Loyalty's Reward — A Felony Conviction: Recent Prosecutions of High-Status Female Offenders

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LOYALTY'S REWARD — A FELONY CONVICTON: RECENT PROSECUTIONS OF HIGH-STATUS FEMALE OFFENDERS

Michelle S. Jacobs*

I. INTRODUCTION

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


2. The Savings and Loan crisis of the 1980s “turned out to be the costliest white-collar crime scandal in U.S. history.” Kitty Calavita & Henry N. Pontell, The State and White Collar Crime: Saving the Savings and Loans, 28 LAW & SOC’Y REV. 297, 297 (1994). Charles Keating, the owner of Lincoln Savings and Loan in Irvine, California, was one of the most notorious figures in this scandal. Savings and Loan Crisis, http://www.biography.ms/Savings_and_Loan_scandal.html. He was convicted of fraud and racketeering, and served four-and-a-half years in prison before his convictions were overturned. Id. At the end of the investigations, over eight hundred savings and loan offenders had been convicted, and seventy-seven percent of them received prison sentences. Calavita & Pontell, supra, at 297-98.


 Nonetheless, the present wave of corporate and white-collar scandals distinguishes itself through the sheer number of companies being investigated. It appears that no industry has been safe from scandal. The investigations prompted by the collapse of Houston’s energy giant, Enron, were independently responsible for the indictments of thirty individuals as of May 2004. The present scandals are also interesting because they provide us with an opportunity to observe the prosecutions of several women of high status charged with white-collar crime. Other than Susan McDougal, a defendant in the Whitewater case, and Leona Helmsley, the


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

9. Susan McDougal, her husband, James B. McDougal, and then governor of Arkansas, Jim Guy Tucker, were indicted and convicted of conspiracy and fraud in connection with the Whitewater investigation. See The Trials and Tribulations of Susan McDougal, CNN.com, Apr. 8, 1999, http://www.cnn.com/ALLPOLITICS/stories/1999/04/08/medougal.trials/. James McDougal became a government witness in the investigation and tried to convince his wife to cooperate as well. Id. She refused, and in addition to being sentenced to two years on the Whitewater charges, she was held for eighteen months on a civil contempt charge for refusing to testify in Kenneth Starr’s investigation. Id. McDougal served a total of twenty-two months in jail. Id. Upon release, she was tried and acquitted of the charge of embezzling funds from
New York Hotel proprietor, one is hard pressed to recall significant numbers of women publicly associated in the past with white-collar crime or corporate scandal at the level we presently see.

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

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


11. See Toedtman, supra note 5.


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

During the same period of time these corporate scandals were unfolding, another “mediagenic” case of a high-status woman was investigated and prosecuted. This woman was rap artist Lil’ Kim, whose birth name is Kimberly Jones. At first blush, Lil’ Kim’s

21. Ebbers was convicted at trial and sentenced to twenty-five years in prison. See Andrew Ross Sorkin, How Long To Jail White-Collar Criminals?, N.Y. Times, Sept. 16, 2005, at Cl.
case appeared to fit within the parameters of the prosecutions of the other high-status women. She was, for example, charged with a classic white-collar cover-up crime, as was Martha Stewart.\(^{23}\) She was charged in connection with an investigation into the actions of others. However, for reasons that will be discussed in Part IV of this Article, Lil' Kim's high status was not sufficient to elevate her case to the level of white-collar treatment.\(^{24}\)

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

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

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

24. See infra Part IV.

nificantly from many women who are incarcerated for street crimes. Lil’ Kim’s case offers an example of how strikingly close a street crime offender can be to a white-collar offender.

II. WOMEN AND CRIME

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

The factors that appear to contribute to women’s criminality are low income, school failure, and limited vocational skills and work experience. In addition, women victims of profound physical and sexual abuse tend toward a disproportionately criminal path. The two scholars most frequently cited who study women’s pathways to crime are sociologists Kathleen Daly and Beth Richie. In her study, Daly compared women and men’s offending within the con-

27. See Leslie Acoca & Myrna S. Raeder, Severing Family Ties: The Plight of Non-violent Female Offenders and Their Children, 11 STAN. L. & POL’Y REV. 133, 137 (1999). In federal prisons, seventy-two percent of incarcerated women were convicted of drug offenses; an additional twelve percent were incarcerated for property crimes, which included larceny and fraud. See Greenfeld & Snell, supra note 26, at 6. The authors state that twenty-six percent of women admitted to prison following a court sentence are convicted of larceny or fraud, compared with ten percent of men. Id.; see also Nancy Gertner, Women Offenders and the Sentencing Guidelines, 14 YALE J. L. & FEMINISM 291, 293 (2002) (arguing that women’s crimes are less serious than the crimes men commit and that women’s crimes cluster around drugs, embezzlement and fraud).
29. Greenfeld & Snell, supra note 26, at 5.
30. Id.
31. See Kathleen Daly, Gender, Crime, and Punishment 43-45 (1994).
32. Id.
text of a criminal court in Connecticut.\textsuperscript{33} Richie, on the other hand, focused on battered African American women detained at Riker’s Island in New York.\textsuperscript{34} Though each used differing nomenclature for the pathways they observed, both recognized the role violence, abuse, and poverty played in the pathways.\textsuperscript{35} Daly’s category of “other” included women who were not abused or drug-addicted and seemed to commit crime out of economic necessity or greed.\textsuperscript{36} Although both sociologists make reference to crimes committed by women in association with men, Richie specifically mentions loyalty as a factor that may trap African American battered women.\textsuperscript{37}

None of the factors traditionally found among women offenders appear to be relevant for the six White high-status women featured in this article. Which, if any, factors would be predictive of white-collar offenses among women? After the feminist movement took root in the United States, theories abounded suggesting that with women’s impending liberation, there would be a corresponding increase in the number of women committing white-collar crime.\textsuperscript{38} The theory was that as more women moved up the corporate ladder, there would be more opportunity to engage in the same types of crimes as male executives.\textsuperscript{39} This expected increase in women’s white-collar crime did not materialize. Although the number of women in prison has increased, this is believed to be a result of changes in criminal justice policy, rather than changes in the

\textsuperscript{33} Id. at 3-5.

\textsuperscript{34} See Beth E. Richie, Compelled to Crime 101 (1996).

\textsuperscript{35} Daly identified five types of women criminals: street women, harmed and harming women, battered women, drug-connected women, and “others.” Daly, supra note 31, at 45-49. Richie, on the other hand, identified six pathways from the women’s stories of what led them to the point of arrest: women held hostage, projection and association, sexual exploitation, fighting back, poverty, and drug addiction. Richie, supra note 34, at 105-23.

\textsuperscript{36} Daly, supra note 31, at 48. There may be some overlap between Daly’s “other” and Richie’s “poverty” path. However, Richie’s poverty path is defined as poverty caused by refusal of a violent spouse or intimate other to support a woman. Richie, supra note 34, at 120.

\textsuperscript{37} Richie, supra note 34, at 51.


\textsuperscript{39} Id. The theory has since been soundly criticized. See, e.g., Meda Chesney-Lind & Lisa Pasko, The Female Offender: Girls, Women, and Crime (2d ed. 2004). Chesney-Lind points to some studies by law enforcement that attempted to link women’s crime to the movement for female equality. She argues, however, that careful analysis of the data relied upon disputed the “liberation” or “emancipation” hypothesis. Id. at 112-14.
amount and type of crime women commit. More women are now being sent to prison for offenses that used to garner only a probationary sentence, but women still primarily commit non-violent crimes: larceny, theft, drunken driving, and fraud. In criminal enterprises, women still function at the lower echelons, clustered at the bottom of the organizational hierarchy, and their involvement in criminal activity is as minor players rather than primary players.

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

A. Loyalty—A New Path to Crime?

Women's loyalty to principal male offenders, and its relationship to female offending, is an issue of concern. The connection between a woman's criminality and a man's is most clearly demonstrated in the cases of women who are prosecuted for drug offenses. Eda Katharine Tinto argues that the comfort and com-

40. Gertner, supra note 27, at 303.
41. CHESNEY-LIND & PASKO, supra note 39, at 99.
42. Id.
43. Id. at 103. The data cited indicates that gains of men engaged in fraud were ten times higher than the gains achieved by women. Id. Fastow and Vinson appear to fit this pattern as well.
44. Gertner, supra note 27, at 305; Tracy Huling, Women Drug Couriers, 9 CRIM. JUST. 14, 16 (1995) (detailing narratives of women imprisoned for acting as mules on behalf of men they loved or feared).
45. See generally Celesta A. Albonetti, The Joint Conditioning Effect of Defendant's Gender and Ethnicity on Length of Imprisonment Under the Federal Guidelines for Drug Trafficking/Manufacturing Offenders, 6 J. GENDER RACE & JUST. 39 (2002);
panionship of an intimate relationship may outweigh the risks of providing help to a partner engaged in crime.\textsuperscript{46} The woman may also be dependent on the male offender for financial support for herself and her children.\textsuperscript{47}

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

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

III. WOMEN AND ACTUAL OFFENSES

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

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

53. See generally Paula C. Johnson, Inner Lives: Voices of African Ameri-
can Women in Prison 212-14 (2000) (Angela Thompson, who was prosecuted for
aiding her uncle’s drug operation and refused to take a plea, believing it would re-
quire her to testify against her uncle, was sentenced as a first-time offender to fifteen
years to life.).

54. See Daly, supra note 31, at 48.
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A. United States v. Betty Vinson

1. The Facts

Prior to its collapse, WorldCom was a telecommunications giant. Through mergers, it had grown from a small long distance company into the entity that became known as WorldCom. Betty Vinson started her employment with the company as a mid-level accountant when it was still a small company. Ms. Vinson was described as a "loyal employee who would do anything you told her." After a promotion, elevating her to senior manager in WorldCom's Corporate Accounting division, Vinson's responsibilities included compiling data for the company's quarterly statements. Unfortunately for Vinson, she and co-worker, Troy Normand, were approached in 2000 by their superior, Buford Yates, who asked them to engage in questionable accounting practices in order to help close a gap between WorldCom's performance and Wall Street's expectations. Initially, Vinson and Norman were concerned and disturbed by the request and did not want to oblige. Later, at the trial of Bernard Ebbers, the CEO of WorldCom, Vinson testified that she initially decided to quit rather than comply with the request. She drafted a letter of resignation but never submitted it. Scott Sullivan, the CFO of WorldCom, took personal responsibility for allaying the fears of Vinson and Normand. He appealed to her sense of loyalty and assured her that the manipulation was just for one quarter, that nothing she was doing was illegal, and that he would take responsibility if anything happened. She testified that Sullivan convinced her that the fraudulent entries were just for the quarter, a one-time incident, and that he just needed time to turn

56. Id. Ms. Vinson was the daughter of parents who owned a typewriter shop, where she worked summers as a college student. Id.
57. Id.
58. Id. Pulliam reports that by this time Vinson had ten employees reporting to her.
59. See Masters, supra note 20.
60. Id.
61. Id.
62. Id.
64. Id. Pulliam reports that Sullivan told her to defer quitting because "they had planes in the air. Once they have landed, if you still want to leave, then leave, but not while the planes were in the air." Id.
things around so that WorldCom could meet Wall Street's expectations. Vinson decided to stay because she accepted Sullivan's representations and wondered what right she had to question his strategy since, as Pulliam stated, he was "heralded as one of the top chief financial officers in the country." In addition, Vinson felt personal financial pressures to stay. She decided to help him just that one time.

Of course, one need not be a fortuneteller to predict that the manipulation would not end on that one occasion. Vinson and Normand ended up manipulating the figures for five additional quarters. Eventually, the deception was revealed when WorldCom collapsed. The United States Attorney for Mississippi launched an investigation into WorldCom's financial irregularities. Initially, Vinson and Normand were not targets of investigation by the United States Attorney in Mississippi. They voluntarily came in and gave the office the information they had about the fraud. However, the investigation was eventually taken over by the United States Attorney for the Southern District of New York, who did treat Vinson and Normand as targets of the investigation. Vinson was charged with conspiracy and securities fraud. She pled guilty and agreed to cooperate with the government's prosecution of Sullivan and Ebbers. When it was time for Vinson to be sentenced, the judge stated that she believed Vinson was at the lowest level of culpability for the fraud that took place at WorldCom. Yet, at the same time, she felt that without Vinson's false entries, WorldCom's true financial condition would have been

65. Id.
66. Id.
67. Id. She rationalized that she was the primary breadwinner of the family and her family depended on her insurance coverage. Id. In this regard, Vinson shared the approach many female street crime offenders use when weighing whether to stay with drug-dealing men.
68. Id.
72. Id.
73. Id.
74. Id.
75. See Masters, supra note 20.
discovered much earlier.\textsuperscript{77} Vinson received a term of five months in prison and five months of house arrest.\textsuperscript{78} Normand was sentenced to three years probation.\textsuperscript{79} There is no evidence that Vinson reaped any undue financial reward, other than a promotion, which brought her to a higher salary level. Her decision to help was motivated by loyalty to Sullivan, Yates, and WorldCom, as well as by the fear of the financial repercussions she would incur if she did not help.

Not everyone believed Vinson’s sentence was just. A former federal prosecutor stated that neither Vinson nor Normand should have been charged at all, but since they were charged, both should have received the same punishment.\textsuperscript{80} He argued that Vinson was a low-level employee who did not bear major responsibility for the massive fraud that occurred at WorldCom. Here, too, Vinson’s predicament can be compared with those of low-level female street crime offenders. Her actions were directed by other men who participated in the highest level of decision-making and reaped financial reward.

\textbf{B. United States v. Lea Fastow}

1. \textit{The Charges}

Of the six white-collar defendants, Lea Fastow’s charges were the most serious. She was initially charged with one count of conspiracy to commit wire fraud and defraud the United States;\textsuperscript{81} money laundering conspiracy;\textsuperscript{82} and four counts of subscribing to a

\begin{itemize}
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id. The former prosecutor, Jacob Frenkel, thought it was outrageous that Vinson would get the same sentence Martha Stewart received. He stated that “[t]he decision to prosecute these two people is like taking a sledge hammer to a thumb tack.” \textit{Id}. Scott Sullivan entered into a cooperation agreement of his own and pled guilty to securities fraud. He received a five-year sentence. \textit{See Sullivan Gets Five Years for WorldCom Fraud – Fifth WorldCom Executive Sentenced to Prison in $11 Billion Scandal}, MSNBC, Aug. 11, 2005, http://www.msnbc.msn.com/id/8907976. \textit{But see Torres, supra note 69} (contrasting Vinson, whose actions were driven by loyalty to her boss and by her own financial concerns, with Cynthia Cooper, the female accountant who, at great risk to herself, blew the whistle on WorldCom).
  \item \textsuperscript{81} Indictment, United States v. Fastow, 300 F. Supp. 2d 479 (S.D. Tex. 2004) (No. H-03).
  \item \textsuperscript{82} Id.; see also 18 U.S.C.A. § 1956(h) (West 2006). The money laundering statutes concentrate on fraudulent activities involving proceeds of unlawful activity. The elements of money laundering are that the defendant took part in a financial transaction, knowing that the property involved in the transaction involved proceeds of illegal activity; that the property involved was in fact the proceeds of illegal activity; and
false tax return. Ms. Fastow held the title of Director and Assistant Treasurer of Corporate Finance at Enron from 1991 until 1997. Her husband, Andrew Fastow, was Enron's Chief Financial Officer from 1997 until 2001; prior to that time he was the Managing Director. At the time of the activities that formed the basis of the charges against her, Ms. Fastow was no longer employed by Enron and was a stay-at-home mother. During the time in question, Andrew Fastow and Michael Kopper created several Special Purpose Entities (SPEs) to hold off-balance sheet treatment of assets held by Enron. Through the SPEs, Mr. Fastow was able to move debt off the books of Enron, thus concealing the true economic health of the corporation. These entities could only legitimately qualify as off-balance sheet entities if independent third party investors contributed at least three percent of the SPE's capital, and that investment was genuinely at risk. If the third party was not truly independent or its equity not truly at risk, the SPE had to be consolidated onto Enron's balance sheet. There were at least four SPEs created by Mr. Fastow that did not have independent third party investors and which did not hold at-risk investments. Ms. Fastow assisted with concealing the fraudulent nature of two of the SPEs. In both cases, Ms. Fastow accepted "gifts" in finally that the defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, source, location, ownership, or control of illegal proceeds. See Ellen S. Podgor & Jerold Israel, White Collar Crime in a Nutshell 195 (2d ed. 1997).

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


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

86. Id.

87. Id.

88. Id.

89. Id.

90. The two SPEs mentioned in connection with Lea Fastow were RADR and CHEWCO. Id. In RADR, Lea Fastow and her husband loaned money to Kopper, for him to loan to the so-called independent investors. Andrew Fastow controlled the distribution of RADR proceeds through Kopper. Id.
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her name and in the names of her children, knowing that the gifts were kickbacks. In another instance, the Fastows were attempting to hide the fact that Ms. Fastow's father was used as an "independent" third party of RADR. When the Fastows realized that the father's ownership would trigger a reporting requirement, they had him pull out of the deal. Ms. Fastow convinced her father to file a false tax return in an effort to continue hiding their involvement in the SPE. On the most serious count, Ms. Fastow faced a potential term of imprisonment of twenty years.

Approximately six months after her husband's indictment on ninety-eight counts, ranging from conspiring to commit securities fraud to filing a false tax return, Ms. Fastow was indicted. The prosecution of Ms. Fastow was commonly believed to be motivated by the government's desire to pressure her husband into cooperating with the government, and assist in its investigation of the role that Jeffrey Skilling and Kenneth Lay may have played in concealing and/or directing the fraud at Enron. Initially, the government and the Fastows had agreed to a plea bargain for Ms. Fastow that would have allowed her to plead to one felony count of filing a false tax return. Mr. Fastow would plead to two counts of conspiracy and agree to serve a ten-year sentence once his cooperation had ended. In return, the government would recommend a five-month prison sentence for Ms. Fastow, with an additional five months of house arrest. United States District Judge David Hittner rejected the proposed plea because it gave him no leeway to increase the sentence, and he set Ms. Fastow's case for trial.

91. See Indictment, supra note 81. Ms. Fastow received a total of $141,218.00 from RADR.
92. Id.
93. Id.
96. See Crawford, supra note 19.
97. Id.
98. Id.
100. See Flood, supra note 19. In Ms. Fastow's pre-sentence report, which is not available to the public, there may have been a recommendation that the court could or should enhance Ms. Fastow's sentencing range, which spanned ten to sixteen months. Prosecutors argued against an enhancement saying Ms. Fastow played an
The court's rejection of the plea caused a small media flash as many questioned what effect the denial of the bargain would have on Mr. Fastow's enthusiasm during the course of his cooperation. The plea deal for Ms. Fastow was reworked and the court accepted a plea to a misdemeanor charge of submitting a personal tax return in 2000 that failed to include $47,800 in income. Ms. Fastow was sentenced to a term of one year in prison. Though Judge Hittner accepted the second plea, he was disturbed by the prosecution's behavior during the course of the negotiations. He accused the prosecutors of manipulating the justice system to achieve their goals.

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

integral role in getting her husband to cooperate. See Enron Task Force Eases Up on Lea Fastow, supra note 99.


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

103. See Crawford, supra note 19.

104. Id.

105. The pertinent part of the court's remarks were, "The Department of Justice's behavior might be seen as a blatant manipulation of the federal justice system and is of great concern to this court." Id. It is not altogether clear whether the court was offended that such serious charges had been brought against Lea Fastow to coerce her husband into a plea, or that the government made such serious allegations against her but seemed all too eager to sacrifice punishing her in order to gain her husband's cooperation.

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

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

There are many Black and Latina women who are arrested at the same time as their husbands and boyfriends because the government is trying to pressure the husbands by arresting the women associated with them. However, no generous provisions are made or negotiated for those women and the care of their children. There are over 1.3 million children in the United States who have a mother under correctional sanction. According to Greenberg and Snell, sixty-four percent of women reported living with their minor children before entering prison, compared to forty-four percent of men. The rate of fathers living with children does not, however, provide the full custodial picture. When a father is incarcerated, children are three times more likely to live with the other parent than when the mothers are in prison. Seventy percent of women incarcerated in local jails are mothers. In the federal system, the United States Sentencing Commission's Policy Statement 5H1.6 specifically restricts the court's use of family ties as a basis for formulating a defendant's sentence. Moreover, when district

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107. See Crawford, supra note 19; Flood, supra note 19.
108. In discussing the prospect of taking the Fastow's children into account, Prosecutor Andrew Weissman, Director of the Enron Task Force, was reported as saying, "There is no reason for the government, when it can, to have a husband and wife serve their sentences at the same time." See Mary Flood, Wife of Former Enron Chief Financial Officer Gets One-Year Prison Sentence, HOUSTON CHRON., May 7, 2004.
110. Lapidus et al., Caught in the Net, supra note 28, at 35.
111. Greenfeld & Snell, supra note 26, at 8.
112. Lapidus et al., Caught in the Net, supra note 28, at Executive Summary. Ten percent of children with mothers incarcerated in state prisons are in foster homes or agencies, and seventy-nine percent live with a grandparent or relative. Id.
113. Greenfeld & Snell, supra note 26, at 7. The figure is sixty-five percent for women in state prisons, and fifty-nine percent for women incarcerated in federal facilities. Id.
court judges have attempted to accommodate a mother’s concerns for the custodial well being of her children by giving the mother a downward departure from the sentencing guidelines, federal prosecutors have aggressively challenged those departures. The circuit court judges are likely to uphold the prosecutor’s objections to downward departures. These mothers are mostly poor women of color, and their children are forced to deal with parent/child separation and potential termination of the mother’s parental rights by the state. High status saved Lea Fastow’s children from the trauma the children of poor defendants face when forcibly separated from their mothers through arrest and incarceration.

C. Martha Stewart

1. The Charges

In December 2001, ImClone, a pharmaceutical company, was on the verge of receiving notice that the Food and Drug Administration would not accept its application for the approval of a drug Imclone was developing. The founder and CEO of ImClone, Sam Waksal, attempted to have Merrill Lynch & Co. sell all of his shares of the company stock prior to the announcement becoming public. Peter Bacanovic, a securities broker at Merrill Lynch, knew that his client Martha Stewart was a friend of Waksal’s, and tried to get a message to her that Waksal was selling large blocks of stock. When Bacanovic was unable to reach Stewart directly, he instructed his assistant, Doug Faneuil, to handle any return calls from Stewart. Stewart spoke with Faneuil, who communicated the fact that Waksal was selling his shares of ImClone. On De-

115. Lapidus et al., Caught in the Net, supra note 28, at 40 (citing the United States Court of Appeals for the Seventh Circuit).
118. Id. at 6, ¶13.
119. Id. at 7, ¶16.
120. Id.
121. Id. at 7-8, ¶17.
November 27, 2001 she ordered her holdings to be sold. The next day, when the FDA announcement was released, ImClone shares lost eighteen percent of their value. Martha Stewart made profit of approximately $45,000 from the sale. The precipitous drop in the value of ImClone shares prompted the government to investigate large sales of stock made by insiders the day before the announcement was made. Investigators sought to question Martha Stewart about any conversations she may have had with Bacanovic. Though not under oath, she met with the investigators and was interviewed on two occasions. Bacanovic told investigators that there had been a pre-existing agreement with Stewart that her shares were to be sold when the stock reached a certain price. Stewart concurred that such an agreement existed. It was the government's position that Stewart and Bacanovic concocted the idea of a pre-existing agreement to cover up their possible insider trading.

Stewart was indicted for one count of conspiracy to obstruct justice, obstruction of justice, and securities fraud, and two counts of making a false statement. Throughout the period from arrest through trial, Stewart maintained that the charges were ridiculous, that she was innocent, and that she believed she would be vindicated. The evidence at trial demonstrated, however, that both Bacanovic and Faneuil had communicated to Stewart that Waksal was about to sell his shares. The government's case included Stewart's phone log, which included a message from Bacanovic that something was going on with Waksal and the ImClone shares. Stewart's own secretary was called as a government witness and testified that Stewart had attempted to alter the phone log

122. Id.
123. Id. at 8, ¶20
124. Id. at 8-9, ¶21.
125. Id. at 9, ¶22.
126. Id. at 11, ¶25.
127. Id. at 12, ¶27.
128. Id. at 11, ¶24(a).
129. Id. at 13, ¶27(a).
130. Id. at 9-10, ¶23.
131. For a discussion of the government practice of using one false statement that is repeated on multiple occasions as the basis for multiple counts of false statements or perjury, see Seigel & Slobogin, supra note 13.
133. Id.
134. Id.
to delete the subject matter of the call.\textsuperscript{135} After a very public trial, the jury found Stewart guilty of conspiracy, both counts of making a false statement, and one count of obstruction of agency proceedings.\textsuperscript{136} The court dismissed the securities count at the close of the government’s case. Under the federal sentencing guidelines, Stewart fell in the range of ten to sixteen months.\textsuperscript{137} Stewart’s attorney asked the court to consider the fact that his client had already suffered the stress of being arrested and tried in determining whether a jail sentence was appropriate.\textsuperscript{138} Through her lawyer, Stewart offered the possibility of performing volunteer work with poor women as an alternative to incarceration.\textsuperscript{139} Judge Miriam Cedarbaum rejected the sentencing alternative, choosing instead to sentence her to five months imprisonment, followed by two years of probation that included five months of home confinement.\textsuperscript{140} She was also fined thirty thousand dollars.\textsuperscript{141}

2. Contrition

During the time Martha was prosecuted she maintained a web site where her fans could read messages from her, and keep themselves updated on her case.\textsuperscript{142} Stewart prepared remarks for her sentencing in which she neither apologized nor expressed any kind of guilt or remorse for her activities.\textsuperscript{143} She did indicate that she was sorry for the inconvenience and suffering her employees ex-

\begin{itemize}
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Brickey, \textit{supra} note 12, at 536.
\item \textsuperscript{139} Stewart and her lawyer had worked out an agreement with Women’s Venture Fund, a nonprofit organization in New York, under which Stewart would train low-income and minority women how to begin their own cleaning companies. \textit{Id.} at 541. At first the Fund Director objected to Stewart’s proposal, but she was eventually convinced of its merits. She would later state, “Can you imagine if we had graduates of the Martha Stewart cleaning program bidding for contracts cleaning Hilton Hotels?” \textit{Id.} at 541 n.153. It is interesting that Stewart chose to train the women about how to start their own cleaning companies. Why was cleaning selected? She had experiences in many businesses, including catering. One might ask whether the idea was tainted by unconscious racial or class stereotyping.
\item \textsuperscript{140} Rochelle Steinhaus, \textit{Judge Sentences Stewart to Prison, but Grants Stay Pending Appeal}, \textsc{CourtTv.com}, http://www.courttv.com/trials/stewart/071604_ctv.html.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} See Martha Stewart Uses Personal Web Site to Rally Support, \textsc{CourtTv.com}, http://www.courttv.com/news/2004/0112/stewart_ap.html.
\item \textsuperscript{143} Steinhaus, \textit{supra} note 140.
\end{itemize}
She continued to express annoyance at the fact that "such a small thing" had been blown out of proportion.

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

3. Loyalty

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

IV. HIGH STATUS COLLIDES WITH STREET CRIME

A. Lil' Kim’s Case

1. The Facts of the Case

Rapper Lil' Kim is known throughout the world for her musical talents. She is also an entrepreneurial businesswoman with an aggressive marketing agenda. Though she had high status because of her celebrity and wealth, she couldn’t have been more different than the other three high-status white-collar women offenders discussed here. She did not come from a wealthy family. Her parents divorced when she was nine years old. “Lil' Kim lived with her father until she ran away from home as a teenager, and survived by associating herself with drug dealers, and may have even prostituted herself.” Her life began to take a turn for the better when rapper Christopher Wallace, also known as the Notorious B.I.G., introduced her to his protégés, Junior M.A.F.I.A., where she became the only female rapper of the group. Kim’s career was blossoming when her mentor was killed. His death took an emotional toll on her and led her to take


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


155. See Lil' Kim, supra note 153.
some time off from performing.\textsuperscript{156} Eventually, she returned and re-ignited her career.

Lil' Kim became of interest to the government in its investigation of a shooting that occurred between two rival groups on the street outside a radio studio in lower Manhattan in 2001.\textsuperscript{157} Although Lil' Kim was not suspected of being the shooter or participating in the shoot out, the government believed she knew the identity of some of those involved in the shoot out.\textsuperscript{158} In fact, one of the shooters, Damion Butler, had been one of her managers and a friend of hers since the beginning of her career.\textsuperscript{159} The other individual, Suif Jackson, if not a friend, was certainly a known acquaintance and had acted as Lil' Kim's bodyguard on occasion.\textsuperscript{160} When questioned about the identity of the shooters, Lil' Kim denied knowing the identity of the shooters and denied that she had seen or been in the company of Butler or Jackson on the day of the shooting.\textsuperscript{161} She was called before the grand jury on several occasions and falsely testified at each appearance.\textsuperscript{162} The government indicted Lil' Kim for conspiracy to commit perjury, three counts of perjury and one count of obstruction of justice.\textsuperscript{163} At her trial, the former members of the Junior M.A.F.I.A., compelled to appear by subpoena, testified that Lil' Kim knew Butler and Jackson, and that the two accompanied her to and from the studio on the day of the shooting.\textsuperscript{164} Lil' Kim testified on her own behalf and repeated her denials, despite the fact that a security video supplied by the radio station clearly showed her entering the radio studio with Butler, and standing near him at the time the shooting occurred.\textsuperscript{165} The jury convicted Lil' Kim on three counts of perjury but acquitted her on the obstruction of justice charge.\textsuperscript{166}

At her sentencing, Judge Gerald Lynch engaged in a long series of exchanges with the prosecutor over the appropriate sentencing range for Lil' Kim. The officer completing her pre-sentence report

\begin{itemize}
\item \textsuperscript{156} Id.
\item \textsuperscript{157} See A Year and A Day For Lil' Kim, supra note 151.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Butler, 2004 WL 2274751, at *1.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\item \textsuperscript{165} See A Year and A Day For Lil' Kim, supra note 151; see also Sentencing Transcript, supra note 154, at 22-23 (colloquy between Judge Lynch and AUSA Gitner).
\item \textsuperscript{166} Sentencing Transcript, supra note 154, at 22-23.
\end{itemize}
advocated she be sentenced in the twenty-seven to thirty-three month range.\textsuperscript{167} The range was calculated by using a provision in the guidelines giving the court discretion to cross-reference the base level for perjury with the base level of the offense that the defendant was trying to cover up.\textsuperscript{168} Aggravated assault was suggested by the government as the appropriate base offense.\textsuperscript{169} The government advocated for a sentencing range of thirty three to forty one months, and asked the judge to deny the defendant any credit for acceptance of responsibility.\textsuperscript{170} Judge Lynch expressed concern that the use of aggravated assault as the base level offense was inappropriate, although an alternative calculation based on a "felon in possession" charge provided a greater possibility of jail time.\textsuperscript{171} In its final analysis, the court could find no reason to use anything other than the baseline offense for perjury as the appropriate guideline.\textsuperscript{172} Judge Lynch was clearly concerned with the possibility a harsh sentence imposed on Lil' Kim would be perceived by the public as an indication that the system of justice was biased.\textsuperscript{173} He worried that the case would be compared with Martha Stewart's five-month prison term.\textsuperscript{174} Although the court perceived the two cases to be materially different, the judge wondered how he could sentence Lil' Kim to a substantially higher sentence for behavior that on the surface appeared substantially equivalent to Stewart's.\textsuperscript{175} The court asked the United States Attorney and defense counsel to comment on the similarities of the

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


\textsuperscript{169} Sentencing Transcript, supra note 154, at 29-31.

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

\textsuperscript{171} See id. at 25-28 (colloquy between Judge Lynch and counsel).

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

\textsuperscript{173} Id. at 50-51. Lil' Kim is a Black female.

\textsuperscript{174} Id.

\textsuperscript{175} Id.
two cases if there were any.\textsuperscript{176} Not surprisingly, the government made every effort to distinguish the two cases, arguing that Lil' Kim was under oath in the grand jury, that she perjured herself at trial, and that the underlying offense Lil' Kim tried to cover up was not a securities question, but rather a violent street crime.\textsuperscript{177}

On the other hand, while acknowledging the difference between a shooting and insider trading, defense counsel pointed out that Lil' Kim neither knew about the shooting, nor participated in it, but rather, out of a misplaced sense of loyalty and perhaps as a result of bad legal advice, tried to help protect a friend.\textsuperscript{178} When the debate had concluded and Lil' Kim made her remarks to the court, Judge Lynch determined that he would credit Ms. Jones for her acceptance of responsibility, which dropped her to a sentencing range of twelve to eighteen months.\textsuperscript{179} The court still seemed to be concerned with the possibility that Lil' Kim's case would be compared to Martha Stewart's sentencing.\textsuperscript{180} Judge Lynch stated that the purpose of the guidelines was to avoid disparity in sentencing.\textsuperscript{181} However, in the final analysis, Judge Lynch argued that "lying to the grand jury about people getting shot and carrying machine guns is just more serious than lying about money, no matter how much money."\textsuperscript{182} But in a final nod to the shadow of the Stewart case, Judge Lynch pointed out that Stewart's sentence was not just five months in prison, but also five months under house

\textsuperscript{176} Id. at 51, 53-54.

\textsuperscript{177} Id. at 57-59.

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

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

\textsuperscript{180} Id.

\textsuperscript{181} Id.

\textsuperscript{182} Id. at 71. While the judge's belief does reflect judicial attitudes towards white-collar crime, an argument can certainly be made that lying about money, particularly significant sums, is more a serious offense than many street crimes, even ones which are deemed violent. The Enron fraud, for example, created the largest bankruptcy in history and destroyed the retirement savings of thousands of employees. Krysten Crawford, \textit{Ex-WorldCom CEO Ebbers Guilty}, CNNMONEY.COM, Mar. 15, 2005, http://money.cnn.com/2005/03/15/news/newsmakers/ebbers/index.htm. Many real people were injured in concrete ways that far exceed the injuries that were caused in the Lil' Kim shootout.
arrest, so that her actual sentence was ten months. Judge Lynch sentenced Lil’ Kim to twelve months and one day.

2. Loyalty’s Role

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

It would not be surprising to find that loyalty, particularly to the men in her life, would be an important factor. Feminist scholars have argued that the Black community demands loyalty from its women to the detriment of their own interests. In the end, Lil’ Kim admitted to the court that loyalty led her to do the wrong thing and that she had taken steps to correct her mistaken reliance on friends who did not have her best interest at heart.

183. Sentencing Transcript, supra note 154, at 72. Although the court did point out that it was troubling for a defendant to be sentenced to home confinement in a home that is more luxurious than that which most people could afford. Id.
184. Id. at 73.
185. Id. at 60, 65-67.
187. Id.
188. See Sentencing Transcript, supra note 154, at 38.
189. Id. at 65-67.
192. Sentencing Transcript, supra note 154, at 64.
B. White-Collar Crime, Street Crime, Morality and Perceptions of Harm

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

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

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193. Id. at 71.
194. Green, supra note 8, at 502.
195. Id.
196. Id.
197. See Szockyj, supra note 8, at 488; see also Darryl K. Brown, Street Crime, Corporate Crime, and the Contingency of Criminal Liability, 149 U. Pa. L. Rev. 1295, 1330-31 (2001) (noting that the wealth of white-collar criminals can raise enforcement costs for the government.).
criminals.\textsuperscript{198} A study of the sentencing practices of judges in white-collar crime cases found that many judges believed that the process of indictment and conviction was, in some cases, punishment enough.\textsuperscript{199} In another study, judges were troubled by the possibility that they may treat white-collar cases differently because they can more easily identify with the white-collar offender.\textsuperscript{200}

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

On the other hand, government officials have argued for tougher sentences, claiming that lighter sentences for white-collar criminals

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

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


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

\textsuperscript{202} Green, supra note 8, at 515.

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

\textsuperscript{204} Id.
have not produced a deterrent effect. Many believe that even with
the sentencing guidelines enhancements that provide stiffer penalty
ranges, white-collar offenders are still sentenced at the lowest end
of the ranges.\textsuperscript{205} Moreover, if probation is an option, the white-
collar defendant will almost always be sentenced to probation.\textsuperscript{206}
Therefore, strict penalties are needed to ensure that white-collar
defendants receive tougher sentences.

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

Scholars, judges, defense lawyers, and other commentators who
advocate against incarceration of white-collar criminals do not
seem to realize that many of the traits they describe as positive
among white-collar offenders, such as lack of prior involvement
with the law and providing economic support to family and com-


\textsuperscript{205} See Summer 2002: The Genesis of the Sentencing Provisions of the Sarbanes-
Oxley Act: Are We Really Getting Tough on White Collar Crime? Part I: Hearing
Before the S. Comm. on the Judiciary, Subcomm. On Crime and Drugs, 107th Cong.

\textsuperscript{206} Id. at 3.

\textsuperscript{207} Strader, supra note 8, at 1267.

\textsuperscript{208} Id. at 1267-68.

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

\textsuperscript{210} GREENFELD & SNELL, supra note 26, at 9.

\textsuperscript{211} LAPIDUS ET AL., CAUGHT IN THE NET, supra note 28, at 53.
addition, despite the fact some judges believe that white-collar defendants would not be prepared to handle the deprivation of life in prison, other studies have found that white-collar criminals actually adjust better to prison than do many street offenders, and suffer fewer negative consequences upon release than do street offenders.\textsuperscript{212} Many white-collar offenders, for example, can return to jobs similar to the ones held before they were incarcerated.\textsuperscript{213} The same is not true for a street crime offender who, upon release from prison, will have tremendous difficulty obtaining employment with a felony conviction in his or her background.

Professor Darryl Brown argues that the distinctions drawn between white-collar crime and street crime are often artificial.\textsuperscript{214} Most importantly, Brown establishes that culture and social practices define what crime is. He uses the example of domestic violence, noting that, until recently, spousal battery was not considered a crime.\textsuperscript{215} Despite over thirty years of advocacy and education there are still problems getting legal actors to understand domestic violence and to provide the protection the victim needs.\textsuperscript{216} Another contemporary example of social and cultural practices that relate to the issue of how our social perceptions shape the definition of what constitutes a crime is the illegal downloading and sharing of music files. Despite the fact that the act itself is illegal, few people acknowledge the criminal nature of this behavior.\textsuperscript{217} Brown and others argue that many white-collar crimes do far more harm than the run-of-the-mill street offense.\textsuperscript{218} He acknowledges, however, that white-collar offenders are seen as

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

\textsuperscript{213} Id.

\textsuperscript{214} Brown, supra note 197, at 1315-16.

\textsuperscript{215} Id. at 1340.

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


\textsuperscript{218} Id. Another example is the sentencing of Archer Daniels Midland officials for rigging prices. The critique of the light sentences they received was that the “executives who effectively cheated every grocery store in the country receives shorter sentences than if they had robbed just one.” Green, supra note 8, at 515 (citing Kurt Eichenwald, White Collar Defense Stance: The Criminal-less Crime, N.Y. TIMES, Mar. 3, 2002, at D1). Former Attorney General Richard Thornburgh, when comparing the harm from white-collar offenses and street crime, once said, “[a] street criminal can only steal what he can carry. With the stroke of a pen, or push of the computer key, white-collar criminals can, and do, steal billions.” Murphy, supra note 199, at 14.
reasonable, mainstream people whose crimes are often unintentional. Street offenders, on the other hand, are seen as violent and greedy members of a subculture whose crimes are seen as intentional. In addition, Brown points out that the criminal justice system sees street crime offenders as individuals who make free-willed choices and are immune to social influences. By contrast, in the corporate punishment realm, blame is placed not only on the individual offender, but on those who influenced him as well. In addition, when weighing sentencing for a corporate or white-collar offender, the court will often consider costs of incarceration that run beyond punishing the individual defendant. These costs are rarely taken into consideration when punishing street crime offenders, particularly in the context of the harm that occurs to a community that has large numbers of its members subjected to incarceration and the other consequences that flow from incarceration.

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

219. Brown, supra note 197, at 1315.
220. Id.
221. Id. at 1322. Brown argues that the use of criminal punishment “reinforces the view that such conduct is so blameworthy that only criminal sanction is appropriate,” whereas civil remedies dominate corporate crime. Id. at 1336.
222. Id. at 1319. Brown gives the example of the Saving and Loan scandal where part of the blame for the large scale criminal conduct was placed on the failure of the regulatory system, an attribution that Brown says is unthinkable in a street crime context. Id. at 1336.
223. One of the objections to the prosecution of accounting firm Arthur Andersen as a result of the Enron implosion was that such a prosecution would hurt not only the individual wrongdoers, but shareholders, low-level employees, clients, and the general community to which Arthur Andersen donated charitable contributions.
224. For the African American community, Brown lists the consequences of reduced employment prospects and earning capacity, less appealing marriage prospects, more single female households, and more children under court supervision. Brown, supra note 197, at 1307.
225. Id. at 1302; see also Paul D. Butler, The Role of Race-Based Jury Nullification: Case-in-Chief, 30 J. Marshall L. Rev. 911 (1997) (arguing that the black community
Kim's sentencing that he was concerned with the possible public perception that the law had not been fairly (hence legitimately) applied in her case when compared with Martha Stewart's.\textsuperscript{226} The judge referenced the culture in the hip-hop community of not cooperating with police and cited it as one of the primary reasons why the murder of Christopher Wallace had not yet been solved.\textsuperscript{227}

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

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

V. CONCLUSION

Whether Lea, Betty, Martha, and Lil' Kim are high-status white-collar offenders or just high-status street crime offenders, at least three of them engaged in offending that was partially motivated by a sense of loyalty. In the end, they differed little from the most common female offender, who is serving time for drug related offenses, because they got in trouble as a result of their associations with offending men. As the months pass, it will be interesting to see what, if any, information is revealed about the three women should use jury nullification as a tool to achieve political ends of the community against over-criminalization of community by law enforcement).

\textsuperscript{226} See Sentencing Transcript, supra note 154, at 70.

\textsuperscript{227} Id. Of course, this is Judge Lynch's view. Members of Christopher Wallace's family believe that Wallace's murder remains unsolved because it was the police who either murdered him or conspired with others who murdered him. See A Year and A Day For Lil' Kim, supra note 151.

\textsuperscript{228} See Strader, supra note 8, at 1212.
who have yet to be sentenced. Did loyalty lead them to offend, just as it did with Lea Fastow, Betty Vinson, and Lil' Kim? Or will it be revealed that they, like Martha Stewart, successfully transitioned into the halls of real power? Only time and a good sentencing transcript will tell.