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WHITE-COLLAR CRIME, SENTENCING GENDER DISPARITIES POST-*BOOKER*, AND IMPLICATIONS FOR CRIMINAL SENTENCING

Sarah Turner*

“White-collar crime” is an amorphous term that has yet to be conclusively defined since its first use in 1939. This category of criminal activity results in what can be characterized as either economic harm or an impediment to the government’s ability to run successfully while minimizing conflicts of interest. Sentencing of white-collar crimes came into question in the late twentieth century due to a perception that white-collar offenders were receiving much lower sentences than offenders committing more traditional crimes. Additionally, the relationship between sentencing outcomes and status characteristics like race, age, citizen status, and gender were cause for concern. Different outcomes based on demographic differences were a significant part of the impetus for sentencing reform.

*To address these disparities, the United States Sentencing Commission (USSC) promulgated the United States Sentencing Guidelines (Guidelines) in 1987. The purpose of the Guidelines was to provide a comprehensive, uniform sentencing scheme that would minimize nationwide sentencing disparities. Although called “Guidelines,” these pre-determined sentencing ranges were mandatory until 2005, when the Supreme Court deemed them merely advisory in *United States v. Booker*. The resumption of judicial discretion has potentially opened the door to new trends in sentencing disparities. This Comment will focus on analyzing the data provided by the USSC to determine if there has been a gender-based disparity in sentencing since 2005, and, if so, why. Historically, when criminally convicted, women have been sentenced much more leniently than men. The rise of women in corporate management positions seems to lend itself to the idea that there should be a rising number of women participating in and being sentenced for*

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white-collar crimes. This Comment will investigate if this has been the case and will attempt to explain the results from nationwide data.

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INTRODUCTION

White-collar crime has evaded a formal definition since the term's first use by criminologist and sociologist Edwin Sutherland in 1939.¹ The term is more often described by what it is not.² White-collar crimes do not include those that require physical force against a victim or her property.³ These crimes are not directly related to the possession, sale, or distribution of narcotics.⁴ These crimes exclude organized crime and common theft crimes.⁵ The result of white-collar crimes can often be characterized as either

¹ J. KELLY STRADER & SANDRA D. JORDAN, *WHITE COLLAR CRIME: CASES, MATERIALS, AND PROBLEMS* 2 (3d ed. 2015) (representing Sutherland's definition as "crime[s] committed by [] person[s] of respectability and high social status in the course of his corporation" and as offenses committed by organizations, including corporations).

² *Id.*

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.*

economic harm or an impediment to the government's ability to run successfully while minimizing conflicts of interest.⁶

The sentencing of white-collar crimes came into question in the late twentieth century because of a perceived disparity in sentencing—specifically, white-collar offenders were receiving disproportionately lower sentences as compared to the sentences for more traditional crimes.⁷ Additionally, the relationship between sentencing outcomes and status characteristics like race, age, citizenship, and gender was cause for concern.⁸ Several of the demographic characteristics that were associated with shorter sentences and a lesser likelihood of imprisonment included being more educated, white, a citizen, older, and female.⁹ Different outcomes based on demographic differences were a significant part of the impetus for sentencing reform.¹⁰

To address these disparities that negatively impacted public perceptions of the criminal legal system, the United States Sentencing Commission (USSC) promulgated the United States Sentencing Guidelines (Guidelines) in 1987.¹¹ The purpose of the Guidelines was to provide a comprehensive, uniform sentencing scheme that would minimize nationwide sentencing disparities.¹² Although named Sentencing “Guidelines,” these pre-determined sentencing ranges were initially mandatory.¹³ While academic literature has questioned the effectiveness of the Guidelines in achieving the

⁶ *Id.* at 3–4.

⁷ Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 *LAW & CONTEMP. PROBS.* 53, 55 (2013).

⁸ Amy Farrell, Geoff Ward & Danielle Rousseau, *Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities*, 14 *J. GENDER, RACE & JUST.* 85, 112 (2010) (finding that female offenders are less likely to be imprisoned and, if incarcerated, serve shorter terms than men; Black offenders are more likely to be imprisoned and, if incarcerated, serve longer terms than white offenders; Hispanic offenders are more likely to be imprisoned than and, if incarcerated, serve similar terms to white offenders; non-citizens are more likely to be imprisoned than citizens; and older and more educated offenders are less likely to be imprisoned, but, if incarcerated, these factors do not have a significant effect on length of sentence).

⁹ *Id.*

¹⁰ See Whitley Zachary, *Prison, Money, and Drugs: The Federal Sentencing System Must Be More Critical in Balancing Priorities Before It Is Too Late*, 2 *TEX. A&M L. REV.* 323, 327 (2014).

¹¹ Farrell, Ward & Rousseau, *supra* note 8, at 86.

¹² *Id.*

¹³ Zachary, *supra* note 10, at 328.

goal of reducing sentencing disparities,¹⁴ the Supreme Court mooted the issue in 2005 by deeming the Guidelines merely advisory in *United States v. Booker*.¹⁵ The resumption of judicial discretion opens the door to potential new trends in sentencing disparities. This Comment will focus on analyzing the data provided by the USSC to determine if there has been gender-based disparities in sentencing since 2005. Historically, when criminally convicted, women have been sentenced much more leniently than men.¹⁶ The rise of women in corporate management positions seems to lend itself to the idea that there should be a rising number of women participating in and being sentenced for white-collar crimes.¹⁷ This Comment investigates if this has been the case and will attempt to explain the results from the nationwide data.

Part I of this Comment provides background on white-collar crimes and the evolution of the Sentencing Guidelines promulgated by the USSC. Additionally, Part I provides information on historical gender-based sentencing disparities. Part I concludes with the USSC's data from 2015–2020 on the number of federal offenders committing selected white-collar crimes as well as their sentencing outcomes, type of sentence, and length of sentence. Part II argues that the apparent gender sentencing disparity is a result of the consideration of legal factors outside of gender and the impact of social normative values imposed on women. Part II also suggests that this disparity may not need “solving.” This Comment concludes by arguing that gender imbalances in the legal system also result from factors outside judicial sentencing and should be considered in determining the way forward.

I. BACKGROUND

A. WHITE-COLLAR CRIME

Edwin Sutherland was the first to coin the phrase “white-collar crime” as a way to categorize “crimes[s] committed by a person of respectability and

¹⁴ See, e.g., Mona Lynch, *Booker Circumvention: Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 N.Y.U. REV. L. & SOC. CHANGE 59, 60–61 (2019).

¹⁵ *United States v. Booker*, 543 U.S. 220, 226–27, 234–36 (2005) (holding that the mandatory nature of the Sentencing Guidelines violated the Sixth Amendment right to a jury trial but salvaging the Guidelines by changing their status from compulsory to advisory).

¹⁶ Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER, RACE & JUST. 73, 75–77 (2010).

¹⁷ Michelle S. Jacobs, *Loyalty's Reward - A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843, 849 (2006).

high social status in the course of his occupation.”¹⁸ This phrase emerged in 1939, a period when men still made up most of the workforce.¹⁹ This historical context clarifies why Sutherland provided an inherently gendered definition of the white-collar offender—“person . . . in the course of *his* occupation.”²⁰ The combination of gender disparities in the workforce and the general focus on men led to studies focused on white-collar crimes primarily from the male perspective.²¹ Over time, the focus of the phrase “white-collar crime” transitioned from the offender to the offense.²² Influential in this transition was Herbert Edelhertz, former chief of the Department of Justice Fraud Section.²³ The focus on the offense was important for bringing the phrase from the sociology and criminology realm to the legal field.²⁴ Edelhertz’s definition of white-collar crime expanded on Sutherland’s earlier definition by characterizing these crimes as “illegal act[s] or [a] series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage.”²⁵ He focused on factors including the intent of the offender, the use of disguise or concealment, and the impact on the victim.²⁶ This focus on the offense committed, rather than on the characteristics of the offender, continues today.²⁷

¹⁸ Lucian E. Dervan & Ellen S. Podgor, *White-Collar Crime: Still Hazy After All These Years*, 50 GA. L. REV. 709, 718 (2016).

¹⁹ Kristy Holtfreter, *Gender and “Other People’s Money”: An Analysis of White-Collar Offending Sentencing*, 23 WOMEN & CRIM. JUST. 326, 327 (2013).

²⁰ *Id.*

²¹ *Id.*

²² Dervan & Podgor, *supra* note 18, at 719.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See, e.g., Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It’s Going*, 28 NOTRE DAME J.L., ETHICS & PUB. POL’Y 481, 484–85 (2014) (discussing how the FBI’s definition of white-collar crimes include “those illegal acts which are characterized by deceit, concealment, or violation of trust . . .” which demonstrates a focus on the act itself rather than the individual committing the act).

B. THE SENTENCING GUIDELINES

Perceived leniency in white-collar sentencing was further exacerbated by national disparities in sentencing for the same crimes.²⁸ In an attempt to create more uniformity in federal sentencing, the Sentencing Reform Act of 1984²⁹ was passed.³⁰ This Act led to the creation of the United States Sentencing Commission (USSC), which was tasked with producing the Federal Sentencing Guidelines.³¹ The purpose of the Guidelines was to create uniform sentences based on the consideration of consistent factors, a consequence of which would be the near elimination of judicial sentencing discretion.³² An expected result of the implementation of the Guidelines was that disparities based on demographic characteristics, like sex and race, would be reduced because judges would no longer rely on their own internal biases at the sentencing stage.³³ However, this double-edged sword would also prevent judges from considering an individual and all of her characteristics at the sentencing stage, a threat to the personhood of each defendant at sentencing.³⁴ Because the judge cannot consider a person's individual circumstances when sentencing, there is limited room to consider mitigating factors.³⁵ With the goal of standardizing federal sentencing, the USSC produced a set of complex, inflexible, and mandatory Guidelines to constrain judicial decision-making.³⁶

The Guidelines went into effect on November 1, 1987.³⁷ By no coincidence, this was also the same year the Supreme Court decision in *McCleskey v. Kemp* was handed down.³⁸ This case involved a Black male plaintiff who used statistical studies to argue that the imposition of the death penalty in Georgia was impermissibly related to the race of the victim.³⁹

²⁸ See Jeffery T. Ulmer & Michael T. Light, *The Stability of Case Processing and Sentencing Post-Booker*, 14 J. GENDER, RACE & JUST. 143, 143 (2010) (discussing general disparities in pre-Guidelines sentencing).

²⁹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

³⁰ Farrell, Ward & Rousseau, *supra* note 8, at 86.

³¹ *Id.*

³² *Id.*

³³ *See id.*

³⁴ *See* Lynch, *supra* note 14, at 98.

³⁵ *Id.*

³⁶ *Id.* at 63.

³⁷ *Id.*

³⁸ Etienne, *supra* note 16, at 78; *McCleskey v. Kemp*, 481 U.S. 279, 320 (1987).

³⁹ *McCleskey*, 481 U.S. at 286.

McCleskey could not prove that he suffered purposeful discrimination which affected his trial, so the Court found that he did not establish a Fourteenth Amendment Equal Protection Clause claim.⁴⁰ The majority in *McCleskey* outlined what a defendant raising a discrimination claim would have to show to succeed on their claim—explicit and intentional efforts to discriminate by main players throughout a trial.⁴¹ These main players potentially include the prosecutors, law enforcement, or judges.⁴² While the *McCleskey* decision did not reach gender, the Court alluded to its concern that McCleskey’s legal argument could expand sentencing challenges available to defendants. If a defendant could challenge her sentence by arguing that the sentencing was dependent on a characteristic like race, what was stopping another defendant from making the same challenge based on gender?⁴³ If a defendant could challenge sentencing practices based on her gender, there could have been significant disruption in the sentencing context at the time. In *McCleskey*, the Court provided a roadmap to proving intentional discrimination, and this could have drastically affected the sentencing landscape.⁴⁴ While the *McCleskey* Court held that evidence of disparate impact on Black defendants was not enough to prove intentional discrimination,⁴⁵ it is plausible that the consideration of this evidence led to a willingness to compromise between those aiming for uniformity and equality in sentencing and those pursuing harsher sentences for defendants. This decision exemplifies why Congress sought to create sentencing uniformity.

C. GUIDELINES SHIFT FROM MANDATORY TO ADVISORY

Beginning with their promulgation in 1987, the Guidelines were mandatory.⁴⁶ However, a trend of increasing judicial departures from the Guidelines in sentencing continued until 2001.⁴⁷ Prompted by concerns about judicial discretion overruling the Guidelines, Congress passed the Feeney

⁴⁰ *Id.* at 279–80.

⁴¹ Etienne, *supra* note 16, at 78.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (noting that to prove intentional discrimination, a defendant had to show “explicit and intentional efforts to discriminate by prosecutors, law enforcement, judges, or other decision makers”).

⁴⁵ *Id.* at 81.

⁴⁶ Lynch, *supra* note 14, at 63.

⁴⁷ Ulmer & Light, *supra* note 28, at 145.

Amendment to the PROTECT Act of 2003.⁴⁸ This Amendment did three things.⁴⁹ First, it shifted the standard for Guidelines departures from abuse of discretion to de novo review.⁵⁰ Second, it increased the power of prosecutors at sentencing by giving them control over the point reduction defendants could receive for acceptance of responsibility.⁵¹ Third, the Amendment instructed the Commission to reduce the departures available at that time.⁵² Hearing the message from Congress loud and clear, judicial downward sentencing departures dropped significantly until 2005.⁵³ In the continued interplay between judicial and legislative action, the Supreme Court took the next step in *United States v. Booker*.⁵⁴

In the *Booker* decision, the Supreme Court was faced with a Sixth Amendment claim arguing that the Guidelines violated defendants' right to a jury trial by allowing enhanced sentences to be imposed based solely on the sentencing judge's determination of fact. The enhanced sentences did not take into account any finding by the jury or admission by the defendants.⁵⁵ Rather than voiding the Guidelines in their entirety, the Court responded to this claim by ruling that the *mandatory* Guidelines were a violation of the defendants' Sixth Amendment rights but found that making the Guidelines *advisory* would remedy the constitutional violation.⁵⁶ The next questions for the Court to handle were how to implement *Booker* and how much influence the Guidelines should have on sentencing.

The case law that followed *Booker*, including *Rita v. United States*⁵⁷ and *Gall v. United States*,⁵⁸ provided more guidance on how to implement *Booker* while clarifying that trial courts should not merely accept that sentences falling within the Guidelines were appropriate.⁵⁹ In *Rita*, the defendant received a sentence within the range of the Guidelines, but the sentencing

⁴⁸ *Id.* at 145–46.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 146.

⁵⁵ *United States v. Booker*, 543 U.S. 220, 245 (2005).

⁵⁶ Lynch, *supra* note 14, at 65.

⁵⁷ *Rita v. United States*, 551 U.S. 338, 345–46 (2007).

⁵⁸ *Gall v. United States*, 552 U.S. 38, 43 (2007).

⁵⁹ Lynch, *supra* note 14, at 81; Ulmer & Light, *supra* note 2828, at 152.

judge did not explicitly consider the factors in 18 U.S.C. § 3553(a)⁶⁰ that may have justified a lower sentence.⁶¹ The Supreme Court held that Courts of Appeals may apply a nonbinding presumption of reasonableness to sentences that fall within the Guidelines range, finding it significant that a sentence was agreed upon by the Sentencing Commission and the sentencing judge.⁶²

In *Gall*, the defendant received a sentence of thirty-six months of probation, well below the Guidelines, for his previous involvement in a drug ring as an undergraduate student.⁶³ The defendant had voluntarily left the conspiracy and moved away to start a new, drug-free life.⁶⁴ When confronted by authorities, he pled guilty to his role in the conspiracy.⁶⁵ The judge considered these mitigating circumstances and chose to impose the probationary period instead of the government’s recommended thirty months in prison.⁶⁶ The Eighth Circuit reversed the sentence, finding that to impose

⁶⁰ The Sentencing Reform Act, 18 U.S.C. § 3553(a), lists the factors to be considered in imposing a sentence. A court is instructed to impose a sentence “sufficient, but not greater than necessary” and “shall consider” the following:

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

 any pertinent policy statement—

 the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 the need to provide restitution to any victims of the offense.”

Id.

⁶¹ *Rita*, 551 U.S. at 345–46.

⁶² *Id.* at 347–48.

⁶³ *Gall*, 552 U.S. at 43.

⁶⁴ *Id.* at 41–42.

⁶⁵ *Id.* at 42.

⁶⁶ *Id.* at 43–44.

a sentence outside of the recommended Guidelines range, the sentencing judge must overcome a presumption of unreasonableness.⁶⁷ The Supreme Court reversed the Eighth Circuit's decision, holding that federal courts are permitted to set *any* reasonable sentence as long as they explain their reasoning.⁶⁸ This confirmed that the Guidelines after the *Booker* decision were simply advisory.⁶⁹ This was also a rejection of the idea that the greater the departure from the Guidelines, the more extraordinary the judge's justification had to be for the departure.⁷⁰ While the range prescribed by the Guidelines could be given a presumption of reasonableness, it is not permissible to impose an opposite presumption of unreasonableness for a sentence outside of the Guidelines.⁷¹

The *Booker* decision was initially met with concern that there would be an increase in sentencing disparities because judges were no longer bound by the Guidelines.⁷² This would undermine the goal of uniformity underlying the creation of the Guidelines. The consensus after just a year under the new regime was that there had been little change, and the worries about dramatic variations in sentencing had been largely unfounded.⁷³ It was assumed that the Guidelines would remain largely binding even though they were now technically advisory.⁷⁴ This was supported by the fact that Courts of Appeals in the wake of *Booker* treated sentences within the Guidelines as inherently reasonable and treated sentences departing from the Guidelines with suspicion.⁷⁵ However, as time has passed, judges have increasingly taken advantage of their ability to depart from the Guidelines—one of few opportunities to exercise their discretion.⁷⁶

Similar to the factors influencing the USSC's sentencing recommendations, factors associated with more severe sentences include the defendant's criminal history, the seriousness of the offense, and the

⁶⁷ *Id.* at 45.

⁶⁸ *Id.* at 46.

⁶⁹ *Id.*

⁷⁰ Ulmer & Light, *supra* note 28, at 147.

⁷¹ *Gall*, 552 U.S. at 46–47.

⁷² Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1260–61 (2014).

⁷³ Ulmer & Light, *supra* note 28 at 151.

⁷⁴ Lynch, *supra* note 14, at 79.

⁷⁵ *Id.*

⁷⁶ Ulmer & Light, *supra* note 28, at 163.

defendant's culpability.⁷⁷ However, the most consequential post-*Booker* change was the defense's ability to strategize for sentencing by producing a mitigation argument based on the characteristics of the individual defendant.⁷⁸ This is a key benefit of the Guidelines being advisory—a judge is allowed to consider the qualitative differences between defendants instead of being required to forgo considering those factors that are relevant for sentencing, especially in the white-collar context.⁷⁹ As the Court continued along the *Booker* jurisprudence, the consideration of individualized factors for sentencing increased in importance.⁸⁰ This set the stage for attorneys to significantly alter their sentencing arguments, making them more tailored to each individual defendant.⁸¹ This also affected plea negotiations, which now take place with the parties considering the sentencing judge's opinion rather than the Guidelines.⁸² In the alternative, the defense has the option to reject plea bargaining all together and focus their defense strategy on achieving a favorable sentence for their client directly from the judge.⁸³

Resumption of judicial sentencing discretion had another dimension that was less defendant-friendly—judges could impose sentences with downward departures from the Guidelines, but they could also choose to impose upward departures.⁸⁴ As a result, upward departure rates increased a small amount following *Booker*.⁸⁵ The impact of *Booker* is viewed as positive for some defendants because a judge can consider them as an individual instead of blindly following the Guidelines. However, it also opened the door for judicial biases, including gender bias, to infiltrate judges' decision-making.⁸⁶

⁷⁷ Holtfreter, *supra* note 19, at 329.

⁷⁸ Lynch, *supra* note 14, at 92.

⁷⁹ *Id.* at 98.

⁸⁰ *Id.* at 84.

⁸¹ *Id.*

⁸² *Id.* at 88.

⁸³ *Id.* at 91.

⁸⁴ Ulmer & Light, *supra* note 28, at 163; Lynch, *supra* note 14, at 89.

⁸⁵ Ulmer & Light, *supra* note 28, at 163 (finding that upward departure rates increased from 1% pre-2003 to 1.8% in the post-*Booker* era).

⁸⁶ While outside the scope of this paper, this highlights the importance of having women and non-white legal actors to manage deviations from the inflexible sentencing Guidelines and avoid the potential for cultural pluralism. However, this is not currently the case, and the data reflects the decision-making of the present set of legal actors.

D. HISTORICAL GENDER SENTENCING DISPARITIES

Even though the purpose of the Guidelines was initially to stabilize sentencing without considering characteristics like gender, women have continued to be less likely to go to prison than men since the promulgation of the Guidelines in 1987.⁸⁷ Additionally, the women who do go to prison serve shorter sentences on average than their male counterparts for similar crimes.⁸⁸ Gender-based disparities have become more pronounced than differences based on any other characteristic, including race, ethnicity, or geography.⁸⁹ In fact, when considering how likely it is that an offender will be imprisoned, gender plays an even larger role than race.⁹⁰ These disparities have continued despite legislative changes designed to reduce them.⁹¹ However, at least one study has found that the gender effect for federal and state sentencing has been lessened in the post-*Booker* period as opposed to the previous decades, even though women continue to receive significantly shorter sentences than men.⁹²

Factors that broadly correlate with female criminality include low income, school failure, and limited skills or work experience.⁹³ Additionally, female offenders' pasts commonly include a history of physical or sexual abuse.⁹⁴ As compared to their male counterparts, female offenders are also more likely to be white, U.S. citizens, and have some college education.⁹⁵ The percentage of women committing white-collar crimes, as opposed to street crimes, is higher than for men.⁹⁶

The intersection of race and gender as it pertains to sentencing is particularly troubling, given that one of the stated goals of the Guidelines was

⁸⁷ Etienne, *supra* note 16, at 76.

⁸⁸ *Id.*

⁸⁹ *Id.* at 73.

⁹⁰ *Id.* at 75 (finding that a gender disparity in odds of imprisonment exists even after accounting for characteristics including education and presence of dependents).

⁹¹ Jill K. Doerner & Stephen Demuth, *Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?*, 25 CRIM. JUST. POL'Y REV. 242, 243 (2014).

⁹² Ulmer & Light, *supra* note 28, at 166.

⁹³ Jacobs, *supra* note 17, at 848.

⁹⁴ *Id.*

⁹⁵ Farrell, Ward & Rousseau, *supra* note 8, at 109 (finding that 42.1% of female offenders are white compared to 32.4% of male offenders; 83.8% of female offenders are U.S. citizens, compared to 69.8% for male offenders; and 31% of female offenders have some college education as compared to 21.9% for male offenders).

⁹⁶ Doerner & Demuth, *supra* note 91, at 255.

achieving sentencing uniformity.⁹⁷ As compared to men, women are generally considered to receive less severe sentences.⁹⁸ White women in particular seem to receive leniency throughout their time in the criminal legal system, including during the sentencing phase.⁹⁹ Judges tend to give Black and Hispanic women longer sentences than white women, but these sentences are still less severe than the sentences given to Black and Hispanic men.¹⁰⁰ Being Black or Hispanic is linked to a greater likelihood of imprisonment for men, but this trend is not found in the likelihood of imprisonment for women.¹⁰¹ However, both male and female offenders who are Black or Hispanic are more likely to have longer sentence lengths than their white counterparts.¹⁰² These racial disparities found in the sentences of female offenders may be attributable to the fact that a white offender is more likely to receive a downward departure from the Guidelines than a minority offender.¹⁰³ While the Guidelines are no longer mandatory, judges are required to first calculate a sentence according to the Guidelines as a starting point in sentencing.¹⁰⁴ Both implicit biases and the currently-available departures from the Guidelines likely influence the differences in sentencing outcomes for women of different races. However, this Comment will focus on investigating only the gender-specific sentencing trends to determine if, and why, there may be differences between them.

E. DATA

The USSC releases information on sentencing trends. The following analysis shows that before and after *Booker*, there has been a significant difference in sentence lengths for male and female offenders overall. Notably, the USSC provides sentencing data for all crimes, not just white-collar offenses.

⁹⁷ Farrell, Ward & Rousseau, *supra* note 8, at 86.

⁹⁸ Etienne, *supra* note 16, at 75.

⁹⁹ Lynch, *supra* note 14, at 96–97.

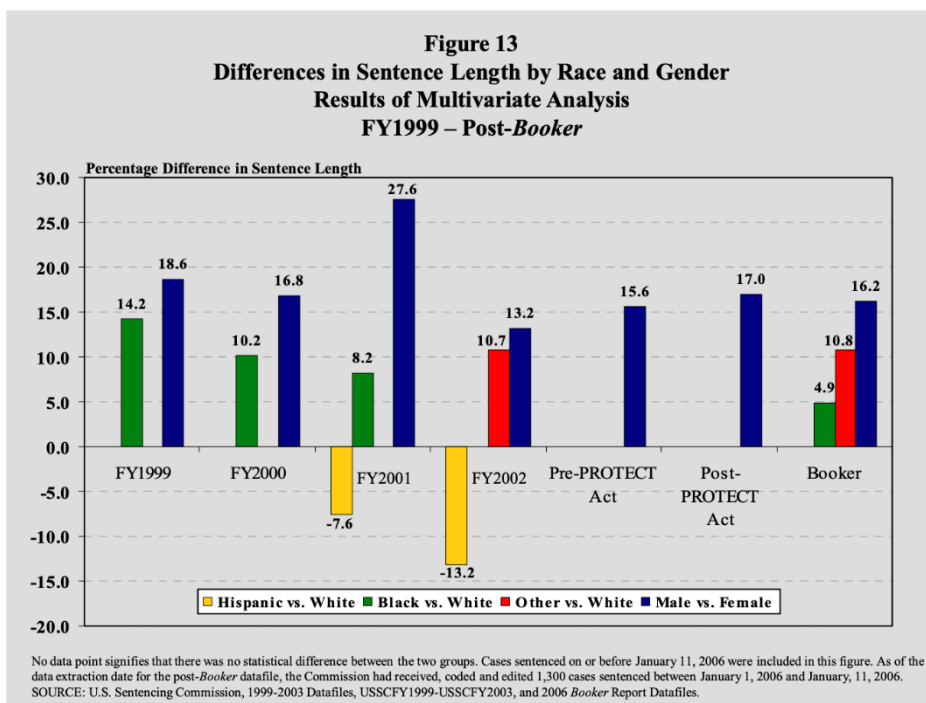
¹⁰⁰ Farrell, Ward & Rousseau, *supra* note 8, at 87.

¹⁰¹ *Id.* at 120.

¹⁰² *Id.*

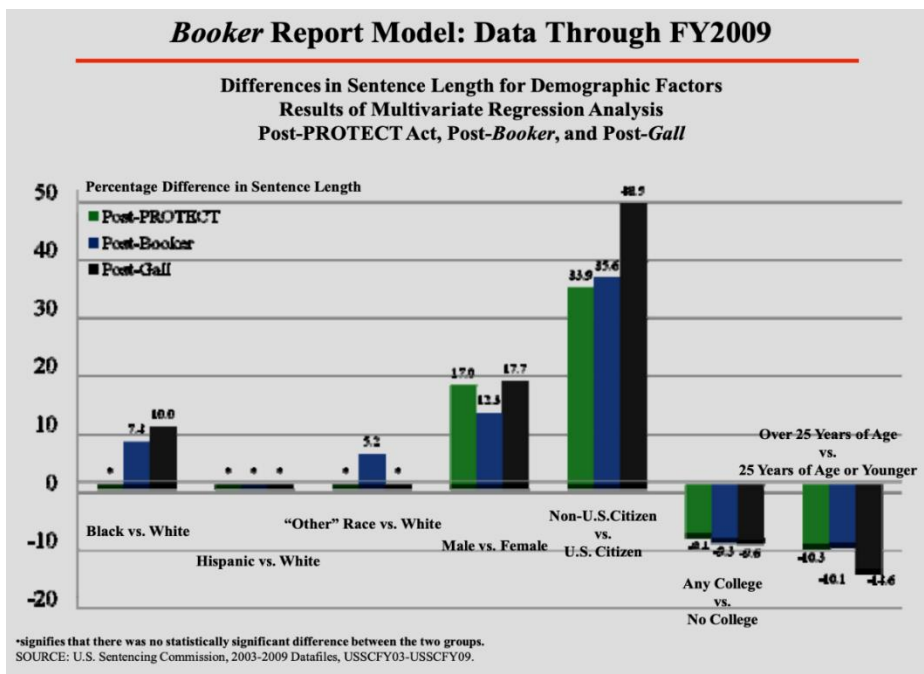
¹⁰³ *Id.* at 92.

¹⁰⁴ STRADER & JORDAN, *supra* note 1, at 761.



*Figure 1*¹⁰⁵

¹⁰⁵ U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS 14 fig.13 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf [<https://perma.cc/8XJG-TV3U>].

Figure 2¹⁰⁶

For white-collar crimes specifically, the main agencies responsible for investigating are the Federal Bureau of Investigation (FBI), the Internal Revenue Service (IRS), and the Secret Service.¹⁰⁷ Additional investigative agencies that can be involved include the U.S. Postal Service (USPS), the Social Security Administration (SSA), and Health and Human Services (HHS).¹⁰⁸ Within the first eleven months of 2019, only 3.3% of federal prosecutions were for white-collar offenses despite the wide range of frauds believed to be perpetrated each year.¹⁰⁹ These frauds include corporate, securities, health care, procurement, telemarketing, computer, consumer, and

¹⁰⁶ *Id.* at 16 fig.B.

¹⁰⁷ *White-Collar Crime Prosecutions for 2021 Continue Long Term Decline*, TRAC REPORTS (Aug. 9, 2021), <https://trac.syr.edu/tracreports/crim/655/> [<https://perma.cc/EP6G-WQD2>] [hereinafter *Long Term Decline*].

¹⁰⁸ *Id.*; *White-Collar Prosecutions Half Level of 8 Years Ago*, TRAC REPORTS (Sept. 25, 2019), <https://trac.syr.edu/tracreports/crim/577/> [<https://perma.cc/SVH8-BGNA>] [hereinafter *Half Level*].

¹⁰⁹ *Half Level*, *supra* note 108.

other frauds.¹¹⁰ Prosecutions by January 2020 reached a new low since tracking them began during the Reagan Administration.¹¹¹ Prosecution numbers have remained low in 2021.¹¹²

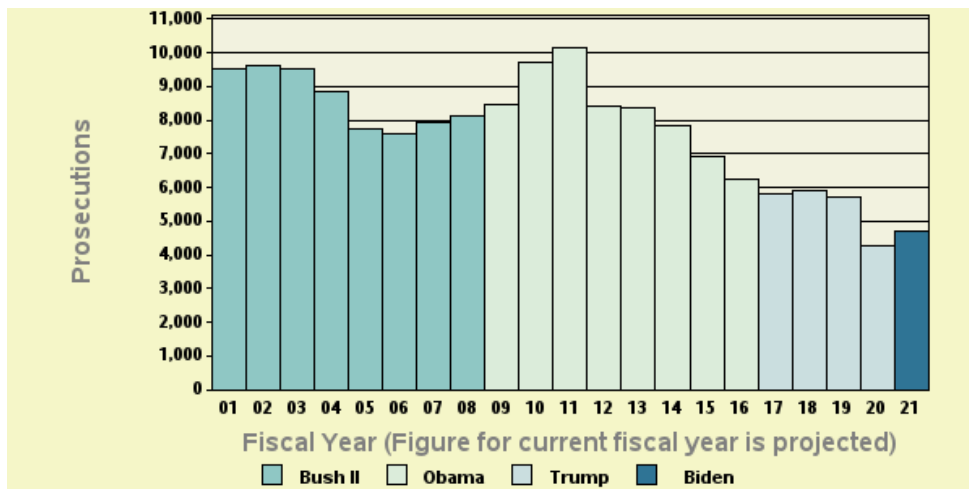


Figure 3¹¹³

The USSC provides sentencing data for federal offenders.¹¹⁴ While they lack of formal definition, white-collar crimes encompass a variety of economic crimes, including bribery or corruption; extortion or racketeering; fraud, theft, or embezzlement; and money laundering.¹¹⁵ Data on these crimes from 2015–2020 reveals gender disparities in the number of offenders, sentencing outcomes, type of sentence, and length of sentence.¹¹⁶ Using the combination of these crimes and this time period, men go to trial (as opposed to taking a plea) significantly more often than women.¹¹⁷

¹¹⁰ *Id.*

¹¹¹ *Corporate and White-Collar Prosecutions at All-Time Lows*, TRAC REPS. (Mar. 3, 2020), <https://trac.syr.edu/tracreports/crim/597/> [<https://perma.cc/D8VN-A8JP>].

¹¹² *Long Term Decline*, *supra* note 107.

¹¹³ *Id.*

¹¹⁴ *Interactive Data Analyzer*, U.S. SENT’G COMM’N, <https://ida.usc.gov/analytics/saw.dll?Dashboard> (last visited Sept. 4, 2022) [hereinafter *Data Analyzer*].

¹¹⁵ See *White Collar Crime*, TRAC REPS. (2006), https://trac.syr.edu/tracreports/bulletins/white_collar_crime/side_80.html [<https://perma.cc/C5UQ-EHLE>].

¹¹⁶ See *infra* Figures 4–6.

¹¹⁷ *Data Analyzer*, *supra* note 114 (Click “Sentencing Outcomes” tab; then select all years 2015–20 in “Fiscal Year” dropdown; then select “Bribery/Corruption,” “Extortion/Racketeering,” “Fraud/Theft/Embezzlement,” and “Money Laundering” in “Crime Type”

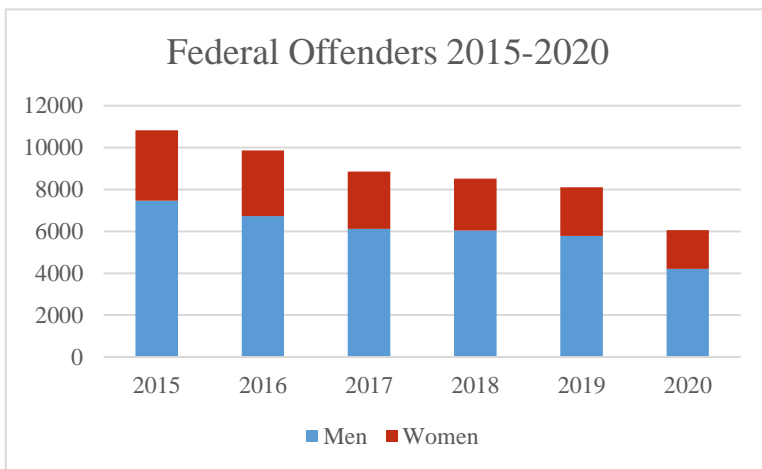


Figure 4¹¹⁸

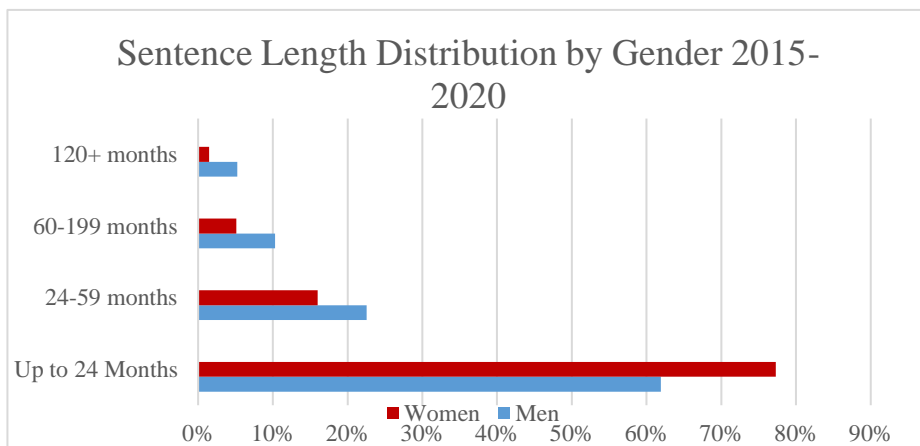
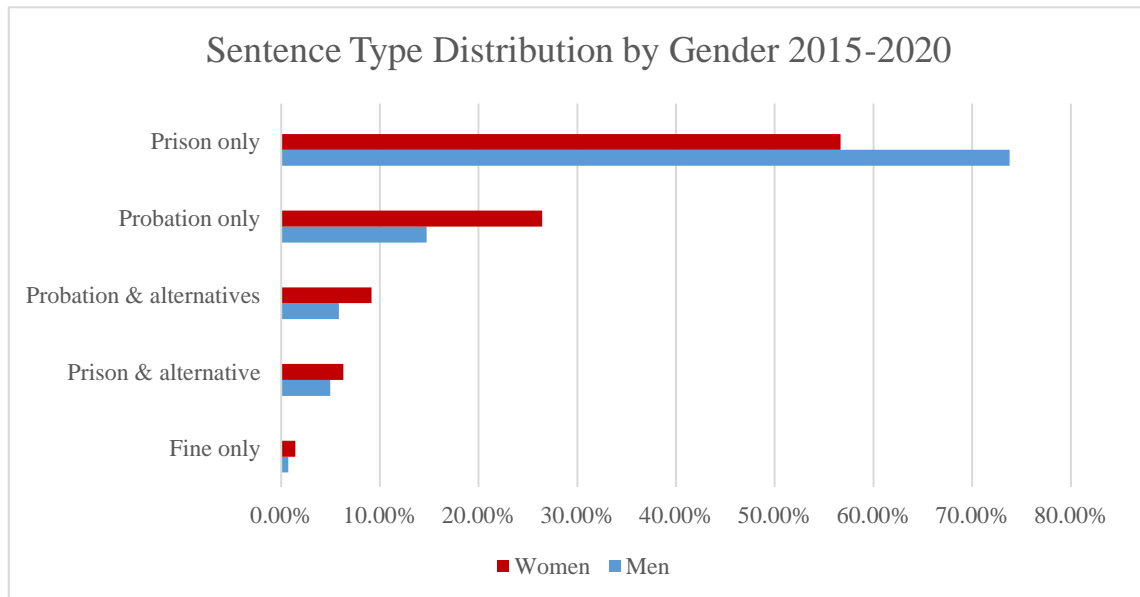


Figure 5¹¹⁹

dropdown; then compare results from a selection of “Female” and “Male” under the “Gender” dropdown) (showing that men over this time period went to trial about 5.6% of the time compared to women who went to trial about 3.8% of the time).

¹¹⁸ *Data Analyzer, supra* note 114 (Click “Home” tab; then select “Bribery/Corruption,” “Extortion/Racketeering,” “Fraud/Theft/Embezzlement,” and “Money Laundering” in “Crime Type” dropdown; then compare results in “Number of Offenders Over Time” between a selection of “Female” and “Male” under the “Gender” dropdown; hover pointer over individual bars for exact numbers).

¹¹⁹ *Data Analyzer, supra* note 114 (Click “Sentencing Outcomes” tab; then click “Sentence Type” subtab; then select “Bribery/Corruption,” “Extortion/Racketeering,” “Fraud/Theft/Embezzlement,” and “Money Laundering” in “Crime Type” dropdown; then



*Figure 6*¹²⁰

II. ARGUMENT

A. INTRODUCTION

As the feminist movement in the United States changed the gender makeup of the workplace, theories were promulgated that the number of women committing white-collar crimes would mirror the increase of women in corporate positions.¹²¹ The idea posited was that as more women moved up the corporate ladder, they would have more opportunities to commit the

compare results in “Number of Offenders Over Time” between a selection of “Female” and “Male” under the “Gender” dropdown; hover pointer over individual bars for exact numbers).

¹²⁰ *Data Analyzer*, supra note 114 (Click “Sentencing Outcomes” tab; then click “Sentence Length” subtab; then select all years 2015–20 under “Fiscal Year” dropdown; then select “Bribery/Corruption,” “Extortion/Racketeering,” “Fraud/Theft/Embezzlement,” and “Money Laundering” in “Crime Type” dropdown; then compare results in “Distribution of Sentence Length” between a selection of “Female” and “Male” under the “Gender” dropdown; hover pointer over pie chart for exact numbers).

¹²¹ Jacobs, supra note 17, at 849.

same types of crimes that male executives commit (and would do so).¹²² While women may have been exposed to these opportunities, they were not using their corporate positions for criminal activity because the increase in female white-collar criminality did not actually occur.¹²³ Some research finds that there is limited evidence of gender-related leniency for female fraud offenders at sentencing.¹²⁴ This research attributes the disparity to a difference in legal factors rather than characteristics like gender.¹²⁵ This would indicate that actors within the legal system who are making sentencing decisions are not actually treating women differently than men.¹²⁶ The question that logically follows is if women are not being sentenced differently because of their gender, then what explains the gender disparities in the context of sentence type and sentence length? While the data reveals that when convictions do occur, there are gender disparities in sentence type and length, it also shows that the differences are caused by factors outside of gender, as well as the impact of social normative values imposed on women.¹²⁷

B. FACTORS OUTSIDE OF GENDER CONTRIBUTING TO SENTENCING DISPARITIES

While women do consistently receive lower sentences than men, some scholars argue that this is not truly a sentencing disparity.¹²⁸ The resumption of judicial sentencing discretion actually may *overly* penalize women in some cases rather than creating a disparate advantage.¹²⁹ When looking at the goals of sentencing, women's low recidivism rates and relative culpability in crimes may indicate that the current sentencing regime is still too high, despite the apparent disparity.¹³⁰ For example, one feature of the Guidelines is the minimal weight that "role in the offense" plays.¹³¹ While other offender characteristics can result in a significant reduction in points, this factor can

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Holtfreter, *supra* note 19, at 338–39.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Etienne, *supra* note 16, at 82.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

only result in a one- or two-point difference in sentencing.¹³² This feature disproportionately affects female offenders because women often play small roles in multi-defendant cases, whether with a partner or a larger group of co-conspirators.¹³³ The context of fraud offending differs greatly by gender, in part due to the smaller roles women tend to play in fraudulent schemes.¹³⁴

While the role of the offender plays only a small part in guiding downward departures, the Guidelines place a substantial amount of weight on the amount of financial loss.¹³⁵ Women who commit corporate fraud usually get less financial reward than their male counterparts or co-schemers.¹³⁶ Given the value that the Guidelines place on the amount of loss, this finding is consistent with women receiving lower sentences.¹³⁷ Overall, women not only profit less than similarly situated male co-conspirators, they also play much smaller roles in corporate fraud schemes.¹³⁸ These roles usually come about in one of two ways.¹³⁹ First, the female offender plays an instrumental role in the scheme.¹⁴⁰ An instrumental role is considered to be a “utility pathway” and occurs when the female defendant holds a strategic position in a company—for example, working in compliance or accounting.¹⁴¹ Second, her involvement stems from relational ties.¹⁴² This “relational pathway” involves a close personal or romantic relationship with the ringleader or other major player in the scheme.¹⁴³ Rarely do female offenders break the glass ceiling while committing upper-level corporate crimes.¹⁴⁴ Similar to gendered workforce processes, sex segregation continues in corporate criminality.¹⁴⁵

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Holtfreter, *supra* note 19, at 338.

¹³⁵ STRADER & JORDEN, *supra* note 1, at 759.

¹³⁶ Darrell J. Steffensmeier, Jennifer Schwartz & Michael Roche, *Gender and Twenty-First-Century Corporate Crime: Female Involvement and the Gender Gap in Enron-Era Corporate Frauds*, 78 AM. SOCIO. REV. 448, 462 (2013).

¹³⁷ See *supra* Section II.E (showing that women receive lower sentences on average).

¹³⁸ Steffensmeier, Schwartz & Roche, *supra* note 136, at 463.

¹³⁹ *Id.* at 465.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 469.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 448.

For large-scale schemes, women are often excluded from the conspiracy or are used in a minimal, specific way that stems from their position within the company to effectuate the enterprise.¹⁴⁶ The breakdown of Enron in 2001 provides one example of the roles women play in massive criminal frauds.¹⁴⁷ Thirty-four employees at Enron were charged in connection with illegal accounting practices.¹⁴⁸ Of these thirty-four, only three were women.¹⁴⁹ Of these three women, each was instrumental in that they had strategically useful positions for executing the fraud.¹⁵⁰ Additionally, all three women played either a small role, or no role at all.¹⁵¹ The women were not only used instrumentally within the conspiracy, however.¹⁵² Each indicted woman was used as a witness by the government and served an instrumental role for the prosecution as well.¹⁵³

In mixed-gender groups of corporate fraudsters, there are clear differences between female and male involvement.¹⁵⁴ Demographically, female offenders in these groups tend to be younger, have less education, and hold lower-level positions in the company than their male counterparts.¹⁵⁵ As is typical for corporate fraud, the female offenders in these groups do not benefit much financially, if at all.¹⁵⁶ Additionally, the decision to participate in a scheme for the female offenders is more reactive rather than proactive.¹⁵⁷ Often in the scheme, male co-conspirators will play the role of ringleader or other significant roles, while most female co-conspirators play minor roles.¹⁵⁸

One theory is that women have a harder time recruiting fellow conspirators, which limits their ability to act as a ringleader in a corporate fraud.¹⁵⁹ Additionally, when women commit white-collar crimes alone, the

¹⁴⁶ *Id.* at 463, 470.

¹⁴⁷ *Id.* at 466.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 466–67.

¹⁵³ *Id.* at 467.

¹⁵⁴ *Id.* at 469.

¹⁵⁵ Holtfreter, *supra* note 19, at 337.

¹⁵⁶ Steffensmeier, Schwartz & Roche, *supra* note 136, at 469.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (finding that even after controlling for company positions, women were taking on more peripheral roles in the scheme).

¹⁵⁹ *Id.* at 468.

crimes tend to be less serious than those crimes committed by men.¹⁶⁰ Overall, the differences in roles played by men and women in corporate frauds, even after controlling for corporate rank, indicate that women being in less powerful corporate positions is not the primary driver of their taking on minor roles in these frauds.¹⁶¹ If women being in a minor role is not a result of being in a less powerful corporate position, this raises a new question of what is drawing them to commit white-collar offenses in the first place.

C. IMPACT OF SOCIAL STEREOTYPES ON FEMALE CRIMINALITY AND SENTENCING

One theory to explain why the gender disparities in legal settings persist is the judicial application of “benevolent sexism,” posited by Jeffrey Rachlinski and Andrew Wistrich.¹⁶² Stereotypical traits of women, like being better, more involved parents of young children, may be factors that benefit women at sentencing.¹⁶³ In fact, research has found that the relationship between gender and the number of dependents a female offender has is a significant predictor of imprisonment.¹⁶⁴ The more dependent children a female offender has, the more likely she is to receive a sentence of sanctions within the community instead of imprisonment.¹⁶⁵ In addition, the relationship between dependents and sentencing outcomes does reveal an increased leniency for white women over women in minority racial groups.¹⁶⁶ Sentencing decisions tend to give more weight to the protection of white families, suggesting a disregard of family well-being for minority groups.¹⁶⁷

Rachlinski and Wistrich’s recent research found that male judges imposed slightly more lenient sentences for female offenders as compared to male offenders, and female judges imposed more similar sentences for male and female offenders.¹⁶⁸ Their research is consistent with the idea that judges

¹⁶⁰ Holtfreter, *supra* note 19, at 337.

¹⁶¹ Steffensmeier, Schwartz & Roche, *supra* note 136, at 463.

¹⁶² Jeffrey J. Rachlinski & Andrew J. Wistrich, *Benevolent Sexism in Judges*, 58 SAN DIEGO L. REV. 101, 102 (2021).

¹⁶³ *Id.* at 105.

¹⁶⁴ Doerner & Demuth, *supra* note 91, at 245.

¹⁶⁵ *Id.*

¹⁶⁶ Farrell, Ward, & Rousseau, *supra* note 8, at 90.

¹⁶⁷ *See, e.g.*, Jacobs, *supra* note 17, at 859–60.

¹⁶⁸ Rachlinski & Wistrich, *supra* note 162, at 129, 135 (including data showing that male judges imposed sentences that were about 3.7 months less for female defendants than for male

have sympathy for non-violent female offenders, a key idea for why gender disparities persist.¹⁶⁹ Additionally, their research adds to existing literature demonstrating that judges tend to hand down more lenient sentences to women, especially non-violent offenders.¹⁷⁰ Benevolent sexism, while seemingly influencing judicial decision-making, is challenging to address because it appears to help women in some ways and fits traditional social norms, which means it does not receive as much attention as other disparities in the criminal legal system.¹⁷¹ This perpetuates the presence of these biases because judges do not have the same motivation to overcome them and may not even be aware of their influence.¹⁷²

The concept of benevolent sexism also ties into additional factors that have been suggested as explanations for the existence of gender disparities, despite legislative maneuvers like the Guidelines, and for why limited efforts have been made to reduce these disparities.¹⁷³ One factor is the lack of a presumption that women are subjected to more severe sentences because of their sex.¹⁷⁴ This is in stark contrast with the relationship between race and treatment in the legal system. Another factor is that women tend to be considered lower recidivism risks and more deserving of lighter sentences than men because there is a greater predilection for crime among men.¹⁷⁵ Lastly, the court often makes what it considers to be “practical considerations” about the role women play in the family, especially if dependent children are involved.¹⁷⁶ This factor is aligned with the “chivalry” framework, which argues that chivalry is why female offenders are treated more leniently than male offenders for committing the same crimes.¹⁷⁷ All of these factors are consistent with the predictive value of the relationship between gender and sentencing outcomes.¹⁷⁸

defendants, while female judges imposed sentences that were only 0.7 months less for female defendants than for male defendants).

¹⁶⁹ *Id.* at 133.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 135.

¹⁷² *Id.*

¹⁷³ *Id.*; Doerner & Demuth, *supra* note 91, at 243.

¹⁷⁴ Doerner & Demuth, *supra* note 91, at 243.

¹⁷⁵ *Id.* (citing CASSIA SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT (2002) for research on perceived recidivism in female offenders).

¹⁷⁶ *Id.*

¹⁷⁷ Holtfreter, *supra* note 19, at 331 (rejecting such a framework).

¹⁷⁸ *But see id.* (suggesting that gender weighs less on outcomes than characteristics indicative of blameworthiness).

Another theory is the “focal concerns” perspective, which argues that legal decisions are made around the concepts of “blameworthiness, protection of the community, and practical constraints and consequences.”¹⁷⁹ The difference in focal concerns between men and women creates different likelihoods of criminality between the genders. Women are ascribed the role of the nurturer and bear the value society places on “female moral virtue.”¹⁸⁰ These qualities lead to greater disapproval of crimes committed by women.¹⁸¹ Relational concerns tend to impact women more, which can lead to women being pulled into crimes committed by men in their lives.¹⁸² The focal concerns of men, including emphasizing individualism, achieving a high social status, and acting in a protector role, are more aligned with committing crimes.¹⁸³ The dividing line is much less blurry between feminine focal concerns and crime than masculine focal concerns and crime.¹⁸⁴ Gendered focal concerns guide social expectations and shape other social interactions, including risk-taking and crime.¹⁸⁵ These focal concerns remain consistent in corporate settings and lead to gender differences in the context of white-collar offenses.¹⁸⁶

Yet another theory is the “paternalism” perspective, which holds that women need the protection of male authorities and cannot be held responsible for their actions, resulting in more lenient sentences.¹⁸⁷ The “familial paternalism” perspective also has been suggested as framing judicial sentencing determinations.¹⁸⁸ Judges may be sentencing women more leniently to protect traditional families, especially dependent children who may suffer if their mother goes to prison.¹⁸⁹ Other theories pivot around the traditional social status of women, but overall, all theories attempt to explain the seemingly gender-based leniency discrepancy.¹⁹⁰

¹⁷⁹ Doerner & Demuth, *supra* note 19, at 262.

¹⁸⁰ Steffensmeier, Schwartz & Roche, *supra* note 136, at 451.

¹⁸¹ *Id.*

¹⁸² *Id.* at 452.

¹⁸³ *Id.* at 451–52.

¹⁸⁴ *Id.* at 452.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Farrell, Ward & Rousseau, *supra* note 8, at 89.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 88–89.

D. IMPLICATIONS OF THE GENDER SENTENCING DISPARITY

Despite the sentencing disparities potentially impacting the deterrent value of the threat of imprisonment, women continue to commit fewer crimes, white-collar or otherwise, than men.¹⁹¹ This has interesting implications for corporate organization—as well as sentencing women outside of the white-collar context. White-collar sentencing also provides a blueprint for the integration of more restorative justice in the criminal legal system.

Because women in corporate leadership commit white-collar crimes less often than their male counterparts, this actually may be an incentive to continue to select women for these roles.¹⁹² This may be an interesting route to continue to diversify corporate leadership while reducing corporate fraud. The presence of female executives may lead to more ethical decision-making, less risk-taking behavior within and outside of the corporation, and less cultural acceptance of fraudulent behavior within the corporation.¹⁹³ However, the competing concern is that the addition of more women into corporate hierarchies will not create any change because of organizational inertia challenges.¹⁹⁴ Organizational inertia refers to “the tendency of a[n] . . . organization to continue on its current trajectory.”¹⁹⁵ Here, that trajectory includes continuing the path previously led by men in corporate executive roles. A related concern is that the women who do end up in these high-ranking corporate roles get these positions because of their willingness to subscribe to commercial interests and market dominance over all else.¹⁹⁶ This potential outcome has already been suggested as the reason for an analogous situation within the courtroom.¹⁹⁷ Some research has found that there is not much difference between male and female judges’ sentencing outcomes,¹⁹⁸ which can be considered at odds with several theories that posit that men feel the need to be chivalrous or are sexist towards female litigants.

¹⁹¹ Nadia Campaniello, *Women in Crime*, IZA WORLD OF LAB. (June 2019), <https://wol.iza.org/articles/women-in-crime/long> [<https://perma.cc/W798-TT93>].

¹⁹² Steffensmeier, Schwartz, & Roche, *supra* note 136, at 471.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Organizational Inertia*, MANAGING RSCH. LIBR., <https://managingresearchlibrary.org/glossary/organizational-inertia> [<https://perma.cc/ZGM7-MT83>] (last accessed July 18, 2022).

¹⁹⁶ Steffensmeier, Schwartz & Roche, *supra* note 136, at 471.

¹⁹⁷ Farrell, Ward, & Rousseau, *supra* note 8, at 97.

¹⁹⁸ *Id.* (citing Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166 (1993)).

One suggestion is that female judges play a token role in the men's legal world, leading the female judges to make decisions similar to those a male judge might make.¹⁹⁹ This consequence might also carry over to corporate leadership.

However, further research has found that as the proportion of female judges increases in a federal district, gender disparities in sentencing are reduced because the leniency of paternalistic judges towards female litigants was remedied by the presence of women on the judiciary.²⁰⁰ Reducing gender disparities can be done either by increasing sentences for female offenders, creating equal severity in punishment, or by reducing the sentences for male offenders.²⁰¹ If the latter strategy is chosen, the focus could shift from punitive measures to reparation and rehabilitation.²⁰²

White-collar sentencing data raises considerations for how other crimes are sentenced. The restorative justice approach requires asking what can be done to make things right.²⁰³ The Court's relegation of the Guidelines to advisory status is in line with the potential for a restorative approach because this allows a sentencing judge to take a more holistic look at the defendant and the crime to best determine how to meet the needs of offenders, victims, and communities.²⁰⁴ Under rigid, mandatory Guidelines, judges do not have the same opportunity to take a holistic look at the individual before them—they can only sentence according to the criteria set out by the Guidelines.²⁰⁵ Restorative justice is an especially useful framework for determining criminal consequences since white-collar crimes often have relational aspects because they take place in the context of organizations.²⁰⁶ Restorative justice carries an assumption that people are involved in a “web of social relationships that crime harms.”²⁰⁷ These social relationships can be used to promote change from the individuals involved in crime.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 97–98 (citing Max Schanzenbach, *Racial and ex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 74–75 (2005)).

²⁰¹ *See id.* at 95.

²⁰² *Cf. id.*

²⁰³ Justin Rex, *Restorative Justice, White-Collar Crime, and the 2008 Financial Crisis*, 19 APPALACHIAN J.L. 1, 4 (2019–2020).

²⁰⁴ *Cf. id.* at 3.

²⁰⁵ *Id.* at 17.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 5.

Interestingly, the same critics of retributive justice in the context of blue-collar crime call for an increase in retributive justice for white-collar crime in the name of fairness.²⁰⁸ However, there is no reason that “fairness” excludes restorative justice in favor of punitive consequences for any particular type of crime. An alternative may be to use the white-collar sentencing blueprint and question whether a similar, less severe punishment may be appropriate outside of the white-collar context.²⁰⁹ In a similar vein, commentators who support not incarcerating white-collar offenders do not seem to recognize that many traits noted as positive in these offenders can be found in street-crime offenders.²¹⁰ Street crimes are considerably different from the non-violent, economic white-collar crimes. They include crimes involving interpersonal violence like homicide, assault, and robbery as well as property crimes like burglary or arson. Traits common in white-collar offenders include lack of prior criminal history, as well as providing support, especially economic support, to their family and community.²¹¹ However, these traits can also be found in the context of offenders committing interpersonal and property crimes. The consideration of these traits in the white-collar sentencing context should be extended to other sentencing contexts to promote restorative justice and an equitable approach to sentencing.

E. LIMITATIONS

Research using data from white-collar crime cases has inherent challenges when it comes to the realities of case selection bias²¹² and the lack of a true definition for “white-collar crime.”²¹³ Local federal case selection has an impactful role in shaping sentencing outcomes but has yet to be effectively quantified.²¹⁴ Department of Justice policies also play a role in the progression and outcome of criminal cases.²¹⁵ Case selection issues compound because they differ in each district across the country. There is no set list of crimes that qualify as white-collar offenses, so it is challenging to

²⁰⁸ *Id.* at 40.

²⁰⁹ *Id.*

²¹⁰ Jacobs, *supra* note 17, at 871.

²¹¹ *Id.*

²¹² See Lynch, *supra* note 1414, at 71.

²¹³ Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 1 (2004).

²¹⁴ See Lynch, *supra* note 14, at 71.

²¹⁵ *Id.* at 74.

categorize data in a way that reveals completely accurate insights into sentencing.

Case selection bias attributes disparities to the work of prosecutors rather than judges.²¹⁶ Even though the Guidelines were made advisory, the initial selection of who to prosecute and which charges to present has a significant impact on outcomes.²¹⁷ Department of Justice policies can shape these outcomes by issuing memos relating to charging and bargaining to the U.S. Attorneys' offices.²¹⁸ In 2010, Attorney General Eric Holder shifted the policy from the "Ashcroft Memo" which had previously required U.S. Attorneys to pursue the most serious charge they could prove and to request a maximum sentence.²¹⁹ Case selection bias was also exacerbated by the promulgation of the Guidelines.²²⁰ Discretionary power shifted from judges at the sentencing phase to prosecutors at the charging phase.²²¹ This led to charging decisions being strongly predictive of ultimate outcomes for defendants and allowed prosecutors to control most of the adjudication process.²²² There is no data on who was *not* charged or why prosecutors made the charge selection that they did. This early case selection bias is challenging when trying to discern disparities at the sentencing stage of the process. The inability of judges to deviate from the Guidelines led to a process largely hidden from scrutiny and played a large role in the sentencing disparities during the Guidelines period.²²³

CONCLUSION

Sentencing of white-collar crime has been impacted by the rise of the USSC's Sentencing Guidelines and by their fall in 2005 to merely advisory status.²²⁴ The original goals of the Guidelines were to reduce sentencing disparities, increase both the predictability and severity of sentences, and increase uniformity in sentencing for similar offenders in different federal

²¹⁶ *See id.* at 99–100.

²¹⁷ *See id.*

²¹⁸ *Id.* at 74.

²¹⁹ *Id.*

²²⁰ *Id.* at 64.

²²¹ *Id.*

²²² *Id.* (noting that prosecutors were in charge of making the findings of fact, applying the law to the facts, and picking the sentence or the sentence range).

²²³ *Id.* at 70.

²²⁴ *See id.* at 99–100.

courts.²²⁵ However, the rigidity of the Guidelines was made more flexible by the Court in *Booker*, allowing judges the freedom to consider the totality of circumstances for defendants standing before them and to exercise individualized judgment.²²⁶ While initially the *Booker* decision was expected to have little effect on the use of the Guidelines, judges have increasingly used their discretion for sentencing decisions since 2005.²²⁷ This discretion opens the door for the very disparities the Guidelines were intended to reduce, especially with regard to race and gender.²²⁸

For white-collar crimes, women tend to face less severe sentences than men.²²⁹ Qualitative gender differences for white-collar offenders suggest that there is more than just difference in access to offending opportunities, as some had theorized.²³⁰ This disparity can be explained by looking at legal factors other than gender in combination with the impact of social stereotyping on women's criminality and sentencing. Legal factors other than gender considered by the courts include women usually having less serious criminal records, committing less serious crimes, and playing smaller roles in offenses involving other defendants than men.²³¹

Social stereotyping can impact the likelihood of women committing crime as well as sentencing decisions.²³² Sex segregation in the workplace continues to exclude women, even in high-level positions, from being involved in male networks at work, including in the context of potential criminal opportunities.²³³ At sentencing, the social expectation of women as caregivers tends to lead to women with dependent children being given even greater leniency.²³⁴ Because of the relatively small number of female offenders, it is challenging to parse out if gender alone is driving the disparity, or a combination of gender and parental status. Despite the sentencing disparities, it is important to note that *Booker* opened the door for

²²⁵ Ulmer & Light, *supra* note 28, at 143.

²²⁶ See *Equal Justice and Sentencing Practices Among Federal District Court Judges*, TRAC REPORTS (Sept. 30, 2021), <https://trac.syr.edu/tracreports/judge/663/> [<https://perma.cc/S8XZ-8DBG>].

²²⁷ Lynch, *supra* note 14, at 79-80; Ulmer & Light, *supra* note 28, at 163.

²²⁸ See Farrell, Ward, & Rousseau, *supra* note 8, at 86.

²²⁹ See *supra* Figures 5–6.

²³⁰ Steffensmeier, Schwartz, & Roche, *supra* note 136, at 451.

²³¹ Farrell, Ward, & Rousseau, *supra* note 8, at 91.

²³² See, e.g., Rachlinski & Wistrich, *supra* note 162, at 135 (discussing benevolent sexism).

²³³ Steffensmeier, Schwartz, & Roche, *supra* note 136, at 453.

²³⁴ See Doerner & Demuth, *supra* note 91, at 247.

judicial discretion and sentencing, but also changed the way strategic actors within the legal system operate.²³⁵ The gender disparities reveal the results of all these actors' decisions, including case selection, charging strategy, and sentencing advocacy by the defense and prosecution.²³⁶

The door opened by *Booker* provides opportunities for a more individualized assessment of criminal sentencing. The downside to this is that the judges tasked with making these individualized assessments have an opportunity to bring their own biases to sentencing. The Sentencing Guidelines were one way of trying to manage these biases and create uniformity in the sentencing system. However, the *Booker* approach is more effective. While uniformity is an admirable goal in some contexts, within the sentencing context it is less so because there is not uniformity among offenders. Each person convicted of a white-collar crime has their own story to tell that cannot necessarily be measured by the values deemed important within the Guidelines. Women continue to participate in fewer white-collar crimes than their male counterparts. They also receive lower sentences and fewer sentences of imprisonment. This disparity is not necessarily unacceptable. One way to further investigate this data is to determine if the lower sentences received by women in the white-collar context could be mirrored in any other contexts. *Booker's* analysis provides a way to look at the current mass incarceration situation within the country with a focus on individualized assessment. It also provides samples of defendants who receive lower sentences than they would have received under the Guidelines. This provides information on how effective the sentencing system is at achieving the goals of the criminal legal system—separation from society, rehabilitation, punishment, restitution.

If women are receiving lower sentences and are being imprisoned less, are we still accomplishing these societal goals? If so, how can we expand a reduction in imprisonment to continue accomplishing these societal goals while beginning to disassemble the mass incarceration framework currently at play? These questions remain left open.

²³⁵ Lynch, *supra* note 14, at 99–100.

²³⁶ *See id.* at 96–97, 100.