Freedom Futures: Charitable Donations in White-Collar Sentencing

Jessica Baldwin Bowes[*]

ABSTRACT: When making sentencing decisions, judges only consider downward departures based on charitable donations when a defendant's financial donations are extraordinary, and the offense is a white-collar crime. Because only wealthy defendants can make such extraordinary donations, a judge inherently considers a defendant's wealth—and, by extension, a defendant's socioeconomic status—when considering a defendant's charitable giving. Though the U.S. Sentencing Guidelines forbid judges from considering socioeconomic status, as evinced in section 5H1.10, recent Supreme Court decisions have complicated the issue. In United States v. Booker*, the Court made the Guidelines advisory. In* Koon v. United States*, the Court clarified that district court sentences are only subject to an "abuse-of-discretion" review. Supreme Court precedent, however, indicates that when criminal adjudication affects a defendant's liberty, the Court is particularly committed to preserving fairness in the judicial process. This commitment protects defendants from undue discrimination, while ensuring that wealthy defendants cannot circumvent punishment by "investing" in their future liberty. Yet, a defendant can do precisely that by making extraordinary charitable donations. But this problem can be solved. In the short term, the U.S. Sentencing Commission should amend section 5H1.11 to clarify that charitable donations do not constitute charitable service. Ultimately, however, the only comprehensive solution is for the Supreme Court to hold that when judges consider defendants' charitable donations during criminal sentencing, they abuse their discretion because such consideration impermissibly favors affluent defendants over non-affluent defendants. Such a holding will reaffirm the Court's commitment to fundamental fairness in criminal adjudication while rebuilding public faith in the judicial process.*

[*] J.D. Candidate, The University of Iowa College of Law, 2021; M.A., Towson University, 2012; B.A., New York University, 2009.

I. INTRODUCTION 874

II. SOCIOECONOMIC DISCRIMINATION, JUDICIAL DISCRETION, AND THE GUIDELINES 876
A. *THE SUPREME COURT CONFRONTS SOCIOECONOMIC DISCRIMINATION* 877
B. *SENTENCING DISPARITY AND CREATING THE GUIDELINES* 879
C. *THE GUIDELINES POST-*BOOKER 882
D. *CONSIDERING CHARITABLE "SERVICE" VIA FINANCIAL DONATIONS* 885

III. CHARITABLE DONATIONS ARE A PROXY FOR SOCIOECONOMIC STATUS 890
A. *CHARITABLE DONATIONS REFLECT HIGH-SOCIETY NETWORKS AND INFLUENCE* 890
B. *CONSIDERING CHARITABLE DONATIONS IS THINLY VEILED SOCIOECONOMIC DISCRIMINATION* 895
C. *SEVERAL CIRCUITS RECOGNIZE THE DANGER OF WEALTHY DEFENDANTS "INVESTING" IN FUTURE LIBERTY* 897

IV. REMOVING CLASS FROM CRIMINAL SENTENCING: A TWO-PART SOLUTION 899
A. *THE SENTENCING COMMISSION MUST EXCISE CHARITABLE DONATIONS FROM GUIDELINES SECTION 5H1.11* 899
B. *THE SUPREME COURT MUST CLARIFY THE BOUNDARIES OF JUDICIAL DISCRETION* 900
1. A Natural Extension of the Court's Precedent on Criminal Adjudication 900
2. A Modest Carve-Out with a Powerful Impact 902

V. CONCLUSION 904

I. INTRODUCTION

A billionaire toy tycoon pleads guilty to concealing "as much as $106 million in secret Swiss [bank] accounts and evading at least $5.5 million in tax on the accounts' earnings over 12 years."[1] At sentencing, the defense requests a downward departure based on the defendant's history of charitable donations—$140 million over the previous decade.[2] After considering the

1. Janet Novack, *Prosecutor: Beanie Babies Billionaire Tax Cheat Didn't Deserve 'Get-out-of-Jail' Card*, FORBES (May 9, 2014, 7:51 PM), https://www.forbes.com/sites/janetnovack/2014/05/09/prosecutors-beanie-babies-billionaire-not-so-charitable-didnt-deserve-a-get-out-of-jail-card [https://perma.cc/R4BF-8YPY].

2. *Id.*

U.S. Sentencing Commission's Guidelines ("the Guidelines") sentencing range of 46 to 57 months in prison, the judge issues the sentence: probation.[3]

In a high-profile scandal, a millionaire big-law attorney is convicted of conspiracy to commit securities fraud by helping a corporate CEO steal $11 million to repay the corporation's investors for his reckless trading.[4] Supported by nearly 200 letters, the defense asks the judge to consider the defendant's "charitable work," including complimentary speaking engagements previously reported as "business development"[5] and fundraising for nonprofits, as well as his childhood Cub and Eagle Scout troops some 40 years prior.[6] After considering the Guidelines' sentencing range of 108 to 135 months in prison, the judge issues the sentence: 18 months.[7]

The kind of charitable giving that judges consider at white-collar sentencings, including when departing from section 5H1.11 of the Guidelines,[8] can only be performed by truly wealthy individuals. Thus, wealthy defendants have an additional way to reduce their sentences. Large-scale charitable donations can end up shaving several levels off a defendant's sentencing calculation, thereby reducing prison time or preventing it entirely.[9] Because federal white-collar statutes are sprawling and vague,

---

3. *Id.*

4. *See* Christie Smythe, *Shkreli's Ex-Lawyer Convicted of Aiding Him in Fraud Schemes*, BLOOMBERG (Dec. 27, 2017, 3:16 PM), https://www.bloomberg.com/news/articles/2017-12-27/shkreli-s-former-lawyer-convicted-of-aiding-him-in-fraud-scheme [https://perma.cc/X32G-QSHS].

5. The Gov't's Sent'g Submission at 47, 57–58, United States v. Greebel, No. 1:15-cr-00637 (E.D.N.Y. July 26, 2018).

6. Sent'g Memorandum on Behalf of Evan Greebel, Ex. A at 2, *Greebel*, No. 1:15-cr-00637 (E.D.N.Y. Aug. 8, 2018).

7. Judgment at 2, 8, *Greebel*, No. 1:15-cr-00637 (E.D.N.Y. Aug. 24, 2018).

8. *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.11 (U.S. SENT'G COMM'N 2018).

9. For instance, Judge Rakoff sentenced ex-Goldman Sachs Director Rajat Gupta to two years in prison for four counts of insider trading, though the Guidelines indicated an appropriate sentence of eight to ten years and the Government recommended the same. *See* Gov't's Sent'g Memorandum at 1, 12, United States v. Gupta, No. 1:11-cr-00907 (S.D.N.Y. Oct. 17, 2012); Peter Lattman, *Ex-Goldman Director to Serve 2 Years in Insider Case*, N.Y. TIMES: DEALBOOK (Oct. 24, 2012, 4:17 PM), https://dealbook.nytimes.com/2012/10/24/rajat-gupta-gets-2-years-in-prison [https://perma.cc/TDE8-3UZ9].

To compare the defense strategy with the Government's approach, compare Sent'g Memorandum of Rajat K. Gupta at 1, *Gupta*, No. 1:11-cr-00907 ("The convictions in this case represent an utter aberration in the life of the man before the Court—a man whose 'personal history and characteristics' are dramatically different from those routinely presented to sentencing courts in white collar cases. Rajat Gupta's life story does not merely include a record of charitable giving, or of caring for others and having a loving family. It is, instead, a life defined by helping others and one fundamentally at odds with the events of this case. That is, the events of this case are *uncharacteristic* in the most literal sense, inconsistent with the true character of the man."), with Gov't's Sent'g Memorandum at 6, *Gupta*, No. 1:11-cr-00907 ("Although Gupta's criminal conduct appears to represent a deviation from an otherwise law-abiding life, Gupta's crimes were not an isolated occurrence or a momentary lapse in judgment. Indeed, the opposite is true. Gupta repeatedly tipped Rajaratnam with corporate secrets for nearly two years. And the

prosecutorial discretion presents a minefield that renders white-collar defendants uniquely vulnerable to unexpected indictments. These risks, in turn, might predispose the wealthy to make certain "investments" in their future liberty.

While clarifying the Guidelines could help prevent such discrepancies and potential abuses, the Guidelines' advisory nature post-*United States v. Booker* would render this solution incomplete. Instead, the only comprehensive solution is for the Supreme Court to rule that by considering defendants' charitable donations in criminal sentencing, judges abuse their discretion.

This Note, in Part II, details Supreme Court precedent on socioeconomic discrimination in criminal sentencing and the rise and fall of the Guidelines' solution to sentencing disparity, including how section 5H1.11's "charitable service" language has been interpreted to include financial donations. Part III introduces this Note's central claim: By equating charitable donations with service, judges impermissibly sentence criminal defendants based on socioeconomic status. Finally, Part IV outlines two solutions: editing the Guidelines to clarify that a judge may not consider a defendant's charitable donations—an impermissible proxy for socioeconomic status—at sentencing and a Supreme Court ruling to do the same.

II. SOCIOECONOMIC DISCRIMINATION, JUDICIAL DISCRETION, AND THE GUIDELINES

As described above, U.S. courts are improperly considering a defendant's socioeconomic status during criminal sentencing. This Part sets the foundation for discussing how the confusion and controversy around criminal sentencing procedure and judicial discretion obscured Supreme Court precedent and how the U.S. Sentencing Commission ("the Commission") and the Court can remedy this problem. First, Section II.A introduces Supreme Court opinions stating that socioeconomic discrimination has no place in the criminal justice process. Second, Section II.B discusses Congress' intent in creating the Commission and developing the Guidelines to cabin judicial discretion in criminal sentencing. Third, Section II.C discusses the Guidelines after *United States v. Booker*. Finally, Section II.D explores how courts broadly interpret the downward departure for charitable service as applying to strictly financial donations.

---

ease with which he disclosed confidential information to Rajaratnam in the July 29, 2008 wiretapped conversation reflects the total disregard he showed for his fiduciary duties and the callousness with which he handled confidential information. Perhaps the most appalling example, though, was Gupta's illegal tip to Rajaratnam on September 23, 2008 regarding Warren Buffett's $5 billion infusion of capital to Goldman Sachs.").

A. THE SUPREME COURT CONFRONTS SOCIOECONOMIC DISCRIMINATION

In the 1940s and '50s, the Supreme Court addressed socioeconomic discrimination in several criminal cases. In *Chambers v. Florida*, the Court based its holding on the "principle that all people must stand on an equality before the bar of justice in every American court,"[10] and reasoned that the role of courts is to "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[11] Other Supreme Court rulings protecting indigent defendants' rights to representation were similarly predicated on fundamental notions of fairness in criminal adjudication.[12]

In *Griffin v. Illinois*, the Court held that "in criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," and that all defendants are entitled to a fair trial, regardless of how much money they have at their disposal.[13] The Court stated: "Plainly the ability to pay costs in advance *bears no rational relationship* to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."[14] As Justice Frankfurter wrote in his concurrence addressing sentencing, neither the federal government nor the states are authorized to

10. Chambers v. Florida, 309 U.S. 227, 241 (1940).

11. *Id.* In *Chambers*, the Court held that law enforcement's violent behavior compelled the defendants' confessions and violated due process. *Id.* at 238–39.

12. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (overturning *Betts v. Brady*, 316 U.S. 455 (1942) and holding that all indigent criminal defendants must be provided counsel because "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot [otherwise] be assured a fair trial"). "The Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." *Id.* at 349 (Clark, J., concurring in judgment); *see also* Smith v. O'Grady, 312 U.S. 329, 333–34 (1941) (holding that because of a defendant's "ignorance of his rights, and because of the trial court's failure to appoint, and his inability to obtain, counsel, the original sentence was not appealed[,] . . . undermin[ing] and invalidat[ing] the [court's] judgment").

13. Griffin v. Illinois, 351 U.S. 12, 17 (1956). "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem." *Id.* at 16. The *Griffin* case focused on the question of whether a state law requiring the indigent defendants to pay a fee for court records in order to appeal their convictions violated the Fourteenth Amendment's Due Process and Equal Protection Clauses. *Id.* at 13. Dissenting from the majority's holding that the law was unconstitutional, four Justices would have held that the federal government could not make such a requirement of the state. *See id.* at 38 (Harlan, J., dissenting).

Though the Court's decisions regarding state law are helpful guideposts, this Note focuses on sentencing in federal courts. Because the Fourteenth Amendment does not limit state police power, the principles discussed herein may be applied differently—and lead to different outcomes—in federal courts as compared to state courts.

14. *Id.* at 17–18 (majority opinion) (emphasis added).

"impos[e] . . . conditions that offend the deepest presuppositions of our society."[15]

Instead, a sentence should focus on achieving the four primary goals of punishment,[16] while taking into account the seriousness of the crime and the defendant's relevant characteristics—particularly those that rationally relate to the defendant's likelihood of recidivism.[17] Prior to sentencing reform in the 1980s, courts were given a wide berth in what information they could consider in determining an appropriate sentence.[18] As the Court stated in *Williams v. New York*:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.[19]

But the Court's willingness to address such issues shifted. Since the 1960s, the Court has avoided issues of discrimination based on socioeconomic status, often choosing to focus on racial discrimination when both race and class issues are present.[20] Nixon's Supreme Court nominees quickly established their staunch commitment to rational-basis review, and the Court has not "used more than rational-basis review in evaluating any type of discrimination" since 1976.[21] Because no precedent classifies discrimination based on socioeconomic status as being subject to more rigorous review, socioeconomic discrimination is presumed to be evaluated on a rational-basis standard.[22] Under rational-basis review, if a court can even hypothesize a

---

15. *Id.* at 22 (Frankfurter, J., concurring in judgment).

16. *See* Williams v. New York, 337 U.S. 241, 248 n.13 (1949) (discussing the goals of punishment: rehabilitation, reformation, deterrence, and incapacitation).

17. *See generally id.* (discussing how the goals of punishment have evolved with cultural norms and criminal justice priorities, as pertaining to a judge's appropriate comments to the jury).

18. *See id.* at 247; *see infra* Section II.B.

19. *Williams*, 337 U.S. at 247.

20. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS., no. 4, 2009, at 109, 109–15. Some advocates view the Court's opinions as indicating that "the focus on race means not focusing on social class." *Id.* at 124–25. This Note uses the terms "socioeconomic status" and "class" interchangeably, as seems to be standard practice in both academia and courts. *See id.* at 126–30.

21. *Id.* at 123. However, "[s]ome cases [including *Griffin*] preceding the seventies, though, implied that the Court would apply a higher level of scrutiny for discrimination against the poor." *Id.*

22. *Id.* In part, Barnes and Chemerinsky attribute this to a shift in social dynamics:

> [T]he social focus on race—and other group identities, such as gender, sexual orientation, and disability—has shifted attention away from socioeconomic class. As people tend to identify themselves by these group identities, and to seek political

rational relationship between a legitimate government interest and the policy in question, it will uphold the policy.[23] Almost exclusively, rational-basis review's expansive deference leads courts to uphold the status quo.[24]

Around the time that the Supreme Court stopped addressing socioeconomic discrimination, record crime rates nationwide shined a spotlight on federal court sentencing. Federal judges maintained total discretion in sentencing, "met[ing] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."[25] When deciding defendants' sentences, judges considered whatever evidence they pleased and "were not required to give any reasons for the particular sentences that they imposed."[26]

Notably, "considerable research existed to show evidence of [judicial] unfairness, discrimination, and general sentencing disparities attributable to racial, ethnic, gender, and *socioeconomic factors*."[27] Though sentences varied widely regardless of the underlying crime, white-collar sentencings provided especially curious comparisons.[28] Courts disagreed about where to set thresholds warranting additional incarceration and which crimes necessitated confinement in the first place.[29]

B. SENTENCING DISPARITY AND CREATING THE GUIDELINES

In response to these inconsistencies, in 1984, as part of the Comprehensive Crime Control Act, Congress passed the Sentencing Reform Act ("SRA") to institute honesty, proportionality, and reasonable uniformity

---

> benefits based on them, the emphasis on class decreases. Although many special interest groups have been organized along such other group identities, it is difficult to even think of an organization that exists to advocate for the interests of the poor.

Id. at 124 (footnote omitted).

23. *See* FCC v. Beach Commc'ns., Inc., 508 U.S. 307, 313–15 (1993).

24. *See, e.g.*, Armour v. City of Indianapolis, 566 U.S. 673, 687 (2012) (suggesting laws will be upheld under a rational-basis review unless "'facts preclude[]' any alternative reading of state law and thus any alternative rational basis" (quoting Nordlinger v. Hahn, 505 U.S. 1, 16 (1992))); *FCC*, 508 U.S. at 320 ("The assumptions underlying these [plausible] rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review . . . ." (quoting Vance v. Bradley, 440 U.S. 93, 112 (1979))); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (hypothesizing three plausible rationales for finding that the statute had a rational basis and thus finding the statute constitutional); *see also* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (mentioning that "almost all laws" could survive rational-basis review).

25. S. REP. NO. 98-225, at 38 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

26. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1170 (2017).

27. Dean J. Champion, *The U.S. Sentencing Guidelines: A Summary of Selected Problems and Prospects*, *in* THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 231, 232 (Dean J. Champion ed., 1989) (emphasis added).

28. *See* Newton & Sidhu, *supra* note 26, at 1180.

29. *Id.*

in sentencing.[30] Although the SRA did not remove all judicial discretion, it significantly cabined discretion within certain sentencing ranges for specific crimes and limited how judges could use discretion to depart from the range via specific upward or downward departures enumerated in the Guidelines.[31] Congressional motivations extended beyond justice and fairness; against a backdrop of soaring crime rates, both Congress and the public attributed the rise to repeat offenders who were able to recidivate because criminal sentences were inconsistent and often lenient.[32] Pursuant to the SRA, Congress established the Commission to, among other things, promulgate sentencing guidelines for judges and create the sentencing range for each federal crime, regardless of which court issued the sentence.[33]

"To help ensure uniformity . . . , Congress directed the Commission to decide what offense and offender characteristics were relevant for sentencing (with several limitations imposed by the statute) . . . ."[34] The overarching mission of the Commission, as well as the Guidelines it developed, was to ensure that "the sentence . . . fit the crime," not the individual.[35] As

30. *See* 28 U.S.C. § 991(b)(1)(B) (2018) (setting a goal of "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

31. S. REP. NO. 98-225, at 51–52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234–35.

32. *See* Newton & Sidhu, *supra* note 26, at 1169–70 ("At sentencing hearings, there were no limitations on what evidence was relevant to the court's sentencing decision. Once federal district judges decided upon a sentence, they were not required to give any reasons for the particular sentences that they imposed." (footnote omitted)).

> For example, in bank embezzlement cases, judges in the Northern District of California and the Middle District of Florida were more likely to impose a term of imprisonment, whereas judges in the District of New Jersey and the Northern District of Ohio were less likely to impose a prison term for the same degree of offense. Even among the harsher sentencing judges in the Northern District of California and the Middle District of Florida, the former would impose a term of imprisonment only if the amount involved was at least $100,000, whereas the threshold for the latter judges was only $10,000.

Id. at 1180 (footnotes omitted); *see also* STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 10 (1988) (mentioning the arbitrariness of being placed "before a lenient judge" or "a 'hanging' judge").

33. 28 U.S.C. § 994.

34. Newton & Sidhu, *supra* note 26, at 1185.

> The guidelines were to be "mandatory," insofar as a sentencing judge could not "depart" from the applicable sentencing range unless either the Commission had explicitly authorized a departure for a particular reason or the sentencing court found the existence of an aggravating or mitigating circumstance that was "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described" in the guidelines.

Id. (footnotes omitted) (first quoting S. REP. NO. 98-225, at 79 (1983); and then quoting 18 U.S.C. § 3553(b) (2012)).

35. *Id.* at 1240 (quoting Interview with George MacKinnon, Comm'r, U.S. Sent'g Comm'n (Oct. 28, 1994) (on file with authors)).

an additional safeguard, Congress provided that factors should not be considered whenever they "might serve as proxies for forbidden factors."[36] For instance, in *Mistretta v. United States*, the Court mentioned considering a defendant's "current unemployment" as an inappropriate proxy for considering socioeconomic status.[37]

Likewise, the SRA's congressional record unmistakably evinces the Legislature's intent to prevent a judge from considering a defendant's socioeconomic status at sentencing.[38] Advocates within Congress and the Commission found that considering factors such as socioeconomic status did not result in sentences that more fully realized the goals of punishment; rather, these considerations resulted in inconsistent and even arbitrary sentencing.[39] Accordingly, Congress imposed a duty on the Commission to "assure that the [G]uidelines and [associated] policy statements [we]re *entirely neutral* as to the race, sex, national origin, creed, and socioeconomic status of offenders."[40]

True to Congress' intent, the Guidelines preclude a judge from considering a defendant's socioeconomic status during sentencing.[41] "Socioeconomic status" is defined as "an individual or community's social standing in relation to others."[42] Social standing is typically based on three interrelated factors: "occupation, income, and education."[43] Intuitively, education often leads to occupational opportunities that create income. As the Senate Report stated, section 994's purpose was

> to *make it absolutely clear* that it was not the purpose of the list of offender characteristics set forth . . . to suggest in any way that the

36. Mistretta v. United States, 488 U.S. 361, 376 (1989) (discussing 28 U.S.C. § 994(e)).

37. *See id.*

38. *See* S. REP. NO. 98-225, at 41, 171 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224, 3354 (discussing inequities in sentencing and expressing the Committee's desire "to make it absolutely clear that" discriminatory sentences based on socioeconomic status are inappropriate).

39. *See* Newton & Sidhu, *supra* note 26, at 1184 ("Judge Frankel, the 'father of sentencing reform,' observed that judges' 'substantially unbounded discretion' combined with the varying backgrounds and perspectives of judges to produce 'arbitrary, random, [and] inconsistent' sentencing decisions." (alteration in original) (footnotes omitted) (first quoting KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 35 (1998); and then quoting Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 7–8, 46 (1972))).

40. 28 U.S.C. § 994(d) (2018) (emphasis added).

41. *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.10 (U.S. SENT'G COMM'N 2018) (maintaining the same language as enacted in 1987).

42. BILL SANDERS, *Socioeconomic Status*, A DICTIONARY OF GANGS (Oxford Univ. Press 2019).

43. JOHN SCOTT, *Socio-Economic Status*, A DICTIONARY OF SOCIOLOGY (Oxford Univ. Press 4th ed. 2014). Education and occupation are mentioned in the Guidelines' specific offender characteristics section as well, though neither section mentions the topics' relevance to sentencing departures. Though these topics are outside the scope of this Note, according to the Guidelines, both characteristics "may be relevant in determining the conditions of probation or supervised release." *See* U.S. SENT'G GUIDELINES MANUAL §§ 5H1.2, 5H1.5.

> committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion *or level of affluence* . . . .[44]

That said, the Commission's "requirement of neutrality" did not require that a judge be blind to a defendant's reality.[45] Rather, the Senate Report notes that a judge may reasonably consider otherwise forbidden personal characteristics, such as race, gender, or religion, to ensure that a defendant's rights will be protected as required by the Constitution.[46] For instance, a judge might properly consider a defendant's religion when deciding the proper prison facility for commitment so the defendant may observe dietary restrictions required by his faith tradition.[47]

As Professor Leonard Orland and Judge Marvin E. Frankel, the oft-attributed father of the modern sentencing system, alluded, if judges are able to favor a certain type of defendant over another, defendants with means will "judge-shop" to ensure they receive an ideal sentence based on a judge's reputation for "leniency or severity."[48] In light of this collateral consequence, the Guidelines outline several "specific offender characteristics" that judges are cautioned against considering but may consult in exceptional situations.[49] The Guidelines caution that "[g]enerally, the most appropriate use of specific offender characteristics is to consider them *not* as a reason for a sentence *outside* the applicable guideline range but for other reasons, such as in determining the sentence *within* the applicable guideline range."[50]

*C. THE GUIDELINES POST-*BOOKER

The Supreme Court's decision in *United States v. Booker* significantly reduced the Guidelines' weight and ability to cabin judicial discretion. In *Booker*, the Court found that because the Guidelines were "mandatory and binding on all judges," with the full "force and effect of laws," the Guidelines violated a defendant's Sixth Amendment right to trial by jury when they allowed a judge to enhance the defendant's sentence based on facts not before the jury.[51] The *Booker* Court, however, held the unconstitutionality was

---

44. S. REP. NO. 98-225, at 171 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3354 (emphasis added).

45. *Id.* at 171 n.409, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3354 n.530.

46. *See id.*

47. *Id.*

48. Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 231 (1984) ("When there are opportunities for judge-shopping, the lawyers know where to shop. Defendants learn this lore quickly and pursue it among the most common topics of study and gossip in prison. The contention that no problem of sentencing disparity exists clearly fails to hold up under close analysis.").

49. *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (U.S. SENT'G COMM'N 2018).

50. *Id.* (emphasis added).

51. United States v. Booker, 543 U.S. 220, 233–34 (2005); *id.* at 226–27.

limited to the Guidelines provisions that *mandated* the judiciary's compliance; in other words, the Guidelines were not altogether unconstitutional.[52] Rather, pursuant to the *Booker* opinion, the Guidelines became advisory instead of mandatory, "recommend[ing], rather than requir[ing], the selection of particular sentences in response to differing sets of facts."[53]

Nevertheless, the Supreme Court has held that the Guidelines are and should remain a central consideration during the sentencing process.[54] The *Booker* opinion itself instructed lower courts to look to the Guidelines in an effort "to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences *where necessary*."[55] When formulating the defendant's sentence, however, "[a] district court 'may not presume that a within-Guidelines sentence is reasonable.'"[56] As the Second Circuit has held, district courts "must instead conduct [their] own independent review of the sentencing factors, aided by the arguments of the prosecution and defense."[57]

Of course, regardless of the circuit, judges are generally free to impose sentences outside the recommended range,[58] but they are still required to consult the sentencing procedure outlined in the Guidelines.[59] Under the Guidelines, each offense has its own Base Offense Level ("BOL").[60] The application of relevant guidelines adjusts the BOL to arrive at what is commonly called an Adjusted Offense Level ("AOL").[61] The AOL is used in

---

52. *Id.* at 245.

53. *Id.* at 233.

54. *See, e.g.*, Peugh v. United States, 569 U.S. 530, 542 (2013) (discussing the Guidelines "as the framework for sentencing"); Rita v. United States, 551 U.S. 338, 347–51 (2007) (discussing the importance of following the Guidelines despite their advisory nature); *Booker*, 543 U.S. at 264 (describing the now-advisory Guidelines as "retain[ing] other features that help to further [Congress' SRA] objectives" of honesty, proportionality, and reasonable uniformity).

55. *Booker*, 543 U.S. at 264–65 (emphasis added).

56. United States v. Armand, 856 F.3d 1142, 1145 (7th Cir. 2017) (quoting United States v. Johnson, 635 F.3d 983, 988 (7th Cir. 2011)) (reiterating precedent holding that Guidelines sentences are not presumptively reasonable).

57. United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008).

58. *See* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes –Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 392–93 (2003) (explaining that the deferential abuse-of-discretion standard of review generally results in affirmed sentences).

59. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 11 (2018) [hereinafter U.S. SENT'G COMM'N, THE BASICS], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf [https://perma.cc/F5R4-SDBA] ("After the Supreme Court's decision in *Booker*, just as before it, a sentencing court must correctly calculate a defendant's guideline range and then consider whether there is any basis set forth in the *Guidelines Manual* to 'depart' from the range.").

60. U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2018) (directing judges through the sentencing determination and instructing judges to "[d]etermine the base offense level").

61. *See id.* (informing judges which adjustments to apply during certain stages of the sentencing process).

conjunction with the defendant's criminal history points to determine the defendant's Guidelines range.[62] In rare circumstances, the judge will sentence the defendant above the range (commonly referred to as an "upward departure") or below the range (commonly referred to as a "downward departure") based on specific offender characteristics.[63] When determining whether the trial court sentence falls inside or outside a Guidelines standard, an appellate court applies "a deferential abuse-of-discretion standard."[64] As the Supreme Court noted in *Koon v. United States*, any departure determinations are likewise reviewed by the appellate courts under an abuse-of-discretion standard.[65]

Accordingly, judges continue to utilize both Guidelines policy statements, such as section 5H1.10, and Guidelines-specific offender characteristics, such as section 5H1.11, as guideposts when determining which facts are relevant or irrelevant.[66] When judges sentence defendants below the Guidelines range, "around 40 percent of [sentences] are the result of grounds for downward departure specifically recognized by the [Guidelines]."[67] Section 5H1.10 forbids courts from considering race, sex, national origin, creed, religion, or socioeconomic status at sentencing.[68] Section 5H1.11 provides that military service or "[c]ivic, *charitable*, or public service; employment-related contributions; and similar prior good works are

62. *See id.* (instructing judges to "[d]etermine the defendant's criminal history category").

63. *See id.* (explaining that consideration of specific offender characteristics or other policy statements should be reserved until after the defendant's AOL has been determined). An upward departure is defined as "a court's imposition of a sentence harsher than the standard guidelines propose, as when the court concludes that a criminal's history did not take into account additional offenses committed by the prisoner." *Departure*, BLACK'S LAW DICTIONARY (11th ed. 2019). A downward departure is defined as "a court's discretionary imposition of a sentence more lenient than the standard guidelines propose, as when the facts militate in favor of a lesser punishment." *Id.*

64. Gall v. United States, 552 U.S. 38, 41 (2007). If the discrepancy were about *interpreting* the Guidelines, rather than *applying* them, the relevant question would be one of law, making the standard of review de novo. *See, e.g.*, United States v. Miller, 883 F.3d 998, 1004 (7th Cir. 2018) ("As a question of law, we review interpretation of the Sentencing Guidelines *de novo*."); United States v. Stella, 591 F.3d 23, 27 (1st Cir. 2009) ("Pure issues of law, such as interpretations of the guidelines, are reviewed de novo . . . ."). Thus, the Supreme Court would not have to account for a lower court's discretion when considering how the Guidelines should be interpreted.

65. Ramirez, *supra* note 58, at 393–96.

66. U.S. SENT'G COMM'N, THE BASICS, *supra* note 59, at 18–19 (describing specific "overrides," applicable to "a small percentage of defendants," for whom "the application of their guideline ranges is not determined solely by the offense levels established in Chapters Two and Three and their Criminal History Categories established in Chapter Four, Part A," as well as departures and variances, which are used "[a]fter determining the defendant's guideline sentencing range, . . . [to] determine whether one or more 'departure' factors set forth in the guideline commentary or policy statements in the *Guidelines Manual* warrant consideration for imposing a sentence outside of the range").

67. *Id.* at 4.

68. U.S. SENT'G GUIDELINES MANUAL § 5H1.10 (U.S. SENT'G COMM'N 2018).

not ordinarily relevant in determining whether a departure is warranted."[69] In 2010, the Commission reorganized section 5H1.11, shifting military service into its own section followed by a second section outlining service, employment-related contributions, and other prior good works.[70] The new organization highlights the original intent behind section 5H1.11: to enable the possibility of considering extraordinary service—especially service to the United States—at sentencing.[71]

D. CONSIDERING CHARITABLE "SERVICE" VIA FINANCIAL DONATIONS

Charitable service is typically performed in furtherance of a charitable organization. The Internal Revenue Service, which classifies charities for tax purposes, defines a charitable organization as one that "must be organized and operated exclusively for exempt purposes set forth in [26 U.S.C.] section 501(c)(3), and none of its earnings may inure to any private shareholder or individual."[72] With that in mind,

> [t]he term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.[73]

---

69. *Id.* § 5H1.11 (emphasis added).

70. U.S. SENT'G GUIDELINES AMEND. 739 (U.S. SENT'G COMM'N 2010), https://www.ussc.gov/guidelines/amendment/739 [https://perma.cc/EC4W-SPAV].

71. *See id.* (explaining Amendment 739's objective "to draw a distinction between military service and the other circumstances covered," due in part to the nation's leniency to veterans—particularly combat veterans—in recognition of their service).

72. *Exemption Requirements—501(c)(3) Organizations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations [https://perma.cc/RRL6-CRKH] (last updated July 23, 2020). Accepted 501(c)(3) designation is appropriate for organizations that are "charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals." *Exempt Purposes—Internal Revenue Code Section 501(c)(3)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3 [https://perma.cc/P4GQ-A25Y] (last updated July 28, 2020). As such, 501(c)(3) nonprofits whose work falls within these designations are commonly referred to and thought of as charitable organizations, though such reference is not technically correct.

73. *Exempt Purposes—Internal Revenue Code Section 501(c)(3)*, *supra* note 72 (emphasis omitted).

Traditionally, charitable service is volunteer service—physical acts committed for the benefit of another without the expectation of payment.[74] Black's Law Dictionary defines "charitable" as "[d]edicated to a general public purpose, usu[ally] for the benefit of needy people who cannot pay for benefits received."[75] This definition conjures familiar images of doling out soup in homeless shelters, teaching children how to read, or performing chores and errands for the infirm.

But charitable service extends beyond volunteerism. "Charitable" is commonly defined as being "liberal in benefactions to the needy,"[76] through "contribution[s] to the welfare of others."[77] This comprehensive definition includes charitable acts that are not given directly to the eventual beneficiary but rather donated to the charitable organization. The rise in these "services" is largely due to technological advances in modern philanthropy.[78] This broad, widely accepted definition includes financial and in-kind donations, service as a charity or nonprofit board member, planned giving, appreciated-assets giving, participation in employer matching programs, and fundraising on behalf of a nonprofit or charitable organization.[79]

In practice, a judge expects a defendant's service to be exceptional, or "present to an unusual degree," to warrant a downward departure at sentencing.[80] By limiting relevant service to that which is truly remarkable and out of the ordinary, judges construe section 5H1.11 considerations narrowly. This narrow construction is in keeping with congressional intent and the Commission's findings as expressed through the Guidelines and policy statements therein—only a truly specific and unique characteristic warrants the transition of ordinarily irrelevant information into fodder for sentencing

74. *See Volunteer*, NEW OXFORD AMERICAN DICTIONARY (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010) (defining volunteer as to "freely offer to do something" such as to "work for an organization without being paid").

75. *Charitable*, BLACK'S LAW DICTIONARY (11th ed. 2019).

76. *Charitable*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/charitable [https://perma.cc/L8C4-ETTX].

77. *Service*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/service [https://perma.cc/5HB3-YHPR].

78. *See* LAURA ARRILLAGA-ANDREESSEN, GIVING 2.0: TRANSFORM YOUR GIVING AND OUR WORLD 45–52 (2012) (discussing prevalence of online donations, digital fundraising, giving via social networks, etc.).

79. *See* Brian Acton, *13 Ways to Give to Charity Without Breaking Your Budget*, USA TODAY (Oct. 27, 2017, 7:00 AM), https://www.usatoday.com/story/money/personalfinance/budget-and-spending/2017/10/27/13-ways-give-charity-without-breaking-your-budget/792720001 [https://perma.cc/ESW2-WBMD] (listing giving methods); BoardAssist, *Volunteering vs. Serving on a Board vs. Donating—What Nonprofit Role is Best for You?*, GUIDESTAR (June 28, 2016, 9:58 AM), https://trust.guidestar.org/volunteering-vs.-serving-on-a-nonprofit-board-vs.-donating-what-nonprofit-role-is-best-for-you [https://perma.cc/SQE9-QGJV]; *Ways to Give*, PROVIDENCE, https://www.stjudemedicalcenter.org/st-jude-memorial-foundation/ways-to-give [https://perma.cc/23DS-34T2] (listing a variety of ways to donate).

80. United States v. Serrata, 425 F.3d 886, 914 (10th Cir. 2005) (quoting U.S. SENT'G GUIDELINES MANUAL § 5K2.0 (U.S. SENT'G COMM'N 2002)).

consideration.[81] Broadening such exceptions could create opportunity for abuse by individuals who know they might be held criminally liable and therefore accumulate a record of good acts to diminish future punishment.

Accumulating the amount of service that a judge would classify as exceptional was extremely rare—until *Koon* changed how defense attorneys proposed downward departures.[82] Before *Koon*, judges rejected "downward departure[s] based on outstanding charitable and community service work," citing a conflict with section 5H1.10's mandate to disregard socioeconomic status.[83] In *Koon*, the Supreme Court tackled the aftermath of the 1992 Los Angeles riots in response to four policemen savagely beating a single unarmed black man, Rodney King, and being acquitted of state charges.[84] In just five days, "[m]ore than 2,000 people were injured, and nearly 6,000 alleged looters and arsonists were arrested" in riot-related incidents, and more than 50 people were killed, including ten by law enforcement.[85] Co-defendant officers Stacey Koon and Laurence Powell were charged and convicted of violating King's civil rights on substantially the same evidence as the state charges. The district court departed downward for both co-defendants, resulting in a 30-month sentence—well below the Guidelines' 70 to 87 month range.[86] Reversing the circuit court's ruling, the Supreme Court found the district court did not abuse its discretion by relying on three factors: the victim's misconduct, the defendants' "susceptibility to prison abuse[,] and the burdens of successive prosecutions."[87] The Court did remand for resentencing, however, because it found the district court abused its discretion in departing downward based on the defendants' "career loss and low recidivism risk."[88]

The criminal-defense bar saw the Court's liberal interpretation of downward departures and quickly changed its sentencing approach.[89] Post-*Koon*, defense attorneys advocate for downward departures wherever possible. Since *Koon*, "[n]owhere has the case law changed as dramatically . . . as in the area of downward departures for civic, charitable, or public service."[90] The potential to consider a particular defendant's unique characteristics and

81. *See* U.S. SENT'G GUIDELINES MANUAL § 5H1.11 (U.S. SENT'G COMM'N 2018).

82. Alan Ellis, *Let Judges Be Judges! Post-*Koon *Downward Departure: Part 4: Civic, Charitable, or Public Service*, CRIM. JUST., Fall 1998, at 39, 39.

83. *Id.*

84. *See* Koon v. United States, 518 U.S. 81, 87–88, 101–12 (1996); Anjuli Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots [https://perma.cc/G8U3-DFH9].

85. Sastry & Bates, *supra* note 84.

86. *Koon*, 518 U.S. at 89–90.

87. *Id.* at 113–14.

88. *Id.*

89. *See* Ellis, *supra* note 82, at 39–40.

90. *Id.* at 39.

circumstances only grew when *Booker* made the Guidelines advisory.[91] In *Rita v. United States*, the Supreme Court observed that "[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court."[92] After *Rita*, the Court has reiterated its *Koon* reasoning in *Gall v. United States*: "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."[93] Nevertheless, the Commission continues to reiterate its stance—shared by the Supreme Court—that judges should prioritize consistency and fairness when applying specific offender characteristics such as section 5H1.11.[94] This tension between the Court's support of judicial discretion and its commitment to fairness has led to uncertainty in the law.

Though the Commission's limited reporting makes it "difficult to determine the number of federal defendants who have received reduced sentences for their prior good acts,"[95] the Supreme Court's decisions following *Booker* and *Koon* give judges broader freedom to consider defendants' personal circumstances under 18 U.S.C. § 3553,[96] and to regularly invoke a section 5H1.11 downward departure based on charitable

91. *See* Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721, 730–31 (2005).

92. Rita v. United States, 551 U.S. 338, 357–58 (2007).

93. Gall v. United States, 552 U.S. 38, 52 (2007) (quoting *Koon*, 518 U.S. at 113).

94. U.S. SENT'G GUIDELINES AMEND. 739 (U.S. SENT'G COMM'N 2010), https://www.ussc.gov/guidelines/amendment/739 [https://perma.cc/QV8D-5KAW]; *see also* United States v. Booker, 543 U.S. 220, 264–65 (2005) (observing that the Guidelines post-*Booker*, "while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary").

95. Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1123 (2008). Unfortunately, the Commission's sentencing reports combine classic white-collar crimes, such as fraud, with "street" crimes, such as theft. *See* U.S. SENT'G COMM'N, SENTENCE TYPE BY TYPE OF CRIME (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table13.pdf [https://perma.cc/L4ZS-GN2G] (categorizing sentences into 30 types of crime, including "other").

Additionally, the Commission's reports on downward departure do not separate departures based on section 5H1.11 factors into a separate category. *See* U.S. SENT'G COMM'N, REASONS GIVEN BY SENTENCING COURTS FOR DOWNWARD DEPARTURES FROM THE GUIDELINE RANGE (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/Table43.pdf [https://perma.cc/8VXA-YH3W].

Also, because the appellate standard of review is the demanding "abuse of discretion," circuit court review is now rarer than it was pre-*Booker*. Accordingly, tracking such departures means reviewing sentencing opinions, many of which are not readily available on legal databases.

96. 18 U.S.C. § 3553 (2018) (detailing factors to be considered when imposing a sentence, notably including "the nature and circumstances of the offense and the history and characteristics of the defendant").

service—including financial contributions.[97] Despite concern that such use of section 5H1.11 could mean "that a successful criminal defendant need only write out a few checks to charities and then indignantly demand that his sentence be reduced,"[98] this type of service—charity measured in dollars and cents—is now fair game to mitigate otherwise harsh sentences in white-collar cases.[99] To donate so much money that a judge would classify the defendant's generosity as exceptional, the defendant must have a substantial amount of money to spare. In effect, the defendant must be wealthy.

---

97. *See* United States v. Tomko, 562 F.3d 558, 571–72 (3d Cir. 2009) (upholding the district court's downward departure in a tax-evasion case, based on defendant's "extensive charitable works" in which he "devoted . . . a portion of his wealth," after previously reversing the district court's decision prior to Supreme Court's *Gall* opinion); *see also* Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS., no. 1, 2013, at 53, 60–62 (discussing worries expressed by the Commission, U.S. Attorney Preet Bharara (S.D.N.Y.), the Department of Justice, and Congress regarding "new discretionary license in white collar cases").

98. United States v. McHan, 920 F.2d 244, 248 (4th Cir. 1990).

99. Peter J. Henning, *Prior Good Works in the Age of Reasonableness*, 20 FED. SENT'G REP. 187, 187–89 (2008) [hereinafter Henning, *Prior Good Works*].

The background of most white-collar defendants as (otherwise) law-abiding citizens who contribute to their community, particularly through charitable contributions, can become an important basis for seeking a reduced sentence. Under the reasonableness regime ushered in by *Booker*, the "good works" of the defendant may take on even greater prominence in the sentencing process. For white-collar defendants, the nonviolent nature of their offenses, and their personal histories of community service and charity, can become a potent means to argue in favor of an exercise of judicial discretion to impose substantially reduced sentences. *Id.* at 189.

This is not to say, however, that evidence of impressive charitable donations always yields a downward departure. In fact, some courts have been quick to observe the opposite. For instance, Judge William Pauley III shut down attorney Michael Cohen's request for consideration of his charitable donations and fundraising at Cohen's high-profile 2018 sentencing "for lying to Congress, campaign finance violations, bank fraud and tax evasion." Janell Ross, *Three Years for Cohen Is Serious. But It's Not Even Close to the Average Federal Sentence*, NBC NEWS (Dec. 13, 2018, 2:15 PM), https://www.nbcnews.com/news/nbcblk/three-years-cohen-serious-it-s-not-even-close-average-n947611 [https://perma.cc/NE39-Y48N].

> Cohen's lawyers argued that his decision to fundraise for St. Jude Children's Research Hospital, Operation Smile, a scholarship fund at his children's Manhattan private school and other good deeds within his social circle should mitigate his punishment. They argued for no jail time at all. The judge's response was that of a man who has heard it before from rich defendants. [Judge Pauley stated:] "The letters submitted . . . reveal a man dedicated to his family and generous with his time and money to help people in his own orbit . . . . Of course that kind of generosity is laudable. But somewhere along the way Mr. Cohen appears to have lost his moral compass and sought instead to monetize his newfound influence."

Id.

III. CHARITABLE DONATIONS ARE A PROXY FOR SOCIOECONOMIC STATUS

A. CHARITABLE DONATIONS REFLECT HIGH-SOCIETY NETWORKS AND INFLUENCE

Departures based on section 5H1.11 or otherwise related to a defendant's "charitable service" are disproportionally considered in white-collar sentencings.[100] When "giving" means donations, a defendant's actions differ from the norm when the defendant donates an extraordinary amount of money.[101] As a practical matter, high-income defendants are more likely to be able to make these gifts; in fact, "[h]igh-income households provide an outsized share of all philanthropic giving."[102]

Compared to lower-income brackets, the wealthy give disproportionately "both in dollars and as a fraction of income."[103] Undoubtedly, the wealthiest Americans make the most extraordinary charitable donations—because they can afford to. Individuals "in the top 1 percent of the income distribution . . . provide about a third of all charitable dollars given in the U.S."[104] More than 97 percent of wealthy households donate annually, and although not all gifts are "extraordinarily copious," enough are large enough to "push up the donation average."[105] Because white-collar defendants are disproportionately wealthy,[106] they are more likely to benefit from judicial consideration of

100. This observation is notwithstanding military service departures under section 5H1.11. *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* U.S. v. Booker*: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 2 (2011) (statement of Chairman James Sensenbrenner) ("The increasing frequency of downward departures is undermining sentencing fairness throughout the Federal system."); Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 972 (2017) (finding that "in the context of a harsh sentencing regime for mid-to-high value economic crimes, [particularly federal] judges . . . may still be holding back in sentencing economic criminals").

101. *See supra* Section II.D (explaining the "extraordinary" requirements for a downward departure based on charitable donations).

102. *Who Gives Most to Charity?*, PHILANTHROPY ROUNDTABLE, https://www.philanthropyroundtable.org/almanac/statistics/who-gives [https://perma.cc/4MNG-FMD3].

103. *Id.*

104. *Id.* In 2015, the top one percent included "any family making $394,000 or more." *Id.* When gifts come by "bequest[], the rich are even more important: the wealthiest 1.4 percent of Americans are responsible for 86 percent of the charitable donations made at death." *Id.*

105. *Id.*

106. Peter J. Henning, *Determining a Punishment that Fits the Crime*, N.Y. TIMES: DEALBOOK (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/dealbook/determining-a-punishment-that-fits-the-crime.html [https://perma.cc/H6YP-VWAA].

> Unlike those who commit street crimes, white-collar offenders are much more likely to be members of the middle class, and possibly even among the economic elite . . . . They have the resources to present a sympathetic picture of their life while claiming that violations of the law were just aberrations from an otherwise exemplary life.

Id. White-collar defendants are also more likely to be white, have pursued or completed higher education, and are less likely to suffer from substance abuse than "street crime" defendants. Ernest Poortinga, Craig Lemmen & Michael D. Jibson, *A Case Control Study: White-Collar Defendants*

charitable donations, regardless of whether the judge is following the Guidelines.

Beyond generosity, wealthy individuals have other reasons to give, such as reciprocity, seeking a "warm glow," and exercising influence.[107] High-socioeconomic-status donors are more likely to give—and to self-report their giving—when they believe in reciprocity, whereas low-socioeconomic-status donors tend to be more generous when they give based on gratitude.[108] Under the reciprocity theory, people give because they are "motivated by rewarding incentives (such as a gain in reputation or status)" or because they had a positive past experience.[109] People also enjoy being observed when they give "because of the prestige, respect, and public acclaim that charity participation often entails."[110] Accordingly, in the small social circles of the extremely wealthy, giving itself can be competitive.[111]

In addition to their disproportionate wealth, white-collar defendants are more likely to be professionals, nonviolent, and first-time offenders—all evidence that judges tend to weigh in favor of unlikely recidivism and "lighter" sentences.[112] They typically work as corporate executives, financial analysts, attorneys, accountants, doctors, bankers, and the like. In fact, Edwin H. Sutherland, the sociologist who introduced the concept of white-collar crime, originally defined white-collar criminals as a subset of professionals.[113] As

---

Compared with Defendants Charged with Other Nonviolent Theft, 34 J. AM. ACAD. PSYCHIATRY & L. 82, 87 (2006) (finding that "white-collar defendants were likely to have more education," contributing to their "higher" socioeconomic status).

107. *See infra* notes 108–11 and accompanying text (explaining why people give); *see also* Giuseppe Mastromatteo & Francesco Flaviano Russo, *Inequality and Charity*, 96 WORLD DEV. 136, 143 (2017) (noting that people contribute to charity as a "result of pure altruism, or the result of impure altruism, for instance because of the warm-glow feeling associated with giving or because of the prestige, respect, and public acclaim that charity participation often entails").

108. Chang-Jiang Liu & Fang Hao, *Reciprocity Belief and Gratitude as Moderators of the Association Between Social Status and Charitable Giving*, 111 PERSONALITY & INDIVIDUAL DIFFERENCES 46, 49 (2017).

109. *Id.* at 46.

110. Mastromatteo & Russo, *supra* note 107, at 143.

111. *See* Jenny Santi, *Philanthropy: The New Prada? Competitive Altruism and the Rise of Philanthropy as the Ultimate Status Symbol*, HUFFPOST (Oct. 6, 2016, 4:03 PM), https://www.huffpost.com/entry/philanthropy-the-new-prad_b_12362088 [https://perma.cc/A64U-PK8Z] ("[T]hose who can afford to have parks, libraries, museums, and educational institutions named after themselves and their families are on an entirely different plane [of social status]."). High-status individuals' financial decisions have even been shown to psychologically influence others' economic decision-making in general. *Id.* Affluent individuals can have a compounding effect on fundraising; research shows that people are more likely to donate after they see a wealthy person donate money. Felix Ebeling, Christoph Feldhaus & Johannes Fendrich, *A Field Experiment on the Impact of a Prior Donor's Social Status on Subsequent Charitable Giving*, 61 J. ECON. PSYCH. 124, 129–30 (2017).

112. Bibas, *supra* note 91, at 723–24; Henning, *Prior Good Works*, *supra* note 99, at 188–89.

113. *See generally* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949) (introducing the concept of "white-collar crime" as crime committed by well-respected professionals in the course of their occupation).

professionals, white-collar criminals base their livelihoods on reputations and referrals, making them deeply reliant on and invested in their social networks.[114]

To convey a defendant's charitable service to the sentencing judge, defense attorneys present a variety of evidence to document the defendant's exceptional record of prior good works.[115] For instance, defense counsel may present evidence of charitable donations—for example, by documenting gifts or encouraging witnesses to attest to the defendant's generosity and character via sentencing letters.[116] Because of defendants' extensive social and professional networks, white-collar sentencings regularly yield hundreds of these letters.[117]

Though most any high-profile white-collar sentencing could provide a salient illustration,[118] the sentencing in *United States v. Gupta* clearly exemplifies the benefits of being well-connected in high society.[119] Prior to the Goldman Sachs director Rajat Gupta's sentencing hearing for insider trading, Gupta's counsel submitted over 200 letters in support of a more lenient sentencing based on his charitable service.[120] Included were letters from Microsoft co-founder Bill Gates, who discussed serving on a charity board with Gupta, and former secretary–general of the United Nations Kofi Annan.[121] Additionally, Berkshire Hathaway executive Ajit Jain testified in support of Gupta and his character.[122] Though Gupta's recommended

114. *See generally* Michael L. Benson, *Emotions and Adjudication: Status Degradation Among White-Collar Criminals*, 7 JUST. Q. 515 (1990) (analyzing the ramifications of white-collar offenders' reliance on hierarchical societal structure and their professional communities).

115. Henning, *Prior Good Works*, *supra* note 99, at 188–90.

116. *See* Richman, *supra* note 97, at 71; Janet Hinton, *Developing Mitigation Evidence*, FED. PUB. DEF., E. DIST. OF MO., https://moe.fd.org/Dev_Mitigation.php [https://perma.cc/634H-HJV3] ("Character or reference letters are also an important part of persuasive sentencing advocacy."); *see, e.g.*, *infra* notes 127–30 and accompanying text (discussing gift documentation and character letters filed in one case).

117. *See* Henning, *Prior Good Works*, *supra* note 99, at 190.

118. *See, e.g.*, United States v. Mehta, 307 F. Supp. 2d 270, 271 (D. Mass. 2004) ("118 letters were sent to the Court describing Mehta's record of charitable and community works . . . ."); Status Report, Exhibit A: Transcript of Sent'g at 79, United States v. Manafort, No. 1:17-cr- 00201 (D.D.C. Mar. 11, 2019), ECF No. 544 (on file with author) (describing how Manafort "earned the admiration of a number of people, all of whom have written the Court about him"); Melissa Harris, *Ty Warner Got Off Easy*, CHI. TRIB. (July 15, 2015, 3:09 PM), https://www.chicagotribune.com/business/ct-harris-ty-warner-0716-biz-20150715-column.html (describing the impact 70 supportive letters made on judge's sentencing decision).

119. *See* Michael Rothfeld, *Dear Judge, Gupta Is a Good Man*, WALL ST. J. (Oct. 12, 2012, 7:47 PM), https://www.wsj.com/articles/SB10000872396390444657804578052990875489744 [https://perma.cc/TV8Z-JD69]. Though "Judge Rakoff limited the discussion of Mr. Gupta's charitable works at the trial," he considered the evidence during sentencing. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

Guidelines sentence "could [have] exceed[ed] 10 years,"[123] Judge Rakoff sentenced Gupta to only two years in prison.[124]

Even before a judge as experienced and discerning as Judge Rakoff, the words of successful public figures like Gates, Annan, or Jain can carry greater weight than those of an unknown individual. The judge is likely familiar with the speaker and knows that any of the speaker's public comments will be scrutinized, making it in the speaker's best interest to tell the truth. As such, the judge might view the speaker's statements as being more reliable than statements of individuals with whom the judge is unfamiliar.

Alternatively, the defendant may choose to present his charitable contributions to the judge directly in the form of a sentencing exhibit.[125] Stark accounting is an effective tool for conveying the remarkable size of a defendant's charitable donations. For instance, in *United States v. Seabrook*, Murray Huberfeld was convicted of conspiracy to commit wire fraud in a $20 million bribery scheme and faced up to five years in prison.[126] At sentencing, in addition to individual letters discussing Huberfeld's charitable works,[127] Huberfeld's defense counsel submitted detailed accounting of the defendant's family fund and foundation.[128] The "Bodner–Huberfeld Fund" records indicated that the defendant had donated $107,259,050 to charities

123. *Id.*; *see also* Gov't's Sent'g Memorandum at 12, United States v. Gupta, No. 1:11-cr-00907 (S.D.N.Y. Oct. 17, 2012) (indicating a Guidelines range of 97 to 121 months for Gupta's conduct).

124. Michal Addady, *Former Goldman Sachs Director Completes Prison Sentence*, FORTUNE (Mar. 14, 2016, 1:30 PM), https://fortune.com/2016/03/14/prison-sentence-rajat-gupta [https://perma.cc/F6YM-CAZK] ("[Gupta] was . . . sentenced to two years in prison, which is about four times less than federal sentencing guidelines. Additionally, he was fined $5 million. Gupta, 67, finished out the last two months of his sentence under house arrest at his Manhattan home . . . .").

125. *See infra* notes 127–30 and accompanying text.

126. Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S. Dist. N.Y., Hedge Fund Founder Pleads Guilty to Fraud in Connection with Bribery of Former Correction Officers Union Leader (May 25, 2018), https://www.justice.gov/usao-sdny/pr/hedge-fund-founder-pleads-guilty-fraud-connection-bribery-former-correction-officers [https://perma.cc/H6VK-QMTU].

> HUBERFELD, founder of the Platinum Partners hedge fund ("Platinum"), pled guilty to conspiring with an intermediary, Jona Rechnitz, to cause the fund to pay $60,000 to Rechnitz's company by falsely representing that the money was payment for courtside tickets to eight New York Knicks basketball games. Instead, as HUBERFELD knew, the actual purpose of the payment was to reimburse Rechnitz for having paid Norman Seabrook, then-president of the Correction Officer's Benevolent Association ("COBA"), for Seabrook's efforts to get COBA to invest millions of dollars in Platinum.

Id.

127. *See generally* Sent'g Letter from Henry E. Mazurek, Ex. D, United States v. Seabrook, No. 1:16-cr-00467 (S.D.N.Y. Jan. 18, 2019), ECF No. 279-1 (containing charity, good deed, and mentor letters); Sent'g Letter from Henry E. Mazurek, Ex. E, *Seabrook*, No. 1:16-cr-00467, ECF No. 280-1 (containing charitable institution letters).

128. Ex. J: Bodner–Huberfeld Fund at 2, *Seabrook*, No. 1:16-cr-00467, ECF No. 281-5; Letter from Wagner, Ferber, Fine & Ackerman PLLC re: Huberfeld Family Foundation, *Seabrook*, No. 1:16-cr-00467 (S.D.N.Y. Feb. 8, 2019), ECF No. 294-2.

between 1987 and 2017.[129] The "Huberfeld Family Foundation" paperwork indicated that the organization, funded by the defendant, reported contributions and grant disbursements totaling $23,701,248 over the previous ten years.[130] "Huberfeld pleaded guilty to one count of conspiracy to commit wire fraud" and worked out a deal with prosecutors to face six months to one year in prison, based in part on his exemplary charitable giving.[131] Admittedly, however, Judge Alvin Hellerstein "disagreed with the parties' calculations" and sentenced Huberfeld to 30 months in prison.[132]

In addition, a defendant may personally inform the judge of his philanthropy during the sentencing hearing.[133] This was the strategy invoked by Peter Madoff, chief compliance officer of Bernard L. Madoff Investment Securities and brother of the eponymous Bernie.[134] When outlining his financial transactions during his emotional sentencing hearing, Peter pointedly recollected, "I had taken out $200,000 from the firm to make end-of-year charitable contributions, as I had planned to do before I was aware of the fraud."[135] Such direct and seemingly objective evidence can make it difficult for a judge to argue with a defendant's generosity. Indeed, if the defendant has made extraordinary contributions, failing to ask for a departure or variance seems like ineffective assistance on the attorney's part. For instance, if members of the Sackler family, philanthropic heavyweights and owners of pharmaceutical giant Purdue Pharma, were convicted of

---

129. Ex. J: Bodner–Huberfeld Fund, *supra* note 128, at 2.

130. Letter from Wagner, Ferber, Fine & Ackerman PLLC re: Huberfeld Family Foundation, *supra* note 128.

131. Priscilla DeGregory, *Norman Seabrook Pal Gets 2.5 Years for Role in Bribery Scheme*, N.Y. POST (Feb. 12, 2019, 9:48 PM), https://nypost.com/2019/02/12/norman-seabrook-pal-gets-2-5-years-for-role-in-bribery-scheme [https://perma.cc/224E-C4B4].

This Note primarily focuses on the actions of judges, because only they can sentence defendants. In some instances, however, prosecutorial discretion is just as concerning. By offering deals that take the defendant's sentence out of the Guidelines range, prosecutors can greatly influence the exercise of judicial discretion. But prosecutorial discretion is, of course, unreviewable and the influence a defendant's socioeconomic status has on the prosecutor's recommendation is ultimately of little consequence at the sentencing stage.

132. *Id.*

133. *See* WHEELER ET AL., *supra* note 32, at 53 ("Though defense attorneys influence the way in which a defendant handles the allocution, judges feel that in their reading of it they can often pick up a sign of remorsefulness, or lack thereof, or get a better understanding of why the defendant did what he did.").

134. *See Anniversary Behind Bars: Where Are Bernie Madoff's Insiders?*, ABC NEWS, https://abcnews.go.com/US/photos/anniversary-bars-bernie-madoffs-insiders-27544302/image-peter-madoff-27544303 [https://perma.cc/7P43-E2Z2]. At sentencing, Peter Madoff conveyed to Judge Swain that he idolized his older brother, Bernie, stating, "I revered him and trusted him implicitly," and was led into inappropriate behavior by his brother. Sent'g Transcript at 32, United States v. Madoff, No. 10 Cr. 228 (S.D.N.Y. June 29, 2012) (on file with author). But Peter stated that "[o]n several occasions my brother and I engaged in money transfers in ways specifically designed to avoid payment of taxes" and that he "knew that this conduct was wrong." *Id.* at 33.

135. *Id.* at 39.

fraud,[136] their counsel would undoubtedly maintain a tactical, narrative-controlling approach when presenting the defendants' charitable donations during the sentencing phase, just as counsel for Gupta, Huberfeld, and Madoff did.[137]

B. Considering Charitable Donations Is Thinly Veiled Socioeconomic Discrimination

By equating the depth of a defendant's service to the size of his donations, judges favor rich defendants who have the means to make extraordinary donations. In practice, considering a defendant's charitable donations in a criminal sentencing means considering the defendant's available income. Income is the cornerstone of socioeconomic status. Thus, considering charitable donations is a proxy for considering socioeconomic status. The Guidelines expressly forbid this. The language and order of the Guidelines, however, make it easy for judges to misinterpret section 5H1.11's language as a potentially expansive exception to section 5H1.10's preclusion of socioeconomic consideration.[138]

Circuit courts vary in how strictly they police this issue. Accordingly, a defendant's socioeconomic status may be considered to a different extent or considered with greater frequency depending on the circuit in which he is sentenced. In *United States v. Tomko*, the Third Circuit treated the district court's "individualized assessment" with great deference, citing the recent *Booker* and *Gall* opinions.[139] In *Tomko*, the defendant was sentenced to "three

136. *See* Jared S. Hopkins & Sara Randazzo, *Purdue's Sackler Family Accused of Fraud in Transfers of Opioid Profits*, WALL ST. J. (Mar. 28, 2019, 3:37 PM), https://www.wsj.com/articles/new-york-attorney-general-files-new-allegations-against-opioid-maker-purdue-pharma-and-sackler-family-owners-11553781600 [https://perma.cc/2492-HN45].

137. *See* Erica Orden, *Sackler Family, Fortune and Philanthropy Under Scrutiny Amid Opioid Lawsuits*, CNN (Feb. 1, 2019, 7:28 PM), https://www.cnn.com/2019/02/01/health/sackler-family-fortune-philanthropy-opioids-scrutiny/index.html [https://perma.cc/88TX-MNT8] (describing "the Sackler name" as "most closely associated with some of the premier cultural and academic institutions in the world," and describing the family's donations to cultural landmarks such as the Louvre, the Guggenheim Museum of Art, and the Victoria & Albert Museum, as well as Sackler-funded "educational programs, professorships and medical research programs" at elite American universities).

138. Section 5H1.11 directly follows section 5H1.10's blanket disavowal of socioeconomic consideration. Additionally, section 5H1.11's terms are broad and its list lengthy. U.S. SENT'G GUIDELINES MANUAL § 5H1.11 (U.S. SENT'G COMM'N 2018) (allowing judges to consider "[c]ivic, charitable, or public service; employment-related contributions; and similar prior good works"). Additionally, by stating that these factors "are not ordinarily relevant in determining whether a departure is warranted," the Guidelines leave the question of when the factors *are* relevant up to judicial interpretation. *Id.*

139. United States v. Tomko, 562 F.3d 558, 575 (3d Cir. 2009). The First Circuit has utilized similar language when affirming sentences under similar conditions. *See generally* United States v. Thurston, 544 F.3d 22 (1st Cir. 2008) (affirming sentence of three months in prison for defendant convicted of conspiracy to defraud Medicare of over $5 million, when the defendant

years of probation with one year of home confinement" for criminal tax evasion, though his Guidelines sentence was 12 to 18 months in prison.[140] One reason for the district court's downward departure was Tomko's charitable services, which included financial aid to the Pittsburgh Habitat for Humanity, as described in "over fifty letters from family, friends, [and] community leaders."[141] In contrast, in *United States v. Romanini*, the Sixth Circuit overturned Romanini's sentence because the district court judge expressly and repeatedly considered Romanini's wealth when determining his sentence—including as it related to his widespread business network.[142] Accordingly, the Sixth Circuit found the judge "impermissibly considered Romanini's socioeconomic status in determining his sentence."[143]

To complicate matters further, judges themselves generally hold higher socioeconomic status and may be predisposed to favor like-situated defendants at sentencing.[144] The average federal judge's social and financial standing is more akin to a high-profile white-collar defendant than any other type of criminal defendant. For instance, federal district court judges make an annual salary of $210,900 and circuit court judges make $223,700.[145] Meanwhile, the average American salary is $50,000 and the median is a little over $32,800.[146] Notably, this data does not factor in the unemployed. Judges also tend to view themselves as "self-made" because they see their judicial appointments as merit-based and founded in their educational and

faced a Guidelines range of 63 to 78 months in prison and the judge based departure on charitable and spiritual service).

140. *Tomko*, 562 F.3d at 576 (Fisher, J., dissenting).

141. *Id.* at 562, 572 (majority opinion).

142. United States v. Romanini, 502 F. App'x 503, 509 (6th Cir. 2012). The district court also noted the defendant's ability to employ many people in the area. *Id.*

143. *Id.* at 510.

144. *See generally* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013) (analyzing socioeconomic bias in the judiciary, including its sources and effects). Such behavior would be in violation of the ABA Model Code of Judicial Conduct's prohibition of socioeconomic bias. Rule 2.3 provides that judges shall not "manifest bias or prejudice," including but not limited to biases based on "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS'N 2020).

145. *Judicial Compensation*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/P74X-57S9].

146. *Measures of Central Tendency for Wage Data*, SOC. SEC. ADMIN., https://www.ssa.gov/OACT/COLA/central.html [https://perma.cc/GNX2-JBWY] ("[T]he median wage is substantially less than the average wage. The reason for the difference is that the distribution of workers by wage level is highly skewed.").

occupational qualifications.[147] Accordingly, judges may be more likely to see socioeconomic status as earned.[148]

Although the Guidelines may no longer be mandatory, the underlying principle that socioeconomic status, along with race and gender, should not be considered during a trial or sentencing is a fundamental part of fair and impartial criminal adjudication. Though judges have discretion to consider all aspects of the defendant's situation in determining a criminal sentence, judges may not render inequitable results based on the defendant's socioeconomic status, race, or gender. And yet, when judges make sentencing decisions based on charitable donations, they do just that. "[T]he growing gap between rich and poor people in the United States demands renewed attention to the problem of judicial bias against the poor," even when this bias might be as simple as an unconscious identification with the wealthy.[149]

C. SEVERAL CIRCUITS RECOGNIZE THE DANGER OF WEALTHY DEFENDANTS "INVESTING" IN FUTURE LIBERTY

Just because judges are in the same or similar social echelon as the white-collar defendants they sentence does not mean they are ignorant of the problems posed by considering a defendant's socioeconomic status during sentencing. Indeed, some judges predicted today's inequity long ago.[150] Several circuits have recognized that white-collar defendants are able to manipulate the justice process by qualifying for sentencing reductions. For instance, the Tenth Circuit recently addressed the problem in *United States v. Sample*.[151] There, a district court judge sentenced Sample to five years of probation for "one count of frauds and swindles . . . and two counts of wire fraud."[152] Though "the government requested a sentence at the low end of Sample's Guidelines range, which was 78 to 97 months' imprisonment," the judge chose to let Sample keep his lucrative job as an investor so he could pay his victims back more quickly.[153]

But the Tenth Circuit rejected the sentence as substantively unreasonable, describing its "puzzle[ment at] the court's implicit suggestion that if the defendant were poor and unemployed, he might get a prison

147. *See* Neitz, *supra* note 144, at 143–44 (describing class privilege stemming from law school, private practice, and a lifetime appointment to the federal bench, and how different judges view this path differently).

148. *See id.* (explaining that some judges see their status as earned instead of granted as a privilege).

149. *Id.* at 146.

150. *See supra* Part II; United States v. McHan, 920 F.2d 244, 248 (4th Cir. 1990) (expressing concern about a defendant's ability to in effect purchase a reduced sentence).

151. *See* United States v. Sample, 901 F.3d 1196, 1198 (10th Cir. 2018).

152. *Id.* at 1197.

153. *Id.* at 1197–98. Though some of Sample's victims lost their life savings, Sample urged them "to testify for him before the Securities and Exchange Commission and in his criminal case" as witnesses to his character, as Ajit Jain did for Rajat Gupta. *Id.* at 1198; Rothfeld, *supra* note 119.

term."[154] Citing an Eleventh Circuit opinion in agreement, the court cautioned that because white-collar defendants routinely weigh large rewards with relatively small chances of getting caught, deterrence and sentencing consistency were particularly important in white-collar cases.[155] It continued on to caution that, by "imposing minimal sentences on white-collar criminals, courts 'raise concerns of sentencing disparities according to socio-economic' status."[156]

Citing similar holdings in the First Circuit and Third Circuit, the Tenth Circuit also highlighted the importance of minimizing discrepancies between white-collar sentences and "street crime" sentences, stressing that white-collar defendants "with money or earning potential" should not be able "to buy their way out of jail."[157] Because "[o]ur system of justice has no sentencing discount for wealth,"[158] the court held that the district court's reliance on Sample's wealth as a basis for reducing his sentence was improper and remanded the case for resentencing.[159]

In this way, *Sample* identifies the problem with downward departures for charitable donations under section 5H1.11: Individuals who engage in risky financial decisions that border on, or even knowingly pass into, criminal behavior know that they might be viewed more favorably if they can demonstrate their value to the community—even if that value is financial. Judge Victor Marrero has observed this "stark reality": For a white-collar defendant who "commits serious crimes and then begs for leniency," "the mask of piety he wears is but the face that previously disarmed his victims, and his front of charity merely the human shield he raises to seek immunity or dramatic mitigation of punishment when he is caught."[160] Such "social and economic advantages" allow white-collar offenders "to gain a substantial edge

154. *Sample*, 901 F.3d at 1199. The Tenth Circuit cited several other circuit courts who have found similar impermissible outcomes when judges imposed more lenient sentences on white-collar defendants. *Id.* at 1200; *see, e.g.*, United States v. Prosperi, 686 F.3d 32, 47 (1st Cir. 2012) ("It is impermissible for a court to impose a lighter sentence on white-collar defendants than on blue-collar defendants because it reasons that white-collar offenders suffer greater reputational harm or have more to lose by conviction."); United States v. Stall, 581 F.3d 276, 286 (6th Cir. 2009) ("We do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose."); United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999) ("Business criminals are not to be treated more leniently than members of the 'criminal class' just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity.").

155. *Sample*, 901 F.3d at 1199–1200 ("The Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status." (quoting United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013))).

156. *Id.* at 1201 (quoting United States v. Levinson, 543 F.3d 190, 201 (3d Cir. 2008)).

157. *Id.* (quoting United States v. Mueffelman, 470 F.3d 33, 40 (1st Cir. 2006)).

158. *Id.*

159. *Id.* at 1199, 1201.

160. United States v. Fishman, 631 F. Supp. 2d 399, 403 (S.D.N.Y. 2009).

over blue collar offenders who cannot make claim to comparable means and opportunities with which to mitigate the full impact of a heavy sentence."[161]

As the law stands, defendants would be unwise *not* to accumulate "good works" in the form of charitable donations to prepare for a future indictment, regardless of however uncertain charges might be. According to Supreme Court precedent,[162] this "investment" in future liberty is fundamentally unfair.

IV. REMOVING CLASS FROM CRIMINAL SENTENCING: A TWO-PART SOLUTION

Considering a defendant's socioeconomic status under section 5H1.11 is neither "consistent with the proper principles of punishment" nor a step forward in "re-plant[ing] the seeds of judicial trust."[163] This Part proposes two solutions. The first—modifying the Guidelines—is a cautious approach that could chip away at the problem but, due to *Booker*, will not solve it entirely. Only an additional and corresponding second approach will truly remedy the issue: The Supreme Court must clarify that judicial consideration of a defendant's socioeconomic status during a criminal sentencing conflicts with precedential principles of fairness in criminal adjudication. However, until the question comes before the Court, the Guidelines should be modified to clarify that "charitable service" does not include monetary donations, as these are proxies for improperly considering the defendant's socioeconomic status.

A. THE SENTENCING COMMISSION MUST EXCISE CHARITABLE DONATIONS FROM GUIDELINES SECTION 5H1.11

First, charitable donations must be disregarded entirely during criminal sentencings. Considering a defendant's socioeconomic status this way neither achieves the goals of punishment nor strengthens public trust in the judiciary. Thus, given the realities of implicit socioeconomic bias, it is neither prudent nor just to allow a judge to consider a defendant's socioeconomic status in criminal sentencing, just as it would be unjust to allow judges to consider a defendant's race or gender. Ignoring this bias, as criminal justice stakeholders have, is contrary to elementary notions of justice and psychology. It effectively authorizes bias.

A compromise proposal based on percentage of income given to charity would be an insufficient solution because selecting a set percentage that would result in fair sentencing calculations across a myriad of income levels and asset types would be exceedingly difficult. This issue would be exacerbated by the fact that this problem typically arises only in white-collar cases in which the defendant is extremely wealthy and has a remarkable amount of disposable income. Moreover, any set percentage is likely to be abused by offenders or even manipulated by adept defense counsel.

---

161. *Id.*

162. *See supra* Section II.A.

163. Bennett at al., *supra* note 100, at 989.

Regardless, because income is the lynchpin of socioeconomic status, considering income is considering socioeconomic status. As such, the intent behind section 5H1.10 would remain defeated if a threshold percentage of income given to charity were sufficient to enable judicial consideration of a defendant's socioeconomic status at sentencing.

B. THE SUPREME COURT MUST CLARIFY THE BOUNDARIES OF JUDICIAL DISCRETION

In any case, because the Guidelines are now advisory, the Supreme Court must also act by clarifying that when judges consider charitable donations during a criminal sentencing, they are considering defendants' incomes and financial resources despite section 5H1.10's explicit policy that socioeconomic status is not relevant. Judicial consideration of these otherwise discriminatory factors does not protect defendants' rights as required by Court precedent. On the contrary, it enhances discrimination in criminal sentencing. Considering charitable donations during sentencing is far more likely to benefit wealthy individuals who can donate "extraordinary" amounts of money than their non-affluent counterparts who cannot afford such donations. When it comes to section 5H1.11 downward departures based on donations, judicial discretion only benefits the wealthy. A Supreme Court opinion clarifying that judges may not consider a defendant's socioeconomic status via charitable donations is a natural extension of the Court's precedent and a fair and modest solution that would reinvigorate public trust in the judicial process.

1. A Natural Extension of the Court's Precedent on Criminal Adjudication

"Due process and equal protection principles converge in the Court's analysis" where the case concerns inequality based on a criminal defendant's socioeconomic status.[164] In ruling on such issues, the Court "analyze[s] the fairness of relations between the criminal defendant and the State under the Due Process Clause, while . . . approach[ing] the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause."[165] But the Court has found that when the federal government denies equal protection, its acts nearly always constitute a deprivation of liberty under the Fifth Amendment's Due Process Clause.[166]

But it is unclear whether the Court would define consideration of charitable donations as a situation in which non-affluent people are denied liberty—here, freedom from incarceration—and affluent people are

164. Bearden v. Georgia, 461 U.S. 660, 665 (1983).

165. *Id.*

166. *See* U.S. CONST. amend. V; Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that racial segregation in D.C. public schools "depriv[ed] [African-American children] of their liberty in violation of the Due Process Clause").

essentially granted an additional way to preserve their liberty. And given the Court's recent reticence to apply any standard more demanding than rational basis, a strictly due process or equal protection claim is unlikely to be a realistic solution.[167] Regardless, given that the Guidelines are no longer mandatory post-*Booker*, what matters is the Court's case law. Therefore, it is inconsequential whether the Court can tear itself away from its deferential rational-basis standard of review, so long as a conflict with binding precedent exists.

Thus, the Court must rule that considering a defendant's charitable donations is a proxy for improperly considering socioeconomic status, and such consideration during criminal sentencing contravenes Supreme Court precedent. The practice of considering charitable donations at criminal sentencings is in opposition to the Court's 1940s and '50s criminal-law precedent, in which the Court compared socioeconomic status to race and religion and proclaimed that it was fundamentally unfair and bore no rational relationship to sentencing goals; thus the Supreme Court forbade courts from allowing these factors to affect the administration of criminal justice.[168] As the *Griffin* Court held, a defendant's financial resources are unrelated to his guilt or innocence.[169] Similarly, a defendant's income bears no rational relation to the goals of punishment: rehabilitation, deterrence, isolation, and retribution. Thus, while the Court's more liberal-minded Justices' disapproval of considering socioeconomic status at criminal sentencing would likely be based on fairness principles and civil liberties, the Court's more conservative-minded Justices may disapprove and join an opinion outlawing the practice for other reasons. For instance, no evidence indicates that considering a defendant's socioeconomic status prevents future crimes or protects communities; in fact, it likely saves a deserving defendant from fitting punishment.

Although sentencing is inherently more individualized than a trial, given that the court considers the defendant's personal characteristics in additional to the crime committed, both ultimately concern the same thing: the defendant's liberty. As the *Griffin* majority, speaking through Justice Black, stated, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[170] For this principle to hold, it must logically extend to other components of criminal adjudication directly affecting a defendant's liberty. There can be no equal justice where a

167. As Justice Frankfurter noted in his concurrence in *Griffin*, however, this may underestimate the Court. Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring in judgment) ("'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.").

168. *See supra* Section II.A.

169. *Griffin*, 351 U.S. at 17–18.

170. *Id.* at 19.

defendant's length or type of sentence depends directly on the defendant's wealth.

The Supreme Court is also the only court with the ability to adjust law on a national scale—the appropriate scale needed to address the federal sentencing discrepancies this Note detailed. As Justice Frankfurter observed: "In arriving at a new principle, the judicial process is not impotent to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel 'either/or' determinations."[171] The Court "should not indulge in the fiction that the law now announced has always been the law . . . . It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law."[172] Over the past several decades, cultural expectations have shifted. Americans now demand a judicial process free from clear bias.[173] Although the Court cannot eliminate judicial bias completely,[174] it can remove clear barriers to equal justice.

2. A Modest Carve-Out with a Powerful Impact

Because restricting judicial discretion is always controversial, this solution will surely have its detractors. As Judge William W. Schwarzer wrote, "[a] justice system that denies judges discretion cannot be depended on to produce fair and reasonable results. And a justice system that denigrates and distrusts its judges will not long be worthy of the name."[175] Other jurists have long relied on the maxim *optima lex quae minimum relinquit arbitrio judicis; optimus judex qui minimum sibi*,[176] which translates as "[t]hat system of law is best which confides as little as possible to the discretion of the judge; that judge the best who relies as little as possible on his own opinion."[177]

---

171. *Id.* at 26 (Frankfurter, J., concurring in judgment).

172. *Id.* However, several current Supreme Court Justices, including Chief Justice Roberts, view their work as interpreting pre-existing legal constructs, i.e., "what the law is," more than directly interpreting legal concepts. *See Chief Justice Roberts Statement—Nomination Process*, U.S. CTS. (Sept. 29, 2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process [https://perma.cc/F3MH-L24X]; Richard Wolf, *For Supreme Court's Conservatives, It's All About the Letter of the Law*, CONST. ACCOUNTABILITY CTR. (May 29, 2018), https://www.theusconstitution.org/news/for-supreme-courts-conservatives-its-all-about-the-letter-of-the-law [https://perma.cc/7P5R-PZW6]. For this reason, a Supreme Court opinion that proceeds on a purposive theory may be unrealistic in the near future.

173. *Most Americans Trust the Supreme Court, but Think It Is 'Too Mixed Up in Politics,'* AP NEWS (Oct. 16, 2019), https://apnews.com/PR%20Newswire/ca162cc03b3261ff6o8ab7d8cfc31a25 [https://perma.cc/6R3X-GL32] (detailing the Annenberg Public Policy Center's 2019 study in which 87 percent of Americans surveyed said that a judge's being "fair and impartial" was either "essential or very important").

174. Neitz, *supra* note 144, at 149–50.

175. William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENT'G REP. 339, 341 (1991).

176. Nathan Isaacs, *The Limits of Judicial Discretion*, 32 YALE L.J. 339, 350 (1923).

177. *Optima Est Lex Quae Minimum Relinquit Arbitrio Judicis; Optimus Judex Qui Minimum Sibi*, BLACK'S LAW DICTIONARY (1st ed. 1891).

This Note advocates for neither a reduction in nor expansion of judicial discretion. Instead, this Note merely proposes that the Court use its supervisory role to enforce preexisting limits on judicial discretion that prevent judges from considering a defendant's socioeconomic status via the proxy of financial donations. "[J]ustice must satisfy the appearance of justice."[178] The kind of personal characteristics listed in section 5H1.10 may not be considered during sentencing unless invoked to protect a defendant's constitutional rights.[179] Although judicial discretion's proper extent continues to be debated, this much is certain: Within its appropriate scope, discretion *promotes* justice.

Indeed, this necessary clarification does not produce unfair and unreasonable results—in fact, quite the opposite. Similarly, it does not evidence "distrust" of judges. The State's penological interest in sentencing a defendant does not—and should not—depend on how much money the defendant has. The harm to society remains the same and the interest in retribution should not change depending on whether a convicted criminal defendant is wealthy enough to make extraordinary charitable donations or not.

Per this recommended solution, defendants who, save for their criminal act(s), are exemplary citizens and truly devoted to their communities will still be able to receive downward departures based on appropriate judicial discretion. Though a defendant's charitable donations will be off-limits, a judge will still be able to factor in a defendant's prior good works via charitable *acts*, military service, and community service. A judge will still be able to consider a defendant's level of remorse, willingness to make restitution, and other sentencing factors allowing for assessment of character and continued risk to society.[180] This solution may be modest in the amount of cases it affects. But it will undoubtedly serve as a powerful statement to all stakeholders in the criminal justice process—as well as the general public: Discriminatory sentencing will not be tolerated.

---

178. Offutt v. United States, 348 U.S. 11, 14 (1954); *see also* United States v. Leung, 40 F.3d 577, 586–87 (2d Cir. 1994) (holding that when there is "sufficient risk that a reasonable observer . . . might infer, however incorrectly, that [race or nationality] played a role in determining [a] sentence," the sentence should be vacated).

179. *See* United States v. Bulltail, 594 F. App'x 346, 347 (9th Cir. 2014). "Although sentencing judges are afforded broad discretion to consider any information concerning the background, character, and conduct of a defendant in imposing a sentence, a defendant's race or ethnicity may not be considered." *Id.* (citation omitted) (interpreting the Supreme Court's decision in *Pepper v. United States*, 562 U.S. 476 (2011)); *see also* S. REP. NO. 98-225, at 171 n.409 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3354 n.530 (explaining the need for balance between neutrality and protection of a defendant's constitutional rights).

180. Though outside the scope of this Note, the question of the defendant's ability to make restitution has been discussed as another way that a defendant's socioeconomic status may be impermissibly considered at sentencing. *See* United States v. Plate, 839 F.3d 950, 958 (11th Cir. 2016) (holding that the district court's sentence, based on defendant's inability to pay full restitution, was substantively unreasonable).

V. CONCLUSION

Downward departures based on charitable donations enable preferential sentencing for wealthy defendants. Though the Guidelines forbid judges from considering socioeconomic status under section 5H1.10, judges typically view section 5H1.11 as an exception to the rule and consider financial donations to be a type of charitable service. Since the Supreme Court's *Booker* opinion made the Guidelines advisory, district court sentences are subject only to an abuse-of-discretion standard of review, leaving discretion less confined.

Supreme Court precedent evinces the Court's tension between sentencing individuals based on both the offense and the offender, on the one hand, and protecting fairness in the judicial process—particularly in criminal cases, when the defendant's liberty is at stake—on the other. But judicial discretion has its limits and the Supreme Court must step in if, as here, judges go too far. Considering socioeconomic status when calculating criminal sentences does not make society safer. It does not achieve just punishment.

For the general public, "it is the sentence that gives expression to our sentiments and understandings regarding crime and criminals."[181] A modest carve-out removing charitable donations from the scope of judicial sentencing review could result in substantial social gain. By preventing the wealthy from being able to "invest" in their future liberty via charitable donations, the Court will reaffirm its commitment to ensuring fundamental fairness at all stages of criminal adjudication.

181. WHEELER ET AL., *supra* note 32, at 1.