
ESSAY

“LOSING GROUND”—IN SEARCH OF A REMEDY FOR THE OVEREMPHASIS ON LOSS AND OTHER CULPABILITY FACTORS IN THE SENTENCING GUIDELINES FOR FRAUD AND THEFT

DAVID DEBOLD[†] AND MATTHEW BENJAMIN^{††}

INTRODUCTION

In 2010, fraud offenses were the third largest portion of the federal criminal docket, trailing only immigration and drug offenses.¹ And yet, the strong criticisms of the primary advisory guideline governing the sentencing of those offenses, U.S. Sentencing Guideline § 2B1.1, remain unaddressed.² Judges, defense lawyers, and commentators have long called for a reassessment of § 2B1.1’s “inordinate emphasis” on the amount of loss caused by an offense.³ Even

[†] Partner, Gibson, Dunn & Crutcher LLP. Mr. Debold is a former special counsel to the United States Sentencing Commission and serves as chair of the Commission’s Practitioners Advisory Group. The views he expresses here are in his individual capacity.

^{††} Associate, Gibson, Dunn & Crutcher LLP.

¹ See U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. A (2010); see also *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 19 (2011) (statement of Judge Patti B. Saris, Chair, United States Sentencing Commission) [hereinafter Saris Testimony], available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf.

² U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

³ *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006); see also, e.g., Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT’G REP. 167, 169 (2008) (“In sum, since *Booker*, virtually every judge faced with a top-level corporate defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high.”); Alan Ellis et al., *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, CRIM. JUST., Winter 2011, at 34, 35 (“In short, the increasingly complex fraud guideline is rapidly becoming a mess.”); James E. Felman, *The*

the other major participant in the sentencing process—the Department of Justice (DOJ)—has called for a comprehensive review of the economic crimes guideline.⁴

The staggering increases in sentence ranges driven by the amount of loss,⁵ combined with largely duplicative sentencing enhancements,⁶ have escalated advisory guidelines sentences for high-loss frauds beyond those once reserved for violent criminals. Indeed, the memorandum opposing the government’s request to imprison Raj Rajaratnam for between 235 and 293 months (approximately 19.5 to 24.5 years) noted that the “average sentence imposed for manslaughter in 2010 was 73 months; for kidnapping and hostage-taking, 163 months; for sexual abuse, 109 months; for robbery, 77 months; for arson, 79 months, and for child pornography, 118 months.”⁷ On October 13, 2011, Rajaratnam received a sentence of 132 months (11 years) in prison, the longest term ever imposed for insider trading,⁸ though it pales in comparison to sentences imposed in other recent fraud cases.⁹

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”).

⁴ See *Hearing on Proposed Amendments to the Sentencing Guidelines Before the U.S. Sentencing Comm’n*, 112th Cong. 2, 4 (2011) [hereinafter *Hearings*] (statement of Preet Bharara, United States Attorney, Southern District of New York), available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Testimony_DOJ_%20Bharara.pdf; Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep’t of Justice, to the Honorable William K. Sessions III, Chair, U.S. Sentencing Comm’n 4-5 (June 28, 2010) [hereinafter *Wroblewski Letter*] (recommending reform of the economic crimes guideline due to significant variances at the district court level), reprinted in 23 FED. SENT’G REP. 282 (2011); see also *infra* text accompanying note 45.

⁵ See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1).

⁶ See *id.* § 2B1.1(b)(10) (increasing sentence where defendant used “sophisticated means”); see also James Felman & Mary Price, *Out-of-Control Fraud Guidelines*, NAT’L L.J., July 25, 2011, at 43, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202504720046&slreturn=1> (describing redundant sentencing enhancements as one of the major weaknesses of the fraud guidelines).

⁷ Reply Sentencing Memorandum for Defendant at 2, *United States v. Rajaratnam*, No. 09-1184 (S.D.N.Y. Sept. 9, 2011), 2011 WL 4021121 [hereinafter *Rajaratnam Sent’g Memo.*].

⁸ See Peter Lattman, *11 Years in Jail for Fund Chief in Stock Deals*, N.Y. TIMES, Oct. 14, 2011, at A1.

⁹ For example, on September 16, 2011—less than one month before Rajaratnam’s sentencing—Judge James Lawrence King of the Southern District of Florida imposed the longest sentence ever given to a Medicare fraud offender, sentencing Lawrence Duran, the president of American Therapeutic Corp., to fifty years imprisonment. Duran’s co-conspirator Marianella Valera received a sentence of thirty-five years. Jay Weaver, *Judge Sends Therapist to Prison for 35 Years in Massive Medicare-Fraud Case*, MIAMI

The severity of loss-driven sentences has provoked significant judicial criticism of the economic crimes guideline, memorably derided by Judge Frederick Block in *United States v. Parris* as “a black stain on common sense.”¹⁰ Employing their discretion to “vary” from the advisory guidelines range based on policy disagreements, federal judges have increasingly imposed non-government-sponsored below-range variances in fraud cases since *Booker*.¹¹ These variances are part of an escalating attack on the rationality of the economic crimes guideline.

In Part I, we trace briefly the history of various amendments to the economic crimes guideline, which quickly ratcheted up both the prominence of loss as a sentencing input and the severity of sentences generally. In Part II, we describe the recent mounting pressure on the U.S. Sentencing Commission to conduct a comprehensive review of the economic crimes guideline, and the scuttling of those efforts. In Part III, we explore the economic crimes guideline’s overemphasis on loss and the pernicious consequences of that overemphasis. In Part IV, we propose a series of targeted remedies that would help in the effort to rebalance the various sentencing inputs for economic crimes.

I. HOW WE GOT HERE

The development of the economic crimes guideline has been fully chronicled elsewhere,¹² and we therefore trace that history only briefly, focusing in particular on the inconsistency and irrationality underlying the Commission’s insistent upward ratcheting in response to political pressure.¹³

When Congress enacted the Sentencing Reform Act of 1984, it specifically directed the Commission to promulgate guidelines that

HERALD, Sept. 19, 2011, available at <http://www.miamiherald.com/2011/09/19/2414969/judge-sends-therapist-to-prison.html>.

That same day, the Eighth Circuit Court of Appeals affirmed the hotly contested twenty-seven-year sentence of Sholom Rubashkin, who was convicted for numerous frauds causing a calculated \$27 million loss. *United States v. Rubashkin*, 655 F.3d 849, 855 (8th Cir. 2011). Rubashkin’s sentence fell at the low end of the guideline range. *Id.*

¹⁰ *United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008).

¹¹ Saris Testimony, *supra* note 1, at 7 (citing *United States v. Booker*, 543 U.S. 220 (2005)).

¹² See generally Frank O. Bowman III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373 (2004).

¹³ See, e.g., Rajaratnam Sent’g Memo., *supra* note 7, at 8 (arguing that the guidelines for economic crimes tend “to yield these unduly severe sentences because they have been repeatedly stiffened in response to political pressure instead of empirical research”).

met the “purposes of sentencing”¹⁴ and to use as a “starting point” the average sentences actually served during the pre-guidelines period.¹⁵ The original Commission could not agree on which sentencing purposes should predominate, however, and instead purportedly based the guidelines exclusively on the latter, empirical approach. But the fraud guideline was an exception even to that compromise. According to Justice Breyer, the original Commission, of which he was a member, abandoned “the touchstone of prior past practice” with respect to economic crimes.¹⁶ Instead, the Commission decided to require short but certain periods of confinement for all but the least serious offenders, generally exceeding the average penalties imposed in the pre-guidelines period for economic crimes.¹⁷

Merely two years after the promulgation of the initial 1987 guidelines, the Commission enhanced penalties again by revising the loss table.¹⁸ Though the Commission justified the change by invoking the goals of “provid[ing] additional deterrence and better reflect[ing] the seriousness of the conduct,”¹⁹ a former commissioner and a former deputy chief counsel complained that the increases were motivated by pressure from the DOJ and grounded in “overtly political and inexperienced” reasons.²⁰ Between 1989 and 2001, the Commission promulgated several aggravating specific offense characteristics, many of which duplicated the factors for which loss alone had previously “served as a

¹⁴ See 28 U.S.C. § 991(b)(1)(A) (2006).

¹⁵ See 28 U.S.C. § 994(m) (2006).

¹⁶ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 23 (1988).

¹⁷ See U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1987); *id.* ch. 1, pt. A, 4(d) (2011) (providing for “at least a short period of imprisonment in [economic crime] cases”); see also U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 56 (2004) [hereinafter FIFTEEN-YEAR REPORT] (noting the shift from probation to incarceration for economic crimes during the guidelines period).

¹⁸ U.S. SENTENCING GUIDELINES MANUAL app. C, amends. 99, 154 (1989). The amendments to the loss tables for theft and fraud imposed higher offense levels starting at loss amounts of more than \$40,000 and added four more loss ranges at the top of the table. Thus, for example, the enhancement for a fraud loss of more than \$800,000 went from eight levels to eleven, and the largest loss amount (more than \$80,000,000) would now receive an enhancement of eighteen offense levels instead of eleven levels. The stated reasons for the amendments—“to conform the theft and fraud loss tables to the tax evasion table”—demonstrates how efforts to get tough on one offense have ripple effects. See *id.* amend. 154.

¹⁹ *Id.*

²⁰ Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 320 (1989).

rough proxy.”²¹ And in 2001, the Commission’s multi-year review of the sentences for fraud and theft culminated in the merging of three guidelines—§ 2F1.1 (fraud), § 2B1.1 (theft/embezzlement), and § 2B3.1 (property destruction)—into one guideline, § 2B1.1, with a more severe loss table.²² These increased penalties were based, in part, on an ill-guided effort to create rough parity with the drug guidelines, which themselves lacked empirical basis and were dictated by mandatory minimum sentences over which the Commission had no input or control.²³

A series of major corporate and accounting scandals—Enron, Adelphia, WorldCom, Tyco—followed close on the heels of these “economic crimes package” amendments and generated inevitable pressure to “do something.” Choosing to ignore the “something” that the Commission had just done—making a substantial change to the economic crimes guideline that would soon result in much higher sentences in fraud cases—Congress passed the Sarbanes-Oxley Act of 2002, which raised statutory maximums for most fraud offenses.²⁴ Reacting to directives in the Act and pressure from the DOJ, the Commission then raised the base offense level from six to seven for defendants convicted of an offense with a statutory maximum of twen-

²¹ Bowman, *supra* note 3, at 170; *see also* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 317 (1990) (increasing the sentence if the “offense substantially jeopardized . . . a financial institution”); *id.* amend. 551 (1997) (increasing the sentence if the offense involved misappropriation of a trade secret and the defendant knew it would benefit a foreign state); *id.* amend. 576 (1998) (increasing the sentence if the “offense involved theft of property from a national cemetery”); *id.* amend. 596 (2000) (increasing the sentence if the offense involved, inter alia, trafficking devices or unauthorized transfer of identification). By way of example, the initial fraud guideline, § 2F1.1, included two specific offense characteristics in addition to loss, one with four subparts applicable in the alternative and one that required a floor of twelve levels. *See id.* § 2F1.1 (1987). If there was “more than minimal planning” and “more than one victim,” one two-level enhancement applied. Today, § 2B1.1 has seventeen specific offense characteristics in addition to the loss table, and many have multiple alternatives. *See id.* § 2B1.1(b) (2011). “Sophisticated means” and “250 or more victims” produce a cumulative eight-level enhancement. *Id.* at § 2B1.1(b)(2), (b)(10).

²² *Id.* app. C, amend. 617 (2001). The new loss table used two-level increments rather than one-level, and increased the penalties at numerous loss amounts. *Id.* Moreover, the amendment revised the definition of “actual loss” to include “reasonably foreseeable pecuniary harm,” much like the broader, civil definition. *Id.*

²³ *See generally* Hon. Joe Kendall, Remarks at U.S. Sentencing Comm’n Symposium Panel on the Nature and Severity of Punishment for Economic Crimes: Determinants of Offense Seriousness and Offender Culpability 54-69 (Oct. 12, 2000).

²⁴ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). *See generally* Bowman, *supra* note 12, at 373.

ty years.²⁵ More importantly, the newly revised guideline also substantially increased the prominence of loss and other aggravating factors.²⁶

II. CALLS FOR COMPREHENSIVE REVIEW

A. *The DOJ's and Congress's Responses to Judicial Criticism*

In a trio of decisions from 2005 to 2007, the Supreme Court rendered the guidelines advisory,²⁷ established a deferential standard for appellate review,²⁸ and authorized judges to reject the Commission's policy judgments in certain circumstances.²⁹ Exercising this newfound discretion to vary from the guidelines, several judges have taken aim at the economic crimes guideline.³⁰ By 2008, one prominent commentator observed that, since *Booker*:

virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines [in corporate fraud cases] and the fundamental requirement of Section 3553(a) that judges impose sentences "sufficient, but not greater than necessary" to comply with its objectives.³¹

²⁵ U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 653 (2003).

²⁶ Specifically, the loss table was extended by two additional brackets, and enhancements for "officer/director," "company insolvency," and "more than 250 victims" were added. *Id.* amends. 647 & 653.

²⁷ *United States v. Booker*, 543 U.S. 220, 245 (2005).

²⁸ *See Gall v. United States*, 552 U.S. 38, 52 (2007) ("The uniqueness of the individual case, however, does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.").

²⁹ *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). The Court has reaffirmed this line of authority in subsequent decisions. *See Pepper v. United States*, 131 S. Ct. 1229, 1236 (2011) (rejecting an argument that the sentencing court must use the "same percentage departure[s]" as the guidelines recommend); *Spears v. United States*, 555 U.S. 261, 265-66 (2009) (permitting virtually any variance if based on the individualized features of the case).

³⁰ *See, e.g., United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (imposing a term of five years where the guidelines range suggested thirty years to life, and explicitly criticizing the economic crimes guideline); *United States v. Adelson*, 441 F. Supp. 2d 506, 506 (S.D.N.Y. 2006) (finding a guidelines sentence in a securities fraud case so outrageous that the judge had to rely on other factors); *United States v. Mueffelmann*, 400 F. Supp. 2d 368, 377-78 (D. Mass. 2005) (arguing that total loss should be a contingent factor, not absolute); *see also United States v. Emmenegger*, 329 F. Supp. 2d 416, 428 (S.D.N.Y. 2004) (weighing factors outside of the guidelines calculations during sentencing in a securities fraud case).

³¹ *Bowman*, *supra* note 3, at 169 (quoting 18 U.S.C. § 3553).

In its June 2010 annual report to the Commission, the Department of Justice responded to this phenomenon. Observing the existence of “certain offense types for which the guidelines have lost the respect of a large number of judges,” the Department’s ex-officio representative on the Commission, Jonathan Wroblewski, called for a comprehensive review of, and possible amendments to, those guidelines.³² Wroblewski then specifically cited two guidelines “that have lost the backing of a large part of the judiciary”: the guidelines for child pornography possession offenses and fraud offenses.³³

With respect to the economic crimes guideline, Wroblewski decried the increasing frequency of district courts sentencing “fraud offenders—especially high-loss fraud offenders—inconsistently and without regard to the federal sentencing guidelines.”³⁴ The letter did not move far beyond “handwringing,” however³⁵: after declaring “current sentencing outcomes” to be “unacceptable,” Wroblewski called on the Commission to “determine whether some reforms are needed. Such reforms might include amendments to the sentencing guideline for fraud offenses, recommendations for new statutory penalties, or other policy changes.”³⁶

Responses to the Wroblewski letter varied. Testifying before the Commission on behalf of the American Bar Association, James Felman speculated that the “reference to ‘new statutory penalties’ is presumably intended to suggest mandatory minimum penalties for certain economic offenses.”³⁷ Professor Frank Bowman noted a “dramatic change in tone,” suggesting that the “DOJ recognizes the problem they’ve got in the fraud area is the guidelines have become disconnected from reality, at least at the top end, for high-loss, corporate official-type sentences.”³⁸ And in a stinging rejoinder, Judge John Gleeson of the Eastern District of New York suggested that the De-

³² Wroblewski Letter, *supra* note 4, at 2-3; *see also* Marcia Coyle, *DOJ Wants Sentences Examined; Prosecutors See Disparity in Fraud, Child Pornography Punishments*, NAT’L L.J., July 19, 2010, at 21, 25 (quoting former federal judge Paul Cassell as stating, “I think they’re conceding judges have lost confidence in those guidelines for good reason—they’re mindlessly draconian in some situations.”).

³³ Wroblewski Letter, *supra* note 4, at 3.

³⁴ *Id.* at 4.

³⁵ *United States v. Ovid*, No. 09-0216, 2010 WL 3940724, at *2 (E.D.N.Y. Oct. 1, 2010).

³⁶ Wroblewski Letter, *supra* note 4, at 5.

³⁷ *Hearings*, *supra* note 4, at 12 (statement of James E. Felman on behalf of the American Bar Association), *available at* http://www.usc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Testimony_ABA_%20Felman.pdf.

³⁸ Coyle, *supra* note 32, at 25 (quoting Professor Bowman).

partment had failed to avail itself of a clear solution to the “‘unacceptable’ outcomes [it] complain[ed] about”: appellate review.³⁹ Noting that prosecutors had appealed only 18 of the 1711 non-government-sponsored below-range variances imposed in fiscal year 2009, Judge Gleeson questioned why the Department had “chosen to complain about fraud sentences to the Commission but not to the circuit courts of appeals.”⁴⁰

At a time when even the Department recognized that some change in direction was needed, it continued to be business as usual at Congress. The Dodd-Frank Wall Street Reform and Consumer Protection Act⁴¹ and the Patient Protection and Affordable Care Act,⁴² both passed in 2010, directed the Commission to revisit the penalties for health care fraud, securities fraud, and bank fraud. Dodd-Frank’s instruction was general: the Commission must ensure that the penalties for securities fraud and bank fraud fully reflect “the serious nature of [those] offenses,” the “need for an effective deterrent and appropriate punishment to prevent [those] offenses,” and “the effectiveness of incarceration in furthering” those objectives.⁴³ The health care reform law, on the other hand, mandated a more aggressive, burden-shifting definition of “intended loss” and specific new offense-level increases—applicable only to fraud involving government health care programs—for higher loss amounts.⁴⁴ In neither Act did Congress explain why existing penalties for health care fraud, securities fraud, and bank fraud are insufficient, nor was it evident why health care fraud, which only rarely victimizes individuals, should be treated more severely than every other fraud.

B. *Ready, Set . . . No*

Given the appeals from a diverse group of stakeholders, including the DOJ, for something more than a piecemeal reaction to congress-

³⁹ *Ovid*, 2010 WL 3940724, at *2.

⁴⁰ *Id.* at *9.

⁴¹ See Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077 (2010) (codified as amended at 28 U.S.C. § 994).

⁴² See Pub. L. No. 111-148, § 10606, 124 Stat. 119, 1006 (2010) (codified as amended at 28 U.S.C. § 994).

⁴³ § 1079A (a)(1)(B)(i), 124 Stat. at 2078.

⁴⁴ § 10606(a)(2)(B), 124 Stat. at 1007. This amendment threatens to shift the burden to the defendant of disproving intended loss, even in cases involving “upcoding,” false certification, or other instances where billing was submitted for services actually rendered. See *Hearings*, *supra* note 4, at 9 (statement of James E. Felman).

ional directives that nibble around the edges, many entered this calendar year cautiously optimistic that the Commission would launch a comprehensive, multi-year review of the economic crimes guideline.

Early signs were promising. In its January 2011 Notice of Proposed Amendments, the Commission responded to the directives contained in Dodd-Frank by announcing the possibility of a comprehensive, multi-year review:

[T]he Commission is considering conducting a more comprehensive review of § 2B1.1 and related guidelines, not only of the specific offense characteristics referred to in the directives (§ 2B1.1(b)(14) and (17)), but also of certain other aspects of the guidelines (e.g., the loss table and the definition of loss; the victims table and the definition of victim; and the interactions between these tables and definitions).⁴⁵

The following month, at a public hearing on proposed amendments for 2011, a broad cross-section of witnesses, including United States Attorney Preet Bharara for the Southern District of New York, supported such a review.⁴⁶ And in March 2011, the Commission received comment letters favoring it.⁴⁷

⁴⁵ Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 76 Fed. Reg. 3193, 3201 (Jan. 19, 2011).

⁴⁶ See, e.g., *Hearings*, *supra* note 4, at 4 (statement of Preet Bharara) (“As we have stated before, the Department fully supports the Commission’s plan for a thorough review of the federal sentencing guidelines that relate to fraud offenses generally as well as to securities, bank, and mortgage fraud offenses in particular.”); *id.* at 2 (statement of Hector Dopico, Supervisory Assistant, Federal Public Defender for the Southern District of Florida, Federal Public and Community Defenders), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Testimony_FPD_Dopico.pdf (“Given the complexity of the fraud guidelines, and the wide variety of circumstances involving frauds on Government health care programs, we believe that the Commission should undertake a comprehensive review of the fraud guideline in general and health care fraud offenses specifically.”); *id.* at 1 (statement of Susan Howley, Director, Public Policy and Victims Services, National Center for Victims of Crime), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Testimony_VAG_Howley_Panel_II.pdf (“We urge the Commission to undertake a broad review of §2B1.1, not only with an eye to the Dodd-Frank Act, but to reconsider sentencing for serious property offenses.”); *id.* at 3 (statement of Eric A. Tirschwell, Practitioners Advisory Group), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110216/Testimony_PAG_Tirschwell.pdf (“We encourage the Commission to undertake the comprehensive review of § 2B1.1 that the Proposed Amendments say the Commission is considering.”).

⁴⁷ See, e.g., Letter from Jim E. Lavine, President, Nat’l Ass’n of Criminal Def. Lawyers (NACDL), to the Honorable Pati B. Saris, Chair, U.S. Sentencing Comm’n 11 (Mar. 21, 2011) (“NACDL supports a comprehensive review of § 2B1.1, and urges

By mid-summer, however, the Commission had backed off. In July 2011, the Commission identified among its proposed priorities for 2012 the continuation of its work implementing the directives of Dodd-Frank and “any other crime legislation enacted during the 111th or 112th Congress warranting a Commission response.”⁴⁸ This fell well short of the comprehensive, multi-year review of § 2B1.1 previewed just five months earlier. And despite a number of comment letters urging the Commission to reconsider its rejection of a comprehensive review,⁴⁹ in September 2011, the Commission adopted the narrower priority as proposed.⁵⁰

For the time being, then, it appears that the economic crimes guideline’s “inordinate emphasis” on loss is not going anywhere. As explained in the next Part, that decision is highly unfortunate.

III. LOSS, DISPARITY, AND THE SIXTH AMENDMENT

The heavy emphasis on loss in the economic crimes guideline, combined with the possibility of multiple additional enhancements for overlapping offense characteristics, leads to particularly pernicious forms of unwarranted disparity.

Several federal judges and commentators have observed that loss is only a very rough barometer of an individual defendant’s culpability.⁵¹ An earlier background note to § 2B1.1 accurately identified loss

the Commission not to respond to the directives before the current amendment cycle ends on May 1, 2011.”).

⁴⁸ See Notice of Proposed Priorities, 76 Fed. Reg. 45007, 45008 (July 27, 2011).

⁴⁹ Several organizations submitted comment letters in August 2011 urging the Commission to “maintain as a priority for the upcoming amendment cycle the ‘more comprehensive review of Section 2B1.1 and related guidelines’ that [it] signaled earlier this year it was ready to undertake.” Letter from David Debold, Chair, and Eric A. Tirschwell, Vice Chair, Practitioners Advisory Grp., to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm’n 2 (Aug. 31, 2011); see also Letter from Thomas M. Susman, Director, Gov’t Affairs Office, Am. Bar Ass’n, to the Honorable Patti B. Saris 1 (Aug. 25, 2011); Letter from Miriam Conrad, Vice Chair, and Marjorie Meyers, Chair, Fed. Defender Sentencing Guidelines Comm., to the Honorable Patti B. Saris 2-3 (Aug. 26, 2011). Indeed, even the Department reiterated its earlier call, noting that it had previously “urged the Commission to review the guidelines for economic crimes with a special focus on high-loss fraud cases.” Letter from Lanny A. Breuer, Assistant Att’y Gen., and Jonathan J. Wroblewski, Director, Office of Policy & Legislation, U.S. Dep’t of Justice, to the Honorable Patti B. Saris 6 (Sept. 2, 2011).

⁵⁰ Notice of Final Priorities, 76 Fed. Reg. 58564 (Sept. 21, 2011).

⁵¹ See, e.g., *United States v. Watt*, 707 F. Supp. 2d 149, 155 (D. Mass. 2010) (“Loss under the Guidelines is effectively a proxy for evaluating culpability. Sometimes it is appropriate, and sometimes it is not.”); *United States v. Emmenegger*, 329 F. Supp. 2d

as something of a proxy for culpability because it reflected both “harm to the victim” and “gain to the defendant.”⁵² The problem is that loss has taken on a role in the sentence calculation that dwarfs most of the other important factors.

No one could seriously doubt that, “[a]ll else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment.”⁵³ But rarely is all else even *close* to equal, and that is where the current emphasis on loss leads to unwarranted disparity.

The economic crimes guideline calls for use of either “actual” loss or “intended” loss, whichever is higher. Actual loss might be higher because of foreseeable pecuniary harms to the victims that the defendant did not intend to bring about. Intended loss might be higher where the scheme is thwarted before it has a chance to succeed. But even these simple distinctions raise serious questions about proportionality. If two defendants embark on identical schemes with identical intended loss, why punish more severely the one who inflicted a higher actual loss just because he happened to succeed? And if two defendants engage in mortgage fraud, but only one has the fortuity of selling his house and paying off his loan before market conditions unexpectedly deteriorate, why punish more severely the one who started the crime a few months later and therefore got stuck by the market downturn? These are just two examples in which the amount of loss is driven by factors unrelated to the defendant’s level of culpability.⁵⁴

It is worth pausing to note that the problem of disparity comes in more than one form. We have just seen examples of “like” offenders

416, 427 (S.D.N.Y. 2004) (describing the amount of loss as a “relatively weak indicator of the moral seriousness of the offense or the need for deterrence”).

⁵² *Watt*, 707 F. Supp. 2d at 155 n.10 (quoting U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2001)).

⁵³ *Emmenegger*, 329 F. Supp. 2d at 427.

⁵⁴ Another example is where co-conspirators trade on the same inside information to purchase stock but hold onto that stock for different periods of time before selling. *See United States v. Mooney*, 425 F.3d 1093, 1107 (8th Cir. 2005) (Bright, J., dissenting) (arguing that, in this case, the majority’s decision to determine gain from the crime at the time of sale rather than from the amount derived from the insider trading leads to “unequal justice for equal crimes”). Consider also Congress’s directive that health care fraud should be sentenced under its own, more punitive definition of “intended loss,” and that the resulting loss amounts should in turn result in greater punishment for health care fraud than for all other types of fraud. *See Pub. L. No. 111-148*, § 10606(a)(2)(B), 124 Stat. 119, 1006 (2010) (codified as amended at 28 U.S.C. § 994). As George Orwell might have put it, when it comes to culpability, all frauds are equal, but some are more equal than others. *Cf. GEORGE ORWELL, ANIMAL FARM* ch. 10 (1945).

being treated differently for reasons unrelated to the purposes of punishment. The converse is no less worrisome: Defendants are often treated the same under the economic crimes guideline even though the purposes of punishment call for different treatment. Another name for this is unwarranted uniformity. It happens under the economic crimes guideline in a number of ways. For example, “we now have an advisory guidelines regime where . . . any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment.”⁵⁵ In short, the economic crimes guideline does not adequately distinguish Bernie Madoff from Richard Adelson.⁵⁶

But even in cases where the prescribed punishment falls short of a life sentence, the loss table fails to differentiate offenders who ought to be differentiated. For example, an amount of loss—especially when it is actual loss—does not tell us anything about why the defendant committed the offense or how much he personally benefited. These motive-based facts are important for issues of retribution, deterrence, and the need for incapacitation. Take an accountant at a public company who is deliberately ignorant of a subordinate’s improper bookkeeping. Assume that this defendant turns a blind eye because he is afraid the company might miss its earnings target, and he is under great pressure not to let that happen in light of the negative reaction the year before when his honest reporting of a bookkeeping mistake caused the company to fall short. With a public company that issues millions of shares, even small inflation in the price of a stock can add up to tens of millions of dollars in loss. Even if this defendant never sold any stock, and therefore never realized a penny of gain from the fraud, the guidelines would treat him the same as a career con man who creates a phony company, runs it as a Ponzi scheme, pockets tens of millions in proceeds for his own benefit, and flees the

⁵⁵ United States v. Parris, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008).

⁵⁶ Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1002 (2010). Adelson, the president of Impath, uncovered a sophisticated accounting fraud designed by other Impath employees to inflate the value of the company’s stock. United States v. Adelson, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006) (Rakoff, J.). Relatively late in the conspiracy, Adelson chose to conceal the fraud rather than report it. *Id.*; see also *Does Money Play Too Large a Role in Federal Sentencing?*, CRIME IN THE SUITES (Nov. 15, 2010), <http://crimeinthesuites.com/does-money-play-too-large-a-role-in-federal-sentencing> (quoting Judge Rakoff’s description of Richard Adelson as a “very decent human being who towards the end of a fraud perpetrated mostly by other people[] became involved and made a mistake and covered it up”).

country. Motive, intent, and personal gain are all important offense characteristics that do not get accounted for in the guidelines.

Finally, the overemphasis on loss, both in proportion to other factors and as a driver of sentence severity, encourages a third disparity less frequently characterized as such: the vastly dissimilar sentences received by those who cooperate and those who exercise their Sixth Amendment right to trial. Armed with the leverage of a draconian guideline range driven by an aggressive loss calculation, the government can more readily extract guilty pleas in exchange for negotiated charges and facts. For example, in exchange for a guilty plea, the government may allow the defendant to plead to a charge with a relatively low statutory maximum.⁵⁷ One commentator has suggested that “[t]his means of case resolution is the likely norm going forward” in high-loss fraud cases.⁵⁸ Alternatively, and more pertinently, the government may bargain away millions of dollars in loss by stipulating to specific calculations—again, in exchange for guilty pleas. The coercive power of this tactic was not lost on Raj Rajaratnam, whose lawyers pointed to the discrepancy between the amount of gain that the government initially alleged his cooperating co-conspirator had received, and the significantly lower amount that the government stipulated to in her plea agreement. Because he went to trial, Rajaratnam alleged, the government had increased the amount of gain charged in the indictment by \$20 million.⁵⁹

⁵⁷ See, e.g., *United States v. Ovid*, No. 09-216, 2010 WL 3940724, at *6 (E.D.N.Y. Oct. 1, 2010) (“In exchange for Ovid’s plea of guilty to Count One, which carried a five-year statutory maximum, the government agreed to dismiss other pending charges, which exposed Ovid to an additional 40 years in prison.”); *United States v. Watt*, 707 F. Supp. 2d 149, 151, 155 (D. Mass. 2010) (explaining that the government agreed to a plea to a single count with a 60-month statutory maximum where advisory guidelines sentence was life imprisonment, and imposing a 24-month term).

⁵⁸ *Hearings*, *supra* note 4, at 7 n.22 (statement of James E. Felman); see also *id.* (“Where the guidelines routinely call for a lifetime of imprisonment, a significant portion of the sentencing function is transferred to the prosecutors who select the statutory maximum penalties of the counts to which the defendant will be permitted to plead guilty.”).

⁵⁹ The Rajartnam team argued:

The “accidental” relationship of the gain amount to the defendant’s actual culpability surely explains why the government is willing to bargain away millions of dollars of gain in order to obtain guilty pleas by stipulating to gain calculations acceptable to both sides. For example, Mr. Rajaratnam and Danielle Chiesi were originally indicted together on charges of securities fraud and conspiracy. The Superseding Indictment charged that Mr. Rajaratnam’s conduct resulted in \$45 million of gain to Galleon and that Ms. Chiesi’s conduct resulted in \$4 million of gain to New Castle. But Ms. Chiesi’s plea agreement stipulates that the amount of unlawful gain is *less than* \$2.5 million—resulting in a Guidelines calculation 2 points *lower* than it would have

Professor Bowman has correctly argued that the government's willingness to afford steep sentencing discounts to cooperating defendants reflects not only a "reward for effective cooperation, but a *sub rosa* acknowledgment by both prosecutors and the courts that the starting point for departures in these cases should be far lower than the Guidelines nominally require."⁶⁰ Judge Gleeson echoed this supposition in *Ovid*.⁶¹ Whatever the government's motivation, white-collar offenders who proceed to trial must be prepared to defend not only against charges with significantly higher statutory maximums but also against more aggressive and creative loss calculations. The government effectively acknowledged as much during the recent sentencing of lobbyist Kevin Ring.⁶²

IV. TARGETED SUGGESTIONS

Fortunately, a few relatively simple revisions could be made that would reduce the economic crimes guideline's overemphasis on loss and consequent potential for unwarranted disparities.

First, amount of loss should simply be a less significant sentencing input. One way to effect this change is to broaden the brackets of loss amounts in the loss table and employ a progressively decreasing scale in which each doubling of the loss amount has a smaller effect on the offense level.⁶³ There is no empirical basis for subdividing monetary loss into sixteen different levels. One legal policy organization recently suggested that the Commission "should justify any cutoff between the various levels of enhancement and should seek to tailor each level

been had she been held responsible for the \$4 million charged in the indictment. In contrast, the government argues that Mr. Rajaratnam is responsible for \$63 million of gain, nearly \$20 million *more than* charged in the indictment, resulting in a Guidelines calculation 2 points *higher* than it would have been if the amount charged in the indictment had been used.

Rajaratnam Sent'g Memo., *supra* note 7, at 6 n.3 (citations omitted).

⁶⁰ Bowman, *supra* note 3, at 170.

⁶¹ *Ovid*, 2010 WL 3940724, at *10 ("Perhaps, as in this case, the prosecutors who are actually handling the cases in the courtrooms do not regard the sentences as unacceptable simply because they are below the advisory Guidelines ranges.").

⁶² See *United States v. Ring*, No. 08-274, 2011 WL 4360005, at *4 n.9 (D.D.C. Sept. 20, 2011) (quoting the government at oral argument as saying, "Mr. Ring chose to proceed to trial, expend government resources, the court's resources, and the public's resources and therefore is not similarly situated to others who pled guilty early on in the investigation").

⁶³ Ellis et al., *supra* note 3, at 39-40.

to an empirical rationale for the line drawn.”⁶⁴ It may be that an empirical rationale cannot be found, but that in itself would be a highly useful piece of information when deciding how much weight to give loss and how to make distinctions between different amounts. If fewer distinctions are needed, then the Commission could also return to the pre-2001 approach of one-level increases from one loss-amount bracket to the next.

Second, the Commission should cabin the scope of “intended loss.” In *United States v. Manatau*, the Tenth Circuit recently held that the amount of “intended loss” includes only those losses that are an object of the defendant’s specific purpose, not those that are merely “possible and potentially contemplated.”⁶⁵ To the extent that the current guideline can be read to permit a broader concept of “intended loss,”⁶⁶ the Commission should expressly endorse the *Manatau* definition.

Third, the amount of the defendant’s pecuniary gain should be a more consequential sentencing input. Currently, a defendant’s gain may be considered only if there was a loss that reasonably cannot be determined; in other words, the defendant’s gain is used only as a substitute measure for loss.⁶⁷ But as the DOJ has acknowledged, cases in which loss greatly exceeds a defendant’s gain are likely candidates for below-guidelines variances.⁶⁸ The Commission should revise the economic crimes guidelines to incorporate consideration of a defendant’s pecuniary gain. As one possible approach, the American Bar Association has proposed simplified tables for loss and gain, “with the adjustments from both tables applied cumulatively in appropriate cases.”⁶⁹

Fourth, and in a similar vein, the Commission should explore offense-level decreases or an offense-level cap in cases where loss greatly exceeds a defendant’s gain. The drug guideline has a similar “mitigating role” cap for those who were minor or minimal participants in an offense.⁷⁰ Upon receiving a mitigating role adjustment, a drug defendant’s offense level is limited to an absolute ceiling, or decreased by specified levels. Something similar could work under § 2B1.1. But ra-

⁶⁴ Comments from Daniel J. Popeo & Michael P. Wilt, Wash. Legal Found., to the U.S. Sentencing Comm’n 3 (Aug. 26, 2011), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/Washington-Legal-Foundation_PubComm_priorities.pdf.

⁶⁵ 647 F.3d 1048, 1048-49 (10th Cir. 2011).

⁶⁶ See, e.g., *United States v. Alli*, 444 F.3d 34, 38-39 (1st Cir. 2006).

⁶⁷ U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, Application Note 3(B) (2011).

⁶⁸ See *Hearings*, *supra* note 4, at 45 (response of Preet Bharara).

⁶⁹ Letter from Thomas M. Susman, *supra* note 49, app. at 8.

⁷⁰ See Letter from David Debold, *supra* note 49, at 3 (discussing § 2D1.1(a)(5)).

ther than focus on whether the defendant was a minor or minimal participant—which depends on whether others were more involved or culpable—the cap or reduction under the economic crimes guideline could be triggered where the amount of gain is very low in relation to the loss amount that applies to the defendant. The Commission should also consider revising the mitigating role guideline so that reductions are available to those whose culpability is less than typical under the applicable offense guideline (e.g., § 2B1.1), rather than by comparing the defendant to co-defendants involved in the same offense conduct.

Fifth, the Commission must rationalize the proliferation of overlapping specific offender characteristics in § 2B1.1. In addition to loss amount, there are seventeen provisions—some with multiple parts—that enhance sentences based on how the offense was committed. Not only does one aspect of offense conduct often trigger two or more enhancement provisions, but the guidelines also operate in such a way that each additional factor has a larger effect on the sentence range than those before it.⁷¹ The Commission itself has acknowledged this phenomenon of “factor creep”: as “more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”⁷²

Sixth, the economic crimes guideline explicitly permits a downward departure where a guidelines sentence “substantially overstates the seriousness of the offense.”⁷³ As one commentator has suggested, the Commission should consider offering nonexclusive examples of situations where this language applies.⁷⁴ Though policy-based variances would of course remain available, clarification would “offer meaningful direction to district courts seeking to mitigate the severity of the sentencing ranges produced under this guideline” and promote the goals of consistency and transparency.⁷⁵

The sooner the Commission begins to address the problem of overemphasis on loss amount in § 2B1.1, the sooner it will be possible

⁷¹ Having two enhancements of two levels each will mean that the top of the new range is approximately twice the bottom of the beginning range, even if the starting offense level is relatively high. For example, the bottom of the range for offense level 26 is 63 months, and the top is 78 months. At level 30, the range is 97 to 121 months. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A, sentencing tbl. (2011).

⁷² FIFTEEN-YEAR REPORT, *supra* note 17, at 137.

⁷³ U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.19(C) (2011).

⁷⁴ See Stephen Kress, *Revise U.S.S.G. Section 2B1.1, Application Note 19(c)*, 23 FED. SENT'G REP. 271, 271 (2011).

⁷⁵ *Id.*

to draft appropriate language that mitigates the three types of unwarranted disparity experienced under that guideline. In the meantime, sentencing courts will continue to have at their disposal the power to vary from the guidelines when they determine that culpability is overstated and that various mitigating factors apply.

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