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## ESTABLISHING UNIFORMITY: THE NEED FOR A PER SE RULE AGAINST THE GROUPING OF MONEY LAUNDERING AND FRAUD COUNTS UNDER THE FEDERAL SENTENCING GUIDELINES

The goal of the American criminal justice system is to achieve justice and fairness for all involved, including the victim, the accused, and society as a whole.<sup>1</sup> Fundamental to this proposition, however, is a system without gaps: from the arrest to the punishment, the system must consistently apply policies and procedures that promote the ultimate goals of justice and fairness. With a break in the chain, these goals cannot be realized. Thus, the sentencing decision, as one necessary link in the chain, is critically important to the criminal justice system. As one commentator has stated:

The sentencing decision is the symbolic keystone of the criminal justice system: in it, the conflicts between the goals of equal justice under the law and individualized justice with punishment tailored to the offender are played out, and society's moral principles and highest values—life and liberty—are interpreted and applied.<sup>2</sup>

Indeed, the sentencing decision is even more than a “symbolic keystone”; the decision has real consequences, not only for the

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1. It should be emphasized that this is the *goal* of the American criminal justice system. Clearly, one can argue with the *results* of the system, as individuals and groups frequently do. Victims' rights advocates argue that the system is unfair to victims; defense attorneys, civil libertarians, and civil rights activists argue that the system is unfair to those accused of crimes; and politicians of every political stripe argue, most frequently around election time, that society is being missserved by the system. While some may argue that structural remediation is necessary, the reality is that much of the criticism is born of self-interest (e.g., vote-hungry politicians) and, in cases where the system appears to fail, the perceived failure is probably more often endemic of localized abuses (e.g., jury nullification, prosecutorial and police misconduct, etc.) than systemwide failure.

2. 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (Alfred Blumstein et al. eds., 1983).

accused, but also for the many other individuals directly and indirectly affected by the crime.

Congress recognized the importance of sentencing when it passed the Sentencing Reform Act of 1984.<sup>3</sup> Congress had become disenchanted with the wide sentencing disparity in federal courts, whereby similar crimes would garner substantially different sentences depending on which judge made the sentencing decision.<sup>4</sup> To remedy this problem, the Act mandated the creation of the United States Sentencing Commission, whose duty was to develop a uniform, determinant sentencing system to be applied by all federal judges.<sup>5</sup> The result of the Commission's work was the Federal Sentencing Guidelines,<sup>6</sup> which provide a relatively straightforward, quasimathematical approach to criminal sentencing.<sup>7</sup> Yet, despite the general clarity of the Guidelines, they

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3. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 18 U.S.C. §§ 3551-68 (1994), 28 U.S.C. §§ 991-98 (1994)).

4. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988). For a more complete discussion, see *infra* notes 33-61 and accompanying text.

5. See 28 U.S.C. §§ 991-98 (1994).

6. 18 U.S.C.A. app. § 3D1.2 (West 1996).

7. At least one author considers the Guidelines to be an abysmal failure because of, among several other reasons, their complexity. See MICHAEL TONRY, SENTENCING MATTERS 72 (1996). Tonry also gives a scathing assessment of the Sentencing Commission, stating that the Commission "failed . . . badly in nearly every respect." *Id.* at 83. While Tonry makes several interesting points, one might question the motive for his hostility. For example, Tonry concedes that the Commission has succeeded in making sentences harsher, but equates this success with "that of a doctor whose patient died despite a successful operation." *Id.* at 72. When this statement is read against the backdrop of earlier assertions in Tonry's book, it becomes clear that his disdain for the Guidelines is a reflection of his ideological beliefs. Indeed, while Tonry proposes to move the debate over sentencing beyond partisan politics and ideological conflicts, he makes no attempt to hide his displeasure with the "just deserts" theory of sentencing (which is arguably the theoretical foundation for the Guidelines) and with "campaigning conservative politicians." *Id.* at 7.

"Just deserts" is a multifaceted theory premised on the eminently rational belief that "[s]everity of punishment should be commensurate with the seriousness of the wrong" and that individuals convicted of similar crimes should receive similar sentences. Andrew von Hirsch, *Doing Justice: The Principle of Commensurate Deserts*, in SENTENCING 243, 243 (Hyman Gross & Andrew von Hirsch eds., 1981) (emphasis omitted). Citing a host of philosophers, Tonry dismisses this theory by peddling his own ideology, most notably that we live in a world where not "all citizens have equal opportunities for self-realization and material advancement." TONRY, *supra*, at 15. Implicit in this statement, of course, is that socioeconomic inequities, whether real or perceived, justify disparate sentences. Thus, Tonry's gloomy assessment of the Guidelines may be largely a reflection of his ideological

are not without their interpretive problems. Nowhere is this more clearly demonstrated than with the sentencing of defendants convicted of multiple counts of money laundering and fraud.

The problem arises out of ambiguous phrasing within section 3D1.2 of the Guidelines.<sup>8</sup> This particular section provides for the "grouping" of closely related counts.<sup>9</sup> According to the Guidelines, closely related counts are those counts which involve "substantially the same harm."<sup>10</sup> The Guidelines provide four subsections with the express purpose of defining "substantially the same harm."<sup>11</sup> Nevertheless, courts have been unable to agree on the scope and meaning of this phrase, especially with regard to whether money laundering and fraud convictions should be grouped as related counts.

The issue, at last count, has split ten Federal Courts of Appeals.<sup>12</sup> Thus, the purpose of this Note is twofold. First, this Note attempts to define more clearly the meaning and scope of "substantially the same harm" as that phrase relates to money laundering and fraud

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beliefs, rather than of an objective, empirical analysis.

8. The section provides:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

18 U.S.C.A. app. § 3D1.2.

9. *See id.*

10. *Id.*

11. *Id.*

12. The First, Second, Eighth, Ninth, and Tenth Circuits have held that the counts *should not* be grouped. *See* United States v. Napoli, 179 F.3d 1, 7 (2d Cir. 1999); United States v. O'Kane, 155 F.3d 969, 972 (8th Cir. 1998) and United States v. Hildebrand, 152 F.3d 756 (8th Cir. 1998); United States v. Kneeland, 148 F.3d 6 (1st Cir. 1998) and United States v. Lombardi, 5 F.3d 568, 571 (1st Cir. 1993); United States v. Kunzman, 54 F.3d 1522

convictions. Second, the Note recommends the establishment of a *per se* rule for the federal courts to follow: money laundering and fraud should not, under any circumstances, be grouped as related counts. Implementation of this rule will have the immediate effect of resolving the circuit split and will best serve the intended purposes of the Guidelines, namely uniformity and proportionality in sentencing.<sup>13</sup>

Section I provides a more detailed explanation of the issue. Section II examines the policies underlying the Sentencing Guidelines, including an explanation of why the Guidelines initially were implemented. Section III provides a brief survey of the circuit split. Section IV is a detailed analysis of the relevant subsections of section 3D1.2. This section integrates and expands upon material from prior sections of the Note (i.e., policy considerations and the cases) and argues that money laundering and fraud should not be grouped. Finally, Section V recommends the establishment of a *per se* rule against the grouping of money laundering and fraud convictions. Such a rule would be applied as a matter of law, rendering moot the underlying facts of the particular case with regard to the grouping decision.<sup>14</sup>

### MONEY LAUNDERING AND FRAUD AS RELATED COUNTS

The issue is easily stated: whether money laundering and fraud<sup>15</sup> should be grouped as related counts under section 3D1.2 of the Federal Sentencing Guidelines. While some may consider the issue

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(10th Cir. 1995) and *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992); *United States v. Taylor*, 984 F.2d 298, 302 (9th Cir. 1993). The Third, Fourth, Fifth, Seventh, and Eleventh Circuits have held that money laundering and fraud *should* be grouped as related counts. See *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997); *United States v. Wilson*, 98 F.3d 281, 283 (7th Cir. 1996); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995); *United States v. Cusumano*, 943 F.2d 305, 314 (3d Cir. 1991).

13. See *infra* notes 51-60 and accompanying text.

14. This is only logical. To establish a *per se* rule, the sentencing court must not be left with the discretion to group the counts under a particular set of facts.

15. "Fraud" can take many forms, such as wire fraud, mail fraud, and bank fraud. This Note uses the term in its generic sense, which is "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging

nothing more than "a bit of sentencing esoterica,"<sup>16</sup> the fact remains that this is an important issue that will continue to spawn inconsistent results in the federal judiciary until definitively resolved.<sup>17</sup> The decision whether to group the counts can, moreover, dramatically impact the ultimate sentence that the defendant receives. To understand this potentially dramatic impact, one must first understand the procedure for determining total combined offense levels in cases of multiple count convictions and the integral role that the grouping decision plays in this determination.

Pursuant to section 3D1.1(a), there is a three-step procedure for determining offense levels in cases of multiple count convictions.<sup>18</sup> First, all counts should be separated into groups of closely related counts by applying the rules specified in section 3D1.2.<sup>19</sup> Second, the count with the highest offense level within each group of convictions is used to determine that group's offense level pursuant to section 3D1.3.<sup>20</sup> Third, if there is more than one group, a total combined offense level must be calculated in accordance with the rules set forth in section 3D1.4.<sup>21</sup> Under this section, the group with

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to him or to surrender a legal right." BLACK'S LAW DICTIONARY 660 (6th ed. 1990). This generic definition is appropriate because, while the various fraud crimes are statutorily distinct, the distinction rests only in the manner or method by which the crime is carried out. The intent and harm of each crime is, at least in the abstract, identical. Likewise, "money laundering" is a term that encompasses more than one particular crime. For example, the federal money laundering statutes, 18 U.S.C. §§ 1956-57, contain provisions for eleven different types of laundering activity. For the purposes of this Note, "money laundering" can be defined generally as "the process by which one conceals the existence, illegal source, or illegal application of income, and disguises that income to make it appear legitimate." Jason Schuck & Matthew E. Unterlack, *Money Laundering*, 33 AM. CRIM. L. REV. 881, 881 (1996) (citation omitted).

While the Note utilizes the generic definitions of these terms, this is not meant to suggest that the specific statutes are not important in determining the appropriate sentence under the Guidelines. Indeed, the Guidelines draw distinctions based on which statute is violated. For example, the money laundering guideline provides for a higher base offense level if the defendant is convicted under section 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A), but a lower level if the conviction is under any of the other provisions. See 18 U.S.C.A. app. § 2S1.1. Nevertheless, these considerations do not change the substantive analysis of section 3D1.2. Where necessary to accurately illustrate a particular proposition, the Note will refer to specific statutory provisions.

16. Paul C. Rauser, *Split Widens in Circuits Over 'Grouping' Under Guidelines*, 7 No. 4 MONEY LAUNDERING L. REP. 1, 6 (1996).

17. See *supra* note 12.

18. See 18 U.S.C.A. app. § 3D1.1(a).

19. See *id.* § 3D1.1(a)(1).

20. See *id.* § 3D1.1(a)(2).

21. See *id.* § 3D1.1(a)(3).

the highest offense level is assigned a value of one "Unit."<sup>22</sup> The other groups are then assigned a certain number of "Units" based on their level of seriousness in relation to the group with the highest offense level.<sup>23</sup> Finally, the Units are added together and are used to increase the offense level of the group with the highest offense level.<sup>24</sup>

Thus, as the critical first step, the grouping decision plays an important role in the sentence ultimately handed down. The actual effect of the grouping decision on the defendant's sentence, however, is less clear. Intuitively, grouping would appear to benefit the defendant by shortening the length of the sentence. This is not always true, however: in some cases, the defendant's sentence will actually be *increased* by grouping the counts.

This apparent anomaly is the subject of discussion in *United States v. Napoli*.<sup>25</sup> The court cites the example of a defendant who fraudulently obtains \$1,000,000 from multiple victims but launders only \$100,000 of that money.<sup>26</sup> If the counts are not grouped, the defendant's fraud count is assigned a total offense level of 19 based on section 2F1.1,<sup>27</sup> while the money laundering count is assigned a total offense level of 20 based on section 2S1.1(a)(2).<sup>28</sup> The total

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22. See *id.* § 3D1.4(a).

23. See *id.* § 3D1.4.

24. See *id.* To avoid confusion, it should be noted that multiple counts of conviction will always be "combined" under this section. In other words, "grouping" and "combining" are distinct species under the Guidelines. Moreover, a "group" may be comprised of a single count. See *id.* § 3D1.2, Commentary, Application Note 7. For a relevant example, consider the case of a defendant who is convicted of two counts, one for fraud and one for money laundering. If the two counts are not grouped, then there will be two separate one-count groups. These one-count groups will then be "combined" under section 3D1.4 to produce the combined offense level.

25. 179 F.3d 1, 12 (2d Cir. 1999).

26. See *id.*

27. See *id.* To understand how the fraud count is assigned a total offense level of 19, one must refer to section 2F1.1, which is the guideline that applies to fraud convictions. Under this guideline, the offense is initially assigned a base level of six; two levels are then added because there was more than one victim. Finally, 11 levels are added because the loss was more than \$800,000 but less than \$1,500,000. See 18 U.S.C.A. app. § 2F1.1.

28. See *id.* As noted above, the federal money laundering statute is found in two sections of the United States Code, 18 U.S.C. §§ 1956-57. See *supra* note 15. The specific section under which the defendant was convicted is important in determining the proper offense level because different guidelines apply to each section. Moreover, different base offense levels apply depending on the subsection under which the defendant was convicted. Thus, in order for section 2S1.1 to apply and for the base offense level to be 20, the example

combined offense level under section 3D1.4 is 22.<sup>29</sup> Conversely, if the counts are grouped under section 3D1.2(d), the offense level is based on the aggregated quantity of the harm (i.e., \$1,100,000) in accordance with section 3D1.3(b). Pursuant to section 2S1.1, the base offense level is 20; the base level is then increased by five because the value of the harm exceeded \$1,000,000, thereby resulting in a total combined offense level of 25.<sup>30</sup> Thus, in this particular case, the defendant would benefit from a decision *not* to group the counts.

The example cited above is indicative of the primary problem created by the lack of clarity in section 3D1.2. The problem, quite simply, is *uncertainty*. Neither the defendant nor the prosecutor can accurately determine the probable sentence which ultimately will be handed down by the trial judge.<sup>31</sup> Even in the circuits which have considered this issue, the courts' opinions were generally more fact-specific than precedent setting.<sup>32</sup> Indeed, none of the Federal Appeals Courts have established a per se rule either requiring or disallowing the grouping of money laundering and fraud counts.

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requires that two assumptions be made. First, assume that the defendant was convicted under section 1956. Second, assume that the defendant was *not* convicted under section 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A). Based on these assumptions, the total offense level for the money laundering count is 20; there is no increase because the value of the funds laundered did not exceed \$100,000. See 18 U.S.C.A. app. § 2S1.1.

29. The total combined offense level of 22 is determined by taking the offense level applicable to the group with the highest offense level, which in this case is the money laundering level of 20, and increasing that level by two. The two-level increase is a result of the number of "units" assigned to the groups. In this case, the money laundering group has the highest offense level and is therefore assigned one unit. The fraud group is one level less serious than the money laundering group (i.e., a level of 19) and is therefore assigned one unit. Based on the table in section 3D1.4, two units requires an increase of two levels. See 18 U.S.C.A. app. § 3D1.4.

30. See 18 U.S.C.A. app. § 2S1.1.

31. This uncertainty presumably impacts the decision of whether to plea bargain, and, in the event of plea negotiations, makes it difficult for both the prosecutor and the defense attorney to determine a reasonable negotiating range. Although controversial, plea bargaining is generally acknowledged to be an effective method for reducing judicial costs and enhancing judicial efficiency. Guilty pleas account for approximately ninety percent of the convictions in the federal system. See THOMAS W. HUTCHISON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* 1325 n.1 (2000) (citing the U.S. Sentencing Commission's 1997 sourcebook of Federal Sentencing Statistics). Inconsistent interpretations of section 3D1.2 could potentially undermine this process, lending further credence to the argument that this issue must be definitively resolved.

32. See *supra* note 12.



In sum, the issue is of substantial present and future importance. Before proceeding with the discussion of the cases and the analysis of section 3D1.2, it is necessary to briefly review the background of the Sentencing Guidelines, including the underlying policy rationale for their implementation.

### BACKGROUND

Prior to the implementation of the Guidelines, prison sentences in the federal system were imposed in two stages.<sup>33</sup> The trial judge would first determine the maximum period the offender would spend in prison.<sup>34</sup> The United States Parole Commission would then decide what portion of the term the offender would actually serve.<sup>35</sup> Widely disparate sentences for individuals who had committed similar crimes resulted due to the considerable discretion permitted at both stages of the sentencing process.<sup>36</sup> The length of the sentence imposed by the trial court was essentially nonreviewable on appeal.<sup>37</sup> Congressional discontent with this system grew to such a level that it was termed a "national scandal."<sup>38</sup>

Congress eventually responded to the problem by passing the Sentencing Reform Act of 1984 (SRA).<sup>39</sup> The SRA created the United States Sentencing Commission<sup>40</sup> as an independent agency

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33. See Karen Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 HOFSTRA L. REV. 281, 282 (1979).

34. See *id.*

35. See *id.*

36. See *id.* at 284-94. The author notes that the Parole Commission attempted to mitigate sentencing disparity by implementing guidelines in 1973. See *id.* at 289.

37. See Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 506-08 (1999). Under the Guidelines, sentences are reviewed for an abuse of discretion. See *Koon v. United States*, 518 U.S. 81, 91 (1996).

38. See Edward M. Kennedy, *Symposium on Sentencing, Part I: Introduction*, 7 HOFSTRA L. REV. 1, 1 (1978); see also UNITED STATES SENTENCING COMMISSION: UNPUBLISHED PUBLIC HEARINGS 1986, at 3 (1988) (recording the opening remarks at the Public Hearing on Offense Seriousness as made by Chairman William W. Wilkins, Jr., who believed that sentencing disparity "undermines public confidence in our system, and . . . breeds disrespect for the rule of law").

39. 28 U.S.C. §§ 991-98 (1994).

40. The Commission is composed of seven voting and two nonvoting members. See 18 U.S.C.A. app. § 1A (West 1996). The members of the Commission are selected by the

in the judicial branch<sup>41</sup> and charged it with the responsibility of comprehensively reforming the sentencing process through the development of guidelines.<sup>42</sup> After extensive hearings, deliberation, and consideration of public comment, the Guidelines went into effect in November of 1987.<sup>43</sup>

Through the enactment of the SRA, Congress sought to achieve three primary objectives.<sup>44</sup> First, Congress desired "honesty in sentencing."<sup>45</sup> Under the pre-Guidelines system, judges would sentence the offender to a certain number of years, only to have the Parole Commission release the offender early in many cases.<sup>46</sup> As a result of this practice, offenders would often serve only about one-third of the sentence imposed by the court.<sup>47</sup> The granting of parole, however, was not inevitable: the decision was based upon a subjective determination by the Parole Commission at a future point in time. Such a system "sometimes fooled the judges, sometimes disappointed the offender, and often misled the public."<sup>48</sup> Thus, to restore credibility to the system, the SRA abolished parole.<sup>49</sup> Under the present law, the offender must serve

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President and confirmed by the Senate. See 28 U.S.C. § 991(a). Current United States Supreme Court Justice Stephen Breyer was among the initial commissioners. See TONRY, *supra* note 7, at 84.

41. The Commission's standing as an independent agency within the judicial branch was immediately challenged as an improper legislative delegation and violation of the separation of powers in *Mistretta v. United States*, 488 U.S. 361 (1989). The Supreme Court rejected the challenge, holding that the SRA did not violate the separation of powers because the judiciary is the branch of government that has traditionally been entrusted with substantive sentencing decisions and judicial rulemaking. See *id.* at 390-97. The Court also upheld the general constitutionality of the Guidelines in this case. See *id.* at 412. The Court's quick response to the constitutional challenge was necessary considering that between the initial implementation of the Guidelines and the decision in *Mistretta*, a period of 14 months, nearly 150 federal judges found the Guidelines to be unconstitutional and refused to follow them. See Kay A. Knapp & Denis J. Hauptly, *U.S. Sentencing Guidelines in Perspective: A Theoretical Background and Overview* 1, 16, in *THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE* (Dean J. Champion ed., 1989).

42. See 28 U.S.C. § 994.

43. See 18 U.S.C.A. app. § 1A2.

44. See *id.* § 1A3.

45. *Id.*

46. See Breyer, *supra* note 4, at 4.

47. See 18 U.S.C.A. app. § 1A3.

48. Breyer, *supra* note 4, at 4.

49. See *id.*

the sentence imposed by the court, except for a legislatively defined "good time" reduction.<sup>50</sup>

The second objective Congress sought to achieve was uniformity in sentencing.<sup>51</sup> As evidenced by numerous statistical studies, the lack of uniformity was a serious problem under the pre-Guidelines system.<sup>52</sup> For example, in the Second Circuit, sentences could range from three years to twenty years for identical crimes.<sup>53</sup> Sentences also varied depending upon the region in which the offender was convicted.<sup>54</sup> Such results were inconsistent with notions of fairness and equity in a national criminal justice system. Certainly one could hardly argue that an offender who commits a federal crime in New York City should be treated more harshly or more leniently than an offender who commits the identical crime in Atlanta. Thus, the implementation of the Sentencing Guidelines was necessary to achieve uniformity throughout the federal system.

The final objective Congress sought to achieve was "proportionality in sentencing through a system that impose[d] . . . different sentences for criminal conduct of differing severity."<sup>55</sup> Certainly not all crimes are *exactly* the same simply because they violate the same statute.<sup>56</sup> Thus, penal sentences should be

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50. "Good time" has been defined as a "credit toward service of a sentence for satisfactory behavior." Deborah G. Wilson, *The Impact of Federal Sentencing Guidelines on Community Corrections and Privatization* 165, 168-69, in *THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE* (Dean J. Champion ed., 1989) (quoting the U.S. Sentencing Commission, 1987d; ch. 229 sec. 3624(b)). The "good time" provision allows offenders who are not serving life sentences to accrue a maximum 54 day credit annually; if the maximum credit is earned each year, the sentence will be reduced by approximately 15 percent. *See id.* at 169. Credits are awarded for compliance with prison rules and regulations and thus are intended primarily to motivate the offenders to abide by the rules. *See id.* at 168-69.

51. *See* 18 U.S.C.A. app. § 1A3.

52. *See* Breyer, *supra* note 4, at 4-5. Not everyone is convinced that the pre-Guidelines system was plagued by unwarranted disparities. At least two commentators have attacked both the methodology and conclusions of the studies. *See* KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 107-10 (1998). Stith and Cabranes also reject the notion that uniform sentencing "ought to be the paramount objective in criminal sentencing." *Id.* at 105.

53. *See* Breyer, *supra* note 4, at 5.

54. *See id.*

55. 18 U.S.C.A. app. § 1A3.

56. For example, a phone scam that nets \$1,000,000 and harms 5,000 victims is substantially different than a phone scam that nets \$1,000 and harms one victim. Even though both scams constitute wire fraud, hence violating the same statute, they can hardly

tailored, at least to some degree, to the particular facts of the crime. Reconciling the second and third objectives, however, proved a difficult task when developing the Guidelines.<sup>57</sup> Simply put, a system of uniformity would have destroyed proportionality because such a system fails to take into account the myriad of special circumstances surrounding particular crimes.<sup>58</sup> Conversely, a system that granted judges broad discretion to consider the various circumstances of each crime would undermine uniformity because judges would inevitably exercise their discretionary powers in different ways.<sup>59</sup> Ultimately, the Commission attempted to balance these two objectives by establishing broad categories for each crime and subcategorizing a list of relevant distinctions.<sup>60</sup>

The end result of the SRA was, of course, the Sentencing Guidelines. Each section is relatively detailed and is supported by official commentary. As with any statute, however, careful drafting and detailed commentary cannot prevent disputes as to intended meaning.<sup>61</sup> This inevitable dispute over meaning has been dramatically illustrated by the divergent approaches to whether money laundering and fraud should be grouped as related counts. Accordingly, the discussion turns to the cases in which the Federal Courts of Appeals have considered this issue.

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be termed equivalent crimes deserving of similar punishment. This difference in degree should be distinguished from cases of sentencing disparity, in which *identical* crimes are punished differently. An example of sentencing disparity would be different punishments for two individuals who had defrauded substantially the same number of victims for roughly equal amounts of money.

57. See 18 U.S.C.A. app. § 1A3.

58. See *id.*

59. See *id.*

60. See *id.* The Commission noted that a "system tailored to fit every conceivable wrinkle of each case would quickly become unworkable." *Id.* Thus, the subcategories omit certain distinctions that some may consider important. See *id.*

61. Faced with this reality, the Sentencing Commission should adopt the per se rule proposed in this Note. Unlike present section 3D1.2, the per se rule could be easily drafted to avoid any ambiguity. The rule would simply state: "money laundering and fraud counts *shall not* be grouped under any circumstances." The words "shall not" are emphasized in order to foreclose any argument that such a rule is discretionary, as would be the case if the phraseology was "may not." For a complete discussion of the proposed per se rule, see *infra* notes 131-39 and accompanying text.

## A SURVEY OF THE CIRCUIT SPLIT

Under section 3D1.2, "[a]ll counts involving substantially the same harm shall be grouped together into a single Group."<sup>62</sup> Counts are considered to involve "substantially the same harm" if they meet any one of four criteria set out as subsections in the Guideline.<sup>63</sup> Thus, the issue to be resolved in each of the cases was whether money laundering and fraud came within the meaning of "substantially the same harm" as that phrase is defined in subsections (a)-(d).<sup>64</sup> Of the ten circuits that have considered the issue, five have held that the counts should not be grouped, whereas the other five have held that the counts should be grouped.<sup>65</sup>

In the most recent case, *United States v. Napoli*,<sup>66</sup> the Second Circuit held that money laundering and fraud should not be grouped under subsection (b) because they do not involve the same victim.<sup>67</sup> The court held that the victim of fraud is the person defrauded, while the victim of money laundering is society as a whole.<sup>68</sup> The court's rationale represents the majority view: the First,<sup>69</sup> Eighth,<sup>70</sup> and Tenth<sup>71</sup> Circuits have all held that money laundering and fraud involve different victims. Only the Fifth

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62. 18 U.S.C.A. app. § 3D1.2.

63. *Id.* § 3D1.2(a)-(d). For the complete text of this section, see *supra* note 8. It is not clear whether the court can group counts together only if one of the subsections applies. For example, in a case where the court may find grouping appropriate even though the counts do not specifically fall under any of the subsections, the Sentencing Guidelines do not provide any guidance as to whether such grouping would be appropriate. Nevertheless, this may be a moot point as there does not appear to be any case law on this issue. See HUTCHISON ET AL., *supra* note 31, at 966 (authors' comments).

64. Because money laundering and fraud are two distinct crimes, thereby involving two distinct acts, subsection (a) is inapplicable. Subsection (a) applies only when the crimes involve the same act. Thus, the courts properly have not considered this subsection in money laundering and fraud cases.

65. See *supra* note 12.

66. 179 F.3d 1 (2d Cir. 1999).

67. See *id.* at 7.

68. See *id.*

69. See *United States v. Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993).

70. See *United States v. O'Kane*, 155 F.3d 969, 972 (8th Cir. 1998).

71. See *United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995).

Circuit, in *United States v. Leonard*,<sup>72</sup> has taken a contrary view.<sup>73</sup> In *Leonard*, the court held that the defendants' money laundering activity perpetuated the fraudulent scheme, thereby allowing the defendants to defraud more victims.<sup>74</sup> Thus, the victims of the fraud were de facto victims of the money laundering.<sup>75</sup>

Interpretation of subsection (d) has also proved to be fertile ground for disagreement. The Second,<sup>76</sup> Eighth,<sup>77</sup> Ninth,<sup>78</sup> and Tenth<sup>79</sup> Circuits have held that grouping is not appropriate under this subsection because money laundering and fraud involve different types of harms. As noted in *United States v. Hildebrand*, "[f]raud sentences are based on the *amount of loss* to victims," while "[m]oney laundering sentences are based on the *value* of the money laundered."<sup>80</sup>

The Fourth,<sup>81</sup> Seventh,<sup>82</sup> and Eleventh<sup>83</sup> Circuits have taken a different view, holding that money laundering and fraud should be grouped under subsection (d). In *United States v. Wilson*, the court held that the offense level for both crimes is measured by the total amount of harm or loss.<sup>84</sup> The court did not address the apparent distinction between *loss* and *value*, focusing instead on the close relation between money laundering and fraud under the facts of the case.<sup>85</sup> The close relation between the two counts was also the basis for the Eleventh Circuit's decision in *United States v. Mullens*, in

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72. 61 F.3d 1181 (5th Cir. 1995).

73. In *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), the Seventh Circuit discussed the "same victim" argument without expressly referring to subsection (b). The court held that, under the facts of the case, the victims of the fraud were also the victims of the money laundering. *See id.* at 283-84.

74. *See Leonard*, 61 F.3d at 1186.

75. *See id.*

76. *See United States v. Napoli*, 179 F.3d 1, 7 (2d Cir. 1999).

77. *See United States v. Hildebrand*, 152 F.3d 756, 763 (8th Cir. 1998).

78. *See United States v. Taylor*, 984 F.2d 298, 302 (9th Cir. 1993).

79. *See United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992).

80. *Hildebrand*, 152 F.3d at 763 (emphasis added); *accord Johnson*, 971 F.2d at 576. For a complete discussion of this distinction, see *infra* text accompanying notes 129-30.

81. *See United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997).

82. *See United States v. Wilson*, 98 F.3d 281, 283 (7th Cir. 1996).

83. *See United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995).

84. *See Wilson*, 98 F.3d at 283.

85. *See id.* at 282-84.

which the court called the two counts "integral cogs in continuing the scheme."<sup>86</sup>

Subsection (c) has received significantly less attention from the courts than subsections (b) and (d). In fact, the First Circuit is the only court to expressly analyze the grouping of money laundering and fraud counts under this subsection. In *United States v. Lombardi*,<sup>87</sup> the court held that grouping was not appropriate because the conduct involved in fraud is not treated as a specific offense characteristic in the money laundering guideline.<sup>88</sup> As the court explained, the conduct involved in the fraud (i.e., the acts plus the intent to deceive) was not equivalent to the specific offense characteristic (i.e., knowledge of the money's source) in the money laundering guideline.<sup>89</sup>

In sum, the cases prove that there is considerable doubt as to the proper treatment of money laundering and fraud under section 3D1.2. Moreover, it is difficult to derive either black letter law or precedent from the opinions because they are, as to be expected, bound to the facts of the underlying cases.<sup>90</sup> Thus, section 3D1.2 is best understood through an analysis free of the restraints of a factual record.

### RESOLVING THE AMBIGUITY: THE CORRECT INTERPRETATION OF SECTION 3D1.2

Prior to analyzing the text of section 3D1.2, it is helpful to first understand the policy considerations underlying this section. The

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86. *Mullens*, 65 F.3d at 1564. In this case, the defendant "reinvested" substantial sums of the fraudulently obtained money back into the Ponzi scheme. *See id.* The court reasoned that this reinvestment was essential to continuing the scheme and was thus an "integral cog." *See id.*

87. 5 F.3d 568 (1st Cir. 1993).

88. *See id.* at 571.

89. *See id.*

90. As an example, consider the Eleventh Circuit's "integral cogs" theory in *Mullens*, 65 F.3d at 1564. One might wonder what the result would have been had the defendant not reinvested the proceeds of the fraud back into the fraudulent scheme. If the defendant had simply laundered the money by investing in stocks or bonds, for example, the court might have found grouping of the defendant's money laundering and fraud convictions to be improper. It certainly would be difficult to consider the counts "integral cogs" in such a case because the laundered funds would not have been used in any way to perpetuate the fraudulent scheme.

Commission's primary objective was to "minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence."<sup>91</sup> The Commission believed that conduct causing multiple harms should not necessarily result in a proportionate increase in the defendant's sentence, lest the "simplest offenses . . . lead to sentences of life imprisonment."<sup>92</sup> Conduct that causes multiple harms, however, does warrant a certain degree of additional punishment. In essence, the Commission had to balance the competing interests of the offender and society. Section 3D1.2, in combination with the other "multiple counts" rules, represents this balance: it "prevent[s] multiple punishment for substantially identical offense conduct," while "provid[ing] incremental punishment for significant additional criminal conduct."<sup>93</sup> Thus, the decision of whether to group particular counts must be understood in light of the policy choices considered by the Commission when drafting this rule. Policy considerations alone are, nevertheless, not a substitute for careful textual analysis of section 3D1.2, to which the discussion now turns.<sup>94</sup>

The guideline provides the analytical framework by expressly stating the three circumstances under which money laundering and fraud can properly be grouped.<sup>95</sup> Thus, the analysis logically proceeds within this framework.

### *Subsection (b)*

In order to group counts pursuant to subsection (b), two general elements must be met. First, the counts must involve the "same

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91. 18 U.S.C.A. app. § 1A (West 1996).

92. *Id.*

93. *Id.* § 3D (introductory commentary).

94. Of course, when the intended meaning of a rule is ambiguous on its face, and thus susceptible to contradictory interpretation, as is the case with section 3D1.2, policy statements are a necessary source in the quest to resolve the ambiguity. As one commentator stated, "[b]efore the true meaning of a statute can be determined where there is genuine uncertainty concerning its applications, consideration must be given to the problem in society to which the [Commission] addressed itself." NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION 15 (6th ed. 2000).

95. Subsection (a) is inapplicable to the analysis for the reasons previously cited. See *supra* note 64.



victim.”<sup>96</sup> Second, the counts must involve “two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.”<sup>97</sup> As noted above, the “same victim” requirement has been the subject of considerable discussion in the appellate courts, with the majority holding that money laundering and fraud involve different victims.<sup>98</sup> These decisions are based on the rationale that the victim of fraud is the person defrauded, while the victim of money laundering is society. This rationale finds considerable support both in the guideline itself and in a logical consideration of the crimes involved.

The guideline, naturally, is the starting point. While subsection (b) does not provide a definition of “victim,” the application notes following the rule provide insight into the Commission’s intended meaning of the word. Specifically, Application Note Two states that

“[V]ictim” is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims . . . the “victim” . . . is the societal interest that is harmed.<sup>99</sup>

Thus, under the guideline, the “victim” is either a person, which includes corporations and other organizations, or society.<sup>100</sup>

While the guideline provides the starting point, it does not ultimately answer the question of whether an offender who defrauds individuals and subsequently launders the proceeds of the fraud is guilty of harming the “same victim.” To answer this

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96. See 18 U.S.C.A. app. § 3D1.2(b).

97. *Id.*

98. See *supra* notes 62-75 and accompanying text.

99. 18 U.S.C.A. app. § 3D1.2, Commentary, Application Note 2.

100. From a purely theoretical standpoint, one could argue that society is always the victim of a criminal act. Certainly, the criminal justice system is founded on the premise that criminal acts are public wrongs because they offend the peace and are “detrimental to the welfare of society.” JOHN C. KLOTTER, CRIMINAL LAW 3 (3d ed. 1990). Thus, in one sense, we are all victims of criminal conduct. Nevertheless, we are at most indirect or secondary victims and Application Note Two makes clear that “victim” is not intended to refer to indirect or secondary victims. See 18 U.S.C.A. app. § 3D1.2, Commentary, Application Note 2. Thus, societal interests are implicated only in cases in which there is not an actual victim directly harmed by the conduct.

question, one must consider the nature of the substantive offenses involved and, more precisely, who is directly affected by the crime. In the case of fraud, it is quite obvious that the person most directly and seriously affected is the person defrauded. Thus, the victim of fraud is the person defrauded.

The difficulty, of course, is identifying the victim of money laundering. In *United States v. O'Kane*, the Eighth Circuit held that "money laundering harms society's interest in discovering and deterring criminal conduct, because by laundering the proceeds of crime, the criminal vests that money with the appearance of legitimacy," which in turn allows the "criminal unfettered, unashamed and camouflaged access to the fruits of those ill-gotten gains."<sup>101</sup> The Tenth Circuit, moreover, noted that "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'"<sup>102</sup> Certainly, it is logical to treat the two crimes as mutually exclusive. Once defrauded, the victim has been harmed; what the offender subsequently does with the money is irrelevant from the fraud victim's standpoint, except to the extent that the subsequent activity makes the money more difficult to recover in the form of restitution. In sum, the victimization is complete when the offender gains possession of the money.

Nevertheless, there is a somewhat persuasive counterargument in cases in which the money is reinvested in the fraudulent scheme, thereby perpetuating further fraudulent activity. There are two potential scenarios in such cases. One scenario involves an offender who uses the fraudulently obtained funds to promote and perpetuate the fraudulent activity, which in turn leads to more people being defrauded. This scenario essentially follows the facts of *United States v. Leonard*.<sup>103</sup> In that case, the court held that grouping was appropriate because there was a "group of targeted

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101. 155 F.3d 969, 972-73 (8th Cir. 1998).

102. *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) (quoting *United States v. Edgmon*, 952 F.2d 1206, 1214 (10th Cir. 1991)); see also Michael Zeldin, *Money Laundering Sentencing Guidelines*, in *THE SIXTH ANNUAL NATIONAL SEMINAR ON THE FEDERAL SENTENCING GUIDELINES* § 10, at 15 (1997) (noting that Congress intended that money laundering be punished separately from the underlying crime that gave rise to the proceeds).

103. 61 F.3d 1181 (5th Cir. 1995).

victims"<sup>104</sup> and therefore all the victims of the fraud were also victims of the money laundering. The court's reasoning, however, disregards the plain language of Application Note Two, which states that "there will be *one* person who is directly and most seriously affected by the offense and is therefore identifiable as the victim."<sup>105</sup> Certainly, section 3D1.2(b) does not contemplate the grouping of *victims*.<sup>106</sup> Thus, in cases in which the money defrauded from certain individuals is laundered and subsequently reinvested in the criminal scheme to defraud another group of individuals, the victims of the fraud and money laundering are clearly distinct and separate victims.

Under the second conceivable scenario, the analysis potentially becomes more difficult. For example, if a person is defrauded and part of that money is "reinvested" and used to defraud the *same person* a second time, one could argue that the individual has been victimized by both crimes. However, the pivotal question is whether the money laundering itself harmed the victim of the fraud. The inescapable conclusion is that it did not. The harm from the second fraud derives from the fraudulent acts, not the laundered money.<sup>107</sup> As stated in Application Note Two, ambiguities are to be resolved by identifying and grouping "counts involving substantially the same harm."<sup>108</sup> Thus, where the harm is distinct, the counts cannot be grouped.

The concept of "harm" is also important to an understanding of the second element of subsection (b). The counts must not only be part of "a single course of conduct with a single criminal objective," but must also "represent essentially one composite harm."<sup>109</sup> As noted above, fraud causes a personal injury to the individual defrauded, while money laundering invades societal interests. Essentially, the "same harm" requirement prevents the overly broad application of this guideline to substantially different counts

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104. *Id.* at 1186.

105. 18 U.S.C.A. app. § 3D1.2, Commentary, Application Note 2 (emphasis added).

106. *See id.* § 3D1.2(b).

107. The laundered money is essentially nothing more than a tool used to commit the second fraud. This would be similar to an individual using a gun stolen during one burglary to commit a second burglary.

108. 18 U.S.C.A. § 3D1.2.

109. *Id.*, Commentary, Application Note 4.

that happen to be connected by a single objective and source of conduct.

The rationale behind this requirement becomes manifestly clear by considering the following example. A crack addict is in desperate need of a "fix" but has no money. To obtain the cash necessary to buy the drugs, the addict robs a convenience store. Immediately after the robbery, the addict walks outside and purchases crack from a street dealer. The addict is then arrested, charged, and convicted of robbery and drug possession. Under the facts of this example, both the robbery and the drug possession are linked by a common objective and course of conduct. Grouping would, nevertheless, be inappropriate because the counts involve different harms.<sup>110</sup>

In sum, money laundering and fraud should not be grouped under subsection (b). While the two crimes may, in many cases, be part of a single criminal scheme, they cause different harms to different victims and thus fall outside the scope of subsection (b).

### *Subsection (c)*

Subsection (c) permits grouping when "one of the counts embodies conduct that is treated as a specific offense characteristic in . . . the guideline applicable to another of the counts."<sup>111</sup> The Sentencing Commission provided guidance for when this subsection should be used by noting that "when conduct that represents a separate count . . . is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an

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110. This also serves to refute the "but for" theory of *United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995). In *Mullens*, the court held that "[w]ithout the fraud there would have been no funds to launder." *Id.* at 1564. This is essentially another way of saying that the money laundering and fraud are part of a single course of conduct with a single objective. Applying this theory to the example, one could say that "but for" the robbery, there would have been no money to buy drugs, and hence no conviction for drug possession. Moreover, the "but for" theory would effectively subsume the money laundering statute into the underlying offense that was the source of the funds. There will, of course, never be money to launder without the commission of an underlying offense to generate the money. Thus, the "but for" theory sweeps too broadly and must be reined in by adherence to the "same harm" standard.

111. 18 U.S.C.A. app. § 3D1.2(c).

aggravating factor."<sup>112</sup> The express purpose of this subsection was to prevent "double counting" of offense behavior."<sup>113</sup>

As previously noted, the First Circuit, in *United States v. Lombardi*,<sup>114</sup> is the only federal appellate court to have considered this issue. In *Lombardi*, the defendant argued that the conduct embodied in the fraud counts were the fraudulent acts; the specific offense characteristic in the money laundering count was knowledge of the funds' source.<sup>115</sup> By committing the fraudulent acts, the defendant obviously had knowledge of the funds' source. Although this was a novel argument, the court properly recognized the defendant's misreading of subsection (c).<sup>116</sup> The fraudulent acts (i.e., the "conduct") are not the same thing as knowledge of the funds' source (i.e., the specific offense characteristic). In essence, "it is the knowledge of the fraud, not the fraud itself, that enhances the sentence"<sup>117</sup> under the money laundering guideline. Moreover, subsection (c) applies only when the "offenses are closely related."<sup>118</sup> For the reasons cited above<sup>119</sup> and below,<sup>120</sup> money laundering and fraud are distinct offenses and therefore are not closely related.

Subsection (c) will likely continue to receive comparatively little attention in the federal courts. Certainly, the theory employed by the defendant in *Lombardi* is limited to a narrow scope of cases: those cases in which the defendant is convicted under 18 U.S.C. § 1957 for money laundering and the underlying offense do not involve the "manufacture, importation, or distribution of narcotics or other controlled substances."<sup>121</sup> By contrast, subsection (d) has received substantial attention by the federal courts.

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112. *Id.* § 3D1.2, Application Note 5.

113. *Id.*

114. 5 F.3d 568 (1st Cir. 1993).

115. *See id.* at 571.

116. *See id.*

117. ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 530 (1997).

118. 18 U.S.C.A. app. § 3D1.2, Commentary, Application Note 5.

119. *See supra* notes 96-110 and accompanying text.

120. *See infra* notes 122-30 and accompanying text.

121. 18 U.S.C.A. app. § 2S1.2(b)(1)(A).

*Subsection (d)*

The relevant part of subsection (d) states that counts are to be grouped "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm."<sup>122</sup> At first blush, this would appear to require the grouping of money laundering and fraud counts. Without question, subsection (d) provides the strongest foundation for the grouping argument.<sup>123</sup> This is true for at least two reasons.

First, the fraud and money laundering guidelines are specifically listed as guidelines "to be grouped" under subsection (d).<sup>124</sup> Second, the offense level for both the fraud and money laundering guidelines appear to be based on a monetary valuation of the harm or loss. While initially persuasive, these arguments ultimately are refuted by closer analysis.

As the courts that have grouped the counts under this subsection have readily acknowledged, the fact that the fraud and money laundering guidelines appear on the list of counts to be grouped does not make grouping automatic.<sup>125</sup> Rather, it is merely a listing of counts that *may* be appropriate for grouping. The overriding requirement is that the offenses be of the "same general type."<sup>126</sup> Application Note Six explains that the phrase "same general type" "is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud."<sup>127</sup> While it is instructive to note that money laundering is absent from this list, this is hardly dispositive of the issue. An examination of the phrase

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122. *Id.* app. § 3D1.2(d).

123. *But see* HUTCHISON ET AL., *supra* note 31, at 973 (arguing that grouping would be inappropriate under subsection (d) because money laundering offenses are not assessed using similar tables as are other offenses, and it would therefore be impossible to aggregate the amount of money involved).

124. 18 U.S.C.A. app. § 3D1.2(d); *see also* United States v. Wilson, 98 F.3d 281, 283 (7th Cir. 1996) (stating that "[i]t is noteworthy that subsection (d) . . . identifies" money laundering and fraud as offenses to be grouped); United States v. Mullens, 65 F.3d 1560, 1564 (11th Cir. 1995) (noting that both money laundering and fraud appear on the list of counts to be grouped).

125. *See* Wilson, 98 F.3d at 283 (citing United States v. Harper, 972 F.2d 321, 322 (11th Cir. 1992)).

126. 18 U.S.C.A. app. § 3D1.2(d), Commentary, Application Note 6.

127. *Id.*

"same general type" in light of the examples supplied by the Commission is more telling.

A relevant example is the following: a "defendant is convicted of five counts of mail fraud and ten counts of wire fraud. . . . All fifteen counts of fraud are to be grouped together."<sup>128</sup> In this example, the counts are clearly of the "same general type" because they all involve a monetary objective achieved through deceptive conduct. Similarly, if a defendant was convicted of five counts of transaction money laundering and five counts of transportation money laundering, all ten counts presumably should be grouped together because they are of the "same general type." Moreover, by merging the examples, one can see how section 3D1.2(d) should operate in a case involving both fraud and money laundering. For example, suppose a defendant is convicted of five counts of mail fraud and five counts of transaction money laundering. The five counts of fraud should all be grouped as one, while the five counts of money laundering should all be grouped as one. This is as far as the grouping process should go, however, leaving the court with *two separate* groups to combine under section 3D1.4. Such a conclusion appears to be the correct interpretation of subsection (d), especially in light of the fact that money laundering and fraud actually measure the amount of harm in different ways.

As noted above, proponents of grouping argue that money laundering and fraud measure harm in similar ways because both base the offense level on the amount of money involved. *Hildebrand*,<sup>129</sup> however, recognized an important distinction between the guidelines for the two crimes. The court noted that "[f]raud sentences are based on the amount of *loss* to the victims [while] [m]oney laundering sentences are based on the *value* of the money laundered."<sup>130</sup> The difference between *loss* and *value* can best be explained by an example. Consider the following facts: a defendant is convicted of fraud for misrepresenting the value of a ring because he claimed it was a diamond ring worth \$10,000 when it was actually a cubic zirconia ring worth \$100. The defendant sold the ring to the victim for \$10,000 and immediately laundered the

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128. *Id.*

129. 152 F.3d 756 (8th Cir. 1998).

130. *Id.* at 763 (emphasis added).

sale proceeds by investing in securities. The *value* of the money laundered is \$10,000, while the *loss* from the fraud is only \$9,900 because the victim received \$100 worth of property. In other words, the *loss* represents the amount the ring was overvalued. Thus, while the offense levels for both the money laundering and fraud guidelines are based on a monetary amount, the two guidelines measure that amount in distinctly different ways.

In the final analysis, money laundering and fraud are distinct crimes that simply do not fit under the grouping rules of section 3D1.2. It is time to establish a *per se* rule that mandates that money laundering and fraud never be grouped together for sentencing purposes.

### ESTABLISHMENT OF THE PER SE RULE

In establishing such a rigid rule as the one proposed here, a necessary first step is to define precisely the scope of the rule. The rule, quite simply, would mandate that fraud counts be treated separately from money laundering counts *under all facts and circumstances*.<sup>131</sup> The rule would be directed only to the grouping decision itself and, thus, would have no effect on either the application of the fraud guideline to the fraud count or the application of the money laundering guideline to the money laundering count.<sup>132</sup> Courts would apply the rule as a matter of law, thereby obviating the need for a fact-specific inquiry.

There are at least three compelling justifications for establishing this rule. First, the current circuit split would be resolved by such a rule. While circuit splits are, of course, quite common, there

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131. One could argue that the rule proposed in this Note is nothing more than piecemeal reform that does not address the many other interpretive problems that have arisen under the Guidelines. See STITH & CABRANES, *supra* note 52, at 92-93 (listing a number of interpretive difficulties with various sections of the Guidelines). This is certainly a valid criticism for those who believe that the Guidelines require comprehensive reform. See, e.g., *id.* at 143-77. Short of such a complete overhaul, however, the proposed rule effectively resolves one serious issue that currently plagues the federal judiciary. The proposed rule, moreover, is precisely the kind of reform that is needed: it is clear, precise, and easily applied. Indeed, offense-specific amendments may be even more effective than comprehensive reform because such reform would likely require redrafting, which would undoubtedly lead to a whole new set of disputes concerning interpretation.

132. The counts would, of course, still be *combined* under section 3D1.2. See *supra* note 24 and accompanying text.



comes a point at which resolution is required. In the case of section 3D1.2, the time has arrived. As previously noted, of the thirteen federal circuits, ten have considered the issue.<sup>133</sup> Unable to find common ground, the courts have split evenly, with five circuits holding that the counts ought to be grouped, and five holding that they should not be grouped.<sup>134</sup> Such a result clearly is not consistent with the role of the federal judiciary. Indeed, the federal laws are national laws and are intended to be applied equally throughout the country. When it becomes apparent that this goal is not being achieved, as is the case here, intervention is necessary.

The second reason necessitating the establishment of a *per se* rule is the prevention of judicial waste and inefficiency. Consider the facts of the cases decided by the appeals courts. In many cases, the government does *not* want the money laundering and fraud counts to be grouped because nongrouping will produce a longer sentence;<sup>135</sup> in other cases, the government *does* want the counts to be grouped because this will produce a longer sentence.<sup>136</sup> The reverse, of course, is true from the defendant's perspective: grouping is desirable when it produces a shorter sentence, but is undesirable when it produces a longer sentence. The absurdity is that a federal prosecutor may argue for grouping in one case, but return to the same court the next day and argue against grouping in another case.<sup>137</sup> The litigation necessary to resolve this issue in individual cases requires the expenditure of valuable resources in an already overburdened judicial system.

Finally, a *per se* rule is necessary to carry out the express policy objectives of the Sentencing Reform Act, namely, uniformity and

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133. See *supra* note 12.

134. See *id.*

135. See *United States v. Napoli*, 179 F.3d 1, 7 (2d Cir. 1999); *United States v. O'Kane*, 155 F.3d 969, 971 (8th Cir. 1998); *United States v. Wilson*, 98 F.3d 281, 283 (7th Cir. 1996); *United States v. Mullens*, 65 F.3d 1560, 1563 (11th Cir. 1995); *United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995); *United States v. Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993); *United States v. Taylor*, 984 F.2d 298, 299 (9th Cir. 1993); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992).

136. See *United States v. Hildebrand*, 152 F.3d 756, 762-63 (8th Cir. 1998); *United States v. Walker*, 112 F.3d 163, 166-67 (4th Cir. 1997); *United States v. Leonard*, 61 F.3d 1181, 1185 (5th Cir. 1995).

137. At least one court has expressed its dissatisfaction with such conduct. See *Leonard*, 61 F.3d at 1186 n.5 (noting that the government had only "technically" avoided inconsistency in its arguments before the court).

proportionality in sentencing. An ad hoc approach to the Sentencing Guidelines effectively returns the federal judiciary to the pre-Guidelines system of inconsistency and inequity. Even if one were to accept the proposition that individuals who commit the same crimes ought to be sentenced differently because of other factors, such as socioeconomic status,<sup>138</sup> sentencing should not depend solely on the jurisdiction in which the criminal was sentenced. A violation of the federal fraud and money laundering statutes is neither more nor less of a crime whether it is committed in the Second Circuit or the Fourth Circuit. Nevertheless, this is the current state of affairs. Depending upon the jurisdiction, an individual may receive a sentence that is disproportionately harsh or disproportionately lenient.<sup>139</sup> Without implementation of the per se rule, the federal judiciary will continue to impose sentences that are not uniform throughout the system.

### CONCLUSION

In the American criminal justice system, there are two general parts to every criminal trial in which a defendant is found guilty—the culpability phase, in which guilt or innocence is decided, and the sentencing phase, in which an appropriate punishment is determined. The importance of the second phase, the sentencing decision, cannot be overstated. Indeed, while a conviction has several important consequences (i.e., public stigmatization), its chief consequence is that it enables the court to impose punishment on the defendant.

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138. See, e.g., TONRY, *supra* note 7, at 15 (suggesting that socioeconomic status justifies disparate sentences).

139. It should also be noted that the per se rule is neither “pro-defendant” nor “anti-defendant,” and is therefore not susceptible to the criticism that the Guidelines have made sentences harsher across the board. See *id.* at 72. In some cases, the defendant will receive a longer sentence by not grouping the two counts, while in other cases he will receive a shorter sentence. See *supra* notes 135-36 and accompanying text.

It is important to emphasize why sentences will differ when the counts are not grouped, lest the per se rule be attacked for destroying the very proportionality and uniformity that it purports to uphold. Specifically, sentences will differ because of differences in the *substantive nature of the defendants’ crimes* rather than because of inequitable application of the Guidelines. This point is most easily understood by referring back to the example cited in the *Napoli* case. See *supra* notes 25-30 and accompanying text.

Prior to 1987, a defendant in federal court was at the mercy of the judge who happened to be assigned to the case. There was little structure or guidance to the sentencing decision and, thus, there was little to rein in the judge's discretion.<sup>140</sup> The result was that, within the same federal courthouse, in courtrooms separated only by a common wall, two defendants convicted of similar crimes could be sentenced to starkly different punishments. Some punishments were too harsh, while others were too lenient.

The judges could hardly be blamed for such unjust results. Judges, like all people, have certain preexisting beliefs and prejudices that are shaped by a lifetime of experiences. Consciously or subconsciously, these beliefs inevitably influenced their sentencing decisions. Thus, it is hardly surprising that sentences varied so drastically from one courtroom to the next.

The implementation of the Sentencing Guidelines was intended to bring uniformity to the system. With a single set of guidelines for the entire federal judiciary, the days of disparate, disproportionate sentences should have been relegated to the status of a historical footnote. Indeed, "[t]he whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by the courts of appeals."<sup>141</sup> Unfortunately, while sentences as a whole have become more uniform and proportional, the misapplication of section 3D1.2 to fraud and money laundering convictions demonstrates that inequity still exists. The time has arrived for the Sentencing Commission, through an amendment to the Guidelines, or for the U.S. Supreme Court to resolve this issue.<sup>142</sup> Implementing the per se rule proposed in this Note would

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140. See Skrivseth, *supra* note 33, at 284-94.

141. STITH & CABRANES, *supra* note 52, at 78 (quoting Frank O. Bowman).

142. Based on the Supreme Court's holding in *Braxton v. United States*, 500 U.S. 344 (1991), the likelihood is that the Sentencing Commission will have to resolve the issue. The Court expressed its opinion that the Commission should have the primary responsibility of resolving conflicts among the circuit courts with respect to the statutory interpretation of the Guidelines, and, therefore, the Court should exercise restraint in granting certiorari in such cases. See *id.* at 348.

Interestingly, the Commission did make one attempt to resolve this issue. In 1995, the Commission submitted to Congress an amendment that would have revised substantially the money laundering guideline. Part of the recommended revision grouped money laundering with the offenses from which the laundered money was derived. See HUTCHISON ET AL., *supra* note 31, at 973. Congress, however, rejected the amendment because it would have allowed money laundering to be grouped with drug offenses. See Pub. L. No. 104-38, 109 Stat.

best serve the policy objectives of the Guidelines and would definitively resolve an issue that has split nearly the entire federal judiciary.

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334 (1995). The rejection of the amendment appears to signal that Congress would prefer that money laundering not be grouped with the underlying offense. Thus, while it is difficult to predict how Congress would vote on a hypothetical amendment, there appears to be a reasonably strong likelihood that the *per se* nongrouping rule would receive Congressional approval.