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## PLEA BARGAINING'S SURVIVAL: FINANCIAL CRIMES PLEA BARGAINING, A CONTINUED TRIUMPH IN A POST-ENRON WORLD

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### *Introduction*

Occasionally, an event occurs which seems to mark the beginning of a new era, an irreversible shift in both perception and focus that changes the way we view the past and the present. When, in October of 2001, Enron collapsed as a result of corporate accounting fraud, many believed just such a day had arrived, and the quick succession of corporate scandals that followed only served to reinforce this belief.<sup>1</sup> WorldCom, Adelphia, Symbol Technologies, Dynegy, HealthSouth, and others combined to create a blinding image of greed

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1. See Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221 (2004) (describing the various corporate scandals following Enron); Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 671 (2002) ("Since Enron's implosion, an astounding string of accounting scandals have stunned the securities markets.").

and corruption that drew America into yet another war, a war on financial crimes.<sup>2</sup>

The government wasted no time responding to growing angst amongst investors and outrage throughout the country as thousands lost their life savings. The President, Congress, Department of Justice (DOJ), and United States Sentencing Commission (Sentencing Commission) all acted to “get tough” on corporate criminals.<sup>3</sup> Predominantly these government institutions focused on two reforms aimed at restoring confidence in the American financial system: increasing the number of criminal offenses available to prosecutors to fight fraud and increasing the prison sentences for those convicted. With these new tools, the government assured America that enforcement would increase and punishments would grow steadily more severe. So convincing were such proclamations, some in the legal community actually became concerned that increasing enforcement and lengthening sentences would lead to decreasing rates of plea bargaining. Seven years later, one must wonder whether all the predictions have become reality. It is certainly true that reforms in the shape of statutes and policies flowed from all sectors of American government following Enron. But such efforts mean little if the machine of federal prosecution did not change in response.

A review of statistics tracking government prosecutions, prison sentences, and rates of plea bargaining reveals that not only has the government’s focus on financial crimes not increased, but prison sentences for fraud have remained stagnant. Furthermore, the fears of those who believed plea bargaining was in jeopardy were unfounded. Plea bargaining continues to succeed in over 95% of federal cases. Why then did the predicted revolution in financial crimes prosecution not take shape, and why did so much effort die in the trenches of this American war? The answer, it appears, may be plea bargaining itself.

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2. See President George W. Bush, Remarks at the Presentation of the Malcolm Baldrige National Quality Awards, 1 PUB. PAPERS 356 (Mar. 7, 2002), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002\\_public\\_papers\\_vol1\\_misc&age=356&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002_public_papers_vol1_misc&age=356&position=all).

You know, we’re passing through extraordinary times here in America. We fight a war—a real war—to protect our homeland by bringing terrorists to justice. . . .

America is [also] ushering in a responsibility era, a culture regaining a sense of personal responsibility, where each of us understands we’re responsible for the decisions we make in life. And this new culture must include a renewed sense of corporate responsibility.

*Id.* at 358.

3. Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 721 (2005) (“As the media exposed ever more corporate corruption and shady dealing, lawmakers competed to prove their toughness on crime by raising sentences.”).

While prosecutors could have chosen to use new statutes and amendments to the United States Sentencing Guidelines (Sentencing Guidelines) passed in the wake of Enron to increase prosecutions and sentences, they did not. Instead, prosecutors are using their new tools to encourage defendants to accept plea agreements that include sentences similar to those offered before 2001, while simultaneously threatening to use these same powers to secure astounding sentences if defendants force a trial. The result is that the promises of post-Enron reforms aimed at financial criminals were unfulfilled and served only to reinforce plea bargaining's triumph.

Part I of this article examines the changes implemented by the government following the corporate scandals of 2001, many of which were directed at all manner of financial crimes, not just catastrophic corporate fraud. Part II discusses the proclamations made by the government regarding the success of the war on financial crimes and the predictions by the public, scholars, and the defense bar regarding the impact of post-Enron reforms. Part III analyzes Sentencing Commission statistics from 1995 through 2006 and reveals that since Enron, the government's focus on financial crimes has actually decreased, prison sentences for those convicted of fraud have remained stagnant, and the percentage of federal cases resulting in plea agreements has remained above 94.5%. Finally, Part IV postulates that, after all the government did in response to corporate accounting scandals, little has actually changed because prosecutors are using post-Enron reforms to encourage defendants to enter into plea agreements.

### *I. A Quick Road to the Front*

On July 9, 2002, President Bush created the Corporate Fraud Task Force, an organization of government agencies formed to "investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes."<sup>4</sup> In a speech describing the new Task Force, the President summarized the war that was taking place on Wall Street and in board rooms across the country.

Today, by executive order, I create a new Corporate Fraud Task Force, headed by the Deputy Attorney General, which will target major accounting fraud and other criminal activity in corporate finance. The task force will function as a financial crimes SWAT

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4. Exec. Order No. 13,271, 3 C.F.R. 245 (2003), *reprinted as amended* in 28 U.S.C. § 509 (Supp. IV 2004).

team, overseeing the investigation of corporate abusers and bringing them to account.<sup>5</sup>

This new financial SWAT team was only the beginning of a campaign of reforms aimed at increased prosecutions and sentences. While particular reforms, such as the creation of the Corporate Fraud Task Force itself, focused exclusively on catastrophic corporate fraud, many of the changes impacted financial crimes and fraud more generally. By implementing broad reforms alongside more targeted initiatives, the government took aim at all manner of economic wrongdoing in an effort to “win the war” on financial crimes.<sup>6</sup>

#### A. Congress

As one scholar aptly stated of Congress’s reaction to Enron and other corporate scandals, “Congress got in a tizzy over the crime *du jour*.”<sup>7</sup> The result of this frantic effort was the Sarbanes-Oxley Act of 2002 (SOX).<sup>8</sup>

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5. President George W. Bush, Remarks on Corporate Responsibility in New York City, 2 PUB. PAPERS 1194, 1196 (July 9, 2002), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=1196&dbname=2002\\_public\\_papers\\_vol2\\_misc](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=1196&dbname=2002_public_papers_vol2_misc).

6. See Letter from Eric H. Jaso, Counselor to the Assistant Att’y Gen., to Diana E. Murphy, U.S. Sentencing Comm’n Chair (Dec. 18, 2002), reprinted in 15 FED. SENT’G REP. 278, 278 (2003) [hereinafter December Letter from Eric H. Jaso] (discussing proposed amendments to the Sentencing Guidelines).

As we [the DOJ] have stated consistently, we believe that these penalty increases should apply not only to the billion-dollar cases that have dominated the news headlines in recent months, but also to the many so-called “lower-loss” criminal fraud cases that make up the bulk of federal prosecutions across the country. In addition to the WorldComs and Enrons, the Department prosecutes many smaller-scale frauds around the country that, while evidently less newsworthy, nonetheless constitute heart-rending calamities for their victims. Congress did not intend to ignore such cases and reserve severe punishment only for those whose illegal deeds make the front page.

*Id.*

7. Frank O. Bowman, III, *Pour Encourager Les Autres?: The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 435 (2004).

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 & 18 U.S.C.); see also Perino, *supra* note 1, at 672 (“[SOX] moved with [lightning] speed through the legislature and only seemed to pick up momentum with the revelation of each new accounting restatement.”).

President Bush signed SOX into law on July 30, 2002. See President George W. Bush, Remarks on Signing the Sarbanes-Oxley Act of 2002, 2 PUB. PAPERS 1319, 1319 (July 30, 2002), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002\\_public\\_papers\\_vol2\\_misc&page=1319&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002_public_papers_vol2_misc&page=1319&position=all). The three titles most relevant to prosecution and punishment of financial crimes are Titles VII, IX, and XI of SOX. Title VII created new obstruction of justice statutes, protected employees who reported criminal conduct up the

Heralded by President Bush as one of “the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt,” the law sought to restore investor confidence through sweeping changes to corporate structure and criminal statutes.<sup>9</sup>

As described by the DOJ, SOX contains provisions that reached white-collar crime on all levels, not just the small class of corporate malfeasance that ignited the rush to reform.

Central to [SOX] were substantial increases in the statutory penalties for the crimes most commonly charged by federal prosecutors in corporate fraud and obstruction-of-justice cases (so-called “white collar” crimes); [SOX] included specific and general directives to the United States Sentencing Commission to implement amendments to the sentencing guidelines responsive to these changes, and provided emergency amendment authority to underscore the urgency of taking prompt and substantive action.<sup>10</sup>

By creating new laws and amending old fraud provisions, SOX took aim at all financial crimes in an effort to increase prosecutions and prison sentences for an enormous class of defendants, not just the limited number of officers and directors involved in the major scandals of the day.

SOX’s first sweeping reform was to impose a fourfold increase in the maximum punishments for mail and wire fraud.<sup>11</sup> Prior to SOX, the maximum penalty for these commonly charged fraud statutes was five years. Under the revised statute, the maximum penalty skyrocketed to twenty years.<sup>12</sup> Similarly, SOX also increased the maximum penalty for attempt and conspiracy to defraud to twenty years.<sup>13</sup> Finally, SOX created the first criminal code

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ladder, and created a Title 18 Securities and Exchange commission offense. Title IX enhanced punishments for already existing crimes, created new criminal statutes, and directed the Sentencing Commission to amend the Sentencing Guidelines to reflect the seriousness of the crimes addressed in the legislation. Title XI also addressed obstruction of justice and retaliation by employers. *See generally* Sarbanes-Oxley Act of 2002.

9. Bush, *supra* note 8, at 1319.

10. December Letter from Eric H. Jaso, *supra* note 6, at 278.

11. *See* 18 U.S.C. §§ 1341, 1343 (2006) (imposing criminal penalties for mail and wire fraud); *see also* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 378-79 (2003) (comparing pre-SOX and post-SOX penalties for fraud).

12. *See* 18 U.S.C. §§ 1341, 1343; *see also* Perino, *supra* note 1, at 672 (“In addition to creating new crimes, [SOX] beefs up the penalties for certain existing crimes. Maximum penalties for mail and wire fraud are increased from five to twenty years.”).

13. *See* 18 U.S.C. § 1349 (defining punishment for attempts and conspiracies to commit criminal fraud offenses). SOX mandates:

Any person who attempts or conspires to commit any offense under this chapter

provision for securities fraud.<sup>14</sup> Mimicking the language used in the wire and mail fraud statutes, the securities provision created an offense for knowingly executing a scheme or artifice to defraud any person in connection with any security or in the purchase or sale of any security.<sup>15</sup> Perhaps believing a twenty year sentence for an offense so closely linked with the ongoing scandals unsuitable, SOX prescribed a maximum sentence of twenty-five years for this crime.<sup>16</sup> For prosecutors, SOX offered new tools to fight fraud inside and outside of corporate America and signaled that so-called white-collar criminals would no longer enjoy preferential treatment in a criminal justice system that had been wildly increasing sentences for varying types of offenses for over a decade.

### *B. Department of Justice*

Similar to Congress, the DOJ did not limit its reforms after Enron to catastrophic corporate fraud, though reforms such as the creation of the Corporate Fraud Task Force were certainly specifically directed at this area. Rather, many of the DOJ's most important new policies affected defendants throughout the federal system.

The first significant reform came in response to the PROTECT Act and the Feeney Amendment in 2003.<sup>17</sup> The Feeney Amendment prohibited federal judges from making downward departures during sentencing for any reason other than those specifically enumerated in the Sentencing Guidelines.<sup>18</sup>

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shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt of conspiracy.

*Id.*

14. See 18 U.S.C. § 1348; see also Brickey, *supra* note 1, at 231 (“[SOX] adds the first securities fraud crime to be codified in the federal criminal code . . .”).

15. See 18 U.S.C. § 1348.

16. See *id.*

17. See Prosecution Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28 & 42 U.S.C.).

18. PROTECT Act § 401(b)(1). The Department of Justice reiterated this policy in its September 22, 2003, memorandum regarding plea bargaining and charging decisions. See Memorandum from Attorney General John Ashcroft to All Federal Prosecutors (Sept. 22, 2003), reprinted in 16 FED. SENT'G REP. 129, 132 (2003) [hereinafter September Memorandum] (regarding the Department of Justice policy concerning charging criminal offenses, disposition of charges and sentencing) (“Accordingly, federal prosecutors must not request or accede to a downward departure except in the limited circumstances specified in this memorandum and with authorization from an Assistant Attorney General, United States Attorney, or designated supervisory attorney.”); see also Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1248 (2004) (“The Feeney Amendment, as enacted in the PROTECT Act, revealed deep Congressional dissatisfaction with the operation of the

Furthermore, the amendment required that when such departures were made, the departing judge had to place the reasons for the decision in writing.<sup>19</sup> On July 28, 2003, the DOJ clarified its support for the Feeney Amendment's restrictions on judicial discretion and instructed federal prosecutors regarding new procedures which would be implemented to ensure compliance.<sup>20</sup> The memorandum required prosecutors to vigorously oppose court actions that were inconsistent with the goals of the Feeney Amendment and to report federal judges who violated the Amendment's prohibitions.<sup>21</sup> The goal of the Department's memorandum was, in essence, to further restrict a defendant's ability to receive departures and, thus, increase prison sentences.<sup>22</sup>

The second major reform came on September 22, 2003, when Attorney General John Ashcroft issued a memorandum to all United States Attorneys clarifying the government's position on plea bargaining and the charging of criminal offenses.

It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.<sup>23</sup>

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federal guidelines system it had created.”).

19. PROTECT Act § 401(c)(1); *see also* Joy Anne Boyd, Commentary, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 602 (2004) (“The practical effect of this portion of the Feeney Amendment is to drastically reduce the opportunity for federal defendants to obtain more lenient sentences.”).

20. *See* Memorandum from Attorney General John Ashcroft to All Federal Prosecutors (July 28, 2003), *reprinted in* 15 FED. SENT'G REP. 375 (2003) [hereinafter July Memorandum] (regarding the Feeney Amendment to the PROTECT Act); *see also* Miller, *supra* note 18, at 1246 (“The Act directed the Department to adopt policies that discourage downward departures and encourage appeals of downward departures.”).

21. *See* Miller, *supra* note 18, at 1255.

22. *See* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 308 (2004) (“The politics of being tough on crime trumps the [Sentencing] Commission's technocratic expertise. The obvious result is more rules and fewer unilateral judicial departures. The less obvious result is a transfer of even more plea-bargaining power from judges to prosecutors, resulting in higher sentences on prosecutors' terms.”).

23. September Memorandum, *supra* note 18, at 130 (regarding the Department of Justice policy concerning charging criminal offenses, disposition of charges, and sentencing).

The government's aversion to charge bargaining and fact bargaining was revealed in the



The memorandum dictated that prosecutors stop offering reduced sentences in return for plea agreements if such deals excluded a readily provable offense for which the sentence was greater.<sup>24</sup> While many United States Attorney's Offices disputed the claim that this policy was not already in place, the reality of the plea bargaining machine before this memorandum was issued necessitated charge bargaining that led to a reduction in sentence.<sup>25</sup> If this were not the case, little incentive would have existed to encourage defendants to accept the government's offer.<sup>26</sup> Once again, through DOJ policy memoranda, the government implemented reforms aimed at increasing the average sentence of everyone in the criminal system, including financial criminals.

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July Memorandum from Attorney General Ashcroft regarding the Feeney Amendment, though this aversion was not discussed in as extensive detail as it was in the subsequent September Memorandum.

Similarly, in negotiating plea agreements that address sentencing issues, federal prosecutors may not "fact bargain," or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing. Nor may prosecutors reach agreements about Sentencing Guidelines factors that are not fully consistent with the readily provable facts.

July Memorandum, *supra* note 20, at 376 (regarding the Feeney Amendment to the PROTECT Act).

24. See Miller, *supra* note 18, at 1254 ("The memorandum includes fierce language mandating charges and limiting various kinds of plea bargains, subject only to 'certain limited exceptions.'"); see also Boyd, *supra* note 19 (discussing the September Memorandum).

25. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1077 (2006) ("Although there are some limited exceptions to this 'no charge bargaining' policy, the duty to charge 'the most serious, readily provable offense(s)' impacts the kind of plea offers an [Assistant United States Attorney] may make or what counter-offers an [Assistant United States Attorney] may accept." (footnotes omitted)); Miller, *supra* note 18, at 1256 ("It is striking that in 2003, after fifteen years of directing line prosecutors to make consistent, fully revealed and tough judgments, the Attorney General would think it necessary to *again* forbid concealment of facts, fact bargains, and agreements 'not fully consistent with the readily provable facts.'").

26. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 657 (1981).

Plea negotiation works . . . only because defendants have been led to believe that their bargains are in fact bargains. If this belief is erroneous, it seems likely that the defendants have been deluded into sacrificing their constitutional rights for nothing. Unless the advocates of plea bargaining contend that defendants should be misled, they apparently must defend the proposition that these defendants' pleas should make some difference in their sentences.

*Id.* (footnotes omitted).

*C. United States Sentencing Commission*

The final piece of the revolution regarding financial crimes came from the Sentencing Commission. Demands to increase sentences for financial crimes, however, predated the calamities of 2001. Responding to pressures that had begun in the mid-1990s—and shortly before Enron's collapse—the Sentencing Commission adopted significant changes to the Sentencing Guidelines with the implementation of the 2001 Economic Crime Package.<sup>27</sup> The reform package, which included consolidating fraud guidelines, amending loss tables, and modifying various other provisions, focused on significantly raising the sentencing ranges for mid-level and high-level fraud.<sup>28</sup> While the government seemed satisfied with these amendments at the time of their passage, the DOJ expressed concern that defendants charged with low-level fraud would not also face steeper sentences.<sup>29</sup> The government did not have to wait long to correct this perceived oversight.

The ink had barely dried on the 2001 Economic Crime Package when the Enron scandal revealed itself.<sup>30</sup> In an approach quite opposite to the six years

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27. For a thorough examination of the 2001 Economic Crime Package, see Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 7 (2001) [hereinafter Bowman, *Sentencing Reforms*] (“These measures, known collectively as the ‘economic crime package,’ were the culmination of some six years of consultation and debate by the Sentencing Commission, the defense bar, the Justice Department, probation officers, the Criminal Law Committee of the U.S. Judicial Conference (CLC), and the occasional academic commentator.”); Frank O. Bowman, III, *The Sarbanes-Oxley Act and What Came After*, 15 FED. SENT’G REP. 231, 231-32 (2003) [hereinafter Bowman, *Sarbanes-Oxley Act*] (“A year before the corporate scandals of 2002, the Sentencing Commission passed the so-called Economic Crime Package, a set of guidelines amendments effective in November 2001 that completely overhauled the sentencing of economic crime offenses. This package was the product of more than five years of careful study, consultation, and negotiation among the Commission, judges, probation officers, defense counsel, and the Department of Justice.”).

28. Bowman, *supra* note 7, at 389 (“The practical result was to slightly lower the sentences of some classes of low-loss offenders, while raising significantly the sentences of most mid- to high-loss offenders.”).

29. See Letter from Eric H. Jaso, Counselor to the Assistant Att’y Gen., to Diana E. Murphy, U.S. Sentencing Comm’n Chair (Oct. 1, 2002), reprinted in 15 FED. SENT’G REP. 270, 271 (2003) [hereinafter October Letter from Eric H. Jaso] (“[W]e remain concerned that the November 2001 amendments, which decreased sentences for lower-loss offenses, in particular for those offenders responsible for losses under \$70,000, will have a widespread detrimental affect [on] our ability to punish, and, as a result, to deter, such crimes.”); see also Bowman, *supra* note 7, at 412 (“In June 2002, the Department had pronounced itself happy with the 2001 Economic Crime Package, saving only its sentences for low-loss offenders.”).

30. See Bowman, *supra* note 7, at 392 (“On December 2, 2001, barely a month after the new economic crime guideline amendments became effective, the Enron Corporation filed the

of painstaking work that had gone into crafting measured and calculated reforms for the 2001 Economic Crime Package, the government's reaction to the new barrage of corporate scandals came in a blurred rush as Washington institutions fought for center stage.<sup>31</sup> As the dust settled, Sarbanes-Oxley emerged. While SOX is perhaps best known for the creation of new statutes and the amendment of statutory sentencing maximums, the law's more important legacy is its direction to the Sentencing Commission to review and amend the Guidelines within 180 days to "reflect the serious nature of the offenses and penalties set forth in [the] Act."<sup>32</sup> The message was clear, Congress had increased sentences for fraud by four times and expected the Sentencing Commission to make a similar demonstration of its commitment to increasing punishments for financial criminals.

By October 2002, the DOJ was calling on the Sentencing Commission to respond to the directions of SOX by increasing the applicable base offense level for all fraud defendants from six points to seven points.<sup>33</sup> The goal of the proposal was to correct the 2001 Economic Crime Package's lenient treatment of low-loss fraud and to increase both the number of defendants serving prison time and the length of such sentences.<sup>34</sup> This seems a strange focus for the DOJ given that the country was reacting to crimes involving hundreds of millions of dollars. For the DOJ, however, Enron created an opportunity to group all financial crimes together and force reforms that touched all levels of fraud. The Sentencing Commission responded to the pressure and implemented the requested change, though it limited the increase in base offense level to defendants convicted of an offense carrying a maximum sentence of twenty

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largest bankruptcy petition in U.S. history."); Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 ("[W]hen corporate scandal began dominating the news in early 2002, the Sentencing Commission was ahead of the curve.").

31. See Bowman, *supra* note 7, at 404 ("[I]n the weeks prior to Sarbanes-Oxley's enactment, a bidding war broke out between the House and Senate in which each chamber vied for the honor of raising statutory maximum sentences for fraud-related crimes the farthest. During the reconciliation process, the conferees simply accepted whichever figure was highest.").

32. See Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 386 (2003); see also Sarbanes-Oxley Act of 2002 § 905, 28 U.S.C. § 994 (Supp. IV 2004).

33. See October Letter from Eric H. Jaso, *supra* note 29, at 270 (discussing proposed amendments).

34. See *id.* at 271 ("We suggest . . . that the Commission modify the fraud loss table . . . in a manner that will ensure that incarceration is the rule, rather than the exception, in cases involving losses up to \$120,000. Our proposal is that the table be revised such that probationary sentences are reserved for truly minor offenders."); see also Bowman, *supra* note 7, at 416 ("[B]y raising the base offense level and changing the low end of the loss table, the Department sought to increase the number of defendants *required* to serve prison time.").

years or more.<sup>35</sup> Since SOX had increased the maximum sentence for the most commonly charged fraud provisions to twenty years, the Guideline's reform impacted almost every financial crimes case.<sup>36</sup> Commenting on the increase, Frank Bowman, a noted academic who has published voluminously on the subject of the Guidelines and who has previously served as Special Counsel to the Sentencing Commission, described the significance of the one point change in the loss table.

[T]hough a one-base-offense-level increase may seem insignificant, it actually has profound effects on thousands of individual defendants. It bumps up the sentencing range of every federal fraud defendant by one level, thus increasing the minimum guideline sentence of defendants subject to imprisonment by roughly ten percent. Even more importantly, it limits judicial choice of sentence *type* in four out of ten fraud cases prosecuted in federal court.<sup>37</sup>

Thus, while SOX led to numerous changes in the Sentencing Guidelines for catastrophic financial crimes, its more resounding impact was to create an atmosphere in which the DOJ could compel the Sentencing Commission to increase sentences for fraud generally.<sup>38</sup>

The reform of financial crimes enforcement had come to fruition and the tools to fight this war had been made available by the President, Congress, the

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35. See Bowman, *supra* note 7, at 432 ("Faced with the prospect that a Justice Department appeal to Congress would receive support not only from Republicans but also from a prominent Judiciary Committee Democrat [Senator Biden], the Commission voted for a broad-based, albeit small and curiously structured, sentence increase.").

36. See U.S. SENTENCING COMM'N, FINAL POST-SARBANES-OXLEY AMENDMENTS (2003), reprinted in 15 FED. SENT'G REP. 301 (2003) [hereinafter FINAL SOX AMENDMENTS].

37. Bowman, *supra* note 7, at 433 (footnote omitted); see also Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 231 ("And the apparently insignificant one-base-offense-level increase for fraud offenders will preclude probationary, home or community confinement, or split sentences for thousands of low-loss defendants.").

38. See Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 231 (2003).

The Justice Department, which in June 2002 had pronounced itself happy with the Economic Crime Package, in October 2002 discovered in Sarbanes-Oxley a mandate from Congress to the Commission to increase economic crime sentences on both corporate bigwigs and ordinary middle and low level fraud and theft defendants. DOJ proposed both specific enhancements for characteristically corporate crime, and a loss table amendment significantly increasing sentences for every defendant sentenced under Section 2B1.1 who caused a loss greater than \$10,000.

*Id.* at 232-33; see also John R. Steer, *The Sentencing Commission's Implementation of Sarbanes-Oxley*, 15 FED. SENT'G REP. 263 (2003) (discussing the numerous amendments to the Sentencing Guidelines resulting from the passage of SOX, including more general across the board enhancements for fraud).

DOJ, and the Sentencing Commission. As prosecutors reviewed all they had been given, the highest levels of government and the public itself waited anxiously for news of the results. The expectations were clear: America wanted news of increased prosecutions and staggering sentences.

## *II. From Those to Whom Much Is Given . . .*

During the post-Enron reform period, few days passed without a pronouncement from the government regarding a new corporate investigation, a victorious financial crimes trial, or a significant fraud sentence being handed down. From the beginning of the movement, Attorney General John Ashcroft set the tone by proclaiming that the future would include increased focus on financial crimes and increasingly harsh punishments for those convicted. Shortly before SOX became final, he stated that the proposed reforms would “make[] it clear that executives and companies will face tough penalties including longer jail sentences for individuals.”<sup>39</sup> Deputy Attorney General Larry Thompson, head of the Corporate Fraud Task Force, also reinforced the government’s message.

[T]hese [financial] crimes are particularly pernicious and appropriately the subject of intense—and that is what they are getting—law enforcement focus and action. . . .

. . . .  
. . . . Our goal is to separate the offenders from law-abiding companies. In many cases, that separation will be physical and for an extended term of years. My hope is that comprehensive enforcement efforts will restore investor confidence in the integrity of the market by demonstrating that financial criminals will pay—and they will pay with more than financial penalties.<sup>40</sup>

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39. Press Release, Dep’t of Justice, Attorney General Statement on Corporate Responsibility and the Creation of the Corporate Fraud Task Force (July 9, 2002), available at [http://www.usdoj.gov/opa/pr/2002/Jul/02\\_ag-388.htm](http://www.usdoj.gov/opa/pr/2002/Jul/02_ag-388.htm).

40. Larry D. Thompson, Deputy Att’y Gen., A Day with Justice (Oct. 28, 2002) (transcript available at <http://www.usdoj.gov/archive/dag/speech/2002/102802daywithjustice.htm>); see also Christopher Wray, *Prosecuting Corporate Crime*, ECON. PERSPECTIVES, Feb. 2005, at 12, 15, available at <http://usinfo.state.gov/journals/ites/0205/ijee/ijee0205.pdf> (“Much has been accomplished in the Department of Justice’s ongoing campaign against corporate fraud; however, much remains to be done. In order to restore full public confidence in the financial markets, continued strong enforcement will be necessary to increase the level of transparency of corporate conduct and of financial reporting and to strengthen the accountability of corporate officials.”).

Change was coming swiftly, argued the government, because the public's calls for change had been answered through legislation and policy initiatives.

It did not take long for the government to move beyond predicting success as a result of the government's new war on financial crimes and to begin proclaiming victory. Only a year after the formation of the Corporate Fraud Task Force, the financial SWAT team's first-year report to the President read like a recruiting poster.

Although our task was daunting, it was not impossible. On this one-year anniversary of the Corporate Fraud Task Force, I am pleased to report that the Task Force has responded to the President's call for action with impressive results. . . .

. . . .

. . . Since its creation, the Task Force has been involved in well over 320 criminal investigations involving more than 500 individual subjects. As of May 31, 2003, criminal charges were pending against 354 defendants. And 250 individuals have been convicted or pled guilty to corporate fraud charges.<sup>41</sup>

As the number of prosecutions being touted by the government swelled, public confidence in the markets grew and the public began to cheer the government's harsh response to the corporate improprieties that had permeated the country.<sup>42</sup>

The government was not resigned, however, to simply discussing the growing number of financial crimes cases being disposed of each year. Specific examples also existed to demonstrate the success of SOX and the Sentencing Guidelines amendments in increasing prison time. One of the most well-publicized cases was that of Dynegy's mid-level executive, Jamie Olis. Olis refused to enter into a plea agreement and was convicted in a \$105 million stock fraud scheme. Though his sentence was later reversed, the district court initially sentenced Olis to twenty-four years and four months in prison.

Only days and weeks before in the same district, drug dealers, a corrupt public official, a kiddie-porn collector and a six-time felon

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41. CORPORATE FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT, at iii (2003), available at [http://www.usdoj.gov/dag/cftf/first\\_year\\_report.pdf](http://www.usdoj.gov/dag/cftf/first_year_report.pdf). The second such report read much the same, proclaiming over 900 defendants had been charged within the Task Force's first two years. See CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT, at iii (2004) [hereinafter SECOND YEAR REPORT], available at [http://www.usdoj.gov/dag/cftf/2nd\\_yr\\_fraud\\_report.pdf](http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf).

42. See Tracy L. Coenen, *Enron: The Good, the Bad, and the Ugly*, WIS. L.J., June 7, 2006, available at <http://www.wislawjournal.com/archive/2006/0607/coenen-060706.html> (discussing public confidence in the markets as a result of the government's prosecutions).

caught possessing a gun all received less time behind bars. After Olis was sentenced, prosecutors were quick to mount soapboxes and proclaim that the days had ended when button-down crooks could expect little more than a sharp rap on the knuckles.<sup>43</sup>

The government praised the case as an example of the tough new punishments criminals faced, while the public watched with vindictive glee with memories still fresh of all that had been lost to such villains.<sup>44</sup>

The public was not the only group soaking up the government's claims that the new tools granted by Congress, the DOJ, and the Sentencing Commission were changing the face of financial crimes enforcement. Scholars also began writing about the reforms and the government's claims of increasing prosecutions. In a 2004 article regarding Enron's legacy, one scholar wrote, "Unprecedented marshaling of federal regulatory and law enforcement resources has contributed to significant criminal enforcement levels in the post-Enron era."<sup>45</sup> Whether in response to specific reforms enacted after Enron or as a result of the compilation of changes from various government institutions,

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43. John Gibeaut, *Do the Crime, Serve More Time*, ABA J. E-REPORT, Apr. 2, 2004, available at Westlaw, 3 No. 13 ABAJEREP 1; see also Carrie Johnson & Brooke A. Masters, *Cook the Books, Get Life in Prison: Is Justice Served?*, WASH. POST, Sept. 25, 2006, at A1 (describing the staggering sentences received by Bernard Ebbers and Jamie Olis). It should be noted, though it will be discussed in greater detail during this article's examination of differentials in sentencing after plea agreements as opposed to trials, that Olis's boss was sentenced to fifteen months after pleading guilty and agreeing to testify against his subordinate. See *id.*

The same type of comparison was made when Bernard Ebbers, former head of WorldCom, reported to prison to serve a twenty-five-year sentence that was akin to a life sentence for the sixty-five-year-old with heart ailments.

In the category of longest prison sentence, WorldCom Inc. founder Bernard J. Ebbers recently bested the organizer of an armed robbery, the leaders of a Bronx drug gang and the acting boss of the Gambino crime family.

Carrie Johnson & Brooke A. Masters, *Paying the Price for Cooking the Books*, WASH. POST WKLY., Oct. 2-8, 2006, at 20.

44. See SECOND YEAR REPORT, *supra* note 41, at 3.14 ("Following a trial and guilty verdict, on March 25, 2004, Dynegy's former Senior Director of Tax Planning/International Tax and Vice President of Finance was sentenced to more than 24 years for his role in a corporate fraud scheme."); see also Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 188 (2004) ("The effect of the increased penalties following the 2001 reform is reflected in the sentence received by Jamie Olis, a mid-level executive at Dynegy, an energy trading firm.").

45. Brickey, *supra* note 1, at 246; see also Bowman, *supra* note 7, at 398-99 ("[I]n keeping with the emphasis on moral failure, the list of governmental actions proposed by the President was headed by a call for increased enforcement of criminal laws and for 'tough new criminal penalties for corporate fraud.'").

many scholars also predicted that sentences for financial criminals would increase. Stephanos Bibas, who has written extensively about the post-Enron period, concluded one article by stating that the Feeney Amendment would result in fewer departures and “a transfer of even more plea-bargaining power from judges to prosecutors, resulting in higher sentences on prosecutors’ terms.”<sup>46</sup> In an article discussing his experiences as a member of the DOJ Enron Task Force, John Kroger also estimated that higher sentences for a wide range of defendants would result from post-Enron reforms.

The most important development has been in the area of criminal punishment. As noted above, white collar crimes have historically been punished very lightly in the United States. This scandalous practice has come to an end. Since late 2001, Congress and the United States Sentencing Commission have radically increased criminal penalties for persons convicted of white collar fraud. . . . The United States Sentencing Commission has completely rewritten the sentencing guidelines applicable to fraud cases in the last several years.<sup>47</sup>

Such views appear to have been widely embraced and well received. Given the statements emanating from the DOJ and the plethora of new statutes and Sentencing Guideline provisions available for use, however, it would have appeared counterintuitive to argue otherwise.

While the public cheered and scholars discussed the government’s claims, some involved in the criminal system perceived another potential impact resulting from the government’s alleged success. People began to question whether the new enforcement regime and sentencing structure would affect plea bargaining. One defense attorney summarized the undercurrent of concern when responding to the DOJ’s policy regarding charging the most readily provable offense:

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46. Bibas, *supra* note 22, at 308. In discussing the 2001 Economic Crime Package amendments to the Sentencing Guidelines and the concurrent amendments to the Sentencing Guidelines for money laundering, another scholar stated, “Taken together, the amendments should provide greater clarity to sentencing courts, uniformity in longer terms of imprisonment for moderate and high levels of pecuniary harm, and specific deterrence to economic crime offenders.” Ramirez, *supra* note 32, at 361.

47. John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor’s Perspective*, 76 U. COLO. L. REV. 57, 114-15 (2005); *see also* Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 (explaining that while increases in statutory maximums have little impact alone, these reforms coupled with amendments to the Sentencing Guidelines “add real years for real defendants”).



“Defense attorneys will recognize that the worst possible outcome at trial is the same as any settlement offer they get from prosecutors.” As a result, he said, “they will be ethically mandated to take every case to trial.” Federal courts could be overwhelmed with cases going to trial, Wallace said, pointing to a report by the U.S. Judicial Conference estimating that a five percent reduction in guilty pleas would result in a 33 percent increase in trials.<sup>48</sup>

This concern was also raised in another article regarding post-Enron sentencing reforms in which a partner at Steptoe & Johnson LLP observed, “[i]n terms of causing people to plead, you could make the argument that there are disincentives to plead because the guidelines cause sentences to be so onerous [now] that nobody can get around them, so you have to go try the case.”<sup>49</sup> Finally, in an article dedicated to Sarbanes-Oxley, the former Principal Associate Deputy Attorney General in the Clinton administration commented that some believed the DOJ’s policies after Enron would simply stifle plea bargaining in the federal system.<sup>50</sup>

Not everyone was convinced, however, that the flurry of activity after Enron would lead to lower rates of plea bargaining. Marc Miller, in an article discussing prosecutorial power in sentencing, questioned the legitimacy of these concerns and predicted a wildly different result.

If many commentators who have praised the Department policies for restricting plea bargains are correct, then they should expect a reversal of the longstanding increase in guilty plea rates in the federal system. The availability of open pleas (pleas that are not the product of bargains) means that the guilty plea rate may remain high, but if the Attorney General has put a functioning brake on the habit of making deals defendants cannot refuse, then, other things being equal, some decrease in the guilty plea rate should result. If I am correct that the PROTECT Act simply increases prosecutorial power compared to all other actors and therefore the ability to

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48. *Attorney General Ashcroft Announces New Hardball Policy on Charging, Plea Bargaining*, 73 *Crim. L. Rep.* (BNA) 24 (2003) [hereinafter *Ashcroft Charging Policy*], available at <http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-5RPJKS?Opendocument>.

49. Robert Pack, *Defense Lawyers and Federal Sentencing Guidelines*, *WASH. LAW.*, Oct. 2003, at 26.

50. Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the “Delete” Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 *AM. CRIM. L. REV.* 67, 89 (2004) (“Skeptics, both within and outside of the DOJ, will no doubt argue that the policy will have the opposite result, effectively stifling plea bargains that are often pivotal in securing the information necessary to prosecute ‘up the chain.’ It is too early to tell.”).

control plea/trial differentials, the guilty plea rate will hold steady or continue to rise.<sup>51</sup>

Miller not only challenged the concerns of many in the defense bar regarding the impact of post-Enron reforms, he also raised an issue at the heart of this analysis: What has *actually* changed with regard to the focus on and sentencing of financial criminals since 2001?

If one takes Miller's statement one step further and argues that post-Enron reforms did little more than increase prosecutorial power, are any of the assumptions that have been made about the impact of SOX, the DOJ policies, or the Sentencing Guidelines amendments correct? Scholars, attorneys, and laypersons alike appear to have embraced the position that the government's war on financial crimes would result and, in fact, has resulted in increased focus on economic crimes and increasingly harsh sentences for all defendants caught under the purview of the Sentencing Guidelines applicable to fraud. Now that seven years have passed, the need for speculation is over and one can examine whether the Jamie Olis's of the world were merely a blip on the screen of federal enforcement or whether fundamental, broad-sweeping changes have actually occurred.

### *III. While Wars Wage Above, The Trenches Lay Silent*

The Sentencing Commission makes available statistical data dating from 1995 through 2006 regarding an array of matters traceable under the Sentencing Guidelines.<sup>52</sup> If, as has been argued, fundamental shifts have occurred in financial crimes enforcement, such changes should be evident in the array of data collected in these studies. Furthermore, because these statistics pre-date the corporate scandals by several years, even a gradual shift in focus should become evident over time.

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51. Miller, *supra* note 18, at 1258.

52. The data are presented in annual reports that cover the federal fiscal year. Thus, the 2006 report includes data from October 1, 2005 through September 30, 2006. For purposes of this article, the year of the report will be used for both descriptive discussion and for graphing the data.

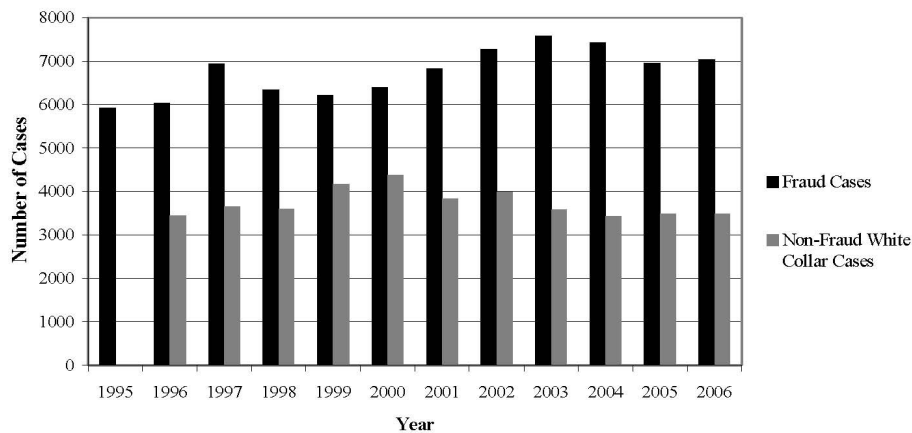
It should also be noted that in the 2004 and 2005 reports, data were divided between pre- and post-*Blakely* and pre- and post-*Booker* time periods, respectively. See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004). Where appropriate, this article will combine these statistics to create one data point for 2004 and one data point for 2005. Where this is not appropriate because of the nature of the data being examined, the discussion or graph will indicate such.

*A. Has the Government's Focus on Financial Crimes Prosecutions Increased?*

The first proposition advanced by the government following the collapse of Enron and the ensuing rush for reform was that the government's focus on financial crimes has dramatically increased. The Sentencing Commission tracks the number of prosecutions each year in two categories related to the government's claim. First, statistics are available for "Fraud" cases, which include fraud and deceit and insider trading. Second, statistics are available for "Non-Fraud White Collar Cases" cases, which include embezzlement, forgery, bribery, money laundering, and tax evasion. Below are the numbers of prosecutions for such offenses from 1995 through 2006.<sup>53</sup>

FIGURE 1

Total Number of Fraud and Non-Fraud White Collar Cases



What is evident from these statistics is that a major shift in the number of fraud cases has not occurred, and a reduction has actually resulted in the number of non-fraud white collar crime prosecutions since 2001. It is certainly worthy of mention that by 2003 the government did increase fraud prosecutions

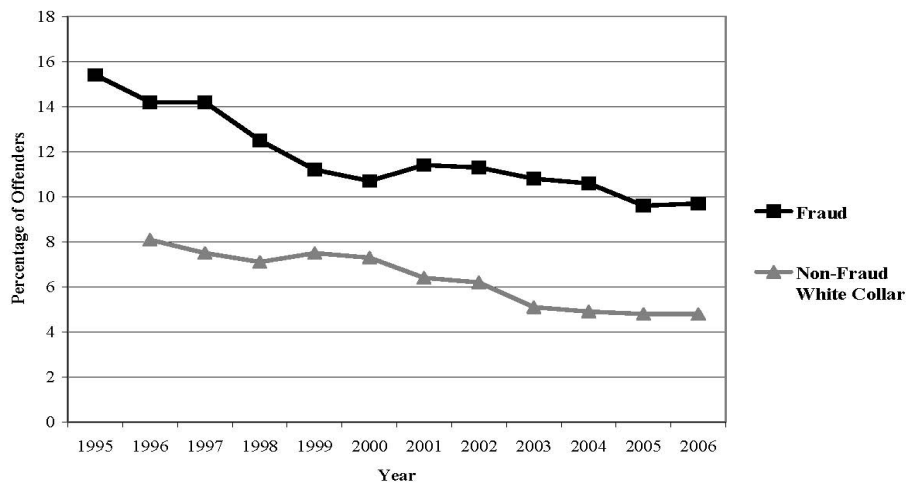
53. The Sentencing Commission offers their federal sentencing statistics for the years 1995-2006 online. See U.S. Sentencing Comm'n, Annual Reports and Statistical Sourcebooks, <http://www.ussc.gov/annrpts.htm> (last visited Nov. 16, 2007) [hereinafter U.S. Sentencing Comm'n Reports]. It should be noted that no data were available in 1995 for "non-fraud white collar crime." Furthermore, the Sentencing Commission calculated these percentages using the total number of guideline cases per year. In certain circumstances, an insignificant number of cases were removed from the data set because of missing primary offense categories. For purposes of calculating the total number of cases per year, however, this study utilizes the total number of guideline cases for consistency.

by 760 cases from the number of cases in 2001. This, coupled with the subsequent decline in fraud prosecutions to a low of 6956 in 2005, only 128 more than in 2001, does little to bolster the government's position that financial crimes prosecutions have become a high priority for the DOJ.

While the specific number of financial crimes prosecutions per year reveals a significant gap between the government's assertions and reality, even more telling is an analysis of the percentage of offenders in the federal system for whom fraud or non-fraud white collar crime was the primary offense category.<sup>54</sup> Through an examination of these data, one can trace the DOJ's commitment to a particular subset of criminal activity relative to other crimes in a particular year. While there are limitations to the strength of such an analysis, it does offer a glimpse at both the resources and the commitment of the government over time, whether by choice or by circumstance.

FIGURE 2

Percentage of Offenders in the Federal System for Whom Fraud/White Collar Crime was the Primary Offense Category



Between 2001 and 2006, the percentage of offenders in the federal system for whom fraud was the primary offense category declined from 11.4% to 9.7%. Similarly, the percentage of offenders for whom non-fraud white collar crime was the primary offense level declined from 6.4% to 4.8%. These declines continued a trend that had been present since 1995. While this appears counterintuitive given the government's statements regarding its renewed focus on financial crimes following Enron and similar corporate scandals, it appears that the bulk of federal enforcement resources have been placed elsewhere.

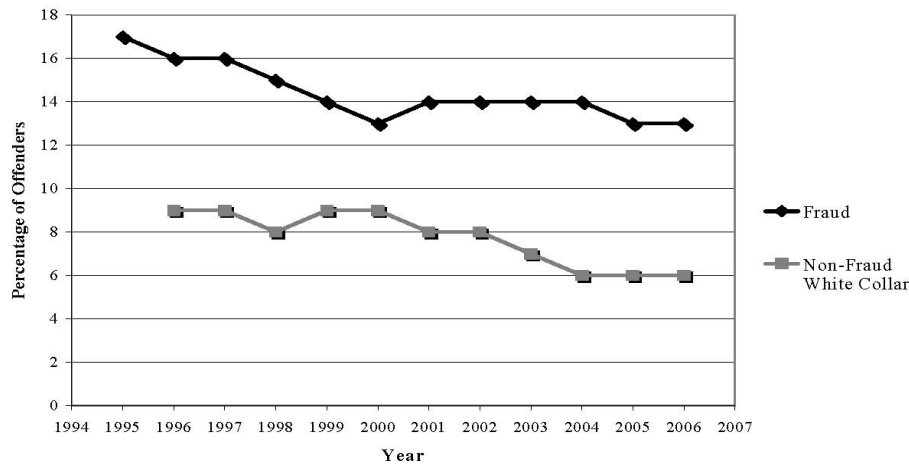
54. *Id.*

While many might assume that an increased focus on terrorism or drug cases may have resulted in this down-swing, the actual culprit is immigration cases. The percentage of offenders for whom an immigration violation was the primary offense category grew from 8.3% in 1995 to 24.5% in 2006.

It is difficult to know whether the increase in immigration cases represents a true focus of the federal government to the detriment of the war on financial crimes because immigration cases are often disposed of quickly through fast track systems. Therefore, it is worth examining the percentage of federal defendants for whom the primary offense category was fraud or non-fraud white collar crime from 1995 through 2006 when immigration cases are removed from the calculations.<sup>55</sup>

FIGURE 3

Percentage of Offenders in the Federal System for Whom Fraud/White Collar Crime was the Primary Offense Category (Excluding Immigration Cases)



These figures indicate that even when immigration cases are removed from the data sets, the government's focus on federal prosecution of financial crimes as compared with other offense categories has diminished since 1995, with no increase following Enron. When compared to the previous graph, this figure demonstrates a less abrupt decrease. But, it also lends further support for the position that the DOJ has not, as it claimed, increased fraud prosecutions. Based on these data, it appears that the government's new era in financial crimes enforcement has not materialized. Rather, perhaps it is more accurate

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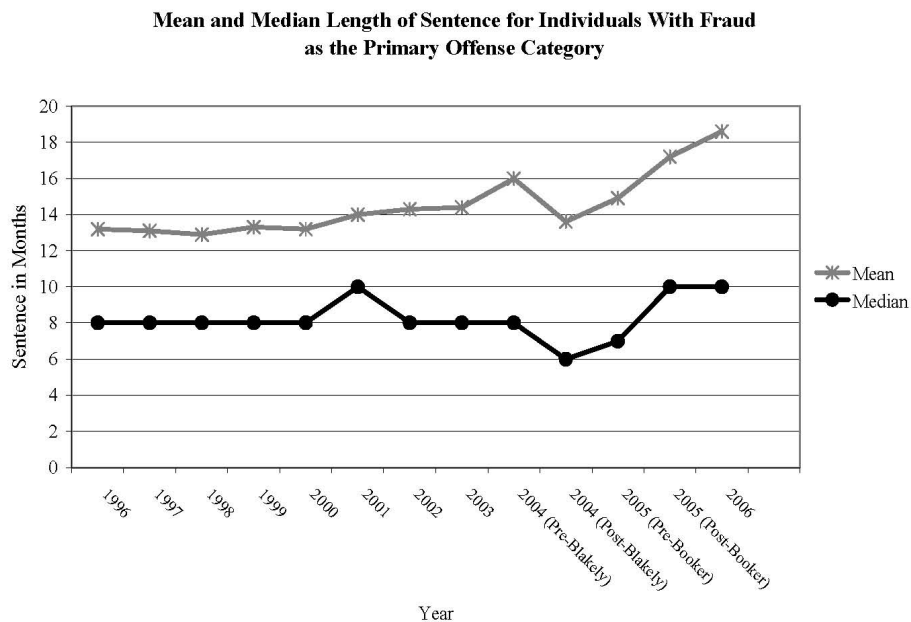
55. *Id.*

to state that there is a perception that enforcement has increased because the government has focused its efforts on a few high profile corporate scandals.

*B. Have Sentences for Financial Crimes Increased?*

With ever-increasing demands on the DOJ in various areas of federal criminal law enforcement, it may seem irrelevant to some that the DOJ has not increased the number of financial crimes cases since Enron. For those who embrace such an argument, perhaps there is a belief that increasing sentences resulting from the 2001 Economic Crime Package, SOX, DOJ policies, and subsequent Sentencing Guidelines amendments for fraud are sufficient to reign in those who perpetrate such offenses. As we have seen, however, predictions regarding the impact of post-Enron reforms and government claims of success do not necessarily equate into true change. It is necessary, therefore, to examine average and mean sentences of individuals convicted of fraud. Below is a graph demonstrating the mean and medium length of sentences for individuals with fraud as their primary offense category.<sup>56</sup>

FIGURE 4



56. *Id.* Figure 4 includes specific information for pre- and post-*Blakely* 2004 and pre-*Booker* 2005. Furthermore, data were only available from 1996 forward for average and mean sentences.

Again, the results are surprising. Where are the “radical increases” predicted by some as a result of SOX and the amendments to the Sentencing Guidelines?<sup>57</sup> In 2001, the average sentence for fraud was fourteen months, a 0.8 month increase from the year before. With the exception of one year, the average sentence then climbed slightly towards, but never reached, fifteen months until post-*Booker* 2005.<sup>58</sup> Remembering that the 2001 Economic Crime Package did not go into effect until November 2001 and would not have had an impact on sentencing until 2002, it appears that both the sweeping Sentencing Guidelines amendments made shortly before Enron and all of the post-Enron reforms from Congress, the DOJ, and the Sentencing Commission combined to increase sentences for economic crimes by less than one month in the years shortly after Enron.<sup>59</sup> When median sentences are examined, an even more significant trend appears. In 2001, before the impact of the 2001 Economic Crime Package or post-Enron reforms were realized, the median sentence for fraud increased to ten months for the first time since the Sentencing Commission began tracking this information. Following this brief spike, the median returned to eight months in 2002. Two years later, in the midst of the government’s war on financial crimes, median sentences fell again to six months. An average defendant convicted of fraud, therefore, actually fared better following Enron and the subsequent reforms. Furthermore, that the median sentence decreased after 2001 may indicate that any increase in mean sentences resulted from only a select few staggering sentences in some of the more publicized catastrophic fraud cases.

It must be noted that beginning with post-*Booker* 2005, a clear upward trend begins to appear in the data, indicating that sentences for fraud are on the way up. To attribute this to reforms implemented years before and which were apparently ineffective for the first four years of the war on financial crimes, however, seems to ignore the more likely cause of this recent increase in sentence length. If one examines the data over time, it appears that the Supreme Court’s decision in *Booker* had a much more significant and immediate impact on sentences than all of the post-Enron reforms combined. Apparently, Congress missed its mark by passing SOX and encouraging amendments to the sentencing guidelines, when all that was really necessary to meet their goals was to remove the mandatory nature of the sentencing

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57. See Kroger, *supra* note 47, at 114-15.

58. The graphs in this article discussing the length of sentences and plea bargaining rates include pre- and post-*Blakely* and pre- and post-*Booker* data points.

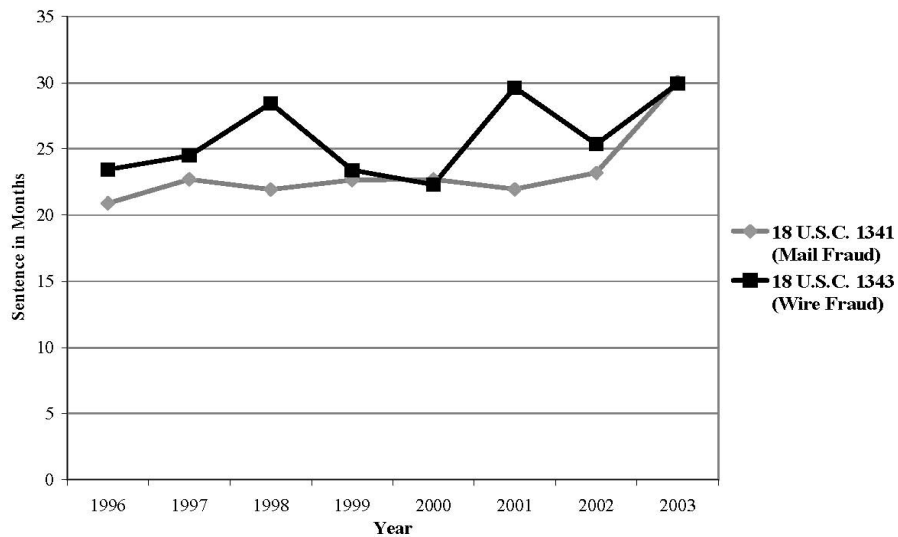
59. See Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 (stating that the Economic Crime Package went into effect in November 2001). The mean sentence for fraud for 2002 through pre-*Booker* 2005 was 14.84 months, a 0.84 month increase over the average sentence in 2001. See *supra* Figure 4.

guidelines. While it is still too early to make definitive conclusions about the impact of the Supreme Court's decision in *Booker*, it appears that making the sentencing guidelines advisory may be resulting in increasingly severe sentences. Regardless, and for purposes of this study, the increase in the length of sentences following the Supreme Court's actions in 2005 does not seem to cloud the more relevant determination that no "radical increases" in prison sentences resulted from the reforms implemented in response to Enron and other corporate scandals.

Looking more closely at what the DOJ itself described as the most commonly charged offenses for financial crimes, wire and mail fraud, one sees a slightly improved result.<sup>60</sup>

FIGURE 5

Mean Sentence for Offenders with Mail or Wire Fraud as the Primary Offense



While data beyond 2003 are not available for these specific offenses, in the two years after Enron, only the mean sentence for mail fraud increased. Mail fraud sentences increased between 2001 and 2003 by more than ten percent.

60. See December Letter from Eric H. Jaso, *supra* note 6, at 278 ("Central to [SOX] were substantial increases in the statutory penalties for the crimes most commonly charged by federal prosecutors in corporate fraud and obstruction-of-justice cases (so-called 'white collar' crimes)."); see also Perino, *supra* note 1, at 684 ("In addition to creating new crimes, [SOX] beefs up the penalties for certain existing crimes. Maximum penalties for mail and wire fraud are increased from five to twenty years.").



Though these data are sparse, it does allow for some initial observations. Recall that Frank Bowen predicted that “though a one-base-offense-level increase [to section 2B1.1 of the Sentencing Guidelines] may seem insignificant, it actually has profound effects on thousands of individual defendants. It bumps up the sentencing range of every federal defendant by one level, thus increasing the minimum guideline sentence of defendants subject to imprisonment by roughly ten percent.”<sup>61</sup> It is possible, therefore, that the ten percent increase in mail fraud sentences is a direct result of the one point increase in defendants’ base offense levels. Curiously, if the one point increase in base offense level affected mail fraud, why did it not equally impact wire fraud and all other fraud offenses sentenced under section 2B1.1 of the Sentencing Guidelines? That there was no ten percent increase in fraud convictions generally indicates that perhaps some as of yet unidentified influence was at work for mail fraud between 2001 and 2003. Regardless, it must be noted that the base offense level amendment to section 2B1.1 was but one small act in a sea of changes following the corporate scandals beginning in 2001. If this Sentencing Guidelines amendment is responsible for the increase in prison time for defendants convicted of mail fraud, the looming question still remains: where may the impact of all the other reforms be seen and why, even here, an impact for financial crimes in general is absent.<sup>62</sup>

*C. Have the Percentage of Cases Resulting in Plea Agreements Diminished?*

Given that neither actual enforcement nor prison sentences for financial crimes appear to have increased dramatically since 2001, our final question seems already answered. Have the number of cases resulting in plea agreements decreased as many feared?<sup>63</sup> The answer is no.

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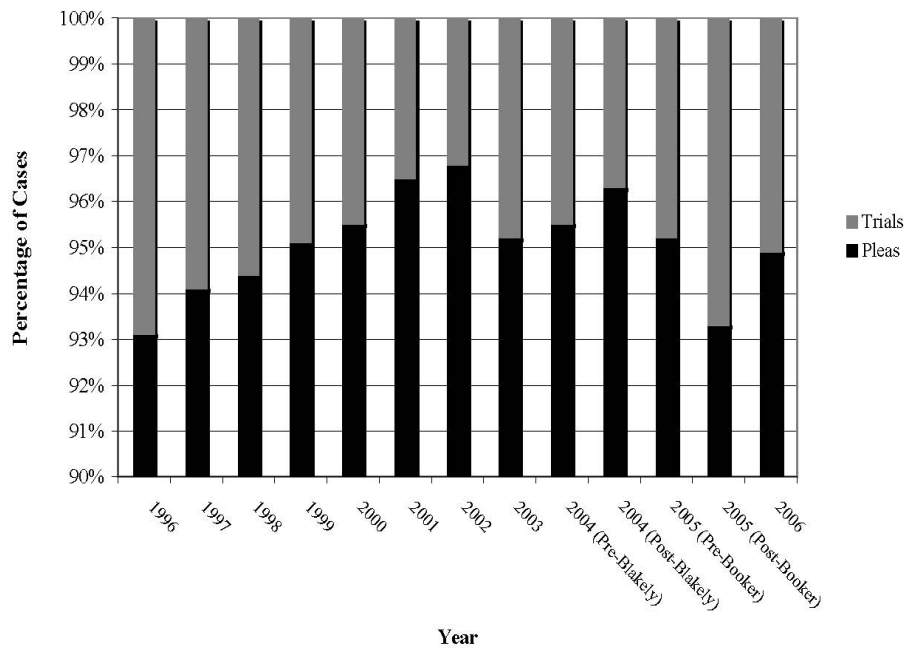
61. Bowman, *supra* note 7, at 433.

62. Some might argue that post-Enron reforms increased the number of defendants with low-loss levels receiving prison time rather than probation. *See supra* note 34 and accompanying text. As defendants who receive probation are not included in the Sentencing Commission’s sentencing statistics, such a change might lower average sentences as more defendants with minimal prison time enter the statistical data sets. Review of the statistics tracking the number of fraud defendants receiving probation as opposed to prison sentences, however, reveals that the number of financial crimes defendants receiving probation has actually increased since 2000. *See* U.S. Sentencing Comm’n Reports, *supra* note 53. In 2000, 30.8% of fraud defendants received probation, as compared with 34.8% and 32.4% in 2004 and pre-*Booker* 2005 respectively. *See id.*

63. U.S. Sentencing Comm’n Reports, *supra* note 53.

FIGURE 6

## Percentage of Cases Resulting in Guilty Pleas and in Trials in Fraud Cases

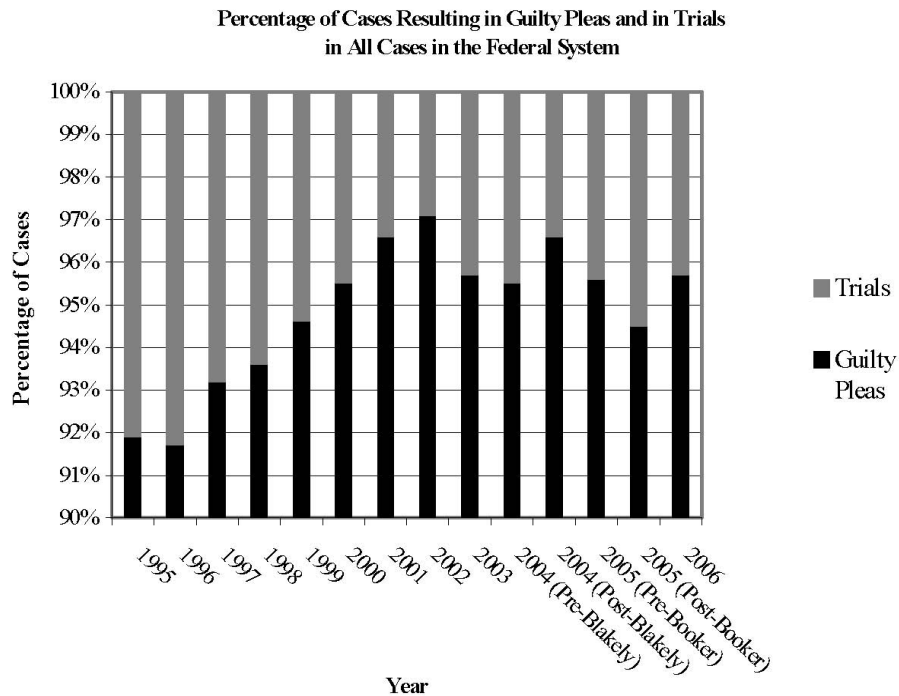


In the federal system as a whole, plea bargaining appears, as might have been expected, to be thriving at well over 94.5% since 1999. While minor fluctuations are to be expected, it is curious that, of the years in which the Sentencing Commission has kept data, the highest rate of plea bargaining occurred in 2002. After this spike, plea bargaining rates for each year for all federal crimes rested comfortably between 94.5% and 96.6%. These figures are for all federal crimes, and one might expect that the greater impact would be seen with regard to fraud cases specifically. In examining the percentage of plea bargaining in fraud cases, however, one does not find a significant impact from post-Enron reforms.<sup>64</sup>

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64. *Id.*

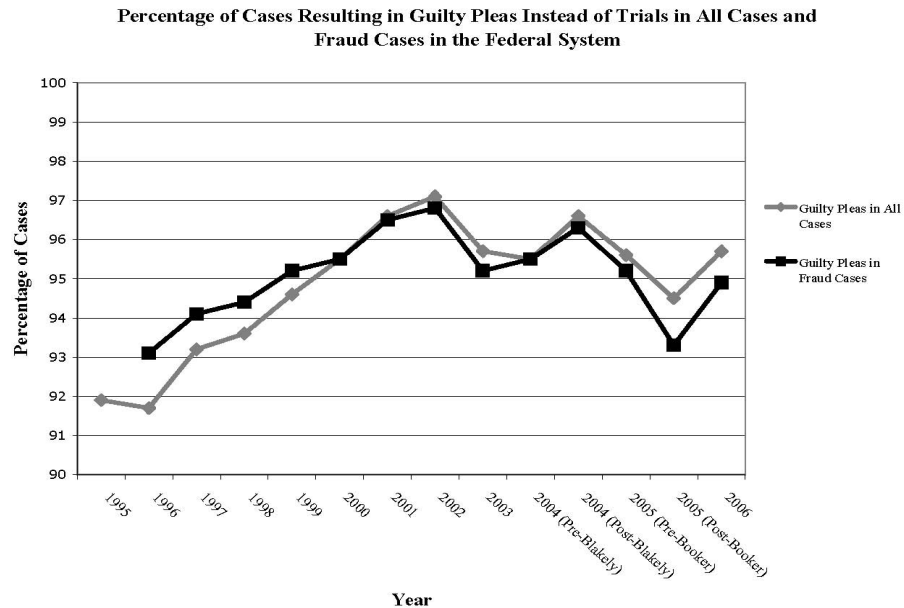
FIGURE 7



Strikingly, the percentage of fraud cases resolved through guilty pleas mimics the percentages for all federal criminal cases. These data tell us several important things about the impact of post-Enron reforms on financial crimes plea bargaining. First, any impact that may have occurred was minimal. As with federal criminal prosecutions generally, the percentage of defendants pleading guilty to fraud remained above 95% for every year since 1999, with the exception of post-*Booker* 2005. Second, the percentage of cases resulting in plea bargains is higher after 2001 than before, which is the opposite effect predicted by some in the defense bar.<sup>65</sup> Finally, as can be seen below, whatever forces acted upon plea bargains in fraud cases during these years impacted the entire institution of federal plea bargaining in the same manner.

65. See *Ashcroft Charging Policy*, *supra* note 48, at 24; Grindler & Jones, *supra* note 50, at 89 (“Skeptics, both within and outside of the DOJ, will no doubt argue that the policy will have the opposite result, effectively stifling plea bargains that are often pivotal in securing the information necessary to prosecute ‘up the chain.’ It is too early to tell.”); Pack, *supra* note 49, at 26.

FIGURE 8



This means that if any of the reforms are directly attributable to these fluctuations, such as the spike in 2002, it would have to result from a reform that impacted not just financial crimes but all federal crimes. Regardless, plea bargaining remains alive and well, and the fears of those who believed the federal criminal system was about to come crashing down have not materialized.

Having examined the data, what must be asked is, after all that the government did in response to corporate scandals and all that has been said publicly about the war on financial crimes, why does it appear that little has actually changed? Why have financial crimes prosecutions not increased dramatically? Why are financial criminals receiving only marginally higher sentences? The answer may be found in the institution some felt was in jeopardy because of post-Enron reforms: plea bargaining. Prosecutors are not using their weapons in the war on financial crimes to increase prosecutions or prison sentences, but instead are using new statutes and the possibility of monumental sentences as tools to encourage defendants to accept plea agreements that include sentences similar to those offered before 2001. For those who refuse the government's advances, prosecutors are prepared to use all of their new powers to secure significantly higher sentences as both a

punishment for removing themselves from the plea bargaining machine and as an example to others who might be considering the same foolish course.

#### IV. Plea Bargaining's Continued Triumph

##### A. Plea Bargaining's Rise

The history of plea bargaining's growth is the history of prosecutors gaining increased leverage to bargain. George Fisher begins his seminal work on plea bargaining in America, *Plea Bargaining's Triumph*, with a somber expression of remorse over this machine's rise to prominence and with a single statement summarizing why this system in which rights are exchanged for concessions triumphed.

There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. . . . But though its victory merits no fanfare, plea bargaining has triumphed. . . .

The battle has been lost for some time. . . . [V]ictory goes to the powerful.<sup>66</sup>

Although plea bargaining, of course, pre-dates the American criminal justice system, its evolution into a force that consumes over 95% of defendants in America is a phenomenon confined predominantly to the nineteenth and twentieth centuries.<sup>67</sup> This rise can be attributed to various forces, but, as Fisher states above, the increasing power of prosecutors is the pinnacle reason for plea bargaining's success.

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66. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (emphasis added); see also GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) [hereinafter FISHER, HISTORY OF PLEA BARGAINING]. For a discussion of scholarship on plea bargaining generally and the debate over whether plea bargaining is an appropriate part of our criminal justice system, see Jacqueline E. Ross, *Criminal Law and Procedure: The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. (SUPPLEMENT) 717 (2006).

67. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) [hereinafter Alschuler, *Plea Bargaining*] (discussing the evolution of plea bargaining beginning with an examination of confessions in twelfth century England); see also Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211 (1979) [hereinafter Alschuler, *Plea History*] (tracing the history of plea bargaining); Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 508-11 (1999) (describing plea bargaining's existence in early American history and its rise to prominence in more recent history); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (commenting that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system").

Albert Alschuler, in discussing the history of plea bargaining, draws a similar conclusion. He states, the “history of plea negotiation [] is a history of mounting pressure for self-incrimination, and in explaining this phenomenon, a growth in the complexity of the trial process over the past two-and-one-half centuries seems highly relevant.”<sup>68</sup> While Alschuler’s article focuses on the impact of growing complexities, he alludes to the way these forces bestow power on prosecutors managing the criminal system and willing to offer significant incentives for those who will bypass a trial.<sup>69</sup> “When Joan of Arc yielded to the promise of leniency that this court made,” comments Alshuler, “she demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation.”<sup>70</sup>

In *Plea Bargaining’s Triumph*, Fisher further develops the idea that as the criminal system becomes more complex, prosecutors gain increased powers to offer significant incentives to defendants.<sup>71</sup> Through analysis of plea bargaining in Massachusetts, Fisher argues that as the criminal system becomes more sophisticated, prosecutors gain the power to use selective charge bargaining to offer reduced sentences for those who will negotiate.<sup>72</sup> The key element of this machine, of course, is prosecutorial discretion and the ability to select from various criminal statutes with significantly different sentences.<sup>73</sup>

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68. See Alschuler, *Plea Bargaining*, *supra* note 67, at 40; see also Alschuler, *Plea History*, *supra* note 67.

69. See Alschuler, *Plea Bargaining*, *supra* note 67, at 42 (“[T]he more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination.”); see also Alschuler, *Plea History*, *supra* note 67.

70. See Alschuler, *Plea Bargaining*, *supra* note 67, at 41.

71. See FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 23 (stating that plea bargaining is “an almost primordial instinct of the prosecutorial soul”); see also Stephanos Bibas, *Pleas’ Progress*, 102 MICH. L. REV. 1024 (2004) (reviewing FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66); Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721 (2005) (reviewing FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66).

72. FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 210 (“[Sentencing Guidelines] invest prosecutors with the power, moderated only by the risk of loss at trial, to dictate many sentences simply by choosing one set of charges over another.”).

73. For a discussion of charge bargaining and its use by prosecutors, see Boyd, *supra* note 19, at 592 (“Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file.”); Brown & Bunnell, *supra* note 25, at 1066-67 (“Like most plea agreements in federal or state courts, the standard D.C. federal plea agreement starts by identifying the charges to which the defendant will plead guilty and the charges or potential charges that the government in exchange agrees not to prosecute.”); Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 512 (2003) (“Charging decisions are a critical sentencing matter and are left solely to the discretion of the prosecutor. When determining which charges to bring, prosecutors may often choose from more than one statutory offense.” (footnote omitted)); Moohr, *supra* note 44, at

Rather than arguing that this rise in power leveled off in the twentieth century when the rate of plea bargaining in federal cases began to top 80%, Fisher argues that the power to control the system and offer defendants deals has only continued to increase. As an example, he argues that the passage of the Sentencing Guidelines in the last decade of the twentieth century greatly increased prosecutors' control of the system, and therefore, increased their ability to force defendants into plea agreements.

Before the advent of modern sentencing guidelines, both prosecutor and judge held some power to bargain without the other's cooperation. . . . Today, sentencing guidelines have recast whole chunks of the criminal code in the mold of the old Massachusetts liquor laws. By assigning a fixed and narrow penalty range to almost every definable offense, sentencing guidelines often empower prosecutors to dictate a defendant's sentence by manipulating the charges. Guidelines have unsettled the old balance of bargaining power among prosecutor, judge, and defendant by ensuring that the prosecutor, who always had the strongest interest in plea bargaining, now has almost unilateral power to deal.<sup>74</sup>

With prosecutors in firm control of the decision-making process, Fisher concludes that the plea bargaining machine is unlikely to fall from its triumphant state.<sup>75</sup>

The rise in prosecutorial power to manipulate an ever more complex criminal justice system and select from differing criminal statutes as a means of controlling sentencing explains only half of the plea bargaining machine. Without significant differences in the sentences available as a result of pleading guilty as opposed to risking trial, plea bargaining cannot contain enough of an incentive for defendants to give up the fight.<sup>76</sup> In a 1981 article on plea

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177 ("The power of the prosecutor to charge is two-fold; the power to indict or not . . . and the power to decide what offense to charge.").

74. FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 17; *see also* Boyd, *supra* note 19, at 591-92 ("While the main focus on the Sentencing Guidelines appeared to be narrowing judicial discretion in sentencing, some critics argued that the Sentencing Guidelines merely shifted the federal judges' discretionary power to federal prosecutors."); Miller, *supra* note 18, at 1252 ("The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.").

75. *See* FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 230 ("[P]lea bargaining grew so entrenched in the halls of power that today, though its patrons may divide its spoils in different ways, it can grow no more. For plea bargaining has won.").

76. Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2003) ("The criminal justice system uses large sentence

bargaining, Alschuler wrote of this “differential” and stated, “Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial. A number of studies suggest this perception is justified.”<sup>77</sup> Among such studies was an examination by David Brereton and Jonathan Casper that analyzed robbery and burglary defendants in three California jurisdictions.<sup>78</sup> The results were shocking and illustrated that defendants who exercised their constitutional right to a trial received significantly higher sentences than those who worked with prosecutors to reach an agreement.<sup>79</sup> Not limiting themselves to a mere observation of sentencing trends, the researchers also made an insightful statement regarding the impact of high differentials on the rates of plea bargaining:

The point of the preceding discussion is simple enough: when guilty plea rates are high, expect to find differential sentencing. We believe that recent arguments to the effect that differentials are

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discounts to induce guilty pleas. Of course these discounts exert pressure on defendants to plead guilty.”). Along with sentencing differentials, of course, are considerations by the defendant of the likelihood of success at trial. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2465 (2004) (“In short, the classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains.”). A prosecutor, however, has less control of a defendant’s perceptions of these odds, and, as such, this topic is less applicable to our discussion.

77. Alschuler, *supra* note 26, at 652-53 (footnote omitted). Alschuler goes on to state: “Although the empirical evidence is not of one piece, the best conclusion probably is that in a great many cases the sentence differential in America assumes shocking proportions.” *Id.* at 654-56; see also Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 251 (2006) (“While practitioners disagree about the acceptability of a large sentence differential between the post-plea and post-trial sentence, they agree that such a differential is common.” (footnote omitted)).

78. See David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty?: Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC’Y REV. 45, 55-59 (1981-82); see also H. J. Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Process*, 1 J. CRIM. JUST. 27 (1973) (finding that charge reduction directly results in reduction of the maximum sentence available and indirectly results in lesser actual time served).

79. See Brereton & Casper, *supra* note 78, at 55-59; see also Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1382 (2000) (“The differential in sentencing between those who plead and those convicted after trial reflects the judgment that defendants who insist upon a trial are doing something blameworthy.”); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 443 (1995) (“Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea.”).



largely illusory do not withstand serious scrutiny, even though this revisionist challenge has been valuable in forcing us to examine more closely what is too often taken to be self-evidently true.<sup>80</sup>

Significant differentials, Brereton and Casper argued, are a tool used to increase plea bargaining rates by increasing the incentives for negotiation.<sup>81</sup>

Under the above theory, that as differentials increase so too do the incentives to accept a prosecutor's offer, it must also be true that at some point differentials are so extreme as to make rejection of a plea agreement irrational regardless of guilt or innocence.<sup>82</sup> Such realizations have led some to argue that plea bargaining is equivalent to torture.

We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ these machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. The sentencing differential is what makes plea bargaining coercive. There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.<sup>83</sup>

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80. See Brereton & Casper, *supra* note 78, at 69.

81. See *id.* at 45 ("It is this sentence differential (whether conceived of as a reward to guilty pleaders or as a punishment of those who waste the court's time by 'needless' trials) which has traditionally been seen as the engine driving the plea-bargaining assembly line."); see also Givelber, *supra* note 79, at 1382 ("The pragmatic justification for differential sentencing is simple and powerful: we want those charged with crimes to plead guilty, and differential sentencing provides an accused with a strong incentive to do just that.").

82. See Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 46 (1983) ("The sentencing differential between defendants who are convicted at trial and those who accept the prosecutor's offer to plead guilty is so pervasive and so substantial that few defendants are foolhardy enough to risk testing the prosecutor's determination of the 'value' of their case.").

83. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978) (footnote omitted). While some argue that increased differentials encourage innocent defendants to waive their right to a trial, thus producing an unjust result, Frank Easterbrook argues that this does not mean plea bargaining itself is an unacceptable institution.

From a market perspective, acceptance of such pleas [from innocent defendants] is no mystery. Sometimes the evidence may point to guilt despite the defendant's factual innocence. It would do defendants no favor to prevent them

Regardless of the legitimacy of such a dramatic characterization of a mechanism which is a vital aspect of the American criminal justice system, statements such as the one above serve to reinforce the persuasive value of large sentencing disparities and remind us that prosecutors benefit from increased control and higher maximum sentences because these weapons allow them to increase differentials to encourage bargaining.

*B. The Continued Triumph*

As has been discussed, plea bargaining relies on two fundamental elements: a prosecutor's power to structure and offer a plea bargain and the significance of the differential between the sentence available through negotiations and the sentence a defendant risks if unsuccessful at trial. Through consideration of these two elements, the reasons for the failure of post-Enron reforms to result in increased prosecutions or prison sentences becomes clear, and the expectation of some that these reforms might lead to decreasing plea bargaining rates seems to ignore the true operation of the plea bargaining machine.

When examined in light of the discussion above, each post-Enron reform either serves to increase prosecutorial power to charge bargain and select sentencing ranges, increase the top end of differentials faced by defendants, or do nothing at all to impact prosecutors' ability to deal. Let us begin with the DOJ policies issued in 2003, aimed at ensuring the most readily provable offense is charged and enlisting prosecutors in the battle to frustrate the instances of downward departures.<sup>84</sup> As discussed previously, if the September 22 memorandum requiring that a prosecutor charge the most readily provable offense were followed, there would be little incentive for defendants to enter into plea bargains because the differential between the offered plea and the

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from striking the best deals they could in such sorry circumstances. And if the probability of the defendant's guilt is indeed low even on evidence that would be placed before the court . . . the sentencing differential will be correspondingly steep.

Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 320 (1983); see also F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYUJ. PUB. L. 189, 204 (2002) ("The innocent defendant [] may regard the incentives as holding more value because he perceives the system as unreliable."). What Easterbrook's discussion fails to recognize is the significant economic costs associated with taking a case to trial. As such, if the differential is significant enough, an individual might plead guilty to avoid the financial devastation that could result from forcing a trial he or she may actually win.

84. See September Memorandum, *supra* note 18, at 130 (regarding the Department of Justice policy concerning charging criminal offenses, disposition of charges, and sentencing); see also July Memorandum, *supra* note 20, at 376 (regarding the Feeney Amendment to the PROTECT Act).

sentence at trial would become inconsequential.<sup>85</sup> As plea bargains have not decreased, therefore, the logical conclusion is that prosecutors have ignored this memorandum in so far as it attempts to limit their discretion to create incentives for defendants. Prosecutors have themselves supported this conclusion by admitting that the memorandum has made no difference in their daily operations. Shortly after the memorandum's release, an article appearing in *The Champion* described the impact of the policy as "[n]ot much."<sup>86</sup> As the article highlights, USAO's responded to a survey by indicating that it was "still business as usual in the courthouse."<sup>87</sup> While most prosecutors argued that nothing had changed because they were abiding by the memorandum's dictates before its release, the true message being conveyed was that plea bargaining remained alive and well.<sup>88</sup> Of course, that plea bargaining and the status quo survived the DOJ mandate does not mean prosecutors were in open violation of the memorandum. Rather, the memorandum itself had been structured to allow prosecutors to attain compliance without amending their procedures because "the tough-sounding 2003 policies include exceptions that any wise prosecutor (and there are many wise prosecutors) could drive a truck through."<sup>89</sup> Whether this was purposeful or an inadvertent window through which business as usual could endure, the end result was that charge bargaining and the incentives created by this system continued to exist.

While it appears that the September 22 DOJ memorandum did little to change day-to-day operations, the July 28 DOJ memorandum enforcing the Feeney Amendment had an actual and significant impact. By removing the ability of judges to grant downward departures in certain cases and creating a system in which the DOJ would both monitor and challenge all unsupported downward departures, prosecutors gained further power to control the system in which they operate. George Fisher, with regard to the passage of the Sentencing Guidelines, argued that as judges lose the ability to influence sentences, prosecutors become the lone gatekeeper and controllers of the discretionary elements of the sentencing process.<sup>90</sup> It appears that the Feeney

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85. See Alschuler, *supra* note 26, at 657; *Ashcroft Charging Policy*, *supra* note 48, at 24.

86. See G. Jack King, Jr., *NACDL Survey: USAOs Deny Ashcroft Memo Affecting Plea Bargaining*, *CHAMPION*, Dec. 2003, at 6.

87. See *id.*

88. See *id.*; see also Miller, *supra* note 18, at 1254.

89. Miller, *supra* note 18, at 1257.

90. See FISHER, *HISTORY OF PLEA BARGAINING*, *supra* note 66, at 17; see also Boyd, *supra* note 19, 591-92 ("While the main focus of the Sentencing Guidelines appeared to be narrowing judicial discretion in sentencing, some critics argued that the Sentencing Guidelines merely shifted the federal judges' discretionary power to federal prosecutors.").

Amendment has resulted in the same increase in prosecutorial discretion to the detriment of the judiciary.

Even if prosecutors limit their reliance on the specified exceptions, prosecutorial power would still increase under the PROTECT Act. This is so because the restriction on visible downward departures that is the purpose of the Act gives prosecutors greater control over the likely sentencing range. Because prosecutors can control the sentencing range, they can control the likely (expected) differential in sentence after plea and after trial.<sup>91</sup>

The post-Enron DOJ policy regarding the Feeney Amendment, therefore, gave prosecutors enhanced abilities to structure the sentences resulting from plea bargaining and from trial to maximize the differential. While it is certainly true that prosecutors simply could have used these new powers to challenge downward departures in an effort to increase the average sentences for all those convicted in the federal system, statistics regarding prison sentences and plea bargaining rates in financial crimes cases do not support this conclusion. Rather, the data support an argument more consistent with the literature explaining the function of the plea bargaining machine. That is, prosecutors have continued to offer financial crimes defendants plea deals with pre-Enron sentences, while simultaneously using their new powers to increase the projected sentence if a defendant rejects the plea offer and risks trial.

Congressional action in the form of SOX and subsequent amendments to the Sentencing Guidelines were offered amidst the same discussion of increased enforcement and punishment as the DOJ memoranda above. It appears, however, that these post-Enron reforms have also failed to achieve their proposed effect, instead merely offering prosecutors more tools to perpetuate the dominance of plea bargaining. First, SOX offered prosecutors new crimes with which to charge defendants, presumably intended to assist in the expansion of financial crimes prosecutions. According to the statistical data, however, this did not occur. Second, SOX offered prosecutors a fourfold increase in the sentence for the most commonly charged fraud offenses, wire and mail fraud and conspiracy to commit fraud.<sup>92</sup> Again, however, the sentencing data do not reflect a significant increase in prison time for financial criminals as a result of these SOX measures. It appears, therefore, that once again prosecutors have chosen to use post-Enron reforms to increase their power and control of sentencing rather than to increase prosecutions and/or prison sentences.

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91. Miller, *supra* note 18, at 1257-58.

92. See Sarbanes-Oxley Act of 2002 § 903, 18 U.S.C. §§ 1341, 1343 (Supp. IV 2004) (listing criminal penalties for mail and wire fraud); see also Brickey, *supra* note 11, at 378-79 (comparing pre-SOX and post-SOX penalties for fraud).

Through SOX, prosecutors have gained the power to increase differentials by offering a defendant a plea agreement which does not include wire or mail fraud nor one of the newly created statutes carrying a large sentence. The result is that prosecutors have more discretion to choose between statutes with wildly different statutory maximums to increase the differential between the plea offer and the possible sentence resulting from trial. As an example, a prosecutor might agree to charge an offense that carries a maximum prison sentence of five years in return for a plea agreement, but threaten to charge the defendant with mail or wire fraud if she proceeds to trial.<sup>93</sup> If, as has been discussed, differentials are the key to a prosecutor's ability to plea bargain, SOX opened the door to staggering new prosecutorial power.

While increased statutory maximums are relatively meaningless without accompanying Sentencing Guidelines amendments, pre-Enron Sentencing reforms, SOX, and post-SOX Sentencing Guidelines initiatives addressed this issue.<sup>94</sup> Through passage of the 2001 Economic Crime Package, Congress significantly increased the sentencing range for fraud shortly before the corporate calamities of 2001.<sup>95</sup> Not satisfied, further amendments to the Sentencing Guidelines were adopted following SOX that, among other changes, added one point to the base offense level depending on the statutory charge in the case.<sup>96</sup> While many predicted that these initiatives would culminate in drastically increased sentences for financial criminals, the sentencing statistics show only a minor increase.<sup>97</sup> Again, it appears that while prosecutors could

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93. See Miller, *supra* note 18, at 1253.

What the federal guidelines have allowed is vastly greater prosecutorial control not only over the actual sentences, but over the plea/trial differential. Even changes such as mandatory penalties that appear to reduce prosecutorial discretion in fact increase prosecutorial control since prosecutors choose whether to charge a crime triggering mandatory sentences, and whether to propose the one kind of departure (substantial assistance) that allows departures below mandatory minimum sentences.

*Id.*; see also William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004) ("The bodies of law, state and federal, that claim to define crimes and sentences do not really do what they claim. Instead, those bodies of law define a menu—a set of options law enforcers may exercise, or a list of threats prosecutors may use to induce the plea bargains they want.").

94. See *supra* Part I.C.

95. See Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 (explaining that while increases in statutory maximums have little impact alone, these reforms coupled with amendments to the Sentencing Guidelines "add real years for real defendants"); see also Bowman, *supra* note 7, at 389; Bowman, *Sentencing Reforms*, *supra* note 27, at 7.

96. See FINAL SOX AMENDMENTS, *supra* note 36; see also Bowman, *supra* note 7, at 433; Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 231.

97. See Kroger, *supra* note 47, at 114-15; see also Bowman, *supra* note 7, at 433; Bowman,

have used the 2001 Economic Crime Package, SOX, and the subsequent Sentencing Guideline amendments to increase enforcement and ratchet up punishments, prosecutors instead have used these reforms to increase their power over sentencing differentials. Just as the selection of a particular statutory offense changes the maximum allowable sentence, so too does the selection of a statute affect a defendant's base offense level.<sup>98</sup> By offering defendants a plea agreement which includes conviction for a statute carrying a six point, rather than seven point, base offense level, prosecutors can significantly impact a defendant's sentence. Therefore, the result of the adoption of this Sentencing Guidelines amendment, which was intended to increase sentences for all fraud cases, was to further strengthen plea bargaining's triumph and ensure that prosecutors have the tools necessary to present defendants with large differentials as incentives to plead guilty.

Further evidence to support the above conclusions is found through examination of post-Enron cases where one can compare the differential between the plea offer the government presented and the sentence the defendant faced at trial. The best example of the significance of the post-Enron differential is Jamie Olis of Dynegy.<sup>99</sup> Olis, a mid-level executive, was initially sentenced in excess of twenty four years after losing at trial. In comparison, the CEO of the company only received fifteen months in return for a guilty plea. As a mid-level executive, one must imagine Olis was offered a similar, if not more lenient, deal. Therefore, Olis likely faced a differential of fifteen months for pleading guilty or 292 months for proceeding to trial, an almost 2000% increase for putting the government to its burden. It is hard to imagine any defendant, including an innocent one, rejecting such odds. Olis, however, exercised his right to a trial, and, unlike his colleagues, reaped the full wrath of post-Enron reforms. Another example is Lea Fastow, former Director and Assistant Treasurer of Corporate Finance at Enron, who was offered a plea deal that required her to plead guilty to a single count of filing a false tax return and serve one year of supervised release.<sup>100</sup> If she had rejected the offer, she would have gone to trial facing a six count indictment that charged her with

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*Sarbanes-Oxley Act*, *supra* note 27, at 231.

98. See Bowman, *supra* note 7, at 434 (“[S]etting different base offense levels within the same guideline based on the statutory maximum sentence of the offense of conviction results in a net transfer of sentencing discretion to prosecutors.”).

99. Gibeaut, *supra* note 43; Johnson & Masters, *supra* note 43, at A1.

100. See Bruce Zucker, *Settling Federal Criminal Cases in the Post-Enron Era: The Role of the Court and Probation Office in Plea Bargaining Federal White Collar Cases*, 6 FLA. COASTAL L. REV. 1, 3 (2004). Though Fastow's initial deal with the government was rejected by the court, it provides an example of the significant differential between the government's plea offer and the sentence Fastow faced at trial. *Id.* at 3-5.

participation in a \$17 million fraud. If convicted on these six counts, her sentence may have exceeded ten years in prison.<sup>101</sup> Unlike Olis, Fastow chose not to risk facing the trial differential. Other instances of staggering sentences do not allow for a glimpse at what was offered by the government, but do illustrate the type of sentences faced by those who go to trial. For instance, Bernard Ebbers, former head of WorldCom, was sentenced to twenty-five years in prison.<sup>102</sup> More recently, Jeffrey Skilling, former chief executive of Enron, was sentenced to twenty-four years and four months in prison.<sup>103</sup> It appears, therefore, that while those who risk trial face the possibility of radically increased sentences, the 95% or more of defendants who plead guilty, even in some of the most publicized post-Enron cases, have received sentences similar to those handed down in these types of cases for over a decade.

#### *Conclusion*

Plea bargaining is an integral part of the American criminal justice system, and it rose to prominence because prosecutors gained sufficient control of the system to offer defendants incentives to confess. While many believed that post-Enron reforms would result in increased prosecutions, higher sentences, and, perhaps, less plea bargaining, the actual impact was simply to increase prosecutors' control of the criminal justice system, in turn perpetuating the prominence of the plea bargaining machine. With more tools and increased control, prosecutors have increased differentials in financial crimes cases to staggering new levels by offering plea bargains carrying sentences similar to the pre-Enron era while threatening sentences following trial that take full advantage of SOX and the new Sentencing Guidelines structure. While it is possible that these new powers could actually result in more defendants accepting plea offers in the future, plea bargaining rates have been so high in recent years there is little room left for expansion. Plea bargaining triumphed many years ago, and, therefore, the reforms following Enron merely served to

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101. This calculation was made using the 2002 Sentencing Guidelines for fraud. Beginning with a base offense level of six points, Fastow would have received twenty points for a \$17 million loss and four points for an offense involving more than fifty people. A defendant with no previous criminal history and thirty points has a sentencing range between 97-121 months. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2B1.1, at 68-69 (2002), available at <http://www.ussc.gov/2002guid/2002guid.pdf>.

102. See Steven B. Duke et al., *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 8 (2007).

103. See Alexei Barrionuevo, *Enron's Skilling Is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, at C1; Carrie Johnson, *Skilling Gets 24 Years for Fraud at Enron*, WASH. POST, Oct. 24, 2006, at A1.

perpetuate this triumph and further solidify plea bargaining's place in the criminal justice system.

The promises of SOX, the DOJ policy memoranda, and the Sentencing Commission amendments remain unfulfilled. While these post-Enron reforms affected the war on financial crimes, the true impact was merely to aid in plea bargaining's survival, not to get tough on the majority of financial criminals. For most of those accused of financial crimes, therefore, little is different; ninety-five percent or more will receive a sentence relatively unchanged by the events of the last seven years. For those few souls that do risk trial, the outlook has become much more severe. So, in many ways, one can argue that the most significant legacy of the government's efforts to get tough on financial criminals is to have created further incentives for defendants to plead guilty and further risks for those who put the government to its burden at trial.