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Sentencing Disparities of White Collar Crime and Non-White Collar Crime

I. Introduction

The 2008 Recession and the current opioid crisis have had disastrous consequences for the poorest and most vulnerable in our society: many lost their homes, jobs, and even lives because of these crises. Both instances' damages were greatly augmented by acts of crime, white collar crime to be exact. For example, during the financial crisis, Countrywide Home Loans committed a substantial amount of mortgage fraud of which the banks that bought and sold the mortgages financed by Countrywide were aware.¹ The failure of these mortgages was the main catalyst for the financial crisis. Additionally, what has spurred the opioid epidemic are illegal acts perpetrated by Purdue pharmaceuticals and McKesson to grow the opioid market, regardless of the harm their proscription opioids posed to consumers.²

¹ Dominic Rushe, *Bank of America's Countrywide found guilty of Mortgage Fraud*, THE GUARDIAN, (Oct. 23, 2013), <https://www.theguardian.com/business/2013/oct/23/bank-of-america-countrywide-guilty-fraud>

²Jef Feeley & Jared Hopkins, *Purdue Approaches States to Settle Bid Claims*, BLOOMBERG, (Nov. 17, 2017), <https://www.bloomberg.com/news/articles/2017-11-17/purdue-is-said-to-approach-states-in-bid-to-settle-opioid-claims>; Anders Melin & Jef Feeley, *McKesson's Records Show Failed Opioid Oversight*, BLOOMBERG, (Dec. 8, 2017), <https://www.bloomberg.com/news/articles/2017-12-08/mckesson-investor-claims-board-failed-oversight-duty-on-opioids>; Larry Bernstein & Scott Higham, *We feel like our system was hijacked': DEA agents say a huge opioid case ended in a whimper*, WASHINGTON POST, (Dec. 17, 2017), https://www.washingtonpost.com/investigations/mckesson-dea-opioids-fine/2017/12/14/ab50ad0e-db5b-11e7-b1a8-62589434a581_story.html?utm_term=.8d8737a8f946

However, the resulting punishment for those corporate transgressions did not seem to fit the crime of impoverishing and laying off millions (Financial Crisis) and leaving thousands with addiction (Opioid Epidemic). The government agencies assigned with responding to this conduct were viewed by many as lenient when the fines levied were small and none of the corporate executives involved in these crimes went to jail. Upon first glance, it appears as though the Department of Justice, Securities and Exchange Commission, Drug Enforcement Agency, and others have neglected to put in the time, effort, and resources to punish white collar wrongdoers at McKesson, Countrywide Home Loans, and others to the fullest extent of the law.

When comparing white collar sentences to non-white collar sentences anecdotally, a disparity in punishment becomes quite apparent. For example, McKesson was fined \$150 million for violating the law by not reporting opioid distributions to the DEA. By not doing so, McKesson supplied and fueled an underground and illegal proscription opioid market.³ \$150 million is a small fraction of the company's revenue and profits; in 2017, McKesson recorded \$11.27 Billion in gross *profit*.⁴ Based on those statistics, McKesson made up for that fine in as little as a week. On the other hand, if you were to sell heroin, another opioid that many who have become addicted to McKesson's prescription opioids have turned to, your

³ Larry Bernstein & Scott Higham, *'We feel like our system was hijacked': DEA agents say a Huge opioid case ended in a whimper*, WASHINGTON POST, (Dec. 17, 2017), <https://www.washingtonpost.com/investigations/mckesson-dea-opioids->

⁴ McKesson Fiscal Reports (2017), <http://www.mckesson.com/about-mckesson/newsroom/press-releases/2017/mckesson-reports-fiscal-2017-fourth-quarter-results/>; See *We Feel Like Our System was Hijacked: DEA Agents Say a Huge Opioid Case Ended in a Whimper*.

sentence cannot be *any less* than one year under certain circumstances.⁵ It could be argued that McKesson's fraudulent efforts have resulted in thousands becoming addicted to opioids, including heroin. McKesson's punishment for that conduct is effectively moot after a handful of days. But, if an individual were to sell an opioid to one person, he or she would be sentenced to *at least* one year in prison with irreparable damage to his or her future. This discussion leads me to my core questions: (1) Is there a disparity between white collar crime sentences and non-white collar crime sentences?; (2) If so, why does this disparity occur?; (3) Is this disparity a fair and accurate outcome?

97% of criminal prosecutions end in a plea deal.⁶ Thus, the sentence recorded by the United States Sentencing Commission is most likely a sentence negotiated during a pre-trial agreement. This paper will show that a disparity in sentencing exists between white-collar sentencing and non-white collar sentencing through the amount of the "discount" from the United States Sentencing Guidelines that a criminal receives during that pre-trial agreement. To begin, this paper will introduce literature that I have researched that discusses the disparity and why it occurs. Next, the paper will explain a model which illustrates the disparity in simplistic terms. And finally, the paper will adjust the factors of the model and compare that adjustment with ethical theories of equity, ethics, and fairness.

⁵ Federal Mandatory Minimums, <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>

⁶ United States Sentencing Commission, Overview of Federal Criminal Cases – Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf

II. LITERATURE

A. Is There a Disparity?

In analyzing the data illustrating the sentences of white collar criminals and Non-white collar or street criminals, it becomes clear that there is a disparity between the discounted sentences of white collar criminals and non-white collar or street criminals.⁷ The following data comes from the US Sentencing Commission reports. These reports demonstrate that there are greater discounts from the US sentencing guidelines given to white collar defendants than non-white collar defendants. This disparity creates an inequity insofar as white collar criminals are given less of their Congressionally recommended sentence than non-white collar defendants.

⁷ The paper will refer to non-white collar crimes and street crimes interchangeably. Both phrases refer to the same type of crime.

1. *The Data*

WHITE COLLAR SENTENCES⁸

Crime	Guideline (months)	Sentence (months)	Percent Discount
Mortgage Fraud	42-49	22-27	48%
Tax Fraud	24-26	15-18	38%
Securities Fraud	74-107	49	33%
Copyright Infringement	24-27	12-14	50%

NON-WHITE/STREET CRIME COLLAR SENTENCES

Crime	Guideline (months)	Sentence (months)	Percent Discount
Powder Cocaine Possession	94-95	70-72	24%
Firearm – 924(c)	202-208	151-165	26%
Heroin Possession	87-91	63-70	28%

⁸ The data in the chart is drawn from the United States Sentencing Commission Reports. United States Sentencing Commission Report on Securities Fraud Sentencing for Fiscal Year 2016: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY16.pdf; United States Sentencing Commission Report on Mortgage Fraud Sentencing for Fiscal Year 2016: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Mortgage_Fraud_FY16.pdf; United States Sentencing Commission Report on Tax Fraud Sentencing for Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Tax_Fraud_FY16.pdf; United States Sentencing Commission Report on Copyright Infringement for Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Copyright_FY16.pdf; United States Sentencing Commission Report on Powder Cocaine Possession for Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Powder_Cocaine_FY16.pdf; United States Sentencing Commission Report on Heroin Possession for Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Heroin_FY16.pdf; United States Sentencing Commission Report on 924(c) Firearm Possession for Fiscal Year 2016, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY16.pdf

B. Why Does the Disparity Occur?⁹

Through conducting my literary research, it is apparent that three factors that most substantially influence sentencing are: cost of prosecution, potential benefits of prosecution, and judicial discretion. I have divided my literature review into two sections, white collar and non-white collar, and within each section is a discussion of the three aforementioned factors.

1. *White Collar*

a. Cost of Prosecution

Cost of prosecution refers to the resources required by the enforcing authorities to prosecute the defendants—here, white collar defendants. According to the literature, the cost of prosecuting white collar defendants is very high. The main reason is due to the complexity of white collar crime offenses. The complexity of the crime includes two elements: one, the crimes themselves are fantastically elaborate; and two, the prosecutor must prove the conduct is criminal.¹⁰ This complexity creates a substantial resource drain on the government. Additionally, due to this complexity and the substantial number of resources that a white collar defendant has, there is a perception that government attorneys have a low probability of winning these cases.

⁹ It should be noted that this paper, because 97% of all criminal sentences come as the result of a plea deal and not the consummation of a trial, will discuss the disparity in sentencing as one in terms of disparity in sentencing resulting from a plea deal. Therefore, the paper discusses the pros and cons of “prosecuting.” “Prosecuting” in this context refers to going to trial to seeking the maximum penalty as opposed to avoiding trial and settling for a much lesser sentence in a plea negotiation. Plea negotiated sentences, by their nature of being negotiated, are not the harshest sentence that could be secured by the prosecutor.

¹⁰ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

i. White Collar Crime Cases Require Substantial Government Resources to Prosecute

As discussed above, white collar crime cases require a substantial number of government resources because they complex crimes and it must be proven that the conduct is criminal.

A. White Collar Crimes Are Extraordinarily Complex

In non-white collar crimes or street crimes, immediately after the crimes are committed, like a robbery or homicide, a police officer shows up; citizens will know right away.¹¹ However, as Joseph Martinez states in his article entitled *Unpunished Criminals: Social Acceptability of White Collar Crimes in America*, “[t]here is a strong possibility that many white collar criminals are currently perpetrating various financial, economical, and other major frauds and schemes” while the average citizen is completely unaware. This comparison illustrates how white collar crimes are not openly and obviously occurring, like street crimes, but rather are hidden, disguised, and not always easy to uncover.

This discreet and hidden nature of white collar crime, contributes substantially to the complexity of prosecution. White collar crimes are typically committed by sophisticated individuals who disguise their scheme well while also making the scheme elaborate and intricate. A former FBI agent told me that “you must have your best people on the job” in order to uncover and de-construct a white collar crime.¹²

¹¹ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

¹² Telephone Interview with former FBI Agent (Mar. 2018).

The agent went on to say that the cases require greater skill and precision, suck more resources from the government, take substantially more time, and, as a result, these investigations can take many years.¹³ For the prosecutor, the demand in trying these intricate cases is just as substantial as investigating them.¹⁴

Prosecuting a white collar defendant takes the same time, resources, and effort to construct the crime, including the defendant's role in it, for the factfinder¹⁵ that is required of the investigating agents to uncover and gather evidence of the crime. Therefore, the demand on both the prosecution and investigating agents puts a substantial strain on the government. The people I interviewed concluded that because of this, the number of white collar crimes that are brought by prosecutors are limited in number.¹⁶ In sum, White collar crimes in and of themselves are significantly complex to uncover and explain to a jury, requiring much more government resources to investigate and prosecute.

B. White Collar Crimes Require that the Prosecutor Prove the Conduct is Criminal

In white collar cases, not only does the prosecutor have to convince a factfinder that the defendant committed the conduct that the prosecutor asserts, the prosecutor must also prove that the conduct itself is criminal.¹⁷ This element creates an

¹³ *Id.*

¹⁴ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

¹⁵ The factfinder can refer to either a judge or a jury depending on whether it is a bench trial (before the judge solely) or a jury trial.

¹⁶ Telephone Interview with former FBI Agent (Mar. 2018).

¹⁷ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

additional layer of complexity that is not present with street crimes. This could create a problem when prosecutors are explaining these crimes to a jury. The Bob Menendez trial is an apt demonstration of a jury not convinced of the criminal element.¹⁸ In the trial, Menendez admitted to committing the white collar crime acts alleged by the prosecution, but the jury was unconvinced that the conduct itself was criminal.¹⁹ This demand adds another hurdle that must be leapt over to succeed in the prosecution of a white collar criminal, thus resulting in even more time and effort from the individual prosecutor. Accordingly, the cost of prosecution from a resource perspective is quite high.

i. The Government has a Perceived Low Probability of Winning

According to the literature, the complexity of these crimes creates uncertainty regarding the possibility of conviction.²⁰ As a prosecutor, you are putting your career and reputation on the line when you take on a case; every case you take on is important to the construction of your profile as a lawyer.²¹ For cases these complex, there is a perceived low probability of winning. However, that is not the only issue working against the prosecutor, the defendant typically has a substantial amount of resources.²²

¹⁸ Laura Jarrett & Sarah Jorgensen, *Bob Menendez Trial Ends in Deadlock*, CNN, <https://www.cnn.com/2017/11/16/politics/bob-menendez-trial/index.html> (last visited March 25, 2018).

¹⁹ *Id.*

²⁰ Telephone Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

²¹ *Id.*

²² Telephone Interview with current White Collar Attorney, Former Public Defender (Mar. 2018).

A. Complexity of Cases

The complexity of the cases decreases the chance of the prosecutor succeeding at trial. There is a real risk that the Prosecutor might lose—the jury might not understand the crime or even that the criminal element is there. As demonstrated by the Bob Menendez trial, there can be times when the prosecutor proves that the individual committed the crime, but the jury is unconvinced that the crime is criminal.²³ The complexity of these cases, including the complex nature of the crime as well as proving the conduct was criminal, is an added element that decreases the chances of winning for a prosecutor in a white collar case.

B. Defendant's Resources

White Collar defendants have the resources to put up a substantial fight against the prosecutor at trial. First, the white collar defendant typically has a well skilled legal team made up of lawyers who are former Department of Justice prosecutors.²⁴ Not only that, white collar defendants have resources to obtain effective and convincing experts to further bolster their defense.²⁵ In sum, at trial, the white collar defendant has talented lawyers and substantial resources, allowing him or her to mount a formidable defense.

Even if the white collar defendant loses at trial, they have the resources to convince a judge to mitigate the jail time. According to a seasoned white collar

²³ Laura Jarrett & Sarah Jorgensen, *Bob Menendez Trial Ends in Deadlock*, CNN, <https://www.cnn.com/2017/11/16/politics/bob-menendez-trial/index.html> (last visited March 25, 2018).

²⁴ These prosecutors are also known as “AUSAs.”

²⁵ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

attorney, the sentencing phase is the most active part of a white collar criminal trial.²⁶ White Collar defendants can produce a litany of evidence to demonstrate that they should receive a lighter sentence than the guidelines.²⁷ This evidence would include: psychologists, commitments from future employers, a showing that community service has been lined up for the defendant, a packed courtroom full of family and friends, community leaders letters to the judge on the defendants behalf.²⁸ In other words, the legal team of white collar defendant can make a convincing argument that the defendant's punishment should be mitigated because the defendant has structure in the community to fully rehabilitate him or her.²⁹ The defendant has the resources to assure the judge that he or she will integrate seamlessly back into society and be law abiding. Even if the prosecutor were to prevail

²⁶ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

²⁷ *Id.*

²⁸ Michael Peppel of MCSi: The district court judge took into account the letters of support and handed down just a seven-day prison sentence the Judge concluded that the defendant was a "remarkably good man" "The recommended sentence was approximately eight to ten years based on the loss to shareholders of \$18 Million. The Sixth Circuit concluded that there was a 99.99% reduction in the sentence. Additionally, Mr. Wiess a symbol for the fight against corporate greed, was facing 40 years in prison if convicted on all counts, Mr. Weiss pleaded guilty to racketeering. But, after an outpouring of more than 250 letters to the court from supporters and a 125-page sentencing memorandum from his lawyer, Benjamin Brafman, Mr. Weiss was sentenced by United States District Judge John F. Walter to 30 months in prison and ordered to forfeit \$9.75 million and pay a \$250,000 fine. He served half his sentence in a federal correctional institution and the remainder confined at home. Finally, Rajat Gupta, had more than 400 letters sent on his behalf, including ones from Bill Gates, the Microsoft billionaire and philanthropist, and Kofi Annan, the former United Nations secretary-general." Peter Henning, *The Challenge of Sentencing White Collar Defendants*, NY TIMES, (Feb. 25, 2013), <https://dealbook.nytimes.com/2013/02/25/the-challenge-of-sentencing-white-collar-defendants/>.

²⁹ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018); Telephone Interview with current White Collar Attorney, Formal Public Defender (Mar. 2018).

over the challenging obstacles and obtain a guilty verdict, the prosecutor could fail to procure the sentence he or she desires because of a typical white collar defendants' ability to present a convincing rehabilitation structure. For these reasons, the probability of achieving the prosecutors desired outcome is greatly diminished.

b. Potential Benefits of Prosecution

The literature makes it clear that there are some benefits to prosecuting white collar criminals. According to Martinez's article, white collar crimes are significantly more harmful than street crimes. In fact, Martinez cites Eitzen who finds that in Florida the average cost per street crime is \$35; whereas, the average cost per white collar crime is \$621,000.³⁰ Therefore, it would appear to be a more effective use of time to go after white collar criminals rather than non-white collar criminals. Furthermore, prosecuting white collar criminals would appear to remove people who do far more damage to community than street criminals. However, in speaking with professionals in the field and researching published material, there does not appear to be a consensus on the benefits of prosecuting white collar criminals. Two possible benefits that were debated among the literature are: (1) deterring future individuals from committing these types of crimes; (2) demonstrating to the public that the justice system applies to everyone.

³⁰ Joseph P. Martinez, "Unpunished Criminals: Social Acceptability of White Collar Crimes in America" <http://commons.emich.edu/honors/382> (last visited March 25, 2018) (citing Eitzen, D., *Social Problems* (3rd ed. 1986)).

i. Deterring Future Conduct

In speaking with a former federal public defender, he argued that the prosecuting of white collar criminals has no real effect on behavior of future potential white collar criminals.³¹ Additionally, Peter Henning argued that even a sentence as severe as Bernie Madoffs' 150-years has little deterrent effect on those it is meant to deter.³² Henning surmises that because most white collar defendants don't believe that what they are doing is wrong, they are undeterred by people who have been convicted for similar, but not identical crimes.³³ In other words, because of the unique set of circumstances underlying each white collar crime, the deterrence is imprecise.³⁴ However, the former federal prosecutor I spoke to argued that prosecuting white collar defendants would have a substantial deterrent effect. He believes that if white collar crimes are prosecuted more consistently, this creates an added risk for business people to consider when deciding to engage in criminal behavior.³⁵ Accordingly, because it is disputed within the literature, it can only be surmised that deterrence of further crime is one of the *possible* potential benefits of prosecuting white collar criminals.

³¹ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

³² Peter J. Henning, Is Deterrence Relevant in Sentencing White-Collar Criminals?, 61 Wayne L. Rev. 27 (2015). Available at: <http://digitalcommons.wayne.edu/lawfrp/100>

³³ *Id.*

³⁴ *Id.*

³⁵ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

ii. Demonstrating to the Public That the Law Applies to Everyone

In an article by Kenneth Mann and Stanton Wheeler, one Judge interviewed points out that the perception is that the “rich are getting away with murder” with regard to white collar criminals lack of harsh sentences.³⁶ Additionally, people who *are aware* of the partial sentencing in favor of white collar criminals do believe that the justice system is rigged against them.³⁷ Accordingly, the literature generally supports the notion that the benefits of prosecuting more white collar crimes would include curbing the perception that the justice system favors the rich and well-connected.

c. Judicial Discretion

Judicial discretion has become a substantial factor in determining sentences for both white collar defendants and non-white collar defendants. This increased role is due to *United States v. Booker*, a Supreme Court decision that found that the federal sentencing guidelines were not binding on federal judges but merely advisory.³⁸ This decision granted discretion to judges in sentencing—allowing judicial bias back into the sentencing equation. This bias manifests itself in two different ways: identity and social danger bias. *Identity bias* refers to who the white collar

³⁶ Kenneth Mann; Stanton Wheeler; Austin Sarat, *Sentencing the White-Collar Offender*, 17 Am. Crim. L. Rev. 479, 500 (1980)

³⁷ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018). However, that attorney caveated that statement by highlighting those that are aware would acknowledge the benefit of prosecuting white collar criminals. He concluded that most people are unaware of the leniency that some white collar defendants receive.

³⁸ 543 U.S. 220 (2005)

defendant typically is whereas *social danger bias* refers to the notion that white collar defendants are not typically seen as social dangers.

A white collar criminal is typically middle-class or upper-class, white, well educated, financially and socially successful, and involved and influential in the community³⁹. The Judge who is also well-educated, financially and socially successful, and involved in the community.⁴⁰ Therefore, the white collar defendant's life touches the judge's life—he's not that much different than the judge.⁴¹ As one white collar attorney I interviewed said: "White collar defendants are like the judge. The defendant grew up and went to fancy schools, he looks like the judge, coaches his son's baseball team, on the board at schools, and has performed good deeds within the community."⁴² These similarities create a natural empathy for the white collar defendant which strongly correlates to a reduction in sentences.

It is also important to understand how the judges feel about what the defendants have done. There is a significant difference in how judges view street crime offenders and white collar offenders in terms of what danger they present to society.⁴³ Judges see street criminals as those which present an immediate physical danger to the public whereas white collar criminals are seen only as those who can inflict economic harm on the public. Accordingly, because the immediate physical

³⁹ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

⁴⁰ *Id.*

⁴¹ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

⁴² Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

⁴³ *Id.*

danger is more visceral to the public, it appears that judges are far more willing to sentence violent street criminals to prison than white collar criminals. One of the white collar attorneys that I interviewed described the outcome of that bias as such: “people going to jail for robbing a small amount from a gas station while others are sentenced much less for covertly stealing \$100 million.”⁴⁴

2. *Street Crime/Non-White Collar*

a. Cost of Prosecution

Non-white collar or street crime cases are viewed as “low hanging fruit” for the prosecutor.⁴⁵ The cases are very simple, the defendants typically have few to no resources, and therefore, prosecutors are typically successful when prosecuting a street crime.

i. Simplicity of Cases

Street crime cases are very simple. Typically, when a non-white collar defendant is arrested, the officers have all the evidence to prove the crime. The only issue in the case that could be disputed is whether the person the police have arrested in fact committed the crime.⁴⁶ A white collar attorney described this lack of complexity in street crime cases via a scenario: “when a 7-11 is robbed, all you need to do to prove that (x) robbed the 7-11 is the video camera of him doing it and a testimony from the clerk who was at the store when it was robbed.”⁴⁷ Therefore, these

⁴⁴ *Id.*

⁴⁵ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

⁴⁶ *Id.*

⁴⁷ *Id.*

kinds cases do not put a substantial strain on government resources to prosecute. Compare that scenario to the complexity of white collar crime cases and it is easy to understand why the prosecutors have much more leverage in non-white collar crimes than white collar crimes.

ii. High Probability of Winning

The lack of complexity and the lack of resources result in street crime cases being much easier to prosecute—prosecutors have a much greater chance at winning. Therefore, the cost of prosecuting is very low because the crimes are simple and the street-crime defendant is under-resourced.

A. Defendant's Low Resources

Defendants in non-white collar crime or street crime cases typically do not have the resources that white collar defendants have. Street crime defendants will likely have an over-worked and under-resourced public defender trying their case rather than a skilled, experienced, and well-resourced private white collar attorney.⁴⁸ Furthermore, street crime defendants typically will not be able to provide the structure during sentencing that helps to mitigate the sentence: no letters from community members, no guarantees of employment after punishment, and no courtroom full of supporters.⁴⁹ This resource imbalance gives the prosecutor greater leverage during plea negotiations not only because the prosecutor has a greater

⁴⁸ *Id.*

⁴⁹ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

chance of winning the trial, but also because of the lack structure the defense attorney is likely able to build for his client during a sentencing proceeding.⁵⁰

b. Potential Benefits of Prosecuting

The benefits of prosecuting street crimes are quite obvious but far from numerous. There is a real, visceral effect that prosecutors are fighting crime—that violent criminals are being locked up.⁵¹

The primary benefit of prosecuting street collar defendants is the real and visceral appearance that prosecutors are fighting crime. Today, when people think of crime, they typically think of drug dealers and murderers. Therefore, when prosecutors punish drug dealers and murders to the fullest extent, the prosecutors send a message to the public that the justice department is fighting crime and punishing criminals. Additionally, there is a tangible benefit of removing violent offenders off the street. Prosecuting street criminals both gives the the public a feeling that they are safer and the tangible effect of one less violent criminal on the street.⁵²

c. Judicial Discretion

Unlike the bias in favor of white collar criminals, judicial bias works against

⁵⁰ *Id.*

⁵¹ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

⁵² While deterrence was discussed as a benefit in the initial draft. I have chosen to omit that discussion. There is very little support for the notion that prosecuting street criminals has a deterrent effect. See Paul H. Robinson, John M. Darley; Does Criminal Law Deter? A Behavioural Science Investigation, *Oxford Journal of Legal Studies*, Volume 24, Issue 2, 1 July 2004, Pages 173–205, <https://doi.org/10.1093/ojls/24.2.173>

street crime defendants. Street crime defendants look *nothing* like the judges: both in physical appearance and in background.⁵³ Street crime defendants did not go to elite schools, they are not involved in the community, and they are not close with influential members within the community.⁵⁴ Additionally, there is no part of the defendant's life that reflects the life of the judge.⁵⁵ Therefore, because judges cannot relate to the street crime defendant, they are more likely to give them tougher sentences.⁵⁶ In sum, unlike white collar defendants, street crime defendants do not receive the benefit of judicial discretion.

III. METHODOLOGY

In order to obtain a sense of whether and why discounts are greater for one type of crime than another, I developed a model of the discount from sentencing. This model is depicted in equation (1).

$$(1) \text{ discount from sentencing guidelines} = f[(\text{cost of prosecution}) - (\text{benefits of prosecution}), \infty]$$

∞ = Judicial discretion/bias

This model will allow me to evaluate the aforementioned factors and how they work together to impact sentencing for both white collar criminals and non-white collar criminals. The key element of this model is that sentencing is a function of the net benefits of prosecuting and judicial discretion. The net benefits of prosecuting is

⁵³ Telephone Interview with current White Collar Attorney, Former Federal Public Defender (Mar. 2018).

⁵⁴ *Id.*

⁵⁵ Telephone Interview with current White Collar Attorney, Former Federal Prosecutor (Mar. 2018).

⁵⁶ This ability relates to the judicial discretion brought up in the discussion of judicial discretion regarding white collar defendants.

the cost of prosecution minus the benefits of prosecution. The conventional view is—as noted in the literature review section—that the cost of prosecution is high for white collar crime while the benefits are low. This alone would lead to a large discount from the US Sentencing Guidelines. However, the additional factor of judicial discretion also increases the white collar defendant’s discount. The reverse is true for non-white collar defendants: the costs are low, the benefits are moderate, and judicial discretion is against the defendant. This understanding of the factors for non-white collar defendants drives the discount down. This model then explains why there is a disparity in the discounts.

However, there is reason to believe the existing discount disparity facing white collar crime is excessive due to a miscalculation of the perceived benefits and the costs of prosecution—which I will elaborate below.

IV. ANALYSIS

Using the model outlined above, I will demonstrate that the current sentencing disparity is not a natural or a logical outcome but rather the result of miscalculation and misevaluation of the input factors (cost of prosecution, benefits of prosecution, and judicial discretion). Pursuant to the literature’s evaluation of the input factors, the outcome of the model is a substantial discount disparity⁵⁷ between white collar and non-white collar crime. However, if the factors are appropriately evaluated and assessed, the model will produce a different result than the present discounts for both white collar crime and non-white collar crime.

⁵⁷ Discount disparity refers to the degree of departure of the actual sentence from the sentencing guidelines.

A. White Collar Crime

As demonstrated by the chart on page 4, there is a substantial disparity between the discount received by white collar criminals during plea deals and the discount received by non-white collar criminals. However, this disparity should not be as substantial as the chart demonstrates. At the very least, the sentencing disparities of white collar and street crime should be aligned with each other. I will argue that if the input factors which I have described in my literature section were calculated more accurately, white collar sentencing would get a much smaller discount than current practice has produced. I argue that the input factors for determining the appropriate plea agreement discount for a typical white collar defendant have been misevaluated. Specifically, I believe that the cost of prosecution for white collar crime has been overvalued and the benefits of prosecution are *substantially* undervalued.⁵⁸

1. *Cost of Prosecution*

I will split the cost of prosecution into two sections: one that discusses the sheer resource drain that white collar crimes present and second into a discussion of the probability of winning. The literature I researched led me to conclude that the complexity of white collar crimes and the resource drain these crimes require to

⁵⁸ Judicial Discretion will not be discussed. Judicial discretion granting favor on an individual via the sympathies and empathies of judge that he or she has no control, nor can recognize the existence of, are innate of human relationships. To argue that this input factor is misevaluated or miscalculated would be an argument that unrecognizable human empathy and sympathy can be recognized and therefore adjusted; a near impossible argument to substantiate. For that reason, I decline to discuss a misevaluation or a miscalculation of judicial discretion in its effecting of white-collar or non-white collar crime sentencing.

properly argue is an important factor in increasing the cost of prosecution. Additionally, the literature supports the notion that because the probability of winning white collar cases is so low, that prosecutors shy away from even pursuing them. In the following paragraphs, I will argue that prosecutors have the necessary resources and skill to demystify the complexity of white collar cases and therefore have a chance at winning those cases. Therefore, the formula *should* reflect a greater probability of winning than the literature and current model current support. Accordingly, the cost is of prosecuting white collar criminals is lower than the conventional perception because the government has the resources and skill to adequately challenge white collar defendants.

a. The Government has the Resources and Skill to Adequately Fight White Collar Cases

The cost of prosecution is misperceived as too high. One of the primary reasons behind this inappropriately high evaluation is the complexity of a white-collar criminal case. While the cases are complex and require substantial effort to investigate and then reconstruct for the jury, it is my opinion that there needs to exist a greater prosecutorial vigor to try these cases and seek punishment to the fullest extent. Prosecutors should be influenced by a patriotic and civic duty and put in the time and effort to de-construct and re-construct these white collar cases.

The government has the time, effort, and capable skill to adequately fight these cases. There is no entity in the United States with greater resources than the federal

government.⁵⁹ This includes, but is not limited to, the government's leverage in the court system and the tens of thousands of lawyers who work in the Department of Justice ("DOJ") and its state contemporaries. Furthermore, there are numerous attorneys within the Department of Justice whose primary duty is to identify and prosecute white collar crimes.⁶⁰ Accordingly, the government should not be intimidated by the resources of a corporation and especially not those of a single white collar defendant.

DOJ lawyers themselves have the resources and the capabilities to prosecute these cases to the fullest extent. While white collar defense attorneys are skilled lawyers, federal prosecutors are also well skilled and talented. "AUSAs," as they are commonly known as, are some of the most sought after legal positions in the industry. It is without a doubt that some of the most skilled and motivated lawyers end up as AUSAs, or at the very least, spent some time as one. Therefore, federal prosecutors should not be afraid of challenging private white collar defense attorneys. Federal prosecutors themselves are equally as talented and skilled lawyers as the defense attorneys are. In fact, some of those defense attorneys might be applying for the prosecutor's job. In sum, the government has the resources as well as the skill to challenge white collar defendants. Accordingly, the notion that the "cost" of prosecuting is so high because the government is over-matched is inaccurate.

⁵⁹ It should be noted that majority of white collar cases are federal cases as majority of white collar crimes are federal crimes.

⁶⁰ Department of Justice Website, Sections within the Criminal Division <https://www.justice.gov/criminal/sectionsoffices>

b. The Government Does Have an Adequate Probability of Winning

The probability of winning is not properly assessed by the literature. White Collar cases are tough, and you *may* lose as a prosecutor, but the prosecutor does have greater than 50/50 odds to secure the sentence sought after at trial. A prosecutor is up against skilled and well-resourced opponents. However, as discussed above, the prosecutor themselves is equally, if not greater, resourced and possesses the requisite skill to fight the case at trial. Put in the time, put in the effort, be willing to do the right thing and go after these criminals, and prosecutors will find that they have a greater chance at securing these harsher sentences than originally thought.

2. Benefits of Prosecution

The benefits of prosecuting white collar criminals are substantially undervalued by the literature. There are substantial benefits to the public, including tangible and intangible benefits, and there are a variety of benefits to the business industry. Compile these aforementioned benefits together and the total benefit for prosecuting white collar criminals is significant—a level of significance the current model and literature do not reflect.

a. Benefits to the Public

Prosecuting white collar criminals has a substantial benefit to the public. This benefit includes the tangible benefits such as curbing large-scale fraud and exploitation of the American consumer as well as intangible benefits such as demonstrating that no one, no matter how rich and powerful, is above the law.

i. Tangible

White collar crimes exploit Americans who then become dependent on the government. Therefore, the public has a strong interest in deterring this conduct. Prosecutors taking white collar criminals to trial to ensure the strongest punishment will create that deterrence⁶¹ and thereby decrease the overall tax burden of Americans. To support my argument of the tangible benefits to the public of prosecuting white collar crime to the fullest extent, I will discuss the 2008 mortgage crisis and the current opioid epidemic and how an effective deterrence would have minimized the impact of these crises. In particular, I will focus on the tangible benefit that would have occurred had mortgage lenders, including Countrywide, and prescription opioid manufacturers, including McKesson, been punished to a much greater extent. I will argue that prosecuting mortgage lenders who helped perpetuate the mortgage crisis and McKesson more vigorously would serve as a deterrent against exploitative conduct.

Prior to the mortgage crisis itself, mortgage lenders, in sum, were executing loans to individuals the lenders knew the individuals could never pay back.⁶² These loans were then collected with other loans that lenders knew would never be paid

⁶¹ As mentioned in the literature section, there is a debate as to whether prosecuting white collar criminals would deter white collar criminal behavior. I strongly believe that it would. If white collar criminals are punished more consistently and thoroughly, a substantial risk is created which the potential perpetrators will cite when deciding *not* to commit white collar crimes.

⁶² John Duca, *Subprime Mortgage Crisis*, Federal Reserve History, https://www.federalreservehistory.org/essays/subprime_mortgage_crisis, (last visited March 25, 2018).

back and sold off to other lenders and buyers.⁶³ What the lenders were doing was, essentially, predatory lending and securities fraud in order to make more money for themselves.⁶⁴ None of these lenders faced any jail time and Countrywide, the most significant perpetrator in this scheme, is still in business today.⁶⁵

After the financial crises, the US government responded by creating and passing Dodd-Frank, the consumer protection act, which established the Consumer Financial Protection Bureau (CFPB). The CFPB focuses on going after these lenders themselves and ensuring they do not execute predatory loans.⁶⁶ The implementation of Dodd Frank costs tens of billions of dollars.⁶⁷ More importantly, this conduct resulted in the collapsing of some US banks, who were granted substantial government bailouts, and a nationwide stimulus of government money; a cost in the trillions of dollars.⁶⁸

⁶³ *Id.*

⁶⁴ Securities fraud involves the selling of mortgages the sellers knew were going to fail. See Francinne McKenna, *DOJ Sues Barclays Bank for Crisis-Era Mortgage Securities Fraud*, MARKETWATCH, (Dec. 22, 2016), <https://www.marketwatch.com/story/doj-sues-barclays-bank-for-crisis-era-mortgage-securities-fraud-2016-12-22>.

⁶⁵ Peter Henning, *Prosecution of Financial Crisis Ends in a Whimper*, NY TIMES, (Aug. 29, 2016), <https://www.nytimes.com/2016/08/30/business/dealbook/prosecution-of-financial-crisis-fraud-ends-with-a-whimper.html>.

⁶⁶ Ayesha Javid, *Dodd Frank Reaches costs of \$36 Billion in Sixth Year*, BLOOMBERG PROFESSIONAL SERVICES, (July 22, 2016), <https://www.bloomberg.com/professional/blog/dodd-frank-costs-reach-36-billion-sixth-year-2/>.

⁶⁷ *Id.*

⁶⁸ David Herszhehorn, *Congress Approves \$700 Million Wall Street Bailout*, N.Y. TIMES, (Oct. 3, 2008), <https://www.nytimes.com/2008/10/03/business/worldbusiness/03iht-bailout.4.16679355.html> (last visited March 25, 2018). When I am referring to a cost/benefit analysis of prosecuting, my argument is centered on the notion that if you were to prosecute these fraud crimes early on, the financial crises might have been prevented. I acknowledge the necessity for the government to prevent these large banks from failing.

The tangible benefit to the public is that punishing the fraud that perpetuated the mortgage crises would have acted as a deterrent from that conduct which ended up costing the American public trillions of dollars. If individuals are facing harsh punishment, it is unlikely they would be willing to systematically defraud millions of Americans—the benefit of making money hand over fist exploiting Americans no longer outweighs the cost. Furthermore, if the government were to deter these criminals through substantial punishment, the government’s need to spend trillions to bail out the big banks, and America as a whole, could have been avoided. If the government were to prosecute the first person who sold packaged subprime mortgage loans to an effective extent, there would be no second person selling those securities. This *could have prevented* the Economic Recession. Now, because that didn’t happen, what is to deter banks from engaging in bad conduct again, including packaging and reselling subprime mortgage loans, knowing they will get bailed out and no one will go to jail? Accordingly, the tangible benefit of prosecuting these mortgage lenders to the fullest extent is the deterrent effect it will serve thereby reducing or eliminating the cost on the American taxpayer.

Prosecuting McKesson’s violations of federal law by failing to report distribution numbers to the DEA would decrease the tax burden through deterrence of this behavior.⁶⁹ If McKesson were to have been substantially punished the first

⁶⁹ Anders Melin & Jef Feeley, *McKesson’s Records Show Failed Opioid Oversight*, BLOOMBERG, Dec. 8, 2017, <https://www.bloomberg.com/news/articles/2017-12-08/mckesson-investor-claims-board-failed-oversight-duty-on-opioids>; Larry Bernstein & Scott Higham, *‘We feel like our system was hijacked’: DEA agents say a huge opioid case ended in a whimper*, WASHINGTON POST, Dec. 17, 2017, <https://www.washingtonpost.com/investigations/mckesson-dea-opioids->

time they failed to follow the law, they would not have continued to commit illegal acts.⁷⁰ Instead, they continued to do so and thereby helped fill criminals' pockets with proscription opioids to sell on the street.⁷¹ As a result, of the lack of punishment for McKesson's initial violation of federal law, thousands more are now members of the opioid epidemic.⁷² However, if McKesson would have been punished and therefore deterred the first time, there would be a reduction in the number of people that are wards of the state because the addiction has left them completely incapable of caring for themselves. Discouraging exploitative and greedy behavior through prosecuting McKesson would reduce the number of people with addiction thereby reducing the number of people that require government assistance to overcome that addiction. Discouraging illegal behavior by McKesson could have minimized the opioid epidemic, saving millions in taxpayer dollars.

ii. Intangible Benefits

The intangible benefit of prosecuting white collar criminals is the demonstration to the public that the law applies to everyone. The demonstration that no matter how rich, powerful, or connected an individual is, that individual is not above the law. It is clear that there is already distrust in the overall fairness of the justice—especially among those that are poor. Therefore, if white collar criminals were to be prosecuted to the same extent that street criminals, majority of whom are

[fine/2017/12/14/ab50ad0e-db5b-11e7-b1a862589434a581_story.html?utm_term=.cbcab31baf78](https://www.fine/2017/12/14/ab50ad0e-db5b-11e7-b1a862589434a581_story.html?utm_term=.cbcab31baf78)

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

poor, are prosecuted, then the assertion that the justice system does not punish the rich is unsubstantiated. The justice system is an essential component of our democratic regime, and if there is no faith in its fairness, then our democratic regime as a whole is called into question. In sum, the intangible benefit to the public is the knowledge that the justice system applies fairly to all, thereby increasing the trust in justice system as an institution and in the Government as a whole.

b. Benefits to Business Industry

The primary benefit to the business industry of prosecuting white collar criminals to the business industry is that it curbs bad⁷³ behavior and encourages positive behavior by promoting fair business practices. Curbing bad behavior and encouraging good business practices is beneficial to the business industry because it encourages innovation and promotes positive stakeholder relationships. This benefit is substantial and should be considered by prosecutor when choosing to prosecute to the strongest extent.

i. Curbing Bad Behavior

Prosecuting white collar criminals to a greater extent acts as a deterrent against bad business behavior. Bad behavior occurs as the result of a risk-reward, cost-benefit analysis. If business people believe that if their bad conduct will bring about a substantial financial reward, the business person will be encouraged to engaged in that bad conduct if the cost of that conduct is outweighed by the benefit. Therefore, in order to discourage bad behavior, the cost, or punishment, must

⁷³ “Bad behavior” refers to business conduct that would qualify as a criminal, e.g. fraud.

outweigh the benefits. To discourage business behavior that is classified as white collar criminal behavior, which could yield substantial financial reward, the punishment must be substantial. Prosecuting white collar criminals to a much greater extent would curb industry practice away from bad business behavior. Prosecuting white collar criminals is beneficial to the business industry because it encourages innovation and promotes positive stakeholder relationships which increase efficiency and business longevity.⁷⁴

A. Encouraging Innovation

Curbing white collar crime would encourage innovation. I will illustrate this by discussing the Volkswagon (“VW”) emissions scandal. In the mid-2000s, VW instituted a firm wide goal of becoming the largest automaker in the world before 2020.⁷⁵ However, VW sales in the United States were lagging—they needed a strategy to increase sales in one of the world’s largest auto markets.⁷⁶ Rather than attempt to innovate and therefore sell a product that could help them corner the market, VW opted to cheat.⁷⁷

VW began aggressively marketing their diesel cars. VW characterized these

⁷⁴ While this paper will not discuss this, it is important to raise the issue as to why businesses themselves fail to recognize this benefit. I.e. Why aren’t business calling for their competitions’ heads when their competition cheats?

⁷⁵ Russell Hotten, *Volkswagon: The Scandal Explained*, BBC, (Dec. 10, 2015), <http://www.bbc.com/news/business-34324772>; Benjamin Zycher, *The Volkswagen Emissions Scandal and the Urge for Collective Punishment*, American Enterprise Institute, <http://www.aei.org/spotlight/the-volkswagen-emissions-scandal/> (last visited March 25, 2018).

⁷⁶ *Id.*

⁷⁷ *Id.*

cars as “clean diesels,” meaning that these vehicles had all the benefits of a diesel powered car (increased efficiency, greater reliability) without the downside of emitting copious amounts of toxic nitrous oxide.⁷⁸ To support this characterization, VW created a cheat device in the vehicles which resulted in emissions tests of the cars yielding fraudulent positive data.⁷⁹ The marketing campaign based on this characterization was effective—they sold nearly half a million of these vehicles with the cheat device.⁸⁰ However, it was all lie. In fact, the diesel cars that VW marketed as “clean diesels” were roughly 40 times more polluting.⁸¹ Rather than actually try and innovate and therefore engineer a powertrain that would be less polluting than a typical diesel, VW chose to cheat. VW cheated because they did not determine the cost of this act to be greater than the benefit. They decided that the increase in sales, helping them to achieve their goal of becoming the largest automaker in the world, was far greater than the punishment of getting caught cheating. However, if white collar criminals, like VW’s executives, were to be punished to a much greater extent, the cost would be higher, and in the case of VW, they would have likely chosen not to cheat the emissions testing but rather to innovate. While the innovation would have been expensive, it would have been a lesser cost than that of cheating and getting

⁷⁸ Russell Hotten, *Volkswagon: The Scandal Explained*, BBC, (Dec. 10, 2015), <http://www.bbc.com/news/business-34324772>; Benjamin Zycher, *The Volkswagen Emissions Scandal and the Urge for Collective Punishment*, American Enterprise Institute, <http://www.aei.org/spotlight/the-volkswagen-emissions-scandal/> (last visited March 25, 2018).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

caught. In sum, the benefit of prosecuting to a stronger extent is the creation of a more effective deterrent to encourage innovative behavior and discourage cheating.

B. Promoting Positive Internal Relationships

Promoting positive internal relationships is beneficial for the business industry because it increases business efficiency and longevity. Through the deterring of white collar crime, a positive, open, and honest internal culture is encouraged. However, if there is no deterring of white collar crime, which occurs through the permitting of substantially alleviated punishment, this promotes a dishonest and negative internal culture. The effect of this culture can be illustrated by the aforementioned VW example. Employees were encouraged to be deceptive towards one another so as to help maintain the secrecy of the emissions cheating scheme.⁸² This likely created poor internal relationships which lead to inefficiencies because co-workers did not feel as though they could openly communicate with their superiors or colleagues regarding any issue—cheating the emissions testing created an internal culture of lies and deceit within VW.⁸³ This internal culture exacerbated the problems for VW and resulted in a cover-up that was much more severe than the crime.

A business that is willing to lie, cheat, and steal from customers and their competition cannot escape the natural effect that their employees will be willing to practice that same conduct within the business. Internal employees lying, cheating

⁸² Charles Riley, *U.S. prosecutor: Volkswagen's top execs ordered emissions cover-up*, CNN, (January 10, 2017), <http://money.cnn.com/2017/01/10/news/volkswagen-vw-emissions-cheating-coverup/index.html>

⁸³ *Id.*

and stealing from each other results in co-workers being unable to communicate openly and honestly with each other. If coworkers no longer feel that way, the business will become inefficient. Co-workers will no longer feel they can work openly and honestly with their colleagues in addressing business issues and proposing new ideas. This internal culture results in unresolved problems and stagnant innovation. Additionally, an internal business culture like this encourages turnover and only leads to more bad behavior perpetuating these issues—all of which hurt business efficiency and long-term health. Accordingly, curbing white collar criminal behavior encourages positive internal relationships which increase business efficiency and longevity.

B. Non-White Collar or Street Crime

The input factors for the model of Non-White Collar crime's discount from the sentencing guidelines are appropriately evaluated. The cost of prosecution is low and the benefits are moderate. Accordingly, the model appropriately yields an accurate output. The inaccurate disparity⁸⁴ occurs because the cost of prosecuting white collar criminals and the benefits of prosecuting them are substantially miscalculated (see above). The disparity does not occur because the cost of prosecution or the benefits of prosecuting non-white collar criminals are miscalculated. The analysis focuses on the assertion that the white collar discount should not be as substantial as it is and that therefore the disparity in sentencing should not be as great as the conventional thinking permits.

⁸⁴ Referring to the disparity between white collar crime discounts and non-white collar crime discounts.

V. NORMATIVE

In this section, the analysis will be compared with the ethical theories of John Locke, Martha Nussbaum, and John Rawls.

A. John Locke

John Locke's view of equity, that equity is a prerequisite for a free society, contradicts with the current outcome of the model. The following inference can be surmised from the basics of Lock's theory. In creating an unequal disparity of sentencing, there is a creation of an unequal justice system. In creating an unequal justice system, there is a creation of an unequal society. Therefore, pursuant to that theoretical inference of Locke's ideas, in order to have a free society we must address the inequity in the sentencing.

My analysis concurs with Locke's theories that this form of equality is essential. In particular, I agree that if the sentencing discount for white collar crime was more comparable to thought of non-white collar crime, then people would see the justice system as a fairer one. Today, there are many in the public that view our justice system as one that strongly favoring the rich—punishing the poor to the fullest while letting the wealthy off with a slap on the wrist. This feeling of inequity results in a questioning of the justice systems and that questioning bleeds over to uncertainty regarding the fairness of the government and its institutions as a whole. This argument that I make parallels the inferences made from Locke's central theories. Therefore, my analysis aligns itself with Locke's equity theories.

B. Martha Nussbaum

Martha Nussbaum's outcome oriented theory of justice is based on her capability theory.⁸⁵ Nussbaum's capability theory states that justice is ensured if it focused on achieving an inherent human good illustrated by the fulfilling of a variety of factors.⁸⁶ Included in those factors are bodily health, bodily integrity, and affiliation.⁸⁷ Nussbaum argues that justice is achieved when human dignity is assured. In sum, Nussbaum does not focus on the procedure necessary to achieve that outcome, but that the outcome must be focused on the inherent human good.

The analysis runs parallel to Nussbaum's theory of outcome oriented justice. The central part of my argument for increasing the severity of white collar crime sentencing is that the benefit of sentencing, or the outcome, is so significant as to influence the carrying out of justice itself. Therefore, paralleling Nussbaum's theoretical framework, justice should be focused on achieving the outcome. The outcome that is established in the analysis is that the discount from the sentencing guidelines received as a white collar crime sentencing should not be substantially different than the discount received by non-white collar sentences. This would be establishing an inherent human good because it preserves human dignity in its promotion of fairness. Accordingly, the analysis in my paper aligns with Nussbaum's outcome oriented theories which are designed to preserve human dignity.

⁸⁵ Catherine Holst, *Martha Nussbaum's Outcome Oriented Theories of Justice*, Center for European Studies: University of Oslo, (Dec. 2010), <http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2010/wp-16-10.pdf>.

⁸⁶ *Id.*

⁸⁷ *Id.*

C. John Rawls

John Rawls' theory of punishment⁸⁸ posits that the justice system should be focusing on achieving a procedure that is to the public's overall satisfaction.⁸⁹ Rawls argues that justice is reached if that outcome is aligned with a reasonable public deliberation.⁹⁰ A reasonable public deliberation would mean that as long as the procedures of justice are followed the outcome is irrelevant.⁹¹ I am unsure whether, in this context, following the procedure refers to remaining within the guidelines and confines of the justice system or, proceeding to trial, the quintessential procedure in ensuring fairness of justice.

If it is the former, then the analysis deviates away from Rawls theories. The analysis is akin to the theories of Rawls. It is clear that simply focusing on the procedures of justice could allow for grossly disparate outcome. Regarding my topic, the outcome that is achieved is not one that violates the generally accepted procedures but rather is grossly unfair. While not always true, for the most part, the justice system procedures remain within the constraints of the rules written to constrain them. Therefore, if this is Rawls's understanding of procedure in this context, then the analysis does not align with his theories.

⁸⁸ While Rawls also posits a veil of ignorance and original position theories, my focus is rather on his view of justice insofar as where practiced and outlined procedure is followed, fairness results. While I recognize that veil of ignorance and original position theories of ethics would undermine current existing judicial bias, I would prefer to direct my focus on his theories regarding procedure.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

However, if Rawls procedure in this context refer to the procedure anticipated in the creation of our justice system, the trial, then the analysis somewhat follows Rawls. It follows insofar as there should be an encouragement of taking these criminals to trial because the trial is the procedure that the public finds satisfactory. In sum, Rawls' theory of justice either collides or rides along the reasoning in the analysis section; it depends on the interpretation of procedure in this context.

VI. CONCLUSION

There is a disparity between the sentencing of white collar criminals and non-white collar criminals. The disparity exists because of the differences in cost of prosecution, perceived benefits of prosecution, and inadvertent biases in judges. However, if the costs of prosecution and the benefits of prosecution were accurately evaluated, the model would not support a significant disparity in the discount between white collar crime and non-white collar crime. In sum, the current sentencing practice for white collar criminals is an inaccurate evaluation of the benefits of prosecuting and the cost of prosecuting.