



February 10, 2003

SCHOOL OF LAW
INDIANAPOLIS

Hon. Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002-8002

Re: Response to request for comment on proposed permanent
amendments responsive to the Sarbanes-Oxley Act

Dear Judge Murphy:

I am writing in response to the Commission's request for comment published in the Federal Register on January 17, 2003. In this letter, I will address the question of whether the base offense level and/or the loss table of U.S.S.G. § 2B1.1 should be further modified to provide across-the-board sentence increases for economic crime offenders at virtually all loss levels. In my view, no case for doing so has yet been made. In a subsequent letter, I will address the suggestion that the five years of work which produced the simplifying achievement of the 2001 Economic Crime Package should be cast aside by separating "theft" offenses and "fraud" offenses into two different guidelines.

The Sarbanes-Oxley Act and the Department of Justice

The Sarbanes-Oxley Act (the "Act") was passed in the summer of 2002 in response to a spate of corporate scandals involving mismanagement, questionable accounting practices, and a variety of allegedly criminal behavior by senior officers of some of America's largest corporations. In January 2003, the Commission passed a set of emergency amendments in response to directives in the Act. Prior to the passage of the January 2003 amendments, the Department of Justice argued that Sarbanes-Oxley contained an express or implied directive that sentences should be increased for virtually all economic crimes, regardless of loss amount or other indicia of seriousness. The Commission reviewed the language and legislative history of the Act and wisely rejected the view that it mandated across-the-board sentence increases. Instead, the Commission enacted a number of amendments targeting sentence increases at those serious corporate offenders whose misdeeds were the focus of the language and legislative history of the Act.

OFFICES OF THE FACULTY

Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana
46202-3225

317-274-8523

<http://indylaw.indiana.edu>

The Department of Justice has nonetheless persisted in its campaign to secure sentence increases for all classes of economic crime. Its Commission representative has proposed modifications to the loss table of § 2B1.1, and I am given to understand that the Department is drafting legislation for congressional consideration that would mandate sentence increases.

Should legislation be enacted, the Commission would, of course, be obliged to comply with its dictates. In the absence of such legislation, however, the Commission's charge is to make new law only when there is a sound, compelling case for doing so. Particularly where the proposed course of action is a significant increase in the length of prison sentences to be served by literally thousands of defendants, the burden of proving the advisability of acting is very high.

Thus far, the Justice Department's argument in favor of raising economic crime sentences across the board has rested entirely on the contention that the Commission was *required* to raise all sentences by the Sarbanes-Oxley Act. Entirely absent has been any effort to explain why the Commission *should* enact a general sentence increase. To date, the Department has failed to support its proposals with arguments grounded in experience, statistical evidence, penological theory, reason, or common sense.

The Justice Department's approach has the rhetorical advantage of making a response difficult. One cannot rationally analyze an argument that has not been made. However, the Department's abstention from substantive argument leaves even a potentially sympathetic observer like myself — a former federal and state white collar prosecutor with no affinity for thieves and swindlers — at something of a loss. Therefore, in composing the following comments, I have been compelled to consider the arguments one can only presume the Department would make if it were to engage in a debate on the merits.

Response to a Crime Wave?

It occurred to me that the Department might be proposing sentence increases in response to a rising tide of economic crime. Therefore, I examined available statistics on the prevalence of economic offenses over the past several decades. I first considered the broad category of property crimes. Figures published by the Justice Department's Bureau of Justice Statistics show that the rate of property crime has been dropping steadily since 1974. As the BJS chart on the next page (Figure 1) illustrates, the victimization rate for property crimes fell from 551 incidents per 1,000 households in 1974 to 167 per 1,000 households in 2001, a decline of

69%.¹ This long-term trend continued throughout the 1990s. Figure 2, excerpted from a 2001 BJS publication, shows the percentage of households experiencing a property crime of property theft, motor vehicle theft, or household burglary declined from about 21% in 1994 to about 14% in 2000.²

Figure 1: Property Crime Rate, 1973-2001

Property crime rates

Adjusted victimization rate
per 1,000 households

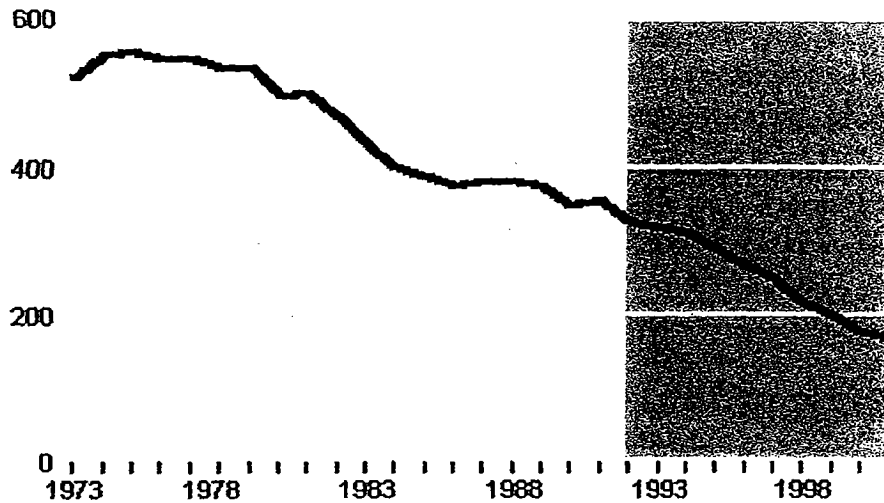
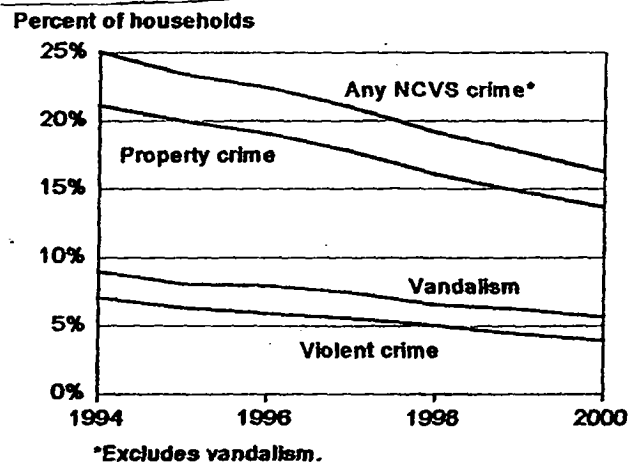


Figure 2: Property Crime Rates, 1994-2000



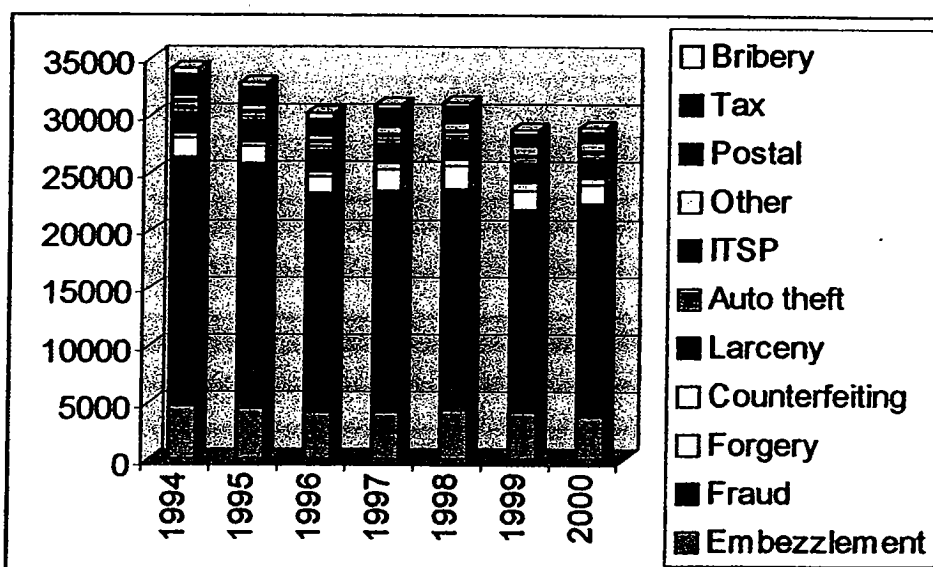
¹ Figure 1 and statistics in the text are from BJS website, <http://www.ojp.usdoj.gov/bjs/glance/house2.htm>.

² Figure 2 is excerpted from Patsy A. Klaus, *BJS Bulletin: Crime and the Nation's Households, 2000*, NCJ 194107 (Sept. 2002).

Of course, the national statistics reported in Figures 1 and 2 are primarily for offenses prosecuted at the local level. Therefore, in order to determine if the national downward trend in property crime is mirrored in economic crimes prosecuted in federal court, I examined Justice Department statistics on referrals by federal investigative agencies to U.S. Attorney's Offices. As Figure 3 below illustrates, in recent years referrals to U.S. Attorney's Offices for economic offenses have declined steadily, dropping by 5,166 or 15% between 1994 and 2000.

This decline is rendered even more striking when one considers that between 1994 and 2000, the U.S. population grew by 20 million people.³ Thus, while the absolute number of economic crime referrals to U.S. Attorney's Offices fell by 15% during 1994-2000, in the same period the rate of economic crime referrals to federal agencies per 1,000 population fell by 21%.

Figure 3: Referrals to U.S. Attorney's Offices, 1994-2000⁴

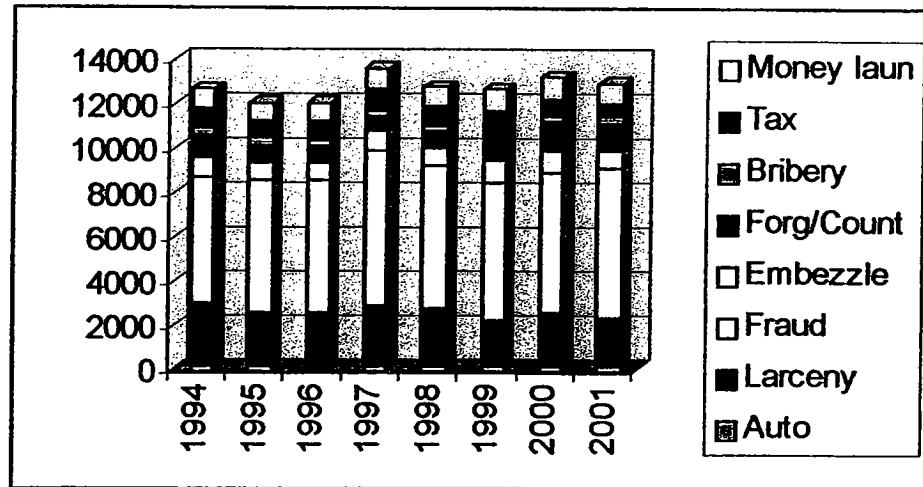


³ U.S. Census Bureau, *Statistical Abstract of the United States 2001*, at 8, Tbls. 1 and 2 (2002) (showing that the population of the United States grew from approximately 260,000,000 in 1994 to 281, 421,906 in 2000).

⁴ The data in Figure 3 is drawn from the 1994-2000 editions of the *BJS Compendium of Federal Criminal Justice Statistics*, Chapt. 1, Tbl. 1.1.

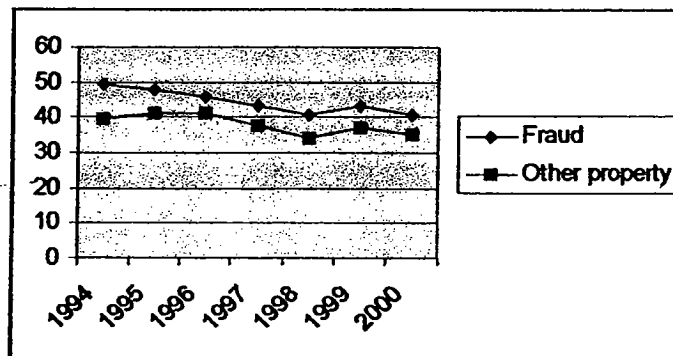
Interestingly, as shown in Figure 4 below, while federal economic crime referrals dropped from 1994-2000, the number of economic crime defendants sentenced in federal court held roughly steady between 1994 and 2001. The number of defendants sentenced for economic crimes peaked in 1997 at 13,571, but was virtually identical in 1994 (12,631) and 2001 (12,887).

Fig. 4: Defendants Sentenced Federal Court – Economic Crime, 1994-2001⁵



As one would expect, maintaining a roughly constant number of economic crime defendants from a decreasing supply of economic crime referrals has meant U.S. Attorney's Offices must decline fewer economic crime cases. Figure 5 illustrates the decreasing declination rates for fraud and other property offenses between 1994 and 2000.

Figure 5: Declination Rates: Fraud & Other Property Crime, 1994-2000 (%)⁶



⁵ Data in Figure 4 from U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1994-2001). Crime categories in Figs. 3 and 4 are different because BJS and the Sentencing Commission code data differently. Nonetheless, the offenses covered by the two graphs are roughly congruent.

⁶ Data in Fig. 5 from seven volumes of BJS, Compendium of Federal Justice Statistics (1994-2000); 1998-2000 data from Table 2.2; 1994-1997 data from Table 1.2. BJS counts fraud, embezzlement, forgery and counterfeiting as "fraud," and burglary, larceny, auto theft, arson, ITSP, and miscellaneous as "other."

In sum, the available evidence suggests that, far from confronting a rising tide of economic crime, the Department of Justice has been obliged to dip ever deeper into a shrinking pool of offenders to hold roughly constant the flow of economic crime defendants through the federal courts. There are doubtless many explanations for this phenomenon. But whatever else these statistics may show, they do not make out a case for a general increase in economic crime penalties.

A Reaction to Declining Sentences?

I also wondered whether the Justice Department might be reacting to some trend in economic crime sentences actually imposed. The average sentence imposed by federal judges in a number of major crime categories declined during the 1990s. The average (mean) length of sentences imposed on drug defendants decreased from 87.6 months to 71.7 months between 1994 and 2001, while the average length of sentences for violent offenders declined from 101.6 months to 89.5 months.⁷ If a similar trend existed in economic crime sentencing, the Justice Department's current position might be explainable as an effort to reverse it. However, Sentencing Commission statistics establish that during the same period drug and violent crime sentences were dropping, the average (mean) sentence of white collar defendants actually increased slightly, from 19 months in 1994 to 20.8 months in 2001. The median sentence increased still more, from 12 months in 1994 to 15 months in 2001.⁸

Moreover, the figures just cited apply only to those defendants actually sentenced to a term of imprisonment. Sentencing Commission figures also show that the percentage of economic crime defendants who receive terms of imprisonment increased markedly throughout the 1990s. Figure 6 below illustrates the upward movement in imprisonment rates for auto theft, larceny, fraud, embezzlement, forgery/counterfeiting, and tax offenders. Figures 6A, 6B, and 6C break out the numbers for the major categories of fraud, larceny, embezzlement.

⁷ U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 2001, at 32 Fig. E (2002); U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 1998, at 32 Fig. E (1999). For an analysis of the causes of the decline in drug sentence length, see Frank O. Bowman, III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L.R. 477 (2002); Frank O. Bowman, III and Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. R. 1043 (2001).

⁸ U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 2001, at 32 Fig. E (2002); U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 1998, at 32 Fig. E (1999).

Figure 6: Rate of Imprisonment (%)

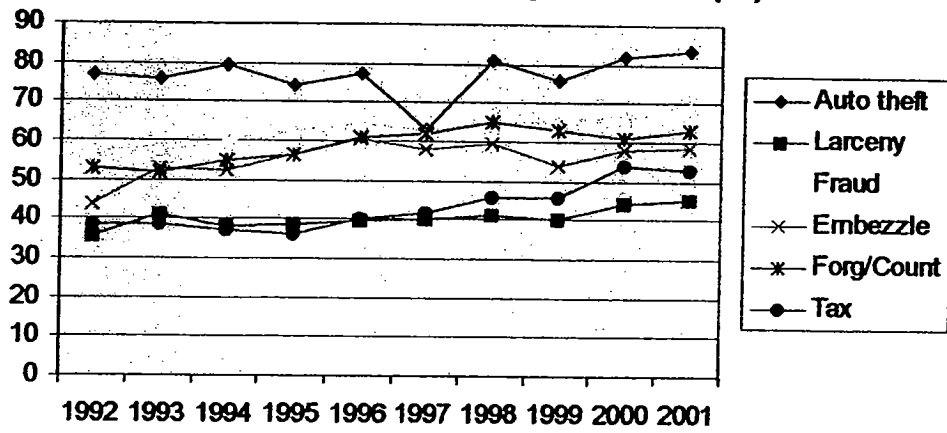


Fig. 6A: Imprisonment Rate - Fraud (%)

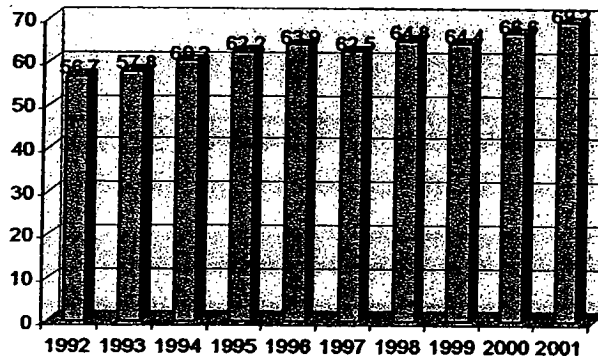
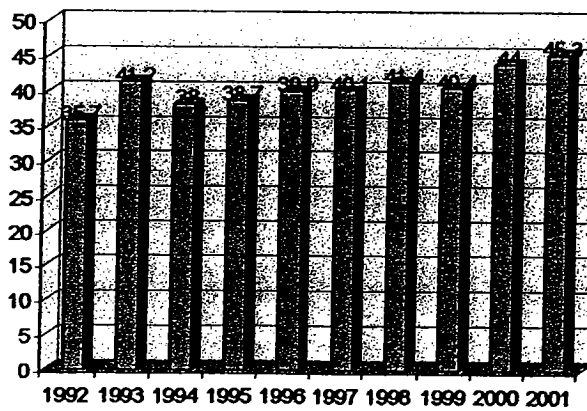
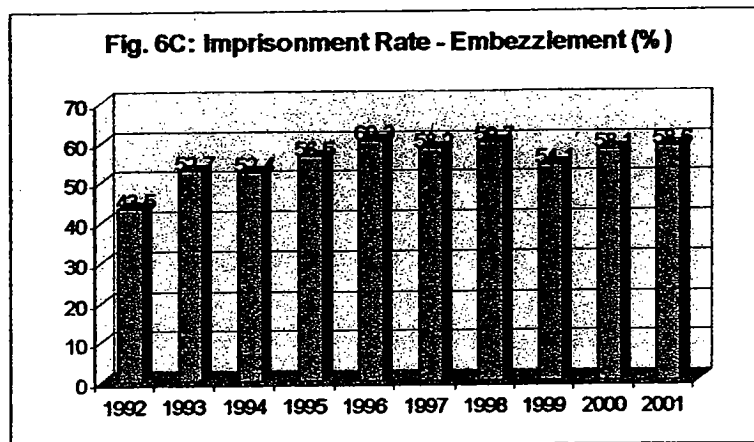


Fig. 6B: Imprisonment Rate - Larceny (%)





In short, during the 1990s, an ever-increasing percentage of economic offenders were sentenced to prison and those who received prison sentences received higher average sentences.

Still more importantly for present purposes, the upward trend will accelerate over the next few years as the sentence increases built into the 2001 Economic Crime Package begin to take effect. With regard to the 2001 amendments, three points should be noted. First, the 2001 amendments are only the latest in a series of sentence increases for economic crime that have been enacted at intervals since the advent of the Guidelines in 1987. Second, these amendments embody very significant sentence increases for virtually all economic crime defendants whose offenses are even moderately serious. And third, because the 2001 amendments affect only defendants whose crimes occurred after November 1, 2001, relatively few defendants have been sentenced under the new law and we have no meaningful data on its effects.

In order to illustrate the first two of these points, I have assembled an illustrative group of hypothetical defendants with varying loss amounts and offense characteristics. Figures 7A and 7B below describe these defendants and the sentences they would probably have been subject to in 1987, 1989, 1991, 1998, November 2001, and presently.

Figure 7A: Description of Representative Defendants

Def. A	Teller in federally insured bank. Steals \$2,000 from bank.
Def. B	Wife of social security recipient. Continues to cash checks after death of spouse. Loss = \$11,000
Def. C	Defendant is a postal worker who steals credit cards from the mail and uses them to purchase goods worth \$35,000, which he then sells to support a drug habit.
Def. D	Defendant commits online auction fraud from his home computer. Causes loss of \$50,000 to more than 50 victims.
Def. E	Doctor submits false billings to Medicare using complex system of double books. Loss = \$125,000
Def. F	Telemarketer runs boiler room with 8 employees. Defrauds more than 250 elderly victims of \$250,000.
Def. G	Computer expert constructs scheme for stealing credit card and other personal information online. Using this information, he obtains merchandise and phony car loans online totaling \$450,000 from 25 individual and institutional victims.
Def. H	President of small, publicly traded bank commits bank fraud causing loss of \$1.1 million and collapse of the bank. In the course of the offense, he causes false statements to be made in required SEC filings. Thirty employees lose their jobs.
Def. I	CEO of publicly traded corporation operating chain of hospitals and nursing homes, in collusion with 4 other members of his management team, defrauds Medicaid and Medicare of \$10.1 million and causes false statements to be made in required SEC filings.
Def. J	CEO of large conglomerate, in collusion with CFO and other members of management, engage in accounting fraud and stock manipulation causing bankruptcy of company and losses to shareholders and employee pension fund of \$110 million.

Figure 7B: Applicable Guideline Range of Representative Defendants⁹

	1987	1989	1991	1998	Nov. 2001	Jan. 2003
Def. A	0-6 mos. ⁱ	0-6 mos. ⁱⁱ	0-6 mos.	0-6 mos.	0-6 mos.	0-6 mos.
Def. B	2-8 mos. ⁱⁱⁱ	4-10 mos. ^{iv}	4-10 mos.	4-10 mos.		6-12 mos.
Def. C	12-18 mos. ^{vi}	15-21 mos. ^v	15-21 mos.	15-21 mos.		27-33 mos.
Def. D	10-16 mos. ^{ix}	12-18 mos. ^{vii}	12-18 mos.	12-18 mos.		27-33 mos.
Def. E	21-27 mos. ^{xii}	24-30 mos. ^{viii}	24-30 mos.	24-30 mos.		33-41 mos.
Def. F	37-46 mos. ^{xv}	41-51 mos. ^{xi}	41-51 mos.			
Def. G	24-30 mos. ^{xx}	30-37 mos. ^{xiii}	30-37 mos.	30-37 mos.		78-97 mos.
Def. H	27-33 mos. ^{xxiii}	37-46 mos. ^{xiv}	57-71 mos. ^{xvi}	57-71 mos.		
Def. I	57-71 mos. ^{xxviii}	87-108 mos. ^{xv}	87-108 mos.	87-108 mos.		
Def. J	57-71 mos. ^{xxxii}	121-151 mos. ^{xvii}	121-151 mos.			

⁹ Figure 7B assumes first-time offenders (Criminal History Category I) convicted after trial. Sentences for defendants pleading guilty would be slightly lower. Sentences for defendants with criminal records would be slightly (in some cases considerably) higher. Shaded boxes indicate increase due to guideline change.

Figures 7A and 7B illustrate visually several points of central importance:

First, Guideline sentences for economic crime have been raised repeatedly since 1987. For some classes of offenders, the Commission has raised sentences four times since 1987, and three times within the last five years.

Second, the increases are very substantial, in both absolute and percentage terms. The Guideline sentence of all but one defendant in Figure 7B whose loss level exceeds \$10,000 has at least doubled since 1987 (and that defendant [E] would now receive a sentence 60% higher than in 1987). For the five most serious offenders, sentences rose between 160% and 330%. In absolute terms, Guideline sentences for the same conduct rose by as little as four months (Defendant B) to as much as *fourteen additional years* (Defendant I). And in the case of Defendant J, whose circumstances mirror those of the leading figures in last summer's corporate scandals, the minimum guideline sentence has skyrocketed from less than five years in 1987 to mandatory life imprisonment.

Third, the sentence increases shown in Figure 7B result in large measure from amendments adding or modifying Specific Offense Characteristics, as well as from the amendments to the loss table in 1989 and 2001. In 1987, the theft and fraud guidelines combined contained only nine sentence-enhancing Specific Offense Characteristics. By 2001, there were twenty-three. The January 2003 amendments added at least three more. Application of any one of these enhancements produces at least a 25% increase in a defendant's guideline sentence.¹⁰ Where more than one enhancement applies, the cumulative effect begins to rival that of the loss amount. This is a critical point because the Justice Department would have us focus purely on the loss table, as if no other factors affected a defendant's sentence. Particularly in serious economic crime cases of the sorts which receive wide public attention -- telemarketing fraud, complex schemes involving offshore concealment, fraud against the elderly, identity theft, bank fraud, bankruptcy fraud, and now high-level corporate fraud -- the Commission has added a plethora of sentence enhancements.

Fourth, Figure 7B does not capture an important component of the 2001 Economic Crime Package that will produce additional sentence increases beyond those immediately obvious from reading the Loss Table or Specific Offense Characteristics. The revised definition of loss, which focuses on pecuniary harms reasonably foreseeable to a defendant at the time of the offense will, in a good

¹⁰ This is so because all SOC's carry at least a 2-offense level increase, and, beginning at Offense Level 8, every two-level upward adjustment on the Sentencing Table carries at least a 25% increase in the minimum guideline sentence.

many cases, produce a higher loss figure and thus a higher sentence than the old definition.¹¹

Fifth, it bears repeating that the impact of the 2001 sentence increases has not yet been felt because these increases are applicable only to offenses completed on or after November 1, 2001.

Too low as compared to the states?

It occurred to me that perhaps the Department's argument is based on a comparison to sentences under state law, so I examined national statistics on economic crime sentences. Figure 8 compares state and federal economic crime sentences for 1998 using Justice Department figures for the most recent year for which BJS has published data. Precise state-federal comparisons are difficult given differences in offense definitions, sentencing practices, categorization of offense characteristics, the availability in states of parole, etc. Nonetheless, it appears that, on average, sentences served by federal economic offenders are markedly more severe than those served by state economic crime defendants. And the 1998 figures I have cited here do not account for the federal sentence increases in November 1998, 2001, and 2003. Therefore, the Justice Department's position cannot be explained as an effort to achieve parity with state sentences.

Fig. 8: Comparison of State & Federal Economic Crime Sentences (1998)¹²

	<u>Average (Mean) Sentence Imposed</u>		<u>Average (Mean) Actual Sentence Served¹³</u>	
	State	Federal	State	Federal
Larceny	25 mos.	32 mos.	12 mos.	29 mos.
Fraud	27 mos.	22 mos.	13 mos.	20 mos.
Burglary	39 mos.	27 mos.	18 mos.	25 mos.

Too low as compared to other federal crimes?

Perhaps the Justice Department is of the view that economic crime sentences are too low in comparison with sentences for other types of federal crime. A superficially plausible case for this view might be made by comparing the

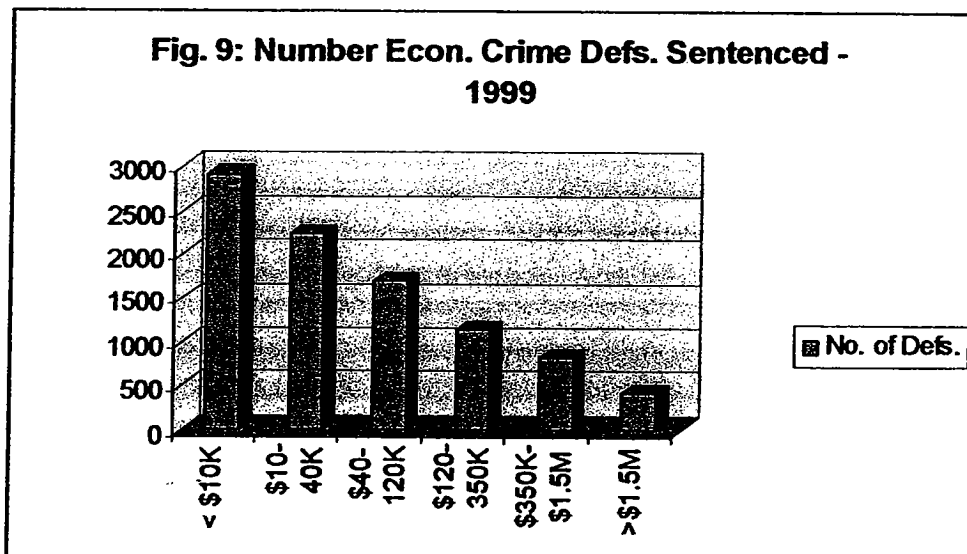
¹¹ The field test of the revised loss definition found that the new definition produced a higher loss amount in about 15% of randomly selected cases. *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission*, available at <http://www.ussc.gov/research>.

¹² Matthew R. Durose, David J. Levin, and Patrick A. Langan, *BJS Bulletin: Felony Sentences in State Courts, 1998*, NCJ 190103, at 3 (Oct. 2001).

¹³ Although the average nominal sentences imposed by state court judges for economic offenses are comparable to, or sometimes higher than, average imposed federal sentences, in 1998 state court defendants served only 47% of their imposed sentences, as compared to 91% for federal defendants. *Id.* Therefore, the average actual sentences served by federal economic crime defendants are higher than those served by state defendants.

2001 average white-collar sentence of just over 20 months with the average drug sentence (71.7 mos.) or violent crime sentence (89.5 mos.).¹⁴ However, any such comparison of averages would be inherently flawed. First, no serious observer would argue that crimes against property are as serious as violent crimes against persons. Second, it would be surprising, to say the least, if this Administration were to contend that garden variety thefts and frauds are as serious as drug trafficking, an activity the Administration has publicly linked to terrorism and cited as a threat to national security.

In any event, focusing on the relatively low average prison sentence for the entire class of white collar offenders is profoundly misleading because the vast majority of federal economic crime defendants are low-level offenders whose crimes caused only modest losses. For example, in 1999, 55% of all federal defendants sentenced for economic crime offenses caused losses less than \$40,000. More than 30% were responsible for losses less than \$10,000. And fully 15% of all federal economic defendants, or one out of seven, took less than \$2,000.¹⁵ In short, the average federal economic crime sentence is relatively low, not because the sentencing structure is unduly lenient, but because U.S. Attorney's Offices are prosecuting thousands of small cases in which little or no prison time would be called for under any rational sentencing scheme.



If, rather than focusing on the average sentence, one looks instead at the sentences now required for even moderately serious white collar offenders — the

¹⁴ U.S. Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 32, Fig. E (2002).

¹⁵ See, *Proceedings of the Third Symposium on Crime and Punishment in the United States: Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses, October 12-13, 2000*, Fig. Semisch-2: Number of Offenders in Each Loss Amount Category (2001). The data in Figure 9 are drawn from the same source.

defendants who were the real concern of Congress in enacting Sarbanes-Oxley -- the comparative picture is very different. For example, the current sentencing range of Defendant C in Figure 7B above (the postal worker who committed a \$35,000 credit card fraud) is 27-33 months; the low end of this range is eight months longer than the average bribery sentence in 2001 and three months longer than the average sentence for burglary.¹⁶ Defendant E (the doctor who overbilled Medicare for \$125,000) has a sentencing range of 33-41 months; the low end of this range is nine months longer than the average sentence imposed on burglars in 2001 and almost exactly equivalent to the 34.3 month average sentence for manslaughter.¹⁷ The range for Defendant F (the telemarketer who bilked elderly victims of \$250,000) is 97-121 months, or 8-10 years. This is eight months longer than the average sentence imposed for violent crimes in 2001, and 25 months longer than the average drug sentence.¹⁸ Defendant H, the crooked small bank president who stole \$1.1 million, now faces 188-235 months, or roughly 15-20 years. This sentence is higher than the 2001 average sentence for kidnapping, robbery, sexual abuse, assault, arson, drug trafficking, and racketeering.¹⁹ And a sentence in the midpoint of the 188-235 month range would equal the average sentence for murder.²⁰

Still not high enough?

In sum, federal economic crime penalties have been repeatedly increased in the last fifteen years. The rate of imprisonment of economic crime defendants, the severity of sentences called for by the Guidelines, and the length of sentences of imprisonment actually imposed are now at all-time highs. Federal economic crime sentences are, on average, higher than economic crime sentences in the states. The misleadingly low average federal white-collar crime sentence is attributable primarily to the predominance of low-level, low-loss cases in the federal system. Penalties for moderate-to-serious white collar offenses are now quite high, on parity with or in excess of sentences imposed for narcotics crimes and crimes of violence. Nonetheless, the Justice Department insists that economic crime penalties are not high enough.

Now it may be that the Justice Department is right. I, for one, stand ready to be persuaded. But the Department bears the burden of proving its case on the merits. So far, it has abstained from arguments on the merits, apparently being of the view that it could harness the prevailing political winds to achieve victory without seriously engaging the concerns of those who have reservations about the government's proposals. Before the Commission or Congress gives serious

¹⁶ U.S. Sentencing Commission, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 30, tbl. 14 (2002).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

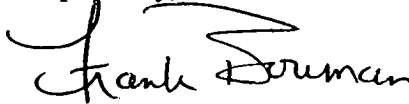
²⁰ *Id.*

consideration to the Department's position, the Department should be required to answer at least six questions:

- First, why are economic crime penalties at their current levels insufficient?
- Second, what legitimate sentencing purpose(s) would be advanced by an across-the-board increase in economic crime sentences?
- Third, why would higher sentences advance the identified purpose(s) more than sentences at their current levels?
- Fourth, what evidence is there in support of the position that higher sentences would advance the identified purpose(s)?
- Fifth, in a period of declining budgets and ballooning budget deficits, how much would DOJ proposals cost?
- Sixth, are the benefits of raising sentences worth the cost?

Once answers to these questions are proffered, a serious and dispassionate debate about the desirability of the proposed sentence increases will be possible.

Respectfully,



Frank O. Bowman, III
Professor of Law
Indiana Univ. School of Law – Indianapolis

Cc: All Sentencing Commissioners
Senate Judiciary Committee
House Judiciary Committee

ENDNOTES for FIGURE 7B

-
- ⁱ Offense Level 6. Assumes no "More than minimal planning" (MMP)
 - ⁱⁱ Offense Level 6. Assumes no MMP.
 - ⁱⁱⁱ Offense Level 8. Assumes no MMP.
 - ^{iv} Offense Level 9. Assumes no MMP
 - ^v Offense Level 10. Assumes no MMP.
 - ^{vi} Offense Level 13. Assumes fraud conviction, MMP, 2-level abuse of trust.
 - ^{vii} Offense Level 14. Assumes fraud conviction, MMP, 2-level abuse of trust.
 - ^{viii} Offense Level 18. Assumes fraud conviction, 4-level undelivered U.S. Mail (§2B1.1 app. note 3(B)).
 - ^{ix} Offense Level 12. Assumes MMP.
 - ^x Offense Level 13. Assumes MMP.
 - ^{xi} Offense Level 18. Assumes 4-level > 50 victims, and 2-level sophisticated means.
 - ^{xii} Offense Level 16. Assumes MMP, 2-level abuse of trust.
 - ^{xiii} Offense Level 17. Assumes MMP, 2-level abuse of trust.
 - ^{xiv} Offense Level 20. Assumes 2-level sophisticated means, 2-level abuse of trust.
 - ^{xv} Offense Level 21. Assumes MMP, four-level aggravating role, two-level vulnerable victim.
 - ^{xvi} Offense Level 22. Assumes MMP, four-level aggravating role, two-level vulnerable victim.
 - ^{xvii} Offense Level 24. Assumes MMP, 4-level aggravating role, 2-level vulnerable victim, 2-level mass marketing.
 - ^{xviii} Offense Level 28. Assumes 4-level > 50 victims, 4-level aggravating role, 2-level vulnerable victim.
 - ^{xix} Offense Level 30. Assumes 6-level > 250 victims, 4-level aggravating role, 2-level vulnerable victim.
 - ^{xx} Offense Level 17. Assumes MMP, 2-level use of special skill.
 - ^{xxi} Offense Level 19. Assumes MMP, 2-level use of special skill.
 - ^{xxii} Offense Level 26. Assumes 2-level sophisticated means, 2-level access device/means of identification, 2-level > 10 victims, 2-level use of special skill.
 - ^{xxiii} Offense Level 18. Assumes MMP, two-level abuse of trust.
 - ^{xxiv} Offense Level 21. Assumes MMP, two-level abuse of trust.
 - ^{xxv} Offense Level 21. Assumes MMP, two-level abuse of trust, four-level endanger financial institution.
 - ^{xxvi} Offense Level 32. Assumes 2-level > 10 victims, 2-level sophisticated means, 4-level jeopardize financial institution, 2-level abuse of trust.
 - ^{xxvii} Offense Level 36. Assumes 2-level > 10 victims, 2-level sophisticated means, 4-level jeopardize financial institution, 4-level officer of publicly traded corporation, 2-level abuse of trust.
 - ^{xxviii} Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.
 - ^{xxix} Offense Level 29. Assumes MMP, four-level aggravating role, two-level abuse of trust.
 - ^{xxx} Offense Level 34. Assumes 2-level sophisticated means, 4-level aggravating role, 2-level abuse of trust.
 - ^{xxxi} Offense Level 38. Assumes 2-level sophisticated means, 4-level violation of securities law by officer of publicly traded corporation, 4-level aggravating role, 2-level abuse of trust.
 - ^{xxxii} Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.
 - ^{xxxiii} Offense Level 32. Assumes MMP, four-level aggravating role, two level abuse of trust.
 - ^{xxxiv} Offense Level 34. Assumes MMP, 2-level sophisticated means, 4-level aggravating role, 2 level abuse of trust.
 - ^{xxxv} Offense Level 48. Assumes 4-level > 50 victims, 2-level sophisticated means, 4-level jeopardize soundness of financial institution (pension fund), 4-level aggravating role, 2-level abuse of trust.
 - ^{xxxvi} Offense Level 54. Assumes 6-level > 250 victims, 2-level sophisticated means, 4-level jeopardize soundness of financial institution (pension fund), 4-level violation of securities law by officer of publicly traded corporation, 4-level aggravating role, 2-level abuse of trust.



February 18, 2003

Hon. Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002-8002

SCHOOL OF LAW
INDIANAPOLIS

Re: Proposal to divide theft and fraud cases between 2 guidelines

Dear Judge Murphy:

This is the second of my letters in response to the Commission's request for comment published in the Federal Register on January 17, 2003. In this letter, I will address the suggestion that the five years of work which produced the simplifying achievement of the 2001 Economic Crime Package should be cast aside by separating "theft" offenses and "fraud" offenses into two different guidelines with different loss tables and specific offenses characteristics. This is a bad idea. In the remainder of this letter, I'll try to explain why.

1. Different penalty levels for "theft" and "fraud" would create chaos to no purpose

It may be suggested that carving up the consolidated economic crime guideline is really no big deal since, after all, we had separate theft and fraud guidelines for fourteen years. In this view, resplitting them would mean only a return to the status quo ante. Nothing could be further from the truth.

Separate theft and fraud guidelines coexisted in the pre-2001 guidelines because they were essentially identical -- regardless of which guideline was applied, the resulting sentence was the same in virtually every case. Precisely because the theft-fraud distinction made no practical difference, there was never a need to parse highly technical (and largely illusory) distinctions between theft and fraud. By contrast, the proposal under consideration by the Commission would set different sentencing levels for the two categories, with "fraud" defendants generally receiving higher sentences than similarly situated "theft" defendants.

OFFICES OF THE FACULTY

Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana
46202-3225

317-274-8523

<http://indy.law.indiana.edu>

The first point to remember about the proposal before you is this: If the Commission adopts a scheme in which the categorization of an offense as a "theft" or a "fraud" affects sentencing outcomes, that categorization will be litigated in thousands of federal cases. A now-meaningless formal distinction will become central to countless plea negotiations, sentencing hearings, and appeals.

Of course, guideline amendments often generate litigation. But the Commission should only create sentencing categories that require litigation if two conditions are met: (1) The categories can be readily distinguished from each other in all but the most unusual cases. (2) The categories separate defendants into groups that are genuinely different for sentencing purposes. That is, if the Guidelines separate defendants into a Group A with offense level X and a Group B with offense level X+2, we should be able to say with confidence that, all else being equal, the Group B defendants are more culpable, more dangerous, or otherwise more deserving of longer punishment than Group A.

The proposal to split "theft" and "fraud" cases between two guidelines meets neither of these conditions. As I will discuss below, the distinction between "theft" and "fraud" is largely illusory, and even where not illusory is complex and highly technical. More importantly, there is no basis in history, current state or federal practice, or common sense for imposing different sentences on defendants based on the categorization of their offense as a "theft" or a "fraud."

2. Theft and fraud cases cannot be separated into two analytically distinct categories

The proposed separation of theft and fraud cases rests on the erroneous assumption that theft and fraud cases can be separated into two mutually exclusive, or even meaningfully distinct, categories. To understand why this assumption is erroneous requires a brief foray into Anglo-American legal history, followed by a quick survey of modern American criminal law.

Very early English law criminalized only forceful takings of property, what we would call robbery.¹ However, by at least the Thirteenth Century, non-violent disposessions were criminalized as larceny.² Common law larceny proscribed the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property.³ Originally, the requirement of a "trespassory taking" was construed to mean a taking unpermitted by the lawful owner or possessor of the property.

However, this definition was insufficient to cover cases in which bailees and carriers of goods pilfered from the shipping containers entrusted to them by merchants. Consequently, in 1757, the Kings' Council of the Star Chamber created the legal fiction of "breaking bulk" that allowed a larceny conviction whenever a bailee received an unopened container, but opened it to steal its contents.⁴ The original common law definition of larceny also excluded any case

¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 545 (3d Ed. 2001).

² See, e.g., Roger D. Groot, *Petit Larceny, Jury Lenity and Parliament*, in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW (2001).

³ DRESSLER, *supra* note 1, at 546.

⁴ *Anon v. The Sheriff of London (The Carrier's Case)*, Year Book 13 Edw. IV pl. 5 (1473).

in which the defendant deceived the property owner into voluntarily parting with the property, as for example where a defendant "rents" a horse, all along intending to sell it. To fill this gap, in 1779, English judges began to hold that deceiving an owner into transferring possession of property constituted a "trespass" and thus could be charged as larceny.⁵ This form of larceny became known as "larceny by trick."⁶ Thus, by the 18th Century, common law larceny already embraced conduct with two of the primary indicia of what we might think of as "fraud" -- breach of trust and false representations relied upon by the victim.

To complicate matters further, English legislators filled other gaps in the law of larceny by creating in 1757 the crime of "false pretences,"⁷ and in 1799 of embezzlement.⁸ False pretences is the traditional property crime most commonly associated with offenses we might now call "fraud," because conviction required knowingly and designedly obtaining property of another by means of untrue representations of fact with intent to defraud.⁹ By contrast, many people think of embezzlement as a sort of fraud crime when, under both ancient and modern statutes, it can be committed without the defendant making any misrepresentation whatever. The traditional definition of embezzlement is the "fraudulent conversion of personal property by a person to whom it was entrusted either by or for the owner."¹⁰ However, the phrase "fraudulent conversion" is misleading because, in embezzlement, the word "fraudulent" means nothing more than an intent to steal.¹¹ Embezzlement need not even involve a direct breach of trust. Although embezzlements often involve stealing property directly entrusted to the defendant by the owner, under some statutes, embezzlement is also committed when a defendant comes lawfully into possession of property belonging to someone with whom he has no personal connection at all.¹²

Thus, as Professor Joshua Dressler has observed, "Larceny, embezzlement, and false pretences may occur as a result of fraud."¹³ Conversely, as we have seen, the traditional property crimes of larceny and embezzlement can be, and often are, committed without any hint of "fraud." In consequence of these and

⁵ King v. Pear, 1 Leach 212, 168 Eng. Rep. 208 (1779).

⁶ Dressler, *supra* note 1, at 552.

⁷ 30 Geo. II, c. 24 § 1 (1757).

⁸ 39 Geo. III, c. 85 (1799).

⁹ ROLLIN M. PERKINS AND RONALD N. BOYCE, CRIMINAL LAW (3d Ed. 1982).

¹⁰ *Id.* at 354.

¹¹ "The element of embezzlement designated by 'fraudulent' is the equivalent of the intent-to-steal element of larceny." *Id.* at 357. See also, Dressler, *supra* note 1, at 563 (fraudulent conversion of property means that defendant "performed some act that demonstrated his intention to deprive another of the property permanently").

¹² Wayne R. LaFave, Criminal Law (3d Ed. 2000) (noting that "the modern view is to make it embezzlement (or a form of the broader crime of theft) fraudulently to convert another's property in one's possession," but observing that "[s]ome states limit the scope of embezzlement by requiring that the property be 'entrusted' or 'delivered' to the embezzler").

¹³ DRESSLER, *supra* note 1, at 564.

many other puzzlements created by the complex distinctions between the traditional property offenses, virtually every modern commentator has joined in the view expressed by Professor Perkins and Judge Boyce that, "*the distinctions between larceny, embezzlement and false pretenses serve no useful purpose in the criminal law but are useless handicaps from the standpoint of criminal justice.*"¹⁴ The overwhelming majority of states have abandoned the traditional offenses and their distinctions in favor of consolidated property crime statutes. These statutes gather all of the traditional methods of unlawfully depriving another person of his property into a single offense, usually called "theft." I have attached several representative samples of such statutes to this letter.

I can imagine that proponents of separate theft and fraud guidelines might reply, "But we don't want to create separate guidelines for the old common law offenses. We want to separate 'theft' crimes from 'fraud' crimes." The problem, of course, is that "theft" is a modern catch-all term which has no defined meaning outside the four corners of the particular statute in which it appears. And in virtually every modern statute, the term "theft" subsumes numerous traditional offenses -- larceny by trick, false pretenses, those forms of embezzlement involving misrepresentation, forgeries, and scams of every sort -- containing elements of "fraud." Thus, in modern American law, "fraud" is merely one of the means by which "theft" is committed.

The definitional difficulties evident in common law property crimes and in the modern law of the states are compounded one-hundred-fold in federal law. Federal substantive law regarding economic crime is, frankly, a mess. When I first wrote about sentencing economic offenses in 1998, the Statutory Index of the Sentencing Guidelines listed some 250 different statutes sentenced under the then-existing theft and fraud guidelines.¹⁵ Some of these offenses could be neatly pigeonholed into one of the common law categories.¹⁶ However, a great many federal statutes, particularly those of more recent vintage, follow the modern trend of including within a single crime some or all of the traditionally recognized methods of parting the victim from his money. Consider, for example, a prosecutorial mainstay like 18 U.S.C. § 666, directed at one who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts" property of a program receiving federal funds. Or 18 U.S.C. § 1708, which strikes at anyone who "steals, takes, abstracts, or by fraud or deception obtains" mail matter from a post office or mail depository. Are these crimes "thefts" or "frauds"?

¹⁴ Boyce and Perkins, *supra* note 9, at 389.

¹⁵ Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 480 (1998).

¹⁶ For example, 18 U.S.C. § 661 is a pretty classic common law larceny statute. But even here, there remains the question of whether federal law embraces the fraud-like crime of larceny by trick.

Federal statutes directed at embezzlement or unlawful conversion present particularly knotty problems of categorization. As noted above, embezzlement can be committed without either a false representation or a breach of trust, but embezzlements sometimes involve one or both. So, even assuming that one could define distinct categories of "theft" and "fraud," into which category would embezzlement fall? The only honest answer would have to be that it depends on the circumstances of the particular case.

In the Statutory Index of the pre-2001 Guidelines, at least twenty-five statutes are listed as being properly sentenced under either the former theft guideline, §2B1.1, or the former fraud guideline, §2F1.1. Among these schizophrenic statutes are such prosecutorial standards as 18 U.S.C. § 656 (theft, embezzlement, or misapplication by bank officers and employees), 18 U.S.C. § 657 (theft, embezzlement, or misapplication by employees of lending, credit, and insurance institutions), 18 U.S.C. § 659 (obtaining goods from interstate shipment by theft, embezzlement, or fraud), 18 U.S.C. § 1033(b)(1) (insurance fraud), 18 U.S.C. § 2314 (interstate transportation of stolen property), and 18 U.S.C. § 2315 (fencing stolen property).

Given the prevalence of federal economic crimes that can be committed by both fraudulent and non-fraudulent means, the commission would have three choices:

- (1) Identify those crimes that can be committed by both fraudulent and non-fraudulent means, designate them in the Statutory Index as sentenceable under *either* the "theft" or "fraud" guideline, and let the trial courts figure out the difference between "theft" and "fraud" on a case-by-case basis. Since a "fraud" will be subject to a different and higher penalty than a "theft," the distinction between "fraud" and "theft" will often be hotly contested at sentencing. And any decision placing the defendant in the more severe "fraud" category will be subject to appeal.
- (2) Alternatively, to avoid litigation, the Commission could, by fiat, use the Statutory Index to place *every* economic crime statute in either the "theft" category or the "fraud" category, but never in both. But since we already know that a great many commonly used statutes don't fit neatly in either box, this solution would require courts to sentence many defendants who committed "theft-like" crimes to fraud-length sentences, and vice versa. In taking this option, the Commission would sacrifice one of its most basic mandates -- sentence similarly situated defendants similarly -- for the sake of administrative convenience. Prior to November 2000, trial judges might have

been able to mitigate the unfair effects of such an approach by finding that the guideline for the offense of conviction, say fraud, did not accurately reflect the defendant's conduct and using the theft guideline instead. However, the Commission's 2000 amendment of §1B1.2 precludes this approach by making the Statutory Index designation mandatory.¹⁷

- (3) In order to avoid the litigation inevitable under solution #1 and the arbitrariness of solution #2, and to ensure that every defendant is sentenced under the guideline that most closely matched his conduct, the Commission would be obliged to examine every statute that can be committed by both "theft-like" and "fraud-like" methods and specify which *methods* should be sentenced under the theft guideline and which should be sentenced under the fraud guideline. Thus, the Commission would specify that a defendant who violated 18 U.S.C. §666 should be sentenced under the theft guideline if he "steals" money from a federally funded program, under the fraud guideline if he obtains money from that program "by fraud," under the fraud guideline if he embezzles money using some means characteristic of fraud, and under the theft guideline if the embezzlement lacks indicia of fraud. And so forth throughout the federal criminal code.

It goes almost without saying that none of the foregoing options are particularly attractive. The bottom line is that the proposal to separate economic crime offenses into "theft" and "fraud" guidelines cannot meet the first condition for creating separate sentencing categories -- that the categories can be readily distinguished from each other in all but the most unusual cases.

3. Separate "theft" and "fraud" guidelines are bad sentencing policy because these categories have no necessary connection to offense seriousness, defendant blameworthiness, or any other valid sentencing consideration.

The only good reason to create a sentencing rule dividing defendants into two categories is if the rule reliably distinguishes between those deserving greater and lesser punishment. Trying to separate "theft" and "fraud" defendants is not only a theoretical and practical nightmare, but would serve no valuable purpose. Modern statutes collapse the common law property crimes into consolidated theft

¹⁷ The one exception is in a case of a plea agreement which stipulates that the defendant should properly be sentenced under a guideline calling for a higher sentence than the guideline applicable to the offense of conviction. U.S.S.G. § 1B1.2(a) (2002). But this provision takes the question of the most appropriate guideline out of the hands of the judge and places it, de facto, in the hands of the prosecution.

statutes not only because the traditional distinctions are unfathomable, but because "there is no meaningful difference between the offenses in terms of the culpability of the actors, their dangerousness, or the seriousness of the harm caused."¹⁸ The same is true of federal crimes in the as-yet-undefined categories of "theft" and "fraud."

Modern consolidated theft statutes emerged not merely because drawing distinctions between the various traditional property offenses was so hard. Rather, consolidated theft statutes became virtually universal in the states, and are littered throughout the federal criminal code, because of a consensus that the traditional distinctions between property crimes -- distinctions based on the *method* by which a victim was parted from his money -- are irrelevant to offense seriousness. State theft statutes and federal statutes like 18 U.S.C. §666, in which larceny, embezzlement, false pretenses, and all forms of fraud are subsumed in a single offense, exist because the legislatures that passed them saw no meaningful distinction between the means by which crooks steal.

In the recent history of Anglo-American law and legal scholarship, few, if any, knowledgeable commentators have suggested that a "fraud" is intrinsically more serious than a non-fraudulent "theft" of the same value. Indeed, as an historical matter, frauds have generally been considered less serious than other kinds of property crime. Larceny by trick was a late expansion of the ancient crime of larceny. False pretenses and embezzlement were legislative creations and were enacted as misdemeanors at a time when larceny was a felony and, like all felonies of the time, a capital offense. The only serious argument I know of in modern academic literature for maintaining a distinction between larceny-like crimes and other offenses was advanced by George Fletcher twenty-five years ago.¹⁹ But he believed that the larceny category should be maintained because it is *more serious* than the other types of property offenses developed later. In sum, there is no compelling historical or theoretical argument in favor of punishing a "fraud" more severely than "theft."²⁰

¹⁸ DRESSLER, *supra* note 1, at 567.

¹⁹ George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARVARD L. REV. 469 (1976).

²⁰ Professors Jeffrey Parker and Michael Block have argued in favor of separate theft and fraud guidelines. Parker and Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason, L.R. 1001 (2001). Considerations of space preclude a detailed analysis of their position, but several points may be worth making.

First, the general tenor of the article makes dispassionate analysis of its arguments difficult. The article is largely devoted to excoriating virtually every fundamental decision made by the Sentencing Commission since 1987, with particular derogatory attention to the process that produced the 2001 Economic Crime Package. For example, the discussion of the economic crime package opens with the declaration that, "The current issues concerning the fraud and theft guidelines provide a thorough illustration of the degenerate course of federal sentencing reform, virtually from the inception of the initial guidelines." *Id.* at 1036.

Second, although the article claims that "theft" and "fraud" should be sentenced differently, it never clearly defines those categories, either in the abstract or by listing the statutes to be placed in those

In order to give the foregoing rather dry and theoretical arguments a human face, consider several representative pairs of hypothetical defendants:

CASE ONE: Defendant A, a civilian employee of NASA, uses his official identification to gain access to a computer storeroom and walks away with \$10,000 in computer parts. Defendant B, also a civilian employee of NASA, uses his access to the NASA computer system to generate a false requisition directing that \$10,000 in computer parts be mailed from a military warehouse to his residence and billed to NASA. Defendant A violates 18 U.S.C. § 641 (embezzling, stealing, purloining, or converting to his own use property of a U.S. agency). Defendant B commits mail fraud, 18 U.S.C. § 1341.

CASE TWO: Defendant C, a postal carrier, takes envelopes containing \$20,000 in postal money orders from his mail bag and cashes them. Defendant D, a postal clerk, tells customers who purchase money orders to be sent overseas that she must put a special address sticker on the envelope to ensure proper delivery, and then addresses the letter to herself. She obtains \$20,000 in postal money

categories. The authors suggest that the defining feature of "fraud" is the presence of some element of deception, but seem unaware of the fact that all common law property crimes, all modern consolidated theft statutes, and virtually all federal economic crime statutes can sometimes involve deception.

Second, the article seems to suggest that "fraud" should (always? sometimes?) be sentenced more severely than "theft," but it provides no explanation of *why* this should be so.

Fourth, some of the foregoing difficulties may be attributable to an evident lack of familiarity with both common law property crimes and the content of modern state and federal economic crime statutes. As but one example, the authors write: "The traditional federal criminal fraud statutes are codified versions of the common-law offenses, in which larceny and fraud were sharply distinguished. Under that system, fraud and simple 'theft' (in the sense of larceny) are not the same offense, either doctrinally or in concept. Fraud involves an element of deliberate deception that is not involved in simple theft." *Id.* at 1045. The imprecisions, errors, and omissions in this passage include: (1) The authors do not identify the "traditional federal criminal fraud statutes" which are supposedly "codified versions of the common law offenses." I am aware of no set of federal fraud statutes which does, or could, meet this description. (2) The assertion that "larceny and fraud were sharply distinguished" under the common law is incorrect. As noted above, larceny, embezzlement, and false pretenses could all be committed by fraud. *See* DRESSLER, *supra* note 13. (3) In modern federal law, the neat division imagined by Parker and Block between fraud and "simple theft (in the sense of larceny)" with no "element of deliberate deception" does not exist. There are a fair number of pure "fraud" statutes (such as 18 U.S.C. § 1341 and 1343), a very few pure larceny statutes (such as 18 U.S.C. § 661), and a bundle of statutes in which disparate theories of criminal liability are jammed into a single statute like passengers into a Tokyo subway car. (4) Neither here nor elsewhere do Parker and Block explain where the numerous federal embezzlement and conversion statutes fit in their bipolar taxonomy.

Fifth, the article offers no practical solution to the question of how to quantify the supposed difference between "theft" and "fraud" offenses. It states, "In fraud, loss more appropriately is measured by the nature and degree of the deception involved, whereas loss in simple theft can be measured by the value of the property right invaded." How, precisely, does one calculate a dollar figure for loss based on the "nature and degree of deception"? For that matter, what is meant by the "value of the property right invaded"?

In short, while this article provides a distinctive perspective on the development of the Federal Sentencing Guidelines, it offers little help in the task of writing guidelines for federal economic offenses.

orders, which she cashes. Both defendants violate 18 U.S.C. § 1708. Defendant C does so by stealing, taking, or abstracting mail matter. Defendant D does so by fraud or deception (and also commits mail fraud under 18 U.S.C. § 1341).

CASE THREE: Defendant E, an 18-year-old gang member, breaks into mail boxes in his tenement and steals Social Security checks totaling \$40,000 intended for elderly residents of the building. Defendant F, a widow of straightened means, fails to tell the Social Security Administration that her husband has died, mails in forms in his name, and over a two-year period following his death cashes \$40,000 in benefit checks. The gang member steals, takes, and abstracts mail matter in violation of 18 U.S.C. § 1708. The widow commits forgery, 18 U.S.C. § 510, and mail fraud, 18 U.S.C. § 1341.

The proposal before the Commission would require higher sentences for Defendants B and D and E than for Defendants A and C and F. In Cases One and Two, both defendants abused their official positions to obtain precisely the same sum of money from precisely the same victims. In Case Three, the gang member steals from the Social Security Administration to support buy drugs, clothes, or weapons, while the widow lies to support herself at a subsistence level. Most of us, I suspect, would find it difficult to discern any meaningful difference between the defendants in Cases One and Two. And many of us would be disposed to consider the widow's offense in Case Three less serious than that of the gang member. By what logic does a thief who steals by guile *always* deserve a longer sentence than one who brazenly takes what he pleases?

In sum, theft and fraud cases should not be divided between two different guidelines with different sentencing levels because the categorization of a case as a "theft" or a "fraud" has no necessary connection to the seriousness of the offense or the relative blameworthiness of the defendant.

3. Splitting up the newly consolidated economic crime guideline without compelling justification less than eighteen months after the consolidation will damage the institutional credibility of the Sentencing Commission.

Less than eighteen months ago, the Sentencing Commission brought to fruition a five-year process of revising the economic crime guidelines. The project, and its product, are widely hailed even by perennial Commission critics as a success story. The process brought together all of the affected groups and institutions -- judges, probation officers, prosecutors, defense lawyers, Commissioners and their staffs, and the odd academic or two -- for prolonged, careful consultation. Of all the issues considered and resolved during this long process, consolidation of the theft and fraud guidelines was one of the few on which virtually complete unanimity existed from start to finish. No group or institution ever objected to the idea. It was endorsed as a desirable simplification

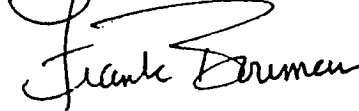
by the Judicial Conference, the PAG, and the Justice Department. It is now the law.

At best, the project of redividing "theft" and "fraud" cases into two different guidelines, this time with different sentencing levels, is theoretically questionable and practically difficult. Its benefits have yet to be explained. If the Commission were to proceed, less than eighteen months after the effective date of the 2001 Economic Crime Package, to undo one of the central organizing features of that reform, the damage to its institutional credibility would surely be severe. Lawyers and judges in the field would be aghast at the appearance of a third set of economic crime rules in less than a year-and-a-half. The institutions and groups that devoted countless hours to careful honing of the 2001 reforms would wonder, with justice, why they invested their time in a process whose results would be discarded virtually overnight for no publicly apparent reason and without any demand for such a change from any institutional participant in federal sentencing.

I am aware that considerations relating to other pending economic crime sentencing proposals may dispose some Commissioners to look sympathetically on a theft-fraud decoupling. However, decoupling "theft" and "fraud" will not solve the problem that concerns you and will instead lead the Commission and those who use the Guidelines into a thicket of unnecessary complications.

This is a bad idea. Please don't do it.

Respectfully,



Frank O. Bowman, III
Professor of Law
Indiana Univ. School of Law - Indianapolis

MINNESOTA STATUTES ANNOTATED
CRIMES, CRIMINALS
CHAPTER 609. CRIMINAL CODE
THEFT AND RELATED CRIMES

Copr. © West Group 2003. All rights reserved.

Current through End of 2002 1st Sp. Sess.

609.52. Theft

Subd. 2. Acts constituting theft. Whoever does any of the following commits theft and may be sentenced as provided in subdivision 3:

(1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property; or

(2) having a legal interest in movable property, intentionally and without consent, takes the property out of the possession of a pledgee or other person having a superior right of possession, with intent thereby to deprive the pledgee or other person permanently of the possession of the property; or

(3) obtains for the actor or another the possession, custody, or title to property of or performance of services by a third person by intentionally deceiving the third person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. "False representation" includes without limitation:

(i) the issuance of a check, draft, or order for the payment of money, except a forged check as defined in section 609.631, or the delivery of property knowing that the actor is not entitled to draw upon the drawee therefor or to order the payment or delivery thereof; or

(ii) a promise made with intent not to perform. Failure to perform is not evidence of intent not to perform unless corroborated by other substantial evidence; or

(iii) the preparation or filing of a claim for reimbursement, a rate application, or a cost report used to establish a rate or claim for payment for medical care provided to a recipient of medical assistance under chapter 256B, which intentionally and falsely states the costs of or actual services provided by a vendor of medical care; or

(iv) the preparation or filing of a claim for reimbursement for providing treatment or supplies required to be furnished to an employee under section 176.135 which intentionally and falsely states the costs of or actual treatment or supplies provided; or

(v) the preparation or filing of a claim for reimbursement for providing treatment or supplies required to be furnished to an employee under section 176.135 for treatment or supplies that the provider knew were medically

unnecessary, inappropriate, or excessive; or

(4) by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person; or

(5) intentionally commits any of the acts listed in this subdivision but with intent to exercise temporary control only and:

(i) the control exercised manifests an indifference to the rights of the owner or the restoration of the property to the owner; or

(ii) the actor pledges or otherwise attempts to subject the property to an adverse claim; or

(iii) the actor intends to restore the property only on condition that the owner pay a reward or buy back or make other compensation; or

(6) finds lost property and, knowing or having reasonable means of ascertaining the true owner, appropriates it to the finder's own use or to that of another not entitled thereto without first having made reasonable effort to find the owner and offer and surrender the property to the owner; or

(7) intentionally obtains property or services, offered upon the deposit of a sum of money or tokens in a coin or token operated machine or other receptacle, without making the required deposit or otherwise obtaining the consent of the owner; or

(8) intentionally and without claim of right converts any article representing a trade secret, knowing it to be such, to the actor's own use or that of another person or makes a copy of an article representing a trade secret, knowing it to be such, and intentionally and without claim of right converts the same to the actor's own use or that of another person. It shall be a complete defense to any prosecution under this clause for the defendant to show that information comprising the trade secret was rightfully known or available to the defendant from a source other than the owner of the trade secret; or

(9) leases or rents personal property under a written instrument and who:

(i) with intent to place the property beyond the control of the lessor conceals or aids or abets the concealment of the property or any part thereof; or

(ii) sells, conveys, or encumbers the property or any part thereof without the written consent of the lessor, without informing the person to whom the lessee sells, conveys, or encumbers that the same is subject to such lease or rental contract with intent to deprive the lessor of possession thereof; or

(iii) does not return the property to the lessor at the end of the lease or rental term, plus agreed upon extensions, with intent to wrongfully deprive the lessor of possession of the property; or

(iv) returns the property to the lessor at the end of the lease or rental term, plus agreed upon extensions, but does not pay the lease or rental charges agreed upon in the written instrument, with intent to wrongfully deprive the lessor of the agreed upon charges.

For the purposes of items (iii) and (iv), the value of the property must be at least \$100.

Evidence that a lessee used a false, fictitious, or not current name, address, or place of employment in obtaining the property or fails or refuses to return the property or pay the rental contract charges to lessor within five days after written demand for the return has been served personally in the manner provided for service of process of a civil action or sent by certified mail to the last known address of the lessee, whichever shall occur later, shall be

evidence of intent to violate this clause. Service by certified mail shall be deemed to be complete upon deposit in the United States mail of such demand, postpaid and addressed to the person at the address for the person set forth in the lease or rental agreement, or, in the absence of the address, to the person's last known place of residence; or

(10) alters, removes, or obliterates numbers or symbols placed on movable property for purpose of identification by the owner or person who has legal custody or right to possession thereof with the intent to prevent identification, if the person who alters, removes, or obliterates the numbers or symbols is not the owner and does not have the permission of the owner to make the alteration, removal, or obliteration; or

(11) with the intent to prevent the identification of property involved, so as to deprive the rightful owner of possession thereof, alters or removes any permanent serial number, permanent distinguishing number or manufacturer's identification number on personal property or possesses, sells or buys any personal property knowing or having reason to know that the permanent serial number, permanent distinguishing number or manufacturer's identification number has been removed or altered; or

(12) intentionally deprives another of a lawful charge for cable television service by:

(i) making or using or attempting to make or use an unauthorized external connection outside the individual dwelling unit whether physical, electrical, acoustical, inductive, or other connection; or by

(ii) attaching any unauthorized device to any cable, wire, microwave, or other component of a licensed cable communications system as defined in chapter 238. Nothing herein shall be construed to prohibit the electronic video rerecording of program material transmitted on the cable communications system by a subscriber for fair use as defined by Public Law Number 94-553, section 107; [FN2] or

(13) except as provided in paragraphs (12) and (14), obtains the services of another with the intention of receiving those services without making the agreed or reasonably expected payment of money or other consideration; or

(14) intentionally deprives another of a lawful charge for telecommunications service by:

(i) making, using, or attempting to make or use an unauthorized connection whether physical, electrical, by wire, microwave, radio, or other means to a component of a local telecommunication system as provided in chapter 237; or

(ii) attaching an unauthorized device to a cable, wire, microwave, radio, or other component of a local telecommunication system as provided in chapter 237.

The existence of an unauthorized connection is prima facie evidence that the occupier of the premises:

(i) made or was aware of the connection; and

(ii) was aware that the connection was unauthorized; or

(15) with intent to defraud, diverts corporate property other than in accordance with general business purposes or for purposes other than those specified in the corporation's articles of incorporation; or

(16) with intent to defraud, authorizes or causes a corporation to make a distribution in violation of section 302A.551, or any other state law in conformity with it; or

(17) takes or drives a motor vehicle without the consent of the owner or an authorized agent of the owner, knowing or having reason to know that the owner or an authorized agent of the owner did not give consent.

Subd. 3. Sentence. Whoever commits theft may be sentenced as follows:

- (1) to imprisonment for not more than 20 years or to payment of a fine of not more than \$100,000, or both, if the property is a firearm, or the value of the property or services stolen is more than \$35,000 and the conviction is for a violation of subdivision 2, clause (3), (4), (15), or (16); or
- (2) to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both, if the value of the property or services stolen exceeds \$2,500, or if the property stolen was an article representing a trade secret, an explosive or incendiary device, or a controlled substance listed in schedule I or II pursuant to section 152.02 with the exception of marijuana; or
- (3) to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both, if:
 - (a) the value of the property or services stolen is more than \$500 but not more than \$2,500; or
 - (b) the property stolen was a controlled substance listed in schedule III, IV, or V pursuant to section 152.02; or
 - (c) the value of the property or services stolen is more than \$250 but not more than \$500 and the person has been convicted within the preceding five years for an offense under this section, section 256.98; 268.182; 609.24; 609.245; 609.53; 609.582, subdivision 1, 2, or 3; 609.625; 609.63; 609.631; or 609.821, or a statute from another state, the United States, or a foreign jurisdiction, in conformity with any of those sections, and the person received a felony or gross misdemeanor sentence for the offense, or a sentence that was stayed under section 609.135 if the offense to which a plea was entered would allow imposition of a felony or gross misdemeanor sentence; or
 - (d) the value of the property or services stolen is not more than \$500, and any of the following circumstances exist:
 - (i) the property is taken from the person of another or from a corpse, or grave or coffin containing a corpse; or
 - (ii) the property is a record of a court or officer, or a writing, instrument or record kept, filed or deposited according to law with or in the keeping of any public officer or office; or
 - (iii) the property is taken from a burning, abandoned, or vacant building or upon its removal therefrom, or from an area of destruction caused by civil disaster, riot, bombing, or the proximity of battle; or
 - (iv) the property consists of public funds belonging to the state or to any political subdivision or agency thereof; or
 - (v) the property stolen is a motor vehicle; or
- (4) to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both, if the value of the property or services stolen is more than \$250 but not more than \$500; or
- (5) in all other cases where the value of the property or services stolen is \$250 or less, to imprisonment for not more than 90 days or to payment of a fine of not more than \$700, or both, provided, however, in any prosecution under subdivision 2, clauses (1), (2), (3), (4), and (13), the value of the money or property or services received by the defendant in violation of any one or more of the above provisions within any six-month period may be aggregated and the defendant charged accordingly in applying the provisions of this subdivision; provided that when two or more offenses are committed by the same person in two or more counties, the accused may be prosecuted in any county in which one of the offenses was committed for all of the offenses aggregated under this paragraph.

Formerly cited as IL ST CH 38 ¶ 16-1

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 720. CRIMINAL OFFENSES
CRIMINAL CODE
ACT 5. CRIMINAL CODE OF 1961
TITLE III. SPECIFIC OFFENSES
PART C. OFFENSES DIRECTED AGAINST PROPERTY
ARTICLE 16. THEFT AND RELATED OFFENSES

Copr. © West Group 2003. All rights reserved.

Current through P.A. 92-886 of the 2002 Reg.Sess.
& P.A. 93-1 of the 2003 Reg.Sess

5/16-1. Theft

§ 16-1. Theft.

(a) A person commits theft when he knowingly:

- (1) Obtains or exerts unauthorized control over property of the owner; or
- (2) Obtains by deception control over property of the owner; or
- (3) Obtains by threat control over property of the owner; or
- (4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen; or
- (5) Obtains or exerts control over property in the custody of any law enforcement agency which is explicitly represented to him by any law enforcement officer or any individual acting in behalf of a law enforcement agency as being stolen, and

(A) Intends to deprive the owner permanently of the use or benefit of the property; or

(B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

(b) Sentence.

(1) Theft of property not from the person and not exceeding \$300 in value is a Class A misdemeanor.

(1.1) Theft of property not from the person and not exceeding \$300 in value is a Class 4 felony if the theft was committed in a school or place of worship.

(2) A person who has been convicted of theft of property not from the person and not exceeding \$300 in value

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

who has been previously convicted of any type of theft, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, home invasion, forgery, a violation of Section 4-103, 4-103.1, 4-103.2, or 4-103.3 of the Illinois Vehicle Code [FN1] relating to the possession of a stolen or converted motor vehicle, or a violation of Section 8 of the Illinois Credit Card and Debit Card Act [FN2] is guilty of a Class 4 felony. When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

(3) (Blank).

(4) Theft of property from the person not exceeding \$300 in value, or theft of property exceeding \$300 and not exceeding \$10,000 in value, is a Class 3 felony.

(4.1) Theft of property from the person not exceeding \$300 in value, or theft of property exceeding \$300 and not exceeding \$10,000 in value, is a Class 2 felony if the theft was committed in a school or place of worship.

(5) Theft of property exceeding \$10,000 and not exceeding \$100,000 in value is a Class 2 felony.

(5.1) Theft of property exceeding \$10,000 and not exceeding \$100,000 in value is a Class 1 felony if the theft was committed in a school or place of worship.

(6) Theft of property exceeding \$100,000 in value is a Class 1 felony.

(6.1) Theft of property exceeding \$100,000 in value is a Class X felony if the theft was committed in a school or place of worship.

(7) Theft by deception, as described by paragraph (2) of subsection (a) of this Section, in which the offender obtained money or property valued at \$5,000 or more from a victim 60 years of age or older is a Class 2 felony.

(c) When a charge of theft of property exceeding a specified value is brought, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value.

CREDIT(S)

1993 Main Volume

Laws 1961, p. 1983, § 16-1, eff. Jan. 1, 1962. Amended by Laws 1967, p. 1802 : 1, eff. July 20, 1967; P.A. 77-2638, § 1, eff. Jan. 1, 1973; P.A. 78-255 : 61, eff. Oct. 1, 1973; P.A. 79-840 : 1, eff. Oct. 1, 1975; P.A. 79-973, § 1, eff. Oct. 1, 1975; P.A. 79-1454, § 16, eff. Aug. 31, 1976; P.A. 82-318 : 1, eff. Jan. 1, 1982; P.A. 83-715, § 1, eff. July 1, 1984; P.A. 84-950 : 1, eff. July 1, 1986; P.A. 85-691 : 1, eff. Jan. 1, 1988; P.A. 85-753, § 1, eff. Jan. 1, 1988; P.A. 85-1030 : 2, eff. July 1, 1988; P.A. 85-1209, Art. II : 2-23, eff. Aug. 30, 1988; P.A. 85-1296, § 1, eff. Jan. 1, 1989; P.A. 85-1440, Art. II : 2-9, eff. Feb. 1, 1989.

2003 Electronic Update

Amended by P.A. 89-377, § 15, eff. Aug. 18, 1995; P.A. 91-118 : 5, eff. Jan. 1, 2000; P.A. 91-360 : 5, eff. July 29, 1999; P.A. 91-544, § 5, eff. Jan. 1, 2000; P.A. 92-16 : 88, eff. June 28, 2001.

FORMER REVISED STATUTES CITATION