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WHITE COLLAR INNOCENCE: IRRELEVANT IN THE HIGH STAKES RISK GAME

ELLEN S. PODGOR*

INTRODUCTION

When one thinks of “wrongful convictions and reliability in the criminal justice process” one often thinks of street crime convictions of defendants later proven innocent through DNA or other scientific evidence.¹ Implanting white collar crime in this ballpark seems misplaced and perhaps offensive to some. After all, could there really be innocent individuals or corporations among the affluent federal criminals who were convicted of deliberately perpetrating frauds that caused the loss of life-savings and pensions of many victims? And if there are innocent defendants in the white collar sphere, do they merit consideration? After all one envisions these individuals and entities with sufficient funds to secure top-notch representation to argue their case through the judicial process.

The stories presented in this Article are not intended to demean the importance of more typical innocence cases, or say that street crime cases involving drugs, sex crimes, or others in the federal system are not significantly affected by a judicial system reliant upon a federal sentencing guideline system with high penalties. Nor is this Article meant to place the collateral consequences that can devastate a corporation above the consequences to the typical individual defendant who bears enormous collateral consequences, such as losing a job that serves as the funding source to feed a family. This Article merely shows that innocence is no longer the key determinant in some aspects of the federal criminal justice system, even for those charged with white collar offenses. Rather, our existing legal system places the risk of going to trial, and in some cases even being charged with

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1. See, e.g., Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (discussing a free-standing innocence claim); Daniel S. Medwed, *Looking Foreword: Wrongful Convictions and Systemic Reform*, 42 AM. CRIM. L. REV. 1117 (2005) (introducing symposium on wrongful convictions); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (providing empirical evidence to justify legal reform).

a crime,² so high, that innocence and guilt no longer become the real considerations. This is especially true for upper level white collar offenders like CEOs³ and corporate entities.⁴ In these cases maneuvering the system to receive the least onerous consequences may ensure the best result for the accused party, regardless of innocence.⁵

I. THREE STORIES

Arthur Andersen LLP, Jamie Olis, and Jeffrey Skilling proceeded to trial after criminal charges were brought against them. In contrast, KPMG, Gene Foster, and Andrew Fastow secured plea agreements or deferred prosecution agreements with reduced sentences and finite results. As one might imagine, the latter group's sentences or fines were significantly below those of the individuals and entities that proceeded to trial. The pronounced gap between those risking trial and those securing pleas is what raises concerns here. Some refer to this as a "trial penalty"⁶ while others value the cooperation and support the vastly reduced sentences.⁷

A. Arthur Andersen, LLP & KPMG

Arthur Andersen, LLP, was charged under an obstruction of justice

2. This Article does not speak to consequences that may accompany the charging process, such as having individuals subjected to a "perp walk." See Ashby Jones, *The 'Perp Walk': Debate: Prejudicial or Legit?*, Wall St. J. Law Blog, <http://blogs.wsj.com/law/2008/06/19/the-perp-walk-debate-prejudicial-or-legit/> (June 19, 2008, 16:42 PM).

3. The list of CEOs to receive high sentences has grown in the last few years. For example: Bernie Ebbers, CEO of Worldcom (25 years); Dennis Kozlowski, CEO Tyco (8.5–25.0 years); John Rigas, CEO Adelphia (12 years); Jeffrey Skilling (24 years). See Ellen S. Podgor, *Throwing Away the Key*, 116 YALE POCKET PART 279 (2007), <http://thepocketpart.org/2007/02/21/podgor.html>.

4. Companies that are subject to debarment (defense contractors), government exclusions (health care providers), and shareholder derivative actions are particularly susceptible to collateral consequences that can destroy the company if convicted of a crime. See generally Candace Zierdt and Ellen S. Podgor, *Corporate Deferred Prosecution Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007–08).

5. Clearly this process raises concerns regarding the right to trial by jury under the Sixth Amendment. This Article does not confront these concerns and leaves this discussion for another day.

6. See, e.g., Douglas A. Berman, *Newspaper article on the "trial penalty"*, Sentencing Law & Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/newspaper_artic.html (March 28, 2006, 1:58 AM) (citing Paula Reed Ward, *Plead Guilty or go to trial?*, Pittsburgh Post-Gazette, <http://www.post-gazette.com/pg/06086/677199-85.stm> (March 27, 2006)); Tom Kirkendall, *Hedging the Enron trial penalty*, Houston's Clear Thinkers, http://blog.kir.com/archives/2008/10/hedging_the_enr.asp (Oct. 15, 2008, 12:01 AM).

7. See *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) ("No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."); see also Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447 (2000) (discussing the importance of allowing prosecutors to offer leniency for testimony).

statute⁸ for its alleged conduct of instructing “employees to destroy documents pursuant to its document retention policy.”⁹ The defendant argued that it was “encouraging its employees to comply with the firm’s standard document retention policy during the four-week period that preceded the [Securities Exchange Commission (SEC)]’s initiation of a formal proceeding concerning Enron Corporation in 2001.”¹⁰ The government claimed the document destruction was a deliberate act to “prevent Enron’s and its own financial misdeeds and aggressive accounting from being uncovered by the SEC.”¹¹ After a trial by jury, the company was convicted and eventually sentenced to five years probation and fined the maximum allowed for this offense under law, a fine of five hundred thousand (\$500,000) dollars.¹² Although the Fifth Circuit affirmed this conviction,¹³ the Supreme Court reversed.¹⁴

The fine imposed on the company in the *Arthur Andersen, LLP* case proved inconsequential in comparison to a collateral consequence of the conviction—that Andersen was precluded from auditing public companies.¹⁵ Thus, the company died upon conviction, and the later reversal by the Supreme Court was worthless to the defunct company.¹⁶ It made no difference that the Supreme Court raised the concern that the jury could have used “innocent conduct” in its finding of guilt because of the improper instruction provided to them.¹⁷ The Supreme Court’s acknowledgment of the infirmities in the jury instructions offered no relief to the company’s ability to continue business. A collateral consequence of the jury’s finding was that thousands of innocent employees who worked for the company lost their jobs.¹⁸

8. See 18 U.S.C. § 1512(b) (2000).

9. 544 U.S. 696, 698 (2005).

10. See Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality be an Element of Obstruction of Justice*, 44 WASHBURN L.J. 583, 586–87 (2005) (citing Petition for Writ of Certiorari, *Arthur Andersen, LLP v. United States*, 2004 WL 2070872, at *9 (U.S. 2004)).

11. *Id.* (citing Brief of the United States in Opposition at *1, *Arthur Andersen, LLP*, 125 S. Ct. 823 (2004) (No. 04-368)).

12. *Id.* (discussing the penalties given to the company upon conviction).

13. See *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 284 (5th Cir. 2004).

14. See *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 698 (2005).

15. See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 108 (2006) (noting how the conviction led to an “inability to audit public companies”); see also Podgor, *supra* note 10, at 586–87 (discussing the fall of Arthur Andersen, LLP).

16. See Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons From Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 173–76 (2004) (discussing collateral consequences to Andersen).

17. See *Arthur Anderson*, 544 U.S. at 706–08 (2005) (noting that the jury instructions “failed to convey the requisite consciousness of wrongdoing”).

18. In the United States alone, more than 28,000 individuals lost their jobs. Carrie Johnson, *High*

Contrast the Arthur Andersen case with what happened to KPMG.¹⁹ KPMG, also an accounting and auditing firm, allowed a one count Information for conspiracy to be filed against the company. The specific acts alleged were “(i) to defraud the United States and its agency the Internal Revenue Service; (ii) commit tax evasion in violation of 26 U.S.C. § 7201; and (iii) make and subscribe false and fraudulent tax returns, and aid and assist in the preparation and filing of said tax returns in violation of 26 U.S.C. § 7206.”²⁰ In a deferred prosecution agreement, KPMG admitted to violating the law. The company agreed to cooperate with the government in its criminal investigation, to implement a compliance and ethics program, and to have a monitor “review and monitor KPMG’s compliance with the agreement.”²¹ KPMG also agreed not to assert any rights of attorney-client privilege.²² Under the terms of the deferred prosecution agreement, the company paid 456 million dollars.²³

In the KPMG case the company’s employees retained their jobs, the business remained viable, and there were no collateral consequences that would cause a demise of the firm. Not only was there no debarment in the KPMG case, but the deferred prosecution agreement specifically noted that the company could continue “to audit the Department of Justice’s financial statements”²⁴ as the department’s debarring official proclaimed them to be a “responsible contractor.”²⁵ Compliance with the deferred prosecution agreement ultimately meant a dismissal of the charging Information.²⁶

One can easily argue that Anderson was more culpable than KPMG, and therefore deserving of a harsher punishment.²⁷ To assert this claim, however, presents the obvious question as to why the fine to be imposed

Court Will Hear Andersen Appeal, WASH. POST, Jan. 8, 2005, at E1, available at <http://www.washingtonpost.com/wp-dyn/articles/A57805-2005Jan7.html>.

19. Professor Samuel W. Buell also uses, as his examples, Arthur Andersen and KPMG. His discussion focuses on “the blaming of an institution for a wrong.” See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).

20. Letter from David N. Kelley, United States Attorney, Southern District of N.Y., to Robert S. Bennett, Esq., KPMG Attorney, <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf> (Aug. 26, 2005).

21. *Id.* at 19.

22. *Id.*

23. *Id.* (“[P]ayments are attributable to the following: a fine consisting of disgorgement of \$128,000,000 of fees received by KPMG from the activities described in the Statement of Facts; restitution to the IRS of \$228,000,000 for actual losses . . . and an IRS penalty of \$100,000,000.”)

24. This Article leaves to another day a discussion as to any possible conflict by the Department of Justice for including as part of this deferred prosecution agreement that the company can continue to serve as the government’s auditors.

25. See Kelley, *supra* note 20.

26. *Id.* at 13.

27. See Kathleen F. Brickey, *Andersen’s Fall From Grace*, 81 WASH. U. L. Q. 917, 919–31 (2003) (discussing Andersen’s “liability as a firm”).

against Arthur Andersen was significantly less than that paid by KPMG.²⁸ This is because the punishment imposed under law was not the real punishment suffered by the company in the *Andersen* case. Rather, it was the collateral consequences which accompanied the conviction that caused the demise of Arthur Andersen LLP. KPMG, which paid a greater fine and consented to monitor oversight, avoided the collateral consequences by cooperating with the government.

B. *Jamie Olis & Gene Foster*

Jamie Olis was the Senior Director of Tax Planning and International at Dynegy²⁹, where he worked on a transaction referred to as “Project Alpha.” In essence, “Project Alpha was a plan to borrow \$300 million and make it appear to the outside world” and the auditors, “as if the money was generated by Dynegy’s business operations.”³⁰ The scheme was discovered when the “SEC required Dynegy to restate the cash flow as derived from a ‘financing’ rather than ‘operations.’”³¹ Jamie Olis, along with his boss at Dynegy, Gene Foster, and a co-worker, Helen Sharkey, were indicted for this fraudulent activity.³² Olis opted for trial and was convicted of “securities fraud, mail and wire fraud and conspiracy.”³³ Foster and Sharkey both opted for pleas that included cooperation.³⁴

Initially, Jamie Olis received a twenty-four year sentence, despite the fact that he had no prior criminal record.³⁵ The high sentence reflected a loss of \$105 million to the University of California Retirement System, use of “sophisticated means,” having a “special skill” to carry out the fraud, and more than fifty victims of the fraudulent activity.³⁶ This sentence was eventually overturned when the Fifth Circuit, in an opinion authored by Judge Edith H. Jones, concluded that a “substantial portion of the entire

28. The government only charged Arthur Andersen, LLP with one count under of obstruction of justice. In contrast, KPMG’s deferred prosecution agreement had allegations under the conspiracy statute, 18 U.S.C. § 371. See Kelley, *supra* note 20.

29. He later became the Vice President of Finance. See *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005).

30. *Id.* at 541.

31. *Id.* at 542.

32. See Simon Romero, *Former Employees of Dynegy Face Charges of Fraud*, N.Y. TIMES, Nov. 23, 2008, at B1.

33. *Olis*, 429 F.3d at 541.

34. See Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 741–42 (2007) (discussing the Olis sentence).

35. See Kris Axtman, *Cases test new flexibility of sentencing guidelines*, The Christian Science Monitor, <http://www.csmonitor.com/2005/0218/p02s01-ussc.htm> (Feb. 18, 2005).

36. *Olis*, 429 F.3d. at 542–43.

loss . . . could not have been caused by Olis's work on Project Alpha."³⁷ On remand, Jamie Olis received a sentence of six years.³⁸

Gene Foster and Helen Sharkey opted not to go to trial. Foster cooperated with the government and testified at Olis's trial. Despite being Olis's boss who approved his work, Foster received a sentence of fifteen months.³⁹ Helen Sharkey, a co-worker, received a one month sentence.⁴⁰

Olis's innocence claim continues to this day with allegations that he was denied funding for his legal counsel,⁴¹ counsel that he argues he was entitled to have as an employee at Dynegy.⁴² Even the court at resentencing noted that "[a]lthough Olis was intimately involved in the conspiracy and in planning Project Alpha, he did not have the ultimate authority at Dynegy to approve Project Alpha, nor was he responsible for drafting the documents by which the conspiracy was carried out and concealed."⁴³ Yet despite these conclusions, Olis's sentence was nearly five times greater than the individual with the authority to approve the activities. Olis risked trial on a claim of innocence, and having been found guilty, his sentence enormously exceeded individuals who cooperated with the government.

C. *Jeffrey Skilling & Andrew Fastow*

Jeffrey K. Skilling's testimony before the House Energy and Commerce Oversight Investigations Subcommittee caused "eyes to roll."⁴⁴ The financial collapse of Enron was met with questions and investigation. Skilling, the former CEO of Enron, was indicted along with now-deceased Kenneth L. Lay, also a former CEO of Enron, and Richard A. Causey, Enron's Chief Accounting Officer.⁴⁵ Richard Causey pled guilty to one count of

37. *Id.* at 548.

38. *See* United States v. Olis, No. H-03-217-01, 2006 WL 2716048, at *12 (S.D. Tex. Sept. 22, 2006), *aff'g in part, rev'g in part* 429 F.3d 540 (5th Cir. 2005).

39. Peter Henning, *Former Dynegy Executives Receive Lighter Sentences*, White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/01/former_dynegy_e.html (Jan. 6, 2006).

40. *See Id.*

41. Peter Henning, *Attorney's Fees for Olis' Counsel*, White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2007/05/attorneys_fees_.html (May 18, 2007).

42. The district court did not accept Olis's argument, for purposes of granting bail only, that his "Fifth and Sixth Amendment rights [were denied] by using threat of indictment to pressure Dynegy to cut off his access to defense funds." *See* Memorandum Opinion, United States v. Olis, No. H-03-217-01 at *6 (S.D. Tex. Mar. 3, 2008), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/march32008.pdf (last visited Sep. 23, 2009).

43. *Id.*; *see also* Podgor, *supra* note 34, at 742-43.

44. Videotape: Enron's Skilling Answers Markey at Hearing; Eyes Roll, (C-Span 2002), at <http://www.youtube.com/watch?v=hPqH3DrWEEU>.

45. Superseding Indictment, United States v. Causey, Cr. No. H-04-25 (S-2),

securities fraud⁴⁶ and received a sentence of sixty-six months.⁴⁷ Lay and Skilling proceeded to trial. As a result of his death, Kenneth Lay's conviction was abated.⁴⁸ Skilling, however, was convicted of securities and wire fraud. He initially received a sentence of over twenty-four years.⁴⁹ Although this sentence will be modified, it seems unlikely that a reduction in this sentence will dissipate the gross disparity in sentence between his sentence and the cooperating witness who did not go to trial.

A key witness at the Skilling/Lay trial was Andrew Fastow, who had served as Enron's Chief Financial Officer. Fastow reached a plea with the government that allowed him to plead to two counts of conspiracy,⁵⁰ an agreement that called for his extensive cooperation.⁵¹ Under the terms of the agreement, Andrew Fastow was to receive a sentence of ten years⁵² and it was agreed that he would "not move for a downward departure from the offense level or guideline range calculated by the Court and that no grounds for a downward departure exist."⁵³ At sentencing, however, with no objection from the government, Fastow received a sentence of six years.⁵⁴

Fastow's sentence of six years is a sharp contrast to the twenty-four plus years initially given to Jeffrey K. Skilling. Skilling continues to maintain his innocence⁵⁵ and his appeal in the Fifth Circuit resulted in a denial

<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/enron/usvlay70704ind.pdf> (July 7, 2004).

46. Laurel Brubaker Calkins, *Casey Heads To Prison for Role in Enron*, WASH. POST, Jan. 3, 2007, at D1.

47. Ellen S. Podgor, *Casey Off to Prison*, White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2007/01/causey_off_to_p.html (Jan. 3, 2007).

48. See *Lay's Enron Conviction 'Abated' Due to Death*, (NPR broadcast Oct. 18, 2006), <http://www.npr.org/templates/story/story.php?storyId=6288956>.

49. Skilling's initial sentence was for 292 months imprisonment. The Fifth Circuit remanded the case for resentencing. Although the court rejected Skilling's argument that the court erred in considering "Skilling's SEC testimony at sentencing," the en banc court did find error in the court's use of "an enhancement for substantially jeopardizing a 'financial institution.'" See *United States v. Skilling*, 554 F.3d 529, 591-95 (5th Cir. 2009).

50. Andrew S. Fastow pled guilty to conspiracy to commit wire fraud and conspiracy to commit wire and securities fraud. See Plea Agreement, *United States v. Andrew Fastow*, Cr. No. H-02-0665, <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/enron/usafastow11404plea.pdf> (last visited Sept. 23, 2009).

51. *Id.* at 4. The agreement also was conditioned on a plea on the part of Lea W. Fastow, the wife of Andrew Fastow. *Id.* at 15.

52. *Id.* at 1-2.

53. *Id.* at 2-3.

54. Ellen S. Podgor, *Fastow Receives A Six Year Sentence*, White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/09/fastow_receives.html (September 26, 2006).

55. *Former Enron CEO Skilling Gets 24 Years*, MSNBC, <http://www.msnbc.msn.com/id/15389150/> (Oct. 23, 2006, 7:15 PM) (discussing how Skilling at sentencing continued to maintain his innocence).

of his substantive criminal law claims, but entitled him to have his sentence modified.

II. THE MORAL OF THESE STORIES

Clearly one can argue that Arthur Andersen, LLP, Jamie Olis, and Jeffrey Skilling all deserve punishment, and that the amount of punishment received was warranted in each case. This, however, remains unclear as one case (*Andersen*) was reversed and the other two (*Olis* and *Skilling*) continue to maintain that the level of culpability attributed to them was improper. But whether the punishment was appropriate is not the focus of this Article. The real moral of these stories is not whether the punishment was warranted, but rather the appropriateness of the level of risk that one has to take to proceed to trial, and the chilling effect of the high risk caused by the “trial penalty.”⁵⁶ Innocence becomes irrelevant as the real question becomes whether it is worth the risk of testing an innocence claim.

Professor Russell D. Covey examines sentence differences between cases resolved via plea bargains and those that proceed to trial.⁵⁷ He advocates elimination of “the punitive trial sentences that coerce defendants to accept the plea-bargained alternative through adoption of a device referred to herein as ‘plea-based ceilings.’”⁵⁸ His call for “mandatory caps or ceilings on trial sentences”⁵⁹ is a forceful solution that can restore the value of the constitutional right of trial by jury.⁶⁰

Professor Covey’s article is not focused on white collar crime, and there may be some unique aspects to these corporate related cases. In white collar crime cases it is not merely the sentences that can necessitate the need for a plea. It also can be a function of collateral consequences such as civil suits by shareholders, or the indictment stigma that can significantly harm business. As noted, the penalty paid by KPMG was higher than the fine given after trial to Arthur Andersen, LLP.

Jamie Olis took the risk because he believed he was innocent of the charges levied against him. This risk cost him an initial sentence that was 288 times greater than a non-risk taker and an eventual sentence that was approximately seventy-two times greater than a co-worker who decided not

56. See Berman, *supra* note 6; Kirkendall, *supra* note 6.

57. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1237 (2008).

58. *Id.* at 1242.

59. *Id.*

60. U.S. CONST. amend. VI.

to take the risk of going to trial.⁶¹ His boss, who also did not risk trial, received a sentence less than one quarter of what Olis received.⁶²

Jeffrey Skilling also proclaimed his innocence and continues to this day to do so. Irrespective of whether one accepts his claim of not guilty, the reality is that he initially received a sentence four times greater than the individual who pled and cooperated with the government.⁶³ Whether the Fifth Circuit's remand⁶⁴ will provide a closer differential between the Skilling and Fastow sentence is uncertain, but experts' reports find this to be unlikely.⁶⁵

Perhaps the highest level of risk is demonstrated in the corporate sphere, especially when the risk can cause the death of the organization because of its inability to continue to perform its job function.⁶⁶ The *Andersen* case, as well as the later court determination reversing the conviction, demonstrates that the actual criminal fine is insignificant. In contrast, the risk of trial and its immediate consequences can be devastating to the company. Match this result against a corporate deferred prosecution, and the corporation would be foolish to take the trial route⁶⁷ as it is rare that one hears of a corporation going to trial and being found not guilty.⁶⁸ Whether any of the recent deferred prosecution agreements are examples of wrongful convictions, is unknown, as many corporations are not in a position to assert a claim of innocence because of the possible consequences should a jury return a guilty finding.

These three stories provide symbolic examples of the disparity between selecting trial and entering a plea with cooperation. Some improve-

61. Helen Sharkey, a co-worker, received a sentence of one month. See Henning, *supra* note 39. Of course one can claim that her lower sentence is because of an acceptance of responsibility and cooperation. But, one could also argue that Olis received a higher sentence because of arrogance and assertion of his constitutional right to trial.

62. See *Id.*

63. Andrew Fastow's sentence was for six years. See Plea Agreement, *supra* note 50.

64. See *United States v. Skilling*, 554 F.3d 529, 591–95 (5th Cir. 2009).

65. See Jef Feeley & Thom Weidlich, *Skilling Wins Resentencing After Getting 24-Year Term*, BLOOMBERG, <http://www.bloomberg.com/apps/news?pid=20601103&sid=aB1n1kNiYIs4&refer=us> (Jan. 7, 2009) (noting that experts believe that there will be little change in Skilling's sentence on remand); Dan Slater, *Skilling Conviction Upheld, Resentencing Ordered*, Wall St. J. Law Blog, <http://blogs.wsj.com/law/2009/01/06/skilling-conviction-upheld-resentencing-ordered/> (Jan. 6, 2009) (discussing how Skilling's sentence could remain the same on remand).

66. See Zierdt & Podgor, *supra* note 4, at 2.

67. This Article is not advocating against corporate deferred prosecutions, as these agreements play an important role in the judicial process. They are especially important when the corporate criminality is premised upon wrongdoing by a rogue employee. See generally Zierdt & Podgor, *supra* note 4, at 8.

68. W.R. Grace was found not guilty following a jury trial on alleged environmental crimes. See Ellen S. Podgor, *W.R. Grace – Not Guilty*, White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/verdict/ (May 8, 2009).

ment has been made to move the risk-controller from the hands of the prosecution into the hands of the judiciary as a result of recent Supreme Court decisions. The recent cases of *Booker*,⁶⁹ *Gall*,⁷⁰ and *Kimbrough*,⁷¹ allow judges increased discretion at sentencing. Judges can now focus on section 3553(a)⁷² factors and deviate from the federal sentencing guidelines when the guideline sentence is “‘greater than necessary’ to serve the objectives of sentencing.”⁷³ There have also been internal limits in the corporate sphere that rein in prosecutorial power in deferred prosecution agreements.⁷⁴

Writings about the deficiencies in the plea bargaining process with respect to innocence are not new, and some have chosen to defend the process in the wake of innocence cases. For example, Professor Josh Bowers, writes that the “typical innocent defendant in the typical case. . . is a recidivist facing petty charges.”⁷⁵ He notes that these innocent defendants are receiving lesser consequences in a world with plea-bargaining than one without it being available.⁷⁶ But those charged with white collar crimes do not fit this mold, as they usually are not recidivists, and often the penalties faced may be lengthy ones or have severe ramifications to those who have no criminal culpability.

This Article is not, however, to rehash the process that allows an innocent or guilty person, or entity, the option to reduce a sentence through plea bargaining. Rather, the focus here is on the gravity of the risk incurred in proceeding to trial, and the result that innocence becomes insignificant in the decision-making process, especially in the corporate arena. It is this reality that makes white collar matters prime as candidates for future wrongful convictions, even if the numbers to date do not demonstrate a

69. *United States v. Booker*, 543 U.S. 220 (2005) (holding that the Sixth Amendment’s right to trial by jury applies to the federal sentencing guidelines).

70. *Gall v. United States*, 128 S. Ct. 586, 595 (2007) (allowing for a sentence outside the guidelines even when there is no showing of extraordinary circumstances).

71. *Kimbrough v. United States*, 128 S. Ct. 558 (2007) (allowing judicial discretion for a sentence outside the guidelines range).

72. 18 U.S.C. § 3553(a) (2003). The statute provides the “[f]actors to be considered in imposing a sentence” such as “the nature and circumstances of the offense and the history and characteristics of the defendant” and the “the kinds of sentences available.” *Id.*

73. *Kimbrough*, 128 S. Ct. at 564. See generally Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235 (2009) (discussing increased discretion of judges at sentencing).

74. See generally Erik Paulsen, Note, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434 (2007) (discussing the McNulty Memo).

75. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119-20 (2008). He notes that “the best resolution is generally a quick plea in exchange for a light, bargained-for sentence.” *Id.*

76. *Id.*

sharp decrease in risk-taking in the white collar realm.⁷⁷

CONCLUSION

The reward of a “not guilty” verdict at trial comes at a high cost. There is the high cost of going to trial, a cost that far exceeds the typical street crime because of the long investigation and trial and in large part because these cases are predominantly a product of documents.⁷⁸ It can also be a short-lived verdict when the government decides to proceed against the individual with a second prosecution, even after a not guilty finding.⁷⁹

Clearly, many of the individuals charged with crimes by the federal government are in fact guilty of these criminal acts and deserve to be punished with a prison sentence. Likewise, many of the entities deserve to be fined for their criminal conduct. That said, it is problematic that the message being sent today is that trials carry enormous risk, and even if innocent, the best route may be to proceed with a finding of guilt or deferred prosecution.

This means that innocence or guilt does not frame the judicial process in white collar cases. The risk of trial becomes so great that in order to minimize the possible consequences innocence becomes an irrelevancy. Although the plea bargain to trial differential existed for many years in crimes outside the white collar crime context, the high sentences now being given to individuals and entities charged with white collar crimes place those crimes in comparable stead with street crimes. This gives pause to whether the next phase of wrongful convictions might move beyond street crimes into the white collar world.

77. The appendix to this Article provides data from select crimes reported by the U.S. Sentencing Commission. U.S. SENTENCING COMM’N, GUILTY PLEAS AND TRIALS IN EACH PRIMARY OFFENSE CATEGORY TABLE 11 (1997), <http://www.ussc.gov/annrpt/1997/table11.pdf>; U.S. SENTENCING COMM’N, GUILTY PLEAS AND TRIALS IN EACH PRIMARY OFFENSE CATEGORY TABLE 11 (2007), <http://www.ussc.gov/ANNRPT/2007/Table11.pdf>. Seven key white collar offenses are used to show the difference in guilty pleas and trials in 1997 and then ten years later in 2007. In all categories except one, there is an increase in the percentage of cases proceeding via plea as opposed to trial. The most noticeable increase in pleas is seen in the antitrust area, with a slight decrease in pleas seen with bribery cases. *Id.*

78. See Peter J. Henning, *Lawyers Don’t Come Cheap These Days*, White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2007/10/lawyers-dont-co.html (Oct. 13, 2007) (discussing attorney fees in recent white collar cases); Susan Beck, *Companies With Backdating Troubles Are Paying Astronomical Legal Fees*, AMERICAN LAWYER, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=900005493308&slreturn=1&hbxlogin=1> (October 12, 2007).

79. *Scrushy Pleads Not Guilty to New Charges*, L.A. TIMES, Oct. 29, 2005, at C2 (discussing how the Department of Justice charged Richard Scrushy with new charges following his not guilty verdict after a trial by jury). Of course, the 1988 Hyde Amendment provides relief to defendants who are subjected to government prosecutions that are “vexatious, frivolous, or in bad faith.” See 18 U.S.C. § 3006A (1998).

APPENDIX

GUILTY PLEAS AND TRIALS IN SELECT WHITE COLLAR CATEGORIES⁸⁰

<i>Crime</i>	<i>Year</i>	<i>Plea Percent</i>	<i>Trial Percent</i>
Fraud	2007	95	5
	1997	94.1	5.9
Embezzlement	2007	97.6	2.4
	1997	97.5	2.5
Bribery	2007	89.7	10.3
	1997	90.6	9.4
Environment/Wildlife	2007	96.9	3.1
	1997	94.7	5.3
Antitrust	2007	100	0
	1997	81.8	18.2
Food & Drug	2007	97.2	2.8
	1997	91.9	8.2

80. See *supra* note 77.