

Day One—Plenary Session III

The Nature and Severity of Punishment for Economic Crimes; Determinants of Offense Seriousness and Offender Culpability

*Moderator: The Honorable Joe Kendall, Judge, U.S. District Court, N.D. TX, and
Commissioner, U.S. Sentencing Commission*

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**PLENARY SESSION III:
THE NATURE AND SEVERITY OF PUNISHMENT FOR ECONOMIC CRIMES;
DETERMINANTS OF OFFENSE SERIOUSNESS AND OFFENDER CULPABILITY**

JUDGE KENDALL: Let me begin by introducing the panel participants for Session III. That would be Phil Gilbert, who is the chief judge of the district court, Southern District of Illinois. He is also a member of the Criminal Law Committee.

James Robinson is the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice.

Jim Felman is a criminal defense lawyer who defends complex criminal cases in Tampa, Florida, and is also co-chair of the Practitioners' Advisory Group.

Dr. Mark Cohen was introduced on an earlier panel. About the only thing I could add when I saw his resume and I was looking at all of the things that he has published, if it is true in academic circles that "if you don't publish you perish," Dr. Cohen ought to be with us some time till shortly before the birth of James T. Kirk.

Anyway, it is a panel and what I want to do as the moderator, hopefully, is to get us off the minutiae when we are talking about, "Should we raise this level two to three and three to four?" and what deters and what does not, and talk about some more basic overriding issues.

You should have on your desk the three questions, and what I have asked each panelist to do is spend five to eight minutes answering the three questions that are in front of them.

The first question and, again, these questions are designed to get us talking and thinking about basic presuppositions that we bring to the guidelines regime. I do not think it is harmful to revisit these questions, these basic questions.

First, is loss the best proxy to establish an appropriate sentence in a theft or fraud case? If so, why? If not, why not? Let me just make a little comment about that. When we talk about loss, does it make a difference if we are defining that as actual loss or intended loss, in determining whether or not loss is the best proxy?

Let me just play law professor for a minute, give a hypothetical. Should we punish a borrower who goes in and borrows \$400,000 from a bank, fudges on his or her financial statement, defaults on the loan, and is prosecuted for that \$400,000 fraud loss?

Should that person be similarly punished, or how should that \$400,000 fraud loss relate to, a nomadic gypsy who wanders around and who probably has never had a real job a day in his or her life—a Henry Gondorf type of individual—causes a fraud loss of \$50,000—\$5,000 a pop times ten victims? That kind of question. Again, it will be, if so, why? If not, why not?

Second question, if there is a current problem with the guidelines that is in need of repair, is it that fraud and theft are punished too leniently or that drug crimes are punished too harshly? Now, a lot of the debate does not directly carry us there, although you see it and indeed we even saw that a little bit this

morning in the comments that Mr. Holder made about relating the punishments that are given for drug cases to the punishments that are given for so-called white collar crimes—and I don't know that I like that term as much as I do economic crime.

If you look at the numbers, the so-called white collar aspect of it may not be as large a percentage as just straight theft and other fraud that is not necessarily associated with so-called white collar criminal activity.

But should that be punished in the same way that we punish drug offenders? Is the societal harm created by those two different genres of offenses similar such that we should increase those punishments? And, I guess, the bottom line question, are economic crime offenders getting off too lightly?

Then, third, part of our assigned discussion was to deal with alternatives; that is, in fraud and theft offenses, should there be alternatives to incarceration? If so, what should they be? What factors or offender characteristics would cause one to be included or excluded as a candidate for an alternative punishment?

So, with that, we will just start and go down the row and ask Judge Gilbert to give his opinions and his answers to these three questions. Judge?

JUDGE GILBERT: First of all, with regard to John Steer's comment this morning about me taking a dive off the podium for the Sentencing Commission—I do want to make one observation to my colleagues on the bench and that is an Article III judge cannot walk on air. I tried it and it does not work.

In response to the question, "Is loss the best proxy to establish an appropriate sentence in theft and fraud cases,"—if you look back, I think, at the history of state law and common law, criminal law imposes punishment on a person who has been found guilty of a public offense and causing or intending to cause harm to another person.

In the economic crimes area, the type of harm is usually monetary. The loss figure is designed as a measurement of the type of harm or culpability that the individual committed. I don't know of any other measurement to be used in measuring the harm that a person commits. A person who steals more should be punished more than a person who steals less. For example, if someone steals \$10,000, that person should be punished more than a person who steals \$1,000. I think that is almost rooted in the common law or the history of the state courts throughout this country.

I think that trying to come up with some other measurement on how to establish appropriate sentences in theft and fraud, I think, would be very difficult. Again, consider the harm that is caused, the culpability of the defendant; again, the person who steals more probably has engaged in more complex thinking on the stealing than someone who steals less.

So, my answer to question 1: "Is loss the best proxy?" I think it is the best proxy or the best measurement in determining what the culpability or the sentence should be. It is easy when the crime has been completed. It becomes more difficult when there is intended loss or the culprit is caught in mid-stream and the defendant has not received the fruits of all of his crime, and that becomes a little more problematic in determining the measurement of the loss.

Do you include the intended loss? Do you include, for example, in a case in the 7th Circuit, the *Bonanno* case (*United States v. Bonanno*, 146 F.3d 502 (7th Cir. 1998)), where there was an insurance fraud in which the culprits had received \$162,000 out of \$600,000 worth of insurance premiums they had sold because they were caught in mid-stream. Is the loss what they actually received, or is it what they intended to receive?

So, in that respect, it does become more problematic. But, still, I think that that is the proper measurement.

Answer to 2: "Is there a current problem with the guidelines that is in need of repair"; that is, is it that fraud and theft are punished too leniently or that the drug crimes are punished too harshly? I think we need to separate out the drug crimes. I don't think we can compare apples and oranges between theft and fraud and drugs. I think there are probably only a few people in this room that would disagree that drug crimes are probably punished too harshly. So I think that is comparing apples and oranges.

In terms of: "Are theft and fraud punished too leniently?"—my personal opinion is that, as we were talking earlier, at the upper one third, maybe the upper half of the table, I think they are punished too leniently. When we are talking about a bump, we are not talking about a draconian bump of many, many years.

But I think, as said earlier, that there are more white collar crimes that are being committed. There is more enforcement of white collar crimes. There is more public awareness and perception of the general public, and I think that when people steal \$1 million, as an example, and get 24 or 27 or 30 month sentences, I think that the public looks at that and says that is just too light a sentence.

By the same token, I think that judges ought to be given more alternatives, more flexibility at the lower end of the tables, in order to expand the available alternative sentences. I guess that kind of goes into the third question.

"In fraud and theft, should there be alternatives to incarceration?" I say, yes, especially when you are talking about the bottom third of those where you have quite a few of the bank tellers and people who steal less, I think that the judges ought to be given more flexibility, more alternatives, ability to do alternative sentencing other than sending someone straight to prison.

So, I guess that kind of answers my part.

JUDGE KENDALL: Okay. Thank you, Judge Gilbert. We are now going to ask James Robinson to give us his views on these three questions. Will these be your personal views or the views of the U.S. Department of Justice that we will be hearing from you?

MR. ROBINSON: I am in trouble if I don't reflect the views of the Department of Justice to a certain extent. Let me just say, however, that as I sat here this morning watching the graphs and seeing the numbers and listening to the economist, it occurred to me why I started law school in 1965. The reason I went to law school is because I didn't have the science skills to go to medical school or the math skills to be an accountant. But, here we are, 30-some years later wrestling with these numbers.

I also spent the first 20 years of my practice in a world without the sentencing guidelines. I was a United States Attorney in Detroit in the late '70s and later did white collar criminal defense work, and this is a whole new world.

But, I think the Commission has done a wonderful job of trying to struggle with these issues, and I commend the Commission for bringing together this group of defense lawyers and academics, judges and prosecutors to wrestle with these questions.

Let me just try to take a cut at these three questions from my current position as the Assistant Attorney General for the Criminal Division. On the question of: "Is loss the best proxy to establish an approximate sentence in a theft or fraud case?" and, if so, "Why" and, if not, "Why not"; I guess I would say, well, it may or may not be the best, but it certainly is an important measure of the magnitude of an economic offense.

The amount of loss does reflect the conduct of the defendant. I think it is an important tool in measuring the need to promote respect for the law, to afford adequate deterrence to criminal conduct, and also to protect the public from further crimes of the defendant, which are all, of course, the goals of the Sentencing Reform Act.

As Eric Holder indicated in his remarks this morning, in an era when white collar offenders can create a very wide impact with sometimes minimal effort, the decision to use technology to this end is related, I think, to the offender's culpability. If loss were not used as a basis to establish sentences, an offender who committed a \$5 million fraud would be subject to the same sentencing range as one who committed a crime involving a much lower loss, \$5,000 loss, for example, everything else of course being equal.

And, under that kind of a regime, offenders could correctly reason that they might as well steal as much as they can if there isn't going to be a difference, and I think there needs to be proportionality with regard to that.

But, while loss is an important measure of the seriousness of criminal conduct, for sentencing purposes, it does seem to me that it should not be the only basis for determining the sentence. If used alone as a proxy for seriousness, the loss may not capture other important factors of culpability that are reflected in the degree of planning, the risk of injury to potential victims, and the impact of criminal activity on victims generally.

The sentencing guidelines currently reflect an interesting mix of dollar loss and other factors as determinants of the sentence; such that these other factors, taken together, can have a major impact on the sentence, even where the loss is relatively low. We think that is appropriate. These factors include the recently promulgated amendments that cover identity theft, production of unauthorized access devices, and mass marketing fraud.

For example, if a \$15,000 fraud involved identity theft and, as well, the targeting of vulnerable victims, the identity theft and the vulnerable victims factor could provide a five-level increase in the sentence; while a \$15,000 loss would account only for a three-level increase in the base offense level.

In contrast, at a high-dollar level, non-monetary factors do not have as great an impact on the sentence. It seems to me that this distinction makes sense in that high dollar reflects significant culpability on its own by virtue of the defendant's efforts to cause widespread or deep loss.

As the Commission examines the appropriate mixture of dollar loss and other factors in determining the sentence, it should, we think, take into account the extent to which other factors are important in determining the sentence. These include the impact on victims, whether the offense deprived the victim of nearly his last dollar, and the need to protect against the risk of harm when an offense itself does not produce dollar harm or relatively little harm.

As to the second question of whether there is a current problem with the guidelines that is in need of repair; in other words, is it that fraud and theft are punished too leniently or that drug offenses are punished too harshly, I tend to agree with the judge; it is difficult to draw comparisons between economic crimes and drug crimes. The nature of the harm to society really is quite different; economic crimes also often result in not only economic loss but can also produce significant health and safety risks

The Commission has a course to establish proportionality among sentences, and there are many economic crimes that create more than monetary harm; for example, harm to reputation of victims and loss of confidence in important institutions are very important considerations as well. And, even purely monetary crimes can be extremely serious in certain circumstances.

It seems to me another relevant consideration that is hard to quantify in terms of numbers is the notion of the perception of the fairness of the criminal justice system in our country. Are we advantaging those who commit crimes in the suites as opposed to those who commit crimes in the streets? And I think that is an important consideration to keep in mind.

I don't have a clear answer about how you account for all of this, but I think that needs to be factored in. If there is a large segment of the population that believe that certain classes, socioeconomic classes, in America suffer more harshly than others who have certain advantages, I think that is something that we need to be cognizant of as we develop proportionality in punishment.

The Sentencing Commission should address the comparison between economic and drug crimes, it seems to me, in terms of the need to fulfill the purposes of sentencing, which are set forth in the Sentence Reform Act: just punishment, deterrence, protection of the public from further crimes of the defendants, and, of course, rehabilitation.

Deterrence, it seems to me, is a key factor. In the economic crimes, people can make judgments about their behavior, and I think, based upon my experience both as a prosecutor and in representing people accused of white collar crimes, there can be a real deterrent impact in the amount of punishment that exists at the end of the day.

We are living in an era when technological advances have made economic crimes more easy to commit on a widespread basis, and the need for deterrence, it seems to me, as we move into these new areas is particularly important. Relatively high sentences to foster deterrence are necessary, we think, in appropriate cases.

By the same token, we have experienced widespread drug crime that has brought about devastating effects. Congress mandated high sentences in response to the drug crime problem, but has also enacted a safety valve exemption so that, at least, less serious offenders can avoid mandatory minimum sentences.

And we are now finding that there are new emerging drugs, such as Ecstasy and others, that are posing additional threats, particularly to our young people. The need to deter these crimes, it seems to me, is paramount, and the Sentencing Commission should establish sentences that act as an effective deterrent, as well as meeting the other purposes set out in the Act.

In short, sentences for economic crimes should not be set, in our view, to match sentences for drug crimes, but rather in both areas should meet these important purposes. But, obviously, as I think the deputy mentioned this morning, we have to appreciate that people do look and make comparisons between these kinds of punishments.

With regard to alternatives to incarceration, what they should be and whether they exist, there should be alternatives—I agree with the judge in that regard—to imprisonment for fraud and theft offenses where the offense level is relatively low.

We believe the current guidelines do provide those alternatives in appropriate cases. The guidelines provide alternatives to incarceration in a manner that we think carries out the mandate of the Sentencing Reform Act: that the Commission ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or otherwise serious crimes.

Now, in our view, the offense level determined under the guidelines, in combination with the offender's sentencing history, establishes the seriousness of the offense through this mix of factors, and the guidelines do provide for alternatives such as probation and probation with conditions of confinement.

Whether additional alternative types of sentences are appropriate is something that I think is worthy of study by the Commission, and hopefully, meetings such as this one will provide a dialogue so that judges, prosecutors, defense attorneys, academics, and other members of the public can contribute to dealing with these issues.

So I am happy to be here and listen to what people have to say as the Commission struggles with these difficult questions.

JUDGE KENDALL: Thank you very much, Mr. Robinson.

Now, I am trusting—one thing I wanted to do is not have a scripted panel discussion, and I don't think we are going to have that, and I am trusting. I don't know this for a fact because I have not talked to Jim Felman about what he is going to discuss, but I am trusting that, much like Paul Harvey, we might hear the other half of the story now. Mr. Felman?

MR. FELMAN: Thank you, Judge. I don't know if I am worthy of trying to get out the rest of the whole story here, but I will try my best to express my views as simply those of one isolated, randomly selected, cynical, jaded, biased, defense attorney.

But I do want to take the opportunity to thank the Commission on behalf of the Practitioners' Advisory Group, which Barry Boss and I co-chair, for the opportunity for many of our members to participate in this conference and also for the Commission's ongoing willingness to listen to us complain.

The answer to question one is, yes.

The answer to two is, no.

And the answer to three is, yes.

JUDGE KENDALL: Would you care to elaborate on that?

MR. FELMAN: Well, loss is the best proxy for culpability. There are so many different kinds of fraud cases, it is really hard to write a guideline that is going to work in every case perfectly. I think that my own view is that of a qualified, yes. I wish there were more emphasis placed on things like role in the offense rather than just looking at the dollar numbers. I think that tells you a little bit more about the real severity and the culpability of this offender.

But you have to write a guideline, and I am reconciled to the fact that loss does probably do the best job of measuring the harm to the victim and the overall seriousness of the offense, but with two caveats. The first caveat is, "Let's not forget why we are bothering to figure out what the loss is." Let's not forget what we are doing.

What we are trying to do is use loss as a rough proxy for culpability, as a way of comparing the seriousness of one offender to another. We are not measuring loss as an end in and of itself. That can be a lot of trouble. So what that leads me to is, in specific terms, let's not fool with a rule that makes us go figure out, with absolute precision, items of loss that are going to be present in every case because all we are really trying to do is compare cases.

An example of this is interest. Professor Cohen, you are dead wrong. Interest should not count. Interest isn't given to me on a piece of paper, it is in some box of documents somewhere that I have got to go get and figure out and subpoena and we have got to have a hearing about it. It is going to be roughly the same in every case. Why bother?

And frankly, you know, interest probably applies only in some cases. There are some people who say, well, if it is bargained for, if you promised to pay the interest, that should count. That is idiocy. I mean, that is like saying—

JUDGE KENDALL: Don't hold back. Tell us what you really think.

[Laughter.]

MR. FELMAN: I am not, Judge. I mean, you know, how would you react to a guideline that says, if somebody steals \$100,000, it's a base offense level 6, but if somebody goes out and borrows it and promises to repay it at a certain rate of interest and may even intend to repay the money, we will make that an 8. I mean, there is just no basis for—

MR. ROBINSON: Are you a candidate for an interest-free loan?

MR. FELMAN: Well, if you steal my money, it is the same to me. Anyway, the first caveat is, let's keep it simple. Try to figure out some rough way of measuring direct loss and not get bogged down in too many details that don't really help the underlying purpose.

The second caveat is gain. I have had very few cases where the defendant got all the money or, in some cases, any of the money. To me, there is a palpable difference in culpability between a defendant who sets out to steal half a million dollars and does and pockets it and buys Mazerattis and lives some lifestyle above his means and the poor mid-level manager in a corporation stuck in the wrong place who commits a crime and goes along with some practice that results in a half million dollar loss and doesn't get any of it. He may keep his job. He may get his salary.

But those are two completely different people, and these guidelines treat them identically. I will go along with using loss as the starting point because the victim still lost \$500,000 no matter how it happened, and I hear that. But you also have to take into account the culpability of the offender.

So, if you are going to start with loss, the second caveat is there has got to be an encouraged departure where gain is significantly different from loss. And that door swings both ways because there are also cases in which the loss may be zero, but the gain is huge. And it just doesn't look right to say, this is a six plus a two for minimal planning, eight, probation, you are on your way; and, by the way, he made \$10 million from it.

There probably needs to be an encouraged upward departure where gain is significantly different from loss in the other direction. So, with those two caveats, probably can't—

JUDGE KENDALL: Let me interrupt, can federal judges really be trusted to do that?

MR. FELMAN: You, in particular, or in general? [Laughter.]

JUDGE KENDALL: Let's just leave it with the Tampa judges.

MR. FELMAN: Yeah, I think that they can. I mean, obviously, I haven't experienced departure mania in Tampa. I think they can be, and I think it is going to be probably a relatively reasonable or modest departure, and we are just trying to get close here, folks. I mean, we are not going to be able to nail it on the head every time.

If it is a couple offense levels off here or there, let the judges do it if it helps mirror culpability better. So I am not afraid of departures. I think that they are usually modest and they usually make sense. I think that particular departure would.

Question 2: Are fraud cases sentenced too leniently? Now, I am assuming we are discussing the cases that are charged as fraud cases and not money laundering. Because, every serious fraud case I see, this entire discussion is irrelevant because they just charge it as a 1956, usually a conspiracy; nobody knows what happened but there is a transaction and it is a fraud and Base Offense Level 23, good bye.

So, you know, without a fix to the money laundering situation, half of this conference is moot. But, assuming that we can fix that, then let's talk about the severity levels in fraud cases.

A little history—Andy Purdy told us that in 1987 the Commission tried to mirror the sage wisdom of the entire body of the federal judiciary—the people, the President, and everybody selected as the best people we can find to sentence people—and mirrored what they had been doing with one exception, economic crimes. "We are going to hammer those people a little harder than what is being done."

That was 1987. It took two years to come up with a new table that hammered them even more. A one-level increase phased in at \$40,000, two levels at \$350,000; a three-level increase at \$800,000; and four-, five-, six-, and seven-level increases above the previous table at higher levels.

A couple of years later, an encouraged upward departure was put in where the loss doesn't adequately capture the seriousness of the offense. So, for almost the last ten years, judges have an encouraged departure in cases in which there are non-monetary factors that are so significant that they really need to be taken into account and there should be an upward departure. We have had that.

Then, over the years, we have had all these tinkering that have added a plus two for this, and a plus two for that, or a floor of 24 for this, and all of them in one direction. Then, just in '98, we had a two-level bump for sophisticated concealment which, by the time it could even become effective, had been transformed into sophisticated means. So you get two for more than minimal planning and then two more for sophisticated means and then two more on top of that for mass marketing.

We don't even know what the effect of these '98 amendments is. A four-level bump can about double somebody's sentence. So, what we are not seeing in the chart is what is the actual impact on the sentences from these little bumps we are putting in.

So, we have been going in only one direction here. There has been a suggestion we should ask the public what they think and respond to that. Well, here are some statistics—I don't have any charts—but I think I can just state them and I think the force of them speak for themselves.

From 1986 to 1997, an 11-year period, the federal prison population nearly tripled. From 1984 to 1998, a period of 14 years, the average federal sentence roughly doubled. At the beginning of that period, 83 percent of the people polled by the Bureau of Justice Statistics thought that sentences were not harsh enough. Having tripled the federal population and doubled the average sentence, the perception has remained unchanged every year ever since.

The range has varied between 78 and 86 percent. So I can save all the pollsters all the money. If you want to go ask the public what they think, they are going to tell you to raise sentences. No matter how high you raise them, the answer isn't ever going to change in my view. So, in any event, that is what good you get from asking the public.

Now, what would be the indications from the judges that there is a need for an increase in severity? What sort of statistics would we expect to see there? I would think you would see a whole bunch of frustration, with judges cramming into the high end of the range, putting in upward departures. You would expect to see that, right?

Well, in embezzlement cases, four percent of the cases are sentenced at the high end of the range; 7.5 percent are sentenced above the mid-point anywhere, including the high end of the range. And about 70 percent of them are sentenced at the low end.

In fraud cases, the numbers are a little higher; 12 percent of the fraud cases are sentenced at the high end of the guidelines range. The total amount of all fraud cases sentenced anywhere above the mid-point is 18 percent. Less than one in five gets his sentence above the mid-point of the current range; 62 percent are sentenced at the dead bottom of the guidelines range.

Now, I know that somebody will say, "Well, wait a minute, that is because there is a plea agreement or judges just feel like, you know, they ought to do that or they don't want to be harsh. You know, that is just kind of how the practice is."

Well, I guess if that were true, then those numbers would be higher than the overall percentages for high end across all cases. That is not true, either. If you take into account all cases, 14.3 percent are sentenced at the high end of the range. So the percentage of cases sentenced at the high end of the range for all cases is higher than in the fraud cases that we are talking about needing to increase. The same thing for the other percentages.

Upward departures: the statistics from '99 talk about 3,529 fraud cases. Out of those cases, there were 38 upward departures and 494 downward departures. I mean, if the judges think they don't have enough room at the top end, we would certainly expect we would be seeing a whole lot of upward departures and not many downward departures. But the downward departures outnumber the upward departures by ten-fold, and that is not counting substantial assistance ones. The same numbers in embezzlement.

We talked earlier about putting doctors in jail. There was a complaint made, I think by Mr. Holder, that a certain doctor under a certain scenario wouldn't get enough time. Look, I have represented doctors, and I watch them go to jail, and it is absurd to some extent. I mean, these are people who are highly educated, who are doing what we would hope anybody in the community would do. They are not evil people who get mixed up in these things. I have represented very few evil people.

Just the fact that they are going to have their ticket yanked, that they will never be able to practice medicine again, is the worse deterrent you could put on a doctor. I mean, putting him in jail is an afterthought. So putting a doctor in jail for three years instead of one year doesn't change much other than using up space in a prison bed for a doctor. So, you know, the social stigma point that we have heard about is a very powerful one. That is the real punishment that my clients are getting.

Question 3: Alternatives to incarceration—yes, we like them. They aren't used much in the federal system. We could be using halfway houses more, home confinement more, intermittent confinement more. There is a congressional mandate to the Sentencing Commission in the enabling legislation that says that the Commission shall ensure that the guidelines reflect the "general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

And of course, the whole rub is what is an "otherwise serious offense?" Under the current guidelines, prison is mandatory for all fraud and theft cases of more than \$10,000 of loss. I don't know if

there has been any empirical study done on anybody on what is the effectiveness of letting people keep their jobs, if they can keep them, stay with their families to some extent, and live in a halfway house, and be punished via intermittent confinement, going to jail on the weekends.

There are a lot of creative solutions there that, if judges were granted the flexibility, I believe they could utilize and they would utilize responsibly. The Practitioners' Advisory Group has proposed that congressional legislation be implemented by expanding Zones B and C, only within Criminal History Category I, to some extent; so that, for first-time offenders, we have got some creativity as a possibility, instead of saying, "Lock them all up." I have probably gone over my time.

JUDGE KENDALL: Thank you very much, Mr. Felman. Now we will hear from Dr. Cohen with, perhaps, a different perspective.

PROFESSOR COHEN: First, I was accused of publishing too much, then I was called an "idiot." But that is okay, I like that. That is what happens to us in class when we get evaluated by our students, and that is quite nice.

But I was also told afterwards, even though you didn't like my idea on interest which is correct, not wrong, you did like my issues about the moral stigma and I think that is a really important factor to consider.

Let me try, very briefly to get to question number two and spend a little more time on that. Is loss the best proxy? Of course, it is, and I even added "include the non-monetary," and I think this is a point that Daniel Nagin made, a point that others have made, that loss is not always just monetary. The difficulty, of course, is how you account for that, and I think those are interesting questions.

The way it seems to be accounted for is through some additional changes in the guidelines by saying certain types of crimes are inherently more harmful. But, of course, we know that is not all. It shouldn't be just loss, and I think we all can agree that there are other things like the conviction rate, the vulnerability of victims, and I think most importantly, prior offender history.

Let me go on to number three, and then I am going to come back to question two. On question three, should there be alternatives? Again, that makes a lot of sense. It makes a lot of sense, primarily, because like I said before, prison is costly. The question is, does it add any deterrent effect? That is really the bottom line. Is it worth the extra cost? For an offender who has no prior history and where restitution is likely to be paid, it makes a lot of sense to use some of these alternatives.

There may be some benefit from short-term prison sentences for all fraud offenders because of what I talked about before: the certainty of punishment becomes important. But all this, of course, gets caveated by my earlier statement that the moral stigma of punishment is really the overriding factor in most, not all, but most of these crimes. That is about all I want to say about alternatives.

Is fraud punished too leniently relative to drug crimes? Well, first of all, I noted that the Judicial Conference Committee on Criminal Law has an interesting paper they put out on some of these issues, indicating that the fraud and theft guidelines are too lenient relative to street crime and that the slope of the loss table is not steep enough. So I want to address both of these questions very briefly.

First, it is difficult to compare the severity of punishment across crime types unless we compare other factors such as harm, detectability, et cetera. Presumably, somebody who sells \$10,000 worth of cocaine causes more social harm than someone who embezzles \$10,000 from a bank, although as we heard, there are issues about what is the loss beyond the \$10,000.

But, in addition, drug dealers are less likely to be detected. There is no victim to report. Oftentimes, these are called "victimless crimes," although we know there are all kinds of victims associated with the side dealing with all of the violence that occurs. That is a different issue and that, in fact, gets handled elsewhere in the criminal justice system.

But I think one of the big reasons for thinking that these are different crimes is that frauds, particularly large frauds, tend to be detected. There is a victim who, in many cases, has every self-interest in getting that offender out there and getting the money back and getting some conviction. So detectability may play one of the roles in thinking about why economic crimes are not sentenced as severely, in terms of prison time.

And, of course, Congress has spoken about minimum mandatories and so we don't need to get into that.

Let's look very quickly at some of the data. These are all Sentencing Commission data. They looked, prior to the guidelines in '84, and you see about 40 percent, 39 percent of economic crime offenders are sent to prison. This is the percentage going to prison. That increased under the guidelines. (See Figure Cohen-5.)

A 1991 study showed that in 1990 this number was 51 percent—and that was the big push to increase the percentage of white collar economic crime offenders who go to prison. And I just looked at the most recent sentencing guidelines report, and it shows that, in fact, we are now up to 61 percent.

So there has been a dramatic increase. Yes, there is a higher percentage, of course, of drug offenders going to prison, but there has been a 50 percent, overall increase in the percentage of economic offenders going to prison.

Then I want to come back and keep asking that question about, "If it ain't broke, don't fix it." Do we have good evidence that we need more deterrent effect?

Let's look at the average sentence that is received for those who are going to prison. It really didn't change much under the guidelines. It went from about 14 months to now about 18 months. (See Figure Cohen-6.) The real reason it didn't go up much, of course, is that we have put a lot more offenders in prison for short times; that is, the increase from 39 percent going to prison to 61 percent. Most of those are getting six months, eight months, ten months, so that brings the average down a little bit. So that is why, even though we have more people going to prison—more economic offenders going to prison—the average sentence is not going up dramatically.

You can see what happened to drug offenses, and we know why.

The other thing that Courtney showed this morning was that there are more small-dollar frauds, and that is not necessarily true for drugs. I hadn't compared that, it would be kind of interesting to look at it.

One of the reasons, again, that these numbers are relatively low is because the bulk of criminal offenses are, in fact, under \$10,000 offenses.

Well, what is the expected penalty if you are convicted? Okay, this is what is facing somebody who is going to be convicted of an economic crime, and that is just multiplying the probability of going to prison times the number of months. You can see we doubled it so that somebody who is convicted of an economic crime could expect, on average, 5.5 months in jail. Now they can expect, on average, 11 months in jail, so it has about doubled. (See Figure Cohen-7.)

Again, I want to compare what is done with drugs. You can see what has happened with drugs. It has gone up dramatically.

Interesting question about proportionality—if you look at the low-dollar losses—I took this out of the Sentencing Commission report on cocaine sentencing in 1995. They use an example of \$42,000 worth of drugs which would receive an offense level of 14. This was marijuana. I looked at what a comparable fraud is worth. Well, comparable fraud, if I include more than minimal planning—as we know that is common—gets a 13-level, and the difference is about three months. So they are pretty comparable at low levels of fraud, pretty close.

Now let's take a look at \$1 million. Well, again, comparing the two, it looks as though the fraud is under-penalized relative to the drug offense. The difference between a 26 and a 32 is enormous, in terms of number of years. It is a five-year difference in terms of the actual number of years of sentence.

So the question is, though, "Is this good or bad policy?" And I guess the only thing I have to say to this, I think we again come back to, "If it ain't broke, don't fix it." Maybe a lot of people would argue that drug offenses are broke so they need to be fixed. Let me not touch that hot potato, but just say that I don't have evidence that fraud is broke.

Again, think about the large value offenses. Large-dollar-value drug offenders are highly insulated and hard to catch because they have got very, very well-insulated organizations. They are hard to find. They are hard to detect, hard to convict, hard to prosecute. So we expect, in terms of economic theory, that we would need a larger sentence because of the low probability of detection.

My comment earlier about fraud is also important; in the large fraud cases generally there is going to be a victim. Now, again, in cases where there is not, where there is a very small dollar figure for millions of victims and it is not in any victim's interest to take that on, that might be a good reason for government to get involved. It might be a good reason to have a departure or higher guideline. I don't know.

But I think that the point is that large dollar frauds tend to get caught and there is a victim out there who has the incentive to catch them and a stake in the outcome, so there isn't a need for as large a prison sentence.

One of the things that I do question, when I was playing around with the data and it was kind of troubling, was why the criminal history grid is so flat for economic crimes. If you look at the average sentence by length, by criminal career category, Category I means no prior record, and II is an increase in gradations and there is not a lot of increase. (See Figure Cohen-8.)

There is a huge increase for drugs, but for economic crimes, the second-time offender, to some extent, gets 17-21 months, third and fourth time. I think that is a question that I have. I don't know. I haven't examined the data well enough, but I think that is something to look into.

It is interesting to me, though, that this isn't just the case with fraud offenses. That is the nature of the grid. That is the way the grid works. And so, if you really want to ask where I should focus my attention, you might want to focus some attention on second-time fraud offenders or repeat offenders and question why they are repeat offenders. I don't know. Why are there repeat offenders, and why is it that they are getting only 21 months or 17 months?

Now, I wanted to tackle one of the concerns that was raised in the Criminal Law Committee's Conference report on the severity of the loss tables. It particularly noted a very interesting example, the *McDowell* case (*United States v. McDowell*, 109 F.3d 214 (5th Cir. 1997)), where there was a \$300,000 fraud and only \$8,000 was recovered. I calculated that as being 21 to 27 months, level 16 fraud, but the concern that the paper had was over the guidelines range.

If we include more than minimal planning, that is what we get, about 21 months. The judge wanted to impose an upward departure, wanted something like 37 months, a level 19, but was overturned on appeal. But the question is, "How do you raise the severity of the loss tables so that a loss of this magnitude would receive something more appropriate than two years if, in fact, you think of it as inappropriate?"

I guess one of the questions that I would raise is it seems to me that there is a big difference between an offender who squanders and hides; in a lot of these large-dollar crimes, the money is hidden overseas and never to be seen again. Restitution is supposedly required. Well, it is only given if it is available, if you can find the assets, only if, in fact, funds are at least available, somehow made available by the offender. And the offense level does not at all depend on whether restitution is given.

So, on the one hand, we have restitution that is supposed to be paid. It may be paid, it may not be paid. On the other hand, we have an offense level that is irrespective of the restitution. I put this as a proposal in quotes because I think it might be one way to think about dealing with this issue: if there is a perceived concern about the high dollar of losses and the victim losses that are occurring in some cases, you might want to think about adding unpaid restitution back into the loss calculation for purposes of calculating the offense level.

So then, if you have two offenders and you take this *McDowell* example; if a \$300,000 fraud results in restitution to the victims, they would get level 16, 21 to 27 months. However, if a \$300,000 fraud results in squandering the money and no payments, alleged no assets, that becomes a \$600,000 fraud which gets you to a level 19 which gives you 30 to 37 months.

The point is that there is now an incentive not to squander, not to hide your money. In fact, if there is money, if there are assets there, the bottom line is that it is a way to get your sentence back down to what it would be if you provided full restitution.

So this is just one idea I had, just to be a little provocative and throw it out there. But it might get at some of the issues about severity of crime that people have in the back of their minds where you are much more concerned about these large-dollar frauds that result in no restitution.

JUDGE KENDALL: Thank you, Dr. Cohen. You have heard a number of different points of view, some a little more passionate than others. You are welcome, if you want to raise your hand—we will bring a microphone to you so you can ask a question of any of the panelists about anything that they said. That is what we would like to have happen.

Let me begin by asking this question: three of the four panelists—and I will throw it open to anyone who wants to take this question—took the position that there would be some deterrence aspect to raising the offense levels or the fraud loss tables; if I heard it correctly, there would be a deterrence aspect to doing that.

So I want to throw this question out, maybe to be a little bit provocative: how many of you live in a community where federal sentencing guidelines manuals are thrown door-to-door? [Laughter.] Any of you? Obviously, there is a specific deterrence aspect for the people who are caught. But for a general deterrence aspect, I would like to throw it open to anyone who wants to comment about that; the guidelines generally, and the fraud loss tables, particularly, why you would say that doing anything with them would deter someone?

JUDGE GILBERT: Joe, can I just respond to that?

JUDGE KENDALL: Sure.

JUDGE GILBERT: The deterrence? I have always advocated to our U.S. Attorney, why don't you get billboards and go into these areas where there are high amounts of drug offenses and just put up what the guidelines are. You know, the deterrence is what the press reports people are sentenced to; people read about what someone was sentenced to in a fraud case or theft case.

You don't have the guidelines distributed like phone books. I have people appear before me and ask them, "Well, did you know what the guidelines were before you committed this offense?" They say, "Heck, no." They didn't even know about guidelines.

JUDGE KENDALL: That leads us to the question: what would lead the U.S. Sentencing Commission, as a body, to conclude that by raising the fraud tables that there would be any prospective deterrent aspect to doing that?

JUDGE GILBERT: You can't limit it to just deterrence. You have got to talk about just punishment and proportionality and you have got to look at the whole picture. You just can't pick one item out. Is raising these tables going to deter someone? Probably the marginal people. To the vast majority of the people that are hell-bent on committing a theft or a fraud, no. Raising these six months or 12 months isn't going to deter them. But it will the marginal people. And, if you deter one person or a handful of people, you know, is there not a benefit there?

PROFESSOR COHEN: That is reasoning that goes a pretty long way. I mean, I haven't gotten my first call from anybody yet who is thinking about committing a crime wanting to know what the guidelines would be. You know, I would like to market myself as knowing something about the guidelines so maybe they would call me, but I don't know if anybody has gotten a call like that yet, either.

I mean, I don't think there is any question, Judge Kendall, that there isn't any basis that we have heard that I would find convincing for the Commission to conclude that increasing these penalties is going to increase deterrence. Now it may be that you want to do it for other reasons, but deterrence isn't supported, I don't think, by anything we have heard.

JUDGE KENDALL: I believe we have a question.

QUESTIONER: This is, I guess, not so much a question but an observation directed both at Jim Felman and at Dr. Cohen. I would just like the two of your reactions to this.

Dr. Cohen had a chart up there that picked out three years and compared drug sentences and fraud sentences. I believe they were like 1984, 1990, and 1999. In looking at that trend because of the years you picked, it appears to show that there is a steady increase in both fraud sentences and drug sentences during that entire period.

In fact, if you had picked as your middle year, 1991, what you would have seen is that drug sentences peaked in 1991. And all of this is probably a little known fact in this group, it is a statistical truth that since 1991, the average federal drug sentence in this country has decreased by approximately 20 percent.

Now, whereas, in the same period of time, it is true to say that federal white collar sentences have, in fact, increased, albeit not a great deal. I am interested in your reaction to that, particularly Jim, because your argument essentially, I guess, is that if judges really thought that white collar crime was more serious and so forth that they ought to respond to that and we ought to be able to see their responses.

In fact, at least I would suggest to you, tentatively, that judges do behave and have demonstrably behaved very differently with respect to white collar and drug crimes because, for a variety of reasons, drug sentences are coming down and white collar sentences are going up.

MR. COHEN: Let me first speak to the data. I was looking at the '84 versus the '90 because that is what the Commission had used in its report to Congress in comparing before and after the guidelines. In fact, drug sentences were up dramatically as I showed.

But, actually, I just went to the latest report, 1999, and used those figures. Again, drug sentences are up. Maybe you are looking at different data. I just pulled it out of the Sentencing Commission's *Annual Report*. I haven't analyzed it in detail, so you could well be right. Sometimes, when you just pull a number out of a table, there can be a problem with it. But I think the more important point is, number one, that economic offenses have been dealt with much more seriously. That was the reason I was showing that. That, in fact, if you look at the increase, we have got a 50-percent increase in those going to prison.

We have doubled the average expected sentence. Yes, drugs were going up faster. Maybe they are actually going down now, I don't know that. But that, to me, was externally generated by Congress, and those are different issues.

And the more important point is what is a deterrent? And I think what we hear is that it is the moral stigma, it is the threat of being prosecuted and convicted that is as much a deterrent as anything else;

that the extra length in prison time is not going to give us an awful lot of deterrent effect. I think that is sort of one of the things that we are hearing.

JUDGE KENDALL: Someone else have a question? We need to get a microphone to you.

QUESTIONER: I just kind of want to respond a little bit. We have heard a couple of times this morning about the horrible impact of the stigma for the economic crime offender. If that moral stigma, which has been used a couple times this late morning, is so very important to these folks, then they wouldn't be committing these crimes to begin with.

My experience in interviewing them and in supervising them, it is as much the embarrassment of getting caught and prosecuted as it is what they did. Secondly, I find it very offensive that we should be treating more leniently economic crime people, people who have more income, people who are better educated, just because they may live in our neighborhoods.

And, finally, we find, in supervising folks after the fact, that the economic crime people land on their feet. They get jobs. They may not be able to live in \$300,000 or \$400,000 homes again. They may not be driving high-end luxury vehicles, but they get jobs and they are integrated into the community much better than people without a background such as theirs. So I don't have a lot of empathy for them.

JUDGE KENDALL: Another question?

QUESTIONER: I have been listening intently to all the discussion, and I want to pick up on a word Mr. Felman used because it was only used once in the whole morning and I want to add a little bit to it. He used the word "simplicity." It seems to me if you are going to talk about problems with the guidelines, this new Commission has a marvelous opportunity to face up to the undue complexity of the guidelines system. I am not talking about whether they are too severe or too lenient; that is a wholly different issue.

But, if anybody came from Mars and took a look at this system, they would say it is way too complicated and there is a risk it is going to get more complicated. When you talk about whether loss should be the factor, sure, I can agree it should be the factor. But, should it come in 21 flavors? The answer to anybody rationally looking at it would be, "No, it shouldn't."

Now the point was made from the panel, if you steal more money, do you get more punishment? Doesn't everyone agree? No, everyone doesn't agree. The table says stealing \$10,000 is worse than stealing \$5,000. Is it? My answer is, "Absolutely no." The guy who goes with a gun to a convenience store and takes \$10,000 and the fellow across town who takes \$5,000 is the same crime. They take what is in the drawer. They don't say, I feel like committing only \$5,000 worth of moral culpability.

In the whole world or in the 12 states that have guidelines, only the federal guidelines system makes a dollar distinction between \$5,000 and \$10,000. You ought to take your loss table and say, "Look, there are small crimes, small losses, medium losses, big losses and very big losses."

I talked to a lawyer today from Michigan. He was complaining their system got too complicated. I said, how many loss tables do you have, categories? He said, four. Well, four is right. If the people who thought about it in Michigan could realize four is enough, why on earth are we burdened with a 21-level system here?

I will tell you one reason why we are. It is because we have an assumption that, when the crime is reported to the prosecutors and then put into the court, it will come as a certainty what the real loss is. That is an illusion.

If you are talking about a fraud scheme—in one part of the country a postal investigator investigates it, in another part of the country, another postal investigator investigates it. One guy is real busy so he finds out about only 80 victims, so he puts the loss at \$200,000. Another guy is more industrious or for whatever reason he investigates it harder. He runs the loss up to \$400,000. They are both investigating fraud schemes, but we operate on the assumption one of them is a \$200,000 scheme and one of them is a \$400,000 scheme.

We go to the loss table and we make distinctions. It is an absolute myth. They are both fraud schemes, and the only variation is the industriousness of the postal inspector or the time he spent on it or what the prosecutor chose to do. So you could simplify this thing terrifically. And, as you go into discussions this afternoon, I urge you to ask as we are discussing all these variables, "Are we going to count interest?" Are we going to give a discount for money returned to the victim?

A fellow runs a \$600,000 fraud and some people want us to decide if we are going to adjust the \$600,000 fraud down by \$30,000 because he gave \$30,000 worth of benefit to the victim? That is crazy. Somebody used the word "idiocy" and, on some matters, that is right. If it is a \$600,000 fraud, it is a pretty big fraud. It is not a \$20 million fraud, but it is pretty big.

And don't take the time of several thousand probation officers and U.S. Attorneys and judges and defense lawyers to decide whether to bump it from \$600,000 to \$630-up or to \$580-down. It is madness. It is not worth anyone's time. It has nothing to do with penology, nothing to do with criminal law. It satisfies a statistician's view of the purity of a smooth curve. That is all it does.

And my final word is, I hope to talk about this later during our sessions but this Commission, for the first time in 13 years because it is a brand new Commission, has the perfect opportunity to take a fresh look and say, "Look, before we decide whether to add one point for this, minus one for that," step back, stop counting the trees and take a look at the forest, and say, "Are each of these adjustments worth it? Are they worth the time, the burden on the system?"

I wrote an opinion the other day in a criminal tax case, 30 pages to calculate the tax loss. The civil side of the case would never have bothered with it because they would have settled the case. They would have settled the civil liability. But because it was a criminal case, I had to spend 30 pages determining about 20 disputed items of tax loss.

I knew it was somewhere between \$100,000 and \$1 million, but that wasn't good enough for the Commission. I had to determine which of the six boxes within there it fell into.

So this new Commission ought to step back, take a deep breath, rebuff the pressure to make all these refinements, and take a look at the essentials of what a guideline system ought to be; look at the states that are doing it flexibly, they know what they are doing. They are not stupid people out there in the states. It is only the federal system that has a 21-level box system with all these minute adjustments.

And, frankly, I have said this in many other forums, this system is giving guidelines around the world a bad name because the rest of the world that began to look at guidelines and said, "Maybe, we should structure discretion," now says, "Well, if it is your 400-page manual with all those levels, we are not going to touch it."

You have got a great opportunity to build on Mr. Felman's word, "simplicity." If you want to debate severity or leniency, that is a different fight, and that is a whole different issue. But "simplicity" you can achieve without taking on any of the political fights that are inherent in the other issues. Thanks.

JUDGE KENDALL: Thank you very much, Judge.