UNITED STATES SENTENCING COMMISSION
SYMPOSIUM ON ECONOMIC CRIME
SEPTEMBER 18-19, 2013
JOHN JAY COLLEGE OF CRIMINAL JUSTICE, NEW YORK CITY

AGENDA

DAY ONE — September 18

8:45 a.m.
WELCOME AND INTRODUCTIONS *Gerald W. Lynch Theater*

Jeremy Travis
President, John Jay College

Hon. Patti B. Saris
Chair, U.S. Sentencing Commission

9:00 a.m. – 9:30 a.m.
PLENARY SESSION I *Gerald W. Lynch Theater*

Laying the Foundation for Discussion: Trends in Economic Crime Sentencing

Courtney Semisch
Senior Research Associate, U.S. Sentencing Commission

9:30 a.m. – 10:30 a.m.
PLENARY SESSION II *Gerald W. Lynch Theater*

Views from the Stakeholders Regarding the Fraud Guideline

Moderator: Hon. Charles R. Breyer
Vice Chair, U.S. Sentencing Commission

Russell Butler
Chair
Victims Advisory Group

Michael Caruso
Federal Public Defender
Southern District of Florida

Hon. J. Phil Gilbert
United States District Judge
Southern District of Illinois

Hon. Melinda Haag
United States Attorney
Northern District of California

Hon. Loretta Preska
Chief United States District Judge
Southern District of New York

11:00 a.m. – 12:30 p.m.
PLENARY SESSION III

Gerald W. Lynch Theater

Visions of Change for Sentencing of Economic Crime

Moderator: Hon. William H. Pryor, Jr.
Commissioner, U.S. Sentencing Commission

Jennifer Arlen
Professor of Law
New York University

Miriam Baer
Associate Professor of Law
Brooklyn Law School

Steven L. Chanenson
Chair
Pennsylvania Commission on Sentencing

David Debold
Gibson, Dunn & Crutcher
Washington, D.C.

James E. Felman
American Bar Association
Committee on Sentencing

Hon. Gerard E. Lynch
Circuit Judge
Second Circuit Court of Appeals

2:00 p.m. – 3:30 p.m.
GROUP BREAKOUT SESSION I

Measuring the Seriousness of Economic Crimes — Discussion of Loss, Motive, Measuring Victimization, and Defining "Culpability"

4:00 p.m. – 5:30 p.m.
GROUP BREAKOUT SESSION II

Rewriting §2B1.1— Discussion of Specific Suggestions and Proposals

RECEPTION
5:30 p.m. – 6:30 p.m.

Co-sponsored by:

- **John Jay College of Criminal Justice**
- **Federal Bar Association, Chapter Activity Fund**
- **Federal Litigation Section of the Federal Bar Association**
- **Criminal Law Section of the Federal Bar Association**
- **District of Massachusetts Chapter of the Federal Bar Association**
- **Federal Courts Committee of the New York County Lawyer's Association**
- **Southern District of New York Chapter of the Federal Bar Association**

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DAY TWO — September 19

9:00 a.m.
INTRODUCTION OF KEYNOTE SPEAKER — *Gerald W. Lynch Theater*

Hon. Patti B. Saris
Chair, U.S. Sentencing Commission

9:05 a.m. – 9:35 a.m.
KEYNOTE ADDRESS — *Gerald W. Lynch Theater*

Hon. Michael Oxley
Baker & Hostetler LLP
Former Congressman for Ohio's Fourth Congressional District and Chairman of House Financial Services Committee

9:35 a.m. – 10:05 a.m.
PLENARY SESSION IV — *Gerald W. Lynch Theater*

Report from Breakout Groups

Kathleen Cooper Grilli
Deputy General Counsel, U.S. Sentencing Commission

10:30 a.m. – 11:45 a.m.
PLENARY SESSION V — *Gerald W. Lynch Theater*

How the Competing Purposes of Sentencing Influence Sentencing Policy for Economic Crime

Moderator: Hon. Rachel Barkow
Commissioner, U.S. Sentencing Commission

Neil Barofsky
Senior Fellow, NYU Law
Former Inspector General for TARP

Ellen S. Podgor
Professor of Law
Stetson Law

Shanna R. Van Slyke
Assistant Professor of Criminal Justice
Utica College's School of Economic Crime and Justice

Meg Garvin
Executive Director
National Crime Victim Law Institute

Brett L. Tolman
Ray Quinney & Nebeker
Former United State Attorney
District of Utah

11:45 a.m.
CLOSING REMARKS — *Gerald W. Lynch Theater*

Hon. Patti B. Saris
Chair, U.S. Sentencing Commission

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UNITED STATES SENTENCING COMMISSION
SYMPOSIUM ON ECONOMIC CRIME

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September 18, 2013
8:45 a.m.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE

524 West 59th Street New York, NY 10019

WELCOME AND INTRODUCTIONS: Jeremy Travis Hon. Patti B. Saris Hon. Ricardo H. Hinojosa Hon. Ketanji Brown Jackson Hon. Charles R. Breyer Hon. Dabney Friedrich Hon. Rachel Barkow Hon. William H. Pryor, Jr. Hon. Jonathan Wroblewski.

MR. TRAVIS: Good morning, everybody. My name is Jeremy Travis. I'm the President of John Jay College of Criminal Justice and I'm delighted to welcome all of you to this meeting of the United States Sentencing Commission. I apologize for having a frog in my throat, whatever is the appropriate cliché. I'm told the antibiotics will kick in real soon, so we'll see.

But I'm delighted, really thrilled and honored that you have chosen John Jay as the place for this very important and timely meeting of the Commission. With the privilege of having the mic for a moment, let me just tell you a bit about where you are.

So John Jay College is a remarkable institution. I'm privileged to be its president, I've been here now nine years. Here are some basic facts. We're almost 50 years old. We were founded, for those of us who remember those days, at a time when there was a lot of turmoil in our

country about the role of the police, the criminal justice system, race riots in our cities. And a number of presidential commissions said it would be really important to have people who do the work of justice, particularly the police, be college educated. So John Jay was founded then.

And our motto, which applied then and it applies now, is "educating for justice." So we're -- some people think we're a cop college, that's not what we are; we're a liberal arts college where students come if they're interested in questions of justice.

So you'll see our logo outside that has many modifiers to that word, justice, a powerful word: International justice, environmental justice, racial justice, social justice, criminal justice, et cetera; for our English faculty, we also put up there poetic justice.

So we have 15,000 students who come to John Jay every day -- not every day, thankfully, we couldn't accommodate them.

Two doctoral programs, nine masters' programs, and about twelve- and- a- half thousand of them are undergraduates and they go on to law school, and go on to policing, they go on to do human rights work. They do all sorts of wonderful things to make the world a better place.

We're also the most diverse of the senior colleges within the City University of New York, something we're very proud of. Three- quarters of our students are students of color. And they come here, all of our students, with just hunger and ambition, mostly working class immigrant kids, and we love helping them find their way up that ladder to economic success. So that's us.

So let's just talk a bit about why we're so pleased to have you here. We think a lot about questions of criminal justice and the criminal sanction and sentencing and prisons and reentry here, this is my own area of scholarly work before coming here. And to think that we're hosting a meeting of the United

States Sentencing Commission where you're addressing those questions is a great tribute. We sort of feel like it's in the air here.

But it's also, as you know better than I, an important time for you to be doing this work. There's a lot of -- I was just talking with Judge Saris about it -- and we have a sense that there's some important sort of changes underway in our country. And this is the time for us to sort of think harder about old questions of what's the appropriate response to violations of the criminal law, and what -- to even push it back one further step, what is appropriate to be recognized as a violation of the criminal law. And ironically, there's a lot of work underway on that question, in fact today, in Washington.

And the question of economic crime, where better than New York City to talk about those issues. I'll make no further comment on Wall Street.

But let me take just a moment to also

present a preview of coming attractions. One of the hats that I wear is I'm Chair of the Committee on Law and Justice of the National Academy of Sciences. And that committee has undertaken a review of the evidence of the science on what we -- the phrase, literal phrase of our -- title of our panel is the Causes and Consequences of High Rates of Incarceration in America.

So this panel has almost done its work. It took us two years and five meetings, two- and- a- half days each, to arrive at a consensus, which we have, on the causes. How did we get here? How did we get to the place where America now has more than quadrupled the per- capita rate of incarceration after 50 years of stability leading up 1972? How did this happen? What caused it? So that's the big -- one big question that we're answering.

And the second question is, what are consequences of being here for the people incarcerated, for public safety, for their participation in the labor market,

for their children, for civic life, voting rights, and the like.

So these are some of the big questions facing our country, and we are hopeful that the report of the consensus panel that I chair will be useful to facilitating that national conversation.

And one of the important people, one of the important members, someone I've enjoyed getting to know over the years that we've done this work, is your very own Judge Ricardo Hinojosa. He's somewhere here. There he is.

Ricardo and I have -- often in those wonderful sidebar conversations you have in hallways in these meetings -- we sort of look at each other and just sort of shake our head and say, "Will we get to the end of this and try to figure out how to sort of bring these different views under one big umbrella?" And he gave me a lot of help in getting us to the point where we are.

We can't talk publicly yet about our findings, but I'm very pleased with the

progress that we've made. And particularly grateful for his contributions.

So with no further ado, I welcome you to John Jay. We'll see each other at a reception in my office after you conclude your day. And I look forward to hearing more about what you've done. And thank you for choosing John Jay as the venue for this very important meeting.

And I now turn the microphone over to your Chair, Judge Patti Saris, with the hope that I'll drop in and out and learn something and make believe I'm back in law school. So welcome.

HON. SARIS: Thank you. So good morning to everyone. You're up, awake, beautiful day in New York City. I'd like to take this opportunity to thank President Travis for his very kind welcome and also for agreeing to host this event. It's a gorgeous facility and his staff has been terrific, so thank you, thank you.

On behalf of myself and the other commissioners, I would also like to

welcome all of you to the Commission's Fifth Symposium on Crime and Punishment -- a very Dostoyevsky title -- in the United States.

As you know, the topic of this one - and- a- half- day event is economic crime. And few places boast more expertise in dealing with this important issue than New York City. After all, New York is the home of Wall Street and the New York Stock Exchange and the center of American financial markets. It is also home to some of the prosecutors, defense attorneys, and judges most familiar with the challenges presented by fraud cases.

But that is not to say that economic crime is centered here alone. As we know, fraud offenses occur all over the United States, which is why we have invited stakeholders from around the country, Texas, California, all over the country, to be here with us to discuss how the commission can improve 2B1.1 of the sentencing guidelines, known by all of us as the fraud guideline.

I'd like to introduce the members of the Commission. And I want to go through them one by one. We're not speaking right now, although you'll be seeing us, a lot of us, throughout the next day and a half.

Let me begin with Judge Ricardo Hinojosa. Judge Hinojosa is the Chief District Judge for the Southern District of Texas and has been a district judge on that court since 1983. Judge Hinojosa has served on the Commission since 2003. While he currently serves as the Vice Chair, he has also served as the Chair of the Commission.

Next to him is Judge Ketanji Brown Jackson. Judge Jackson was confirmed as the United States District Judge for the District of Columbia just this year. She's a brand new baby judge. She has served as a Vice Chair of the Commission since 2010. So she's not new on the Commission at all, but she's a new judge.

Next to Judge Jackson is Judge Charles Breyer, aka Chuck. He is a Senior District Judge for the Northern District

of California. Judge Breyer has served as a United States district judge since 1998. He joined the Commission this year and also serves as a Vice Chair.

Next to him is Dabney Friedrich, who has served on the Commission since 2006. Immediately prior to her appointment to the Commission, Commissioner Friedrich served as an associate counsel at the White House. She previously served as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant U.S. Attorney, first for the Southern District of California, and then for the Eastern District of Virginia.

So next to Commissioner Friedrich is Rachel Barkow, who joined the Commission just this year; in fact, June. Commissioner Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law where she focuses her teaching and research on criminal and administrative law. She's written extensively about

sentencing guidelines and commissions. She serves as the Faculty Director of the Center on the Administration of Criminal Law at the law school.

Seated to her left is Judge William H. Pryor, who also just joined the Commission this year. Judge Pryor is the United States Circuit Judge for the Eleventh Circuit Court of Appeals, appointed in 2004. Before his appointment to the federal bench, Judge Pryor served as the Attorney General for the State of Alabama and was also instrumental in setting up the Alabama Sentencing Commission.

And, finally, Jonathan Wroblewski is seated at the far end of the table. Commissioner Wroblewski is the designated ex- officio member of the United States Sentencing Commission representing the Department of Justice. He serves as Director of the Office of Policy and Legislation in the department's Criminal Division.

So you've met us all. What led us

to hold this event today? Fraud is always one of the top offense types sentenced each year, exceeded only by immigration and drug offenses; and as such, is inherently of great and continuing interest.

The Commission is aware of Congress's longstanding interest in the sentences for economic crime offenses. In fact, one of the reasons underlying enactment of the Sentencing Reform Act and creation of the Commission was a concern that sentences for certain types of economic crimes, such as fraud, embezzlement, and tax offenses, were unduly lenient, particularly as compared to those imposed with the substantially equivalent crime of larceny.

The legislative history of the Sentencing Reform Act indicated a concern that sentencing white-collar offenders to a small fine and little or no imprisonment created the impression that certain offenses could be written off as a cost of doing business.

Today, though, we know from our data that sentences of little or no imprisonment are no longer the norm for economic crime offenses. In fact, the average sentence length for offenders sentenced under the fraud guideline has steadily increased for the last 10 years.

We also know that over time for all crimes, average sentences have increased on a parallel course with increases in the guidelines. This trend suggests that guidelines have an anchoring effect on sentences.

In the course of preparing the Commission's report to Congress, released earlier this year, on the continuing effects of Booker, the Commission saw that for fraud offenses, there is a widening gap between the average guideline minimum and the average sentence imposed. Thus, the fraud guideline's anchoring effect on sentences appears to be diminishing.

This trend is of concern and is particularly notable because it is at odds with the result of a judges' survey just

conducted in 2010. Only 10 percent of the judges who responded to the survey thought that the guideline range for fraud offenses was too high. In fact, the large majority of the judges responded that the guideline range was either generally appropriate for fraud offenses or actually too low.

So what's happening here? Not withstanding the survey results, the finding in the Booker report suggests a possible need for revision of the fraud guideline. In addition, the Commission has received public comment from a broad range of stakeholders concerning the fraud guideline. Those stakeholders include the Department of Justice, the federal public defenders, federal judges, in opinions and in statements, the Commission's advisory groups, and the American Bar Association, among others. While some limit their suggestions to minor adjustments, others call for a complete overhaul of the guideline.

The last comprehensive revision of

the fraud guideline occurred in the Economic Crime Package in 2001. At that time, the Commission consolidated that guideline, 2B1.1, and the fraud guideline, 2F1.1, into one guideline. We also revised the loss table for the fraud and tax guidelines and revised the loss definition.

The Economic Crime Package was the product of five years of work, which included several public hearings, publication of proposed amendments for comment, and field testing of the amendments.

Although the Economic Crime Package of 2001 was the last time the Commission comprehensively amended the fraud guideline, the Commission has promulgated numerous amendments since then. Many of these amendments, it is important to note, were prompted by Congressional directives, such as those included in the Sarbanes- Oxley Act of 2002, the Patient Protection and Affordable Care Act, and the Dodd- Frank Act.

Indeed, the Commission has included consideration of fraud offenses as a policy priority for several of the past amendment cycles. And last year, amendments were limited to discrete changes for particular types of fraud offenses, again, largely driven by Congressional statutes and directives.

This plethora of types of amendments has resulted in an increasingly complex guideline, with 18 specific offense characteristics and four cross- references. As a result, we've heard criticism of the guideline. I analogize it to criticism, calling it a Christmas tree, or I might say a Hanukkah bush, overdecorated with specific offense characteristic ornaments.

As I stated, the Commission has not taken a comprehensive look at the fraud guideline since 2001. Now, 12 years later, with more than 300 statutes now referenced to this guideline, it is time for us to do so. This symposium is an important step of a comprehensive multi

- year study.

So what are we doing this morning? This morning, we'll start with a presentation of relevant Commission data. Later, we'll have two plenary sessions during which speakers will offer their views about what is and what is not working with the fraud guideline and how we should consider changing sentencing in economic crime cases.

This afternoon, we will have the opportunity to participate in discussions in smaller breakout groups, during which we will discuss the views presented during the plenary sessions and your own ideas on how we can improve the guideline.

At the close of today -- and we'll really hear what you have to say in a cocktail reception with wine flowing -- hosted by John Jay. Again, I can't say enough of thank you, it's so important to have this in New York City, as I stated, and what a nice place this is. And they've agreed to host us for a reception, as you heard, President Travis has, as

well as various sections and local chapters of the Federal Bar Association and the New York County Lawyers' Association. We're very grateful to these groups for sponsoring the reception and we hope to see you there.

Tomorrow morning, actually, we were thrilled that former Congressman Michael Oxley agreed to talk to us. And he will join us as a keynote speaker tomorrow morning. As you know, he was the key sponsor of the Sarbanes- Oxley Act of 2002. As you know, we made -- the Commission made various amendments to the guideline in response to that act.

After his remarks, we will have a report of the key conclusions from the breakout groups and a plenary session during which the speakers will discuss how the competing purposes of sentencing should influence economic crime sentencing policy.

So with all of that, what I'm going to do is turn this over to Dr. -- I like calling you that -- Dr. Courtney

Semisch, who is the Senior Research Associate at the Commission and Co- Chair of the Staff Working Group. I want to thank her and Kathleen Grilli for putting together this amazing event.

And she has worked on the issues -- I hate to say it -- since 1997. It makes you sound so much older than you look. But she's been working on it for a long time when she joined the Commission, including the Economic Crime Package, as well as amendments in response to the Sarbanes- Oxley Act, the Patient Protection and Affordable Care Act, and the Dodd- Frank Act, among others.

She knows everything about this subject. You've received some of the materials, I believe. And she's going to go through a Powerpoint presentation. And then we will have a panel chaired by, I think, Judge Breyer.

So why don't we, we're going to, as we say, exit stage left and hand this over here to Courtney. Thank you.

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UNITED STATES SENTENCING COMMISSION
SYMPOSIUM ON ECONOMIC CRIME

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September 18, 2013
9:07 a.m.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE

524 West 59th Street New York, NY 10019

PLENARY SESSION I: Courtney Semisch

MS. SEMISCH: Good morning.

Before I begin, I have a few announcements for everyone.

First of all, a couple of rules for the theater. Fire code prohibits people from standing in the back of the theater. So when you come in, please just come in and take a seat and the ushers here will help us remember to do that. Also, there's no food or drink allowed in the theater. You can bring in bottled water but nothing else.

Please wear your name tags at all times during the symposium. That helps us, as staff of the Commission, recognize you as our guest, but it's also helpful for the marshals for security purposes.

The registration table where you checked in this morning will be staffed for the entire event, so if you have any questions or problems or need anything, please check in with us there and we'll do our best to help you.

Also, some people have asked about Wi-Fi access. We have access to the John

Jay College Wi- Fi network. The network names are either John Jay Guest or CUNY Guest. If you want to access that network, the username is CUNY for City University of New York, and the password is CUNYCUNY. I'm told that that's not case sensitive but I haven't tried it so...

And finally, if you will switch your cell phones to off, airplane modes, stun, whatever it is, so that they don't disturb us.

The title of my presentation this morning is Laying the Foundation for Discussion: Trends in Economic Crime Sentencing. And my goal this morning is to give us all some data and some facts so we have sort of the same foundation of knowledge going into the discussions for the rest of the symposium.

My presentation this morning is based on Commission data. And for those of you who may not be familiar with the Sentencing Commission's data, I'll give you a little bit of a background.

One of the Commission's statutory missions is to collect and report on federal sentencing information. And we actually collect information on appeals, organizational sentencing, resentencing, and individual offender sentencing. And my presentation this morning is actually just going to focus on individual offender sentences.

We receive, electronically, case documents from all 94 judicial districts. And those are sent to us every year. We receive charging documents and plea agreements when they are appropriate, presentence reports, statement of reasons, and judgement orders. And from those documents, we collect statute information, guideline application information, sentences imposed, departure and variance information, and reasons for sentences outside the guideline range, as told to us by the court, and demographic information for all offenders.

We take all that information and

extract it into a database. And we have an extensive quality- control process in the Office of Research and Data so that we can check and double- check and make sure that we've collected the information correctly and that we're reporting out accurately what the court has told us that it has done.

And to put that job into perspective for you, for fiscal year 2012, the Office of Research and Data in the U.S. Sentencing Commission processed almost 390,000 individual documents for 84,000 cases. So it's an ongoing, year- long job.

But we're very proud of our data, we work very hard to make it accurate. And it's because all of the districts submit these documents that we're able to present the information we have today.

I want to start off with some sentencing trends, to give you a picture of what's been going on for the past 10 years under 2B1.1. And again, since this symposium is focused on the fraud

guideline 2B1.1, I just want to remind you that that's the only offenders that are included in what I'm going to show you today. If I shorthand it and say fraud offenders, fraud guideline, I'm still talking about 2B1.1.

So the blue line on this chart shows you, from fiscal year 2003 to fiscal year 2012, the number of fraud offenders sentenced under the fraud guideline. So from about 6,000 to about 8,500 in the most recent year.

Looking at the yellow line, that shows you that consistently, 2B1.1 offenders have accounted for about 11 percent of the federal caseload; so the number's gone up, but proportionally, they've been about the same during the time period.

What hasn't remained the same are the median loss amounts for these offenders. In fact, they've increased almost five- fold during the 10- year period.

For the first four years, shown

here, the median loss amount increased from about $18,000 to about $27,000. And to put that in the context of the loss table in the fraud guideline, those median loss amounts are associated with a four-level offense level increase.

Over the next five years, the median loss amount for 2B1.1 offenders increased from about $31,000 to about $67,000. And to put that in context of the 2B1.1 loss table, those median loss amounts are associated with six level increases.

And finally, in 2012, the median loss amount for 2B1.1 offenders was $95,000. And that median loss amount is associated with an eight level increase on the loss table.

Another way of looking at this increasing severity of offenders sentenced under 2B1.1 is to look at the average guideline minimum that these offenders have faced. And that has increased from an average of 10 months in 2003 to an average of 29 months in 2012.

What also has increased is the

average sentence for these offenders, from an average of 10 months in 2003 to an average of 22 months during the same time period. And it's notable that the guideline minimum and the average sentence are equal at 10 months in 2003. But there's about a 32 percent difference between the two by 2012.

Another way to look at this gap between sentences imposed and guideline minimums is to look at the sentence relative to the guideline range for the time period. The red line on the chart shows that the within range sentences have decreased from 2003 from 83.4 percent to 50.6 percent in 2012.

The line here at the bottom shows the rates of above range sentences, which actually has more than doubled, but that's really not the story here.

The blue line shows the rates of government- sponsored below range sentences for the 10- year time period. And the rates for those have actually doubled in the past 10 years. And the

government- sponsored below range sentences include, for fraud offenders, mostly substantial assistance departures, and also below range sentences pursuant to plea agreements, among other things, including savings to the government, waivers of indictment, and a few other things. But mostly, it's 5Ks and plea agreements.

Finally, the rates of non-government sponsored below range sentences have increased four- fold during the past 10 years, from 6.1 percent of 2B1.1 offenders in 2003 to 25.2 percent in 2012.

Despite the fact that the sentences below the range have been increasing over the 10- year time period, if you look at severity of sentences in terms of type of sentence imposed, there's actually been an increase.

The first line on this chart shows you the percentage of 2B1.1 offenders during the 10- year time period that have been sentenced to prison only. And

that's increased from 44.9 percent to 61.5 percent.

Alternative sentences, as shown by these two lines, consistently have been applied less often and have decreased during the time period. Combining these two, with prison split sentences and probation sentences with some sort of confinement, combined, accounted for 24.9 percent in 2003 and decreased to 18.8 percent in 2012.

So this yellow line that shows the decrease in probation only sentences is really accounting for that increase in prison only. And offenders sentenced under 2B1.1 that received a sentence of probation only was 30 percent in 2003 and then decreased to 19.8 percent.

So next, I want to take you from this broad 10- year look at 2B1.1 sentences and look much more focused at 2B1.1 offenders and comparing offenders in each of the loss table categories, because I know the loss table is going to be a focus of a lot of our discussion for the next day and a

half.

So reading across the bottom of this chart, each of these categories represents the 16 different offense level categories on the loss table.

So starting at the far left, you see 1,247 cases sentenced in that first category. So that's the $5,000 or less category. And those offenders did not receive an offense level increase from the loss table. And that's actually the largest group of offenders for 2012.

Approximately half of the offenders sentenced under 2B1.1 received offense level increases from the loss table in the first five categories. So that's up to $120,000 or +8 or lower offense level increases.

Another way of looking at that and putting these raw numbers in perspective is that 83 percent of the offenders sentenced under 2B1.1 are sentenced in the lower half of the loss table, so the first eight categories, up to $1 million.

But I do want to draw your attention

to something that may not draw your attention right away, and that's the top three categories in the loss table, very, very small numbers of offenders. The more than 100 million, more than 200 million, and more than 400 million have two, three, and nine offenders in them respectively.

And the reason I want to point those out is the next few charts I'm going to show you are going to show you averages and percentages. And when you have such small numbers like that, the trends really aren't trends anymore, so I would caution you not to draw any grand conclusions from numbers that you see when you see such small numbers like that.

Similar to what I showed you for the 10- year trend, this shows you the average guideline minimum for offenders in each of the loss table categories, reading across. And you see what you would expect, that the average guideline minimum increases with the loss amount category.

The blue line shows the average sentence for offenders in each of the loss table categories. And again, you see the increase with the loss table categories. And the average increases from five months to 125 months.

But also, as with what we saw over time, there's also an increase in gap of sentences below the range within the higher loss table categories.

And again, another way of looking at this gap is to look at, for offenders in these categories, the sentences relative to the guideline range. So the red line shows for the offenders in each of the loss table categories the rates of within range sentences, starting at 84.1 percent for the lowest level of the table, down to zero for the highest level of the table, remembering that that's nine offenders.

Again, above range sentences are on here. They actually decrease with the higher loss table categories too. But what's much more interesting are the two types of below range sentences for these

offenders.

Government- sponsored below range sentences increased steadily with loss amount category, up to about the more than $7 million category. And then generally, they consistently account for about a third of sentences imposed starting at that $400,000 category.

Non- government- sponsored below range sentences increased quickly with loss amount category. And they're generally imposed more commonly than government- sponsored, up until about the $400,000 category.

And now you can see why I cautioned you about drawing grand conclusions about the top three categories because it messes up my trend lines.

So again, what we saw with the trends over time, even though there's increasing sentences below the guideline range, we're still seeing, at least in terms of sentence severity, increases with loss table category.

Prison only sentences increased to

more than half of the offenders starting at more than $70,000.

These next two lines show you the alternative sentences imposed for fraud offenders across loss table categories. And they peak within the first five categories at more than 70 and more than 30,000 dollars.

Offenders sentenced to probation only are just about equal to offenders sentenced to prison only at the lower couple of categories on the loss table. But they split at the more than $30,000 category where probation starts to decline.

And interestingly, probation only sentences and alternative sentences stay about the same for the higher loss table category offenders.

The last bit of information that I want to share with you today is related to a topic that we expect to be a lot of the discussion for this symposium and -- because it's something that a lot of commentators to the Commission have

voiced concern about -- alternatively called factor creep or piling on, double-counting, Christmas tree, Hanukkah bush, however you want to put it.

And there are two aspects to this idea of the piling on of specific offense characteristics. And the question is: Are the specific offense characteristics applied in 2B1.1 punishing for the same conduct? And the question of do they punish for the same conduct is really a question for our breakout sessions later. What I can do is answer for you with the data numerically whether that is happening. So the next few charts that I have here are going to address this numerically, whether the piling-on is actually happening.

The pie chart here shows you, for 2B1.1 offenders sentenced in 2012, the application of specific offense characteristics. The blue half, and it is exactly half, 50 percent, indicates that 50 percent of offenders sentenced under 2B1.1 received an increase from the

loss table but nothing else. So those offenders received their base offense level, a loss table increase; and that's all they received under 2B1.1.

Approximately a third of the offenders in that yellow group received an increase from the loss table and at least one other specific offense characteristic.

The very small slice, the tan slice, represents the 4.4 percent of 2B1.1 offenders who received some specific offense characteristic, but no increase from the loss table.

And the final part of the pie chart, the green category, represents the 10.2 percent of 2B1.1 offenders that received neither an increase from the loss table nor a specific offense characteristic increase. So that 10.2 percent of offenders received a base offense level in 2B1.1 and nothing else.

So obviously, what's of interest then is the yellow section. How many are they getting as they're piling on? So the

table to the right of the pie chart just contains information for those 3,007 offenders who received a loss table increase and no other increase from -- excuse me, a loss table increase and at least one other specific offense characteristic.

So reading down the table, 63.2 percent of those offenders received an increase from the loss table and one additional specific offense characteristic. 27.8 percent received an increase from the loss table and two additional specific offense characteristics.

8 percent received an increase from the loss table and three additional specific offense characteristics.

0.9 percent received an increase from the loss table and four additional specific offense characteristics.

And 0.1 percent, two offenders, received an increase from the loss table in five additional specific offense characteristics.

So the next obvious question is, what do they get? We have, in your materials, if you had a chance to look at them beforehand, application rates for 2B1.1. And if you had a chance to look at that, this isn't going to surprise you.

So for those 3,007 offenders who received an increase from the loss table and at least one other specific offense characteristic, most of them are receiving an increase from the victim table, 59.1 percent.

The next most commonly- applied specific offense characteristic is for sophisticated means or relocation of the offense outside of the United States.

And then 28.4 percent received a device making/means of identification or the identify theft specific offense characteristic.

The other specific offense characteristics listed on this table were applied between 1.3 and 8 percent of the time. I have left off the other specific offense characteristics because they were

applied in less than 1 percent of the cases.

So despite the fact that more than 90 percent of 2B1.1 offenders received two or fewer specific offense characteristics, there is a relationship with loss.

So again, reading across, these are the 16 loss table categories from the 2B1.1 loss table. And the blue bars show you the percentage of offenders in each loss table category that received an increase in the loss table but nothing else.

So application of loss table and nothing else decreases at higher levels of the loss table, from 73.7 percent to 22.2 percent.

Building up, within those categories, the gold bars show the percentage of offenders in each of the loss table categories that received an increase from the loss table and one additional specific offense characteristic.

So combining those two together accounts for more than half of the cases in most of the loss table categories.

Next is the percentage of offenders who receive an increase from the loss table and two additional specific offense characteristics. That becomes more common at the more than $2.5 million category.

The next one is loss and three additional specific offense characteristics.

Okay, and this one you're going to have to squint to start seeing. This is loss plus four additional specific offense characteristics. It's white.

And then the last two cases, orange, with loss plus five specific offense characteristics.

So that's some information that I hope will be a good basis for discussion. The Commission continues to analyze its data and think of more data questions to help inform the issue.

I appreciate your attention this

morning. Thank you very much. And I'm going to turn the program over now to Judge Breyer and his panel.

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UNITED STATES SENTENCING COMMISSION
SYMPOSIUM ON ECONOMIC CRIME

- x

September 18, 2013
9:27 a.m.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE

524 West 59th Street New York, NY 10019

PLENARY SESSION II: Hon. Charles R. Breyer Russell Butler Michael Caruso Hon. J. Phil Gilbert Hon. Melinda Haag Hon. Loretta Preska

HON. BREYER: Good morning, everyone. Welcome. You've been welcomed now by quite a few people. And so I want to just plunge into this.

We've really divided this discussion this morning into two parts. This is the small part, then we're going to have a larger part.

What is the small part? The small part is, are there really problems with the fraud guideline? Because if it's not broken, we don't need to fix it.

So I've encouraged our speakers today to tell us what the problems are, and don't worry about a solution because the solution is the problem of the next panel and we don't really have to deal with that. We're just going to tell you, does it really work?

Now, you've looked at these charts. And the charts of course tell you some very interesting things. Statistics always do, but then statistics have their own problems themselves.

But one thing seems to be apparent, which is that with respect to 2B1.1, the fraud guideline, we see over time now an increasing distance between guideline sentence and variances or non-guideline sentences. And we see that growing.

Now, maybe that's fine. Maybe that reflects the complexity of trying to take so much conduct and put it into basically one category and try to figure out, with all of those different characteristics, all of those different types of conduct, maybe you're going to get that. Maybe you're going to get it because sentencing is individualized. And so that's just the way it is.

But then on the other hand, to the extent that it's becoming -- that the disparity's becoming greater and greater, maybe it's telling us something about the guidelines themselves. And that's really what we're going to explore for the next day and a half.

With this panel -- I'm not going to introduce them other than tell you what

they do -- is a lot of expertise of the practical application of the guidelines.

So Judge Preska, who is the Chief Judge of the Southern District of New York, you may proceed.

HON. PRESKA: Thank you, Judge Breyer.

I know you've been welcomed many times, but as the resident New Yorker, welcome again. It's a delight to have you all. And thanks to John Jay.

I'd like to talk about a few of the practicalities that Judge Breyer was talking about, specifically, a case that I had recently, and then I'd like to touch on some other cases that we've seen pretty much in this neck of the woods that talk about so much conduct that Judge Breyer just talked about.

Very recently, I had a trial of a fellow named Joseph Collins who was the outside lawyer for the Refco companies. And you'll remember that Refco provided execution and clearing services for various types of financial instruments,

like derivatives and what not, and at one point in time was, in fact, the largest such outfit in the world.

In an effort to cover up a trading loss at Refco, over the years, the company hid its financial health -- or indeed, sickness -- and its economic structure from everybody. They tried to cover up what became referred to as a hole, which grew to a billion dollars by the time the fraud ended.

One of the methods for doing this was to conduct sham loans, referred to in the evidence as round- trip loans during the time the auditors were there. They'd take the loan, and as soon as they were gone, pay it back, of course with legal documentation. And that legal documentation was of course done by Joe Collins's law firm, the Mayer Brown firm.

At the end of the day, Refco underwent an LBO by Thomas H. Lee Partners and then an IPO.

When the fraud was revealed, within a week, the company was bankrupt, the loss

was something like $2.4 billion. The principals in the company received sentences of 16 years, 10 years, numbers like that. This fraud had gone on for many years. It was obviously calculated.

Collins was indicted long after the rest of them, and eventually convicted on a variety of counts. His income at the firm was substantial but appropriate to a partner of his level of experience, and didn't seem to vary much with the Refco billings. But of course, the Refco billings were substantial.

When we received the presentence report, the $2.4 billion translated into 30 levels. He received enhancements for over 250 victims, a complex and sophisticated scheme, jeopardizing the safety and soundness of Refco, a financial institution, and using his special skills as a lawyer. All of that translated into a total offense level of 49, which was life imprisonment.

And to echo my colleague, Judge Jed Rakoff, and various other folks, in

talking about the 2B1.1 guidelines, this was absurd. Simply absurd.

At the sentencing, the very substantial presentation pointed out two other factors, which I, at least, found to be very persuasive. One, Collins took no money at all. He had his law firm income and that was I- T, it. Number two, the man was a certifiable saint, not just after his arrest, but for his entire life. And I don't mean writing checks on opera houses and things like that; but taking troubled children into his own home to live with them, paying for their college educations, and the like.

After his arrest, when he was out of work, Collins went to work at the inner - city high school that his boys attended, doing everything from sweeping the floor to tutoring students.

I was very persuaded by all of that. And instead of giving him life, I gave him a year and a day.

Let me talk about some of the other cases that we've seen in this neck of the

woods, and some of the influences judges have found persuasive in those cases.

We all remember the Bernie Ebbers case, the WorldCom case, which had billions of dollars of loss. Ebbers was given 25 years by a judge in this district who commented on the calculation of the scheme, and the utter and complete greed with which he acted.

And in looking at things like greed, the egregiousness of the conduct, those seem to me to be very subjective. And yet, when you look at fraud as a breach of faith, they seem to me to be very relevant.

Adelson, who ran a company that overstated its financials, his guidelines range was 85 years, he received 42 months. In that case, Judge Rakoff, again, used the "absurd" word, and then went on to look at the other 3553 factors.

This guy came in at the end of the conspiracy. Others previously sentenced had been either cooperators or had received non-guidelines, below-guideline sentences, and therefore, a

disparity might appear if this guy got a long sentence. Substantial past good deeds, substantial financial penalties, and, in Judge Rakoff's opinion, the short sentence for a white- collar offender does have a deterrent effect. A longer sentence is not necessary.

Then there was Mr. Kluger, who the Court noted began selling inside information even before he had graduated from law school. Couldn't wait. Did it for 17 years. The court noted that he was truly, if not technically, truly a career criminal. He received 144 months, which was the middle of the guidelines range. Big breach, right? A big breach of faith, career criminal, and utter and complete greed were the factors noted.

We're all familiar with the Gupta sentencing. Mr. Gupta, you'll remember, phoned tips to folks who were trading moments after leaving Goldman Sachs board meetings. Gupta's range was 78 to 97 months; he received 24 months. Relied on in the downward departure -- and the

actually non- guideline sentence -- was his prior community service and the fact that this was aberrant behavior.

I would note that this was also a big breach, as in gross and disgusting, to come out of a meeting and give up the information immediately.

We all know about Bernie Madoff, 150 years, a $13 billion loss. The amount of the fraud was influential. The time period over which the fraud occurred, decades. And, in Judge Chin's words, the fact that the scheme was "extraordinarily evil." Which sounds about right.

Another seller of information, a Ms. Jiau, J- I- A- U, sold information over about a two- year period. Her guidelines range was 97 to 121; she was given 48 months, noting the breach of faith, no remorse whatsoever, and obstruction of justice.

We all know about Rajaratnam, who also received inside information and traded on it. His guideline range was 235 to 293; he received 132 months, which at

that time was the longest insider trading sentence we had seen. The factors influencing the sentencing judge were the amount of the gain, the fact that he was an organizer and a leader, and his obstruction of justice; that is, he lied to the SEC. And you know they have very little sense of humor about that.

And finally, there was a recent case, July 24th of this year, from the Second Circuit Court of Appeals. The guy's name was Corsey. He had helped run a fake investment scheme in a Siberian pipeline. There was no such scheme. There was a cooperator involved. The intended loss was $3 billion. But of course, there was no loss. His guidelines range was life; he received 20 years.

In a concurring opinion in the Second Circuit, Judge Underhill of the District of Connecticut, I think, showed us where our work is. He said, "The real problem is that the sentences are shockingly high. In my view, the loss

guideline is fundamentally flawed, and those flaws are magnified where, as here, the entire loss consists of intended loss."

Judge Underhill noted that the result was particularly egregious, where, as here, the defendants were engaged in a "clumsy, almost comical, conspiracy to defraud a non- existent investor of three billion dollars."

And there was "an absence of any actual loss whatsoever and an absence of a victim." He says, "Until the Court of Appeals weighs in on the merits of the loss guideline, sentences in high loss cases will remain vividly divergent as some district judges apply the loss guideline unquestioningly while others essentially ignore it."

In conclusion, Judge Underhill cited the Adelson case, which you remember was the one where he overstated the company's financials, got 42 months instead of 85 years, saying, "When the Guidelines range zooms off the sentencing

table, sentencing judges are discouraged from undertaking close examination of the circumstances of the offense and the background and characteristics of the offender."

So in my view, this is the problem we all face. Thank you.

HON. BREYER: Thank you. Let me turn to Judge Phil Gilbert from the Southern District of Illinois.

HON. GILBERT: Thank you, Judge Breyer.

First of all, when I came up here -- I'm glad I'm not standing up there, because in 2000, as a member of the Criminal Law Committee, I was moderating a panel with the commissioners. And we were breaking for lunch. And if you noticed, when I came up, I looked behind me because as the -- I thought I would be a nice guy and let the commissioners get off the stage. And as every commissioner was walking off, I stepped further back -- which included Sterling Johnson and Bill Sessions. And the next thing I knew,

I didn't realize there was a gap about that long between the stage and the wall and I went over, shattered my elbow, and was operated on in Phoenix at 1 o'clock in the morning.

Well, at the next meeting, I did not get the Purple Heart. They gave me the Purple Gavel Award.

MS. PRESKA: Welcome to New York.

HON. GILBERT: Well, that's why I looked back there, and I'm thinking I'm safe. And I'm sitting down, which is even safer.

Anyway, I've been a judge for -- actually, next week it will be 21 years -- and I was on the Criminal Law Committee back in '90s and early 2000s in which we recommend to the Commission the combining of the theft and fraud guidelines.

When you look at the history, and I think we went over a little bit earlier today, in 1984, the guidelines included -- the fraud guidelines were four pages, consisted of two subsections. Now they're 21 pages and they have a ton of

enhancements.

Now, Judge Preska is from New York and deals with high dollar. I'm from the heartland of the country, Southern District of Illinois in the Seventh Circuit. I can tell you, Judge, that if I had a guideline range of life imprisonment and gave them a year and a day, I have a judge named Easterbrook and Posner that would take a dim view of that.

HON. PRESKA: The fat lady has not sung on this one.

HON. GILBERT: But the problem --

HON. BREYER: No circuit judges from the Second Circuit here, are there? Well, but you look like you have your weight under control.

HON. GILBERT: The problem that I've experienced -- and I don't deal in high- dollar amounts, again, I'm from a medium district and I don't deal with the high- dollar amounts -- but the problem that I have encountered in the 21 years I've been on the federal bench is the

dichotomy between the intended loss and the actual loss. And there seems to be no relation to them. And even more so now than it was back in -- you know, 10, 15 years ago. And part of that is because of the computer age.

And let me give you an example, Medicare billing. We did have a case, it wasn't my case, in our district where the Medicare billing was $14 million. And everyone knows that -- from their own experience -- that, you know, what is the billed amount and actually paid amount is different. And now, we have -- and the interpretation by statute now is mandated because of the -- for public insurance that the intended loss amount be the basis for establishing the guideline range, and even though the billed amount is substantially less.

And in my district, one of the judges, the billed amount -- the actual loss was $2 million and not $14 million. Now, the judge established the guideline range at 14 million, but then used the

3553(a) factors to impose a sentence based upon what the actual loss was, was 2 million.

Now, a few years ago, we couldn't do that. But with Booker -- and I guess when I, before I came out here, I talked to some of our prosecutors and federal defenders and just got their ideas about what their thoughts are problems with the loss guideline, the fraud guideline. And it depends on whose glasses you're looking through. If you're talking to a prosecutor -- I guess you're one of them?

HON. HAAG: I am.

HON. GILBERT: They'll say the fraud guidelines are working fine and, hey, you judges can use the 3553(a) factors to bring justice, what you think is justice. And so you can use those 3553(a) factors to bring a sentence down that you think is too harsh.

If you talk to a federal defender, they'll say the guidelines are out of whack because you're using -- you need to be a mathematician to figure out what the

loss is when you're looking at intended loss and the actual loss. And so it depends on whose glasses you're looking through.

From my standpoint, from a stakeholder's standpoint, I think the 2B1.1 is cracked badly, but probably not totally broken. I think that we could make some adjustments. And I think in one of the articles, make some adjustments that would bring more reality to it.

But there's no reality between what a fraud is -- and the frauds that I deal with are probably 400,000, 500,000 dollar range, not the millions and billions of dollars. But the problem that I have encountered is the fact that the prosecutors, through plea agreements, establish what the guideline range is. So it's there when they plead guilty. Here's the guideline range and here's all the specific enhancements, whether victim enhancements or sophisticated means; and they're all contained in a plea agreement.

So that's a starting point that I,

as a judge, have to look at. And when I look at it, I say, you know, that's just too damn high. You know, I'm not going to sentence someone that has a guideline range of -- for a, let's say a $100,000 -- I'm going to do with that one minute, don't worry about that -- $100,000 to a 78- month sentence when probably a 24- month sentence or an 18- month or a 12- months- and- a- day might work.

So we have to use -- the problem is there's a psychology in setting the guideline range for judges when they depart, when they vary either upwards or downwards. And from my standpoint, I would like to see, even in the types of frauds that I'm used to seeing, a guideline range that is probably a little more flexible than what we have now.

So because, as Judge Castillo will tell you, when you're in the Seventh Circuit, if you're going to, you know, our judges tell you that if you're going to vary downward substantially or even vary upward substantially, you'd better have

some pretty good reasons and list each 3553(a) reasons as to why you're doing it; otherwise, it's going to come back to you.

So I think from -- without getting into what the next session is, but I think that we, as judges, need a little more realistic starting point which are driven by what prosecutors charge in establishing what the appropriate guideline range is and what an appropriate sentence would be when we look at the 3553(a) factors.

So did I do okay?

HON. BREYER: Thank you. You did fine.

It's with some trepidation that I'm announcing our next speaker because Melinda Haag is the United States Attorney for the Northern District of California where I sometimes practice. And she will tell you that the real problem with the guidelines are the judges. Go ahead.

HON. GILBERT: As I said, whose glasses you're looking through.

HON. HAAG: One in particular, Your

Honor.

Madame Chair, members of the Commission, thank you so much -- and Judge Breyer -- thank you so much for inviting the Department of Justice and the U.S. Attorney community to participate in this symposium. We certainly appreciate having a voice here in this important discussion.

As Judge Breyer said, I am the United States Attorney for the Northern District of California. I'm also the co-chair of the White Collar Subcommittee of the Attorney General's Advisory Committee, and it's really our honor to be here and participate today.

I want to introduce you to, briefly, the people from our community that are here, the prosecution community. Deputy Assistant Attorney General Denis McInerney and Fraud Chief Jeff Knox from the Department of Justice are here, along with members of their staff; as well as U.S. attorneys from the local area, Preet Bharara, Loretta Lynch, and Paul Fishman.

John Walsh, who was my co- chair on the White Collar Subcommittee, from Colorado, is here. Ann Tompkins from North Carolina, Sally Yates from Georgia, and Carmen Ortiz from Massachusetts.

And I can tell you, if I may, about my colleagues. This is really truly an A - list of white- collar prosecutors, and I know they look forward to participating in the discussion and to adding their voice and their thoughts and ideas to the discussion over the next day and a half, so thank you.

We do see it from a different perspective, I think, and that's the perspective of the prosecution because prosecuting fraud remains a top priority for the United States attorneys all around the country. We see it all. Investment scams are rampant, fraud- on- the- market schemes continue, mortgage fraud, fraud on the government, and theft from government programs are all too common, large- scale identity theft is becoming easier and easier given the advent of the

Internet.

We are aggressively pursuing these cases. The public expects us to aggressively pursue these cases. And we believe that strong, consistent, and fair sentencing policies are completely critical to our efforts in protecting the American public. So we certainly take our roles quite seriously.

I do want to acknowledge however, as we've already heard, why we're here today; a concern by some on the bench and in the defense bar that economic crime sentences are just too high. We understand that.

Specifically, a number of juges believe that Section 2B1.1 leads to sentences that vastly overstate the conduct at issue. And some have expressed a concern that focusing on the loss amounts, and not other factors, downplays what's important, as Judge Preska I think most specifically talked about actually, and Judge Gilbert as well.

Those are some of the concerns that bring us here today and we welcome the

opportunity to engage in a discussion and debate about that.

In preparation for today, we certainly did analyze the data that was made available by the Sentencing Commission, we certainly appreciated that. And I do have to say that based on that data, although we see the issues of the margins, I think, as the judges have so eloquently described, we don't believe that based on the data so far, a case has been made for a wholesale change to Section 2B1.1 or the loss table.

Again, we recognize that there may be issues in some of the high- loss cases, we recognize that there may be issues with respect to intended loss, as Judge Gilbert described, and we recognize that there may be ways to simplify the guidelines as well in economic crimes cases, which I'll address in a few minutes, and I'm sure we'll discuss at this symposium.

But with regard to the vast majority of the cases sentenced under Section 2B1.1, we believe, in our collective

experience, that the sentences that result are reasonable.

Of course, in recent years, we all know there have been sentences in economic crimes cases of -- lengthy sentences in economic crime cases of 20 years or more in custody. Some are famous that we all know about, Bernie Madoff, Allen Stanford; and some all around the country less famous, a gentleman in Southern District of Indiana, Timothy Durham, was sentenced to 50 years; and in my district, Samuel Cohen was recently sentenced to 22 years in custody.

These cases -- and there are many, many more examples, in the interest of time I won't go through -- but these cases and other cases that the U.S. Attorneys' offices are dealing with every day all around the country reflect hundreds of thousands of victims, billions of dollars in losses. And in our experience, many of them, most of them involve judges who don't seem to hesitate in imposing lengthy prison terms, noting

the devastation that these fraud schemes wreak on other people and the greed that motivated most of the defendants before them.

The cases that result in lengthy prison terms are the ones that get all the attention, and that's the large part of why we're here today. However, it was very interesting for us to note that the average sentence imposed under 2B1.1 in FY 2012 was just 22 months, and the median sentence was 12 months.

It was also very interesting for us, in analyzing the data, to see that 54 percent of the cases involved losses of less than $120,000, and 83 percent of the cases involve losses of less than a million dollars. It's actually a relatively small number of cases that have led to the concern about 2B1.1 and the reason that we're here today.

Again, we've been studying the data and we understand that it is true that on average, federal judges sentence below the guideline range at a higher rate in

economic crimes cases than in other kinds of cases. 18 percent is the average in all cases, 25 percent is the average in economic crimes cases. So the judges do go below the guidelines or vary from the guidelines more on average in economic crimes cases.

But what that means is that in approximately 75 percent of the cases, the sentences were either within the guideline range, above the guideline range, or the result of a government-sponsored variance.

Regardless, though, we understand and we hear the judges; they're varying from the guideline ranges at a higher rate than average in economic crimes cases. And there are concerns that are expressed by the judges, Judge Preska and Judge Gilbert and others as well, about that and we certainly take that seriously and again are happy to be part of the debate as a result of that.

Although there are theories about why the departures happen -- and we

certainly know why in some cases, as again so eloquently described by the judges -- the U.S. attorneys and our colleagues at the Department of Justice don't believe that we have a full understanding of why and to what extent variances occur across the spectrum of the cases that we're talking about.

And if we're talking about significant changes to the sentencing guidelines, in our view, it's important to understand more about why and what leads to these variances and how much the judges are varying.

We, therefore, suggest that we need answers to the following questions, among others. First, what was the extent of the variance? For example, in a recent case in Los Angeles, the Court varied from the guideline range at issue and the case was therefore included in the statistics that we all look at here. But the variance in that case was only three months, it was from a guideline range of -- a minimum guideline sentence of 135 months to an

actual sentence of 132 months.

So one question that we have is how significant are the variances and do the statistics overstate the issue or fairly state the issue?

Another question that we have is, does the nature of the fraud matter? Are a disproportionate number of the cases in which the courts vary occurring in certain kinds of cases, for example, fraud-on-the-market cases or insider trading cases?

Courts may feel that the loss measures in those kinds of cases overstate the defendant's conduct or are too difficult to calculate; is that the problem?

On the other hand are investment fraud cases. U.S. attorneys all around the country are handling a crushing caseload of investment fraud and Ponzi scheme cases involving billions of dollars in losses and heartbreaking stories of life savings and retirement savings going up in smoke.

The U.S. Attorney community recent -- and the Department of Justice -- recently collected data in connection with a series of investment fraud summits that we held around the country. In a recent 18- month period, the United States Attorneys and the Department of Justice Criminal Division alone handled investment fraud cases against more than 800 defendants, involving hundreds of thousands of victims, and losses of more than $20 billion.

The FBI statistics during that time reflect that an astonishing 60 percent of their white- collar caseload is investment fraud cases, certainly consistent with the caseloads that we're seeing in U.S. Attorneys' offices around the country.

And investment fraud cases, the sentencing judges seem to express much less concern about the guideline ranges and severe sentences. The losses are generally easy to calculate, they're generally real losses and not intended

losses, and the defendants are not sympathetic.

I can tell you that Judge Breyer -- I told him I was going to quote him, so he knows -- Judge Breyer, in a recent case in our district, sentenced the defendant to 22 years in custody in an investment fraud case. And this is the observation that he made in imposing that sentence, "In more than 40 years of experience with the criminal justice system, I have never encountered a con man like Mr. Cohen. He is serial in his proclivity to commit cons. He is nearly sociopathic in his inability to relate to the victims of the crimes he conceives. And it appears to the Court that he has not one ounce of contrition, not an ounce of remorse, not an ounce of any compassion for any of these victims."

So we ask, what kinds of cases lead to variances? It may actually be happening in a relatively small subset of economic crimes cases. And we believe it's important to understand this before

considering wholesale changes to the sentencing guidelines.

Another question is, are the variances based on the role of the defendant? Was he a minor participant or late to the scheme? Were his motives pure in the beginning and then things just unraveled or were his motives impure from the beginning?

Some courts have certainly expressed concern with certain defendants being held responsible for the totality of the fraud; we'd be interested in discussing that.

Do variances depend on the district? We think it would be helpful to know whether variances are occurring uniformly across the country or whether it reflects a practice or a culture in certain districts and not others.

Are variances based on loss amounts, as many people suggest? Certainly, commentators in the courts have expressed discomfort with high loss numbers and believe that that drives a

high number of the downward variances.

Of course, as I noted earlier, it was interesting to us that a small -- a relatively small number of cases actually involve those high- loss figures. Again, 54 percent were less than $120,000 losses. I can tell you, in my extra- large district, that's below our intake guidelines. So 54 percent of the cases we would decline that are being handled around the country.

But 83 percent of the cases were less than a million dollars. And again, if you're in a district like mine, a million- dollar case is probably less than average.

Given this, is it a relative handful of cases that are causing the concern? And does that support a complete overhaul of the sentencing guidelines or perhaps a more measured approach?

Despite our questions and concerns, however, we do agree that in some cases, loss may overstate the seriousness of the offense. We believe that certain

categories of cases warrant careful study by the Commission and potentially narrowly- tailored amendments to 2B1.1.

Areas of study might include reasonableness of the loss table for certain types of offenses, for example, fraud- on- market cases. Greater adjustments for mitigating roles as the offense level increases. And eliminating, grouping, or capping certain of the 2B1.1 enhancements.

We look forward to discussing these and other ideas at the symposium over the next day and a half.

So in closing, while some commentators believe that sentencing in economic crimes cases are too tough, we believe that sentencing -- the sentencing guidelines lead to tough but fair and appropriate sentences in the vast majority of the cases.

We don't believe there should be a rush to dramatically change the sentencing guidelines but rather, we should engage in a thoughtful and thorough

process, which I know we're doing here and we certainly appreciate that.

We should work together to understand why and to what extent variances are occurring and if there's a problem, determine whether more limited changes might accomplish our collective goal of principled sentencing policies.

So thank you to the Sentencing Commission for having us. Thank you for allowing us to have a voice and to participate in this very important discussion. Thank you.

HON. BREYER: Thank you. You know, my colleagues will appreciate this, that whenever as -- sitting as a judge, your words are quoted back to you, you realize your options are being limited. So -- because of the obvious wisdom of what you said, which you can't really remember having said in a different context. At any rate, it was quite impressive.

Let's turn to Michael Caruso, who is the federal public defender of the

Southern District of Florida, where you see, if you look at the materials furnished by the Sentencing Commission, the Southern District of Florida seems to be number one in cases involving 2B1.1.

MR. CARUSO: Thank you, Judge Breyer. And thank you Madame Chair and other members of the Commission for inviting the defender community to participate in the symposium.

It does pain me with Judge Pryor here from Alabama that the Southern District of Florida is only number one in fraud rather than in college football. But we'll leave that discussion for another day.

I think South Florida is a good district to study the fraud issues that all defenders are confronting across the country. I think we do provide a nice cross- section of the district here that Judge Preska serves and the district in Illinois that Judge Gilbert serves. We have a very, very broad spectrum of fraud cases that we defend every day.

And I would agree with my colleague that the U.S. Attorneys' office, certainly in the Southern District of Florida, is aggressively pursuing fraud cases. And I actually don't know what their intake level is, but we do see cases from the very, very minor credit card frauds to -- we recently handled a hedge fund fraud that had losses alleged to be over $500 million. And we also have every case in between.

And over the years, in dealing with the fraud guideline in particular, we have identified various problems because we would respectfully contend that the guideline is tough but not fair. And I think there are four issues that we've identified that caused this fundamental unfairness.

First, the guidelines are exceedingly complex. The guidelines are too severe. They fail to adequately capture mitigating factors and they're subject to prosecutorial manipulation, both in the pejorative and the non-

pejorative sense.

So I'd like to talk about today, and I think we'll talk about for the next day and a half, these four areas at the very least.

I'd first like to address the complexity of the guidelines, and this is of particular concern to me as the federal public defender for the Southern District of Florida, and I have the responsibility for managing 100 employees as we defend over 2,000 cases a year in an environment of ever- decreasing budgets.

You know, when I first started with the federal public defender's office about 15 years ago, if you received a discovery packet that was about an inch and a half thick, that was a big case. Now, routinely in these fraud cases -- and I hear my defender and U.S. attorneys colleagues chuckling that we don't receive paper, we have to give the U.S. attorneys hard drives to get all the information back to us that we can review with our clients.

And not only is the Southern District of Florida number one in fraud cases but we're also number one in disposition times; that is, we have very, very short times between indictment and resolution of the case. So that of course provides -- even if we had all the money in the world to defend these cases -- of course that provides challenges in handling these type of cases.

But I don't need to tell you all how complex the guidelines are. There are now 18 specific offense characteristics. The ones of course that we find most complex and take most of our time, both in counseling our clients as to what the likely outcome will be at sentencing, are the loss tables for certain, the sophisticated means enhancement, and the victim table issue. So I would respectfully suggest that this is an issue that the Commission should consider, whether simplifying this guideline to make it easier for practitioners to advise their clients as to what the potential

outcomes will be.

The next issue is -- and I'm always glad when I'm on a panel where I seem to be in agreement with the district court judges on the panel -- that the guidelines, in my view, and I believe the view of the defender community, are too severe. And this is caused, I think, by two overlapping issues. Certainly the loss tables are too severe, not only at the high end, not only at the low end, but all over.

The actual loss doesn't, in my view, again, capture in all cases or in most cases what is really going on in the case because as judges and other commentators have said, loss is sometimes an accident or a mistake. You know, I have very few cases where a client has set out, at inception, I want to steal or take this amount of money. A scheme starts, and where that scheme goes depends on a variety of factors, including when law enforcement gets involved.

The other issue with regard to the

loss table is, again, I think an issue that we are in widespread agreement that it's a problem, is the intended loss rule. Again, we see this in many, many cases that we defend in the Southern District of Florida and all over the country. The intended loss rule that seems to derive the loss from the worst-case scenario, even though that worst-case scenario is unlikely or impossible to obtain.

There is simply no empirical evidence that I've seen that a rational sentencing regime should be based -- if deterrence is our ultimate goal in sentencing a person -- that an ultimate sentence should be derived from losses that are unlikely or impossible to obtain.

The other issue with regard to the severity of the guidelines is -- and I love the analogy to the Christmas tree and Hanukkah bush, I am definitely going to steal that -- there is a real, real issue with double-counting. And we saw the statistics earlier today regarding the loss table, the sophisticated means

adjustment, the adjustment for victims, and the identity theft adjustments. We see, in nearly all the cases that we handle, that these adjustments are clustered around one another and they're not really capturing different conduct, they're capturing the same conduct and driving up the sentence.

The defenders have spoken before about the lack of mitigating factors within the guidelines, that there is a relatively new comment in the role adjustment section with regard to nominee owners in our district where we have massive health care fraud being prosecuted by the U.S. Attorneys' office. I can tell you, because that note is phrased in the negative that a role adjustment shall not be precluded, I don't believe that that note has had the impact that the Commission intended.

There are a litany of other factors, largely involving motive and fraud creep, that we think the Commission should take into account but is not captured within

the current guideline structure.

The final issue we see -- and I think this is indicative that we are indeed in large agreement with the U.S. Attorneys' office -- is the use of pleading decisions, charge and fact bargaining, and cooperation agreements, in not only the high-valued cases but all types of cases.

I'll tell one story in particular from my district. We defended a case where we were appointed to represent the investment manager of an over $500 million hedge fund fraud. We were appointed very late in the game, as is usual, federal public defender's offices. The other defendants in the case who still had assets and lawyers pre-indictment, they worked out deals, their plea agreements stated that the loss in the case was over 100 million or in some cases, over $200 million; yet, to gain their cooperation, the U.S. Attorneys' office allowed them to plead to a 371 conspiracy, which of course, as you know, carries a five-year

statutory maximum.

So I think the government, in those type of cases, wants the best of both worlds. They realize that they're not going to get cooperation from a 55- year - old professional whose guideline range is at 25 to 30 years. So to put that carrot in front of that person, they allow that person's maximum sentence to be capped at five years, and then a 5K or a rule 35 on top of that. In the case that I'm talking about, the judge ultimately, on a 5K, departed downward to one month in prison.

So I think that is a recognition by the U.S. Attorneys' office that these fraud guidelines are not consistent with our best practices.

I look forward to speaking with you over the next day and a half. Thank you.

HON. BREYER: And finally, let me turn to Russell Butler, who is the Chair of the Victims Advisory Group in Maryland.

HON. GILBERT: There's no space behind you, so you're okay.

MR. BUTLER: Thank you Judge Saris, members of the Commission, Judge Breyer. I'm Chair of the Victims Advisory Group of the United States Sentencing Commission. I was asked to discuss a little bit today about, you know, what do crime victims want and relate that to economic crimes.

And I would first say that for any of you believed that what victims want, one size fits all, you're wrong. All of the 3553 factors some victims may want and some victims may not care about. And that may be punishment, deterrence, protection of the public, rehabilitation, and restitution, which I will address in further detail.

You know, in restorative justice, it isn't always that the defendant could go to jail for a long period of time. But it is that there are particular roles and there should be justice, and many victims don't want the person that offended them to go back out and harm other people. They want their views to be considered. They somehow want to feel whole, they're

the ones that have been harmed by the crime, yet the crime has been committed against the government and not the victim. And sometimes they want meaningful consequences, and that's an individualized determination.

And I would say as to restitution, that's part of restoring the harm, that real economic loss, not what the intended loss is, but what the actual loss of what the victim has suffered.

Let's say that there's only two options. One, restitution, restorative justice or jail time. I had a client who really wanted restitution. He had lost his college savings for his children. And when he found out that the defendant was going to pay, all of a sudden, he really wanted that defendant to go to jail for a long time.

But some victims will want restitution, some victims will want offenders to be incarcerated. And I think it's important how courts and how the guidelines balance restitution and

incarceration and even, does the court know what a victim wants and how should the court, in sentencing, weigh what the victim wants at all, under the guidelines, what's an appropriate sentence.

So some victims don't even want crimes prosecuted. Talk of what it means, the cost of doing business. There are many corporations, many businesses who don't even want crimes prosecuted because they don't want to be involved in the judicial system because it costs them money, it costs them their time.

So you know, your numbers, by the dollar thresholds for some crimes, some crimes won't even be prosecuted in federal court because of the U.S. Attorneys' intake numbers. So a lot of what you have is data that's not complete because you have differences in the various districts.

I think it's also important to realize that under the current guidelines, some victims who feel they are victims aren't considered the victims.

Think of a bank fraud case. Who's the victim? The bank is the victim. Yet, there may be many victims who suffer economic harms; and those harms can be dollar loss, but they can also be things like higher interest rates, losing their credit, becoming depressed. So there are many more harms to victims than just a monetary loss as calculated under the guidelines.

So I have an example -- and I'm not going to answer the question -- but consider a $1 million actual loss, and under the three scenarios, defendant one steals a million dollars from a billionaire; number two, the defendant steals $1 from one million individuals; and number three, the defendant steals $100,000 from 10 retired individuals, depleting each of those 10's life savings and destroying their credit and making each victim homeless.

Now, you have scenarios there where the actual and assumed intended loss is exactly the same, yet you have very

different consequences, for which I think is very appropriate for the court to consider all of the harms and not just the total dollar loss that may be calculated under the guidelines.

There are some departure factors that I think are appropriate to think about, and I think the identity theft ones are very appropriate and identity theft can cause victims to lose their credit, for example. And it's very difficult for them to restore their credit. And there are specific departure considerations for that.

But if you have that investor fraud, if you have that mortgage fraud, the guidelines don't talk about what happens to the victim's reputation or credit. So there are some variables that probably aren't considered that perhaps should be considered.

I looked at another couple of tables from the Commission dealing with restitution and I put some of the financial ones -- and particularly as to

fraud, if you look at the ones where there are no fine or restitution or fine only, you'll find out that for fraud, 31 percent of the cases do not -- there's no restitution order. For organizations, it's actually a little higher, it's 42.3.

And I had a couple of other related offenses, and you can see that for the most part, except for embezzlement, they're somewhere in the 30 percent range of that -- in cases that restitution is not ordered. And that's an important thing for victims to understand that the guidelines should hopefully further address.

In terms of acceptance of responsibility, defendants get pleas for pleading, pleading early. But perhaps one of the things that could be used, the defendant make a substantial restitution payment or pay their restitution prior to sentencing. On the other hand, what about if a defendant has hid their assets so that the restitution cannot be collected?

I think it's important to look at all the tables you looked at earlier and also to interlineate those tables with restitution, not only ordered but collected. And having this data, I think, would be very helpful in terms of what policies would be good if restitution is going to be an alternative to a long sentence.

I want to leave with a couple of thoughts, that I think, of absurdity. Take that case where restitution is not ordered because there are too many victims or it's too complex to calculate. So you may have a defendant who has a much smaller crime, and yet, has to deal with the economic consequences. Restitution is not necessarily to punish but to restore the victim; and yet, that defendant who's caused great harm, great harm, pays no restitution, while somebody who's done less harm -- and I think that's something that needs to be looked at.

Last but not least, I want to leave you with the idea of collection. And I

think collection of restitution is perhaps more important than the ordering of restitution. And two states, Pennsylvania and Hawaii, have recently done a lot to try to improve their systems and I think that the federal system would, likewise, be very worthwhile to look into restitution being ordered and collected and how that fits in the sentencing process.

So I thank you for your time and I look forward to participating in the panel discussion and further over the next two days. Thank you very much.

HON. BREYER: Thank you very much.

Well, we have a few minutes and I'd just like to carry the religious analogy a bit further about the Christmas and Hanukkah in that it appears to be that some judges look at the sentencing guideline manual and believe it more resembles the Talmud, and it's about as useful. And we sort of get really just overwhelmed by trying to use these different specific offense characteristics.

So what's so interesting about the reality, what I call the reality, the statistics in large part reflect a reality, is that you see this very, very large number of cases to which it's simply the loss and you don't apply the specific offense characteristics. And they're at the low end of -- basically at the low end. Then you might ask the question of the United States attorney for the Northern District of California: What? You don't bring these cases? How interesting.

Now, what does that say about the uniformity of sentencing throughout the country? Is this just an individualized concern or is it something that appropriately reflects local concerns which would be recognized by the Justice Department?

Another question you might have is when you take a look at the specific offense characteristics, and you see that the largest group would be victims -- and I think that accounts for about a 22

percent of the implementation of the specific offense characteristic -- does that really reflect, because it's a large number of people, does that really reflect the seriousness of the crime? Does it really reflect the harm that it's caused?

And of course, the analogy, the examples given by Mr. Butler sort of highlight that. 10 people, one person, a million people. So those are very, very different impacts in terms of sentencing. Are they really accurate reflections of harm that should be sanctioned in a sense?

You come to the next group of specific offense characteristics, in terms of its implementation, which I think is the sophisticated means, and that is about 12.7 percent -- also whether it's outside the jurisdiction -- but I think the sophisticated means is the primary component there, though I could be wrong.

And the question there is, well, you know, you're talking about fraud, you know, isn't fraud inherent -- inherent in fraud are some sophisticated means, at

least if you're, quote, successful, it ought to be -- and sort of not all that successful because you're in front of us, but successful enough to pull it off at least in the beginning, is this part of it?

And then to what extent are you really double-counting here, double-counting? You get to the third category of implementation of these requirements, which is identity theft, essentially. That's 12 percent. And that's a serious, serious problem, and sometimes a problem that's immeasurable because to take away a person's identity can devastate that person, though not necessarily in a quantifiable way. So how are we measuring that?

And I think that on the one hand, one might say, like the Talmud, it's so complicated. And then on the other hand, you might say, let's have some simplification here. Because it's so complicated, judges are having a hard time implementing it in a uniform -- somewhat uniform way across the country. And

isn't that defeating one of the stated purposes of the sentencing guideline?

So let me just ask, start with our judges here, is it too complicated? Or is it just, all right, I can use these, they're not all that complicated, and I'm pretty confident that the type of sentence that I would impose in case X would be the type of sentence that that judge down the road in some other jurisdiction might impose.

Judge Preska, I'll have you go first.

HON. PRESKA: Well, my concern is that it would not be the same, for the reasons set out by Judge Underhill in his concurring opinion. And I think it is driven primarily by the loss amount.

Now, I don't know if we were doing the cases in your district where the smaller loss amounts would yield lower guideline sentences, but among the cases where there are large loss amounts, I think judges will vary tremendously. But why? One, of course, the venality or the

evil of the fraud, the period of time. In the examples we just saw, whose life savings have been wiped out? I mean all sorts of factors. But I think there would be a great disparity, and that's one of the problems.

HON. BREYER: Judge Gilbert.

HON. GILBERT: Well, first of all, sentencing -- and I think any judge would agree with this -- sentencing is the most difficult and can be the most stressful aspect of our job. When you're deciding someone's freedom, we do not take that responsibility lightly.

And about 80 percent of the fraud victim -- the fraud defendants I have seen in my years were Criminal Hist. Category I. It's one thing, in other types of crimes, drugs and guns, when you're sentencing someone that has a rap sheet that puts them into a III, IV, or a V. When you're dealing with someone that Criminal Hist. Category I that maybe started out with good intentions and then somewhere, got off track, you've had a

relative or a close friend or a financial advisor take advantage and they intended to pay this money back that they had taken but it got too easy and it just got out of hand, and they've been Boy Scout leaders or Girl Scout leaders and, you know. The problem with the 2B1.1 is that it puts an overemphasis upon loss and not upon other human factors that we, as judges, have to take into consideration.

Now, I've had victims appear before me not wanting the defendant to go to jail because they wanted restitution, they wanted to get paid back. They said, you know, I want this person to pay me back, I'm interested in my money, I don't care how much time -- whether he goes to jail or not.

And then I've had other victims in which entire life savings have been wiped out, in which there may have been -- their guideline range may be 24 months or so. And that kind of harm is not really taken into consideration by the guideline. That's when you use the

3553(a) factors to maybe vary upward.

So there's -- in terms of uniformity, that's a fiction. It's been a fiction for -- ever since I've been on the federal bench. You try to develop -- you know, there's going to be no perfect fix here.

But the problem, as I see it, is that there's an overemphasis upon the determining the amount of loss and not upon these other factors that we have to take into consideration in sentencing which is, as I said, the most difficult aspect of our job.

HON. PRESKA: One more, could I just?

HON. BREYER: Sure, go ahead.

HON. PRESKA: And part of the problem with the uniformity issue is that there are so many more moving parts in these kinds of crimes than there are in, say, drug crimes or gun crimes. There are just a lot more moving parts and the factors that Judge Gilbert just mentioned. And that's why, in my view,

that when we are driven by the loss amount and then go on to consider the other factors, there's so much leeway in there that we are going to get great disparity and perhaps appropriately so.

HON. BREYER: Well, I'm getting the sign that we've already exceeded our time. So I want to thank the panel and I particularly want to point out that we are going to sit -- this panel is going to now sit in the audience and find out what are all the answers to the questions they raised. Thank you.

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UNITED STATES SENTENCING COMMISSION
SYMPOSIUM ON ECONOMIC CRIME

- x

September 18, 2013
10:58 a.m.

JOHN JAY COLLEGE OF CRIMINAL JUSTICE

524 West 59th Street New York, NY 10019

PLENARY SESSION III: Hon. William H. Pryor, Jr. Jennifer Arlen Miriam Baer Steven L. Chanenson David Debold James E. Felman Hon. Gerard E. Lynch

HON. PRYOR: Good morning. I want to thank all of you again for attending our symposium to discuss issues related to the fraud guideline.

I suppose that Chuck was right, that the earlier panel was supposed to determine whether the guideline was broken. Chuck has prepared the record, as he often is tasked with doing, and our task is to review the record and take it, I suppose, now, as an established fact that the guideline is broken, or at least we're going to assume it for the sake of argument at this time.

And we're going to discuss visions for change, that is, if it is broken, how ought it to be fixed? And we have a distinguished panel to help discuss that idea and to give us some possibilities.

We're going to start out with Jim Felman, who is a partner at Kynes, Markman & Felman in Tampa, Florida where he practices criminal defense. He was a member of the Commission's Practitioners

Advisory Group from '94 to 2009 and served as Co- Chair from 1998 to 2002. He is the Co- Chair of the ABA's Committee on Sentencing and the author of a treatise on grand jury practice.

And Jim's going to start us off with the very recent report of an ABA task force on the reform of federal sentencing for economic crimes. So Jim.

MR. FELMAN: Thank you. And good morning. Thank you to the Sentencing Commission for both putting on this program and for inviting myself, on behalf of the American Bar Association, to present this presentation.

What I'm about to present to you is the efforts of a task force that we assembled, with the premise that the guideline is in need of fundamental reform, but to move past making that point, to move past the idea of simply criticizing the guideline, to write down what it ought to look like. And, you know, quit complaining, start fixing. So that was the philosophy of our group.

This is the makeup of the group; it's five professors, three judges, six practitioners, representatives of two organizations, and a Department of Justice observer -- although those of you who know Mr. Wroblewski will know that I don't think any of his observations were withheld.

We began work in April, we had two meetings of our full group, we then had a drafting subcommittee try to put together a draft. The full group then met and reviewed that draft last week. And I am pleased to say that what I'm going to present to you is based on a unanimous consensus of our group, although that consensus is in accordance with certain principles of consensus that is essential that I present to you and also some disclaimers.

It's presented as a consensus proposal with the understanding that we're kind of stuck with the 25 percent rule, with a largely numeric guideline system that's going to have fairly

specific numeric values assigned to sentencing considerations.

So rather than say, well, we're just -- we don't like that so we're not going to participate, we realize that somebody's going to write a guideline potentially that follows that format, and rather than have someone else write it without us, we elected to participate.

But we want to make it clear that we don't -- by participating, all of us feel, in the task force, that this is not an ideal structure because it's often unduly rigid. It can lead to assignments of values that are somewhat arbitrary, that tends to overemphasize considerations that are more easily quantified, to the detriment of those that are less easily quantified. And it caries a risk that it's going to look more empirically based than it actually is.

A better structure would give more authority to the judiciary, but we did not have consensus on the task force as to the ideal allocation of authority among the

various constituents. But we decided that in light of the fact that we're likely stuck with the system we have now, there wasn't much point to be served in hashing all that out.

So with that understanding, this is a -- our first draft, and I know it's tiny, so I'm going to blow it up and I'm going to walk ourselves through it.

But before I do that, I want to make sure that it's understood that this is very much a work in progress and that we feel much more confident about the structure of the proposal rather than -- than we are about the specific numbers that we put down.

We felt like we ought to assign numbers because it's really hard to picture how the structure works without numbers on it, but we put all of the numbers in brackets because we're not suggesting that we put that kind of rigor into figuring out what the numbers should be.

And in some instances, you'll see a

range of numbers in a bracket which wouldn't be allowed under the 25 percent rule. So you'd have to -- in a guideline, you'd have to pick one. But we wanted to sort of illustrate that we were even less certain about what some of those numbers ought to look like.

So we hope that rather than get too distracted by the numbers, that you will look at the structure. We've given you a new musical instrument, it may need some tuning. This one might sound more like a banjo than a guitar. But if you tweak each of the strings a little bit, we hope at the end of the day that you'll -- my father played the banjo and I hated it, so apologies to those who like it -- and so hopefully with some tuning, this could be where we need to be.

Secondly, we have discussed but we have not fully resolved the question of disaggregation. We recognize that there is a wide array of offenses that get sentenced under this guideline, and we remain open to the possibility that some

offense types ought to be sentenced under different guidelines.

Third, we're hopeful that the Commission will move expeditiously to overhaul this guideline. But in the interim, you'll notice that we have emphasized 994(j), the principle that offenses that are not crimes of violence or otherwise serious when committed by first offenders ordinarily should be receiving a sentence other than imprisonment. And so we urge the Commission to consider that as a standalone measure in the interim in the event that a complete overhaul can't be accomplished in a shorter time frame.

I also want to emphasize that this is an interim proposal from our group. We have more work to do. We want to see how it's received, we want to react to it, we intend to keep working. But we also hope that our work could be used as a sample of how advisory guidelines could be written. In other words, we hope the structure would be helpful to look at not only in

addressing this guideline, but also in looking at how, under an advisory system, guidelines could be written in the future. And so we hope that it will be taken in that spirit as well.

Copies of this proposal will be available for each of you in the breakouts this afternoon so that you can look at it and take it with you, and then criticize it.

So what we start with is a base offense level, but we've put it in brackets because we recognize that there may be a need to adjust the present base offense level, in light of some of the other changes that are being made.

We still have a loss table but it has many fewer loss breaks in it, and many fewer offense levels that are added. Again, the numbers are in brackets, but they give you a rough feel for what we're looking at.

It seemed to be a common critique that loss is overstated in the present guideline. We've not eliminated it

altogether. We still think it can serve as a first measure of the harm or magnitude of the offense, but we think that loss unduly drives the sentences in the present guideline.

So instead, we have substituted what we call -- and this is somewhat the core of our proposal -- what we call culpability. And I'm going to explain. We have detailed application notes as to the considerations that courts ought to consider in arriving at culpability. And of course, here, you see in brackets ranges of numbers, which wouldn't be permitted in a final guideline, you'd have to pick one, most likely. But we just were so uncertain about the magnitude and obviously the tuning of this that we just threw out ranges there for further study.

And I'm going to go through in a moment the culpability considerations.

Then third, we have victim impact. And we think just counting the number of victims is not all that helpful. I think Mr. Butler made that point in a very

compelling fashion this morning. So we do have separately, as a victim impact consideration, but a much more nuanced look at victim impact, we hope.

Then we take all of the Congressional directives that are in the present guideline and we consolidate them in one place and we suggest that courts ought to look at what motivated those directives and if they've not otherwise been considered, then there needs to be an increase.

And there's a lot more work that we need to be doing here. There are some Congressional directives that are much more specific than others, some of which would require their own note; an example, I think is the most recent health care fraud amendment where it's very specific.

So there's more work here that needs to be done. But in general, we feel like most of the Congressional directives could be relocated into one central place.

And then this is our 994(j) point, that we really feel that if the offense is

not otherwise serious, that the offense level should be no greater than 10 and that a sentence other than imprisonment would genally be appropriate.

So let me walk through then these various components. When it comes to loss, we were very clear that loss ought to be actual loss. Intended loss is a matter that we feel could be dealt with in our culpability considerations.

And I should mention, by the way, in the base offense level, that we think there just needs to be one base offense level, we don't see any point in having a special base offense level for mail or wire fraud.

And so then we get into culpability. And as you've seen, there's five different levels there. We think that culpability should look at the following matters. And then we go and we break these down.

The defendant's motive; the correlation between the amount of the loss and the amount of the defendant's gain; the degree to which the offense was

sophisticated and whether the defendant's contribution to it was sophisticated; the duration of it; whether there are extenuating circumstances in connection with the offense; whether the defendant initiated the offense or just joined in it afterwards; whether the defendant took steps to mitigate the harm from the offense.

And obviously, we feel this is not an exclusive list so we welcome other thoughts, but this was the best first cut that we could come up with of the things that courts generally find to be relevant in deciding an appropriate sentence.

We started by listing them and then putting numbers next to them. And then, boy, it just immediately felt arbitrary. To try to weigh these things and put numbers on each one felt like we were engaged in just the sort of thing that we were criticizing the present guideline about. And in an advisory system, it seemed unnecessary. So instead, the weight is not accorded some numeric value,

but they're all there for the court's consideration.

I'm scrolling through quickly, this is the text and you'll get to see it this afternoon. But we want to make sure that the court would be careful not to double-count the amount of the loss or the victim impact. There may also be overlap with role, and so the court would need to be careful in making sure that at the end of the day, there hasn't been double-counting.

So when we look at motive, we thought, well, there really are very different kinds of crimes here. There are predatory offenses, the classic scenario in which the defendant intends to inflict a loss, that's their purpose, and the purpose is to get the money themselves, to generate a gain to themselves in roughly that amount. Those we think are the most serious offenses and they're ones that are often invoked as examples of why severe penalties are necessary in this area.

But we also realize there are many scenarios where the effort is legitimate at the beginning and it strays over into criminality as a result of some unexpected event. And, you know, it's still intended to cause a loss and a gain, it's still a very serious offense, but less serious than one that's an outright fraud from the beginning.

Then we get these cases that we call risk shifting, where there really isn't any intent to cause a loss at all. The defendant just wants to be very confident that there -- if there's a loss, it's suffered by someone other than them. And that's obviously still a culpable and fraudulent behavior, but less serious than one where there is an actual intent to cause a loss.

Finally, we see cases that are really purely gatekeeping violations, where there's no intent to cause a loss, there's really not much of a risk of loss. But they are nevertheless a violation of the statutes that are there to protect us

against the risk of loss. And we think those are at the lowest severity level.

There are obviously many permutations of these things, some cases may fit into more than one category. And so rather than try to be more specific, that's where we are at this point. But we think it's important to recognize that there is that array of types of cases.

Second culpability consideration is gain. Did the defendant get the money? If the gain is commensurate with the loss, that would be more culpable; where it's less than loss, that would be less culpable; and where the gain is minimal or zero, that would be yet less culpable than number two.

And we'd want to also look at the extent to which the defendant himself personally gained.

There also is a need to look at a situation where the intended loss is very large even if the gain is small.

Then the third consideration under culpability is the degree of

sophistication and organization. Higher -- obviously, higher sophistication/organization, more culpable; the reverse equally true.

Then we suggest duration is important. Is this something that went on and on and on and it really became the defendant's lifestyle or is it a fleeting, one-time, stupid thing and everything in between? It seems to be an important consideration to sentencing courts.

Then we suggest extenuating circumstances. There may just be circumstances where things have occurred really beyond the defendant's control that have contributed to the offense and mitigated it in some fashion.

And then obviously, efforts to mitigate, voluntary cessation, self-reporting, restitution prior to detection, things like that we think are important and relevant.

So we think that the court ought to consider all of these various things together, and they may overlap, and do the

best they can to rank people according to who is typically sentenced under this guideline.

I think we threw out in brackets that maybe 5 percent on either end, 40 percent in the middle -- I guess that would be 25 percent in the middle categories on the low and high end -- but again, very rough approximations of what we were thinking.

In terms of victim impact, we have four different levels. We think that in considering victim impact, we should look and see whether or not these victims were targeted, whether they were vulnerable, what is the significance of their loss? Was it $1 loss from a million people or was it the example Mr. Butler gave of a really devastating personal loss. We think that's important.

Other non-economic harm. There are cases where the primary impact to the victim really isn't economic, but it's nevertheless an important and relevant consideration.

There are also circumstances where the victim has contributed to the offense in some manner. And that may indicate a lesser degree of culpability.

And then, as I mentioned earlier, the offense level cap for offenses that are not otherwise serious.

And we would urge the court to basically consider all of the above.

Now, obviously, I guess if the guideline were rewritten comprehensively, it may accomplish that on its own. We would hope that a well-crafted guideline would be such that otherwise serious offenses would not score to imprisonment. Unfortunately, the present guideline seems to make the judgment call that every economic crime is an otherwise serious one. We don't believe that to be consistent with the legislative intent.

And so that is the gist of what our work has been to date, and we hope that we will be able to contribute to the discussion in the coming days and coming

months, and hopefully we can accomplish something that would fix a problem that we believe to be very real. Thank you.

HON. PRYOR: Our next speaker is Judge Gerry Lynch. Judge Lynch has served on the Second Circuit since 2009 and previously served as United States District Judge for the Southern District of New York from 2000 to 2009.

Before taking the bench, he was an Assistant United States Attorney and head of the Criminal Division of the U.S. Attorneys' office in the Southern District.

He's also been a professor and vice dean at Columbia University Law School, in private practice, and was a law clerk to Justice Brennan on the Supreme Court.

So Judge Lynch was also a member of the ABA task force, and please share with us your thoughts.

HON. LYNCH: Well, thank you. First, as Judge Preska welcomed you to her and my district, I want to welcome you to my theater.

Of course, it's not. If you look carefully, you'll see I'm Gerard E. Lynch, the theater is the Gerald W. Lynch Theater. The other Gerry Lynch was the long-time president of this institution, the John Jay College, a major figure in law enforcement education and in building this terrific institution as an important part of the City University of New York. So since he's sort of my namesake, I wanted to acknowledge his presence. He died recently unfortunately, and so I pay tribute to him.

I'm going to depart from my intended script a little bit to address something that came up in the panel this morning that I think is important to think about. I perhaps have a more radical notion of what may be wrong with this guideline than the fact that judges often deviate from it.

The division between the guideline's recommendations and what the judges do is not necessarily a bug, it may be a feature of the system; variances are part of our system, there's nothing

necessarily wrong with it. So it may not necessarily be a problem.

It may also mask problems. After all, we learned this morning that the dramatic, new, large, increased difference between the average sentence given out and the average guideline recommendation is seven months. Now, I'm the last to minimize the importance of seven months in prison to an individual's life, that's important. But from a public policy standpoint, it's a little hard for me to see that the difference between a sentence -- a recommend sentence of two and a half years and a sentence of two years is making some major difference in deterrence or in the crime rate or in anything that's very important.

I think what the numbers show is that on the whole, judges are anchored to the guidelines. So the fact that the judges are close to the guideline sentences or the fact that they differ increasingly from guideline sentences doesn't necessarily mean that the judges

are right and the Commission is wrong or vice versa. It may mean that the whole system -- or it may mask the fact that the whole system could be off in some way. And so I think we need to rethink the guideline, without so much of an emphasis on what are the variance levels.

I was also struck this morning that until we got to the judges, the human aspects of sentencing were not emphasized. When I heard the statistics, they're very interesting, but they didn't sound familiar to me in terms of the kinds of cases that judges see. And by this, I don't only mean or even primarily mean some of the factors that Judge Preska emphasized that are common to discussions of sentencing, the aspects of the individual offender that are not captured by guidelines that primarily deal with the seriousness of the offense; that's an old theme, people have different views about it, I'm not going to rehash that.

I mean that even when we talk about the offense, and the offense only, things

that bear on the seriousness of the offense, the numbers -- and the guidelines are primarily crafted in terms of numbers, principally the loss amount -- don't necessarily capture the difference. And I'll talk more about that in a minute.

Another factor that I think we just need to bear in mind is how many of the guideline numbers that lead to the actual imposition of sentence are determined by plea bargains. This was mentioned in the panel. What wasn't mentioned is that the way the guidelines read can influence those plea bargains, the in terrorem effect. Even if not many specific offense characteristics actually get taken into account in the actual sentences that are imposed, that doesn't mean that defendants and defense lawyers looking at a system that promises the possibility of multiple enhancements are not going to be influenced by that in the bargains that are struck and in the decision to plead guilty.

So whether the guidelines are capturing accurately the factors that matter may be important in ways that are not captured by what actually looks like it's happening when sentences are imposed in a system that is driven by plea negotiations.

So with that, let me turn to some of the things I had intended to say, some of which pick up on Jim's themes about possible solutions.

I just want to start by emphasizing two things about my attitudes. I'm a believer in guidelines, always been a believer in guidelines, Marvel Frankel sold me on guidelines in 1974 when I was a law student and I've believed in them ever since.

There is a need for a system that gives judges, who vary very much in their philosophies and attitudes, some guidance about what sentences are expected in particular cases and in a range of cases.

Second, no love lost here for white - collar offenders as such. I started my

career in criminal law as a white- collar prosecutor. For much of my life, I've argued that white- collar sentences should be higher than they are. I don't come to this with a view that these offenses are not serious; quite the contrary. At the same time, I have come around to the view that we've gone overboard at both the high and the low end of the guidelines.

Last preliminary point I want to say, I think it's important, as Jim said, that we think about structuring guidelines for an advisory guidelines regime. These guidelines were crafted in the first place as mandatory guidelines and they bear the mark of that. They bear the mark of an attempt to characterize every crime by a numerical value, taking into account every conceivable factor that could go into that calculation in a very specific way. That is probably not how advisory guidelines ought to be structured.

So let me look briefly at some of the

issues that I think would be helpful for guideline reform to address. First, the guidelines, as they exist, do not seem to be designed to answer, even implicitly, the most important question facing courts dealing with non-violent economic offenders, which is, which of these offenders should go to jail and why. This is not a feature of the handful of cases at the high end that get all the publicity; that's not my concern at this moment, that will be a different concern.

As was pointed out this morning, the vast majority of cases are at the lower end. And in those lower-end cases, the issue is, should this person go to prison or should this person not go to prison? I think a very helpful suggestion in the ABA proposal is the one about thinking about some kind of cap, some kind of guideline that would be directly addressed to the idea, who should not go to prison, let's put it that way. And then it voids some of the other calculations if certain standards are met.

This is not a radical idea for the guidelines, it's exactly what we do with the career offender guideline at the high end. We say we have all this calculation that we go through, we add up all the numbers and we get somewhere, but then that can be trumped if there's somebody who, because of his career offense status, ought to go to prison for a very long time.

What the ABA committee is proposing -- task force is proposing is something in the economic area of a similar nature at the low end that says, regardless of these particular difficult-to-measure variables, there may be some cases where someone ought not to go to prison, a lot of cases, and we should try to capture those and decide where we should be sending people to prison and where we shouldn't. I think that's helpful.

I won't spend too much time on loss because everybody says the same thing about loss. I think Mr. Butler stole my thunder. I had a similar example about different $1 million losses. Everybody

understands that there are different types of crimes that generate the same type of loss, and that they should probably be treated differently. I'll get in a minute to the ways in which the current guidelines try to do that and fail. But it should get less importance.

The loss table should be compressed. Judge Gilbert gave a wonderful example of Medicare fraud where the intended loss theoretically could be seen as $14 million, the actual loss as 2.

Now, putting aside questions of whether intended loss or actual loss should be primary, does anybody sitting here actually think that when we're deciding who should go to prison and for how long, that the difference between a $2 million fraud and a $14 million fraud is actually important? Either way, it's a very large scam. Either way, if we look to the ABA's suggested culpability factors, there are a lot of culpability things going on here. It's a long-running fraud, it's intentional, it's

aimed at a government program, it's done by pure greed.

The 14 and 2 million are both arbitrary numbers after all. If the government got there sooner and closed it down, the numbers would have been lower. If it went on longer before the government caught them, the numbers would have been higher. The numbers are really arbitrary.

Note, by the way, this is not unique to the economic crime category; the same problem pervades the drug guidelines, an overemphasis on what can be measured, as opposed to what is important. If we don't need to measure so carefully anymore, we probably should be thinking differently about it.

Okay. I got more. Can I could have two more minutes?

HON. PRYOR: Yeah, two minutes.

HON. LYNCH: Let me try to get through a couple of them.

One, the guidelines try to capture these differences in amount of fraud, the

differences in culpability, by adding a lot of things. This is a feature it shares with the child pornography guidelines, another very unpopular guideline with judges. There's a kind of cascade. But it's not only the problem of double-counting, it's also the problem that the guidelines recognize in the grouping rules, there's a law of diminishing returns. If you have five counts of a certain crime, you don't get five times the sentence. Each additional crime doesn't add the same amount to your sentence.

The same is really true of adjustments. Several -- and this is another thing the ABA tries to get at -- if there are several factors that increase the culpability level, they may not all need weight of a particular amount, let alone an increase of 25 percent, which is what two levels means -- we're always talking about levels, we're not often talking about years. Every two points is 25 percent added on to

the sentence and it's compound interest. When you add two two- level adjustments, it goes up 25 percent each time.

Grouping these culpability factors is useful. One thing I urge the ABA task force to do, and I'm glad it did, at least symbolically, is to recognize that sometimes these should be reductions rather than additions, that we might want to set a fairly high base level and reduce it in cases where the culpability is less, rather than always setting the guideline at one level and then adding a number of increases.

It's also worth noting that the factors are awkward and they work differently in different cases. Multiples victims? Well, yeah, defrauding a lot of people is, in the average, on average, worse than defrauding a few people. But as Mr. Butler's example shows, maybe defrauding a million people of $1 is not as serious as defrauding one person of a million dollars.

The duration of the fraud? Well, that shows people are sticking to it, that's bad. But somebody who's embezzling a little bit every day, we accumulate those losses the same way we do with drugs. Maybe the length of fraud is actually a mitigating factor when judged against the total loss in these cases.

The factors are complicated, which is why the solution may be to give judges the opportunity to assess how those factors actually work and arrive at an aggregate culpability score.

30 seconds on one last idea that the ABA does not do. Maybe we should think about disaggregating the fraud guideline. It tries to cover every crime of dishonesty. It might be useful, at least as an exercise, for the Commission to think about, is insider trading different than credit card scams, for example? There are different types of crimes that are covered by this guideline. And notice, we would want to use prison differently in those different cases.

Some con artists are predators, they are serial offenders, they're just like other common criminals who have a long history of doing bad deeds, we need to incapacitate them.

In other categories, we're looking at deterrence. We might want to measure the in- out decision and the length of prison differently in those kinds of cases. I think that's something that deserves a thought.

Sorry for going over my time. Thank you for having me here.

HON. PRYOR: I hate to enforce the red light on Judge Lynch who often has so much that is valuable to hear. But I appreciate that very much.

Our next speaker is practitioner David Debold with Gibson Dunn. He is the chair of the Commission's Practitioners Advisory Group and has also been a member of the task force, right?

MR. DEBOLD: That's right.

HON. PRYOR: Thank you, David.

MR. DEBOLD: Thank you, Judge.

A few general points and then I want to touch on a few things about the proposal that both Jim and Judge Lynch have already discussed.

One thing that, as we went into this process, was on my mind is the danger of doing a most- cases kind of analysis, asking people, well, do the fraud guidelines generally work in most cases? Do they generally bring out an outcome of an appropriate sentence?

The guidelines could be working right in even 70 or 80 percent, or even 90 percent of the cases, but if you have a significant number -- and it would be a significant number since we're dealing with about 8,000 people a year, over 8,000 people a year under this guideline -- it could point to a problem that needs to be addressed more systemically rather than trying to figure out who those 10, 20, or 30 percent are and finding a solution for those folks.

The second general point that I came to this process thinking about is to

beware of using averages. We might look at the numbers that you saw on the slideshow earlier today and say, well, you know, at the low end of the table, on average, the judges are giving about the same sentence that the guidelines call for, 20 months or 24 months or whatever it is. But, you know, I kind of compare this to, you know, putting one of your feet in a pail of hot water and your other foot in a pail of ice water, and saying that on average, the water is just about right.

The real problem here that we have to dig into is in individual cases, are judges seeing the need to go above or below the guidelines or are we, after evaluating these cases, deciding that the guidelines are not doing a very good job. And that applies to a whole bunch of numbers, including the extent to which judges are varying from the guidelines.

Sure, some judges may -- judges may, on average, vary a relatively small amount, but if there's a number of cases where they're varying quite a bit, that's

something we need to address.

The third general point that I came to this process thinking about is that the fraud and theft guideline -- and I do think it's important to give it its full name because we have fraud cases and theft cases all being sentenced under the same guideline -- perhaps more than any other guideline, tries to do an awful lot. And this gets to the point that Judge Lynch made at the end of his presentation with the possibility that we may want to try to disaggregate and take some cases that are currently in the fraud and theft guideline and treat them under a separate guideline. I'm not terribly enthralled with that idea, and I'll explain why in just a minute.

But I think it's important to keep in mind that this guideline tries to calculate sentences for a great variety of offenses and a great variety of offenders. And this gets back also to the point you heard from the U.S. attorney from the Northern District of California, it

really matters to think about what type of fraud we're talking about, because certain types of frauds, like investment fraud, are very different from other types of frauds.

So as we approached this task and as I thought about this task, the real problem is, how do you take all these differences among these various offenders and the things that go into what makes the offense a serious offense or a less serious offense, and assign numbers to them; and then figure out how they should interact with one another.

And that's where we really ran into trouble in trying to come up with a solution to the current system.

I think a lot of us could agree that some of the things we identified, for example, in the culpability score, which is the motive or the nature of the offense, the gain that the defendant accomplished in relationship to the loss, the extent to which the crime was sophisticated or organized, and the extent to which the

defendant himself was responsible for that, the duration of the offense, extenuating circumstances that might mitigate the offense, whether the defendant initiated the offense or followed along with somebody else's plan, and whether the defendant took any steps to ameliorate. I think we could all agree that if you go down one by one on in each factor and consider them in isolation, we can agree that, you know, somewhere on that continuum, if you're at the high end of duration versus the low end, that in general, that is going to be a more serious offense.

But then you have to combine each of these culpability factors that we've identified with one another. And when you start combining them together, things that don't always lend themselves well to quantification -- like motive, how do you quantify motive, how do you quantify extenuating circumstances -- all these things have to be considered in combination with one another.

And so I think probably the biggest change we're proposing with this revised guideline is to take all of those factors that we call culpability factors, and at the end of the process, have the judge figure out where does this defendant fit, from a culpability standpoint, compared to all the other defendants who are sentenced under this guideline.

And one thing that I think would benefit, in terms of a further iteration of this proposal, is to start coming up with some examples of who fits within the five categories that we've come up with on the culpability scale, so that judges, in the end, are trying to do a proportionality analysis; how does this defendant compare to other defendants from a culpability standpoint on the scale from, you know, the highest to the lowest and three levels in between.

And as Jim said, we kind of threw into the proposal this notion that we would expect on -- you know, we would expect overall that maybe 5 percent of the

people would be in that highest culpability level and 5 percent would be at the lowest, 40 percent in the middle, and 25 percent on either end on the two remains ones. That obviously is something that would have to be discussed in terms of whether that really captures the culpability variability that we have under current sentencing. But it's certainly a step forward in making sure that if somebody appears before a judge in one district versus a judge in another district, that they're asking the same question and hopefully combining these factors to come to a reasonably close answer.

And we do note, and when you see the fine print on this, there are a number of things that will have to be worked out and a number of cautions that judges will have to pay attention to. For example, the overall amount of loss could end up being double- counted when you do the culpability score, and so there will be some need for the judges to pay attention

to -- just keeping aside what the total amount of loss is -- how does culpability for this defendant compare to others. Inevitably, there's going to be some overlap.

The same thing with victim impact. Some of the things that we think about that make a crime more culpable or more blameworthy also will factor into whether the victim impact is zero or high or somewhere in between. And so those kinds of things will have to be worked out.

But the overall approach tries to take what is now all these specific offense characteristics that are mostly aimed at determining culpability, you know, was it a health care fraud over a million dollars; Congress decided that was worse than a securities fraud more than a million dollars, I'm not sure why, but that's what we're stuck with.

Sophisticated means, someone on the board of a publicly- traded company, all those things generally are ways to measure culpability. And what our proposal does

is tries to take those all and have them considered in the aggregate and in relation to one another to come up with an overall score on that culpability scale.

Same thing with victim impact. As Judge Lynch mentioned, and I think Jim mentioned as well, and echoing what we heard from Mr. Butler, victim impact can't always be readily quantified by number of victims or other types of things that relate to victim impact. You have to consider the totality of what the victim impact is and compare it to victim impact in other cases.

So there's certainly a lot more that needs to be done here. This, I think, is a good start for us and for the group here today and tomorrow to start thinking about how we approach these various factors.

A number of people came up to me before this panel and mentioned that they had read the article that Matt Benjamin and I wrote a couple of years ago -- and Matt's here in the audience. And, you know, this is a different approach than

what we have in that article, but if you go back and look at some of the things we talked about, it's a way of trying to address some of those same concerns; the overemphasis on loss, actual versus intended loss, the effect of gain in relationship to loss, the cumulation of factors.

So, you know, my thinking on this has evolved since we put that article together and it was helped quite a bit by the other people on the panel of the Economic Crime Task Force. And I hope that this will be a good way to at least advance the discussion for reforming this guideline.

HON. PRYOR: That was fast. Thank you. You can tell who the lawyer is.

Professor Baer is our next panelist and is an Assistant Professor of Law at the Brooklyn Law School where she teaches criminal law and procedure. She's affiliated with the Center for the Study of Business Law and Regulation. And her scholarship has focused primarily on

organizational wrongdoing. She previously served as an Assistant United States attorney in the Southern District where she focused on white- collar prosecutions.

Professor Baer.

MS. BAER: Thank you so much. And thank you for having me.

So as was said, from 1999 to 2004, I was a prosecutor in the Southern District of New York. And by the end of my time there, I had mostly fraud cases of some nature. And now, I am a professor and I teach both criminal law, the basic criminal law course and corporations.

And of course, teaching the basic criminal law course is quite eye opening. Among other things, you actually learn that there are states. But when I teach the basic criminal law class, I'm always struck by the ways in which, you know, we focus a lot on homicide. And homicide's statutory structure of course differs so much from what we think of when we look at the federal wire securities/mail fraud

statutes.

And of course, if you pick up any criminal law case book, including Commissioner Barkow's, you'll find that the cases sort of span this -- they focus on several types of homicide, which tend to focus on, for example, you know, at one end is premeditated murder, right, which ordinarily implies this planned, cold-blooded killing, even though the cases themselves often belie that of assumption.

And like farther down the list is sort of the intentional plain vanilla murder, right, so you intended it. But we don't necessarily have this premeditation.

And then you have even different categories for people who intentionally or purposely killed someone but were acting in, for example, some type of heat of passion, which often -- or extreme emotional disturbance -- which often includes in these facts, usually there's some kind of spur- of- the moment conduct,

some sort of trigger.

Okay. Now, what I find striking, right, when I teach that section of the course is how different of a course that is from our world of fraud, where the statute has made none of these kinds of distinctions, to the extent we believe there should be any sorting of what we might call highly- planned and premeditated conduct and sort of impulsive conduct, not well- planned conduct. We expect that to all happen at the back end where sentencing occurs.

And so I think it's wise to ask, first, do we want to tease out these distinctions, do we think they're important enough that we want both our courts and our sentencing guidelines to do this? And then of course then to ask, do we think that the guidelines are doing it in a good way?

And I think, really, if you listen to what everyone has said today, there's almost an intuition people have, which is that somehow planned, premeditated, well

- thought- out frauds are more wrongful, right? They suggest a certain level of thought, maybe these are the folks that we think are the really greedy people. And we think of these folks as the more dangerous.

And so I think everyone here more or less agrees with that notion. And by the same token, and maybe a little less agreement here, I think people also worry that there are a group of people who sort of impulsively get themselves into frauds and that that group should get some sort of - - and I'll say discount, something, they shouldn't quite be treated like the ordinary fraudster. This, of course, is the great problem is how do you define the ordinary fraudster.

So if you believe just generally in that basic notion, then I think it's important to ask to what extent are the guidelines helping us achieve that kind of basic ranking.

And of course, you know, the guideline's history of dealing with

planning -- and I'm going to just say planning for now as a proxy for what I've been talking about -- is kind of spotty, right? We all know that in 2001, when you had this whole overhaul of the guidelines, the guideline that disappeared, or I guess the specific offense characteristic that disappeared was the more than minimal planning enhancement because by that point, it had become so over-used that, I think in at least the fraud guideline, 2F1.1, I had seen somewhere it had gotten up to the point of 89 percent. Everything seemed to be more than minimal planning. So if you wanted some kind of sorting going on, it wasn't doing that great a job. And also, it caused a lot of litigation.

So okay, the solution was to get rid of more than minimal planning, right, and then, in fact, the table was recalibrated to take into account so the points actually -- the offense level went up for loss. And then also, sophisticated means was now intended to do some of this additional sorting. But instead of

sorting on the bottom, we were now going to do sorting at the top, meaning the most, you know, just, I'm quoting from the application note, sophisticated means, "especially complex or especially intricate offense conduct pertaining to the execution or the concealment of an offense." That was intended to sort of make that kind of ranking at the top.

Now, there's problems with that on several levels. One, if you think planning out offenses suggests that you're sort of a worse fraudster than whatever you want to call it, other fraudsters, planning and sophistication aren't the same thing. They may well overlap in many instances. But the fact of the matter is I can have a sort of simple garden-variety fraud that I, for whatever reason, spend a fair amount of time thinking about and planning, I don't think that makes it sophisticated, right?

Nevertheless, I will tell you, as I started looking through all of the various sophisticated means cases that I started

pulling up in the last few months, oh, lo and behold, lots of courts like to say things like, based on the duration of the offense, based on repetitive conduct, hey, I think there was sophisticated means here.

So then I was curious to see if sophisticated means has changed over time. So I actually went on the Commission's website and I was looking at those data files that you have year by year. And I just went back to 2008. And I pulled the percentage of offender sentenced. And this I didn't -- because the sophisticated means enhancement is part of that 2B1.1(b)(10), I pulled out just the, it's (b)(10)(C). So I just wanted to see what's the application rate for (b)10(C). And I went from 2008 to 2012.

So in 2008, 4.7 percent of the fraud offenders, those sentenced under that fraud guideline, ended up with a sophisticated means enhancement, meaning just 2B1.1(b)(10)(C). By 2009, that went

up to 6.2 percent. By 2010, that went up to 7.1 percent. By 2011, that went up to 9.4 percent. And by 2012, the amount -- and this is only sophisticated means -- went up to 9.6 percent. So you went in I guess five years from 4.7 percent to 9.6 percent.

And so that seems to me quite striking, because whatever sorting this device was doing, it's sorting differently. And it's sorting differently in a radically different way over five years.

Now, obviously, there are different reasons why maybe there is more sophisticated means being applied here. It could be, for example, that crimes have become -- frauds have become more sophisticated. But that kind of begs the question, right, if everyone's crime has become more sophisticated, well, then we're not really picking out the so-called especially intricate and especially complex cases for greater punishment.

And I might add, by the way, when you go down that -- you know, when you're looking at the commentary, you know, this example, which I know has been there for a number of years -- for example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means.

I don't know in our world anymore, where's -- everything is so connected where, you know, forget you're thinking about a crime. If I told you I had a business, and guess what, I have an office in New York but I do solicitations in New Jersey. If I then turn to you and say, "Don't I have a wonderful sophisticated business?" My guess is no one would say, yeah, you do. Certainly not on that alone.

So one possibility is that -- it's just that everything now is beginning -- everyone has become more sophisticated. And that has obviously

its Lake Wobegon problems.

The other possibility is that prosecutors -- and this is possible -- it would be federal prosecutors are charging more sophisticated crimes than they did in the past. And I think you'd have to do more work in conjunction. You know, one thing that did make me think that that could be possible would be the increase in loss. In other words, if you're charging more high- loss cases, if that's somehow connected, that means you're charging more sophisticated cases, that then wouldn't be such a terrible thing.

And then the final, though, reason why we might see an increase in the use of the sophisticated means guideline would be that prosecutors are seeking the application more often, probation officers are more likely to hand it out, and that courts themselves have, slowly but surely over time, relaxed their definition of what is truly sophisticated. That, for example, once

one or two courts start to say, oh, hey, I'm looking at the duration, I'm looking at a lot of repetitive conduct, other courts and prosecutors -- and this is also part of the plea bargains themselves -- start to accept that definition. And by that, we get a certain amount of creep.

Now, aside from this definitional question, right, are we really sorting the way we want to? I would say the other problem with the sophisticated means enhancement is -- and I think Judge Lynch made reference to this -- is it's asymmetrical in its application. It basically, if you were to sort of, you know, break the world into impulsives and planners, right, and then you're going to match them with low loss and high loss, okay. Low- loss planners, meaning people who cause very low loss and their -- the intended loss is low too -- under the sophisticated means enhancement, right, you get -- if there's sophisticated means, you get, first of all, a two point bump- up and also if it hasn't yet -- if

your offense level hasn't yet reached 12, you're supposed to go to 12.

So that's a real big bump- up for someone whose intended/actual loss, whichever one is greater, is really, really, really low. So that person is really getting a harsh increase in sentence for having been a planner, someone who -- and I'm using planner, it's assuming sophisticated means and planning are starting to be -- more or less start to look the same.

By contrast, say you're someone who causes a very high loss, right, but you did so impulsively. And some people ask, what do you mean by that? You know, I sometimes think about Judge Rakoff's decision in the Adelson case. There's some language in there where he sort of says, I think that this decision to join in this already- existing fraud -- he doesn't use the word impulse, but it sort of implies this sort of spur- of- the- moment snap decision. That kind of person gets no discounts under this kind

of set-up, right?

So these are real problems. Now, by the way, this exists elsewhere. A similar kind of asymmetrical application is in, for example, the insider trading guideline, where you just added -- and this is new -- the Sentencing Commission added this enhancement for an organized scheme.

Again, if you're a really low-gain offender, someone who came away with very low gain, but you're engaged in what the court decides is an organized scheme, your minimum offense level goes up to, I think, a 14, right?

Same idea if you're a high-gain offender who acted impulsively -- and that seems even more likely in insider trading -- sorry, you get no discount.

It strikes me that there's reason to ask, why are we doing that? And all of this is very much of course consistent with the complaint that the guideline is ratcheting up sentences without mitigating them on the other side.

So for all those reasons, you know, if we wanted to sort of characterize this, you know, what we're concerned about, if we think that we should be sorting planning and impulse, if you will, in this sort of fraud world, what we want is transparency, we want some level of consistency that allows discretion. And I would think we want symmetry.

In terms of transparency, I would just get rid of the word "sophisticated." I'm not sure we know what is sophisticated anymore. And I think, by the way, in the fraud world particularly, where technology is always changing, I really question the ability to keep up that easily with the notion of what is truly sophisticated, I would go back into the question of planning. I would actually return to the word planning, meaning -- and then have some non-exhaustive list of factors that implies planning, like duration, repetitive conduct, does the person keep notes or whatever -- or something like that line.

I think that actually is more important than whether it happens to be, you know, fits some definition that someone made up as sophisticated 10 years ago and that doesn't really mean as much as it used to.

In terms of consistency, I actually think we do want to get rid of sophisticated if we want consistency because some courts are going to look at that word, sophisticated, and interpret it to mean something new and truly intricate and complex, and others are going to start interpreting it to mean something different, like duration and repetitive conduct. And that seems very problematic. And as I said, I would want to import some level of symmetry.

So in my wonderful world, if I could somehow fix things, and of course, I'm not going to be able to do that, what I would suggest is actually relatively conservative compared to what the ABA is suggesting, though I think a lot of what the ABA brings up with regard to

culpability is absolutely right -- but it strikes me what one could do is get rid of the sophisticated means enhancement and instead, replace it with sort of a non-exhaustive list of factors that relate to concepts like planning and premeditation.

Then what I would do is I'd have, sort of for ordinary crimes, I'm going to say this should be a zero. For crimes that have sort of this greater than usual -- than ordinary amount of planning and premeditation, that would be a plus 2, and for crimes that have less, I'd suggest a minus 2. I know that has all of its arbitrariness built into it.

But here's the kicker. I would tell the court to do this, I'd say first, look at the loss amount. And you should only apply this plus 2 or minus 2 if you think the loss amount does not adequately reflect the seriousness of the offense, either in how little it is or how big it is. In other words, if you look at the loss amount and you're happy that it

reflects the seriousness of the offense, then you don't -- you wouldn't even look at this kind of rubric.

But if looking at the loss amount, you think it's overstating the offense, and you see that there's this problem with it, seems not to be, for example, a less than ordinary amount of planning and meditation, that would allow the courts to adjust downward or upward.

That's sort of where I was going. I totally admit that it's a more point-driven kind of way of doing things than some probably will prefer, but I think it at least gets everyone away from what I think is a silly creep that's going to happen with the sophisticated means enhancement, and I think gets us back to thinking about what really matters is that people are planning. And the people who really plan things out are folks that are more culpable and we should punish them more, but the people who don't, we should punish them less.

Thank you.

HON. PRYOR: Thank you.

Our next panelist is Professor Jennifer Arlen. Professor Arlen is the Norma Paige Professor of Law at the NYU Law School. She has served as Co-President of the Society of Empirical Legal Studies and as Director of the American Law and Economics Association. Professor Arlen.

MS. ARLEN: Thank you very much. And thank you to the Commission for inviting me to speak with you.

My role is -- at least as I'm seeing it -- is to think about what economic theory, and theory in particular of optimal deterrence, would have to say to us about how we might structure guidelines if we were thinking about how to design them from the bottom up. Because I do think that this is a wonderful opportunity to ask, how do we deter white-collar crime, in particular, fraud, which is my focus, and are these guidelines structured in order to do that?

Now, when I think of optimal deterrence as both a lawyer and an

economist, my goal is to minimize the social cost of crime plus enforcement. So we want to deter crime, but we want to bear in mind that it's not free to do so. So we want to use our resources effectively.

Now, before I sort of get into, well, what might that mean? I would like to, I guess, echo something that Judge Lynch said, since I'm about to talk about using fines a lot.

So first, I also believe in guidelines. I also believe in punishing white-collar criminals. Anyone who knows my work knows I'm an individual liability hawk. But I believe in being careful about where we spend our resources to do so because the resources we spend on long imprisonment are coming from somewhere, and I happen to think that the biggest problem we're facing is not sanction magnitude, it's how often we're sanctioning.

So to the extent that we're able to take enforcement resources that might be

spent unnecessarily on sending someone to jail for 20 years instead of 10, 10 might do it, and maybe put them into increased enforcement so that a white-collar criminal thinks they're more likely to go to prison and -- get caught and go to prison than they are now, that would have a huge bump in deterrence. I believe that the probability of enforcement is the most important thing and the empirical evidence supports that.

So when one thinks about optimal deterrence, the key thing is to try to make sure that crime doesn't pay, removing the expected benefit of crime, in the most cost-effective way. And what the economic literature would suggest is you start by trying to do that in the lowest-cost way possible, which is fines.

So fines are very important. And they're particularly important in this area where you have a lot of criminals who are, in fact, being rational and calculated and driven by money. So it can be particularly effective to ensure that

they don't expect a financial benefit. And what that means is when they look at the benefit of their crime, it would be good if they think the expected fine imposed on them will wipe out the benefit.

Now, what does that mean? It does not mean that if they're doing a $100,000 crime, the fine should be 100,000. Because the benefit of the crime is guaranteed, 100,000, and the fine, they'd have to get caught first, and they'd have to have the evidence and they'd have to be sanctioned. Maybe that's 1 in 4, maybe that's 1 in 10. So the fine imposed has to be multiple times the value that they get.

But we have to do what we can with fines to make sure that someone who's thinking of committing a crime thinks, you know what, at the end of the day, I expect to be worse. They're going to take away all the benefit and then some.

So in a regime where we're imposing massive fines, what's the role of prison? Well, the simple answer is most people who

commit these crimes don't have enough money to pay a fine that's large enough to deter them; maybe they got $100,000 and that's all they have, or maybe they got a million dollars and that's all they have. We can take away what they got, but we can't impose the enormous penalty that would be able to deter.

Prison comes in to do that. But once you introduce prison, you're introducing something that's very expensive. And I think that expense is worth taking into account. It's expensive for us, it costs lots of money to take someone into prison. It's also expensive in terms of the person being put away. If you don't need to put them away, for 20 years, and they might otherwise join society in an effective way, we should avoid doing so, as one of the examples this morning gave, of someone who actually is otherwise an effective member of society.

So when I started to think about what role for prison -- and I actually

did sort of my own version of what guidelines would look like -- I discovered that they actually had a remarkable similarity to what the ABA task force was doing, although not exactly.

So when you think about prison from an optimal deterrence standpoint, the things you think about are, how much do we need prison? In other words, how ineffective are fines? Well, that turns on, what is the benefit of the crime to the wrongdoer? The greater the benefit of the crime, the more likely we need to do something extra to deter it.

How committed to the crime is the wrongdoer? Is this someone who's a predator, who's sort of really embraced criminal activity? Is it someone who stumbled into it, made an offhand mistake, and once caught, is just never going to do this again? And how serious is the crime?

What's striking about the guidelines is they act like loss is the key measure of what we should be doing. The reason loss matters, I think, is that loss

tells us how much we should be investing in deterrence.

So when should we be gearing up the tremendous cost of prison to deter? Maybe not so much for a really low- level crime that's cost $2,000 by someone who's not going to commit a crime again. And yes for crimes that have done huge amounts of damage, not just measured by the financial magnitude, but by the cost to people.

And therefore, I agree that a crime that causes $100,000 loss and wipes out 100 people is definitely worse than a million dollar crime on a billionaire.

So we need to look at loss because it's telling us how much should we invest in deterring using prison. In that case, I think there's a very good argument for dividing prison terms into about four categories based on loss amount -- or five -- and not as many as the Commission does, that have quite broad range. So low - loss crimes where, you know, by and large maybe we shouldn't be using prison unless

this is a recidivist, where we think, based on the nature of the crime, this person is going to be back, so they'll be doing a $2,000 crime over and over and over again. And then going up in categories of loss in terms of the magnitude of prison.

And for this, I suspect that for economic crimes, it's quite likely that the highest loss category need not go over 10 to 15 years because I suspect -- and I would need to know more empirically, that most white-collar offenders are going to be as deterred by 15 years as by 22. White-collar offenders tend -- or fraud offenses tend to be committed by people who are not teenagers; they are older people. And I don't think we're getting much deterrence difference between 10 to 15 years and 22 years. But it costs the system a huge amount of money.

Within those categories -- so within the super-high category or the medium-high category, which could be a five to 10 year category, then we should do it based on how important is prison,

which would turn on the benefit of the crime, how committed the wrongdoer was, efforts the wrongdoer did to hide the crime, which make prison more important because the sanction is less likely, and things like that.

So you would have a two- tiered system. Loss determines a prison range. And then within that range, you would be sanctioned based on how much you would want to commit the crime, how much benefit did you get, how committed you were to the crime, so how much we need to intervene to deter you, are you a repeat offender, whether you took actions to hide the crime, and other things like that that go to our sense that you need extra deterrence and you were particularly wrongful. But you would not have as many loss categories as the Commission does right now and this would not all be additive.

Thank you.

HON. PRYOR: Our final panelist is Steven Chanenson, who's the Chair of the

Pennsylvania Commission on Sentencing. He's also a professor of law at Villanova University School of Law where he's the Director of the Villanova Sentencing Workshop and Associate Dean for Faculty Research.

MR. CHANENSON: Thank you very much, Judge.

It's a terrible position to be between the group and lunch, but consider it an incentive for me to speak quickly.

So I, of course, would like to thank the Commission for inviting me. I am wearing multiple hats here. But as always, I speak as simply the academic gadfly, and do not represent anything but my own views, not those of the Commission, its other members, its staff. That always reminds me, every time I say it, of the station break during the baseball game. So you can take it in that spirit.

2B1.1 has taken some hits here today. When I was thinking about that, I pulled some of the more memorable quotes from a few opinions that jumped to my mind.

One of my favorites, and I believe from Judge Block, "black stain on common sense." Sounds like they're talking about me.

So what I want to do is give you an opportunity to think about something different now, imagining a different place. Now, I didn't know until Jim talked here just a little while ago what the ABA was thinking about. So I think that it's a very commendable effort that they're doing and one that will look all the more modest in terms of its reliance on judicial discretion when you hear a little bit more about Pennsylvania. So to the extent you were worried about somebody going on your flank, I've got you covered.

Pennsylvania is a system that still has a lot complexity, I'm going to give you just a little bit of an insight into that. But my primary goal is to show that we can, as policymakers setting up systems and legislators settling up systems -- which of course is an important feature here, as

Jim mentioned, with the 25 percent rule -- we can make different choices. Which one is the right one, that depends on your point of view. But I want you to understand that there are other opportunities.

So setting the stage very simply or as simply as I can, dramatic difference between the federal system and Pennsylvania is in Pennsylvania, we do have an indeterminate sentencing system, that means there is discretionary parole release. Just to make it more complicated, we have both a parole board that exercises that power and, depending on the nature of your sentence, the trial judge. For relatively short sentences, it's the trial judge that is the paroling authority; otherwise, it is our statewide Board of Probation and Parole.

Being an indeterminate system, that means you don't get one, we give you two numbers, at least, with your sentence. We call it a min and a max. A two to four - year sentence, perfectly acceptable.

At the end of two years, under most circumstances, you are then eligible, not entitled, but eligible for discretionary parole release.

There are all kinds of arcane rules I will not burden you with, but two to four - year sentence, that's acceptable; two to three, not.

There's a wonderful staff member from the Sentencing Commission, Kevin Blackwell, who used to be in Pennsylvania. He says once you figure out the Pennsylvania system, you're not allowed to leave. Because there's just too much in the way of sunk cost.

So we've had, functionally, advisory guidelines, although there was a period there in the early '90s when our Intermediate Court of Appeals kind of flirted with more bite. Our Supreme Court has made it clear that oh, no, all along, our guidelines have been advisory.

We've had a commission since '79 and guidelines in one form or another since '82. We use them as a benchmark for our

judges, being advisory guidelines. They must be considered for every felony and every misdemeanor conviction. They are largely charge based. We have now a very modest appellate review.

Importantly, and many of us think crucially, in error, the guidelines make no recommendations as to concurrent consecutive sentences. There are fewer multiple- charge judicial proceedings than one might think, but it's still a very significant factor.

Most of our mandatory minimums just come in and trump our guidelines, unlike the federal system that, in many ways, has tried to accommodate them. So we can have cliffs. Most of our mandatories are for drugs and violent offenses with a couple of exceptions. And almost all of them are what I would call notice mandatories. Think of, in the drug world, an 851 information, the prosecution has the ability to take it away, have it apply at its discretion.

We only give recommendations for

that minimum number, the two, as opposed to the four, allowing the judge, in her discretion, to impose a much longer period of potential parole supervision.

In many ways, though, it does look like the federal system. As opposed to offense levels and criminal history categories, we call them offense gravity scores and prior record scores. But it's the same fairly familiar two-axis grid.

Where things get a little different is for each of those cells, we have three recommendations. The standard range for the typical offense, a mitigated range, and an aggravated range. And the guidelines permit departures above or below.

We've broken it down into five basic levels. A level just gives a general recommendation of what the Commission is thinking about in terms of the nature of the punishment. But as compared to the federal system's 43 offense levels, we have 14 offense gravity scores.

Those numbers are months. I'm

always mortified when I go through this at much more painful length with my students, and they say, nine to 16 years, that seems just about right.

So that recommendation there, at offense gravity score 8, and all the way on the left is where we have, just like federal system, our lowest criminal history prior record score of zero, that's recommending the judge impose a minimum sentence of somewhere between 9 and 16 months. To get the max number, that has to be at least doubled; so nine to 18-month sentence, for example. That would be in the standard range.

If you look all the way to the right, you see the plus or minus number. That's our mitigated and aggravated range.

Our guidelines, in some ways not surprising given how broad our ranges are, we have a fairly high level of what we call conformity; 90 percent of all of our sentences last year conformed either to the standard, mitigated, aggravated range. Slightly less for our felony

theft offenses. I thought felony theft offenses were the better comparison, to the extent any comparison is reasonable here, as opposed to our misdemeanors.

We have very broad ranges. Because our mandatories are notice mandatories, the number of below federal guideline sentences, what you see that are at the request of the government, while we of course have that as well, we don't have to wrestle with mandatories in the same way because if the prosecution doesn't want that more severe sentence, the mandatory goes away and the guidelines come back in, almost always at a lower level.

We have, at least anecdotally, fairly wide judicial satisfaction. Part of it is we give a good amount of judicial discretion.

They are still concerned about appellate review. And I would be remiss if I didn't mention that they're also concerned about their reputation.

We, for more than a decade now, have released judge- specific sentencing

information. And I will, Ken, just state once and quickly, I think that's something the Federal Commission should do. I've only been saying that for a decade. And I think really, in my lifetime, it may well happen.

For economic offenses, we focus on actual loss. We have wide loss groupings, so you see the ABA proposal to shrink down the loss table; we are even more minimalist than that.

And further factual differentiation is left to the argument of the attorneys and the judge.

So I think what the ABA is proposing is very intriguing because it tries to give more structure than what we do, but still allows for judicial judgment; that kind of human judgment that we in Pennsylvania have embraced.

I tried doing comparison cases and came to the conclusion that it wasn't going to be particularly meaningful, in part because we don't capture all the information that the feds do. And of

course, our scope is different, yet, I looked at the data here and saw that over half of the districts have fairly modest guideline -- fairly modest loss amounts.

We break it down into four categories: 2 to 25, 25 to 50, 50 to 100, and over 100,000. You see that even in over 100,000, now, that is per count and concurrent/consecutive is at the discretion of the judge, gives the judge a great range. Probation, under the mitigated range. And more than two years of a minimum sentence in the aggravated.

Shockingly, not everybody is happy with the Pennsylvania system. Concerns about judicial disparity, those broad ranges come at a cost. Concerns about predictability. All the arguments that we've all heard. In fact, I was meeting with some district attorneys just recently, the particular district attorney had been a SAUSA, Special Assistant U.S. Attorney, and was quite taken with certain aspects of the federal system, and said, "Steve, you know, I

think we really need to have, make more distinctions and 14 offense gravity score, that's just not enough. And by the way, we don't know, looking at it from the defendant's perspective, whether somebody who pleads guilty is always going to get a reduction. Wouldn't it be better if we had more of those factors?"

It's not surprising to talk about change like that because this is a balance that we're talking about. So right now, the guidelines, even in an advisory system, are fairly tightly controlled. Try to anticipate, as much as we can, as Judge Lynch said, it bears the mark of the era in which they were born. The ABA's proposal broadens that up, talks more about judicial discretion. And where do we find ourselves on that balance? That's a policy choice that we need to make.

In terms, though, of this interest in some quarters in Pennsylvania of having more complexity, I was reminded of an article that Justice Breyer wrote in the

Federal Sentencing Reporter a number of years ago talking about the way we all think. And it struck me as important to remember, the legal mind, we do love to make these distinctions. But at a certain point, as Justice Breyer wrote, we have to decide when is enough. Is it the ABA proposal? Perhaps. Do you want to go all the way over to the Pennsylvania view of much broader categories and greater judicial discretion? I'd be surprised if that's where the federal system went.

So why am I here? That's an Admiral Stockdale question. I think it's part to show that there are different choices, that we're all engaged in what some have called the endless struggle when it comes to sentencing, between prioritizing uniformity and prioritizing individualization.

Pennsylvania, I think, can serve as a very brief case study that shows different choices are possible and provide, as does the ABA in much more

concrete and realistic forms for a federal audience, food for thought.

Thank you very much.

HON. PRYOR: Thank you. Steve, I have one quick question. You mentioned the disclosure of the judge-specific information. Are those trial judges elected or appointed?

MR. CHANENSON: Elected. So the argument has always been if elected judges -- and by the way, we don't just elect our judges, we elect our judges in partisan elections with retention.

HON. PRYOR: I'm familiar with this.

MR. CHANENSON: So if judges running in partisan elections subject to 10-year retention can have that information out there, I would hope that life-tenured federal judges could as well.

HON. PRYOR: One question I wanted to ask the ABA participants particularly, and I guess I'm most interested in hearing Judge Lynch's perspective -- we only

have a few minutes -- but I was wondering how this proposal, it's nice to say, and persuasive to say that we ought to be reforming a guideline to conform to the world of an advisory system, as opposed to the mandatory system from which it was born. But one of the important features we're supposed to have, from the advisory system, is appellate review for reasonableness that Justice Breyer predicted would help iron out sentencing disparities.

And Judge Lynch, you say you believe in guidelines and of course that was Judge Frankel's primary concern, was disparities. How's this going to work when we get it on appellate review and we have broad categories of culpability and victim impact that look to me amorphous?

HON. LYNCH: Oh, I don't think they're amorphous. I think they address the same things that appellate judges are supposed to be considering in substantive review today, only it gives more guidance as to exactly how they should be

considered, at what stage, and what sort of factors are taken into account.

I wrote an article a while ago advocating more appellate review of -- more muscular appellate review of sentencing; that was when I was a district judge, actually.

Now that I've seen it from the other side, our court is supine. There's no other way of describing it. I mean my colleagues have zero appetite for a substantive review. It doesn't mean we don't review sentences. We sometimes, if we're really upset, figure out some kind of procedural unreasonableness issue. But I've been surprised, both by the attitude of at least the appellate judges of the Second Circuit, but also the extent to which I've come to appreciate how far away you are as an appellate judge from the record and from the person, compared to as a district judge. And it's certainly given me pause about how well appellate review of sentencing is ever going to work, other than to curb total outliers.

So I don't know that this system changes that in a - -

HON. PRYOR: You don't think it will make it more supine?

HON. LYNCH: I don't think you could get more supine than our court. But, you know, maybe the Seventh Circuit, as we heard this morning, and other circuits as well.

HON. PRYOR: We have still just a couple of minutes. Anyone else? Or are all of you afraid of being the impediment to lunch?

MR. DEBOLD: Well, I'd just add one thing to what Judge Lynch said. In some ways, I think this culpability, you know, highest, lowest, or one of the three levels in between, is maybe more amenable - - potentially more amenable to appellate review because it does require judges to look at the defendant in comparison to the totality of defendants who are sentenced under that guideline. I think with experience, there may be more opportunity for appellate judges to see

the facts that the judge relied on and decide whether or not it really does seem to fit in that.

I mean I think there's still going to be a fair amount of discretion that judges will have to exercise in the underlying fact- finding and in comparing and stating the reasons for why these factors argue for somewhere within those five different options, but I think, in some ways, it does increase the ability of appellate courts to look at the defendant in relationship to the other types of defendants they see sentenced under that guideline.

HON. LYNCH: And if the real thing appellate judges are doing is enforcing guidelines that are the wrong guidelines, if the main issue is, how far did you go from a benchmark that is not really that well- calculated, I'd rather have the discretion be channeled this way.

MR. FELMAN: While seated between two Court of Appeals judges, I will state that I think it may be worth the trade-

off to have a little bit less appellate review in return for more rational sentencing and consideration of truly appropriate considerations at the trial court.

MR. CHANENSON: And I don't know what the Working Group envisioned, but I would imagine that in order to reach a determination on culpability, as proposed, it's going to require a little bit more explanation from the trial court that may actually facilitate some amount of appellate review.

HON. PRYOR: Okay. Kathleen?

MS. GRILLI: Yes. Thank all of you. And the good news to all of you at the table there, I'm the impediment to lunch.

I want to, on behalf of the Commission, thank all of our speakers this morning. They've given us a lot to talk about and a lot to think about.

Right now, we're going to break for lunch. As you all know, lunch is on your own. John Jay College was very kind to

get us maps of the area. So there are maps available at the registration table that can show you some of the local restaurants.

At 2 o'clock, when we resume, we will not be here in the theater. We will all be in conference rooms in the new building of John Jay, which is, as you exit the theater, in that direction, towards the 11th Avenue entrance.

If you have a red ribbon on your name tag, you will be going to the ninth floor conference room.

Orange ribbons, you will be going to the sixth floor. And I'm told that the elevators on this side of the building do not stop on the sixth floor, so you need to go to the elevators that are on the wall where our registration table is.

Those of you who are yellow or blue, you are on the second floor. And there will be staff stationed on these floors to sort of direct you to your rooms.

And then last but not least is my group, we're in green. We're in the art

gallery. And so for those of you who are going to the art gallery, if you leave the campus, you can come in the building through the 11th Avenue entrance and you do not have to go through the public security gates. We're going to be to the left- hand side of the 11th Avenue entrance. Otherwise, if you come in through this, you're going to go down two levels to level three.

So we'll see you all at 2 o'clock in your various breakout rooms. Thank you.

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UNITED STATES SENTENCING COMMISSION

SYMPOSIUM ON ECONOMIC CRIME

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September 19, 2013
9:00 a.m.

John Jay College of Criminal Justice

524 West 59th Street

New York, NY 10019

INTRODUCTION OF KEYNOTE SPEAKER:

Hon. Patti B. Saris

HON. SARIS: Good morning, everyone. I see some folks hanging around there with their cup of coffee so we're going to get going right now.

I hope you all had a great time last night. I know we did. We met with some of the judges and in the Southern and Eastern District and learned a lot of what's going on here in the Big Apple.

In our Fifth Symposium on Crime and Punishment in the United States, it is my greatest pleasure to introduce our keynote speaker. He's our dream speaker, the person we really wanted, and we were so happy he accepted, Michael G. Oxley, who is currently of counsel to the law firm Baker & Hostetler in Washington DC.

Sarbanes-Oxley, of course, is one of the key pieces of legislation we were all discussing yesterday.

As counsel to the law firm Baker & Hostetler in Washington, he serves

clients in the areas of corporate governance, investigations, and government policy. In addition to this position with the firm, he serves as Senior Advisor to the Board of Directors of NASDAQ OMX Group, Inc.

And I asked, what is OMX Group, Inc.? And it's the stock exchanges up in places like Denmark and Finland. And I hope he gets to visit there.

But Mr. Oxley is better known for his public service. He spent 25 years in Congress representing Ohio's fourth Congressional District. From 2001 through 2006, Mr. Oxley served as Chairman of the House Financial Services Committee. He led the panel through the aftermath of the tech bubble, the difficult post-9/11 period, and the rash of corporate scandals early in the decade that destroyed investor confidence and sent the markets into a tailspin.

His chairmanship is best known for the creation and passage into law

of the Sarbanes-Oxley Act of 2002, which created a new Accounting Oversight Board for publicly-traded companies and increased penalties for mail and wire fraud offenses.

But the Sarbanes-Oxley Act was not his only significant accomplishment. Known for his ability to bring Republicans and Democrats to agreement, Mr. Oxley worked to pass many significant pieces of legislation arising from the Financial Services Committee, including the Check Clearing for the 21st Century Act to modernize the check-clearing system, the anti-money-laundering title of the USA PATRIOT ACT, the Fair and Accurate Credit Transactions Act, also known as the FACT Act, to provide consumers with a free annual credit report, and the Federal Deposit Insurance Reform Act to increase the amount of insured deposits.

Mr. Oxley is frequently interviewed and quoted by the news

media, the Financial Times, the Wall Street Journal, the New York Times, CNBC, Fox Business News, and Bloomberg.

He is a member of the National Association of Corporate Directors' Blue Ribbon Commission on Risk Governance. In 2008, he was inducted into the Directorship magazine's Hall of Fame, which recognizes those who have made unique and lasting contributions to the shape of modern corporate governance. In 2007, he was named to the magazine's Directorship 100, an annual list of the most influential people in corporate governance.

Now, what you might not know, all that -- I could go on and on -- but what you might know about him is he was a special agent of the FBI prior to beginning his 34-year career in public life. And what you -- not even the folks who helped put together these remarks know is he and I had this great conversation beforehand that he was a

special agent of the FBI in Boston, where he also, I heard, in Massachusetts, proposed to his wife. So I know he has fond memories of my neck of the woods.

He practiced law in his hometown of Findlay, Ohio with his dad's firm.

So instead of going on and on, I know you want to hear from him. He will leave some room for questions afterward, so if anybody -- so think about some Q and As. And I will give -- ask you all to give a warm welcome to Congressman Michael Oxley.

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UNITED STATES SENTENCING COMMISSION

SYMPOSIUM ON ECONOMIC CRIME

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September 19, 2013
9:04 a.m.

John Jay College of Criminal Justice

524 West 59th Street

New York, NY 10019

KEYNOTE ADDRESS:

Hon. Michael Oxley

HON. OXLEY: Thank you. Thank you, Judge, very much for that kind introduction. And thanks to the members of the Commission for the invitation to be here today.

Thanks particularly to Kathleen Grilli for -- the Deputy General Counsel -- for helping coordinate our visit here today and to come back to the Big Apple.

My second office in the Bureau was here in New York after being unable to catch Whitey Bulger in Boston as a rookie agent in the 1969-70 time period. And then I was transferred here to the New York office. And so I've got a lot of great memories about the Big Apple. And I was fortunate enough to meet my wife here. And we've enjoyed every visit we've been back to New York.

And boy, New York has really changed, I have to say. Looking back in the 1969-70 time period and today, I

think particularly native New Yorkers probably can see it, I see it all the time, what a tremendous change has taken place in a positive way for New York, and that's because of a lot of really good leadership, I think, from the mayor's office and otherwise about putting New York together.

Just to give you an idea, I was on the bank robbery squad here in New York. We had two full squads doing nothing but bank robberies back in the late '60s, early '70s. We had 25 agents on each squad. New York -- the boroughs of New York averaged 11 bank robberies a day in New York back then. It was just open season on banks. And yet, everything from sophisticated, organized crime to just what we call note jobs and people that were drugged up that figured out that maybe they could stick up a bank, usually unsuccessfully.

So it's been a great experience to have gone through that, particularly

for a kid from Ohio, and from a small town, to have a chance to work in Boston and then of course in New York.

Well, I'm Chairman of the Ethics Resource Center, and to mark the 20th anniversary of the Federal Sentencing Guidelines for organizations, ERC led an independent advisory group to examine their impact. And we issued a report which found that the Sentencing Commission's definition of an effective ethics and compliance program in the guidelines turned out to be the de facto standard for ethics and compliance programs. Essentially, when companies adopt programs based on the Commission's definition in this area, they're able to reduce misconduct substantially.

So the ERC spent a significant amount of time researching the impact of the Commission on the prevention of corporate crime, and we have found that the Commission has been very effective toward that end. And I tip my hat to

the Commission for that.

I want to congratulate you on this symposium on the sentencing of economic crimes. We have had two major economic market meltdowns in the beginning and the end of this decade, as well as two responses from Congress, first Sarbanes-Oxley, and then Dodd-Frank.

Economic and financial crime and fraud is a real issue for people, people that I represented and members of Congress represent; and while such issues as their employment and health care are front and center, many Americans concerned about underwater mortgages, identity theft, financial scams, problems with credit reports, and debt servicing -- directly affect millions of Americans.

Additionally, millions of investors of all stripes depend on the FCC and the FINRA and other regulators to protect them from fraud that may be hidden but still may end up devaluating

their assets or skimming their accounts.

I appreciate the research and review of current sentencing patterns and the fraud guidelines as you continue your multi-year review, including crimes articulated in both the Dodd-Frank Act and the SOX. I only wish the public had a better understanding of the work of the Sentencing Commission and the sophistication with which you approach the setting of guidelines for economic crimes as well as the analysis of sentencing after conviction.

Of course, the ultimate goal is that sentences will be applied with some degree of equanimity across the federal system -- taking into account, of course, appropriate judicial flexibility, Judge.

I was interested to look at some of the research and statistics that were prepared for your conference. And it certainly does seem that they are

reflecting what is going on in the marketplace. The raw number of fraud convictions has increased substantially, and the median loss for fraud offenses has skyrocketed since 2008, just five years ago. Many of your statistics encompass 2003, so they are still capturing the SOX aftermath as well as the postmortem, so to speak, from 2008.

All of us got a rude awakening in December of 2001 when the seventh largest company in the United States filed for bankruptcy; a company, Enron, that had been lionized in the business media. Pictures on the pages of all of the major business magazines with Ken Lay and Jeff Skilling, Andy Fastow, and others.

And then Enron had announced earlier that year the strongest code of ethics, as they claimed, of any company in history. They were voted the number one company to work for. They were producing about a 20 percent return on

investment. Virtually every stockbroker and everybody involved in investing were recommending that you own Enron stock in your portfolio.

This was early in 2001. In the middle of the summer of 2001, they filed a restatement, filed another one later in the fall, and then filed bankruptcy in 2001.

Some of you look old enough to remember when that happened.

HON. SARIS: Don't look at me.

HON. OXLEY: I know, I'm not looking at you, Your Honor.

But you know, it was a real shock to our system. And I thought time and time again, why? Why was this such a huge shock to the public? Well, the reason it was is because we had changed, in the last 25 years leading up to that, from a nation of savers to a nation of investors.

When I came to Congress in 1981, two-thirds of our -- believe it or not, two-thirds of our savings were in bank

deposits and only a third in equities. 25 -- 20, 25 years later it turned exactly around.

In 2001, 54 percent, the highest number of any country in the world, 54 percent of American households owned equities. We had found a way for the average guy working on the line building tires at Cooper Tire in Findlay, Ohio, my hometown, a way for the average guy working on that line to invest in America and to invest in his company through his 401(k) or his IRA or, as my son and some of the younger folks, trading online. And we became this nation of investors.

And we trusted the markets, we trusted what we read, we trusted what we heard. And then along comes Enron. The media, of course, was full of stories of Enron employees who not only lost their job in a blink of an eye but lost the entire contents of their 401(k). Found out that the top people in the C-suite were selling out their

stocks as fast as they could; and at the same time, the average employee was locked out of doing the same.

And so the average person out there thought, what is going on? And of course, that was followed relatively quickly by WorldCom.

Now, WorldCom, a small company down in Mississippi that nobody had ever heard of, ended up buying one of the largest telephone companies in the country, MCI, and quickly moved their headquarters down to Mississippi and began an acquisition. And ultimately, when they filed bankruptcy, under Bernie Ebbers, they were four times larger than Enron. Imagine that.

So my guess is that probably virtually everybody in this room, in 2001, one way or another owned stock in Enron and WorldCom, Tyco, Adelphia, Global Crossing; after all, it was the thing to do, telecommunications, fiberoptics. All of the brokers were talking about, this is a great stock.

And so my guess is that virtually everybody had a interest in that. That's why the effect of the Enron and WorldCom and other scandals had such an enduring effect on the body politic because in fact, people started realizing it, that they owned those stocks.

And so that's really what -- and again, you talk about public reaction. I represented a district that was quite conservative, pro-business; I reflected that in my voting record in the Congress. But when Enron hit and then WorldCom, I noticed a distinct change in my constituents.

I would go to the Rotary meetings occasionally in Findlay, and this is a town of 40,000 people that has two Fortune 500 companies in it. A town of 40,000 people. We've got Marathon Oil and Cooper Tire and Rubber Company. And so this is a pro-business, conservative group of folks that are members -- from my fellows members of

Rotary Club, that I've been a member for 30 years. And the average -- the average guy in there, his attitude towards offending corporate CEOs went something like this: Let's give him a fair trial and then hang him.

Judge, I don't think the Sentencing Commission would necessarily agree with that approach.

But that was -- it was literally visceral. I would go down on the House floor as Chairman of the Committee, and I would be inevitably beset upon by my colleagues from all over the country, from both parties, wanting to tell me the latest horror story about somebody in their district who had been affected negatively by what had happened.

And collectively, we lost $8 trillion in the market. Market value of stocks in the United States lost $8 trillion. So obviously, it had an effect on our economy, it had an effect on people. That's hard to justify.

Our committee had the first hearing on Enron and that was in December of '01. We just happened to be in lame duck session and we had a chance to kind of set the table for what then became SOX in 2002.

A lot of people say, well, it was rushed through. We had the first hearing on Enron in December of '01 and the President signed the bill on July 30th, 2002 -- not that I would remember. And so that was nine months, not exactly in haste, admittedly relatively fast by Congressional terms, particularly these days. But it was clearly well thought out, in my estimation.

We get a lot of flack about -- from the business community, for example, that say, well, it went too far and too bureaucratic and all that kind of -- too expensive. We had zero opposition from the business sector. Hank Paulson at Goldman Sachs came to Washington and spoke to the National

Press Club in what is now called his "mea culpa speech," and basically apologized to the American public, particularly investing public, about what went on in the corporate suite.

But there was no opposition. As a matter of fact, we passed ultimately the bill in the House 423 to 3. And it passed the Senate 99 to nothing. It's always referred to as controversial. I don't recall it being controversial. If 423 to 3 is controversial, then I guess I'm missing the boat.

So that was -- but understand that when people started doing the perp walk, when people started going to jail, when all the bad guys, the bad actors were paraded to jail, they were sentenced under the old law, of course. We can't do any of this ex post facto kind of stuff. And so in some ways, Congress is always fighting the last war. And that's the way obviously our system is set up.

Frankly, those folks who went to

jail were lucky that they got sentenced under the old law because we've essentially doubled the penalties and fines and jail time in SOX.

Did it have the effect that we hoped for? I think the only way you can judge it is: Have we had anything close to a meltdown like we had in Enron or WorldCom? Answer is no.

We provided the aspect of having -- restoring investor confidence through transparency and accountability. That's what the law was about. It wasn't about insider trading, it wasn't about Ponzi schemes; it was about accounting fraud and dealing with accounting fraud and setting up a Public Company Accounting Oversight Board. For the first time, accounting firms were actually regulated and overseen, as opposed to having them check on themselves, which didn't quite work out very well with Arthur Andersen.

And so we changed the landscape,

and that's been more than 10 years now. And so for more than 10 years, we've avoided the catastrophic situation that happened after Enron collapsed. And I think that's the ultimate measurement of how effective a law can be.

Now, fast forward to 2008. A different set of circumstances. I'm shocked sometimes when I see editorial writers, particularly in well-known business newspapers that ought to know better, saying, well, how come Sarbanes-Oxley didn't stop Bernie Madoff and Allen Stanford?

Well, duh. First of all, they're not publicly-traded companies. Secondly, they're not dealing in accounting fraud. Ponzi schemes have been around for over a hundred years and we've already had laws to deal with them.

Or, why didn't Sarbanes-Oxley stop Lehman Brothers and AIG? Again, there was apparently no evidence of

accounting fraud. A lot of people say, well, how come nobody went to jail after Enron and WorldCom? It appears to me, having looked at it from all kinds of ways and talked to some of my colleagues at our law firm who does a lot of work on -- as a matter of fact, our firm is a trustee in the Madoff case, Irving Picard, former SEC official, heads that up and has done a superb job. He's going to return well over 70 cents on the dollar, the largest return ever for victims of a crime like this. Pretty successful, very successful.

But people say, well, how come these people aren't going to jail? And I'm saying, where is the crime? Believe me, if this administration felt strong enough -- strongly enough, Eric Holder and the President, they would love to have some of these CEOs do the perp walk. But I give credit to the Justice Department for being fair on this thing and saying, yes, we had

excessive risk, yes, people took advantage of the situation; but at the end of the day, what crimes were committed?

And I have to say I come down on the side of the Justice Department, sadly. It's sad that some of these CEOs who -- turned a blind eye to what was going on in the name of higher profits. It's a shame that the CEOs who helped invent synthetic CDOs -- are you kidding me, synthetic CDOs -- so they could rip off more people. It is beyond comprehension. And yet, at the same time, there is no statute, as far as I know, for excessive greed or excessive risk.

And so what Dodd-Frank tried to do was to address, going forward, whether an institution is too big to fail. One thing after Sarbanes-Oxley, after 10 years, nobody was ever bailed out under SOX.

And we faced an incredible situation just literally five years ago

yesterday when Hank Paulson had to go to the Hill and basically tell my colleagues, my former colleagues, that we're steering into the abyss, and we may not have an economy come Monday.

So that's how serious it was. And so Barney Frank, who had been my ranking member, and a very effective legislator, and Chris Dodd who was Chairman of the Banking Committee, and I worked very closely with Chris on a number of issues after 9/11 and beyond on some of the issues that the judge mentioned. But they had a totally different issue, they had a totally different palette to work on. And I appreciate that.

And it's still a work in progress. We'll see -- I mean it had a lot more studies. It had a lot more regulation than Sarbanes-Oxley did. Our bill was about 400 pages, theirs was like 1200 pages.

There's a lot of differences in the approach, I understand that. And I

think it's still -- the jury is still out about whether we can avoid another meltdown like we had in '08.

By the way, that one exceeded ours by about $3 trillion. I think the final count there was the markets lost about $11 trillion to -- during that time period. And it took a while to crawl back. I don't know about you, but I know some friends of mine who, at that point, literally got out of the market and they haven't been back.

And so at the end of the day, capitalism depends, at the end of the day, on individual investors, the confidence of individual investors. Without the individual investor, the heart and soul of our system, we really don't have a capitalist system.

And so it is amazing to me that after the shocks of Enron, the shocks of Wall Street, and the loss of some $20 trillion, that any individual investor is in the market at all. As a matter of fact, it has fallen off

dramatically. If you check with the ICI and the mutual fund industry, they will tell you that the average individual has shied away from the market. Well, of course they have. If it hadn't been for low interest rates, there would probably have been more dropping off.

And so it's a constant struggle to try to bring some sense into this system, to try to bring some structure into this system, something the Sentencing Commission has to deal with on a regular basis. Because there will always be people who will take advantage of the situation. There will always be people that will break the law.

I remember during this whole time when we were dealing with Enron, there were a lot backdating of stock options. You'd read about it all the time in the paper, about how companies figured out that they could look back on a particular date and pick that for their

strike date for the stock options. And once again, it was a situation where people on the inside were taking advantage of the situation that people on the outside could not. So it was a terribly unfair situation. And it went on unabated for a long period of time.

And the old law said that you basically had, in many cases, up to six months when you did an insider trade, to report that to the SEC.

In Sarbanes-Oxley, it's little known, we provided that when you do an -- if you're an insider and you sell stock or buy stock, you have to report that to the SEC website within 48 hours. And that basically ended backdating of stock options right now. Transparency. Immediacy.

Some people went to jail. Some people paid large fines. I can't remember the last time I saw a story about backdating a stock option. So it worked. It worked. And that's something I think that I'm proud of and

probably nobody really understands how important that was.

So we've come a long way in the last 10 years. We've been through some incredibly difficult times. Some illegal behavior, some excessive risk behavior, some people have learned their lesson, I suspect some never will. That's why we have a Sentencing Commission, that's why we have the Justice Department, that's why we have a whole system to deal with those folks.

But I'll close by saying this. At the end of the day, the vast majority of corporate executives and board members are honest, hardworking, and have the best interests of their shareholders and their stakeholders at heart. No doubt about that. I have absolutely no doubt about that. But it's sad when some people take advantage of it and tar the rest of their group and cause such incredible damage to our economy.

That's why we have laws, that's why we have transparency, in the hopes that it won't happen again. But even if it does, it's mitigated by that.

So again, I thank you so much for inviting me. It's always good to be back in New York. And Judge, if we've got time, I'd be glad to take some questions -- any questions, accusations, whatever.

Thank you all. Thank you very much.

HON. SARIS: Does anyone have any questions?

HON. OXLEY: Don't be shy. This is New York after all.

HON. SARIS: That's right.

HON. OXLEY: I'm no longer in office so I'm unfettered as far as my opinions are concerned. Yes, sir.

MR. DEBOLD: Hi, my name is David Debold. I'm in private practice. I'm the head of the Practitioners Advisory Group to the Sentencing Commission.

You mentioned that there was

near-unanimous support for the Sarbanes-Oxley legislation, which for some of us actually is kind of a concern in terms of when everybody is rallying behind a bill; is there really any healthy debate about whether everything in there is necessary? And the thing that's relevant to the group here is the fact that the Sentencing Commission had made a number of significant amendments to the fraud guideline that went into effect just after the whole Enron thing, you know, started to tank, November of 2001.

Was there any discussion about the fact that even though -- that the fact that the Commission had already done something to increase the penalties for fraud cases but they just hadn't had a chance to go into effect because the Commission got a directive from that legislation to look at and potentially enhance the penalties, but there had already been a change that had just gone into effect. I'm just

wondering whether there was any discussions at that time about the fact that maybe we already have a fix in place, it just hasn't had a chance to effect companies like Enron.

HON. OXLEY: No, I guess not. I think -- I don't recall that conversation or that debate. I think it was so super-heated, you know, at that time. Again, I can't overemphasize how incredibly upset the country was. And people who owned stock, which turns out to be a lot of them, were reacting. So I don't -- if at best, it was an afterthought that that happened.

But just to give you a flavor for it, when we brought the bill to the floor in the House -- the Judiciary Committee of the House had jurisdiction over the sentencing and the criminal penalty -- so we paused in the debate, a lot of the Judiciary Committee, their power or whoever it was, Jim Sensenbrenner, Chairman of the

Judiciary Committee at the time, and they then brought their bill to bring it in with our bill. And so we kind of grafted on to -- and it did pretty much the same thing in the Senate. So that, to those particular provisions, were Judiciary Committee product.

It's not necessarily that we disagreed with them, it was just that that was the way the structure was set up. So that may have had also something to do with the timing of it going forward.

HON. SARIS: Any other questions? Come on.

HON. OXLEY: Come on, take a shot, come on.

HON. SARIS: Actually --

HON. OXLEY: Go ahead, Judge.

HON. SARIS: -- I thought I'd ask you, we talked yesterday a lot about the role of deterrence in economic fraud penalties. You touched on this at the end of your talk there.

So to what extent, you're an

expert in corporate governance, do people talk about or think about the level of penalties in economic crime kinds of cases?

HON. OXLEY: All you have to do is, to a CEO or CFO, is mention Section 302 of SOX, which they have to certify the financials, and that really kind of draws their attention. I don't think I've talked to a corporate CEO or CFO who didn't mention that. There's nothing that focuses the attention more, I think, than the potential for going to jail.

I mean at the end of the day, corporations can pay huge fines, JPMorgan is going to pay a gigantic fine, which will probably be more than Siemens paid, and Siemens set the record a couple of years ago. That, you know, to some cases, is chump change for them.

What they're worried about, and I would be too, is getting my rear end thrown in jail. And that became, I

think, the ultimate deterrent, if you will, from my perspective. That's why I think it's effective.

I happen to think it has a very -- even if someone is facing that, it makes it much easier for the prosecution to settle the case having that club in the closet, knowing that they would beat it.

I support the death penalty. And the reason I support the death penalty is some people say, well, it's not a deterrent. Well, it is a deterrent because the guy you take care of; that clearly deters him.

But the other part is, how many times -- and I think prosecutors will tell you this -- that they're able to get a plea because the defendant is worried if he goes to trial, he's going to get the death sentence. He'd rather have life without parole than the death sentence. And so if he didn't have that death sentence, then they can roll the dice and go to trial and take up

the time and the money of the taxpayers and they don't really have anything to lose.

I think to some extent there, you've got that deterrent out there that really does reverberate in the corporate suite. And so far, it appears to be working.

HON. SARIS: Anyone have any additional?

HON. OXLEY: Yes, sir.

HON. SARIS: Judge Breyer from California, a member of the Commission.

HON BREYER: Right. Thank you very much. Actually, I had a sentencing in a backdating case in Broadcom and sentenced the defendant to jail. And I wanted to ask you a question about that.

One of the things that the Commission is wrestling with are, of course, the length of sentences. And there's a fair amount of controversy over some of the sentences at the top end being as excessive.

And I'd like to get your impression, coming from the community and coming from Congress, as to whether the length of the sentence is actually the deterrent, as distinct from the certainty or at least the high likelihood that a person who's a white-collar offender will actually go to jail.

HON. OXLEY: Boy, that's a great -- I mean you can talk to criminologists and so forth, Judge. I'm not -- I really don't know the answer to that.

There clearly is that initial shock that you're going to go to jail no matter what. But I think that the -- Jeff Skilling, as you recall, went back to court to try to get his sentence shortened, which I think he did. And I didn't follow all the details of it, but I assumed it was based on -- that the length was out of proportion with the alleged offense. And I think the appeals court agreed,

at least to some extent, with the petitioner on that case. So yeah, there is some of that.

I mentioned that that's -- backdating case, that's -- it's rarer these days. So I'm sure you did the right thing on that.

Are you any relation to the Supreme Court Justice?

HON. BREYER: Slightly related.

HON. SARIS: Brother.

HON. OXLEY: We had a reception at the Supreme Court with the Congressional group, I forget if it was the Wives' Group or I forget what they call it -- anyway, we had a dinner at the Supreme Court. And afterwards, Justice Scalia and Justice Breyer held court in the chamber. Oh, we just happened to wander and I didn't even -- I think it was just kind of an impromptu thing. And people, a lot of people had never been inside the Supreme Court, let alone in the chamber. And then having two

distinguished justices debate issues right before us. I mean it was just incredible. It went on for like 45 minutes.

And they were both entertaining, they were gracious. It was just one of the highlights of my life. It really was. And my wife was really impressed. She's not a lawyer. It was just a wonderful, wonderful night. And it just kind of came together, you know, one of those things, it just happened. And one of the great experiences. And they were just so animated. And they disagreed but they were -- not disagreeable. I just had a wonderful experience, I really did. Hope you pass that along.

HON. BREYER: I will.

HON. OXLEY: Well, I have taken up enough of your time. Best of luck in the rest of the day. Congratulations again to the Sentencing Commission for putting this together and I look forward to working with you

again. Thank you all.

HON. SARIS: All right. So we're moving on to the next part of the program.

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UNITED STATES SENTENCING COMMISSION

SYMPOSIUM ON ECONOMIC CRIME

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September 19, 2013
9:38 a.m.

John Jay College of Criminal Justice

524 West 59th Street

New York, NY 10019

PLENARY SESSION IV:

Kathleen Cooper Grilli

MS. GRILLI: Good morning, everyone. My name is Kathleen Grilli, for those of you who didn't have the opportunity to meet me yesterday. And I am the Deputy General Counsel of the U.S. Sentencing Commission.

And as you've heard today and yesterday, Judge Saris graciously thanked me and my co-chair Courtney Semisch. We are the co-chairs of the policy team that helped organize this event. And you would think as a co-chair, I would have better sense than to position myself after Mike Oxley and before the coffee break, but apparently, I don't. And I've been tasked with talking to you a little bit about what went on in the breakout groups yesterday.

We had a quote that, yesterday evening, as the staff of the Commission was sitting together sort of going over our notes from the room, that really resonated with all of us. And so I

wanted to repeat to you what one of the participants in the breakout room said. This person, who will remain unnamed because, frankly, I don't even know what the name is, said, "This is a really cool experience and I just feel lucky to be here."

And the thing is that resonated with all of us here on the staff, and I think it's because that's the way we feel about this experience and being here in New York with all of you. It was very clear to us, as we sat in the rooms yesterday, that all of you very busy people with jobs and lives and other responsibilities had taken a lot of time to think about the issues that the Commission is grappling with here as we talk about economic crime and how to fix the problems that people have talked to us about with 2B1.1. We feel lucky to be here.

I do want to take a few moments because we've had some public kudos to Courtney and myself. But the fact of

the matter is is that Courtney and I were not the village that put this event together. We had a lot of help. There have been people here in New York. The staff at John Jay has been incredible. And we know the difference, Courtney and I, because we helped the Commission put on a symposium a few years ago at a hotel and we did not have the level of support that the John Jay people have provided to us.

But we also have a whole crew of staff here, they were here yesterday morning at 7 o'clock. And there were people in my hotel room last night at 10 o'clock helping me put these remarks together. And so I did want to say thank you to them.

So there was another thing that was said to me in my hotel room last night as we were preparing these remarks, and it was along the lines of, "Keep it simple." My colleagues are very respectful and nice and so they

didn't add the "stupid" part to it, but I read between the lines.

Now, we heard -- and frankly, as we were preparing for this event and we were talking back in the office about what we thought we would hear, we thought we would hear some common themes, and you all did not disappoint. And so we did hear some common themes yesterday that we expected to hear about: Loss, culpability, and victim impact. And they were not unexpected -- they were not unexpected for us. And frankly, the fact that there were some competing views on how to deal with these things was also not unexpected. We thought that we might hear things like that.

What I really hoped to hear yesterday in the breakout room was, there's a really easy fix. And you know what? I did. Unfortunately, it was about one little discrete issue and it wasn't about the whole 2B1.1.

We heard some recognition that

these are complex issues, it's a difficult topic, it requires thought and debate. And that's part of what we're doing here in New York this week, and what we hope to continue doing.

But we were kind of surprised, as we sat together and talked about the different breakout rooms, to hear how much consensus there was over some of the concepts we talked about yesterday. And so let's go through and talk about those.

Loss. Someone in my room described loss as the biggest dog in the room. I thought that was a really interesting statement. But of course, there are many people who don't think it should be. And we did hear a consensus coming out of all these rooms that loss does have to play a role in sentencing for economic crimes.

But we also seemed to hear, for the most part, some sort of agreement that loss shouldn't be the most critical factor, which many of the

criticisms of 2B1.1 are that it currently is.

There are other measures of culpability, and we're going to talk a little bit of those, and we heard from the ABA proposal some of the thoughts on what those might be. But one of the comments was, is that loss leaves out sort of the human factor, some of the other things that might be going on.

Then we get to the concept of intended loss, which, as all of you know, is part and parcel of the loss definition of 2B1.1. And here, we had a little more discord. Some folks basically said to us, mend it, don't end it; intended loss is important. Others suggested, listen, the defendant intends to steal as much as he can and that's not really the measure of how successfully the offense was. Still others suggested that intended loss may play a role but needs to be tied in more to these culpability factors that we're going to talk about.

But one thing we did hear that sort of resonated with those of us who were sitting around the room talking about it was that possibly, intended loss needs to have a higher standard. And there's been some recent case law I think out of the Tenth Circuit, where they said intended loss needs to be losses that "the defendant purposely sought to inflict," not just possible or potentially contemplated. So that gave us some food for thought.

The next thing that the ABA proposal talks about -- and frankly, we'd heard about in other literature that we reviewed -- is compressing the loss table. And that idea seems to have some traction. It seemed to have some traction across the rooms, although there were those who said the loss table was fine, you know, when you're looking at these things, don't throw the baby out with the bath water, you know, you don't need to redo the table.

But the idea of compressing the table had a lot of traction in the various rooms. And one of the comments, at least in the room that I was in, was that if you compress the table when you had different levels -- and there was not any gelling around the levels that the ABA proposal includes, you know, there are some people that thought those might need to be adjusted -- but the thought of doing that might eliminate some of the litigation over loss amounts and the disputes that one has. And we heard a little bit about that yesterday, you know, in speaking with the judges about these disputes over securities fraud and, you know, what these mini-battles with the experts and all that. So some folks thought that might eliminate some of the litigation and instead focus the litigation on the culpability factors, which people think are the more important.

The last thing in regards to loss

was this notion of gain being factored in. And there seemed to be some consensus around the rooms that this is something that we need to think about, although we didn't get any concrete suggestions on how do it because there was, again, a little disagreement on whether it should be part of the culpability, whether it should be something that reduces the impact of loss. And so this is something that we'll have to grapple with going forward. And of course, we welcome comments that you all have as you continue to think about this.

So the next thing was culpability. And again, here, there was a quote that came out of one of the rooms that we all thought was pretty significant, and that is, "We all know what makes a bad crime."

And you also heard Mike Oxley just talk here about CEOs and the people in the executive suites and most of them being good people, honest

people. And we had conversations in the various rooms about the differences in offenders. And again, in my room, it was described as a "stone-cold fraudster versus an honest person gone bad." And so that notion of culpability and looking at the individual and looking at some of these factors that the ABA proposal -- seemed to get a lot of consensus across the room and across the different groups.

And I find it very interesting in particular because in our room, we had some very vocal probation officers who talked about the fact that now, when they're working on fraud cases and they're looking at the 3553(a) factors and they're talking to their judges about whether to recommend a variance or not of 3553(a), sort of saying some of these culpability factors that the ABA proposal talked about factored into the discussion. So these are things that are already happening now.

So what did we talk about? Well,

we talked about duration of the offense, talked about motive, talked about role in the offense. And I want to talk about -- a little bit about role because we did have some discussion about that.

You all know chapter three of the guidelines includes role adjustments. There's a minor role, there's a minimal role, there's, you know, two, three, four-point reduction. Those things don't apply very often, unfortunately, it seems. And so that's something that the Commission has concerned itself with over time. And so there was, at least in a couple of the rooms, this notion of having a mitigating role cap in the fraud guideline, something like we have in the 2D1.1. But the concern was, well, if people aren't getting role adjustments very often, how is that going to help?

But there did seem to be some gelling among the groups and the different stakeholders who were present

in the notion that there are people in fraud conspiracies, there are people committing fraud offenses or other offenses that go to 2B1.1 that are more culpable. They're the ones who come up with the crime versus the ones who get swept into it at the last minute or those who are brought in late or unable to control the scope of the offense. And so there was discussion about that.

We heard yesterday morning one of our speakers talk about this whole notion of planning. And so one of the factors in the ABA proposal is sophisticated and organized activity. We didn't have a lot of discussion about what constitutes sophisticated; and that's an issue I think we're going to have to grapple with going forward because we do have that sophisticated means enhancement in the guidelines already. And we hear anecdotally -- and we're going to be looking at that -- that oftentimes, what is considered sophisticated to one may not be

sophisticated to another. And this notion of planning is another thing that the Commission will have to grapple with going forward, if we're going to go down this line of, you know, looking at culpability and trying to weave culpability into 2B1.1.

But you know what they say, the devil is in the details. And that was the one thing that came out of the discussions across the rooms. There was discussions about, how do we define these things? How do we weigh these things? This proposal is a little too amorphous. We heard a little concern about what the standard of review on appeal might be. And so these are things that we will have to work on going forward, and we're going to hope to hear from all of you about what we can -- you know, what we should be thinking about, what we should be looking, about, you know, language to define these concepts in the event that they are something that the Commission

ultimately decides to weave in 2B1.1.

In all five groups, nobody discussed extenuating circumstances, such as were laid out in the ABA proposal. The only extenuating circumstances that came up repeatedly had more to do with the personal characteristics of the offender, which I'll talk about in a little bit, or things going on in their life, as opposed to this, you know, he was -- this person was under duress or forced to do this or anything like that. So we didn't really get any commentary from all of you regarding that.

And as it related to mitigation of harm, the key factor that we heard about was what we heard about yesterday from Russell Butler, which is restitution. And the interest in restitution. And it is thought to play a role in what an offender's culpability might be.

But we were also cautioned to make sure that this restitution playing

a role in culpability wasn't going to be an avenue for folks to buy their way out of jail. And that's something that the Commission definitely has to be concerned about because as you well know, one of the reasons that the Commission was created and the Sentencing Reform Act came into effect was this notion that white-collar offenders were viewed as more affluent, more educated, *et cetera*, were getting a pass and, you know, poor minorities were getting hammered in federal court.

So victim impact. Here, again, the consensus was overwhelming. The number of victims is not the good measure of what's happening to the victims. We had a debate about institutional versus individual defendants. And again, when there are -- victims, individual victims seem to resonate.

And it's interesting, I started in the federal system in the district that Mike Caruso, from the Southern

District of Florida -- he was here yesterday -- did, Miami. And my boss, I was a federal public defender, and the federal public defender most recently that I worked for is Kathy Williams who was elevated to federal bench recently.

And Mike was telling me when we were talking about him coming up here and doing this that he had had some conversations with Kathy recently where she was sentencing a fraudster -- and she spent years as a federal defender, I might add -- and she found victim impact statements, the victims coming into court to be really, really, really influential. And we heard that in the groups yesterday, that individual victims and, you know, the suffering that they have, and the loss of the money, these are things that really resonate in the courtrooms with the judges, with the probation officers, with all the stakeholders.

And I'm sure, you know, as a

defense attorney, if the prosecutor has a parade of victims that they're going to bring in, you're just thinking to yourself, oh, boy, what am I going to do with this. So we did hear that.

We also heard, again, along the lines of what Russell Butler said to you yesterday morning, his examples resonated in most rooms as something that we needed to be considering, which is that when you take $100,000 from 10 people, and it's their life savings, it really is much more significant than if you take a million dollars from a billionaire. And so these are things that we'll be thinking about going forward.

We were interested in sort of finding out what the basis of below range sentences is. Because as you heard from Courtney yesterday, you know, the average guideline minimum in the fraud guideline now is 29 months, the average sentence is 22. You know, there is a pretty significant below

range rate, especially when you get to the higher-dollar loss amounts. But even at the low end. And so we were wondering what was going on there. And across the rooms, again, it was interesting to hear that some of the things that are causing the courts not to want to give a guideline sentence are these culpability factors that we've all been talking about.

So the defendant had very little gain from the offense, the defendant got involved in the offense to retain their job and/or earn salary. They were unaware of or unable to control the scope of the offense. They started off with good intentions or, in some of, I think, particularly in the mortgage fraud cases, these external factors, the collapse of the housing market seems to have resonated, because if the market hadn't collapsed, and you went in and you tried to -- you know, mortgage fraud, you have the credit against loss rule and the house was

worth more than the mortgage, then your loss amount would be zero. And so these were things that were resonating.

But there also were discussion of individual characteristics, anomalous behavior caused by some sort of change in life circumstances, mental health and addiction. Mental health and addiction is something the guidelines address.

And then there were other personal characteristics that came into play and were discussed as a reason why judges are not imposing a guideline sentence. And I want to mention these because, again, these raise issues that the Commission needs to be cognizant of, because our statutory -- statute, our statute that set us up had certain directives for us, and we have to make sure that the guidelines are neutral as to race, sex, national origin, creed, and socioeconomic factors.

And so this is something that we have struggled with over time. The

early Commission made the decision that certain other factors that might not be prohibited which, in fact, under 3553, many of the judges are considering, might be proxies for those socioeconomic factors. So we have to be aware of it and we have to think about it. And you know, as we're moving forward, this is something that we hope to discuss with all of you.

Last but not least, this concept of who do we put in jail. Right now, this who do we put in jail and the overcapacity of the federal prisons is a topic du jour, we're focusing a lot of attention on it. And we had a speaker yesterday who talked about the fact that, you know, maybe in the federal system, if we were concerned with dollars and cents a little bit more, we'd be talking a little bit more about this than -- you know, the way they do in the states.

But we are talking about it. We did hear people concerned about this

whole in-out decision. And so that in-out decision discussion brought into play this 994(j) concept about people who do not commit a violent crime, first offenders who do not commit a violent crime or "otherwise serious offense" should get something other than incarceration.

The problem was nobody really had what would be a workable guideline definition to throw out. There was this whole discussion about, how do you weigh the factors, what makes it -- can we codify it in a way that it's very clear. With some of the suggestions, we talked about like tying it to the grade of the offense. The problem with that is it brings in that whole argument about -- we heard yesterday about charging people with a 371 conspiracy as opposed to a wire fraud which carries a heavy, you know, higher-stat max. And so there's a lot to be talked about there.

The other conversation was whose

responsibility is it to implement? And we heard a couple of things. One was, we hoped the Commission would tell us. And so that's putting the ball back in our court, and I guess we need to work on that. But the other was, you know, let the judges decide, trust the judges to do that. And that's what they're doing now under 3553(a). But if we're trying to move this into the guidelines, you know, we need to come up with the rules. And so it's something that we need to think about.

I'm going to close because I'm getting close on time and I stand between you and the coffee break, but I want to close with just a couple of the issues that people talked about that are important that we need to keep in mind and that there was not really any consensus in this room. But there was the discussion briefly about Congressional directives to the Commission, one of them was our 25 percent rule and how that's

interpreted. But the other are these various directives that we've had over time that have impacted and changed 2B1.1 and there was this recognition that we need to be cognizant of those as we move forward.

The other was a warning that we got in one of the rooms about unintended consequences of lowering penalties, and the notion that if you lower penalties too much, it might impact enforcement, law enforcement decisions and the focus on these things. And so it's something that we need to be mindful of going forward and we'll talk about.

The one thing that we did not hear is that you all think that we should take 2B1.1 and take 2F1.1, what went into 2B1.1 and the Economic Crime Package, and separate them out again. You know, that was what the Economic Crime Package did was put those two guidelines together, the idea was to consolidate, to simplify, to lower

litigation over where you needed to be. And nobody said, take them apart.

What they did say is that they seem to think that there are certain places or certain types of fraud where the rules in 2B1.1 are not working well. And so we'll look forward to hearing from all of you more on what those are.

So, did I keep it simple enough? All right. We thank you all very much. We look -- you know, this is the beginning of our journey here on 2B1.1, and I hope that all of you who have been here and given us your time today continue to give us your input, you know, public comment, letters to us, frankly, calls to me and Courtney with, you know, we've been thinking about this and we've got some ideas for you, are welcome too. Because we're going to be continuing to work on these ideas as the year goes forward.

Thank you very much and we have coffee in the conference room now.

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UNITED STATES SENTENCING COMMISSION

SYMPOSIUM ON ECONOMIC CRIME

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September 19, 2013
10:30 a.m.

John Jay College of Criminal Justice

524 West 59th Street

New York, NY 10019

PLENARY SESSION V:

Hon. Rachel Barkow

Neil Barofsky

Meg Garvin

Ellen S. Podgor

Brett L. Tolman

Shanna R. Van Slyke

HON. BARKOW: If I could ask everybody to please take your seats. We're going to have our last session of the day. And I know we all welcomed you and thanked you yesterday for participating and I just want to echo what my colleagues said, we really value your input and participation, this has been tremendously helpful to all of us, and we know it's a big chunk of your days to do this. So thank you very much again. And for sticking it out for the very end, which is us.

So this panel has a broader perspective than the two we had yesterday, which I think were a little bit more narrow in their focus. The title of this one is: How the Competing Purposes of Sentencing Influence Sentencing Policy for Economic Crime.

And so here, we're taking our cue from the fact that the Sentencing Reform Act of 1984 instructs us that

our guidelines need to further the basic purposes of punishment, which are listed as deterrence, incapacitation, just punishment, and rehabilitation.

And so what we'd like to explore with this panel is how we think about those broader theories of punishment and how they meet some of the specific proposals that have been suggested and how we think about setting specific sentences, the factors we want to have considered, how they relate to those overall purposes, bringing a wealth of experience and research. So we're very, very fortunate.

And so the way we're going to do this panel is I have some questions for the panelists and then we'll open it up for discussion among them. And I think we'll have time for questions from you as well to be able to ask them.

So I'm going to start to my immediate left. This is Brett Tolman. He's a former U.S. attorney for the District of Utah. He's now a

shareholder with Ray Quinney & Nebeker. And I want to start off, based on your experience as a former U.S. attorney, if you see among those purposes of punishment, deterrence, incapacitation, just punishment, and rehabilitation, if any one of them is paramount when it comes to economic crimes or specific economic crimes, if there is a way in which we think about economic crimes where one of those purposes of punishment is kind of the chief guiding principle, even if we're trying to take the others into account, based on that experience or any others that you've had, how you think that should help guide us.

MR. TOLMAN: Well, thank you for the opportunity to be here. My voice is a little raspy and my beard's a little longer, and I'll explain both.

Yesterday, I had the privilege of testifying before Congress, the Senate Judiciary Committee, on their hearing on mandatory minimums and some of the

implications of mandatory minimums. At the same time, I'm an enormous Red Sox fan, and I made a commitment with my son -- thank you.

HON. BARKOW: Our Chair is pleased.

MR. TOLMAN: I made a commitment to my son, both us are going to grow our beards until they win the pennant, and they keep losing as of late, and my beard is getting longer and my credibility is decreasing as we go. But my son only has nine whiskers so it doesn't seem to be a problem for him.

It certainly is a privilege to be here. I spent the majority of my career as a prosecutor and have made an uncomfortable but now very enjoyable transition into private practice as I get to see the other side. I spend a majority of my time now representing companies, trying to keep them out of trouble and representing individuals who are in trouble.

I think that this question --

I've given some thought to it -- coincidentally, I was in front, as I was in front of the Judiciary Committee, Senator Cornyn pointed out that during my testimony, I was emphasizing only two aspects of really the purposes in 3553, and I was discussing punishment and deterrence. And I thought it somewhat ironic that the Senator, the good Senator from Texas was reminding me about rehabilitation and the importance of rehabilitation, which was more than ironic since my message was that at times, the over-criminalization and over-punishment has become an issue to which I have gained greater sensitivity.

In the white-collar arena, it is very interesting to me that there seems to be two very important competing interests that I think places one of those purposes more important than the other. In a recent sentencing in Nevada that I was involved in, I was

making the pitch to the judge that this was an individual that was facing an enormous amount of prison time and had no criminal history and was largely, in my opinion, subject to the interpretation of the calculations that we all enter into under 2B1.1. And that there were factors that were not being counted.

The judge was very clear that the public seems to be demanding tougher sentences in white-collar crime. And he was being guided by, in some ways, the sentiments that he understood, especially in his community. He said he was not unsympathetic to the fact that this was a first-time offense, that there is so much discretion in the prosecution, and indeed, at this sentencing, we had alleged victims -- and I say alleged because it was a mortgage fraud prosecution and there's, as you know, the debate between the straw purchasers and, you know, what their role is and what level of victim

they are -- eventually had victims testifying on behalf of the defendant. And there were no victims testifying on behalf of the government.

And the judge indicated while he recognized that the $30 million loss figure that resulted in my client making less during that year he was doing the mortgage business than he'd ever made in his life, and while the victims themselves had been forgiven of the debt that they had incurred, that the $30 million figure is something that is so important in the sentencing, that he just could not justify a variance and go down.

But he said, I will tell you, though, that the rehabilitation factors in this case, to me, are important but I don't think that this individual needs rehabilitation. I think that this defendant will not commit another crime for the rest of his life.

That was for me, a moment -- a deer-in-the-headlights type moment as I

stood there and had no idea what to respond to the judge.

So rehabilitation is interesting in this context. I do not think that it has its proper weight or its proper place in many of the sentencings in this case.

I think that deterrence becomes a very important factor. Punishment and deterrence become sort of those heavy weights that are shackled to defendants' ankles as they go into the sentencing. And I'm not necessarily saying that it's not appropriate that there's more weight given, but I am concerned that we are not focused, and it seems to be somewhat of a prevailing attitude, on more of the rehabilitation.

Just in summing up, I have been making the argument and working with members of Congress in trying to pass some legislation that would actually allow for rehabilitative programs more tailored toward the white-collar

criminal, which would provide ethics education, business training, it would elevate the businesswomen and businessmen and their background while going through their sentencing. So thank you.

HON. BARKOW: Thanks. Next, I want to ask Neil Barofsky a question.

Neil Barofsky was the former Special Inspector General for TARP. Before that, he worked in the Southern District of New York as an assistant U.S. attorney. He's now also in private practice as a partner at Jenner & Block. And he's also an adjunct professor at NYU.

So I want to follow up, you know, on this discussion of which purposes of punishment matter, and ask you whether or not -- some questions about, let's say we are thinking about deterrence and we are thinking about just punishment, there is a question of okay, does that mean jail time and if so, how much jail time does it mean?

And one thing that came up in earlier discussions and we heard it in the -- already this morning is this question of whether or not the -- how important is the length of a sentence, how much does that matter for purposes of deterrence, how much does it matter. And I'd actually like to get your perspective as a head of a law enforcement agency, as the head of SIGTARP, in making decisions which brought many fraud prosecutions, if you considered length of sentence; and if not, what did you -- did you consider that, what else did you consider, sort of how did that all factor into what you were thinking of, as we think about length of sentence, both from the perspective of a law enforcement official and then just also from your general experience also as a prosecutor.

MR. BAROFSKY: That's a tough, long question.

HON. BARKOW: Take your time.

MR. BAROFSKY: I will give you a tough, long answer.

I think my answer to this and my observation of this of course are entirely anecdotal. I started off, before my career in law enforcement, as a defense lawyer, and this is where I find myself again many years later.

So, you know, as someone who's, you know, spoken to criminal defendants from various different perspectives, as their lawyer, as the prosecutor from a law enforcement perspective, and now back in this, my general answer to your question is that from a deterrence perspective, which is, you know, by its nature an almost impossible task. You're delving into the psychology, again, not of a criminal defendant but of someone who is deciding whether or not to commit an economic crime. And the factors that go into that decision, including the likelihood of detection, of being caught, of being investigated, of being prosecuted. And then at the

very end, what that potential sentence is.

And I think that if I were to rank the importance of what -- of that decision-making process, I would put sentencing right there, as well as it is in the sequence, at the very bottom.

My experience -- and again, it's tough to generalize -- I think that, you know, when you're talking about economic crimes and those who are predisposed to commit them, they're much more similarly generated by the clouds that create snowflakes than the cookie cutter that makes uniform pieces of cookies. But generally speaking, there's very little consideration of the length of sentence. The far, far more significant thing is the likelihood of detection, investigation, prosecution, and conviction.

But I do think it might be helpful in looking at some of the different types of economic crimes because I think, depending on the crime

and depending on the scheme, there might be different levels of sensitivity to well-publicized lengthy sentences.

You know, I think a lot of what we're talking about -- and Brett, I think when you talk about the pressures that the Nevada judge had, we think about big-scale white-collar crime, and I think that your mortgage fraudster defendant or alleged -- well, I guess he's convicted, he's a convicted mortgage fraudster at this point -- is probably not the face of what there's a lot of anger in this country. What the anger in this country is, is we're in the aftermath of a devastating financial crisis where the public perception is that those who are most responsible for it have gone without punishment, without accountability. And I think what happens is that those small fry that get caught may get unloaded upon, as it sounds like your defendant did, to try to have some

sense of justice for the many that were not caught.

So when looking at the big-scale -- what I like to think of as the big-scale accounting fraud, the multi-billion, the giant cases, I think in that aspect, the length of sentence as a deterrent is probably very small.

Again, though anecdotally, I was the prosecutor of the Refco case, which I think was discussed by Judge Preska yesterday. It was a case of a multi-billion dollar accounting fraud. And I think it's somewhat helpful to think about this issue because we had three different levels of defendants. At the very top, we had Phil Bennett, which Judge Preska was -- it was assigned to a different judge, who was the architect of this fraud.

Now, this fraud which, again, by the time the music stopped, was a multi-billion-dollar case, started off very small. And when Phil Bennett, who was the mastermind behind this fraud,

committed the initial criminal acts, it was very small in scale. And it wasn't out of greed, it wasn't because he was trying to line his pocket; he was trying to save his company. There was a loss that if it was exposed and the streets saw it, they would have pulled their funding, the company would have gone out of business, he would have lost money.

But at the time that he committed that, my guess is that he thought that the chances of getting caught were extraordinarily low -- it was small-accounting entries -- and that the reward for it was very high, keeping his business in tact, not going out of business.

Now, as it happens with a lot of these large-scale frauds, they start small, but once you're in, you're in. And as the hole becomes bigger with each attempt to cook the books, the hole gets larger and larger. And about nine years later, the fraud size was --

it was a billion-dollar hole.

And right before the fraud collapsed, Phil Bennett, not only had he kept his company alive, but had made himself one of the 300 richest people in the world, at least on paper, with a billion dollars of fraud proceeds.

But I don't think at any point the sentence of Bernie Ebbers or other CEOs, the lengthy sentences, really factored into Phil Bennett's decision-making. His decision initially was, I'm not going to get caught because this is kind of minor. And then afterwards, stopping the fraud would have resulted in detection; and that was his incentive going forward.

He ultimately pleaded guilty and got 16 years in prison, which may or may not be a significant deterrence to the next CEO who's presented with similar situations.

The next level down, we had Tony Grant, who was the president of the company. He was an active participant

in the fraud up until the year 2000, and then he left the company, and unfortunately for him, came back to sign some paperwork on the final stage of the fraud five years later. And he stood to gain about, you know, between the tens and hundreds of millions of dollars. Again, I think that his calculus initially was to help save the company. Ultimately, for that fraud, it was a little bit of greed to get hold of that money. Also, if he didn't participate, the fraud would have fallen apart, which would have led to detection.

Again, he was not really thinking, I don't believe, about the time. He went to trial, was convicted, received 10 years in prison.

The final defendant you heard about yesterday, Joe Collins. Joe Collins was a partner at Mayer Brown. Judge Preska, when she sentenced him, I think referred to him -- compared him to a saint. Now, this fraud, this

multi-billion dollar fraud could not have occurred but for the willing participation of Joe Collins, the outside lawyer. After his first trial before a judge other than Judge Preska, he received a seven-years' term of imprisonment. That case was reversed on a technicality with the jury, was reassigned to Judge Preska. And after being convicted again, was sentenced to a year and a day; same defendant, two different sentences.

And, you know, as the former prosecutors involved in investigating that crime, I liked the first one a little bit better. As a defense lawyer, I guess I like the second one a lot better.

But I think this is where -- we were talking about deterrence -- it's probably the greatest example where a prison term -- the length of potential prison term had absolutely nothing to do with Joe Collins's decision to commit the crime. If he was going to

be deterred, the fall from grace that he has had, you know, completely being wiped out financially, the complete loss of status within his community, a year and a day of jail for someone like him is -- would be as potentially terrifying, I'd imagine, as the original seven-year sentence. And therefore, the impact will be less.

And I'm not here to say which sentence was better. I mean Collins, unlike the other two, were -- didn't really derive personal profit from the scheme, other than his legal fees, which were substantial, and it enabled him to be who he was, which was a high-profile, very respected partner.

And I'm not suggesting that this range of sentences from 16 years to one year were in any way necessarily inappropriate, although from a guidelines perspective, they were in this exact same guidelines range, life. This was a more than $400 million, sophisticated means; I mean every

imaginable guideline enhancement was there. And they became irrelevant, I think, in the sentencing in this case. They became irrelevant because they were so obscenely off the charts. Joe Collins, nor Phil Bennett, nor Tony Grant deserved a life sentence.

So I think both from a deterrence perspective and sort of the unreal nature of the guidelines are sort of illustrated in this case.

Do I have some time? Should I keep going?

HON. BARKOW: I'm going to come back to you, I promise. I will get back to you. Because what I think might be helpful from this point is that since -- I think it's interesting, and I think we noticed this in the breakout sessions yesterday, that what people think might be an appropriate sentence does seem to vary based on whose glasses you are looking out from, which I think is something reflected in both your personal experiences, as I'm

sure prosecutors and defense lawyers, you may see things a little differently.

So I'm hoping we can expand the lens out to get a sense of the public perception of sentencing in white-collar cases and then I'll come back for more comment afterwards. Because I'd like to hear next from Shanna Van Slyke, who's an Assistant Professor of Criminal Justice at the Utica College School of Economic Crime and Justice Studies, who's done a lot of research into the public views on white-collar crime.

And I was hoping you could give us a sense of how, if we were trying to get a sense of how the public views cases like this, how they think about -- how do they break down the different kinds of white-collar crimes, what factors do they think are important, what do we know from the research out there on public perception that can help us think about where to set

sentences or how to approach that.

MS. VAN SLYKE: Thank you. Well, I think the public would flip its lid if it heard some of the conversations that have been had in here during this symposium because since the 1930s, the public has consistently said that they want white-collar offenders to be punished more harshly than they are. And this isn't relying on how well the public knows what the actual sentences are given to white-collar offenders, but this is researchers doing comparisons of the sentences the public would mete out to a white-collar offender versus actual court dispositions that have been given out.

This century, researchers have kind of shifted the question a little bit, and have started asking whether they thought -- whether the public believes that white-collar or street offenders are more likely to be caught and apprehended and punished. And this research has also consistently found

that the public believes that white-collar offenders are far less likely than street offenders to be apprehended and punished.

About a third of respondents, by the way, also believed that the government needs to devote more resources to white-collar crime control. As to factors that affect the public's punitive attitudes towards white-collar offenders, several variables have been identified. I'll save perceptions of offense seriousness for last because that's a surprising twist to some people.

But, so a variety of variables seem to influence whether the public thinks that these white-collar offenders should be sentenced to prison or not. Leading the list are things like multiple deaths, single deaths, multiple injuries, single injuries, like we would see with things like selling unsafe drugs and food products and also with some environmental

crimes.

Following that are high-dollar losses, which we've heard a lot about here. Individual rather than organizational victims lead to more punitive punishment recommendations by the public.

High status rather than low status offenders lead to more punitive punishment recommendations. Trust violations appear to also elevate the punitiveness of how the public would sanction white-collar offenders if they were given the choice, meaning that offenders who are more trusting of corporations, specifically, would choose to punish them more harshly than the members of the public who are less trusting of corporations.

And also, repeat offenders seem to lead to higher punishment recommendations than first-time offenders.

So a lot of this is consistent with what's already going on. The

biggest gap so far seems to be that there's a lot of consensus in this -- among this group that we might want to reduce the severity of sentences, especially at the top, whereas the public really would prefer harsher sentences.

The public opinion research is a bit limited because so much of it has focused on the question of seriousness. And seriousness is a different factor than punitiveness. Seriousness then, that literature doesn't directly speak to punitiveness, and seriousness doesn't perfectly predict it. While people tend to -- who believe that white-collar crimes are more serious than others do generally support harsher punishment recommendations for them, it's not a perfect relationship. And this has two important implications, I think, that one, we shouldn't draw punishment recommendation conclusions based on the seriousness literature, which

simplifies things for a lot of us because in a way, we can almost ignore 75 to 80 percent of the public opinion research, if our question is punitive attitudes.

It also suggests that we need to look at other variables, especially offender, offense, and victim variables. And you're seeing things like offender and victim variables popping up in here.

The research literature, though, I'll add, hasn't included a lot of the things that we've talked about in here. Like culpability, for example; that hasn't featured into the research yet.

I think it's important -- there are some important reasons to look at public opinion on how white-collar offenders or economic offenders should be punished. According to democratic theory and consensus perspectives on the law, how our institutions respond to these offenders should reflect what the public wants and what prevailing

social norms are, and it's public opinion research that tells us this.

There's also -- well, the idea of deterrence, that one keeps popping up too. There's two form -- well, we can break deterrence up into perceptual and objective deterrence; objective ends up being less important. Deterrence theory assumes a rational decision-making process here; it's about what offenders think, not what objective reality is.

So it's less important, for example, if a state passes a new law, we're going to have the death penalty here. What's more important is if the offenders are aware of it and it's that punishment possibility is factored into their decision-making process.

And here, again, the public opinion research is very important because findings that the public believes that white-collar offenders stand a far lower chance of being apprehended and punished seriously than

street offenders tells us that we're probably not achieving the intended deterrent goal of the sentencing guidelines. Because, again, who are the public? They are the would-be offenders, the potential offenders. They're also, incidentally, witnesses and victims. And witnesses and victims -- or victims especially, with white-collar crime, there's underreporting problems.

Stop me if I start going into your turf, please.

MS. PODGOR: Okay.

MS. VAN SLYKE: All right. White-collar crimes are notoriously underreported, kind of like rape. And one of the common findings when we've asked people, why are you not reporting? They say, well, there's not a point, no one's going to do anything about it.

So I think public opinion research speaks very loudly to some of the issues we've been talking about

here.

HON. BARKOW: Great. Thank you very much. So this will transition to our next speaker, which is Ellen Podgor. She's the Gary R. Trombley Family White-Collar Crime Research Professor at Stetson Law School.

And Ellen, you've written a lot about the fact that we should take into account some of the sociological factors associated with white-collar offenders, and also pay attention to the fact of their criminal history because in so many of these cases, these are first-time offenders, which is something that came up in our discussion yesterday as well, and sounds like it's reflected in some of the public opinion research that Professor Van Slyke just told us about, where repeat offenders seem to matter.

Can you give us some thoughts on if we were taking recidivism into account, both criminal history and then how we think going forward about

white-collar offenders, what would a good guidelines approach look like if we were going to do that?

MS. PODGOR: I wish I had the answers.

But let me say thank you very much for having me here. It's been really an enormous pleasure. It has been, although I was not the person to call it cool, it really has been a cool experience for somebody who writes and has been studying this area for an enormous amount of time. I just -- it's just wonderful to be a part of this.

Let me just say that part of the problem where you have a public perception and then you have a reality, and they don't meet, is what is occurring here. And we have a very reactive society, a society that goes in and passes new laws. We have over 4500 federal criminal statutes. We have an additional number of regulatory statutes. And we have all of this

legislation coming out that the poor Sentencing Commission has to deal with, where does it fit and where does it go. And what happens is you have a society that builds up the reaction to a crime and its legislation and it is a sentence and punishment.

The problem is that white-collar crime is different. I can't speak specifically to fraud, but I can speak to white-collar crime. And I think that white-collar crime does encompass a little bit more than just fraud. And in looking at white-collar crime, I can say that the white-collar criminal is different than many other types of criminals. It matches, in some respects, to criminals who commit drug offenses or other offenses, but there are some unique characteristics here. And it doesn't apply in all situations, so let me give that caveat to start.

If one takes a look at something like embezzlement, in Category I, you have 91.87 percent of the people. If I

go to fraud, one year at 69, one year at 71. If I go into drug trafficking in Category number I, it goes down to 52.06. If I look at drugs communication facility in category number 1, I've got 33.66.

I think this tells us a lot. It tells us that we're dealing with individuals in this category who are not recidivists. Maybe they haven't been caught before, some will claim. But the point is we're not seeing them in the system again. And the key thing that we want to achieve here in punishment is to control crime. And if we want to control that crime, then we have to make certain that we are punishing those individuals who are not going to be repeat offenders. We want to make certain that we send a message to society also, the general deterrent, and that we have a specific deterrent.

I don't think specific deterrence is really a problem here, and that's evidenced in the statistics here.

These individuals are not the ones who tend to repeat the offense a second time.

Now, I think that if we were to break down those numbers, which unfortunately I don't have done, some of the numbers may account for some of the differences within the fraud category. And I think there are different types of individuals and different types of offenses in the fraud category that can make a difference.

One of the things about that is the culpability factor. And I think the fact -- one thing I really liked about the ABA proposal was the insertion of that culpability factor. And why I think it applies in the white-collar crime area more than in any other area is because of what the whole concept of white-collar crime is all about.

If I go back to the 1970s, Yale did some studies in 1970 on

white-collar crime and what were the individuals that were committing these white-collar crimes, who were they. And then Ken Mann, an individual who wrote the first book on defending white-collar crime back in 1985, captured some of that. And one of the things he pointed out, he said many suspected cases of fraud, tax, and securities fraud, for instance, leave open basic questions about whether criminal intent was formed by the so-called perpetrator.

One of the things you find in so many white-collar cases is the issue of mens rea. Did the individual know what they were doing or did they not know what they were doing? In some cases, you have the greed, in many cases, you had that knowledge there. But in more cases than not, you don't.

And it's interesting to see that the Supreme Court has sort of noticed that in the white-collar area with two cases, Ratzlaff and Cheek. Both of

those cases deal with the element of willfulness in a statute. Both of those cases defy the basic sort of thing that we grew up with, that being ignorance of the law is no excuse. Both of those cases held that because of the complexity of the statute, we could look beyond it and require that the defendant know that what they were doing was, in fact, wrong.

One of the things that's not factored in here is many individuals don't go to trial; 95 percent in the federal system. We're talking about many individuals who cannot risk going to trial right now because of the high sentences that are imposed in the system. And that's a factor that also needs to be included here.

So when I look at things like incapacitation, they're not an issue here in white-collar crime. When I look at general deterrence, I say, yes, that is an issue. But I kind of agree with Professor Arlen in that respect

that do we achieve that same general deterrence with a shorter sentence than with a long sentence, and do we save money in the process.

And I also seem to think that specific deterrence you achieve just by the investigation of the individual in many of these cases. White-collar cases have a much longer investigation time than a typical street-crime type of a case. That investigation can really have an unusual effect upon the white-collar criminal. And that, in itself, in many instances, will have the effect that one would want.

The last thing I just want to say is the collateral consequences in the white-collar area need to be factored in. That's an important aspect of the punishment too. You have a banker, you have a lawyer, versus a bricklayer, goes into prison, comes out a bricklayer; a plumber goes into prison, comes out a plumber; a lawyer goes into prison, doesn't come out a lawyer; a

stockbroker goes into prison, doesn't come out a stockbroker. That's a difference.

HON. BARKOW: Okay. Thanks very much.

So now we'll hear from our last panelist who is Meg Garvin. She's the Executive Director of the National Crime Victim Law Institute. And she's also a clinical professor of law at Lewis & Clark.

And I'm hoping, Meg, that you can tell us a little bit about the perspective of this from victimization and how we should view what appropriate sentences are if we are taking into account that. I mean, you can see so far -- at least I'm hearing -- there's attention, if we focus on deterrence based on things that Professor Arlen said and Professor Podgor said, maybe it doesn't matter as much the length of the sentence or even prison versus fine. If we were taking into account just punishment, though, and we want to

take into account public perceptions, including the perception of victims, I'm getting the sense from what people are saying that that's different, that's different from what the deterrence theory might tell us.

And so I'm hoping you can shed some light on what you know of victim perceptions to help us think about where they would be coming out in this debate between what the appropriate sentence is.

MS. GARVIN: Sure. And I'm going last because I do have the answers, just -- I want to say.

Thank you so much for letting me be here. I'm really sorry I missed yesterday because it sounds like it was a phenomenal discussion. And I was reading the ABA proposal this morning jotting notes down, and will be sending comments out to folks on that.

You know, as I was sitting here listening, my notepad got messier and messier as I was taking down notes on

what everyone was saying and how I wanted to engage in conversation with some of those ideas.

And I'm going to kind of wrap all of it together and quasi-answer your question but really respond to some of the things.

HON. BARKOW: It was a quasi-question, so that's fine.

MS. GARVIN: There we go.

So I think sometimes the perception of those of us in the room -- whether that be academics, practitioners, the judiciary policymakers -- is that there is a bit of the tail wagging the dog here, that public perception of increased punishment, which I thought it was really interesting that the professor brought up, that the literature has been there since the 1930s. So this is -- and I would hazard to guess it predates that even -- that the public's idea that we should have higher punishments, many folks, I think in

conversation in this room and other conversations I've had, perceive that as the tail wagging the dog; that we should be looking at other things, look at deterrence. And we don't have recidivists, and therefore, maybe we've gone askew.

Well, I think I want to challenge that from the victim's perspective because -- and I can't, I can't give you the victim's perspective because I think probably Russell Butler may have hammered this a bit yesterday, there isn't a single victim perspective. I have worked with fraud victims who say, please do not incarcerate this individual, he's not going to do it again, he has made amends to me, whether those are financial or otherwise. And then I've worked with other fraud victims and financial and economic victims who say, are you kidding me, this guy was privileged in the first place and he ruined my life, so lock him up. So there isn't a

single perspective when it comes to sentencing.

But with the idea of the tail wagging the dog, I think what happens or seems to happen is the public, we are a reactionary society, and Stephanos Bibas has written about this quite a bit, this conveyor belt idea of if you don't invite the public, AKA in these situations the victim, to the table at the front end and allow them to be active participants in the administration of justice, then at the tail end, they're going to dictate higher and higher sentences. Because they'll say, you're not listening to us in the moment. Individual victims are the public.

And so one of the things is is we need to invite victims and their concerns to the table at the front end. And so what do I mean by that? I mean understanding that this isn't always singularly about loss. That is such a heavy factor in the current guidelines

and in our conversations, and yet, the reality is it's about harm for victims, which is a very different thing than loss. Loss is a subcomponent of harm, but it is not harm. And we need to be talking to victims in individual cases, and the Commission needs to be paying attention to the whole panoply of what constitutes harm to understand how to factor victims in these cases.

And so once we start to look at harm, whether that being economic harm or other harm, psychological, mental health, medical, then you start to understand the victim perspective a little bit better. And lest you think that those harms are de minimis in economic crimes, I would hazard a guess you haven't spoken to a victim.

Many of the victims I work with and that the folks we work with nationally end up representing -- because the work I do is legal work, I'm their lawyer or I work with their lawyer -- their harms last for a long

time, and they run the gamut from ulcers to heart disease to many other things downstream because we know from science that high stress causes medical and mental health problems. And economic crimes cause harm that includes those things.

So from a victim's perspective, I can't tell you should deterrence, rehabilitation, which one should weigh specifically in a specific case; what I can tell you is that from a victim's perspective, you have to ask the victim. They have to be at the front end of these conversations. They're individuals, just as we have to -- and I do believe victims believe this -- factor the individuality of the defendant into these things, you do have to factor the individuality of the victim into these things.

And the last point I want to make is is that these purposes that we articulate over and over again, I think we all need to also take a step back,

and the victim's perspective is about this a little bit too, which is each of those specific purposes, deterrence, incapacitation, just punishment, rehabilitation, fall under a greater umbrella of the historical purposes of the criminal justice system. And that larger purpose is the criminal justice system is a constitutive moment of our society; it's a moment in which we say who's in and who's out, what behavior is in and what behavior is out, what behavior is temporarily out but we think it can be -- or what person is temporarily out but we think he can be fixed and then you're back in, right?

And from a constitutive perspective, if we don't factor the victim as an individual, then we have told them, by our policies, you are out. And when the victims feel they are out of the system, they become the public that then says, change this, make it more strict because you're not letting us in the front door so we're

going to come in a different way.

So I think from a victim's perspective, what I want to add is there isn't a single answer but we've got to have them at the table and factor them as individuals and ask them what's the harm, not what is the loss, what is the harm. And then harm becomes a factor.

HON. BARKOW: So I promised I'd get back to you, Neil.

MR. BAROFSKY: Yeah, I just think hearing this conversation, you know, I don't think that there is not a role for significant sentences in having a role in deterrence, even if in certain examples, it may have a minimal impact, I think in others, although it's, again, secondary to the concerns of detection and prosecution, it's still important.

I think a good example of that potentially is in the recent rash of insider trading cases, you know, where you have this tremendous surge in

prosecutions and but for this group of defendants, previous length of sentences to insider trading defendants probably didn't have a lot of impact on their decision to make the crime. They largely committed these crimes because they believe that the -- they rationally believe that the chances of detection were quite slim. And it was only because of very extraordinary use of law enforcement resources, using wiretaps, and really attacking an industry that helped -- that resulted in, I think, in these rashes of cases.

And, you know, within the industry, it was very much a -- it became normalized, relying on insider information. If you follow the government's allegations in these cases in some of the recent allegations, it became institutionalized. Everyone was doing it, whole firms, some of them legitimate, some not, called expert networks, whose business was essentially linking up traders with

potentially inside information. And the fact of these cases, these rash of cases, has a significant potential of having deterrent value because it's going to change that calculus, the chance, the likelihood of detection and prosecution is much more significant.

Now, however, I think that if the sentences that were meted out, for example, the poster child, Rajaratnam, received a financial penalty only and no prison term, or a very light prison term. Sure, his fall from grace was somewhat spectacular, just looking at the amount of money he had, as his place in society. But for the erstwhile or potential insider trader who gets access to that information, it's a cost-benefit analysis. And the benefit is no jail time or potentially I've got to give back what I made, that calculus, now that we're in a point in our history where there is a heightened chance of detection and getting caught and prosecuted for insider trading, I

think it's somewhat important that someone like that got more than a decade of jail time.

Now, that doesn't mean that every insider trader needs to get a decade plus of jail time in order to hammer that deterrent point home. I think, though, the potential and possibility, if that guy got a decade and maybe a couple of other people got a decade, that will inevitably factor in, along with the heightened level, heightened chance of detection.

So I don't think that it's irrelevant and I do think that if you eliminated jail terms or made them all relatively inconsequential, you would, you know, you would frustrate the level of deterrence.

And the second part of your question is as the head of a law enforcement agency, what was my perspective on sentencing. And our agency only did economic crimes, we only did mostly complex white-collar

kinds, mostly accounting fraud and other types of mortgage fraud; and the answer is I have to say, from an institutional perspective, I had very little concern about what the sentencing was.

Now, look, from a sense of justice, we've put in resources, we want to see these guys rung up for as long as possible. That's sort of the normal human element. But from a resource allocation perspective, from trying to maximize the impact of an agency with limited resources, sentencing was frankly the least interesting thing on our plate.

You know, our job was to deploy resources and get criminal charges, hand it over to the prosecutors, and move on to the next case. And individual agents certainly care, because that's the human nature to care when you invest; from an institutional perspective, our bigger concerns is that we didn't want to allocate

resources to sentencing, we wanted to find more bad guys and make more cases.

And, you know, I think that the notion that if sentencing numbers come down, that will somehow dissuade law enforcement from pursuing cases, you know -- at least, again, from my limited anecdotal experience of running a law enforcement agency that did white-collar crime, I don't really think it would factor all that much into our decision.

HON. BARKOW: Can I ask the panel for any of you to react to one thing that's come up is how much is either public perceptions or the criticism of the guidelines, how much is it driven by sentences that are at the high end; so those would both be the high-profile cases and the high-dollar-amount-loss cases versus how much of the perceptions are really about what make up, you know, the 80-plus percent of cases that are in the smaller amounts. Do you have a sense of how -- the

knowledge that's out there, how much -- or the criticism, either one -- is driven at the upper end versus it's a kind of general sense that the approach to economic crime is not quite right?

I don't know if any of you would like to reflect on that in particular. Shanna, you're looking like -- do you have any data for us on the public perception?

MS. VAN SLYKE: I can speak to that a little. I think there's been very little research out there about how actual cases influence public opinion, unfortunately. But what is out there seems to suggest that it's the lenient sentences that influence public opinion rather than the unusually harsh ones that are at the high end, which could explain perfectly why the public thinks that we need to be punishing more harshly than we do.

So when they see things, say a newspaper article, most people know -- or most of the members of the public

know mostly what they know about the criminal justice system from the media. And when the media reports something like, according to the guidelines, this person should receive a life sentence -- but say he got a year and a day, that gets a lot of people angry. I don't think the media reports as much about the high-end sentencing.

HON. BARKOW: Anybody else?

MR. BAROFSKY: If I could just ask a follow-up question. How much -- I thought it was very interesting in your comments when you talked about the public perception of the absence of apprehension and then significant punishment, and I just wonder if there's any way of telling how much that gets conflated? Because I hear a lot of the perception of the lack of apprehension, white-collar criminals just get away with it, and I just wonder how much that perception and that frustration for the lack of apprehension, especially now in the

aftermath of the financial crisis, gets conflated with the idea of, and when they do get one, they should hang them high, if there's sort of any bleed-over between those two things.

MS. VAN SLYKE: I don't know, I'm sorry. I do know that the public's beliefs that there's a very low or a relatively low possibility that white-collar offenders will be apprehended, again, compared to street offenders, is supported by qualitative research with convicted white-collar offenders who are in prison.

So qualitative research is different from this other public opinion research, most of which ask people questions that are answered with yes or no or rankings or ratings. Qualitative research more asks, what do you think, why? Please explain.

And the convicted white-collar offenders will often say that they believe that they weren't going to get caught, or if they were, it was going

to be a slap-on-the-wrist-type thing. That said, a lot of those offenders, when we're talking about convicted white-collar offenders, we're talking about what we generally call the losers, you know, the ones who are in prison, the ones who have been caught. White-collar offenders, like the snow cloud or snowflake analogy, they're not all created alike. I think we could broadly divide them into two categories; one group offends with more frequency and doesn't even necessarily specialize in white-collar crime, they might commit other economic crimes, other street crimes, drug crimes especially. That's who we're talking about or we're talking with when we're getting that information, not the first-time, one-shot offenders who maybe perpetrated these long-term massive frauds.

HON. BARKOW: Great. So we have time if the members of the audience would like to ask questions as well.

And we have microphones on either side, so if you -- I know it's tough -- if you can get to the aisle and come down to the microphone and feel free to ask our panelists.

HON. IRIZARRY: Hi, I'm Judge Irizarry from the Eastern District of New York. My question is for Ms. Garvin.

How would we involve the victim at the front end, and what is the front end? Is the front end the point of making legislation and passing legislation and making -- and criminalizing conduct? I would assume that they are involved in the investigative process because somebody must have reported something or hopefully the investigators are talking to the victims about what happened and their loss.

I'm not clear at what point we involve the victims. I know in my cases, I get the letters from the victims, they are invited to come to my

courtroom; if they want to talk for three hours, they get their three hours. But I'm not clear where it is that they're supposed to come -- where you want them to come in and how.

MS. GARVIN: And, and I'm sorry, and out?

HON. IRIZARRY: And how? How would they be involved?

MS. GARVIN: So that's a great question. I'm sorry for my vagueness, in part sorry for my vagueness; and another part, the answer is a yes to all of that.

So legislatively, of course we should be involving them. In specific cases, a couple of things have been said that indicate that victims aren't involved from the beginning. One is that there is a perception that nothing is going to happen in these cases so often, there's not reporting because a lot of times, there is not reporting; or if there's reporting, there's not investigation. So we have problematic

moments in fraud cases and white-collar crime cases and other economic cases from the get-go.

Then we have the how do we involve them along the way? Well, actually, we have legislation that tells us how they should be involved and it's relatively good legislation at the federal level, not perfect, and that's the Federal Crime Victims' Rights Act, which says they should be conferred with, right, 18 U.S.C. Section 3771 tells us that they need active involvement -- have active involvement all along, from conferring with prosecution, pre-charging, says the Fifth Circuit; U.S. Department of Justice rejects the Fifth Circuit's decision and says it's post-charging because no other circuit has decided. But Fifth Circuit has told us it's pre-charging, involve the victim, talk to them.

Plea bargaining for sure. Charge bargaining, that's an open question.

Involve them then. Involve them in the restitution calculation such that it does not -- that it factors more than clean out-of-pocket loss, factor the tail of restitution, right?

We can, under Federal Restitution Law, get things like future lost income, future counseling, all of those things, but should be factored along the way. And while it's phenomenal that in your courtroom, the victims get the three hours at sentencing, right -- I assume you were discussing their victim impact statement, right -- that's the end, in many ways, and not the closure moment, right, that's a garbage statement from a victim's perspective, but it's the end of this step of their victimization and the criminal justice.

That's the end of the process. So they've got to be involved earlier by investigation and by prosecution. They need to -- and here's my pitch -- they need to have their own lawyers to

say what they want and when they want it. I mean the Federal Crime Victims' Right Act says right in it the victim, the victim's lawyer, or the prosecutor can present information to the courts. And so at times, that's how we need to involve them.

HON. BARKOW: Next question.

HON. FISHMAN: I'm Paul Fishman, I'm the U.S. Attorney in New Jersey.

Before I was U.S. Attorney and after my stint as an AUSA, like Mr. Tolman, I spent 12 years trying to convince the government that what I thought were crimes were really a series of misunderstandings. But now, of course, I know differently.

MR. TOLMAN: Where you stand on a position often depends on where you sit.

HON. FISHMAN: It does but I say it --

MR. BAROFSKY: Or how you get paid.

HON. FISHMAN: Maybe I'll get

paid next week, I'm not actually sure given this morning's paper.

I don't speak for the entire department, I do speak for the District of New Jersey, and I share -- but I have been sort of chatting with a few of my colleagues in the back during this panel. And so some of what I'm going to say I think is a somewhat shared sentiment.

Let me first respond to something that Professor Podgor said, which is, one of the reasons that you're going to see different criminal history categories for white-collar criminals than for violent crime is because we pick different cases in those two areas.

We don't generally prosecute the kinds of cases where people who are committing drug offenses and gun offenses for the first time are being prosecuted. So the criminal history category -- those, the cases we pick in that area, given our limited resources,

are more narrowly-tailored to people who are coming back.

We have chosen differently in the white-collar area. In the white-collar area, we pick the biggest cases. And the biggest cases are often people who haven't been caught before.

So I don't know that you can generalize about the difference between white-collar and what I'll call blue-collar criminals simply based on the criminal history categories that you'll see being prosecuted by U.S. Attorneys' offices around the country.

Second, yesterday, in my small group, I tried to articulate, somewhat unsuccessfully but was picked up in that regard by Professor Baer who is sitting behind me, what we talk about when we're talking about victims and the public's perception is basically embodied in some way in 3553(a) when it talks about respect for the law and social norms. We have made -- society has decided, through Congress, whether

you like what Congress does or not, to make these things crimes. They are crimes. And we think of them as crimes. And when we prosecute cases, that's how we approach them.

And so when we're looking for sentences that we believe are appropriate in white-collar cases, it's because we're vindicating -- we think we're vindicating -- what is a public interest in seeing people who behave in a particular way treated in a particular way.

And I think it's -- partly it's because there are victims, but partly it's because the public sees this conduct in a particular way and wants it handled that way.

And whether you call it norm -- enforcing the norms of society, as Professor Baer said yesterday, or respect for the law, as it is in 3553(a), that's part of our function, I think it's part of the function of the judiciary; it is not part of the

function of defense lawyers, of which I was one. They have a different client and a different agenda.

Third, I do have to take issue with Professor Podgor on the question about mens rea. It is entirely right that many, many white-collar cases turn on the question of what was going on in the defendant's mind or the suspect's mind or the target's mind. We reach a judgment -- people may disagree, juries may disagree -- but we reach a judgment before we bring the case that we think we can prove beyond a reasonable doubt what that intent was. And those are the cases we bring.

And I think it's kind of ironic. I mean there are certain small category of cases, the Park Doctrine is one example, where we don't have to get that far. But we're not bringing those cases, as far as I know. And in fact, we're being criticized for not bringing more cases, and which the public doesn't seem to understand, because we

haven't done a great job of educating on that question. We do see corporate resolutions in those circumstances or maybe civil resolution. But we're not bringing those cases, I think, and I hope.

The last thing I want to say is on the question of collateral consequences. I think there's a big danger in the argument that Professor Podgor made. We now are doing a lot of work with reentry in every U.S. Attorneys' office in the country. And honestly, the people for whom the collateral consequences are often most severe are the electricians and the plumbers. People who lose their law licenses probably deserve to lose their law licenses if they commit insider trading or participate in a substantial fraud.

But most of the clients I had when I was in private practice, and most of the defendants I see coming out of jail who are white collar, they may

not be able to practice law. They may not be able to run a Fortune 500 company. But they do okay. They don't make as much money, but they get jobs because they have better family structure and more support from their friends.

The people who can't, who suffer the greatest collateral consequences are actually other people because they can't live in public housing, they can't get licenses, they can't get jobs. And so I think we have to be very careful about worrying a little bit too much about the people who look like us and the people who don't.

HON. BARKOW: So would anybody like to respond, like say, Professor Podgor, I'm assuming?

MS. PODGOR: Thank you. Several things. One, I think what's noted in what you've just said is the vast amount of prosecutorial power that is here. And I think it's very important that we look at that power from the

sentencing perspective.

I mean prosecutors are making these choices. They're making the choices of who to charge, what to charge, how much to charge, how many counts; all of these decisions are prosecutorial decisions. The only place an individual really gets to have their case heard is at the sentencing because so many of them are going to be pled out. And they're pled out because the risk of going to trial, because of the possible high sentences right now, take away that right to trial. And that's a problem.

People need to have that right to go to trial and test those cases. I do agree with you, in many respects, that there are collateral consequences of a significant amount in all areas. My point is that the collateral consequences in some of the white-collar cases differ a little bit.

One of the aspects that you did bring out was that there is more of a

structure and many of the white-collar offenders have -- the support that they have. And I think that's significant. That's going to go to the fact that they're probably not going to be recidivists. That's going to go to the fact that we don't have to deter them again.

And if punishment is all about trying to have crime control, not getting people to repeat that criminal activity in the future, telling other people, generally deterring them from committing crimes in the future, you achieve that -- you achieve that, yes, if you do the big case, I agree with you, the front-pager, as opposed to the one that doesn't make the newspaper, if we still have newspapers 10 years from now.

But I think what's more important is that we want to stop the crime. And we don't need that large sentence to stop that crime. And we do need to look at the offender themselves and at

their culpability. There are going to be some, and it may be the person who does wear the white collar who is an individual who has done this out of greed, needs to be punished, and needs to go to prison. But there are also going to be many that -- it's not going to serve one of our punishment theories by sending them to prison. And that's what's important.

HON. BARKOW: Mr. Tolman, I know you want to respond.

MR. TOLMAN: I wanted to respond. It sounds like the U.S. Attorney from New Jersey has fixed everything that Chris Christie did wrong. So I'm encouraged to see that.

HON. FISHMAN: That, I'm not going to comment on.

MR. TOLMAN: I used to enjoy a lot of my discussions with the folks from New Jersey because no matter, you never convince them that they're wrong, but you always enjoy the discussion.

I will tell you, just in

response, I'm fascinated by your comment because it is almost verbatim from testimony I just gave in the Committee about the power prosecutors have. I would add to that list that they have the power to influence the sentence in a tremendous way.

Even post-Booker, it was fascinating, a case I recently had in which, you know -- you referenced the plea negotiation process and not being able to go to trial -- I represented a lawyer that was being prosecuted. And we determined that we wanted to cooperate, we wanted to plead guilty, and we entered into discussions with the U.S. Attorneys' office. We were informed that if we wanted to make arguments for a variance under 3553, that we were going to have to agree to a guideline range two levels higher in order to make those arguments, which I've never seen before, that sort of proposal.

And when I asked, how are you

justifying the two level increase? They said, oh, we're going to give sophisticated means.

And so it's been an interesting process for me to see, both having been a prosecutor and wielding that power -- and I was never wrong when I was a prosecutor -- and yet, getting out, and in hindsight looking at it, I feel tremendous pride over the work that I did. But there is that power there that is so significant that it is sort of remarkable.

I wanted to talk about the criminal intent just briefly. And you raised the criminal histories itself. And those two aspects are very troubling for me in the white-collar area.

Criminal history -- I agree with you that the notion is out there that we prosecute, in the drug area, for example, repeat offenders and more sophisticated criminals, and so you're going to get criminal histories that

are higher. However, I think if you dig into and spend some time with drug prosecutors, they will tell you that we've sort of reached a point where we mistake large drug quantity for a significant drug-trafficking prosecution.

The reality is most of the prosecutions in this country, federal drug prosecutions, are low-level, mid to low-level individuals. We rarely get up into the higher echelon. And we rarely get to the kingpin. I asked a head of the Drug Division recently, 25-year drug prosecutor, how many times did you get a kingpin? He said I almost got one once. There are some mistaken thoughts and beliefs about who's being prosecuted in the federal system.

On criminal intent, it's fascinating that in the white-collar area, with the use of conspiracy, with the use of the broad money laundering and wire fraud, it's almost like a new

subcategory of criminal intent that's lower than what we have traditionally been required to prove. And the use of conspiracy can actually facilitate the prosecution of individuals with far less criminal intent and far less culpability. And I have concerns about that, so I was interested that we may -- this discussion is fascinating to me because things like focusing on harm, things like focusing on the levels of intent, I think, are good progress because I don't think we need the punishments that we're getting in order to accomplish the goals of 3553.

HON. BARKOW: Anybody -- yes.

MS. GARVIN: Can I jump in? On a point of agreement, and then a further response to the judge.

Prosecutors do wield a lot of power. And while there's also a perception that victims tend to agree with the way in which they wield that, I want to flag that they don't always agree with the way they wield that,

sometimes they do, but they don't always. And so another moment here, right? We've heard it now from three different speakers the reality of plea bargaining and that a lot of what's happening in these cases and others is happening at the plea moment. That's the moment to ask a victim separately, "What do you think?" Right.

They actually have an independent right to be heard at that moment. Ask them, "What do you think?" And, "Does it represent the harm that you endured?" Ask. And that will allow us to say, is the -- from a harm perspective, is the power being wielded in a way that meets that component of our criminal justice system.

So I think at that moment is a moment of invitation to ask and to bring in the individual perspective of harm.

HON. BARKOW: Okay. So I think we have time for one more question if anybody else.

HON. JACKSON: Hi, Ketanji Jackson. I'm a baby judge in the District of Columbia and also a member of the Sentencing Commission.

As we start to think about this notion of culpability in the area of white-collar crimes, one of the things that has been suggested to us is that there is a meaningful distinction between white-collar offenders who are cold-blooded fraudsters who start this, you know, with an intention of inflicting loss on other people, and those who begin trying to save their businesses, and it snowballs and gets out of control.

And Mr. Barofsky suggested that in his experience, most of them begin in the, you know, some I guess innocuous, to some extent, way, and then they're covering up and that's how it turns into a billion-dollar fraud.

And if that's the case, I'm wondering if there really is a meaningful distinction to be made in

the guidelines, if the majority of people are really in this category of it started off innocently.

MR. BAROFSKY: The example I gave, I think, is that type of large-scale accounting fraud. I would also say, though, there are plenty of retail fraudsters and, you know, smaller-scale schemes, schemes that don't necessarily make the public, and therefore, don't end up on the front page of the paper, and therefore, don't really contribute to deterrent value, for which these are just straight rifts.

I mean these are -- and look, I did a far -- as a prosecutor, I did far more of those cases than I did of the jumbo billion-dollar accounting fraud cases. And there, the culpability is -- I mean these are just stealing from widows and orphans, you know, investment schemes, where the -- there's nothing behind it, it's just straight stealing. It's just a

different form. You know, they're not putting a gun to someone's head and doing an armed robbery, but that level is there.

And, you know, and I think, you know, the culpability I think is being done obviously every day by district court judges around the country, they're making those determinations as they consider the 3553(a) factors. But it's, I think it's, you know, I think it's an interesting idea. It's probably, you know, formalizing it in some way is a -- is probably a positive in some aspects.

But the notion that that will reduce litigation over it, I think, is probably not necessarily the case because it's very hard, I think, in making those determinations -- you know, when I first started doing securities fraud prosecutions, a more senior prosecutor took me aside and was doing one of these very sort of mind-boggling, advanced-fee prime bond

fraud cases which are, you know, the victims are -- become perpetrators and it becomes terribly confusing.

And the advice I received from our senior prosecutor was, don't crawl down that rabbit hole of really trying to sink -- to go through, you know were there misrepresentations, was there an attempt to commit fraud; prove that and don't get caught up in that. And I think that, you know, that's going to be -- that is a continuing struggle for sentencing is that there's that requirement to climb down that rabbit hole. And, you know obviously, at that moment, there is a large incentive to re-characterize behavior as being non-culpable when, in fact, there -- no matter how big the fraud is, they may be just as culpable and have just as malevolent an intent as our retail fraudster who's ripping off widows and orphans.

HON. BARKOW: Well, I would like to thank the panelists very much for a

very engaging discussion. Thanks so much for being here today.

CLOSING REMARKS: Hon. Patti B. Saris

HON. SARIS: I want to thank the panel, Commissioner Barkow and the great panel for that discussion. And I'm here just basically to say good-bye.

This symposium has given us an opportunity to publicly -- listen to me, I can hardly speak anymore I've been talking so much -- to publicly acknowledge that we've heard the criticism of the fraud guideline, particular in the high-loss cases. Of course that's why we came to New York because so many of those cases occur here. And this symposium has given us the opportunity to discuss how to address the criticism.

I know the general thesis in litigation is, keep it simple stupid -- I did use the stupid word -- but in this situation, there are no simple, easy solutions. The word complex comes to mind rather than simple. We have read the data. We have read several

very important opinions, by judges we respect, criticizing the fraud guideline. We've listened to many of our stakeholders like the Justice Department, the ABA, as well as victims' advocates. And our stakeholders do not speak with a unified voice.

The breakout groups, as you well imagine, didn't just happen. We didn't randomly throw names together. We tried to put together breakout groups that were composed of all the different stakeholders. And we heard in them -- Kathleen did a great job trying to sort of outline areas of overlap and agreement, there were certainly many areas where that was not true.

And I, as a judge -- I've been a judge now a really long time, 20 years on the federal bench, and since 1986 if you consider my state court days -- I've been thinking through all the different levels of crime fraud that I've personally seen in the courtroom.

And these kinds of crimes do span everything from social security fraud to mortgage fraud to the person with the telecommunication fraud with the old lady sitting in my courtroom to the big, much larger mortgage fraud; and the kinds of fraud cases I actually never see, like fraud-on-the-market that we hear so much about.

So the issues in resolving a guideline will be very difficult. How do we think about actual loss and intended loss. How do we think about victims. Maybe there is some consensus a little bit that it shouldn't just be quantitative, it should be a qualitative analysis of the impact. And finally, this new concept that I was so happy the ABA brought forth, which is how do we think about culpability.

I keep getting cornered, "So what are you going do?" And, "What are you doing to do?" I mean the matter is complex, 300 different statutes tied to

this guideline. And the only answer I have, the thing that we're going to do next is literally the minute you all leave, we are all getting into a room and talking. All the Commissioners, the seven of us, we're some of us old-timers, some of us new, but we've all been listening, as you can tell, very, very deeply to everything everyone has had to say. And we're going to talk about, is there a problem? What is the problem? Is this involved something that's a major overhaul or simply fixing discrete parts of it? We're going to talk.

And we're also going to talk about timetables and what are next steps. And these approaches could include preparing issues for comment, which will be published in the Federal Register; it could include amendments; it could include hearings; and it certainly will include analyzing the data. And so you've given us a huge amount to think about.

I want to thank the panel. It's a sort of uplifting way to think about the big-picture issues from the point of view of prosecutors, defense attorneys, victims, and the academy, which has been so helpful for me in thinking about all the economic deterrence value and should we be thinking in terms of -- like some of the professor here have been.

So thank you, thank you. It's now our turn. We need to go back. We need to think about it. We need to talk. So hope we can come back to the Big Apple. And once again, thanks to John Jay for this lovely, lovely space.