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## Essentially Life Sentences for Commercial Crimes in U.S.

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While plain numbers can rarely tell a whole story, there are trends in criminal sentencing in this country which I suggest should, particularly in this era of ever-accelerating economic globalization, be pondered in relation to where we stand in comparison with the rest of the world.

*Why does the United States have more people in jail per capita than any other country? <sup>1</sup>Why do we have longer jail sentences by far for commercial crimes than the countries with whom we trade?<sup>2</sup>*

My last article spoke of the insufficient discipline and controls underlying the system by which charging decisions are made in this country. These defects are especially troubling with regard to crimes based on complex economic conduct.<sup>3</sup> Unlike, for example, the armed robbery of a liquor store, financial crimes may lack a bright-line clarity as to the wrongfulness of the conduct that is charged as criminal. Yet many of those convicted lately of financial crimes in this country have received what are, in effect, life sentences. And as a former Manhattan U.S. attorney has observed: "You have to ask yourself whether the proof in these cases warrants such a sentence."<sup>4</sup>

In seeking to justify our current approach to the sentencing of economic crime, one might look to the history of this country - namely its rigorous moral roots and traditions. Puritans, turkeys and all of that.

We might, on the other hand, trace the psyche of our present justice system to plain old populism and a "lynching mentality" occasioned by our frontier past. Or we might trace it to the political ambitions of those in power to effect particularly cruel sanctions in the hope of achieving personal notoriety.

Yet it is interesting as well, and the subject of this brief commentary, to compare the sentences for financial crimes in the United States to recent examples of sentences handed down in other countries. I believe we tend to overestimate our hegemony in the world's financial markets and the unassailability of our own approach to addressing financial crimes and regulation.

We advertise ourselves as the most humane and democratic country in the world. We hold ourselves out in many respects as a model to be emulated on a voluntary basis, owing to the enlightened mindset that we so readily claim to embrace. But it is enlightening as well to look at how some of our trading partners and competitors in the present global market have treated those accused of economic wrongdoing.

### Sentences in Other Countries

Perhaps the most notable trend revealed by such an inquiry is the relative lack of criminal prosecutions of complex financial crimes outside of the United States.<sup>5</sup> Even where such prosecutions have occurred, the sentences handed down in other countries rarely come close to matching the sentences recently imposed in this country for similar crimes.

In 2004, for example, a British court convicted the former chief executive of the Versailles Group of fraud in a scandal that brought down a company which at its height had an estimated market capitalization of over 600 million. A judge labeled the Versailles scandal as one of the "worst examples of conspiracy to defraud." Much of the company's trading and profits had been simply illusory. Like some of those recently convicted in this country, the executive, Carlton Cushnie, was accused of using the proceeds of his fraud to "fund a playboy lifestyle." Mr. Cushnie paid more than 10 million in penalties and was banned from serving as a company director for 10 years. Yet he was sentenced to only six years in prison. The chief financial officer of Versailles pleaded guilty and received a similar sentence.<sup>6</sup>

In France, the former chairman of Credit Lyonnais, Jean-Yves Haberer, was convicted of fraud in 2003 for falsifying the bank's accounts as it approached collapse during the 1990s. French taxpayers ultimately were forced to bail out

the bank at a cost of billions. He was given an 18-month suspended sentence. Two other executives also were convicted and received suspended sentences.<sup>7</sup> In 2004, Jean-Marie Messier, the former chairman and CEO of Vivendi Universal, was fined 1 million by France's Financial Markets Authority for issuing misleading financial reports that disguised the company's serious cash flow and liquidity problems. He received no jail time, and the fine was reduced to 300,000 on appeal.<sup>8</sup> Mr. Messier had previously forfeited a 21 million severance package to settle charges by the Securities and Exchange Commission (SEC) in the United States.

Last month in Germany, a court convicted two former Siemens executives of paying 6 million in kickbacks to officials of an Italian utility. Both of the executives received suspended sentences, and the court ordered Siemens to forfeit 38 million.<sup>9</sup>

Last year in the Netherlands, two former top officials of Royal Ahold were convicted of fraud in connection with the company's widely reported 1 billion accounting scandal that, once disclosed, caused the company to lose two-thirds of its value overnight. Both men received nine-month suspended sentences and were fined 225,000.<sup>10</sup>

Earlier this year in Japan, a court convicted Takafumi Horie, a charismatic 34-year-old Internet tycoon, of violating the country's securities laws in an alleged multi-million-dollar fraud. He was sentenced to two and one-half years in prison, a sentence that was accompanied by much public handwringing throughout Japan as to whether it was too severe.<sup>11</sup>

Last year in South Korea, a court convicted the founder of Daewoo of fraud and embezzlement in what has been described as the country's biggest financial scandal. He was sentenced to eight and one-half years and ordered to forfeit the equivalent of \$22 billion.<sup>12</sup> This year, a South Korean court convicted Chung Mong Koo, the chairman of Hyundai, of embezzling tens of millions of dollars from the company. He was sentenced to three years in prison.<sup>13</sup>

In Italy, a number of defendants accused of wrongdoing in connection with the huge Parmalat fraud scandal have pleaded guilty to charges of market manipulation, falsification of audits and obstruction. The sentences ranged from 10 months to two and one-half years, and most were conditionally suspended due to the defendants' previously clean criminal records.<sup>14</sup> Additional defendants, including the founder of the company, Calisto Tanzi, are awaiting trial in Milan on these same charges and face maximum sentences of five years.<sup>15</sup> In a separate action involving more serious charges of a fraudulent bankruptcy and criminal association, the defendants face a maximum of 15 years in prison.<sup>16</sup> Compare this to the maximum sentences under the U.S. guidelines of 45 years for Kenneth Lay and 185 years for Jeffrey Skilling.

In Australia, Lakhmi Daswani was convicted in 2004 of multiple counts of criminal fraud and embezzlement in a "brazen" and "ruthless" scheme to obtain millions of dollars in fraudulent loans and appropriate funds from the retail group he ran. He was sentenced to 12 years, later reduced to 10 years on appeal, with a possibility of parole after four years and three months.<sup>17</sup> In the last few years, several defendants have been prosecuted and convicted in a widespread fraud and bribery scandal related to HIH Insurance Ltd., formerly the second-largest insurance company in Australia but now bankrupt. Former HIH director Rodney Adler pleaded guilty to fraud and was sentenced to four and one-half years in jail, with the possibility of parole in two and one-half years. Sydney businessman Brad Cooper was sentenced to eight years in jail for bribing an HIH official to expedite false claims in the months preceding the company's collapse. He will become eligible for parole after five years.

In a high-profile case last year in Canada, Michael Ritter pleaded guilty to theft and fraud and was sentenced to 10 years in prison after admitting that he stole \$10.5 million from U.S. energy trader and embezzler Dan Gordon, and helped orchestrate a \$270 million pyramid scheme that defrauded approximately 6,500 investors. In another prosecution, in what has become known as the "sponsorship scandal," Canada last year sentenced Charles Guite, a former public servant, to three and one-half years in jail for conspiring with a private contractor to defraud the government of over \$1.5 million. The contractor, Jean Lafleur, has been convicted as well, and is awaiting sentencing. Prosecutors are seeking a sentence of four and one-half years.

### **Essentially Life Sentences**

In contrast, we in the United States have structured a justice system under which a corporate officer or director may find that he has received what is essentially a life sentence because the government has determined that he has run the company in a way that wasn't honest. In 2005, for example, then 63-year-old Bernard Ebbers, the former CEO of WorldCom, was sentenced to 25 years in prison. While the U.S. Court of Appeals for the Second Circuit upheld this sentence on appeal, it recognized that it "is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation."<sup>18</sup>

Also in 2005, then 80-year-old John Rigas, the founder of Adelphia Communications, and his 49-year-old son, Timothy Rigas, were sentenced to 15 and 20 years in prison, respectively. In 2006, then-52-year-old Jeff Skilling, the former CEO of Enron, was sentenced to over 24 years in prison. In 2005, then 58-year-old Dennis Kozlowski, the ex-CEO of Tyco, was sentenced by a New York State court to up to 25 years, as was former CFO Mark Swartz, then 44. Conrad Black, on trial in federal court in Chicago on numerous counts of criminal fraud, reportedly faces over 100 years in prison if convicted on all counts.

### **Not Killing Offenses**

Parole is no longer an option in the federal system and inmates receive only limited time off for good behavior, meaning that most of these individuals will serve the bulk of their sentences in a penitentiary. As a result, many of these people will die in jail. While we certainly can get angry at the arrogance and greed involved in the conduct of which these individuals have been convicted, these are not, I submit, killing offenses. These sentences raise questions of basic fairness. Do we want to be part of a system in which the penalty for failure or inability to cooperate may be, in effect, a life sentence? Far beyond the scope of this article are issues of whether being the most harsh in regulating economic conduct is plainly and simply good business in the world of today. Yet we can surely achieve honest and transparent markets without life terms.

Under the new federal Sentencing Guidelines, which are now only advisory but are followed by courts in the majority of cases,<sup>19</sup> the penalties in corporate fraud cases are multiplied substantially by the size of the actual or intended loss to shareholders, a factor that may lead to astronomically lengthy recommended jail terms for corporate fraud. The recent example of Jamie Olis, a former lawyer and accountant at Dynegy Corp., is illustrative. Mr. Olis was convicted in 2003 of securities fraud, mail and wire fraud, and conspiracy, and sentenced to over 24 years in prison. The primary factor contributing to the severity of Mr. Olis's sentence was the district court's finding that he participated in a fraud that cost Dynegy's investors \$105 million, which led to an "extraordinarily high" offense level.<sup>20</sup> Mr. Olis appealed his conviction and sentence to the U.S. Court of Appeals for the Fifth Circuit. The appeals court affirmed the conviction, but found that the district court had miscalculated overall investor losses by failing to consider other possible factors affecting the market price of the stock. After recalculating the loss figure, the district court came up with a guidelines range of twelve and one-half to fifteen and one-half years, thus reducing the recommended sentence by about half. The court ultimately sentenced Mr. Olis to six years in a commendable example of a court departing from the guidelines under *Booker*.<sup>21</sup>

In another such example, the court in *U.S. v. Adelson*, 441 FSupp2d. 506, 515 (SDNY 2006), found that under the facts of that case "the calculations under the guidelines have so run amok that they are patently absurd on their face," and assigned a lesser sentence. In doing so, the court recognized "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense." *Id.* at 512. Of course, while these departures from the guidelines are encouraging, any such "common sense" will be exercised in the context of the guidelines scheme.

### **Other Nations' Values Useful**

The federal guidelines and other criminal sentencing structures are old arguments in our country. But our commerce is becoming ever more interwoven with that of other productive countries. And, perhaps, as well, our sense of what is fair and just in our criminal system needs to be seasoned a bit by what is going on in the rest of the world.

1. The International Centre for Prison Studies at King's College of London has reported that the United States has 737 people in jail per 100,000, more than any other country.

2. China's penchant - diminishing, some say - for executing certain of those whom its "courts" deem economic criminals raises many issues beyond my notion that our country's ever-harshening criminal justice system is out of step with the rest of the productive world. See "With New Laws, China Reports Decline in Executions," *New York Times* (June 9, 2007).

3. I do not here address drug crimes, which are a major cause of overcrowding in our jails. Our nation's drug laws and the sanctions that are imposed for such crimes are in my view savage and lunatic, but beyond the scope of this article.

4. Andrew Ross Sorkin, "How Long to Jail White-Collar Criminals," *New York Times* (Sept. 16, 2005) (quoting Otto Obermaier, U.S. Attorney for the Southern District of New York from 1989-1993).

5. John C. Coffee Jr., Director of the Center for Corporate Governance at Columbia Law School, has noted that in the area of securities fraud, "there is very little criminal enforcement outside of the United States." "U.S. Securities Law, Does High Intensity Enforcement Pay Off?," Knowledge@Wharton (May 30, 2007).
6. James Daley, "Cushnie Pays 10M to Fraud Victims," Independent (Nov. 21, 2006). See also Paul Lashmar, "Versailles Fraudster Gets Three More Years," Independent (Aug. 20, 2006).
7. Paul Webster, "Acquittal Clears Trichet's Path to European Bank," Guardian (June 19, 2003).
8. Peggy Hollinger, "Court Halves Messier Fine," Financial Times UK (June 30, 2005).
9. "Former Siemens Executives Convicted of Bribery," International Herald Tribune (May 14, 2007).
10. "Ex-Ahold Executives Fined in Netherlands Fraud Case," New York Times (May 23, 2006).
11. Norimitsu Onishi, "Ex-Internet Tycoon in Japan Guilty of Fraud," New York Times (March 16, 2007).
12. Holly Hubbard Preston, "Slowly, the Chaebol Heed Shareholders," International Herald Tribune (Nov. 4, 2006); Choe Sang-Hun, "Daewoo Founder Sentenced to Jail," International Herald Tribune (May 31, 2006).
13. Choe Sang-Hun, "Hyundai to Retain Chairman as Sentence Is Appealed," New York Times (Feb. 7, 2007).
14. Eric Sylvers, "Parmalat Trial in Milan Nets 11 Convictions," International Herald Tribune (June 29, 2005).
15. "Milan Judge in Parmalat Trial Refuses to Consider Plea Bargains," AP Data Stream (May 31, 2007).
16. Elisabetta Povoledo, "64 Parmalat Defendants Start Hearings but Angry Crowds Fail to Materialize," International Herald Tribune (June 6, 2006).
17. Mark Oberhardt, "Seindler Fails in Court Bid for Earlier Release on Parole," Courier Mail (April 4, 2006).
18. *United States v. Ebbers*, 458 F3d 110, 129 (2d Cir. 2006).
19. U.S. Sentencing Comm'n, Final Report on the Impact of *United States v. Booker* on Federal Sentencing (2006).
20. *U.S. v. Olis*, 429 F3d 540, 542-545 (5th Cir. 2005).
21. *U.S. v. Olis*, 2006 WL 2716048, at \*13 (S.D. Tex. Sept. 22, 2006). The same judge, Sim Lake of the Southern District of Texas, sentenced both Mr. Olis and Mr. Skilling. The sentence Judge Lake assigned to Mr. Skilling fell at the low end of the range recommended by the guidelines.