Fordham Law Review

Volume 82 | Issue 6 Article 19

2014

Sentencing the Why of White Collar Crime

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SENTENCING THE WHY OF WHITE COLLAR CRIME

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"So why did Mr. Gupta do it?" That question was at the heart of Judge Jed Rakoff's recent sentencing of Rajat Gupta, a former Wall Street titan and the most high-profile insider-trading defendant of the past thirty years. The answer, which the court actively sought by inquiring into Gupta's psychological motivations, resulted in a two-year sentence, eight years less than the government requested. What was it that Judge Rakoff found in Gupta that warranted such a lenient sentence? While it was ultimately unclear to the court exactly what motivated Gupta to commit such a "terrible breach of trust," it is exceedingly clear that Judge Rakoff's search for those motivations impacted the sentence imposed.

This search by judges sentencing white collar defendants—the search to understand the "why" motivating defendants' actions—is what this Article explores. When judges inquire into defendants' motivations, they necessarily delve into the psychological mechanisms defendants employ to free themselves from the social norms they previously followed, thereby allowing themselves to engage in criminality. These "techniques of neutralization" are precursors to white collar crime, and they impact courts' sentencing decisions. Yet the role of neutralizations in sentencing has been largely unexamined. This Article rectifies that absence by drawing on established criminological theory and applying it to three recent high-profile white collar cases. Ultimately, this Article concludes that judges' search for the "why" of white collar crime, which occurs primarily through the exploration of offender neutralizations, is legally and normatively justified. While there are significant potential drawbacks to judges conducting these inquiries, they are outweighed by the benefits of increased individualized sentencing and opportunities to disrupt the mechanisms that make white collar crime possible.

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INTRODUCTION

As he peered over his bench, Judge Jed Rakoff, Senior District Judge for the Southern District of New York, faced one of the most high-profile defendants of his long career. Rajat Gupta, the former managing director of the global investment bank Goldman Sachs, the former head of the global management consulting firm McKinsey & Company, and a former board member of Proctor & Gamble, stood before the court to be sentenced. Gupta, wearing a slight frown, looked haggard after his month-long trial and conviction for passing inside information to hedge fund manager Raj Rajaratnum, including about a $5 billion investment in Goldman by Warren Buffet's Berkshire Hathaway that allowed Rajaratnum to make millions in illegal trades in less than two days.[1] "After carefully weighing all . . . relevant factors," stated Judge Rakoff, "the Court concludes that the sentence that most fulfills all requirements . . . is two years in prison."[2]

Although he gave no visible reaction to the sentence, only rocking back slightly on his heels, Gupta should have been relieved. He was the most high-profile defendant in a four-year-long investigation of insider trading

1. *See* Michael Rothfeld & Dan Strumpf, *Gupta Gets Two Years for Leaking Inside Tips*, WALL ST. J., Oct. 25, 2012, at A1; Peter Lattman, *Ex-Goldman Director To Serve 2 Years in Insider Case*, N.Y. TIMES DEALBOOK (Oct. 24, 2012, 4:17 PM), http://dealbook.nytimes.com/2012/10/24/rajat-gupta-gets-2-years-in-prison/.

2. Sentencing Memorandum and Order at 14–15, United States v. Gupta, No. 11 CR 907 (S.D.N.Y. Nov. 9, 2012), ECF No. 128.

on Wall Street that had already seen sixty-eight others plead guilty or be convicted, thirty-seven of whom would be serving prison time, including an eleven-year sentence for Rajaratnum.[3] The Federal Sentencing Guidelines called for a much longer term, between six-and-a-half and eight years.[4] The government, citing Gupta's "special responsibility that came with being in such an extraordinary position of trust," wanted ten.[5]

What was it that Judge Rakoff found in Gupta that warranted such a lenient sentence? While the answer undoubtedly involves a "large complex of facts and factors,"[6] at least part of the reason rests on the court's search for the "why" of Gupta's crimes. Throughout the sentencing hearing, Judge Rakoff struggled to understand what motivated Gupta's actions. Why had an incredibly wealthy man in the uppermost echelon of American financiers, who by all accounts had lived an exemplary life and given so much to "humanity writ large,"[7] committed a crime that provided him no direct benefit? The court put it bluntly: "So why did Mr. Gupta do it?"[8] In attempting to answer that question, Judge Rakoff probed the statements Gupta had made during his sentencing hearing, letters from his supporters, and submissions from his attorneys, speculating about a host of possible reasons why this "good man" committed such a "terrible breach of trust."[9] While it was ultimately unclear to the court exactly what motivated Gupta to commit the crimes he did, it is exceedingly clear that Judge Rakoff's search for those motivations impacted the sentence imposed.[10]

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3. *See* Rothfeld & Strumpf, *supra* note 1.

4. For an overview of the Federal Sentencing Guidelines and an explanation of how they operate to calculate a defendant's sentence, see Frank O. Bowman III, Pour Encourager Les Autres?*: The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 380–82 (2004).

5. Government's Sentencing Memorandum, at 6, 12, *Gupta*, No. 11 CR 907, ECF No. 124. Most sentencing pundits predicted a sentence of four or five years. *See, e.g.*, Douglas A. Berman, *Any Early Federal Sentencing Predictions After Quick Conviction in Gupta Insider Trading Case?*, SENT'G L. & POL'Y BLOG (June 16, 2012, 11:44 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/06/any-early-federal-sentencing-predictions-after-quick-conviction-in-gupta-insider-trading-case.html (placing the "over/under betting line for Gupta's sentencing at around 5 years' imprisonment" and then revising it to four years).

6. Sentencing Memorandum and Order, *supra* note 2, at 1.

7. *Id.* at 11.

8. *Id.* at 12. The government's contention that Gupta was motivated by simple greed did not seem plausible to Judge Rakoff given Gupta's estimated net worth of $130 million and that he received no direct benefit from the insider trades. *See* Peter Lattman & Azam Ahmed, *Rajat Gupta Convicted of Insider Trading*, N.Y. TIMES DEALBOOK (June 15, 2012, 12:05 PM), http://dealbook.nytimes.com/2012/06/15/rajat-gupta-convicted-of-insider-trading/.

9. Lattman, *supra* note 1, at 1 (quoting Judge Rakoff).

10. *See* Sentencing Memorandum and Order, *supra* note 2, at 10 ("Thus, at the very outset, there is presented the fundamental problem of this sentence, for Mr. Gupta's personal history and characteristics starkly contrast with the nature and circumstances of his crimes."); *see also* David A. Kaplan, *Jed Rakoff: The Judge Who Rules on Business*, FORTUNE, Feb. 4, 2013, at 107, 108 (quoting Judge Rakoff as saying, "But also because of what I think is an appropriate way to look at sentencing, which is, there are defendants who are good people who have nevertheless done some bad things.").

The search by judges sentencing white collar defendants—the search to understand the "why" motivating defendants' actions—is what this Article aims to explore. When Judge Rakoff sought to understand Gupta's motivations, he necessarily delved into the psychological mechanisms white collar defendants employ to free themselves from the social norms they have previously followed, thereby allowing themselves to engage in criminality. Criminologists call these mechanisms "techniques of neutralization," and they are precursors to white collar crime.[11] Whether he was aware of it or not, Judge Rakoff's search to understand Gupta's motivations resulted in a judicial evaluation of the neutralization techniques Gupta employed. The court's crediting of these neutralizations as mitigating sentencing factors was key to Gupta's lenient punishment.

For example, in arriving at the two-year sentence, Judge Rakoff found Gupta's record of philanthropy to be a mitigating sentencing factor. After listening to Gupta's recitation of his prior good works during the sentencing hearing and reading hundreds of supportive letters, Judge Rakoff concluded that he had "never encountered a defendant whose prior history suggests such an extraordinary devotion . . . to individual human beings in their times of need."[12] While crediting a defendant's good deeds at sentencing is common in white collar cases, Judge Rakoff did something uncommon—he suggested Gupta's extensive good works may have played a role in allowing his criminal behavior to go forward.[13] By doing so, the court identified and validated a neutralization technique common to white collar offenders called the "metaphor of the ledger,"[14] in which a defendant—*prior* to engaging in the criminal act—internally catalogs his good works and compares them to his potential future criminal conduct.[15] This allows

11. *See generally* Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 228–34 (2005) (providing an overview of neutralization theory and its place in criminology); Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 667 (1957) (originally positing neutralization theory and setting out five types of neutralizations).

12. Sentencing Memorandum and Order, *supra* note 2, at 12–13 (calling Gupta's behavior "aberrant"); *see also* Michael Rothfeld, *Dear Judge, Gupta Is a Good Man*, WALL ST. J. (Oct. 12, 2012), http://online.wsj.com/news/articles/SB10000872396390444657804578052990875489744 (describing and linking to letters submitted on Gupta's behalf); *Rajat Gupta's Full Statement in Court*, NDTV (Oct. 25, 2012), http://www.ndtv.com/article/world/rajat-gupta-s-full-statement-in-court-284090.

13. *See* Sentencing Memorandum and Order, *supra* note 2, at 12–13 ("Gupta, for all his charitable endeavors, may have felt frustrated . . . .").

14. *See* MARK M. LANIER & STUART HENRY, ESSENTIAL CRIMINOLOGY 179–81 (3d ed. 2004) (describing the metaphor-of-the-ledger neutralization and nine others that have been identified as "free[ing] the delinquent from the moral bind of law so that he or she may now choose to commit the crime").

15. Much has been made in the criminological literature regarding whether offenders' explanations of their behavior are after-the-fact rationalizations or pre-act neutralizations. *See* Maruna & Copes, *supra* note 11, at 271 (calling this sequencing issue the "most significant stumbling point for neutralization theory"). However, as explained in Part II.A through II.B, *infra*, this is ultimately a false dichotomy. Any postoffense rationalization offered by an offender, what we commonly call an "excuse," is premised on beliefs drawn from "society rather than something created de novo" by the offender. Maruna & Copes, *supra* note 11, at 230 (quoting Sykes & Matza, *supra* note 11, at 669). Therefore, offenders'

the defendant to rationalize his future antinormative behavior, thereby "blunt[ing] the moral force of the law" and allowing his criminal behavior to proceed.[16] Gupta's use of this technique may have allowed him to see himself as someone who had done more good in life than bad, thereby reconciling the criminal acts he was committing with his self-image as an upstanding member of society, a critical step in the process of committing a white collar crime.[17]

The court's identification and acceptance of Gupta's neutralization and the positive impact that had at sentencing raises a host of questions. For one, how large an impact did crediting this single neutralization have on the final sentence? Did the court consider other neutralizations Gupta may have employed?[18] If so, were they credited or rejected by the court and to what degree? More broadly, do judges' considerations of neutralizations favor particular groups of defendants? Does this lead to unwarranted sentencing disparity? Broader still, what are the potential costs and benefits of basing sentencing decisions on inquiries into defendants' neutralizations? What place, if any, does this type of inquiry have in white collar sentencing, or sentencing as a whole?

These questions, and the associated normative implications, have been largely unexamined in legal scholarship.[19] This is particularly troubling because judges' search for what motivates defendants to commit white collar crime necessarily confronts offender neutralizations. Although this Article does not endeavor to address all the questions raised above, it does attempt to rectify the absence in scholarship by drawing on established

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postoffense rationalizations express their pre-act rationalizations. These pre-act rationalizations—neutralizations—allow the illegal act to proceed. *Id.* at 271. Put another way, "neutralizations [in general] might start life as after-the-fact rationalizations but become the rationale . . . facilitating future offending." *Id.* Given that very few white collar crimes are single acts, but instead are made up of many small acts occurring over time, any rationalization offered by an offender at the time of sentencing likely reflects that offender's pre- and inter-act thinking. *See id.*

16. Maruna & Copes, *supra* note 11, at 230; *see also* Michael L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, 23 CRIMINOLOGY 583, 584 (1985) (analyzing neutralizations used by four groups of white collar offenders).

17. *See* Benson, *supra* note 16, at 584.

18. *See infra* Part II.B for a taxonomy of white collar neutralization techniques.

19. While some fascinating work has been done regarding the role of motive in criminal law and punishment, *see, e.g.*, Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89 (2006), there has been almost no discussion of how judges use evidence of motive to make sentencing decisions, let alone the more specific issue of judicial inquiry into white collar offender neutralizations. *See* Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 747–48 (2007) (discussing how motive may be, although often is not, a factor in punishment). As more fully developed in Part II, *infra*, the neutralization processes defendants undertake, and on which courts appear to base part of their sentencing determinations, are distinct from motives. A white collar defendant's motive is broader than the neutralizations he employs, although both are related to the mental process facilitating the offense. Neutralizations are accounts or verbalizations that *allow* an offender to act on his or her motivations. *See* Donald R. Cressey, *The Respectable Criminal*, 3 CRIMINOLOGICA 13, 14–15 (1965) (describing an offender's motivation to commit a crime as involving three "essential kinds of psychological processes," one of which is a neutralization).

criminological theory and applying it to three recent high-profile white collar cases.

Ultimately, this Article concludes that judges' search for the why of white collar crime, which occurs primarily through the exploration of neutralizations that defendants employ, is legally and normatively justified. While there are significant potential drawbacks to these inquiries, they are outweighed by the benefits of increased individualized sentencing, the importance of which has been recently reaffirmed by the U.S. Supreme Court in *Pepper v. United States*.[20] And, although counterintuitive, neutralization inquiries may even disrupt the future commission of white collar crime. Because when judges inquire into how defendants neutralize their criminal behavior, but then reject those neutralizations as sentencing mitigators (or treat them as aggravators), this lessens the ability of future potential offenders to use those neutralizations to free themselves from the moral bind of the law.[21] Yet for these benefits to be realized in a fair and transparent way, judges must be better educated as to the etiology of white collar crime, understand how neutralizations are used by defendants, consider the costs and benefits of basing sentencing decisions on defendants' neutralizations, and explain their decisionmaking processes.

Part I of this Article analyzes the sentencings of three high-profile white collar offenders—Rajat Gupta, Peter Madoff, and Allen Stanford—highlighting the courts' inquiries into what motivated the defendants' conduct. Part II draws on established criminological theory to provide a framework for understanding the role of neutralizations in white collar sentencing. It also provides a new taxonomy of neutralization techniques specific to white collar crime that are at the heart of these judicial inquiries. Part III addresses the legal and normative implications of courts taking defendants' neutralizations into account at sentencing, concluding that the practice is justified yet not without potential costs.

I. JUDICIAL INQUIRY INTO THE WHY OF WHITE COLLAR CRIME

Sentencing is not easy. This we know.[22] Part of the reason sentencing is so difficult is that it compels a judge to try and understand what motivated a

20. 131 S. Ct. 1229 (2011).

21. As explained in Part II.A, *infra*, white collar offenders must neutralize their future criminal conduct in order to commit their offenses, otherwise they "could not free themselves of the potential harm to their self-concept." Maruna & Copes, *supra* note 11, at 271.

22. Justice Kennedy, during a recent oral argument, stated the following: "The hardest thing—as we know in the judicial system, one of the hardest things is sentencing." Transcript of Oral Argument at 46, Dorsey v. United States, 132 S. Ct. 2321 (2012) (No. 11-5683), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-5683.pdf. *But see* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 15 (1973) (noting that while "[j]udges are commonly heard to say that sentencing is the grimmest and most solemnly absorbing of their tasks," they actually spend little time talking, reading, or writing about sentencing issues).

defendant to commit the crimes charged.[23] Sometimes there is an obvious reason—addiction, mental health problems, an extensive social history of abuse and neglect.[24] But more often, a defendant's motivations are less clear, forcing the court to delve into the defendant's personal history and statements made at sentencing.[25]

The court's inquiry is particularly difficult in white collar cases,[26] in which a judge is often faced with a seemingly successful and heretofore law-abiding defendant who has nonetheless committed a serious crime.[27] In these instances, the judge's search for the defendant's motivations necessarily confronts the defendant's expressed reasons for his conduct—his rationalizations.[28] The following descriptions of three recent white

23. In theory, judges could avoid this inquiry by basing sentencing decisions only on the harm caused by defendants. However, even judges taking a strictly retributivist approach to sentencing must confront defendants' motivation to correctly assess blameworthiness, a central focus of the retributivist when determining the proper level of just punishment. *See* Hessick, *supra* note 19, at 112–13. Most federal judges consider a combination of retributivist and consequentialist purposes when sentencing. *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 tbl.13 (2010), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Surveys/20100608_Judge_Survey.pdf.

24. *See generally* Todd Haugh, *Can the CEO Learn from the Condemned? The Application of Capital Mitigation Strategies to White Collar Cases*, 62 AM. U. L. REV. 1 (2012) (discussing the use of social history investigations in white collar cases).

25. The main tool by which courts investigate defendants' motivations is through the Presentence Investigation Report (PSR) completed by the U.S. Probation Office. *See* OFFICE OF PROB. & PRETRIAL SERVS., PUBLICATION 107, PRESENTENCE INVESTIGATION REPORT (2006), *available at* http://www.fd.org/docs/select-topics---sentencing/the-presentence-investigation-report.pdf?sfvrsn=4. PSRs are confidential documents prepared for the sentencing judge detailing the offense conduct, impact to victims, defendant's criminal history, and defendant's personal characteristics. *Id.* Letters submitted to the court are another way a judge learns about the defendant.

26. There is a longstanding debate concerning the definition of "white collar crime." *See* Gilbert Geis, *White-Collar Crime: What Is It?*, *in* WHITE-COLLAR CRIME RECONSIDERED 31, 31–48 (Kip Schlegel & David Weisburd eds., 1992) (explaining the origins of various definitions); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 3–13 (2004). Because the focus of this Article is on sentencing white collar offenders, it adopts the definition used by the U.S. Sentencing Commission. *See White Collar Sentencing Data: Fiscal Year 2005—Fiscal Year 2009*, 22 FED. SENT'G REP. 127, 127 (2009) (including most offenses punished under the fraud, antitrust, and tax guidelines, but excluding offenses such as simple theft, shoplifting, failure to pay child support, etc.).

27. Seventy-one percent of fraud offenders, which includes the vast majority of white collar offenders, have little or no criminal history. *See Selected Sentencing, Guideline Application, and Demographic Information for § 2B1.1 Offenders, Fiscal Year 2012*, U.S. SENT'G COMM'N (Sept. 18, 2013), http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Selected_Sentencing_Guideline_Application_Demographic_Info.pdf.

28. Although the criminological literature often uses the terms motivation, rationalization, and justification interchangeably, *see, e.g.*, Maruna & Copes, *supra* note 11, at 234–39, this Article treats the terms as distinct. As used here, motivation refers to what inspires an offender to commit an illegal act; rationalization refers to the explanatory account an offender offers of his illegal behavior (ex ante or ex post). Given its legal and normative "baggage," the term justification, which refers to the attempt by an offender to demonstrate the *correctness* of his illegal behavior, is avoided when possible. However, as seen in Part II.A, *infra*, neutralization theory blurs these distinctions.

collar sentencings demonstrate that judges are not only trying to understand offender motivations, but they are crediting some rationalizations as sentencing mitigators and rejecting others. The sentencings of Rajat Gupta for insider trading, Peter Madoff for aiding his brother's Ponzi scheme, and Allen Stanford for fraud and money laundering highlight this judicial inquiry and its variable effects on white collar sentences.[29]

A. Rajat Gupta

Indicted in October 2011, Gupta was the most high-profile defendant charged with insider trading since junk bond–king Michael Milkin in the 1980s.[30] The charges against Gupta centered around his alleged leaking of boardroom secrets about Goldman and Procter & Gamble to Rajaratnam, cofounder of the hedge fund Galleon Group and Gupta's longtime friend and business associate.[31] According to the government, Rajaratnum gained over $15 million in illegal trades based on Gupta's tips.[32] The government alleged that Gupta was "motivated to assist" Rajaratnum and others at Galleon because Gupta shared business interests with the hedge fund.[33] A jury ultimately found Gupta guilty of providing confidential information related to two trades that Rajaratnum made.[34] At sentencing, the government asked for a prison term of 97 to 121 months, the range prosecutors argued was required by the U.S. Sentencing Guidelines.[35]

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29. The three sentencing "case studies" offered here are not intended to serve as a substitute for a more robust qualitative or quantitative analysis of white collar sentencing or judicial decisionmaking. Instead, the descriptions, drawn from cases that vary in terms of offense conduct, geographic location, and procedural posture, are intended only to highlight the inquiries judges undertake in white collar sentencings. Whether they are representative of a broader range of white collar sentencings will depend on the results of a more comprehensive review. That said, based on the author's study of many white collar sentencings, and his decade of experience defending white collar clients, these courts' inquiries do appear to be typical in white collar cases.

30. *See generally* Sealed Indictment, United States v. Gupta, No. 11 CR 907 (S.D.N.Y. Nov. 9, 2012), ECF No. 1 (charging Gupta with six counts of securities fraud and conspiracy to commit securities fraud). The government filed a superseding indictment, expanding its allegations of securities fraud in January 2013. Superseding Indictment, *Gupta*, No. 11 CR 907; *see also* Michael Bobelian, *The Obscure Insider Trading Case That Started It All*, FORBES (Nov. 30, 2012, 11:52 AM), http://www.forbes.com/sites/michaelbobelian/2012/11/30/the-obscure-insider-trading-case-that-started-it-all/.

31. *See* Superseding Indictment, *supra* note 30, at 6; Patricia Hurtado et al., *Ex-Goldman Director Gupta Indicted on Fraud Charges*, BLOOMBERG (Oct. 26, 2011, 1:03 PM), http://www.bloomberg.com/news/2011-10-26/ex-goldman-sachs-director-gupta-is-charged-by-u-s-with-securities-fraud.html.

32. Sentencing Memorandum and Order, *supra* note 2, at 9. Judge Rakoff ultimately rejected this amount, finding Gutpa's tips generated only $5 million in illegal gains.

33. Government's Sentencing Memorandum, *supra* note 5, at 3–4 (contending that Gupta invested tens of millions of dollars with Galleon-related entities and stood to make substantial profits if the hedge fund was successful).

34. Chris Isidore, *Gupta Convicted of Insider Trading*, CNNMONEY (June 15, 2012, 4:33 PM), http://money.cnn.com/2012/06/15/news/companies/gupta-verdict/index.htm. The jury rejected the defense's contention that there were legitimate reasons for Gupta and Rajaratnum to be communicating. Gupta was also acquitted of two counts. *Id.*

35. Government's Sentencing Memorandum, *supra* note 5, at 12. The range was driven primarily by the monetary gain to Rajaratnum caused by Gupta's tips. *See* Sentencing

Gupta, not surprisingly, argued for a much different sentence. On the basis of over 400 letters submitted to the court, including by Bill Gates, Kofi Annan, Deepak Chopra, and other luminaries in medicine, finance, and government, the defense sought a sentence of probation with a significant community service component.[36] In letter after letter, writers detailed Gupta's extensive humanitarian efforts, including as chairman of three international organizations.[37] Gupta's attorney called his client's removal from these organizations and various company boards a "fall from grace of Greek tragic proportions," contending that Gupta had "suffered punishment far worse than prison already."[38] Gupta's family members also submitted letters to the court, relating personal stories of Gupta's individual acts of kindness.[39]

Gupta addressed the court at his sentencing hearing. He began by focusing on the harm caused to his reputation "built over a lifetime" and the "devastation" to his family by the verdict.[40] Gupta also spoke of his many good deeds, highlighting his individual acts of philanthropy.[41] While not citing the defense letters specifically, Gupta stated he was grateful for family and friends that continued to support him.[42] Notably, Gupta never

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Memorandum and Order, *supra* note 2, at 9 (explaining that the gain amount was calculated by the probation department and adopted by the government). According to the government, a ten-year prison sentence was necessary to "reflect the seriousness of Gupta's crimes and to deter other corporate insiders in similar positions of trust from stealing corporate secrets and engaging in a crime that has become far too common." Government's Sentencing Memorandum, *supra* note 5, at 1. The government further argued that despite Gupta's apparent "deviation from an otherwise law-abiding life," his two-year conspiracy to tip Rajaratnum "displayed an above-the-law arrogance." *Id.* at 6, 8.

36. Government's Reply Sentencing Memorandum, United States v. Gupta, No. 11 CR 907 (S.D.N.Y. Nov. 9, 2012), ECF No. 26. Gupta's sentencing memorandum and the accompanying letters to the court were filed under seal; however, some letters and excerpts from the defense memorandum were reported by the media. *See* Rothfeld & Strumpf, *supra* note 1 (noting that Gupta's attorneys argued for a sentence of probation and "rigorous" community service in rural Rwanda).

37. *See* Letter from Kofi Annan to Jed S. Rakoff, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Sept. 21, 2012), *available at* http://s3.documentcloud.org/documents/470772/letters-from-gates-and-annan-offer-support-for.pdf; Letter from Bill Gates to Jed S. Rakoff, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (July 24, 2012), *available at* http://s3.documentcloud.org/documents/470772/letters-from-gates-and-annan-offer-support-for.pdf. Gupta served as chairman of the Global Fund to Fight AIDS, Tuberculosis, and Malaria; the Public Health Foundation of India; and the United Nations Association of America. The letters also referenced Gupta's involvement with the Pratham Foundation, which provides education to underprivileged children in India, and the Rockefeller Foundation. *See* Sentencing Memorandum and Order, *supra* note 2, at 10.

38. Rothfeld & Strumpf, *supra* note 1, at 2.

39. *See, e.g.*, Letter from Anita Gupta to Jed S. Rakoff, Judge, U.S. Dist. Court for the S. Dist. of N.Y. (Sept. 4, 2012), *available at* http://s3.documentcloud.org/documents/470772/letters-from-gates-and-annan-offer-support-for.pdf.

40. *Rajat Gupta's Full Statement in Court*, *supra* note 12.

41. *Id.* Gupta stated: "I mentored many young people, and many more view me as a role model," and "I also often thought in particular about three not-for-profit organizations that I was fortunate to help create." *Id.*

42. *Id.*

admitted wrongdoing. The most he offered was that "the overwhelming feelings in [his] heart [were] of acceptance of what ha[d] happened."[43]

From the outset of Judge Rakoff's remarks, it was clear he would not be imposing a sentence within the Guidelines range. He began by rejecting the Guidelines' heavy reliance on monetary gain to establish the sentencing range for an insider-trading offense.[44] He reasoned that the heart of Gupta's offense, the abuse of his position of trust, was given too little weight by the Guidelines.[45] Equally as important, he found, the Guidelines range did not "rationally square with the facts of this case."[46] Judge Rakoff appeared to be searching for something more than what was expressed in the Guidelines when making his sentencing decision.

The discussion then turned to the nature and circumstances of the offense and Gupta's personal history.[47] Judge Rakoff speculated about the motivations underlying Gupta's crimes, acknowledging a "fundamental problem" in many white collar cases: how to sentence a defendant who was a "good man," but who had committed a bad act.[48] In an effort to reconcile this duality, the judge rhetorically asked why Gupta "did it."[49]

Judge Rakoff offered two possible reasons. One was that Gupta felt frustrated in "not finding new business worlds to conquer," allowing himself to be enticed into sharing information with Rajaratnum, a fellow South Asian executive on Wall Street who offered excitement and new opportunities.[50] The second reason is less clear. Hinting at information presented to the court under seal, Judge Rakoff speculated that Gupta had "begun to loosen his self-restraint in ways that clouded his judgment."[51] Judge Rakoff suggested, based on an "implicit suggestion,"[52] that Gupta

43. *Id.* It is not surprising Gupta did not admit wrongdoing, as he had maintained his innocence throughout the trial and filed an appeal of his conviction immediately after the verdict.

44. *See* Sentencing Memorandum and Order, *supra* note 2, at 4–9 (calling reliance on gain "arbitrary" and "unsupported by any empirical data," and calling into question the "huge increase" in sentencing ranges for economic crimes since 1987). Judge Rakoff has long-held views on the flaws in guidelines sentencing. *See* Nate Raymond, *U.S. Commission Reviews White-Collar Sentences*, REUTERS (Sept. 17, 2013), http://www.reuters.com/article/2013/09/17/us-financial-crime-sentences-idUSBRE98G1D020130917 (stating that Judge Rakoff "called for the guidelines to be 'scrapped in their entirety'").

45. *See* Sentencing Memorandum and Order, *supra* note 2, at 2.

46. *Id.* at 9.

47. *See id.* Section 3553 of the Sentencing Reform Act, the "bedrock of all federal sentencing" according to Judge Rakoff, *see id.*, requires judges to consider the nature and circumstances of the offense and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1) (2012).

48. Sentencing Memorandum and Order, *supra* note 2, at 10. Although not stated in the written memorandum, it was widely reported that Judge Rakoff called Gupta's crime "disgusting in its implications." Rothfeld & Strumpf, *supra* note 1.

49. Sentencing Memorandum and Order, *supra* note 2, at 12.

50. *See id.* at 12 (Judge Rakoff called Rajaratnum a "clever cultivator of persons with information"); *see also Every Bloody Indian Co-operated To Nail Me: Raj*, TELEGRAPH (Oct. 28, 2011), http://www.telegraphindia.com/1111028/jsp/frontpage/story_14677090.jsp.

51. Sentencing Memorandum and Order, *supra* note 2, at 12.

52. *Id.* Although unclear, this suggestion likely came from Gupta's sentencing memorandum filed under seal or letters from family members.

may have acted improperly because he "longed to escape the straightjacket of overwhelming responsibility."[53] While Judge Rakoff ultimately could not pinpoint what "was operating in the recesses of [Gupta's] brain," he believed Gupta's criminal acts were motivated by the prospect of "future benefits, opportunities, and even excitement."[54]

His inquiry into Gupta's motivations complete, Judge Rakoff briefly discussed additional sentencing factors and then imposed a two-year sentence.[55] Although Gupta did not receive probation,[56] the sentence was still strikingly lenient given the Guidelines range and the government's request.[57] Exactly to what extent Judge Rakoff's inquiry into Gupta's motivations impacted the final sentence is difficult to quantify, but the judge's statements indicate there was an impact. In fact, Judge Rakoff appeared to directly credit two of Gupta's expressed rationalizations as mitigating sentencing factors: his relationship with and feelings of loyalty to Rajaratnum, and his extensive good works compared to his aberrant criminal behavior.[58] In addition, Judge Rakoff intimated that he also found Gupta's suggestion that he had earned the right to engage in risky or unethical behavior based on his many years of doing the right thing by caring for others—the "loosen[ing] of self-restraint," as the judge put it—to be mitigating.[59] In Gupta's case, then, the court's sentencing determination appears to have been directly impacted by the rationalizations offered by the defendant. Those rationalizations were credited by the court, resulting in a sentence that was well below the Guidelines range.

B. Peter Madoff

If Gupta's case demonstrates how a defendant's rationalizations of his crimes may be credited by the court at sentencing, Peter Madoff's case demonstrates how a court may credit some rationalizations and reject others, resulting in little net impact at sentencing. The story of Peter Madoff's brother, Bernard, and his massive Ponzi scheme is well known.[60] Beginning in the 1970s and ending in December 2008, Bernie Madoff, founder of Bernard L. Madoff Investment Securities, ran the largest Ponzi scheme in history, bilking thousands of individual and institutional

53. *Id.*
54. *Id.*
55. *Id.* at 13–15.
56. Rothfeld & Strumpf, *supra* note 1 (rejecting the idea of rigorous international community service in place of imprisonment as "a kind of 'Peace Corps for insider traders'" (quoting Judge Rakoff)).
57. *See* Larry Neumeister, *Ex-Goldman Exec's 2-Year Sentence Draws Scrutiny*, ASSOCIATED PRESS (Oct. 25, 2012), http://bigstory.ap.org/article/ex-goldman-execs-2-year-sentence-draws-scrutiny.
58. *See* Sentencing Memorandum and Order, *supra* note 2, at 12–13.
59. *Id.* at 12.
60. For a comprehensive analysis of Bernie Madoff's scheme and the lies he told investors and regulators, see JAMES B. STEWART, TANGLED WEBS: HOW FALSE STATEMENTS ARE UNDERMINING AMERICA: FROM MARTHA STEWART TO BERNIE MADOFF 363–432 (2011).

investors out of billions of dollars.[61] In June 2009, the seventy-one-year-old former chairman of the NASDAQ was sentenced to 150 years in prison and ordered to forfeit $170 billion.[62] The sentencing judge called his crimes "extraordinarily evil."[63]

While public outrage over the Madoff fraud focused on Bernie, questions arose about who else knew his investment company was a sham.[64] At the time of his arrest, Bernie told investigators that only he was to blame.[65] But three years later, Peter, the company's chief compliance officer, pleaded guilty to falsifying investment records and tax returns that enabled the fraud.[66] Peter also admitted to Judge Laura Swain that he prepared over $300 million in investment redemptions to select employees, family, and friends after his brother's confession—three days before going to prosecutors.[67] However, Peter denied knowing that Bernie had been operating a Ponzi scheme until he confessed.[68] Pursuant to a plea agreement, Peter consented to a $143.1 billion forfeiture order and a ten-year prison sentence.[69]

Because he had entered a plea agreement stipulating his punishment, Peter's statements and submissions to the court were aimed at ensuring that Judge Swain accepted the agreed-upon sentence.[70] Beginning with his plea

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61. *See* Steve Fishman, *The Madoff Tapes*, N.Y. MAG., Mar. 7, 2011, at 24. Madoff's crimes are considered the "largest, longest and most widespread Ponzi scheme in history." Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1.

62. Henriques, *supra* note 61; Patricia Hurtado, *Peter Madoff, Bernie's Brother, To Plead Guilty*, BLOOMBERG (June 28, 2012), http://www.bloomberg.com/news/2012-06-27/peter-madoff-brother-of-bernard-will-plead-guilty-u-s-says.html.

63. Transcript of Sentencing Hearing at 47, United States v. Madoff, No. 09 CR 213 (S.D.N.Y June 29, 2009), *available at* http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf.

64. *See Bernie Madoff: Lord of the Lies*, ECONOMIST, May 21, 2011, at 87 (recounting journalist Diana Henriques's search for who else knew of Madoff's fraud).

65. Hurtado, *supra* note 62.

66. *See* Peter Lattman & Ben Protess, *In Guilty Plea, Peter Madoff Says He Didn't Know About the Fraud*, N.Y. TIMES DEALBOOK (June 29, 2012, 8:16 PM), http://dealbook.nytimes.com/2012/06/29/in-guilty-plea-peter-madoff-says-he-didnt-know-about-the-fraud/?_php=true&_type=blogs&_r=0.

67. *See* Transcript of Plea Hearing at 38–39, United States v. Madoff, No. 10 Cr. 228 (S.D.N.Y. Dec. 21, 2012), *available at* http://www.justice.gov/usao/nys/madoff/20120629transcriptpetermadoffpleaproceeding%20.pdf; Lattman & Protess, *supra* note 66.

68. *See* Transcript of Plea Hearing, *supra* note 67, at 30 ("[I]t is important for your Honor to know that at no time before December 2008 was I ever aware that my brother Bernard Madoff, or anyone else at BLMIS, was engaged in a Ponzi scheme.").

69. *Id.* at 22, 46. The $143.1 billion forfeiture amount does not reflect what Madoff could pay, only the amount of money that passed through the investment company. Even the widely reported $65 billion figure is misleading, because it includes the paper profits victims believed they held in the fund. According to bankruptcy trustee Irving Picard, Madoff customers had actual cash losses of $17.3 billion. *See* Peter Lattman & Diana B. Henriques, *Peter Madoff Is Sentenced to 10 Years for His Role in Fraud*, N.Y. TIMES DEALBOOK (Dec. 20, 2012, 5:59 PM), http://dealbook.nytimes.com/2012/12/20/peter-madoff-is-sentenced-to-10-years-for-his-role-in-fraud/.

70. Despite a plea agreement between the defendant and the government, the sentencing judge is the final arbiter of the sentence. *See* 18 U.S.C. § 3553(a) (2012); FED. R. CRIM. P. 11(c). Peter Madoff's plea agreement acknowledged that the court was not bound by the

allocution and throughout the sentencing hearing, Peter took responsibility for his crimes.[71] However, he did offer a series of rationalizations. Stating that he wanted to make the court aware of "some important background facts that do not excuse my conduct, but that may help [the court] understand why I am here today," Peter described his relationship with his brother.[72] He explained that he always admired and looked up to Bernie, who was seven years his senior, and believed him to be a "brilliant securities trader."[73] He said he trusted Bernie "implicitly" during the almost forty years he worked for him.[74] But he also described how Bernie controlled and demeaned him, personally and professionally.[75] Numerous letters from family, friends, and business associates confirmed that even though Bernie was often "abus[ive]" to him, Peter "seemed to be blind to his brother's flaws."[76] Peter stated that after Bernie told him of the fraud, he was "shocked and devastated, but nevertheless I did as my brother said, as I consistently had done for decades."[77]

Peter also highlighted his extensive good deeds. Through his sentencing submissions, Peter recounted how he used his experiences as a cancer survivor to help family members fight the disease, including his son and a young niece and nephew.[78] He also detailed his service to a facility aiding

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agreement between the parties and the final sentence would be determined "solely" by Judge Swain. Letter Agreement at 5, *Madoff*, No. 10 Cr. 228, *available at* http://www.justice.gov/usao/nys/madoff/20120629pleaagreementpetermadoffexecuted.pdf.

71. *See* Transcript of Plea Hearing, *supra* note 67, at 29–30 ("Your Honor, I am here today to plead guilty to conspiracy and falsifying records of an investment adviser and to accept responsibility for what I have done."); *see also* Sentencing Memorandum at 3, *Madoff*, No. 10 Cr. 228, ECF No. 296 (on file with *Fordham Law Review*) ("Peter Madoff acknowledges without reservation that his offense conduct was wrong, is deeply ashamed, and struggles to comprehend his circumstances and his own conduct."); Transcript of Sentencing Hearing at 22, *Madoff*, No. 10 Cr. 228, *available at* http://www.justice.gov/usao/nys/madoff/cckfmads.pdf ("I accept full responsibility for my actions that have brought me before your Honor today and I am here to accept my punishment from this Court.").

72. Transcript of Plea Hearing, *supra* note 67, at 30.

73. *Id.* at 30.

74. *Id.* at 32–33. Peter explained how he convinced other family members to invest millions in Bernie's investment fund, which was lost when the fund collapsed. *Id.*

75. *See id.* at 33. The most obvious way was Bernie's refusal to give Peter a financial interest in the company he had helped build; another was Bernie's criticism of Peter's family and religious devotion. *See* Sentencing Memorandum, *supra* note 71, at 21. Peter also recounted that "Bernie was the boss," and "[w]hen it came to business, no one could question Bernie; Bernie would always have the last say: 'My name is on the door.'" *Id.*

76. Sentencing Memorandum, *supra* note 71, at 21. One letter, which Peter stressed at sentencing, is particularly telling of the relationship between the Madoffs:

> When he spoke about Bernie, it sometimes sounded as if Peter was a young boy, speaking about his idol. . . . I only knew Bernie as seen through Peter's eyes. He was the older brother who, when it came down to it, Peter worked for. The brother Peter always wanted to please, the brother who would never really let Peter in, the brother with the power. . . . Peter wanted to please others, and couldn't see himself as anything but the younger fat brother looking for approval from his idol.

Id. at 22.

77. Transcript of Plea Hearing, *supra* note 67, at 38–39.

78. *See* Sentencing Memorandum, *supra* note 71, at 24.

the elderly and to many causes related to the Jewish community.[79] Peter's statements were buttressed by sixty-three letters from family and friends describing his individual good deeds.[80] This was in stark contrast to Bernie's sentencing, in which not a single supporting letter was submitted, a fact Peter made clear to the court.[81] Peter concluded by saying he was a "good man" who made serious mistakes.[82]

Although not as explicitly as Judge Rakoff, Judge Swain also searched for an explanation as to what motivated Peter to commit his crimes. In determining whether the ten-year sentence was appropriate, Judge Swain discussed at length the duality of Peter's life.[83] Alternatively applauding him for his devotion to family and scolding him for enabling his brother's fraud, Judge Swain ultimately found Peter's behavior "remarkable, but not unique."[84] She suggested that only Peter could truly know the "story" behind his actions, and she urged him to share it as a way to make amends for his behavior.[85] Judge Swain even suggested that Peter should become more introspective so that he might understand the motivations underlying his own criminal conduct.[86]

Judge Swain's search for Peter's motivations did not translate into a lower sentence, however. The judge imposed the ten-year term as agreed to by the parties.[87] Yet it does appear Judge Swain credited at least two of Peter's rationalizations as sentencing mitigators. The first was his subservient relationship with his brother. Judge Swain stated explicitly that the court "underst[ood] that Peter Madoff's relationship with his brother Bernard was unhealthy."[88] Second was Peter's extensive history of good works compared to his criminal acts. The court found "much that [was] good in [his] life," specifically referencing his combination of community work and devotion to family.[89]

At the same time, the court rejected Peter's contention that he was not responsible for his brother's fraud because he had been misled. Calling him a "sophisticated person who knew and knows right from wrong," Judge Swain found Peter's contention that he did not know of the Ponzi scheme

79. *See id.* at 34–35 (calling Peter a "selfless and dedicated" board member of the Old Westbury Hebrew Congregation, a "trusted participant" of the Central Synagogue in Manhattan, and a "steady hand" on the board of the Lower East Side Tenement Museum).

80. *See* Reed Albergotti, *Support for Madoff Brother*, WALL ST. J., Dec. 18, 2012, at C3 (describing letters).

81. *See* Lattman & Protess, *supra* note 66.

82. Sentencing Memorandum, *supra* note 71, at 42.

83. *See* Transcript of Sentencing Hearing, *supra* note 71, at 29.

84. *Id.* at 29.

85. *Id.* at 29, 30.

86. *See id.* at 29–30 (recording Judge Swain as stating, "I recognize that you want to understand what has happened," and urging him to look inward to do so).

87. *Id.* at 32.

88. *Id.* at 28. The court was quick to state that the brothers' relationship "cannot excuse Peter Madoff's conduct." *Id.*

89. *Id.* at 31.

implausible.[90] Judge Swain then challenged him to "be honest about all that you have done and all that you have seen, in other words, about all that you know."[91] In addition, Judge Swain rejected an implicit rationalization that Peter appeared to be making—that his fraudulent acts were minor and somehow acceptable when compared to the enormity of his brother's Ponzi scheme.[92]

As with the Gupta case, the exact impact of the court's inquiry on Peter's final sentence is unclear. It is evident, however, that the judge grappled with understanding Peter's motivations and rationalizations. Judge Swain's acceptance of the ten-year sentence, despite conducting a lengthy inquiry into Peter's motivations, suggests she may have viewed his rationalizations as offsetting. She may have credited two of Peter's rationalizations (his relationship with his brother and his prior good works), but offset them by rejecting two others (denial of full responsibility and claim of relatively acceptable conduct), resulting in no net change to the agreed-upon sentence.

C. Allen Stanford

The sentencing of Allen Stanford provides a third example of a court's consideration of a white collar defendant's rationalizations of his conduct, albeit with a much different result. Stanford, a brash Texas financier and former chairman of Stanford Financial Group, was convicted in March 2012 of orchestrating a twenty-year-long scheme selling high-interest certificates of deposit.[93] Although his attorneys portrayed him as a "visionary entrepreneur," evidence at trial showed Stanford's financial empire that stretched from the United States to Latin America and the Caribbean was a sham.[94] Stanford used money invested in CDs issued by his Antigua-based bank to fund a string of bad business ventures and real estate deals, while at the same time buying multimillion-dollar yachts, a fleet of jets, and a professional cricket team.[95] Following a six-week trial, a jury found Stanford guilty of defrauding nearly 30,000 investors in 113 countries out of $7 billion.[96] Repeatedly invoking comparisons to Bernie

90. *Id.* at 25. The court said Peter's claim that he lacked knowledge of the scheme was "beneath the dignity of the former vice chairman of NASD, governor of the National Stock Exchange and corporate director, community pillar and family paradigm about whom I have read so much." The court added, "It is also, frankly, not believable." *Id.* at 27–28.

91. *Id.* at 30.

92. *See id.* at 28; Sentencing Memorandum, *supra* note 71, at 20–23 (drawing comparisons between Peter and Bernie Madoff).

93. *See* Nathan Vardi, *Allen Stanford Convicted in $7 Billion Ponzi Scheme*, FORBES (Mar. 6, 2012, 1:49 PM), http://www.forbes.com/sites/nathanvardi/2012/03/06/allen-stanford-convicted-in-7-billion-ponzi-scheme/.

94. *See* Juan A. Lozano, *Allen Stanford Sentenced to 110 Years in Prison for $7 Billion Ponzi Scheme*, HUFFINGTON POST (June 14, 2012, 6:15 PM), http://www.huffingtonpost.com/2012/06/14/allen-stanford-sentenced-prison-jail-ponzi-scheme-110-years_n_1597286.html.

95. *See id.*

96. Clifford Krauss, *Jury Convicts Stanford of 13 Counts in $7 Billion Ponzi Fraud*, N.Y. TIMES, Mar. 7, 2012, at B1. The government alleged that at the height of the fraud, Stanford was stealing $1 million a day from the bank to prop up his failing personal

Madoff, prosecutors sought a prison term of 230 years.[97] Stanford asked for time served.[98]

If Peter Madoff provides an example of a defendant accepting responsibility for his conduct, Stanford provides the counterexample. Through his sentencing submissions, Stanford vehemently denied that he operated a Ponzi scheme.[99] He contended his company "actually made investments" and had real value.[100] In fact, he asserted the company would have been able to fully meet its liabilities but for the government's intervention.[101] In addition, he argued that he never actually promised depositors he would make them profits or that any profits made would come directly from their deposits.[102] Stanford's sentencing submissions also attacked the government, accusing it of causing the company's downfall, of "spinning" the evidence to suggest a nonexistent Ponzi scheme, and of engaging in "double-talk."[103] Finally, Stanford suggested the government had targeted him to deflect attention away from its failure to "uncover[] the shenanigans of the banks and other financial institutions in 2008 and 2009."[104]

At his sentencing hearing, in what can only be described as a "rambling" address, Stanford denied that he had defrauded investors, attacking the government for over forty minutes.[105] He explained to Judge David Hittner that he "was not a thief"; instead, it was the government's "Gestapo tactics" and insistence on making him a "scapegoat" for the "worldwide economic collapse" that "destroyed a business that had real value."[106] He stated that

businesses. *See* David Benoit, *Allen Stanford Sentencing: The Arguments From Both Sides*, WALL ST. J. (June 14, 2012, 1:10 PM), http://blogs.wsj.com/deals/2012/06/14/allen-stanford-sentencing-the-arguments-from-both-sides/.

97. United States' Sentencing Memorandum at 1, United States v. Stanford, No. 4:09-CR-00342-1 (June 14, 2012), ECF No. 866. The first line of the government's sentencing memorandum read, "Robert Allen Stanford is a ruthless predator responsible for one of the most egregious frauds in history, and he should be sentenced to the statutory maximum sentence of 230 years' imprisonment." *Id; see also* Transcript of Sentencing Proceedings at 40, *Stanford*, No. 4:09-CR-00342-1 (on file with *Fordham Law Review*) (presenting a victim advocate's argument that Stanford is more culpable than Madoff).

98. United States' Sentencing Memorandum, *supra* note 97, at 1.

99. *See* Defendant's Response to the Government's Sentencing Memorandum at 2, *Stanford*, No. 4:09-CR-00342, ECF No. 875 (on file with *Fordham Law Review*).

100. *Id.* at 3–4 (contending that Stanford Financial Group held, among other things, an equity interest in Liat Airline).

101. *See id.* at 4 ("The fact is that right up to the intervention by the United States the Bank had sufficient assets to meet its liabilities when taking into account liquid and non-liquid assets.").

102. *See id.* at 5.

103. *Id.*

104. *Id.* at 6.

105. Krauss, *supra* note 96, at B1. At one point, the sentencing judge called a sidebar, saying, "All right. I want to get this on the record. Mr. Stanford now is starting to ramble." Transcript of Sentencing Proceedings, *supra* note 97, at 40. Stanford explained at the hearing's outset that he had trouble organizing his thoughts after being severely injured in a prison brawl and developing an addiction to painkillers. *See id.* at 26–29 (calling his ability to remember events "Swiss cheese").

106. Transcript of Sentencing Proceedings, *supra* note 97, at 31.

he "worked tirelessly and honestly" for thirty years building a "world class financial services global company," and that his bank was no different than "the big banks whose CEOs and chairmen sit on the board of directors of the Federal Reserve."[107] In addition, Stanford suggested he had been singled out for prosecution because of his lack of political connections.[108] He concluded by saying he was "at peace" with the way he "conducted [him]self in business."[109] In response, the government called Stanford's version of events "obscene," commenting that the "best argument for a guideline sentence of 230 years just came from Allen Stanford."[110]

Judge Hittner did not pause long before imposing sentence. He said the evidence at trial demonstrated Stanford committed his crimes with the "precise aim of amassing billions of dollars to fund a personal business empire and to support an extraordinarily lavish lifestyle."[111] He then sentenced Stanford to 110 years in prison.[112] While not addressing Stanford's allocution in detail, it is evident that Judge Hittner rejected Stanford's rationalizations of his conduct.[113] By framing Stanford's motivations as driven solely by greed,[114] Judge Hittner dismissed three of Stanford's rationalizations: that others were responsible for investor losses, that his investors were sophisticated and he was the real victim, and that the government wrongly targeted him. Stanford also appeared to be offering a fourth rationalization by suggesting that he had achieved much good in life by building a successful international business, which Judge Hittner also rejected.

Stanford's sentencing offers an example of a court considering but rejecting the defendant's proffered rationalizations for his conduct, leading to an extremely lengthy sentence. This is in stark contrast to Rajat Gupta's sentencing, in which the court credited the defendant's rationalizations (even independently suggesting some) to impose a lenient sentence. Peter Madoff's sentencing falls somewhere in between—the court accepted some rationalizations and rejected others, which likely had a negligible net impact

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107. *Id.* at 30–31, 37.

108. *See id.* at 42 ("I was a formerly very rich, colorful, maverick Texan living in the Caribbean who was a target and an easy target . . . not part of the Wall Street crowd. . . . What I've seen very now close and personal is how that really works more so than I ever thought. It's who you know.").

109. *Id.* at 43.

110. *Id.* at 44, 46.

111. *Id.* at 71.

112. *Id.* at 71–72. This places Stanford fourth on the list of the longest white collar sentences, one below Madoff. *See* Liz Moyer, *It Could Have Been Worse for Madoff*, FORBES (June 29, 2009, 10:25 AM), http://www.forbes.com/2009/06/24/bernie-madoff-prison-sentence-business-beltway-madoff.html (describing the longest sentences of white collar offenders).

113. Through his questioning of the government's counsel and Stanford's attorney at various times during the sentencing hearing, Judge Hittner appears to have considered Stanford's rationalizations as they were raised, but quickly rejected each of them. *See, e.g.*, Transcript of Sentencing Proceedings, *supra* note 97, at 47–52 (questioning whether Stanford's fraudulent conduct met the definition of a Ponzi scheme and how much knowledge depositors possessed).

114. *Id.* at 53.

at sentencing. Common among each of these cases, however, is the court's inquiry into the defendant's motivations and rationalizations, and that the inquiry impacted the sentencing calculus. Assuming this is occurring in other white collar cases, the next task is to understand exactly what judges are searching for and what they may be finding that affects their sentencing decisions. Criminological theory concerning the etiology of white collar crime offers a compelling framework through which to analyze this aspect of white collar sentencing.

II. NEUTRALIZATIONS AND WHITE COLLAR CRIME

A judge's search for the why underlying a defendant's white collar crime necessarily begins with an inquiry into what motivated the defendant's actions. Prosecutors, such as those in the Stanford case, tend to argue that white collar defendants are driven by simple, overwhelming greed.[115] This explanation, while having broad public appeal, is simplistic.[116] Judges realize, as evidenced by their willingness to consider many factors at sentencing, including defendants' motivations, that what causes—or allows—a person to commit a white collar crime is varied and nuanced. Criminological theory provides a framework to understand these causes. In turn, neutralization theory helps illuminate what judges may be finding during their sentencing inquiries that impact the sentences imposed.

A. Neutralization Theory

Understanding neutralization theory and how it helps explain white collar crime and sentencing begins with the work of criminologist Donald Cressey. Cressey, a former student of Edwin H. Sutherland, whose groundbreaking work "invented the concept" of white collar crime, used a study of embezzlers to develop a social psychological theory regarding the etiology of "respectable" crime.[117] Building on Sutherland's theory of differential association, which posited that criminal behavior involves "motives, drives, rationalizations, and attitudes favorable to the violation of law,"[118] Cressey determined that three key elements are necessary for

115. *See id.* (noting the government's argument that Stanford was "one of the greediest criminals ever to appear for sentencing in a criminal case"). Professor Craig Haney has identified this type of argument as part of the "crime master narrative" adopted by prosecutors to sway sentencers. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 841 (2008). While greed undoubtedly plays a part in white collar crime, the "narrative" is a nuanced one. *See, e.g.*, MICHAEL L. BENSON & SALLY S. SIMPSON, WHITE-COLLAR CRIME: AN OPPORTUNITY PERSPECTIVE 71–72 (2009) (discussing research showing many white collar crimes are committed not out of drive for additional material success, but out of the fear of losing status).

116. *See* Bowman, *supra* note 4, at 431–35 (describing the public and legislative reaction to the Enron, WorldCom, and Tyco corporate scandals).

117. DONALD R. CRESSEY, OTHER PEOPLE'S MONEY: A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT, at x, 12 (1973); Cressey, *supra* note 19, at 13.

118. *See* Sykes & Matza, *supra* note 11, at 664; *see also* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 240 (1983).

violations of a financial trust—the essence of white collar crime—to occur.[119]

First, Cressey theorized that an individual must possess a nonshareable financial problem, i.e., a financial problem the individual feels cannot be solved by revealing it to others.[120] Second, the individual must believe that the financial problem can be solved in secret by violating a trust, typically by appropriating funds to which the individual has access through her employment.[121] Third, the individual must verbalize the relationship between the nonshareable financial problem and the illegal solution in "language that lets [her] look on trust violation as something other than trust violation."[122] Put another way, the individual uses words and phrases during an internal dialogue that makes the behavior acceptable in her mind (such as by telling herself she is "borrowing" the money and will pay it back), thus keeping her perception of herself as an honest citizen intact.[123]

Cressey called the verbalizations described in his third element "the crux of the problem."[124] According to him, the words that the potential white collar offender uses during her conversations with herself are "actually the most important elements in the process which gets [her] into trouble, or keeps [her] out of trouble."[125] Cressey did not view these verbalizations as simple, after-the-fact excuses that offenders use to relieve their culpability upon being caught. Instead, he found the verbalizations were "[v]ocabularies of motive," words and phrases not invented by the offender "on the spur of the moment," but that existed as group definitions labeling deviant behavior as appropriate.[126] This meant, he suggested, that an offender's rationalizations were created *before* acting. "The rationalization is [her] motivation"—it not only justifies her behavior to others, but it makes the behavior intelligible, and therefore actionable, to herself.[127]

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119. *See* Cressey, *supra* note 19, at 14.

120. *See id.* Cressey explained that the problem may not seem dire from the outsider's perspective, but "what matters is the psychological perspective of the potential [white collar criminal]." *Id.* Thus, problems may vary in type and severity, from gambling debts to business losses, which the individual is ashamed to reveal. Cressey's definition of a nonshareable problem encompasses notions of greed. *See* JAMES WILLIAM COLEMAN, THE CRIMINAL ELITE 195 (5th ed. 2002) (arguing that of Cressey's three elements, the first is the "most questionable, for there appears to be no necessary reason why an embezzlement must result from a nonshareable problem instead of a simple desire for more money").

121. *See* LANIER & HENRY, *supra* note 14, at 168; Cressey, *supra* note 19, at 14–15.

122. Cressey, *supra* note 19, at 15.

123. *See id.*

124. *Id.*

125. *Id.*

126. *See id.* Cressey's discussion of vocabularies of motives drew from the work of C. Wright Mills's and Edwin Sutherland's "definitions favorable to violations of law." CRESSEY, *supra* note 117, at viii.

127. CRESSEY, *supra* note 117, at 94, 95. Cressey explained that his interviews of embezzlers revealed "significant rationalizations were always present *before* the criminal act took place, or at least at the time it took place, and, in fact, after the act had taken place the rationalization often was abandoned." *Id.* at 94.

Cressey explained that verbalizations permit behavior that would otherwise be unavailable or unacceptable to the offender.[128]

Shortly after Cressey published his theories, Gresham Sykes and David Matza advanced a sophisticated theory of delinquency focused on how juvenile delinquents rationalize their behavior. Their influential study found that great flexibility exists in criminal law; values and norms appear not as absolutes, but as qualified guides for action.[129] Pointing to the various defenses to criminal liability, such as necessity, insanity, and self-defense, they argued that this flexibility allows offenders to avoid moral culpability and negative societal sanctions by demonstrating to themselves their lack of criminal intent.[130] Sykes and Matza believed that most antinormative behavior was based on "what is essentially an unrecognized extension of defenses to crimes, in the form of justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large."[131] In other words, delinquents justify or rationalize their behavior to fit it within a "defense" they deem valid but that larger society may not.[132]

Like Cressey, Sykes and Matza found that while rationalizations may occur following deviant behavior, they also *precede* behavior and make it possible.[133] By rationalizing their conduct ex ante, thus creating pre-act defenses, offenders are able to neutralize the "[d]isapproval flowing from internalized norms and conforming others in the social environment."[134] Sykes and Matza called these rationalizations "techniques of neutralization," and they believed they explained the episodic nature of delinquent behavior more completely than competing theories.[135] Neutralizations explained how offenders could "remain[] committed to society's dominant normative system," yet qualify that system's imperatives in a way to make periodic violations "'acceptable' if not 'right.'"[136] Neutralization theory and its core idea—that the mechanisms

128. *See id.* at 153. Cressey conducted interviews with inmates at three penitentiaries who were incarcerated for crimes defined as "the criminal violation of financial trust." *Id.* at 22. One hundred and thirty-three inmates were interviewed multiple times and for multiple hours to understand the motivations underlying their crimes. *Id.* at 25. Although criminological studies such as Cressey's often rely on such qualitative interviews, concerns regarding sample selection and generalizability should not be ignored. *See* Maruna & Copes, *supra* note 11, at 260–70 (discussing the pros and cons of interview-based, survey-based, and quantitative neutralization research).

129. *See* Sykes & Matza, *supra* note 11, at 666.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. *Id.* at 667. For a list mainstream criminology's theoretical approaches to understanding the causes of crime, see FRANK E. HAGAN, INTRODUCTION TO CRIMINOLOGY: THEORIES, METHODS, AND CRIMINAL BEHAVIOR 146 (2011).

136. Sykes & Matza, *supra* note 11, at 667. Key to neutralization theory is the concept of "drift," which Matza developed in his solo work. The idea is that offenders are able to drift in and out of delinquency by using neutralization techniques that "free[] the individual from the moral bind of law and order." Maruna & Copes, *supra* note 11, at 231.

offenders use to rationalize their behavior are a critical component in the etiology of criminal behavior—has greatly influenced the study of crime.[137]

Although neutralization theory was specifically developed in the context of juvenile delinquency, it has particular force in explaining white collar crime. As an initial matter, neutralization theory has its roots in the study of "respectable" crime. The theory stems from Cressey's ideas regarding the verbalizations that trust-violators employ, which he identified as the most important of the elements necessary for white collar crime.[138] Indeed, Sykes and Matza recognized that neutralization techniques might be used not only by juveniles, but also by adults engaged in general forms of deviance, including those committing crimes in the workplace.[139]

More fundamentally, neutralization theory is especially applicable in describing the etiology of white collar crime because "almost by definition white-collar offenders are more strongly committed to the central normative structure."[140] They are older, more educated, better employed, and have more assets than other offenders.[141] These factors suggest that white collar offenders are able to conform to normative roles and have a self-interest in doing so—they have a "greater 'stake' in conformity" than many other offenders.[142] It is therefore reasonable to assume that white collar offenders must rationalize their behavior through "elaborate neutralization processes prior to their offenses."[143] Without employing neutralizations, white collar offenders would be unable to "bring [their] actions into correspondence with the class of actions that is implicitly acceptable in . . . society."[144] Not

137. *See* Maruna & Copes, *supra* note 11, at 222. Shadd Maruna and Heith Copes state that the "influence of this creative insight has been unquestionable." *Id.* Indeed, Sykes and Matza's article is one of the most-cited explanations of criminal behavior in the first part of the twenty-first century, and their theories have been applied in a variety of contexts. *Id.* at 222–23 ("It is clear that neutralization theory 'transcends the realm of criminology.'" (quoting Moshe Hazani, *The Universal Applicability of the Theory of Neutralization: German Youth Coming to Terms with the Holocaust*, 15 CRIME L. & SOC. CHANGE 135, 146 (1995))).

138. *See* Cressey, *supra* note 19, at 14, 16. While acknowledging his theories were developed only to fit the crime of embezzlement, Cressey believed "the verbalization section . . . will fit other types of respectable crime as well." *Id.* at 16. This makes sense given that Cressey's theories arose out of Sutherland's work on white collar crime. Sykes and Matza cite to both Sutherland and Cressey in their seminal article. *See* Sykes & Matza, *supra* note 11, at 664 n.1, 669 n.14.

139. *See* William A. Stadler & Michael L. Benson, *Revisiting the Guilty Mind: The Neutralization of White-Collar Crime*, 37 CRIM. JUST. REV. 494, 496 (2012) (explaining the applicability of Sykes and Matza's theories to white collar offending).

140. Benson, *supra* note 16, at 587. Of course, defining what exactly is society's central normative structure is problematic. As used here, it means only a law-abiding structure.

141. *See* BENSON & SIMPSON, *supra* note 115, at 51–52.

142. Scott M. Kieffer & John J. Sloan III, *Overcoming Moral Hurdles: Using Techniques of Neutralization by White-Collar Suspects As an Interrogation Tool*, 22 SEC. J. 317, 324 (2009).

143. Benson, *supra* note 16, at 587.

144. *Id.* at 588.

surprisingly, numerous studies have documented the use of neutralizations by white collar criminals.[145]

In addition, neutralization theory is particularly compelling in the context of white collar crime because of where neutralizations originate. Criminologists believe that the rationalizations offenders use are not created in a vacuum; instead, offenders find the "vocabularies" they use to neutralize their future criminal behavior from their environment.[146] Cressey explained that these rationalizations are "taken over" from "popular ideologies that sanction crime in our culture."[147] Sykes and Matza suggested that neutralizations are learned from the legal system itself. With its reliance on lack of intent defenses, they contended, "[t]he law contains the seeds of its own neutralization."[148] This seems particularly true for white collar crimes. Intent is almost always an offense element and most defenses are premised on its alleged absence.[149] Also, the environments in which white collar offenders operate provide a source of learned neutralizations. This could be the corporate capitalist environment generally,[150] or a specific occupational subculture in which an offender

145. *See* Maruna & Copes, *supra* note 11, at 223; *see also* Benson, *supra* note 16, at 591–98 (finding antitrust, tax, financial trust, fraud, and false statements offenders were "nearly unanimous" in neutralizing their criminal conduct by "denying basic criminality"); Petter Gottschalk, *Rotten Apples Versus Rotten Barrels in White Collar Crime: A Qualitative Analysis of White Collar Offenders in Norway*, 7 INT'L J. CRIM. JUST. SCI. 575, 580–81 (2012) (applying neutralization theory in a study of Norwegian white collar offenders); Kieffer & Sloan, *supra* note 142, at 318–24 (arguing that neutralizations are particularly important for white collar offenders); Stadler & Benson, *supra* note 139, at 495–98 (listing the domains in which researches have explored the use of neutralizations, including occupational deviance, corporate crime, and other forms of white collar offending); Paul Michael Klenowski, "Other People's Money": An Empirical Examination of the Motivational Differences Between Male and Female White Collar Offenders, at iv (May 2008) (unpublished Ph.D. dissertation, Indiana University of Pennsylvania) (on file with *Fordham Law Review*) (studying neutralization techniques employed by male and female white collar trust violators).

146. LANIER & HENRY, *supra* note 14, at 169–70; Cressey, *supra* note 19, at 15. Michael Benson stated it this way: "[T]he offender . . . must bring his actions into correspondence with the class of actions that is implicitly acceptable in his society. For this reason, accounts should not be thought of as solely individual inventions." Benson, *supra* note 16, at 588.

147. Cressey, *supra* note 19, at 15. Cressey argued that once antinormative verbalizations, such as "'[a]ll people steal when they get in a tight spot,'" are assimilated and internalized by an individual, they take on a more personal bent, allowing the individual to act without disrupting her self-perception as an honest individual. *Id.*

148. DAVID MATZA, DELINQUENCY AND DRIFT 61 (2009); *see also* LANIER & HENRY, *supra* note 14, at 170; Sykes & Matza, *supra* note 11, at 666.

149. *See, e.g.*, Dan Markel, *Retributive Damages: A Theory of Punitive Damages As Intermediate Sanction*, 94 CORNELL L. REV. 239, 314 (2009) (describing "ambiguous areas of moral wrongdoing sometimes associated with white-collar misconduct"); *Q&A with Morgan Lewis' Eric Sitarchuk*, LAW360 (Feb. 28, 2013), http://www.law360.com/articles/418509/q-a-with-morgan-lewis-eric-sitarchuk ("In white collar cases . . . the issue is often whether a crime even occurred—which often turns on a careful analysis of what the circumstantial says about criminal intent . . . .").

150. *See* Benson, *supra* note 16, at 588 ("The widespread acceptance of such concepts as profit, growth, and free enterprise makes it plausible for an actor to argue that governmental regulations run counter to more basic societal values and goals. Criminal behavior can then be characterized as being in line with other higher laws of free enterprise.").

works.[151] These environments provide its "members with a set of appropriate rationalizations . . . [and] help to isolate them from contact with those who would pass harsher judgment on their criminal activities."[152] While it is certainly true that many types of offenders rationalize their criminal behavior, neutralization theory's relevance in understanding white collar crime is especially strong.

B. A Taxonomy of White Collar Neutralizations

Given neutralization theory's strength in explaining white collar crime, it follows that white collar offenders must neutralize their illegal conduct in order to effectuate their crimes. This Article identifies eight neutralization techniques employed by white collar criminals, some of which will be familiar from the discussion of the Gupta, Madoff, and Stanford cases.[153] The discussion below also provides insight into which neutralizations judges may be crediting or rejecting as part of the sentencing process.

Denial of Responsibility. Called the "master account," the denial of responsibility neutralization entails the offender defining his conduct in a way that relieves him of responsibility, thereby mitigating "both social disproval and a personal sense of failure."[154] Generally, offenders deny responsibility by claiming their behavior is accidental or due to forces outside their control.[155] White collar offenders deny responsibility by pleading ignorance, suggesting they were acting under orders, or contending larger economic conditions caused them to act illegally.[156] The complexity of laws regulating many white collar crimes and the hierarchical

151. *See* COLEMAN, *supra* note 120, at 199; Benson, *supra* note 16, at 591–98 (describing occupational cultures that promote specific neutralization techniques); Kieffer & Sloan, *supra* note 142, at 324 ("[A] group in which the offender has membership may sanction a particular trust violation, and the offender may then take that general acceptance, apply it to his or her own situation, and thus rationalize it because the *group sanctioned it*. This concept is especially applicable to white-collar crime, where learning neutralizations may take place as part of routine professional socialization processes that occur in complex organizations.").

152. COLEMAN, *supra* note 120, at 199.

153. Sykes and Matza originally identified five major types of neutralization techniques. *See* Sykes & Matza, *supra* note 11, at 667–70. These "famous five" neutralizations are the first five discussed below. As neutralization theory has progressed, some criminologists have criticized the list as not conceptually distinct enough, thereby causing problems for future research. *See* Maruna & Copes, *supra* note 11, at 284 (arguing that the original list of five techniques are not theoretically precise). Currently, researchers have identified between fifteen and twenty techniques. It is difficult to make a definitive count because some techniques appear to overlap or are described inconsistently by researchers. *See* Maruna & Copes, *supra* note 11, at 234; Stadler & Benson, *supra* note 139, at 496–98.

154. Maruna & Copes, *supra* note 11, at 231–32.

155. *See id.* at 232; Sykes & Matza, *supra* note 11, at 667 ("By learning to view himself as more acted upon than acting, the delinquent prepares the way for deviance from the dominant normative system without the necessity of a frontal assault on the norms themselves.").

156. *See* Kieffer & Sloan, *supra* note 142, at 320–21 (explaining how white collar offenders blame violations on personal problems, such as alcoholism, drug addiction, or perceived financial difficulties); Maruna & Copes, *supra* note 11, at 232; Sykes & Matza, *supra* note 11, at 667.

structure of companies offer offenders numerous ways to diffuse their responsibility.[157] Both Peter Madoff and Allen Stanford appear to have neutralized their conduct by denying responsibility—Madoff by asserting his brother misled him and Stanford by asserting the global financial downturn and government intervention caused investor losses. Neither Judge Swain nor Judge Hittner appears to have accepted this neutralization as a mitigating sentencing factor.[158]

Denial of Injury. This neutralization technique focuses on the injury or harm caused by the illegal act.[159] White collar offenders may rationalize their behavior by asserting that no one will "really" be harmed.[160] If an act's wrongfulness is partly a function of the harm it causes, an offender can excuse or mollify his behavior if no clear harm exists.[161] The classic use of this technique in white collar crime is an embezzler describing his actions as "borrowing" the money—by the offender's estimation, no one will be hurt because the money will be paid back.[162] Offenders may also employ this neutralization when the victim is insured or the harm is to the public or market as a whole, such as in insider trading or antitrust cases.[163] Although seemingly available to him given his offense conduct, it does not appear that Rajat Gupta neutralized his conduct by denying his acts caused injury.[164]

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157. *See* Maruna & Copes, *supra* note 11, at 232 (describing how an engineer at B.F. Goodrich failed to inform his supervisor of the reporting of false documents because he "learned a long time ago not to worry about things over which [he has] no control"); *see also* Benson, *supra* note 16, at 594 (reporting an income tax offender referring to criminal behavior as "mistakes" resulting from ignorance or poor bookkeeping).

158. As the "master account," the denial of responsibility neutralization necessarily encompasses aspects of all neutralization techniques. For example, descriptions of the defense of necessity neutralization in the white collar context are very similar to the denial of responsibility neutralization. *See* COLEMAN, *supra* note 120, at 196–97 (describing different versions of the defense of necessity technique).

159. Sykes & Matza, *supra* note 11, at 667.

160. Maruna & Copes, *supra* note 11, at 232.

161. *See id.*

162. *See* Cressey, *supra* note 19, at 15; Kieffer & Sloan, *supra* note 142, at 321–22.

163. *See* COLEMAN, *supra* note 120, at 196 (providing an example of a price fixing offender asserting that while his conduct may have been "illegal," it was not "criminal" because "criminal action meant damaging someone, and we did not do that"); Benson, *supra* note 16, at 598 (providing an example of a bank fraud offender arguing there was no harm because "[t]he bank didn't lose any money . . . . What I did was a technical violation." (second alteration in original)).

164. Why Gupta did not neutralize his conduct this way, even though it would seem particularly appealing to do so given his offense, is an interesting question. It could be that Gupta *did* neutralize his conduct by denying there was an identifiable victim, but he did not make that known to the court. In other words, he may have made an after-the-fact decision to hide his pre-act rationalization because he believed Judge Rakoff would reject it is as a mitigating sentencing factor (and possibly even view it as an aggravator). On the other hand, it could be that Gupta *did not* neutralize his conduct this way because he understands that insider trading does cause injury to the market and other investors. Thus, the denial of injury verbalization did not offer him a pre-act "defense" and would have had no neutralizing effect to lessen the disconnect between his contemplated illegal behavior and his self-perception as an upstanding citizen. This inquiry highlights some of the challenges in determining the neutralizations that offenders employ, but also some of the benefits. If potential offenders can be made aware that a neutralization is not valid, it ceases to be the critical component

Denial of the Victim. Even if a white collar offender accepts responsibility for his conduct and acknowledges that his conduct is harmful, he may insist that the injury was not wrong by denying the victim in order to neutralize the "moral indignation of self and others."[165] Denying the victim takes two forms. One is when the offender argues that the victim's actions were inappropriate and therefore he deserved the harm.[166] The offender claims rightful retaliation or punishment, and then denies the victim aggrieved status.[167] The second is when the victim is "absent, unknown, or abstract," which is often the case with property and economic crimes.[168] In this instance, the offender may be able to minimize his internal culpability because there are no visible victims "stimulat[ing] the offender's conscience."[169] White collar offenders may use this neutralization in frauds against the government, such as false claims or tax evasion cases, and other crimes in which the true victim is abstract.[170] Stanford appears to have rationalized his conduct by denying the victim. He asserted that depositors knew the risks of investing and therefore were not innocent victims, and that he was the true victim of the economic downturn. Judge Hittner rejected both of Stanford's proffered rationalizations.

Condemnation of the Condemners. White collar offenders may also neutralize their behavior by shifting attention away from their conduct on to the motives of other persons or groups, such as regulators, prosecutors, and government agencies.[171] By doing so, the offender "has changed the subject of the conversation"; by attacking others, "the wrongfulness of his own behavior is more easily repressed."[172] This neutralization technique takes many forms in white collar cases: the offender calls his critics hypocrites, argues they are compelled by personal spite, or asserts they are motivated by political gain.[173] The claim of selective enforcement or prosecution is particularly prominent in this neutralization.[174] In addition, white collar offenders may point to a biased regulatory system or an anticapitalist government.[175] Stanford's sentencing allocution provides a study in the use of this neutralization technique. In his forty-minute speech,

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allowing white collar crime to proceed. Put another way, by neutralizing the neutralizations, crime can be prevented. *See infra* Part III.B.2.

165. Sykes & Matza, *supra* note 11, at 668.

166. Maruna & Copes, *supra* note 11, at 232.

167. *See* Kieffer & Sloan, *supra* note 142, at 322 (describing physicians committing Medicare fraud as claiming the excess reimbursements they submitted were "only what they rightfully deserved for their work"); Sykes & Matza, *supra* note 11, at 668 ("By a subtle alchemy the delinquent moves himself into the position of an avenger and the victim is transformed into the wrong-doer.").

168. Maruna & Copes, *supra* note 11, at 233; Sykes & Matza, *supra* note 11, at 668.

169. Maruna & Copes, *supra* note 11, at 233.

170. Kieffer & Sloan, *supra* note 142, at 322.

171. Maruna & Copes, *supra* note 11, at 233; Sykes & Matza, *supra* note 11, at 668.

172. Sykes & Matza, *supra* note 11, at 668.

173. *See* Kieffer & Sloan, *supra* note 142, at 323.

174. *See id.*

175. *See id.*

Stanford attacked the government for causing his bank to fold, argued he was being made a scapegoat for the financial collapse, and suggested his prosecution was a result of his lack of political clout. The court summarily rejected these rationalizations.

Appeal to Higher Loyalties. The appeal to higher loyalties neutralization occurs when an individual sacrifices the normative demands of society for that of a smaller group to which the offender belongs.[176] The offender does not necessarily reject the norms he is violating; rather, he sees other norms that are aligned with his group as more compelling.[177] In the white collar context, the group could be familial, professional, or organizational. Offenders rationalizing their behavior as necessary to provide for their families, protect a boss or employee, shore up a failing business, or maximize shareholder value are employing this neutralization technique.[178] Notably, female white collar offenders have been found to appeal to higher family loyalties more than their male counterparts.[179] Both Gupta and Madoff expressed higher loyalties when rationalizing their crimes. Gupta suggested his long-time personal and business relationship with Rajaratnum facilitated his behavior; Madoff suggested his brother's domineering relationship over him influenced his conduct. The judges in both cases appeared to credit these rationalizations as mitigating sentencing factors.

Metaphor of the Ledger. White collar offenders may accept responsibility for their conduct and acknowledge the harm it caused, yet still rationalize their behavior by comparing it to all previous good behaviors.[180] By creating a "behavior balance sheet," the offender sees his current negative actions as heavily outweighed by a lifetime of good deeds, both personal and professional, which minimizes moral guilt.[181] It seems likely that white collar offenders employ this technique, or at least have it available to them, as evidenced by current sentencing practices—almost every white collar sentencing is preceded by a flood of letters to the court supportive of the defendant and attesting to his good deeds.[182] It appears that Gupta and Madoff used this technique to rationalize their actions, and

176. Sykes & Matza, *supra* note 11, at 669.

177. *See* Maruna & Copes, *supra* note 11, at 233.

178. *See* Kieffer & Sloan, *supra* note 142, at 323 (describing an antitrust offender who justified his conduct by saying, "I thought . . . we were more or less *working on a survival basis* in order to try to make enough to keep our plant and our employees" (quoting JOHN E. CONKLIN, CRIMINOLOGY 187 (8th ed. 2004))).

179. *Compare* Kathleen Daley, *Gender and Varieties of White-Collar Crime*, 27 CRIMINOLOGY 769 (1989) (finding female embezzlers were twice as likely to justify their conduct based on family needs than male embezzlers), *with* Klenowski, *supra* note 145, at 233 (finding appeal to higher loyalties "with even greater frequency" for males than female participants, calling the finding "one of the most salient discoveries" of his study).

180. 2 LAWRENCE M. SALINGER, ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME 797 (2005); Klenowski, *supra* note 145, at 54.

181. 2 SALINGER, *supra* note 180, at 797.

182. *See, e.g.*, Ron Kampeas, *Sharansky, 173 Others Plead Leniency for Libby*, JWEEKLY.COM (June 8, 2007), http://www.jweekly.com/article/full/32649/sharansky-173-others-plead-leniency-for-libby/ (describing the Scooter Libby sentencing, in which Libby submitted 174 letters appealing for leniency when facing just a thirty-seven-month sentence). Gupta, of course, submitted over 400 letters; Peter Madoff submitted sixty-three.

both of their judges found it compelling. However, Judge Hittner appeared to reject Stanford's attempts to rationalize his conduct based on a record of business achievements alone.[183]

Claim of Entitlement. Under the claim of entitlement neutralization, offenders rationalize their conduct on the grounds they deserve the fruits of their illegal behavior.[184] This neutralization is particularly common in employee theft and embezzlement cases, but is also seen in public corruption cases.[185] Although he based it only on an "implicit suggestion,"[186] Judge Rakoff appears to have at least partially credited Gupta's rationalization that he earned the right to engage in unethical behavior because he had cared for others for so many years.

Claim of Relative Acceptability/Normality. The final white collar neutralization technique entails an offender justifying his conduct by comparing it to the conduct of others. If "others are worse" or "everybody else is doing it," the offender, although acknowledging his conduct, is able to minimize the attached moral stigma and view his behavior as aligned with acceptable norms.[187] In white collar cases, this neutralization technique is often used by tax violators and in real estate and accounting frauds.[188] Both Madoff and Stanford implicitly rationalized their conduct by comparing it to others. By referencing his brother's fraud, Peter Madoff drew a distinction between his relatively minor offenses and Bernie's massive Ponzi scheme. Stanford, on the other hand, seemed to be asserting that his bank was doing nothing different than other international lenders. Neither Judge Swain nor Judge Hittner found these rationalizations to be mitigating sentencing factors.

The above discussion highlights a few additional points about neutralization theory. First, although there seems to be a compulsion among criminologists to categorize neutralization techniques (one this Article indulges in), that there are differing types of neutralizations is not all that remarkable. In fact, if it is true as some argue that rationalizing bad behavior is "part of being human,"[189] it follows that the list of neutralization techniques will continue to grow as researchers study more offenders in differing occupations. Put another way, "[w]hat is interesting about neutralization theory is . . . what the neutralizations *do*," and "not the flavors it comes in."[190]

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183. This may suggest that different types of "credits" on the ledger carry different weights with sentencers.

184. COLEMAN, *supra* note 120, at 198.

185. *See id.* (describing a former city councilman who explained his involvement in corruption as due to his low salary and lack of staff); Klenowski, *supra* note 145, at 209–10.

186. Sentencing Memorandum and Order, *supra* note 2, at 12.

187. COLEMAN, *supra* note 120, at 197–98; Klenowski, *supra* note 145, at 67, 209–10.

188. *See* COLEMAN, *supra* note 120, at 197 (describing a real estate agent rationalizing fraud as rampant); Benson, *supra* note 16, at 594 (describing tax offenders claiming that "everybody cheats somehow on their taxes").

189. Maruna & Copes, *supra* note 11, at 285 (quoting STANLEY COHEN, STATES OF DENIAL 37 (2001)).

190. *Id.* at 284 (emphasis added).

That said, if there are demographic differences in the use of neutralizations, that may provide insight into offenders' differing self-narratives and would be very valuable information.[191] For example, antitrust offenders neutralize their conduct differently than embezzlers.[192] Women embezzlers neutralize their conduct differently than male embezzlers.[193] It is possible that women embezzlers of different ages, races, and socioeconomic backgrounds neutralize their conduct differently. A judge that understands the neutralization techniques employed by specific types of white collar offenders would be a better-educated sentencer (and arguably a more accurate one) in those cases. This highlights the need for additional study of how and why white collar offenders neutralize their conduct.[194]

Second, neutralizations are not "one size fits all." Offenders employ neutralizations in different degrees, combine them with other neutralizations, and use them at different times. Moreover, the exact verbalizations an offender uses to neutralize his behavior will be specific to his circumstances, because they are part of his internal dialogue influenced by his unique environment.[195] The above list demonstrates that many of the neutralization techniques partially overlap, and offenders may use multiple techniques. For example, Madoff appears to have used at least four neutralizations to minimize his guilt; Stanford may have used five or more. Some of these are of the same category, but they are tailored to the individual defendant. Thus, understanding offender behavior requires a broad view of possible neutralizations, as well as a close view of the offender's specific conduct and circumstances.

Relatedly, the "toxicity" of neutralizations may vary. While neutralizations are sometimes described as being universally "bad" because they facilitate criminal behavior, the issue is likely not so black and white. It may be that neutralization techniques are arranged on a gradient, from mostly benign to highly criminogenic.[196] Some neutralizations appear to be particularly offensive because they dehumanize victims or convert shame into anger, both of which may suggest aggressive future offending.[197]

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191. *See id.* (arguing that future research should investigate the nature of neutralizations in contrasting situations, circumstances, contexts, and cultures). Michel Benson's research finding that white collar offenders use different neutralization techniques depending on the type of offense committed is just this type of work. *See* Benson, *supra* note 16, at 591.

192. Benson, *supra* note 16, at 602–05.

193. Klenowski, *supra* note 145, at 233–35.

194. *See* Maruna & Copes, *supra* note 11, at 289–300 (listing areas of study for the "next generation of neutralization research").

195. *See* LANIER & HENRY, *supra* note 14, at 169–70.

196. *See* Maruna & Copes, *supra* note 11, at 290 (describing that the "working assumption" in neutralization research is that all neutralizations are bad, but suggesting a gradient from benign to "most toxic").

197. *See id.* at 290. For example, the "denial of humanity" neutralization identified in the context of the crime of genocide is seen as "the worst of the worst" because it promotes and allows for further atrocities. *Id.*; *see also* Alexander Alvarez, *Adjusting to Genocide: The Techniques of Neutralization and the Holocaust*, 21 SOC. SCI. HIST. 139, 166 (1997) (studying the techniques of neutralization and the Holocaust).

Other neutralizations may be more innocuous, suggesting only episodic offending and even allowing for eventual strengthened normative behavior.[198] This could explain why judges are willing to credit some offender neutralizations as sentencing mitigators, but reject others and even view them as aggravators. If, for example, the appeal to higher loyalties neutralization is relatively benign, that could be why Judges Rakoff and Swain viewed it as a mitigating explanation of Gupta's and Madoff's conduct.[199] Likewise, if condemning one's condemners is more "toxic," that may explain why Judge Hittner rejected it in Stanford's case. While an in-depth exploration of this issue is outside this Article's scope, the possibility of a neutralizations gradient suggests that judges must not only fully understand the underlying theory but also how specific offenders are using neutralizations to facilitate their criminal conduct.[200] It also suggests a need for further research into the relative harmfulness of neutralizations and if that corresponds with how judges credit or reject neutralizations at sentencing.

Finally, there remains a nagging question concerning neutralizations: how can researchers—and judges evaluating their theories—determine whether an offender's rationalizations are occurring *prior to* the criminal act, making them true neutralizations, or *after* the act, rendering them mere excuses?[201] Although this question persists in the criminological literature, it need not be answered directly because it creates a false dichotomy. As explained by criminologists Shadd Maruna and Heith Copes, even if white collar offenders commit criminal acts "in the absence of definitions favorable to them" (i.e., without using verbalizations that minimize moral guilt), those definitions "get applied retroactively to excuse or redefine the initial deviant acts. To the extent that they successfully mitigate . . . self-punishment, they become discriminative for repetition of the deviant acts

198. Maruna & Copes, *supra* note 11, at 290. Some argue that denying responsibility by labeling oneself as an addict helps offenders by allowing them to see their past actions as symptoms of a disease, rather than a lifelong character flaw, which reduces future offending. *Id.* at 291. Critics contend that such labels "come[] at too high a cost" because they allow for perpetual relapse into negative behavior patterns. *Id.*

199. An even more recent example of the appeal-to-higher-loyalties neutralization being credited at sentencing is in the Kenneth Miller kidnapping case. Although Judge William Sessions sentenced Miller, a Mennonite pastor, to twenty-seven months in prison for aiding a born-again Christian woman in kidnapping her daughter from a former same-sex partner, the judge said he admired Miller for the depth of his convictions. *See* Wilson Ring, *Virginia Pastor Credits 'the Mercy of God' in Custody Dispute at Sentencing*, BURLINGTONFREEPRESS.COM (Mar. 4, 2013), http://www.burlingtonfreepress.com/viewart/20130304/NEWS07/303040011/Virginia-pastor-sentenced-in-Vermont-custody-dispute. Sessions then released Miller while his appeal was pending, despite Miller saying "he couldn't promise he would not again aid in international parental kidnapping." *Id.*

200. Maruna and Copes suggest that the importance of neutralization theory is not necessarily that neutralizations occur, or occur often, but that they occur in some instances to allow for offending and not in others. They suggest that neutralizations may be thought of not as direct causes of criminality, but as explanations of the persistence or desistence of crime. Maruna & Copes, *supra* note 11, at 271. Under their view, whether certain neutralization techniques allow for the persistence of crime more than others is an open question that demands further research. *Id.* at 290.

201. *See id.* at 271 (calling this the "lingering 'chicken-or-the-egg' debate").

and, hence, precede the future commission of the acts."[202] In other words, a neutralization may start off as an after-the-fact rationalization, but necessarily becomes the rationale that facilitates future offending.[203] Because almost no white collar offenses are truly singular acts, but instead are made up of a number of smaller acts occurring over time, there is little concern that a defendant may be employing an after-the-fact rationalization as an excuse that did not somehow neutralize his course of criminal conduct.[204]

III. THE ROLE OF NEUTRALIZATIONS IN WHITE COLLAR SENTENCING

The preceding discussion demonstrates that a white collar defendant's sentence will likely be impacted by the court's inquiry into what motivated the defendant's conduct. Judges appear to credit some rationalizations as mitigators and deem others aggravators, all of which factors into the final sentence. The court's evaluation of a defendant's rationalizations necessarily confronts the neutralization techniques employed by that defendant, techniques that have particular salience in white collar cases. Yet the broad question posed at the outset of this Article remains: what place, if any, does all of this have in white collar sentencing?

The answer requires a two-part analysis. The first addresses whether judicial inquiry into offender neutralizations is consistent with current sentencing doctrine. The Supreme Court's recent decision in *Pepper v. United States*,[205] which reestablishes the importance of individualized sentencing under the Sentencing Reform Act, indicates that it is. The second part of the analysis addresses the more difficult normative question of whether judicial inquiry into offender neutralizations is appropriate. While there are significant potential drawbacks, neutralization inquiries increase individualized sentencing and even, counterintuitively, provide opportunities to disrupt white collar crime—benefits that weigh in favor of the practice.

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202. *Id.* (quoting RONALD L. AKERS, DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH 60 (3d ed. 1985)).

203. *Id.*; *see also supra* note 15.

204. That said, human thinking is undoubtedly complex; pinpointing precisely when a thought enters a person's mind and whether it changes over time is difficult, if not impossible. Therefore, this "sequencing" question will likely remain open for some time. *Compare* Robert Agnew, *The Techniques of Neutralization and Violence*, 32 CRIMINOLOGY 555 (1994) (engaging in a longitudinal study supporting neutralization theory's sequencing), *with* Paul Cromwell & Quint Thurman, *The Devil Made Me Do It: Use of Neutralizations by Shoplifters*, 24 DEVIANT BEHAV. 535 (2003) ("No one . . . has yet been able to empirically verify the existence of preevent [as opposed to postevent] neutralizations . . . .").

205. 131 S. Ct. 1229 (2011).

A. Legal Justification for Judicial Inquiry into Offender Neutralizations

The Supreme Court's *Pepper* opinion provides a strong jurisprudential justification for judges inquiring into offender neutralizations. Before discussing *Pepper* in detail, however, it is necessary to understand the evolution of white collar sentencing.

1. Evolution of White Collar Sentencing

For the twenty years prior to 2005, federal sentences were determined almost exclusively by the U.S. Sentencing Guidelines.[206] Promulgated under the authority of the Sentencing Reform Act of 1984,[207] the Guidelines had the goal of creating honesty in sentencing and reducing unwarranted sentencing disparities prevalent in the indeterminate, parole-based scheme operating at the time.[208] The Guidelines replaced the indeterminate system with one in which judicial sentencing discretion was significantly reduced by establishing narrow sentencing ranges based on a series of factors, including the type of offense, adjustments related to characteristics of the victim and offender, and the defendant's criminal history.[209]

From their inception, the Guidelines were heavily criticized. One of the primary arguments against the Guidelines was that they were too rigid.[210] Part of that rigidity came from the Guidelines' sharp limitations on the factors judges could consider at sentencing. Dozens of Guidelines provisions directed judges to consider a range of aggravating factors, but to ignore many in mitigation.[211] While departures outside the calculated sentencing range were contemplated by the Guidelines, they were only allowed when the circumstances of a case were not adequately taken into consideration by the Guidelines (i.e., when the case was outside the

206. *See* Bowman, *supra* note 4, at 379–80.

207. Pub. L. No. 98-473, 98 Stat. 1837 (codified in scattered sections of 18 and 28 U.S.C.).

208. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL 2–3 (2013); *see also* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 38–77 (1998) (providing a comprehensive history of federal sentencing); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 20 (2003).

209. *See* U.S. SENTENCING COMM'N, *supra* note 208, § 1B1.1, at 16; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6–8 (1988).

210. J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 723–28 (2011).

211. *See, e.g.*, U.S. SENTENCING COMM'N, *supra* note 208, §§ 5H1.2, at 445, 5H1.4–.6, at 446–47, 5H1.10–.12, at 449 (explaining specific offender characteristics not ordinarily relevant in sentencing); *see also* Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180, 183–84 (1999) (explaining that compromises by the Sentencing Commission resulted in leaving out mitigating personal characteristics of the defendant in favor of using criminal history to increase sentences).

"heartland" of typical cases).[212] Departures were rarely granted, and when they did begin to increase, Congress attempted to limit their use.[213]

Another criticism of the Guidelines was that they were too harsh.[214] Particularly as to white collar offenders, the Guidelines operated as a one-way "upward ratchet," continually driving sentencing ranges higher.[215] Indeed, one of the compromises "embodied in the Guidelines" concerned increased penalties for white collar defendants.[216] Between 1987 and 2001, sentencing ranges climbed from those initially elevated levels, as the "loss table," the main determiner of offense level for white collar crimes, was repeatedly adjusted upward.[217] A series of aggravating specific offense characteristics was also added to the economic crime guidelines, which increased sentencing ranges even more.[218] This trend continued in the early 2000s, as Congress, through its Sarbanes-Oxley legislation, directed heightened penalties for economic crimes in the wake of the Enron, WorldCom, and Tyco corporate scandals.[219] The result was a set of guidelines for white collar offenders that limited probation, increased average sentences, and exposed high-loss defendants to decades of imprisonment.[220]

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212. Koon v. United States, 518 U.S. 81, 96 (1996); U.S. SENTENCING COMM'N, *supra* note 208, § 5K2.0(a)(4), at 452–56.

213. *See* Oleson, *supra* note 210, at 713, 724 ("At one point, House Majority Whip Tom DeLay threatened, "'The judges need to be intimidated. . . . They need to uphold the Constitution.' If they don't behave, 'we're going to go after them in a big way.'" And in what sometimes seemed like a battle between branches of government, some legislators threatened to strip judges of *all* discretion, enacting broad slates of mandatory minimums." (quoting Joan Bikuspic, *Hill Republicans Target 'Judicial Activism'; Conservatives Block Nominees, Threaten Impeachment and Term Limits*, WASH. POST, Sept. 14, 1997, at A1)).

214. *Id.* at 707–14.

215. *See* James E. Felman, *The Need To Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT'G REP. 138, 138 (2010).

216. *See* Breyer, *supra* note 209, at 18, 20; Alan Ellis et al., *At a "Loss" for Justice*, CRIM. JUST., Winter 2011, at 34, 36. While the sentencing ranges for most crimes were determined by analyzing pre-Guidelines sentences and then establishing sentencing ranges based on past practices, the sentencing ranges for economic crimes were set higher than in the past based on policy decisions made by the Sentencing Commission. *See* U.S. SENTENCING COMM'N, *supra* note 208, at 4–5.

217. *See* Ellis et al., *supra* note 216, at 36. The loss table increases the offense level as the loss to the victim increases. The current table has fifteen two-level increases, up to thirty offense levels for a loss of more than $400 million. Each increase of six offense levels approximately doubles the sentence. *See* U.S. SENTENCING COMM'N, *supra* note 208, § 2B1.1(b)(1), at 79.

218. *See* Bowman, *supra* note 4, at 387–91.

219. *See id.* at 432–35.

220. *See* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 168–69 (2008) (charting increases to a hypothetical corporate defendant's sentence from 1987 to 2007). These increases continue today. In a series of amendments taking effect in November 1, 2012, the Commission increased penalties for "organized" insider trading offenses and added an upward departure provision for offenses that risk a significant disruption of a national financial market. *See* U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 5, 18 (2012). *But see id.* at 5 (adding departure language applicable when the cumulative impact of the loss table and the victims table overstates the seriousness of an offense). However, the Commission has recently considered proposals by the American Bar Association that would likely reduce

Then, in 2004, the entire landscape shifted. In *Blakely v. Washington*, the Supreme Court found that any sentencing increase based on judge-found facts that took a sentence beyond the presumptive guideline range violated the Sixth Amendment.[221] The Court held that any fact, other than a prior conviction, that raises the penalty "beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[222] A year later, in *United States v. Booker*, the Court found that the Sentencing Guidelines also violated the Sixth Amendment.[223] Because the Guidelines were mandatory, thereby requiring judges to increase a defendant's "statutory maximum for *Apprendi* purposes" based on factual findings not submitted to a jury, they were unconstitutional.[224] The Court remedied this infirmity by excising two provisions of the Sentencing Reform Act, thereby rendering the Guidelines advisory.[225]

Suffice it to say, the *Booker* decision drastically altered federal sentencing. Instead of simply following the mandatory Guidelines, under *Booker*, district judges must now follow a three-step process when sentencing a defendant.[226] First, the judge must calculate the applicable Guidelines range.[227] Then, the judge must determine whether to depart from the sentencing range in situations falling outside the "heartland" of cases to which the Guidelines were intended to apply.[228] Third, after the

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sentences for many economic crime offenders. *See* A REPORT ON BEHALF OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES, *available at* http://lawprofessors.typepad.com/files/ussc-presentation-9-17-13.pdf (proposing to restructure the fraud guideline to reduce reliance on loss and incorporate more individual culpability factors).

221. Blakely v. Washington, 542 U.S. 296, 313–14 (2004). The decision in *Blakely* was an extension of principles set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Apprendi*

> declared unconstitutional a New Jersey hate crime enhancement that enabled a sentencing judge to impose a sentence higher than the otherwise available statutory maximum for various crimes based on a finding by a preponderance of the evidence that an offense involved racial animus. The *Apprendi* Court asserted the hate crime sentencing enhancement was constitutionally problematic because, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Douglas A. Berman, *Foreword: Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 672 (2005) (alteration in original) (quoting *Apprendi*, 530 U.S. at 490).

222. *See Blakely*, 542 U.S. at 301.

223. United States v. Booker, 543 U.S. 220, 226–27 (2005).

224. *Id.* at 232 (internal quotation marks omitted).

225. *See id.* at 245. Because the now advisory Guidelines did not create "statutory maximums" under *Apprendi* and *Blakely*, no Sixth Amendment concerns were implicated. *See id.* at 264–65. Thus, the Court remedied the constitutional infirmities of the Guidelines without completely destroying the federal sentencing scheme that had been in place for the past twenty years.

226. *See* Rita v. United States, 551 U.S. 338, 351 (2007) (setting out the three-step analysis).

227. *See id.*; Gall v. United States, 552 U.S. 38, 49 (2007) ("The Guidelines should be the starting point and the initial benchmark [at sentencing].").

228. *Rita*, 551 U.S. at 351.

sentencing range is calculated, the judge must then consider "all of the [Sentencing Reform Act's] § 3553(a) factors to determine whether they support the sentence requested."[229] It is here that a judge is free to provide a "variance" if she decides an outside-Guidelines sentence is warranted.[230]

2. *Pepper*'s Impact on White Collar Sentencing

While *Blakely* and *Booker* recrafted federal sentencing into an advisory guidelines system, not until *Pepper* did the Court unequivocally establish the breadth of district courts' sentencing discretion.[231] This wide discretion allows courts to inquire into defendants' neutralizations at sentencing.

In *Pepper*, the issue before the Court was whether a district court could consider evidence of a defendant's postsentencing rehabilitation at resentencing.[232] Jason Pepper had originally been sentenced, pursuant to a large downward departure under the Guidelines, to twenty-four months' imprisonment for conspiracy to distribute methamphetamine.[233] The government appealed, arguing the departure was too great.[234] After a *Booker* remand,[235] the district court resentenced Pepper to the original sentence, this time based partly on his postsentencing rehabilitation, which included successful drug treatment, a straight-A performance as a full-time college student, steady employment, and strong family support.[236] The government appealed again. The Eighth Circuit determined that "evidence of postsentencing rehabilitation 'is not relevant and will not be permitted at resentencing,'" and the case was once again remanded.[237] Without the benefit of his postsentencing rehabilitation arguments, Pepper was resentenced to sixty-five months' imprisonment.[238] Pepper appealed again; this time the Eighth Circuit sustained the sentence.[239]

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229. *Gall*, 552 U.S. at 49–50.
230. *Id.* at 50.
231. *See* Pepper v. United States, 131 S. Ct. 1229, 1235 (2011).
232. *See id.* at 1235–36.
233. See i*d.* at 236.
234. *See id.*
235. *Booker* remands occurred in cases that were pending when the *Booker* decision was decided, necessitating a remand to determine if the court had enhanced the applicable sentence through judge-found facts not agreed to by the parties. *See, e.g.*, United States v. Goldberg, 406 F.3d 891, 892, 894 (7th Cir. 2005) (discussing procedures and pitfalls under *Booker* remands).
236. *Pepper*, 131 S. Ct. at 1236–37.
237. *Id.* at 1237 (quoting United States v. Pepper, 486 F.3d 408, 413 (8th Cir. 2007)) (stating that a policy statement in the Guidelines against considering postsentencing rehabilitation, § 5K2.19 ("Post-Sentencing Rehabilitative Efforts"), formed the basis of the Eighth Circuit's decision).
238. *Id.* at 1238. Because he had already served his original twenty-four-month sentence, Pepper would have had to surrender to the Bureau of Prisons for an additional forty-one months, likely losing his job and apartment in the process.
239. *Id.* Pepper had an intervening trip up to the Eighth Circuit and back down for resentencing; all told, the case was before the Eighth Circuit four times and the Supreme Court twice. *Id.* at 1238–39.

Justice Sotomayor, writing for the majority, overturned the Eighth Circuit's decision. The Court's opinion began by recognizing the right of each defendant to be sentenced individually:

> It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.[240]

The Court said it was "'essential'"[241] that the district court "consider the widest possible breadth of information about a defendant" to ensure that the sentence "'will suit not merely the offense but the individual.'"[242]

The Court found that the language of the Sentencing Reform Act surviving after *Booker* did not constrain judicial sentencing discretion; indeed, it "preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited'" in the kind of information that may be considered.[243]

> In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.[244]

The Court therefore held that a district court may consider a defendant's postsentencing rehabilitation at resentencing and grant a downward variance when appropriate as part of the court's consideration of the Sentencing Reform Act's § 3553(a) factors.[245] Because this conclusion conflicted with a statutory provision that precluded a court on resentencing from "imposing a sentence outside the Guidelines range except upon a 'ground of departure' that was expressly relied upon in the prior sentencing,"[246] the Court invalidated the provision as inconsistent with *Booker*.[247]

Pepper provides strong doctrinal support for judicial inquiry into offender neutralizations. Most fundamentally, as the *Booker*-through-*Pepper* line of cases explains, courts now have almost unrestrained discretion to impose a sentence. This means there is no more forced "rigidity" in sentencing. *Pepper* reconfirms that *Booker* eliminated the required adherence to the Guidelines and their proscription on considering certain offender characteristics.[248] Pursuant to *Booker*, strict adherence to the Guidelines was replaced with discretion bounded only by the broad

240. *Id.* at 1239–40 (citation omitted).
241. *Id.* at 1240 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).
242. *Id.* (quoting Wasman v. United States, 468 U.S. 559, 564 (1984)).
243. *Id.* (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)).
244. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010)).
245. *See id.* at 1246.
246. *Id.* at 1243.
247. *Id.* at 1247, 1249.
248. *Id.* at 1241–42, 1247.

statutory sentencing factors underlying the Sentencing Reform Act.[249] And that language, contained in § 3553(a), makes clear that judges are permitted to consider defendants' neutralizations.

Section 3553(a) begins with an overarching mandate: "[C]ourt[s] shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of the statute]."[250] The statute goes on to direct courts to consider almost anything related to the defendant or his potential punishment:

> The court, in determining the particular sentence to be imposed, *shall consider*—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the [Guidelines] sentencing range . . .
>
> (5) any pertinent policy statement [contained in the Guidelines] . . .
>
> (6) *the need to avoid unwarranted sentence disparities* . . . ; and
>
> (7) the need to provide restitution to any victims of the offense.[251]

In addition, a companion provision states that, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[252] Accordingly, courts have essentially "no boundaries" under current federal law that would constrain their inquiries at sentencing,

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249. *See* Amy Baron-Evans, *Rita*, *Gall* and *Kimbrough*: A Chance for Real Sentencing Improvements (2008) (unpublished manuscript), *available at* http://www.fd.org/docs/select-topics/sentencing-resources/rita-gall-and-kimbrough-a-chance-for-real-sentencing-improvements.pdf?sfvrsn=4.

250. 18 U.S.C. § 3553(a) (2012). This provision embodies the "parsimony principle," which has been described as requiring "a sentencing court when handing down a sentence [to] be stingy enough to avoid one that is too long, but also that it be generous enough to avoid one that is too short." United States v. Irey, 612 F.3d 1160, 1197 (11th Cir. 2010); *see also* Nancy Gertner, *Federal Sentencing Guidelines: A View from the Bench*, 29 HUM. RTS. 6, 6 (2002).

251. 18 U.S.C. § 3553(a) (emphasis added).

252. *Id.* § 3661.

including inquiries into the neutralization techniques defendants may be employing.[253]

Indeed, the "shall consider" language of § 3553(a) suggests courts are compelled to consider defendants' motivations, which necessarily include the neutralizations employed. How a defendant neutralizes his criminal behavior so that it may proceed touches on at least three of § 3553(a)'s factors. The type of neutralization a defendant employs is part of the nature and circumstances of the offense and the history and characteristics of the defendant—it is the psychological mechanism that makes the offense possible.[254] A defendant's use of neutralizations also impacts the need for the sentence imposed, particularly when courts are considering the four traditional purposes of punishment outlined in the statute.[255] Finally, if some judges are inquiring into offender neutralizations and factoring them in to sentencing determinations (which the Gupta, Madoff, and Stanford cases demonstrate they are), the need to avoid unwarranted sentence disparities consideration is also implicated.

Pepper supports judicial inquiry into offender neutralizations in another, less direct way. *Pepper*'s holding has the practical effect of refocusing sentencing on the § 3553(a) factors, but the normative basis of the Court's opinion is also important. Justice Sotomayor began her analysis by recognizing the traditional right of each defendant to be sentenced as an individual.[256] Underlying this tradition, she found, was the principle that punishment should be tailored to the offender, not just the crime.[257] This principle, which "justice generally requires," stems directly from the Court's prior rejection of determinate sentencing schemes and is consistent with the now widely accepted view of sentencing as being "most just" when it contemplates both the offense and the offender.[258] This requires judges

253. *See* Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 713 (2008) ("[T]he scope of mitigation evidence [is] 'potentially infinite' and . . . 'anything under the sun' can be tendered by the defense in mitigation of punishment" (quoting Ayres v. Belmontes, 549 U.S. 7, 21 (2006); Lockett v. Ohio, 438 U.S. 586, 631 (1978) (Rehnquist, J., concurring in part and dissenting in part))). Of course, there are bounds to what evidence an advocate may introduce at a sentencing hearing. *See* FED. R. CRIM. P. 32(i)(2).

254. *See* Sykes & Matza, *supra* note 11, at 667.

255. *See* 18 U.S.C. § 3553(a)(2)(A)–(D); *see also infra* Part III.B.1.

256. Pepper v. United States, 131 S. Ct. 1229, 1239–40 (2011).

257. *Id.* at 1240. The Court cited *Williams v. New York*, 337 U.S. 241, 246 (1949), which relied on a number of social science texts extolling the virtues of individualized sentencing. *See, e.g.*, Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 463–64 (1928) ("In a word, individualization is necessary on the part of the court and other institutions dealing with the offender; and effective individualization is not based on guesswork, mechanical routine, 'hunches,' political considerations, or even (as so many judges seem to think) on past criminal record alone. It must rest on a scientific recognition and evaluation of those mental and social factors involved in the criminal situation which make each crime a unique event and each criminal a unique personality.").

258. *Pepper*, 131 S. Ct. at 1240. *But see id.* at 1252 (Breyer, J., concurring) (contending that individualized sentencing is not the only relevant tradition: "A just legal system seeks not only to treat different cases differently but also to treat like cases alike. Fairness requires sentencing uniformity as well as efforts to recognize relevant sentencing differences.").

to consider, "*without limitation*,"[259] any mitigating or aggravating evidence concerning the defendant in order to achieve a sentence "sufficient, but not greater than necessary."[260] Evidence of how and why a defendant neutralizes his behavior, which allows the criminal conduct to occur, is important to the individualized sentencing process *Pepper* envisions.

B. Normative Justification for Judicial Inquiry into Offender Neutralizations

While judicial inquiry into offender neutralizations is legally permissible, and likely compelled, under current sentencing law, whether it is normatively appropriate is a separate question. The practice raises a number of potential positives and negatives. Ultimately, the benefits of increased individualized sentencing and opportunities to disrupt the mechanisms of white collar crime outweigh the possible negatives associated with the practice.

1. Increased Individualized Sentencing

The most direct benefit of judges inquiring into how defendants neutralize their conduct is the one just discussed: increased individualized sentencing. *Pepper* reestablishes that individualized sentencing is the most just way to impose punishment—that a fair sentence considers both the offense and the offender.[261] At the same time, criminological theory explains that neutralizations are an integral component of both white collar offenses and the offenders who commit them.

The verbalizations that a defendant uses to neutralize his antinormative behavior and bring it in line with society are one of the three causal elements of any white collar crime;[262] therefore, neutralizations are fundamental to white collar offenses.[263] While neutralizations are not explicit offense elements, they facilitate the commission of white collar crime and are intrinsic to it.[264] Yet, as discussed above, specific neutralization techniques may vary by offense type.[265] In order to fully understand the offense committed, a judge must understand the neutralizations that preceded it.

Neutralizations are also critical to understanding the offender. Neutralizations explain the psychological processes an offender undergoes in order to commit the offense—they are part of the explanation of how the

259. *Id.* at 1240.
260. 18 U.S.C. § 3553(a).
261. *Pepper*, 131 S. Ct. at 1239–40.
262. Sykes & Matza, *supra* note 11, at 667.
263. Cressey, *supra* note 19, at 15.
264. Some white collar criminal statutes do make defendants' motivations, and therefore their rationalizations and neutralizations, more explicitly part of the offense elements. *See* Hessick, *supra* note 19, at 96–97 (describing how obstruction of justice and bribery offenses contain elements requiring the defendant to act with corrupt or improper purposes, necessarily requiring an evaluation of the defendant's reasons for acting).
265. *See* Benson, *supra* note 16, at 605; Klenowski, *supra* note 145, at 233.

offender "bec[ame] delinquent."[266] In this way, neutralizations are like any other demographic or social history factor considered by a sentencer. Of course, not all offenders will employ the same neutralization techniques. Despite all being high-profile white collar defendants, Gupta, Madoff, and Stanford neutralized their criminal conduct much differently—the techniques used were unique to each offender's background and character, influenced by their personal and professional environment.[267] It follows that a judge inquiring into a defendant's neutralizations will be better educated as to the "unique . . . human failings that sometimes mitigate, sometimes magnify, the crime and the punishment."[268]

Neutralization inquiries also aid individualized sentencing determinations by informing judges as to the retributive and utilitarian purposes of punishment.[269] Judges focused on retributive punishment goals are generally trying to evaluate the harm caused by the offense and assign it some proportional weight, thereby punishing the offender based on his relative blameworthiness.[270] Neutralization inquiries in white collar cases can help judges make this type of assessment. When a judge understands the motivations of an offender and the specific neutralization techniques used to facilitate the crime, relative blameworthiness comes into sharper focus. A company executive who illegally backdates stock options by convincing himself that he deserves a little extra for all his hard work (claim of entitlement), and that the shareholders should not care anyway because of all the money he has made them (denial of the victim), is more blameworthy than an executive who commits an accounting or bank fraud to secure a loan to keep a failing company afloat and its personnel

266. Sykes & Matza, *supra* note 11, at 667.

267. *See* LANIER & HENRY, *supra* note 14, at 169–70. For example, Peter Madoff attempted to neutralize his conduct through the claim-of-relative-acceptability technique, which was tailored to his brother's conduct and their professional environment. *See* Transcript of Sentencing Hearing, *supra* note 71, at 28; *see also* Sentencing Memorandum, *supra* note 71, at 20–23. Stanford employed a similar technique, but the focus was different because he saw himself operating in the global banking environment. *See* Transcript of Sentencing Proceedings, *supra* note 97, at 32, 37.

268. *Pepper*, 131 S. Ct. at 1240 (quoting Koon v. United States, 518 U.S. 81, 113 (1996)).

269. *See* RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 7–9 (2013) (providing an overview of sentencing principles). Judges are required to consider these punishment purposes at sentencing under 18 U.S.C. § 3553(a)(2).

270. *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 72–73 (3d ed. 2000); Hessick, *supra* note 19, at 113. For example, a retributivist judge would deem a defendant who committed murder as more deserving of punishment than a thief because the murderer caused more relative harm. And most judges, also consistent with retributivism, would deem a mercy killer less blameworthy than a contract killer. While both murderers have inflicted the same relative harm—the taking of another's life—we see the contract killer as more culpable, and thus deserving of more punishment, because he acted for profit rather than to end suffering. *See id.* at 114; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603 (1996). This can best be understood through the expressivism strain of retributivism, which contends that an "individual deserves punishment when she commits an illegal act, because in committing that act, the individual has demonstrated that she does not respect an important value, such as a victim's moral worth." *See* Hessick, *supra* note 19, at 113.

employed (appeal to higher loyalties). Both crimes may result in similar financial harm, but we view the offenders' relative culpability differently.[271] Judicial inquiry into an offender's specific neutralizations helps clarify relative blameworthiness and facilitates proportional sentencing.

Courts evaluating offender neutralizations will also have more insight when considering utilitarian punishment goals. Although judges are required to consider deterrence, incapacitation, and rehabilitation when sentencing,[272] in white collar cases general deterrence is usually the primary focus.[273] General deterrence is the idea that the threat of punishment to one offender will result in lawful behavior of other potential offenders.[274] The problem with basing punishment on this notion is that there are no reliable findings related to the marginal deterrent effects of various punishment levels.[275] General deterrence is premised on the potential offender's knowledge of the penalty and risk of detection, and this type of "factual data on which a deterrent system must be founded do[es] not exist."[276]

This does not mean that general deterrence is an invalid sentencing consideration in white collar cases.[277] But, judges should consider the concept differently in light of neutralization theory. As will be discussed in the next section, if neutralizations allow individuals to construct self-narratives enabling the commission of white collar crime, helping those individuals and other potential offenders understand that mental process can break the causal chain—neutralizations can be neutralized.[278] In other

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271. *See* United States v. Ranum, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005); Podgor, *supra* note 19, at 747–48 (discussing the relative moral culpability of a white collar defendant not acting for personal gain).

272. *See* 18 U.S.C. § 3553(a)(2)(B)–(D) (2012).

273. That is because judges understand that upon conviction most white collar offenders lose their jobs, professional licenses, and status in the community. *See* Kenneth Mann et al., *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 483–84 (1980); Podgor, *supra* note 19, at 753. Therefore, it is highly unlikely they will reoffend, which is the concern that primarily drives the need to specifically deter, incapacitate, or rehabilitate an offender.

274. *See* ASHWORTH, *supra* note 270, at 64 (discussing general and specific deterrence).

275. *See* Hessick, *supra* note 19, at 116.

276. ASHWORTH, *supra* note 270, at 64.

277. Indeed, Carissa Hessick makes a compelling argument for expanding motive's role in punishment to deter more crime. *See* Hessick, *supra* note 19, at 116–18.

278. Under Cressey's theory, eliminating any of the three causal elements of white collar crime—nonshareable financial problem, position of trust, or verbalizations—would reduce recidivism. *See* Cressey, *supra* note 19, at 14. However, Cressey believed only two elements could be "effectively blocked" to impede white collar crime. *Id*. at 15. He argued that companies, through workplace education and counseling, could reduce the number of employees possessing nonshareable financial problems. *See id.* He viewed this as a front-end crime prevention issue, not necessarily a treatment issue. He did not believe the position-of-trust element could be addressed because of the prevalence and necessity of trust in the workplace. CRESSEY, *supra* note 117, at 154–55. He viewed the elimination of verbalizations as the most appropriate target for rehabilitative penal programs. *See id*. at 155. He cautioned, however, that prison environments could cause offenders to replace one set of neutralizations with another. *See id*. at 156. Other researchers are less pessimistic than

words, judges may be able to deter future white collar crime not simply through punishment, but by educating potential offenders as to the psychological mechanisms that allow for the commission of crime.

The practice of judges inquiring into offender neutralizations raises a host of additional positives and negatives. One positive might be that judges will use these inquiries to mitigate against what many consider to be an overly harsh sentencing scheme for white collar offenders. As explained above, although *Booker* rendered the Sentencing Guidelines advisory, they are still the "initial benchmark" at sentencing and carry great weight in most sentencing decisions.[279] And because of steady increases in penalties for economic crimes, white collar defendants, particularly those facing high loss amounts, are being sentenced drastically higher than in the past.[280] Judicial inquiry into a defendant's neutralizations may provide the court with a more complete understanding of the defendant's conduct, possibly mitigating his criminal behavior that would have otherwise resulted in a lengthy sentence.

This appears to be precisely what happened in Judge Rakoff's courtroom. He rejected the Guidelines' heavy reliance on the monetary gain to Rajaratnum from Gupta's inside tips because it failed to address what he saw as the heart of Gupta's crime—the abuse of trust.[281] Judge Rakoff then sought an explanation for that abuse of trust, finding credible Gupta's rationalizations of his conduct. Gupta's appeal-to-higher-loyalty, metaphor-of-the-ledger, and claim-of-entitlement neutralizations became sentencing mitigators under § 3553(a), resulting in a downward variance from the applicable Guidelines range.[282]

Many, of course, would view what happened in Gupta's case as a great negative. They not only disagree that the economic crime guidelines are overly harsh, but they argue white collar offenders are finally receiving sentences commensurate with the harms they cause. Therefore, judicial inquiry into offender neutralizations is not necessary, especially if they lead

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Cressey. *See* Maruna & Copes, *supra* note 11, at 299–300 (describing programs successfully challenging offenders' neutralization techniques but acknowledging the effectiveness of these programs "remains an [open] empirical question").

279. *See* Gall v. United States, 552 U.S. 38, 49 (2007).

280. *See White Collar Sentencing Data*, *supra* note 26, at 129 (showing a steadily increasing average sentence length for white collar offenders since 2005); *see also* Felman, *supra* note 215, at 138. Some say, pointedly, that white collar sentencing, even under the advisory Guidelines system, is completely "out of whack" and "patently absurd on [its] face." *See* Bowman, *supra* note 220, at 172; *see also* United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006). As Professor Frank Bowman points out, "[U]nder the current Guidelines, a judge who wanted to impose a 25-year sentence on an Ebbers, a Skilling, or a Rigas, thus equating their economic offenses with murder by a five-time felon, *would have to depart downward 19 offense levels to do it*." Bowman, *supra* note 220, at 169.

281. Sentencing Memorandum and Order, *supra* note 2, at 2.

282. It appears that many judges sentencing white collar offenders are finding reasons to impose lower prison terms than suggested by the applicable Guidelines range, particularly in high-loss cases that go to trial. *See White Collar Sentencing Data*, *supra* note 26, at 131 (reporting judges are varying downward in 23.5 percent of white collar cases that end in a guilty plea and in 43.7 percent that end in a conviction after trial).

to more lenient sentences.[283] Moreover, critics might argue that judicial inquiry into the mental processes that white collar offenders undergo may create other problems. It is possible that neutralizations could become legally sanctioned proxies for judges wishing to give lenient sentences to offenders with which they most closely identify. This was one of the concerns expressed at the time of the Sentencing Reform Act's passage and embodied in the original fraud guideline.[284] The metaphor-of-the-ledger neutralization, which Judges Rakoff and Swain credited, seems particularly susceptible to becoming a tool for judges seeking to lessen punishment for defendants with similar backgrounds as their own.[285]

All of this highlights the larger concern of increasing sentencing disparity. Inherently, the more individualized sentencing becomes, the less uniformity exists. Creating uniformity in sentencing was one of the primary goals of the Sentencing Reform Act.[286] While the *Booker*-through-*Pepper* line of cases preferences judicial sentencing discretion over mandatory guidelines that guarantee uniformity, a "just legal system seeks not only to treat different cases differently but also to treat like cases alike."[287] And for white collar sentences, disparity is on the rise. Non-government sponsored below Guidelines range sentences (i.e., sentences in which there was a judicial departure or variance without a government motion) in fraud cases, which include white collar offenses,[288] rose from 6.2 percent prior to *Booker*, to 16.4 percent after *Booker*, and now sits at 23.8 percent.[289] The limited data available focusing specifically on white collar offenders indicates that non-government sponsored below range

283. *See, e.g.*, Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007) (disagreeing that white collar defendants are subjected to uniquely harsh penalties under the Guidelines).

284. *See* Bowman, *supra* note 4, at 385; Breyer, *supra* note 209, at 20–21.

285. Of course, Judge Swain and Judge Hittner rejected many of the neutralizations offered by Madoff and Stanford, so there are no guarantees as to how judges will view specific offender neutralizations.

286. *See* U.S. SENTENCING COMM'N, *supra* note 208, at 3–4; Hofer & Allenbaugh, *supra* note 208, at 20–21.

287. Pepper v. United States, 131 S. Ct. 1129, 1252 (2011) (Breyer, J., concurring).

288. The Sentencing Commission does not consistently break out statistics for white collar offenses; the fraud offense category includes white collar crimes, as well as other forms of economic crimes sentenced under § 2B1.1. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2013).

289. *See Prepared Testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission*, U.S. SENTENCING COMMISSION 47 (Oct. 12, 2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf; *2012 Sourcebook of Federal Sentencing*, U.S. SENTENCING COMMISSION tbl.27A (2012), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm (last visited Apr. 26, 2014). The numbers are even higher when focusing on offenders sentenced under the specific fraud guideline, § 2B1.1, which would include the vast majority of white collar offenders. In fiscal year 2012, 25.3 percent of § 2B1.1 offenders received a non-government sponsored below range sentence. *Id.* tbl.28. Non-government sponsored below range sentences are the best measure of whether the Guidelines are being followed by sentencing courts because they represent "pure" judicial discretion.

sentences currently top 25 percent.[290] This trend appears to be even more pronounced for high-loss economic crimes, such as those committed by Gupta, Madoff, and Stanford. Whether these increases in variance rates are warranted or not depends on one's point of view, but providing judges with another tool to vary from the Guidelines will likely decrease overall sentencing uniformity.[291]

One final consideration related to increased individualized sentencing is whether courts possess the institutional competency to accurately assess offender neutralizations. Most district court judges are not social scientists or criminologists. It could be argued that judges lacking criminological training are ill equipped to investigate and accurately assess how offenders neutralize their conduct. While there is some intuitive appeal to this argument, sentencing judges routinely make assessments regarding defendants' backgrounds and mental processes, including delving into their motivations. The nature of some offenses requires it,[292] and § 3553(a) suggests that such an inquiry is mandated in all cases. Not surprisingly, then, many judges see these inquiries as their "prime objective" at sentencing, using their considerable autodidactical abilities to perform them effectively.[293] Even if individual judges do not possess special training in evaluating neutralizations, they are not acting alone during the sentencing process. Each judge is aided by a comprehensive presentence investigation report created by a probation officer who has special expertise in uncovering all relevant information about the offender and the offense.[294] This is not to mention the role of the prosecutor and defense attorney, whose obligation it is to educate the court, possibly through expert testimony, as to all sentencing aggravators and mitigators, including offender neutralizations.[295]

290. *See White Collar Sentencing Data*, *supra* note 26, at 128.

291. Rising variance rates could be tempered by formalizing neutralization inquiries and making their evaluation part of the Guidelines themselves. Neutralizations could be taken into account by amending the text of the fraud guideline or its application notes, or by adding a policy statement addressing neutralizations. Some may argue, however, that this simply hides sentencing disparity; offenders are still being sentenced in a less uniform manner, but the disparity is now sanctioned by the Guidelines.

292. *See* Hessick, *supra* note 19, at 96–97.

293. Irving R. Kaufman, *Sentencing: The Judge's Problem*, ATL. MONTHLY, Jan. 1960, at 3, *available at* http://www.theatlantic.com/past/docs/unbound/flashbks/death/kaufman.htm.

294. *See generally* OFFICE OF PROB. & PRETRIAL SERVS., *supra* note 25.

295. The adversarial process, which is still very active during sentencing, should guard against defendants raising neutralizations as a way to game sentencings to get a lower punishment. The validity of a defendant's claimed pre-act mental process may be tested by the usual evidence at sentencings—witness testimony, affidavits, documentary evidence, and the like.

2. Disrupting the Mechanisms That Make White Collar Crime Possible

In addition to increased individualized sentencing, judicial inquiry into offender neutralizations also has the benefit of disrupting the mechanisms that make white collar crime possible. How this may occur, however, is somewhat counterintuitive.

In one view, all neutralizations are negative because they are the mechanisms by which individuals commit white collar crime. According to Cressey, without neutralizations, there is no white collar crime.[296] Therefore, it may seem that regardless of what the law allows, sentencing judges should not be inquiring into or evaluating neutralizations because that would only perpetuate their existence, thereby perpetuating the very offenses judges are punishing.[297] Under this view, any consideration by a court of crediting an offender's neutralization as a sentencing mitigator (as occurred in the Gupta and Madoff cases) should be strictly prohibited.

Although this view has the benefit of definiteness, it is myopic. Neutralizations originate from many different sources, not just the legal system or sentencing hearings. Neutralization theory posits that offenders learn the verbalizations they use to neutralize their criminal conduct from a number of sources.[298] While these sources may include the legal system generally and judicial sentencing determinations specifically, they also include the corporate and organizational environments in which offenders work and live—a more direct (and likely) source of learned neutralizations.[299] Therefore, a blanket prohibition on judges inquiring into neutralizations would not eliminate the mechanisms that make white collar crime possible.[300]

A better approach allows judges to inquire into defendants' motivations and rationalizations, confront the neutralization techniques that are revealed, and credit or reject those neutralizations as part of the court's discretionary sentencing process. By doing so, judges have an opportunity to neutralize neutralizations. If courts publically explain what neutralizations are, how offenders use neutralizations to facilitate their

296. *See* Cressey, *supra* note 19, at 15 ("It follows from my generalization that embezzling can be effectively blocked at the . . . verbalization point.").

297. Indeed, Sykes and Matza believed the legal system itself provided many of the neutralizations that offenders used to facilitate their delinquency. *See* MATZA, *supra* note 148, at 61 ("The law contains the seeds of its own neutralization."); Sykes & Matza, *supra* note 11, at 666.

298. *See* LANIER & HENRY, *supra* note 14, at 169–70; Benson, *supra* note 16, at 588.

299. *See* Benson, *supra* note 16, at 588 (explaining how neutralization techniques vary across white collar offense types).

300. It could be argued that judges, as part of their sentencing determinations, should be required to identify white collar neutralizations and then reject them, possibly even treating any neutralization raised by a defendant as a sentencing aggravator. This practice might lessen the effectiveness of neutralizations because judges would be rejecting their validity directly. The problem with this approach is that it would still not capture neutralizations learned from other sources outside of the legal or sentencing context, and it would likely drive neutralizations underground. No defendant would offer a rationalization, no matter how true, for fear of it being used as a sentencing aggravator. Neutralizations would continue to enable white collar crime; they would simply be more difficult to identify.

crimes, and why neutralizations fail as true "defenses" to illegal behavior, future potential offenders may view neutralizations differently. Put another way, a neutralization that is a demonstrated failure in harmonizing a white collar offender's breach of trust and his self-perception as an upstanding citizen ceases to adequately rationalize the illegal behavior. And when a neutralization ceases to rationalize illegal behavior, the behavior can no longer proceed.

In addition, this approach conforms to what is likely widespread practice among judges. If the Gupta, Madoff, and Stanford cases are any indicator, judges are already engaged in neutralization inquiries. Such inquiries also have the benefit of not sacrificing the positives of increased individualized sentencing, especially considering how little we actually know about neutralizations. If it is true that not all neutralizations are uniformly "bad," it may be that the overall goals of sentencing are best furthered by judges considering and crediting benign neutralizations, even at the risk of marginally enabling some white collar crime. Allowing, and even encouraging, neutralization inquiries lets judges practice individualized sentencing, yet still publically reject "toxic" neutralizations. This balanced and flexible approach stays true to the normative underpinnings of *Pepper* and § 3553(a), while providing courts with an opportunity to disrupt the mechanisms that make at least some white collar crime possible.

Regardless of where the line is drawn between encouraging some neutralizations and discouraging others, judicial inquiry into the neutralizations defendants employ must be transparent. Sentencing transparency was one of the twin goals of the Sentencing Reform Act, and it is no less important today.[301] As evidenced by the Gupta, Madoff, and Stanford cases, some courts' sentencing determinations are being influenced by offender neutralizations. But precisely what inquiries are being made, under what circumstances, and to which defendants is unclear. Nor is it clear how much judges truly understand about the role of neutralizations in the etiology of white collar crime. In order for judges to make effective sentencing inquiries and properly credit or reject defendants' neutralizations, judges must be better educated as to the causes of white collar crime. At the same time, in order for sentencing policymakers to evaluate the effectiveness of these inquiries and how they affect federal sentencing as a whole, judges must memorialize their sentencing determinations, including their search for the why of white collar crime.

301. *See* U.S. SENTENCING COMM'N, *supra* note 208, at 3–4; *see also* STITH & CABRANES, *supra* note 208, at 38–77.

CONCLUSION

"When you ask people why they commit crime, they make sounds. I call them verbalizations. These are data. You study them."[302] That is how Donald Cressey, the pioneering white collar criminologist, described his research into what would become known as offender neutralizations, the psychological mechanisms white collar defendants employ to free themselves from social norms and engage in criminal behavior. Cressey spent his career searching for the why of white collar crime, trying to understand what caused "good people" to commit terrible breaches of trust.

As the cases of Rajat Gupta, Peter Madoff, and Allen Stanford demonstrate, judges are also engaging in this inquiry, and it is having an impact at sentencing. This Article set out to explore this previously unexamined aspect of white collar sentencing, primarily through the criminological theory of neutralizations, which is particularly compelling in describing the etiology of white collar crime. The sentencings of Gupta, Madoff, and Stanford highlight how defendants may rationalize their conduct through eight different neutralization techniques specific to white collar offenders, and how judges credit some of those neutralizations as sentencing mitigators while rejecting others. Although judicial inquiry into offender neutralizations raises legitimate concerns, on the whole neutralization inquiries appear beneficial. When undertaken in a transparent manner by judges educated about the role of neutralizations in white collar cases, these inquiries can increase individualized sentencing and even potentially disrupt the mechanisms that cause some white collar crimes. Therefore, they should become a larger part of the white collar sentencing discussion.

302. Maruna & Copes, *supra* note 11, at 222 (quoting Interview with Edwin M. Lemert, Professor Emeritus, Univ. of Cal., Davis (Mar. 16, 1979), *in* CRIMINOLOGY IN THE MAKING: AN ORAL HISTORY 118, 139 (John H. Laub ed., 1983)).