I. Introduction

Just over twenty-five years ago, when assigned the task of developing the initial set of sentencing guidelines, the new U.S. Sentencing Commission began by compiling data on 10,000 federal sentences, from which it sought to build a comprehensive picture of past sentencing practices. After reviewing these data, the Commission decided that sentences for white-collar offenses had historically been too low compared to so-called “street crimes” involving similar economic losses. Accordingly, the Commission intentionally crafted the initial set of guidelines to require more severe punishment, and more frequent use of imprisonment, than had historically been the case for typical white-collar offenses.

White-collar crimes almost universally involve some form of pecuniary gain to the defendant or loss to the victim, and the Commission’s study of past practices showed that in white-collar offenses such as fraud, both the sophistication of the crime and the financial harm caused by the offense bore some relationship to the length of the sentences imposed. Accordingly, based on these data and its own policy judgments, the Commission decided that an appropriate sentencing factor for economic crimes would be a measure of the “pecuniary harm” caused by the offense, which it labeled “loss.” The influence of loss was not limited to the relatively modest role identified by the past practice study, however. Later amendments, some in response to directives and statutory changes enacted by Congress without regard to the Commission’s own research and reforms, increased the importance of loss even further. Under the current Guidelines, loss is far and away the primary determinant of the advisory sentencing range under § 2B1.1.

Indeed, “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 specific offense characteristic of loss amount now figures in the sentencing of a plethora of disparate offenses from money laundering to foreign espionage, from mortgage fraud to insider trading, and many more. And just as the offenses covered by § 2B1.1 are extremely varied, so too are the offenders and their motives, even among those who commit the same offense. For example, in the case of a $1 million investment fraud, the offender’s culpability could vary from that of a desperate business owner cutting corners to keep his business alive and his workers employed and insured, to the unmitigated avarice of a Bernie Madoff.

After more than a quarter-century of using loss as a primary sentencing factor for diverse offenses and disparate offenders, what do the Commission’s sentencing data tell us about judges’ views of the relative importance or unimportance of loss amount, as currently measured by the Sentencing Guidelines? In sum, the data suggest that loss is an unsound measure of the seriousness of many offenses, with the result that judges are increasingly willing to go below the Guidelines when they impose sentences in white-collar cases.

Judicial dissatisfaction with the current treatment of loss does not necessarily mean that Congress or the Commission should act to limit judicial discretion. Rather, as the Commission itself has expressly stated since its inception: “By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.” Congress and the Commission should understand this judicial resistance to the Guidelines’ focus on loss as feedback from sentencing’s front lines—a call to reform and refine the definition, weight, and role of loss to better reflect the purposes of sentencing.

II. Section 2B1.1: A Guideline with a Problem

As shown in Figure 1, average sentences for fraud offenses have increased by 30 percent in just the past seven years, from 18.6 months in FY 2006 to 24 months as of the second quarter of FY 2013. Although average sentences for fraud have grown significantly, they remain lower than for all but immigration offenses. Yet fraud sentences grew by the greatest percentage among all major offense categories, including drug trafficking, firearms, and immigration, which together with fraud constitute over 80 percent of all federal offenses. In fact, fraud offenses accounted for over 10 percent of the federal docket in 2012, and three-quarters of fraud offenders received some time in prison, so this...
increase is a significant contributor to prison overcrowding and increased costs.

The increase in fraud sentences would have been greater if judges did not consistently impose sentences below the recommended guideline range far more frequently than in any other major offense category. As shown in Figure 2, fraud offenders received sentences below the guideline range other than because of government motions (i.e., cooperation) in nearly a quarter of all cases in the most recent year, compared to 17.8 percent for federal crimes overall. When one considers both government-sponsored below-range sentences and other sentences outside the guideline range, courts sentenced within the guideline range only 48.4 percent of the time in the second quarter of FY 2013, as indicated in Figure 3. This is the first time that within-guideline sentences for fraud offenses have dipped below 50 percent—itself the lowest rate of any major offense category.

When courts impose sentences below the fraud guidelines, the median reduction is 12 months. As Figure 4 shows, that is greater in absolute terms than the median reduction for immigration offenses, the same as for firearms offenses, and a little more than half the reduction for drug offenses, reflecting the longer average sentences imposed on drug offenses.

However, as Figure 5 shows, when viewed on a percentage basis, the reduction for fraud offenses is greater than for any other major offense category. The fact that courts in recent years have consistently cut the minimum
Guideline-recommended sentence by more than half strongly suggests that in the eyes of the judiciary, something is amiss with this guideline.15

As the Commission itself recognized in its recent Report on the Continuing Impact of United States v. Booker on Federal Sentencing,17 the influence of the Guidelines on the final sentences imposed has decreased in the advisory era most notably for fraud offenses and child pornography offenses. Figure 6, taken from that report, shows the gap between the average guideline minimum and the sentence ultimately imposed. The gap has gradually widened since Booker, suggesting widespread and growing judicial dissatisfaction with the guidelines governing fraud offenses.

III. Evidence of Problems with the Loss Adjustment

Several types of evidence indicate that a primary reason for judicial dissatisfaction with § 2B1.1, at least as it applies to fraud offenses, is that loss amount (in combination with the many other upward adjustments provided by the guideline) frequently inflates sentences far more than necessary to achieve the purposes of sentencing as set forth at 18 U.S.C. § 3553(a). The enhancement for loss provided by § 2B1.1(b)(1) alone can raise a sentence anywhere from 2 to 30 offense levels, dwarfing the base offense level of 6 or 7.

In this section, data on the relationship between sentences imposed and loss amounts are examined, with an eye toward uncovering any correlation between the two. Data on rates of sentences below the guideline range at various loss amounts also are examined. As the analyses indicate, it readily is apparent that many judges do not believe sentences should increase as much as the Guidelines recommend—especially as the loss amount increases.

Figure 7 illustrates the rates of sentences imposed within, above, or below the guideline range for § 2B1.1, at various loss amounts. A striking pattern is immediately apparent: the greater the loss adjustment, the less likely the sentence will fall within the guideline range. More granularly, the percentage of sentences imposed below the range, excluding sentences reflecting motions by the government, rises steadily as the loss adjustment increases from 0 to 8. Above that level, government motions become the dominant force, resulting in even greater numbers of below-range sentences. At loss amounts above a mere $30,000, which corresponds to a $6 adjustment, courts sentence within the guidelines less than half the time. At loss amounts above $200,000, which corresponds to a $12 adjustment, within-range sentences drop to only one-third of all fraud sentences.
Indeed, the Commission published Figure 8 at its recent Symposium on Economic Crime held on September 18–19, 2013, at the John Jay College of Criminal Justice in New York, which shows in detail the increasing divergence between the average Guidelines minimum and the average sentence actually imposed as loss amount grows.

Figure 9, also from the Commission’s symposium, illustrates where, relative to the Guideline range, a sentence ultimately is imposed and for what reasons. Non-government-sponsored below-range sentences become more common, and within-guideline sentences become far less frequent, as the loss amount increases up to $400,000.
Beyond that level, government-sponsored below-guideline sentences become most common where loss is up to $7 million.

These data suggest that courts are rejecting guideline sentences in significant part because of the manner in which loss drives the guideline calculation in § 2B1.1. Theoretically, it might be the case that judges simply dislike imposing lengthy sentences on white-collar offenders, whether the Guideline range results more from the loss enhancement or from other aggravating adjustments. (Loss and adjustments for use of sophisticated means or multiple victims, for example, seem to capture many of the same dimensions of offense seriousness.) However, by comparing defendants who are assigned the same offense level but through different calculations, we can see that loss is more strongly correlated with downward variances from the Guidelines range than any other factor. For example, among fraud offenders who receive the two most common final offense levels (13 and 17), those whose offense level results predominately from the loss adjustment are sentenced within the Guideline range at lower rates than those who are at the same offense level but as the result of other enhancements.

Based on published data from the Sentencing Commission, Figure 10 illustrates the distribution of all non-probationary sentences with non-zero loss amounts that have been imposed under § 2B1.1 from FY 2006 through FY 2012. It compares the final sentence imposed with the loss amount. Because of the enormous range of sentences and loss amounts, a logarithmic scale is used along both the x axis (indicating months of imprisonment from 1 to 240) and the y axis (indicating loss amounts from $1 to $100 million) to better display the distribution. For any given sentence length, the chart shows the range of loss amounts associated with it, which are represented in vertical bands. In Figure 10, some bands have been outlined and marked with their respective loss ranges. To exclude outliers, only the first (25th percentile) and third quartiles (75th percentile) are given as the ranges; that is, the middle 50 percent are identified, along with the maximum loss amount for that particular sentence length. For example, among those cases in which an offender was sentenced to 24 months’ imprisonment, the middle 50 percent of the loss amounts ranged from the first quartile of $53,950 to the third quartile of $539,850, with a maximum loss amount of $63,693,718.

These vertical bands vividly illustrate the great variation in loss amounts associated with any particular sentence length. In turn, that variation suggests that judges do not find loss a useful metric at sentencing. For example, as Figure 11 illustrates, a loss amount of $150,000 falls within the middle 50 percent of sentences ranging from 12 months to 5 years. If one considers loss amounts outside the middle 50 percent range, a loss of only $10,000 has been found for sentences ranging from a mere 3 months all the way to 10 years. Likewise, a $2.5 million loss also is consistent with sentences from 3 months to 10 years (and more). It appears that in practice, loss has very little correlation to the ultimate sentence imposed, regardless of how it determines the advisory guideline range.

Finally, as less than half of fraud sentences are now sentenced within the guideline range, it is revealing to
compare three types of cases: those with sentences within the guidelines, those sentenced below pursuant to a government motion, and those sentenced below pursuant to the court’s own discretion. As Table 1 illustrates, during FY 2012, within-range sentences tended to involve more loss than those where the government sponsored a downward departure, or those where the court otherwise exercised its discretion to go outside the range. That may seem unsurprising. What is somewhat more surprising, however, is that when courts do exercise their discretion, or when the government moves for a lower sentence, it generally does so in cases involving much higher loss amounts than for those receiving within-range sentences. As Table 1 shows, the average loss amount for those sentences imposed within the Guideline range is slightly more than $4.5 million. In contrast, the average loss amount for those sentences imposed as a result of a government motion was $5.9 million, and the average loss amount for those sentences imposed as a result of a court’s decision to vary downward was nearly $5.4 million. In other words, ostensibly more serious offenses (as per the loss amount) are receiving far less severe sentences. Now, of course, with respect to cooperation agreements or other government motions, that is to be expected. But when courts are increasingly utilizing their discretion to vary below the guidelines, and when they do so for offenses that are
supposedly more serious based upon the loss amount, it can only mean that courts are rejecting the manner in which the Guidelines use loss as a proxy for the seriousness of the offense.

IV. Conclusion

Courts are varying downward more often and at a greater magnitude in fraud cases than in any other major offense category. The statistical evidence reviewed above strongly points to the concept of loss as the primary reason for the judiciary’s increasing dissatisfaction with the fraud Guidelines. Indeed, according to Figure 12, which was published at the Commission’s recent Symposium on Economic Crime, in well over half of all fraud cases with loss amounts of less than $400,000, the sentences were driven exclusively by the loss table; that is, the loss amount was the only specific offense characteristic calculated (other than the base offense level) in determining the offense level under § 2B1.1. Loss in such cases obviously can be the only reason for a below Guidelines sentence.

Does all this mean that judges’ sentencing discretion should be reined in to follow more closely the dictates of the Guidelines? Only if we assume a priori that loss is the most important consideration in fraud cases, that the Guidelines measure it appropriately, and that sentences should correlate highly with loss amount. Given the years of criticism levied at loss and recent sentencing trends, the better interpretation is that judges are rightly rejecting Guideline recommendations that are driven excessively by loss.

As with the on-going debate regarding child pornography sentencing, the fraud Guidelines themselves are in need of a thorough revision, which should start with a reconsideration of the definition and role of loss. As the above statistical review reveals, judges increasingly appear to reject loss as an appropriate measure of the sentence that

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### Table 1. Loss amounts by specified Guidelines group

<table>
<thead>
<tr>
<th>Group</th>
<th>Overall (n=4,492)</th>
<th>Within FSG (n=2,196)</th>
<th>Government-Sponsored Below FSG (n=1,199)</th>
<th>Court Discretion Below FSG (n=1,097)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Months</td>
<td>Loss</td>
<td>Months</td>
<td>Loss</td>
</tr>
<tr>
<td>1st Quart.</td>
<td>12</td>
<td>$51,444</td>
<td>15</td>
<td>$29,273</td>
</tr>
<tr>
<td>Median</td>
<td>24</td>
<td>$224,079</td>
<td>30</td>
<td>$159,894</td>
</tr>
<tr>
<td>Average</td>
<td>32.7</td>
<td>$5,102,627</td>
<td>40</td>
<td>$4,508,545</td>
</tr>
<tr>
<td>3rd Quart.</td>
<td>42</td>
<td>$950,000</td>
<td>52.3</td>
<td>$672,332</td>
</tr>
<tr>
<td>Max</td>
<td>420</td>
<td>$6,746,399,008</td>
<td>360</td>
<td>$6,746,399,008</td>
</tr>
</tbody>
</table>

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**Figure 12**

Number of specific offense characteristics applied for § 2B1.1 offenders in each loss table category (N = 7,260), FY 2012

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is “sufficient, but not greater than necessary” to achieve the purposes of sentencing. Whether loss as measured by the Guidelines is a proper measure of offense seriousness, or offender dangerousness, or some other purpose of sentencing, is a philosophical debate beyond the scope of this paper (although there are many reasons to doubt that loss is a proper measure of any of these factors). There can be no doubt, however, that judges are more likely to disagree with Guideline recommendations in fraud cases that are driven substantially by loss.

The reason courts increasingly reject the advice of § 2B1.1 is most likely their perception that loss often substantially overstates the seriousness of the harm caused by the offense. Perhaps other dimensions of loss besides the mere amount might make it a more reliable measure of offense seriousness—for example, how the money was derived and from whom. And perhaps other factors should be given more consideration, such as offender motives. Another option is to decrease the number of steps in the loss table or the offense levels associated with them.

Indeed, a 2010 Commission survey indicated that only 25 percent of those judges surveyed somewhat disagreed or strongly disagreed with the proposition that “[t]he number of categories in the loss tables in U.S.S.G. § 2B1.1 should be decreased by broadening the monetary ranges.”25 In contrast, 37 percent somewhat agreed or strongly agreed with that proposition, while an equal proportion was neutral.30

Although the concept of loss has intuitive appeal as a measure of economic offense seriousness, it is far too abstract in its current form to serve as an appropriate sentencing factor for so many diverse types of offenses and offenders. Being drawn from nowhere, loss has led to growing dissatisfaction with one of the most frequently used guidelines in the federal courts. As the Second Circuit recently observed: “The loss guideline, like the child pornography guideline at issue in [United States v. Dorvee, 616 F.3d 174, 182 (2d Cir. 2010)] was not developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. As such, district judges can and should exercise their discretion when deciding whether or not to follow the sentencing advice that guideline provides.”33 Any amendment to the fraud guidelines or to the concept of loss should be made with an eye toward promulgating a guideline that the judiciary no longer feels compelled to sideline, but rather one that can inform sentencing.

Now, especially in light of its Booker Report, wherein the Commission notes that other than child pornography, fraud is the only major category of offenses regularly being sentenced below the Guidelines, it is time for the Commission to act and to do so decisively. After all, as the Commission itself recognizes, its mandate “rem[ains] on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.”34

It is time for the Commission to exercise that mandate in light of the application experience reviewed above: loss should fundamentally be reconfigured starting with what the Commission is most experienced with—empirical data. Certainly, a loss definition sensitive to the different types of pecuniary harm (and gain) as well as the sources for the same will be quite helpful toward achieving this end. But just as importantly, decreasing the now-central role loss has in sentencing economic crimes is imperative. As one well-known practitioner and commentator has noted, “The reliance on loss to drive sentencing outcomes is simply out of control.”33 Field-testing various definitions of loss, expanded loss tables, and various iterations of § 2B1.1 is a good place to start as a follow-on to the Commission’s recent Symposium on Economic Crime.34 Until then, courts and practitioners are well advised to look critically, and indeed skeptically, on the sentencing advice given by the Guidelines that are influenced by loss.

Notes
8 Mr. Allenbaugh is an attorney in private practice. He is a former staff attorney to the U.S. Sentencing Commission and currently serves as a nonvoting member on its Practitioners Advisory Group; he also serves as Co-Chair of the Sentencing Committee for the National Association of Criminal Defense Lawyers. Mr. Allenbaugh extends his sincere gratitude to Dr. Paul Hofer and Jacquelynn Paolillo for their invaluable comments and edits. He can be reached at mark@allenbaughlaw.com. The quotation in the title of this article is drawn from Hon. Jed S. Rakoff’s keynote address, delivered at the 2013 ABA National Institute on White-Collar Crime.
1 U.S.S.G. Ch. 1, Pt. A(1)(3).
2 See id.
4 U.S.S.G. § 2B1.1, comment. (n.1).
5 See David Debold & Matthew Benjamin, “Losing Ground”—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft, 160 U. Pa. L. Rev. PENNumbra 141, 151 (2011) (“The problem is that loss has taken on a role in the sentence calculation that dwarfs most of the other important factors.”).
8 U.S.S.G. Ch. 1, Pt. A(1)(b).
9 U.S. Sentencing Commission, Preliminary Quarterly Data Report, 2d Quarter (2013), tbl. 13 (hereinafter, USSC Quarterly). In this analysis, sentences of probation without confinement are counted as 0 months’ imprisonment.
10 Child pornography offenses also are considered a major offense category, but are not included in these analyses because they constitute only 2.4% of all offenses, compared with 30.2% for drug trafficking, 9.8% for firearms, 10.5% for fraud, and 32.2% for immigration as of FY 2012. U.S. Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics, at fig. A, available at http://www.ussc.gov/
15. According to the sources cited in Figure 5, from 2006 through 2009, the median downward variance (or departure) from the guideline range for fraud offenses itself decreased from more than 80% to 50%. That is the result of a mathematical artifact: the mean sentences for fraud offenses grew from 18.6 months in 2006 to 21.8 months in 2009, while the median decrease remained at 10 months. Thus, as mean sentences increased, and the median percent decrease remained the same, that decrease became a smaller proportion of the pre-variance sentence. In contrast, since 2010, the median decrease has increased from 10 months to 12 months. The mean sentence for fraud offenses, however, also has grown from 18.6 months in 2006 to 24 months as of the second quarter of FY 2013. Thus, as the average sentence has increased by nearly 6 months since 2009, a 12-month median decrease constitutes a smaller portion of the pre-variance sentence of 24 months than a 10-month variance did when the average sentences were only around 18 months. The point simply is that while the percentage decrease has itself decreased, this does not mean that courts are varying below the fraud guideline at a lower magnitude; rather they in fact have increased the magnitude of their downward variances from 10 months to 12 months since 2006. See U.S. Sentencing Commission, 2006–2012 Sourcebooks of Federal Sentencing, tbl. 27; U.S.S.C. Quarterly, at tbl. 3.
20. Source: U.S.S.C., 2012 Datafile, USSCFY2012; cited in U.S.S.C., Sentencing and Guideline Application Information for § 2B1.1 Offenders, Symposium on Economic Crime, Sept. 18–19, 2013, fig. 7 [hereinafter, U.S.S.C. Symposium]. The Symposium report adds the following information to Figures 8, 9, and 12: “Of the 84,173 cases in the FY 2012 datafile, 9,678 were excluded due to incomplete guideline application information. Of the 74,495 remaining cases, 65,985 were excluded that were not sentenced under § 2B1.1. Of the remaining 8,510 cases sentenced under § 2B1.1, three were excluded that were sentenced using a Guideline Manual in effect prior to November 1, 2001 or for other logical criteria.” The Symposium report adds this regarding Figure 8: “An additional two cases were excluded due to missing information on sentence imposed.”
22. At offense level 13, 44% of offenders with loss adjustments of 8 or less are sentenced within the guideline range, compared to only 21% of offenders with loss adjustment of 10 or more. Among offenders at final offense level 17, the rates are 47% and 29%, respectively. See U.S. Sentencing Commission, FY2012 Datafile. For more information on the Datafiles, see U.S.S.C., Variable Codebook for Individual Offenders: Standardized Research Data Documentation for FY1999–2012 (Rev. Apr. 29, 2013), available at http://www.uscc.gov/Research_and_Statistics/Datafiles/Variable_Codebook_for_Individual_Offenders.pdf.
23. Zero-loss cases were excluded because, by definition, loss had no effect on the sentence imposed. Probationary sentences also have been excluded for the similar reason that the loss amount, if any, appears to have had no effect on the sentence; other factors obviously supervened over any consideration of loss. In any event, Figure 10 is meant to compare the correlation between loss and any term of incarceration actually imposed.
25. The scatterplot in Figure 11 is scaled arithmetically (i.e., not logarithmically) up to $20 million in loss and 240 months imprisonment, thereby capturing 98.7% of all loss amounts and 99.6% of all sentences. It is essentially a more focused snapshot of the previous scatterplot and reveals a bit more detail.
28. Source: U.S.S.C., 2012 Datafile, USSCFY2012; cited in U.S.S.C. Symposium, fig. 12. The Symposium report adds this regarding Figure 12: “Chart includes only offenders with loss table increases.”