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Autocorrect? A Proposal to Encourage Voluntary Restitution Through the White-Collar Sentencing Calculus

Daniel Faichney

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COMMENTS

AUTOCORRECT?

A PROPOSAL TO ENCOURAGE VOLUNTARY RESTITUTION THROUGH THE WHITE-COLLAR SENTENCING CALCULUS

Daniel Faichney*

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* J.D. Candidate, Northwestern University School of Law, 2014; M.N.A., North Park University, 2010; B.A., University of Michigan, 2005. While preparing this Comment, I have benefitted greatly from the thoughtful and diligent editorial assistance of John Doyle, Timothy Fry, Matthew Lasky, Jessica Notebaert, Alexandra Schaller, Kelsey B. Shust, Emily Thomas, Edward Vrtis, and the *Journal of Criminal Law and Criminology* staff. I am deeply grateful for their contributions.

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INTRODUCTION

For decades, policymakers and the public have condemned the inadequacy of the law governing punishment for white-collar crimes.¹ In response to this ferment, all three branches of government have transformed that law. Some reforms have flourished and others have foundered: determinate sentencing has come and gone, but more sophisticated frameworks for linking punishment to harm and culpability have emerged and may continue to develop. Throughout this process, the severity and scope of recommended carceral penalties for white-collar offenses has steadily grown, ensuring that stiff punishments await all serious offenders, in proportion to the harm they have caused. Such changes have likely increased the deterrence and expressive–retributive effects of the law governing white-collar crime.

With these reforms in place, it is now time to consider cost-effective, complementary sanctions designed to encourage prompt victim redress and socially beneficial behavior. Although prison sentences rightfully play an important role in the means of punishment mix, incarceration should not overpower other measures that can limit the adverse societal impacts of white-collar crime. Such wrongdoing causes economic harm in the first instance, and punishment for it should aim, at least in significant part, to efficiently and effectively minimize that harm. Starting from that premise, this Comment argues that courts and the United States Sentencing Commission (USSC) should encourage restorative behavior by expanding formal measures to modestly mitigate carceral punishment when an offender voluntarily and promptly pays victims restitution.

Restitution is a familiar tool. Court-ordered restitution is used widely in white-collar cases, and voluntary restitution also plays a background role, although published decisions rarely acknowledge and examine it. While the availability of mandatory restitution may appear on its face to obviate the

¹ White-collar crime includes such crimes as money laundering, embezzlement, and a range of fraud offenses (e.g., bankruptcy fraud, corporate fraud, financial institution fraud, health care fraud, hedge fund fraud, insurance fraud, mass marketing fraud, mortgage fraud, and securities fraud). See *White-Collar Crime*, FED. BUREAU OF INVESTIGATION, <http://goo.gl/bHS5jc> (last visited Mar. 30, 2014).

need to encourage offenders to *voluntarily* repay their victims, a closer look at existing practices demonstrates that the prevailing mandatory approach is ineffective. Mechanisms for enforcing restitution judgments are imperfect at best, collection rates are abysmally low, and offenders use a panoply of evasive tactics to avoid their obligations.² Consequently, mandatory restitution orders may have expressive value, but their restorative effects tend to fall short of the mark. Their use in lieu of possibly more helpful alternative measures fails to leverage the power of the courts to induce remedial, and possibly more socially responsible, behavior.

The policy considerations motivating the drive to incarcerate economic offenders and expand the use of mandatory restitution have been sound. Efforts to strengthen the deterrent effect of laws governing economic crimes and to bring punishments for those crimes into closer alignment with punishments for “street crimes” have made white-collar prison sentences fairer, and also more responsive to public assessments of reprehensibility. In the aftermath of outbreaks of financial mega-crimes, such as the Adelphia, Enron, Tyco, and WorldCom frauds, sentencing reforms have ensured that the scale of available punishments has increased to fit the scale of actual crimes.

It is now time to expand on these reforms by turning to victims’ interests. As *United States v. Booker*³ and its progeny settle into our sentencing scheme, a paradigm shift in sentencing is at hand. Federal judges now have considerably more leeway to make individualized sentencing decisions and must balance the principal theories of punishment when making these decisions. Rather than rely solely on the United States Sentencing Guidelines, judges may now impose punishments that deviate

² For a more detailed discussion of restitution collection rates, see *infra* notes 115–18 and accompanying text. The proceedings following the 2008 guilty plea agreement in the prosecution of former Detroit Mayor Kwame Kilpatrick illustrate what can go wrong after a court has entered a restitution order. Facing several felony charges, Kilpatrick agreed to pay the City of Detroit \$1 million in restitution. M.L. Elrick et al., *Kilpatrick to City: ‘There’s Another Day for Me,’* DETROIT FREE PRESS (Sept. 4, 2008, 1:59 PM), <http://goo.gl/XQYTKi>. In the ensuing four years, Michigan courts repeatedly stepped in to consider issues related to the enforcement of that agreement. See, e.g., Tresa Baldas, *Text Message Scandal: Kilpatrick to Pay More on Restitution*, DETROIT FREE PRESS, Mar. 2, 2012, at 4A (detailing the order that increased Kilpatrick’s payments from \$160 per month to \$500 per month toward the \$859,222.80 still owed and reporting Kilpatrick’s pending appeal of the order); Jim Schaefer et al., *‘I Lied’: Mayor Admits Guilt, Resigns from Office—Scandal that Crippled City Ends with 2 Felony Convictions, 4 Months in Jail*, DETROIT FREE PRESS, Sept. 5, 2008, at 1S (describing the plea agreement). When Kilpatrick was convicted of corruption charges in March 2013, he still owed the City of Detroit \$854,062.20. Tresa Baldas & Jim Schaefer, *Kilpatrick Can’t Escape Restitution: Locked Up, He’s Still on Hook for Debt to City*, DETROIT FREE PRESS, Mar. 13, 2013, at 1A.

³ 543 U.S. 220 (2005).

from those Guidelines, provided that their punishments comport with the considerations set forth in the governing statutes. With the return of judicial discretion to the sentencing field, it is not only possible but may indeed be *necessary* to develop a structural approach to white-collar sentencing that is more responsive to victims' compensatory interests. Without one, we may witness a slow erosion of the uniformity obtained by two decades of binding sentencing policy: judges may increasingly use their newly granted discretion to impose ad hoc sentences that recognize offenders' voluntary attempts to compensate victims in individual cases, potentially leading to fractured and unpredictable sentencing practices.⁴ Formally recognizing and expanding the role of restorative measures through the U.S. Sentencing Guidelines encourages judges to consider victim interests in a uniform manner. This may, in turn, promote more uniform sentencing outcomes overall.

In recent years, scholars and practitioners debated many possible sentencing policy changes. Some, but relatively few, have made detailed proposals for the expanded use of complementary or alternative punishments. Indeed, since *Booker*, much commentary on white-collar sentencing has focused on rethinking the measurement of economic loss⁵ and its role in the existing sentencing framework.⁶ Other authors have addressed problems of overcriminalization,⁷ overpunishment or context-insensitive punishment,⁸ and underpunishment.⁹ A smaller set of authors

⁴ The discretion *Booker* and its progeny have granted to judges has gradually eroded the (relatively) uniform sentencing results achieved in the pre-*Booker* era. See *infra* Part I.B. A national sentencing policy encourages uniformity. But without binding force, such a policy must maintain judicial support if it is to have this effect over the long term.

⁵ See Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 738–39 (2005); Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 773–78 (2006); Lana L. Freeman, Note, *Sentences Should Be Reasonable, Not Shocking: A De-emphasis on Loss for Federal Securities Fraud Sentencing*, 2012 U. ILL. L. REV. 969, 997–1002; Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1012 (2010).

⁶ David Debold & Matthew Benjamin, Essay, “*Losing Ground*”—*In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. PENNUMBRA 141, 154–55 (2011); John D. Esterhay, *Apples and Oranges: Securities Market Losses Should Be Treated Differently for Major White-Collar Criminal Sentencing Under the Federal Guidelines*, 76 MO. L. REV. 1113, 1139 (2011); Danielle DeMasi Chatten, Note, *The More You Gain, the More You Lose: Sentencing Insider Trading Under the U.S. Sentencing Guidelines*, 79 FORDHAM L. REV. 165, 211–13 (2010).

⁷ J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 55–57 (2007).

⁸ Rodney D. Perkins, *Purposes-Based Sentencing of Economic Crimes After Booker*, 11 LEWIS & CLARK L. REV. 521, 528–36 (2007) (arguing in favor of using the existing sentencing statute to mitigate white-collar punishments when the Guidelines provide a

have addressed noncarceral measures. Several of these authors have discussed introducing to the sentencing process sanctions such as shaming,¹⁰ criminal fines pegged to offenders' wealth,¹¹ asset forfeiture,¹² and computer use restrictions for Internet offenders.¹³ Others have

flawed or unacceptable benchmark); Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 756–58 (2007) [hereinafter Podgor, *The Challenge*] (arguing that current white-collar sentencing law fails to adequately consider offenders' culpability, the unique characteristics of white-collar crime, and offenders' future dangerousness); Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 87 (2010) (noting that costs and risks of white-collar trials have created a state of affairs where plea-bargaining strategy, rather than innocence or guilt, is the preeminent consideration in white-collar prosecution); Note, *Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act*, 122 HARV. L. REV. 1728, 1732–39 (2009) (arguing that the current sentencing model underdeters white-collar crime, overpunishes small-scale offenders, and leads to uneven outcomes).

⁹ Daniel A. Chatham, *Playing with Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 637–39 (2007); John D. Esterhay, Note “Street Justice” for Corporate Fraud—Mandatory Minimums for Major White-Collar Crime, 22 REGENT U. L. REV. 135, 165–89 (2009); Casey C. Kannenberg, Note, *From Booker to Gall: The Evolution of the Reasonableness Doctrine as Applied to White-Collar Criminals and Sentencing Variances*, 34 J. CORP. L. 349, 378–79 (2008).

¹⁰ Bibas, *supra* note 5, at 739–40; Mirela V. Hristova, *The Case for Insider-Trading Criminalization and Sentencing Reform*, 13 TRANSACTIONS: TENN. J. BUS. L. 267, 304–08 (2012).

¹¹ Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 792 (2006) (“There are a couple of important policy implications to be drawn from the analysis. First, if fines are more heavily relied upon, the analysis suggests that racial disparities in prison sentences, particularly those between black[s] and whites, might increase. Second, if racial disparities in white-collar sentences and fines are driven partly by income levels and unobserved assets, then a more creative system of fining and ascertaining the ability of offenders to pay fines might actually reduce observed racial disparities. If fines are made proportionate to wealth and a system of payment options is created, prison time may be forgiven in a more equitable fashion.”).

¹² Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. CAL. REV. L. & SOC. JUST. 45, 49 (2008) (explaining the statutory basis for criminal forfeiture in white-collar cases); Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 197–203 (2011) (arguing that asset forfeiture may serve the same deterrence and retribution aims effectuated by incarceration and should be considered as a viable alternative or complementary punishment); Lisa H. Nicholson, *The Culture of Under-enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 327 (2007) (arguing that, in securities fraud cases, “any funds obtained (including any profits gained or losses avoided), as well as any assets traceable thereto, should be forfeited. . . . [And these forfeited losses should be] returned to the corporation, or to victimized investors”).

¹³ Katharine A. Alexander, Comment, *Bullseye on the Nation's Back: Combating the Heightened Threat of Pedestrian Economic Criminals*, 19 COMMLAW CONSPECTUS 559, 591–94 (2011) (recommending that courts expand the application of computer use restrictions to punish white-collar crimes committed online).

addressed, and recommended, the use of “restorative justice” to supplement existing white-collar punishment.¹⁴ The role of restitution, meanwhile, appears to have only entered the literature in passing or as a subsidiary component of proposed reforms.¹⁵

Among these authors, Professor Stephanos Bibas describes one alternative approach to sentencing after *Booker*. Professor Bibas argues that combining “short but certain terms of imprisonment” with the use of restitution and other noncarceral sanctions will permit the USSC to “foster deterrence, inflict retribution, express condemnation, and heal victims at a fraction of the cost,” thus “calibrat[ing] white-collar sentences to their core purpose.”¹⁶ This Comment does not question the soundness of current Guidelines-range sentences. Instead, this Comment urges courts and the USSC to continue the white-collar sentencing “calibration” process by establishing formal measures to more fully recognize the voluntary, pre-sentencing payment of victim restitution by offenders—a reform that imposes fewer costs or administrative burdens than most other proposed complementary sanctions.

By using voluntary restitution for “autocorrection” as a “carrot” to balance the “stick” of incarceration, courts can encourage offenders to directly and promptly repay victims. If voluntary restitution emerges from

¹⁴ See, e.g., Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 423 (2007) (arguing that “restorative justice interventions are warranted and possible even in high-profile white-collar crime cases where restorative justice has not been applied to date” and suggesting that a model “inspired by the South African Truth and Reconciliation [Commission]” might be used in place of “conventional restorative justice process models such as victim-offender mediation, group conferencing and circles” in cases of high-profile financial crime (citation omitted)); see also *id.* at 451 (suggesting that “introducing restorative justice to high-profile white-collar crime must be coupled with the current traditional responses,” since “only through such a structure can the use of restorative interventions be justified from both a retributive and a utilitarian perspective”).

¹⁵ See Bibas, *supra* note 5, at 739–40.

¹⁶ *Id.* at 739. “The combination of [apology, restitution, and public shaming] might foster deterrence, inflict retribution, express condemnation, and heal victims at a fraction of the cost.” *Id.* at 740. “It would condemn and deter crime *ex ante* without sacrificing *ex post* individualized justice.” *Id.* For purposes of this Comment, the core aims of sentencing are those set forth in 18 U.S.C. § 3553(a)(2) (2012). Those aims include:

- deterrence, § 3553 (a)(2)(B);
- incapacitation, § 3553(a)(2)(C);
- rehabilitation, § 3553(a)(2)(D); and
- just punishment, § 3553(a)(2)(A).

The parsimony provision of § 3553(a) enjoins courts to impose a sentence that is “sufficient, but not greater than necessary” to comply with the goals set forth in § 3553(a)(2) and directs courts to consider a series of factors when crafting a sentence; § 3553(a)(7) identifies “the need to provide restitution to any victims of the offense” as one such factor.

the shadows of the sentencing process in a form that can be reliably recognized and applied, more offenders might be persuaded to cooperate. Such an incentive would reduce the destructive impact of financial crime, which judges must already consider when sentencing white-collar offenders.

Restitutive principles need not (and should not) be the only principles animating criminal punishment.¹⁷ Nonetheless, they advance substantial public interests and should play a wider, more explicit role in the sentencing process. Toward that end, this Comment argues in favor of expanding the role of voluntary restitution as a complementary measure that judges may use to modestly mitigate existing Guidelines-range sentences. Operating in this way, voluntary restitution does not compromise existing punishments. Instead, the proposed reform provides judges and offenders with a device that leads to better calibrated sentencing outcomes.

Resultantly, this Comment discusses the unique contribution that voluntary restitution can make to the white-collar sentencing process and sets forth a comprehensive proposal for encouraging it through the post-*Booker* federal sentencing process. Part I summarizes the development and current state of white-collar sentencing law, Part II discusses the advantages and drawbacks of accounting for voluntary restitution in sentencing, and Part III sets forth a proposed reform.

¹⁷ Advocates of “restitutive justice” argue that restitution should entirely replace the current system of penal sanctions. See Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 160 (1996) (arguing that “(1) injustice arises when one person violates the rights of another; (2) justice requires the rectification of this rights violation; and (3) rectification should consist of forcing the offender to raise the victim up—restitution—rather than lowering the criminal to the level of his victim—punishment”); Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977). Restitutive justice, however, does not address the extent to which crimes represent offenses against the public, the corresponding public interest in expressive and retributive sanctions, or the role of these sanctions in deterring future bad acts. For a critique of penal restitution that addresses these and other points, see Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 977 (1986) (“[T]heories of restitution . . . fail to account for the complementary relationship which exists between the adjudicatory and sanctioning phases of the criminal process. In addition, they do not comprehend the larger institutional role which each plays in creating social cohesion.”).

I. THE EMERGENCE OF CURRENT WHITE-COLLAR SENTENCING POLICY

A. REFORMS BEFORE *UNITED STATES V. BOOKER*

Starting in 2001, a spate of corporate scandals thrust white-collar crime into the spotlight. Enron came first,¹⁸ followed in turn by WorldCom,¹⁹ Tyco,²⁰ and Adelphia.²¹ Commentators responded with outrage, and a majority of the public supported far-reaching reforms.²²

Congress took notice, and passed the Sarbanes-Oxley Act (SOX) in July 2002.²³ SOX included components intended to effectuate corporate governance and accounting reform²⁴ as well as provisions that addressed white-collar sentencing.²⁵ The former provided tools to deter or otherwise prevent future frauds, while the latter directed the USSC to impose stiffer punishments for white-collar crimes, especially highly egregious ones, such as frauds that threaten the financial solvency of more than fifty

¹⁸ In November 2001, months after Enron's financial health took a turn for the worse, the Securities and Exchange Commission commenced an investigation into the company. See Alex Berenson, *S.E.C. Opens Investigation into Enron: A Company Fails to Explain Dealings*, N.Y. TIMES, Nov. 1, 2001, at C4. One month later on December 2, 2001, the company filed for bankruptcy. Riva D. Atlas, *The Process: Path to Settling the Claims Will Be a Long One, Experts Say*, N.Y. TIMES, Dec. 3, 2001, at A16.

¹⁹ Following the announcement that the Securities and Exchange Commission charged WorldCom with fraud, the company filed for bankruptcy in July 2002. Simon Romero & Riva D. Atlas, *WorldCom Files for Bankruptcy; Largest U.S. Case: \$107 Billion Collapse Isn't Likely to Disrupt Service, for Now*, N.Y. TIMES, July 22, 2002, at A1. In 2004, federal prosecutors filed criminal charges against the company's former chief executive officer, Bernard Ebbers, leading to a conviction in March 2005. See *United States v. Ebbers*, 458 F.3d 110, 117 (2d Cir. 2006).

²⁰ Top Tyco managers and officers were indicted in September 2002. See Andrew Ross Sorkin, *2 Top Tyco Executives Charged with \$600 Million Fraud Scheme*, N.Y. TIMES, Sept. 13, 2002, at A1.

²¹ In September 2002, only days after the Tyco indictments, federal prosecutors filed charges against Adelphia's founder, his two sons, and former managers, alleging a conspiracy to hide \$2.5 billion in misappropriated funds. Geraldine Fabrikant, *Indictments for Founder of Adelphia and Two Sons*, N.Y. TIMES, Sept. 24, 2002, at C1.

²² Rage against the executives ran so high in some quarters that one writer compared WorldCom's Bernard Ebbers to Osama bin Laden. Daniel Gross, *Bernie bin Laden*, SLATE (Sept. 10, 2002, 6:50 PM), <http://goo.gl/UBI4v1>. Meanwhile, one poll found that 56% of Americans supported either a "complete overhaul" or "major reforms" of corporate auditing practices, and another reported that the percentage of respondents who thought that there was "too little" regulation of big business nearly doubled between 2001 and 2002. *Big Business*, GALLUP, <http://goo.gl/jYxmnY> (last visited Apr. 19, 2014); David W. Moore, *Public: Major Auditing Reforms Needed*, GALLUP (Feb. 26, 2002), <http://goo.gl/CJhN4W>.

²³ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

²⁴ *Id.* §§ 101–501 (codified in scattered sections of 15 U.S.C.).

²⁵ *Id.* §§ 801–1107 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

individuals.²⁶ Title IX,²⁷ the White-Collar Crime Penalty Enhancement Act of 2002 (WCCPA) contains pieces of both. It set harsher penalties for some existing offenses,²⁸ created new offenses (including destruction of corporate audit records and certifying noncompliant financial reports), and suggested enhancements to the Sentencing Guidelines promulgated by the USSC.²⁹ While the WCCPA arrived too late to play a role in convicting and sentencing the Enron principals, it changed corporate governance and its regulation³⁰ as well as revamped the punishments that apply to those who violate these rules.³¹ It was, in other words, something along the lines of what the public sought:³² a legislative effort intended to shift the norms involving white-collar misconduct.³³

On the punitive side, the tasks of defining and revising punishments and determining the standards on which they rested fell to the USSC. The USSC responded to SOX by establishing longer sentences for white-collar crimes that either impacted large numbers of people or were committed by managers.³⁴ This action comported with a trend that dated to the inception

²⁶ See, e.g., JOHN R. STEER, THE SENTENCING COMMISSION'S IMPLEMENTATION OF THE SARBANES-OXLEY ACT 10–12 (2003), available at <http://goo.gl/L1qShH>.

²⁷ Sarbanes-Oxley Act § 901.

²⁸ These penalties included “quadrupling the maximum penalty for mail and wire fraud (from five to 20 years’ imprisonment), and equating the maximum penalties for fraud attempts and conspiracies with the penalties for the underlying substantive offense.” STEER, *supra* note 26, at 9.

²⁹ *Id.* at 15 (citing 18 U.S.C. §§ 1348, 1350, and 1520 (2012)).

³⁰ See Douglas M. Branson, *Too Many Bells? Too Many Whistles? Corporate Governance in the Post-Enron, Post-WorldCom Era*, 58 S.C. L. REV. 65, 82–108 (2006).

³¹ See STEER, *supra* note 26, at 9.

³² For a discussion of public sentiment around this time, see *supra* note 22.

³³ Former President George W. Bush, who signed SOX into law, called its provisions the “most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt.” *The Laws that Govern the Securities Industry*, U.S. SEC. & EXCH. COMM’N, <http://goo.gl/2xSkEF> (last visited Apr. 19, 2014). The extent to which SOX has actually succeeded is an open question. The WCCPA steeply increased penalties for some white-collar offenses, but one critic argues that it failed to provide an effective mechanism for differentiating between the more serious crimes and the less serious ones. See, e.g., Note, *supra* note 8, at 1730. As a result, the critic says, it “underdeters massive fraud, [and] simultaneously overdeters the much more common minor white collar crimes.” *Id.*

³⁴ Notably, the USSC:

- (1) added a new sentencing enhancement category for offenders whose crime(s) impose an economic loss on more than 250 people, so that offenders in this category face an “almost double[d]” sentence as compared with those whose crime(s) impacted fewer than 250 people;
- (2) provided a set of factors intended to help courts measure the scope of harm in large-scale cases; and
- (3) added an additional enhancement of up to 50% of the Guideline-range sentence applicable in securities fraud cases where the offender is a “corporate officer or director at the time of the offense.”

STEER, *supra* note 26, at 10–13.

of the USSC and indeed was understood to be a major part of the USSC's mandate: stiffening white-collar sentences and eliminating the disparity between such sentences and those imposed for other crimes.³⁵ Before SOX, the USSC repeatedly acted on this mandate, sometimes in concert with Congress. In prior years, for instance, the USSC responded to legislative mandates to increase penalties for "(1) frauds against the elderly, (2) international currency counterfeiting, (3) computer crimes, (4) electronic copyright infringement, (5) telemarketing fraud, (6) cellular telephone cloning, (7) identity theft, and (8) higher education financial assistance fraud."³⁶ The USSC also reformed white-collar sentencing on its own initiative by adjusting the Guidelines' monetary loss table³⁷ and by engaging in a six-year review of its economic crime provisions, which culminated in releasing new guidelines.³⁸

Although the shifts in white-collar sentencing policy did not generate penalty increases as dramatic as those seen in sentencing for some other types of crimes,³⁹ the trend toward imposing harsher penalties for economic

³⁵ See *id.* at 1 ("Th[e] first group of commissioners also carefully studied the Commission's organic statute and its legislative history. They found therein strong indications that Congress wanted the Commission to toughen the sentences for fraud, embezzlement, and other economic crimes. The Commission did just that, reducing substantially the general availability of probation sentences, and increasing the likelihood that 'white-collar' [c]riminals would have to spend some time in jail . . ."); see also *United States v. Davis*, 537 F.3d 611, 617 (6th Cir. 2008) ("One of the central reasons for creating the sentencing guidelines was to ensure stiffer penalties for white-collar crimes and to eliminate disparities between white-collar sentences and sentences for other crimes.").

³⁶ STEER, *supra* note 26, at 3.

³⁷ The loss table is a fixture of the Guidelines' white-collar provisions that provides for sentencing enhancements corresponding with the magnitude of monetary losses caused by the crime. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2012), available at <http://goo.gl/aJwHeh>. Past editions of the Sentencing Guidelines are also available. See *Guidelines Manual Archives*, U.S. SENTENCING COMM'N, <http://goo.gl/UiUrkS> (last visited Apr. 19, 2014).

³⁸ STEER, *supra* note 26, at 3–9; see Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 32–37 (2001) (describing the procedural history of the 2001 economic crime package). The revisions modified the then-existing U.S. Sentencing Guidelines § 2B1.1 (theft guidelines) and § 2F1.1 (fraud guidelines), and consolidated them within a single section, § 2B1.1. *Id.* at 7 n.1. As Judge Diana Murphy, chair of the USSC in 2001, explained in a contemporary article, the 2001 economic crime amendment package "simplif[ied the] Guidelines application for economic crimes, significantly increase[d] penalties for offenses involving high dollar losses, and provide[d] more discretion to judges in sentencing defendants who caused or intended relatively low losses." Diana E. Murphy, *Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond*, 87 IOWA L. REV. 359, 363–64 (2002).

³⁹ See Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286, 287 (2007) (noting that the average fraud

crimes did broadly track with a systemic shift in the criminal law over the last three decades. The Sentencing Reform Act of 1984⁴⁰ (which created the USSC and made its sentencing guidelines binding on judges) set forth a host of punishment theories and considerations intended to guide sentencing decisions.⁴¹ Nonetheless, much legislation since that time has focused on “deterrence,” “incapacitation,” and the goal of “communicat[ing] with the offender about her wrongdoing,”⁴² all of which find their primary expression in incarceration.⁴³

The USSC’s SOX implementation process was consistent with systemic shifts in sentencing in general and white-collar sentencing in particular, but it was also one of the USSC’s final major acts before the judicially binding sentencing guidelines succumbed to a constitutional challenge. In 2005, the U.S. Supreme Court decided *United States v.*

sentence increased by 5.3 months between 1995 and 2005, while the average sentence for national security crimes increased sixfold, to 126.7 months).

⁴⁰ Pub. L. No. 98-473, §§ 211–39, 98 Stat. 1987, 1987–2040 (codified as amended in scattered sections of 18, 28 U.S.C.).

⁴¹ See 18 U.S.C. § 3553(a)(2), (7) (2012) (including such aims as rehabilitation and victim compensation).

⁴² Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1327–28 (2007). Shifts in drug-related sentencing since 1980 illustrate this trend most clearly. Between 1980 and 2003, the number of prisoners serving time for drug-related offenses increased twelvefold. MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 9 (2007), available at <http://goo.gl/wafjES>. Meanwhile, between 1991 and 2004, inmate participation in drug treatment programs fell by more than half. *Id.* at 15.

⁴³ This development is consistent with Professor William Stuntz’s theory of the political dynamics of criminal law, which posits that the incentives governing criminal legislation and enforcement tend to turn the criminal law into a “one-way ratchet,” turning steadily toward broader proscription and higher penalties; ratchet-turning minimizes prosecutors’ overall costs of obtaining convictions and manages the risk of public backlash against legislators. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20, 546–57 (2001). “Most criminal laws are written reactively[—]an event happens, and Congress provides legislation to appease the public.” Podgor, *The Challenge*, *supra* note 8, at 743. Large majorities of the general public have favored increased incarceration at points during the past twenty years: During the 1988–91 sampling period, nearly 84% of General Social Survey respondents either agreed or strongly agreed with the proposition that “[p]eople who break the law should be given stiffer sentences.” NAT’L OP. RESEARCH CTR., GENERAL SOCIAL SURVEYS, 1972–2012: CUMULATIVE CODEBOOK 2363 (2013), available at <http://goo.gl/Au3wBr>. Some new evidence shows that public appetites for more incarceration may now be waning. See, e.g., PEW CTR. ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 2–5 (2012), available at <http://goo.gl/r0wr9m> (reporting the results of a 2010 survey showing that 45% of respondents believe the American prison population is too large and showing that large majorities of respondents support reducing prison sentences for nonviolent offenders and favor prioritizing recidivism reduction over time served).

Booker.⁴⁴ In *Booker*, the Court abrogated the portion of the Sentencing Reform Act⁴⁵ that made the Guidelines mandatory.⁴⁶ *Booker* did not write the Guidelines out of existence; rather, it ordered judges to “consult” the Guidelines when calculating an appropriate sentence.⁴⁷ Decisions rendered under this new framework would then be subject to appellate review for reasonableness.⁴⁸

B. DISCRETION RETURNS AFTER *BOOKER*

In the wake of *Booker*, the Supreme Court carved out a new role for the Guidelines. In *Rita v. United States*, the Court clarified the standard of appellate review governing sentencing decisions and held that Guidelines-range sentences are presumptively reasonable.⁴⁹

Early in the following term, the Court held in *Gall v. United States* that a below-Guidelines, noncustodial sentence for a former drug dealer was “reasonable” because it reflected the sentencing judge’s considered, individualized assessment of the facts relevant to sentencing.⁵⁰ As the Court explained, the district judge carefully evaluated the offender’s conduct, finding evidence of rehabilitation in both the offender’s pre-indictment decision to abandon his drug-dealing enterprise and his cooperation with authorities after indictment.⁵¹ Compelled by this rehabilitation evidence, the district judge departed from the Guidelines and ordered the offender to serve a term of probation.⁵² The Supreme Court upheld the decision over the Eighth Circuit’s objection, noting that *Booker* made strict adherence to the Guidelines’ sentencing formula inappropriate. The Court explained that circuit courts “must give due deference to the

⁴⁴ 543 U.S. 220 (2005).

⁴⁵ *Id.* at 259 (abrogating 18 U.S.C. § 3553(b)(1) (2000 & Supp. IV)).

⁴⁶ The binding guidelines did, however, survive an early constitutional challenge. *See Mistretta v. United States*, 488 U.S. 361 (1989).

⁴⁷ *Booker*, 543 U.S. at 264.

⁴⁸ *Id.* at 261.

⁴⁹ *See* 551 U.S. 338, 351 (2007) (holding that (1) sentencing judges must consult the Guidelines and the 18 U.S.C. § 3553(a) factors; (2) any sentence that falls within the Guidelines range is presumed reasonable for purposes of appellate review; and (3) the “reasonableness” standard governing such review is equivalent to abuse of discretion).

⁵⁰ 552 U.S. 38, 53–57 (2007).

⁵¹ *Id.* at 43–45.

⁵² Specifically, the district court judge reasoned that “[a]ny term of imprisonment in this case would be countereffective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life. The Defendant’s post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society.” *United States v. Gall*, 374 F. Supp. 2d 758, 763 (S.D. Iowa 2005).

district court's decision that the § 3553(a) factors, on the whole, justify the extent of the variance."⁵³ Determining whether a variance is justified is necessarily an individualized process: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."⁵⁴

The Court next articulated a deferential approach to judicial policy decisions in sentencing. In *Kimbrough v. United States*, the Supreme Court's third post-*Booker* sentencing case, the Court upheld a below-Guidelines sentence for a crack dealer.⁵⁵ In that case, the district judge disagreed with the crack/powder cocaine sentencing disparity and adjusted the offender's sentence accordingly.⁵⁶ The Supreme Court upheld that sentence, noting that the district judge's assessment of narcotics sentencing policy was a valid consideration in determining a "sufficient, but not greater than necessary" sentence under § 3553(a).⁵⁷

The upshot of *Rita, Gall*, and *Kimbrough* is that judges once again have considerable discretion to make individualized determinations based on all of the major sentencing rationales when choosing the appropriate sentence to impose. The statute governing the requisite initial phase of judicial penal analysis, 18 U.S.C. § 3553(a), sets forth the principal sentencing goals and permits judges to consider nearly all of the leading theories of punishment and related considerations, including retribution⁵⁸

⁵³ *Gall*, 552 U.S. at 51. The 18 U.S.C. § 3553(a) factors set forth policy rationales that judges must consult, per *Booker*, when making a sentencing decision.

⁵⁴ *Id.* at 52 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)) (internal quotation marks omitted).

⁵⁵ 552 U.S. 85, 91–93 (2007).

⁵⁶ *Id.* at 92–93.

⁵⁷ *Id.* at 110–11 (quoting 18 U.S.C. § 3553(a)) (internal quotation marks omitted). Lower courts have since read *Kimbrough* to extend beyond the realm of drug sentencing. See *United States v. Johnson*, 588 F. Supp. 2d 997, 1002–05 (S.D. Iowa 2008) (departing downward from the Guidelines range in a child pornography case in which the applicable Guidelines did not permit judges to distinguish between the "most and the least egregious" offenders and, consequently, did not support individualized application of the 18 U.S.C. § 3553 factors). Policy-based deviations were not always reversed even before *Kimbrough*. See *United States v. Wachowiak*, 496 F.3d 744, 745 (7th Cir. 2007) (affirming, pre-*Kimbrough*, the trial court's below-Guidelines sentence for child pornography possession premised on disagreement with the Guidelines' treatment of sentence-mitigating factors).

⁵⁸ See 18 U.S.C. § 3553(a)(2)(A) (2012) (explaining that sentences should be designed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

(or “just deserts”⁵⁹), incapacitation,⁶⁰ general deterrence,⁶¹ rehabilitation,⁶² uniformity,⁶³ and victim remediation.⁶⁴ As long as the judge’s sentencing decision is not egregious⁶⁵ and comports with the utilitarian injunction that sentences be “sufficient, but no greater than necessary” to comply with the § 3553(a) factors, that decision should survive appellate review. Empirical data illustrates the effects of this change: the Guidelines continue to set basic sentencing norms, but individualized assessment and policy analysis have measurably altered aggregate sentencing outcomes.⁶⁶

⁵⁹ See William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 247, 253–54 (Julian V. Roberts ed., 2011).

⁶⁰ See 18 U.S.C. § 3553(a)(2)(C) (explaining that sentences should be designed “to protect the public from further crimes of the defendant”).

⁶¹ See *id.* § 3553(a)(2)(B) (explaining that sentences should be designed “to afford adequate deterrence to criminal conduct”).

⁶² See *id.* § 3553(a)(2)(D) (explaining that sentences should be designed “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

⁶³ See *id.* § 3553(a)(6) (explaining “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).

⁶⁴ See *id.* § 3553(a)(7) (explaining “the need to provide restitution to any victims of the offense”).

⁶⁵ What constitutes egregiousness (that is, an abuse of discretion) in the white-collar context is still being worked out in the circuit courts. See John H. Chun & Gregory M. Gilchrist, *Challenges for White Collar Sentencing in the Post-Booker Era*, *CHAMPION*, May/June 2008, at 36.

⁶⁶ Reports from the district courts shed some light on changes currently afoot. A national study on interjudge sentencing variation found statistically significant variations in approximately 60% of courthouses. Susan B. Long & David Burnham, *TRAC Report: Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges*, 25 *FED. SENT’G REP.* 6, 15 (2012). The Long and Burnham study did not consider the extent to which sentences conformed to the Guidelines, but rather considered only interjudge variation within courthouses and between districts in 370,000 criminal cases completed between 2007 and 2011. *Id.* It found, among other things, that the median white-collar sentence spanned a 39-month range between the lowest sentencing judge and the highest sentencing judge in the Northern District of Illinois (making it the widest varying district in the nation), a 23.5-month range in Atlanta (fourth-widest varying), a 22.5-month range in Manhattan (sixth-widest varying), and a 19.5-month range in Kansas City (tenth-widest varying). *Id.*; see also Ryan W. Scott, *Inter-Judge Sentencing Disparity after Booker: A First Look*, 63 *STAN. L. REV.* 1, 32–33 (2010) (noting that, among Boston judges in the District of Massachusetts, “the effect of the judge on sentence length is now twice as strong as in the three years before *Booker*”). Nonetheless, the Guidelines still form the bedrock of federal sentencing, especially in some districts. In 2003, the ten districts that complied *least* with the Guidelines still complied between 41% (District of Arizona) and 64.7% (District of New Jersey) of the time, while the ten *most* compliant districts in that year issued Guidelines-range sentences between 88.9% (Western District of Oklahoma) and 82.1% (District of Utah) of the time. Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 *FED. SENT’G REP.* 356, 362 fig.4A (2012). In 2011, the comparable ranges were 24.6% (Eastern District of Wisconsin) to

C. WHITE-COLLAR SENTENCING MITIGATION AFTER *BOOKER*

In the white-collar context, judges have used their post-*Booker* discretion to make significant “downward departures”⁶⁷ from Guidelines-range sentences. Many of these non-Guidelines sentences have been vacated on appeal.⁶⁸ Circuit courts, in deciding to vacate, have either explicitly or implicitly expressed misgivings about treating white-collar offenders too leniently, as had occurred in the pre-Guidelines era.⁶⁹ Courts have also specifically noted their intentions to avoid creating the perception that white-collar offenders can “buy their way” out of a prison sentence.⁷⁰

34.9% (Southern District of New York) at the low end, and 80.4% (Southern District of Mississippi) to 70.6% (Middle District of North Carolina) at the high end. *Id.* at 362 fig.4B; *see also* Berry, *supra* note 59, at 258 (“Despite the broader discretion offered and even required of judges under *Booker* and section 3553, judges have adopted the guideline sentence in an overwhelming majority of cases.”).

⁶⁷ *See, e.g.*, *United States v. Parris*, 573 F. Supp. 2d 744, 745, 754–55 (E.D.N.Y. 2008) (imposing a sixty-month sentence on fraud offenders despite a Guidelines range of 360 months to life, and explaining why the Guidelines did not yield a sentence that comported with § 3553(a)). After *Booker*, the term “departure” no longer has the same significance. *See United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005) (holding that “instead of employing the pre-*Booker* terminology of departures, we have moved toward characterizing sentences as either fitting within the advisory guidelines range or not”). Nevertheless, given that the Guidelines remain the starting point of the federal sentencing calculus, *Gall v. United States*, 552 U.S. 38, 51 (2007), and an appellate court may (though need not) presume that a within-Guidelines sentence is “reasonable” for the purposes of appellate review, *id.*, the term “downward departure” remains a useful shorthand for sentences that deviate from the Guidelines norms.

⁶⁸ *See, e.g.*, *United States v. Peppel*, 707 F.3d 627, 631 (6th Cir. 2013) (vacating a seven-day sentence where the offender’s Guidelines calculation called for 97–121 months); *United States v. Crisp*, 454 F.3d 1285, 1287–89; 1291–92 (11th Cir. 2006) (vacating sentence of restitution and five hours’ confinement where the fraud offender’s Guidelines calculation was twenty-four to thirty months and the offender was unlikely to satisfy the restitution judgment upon which the district judge justified the departure); *see also* Matthew A. Ford, Note, *White-Collar Crime, Social Harm, and Punishment: A Critique and Modification of the Sixth Circuit’s Ruling in United States v. Davis*, 82 ST. JOHN’S L. REV. 383, 385 n.11 (2008) (listing cases where sentences were vacated on appeal).

⁶⁹ “[I]n enacting § 3553, Congress was especially concerned that prior to the Sentencing Guidelines, [m]ajor white collar criminals often [were] sentenced to small fines and *little or no imprisonment*.” *United States v. Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009) (internal quotation marks and citation omitted); *see also United States v. Crisp*, 454 F.3d 1285, 1291 (11th Cir. 2006) (noting, in a case where an offender’s fraud caused a loss of over \$480,000 to a small family-owned bank and the district court imposed a probation-only sentence, that the USSC deliberately linked financial loss to sentencing severity to reflect the offense’s seriousness, and holding that the lenient punishment did not comport with this goal); *cf. United States v. DeMonte*, 25 F.3d 343, 348 (6th Cir. 1994) (explaining that the Guidelines sought to eradicate the disparities between punishments for “street crime” and punishments for white-collar crime).

⁷⁰ *See, e.g.*, *United States v. Engle*, 592 F.3d 495, 505 (4th Cir. 2010) (“Allowing sentencing courts to depart downward based on a defendant’s ability to make restitution

Despite these considerations, circuit courts have not vacated all significantly downward-departing white-collar sentences.⁷¹ In evaluating the sentences that have survived appellate review both before and after *Booker*, several themes emerge. Some courts have recognized defendants' public, expressive good works involving "hands-on, personal sacrifice,"⁷² and charitable acts requiring considerable personal involvement.⁷³ Several others have emphasized utilitarian considerations, upholding downward-departing sentences in those situations where the adverse collateral consequences of incarceration (e.g., failure of a business, harm to innocent employees or family members, and assorted personal impacts) outweigh the benefits achieved by long sentences.⁷⁴ Finally, in a few cases, courts have departed downward where defendants made especially arduous efforts to

would thwart the intent of the guidelines to punish financial crimes through terms of imprisonment by allowing those who could pay to escape prison. It would also create an unconstitutional system where the rich could in effect buy their way out of prison sentences." (quoting *United States v. Seacott*, 15 F.3d 1380, 1389 (7th Cir. 1994))).

⁷¹ See *Chun & Gilchrist*, *supra* note 65, at 39.

⁷² *Id.* (quoting *United States v. Cooper*, 394 F.3d 172, 177 (3d Cir. 2005)) (internal quotation marks omitted).

⁷³ See, e.g., *Cooper*, 394 F.3d at 177. In *Cooper*, the Third Circuit Court of Appeals upheld a downward departure in a pre-*Booker* case where the offender "mentored [an] underprivileged young man, who later attributed his success to [the offender]." *Id.* "[The offender] also paid for not one, but four young men to attend a high school together where they would have a better opportunity to succeed." *Id.* These kinds of extraordinary efforts justified the departure. *Id.*

⁷⁴ See, e.g., *United States v. Spero*, 382 F.3d 803, 804–05 (8th Cir. 2004) (affirming a sentence of home confinement and probation where the offender demonstrated that incarceration would deprive his developmentally disabled son of necessary parental support); see also *Chun & Gilchrist*, *supra* note 65, at 39.

pay restitution,⁷⁵ or paid restitution beyond the amount required by the Guidelines or the governing law.⁷⁶

II. VOLUNTARY RESTITUTION: CAN OFFENDERS AUTO-CORRECT, AND SHOULD THEY?

A. VOLUNTARY RESTITUTION COMPENSATES VICTIMS AND REDUCES CRIMINAL JUSTICE COSTS

Among the mitigating factors discussed in the preceding Part, voluntary restitution is unique. Because voluntary restitution is an affirmative act, intended to return ill-gotten gains directly to victims, it is unlike and, from a utilitarian standpoint, superior to the indirect purgation that may occur when an offender performs charitable works.⁷⁷ In contrast

⁷⁵ *United States v. Kim*, 364 F.3d 1235, 1244–45 (11th Cir. 2004) (acknowledging that offenders took out loans and depleted their life savings to make restitution). *Compare* *United States v. Filipiak*, 466 F.3d 582, 583–84 (7th Cir. 2006) (declining to grant an offender, a former director of accounting and administration, an additional reduction to a below-Guidelines range sentence where the offender returned the balance of documented losses but “still had a net worth of \$1.4 million at the time of sentencing, and . . . may have been able to make restitution precisely because she profited from investing the very funds she pilfered from her employer”), *with* *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999) (upholding a downward departure based on the fact that the offender, a cattle rancher who defrauded a bank by misrepresenting the amount of livestock he possessed (1) “voluntarily began making restitution almost a year before he was indicted,” (2) “worked hard to ensure that his assets received the highest possible value, including taking care of the crops until harvest, carefully tending the livestock until sale, and loading the hay trucks for the bank,” (3) “often worked sixteen-hour days,” (4) “turned over his life insurance policy and his wife’s certificate of deposit,” (5) “took an outside job,” (6) “gave up his home,” and (7) paid back “nearly ninety-four percent” of what he owed).

⁷⁶ *See, e.g., Kim*, 364 F.3d at 1244–45 (noting that defendants’ restitution amounted to 140% of offenders’ share of losses incurred); *see also* 18 U.S.C. § 3553(a)(7) (2012) (establishing that the need to pay restitution to victims is a relevant factor in the sentencing calculus). Section 3553(a)(7) also has a utilitarian dimension in that a harsh sentence may undercut the offender’s ability to work in order to repay her victims. *See, e.g., United States v. Rangel*, 697 F.3d 795, 803–04 (9th Cir. 2012) (noting that “the district court’s goal of obtaining restitution for the victims of Defendant’s offense, 18 U.S.C. § 3553(a)(7), is better served by a non-incarcerated and employed defendant” (citations and internal quotation marks omitted)). English sentencing law includes a similar consideration: “the making of reparation by offenders to persons affected by their offences.” Andrew Ashworth, *Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING*, *supra* note 59, at 21, 24.

⁷⁷ This is not to say that charitable works could not directly aid victims or aid individuals similarly situated to victims, but rather that the type of charitable works commonly invoked by individuals pursuing mitigation are often within the range of normal behavior for professional people and have no direct connection to the harm done. *See, e.g., United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998) (holding that “advis[ing] local business owners, hir[ing] young people, serv[ing] on [a] church council, and rais[ing] money for

with generalized community volunteer service or donations to third parties, restitution directly repairs the harm that the offender has done. Moreover, by drawing upon or, in extraordinary cases, exhausting the offender's financial resources to compensate victims,⁷⁸ it ensures that the offender bears at least some of the cost of the harm done. In some cases, this result may be superior to punishment that forces the state to bear the full cost of harm through incarceration.⁷⁹ One reason such a result may be superior in the white-collar context is that white-collar offenders are especially susceptible to specific deterrence, at least in the aggregate. Although it has been argued that white-collar convictions are difficult to obtain,⁸⁰ and may not represent the full extent of an offender's bad acts,⁸¹ first-time fraud offenders are least likely among all individuals convicted of federal crimes to recidivate.⁸² In the ideal case, such as where the offender offers restitution in sufficient quantities to compensate the victim or victims for the full extent of their economic losses, and does so promptly, the offender becomes a partner in achieving what might be the closest possible approximation of an optimal response to a crime.⁸³ With victim interests at

charity" are activities that are "neither exceptional nor out of the ordinary" for a prominent citizen and cannot justify a downward departure).

⁷⁸ See, e.g., *Kim*, 364 F.3d at 1244–45 (finding, pre-*Booker*, that the offender's payment exceeded total profits from his crime and was made at great personal cost, warranting a downward departure).

⁷⁹ In 2009, the average annual per-inmate incarceration cost within the federal prison system was \$25,251. Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 6,161 (Feb. 3, 2011).

⁸⁰ Weissmann & Block, *supra* note 39, at 290 n.18 ("White-collar prosecutions are notoriously difficult to pursue successfully because they depend on complex financial records and often arcane regulatory schemes, and white-collar defendants are often represented by skilled and well-financed attorneys.").

⁸¹ *Id.* (noting that the nature of white-collar crime and the difficulty of obtaining a conviction in this context makes it more likely that "a 'first time' white-collar offender may have engaged in prior frauds without being detected, charged, and convicted").

⁸² The recidivism rate for first-time fraud offenders is 9.3%, less than half the rate among all offenders (22.1%), and the lowest among all crimes covered by the Guidelines. U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 20 ex.1, 30 ex.11 (2004), available at <http://goo.gl/9xRgGV>.

⁸³ "The Pareto theory of equilibrium holds that an optimum is a state in which no person can benefit without a corresponding detriment to another person." Donald V. MacDougall, *The Exclusionary Rule and Its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. CRIM. L. & CRIMINOLOGY 608, 636 n.181 (1985). The general analogy to Pareto optimality here is intended to be illustrative. Assuming that victims of white-collar crime would prefer to be compensated promptly and fully, rather than see a maximally long sentence imposed on the offender, and assuming further that those two outcomes might sometimes be mutually incompatible, making use of a rule that encourages voluntary restitution leaves victims better off by increasing the likelihood that offenders will

least partly addressed, judges remain free to impose a sentence that best advances the remaining penal policies.

B. ADDRESSING THE “BUYOUT” AND REDUNDANCY PROBLEMS

Despite its positive qualities, voluntary restitution remains a “discouraged” factor in the Guidelines’ sentencing mitigation calculus.⁸⁴ In part, this is due to the architecture of the Guidelines themselves. During the initial Guidelines determination, sentencing judges must consider any relevant USSC policy statements.⁸⁵ Under the policy statement governing departures (§ 5K2.0(d)(5)), judges may not deviate from a Guidelines sentence calculation in cases where a defendant pays restitution at or below the amount “required by law including the [G]uidelines”⁸⁶ The relevant law and Guidelines provide that full restitution after conviction will usually be obligatory and may not justify a departure. Preconviction restitution, however, may suffice to warrant a limited departure. The Mandatory Victims Restitution Act of 1996 (MVRA) requires that judges order full restitution to victims of all offenses against property (including those committed by fraud or deceit) except where assessing restitution is “impracticable” or otherwise imposes a burden on the sentencing process serious enough to outweigh victims’ need for restitution.⁸⁷ The Guidelines, in turn, provide for limited sentencing adjustments where offenders fulfill their restitution obligation before conviction, and also permit additional departures (but only in extraordinary cases⁸⁸).

In considering defendants’ requests to accord greater mitigating effect to restitution payments than the Guidelines expressly provide, courts have

repay victims. Courts and law enforcement are also better off: encouraging voluntary restitution takes no punishment (and hence no deterrent tool) off the table, but lightens the financial burden associated with enforcing mandatory restitution orders and adjudicating civil suits for damages. For reasons discussed *infra* note 120, reducing white-collar crime by relying on incarceration alone might be a uniquely expensive proposition. Voluntary restitution permits the offender, rather than taxpayers, to shoulder some of the costs of the crime, reducing the costs to society where the judge deems the repayment sufficient to mitigate the sentence. Finally, by creating an opportunity for offenders to engage in self-initiated remedial behavior, courts encourage offenders to accept responsibility, benefitting society at large. The stakeholders whose punitive interests are left worse off in this equation are those who favor retributive punishment or incapacitation over other punitive policies, notwithstanding the associated actual or opportunity costs.

⁸⁴ *United States v. Kim*, 364 F.3d 1235, 1242 (11th Cir. 2004).

⁸⁵ U.S. SENTENCING GUIDELINES MANUAL, *supra* note 37, at § 1B1.1(b).

⁸⁶ *Id.* § 5K2.0(d)(5).

⁸⁷ Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended at 18 U.S.C. § 3663A (2012)).

⁸⁸ For a discussion of how the Guidelines address preconviction restitution, see *infra* Part III.B.

sometimes concluded that the foregoing authorities make such mitigation unnecessarily redundant. Courts have also expressed concern that additional mitigation might send the wrong message to offenders and would-be offenders by suggesting, in effect, that money can buy a ticket out of jail.⁸⁹ Neither concern should foreclose this Comment's proposed reform. In addressing the significant mandatory restitution collection gap, increased restitution-based mitigation complements existing restitutionary sanctions and furthers the compensatory goals already established by restitution statutes and the Guidelines. By formally encouraging victim remediation while leaving robust carceral sanctions in place, restitution-based mitigation avoids the "buyout" problem that sometimes arises when defendants urge courts to waive carceral sanctions altogether. The following Sections discuss both the "buyout" and "redundancy" concerns in greater detail.

1. The "Buyout" Problem

When defendants make restitution and seek mitigation in excess of the amount prescribed by the Guidelines, courts have expressed concern that excessive mitigation might create a perception that an offender can buy her way out of jail.⁹⁰ This is a well-justified concern: unconstrained, the substitution of cash payments for time served undermines the deterrence, retributive, and exemplary goals set forth in § 3553(a)(2). If would-be offenders believe that they will be able to purchase leniency by voluntarily making restitution, they might be less likely to act lawfully in the first place, especially if they are capable of repaying victims in the event that they are caught.⁹¹ In turn, members of the public might notice this cost-benefit phenomenon and lose faith in courts' ability to impartially administer justice.

Because courts have endeavored to dispel the perception that white-collar offenders can simply buy their way out of prison sentences, it is critically important to distinguish limited restitution-based mitigation from such a "buyout" scenario. Structural context provides one important point of distinction. Under a system of ad hoc mitigation in which offenders might be able to *fully* avoid serving time for serious crimes, "buyout" (and its consequences) will likely arise from time to time. Where, however, the restitution-based mitigation is expressly defined, limited in scope, and

⁸⁹ See, e.g., *United States v. Engle*, 592 F.3d 495, 505 (4th Cir. 2010).

⁹⁰ *Id.*

⁹¹ See 18 U.S.C. § 3553(a)(2)(A) (2012); see also Weissmann & Block, *supra* note 39, at 290 (arguing that Enron-era scandals demonstrated that then-existing civil and criminal penalties underdeterred white-collar criminals).

yields the lion's share of benefits to victims rather than offenders, "buyout" is far less likely to occur. Two additional considerations further distinguish such limited restitution-based mitigation from "buyout" mitigation: the focus on victim interests required by § 3553(a)(7), and the proportional relationship between such mitigation and existing carceral punishment.

The Ninth Circuit's *United States v. Rangel*⁹² decision illustrates how prioritizing victim interests can justify construing restitution as a remedial, rather than evasive, recourse. In *Rangel*, the circuit court held that the district judge did not abuse his discretion when he imposed on an offender an above-Guidelines sentence (twenty-nine months, or about 12% above the Guidelines maximum⁹³) in response to the offender's failure to mitigate \$20 million in losses that he caused.⁹⁴ There, the district court did not consider "Rangel's inability to pay restitution itself as an aggravating factor in imposing a longer sentence, but focused instead on the impact on the victims of Rangel's crimes."⁹⁵ The circuit court approvingly acknowledged this critical distinction and noted that the sentence rested on the "restitution to the victims" factor of § 3553,⁹⁶ rather than on a motive to "punish Rangel for his inability to pay."⁹⁷ Accordingly, the court explained, the sentence responded to "the financial ruin that Rangel caused his victims, and the length of time it would take them to recover their losses,"⁹⁸ rather than to Rangel's financial status.

The utilitarian focus of § 3553(a)(7)⁹⁹ points to a difference between sentence-mitigating restitution and "buyout." While "buyout" amounts to the avoidance of a prison term, sentence-mitigating restitution properly considers the status of victims and should never justify wholly noncarceral punishment unless the rest of the § 3553(a) analysis supports doing so under truly extraordinary circumstances. A hypothetical reversed *Rangel* scenario further illustrates this difference.

Under such a scenario, the offender has *repaid* the \$20 million owed to victims, and the court notes his repayment when consulting § 3553(a)(7) at sentencing. Since the "restitution" factor cuts in the offender's favor, the

⁹² 697 F.3d 795 (9th Cir. 2012).

⁹³ *Id.* at 799–800.

⁹⁴ *Id.*

⁹⁵ *Id.* at 804.

⁹⁶ See 18 U.S.C. § 3553(a)(7).

⁹⁷ *Rangel*, 697 F.3d at 804 (internal quotation marks omitted).

⁹⁸ *Id.*

⁹⁹ This victim-driven inquiry has also informed decisions to impose custodial sentences on independently wealthy offenders who do not need to stay employed in order to pay court-ordered restitution. See, e.g., *United States v. Miell*, 744 F. Supp. 2d 904, 948–49, 955–56, 960 (N.D. Iowa 2010).

court holds that the offender might be eligible for a reduced sentence, or at least does not deserve an upward-departing one.¹⁰⁰ Such an outcome would be superior to the one obtained in the real world *Rangel*. The victims would be compensated, reducing the vast consequential losses stemming from the crimes. Since the need to pay restitution is only one of several considerations in the § 3553 rubric, and only comes into play following the initial Guidelines determination, the judge may (and almost certainly will) impose a sufficient custodial sentence and any other sanctions necessary to carry forward the other punitive goals set forth in the statute.

In his appeal, the *Rangel* defendant argued that the district court's application of § 3553(a)(7) violated settled principles of sentencing equity. Under *Williams v. Illinois* and *Tate v. Short*, a judge may not excessively aggravate a custodial sentence¹⁰¹ or impose an ad hoc custodial sentence¹⁰² based on an offender's inability to pay a fine. Relatedly, under *Bearden v. Georgia*, a judge cannot revoke an offender's probation because the offender has blamelessly failed to pay a fine or make restitution.¹⁰³ These decisions make clear that indigent offenders should not face incarceration simply because they cannot, due to no fault of their own, satisfy the conditions of a fine-only punishment.¹⁰⁴ They do not, however, address statutorily authorized carceral punishment that accounts for the interests of victims of economic crimes. The *Rangel* court recognized this distinction, and concluded that courts may consider the status of victims when applying § 3553(a)(7).¹⁰⁵

Tate, *Williams*, and *Bearden* support the broader proposition that "class and wealth distinctions . . . have no place in criminal sentencing."¹⁰⁶

¹⁰⁰ The appropriate size of the reduction depends on other determinations the judge makes during the sentencing process.

¹⁰¹ *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970) (holding that a court may not impose a longer prison term based on the defendant's inability to pay a fine).

¹⁰² *Tate v. Short*, 401 U.S. 395, 396–97 (1971).

¹⁰³ *Bearden v. Georgia*, 461 U.S. 660, 668–69 (1980).

¹⁰⁴ *Id.* at 667–68, 672.

¹⁰⁵ *Rangel*, 697 F.3d at 803–04 ("A sentencing court is empowered to consider whether the victims will receive restitution from the defendant in varying from the Sentencing Guidelines based on § 3553(a) factors.").

¹⁰⁶ *Rangel*, 697 F.3d at 804 (quoting *United States v. Burgum*, 633 F.3d 810, 816 (9th Cir. 2011)) (internal quotation marks omitted). The appellant in *Tate* served a custodial sentence on a Houston, Texas prison farm for his inability to pay outstanding traffic fines, despite the fact that the Houston traffic court had no authority to impose custodial sentences. 401 U.S. at 396. The appellant in *Williams*, convicted of petty theft, received a sentence 101 days longer than the statutory maximum pursuant to a court order that he "work off" the balance of his unpaid fines at the rate of \$5 per day. 399 U.S. at 236–37 (internal quotation marks omitted). In *Bearden*, the offender received a suspended sentence, plus fines and restitution, for burglary and "theft by receiving stolen property;" he then lost his job, and

This manifestly valid proposition does not require courts to remain blind to the status of the victims at sentencing, and it should not require courts to disregard an offender's decision to return to victims ill-gotten gains. The initial Guidelines sentence calculation for white-collar punishment is pegged to the extent of financial loss arising from the wrongful act.¹⁰⁷ Acknowledging an offender's efforts to remediate that loss and return ill-gotten gains need not undermine such proportional punishment, much less implicate *Tate-Williams-Bearden* issues. Instead, providing an offender with an opportunity to promptly and responsibly return illicit profit makes use of a valuable and long-established remedial tool, and offers offenders a final opportunity to engage in socially beneficial corrective behavior (i.e., to "autocorrect") before sentencing. If restitution-based mitigation is unavailable, the offender has a powerful incentive to spend wildly or hide her ill-gotten gains for as long as she can.

One issue relevant to an equal protection inquiry is whether making a restitution-based mitigation channel available specifically for white-collar offenders would encourage a return to the pre-Sentencing Reform Act era, when white-collar offenders tended to receive more lenient sentences than other offenders.¹⁰⁸ After several decades of white-collar sentencing reform, the law governing white-collar crime has shifted considerably, making this concern less pressing than it was twenty-five years ago.¹⁰⁹ Guidelines-range sentences, still the source of the predominating norms, are stiffer. In addition, thanks to the efforts of Congress and the USSC, federal white-collar criminal law is more sophisticated than it was before the Sentencing Reform Act took effect. The reform outlined in the following Part corresponds directly with the Guidelines, prescribing mitigation in proportion to the existing sentencing framework. Carving out a wider role for voluntary restitution in this manner might modestly reduce the overall

failed to make a timely payment on his fine and restitution. 461 U.S. at 603. The state, in turn, imposed a carceral sentence on the offender. *Id.*

¹⁰⁷ See STEER, *supra* note 26, at 2. Under the Guidelines, economic crimes leading to smaller losses lead to lower initial sentencing calculations. In a hypothetical securities fraud situation where an offender reaps no ill-gotten gains or causes minimal provable losses, the *Tate-Williams-Bearden* inquiry might be different and so might the proper punishment.

¹⁰⁸ *Id.* at 1 ("The group of commissioners who developed the initial sentencing guidelines for individual defendants used a systematic approach, which included a rather sophisticated measurement of past sentencing practices. Analyzing this research, the Commission noted some apparent inequities. For example, generally speaking, 'blue-collar' theft and property destruction offenses were being sentenced more severely than 'white-collar' fraud offenses that caused comparable dollar harm. Furthermore, economic crimes generally were punished less severely than other criminal conduct that the Commission considered to be of equivalent seriousness.").

¹⁰⁹ See *supra* Part I.A.

length of custodial sentences served by white-collar offenders, but it need not reduce the proportion of offenders who receive a substantial custodial sentence pursuant to the Guidelines analysis and a careful balancing of the remaining § 3553 factors. If implementing the reform is guided by a set of rigorous standards, it will not function any differently than other sentencing adjustments. To the extent that it further incorporates nonretributive considerations into the sentencing process, it will not be much different from alternative and complementary sentencing programs. Such programs are not new: pretrial diversion,¹¹⁰ drug courts,¹¹¹ and court-ordered community service¹¹² operate nationwide and address a wide range of offenses. Given the long-standing operation of these alternative sentencing programs alongside carceral punishment, the expansion of restitution-based mitigation within the conventional sentencing process would not likely be disruptive.

Regardless, the act of paying restitution does not negate any element of the crime. The offender does not escape conviction, incarceration, or the consequences (personal, professional, and otherwise) stemming therefrom. The sentencing judge still must conduct a § 3553(a) analysis and craft a sentence that best effectuates all of the relevant penal policies. The court might also impose additional penalties (such as asset forfeiture and additional mandatory restitution) if evidence indicates that the offender has garnered, but not disgorged, additional ill-gotten gains in connection with the offense.¹¹³ The offender making restitution accordingly would not

¹¹⁰ Federal pretrial diversion programs, established by the Pretrial Services Act of 1982, Pub. L. No. 97-267, 96 Stat. 1136, and governed by 18 U.S.C. §§ 3152–56 (2012), are available to many defendants at the discretion of the U.S. Attorney's Office. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, TITLE 9: CRIMINAL RESOURCE MANUAL § 22.100 [hereinafter CRIMINAL RESOURCE MANUAL], available at <http://goo.gl/RPv2tW> (last updated Apr. 2011). There is some concern, however, that pretrial diversion has failed to gain traction in the federal courts. See, e.g., Joseph M. Zlatich et al., *Pretrial Diversion: The Over-Looked Pretrial Services Evidence-Based Practice*, 74 FED. PROBATION 28, 28–29 (2010).

¹¹¹ In 2009, over 2,400 drug courts operated in the United States, including 30 in federal district courts. WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 19 & tbl.2 (2011), available at <http://goo.gl/4lbCL7>.

¹¹² In federal court, judges may assign community service as a condition of probation. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 37, § 8B1.3.

¹¹³ Such a situation might obtain where the offender uses the proceeds of her illegal act to make profitable investments. To avoid unjust enrichment or to ensure adequate specific deterrence and retribution, the court in these situations could impose complementary punishments, such as asset forfeiture. For a discussion of situations where restitution might be insufficient and an explanation of how asset forfeiture might complement it, see Nicholson, *supra* note 12, at 370–77.

escape punishment, but rather would receive punishment tailored to both the offense and the balance of unmitigated harm, if any, that remains.

2. The Redundancy Problem

On its face, the widespread use of mandatory restitution in sentencing calls into question the value and relevancy of any voluntary restitution scheme. Mandatory restitution is a well-established component of white-collar criminal punishment¹¹⁴ and may achieve some of the same compensatory goals. This invites a question: what purpose does voluntary restitution serve if offenders are already required (as they are in many cases) to disgorge what remains of their ill-gotten gains?

Voluntary restitution offers several practical advantages over the current approach. Since mandatory restitution only occurs after adjudication, victims must wait and endure hardship until after the criminal proceedings have drawn to a close. Indeed, victims may wait indefinitely to collect. While mandatory restitution is a predictable consequence of white-collar criminal prosecution, actual postconviction collection is not.¹¹⁵ As of 2002, uncollected federal criminal debt amounted to \$25 billion, with mandatory victim restitution accounting for about 70%.¹¹⁶ Between 2000 and 2002, criminal debt collection rates stood around 4%, falling from 7% during the late 1990s.¹¹⁷ Even if collection rates stood at 100%, offenders expecting prosecution or conviction would still have considerable incentives to hoard, hide, or perhaps rapidly spend the funds they obtained before losing access to them upon conviction.¹¹⁸ In either scenario, courts

¹¹⁴ See COURTNEY SEMISCH, U.S. SENTENCING COMM'N, *ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 19 (2009), available at <http://goo.gl/OsqgAu> (“A substantial proportion of larceny (67.6%), fraud (65.2%), and other white collar (58.9%) offenders were ordered to pay restitution as part of their sentences.”).

¹¹⁵ U.S. GEN. ACCOUNTING OFFICE, GAO-04-338, *CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE’S COLLECTION PROCESSES* 2–3 (2004), available at <http://goo.gl/pdnfjO>. Similarly low collection rates prevail in the context of federal criminal and civil fines, with collection possibly as low as 10%. Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL’Y REV. 453, 473–74 (2011).

¹¹⁶ U.S. GEN. ACCOUNTING OFFICE, *supra* note 115, at 2–3.

¹¹⁷ *Id.*

¹¹⁸ In response to a Government Accountability Office inquiry, the Department of Justice explained that offender behavior reduces the pool of funds available for the eventual satisfaction of criminal debt:

During the intervals between criminal activities and the related judgments[,] . . . dispositions and circumstances involving the offenders’ assets or the offenders often occur that create major debt collection challenges [C]riminals with any degree of sophistication, especially those engaged in fraudulent criminal enterprises, commonly dissipate their criminal gains quickly and in an untraceable manner. Assets acquired illegally are often rapidly depleted on intangible and

may conclude that victim harm is a sunk cost. When this is so, a judge may order the offender to serve a stiff custodial sentence.¹¹⁹ If the judge imposes such a sentence, two innocent groups—the offender’s victims and the taxpaying public—must pay a price.¹²⁰

By encouraging voluntary restitution, courts will reduce collection problems and encourage more prompt and complete victim redress. While perpetrators of massive frauds may cause losses that far exceed their ill-gotten gains (and will hence be unable to make sufficient restitution), many white-collar offenders are capable of repaying their victims.¹²¹ These offenders may choose to make restitution more fully and more promptly if they know that their repayments will be considered as a mitigating factor in their sentencings. In this way, restitution-based mitigation gives judges a more powerful sentencing tool, improving the effectiveness of punishment, rather than reduplicating punishments already in use.

excess ‘lifestyle’ expenses. Specifically, travel, entertainment, gambling, clothes, and gifts are high on the list of means to rapidly dispose of such assets. Moreover, money stolen from others is rarely invested into easily located or exchanged assets, such as readily identifiable bank accounts, stocks or bonds, or real property.

U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 11–12 (2005), available at <http://goo.gl/ZH47RI>. In some cases, offenders created trusts and conveyed assets before conviction. *Id.* at 13. These transfers, even if traceable and revocable, create further collection problems for law enforcement. *Id.*

¹¹⁹ See *United States v. Rangel*, 697 F.3d 795, 804 (9th Cir. 2012). While nothing in the opinion suggests that the defendant in *Rangel* liquidated his assets in advance of conviction, it is clear only that the defendant could not repay his victims after incurring massive losses. *Id.* at 799. Many offenders who have amassed large surpluses from their crimes and accordingly anticipate asset seizure upon conviction have only weak incentives, if any at all, to serve as responsible stewards of their ill-gotten gains and avoid winding up in the same situation as the *Rangel* defendant at the time of his sentencing.

¹²⁰ Attempts to estimate the cost of crime reduction that is “purchased,” as it were, through increased incarceration, reach widely varying results. Cf. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 802–03 (2010) (concluding that “we can attribute anywhere from 20% to 30% of the crime drop to imprisonment,” and that “both deterrence and incapacitation are equally compelling explanations” for this effect); Louis Michael Seidman, *Hyper-incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109, 113 & n.19 (2011) (noting that scholars have estimated the crime rate reduction attributable to increased incarceration during the 1990s at between 2% and 5%, though others disagree). Recidivism rates in the white-collar context are lowest among all categories of crime. See U.S. SENTENCING COMM’N, *supra* note 82, at 20 ex.1, 30 ex.11. Thus, if incapacitation—the fact that would-be repeat offenders are kept away from opportunities to recidivate while they are in prison—is responsible for incarceration’s crime reduction effect, it is at least arguable that the marginal cost of reducing white-collar crime through additional incarceration ranks highest among all categories of crime.

¹²¹ See *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999).

III. PROPOSED RULES FOR THE EXPANDED CONSIDERATION OF VOLUNTARY RESTITUTION IN SENTENCING

To realize the benefits of voluntary restitution, courts and the USSC should expand its use in the white-collar sentencing calculus. The USSC should take the first step in this process by adding a new restitution-based mitigation framework to the Guidelines' sentencing calculation procedure. This Comment proposes a framework that links modest sentencing reductions to timely and substantial payment of lost funds.

To fit restitution into the individualized, evaluative sentencing approach encouraged post-*Booker*, the proposed Guidelines amendment contains a five-factor restitution sufficiency test.¹²² This test is based on common law factors already utilized (albeit rarely) by district courts and approved by circuit courts. Over time, courts' use of this test would facilitate their development of precedent that could guide the restitution-based mitigation framework's application to individual cases. To avoid any conflicts with fines and compulsory restitution, and to provide offenders with an incentive to promptly repair the harm they have caused, the test permits courts to tailor the legal significance of restitution payments to reflect the promptness with which offenders make them. Payments should have less of an effect if made at the time of sentencing and more of an effect if made earlier in the process.

Finally, courts could also provide an opportunity for offenders to make or offer preconviction restitution payments without regard to whether such payments are deemed admissions of guilt. They may do so by affording preconviction restitution payments the protection of Federal Rule of Evidence 408.

A. THE INITIAL STEP: GIVING RESTITUTION-BASED MITIGATION A DISTINCT ROLE IN THE SENTENCING PROCESS

Given that white-collar offenders are especially responsive to calculable incentives,¹²³ an institutional approach to white-collar sentencing that encourages voluntary restitution throughout the federal court system is much more likely to be effective than one gradually implemented judge by

¹²² See *infra* Part III.B.1. Even if the USSC does not adopt the proposed framework, judges could revisit the role of voluntary restitution by focusing, as the *Rangel* court did, on § 3553(a)(7) (the Guidelines' "restitution" factor) when evaluating aggravation and mitigation arguments at sentencing. They could tailor their sentences according to the level of restitution provided. See *Rangel*, 697 F.3d at 804.

¹²³ Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1094 (2010) (noting that "[w]hite collar offenders . . . are much more likely to be the rational calculators that deterrence requires").

judge.¹²⁴ Thus, the USSC has a special role to play in this reform. Although judges may now make sentencing decisions based more directly on their own case evaluations and penal policy analyses, all sentencing decisions still begin with a Guidelines calculation.¹²⁵ If that calculation accounts for voluntary restitution, it will anchor¹²⁶ the sentences at a lower point. Such anchoring provides offenders with a fixed and calculable incentive to act. With such an incentive in place, offenders will be able to structure their conduct around the certainty that their restitution will at least play a role during the first step in the sentencing process.

Action by the USSC is preferable for another reason: the reform is most likely to be uniformly applied if it is incorporated into every sentencing decision in the same way.¹²⁷ The best way to do this is to build into the Guidelines a restitution-based mitigation framework that would apply to the initial sentencing analysis underlying every case. Such a framework could consider the extent to which a restitution payment

¹²⁴ Professor Julian Roberts notes that comprehensive sentencing guidance results in more uniform (and fairer) punishments, defines and guides the application of sentencing factors, reduces “intuitive” bias, and promotes public confidence in sentencing. Julian V. Roberts, *Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing*, in MITIGATION AND AGGRAVATION AT SENTENCING, *supra* note 59, at 1, 2–4. Uniform application of a restitution-based mitigation framework within the Guidelines will likely further the same ends.

¹²⁵ “The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines.” *Rita v. United States*, 551 U.S. 338, 351 (2007).

¹²⁶ “Anchors cause perceptual shifts by altering the background against which focal stimuli are judged” Barry Markovsky, *Anchoring Justice*, 51 SOC. PSYCHOL. Q. 213, 213 (1988). Anything may be an anchor if it serves as “a reference point in the judgment context” and is associated either with a stimulus or a response. *Id.* at 214. The initial Guidelines calculation, as presently utilized in the sentencing process, is a response-side anchor. It considers the stimuli underlying the sentencing decision (e.g., the offender’s criminal history and the financial loss resulting from the offense) and provides the initial starting point for a judge’s sentencing analysis. Accordingly, it establishes the basic parameters of the analysis. Against these basic parameters, courts consider deviations and either accept them or rule them out. *See generally* Hon. Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY (forthcoming 2014) (discussing the role of Guidelines anchoring in the sentencing process and proposing an alternative sentencing methodology intended to counteract it).

¹²⁷ The USSC has used extensive empirical research to develop most of the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 37, § 1A1.5 (explaining that, in its initial phases, the USSC “relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments”). The Guidelines thus incorporate existing sentencing norms and reinforce them.

ameliorated proven economic loss,¹²⁸ the timeliness and voluntariness of an offender's payment, and the extent to which the payment demonstrated sincere acceptance of responsibility. On this basis, the framework would prescribe modest pro rata mitigation for payments that meet a predetermined general threshold. So constituted, the mitigation framework would not undermine the uniformity goals advanced by Congress, the USSC, and the courts any more than other aspects of the Guidelines' sentencing calculus do. Indeed, it would lend clarity to an area of white-collar sentencing law that is presently bereft of workable standards. Rather than herald a return to the ad hoc sentencing standards of the era preceding the Sentencing Reform Act, it will provide guidance not presently available. An example of a proposed framework, to be incorporated into the Guidelines' § 3E1.1 (the "Acceptance of Responsibility" section), is included below. Proposed amendments are bolded.

¹²⁸ *Id.* § 2B1.1(b)(1).

Figure 1
§3E1.1. Acceptance of Responsibility

-
- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.
- (c) **If the offense(s) of conviction require(s) a calculation of financial loss at sentencing, and if**
- (1) **The defendant qualifies for a decrease under subsection (a), and**
 - (2) **The defendant has made a voluntary restitution payment resulting in substantial victim compensation,**
- decrease the offense level by up to 2 additional levels.**

Commentary

Application Notes:

(X). In determining whether a defendant qualifies under subsection (c), appropriate considerations include, but are not limited to, the following:

- (1) The degree of voluntariness exhibited by the offender;
- (2) The efforts required to make the payment;
- (3) The percentage of lost funds restored;
- (4) The timing of the restitution; and
- (5) Whether the defendant's motive demonstrates sincere remorse and acceptance of responsibility.

Suggested thresholds for each factor:

Timing	Voluntariness	Efforts	Percentage	Sincere Remorse and Acceptance of Responsibility	Adjustment
Before victim discovery	High	Less important	Must be nearly 100%	Must be present and sufficient to satisfy §3E1.1(a)	0-2
After victim discovery	Medium	More important			0-2
After charging	Low	Must be arduous			0-2, subject to sufficient "Efforts" factor showing
Upon entry of plea	Low	Must be arduous			
Upon conviction	Low	Must be arduous			
At sentencing	Low	Must be arduous			

If the USSC does not add a restitution-based mitigation framework to the Guidelines, the benefits of performing voluntary restitution become much more speculative, and the incentive for offenders to take independent corrective action, in turn, becomes much weaker. But all would not be lost. Even if the USSC does not add a restitution-based mitigation framework, judges may—in the exercise of their post-*Booker* discretion—adopt the foregoing restitution-based mitigation approach as a way of operationalizing § 3553(a)(7) (the “restitution to victims” factor) and ensuring that their sentences comport with the “sufficient, but no greater than necessary” injunction of § 3553(a). Over time, the practice may win over other judges and achieve widespread use throughout the federal courts.¹²⁹

No matter how restitution-based mitigation enters the sentencing calculus, its use will achieve a variety of positive ends: more victims will be repaid, offenders will have an incentive to accept responsibility, incarceration costs will be reduced, and judges will have another tool with which to operationalize the § 3553 factors (especially factor (a)(7)). These benefits need not compromise the deterrent effect of existing sentencing law. In the post-*Booker* world, judges may use their familiarity with the facts of each case to craft a sentence that fits the crime and specifically deters the offender. Owing to statutory sentencing ranges that reflect the shifts in white-collar sentencing norms¹³⁰ over the course of the past twenty-five years, stiff punishments remain available when the § 3553(a) analysis warrants their imposition.

¹²⁹ The emergence of the common law doctrine of promissory estoppel illustrates how such a shift might occur and also how fraught its path may be. See Kevin M. Teeven, *A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance*, 72 TENN. L. REV. 1111, 1126–57 (2005). The architecture of the pre-*Booker* Sentencing Reform Act suggests legislative commitment to developing a limited “common law of sentencing”: the Guidelines’ departure and review mechanisms permitted judges to deviate from sentencing formulae and authorized appellate courts to approve these deviations under some circumstances. Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 34–35 (2000); see also Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 530 (2007); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1455 (1997). Owing, perhaps, to the development of appellate doctrines disfavoring departures, common law sentencing rules did not flourish before *Booker*. Berman, *supra*, at 51–56. After *Booker*, the individualized sentencing inquiry required by § 3553(a), coupled with a more deferential standard of review, gives judges more room—if not a greater incentive—to develop common law sentencing principles.

¹³⁰ See *supra* Part I.A.

B. DEFINING THE SCOPE AND EFFECT OF RESTITUTION-BASED
MITIGATION IN INDIVIDUAL CASES

As with sentencing in general, the maxim that a sentence should be “sufficient, but not greater than necessary”¹³¹ should govern the effect of voluntary restitution on an offender’s sentence. To avoid the “buyout” problem, restitution-based mitigation should comport with § 3553(a)(2) and inform sentences that are designed “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”¹³² Restitution-based mitigation will align with this fundamental principle if it operates under several constraints, each of which are present in the suggested Guidelines Table offered in the foregoing Part. The discussion that follows explains the importance of each.

First, any mitigation for offenders who voluntarily provide restitution must not be so dramatic that it leads to disproportionately light sentences. Excessive leniency may reduce the general deterrent effect of white-collar punishment: when sentences seem trivial in comparison to the harm done, some individuals might see a low-cost opportunity to break the law.¹³³ Second, any mitigation should reflect the need for specific deterrence. While some white-collar offenders are highly susceptible to specific deterrence (as they may lose their professional positions, licenses, or reputations after conviction),¹³⁴ others, for a variety of reasons, may be more likely to recidivate in the absence of a stiff sentence. Regardless of the likelihood of recidivism, some sentences are so lenient that their lack of specific deterrence value is plainly evident.¹³⁵ In light of these issues, a wider role for restitution-based mitigation in the sentencing calculus will only advance the goals of sentencing policy if its use in individual cases is governed by properly calibrated sufficiency standards that permit it to realize its desired effect without undermining the goals set forth in section § 3553(a)(2). The alternative—reliance on ad hoc standards, such as those currently used by courts, and the unpredictable results that follow—makes restitution a wild card with few (if any) meaningful behavior-influencing effects.

¹³¹ 18 U.S.C. § 3553(a) (2012).

¹³² *Id.* § 3553(a)(2)(A).

¹³³ *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (explaining that “[b]ecause economic and fraud-based crimes are ‘more rational, cool, and calculated than sudden crimes of passion or opportunity,’ these crimes are ‘prime candidate[s] for general deterrence’” (quoting *Bibas*, *supra* note 5, at 724)).

¹³⁴ Podgor, *The Challenge*, *supra* note 8, at 740.

¹³⁵ *Martin*, 455 F.3d at 1240 (explaining that “the message of [the offender’s] 7-day sentence is that would-be white-collar criminals stand to lose little more than a portion of their ill-gotten gains and practically none of their liberty”).

The Guidelines permit judges to consider most restitution payments to be evidence of an offender's "acceptance of responsibility," which triggers a two-level sentencing reduction.¹³⁶ In exceptional cases (i.e., those where the restitution is "unusual and present to [a] degree substantially in excess" of the level at which it is ordinarily present and hence "outside the heartland of cases to which [Guideline] § 3E1.1 applies"¹³⁷) the Guidelines permit downward departures.¹³⁸ Before *Booker*, judges relied on a few general principles¹³⁹ to assess whether restitution was exceptional in the context of a particular case. These principles may still provide guidance to judges conducting initial Guidelines determinations under the post-*Booker* sentencing process. Nonetheless, the very nature of the pre-*Booker* inquiry (directed, as it was, toward identifying how an offender's behavior deviates from the norm, however a judge might define it) made it difficult to establish workable standards. The absence of mitigation-measuring standards presents a difficult question: "how can one white-collar criminal's efforts to make restitution be extraordinary if other white-collar criminals' efforts are essentially the same?"¹⁴⁰ In post-*Booker* terms, the question might be whether a criminal's efforts to make restitution are *sufficient* to warrant mitigation, either within the Guidelines framework or outside of it. Here, though, as was the case before *Booker*, the inquiry is largely ad hoc. A sufficiency test, applicable in the first instance to all cases where an offender makes restitution, provides guidance and encourages the development of a body of law that helps to answer this question.

Additionally, restitution-based mitigation must also encourage prompt action by the offender. Ideally, it will also fit within the schema of evidentiary rules in such a manner as to permit offenders to make restitution payments without creating evidence that could be used to prove their

¹³⁶ See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 37, § 3E1.1(a) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."); see also *id.* § 3E1.1 cmt. n.1 ("In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to . . . (C) voluntary payment of restitution prior to adjudication of guilt . . ."). A two-level reduction might reduce a 6- to 12-month Level 10 sentence to 0 to 6 months, a 33- to 41-month Level 20 sentence to 27 to 33 months, and a 292- to 356-month Level 40 sentence to 235 to 293 months. See *id.* § 5A.

¹³⁷ *United States v. Lieberman*, 971 F.2d 989, 996 (3d Cir. 1992) (citations omitted); see also U.S. SENTENCING GUIDELINES MANUAL, *supra* note 37, § 5K2.0(a)(3).

¹³⁸ See, e.g., *Lieberman*, 971 F.2d at 996; *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991) (holding that the "guidelines provide the district judge with authority to depart downward based on extraordinary restitution").

¹³⁹ Typically, the arduousness of the offender's efforts and the financial burden assumed by the offender played a role. See *United States v. Kim*, 364 F.3d 1235, 1245 (11th Cir. 2004); *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999).

¹⁴⁰ *Kannenber*, *supra* note 9, at 368.

culpability.¹⁴¹ The following Sections suggest how to meet each of these conditions.

1. *A Sufficiency Test*

Presently, voluntary restitution plays an uncertain and largely symbolic role in white-collar sentencing. If an offender undertakes efforts to pay back her victims in advance of conviction, her efforts might demonstrate acceptance of responsibility¹⁴² and could justify mitigation on that basis.¹⁴³ No provision of the Guidelines directly addresses voluntary restitution made *after* conviction, and no widely accepted sufficiency standard governs the effect an offender's restitution will have at any procedural stage. As a result, an offender cannot anticipate whether (or how) a voluntary restitution payment will impact her sentence until plea negotiations (and sentencing proceedings) begin; even then, the effect of the payment is uncertain. Thus, offenders who wish to make an independent effort to promptly compensate victims may need to take a leap of faith when doing so. This might be maximally significant in a moral sense,¹⁴⁴ but it is not clear why maximal moral significance should be the governing threshold, nor whether victims would prefer it to be so.¹⁴⁵

A clear and broadly applied sufficiency test would help to address this problem. Fortunately, a working model of one already exists. In *United States v. Kim*, a pre-*Booker* case, the Eleventh Circuit considered sufficiency factors noted by other circuits and synthesized a test for determining whether restitution is sufficiently extraordinary to warrant a

¹⁴¹ See FED. R. EVID. 408.

¹⁴² This is the role given to pre-adjudication voluntary restitution by the Guidelines. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 37, § 3E1.1 cmt. n.1(C); see also *United States v. Filipiak*, 466 F.3d 582, 584 (7th Cir. 2006) (explaining that the Guidelines account for voluntary restitution payments and contemplate departures only in cases where voluntary restitution is extraordinary).

¹⁴³ See *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (explaining, in a case where the sentencing judge ordered the offender to pay restitution, that the mitigating effect of additional voluntary restitution turns, in part, on whether that restitution shows "sincere remorse and acceptance of responsibility"); cf. *Lieberman*, 971 F.2d at 996 (surveying earlier doctrine regarding the circumstances under which voluntary restitution could show acceptance of responsibility and warrant a downward departure).

¹⁴⁴ The effort to repay victims might not impact an offender's sentence, after all, and accordingly is more likely to show true contrition.

¹⁴⁵ See Gabbay, *supra* note 14, at 465 (2007) (citing Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 23 (2003) (reporting findings from a British study concluding that "when victims are asked, they indicate a strong preference for compensation directly by the offender," and sometimes prefer a lower amount directly from an offender over a higher amount furnished by the government)).

reduced sentence.¹⁴⁶ Applying this test, a sentencing judge considers “[1] the degree of voluntariness, [2] the efforts to which a defendant went to make restitution, [3] the percentage of funds restored, [4] the timing of the restitution, and [5] whether the defendant’s motive demonstrates sincere remorse and acceptance of responsibility.”¹⁴⁷ The *Kim* court joined a majority of circuits in permitting downward-departing mitigation based on extraordinary restitution.¹⁴⁸ Although the Eleventh Circuit has rarely cited the *Kim* decision since its inception,¹⁴⁹ its test remains in force. Defendants and prosecutors elsewhere have cited the test,¹⁵⁰ but no other circuit court has yet expressly adopted it.¹⁵¹ This is unfortunate, as it offers a superior alternative to the ad hoc inquiry many courts currently employ.

¹⁴⁶ *United States v. Kim*, 364 F.3d 1235, 1244 (11th Cir. 2004). The court drew factors from *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999) (analyzing timing, voluntariness, efforts at restitution, and percentage of funds restored); *United States v. Hairston*, 96 F.3d 102, 108 (4th Cir. 1996) (accounting for the percentage of funds restored, efforts at restitution, voluntariness, timing, and motive); *United States v. DeMonte*, 25 F.3d 343, 347 (6th Cir. 1994) (factoring in voluntariness); and *Lieberman*, 971 F.2d at 996 (factoring in timing and percentage of funds restored). *Kim*, 364 F.3d at 1244.

¹⁴⁷ *Kim*, 364 F.3d at 1244. In a concurring opinion, Judge Nangle noted an additional consideration that might serve as a sixth factor: “[T]he defendants had no assurance that their restitution efforts would be rewarded by the District Court at sentencing” *Id.* at 1245 (Nangle, J., concurring).

¹⁴⁸ *Id.* at 1240 (majority opinion).

¹⁴⁹ Of the three Eleventh Circuit decisions that cite *Kim*, only one discusses the restitution test at any length. Compare *United States v. Lorenzo*, 144 F. App’x 833, 834 (11th Cir. 2005), and *United States v. Simmons*, 368 F.3d 1335, 1339 (11th Cir. 2004), with *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005).

In *Crawford*, the circuit court ordered the district judge to apply the test. *Id.* at 1182. *Kim* appears to operate most frequently in the background of sentencing decisions: as of October 24, 2013, seventy-nine court filings available on Westlaw cite the case. See, e.g., Defendant Monty Ervin’s Sentencing Memorandum at 17, *United States v. Ervin*, No. 2:11cr7-MHT (M.D. Ala. May 17, 2012), 2012 WL 2476764; United States’s Sentencing Memorandum at 24, *United States v. Berkowitz*, No. 1:07-CR-063-RWS (N.D. Ga. Nov. 17, 2008), 2008 WL 8083293. In one post-*Booker* case later upheld by the Eleventh Circuit, the trial court judge analyzed the offender’s request for restitution-based mitigation under the *Kim* test and found that the offender’s conduct justified mitigation. See Sentencing Memorandum at 8–10, *United States v. Anderson*, No. 1:06-CR-091-01-ODE (N.D. Ga. Mar. 2, 2007); see also *United States v. Anderson*, 267 F. App’x 847 (11th Cir. 2008).

¹⁵⁰ Cf. *United States v. Filipiak*, 466 F.3d 582, 584–85 (7th Cir. 2006) (discussing *Kim*); *United States v. Tilga*, No. 1:09-cr-00865-JB, 2012 WL 1192526, at *3 (D.N.M. Apr. 5, 2012) (same); *United States v. Mady*, No. 04-80408, 2006 WL 3147740, at *7 (E.D. Mich. Nov. 1, 2006) (same); *United States v. Kuhn*, 351 F. Supp. 2d 696, 706 (E.D. Mich. 2005) (same).

¹⁵¹ Perhaps this is so because many judges still adhere to the Guidelines. Berry, *supra* note 59, at 258; Bowman, *supra* note 66, at 361–62 & fig.4B. Finding the Guidelines sufficient in this context, courts may remain unconvinced that the *Kim* test merits a closer look.

Indeed, the *Kim* test addresses nearly all of the dimensions of restitution relevant to the policy aims the proposed reform might further. Applying the test, the *Kim* court provided some guidance on how to weigh and balance the factors. There, the timing of the offenders' payments cut against the voluntariness factor, as the offenders only made payments following indictment and the completion of plea agreements.¹⁵² Nonetheless, the court recognized that offenders may need time to assemble funds to make payments, and accordingly, refused to adopt a bright-line rule that excluded all restitution payments made after indictment or pursuant to plea agreements.¹⁵³ In future cases, courts might view the "timing" and "voluntariness" factors in conjunction with one another, giving "autocorrection" less significance later in the procedural timeline unless offenders needed time to gather the necessary financial resources to make restitution payments. Similarly, as in *Kim*, the "efforts" factor might exclude offenders who can easily provide restitution by virtue of their personal wealth.¹⁵⁴ Grounding the test in the actual loss and amount of repayment, the "percentage of funds restored" factor might correspond with the Guidelines' existing loss table.¹⁵⁵ Finally, the "acceptance of responsibility" factor permits judges to consider whether, under all of the circumstances, the offender's actions represent a cynical attempt to secure more lenient punishment or a genuine expression of contrition.¹⁵⁶ The thresholds required to meet each *Kim* factor could develop as the common law does, allowing standards to crystallize over time and inform future revisions of the proposed restitution-based mitigation Guidelines provisions.

Two hypotheticals illustrate how the test might work. In the first example, a variation on the facts of *Kim*, the offender has been indicted for government benefits fraud. Before conviction, the offender liquidates most of his savings and investments to gather the funds necessary to repay the government; he also secures loans from his friends and family. Upon conviction, the offender pays back one hundred percent of the funds owed. In doing so, he explains the shame and loss of professional stature he has

¹⁵² *Kim*, 364 F.3d at 1244.

¹⁵³ *Id.*

¹⁵⁴ In *Kim*, the offenders favorably impressed the court by depleting their life savings and taking out \$200,000 in debt to pay restitution. *Id.* at 1245.

¹⁵⁵ The *Kim* offenders received around two-thirds of the proceeds of a fraud scheme, but they personally repaid 100% of the funds wrongfully acquired. *Id.* at 1238. The court, applying this factor, noted that their restitution accounted for 140% of the "amount from which they personally benefitted." *Id.* at 1245.

¹⁵⁶ Here, the *Kim* court acknowledged "the embarrassment, the humiliation, the shame, [and] the sorrow" the offenders felt about their actions. *Id.* (internal quotation marks omitted).

experienced as well as his efforts to remedy his wrongdoing. The court is impressed by the offender's efforts to gather the funds necessary to fully repay the government and, accordingly, takes seriously the offender's statements about losing face after being charged with fraud. The court is skeptical, however, as to whether *Kim* factors one (degree of voluntariness) and four (timing of the restitution) favor him: after knowingly defrauding the government, the offender waited until he was indicted to change course and repay the stolen funds. The prosecution stresses this point and uses it to argue against mitigation. After weighing each of the factors and considering comparable cases, the court finds that the offender's remorse outweighs his delay in repaying the government, and reduces the offender's sentence by two levels from the Guidelines range, as the restitution-based mitigation framework suggests.

In another hypothetical example, this time a variation on the facts of *United States v. Filipiak*,¹⁵⁷ the offender embezzles at least \$2.5 million from her employer, a real estate investment firm. She uses these funds to make personal investments that yield unknown, but likely substantial, returns. Before she is charged, the offender returns the balance of *documented* losses, but responds evasively to her employer's questions about the extent of the embezzlement and never provides a satisfactory accounting of the full scope of funds she misappropriated. At sentencing, the court finds that she still has net assets in excess of \$1 million, some of which she may have acquired by investing the funds she embezzled. The court applies the *Kim* factors and finds that, while the offender ostensibly repaid the known losses voluntarily (and before she was charged), satisfying factors one and four, she never satisfactorily explained how much she embezzled. Because the court cannot accurately measure the percentage of funds restored, it finds that factor three weighs against the offender. The court further notes that the offender, a wealthy individual, easily made restitution, and after doing so still has a high net worth, thanks (most likely) to the proceeds of investing her ill-gotten gains. This makes factor two negative.¹⁵⁸ Finally, owing to the offender's evasiveness and continued gamesmanship, the court is not persuaded that she has accepted responsibility for her wrongdoing, meaning that factor five is also negative. After noting the negative impact of the factors addressing the offender's candor and remorse, the court is torn between declining to deviate from the premitigation Guidelines range on the basis that the offender has not

¹⁵⁷ 466 F.3d 582 (7th Cir. 2006).

¹⁵⁸ Such a scenario also suggests that asset forfeiture might be used here to craft an appropriate punishment. See McCaw, *supra* note 12, at 197–203.

sufficiently accepted responsibility, or giving the offender some credit for her restitution, which all sides agree has been substantial.¹⁵⁹

Despite the offender's continuing suspicious conduct, the court acknowledges that the offender's restitution payment has addressed some of the harm she caused to her former employer. While some doubt remains as to whether she has provided *full* restitution, the quantity is substantial enough, and the timing of the payment early enough, to warrant taking her payment into account as a mitigating factor. Here, as in the actual *Filipiak* case, the court notes that the offender has not fully accepted responsibility for the offense and imposes a substantial custodial sentence to "promote respect for the law" per § 3553(a)(2)(A).¹⁶⁰ Even while doing so, however, the court notes that factor § 3553(a)(7)—the "need to provide restitution to any victims"—tilts in the offender's favor.¹⁶¹ Of course, if the situation were modified such that it was clear that the offender provided a full account of the funds she embezzled (and, in turn, returned them all to their rightful owners), and undertook laborious efforts to obtain the necessary funds, her mitigation case under the *Kim* factors would be stronger, and the resulting sentence would accordingly reflect that strength.

2. Encouraging Prompt Restitution Payment

To encourage prompt action by offenders, it is important to establish clear rules that govern how the timing of a restitution payment may impact a sentence. At a minimum, the restitution-based mitigation test should encourage at least substantial payment before sentencing, since the offender will almost certainly be ordered to pay post-sentencing restitution pursuant to the MVRA.¹⁶² Moreover, payments made at this point may have the appearance of a "buyout," and thus, if given excessive weight in mitigation, might diminish the offender's and the public's respect for the law.

On the other hand, an offender (as in *Kim*) might have difficulty assembling the funds necessary to make restitution before he is sentenced. A bright-line rule excluding *all* post-indictment restitution payments could disproportionately favor offenders with abundant liquid assets. To address this problem, the rule could *presumptively* exclude postconviction, presentencing restitution payments, and the offender could rebut the

¹⁵⁹ This was what actually happened in *Filipiak*. The court sentenced the offender to a term of twenty-four months (nine months less than the Guidelines range). *Filipiak*, 466 F.3d at 582. The offender appealed. *Id.* Noting that the facts of the case suggested less-than-total acceptance of responsibility, the circuit court declined to vacate the sentence. *Id.* at 584.

¹⁶⁰ 18 U.S.C. § 3553(a)(2)(A) (2012).

¹⁶¹ *Id.* § 3553(a)(7).

¹⁶² 18 U.S.C. § 3663A (2012).

presumption by demonstrating that he took meaningful steps to gather the funds necessary to make restitution before that time.

3. *Voluntary Restitution as Evidence of Guilt*

In most cases, restitution-based mitigation should only be available to offenders who admit guilt.¹⁶³ In the rare event that a mitigation-eligible case goes to trial, the prosecution might seek to offer evidence of an offender's efforts to pay restitution to her victims as evidence of culpability. Given that the goal of the proposed restitution-based mitigation is in fact to *encourage* culpable offenders to accept responsibility and promptly remedy their bad acts, such a result could have a chilling effect on at least *some* of the desired conduct. If paying restitution amounts to an admission of guilt (as juries would almost certainly deem it to be), then offenders with a bona fide basis to contest the charges against them might be less likely to "autocorrect," choosing instead to take their chances at sentencing.

Federal Rule of Evidence 408 (the "Compromise Offers and Negotiations" Rule) most directly addresses this concern.¹⁶⁴ It bars the introduction of evidence that an offender "furnish[ed], promis[ed] or offer[ed]—or accept[ed], promis[ed] to accept, or offer[ed] to accept—a valuable consideration in compromising or attempting to compromise [a] claim" as well as evidence of "conduct or a statement made during compromise negotiations about the claim" when a party attempts to introduce that evidence to "prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."¹⁶⁵ The Rule applies to evidence of settlement negotiations between private parties, but not to evidence of a negotiation "in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority."¹⁶⁶ It also permits the introduction of settlement evidence to show "a witness's

¹⁶³ See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 37, § 3E1.1(a) cmt. n.2 ("[Sentence adjustment for acceptance of responsibility] is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial . . . in each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.").

¹⁶⁴ FED. R. EVID. 408.

¹⁶⁵ *Id.* at 408(a).

¹⁶⁶ *Id.* at 408(a)(2).

bias or prejudice, negat[e] a contention of undue delay, or prov[e] an effort to obstruct a criminal investigation or prosecution.”¹⁶⁷

The drafters of Rule 408 intended to promote open settlement negotiations, including negotiations in cases where an offender may face overlapping civil and criminal liability.¹⁶⁸ To prevent misuse of the Rule, the drafters also specifically noted that it should not be used where a defendant seeks to “buy off” the prosecution or a prosecuting witness in a criminal case.”¹⁶⁹ Courts have applied the Rule to bar the use of settlement offers to prove guilt in criminal cases¹⁷⁰ and should similarly use it to insulate good faith attempts to “autocorrect” in those rare cases where a defendant compensates claimants (or potential claimants) and also has a legitimate reason to contest the charges against him.

CONCLUSION

After twenty years of sentencing reform, the norms governing white-collar sentencing have shifted: Congress and the U.S. Sentencing Commission have established strict penalties for existing white-collar offenses and created altogether new offenses. To the extent that these developments have fostered more proportional and equitable punishments,¹⁷¹ furthered the goals of specific and general deterrence,¹⁷²

¹⁶⁷ *Id.* at 408(b).

¹⁶⁸ See *McAuliffe v. United States*, 514 F. App’x 542, 549 (6th Cir. 2013) (“A 2006 rule amendment . . . conclusively settled a circuit split in favor of applying Rule 408 in criminal cases . . .”). The 2006 advisory committee notes explained that Rule 408 applies in criminal cases because private parties who engage in compromise negotiations cannot “protect against the subsequent use of statements in criminal cases by way of private ordering,” and in the absence of an evidentiary bar, individuals expecting criminal prosecution might “refus[e] to admit fault” or otherwise avoid settlement. FED. R. EVID. 408 advisory committee’s note.

¹⁶⁹ FED. R. EVID. 408 advisory committee’s note.

¹⁷⁰ See, e.g., *United States v. Davis*, 596 F.3d 852, 859–61 (D.C. Cir. 2010). In *Davis*, the circuit court vacated the appellant’s conviction after concluding that the trial court erred by admitting evidence of the appellant’s unsuccessful offer to return a fraction of the funds he allegedly stole from his employer. *Id.* Prosecutors expressly stated that they intended to use this evidence to prove guilt rather than to prove obstruction of a criminal investigation, and the circuit court held that admitting the evidence for this purpose was reversible error. *Id.* at 861. Nonetheless, evidence derived from settlement discussions may be admissible for other purposes. See, e.g., *McAuliffe*, 514 F. App’x at 548–50 (concluding that the trial court properly allowed the government to introduce a recording of a purported settlement negotiation to prove the offender’s “knowledge of and participation in illegal acts—in other words, his state of mind”).

¹⁷¹ See STEER, *supra* note 26, at 1–2.

¹⁷² They have furthered the goals of specific and general deterrence by imposing punishments that make white-collar crimes more costly.

and incapacitated dangerous individuals,¹⁷³ they are laudable. But low criminal debt collection rates demonstrate that victim interests now need closer attention. White-collar crime causes economic harm in the first instance, and incarceration alone, though surely useful for the purposes of communicating society's disapproval of bad acts, may not remedy victims' harm as fully as might be possible under the circumstances. As long as criminal debt collection rates remain at low levels, plenty of room for improvement remains. Voluntary restitution may remedy the harm caused by white-collar crime at the place where its effects have been most directly felt. In addition to improving victims' economic well-being, voluntary restitution may also be morally significant. An affirmative compensatory act by the offender may demonstrate acceptance of responsibility and restore social trust and goodwill, especially if the offender must work arduously to provide it. While a court may (and in many circumstances, must) order restitution, it can only do so after an adjudication of guilt. Ordering restitution at sentencing does not require the offender to accept any responsibility for his crime and does not discourage financial gamesmanship by offenders. Under the present sentencing structure, these unfortunate consequences are inevitable.

Seeking to improve the existing sentencing process by encouraging victim remediation and discouraging gamesmanship by offenders, this Comment's proposed reform sets forth potential components of a workable reform. It avoids the "buyout" problem by limiting mitigation and linking it to existing Guidelines sentences. It is governed by context-sensitive sufficiency standards, encourages prompt action by offenders, and complements existing punitive devices.¹⁷⁴ By providing offenders with the opportunity to take self-correcting action, it may encourage rehabilitation. Rather than waiting to see what the judge might order, offenders could own up to their crimes and take steps to repair the damage they have caused. In giving judges a set of criteria they may use to mitigate an offender's sentence when an offender has taken meaningful steps to repair the harm he has caused, the proposed reform leads to more economically efficient results: redress places the victims in a better position than they would have been in if the offenders had no incentive to promptly repay them, and the

¹⁷³ They have incapacitated dangerous individuals by punishing repeat offenders more severely.

¹⁷⁴ In other words, an offender's restitution payment should be considered to mitigate only to the extent that it conforms to the priority order set by statutes and federal law. It should not supplant or preclude the payment of fines or back taxes, or substitute for the repossession of assets where statutes require such measures in the first instance. Rather, voluntary restitution should be considered in mitigation in those situations where compulsory restitution or incarceration may be used to punish the offender.

government incurs fewer expenses in connection with enforcing criminal judgments and incarceration.

No punishment, including long carceral sentences, can ever undo a crime. Many punishments, however, can serve a corrective purpose. By encouraging white-collar offenders to “autocorrect,” this Comment’s proposed restitution-based mitigation framework would permit the USSC and courts to build on past reforms and take an additional step toward “calibrat[ing] white-collar sentences.”¹⁷⁵ For victims and for the overstressed federal criminal justice system, such a step is long overdue.

¹⁷⁵ Bibas, *supra* note 5, at 739.