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# Sentencing High-Loss Corporate Insider Frauds after *Booker*



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## I. Introduction

The Federal Sentencing Guidelines have for some years prescribed substantial sentences for high-level corporate officials convicted of large frauds. Guidelines sentences for offenders of this type moved higher in 2001 with the passage of the “Economic Crime Package” amendments to the Guidelines<sup>1</sup> and higher still in the wake of the Sarbanes-Oxley Act of 2002.<sup>2</sup> Today, any corporate insider convicted of even a moderately high-loss fraud is facing a Guideline range measured in decades or perhaps even mandatory life imprisonment. Successful sentencing advocacy on behalf of such defendants requires convincing the court to impose a sentence outside (in many cases, far outside) the range prescribed by the Guidelines. Conventional “departure” or “variance” arguments emphasizing particular characteristics of the client or the offense remain important; however, Guideline sentencing levels for corporate officers in big frauds are currently so high that individualized arguments must be paired with the more fundamental contention that the Guidelines no longer provide useful guidance for sentencing such defendants. This Article lays out this fundamental argument, and explores its limits.

## II. Serious Corporate Fraud in the Post-Booker World

In *United States v. Booker*, the Supreme Court struck down the Guidelines as an unconstitutional violation of the Sixth Amendment but immediately resurrected them by judicially amending the Sentencing Reform Act to transform the previously binding sentencing rules into an “essentially advisory” system. This is not the place for a dissection of *Booker* or of the high court’s subsequent convoluted efforts to make sense of its own odd creation. Only those with a well-developed taste for insoluble paradox should think too carefully about *Booker* and its progeny.<sup>3</sup> For practical lawyers, the current lay of the land is as follows.

The Federal Sentencing Guidelines remain in effect. Judges must make the same findings of fact and perform the same Guidelines calculations as were required before *Booker*.<sup>4</sup> The precise legal weight trial and appellate judges ought to accord the Guideline ranges produced by those findings and calculations remains something of a puzzle, but two things are clear. First, the Guideline range remains important. As the Court said in *Gall v. United*

*States*, “As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”<sup>5</sup> Trial judges may not presume that the Guideline range represents a reasonable sentence<sup>6</sup> (though appellate courts apparently can do just that<sup>7</sup>). But the Court insists that the range nonetheless continues to be of sufficient importance that, if a judge “decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.”<sup>8</sup>

Second, in *Gall* and its companion case, *Kimbrough v. United States*,<sup>9</sup> the Court suggested that a properly calculated Guideline range retains its influence because the Guidelines are the product of careful study and deliberation by an expert agency, the U.S. Sentencing Commission. Importantly, however, the Court held that a judge may impose a non-Guidelines sentence based on disagreement with Commission policy judgments embodied in applicable Guidelines.<sup>10</sup> Indeed, in *Kimbrough*, a decision upholding a significant downward departure in a crack cocaine case, the Court went still further. Justice Ginsburg’s opinion recounted at length the history of the debate over the crack-powder sentence differential, noting that the Commission’s views on appropriate sentences for crack cocaine offenders have for some years been at odds with its own Guidelines, but that Congress has repeatedly blocked efforts to change the well-known 100-1 crack-powder ratio or otherwise reduce Guidelines crack sentences. Justice Ginsburg’s opinion strongly implies that a Guideline may be entitled to less judicial deference if it resulted from a process in which the expert judgment of the Commission was influenced or overridden by Congressional directives.

One cannot help but note the extreme oddity of this suggestion. One scarcely would have thought that a rule-making agency’s *opinions* about an issue, published in reports but never successfully enacted as a rule or Guideline, would be entitled to more legal weight than the agency’s own rule covering the same issue. Moreover, the Commission is a creation of, and constitutionally subordinate to, the democratically elected Congress. The

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suggestion that the Commission's opinions should be preferred to its Guidelines looks even odder when the Guideline in question was enacted and maintained for twenty years despite much controversy, in accordance with the clearly expressed judgment of Congress.

Be that as it may, the weight that continues to be accorded to the Guidelines after *Booker* depends on the implicit, albeit now contestable, assumption that Guideline ranges are rationally supportable and broadly consistent with the stated aims of the Sentencing Reform Act of 1984 in 18 U.S.C. § 3553(a). As the Court observed in *Kimbrough*, "in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'"<sup>11</sup> In most fraud cases, judges are likely to proceed from the assumption that a Guidelines sentence is in accord with the expert judgment of the Commission, consistent with the objectives of Section 3553(a), and, in general, a rational and legally supportable result.

However, in fraud cases involving officers of public companies, the Guidelines have become over the past few years an increasingly imperfect measure of an appropriate sentence. For the small class of defendants consisting of corporate officers convicted of fraud offenses associated with very large Guidelines loss calculations, the Guidelines now are divorced both from the objectives of Section 3553(a) and, frankly, from common sense. Accordingly, the Guidelines calculations in such cases are of diminished value to sentencing judges.

**A. Repeated Exponential Guidelines Increases Have Produced Irrational Severity**

The sentences prescribed by the Guidelines have increased steadily and repeatedly since 1987 for all classes of economic offenders.<sup>12</sup> One can argue that the last several rounds of across-the-board increases were rationally defensible, even if ill advised.<sup>13</sup> But for officers of public companies convicted of very large frauds, the Guidelines have escalated beyond rational constraints. Figure 1 illustrates the point by charting the offense levels and corresponding sentencing ranges that the Guidelines prescribed in 1987, 1989, 1998, 2001, and 2007 for a hypothetical corporate chieftain akin to the leaders of Adelphia, WorldCom, or Enron. These calculations assume conviction of offenses that implicate securities laws and cause losses greater than \$400 million (the largest number now included in the Guidelines loss table) and the collapse or near collapse of a big company.

**Figure 1. Guideline Sentence Ranges for Hypothetical Corporate CEO**

Guidelines version	1987	1989	1998	2001	2007
Offense level	25 <sup>14</sup>	32 <sup>15</sup>	38 <sup>16</sup>	48 <sup>17</sup>	57 <sup>18</sup>
Sentencing Range	57–71 Months	121–151 Months	235–293 Months	Life (+ 5 levels)	Life (+14 levels)

Several points are immediately obvious. First, the offense levels prescribed by the 2001 and 2007 versions of the Guidelines reflect a failure on the part of the Commission to consider adequately the effect of recent amendments on high-loss corporate fraud cases.<sup>19</sup> The point of sentencing Guidelines is to give meaningful guidance to sentencing judges by subdividing the universe of possible sentences into ranges and assigning defendants to those ranges based on the presence or absence of relevant factors. A sentencing regime so imprecisely calibrated that it generates sentencing ranges for property crimes from 5 to 14 notches higher than necessary for life imprisonment is useless to a judge attempting to craft sentences in a serious corporate white-collar case. If disposed to take a very stringent view of corporate wrongdoing, one might be able to rationalize a multi-decade term for the very worst-of-the-worst, biggest-of-the-biggest corporate criminal, but under the current Guidelines a corporate officer who presides over a fraud involving securities and a loss of only \$2.5 million can qualify for life imprisonment.<sup>20</sup> A system pegged to such extreme levels of severity no longer provides a means of distinguishing between more and less culpable defendants and instead sweeps virtually any significant participant in a large corporate fraud into the same unreasonably punitive category.

Second, the astounding diversity of outcomes called for by successive versions of the Guidelines between 1987 and 2007 yields little confidence that any iteration of the fraud/theft Guideline provides a reasonable basis for sentencing cases like the hypothetical corporate CEO. Since *Booker*, the Government consistently has argued that the Guidelines accurately reflect and carefully balance all of the sentencing considerations enumerated in the Sentencing Reform Act and, therefore, that a sentence within a properly calculated Guideline range is presumptively reasonable. However plausible that position may be in general, it requires courts to accept that in 1987 a reasonable sentence for our hypothetical corporate chieftain would have been less than 6 years, in 1989 a bit more than 12 years, in 2000 more than 24 years, in 2001 life in prison plus another 5 offense levels, and in 2007 life plus 14 offense levels. Neither the principles embodied in the Sentencing Reform Act, nor the dictates of reason, nor the nature of economic crimes changed sufficiently between 1987 and 2007 to justify this exponential progression. Moreover, the Guidelines provide no help to a judge trying to identify a moment in the progression from 6 years to life-plus-14-offense-levels when the Guideline range was a meaningful embodiment of the objectives of Section 3553(a).

Third, any rational assessment of whether a sentence accords with the injunction of 18 U.S.C. § 3553(a)(2)(A) that sentences must "reflect the seriousness of the offense . . . and . . . provide just punishment for the offense" requires not only comparison with other offenses and offenders of the same general type but also

comparison between offense types. While corporate fraud is certainly a serious offense, it is hard to argue that it is more serious than murder and several orders of magnitude more serious than armed robbery. In 2005, the average sentence actually imposed on a robber with no prior criminal record was 57 months, or less than 5 years.<sup>21</sup> Even robbers who were also Criminal History Category VI career offenders (meaning they had roughly five prior felony convictions) received an average of only 168 months, or 14 years.<sup>22</sup> The average sentence for all murderers regardless of prior criminal record was less than 19 years.<sup>23</sup> And in 2005, the mean sentence imposed on murderers who were also career offenders was 297.5 months, or just shy of 25 years.<sup>24</sup> By comparison, Bernie Ebbers of WorldCom got 25 years<sup>25</sup> and Jeffrey Skilling of Enron 24½.

There are, of course, those who argue that Ebbers, Skilling, the Rigases of Adelphia, and other recent marquee corporate convicts deserved the sentences they received. But even if one accepts that argument, the Guidelines remain useless in such a case. Under the current Guidelines, a judge who wanted to impose a 25-year sentence on an Ebbers, a Skilling, or a Rigas, thus equating their economic offenses with murder by a five-time felon, *would have to depart downward 19 offense levels to do it.*

#### B. The Behavior of Judges and Prosecutors

The sentences nominally prescribed by the Guidelines for high-loss corporate fraud cases have become so draconian that judges are unwilling to impose them even in the biggest and most publicly notorious cases. Among recent high-profile corporate insider defendants accountable for losses in the hundreds of millions or higher, so far as I know only one, Jeffrey Skilling, has received a sentence within the applicable Guideline range. Bernie Ebbers's 25-year-sentence was a downward departure from the applicable 30-year Guideline minimum. The Guidelines called for life imprisonment for both the Rigases. David Wittig and Douglas Lake of Westar confronted Guidelines calculations calling for life imprisonment but received "only" 18 and 15 years (before their convictions were overturned on appeal).<sup>26</sup> And as long as Skilling's sentence was, it fell within the Guideline range only because Judge Lake applied the more lenient 2000 Guidelines to his case.

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. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines for cases like these and the fundamental requirement of Section 3553(a) that judges impose sentences "sufficient, but not greater than necessary" to comply with its objectives. As Judge Sim Lake, the presiding judge in the Skilling case, ruled in reducing the sentence of Dynegy defendant Jamie Olis, in an appropriate high-loss

corporate fraud case, the objectives of Section 3553(a) can be achieved with a lower-than-Guideline sentence.<sup>27</sup>

Moreover, recent cases strongly suggest that the Department of Justice itself is only weakly committed to the position that the astronomically high sentences called for by the Guidelines are required either as a matter of just deserts or in order to achieve deterrence or other objectives of Section 3553(a). For example, although the sentences imposed in both the Ebbers and Rigas cases were significantly below the Guideline range, it does not appear that the Government cross-appealed the sentences of any of these defendants. On appeal, the Government defended Bernie Ebbers's sentence as "reasonable."<sup>28</sup>

Perhaps even more revealing is the Government's behavior toward corporate-officer defendants who cooperated in recent high-profile cases. A full review of the fate of cooperators in recent high-profile frauds is beyond the scope of this essay, but several examples are illustrative. In the Enron prosecution, the Government obtained cooperation from a number of high-level corporate insiders with significant personal culpability. Virtually every one of these cooperating defendants, if prosecuted to the full extent of the law, convicted, and sentenced strictly in accordance with the Guidelines, surely would have fallen into Guideline ranges on the order of 20 years to life imprisonment. Yet the highest sentence actually imposed on any cooperating defendant was the 6 years received by Enron's chief financial officer, Andrew Fastow.<sup>29</sup> The others fared even better: Enron Treasurer Ben Glisan (5 years),<sup>30</sup> Assistant Treasurer Lea Fastow (1 year),<sup>31</sup> Assistant Treasurer Timothy Despain (4 years' probation); Global Finance Managing Director Michael Kopper (3 years),<sup>32</sup> head of investor relations Mark Koenig (18 months),<sup>33</sup> investor relations official Paula Rieker (2 years' probation),<sup>34</sup> and Dave Delainey, chair and CEO of Enron Energy Services (30 months).<sup>35</sup> The average prison sentence among the cooperators who received time was just over 3 years. Perhaps even more striking was the Government's deal with Enron Executive Vice President Richard Causey, who did not cooperate but received only 5½ years after entering into a plea agreement in which the Government agreed to a maximum 7-year term and later recommended a reduction from that cap.<sup>36</sup>

Similarly, in the WorldCom case, Chief Financial Officer Scott Sullivan, who according to the Government's own appellate brief "directed the fraud,"<sup>37</sup> received a 5-year sentence,<sup>38</sup> one-fifth the length imposed on CEO Ebbers. Other cooperators in the case, as Ebbers's appellate brief pointed out, received 1 year and 1 day (Myers), 1 year and 1 day (Yates), 5 months followed by 5 months of home detention (Vinson), and 3 years of probation (Normand).<sup>39</sup>

Although no precise calculation is possible, the sentence discounts conferred in these cases appear strikingly large in both absolute and percentage terms—on the order of 15 to 20 years or more and 75 to 80 percent or more

below the Guideline range that would have applied absent cooperation. Given that the median substantial assistance departure in federal cases since 2000 has been roughly 25 to 28 months, or about 50 percent below the otherwise applicable range,<sup>40</sup> the magnitude of the sentence discounts afforded these cooperating defendants suggests that they were not merely 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. Further evidence that the Government holds this view is found in its repeated willingness to enter into charge bargains (such as those of Mr. Fastow, Mr. Causey, and Mr. Kopper in the Enron matter) that dramatically lower the defendant's sentencing exposure even before any reduction for substantial assistance is granted.

### III. The Problem of Cumulative Effects of Closely Related Sentence Adjustments

The consistent judicial (and prosecutorial) reluctance to impose the extraordinarily high sentences the Guidelines now prescribe in high-loss corporate fraud cases is not surprising. Even in the pre-*Booker* period, when the Guidelines were mandatory, the Commission recognized that it had not constructed a perfect edifice and that departures were appropriate in cases where the Commission failed to give "adequate consideration" to some factor or factors important to the imposition of a just sentence.<sup>41</sup> In the wake of *Booker*, even greater responsibility devolves upon the sentencing judge to ensure that the occasional and inevitable failure by the Commission to properly consider the effects of its complex Guidelines on particular cases does not produce unjust punishments.

Judges should be particularly sensitive to the Commission's failure to consider adequately the cumulative effects of a number of closely correlated sentence enhancements that cluster in cases of high-loss fraud by corporate officers. The Commission has done a commendable job of *identifying* factors that ought to be considered in sentencing an economic offender, such as the amount of loss inflicted by an economic offense,<sup>42</sup> the complexity of the scheme devised by the defendant,<sup>43</sup> the number of affected victims,<sup>44</sup> the size of a defendant's personal gain,<sup>45</sup> damage to financial institutions,<sup>46</sup> and the factors in Chapter Three relating to role in the offense. All of these are theoretically relevant to offense seriousness and therefore to punishment. But the Guidelines do a poor job of *quantifying* the sentencing effects of these factors when many of them interact in a single case.

Both the former fraud Guideline, Section 2F1.1, and its current successor, Section 2B1.1, embody two basic quantification errors. The first is the assignment of independent weight to factors such as those identified above that, in practice, often are present together. When the Guidelines first were enacted in 1987, the fraud Guideline consumed a single page of text and enumerated only

six factors determinative of offense level—amount of loss, plus five others.<sup>47</sup> At the time, loss was understood to serve as a valid proxy for most of the considerations relevant to offense seriousness in economic crimes. However, in the years following 1987, the Commission continually added new specific enhancements in Section 2F1.1 and elsewhere. By 2000, the number of specific offense characteristics (SOCs) in Section 2F1.1 had ballooned to 19. The current consolidated economic crime Guideline, Section 2B1.1, contains at least 29 sentence-enhancing SOCs, and perhaps more, depending on how one counts the subsections.

The effect of this proliferation of SOCs is demonstrated graphically by the Guidelines calculations for the hypothetical CEO in Figure 1 above. This imaginary defendant, in common with many real ones, receives upward offense-level adjustments for more than minimal planning,<sup>48</sup> use of a sophisticated scheme,<sup>49</sup> number of victims,<sup>50</sup> derivation of a large personal gain,<sup>51</sup> leadership role,<sup>52</sup> and abuse of a position of trust.<sup>53</sup> All these factors are closely correlated in the sense that any corporate officer found guilty of a large-loss corporate fraud is virtually certain to be subject to all of them. Yet each of these factors generates a separate offense-level increase in addition to the separate and substantial offense-level increase provided for a high loss amount itself. In effect, what the Guidelines have done over time is to tease out many of the factors for which loss served as a rough proxy and to give them independent weight in the offense-level calculus.

The second quantification error arises out of the logarithmic structure of the Guidelines' sentencing table. Because the sentencing table was constructed according to constraints imposed by the so-called "25 percent rule," the size of the sentence increase associated with each one-offense-level increase grows steadily the further one travels up the vertical offense-level axis.<sup>54</sup> Thus, a one-offense-level increase at the bottom of the table changes a defendant's sentencing range not at all,<sup>55</sup> whereas the same one-offense-level increase at the top of the sentencing table increases the defendant's minimum sentence by 3 years and his maximum sentence from 30 years to life imprisonment.<sup>56</sup> The result is that many factors for which loss already was a proxy not only have been given independent weight but also impose disproportionate increases in prison time because they add offense levels on top of those already imposed for loss itself and do so at the top of the sentencing table, where sentencing ranges are wide.

The Sentencing Commission itself has recognized this phenomenon. In the Commission's Fifteen-Year Report on the operation of the Guidelines between 1987 and 2002, the Commission acknowledged the deleterious effects of what it called "factor creep" and observed that "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."<sup>57</sup>

The failure to ensure that the interactions and cumulative effects of numerous closely correlated factors properly track offense seriousness is most notable in high-loss corporate fraud cases. Any case involving a corporate officer and a multimillion-dollar loss will almost always trigger application of multiple offense-level enhancements that have the effect of punishing the defendant over and over for the same basic thing—conducting a big fraud in a corporate setting. Before *Booker*, the Second Circuit recognized the dangers of “factor creep” in high-loss white-collar cases and endorsed a departure from the Guideline range on that ground in *United States v. Lauerson*.<sup>58</sup> Although the judgment in *Lauerson* was vacated by the Supreme Court during the wave of post-*Booker* litigation, the Second Circuit’s reasoning remains compelling.

#### IV. The Interplay of “Loss” and Culpable Mental State

In high-loss corporate fraud cases, the substantial offense-level enhancement provided for loss may itself overstate the seriousness of the defendant’s offense. Loss plays a central role in the Guidelines because it reflects, directly or indirectly, factors that historically have been considered important to sentencing economic criminals. “[L]oss serves multiple purposes. That is, actual loss is not only a direct measure of harm, but also an important proxy measurement of *mens rea*. Similarly, intended loss serves as a direct measurement of mental state, but also as a rough measure of the risk of real harm presented by the defendant’s conduct.”<sup>59</sup> However, precisely because loss serves multiple purposes and measures some factors relevant to criminal blameworthiness directly while acting as an indirect and imperfect proxy measurement of other factors, it can in an individual case overstate or understate the seriousness of an offense or the degree of the defendant’s criminal culpability.

Indeed, the Guidelines themselves recognize the imperfections of the loss measurement. Both the current consolidated economic crime Guideline and the former fraud Guideline expressly sanction departures from the otherwise applicable sentencing range where the loss (or in the current Guideline, the overall offense level) “overstates the seriousness of the offense.”<sup>60</sup> It is worth noting that the imprecision of the loss measurement is the only ground for downward departure expressly recognized in the economic crime Guidelines. In the wake of the *Booker* decision, a sentencing court plainly has even more latitude to take account of the imperfections of the loss measurement in any given case.

For example, the Guidelines loss enhancement may fail to distinguish between defendants who intend to steal or cause economic harm to others and defendants who, though guilty of criminal conduct, cause losses they neither desired nor perhaps even foresaw. Likewise, the loss enhancement may be prone to overstate the criminal culpability of defendants in cases involving overly aggressive accounting treatments designed to maintain or increase

the stock price of legitimate businesses and other behavior at the borderlines of the law.

Speaking broadly, criminal liability is premised on proof of an act or culpable omission, a harm (or at least the risk of harm), and a culpable mental state.<sup>61</sup> Likewise, the severity of offenses and their attendant punishments are ranked by categorizing the severity of harms caused or risked, the state of the defendant’s mind, and, in the case of completed crime, the causal relation between the defendant’s conduct and the resultant harm.<sup>62</sup>

A peculiar feature of American property crimes generally and federal fraud crimes in particular is that, unlike crimes against persons, statutory law does not rank the severity of offenses according to differences in the mental states of defendants. Federal law uses many different terms for culpable mental state.<sup>63</sup> And even verbal formulas that have been familiar through long usage, such as the wire fraud statute’s prohibition against “devis[ing] or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,” have multiple meanings and embrace states of mind as various as an unvarnished intention to steal money,<sup>64</sup> an intent to deprive a public or private entity of its intangible right to honest services, and a plan to deprive a newspaper of confidential business information.<sup>65</sup> But the myriad mental state provisions of federal economic crime statutes all relate to liability. Neither federal statutes nor the Guidelines rank mental states as more or less serious or attempt to correlate them with degrees of punishment.

Nonetheless, some culpable mental states associated with economic crime are more blameworthy than others. Just as a homicide committed intentionally and after long deliberation is more blameworthy than a death resulting from recklessness or criminal negligence,<sup>66</sup> there are meaningful differences between the states of mind of economic offenders. A defendant who consciously sets out to steal or cause economic loss is more culpable and deserving of greater punishment than one who acts dishonestly but without the desire to steal or cause loss.

The result of the interplay between the rules governing substantive criminal liability for fraud and those governing sentencing is that the Guidelines place someone who never set out to steal or cause a loss—but could have foreseen that a substantial loss might occur based on his actions or omissions—in the same sentencing range as someone who consciously sought to steal or to inflict huge financial losses on his corporation, its shareholders, and its employees. In this way, the Guidelines embody the view that some quantum of punishment should be assessed for undesired, but foreseeable, economic harms. Nonetheless, fundamental principles of the law of crime and punishment suggest that the degree of punishment imposed for what amounts to criminally negligent infliction of harm should be lower than the

degree of punishment for intentional infliction of the same harm. Particularly in view of the additional flexibility accorded by the *Booker* decision and the dictates of Section 3553(a), courts can accommodate traditional criminal justice principles by differentiating between defendants whose intention from the outset was to steal, those who did not set out to steal or cause financial harm but were reckless about the likelihood of harm occurring, and those who caused financial harms that, while perhaps legally foreseeable, were far larger than those the defendants intended or foresaw.

## V. Conclusion

There is more than a touch of irony in the current state of federal sentencing for high-profile corporate offenders. By pushing unrelentingly for ever-higher sentences for corporate bad guys, Congress and the Justice Department have escalated the Guidelines applicable to these offenders to such absurd heights that no one, not even the Justice Department itself, takes them seriously. In the pre-*Booker* era, this might have produced a mix of a few real, honest-to-goodness life sentences from those judges who felt bound by the expressed will of Congress and the Commission and outright rebellion from other judges who would refuse to perpetrate what they felt to be an intolerable injustice. The advent of *Booker* alters this dynamic. Judges now are at liberty to disregard Guideline ranges that appear patently unreasonable and to fashion an appropriate non-Guidelines sentence. But because the Guidelines are so out of whack for high-loss corporate frauds, judges and parties to such cases must proceed without even useful "advice" from the Commission. Advocates on both sides and the court itself will, in effect, be operating in a pre-1987, Guidelines-free zone, albeit a zone bounded at the bottom by a general sense that Congress and the Commission intend high-level corporate crime to be strongly punished.

When operating in this environment, defense advocates may find the arguments in the preceding discussion useful in holding sentences down. Individual prosecutors seeking to hike sentences for noncooperating defendants will doubtless stress the harms, economic and otherwise, inflicted by corporate crime and the imperative of responding forcefully to those who commit it. The Department of Justice as an institution ought perhaps to consider whether its interests are best served by maintenance of untenably stringent rules or by a sensible revision of the Guidelines governing corporate crime to produce sentencing ranges that are both appropriately stern and judicially acceptable in a post-*Booker* world.

## Notes

- <sup>1</sup> 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, 389 (2004) [hereinafter "*Bowman, Pour Encourager les Autres*"].
- <sup>2</sup> *Id.* at 428-35.

- <sup>3</sup> See, e.g., Frank O. Bowman III, "*The Question Is Which Is to Be Master—That's All*": *Cunningham, Claiborne, Rita and the Sixth Amendment Muddle*, 19 FED. SENT. REP. 155 (2007).
- <sup>4</sup> *Gall v. United States*, 128 S. Ct. 586, 596 (2007).
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.* at 596-97.
- <sup>7</sup> *Rita v. United States*, 127 S. Ct. 2456, 2462-63 (2007).
- <sup>8</sup> *Gall*, 128 S. Ct. at 597.
- <sup>9</sup> 128 S. Ct. 558 (2007).
- <sup>10</sup> *Id.* at 570.
- <sup>11</sup> *Id.* at 574 (quoting *Rita*, 127 S. Ct. at 2465).
- <sup>12</sup> See Bowman, *Pour Encourager les Autres*, *supra* note 1, at 428, Fig. 5B (charting Guidelines sentence increases from 1987 to 2004 for ten representative economic crime defendants).
- <sup>13</sup> *Id.* at 417-31 (critiquing the across-the-board increases in Guidelines sentences for economic crime defendants enacted following the Sarbanes-Oxley Act).
- <sup>14</sup> Offense Level 25. Assumes a base offense level of 6 under U.S.S.G. § 2F1.1(a) (1987); an 11-level increase for loss in excess of \$5 million, § 2F1.1(b)(1)(L); a 2-level increase for more than minimal planning, § 2F1.1(b)(2)(A); a 4-level increase for aggravated role, § 3B1.1(a); and a 2-level increase for abuse of position of trust, § 3B1.3.
- <sup>15</sup> Offense Level 32. Assumes a base offense level of 6 under U.S.S.G. § 2F1.1(a) (1989); an 18-level increase for loss in excess of \$80 million, § 2F1.1(b)(1)(S); a 2-level increase for more than minimal planning, § 2F1.1(b)(2)(A); a 4-level increase for aggravated role, § 3B1.1(a); and a 2-level increase for abuse of position of trust, § 3B1.3.
- <sup>16</sup> Offense Level 38. Assumes a base offense level of 6 under U.S.S.G. § 2F1.1(a) (2000); an 18-level increase for loss in excess of \$80 million, § 2F1.1(b)(1)(S); a 2-level increase for more than minimal planning, § 2F1.1(b)(2)(A); a 2-level increase for sophisticated means, § 2F1.1(b)(6)(C); a 4-level increase for endangering the safety of a financial institution, § 2F1.1(b)(8)(A); a 4-level increase for aggravated role, § 3B1.1(a); and a 2-level increase for abuse of position of trust, § 3B1.3.
- <sup>17</sup> Offense Level 48. Assumes base offense level of 6 under U.S.S.G. § 2B1.1(a) (2001); a 26-level increase for loss greater than \$100 million, § 2B1.1(b)(1)(N); a 4-level increase for more than 50 victims, § 2B1.1(b)(2)(B); a 2-level increase for sophisticated means, § 2B1.1(b)(8)(c); a 4-level increase for endangering the safety of a financial institution, § 2B1.1(b)(12)(B); a 4-level increase for aggravated role, § 3B1.1(a); and a 2-level increase for abuse of position of trust, § 3B1.3.
- <sup>18</sup> Offense Level 57. Assumes base offense level of 7 under U.S.S.G. § 2B1.1(a)(1) (2007); a 30-level increase for loss greater than \$400 million, § 2B1.1(b)(1)(P); a 6-level increase for more than 250 victims, § 2B1.1(b)(2)(C); a 2-level increase for sophisticated means, § 2B1.1(b)(8)(c); a 4-level increase for endangering the safety of a financial institution, § 2B1.1(b)(12)(B); a 4-level increase for violation of securities law by officer of publicly traded company, § 2B1.1(b)(15)(A); and a 4-level increase for aggravated role, § 3B1.1(a).
- <sup>19</sup> I bear some personal responsibility for this failure as a participant in the process of enacting the 2001 Economic Crime Package of amendments to the Guidelines. See Frank O. Bowman III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001) [hereinafter "*Bowman, The 2001 Federal Economic Crime Sentencing Reforms*"].
- <sup>20</sup> The Guidelines call for a life sentence beginning at Offense Level 43 for a first-time offender. Under the November 1, 2007, Guidelines, a defendant would have a Level 43 assuming the following Guideline adjustments: base offense level of 7, U.S.S.G. § 2B1.1(a)(1) (2007); an 18-level increase for loss greater than

- \$2.5 million, § 2B1.1(b)(1)(P); a 2-level increase for deriving more than \$1 million in gross receipts, § 2B1.1(b)(13)(a); a 6-level increase for more than 250 victims, § 2B1.1(b)(2)(C); a 2-level increase for sophisticated means, § 2B1.1(b)(8)(c); a 4-level increase for violation of securities law by officer of publicly traded company, § 2B1.1(b)(15)(A); and a 4-level increase for aggravated role, § 3B1.1(a).
- <sup>21</sup> U.S. SENTENCING COMMISSION, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 256, Table 14 (2006) (hereinafter "2005 SOURCEBOOK").
- <sup>22</sup> *Id.* at 257.
- <sup>23</sup> *Id.* at 256 (reporting that the mean sentence for defendants convicted of murder in the portion of FY 2005 after the decision in *United States v. Booker* was 220 months).
- <sup>24</sup> *Id.* at 257 (reporting that the average sentence for a convicted murderer who was also a Criminal History Category VI career offender was 297.5 months).
- <sup>25</sup> *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006).
- <sup>26</sup> Karen Donovan, *A Setback for Prosecutors in the "Enron of Kansas" Case*, N.Y. TIMES, Jan 12, 2007, available at <http://www.nytimes.com/2007/01/12/business/12westar.html>.
- <sup>27</sup> *United States v. Ollis*, No. H-03-217-01, 2006 WL 2716048 (S.D. Tex. Sept. 22, 2006).
- <sup>28</sup> *United States v. Ebbers*, No. 05-4059-cr, Brief of Respondent United States, 2005 WL 5338136, at \*102 (2005).
- <sup>29</sup> <http://www.chron.com/content/news/photos/02/10/21/players/photo4.html>.
- <sup>30</sup> Glisan did not originally agree to cooperate but pled straight up to a five-year term. He later agreed to cooperate and received some consideration for his help (<http://www.chron.com/content/news/photos/02/10/21/players/photo8.html>).
- <sup>31</sup> <http://www.chron.com/content/news/photos/02/10/21/players/photo4.5.html>.
- <sup>32</sup> <http://www.chron.com/content/news/photos/02/10/21/players/photo6.html>.
- <sup>33</sup> <http://www.chron.com/content/news/photos/02/10/21/players/photo10.16.html>.
- <sup>34</sup> <http://www.chron.com/content/news/photos/02/10/21/players/photo10.15.html>.
- <sup>35</sup> <http://www.chron.com/content/news/photos/02/10/21/players/photo10.1.html>.
- <sup>36</sup> Carrie Johnson, *Former Enron Accountant Gets 5½ Years for Fraud*, WASH. POST, Nov. 16, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/15/AR2006111501076.html>.
- <sup>37</sup> *United States v. Ebbers*, Brief of Respondent United States, No. 05-4059-cr, 2005 WL 5338136, at \*113 (2005).
- <sup>38</sup> *United States v. Ebbers*, Brief of Appellant Ebbers, No. 05-4059-cr, 2005 WL 5338137, at \*91 (2005).
- <sup>39</sup> *Id.*
- <sup>40</sup> Frank O. Bowman III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker*, 43 Hous. L. Rev. 279, 308, Fig. 4 (2006).
- <sup>41</sup> U.S.S.G. § 5K2.0.
- <sup>42</sup> U.S.S.G. § 2B1.1(b)(1) (Loss Table) (2007).
- <sup>43</sup> U.S.S.G. § 2F1.1(b)(2)(A) (2000) (more than minimal planning enhancement), and § 2B1.1(b)(9)(C) (2007) (sophisticated means enhancement).
- <sup>44</sup> U.S.S.G. § 2F1.1(b)(2) (2000) (enhancement for scheme to defraud more than one victim), and § 2B1.1(b)(2)(B) (2007) (enhancement for fifty or more victims).
- <sup>45</sup> U.S.S.G. § 2B1.1(b)(13)(A) (2007) (enhancement for \$1 million gross receipts from a financial institution).
- <sup>46</sup> U.S.S.G. § 2B1.1(b)(13)(B) (2007).
- <sup>47</sup> U.S.S.G. § 2F1.1 (1987). In its original form, § 2F1.1 considered only loss, more than minimal planning, scheme to defraud more than one victim, misrepresentation that the defendant was acting on behalf of a charitable, religious, or political organization or a government agency, violation of a judicial or administrative order, and the use of foreign bank accounts or transactions to conceal the fraud.
- <sup>48</sup> U.S.S.G. § 2F1.1(b)(2)(A) (2000) (if sentenced before 2001).
- <sup>49</sup> U.S.S.G. § 2F1.1(b)(2)(A) (2000) or § 2B1.1(b)(9)(C) (2007).
- <sup>50</sup> U.S.S.G. § 2B1.1(b)(2)(B).
- <sup>51</sup> U.S.S.G. § 2B1.1(b)(13)(B).
- <sup>52</sup> U.S.S.G. § 3B1.1(a).
- <sup>53</sup> U.S.S.G. § 3B1.3.
- <sup>54</sup> See Frank O. Bowman III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing after Booker*, 2005 U. CHI. LEG. F. 149, 195, 199-201 (describing the "25 percent rule" and its effects on Guidelines architecture).
- <sup>55</sup> An increase in offense level from 6 to 7 has no effect on a first-time offender's sentencing range, which remains at 0-6 months. U.S.S.G. § 5A (Sentencing Table) (2005).
- <sup>56</sup> An increase in offense level from 41 to 42 changes the sentencing range for a first-time offender from 324-405 months to 360 months-life imprisonment. U.S.S.G. § 5A (Sentencing Table) (2005).
- <sup>57</sup> U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 137 (Nov. 2004), available at [http://www.ussc.gov/15\\_year/Chap5.pdf](http://www.ussc.gov/15_year/Chap5.pdf).
- <sup>58</sup> 343 F.3d 604 (2d Cir. 2004), *adhered to on reh'g*, 362 F.3d 160 (2004), *judgment vacated* 543 U.S. 1097 (2005) (remanding for further proceedings in light of *Booker*); *United States v. Jackson*, 346 F.3d 22 (2d Cir. 2003).
- <sup>59</sup> Bowman, *The 2001 Federal Economic Crime Sentencing Reforms*, *supra* note 19, at 40.
- <sup>60</sup> See U.S.S.G. § 2F1.1, app. note 8(b) (2000) (sanctioning departure "[w]here the loss . . . significantly understates or overstates the seriousness of the defendant's conduct"); U.S.S.G. § 2F1.1, app. note 11 (2000) (authorizing a downward departure where the loss "overstate[s] the seriousness of the offense"). The 2001 Guidelines contain a similar provision, which broadens the scope of the downward departure ground from situations in which loss alone overstates the seriousness of the offense to situations in which "the offense level determined under this Guideline substantially overstates the seriousness of the offense." U.S.S.G. § 2B1.1, app. note 15(B) (2001).
- <sup>61</sup> See WAYNE L. LAFAVE, CRIMINAL LAW 7-9 (3d ed., West Group 2000).
- <sup>62</sup> *Id.* at 9, 204-6.
- <sup>63</sup> See William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1064-65 (1994) (identifying more than 100 types of *mens rea* in federal statutes).
- <sup>64</sup> *United States v. McNally*, 483 U.S. 350, 356 (1987) (describing the core objectives of the original mail fraud statute).
- <sup>65</sup> *Carpenter v. United States*, 484 U.S. 19 (1987).
- <sup>66</sup> Compare, e.g., Texas Penal Code § 19.02(b)(1) (defining murder, a felony of the first degree, as "intentionally or knowingly caus[ing] the death of an individual"), with Texas Penal Code § 19.04(a) (defining manslaughter, a felony of the second degree, as "recklessly caus[ing] the death of an individual"), and Texas Penal Code § 19.05(a) (defining manslaughter, a "state jail felony," as causing the death of an individual by criminal negligence").