



Half-Baked: The Yates Memo Calls for Charging More Offenders, But How Do We Sentence Them?

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When the Deputy Attorney General issued what has become her eponymous memorandum, many in the criminal justice community praised the Department's focus on individual prosecutions. In the wake of the financial crisis where executives appeared to get off scot-free, the memorandum let everyone know that federal prosecutors were going to re-focus their efforts on putting more white-collar offenders behind bars. But, this focus on prosecuting more individuals and obtaining greater punishment cannot occur in a vacuum. There is a crisis in the federal criminal justice system presently: sentences in white collar cases are often disproportionate and irrational. If the Yates memorandum becomes a reality and more individuals are criminally prosecuted, this crisis will be exacerbated.

Take for example the sentencing guidelines that are applicable in most white collar cases. These guidelines are widely criticized by both judges and practitioners as being "useless" and having "so run amok that they are patently absurd on their face." *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D. N.Y. 2006) (Rakoff, J.). Because the guidelines for white collar cases tether prison sentences to the dollar amount associated with the crime, a single stock tip can yield a sentence of 20 years while an armed robbery is punishable only by 10 years, sexual assault is punishable by 5 years, and child abuse is punishable by 12 years. As recognized by judges, practitioners, legal scholars, and even Judge Patti B. Saris, chair of the Sentencing Commission, the white collar guidelines are "fundamentally broken."¹ Although the Guidelines are advisory in nature, the judge must consider them in determining the sentence, and sentences within the Guideline range are presumed reasonable on appeal by many appellate courts.²

While white collar offenders, such as Bernie Madoff, have become the face of villainous greed, most

of the people are first offenders and far less damnable: a home health care provider in Florida is serving a 12-year sentence for submitting claims to Medicare for supplemental oxygen he provided to patients that did not have the requisite certification (although there was no problem with the product);³ a CEO, after relying on legal advice that no state rebate was due, faced a 20 year sentence under the Guidelines for his company's failure to rebate premiums to a state agency;⁴ and a 70-year-old business owner is serving a 7-year sentence after submitting false inventory and account information to a lender, enabling his business to borrow more than it otherwise would have after the company fell on difficult times.⁵

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White collar sentencing guidelines are, of course, not the only guidelines which have come under fire (there are also major movements to reform drug guidelines and other guidelines that target poor communities), but they are the guidelines which will be most implicated by Yates-inspired DOJ policy changes.

The harmful reach of the draconian sentencing guidelines extends well beyond individual offenders. The rate of imprisonment in the United States is now four times the world average, with approximately 2.2 million people in prisons or jails.⁶ An ever-increasing number of these individuals are first-time, non-violent offenders. Lengthy sentences for this growing number of non-violent offenders is a costly drain on society

with little or no benefit to protecting the community or rehabilitating offenders. The total per inmate cost averaged \$31,286 annually.⁷ Studies show that lengthening prison sentences has no deterrent effect on crime — one of the chief purposes of sentencing.⁸ New research also suggests that incarceration and lengthier prison sentences could increase recidivism.⁹

While there has been some sentencing reform in recent years, changes are made at a glacial pace. In 2015, after years of criticism prompted the Sentencing Commission to conduct a multiyear study of the white-collar guidelines, the Sentencing Commission adjusted the loss table for inflation. So, for instance, the sentencing enhancement that was previously triggered by a \$7 million fraud, is now set at \$9.5 million. The commission also amended the “victim enhancement” and “intended loss” so that certain sentencing enhancements are more tailored to the crime. These changes are indeed welcomed but they are modest — and, as sentencing expert Jim Felman points out, they do not “address the fundamental and profound deficiencies” in the current guideline which include an “overemphasis on loss” and a “cumulative piling on of specific offense characteristics.”¹⁰ Thus, they will have little impact on the exaggerated sentences in high loss cases.¹¹ Even with the recent amendments, any executive of a public company convicted of a criminal offense relating to the company’s business operations likely faces a sentence under the Guidelines of life imprisonment or close to it.¹²

If we are moving forward with more individual prosecutions in white collar cases, then there should be a concomitant focus on how those individuals are sentenced. In 2015, the American Bar Association’s Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes crafted an alternative sentencing structure. The ABA approach would be an excellent starting point for true sentencing reform. Referred to by practitioners and judges as the “shadow guidelines,” the task force proposal considers loss as one of several factors in fashioning a sentence and places greater emphasis on overall offender culpability. Commentators have praised this alternative approach as a way to achieve more just and proportionate sentences, and judges have begun to rely on them in making sentencing decisions.¹³

People will debate whether the Yates memorandum makes good sense from a policy

perspective, but what is indisputable is that if more people are prosecuted, it must be accompanied by a more rational sentencing scheme. Otherwise, the Yates memorandum will result in the opposite of its intended effect: greater injustice.

Notes

1. Hon. Patti Saris, *Keynote Address, Regulatory Offenses and Criminal Law Conference* (Apr. 14, 2015), available at http://www.uscc.gov/sites/default/files/pdf/news/speeches-and-articles/speech_saris_20150414.pdf.

2. See *Gall v. United States*, 552 U.S. 38, 50 (2007) (holding that the Guidelines shall be the “starting point and the initial benchmark”); *United States v. Tucker*, 629 Fed. Appx. 572, 572 (4th Cir. 2016) (unpublished) (holding that, upon review, “any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable”).

3. See *United States v. Bane*, 720 F.3d 818 (11th Cir. 2013).

4. See *United States v. Farha*, 8:11-cr-00115 2011 WL 12844360 (M.D. Fla. 2011) (indictment).

5. See *United States v. Massaro*, 1:12-cr-00148 (E.D. Va. 2012) (Brinkema, J.) (sentencing order).

6. Jason Furman and Douglas Holtz-Eakin, *Why Mass Incarceration Doesn't Pay*, N.Y. Times (Apr. 21, 2016), available at <http://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html>.

7. *Id.*

8. E.g., Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”); David Weisburd, et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 CRIMINOLOGY 587 (1995) (“There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through deterrence mechanisms.”).

9. Nat’l Inst. of Justice, *Five Things About Defense*, (May 2016) available at <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>.

10. James Felman, *Reflections on the United States Sentencing Commission’s 2015 Amendments to the Economic Crimes Guideline*, 27 FED. SENT. R. 288, 290 (2015).

11. *Id.* at 288.

12. James Felman, Am. Bar Ass’n, *Testimony on Economic Crimes to the U.S. Sentencing Comm’n* (Mar. 12, 2015) (“A result of these numerous increases in guideline penalties is that a typical

officer or director of a public company who is convicted of a securities fraud offense now faces an advisory guidelines sentence of life without parole in virtually every case.”)

13. *United States v. Faibish*, Sentencing Hearing, at 23:2-25, No. 1:12-cr-00265. (E.D. N.Y. Mar. 10, 2016) (expressly relying on ABA shadow guidelines in sentencing defendant to 63 months for his role in a check kiting scheme instead of the life sentence requested by the government); Robert J. Anello and Richard F. Albert, *Rise of ABA Task Force’s “Shadow Sentencing Guidelines,”* 255 NYLJ 64 (Apr. 5, 2016).

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