The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes

JAMES E. FELMAN*

Kynes, Markman & Felman, P.A., Tampa, Florida

I. Introduction

The advisory federal Guidelines face perhaps their greatest initial challenge in the sentencing of high-loss economic crimes because the sentences advised by the Guidelines in these cases are frequently "patently absurd on their face,"[1] "a black stain on common sense,"[2] and, ultimately, "of no help."[3] The result of relentless upward ratcheting, the present Guidelines for high-loss economic crimes routinely call for sentences at or near life without parole for defendants who typically have no criminal history. These Guidelines are merely advisory, however, and some judges opt instead to impose significantly lower sentences. Other judges adhere to the Guidelines and mete out the called-for sentences.

To some, this disparity looks like what the Guidelines were created to avoid—a regime in which the punishment turns as much on the philosophy of the sentencing judge as it does on the facts of the offense. To others, it reflects the birth of a common law of sentencing as the courts evaluate the extent to which Guideline sentences serve the purposes of sentencing in individual cases. Under either view, in high-loss cases, the present Guidelines appear to be broken. They should be fixed.

II. How Did the Guidelines Get Here?

The upward ratchet of the Guidelines for economic crimes began at the beginning—with the initial set of Guidelines. Unlike the penalties for most offenses, which the initial Sentencing Commission pegged to match pre-Guidelines practice, the Commission specifically elected to increase the penalties for economic crimes in the initial 1987 Guidelines over the pre-Guidelines practices of the judiciary as a whole.[4] Although it cited no data demonstrating that these initial increased penalty levels were inadequate, the Commission waited only two years before again revising upward the penalties for economic crimes through a new loss table.[5] The Commission added numerous aggravating specific offense characteristics from 1989 to 2001,[6] when it again adopted wholesale increases through yet another new loss table.[7]

Just when the Commission thought it could rest assured that the penalties for economic crimes were now sufficiently severe, a series of high-profile corporate scandals drove Congress to enact the Sarbanes-Oxley Act, which in part directed the Commission to ratchet up the penalties for high-loss economic crimes yet again. The Commission dutifully did so.[8] A result of all this effort is that a typical officer or director of a public company who is convicted of a securities fraud offense now faces an advisory Guidelines sentence of life without parole in virtually every case:

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Officer or director, §2B1.1(b)(17)(A)(i):	+4
Role in the offense, §3B1.1(a):	+4
$7 million loss, §2B1.1(b)(1)(K):	+20[9]
Total offense level:	43 (life)

Furthermore, The advisory Guideline sentence will be life without parole for virtually *any* employee convicted of a serious securities fraud causing more than $100 million of loss:

Base offense level, §2B1.1(a)(1):	7
250 or more victims, §2B1.1(b)(2)(c):	+6
Sophisticated means, §2B1.1(b)(9):	+2
Substantially jeopardizing corporation, §2B1.1(b)(14)(B):	+2
$100 million loss, §2B1.1(b)(1)(N):	+26
Total offense level:	43 (life)

Thus, virtually any defendant in the cases featured in the media run-up to the Sarbanes-Oxley Act will now face an advisory range of life without parole.[10]

III. The Judicial Reaction

Faced with such supposed advice, a number of judges have understandably declined to follow it. In *United States v. Adelson*, for example, Judge Rakoff in the Southern District of New York was confronted with a defendant convicted of joining a conspiracy "initially concocted by others" to materially overstate a public company's financial results and thereby artificially inflate the price of its stock.[11] Adelson's Guidelines score was level 46—three levels off the chart—and called for a sentence of life imprisonment. Even the government "blinked at this

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barbarity," but was unable to make a specific sentencing recommendation.[12] For Judge Rakoff, this circumstance exposed "the utter travesty of justice that sometimes results from the Guidelines' fetish with abstract arithmetic, as well as the harm that Guideline calculations can visit on human beings if not cabined by common sense."[13]

Given that Adelson had not originated the fraud, presented an "exemplary" past history, and appeared "extremely unlikely" to recidivate—and, coupled with the "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders"—the court sentenced Adelson to three-and-a-half years' imprisonment and ordered restitution in the amount of $50 million.[14] Along the way, Judge Rakoff explained that he had jettisoned the advisory Guidelines range because "the calculations under the guidelines have so run amok that they are patently absurd on their face."[15]

Another example is *United States v. Parris*, where Judge Block in the Eastern District of New York sentenced two defendants to five years' imprisonment "in the face of an advisory guideline range of 360 to life."[16] The offense—a pump-and-dump stock manipulation scheme—scored an offense level 42 based on upward adjustments for more that $2.5 million of loss, more than 250 victims, sophisticated means, officer or director status, role in the offense, and obstruction of justice.[17] Quoting Judge Rakoff in *Adelson*, Judge Block described this Guidelines scoring as the "kind of 'piling-on' of points for which the guidelines have frequently been criticized."[18] The court noted that it saw no valid grounds for downward departure from the Guidelines and, thus, but for their advisory status, the court "would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence."[19] Even the government agreed that "many reasonable sentences would fall outside" the advisory Guidelines range.[20] In fashioning a reasonable sentence, the court stated it "would have much preferred a sensible guideline range to give . . . some semblance of real guidance."[21]

The court found no such help in the present Guidelines, observing that "we now have an advisory guidelines regime where, as reflected by this case, 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."[22] Instead of using the Guidelines, the court instead assembled an extensive compendium based on submissions from the parties listing sentences in other high-loss cases.[23] After a lengthy discussion of what is essentially an emerging common law of high-loss economic crime sentences, the court concluded that a sentence of five years' imprisonment was sufficient to achieve the purposes of sentencing.

Another recent case illustrating the overkill of the present high-loss Guidelines is *United States v. Watt*, where Judge Gertner in the District of Massachusetts was presented with a 25-year-old first offender who pled guilty to what was reportedly the "largest conspiracy to commit identity theft in American history."[24] The government had resolved the matter by permitting Watt to plead guilty to a single count carrying a five-year statutory maximum penalty.[25] Watt, who received no financial benefit from the crime, sought probation; the government urged the maximum possible five-year sentence. As Judge Gertner sought to determine the sentence sufficient but not greater than necessary to achieve the purposes of sentencing, she specifically noted that "[t]he Guidelines were of no help; if not for the statutory maximum, the Guidelines for an offense level 43 and criminal history I would have called for a sentence of life imprisonment."[26] Given Watt's zero gain from the offense, his lack of criminal history, and the court's belief that he was unlikely to recidivate, Judge Gertner sentenced him to two years' imprisonment and $171 million of restitution.

A number of similar cases did not result in published decisions. In *United States v. Ferguson*, the district court in Connecticut imposed sentences ranging from one year and one day to four years on five defendants whose Guideline ranges included the possibility of life imprisonment and who were convicted of fraud leading to more than $500 million in loss.[27] In *United States v. Stinn*, a former CEO of a public company faced a Guidelines range of life imprisonment but was sentenced to twelve years' imprisonment in the Eastern District of New York.[28] A defendant who caused approximately $25 million in losses was sentenced by the district court in the Eastern District of Missouri to one year and one day in *United States v. Turkan*.[29] In each of these cases, the courts found significant mitigating circumstances not otherwise taken into consideration by the Guidelines.

IV. The Legislative Reaction

Although one might have hoped that Congress would react to judicial rejection of the Guidelines in high-loss cases by reconsidering the current penalty structure, it will come as no surprise to those who follow federal sentencing policy to learn that Congress has instead done the opposite—it has called for yet *more* upward ratcheting. In the recent health care reform law, Congress directed the Sentencing Commission to amend the definition of loss to provide that "the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall be prima facie evidence of the amount of the intended loss by the defendant."[30]

Of course, health care fraud assumes a wide array of forms, ranging from billing for services that were simply not rendered, at one extreme, to properly billing for services actually rendered but accompanied by a false anti-kickback certification, near the other.[31] Cases in the middle of this range include *upcoding*—billing for a more expensive procedure than the one actually performed. Evidently the intent of this new law is to treat some or all of these cases identically—as if no services were provided. Coupled with this potentially expansive new definition of

loss, the law also provides for a new 2-level increase for losses between $1 million and $7 million, a new 3-level increase for losses between $7 million and $20 million, and a new 4-level increase for losses over $20 million. Thus, the combination of the new loss definition and the new high-loss upward adjustments means that a hospital executive who approves the submission of $20 million of bills for services actually rendered but obtained via the payment of unlawful kickbacks would likely face the following Guidelines calculation:

Base offense level:	7
$20 million loss:	+22
Health care fraud:	+4
Sophisticated means:	+2
Role in the offense:	±4
Total offense level:	39

Assuming no prior record, this formula yields an advisory Guidelines range of 21.8 to 27.25 years' imprisonment. It is not evident why Congress believed health care frauds are any more serious than any other frauds, or why it believed the existing penalties for health care frauds were insufficient.[32]

Congress was at it again in recent financial overhaul legislation that directs the Sentencing Commission to revisit the penalties for both securities fraud and bank fraud to ensure that they fully reflect "the serious nature of [these] offenses," the "need for an effective deterrent and appropriate punishment to prevent [these] offenses," and "the effectiveness of incarceration in furthering" these objectives.[33] Although the law does not say so explicitly, it seems all but certain that the Sentencing Commission will read this provision as a suggestion that the penalties for securities fraud and bank fraud should be increased yet again. As with the health care law, it is not possible to discern why Congress believed that these two types of fraud are any worse than other frauds, or why it believed the existing penalties for these frauds are insufficient.

Thus, the upward ratcheting continues without interruption in the face of judicial opinions describing the existing penalties as patently absurd. In at least some sense, it would appear that Congress is pushing on a rope.

V. The Department of Justice Reaction

The Department of Justice has recently announced that it has had enough of the present state of affairs. In its recent annual report to the Sentencing Commission, the Criminal Division of the Justice Department openly acknowledged that there are "certain offense types for which the Guidelines have lost the respect of a large number of judges . . . including certain frauds involving high loss amounts."[34] The letter calls for change, stating that the Commission "should conduct a review of—and consider amendments to—those Guidelines that have lost the backing of a large part of the judiciary."[35]

The Department has not, however, said much about what should be changed. After noting the "increasing frequency [of] district courts sentencing fraud offenders—especially high-loss fraud offenders—inconsistently and without regard to the federal sentencing guidelines," the Department declares that the "sentencing outcomes in these cases are unacceptable."[36] The Department suggests that the Commission "should determine whether some reforms are needed," but the extent of specificity given consists of the single sentence: "Such reforms might include amendments to the sentencing Guideline for fraud offenses, recommendations for new statutory penalties, or other policy changes."[37] The reference to new statutory penalties is presumably intended to suggest mandatory minimum penalties for certain economic offenses.

VI. Where Should the Guidelines Go from Here?

The current state of affairs in high-loss economic crimes cases looks to me like the perfect storm for reform. One possibility, of course, is that the Department of Justice and Congress will simply cram absurd penalties down the throats of the judiciary through a slew of mandatory minimums. But one can at least hope that a different option would be to recalibrate the Guidelines for economic crimes in such a manner that the respect of the judiciary would be restored. The dynamic between the judiciary and the Congress–Sentencing Commission needs to become a dialectic—a process of improvement through a synthesis of views. In simpler terms, if the Guidelines made more sense, judges would be more willing to follow them.

I have a few humble suggestions for how to accomplish this goal. First, the reliance on loss as the primary measure of culpability needs to be reduced, as perhaps best described by Judge Lynch:

> The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All 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. But the Guidelines provisions for theft and fraud place excessive weight on this single factor, attempting—no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes—to assign precise weights to the theft of different dollar amounts. In many cases . . . the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.[38]

In the initial 1987 Guidelines, the amount of the loss could result in no more than a fivefold increase in the range of imprisonment. Under the current Guidelines, the loss can increase the range nearly fortyfold. The reliance on loss to drive sentencing outcomes is simply out of control.[39]

In addition to loss, the Guidelines should look at the defendant's actual and/or intended gain from the offense. There can be no question that the harm caused by an offense is an important consideration in determining

culpability. But without consideration of gain, loss often does not tell the whole story. There is a palpable difference in culpability between a defendant who commits bank fraud to obtain a loan he fully expects and desires to repay and a defendant who commits bank fraud for the sole purpose of running off with the money—and then does so. There is a difference in culpability between an employee who goes along with a fraud simply to keep his job and earn his ordinary salary and an employee who conceives and executes a fraud with the purpose of putting its proceeds into his pocket.

The current Guidelines fail to draw these distinctions because they are indifferent to the defendant's gain or lack thereof.[40] Many, if not all of the cases in which judges have found the current Guidelines unhelpful present circumstances in which the defendant's gain was either zero or quite small in relation to the loss. One possible approach might be to have both a simplified table for loss and a second fairly simple table for gain, with the adjustments from both tables applied cumulatively in appropriate cases.

The economic crime Guideline should also be dramatically simplified to reduce and eliminate multiple upward adjustments that, either singly or in combination, produce a piling-on effect beyond their underlying rationale and often smack of double counting. A fraud that resulted in a $100 loss to 250 victims does not necessarily warrant a sentence six levels higher (roughly doubling the sentence) than a fraud that caused a $25,000 loss to a single victim.[41] Many, if not most of the blizzard of specific offense characteristics added to the fraud Guideline over the past two decades are superfluous and frequently fail to accomplish meaningful distinctions in relative culpability across a spectrum of defendants.

Instead of considering whether two levels should be added because a particular defendant's theft happened to involve property from a veterans' memorial,[42] the Guideline should attempt to focus on more meaningful issues. What harm was the defendant truly intending to cause? What was his motivation for committing the crime? Did the defendant initiate the scheme or did he join it in midstream under coercive circumstances? Did the offense risk or cause some significant nonmonetary harm? Did the defendant commit the offense because of some extreme financial or other hardship? Did the defendant make significant efforts to limit the harm caused by the offense prior to its detection? How likely or realistic was it that an attempted offense would actually succeed? Did the defendant commit the offense in order to avoid a perceived greater harm?

The Sentencing Commission should take to heart the congressional directive to revisit the penalties in cases of securities fraud and bank fraud, as well as the Department of Justice's request to revisit the Guidelines in high-loss cases as a whole. But in doing so, it should begin not simply with what it thinks Congress or the Justice Department want but also with what the judiciary will respect and follow. This approach means taking a careful look at the cases in which the courts have declined to follow the current Guidelines and why they did so. The Sentencing Commission might find a host of rather refined and nuanced advice coming to them from the judiciary they seek to advise.

Notes

* Also serving as the American Bar Association's liaison to the U.S. Sentencing Commission and cochair of the Sentencing Committee of the Criminal Justice Section of the American Bar Association; former cochair of the Practitioners' Advisory Group to the U.S. Sentencing Commission.

1. United States v. Adelson, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006).
2. United States v. Parris, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008).
3. United States v. Watt, __ F. Supp. 2d __, 2010 WL 1676439 (D. Mass. 2010).
4. *See* U.S.S.G. ch. 1 pt. A. The other exception to pegging Guideline penalties to pre-Guidelines practices was in drug cases, where the Commission was driven upward to avoid cliffs caused by the mandatory minimum penalties enacted in 1986.
5. U.S.S.G. app. C, amends. 99, 154 (1989).
6. U.S.S.G. app. C, amend. 317 (1990); U.S.S.G. app. C, amend. 551 (1997); U.S.S.G. app. C, amend. 576 (1997); U.S.S.G. app. C, amend. 596 (2000).
7. U.S.S.G. app. C, amend. 617 (2001).
8. U.S.S.G. app. C, amends. 647, 653 (2003).
9. A $7 million loss is rather easy to come by in securities fraud cases because it is often equated with the drop in market capitalization that follows the disclosure of the fraud.
10. Lest it appear that the author was derelict in his duties, these extraordinary results were explained to the Commission by its Practitioners' Advisory Group at the time it enacted the post–Sarbanes-Oxley Act amendments. *See* Minutes of the November 19, 2002 U.S. Sentencing Commission Public Meeting, *available at* http://www.ussc.gov/MINUTES/11-19-02.htm ("Mr. Felman stated that the PAG believes history will look at a decision to adopt these enhancements as the moment in time when a new experiment in incarcerating first time nonviolent offenders began."). *See also* Barry Boss & Jude Wikramanayake, *Sentencing in White Collar Cases: Time Does Not Heal All Wounds*, 13 Fed. Sent. Rep. 15 (2001); James E. Felman, February 8, 2001 Submission of the PAG to the USSC, *reprinted in* 13 Fed. Sent. Rep. 19 (2001).
11. 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006).
12. *Id.* at 511–13.
13. *Id.* at 512.
14. *Id.* at 514–15.
15. *Id.* at 515.
16. 573 F. Supp. 2d 744, 745.
17. *Id.* at 747–48.
18. *Id.* at 745 (quoting *Adelson*, 441 F. Supp. 2d at 510).
19. *Id.* at 750–51.
20. *Id.* at 751.
21. *Id.*
22. *Id.* at 754.
23. *Id.* at 756–63. The compendium includes thirty-four cases with loss amounts ranging from $6 million to $14 billion and sentences ranging from probation to twenty-five years' imprisonment.
24. 2010 WL 1676439 at *1 (D. Mass. 2010).
25. Going forward, this means of case resolution is the likely norm in such cases. 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.

[26] *Watt*, 2010 WL 1676439 at *1. *See also id.* at *4 ("It should be noted that the Guidelines are almost irrelevant here, to the extent that they are completely trumped by the maximum sentence.").

[27] United States v. Ferguson, No. 3:06-cr-00137-CFD (D. Conn. 2009).

[28] United States v. Stinn, No. 07-CR-00113(NG) (E.D.N.Y. 2009).

[29] United States v. Turkan, No.4:08-CR-428 DJS (E.D. Mo. 2009).

[30] The Patient Protection and Affordable Care Act (hereinafter PPACA), § 10606(a)(2)(B), 124 Stat. 1007 (2010).

[31] Bills submitted to federal health care programs routinely require providers to certify that they have not paid any kick-backs to obtain the referral of the services. *See* 42 U.S.C. § 1320a–7b(b).

[32] The law also directs the Sentencing Commission more broadly to "provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances," but left it to the Commission to decide what such circumstances are. PPACA, § 10606(a)(3)(A)(ii), 124 Stat. 1007 (2010).

[33] Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1079A (2010).

[34] June 28, 2010, letter to William K. Sessions, chair of the Sentencing Commission, from Jonathan Wroblewski, director, Office of Policy and Legislation (on file with the author).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] United States v. Emmenegger, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004).

[39] The present loss table is also needlessly complex given the advisory status of the ending Guideline calculation. There is no need for a table that slices loss sixteen different ways to afford judges appropriate advice in determining a reasonable sentence.

[40] A defendant's gain may be considered only in cases of a loss that cannot reasonably be measured, such that the defendant's gain is used to estimate the loss. U.S.S.G. § 2B1.1, Application Note 1(B).

[41] I agree that an offense with a large number of victims should be viewed more harshly than one with a small number of victims under some circumstances, but typically that would be so only where the harm caused to the large number of victims was highly significant to each or most of them. In any event, I think it is difficult to justify punishing otherwise identical frauds with the same loss and gain figures with more than a 25 percent variance based solely on the spread of the loss across a number of victims.

[42] U.S.S.G. § 2B1.1(b)(6).