ABSTRACT

Title of Thesis:       SENTENCING CORPORATE CRIME: RESPONSES TO SCANDAL AND SARBANES-OXLEY

Miranda A. Galvin, Master of Arts, 2015


Thesis directed by:     Professor Sally S. Simpson
Department of Criminology and Criminal Justice


This thesis assesses the effects of the accounting scandals of the early 2000s and the Public Company Accounting Reform and Investor Protection Act (commonly known as Sarbanes-Oxley) on sentences for corporations in federal criminal court. I hypothesize that the time period in which the case was sentenced will exert both direct and interactive effects on the likelihood of harsh punishments and mediate the effects of legal and extralegal variables on the same. This research uses a probit regression model to explore the direct and interactive effects of extralegal characteristics across time with pooled cross-sectional data from the United States Sentencing Commission organizational data series. Companies sentenced during the scandal period were more likely to receive harsh fines, consistent with a collective framing argument. Evidence also suggests that certain offender and offense characteristics are doubly-penalized.

SENTENCING CORPORATE CRIME:

RESPONSES TO SCANDAL AND SARBANES-OXLEY


By


Miranda A. Galvin



Thesis submitted to the Faculty of the Graduate School of the
University of Maryland, College Park in partial fulfillment
of the requirements for the degree of
Master of Arts
2015

Advisory Committee:
   Professor Sally S. Simpson, Chair
   Professor Brian D. Johnson
   Professor Thomas Loughran

# TABLE OF CONTENTS

## INTRODUCTION

Since the turn of the century, the United States has been enveloped in a continual saga of corporate scandals. The early 2000s saw accounting scandals, preceded by greed and financial manipulation. The derivative market for mortgages fed the 2008 financial collapse with commercial banks, investment banks, rating agencies and regulatory agencies all implicated in wrongdoing (Levin and Coburn 2011). This century has also seen the ten largest bankruptcies in US history (Howe 2011).

This rash of corporate crime has prompted several significant pieces of legislation in the past decade, most notably the Public Company Accounting Reform and Investor Protection Act [Sarbanes-Oxley, SOX] in 2002 and the Wall Street Reform and Consumer Protection Act [Dodd-Frank] in 2010. Sarbanes-Oxley represented the most significant piece of financial regulation passed since the Great Depression and was, in part, prompted by the perception that white-collar crime was not treated harshly enough by the criminal justice system (Recine 2002).

Well known to those who study white-collar crime, both the prevalence and consequences of offenses by organizations have been documented by scholars for decades. Sutherland (1949), Clinard and Yeager (1980) and Simpson (1986) find (to varying degrees), the majority of corporations commit at least some illegal acts in the course of business; these organizational defendants are frequently in the position to commit crimes against large numbers of people in a way impossible for traditional criminals. American corporations have been

drawing criticism for harmful consequences stemming from their business practices since before the Great Depression (Hagan 2012). Since then, there has been no shortage in scandals, and the early 2000s was no different. In the decade that followed, the widespread consequences of corporate malfeasance received continued attention, notably during and after the 2008 financial crisis. Consumer fraud alone is estimated to impact 16-24% of adults (Deevy and Beals 2013); similarly, the Federal Trade Commission reports more than 35 million incidents of fraud per year (Anderson 2004). Though most consumer fraud is not very expensive for the individual,[1] the total financial cost of white-collar crime dwarfs that of street crime (Lynch et al. 2004). While precise reliable annual estimates are hard to attain, it is certain that if *settlements* reached between prominent firms and regulatory agencies are in the hundred millions (and billions),[2] then the costs to society from such crime are almost certainly greater. Further, white-collar crimes involving labor, food, or environmental laws pose threats to society far beyond the scope of financial loss. Yet prior research has found that the costs of organizational crime far exceed the fines imposed (Cohen 1988). Indeed, a demand for harsher sentences, commensurate with the costs, was behind several key provisions of Sarbanes-Oxley (Recine 2002).

For these and other reasons, the sentencing of organizations should be of immense interest to criminologists. Yet one of the most vibrant areas of

---

[1] Both Huff et al. (2010) and (Anderson 2004) estimate the average loss for each consumer to be about $200.

[2] In early 2014, Morgan Stanley reached a $275 million settlement with the U.S. Securities and Exchange Commission. Bank of America settled with the Department of Justice for $17 billion. See LaCapra (2014) and Rexrode and Barrett (2014)

contemporary criminology – sentencing research – has largely ignored white-collar crime  (Simpson and Weisburd 2009), including criminal sentencing research (both before and after the implementation of the Federal Sentencing Guidelines in 1988).[3]  A notable program of white-collar crime sentencing research, namely the Yale Studies on White-Collar Crime, emerged in the 1980s; however, this research exclusively focused on individual criminal sentences and was hampered by inconsistent definitions of white-collar crime and different methodologies. These studies compared the sentences of white-collar offenders to those received by traditional offenders, largely ignoring organizations and differences between white-collar offenses and offenders.[4] Further, little research has focused on the sentencing of white-collar offenders after the implementation of the federal sentencing guidelines.

Empirical research on the sentencing of organizations under the federal Guidelines is even sparser; what little there is (see e.g. Piquero and Davis 2004, Arlen et al. 1999) focuses exclusively on the fine provisions. While fines are arguably the most well known form of organizational sanctions, they are far from the only option (see Gruner 1993).

In this thesis, I consider the sentencing and punishment of organizational offenders, or more specifically the criminally sanctioned behavior of corporate actors.  Corporate criminals are typically understood to be a subset of white-collar

---

[3] It is important to note here that white-collar scholars also have not recently pursued sentencing research, as Simpson (2013) notes.

[4] Some research did attempt to parse out the role of status within white-collar offenses, and the role of offense type for white-collar offenders (see e.g. Nagel and Hagan 1982). However, the focus was on the interactive effect of being a "white-collar offender" and committing a "white-collar crime," not *between different types* of white-collar offenses or offenders. One exception is Schanzenbach and Yaeger (2005), who examine the role of race among white-collar offenders.

offenders; corporate crimes are consistent with most, if not all, established definitions of white-collar crime.[5] I explicate the roles of organizational and offense characteristics in the use of judicial discretion during the sentencing of organizational defendants in federal criminal court. Additionally, this research will explore the effects of contemporary events and the introduction of new legislation, namely the accounting scandals of the early 2000s and the Public Company Accounting Reform and Investor Protection Act, commonly known as Sarbanes-Oxley. These events may have reframed, or shifted the levels of blameworthiness, harm, and collateral costs attributed to organizations, consequently influencing the likelihood of a judge imposing a harsher sanction.

This research examines the two punishment outcomes available to judges sanctioning organizations: fines and the imposition of corporate probation. Using data from the United States Sentencing Commission series on Organizations Sentenced in Federal Criminal Court, I use a probit regression model to explore the direct and interactive effects of offense and offender characteristics across time with pooled cross-sectional data. The first model will predict the likelihood of an organization receiving a fine within or in excess of the fourth quartile of the prescribed guidelines range, taking into account effects of extralegal variables across time periods. The second model will predict the likelihood of a secondary sanction of probation being imposed, contingent upon the amount of fine imposed and other factors.

---

[5] It must be acknowledged that there are nearly as many variations on the definition of white-collar crime as there are scholarly works on the subject. This has certainly had consequences of its own (Freidrichs 2002, Simpson 2013). Yet a detailed discussion of this debate is beyond the scope of this research.

## *WHY SARBANES-OXLEY?*

The well-publicized corporate scandals at Enron, WorldCom, Global Crossing, and Adelphia (representing four of the six largest U.S. bankruptcies since the Great Depression) preceded the passing of corporate reform legislation (Recine 2002). These cases evidenced rampant accounting manipulation and the failure of both upper level executives and auditing firms to identify and rectify unethical practices. In response, President George W. Bush signed into law the Public Company Accounting Reform and Investor Protection Act (commonly known as Sarbanes-Oxley, or SOX) on July 30, 2002. SOX predominantly focused on increased controls for corporate financial recordkeeping, reporting, and auditing procedures. One of the most significant components of the legislation is the creation of the Public Company Accounting Oversight Board (PCAOB), whose duties entail the supervision of auditing firms.

From the point of view of this thesis, Sarbanes-Oxley will be treated as a significant event in time, even though the provisions of the Act have relatively few criminal justice components.[6] So why should Sarbanes-Oxley matter for sentencing? Between 2000 and 2002, the American public was faced with more than a dozen accounting frauds that are estimated to have shorted the securities market of more than $500 billion (Farrell 2004). Between October 2001 and June

---

[6] The primary relation to criminal organizations and the Act is in the codification of five new statutes: 18 U.S.C. §§ 1348, 1349, 1350, 1519, and 1520. Additionally, Title IX, also known as the White Collar Crime Penalty Enhancement Act, which increased the statutory maximum for certain offenses. The criminal provisions of SOX will be discussed in more detail in the next chapter. The bulk of Sarbanes-Oxley pertains to changes in lower level regulatory codes and the firms and agencies that oversee corporate compliance. As such, there has been extensive research on the consequences of Sarbanes-Oxley for corporations. Most have focused on stock price shocks in the immediate aftermath (e.g. Li et al. 2008) and longer-term changes in "cosmetic" earnings management (e.g. Aono and Guan 2008). Other research has focused on regulatory changes, both affecting corporate perceptions (Vakkur et al. 2010) and behavior (Hughes et al. 2009).

2002, fifteen major companies faced accounting scandals (Patsuris 2002). In each case, executives were implicated in the scandal, and in many cases were later brought up on criminal charges. As each scandal unfolded, public opinion polls captured incensed public sentiments, and politicians (including President George W. Bush himself) sought to appease demands for criminal justice; Sarbanes-Oxley was the legislative response, capturing and criminalizing distinct elements of these events (Recine 2002). SOX thus arguably provided a codified description of "bad" corporations and the type of white-collar crime that deserved condemnation.

Despite emerging in the midst of a long-lasting period of deregulation (Hagan 2012), key conservative politicians, including the President and the Attorney General, took part in the vilification of white-collar offenders, both corporations and those in their employ (Recine 2002). Hagan (2012) refers to this phenomenon as collective framing; the use of carefully constructed phrases and manipulation of focus by politicians and others in power frames the collective conscience. Sarbanes-Oxley is evidence of a shift in the framing of corporate crime by politicians, and may have thus signaled the need for harsher sentences to judges. If a change in discretionary practices is found after the passage of Sarbanes-Oxley, this suggests that judges are conscious of values stated in policy during the sentencing process.

Alternatively, judges may engage in their own form of collective framing; Erikson (1966) suggests that punishment is a primary means through which communal values regarding seriousness of crime is transmitted. The sentences

that judges choose to mete out to organizations, both the type and magnitude, are representative of their perception of social values surrounding corporate crime within reasonable legal restraints. To the extent that there is an empirical shift in judicial decision-making (e.g. the decision to fine an organization in the upper quartile within the parameters of the established minimum and maximum fine for which a corporation is eligible) after Enron but *before* the introduction and passage of SOX, this may be reflective of a change in judicial values, which are arguably influenced by changes in social values.

Over the past several decades, public opinion toward white-collar crime has gone through periods of ambivalence and growing awareness (Katz 1980). One of the primary reasons white-collar crime receives differential (and often preferential) treatment is that "public resentment" is "unorganized" (Sutherland 1940: 137). It is possible that Sarbanes-Oxley finally saw, and symbolically was, the solidification of that resentment. Cullen et al. (2009) argue that there has been a qualitative shift in the public perception of white-collar crime; the public now perceives white-collar offenders as no different than street offenders, thus demanding that they are subject to increasingly harsh penalties. Among individual defendants, there is evidence of increased criminal prosecution of high level executives (Gustafson 2006; see also Brickey 2003), lending support to claims that the public expects harsh punishment for crimes committed by organizations and their employees. Given that judges are sensitive to public opinion (see Comey 2009, Wheeler et al. 1988), it follows that they will use public sentiment to inform their sentencing decisions.

It is the expectation of this thesis that the accounting scandals and Sarbanes-Oxley affected not only the behavior of corporations (through increased regulation and enhanced penalties), but also of criminal justice agents who respond to corporate crime. Specifically, Sarbanes-Oxley may have had an *unintended* effect on the sentencing of criminal organizations, distinct from amendments made to the Federal Sentencing Guidelines. I contend that SOX affected judicial discretion in the application of sentencing provisions beyond those dictated by the Act. Specifically, I expect that judges behaved retributively, resulting in harsher penalties during the scandals and post-SOX for all offenses; I also expect that these increases will not be uniform across all offenses and that certain scandalized behaviors will be fined more harshly *in addition* to the overall period effect. Judicial discretion, as operationalized in this thesis, refers to a decision-making process that results in the imposition of a sentence that is retributive, and results in a harsher penalty. This is measured as a sentence within or in excess of the fourth quartile of the fine range. I will examine organizational sentencing outcomes during key time periods to illuminate the probable mechanisms through which SOX affected judicial decision-making (see further detail in Chapter 3). In the next section, I discuss the history of the Sentencing Guidelines for Organizations and the manner in which sentences are calculated.

### *SENTENCING ORGANIZATIONS UNDER THE FEDERAL GUIDELINES*

The Sentencing Reform Act [SRA] was passed in 1984 as a response to growing concerns over widespread disparate sentencing practices. The SRA included within it the creation of the United States Sentencing Commission [the

Commission, USSC] and a mandate for the Commission to promulgate guidelines for the sentencing of federal defendants. The Commission completed a review of sentences and developed mandatory guidelines that were implemented in 1988. However, with the exception of antitrust offenses, these guidelines applied only to the sentencing of individuals. This left the sentencing of organizations largely up to the discretion of judges, thus failing to alleviate the disparity for which the guidelines were drawn; there was no clear sentencing philosophy for organizations (Nagel and 1993). Further, evidence suggested that existing practices resulted in fines far less than the harms caused by corporate crimes (Cohen 1988). In order to conduct a more thorough review of organizational sentencing practices, the Commission deferred release of organizational sentencing guidelines.

The original Guidelines for Organizations (Chapter Eight) went into effect on November 1, 1991, but not all types of organizational offenses were subject to the Guidelines. For instance, guidelines for food and drug or environmental offenses were not provided, a situation that remains today.[7] Even when Chapter Eight applies, the guidelines allow a significant amount of freedom in the determination of a sentence for an organization. Most calculations are based on relatively ambiguous terminology (Parker 1993); judges are responsible for "calculating" mitigating and aggravating factors, many of which relate to

---

[7] The Commission has hosted advisory groups on the offenses and yet has thus far failed to implement any formal guidelines. In their stead, the Commission refers judges to consider 18 U.S.C §§3553 and 3572, which formally state factors that should be considered in the determination of criminal sentencing and fines. Both provisions state the goals of punishment (as established by the SRA), which are myriad and provide more fodder for philosophical debate rather than rigid sentencing instruction.

cooperation and suitability of programs, which are arguably subjective. For instance, an organization's cooperation in the investigation and prosecution (e.g. self-reporting, not resisting investigative efforts) can reduce the fine range for which an organization is eligible (mitigation). Alternatively, if an organization has a prior history of offending, its culpability score will be "aggravated", resulting in a higher fine range (for further discussion of the Chapter Eight guidelines and the culpability score, see Chapter Two and Appendix A). Further, the Guidelines allow departures for a host of extralegal factors, many of which will be examined in relation to focal concerns herein. Thus, criminal corporations face little certainty in sentencing.[8]

Ceteris Paribus: why is a harsher penalty given to one defendant and not another? Much work has been done on the concept of judicial focal concerns; the paradigm asserts that during sentencing, a judge considers characteristics of the offender (e.g. blameworthiness) and the offense (e.g. harm caused) and weighs those characteristics against anticipated consequences of various sentences. (see Steffensmeier et al. 1998). However, little, if any, work has considered the role of judicial perception in the sentencing of organizations.[9] Yet, due to the structure of the Chapter Eight guidelines, discretion is at the very crux of organizational sentencing.

---

[8] In 2005, the United States Supreme Court ruled that Federal Sentencing Guidelines were unconstitutional to the extent that they were mandatory; thus the guidelines have subsequently been considered advisory. This has only amplified the uncertainty in organizational sentencing.

[9] Some work has considered the role of extralegal factors in sentence severity for organizations (e.g. Piquero and Davis 2004); however, such work operates absent a larger theoretical framework and was conducted with problematic data (see Alexander et al. 2000).

*CONTRIBUTION TO LITERATURE*

This research will add to existing literature on the widespread collateral consequences of Sarbanes-Oxley. Prior research on sentencing and SOX has exclusively examined individuals (e.g. Comey 2009),[10] but this study will examine the effects for corporations and offer new insights as to the policy's effect on organizational defendants in criminal court.

To do so, this research extends the focal concerns paradigm to organizational defendants. This application will allow for greater attention to be paid to disparities in organizational sentences as well as flesh out the focal concerns paradigm to reflect all sentencing behavior, not just that pertaining to individuals. For the purposes of this research, the extension of focal concern provides a concept that can be framed, or reframed, as a result of collective framing processes. This research also offers a study of organizational sentences that moves beyond the fine to consider the alternative sentences allowed by the guidelines. This research thus offers both empirical and theoretical bridges, linking white-collar, specifically corporate, crime with contemporary sentencing research and expanding the Sarbanes-Oxley literature.

**LITERATURE REVIEW**

This research proposes to explain patterns of judicial decision-making in the context of sentencing organizations. At the core of this research is the question of discretion: was there a change in patterns of judicial discretion after the

---

[10] This is not to deny the many theoretical arguments and general commentaries made on the implications of Sarbanes-Oxley for corporate sentencing (e.g. Nicholson 2007, Hess 2007).

passage and implementation of Sarbanes-Oxley? What offender or offense characteristics are predictors of this discretion? Have predictors of discretion been affected by Sarbanes-Oxley? Discretion of itself is not a problematic construct; judges are within rights to mitigate or enhance sentences when circumstances warrant. However, discretion is not necessarily evenly applied; the consequence is disparity in sentencing.

## *DIFFERENCES IN SENTENCING OUTCOMES*

There are a myriad of theoretical justifications for sentencing – retributive, deterrence, rehabilitation, to name but a few – yet all rely on equality in sentencing to some degree. Retributive justifications, for example, demand that equal harm receives commensurate punishment. Deterrence relies on limited disparity in sentencing to support the principle of certainty; not only must the imposition of a sentence be certain, but so must its substantive qualities. When punishment varies significantly among like offenders committing like offenses, the principle of certainty is undermined. While rehabilitative justifications require that each offender is considered individually, the argument that like offenders who have committed like offenses should be sentenced similarly holds. Corporate actors may be argued to be even *more* rational than individual offenders (see Paternoster and Simpson 1996), and thus consistency in organizational sentencing is potentially of even greater import than for individuals.

### *WHITE-COLLAR CRIME SENTENCING*

Despite the plethora of criminological research on sentencing disparity, little work has explored sentencing outcomes as related to white-collar offenders

since the 1980s. Sutherland (1940) first claimed that white-collar offenders were treated more leniently than common criminals, a belief that has lasted for decades. However, the empirical reality is more nuanced. Inconsistency in definition and methods have precluded meaningful consensus from findings. What research has been done largely focuses on individuals.

Early sentencing research by Wheeler et al. (1982) and Weisburd et al. (1990) found no evidence of leniency for white-collar offenders. Instead, the authors found that high-status offenders received sentences that were *more* harsh than their low status counterparts. The authors utilized a sociological definition of white-collar (operationalized as socioeconomic status and social class, respectively), consistent with Sutherland's initial definition. Benson and Walker (1988), however, came to the opposite conclusion using a similar definition; status had no direct effect on either the incidence or length of imprisonment. Considering the intersection of offense and offender definitions, Hagan and Nagel (1982) found that higher educated offenders received more lenient sentences, both for common crimes and for white-collar crimes; the greatest sentence discount was given to "white-collar" (well educated) persons who committed a white-collar offense. However, the authors also found that among offenses, judges gave harsher sentences to individuals whose crimes violated public trust (e.g. antitrust offenses).

Benson and Walker (1988) also found that private counsel (likely correlated with socioeconomic status) led to a lower likelihood of imprisonment. The latter finding is consistent with Schanzenbach and Yaeger's (2006) finding

that the amount of fine paid was strongly related to the length of incarceration. Not only were there race disparities among income (and thus, who *could* pay fines), the authors also found that the discounting effects of the fine amount varied by race; whites earned a greater discount per dollar paid than nonwhites.

Albonetti (1999) posits a different mechanism through which white-collar offenders might receive an unfair advantage at sentencing: complex cases (involving both an overarching plan and an organizational affiliation) were more likely to receive plea bargains, which in turn increased the likelihood of receiving a suspended sentence. Albonetti also found that social impeccability also increased the likelihood of pleas and suspended sentences. Katz (1979) similarly argues that white-collar cases have an advantage in attaining plea bargains; white-collar cases require greater resources to investigate and frequently require prosecutors to become involved at early stages to facilitate this investigation. In order to gain access to evidence, prosecutors must plea bargain; taken in conjunction with Albonetti's findings, white-collar offenders appear to arrive at the sentencing stage with greater advantages than traditional offenders. Further affecting sentencing, there is also some evidence that prosecutors charge managers with less punitive statutes, and that this practice varies across time (Hagan and Parker 1985). In the era of sentencing guidelines and the resulting practice of amendment bargaining (in addition to charge bargaining)[11], this has profound implications for the sentencing of white-collar offenders.

---

[11] Amendment bargaining refers to the practice of negotiating the amendment year of the Sentencing Guidelines during the plea bargain process. Choosing the amendment year can have drastic consequences on the sentences for which an offender is eligible. For example, the 2003 amendments drastically increased penalties for white-collar offenses as dictated by Sarbanes-

Further, corporate offenders may face advantages during criminal sentencing due to the fact that many of them are never criminally prosecuted, though they commit and can be punished for crimes. In his study, Sutherland (1949) demonstrated that the bulk of corporate sanctions occurred outside the criminal courts, a fact that remains true today. Unlike traditional offenders, organizations (and those in their employ) who commit crimes in the course of legitimate business activity are subject not only to criminal and civil authorities, but also to regulatory bodies. A single business is likely to be under the supervision of multiple federal regulatory agencies that operate under different domains (see Frank and Lombness 1988, Shover et al. 1986).

However, the regulatory justice system sometimes operates at cross-purposes with the criminal justice system. While the criminal justice operates on the presumption of sanctioning, the goal of the regulatory system is future compliance with the law; most agencies rely a cooperative model of voluntary compliance[12] (Frank and Lombness 1988). Ayres and Braithwaite (1992) thus propose a pyramid of enforcement; the bulk of actions should be nonpunitive, with only the most serious, repeated, offenses escalating to the levels of criminal prosecution or corporate debarment. However, larger, more powerful firms may have disproportionate negotiation power and ultimately receive less serious

---

Oxley; negotiating a plea in which the offender is sentenced under the 2001 guidelines could be very beneficial. Charge bargaining refers to the practice of negotiating the number of counts or the exact statutory charge for which an offender pleads guilty. The maximum penalties for 18 U.S.C. § 371 and 18 U.S.C. § 1349, both conspiracy charges, vary considerably (5 years imprisonment and up to 20 years, respectively).

[12] It is worth mentioning that some scholars assert that agencies are driven toward this model due to "capture" – the coopting of agency mission and positions by officials from the regulated industry. To the extent that this is accurate (and there is some evidence that it is not – see e.g., it will serve to further enhance differential treatment.

sanctions despite commensurate or excessive violations (Frank and Lombness 1988). Thus, regulatory agents are highly influential in keeping offenses from reaching the stage of criminal prosecution. Even before entering the "funnel" of the criminal justice system, agencies funnel out the majority of white-collar offenses. Even if they are not funneled out, a repeat corporate offender will not carry its previous regulatory violations forward (unlike a traditional offender, whose whole official offending history follows him throughout his life).

Szockyj (1998) synthesized research to conclude that, taking both empirical research on sentencing and the processes through which white-collar offenders avoid criminal prosecution, white-collar offenders face an advantage in imprisonment decisions. This argument is consistent with Sutherland (1940), who first noted the absence of white-collar offenders in the criminal courts, despite conclusive evidence of corporate crime. However, there is some evidence that even among regulatory sanctions, class disparity exists. Eitle (2000) reported that, excepting those with no legitimate organizational role, managers and principals were least likely to receive punitive sanctions; he also found that being affiliated with a large firm increased the likelihood of sanctions, though significantly less so for principals.

Much less research has focused on the sentencing of corporations. This literature is predominantly of a legal-theoretical, rather than empirical, nature. There is some evidence that extralegal factors do influence sentences; Piquero and Davis (2004) found that closely held organizations and economically solvent organizations receive higher fines. Additionally, the base fine is negatively related

to being sentenced above the midpoint of the fine range; extralegal factors, however, were not found to be related to the likelihood of receiving a harsher sentence. However, the findings from this study are suspect because the organizational guidelines data suffers from missing cases (see Alexander et al. 2000, discussed further in Chapter Three). Prior to the guidelines, organizations on the whole received relatively low fines (Cohen et al. 1988), often less than the harm caused by the offense (U.S. Sentencing Commission 1988). However, the guidelines have – on the whole – significantly increased penalties (Alexander et al. 1999, Murphy 2002[13]).

In sum, there is limited and inconsistent evidence that white-collar offenders are sentenced more leniently due to status characteristics. There is even less evidence as to the effect of extralegal variables on sentences for organizations, an issue that will be examined in this research. However, there is evidence that white-collar individuals are granted advantages at early stages in the criminal justice system process, primarily through prosecutorial decisions to pursue less punitive charges and to plead cases, that garners white-collar offenders significant cumulative leniency in sentencing.

### *HISTORY OF THE FEDERAL SENTENCING GUIDELINES*

The Sentencing Reform Act [SRA] was passed in 1984 in response to both liberal and conservative concerns regarding criminal sentencing policy. Faced with claims that "nothing works in rehabilitation" (Martinson, 1974) and research showing a large proportion of offenses are committed by career criminals

---

[13] While these findings are generally accepted, Parker and Atkins (1999) find that there has been no significant difference in the amount of fines collected or in sanction type.

(Wolfgang et al. 1972), conservatives scrambled to respond to the crime problem. Liberals, on the other hand, demanded more uniformity in sentencing as disparity in sentencing became evident (see below) and insider critics such as Judge Marvin Frankel argued that judges did not have the necessary experience or information to fairly sentence (1973). The SRA created the United States Sentencing Commission as an independent agency tasked with the promulgation of federal sentencing guidelines to be used for the sentencing of all federal crimes (see Stith and Carbranes 1998).

The Federal Sentencing Guidelines [hereafter, "the Guidelines"] were implemented in 1988. Notorious for their bulk and opaque instructions, the Guidelines are in their simplest form a large table. The possible sentences for an offender lie at the intersection of a row determined by offense level and a column determined by the offender's criminal history. Each of these is determined by a tabulation structured by the Guidelines. Prior to 2005, the Guidelines were mandatory – judges were required to sentence within the calculated range with only a few legitimate reasons for departures; since 2005, the Guidelines became advisory,[14] though inconsistent sentencing may be appealed. However, the bulk of the Guidelines pertain to individual defendants, and thus are not worth treating in detail here. Rather, it is sufficient to say that the Guidelines by design are meant to circumscribe judicial discretion, basing a narrow range of sentencing options on two pre-determined factors.

---

[14] *United States v. Booker* 543 U.S. 220 (2005).

*THE CHAPTER EIGHT GUIDELINES*

*CREATING CHAPTER EIGHT – THEORIES OF ORGANIZATIONAL*

*SENTENCING*

In their original form, the Guidelines covered all offenses committed by individuals and corporations being sentenced for antitrust offenses. The Commission originally intended to include a matrix sufficient for the sentencing of all corporate offenders, but opted instead to delay guidelines for the sentencing of organizational defendants until a greater consensus could be reached (Nagel and Swenson 1993). Chapter Eight Guidelines for Organizations were finally implemented in 1991 after protracted debate.

The SRA established the purposes of punishment as just punishment (deserts), deterrence, rehabilitation, and incapacitation.[15] The criminal sentencing of organizations presents challenges not present when sentencing individuals; namely, corporations cannot be imprisoned (United States Sentencing Commission 1988). As such, there are theories of punishment unique to organizations. One such theory is that of optimal penalties: organizations should be fined enough so that, factoring in the likelihood of detection, they are deterred from offending (see e.g. Block 1991). However, the difficulty in accurately estimating a detection parameter caused the Commission to move away from this line of thinking (Nagel and Swenson 1993).

In drafting the organizational sentencing guidelines, the Commission faced pressures to institute high fines; fines in the past were often less substantial

---

[15] See 18 U.S.C. §3553

than the harms caused by corporate crime (U.S. Sentencing Commission 1988), and the SRA specifically demanded harsher sanctions for white-collar crime (Nagel and Swenson 1993). These spoke to deterrence goals. But how to rehabilitate? The Guidelines promoted compliance programs as the answer. Where compliance programs were operating effectively, they would justify a mitigated sentence, consistent with deserts; where they lacked, they could be ordered instituted, thereby rehabilitating the offending organization and reducing the likelihood of reoffending. Just deserts were realized through both aggravating and mitigating factors that would adjust the fine range (Nagel and Swenson 1993). Incapacitation is perhaps the least realized goal in the organizational guidelines. The means closest to imprisonment for organization are that of court stewardship, operationalized as corporate probation (see Gruner 1993, especially p. 311 *ff,* Wray 1992). Probation is available for almost every offense covered under the Guidelines, and may be instituted, broadly, in any case the judge feels that probation would be required to collect on fines, impose a compliance program, or otherwise would fulfill the purposes of sentencing as defined by the SRA.

The Guidelines in their final form have not been without their critics. The "corporate citizenship" model promoted by the Commission has earned mixed reviews; while more corporations have implemented programs in advance of sentencing (Murphy 2002), scholars have criticized the guidelines as overly harsh. Parker (1993) asserts that the Guidelines are arbitrarily harsh and pressure organizations to sublimate themselves to state control. He argues that the "carrot"

of preventative compliance programs is "poisonous to our economy, if not to our society more generally. The carrot is statism" (1993:411). Arlen (2011) asserts, in a less vitriolic argument, that the incentives granted from compliance programs and self-reporting are insufficient to provide adequate deterrence (see also Bucy 1993). To the extent that judicial discretion results in more lenient sentences for more serious crimes, this will further decrease the deterrent effect of the Guidelines. However, such an argument relies on the assumption that judges are likely to undervalue the costs of white-collar crime (see Comey 2009), an assertion challenged by this research.

*ORGANIZATIONS SENTENCED UNDER CHAPTER EIGHT*

Because the organizational guidelines data are rarely used by scholars, little research describes the nature of organizations that appear in the data. However, from what has been done, clear patterns have emerged. First, the organizations (99% of which are companies) that are sentenced are most often small, with the median number of employees being 20 (Murphy 2002), though the mean is much higher (Piquero and Davis 2004). Additionally, they are most often closely held (i.e. privately owned or not publicly traded), lack compliance programs, and many are facing financial difficulty (Piquero and Davis 2004).[16] Environmental offenses are the most common reason for sentencing; however, of those organizations whose sentences are constrained by the guidelines (i.e. those

---

[16] Scholars have interpreted this as reflecting some sort of selection bias in the criminal justice funnel (e.g. larger firms are more costly for prosecutors to pursue because they can devote more resources to defense counsel). However, it is possible that privately owned firms, which may lack the internal controls of larger and public firms, are more likely to be criminally involved.

like the organizations examined herein), the most common offenses are for antitrust and fraud violations (Alexander et al. 1999).

*USING CHAPTER EIGHT*

Chapter Eight of the Guidelines contains directives for the sentencing of organizational defendants that face criminal offenses. However, a few crime types lack explicit Guidelines calculations; most notably, environmental crimes and food and drug violations are not provided for within Chapter Eight instructions,[17] despite multiple working groups and longstanding recommendations. In these cases especially, judges are given considerable leeway in sentencing. However, judges are similarly granted extensive opportunity to exercise discretion within the explicit calculations mandated by the Guidelines.

The Chapter Eight guidelines are closely linked to Chapter Two calculations for individuals. Section 2B1.1 provides instructions for the calculation of offense levels for "basic economic offenses"; the same procedure and values are used for the determination of an organization's offense level (See Appendix A, Table A.1). A base level of 6 or 7 is established based on the statutory maximum term of imprisonment.[18] The second stage of calculation is the addition of points based on the monetary loss caused by the offense; while this would appear straightforward, Chapter Eight defines the loss calculation as being

---

[17] Chapter Eight *does* make reference to environmental crimes and food and drug violations in so far as it directs judges to consider statutory minimums and maximums in determining the sanction for organizations convicted of these offenses as well as the factors to be considered in a sentence as defined by 18 U.S.C. §§3553 and 3572. (U.S. Sentencing Guidelines §8.2.10).

[18] This distinction was established as a result of the Sarbanes-Oxley amendments to the Sentencing Guidelines. Prior to January 2003, all offenses under Section 2B1.1 had a base level of 6. However, to reflect the seriousness of certain white-collar offenses, statutes with a statutory maximum of at least 20 years imprisonment were elevated to a base offense level of 7.

the greatest of the actual loss incurred, the illegal gain, or the intended loss. The fluid description thus allows for varied methods of calculation and thus, inconsistency.

Additional adjustments are made for the number of victims and offense characteristics; the most relevant adjustments for organizational offenders are the additions for jeopardizing the soundness of a financial institution, a public company, a company with more than 1,000 employees or endangering the financial solvency of 100 or more victims (4 level enhancement, minimum level of 24), or violations of securities or commodities law in which the offender was in a position of trust (4 level enhancement). The final adjusted offense level is then used to determine a base fine (see Appendix A, Table A.2). The final base fine is the greater of the amount established in the table §8C2.4 or the pecuniary loss or gain caused by the offense; this prevents a fine from being less than the amount of harm caused.

Chapter Eight makes extensive provisions for determining the culpability of organizational offenders. Unlike individual offenders, for which *mens rea* is required for criminal conviction, organizational offenders may be held responsible for the conduct of their employees under *respondeat superior*. However, the Guidelines attempt a more nuanced understanding, taking into account not only the action and prior history (as it does for individual defendants) but also the role of high-level personnel (enhancements scaled by the size of the organization or unit in which the offense was committed), obstruction of justice,[19] self-reporting

---

[19] For a discussion of the important role that corporations play in establishing evidence of their own offending, see discussion of Katz (1979) and prosecutor involvement, above.

and acceptance of responsibility, and the presence of an effective compliance program (see Appendix A, Table A.3). Culpability scores may range from negative values to more than 10. Once the culpability score is established, the appropriate set of minimum and maximum multipliers is selected; the minimum multiplier is .05 and the highest multiplier is capped at 4.00; see table A.4). The base fine is used in conjunction with these multipliers to determine the Guideline fine range, within which the organization may be sentenced (see Appendix A). Departures may be done for a variety of reasons, including offender and offense variables that are otherwise incorporated into the culpability and base fine levels.

The specific calculations (i.e. adjustments to offense level and culpability scores) are subject to change depending on the year of the guidelines applied during sentencing. Additional offense-specific factors have been added over time, and the magnitude of level adjustments has also changed in response to new legislation (and other factors). Because of the structure of the Chapter Eight fine guidelines, changes to both Chapter Eight and §2B.1 may have consequences for organizational sentencing. For example, in 1998, the Sentencing Commission added an offense level increase of 2 points for the desecration of property in national cemeteries and veterans' memorials in response to the Veteran's Cemeteries Protection Act of 1997. The table below articulates the changes that were made that affect the calculations of corporate fine ranges. Sarbanes-Oxley remains the most significant changes to corporate criminal sentencing throughout the study period.

**Table 1: Guidelines Amendments Relevant to The Sentencing of Organizations**

| Year in effect | Section | Description |
|---|---|---|
| **1998** | §2B1.1 | Increases by two offense levels the penalties in the theft, property destruction, and arson guidelines for offenses involving desecration of property in national cemeteries |
| **1998** | §2F1.1 | Increases penalties for mass-marketed fraud, relocation to avoid prosecution, frauds using sophisticated means. §2F1.1 was consolidated into §2B1.1 as of 2001. |
| **1999** | §2F1.1 | Two level increase for offenses involving sophisticated means |
| **2000** | §2F1.1 | Enhancement for false statements in bankruptcy proceedings and false statements in violation of specific orders in non-bankruptcy proceedings. |
| **2001** | §2B1.1 | Consolidates theft, property destruction and fraud guidelines; new loss table, redefined "loss" |
| **2002** | §2B1.1 | Specification of certain offense characteristics previously defined as "statutory criteria" |
| **2003** | §2B1.1 | Increase in offense level calculations for financial institutions, size of loss, number of victims (discussed in text); adjustment to base fine table. |
| **2004** | §2B1.1 | Increase in offense level for violation of 18 USC §1037; increase in offense levels for falsification of identification documents |
| **2004** | §8B2.1 | Strengthened the criteria an organization must follow to be considered as having an effective compliance program; respecification of organizational sentencing principles. |
| **2007** | §2B1.1 | Corrections of typographical errors |
| **2008** | §2B1.1 | Addition of offense level increase for violations of Emergency and Disaster Fraud Penalty Enhancement Act of 2007 |

While the guidelines relevant to organizational fine sentences have changed markedly over the study period, this is likely not of concern. Punitiveness, as a concept, speaks to a *relative* evaluation; that is, within the eligible fine range (regardless of its magnitude) a punitive sentence is one that is closer to the upper end of the fine range. The amendments listed above (when substantive) have had the exclusive effect of increasing the absolute value of the fine ranges; on a conceptual level, this should not affect punitiveness.

*CHAPTER EIGHT AFTER SARBANES OXLEY*

Within Sarbanes-Oxley was a directive for the Sentencing Commission to amend the guidelines (both for individuals and organizations) to reflect the new offenses and the seriousness of the behaviors underlying the corporate scandals. The Commission made several adjustments to the offense level calculation in §2B1.1.

Ultimately, while the amendments did not specifically alter Chapter Eight; they did modify the offense level calculation from Chapter Two (used for the determination of a base fine), creating an indirect effect. Chapter Two calculations affect more than half of all organizations sentenced (United States Sentencing Commission 2003). Consider: §2B1.1(a) establishes a base offense level of 6. After Sarbanes-Oxley, however, the base offense level may be set at 7 if the defendant was convicted of an offense with a statutory maximum of 20 years or more; the WCCPEA enhanced maximums significantly enough that offenders convicted of these crimes would bear a one unit increase in base offense level regardless of mitigating and aggravating circumstances. Such changes significantly impact the sentences of both individuals and organizations.

In calculating victim impact, the Commission added a third tier (worth six additional offense levels[20]) if the offense impacted more than 250 victims. To be added cumulatively, if the offense endangered the financial security of employees, pensioners, or investors, a four-level enhancement may be applied. This results in up to a ten-level increase, effectively tripling the punishment. Further, the

---

[20] The 2002 guidelines include up to a four-level increase for crimes that harm 100 or more victims.

Commission added two new levels to the financial loss table, which now may contribute to a 28-level enhancement. The former Abuse of Trust provision was underapplied; to rectify this "failure to punish," new provisions created four-level enhancements for securities violations committed by managers (United States Sentencing Commission 2003).

For example, an organization convicted of one count of mail fraud with the minimum culpability score and an offense level of 14 in 2002 would receive a fine between $4,250 and $17,000. [21] The same organization sentenced for the same offense, under post-SOX amendments, would have a base offense level of 15; at a minimum culpability score, the organization would face fines between $6,250 and $25,000. While the absolute difference between the fines seems negligible, this represents a 47% increase in the minimum and maximum fines. This is the cost of only a single unit increase in offense level, resulting from maximum penalty enhancements. The cumulative effect of the restructuring of §2B1.1 offense level calculations will certainly have a greater impact on the fine ranges prescribed by the Guidelines.

However, only a few years after these expansive changes were put into effect, the guidelines faced a constitutionality challenge in the Supreme Court of the United States in United States v. Booker. While the guidelines remained in place, their fundamental purpose was altered. In spite of this, there is reason to

---

[21] The base fine for offense level 14 is $85,000. Culpability scores of 0 or less receive multipliers of .05 and .20. The lowest fine range for this organization is (0.05 x $85,000) to (0.20 x $85,000). Culpability scores of 10 or more earn multiples of 2.00 and 4.00. The highest fine range for this organization, then, is (2.0 x $85,000) to (4.0 x $85,000)

suspect that the Booker decision will not fully mitigate the importance of guideline amendments.

*THE IMPLICATIONS OF BOOKER FOR JUDICIAL DISCRETION*

United States v. Booker was overturned by the Supreme Court; the majority opinion found that the federal sentencing guidelines, as operated, were unconstitutional. As a result, the Guidelines were no longer mandatory, but advisory. Judges must consider the recommended Guidelines sentence (and go through the task of calculating it) but are no longer bound by it; however, sentences that are outside the guidelines range may be appealed on that ground alone. Thus, it should not be surprising that even post-*Booker*, the proportion of sentences consistent with the Guidelines remains relatively high (U.S. Sentencing Commission 2006, 2012). However, it is also possible that judges feel freer to depart for reasons other than corporate characteristics (for example, a judge may feel that the guidelines are always insufficiently harsh). *Booker* may allow for judges to respond to prosecutorial discretion by "rectifying" lenient agreements (Bibas 2005). Early reviews found that theft and fraud sentences for individuals more often resulted in prison and for longer lengths of time, despite an increase in downward departures (United States Sentencing Commission 2006).

Additionally, *Booker* has also allowed for considerable discretion to be utilized in guidelines calculations; this especially the case in the determination of loss for §2B1.1, the most significant fine determinant for many white-collar cases (Gonzalez et al. 2008). Post-*Booker* departures were more common for cases sentenced under this section of the guidelines than all others except gun

guidelines (U.S. Sentencing Commission 2006 in Chatham 2006). While there is evidence of judges' increasing willingness to sentence below the departure (as predicted by Bibas 2005), the overall sentencing trend for fraud offenders is one of *increasing* severity (U.S. Sentencing Commission 2012). The extent to which these finding hold true for organizations has yet to be examined, and is not the primary focus of this research.

## *JUDICIAL PERCEPTION AND COLLECTIVE FRAMING*

John Hagan (2012) argues that white-collar crimes have been treated differently by the criminal justice system and that this differential response is the result of the use of carefully constructed phrases and the manipulation of focus by those in power (politicians, the media), a phenomenon known as collective framing. Collective framing is done in such a way that the public (i.e. those not in power) are exposed only to certain interpretations of events and actors (in this case, white collar crimes and the associated organizations). Further, public exposure may be reduced through a displacement of focus, or distraction.

In the past, white-collar crime has been framed in such a way that its harms were minimized and organizations were relieved of culpability for these harms (Hagan 2012). However, the accounting scandals of the early 2000s were treated differently by politicians and media alike. President George W. Bush spoke publicly about the need for tougher penalties for corporate criminals and increased corporate responsibility (Bush in Recine 2002). Sarbanes-Oxley dramatically increased the penalties for white-collar crimes, a bipartisan bill that effectively shifted the national discourse at the highest level to corporate crime.

Further, the U.S. Attorney General insisted that white-collar offenders serve their criminal sentences in federal prison, opposed to less restrictive halfway houses (Gustafson 2006).

The media also presented a unified front, with corporations clearly defined as culpable "bad guys" (Gustafson 2006, Cullen et al. 2009). Further, sensationalized media coverage has resulted in the public blaming criminal justice agents for failing to protect them (Pratt 2007). This coverage contributes to collective framing by "organizing" public resentment of white-collar crime in a way that it has not been previously (see Sutherland 1945). In response to these reframing acts and the apparent failure of the gatekeepers to detect the harm and prevent corporate malfeasance (see Coffee 2006), judges may have sought to rectify the harm and restore faith in officials through the imposition of more punitive sentences (Barak 2010:27).

Comey (2009) notes that individuals in high-profile cases were sentenced exceptionally harshly after Sarbanes-Oxley. And unlike previous waves of white-collar crime, the public became intimate with the extravagant lifestyles of pre-Sarbanes-Oxley defendants (Gustafson 2006). Changes in public punitiveness are, in part, a consequence of this awareness (Roberts et al. 2003). Together, it suggests that judges could hardly ignore the increased attention devoted to white-collar crime nor could they ignore the changing content of that discourse. Specifically, judges and the rest of the American public became acutely aware of certain harms caused by those offenses and offenders that mirrored the accounting fraud and systematic negligence of the myriad of accounting frauds.

*POPULIST PUNITIVENESS*

Public opinions about white-collar crime are no longer "unorganized" as they were in Sutherland's day, and the spread of corporate illegality and its consequences have been successfully illustrated to the broader public – but to what end? Judges sentence offenders, not the public. Yet populist penal theory asserts that these sentiments are of incredible consequence (Bottoms 1995, Almond 2008).

In addition to being subject to collective framing, judges were also subject to demands from a public demanding more punitive sentences. "'Populist punitiveness' is intended to convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance" (Bottoms 1995: 40). Pressures exist at multiple levels, causing political and criminal justice agents to be receptive to public demands for punitive sentences. Legislators and prosecutors are subject to pressures for reelection, and thus are overtly attentive to public opinion. Not all judges are elected (as is the case for the federal judges responsible for sentencing organizations), but even those that are selected are subject to political manipulation indirectly by politicians responsible for their continued appointments and promotions (see Cohen 1992); the latter is of greater concern for federal judges. Most federal judges are appointed as long as they evidence "good behavior", and can only be removed through formal conviction and impeachment by Congress. However, federal judges can still be politically pressured; the weight of this has prompted

judicial comment and even resignation (see Bright 1997). In short, much like elected officials, judges are mindful of public opinion.

While there is no role for public opinion in the sentencing guidelines, the development of the Guidelines took into consideration public opinion by responding to comments solicited during the development phase (United States Sentencing Commission 1988). In addition, judges consider, at least to some extent, the objective perception of a sentence. "The need to sustain public confidence in the administration of justice means that public opinion plays an important, albeit indirect role in sentencing policy and practice" (Hough and Roberts 1999:11). Critical for this research, federal judges report being sensitive to publicity of a case, often leading to more retributive sentences (Wheeler et al. 1988: 136 *ff,* see also Roberts 2008). This is consistent with prior research that following the highly publicized Watergate scandal white-collar offenders were sentenced more harshly (Hagan and Parker 1985, Hagan and Palloni 1986), independent of any policy changes. McShane et al. (2012) also found that case notoriety increased the amount of money received in class action securities lawsuits.

Populist punitive literature highlights various social changes that buttress the increased demand for punitive sentences, including a decline in trust of government and criminal justice institutions, a belief in moral deterioration, and perceived threats from globalization (fueling uncertainty) (Pratt 2007; see also Tyler and Boerckerman 1997). Crime control policies in the United States have already showed a tendency toward populist punitiveness (e.g. Megan's Law, three

strikes laws) (Pratt 2007); but did the accounting scandals of the early 2000s evince a similar shift?

The bankruptcies of Enron, Adelphia, Global Crossing, and Worldcom were the four largest since the Great Depression, drawing significant attention; public punitiveness is more likely to be affected by exceptional circumstances (Hough and Roberts 1999). In addition, media has a prominent role in shaping public attitudes toward crime (Pratt 2007, Roberts et al. 2003). Scandal "coverage [in the early 2000s] employed a 'vocabulary of deviance' to describe offenders and used the 'personalization of harm' to describe victims" (Cullen et al. 2009: 40). Key to the media framing of organizational crime is deliberateness of actions and the corporate response; villains are made from intentional negligence and corporate cover-ups (Swigert and Farrell 1980-1981). Enron's accounting frauds were appropriately portrayed as deliberate and involving managers who retained their positions even after the restatements; this likely amplified public incense. Which, in turn, can put increased pressures on judges to sanction in accordance with public opinion (Roberts 2008).

The mark of populist punitiveness is suggested by the fact that the WCCPEA was put into place and that new criminal provisions specific to the accounting frauds that transpired were included in Sarbanes-Oxley (see Roberts 2008). It seems likely, then, that the public demanded increasingly punitive sentences for white-collar crime in response to the rampant accounting frauds of the early 2000s. Assuming such a shift occurred (see below), it follows that

33

political agents (i.e. judges) took note of this shift, crystallized in the form of Sarbanes-Oxley.

*PUBLIC PERCEPTIONS ABOUT WHITE-COLLAR CRIME*

To assert that judges were affected by a desire for more punitive white-collar crime sentences in the wake of scandal, it is critical to show that the public did indeed demonstrate such punitive attitudes. Populist punitiveness and the collective framing undertaken suggest that public attitudes *should* have changed; but did they? Sutherland first noted that public sentiment about white-collar crime is "unorganized" (1945: 137); he argued this was one of the principle reasons that white-collar offenses were not processed in criminal courts, despite meeting the definition of crime. However, "public attitudes are bounded by limited knowledge" (Almond 2008: 449) – the public that Sutherland wrote about may have been unaware of the pervasiveness of corporate crime and its long reaching consequences (Katz 1980). The media coverage of the accounting scandals of the early 2000s and the resulting criminal charges brought these offenses to the forefront of American public discourse, whetting the public's punitive appetite (Pratt 2002).

There has been a general presumption that the public does not see white-collar crime as a serious offense; yet this is an overgeneralization (Conklin 1977 in Cullen et al. 2009, Cullen et al. 1982), especially in more recent years. Research done in the 1980s found not only a general increase in perceived crime seriousness, but also a slight but significant increase in both relative and absolute ratings of white-collar crime. In particular, Cullen et al. (1982) found that

corporate crimes with violent consequences and price-fixing schemes experienced large increases in perceived seriousness; the authors attribute these changes to contemporary scandals, though differences in methodology between the original (Rossi et al. 1974) and replication study make such claims tenuous. Such a shift may be the result of changing perceptions of the wrongfulness or harmfulness of white-collar offenses, though no survey to date has attempted to parse out these factors (see Stylaniou 2003).

Holfreter et al. (2008) found that most people believed that white-collar crime warranted at least as many resources as violent crimes; unfortunately, coding inconsistencies preclude the reader from deciphering normative attitudes about white collar crime sanctions. Perhaps the authors' most significant finding was that attitudes about white-collar crime were largely consistent across demographic variables. However, Unnever et al. (2008) found evidence of class differences in that both income and employment were positively related to the likelihood of supporting stiffer penalties; Holfreter et al. found no effect of income, but did find that homeowners were more likely to express opinions that white-collar crime deserved more serious sanctions than a violent offense.

This is still a relatively recent trend. So, why have opinions changed? "Anti-executive sentiments likely were inflated by the wave of corporate crime scandals that rocked the United States in the first part of this century" (Cullen et al. 2009:40). Cullen et al. argue that public opinion about white-collar crime has undergone periods of inattention (before 1970), increasing awareness (1970-2000), and "transformed attention" (post-2000). The scandals of the early 2000s

crystallized public resentment towards white-collar crime by solidifying the image of white-collar offenders as "bad guys," representing a "qualitative shift" in how the public perceived the criminality of white-collar offenders (Cullen et al. 2009:33). The authors cite increasing willingness to bring white-collar offenders to justice.

This is an extension of Katz's (1980) assertions about social movements against white-collar crime. He agues that, following Watergate, the United States experienced a stark shift in both public attention and criminal justice treatment of white-collar offenders. The increase in awareness of white-collar crime was fueled by the general distrust of institutions, a decrease in acceptable risk, and the civil rights movement's emphasis on equal treatment. Simpson (2002) further argues that this focus on white-collar criminality continued through the 1990s; corporate violations typically resolved through regulatory justice means (administrative and civil sanctions) were increasingly criminalized, both by legislative changes (e.g. the criminalization of certain environmental protection laws) and by increased criminal prosecution under existing laws.

Much like Watergate, the scandals of the early 2000s brought significant attention to corporate offenses. *Unlike* the 1970s, however, the scandals of the 2000s prompted institutional changes promoting accountability. Katz (1980) predicted that, absent these institutional changes, white-collar crime would once again fall by the wayside in the public consciousness; in fact, Katz commented that such a decline in attention was already in progress at the time of writing (1980). The creation of PCAOB, the requirement for corporate officers to certify

public documents, and the enhanced penalties all suggest restructured accountability in the wake of Enron and Sarbanes-Oxley; this should sustain the public and criminal justice attention.

*SENTENCING AFTER SARBANES-OXLEY*

Title IX of the Public Company Accountability and Investor Protection Act of 2002 is more commonly known at the White Collar Crime Penalty Enhancement Act (WCCPEA). Within this statute, the maximum penalties for mail and wire fraud quadrupled, from 5 to 20 years imprisonment (per count). Additionally, the WCCPEA increased maximum penalties for violations of the Employee Retirement Income Security Act of 1974, created a new conspiracy provision (with a higher maximum sentence than the older charge[22]), and criminalized the failure of corporate officers to certify financial reports. Other provisions of Sarbanes-Oxley created criminal provisions for securities fraud and the destruction or manipulation of accounting and audit records. Still further, the final chapter of SOX increased penalties for the violation of the Securities and Exchange Act of 1934 and retaliation against whistleblowers. In its entirety, Sarbanes-Oxley would appear to have a large impact on sentencing, simply due to new statutory changes.

These changes have been criticized as overly retributive responses to a rash of corporate scandals (Recine 2002, Nicholson 2007; for a review of

---

[22] SOX created 18 U.S.C. § 1349, which applies to Title 18 Chapter 63 offenses. These offenses include mail fraud, wire fraud, bank fraud, health care fraud, and foreign labor contracting fraud, as well as securities fraud and failure of corporate officers to certify financial reports. The new conspiracy charge allows for the maximum penalty equivalent to the statutory maximum for the offense conspired to commit. The existing statute, 18 U.S.C. § 371 has a maximum penalty of five years imprisonment. Thus, in the case of newly enhanced mail fraud penalties, the difference between maximum sentences is four-fold.

accounting scandals see Rockness and Rockness 2005). Comey (2009) argues that judges are likely to increase downward departures for individuals as a result of this overcriminalization; this is consistent with Piquero and Davis's (2004) finding that as base fines for which an organization is eligible increase, the likelihood of receiving a fine below the midpoint of the range also increases. However, while the authors explored the role of extralegal and legal factors in sentencing decisions, they did not propose a theoretical rationale or mechanism through which judges came to value these factors.

Still other scholars have remarked that the changes that followed Sarbanes-Oxley are necessary. Silberfarb (2003) argues that the marked increases in potential imprisonment sentences are necessary to convey society's condemnation of white-collar offenses. Steer (2003) anticipates significant increases in terms of imprisonment; offenders who commit acts specifically targeted by Sarbanes-Oxley will face such significant penalty increases that minimum terms under the new amendments will significantly exceed maximum terms under the old guidelines.[23]

## *THE FOCAL CONCERNS PARADIGM*

Criminologists have long-attempted to explain sentencing discrepancies. Arguments have been made for discrimination and for innocent disparity; the depths of this debate are beyond the scope of this research (see Spohn 2009 for a review). While the criminal justice system offers many decision points at which offenders may be evaluated differently, offenders at any given stage should be

---

[23] Some commenters note that these enhanced penalties apply to both low level fraudsters and the corporate managers the Act intended to target; this may be of questionable fairness (Comey 2009).

evaluated under the same criteria. The focal concerns paradigm emerged as a means to understand the differential evaluation of offenders at the sentencing stage; this research will utilize these ideas to conceptualize how judges sentence organizational offenders.

The phrase "focal concerns" can be attributed to the work of Steffensemeier et al. (1993, 1998), though previous authors discussed similar concepts (e.g. Wheeler et al. 1988, Albonetti 1991). Focal concerns and its precursors generally assert that judges consider offender blameworthiness, the seriousness of the offense, how best to protect the public, and the repercussions of various sentencing outcomes in determining the final sanction. Differences in sentences given for the same offense are thus attributable to differences in either offender blameworthiness or the consequences of a sentencing outcome. In making these assessments, judges use concrete characteristics, such as gender, or occupation, as heuristic devices. For example, judges perceive female offenders to be less dangerous and less culpable than male offenders (Spohn and Beichner 2000, Steffensmeier et al. 1993), which may explain their lower rates of, and shorter lengths of, incarceration.

Steffensmeier et al. (1998) found evidence of sentence disparity across age, race, and sex; young, black men received the harshest sentences. They argue that both youth and sex appear as less susceptible to reform and a greater future threat to the community, leading to longer sentences. Offenders who are thought to have greater ties to the community of who might be overly negatively affected by prison were more leniently sanctioned. Parallel to Albonetti's (1991) argument

on attribution, they further claim that gender and race stereotypes influence the perception of blameworthiness. But how do judges evaluate these concerns for white-collar offenders? More specifically, how do judges perceive the blameworthniess of corporations, the seriousness of their crimes, and the consequences of the sanctions imposed?

*FOCAL CONCERNS FOR WHITE-COLLAR OFFENDERS*

Wheeler et al. (1988) studied the sentences meted out to white-collar offenders by interviewing federal judges in six[24] districts as part of a broader study of white-collar crime. The researchers discussed actual cases of bribery, bank embezzlement, tax fraud, postal and wire fraud, price fixing, and false claims and statements with judges. They found judges often engaged in "real offense" sentencing, justifying sanctions based on the behavior of defendants, rather than on the charges brought. This is particularly relevant given guidelines bargaining strategies[25] available to prosecutors post-guidelines. Ultimately, judges select sentences based on evaluations conducted through a normative lens, considering an offense's harm, the offender's blameworthiness, and the consequence of sentencing. This normative lens is a function of common cultural norms, which similarly affect the creation of law; according to Wheeler et al. (1988: 24), judges are thus influenced by cultural norms in two ways; directly and indirectly through the laws created as a result of norms.

---

[24] Other portions of the Yale Study on White-Collar Crime refer to seven districts. However, the authors refer only to six (Wheeler et al. 1988: 3, fn 10).

[25] In the course of a plea agreement, prosecutors may choose to bargain by adjusting the charges brought or the guidelines year under which a defendant will be sentenced. This is particularly significant for certain crimes in certain years; for example, a crime sentenced under the 2004 sentencing guidelines would contain enhancements resulting from Sarbanes-Oxley, while the 2002 guidelines would not.

White-collar crime is generally perceived of as inflicting less social harm than traditional offenses, though judges are particularly conscious of the financial harm caused (though there is ambiguity in this value).[26] Offenses perpetrated over a longer period of time (such as the accounting manipulations at Enron) are also perceived as causing greater harm. At the time of the study, judges considered securities fraud to be particularly egregious, with investors seen as entirely defenseless victims. But, because offenders are often in good positions in society, and appear to be at low risk for recidivism, judges reported being swayed by contrition in the aftermath.

Wheeler et al. (1988) further argue that white-collar crimes are unique in that they offer greater contradictions between the harm caused by an act and the blameworthiness of the offender compared to traditional crimes; frequently white-collar criminals are "good people" who make "poor choices" that victimize many, but may impact each individual only slightly (as may be the case with price fixing for small goods).

Understanding judicial motives of sentencing and personal philosophical beliefs are just as important as understanding sentencing policy (i.e. guidelines). To the former, judges vary in their valuation of "just deserts," deterrence, and utilitarian objectives. Judges in the Wheeler et al. study reported that white-collar criminals often suffer informal sanctions both before and potentially as a result of imprisonment. Additional considerations may involve an offender's age or health status. Consistent with Sutherland's (1940) explanation, judges report

---

[26] For example, does the calculus include the absolute magnitude of financial loss, or the loss to each individual? Do judges really consider intended loss as serious as actual loss, as the Sentencing Guidelines allow?

empathizing more with white-collar criminals than street offenders. Taken together, it may suggest that judges impose the same calculus for white-collar and street offenders, but white-collar offenders possess characteristics that weigh more heavily against imprisonment.

*EXTENDING FOCAL CONCERNS*

The focal concerns paradigm was developed to explain differences in sentences between *individuals*, yet, the research proposed herein focuses on *organizational* defendants. However, the fundamental structure of focal concerns may easily be expanded upon to include organizations, specifically, corporations.

In sentencing organizations, federal judges are granted a great deal of discretion, as discussed above. In fact, Chapter Eight was built *around* the factors highlighted by the focal concerns paradigm; the base offense level is explicitly a measure of harm, while aggravating and mitigating factors are equivalent to blameworthiness (see below). However, there remains room for an examination of discretion in the context of organizational sentencing (see also Schanzenbach and Yaeger 2006: 783). First, the guidelines provide a fine *range* for the organization's sentence; the placement within that range (which can be quite wide) is a matter for the judge to decide. Additionally, the judge determines "aggravating" and "mitigating" factors that affect the modification of the initial offense seriousness level. A compliance program can mitigate a fine if it is "effective," but effectiveness is subjective. Other organizational characteristics that may relate to the blameworthiness of the organization or the harm of the

offense, such as the ownership structure, may not be found formally in the guidelines but are provided for within the accepted reasons for a departure.

In keeping with Steffensmeier et al.'s focal concerns paradigm (1998), judges will consider three factors in determining the sentence of an organization: blameworthiness, protection from future harm, and the consequences of sentencing (including costs to the offender). To the extent that an organization is more blameworthy or the offense caused a greater harm, a judge is more likely to a) order a higher fine within the calculated range or b) order a fine higher and outside the calculated range (an upward departure). The converse may be said for those organizations or offenses perceived to be less blameworthy or less harmful.

To some extent, it is slightly more difficult to explicate the difference between offender blameworthiness and offense seriousness for corporate offenders than for individuals; the nature of industry is such that only some companies may commit certain types of offenses, and certain industries are regulated more strictly than others. For example, only a food producer may be prosecuted for providing food unfit for consumption; the offender may be more blameworthy because the company was trusted to provide safe food, but the offense may also be more harmful due to its physical consequences.

However, in general, it can be said that corporations may commit a variety of crimes resulting in criminal charges that may have financial (e.g. securities fraud), physical (e.g. unsafe work conditions resulting in death or injury), or environmental (e.g. improper disposal of hazardous materials) consequences. In evaluating the harm caused by an offense, judges will consider metrics of harm

that may include the dollar loss (absolute and per victim), as well as the severity of physical harm (injuries versus death, the number of injured). While this and other characteristics discussed in this section are legally accounted for within the guidelines calculation of a fine *range*, they may still affect judge's perceptions of harm, blameworthiness, and other components of focal concerns and subsequently affect fine *placement* within that range. Variables that are legal may thus act as extralegal variables.

Blameworthiness is more than harm; it may be thought of as a company's commitment to criminal behavior. Organizational tolerance and the involvement of upper level personnel imply more commitment (i.e., a corporate culture supportive of crime). Certain types of organizations may be considered more blameworthy than others; companies in whom fiduciary responsibility is established (e.g. banks) may be considered more criminally blameworthy than others for having violated that trust. Ownership structure may also be relevant; companies that are publicly held may be considered more blameworthy because investors are seen as "defenseless victims" (Wheeler et al. 1988). Large companies may be seen as either more blameworthy (due to contemporary sensational events, such as the accounting scandals of the early 2000s) or less (due to limited oversight capability). The industry in which a corporation operates may be relevant; for example, companies whose business directly affects consumer health or safety may be considered more blameworthy. The role of leadership in the offense also likely affects perceptions of corporate blameworthiness; companies sentenced for offenses that were known to, or

participated in, by leadership may be considered more blameworthy than others. An "abuse of trust" violation is incorporated into the guidelines calculation but it may be considered egregious enough to further enhance the likelihood of a more punitive sentence.

Protecting the community from future harm is more troublesome for the sentencing of organizations than for individuals. Corporations that commit crimes are, in large part, not criminal entities; they provide necessary goods and services and sustain the economy. Incapacitation, then, is less desirable; only in the case of purely criminal organizations do the Guidelines suggest fines severe enough to render the organization inoperable. Excessively punitive fines may also preclude an organization from paying restitution. However, most corporations are recidivists (Sutherland 1949, Clinard and Yeager 1980, Simpson 1986). Criminal conviction may be an outward sign that corporate culture supports offending. However, to the extent that an organization cooperates, self-reports, or has a compliance program in place, an organization may be seen as having a lower risk of reoffending, thus requiring less punishment.

The consequences of sentencing may be thought of as having three components: system resource capacity, effect on innocent others, and general deterrence. Though organizations cannot be imprisoned, the imposition of fines, probation, and other punishments require the use of government resources. Often, probation is assigned as a means to assure fine payment, though in many cases it is assigned for its own sake; this is a drain upon resources. In contrast to the sentencing of individuals, it may be *more* costly to sentence an organization to

probation than the alternative (a fine alone) rather than to probation (either alone or in addition to a fine) because probation requires supervision resources. A judge may also consider the effect on innocent others – namely, shareholders. If a large public company, for example, were to be fined, the primary victims are the shareholders when stock prices fall. High fines may also impede the company's ability to provide valuable social goods. Finally, judges almost certainly consider general deterrence in the determination of an organizational sentence. If the offense is considered to be particularly common, judges may be more likely to give higher fines in order to discourage others.

*REFRAMING FOCAL CONCERNS AFTER THE SCANDALS AND SARBANES-OXLEY*

Around the time of the first draft of the organizational sentencing Guidelines, "Congress had recently raised the maximum penalty levels contained in a number of statutes… This action signaled congressional concern that the penalties imposed were sometimes too low." (Nagel and Swenson 1993: 224-5). This comment mirrors the climate surrounding the passage of Sarbanes-Oxley. Accounting scandals flooded the headlines for the eight months prior to the passage of Sarbanes-Oxley and for months after; corporate crime, at least certain forms committed by certain types of companies, was in the spotlight. In addition to the harsh public sentiment, even legislators and politicians (including the sitting President, George W. Bush) expressed indignation at the lenient treatment of white-collar criminals (see Recine 2002, Barak 2012). If raising maximum penalties is a sign of congressional concern, then the fourfold increase of

maximum sentences for many statutes clearly connotes a demand for more serious attention to be paid to white-collar crime; a collective reframing of corporate crime was underway. This demand may transform judicial perceptions of the blameworthiness and harm of white-collar offenders, as well as enhance judges' feelings of the need to protect the community from these offenders and offenses.

*CONCLUSION*

Due to the broad range of prescribed fines under the Guidelines for Organizations, the array of acceptable reasons for departures, and the role of judicial perception in the calculation of organizational culpability scores, judges have great deal of discretionary power in the sentencing of organizations. The factors that affect these sentencing decisions, then, are of incredible import for criminologists. The most recent sentencing research has largely ignored white-collar offenders, especially corporations. This research argues that contemporary scandals and law were collectively framed in such a way that transformed judicial perceptions of focal concerns related to corporate crime, resulting in changes in the operation of judicial discretion. Offenders and offenses that more closely resemble the accounting scandals of the early 2000s will likely be sanctioned more severely as a result. Sarbanes-Oxley in itself is an expression of this populist punitiveness trend, though it may be that judges were affected both by public opinion and the subsequent passage of a law that codified this increased demand for punitiveness.

## HYPOTHESES

This thesis aims to both describe and explain judicial decision-making in the criminal sentencing of organizations. I explore whether contemporary events, specifically Sarbanes-Oxley and the scandals immediately preceding its passage, had a framing effect on judicial decision-making. My hypotheses focus on two areas: the independent effects of contemporary events and the interactive effects of time in conjunction with offense and offender characteristics.

I expect that previous patterns of judicial decision-making were interrupted when judges and the general public became aware of the magnitude of harm caused by the rash of corporate crime in the early 2000s. Sarbanes-Oxley was the legislative crystallization of this change in perception, and both events should have reframed judge's perceptions of the blameworthiness of corporate offenders, the need to protect the community from future serious harm caused by these offenders, and the practical consequences of sentences underwent the same "qualitative shift" that Cullen et al. (2009) find in the general public.

> *H1a: Cases sentenced during the scandal period will receive higher fines than those sentenced before the scandal period.*

> *H1b: Cases sentenced after the passage of Sarbanes-Oxley will receive higher fines than those sentenced before the scandal period.*

Not only will the time period affect sentencing, but I also expect that offenders and offenses that closely resemble the accounting scandals committed by companies in the early 2000s (e.g. Enron, Adelphia, WorldCom) will receive the brunt of harsh sentencing. Judicial perceptions of harm and blameworthiness, for example, related to these offenders and offenses may have been altered

(reframed) during this period more so than perceptions about unrelated offenses. These events may have altered the heuristic devices that judges use in their determination of these values (see Albonnetti 1991, Steffensmeier et al. 1998).

> *H2a: Corporate tolerance will have an interactive effect with the time period in which an organization is sentenced. Companies with higher tolerance scores that are sentenced during the scandal period or after the passage of Sarbanes-Oxley will be more likely to receive harsh fines.*

> *H2b: The offenses for which a company is sentenced will have an interactive effect with the time period in which an organization is sentenced. Organization convicted of "scandal offenses" (i.e., offenses similar to those committed by the highly publicized cases of Enron and other companies) that are sentenced during the scandal period or after the passage of Sarbanes-Oxley will be more likely to receive harsh fines.*

Finally, I expect that the same factors that predict the imposition of higher fines will also impact judicial decision-making in the additional sanction of corporate probation. Corporate probation is potentially very invasive and thus likely receives as much consideration by judges as criminal fines. Thus, I also expect that the increased awareness of the pervasiveness and gravity of corporate crime that accompanied the early 2000s may have led judges to impose probation more often.

> *H3a: Cases sentenced during the scandal period will be more likely to receive probation than those sentenced before the scandal period.*

> *H3b: Cases sentenced after the passage of Sarbanes-Oxley will be more likely to receive probation than those sentenced before the scandal period.*

Additionally, the legal and extralegal variables proposed to have an effect on the severity of fines are expected to similarly influence the imposition of probation.

> *H4a: Corporate tolerance will have an interactive effect with the time period in which an organization is sentenced. Companies with higher*

*tolerance scores that are sentenced during the scandal period or after the passage of Sarbanes-Oxley will be more likely to receive probation.*

*H4b: The offenses for which a company is sentenced will have an interactive effect with the time period in which an organization is sentenced. Organization convicted of "scandal offenses" (i.e., offenses similar to those committed by the highly publicized cases of Enron and other companies) that are sentenced during the scandal period or after the passage of Sarbanes-Oxley will be more likely to receive probation.*

Time-period effects on judges' decision-making (in relation to both the imposition of punitive fines and likelihood of a probationary sentence) will support the claim that the scandals and Sarbanes-Oxley contributed to a reframing of the consequences and organizational responsibility for corporate crime. Additional time-specific effects of organizational and offense characteristics that are similar to the scandals will support the claim that judges became sensitized not only to corporate crime *in general* but to specific types of offenses and offenders that were of contemporary significance.

## METHODS

### *DATA*

The data for this research are drawn from the United States Sentencing Commission ["the Commission"] series "Organizations Convicted in Federal Criminal Courts." The data are housed at the National Archive of Criminal Justice Data at the Interuniversity Consortium for Political and Social Research (ICPSR). The data are published annually, by fiscal year. Though the organizational guidelines only went into effect in 1991, data on organizational defendants are available from 1987-2008.

Because this research is concerned with the placement of fines relative to guidelines-calculated ranges, only those cases sentenced under Chapter Eight fine guidelines will be considered. Prior to the implementation of the Chapter Eight guidelines for organizations, the Commission provided guidelines for the sentencing of organizational defendants only related to antitrust offenses. Including only these offenses would unfairly limit variation for these early years, and thus data from before the guidelines implementation will be excluded entirely.

The data will be analyzed at the organizational level, consistent with the Commission's data. The files contain information on organizational characteristics, (e.g. ownership structure, size, and industry), as well as legal variables (e.g. statute of conviction, prior history, case sentencing date and disposition) and guidelines calculations (i.e., the value added or mitigated for each step of the sentencing process). Unfortunately, due to changes in recordkeeping, not all variables are available across all years, nor are all variables fully populated. The number of employees in an organization, for example, may be up to 40% missing depending on the year.

Data analysis will include specific years 1995-2008, selecting only companies, rather than all organizations sentenced (which may include government agencies, unions, charities, etc.). Starting data analysis in 1995 offers approximately 6 years of pre-Sarbanes Oxley sentencing patterns; given that only a few hundred organizations are sentenced each year, maximizing the number of cases in the dataset is critical. Most organizations sentenced prior to 1995 were

not eligible for the Chapter 8 fine guidelines.[27] Moreover, the Commission has not included the same variables over the series' history. The first dataset in the series includes only 102 variables, while the most recent file contains 935. This obviously reflects changes in the guidelines over time. Luckily, however, most variables of interest are available from the inception of the series.

Finally the decision to begin the analysis with 1995 data has been influenced by missing cases in the early organizational datafiles. However, data starting in 1995 are at least 90% complete (Alexander et al. 2000). The current USSC procedure for data validation (a semi-annual verification process comparing Commission datafiles with records from the Administrative Office of the U.S. Courts) suggests that these critiques are no longer as relevant.

However, missing data remain a problem even in the years selected. While the list of cases in the data may be close to comprehensive, cases in the dataset continue to be missing values for several substantive variables of interest. However, many of these variables, such as prior record, ownership structure, and plea bargaining, are important theoretical controls that must be retained in the model. The cumulative effect of missing data results in the loss of approximately one-third of cases. Several sets of analyses were conducted to determine the extent to which the main model is sensitive to these missing cases and evaluate potential endogeneity concerns. These analyses are contained in Appendix B, and are discussed later on.

---

[27] Only 34% of cases between 1987 and 1993 were sentenced under the Guidelines for Organizations, and slightly more than half of the cases in 1994 were sentenced under the fine guidelines.

*MODEL*

This research is focused on two key questions: what factors influence the fine placement of organizations, such that they receive more severe sanctions, and how these factors have been affected by Sarbanes-Oxley. Analysis thus must allow for time-sensitive effects. To determine the effect of particular organizational and offense characteristics, contextually relevant time periods, and time-sensitive effects of offender and offense characteristics, this research will utilize a binary regression model with interaction terms to determine the time-specific effects of particular variables. Because only approximately 15% of cases receive fines that are harsh (i.e., this is an uncommon event), the analysis utilizes a probit model. The model follows the functional form

$$P[y = 1|x_i] = \Phi[\beta_0 + \beta_1 x_1 + \delta_0 t_1 + \delta_1 x_1 t_1 + \cdots \beta_k x_k + \delta_{2j-1} t_j + \delta_{2j} x_k t_j]$$

In this equation, the beta coefficients represent the direct effect of individual independent variables (*x*) on the outcome variable (*y)*. The direct effect of time period (a dummy variable, *t*) is given by the gamma coefficient. Time-specific effects of independent variables are given by the gamma values on the interactive term $x_k t_j$. Only independent variables thought to have time specific effects are interacted with time variables. Significant gamma coefficients indicate that time periods have direct (or indirect, if interacted) effects on sentencing outcomes. This research is interested in *both* forms of time-sensitive effects.

It must be acknowledged that this method is a departure from individual sentencing research. Sentencing research involving individual defendants has long recognized the importance of a multistage sentencing process. Analysis includes

both the "in/out" incarceration or probation decision as well as models of the length of incarceration. Much of current sentencing research now makes use of hierarchical linear modeling to account for variations in these decision points. However, organizational sentencing under the federal guidelines does not operate under the same conditions as that for individuals. Foremost, there exists no parallel "in/out" decision for organizational defendants; all organizations are given at least a minimal fine (the lowest range possible is 0.05-0.20 times the greater of the loss or gain and base fine). Given that fines are the universal and primary sanction of the organizational guidelines, this relieves the need for analysis to account for a multistage sentencing process.

Organizations are eligible for probationary sentences, though the use of corporate probation differs significantly from its application to individuals. Probation for individuals can excuse the offender from incarceration; this is not an option for organizations. Rather than a lesser sanction, corporate probation may be imposed *in addition* to fines for broadly defined reasons, including the insurance of fine payment or implementation of a compliance program, the completion of community service, or more "innovative" sanctions of mandated charitable donations and shaming through public advertisement of wrongdoing (Gruner 1993, Wray 1992). Unlike probation for individuals, corporate probation varies widely in its terms and may be very restrictive. Because probation may be imposed on any organization sentenced under the guidelines, rather than only to a select group based on offense level and prior history (like individual defendants), the imposition of corporate probation should be considered an *additional* but *not*

*contingent* sentencing decision. As such, the decision to sanction an organization with probation will be treated as a separate outcome variable.

Further, the model is consistent with previous *organizational* sentencing research. Piquero and Davis (2004) evaluated the effects of offense and offender variables using linear (absolute fine amount) and logistic (above or below the midpoint of the guidelines range) regressions.

*DEPENDENT VARIABLES*

*Harsh Fine*: A judge will have been said to exercise punitiveness if the fine given was either a) in the upper quartile of the guidelines range or b) above the guidelines range.[28] The analysis focuses on the use of judicial discretion to produce *harsh* sanctions, opposed to the lenient sanctions typically pursued in judicial discretion research, due to the cultural response to the events surrounding the passage of Sarbanes-Oxley and increased punitive demand for white-collar offenses (see previous chapter).

*Probation*: This is a dummy variable, coded "1" if an organization was sentenced to probation and "0" if not.

*INDEPENDENT VARIABLES*

*Time Period*: The analysis will take into account multiple possible time-periods, both for direct and indirect effects. Each time period will be coded as a dummy

---

[28] Harsh Fine was coded as 1 if $FineImposed \geq MaximumFine - \frac{(MaximumFine - MinimumFine)}{4}$

variable, coded "1" if a defendant was sentenced in the period and "0" otherwise. The time periods to be considered are 1) prior to Enron's restatement notice (the first public disclosure of illegal activity) on October 16, 2001 [pre-Enron], operationally defined as October 1994-September 2001 2) the "scandal period", operationally defined as October 2001-September 2002[29] 3) and post-SOX, operationally defined as October 2002-September 2008. The first time period serves as a control for the latter two. The relationship between the time periods as operationally and conceptually defined is shown in the figure below:
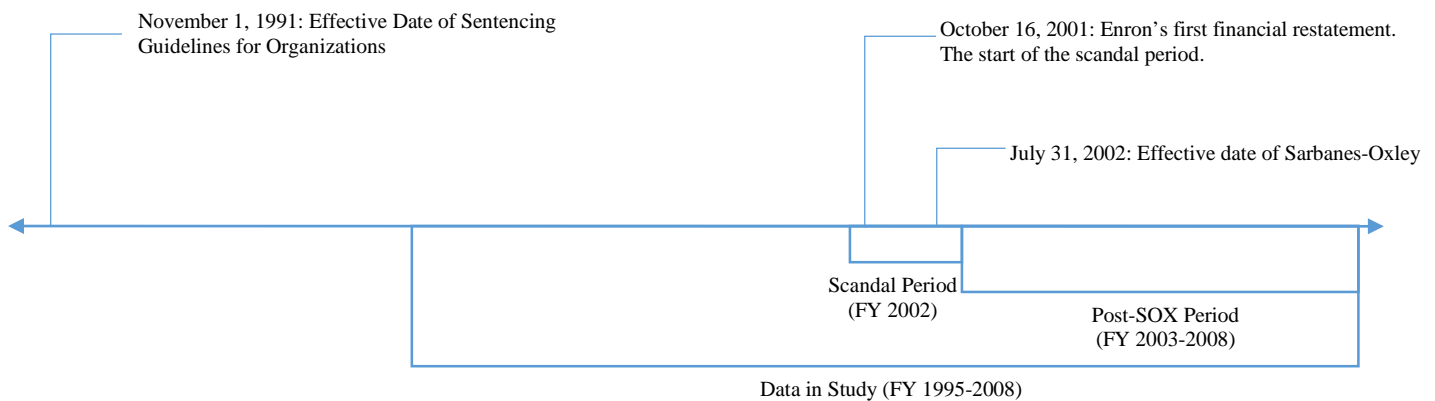


**Figure 1: Scandal Timeline**

*Public*: Because the majority of companies involved in the early 2000s scandals were public companies, and judges typically see the harm caused to investors as particularly egregious corporate conduct, it is likely that these companies were punished more harshly after Sarbanes-Oxley than private or closely held

---

[29] Due to the unavailability of the month and year of sentencing for cases sentenced in fiscal years 2000-2002, more precise time period construction is not possible. However, a case can be made that this is likely of minor consequence. The restatement of Enron's earnings (considered the onset of the scandals) occurred on October 15, 2001. This coincides very closely with the beginning of fiscal year 2002 (October 1, 2001). Sarbanes Oxley was passed on July 30, 2002 and went into effect the following day. While ideally the "post-SOX" period would begin on one of those days or August 1, 2002, starting the period on October 1, 2002 (the beginning of fiscal year 2003) results in few cases being "misclassified" relative to ideal coding

organizations. This is a dummy variable coded "1" if an organization was publicly owned and "0" otherwise.

*Scandal Offense*: The scandals of the early 2000s took a wide variety of forms. The charges faced by individuals in these cases included bank fraud (e.g. United States v. Rigas, in the matter of Adelphia), securities fraud (e.g United States v. Ebbers, in the matter of WorldCom), falsifying books and records (e.g. United States v. Thomson, in the matter of HealthSouth), racketeering (e.g. United States v. Kramer, in the matter of Duke Energy North America), obstruction of justice (e.g. United States v. Arthur Andersen, LLC., in the matter of Enron), wire fraud (e.g. United States v. Olis et al, in the matter of Dynegy), and making false statements (e.g. United States v. Causey, in the matter of Enron).[30] Judges may be more sensitive to the harms caused by these offenses after the scandals broke, and consequently resort to higher, more retributive fines. This will be a single composite variable coded "1" if the organization faced charges on at least one of the following: 15 U.S.C. §§ 77, 78 (securities fraud, falsifying books and records), 18 U.S.C. §§ 1005, 1006, 1007, 1344 (bank fraud), 1510 (obstruction of criminal investigation), 1343 (wire fraud), or 1001 (false claims and statements), and coded "0" otherwise.

*Tolerance*: Given the role of managers and high level executives in the offenses committed at Enron and other companies in the early 2000s' scandals, judges may be more likely to harshly fine companies that tolerate illegal behavior after the

---

[30] For a full list of the charges facing scandal participants, see Appendix 1 of Brickey (2003).

scandal. While already a part of the guidelines calculations, judges may still consider this in their determination of fine placement within a range (potentially acting as a "double penalty"). This is an interval-level variable coded that represents the extent to which an organization was involved in, willfully negligent, or tolerant of criminal activity (this is a component of the total culpability score). The potential values for this variable vary by guidelines year (especially after Sarbanes-Oxley amendments to the guidelines) but always increase according to level of organizational tolerance.

In addition to the direct effects of these variables, several interaction variables will be included, as discussed in the hypotheses. They are as follows: Scandal Period*Scandal Offense, Scandal Period*Public Company, Scandal Period* Tolerance, Post-SOX*Scandal Offense, and Post-SOX*Public Company, and Post-SOX*Tolerance. These variables represent the unique, additional, effect of company tolerance and scandal offenses during the scandal or post-Sarbanes-Oxley time periods.

*CONTROL VARIABLES*

*Either Prior Criminal or Civil:* This is a dummy variable coded "1" if the organization has a history of *any* legal action [for a similar offense] or "0" otherwise. Judges may perceive any action against an organization is indicative of patterned behavior and an increased risk of future harm.

*Compliance Program:* While already a part of the guidelines calculations, judges may see organizations with effective compliance programs as less blameworthy and less likely to reoffend than those without. This is a dummy variable coded "1" if the organization had, at the time of the offense, an effective compliance program.

*Base fine*: This is a ratio-level variable and part of the guidelines sentencing process. Higher base fines indicate a more serious offense (given that the base fine is to be the greatest between the calculated score, the intended or actual loss, or the intended or actual illicit gain).

*Culpability*: This is a numeric interval-level variable, containing the final culpability score for the organization as calculated according to the Chapter Eight fine guidelines. This is a proxy for the responsibility attributed to the organization by judges.

*Solvent*: This is a dummy variable, coded "1" if an organization was solvent at the date of sentencing and "0" otherwise. It is likely that judges take into consideration the financial resources of a firm before sentencing.

*Number of Counts*: This variable is a reflection of offense seriousness and case complexity. Judges may perceive organizations that violate multiple laws to be more blameworthy and a greater risk to the public in the future.

*Acceptance of Responsibility*: This is a reverse-coded categorical variable, depicting the number of culpability points reduced for cooperation and acceptance of responsibility. An organization can receive a reduction of five points (coded 5) for prompt disclosure without the threat of an investigation and cooperated fully, two points (coded 2) for acceptance of responsibility and cooperation, one point (1) for acceptance of responsibility. Cases are coded 0 if the organization did not accept responsibility.

*Can't Pay*[31]: The sentencing guidelines detail adjustments that can be made if an organization is not capable of paying the fine originally calculated. This is a dummy variable coded "1" if the organization cannot pay all or part of the fine and "0" otherwise.

*Criminal Purpose*: The guidelines require the harshest fines be given to organizations that have no legitimate purpose; explicitly, the guidelines demand that fines be significant enough to fully divest an organization of its assets. This is a dummy variable coded "1" if the organization sentenced was deemed to be an exclusively "criminal purpose" organization and "0" otherwise.

---

[31] This variable is moderately correlated with a company's solvency (r=0.40). However, excluding it from the model did not result in any changes in coefficient estimates or standard errors. Thus, because inability to pay represents a related but distinct concept, the variable was retained in the final model.

*Plea*: The "plea discount" has been documented extensively in individual sentencing literature. This is a dummy variable coded "1" if the organization was sentenced according to a plea agreement (which presumably may influence a judge's opportunity for discretionary decision-making) and "0" otherwise.

*Personal Fine Offset*: In closely held organizations, the organizational fine may be offset by criminal fines paid by the owner of the organization for the same offense. This is a ratio-level numeric variable reflecting the amount of fines eligible for offsetting an organization's sentence.

*Post-Booker:* This is a dummy variable coded "1" if the case was sentenced after the guidelines became advisory and "0" otherwise.

*Total Fine:* This is a ratio-level numeric variable depicting the final criminal monetary fine imposed for each case, net of offsetting monetary factors (restitution and individual criminal fines).[32]

Table 2 (below) displays the mean and standard deviation for the sample, split by time period.. Overall, about 14% of cases were given fines that met the

---

[32] Unlike the base fine, for which no case may hold a value of zero, the total fine imposed was equal to $0.00 in 448 cases (~30%). Eighty-five percent of these cases had plea bargain agreements, which may have stipulated the total fine to be imposed. However, 64 cases had no fine imposed (which should not occur under guidelines computations). Therefore, reasons for these zero values are unclear. The analysis is restricted to cases eligible for Chapter Eight Fine Guidelines according to USSC specifications. Cases with stipulated sentences or in which guidelines calculations were not computed should have been recorded as "Not Applicable" and thus have been excluded from the sample. This variable is only included in the probation models, and therefore any implications as to its validity are limited to those models.

operational definition of a harsh fine[33], while a much larger proportion, more than two-thirds, were sentenced to probation concurrent with their fine. Ten percent of total cases were sentenced during the scandal period, and 37% were sentenced after the passage of Sarbanes-Oxley. The data contain few public firms and most do not have prior records, consistent with previous examinations of the organizational guidelines.

One-way ANOVA tests and Dunett's were performed on the means to assess differences between the scandal and post-SOX periods from the control (significant differences denoted on table). In general, 10-20% of companies were sentenced at or above the fourth quartile of the prescribed fine guidelines; more often, companies were sentenced to probation. There appears to be an increased likelihood of harsh sentences during the scandal period, for both probation and harsh fines, though the difference is only significant for fines. The average base fine was significantly higher after the passage of Sarbanes-Oxley; restitution exhibits a similar pattern. In addition, the average number of counts for which a company was sentenced was also higher post-SOX, though the difference is not significant. It is perhaps less surprising then, that more companies in the post-SOX time period were deemed unable to pay the fine to which they were sentenced.

---

[33] During the course of the analysis, it was discovered that 53 cases included errors in the entry of their minimum and maximum fines that necessitated their exclusion from analysis. Eleven cases had a recorded minimum fine that was greater than the maximum fine. Forty-two additional cases listed the fine minimum and maximum as 0 (which is not possible under guidelines fine calculations). Of these, 37 would have otherwise been included in the analysis. However, because it is impossible to determine the percentile placement of the fine received, they were recoded as missing.

Companies were, on average, determined to be less tolerant of the criminal activity during the scandal period and post-SOX. However total culpability scores and measures of responsibility remain fairly consistent across time periods. Plea bargains were fairly common for all three time periods, with 87-89% of companies sentenced having agreements. However, it is notable that this is much less than the proportion of individuals who plead out (approximately 95%, depending on the source of estimation.). This is consistent with Weisburd (1991), who noted that the rate of pleas is lower among white-collar offenders, and with the cumulative advantages in criminal justice processing discussed in Chapter Two.

Surprisingly, the vast majority of firms did not have a compliance program in effect at the time of offense, which is inconsistent with claims made by the Commission (see Murphy 2002). Only about half of companies sentenced were solvent at the time of sentencing. Very few organizations were considered to be exclusively for criminal purposes (not shown).[34]

**Table 2: Descriptive Statistics**

| n=1002 | Variable Mean (S.D.) | Control Period | Scandal Period | Post-SOX Period |
|---|---|---|---|---|
| *Dependent* | Harsh Fine | 0.131 (0.015) | 0.209** (0.038) | 0.129 (0.017) |
| | Probation | 0.743 (0.020) | 0.826 (0.035) | 0.780 (0.021) |
| *Independent* | Tolerance[+] | 1.010 (0.048) | 0.948** (0.099) | 0.946*** (0.053) |
| | Scandal Offense[+] | 0.0151 (0.016) | 0.148** (0.033) | 0.149* (0.018) |
| *Control* | Prior Record | 0.203 (0.018) | 0.104* (0.029) | 0.159 (0.018) |
| | Compliance Program | 0.058 | 0.035 | 0.073 |

---

[34] Criminal purpose was intended to be included in the models, however the variable exhibited perfect colinearity, likely due to the USSC's requirement that criminal purpose organizations receive fines sufficient to render them inoperable.

|  | | (0.011) | (0.017) | (0.013) |
|---|---|---|---|---|
| Base Fine | | $1,382,853 | $794,584.10 | $4,586,088*** |
|  | | ($301,911.10) | ($168,992.30) | ($1,263,438) |
| Culpability | | 4.788 | 4.887 | 4.787 |
|  | | (0.078) | (0.168) | (0.092) |
| Solvent | | 0.529 | 0.565 | 0.491 |
|  | | (0.023) | (0.046) | (0.025) |
| Number of Counts | | 3.720 | 3.235 | 4.511 |
|  | | (0.410) | (0.830) | (0.981) |
| Responsibility[35] | | 1.452 | 1.409 | 1.370 |
|  | | (0.039) | (0.074) | (0.044) |
| Can't Pay | | 0.363 | 0.487* | 0.446 |
|  | | (0.022) | (0.047) | (0.025) |
| Plea | | 0.876 | 0.896 | 0.868 |
|  | | (0.015) | (0.029) | (0.017) |
| Fine Offset | | $2,546.00 | $86.96 | $3,979.15 |
|  | | ($2,080.89) | ($86.96) | ($3679.16) |
| Post-Booker | | 0 | 0 | 0.648 |
|  | | n/a | n/a | (0.024) |
| Restitution | | $271,896.10 | $109,273.60 | $1,517,545.00** |
|  | | ($63,411.115) | ($16,818.93) | ($587,329.00) |
| Public | | 0.025 | 0 | 0.023 |
|  | | (0.007) | n/a | (0.008) |
| Fine (Probation Model) | | $579,097.80 | $161,812.70 | $1,327,466.00** |
|  | | ($167,992.80) | ($41,688.66) | ($621,232.90) |

+ Indicates a variable that will be interacted with time periods. Because the individual values of these interactive terms are of no significance, they are excluded from this table.
* significantly different from control time period at p<.10
** significantly different from control time period at p<.05
*** significantly different from control time period at p<.01

Overall, the organizations that were sentenced during all three periods were relatively similar on objective markers. The average base fine across all three periods is large, though the data are heavily skewed left. For this reason, the base fine will be logged in the regression models. Skew was also problematic for several other variables, specifically restitution, culpability, the number of counts, and the total fine (included only in the probation model).[36]

---

[35] The mean is less informative here than the distribution of offenses. Only 1.39% of cases received a full discount of 5 points; 0.28% received a discount of three points (this is presumably a coding error, as the guidelines do not allow for a reduction of three points); more than half (52.19%) received a discount of 2 points; 29.56% received a discount of one point, and only 16.59% received no discount for cooperation.

[36] Because several of these variables may have values of zero, the natural log was taken of the original value plus one.

Most corporations are sentenced at or below the lowest quartile of the guidelines calculated range in which they are eligible to receive a fine (see Graph 1; for ease of interpretation, each bin has a width of 5%) Because of the overpopulation of low placement sentences, it is difficult to understand the distribution of cases above this quartile. Graph 2 depicts the distribution of fine placement, excluding the left-most bin of the first histogram (cases receiving fines at or below the fifth percent of the fine range). It is relatively rare for corporations to receive harsh penalties.
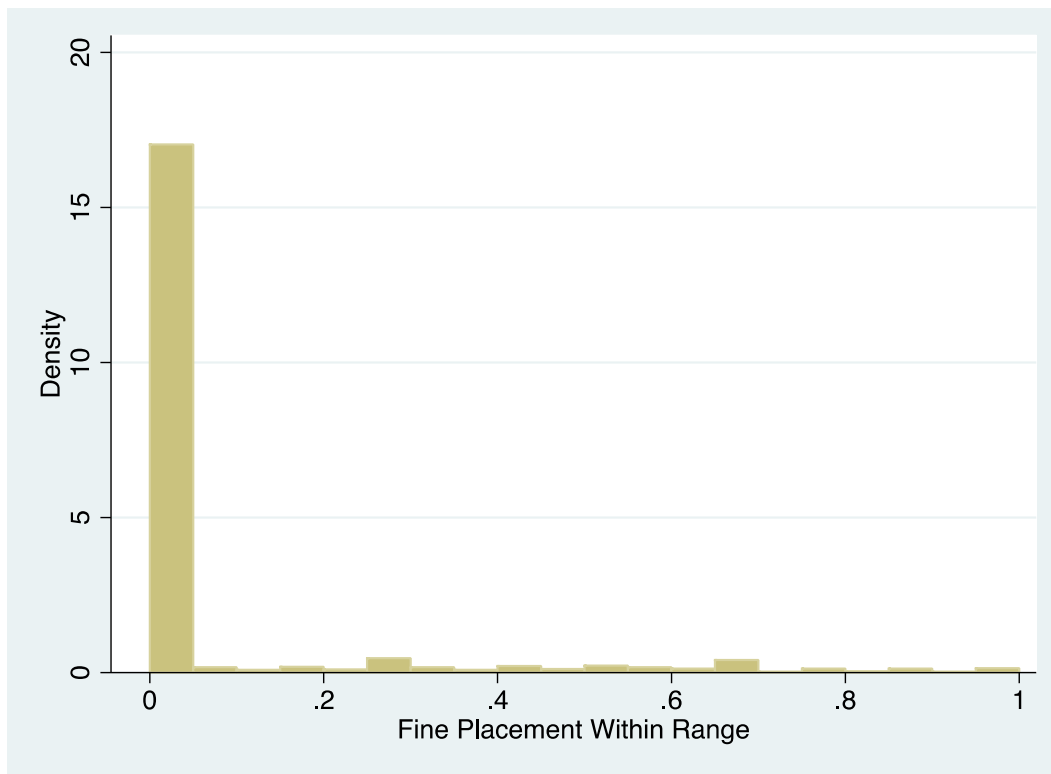


**Graph 1: Distribution of Fine Placement (Confined between 0 and 1)**
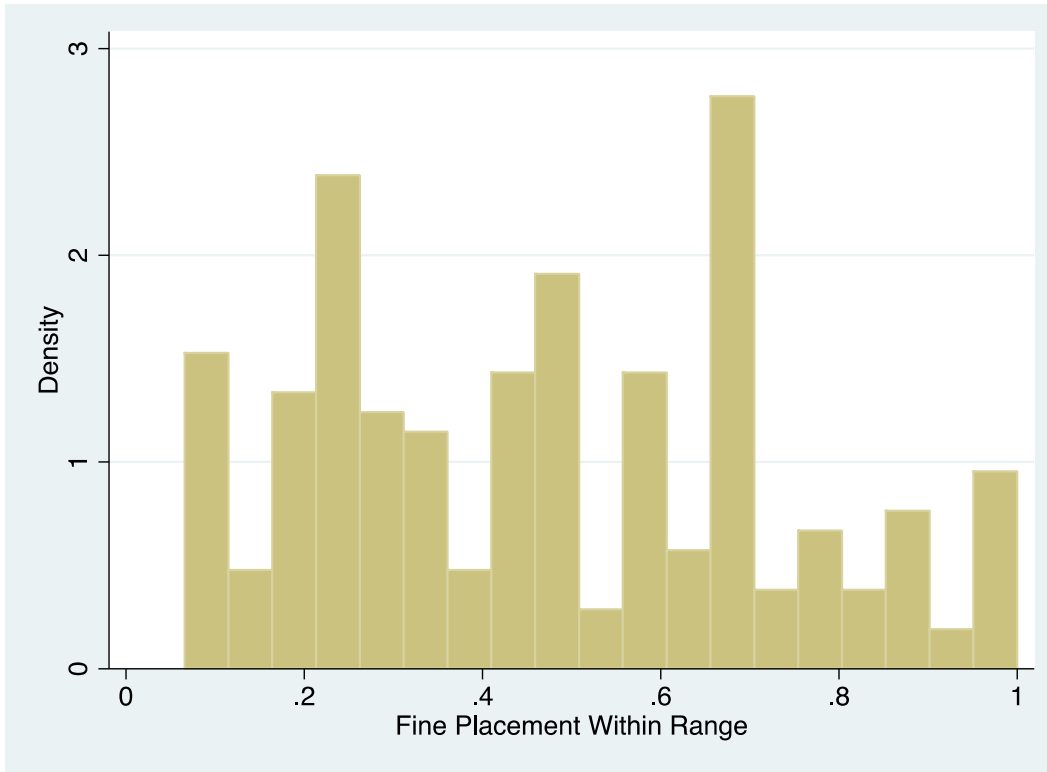
**Graph 2: Distribution of Fine Placement, excluding lower 5th percentile**

## ORGANIZATIONAL SENTENCING PATTERNS AND REGRESSION RESULTS

Before moving to the regression analysis to test my hypotheses, I first examined

descriptive patterns present in the data. There is considerable variability in the

proportion of offenders sentenced to a harsh fine (Figure 2) from year to year. It

appears that there is a peak in harsh sentencing the year prior to the scandals,

followed by a general decline (inconsistent with my hypotheses). However, no

cohesive trend is evident when considering the whole study period.
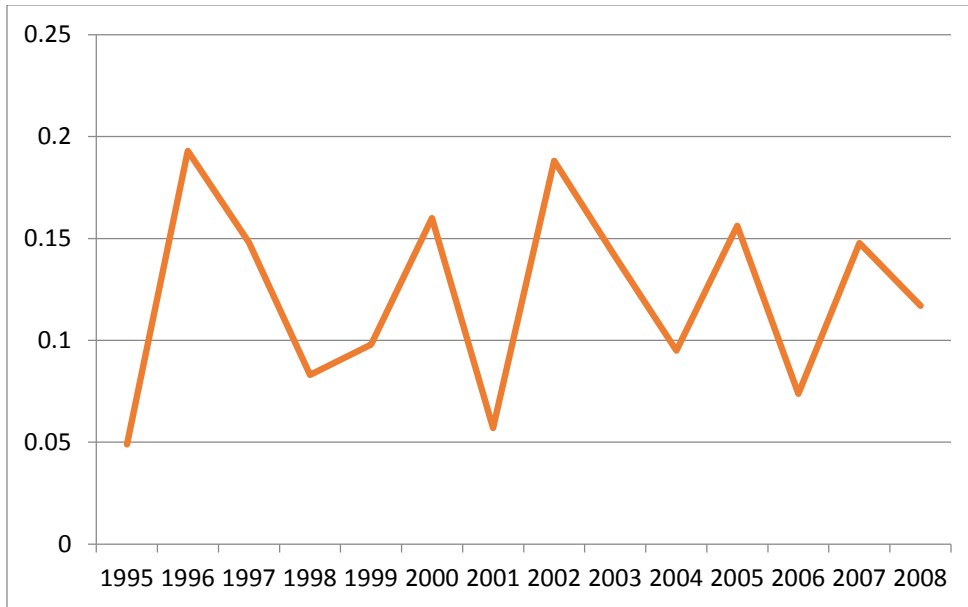
**Figure 2: Proportion of Companies Sentenced to a Harsh Fine Over Time**

There is less variation among probation sentences (Figure 3), though again there

appears to be a decline after the early 2000s. In general, however, the proportion

of companies sentenced to probation has changed little from year to year,

bounded between 60 and 80%.
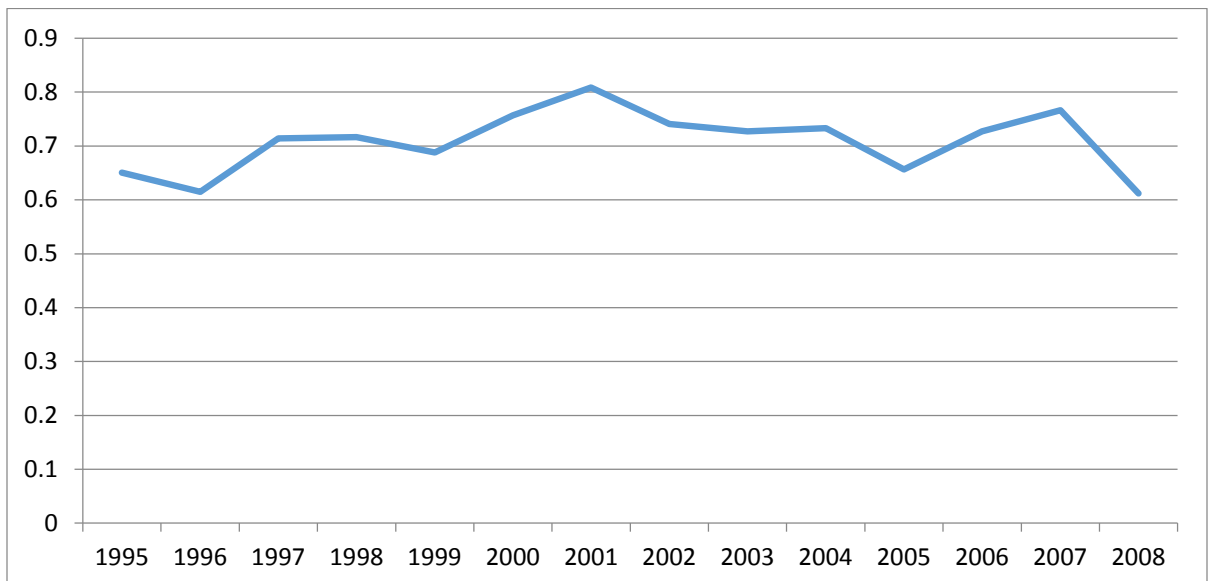


**Figure 3: Proportion of Companies Sentenced to Any Probation Over Time**

Looking more generally at fine placement over time, it appears that punishment

trends are driven by the uppermost (top 10% of firms) – see Figure 4. Typically,

50% of firms receive fines *below* the minimum fine in guidelines range (these appear as negative percentiles). Further, fairly consistently 90% of firms receive fines less than the maximum fine in the guidelines range (100% on the vertical axis below). Yet the average fine is highly variable, and is often close to the 90th percentile of all fines given in a fiscal year, implying that the mean is driven heavily by those rare (i.e., less 10% of all firms sentenced in a given year) organizations that received fines far outside the guidelines range.
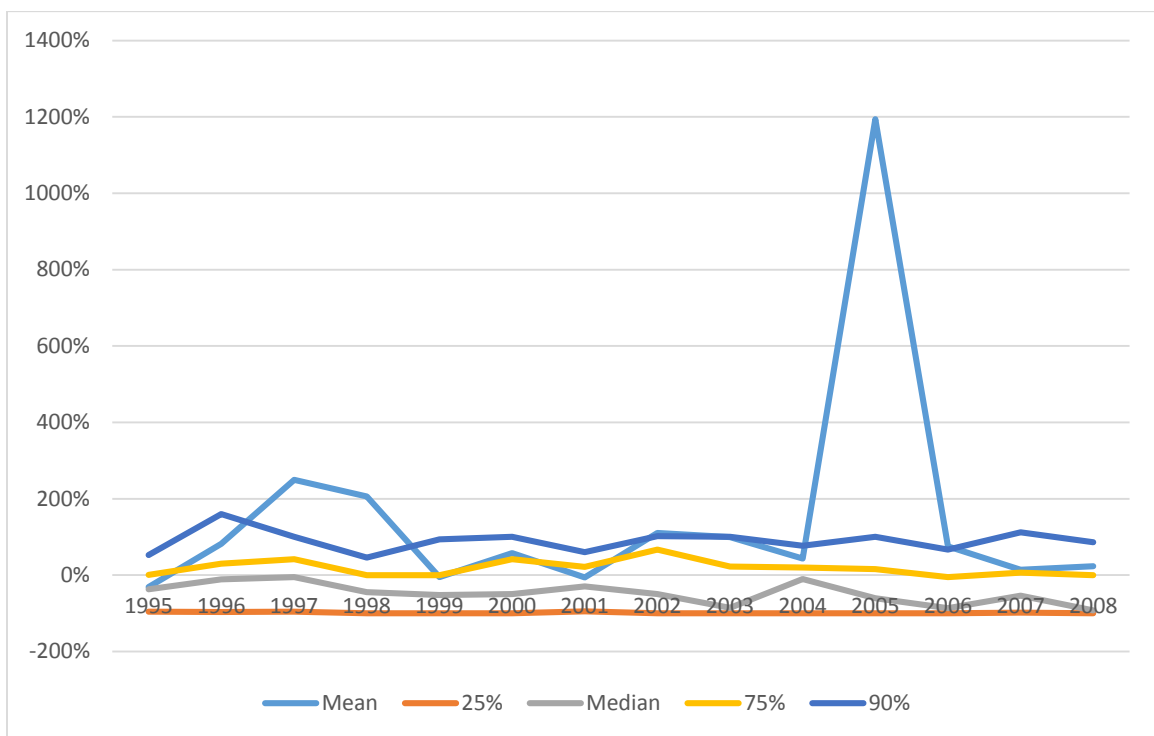


**Figure 4: Average Placement Within Fine Range Over Time**

The penalties imposed on a company under the Chapter Eight Guidelines are broader than fines. Total monetary penalties include both restitution and fines[37] – the breakdown of total monetary penalties imposed are shown in Figure 5. Over time, the amount of fines paid by the top 10% of companies has become

---

[37] Companies may also be forced to disgorge profits gained as a result of illegal activity. However, this is corrective, not punitive, and thus is not included in the total penalties calculation.

increasingly higher than the total penalties paid by the lower 75% of companies.

Since 2002, the penalties paid by the top 10% of companies have skyrocketed,

from approximately $1 million to more than $13 million in 2008. There appears to

be a bump in the 1997-1998, however this is the result of a select group of

companies that received fines well outside the guidelines range. In both 1997 and

1998, four companies received fines in excess of $10million, including one with a

fine of more than $100 million. Because most companies receive fines well below

$50,000, these cases can significantly alter the average fine for these years. None

of these outliers had compliance programs in place, and received little or no credit

for accepting responsibility for their crimes. Further, most had aggravating points

added to their culpability score for tolerating criminal behavior.
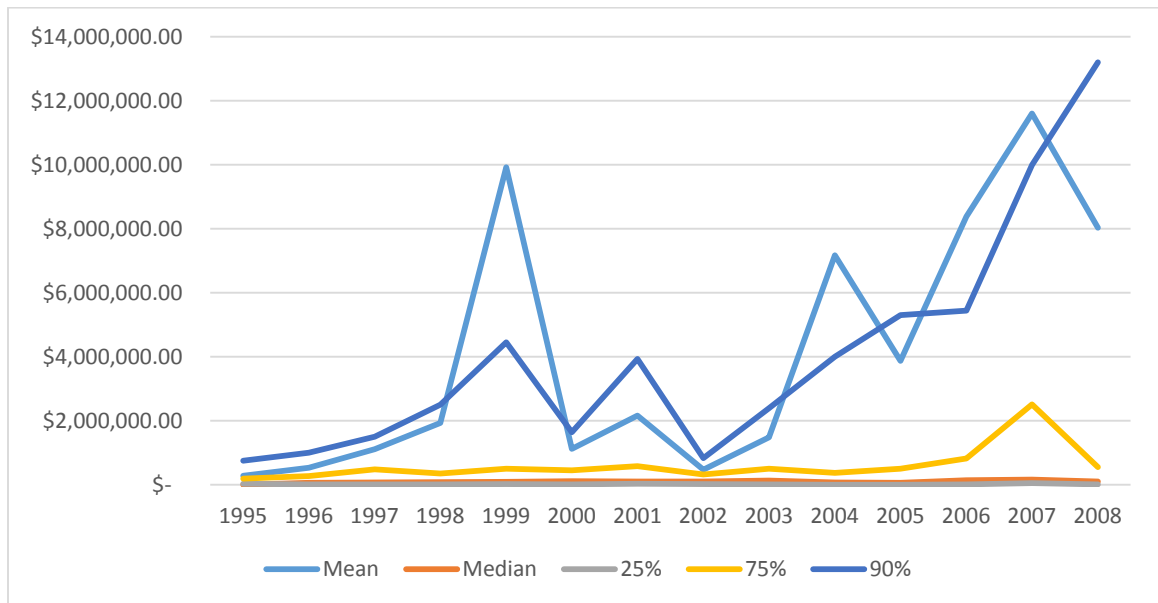


**Figure 5: Average Total Penalties Imposed**

The trends in fines imposed are similar to that of total penalties and are shown in

Figure 6. The average total fine imposed is clearly driven by the harshest 10% of

fines, which generally increases each year after the scandal period (FY 2002). In

contrast, 75% of organizations receive average fines far below one million

dollars. The lower 75% of fines imposed and the upper 10% increasingly diverge over time, particularly after fiscal year 2002, suggesting that while penalties for *most* companies were not affected by contemporary scandals, a select subset of companies is receiving much harsher fines. The same can be said of restitution (which is imposed on a much smaller scale, with 75% of companies usually receiving no restitution orders). This trend is shown in Figure 7.
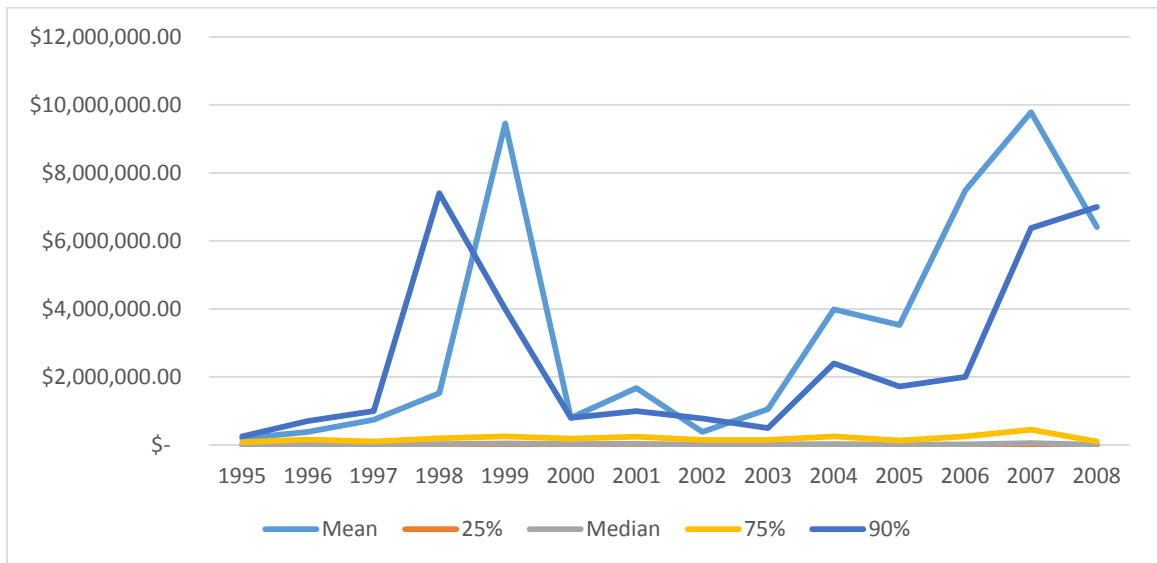


**Figure 6:  Average Total Fines Imposed**
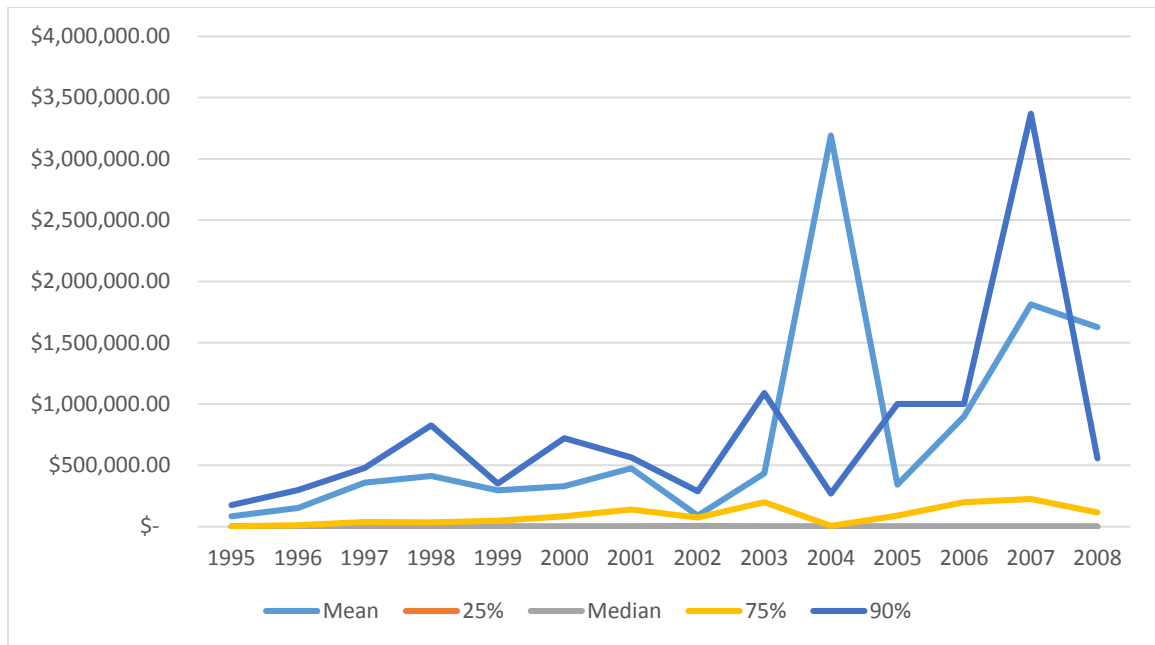
**Figure 7: Average Total Restitution Imposed**

From these trends, it appears that a few clear patterns exist in organizational

sentences before or after the financial scandals of the early 2000s. While the bulk

of sentences show little evidence of change in probation, fines, restitution, or total

monetary penalties, the monetary sanctions experienced by the upper 10% of

organizations suggest that harsh fines are increasing. However, it is possible that

the few differences in offender and offense characteristics (see Table 2, above)

between time periods may have impacted these trends.

To further examine my hypotheses, I performed probit regression analysis.

The results of the regression provided mixed support for my hypotheses. I first ran

the regression predicting harsh fines with only the time period variables (Model 1,

Table 3).[38] The second model incorporates control variables. The third model

includes both the main and interacted effects of all independent variables. The

---

[38] Unfortunately, too few cases were available to include the criminal purpose and ownership-time period interaction variables in the models.

fourth and final model is the fully specified equation, including all independent and control variables.

In the first model, my hypotheses achieve partial support. Companies sentenced during the scandal period were more likely to receive a harsh fine. This effect did not, however, extend to the Post-SOX period.  When controls are added in Model 2, this positive effect of the scandal period retains its significance and increases in magnitude (however, the marginal effect is not substantially affected, not shown). When the interaction terms are added in Model 3, the main time period effect is no longer significant; further, none of the interaction terms are significant.

**Table 3: Fine Regression Analysis**

| n=1002 | Model 1 β (S.E.) | Model 2 β (S.E.) | Model 3 β (S.E.) | Model 4 β (S.E.) |
|---|---|---|---|---|
| Scandal Period (T1) | 0.303* (0.150) | 0.546** (0.192) | 0.241 (0.230) | 0.608* (0.300) |
| Post-SOX (T2) | -0.008 (0.107) | 0.212 (0.190) | -0.142 (0.166) | 0.084 (0.251) |
| T1*Tolerance | - | - | 0.051 (0.138) | -0.061 (0.171) |
| T1*Scandal Offense | - | - | 0.129 (0.402) | 0.084 (0.501) |
| T2*Tolerance | - | - | 0.066 (0.098) | 0.019 (0.126) |
| T2*Scandal Offense | - | - | 0.336 (0.274) | 0.457+ (0.347) |
| Tolerance | - | 0.223* (0.096) | 0.129* (0.066) | 0.226* (0.118) |
| Scandal Offense | - | 0.417** (0.160) | 0.263 (0.187) | 0.231 (0.231) |
| Prior Record | - | 0.495** (0.152) | - | 0.492** (0.152) |
| Compliance Program | - | 0.125 (0.236) | - | 0.144 (0.237) |
| Base Fine | - | -0.312** (0.037) | - | -0.312** (0.037) |
| Culpability | - | 0.010 (0.422) | - | 0.032 (0.427) |
| Solvent | - | 0.014 (0.135) | - | 0.010 (0.136) |
| Number of Counts | - | 0.105 (0.115) | - | 0.105 (0.115) |
| Responsibility | - | -0.060 (0.139) | - | -0.042 (0.141) |
| Can't Pay | - | -1.111** (0.203) | - | -1.113** (0.105) |
| Plea | - | 0.025 (0.285) | - | 0.034 (0.286) |
| Fine Offset | - | -0.060 (0.049) | - | -0.058 (0.049) |
| Restitution | - | -0.028* (0.013) | - | -0.029* (0.013) |
| Post-Booker | - | -0.057 (0.214) | - | -0.019 (0.218) |
| Public | - | -0.006 (0.438) | - | 0.002 (0.441) |
| Pseudo $R^2$ | .0055 | 0.3231 | 0.0343 | 0.3255 |

+ one tailed z-test p<.10
*one tailed z-test p<.05
**one tailed z-test p<.01

In the fully specified model, Model 4, most of the independent variables are insignificant. However, the positive effect of the scandal period remains significant; companies sentenced during the scandal period were 9% more likely to receive a harsh fine, net of all other factors. This offers some support for the claim that the extensive media coverage and political rhetoric reframed judges' perceptions of white-collar crime such that they were more likely to sentence such crimes punitively.

However, it is also worth noting that several control variables are consistently significant across models. Companies that have a prior record (either criminal or civil) are 6.5% more likely to receive a harsh fine. While this is perhaps not a substantive increase, it is important to remember that this is a "double-penalty" of sorts. Prior records are already taken into account in a company's culpability score (held constant in the model), and thus incorporated in the resulting fine range, companies with prior records are significantly more likely to receive a harsh fine. This may suggest that judges consider these offenders to be more harmful, or more likely to be repeated, and correspondingly give more punitive sentences within the guidelines range. Similarly, companies that are considered more tolerant of criminal behavior are more likely to receive harsh fines across all time periods.

The base fine is associated with a significantly *lower* likelihood of receiving a harsh fine. This is consistent with Piquero and Davis's (2004) finding that the base fine is associated with an increase in the likelihood of receiving a fine below the midpoint. While the base fine may be considered a proxy for

offense seriousness, the base fine calculations have also received the brunt of guidelines alterations that affect corporate sentencing. In each case, the amendments resulted in higher base fines (which then translate to high fine ranges). Judges may respond to this by sentencing in the lower end of the range to match their own assessment of offense seriousness. A one standard deviation (2.27) in the natural log of the base fine at its mean (12.07), which is equal to an increase of about $1,515,040.14 in the base fine,[39] is associated with a 3.1% decrease in the probability of receiving a harsh fine. However, it may be that because the increase in the base fine required is so large and the distribution is so skewed right that this finding may have little substantive relevance.

Further evidence of judges exercising discretion in favor of lower monetary penalties is evidenced by the significant negative effect of restitution on the probability of receiving a harsh fine. Finally, an offender's inability to pay is associated with a significant decrease (10.4%) in the likelihood of a fine at or above the 75th percentile of the guidelines range.

---

[39] The mean base fine is e^12.04. A one standard deviation increase in the base fine results in a fine of e^12.07+2.27. The difference between these two values is 1,515,040.15.

**Table 4: Marginal Effects for Fine Models**

|  | Model 4 |
| --- | --- |
| n=1002 | |

| | *dy/dx* |
| --- | --- |
| Scandal Period (T1) | 0.089 |
| Post-SOX (T2) | 0.009 |
| T1*Tolerance | -0.006 |
| T1*Scandal Offense | 0.009 |
| T2*Tolerance | 0.002 |
| T2*Scandal Offense | 0.636 |
| Tolerance | 0.023 |
| Scandal Offense | 0.027 |
| Prior Record | 0.065 |
| Compliance Program | 0.016 |
| Base Fine | -0.031 |
| Culpability | 0.001 |
| Solvent | 0.003 |
| Number of Counts | 0.011 |
| Responsibility | -0.004 |
| Can't Pay | -0.104 |
| Plea | 0.003 |
| Fine Offset | -0.006 |
| Restitution | -0.003 |
| Post-Booker | -0.002 |
| Public | 0.0002 |

Marginal effects for dummy variables represent a discrete change from 0 to 1

The same process was applied to predict the imposition of corporate probation. Because corporate probation can be incredibly invasive, it may reasonably be thought of as another form of punitive sanctions. A reframing of focal concerns may then be expected to have similar effects on probation as on the imposition of harsh fines. Model 5 predicts the imposition of probation using only the two time periods. As with the model predicting harsh fines, there is some initial support for the direct effect of the scandal period. However, the introduction of controls (Model 6) and interaction terms (Model 7) reduces the

term to nonsignificance. Although both controls and interaction terms

substantially increase the model's explanatory power relative to their exclusion,

the total explained variance in the probation model remains low.

The fully specified model predicting the imposition of probation is

presented in Model 12 of Table 5. None of the independent variables were related

to the imposition of probation.. Overall, it appears that the variables that predict

the imposition of a harsh fine are *not* the same as those related to the imposition

of probation. Only tolerance and restitution are predictive of both; however in the

case of probation, the variables have the opposite sign, suggesting that probation

may be imposed as a lesser consequence, despite its potential for invasiveness.

Organizations sentenced under plea bargains are nearly 17% more likely to

receive probation (see Table 6).

**Table 5: Probation Regression Results**

| n=994 | Model 5 β (S.E.) | Model 6 β (S.E.) | Model 7 β (S.E.) | Model 8 β (S.E.) |
|---|---|---|---|---|
| Scandal Period (T1) | 0.285* | 0.168 | 0.220 | 0.084 |
| | (0.150) | (0.157) | (0.215) | (0.225) |
| Post-SOX (T2) | 0.120+ | 0.092 | 0.031 | 0.035 |
| | (0.094) | (0.141) | (0.133) | (0.172) |
| T1*Tolerance | - | - | 0.122 | 0.148 |
| | | | (0.139) | (0.144) |
| T1*Scandal Offense | - | - | -0.474 | -0.487 |
| | | | (0.434) | (0.448) |
| T2*Tolerance | - | - | 0.103 | 0.102 |
| | | | (0.087) | (0.091) |
| T2*Scandal Offense | - | - | -0.170 | -0.276 |
| | | | (0.287) | (0.298) |
| Tolerance | - | -0.106 | -0.123** | -0.168* |
| | | (0.069) | (0.057) | (0.083) |
| Scandal Offense | - | 0.293* | 0.462* | 0.457** |
| | | (0.139) | (0.192) | (0.197) |
| Prior Record | - | 0.092 | | 0.085 |
| | | (0.122) | | (0.123) |
| Compliance Program | - | -0.127 | | -0.181 |
| | | (0.187) | | (0.188) |
| Base Fine | - | 0.008 | | 0.010 |
| | | (0.023) | | (0.024) |
| Culpability | - | 0.087 | | 0.103 |
| | | (0.280) | | (0.280) |
| Solvent | - | 0.200* | | 0.202 |
| | | (0.102) | | (0.102) |
| Number of Counts | - | 0.000 | | 0.003 |
| | | (0.077) | | (0.077) |
| Responsibility | - | -0.178+ | | -0.172* |
| | | (0.096) | | (0.097) |
| Can't Pay | - | 0.026 | | 0.014 |
| | | (0.136) | | (0.137) |
| Plea | - | 0.503** | | 0.501** |
| | | (0.193) | | (0.193) |
| Fine Offset | - | -0.013 | | -0.014 |
| | | (0.028) | | (0.028) |
| Restitution | - | 0.045** | | 0.046** |
| | | (0.008) | | (0.008) |
| Post-Booker | - | -0.025 | | -0.044 |
| | | (0.154) | | (0.155) |
| Public | - | -0.298 | | -0.300 |
| | | (0.297) | | (0.302) |
| Total Fine | - | -0.007 | | 0.007 |
| | | (0.012) | | (0.012) |
| Pseudo $R^2$ | .0040 | .0582 | 0.0156 | .0615 |

+ one tailed z-test p<.10
*one tailed z-test p<.05
*one tailed z-test p<.01

Unique to the imposition of probation, offense matters. Companies sentenced for securities fraud, falsifying books and records, bank fraud, obstruction of criminal investigation, wire fraud, or false claims and statements (that is, a scandal offense) are more likely to be given probation than others. With other variables held constant at the mean, a company that is sentenced for a scandal offense is 11.7% more likely to be sentenced to a harsh fine (Table 6).

**Table 6: Marginal Effects for Probation Models**

Model 8

n=994

| | *dy/dx* |
|---|---|
| Scandal Period (T1) | 0.024 |
| Post-SOX (T2) | 0.010 |
| T1*Tolerance | 0.044 |
| T1*Scandal Offense | -0.166 |
| T2*Tolerance | 0.301 |
| T2*Scandal Offense | -0.088 |
| Tolerance | -0.049 |
| Scandal Offense | 0.117 |
| Prior Record | 0.024 |
| Compliance Program | -0.056 |
| Base Fine | 0.003 |
| Culpability | 0.030 |
| Solvent | 0.060 |
| Number of Counts | 0.001 |
| Responsibility | -0.051 |
| Can't Pay | 0.004 |
| Plea | 0.167 |
| Fine Offset | -0.004 |
| Restitution | 0.014 |
| Post-Booker | -0.013 |
| Public | 0.002 |
| Fine | |

Marginal effects for dummy variables represent a discrete change from 0 to 1

In addition, the more responsibility a company accepts during the investigation process, the less likely it will be given probation. Companies that are solvent at the time of sentencing are 6% more likely to be given probation. Additionally, each standard deviation increase in the amount of restitution ($62,167.74)[40] paid is associated with a 1.4% increase in the likelihood of probation being imposed, though this may not be substantive.

---

[40] With mean ln(Base Fine)=5.01, S.D.=6.03: $e^{(5.01+6.03)}$ - $e^{5.01}$= difference in base fine resulting from a one SD increase. See fn 33.

## DISCUSSION AND CONCLUSION

### *DISCUSSION*

Overall, the research hypotheses received partial support. Corporations sentenced during the scandal period had an increased likelihood of receiving a harsh fine; no such time period effects (direct or indirect) were found in the imposition of probation. The former finding thus lends support to the claim that judges experienced a shift in focal concerns, likely due to a collective framing process that reframed issues of corporate crime seriousness, organizational blameworthiness, and the need to protect the community. Media attention and political attention to white-collar crime was at its height during the scandalsand leading up to the passage of Sarbanes-Oxley. However, I found no evidence that this effect continued beyond the one year scandal period.

Yet, there is evidence of increasingly punitive sanctions. From 2002-2008 there is evidence of a dramatic increase in the average monetary penalties (see Figures 5-7). The main driver of this increase, however, is the fines imposed on 10% of companies sentenced. Because the fine guidelines were radically restructured beginning in January 2003 (when emergency amendments related to Sarbanes-Oxley were put in place), it is likely that these changes drove the increase in high fines. It is possible that, prior to the imposition of the sentencing guideline amendments, judges felt the need to alter their sentencing patterns in favor of more punitive fines. However, once the guidelines were amended in such a way that significantly increased penalties for corporate offenders, judges no longer felt the need to impose relatively harsh sentences. The failure to sentence harshly after the imposition of the guidelines is *not* consistent with the idea of a

judicial backlash in response to overly harsh sentences, as there was no evidence of a shift in lenient sentences during this time (see sensitivity analyses, below). Rather, the findings suggest that judges altered their sentencing patterns during the scandal period because the legal supports for harsh sentences were not yet in effect; once the emergency guideline amendments were put into place, judicial sentencing behavior related to the relative placement of fines returned to pre-scandal patterns. This suggests that the punitive goals of Sarbanes-Oxley were consistent with reframed judicial perceptions of focal concerns related to corporate crime.

Interestingly, there is evidence of a "double-penalty" for certain offender and offense characteristics. For example, companies with a prior record are 6.5 % more likely to receive a harsh fine. Tolerant companies are also more likely to receive harsh fines, across all time periods. Offenses like those committed during the 2000s accounting scandals are associated with a 9% increase in the likelihood of receiving a harsh fine. Accepting responsibility and being less tolerant are associated with an increased likelihood of probation. Each of these variables is legally taken into account during the establishment of the organization's base fine and culpability scores, which together determine the fine range. Even holding constant the components of the fine range, these factors are still significant, lending preliminary support to the argument that judges use certain heuristic devices to determine where within the range an organization should be fined, similar to the decision process related to the imprisonment of individuals.

The models also suggest that judges consider total monetary sanctions when imposing fines. Higher base fines were associated with a significant *decrease* in the likelihood of receiving a fine at or above the fourth quartile, as was restitution. Supplemental analyses (Appendix C) were run to explore the potential that judges were more lenient during these periods in the face of major adjustments to the fine guidelines. I considered four alternative specifications of the dependent variable: the likelihood of receiving a fine at or below the 25th percentile, the likelihood of receiving a downward departure (together referred to as "lenient sentences"), the likelihood of being sentenced about the midpoint, and the likelihood of receiving an upward departure.

The sensitivity results were very consistent with the findings from the original fine model. There was limited support for some hypotheses; tolerance exhibited a time-period specific effect during the scandal period on the likelihood of downward departure in the opposite direction as for harsh fines. The midpoint defined dependent variable was generally not predicted by control or independent variables. The general effect of tolerance is at least marginally significantly related to the other three specifications of the dependent variable; more tolerant companies are less likely to receive lenient sentences and more likely to receive an upward departure. As with the main model, base fine, a company's ability to pay, and amount of restitution are positively related to lenient and negatively related to harsh outcomes. Together, this supports the notion that judges are particularly mindful of the financial impact of the fines they impose on companies, consistent with the third element of focal concerns – too great, and the

costs will be borne by consumers, or at the far end of the spectrum, companies will be forced out of business. Most organizations that are prosecuted under the guidelines are not wholly criminal entities – they are productive members of society that provide valuable social goods; companies may respond to high fines by increasing prices for these goods, or by cutting employment costs. High fines will also affect stock prices as investors respond to decreased profits, which impact the stockholders more than the responsible party. The findings suggest that judges aim to minimize, or at least reduce, the incidence of punishing innocent third parties.

## *LIMITATIONS*

This research suffers from two primary limitations. The first relates to issues of selection, both as it pertains to the formal treatment of organizational defendants as well as the quality of the data and issues of missing cases. Second, the Sentencing Commission data for organizations are only available through fiscal year 2008. In addition, this research is limited in its ability to draw firm conclusions about judicial focal concerns because it is not, in itself, an explicit test of focal concerns; this is not a significant limitation, as focal concerns still provides a useful paradigm for the generation of hypotheses and proposed mechanism to explain significant findings.

### *SELECTION*

While the selection of cases into fines and probation does not mirror the same selection process related to imprisonment decisions, this does not preclude earlier selection issues related to organizational crimes. It is important to

acknowledge that the corporations that are ultimately tried and convicted in criminal court may be different from those that are punished through administrative (regulatory agency) or civil action (which may be initiated by regulatory agencies or the by U.S. Attorneys). Regulatory bodies frequently value compliance over criminal punishments, and only after severe noncompliance are criminal charges pursued (see Ayres and Braithwaite 1992). Larger, more powerful firms may have disproportionate negotiation power and ultimately receive less serious sanctions despite commensurate or excessive violations (Frank and Lombness 1988).

Assuming that a case is made known to capable criminal justice agents, the decision to pursue formal charges must be made by a prosecutor. As with other topics in criminology, the prosecutor's office is a presumed "black box" of discretion in white-collar crime cases, though little empirical research has focused specifically on the role of the prosecutor. One exception is Albonetti (1999), who posits a legal-bureaucratic model in which white-collar defendants face an advantage at the plea-bargaining stage; the advantage gained in plea bargaining later translates into an increased likelihood of a suspended sentence. Corporate crimes are more likely than other economic crimes to be complex, involving multiple parties, and prolonged, technically complicated means of offending, indirectly offering advantages at later stages in the criminal justice process.

Additionally, more so than other crime types, crimes committed by organizations often lack presumptive evidence of a crime without documentation; this requires prosecutors to become involved early on in a case (e.g. Katz 1979,

Benson and Cullen 1989). This allows prosecutors to choose not only the charges for which offenders will be sentenced, but also, in the case of federal guidelines, whether or not the offender will be granted a downward departure for "substantial assistance" to the government. Charge bargaining (or guidelines bargaining) can have quite substantial consequences; a mail fraud prosecution under the 2002 guidelines, for example, carries a maximum penalty of 5 years. Under the 2003 guidelines, the maximum penalty is 20 years imprisonment, and one additional base offense level.

White-collar crime is particularly susceptible to office policy; Benson and Cullen (1998), among others, note the importance of conserving resources in the prosecution of white-collar crime, which frequently requires specialized knowledge. When resources are scarce, criminal prosecutions likely flag. Further, The McNulty Memorandum, propagated among federal prosecutors, directed attorneys to consider a wide variety of culpability factors in determining whether or not to pursue criminal charges against the organization (McNulty 2006); these factors, including compliance programs, cooperation, and the like, in effect duplicate the mitigating factors of sentencing (according to the sentencing guidelines for organizations). Compliance program benefits are more likely to be utilized by large than small companies (see Stretsky 2006), thus leading not only to disparity between white-collar and traditional offenders, but within white-collar offenders as well.

The organizations found in the organizational sentencing thus can be seen as a subset of offending organizations. However, absent research on the

organizational and offense factors associated with different decision points in the regulatory, civil, and criminal justice funnels, it is not possible to assume that this is a *representative* sample of corporate crime or corporate criminals. Findings should thus be restricted to understanding the sentencing decisions of corporations that have already been convicted in criminal court. Further, the above discussion highlights the particular role that prosecutors and defense attorneys play in restricting access to information that ultimately appears before a sentencing judge; criminal sentencing is the result of a cumulative, multistage process by various actors, of which judicial decision-making comprises only the final stage (plea agreements in particular reflect discretion of multiple actors; see e.g. Johnson 2003).

In addition to selection issues related to the criminal justice process, there may also be selection issues related to the dataset. Alexander et al. (1999) have criticized the organizational sentencing data as incomplete; specifically, the authors found that sentences for large organizations, often resulting in large fines, were absent from the Sentencing Commission data but otherwise present in court records. The Commission now claims to validate its data using independent data from the Administrative Office of the U.S. Courts (U.S. Sentencing Commission, 2012). Even though this research is not concerned with the absolute magnitude of fines, the extent to which organizational characteristics, such as size or ownership structure, are related to a case's inclusion or exclusion from the data will result in biased and inconsistent estimates and potentially affect the conclusions drawn

about the importance of organizational characteristics and the probability of receiving a more punitive sentence.

However, Parker and Atkins (1999) used a sample selection correction model and conclude that data truncation did not have an impact on the absolute value of the fine meted out to convicted organizations. Unfortunately, because the primary dependent variable is binary, it is not possible to use a traditional Heckman or other sample selection correction that requires linear regression for the second stage of the model.

Sensitivity analyses were conducted to determine if variables missing large proportions of data were consequential to the parameter estimates. Organization size was completely excluded from the model due to a high degree of missing data. The variables FTEMPLY, FTENSIGN, and FTEMNUM, are also not good candidates for imputation. Some values are round estimates, while others are precise. Thus, even an imputed number would not allow for interpretable coefficients due to inconsistencies in the coding process.

Unfortunately, the missing data are highly correlated with one another; 35% of cases are missing at least one variable, and 15% of cases are missing more than one of the examined (Appendix B, Table B.3). With the exception of the variable denoting an organization's ability to pay, all of the dummy variables depicting a case's missing values are moderate to strongly correlated with one another. Missing prior record seems to be extremely problematic. There is also a moderate negative correlation between the likelihood of receiving probation and a case missing values for prior record, solvency, compliance programs, and

88

ownership structure (Table B.4). None of these variables were significantly related to receiving a harsh fine, suggesting that, while the significant factors in the model may be unaffected, the model may also have failed to elucidate the true relationship between these offender characteristics and the imposition of probation.

I evaluated the extent to which these cases are missing at random by using an endogenous selection equation to predict missing data for organizational size (excluded from the final model) as well as five variables with between 9-15% missing that were retained in the full model: prior record, presence of a compliance program, solvency, ability to pay, and ownership structure. Across all models, very few variables are significant predictors of missingness – this lends some support to a claim of data missing at random. Endogenous factors appear to be unrelated to data missingness (and subsequent listwise deletion during analysis). There is a significant positive relationship between being sentenced during the scandal year and missing a value for company size. However, it is probable that this is a function of data quality for a given year – Table B.2 (Appendix B) notes that FY2002 has a high rate of missingness, while the control period contains several years with perfect data. Solvency also has a significant effect on size missingness, but this is to be expected from the high intercorrelation of missing data.

Importantly, it became clear that the variable used to denote whether a case was disposed via a plea agreement was missing for every case sentenced in 1998. However, the exclusion of these cases was not likely problematic. Table

89

B.8 (Appendix B) supplemented the plea bargain values using a second variable for 1998, and the resulting fine model exhibited the same significant relationships and coefficients of similar magnitude as the fine model presented here.

Both dependent variables are significantly negatively related to a case missing information on the company's ability to pay. However, this may not be particularly problematic for the probation model, as an inability to pay is not associated with the likelihood of receiving a probation term. The relationship is more problematic for the fine model. Companies not receiving harsh fines are more likely to be missing information on the ability to pay; in the main analysis (Model 6, Table 2), ability to pay does have a significant relationship with the probability of receiving a harsh fine. Thus, this finding should be interpreted with caution.

To determine the degree to which the absence or presence of these cases may affect the results, I ran the fully specified fine and probation models excluding the problematic variables, both with all cases available and only the subset of cases used in the main analysis. The purpose of this was not to attain reliable coefficient estimates (as they will suffer from omitted variable bias), but to compare the coefficients between the models with all available cases and the models with only the main analysis sample. While the magnitude of the coefficients change, their direction and significance does not (see Appendix B, Table B.7). This suggests that the cases dropped due to missingness did not bias either model's substantive conclusions. Because the signs and significance of parameters are similar between the full and main samples, this suggests that the

cases dropped for the main analyses did not bias the main model findings. This lends further support to the robustness of the findings.

Despite its theoretical interest, industry was excluded from analysis because its values are not consistent across years. The USSC utilized two coding schemes for business class (i.e., the industry in which the company operated) over the course of the series: the first from 1987-1999 and the second from 2000-2008. The codes are not compatible (i.e., the 2000 values are not a simple extension of those from 1999). The models also are limited because they lack ability to hold constant the Guidelines amendment year under which an organization was sentenced. This is only available after 1999. Further, in the fiscal year 2000 data, the variable values are corrupted and the Office of Data and Research at the United States Sentencing Commission was unable to provide corrected values. While this would seriously compromise most sentencing research, it is not likely to be seriously consequential. The dependent variables do not focus on the *magnitude* of fines, but rather the placement within the range (which should not be affected by the structure of the guidelines) and the imposition of probation, the criteria for which have not changed since the implication of the Chapter Eight Guidelines; therefore changes in the structure of the guidelines from year to year should have no influence on these outcomes.

Supplemental analyses (Appendix C, Table C.2) incorporate both amendment year and industry variables in models predicting the imposition of both harsh fines and probation. Using only data after fiscal year 2000, it is possible to determine the extent of potential omitted variable bias caused by the

exclusion of the industry variable. Beginning in 2000, the industry variable is coded consistently and exhibits little problems of missingness (see Table B.2). Also available for these years is the guidelines amendment year under which a case was sentenced. While this variable should not have an effect on fine placement within the calculated range (though most definitely affects the absolute value of the range) nor the imposition of probation (the directives for which have not changed since the development of the Chapter Eight guidelines), I have included it as a control to keep with convention in individual sentencing literature.

I considered industry as a categorical variable (simply holding constant the values), as well as isolating finance and healthcare industries, which are of theoretical interest because these companies may be thought to have a higher degree of responsibility toward their customers (i.e. fiduciary duty, obligation to heal). In general, the findings proved fairly robust (Table C.2). All but one variable that were significant predictors of harsh fines in the main analysis were supported in the second model as well; the effect of the scandal period was reduced to marginal significance, however this is likely due to the decrease in cases in the control time period (evidenced by Model 1, Table C.2). In the third model, healthcare companies were significantly more likely to be sentenced to a harsh fine. Future work should focus on the effects of particular industries on sentencing. The same sensitivity analyses were also done for probation (not shown). In no case was industry significant. However, companies sentenced after Sarbanes-Oxley were more likely to receive probation. In addition, tolerance exerted an indirect effect on probation through both time periods; however, the

main effect of tolerance was negative. This again is supportive of the notion that judges responded to increasingly punitive sanctions for corporate crime by imposing more *lenient* sentences after the initial reframing concluded and guidelines were restructured.

*LIMITED DATA AND THE GLOBAL FINANCIAL CRISIS*

The Sentencing Commission has not released organizational sentencing data for release through ICPSR since fiscal year 2008. However, the global financial crisis, specifically the unethical, predatory, and otherwise negligent behavior by corporations and regulatory agencies may have affected judicial perceptions of organizational blameworthiness, harm, and the need to protect the community from white collar crimes.

It is also possible that there have been diminishing effects of Sarbanes-Oxley over time. Much like Katz (1980) noted that the enhanced attention and harsher punishment given to white-collar crime faltered as Watergate became further removed in time, as the immediate effects of Sarbanes-Oxley were less visible, it is possible that judges perceptions also changed over time. As the Commission releases more data, it will be possible to extend the analyses to explore these possibilities.

***CONCLUSION***
There is some evidence to support the hypotheses that judges experienced a shift in focal concerns as a result of the collective reframing of white-collar crime prompted by the accounting scandals of the early 2000s. The findings also suggest that judges may have been more willing to impose harsh sentences for corporate crime after a shift in collective framing, but only in the absence of

correspondingly harsh laws. Further, there is evidence that judges use factors already incorporated in the guidelines in their punishment decisions, consistent with a focal concerns perspective. Future research should tease out these relationships. Further, the factors that influence fines only partially overlap with the factors that explain the imposition of probation. This suggests that probation may not be a punitive sentence as applied to companies, despite its potential for invasiveness. The consistent positive relationship between plea bargains and the imposition of probation supports this interpretation. Finally, the findings suggest that judges are mindful of the total monetary penalty being imposed upon organizations. Given that most organizations are not wholly criminal enterprises, this financial burden may be part of the "practical constraints" that judges consider when imposing fines on companies. Again, future research should explore this phenomenon.

## APPENDIX A – SENTENCING ORGANIZATIONS

The Chapter Eight fine range is determined by the following calculations:

Base Fine
x   Minimum Multiplier
_____
=   Minimum Fine

Base Fine
x   Maximum Multiplier
_____
=   Maximum Fine

The base fine is determined by the seriousness of an offense, a calculated offense level. Determining the offense level for organizations sentenced under the fine guidelines (relevant offenses defined in §8C2.1) is determined according to Chapter §2B.1 for offenses with only one count, as mandated by §8C2.3. For the simplicity of illustration, only mock calculations for §2B.1 will be shown.

## TABLE A.1 OFFENSE LEVEL CALCULATION

| Add/Subtract | Score | Adjustment |
|---|---|---|
| | 6 or 7 | Base Offense Level |
| + | 0, 2-30 (by increments of 2) | Size of loss |
| + | 0, 2, 4, or 6 | Number of victims |
| + | 0 or 2 | Personal theft |
| + | 0 or 2 | Stolen property |
| + | 0 or 2 | Property from national cemetery or veteran's memorial |
| + | 0 or 2 | Illegal use of email |
| + | 0, 2, or 4 | Health care fraud |
| + | 0, 2, or 4 | Medical product theft |
| + | 0 or 2* | Special misrepresentation |
| + | 0 or 2** | Relocation to evade officials |
| + | 0 or 2** | Fraudulent identification documents |
| + | 0 or 2** | Emergency benefits fraud |
| + | 0, 2, or 4*** | Misappropriation of trade secrets |

| | | |
|---|---|---|
| + | 0 or 2*** | Stolen vehicles |
| + | 0 or 2*** | Death, bodily injury, weapons |
| + | 0, 4, or 8**** | Financial institution fraud |
| + | 0 or 2 | Identity fraud using computers |
| + | 0, 2, 4, or 6**** | Fraud using computers |
| + | 0 or 4 | Securities and commodities fraud |
| = | Offense Level | |

* minimum offense level of 10
** minimum offense level of 12
*** minimum offense level of 14
**** minimum offense level of 24

The offense level is used to determine the base fine. The base fine is the greatest of (1) the associated fine with the offense level as calculated under the guidelines of §2B.1, (2) the pecuniary gain to the organization from the offense or (3) the pecuniary loss from the offense caused by the loss [§8C2.4].

The associated fines to which the above refers are as follows:

**TABLE A.2 BASE FINE CALCULATION**

| Offense Level | Amount |
|---|---|
| 6 or less | $5,000 |
| 7 | $7,500 |
| 8 | $10,000 |
| 9 | $15,000 |
| 10 | $20,000 |
| 11 | $30,000 |
| 12 | $40,000 |
| 13 | $60,000 |
| 14 | $85,000 |
| 15 | $125,000 |
| 16 | $175,000 |
| 17 | $250,000 |
| 18 | $350,000 |
| 19 | $500,000 |
| 20 | $650,000 |
| 21 | $910,000 |
| 22 | $1,200,000 |
| 23 | $1,600,000 |
| 24 | $2,100,000 |

| | |
|---|---|
| 25 | $2,800,000 |
| 26 | $3,700,000 |
| 27 | $4,800,000 |
| 28 | $6,300,000 |
| 29 | $8,100,000 |
| 30 | $10,500,000 |
| 31 | $13,500,000 |
| 32 | $17,500,000 |
| 33 | $22,000,000 |
| 34 | $28,500,000 |
| 35 | $36,000,000 |
| 36 | $45,500,000 |
| 37 | $57,500,000 |
| 38 or more | $72,500,000 |

This base fine, as depicted above, is multiplied by the minimum and maximum multipliers, which are a function of an organization's culpability score. The culpability score contains the following "aggravating" (punitive) and mitigating circumstances and is calculated as depicted in table A.3.

## TABLE A.3 CULPABILITY SCORE CALCULATIONS

| Add/Subtract | Score | Adjustment |
|---|---|---|
| | 5 | Base Culpability Score |
| + | 0-5 | Tolerance of criminal activities |
| + | 0-2 | Prior History |
| + | 0-2 | Violation of an order |
| + | 0, 3 | Obstruction of Justice |
| - | 0, 3 | Effective Compliance Program |
| - | 0, 1, 2, or 5 | Self-Reporting, Cooperation, Acceptance of Responsibility |
| = | | Final Culpability Score |

Culpability scores, which can range from -3 to 18 from the calculations above, are associated with "multipliers" – two values that are each multiplied by the base fine amount to determine the guidelines defined range in which an organization is to be sentenced. The multipliers are as follows (as defined by §8C2.6):

## TABLE A.4 BASE FINE MULTIPLIERS

| Culpability | Minimum | Maximum |
|---|---|---|

| Score | Multiplier | 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 |

## APPENDIX B – SENSITIVITY ANALYSES

Between 1995 and 2008, 1,562 organizational sentences were imposed that were both a) subject to the Chapter Eight fine guidelines and b) given to company (i.e. not a charitable, nonprofit, or political organization). Missing values were prevalent (more than 10%) for three variables: prior record, compliance program, and solvency. Missing values are even more problematic for the cases in which the fine range was available for coding the dependent variable (as discussed in text). The variables that are most problematic are prior record, compliance program, solvency, public, can't pay, plea bargain, and responsibility.

## TABLE B.1 PERCENT MISSING

| N=1,562 | Variable | Total Sample | Cases with Known Fine Range |
|---|---|---|---|
| *Dependent* | Harsh Fine | 3.349% | 0.000% |
| | Probation | 0.895% | 4.289% |
| *Independent* | Scandal Period | 0.000% | 0.000% |
| | Post-SOX | 0.000% | 0.000% |
| | Tolerance | 6.018% | 8.963% |
| | Scandal Offense | 0.000% | 0.000% |
| *Control* | Prior Record | 10.056% | 13.444% |
| | Compliance Program | 12.420% | 14.085% |
| | Base Fine | 5.687% | 8.707% |
| | Culpability | 4.289% | 7.298% |
| | Solvent | 15.685% | 18.310% |
| | Number of Counts | 0.000% | 0.000% |
| | Responsibility | 7.939% | 10.948% |
| | Can't Pay | 9.923% | 12.740% |
| | Plea | 7.875% | 11.268% |
| | Fine Offset | 5.186% | 8.387% |
| | Restitution | 0.832% | 4.225% |
| | Booker | 0.000% | 0.000% |
| | Public | 0.093% | 12.228% |
| | Fine (Probation Model) | 0.192% | 0.256% |

For those variables with missing case problems, the degree of missingness varies considerably by year, shown in table B.2. In some years, complete information exists, while other years are missing more than 25% of case information. Plea information is missing for all of 1998, due to the absence of values for all modes of disposition. Using an alternative source of information on plea agreements to supplement the pleabargain variable (variable "PLEA"; cases marked "NA" for the receipt of a plea agreement were coded as "0" for having a plea bargain, while those marked "received", "not received", or "other agreement" were coded "1"),

**TABLE B.2 PERCENT MISSING CASES BY YEAR**

| Year | Size | Prior Record | Solvent | Compliance Program | Public | Can't Pay | Plea | Responsibility |
|---|---|---|---|---|---|---|---|---|
| 1995 | 21.69 | 0.00 | 1.20 | 0.00 | 12.05 | 3.61 | 0.00 | 2.41 |
| 1996 | 0.00 | 15.60 | 19.27 | 15.60 | 9.17 | 18.35 | 0.02 | 16.51 |
| 1997 | 25.78 | 7.81 | 11.72 | 10.16 | 6.25 | 14.06 | 0.00 | 11.72 |
| 1998 | 25.62 | 5.79 | 9.09 | 4.96 | 1.65 | 5.79 | 1.00 | 3.30 |
| 1999 | 26.79 | 12.50 | 16.07 | 14.29 | 9.82 | 6.25 | 0.00 | 10.71 |
| 2000 | 0.00 | 3.42 | 11.64 | 13.70 | 2.73 | 8.22 | 0.00 | 0.00 |
| 2001 | 0.00 | 9.92 | 20.66 | 12.40 | 12.40 | 9.09 | 0.00 | 10.74 |
| 2002 | 35.19 | 14.20 | 20.37 | 16.67 | 12.40 | 10.49 | 0.00 | 11.73 |
| 2003 | 18.18 | 14.14 | 18.18 | 14.14 | 13.13 | 17.17 | 0.00 | 10.10 |
| 2004 | 16.00 | 10.67 | 17.33 | 10.67 | 12.00 | 9.33 | 0.00 | 8.00 |
| 2005 | 17.71 | 16.67 | 33.33 | 16.67 | 13.54 | 9.38 | 0.00 | 8.33 |
| 2006 | 28.69 | 17.21 | 17.21 | 18.85 | 16.39 | 9.84 | 0.00 | 12.30 |
| 2007 | 17.78 | 8.89 | 10.00 | 10.00 | 7.78 | 2.22 | 0.00 | 1.11 |
| 2008 | 24.49 | 10.20 | 11.22 | 10.20 | 12.24 | 13.27 | 0.00 | 1.02 |

**TABLE B.3 CORRELATIONS BETWEEN MISSING VALUES**

| n=1502 | Size | Prior Rec. | Solvent | Comp. Program | Can't Pay | Public | Plea | Resp |
|---|---|---|---|---|---|---|---|---|
| Prior Record | 0.4401 | | | | | | | |
| Solvent | 0.3181 | 0.7453 | | | | | | |
| Compliance Pr. | 0.4327 | 0.8986 | 0.7260 | | | | | |
| Can't Pay | 0.0777 | 0.1925 | 0.1866 | 0.2068 | | | | |
| Public | 0.4056 | 0.8628 | 0.7263 | 0.8037 | 0.2097 | | | |
| Plea | 0.0494 | -0.0463 | -0.0542 | -0.0591 | -0.0334 | -0.0775 | | |
| Responsibility | 0.3157 | 0.6233 | 0.5115 | 0.6668 | 0.1798 | 0.5972 | -0.0419 | 1.00 |

## TABLE B.4 CORRELATIONS BETWEEN MISSING VALUES AND DEPENDENT VARIABLES

| n=1495 | Size | Prior Record | Solvent | Comp. Program | Can't Pay | Public | Plea | Resp |
|---|---|---|---|---|---|---|---|---|
| Harsh Fine | -0.0586 | -0.0035 | -0.0167 | -0.0099 | -0.0876 | -0.0012 | -0.0051 | -0.0383 |
| Probation | -0.2758 | -0.1028 | -0.2063 | -0.2758 | -0.1012 | -0.2422 | -.2692 | -0.1937 |

## TABLE B.5 CORRELATIONS BETWEEN MISSING VALUES AND INDEPENDENT VARIABLES

| n=1468 | Size | Prior Record | Solvent | Compliance Program | Can't Pay | Public | Plea | Resp. |
|---|---|---|---|---|---|---|---|---|
| Scandal Period | -0.0994 | -0.0046 | -0.0117 | -0.0091 | -0.0364 | -0.001 | -0.0989 | -0.0506 |
| Post-SOX | -0.0021 | 0.0254 | 0.0163 | 0.0257 | 0.0214 | 0.0505 | -0.2283 | -0.1168 |
| Tolerance | 0.1392 | 0.3655 | 0.2179 | 0.3804 | 0.0373 | 0.3180 | 0.0034 | 0.7101 |
| Scandal Offense | -0.0599 | 0.0195 | 0.0049 | 0.0291 | 0.0166 | 0.0408 | -0.1170 | -0.0506 |

In the case of organization size and industry variables, inconsistent data coding and high rates of missingness precluded the inclusion of these variables in the analysis. To determine the degree to which the results of this research may be biased as a result, probit regressions were run predicting missing values using the same offender and offense characteristics as in the main analysis. The results are shown in Table B.6.

In addition to the models predicting missingness of variables excluded from the model, I also considered issues caused by missing cases for variables that were retained in the model. I ran six probit regressions predicting missingness for the most problematic variables (excluding missing information on pleas).

## TABLE B.6 PREDICTING MISSING DATA

| | Size Missing | Missing Prior Rec. | Missing Solvent | Missing Can't Pay | Missing Compliance | Missing Public |
|---|---|---|---|---|---|---|
| | β | β | β | β | β | β |
| Harsh Fine | -0.140 | 4.769 | -0.058 | -0.896** | omitted | 0.835 |
| Probation | 0.070 | omitted | 0.190 | -0.382** | omitted | omitted |
| Scandal Period | 0.906** | | -0.179 | -0.495 | 0.354 | omitted |
| Post-SOX | 0.137 | 4.723 | -0.194 | 0.400 | -4.120 | -4.165 |
| Tolerance | 0.067 | 0.093 | -0.117 | -0.164 | 0.582 | -0.070 |
| Scandal Offense | -0.068 | omitted | -4.144 | 0.144 | 0.321 | 1.317 |
| Prior Record | 0.065 | - | 0.223 | 0.183 | 0.035 | omitted |
| Compliance | -0.566 | omitted | -0.279 | 0.153 | - | omitted |

| | | | | | | |
|---|---|---|---|---|---|---|
| Program | | | | | | |
| Base Fine | 0.028 | 0.103 | 0.022 | -0.031 | 0.278 | -4.95$_{E-4}$ |
| Culpability | -0.213 | -0.912 | 0.072 | 0.118 | -2.661 | -0.185 |
| Solvent | -0.271* | -0.006 | - | 0.060 | omitted | -0.440 |
| Number of Counts | -0.001 | -0.132 | -0.015 | 0.070 | 1.421 | 0.637 |
| Responsibility | -0.124 | -0.729 | -0.063 | 0.060 | -0.603 | 0.480 |
| Can't Pay | 0.123 | 3.683 | -0.187 | - | 0.136 | -1.127 |
| Plea | -0.072 | omitted | 0.111 | 0.209 | omitted | omitted |
| Fine Offset | omitted | omitted | 0.014 | -0.048 | omitted | omitted |
| Restitution | -0.013 | 0.002 | -0.026 | -0.010 | 4.459 | 5.527 |
| Post-Booker | 0.393 | 4.551 | 0.003 | -0.321 | -0.129 | 0.117 |
| Public | 0.177 | omitted | omitted | omitted | omitted | - |
| n= | 950 | 515 | 1029 | 1048 | 287 | 440 |
| $R^2$ | 0.1092 | 0.3195 | 0.0417 | 0.0825 | 0.03784 | 0.4297 |

*p<.05, two-tailed
** p<.01, two-tailed

Analyses were conducted to determine the effect of the specific cases that were dropped. That is to say, did the dropped cases result in biased coefficient estimates? To do so, I ran both the fully specified fine and probation models, excluding the problematic variables, using all available cases. I then ran the same model with only the cases included in the main analyses. The purpose of this was not to attain reliable coefficient estimates (as they will suffer from omitted variable bias), but to compare the coefficients between the models with all available cases and the models with only the main analysis sample. Because the signs, magnitude, and significance of parameters are similar between the full and main samples, this suggests that the cases dropped for the main analyses did not bias the main model findings.

## TABLE B.7 SENSISTIVITY TO MISSING CASES

| | Harsh Fine | Harsh Fine - Full Model Cases Only | Probation | Probation - Full Model Cases Only |
|---|---|---|---|---|
| | β | β | β | β |
| Scandal Period | 0.439 | 0.496 | 0.0115 | 0.077 |
| Post-SOX | -0.124 | 0.124 | -0.140 | 0.034 |
| T1*Tolerance | -0.002 | -0.073 | 0.106 | 0.164 |
| T1*Sc.Off. | -0.259 | 0.025 | -0.529 | -0.440 |
| T2*Tolerance | 0.134 | -0.030 | 0.117 | 0.112 |
| T2*Sc.Off. | 0.385 | 0.457 | -0.222 | -0.21 |
| Tolerance | 0.189** | 0.321** | -0.146** | -0.174** |
| Scandal Offense | 0.223 | 0.220 | 0.383* | 0.436* |

| | | | | |
|---|---|---|---|---|
| Prior Record | - | - | - | - |
| Compliance Program | - | - | - | - |
| Base Fine | -0.356** | -0.347** | -0.018 | 0.002 |
| Culpability | 0.290 | 0.164 | 0.197 | 0.330 |
| Solvent | - | - | - | - |
| Number of Counts | 0.108 | 0.050 | -0.038 | -0.085 |
| Responsibility | - | - | - | - |
| Can't Pay | - | - | - | - |
| Plea | - | - | - | - |
| Fine Offset | -0.066 | -0.065 | 0.008 | -0.013 |
| Restitution | -0.028** | -0.042** | 0.046** | 0.044** |
| Post-Booker | 0.158 | 0.009 | 0.018 | -0.067 |
| Public | - | - | - | - |
| Fine | - | - | $-9.53_{E-9}$* | $-5.99_{E-9}$ |
| n= | 1329 | 1002 | 1362 | 994 |
| $R^2$ | 0.2456 | 0.2595 | 0.0541 | 0.0497 |

*p<.05, two-tailed
** p<.01, two-tailed


The
Sensitivity to missing plea data was conducted using supplemental data to replace missing values from FY 1998. The magnitude, sign, and significance of both independent and control variables are consistent, suggesting that the original model did not suffer due to the exclusion of 1998 cases.


## TABLE B.8 1998 PLEA RECODE

| | Harsh Fine | | Harsh Fine 1998 Plea Recode | |
|---|---|---|---|---|
| | β (S.D) | dy/dx | β (S.D) | dy/dx |
| Scandal Period | 0.608** (0.300) | 0.089 | 0.529* (0.293) | 0.074 |
| Post-SOX | 0.084 (0.251) | 0.009 | 0.003 (0.243) | 0.003 |
| T1*Tolerance | -0.061 (0.171) | -0.006 | -0.004 (0.167) | -0.0004 |
| T1*Sc.Off. | 0.084 (0.501) | 0.009 | 0.043 (0.499) | 0.004 |
| T2*Tolerance | 0.019 (0.126) | 0.002 | 0.078 (0.121) | 0.008 |
| T2*Sc.Off. | 0.457+ (0.347) | 0.636 | 0.418 (0.343) | 0.056 |
| Tolerance | 0.226* (0.118) | 0.023 | 0.160+ (0.103) | 0.016 |

103

| | | | | |
|---|---|---|---|---|
| Scandal Offense | 0.231 | 0.027 | 0.247 | 0.028 |
| | (0.231) | | (0.226) | |
| Prior Record | 0.492 | 0.065 | 0.417** | 0.052 |
| | (0.152) | | (0.146) | |
| Compliance Program | 0.144 | 0.016 | 0.083 | 0.009 |
| | (0.237) | | (0.231) | |
| Base Fine | -0.312** | -0.031 | -0.313** | -0.031 |
| | (0.037) | | (0.036) | |
| Culpability | 0.032 | 0.003 | 0.121 | 0.012 |
| | (0.427) | | (0.374) | |
| Solvent | 0.010 | 0.001 | -0.026 | -0003 |
| | (0.136) | | (0.130) | |
| Number of Counts | 0.105 | 0.011 | 0.143$^+$ | 0.014 |
| | (0.115) | | (0.110) | |
| Responsibility | -0.042 | -0.004 | -0.046 | -0.005 |
| | (0.141) | | (0.129) | |
| Can't Pay | -1.113** | -0.104 | -1.184** | -0.109 |
| | (0.205) | | (0.201) | |
| Plea | 0.034 | 0.003 | 0.146 | 0.013 |
| | (0.286) | | (0.278) | |
| Fine Offset | -0.058 | -0.006 | -0.070$^+$ | 0.007 |
| | (0.049) | | (0.012) | |
| Restitution | -0.029* | -0.003 | -0.021 | -0.002 |
| | (0.013) | | (0.012) | |
| Post-Booker | -0.019 | -0.002 | 0.016 | 0.002 |
| | (0.218) | | (0.217) | |
| Public | 0.002 | 0.0002 | -0.107 | -0.010 |
| | (0.441) | | (0.422) | |

$^+$ one tailed z-test p<.10
*one tailed z-test p<.05
**one tailed z-test p<.01

## APPENDIX C – SUPPLEMENTAL ANALYSES

It is possible that alternative coding of my dependent variables may reveal a different picture of sentencing patterns. In order to account for these possibilities, I considered multiple alternative dependent variables. To explore the possibility that judges were more likely to impose *lenient*, rather than punitive, fines during this time, I ran the fully specified model predicting a fine in the at or below the lower 25th percentile of the fine range. I also considered the likelihood of a downward departure. To determine the extent to which my results are sensitive to my precise specification of punitive sentences, I also ran the models predicting upward departures (more restrictive) and being sentenced above the midpoint (less restrictive).

## TABLE C.1 ALTERNATIVE SPECIFICATIONS OF THE DEPENDENT VARIABLE

| | At or Below 25th Percentile | Downward Departure | Above the Midpoint | Upward Departure |
|---|---|---|---|---|
| | β | β | β | β |
| Scandal Period (T1) | -0.268 | 0.367+ | 0.320 | 0.301 |
| Post-SOX (T2) | -0.063 | -0.029 | 0.235 | -0.004 |
| T1*Tolerance | -0.038 | -0.308* | -0.079 | -0.063 |
| T1*Sc.Off. | 0.100 | -0.065 | 0.226 | 0.060 |
| T2*Tolerance | 0.032 | -0.059 | -0.107 | 0.042 |
| T2*Sc.Off. | -0.029 | -0.317 | 0.029 | 0.126 |
| Tolerance | -0.260** | -0.185* | 0.210 | 0.158+ |
| Scandal Offense | -0.594** | -0.232 | 0.463 | 0.259 |
| Prior Record | -0.350** | 0.016 | 0.445** | 0.473** |
| Compliance Program | -0.180 | -0.036 | 0.149 | -0.205 |
| Base Fine | 0.250** | 0.293** | -0.284** | -0.222** |
| Culpability | 0.361 | 0.293 | -0.436 | 0.007 |
| Solvent | -0.014 | 0.008 | 0.069 | -0.068 |
| Number of Counts | 0.022 | 0.072 | 0.046 | 0.037 |
| Responsibility | 0.096 | -0.060 | -0.128 | 0.096 |
| Can't Pay | 1.245** | 1.984 | -1.105** | -0.662** |
| Plea | -0.145 | 0.210** | 0.272 | -0.125 |
| Fine Offset | 0.035 | 0.088** | -0.072* | -0.034 |
| Post-Booker | 0.147 | 0.602** | -0.138 | -0.091 |
| Restitution | 0.019** | 0.013+ | -0.016+ | -0.001 |
| Public | -0.450+ | -0.746* | 0.300 | 0.653* |
| n= | 1002 | 1002 | 1002 | 1002 |

| R$^2$ | 0.3024 | 0.4584 | 0.3051 | 0.2046 |
|---|---|---|---|---|



Proportion Sentenced to a Lenient Fine
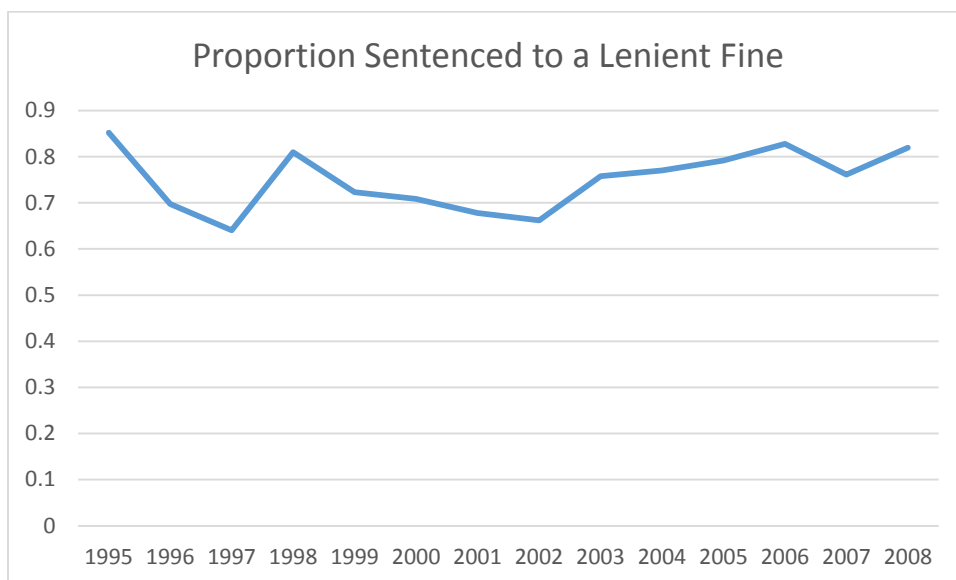
**TABLE C.2 POST-2000 FINE ANALYSIS**

|  | Model 1 | Model 2 | Model 3 |
|---|---|---|---|
|  | β | β | β |
| Scandal Period (T1) | 0.631[+] | 0.620[+] | 0.597[+] |
| Post-SOX (T2) | 0.056 | 0.055 | 0.055 |
| T1*Tolerance | -0.065 | -0.061 | -0.085 |
| T1*Sc.Off. | -0.027 | -0.034 | -0.004 |
| T2*Tolerance | 0.029 | 0.031 | 0.020 |
| T2*Sc.Off. | 0.227 | 0.339 | 0.379 |
| Tolerance | 0.147 | 0.145 | 0.142 |
| Scandal Offense | 0.383 | 0.386 | 0.390 |
| Prior Record | 0.490** | 0.494** | 0.489** |
| Compliance Program | -0.025 | -0.021 | 0.019 |
| Base Fine | -0.313** | -0.315** | -0.329** |
| Culpability | 0.486 | 0.503 | 0.547 |
| Solvent | -0.050 | -0.040 | -0.017 |
| Number of Counts | 0.047 | 0.043 | 0.047 |
| Responsibility | -0.124 | -0.111 | -0.089 |
| Can't Pay | -1.647** | -1.644** | -1.708** |
| Plea | 0.375 | 0.372 | 0.373 |
| Fine Offset | -0.014 | -0.015 | -0.026 |
| Restitution | -0.034* | -0.034* | -0.037* |
| Post-Booker | -0.007 | -0.030 | -0.055 |
| Public | 0.0001 | 0.008 | 0.010 |

106

| | | | |
|---|---|---|---|
| Industry | - | 0.0001 | - |
| Finance | - | - | 0.166 |
| Healthcare | - | - | 0.492* |
| n= | 689 | 688 | 689 |
| $R^2$ | 0.3909 | 0.3911 | 0.3986 |

[+] one tailed z-test p<.10
*one tailed z-test p<.05
**one tailed z-test p<.01

## REFERENCES

Albonetti, C. A. (1991). An integration of theories to explain judicial discretion. *Social Problems , 38* (2), 247-266.

Albonetti, C. A. (1997). Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992. *Law & Society Review , 31*, 789-822.

Albonetti, C. A. (1999). The avoidance of punishment: a legal-bureaucratic model of suspended sentences in federal white-collar cases prior to the federal sentencing guidelines. *Social Forces , 78* (1), 303-329.

Alexander, C. R., Arlen, J., & Cohen, M. A. (2001). *Evaluating Data on Corporate Sentencing: How Reliable are the U.S. Sentencing Commission's Data.*

Almond, P. (2008). Public perceptions of work-related fatality cases: Reaching the outer limits of "populist punitiveness"? *British Journal of Criminology* , 448-467.

Anderson, K. (2004). *Consumer fraud in the United States: An FTC survey.* Washington: Federal Trade Commission.

Aono, J. Y., & Guan, L. (2008). The impact of Sarbanes-Oxley Act on cosmetic earnings management. *Research in Accounting Regulation* , 205-215.

Arlen, J. (2011). The failure of the Organizational Sentencing Guidelines. *University of Miami Law Review , 66*, 321.

Ayres, I., & Braithwaite, J. (1992). *Responsive regulation: Transcending the deregulation debate.* Oxford: Oxford University Press.

Barak, G. (2012). *Theft of a Nation: Wall Street Looting and Federal Regulatory Colluding.* Plymouth, UK: Rowman and Littlefield Publishers, Inc.

Benson, M. L., & Cullen, F. T. (1998). *Combating Corporate Crime: Local Prosecutors at Work.* Boston, MA: Northeastern University Press.

Benson, M. L., & Walker, E. (1988). Sentencing the white-collar offender. *American Sociological Review , 53* (2), 294-302.

Bibas, S. (2005). White-collar plea bargaining and sentencing after Booker. *William & Mary Law Review , 47* (3), 721-741.

Block, M. K. (1991). Optimal penalties, criminal law and the control of corporate behavior. *Boston University Law Review , 71*, 395-.

Bottoms, A. (1995). The philosophy and politics of punishment and sentencing. In C. Clarkson, & R. Morgan (Eds.), *The Politics of Sentencing Reform* (pp. 17-49). Oxford: Clarendon Press.

Braithwaite, J. (1989). *Crime, Shame, and Reintegration.* New York: Cambridge University Press.

Brickey, K. F. (2006). In Enron's wake: Corporate Executives on trial. *Journal of Criminal Law & Criminology , 96* (2), 397-433.

Bright, S. B. (1997). Political attacks on the judiciary: Can justice be done amid efforts to intimidate and remove judges from office for unpopular decisions? *New York University Law Review , 72*, 308-336.

Bucy, P. H. (1993). Organizational sentencing: The cart before the horse. *Washington University Law Quarterly , 71* (2).

Chatham, D. A. (2006). Playing with post-Booker fire: The dangers of increased judicial discretion in federal white collar sentencing. *Journal of Corporation Law* , 619-639.

Clinard, M. B., & Yeager, P. C. (1980). *Corporate Crime.* New York: The Free Press.

Coffee, J. J. (2006). *Gatekeepers: The Professions and Corporate Governance.* New York: Oxford University Press.

Cohen, M. A. (1988). Corporate crime and punishment: A study of social harm and sentencing practice in the Federal Courts, 1984-1987. *American Criminal Law Review , 26*, 605-660.

Cohen, M. A. (1991). Environmental crime and punishment: Legal/economic theory and Empirical Evidence on enforcement of Federal environmental statutes. *Journal of Criminal Law & Criminology , 82* (4), 1054-.

Cohen, M. A. (1992). The motives of judges: Empirical evidence from antitrust sentencing. *International Review of Law and Economics , 12* (1), 13-30.

Comey Jr., J. B. (2009). Go directly to jail: White collar sentencing after the Sarbanes-Oxley Act. *Harvard Law Review , 122* (6), 1728-1749.

Cullen, F. T., Hartman, J. L., & Jonson, C. L. (2009). Bad guys: Why the public supports punishing white-collar offenders. *Crime, Law, and Social Change , 51* (1), 31-44.

Cullen, F. T., Link, B. G., & Polanzi, C. W. (1982). The seriousness of crime revisited: Have attitudes toward white-collar crime changed? *Criminology , 20* (1), 83-102.

Deevy, M., & Beals, M. (2013). *The Scope of the Problem: An Overview of Fraud Prevalence Measurement.* Financial Fraud Research Center.

Eitle, D. J. (2000). Regulatory justice: A re-examination of the influence of class position on the punishment of white-collar crime. *Justice Quarterly , 17* (4), 803-839.

Erikson, K. T. (1966). *Wayward Puritans: A Study in the Sociology of Deviance.* New York: MacMillan Publishing Group.

Frank, N., & Lombness, M. (1988). *Controlling Corporate Illegality: The Regulatory Justice System.* Cincinnati, OH: Anderson Publishing Co.

Frankel, M. E. (1973). *Criminal Sentences: Law Without Order.* New York: Hill & Wang.

Friedrichs, D. O. (2002). Occupational crime, occupational deviance, and workplace crime: Sorting out the difference. *Criminology and Criminal Justice , 2* (3), 243-256.

Gonzalez, H., Ingber, M. D., & Chesin, S. A. (2008). Is Booker a "loss" for white-collar defendants? *Federal Sentencing Reporter , 20* (3), 181-186.

Gruner, R. S. (1993). Beyond fines: Innovative corporate sentences under Federal Sentencing Guidelines. *Washington University Law Quarterly , 71*, 261-368.

Gustafson, J. L. (2006). Cracking down on white-collar crime: An analysis of the recent trend of severe sentences for corporate officers. *Suffolk University Law Review , 40*, 685.

Hagan, J. (2010). *Who are the Criminals? The Politics of Crime Policy from the Age of Roosevelt to the Age of Reagan.* Princeton, NJ: Princeton University Press.

Hagan, J., & Palloni, A. (1986). "Club-Fed" and the sentencing of white-collar offenders before and after Watergate. *Criminology , 24* (4), 603-621.

Hagan, J., & Parker, P. (1985). White-collar crime and punishment: The class structure and legal sanctioning of securities violations. *American Sociological Review , 50* (3), 302-316.

Hagan, J., Nagel, I., & Albonetti, C. (1980). The differential sentencing of white-collar offenders in ten federal district courts. *American Sociological Review* , 802-820.

Holtfreter, K., Van Slyke, S., Bratton, J., & Gertz, M. (2008). Public perceptions of white-collar crime and punishment. *Journal of Criminal Justice , 36* (1), 50-60.

Hough, M., & Roberts, J. V. (1999). Sentencing trends in Britain: Public knowledge and public opinion. *Punishment & Society , 1* (1), 11-26.

Hughes, S. B., Sander, J. F., & Snyder, J. K. (2009). Critical accounting policy and estimate disclosures: Company response to the evolving SEC guidance. *Research in Accounting Regulation , 21*, 19-33.

Johnson, B. D. (2003). Racial and ethnic disparities in sentencing departures across modes of conviction. *Criminology , 41* (2), 449-490.

Katz, J. (1979). Legality and equality: Plea bargaining in the prosecution of white-collar and common crimes. *Law and Society , 13* (2), 431-459.

Katz, J. (1980). The social movement against white-collar crime. In E. Bittner, & S. L. Messinger (Eds.), *Criminology Review Yearbook* (Vol. 2, pp. 161-184). Beverly Hills, CA: Sage Publications.

LaCapra, L. T. (2014, Feb 25). *Morgan Stanley could pay $275 million to settle SEC probe*. Retrieved 2014, from Reuters: http://www.reuters.com/article/2014/02/25/us-morganstanley-subprime-idUSBREA1O1X120140225

Levin, C., & Coburn, T. A. (2011). *Wall Street and the financial crisis: Anatomy of a financial collapse.* United States Congress, Senate. Cosimo Reports.

Li, H., Pincus, M., & Rego, S. (2008). Market reaction to events surrounding the Sarbanes-Oxley Act of 2002 and earnings management. *Journal of Law and Economics , 51* (1), 111-134.

Lynch, M. J., McGurrin, D., & Fenwick, M. (2004). Disappearing act: The representation of corporate crime research in criminological literature. *Journal of Criminal Justice , 32* (5), 389-398.

Martinson, R. (1974). What works? Questions and answers about prison reform. *The Public Interest , 35* (2), 22-54.

McNulty, P. J. (2006). *Principles of Federal Prosecution of Business Organizations.* Retrieved from United States Department of Justice: http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf

McShane, B. B., Watson, O. P., Baker, T., & Griffith, S. J. (2012). Predicting securities fraud settlements and amounts: a hierarchical Bayesian model of federal securities class action lawsuits. *Journal of Empirical Legal Studies , 9* (3), 482-510.

Murphy, D. E. (2001). Federal sentencing guidelines for organizations: a decade of promoting compliance and ethics. *Iowa Law Review , 87*, 697-719.

Mustard, D. B. (2001). Racial, ethnic, and gender disparities in sentencing: Evidence from US Federal Courts. *Journal of Law and Economics , 44* (1), 285-314.

Nagel, I. H., & Hagan, J. L. (1982). The sentencing of white-collar criminals in federal courts: A socio-legal exploration of disparity. *Michigan Law Review , 80* (7), 1427-1465.

Nagel, I., & Swenson, W. M. (1993). The Federal Sentencing Guidelines for corporations: Their development, theoretical underpinnings, and some thoughts about their future. *Washington University Law Quarterly , 71*, 205-259.

Nicholson, L. H. (2007). Sarbanes-Oxley's purported over-criminalization of corporate offenders. *Journal of Business & Technology Law , 2*, 43-.

Parker, J. S. (1993). Rules without: Some Critical Reflections on the Federal Corporate Sentencing Guidelines. *Washington University Law Review , 71* (2), 397-442.

Parker, J. S., & Atkins, R. A. (1999). Did the corporate criminal sentencing guidelines matter? Some preliminary empirical observations. *Journal of Law and Economics , 42*, 423-454.

Pasturis, P. (2002, Aug 26). *The Corporate Scandal Sheet*. Retrieved 2014, from Forbes: http://www.forbes.com/2002/07/25/accountingtracker.html

Paternoster, R., & Simpson, S. (1996). Sanction threats and appeals to morality: Testing a rational choice model of corporate crime. *Law & Society Review , 30* (3), 549-584.

Piquero, N. L., & Davis, J. L. (2004). Extralegal factors and the sentencing of organizational defendants: An examination of the Federal Sentencing Guidelines. *Journal of Criminal Justice , 32* (6), 643-654.

Pratt, J. (2002). Emotive and ostentatious punishment: Its decline and resurgence in modern society. *Punishment & Society , 2*, 417.

Pratt, J. (2007). *Penal Populism.* New York: Routlege.

Recine, J. S. (2002). Examination of the white collar crime penalty enhancements in the Sarbanes-Oxley act. *American Criminal Law Review , 39*, 1535-1570.

Rexrode, C., & Barrett, D. (2014, August 20). *Bank of America to Pay $17 Billion in Justice Department Settlement*. Retrieved August 27, 2014, from The Wall Street Journal Online: http://online.wsj.com/articles/bank-of-america-reaches-17-billion-settlement-1408560100

Roberts, J. V. (2008). Sentencing policy and practice: The evolving role of public opinion. In A. Freiberg, & K. Gelb (Eds.), *Penal Populism, Sentencing Councils, and Sentencing Reform* (pp. 15-30). Devon: Willan Publishing.

Roberts, J. V., Stalans, L. J., Indermaur, D., & Hough, M. (2003). *Penal Populism and Public Opinion.* Oxford: Oxford University Press.

Rockness, H., & Rockness, J. (2005). Legislated ethics: From Enron to Sarbanes-Oxley, the impact on corporate America. *Journal of Business Ethics , 57* (1), 31-54.

Rossi, P. H., Waite, E., Bose, C. E., & Berk, R. E. (1974). The seriousness of crimes: Normative structure and individual differences. *American Sociological Review , 39*, 224-237.

Schanzenbach, M., & Yaeger, M. L. (2005). Prison time, fines, and federal white-collar criminals: The anatomy of a racial disparity. *Criminology , 96*, 757-.

Shover, N., Clelland, D. A., & Lynxwiler, J. (1986). *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy.* Albany, NY: State University of New York Press.

Silberfarb, M. D. (2003). Justifying punishment for white-collar crime: A utilitarian and retributive analysis of the Sarbanes-Oxley Act. *13*, 95-.

Simpson, S. S. (2002). *Corporate Crime, Law, and Social Control.* Cambridge: Cambridge University Press.

Simpson, S. S. (1986). The decomposition of antitrust: Testing a multi-level, longitudinal model of profit-squeeze. *American Sociological Review , 51* (6), 859-875.

Simpson, S. S. (2013). White-collar crime: A review of recent developments and promising directions for future research. *Annual Review of Sociology , 39*, 303-331.

Simpson, S. S., & Weisburd, D. (2009). Introduction. In S. S. Simpson, & D. Weisburd (Eds.), *The criminology of white-collar crime.* New York: Springer.

Spohn, C. (2008). *How do judges decide?: the search for fairness and justice in punishment.* Thousand Oaks, CA: Sage Publications, Inc.

Spohn, C., & Beichner, D. (2000). Is preferential treatment of female offenders a thing of the past? A multisite study of gender, race, and imprisonment. *Criminal Justice Policy Review , 11* (2), 149-182.

Spohn, C., & Holleran, D. (2000). The imprisonment penalty paid by young, unemployed black and Hispanic male offenders. *Criminology , 38* (1), 281-306.

Stacey, A. M., & Spohn, C. (2006). Gender and the social costs of sentencing: An analysis of sentences imposed on male and female offenders in three US district courts. *Berkley Journal of Criminal Law , 11*, 43-76.

Steer, J. R. (2003). The Sentencing Commission's implementation of Sarbanes-Oxley. *Federal Sentencing Reporter , 15* (4), 263-269.

Steffensmeier, D., Kramer, J., & Streifel, C. (1993). Gender and imprisonment decisions. *Criminology , 31* (3), 411-446.

Steffensmeier, D., Ulmer, J., & Kramer, J. (1998). The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male. *Criminology , 36* (4), 763-798.

Stith, K., & Cabranes, J. A. (1998). *Fear of Judging: Sentencing Guidelines in the Federal Courts.* Chicago: University of Chicago Press.

Stretsky, P. (2006). Corporate self-policing and the environment. *Criminology , 44* (3), 671-708.

Stylianou, S. (2003). Measuring crime seriousness perceptions: What have we learned and what else do we want to know. *Journal of Criminal Justice , 31*, 37-56.

Sutherland, E. H. (1940). *White Collar Crime.* New Haven: Yale University Press.

Sutherland, E. (1945). Is "white-collar crime" crime? *American Sociological Review , 10* (2), 132-139.

Swigert, V. L., & Farrell, R. A. (1980-81). Corporate homicide: Definitional processes in the creation of deviance. *Law & Society Review , 15* (1), 161-182.

Szockyj, E. (1998). Imprisoning white-collar criminals? *Southern Illinois University Law Journal , 23*, 485-503.

Tyler, T. R., & Boeckmann, R. J. (1997). Three strikes and you are out, but Why? The psychology of public support for rule breakers. *Law & Society Review , 31* (2), 237-266.

United States Sentencing Commission. (1988). *Discussion Materials on Organizational Sanctions.*

United States Sentencing Commission. (2004). *Fifteen Years of Guidelines Sentencing.* Washington, DC: Author.

United States Sentencing Commission. (2006). *Final Report of the Impact of United States v. Booker on Federal Sentencing.*

United States Sentencing Commission. (2012). *Report on the Continuing Impact of United States v. Booker on Federal Sentencing.*

United States Sentencing Commission. (2003). *Report to Congress: Increased Penalties Under the Sarbanes-Oxley Act of 2002.*

Unnever, J. D., Benson, M. L., & Cullen, F. T. (2008). Public support for getting tough on corporate crime: Racial and political divides. *Journal of Research in Crime & Delinquency , 45* (2), 163-190.

Vakkur, N. V., McAfee, R. P., & Kipperman, F. (2010). The unintended effects of the Sarbanes-Oxley Act of 2002. *Research in Accounting Regulation , 22*, 18-28.

Weisburd, D. (1991). *Crimes of the Middle Classes.* New Haven: Yale University Press.

Weisburd, D., Waring, E., & Wheeler, S. (1990). Class, status, and the punishment of white-collar criminals. *Law and Social Inquiry , 15* (2), 223-243.

Wheeler, S., Mann, K., & Sarat, A. (1988). *Sitting in Judgment.* New Haven: Yale University Press.

Wheeler, S., Sarat, A., & Mann, K. (1988). *Sitting in Judgment: The Sentencing of White-Collar Criminals.* New Haven: Yale University Press.

Wolfgang, M. E., Figlio, R. M., & Sellin, T. (1972). *Delinquency in a Birth Cohort.* Chicago: University of Chicago Press.

Wray, C. A. (1992). Corporate probation under the new organizational sentencing guidelines. *The Yale Law Journal* , 2017-2042.