

The value of values: One professor's perspective on practical principles

Chapter 1: Crime & punishment—Individuals

By Paul Fiorelli

"Nothing focuses the mind like the prospect of a hanging" is a loose translation of a 1777 quote by Samuel Johnson.¹ Almost 200 years later, Strother Martin, as the Captain, said something similar when he threatened Paul Newman's Cool Hand Luke to "get his mind right," or risk spending days in a windowless tin box under the hot Florida sun.



Paul Fiorelli

So how effective are these threats to "Masters of the universe" like Jeff Skilling, and the two Bernies (Ebbers from Worldcom and Madoff of Ponzi scheme infamy)? They aren't afraid of money damages. They'll say, "I'm fine with fines. How big a check do you want? Who do I make it out to?" "Community service? How many hours, and where do I show up?" "Home incarceration? Here's my ankle, slap a bracelet on it." "But go to prison? Be with murderers, rapists, and drug addicts for a day, week, month, year, decade, a century-and-a-half? Oh, that can't happen to someone like me."

One of the most prized possessions to these captains of industry is—control. What are three things stripped from you when you go to prison? First is your clothes. Second is your dignity. Third is control. The endless monotony of menial chores, and the risk of harm, shifts the power they used to have to judges, wardens, corrections officers, and burly inmates with scary tattoos.

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In This Issue:

The value of values: One professor's perspective on practical principles—Chapter 1: Crime & punishment—Individuals 1

Empathy, risk analysis, and learning from the homeless 7

I want you to read this article because I want to impact your influencing skills 8

The unintentional criminal 9

Wow, we have a code of conduct! 10

Why compliance professionals need to think about national cultures 11

Seven powerful ideas to deliver meaningful compliance messages 13

Connecting the dots between ethics and corporate giving ... 15

Federal Sentencing Guidelines

Before 1987, there was an old saying that “white-collar crime would get white-collar time,” meaning not very much, if any. Whenever these community pillars were about to be sentenced, they’d run a public relations campaign directed at the judge. Their attorneys would proffer a laundry list of charitable activities, and celebrities from the worlds of business (both for profit, and nonprofit), politics, and entertainment would provide glowing testimonials. White-collar offenders might expect a slap on the wrist, a stern lecture and a scowl, then perhaps a wink and a slap on the back as they left the courtroom, returning to their lives of privilege and high finance—“See you at the club, your honor.”

There was a lot of variance in the system, especially dealing with economic crimes. A judge in Portland, Maine might give a white-collar criminal who had embezzled \$250,000 a fine and probation. A different judge, perhaps in Portland, Oregon, might give an offender under similar circumstance a five-year prison sentence. In 1984, two Senators at the polar opposites of the political spectrum joined forces, leading the charge against charges—Ted Kennedy and Strom Thurmond. To my knowledge, it was the first time in recorded history that Ted Kennedy and Strom Thurmond ever agreed on anything, but they did so, possibly for very different reasons. Did Kennedy fear that judges, who were Reagan appointees, were sentencing poor defendants to the statutory maximums, then throwing away the key? Did Thurmond think that liberal activist judges appointed by Carter were too soft on crime, giving everyone probation, along with milk and cookies? Regardless of their motivations, in the spirit of statesmanship, bi-partisanship, civility, and yes, even compromise, both Democrats and Republicans supported a new system that provided less variance, and more predictability in sentencing. Justice would no longer be a function of a roll of the dice.

The Federal Sentencing Guidelines were enacted in 1987, but it may have been more appropriate to call them the “Federal Sentencing Mandates.” Potential sentences were plotted on a punishment grid based on six criminal history columns, and 33 possible rows that dealt with the severity of the offense. Each of these 258 sentencing cells contained a narrow range of months. Judges had to faithfully follow this table or explain in open court why they didn’t.

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The “losing party” (either the defendant, or the government) could challenge the reason for the departure, on appeal.

The Sentencing Guidelines also formalized how the judiciary would deal with economic crimes. The U.S. Sentencing Commission recognized the devastating impact fraud could have on victims’ lives. It made the prospect of violators serving significant prison time much more likely. These new guidelines also eliminated the concept of parole, in which convicted felons typically only spent one-third of their sentence in prison, receiving up to two-thirds credit for good behavior. Under the old system, a person receiving a 25-year sentence might only expect to serve 8½ years. While this is still the case in state courts, a person sentenced to 25 years within the federal system can get a maximum 54 days a year as “good time,” meaning they’ll serve a minimum of 21 years. This is far different than the previous federal sentencing rubric.

Life in the Fast’ow’ lane

Under this new scheme, Federal judges lost much of their sentencing discretion. But discretion is a bit like energy—it doesn’t disappear, it just goes from one place to another. So where did it go after the guidelines became law? To the prosecutors, who now had a great deal of power when they indicted offenders. These charging decisions, coupled with the sentencing certainty, put tremendous pressure on defendants to accept plea agreements with harsher terms than they were used to.

We saw this prosecutorial clout play out with Andy and Lea Fastow. Andy Fastow was both the CFO of Enron and the General Partner of several Special Purpose Entities (SPEs). These SPEs were limited partnerships, not directly related to Enron, and had bellicose names like “Raptors” and “Jedi.” Fastow promised he could be on both sides of the deals between these two entities without having a conflict of interest. This type of self-dealing is the definition of a

conflict of interest—“a conflict between the private interests and the official responsibilities of a person in a position of trust.”² The only way this would be an “arms-length” transaction was if one of the arms was from an actual raptor. On Halloween night of 2002, Andy Fastow was indicted on 78 counts dealing with fraud, conspiracy, and money laundering.

Lea Fastow, a supermarket heiress in Houston, also worked at Enron for a short while, but quit in 1997 to take care of her first child. The Department of Justice originally charged her on six felony conspiracy and tax counts, alleging that she was “a stand-in for her husband—wiring money, cashing checks, and handling financial housekeeping matters that the Enron CFO didn’t want his fingerprints on.”³ The prosecutors now had a wedge they could use against Andy Fastow. They could threaten his family and turn him into a cooperating witness. Prosecutors would use the testimony from Enron’s CFO to “trade-up,” and convict its President and Chairman.

Lea could potentially provide the government’s first foothold on the 50th floor. The prosecutors’ strategy in going after her first, most experts agree, is to pressure her husband to accept a plea bargain to minimize any punishment of the mother of his children. As part of any deal, he would be forced to testify against former Chairman Kenneth L. Lay and President Jeffrey K. Skilling. Andrew Fastow is, after all, the perfect witness to tell jurors what the top leaders knew about his own off-the-books partnerships. If Justice’s gambit works, the task force could flip Andy without even having to take him to trial.⁴

The Department had a solid case against both Andy and Lea Fastow that could have resulted in long prison sentences. If the government wanted to play “hard ball” they could have made both parents serve their sentences concurrently. This would have effectively turned their young children into orphans, at least until they graduated from college. Or, in “Let’s Make a Deal” fashion, behind door number two, the government could reduce the charges against both, and recommend Lea serve her sentence first, then allow Andy to do his time. Talk about tag-team parenting! Ultimately Lea took a slightly different deal, which resulted in a one-year misdemeanor conviction. Prosecutors were now in the driver’s seat when it came to pressuring defendants to cooperate.

Using smaller fish to catch bigger fish

Andy Fastow cooperated with the government, and was so helpful in testifying against Skilling and Lay, that the prosecutors recommended he only serve six years in prison. This was a far better outcome than the twenty-five year sentence, had Fastow gone to trial, not cooperated, and lost.

Based on Andy Fastow’s testimony, on October 23, 2006, Jeff Skilling, the former CEO of Enron, received a 24-year sentence for fraud. In 2013, Skilling’s sentence was reduced to 14 years for two reasons. First, Skilling gave up all rights to challenge the conviction. The appealing part to the government was just that—Skilling would no longer be appealing. This was important, because the DoJ didn’t want another high profile set-back like the one it suffered when the US Supreme Court reversed Arthur Andersen’s conviction. The possibility that the courts might vacate Skilling’s sentence could have been devastating to the Department of Justice.

Wes Reber Porter, a former lawyer in the Justice Department’s fraud section where he worked on the Enron Task Force in its later stages, theorizes that Skilling’s defense attorneys have alleged that there were prosecutorial errors during the discovery process, like not sharing with defense attorneys all they knew. Or, he said, there could be claims that prosecutors pressured witnesses somehow to testify in a particular way. Were such revelations to come out in court, it would be seen as a humiliation for the government, and perhaps set a chilling precedent for future decisions to prosecute, making a settlement far preferable.⁵

Strategically, the deterrent value of Jeff Skilling in prison for 14 years is almost as scary as 24 years. I doubt there are many executives saying, “I’ll commit this crime if I might only go to jail for 14 years. But there’s no way I’d do it and risk 24 years.” An outright reversal of the conviction, or even a new trial, could make the DoJ appear weak and ineffective. A resentenced Jeff Skilling, without any further appeals, confirms our confidence in the justice system, and allows the government to focus its limited resources on other cases.

The second reason behind the reduced sentence was Skilling’s willingness to free up another \$41 million in assets from his estate. This additional money could be used to help compensate victims of the fraud. The only people who didn’t win, or at least draw, in this deal were the other

Enron constituents (employees, communities, suppliers). The final score—government—1, Skilling—1, victims—1, other stakeholders—0.

Sentencing theories

There are four theories behind criminal sentencing: rehabilitation, incapacitation, retribution, and deterrence. Let's analyze each one by applying them to Bernie Madoff, then see how effective it may be with executives. The first model is "rehabilitation." The hope is that criminals can learn a different skill or trade in prison to help them lead a more productive life afterwards. Rehabilitation is great in theory, and can help many inmates receive their GED, possibly qualifying them for a legitimate job upon release. Inmates discharged from prison need alternatives to the behavior that led to the "fast money" that got them in trouble in the first place. Without options, ex-felons will resort to their previous lives of crime, because we all do what we need to in order to survive and provide for our families. While rehabilitation is a noble theory for many, I'm not sure what new tricks of the trade Mr. Madoff might develop during his stint, but I'm fairly confident they wouldn't help him in the outside business world. The concept of rehabilitation just doesn't seem to apply to executives like Mr. Madoff.

The second theory deals with "incapacitation." Even during fiscally tough times, the Bureau of Prisons typically doesn't have much trouble finding money to build new facilities.

President Obama's budget request for fiscal year 2013 includes cuts to everything from Medicare and Medicaid to defense and even homeland security. But federal prisons are among the "biggest winners," according to an analysis by the *Federal Times*. The Bureau of Prisons (BOP) is seeking 4.2 percent increase, one of the largest of any federal agency, which would bring its total budget to more than \$6.9 billion.⁶

Americans have no problem "warehousing" murderers, rapists and drug addicts as far away from us as possible (NIMBY—Not In My Back Yard), for as long as possible (how about Y3K?). How does this theory apply to Bernie Madoff? I looked at a picture of him, with his silver hair tucked under a floppy baseball cap, being led into the courthouse. I'm not sure, but if I saw him walking down the street, he might be scrappy, but I think I could take him.

He didn't really scare me. This raises the question about whether incapacitating white-collar criminals really makes us any safer. Probably not.

Even though Mahatma Gandhi is attributed with saying, "An eye for an eye makes the whole world blind," the third theory behind sentencing is retribution. Here's what Judge Denny Chin said during Mr. Madoff's sentencing:

One of the traditional notions of punishment is that an offender should be punished in proportion to his blameworthiness. Here the message must be sent that Mr. Madoff's crimes were extraordinarily evil, and that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place just on paper, but that it is instead, as we have heard, one that takes a staggering human toll. The symbolism is important because the message must be sent that in a society governed by the rule of law, Mr. Madoff will get what he deserves, and that he will be punished according to his moral culpability.⁷

Steal \$65 billion from us, and we'll send you to prison for a very long time. How sweet are those "just desserts"?

The fourth theory of sentencing is deterrence, and this was one of the major motivating factors for enacting the Federal Sentencing Guidelines in 1987. Even though Mr. Madoff considered himself a "human piñata" based on his sentencing, Judge Chin sent the message that stealing with a pen was just as bad as stealing with a gun. "The symbolism is important here because the strongest possible message must be sent to those who would engage in similar misconduct that they will be caught and that they will be punished to the fullest extent of the law."⁸ "It is the judgment of this Court that the defendant, Bernard L. Madoff, shall be and hereby is sentenced to a term of imprisonment of 150 years...equivalent to 1,800 months."⁹ A new world record!

While Judge Chin could not sentence Bernie Madoff to life in prison, he could add up the sentences of all the violations, totaling 150 years, and have the same effect. At 71 years old, Bernie Madoff began serving his sentence at a medium security federal prison in Butner, North Carolina, on July 14, 2009. The Bureau of Prisons' website regarding Mr. Madoff listed his release date as Nov. 14, 2139.¹⁰ Good news! Instead of serving the entire 150 years, Mr. Madoff might receive 20 years of credit for "good behavior" (which can be lost, if there's any bad behavior). As of 2014, he's

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got five years down, only 125 to go! By my calculations, if Bernie Madoff lived to be 200, he would still have one year to go before he was released.

One of my former students sent me a link to a “Bernie Madoff Auction” site, which included “Rolex and other flashy items.”¹¹ The auction included 40 high-end watches with a total value of \$404,810, for an average price of \$10,120 per watch. The irony is that the last thing a person spending 150, or even just 130, years in prison needs to know is, “What time is it?”

Scared straight for future executives

Most business people develop their idea of what jail would be like through movies, television, and now Netflix. Heroes like Andy Dufresne (*Shawshank Redemption*), Lincoln Burrows (*Prison Break*), and Piper Chapman (*Orange Is the New Black*) are typically spending too much time in prison due to overzealous prosecutors, mistaken identities, government conspiracies, lying witnesses, jilted lovers, or some combination of all of the above. They manage to survive the ordeal, and change the entire prison system in the process, until they are either exonerated, escape, or released.

During my Supreme Court Fellowship at the U.S. Sentencing Commission in 1998, I attended a Sentencing Conference and sat next to the General Counsel of the Bureau of Prisons. I explained that even though I was working at the Commission for the year, in my real life I was a college professor. I asked him if he could help me bring a group of MBAs to a federal prison. He agreed, and every year since 1999, a small group of my graduate business students have loaded onto a bus and made a day trip to jail. After walking through a triple barbed-wire tunnel, we’re met by corrections officers who’ve already processed our paperwork. Next, we show valid ID, are scanned by a metal detector, and wanded if any questions arise. Only then does each student receive

a hand stamp, visible under ultraviolet light. This was our “get out of jail free” ticket.

We enter the facility through two “sally ports,” which are designed to prevent prison breaks. These are iron gates at opposite ends of a small, cage-like room. One sally port is opened, allowing us to enter, and showing a guard behind an unbreakable glass window our invisible hand brands, which glow under his special light. This verifies that we are temporary visitors to the prison. Once the entire group is vetted and the first sally port slams shut, the second one unlocks. We cautiously leave the entrance and begin our tour of the facility.

The first thing we learn is that there’s a new meaning to the word “accountability.” Accountability occurs when corrections officers “count” each student, as we move from one passageway to the next. The guard at the rear confirms our magic number of participants by going through the fingers on both hands—twice. Then he yells to his counterpart at the head of the group—“Twenty people. We’re all here! You can unlock the door.” To my students’ surprise, there is no six-inch wide glass-block wall separating us from the inmates. My students tell me that they feel awkward intruding on the inmate’s lives. Peeking into a “one-man room” (a real luxury that’s earned through continuous good behavior and cleanliness), or a common area, they nervously whisper amongst themselves, “It feels like we’re in a zoo.” My response to them is, “If we are at a zoo—who’s watching whom?” We eat prison food, observe inmates working out in “the yard,” walk in “gen pop” (the general population), and never ever wash the hand that will act as our exit visa. “Glow, hand stamp, glow. Pleeese.” This invisible imprint was more important to us than the letters of transit were to Humphrey Bogart in Casablanca.

During this trip, we also visit a minimum-security women’s work-camp, next door to the larger prison. This is the kind of facility that Martha Stewart and Leona Helmsley were in. In fact, Helmsley did spend some time in this location. During our visits to the work-camp, we’ve had panel discussions with women inmates who have been involved in corporate crimes, like fraud and embezzlement. While the inmates are open, I caution my students beforehand not to confuse candor with honesty. Everyone has a story to tell, and this can be a good chance for inmates to practice telling theirs to outsiders. Even with my disclaimer, the students

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are riveted by the cautionary tales about the inmates’ lives before prison, the monotony of the daily routine while in prison, and their prospects after prison.

We appreciate their willingness to speak with us, regardless of motivation. Even though the group of women inmates changes from year to year, I normally ask a similar question that goes something like, “How bad is federal prison?” This work camp didn’t look that bad, especially compared to the triple-barbed-wire facility next door. Was this “club fed”? “Three hots and a cot”? “Prisneyland”? A few years ago, this is how one of the inmates answered that question:

Are you kidding me? Are YOU kidding ME? Just because Martha Stewart spends five months in Camp Cupcake doesn’t mean prison doesn’t affect you. In five months you can lose your job. In five months you can lose all of your money. In five months you can lose your family. In five months you can lose your life!

I guess that question wasn’t as smart as I thought it was.

We are extremely grateful to the Bureau of Prisons, the wardens who allow us to spend a day in their facility, and the correction officers who act as our guides and protectors. This is an experiential learning case study in citizenship, and underscores the importance of ethics in the workplace. The sights, sounds, and smells will be burned into these executives’ memories for the rest of their careers. Even though my students are nervous about visiting federal prison, in hindsight they appreci-

ate the sobering opportunity. One once told me, “You could read 100 *Harvard Business Review* cases about white-collar crime, or go to prison for a day. This has a greater impact.”

Is your mind focused? Is your mind right?

Oh what a tangled web we weave when first we practice to deceive¹²

Note to possible offenders when considering breaking the law: Don’t do the crime if you can’t do the time. Ask yourself, “Is the risk worth the reward?” Not only is ethics the right to do, it can be the easier thing to do. When we start lying, and telling someone one thing and another person something else, it can get very complicated. You’ll ask yourself, “did I tell her this lie, or that lie.” Perhaps Mark Twain said it best, “If you tell the truth, you don’t have to remember anything.” □

This is the first chapter of a book entitled The Value of Values that Paul Fiorelli is in the process of writing. For more information, please feel free to contact him at Fiorelli@xavier.edu.

Endnotes

- 1 “When a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.” This quote is attributed to Samuel Johnson, in the book, “The Life of Samuel Johnson, LL.D.” (1791) by James Boswell; September 19, 1777.
- 2 <http://www.merriam-webster.com/dictionary/conflict+of+interest?show=0&t=1401813657>
- 3 <http://www.businessweek.com/stories/2003-11-23/heiress-in-handcuffs>
- 4 <http://www.businessweek.com/stories/2003-11-23/heiress-in-handcuffs>
- 5 Charles Wilbanks, “If Skilling walks, government gets a big black eye,” *Moneywatch*, April 4, 2013. <http://www.cbsnews.com/news/if-skilling-walks-government-gets-a-big-black-eye/> (visited May 27, 2014).
- 6 James Ridgeway and Jean Casella, *Obama Budget: Grow Prisons and Keep Gitmo*, Mother Jones (Wednesday February 22, 2012) www.motherjones.com/politics/2012/obama-federal-prison-budget (last visited on May 28, 2014).
- 7 United States District Court, Southern District of New York, United States of American v. Bernard L. Madoff, Defendant, 09 CR 213 (DC), New York, N.Y. June 29, 2009 10:00AM, Before Hon. Denny Chin. P.47 lines 3-13 [96TJMADF].
- 8 *Id.* at 47, lines 14-19.
- 9 *Id.* at 49, lines 15-17, and 21-22.
- 10 <http://www.bop.gov/inmateloc/> (visited on May 27, 2014).
- 11 <https://www.flickr.com/photos/zaruka/4092114781/> (visited on May 27, 2014).
- 12 Sir Walter Scott, *Marmion*, 1808.