How the Economic Loss Guideline Lost its Way, and How to Save It

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I. INTRODUCTION

This Article revisits a stubborn problem that has been explored by commentators repeatedly over the past thirty years, but which remains unresolved to this day. The economic crimes Guideline, Section 2B1.1 of the United States Sentencing Manual, routinely recommends arbitrary, disproportionate, and often

draconian sentences to first-time offenders of economic crimes.[1] These disproportionate sentences are driven primarily by Section 2B1.1's current loss table, which has an outsized role in determining the length of an economic crime offender's sentence. Moreover, this deep flaw in the Guideline's design has led many judges to lose confidence entirely in the Guideline's recommended sentences, leading to a wide disparity of sentences issued to similarly situated economic crime offenders across the country.[2] Accordingly, this Guideline has failed to address the primary problem it was designed to solve—unwarranted disparities among similarly situated offenders. Worse still, it not only has failed to prevent such unwarranted disparities, its underlying design actively exacerbates them.

In the wake of the United States Sentencing Commission's recent launch of its Interactive Data Analyzer in June 2020, the authors have identified new evidence that this pernicious problem continues to persist.[3] In Part I, we review the history and purposes of the Sentencing Guidelines, generally, and the economic crimes Guideline specifically. In Part II, we explain how the current version of the economic crimes Guideline operates in practice, the extraordinarily high sentences it recommends in high-loss cases, and the resulting overemphasis on loss that overstates offenders' culpability. In Part III, we analyze data made available through the Commission's Interactive Data Analyzer and discuss our findings. In Part IV, we offer a series of reforms designed to restore the judiciary's and practitioners' respect for this Guideline so that it may serve its animating purpose—to reduce unwarranted sentencing disparities among similarly situated offenders.

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[1] Section 2B1.1 provides the sentencing framework for the following crimes, all of which are referred to hereinafter as "economic crimes": fraud and deceit, forgery, larceny, embezzlement, theft, offenses involving stolen property, property damage or destruction, and counterfeiting crimes. U.S. SENT'G GUIDELINES MANUAL § 2B1.1 (U.S. SENT'G COMM'N 2018). The Section 2B1.1 loss table is also specifically incorporated into Section 2C.1.1, which covers bribery offenses, certain extortion offenses, and honest services fraud. U.S. SENT'G GUIDELINES MANUAL § 2C1.1(b)(2) (U.S. SENT'G COMM'N 2015). Accordingly, these additional offenses are likewise grouped in for purposes of the analysis that follows with the Section 2B1.1 offenses as "economic crimes."

[2] Letter from Jonathan Wroblewski, Dir., Dep't of Just. Off. of Pol'y and Legis., to Hon. William K. Sessions III, Chair of the Sent'g Comm'n 2, 4–5 (June 28, 2010).

[3] While this is not the first article to address this question based on a review of empirical data of sentences issued to fraud offenders, the most recent scholarship addressing this issue analyzed data that is now almost a decade old, from 2002–2012. *See, e.g.*, Jillian Hewitt, Note, *50 Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1038 (2016) (reviewing data from S.D.N.Y. cases between 2002–2012); *see also* U.S. SENT'G COMM'N, U.S. SENT'G AND GUIDELINE APPLICATION INFO. FOR § 2B1.1 OFFENDERS (2013), (reviewing national data between 2003–2012) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Sentencing_Guideline_Application_Info.pdf.

A. *History of the Guidelines*

1. Overview and Purpose of the Sentencing Guidelines

Before 1984, federal judges sentencing economic crime offenders had unfettered discretion to impose any sentence up to the statutory maximum and were not required to consider any specific factors or explain their reasoning for the sentence imposed.[4] In 1984, Congress passed the Sentencing Reform Act (SRA) and created the United States Sentencing Commission (the Commission), in an effort to reduce unwarranted sentencing disparities.[5] In doing so, Congress instructed the Commission to promulgate Sentencing Guidelines and to use the average sentences issued to offenders for each type of crime as an anchor in creating these uniform guidelines.[6] The Commission grounded most of the Sentencing Guidelines (the Guidelines) in empirical data, anchoring the promulgated ranges in historic judicial practice for similarly situated offenders.[7] Under the SRA, as passed in 1984, the imposed Guidelines were binding on federal judges, unless a recognized basis for a departure under the Guidelines applied.[8]

In 2005, in *United States v. Booker*, the Supreme Court struck down the provisions of the SRA that made the Guidelines mandatory.[9] It reasoned that a mandatory Guidelines system effectively resulted in mandatory increased sentences on the basis of judicial fact-finding in violation of the Sixth Amendment.[10] To avoid this constitutional infirmity, the Court rendered the Guidelines advisory.[11]

At bottom, Congress commissioned the Guidelines to make federal criminal sentences fairer by addressing a central problem—wildly disparate sentences issued

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[4]   *See* Mistretta v. United States, 488 U.S. 361, 363–64 (1989).

[5]   Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1987; Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295–96 (1993).

[6]   28 U.S.C. § 994(m).

[7]   U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, at 4 (U.S. SENT'G COMM'N 2009) ("In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions."). Note, however, that the Commission deviated from this approach with respect to crafting the economic crimes Guideline. *See infra* Part I.B.

[8]   United States v. Booker, 543 U.S. 220, 233–34 (2005) (citing 18 U.S.C. § 3553(b)(1), which provided that federal courts "shall impose a sentence of the kind, and within the range" established by the Sentencing Guidelines).

[9]   *Id.* at 227.

[10]   *Id.* at 232–34.

[11]   *Id.* at 245.

to similarly situated offenders. In reaction to this problem, it tasked the Commission with drafting Guidelines that would present a uniform baseline from which all judges would start. While *Booker* restored to federal judges the ability to exercise their discretion as to whether to apply the Guideline range in a given case, the Court has emphasized the Guidelines' continued importance as a uniform "starting point and the initial benchmark" from which all judges should begin their analysis.[12]

Thus, the Guidelines, even post-*Booker*, remain a foundational anchor in which all federal sentences are grounded. Past scholarship has documented that the Guidelines' function as an anchor has been largely effective in practice.[13] As Judge Jed Rakoff explains, the Guidelines "create[] a kind of psychological presumption from which most judges are hesitant to deviate too far."[14] For an anchoring Guideline to in fact promote fairness in sentencing, however, it must in fact be fair and reasonable in its recommendations. While some Guidelines may serve this purpose faithfully, the economic crimes Guideline manifestly does not.[15]

2. History and Evolution of the Economic Loss Guideline

The sentencing calculation for federal economic crimes include an enhancement under the Section 2B1.1 economic loss table in any case where the government can show an intended or actual loss. The calculations in this loss table are extraordinarily important because the magnitude of the enhancement can single-handedly drive the severity of sentences issued to economic crime offenders, especially in large-loss cases. This outcome, moreover, is *by design*. The loss table was, in fact, designed (and redesigned) by the Commission to drive the severity of sentences for fraud offenders based primarily on the magnitude of the loss. As the Guidelines explain, "the Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes."[16]

The initial fraud Guideline was located at Section 2F1.1, while the initial theft Guideline was located at Section 2B1.1. In drafting these two Guidelines, the Commission was tasked, as with the Guidelines generally, to collect data on past sentencing practices for fraud and theft cases and draw on that data in crafting the relevant guidelines. In preparing the initial loss table in Section 2F1.1, the Commission did in fact review presentence reports from 10,000 prior cases in

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[12]   Gall v. United States, 552 U.S. 38, 49 (2007).

[13]   Hewitt, *supra* note 3, at 1022; Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 492–93 (2014); Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 226, 228 (2013); David M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 439–41 (2011).

[14]   Rakoff, *supra* note 13, at 228.

[15]   *See infra* Parts I.B, II, & III.

[16]   18 U.S.C. app. § 2B1.1 background (2018).

1984.[17] However, after reviewing the empirical data, the Commission deviated from its standard practice of anchoring the recommended sentencing ranges in the empirical data.[18] First, the Commission chose to exclude from its analysis fifty percent of the total data—every sentence in which a judge had issued a sentence of probation.[19] In addition, even after excluding half of the relevant data, it chose to recommend more severe sentences than the mean sentences of incarceration reflected in the remaining 50 percent of empirical data it considered.[20]

The Commission deviated from the empirical data for two reasons. First, the Commission sought to encourage judges to issue sentences of incarceration for fraud offenders.[21] In addition, the Commission aimed to equalize sentences for "white collar" fraud and "blue collar" theft offenses, in contrast to past practices, in which theft offenders had received more severe sentences than fraud offenders.[22]

The resulting loss table for fraud offenses topped out at $5 million, with enhancements increasing by one point for every loss bracket. The original table was as follows:

Loss Amount	Applicable Enhancement
More than $2,000	+1
More than $5,000	+2
More than $10,000	+3
More than $20,000	+4
More than $50,000	+5
More than $100,000	+6
More than $200,000	+7
More than $500,000	+8
More than $1,000,000	+9
More than $2,000,000	+10
More than $5,000,000	+11

[17]   Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?": America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 140–41 (2014); Mark H. Allenbaugh, *"Drawn from Nowhere": A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data*, 26 FED. SENT'G REP. 19, (2013).

[18]   James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT'G REP. 138, 138 (2010); U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2009) (recognizing that while the Commission generally anchored its Guidelines in empirical data, it departed from the empirical data in crafting guidelines for economic crimes); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7, 23 (1988).

[19]   Mark W. Bennett et al., *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 950 n.48 (2017).

[20]   Osler & Bennett, *supra* note 17, at 141.

[21]   Bennett et al., *supra* note 19, at 951.

[22]   Bennett et al., *supra* note 19, at 950–51.

Under this table, a first-time fraud offender involved in a $1 million+ fraud scheme, with no applicable enhancements other than loss, would have faced an Offense Level of 15 and a Guideline range of 18–24 months.[23] Likewise, a first-time fraud offender involved in a $20 million+ fraud scheme, with no applicable enhancements other than loss, would have faced an Offense Level of 17 and a Guideline range of 24-30 months.[24] The Commission's initial deviations from the underlying empirical data thus resulted in modest increases in the severity of sentences, but these initial ranges were far from the arbitrary, disproportionate, and at times draconian sentences produced under today's loss table.

Indeed, the Commission's initial deviations from the empirical data, and the resulting Guideline ranges, were modest in comparison to the distortions caused by subsequent amendments. Specifically, since the initial loss Guideline was promulgated, there have been three significant amendments that dramatically increased the severity of the loss table.

In 1989, in the wake of the savings and loan fraud crisis, the Commission increased the severity for offenses greater than $40,000 and extended the loss table by four brackets from losses greater than $5 million to losses greater than $80 million.[25] The resulting loss table was as follows:

Loss Amount	Applicable Enhancement
More than $2,000	+1
More than $5,000	+2
More than $10,000	+3
More than $20,000	+4
More than $40,000	+5
More than $70,000	+6
More than $120,000	+7
More than $200,000	+8
More than $350,000	+9
More than $500,000	+10
More than $800,000	+11
More than $1,500,000	+12
More than $2,500,000	+13
More than $5,000,000	+14
More than $10,000,000	+15
More than $20,000,000	+16

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[23] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 1987), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/Chapter_5.pdf.

[24] *See id.*

[25] 18 U.S.C. app. §§ 99, 154 (1989).

More than $40,000,000	+17
More than $80,000,000	+18

Under the revised table, the enhancement for offenses between $500,000 and $10 million generally increased by 2–3 levels each. However, the enhancements for high-loss frauds, those greater than $10 million, increased at even steeper increments—ranging from a 4-level additional enhancement for frauds between $10 and $20 million to a 7-level additional enhancement for frauds over $80 million. Under this revised table, a first-time fraud offender involved in a $1 million+ fraud scheme, with no applicable enhancements other than loss, would face an Offense Level of 17 and a Guideline range of 24–30 months (previously reserved for a $20 million fraud offender).[26] Further, a first-time fraud offender involved in a $20 million+ fraud scheme, with no applicable enhancements other than loss, would face an Offense Level of 22 and a Guideline range of 41–51 months.[27] At the highest end, just two-years after the initial Guidelines took effect, a first-time fraud offender involved in an $100+ million fraud scheme would face an Offense Level of 24 and a Guideline range of 51–63 months, more than *double* the range from the original loss table.

Subsequent amendments caused the loss table to become further untethered from any empirical grounding. In 2001, as part of the Commission's "Economic Crime Package," the Commission merged three guidelines, 2F1.1 (fraud), 2B1.1 (theft/embezzlement), and 2B3.1 (property destruction) into one Guideline, Section 2B1.1.[28] The new Guideline contained an even harsher loss table, which used two-level increments instead of the former one-level increase for each loss bracket.[29] The amendment additionally increased the severity even more stiffly for losses greater than $400,000, ranging from 4–5 levels for losses over $1 million to an increase of 8 levels for losses greater than $100 million.[30] The resulting loss table was as follows:

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[26] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 1989), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1989/manual-pdf/Chapter_5.pdf.

[27] *Id.*

[28] 18 U.S.C. app. § 617 (2001).

[29] *Id.* This series of amendments was influenced in part by a desire by some to equalize sentences for drug crimes and fraud crimes. *See, e.g.*, Barry Boss & Jude Wikramanayake, *Sentencing in White Collar Cases: Time Does Not Heal All Wounds*, 13 FED. SENT'G. REP. 15, 16–17 (2000). As these commentators observed, however, inflating the loss tables on this basis would "not only artificially and unnecessarily increas[e] the sentences in these economic crime cases, but also legitimiz[e] as a sentencing baseline the draconian and irrational sentencing scheme in drug cases." *Id.* at 17.

[30] *Id.*

Loss Amount	Applicable Enhancement
More than $5,000	+2
More than $10,000	+4
More than $30,000	+6
More than $70,000	+8
More than $120,000	+10
More than $200,000	+12
More than $400,000	+14
More than $1,000,000	+16
More than $2,500,000	+18
More than $7,000,000	+20
More than $20,000,000	+22
More than $50,000,000	+24
More than $100,000,000	+26

Taking again the example of a first-time fraud offender involved in a $1 million+ fraud scheme, under this new table, with no applicable enhancements other than loss, the offender would face an Offense Level of 22 (5 levels higher) and a Guideline range of 41–51 months (previously reserved for a $20 million fraud offender).[31] Further, a first-time fraud offender involved in a $20 million+ fraud scheme, with no applicable enhancements other than loss, would face an Offense Level of 28 and a Guideline range of 78–97 months (6.5–8 years), nearly double the previously applicable range.[32] At the highest end, a first-time fraud offender involved in an $100+ million fraud scheme, with no other enhancements, would face an Offense Level of 32 and a Guideline range of 121–151 months (10–12.5 years), more than *double* the range from the original loss table.[33]

The final series of significant enhancements came just two years later, in 2003, after the passage of the Sarbanes-Oxley Act. The Commission again amended Section 2B1.1, this time by increasing the base offense level from 6 to 7 for fraud offenses carrying a statutory maximum penalty of 20 years or more.[34] Additionally, the loss table was further extended by two additional brackets, making the highest loss bracket greater than $400 million.[35] At the $400 million+ level, an offender would receive a 30-level increase.[36] For a $400 million+ first-time fraud offender,

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[31]   *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2001), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2001/manual/CHAP5.pdf.

[32]   *See id.*

[33]   *See id.*

[34]   18 U.S.C. app. §§ 647, 653 (2003).

[35]   *Id.*

[36]   *Id.*

this enhancement alone would translate to an Offense Level of 37, with a Guideline range of 210–262 months (17.5–21.8 years).[37]

In 2015, the Commission issued amendments to Section 2B1.1 that modestly addressed concerns previously raised about the operation of the loss table.[38] Most significantly, this amendment adopted a narrower (subjective) interpretation for intended loss, defining intended loss as "the pecuniary harm that the defendant purposely sought to inflict."[39] However, this amendment in no way corrected the underlying problem—that the loss table has become entirely divorced from the empirical data that informed its creation. Rather, with respect to the loss table itself, the Commission maintained the same number of brackets and adjusted the ranges upward for inflation. For example, the "more than $5000" bracket became a "more than $6,500" bracket, the "more than $10,000" bracket became a "more than $15,000" bracket, and so on. However, it simultaneously increased the scale of attendant penalties, thus doubling-down on the draconian punishments that correspond to high-loss economic offenses.

In combination, this series of amendments resulted in a loss table today that recommends sentences for economic crimes that are *orders of magnitude* greater than the same sentence for the same crime back in the mid-1980s. For example, as Judge Rakoff explains, while a typical fraud in 1987 would have produced a guideline range of 30–37 months, by 2003, that same case would result in a recommended sentence of 151–188 months, an increase of more than 500 percent.[40] This gulf between the recommended Guideline sentences and any grounding in empirical data fundamentally undermines the Guideline's ability to fulfill its key function of "reflect[ing] a rough approximation of sentences that might achieve § 3553(a)'s objectives."[41] For this reason, the Supreme Court has held that courts have broad discretion to vary from the Guidelines, even in a run-of-the-mill case, where the particular Guideline provision is not anchored in "empirical data and [past] national experience," as is the case with Section 2B1.1.[42]

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[37] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2003), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2003/manual/2003guid.pdf.

[38] For a full description and analysis of these amendments, *see* James E. Felman, *Reflections on the United States Sentencing Commission's 2015 Amendments to the Economic Crimes Guideline*, 27 FED. SENT'G REP. 288 (2015).

[39] U.S. SENT'G GUIDELINES MANUAL APP. C § 792 (2015).

[40] United States v. Gupta, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012), *aff'd*, 747 F.3d 111 (2d Cir. 2014).

[41] Kimbrough v. United States, 552 U.S. 85, 109 (2007) (quoting Rita v. United States, 551 U.S. 338, 350 (2007)).

[42] *Id.* at 109–110 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (2007)).

II. SECTION 2B1.1 TODAY

A. *The Loss Guideline Has Lost its Way*

As discussed below, the economic crimes Guideline, Section 2B1.1, has failed in its mission and, in its current form, cannot be justified by the policy concerns animating its dysfunctional design. Under today's Section 2B1.1 loss table, the loss calculation is often the determining factor in the severity of an economic crime offender's sentence. As the size of the loss increases, particularly at the higher end of the loss table, penalties escalate in magnitude, especially in conjunction with the sentencing table. Today's loss table is as follows:

Loss Amount	Applicable Enhancement
More than $6,500	+2
More than $15,000	+4
More than $40,000	+6
More than $95,000	+8
More than $150,000	+10
More than $250,000	+12
More than $550,000	+14
More than $1,500,000	+16
More than $3,500,000	+18
More than $9,500,000	+20
More than $25,000,000	+22
More than $65,000,000	+24
More than $150,000,000	+26
More than $250,000,000	+28
More than $550,000,000	+30

At the highest end, under today's loss table, a loss of $550 million+ results in an Offense Level of 37, with a corresponding Guideline range of 210–262 months (17.5–21.8 years).[43] Notably, this is the *minimum* applicable Guideline range at this loss level, which would only apply to an offender who was not a leader, supervisor, or even manager within the scheme.[44] Rather, this 17–21 year sentence range would apply to the participants with the *least* responsibility for the scheme. In combination with other potentially applicable enhancements, such as a 4-level leadership enhancement and a 2-level sophisticated means enhancement, a first-time offender's

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[43] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf.

[44] *See* U.S. SENT'G GUIDELINES MANUAL § 3B1.1 (U.S. SENT'G COMM'N 2018) (providing for 2-, 3-, or 4-level enhancements for offenders who were leaders, organizers, managers, or supervisors in a scheme).

Offense Level can reach or exceed 43, which corresponds to a sentence of life imprisonment.[45] Thus, as a result of these amendments, the economic crimes Guideline in high loss cases recommends staggering sentences otherwise reserved for violent crimes—regularly sentences of life imprisonment—even for defendants with no prior criminal history.

Such extraordinarily stiff penalties could only be justified by compelling policy concerns that these draconian penalties directly address and resolve. The purpose of Section 2B1.1's focus on the magnitude of the loss is to serve as a proxy for both the seriousness of the offense and for the offender's relative culpability. As the Guideline explains, "[L]oss serves as a measure of [both] the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline."[46] However, the current loss Guideline performs poorly on both fronts.

To begin with, the calculated loss amount often serves as a poor proxy for either metric because the manner in which loss is calculated in economic crimes cases is often necessarily imprecise. Section 2B1.1 defines "loss" as the greater of actual or intended loss attributable to the entire group of co-defendants. "Actual loss" is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense."[47] Many factors make it difficult to accurately calculate this sum. Courts must, among other things, separate out the loss attributable to an economic crime from other complicating causal factors, such as independent market events.[48] Thus, loss calculations are not often a particularly precise metric of the actual magnitude of harm caused. Indeed, courts have recognized that calculating loss is "more an art than a science"[49] and courts are "not required to compute the loss resulting from a fraud offense 'with precision.'"[50] Accordingly, the inherent impreciseness of many loss calculations calls into question the fairness of using this metric alone to overwhelmingly drive the magnitude of sentences imposed on economic crime offenders.

As to the loss calculation's "fit" as a proxy for seriousness of the offense, the current loss enhancement serves as a poor proxy for this factor for two additional reasons. First, the loss calculation ignores a critical consideration—the extent to

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[45]   *See* United States v. Adelson, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006); *see also* United States v. Parris, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008) ("[W]e now have an advisory guideline regime where, as reflected by this case, any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guidelines calculation either calling for or approaching lifetime imprisonment.").

[46]   U.S. SENT'G GUIDELINES MANUAL § 2B1.1 background (U.S. SENT'G COMM'N 2018).

[47]   *Id.* at § 2B1.1 cmt. 3.

[48]   Peter J. Henning, *White Collar Crime Sentences after* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 763 (2006).

[49]   United States v. Deleon, 704 F.3d 189, 193–94 (1st Cir. 2013) (quoting United States v. Rostoff, 53 F.3d 398, 407 (1st Cir. 1995)).

[50]   United States v. Kumar, 617 F.3d 612, 632 (2d Cir. 2010) (quoting United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997)).

which individuals suffered any actual loss. For example, if a group of offenders dreamt up a $600 million scheme, but caused $0 in actual loss, each offender will be sentenced under Section 2B1.1 as if he caused a $600 million loss to actual victims, which would correspond to a minimum Guideline range—if no other enhancements apply—of 210–262 months (17.5–21.8 years). This is so even if the intended loss was "impossible or unlikely to occur."[51] In contrast, an offender who caused $50 million in actual losses to actual victims would correspond to Offense Level 29 and a Guideline range of 87–108 months (7.25–9 years)—a sentence *over ten years* smaller. The loss table produces this absurd result despite the fact that a crime that causes $0 in actual loss is, in reality, substantially less harmful to society than a crime causing $50 million in actual losses to individuals. Yet, the loss table is entirely blind to this factor in the degree of punishment it recommends.

Second, even where the calculation is based on actual (rather than intended) loss, that calculation often does not correspond with the degree of losses in fact suffered by the victims. It seems axiomatic that a crime in which individuals were deprived of a needed good or service or suffered out-of-pocket losses is more severe than one causing only a diffuse loss of revenue to the government. Yet, the loss table is entirely insensitive to these significant distinctions in the relative seriousness of an offense. In fact, there are many tax, healthcare, and other fraud offenses with high loss amounts resulting from a diffuse loss of government revenue, but where no individual was deprived of any good or service or suffered a loss of any kind.[52]

Third, using the steep ladder of loss enhancements as a proxy for seriousness of the offense results in unfair double counting. The reliance on loss as a proxy for seriousness of the offense is rooted in an assumption that larger loss frauds tend to be more sophisticated, affect a larger number of victims, result in greater illicit gains, and involve an abuse of one's position of power. However, other specific enhancements in Section 2B1.1 already cover many of these same characteristics. For example, Section 2B1.1 contains specific and separate enhancements for whether the offense involved (i) sophisticated means,[53] (ii) a large number of

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[51]   U.S. SENT'G GUIDELINES MANUAL § 2B1.1 application n. 3(A)(ii) (U.S. SENT'G COMM'N 2018).

[52]   *See, e.g.* Farha v. United States, Dkt. 16-888, Petition for Certiorari at 9, 26 (Jan. 2017), https://www.scotusblog.com/wp-content/uploads/2017/02/16-888-cert-petition.pdf (noting in a health care fraud case with an $11 million intended loss that the entity involved in the fraud conviction "was no sham corporation; it was a nationally accredited [organization] that provided services exceeding [state agency] standards" and that the case "involves no fake patients, unnecessary treatments, or substandard care"); United States v. Free, 839 F.3d 308, 309, 315 (3d Cir. 2016) (in a bankruptcy fraud case with a $1.83 million loss, all creditors were paid in full); United States v. Woods, No. 1:18-cr-00390-DLF, Doc. 24, at 17–18 (D.D.C. Dec. 13, 2019) (observing that defendant in $500,000 honest services fraud scheme "did not obtain payment for any fake services, but rather provided the contracted training services for which the D.C. Government paid"); United States v. Bernard, No. 2:17-cr-00061-SPC-MRM, Doc. 59, at 10–11 (M.D. Fl. Jan. 23, 2018) (noting that in a tax fraud scheme with a $42 million loss, "there is no victim who inevitably has or will suffer a pecuniary loss" and the only harm was a $4.3 million loss of tax revenue to the government).

[53]   U.S. SENT'G GUIDELINES MANUAL § 2B1.1(b)(10) (U.S. SENT'G COMM'N 2018).

victims,[54] (iii) a loss to a Government health care program over $1 million, $7 million, or $20 million,[55] (iv) gross receipts of more than $1 million from financial institutions,[56] (v) a violation of securities or commodities law where the defendant was an officer or director of a publicly traded company, a registered broker or dealer, or an investment adviser,[57] or (vi) certain misappropriations of trade secrets.[58] Accordingly, the severe increases in the loss table, coupled with these independent enhancements, result in deeply unfair double counting, which in high loss cases often results in the extreme and disproportionate recommendation of life imprisonment.[59]

The current loss table is likewise a poor proxy for relative culpability in many cases. For example, the loss calculation fails to account for the extent to which the offender personally profited from the offense. Indeed, each offender is responsible for the total reasonably foreseeable loss attributable to all co-defendants,[60] regardless of how much each offender personally profited from that amount. Accordingly, an offender who saw no profit at all or a nominal amount of profit will be sentenced just as harshly under the loss table as the mastermind who received the greatest share of the profits. This calculation thus fails to fairly account for relative culpability among offenders and results in disproportionately high sentences for more marginal co-conspirators.[61]

Further, the loss tables are entirely insensitive to motive—the reason why an offender committed the crime.[62] As explained in *United States v. Ranum*, "the guidelines treat a person who steals $100,000 to finance a lavish lifestyle the same as someone who steals the same amount to pay for an operation for a sick child . . . [F]rom the victim's perspective the loss is the same no matter why it occurred. But from the standpoint of personal culpability, there is a significant difference."[63] The loss table's insensitivity to these considerations makes it a highly imperfect proxy for both seriousness of the offense and the offender's relative

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[54]   *Id.* at § 2B1.1(b)(2).

[55]   *Id.* at § 2B1.1(b)(7).

[56]   *Id.* at § 2B1.1(b)(17)(A).

[57]   *Id.* at § 2B1.1(b)(20).

[58]   *Id.* at § 2B1.1(b)(14).

[59]   *See* Daniel S. Guarnera, *A Fatally Flawed Proxy: The Role of "Intended Loss" in the U.S. Sentencing Guidelines for Fraud*, 81 MO. L. REV. 716, 743–44 (2016).

[60]   U.S. SENT'G GUIDELINES MANUAL §§ 1B1.3(a)(1), 2B1.1 application n. 3(A)(i) (U.S. SENT'G COMM'N 2018) ("'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.").

[61]   *See* United States v. Watt, 707 F. Supp. 2d 149, 155 (D. Mass. 2010) (relying on the Third Circuit for the proposition that, as to peripheral defendants, the loss table can "overstate both the degree of [defendant's] criminality and his need to be corrected" (quoting United States v. Stuart, 22 F.3d 76, 82 (3d Cir. 1994))).

[62]   *See* United States v. Dikiara, 50 F. Supp. 3d 1029, 1032 (E.D. Wis. 2014) (noting that "the [loss] guideline fails to take into account other relevant factors, including motive and culpability").

[63]   353 F. Supp. 2d 984, 990 (E.D. Wis. 2005).

culpability. In short, the calculation of loss often fails to directly address the underlying policy concerns justifying reliance on this factor. Accordingly, the current loss table, which is often the determining factor in an economic crime offender's sentence, has an outsized role in influencing such sentences.

B. *A Judicial Consensus Has Emerged that the Section 2B1.1 Loss Guideline is Unduly Harsh*

As a result of these problems with the design and operation of the loss table, a broad judicial consensus has developed that Section 2B1.1's loss table overstates culpability in a great many cases.[64] For instance, New York federal courts, which handle some of the highest volumes of fraud cases in the country,[65] have repeatedly criticized the grossly disproportionate nature of the loss tables. They have called the loss tables "patently absurd"[66] and "a black stain on common sense"[67] that rely upon a "flawed methodology for tabulating white-collar sentences[.]"[68] Accordingly, courts have concluded that imposing sentences corresponding to the loss tables would "effectively guarantee[] that many such sentences would be irrational on their face."[69] An array of white collar scholars and commentators have likewise echoed these concerns.[70]

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[64]   *See, e.g.*, United States v. Moody, 2013 U.S. Dist. LEXIS 109506, at *14 (D. Colo. Aug. 5, 2013) (adopting view that the loss guidelines are "fundamentally flawed"); *see also* United States v. Corsey, 723 F.3d 366, 378 (2d Cir. 2013) (Underhill, J., concurring); Bennett et al., *supra* note 19, at 941–44 ("[A]s the guidelines have become harsher and crimes both more complex and involving larger loss amounts, judges regularly sentence economic criminals well below the minimum guideline in all but the smallest of loss cases."); United States v. Johnson, 2018 U.S. Dist. LEXIS 71257 at *11–12 (E.D.N.Y. Apr. 26, 2018) (reasoning that the "loss-enhancement numbers do not result from any reasoned determination of how the punishment can best fit the crime, nor any approximation of the moral seriousness of the crime"); United States v. Gupta, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012); United States v. Parris, 573 F. Supp. 2d 744, 745, 747–48 (E.D.N.Y. 2008) (finding that application of 18-point loss enhancement was "patently absurd" and varying downward 17 points for defendant with $2.5 million loss (quoting United States v. Adelson, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006))).

[65]   *See* U.S. D. Cts., *Criminal Defendants Pending, by Offense—During the 12-Month Periods Ending September 30, 2017 and 2018*, JUDICIAL BUSINESS tbl. D-8 (2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_d8_0930.2018.pdf.

[66]   *Adelson*, 441 F. Supp. 2d at 515.

[67]   *Parris*, 573 F. Supp. 2d at 754.

[68]   *Johnson*, 2018 U.S. Dist. LEXIS 71257, at *14.

[69]   *Gupta*, 904 F. Supp. 2d at 351.

[70]   *See, e.g.*, Hewitt, *supra* note 3, at 1022; David Debold & Matthew Benjamin, Essay, *"Losing Ground"—In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PA. L. REV. ONLINE 141, 154–55 (2011); Alan Ellis et al., *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 CRIM. JUST. 34, 35 (2011); Felman, *supra* note 18, at 139; Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1001 (2010); Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT'G REP. 167,

Especially as the loss amount increases into the millions, the sentences recommended by the loss table are widely viewed as unduly severe, increasingly arbitrary, and manifestly disproportionate to the non-violent nature of the underlying economic crimes.[71] For example, a first-time fraud offender convicted of wire fraud with a calculated loss over $3.5 million, with no other applicable enhancements, would face an Offense Level of 25 and a Guideline range of 57–71 months. Yet, under the Guidelines, such an offense level would advise a prison term comparable to that recommended for arson, aggravated assault or robbery involving serious bodily injury, and transmission of biological weapons causing serious bodily injury.[72] Likewise, a first-time fraud offender convicted of an offense with a loss exceeding $9.5 million would face an Offense Level of 27—with no other enhancements—and a Guideline range of 70–87 months. Again, under the Guidelines, this sentence is comparable to that recommended for several serious, violent offenses, including attempted murder, arson, and assault with intent to commit murder.[73] These severe sentences, moreover, are recommended equally to offenders who caused $9.5 million in losses to actual individuals and to offenders who caused little or no actual economic harm to any persons.

Further, the magnitude of the scaled loss enhancements far exceeds that of other enhancements designed to capture similar concerns for culpability and seriousness of the offense. By way of comparison, another enhancement designed to measure relative culpability—the leader-organizer enhancement—has only 4 levels of enhancement, ranging from 2 levels for a manager of a small group to 4 levels for the most culpable senior leader of a larger group. In contrast, the loss table has 16 brackets, ranging from 2 levels to 30 levels of possible enhancement.

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169 (2008); Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279, 280 (2007) (describing how reliance on "mathematical computation of loss" can result in "exorbitant sentences" for white-collar defendants); Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286, 286 (2007); Boss, *supra* note 29, at 15.

[71] *See supra*, notes 63–68.

[72] U.S. SENT'G GUIDELINES MANUAL § 2A2.2 (U.S. SENT'G COMM'N 2018) (aggravated assault involving a firearm and serious bodily injury to a victim, OL 24 (14 + 5 +5)); *Id.* § 2B3.1 (robbery involving firearm, OL 25 (20 + 5)); *Id.* § 2B3.2 (extortion by force with the threat of death and brandishing of a firearm, OL 25 (18 + 2 + 5)); *Id.* § 2K1.4 (arson knowingly creating a serious risk of death or bodily injury, OL 24); *Id.* § 2M3.3 (unauthorized disclosure of classified national defense information to a foreign government, OL 24); *Id.* § 2M6.1 (transmitting biological weapons causing serious bodily injury to a victim, OL 24 (20 + 2 + 2)); *Id.* § 2N1.1 (tampering with consumer products involving risk of death or bodily injury, OL 25).

[73] *Id.* § 2A2.1 (attempted murder); *Id.* § 2A2.1 (assault with intent to commit murder); *Id.* § 2B3.2 (extortion by force with the threat of death and use of a firearm); *Id.* § 2D1.10 (endangering human life while illegally manufacturing methamphetamine); *Id.* § 2K1.4 (arson creating a serious risk of death or bodily injury).

III. Empirical Data Shows that Section 2B1.1 Is Not Followed In the Majority of Cases, and Has Not Prevented Widespread Sentencing Disparities

As discussed above in Part II.B, the economic loss Guideline has lost respect among jurists because of its unjustified harshness. Based on its arbitrariness and the disproportionately severe sentences it often recommends, courts routinely conclude that these Guidelines do not serve as a reliable proxy for culpability and issue sentences below the Guideline range.[74]

This trend has been confirmed by data recently released by the Commission through its Interactive Data Analyzer. The Interactive Data Analyzer shows that judges are more likely to vary below the Guideline range in Section 2B1.1 cases than the average federal criminal case. Specifically, as shown in the last row of Figure 1, federal judges on average tend to grant non-government sponsored downward variances to first-time (Category I) offenders in 18 to 20 percent of all federal criminal cases. In contrast, as shown in the last row of Figure 2, in sentencing first-time offenders under Section 2B1.1, federal judges, on average, grant non-

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[74] *See, e.g.*, United States v. Musgrave, 647 Fed. App'x 529, 530, 538 (6th Cir. 2016) (affirming downward variance for defendant with offense level of 25 and a $1.7 million loss to a sentence of one day of imprisonment, reasoning that "because the loss Guidelines were not developed using an empirical approach based on data about past sentencing practices, it is particularly appropriate for variances."); *Johnson*, 2018 U.S. Dist. LEXIS 71257, at *16–20 (finding that application of the 16-point loss enhancement corresponding to $3.1 million gain would result in a sentence "well out of proportion to [an] appropriate sentence" and imposing a sentence of 24 months on defendant with total offense level of 29); Judgment at 2, 8 & Sentencing Transcript at 59, United States v. Murray, No. 1:16-cr-00176-RDM (D.D.C. Feb. 2017), ECF No. 25, 27 (varying downward because loss overstated culpability and sentencing defendant with loss between $250,000 and $550,000 to 6 months imprisonment); Minutes & Transcript at 91–92, United States v. Farha, No. 8:11-cr-00115-JSM-MAP (M.D. Fl. May 19, 2014), ECF No. 882, 885, 888, 891, 903 at 91–2 (varying downward by up to 16.5 years as to defendants convicted at trial of an $11 million fraud from Guideline ranges of 97–293 months (at offense levels 30, 37, and 38), issuing sentences between 12–36 months); United States v. Suarez-Reyes, No. 8:12-cr-67, 2012 U.S. Dist. LEXIS 178771, at *1, *18, *21 (D. Neb. Dec. 18, 2012) (finding that the application of a 14-point loss enhancement would "exaggerate [defendant's] culpability and would not be an accurate measure of his blameworthiness," varying downward to sentence of one day imprisonment for defendant with $693,000 loss); *Gupta*, 904 F. Supp. 2d at 353, 355 (issuing 24-month sentence to defendant in case involving $5 million gain and offense level of 28); United States v. Lenagh, No. 8:07-cr-346, 2009 U.S. Dist. LEXIS 9226, at *17–18 (D. Neb. Feb. 6, 2009) (issuing 24-month sentence in a case involving $1.4 million fraud and affording the fraud Guidelines "less deference" because they are not empirically grounded and as such are "not always a reliable proxy for the culpability of an individual defendant"); Judgment at 3,5, United States v. Kohll, No. 8:04-cr-00409-TDT (D. Neb. Nov. 16, 2004), ECF No. 22 (one year of probation for a mail fraud scheme involving loss of $500,000); United States v. Redemann, 295 F. Supp. 2d 887, 898, 901 (E.D. Wis. 2003) (issuing sentence of 12 months to defendant in $2.5 million fraud involving false and inflated invoices, concluding that the amount of loss "under the guidelines substantially exceeded any fair measure of [defendant's] culpability"); *see also* Bennett et al., *supra* note 19, at 943–44 ("[A]s the guidelines have become harsher and crimes both more complex and involving larger loss amounts, judges regularly sentence economic criminals well below the minimum guideline in all but the smallest of loss cases.").

government sponsored downward variances about 10 percent more frequently, in about 28 to 30 percent of cases.[75]

Figure 1

Sentence Imposed Relative to Guideline Range
Fiscal Year 2015,2016,2017,2018,2019

Sentence Range	2015 N	2015 %	2016 N	2016 %	2017 N	2017 %	2018 N	2018 %	2019 N	2019 %
Grand Total	31,291	100.0%	31,561	100.0%	29,630	100.0%	31,735	100.0%	34,659	100.0%
Within Range	14,783	47.2%	15,770	50.0%	14,489	48.9%	16,845	53.1%	19,335	55.8%
Upward Departure	137	0.4%	126	0.4%	125	0.4%	98	0.3%	128	0.4%
§5K1.1 Substantial Assistance	4,367	14.0%	3,763	11.9%	3,547	12.0%	3,368	10.6%	3,414	9.9%
§5K3.1 Early Disposition Program	1,947	6.2%	1,987	6.3%	1,888	6.4%	2,234	7.0%	2,198	6.3%
Downward Departure Govt Motion	695	2.2%	738	2.3%	621	2.1%	504	1.6%	490	1.4%
Non-Govt Downward Departure	718	2.3%	692	2.2%	535	1.8%	526	1.7%	533	1.5%
Upward Variance	310	1.0%	480	1.5%	484	1.6%	456	1.4%	496	1.4%
Downward Variance Govt Motion	1,738	5.6%	1,748	5.5%	1,886	6.4%	1,678	5.3%	1,707	4.9%
Non-Govt Downward Variance	6,596	21.1%	6,257	19.8%	6,055	20.4%	6,026	19.0%	6,358	18.3%

FILTER:
Fiscal Year: 2015,2016,2017,2018,2019; Crime Type: All; Guideline: All; Circuit: All; State: All; District: All; Race: All; Gender: All; Age: All; Citizenship: All; Education: All

SOURCE: This was produced using the U.S. Sentencing Commission's Interactive Data Analyzer (IDA)
(https://ida.ussc.gov).

Figure 2

Sentence Imposed Relative to Guideline Range
Fiscal Year 2019

Sentence Range	2015 N	2015 %	2016 N	2016 %	2017 N	2017 %	2018 N	2018 %	2019 N	2019 %
Grand Total	5,582	100.0%	4,977	100.0%	4,458	100.0%	4,071	100.0%	3,976	100.0%
Within Range	2,241	40.1%	2,145	43.1%	1,869	41.9%	1,684	41.4%	1,680	42.3%
Upward Departure	15	0.3%	15	0.3%	10	0.2%	11	0.3%	12	0.3%
§5K1.1 Substantial Assistance	927	16.6%	745	15.0%	675	15.1%	650	16.0%	590	14.8%
§5K3.1 Early Disposition Program	2	0.0%	3	0.1%	4	0.1%	1	0.0%	4	0.1%
Downward Departure Govt Motion	108	1.9%	127	2.6%	115	2.6%	68	1.7%	72	1.8%
Non-Govt Downward Departure	167	3.0%	125	2.5%	83	1.9%	79	1.9%	62	1.6%
Upward Variance	57	1.0%	61	1.2%	49	1.1%	42	1.0%	46	1.2%
Downward Variance Govt Motion	362	6.5%	348	7.0%	366	8.2%	326	8.0%	358	9.0%
Non-Govt Downward Variance	1,703	30.5%	1,408	28.3%	1,287	28.9%	1,210	29.7%	1,152	29.0%

FILTER:
Fiscal Year: 2019; Crime Type: Fraud/Theft/Embezzlement; Guideline: §2B1.1 Circuit: All; State: All; District: All; Race: All; Gender: All; Age: All; Citizenship: All; Education: All

SOURCE: This was produced using the U.S. Sentencing Commission's Interactive Data Analyzer (IDA)
(https://ida.ussc.gov).

Indeed, courts depart or vary below the Guidelines in the majority of cases to which the Section 2B1.1 loss enhancement applies. For example, from 2015 through 2019, more than 50 percent of sentences issued to fraud offenders were below the

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[75] *Interactive Data Analyzer*, U.S. SENT'G COMM'N, https://ida.ussc.gov fig. 1 & 2. For purposes of this comparison, we focused on first-time offenders (identified as Category I) because the loss Guidelines are particularly disproportionately harsh with respect to this specific group.

Guideline range.[76] The downward variances given to such offenders, moreover, are typically significant. The mean sentences imposed on fraud offenders in 2018 and 2019 were 21 and 20 months respectively, more than 50 percent below the low end of the Guideline range.[77] Likewise, the median sentences imposed on fraud offenders in 2015 through 2019 were 12, 15, and 16 months, a 45 to 50 percent below the low end of the Guideline range.[78] This is so despite the significant anchoring effect of the Guidelines, and despite the fact that scholarship suggests that anchors influence the judgment of decision makers even when an anchor is incomplete, inaccurate, or otherwise unreliable.[79]

The degree of downward variances issued to fraud offenders, moreover, are typically more substantial than the downward variances issued generally under the Guidelines. The median sentences from 2015 through 2019 across all crimes were between 35 and 37 percent below the low end of the Guideline range, as compared to the 45 through 50 percent downward variances given under Section 2B1.1.[80] This significant trend of substantial downward variances under Section 2B1.1, accordingly, underscores the substantial degree to which this particular Guideline has lost judicial confidence. This data thus provides further evidence that the Section 2B1.1 Guideline overstates the judicial assessment of culpability and the seriousness of these offenses.

While the national data shows that courts vary below the Guideline range under 2B1.1 with higher frequency than in general, and, in so doing, grant substantial variances downward, there are significant variations across jurisdictions in the degree to which courts grant downward variances under this Guideline. A review of all first-time offenders sentenced for economic crimes, by circuit, reveals a

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[76] U.S. Sent'g Comm'n, 2015 Sourcebook of Federal Sentencing Statistics tbl.27A (2015) [hereinafter 2015 Sourcebook]; U.S. Sent'g Comm'n, 2016 Sourcebook of Federal Sentencing Statistics tbl.27A [hereinafter 2016 Sourcebook]; U.S. Sent'g Comm'n, 2017 Sourcebook of Federal Sentencing Statistics tbl.27A [hereinafter 2017 Sourcebook]; U.S. Sentencing Comm'n, 2018 Sourcebook of Federal Sentencing Statistics tbl.31 [hereinafter 2018 Sourcebook]; U.S. Sent'g Comm'n, 2019 Sourcebook of Federal Sentencing Statistics tbl.31 [hereinafter 2019 Sourcebook]. Notably, the 2015–2019 USSC Sourcebooks provided no statistics on the number of below-Guideline sentences issued to fraud offenders based on the applicable loss calculation.

[77] 2018 Sourcebook, *supra* note 76, at tbl.40; 2019 Sourcebook, *supra* note 76, at tbl.40.

[78] 2015 Sourcebook, *supra* note 76, at tbl.31C (50% decrease); 2016 Sourcebook, *supra* note 76, at tbl.31C (50% decrease); 2017 Sourcebook, *supra* note 76, at tbl.31C (47.8% decrease); 2018 Sourcebook, *supra* note 76, at tbl.40 (46.7% decrease); 2019 Sourcebook, *supra* note 76, at tbl.40 (48.9% decrease).

[79] *See* Felman, *supra* note 18, at 138. Further note that these findings are consistent with scholarship analyzing earlier data sets. *See, e.g.*, Hewitt, *supra* note 3, at 1038 (analyzing data from sentencings in the Southern District of New York between 2002–2012); U.S. Sent'g Comm'n 2013, *supra* note 3 (analyzing national data between 2003–2012).

[80] 2015 Sourcebook, *supra* note 76, at tbl.31C (36.8% decrease); 2016 Sourcebook, *supra* note 76, at tbl.31C (36.4% decrease); 2017 Sourcebook, *supra* note 76, at tbl.31C (34.9% decrease); 2018 Sourcebook, *supra* note 76, at tbl.40 (34.8% decrease); 2019 Sourcebook, *supra* note 76, at tbl.40 (34.8% decrease).

difference of more than 20 percent among the circuits in the degree to which courts have granted downward variances under Section 2B1.1 over the past 5 years (Figure 3).[81]

Figure 3
Average Percentage of Non-Government Sponsored
Downward Variances Under § 2B1.1 By Circuit (2015-2019)

Circuit	Value
1st Circuit	26
2d Circuit	41
3d Circuit	27
4th Circuit	27
5th Circuit	20.5
6th Circuit	30.5
7th Circuit	42.6
8th Circuit	30.5
9th Circuit	22.9
10th Circuit	22.5
11th Circuit	30.5
DC Circuit	29.2

■ Average Percentage of Non-Government Sponsored Downward Variances Under Section 2B1.1 from 2015-2019

The disparities among courts in sentencing first-time economic crime offenders under Section 2B1.1 are even more substantial when the data is reviewed at a more granular level, by state.

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[81]   U.S. SENT'G COMM'N, *supra* note 75, fig. 3. We filtered the Interactive Data Analyzer's data down to Category I offenders of economic crimes sentenced under Section 2B1.1 and reviewed the data, by circuit, from 2015–2019, generated under the "Sentence Imposed Relative to Guideline Range" table within the Guideline Application tab. We then averaged, for each circuit, the percentages of non-government sponsored downward variances across the five-year span. We chose to focus on non-government sponsored below-Guideline sentences for purposes of this comparison to exclude cases in which judges granted downward variances or departures based on cooperation with the government. Because cooperation provides a strong reason for a court to grant a below-Guideline sentence independent of the judges' assessment of whether the Guideline range is inappropriately high relative to the offender's culpability, these cases were excluded from consideration.

Figure 4
Average Percentage of Non-Government Sponsored Downward Variances Under § 2B1.1 By State (2015-2019)

State	Value
Alabama	24.4
Alaska	22.4
Arizona	15.5
Arkansas	26
California	23.9
Colorado	21
Connecticut	40.9
DC	29
Delaware	46.4
Florida	35
Georgia	16
Hawaii	23
Idaho	20.6
Illinois	43.2
Indiana	40
Iowa	20.7
Kansas	13.6
Kentucky	29.7
Louisiana	33.5
Maine	36
Maryland	24.3
Massachusetts	30.5
Michigan	38.7
Minnesota	42.8
Mississippi	24.3
Missouri	36.6
Montana	54.5
Nebraska	39.3
Nevada	20.3
New Hampshire	18
New Jersey	26.2
New Mexico	27.9
New York	41.2
North Carolina	23
North Dakota	13.3
Ohio	26
Oklahoma	33.7
Oregon	32.7
Pennsylvania	28.3
Rhode Island	52
South Carolina	25.7
South Dakota	20.9
Tennessee	24
Texas	15.9
Utah	21.5
Vermont	50.3
Virginia	34
Washington	24.5
West Virginia	32.4
Wisconsin	42
Wyoming	26.5

■ Average Percentage of Non-Government Sponsored Downward Variances Under Section 2B1.1 from...

Figure 5
Average Percentage of Sentences At or Above Guideline Range Under § 2B1.1 By State (2015-2019)

State	Average Percentage
Alabama	52.8
Alaska	55.5
Arizona	39.2
Arkansas	67.4
California	34.2
Colorado	58.7
Connecticut	25.4
DC	39.7
Delaware	12.9
Florida	47.5
Georgia	40.9
Hawaii	73.5
Idaho	67.3
Illinois	28.8
Indiana	38.9
Iowa	64.6
Kansas	54.8
Kentucky	51.4
Louisiana	51.7
Maine	47
Maryland	31.4
Massachusetts	26.6
Michigan	31
Minnesota	37.4
Mississippi	68.6
Missouri	44.6
Montana	42.9
Nebraska	42.4
Nevada	41
New Hampshire	60.6
New Jersey	33
New Mexico	50.7
New York	28.5
North Carolina	48
North Dakota	52.2
Ohio	41
Oklahoma	61.6
Oregon	23.6
Pennsylvania	40.5
Rhode Island	25
South Carolina	48.3
South Dakota	64
Tennessee	37.6
Texas	61.9
Utah	36.9
Vermont	20.5
Virginia	48.5
Washington	42.3
West Virginia	59.2
Wisconsin	35.3
Wyoming	38.3

■ Average Percentage of Sentences At or Above Guideline Range Under Section 2B1.1 from 2015-2019

Figure 6
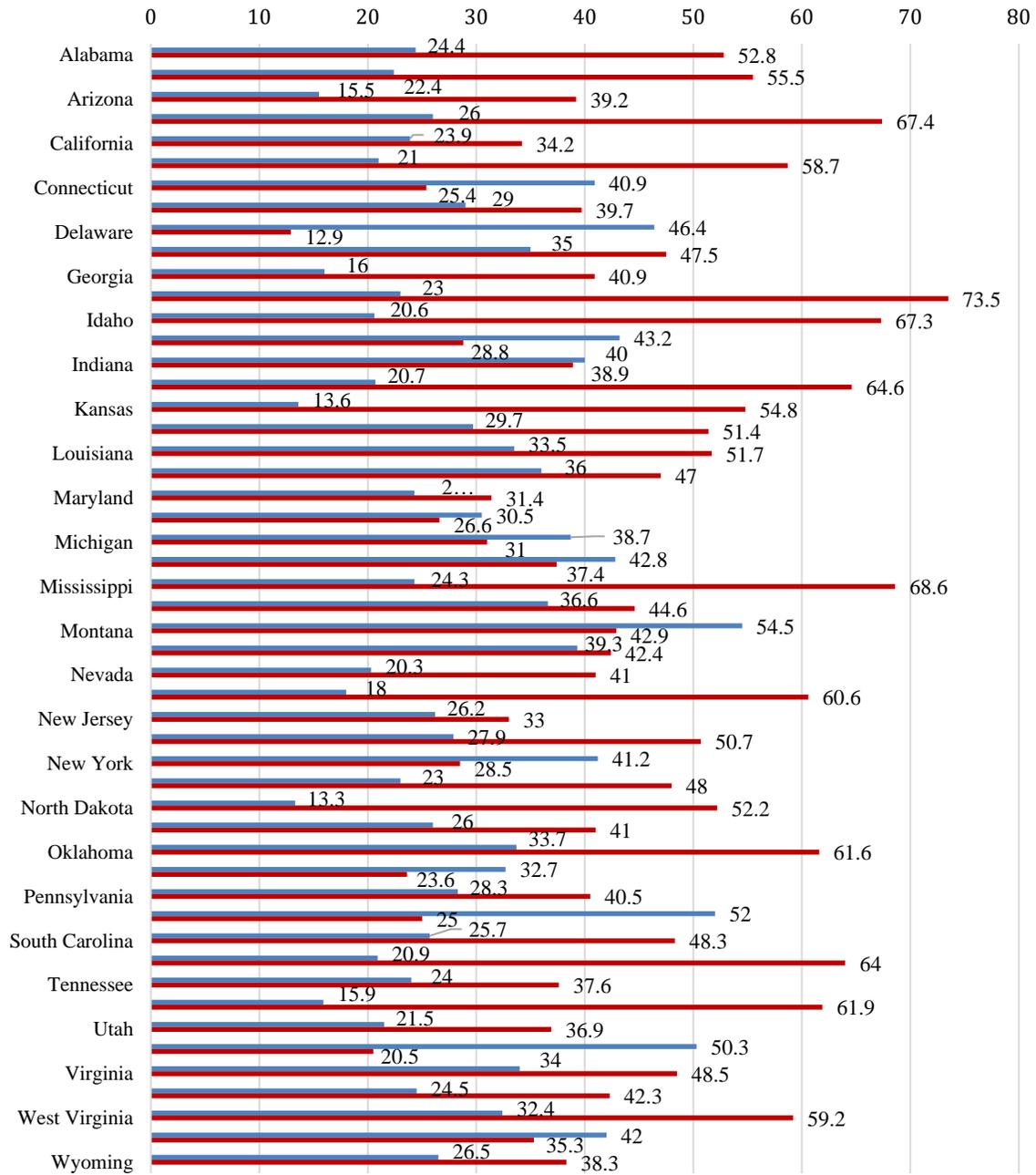**Sentences Relative to the Guideline Range Under § 2B1.1**
By State (2015-2019)

- Average Percentage of Non-Government Sponsored Downward Variances Under Section 2B1.1 from 2015-2019
- Average Percentage of Sentences At or Above Guideline Range Under Section 2B1.1 from 2015-2019

A review of all first-time economic crime offenders, by state, reveals a difference of more than 40 percent among various states in the degree to which they have granted non-government sponsored downward variances under Section 2B1.1 over the past 5 years (Figure 4).[82] As Figure 4 demonstrates, in some states, such as North Dakota and Kansas, courts rarely grant downward variances under Section 2B1.1. In contrast, in other states, such as Montana, Rhode Island, and Vermont, downward variances are granted in more than half of all cases under Section 2B1.1. This data thus illustrates that the willingness of courts to grant non-government sponsored downward variances under Section 2B1.1 can vary dramatically by state and region. Figure 5 further shows that the extent to which federal courts hew to Section 2B1.1's recommended sentences continues to vary dramatically despite the fact that Section 2B1.1, as with the Guidelines generally, was designed to minimize unwarranted disparities among similarly situated offenders.[83] Courts in some states, like Arkansas, Hawaii, Mississippi, and South Carolina issue Guideline (or higher) sentences in more than 60 percent of all cases under Section 2B1.1. In contrast, courts in other states, like Delaware or Vermont, issue Guideline (or higher) sentences under Section 2B1.1 in only 10 to 20 percent of cases. There is a gulf of greater than 50 percent dividing the courts at either end of this spectrum. Further, as Figure 6 shows, the courts less likely to issue non-government sponsored downward variances are, as a corollary, more likely to issue Guideline-length sentences.

As this data underscores, deep disparities remain in the extent to which economic crime offenders are sentenced to Guideline-length sentences under Section 2B1.1. Moreover, the gap in the relative lengths of sentences issued to 2B1.1 offenders is also likely deep, given that courts granting downward variances under Section 2B1.1 tend to vary substantially, close to 50 percent *below* the Guideline range.[84] In fact, these disparities are a direct byproduct of the loss table's design. As discussed in Part I.B, Section 2B1.1 was designed to drive the severity of sentences for economic crime offenders based primarily on the magnitude of the loss.[85] Yet, it is precisely these excessive penalties attendant to high-loss offenses that have driven many courts to vary deeply below the Guideline range.[86] Accordingly, it is the very design of the loss table itself that perpetuates this deep chasm in sentencing practice

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[82]   We filtered the Interactive Data Analyzer data down to Category I offenders sentenced under Section 2B1.1 and reviewed the data, by state, from 2015–2019, generated under the "Sentence Imposed Relative to Guideline Range" table within the Guideline Application tab. For each state, we then averaged the percentages of non-government sponsored downward variances across the five-year span.

[83]   In preparing Figure 5, we filtered the Interactive Data Analyzer data down to Category I offenders sentenced under Section 2B1.1 and reviewed the data, by state, from 2015–2019, generated under the "Sentence Imposed Relative to Guideline Range" table within the Guideline Application tab. For each state, we then averaged the percentages of Guideline sentences and upward departures and variances across the five-year span.

[84]   *See* U.S. SENT'G COMM'N, *supra* notes 76–77;

[85]   *See supra* Part I.B; 18 U.S.C. app. § 2B1.1, *supra* note 16.

[86]   *See supra* Part II.B; *supra* note 73.

under Section 2B1.1. The gulf between the economic crimes Guideline and the average sentences issued under this Guideline results in particularly unfair punishment for offenders sentenced by "Guidelines" judges who do not, absent government cooperation or extraordinary circumstances, vary or depart downward, and who do not vary downward based on the harshness of the loss tables. As a result, similarly situated offenders sentenced in different jurisdictions can receive wildly divergent sentences, despite the fact that this is precisely the problem the Guidelines were meant to address and correct.

IV. REFORM OF SECTION 2B1.1'S LOSS TABLE IS URGENTLY NEEDED

As detailed above, Section 2B1.1's loss enhancement is entirely untethered from its empirical roots,[87] fails to effectively address the policy concerns animating this deviation from prior judicial practice,[88] and has lost the confidence of a great many jurists.[89] As a result, the loss enhancement exacerbates, rather than corrects, the underlying problem of unwarranted sentencing disparities that the Guidelines were designed to solve.[90] Moreover, the loss enhancement results, at times, in draconian sentences for non-violent offenders that strain our correction facilities and do nothing to rehabilitate offenders. This cannot and should not be. The time for reform is now.

Meaningful reform has many facets, but we focus on just two that would make the greatest impact in restoring proportionality to Section 2B1.1. First, to increase the reliability of the loss calculation as a proxy for the seriousness of the offense, the loss calculation should be based on *actual* loss, not intended loss. The seriousness of a non-violent offense should generally be measured by the harm actually caused to society, not by the harm an offender fantasizes about causing. Basing the loss calculation on actual loss removes the risk of offenders being sentenced to draconian terms of imprisonment based on an intended loss that was impossible or unlikely to occur.[91] To account for the relatively higher culpability of an offender who intended a substantially greater loss than that which occurred, the Commission could add a separate intended-loss enhancement ranging from 2–4 levels, similar to the aggravating-role enhancement. A separate enhancement would serve as a more proportional proxy for relative culpability than the current Guideline—which is entirely indifferent to whether a given economic offense caused any harm at all as long as a loss was intended.

Alternatively, should the Commission keep intended loss as a basis for the loss calculation, it should require the Government to prove that the defendant not only

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[87]   *See supra* Part I.B.

[88]   *See supra* Part II.A.

[89]   *See supra* Part II.B.

[90]   *See supra* Part III.

[91]   *See* 18 U.S.C. app. § 2B1.1 application note 3(A)(ii) (defining "intended loss" to include "intended pecuniary harm that would have been impossible or unlikely to occur").

"purposely sought to inflict" the loss at issue,[92] but also that the total intended loss was substantially likely to occur. Such an amendment would, importantly, ensure a closer relationship between the evidence of intended loss and the seriousness of the offense conduct.

In addition, the loss table should be anchored in empirical data. As the Supreme Court recognized in *Kimbrough*, Guidelines that reflect empirical data of prior judicial practice serve a critical institutional role to the courts—offering insight into national sentencing practice to help courts avoid unwarranted sentencing disparities.[93] The only Guideline loss table that comes close to reflecting prior judicial practice is the 1987 table, even though that table increased the proposed sentences beyond what the empirical data demonstrated. In an effort to return this Guideline to a firm foundation in empirical data untainted by the anchoring influence of the disproportionate loss Guideline, the Commission should restore the original loss table from 1987, with adjustments for inflation. It could reasonably add additional brackets for higher levels of loss than were accounted for in 1987, but should follow the enhancement pattern established in the 1987 loss table, which relied on 1-level enhancements for each additional bracket. As adjusted for inflation,[94] our proposed loss table could look as follows:

Loss Amount	Applicable Enhancement
More than $5,000	+1
More than $10,000	+2
More than $20,000	+3
More than $50,000	+4
More than $100,000	+5
More than $225,000	+6
More than $450,000	+7
More than $1,000,000	+8
More than $2,250,000	+9
More than $4,500,000	+10
More than $10,000,000	+11
More than $50,000,000	+12
More than $100,000,000	+13
More than $250,000,000	+14
More than $550,000,000	+15

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[92]   18 U.S.C. app. § 792 (2015).

[93]   552 U.S. 85, 108–09 (2007).

[94]   To adjust for inflation, we relied on the Bureau of Labor Statistics consumer price index, under which prices in 2020 are 125% higher than average prices in 1987. *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/data/inflation_calculator.htm. We then rounded each figure up or down to a round figure.

Notably, in April 2013 the American Bar Association's Criminal Justice Section assembled a Task Force on the Reform of Federal Sentencing for Economic Crimes to draft a model economic crime guideline that would reflect the chorus of concerns raised by judges and commentators.[95] The Task Force consisted of five professors,[96] three judges,[97] six practitioners,[98] two organizational representatives,[99] and observers from the Department of Justice and the Federal Defenders.[100] The group arrived at a consensus final proposal for the Commission's consideration in November 2014.[101] Our proposal herein aligns significantly with the loss table recommendations made by this Task Force.[102] While our proposed loss table has more levels, the enhancements at each loss level closely correspond with those proposed by the Task Force.[103] Further, while the Task Force's proposed loss table

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[95]   *A Report on Behalf of the ABA Criminal Justice Section, Task Force on the Reform of Federal Sentencing for Economic Crimes, Final Draft*, AMERICAN BAR ASS'N 8 (Nov. 10, 2014), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.pdf.

[96]   Stephen Salzburg (George Washington University Law School), Sara Sun Beale (Duke University School of Law), Nancy Gertner (Harvard Law School), Jane Ann Murray (University of Minnesota Law School), and Kate Stith (Yale Law School). AMERICAN BAR ASS'N, *supra* note 95, at 8.

[97]   The Honorable John Gleeson (Eastern District of New York), the Honorable Gerard Lynch (Second Circuit), and the Honorable Jed Rakoff (Southern District of New York). AMERICAN BAR ASS'N, *supra* note 95, at 8.

[98]   James Felman (Kynes, Markman & Felman), Reporter to the Task Force, Barry Boss (Cozen O'Connor) (author herein), David Debold (Gibson Dunn & Crutcher), Gary Lincenberg (Bird, Marella, Boxer, Wolpert, Nessim, Brooks & Lincenberg), Marjorie Peerce (Ballard Spahr), and Neal Sonnett (Neal R. Sonnett, P.A.). AMERICAN BAR ASS'N, *supra* note 95, at 8.

[99]   Kyle O'Dowd (National Association of Criminal Defense Lawyers) and Mary Price (Families against Mandatory Minimums). AMERICAN BAR ASS'N, *supra* note 95, at 8.

[100]   A.J. Kramer (District of Columbia) and Jonathan Wroblewski (DOJ Office of Policy and Legislation). AMERICAN BAR ASS'N, *supra* note 95, at 8.

[101]   AMERICAN BAR ASS'N, *supra* note 95, at 9.

[102]   We recognize that the ABA proposed guideline focused not solely on loss, as our proposal does, but rather also incorporated enhancements based on relative culpability and victim impact. We appreciate the benefit of this approach and the loss table proposed herein is not offered as a criticism of that more holistic approach. Rather, it is offered as a recognition that the ABA proposed guideline would require a complete overhaul of Section 2B1.1 and has not mustered sufficient support to foment meaningful change to the current Guideline. As our more modest proposal works within the structure of the existing Guideline and would simply restore the loss table to its empirical roots, our hope is that this proposal could generate broader support for meaningful reform.

[103]   For example, the ABA Task Force proposed a 4-level increase for a $20,000 loss, compared with our proposed 3-level increase for the same. The Task Force proposed a 6-level increase for a $100,000 loss, compared with our proposed 5-level increase for the same. Likewise, the Task Force proposed an 8-level increase for a $1 million loss, which is the same recommendation contained in our table. The Task Force likewise proposed a 10-level increase for a $5 million loss, which is the same as our recommendation for a $4.5 million loss. Our table, however, adds a few additional increments at the end to incorporate the highest loss levels reflected in the most recent version of the Section 2B1.1 loss table. AMERICAN BAR ASS'N, *supra* note 95, at 1.

was not anchored in empirical data,[104] its proposed loss enhancements correspond closely to those in our table, which is anchored in the empirically based 1987 loss table. Importantly, the Task Force applied its proposed loss table—with similar enhancement levels to our own—to a number of case scenarios, which reassured the Task Force that the proposed loss enhancements "placed appropriate weight on the consideration[] of loss . . . ."[105]

The Commission's recent launch of the Interactive Data Analyzer presents a unique opportunity to revisit those Guidelines not anchored in empirical data and analyze the degree to which such Guidelines result in unwarranted sentencing disparities. The findings contained in this Article reveal troubling sentencing disparities under Section 2B1.1 and provide a compelling reason for the Commission to re-evaluate the design of Section 2B1.1's loss table. We believe that similar analyses should be undertaken with respect to the drug offense Guidelines, which were likewise not anchored in empirical data.[106] The release of this new data, moreover, presents an important opportunity for the Commission to revisit the Task Force's 2014 recommendations for Section 2B1.1, as well as those offered herein and by other commentators. Should the release of the Interactive Data Analyzer serve as a catalyst for meaningful reform, the Commission will have the opportunity to rebuild the judiciary's faith in Section 2B1.1. If it succeeds in doing it, it may finally restore the loss Guideline's fidelity to its animating purpose of minimizing unwarranted sentencing disparities.

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[104]   AMERICAN BAR ASS'N, *supra* note 95, at 9.

[105]   AMERICAN BAR ASS'N, *supra* note 95, at 9.

[106]   *See, e.g.*, Kimbrough v. United States, 552 U.S. 85, 96 (2007).