working jobs at these local schools, the company could appear to be legitimately paying the invoices. As a result, the construction costs were diverted from Tomko personally to Tomko's company, which then deducted them as business expenses, while Tomko also failed to report as personal income the value of the services provided to him at no cost. Thus, Tomko's income was under-represented in two regards: The profits earned by his business appeared to be less and the substantial benefit he received as a result of the construction of a new 8,000–square–foot home went unreported.

Tomko's scheme resulted in a stipulated tax deficiency of $228,557; however, a disputed portion of the record included evidence that the pervasiveness of his scheme was even more extensive. In particular, the Government presented evidence that Tomko on more than one occasion told individuals that his vacation home in Maryland was "a gift from Uncle Sam." Because the Government was unable to provide reliable figures to account for the impact of this alleged fraud with respect to the tax loss incurred by the Government, this disputed evidence apparently did not factor into the District Court's judgment of sentence, and we mention it solely to underscore the point that we are not faced with a garden variety case of tax evasion.

Tomko pleaded guilty to a one-count information charging him with tax evasion, in violation of 26 U.S.C. § 7201. His properly calculated Guidelines range was twelve to eighteen months of incarceration. . . .

In accordance with the standard announced by the Supreme Court in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), our task on appeal is to review the sentence imposed by the District Court for "reasonableness." In *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007), the Supreme Court clarified that appellate reasonableness review involves two steps: the first procedural and the second substantive. The Supreme Court categorized, inter alia, "failing to consider the § 3553(a) factors" and "failing to adequately explain the chosen sentence," as procedural errors under the first step of *Gall*. *Id.* at 597. The Court then instructed:

> "Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."

Id. (internal citation omitted) (emphasis added); *accord* *United States v. Wise*, 515 F.3d 207, 217–18 (3d Cir. 2008) ("As an appellate court, our role is two-fold. . . . If we determine that the district court has committed no significant procedural error, we then review the substantive reasonableness of the sentence under an abuse-of-discretion standard. . . .").

The Court in *Gall* also reaffirmed its decision in *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007), which emphasized the importance of reviewing sentences for substantive reasonableness. *See* *Gall*, 128 S. Ct. at 596–98. As the Supreme Court stated in *Rita*: "In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur." 127 S. Ct. at 2466–67. Consequently, the substantive component of reasonableness review, while deferential, is not impotent.

For these reasons, we disagree with the Majority's statement that "if the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided." Majority Op. at Part II.C. We recognize that "appellate review of sentencing decisions is limited to determining whether they are 'reasonable,'" *Gall*, 128 S. Ct. at 594, but we believe that encompassed within this limited role is the authority and the obligation to vacate sentences that are substantively unreasonable. Therefore, although the Supreme Court "made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions," *id.*, we cannot agree with the Majority's characterization of the appellate courts' role in reviewing sentences as "requir[ing] us to do nothing more and nothing less than to apply the deferential abuse-of-discretion standard." Majority Op. at Part V. We believe that when the Supreme Court instructed appellate courts to review for both procedural and substantive reasonableness, it meant what it said. Accordingly, because we conclude that this sentence is substantively unreasonable, we dissent. . . .

Viewed cumulatively, out of the three reasons offered by the District Court for mitigating Tomko's sentence, only one—community support based on charitable work—even begins to justify a downward variance in this case. Thus, these considerations fall short of placing the sentence imposed within the albeit broad range of permissible choices, even when we add them together. Moreover, the "mitigating" circumstances relied upon by the District Court only address one of the § 3553(a) factors, namely "the history and characteristics of the defendant" under § 3553(a)(1), and therefore do not reflect the "totality of the circumstances" and the "§ 3553(a) factors, on a whole." *Gall*, 128 S. Ct. at 597. As a number of our sister courts of appeals have recognized, excessive reliance on a single § 3553(a) factor is indicative of an unreasonable sentence. United States v. Hampton, 441 F.3d 284, 288–89 (4th Cir. 2006); United States v. Givens, 443 F.3d 642, 646 (8th Cir. 2006); *see also* Cavera, 550 F.3d at 191 (considering whether a particular "factor relied on by a sentencing court can bear the weight assigned to it"). As the remainder of our analysis reveals, the District Court's over-reliance on § 3553(a)(1) as justification for the significant qualitative and quantitative variance it granted pales in comparison to the numerous § 3553(a) factors which suggest that a term of imprisonment is warranted in a case of tax evasion as willful and brazen as Tomko's. . . .

Problem 18-2
Under current law, what is the role of a federal trial judge during sentencing? What is the role of the appellate court when reviewing a sentencing decision?

Problem 18-3
(a) List all deterrent arguments one could make for and against a sentence of probation for Tomko. (b) List all retributive arguments one could make for and against a sentence of probation for Tomko.

The following case contains another lively discussion of how to think about sentencing white collar offenders.

UNITED STATES v. OVID, 2010 WL 3940724 (E.D.N.Y. 2010)

JOHN GLEESON, District Judge.

In a letter dated June 28, 2010 to the Chair of the United States Sentencing Commission, the Director of the Office of Policy and Legislation of the United States Department of Justice ("DOJ" or the "Department") decries the "evolution" of "two distinct and very different sentencing regimes." Letter from Jonathan J. Wroblewski to the Hon. William K. Sessions III, at 2, 1 (June 28, 2010) ("DOJ Letter"). One "regime," the letter contends, "includes the cases sentenced by federal judges who continue to impose sentences within the applicable guideline range for most offenders and most offenses." *Id.* at 1. This is apparently the good regime. The "second regime," by contrast, "has largely lost its moorings to the sentencing guidelines." *Id.* at 2. This regime is a cause of concern for the Department. It consists of judges who sentence fraud offenders, especially in high-loss cases, "inconsistently and without regard to the federal sentencing guidelines." *Id.* at 4. The Department concludes on this issue (the letter addresses various others as well) that "[t]he current sentencing outcomes in [fraud] cases are unacceptable, and the Commission should determine whether some reforms are needed." *Id.* at 5. In short, the premise of the letter is that unless the sentences in fraud cases are "moored" to the advisory ranges provided by the United States Sentencing Guidelines, they produce "unwarranted sentencing disparities" that are "extremely problematic." *Id.* at 2.

The DOJ Letter recommends, *inter alia,* a systemic analysis and synthesis by the Commission of the federal sentencing data it has collected, followed by a report that "explore[s] how to create a single sentencing regime that will earn the respect of the vast majority of judges, prosecutors, defense attorneys, Members of Congress, probation officers, and the public." *Id.* at 3. It also suggests that "reforms might include amendments to the sentencing guideline for fraud offenses." *Id.* at 5.

The Department is an important influence in the formulation of sentencing policy. Jonathan Wroblewski, the author of the letter, is a thoughtful and well-respected expert in the area. Finally, the Attorney General enjoys *ex officio* membership on the Sentencing Commission, and Mr. Wroblewski is the Attorney General's designee to that post. For all these reasons, the DOJ Letter to the Commission will carry great weight.

The sentencing of Isaac Ovid on July 30, 2010 illustrates well the fact that, here in the trenches where fraud sentences are actually imposed, there is a more nuanced reality than the DOJ Letter suggests. The letter describes two "dichotomous regimes" in fraud cases—one moored to the Guidelines, the other adrift in the vast regions beneath the low end of the advisory Guidelines ranges. *Id.* at 2. But Ovid's sentencing shows otherwise. Specifically, it shows how the fraud guideline, despite its excessive complexity, still does not account for many of the myriad factors that are properly considered in fashioning just sentences, and indeed no workable guideline could ever do so. This reality does not render the Guidelines irrelevant in fraud cases; they are in fact quite useful in all sentencings. But sentencing judges know that a full consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), implicates offense and offender characteristics that are too numerous and varied, and occur in too many different combinations, to be captured, much less quantified, in the Commission's Guidelines Manual. A consideration of those and the other factors set forth in § 3553(a) produces sentences that are moored to fairness, and to the goals of sentencing set forth in § 3553(a)(2), but sometimes not so much to the advisory Guidelines range. Indeed, in some cases the fair sentence can drift quite far away from the advisory range, which is, after all, but one of eight factors the sentencing judge must consider.

Ovid's sentencing reveals that the Department knows this as well. Aggressive, experienced, successful white collar prosecutors understand that it does not undermine the Sentencing Guidelines at all, much less create some kind of rogue sentencing regime, when the consideration of factors set forth in 18 U.S.C. § 3553(a) produces a sentence that happens to be substantially below the advisory range.

I support the Department's call for Sentencing Commission review of fraud sentences. But in determining whether reforms are needed, and especially in determining whether the existing guideline should be burdened with even more adjustments, the Commission should examine whether our system already provides an adequate solution for the claimed "unacceptable" outcomes the Department complains about. I suggest that it does, in the form of appellate review, and for all of the handwringing in the DOJ Letter about unacceptable sentences, the Department for the most part has not even tried to avail itself of that solution.

On March 5, 2010, Isaac Ovid pled guilty to Count One of a three-count indictment. It charged him with conspiring between November 2004 and December 2005 to commit securities fraud in relation to two hedge funds, the Logos Fund and the Donum Fund.

Between 2002 and 2006, Ovid was an ordained minister of the Local Christian Assembly (the "Church") in Queens, New York. He also provided private investment services to his family, friends and Church members.

In October 2004, when Ovid was just 23 years old, he and his coconspirators formed Jadis Capital, an investment management company. Ovid provided $445,000 in start-up money, which included $100,000 of his own funds.

Between November 2004 and December 2005, Ovid and others created the first of the two hedge funds, the Logos Fund. Neither fund was registered with the SEC, which meant the funds could legally be marketed only to individuals meeting specified income thresholds. However, Ovid and his coconspirators marketed the funds to friends, family and Church members who did not meet these thresholds. In addition, the private placement memorandums used to market the Logos Fund contained numerous fraudulent misrepresentations and omitted material facts.

By February 2005, nearly all of the start-up money for Jadis Capital was depleted. Ovid and coconspirator Aaron Riddle agreed that they would use the money from the Logos Fund to operate Jadis Capital. Approximately $3.5 million was used to pay Jadis Capital's operating expenses, including a $1.6 million buildout of extravagant offices on Long Island. Another $1.6 million was used to purchase luxury items for the defendants and their family members, and to make payments to their businesses and to charities. Logos Fund money was also used to finance a business created by coconspirator Robert Riddle and his wife and to repay Ovid's debts to his former client.

In May 2005, Ovid began trading the money invested in the Logos Fund and within two weeks he lost more than $2 million, which almost entirely depleted the trading account. Thereafter, from May to mid-August 2005, Ovid stopped trading, but he instructed others to falsely advise prospective investors that Logos Fund was performing at a year-to-date profit of 15%.

In August 2005, Ovid and his coconspirators established the Donum Fund. They marketed it to larger, institutional investors. The private placement memorandums included the same misrepresentations as the Logos Fund memorandums and some others as well. Between August and November 2005, almost $3.1 million was invested in the Donum Fund by outside investors, including $3 million by a group from Panama.

By November 2005, the funds had collapsed. Ovid and several other Jadis Capital executive team members apologized to the defrauded Church members during services. A letter was written in December 2005 advising investors in the Logos Fund that their investments had been lost. Ovid was forced out of the company and returned to Trinidad. After seeking legal advice, the defendants advised the SEC of the fraud.

The advisory Guidelines range for Ovid was 210–262 months. His base offense level was 6; he received upward enhancements of 20 levels for a loss greater than $7 million, 4 levels for more than 50 victims, 4 levels for being associated with a registered broker, 2 levels for preying on vulnerable victims, and 4 levels for his leadership role in the offense. His early guilty plea earned him a 3–level reduction for acceptance of responsibility. The total offense level was 37, which in Criminal History Category I yields a range of 210–262 months.

Ovid was sentenced to 60 months in the custody of the Attorney General and a three-year term of supervised release with various special conditions. He was ordered to pay restitution and was subjected to an agreed-upon forfeiture order.

The reasons for the sentence were stated at the sentencing proceeding. They were:

• "Jadis Capital, the Uniondale company in this case, was not . . . started as a fraud."

• "As opposed to your pump and dumps and some of these other types of criminal schemes that the court has . . . seen over the years, this Jadis Capital . . . was started with the best of intentions. This firm was hoping to benefit the lives of the ministers and the people associated with the church who went to work at the firm and also specifically intended to benefit the members of the congregation."

• "Mr. Ovid was . . . at the center of Jadis Capital. . . . [B]y the age of 23 years old, . . . there was a buzz about Isaac Ovid, that he really knew how to trade and that he was very successful trading stocks in the stock markets. . . . Mr. Ovid to some extent believed that he could pull this off; that he could be the supertrader that he and his co-conspirators were saying that he was."

• "Mr. Ovid provided money for start-up costs of Jadis Capital. . . . [H]e had had success and . . . he did have some liquidity during the period of 2004 where he was able to contribute money, his own money, to the start-up of this company."

• "The idea for hedge funds was not necessarily the original idea for the company. It was going to be a venture capital company where they were going to go out and open up businesses. . . . There was a buzz in this church about Isaac Ovid and about his abilities."

• "[Ovid] never drew a salary from Jadis Capital. Now, did he avail himself of an expense account like many of the other members of Jadis Capital? Absolutely. But we do have him investing some portion of his own money, of $450,000 that he puts into the company when the company starts. Some portion of that, purportedly as much as a hundred thousand dollars of that, comes from Mr. Ovid. And thereafter Mr. Ovid . . . does not collect a salary."

• "In late December of 2004 Mr. Ovid goes to . . . South Africa on a missionary cause related to his work with the church, and he is unable to get back into the United States; and he remains out of the United States from December up until late April, early May of 2005, which is when all of this, the vast majority of the $9.3 million into the Logos Fund, is being collected. . . . That's not to say that Mr. Ovid wasn't directing matters from far away. He was having conference calls with his underlings. . . ."

• "The expenses were excessive for what it was that these gentlemen were running, but we are not talking about expenses that are, you know, $2 million parties for your wife. We are talking about flying first class wherever you go, going out to Ruth's Chris steakhouse for every business-related meeting, a Rolex for each one of the members of the firm, to present the image of being successful. Were they right to do this? Absolutely not. But these were expenses that in some businesses are covered under business expenses, but they were certainly excessive."

• "Now, were there things in the [private placement memorandums] and the offering documents that were untrue? Absolutely. They didn't represent that Mr. Ovid was even affiliated with the fund. But to most people who were associated with the church, that wasn't really a material misrepresentation to them, because they all knew that Mr. Ovid was the person that was going to be trading. [A] lot of the folks who put money into this fund did so without looking at the proposals or without looking at the literature. They believed in Mr. Ovid."

• "By August of 2005 it was clear to the people at the highest levels, including Mr. Ovid, that the firm was [having] serious financial problems. Mr. Ovid . . . actually tried to cut back all of the costs at Jadis Capital and . . . they ended up firing most of their staff. They fired one of their own partners in the firm at that time."

• "Where did all that money go? That money went towards the $1.6 million build-out [of the Jadis offices]. That money went towards all the salaries for all the defendants and their family members who were working there. That money went toward paying Mr. Ovid's expense accounts, which included his stays at hotels and other expenses, not grandiose expenses but expenses nevertheless. They were expenses that he incurred. Throughout this time he was not receiving a salary at all. There was no evidence that . . . he was siphoning off money out of the company for his own personal gain."

• "[T]here is no evidence of him sending money off into foreign accounts."

• "By September 2005, when it came to a head and everybody at the firm realized that the investor funds had been decimated, they then sort of took a swing for the fences; and that's where the Panamanians come in. And that was a deal that, frankly, Mr. Ovid, even though he was a co-conspirator in it, wasn't personally involved in. He did not seek out this investment. This investment from Panama came in, a $3 million investment, that was orchestrated or solicited by his co-conspirators. Mr. Ovid was either explicitly or implicitly asked not to be part of the presentation to the Panamanian investors so as not to run them off by the fact he was a 23-year-old kid; and there were some people at the firm who didn't think that was a good idea to present him as their chief trader at that time."

• "[After they] were able to convince the Panamanians to put $3 million into the fund, . . . Mr. Ovid was asked by his co-conspirators and he was convinced he could get back into trading, and he went back to trading and he went and traded the $3 million and ended up losing $500,000 of it in very short order. It was at that point that [Ovid] and his codefendants realized that their sort of scheme was done and they couldn't survive. They went back to the church, in early November of 2005. They repented, to use their words, and went and told the church about everything that had happened and called all of their investors in and explained to them what it was they had done wrong. Mr. Ovid appeared before the congregation on November 5 and November 16, I think, of 2005 and confessed to the members of the church as to what he had done."

• "[On] December 22 of 2005 Mr. Ovid was in the SEC on an entirely voluntary basis giving . . . them a fulsome explanation of what it was that was going on at Jadis Capital. He then went back to Trinidad, returned again, I believe, in January of 2005, and gave another full debriefing to the SEC."

• "He appeared in the office of the U.S. Attorney in March of 2005 and gave another full statement about his involvement in this case."

• "[T]he guidelines often look to the amount of loss as a proxy for culpability, and certainly here the amount of loss is huge, [but] . . . the defendant and his co-conspirators all believed that this was actually going to work. . . . [O]ne gets a strong sense that the people who were affiliated with Jadis Capital really believed that this was going to work and that this was a—this was going to, to use their terms, bless everybody."

• "There is a measure of exploitation here, but it's hard to put that label on [it] when the people who started the firm did so with the best of intentions and did so to benefit all of the people in the church. And what happened here and what makes this a fraud is that their best intentions were entirely mismanaged, and when the problems blew up they didn't know how to handle it, and people like Mr. Ovid decided that the best way to survive the thing is to ride it out and not tell anybody what you are doing while you know that your . . . marketing materials contained misrepresentations."

• As for remorse, it was "demonstrated heavily" by Ovid.

• "I think in a situation like this, . . . a sentence of 60 months is appropriate in light of the fact that Mr. Ovid was a . . . net zero winner."

Though all of these factors are properly considered pursuant to 18 U.S.C § 3553(a), they are not adequately accounted for in the Guidelines themselves. In combination, and taking into account all the facts of the case, the advisory Guidelines range and the other factors enumerated in § 3553(a), a 60-month term of imprisonment, 12 and one-half years less than the low end of the advisory Guidelines range of 210–262 months, was warranted.

Even though Ovid's sentence amounted to a significant variance from the advisory Guidelines range, the Department does not regard it as an "unacceptable" sentencing outcome. This case will not be cited as evidence of a "second regime" of sentencing that breeds disrespect for our system. To the contrary, the Department regards Ovid's 60-month sentence as the just result of a careful consideration of all the relevant sentencing factors—including the advisory range—and as entirely consistent with the Guidelines themselves.

I say this with confidence because all of the above-quoted statements from the sentencing proceeding were made by the prosecutor. The government had entered into a plea agreement with Ovid pursuant to Fed. R. Crim. P. 11(c)(1)(A). In exchange for Ovid's plea of guilty to Count One, which carried a five-year statutory maximum, the government agreed to dismiss other pending charges, which exposed Ovid to an additional 40 years in prison. The Guidelines instruct me that such a "charge bargain" may be accepted upon a finding by me that the offense of conviction "adequately reflect[s] the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." U.S.S.G. § 6B1.2(a). In its effort to persuade me to accept the bargain, the prosecution cited the factors set forth above and contended that it would not undermine the Guidelines for me to impose a 60-month sentence.

Even though the prosecutor was justifying his plea bargain, not imposing sentence, I couldn't help thinking as I listened to his various reasons for why it was all right to cap Ovid's sentence at 60 months that this is what sentencing judges do. We canvass all of the many features of the case that bear on the culpability of the defendant. Though some of those features have been considered by the Sentencing Commission and incorporated into the Guidelines calculation, many are not. But they are still part of the nature and circumstances of the offense, or part of the history and characteristics of the defendant, and thus may (indeed must) be factored into the sentence by the judge.

As if to make this point even clearer, by happenstance Ovid was sentenced moments after the sentencing of Aisha Hall in *United States v. Aisha Hall,* 09-CR-292-JG-7 (E.D.N.Y.). Hall's fraudulent scheme involved the creation of phony "Proof of Funds" letters and the bribery of low-level bank officers to fraudulently verify that the funds described in the letters were in fact on deposit. As far as the Guidelines are concerned, Hall and Ovid were similar. Hall's calculation did not include Ovid's four-level adjustment for association with a broker dealer or two-level adjustment for preying on vulnerable victims, so her advisory range was 151–188 months, somewhat lower than Ovid's 210–262 month range. Nevertheless, the loss quantities involved were roughly comparable (Hall received an 18–level adjustment as compared to the 20–level adjustment for loss in Ovid's case); both schemes involved more than 50 victims; both defendants received four-level role adjustments for being leaders of their schemes; both pled guilty and received credit for accepting responsibility; and neither had any criminal history.

Like the Department, I "begin from the principle that offenders who commit similar offenses and have similar criminal histories should be sentenced similarly." DOJ Letter at 2. But the fact that two fraud defendants have similar or even identical *Guidelines ranges* does not necessarily mean they committed similar offenses. In ways captured by the § 3553(a) factors but not sufficiently by the Guidelines themselves, Hall was more culpable than Ovid. Her scheme was 100% fraudulent from the outset; her crime involved neither good intentions nor legitimate business activities. When Hall's scheme collapsed, she did not convene her victims to disclose and apologize, as did Ovid; rather, she took steps to evade detection. Unlike Ovid, Hall did not invest (and lose) her own money in her business. And unlike Ovid, Hall drew a considerable amount of money (about $4 million) out of the fraudulent business, and it remained unaccounted for at sentencing. Though both defendants received the maximum upward adjustment for their leadership role, Hall micromanaged every aspect of her scheme, whereas Ovid was uninvolved (at least directly) in much of the fraudulent activity. Also, because Hall's brazen scheme unraveled quickly, there was no danger that the loss amount in her case (gain was used as a proxy pursuant to Application Note 3(B) to U.S.S.G. § 2B1.1) would play a disproportionate role in her advisory Guidelines range calculation. And whereas Ovid's remorse was deep and sincere, Hall's was tepid; even though she admitted her fraud and clearly accepted responsibility for it, she persisted with her implausible claim that no one was actually harmed by the scheme.

Other § 3553(a) factors further differentiated Ovid from Hall. Specifically, the government mentioned a heightened need for the Hall sentence to promote general deterrence; because these proof-of-fund-letter schemes, it argued, are of recent vintage and are cropping up around the country, a strong deterrent message needed to be sent.

So whereas the government asked me to sentence Ovid to a prison term 12 and one-half years below his advisory range, it requested that Hall's sentence be "close to the advisory Guidelines range." I sentenced Hall to a 126–month term of imprisonment, more than twice the length of the 60–month jail term imposed on

Ovid, even though the low end of Hall's sentencing range was five years lower than the low end of Ovid's.

The disparity between these two sentences cannot reasonably be described as unwarranted. When all the relevant factors were considered, Ovid and Hall were not, in the end, similarly situated.

It remains true, of course, that a sentencing regime that permits consideration and weighing of all the various circumstances present in a case will result in disparities. Sentencing is not scientific, and the weight to be accorded, for example, Ovid's pure intentions at the outset, or his lack of personal profit from the scheme, or his confessions and apologies to his congregation and the SEC, are matters of judgment, not precise calibration. Reasonable people will reach different results. Indeed, though I agreed with the prosecutor's observations about Ovid, and a 60-month term was not unreasonable, I would have weighed the various factors differently and sentenced Ovid to more time in prison were it not for the 60-month cap imposed by the plea agreement I accepted. I have no doubt some of my brother and sister judges might have weighed them differently than I did. Some might have imposed less than 60 months in prison; others might have rejected the plea agreement based on a judgment that a sentence no greater than 60 months could not adequately reflect the seriousness of Ovid's fraud, or would undermine the purposes of sentencing or the Guidelines themselves. The same is true with regard to Hall. The prosecutor no doubt thought her sentence, which was 25 months below the low end of the range, should have been closer to that range; other judges might have agreed, and still others might have sentenced Hall to an even shorter term.

There is nothing surprising or disturbing about the fact that once judgment is allowed to play a role in sentencing, it will be exercised differently by different people. It is the natural consequence of permitting judges to judge—to fashion a just sentence based on all the relevant facts in each particular case. The faithful discharge of the obligation to consider all the § 3553(a) factors will produce a range of reasonable outcomes because there are so many relevant considerations that are so difficult to weigh, individually and in combination. That reality is not altered by the illusion of precise calculation created by the ever-expanding fraud guideline and the rest of the now 539-page Guidelines Manual. Thus, across the range of judges in the system, cases that are indeed similar will be sentenced differently. If that's all the DOJ Letter means when it refers to reports by prosecutors that "judicial assignment" matters in a case, DOJ Letter at 2, the letter is correct but the observation is unremarkable.

I suspect the Department's concerns run deeper than that. Implicit in the way it describes a series of "inconsistent[ ]" fraud sentences that it plainly thinks were wayward, *see* DOJ Letter at 4–5, is the claim that judges are inexplicably and unjustifiably all over the lot, sentencing based on their personal preferences and producing the kind of unwarranted disparities the Sentencing Reform Act of 1984 and the Sentencing Guidelines were intended to eliminate. If that is correct, I agree it is unacceptable. But the solution to such a problem, if it exists, is not to promulgate more amendments to the Guidelines for fraud offenses, as the DOJ Letter suggests. The fraud guideline, U.S.S.G. § 2B1.1, already contains more than 40 "Specific Offense Characteristics" adjustments, not to mention 16 pages of dense application notes. It is way too complicated as it is.

Rather, if our system really is producing *unwarranted* disparities in fraud sentences, as opposed to disparities based on legitimate individualized sentencing concerns or on the reasonable exercise of judgment by different judges, we already have a remedy. A judge must explain the reasons for each sentence, and those reasons, and the sentences they support, are subject to appellate review. If the sentencing judge fails to calculate the Guidelines range, or calculates it incorrectly, or fails to consider it or any of the other § 3553(a) factors, or fails properly to find the relevant facts, or fails to explain the sentence, including any deviation from the Guidelines range, the sentence is subject to reversal on appeal. *See Gall v. United States,* 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). And even if the "sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Id.* Only reasonable sentences may be upheld; outliers will be reversed.

The Sentencing Commission's data for Fiscal Year 2009 show that of 8,055 sentences imposed pursuant to the fraud guideline, 1,711 were below the advisory range (excluding "government-sponsored" variations from the range). If those sentences were imposed at the whim of individual sentencing judges, as the DOJ Letter suggests is happening with sufficient frequency that a "second regime" has evolved, the government should appeal them. But the Commission's data show that the government almost never appeals sentences on the ground that the § 3553(a) factors were incorrectly applied. In Fiscal Year 2009 it appealed a total of only 18 such sentences. Even if every one of those appeals involved a fraud sentence, only 1% of the cases the DOJ Letter describes as "extremely problematic" are being appealed by the government.

Even with respect to the eight sentences specifically identified in the DOJ Letter, which are presumably the most egregious examples of what it describes as "unacceptable" fraud sentences, the government either didn't appeal or withdrew its appeal in all but one of them. Five were imposed in *United States v. Ferguson et al.,* 06-CR-137 (CFD) (D. Conn.), and though the government filed notices of appeal, it withdrew them in exchange for the defendants' agreement not to appeal the sentences as too *harsh.* The government also withdrew its appeal in *United States v. Turkcan,* 08-CR-428 (DJS) (E.D. Mo.), and it never even filed an appeal in *United States v. Stinn,* 07-CR-113 (NG) (E.D.N.Y.). The remaining sentence was appealed and the government persisted in its challenge, but the appellate panel affirmed summarily, explicitly rejecting the government's claim that the district court acted on its "personal view" rather than pursuant to the § 3553(a) factors. *United States v. Adelson,* 301 Fed. Appx. 93, 95 (2d Cir. 2008) (quotation marks omitted). The court also observed, as I have here, that fraud cases present a wide spectrum of culpability, and the careful application of the § 3553(a) factors to fraud defendants may properly result in the imposition of sentences well below the advisory range. *See id.* at 94–95 (citing *United States v. Cavera,* 550 F.3d 180, 192 (2d Cir. 2008) (en banc)).

I don't know why the Department has chosen to complain about fraud sentences to the Commission but not to the circuit courts of appeals. It has no reason to believe such appeals would be futile—in the handful of cases in which the government has challenged sentences based on the sentencing judges' application of the § 3553(a) factors, it has prevailed two-thirds of the time. Perhaps, as in this case, the prosecutors who are actually handling the cases in the courtrooms do not regard the sentences as unacceptable simply because they are below the advisory Guidelines ranges. In any event, if the problem the DOJ Letter identifies in this area of federal sentencing in fact exists, there is no need for reform, as the solution is already available.

Problem 18-4
Before reading the next case: If you had been the federal district judge assigned to the case, what sentence would you have imposed on Rajat Gupta, the former head of McKinsey and the Goldman Sachs board member whose insider trading case was described in Chapter 4? What would have been your explanations for your sentence? Under *Booker*, of course, you are required to consider the Guidelines range but may impose a sentence outside the range for which you provide a reasonable justification.

Here is how Gupta's actual sentencing judge (Jed Rakoff, once again) explained his decision.

UNITED STATES v. GUPTA, 904 F. Supp. 2d 349 (2012)

JED S. RAKOFF, District Judge:

The Court is called upon to impose sentence on Rajat K. Gupta, who on June 15, 2012, was found guilty by a jury of one count of conspiracy and three counts of substantive securities fraud, in connection with providing material non-public information to Raj Rajaratnam. Federal law requires a court to state, not only orally but in writing, its reasons for imposing a sentence "different from" a Guidelines sentence. 18 U.S.C. § 3553(c)(2). *See also* *United States v. Rattoballi*, 452 F.3d 127, 128–29 (2d Cir. 2006). This will be a non-guidelines sentence, and, accordingly, the Court will both read this Sentencing Memorandum in open court and docket it promptly thereafter.

Imposing a sentence on a fellow human being is a formidable responsibility. It requires a court to consider, with great care and sensitivity, a large complex of facts and factors. The notion that this complicated analysis, and moral responsibility, can be reduced to the mechanical adding-up of a small set of numbers artificially assigned to a few arbitrarily-selected variables wars with common sense. Whereas apples and oranges may have but a few salient qualities, human beings in their interactions with society are too complicated to be treated like commodities, and the attempt to do so can only lead to bizarre results.

Nowhere is this more obvious than in this very case, where the Sentencing Guidelines assign just 2 points to Mr. Gupta for his abuse of a position of trust—the very heart of his offense—yet assign him no fewer than 18 points for the resultant but unpredictable monetary gains made by others, from which Mr. Gupta did not in any direct sense receive one penny.

It may be worth remembering that the Sentencing Guidelines were originally designed to moderate unwarranted disparities in federal sentencing by enacting a set of complicated rules that, it was hypothesized, would cause federal judges to impose for any given crime a sentence approximately equal to what empirical data showed was the average sentence previously imposed by federal judges for that crime. *See generally* *Kimbrough v. United States*, 552 U.S. 85, 96, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007). From almost the outset, however, the Guidelines deviated from this goal. For example, even though a perceived racial disparity in sentencing was one of the evils the Guidelines were designed to combat, in actuality the Guidelines imposed in narcotics sentencing a huge racial disparity that dwarfed any prior such problem. Specifically, the

Sentencing Commission, based on limited and faulty data, originally determined that an ounce of crack cocaine should be treated as the equivalent of 100 ounces of powder cocaine for sentencing purposes, even though the two substances were chemically almost identical and, as later studies showed, very similar in their effects. Since, however, 85 percent of crack cocaine offenders were black, while most of those who dealt in powder cocaine were Caucasian or Hispanic, the result of the 100-to-1 ratio was to force upon the courts a gross racial disparity in narcotics sentencing. It was only in 2010 that the ratio was changed from 100-to-1 to 18-to-1; and even then as much on the basis of conjecture as evidence. *See generally* Dorsey v. United States, ––– U.S. ––––, 132 S. Ct. 2321, 2326, 183 L. Ed. 2d 250 (2012). For the Sentencing Commission had no more empirical basis for imposing the ratio of 18-to-1 than for earlier imposing the ratio of 100-to-1. In both cases, the numbers were plucked from thin air.

While this example is drawn from the area of narcotics, the fundamental point is equally applicable to the instant case. Here, as there, the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice.

Another example of the deviation of the Guidelines from the original goals of the Sentencing Commission—and one more directly relevant to the instant case—is the huge increase in the recommended Guidelines sentences for securities fraud cases. The Guidelines' calculations for this offense are no longer tied to the mean of what federal judges had previously imposed for such crimes, but instead reflect an ever more draconian approach to white collar crime, unsupported by any empirical data. Take the hypothetical but typical case described by Professor Kate Stith of Yale Law School, involving a typical securities fraud defendant who pled guilty to inflating the financial figures of a public company, thereby causing at least 250 shareholders to collectively suffer a reduction of more than $12.5 million in the value of their shares. In 1987, such a defendant would have faced a Guidelines sentence of 30–37 months; but by 2003, the same defendant would have faced a Guidelines sentence of 151–188 months, a more than 500% increase. *See* Kate Stith, *Federal Sentencing: The One-Way Ratchet*, New York City Bar Association First Annual Conference on White Collar Crime (May 2012). Was such a crime really 500% worse in 2003 than it was in 1987? Had any of the factors that underlie rational sentencing so radically changed as to warrant such a huge increase?

In fairness, this vast increase in white collar sentencing was partly mandated by Congress, reacting in turn to public outcry over such massive frauds as Enron and WorldCom. But in implementing the Congressional mandate, the Sentencing Commission chose to focus largely on a single factor as the basis for enhanced punishment: the amount of monetary loss or gain occasioned by the offense. By making a Guidelines sentence turn, for all practical purposes, on this single factor, the Sentencing Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, see 18 U.S.C. § 3553(a), and, by contrast, effectively guaranteed that many such sentences would be irrational on their face. . . .

[T]here is no better illustration of the irrationality of this approach than the instant case: for of the total of 30 Guidelines points calculated by the Probation Department and endorsed by the Government as reflecting the proper measure of Mr. Gupta's crime and punishment, no fewer than 20—or two-thirds of the total—are exclusively the product of Rajaratnam's and his companies' monetary gain, in which Mr. Gupta did not share in any direct sense.

It might be argued that the Guidelines still work to minimize disparities. But if the sentences so calculated are the product of placing an overwhelming emphasis on a factor that may be central to some frauds but largely incidental to others, the effect is to create, in the name of promoting uniformity, a sentencing disparity of the most unreasonable kind.

The heart of Mr. Gupta's offenses here, it bears repeating, is his egregious breach of trust. Mr. Rajaratnam's gain, though a product of that breach, is not even part of the legal theory under which the Government here proceeded, which would have held Gupta guilty even if Rajaratnam had not made a cent. While insider trading may work a huge unfairness on innocent investors, Congress has never treated it as a fraud on investors, the Securities Exchange Commission has explicitly opposed any such legislation, and the Supreme Court has rejected any attempt to extend coverage of the securities fraud laws on such a theory. . . . In the eye of the law, Gupta's crime was to breach his fiduciary duty of confidentiality to Goldman Sachs; or to put it another way, Goldman Sachs, not the marketplace, was the victim of Gupta's crimes as charged. Yet the Guidelines assess his punishment almost exclusively on the basis of how much money his accomplice gained by trading on the information. At best, this is a very rough surrogate for the harm to Goldman Sachs.

The Court is nonetheless mandated to calculate the defendant's Guidelines range, see 18 U.S.C. § 3553(a)(4)(A), even if, as the Court now holds, the non-guideline sentence that it intends to impose would not vary one whit if the Guidelines calculation was that proposed by the Government, that proposed by the defendant, or anywhere in between.

The parties agree that the base offense level for the offense of which Mr. Gupta stands convicted is 8 points, and that 2 points must be added for abuse of trust. To these 10 points must be added the number of points corresponding to the amount of monetary gain resulting from the offense. Such gain is defined in the official comment to the pertinent section of the Guidelines as "the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information." U.S.S.G. § 2B1.4 cmt. As Judge Holwell pointed out in connection with Mr. Rajaratnam's sentencing, this "phrase is not a model of clarity." *United States v. Rajaratnam*, No. 09 Cr. 1184(RJH), 2012 WL 362031, at *14 (S.D.N.Y. Jan. 31, 2012). Nonetheless, it seems reasonably clear to this Court that the comment limits the calculation to gains made or losses avoided in trades that were based, in whole or in part, on the inside information.

In the instant case, however, it is also clear to the Court, both from the jury's split verdict and from the Court's own assessment of the evidence, that the trades in question were those made by Rajaratnam and his Galleon funds on September 23, 2008 and October 24, 2008, directly and immediately as the result of tips from Gupta. In the former case, Gupta, late on the afternoon of September 23, tipped Rajaratnam about Warren Buffett's soon-to-be-announced infusion of $5 billion into Goldman Sachs, whereupon Rajaratnam caused various Galleon funds to purchase large quantities of Goldman stock just before the market closed. When the Buffett investment was announced the following morning, the stock surged, causing Galleon to realize an immediate gain of $1,231,630. In the latter case, Gupta, on October 23, tipped Rajaratnam that Goldman Sachs would soon report third quarter losses, whereas many analysts were predicting a profit. On the next day, Rajaratnam sold 150,000 shares of Goldman. Thereafter, as word began to seep out about Goldman's reduced prospects, the stock began to fall, and when the poor third quarter results were finally made public on December 16, 2008, it fell still further. Based on all the evidence, the Court concludes that it is more likely than not that Rajaratnam, in the absence of Gupta's tip, would not have caused Galleon to sell its valuable Goldman stock until the morning of December 17, 2008. The tip thus enabled Galleon to avoid losses of $3,800,565. Taken together, therefore, the September and October tip-based trades resulted in an illegal "gain" of $5,032,195.

This figure, while large, is less than one-third of the $15,355,409 gain calculated by the Government and endorsed by the Pre-Sentence Report of the Probation Department. But in the arbitrary world of the Guidelines, this big difference makes little difference. Instead of adding 20 points to Gupta's Guidelines score, it adds 18 points, still overwhelming all other factors.

Although the defendant propounds a number of other theories for still further reducing the gain figure, the Court rejects these arguments, essentially for the reasons given by Judge Holwell in rejecting similar arguments at the time of the Rajaratnam sentencing, 2012 WL 362031, at *13–15, as well as the additional reasons set forth in the Government's two sentencing memoranda submitted in this case. Thus, the Court concludes that the total offense level is 28, the criminal history category is I, and the Guidelines range is 78 to 97 months' imprisonment.

But this Guidelines range does not rationally square with the facts of this case, not only for the reasons already stated but also because it does not take adequate account of the factors this Court is required by law to consider in imposing sentence. The Court therefore turns to the bedrock of all federal sentencing, section 3553(a) of Title 18, entitled "Factors to be considered in imposing a sentence." The very first factor is "the nature and circumstances of the offense and the history and characteristics of the defendant" (emphasis supplied). Thus, at the very outset, there is presented the fundamental problem of this sentence, for Mr. Gupta's personal history and characteristics starkly contrast with the nature and circumstances of his crimes.

All the evidence before the Court—not just the letters written on Mr. Gupta's behalf but also the objective facts of record—establish beyond cavil that Mr. Gupta has selflessly devoted a huge amount of time and effort to a very wide variety of socially beneficial activities, such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Public Health Foundation of India, the Indian School of Business, the Pratham Foundation (which provides quality education to underprivileged children in India), the Cornell Medical School, the Rockefeller Foundation, and many many more. As well summarized in his counsel's sentencing memorandum, such activities are but illustrations of Mr. Gupta's big heart and helping hand, which he extended without fanfare or self-promotion, to all with whom he came in contact.

While some have suggested that the large volume of poignant letters submitted on Mr. Gupta's behalf are simply the strategem of a rich, well-connected defendant endeavoring to derail the Court from focusing on his crimes, this is simply not the case, for the facts recited in most of the letters are well documented and, indeed, undisputed by the Government. The Court can say without exaggeration that it has never encountered a defendant whose prior history suggests such an extraordinary devotion, not only to humanity writ large, but also to individual human beings in their times of need. The Guidelines virtually ignore this measure of the man, but here as elsewhere the Guidelines must take second place to section 3553(a), which requires a court to take account of a defendant's character in imposing sentence. And how could it be otherwise, for on this day of judgment, must not one judge the man as a whole?

But when one looks at the nature and circumstances of the offense, the picture darkens considerably. In the Court's view, the evidence at trial established, to a virtual certainty, that Mr. Gupta, well knowing his fiduciary responsibilities to Goldman Sachs, brazenly disclosed material non-public information to Mr. Rajaratnam at the very time, September and October 2008, when our financial institutions were in immense distress and most in need of stability, repose, and trust. Consider, for example, his tip to Rajaratnam on September 23, 2008. With Goldman Sachs in turmoil but on the verge of being rescued from possible ruin by an infusion of $5 billion, Gupta, within minutes of hearing of the transaction, tipped Rajaratnam, so that the latter could trade on this information in the last few minutes before the market closed. This was the functional equivalent of stabbing Goldman in the back.

So why did Mr. Gupta do it? Since motive is not an element of the offenses here in issue, it did not need to be proved at trial, and so one can only speculate. Having finished his spectacular career at McKinsey in 2007, Gupta, for all his charitable endeavors, may have felt frustrated in not finding new business worlds to conquer; and Rajaratnam, a clever cultivator of persons with information, repeatedly held out prospects of exciting new international business opportunities that Rajaratnam would help fund but that Gupta would lead. There is also in some of the information presented to the Court under seal an implicit suggestion that, after so many years of assuming the role of father to all, Gupta may have longed to escape the straightjacket of overwhelming responsibility, and had begun to loosen his self-restraint in ways that clouded his judgment. But whatever was operating in the recesses of his brain, there is no doubt that Gupta, though not immediately profiting from tipping Rajaratnam, viewed it as an avenue to future benefits, opportunities, and even excitement. Thus, by any measure, Gupta's criminal acts represented the very antithesis of the values he had previously embodied.

So how does a court balance these polar extremes? In arguing for a non-guideline sentence in the Pre-Sentence Report, the experienced Senior U.S. Probation Officer Emily Frankelis had this to say: "We believe the defendant's commission of the instant offenses was aberrant behavior—not aberrant as defined by the U.S. Sentencing Guidelines, but rather as defined by Merriam-Webster: '. . . atypical.'" The Court agrees, and finds that the aberrant nature of Mr. Gupta's conduct by itself would warrant a non-guideline sentence, even aside from the other factors favoring leniency. But in order to find just the right sentence, the Court must also consider two further mandates of section 3553(a): first, "the need for the sentence imposed" to afford specific deterrence, general deterrence, "just punishment," and the like; and, second, the requirement that any sentence imposed be "sufficient, but not greater than necessary, to comply with [these] purposes."

As to specific deterrence, it seems obvious that, having suffered such a blow to his reputation, Mr. Gupta is unlikely to repeat his transgressions, and no further punishment is needed to achieve this result. General deterrence, however, suggests a different conclusion. As this Court has repeatedly noted in other cases, insider trading is an easy crime to commit but a difficult crime to catch. Others similarly situated to the defendant must therefore be made to understand that when you get caught, you will go to jail. Defendant's proposals to have Mr. Gupta undertake various innovative forms of community service would, in the Court's view, totally fail to send this message. Moreover, if the reports of Mr. Gupta's charitable endeavors are at all accurate, he can be counted on to devote himself to community service when he finishes any prison term, regardless of any order of the Court.

At the same time, no one really knows how much jail time is necessary to materially deter insider trading; but common sense suggests that most business executives fear even a modest prison term to a degree that more hardened types might not. Thus, a relatively modest prison term should be "sufficient, but not more than necessary," for this purpose.

There are, however, still other factors set forth in § 3553(a) that the Court must, and has, considered, of which perhaps the most difficult, but most important one, is the concept of "just punishment." While all the other factors under section 3553 partake to a lesser or greater degree of policy considerations, "just punishment" taps a deeper vein. Human beings, as social animals, are programmed to respect moral values. This is why people without shame or guilt are considered psychopaths, and also why violations of the moral order raise such deep passions in the human breast. As people have come to understand that insider trading is not only a sophisticated form of cheating but also a fundamental breach of trust and confidence, they have increasingly internalized their revulsion for its commission. While no defendant should be made a martyr to public passion, meaningful punishment is still necessary to reaffirm society's deep-seated need to see justice triumphant. No sentence of probation, or anything close to it, could serve this purpose.

After carefully weighing all these, and other, relevant factors, the Court concludes that the sentence that most fulfills all requirements of section 3553(a) is two years in prison. Rajat K. Gupta is therefore sentenced to 24 months' imprisonment, concurrent on all counts, to be followed by one year of supervised release, on the terms stated from the bench and here incorporated by reference. The otherwise mandatory forfeiture has been waived by the Government, but Court imposes a fine in the sum of $5,000,000. The Court will defer the determination of restitution for up to 90 days, as permitted by federal law. A formal Judgment embodying these terms and incorporating this Memorandum by reference will issue shortly. Meanwhile, Mr. Gupta is ordered to surrender to the designated prison by 2 p.m. on January 8, 2013.

B. Corporate Sentencing Guidelines

Corporations can't be imprisoned, of course, but the Sentencing Guidelines do provide alternative ways to punish corporations. As you read the following Guidelines provisions, note the major ways a corporation can be punished by a sentencing judge in a criminal case, and the main factors and rationales that appear to be driving the Guidelines on corporate sentencing. Do these Guidelines matter if the vast majority of corporate criminal cases settle via DPAs or NPAs and never see a judge?

UNITED STATES SENTENCING GUIDELINES MANUAL (Excerpts)

CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws. . . .

PART B - REMEDYING HARM FROM CRIMINAL CONDUCT, AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note: Effective November 1, 1991 (*see* Appendix C, amendment 422). Amended effective November 1, 2004 (*see* Appendix C, amendment 673).

1. REMEDYING HARM FROM CRIMINAL CONDUCT

Historical Note: Effective November 1, 2004 (*see* Appendix C, amendment 673).

Introductory Commentary

As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense. A restitution order or an order of probation requiring restitution can be used to compensate identifiable victims of the offense. A remedial order or an order of probation requiring community service can be used to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would otherwise not be remedied. An order of notice to victims can be used to notify unidentified victims of the offense.

Historical Note: Effective November 1, 1991 (*see* Appendix C, amendment 422).

§ 8B1.1. Restitution - Organizations

(a) In the case of an identifiable victim, the court shall—

(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) *Provided*, that the provisions of subsection (a) do not apply—

(1) when full restitution has been made; or

(2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a

degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. *See* 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. *See* 18 U.S.C. § 3664(f)(4).

(e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments. . . .

§ 8B1.2. Remedial Orders - Organizations (Policy Statement)

(a) To the extent not addressed under §8B1.1 (Restitution - Organizations), a remedial order imposed as a condition of probation may require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.

(b) If the magnitude of expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm.

<u>Commentary</u>

<u>Background</u>: *The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense, e.g., a product recall for a food and drug violation or a clean-up order for an environmental violation. In some cases in which a remedial order potentially may be appropriate, a governmental regulatory agency, e.g., the Environmental Protection Agency or the Food and Drug Administration, may have authority to order remedial measures. In such cases, a remedial order by the court may not be necessary. If a remedial order is entered, it should be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.*

§ 8B1.3. Community Service - Organizations (Policy Statement)

Community service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense.

Commentary

Background: An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction. However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a). . . .

2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

§ 8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with

the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process. . . .

PART C - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATIONS

§ 8C1.1. Determining the Fine - Criminal Purpose Organizations

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets. When this section applies, Subpart 2 (Determining the Fine - Other Organizations) and §8C3.4 (Fines Paid by Owners of Closely Held Organizations) do not apply. . . .

2. DETERMINING THE FINE - OTHER ORGANIZATIONS . . .

§ 8C2.4. Base Fine

(a) The base fine is the greatest of:

(1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or

(2) the pecuniary gain to the organization from the offense; or

(3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

(b) *Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate.

(c) *Provided, further*, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine.

(d) Offense Level Fine Table

Offense Level	Amount	Offense Level	Amount
6 or less	$5,000	23	$1,600,000
7	$7,500	24	$2,100,000
8	$10,000	25	$2,800,000
9	$15,000	26	$3,700,000
10	$20,000	27	$4,800,000
11	$30,000	28	$6,300,000
12	$40,000	29	$8,100,000
13	$60,000	30	$10,500,000
14	$85,000	31	$13,500,000
15	$125,000	32	$17,500,000
16	$175,000	33	$22,000,000
17	$250,000	34	$28,500,000
18	$350,000	35	$36,000,000
19	$500,000	36	$45,500,000
20	$650,000	37	$57,500,000
21	$910,000	38 or more	$72,500,000.
22	$1,200,000		

. . .

§ 8C2.5. Culpability Score

(a) Start with **5** points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Criminal Activity

If more than one applies, use the greatest:

(1) If—

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **5** points; or

(2) If—

(A) the organization had 1,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 1,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **4** points; or

(3) If—

(A) the organization had 200 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 200 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **3** points; or

(4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **2** points; or

(5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **1** point.

(c) Prior History

If more than one applies, use the greater:

(1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **1** point; or

(2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **2** points.

(d) Violation of an Order

If more than one applies, use the greater:

(1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add **2** points; or

(2) If the commission of the instant offense violated a condition of probation, add **1** point.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add **3** points.

(f) Effective Compliance and Ethics Program

(1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract **3** points.

(2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) (A) Except as provided in subparagraphs (B) and (C), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i) within high-level personnel of a small organization; or

(ii) within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.

(C) Subparagraphs (A) and (B) shall not apply if—

(i) the individual or individuals with operational responsibility for the compliance and ethics program (*see* §8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (*e.g.*, an audit committee of the board of directors);

(ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;

(iii) the organization promptly reported the offense to appropriate governmental authorities; and

(iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or

(2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or

(3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point. **. . .**

§ 8C2.6. Minimum and Maximum Multipliers

Using the culpability score from § 8C2.5 (Culpability Score) and applying any applicable special instruction for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table below.

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60

3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

§ 8C2.7. Guideline Fine Range - Organizations

(a) The minimum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable minimum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

(b) The maximum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable maximum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

Historical Note: Effective November 1, 1991 (*see* Appendix C, amendment 422).

§ 8C2.8. Determining the Fine Within the Range (Policy Statement)

(a) In determining the amount of the fine within the applicable guideline range, the court should consider:

(1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization;

(2) the organization's role in the offense;

(3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct;

(4) any nonpecuniary loss caused or threatened by the offense;

(5) whether the offense involved a vulnerable victim;

(6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;

(7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c);

(8) any culpability score under §8C2.5 (Culpability Score) higher than 10 or lower than 0;

(9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score);

(10) any factor listed in 18 U.S.C. § 3572(a); and

(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program).

(b) In addition, the court may consider the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score**. . . .**

PART D - ORGANIZATIONAL PROBATION

§ 8D1.1. Imposition of Probation - Organizations

(a) The court shall order a term of probation:

(1) if such sentence is necessary to secure payment of restitution (§ 8B1.1), enforce a remedial order (§ 8B1.2), or ensure completion of community service (§ 8B1.3);

(2) if the organization is sentenced to pay a monetary penalty (*e.g.*, restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments;

(3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;

(4) if the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(5) if an individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(6) if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct;

(7) if the sentence imposed upon the organization does not include a fine; or

(8) if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

§ 8D1.2. Term of Probation - Organizations

(a) When a sentence of probation is imposed—

(1) In the case of a felony, the term of probation shall be at least one year but not more than five years.

(2) In any other case, the term of probation shall be not more than five years.

§ 8D1.3. Conditions of Probation - Organizations

(a) Pursuant to 18 U.S.C. § 3563(a)(1), any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation.

(b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: (1) restitution or (2) community service, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

(c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing. . . .

Problem 18-5
Recall the JP Morgan "London Whale" case from Chapter 3. If the government had proceeded against JP Morgan to a trial and conviction, rather than a settlement, estimate how the above Guidelines would have calculated JP Morgan's recommended fine range, assuming that revelation of the mismarking in the London books caused a $750 million loss in JP Morgan's market capitalization.

C. Sentencing Firms Through Plea Agreements

UNITED STATES v. AEGERION PHARMACEUTICALS, INC., 2017 WL 5586728 (D. Mass. Nov. 20, 2017)

WILLIAM G. YOUNG, DISTRICT JUDGE

Let's see if I've got this straight. Aegerion Pharmaceuticals, Inc. ("Aegerion") developed an effective medicine, called Juxtapid, to treat high cholesterol in people with a rare genetic disease. The treatment did not come cheap. "At market launch in January 2013, Juxtapid cost roughly $295,000 per patient per year. The annual cost of Juxtapid later increased to over $330,000 per patient per year."

Thereafter Aegerion engaged in a series of unfair and deceptive acts, including outright fraud, which pervaded corporate management, all designed to increase the use of Juxtapid in circumstances where such treatment was not medically indicated. Aegerion wrongfully received a great deal of money from this corporate criminal conduct. Still more important, it appears that Aegerion knowingly induced the prescription of Juxtapid to many patients for which it would do no good, thus crowding out more promising therapies. Indeed, "[n]umerous HeFH, statin-intolerant, and diabetic patients, including elderly and pediatric patients suffered adverse events, including liver toxicity and gastrointestinal distress, and had to discontinue use of Juxtapid." Information.

Facing two misdemeanor counts of introducing misbranded drugs into interstate commerce, Aegerion now seeks to plead guilty, pursuant to Fed. R. Crim. P. 11(c)(1)(C) (the "'C' plea"). Under a "C" plea, the judge's choice at sentencing is limited to imposing the sentence agreed between the government and the offender or rejecting the plea altogether. The judge, of course, is forbidden from engaging in the plea bargaining itself. These two requirements conflict whenever a court is inclined to reject a "C" plea since an unexplained rejection smacks of personal fiat and any explanation sounds like court interference in the parties' good faith bargaining. There is no easy course. Seeking to avoid this difficulty, this Court in *United States v. Orthofix, Inc.*, 956 F. Supp. 2d 316 (D. Mass. 2013), thoroughly considered the issues and explained its conclusion that the "C" plea has no place, save in the rarest circumstances, in the context of corporate criminal pleas.

As this case illustrates, the issues presented by the "C" plea in the corporate context are more disquieting than I had originally thought.

To begin:

Here, there is much to commend the proffered plea; unfortunately much of it remains sealed so as not to compromise on-going criminal investigations. It suffices here to say that Aegerion's top management has undergone a near complete makeover and that its cooperation with the government's law enforcement efforts is truly extraordinary.

That said, in light of the larger issues discussed below, it is the duty of this Court candidly to explain the issues it has with this proffered "C" plea. This Court is not bargaining with the parties. None of these points—singly or together—is necessarily a deal breaker. Each one is a consideration—and perhaps I may well not yet have considered every relevant issue.

Oh, Aegerion amended "C" plea—

How do I dislike thee?

Let me count the ways:

• The government agrees that sentencing may take place immediately upon this Court's acceptance of the "C" plea even without the preparation of a Pre-Sentence Report. Why? One can readily understand why Aegerion wants its plea and sentence to be a one-day story, soon forgotten. Why does the government agree? Isn't it better to permit the Court to obtain a thorough Pre-Sentence Report from its own Probation Office the better to understand this complex case?

• Are the Sentencing Guidelines properly calculated? Why is there no enhancement for vulnerable victims? U.S.S.G. § 3A1.1(b)(1). One would think that the marketing of misbranded drugs to a patient population in need of appropriate treatment would meet the quintessential definition of vulnerable victims. Is there no enhancement for the use of sophisticated means to commit the crimes? After all, the scheme here involved falsely marketing Juxtapid for off-label uses to sophisticated physicians. One can readily infer that such false marketing was itself sophisticated.

• Assuming without concluding that the Sentencing Guidelines are properly calculated, the recommended fine range is not less than $18,542,192 to $30,903,653. Even so, the "C" plea calls for a fine of only $6,200,000 paid in installments and forfeiture of $1,000,000. The parties justify the downward variance by pointing to the extraordinary cooperation of Aegerion's new management and its present precarious financial condition.

What is left unexplained is why the government does not simply let Aegerion collapse in disgrace. Surely Aegerion is not too big to fail. After all, its stock apparently is now owned by Novelion, Inc., an innocent investor but one knowledgeable of Aegerion's criminal conduct at the time of its investment. Couldn't an asset sale to Novelion fund the civil settlement, the fine, and the forfeiture? Couldn't Novelion pick up Aegerion's employees? After all, Juxtapid is an FDA approved medicine with an appropriate therapeutic value.

Perhaps these questions do not make economic, real world sense. The point is, I do not know and the proffered "C" plea does not begin to explain the financial picture in detail. Apparently the parties think their representations suffice. They do not. I have a job to do—an independent judicial responsibility I may not delegate to others.

• Most problematic, this "C" plea provides not one cent of restitution to the actual victims. This result is justified say the parties by the multi-million dollar proposed settlement between Aegerion and the third-party payors, federal and state, who were fleeced into paying for misbranded drugs. Thus, governmental actors (who inferentially provided most of the purloined funds) get partial repayment but the actual victims, many of whom suffered medical complications and physical and emotional harm, get nothing.

How can I possibly justify such a result? The parties aver "that the complication and prolongation of the sentencing process that would result from an attempt to fashion a proper restitution order under 18 U.S.C. § 3663 outweighs the need to provide restitution to any non-governmental victims in this case." Really?

Why? The parties are utterly silent on this point. Indeed, in light of this Court's management of the *In Re Relafen Antitrust Litigation*, 231 F.R.D. 52, 64 (D. Mass. 2005), it hardly seems an insurmountable burden to find out who got Juxtapid when such medication was not clinically indicated. After all, the parties agree Aegerion's gross gain is $15,451,827.

• This "C" plea obligates the government not to undertake any further prosecution of Aegerion. What is the government trading away here? Why? What other companies may be implicated? None of this information is provided. Are we not concerned we may be foisting misbranded drugs on innocent and unsuspecting victims in other nations without adequate notification to their regulatory authorities?

• This Court has already commended the new management of Aegerion for its truly remarkable cooperation. It appears to go far beyond the cooperation required in the plea agreement. Why, then, is the cooperation agreement portion of the proffered "C" plea so pallid? The language of the proffered "C" plea is hardly a template for other cases. It obligates the corporate defendant to do little more than could be required by a proper subpoena.

• The proffered "C" plea includes a comprehensive—and in this Court's mind adequate—internal compliance and review program to prevent any recurrence of this wrongdoing. The problem is that the proposed program is entirely internal. There is no provision for the Court's personnel (or some independent employee) independently to examine compliance much like an on-site bank examiner. Even with strict compliance, independent evaluation provides valuable insight. *See* Gretchen Morgenson, *The Fed Wants to Make Life Easier for Big-Bank Directors*, N.Y. TIMES (Aug. 11, 2017), https://nyti.ms/2vq7NOu ("[R]educing the information flow between bank boards and [bank examiners] just doesn't seem smart."); *see also* Katrice Bridges Copeland, *The Yates Memo: Looking for "Individual Accountability" in all the Wrong Places*, 102 IOWA L. REV. 1987, 1924 (2017) ("One of the principal problems with the government's approach to corporate crime is that the government expects the corporation to police itself. The notion that the corporation should perform the prosecutor's function of investigating, identifying, and providing evidence against the wrongdoer within the corporation is ludicrous. . . . If the government truly wants to achieve individual accountability, it must therefore conduct its own investigations from start to finish, rather than relying upon the corporation's internal investigation.").

• While the amended "C" plea now includes a period of probation, it still prohibits this Court from setting any special conditions beyond those set forth in the agreement.

• Perhaps Aegerion's plea is premature. Maybe the Court ought stay its hand until the other criminal investigations have run their course. In that way, the Court fairly could evaluate the actual value of Aegerion's cooperation. *Cf.* U.S.S.G. 5K1.1. . . .

Aware of the concern for promoting justice, Aegerion advances three reasons why this Court ought nevertheless here take a pass and accept this proffered "C" plea.

First, Aegerion argues that times have changed since *Orthofix, Inc.* Look, it says, today we have the "Yates Memo" within the Department of Justice "emphasizing the importance of prosecuting the individuals responsible for the underlying wrongdoing when combatting corporate crime." Such prosecutions depend on corporate cooperation, Aegerion claims, and therefore "C" pleas must be granted to garner such cooperation. These are questionable premises. There has been no uptick in the prosecution of criminal executives since the issuance of the "Yates Memo" in 2015. Moreover, no responsible analysis suggests that, given the government's extensive powers to secure cooperation, granting "C" pleas plays any role in aiding its law enforcement goals.

Second, Aegerion posits that "[e]ntering into a Rule 11(c)(1)(C) plea is often a corporation's only option to resolve criminal charges as the uncertainty in sentencing inherent in Rule 11(c)(1)(B) pleas causes too great a risk to innocent employees, shareholders, investors, and other interested parties." Say what? Why is a "C" plea often a corporation's only option to resolve criminal charges? Does Aegerion think district judges simply are not competent to sentence corporate criminals? Or is it that the interests of drug dealers' innocent wives, children, neighbors, and colleagues are somehow less important than those of a corporation's shareholders and investment bankers? A "C" plea is never a corporation's only option—it has the option of a fair and impartial trial before an American jury, the purest and most incorruptible justice humankind has ever conceived.

Finally, Aegerion argues forcefully that rejecting its "C" plea would result in impermissible disparity in our sentencing regime. It notes, with apparent accuracy, "[t]he vast majority of corporate criminal charges involve (C) pleas. Since Orthofix pled guilty in December 2012, at least 85 companies have had (C) pleas accepted by federal courts." Aegerion supports this general statement with a footnote carefully limited to detailing the practice concerning criminal pharmaceutical corporations in this district. . . .

Reduced to its essence, Aegerion's argument goes like this: Look at this roster of criminal pharmaceutical corporations sentenced in Massachusetts:

<u>ROSTER OF CRIMINAL PHARMACEUTICAL CORPORATIONS</u>

Warner Chilcott Sales U.S. (LLC)

GlaxoSmithKline LLC

Merck Sharp & Dohme Corp.

Elan Pharm., Inc.

SB Pharmco Puerto Rico, Inc.

Forest Pharm, Inc.

Ortho-McNeil Pharm., LLC.

Pharmacia & Upjohn Co.

Biovail Pharm. Inc.

Bryan Corp.

Schering Sales Corp.

Serono Laboratories, Inc.

Warner-Lambert Co. LLC

Bayer Corp.

TAP Pharm. Products, Inc.

Like these corporations, we [Aegerion] are a criminal pharmaceutical corporation. They all got "C" pleas. Therefore we should too—it's forbidden disparity if we don't.

This argument is silly—complete balderdash. The disparity addressed by the Sentencing Reform Act of 1984 and the jurisprudence that follows it deals with unwarranted disparity among sentences actually imposed, not the analyses the judges used to get there.

Aegerion has, however, proved a different type of unwarranted disparity—the shocking disparity between the treatment of corporations and individuals in our criminal justice system. I am ashamed I had not recognized this glaring inequity until this case. Passing without further comment the truly breathtaking extent of pharmaceutical corporate criminality revealed by the "roster" above, Aegerion proves beyond peradventure that a forbidden two-tier system pervades our courts. Corporations routinely get "C" pleas after closed door negotiations with the executive branch while individual offenders but rarely are afforded the advantages of a "C" plea. Instead, they plead guilty and face a truly independent judge. This is neither fair nor just; indeed, it mocks our protestations of "equal justice under law."

It's not hard to understand why corporations facing criminal charges seek "C" pleas. It gives them various advantages, including the most effective damage control.

Save when they are themselves on the attack, seeking to enforce their own property rights, corporations today seek to avoid the legal system altogether, *see In re Relafen Antitrust Litigation*, 231 F.R.D. at 89–93; Mark Galanter, *The Hundred-Year Decline of Trial and the Thirty Years War*, 57 STAN. L. REV. 1255, 1272–74 (2005) ("The recent accelerated decline in the number of trials is . . . part of a much broader turn from law, a turn away from the definitive establishment of public accountability in adjudication . . . ."), negotiating their differences with the administrative state in other fora, *see* William G. Young, *An Open Letter to U.S. District Judges*, 50–JUL FED. LAW. 30, 33 (2003) ("[Corporations have] a good chance of opting out of the legal system altogether. Today's expansive reading of the Federal Arbitration Act allows the unilateral imposition of arbitration clauses to trump all sorts of civil rights and consumer protection legislation. Coupled with today's expansive preemption jurisprudence, business can (and does) make a rational calculus that leads it to lobby for an ever-diminishing role for the federal district courts."). They have been enormously successful. The insurance industry found it could largely immunize itself from suit due to the Employee Retirement Income Security Act ("ERISA"). In light of Supreme Court jurisprudence, many corporations found that through mandatory anti-consumer arbitration they could largely lock the little guy out of the courthouse. Moreover, corporations frequently found they could make peace with many executive agencies without admitting liability (thus exposing them to related civil litigation) and, even more important, could compel the imprimatur of the courts thereon.

Small wonder, then, that corporations seek the same cozy model (and act as though it is their due) even when facing serious criminal charges. Consider the advantages to the corporation of the "C" plea: All negotiations are private. No charges are brought until the plea deal is finalized so the risk of investigative journalism is minimized. All aspects of the sanction are negotiated so there will be no surprises from the judiciary. As the record here makes clear, the likelihood of the judge turning down the "C" plea is virtually non-existent. In a best case scenario, the court will perform the plea colloquy with a lower level functionary and will immediately impose the agreed upon sanction. Case over—in the vernacular of the days of the print journalism, "a one day story, second section, below the fold."

What is far more difficult to fathom is why the government negotiates a "C" plea with a corporation. In my experience, individuals are afforded "C" pleas only when the government's case is weak and it is trying to lock in the plea or when it is trying to flip an implicated co-defendant and obtain evidence against others. Neither of these concerns apply in most corporate criminal prosecutions. A corporation has no Fifth Amendment privilege, *Braswell v. United States*, 487 U.S. 99, 102, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988), and it cannot testify. In my experience, the government never even commences a criminal prosecution against a corporation unless it has a very strong case.

So why does the government uniformly buckle on this point? Knowledgeable commentators have levelled harsh criticisms against prosecutors for such risk aversion. *See e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (Simon & Schuster 2017); Jed S. Rakoff, *Justice Deferred is Justice Denied*, N.Y. REVIEW OF BOOKS (Feb. 19, 2015), http://www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/. Lacking sufficient knowledge, this Court expresses no opinion.

I can, however, offer two observations prosecutors ought always keep in mind.

First, trials matter. "Every lawsuit—whether it is a dispute arising out of a contract, the purchase of a defective product, or the conduct of a government official—has the potential to change the rules that govern behavior going forward." ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 6 (Oxford Univ. Press, 2017). The verdict of an American jury has a moral force incomparably greater than any plea. That's why corporations are so desperate to avoid them. Corporate pleas involve well-educated elites talking to other equally well-educated elites. Things are said, sanctions imposed, nothing really happens. Prices do not come down. Consumers gain no perceptible benefit. Corporations march on, apparently impervious to government regulation or the law itself.

Contrast an actual trial: every trial is a public morality play—perhaps a story of greed and avarice or amoral chicanery, all of it played out live upon actual understandable evidence before twelve public judges largely chosen at random. The result is the fairest, most incorruptible, democratic expression of justice humankind has ever known. "[L]itigation is a social good [which] enables people to promote the rule of law and affirms our citizen-centered political system." *Id.* at 1.

Litigation helps democracy function in a number of ways: it helps to enforce the law; it fosters transparency by revealing information crucial to individual and public decision-making it promotes participation in self-government; and it offers a form of social equality by giving litigants equal opportunities to speak and be heard. . . .

Second, every corporate "C" plea diminishes the legitimacy of our independent judiciary. Even when prosecutors agree to bargain for a plea, why make it a "C" plea? What does a "C" plea add to the public good where prosecutors have a sound case? Face it, if used in strong cases the "C" plea delegitimizes the central role of the trial judge.

Any injustice rankles Americans, systemic injustice rankles them profoundly. Those of us who occupy the constitutional offices of the United States—in whatever branch we serve—must humbly acknowledge that there exists in America today a deep and pervasive sense of injustice. . . .

Upon this record and against this background, accepting this "C" plea simply is not in the public interest. There are just too many unknowns here and the "C" plea process itself unduly hobbles this Court's sworn constitutional duty to "do equal right to the poor and to the rich." 28 U.S.C. § 453.

I end as I began. I am not bargaining with anyone. The problem is the "C" plea process itself. Indeed, as I have already said, there is much in the proffered plea agreement to commend. Moreover, there is here not a scintilla of evidence of collusion among the parties. This does not appear to be a sweetheart deal. Were this Court to have a free hand, I might well sentence Aegerion to virtually the same sentence as the parties here urge on the Court (that's what happened in Orthofix)—or I might not. I simply do not know because, as yet, the parties have deprived me of that responsibility, perpetuating an improper and unjust two-tier system that erodes public confidence in the sentence to be imposed in violation of 18 U.S.C 3553(a) (if indeed it does not violate the Equal Protection clause of the 14th Amendment to the U.S. Constitution).

This case will stand for trial as previously ordered.

Of course, the question of what a corporation should pay in the way of monetary sanctions for criminal conduct has been presented in numerous places throughout the preceding chapters. In response to this question, consider the relevance, wisdom, and utility of the following memorandum recently issued by the Justice Department's Criminal Division.

U.S. Department of Justice
Criminal Division

October 8, 2019

Memorandum
From: Assistant Attorney General Brian A. Benczkowski
To: All Criminal Division Personnel
Subject: Evaluating a Business Organization's Inability to Pay a Criminal Fine or Monetary Penalty

I. Overview

In seeking to resolve a criminal case, a business organization may assert that it is unable to pay the criminal fine or monetary penalty sought by the Criminal Division, despite agreeing that the proposed amount is otherwise appropriate based on the law and the facts. This memorandum and the accompanying Inability-to-Pay Questionnaire (Attachment A) are intended to provide guidance and an analytical framework for Criminal Division attorneys to assess assertions by a business organization that it is unable to pay an otherwise appropriate criminal fine or monetary penalty.

As a threshold matter, before Criminal Division attorneys are able to consider an inability to pay argument, the parties must first reach an agreement as to both the form of a corporate criminal resolution *(e.g.,* non-prosecution agreement, deferred prosecution agreement, or corporate guilty plea) and the monetary penalty that is appropriate based on the law and facts, irrespective of inability to pay considerations. As reflected herein, when evaluating a company's assertion that it is unable to pay an agreed upon penalty, Criminal Division attorneys should carefully consider the statutory sentencing factors set forth at 18 U.S.C. § 3572(a) & (b), the guidance set forth in U.S.S.G. §§ 8C2.2 & 8C3.3, and the Justice Manual's principles regarding the consideration of collateral consequences in resolving a corporate criminal case. In most cases, prosecutors also will need to consult an accounting expert to examine the financial condition of the business.

The burden of establishing an inability to pay rests with the business organization making such a claim, and the organization must cooperate fully in providing information and access to appropriate company personnel to respond to prosecutors' inquiries. In every case where an inability to pay is asserted, the business organization will be expected to provide a complete and timely response to the Inability-to-Pay Questionnaire, as well as to any follow up inquiries.

II. Legal Considerations Relevant to the Evaluation of Inability to Pay Claims

For context, 18 U.S.C. § 3572(a) requires courts to consider a number of factors when deciding whether to impose a criminal fine, how much to impose, and the payment method, which include:

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be

responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

Section 3572(b) also requires courts to: (a) consider whether the amount of any criminal fine will impair a defendant's ability to make restitution to victims of the offense; and (b) impose a criminal fine only to the extent that it will not impair the ability of the defendant to make restitution to victims of the offense.

In addition to these statutory requirements, the federal Sentencing Guidelines advise courts that they may reduce a criminal fine amount below the prescribed Guidelines range where "the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required by § 8C2.7 (Guideline Fine Range - Organizations) and § 8C2.9 (Disgorgement)." U.S.S.G. § 8C3.3(b). This advisory provision is qualified by the condition that "the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization." U.S.S.G. § 8C3.3.

III. Relevant Factors for Assessing Whether a Business Organization has Demonstrated an Inability to Pay the Otherwise Appropriate Criminal Fine or Monetary Penalty

A business organization's ability to pay an agreed upon criminal fine or monetary penalty will often be determined by an analysis of its responses to the Inability-to-Pay Questionnaire to determine the company's current assets and liabilities, as well as to compare current and anticipated cash flows against working capital needs. Where legitimate questions exist regarding an organization's inability to pay, the analysis can be more complex, requiring the consideration of a range of factors, including the following:

- **Background on Current Financial Condition.** Criminal Division attorneys should assess what gave rise to the organization's current financial condition. For example, did ownership or management take capital out of the organization in the form of dividends, distributions, loans, or other compensation? Has the organization recently made investments in the form of facilities expansion, capital improvements, or an acquisition? Has the organization engaged in related-party transactions?

- **Alternative Sources of Capital.** Criminal Division attorneys should consider the organization's ability to raise capital through existing or new credit facilities or via a sale of assets or equity. Criminal Division attorneys should also examine the availability of insurance or indemnification agreements, the existence of booked reserves, any plans for the acquisition or divestment of assets, and the details from any company forecasts.

- **Collateral Consequences.** Criminal Division attorneys also should be mindful of any significant adverse collateral consequences that are likely to result from the imposition of a criminal fine or monetary penalty exceeding an organization's ability to pay. Relevant collateral consequences include impacts on an organization's ability to fund pension obligations or provide the amount of capital, maintenance, or equipment required by law or regulation. Criminal Division attorneys also may consider whether the proposed monetary penalty is likely to cause layoffs, product shortages, or significantly disrupt competition in a market. Certain collateral consequences are generally not relevant in assessing an organization's inability to pay. These include adverse impacts on growth, future opportunities, planned or future product lines, future dividends, unvested or future executive compensation or bonuses, and planned or future hiring or retention.

- **Victim Restitution Considerations.** Criminal Division prosecutors also must consider whether the proposed criminal fine or monetary penalty will impair an organization's ability to make restitution to any victims.

Where Criminal Division attorneys find that an organization is unable to pay the otherwise appropriate criminal fine or monetary penalty, they should recommend an adjustment to the monetary penalty amount, but only to the extent necessary to avoid (1) threatening the continued viability of the organization and/or (2) impairing the organization's ability to make restitution to victims. An adjustment may consist of an appropriate reduction in the proposed criminal fine or monetary penalty, or the use of an installment schedule to facilitate the payment of the proposed fine or penalty amount over a reasonable period of time.

IV. Approval Requirement for Reductions in Monetary Penalties Based Upon Inability to Pay

Before agreeing to a reduction in a criminal fine or monetary penalty based upon an organization's inability to pay, Criminal Division attorneys handling the matter must first receive approval from their supervisors, including the Chief of the relevant Section. Where the proposed reduction exceeds 25% from the otherwise agreed upon criminal fine or monetary penalty, Criminal Division attorneys will also be required to receive approval from the Assistant Attorney General for the Criminal Division or his/her designee.

D. Corporate Fines and Jury Trial Rights

As stated in *Booker*, facts (elements, if you like) that dictate the level of punishment cannot be found by a judge at a sentencing hearing; they must be proved to a jury beyond a reasonable doubt. In the following case, the Supreme Court says that this rule also applies to fines imposed on firms pursuant to an environmental statute's penalty provisions. Is this a helpful ruling? Or is it a big problem, as the dissent says? Will this ruling give firms leverage in negotiations with DOJ?

SOUTHERN UNION v. UNITED STATES, 567 U.S. 343 (2012)

Justice SOTOMAYOR delivered the opinion of the Court.

The Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's maximum potential sentence. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). We have applied this principle in numerous cases where the sentence was imprisonment or death. The question here is whether the same rule applies to sentences of criminal fines. We hold that it does.

Petitioner Southern Union Company is a natural gas distributor. Its subsidiary stored liquid mercury, a hazardous substance, at a facility in Pawtucket, Rhode Island. In September 2004, youths from a nearby apartment complex broke into the facility, played with the mercury, and spread it around the facility and complex. The complex's residents were temporarily displaced during the cleanup and most underwent testing for mercury poisoning.

In 2007, a grand jury indicted Southern Union on multiple counts of violating federal environmental statutes. As relevant here, the first count alleged that the company knowingly stored liquid mercury without a permit at the Pawtucket facility "[f]rom on or about September 19, 2002 until on or about October 19, 2004," App. 104, in violation of the Resource Conservation and Recovery Act of 1976 (RCRA). *See* 90 Stat. 2812, as amended, 42 U.S.C. § 6928(d)(2)(A). A jury convicted Southern Union on this count following a trial in the District Court for the District of Rhode Island. The verdict form stated that Southern Union was guilty of unlawfully storing liquid mercury "on or about September 19, 2002 to October 19, 2004."

Violations of the RCRA are punishable by, *inter alia,* "a fine of not more than $50,000 for each day of violation." § 6928(d). At sentencing, the probation office set a maximum fine of $38.1 million, on the basis that Southern Union violated the RCRA for each of the 762 days from September 19, 2002, through October 19, 2004. Southern Union objected that this calculation violated *Apprendi* because the jury was not asked to determine the precise duration of the violation. The company noted that the verdict form listed only the violation's approximate start date (*i.e.,* "on or about"), and argued that the court's instructions permitted conviction if the jury found even a 1-day violation. Therefore, Southern Union maintained, the only violation the jury necessarily found was for one day, and imposing any fine greater than the single-day penalty of $50,000 would require factfinding by the court, in contravention of *Apprendi*. . . .

This case requires us to consider the scope of the Sixth Amendment right of jury trial, as construed in *Apprendi*. Under *Apprendi,* "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S., at 490, 120 S. Ct. 2348. The "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S., at 303, 124 S. Ct. 2531 (emphasis deleted). Thus, while judges may exercise discretion in sentencing, they may not "inflic[t] punishment that the jury's verdict alone does not allow." *Id.*, at 304, 124 S. Ct. 2531.

Apprendi's rule is "rooted in longstanding common-law practice." *Cunningham v. California*, 549 U.S. 270, 281, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). It preserves the "historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon v. Ice*, 555 U.S. 160, 163, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). We have repeatedly affirmed this rule by applying it to a variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence. See *Cunningham*, 549 U.S., at 274–75, 127 S. Ct. 856 (elevated "upper term" of imprisonment); *United States v. Booker*, 543 U.S. 220, 226–27, 233–34, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (increased imprisonment range for defendant under then-mandatory Federal Sentencing Guidelines); *Blakely*, 542 U.S., at 299–300, 124 S. Ct. 2531 (increased imprisonment above statutorily prescribed "standard range"); *Ring v. Arizona*, 536 U.S. 584, 588–89, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (death penalty authorized upon finding existence of aggravating factors); *Apprendi*, 530 U.S., at 468–69, 120 S. Ct. 2348 (extended term of imprisonment based on violation of a "hate crime" statute).

While the punishments at stake in those cases were imprisonment or a death sentence, we see no principled basis under *Apprendi* for treating criminal fines differently. *Apprendi* 's "core concern" is to reserve to the jury "the determination of facts that warrant punishment for a specific statutory offense." *Ice*, 555 U.S., at 170, 129 S. Ct. 711. That concern applies whether the sentence is a criminal fine or imprisonment or death. Criminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. Fines were by far the most common form of noncapital punishment in colonial America. They are frequently imposed today, especially upon organizational defendants who cannot be imprisoned. And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts. Sometimes, as here, the fact is the duration of a statutory violation; under other statutes it is the amount of the defendant's gain or the victim's loss, or some other factor. In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s "animating principle": the "preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Ice*, 555 U.S., at 168, 129 S. Ct. 711. In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal "sentence[s]," "penalties," or "punishment [s]"—terms that each undeniably embrace fines. *E.g.*, *Blakely,* 542 U.S., at 304, 124 S. Ct. 2531; *Apprendi*, 530 U.S., at 490, 120 S. Ct. 2348; *Ring*, 536 U.S., at 589, 122 S. Ct. 2428. . . .

The Government's remaining arguments, echoed by the dissent (see *post,* at 2369–72), are unpersuasive. The Government first submits that, when it comes to fines, "the judicially found facts typically involve only quantifying the harm caused by the defendant's offense"—for example, *how long* did the violation last, or *how much money* did the defendant gain (or the victim lose)?—"as opposed to defining a separate set of acts for punishment." Only the latter determination, the Government contends, implicates *Apprendi* 's concerns.

This argument has two defects. First, it rests on an assumption that *Apprendi* and its progeny have uniformly rejected: that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an "element" of the offense and one that is a "sentencing factor." *See, e.g.*, 530 U.S., at 478, 120 S. Ct. 2348; *Ring*, 536 U.S., at 605, 122 S. Ct. 2428. Second, we doubt the coherence of this distinction. This case proves the point. Under 42 U.S.C. § 6928(d), the fact that will ultimately determine the maximum fine Southern Union faces is the number of days the company violated the statute. Such a finding is not fairly characterized as merely "quantifying the harm" Southern Union caused. Rather, it is a determination that for each given day, the Government has proved that Southern Union committed all of the acts constituting the offense.

The Government next contends that applying *Apprendi* to fines will prevent States and the Federal Government from enacting statutes that, like § 6928(d), calibrate fines to a defendant's culpability, thus providing just punishment and reducing unwarranted sentencing disparity. But the Government presents a false choice. As was true in our prior *Apprendi* cases, and remains so here, legislatures are free to enact statutes that constrain judges' discretion in sentencing—*Apprendi* requires only that such provisions be administered in conformance with the Sixth Amendment.

Last, the Government argues that requiring juries to determine facts related to fines will cause confusion (because expert testimony might be needed to guide the inquiry); or prejudice the defendant (who might have to deny violating a statute while simultaneously arguing that any violation was minimal); or be impractical (at least when the relevant facts are unknown or unknowable until the trial is completed). These arguments rehearse those made by the dissents in our prior *Apprendi* cases. *See Booker*, 543 U.S., at 329, 125 S. Ct. 738 (BREYER, J., dissenting in part); *Blakely*, 542 U.S., at 318–20, 124 S. Ct. 2531 (O'Connor, J., dissenting); *id.*, at 330–40, 124 S. Ct. 2531 (BREYER, J., dissenting); *Apprendi*, 530 U.S., at 555–59, 120 S. Ct. 2348 (same). Here, as there, they must be rejected. For even if these predictions are accurate, the rule the Government espouses is unconstitutional. That "should be the end of the matter." *Blakely*, 542 U.S., at 313, 124 S. Ct. 2531.

But here there is particular reason to doubt the strength of these policy concerns. *Apprendi* is now more than a decade old. The reliance interests that underlie many of the Government's arguments are by this point attenuated. Nor, in our view, does applying *Apprendi* 's rule to criminal fines mark an unexpected extension of the doctrine. Most Circuits to have addressed the issue already embrace this position, *see Pfaff*, 619 F.3d, at 175–76; *LaGrou Distribution Sys.*, 466 F.3d, at 594; *United States v. Yang*, 144 Fed. Appx. 521, 524 (C.A.6 2005), as did the Government prior to *Ice*, see Brief in Opposition 11, n.2. In light of the reasons given in this opinion, the dramatic departure from precedent would be to hold criminal fines exempt from *Apprendi*. . . .

We hold that the rule of *Apprendi* applies to the imposition of criminal fines. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice BREYER, with whom Justice KENNEDY and Justice ALITO join, dissenting.

Where a criminal fine is at issue, I believe the Sixth Amendment permits a sentencing judge to determine sentencing facts—facts that are not elements of the crime but are relevant only to the amount of the fine the judge will impose. Those who framed the Bill of Rights understood that "the finding of a particular fact" of this kind was ordinarily a matter for a judge and not necessarily "within 'the domain of the jury.'" *Oregon v. Ice*, 555 U.S. 160, 168, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009) (quoting *Harris v. United States*, 536 U.S. 545, 557, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (plurality opinion)). The Court's contrary conclusion, I believe, is ahistorical and will lead to increased problems of unfairness in the administration of our criminal justice system. . . .

In *Ice*, we also took account of the practical extent to which extending *Apprendi*'s rule beyond the "'central sphere of [its] concern'" would "diminish" the States' "role" in "devising solutions to difficult legal problems . . . absent impelling reason to do so." 555 U.S., at 171–72, 129 S. Ct. 711. In particular, we feared that insisting that juries determine the relevant sentencing facts (concerning concurrent, as opposed to consecutive, punishment) would unjustifiably interfere with a State's legislative efforts "to rein in the discretion judges possessed at common law to impose consecutive sentences at will." *Id.*, at 171, 129 S. Ct. 711. It would inhibit (indeed "straightjacke[t]") States seeking to make "concurrent sentences the rule, and consecutive sentences the exception." *Ibid.* We said that we were "unclear how many other state initiatives would fall" if *Apprendi* were extended, and that expansion would be "difficult for States to administer." *Id.*, at 171–72, 129 S. Ct. 711. We believed that these considerations argued strongly against any such "expansion."

Here, the same kinds of considerations similarly argue against "expansion" of *Apprendi* 's rule. Today's decision applies to the States. In the 1950's and thereafter, States as well as the Federal Government recognized a serious problem in respect to the sentencing of corporations. Fines, imposed as a punishment upon corporate offenders, were both nonuniform (treating identical offenders differently) *and* too often they were set too low. Judges would frequently fine corporations in amounts that failed to approximate the harm a corporation had caused or the gain that it had obtained through its illegal activity, both because often the statutory maximums were low and because often the fines imposed tended to be substantially lower than those maximums. *See* Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 408 (1994); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 435, n.55 (1963); Nagel & Swenson, *Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L. Q. 205, 215 (1993).

Consequently, the authors of the Model Penal Code adopted a model provision stating that, in respect to offenses involving financial gain, a court could impose an alternative "higher" fine "equal to double the pecuniary gain derived from the offense by the offender." Model Penal Code § 6.03(5), 10A U.L.A. 259 (2001). New York soon thereafter adopted such a provision. N.Y. Penal Law Ann. § 80.10(2)(b) (West 2009). And other States followed New York's example with similar provisions permitting judges to set fines equal to twice the gain to the offender or twice the loss to the victim, thereby helping to diminish disparity while helping potential victims by increasing deterrence. *E.g.*, Conn. Gen. Stat. Ann. § 53a–44 (West 2007); Fla. Stat. § 775.083(1)(f) (2010). Many of these statutes say in particular that the "court" shall make the finding of gain or loss, in a separate hearing if necessary. *E.g.*, N.Y. Penal Law Ann. § 80.00(3) (West 2009); N.J. Stat. Ann. § 2C:43–3(e) (West 2005).

The Federal Government followed suit. In some instances, such as RCRA, where environmental harm likely varies with the length of the violation period, Congress advanced its uniformity and deterrence goals by tying a dollar-limited fine to the length of time during which that violation took place. 42 U.S.C. § 6928(d)(2)(A). In other instances, it did so through a new general gain-or-loss provision, applying to all offenses, including such crimes as corporate fraud, antitrust violations, and environmental pollution. That provision says:

> "ALTERNATIVE FINE BASED ON GAIN OR LOSS.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. § 3571(d).

To apply *Apprendi'* s rule to the fines set forth in such statutes, no less than in *Ice*, would weaken or destroy the States' and Federal Government's efforts "to rein in the discretion judges possessed at common law," *Ice*, 555 U.S., at 171, 129 S. Ct. 711, over fines. Congress, in enacting such statutes, expected judges, not juries, to determine fine-related sentencing facts because doing so will often involve highly complex determinations. Where, say, major fraud is at issue, the full extent of the loss (or gain) may be unknown at the time of indictment or at any other time prior to the conclusion of the trial. And in an antitrust or an environmental pollution case, the jury may have particular difficulty assessing different estimates of resulting losses.

The consequence of the majority's holding, insisting that juries make such determinations, is likely to diminish the fairness of the criminal trial process. A defendant will not find it easy to show the jury at trial that (1) he committed no environmental crime, but (2) in any event, he committed the crime only on 20 days, not 30. Moreover, the majority's holding will sometimes permit prosecutors to introduce newly relevant evidence that would otherwise have been kept from the jury on the ground that it was cumulative or unduly prejudicial. If victims' losses are relevant, the prosecutor may be able to produce witness after witness testifying only about the amount of life savings lost to the fraud. The defendant in this case, for example, thought the introduction of evidence about the discovery of mercury and remediation and evacuation of a nearby apartment complex was unduly prejudicial. But even if that were so, that evidence might now be admitted as showing the amount of harm caused or the number of days upon which the defendant's unlawful activity took place.

Administrative problems here may prove more serious than where, as in *Apprendi*, prison terms were at stake. In part, that is because corporate criminal cases often focus upon complex frauds, criminal price fixing, extended environmental pollution, food-and-drug safety violations, and the like. Both Congress and the Sentencing Commission have recognized as much. The federal criminal fine statute to which I earlier referred specifically creates an exception where assessing total loss or gain "would unduly complicate or prolong the sentencing process." 18 U.S.C. § 3571(d). Similarly, Sentencing Guidelines applicable to corporations exclude fine provisions for environmental crimes (along with most crimes involving export violations, food-and-drug safety, agricultural-and-consumer products, and RICO violations) because of the "potential difficulty ... of defining and computing loss." Nagel & Swenson, *supra,* at 256; *see* USSG § 8C2.1, and comment., § 8C2.10. Where the defendant is a human being, the Government can avoid problems of proof simply by abandoning any effort to obtain a fine; instead, perhaps to the individual defendant's dismay, the prosecution can seek a longer prison term. Where the criminal defendant is a corporation, however, no such possibility exists.

If, as seems likely, it becomes too difficult to prove fine-related sentencing facts to a jury, legislatures will have to change their statutes. Some may choose to return to highly discretionary sentencing, with its related risks of nonuniformity. Others may link conviction with fines specified in amount, rather like the 10th-century pre-Norman system of three cows for perjury or more modern mandatory minimum penalties. As Blackstone pointed out, those systems produce sentences that are not proportionate; they tend to treat alike offenders who committed the same crime in very different ways. *See* 4 Blackstone 371–72.

The majority believes that 10 years of experience with *Apprendi* "attenuate[s]" any legal claim of reliance on different rule of constitutional law here. Perhaps so. Perhaps that experience shows that *Apprendi*'s jury trial requirement is workable. But there is another less optimistic possibility.

Perhaps that experience, like the canary in a mine-shaft, tells us only that our criminal justice system is no longer the jury-trial-based adversarial system that it once was. We have noted that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. ——, ——, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012). We have added that today "'plea bargaining' is 'not some adjunct to the criminal justice system; it is the criminal justice system.'" *Ibid.* (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)). And in such a system, complex jury trial requirements may affect the strength of a party's bargaining position rather than the conduct of many actual trials.

At the same time, the prosecutor in such a system, perhaps armed with statutes providing for mandatory minimum sentences, can become the ultimate adjudicator. The prosecutor/adjudicator plays an important role in many "European inquisitorial" systems. But those prosecutors, unlike ours, typically are trained formally to be more like neutral adjudicators than advocates. *Cf.* Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1559 (1978); *see, e.g.*, Ècole Nationale de la Magistrature. Today's holding, by unnecessarily complicating the trial process, may prove workable only because it nudges our system slightly further in this direction. I see no virtue in doing so.

For these reasons, with respect, I dissent.

Problem 18-6
Let us end where we started, with a question of theory. How should the legal system punish corporations (assuming that one agrees that they are appropriate subjects of punishment)?