

and Congress’s statutory sentencing instructions in 18 U.S.C. §3553(a) are manifold because, even if soundly calculated: (1) loss is just one aspect of the “nature and circumstances of the offense” and does not capture other relevant offense factors; (2) loss frequently will not “reflect the seriousness of the offense” or produce “just punishment for the offense” but instead produces advisory Guideline ranges that are excessively high; (3) loss does not help a court decide how “to promote respect for the law” and may undermine respect for the law by suggesting sentences unconnected to true culpability; (4) loss poorly addresses the need “to afford adequate deterrence to criminal conduct” and may undermine deterrence by failing to focus on motivations for, and other considerations affecting, fraudulent conduct; and (5) loss may operate, perversely, to distort efforts “to impose similar punishment on similar offenders” because it can lead to similar Guideline-recommended ranges for different types of fraud offenses involving distinct defendants with disparate motives who produce different sorts of harms. And these myriad problems with the Guidelines’ heavy reliance on loss are further compounded in those cases where calculations of loss end up having little or no relationship to either economic realities or an offender’s actual personal gain from an offense.

Critically, many of the points stressed here have been stressed frequently by academics and practitioners in various ways for many years. One leading academic (a former prosecutor), for example, has opined that the “rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense.” Frank Bowman, *Sacrificial Felon: Life Sentences For Marquee White-Collar Criminals Don’t Make Sense*, AMERICAN LAWYER, Jan. 2007, at 63. Others agree. See, e.g., Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, 18 OHIO STATE JOURNAL OF CRIMINAL LAW 605, 605-06 (2021) (“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. 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.”); Alan Ellis, John R. Steer & Mark Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 CRIMINAL JUSTICE 34 (2011) (explaining why “loss” under the Sentencing Guidelines provides a very poor proxy for the true seriousness of an offense and the culpability of a defendant). Indeed, others — including a former federal prosecutor — have long acknowledged that “the current Federal Sentencing Guidelines for fraud and other white-collar offences are too severe” and appear much greater than “necessary to satisfy the traditional sentencing goals of specific and general deterrence — or even retribution.” Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007), at <http://yalelawjournal.org/forum/white-collar-defendants-and-white-collar-crimes>. See also generally Barry Pollack & Addy Schmitt, *Restoring Sentencing Sanity in White-Collar Criminal Cases*, 29 WESTLAW J. WHITE-COLLAR CRIME 6 (Oct. 2014) (noting that “many judges have declined to employ the guidelines in economic crimes cases” because they too often recommend “sentences for first-time nonviolent white collar offenders ... substantially higher than for the most heinous violent criminal offenses [which] undermines the fairness and integrity of our judicial system”).

Examples of the excesses produced by the loss table abound; two examples of such cases are *United States v. Gozes-Wagner*, 14-cr-637 (S.D. Tex.) (involving the imposition of a 20-year (below-guideline) prison sentence in health care fraud case for mid-level first-time offender/single