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Michelle S. Jacobs

University of Florida, Levin College of Law, jacobsm@law.ufl.edu

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LOYALTY'S REWARD – A FELONY CONVICTION: RECENT PROSECUTIONS OF HIGH-STATUS FEMALE OFFENDERS

*Michelle S. Jacobs**

I. INTRODUCTION

Over the past four years, the American public has witnessed a seemingly unending number of corporate and white-collar scandals. Corporate scandals in the business world are not a new phenomenon; indeed, every decade has had its share. Michael Milken, the Wall Street wonder of the eighties, along with his associate, Ivan Boesky, were both dethroned in the “junk bond” scandal.¹ This was followed by the Savings and Loan Scandal that sent Charles Keating to jail.² The Archer Daniels Midland price fixing scandal³ marked the nineties, as did the Whitewater investigation that was closely associated with then President William Clinton and his wife, Hillary Clinton.⁴

* Professor of Law, University of Florida, Levin College of Law.

1. See Kathleen Morris, *The Reincarnation of Mike Milken*, BUS. WEEK, May 10, 1999, available at http://www.businessweek.com/1999/99_19/b3628001.htm; see also Biographical Entry for Ivan Boesky, http://www.reference.com/browse/wiki/Ivan_Boesky (last visited Mar. 26, 2006).

2. The Savings and Loan crisis of the 1980s “turned out to be the costliest white-collar crime scandal in U.S. history.” Kitty Calavita & Henry N. Pontell, *The State and White Collar Crime: Saving the Savings and Loans*, 28 LAW & SOC’Y REV. 297, 297 (1994).

Charles Keating, owner of Lincoln Savings and Loan in Irvine, California, was one of the most notorious figures in this scandal. Savings and Loan Crisis, http://www.biography.ms/Savings_and_Loan_scandal.html. He was convicted of fraud and racketeering, and served four-and-a-half years in prison before his convictions were overturned. *Id.* At the end of the savings and loan investigations, over eight hundred savings and loan offenders had been convicted, and seventy-seven percent of them received prison sentences. Calavita & Portell, *supra*, at 297-98.

3. See Nicholas M. Horrock, *Analysis: Bush’s Corporate Ethics*, INSIGHT ON NEWS, Mar. 18, 2002, <http://www.insightmag.com/main.cfm/include/detail/storyid/218392.html>.

4. The investigation was named after a property purchased by Bill Clinton and Jim McDougal in Marion County, Arkansas. ROBERT W. RAY, INDEPENDENT COUNSEL, FINAL REPORT OF THE INDEPENDENT COUNSEL IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION VOL. II.A 1 (2001), available at <http://icreport.access.gpo.gov/final>. Some of the Whitewater transactions became part of the independent counsel’s investigation of the

Nonetheless, the present wave of scandals distinguishes itself for the sheer number of companies being investigated.⁵ It appears that no industry has been safe from scandal.⁶ The investigations prompted by the collapse of Houston's energy giant, Enron, were independently responsible for the indictments of thirty individuals as of May 2004.⁷ The present scandals are also interesting because they provide us with an opportunity to observe the prosecutions of several women of high status charged with white-collar crime.⁸ Other than Susan McDougal, a defendant in the Whitewater case,⁹

failure of Madison Guaranty Savings and Loan Association. *See id.*

5. See James Toedtman, *Scandal Scorecard*, CHI. TRIB., July 13, 2004, available at <http://www.chicagotribune.com/business/ny-scandal-scorecard,1,7241399.story> (listing nineteen corporate scandals, eleven Wall Street investigations, three investigations of regulating bodies, and eight mutual funds that were accused of wrongdoing).

6. The Attorney General of New York also investigated the insurance industry. Since 2004, the hint of scandal continues. See Gretchen Morgenson & Jenny Anderson, *Insiders Collected \$1 Billion Before Refco Collapse*, N.Y. TIMES, Oct. 25, 2005, at C1 available at <http://www.nytimes.com/2005/10/20/business/20/refco.html> (describing the collapse of a decades-old investment firm whose insiders received more than one billion dollars in cash one year before it sold shares to the public and then made the fourth largest bankruptcy filing in United States history); *Bayou Hedge Fund Founder, CFO Plead Guilty: Company Leaders Took Part In Scandal That Allegedly Cost Investors Millions*, MSNBC, Sept. 29, 2005, available at <http://www.msnbc.msn.com/id/9530534/from/RL.3/>.

7. Enron's bankruptcy now tops the list as the biggest corporate collapse in the United States. *See A Guide to Corporate Scandals*, ECONOMIST, July 15, 2002.

8. The definition of the term white-collar crime differs widely among scholars. As originally coined by Edwin Sutherland, it referred to "a crime committed by a person of respectability and high status in the course of his occupation." Elizabeth Szoocky, *Imprisoning White Collar Criminals*, 23 S. ILL. U. L.J. 485, 485-86 (1999). Other scholars remove the focus from the offender and refer instead to a certain group of offenses. See Stuart Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 501 n.3 (2004). The use of deception by professionals or persons with special technical and professional knowledge to achieve financial gain is the focus of these offenses. See J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1207-08 (1999). Strader posits that it is often better to define white collar crime by stating what it is not—white collar crime does not relate to the possession, sale or distribution of controlled substances, and excludes all of the following: the use or threat of use of physical force; activities by organized crime groups; immigration; civil rights; and national security violations. *Id.* at 1209-10.

9. Susan McDougal, her husband, James B. McDougal, and then governor of Arkansas, Jim Guy Tucker, were indicted and convicted of conspiracy and fraud in connection with the Whitewater investigation. *See The Trials and Tribulations of Susan McDougal*, CNN.COM, Apr. 8, 1999, <http://www.cnn.com/ALLPOLITICS/stories/1999/04/08/mcdougal.trials/>. James McDougal became a government witness in the investigation and tried to convince his wife to cooperate as well. *Id.* She refused, and in addition to being sentenced to two years on the Whitewater charges, she was held for eighteen months on a civil contempt charge for refusing to testify in Kenneth Starr's investigation. *Id.* McDougal served the eighteen months plus four on the original conviction. *Id.* Upon release, she was tried and acquitted of embezzlement of funds from conductor Zubin Mehta. *Id.* She was also indicted for

and Leona Helmsley, the New York Hotel proprietor,¹⁰ one is hard pressed to recall significant numbers of women publicly associated with white-collar crime or corporate scandal of the level we presently see.

Between 2001 and 2004, six high status women were charged with crimes in connection with corporate criminal cases.¹¹ The public is familiar with some of the women, although not all of their cases have been covered equally in the press. The most thorough press coverage was of the arrest and trial of Martha Stewart, former CEO of Martha Stewart Living Omnimedia, whose case has been referred to as “mediagenic.”¹² Stewart’s public persona drove the coverage despite the fact her criminal acts were neither the most serious, nor the most extensive, of the six.¹³ The other five women are Lea Fastow, former assistant treasurer of Enron;¹⁴ Betty

criminal contempt of court and obstruction of justice as a result of her refusal to testify before Starr’s grand jury. *Id.* Susan McDougal believed that Ken Starr was “out to get” President Clinton and if she did not testify the way Starr wanted her to, she would face a perjury indictment. *See McDougal Not Guilty on One Count; Mistrial Declared On Other Two Charges*, CNN.COM, Apr. 12, 1999, <http://www.cnn.com/ALLPOLITICS/stories/1999/04/12/mcdougal.verdict/> McDougal testified on her own behalf at her criminal contempt trial and stated that she did not discuss the illegal loan she obtained with the Clintons, and as far as she knew Clinton had not testified untruthfully to the grand jury investigating Whitewater. *Id.* Commentators believed McDougal was prosecuted because she was viewed as being loyal to Bill Clinton. *See Jury Finds McDougal Not Guilty of All Charges*, CNN.COM, Nov. 23, 1998, <http://www.cnn.com/ALLPOLITICS/stories/1998/11/23/mcdougal/>

10. *See United States v. Helmsley*, 985 F.2d 1202 (2d Cir. 1993). In 1991, Leona and Harry Helmsley, luxury hotel proprietors, were charged with tax evasion. Iver Peterson, *Harry Helmsley: Unfit for Trial but Fit for Business*, N.Y. TIMES, Aug. 12, 1991, at B1. Harry Helmsley subsequently became too ill to prosecute and Leona bore the brunt of the criminal prosecution and the media spectacle that accompanied it. *Id.* Cf. Joan Macleod Heminway, *Save Martha Stewart? Observations About Equal Justice in U.S. Insider Trading Regulation*, 12 TEX. J. WOMEN & L. 247 (2003) (contrasting Martha Stewart’s prosecution with Leona Helmsley’s and raising the possibility that Stewart was prosecuted because she was a successful business woman).

11. *See Toedtman*, *supra* note 5.

12. *See* Allan Sloan, *She’s a Criminal? Give Me a Break*, NEWSWEEK, March 15, 2004, available at <http://www.msnbc.msn.com/id/4467515/>; *see also* Kathleen Brickey, *Mostly Martha*, 44 WASHBURN L.J. 517, 521 (2005).

13. *See United States v. Stewart*, 323 F. Supp. 2d 606, 624-33 (S.D.N.Y. 2004). Martha Stewart’s case generated ongoing comments in the general press as well as in academic circles. Her prosecution was both hailed and denounced. For a sampling of the law review articles written about Martha Stewart, *see Brickey*, *supra* note 12; Heminway, *supra* note 10; Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should Be Charged With Criminal Conduct?*, 109 PENN. ST. L. REV. 1059 (2005); Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023 (2005); Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and The Need For a Law of Counts*, 109 PENN. ST. L. REV. 1107 (2005); *see also* Kathleen Brickey, *Enron’s Legacy*, 8 BUFF. CRIM. L. REV. 221 (2004).

14. *See United States v. Fastow*, 300 F. Supp. 2d 479 (S.D. Tex. 2004).

Vinson, former account manager for WorldCom;¹⁵ Kathleen Winter, former director at Marsh & McLennan, Inc.;¹⁶ Helen Sharkey, of Dynegey, Inc;¹⁷ and Paula Rieker, former Vice President, Managing Director of Investor Relations and Corporate Secretary of Enron.¹⁸ Lea Fastow's prosecution also received some media attention, although the simultaneous prosecution of her husband, Andrew Fastow, the former CFO of Enron, undoubtedly motivated the coverage.¹⁹ Similarly, Betty Vinson's case came to the attention of the press because her guilty plea helped secure the government's case against the CFO of World Com, Scott Sullivan. Sullivan eventually entered into a cooperation agreement with the government.²⁰ His cooperation enabled the government to prosecute Bernard Ebbers, the former CEO of WorldCom at the time the telecommunications firm collapsed.²¹ Relatively little information can be found in the public domain about the other three women, who have all plead guilty, and are presently cooperating with authorities and awaiting sentencing in 2006.

During the same period of time these corporate scandals were unfolding, another "mediagenic" case of a high status woman was investigated and prosecuted. This woman was rap artist Lil' Kim, whose birth name is Kimberly Jones.²² At first blush, Lil' Kim's case appeared to fit within the parameters of the prosecutions of the other high status women. She was,

15. See *In re WorldCom, Inc. Securities Litigation*, 234 F. Supp. 2d 301 (S.D.N.Y. 2002).

16. *Another Marsh Exec Pleads Guilty to Bid Rigging in Spitzer Probe*, INSURANCE JOURNAL, Feb. 24, 2005, <http://www.insurancejournal.com/news/national/2005/02/24/51926.htm>.

17. U.S. Securities and Exchange Commission, Litigation Release No. 18188 (June 12, 2003), available at <http://www.sec.gov/litigation/litreleases/lr18188.htm>.

18. See Press Release, U.S. Dep't of Justice, Former Enron Executive Paula Rieker Pleads Guilty to Insider Trading, Agrees to Cooperate with Ongoing Probe (May 19, 2004), available at http://www.usdoj.gov/opa/pr/2004/May/04_crm_347.htm. Rieker plead to a one-count information alleging she engaged in insider trading in violation of 15 U.S.C. § 78ff and § 78j (b). *Id.*

19. See Mary Flood, *Enron Judge Rejects Plea Bargain for Lea Fastow*, HOUSTON CHRON., Jan. 7, 2004, available at <http://www.chron.com/disp/story.mpl/special/enron/2340879.html>; Krysten Crawford, *Lea Fastow Pleads - Who's Next?*, CNN.COM, May 6, 2004, http://money.cnn.com/2004/05/06/news/midcaps/enron_lfastow/. Over one-half of the content in the articles mentioning Lea Fastow focus on the other primary male defendants in the case.

20. Brooke A. Masters, *Two Who Falsified Books At WorldCom Testify*, WASH. POST, Feb. 3, 2005, at E02.

21. Ebbers was convicted at trial and sentenced to twenty-five years in prison. See Andrew Ross Sorkin, *How Long To Jail White-Collar Criminals?*, N.Y. TIMES, Sept. 16, 2005, at C1.

22. See *Lil' Kim Faces November Trial*, MSNBC.COM, Apr. 19, 2004, available at <http://www.msnbc.msn.com/id/4739992>.

for example, charged with a classic white-collar cover-up crime, as was Martha Stewart.²³ She was charged in connection with an investigation into the actions of others. However, for reasons that will be discussed in Part IV of this Article, Lil' Kim's high status was not sufficient to elevate her case to the level of white-collar treatment.²⁴

The fact that little media attention has been devoted to these women's cases is not surprising. With the exception of an occasional article now and then mentioning the sky rocketing rates of female incarceration, for the most part, women's crime tends to be invisible to the public eye.²⁵ The statistical data the government collects and analyzes on women and crime will be discussed in Part II. Through the use of this data, a portrait of the female offender will be developed, and the factors, or pathways, which lead to women's offending will be discussed. In addition, a query will be made as to whether a pathway based on loyalty can be added. What can the experiences of Fastow, Vinson, and Stewart tell us about women's crime? Is there a basis of comparison between the prosecution of these high status women and the prosecution of women engaged in regular street crime?

Part III of this Article will focus on the prosecution of the individual cases of Fastow, Vinson, and Stewart. Their cases, and where relevant, their life circumstances, and the issue of whether loyalty played a role in their offending, will be examined and contrasted with the experiences of female offenders who are not of high status. Lil' Kim's prosecution will be the focus of Part IV and will highlight the problems of a female offender of color who has high status but whose acts are deemed to be street crime. The Article concludes by suggesting that although the high status female white-collar offender does not share the personal characteristics of the regular female offender, the two groups of women share a common pathway to crime—loyalty to a man engaged in wrongdoing. Moreover, white-collar female offenders do not differ significantly from many women who are incarcerated for street crimes. Lil' Kim's case offers an example of how strikingly close a street crime offender can be to a white-collar offender.

23. The term "cover up" crime is used by Professor Stuart P. Green to describe crimes that are ultimately used to establish criminal liability when the prosecutor cannot establish liability for the crime that serves as the basis of the initial investigation. Cover-up crimes include perjury, making a false statement, and obstruction of justice. See Stuart P. Green, *Uncovering the Cover-up Crimes*, 42 AM. CRIM. L. REV. 9, 9 (2005).

24. See *infra* Part IV.

25. See Fox Butterfield, *Women Find A New Arena For Equality: Prison*, N.Y. TIMES, Dec. 29, 2003, at A9.

II. WOMEN AND CRIME

In the past, women's crime was not specifically studied to determine whether the criminal justice policies that were developed with men in mind were put to appropriate use with women offenders. There was an unspoken assumption that the analysis of men's criminality would satisfactorily explain women's criminality. By all measures available now, that assumption was erroneous.²⁶ Most women in prison have been convicted of non-violent crimes, property crimes, and low-level drug offenses.²⁷ The majority of incarcerated women are women of color.²⁸ Incarcerated women, in general, have attained low levels of education and were living under harsh economic conditions prior to their arrest.²⁹ Over forty percent of women offenders reported a history of physical or sexual abuse prior to offending.³⁰

Factors that appear to contribute to women's criminality are low income, school failure, limited vocational skills and work experience.³¹ In addition, women victims of profound physical and sexual abuse tend toward a disproportionately criminal path.³² The two scholars most frequently cited who study women's pathways to crime are sociologists Kathleen Daly and Beth Richie. Daly compared women and men's offending within the context of a criminal court in Connecticut.³³ Richie, on the other hand, focused on battered African American women detained at Riker's Island in New York.³⁴ Though each used differing nomenclature for the pathways they observed, both recognized the role violence, abuse, and poverty played

26. See LAWRENCE A. GREENFELD & TRACY SNELL, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 9-10 (Dec. 1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf>.

27. See Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Non-violent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 137 (1999). In federal prisons, seventy-two percent of women incarcerated were convicted of drug offenses; an additional twelve percent were incarcerated for property crimes, which included larceny and fraud. See GREENFELD & SNELL, *supra* note 26, at 6. The authors state that twenty six percent of women admitted to prison following a court sentence are convicted of larceny or fraud compared with ten percent of men. *Id.*; see also Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J. L. & FEMINISM 291, 293 (2002) (arguing that women's crimes are less serious than the crimes men commit and that women's crimes cluster around drugs, embezzlement and fraud).

28. LENORA LAPIDUS ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES, 17-18 (2005), available at <http://www.fairlaws4families.org>.

29. GREENFELD & SNELL, *supra* note 26, at 5.

30. *Id.*

³¹ See KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT 43-45 (1994).

³² *Id.*

³³ *Id.* at 3-5.

³⁴ See BETH E. RICHIE, COMPELLED TO CRIME 101 (1996).

in the pathways.³⁵ Daly's category of "other" included women who were not abused or drug addicted and seemed to commit crime out of economic necessity or greed.³⁶ Although both sociologists make reference to crimes committed by women in association with men, Richie specifically mentions loyalty as a factor that may trap African American battered women.³⁷

None of the factors traditionally found among women offenders appear to be relevant for the six White high-status women featured in this article. Which, if any, factors would be predictive of white-collar offenses among women? After the feminist movement took root in the United States, theories abounded suggesting that with women's impending liberation, there would be a corresponding increase in the number of women committing white-collar crime.³⁸ The theory was that as more women moved up the corporate ladder, there would be more opportunity to engage in the same type of crimes as male executives.³⁹ The expected increase in women's white-collar crime did not materialize. Although the number of women in prison has increased, this is believed to be a result of changes in criminal justice policy, rather than changes in the amount and type of crime women commit.⁴⁰ More women are now being sent to prison for offenses that used to garner only a probationary sentence, but women still primarily commit non-violent crimes: larceny, theft, drunken driving, and fraud.⁴¹ In criminal enterprises, women still function at the lower echelons, clustered at the bottom of the organizational hierarchy, and their involvement in criminal activity is as minor players rather than primary players.⁴²

35. Daly studied her data and identified five types of women criminals: street women, harmed and harming women, battered women, drug connected women, and "others." DALY, *supra* note 33, at 45-49. Richie, on the other hand, listened to the women and identified six pathways from their stories of what led them to the point of arrest: women held hostage, projection and association, sexual exploitation, fighting back, poverty, and drug addiction. RICHIE, *supra* note 34, at 105-23.

36. DALY, *supra* note 33, at 48. There may be some overlap between Daly's "other" and Richie's "poverty" path. However, Richie's poverty path is defined as poverty caused by refusal of a violent spouse or intimate other to support a woman. RICHIE, *supra* note 34, at 120.

37. RICHIE, *supra* note 34, at 51.

38. See FRED A ADLER, *SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL* 164, 167-69 (1975).

39. *Id.* The theory has since been soundly criticized. See, e.g., MEDA CHESNEY-LIND & LISA PASKO, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* (2d ed. 2004). Chesney-Lind points to some studies by law enforcement that attempted to link women's crime to the movement for female equality. She argues, however, that careful analysis of the data relied upon disputed the "liberation" or "emancipation" hypothesis. *Id.* at 112-14.

40. Gertner, *supra* note 27, at 303.

41. CHESNEY-LIND & PASKO, *supra* note 39, at 99.

42. *Id.*

The life circumstances and characteristics of women incarcerated today appear strikingly different from the women named in corporate scandals. All six women were White, highly educated, and worked in high-status positions, enjoying relatively large salaries. It is doubtful whether the six women mentioned here serve as an indication that women have finally arrived in the higher ranks of white-collar crime. Indeed, it might be argued that although these women do not fit the characteristics of most female offenders, their crimes nonetheless fit squarely within the second most prevalent category of women's crime, fraud. In addition, despite the fact that there has been an increase in the number of women charged with embezzlement, most women charged in this category of offense are still low-level clerical staff and bank tellers.⁴³ The women mentioned in this Article are not low-level clerical staff. Nonetheless, despite their job titles, with the exception of Martha Stewart, they were removed from the centers of decision making.

A. Loyalty—A New Path to Crime?

Women's loyalty to principal male offenders, and its relationship to female offending, is an issue of concern.⁴⁴ The connection between a woman's criminality and a man's is most clearly demonstrated in the cases of women who are prosecuted for drug offenses.⁴⁵ Eda Katharine Tinto argues that the comfort and companionship of an intimate relationship may outweigh the risks of providing help to a partner engaged in crime.⁴⁶ The woman may also be dependent on the male offender for financial support for herself and her children.⁴⁷

At least four methods of charging criminal liability are associated with

43. *Id.* at 103. The data cited indicates that gains of men engaged in fraud were ten times higher than that achieved by women. *Id.* Fastow and Vinson appear to fit this pattern as well.

44. Gertner, *supra* note 27, at 305; Tracy Huling, *Women Drug Couriers*, 9 CRIM. JUST. 14, 16 (1995) (detailing narratives of women imprisoned for acting as mules on behalf of men they loved or feared).

45. See generally Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant's Gender and Ethnicity on Length of Imprisonment Under the Federal Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER RACE & JUST. 39 (2002); see also Eda Katharine Tinto, Note, *The Role of Gender and Relationship in Reforming The Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906, 917 (2001) (women's drug crime is often in support of partner's larger drug activities).

46. Tinto, *supra* note 45, at 918. However, she also notes that the woman might also calculate the risk she may encounter leaving the intimate partner if abuse is present in the relationship. *Id.* at 919. The woman may find it safer to assist in the criminal undertaking rather than risk injury to herself. *Id.*

47. *Id.*

establishing a woman's criminal liability through the actions of a connected male: constructive possession charges,⁴⁸ conspiracy charges,⁴⁹ accomplice liability,⁵⁰ and asset forfeiture laws.⁵¹ Most women engaged in crimes related to drug offenses are engaged at a low level in the enterprise and do not have major responsibility within the organizations. They may also have very little knowledge of the details of the enterprise itself. Once arrested for a drug offense, they are unable, at the time of sentencing, to obtain significant departures from sentencing guidelines through "substantial assistance" agreements. They have little information of value to offer law enforcement officials. Frequently, these low-level women end up with more significant sentences than the principal male offenders, as the principals can negotiate cooperation agreements.⁵² And even when the women may be able to assist, many do not assist the government because they do not want to be disloyal to the men who support them.⁵³

48. See LENORA LAPIDUS ET AL., CAUGHT IN THE NET, *supra* note 28, at 36-37. Leah Bundy was charged and convicted for weapons found in her boyfriend's apartment. *Id.* Bundy had gone upstairs to use the bathroom when the police raided the wrong apartment. *Id.* Constructive possession is a doctrine used to explain possession crimes where physical control of the item in question cannot be proved. WAYNE R. LAFAYE, CRIMINAL LAW 213 (2000). Instead the court will look to whether the defendant had the ability to exercise dominion and control over the item. *Id.*

49. LENORA LAPIDUS ET AL., CAUGHT IN THE NET, *supra* note 28, at 35. A narrative of Sally Smith who was charged with conspiracy for making two phone calls to collect money owed her boyfriend and signing two receipts for a cash exchange. *Id.* She was sentenced to life without the possibility of parole. *Id.* A conspiracy is an agreement between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means. LAFAYE, *supra* note 48, at 569.

50. LENORA LAPIDUS ET AL., CAUGHT IN THE NET, *supra* note 28, at 36. Brenda Prather handed her boyfriend a role of aluminum foil which he used in drug related activity. *Id.* The state imputed knowledge of the drug activity to her and she was convicted. *Id.* A person is legally accountable for the conduct of another when he is an accomplice of the other person's commission of the crime. LAFAYE, *supra* note 48, at 620.

51. LENORA LAPIDUS ET AL., CAUGHT IN THE NET, *supra* note 28, at 35-38. Eda Katharine Tinto formulates the categories somewhat differently, focusing on constructive possession, actions (non-criminal) that support criminal activity, and low-level criminal acts. Tinto, *supra* note 45 at 922-25. Among the activities which are described as supportive are opening the door to an apartment or using money that is the product of prior drug activity. *Id.*; see also Haneefah A. Jackson, *When Love is a Crime: Why the Drug Prosecutions and Punishment of Female Non-conspirators Cannot be Justified by Retributive Principles*, 46 HOW. L.J. 517, 518-19 (2003).

52. See Myrna Raeder, *The Forgotten Offender: The Effect of the Sentencing Guidelines and Mandatory Minimums on Women and their Crimes*, 8 FED. SENT'G REP. 157 (2002); see also Statement of Position, *National Association of Women Judges*, 8 FED. SENT'G REP. 176 (1995).

53. See generally PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* 212-14 (2000) (Angela Thompson, who was prosecuted for aiding her uncle's drug operation and refused to take a plea, believing it would require her to testify against her uncle, was sentenced as a first-time offender to fifteen years to life.).

While the three women discussed in this article are not involved in drug trade, there does appear to be a close connection for two of them between their offending and relationships, even if they are only business relationships, with men who are principal offenders. In Martha Stewart's case, it is not altogether clear whether loyalty played a role in her offending.

III. WOMEN AND ACTUAL OFFENSES

As is apparent from the discussion above, Fastow, Vinson, and Stewart do not reflect, at least to the naked eye, the normal pathways to crime that can be identified for most women. Indeed, they seem to meet the definition of Professor Daly's "other" category: women who commit crimes for financial reasons, unaffected by drug addiction, substance abuse, physical or mental abuse, or mental health issues.⁵⁴ All three, however, fall squarely within the category of fraud, which is the most common category of women's crime, second only to drugs. In addition, at least two shared a factor that is commonly found among women incarcerated for street crimes, particularly drug offenses. That trait is loyalty to a male, who is the primary wrongdoer. Of the three, Betty Vinson and Lea Fastow were the most seriously impacted by loyalty to the men in their lives. In this sense they are not terribly different from the wives, girlfriends, and friends of street criminals.

A. *United States v. Betty Vinson*

1. *The Facts*

Prior to its collapse, WorldCom was a telecommunications giant. Through mergers, it had grown from a small long distance company into the entity that became known as WorldCom.⁵⁵ Betty Vinson started her employment with the company as a mid-level accountant when it was still a small long distance company.⁵⁶ Ms. Vinson was described as a "loyal employee who would anything you told her."⁵⁷ After a promotion,

54. See DALY, *supra* note 33, at 48.

55. See Susan Pulliam, *Over the Line: A Staffer Ordered to Commit Fraud Balked, Then Caved—Pushed by WorldCom Bosses, Accountant Betty Vinson Helped Cook the Books—A Confession at the Marriot*, WALL ST. J., June 23, 2003, at A1 [hereinafter Pulliam, *Ordered to Commit Fraud*].

56. *Id.* Ms. Vinson was the daughter of parents who owned a typewriter shop, where she worked summers as a college student. *Id.*

57. *Id.*

elevating her to senior manager in WorldCom's Corporate Accounting division, her responsibilities included compiling data for the company's quarterly statements.⁵⁸ Unfortunately for Vinson, she and co-worker, Troy Normand, were approached in 2000 by their superior, Buford Yates who asked them to engage in questionable accounting practices in order to help close a gap between WorldCom's performance and Wall Street's expectations.⁵⁹ Initially, Vinson and Norman were concerned and disturbed by the request and did not want to oblige.⁶⁰ Later, at the trial of Bernard Ebbers, the CEO of WorldCom, Vinson testified that she initially decided to quit rather than comply with the request.⁶¹ She drafted a letter of resignation but never submitted it.⁶² Scott Sullivan, the CFO of WorldCom, took personal responsibility for allaying the fears of Vinson and Normand.⁶³ He appealed to her sense of loyalty and assured her that the manipulation was just for one quarter, that nothing she was doing was illegal, and that he would take responsibility if anything happened.⁶⁴ She testified that Sullivan convinced her that the fraudulent entries were just for the quarter, a one-time incident, and that he just needed time to turn things around so that WorldCom could meet Wall Street's expectations.⁶⁵ Vinson decided to stay because she accepted Sullivan's representations and wondered what right she had to question his strategy since, as Pulliam stated, he was "heralded as one of the top chief financial officers in the country."⁶⁶ In addition, Vinson felt personal financial pressures to stay.⁶⁷ She decided to help him just that one time.⁶⁸

Of course, one doesn't need to be a fortuneteller to predict that the manipulation would not end on that one occasion. Vinson and Normand ended up manipulating the figures for five additional quarters.⁶⁹

58. *Id.* Pulliam reports that by this time Vinson had ten employees reporting to her.

59. *See* Masters, *supra* note 20.

60. *Id.*

61. *Id.*

62. *Id.*

63. Pulliam, *Ordered to Commit Fraud*, *supra* note 55, at A1.

64. *Id.* Pulliam reports that she was informed that Sullivan told them to defer quitting because "they had planes in the air. Once they have landed, if you still want to leave, than leave, but not while the planes were in the air." *Id.*

65. *Id.*

66. *Id.*

67. *Id.* She rationalized that she was the primary breadwinner of the family and her family depended on her insurance coverage. *Id.* In this regard, Vinson shared the approach many female street crime offenders use when weighing whether to stay with drug dealing men.

68. *Id.*

69. Maximillian B. Torres, *The Scandal of Anti-Truth: The Era of Fraud*, ACTON INST.

Eventually, the deception was revealed when WorldCom collapsed.⁷⁰ The United States Attorney for Mississippi launched an investigation into WorldCom's financial irregularities. Initially, Vinson and Normand were not targets of investigation by the United States Attorney in Mississippi.⁷¹ They voluntarily came in and gave the office the information they had about the fraud.⁷² However, the investigation was eventually taken over by the United States Attorney for the Southern District of New York, who did treat Vinson and Normand as targets of the investigation.⁷³ Vinson was charged with conspiracy and securities fraud.⁷⁴ She pled guilty and agreed to cooperate with the government's prosecution of Sullivan and Ebbers.⁷⁵ When it was time for Vinson to be sentenced, the judge stated that she believed Vinson was at the lowest level of culpability for the fraud that took place at WorldCom.⁷⁶ Yet, at the same time she felt that without Vinson's false entries, WorldCom's true financial condition would have been discovered much earlier.⁷⁷ Vinson received a term of five months in prison and five months of house arrest.⁷⁸ Normand was sentenced to three years probation.⁷⁹ There is no evidence that Vinson reaped any undue financial reward, other than a promotion, which brought her to a higher salary level. Her decision to help was motivated by loyalty to Sullivan, Yates, and to WorldCom, as well as by the fear of the financial repercussions she would incur if she did not help.

Not everyone believed Vinson's sentence was just. A former federal prosecutor stated that neither of them should have been charged at all, but since they were charged, both should have received the same at sentencing.⁸⁰ He argued that Vinson was a low-level employee who did

(Acton Institute for the Study of Religion & Liberty, Grand Rapids, MI), Jan. 26, 2005, available at <http://www.acton.org/ppolicy/comment/article.php?id=245>.

70. See John Borland, *WorldCom Finances in Upheaval; CFO Fired*, NEWS.COM, June 25, 2002, <http://news.com.com/2100-1033-939344.html>.

71. Pulliam, *Ordered to Commit Fraud*, *supra* note 55, at A1.

72. *Id.*

73. *Id.*

74. *Id.*

75. See Masters, *supra* note 20.

76. See 2 *Ex-execs Sentenced In WorldCom Scandal*, THE CLARION-LEDGER, Aug. 6, 2005, available at <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/20050806/NEWS0108/508060345/1002>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* The former prosecutor, Jacob Frenkel, thought it was outrageous that Vinson would get the same sentence Martha Stewart received. He stated that "[t]he decision to prosecute these two people is like taking a sledge hammer to a thumb tack." *Id.* Scott

not bear major responsibility for the massive fraud that occurred at WorldCom. Here, too, Vinson's predicament can be compared with those of low-level female street crime offenders. Her actions were directed by other men who participated in the highest level of decision-making and reaped financial reward.

B. *United States v. Lea Fastow*

1. *The Charges*

Of the six white-collar defendants, Lea Fastow's charges were the most serious. She was initially charged with one count of conspiracy to commit wire fraud and defraud the United States;⁸¹ money laundering conspiracy;⁸² and four counts of subscribing to a false tax return.⁸³ Ms. Fastow held the title of Director and Assistant Treasurer of Corporate Finance at Enron from 1991 until 1997.⁸⁴ Her husband, Andrew Fastow, was Enron's Chief Financial Officer from 1997 until 2001; prior to that time he was the

Sullivan entered into a cooperation agreement of his own and pled guilty to securities fraud. He received a five-year sentence. See *Sullivan Gets Five Years for WorldCom Fraud – Fifth WorldCom Executive Sentenced to Prison in \$11 Billion Scandal*, MSNBC, Aug. 11, 2005, <http://www.msnbc.msn.com/id/8907976>. But see Torres, *supra* note 69 (contrasting Vinson, whose actions were driven by loyalty to her boss and by her own financial concerns, with Cynthia Cooper, the female accountant who, at great risk to herself, blew the whistle on WorldCom).

81. Indictment, *United States v. Fastow*, 300 F. Supp. 2d 479 (S.D. Tex. 2004) (No. H-03).

82. *Id.*; see also 18 U.S.C.A. § 1956(h) (West 2006). The money laundering statutes concentrate on fraudulent activities involving proceeds of unlawful activity. The elements of money laundering are that the defendant took part in a financial transaction, knowing that the property involved in the transaction involved proceeds of illegal activity; that the property involved was in fact the proceeds of illegal activity; and finally that the defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, source, location, ownership, or control of illegal proceeds. See ELLEN S. PODGOR & JEROLD ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 195 (2d ed. 1997).

83. 26 U.S.C.A. § 7206 (1). In order to establish this felony, the government must prove that the defendant willfully signed a return, statement, or other document under penalties of perjury; that the return, statement or document was materially false; and that at the time of signing the defendant did not believe it to be true and correct. Violations of the statute carry the possibility of a term of imprisonment of three years. PODGOR & ISRAEL, *supra* note 82, at 179.

84. See Indictment, *supra* note 81, ¶ II. Lea Fastow is the heir to the Weingarten Realty Investors, a Houston, Texas-based real estate investment trust with 355 income-producing and new development properties in twenty-one states. See Weingarten Realty Investors, <http://www.weingarten.com>. She graduated from Tufts University and obtained an M.B.A. in Finance from Northeastern Kellogg School of Business in 1987. Mike France, *Heiress in Handcuffs*, BUS. WEEK, Nov. 24, 2003, available at http://businessweek.com/magazine/content/03_47/b3859001_mz001.htm.

Managing Director.⁸⁵ At the time of the activities that formed the basis of the charges against her, Ms. Fastow was no longer employed by Enron and was a stay at home mother.⁸⁶ During the time in question, Andrew Fastow and Michael Kopper created several Special Purpose Entities (SPE) to hold off-balance sheet treatment of assets held by Enron.⁸⁷ Through the mechanism of the SPEs, Mr. Fastow was able to move debt off the books of Enron, thus concealing the true economic health of the corporation. These entities could only legitimately qualify as off-balance sheet entities if independent third party investors contributed at least three percent of the SPE's capital, and that investment was genuinely at risk.⁸⁸ If the third party was not truly independent or its equity not truly at risk, the SPE had to be consolidated onto Enron's balance sheet.⁸⁹ There were at least four SPEs created by Mr. Fastow that did not have independent third party investors and where the investments were not at risk. Ms. Fastow assisted with concealing the fraudulent nature of two of the SPEs.⁹⁰ In both cases, Ms. Fastow accepted "gifts" in her name and in the names of her children, knowing that the gifts were kickbacks.⁹¹ In another instance, the Fastows were attempting to hide the fact that Ms. Fastow's father was used as an "independent" third party of RADR.⁹² When the Fastows realized that the father's ownership would trigger a reporting requirement, they had him pull out of the deal. Ms. Fastow convinced her father to file a false tax return in an effort to continue hiding their involvement in the SPE.⁹³ On the most serious count, Ms. Fastow faced a potential term of imprisonment of twenty years.⁹⁴

Approximately six months after her husband's indictment on ninety-eight counts, ranging from conspiring to commit securities fraud to filing a false tax return, Ms. Fastow was indicted.⁹⁵ The prosecution of Ms.

85. See Indictment, *supra* note 81, ¶ II.3.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. The two SPEs mentioned in connection with Lea Fastow were RADR and CHEWCO. *Id.* In RADR, Lea Fastow and her husband loaned money to Kopper, for him to loan to the so-called independent investors. Andrew Fastow controlled the distribution of RADR proceeds through Kopper. *Id.*

91. See Indictment, *supra* note 81. Ms. Fastow received a total of \$141,218.00 from RADR.

92. *Id.*

93. *Id.*

94. Mary Flood, *Fastow Pleads Not Guilty to 78-Count Indictment*, HOUSTON CHRON., Nov. 7, 2002, available at <http://www.chron.com/disp/story.mpl/special/enron/1651437.html>.

95. See *Wife of Ex-Enron CFO Released from Prison*, MSNBC, June 6, 2005,

Fastow was commonly believed to be motivated by the government's desire to pressure her husband into cooperating with the government, and assist in its investigation of the role that Jeffrey Skilling and Kenneth Lay may have played in concealing and/or directing the fraud at Enron.⁹⁶ Initially, the government and the Fastows had agreed to a plea bargain for Ms. Fastow that would have allowed her to plead to one felony count of filing a false tax return.⁹⁷ Mr. Fastow would plead to two counts of conspiracy and agree to serve a ten-year sentence once his cooperation had ended.⁹⁸ In return, the government would recommend a five-month prison sentence for Ms. Fastow, with an additional five months of house arrest.⁹⁹ United States District Judge David Hittner rejected the proposed plea because it gave him no leeway to increase the sentence, and he set Ms. Fastow's case for trial.¹⁰⁰ The court's rejection of the plea caused a small media flash as many questioned what effect the denial of the bargain would have on Mr. Fastow's enthusiasm during the course of his cooperation.¹⁰¹ The plea deal for Ms. Fastow was reworked and the court accepted a plea to a misdemeanor charge of submitting an income tax return that failed to include \$47,800 in income on her 2000 personal taxes.¹⁰² Ms. Fastow was sentenced to a term of one year in prison.¹⁰³ Though Judge Hittner accepted the second plea, he was disturbed by the prosecution's behavior during the course of the negotiations.¹⁰⁴ He accused the prosecutors of manipulating the justice system to achieve their goals.¹⁰⁵

<http://www.msnbc.msn.com/id/8117665/>.

96. See Crawford, *supra* note 19.

97. *Id.*

98. *Id.*

99. *Enron Task Force Eases Up on Lea Fastow*, BILLINGS GAZETTE (Houston, Tex.), Mar. 17, 2004, available at BillingsGazette.com (type headline in search box) (Prosecutors objected to an apparent suggestion in pre-sentence report that Lea Fastow's sentence could be made stiffer.).

100. See Flood, *supra* note 19. In Ms. Fastow's pre-sentence report, which is not available to the public, there may have been a recommendation that the court could or should enhance Ms. Fastow's sentencing range, which ran from ten to sixteen months. Prosecutors argued against an enhancement saying Ms. Fastow played an integral role in getting her husband to cooperate. See *Enron Task Force Eases Up On Lea Fastow*, *supra* note 99.

101. Kenneth N. Gilpin, *Judge Rejects Plea Deal of Enron Figure's Wife*, N.Y. TIMES, Apr. 7, 2004, at B1.

102. See *Enron Task Force Eases Up on Lea Fastow*, *supra* note 99. The amount was part of over \$204,000 in undeclared income over the course of four years.

103. See Crawford, *supra* note 19.

104. *Id.*

105. The pertinent part of the court's remarks were, "The Department of Justice's behavior might be seen as a blatant manipulation of the federal justice system and is of great concern to this court." *Id.* It is not altogether clear whether the court was offended that

There is no hint of why Lea Fastow agreed to participate in concealment of the RADR and CHEWCO proceeds. Ms. Fastow had access to wealth of her own, independent of her husband's assets; therefore, it seems unlikely that financial need drove her decision making. In her sentencing remarks, Fastow stated merely that she had made errors in judgment that she would always regret.¹⁰⁶ The government never alleged that she masterminded the fraud at RADR or CHEWCO. Rather, it was her husband, who through his criminal actions exposed Ms. Fastow to prosecution. One can imagine that even a woman who is independently wealthy may have difficulty refusing a request for assistance from her intimate partner and the father of her children. Perhaps Fastow had to weigh and balance the same benefits, interests, and risks of being associated with a criminal intimate partner as the many women charged with street crime.

2. *The Children*

During the renegotiation of the second plea, it was widely reported that Ms. Fastow was interested in a plea that would allow her children to stay at home with one parent while the other was incarcerated, rather than running the risk that both parents would be incarcerated at the same time.¹⁰⁷ The government apparently acquiesced to this request.¹⁰⁸ Why the prosecution was sensitive to Ms. Fastow's child care needs and her wishes to protect her children from the indignity of having both parents incarcerated is not at all clear and is certainly a departure from common prosecutorial practice.

There are many Black and Latina women who are arrested at the same time as their husbands and boyfriends because the government is trying to pressure the husbands by arresting the women associated with them.¹⁰⁹ However, no generous provisions are made or negotiated for those women and the care of their children. There are over 1.3 million children in the United States who have a mother under correctional sanction.¹¹⁰

such serious charges had been brought against Lea Fastow to coerce her husband into a plea, or that the government made such serious allegations against her but seemed all too eager to sacrifice punishing her in order to gain her husband's cooperation.

106. *Id.* Fastow was quoted as saying "I've made errors in judgment, I will always regret. I didn't understand the impact they would have on my family and friends. I only intend to do right from now on." *Id.*

107. See Crawford, *supra* note 19; Flood, *supra* note 19.

108. When talking about taking the Fastow's children into account, Prosecutor Andrew Weissman, Director of the Enron Task Force, was reported as saying, "There is no reason for the government, when it can, to have a husband and wife serve their sentences at the same time." See Mary Flood, *Wife of Former Enron Chief Financial Officer Gets One-Year Prison Sentence*, HOUSTON CHRON., May 7, 2004.

109. LENORA LAPIDUS ET AL., CAUGHT IN THE NET, *supra* note 28, at 35.

110. Myrna S. Raeder, *A Primer on Gender Related Issues That Affect Female Offenders*,

According to Greenberg and Snell, sixty-four percent reported living with their minor children before entering prison, compared to forty-four percent of men.¹¹¹ The rate of fathers living with children does not, however, provide the full custodial picture. When a father is incarcerated, children are three times more likely to live with the other parent than when the mothers are in prison.¹¹² Seventy percent of women incarcerated in local jails are mothers.¹¹³ In the federal system, the United States Sentencing Commission's Policy Statement 5H1.6 specifically restricts the court's use of family ties as a basis for formulating a defendant's sentence.¹¹⁴ Moreover, when district court judges have attempted to accommodate a mother's concerns for the custodial well being of her children by giving the mother a downward departure from the sentencing guidelines, federal prosecutors have aggressively challenged those departures.¹¹⁵ The circuit court judges are likely to uphold the prosecutor's objections to downward departures. These mothers are mostly poor women of color, and their children are forced to deal with parent/child separation and potential termination of the mother's parental rights by the state.¹¹⁶ High status saved Lea Fastow's children from the trauma the children of poor defendants face when forcibly separated from their mothers through arrest and incarceration.

C. Martha Stewart

A. The Charges

In December 2001, ImClone, a pharmaceutical company, was on the

20 CRIM. JUST. 4, 7 (2004) [hereinafter Raeder, *A Primer*].

111. GREENFELD & SNELL, *supra* note 26, at 8.

112. LENORA LAPIDUS ET AL., CAUGHT IN THE NET, *supra* note 28, at Executive Summary. Ten percent of children with mothers incarcerated in state prisons are in foster homes or agencies, and seventy-nine percent live with a grandparent or relative. *Id.*

113. GREENFELD & SNELL, *supra* note 26, at 7. For women in state prisons, the figure is sixty-five percent and fifty-nine percent for women incarcerated in federal facilities. *Id.*

114. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2004).

115. LENORA LAPIDUS ET AL., CAUGHT IN THE NET, *supra* note 28, at 40 (citing the United States Court of Appeals for the Seventh Circuit).

116. Incarceration serves as a ground for termination of parental rights in many states. See Antoinette Greenway, *When Neutral Policies Aren't so Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African American Women*, 17 NAT'L BLACK L.J. 247, 254-55 (2003-2004); Raeder, *A Primer*, *supra* note 110, at 19. See also Philip Genty, *Damage to Family Relationship As a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678 (2003) (citing a two-hundred-fifty percent increase in the number of parental terminations in the five years since AFSA was enacted).

verge of receiving notice that the Food and Drug Administration would not accept its application for the approval of a drug ImClone was developing.¹¹⁷ The founder and CEO of ImClone, Sam Waksal, attempted to have Merrill Lynch & Co. sell all of his shares of the company stock prior to the announcement becoming public.¹¹⁸ Peter Bacanovic, a securities broker at Merrill Lynch, knew that his client Martha Stewart was a friend of Waksal's, and tried to get a message to her that Waksal was selling large blocks of stock.¹¹⁹ When Bacanovic was unable to reach Stewart directly, he instructed his assistant, Doug Faneuil, to handle any return calls from Stewart.¹²⁰ Stewart did speak with Faneuil, who communicated the fact that Waksal was selling his shares of ImClone.¹²¹ On December 27, 2001 she ordered her holdings to be sold.¹²² The next day, when the FDA announcement was released, ImClone shares lost eighteen percent of their value.¹²³ Martha Stewart made approximately \$45,000 profit from the sale.¹²⁴ The precipitous drop in the value of ImClone shares prompted the government to investigate large sales of stock made by insiders the day before the announcement was made.¹²⁵ Investigators sought to question Martha Stewart about any conversations she may have had with Bacanovic.¹²⁶ Though not under oath, she met with the investigators and was interviewed on two occasions.¹²⁷ Bacanovic told investigators that there had been a pre-existing agreement with Stewart that her shares were to be sold when the stock reached a certain price.¹²⁸ Stewart concurred that such an agreement existed.¹²⁹ It was the government's position that Stewart and Bacanovic concocted the idea of a pre-existing agreement to cover possible insider trading.¹³⁰

Stewart was indicted for one count of conspiracy to obstruct justice, two counts of making a false statement, obstruction of justice, and one count of

117. Original Indictment at 5-6, ¶ 11, *United States v. Martha Stewart*, (No. 1:03-CR-00717), available at <http://www.thesmokinggun.com/archive/marthaindict1.html> (last visited Mar. 18, 2006).

118. *Id.* at 6, ¶ 13.

119. *Id.* at 7, ¶ 16.

120. *Id.*

121. *Id.* at 7-8, ¶ 17.

122. *Id.*

123. *Id.* at 8, ¶ 20.

124. *Id.* at 8-9, ¶ 21.

125. *Id.* at 9, ¶ 22.

126. *Id.* at 11, ¶ 25.

127. *Id.* at 12, ¶ 27.

128. *Id.* at 11, ¶ 24(a).

129. *Id.* at 13, ¶ 27(a).

130. *Id.* at 9-10, ¶ 23.

securities fraud.¹³¹ Throughout the period from arrest through trial, Stewart maintained that the charges were ridiculous, that she was innocent, and that she believed she would be vindicated.¹³² The evidence at trial demonstrated, however, that both Bacanovic and Faneuil had communicated to Stewart that Waksal was about to sell his shares.¹³³ The government's case included Stewart's phone log, which included a message from Bacanovic that something was going on with Waksal and the ImClone shares.¹³⁴ Stewart's own secretary was called as a government witness and testified that Stewart had attempted to alter the phone log to delete the subject matter of the call.¹³⁵ After a very public trial, the jury found Stewart guilty of conspiracy, both counts of making a false statement, and one count of obstruction of agency proceedings.¹³⁶ The court dismissed the securities count at the close of the government's case. Under the federal sentencing guidelines, Stewart scored in the range of ten to sixteen months.¹³⁷ Stewart's attorney asked the court to consider when determining whether a jail sentence was appropriate that his client had already suffered the stress of being arrested and tried.¹³⁸ Through her lawyer, Stewart offered the possibility of performing volunteer work with poor women as an alternative to incarceration.¹³⁹ Judge Miriam Cedarbaum rejected the sentencing alternative, choosing instead to sentence her to five months imprisonment, followed by two years of probation that included five months of home confinement.¹⁴⁰ She was also

131. For a discussion of the government practice of using one false statement that is repeated on multiple occasions as the basis for multiple counts of false statements or perjury, see Seigel & Slobogin, *supra* note 13.

132. See Jeffrey Toobin, *A Bad Thing: Why Did Martha Stewart Lose?*, THE NEW YORKER, Mar. 22, 2004, available at http://www.newyorker.com/fact/content/?040322fa_fact1.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Brickey, *supra* note 12, at 536.

139. Stewart and her lawyer had worked out an agreement with Women's Venture Fund, a nonprofit organization in New York, where Stewart if allowed, would train low income and minority women how to begin their own cleaning companies. *Id.* at 541. At first there was resistance but in the words of the director, "Can you imagine if we had graduates of the Martha Stewart cleaning program bidding for contracts cleaning Hilton Hotels?" *Id.* at 541 n.153. The fact that it was a cleaning company Stewart was willing to help train them about was interesting. Why was cleaning selected? She had experiences in many businesses including catering. One might ask whether the idea was tainted by unconscious racial or class stereotyping.

140. Rochelle Steinhaus, *Judge Sentences Stewart to Prison, but Grants Stay Pending Appeal*, http://www.courtstv.com/trials/stewart/071604_ctv.html.

fined thirty thousand dollars.¹⁴¹

2. *Contrition*

During the time Martha was prosecuted she maintained a web site where her fans could read messages from her, and keep themselves updated on her case.¹⁴² Stewart prepared remarks for her sentencing in which she neither apologized nor expressed any kind of guilt or remorse for her activities.¹⁴³ She did indicate she was sorry for the inconvenience and suffering her employees experienced.¹⁴⁴ She continued to express annoyance at the fact that “such a small thing” had been blown out of proportion.¹⁴⁵

In addition, throughout the course of her home confinement it appeared that Stewart flagrantly violated the terms of her house arrest, appearing outside of her restricted areas, possibly to attend a yoga class, and riding a recreational vehicle throughout her property. She boasted in an interview that she had watched the authorities putting her monitoring bracelet on and that she knew how to remove it.¹⁴⁶ The public will never be privy to the exchanges between Stewart and her parole officer, but it is instructive that her period of home confinement was extended by three weeks.¹⁴⁷ A fair conclusion would be that Stewart was punished for failing to follow the terms of her home confinement.¹⁴⁸

3. *Loyalty*

It is hard to determine whether Martha Stewart was motivated by loyalty in denying her interactions with the Merrill Lynch representatives. It was publicly known that Sam Waksal was a good friend of hers. Did she fear

141. *Id.*

142. See *Martha Stewart Uses Personal Web Site to Rally Support*, http://www.courtstv.com/news/2004/0112/stewart_ap.html.

143. Steinhaus, *supra* note 140.

144. *Id.*

145. *Id.*

146. See *Martha Stewart Calls Her Five-Month House Arrest ‘Hideous’*, http://www.courtstv.com/trials/stewart/070605_ap.html. Stewart claimed she was able to search the Internet to find out how to remove the monitoring device. It is unknown whether she actually removed it. *Id.*

147. Maria Puente & Gary Levin, *Martha Still Tethered*, USA TODAY, Aug. 4, 2005, at D1.

148. A probation officer has several courses of action that may be taken when a probationer violates the terms of house arrest. At the very least, a violation report detailing the violation is made and the officer makes a recommendation. The recommendation can range from continuing to monitor to recommending incarceration. See Sylvia J. Ansay, *When Home Is A Prison* (May 1999) (unpublished Ph.D. dissertation, University of Florida) (on file with author).

her acknowledgement of a conversation with Doug Faneuil or Peter Bacanovic might hurt Waksal? Even if that was initially a factor, Waksal was indicted and pled guilty before her own indictment. Her cover up on the tip from Bacanovic could not have hurt or helped Waksal. What then could have led her to continue to stand by her false statement? From the information available, it does not appear that she would have been extraordinarily loyal to Bacanovic; although they were described as friends, they were not social acquaintances.¹⁴⁹ While he was her personal broker and handled her account when Martha Stewart Living Omnimedia had its initial public offering, there was other evidence that the relationship was anything but smooth.¹⁵⁰ It appears not that Stewart was trying to be loyal to her friends and associates, but rather that they were trying to be loyal to her. Stewart does not seem to fit the traditional pattern of women offenders because among the defendants discussed in this article, she is the only one who controlled her own destiny. Stewart was not clustered at the bottom of a hierarchy, she was at the helm. In falling outside of the norm for female offending, her actions may be more in line with the traditional male white-collar offender.

IV. HIGH STATUS COLLIDES WITH STREET CRIME

A. Lil' Kim's Case

1. *The Facts of the Case*

Rapper Lil' Kim is known throughout the world for her musical talents.¹⁵¹ She is also an entrepreneurial businesswoman with an aggressive marketing agenda.¹⁵² Though she had high status because of her celebrity and wealth, she couldn't have been more different than the other three high-status white-collar women offenders discussed here. She did not come from a wealthy family. Her parents divorced when she was

149. See Toobin, *supra* note 132.

150. *Id.*

151. See *A Year and a Day for Lil'Kim*, CNN.COM, July 7, 2005, <http://www.cnn.com/2005/LAW/07/07/ctv.lilkim/index.html>.

152. At the time her legal troubles were coming to the public's attention, Lil' Kim was in the process of developing and releasing a high end line of designer watches which bore the brand Queen B Royalty Watch. The watches are marketed in the \$1,800 to \$3,500 range. See Carl "H.D." Cherry, *Lil' Kim Stays On Time*, Aug. 12, 2004, <http://www.sohh.com/articles/article.php/6133>. She also had plans to enter into the designer footwear market. Remy Fresh, *Queen B Drops Royalty Watch*, June 1, 2004, www.allhiphop.com/hiphopnews/?ID=3210.

nine years old.¹⁵³ “Lil’ Kim lived with her father until she ran away from home as a teenager, and survived by associating herself with drug dealers, and may have even prostituted herself.”¹⁵⁴ Her life began to take a turn for the better when rapper Christopher Wallace, also known as the Notorious B.I.G., introduced her to his protégés, Junior M.A.F.I.A., where she became the only female rapper of the group.¹⁵⁵ Kim’s career was blossoming when her mentor was killed. His death took an emotional toll on her and led her to take some time off from performing.¹⁵⁶ Eventually, she returned and re-ignited her career.

Lil’ Kim became of interest to the government in its investigation of a shooting that occurred between two rival groups on the street outside a radio studio in lower Manhattan in 2001.¹⁵⁷ Although Lil’ Kim was not suspected of being the shooter or participating in the shoot out, the government believed she knew the identity of some of those involved in the shoot out.¹⁵⁸ In fact, one of the shooters, Damion Butler, had been one of her managers and a friend of hers since the beginning of her career.¹⁵⁹ The other individual, Suif Jackson, if not a friend, was certainly a known acquaintance and had acted as Lil’ Kim’s bodyguard on occasion.¹⁶⁰ When questioned about the identity of the shooters, Lil’ Kim denied knowing the identity of the shooters and denied that she had seen or been in the company of Butler or Jackson on the day of the shooting.¹⁶¹ She was called before the grand jury on several occasions and falsely testified at each appearance.¹⁶² The government indicted Lil’ Kim for conspiracy to commit perjury, three counts of perjury and one count of obstruction of justice.¹⁶³ At her trial, the former members of the Junior M.A.F.I.A., compelled to appear by subpoena, testified that she knew Butler and Jackson, and that the two accompanied her to and from the studio on the day of the shooting.¹⁶⁴ Lil’ Kim testified on her own behalf and repeated

153. See *Lil’ Kim*, http://www.askmen.com/women/singer/54c_lil_kim.html (last visited Mar. 12, 2006).

154. *Id.*; see also Sentencing Transcript at 45, *United States v. Butler*, No. S104-CR.340(GEL), 2004 WL 2274751 (S.D.N.Y. 2004) (noting that both Lil’ Kim and her mother had experienced homelessness).

155. See *Lil’ Kim*, *supra* note 153.

156. *Id.*

157. See *A Year and A Day For Lil’ Kim*, *supra* note 151.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Butler*, 2004 WL 2274751, at *1.

162. *Id.*

163. *Id.*

164. *Lil’ Kim Takes Stand At Perjury Trial*, USA TODAY, Mar. 10, 2005, available at

her denials, despite the fact that a security video supplied by the radio station clearly showed her entering the radio studio with Butler, and again, standing near him at the time the shooting occurred.¹⁶⁵ The jury convicted Lil' Kim on three counts of perjury but acquitted her on the obstruction of justice charge.¹⁶⁶

At her sentencing, Judge Gerald Lynch engaged in a long series of exchanges with the prosecutor over the appropriate sentencing range for Lil' Kim. The officer completing her pre-sentence report advocated she be sentenced in the twenty-seven to thirty-three month range.¹⁶⁷ The range was calculated by using a provision in the guidelines giving the court discretion to cross-reference the base level for perjury with the base level of the offense that the defendant was trying to cover up.¹⁶⁸ Aggravated assault was suggested by the government as the appropriate base offense.¹⁶⁹ The government advocated for a sentencing range of thirty three to forty one months, and asked the judge to deny the defendant any credit for acceptance of responsibility.¹⁷⁰ Judge Lynch expressed concern that the use of aggravated assault as the base level offense was inappropriate, although an alternative calculation based on a "felon in possession" charge provided a greater possibility of jail time.¹⁷¹ In its final analysis, the court could find no reason to use anything other than the baseline offense for perjury as the appropriate guideline.¹⁷² Judge Lynch was clearly concerned with the possibility a harsh sentence imposed on Lil'

http://www.usatoday.com/life/people/2005-03-10-lil-kim_x.htm?csp=34.

165. See *A Year and A Day For Lil' Kim*, *supra* note 151; see also Sentencing Transcript, *supra* note 154, at 22-23 (colloquy between Judge Lynch and AUSA Gitner).

166. Sentencing Transcript, *supra* note 154, at 22-23.

167. *Id.* at 10. Pre-sentencing reports are confidential. Judge Lynch referenced the recommendation in a discussion in open court with counsel.

168. U.S. SENTENCING GUIDELINES MANUAL § 2X3.1 (2004).

169. Sentencing Transcript, *supra* note 154, at 29-31.

170. *Id.* at 18, 29-31 In arguing to the court that a higher offense level should be used, the Assistant United District Attorney (AUSA) suggested that the fact Lil' Kim and her group remained outside of the radio station demonstrated that there was something more sinister afoot, that somehow the fact that they waited showed that Lil' Kim knew her group was planning a shootout. *Id.* at 22-25. The court rejected this argument, stating that they could have stayed outside hanging out and signing autographs, and that there was no proof that Ms. Jones' group was planning an attack. *Id.* at 30-31.

171. See *id.* at 25-28 (colloquy between Judge Lynch and counsel).

172. See *id.* at 31. The base offense level for perjury was fourteen. To that the court added a two level enhancement for the perjury at trial, bringing offense level to sixteen. *Id.* A defendant at level sixteen and in Criminal History category one would be exposed to a sentence of twenty-one to twenty-seven months imprisonment under the guidelines. *Id.* Judge Lynch made it clear that the sentence was being decided in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005) (Federal Sentencing Guidelines are advisory, not mandatory). See Sentencing Transcript, *supra* note 154, at 28, 54-57, 77.

Kim would be perceived by the public as an indication that the system of justice was biased.¹⁷³ He worried that the case would be compared with Martha Stewart's five-month prison term.¹⁷⁴ Although the court perceived the two cases to be materially different, the judge wondered how he could sentence Lil' Kim to a substantially higher sentence for behavior that on the surface appeared substantially equivalent to Stewart's.¹⁷⁵ The court asked the United States Attorney and defense counsel to comment on the similarities of the two cases if there were any.¹⁷⁶ Not surprisingly, the government made every effort to distinguish the two cases, arguing that Lil' Kim was under oath in the grand jury, that she perjured herself at trial and that the underlying offense Lil' Kim tried to cover up was not a securities question, but rather a violent street crime.¹⁷⁷

On the other hand, while acknowledging the difference between a shooting and possible insider trading, defense counsel pointed out that Lil' Kim neither knew about the shooting, nor participated in it, but rather, out of a misplaced sense of loyalty and perhaps as a result of bad legal advice, tried to help protect a friend.¹⁷⁸ When the debate had concluded and Lil' Kim made her remarks to the court, Judge Lynch determined that he would credit Ms. Jones for her acceptance of responsibility, which dropped her to a sentencing range of twelve to eighteen months.¹⁷⁹ The court still seemed to be concerned with the possibility that Lil' Kim's case would be compared to Martha Stewart's sentencing.¹⁸⁰ Judge Lynch stated that the purpose of the guidelines was to avoid disparity in sentencing.¹⁸¹ However, in the final analysis, Judge Lynch argued that "lying to the grand jury about people getting shot and carrying machine guns is just more serious than lying about money, no matter how much money. . . ."¹⁸² But

173. *Id.* at 50-51. Lil' Kim is a Black female.

174. *Id.*

175. *Id.*

176. *Id.* at 51, 53-54.

177. *Id.* at 57-59.

178. *Id.* at 38. Defense counsel alluded at sentencing that Lil' Kim's prior attorney had not provided Lil' Kim with proper advice at the grand jury stage.

179. *Id.* at 70. The AUSA on the case argued to the very end of the proceedings that Lil' Kim should not have been given any credit for acceptance of responsibility characterizing her apology as a "ritual expression of remorse." *Id.* at 78.

180. *Id.*

181. *Id.*

182. *Id.* at 71. While the judge's belief does reflect judicial attitudes towards white-collar crime, an argument can certainly be made that lying about money, particularly significant sums, is more a serious offense than many street crimes, even ones which are deemed violent. The Enron fraud, for example, created the largest bankruptcy in history and destroyed the retirement savings of thousands of employees. Krysten Crawford, *Ex-WorldCom CEO Ebbers Guilty*, CNNMONEY.COM, Mar. 15, 2005,

in a final nod to the shadow of the Stewart case, Judge Lynch pointed out that Stewart's sentence was not just five months in prison, but also five months under house arrest, so that her actual sentence was ten months.¹⁸³ Judge Lynch sentenced Lil' Kim to twelve months and one day.¹⁸⁴

2. Loyalty's Role

During the trial, the prosecutor argued Lil' Kim lied under oath to protect her friends.¹⁸⁵ Lil' Kim testified that her friendship with Butler and Jackson had soured; therefore, she had no reason to lie on their behalf.¹⁸⁶ The fact that the friendship soured between her grand jury appearances and trial did not, however, eliminate the fact that at the time of the shooting incident and during the time the case was being investigated before the grand jury, Lil' Kim was friends with Butler, and arguably with Jackson as well.¹⁸⁷ Her lawyer argued at sentencing that misplaced loyalty led her to cover up Butler's crime.¹⁸⁸ The judge clearly believed this was to be true, and pointed to what he called a culture of non-cooperation among members of the hip-hop community and the police.¹⁸⁹ Indeed, during and after the trial, a debate did take place within that community as to whether Lil' Kim should have cooperated with the investigation and whether other artists who testified in response to subpoenas were "snitches."¹⁹⁰

It would not be surprising to find that loyalty, particularly to the men in her life, would be an important factor. Feminist scholars have argued that the black community demands loyalty from its women to the detriment of their own interests.¹⁹¹ In the end, Lil' Kim admitted to the court that

<http://money.cnn.com/2005/03/15/news/newsmakers/ebbers/index.htm>. Many real people were injured in concrete ways that far exceed the injuries that were caused in the Lil' Kim shootout.

183. Sentencing Transcript, *supra* note 154, at 72. Although the court did point out that it was problematic for a defendant to be sentenced to home confinement in a home that is more luxurious than that which most people could afford. *Id.*

184. *Id.* at 73.

185. *Id.* at 60, 65-67.

186. See *Lil' Kim Sentenced to a Year in Prison*, MSNBC, July 6, 2005, <http://msnbc.msn.com/id/8485039/>.

187. *Id.*

188. See Sentencing Transcript, *supra* note 154, at 38.

189. *Id.* at 65-67.

190. See, e.g., Clover Hope, *Capone Issues Statement Regarding Lil' Kim Case*, Mar. 17, 2005, <http://www.allhiphop.com/hiphopnews/?10-4199>; *Lil' Kim: The Ladies Speak Up On The Verdict Response*, <http://www.allhiphop.com/editorial/?ID=251> (last visited Mar. 12, 2006).

191. See Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for the Black Female Inmate*, 94 J. CRIM. L. & CRIMINOLOGY 795, 807-11 (2004).

loyalty led her to do the wrong thing and that she had taken steps to correct her mistaken reliance on friends who did not have her best interest at heart.¹⁹²

B. White-Collar Crime, Street Crime, Morality and Perceptions of Harm

The curious aspect of Lil' Kim's sentencing is that even though Judge Lynch went to great pains to distinguish the Stewart case, he ended up trying to fashion a sentence that was comparable to the Stewart sentencing. The court seemed to be concerned with the fact that Jones lied out of some misplaced street loyalty to protect her wrongdoer friends. That loyalty led her to perjure herself. On the other hand, he did not credit Stewart with a comparably selfless motive.¹⁹³ Judge Lynch, in some sense, seemed to feel that Stewart was the more morally culpable defendant. Yet Lil' Kim's case involved the kind of underlying crime that society believes is exceptionally dangerous: the possession and employment of deadly weapons. It is possible to understand the tension the court faced by contrasting the public's perception of street crime versus white-collar crime.

It is argued that white-collar crime is treated with more leniency by the courts, and is tolerated by the public, because there is ambivalence over the inherent wrongfulness of the behavior.¹⁹⁴ Professor Stuart P. Green indicates this ambivalence is particularly pronounced in "cover-up" crimes such as perjury and obstruction of justice.¹⁹⁵ He suggests that the public's perception of cover-up offenses is more heavily influenced by their feelings about the defendants than by the nature of the offensive conduct itself.¹⁹⁶ Nonetheless, scholars have attempted to explain why white-collar crime is treated leniently within the criminal justice system. One such argument suggests that white-collar crime, unlike street crime, is harder to detect, stretches the investigatory resources of the government, and that the harm it causes is less concrete and less certain than street crime.¹⁹⁷ Some have argued that white-collar criminals are more easily deterred than street criminals because they are not inclined to remain engaged in criminal

192. Sentencing Transcript, *supra* note 154, at 64.

193. *Id.* at 71.

194. Green, *supra* note 8, at 502.

195. *Id.*

196. *Id.*

197. See Szockyj, *supra* note 8, at 488; see also Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1330-31 (2001) (The wealth of white collar criminals can raise enforcement costs for the government.).

activities, and have more to lose by a period of incarceration than do street criminals.¹⁹⁸ A study of the sentencing practices of judges in white-collar crime cases found that many judges believed that the process of indictment and conviction was, in some cases, punishment enough.¹⁹⁹ In another study, judges were troubled by the possibility that they may treat white-collar cases differently because they can more easily identify with the white-collar offender.²⁰⁰

Ambivalence toward white-collar crime is also reflected in legislative decision making. Professor Green argues that categorizing white-collar crime as specialized, regulatory portion of state and federal law, rather than of criminal law, contributes to the sentiment that white-collar crimes are not real crimes.²⁰¹ Green also faults legislative authorization of penalties that are less severe for white-collar than for equally or less serious street crimes as contributing to ambiguity over whether white-collar offenses are crimes.²⁰² Finally, Green points out that moral ambiguity is created through the actions of judges and prosecutors. Prosecutors may be more lenient in a white-collar case than they would be when handling a case involving a traditional street crime.²⁰³ Judges who would normally be tough on street crime tend to be lenient in their treatment of white-collar crime.²⁰⁴

198. Szockyj, *supra* note 8, at 492 (citing John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control*, 28 CRIME & DELINQUENCY 292 (1982)).

199. Martin F. Murphy, *No Room At The Inn? Punishing White-Collar Criminal*, 40 B. B. J. 4 (1996). Though the study was before the sentencing guidelines on white collar crime became fully effective, Szockyj argues that even after the federal sentencing guidelines increased prison sentences for white-collar offenders street offenders are still sentenced more severely. Szockyj, *supra* note 8, at 496.

200. See Murphy, *supra* note 199, at 13 (citing WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS 156 (1988)). In fact, the judges of the Criminal Law Committee of the U.S. Judicial Conference suggested the Sentencing Commission enhance penalties for economic crime. Their recommendations helped formulate the package of amendments included in the Economic Crimes Package of 2001. See *Are We Really Getting Tough on White Collar Crime? Part 2: Hearing Before the S. Comm. on the Judiciary, Subcomm. on Crime and Drugs*, 107th Cong. (2002) (statement of Frank O. Bowman, III, Professor of Law), available at 15 FED. SENT'G REP. 237, 2003 WL 22016895, at *1 (2003).

201. See Green, *supra* note 8, at 514. Green also looks at the criminal/civil hybrid contained in many regulatory laws as further blurring the line between white collar crime and non criminal cases. Brown, *supra* note 197, at 1335.

202. Green, *supra* note 8, at 515.

203. *Id.* at 516 (citing the example of Occupational Safety and Health Administration's reluctance to prosecute employers for safety violations despite the fact that between 1982 and 2002, at least 1,242 cases were investigated in which workers died due to safety violations).

204. *Id.*

On the other hand government officials have argued for tougher sentences, claiming that lighter sentences for white-collar criminals has not produced a deterrent effect. Many believe that even with the sentencing guidelines enhancements that provide stiffer penalty ranges, white-collar offenders are still sentenced at the lowest end of the ranges.²⁰⁵ Moreover, if probation is an option, the white-collar defendant will almost always be sentenced to probation.²⁰⁶ Therefore, strict penalties are needed to ensure that white-collar defendants will receive tougher sentences.

Professor Strader argues that judicial sentencing leniency with white-collar offenders is tied to the political philosophies that shape a judge's view of crime.²⁰⁷ Thus, conservative judges perceive the harm from street crime in a different light from the harm of white-collar crime. Violence and the threat of physical harm are associated with street crime. For conservative judges, street crime raises traditional law and order issues, and punishment is relied on as the default method of accomplishing the goals of law enforcement with respect to public safety.²⁰⁸ Since there is no physical harm in white-collar crime, these same judges do not generally feel compelled to abide by their law and order tendencies.²⁰⁹

Scholars, judges, defense lawyers, and other commentators who advocate against incarceration of white-collar criminals do not seem to realize that many of the traits they describe as positive among white-collar offenders, such as lack of prior involvement with the law and providing economic support to family and community, are also present for street crime offenders. Recent studies indicate for example, that up to sixty percent of incarcerated individuals are first-time or non-violent offenders.²¹⁰ And, at least in the case of women who are incarcerated, many are often the only resource for extended families, and have obligations not only to their children, but also to parents and other family

205. See *Summer 2002: The Genesis of the Sentencing Provisions of the Sarbanes-Oxley Act: Are We Really Getting Tough on White Collar Crime? Part 1: Hearing Before the S. Comm. on the Judiciary, Subcomm. On Crime and Drugs, 107th Cong. (2002)* (statement of James B. Comey, U.S. Att'y, S.D.N.Y.), available at 15 FED. SENT'G REP. 237, 2003 WL 22016894, at 5 (2003).

206. *Id.* at 3.

207. Strader, *supra* note 8, at 1267.

208. *Id.* at 1267-68.

209. *Id.* at 1267 (citing *Tennessee v. Garner*, 471 U.S. 1, 14 & n.12 (1984)). The Supreme Court said some white collar felonies are far less serious than some street crime misdemeanors. Judges with a normally liberal philosophy tend to view white-collar crimes more stringently and are more willing to impose sanctions, particularly where the white-collar defendant has abused a position of wealth or power. *Id.* at 1268.

210. GREENFELD & SNELL, *supra* note 26, at 9.

members.²¹¹ In addition, despite the fact some judges believe that white-collar defendants would not be prepared to handle the deprivation of life in prison, other studies have found that white-collar criminals actually adjust better to prison than do many street offenders, and suffer fewer negative consequences upon release than do street offenders.²¹² Many white-collar offenders, for example, can return to jobs similar to the ones held before they were incarcerated.²¹³ The same is not true for a street crime offender who upon release from prison will have tremendous difficulty obtaining employment with a felony conviction in his or her background.

Professor Darryl Brown argues that the distinctions drawn between white-collar crime and street crime are in many instances artificial ones.²¹⁴ Most importantly, Brown establishes that culture and social practices define what crime is. He uses the example of domestic violence and correctly points out that, until recently, spousal battery was not considered a crime.²¹⁵ Despite over thirty years of advocacy and education there are still problems getting legal actors to understand domestic violence and to provide the protection the victim needs.²¹⁶ Another contemporary example of social and cultural practices that relate to societal acceptance of the definition of crime is the ongoing problem of illegal downloading and sharing of music files. Despite the fact that the act itself is illegal, few people acknowledge the criminal nature of this behavior.²¹⁷ Brown and others argue that many white-collar crimes do far more harm than the run-of-the-mill street offense.²¹⁸ He acknowledges, however, that white-collar

211. LENORA LAPIDUS ET AL., *CAUGHT IN THE NET*, *supra* note 28, at 53.

212. Szockyj, *supra* note 8, at 497 (pointing out that white-collar offenders had the management skills to negotiate the terms of confinement).

213. *Id.*

214. Darryl Brown, *supra* note 197, at 1315-16.

215. *Id.* at 1340.

216. See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L. J. 217 (2003) (outlining ways in which lawyers, judges and the police contribute to poor representation of battered women charged with crimes).

217. See Amy Harmon & John Schwartz, *Despite Suits, Music File Sharers Shrug Off Guilt and Keep Sharing*, N. Y. TIMES, Sept. 19, 2003, at A1.

218. *Id.* See also the example of the sentencing of Archer Daniels Midland officials sentenced for rigging prices. The critique of the light sentences they received was that the "executives who effectively cheated every grocery store in the country receives shorter sentences than if they had robbed just one." Green, *supra* note 8, at 515 (citing Kurt Eichenwald, *White Collar Defense Stance: The Criminal-less Crime*, N.Y. TIMES, Mar. 3, 2002, at D1). Former Attorney General Richard Thornburgh, when comparing the harm from white collar offenses and street crime, once said, "[a] street criminal can only steal what he can carry. With the stroke of a pen, or push of the computer key, white-collar criminals can, and do, steal billions." Murphy, *supra* note 199, at 14.

offenders are seen as reasonable, mainstream people whose crimes are often unintentional.²¹⁹ Street offenders, on the other hand, are seen as violent and greedy members of a sub culture whose crimes are seen as intentional.²²⁰ In addition, Brown points out that the criminal justice system sees street crime offenders as individuals making free willed choices who are immune to social influences.²²¹ By contrast, in the corporate punishment realm, blame is placed not only on the individual offender, but on those who influenced him as well.²²² In addition, when weighing sentencing for a corporate or white-collar offender, the court will often consider costs of incarceration that run beyond punishing the individual defendant.²²³ These costs are rarely taken into consideration when punishing street crime offenders, particularly in the context of the harm that occurs to a community that has large numbers of its members subjected to incarceration and the other consequences that flow from incarceration.²²⁴

The tendency in corporate matters is to work through regulation and encourage voluntary compliance, to help maintain governmental legitimacy in the eyes of corporate officials. This is striking, given the opposite tendency in punishing street crime; that is, the overuse of punishment, despite the acknowledgement that an excessive and disproportionate reliance on punitive measures has undermined the perceived legitimacy of the law in some communities. Brown asserts that this result is demonstrated through jury nullification and the community members' refusal to cooperate in police investigations.²²⁵ In fact, Judge Lynch stated

219. Brown, *supra* note 197, at 1315.

220. *Id.*

221. *Id.* at 1322. Brown argues that the use of criminal punishment "reinforces the view that such conduct is so blameworthy that only criminal sanction is appropriate," whereas civil remedies dominate corporate crime. *Id.* at 1336.

222. *Id.* at 1319. Brown gives the example of the Saving and Loan scandal where part of the blame for the large scale criminal conduct was placed on the failure of the regulatory system, something Brown states could never be imagined in a street crime context. *Id.* at 1336.

223. One of the objections to the prosecution of accounting firm Arthur Andersen as a result of the Enron implosion was that such a prosecution would hurt not only the individual wrongdoers, but shareholders, low level employees, clients, and the general community in which Arthur Andersen contributed charitable contributions.

224. For the African American community, Brown lists reduced employment prospects and earning capacity, less appealing marriage prospects, more single female households, more children under court supervision, etc. Brown, *supra* note 197, at 1307.

225. *Id.* at 1302; see also Paul D. Butler, *The Role of Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911 (1997) (arguing that the black community should use jury nullification as a tool to achieve political ends of the community against over criminalization of community by law enforcement).

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in Lil' Kim's sentencing that he was concerned with the possible public perception that the law had not been fairly (hence legitimately) applied in her case when compared with Martha Stewart's.²²⁶ The court spoke of the culture in the hip-hop community of not cooperating with police and cited it as one of the primary reasons why the murder of Christopher Wallace had not yet been solved.²²⁷

It may be that Lil' Kim's dual status, as both a high status defendant and a street crime offender created a tension the court seemed unable to resolve. In light of the contrasting treatment between traditional corporate crime and street crime offenses, it is clear that although Lil' Kim engaged in perjury, a traditional white-collar offense, the underlying offense was a street crime involving the threat of violence; she thereby lost the white-collar character of her actions.²²⁸

The irony of the contradiction seems so apparent when damage caused by the bankruptcy filing of WorldCom and Enron are considered. In reality, can one argue that Lil' Kim's lie about one shootout, which did not result in any fatalities, is more serious than the fraud that caused the multi-billion dollar collapse of two Wall Street behemoths, which seriously harmed the financial well-being of thousands of employees and investors? The answer depends on one's own views and preconceptions about morality and crime. To many, Betty Vinson, Lea Fastow, and Martha Stewart are far more culpable than Lil' Kim. And yet, for others, Lil' Kim is the more morally culpable actor.

Comment [XP1]: I took out the mention of Judge Lynch b/c it contradicts your statement on p. 127

V. CONCLUSION

Whether Lea, Betty, Martha, and Lil' Kim are high-status white-collar offenders or just high status street crime offenders, at least three of them engaged in offending that was partially motivated by a sense of loyalty. In the end, they differed little from the most common female offender, who is serving time for drug related offenses, because they got in trouble because of their associations with offending men. As the months pass, it will be interesting to see what, if any, information is revealed about the three women who have yet to be sentenced. Did loyalty lead them to offend as it did with Lea Fastow, Betty Vinson, and Lil' Kim? Or will it be revealed that they, like Martha Stewart successfully transitioned into the halls of real

226. See Sentencing Transcript, *supra* note 154, at 70.

227. *Id.* Of course, this is Judge Lynch's view through his lens of law and order. Members of Christopher Wallace's family believe that Wallace's murder remains unsolved because it was the police who either murdered him or conspired with others who murdered him. See *A Year and A Day For Lil' Kim*, *supra* note 154.

228. See Strader, *supra* note 8, at 1212.

power? Only time and a good sentencing transcript will tell.