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# The Federal Sentencing Guidelines: A Guideline to Remedy Ohio's Sentencing Disparities for White-Collar Criminal Defendants

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# THE FEDERAL SENTENCING GUIDELINES: A GUIDELINE TO REMEDY OHIO'S SENTENCING DISPARITIES FOR WHITE-COLLAR CRIMINAL DEFENDANTS

JOELLE LIVORSE\*

## ABSTRACT

Over the past few decades, white-collar crimes have significantly increased across the country, especially in Ohio. However, Ohio's judges are ill-equipped to handle the influx of cases. Unlike federal judges who are guided by the U.S. Sentencing Commission's Federal Sentencing Guidelines, Ohio's judges have significantly more sentencing discretion because the Ohio legislature provides minimal guidance for these crimes. As a result, Ohio's white-collar criminal defendants are experiencing dramatic sentencing variations. To solve this problem, Ohio should look to the Federal Sentencing Guidelines and neighboring states to adopt and create an innovative sentencing model tailored to white-collar crime. Unlike the federal system, Ohio fails to utilize a matrix style grid—which provides notice and uniformity in sentencing. In addition, Ohio should adopt the Federal Sentencing Guideline's loss threshold amounts for white-collar crimes because the ranges in Ohio are too wide and, thereby, impose a longer sentence. The smaller ranges used by the federal government helps reduce prison terms while providing notice and uniformity to judges, practitioners, defendants, and the public. Pennsylvania, Ohio's neighboring state, also created unique and tailored sentencing matrices for specific criminal conduct. A tailored sentencing matrix that focuses on white-collar crime would better adapt the sentence to the criminal defendant's wrongdoing. Although the Federal Sentencing Guidelines have been criticized, they offer visible and uniform benefits that Ohio severely lacks for white-collar criminal defendants. If Ohio turns a blind eye to these sentencing disparities, a white-collar criminal defendant's sentence is left to the mercy of a system with unfettered judicial discretion and arbitrary sentences.

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## CONTENTS

I.	INTRODUCTION: OHIO'S SENTENCING DISPARITY FOR WHITE-COLLAR CRIMINAL DEFENDANTS .....	293
II.	THE IMPORTANCE OF WHITE-COLLAR CRIMES AND HISTORY OF SENTENCING IN THE UNITED STATES AND OHIO.....	295
	A. <i>What Are White-Collar Crimes and Why Do We Punish Them?</i> .....	295
	B. <i>History of Sentencing in the United States</i> .....	298
	C. <i>Modern Sentencing in the United States</i> .....	299
	D. <i>Ohio's Sentencing Structure</i> .....	301
III.	OHIO SHOULD ADOPT SIMPLE, CONSISTENT, AND UNPREJUDICIAL SENTENCING GUIDELINES FOR WHITE-COLLAR CRIMINAL DEFENDANTS .....	305
	A. <i>Ohio Should Adopt the Federal System's Threshold Loss Amounts</i> .....	305
	B. <i>Ohio Should Implement a White-Collar Sentencing Matrix Similar to Pennsylvania's Tailored Sentencing Matrices for Criminal Conduct</i> .....	308
	C. <i>The Criticisms of the Federal Sentencing Guidelines Will Substantially Improve Ohio's Sentencing Structure</i> .....	311
IV.	CONCLUSION .....	312

# I. INTRODUCTION: OHIO'S SENTENCING DISPARITY FOR WHITE-COLLAR CRIMINAL DEFENDANTS

What if a defendant's conduct did not determine his prison sentence, but instead the sentence depended on a decision to prosecute the defendant at the state or federal level? In fact, criminal defendants in Ohio are experiencing this problem today—particularly white-collar criminal defendants. Ohio's lack of an understandable and comprehensive felony sentencing model for white-collar criminal defendants results in dramatic sentencing variations.<sup>1</sup> For example, bribery of a public official in Ohio is a felony of the third degree and imposes a sentence of nine to thirty-six months in prison.<sup>2</sup> Yet in the federal court system, bribery of a public official, also a felony, imposes a sentence of zero to six months in prison.<sup>3</sup> For a defendant with no criminal history, this is a sizeable difference of nine months to three years in state prison, compared to a maximum of six months in federal prison. Accordingly, Ohio should

<sup>1</sup> See generally Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1005 (2010). The United States Sentencing Guidelines “were developed to remedy the prevalence of unwarranted sentencing disparity.”

<sup>2</sup> OHIO REV. CODE ANN. §§ 2921.02, 2929.14 (West 2018).

<sup>3</sup> See United States Sentencing Commission, *Guidelines Manual*, § 2 (2018); compare United States Sentencing Commission, *Guidelines Manual* § 5 (2018).

adopt a sentencing model similar to the Federal Sentencing Guidelines to reduce judicial discretion<sup>4</sup> and unpredictability in Ohio's criminal justice system.

State court judges in Ohio have significantly more autonomy than federal judges when sentencing white-collar criminal defendants. While Ohio judges do rely upon a Felony Reference Sheet,<sup>5</sup> there are no official guidelines, like in the federal system, that mandate certain punishment (or ranges of punishment) for certain criminal conduct.<sup>6</sup> When sentencing a defendant for a felony, Ohio judicial discretion is tethered only to the state law's overarching purpose. This purpose is to punish the offender and protect the public while "using the minimum sanctions . . . without imposing an unnecessary burden on state or local government resources."<sup>7</sup> The Ohio Revised Code (hereinafter "the Code") provides for minimum sanctions, but each felony has a wide range of sentencing provisions.<sup>8</sup> While the Federal Sentencing Guidelines are by no means a perfect standard, they are important to provide notice to a criminal defendant and constrain a defendant's sentence. Additionally, Ohio should follow other states, such as Pennsylvania, which uses matrices that could benefit Ohio because a defendant's punishment is tailored to their specific criminal conduct.<sup>9</sup> This approach reduces arbitrary sentences for defendants that commit both felony and misdemeanor offenses.<sup>10</sup>

The Principle of Legality is a pillar of American criminal law, meaning "no crime without law, no punishment without law."<sup>11</sup> With the current sentencing model in place, Ohio falls short of upholding this fundamental pillar. There are three interrelated corollaries to the legality principle.<sup>12</sup> First, criminal statutes should be understandable to a reasonable, law-abiding person.<sup>13</sup> Second, criminal statutes should be drafted as to not delegate basic policy matters.<sup>14</sup> Third, ambiguous statutes should "be biased in

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<sup>4</sup> James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 179–80 (2010).

<sup>5</sup> Ohio Criminal Sentencing Commission, *Felony Sentencing-Quick Reference Guide* (May 2017). This Felony Reference Sheet includes crimes such as murder, sexual offenses, drug crimes, and human trafficking. However, there are no specific references to white-collar crimes.

<sup>6</sup> See KATHLEEN F. BRICKEY & JENNIFER TAUB, *CORPORATE AND WHITE COLLAR CRIME* 694 (2017). The Federal Sentencing Guidelines take a tough stance on white-collar criminals. The philosophy is that the system can best achieve deterrence by requiring short, but definite prison terms.

<sup>7</sup> O.R.C. § 2929.11.

<sup>8</sup> *Id.* § 2929.14. The statute provides for definite prison terms, for example a felony of the first degree imposes a prison term of three to eleven years. A felony in the second degree imposes a prison term of two to eight years, while a felony of the third degree imposes a prison term of thirty-six months to twelve years, depending on the crime.

<sup>9</sup> See discussion *infra* Section III.B.

<sup>10</sup> *Id.*

<sup>11</sup> JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 92 (2012).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also Geraldine Szott Moohr, *Mail Fraud and The Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 191–92 (1994). The federal mail fraud

favor of the accused,” also known as the Lenity Doctrine.<sup>15</sup> Focusing on the first corollary, the punishment for committing a crime should be clear to citizens. However, Ohio criminal statutes that impose felonies for white-collar offenses permit substantially more judicial discretion when sentencing defendants that commit white-collar crimes than Congress allows federal judges.

This Note examines the disparity between the sentencing of white-collar defendants at the Ohio state court level and at the federal level. Because of Ohio’s lack of an understandable and constricted sentencing model,<sup>16</sup> the length of a defendant’s prison sentence is left at the mercy of the decision to prosecute the defendant at the state or national level. This Note proceeds in four parts. Part II provides background information about white-collar crimes and why society punishes these offenses. This section also examines historical and modern criminal sentencing in the United States and Ohio. Part III identifies various aspects of the Federal Sentencing Guidelines and Pennsylvania’s sentencing model that Ohio should adopt and implement. This section also proposes a clear and uniform model for sentencing white-collar criminal defendants in Ohio. Additionally, Part III also describes the alleged flaws of the Federal Sentencing Guidelines and identifies how these “flaws” are actually beneficial to the federal government and Ohio. Finally, Part IV briefly concludes.

## II. THE IMPORTANCE OF WHITE-COLLAR CRIMES AND HISTORY OF SENTENCING IN THE UNITED STATES AND OHIO

### A. *What Are White-Collar Crimes and Why Do We Punish Them?*

The term “white-collar crime” has expanded and evolved over time.<sup>17</sup> Today, the public understands white-collar crimes as wrongful acts by one or more trusted individuals or corporations that abuse their power and purposely or inadvertently injure another individual, corporation, or government agency.<sup>18</sup> For example, white-

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statute is a broad and overarching criminal statute that easily attaches to white-collar offenses to bring the claim within the jurisdiction of federal courts. Ms. Moohr argues that the federal mail fraud statute is unconstitutionally vague. Hence, the federal statute violates due process by “placing ‘unfettered discretion’ in the hands of police, thereby permitting or even encouraging arbitrary, discriminatory enforcement.” *Id.* at 192.

<sup>15</sup> DRESSLER, *supra* note 11, at 92. John Hasnas, *Ethics and The Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 662 (2005) (“The substantive protections provided by the ban on vicarious criminal liability, the mens rea requirement, and principle of legality clearly had to be abandoned or relaxed if the statutes against white collar crime were to be enforced.”).

<sup>16</sup> See David J. Diroll, A Decade of Sentencing Reform, A Sentencing Commission Staff Report 13 (Mar. 2007). Simplification of Ohio’s sentencing code would make it easier and more understandable to practitioners and citizens.

<sup>17</sup> See Lucian E. Dervan & Ellen S. Podgor, “White-Collar Crime”: Still Hazy After All These Years, 50 GA. L. REV. 709, 712 (2016).

<sup>18</sup> See Hendrik Schneider, *The Corporation as Victim of White Collar Crime: Results from a Study of German Public and Private Companies*, 22 U. MIAMI INT’L & COMP. L. REV. 171, 173 (2015). Dr. Schneider provides a widely accepted definition of white-collar crimes. He describes white-collar crime as “illegal or unethical acts that violate fiduciary responsibility of public trust committed by an individual or organization, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organization gain.” *Id.* However, there many other definitions of white-collar crime. See, e.g., *White-Collar Crime*, FBI, <https://www.fbi.gov/investigate/white-collar-crime> (last visited Sept. 10. 2019)

collar crimes include insider trading, embezzlement, bribery, racketeering, and more. In addition, access to the media and technology helped the public comprehend and mold the image of white-collar offenses.<sup>19</sup> Over the past few decades, white-collar crimes, also known as economic crimes in Ohio, have significantly increased.<sup>20</sup> For example, in 2001, the Federal Bureau of Investigation created a task force to handle the Enron scandal which was “the most complex white-collar criminal investigation in its history.”<sup>21</sup> Not only are economic crimes dangerous on a national level,<sup>22</sup> but these crimes also pose a major threat in Ohio.<sup>23</sup> In 2015, the economic crime rate in Ohio was 17.3% higher than the violent crime rate.<sup>24</sup> Because of the rise in white-collar offenses, Congress implemented new policies and reforms.<sup>25</sup> An essential

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(“These [white-collar] crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage.”).

<sup>19</sup> Many multimillion-dollar blockbusters are based on real and infamous white-collar offenses and their perpetrators. For example, *The Wolf of Wall Street* recounts Jordan Belfort’s fraudulent career as a “successful” stockbroker on Wall Street. Belfort engaged in a series of corrupt activities that caused him to plead guilty to an array of crimes related to a penny-stock scam. However, even though Belfort scammed innocent Americans of millions of dollars, he only spent twenty-two months in prison. *WOLF OF WALL STREET* (Paramount Pictures 2013); see *INSIDE JOB* (Sony Pictures Classic 2010); *Madoff* (Amazon 2016); *White Collar* (USA Network 2014). See generally Geraldine Szott Moohr, *White Collar Movies and Why They Matter*, 16 TEX. REV. ENT. & SPORTS L. 119 (2015).

<sup>20</sup> See Stephen Labaton, *Downturn and Shift in Population Feed Boom in White-Collar Crime*, N.Y. TIMES, June 2, 2002, at A1, 29.

<sup>21</sup> See *Enron*, FBI, <https://www.fbi.gov/history/famous-cases/enron> (last visited Sept. 10, 2019). Public investors, the Securities and Exchange Commission (“SEC”), and Enron’s own board of directors had no idea that Enron’s reported financial statements were “grossly inaccurate.” John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor’s Perspective*, 76 U. Colo. L. Rev. 57, 71 (2005). These inaccuracies were so misleading that Enron disguised a \$622 million loss as \$2.4 billion in profit. *Id.* at 73. Consequently, Congress enacted the Sarbanes-Oxley Act to help avoid another Enron catastrophe. See *infra* note 25 & 26.

<sup>22</sup> According to the United States Sentencing Commission’s most recent study, 10% of the federal court’s caseload stems from the economic crime guidelines in Section 2B1.1. Courtney Semisch, *What Does Federal Economic Crime Really Look Like?*, U.S. SENTENCING COMM’N 2 (2019). Section 2B1.1 is one of the five most frequently applied guidelines in federal sentencing. *Id.* at 3.

<sup>23</sup> Jimmy Dimora, the former Cuyahoga County Commissioner, was convicted of racketeering and thirty-two bribery and corruption charges. Rachel Dissell, *Jimmy Dimora Sentenced to 28 Years in Prison, Defense Attorney Calls it a ‘Death Sentence’*, CLEVELAND.COM (July 31, 2012), [https://www.cleveland.com/metro/index.ssf/2012/07/jimmy\\_dimora\\_sentenced\\_to.html](https://www.cleveland.com/metro/index.ssf/2012/07/jimmy_dimora_sentenced_to.html).

<sup>24</sup> Alan Wedd, *Economic Crime in Ohio Report 2015*, OHIO DEP’T OF PUB. SAFETY 9 (2015).

<sup>25</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 107 Stat. 745 (2002) [hereinafter *Sarbanes-Oxley Act*]. On July 30, 2002, Congress passed the Sarbanes-Oxley Act of 2002 to establish tighter regulations on the security industry and to protect investors. The Sarbanes-Oxley Act enhanced white-collar crime penalties. Specifically, § 905 directed the U.S. Sentencing Commission to review the two aspects of the Federal Sentencing Guidelines and

reason the government penalizes these offenders is the high cost imposed on thousands of innocent Americans due to the wrongful actions of one individual or corporate entity.<sup>26</sup> These financial losses can significantly impact, or even destroy, the financial livelihood of innocent citizens and shareholders through their pensions, retirement plans, and, indirectly, through the economy.<sup>27</sup> Therefore, the punishment of white-collar crime is necessary to advance the welfare of the public, sustain the national economy, and protect the wealth of innocent Americans.<sup>28</sup>

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verify that the punishment supports the offender's conduct. First, the Commission must ensure the Federal Sentencing Guidelines "reflect the serious nature of the offense . . . the growing incidence of serious fraud offenses, and the need to deter and punish such offenses." Second, the Commission must consider "whether a specific offense characteristic should be added in order to provide stronger penalties for fraud committed by a corporate officer or director." *Id.* In addition, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act to regulate the financial industry, particularly those on Wall Street. *See* 12 U.S.C. § 53 (2018).

<sup>26</sup> Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 78 (2006). *See* Press Release, U.S. Dep't of Justice, Former CEO of Arthrocare Corporation Convicted for Orchestrating \$750 Million Securities Fraud Scheme (Aug. 18, 2017) (convicting former CEO of a securities scheme that defrauded shareholders of more than \$750 million.); Press Release, U.S. Dep't of Justice, Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (May 3, 2018) (pleading guilty to three felony counts and fined \$2.8 billion in criminal penalties as a result of a long-term scheme to defraud the revenue of the United States and lying and obstructing justice to further the scheme.); *see also* Felicia Smith, *Madoff Ponzi Scheme Exposes "The Myth of the Sophisticated Investor"*, 40 U. BALT. L. REV. 215, 219–20 (2010). Bernie Madoff defrauded investors of an estimated \$64.8 billion that impacted "hedge fund managers, charities, pension funds, retirees, celebrities, and self-described 'average Americans.'" *See also* Elizabeth Cosenza, *Rethinking Attorney Liability Under Rule 10B-5 In Light of the Supreme Court's Decisions in Tellabs and Stoneridge*, 16 GEO. MASON L. REV. 1, 3–4 (2008). At the turn of the 21st century, the Enron Corporation was the seventh-largest company in the United States, employed about 21,000 people, had \$60 billion in assets, and had an annual income of more than \$100 billion. Yet, Enron collapsed as a result of numerous illegal corporate schemes and left investors suffering losses of more than \$40 billion. Between 2002 and 2007, more than 200 CEOs, 50 CFOs, and 120 Vice-Presidents were convicted of white-collar crimes at the federal level. EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL* 41 (2016).

<sup>27</sup> "While violent crimes may well provoke widespread community outrage more readily than crimes involving monetary loss, economic crimes are certainly capable of rousing public passions, particularly when thousands of unsuspecting people are robbed of their livelihoods and retirement savings." *Skilling v. United States*, 561 U.S. 358, 449 (2010); *see also* Meeks, *supra* note 26, at 88. If a company is charged with participating or orchestrating in a crime, the fines may be shifted to shareholders and consumers in the economy. A corporation can raise its prices to help offset the egregious fines imposed, which ultimately harm consumers and the economy by inflating prices. *Id.*

<sup>28</sup> White-collar crimes are more significant than street crimes from a purely economic perspective and often have the capacity to weaken trust and faith in the basic institutions of society. STANTON WHEELER, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 2–3 (1988).

### B. History of Sentencing in the United States

To understand and appreciate sentencing in the United States, we must first examine the origins of our legal system. Old English common law has greatly influenced American jurisprudence. Throughout the eighteenth century, English judges had to determine the punishment for an individual's crime without any standards to help decide a defendant's punishment.<sup>29</sup> Consequently, judges imposed severe penalties and sentences for a wide array of crimes.<sup>30</sup> The realization of the need for reform grew and spread across Europe,<sup>31</sup> but many resisted this philosophy.<sup>32</sup> Ultimately, the ideology of sentencing reform spread to and influenced the American colonies.

In the early colonial period, the primary sentences for offenders were isolation and punishment.<sup>33</sup> An individual that committed a white-collar crime was fined and forced to pay restitution.<sup>34</sup> Before the American Civil War, many courts abandoned their "traditional" mechanisms and began to incarcerate criminal defendants.<sup>35</sup> Following this ideology, Dr. Benjamin Rush, a signer of the Declaration of Independence, delivered an influential speech at the home of Benjamin Franklin in 1787 regarding the establishment of a prison system in the United States.<sup>36</sup> Rush's

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<sup>29</sup> SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 1 (1985).

<sup>30</sup> *Id.* The judges sentenced individuals that committed violent felonies, such as murder, and treason to death. Yet, minor crimes, such as petty theft or cutting a tree from another's property, were also punished as capital crimes. During this period, the English criminal code contained more than two hundred capital crimes.

<sup>31</sup> *Id.* In 1764, Cesare Beccaria—considered one of the greatest thinkers of the Age of Enlightenment—published *On Crimes and Punishment*. See CESARE BECCARIA, ON CRIMES AND PUNISHMENT 113 (1764). Beccaria demanded that "punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law."

<sup>32</sup> SHANE-DUBOW ET AL., *supra* note 29, at 2. In 1765, the Roman Catholic Church denounced Beccaria as a heretic and "socialist." The following year, the Church categorized *On Crimes and Punishments* as a condemned book. Even, philosopher Immanuel Kant disagreed with Beccaria's demand to end capital punishment. Kant argued that "society must impose capital punishment in order to maintain a system based upon the individual's inherent worth as an individual and his right to receive punishment . . ."

<sup>33</sup> Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 ANNALS OF THE AM. ACADEMY OF POL. AND SOC. SCI. 117, 118 (1976) "Colonial Americans used a variety of nonincarcerative techniques to protect their communities from the threat of crime." *Id.* at 124.

<sup>34</sup> *Id.* "Offenders who simply could not pay were sentenced to forced labor, whipped, placed in the stocks or branded with a symbol of their offense." *Id.* at 124–25.

<sup>35</sup> *Id.* at 125. These jurisdictions abandoned "flogging, whipping, branding, and other corporal punishments."

<sup>36</sup> *Id.* Dr. Rush envisioned a prison system that would "(1) establish various inmates 'classification' programs, for purpose of both inmate housing assignments and various 'treatment' plans; (2) devise a self-supporting institutional system based on inmate piecework and agriculture; and (3) impose indeterminate periods of confinement on inmates who would

belief in an isolated prison system, rather than public punishments, spread and evolved across the country. Society soon began to understand the functionality of the prison system and major reforms of sentencing power were implemented across the country.<sup>37</sup> Consequently, legislatures proposed ranges for criminal offenses, but judges retained the ultimate power to determine a defendant's sentence.<sup>38</sup> As a result, white-collar criminal defendants received inconsistent sentences before the implementation of the Federal Sentencing Guidelines.<sup>39</sup>

### C. Modern Sentencing in the United States

By the 1980s, it became clear that the United States had to solve its sentencing disparity problem, especially for white-collar criminal defendants.<sup>40</sup> Congress passed the Sentencing Reform Act of 1984, which established and required the U.S. Sentencing Commission to create a set of guidelines to assist federal judges when sentencing criminal defendants.<sup>41</sup> The U.S. Sentencing Commission also revised

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then be released on the basis of evidence of their progress towards "rehabilitation." Beccaria's *On Crimes and Punishment* may have influenced Dr. Rush's ideology. DAVID FREEMAN HAWKE, BENJAMIN RUSH: REVOLUTIONARY GADFLY 364 (1971).

<sup>37</sup> Dershowitz, *supra* note 33, at 128. By 1922, thirty-seven states established indeterminate sentencing models and seven states had similar parole systems.

<sup>38</sup> Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696 (2010).

<sup>39</sup> See *United States v. Bergman*, 416 F. Supp. 496, 497 (S.D.N.Y. 1976) (sentencing defendant who stole more than \$1,000,000 to four months in prison); *United States v. Browder*, 398 F. Supp. 1042, 1043, 1047 (D. Or. 1975) (sentencing defendant who stole \$500,000 to twenty-five years in prison). These two cases demonstrate the exact problem courts across the country faced—two federal district courts sentenced two defendants that committed similar white-collar offenses to vastly different sentence terms because of the lack of a uniform sentencing model. See also Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, n.44 (1993).

<sup>40</sup> "We are all aware of the great variation in sentencing practices . . . . It must be ranked as one of our foremost problems in the administration of justice . . . . Terms for forgery range from nine months in Maine and the Southern District of New York to sixty-three months in Oklahoma and fifty-eight months in Western Arkansas." Attorney General Robert F. Kennedy, Address at Joint Sentencing Institute of the Sixth, Seventh and Eighth Judicial Circuits (Oct. 12, 1961). The Comprehensive Crime Control Act of 1984 became a solution. Congress enacted The Comprehensive Crime Control Act of 1984 for two purposes: honesty in sentencing and the reduction of unjustifiable sentence disparities. See Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) ("Honesty in sentencing" refers to the offender serving the imposed sentence from the judge, excluding "good time.").

<sup>41</sup> Breyer, *supra* note 40, at 5. The U.S. Sentencing Commission includes seven members—three of which are federal judges, appointed by the President and confirmed by the Senate. Currently, five of the seven voting positions, including the Chair, are vacant on the U.S. Sentencing Commission. The two Commissioners are Judge Charles R. Breyer (Northern District of California) and Judge Danny C. Reves (Eastern District of Kentucky). Four affirmative votes are required to amend the U.S. Sentencing Guidelines, but there are only two voting members on the Commission. Hence, zero changes can occur to the U.S. Sentencing Guidelines. *Organization*, U.S. SENTENCING COMMISSION, <https://www.ussc.gov/about/who-we-are/organization> (last visited Sept. 2, 2019). Many believe these vacancies are due to

federal probation laws to provide judges with a wider range of sentencing options, and considerably abolished parole in the federal system.<sup>42</sup>

Today, the U.S. Sentencing Commission<sup>43</sup> is responsible for establishing policies and practices for sentencing in the federal criminal justice system.<sup>44</sup> More specifically, the U.S. Sentencing Commission provides a range of guidelines for a specific offense and class of offender.<sup>45</sup> In federal court, the judge normally determines the offender's sentence within the range of the guidelines, but may stray from the suggested range under specific circumstances.<sup>46</sup>

The best method to understand the Federal Sentencing Guidelines is to examine the seven steps that federal judges use when sentencing white-collar criminal defendants.<sup>47</sup> The first step is to calculate the base offense level, which can be determined from the guidelines manual and the forty-three level offense table promulgated by the U.S. Sentencing Commission.<sup>48</sup> In step two, the judge examines specific offense characteristics of that particular crime to determine the gravity of the crime.<sup>49</sup> Steps three and four allow the judge to adjust the offense level if deemed

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President Trump's lack of appointing individuals for the Commission or the Senate failing to confirm his nominees, such as William Otis.

<sup>42</sup> BRICKEY & TAUB, *supra* note 6, at 694. The Sentencing Reform Act of 1984 also raised fines for offenses.

<sup>43</sup> See 28 U.S.C. § 994 (2018). This statute provides a duty of the U.S. Sentencing Commission to create guidelines for punishing criminal defendants in the federal court system.

<sup>44</sup> United States Sentencing Commission, *Guidelines Manual*, § 1A, intro, comment. 1 (2016).

<sup>45</sup> *Id.* § 2. However, the offense range must be narrow: the maximum cannot exceed the minimum by more than 25% of 6 months.

<sup>46</sup> *Id.* See *United States v. Booker*, 543 U.S. 220, 222 (2005) (holding that the provision of the Federal Sentencing Act that made the guidelines mandatory and set forth a standard of review would be severed to maintain the validity of the Act.). The Court noted that "[t]hese features of the remaining system . . . continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65. Therefore, the Federal Sentencing Guidelines are not mandatory, but rather an important advisory to federal judges when sentencing criminal defendants. See also *Gall v. United States*, 552 U.S. 38, 49 (2007) (explaining that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."); see *infra* note 50.

<sup>47</sup> BRICKEY & TAUB, *supra* note 6, at 695.

<sup>48</sup> *Id.* The purpose of step one is to rank the severity of the offenses. See USSG § 1A2.2 ("[The] advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review.").

<sup>49</sup> BRICKEY & TAUB, *supra* note 6, at 696. For example, the Guidelines provide that the crime of fraud is a level 6 offense. However, the magnitude of the crime can increase depending on the estimated or probable loss from the committed fraud. If the loss is \$5,000 or less, the crime remains a level 6 offense; but if the loss is higher the offense level can increase 1 to 18 levels. These increases can significantly impact a judge's decision to sentence the criminal defendant to a longer prison sentence. *Id.* For example, when the loss in mail fraud is more than \$70,000—rather than \$10,000—the recommended sentence doubles. Gwin, *supra* note 4, at 181.

appropriate and if the defendant is convicted of multiple counts.<sup>50</sup> Step five, an important and unique aspect of the federal sentencing system, allows a two level decrease in the base offense level if the defendant “clearly demonstrates acceptance of personal responsibility for his offense.”<sup>51</sup> Step six allows the judge to consider a defendant’s prior criminal history.<sup>52</sup> Finally, in the last step, the court utilizes the sentencing table<sup>53</sup> to determine where the criminal defendant’s conduct lies and imposes a sentence within the designated range.<sup>54</sup>

#### D. Ohio’s Sentencing Structure

In 1974, the Ohio General Assembly “completely revised” its legal system and ratified uniform sentencing for all crimes.<sup>55</sup> Initially, Ohio’s revised sentencing structure for felonies included first, second, third, and fourth degree felony categories with large sentencing disparities between the categories.<sup>56</sup> Ultimately, this structure

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<sup>50</sup> BRICKEY & TAUB, *supra* note 6, at 696. A judge can adjust the offense level from a variety of factors, such as an unusually vulnerable victim, defendant’s role in the offense (whether aggravating or mitigating), or obstruction of justice. Additionally, the Federal Sentencing Guidelines stipulate “procedures for grouping closely related counts, for determining the offense level applicable to each group of counts, and for determining the combined offense level.”

<sup>51</sup> United States Sentencing Commission, *Guidelines Manual*, § 3E (2018). There are numerous considerations that are relevant in determining whether the defendant qualifies for the two level decrease. For example, “truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 . . . . [V]oluntary termination or withdrawal from criminal conduct or associations; voluntary payment of restitution prior to adjudication of guilt; voluntary surrender to authorities promptly after commission of the offense; voluntary assistance to authorities in the recovery of the fruit and instrumentalities of the offense; voluntary resignation from the offense or position held during the commission of the offense; post-offense rehabilitative efforts; and the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility.”

<sup>52</sup> BRICKEY & TAUB, *supra* note 6, at 697. This step allows the court to consider the number and seriousness of a defendant’s prior offenses. Thus, step six does not affect first-time offenders.

<sup>53</sup> *Id.* at 698. The sentencing table is a grid containing vertical and horizontal columns. The vertical column ranks offenses by their severity; a level one offense is the least severe while a level forty-three represents the most severe offense level. The horizontal column increases severity depending on the criminal defendant’s prior criminal history.

<sup>54</sup> *Id.*

<sup>55</sup> SHANE-DUBOW ET AL., *supra* note 29, at 213. Ohio’s statutes provided certain criteria Judges were required to consider to impose a defendant’s sentence; including (1) the nature and circumstances of the offense, (2) the history, character, and condition of the offender, (3) the offender’s need for correctional and rehabilitative treatment; and (4) the resources and ability of the offender to pay fines. See Harry J. Lehman & Alan E. Norris, *Some Legislative History and Comments on Ohio’s New Criminal Code*, 23 CLEV. ST. L. REV. 8, 9 (1974) (discussing that the Technical Committee responsible for drafting the new criminal code relied on revised criminal codes from Illinois, New York, Wisconsin, and the Model Penal Code of the American Law Institute).

<sup>56</sup> See 1972 H 511.

left a lot for the judge to determine.<sup>57</sup> Seven years later, the General Assembly's concern for repeat offenders led to the enactment of Senate Bill 199,<sup>58</sup> which created "aggravated felony" ranges and "repeat aggravated felonies."<sup>59</sup> Yet, Ohio's legal system still encountered problems,<sup>60</sup> which led the General Assembly to enact Senate Bill 2 in 1996.<sup>61</sup> Senate Bill 2 reformed felony sentencing in Ohio.<sup>62</sup>

Today, Ohio is experiencing the same problem the United States had before the existence of the Federal Sentencing Guidelines—disparity in sentencing white-collar criminal defendants. Similar to the federal system, the Ohio Criminal Sentencing Commission is responsible for creating a uniform criminal sentencing code.<sup>63</sup> Unlike the federal system, Ohio does not use a matrix-style grid to guide judges in felony sentencing.<sup>64</sup> Sara Koenig, host of the widely-popular podcast, *Serial*, spoke perfectly about Ohio's current sentencing structure for criminal defendants:

There are sentencing guidelines of course spelled out in *excruciating detail* in the Ohio Revised Code and I'd assumed the guidelines meant that sentencing was fairly mechanical. A *certain kind of charge* would produce a *certain kind of sentence*, plus or minus a little wiggly room in the margin to account for special circumstances or whatever else. But it's not like that. County judges in Ohio have a lot of *leeway in sentencing*, a lot of *discretion* to interpret what punishment consists of, what danger to the public looks like. *Leeway, discretion, that's power by another name*.<sup>65</sup>

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<sup>57</sup> Ohio's first attempt at sentencing reform gave state judges immense discretion. For example, a first degree felony imposed a sentence range of 4 to 25 years; second degree felony imposed 2 to 15 years; third degree felony imposed 1 to 10 years; and a fourth degree felony imposed 6 months to 5 years. SHANE-DUBOW ET AL., *supra* note 29, at 213.

<sup>58</sup> JOHN WOOLREDGE ET AL., NAT'L INST. OF JUSTICE, THE IMPACT OF OHIO'S SENATE BILL 2 ON SENTENCING DISPARITIES 5 (2002) [hereinafter OHIO SENTENCING WHITE PAPER].

<sup>59</sup> *Id.* The legislation "added eight new prison sentence ranges to the original four ranges from the 1974 criminal code."

<sup>60</sup> See Diroll, *supra* note 16, at 11.

<sup>61</sup> See S.2, 121st Gen. Assemb., Reg. Sess. (Ohio 1996).

<sup>62</sup> WOOLREDGE ET AL., *supra* note 58, at 4. Senate Bill 2 provided key changes, such as truthing-in-sentencing, a broad continuum of sanctions, expanded the right of victims, and offered guidance by offense level and appellate review. Before S.B. 2, convicted felons were administered indeterminate and determinate sentences. For example, an indeterminate sentence, such as four to twelve years, allowed the Ohio Parole Board to release felons early or hold them for longer periods. Conversely, determinate sentences require release after the offender has served a fixed term. Diroll, *supra* note 16, at 11.

<sup>63</sup> OHIO REV. CODE ANN. § 181.24 (West 2018).

<sup>64</sup> A key characteristic of sentencing in Ohio is the state's rejection of the grid sentencing system and presumptive sentencing ranges. Ohio rejected this structure to afford greater judicial discretion. DAVID DIROLL & SCOTT ANDERSON, OHIO CRIMINAL SENT'G COMM'N, JUDICIAL DECISION MAKING AFTER *BLAKELY* AND *BOOKER* 12 (2005).

<sup>65</sup> Sara Koenig, *You've Got Some Gauls*, SERIAL (Sept. 21, 2018), <https://serialpodcast.org/season-three/2/youve-got-some-gauls> (emphasis added).

Currently, Ohio's criminal penalties are described in lengthy detail in section 2929 of the Code.<sup>66</sup> Section 2929.12(B) provides a list of non-exhaustive factors the sentencing court shall consider to determine if the offender's conduct is "more serious than conduct normally constituting the offense."<sup>67</sup> Similarly, section 2929.12(C) provides various mitigating factors.<sup>68</sup> Ohio judges may also consider other factors to determine if the offender will commit a future crime.<sup>69</sup> The decision to implement Ohio's sentencing structure into criminal statutes has caused the system to be complex<sup>70</sup> and difficult to comprehend and apply.<sup>71</sup>

The Ohio Criminal Sentencing Commission suggested a necessary topic for further study: the simplification of Ohio's felony sentencing code.<sup>72</sup> The Ohio Criminal Sentencing Commission acknowledged that the sentencing structure "adds untold hours to the workloads of judges, prosecutors, [and] defense attorneys . . . ."<sup>73</sup> Furthermore, Ohio's sentencing structure makes it "extremely difficult for offenders, victims, and the media to understand criminal sentences."<sup>74</sup> It also recognized that Ohio should "streamline and simplify" section 2929 of the Code to make it easier for

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<sup>66</sup> See O.R.C. § 2929.14.

<sup>67</sup> *Id.* These factors include: "(1) [t]he physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim; (2) [t]he victim of the offense suffered serious physical, psychological, or *economic harm* as a result of the offense; (3) [t]he offender held a public office or position of trust in the community, and the offense related to that office or position; (4) [t]he offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice; (5) [t]he offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others; (6) [t]he offender's relationship with the victim facilitated the offense; (7) [t]he offender committed the offense for hire or as part of an organized criminal activity; [or] (8) [i]n committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation or religion . . . ." *Id.* § 2929.12 (emphasis added).

<sup>68</sup> *Id.* § 2929.12(C). These factors include, but are not limited to, the following: "(1) [t]he victim induced or facilitated the offense; (2) [i]n committing the offense, the offender acted under strong provocation; (3) [i]n committing the offense, the offender did not cause or expect to cause physical harm to any person or property; [or] (4) [t]here are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense."

<sup>69</sup> *Id.* § 2929.12(E). These factors include, but are not limited to: "(1) [p]rior to committing the offense, the offender has not been adjudicated a delinquent child; (2) [p]rior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense; (3) [p]rior to committing the offense, the offender has led a law-abiding life for a significant number of years; (4) [t]he offense was committed under circumstances not likely to recur; [or] (5) [t]he offender shows genuine remorse for the offense."

<sup>70</sup> Since Senate Bill 2's enactment, Ohio's felony sentencing code has become "remarkably complex." Diroll, *supra* note 16, at 13.

<sup>71</sup> *Id.* The convoluted sentencing structure makes it difficult apply Ohio's criminal statutes.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

citizens and attorneys to understand.<sup>75</sup> Therefore, a simple model, similar to the Federal Sentencing Guidelines, would foster more consistency in Ohio's criminal justice system.<sup>76</sup>

Not only is Ohio's sentencing system complex and confusing, but it allows Ohio judges to retain too much discretion when sentencing criminal defendants.<sup>77</sup> For example, if a defendant pleads guilty to a crime in the federal system, the offender's acceptance of responsibility automatically decreases the offense by two levels.<sup>78</sup> But Ohio is vastly different because this decrease is not automatic; rather, it is the judge's decision to consider a guilty plea when sentencing the defendant.<sup>79</sup> A report by the National Center for State Courts supports that Ohio has one of the most voluntary and discretionary sentencing structures in the United States.<sup>80</sup> The report established a "Sentencing Guideline Continuum" that measures how each state's sentencing guidelines affect judicial discretion.<sup>81</sup> Ohio received the lowest score possible—a score of one—on the continuum scale.<sup>82</sup> Simply put, Ohio's "state sentencing guidelines" provide too much discretion to judges compared to other states in the nation.<sup>83</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 22. A sentencing model that provides "more felony levels with narrower sentence ranges" could foster more consistency in the legal system.

<sup>77</sup> WOOLLEDGE ET AL., *supra* note 58, at 11.

<sup>78</sup> United States Sentencing Commission, *Guidelines Manual*, § 3E1.1 (2018).

<sup>79</sup> *See* OHIO REV. CODE ANN. § 2929.12(E) (West 2018).

<sup>80</sup> NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 5 (2008). The continuum seeks to "compare and contrast six common characteristics that define and differentiate" sentencing guideline systems in different states.

<sup>81</sup> *Id.* The lower the score on the continuum, the more voluntary the state's sentencing guidelines. This allows for higher rates of judicial discretion when sentencing criminal defendants. A higher the score on the continuum means that the state's sentencing guideline are more mandatory and, therefore, judges have less discretion. The continuum assigned points to each state based on its answer to the following six questions: "(1) Is there an enforceable rule related to guideline use? (2) Is the completion of a worksheet or structured scoring form required? (3) Does a Sentencing Commission regularly report on guideline compliance? (4) Are compelling and substantial reasons required for departures? (5) Are written reasons required for departures? (6) Is there appellate review of defendant-based challenges related to sentencing guidelines?" Each state is awarded 0, 1 or 2 points based on its answer. North Carolina was the only state to receive the maximum score of 12.

<sup>82</sup> *Id.* at 5. Ohio was only one of two states to score a 1—the other was Wisconsin.

<sup>83</sup> *See id.* In response to the National Center for State Court's questions, these were Ohio's answers. In response to question (1), Ohio's guidelines have moved towards an advisory sentencing system. Following question (2), judges in Ohio are not required to complete guidelines worksheets. Question (3), there no statistics for Ohio regarding sentencing patterns or practices. Question (4), Ohio judges may stray from the state's guidelines, but no substantial or compelling reason is required. Question (5), no written reasons are required. Question (6), the sentencing departures are not subject to appeal.

### III. OHIO SHOULD ADOPT SIMPLE, CONSISTENT, AND UNPREJUDICIAL SENTENCING GUIDELINES FOR WHITE-COLLAR CRIMINAL DEFENDANTS

Disparity in sentencing occurs when offenders with comparable prior records commit similar crimes, but are punished or sentenced differently from each other.<sup>84</sup> Ohio should adopt a sentencing model similar to the Federal Sentencing Guidelines to reduce judicial discretion, unpredictability, and unwarranted sentencing disparities in Ohio's criminal justice system.<sup>85</sup> In Ohio, the wide-ranging prison terms that judges rely on are extensively listed in section 2929.14 of the Code.<sup>86</sup>

Ohio's sentencing structure creates unwarranted sentencing disparities for white-collar criminal defendants because offenders that commit similar crimes often receive vastly different sentences. Yet, scholars across the country discovered that the Federal Sentencing Guidelines reduced sentencing disparities for criminal defendants.<sup>87</sup> The U.S. Sentencing Commission conducted a survey to support these findings.<sup>88</sup> Thirty-two percent of federal District Court judges "strongly agreed" that the federal sentencing guidelines reduced unwarranted sentencing disparities of defendants with similar prior records.<sup>89</sup> Similarly, forty-six percent of federal judges "somewhat agreed" to this notion.<sup>90</sup> Hence, federal judges across the country support the national structure because the Federal Sentencing Guidelines achieve their purpose.

#### A. Ohio Should Adopt the Federal System's Threshold Loss Amounts

A central difference between the Federal Sentencing Guidelines and Ohio's sentencing model is the threshold loss amount required for an increase in the offense

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<sup>84</sup> Richard S. Frase, *Why Have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?*, U. OF MINN. (Mar. 25, 2015), <https://sentencing.umn.edu/content/why-have-us-state-and-federal-jurisdictions-enacted-sentencing-guidelines>.

<sup>85</sup> For example, Ohio has failed to track the progress and effectiveness of its sentencing structure, especially in Cuyahoga County. See Koenig, *supra* note 65 (stating "[t]his is possibly the most profound and least examined question in the building: What works? The court doesn't gather statistics on sentencing, and that's true for most of the country by the way, no data that says defendants in Cuyahoga County do better after 6 months of probation than after 3 years of probation, or in terms of reoffending, 4 years in prison yields better results than 7 years in prison. We just don't know—which I found rather astounding that no one is tracking this. . . . [B]ut there's no database locally or nationally, that shows what works.").

<sup>86</sup> OHIO REV. CODE ANN. § 2929.01 (West 2018); see *supra* Section II.D.

<sup>87</sup> See Lydia Brashear Tiede, *The Impact of the Federal Sentencing Guidelines and Reform: A Comparative Analysis*, 30 JUST. SYS. J. 34 (2009).

<sup>88</sup> U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 tbl. 2 (2010).

<sup>89</sup> *Id.* at tbl. 20.

<sup>90</sup> *Id.* Six hundred and twenty-nine federal judges answered this question, while only ten judges abstained. Only six percent of federal judges were "neutral" on this question, nine percent "somewhat disagreed," and seven percent "strongly disagreed." In addition, seventy-six percent of federal judges "strongly agreed" or "somewhat agreed" that the Federal Sentencing Guidelines have increased certainty in meeting the purposes of sentencing. A purpose of the Federal Sentencing Guidelines was to reduce disparities in sentencing criminal defendants.

level. Ohio should adopt a similar form of the threshold loss amounts from the Federal Sentencing Guidelines because the loss thresholds between felony levels in Ohio are too great. The Federal Sentencing Guidelines specify various definitions of loss.<sup>91</sup> In white-collar crimes, the loss calculation is “a critical determinant of the length of a defendant’s sentence.”<sup>92</sup> This loss calculation is critical because the loss is directly correlated to the heart of the crime itself;<sup>93</sup> whether the offense is a form of fraud, embezzlement,<sup>94</sup> an international Ponzi scheme, or another white-collar crime.<sup>95</sup> Therefore, we must compare the required loss amounts in the Federal Sentencing Guidelines to Ohio’s requirements in the Code.<sup>96</sup>

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<sup>91</sup> The USSG identify several types of loss. For example, actual loss is the “reasonably foreseeable pecuniary harm that resulted from the offense.” In addition, intended loss requires two prongs: (1) intended loss is the pecuniary harm that the defendant purposely sought to inflict; and (2) the intended pecuniary harm that would have been impossible or unlikely to occur. Another form of loss, pecuniary harm, means the harm that is monetary or otherwise readily measurable in money. Therefore, pecuniary harm “does not include emotional distress, harm to reputation, or other non-economic harm.” Lastly, reasonably foreseeable pecuniary harm includes the “harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.” United States Sentencing Commission, *Guidelines Manual*, § 2B1.1, comment. 3 (2018).

<sup>92</sup> *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); *see also* Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES, June 29, 2009, at A1 (stating that [i]n 2009, Bernie Madoff was sentenced to 150 years in federal prison for conducting the largest and most wide-spread Ponzi Scheme in history, which affected billions of dollars held by American investors. Madoff’s imposed sentence was three times the recommended length of the Federal Sentencing Guidelines.).

<sup>93</sup> “At the heart of white collar crime is the American dream fueled by our capitalist society wherein competition and success are key factors . . . White collar crime comes hand-in-hand with capitalism, as corporations compete for the biggest profits and fewest losses. This ruthless economic system encourages competitors to work harder than everybody else in order to get ahead, which results in a sense of individualism and a lack of awareness of the problems caused towards others.” Joseph P. Martinez, *Unpublished Criminals: The Social Acceptability of White Collar Crimes in America* (Apr. 11, 2014) (unpublished thesis, Eastern Michigan University), <https://commons.emich.edu/cgi/viewcontent.cgi?article=1381&context=honors>. *See generally* SOLTES, *supra* note 26 (discussing an empirical understanding of why white collar criminals “commit” these offenses. Soltes interviewed multiple corporate executives that committed financial reporting fraud, insider trading, deceptive financial structuring, and Ponzi schemes—including the infamous Bernie Madoff.).

<sup>94</sup> Since 2013, individuals who commit embezzlement and theft routinely comprise the largest type of white-collar offender. They annually represent between 24.6% to 28.3% of all economic crime offenders. Offenders that commit credit card fraud are a distant third. U.S. Semisch, *supra* note 22, at 7.

<sup>95</sup> Other white-collar crimes where loss is at the heart of the offense include “bank fraud, blackmail, bribery, counterfeiting, credit card fraud, embezzlement, extortion, forgery insider trading, insurance fraud, investment schemes, securities fraud, tax evasion, advanced fee scams, service and repair scams, as well as Ponzi & pyramid schemes . . . .” Martinez, *supra* note 93, at 5.

<sup>96</sup> USSG § 2B1.1(b); OHIO REV. CODE ANN. § 2913.02(B)(2) (West 2014).

<b>Federal Sentencing Guidelines<sup>97</sup></b>	
<u>Loss Amount</u>	<u>Increase in Offense Level</u>
\$6,500 or less	No Increase
More than \$6,500	Add 2
More than \$15,000	Add 4
More than \$40,000	Add 6
More than \$95,000	Add 8
More than \$150,000	Add 10
More than \$250,000	Add 12
More than \$550,000	Add 14
More than \$1,500,000	Add 16 <sup>98</sup>
More than \$2,500,000	Add 18
More than \$9,500,000	Add 20
More than \$25,000,000	Add 22
More than \$65,000,000	Add 24
More than \$150,000,000	Add 26
More than \$250,000,000	Add 28
More than \$550,000,000	Add 30

<b>Ohio Revised Code<sup>99</sup></b>	
<u>Loss Amount</u>	<u>Increase in Offense Level</u>
\$1,000 – \$7,499	5 <sup>th</sup> Degree Felony
\$7,500 – \$149,999	4 <sup>th</sup> Degree Felony
\$150,000 – \$749,999	3 <sup>rd</sup> Degree Felony
\$750,000 – \$1,500,000	2 <sup>nd</sup> Degree Felony
\$1,500,000 & above	1 <sup>st</sup> Degree Felony

As demonstrated above, the required threshold loss amount for a theft felony in Ohio is \$1,000.<sup>100</sup> Essentially, the Code provides that a defendant who stole \$7,500

<sup>97</sup> USSG § 2B1.1. This offense table applies to “larceny, embezzlement, and other forms of theft; offenses involving stolen property; property damage or destruction; fraud and deceit; forgery; offenses involving altered or counterfeit instruments other than counterfeit bearer obligation of the United States.”

<sup>98</sup> Ohio’s maximum threshold loss amount is \$1,500,000. O.R.C. § 2913.02.

<sup>99</sup> *Id.*

<sup>100</sup> Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies* 2 (National Conference of State Legislatures, June 2015), <https://www.ncsl.org/documents/cj/sentencing.pdf>. Ohio is one of nineteen states, plus the District of Columbia, to have a \$1,000 state felony threshold amount. New Jersey and Virginia have the lowest state felony threshold amount, \$200, while Wisconsin has the highest state felony threshold amount, \$2,500. Ohio should consider raising its felony threshold amount so the state can focus on sentencing the most serious offenders, rather than the low-level offenders. *Id.*

receives the same punishment as a defendant that stole nearly \$150,000.<sup>101</sup> Whereas, the federal system provides three different loss levels between this wide range. Section 2B1.1 allows intermediate thresholds at \$15,000, \$40,000, and \$95,000 before reaching \$150,000. Hence, white-collar criminal defendants in Ohio have a substantially higher chance of receiving a longer prison sentence due to Ohio's large and inappropriate organization of these threshold loss amounts. Similar to federal sentencing ranges, smaller ranges for loss amounts in Ohio can help reduce the sentence for a white-collar criminal defendant.

However, in 2015, the U.S. Sentencing Commission proposed numerous amendments to Section 2B1.1 of the Federal Sentencing Guidelines.<sup>102</sup> Specifically, one change was the new sentencing factor of "substantial financial hardship" to victims.<sup>103</sup> Under the original sentencing analysis, an offender received a harsher punishment when they impacted fifty or more individuals.<sup>104</sup> Now, the new model allows the same sentence for the same amount of money that affects less people.<sup>105</sup> Therefore, an offender who embezzles or steals \$1,000,000 from one person or fifty-one people can receive the same punishment.

### *B. Ohio Should Implement a White-Collar Sentencing Matrix Similar to Pennsylvania's Tailored Sentencing Matrices for Criminal Conduct*

Various states had already adopted similar structures of the Federal Sentencing Guidelines, even before the federal structure became a national success.<sup>106</sup> In 1982, Pennsylvania was the second state to draft and implement state sentencing guidelines.<sup>107</sup> On September 13, 2012, Pennsylvania approved the Seventh Edition of its Sentencing Guidelines.<sup>108</sup>

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<sup>101</sup> O.R.C. § 2913.02. In Ohio, a defendant that stole nearly twenty times more than another can receive the same punishment.

<sup>102</sup> See Frank O. Bowman, III, Comment on Proposed Amendments to Economic Crime Guideline, §2 B.1.1 (Feb. 19, 2015), <http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf>.

<sup>103</sup> United States Sentencing Commission, *Guidelines Manual*, § 2B1.1(b) (2018).

<sup>104</sup> United States Sentencing Commission, *Guidelines Manual*, § 2B1.1(b)(2) (2014).

<sup>105</sup> *Id.* § 2B1.1(b).

<sup>106</sup> Pennsylvania enacted the sentencing guidelines to promote uniformity and consistency in sentencing for defendants. Jodeen M. Hobbs, *Structuring Sentencing Discretion in Pennsylvania: Are Guidelines Still a Viable Option in Light of Commonwealth v. Devers?*, 69 TEMP. L. REV. 941, 960 (1996). Washington, New Jersey, and Minnesota also have similar structures to the Federal Sentencing Guidelines. Daniel A. Chatham, *Playing with Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 625 (2007).

<sup>107</sup> ROBINA INST. OF CRIM. L. AND CRIM. JUST., JURISDICTION PROFILE: PENNSYLVANIA (2018). The Guidelines were invalidated due to a procedural error, but new guidelines became effective in 1988.

<sup>108</sup> *Sentencing Guidelines and Implementations Manuals*, PA. COMM'N ON SENTENCING, <http://pcs.la.psu.edu/guidelines/sentencing/sentencing-guidelines-and-implementation-manuals> (last visited Oct. 14, 2018).

Pennsylvania's sentencing structure incorporates three important features that can help remedy problems the Federal Sentencing Guidelines do not address. First, the Federal Sentencing Guidelines only apply to felonies and class A misdemeanors; whereas Pennsylvania's Sentencing Guidelines apply to all felonies and misdemeanors.<sup>109</sup> Second, Pennsylvania state judges are required to disclose in open court the purpose and reasons of the imposed sentence for felonies and misdemeanors.<sup>110</sup> Third, and most importantly, Pennsylvania's unique matrix structure for specific criminal conduct can help remedy the sentencing disparity in Ohio for white-collar criminal defendants.

Pennsylvania's sentencing requirements are codified in the Pennsylvania State Code.<sup>111</sup> However, the Pennsylvania Sentencing Commission issued an Implementation Manual.<sup>112</sup> This manual is similar to the Federal Sentencing Guidelines Manual because it is extremely simple in assisting citizens and practitioners to understand the consequences of criminal conduct. To determine the guideline sentence,<sup>113</sup> a judge in Pennsylvania must first determine the Offense Gravity Score of the current misconduct<sup>114</sup> and examine the defendant's prior record.<sup>115</sup> Once these scores are determined, the court may apply an enhancement<sup>116</sup> or any aggravating or mitigating circumstances.<sup>117</sup> Pennsylvania utilizes six different matrices for sentencing defendants.<sup>118</sup> For example, if an enhancement applies, then

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<sup>109</sup> 204 PA. CONST. STAT. § 303.1(a) (2019).

<sup>110</sup> *Id.* § 303.1(d). This statute states “[i]n every case in which a court of record imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed.”

<sup>111</sup> *See generally id.* § 303.1.

<sup>112</sup> Pennsylvania Commission on Sentencing, *Sentencing Guidelines Implementation Manual* (7th ed. 2012).

<sup>113</sup> 204 PA. CONST. STAT. § 303.2(a).

<sup>114</sup> *Id.* § 303.3; *see also* Pennsylvania Commission on Sentencing, *supra* note 112, at 99. The Offense Gravity Score “measures the seriousness of the current conviction.” Similar to the Federal Sentencing Guidelines, we can analogize “Offense Gravity Score” with the offense level.

<sup>115</sup> 204 PA. CONST. STAT. § 303.4(a). A Prior Record Score is “based on the type and number of prior convictions . . . and prior juvenile adjudications . . . . There are eight Prior Record Score categories: Repeat Violent Offense (REVOC), Repeat Felony 1 and Felony 2 Offender (RFEL), and point-based categories of 0, 1, 2, 3, 4, and 5.”

<sup>116</sup> *See id.* § 303.10. A court may enhance the Offense Gravity Score only under specific circumstances. These situations include: if the offender used a deadly weapon, participated in a criminal gang, conducted the crime at or near youth or a school, sexually abused a child, committed third-degree murder of a victim younger than the age of 13, committed arson, or was involved in human trafficking.

<sup>117</sup> *See id.* § 303.13 for a list of aggravating or mitigating factors.

<sup>118</sup> *See id.* §§ 303.16(a)–303.18(c). The matrix a court uses depends on the defendant's criminal conduct. There is a unique sentencing matrix for Offenders Under the Age of 18 Convicted of 1<sup>st</sup> or 2<sup>nd</sup> Degree Murder, Possession of a Deadly Weapon, Use of a Deadly

the court uses the applicable enhancement matrix; otherwise the court applies the basic sentencing matrix.<sup>119</sup> The five unique matrices tailor the Offense Gravity Score and Prior Record Score to the criminal defendant's conduct. Hence, when a court uses a specific matrix focused on specific criminal conduct, the defendant's imposed sentence is better adapted for the criminal defendant's wrongdoing.

Ohio should adopt Pennsylvania's form of sentencing criminal defendants using unique matrices for specific criminal conduct. A critical reason to separate the sentencing structure of white-collar crimes from other offenses is the inherent nature of the crime. White-collar crimes tend to be non-violent offenses and motivated by greed;<sup>120</sup> whereas other crimes, such as homicide or rape, are inherently violent and motivated by a multitude of factors. Rather than using one basic sentencing matrix, a matrix tailored to white-collar criminal conduct would allow offenders to receive a fairer sentence. Ohio should create and implement a white-collar matrix with the loss threshold amounts on the vertical axis and the defendant's prior criminal record on the horizontal axis. This white-collar matrix would allow Ohio courts to account for the criminal defendant's exact loss amount and specific prior criminal record.

However, Ohio should avoid one negative aspect of Pennsylvania's sentencing structure—indeterminate sentencing.<sup>121</sup> An indeterminate sentence is when a court prescribes “a range for the minimum and maximum term”<sup>122</sup> or a “maximum prison term that the parole board can reduce . . . .”<sup>123</sup> Hence, Pennsylvania judges sentence defendants for a range of years, rather than a set term. Whereas, a determinate sentence imposes fixed sentence durations.<sup>124</sup> Unlike Pennsylvania, Ohio primarily utilizes a determinate sentencing model.<sup>125</sup> Determinate sentencing reduces judicial discretion because the judge must sentence a criminal defendant to a specified number of years, rather than a range of years.

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Weapon, Youth Enhancement Matrix, School Enhancement Matrix, and a Youth and School Enhancement Matrix.

<sup>119</sup> See generally *id.* § 303.16(a).

<sup>120</sup> See Pamela H. Bucy et al., *Why Do They Do It?: The Motives, Mores, and Character of White Collar Criminals*, 82 ST. JOHN'S L. REV. 401, 406 (2012). Beyond greed, the top motivations included a sense of entitlement, arrogance, competitiveness, and rationalization.

<sup>121</sup> See Angelica L. Revelant, *Indeterminate ≠ Immunity: A Review of the Pennsylvania Sentencing Guidelines*, 110 PENN. ST. L. REV. 187, 189 (2005).

<sup>122</sup> *Indeterminate Sentencing*, BLACK'S LAW DICTIONARY (10th ed. 2014). Indeterminate sentencing is also known as discretionary sentencing. *Sentencing*, BLACK'S LAW DICTIONARY (11th ed. 2019). Hence, since this Note argues that Ohio should reduce judicial discretion, Ohio should also avoid discretionary sentencing policies.

<sup>123</sup> Bradley R. Hall, *Mandatory Sentencing Guidelines by Any Other Name: When “Indeterminate Structured Sentencing” Violates Blakely v. Washington*, 57 DRAKE L. REV. 643, 648 (2009).

<sup>124</sup> See Lawrence, *supra* note 100, at 4. Determinate sentencing allows for “certainty in the amount of time served, improve[d] proportionality of the sentence to the gravity of the offense, and reduce[d] disparities that might exist when sentences are more indeterminate.”

<sup>125</sup> *Id.* at 5. Along with New York and California, Ohio is one of seventeen states and the District of Columbia to employ a determinate sentencing model. See OHIO REV. CODE ANN. § 2929.14(A) (West 2018).

Unlike a judge's discretionary power in Ohio, Pennsylvania's overall sentencing structure is highly obligatory for each judge to follow. To support this notion, Pennsylvania scored significantly higher on the Sentencing Guideline Continuum compared to Ohio.<sup>126</sup> Pennsylvania received a score of nine, meaning the state's sentencing model is highly mandatory; whereas Ohio's sentencing structure is basically a voluntary decision for each judge.<sup>127</sup> Hence, Ohio should also use Pennsylvania as a guide for adopting a new and innovative sentencing matrix for white-collar criminal defendants, but constrain the model to determinate sentences.

*C. The Criticisms of the Federal Sentencing Guidelines Will Substantially Improve Ohio's Sentencing Structure*

Many scholars and practitioners have heavily criticized the federal government's structure and adoption of the Federal Sentencing Guidelines, including section 2B1.1.<sup>128</sup> The Federal Sentencing Guidelines have been criticized as "rules of great complexity and rigidity,"<sup>129</sup> a "mechanical scoring system,"<sup>130</sup> and, in the words of Justice Kennedy, "unwise and unjust."<sup>131</sup> Although the Federal Sentencing Guidelines are not a perfect standard, they provide a more accurate and visible model for practitioners, citizens, and criminal defendants. Compared to Ohio's model, the Federal Sentencing Guidelines are visible, simple, and efficient. An important and positive aspect of the Federal Sentencing Guidelines is their visibility.<sup>132</sup> Prior to the federal model, sentencing guidelines for any crime were basically invisible to federal judges, practitioners, and defendants.<sup>133</sup> The current guidelines allow defendants reasonable visibility and understanding of their offenses, the variations, and possible imposed sentence. Hence, there is reduced secrecy for a defendant that misappropriates \$100,000 where his conduct falls on the sentencing table.

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<sup>126</sup> See KAUDER & OSTROM, *supra* note 80, at 22. This survey specifically measured how each state's sentencing guidelines affect judicial discretion.

<sup>127</sup> *Id.* at 22; see Koenig, *supra* note 65. In Cleveland, Ohio, Judge Cassandra Collier-Williams stated that entering each judge's courtroom in the Justice Center is like entering a different city. Judge Collier-Williams stated, "[t]here's thirty-four judges up here and it's like thirty-four different cities."

<sup>128</sup> See generally Part II of Lucian E. Dervan, *Sentencing the Wolf of Wall Street: From Leniency to Uncertainty*, 61 WAYNE L. REV. 91, 107-21 (2015); Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007).

<sup>129</sup> Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 8 (2005).

<sup>130</sup> Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 46 (2005).

<sup>131</sup> Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003).

<sup>132</sup> Michael Goldsmith & James Gibson, *The U.S. Sentencing Guidelines: A Surprising Success?* 15 (NYU Law Sch. Ctr. for Research in Crime & Just., Occsn'l Paper in Crime & Just. No. 12, 1999).

<sup>133</sup> *Id.*

A supposed fault of the Federal Sentencing Guidelines is that federal judges have “been robbed” of all judicial discretion.<sup>134</sup> However, this argument assumes that each judge employed a rational and correct model for sentencing defendants before the Federal Sentencing Guidelines existed.<sup>135</sup> Although a federal judge cannot determine a defendant’s sentence from scratch, the judge has the final decision on the defendant’s sentence within the prescribed statutory range.<sup>136</sup> Hence, the Federal Sentencing Guidelines have not eliminated judicial discretion. Instead, the Federal Sentencing Guidelines monitor and steer federal judges in a similar direction. Ohio judges would immensely benefit from similar judicial discretion constraints because white-collar criminal defendants receive vastly different sentences.

Critics also argue that the Federal Sentencing Guidelines are too complex and extensive. However, considering the Federal Sentencing Guidelines account for all federal felony offenses and class A misdemeanors, a four-hundred-page manual is sufficient. The Federal Sentencing Guidelines are organized into eight chapters with descriptions of each offense and specific characteristics for that offense. Each crime has a corresponding offense level that allows federal judges to apply specific enhancements for a particular case.<sup>137</sup> Compared to Ohio, practitioners must locate the criminal statute, understand the punishment prescribed in the statute, locate Ohio’s penalties in the Code, and still leave the defendant’s sentence to the mercy of the judge.<sup>138</sup> Hence, the Federal Sentencing Guidelines are a simple and transparent guide for sentencing criminal defendants; whereas the sentencing structure in Ohio leaves practitioners and defendants in the dark. Therefore, the “negative aspects” of the Federal Sentencing Guidelines, when compared to Ohio’s sentencing model, actually improve the overall purpose and function of sentencing criminal defendants.

#### IV. CONCLUSION

The solution to remedy the sentencing disparity for white-collar criminal defendants in Ohio is apparent and simple: adopt the Federal Sentencing Guidelines. This successful and established national framework can help guide Ohio to implement a clear and uniform sentencing structure. Without this vital change, judges in Ohio retain vast discretion to determine and implement arbitrary sentences. Judicial discretion creates disparities and bias when sentencing any criminal defendant. It is common sense that a defendant’s conduct should determine their final punishment, not Ohio’s flawed sentencing procedures.

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<sup>134</sup> *Id.* at 5.

<sup>135</sup> See generally ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY (1974). The authors conducted a study in the Second Circuit to determine the sentencing disparity of federal judges. The authors discovered that before the Federal Sentencing Guidelines were implemented, there was a wide disparity in sentencing criminal defendants. *Id.* at 9. In particular, the study revealed that the judicial disparity in sentencing in the Eastern District of New York casted “doubt on the theory that sentencing councils tend to generate common approaches to sentencing . . .” *Id.* at 23. See generally Breyer, *supra* note 40.

<sup>136</sup> See *id.* at 19–20. A federal judge has the ability to fluctuate a defendant’s sentence using aggravating or mitigating factors.

<sup>137</sup> *Id.* at 21.

<sup>138</sup> See *id.* at 27–28.

Furthermore, Pennsylvania's unique and effective matrices provide another tool to remedy the sentencing disparities for white-collar criminal defendants. A matrix tailored to white-collar crime will substantially reduce judicial discretion in Ohio and tailor the defendant's sentence to their criminal conduct. Although these guidelines may not solve every problem, they will help Ohio transition in the right direction for sentencing white-collar criminal defendants. These improvements will help Ohio comport with the Principle of Legality, reduce judicial discretion, and minimize unpredictability in the criminal justice system.<sup>139</sup> The reformation of Ohio's criminal sentencing structure is necessary because without guidelines, Ohio judges are left with a "difficult, soul-searching task at best."<sup>140</sup>

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<sup>139</sup> See *supra* Section I.

<sup>140</sup> Attorney General Robert F. Kennedy, Address at Joint Sentencing Institute of the Sixth, Seventh and Eighth Judicial Circuits 6 (Oct. 12, 1961).