Health Care Fraud Sentencing

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Health care fraud convictions are on the rise, but little is known about how health fraud offenders are sentenced. This Note offers the first comprehensive empirical account of sentencing decisions in health fraud cases based on a new dataset constructed from United States Sentencing Commission data. This analysis shows that there is a large disparity in how health fraud offenders are sentenced compared to other white collar offenders and general crimes offenders. Between 2006 and 2014, health fraud offenders received fewer Guidelines-range sentences and more below-Guidelines sentences than other offenders. This is because: (1) health fraud offenders are older, whiter, more educated, and less likely to have a criminal record than other offenders, which are demographic characteristics associated with lighter sentences; (2) judges are dissatisfied with the loss table, which is used to sentence most health fraud offenders; and (3) judges view the collateral consequences of sentencing health fraud offenders—many of whom are health professionals—as a mitigating factor.

This analysis also shows a stark difference in the number of health fraud cases brought in districts across the country. The ten districts with the highest proportion of health fraud convictions account for nearly a quarter of all health fraud convictions. In addition, health fraud offenders go to trial more often than other offenders. This results from the threat of severe collateral consequences—exclusion from Medicare and Medicaid and possible loss of a medical license. These offenders have a larger incentive to go to trial than other offenders, especially because pleading guilty does not allow health fraud offenders to avoid these collateral consequences.

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INTRODUCTION

The number of health care fraud cases has grown since the Department of Justice (DOJ) made health fraud a top priority in 1993.[1] In 1997—when DOJ released its first health care fraud report[2]—prosecutors filed charges in only 282 health fraud cases.[3] But by 2014, this figure jumped nearly 76% to 496 cases.[4]

The number of health fraud convictions has also grown dramatically. In 1997, there were only 363 convictions—by 2014 that figure nearly doubled to 734.[5] Beginning in 2007, the government bolstered its fight against health fraud when DOJ and the Department of Health and Human Services (HHS) launched the

1. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-44.100 (Oct. 2016), https://www.justice.gov/usam/usam-9-44000-health-care-fraud [https://perma.cc/KXW4-CSWE] ("[I]n 1993, the Attorney General made health care fraud one of the Department's top priorities.").

2. The Department of Health and Human Services and the Department of Justice released their first Health Care Fraud and Abuse Control Program Annual Report in 1998. DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FY 1997, at iii (1998), http://oig.hhs.gov/publications/docs/hcfac/hcfacreport1997.PDF [https://perma.cc/UH3T-BMSB].

3. *See infra* Appendix Table 1.

4. *See infra* Appendix Table 1.

5. *See infra* Appendix Table 1.

Medicare Fraud Strike Force.[6] This interagency team of investigators and prosecutors targets health fraud hot spots, including Miami, Detroit, and Chicago.[7] Two years later, DOJ and HHS created the Health Care Fraud Prevention & Enforcement Action Team (HEAT).[8] HEAT's mandate is to increase collaboration between HHS and DOJ to prosecute health fraud.[9] The Medicare Fraud Strike Force and HEAT were created for good reason: health fraud costs taxpayers tens of billions of dollars every year.[10] With this increased focus on health fraud, the number of health fraud convictions increased 34.2% between 2006 and 2014, rising from 547 to 734 convictions.[11] As a result, more health fraud offenders are being sentenced than ever before.

Scholars have conducted empirical analyses of sentencing decisions in white collar cases generally,[12] but to date there has been no empirical analysis of health fraud sentencing in particular.[13] This Note closes this gap, offering the first comprehensive empirical account of sentencing decisions in health fraud cases. This analysis is based on a new health fraud dataset constructed from United States Sentencing Commission (Commission) data.

This Note proceeds in three parts. Part I explains the history of the Commission, the creation of the Federal Sentencing Guidelines (Guidelines), how the Guidelines operate, and how health fraud offenders are generally sentenced under § 2B1.1 of the Guidelines. Part II explains the data and methods used to

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6. DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FY 2014 10 (2015), http://oig.hhs.gov/publications/docs/hcfac/FY2014-hcfac.pdf [https://perma.cc/G878-NV64] [hereinafter HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM FY 2014].

7. *Id.*

8. *Health Care Fraud Unit*, DEP'T OF JUSTICE, https://www.justice.gov/criminal-fraud/health-care-fraud-unit [https://perma.cc/XSE2-X2Z4].

9. *Id.*

10. *The Challenge of Health Care Fraud*, NAT'L HEALTH CARE ANTI-FRAUD ASS'N, https://www.nhcaa.org/resources/health-care-anti-fraud-resources/the-challenge-of-health-care-fraud.aspx [https://perma.cc/XN56-JEGD].

11. *See infra* Appendix Table 1.

12. *See* U.S. SENTENCING COMM'N, SENTENCING AND GUIDELINE APPLICATION INFORMATION FOR § 2B1.1 OFFENDERS 1–2 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Sentencing_Guideline_Application_Info.pdf [https://perma.cc/44ZE-TNVB] (discussing sentencing trends for all offenders sentenced under § 2B1.1 for economic crimes); Jillian Hewitt, Note, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1040–59 (2016) (analyzing sentencing decisions in major white collar cases in S.D.N.Y.); John D. Esterhay, *"Street Justice" for Corporate Fraud: Mandatory Minimums for Major White-Collar Crime*, 22 REGENT U. L. REV. 135, 152–65 (2009) (analyzing 1994–2004 sentencing data for white collar criminals).

13. The Transactional Record Access Clearinghouse published a basic analysis of health fraud prosecutions for 2011 and 2013, which provides statistics on the number of prosecutions for health fraud under 18 U.S.C. § 1347. *See Prosecutions of Health Care Fraud Law Reach New High in FY 2013*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 14, 2014), http://trac.syr.edu/tracreports/crim/338 [https://perma.cc/L37U-5TXQ]; *Record Number of Federal Criminal Health Care Fraud Prosecutions Filed in FY 2011*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 14, 2011), http://trac.syr.edu/tracreports/crim/270 [https://perma.cc/XV5M-RY37]. These reports did not analyze sentencing decisions.

create the health fraud dataset. Part III identifies key patterns in health fraud sentencing. It also offers possible reasons for these patterns. The resulting analysis shows a remarkable disparity in how health fraud offenders[14] are sentenced compared to other white collar offenders and general crimes offenders.[15] Between 2006 and 2014, health fraud offenders received fewer Guidelines-range sentences and more below-Guidelines sentences than other offenders. This Note argues that health fraud offenders receive this treatment because: (1) health fraud offenders are older, whiter, more educated, and less likely to have a criminal record than other offenders—demographic characteristics associated with lighter sentences; (2) judges are dissatisfied with the § 2B1.1 loss table, which is used to sentence most health fraud offenders; and (3) judges view the collateral consequences of sentencing health offenders—many of whom are health professionals—as mitigating factors at sentencing.

But national averages are only part of the story. There is also a tremendous disparity in the number of health fraud cases brought in different judicial districts across the country. Indeed, the ten districts with the highest proportion of health fraud convictions account for nearly a quarter of all health fraud convictions. In these districts there are also significant variations in the number of Guidelines-range sentences, below-Guidelines sentences, and government-sponsored departures. This Note suggests that inter-district sentencing differences are heavily influenced by the policies and practices of prosecutors. Specifically, there is a large variation in government-sponsored departures between districts, which is a function of the discretion given to prosecutors to advocate for below-Guidelines sentences.

Health fraud offenders also go to trial significantly more often than other white collar and general crimes offenders. This Note argues that the severe collateral consequences health fraud offenders face—exclusion from Medicare and Medicaid and possible loss of a medical license—explain the higher rate at which they go to trial. Pleading guilty does not allow health fraud offenders to avoid these collateral consequences, and thus there is a larger incentive for these defendants to proceed to trial.

I. BACKGROUND

A. HISTORY OF THE SENTENCING GUIDELINES

Until 1984, federal judges had almost complete discretion to decide a defendant's sentence.[16] Judges merely had to sentence a defendant within the statutory minimum and maximum, but otherwise they could consider all types of information and did not need to comply with the rules of evidence or provide

14. The Commission's data only reflects convictions. Convicted individuals are referred to as "offenders" rather than "defendants."

15. Non-health fraud and non-white collar offenders are referred to as "general crimes offenders."

16. *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 121 (5th ed. 2012).

reasons for a sentence.[17] By the 1970s, there was growing dissatisfaction with this system because of the perception that it created "the unbridled power of the sentencers to be arbitrary and discriminatory."[18]

To address this problem, Congress passed the Sentencing Reform Act, which created the Commission.[19] Congress tasked the Commission with creating Guidelines to rein in judicial discretion and create more uniform sentencing.[20] Effective for individual criminal offenders in 1987 and for organizational offenders in 2001, the Guidelines gave judges a narrow range within which they were empowered to sentence offenders based on a series of rules and calculations.[21] As originally conceived, the Guidelines were mandatory.[22] In certain cases, judges could depart from the Guidelines, but appeals courts were "fairly vigorous" in reviewing departures.[23]

After a barrage of constitutional challenges to the Guidelines,[24] the Supreme Court in *United States v. Booker* struck down the use of the mandatory sentencing Guidelines as unconstitutional under the Sixth Amendment because the Guidelines allowed judges to find facts that increased an offender's sentence beyond the range authorized by a jury verdict.[25] The Court declared the Guidelines advisory to avoid the constitutional infirmity of the mandatory sentencing scheme.[26]

B. THE SENTENCING PROCESS AFTER *BOOKER*

Following *Booker* and the Court's many related decisions,[27] sentencing generally proceeds as follows.[28] First, the probation office prepares a presentence report based on its independent investigation and interviews with the defendant.[29] The report contains a variety of information, including the defendant's conduct, criminal history, and an initial calculation of the appropriate

17. *Id.*

18. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973).

19. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. §§ 3551–73, 28 U.S.C. §§ 991–98).

20. O'SULLIVAN, *supra note* 16, at 121.

21. *Id.*

22. *Id.*

23. *Id.*

24. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 298 (2004); Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

25. 543 U.S. 220, 226–27 (2005) (Stevens, J., delivering the opinion of the Court in part).

26. *See id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part).

27. *See* Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1228 n.2 (2014) (collecting post-*Booker* sentencing-related decisions).

28. For an excellent overview of the sentencing process, see U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [https://perma.cc/88V2-YGNV].

29. Fed. R. Crim. P. 32(c)–(d).

Guidelines range.[30] At a hearing, the district court considers any objections to the presentence report and may resolve factual disputes with evidentiary hearings.[31] The court then calculates the offender's Guidelines range.[32] To determine the Guidelines range, district courts first calculate the offense level.[33] The offense level is determined by identifying the base offense level, the specific offense characteristics, and any applicable adjustments.[34] Then, the court determines an offender's criminal history category.[35] Based on the offense level and criminal history category, the court identifies the Guidelines-range sentence in the sentencing table.[36] Next, the court considers grounds to depart up or down from the Guidelines.[37] After completing the Guidelines calculation, courts must consider the factors in 18 U.S.C. § 3553, including "the nature and circumstances of the offense and the history and characteristics of the defendant[,] the need for the sentence imposed[, and] the kinds of sentences available."[38] Courts can vary from the Guidelines if doing so is necessary to "impose a sentence sufficient, but not greater than necessary" to comply with the § 3553(a) sentencing factors.[39]

On appeal, courts engage in a two-step review of sentences. First, courts must ensure that "no significant procedural error" occurred, "such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence."[40] Second, if there was no significant procedural error, courts "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[41] Courts of Appeal may presume that a sentence within a Guidelines range is reasonable.[42] They may not, however, apply a presumption of unreasonableness to a sentence outside the Guidelines.[43]

30. *Id.*
31. *Id.* at 32(i)(2)–(3).
32. *See* 18 U.S.C. § 3553(a)(4) (2012) (requiring a district court to consider the applicable Guidelines range).
33. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(2) (U.S. SENTENCING COMM'N 2015) [hereinafter U.S.S.G.].
34. *Id.* § 1B1.1(a)(2)–(3).
35. *Id.* § 1B1.1(a)(6).
36. *Id.* § 1B1.1(a)(7).
37. *Id.* § 1B1.1(b).
38. *Id.* § 1B1.1(c); 18 U.S.C. § 3553(a)(1)–(3).
39. 18 U.S.C. § 3553(a).
40. Gall v. United States, 552 U.S. 38, 51 (2007).
41. *Id.*
42. *See* Rita v. United States, 551 U.S. 338, 347 (2007).
43. *See* Irizarry v. United States, 553 U.S. 708, 713–14 (2008).

C. § 2B1.1 AND THE LOSS TABLE

The offense level for economic crimes, which includes many white collar crimes, is calculated using § 2B1.1.[44] Section 2B1.1 applies to hundreds of offenses, including mail and wire fraud, health fraud, violations of the Anti-Kickback Act, and embezzlement.[45] The section operates by increasing the offense level based on the amount of loss caused by a defendant, as specified in the loss table.[46] The Commission's commentary to § 2B1.1 explains that a sentence "should reflect the nature and magnitude of the loss caused or intended by [an offender's] crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the [offender]'s relative culpability."[47] Loss is therefore either the actual loss or intended loss—whichever is larger.[48] The Guidelines further define actual loss as "the reasonably foreseeable pecuniary harm that resulted from the offense"[49] and intended loss as "the pecuniary harm that the [offender] purposefully sought to inflict."[50] The loss table ranges from $6,500 or less, which results in no additional points, to a loss of $550 million or more, which results in a thirty point increase to the offense level.[51] Thus, a defendant who engages in a scheme to defraud victims of $10 million, but who actually caused no loss, would receive the same number of points as a defendant who actually defrauded victims of $10 million.[52]

D. VARIANCES AND DEPARTURES FROM THE GUIDELINES

Because the Guidelines are now advisory, judges may sentence offenders outside of the calculated Guidelines range. This occurs as either a departure or a variance from the Guidelines. A departure "is typically a change from the final sentencing range computed by examining the provisions of the Guidelines themselves."[53] Section 5K1.1, for example, provides for a downward departure if the government files a motion "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."[54] Conversely, a variance "occurs when a judge imposes a sentence above or below the otherwise properly calculated final sentencing range based on application of the other statutory factors in 18 U.S.C.

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44. U.S.S.G. § 2B1.1.
45. *Id.* app. A.
46. *Id.* § 2B1.1(b)(1).
47. *Id.* § 2B1.1 cmt. background.
48. *Id.* § 2B1.1 cmt. 3(A).
49. *Id.* § 2B1.1 cmt. 3(A)(i).
50. U.S.S.G.§ 2B1.1 cmt. 3(A)(ii).
51. *Id.* § 2B1.1(b)(1).
52. Hewitt, *supra* note 12, at 1033.
53. U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER 1 (2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Departure_and_Variance.pdf [https://perma.cc/SJ6F-BSDW] [hereinafter DEPARTURE AND VARIANCE PRIMER].
54. U.S.S.G. § 5K1.1.

§ 3553(a)."[55]

These factors include "the nature and circumstances of the offense and the history and characteristics of the defendant,"[56] such as the offender's criminal history, health problems, family circumstances, and the seriousness of the offense.[57] The need to protect the public from further crimes, to provide just punishment for the offense, and to reflect the seriousness of the offense are also relevant.[58] Courts must also consider the kinds of sentences that are available (such as probation, home confinement, and incarceration).[59] A variance based on policy disagreements with the Guidelines is also permitted. In *Kimbrough v. United States*,[60] the Court held that district courts may vary from the Guidelines based on policy disagreements with the crack cocaine portion of the Guidelines.[61] Since then, courts have also varied from the child pornography, career offender, firearms, offender characteristics, and immigration portions of the Guidelines based on policy disagreements.[62]

II. DATA AND METHOD

The Commission gathers and reports sentencing data online.[63] This data reflects convictions at the federal level for both corporate and individual defendants for each fiscal year beginning in 2002.[64] The Commission data includes a wide array of information, including where an offender was convicted, the offense(s) for which the offender was convicted, the length of the sentence, whether the sentence was within the Guidelines range, and whether there was a government-sponsored departure.[65] This Note includes only individual and not corporate offenders in its dataset and analysis.

To examine health fraud sentencing, this Note identified health fraud cases by coding for cases where the defendant was convicted under: (1) 42 U.S.C. § 1320a-7b, the Anti-Kickback Act; (2) 18 U.S.C. § 1347, health care fraud; (3) § 1518, obstruction of criminal investigations of health care offenses; (4) § 669, theft or embezzlement in connection with health care; and (5) § 1035, false statements relating to health care matters. To be sure, this method does not

55. DEPARTURE AND VARIANCE PRIMER, *supra* note 53, at 1.

56. 18 U.S.C. § 3553(a)(1).

57. DEPARTURE AND VARIANCE PRIMER, *supra* note 53, at 38–41 (collecting cases).

58. *Id.* at 41–43 (collecting cases).

59. 18 U.S.C. § 3553(a)(3).

60. 552 U.S. 85 (2007).

61. *See* Spears v. United States, 555 U.S. 261, 264 (2009) (per curiam) (discussing the holding in *Kimbrough*).

62. *See* DEPARTURE AND VARIANCE PRIMER, *supra* note 53, at 47–50 (collecting cases).

63. *See Commission Datafiles*, U.S. SENTENCING COMM'N, http://www.ussc.gov/research-and-publications/commission-datafiles [https://perma.cc/D8HF-VFBH].

64. *Id.*

65. *See* U.S. SENTENCING COMM'N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 1–4 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/Variable_Codebook_for_Individual_Offenders.pdf [https://perma.cc/5NHF-RP4M] [hereinafter VARIABLE CODEBOOK]. The data does not reflect resentencing or appeals.

capture sentences related to all health fraud offenses because health fraud defendants may be prosecuted under general criminal statutes. For instance, health fraud offenders may be prosecuted under the False Claims Act and under other multi-purpose statutes for false claims, conspiracy, mail fraud, and wire fraud.[66] However, because the Commission only codes sentences by the statute of conviction, it is impossible to identify cases where a defendant was convicted under a general criminal statute for a health fraud offense.

Nonetheless, the health fraud dataset captures 52% of all health fraud cases. This was calculated by comparing the number of health fraud offenses captured in the dataset to the number of convictions for health care offenses reported by DOJ and HHS in the Health Care Fraud and Abuse Control Program Annual Reports.[67] Thus, although the health fraud dataset is not a complete picture of all health fraud convictions, it captures most of them.

This Note identified other white collar crime convictions by selecting offenders who were convicted of larceny, fraud, embezzlement, bribery, tax offenses, money laundering, antitrust violations, and food and drug offenses, as defined by the Commission.[68] Although there is no universally-accepted definition of white collar crime,[69] these crimes capture the traditional definition of white collar crime—non-violent activities that use deceit and concealment to obtain money or property.[70]

Finally, this Note chose to include data beginning in 2006, the year after *Booker* was decided, because it did not want to confound its analysis by introducing the impact of the Guidelines shifting from mandatory to advisory. The dataset includes Commission data ending in 2014, the most recent year of data available at the time of this study.

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66. *See generally* HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM FY 2014, *supra* note 6.

67. *See infra* Appendix Table 1.

68. The Sentencing Commission codes convictions based on these categories. *See* VARIABLE CODEBOOK, *supra* note 65, at 33–34, A-7.

69. *See generally* Thomas J. Koffer, *All Quiet on the Paper Front: Asserting a Fifth Amendment Privilege to Avoid Production of Corporate Documents in* In Re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 46 VILL. L. REV. 547, 547 n.3 (2001) (discussing the debate over a definition of white collar crime).

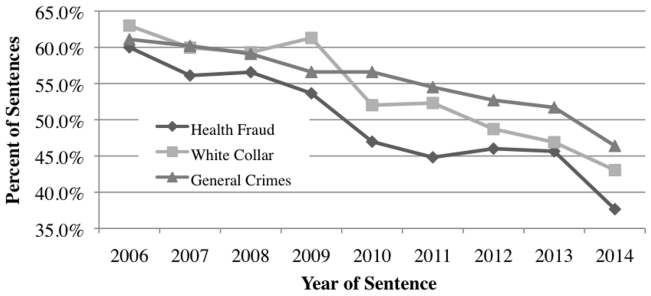
70. *See, e.g.*, DONALD A. MANSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TRACKING OFFENDERS: WHITE-COLLAR CRIME 2 (1986) (describing white collar crime as "nonviolent crime for financial gain committed by means of deception") (internal citations omitted); U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL 39 (1983) (defining white collar crime as "illegal acts that use deceit and concealment—rather than the application or threat of physical force or violence—to obtain money, property, or service; to avoid the payment or loss of money; or to secure a business or personal advantage"); U.S. DEP'T OF JUSTICE, NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIME: REPORT OF THE ATTORNEY GENERAL BENJAMIN R. CIVILETTI 5 (1980) (noting white collar crime involves "those classes of non-violent illegal activities which principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge or illegal circumvention").

III. RESULTS AND ANALYSIS

A. HEALTH FRAUD OFFENDERS RECEIVE FEWER GUIDELINES-RANGE SENTENCES AND MORE BELOW-GUIDELINES SENTENCES THAN OTHER OFFENDERS

Since *Booker* was decided in 2005, the proportion of all offenders sentenced within the Guidelines has steadily decreased. In 2006, 61.7% of all offenders were sentenced within the Guidelines.[71] By 2014, only 46.0% of offenders were sentenced within the Guidelines, reflecting a 15.7% decrease.[72] The declining number of Guidelines-range sentences is reflected in Figure 1, which shows the proportion of Guidelines sentences for health fraud offenders, other white collar offenders, and general crimes offenders. Between 2006 and 2014, health fraud offenders received fewer Guidelines-range sentences than other white collar offenders and general crimes offenders. In 2014, for example, health fraud offenders were nearly 13% more likely than white collar offenders and nearly 19% more likely than general crimes offenders to receive a sentence outside the Guidelines.[73] The disparity in Guidelines-range sentences between health fraud offenders and general crimes offenders was relatively small from 2006 to 2009, averaging only 4.5%.[74] The gap, however, widened in 2010, jumping to 17%.[75] Between 2010 and 2014, health fraud offenders were 15.6% more likely to receive a sentence outside the Guidelines.[76]

Figure 1: Within-Guidelines Sentences



71. U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2006, FIRST CIRCUIT 11 tbl.8 (2006), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2006/1c06.pdf [https://perma.cc/9662-9KAC] [hereinafter STATISTICAL INFORMATION PACKET: FISCAL YEAR 2006].

72. U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, FIRST CIRCUIT 11 tbl.8 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/1c14.pdf [https://perma.cc/J7AN-EZWE] [hereinafter STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014].

73. *See infra* Appendix Table 2.

74. *See infra* Appendix Table 2.

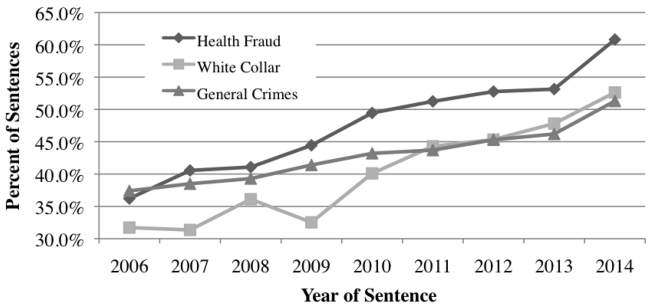
75. *See infra* Appendix Table 2.

76. *See infra* Appendix Table 2.

Following *Booker*, the number of offenders receiving sentences below the Guidelines—either as departures or variances—steadily increased.[77] In 2006, 36.6% of all offenders received a below-Guidelines sentence.[78] By 2014 this figure increased by over 41% to 51.7% of all offenders.[79] Figure 2 reflects the growing number of below-Guidelines sentences.

There is a marked disparity in the percentage of below-Guidelines sentences between categories of offenders. Between 2006 and 2014, health fraud offenders were, on average, more likely to receive below-Guidelines sentences compared to other white collar offenders and general crimes offenders.[80] Health fraud offenders were 19.6% more likely to receive a below-Guidelines sentence compared to other white collar offenders and 10.6% more likely to receive a below-Guidelines sentence compared to general crimes offenders.[81] The message is clear: district court judges are increasingly dissatisfied with the sentencing range produced by the Guidelines, and they are even more dissatisfied with the Guidelines range produced for health fraud offenders.

Figure 2: Below-Guidelines Sentences[82]



Below-Guidelines sentences are either government-sponsored or non-government-sponsored. Both types of below-Guidelines sentences have increased since 2004. Government-sponsored below-Guidelines sentences increased

77. Below-Guideline sentences reflect the Commission's "Below Range" and "Government Sponsored" categories coded in Booker. The "Below Range" category includes "Downward Departures," "Downward Departures w/ Booker," "Below Range w/ Booker," and "Remaining Below Range." The "Government Sponsored" category includes "5K1.1/Substantial Assistance," "Early Disposition/5K3.1" and "Government Sponsored—Below Range." *See* VARIABLE CODEBOOK, *supra* note 65, at 12–13.

78. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2006, *supra* note 71, at 11 tbl.8.

79. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, *supra* note 72, at 11 tbl.8.

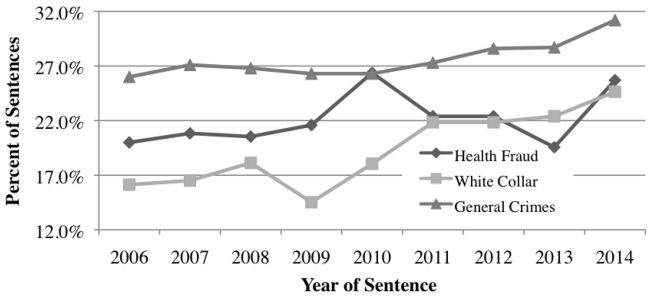
80. *See infra* Appendix Table 3.

81. *See infra* Appendix Table 3.

82. Above-Guideline sentences are not included in this analysis because they represent a tiny percentage of all sentences (only 2.2%). *See* STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, *supra* note 72, at 11 tbl.8.

from 24.6% in 2006[83] to 30.3% in 2014.[84] These sentences include § 5K1.1 substantial assistance departures, § 5K3.1 early disposition departures, and a small number of other government-sponsored departures.[85] Figure 3 reflects the proportion of health fraud, white collar, and general crimes offenders who received a government-sponsored below-Guidelines sentence. Between 2006 and 2014, health fraud offenders received more government-sponsored departures than white collar offenders but fewer of these departures than general crimes offenders.[86] During this period, 19.3% of white collar offenders, 22.2% of health fraud offenders, and 27.6% of general crimes offenders received government-sponsored below-Guidelines sentences.[87]

Figure 3: Government-Sponsored Below-Guidelines Sentences

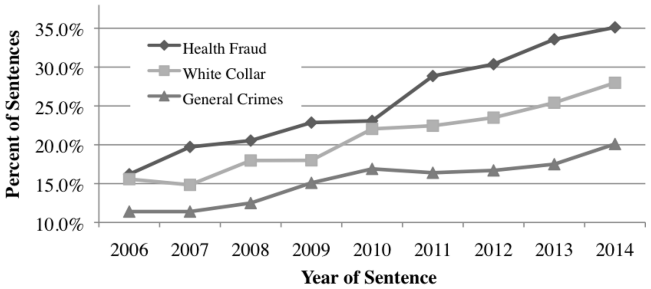


Since 2006, non-government-sponsored below-Guidelines sentences have increased in parallel to government-sponsored departures. These departures have doubled from 12.0% of sentences in 2006[88] to 21.4% of sentences in 2014.[89] Between 2006 and 2014, a higher proportion of health fraud offenders received non-government-sponsored below-Guidelines sentences than white collar offenders and general crimes offenders.[90] During this period, health fraud offenders were 22.0% more likely to receive such a below-Guidelines sentence than other white collar offenders and 38.9% more likely than general crimes offenders.[91] In 2014, for example, 35.1% of health fraud offenders, 28.0% of white collar offenders, and 20.1% of general crimes offenders received a

83. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2006, *supra* note 71, at 11 tbl.8.
84. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, *supra* note 72, at 11 tbl.8.
85. *See* VARIABLE CODEBOOK, *supra* note 65, at 12–13.
86. *See infra* Appendix Table 4.
87. *See infra* Appendix Table 4.
88. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2006, *supra* note 71, at 11 tbl.8.
89. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, *supra* note 72, at 11 tbl.8.
90. *See infra* Appendix Table 5.
91. *See infra* Appendix Table 5.

non-government-sponsored below-Guidelines sentence.[92]

Figure 4: Non-Government-Sponsored Below-Guidelines Sentences



B. DISCUSSION AND IMPLICATIONS

Health fraud offenders receive more below-Guidelines sentences—both government-sponsored and non-government-sponsored—than other offenders for three reasons. First, health fraud offenders are older, whiter, more educated, and less likely to have a criminal record than other offenders, which are demographic characteristics associated with more lenient sentences. Second, health fraud offenders are sentenced using the § 2B1.1 loss table more frequently than other offenders, and judges are largely dissatisfied with the loss table because its application results in overly harsh sentences. Third, judges consider the collateral consequences of sentencing health fraud offenders—the loss of medical license and exclusion from federal health care programs—as mitigating sentencing factors.

1. Demographic Characteristics as Mitigating Factors

One reason health fraud offenders receive more below-Guidelines sentences than other offenders is that they are older, whiter, more educated, and less likely to have a criminal record than other offenders.[93] These demographic characteristics are all linked to more lenient sentences. In 2014, health fraud offenders were 50% more likely than white collar offenders and three-and-a-half times more likely than general crimes offenders to be over the age of fifty.[94] Health fraud offenders were also over 10% more likely than white collar offenders and almost 40% more likely than general crimes offenders to be white.[95] Health fraud offenders are also more educated than other offenders. Health fraud offenders were 96% more likely to be college graduates than white

92. *See infra* Appendix Table 5.
93. *See infra* Appendix Tables 7–10.
94. *See infra* Appendix Table 8.
95. *See infra* Appendix Table 9.

collar offenders and twelve-and-a-half times more likely to be college graduates compared to general crimes offenders.[96] Further still, many more health fraud offenders hold graduate degrees than other offenders.[97] Indeed, in 2014, health fraud offenders were 2.8 times more likely than white collar offenders and nearly 30 times more likely than general crimes offenders to hold a graduate degree.[98] Finally, health fraud offenders were nearly 40% less likely than white collar offenders and 70% less likely than general crimes offenders to receive any criminal history points.[99]

The demographic profile of health fraud offenders corresponds with demographic groups that generally receive more lenient sentences. Each of these characteristics is associated with reduced sentence length.[100] A Commission study found that, controlling for other variables, post-*Booker* offenders with any college education received 9.3% shorter sentences than those without any, offenders over twenty-five received 10.1% shorter sentences than offenders under twenty-five, and black offenders received 7.4% longer sentences than white offenders.[101] Offenders with criminal history points also received 27.7% longer sentences than those without criminal history points, even beyond the amount that those points mathematically contribute to the Guidelines sentence.[102] Accordingly, offender demographics appear to help explain why health fraud offenders receive more below-Guidelines sentences.

2. Judicial Dissatisfaction with the § 2B1.1 Loss Table

Another reason health fraud offenders receive more below-Guidelines sentences than other offenders is that judges are dissatisfied with the § 2B1.1 loss table, which is applied in health fraud cases at a higher rate than for other white collar and general crimes cases. District court judges have heavily criticized the loss table, calling it "a black stain on common sense"[103] and "patently absurd on [its] face."[104] Scholars, too, have criticized the loss table, claiming that the resulting sentences are too harsh.[105] These criticisms are levied for two reasons. First, loss is defined so broadly that § 2B1.1 creates overly severe sentences for

96. *See infra* Appendix Table 7.

97. *See infra* Appendix Table 7.

98. *See infra* Appendix Table 7.

99. *See infra* Appendix Table 10.

100. U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER* REPORT'S MULTIVARIATE REGRESSION ANALYSIS 16–17, B-5 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf [https://perma.cc/CSV6-MTM2].

101. *Id.* at 16–17.

102. *Id.* at B-5.

103. United States v. Parris, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008) (Block, J.).

104. United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (Rakoff, J.).

105. *See, e.g.*, James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT'G REP. 138, 139 (2010) (describing the current high-loss guidelines as "overkill"); Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169 (2008) ("[V]irtually every judge faced with a top-level corporate

offenders who derived little or no actual benefit from their crimes.[106] Although a 2015 amendment to the Guidelines changed the definition of loss from "the pecuniary harm that was intended to result from the offense" to "the pecuniary harm that the defendant purposely sought to inflict," it did little to change the core meaning of loss under the Guidelines.[107] Second, the loss table can overshadow other sentencing factors that in some cases may be more relevant to an offender's culpability, including criminal history, the role of the offender in committing the offense, and any economic benefit received.[108]

In 2014, where the § 2B1.1 loss table was used to calculate the Guidelines range, a health fraud offender was 13.2% more likely to receive a non-government-sponsored below-Guidelines sentence than those cases where the loss table was not applied.[109] The loss table was used to calculate a Guidelines sentence in many more health fraud cases than other kinds of cases.[110] Indeed, it was applied in 81.3% of health fraud cases, compared to 68% of other white collar cases and only 1.3% of general crimes cases.[111] Dissatisfaction with the loss table therefore explains part of why health fraud offenders receive more below-Guidelines sentences than other offenders.

3. Collateral Consequences as Mitigating Factors

Another reason health fraud offenders receive more below-Guidelines sentences is that many of them hold professional licenses or face exclusion from Medicare and Medicaid, which judges factor into sentencing. During sentencing, doctors, nurses, pharmacists, and other health professionals often urge courts to consider that they will lose some form of medical license. Take, for example, a doctor convicted of referring Medicare-eligible patients to a home health care service in exchange for cash kickbacks amounting to nearly $325,000.[112] During sentencing, the doctor cited a variety of collateral consequences in support of a more lenient sentence. She indicated that she would likely lose her medical license and the ability to prescribe controlled substances.[113] She was sentenced to 12 months and one day in prison, a substantial

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defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high.").

106. *See* Hewitt, *supra* note 12, at 1032–33.

107. *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 27 (2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20150430_Amendments.pdf [https://perma.cc/YG47-4ZUT].

108. *See* Hewitt, *supra* note 12, at 1033.

109. *See infra* Appendix T13.

110. *See infra* Appendix T12.

111. *See infra* Appendix T12.

112. *See* Gov't's Sentencing Mem. at 1–2, United States v. Begum, No. 12-CR-491-3 (N.D. Ill. Mar. 24, 2014), ECF No. 210.

113. *See* Defendant's Sentencing Mem. at 8–11, United States v. Begum, No. 12-CR-491-3 (N.D. Ill. Mar. 19, 2014), ECF No. 207.

reduction from the guidelines range of 30–37 months.[114] Another illustrative case is a hospital's pharmacy director who sought out bribes from a pharmaceutical sales representative to keep stocking one of his products.[115] The pharmacy director was convicted for a variety of offenses including violating the Anti-Kickback Act.[116] During sentencing, the pharmacy director argued that a downward departure from the Guidelines was warranted because he would "surely lose his pharmacist's license."[117] He was sentenced to 22 months in prison[118] at the low end of his guidelines range of 21–27 months.[119] These arguments are typical; health professionals like doctors and pharmacists frequently urge courts to exercise leniency because they will likely lose their medical licenses, and that is a mitigating factor.[120]

In addition to defendants, the government sometimes asks district courts to consider the unique collateral consequences health professionals face when asking for a sentence. In a case where a pharmacy technician was convicted of conspiracy to commit prescription fraud and health fraud, the U.S. Attorney for the District of Columbia made a recommendation for leniency in part because the local Board of Pharmacy had commenced disciplinary proceedings against the defendant.[121]

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114. *See* Gov't's Sentencing Mem., *supra* note 112, at 1 (describing guidelines range); Sentencing Agreement ¶2, United States v. Begum, No. 12-CR-491-3 (N.D. Ill. Mar. 19, 2014) (describing sentence).

115. United States v. Muoghalu, 662 F.3d 908, 909 (7th Cir. 2011).

116. *Id.*

117. Benjamin Muoghalu's Sentencing Mem. at 13, United States v. Muoghalu, No. 07-CR-750 (N.D. Ill. Aug. 27, 2009), ECF No. 86 ("After the Court imposes its sentence, Muoghalu will surely lose his pharmacist's license from the Illinois Department of Professional Regulation. Courts routinely acknowledge the harsh collateral consequences of conviction by depart [sic] downward from the advisory guideline range.").

118. Muoghalu, 662 F.3d at 909.

119. Benjamin Muoghalu's Sentencing Mem., *supra* note 117, at 17 (noting Defendant's Guidelines range was 21–27 months); Gov't's Sentencing Mem. at 1, United States v. Muoghalu, No. 07-CR-750 (N.D. Ill. Aug. 27, 2009), ECF No. 90 (same).

120. *See, e.g.*, Defendant's Sentencing Mem. at 14, United States v. Barsoum, No. 11-CR-548 (M.D. Fl. Jan. 28, 2013), ECF No. 207 ("[T]he collateral consequences [the Defendant] has already suffered for his actions in this case, including the impact on his career and reputation, also have a substantial deterrent effect. In particular, [the Defendant's] pharmacist license was criminally forfeited as part of the proceedings in this case."); Sentencing Brief on Behalf of Defendant Bruce E. Costa, Jr. at 33, United States v. Costa, No. 10-47-1 (D. Del. Dec. 17, 2012), ECF No. 152 (arguing for a variance because Defendant "suffered additional punishment in that he will never be able to practice as a licensed pharmacist again"); Defendant's Sentencing Mem. at 4, United States v. Berroa-Baez, No. 08-CR-242 (D.P.R. Nov. 29, 2011), 2011 WL 9316804 ("[T]he court should take into account when imposing sentence[s] . . . unique collateral consequences, including, but not limited to, a certain end to [the Defendant's] medical career . . . ."); Defendant's Sentencing Mem. at 3, United States v. Eldredge, No. 05-CR-771 (D. Utah July 13, 2007), ECF No. 57 ("[T]he collateral consequence of losing his medical license justif[ies] a substantially lower sentence than that set forth under the sentencing guidelines.").

121. *See* Gov't's Mem. in Support of Sentencing & Departure Motion at 5–6, United States v. Mannava, No. 14-CR-39 (D.D.C. June 10, 2015), ECF No. 21; Criminal Information at 1, United States v. Mannava, No. 14-CR-39 (D.D.C. Feb. 26, 2014), ECF No. 3; *see also* Gov't's Sentencing Mem. at 9, United States v. Aczon, No. 11-CR-38 (E.D. Pa. Apr. 26, 2011), ECF No. 13 (stating that the

Health professionals not only point to the effect that a conviction would have on their professional licensure, but also to their likely exclusion from federal and state health care programs.[122] Exclusion from federal and state health care programs is mandatory in some situations[123] and permissive in others.[124] For instance, a five-year mandatory exclusion occurs where an individual or entity is convicted "of a criminal offense related to the delivery of an item or service under Medicare or a State health care program."[125] Exclusion is permissive under a variety of other circumstances at the discretion of the Office of Inspector General.[126]

It is difficult to know how many courts view the possible loss of a medical license or exclusion from state or federal health care programs as a mitigating factor. Courts generally only state the reasons for a sentence orally at the time of sentencing.[127] If a sentence is outside the Guidelines, a judge must complete a statement of reasons form,[128] but these forms are not made public.[129] That said, courts have specifically departed downward because a health professional was likely to or would lose his or her license. For example, in *United States v. Vigil*, a nurse was convicted of drug trafficking crimes for writing illegitimate oxycodone prescriptions.[130] The court discussed twelve factors that supported a downward departure for her sentence, including that she already lost her nursing license.[131] Furthermore, a pre-Guidelines study of white collar sentencing found

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government "considered . . . in particular, the collateral consequences faced by the defendant . . . includ-[ing] the likely suspension of the defendant's license to practice medicine, and his exclusion from participating in federal health benefit programs" in supporting a probation sentence for defendant).

122. *See, e.g.*, Defendant's Sentencing Mem., *supra* note 113, at 9; Defendant's Sentencing Mem. at 1, United States v. Rayne, No. 3:04-CR-324 (M.D. Fla. Apr. 12, 2005), ECF No. 27 (requesting probation because "[t]he Defendant will suffer significant collateral consequences from this felony conviction, including exclusion from federal health care programs and likely disciplinary action against his Georgia chiropractic license").

123. A state, however, may request a waiver—even where exclusion is mandatory—when the excluded individual or entity is the sole community physician or the sole source of essential specialized services in a community. 42 U.S.C. § 1320a-7(c)(3)(B) (2012); 42 C.F.R. § 1001.1801(b) (1997).

124. 42 C.F.R. § 1001.201(a).

125. *Id.* § 1001.101(a), 1001.102(b).

126. *Id.* § 1001.201(a).

127. *See* 18 U.S.C. § 3553(c) (2012); *see also* Judy Ann Clausen, *"Your Honor, May I Have That in Writing?" A Proposed Response to Violations of the Federal Sentencing Written Reasons Requirement*, 42 U. TOL. L. REV. 705, 711 (2011).

128. 18 U.S.C. § 3553(c)(2).

129. Clausen, *supra* note 127, at 712 ("The statement of reasons form is four pages long, not for public disclosure, and requires detailed explanations for sentences outside the recommended range.").

130. 998 F. Supp. 2d 1121, 1125–26 (D.N.M. 2014).

131. *Id.* at 1157. *But see* United States v. Andrews, 390 F.3d 840, 848 (5th Cir. 2004) (stating that "removal of professional licenses" is a prohibited grounds for departure); United States v. Hoffer, 129 F.3d 1196, 1206 (11th Cir. 1997) ("[W]e hold that, under the circumstances of this case, the district court abused its discretion by granting [Defendant] a downward departure based upon loss of his privilege to practice medicine."). There are also cases where courts have addressed whether the loss of a law license is grounds for a departure. *Compare* United States v. Morgan, No. 13-6025, 2015 WL 6773933, at *19 (10th Cir. Nov. 6, 2015) (finding that in considering factors such as "loss of law license," the "[district] court impermissibly focused on the collateral consequences of [defendant's]

that many judges thought that collateral consequences, including job loss, revocation of a professional license, or loss of reputation should be mitigating factors at sentencing.[132] Given the large number of health fraud offenders who receive below-Guidelines sentences, it seems likely that at least some district courts consider the collateral consequences these offenders face.

C. SENTENCING DIFFERENCES ACROSS JUDICIAL DISTRICTS

Health fraud prosecutions are concentrated in a few areas of the country. In fact, the ten judicial districts with the highest proportion of health fraud convictions compared to total convictions account for nearly a quarter of all health fraud convictions.[133] In 2014, the ten districts with the highest proportion of health fraud convictions compared to total convictions (in descending order) were the: (1) Southern District of Illinois; (2) Western District of Louisiana; (3) Eastern District of Michigan; (4) Western District of Kentucky; (5) Southern District of Florida; (6) Southern District of New York; (7) Northern District of Illinois; (8) District of New Jersey; (9) Eastern District of Pennsylvania; and (10) Middle District of Tennessee.[134] These districts contain or are near six of the nine cities where the Medicare Fraud Strike Force currently operates: Baton Rouge, Brooklyn, Chicago, Detroit, Miami, and Tampa Bay.[135] These are cities that law enforcement has identified as health fraud hot spots.[136]

There are, however, significant disparities in sentencing between these ten judicial districts.[137] In 2014, for example, health fraud offenders were far less likely to receive a Guidelines-range sentence in the Southern District of New York—where only 6.3% of offenders received such a sentence—than other parts of the country. In the Southern District of Illinois, by contrast, 84.6% of health

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prosecution and conviction"), *and* United States v. Cutler, 520 F.3d 136, 170 (2d Cir. 2008) ("An attorney convicted of a felony usually loses his license to practice law. The imposition of a light sentence on this basis is not within the court's discretion."), *with* United States v. Weidner, 209 F. App'x 826, 828 (10th Cir. 2006) (affirming district court's downward variance, which was supported, in part, by the fact that the defendant had already "suffered the loss of his license to practice law").

132. STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 144–51 (1988).

133. *See infra* Appendix Table 11.

134. *See infra* Appendix Table 11.

135. *Strike Force Operations*, DEP'T OF JUSTICE, https://www.justice.gov/criminal-fraud/strike-force-operations [https://perma.cc/PF9Z-MW4E].

136. *Id.*

137. *See, e.g.*, Bowman, *supra* note 27, at 1263 ("Throughout the Guidelines era, there has always been a considerable degree of variation among districts in rates of Guidelines compliance." (footnote omitted)); *TRAC Report: Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges*, 25 FED. SENT'G REP. 6, 15 tbl.8 (2012); *see also infra* Figure 5. *See generally* Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268 (2014) (discussing how rendering the Guidelines advisory has led to increased interjudge sentencing disparities).

fraud offenders received a Guidelines-range sentence. The disparity in below-Guidelines sentences is similarly marked. In the Western District of Kentucky, for instance, there were no below-Guidelines sentences, whereas 76.5% of health fraud offenders received a below-Guidelines sentence in the Northern District of Illinois. Sentences above the Guidelines range also varied between districts. Although seven of the ten districts with the highest proportion of health fraud convictions had no sentences above the Guidelines range, 11.1% of sentences in the Western District of Louisiana were above the Guidelines range. Government-sponsored departures also varied considerably. For instance, in the Southern District of Illinois there were no government-sponsored departures, whereas 66.7% of convicted offenders in the Western District of Kentucky received such a departure.

Figure 5: Sentencing Differences By Judicial District

Judicial District	Within-Guidelines	Above-Guidelines	Government-Sponsored Below-Guidelines	Non-Government-Sponsored Below-Guidelines
S.D. Ill.	84.6%	7.7%	0.0%	7.7%
W.D. La.	33.3%	11.1%	22.2%	33.3%
ED Mich.	13.6%	0.0%	45.5%	40.9%
W.D. Ky.	33.3%	0.0%	66.7%	0.0%
S.D. Fl.	62.2%	4.4%	2.2%	31.1%
S.D.N.Y.	6.3%	0.0%	37.5%	56.3%
N.D. Ill.	17.6%	0.0%	5.9%	76.5%
D.N.J.	50.0%	0.0%	30.0%	20.0%
E.D. Pa.	53.3%	0.0%	33.3%	13.3%
M.D. Tenn.	40.0%	0.0%	20.0%	40.0%

D. DISCUSSION AND IMPLICATIONS

As Figure 5 reflects, whether a health fraud offender is sentenced within the Guidelines varies widely by district. Inter-district sentencing differences are well documented, and the disparity has only increased since the Guidelines became advisory.[138] Regional differences in the composition of district courts

138. Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 4 (2010) ("Analysis of [post-*Booker*] sentences reveals a clear increase in inter-judge disparity, both in sentence length and in guideline sentencing patterns.").

help explain some of the variation in sentencing.[139] Democratic judicial appointees tend to prefer lower sentences to Republican appointees.[140] Scholars also suggest that judges appointed before the Guidelines were adopted are also more likely to depart from them and issue shorter sentences.[141] Inter-district sentencing disparity may also be caused by "regional caseload differences created in part by investigative and prosecutorial decisions."[142] Whatever the cause, the disparity in sentencing is significant, and health fraud offenders' sentences are certainly influenced by the district in which they are sentenced.

Inter-district sentencing differences are also heavily influenced by prosecutors. There are large variations in government-sponsored departures between districts, which are a function of the discretion given to prosecutors to advocate for below-Guidelines sentences. Indeed, a substantial portion of government-sponsored below-Guidelines sentences is attributable to § 5K1.1 substantial assistance departures,[143] and a Commission study determined that the application of § 5K1.1 "varied greatly by judicial circuit and district."[144] The study found that 80% of U.S. Attorney's Offices had written substantial assistance policies and that those policies often differed.[145] Almost every policy stated that "offenders who testify[,] . . . participate in the investigation of another offender[,] . . . provide information for the prosecution of others[,] . . . [or] provid[e] information on the criminal activity of others" should receive a substantial assistance departure,[146] but districts were fairly split on whether a defendant who provides incriminating information about his own criminal behavior should receive a substantial assistance motion.[147] Further still, U.S. Attorney's Offices failed to follow their own policies in many cases.[148] The study was "not able to find direct correlations between type of cooperation provided, type of benefit or

139. Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 406 (2011); John S. Carroll et al., *Sentencing Goals, Causal Attributions, Ideology, and Personality*, 52 J. PERSONALITY & SOC. PSYCHOL. 107, 107 (1987); Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109, 114 (1975) ("[I]t is reasonable to infer that the judges' differing sentencing philosophies are a primary cause of the disparity.").

140. Fischman & Schanzenbach, *supra* note 139, at 406.

141. Scott, *supra* note 138, at 18 ("Three-quarters of district court judges in active status, and more than half of all sitting district court judges, were appointed between the effective date of the Guidelines in 1987 and the *Booker* decision in 2005. It should not be surprising, the argument goes, that judges who have spent their entire careers treating the Guidelines as mandatory continue to follow them in the great majority of cases even though they are now advisory.").

142. *Id.*

143. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, *supra* note 72, at 11 tbl.8 (42% of government-sponsored below-range sentences are based on § 5K1.1 motions).

144. LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENT'G COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 5 (1998), http://www.ussc.gov/Research/Research_Publications/Substantial_Assistance/199801_5K_ Report.pdf [https://perma.cc/AF7R-3TZ4].

145. *Id.* at 7.

146. *Id.* at 8–9.

147. *Id.* at 9.

148. *Id.*

result received by the government, the [government's] making of a § 5K1.1 motion [for a sentence reduction], and the extent of the substantial assistance departure received."[149] Variation in judicial and prosecutorial attitudes toward departures helps explain inter-district sentencing disparities.

E. HEALTH FRAUD OFFENDERS GO TO TRIAL MORE OFTEN THAN OTHER OFFENDERS

Only a small portion of all offenders go to trial, and the number of trials for all offenders has been decreasing.[150] In 2006, only 4.3% of offenders went to trial,[151] and this figure shrunk further in 2014 to 2.9%.[152] Figure 6 shows the proportion of offenders who go to trial compared to those who plead guilty by category of offender. There is a remarkable disparity between the rate at which health fraud offenders, other white collar offenders, and general crimes offenders go to trial. Between 2006 and 2014, 13.5% of health fraud offenders, 4.8% of white collar offenders, and 3.2% of general crimes offenders went to trial.[153] This means health fraud offenders were 2.8 times more likely to go to trial compared to other white collar offenders, and 4.2 times more likely to go to trial than general crimes offenders.[154] In 2014, the disparity was well above average: health fraud offenders were 3.1 times more likely to go to trial than other white collar offenders and 5.6 times more likely than general crimes offenders.[155] Since 2006, the number of health fraud and white collar defendants going to trial has decreased very slightly. In 2006, 15.2% of health fraud defendants and 4.9% of white collar defendants went to trial, and in 2014, 14.5% of health fraud offenders and 4.7% of white collar offenders went to trial.[156] Although for health fraud offenders the trial rate has fluctuated from year to year, the number of general crimes offenders going to trial has decreased at a much higher rate, going from 4.1% in 2006 to 2.6% in 2014.[157]

149. *Id.* at 20.

150. One limitation of the Commission's data is that it only includes trials for convicted defendants. The health fraud dataset thus omits acquitted defendants. The federal acquittal rate was 13.9% in Fiscal Year 2014. *See* UNITED STATES COURTS, U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015, at 1–3 (2016), http://www.uscourts.gov/file/19536/download [https://perma.cc/34UL-WMQV].

151. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2006, *supra* note 71, at 3 tbl.2.

152. STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, *supra* note 72, at 3 tbl.2.

153. *See infra* Appendix Table 6.

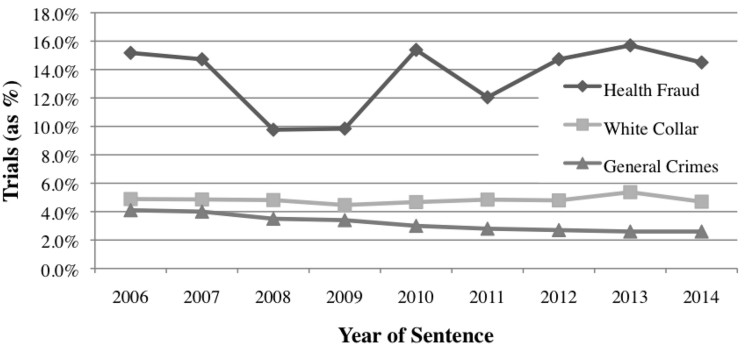
154. *See infra* Appendix Table 6.

155. *See infra* Appendix Table 6.

156. *See infra* Appendix Table 6.

157. *See infra* Appendix Table 6.

Figure 6: Prevalence of Trials



F. DISCUSSION AND IMPLICATIONS

What explains the overall decline in trials but also that health fraud offenders go to trial at a higher rate than other offenders? Observers have hypothesized a number of reasons for the general decline in trials, such as lack of court resources, increasing complexity and cost of trials, longer pretrial delays, judicial incentive to dissuade parties from trials for docket management, predictable sentencing under the Guidelines,[158] and the increased leverage provided to prosecutors in plea bargaining that predictability provides.[159] Commentators, however, have not attempted to explain why health fraud offenders go to trial at higher rates than other offenders.

The higher rate at which health fraud offenders go to trial can be explained by the collateral consequences these offenders face if they plead guilty. As explained in Part II.B.3, health fraud offenders may face the loss of a medical license or exclusion from federal health care programs if they are convicted. Both of these collateral consequences can be a death sentence for a health professional's career. Pleading guilty does not allow health fraud offenders to avoid these collateral consequences, and, as a result, there is a larger incentive for these defendants to go to trial.[160] DOJ policy requires prosecutors to "seek a plea to the most serious readily provable offense charged,"[161] which would likely be a felony that could cause a health professional to lose her license or face exclusion. Health fraud offenders thus have only one choice if they want to avoid losing a professional license or exclusion—they must go to trial and gamble for an acquittal. The difference between trial and a plea is the sentence

158. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1262–63 (2005) (listing plausible explanations for the decline in trials).

159. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 132 (2005).

160. The same might also be true for lawyers, accountants, and bankers, who can lose professional licenses if they are convicted of a felony.

161. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.400 (2015), https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.300 [https://perma.cc/B4AR-CQ4H].

and not the collateral consequences. But many health fraud defendants may perceive the collateral consequences of a conviction worse than a period of incarceration.

Take, for example, a doctor charged with ten counts of health fraud under § 1347. Under DOJ policy, a prosecutor could likely seek a plea to one count of health fraud. However, the doctor would not be able to avoid exclusion or the possible loss of his medical license under this plea agreement. Based on the high trial rate for health fraud offenders, it seems likely that many health professionals faced with the decision to plea and face serious collateral consequences or go to trial and attempt to avoid those consequences choose the latter.

CONCLUSION

This Note closes a gap in sentencing literature by offering the first comprehensive empirical account of sentencing decisions in health fraud cases. As the health fraud dataset shows, there is a significant disparity in the way that health fraud offenders are sentenced compared to white collar offenders and general crimes offenders. Health fraud offenders receive fewer Guidelines-range sentences and more below-Guidelines sentences than other offenders. This is due to the demographic characteristics of health fraud offenders, judicial dissatisfaction with § 2B1.1, and judges that view the collateral consequences for health professionals as mitigating factors at sentencing. There is also a tremendous disparity in the number of health fraud cases brought in different districts across the country. The inter-district sentencing differences are heavily influenced by the policies and practices of prosecutors. Health fraud offenders also go to trial significantly more often than other white collar and general crimes offenders. This is because pleading guilty does not allow health fraud offenders to avoid the serious collateral consequences of conviction, such as exclusion and possible loss of a medical license, and, as a result, there is a larger incentive for these defendants to go to trial.

APPENDIX

Table 1: Total Health Fraud Convictions Compared to Convictions Contained in Health Fraud Dataset

Year	Investigations Opened	Filed Charges	Total Convictions	Convictions in Health Fraud Data	Percent of Total	Source
2014	924	496	734	393	54%	http://oig.hhs.gov/publications/docs/hcfac/FY2014-hcfac.pdf
2013	1,013	480	718	414	58%	http://oig.hhs.gov/publications/docs/hcfac/FY2013-hcfac.pdf
2012	1,131	452	826	326	39%	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2012.pdf
2011	1,110	489	743	357	48%	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2011.pdf
2010	1,116	488	726	364	50%	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2010.pdf
2009	1,014	481	583	315	54%	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2009.pdf
2008	957	502	588	297	51%	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2008.pdf
2007	878	434	560	360	64%	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2007.pdf
2006	836	355	547	290	53%	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport2006.pdf
1997	N/A	282	363	N/A	N/A	http://oig.hhs.gov/publications/docs/hcfac/hcfacreport1997.pdf
		TOTAL	6388	3116	52%	

Table 2: Within-Guidelines Range Sentences

	Health Fraud	White Collar	General Crimes	Health Fraud vs. White Collar (% Difference)	Health Fraud vs. General Crimes (% Difference)
2006	60.0%	63.0%	61.1%	4.7%	1.8%
2007	56.1%	59.9%	60.2%	6.4%	6.8%
2008	56.6%	59.3%	59.1%	4.6%	4.3%
2009	53.7%	61.3%	56.6%	12.5%	5.2%
2010	47.0%	52.0%	56.6%	9.7%	17.0%
2011	44.8%	52.3%	54.5%	14.3%	17.8%
2012	46.0%	48.7%	52.7%	5.6%	12.7%
2013	45.7%	46.9%	51.7%	2.7%	11.7%
2014	37.7%	43.0%	46.4%	12.5%	18.8%
AVERAGE	49.7%	54.1%	55.4%	8.0%	10.3%

Table 3: Below-Guidelines Range Sentences (Both Government and Non-Government Sponsored)

	Health Fraud	White Collar	General Crimes	Health Fraud vs. White Collar (% Difference)	Health Fraud vs. General Crimes (% Difference)
2006	36.2%	31.7%	37.4%	14.2%	−3.2%
2007	40.6%	31.3%	38.5%	29.4%	5.3%
2008	41.1%	36.1%	39.3%	13.8%	4.5%
2009	44.4%	32.5%	41.4%	36.6%	7.4%
2010	49.5%	40.1%	43.2%	23.3%	14.5%
2011	51.2%	44.3%	43.7%	15.7%	17.3%
2012	52.8%	45.3%	45.3%	16.4%	16.5%
2013	53.1%	47.8%	46.2%	11.1%	15.0%
2014	60.8%	52.6%	51.3%	15.6%	18.5%
AVERAGE	47.7%	40.2%	42.9%	19.6%	10.6%

Table 4: Government Sponsored Below-Guidelines Sentences

	Health Fraud	White Collar	General Crimes	Health Fraud vs. White Collar (% Difference)	Health Fraud vs. General Crimes (% Difference)
2006	20.0%	16.1%	26.0%	23.9%	30.0%
2007	20.8%	16.5%	27.1%	26.2%	30.1%
2008	20.5%	18.1%	26.8%	13.3%	30.5%
2009	21.6%	14.5%	26.3%	48.6%	21.8%
2010	26.4%	18.1%	26.3%	46.1%	−0.3%
2011	22.4%	21.8%	27.3%	2.5%	21.9%
2012	22.4%	21.8%	28.6%	2.5%	27.7%
2013	19.6%	22.4%	28.7%	−12.6%	46.7%
2014	25.7%	24.6%	31.2%	4.3%	21.4%
AVERAGE	22.2%	19.3%	27.6%	17.2%	25.5%

Table 5: Non-Government Sponsored Below-Guidelines Sentences

	Health Fraud	White Collar	General Crimes	Health Fraud vs. White Collar (% Difference)	Health Fraud vs. General Crimes (% Difference)
2006	16.2%	15.6%	11.4%	4.0%	29.7%
2007	19.7%	14.8%	11.4%	32.9%	42.2%
2008	20.5%	18.0%	12.5%	14.2%	39.1%
2009	22.9%	18.0%	15.1%	27.0%	33.9%
2010	23.1%	22.0%	16.9%	4.7%	26.8%
2011	28.9%	22.5%	16.4%	28.5%	43.2%
2012	30.4%	23.5%	16.7%	29.3%	45.0%
2013	33.6%	25.4%	17.5%	32.1%	47.9%
2014	35.1%	28.0%	20.1%	25.5%	42.8%
AVERAGE	25.6%	20.9%	15.3%	22.0%	38.9%

Table 6: Trial Rate

	Health Fraud	White Collar	General Crimes	Health Fraud vs. White Collar (% Difference)	Health Fraud vs. General Crimes (% Difference)
2006	15.2%	4.9%	4.1%	210.6%	270.1%
2007	14.7%	4.9%	4.0%	203.1%	268.1%
2008	9.8%	4.8%	3.5%	102.8%	179.0%
2009	9.8%	4.5%	3.4%	120.4%	189.4%
2010	15.4%	4.7%	3.0%	229.2%	412.8%
2011	12.0%	4.8%	2.8%	148.6%	330.2%
2012	14.7%	4.8%	2.7%	207.3%	445.3%
2013	15.7%	5.4%	2.6%	192.3%	503.9%
2014	14.5%	4.7%	2.6%	208.5%	457.7%
AVERAGE	13.5%	4.8%	3.2%	180.7%	324.6%

Table 7: Education

	Graduate Degree (Masters, J.D., M.D., Ph.D.)	Less Than H.S. Graduate	H.S. Graduate	Some College	College Graduate
Health Fraud	27.8%	10.5%	19.3%	27.3%	43.0%
White Collar	7.3%	16.8%	30.0%	31.2%	22.0%
General Crimes	0.9%	52.0%	30.5%	14.0%	3.4%

Table 8: Age

	< 21	21 thru 25	26 thru 30	31 thru 35	36 thru 40	41 thru 50	> 50
Health Fraud	0.5%	2.9%	3.9%	7.6%	12.8%	30.7%	41.5%
White Collar	1%	6.4%	11.6%	13.5%	13.3%	26.5%	27.7%
General Crimes	3.6%	14.9%	18.9%	19.2%	15.3%	18.9%	9.3%

Table 9: Race

	White	Black	Hispanic	Other
Health Fraud	47.4%	27.3%	17.4%	7.9%
White Collar	43.0%	27.8%	21.5%	7.8%
General Crimes	20.1%	18.9%	57.4%	3.5%

Table 10: Criminal History

	Criminal History Points
Health Fraud	21.3%
White Collar	35.0%
General Crimes	68.9%

Table 11: Judicial Districts with Most Health Fraud Convictions

Judicial District	Health Fraud Convictions (as Proportion of Total Convictions)
S.D. Ill.	4.0%
W.D. La.	3.1%
E.D. Mich.	2.3%
W.D. Ky.	2.1%
S.D. Fl.	2.0%
S.D.N.Y.	1.9%
N.D. Ill.	1.9%
D.N.J.	1.8%
E.D. Pa.	1.8%
M.D. Tenn.	1.7%
TOTAL	22.6%

Table 12: Application of § 2B1.1 Loss Table

	Loss Table Applied	Loss Table Not Applied
Health Fraud	81.3%	18.7%
White Collar	68.0%	32.0%
General Crimes	1.3%	98.7%

Table 13: § 2B1.1 Loss Table and Below-Guideline Sentences for Health Fraud Offenders

	§ 2B1.1 Used	§ 2B1.1 Not Used
Below-Guideline	61.0%	53.9%