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UNSOPHISTICATED SENTENCING

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I. INTRODUCTION

Some articles focus on big issues, such as the proper purposes of sentencing, the debate between determinate and indeterminate sentencing, or the optimal allocation of authority between prosecutors and judges. This piece, written for the *Wayne Law Review* Symposium on white collar sentencing, tackles a concededly narrower topic: the "sophisticated means" enhancement for fraud offenses under Section 2B1.1(b)(10)(C) of the United States Sentencing Guidelines (USSG).[1] Over the past decade, the rate at which courts impose this enhancement in federal fraud cases has more than tripled, from approximately 2.9% of all fraud cases in 2005 to over 11% in 2013.[2]

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1. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(10) (2014). The Sentencing Commission recently voted to amend parts of this Guideline. See *infra* Part IV and notes 115–116.

2. *See infra* Table 1. This includes not only the application of the enhancement under Section 2B1.1, but also under the fraud guideline's predecessor, Section 2F1.1. The

Although the enhancement's effect on sentences is modest, amounting to an increase of 6–12 months' imprisonment for most defendants, its increasing prevalence ought to inspire interest among those tasked with mediating limited enforcement budgets and prison space.[3] Moreover, this case study is particularly timely in light of the Sentencing Commission's recent attempt to reform the primary guideline under which economic offenders are sentenced.[4] Indeed, the enhancement growth demonstrates the ways in which various sorting measures can gradually lose their ability to distinguish the worst offenders from the merely bad.

This Essay begins by briefly discussing the two-point enhancement for frauds that "involve[] sophisticated means."[5] It then demonstrates, using the Sentencing Commission's own data, the steady increase in the number of fraud sentences that include the enhancement.[6] After considering several justifications for the enhancement,[7] the Essay offers three possible explanations for this increase.[8] They include: (a) the criminal population has become more sophisticated since the

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Sentencing Commission's data did not begin breaking out data for this particular enhancement until 2005.

3. The United States Sentencing Commission (Commission or Sentencing Commission) has highlighted its intention "to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority." Proposed Priorities for Amendment Cycle, 79 Fed. Reg. 31409-01 (proposed June 2, 2014).

4. The Commission has been engaged in a multi-year study of Section 2B1.1. *See* Sentencing Guidelines for United States Courts, 78 Fed. Reg. 51820 (Aug. 21, 2013); *see also* Final Priorities for Amendment Cycle, 79 Fed. Reg. 49378 (Aug. 20, 2014). As part of its study, the Commission conducted a symposium in New York City on September 18–19, 2013, to discuss possible changes to Section 2B1.1. Transcripts and other materials related to the Symposium are available. *See United States Sentencing Commission Symposium on Economic Crime*, U.S. SENTENCING COMMISSION, http://www.ussc.gov/research-and-publications/research-projects-and-surveys/economic-crimes/united-states-sentencing-commissionsymposium-economic-crime (last visited May 25, 2015).

5. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(10) (2014). The manual provides in pertinent part: "If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels." *Id.* The Sentencing Commission has proposed an amendment that would narrow the enhancement's application to the defendant whose specific *conduct* involves sophisticated means. For discussion on this, see *infra* Part V and notes 115–116.

6. *See infra* Part III.

7. *See infra* Part IV.A.

8. *See infra* Part IV.B.

enhancement enactment;[9] (b) federal prosecutors have charged more sophisticated fraud crimes as a percentage of their overall docket;[10] and (c) courts, probation officers and prosecutors all have gradually widened their definition of what counts as sophisticated, thereby creating a type of sentencing creep,[11] wherein the enhancement no longer performs the guideline's intended function of distinguishing more serious offenses from lesser ones.[12]

The final section of this Essay addresses the policy implications of the foregoing discussion.[13] Enhancements such as those found in Section 2B1.1 are intended to guide federal judges in separating out merely bad behavior from much worse behavior.[14] If the Commission meant the sophisticated means enhancement to cull the *most* dangerous or *most* morally culpable fraud offenders from the rest of the herd, it may need to find different language to say so. Left intact, the enhancement is likely to become nearly as ubiquitous—and criticized—as its predecessor, the "more than minimal planning" enhancement.

II. THE 2001 FRAUD GUIDELINE REVISION AND THE SOPHISTICATED MEANS ENHANCEMENT

In 2001, after five years of receiving substantial input from numerous federal criminal justice constituencies, the Sentencing Commission overhauled the economic crime guidelines that pertained to fraud and theft offenses.[15] Sections 2F1.1 and 2B1.1, which previously

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9. *See infra* Part IV.B.1.

10. *See infra* Part IV.B.2.

11. Mission creep is a social science term describing the ways in which regulators gradually stray beyond their agency's prescribed mission. The term sentencing creep applies the general concept of mission creep to the sentencing context. For one author's recent critique of sentence creep at the state level, see Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. MICH. J.L. REFORM 645 (2014).

12. *See infra* Part IV.B.3.

13. *See infra* Part V.

14. The Guidelines are advisory, not mandatory. United States v. Booker, 543 U.S. 220, 245 (2005). Trial courts must impose a sentence in accordance with the general purposes of punishment laid out in 18 U.S.C.A. § 3553 (a) (West 2014). Although sentences may still be reviewed on appeal for "reasonableness," a sentence that applies the Guidelines and sentences the defendant within its recommended sentencing range is presumptively reasonable on appeal. Rita v. United States, 551 U.S. 338, 351 (2007).

15. For an excellent overview of the dynamics underlying the 2001 Economic Crime Package and the resulting Guidelines that were enacted, as well as the dynamics that led to further changes following passage of the Sarbanes-Oxley Act, see Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 38–47 (2001) [hereinafter Bowman, *The 2001 Federal*

had separately addressed fraud and theft offenses respectively, were consolidated into a single guideline, Section 2B1.1.[16] The "new" Section 2B1.1 featured a revised loss table that imposed higher penalties on offenses that involved high loss amounts and lower penalties for offenses that involved very low loss amounts.[17]

Notably, the Commission deleted from the consolidated guideline an enhancement that had previously applied to offenses involving "more than minimal planning" (MMP), in part because the enhancement had become so common.[18] As a result, the MMP enhancement no longer divided the "really sophisticated schemers from the mass of ordinary thieves."[19] The revised and consolidated guideline effectively incorporated MMP into the revised fraud loss table; its elimination therefore was neither intended nor perceived as a reduction in sentence for most fraud offenders.[20]

At the same time the Commission did away with MMP, it highlighted the "sophisticated means" enhancement, which had been added to the fraud guideline back in 1998, pursuant to Congress's directive in the Telemarketing Fraud Prevention Act.[21] The enhancement, which mirrored a similar enhancement already contained in the tax fraud guideline, Section 2T1.1, increased an offender's offense level by two whenever it appeared that the offense involved sophisticated means in

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Economic Crime Sentencing Reforms] and Frank O. Bowman, III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. CRIM. L.J. 373, 387–91 (2004) [hereinafter Bowman, *Sarbanes-Oxley Act and the Sentencing Guidelines Amendments*].

16. Bowman, *Sarbanes-Oxley Act and the Sentencing Guidelines Amendments*, *supra* note 15, at 388.

17. *Id.* at 389.

18. *Id.* at 407; *see also* John Steer, *The Sentencing Commission's Implementation of Sarbanes-Oxley*, 15 FED. SENT'G REP. 263, 264 (2003) (explaining that MMP had become "routinely applicable in nearly all fraud offenses" and "produced an inordinate amount of litigation in both the sentencing and appellate courts").

19. Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 499 (1998) [hereinafter Bowman, *Coping with "Loss"*].

20. United States v. Forchette, 220 F. Supp. 2d 914, 917-18 (E.D. Wis. 2002) (citing U.S. SENTENCING GUIDELINES MANUAL app. C (supp. 2001) (amendment 617)) ("[T]he enhancement has not really been abolished. Rather, in recognition of the fact that it was applied in more than eighty percent of fraud cases, the Commission simply incorporated it into the § 2B1.1 loss table, obviating the need for judicial fact-finding and avoiding the potential overlap with the 'use of sophisticated means' enhancement.").

21. *See* U.S. SENTENCING GUIDELINES MANUAL app. C (Supp. 1998), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1998/manual/APPCSUPP.pdf.

either the execution or concealment of the offense.[22] The enhancement also set a floor of twelve offense levels for any offense (even a very low-loss offense) meeting the definition of sophisticated.[23]

A close reading of the enhancement suggests that the Commission originally intended it to function as a catch-all, the third of three enhancements aimed at complex, or difficult to detect, conduct. Specifically, the Guideline provides: "If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense *otherwise involved sophisticated means* . . . ."[24]The placement of the sophisticated means enhancement at the end of this list is notable. The first two enhancements describe a narrow set of offenses: offenses in which the offender purposely "relocated" the scheme to evade law enforcement, and extraterritorial offenses, whose presence in foreign countries uniformly posed difficulties for enforcement authorities and therefore, by definition involved "a particularly high level of . . . complexity."[25]

But what of those cases that were neither extraterritorial, nor purposely relocated in order to evade authorities? What is a fraud offense that "otherwise involve[s]" sophisticated means?[26] A jurist might conclude that whatever falls within this group, it must be an offense at least as complex, with an offender as difficult to apprehend, as either the extraterritorial or multijurisdictional offenses that qualify for similar enhancements.[27] But the Guidelines' own "Application Note" following

22. *See* U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(b)(2) (2014). The Commission first suggested an enhancement for "sophisticated concealment," (see Amendment 576), but later broadened the enhancement's language to "sophisticated means" to adhere to Congress' directive in the Telemarketing Fraud Prevention Act of 1998. U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(b)(2) app. C (supp. 1998), *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1998/manual/APPCSUPP.pdf.

23. *See id.* § 2T1.1(b).

24. *Id.* § 2B1.1(10) (2014) (emphasis added).

25. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. background (2012).

26. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(10) (2014).

27. Such an approach would reflect the interpretive canon known as *ejusdem generis*. "[W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 586 (2008); *see also* Victoria's Secret Direct, LLC v. United States, 769 F.3d 1102, 1107 (Fed. Cir. 2014) (quoting Avenues Leather, Inc. v. United States, 178 F.3d 1241, 1244 (Fed. Cir. 1999)) (general phrase at end of list ought to reflect "same essential characteristics or purposes that unite the listed examples preceding the general term or phrase.").

Section 2B1.1 appears to reject this familiar interpretive approach.[28] Although the Note initially states that the enhancement applies to "especially complex or especially intricate offense conduct,"[29] it goes on to provide examples that promote a far broader application of the term.

> For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.[30]

Now, perhaps locating "the main office" of a fraudulent scheme in one state and carrying out the rest in another appeared particularly complicated back in 1998, when telemarketing schemes were salient and on both the legislature's and Commission's minds. Neither cell phones nor portable computers were as accessible or powerful as they are today, and perhaps the movement of assets through more than one bank account evinced particular sophistication and cunning back in the day. The use of multiple shells or fictitious entities might well have confused even veteran investigators and thereby delayed detection of certain frauds.

As the Supreme Court itself recently recognized, however, technology—particularly technology relating to the ways in which we use computers, the Internet, and telephones—has dramatically transformed the ways in which we conduct our personal and commercial business.[31] As a result, mere amateurs can easily undertake the conduct that society previously deemed so "sophisticated."

Today, setting up a virtual office in multiple states would require no more than a few clicks on the Internet;[32] opening one or several bank accounts online would be, in the words of one financial institution "fast,

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28. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.9(B).

29. *Id.*

30. *Id.*

31. Riley v. California, 134 S.Ct. 2473, 2490 (2014) ("Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception.").

32. *See* United States v. Brown, No. CIV. WMN-14-224, 2015 WL 1622034, at *1 (D. Md. Apr. 8, 2015) (describing a scheme in which the defendant "falsely held out that his companies had offices in several cities and abroad, when in fact, he was using virtual offices, telephone answering services, and mail forwarding services to mimic multiple offices").

easy, and secure";[33] and incorporating one or more entities as a corporation or limited liability company would not only be easy, but also fairly inexpensive, as numerous incorporation businesses now market their assistance over the web.[34] If sophistication is an absolute concept, linked to the usage of or interaction with multiple locations, accounts and corporate entities, then it is fair to say that a substantial number of those defendants who have transgressed one of the many federal fraud statutes have in fact used "sophisticated means." Indeed, the very concept of geographical boundaries embedded in the enhancement no longer makes sense. Perhaps some schemes really are "located" in New York or New Jersey or some foreign country; many others, however, are—and will increasingly continue to be—located primarily in some amorphous, virtual computing cloud.[35]

To put it mildly, during the past decade, the enhancement's Application Note has become obsolete. In the meantime, the enhancement's prevalence has steadily increased, as discussed in Part III below.

III. THE ENHANCEMENT'S GROWING POPULARITY: 2005–13

Over the past decade, the sophisticated means enhancement has become more prevalent. Consider Table 1 below, which aggregates the data found on the Commission's website.[36] Between 2005 and 2013, over

33. *See, e.g., Open a SunTrust Account*, SUNTRUST, https://www.suntrust.com/OpenAccount (last visited May 25, 2015); *see also* CITI.COM https://online.citibank.com/US/JRS/pands/detail.do?ID=AOProductSelection (last visited May 25, 2015) (advising customers to "apply now" "[w]ithout moving a muscle"); *FAQs: Applying for Bank Accounts*, BANK OF AMERICA, https://www.bankofamerica.com/deposits/manage/faq-applying-for-accounts.go (last visited May 25, 2015) (advising that customers may apply online for a checking, savings, CD or IRA account).

34. *See, e.g.*, COMPANY CORP., https://www.incorporate.com (last visited May 25, 2015) (incorporation site advertising "fast, simple" incorporations); Michael Simkovic & Benjamin S. Kaminetzky, *Leveraged Buyout Bankruptcies, The Problem of Hindsight Bias, and the Credit Default Swap Solution*, 2011 COLUM. BUS. L. REV. 118, 123 n.7 (2011) (citing rise of online and do-it-yourself incorporation sites that provide services for less than $200).

35. *Riley*, 134 S. Ct. at 2491 ("Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself.").

36. The information discussed in this Section was extracted from the Guideline Application Frequencies tab, found on the Sentencing Commission's website. *Guideline Application Frequencies*, U.S. SENTENCING COMM'N, http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies (last visited May 25, 2015). The Commission provides a frequency analysis for each fiscal year from 2013 through 2002. The Commission began reporting the "sophisticated means" enhancement contained in Sections 2B1.1(b)(10)(C) and 2F1.1(b)(6)(C) separately from

70,000 individuals were prosecuted and sentenced for fraud-related offenses.[37] Most of those individuals were sentenced under Section 2B1.1; some, whose crimes occurred prior to the overhaul of the economic Guidelines, were sentenced under Section 2F1.1, which contained its own identical "sophisticated means" enhancement.[38]

Over a nine-year period, the percentage of fraud defendants who have received a sophisticated means enhancement under either Sections 2B1.1 or 2F1.1 has more than tripled:

other enhancements (relocating the crime to a different jurisdiction and committing a substantial portion of the scheme from outside United States) in 2005. *Id.*

37. *See generally Guideline Application Frequencies*, U.S. SENTENCING COMM'N, http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies (last visited May 25, 2015).

38. Although a court ordinarily applies the Guidelines Manual in effect as of the date of sentencing, the court should apply an earlier manual if application of the new manual results in an ex post facto problem. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (2012). Accordingly, even after the enactment of Section 2B1.1 in 2001, a number of defendants continued to seek sentencing under the previous Guidelines Manuals, which sentenced fraud under Section 2F1.1. Each Guideline contains an identical enhancement for frauds involving "sophisticated means." *See generally Guideline Application Frequencies*, U.S. SENTENCING COMM'N, http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies (last visited May 25, 2015).

Table 1: Sophisticated Means from 2005-13

Year	Fraud Offenders Sentenced under 2B1.1 and 2F1.1[39]	Offenders Receiving Enhancement under 2B1.1 or 2F1.1	Percentage of Offenders Receiving Enhancement under Section 2B1.1	Percentage of Offenders Receiving Enhancement under 2B1.1 or 2F1.1[40]
2005	8060	232	2.9%	2.9%
2006	8089	302	3.6%	3.7%
2007	7777	387	4.3%	5.0%
2008	8370	420	4.7%	5.0%
2009	8058	507	6.2%	6.3%
2010	8427	601	7.1%	7.1%
2011	8561	813	9.4%	9.5%
2012	8748	837	9.6%	9.6%
2013	8416	982	11.7%	11.7%
Total	**74506**	**5081**	------	--------

Back in 2005, a tiny fraction of fraud offenders received the two-point enhancement under either §2B1.1 or §2F1.1.[41] Today, over 10% do,[42] and that number appears poised to grow in light of the manner in which courts routinely interpret the enhancement.

Over the years, a number of federal courts have held that the sophisticated means enhancement is warranted for conduct that is "repetitive" and "coordinated,"[43] that extends over a certain period of time,[44] that includes the use of pseudonyms, forgeries, or fake invoices,[45]

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39. These figures were calculated by adding the total number of defendants sentenced under Sections 2B1.1 and 2F1.1 as reported in the Sentencing Commission's *Use of Guidelines and Specific Offense Characteristics: Fiscal Year*, for each year from 2005–2013. Each of these reports can be found at the Guideline Frequencies tab on the Commission's website for each of these years, the "fiscal year" report was used. *Guideline Application Frequencies*, U.S. SENTENCING COMM'N, http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies (last visited Oct. 10, 2014).

40. These figures were calculated by adding the total number of defendants sentenced under both 2B1.1 and 2F1.1 for the respective year to obtain a denominator, and then adding the total number of defendants receiving "sophisticated means" enhancements under either Guideline enhancement to obtain a numerator. *Id.*

41. *See Guideline Application Frequencies*, *supra* note 37.

42. *Id.*

43. United States v. Bane, 720 F.3d 818, 826–27 (11th Cir. 2013) (relaying how defendant coordinated complex series of acts to accomplish health care fraud scheme).

44. United States v. Bistrup, 449 F.3d 873, 883 (8th Cir. 2006).

or that employs several bank accounts (often in someone else's name) to carry out the offense.[46] Sophisticated schemes need not be "brilliant" or even "intelligent," so long as they exhibit greater complexity than so-called ordinary frauds.[47] As the Eighth Circuit recently observed (apparently without irony): "'Sophisticated means' need not be highly sophisticated."[48] To prove that the enhancement truly has come full circle, one court has helpfully explained that the enhancement's application "is proper when the conduct shows a greater level of *planning* or concealment than a typical fraud of its kind."[49] Thus, the very enhancement that was intended to replace "more than minimal planning" now appears to apply to anything requiring "more than usual planning."

Some of the enhancement's growth may be attributable to the interpretive approach that many courts adopt. Because courts often evaluate the offender's scheme "viewed as a whole," for sophistication,[50] prosecutors have every reason to cite every aspect of the fraud, including even relatively simplistic behavior. By the same token, otherwise ordinary schemes can attain sophistication primarily because of their duration. Over time, the factors cited by the court upholding the enhancement in case "A" create fodder for the enhancement's application in case "B," which features a slightly different panoply of actions that holistically demonstrates the defendant's sophistication.

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45. United States v. Crosgrove, 637 F.3d 646, 667 (6th Cir. 2011) (enhancement appropriate for defendant who used pseudonym and issued fraudulent insurance certificates); United States v. Miell, 744 F. Supp. 2d 904, 941 (N.D. Iowa 2010) (opining that "the use of forged signatures and falsified or altered documents to support the fraud is sufficient, standing alone" to support a sophisticated means enhancement).

46. *See* United States v. Horob, 735 F.3d 866, 872 (9th Cir. 2013) (citing the defendant's use of multiple bank accounts and forged documents, as well as the fact that the defendant "manipulated several people to lie for him"); United States v. Clarke, 562 F.3d 1158, 1166 (11th Cir. 2009) (contending that there exists "no material difference between concealing income and transactions through the use of third-party accounts . . . and using a corporate shell or a fictitious entity to hide assets.").

47. "This argument confuses 'sophisticated' for 'intelligent.'" United States v. Fife, 471 F.3d 750, 754 (7th Cir. 2006) (rejecting the defendant's argument that a "dumb" scheme did not qualify for enhancement in tax fraud case).

48. United States v. Norwood, 774 F.3d 476, 480 (8th Cir. 2014).

49. United States v. Fumo, 655 F.3d 288, 315 (3d Cir. 2011) (quoting United States v. Landwer, 640 F.3d 769, 771 (7th Cir. 2011)) (emphasis added).

50. *See, e.g.*, United States v. Mahmud, 541 F. App'x 630, 636 (6th Cir. 2013) ("[E]ven though none of its component parts was especially intricate standing alone, the scheme as a whole was complex."); United States v. Jenkins, 578 F.3d 745, 751 (8th Cir. 2009); United States v. Jackson, 346 F.3d 22, 25 (2d Cir.2003) ("[E]ven if each step in the scheme was not elaborate, the total scheme was sophisticated in the way all the steps were linked together . . . .").

Not every court has moved in this direction. The Fourth Circuit, for example, recently admonished that the enhancement "does require more than just thoughtful or potentially successful planning" and overturned a lower court's application of the enhancement in a bank fraud case.[51] Among other things, the appellate court did not agree that forgeries and the use of a stolen identity evinced sufficient sophistication.[52] But this case suggests only that the enhancement, much like the MMP enhancement that preceded it, is likely to become the subject of inconsistent opinions and substantial litigation. Indeed, an earlier Fourth Circuit opinion, which affirmed application of the enhancement, cited familiar facts such as the duration of the defendant's scheme and the nature and extent of his lies to his victims.[53] Certainly, there exists no reason for prosecutors *not* to seek the enhancement whenever they can. The enhancement is so case-specific it is doubtful that any one court opinion will curtail its future application.

Oddly enough, the enhancement's tax evasion twin has not enjoyed the same statistical increase in popularity; this may be because courts already applied it more often in 2005, or because the enhancement in Section 2T1.1 applies to a much narrower category of criminal conduct.[54] Nevertheless, courts appear to interpret the tax-related enhancement as expansively as they interpret the enhancement under Section 2B1.1.[55]

To the extent courts are either explicitly or implicitly interpreting sophistication to mean "more than usual planning," they risk transforming the enhancement into a newer version of the "more than minimal planning" adjustment. Had the Commission desired to transform "more than minimal planning" into "more than usual planning," it easily could have done so. Instead, the Commission eliminated MMP and effectively incorporated the concept of planning into the fraud loss tables

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51. United States v. Adepoju, 756 F.3d 250, 259 (4th Cir. 2014) (deciding that the use of forged checks and stolen identity to commit bank fraud was an insufficient basis for application of enhancement in a bank fraud case).

52. *Id.*

53. United States v. Shmuckler, 533 F. App'x 287, 289-90 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 963 (2014) ("[The defendant] similarly attracted clients with lies, including falsehoods regarding the success rate of his business, his status as an attorney, and the extent of [his company's] operations. He also took significant steps to conceal his fraud by telling clients not to communicate with their lenders.").

54. In 2013, 14.3% of the 628 offenders sentenced under Section 2T1.1 received the enhancement for sophisticated means under Section 2T1.1(b)(2), whereas in 2005, that figure was 14.1%. *See Guideline Application Frequencies, supra* note 37.

55. *See, e.g.*, United States v. Jennings, 711 F.3d 1144, 1147–48 (9th Cir. 2013) (deciding that the use of a bank account with a "deceptive name" to hide income was sufficient to justify the enhancement's application in a tax fraud case).

back in 2001.[56] Moreover, as MMP's critics pointed out years ago, an enhancement that applies to nearly all cases does not make for a very good sorting device.[57]

Of course, it may be that the sophisticated means enhancement's incidence will soon level off or that the fraud offender population has so changed in recent years that circumstances actually *warrant* an across the board, two-level increase. I consider these points more fully in Part IV.

IV. EVALUATING THE ENHANCEMENT'S POPULARITY

As discussed in Part III, even a casual observer can discern from a review of both court cases and Sentencing Commission data the sophisticated means enhancement's growing popularity. Given the manner in which courts have interpreted the enhancement, there is no reason to believe this increase will abate.

Although the Guidelines are themselves advisory, they nevertheless set an anchoring point for sentencing judges,[58] even though judges have been fairly willing to sentence below those anchoring points in fraud cases.[59] Thus, the enhancement imposes costs on defendants, including those who successfully argue for variances from their recommended sentencing ranges.

For many defendants, the inclusion of the enhancement translates into an imprisonment increase of about six months, all else being equal.[60] For extremely low-loss offenses, the inclusion translates into an offense level floor of twelve and the increased likelihood that the offender's

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56. *See* Bowman, *The 2001 Economic Crime Sentencing Reforms*, *supra* note 15, at 30 (explaining that "the new guideline builds the [MMP's] two levels into its loss table beginning with cases in which the loss exceeds $120,000").

57. Bowman, *supra* note 19, at 499.

58. Peugh v. United States, 133 S.Ct. 2072, 2083 (2013) ("The post-Booker federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."); Gall v. United States, 552 U.S. 38, 46 (2007) ("[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications . . . .").

59. For a discussion on sentencing departures in fraud cases, see Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1251–52 (2013) [hereinafter Bowman, *Dead Law Walking*].

60. Under the Sentencing Guidelines' Sentencing Table, a two-level increase for a first-time offender with an offense level of 15 would result in an additional six months' imprisonment added to his recommended sentencing range. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table, (2013), *available at* http://www.ussc.gov/guidelines-manual/2013/2013-5asentab.

sentence will include a term of imprisonment.[61] For high-loss offenders, as well as recidivists, the enhancement can result in substantially greater terms of imprisonment, with increases of twenty or even thirty months.[62]

Thus, the enhancement, as it grows in popularity, imposes a moderate additional punishment on numerous criminals who commit fraud offenses. The normative component of this increase hinges largely on two factors: (a) the purported reason for punishing "sophistication" in the first place; and (b) the explanation for the enhancement's rise in popularity over the past decade. The next two sections consider both of these issues in turn.

A. The Justifications for Punishing Sophistication

Although multiple justifications for punishment exist, most of those can be classified under the standard categories of "desert" and "deterrence."[63] Desert-oriented theories focus on the offender's moral culpability and whether it is proper or necessary that society condemn his actions.[64] Deterrence theory, by contrast, is grounded in utilitarian cost-benefit analysis, wherein policymakers attempt to dissuade rational offenders from engaging in harm by manipulating variables such as the offender's sentence and the probability that he will be detected and punished.[65]

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61. *See id.* (noting that offense level 12 translates into Zone C offense recommending 10-16 months' imprisonment).

62. An offense level of 24 matched with a Criminal History Category I (e.g., a first-time offender) yields a recommended sentence range 51–63 months. At level 26, the range increases to 63–78 months. Thus, the enhancement increases the high-level offender's recommended sentence by a year. The effect is magnified the greater one's offense level or criminal history category. *See id.*

63. *See* Michael Cahill, *Politics and Punishment: Reactions to Markel's Political Rebtributivism*, 1 VA. J. CRIM. L. 167, 168 (2012) ("As is well known, there are thought to be two standard so-called 'theories of punishment,' each of which gives a different answer to the question of when and whom to punish..." (citing retributive and utilitarian justifications for punishment)); Paul Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1090-91 (2011) (contrasting rival theories of "desert" and "deterrence").

64. For a discussion of retributive theory's different forms, see Michael Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 825–36 (2007).

65. For several of the most cited accounts, see generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (setting forth general concept that criminal deterrence is a function of probability of detection and sanctions); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 2 (explaining how criminal law's sanctions can shape personal preferences).

Most arguments in support of the sophisticated means enhancement draw on these rival theories. Thus, the enhancement is warranted because sophistication serves as a proxy for low probability of detection and correspondingly low deterrence or because it evinces a particularly culpable state of mind and therefore makes the offender more deserving of harsher punishment. I briefly address each of these below.

1. Sophistication as a Proxy for Probability of Detection

An enhancement for sophistication in either the execution or concealment of an offense reflects concerns that sophistication reduces the probability that law enforcement authorities will detect and successfully prosecute offenders.[66] In order to better deter would-be criminals, law enforcement authorities must match a higher sanction with a lower-visibility offense. This argument is well illustrated by the extraterritorial and multijurisdictional enhancements that are contained in the same section as the sophisticated means enhancement.[67]

Deterrence theory presumes that criminals perceive the expected cost of punishment as a function of the prescribed sanction and its likelihood of occurrence.[68] Further scholarship recognizes that criminals discount sanctions slated to begin in later time periods.[69] If criminals discount the gap between engaging in crime and being punished for it, as well as the additional future months added onto a sanction, sanctions eventually lose their marginal deterrent effect. The same is true for criminals whose disutility of imprisonment decreases after an initial period.[70] Under any of these scenarios, extending an already substantial sanction produces

66. Similar arguments have been made for imposing punitive damages in cases where individuals have attempted to conceal their harmful conduct. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 908 (conceding that courts might use evidence of concealment "to aid in the determination of the chance that the defendant might have escaped liability").

67. *See* U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. Background (2014).

68. *See generally* Miriam. H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1302–10 (2008) (reviewing basic theory) [hereinafter Baer, *Deterrence of Corporate Fraud*].

69. *See, e.g.*, Yair Listokin, *Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 AM. CRIM. L. REV. 115, 116 (2007).

70. Baer, *supra* note 68, at 1305 ("Discounts affect criminal sentences in two ways. First, they erode the disutility of additional penalties. Second, they reduce the overall disutility of sentences meted out after a long delay."). For the technical treatment of discounts and declining utility of imprisonment, and their collective effect on deterrence efforts, see A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 4–7 (1999). *See generally* Steven Shavell, *Criminal Law and the Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985).

less additional deterrence than increasing the offender's probability of detection.

Sometimes, increasing the probability of detection is impossible, as enforcement budgets reach their limit.[71] Accordingly, it might make sense for the fraud guideline, or the Guidelines in general, to include a provision that recognizes truly "difficult to detect" offenses.[72] To some degree, the obstruction of justice adjustment located in Chapter 3 of the Guidelines performs this function.[73] But the obstruction enhancement applies only to offenders who "willfully" obstruct or impede the administration of justice.[74] The obstruction enhancement does not apply to fraud offenders completely unaware of any ongoing law enforcement investigation, much less to offenders whose conduct has yet to trigger any investigation.[75] The issue arises when offenders purposely construct their frauds in a manner so that they will be particularly difficult to detect. Prosecutors desiring to punish these offenders must therefore seek refuge in some other part of the Guidelines.

Judge Posner articulated the detection justification in *United States v. Kontny*, a 2001 tax case in which the Seventh Circuit affirmed the lower court's application of the sophisticated means enhancement under Section 2T1.1.[76] As Judge Posner explained, "The more sophisticated the efforts that an offender employs to conceal his offense, the less likely he is to be detected, and so he should be given a heavier sentence to maintain the same expected punishment, and hence the same deterrence . . . ."[77]

Since the Guidelines already presume some degree of concealment (fraud, after all, depends upon the deception of others), as well as an adjustment for obstructive conduct,[78] a separate enhancement for sophistication presumes that the offender's conduct was *more* difficult to detect than some "average" fraud crime.[79] Thus, were courts to punish sophistication in a disciplined and fair manner, one would expect them to set some agreed upon "baseline" for "ordinary fraud" and then determine

71. *See generally* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1510 (2008) (describing factors that affect the government's decision to continue pursuing offenders).

72. It could also purposely use capacious language to define terms such as "fraud." *Id.* at 1563–64 (2008).

73. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2014).

74. *Id.*

75. *See id.*

76. United States v. Kontny, 238 F.3d 815 (7th Cir. 2001).

77. *Id.* at 820.

78. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2014).

79. *See Kontny*, 238 F.3d at 820–21.

which cases go beyond that baseline in terms of likelihood of detection. In theory this sounds plausible; in practice, however, it is made ever more difficult by the fraud guideline's application to a multitude of economic crimes whose similarity begins and ends with an offender's use of deceit. Surely courts can (and do) compare the case in question to a similar type of offense (i.e., tax evasion), but the process of choosing a proper baseline for a multitude of schemes is an invitation for courts to develop wildly different estimates of how detectible a given crime is and what the relevant baseline should be.

In *Kontny*, for example, a husband and wife attempted to conceal their business income by paying their employees a portion of their salaries off the books.[80] Their methodology was fairly straightforward:

> They wrote separate checks to the employees, one for regular wages and one for overtime, and sometimes the overtime checks would include reimbursement for expense items to disguise the fact that the checks were for wages. The Kontnys programmed their computer so that the amount of the overtime checks was classified in nonwage expense categories. The stubs for the overtime checks, which they gave their accountant, likewise placed the expense in nonwage categories.[81]

As the foregoing description conveys, the only evidence of "sophistication" in *Kontny* was that the defendants used a computer to help keep track of their off-the-book payments.[82] Judge Posner conceded that the Kontnys were hardly "sophisticated" in the "lay sense";[83] nevertheless, Judge Posner concluded that their conduct exhibited greater expertise than the simple shopkeeper who tallies up his receipts for the day and places some of the cash in a shoebox under his bed in order to evade taxes.[84]

Thus, in *Kontny*, the shoebox became the baseline against which all other tax frauds were judged. Not surprisingly, the defendants argued that such a baseline would render nearly all federal tax defendants eligible for the enhancement.[85] This argument, however, did not concern

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80. *Id.* at 816.

81. *Id.* at 820.

82. *See id.*

83. *Id.*

84. *Id.* ("The Kontnys' efforts at concealment were sophisticated in relation to a case in which the owner of a shop evades taxes by emptying the drawer of the cash register before counting the day's cash receipts and puts the cash thus skimmed into a shoebox and slides it under his bed . . . .").

85. *Id.* at 821.

the Seventh Circuit.[86] At the time the Guidelines were adopted in 1987, Judge Posner explained, the cases prosecuted included a mix of simpler tax cases.[87] Thus, it was reasonable to assume that the Commission intended the courts to apply the enhancement to the non-simple cases, even if those non-simple cases expanded to occupy most of the court's docket.[88] The fact that the government had changed its charging practices in the intervening years did not alter the Commission's definition of sophisticated.[89]

Whatever the merits of the Seventh Circuit's reasoning as applied to tax cases may be, it is difficult to believe that the Commission would be satisfied were courts to apply the sophisticated means enhancement across the board to all or nearly all fraud offenders (or those who choose to use implements other than the proverbial shoebox). Nor is it likely that the Commission would set 1987 as the benchmark from which to judge sophistication. Since the promulgation of the Guidelines in 1987, the Sentencing Commission has repeatedly revised both the fraud guideline's core loss table and the various enhancements applicable to specific offense conduct.[90] Accordingly, assuming an equivalent loss amount, the "average fraud" of many years ago now triggers a much harsher punishment long before one takes into account the sophistication of the offense.[91]

Moreover, to the extent federally charged fraud offenders have indeed become more sophisticated, it is likely because of technological improvements in communications and computers. If one adopts as one's benchmark the simple shopkeeper who hides money underneath his mattress, then the term "sophistication" means something akin to "uses a computer or similar technology," which in today's world means very little.

A final point is in order: Although technology greatly enhances a fraud offender's ability to harm and deceive others, it also exposes the

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86. *Id.*

87. *Id.* 821–22.

88. *See infra* note 89.

89. *Kontny*, 238 F.3d at 822 ("[T]oday the average criminal tax fraud that is prosecuted is more sophisticated than when the concept of sophistication was introduced into the guidelines. That is no reason for thinking the Commission would consider the enhancement imposed in this or like cases excessive even if they are the only type of criminal tax fraud being prosecuted nowadays.").

90. "The sentences prescribed by the Guidelines have increased steadily and repeatedly since 1987 for all classes of economic offenders." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT'G REP. 167, 168 (2008) (charting offense level and sentencing range increases for hypothetical offenders) [hereinafter Bowman, *High-Loss Corporate Insider Frauds*].

91. *Id.*

offender to possible detection. The cash a fraudster hides in his shoeboxes and mattresses, for example, is far more difficult to detect than a series of suspicious bank transactions, which are the subject of reporting obligations under the Bank Secrecy Act.[92] The fraud conducted over a smartphone is vastly more traceable and provable than the fraud conducted over a series of face-to-face conversations.

In sum, digital technology aids criminals, but it also aids victims, police departments, and government agents. Computers and the Internet aid prospective victims in avoiding possible scams and enhance the investigative abilities of police and federal agents. A federal statute requires telecommunication companies to aid the government in its law enforcement activities.[93] Just how much technology aids offenders or law enforcement agencies is the subject of a different and far more involved discussion.[94] For now, it is sufficient to point out that technology's effect on criminals and those who pursue them is likely ambiguous. The detection justification for the sophisticated means enhancement therefore takes us only so far.

2. Sophistication as Enhanced Moral Culpability

A distinct reason for sentencing sophisticated offenses more harshly is that sophistication evinces greater moral culpability than purely opportunistic, spur-of-the-moment fraud.[95] As others have pointed out,

92. The Bank Secrecy Act compels financial institutions to file suspicious activity reports with the Treasury Department's Financial Crimes Enforcement Network ("FinCen"), and provides criminal and civil penalties for institutions that fail to do so. *See* 31 U.S.C.A. § 5318 (g) (West 2014) (requiring notification).

93. The Communications for Assistance in Law Enforcement Act (CALEA), was enacted in 1994 and requires telecommunication companies to assist in electronic surveillance. 47 U.S.C.A. §§ 1001–1010 (1994). For an in depth discussion of CALEA's history and the FBI's attempt to expand the Act in light of newer and more sophisticated technology, see generally Steven M. Bellovin, Matt Blaze, Sandy Clark, & Susan Landau, *Lawful Hacking: Using Existing Vulnerabilities for Wiretapping on the Internet*, 12 NW. J. TECH. & INTELL. PROP. 1 (2014).

94. Professor Orin Kerr has persuasively argued that much of Fourth Amendment doctrine can be understood as an adjustment tool whereby the Fourth Amendment expands or contracts to maintain some type of equilibrium in power between criminals and law enforcement personnel as technological advances aid one or the other group. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011). As Professor Kerr's article demonstrates, evolving technology has played a role in aiding *both* criminals and the law enforcers who pursue them: "Change alters how people try to commit crimes and how the police try to catch them." *Id.* at 486.

95. For a more in-depth treatment of the difference between planned misconduct and temptation-driven misbehavior and its implications for the corporate workplace, see Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 115–25 (2014) [hereinafter Baer, *Confronting the Two Faces of Corporate Fraud*].

although fraud offenses are often described as "specific intent" offenses, the intent to deceive serves as an all-purpose mental state; it covers everything from the momentary lapse to the well-planned and meticulously executed scheme.[96] Notwithstanding federal criminal law's treatment of momentary lapses and premeditated frauds as equivalents, most of us intuit a difference between the temptation-driven, impulsive offender and the diabolical, cold-blooded one. This intuition drives the statutory distinctions in state homicide statutes between simple "intentional" murder and "willful and premeditated" murder.[97] The intentional killer becomes angry during an argument and kills his victim with a nearby gun; the premeditated murderer lies in wait and poisons his prey.[98]

Federal crimes do not parse mental states or offense conduct the way state statutes do.[99] As Professor Frank Bowman has observed, "A peculiar feature of American property crimes generally and federal fraud crimes in particular is that, unlike crimes against persons, statutory law does not rank the severity of offenses according to differences in the mental states of defendants."[100] If there is any parsing to be done, it takes place at the moment of sentencing. Courts sometimes care whether an intention to commit fraud was formed "in the moment" or over a long

96. Bowman, *supra* note 90, at 171 ("Neither federal statutes nor the Guidelines rank mental states as more or less serious or attempt to correlate them with degrees of punishment.").

97. *See generally* Michael Zydney Manheimer, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J. 879 (2011) (discussing the rationale for creating a distinction between intentional murders with premeditation and deliberation, and intentional murders without premeditation and deliberation).

98. None of this is to say that these distinctions hold up well when applied to the multitude of cases that fall between extreme prototypes. For a critique of the premeditation doctrine in theory and practice, see Kimberly Kessler Ferzan, *Plotting Premeditation's Demise*, 75 LAW & CONTEMP. PROBS. 83, 84–85 (2012) (articulating normative and conceptual problems posed by doctrine), and Larry Alexander and Kimberly Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 400–01 (2008) (demonstrating ways in which "premeditation" doctrine is both under and over-inclusive).

99. As a result, there is no "grading" of culpability in federal white-collar criminal law: "The classic white collar crimes—bank fraud, mail fraud and wire fraud—are not predicated on lower level crimes with a lesser degree of culpability or extenuating circumstances. The individual is either guilty or not guilty of the designated offense." Ellen Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 757 (2007).

100. Bowman, *supra* note 90, at 171.

period of time,[101] but federal fraud statutes bundle all purposive conduct into a single category.

If one of the Guidelines' purposes is to "distingui[sh] between more and less culpable defendants,"[102] then an enhancement that punishes premeditation more harshly is both justifiable and desirable.[103] Society can justly decide to condemn more harshly premeditated actions over those purposive actions that materialize in a matter of seconds.[104] The concession that premeditation matters, however, still fails to answer several questions. First, it fails to identify the conduct that demonstrates "premeditation" and is therefore deserving of greater punishment. This difficulty has plagued state courts and legislatures who have labored mightily to identify language sufficient to distinguish "intentional" murders from "premeditated" ones.[105]

Beyond the conceptual problem of defining "premeditation," however, is the question of whether "sophistication" can serve as its proxy. When it comes to homicide, one can imagine fairly simple planning (mixing together a relatively common poison, waiting outside someone's home to shoot him, strangling someone in her sleep) that is, nevertheless, premeditated. The same is likely true in the fraud context. Many of the factors that courts cite as evidence of "sophistication" may in fact be evidence of premeditation. But if that is the case, why are we so sure that the current loss table does not already reflect such forethought?

B. Three Possible Reasons for the Increase

The previous section offered two possible reasons for punishing "sophistication." Of the two, the moral culpability claim is more defensible, despite sophistication's limitations as a reliable proxy.

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101. *See, e.g.*, Baer, *supra* note 95, at 98 n.40 (citing United States v. Adelson, 441 F. Supp. 2d 506, 513 (S.D.N.Y. 2006)).

102. Bowman, *supra* note 90, at 168.

103. Kimberly Kessler Ferzan, *Act, Agency and Indifference: The Foundations of Criminal Responsibility,* 10 NEW CRIM. L. REV. 441, 448 (2009) (reviewing VICTOR TADROS, CRIMINAL RESPONSIBILITY (2005)) ("The best understanding of why retributivists could believe that premeditated killings are more culpable than other intended killings is that premeditated killings are the absolute expressions of our agency. These are the acts that the killer not only intends but also plans, coolly and calmly.").

104. "The conclusion that the criminal law might not influence the behavior of many murderers provides no justification for failing to treat with maximum seriousness those offenders who had an opportunity to reflect upon what they were doing and chose to do it anyway." Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 384 (1994) (articulating the retributive argument for punishing premeditated killings more harshly).

105. *See supra* note 98 and accompanying text.

With the moral culpability defense in mind, the remainder of this Part sketches three possible explanations for the rapid increase in the enhancement's popularity: (a) criminals, in general, have become more sophisticated; (b) federal prosecutors have changed their charging practices to focus more intently on sophisticated fraud offenses; and (c) prosecutors, probation officers, and judges have, over time, become more comfortable seeking and applying the enhancement.

1. Fraud Offenders Have Become More Sophisticated

If fraud offenders have, en masse, become more sophisticated, then the enhancement's increasing prevalence is defensible. It still may not be desirable, because if all fraud offenders have, over the past decade, become more dangerous and more morally culpable, the proper response might be to alter the loss table once again, as the Commission has done throughout the years.

Whether fraud offenders are more sophisticated than they were ten years ago is an empirical question meriting its own extended analysis. If the "analysis" however, is simply that fraud offenders more often use technology to carry out their offenses today than before, the argument fails, particularly under the culpability-based justification for punishing sophistication. Recall: one of the core justifications for punishing sophistication is that sophistication serves as a proxy for premeditation[106] and therefore demonstrates enhanced moral culpability. Technology—particularly cheap and prevalent technology—severs the connection between sophistication and premeditation. If one can commit a fraud through the mere press of a button (or swipe of an iPhone screen), then fraud very much resembles the temptation-prone, opportunistic behavior of yesteryear. Accordingly, as technology becomes cheaper and more available to the masses, the link between sophistication and culpability weakens, and the enhancement therefore becomes less useful in sorting the worst offenders from the rest of the pack.

Finally, one might point to the conduct that led to the mortgage meltdown and corresponding financial crisis[107] as evidence of increased sophistication among those who commit fraud. But few of the individuals who marketed or created these securities were even charged

106. *See supra* Part IV.A.2.

107. *See generally* Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM), http://www.forbes.com/sites/stevedenning/2011/11/22/5086/ (giving an overview of why the 2008 mortgage and financial crisis occurred).

with fraud, and even fewer (some would say just one[108]) were convicted in connection with such behavior.[109] Thus, the sophistication of this *uncharged* group of individuals could not possibly justify the application of the enhancement to individuals who engaged in far simpler (if easier to prove) behavior.

2. Prosecutors Have Charged More Sophisticated Fraud Offenses

A second explanation for the increased application of the enhancement is that the population of offenders charged with federal fraud crimes has changed over the past decade. Under this reasoning, the criminal population has remained constant while federal prosecutors charge more sophisticated cases. This explanation more or less maps the government's argument in the *Kontny* case.[110]

As is the case with changes in the overall criminal population, the federal government's charging practices is a subject that merits its own extended treatment. Nevertheless, portions of the Sentencing Commission's data do suggest a shift in the types of fraud cases that prosecutors charge. Over the past decade, prosecutors have charged fewer minor fraud cases.[111] For example, prosecutions of extremely low-loss fraud cases ($5,000 loss or less) that were sentenced under Section 2B1.1 have steadily dropped, as demonstrated by Table 2:

108. *See* Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crime Prosecutions*, 9 VA. LAW & BUS. REV. 153 (2015) (dismissing Kareem Serageldin's prosecution as a "mundane white collar crime marginally related" to the financial crisis).

109. For criticisms and responses regarding the government's failure to prosecute Wall Street executives in connection with the financial crisis, see Hon. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/ (offering reasons why federal prosecutors have focused more on insider trading offenses than possible mortgage fraud claims); Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 265 (2014) (advising that "a focus on headhunting will only distract from, and reduce the pressure for, efforts to explain [the collapse] and prevent its occurrence").

110. *See supra* notes 76–89.

111. *See infra* Table 2.

Table 2: Extremely Low Loss Frauds (Less than $5,000)

Date	Percentage Charged, 2B1.1(b)(1)(A)[112]
2006	24.8[113]
2007	23.6
2008	22.0
2009	20.4
2010	19.2
2011	17.5
2012	15.0
2013	14.7

The fact that federal prosecutors' offices have substantially reduced their share of minor fraud cases suggests either an overall preference for more serious cases, or at least for cases that translate into higher Guideline offense levels and corresponding prison sentences. Extremely low-loss frauds do not likely feature much repetition or exist for a long period of time. Nor do they likely involve much planning or investments in sophisticated technology to carry out the offense since the payoff in most cases is so small.

112. Information in Table 2 is taken from the Sentencing Commission's Guidelines Application Frequencies reports, *Use of Guidelines and Specific Offense Characteristics – Guideline Calculation Based Fiscal Year* for each fiscal year from 2006–2013, *Use of Guidelines and Specific Offense Characteristics – Guideline Calculation Based Fiscal Year*, U.S. SENTENCING COMM'N, http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies (last visited May 25, 2015) [hereinafter GUIDELINE APPLICATION FREQUENCIES].

113. In 2006, an additional 720 offenders were sentenced under Section 2F1.1; all of these offenses involved an actual or intended loss in excess of at least $5,000. *See id.* at Fiscal Year 2006, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2006/06_glinexgline.pdf (last visited May 25, 2015). Thus, the combined group of low-loss frauds sentenced under Section 2B1.1 *and* 2F1.1 forms a slightly less percentage of the entire group—22.2%.

Where the sophisticated means enhancement was reserved solely for a small subset of "especially" intricate or complex conduct, the shift away from extremely low loss frauds would make little difference in the enhancement's prevalence if, in fact, a prosecutor substituted a garden variety moderate-loss fraud for the very minor one.[114] If, however, one defines "sophisticated" as encompassing frauds of several years' duration; that use "repetitive and coordinated" conduct; and employ the use of computers, forgeries, or fraudulent documents, then the shift from minor frauds to even moderate-loss ones becomes quite significant. Indeed, as the government shifts its efforts in the direction of moderate and high-loss frauds, most cases may easily fall under the sophisticated category. The schemes that fail to garner this appellation may not be conceptually different from the rest of the pool, but instead enjoy the moral luck of having been intercepted early enough in the scheme before the offender has had a chance to engage in repetitive and coordinated conduct.[115]

3. Sentencing Creep: Getting Used to the Sophisticated Means Enhancement

The final explanation for the increase in the enhancement's incidence is what one might call sentencing creep. Over time, and in response to various precedents, the various participants within the federal criminal justice system have grown comfortable with a broader definition and application of the enhancement than they may have originally intended. The change is so incremental and gradual that the players themselves are unaware of it.[116]

Sentencing creep entails more than a district court's inadvertent expansion of sentencing law through vague or ill-considered language. Rather, the concept describes a phenomenon whereby all of the various

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114. As Professor Bowman points out, between 2003–2012, the median loss amount for fraud cases shifted upward from $18,414 to $95,408. Bowman, *supra* note 59, at 1254.

115. A sentencing regime that sentences on the basis of moral luck "hold[s] an actor responsible for events beyond his control." Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L. J. 285, 338 (2012) (citing state guideline systems that "adjust sentences based on results and circumstances without regard to a defendant's intent or awareness").

116. Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 511 (2012) ("People are fairly adept at perceiving change when the cues are salient enough, but poor when change is slow and gradual. This is especially true when we are busy, cognitively engaged (if not overloaded) in tasks that employ scripts and schemas to make sense of situations that are largely continuous.").

players in the criminal justice system successively transform a so-called narrowly tailored enhancement into a more broadly applied one through a series of iterative, incremental moves. Prosecutors seek it in plea negotiations and at contested sentencing hearings; defense attorneys more often expect it and perhaps accede to it in some negotiations; probation officers more often include it in their pre-sentence reports; and finally, judges more often apply it. Gradually, and over time, a mechanism meant to sort the worst from the merely bad instead becomes a six to eighteen month add-on in prison time for nearly everyone.

V. SOLUTIONS TO A POSSIBLE PROBLEM

The sophisticated means enhancement for fraud offenses has steadily grown in popularity throughout the past decade. It is unclear whether this growth can be attributed solely to sentencing creep or also to federal charging practices. The data reflects a drop in extremely minor cases, but the sophisticated means enhancement ostensibly applies only to particularly sophisticated offenses. Assuming prosecutors were replacing extremely minor cases with relatively moderate ones, their actions should have had little effect on the enhancement's prevalence.

Whatever the explanation for the enhancement's rise in popularity, it seems unlikely that this increase will abate any time soon. On April 9, 2015, following hearings and consideration of comments, the Sentencing Commission adopted its amendment to Section 2B1.1, which included a narrowing of the sophisticated means enhancement to only those cases in which the defendant's specific conduct was sophisticated.[117] Previously, the enhancement would have applied so long as the "offense" involved sophisticated means.[118] Now, the prosecution must draw a specific link between the enhancement and defendant's conduct. Perhaps this will reduce the enhancement's popularity because the amendment reduces the likelihood that a low-level defendant charged in an otherwise sophisticated conspiracy will be unnecessarily saddled with a two-point enhancement. Then again, there is no indication that the unsophisticated coconspirator has been responsible for the enhancement's three-fold rise.

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117. Preliminary amendments to the Guidelines, which will become final when published in the Federal Register, are available at: http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150409_PRELIM_RF_Amendments.pdf at 65. *See also* Press Release, U.S. Sentencing Commission Adopts Economic Crime Guideline Amendments, Apr. 9, 2015, *available at* http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150409_Press_Release.pdf.

118. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (b)(10) (2014).

More importantly, so long as courts continue to apply the enhancement expansively to a broad range of conduct, the requirement that the defendant's specific conduct be sophisticated is not likely to derail the enhancement's application. The Sixth Circuit's decision in *United States v. Crosgrove*[119] illuminates the problem. The defendant in a fraudulent insurance conspiracy appealed the lower court's application of the enhancement, in part, because he had played no role in the setting up of fictitious shell entities.[120] This fact did not concern the Sixth Circuit in light of his other "sophisticated" conduct:

> Crosgrove's argument that he did not participate in the creation of shells or otherwise participate in offshore activities is therefore irrelevant unless he can also refute the finding that the use of a pseudonym and the issuance of fraudulent insurance certificates is not an appropriate basis for a sophisticated-means enhancement.[121]

If the use of a pseudonym and the creation of false certificates in an insurance fraud scheme trigger the enhancement's application, one cannot help but wonder if the Commission's latest efforts to clarify the enhancement's scope will fall on deaf ears.

Other than the above tweak regarding co-conspirators, the Commission's amendment did not address the additional concerns raised in this Essay. The Commission initially proposed tightening the Application Note to direct courts to compare the present crime to "typical offenses of the same kind," and had further proposed the deletion of the multi-jurisdictional telemarketing example critiqued earlier in this Essay.[122] The Department of Justice, however, objected to these and other proposed changes and ultimately, the Commission left the Application Note and obsolete telemarketing example intact.[123]Thus,

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119. 637 F.3d 646 (6th Cir. 2011).

120. *Id.* at 650.

121. *Id.* at 667

122. The proposed language would have defined sophisticated means as "especially complex or especially intricate offense conduct that displays a significantly greater level of planning or employs significantly more advanced methods in executing or concealing the offense *than a typical offense of the same kind.*" U.S. SENTENCING COMM'N, January 2015 Proposed Amendments to Section 2B1.1(b)(10), Application Note 9(B), at 82, *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/2015014-RFP-Amendments.pdf (last visited May 25, 2015) (emphasis added). In addition, the proposed amendment further provided, "Conduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means." *Id.*

123. *See* Letter submitted by Jonathan J. Wroblewsi, Director, Office of Policy and Legislation, DEPT. OF JUSTICE, March 9, 2015, *available at*

there is no reason to assume that the enhancement's incidence will drop substantially in future years. To the contrary, assuming courts continue to interpret the enhancement expansively, it is quite possible that in another decade or so, the Commission will find itself confronting the same problem it encountered with MMP enhancements years ago. Assuming that day of reckoning occurs, how might the Commission respond?

One possibility is to do nothing beyond monitoring the enhancement more carefully and watching to see if its application crosses some predefined threshold. Presumably, this monitoring exercise would also include the sophisticated means enhancement contained in the tax guideline, Section 2T1.1(b)(2).[124] This monitoring approach, although conservative and unlikely to waste any time or political capital, is distasteful insofar as one believes the enhancement is no longer doing the job the Commission intended it to do. Moreover, it raises the question as to what the threshold ought to be.

A second option is to keep the language in the enhancement intact, but for the Commission to revise its efforts to change the commentary and application notes relating to the enhancement. The Commission could, as it already tried to, update the examples it uses to demonstrate sophistication. It might also state that the mere use of digital or computer technology—as well as innovations made readily available by digital technology, such as altered invoices or forged signatures—does not necessarily signify the "sophistication" warranting a two-level enhancement. It could even make clear that conduct *less* sophisticated than the conduct described in its application note should not justify an enhancement. Unfortunately, these half-measures would likely spur more litigation without necessarily clearing up, for litigants or courts, what the Commission envisions for this particular enhancement. Moreover, any movement in this direction would likely invoke strong objections from the Department of Justice.

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http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/DOJ.pdf.

124. In fiscal year 2013, 14.3% of offenders sentenced under Section 2T1.1 received the enhancement. *See Use of Guidelines and Specific Offense Characteristics Fiscal Year 2013*, U.S. SENTENCING COMM'N, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2013/Use_of_Guidelines_and_Specific_Offense_Characteristics_Guideline_Calculation_Based_Revised.pdf (last visited May 25, 2015). In 2005, that number was 14.1%. *See Use of Guidelines and Specific Offense Characteristics Fiscal Year 2005*, U.S. SENTENCING COMM'N, http://www.ussc.gov/sites/default/files/pdf/data-and-statistics/federal-sentencing-statistics/guideline-application-frequencies/2005/05_glinexgline.pdf (last visited May 25, 2015).

The Commission's remaining options are either to revise and retain some version of the enhancement or eliminate it outright. Elimination might be the easiest and cleanest move, were it not for Congress's 1998 statutory directive to include such an enhancement.[125] Still, that statute requires only that the Commission provide an "appropriate" enhancement for frauds[126] that involve sophisticated means.[127] Although the Commission's discretion to interpret that term is not "unbounded," it nevertheless maintains significant latitude to formulate language meeting Congress' statutory directives.[128] Were the Commission to eliminate Section 2B1.1(b)(10)(C) due to its increasing prevalence, extraterritorial and multijurisdictional schemes would still continue to receive the two-point enhancement (as originally intended by Congress),[129] as would obstructive behavior under Section 3C1.1. Concerned sentencing courts could impose additional upward variances on offenses that featured particularly troubling facts but fell outside the above categories. But the garden-variety "sophistication" that comes about through lying and planning one's conduct over a period of months or years would no longer result in a court or prosecutor needlessly tacking on another six to twelve months' imprisonment; the punishment for such "sophistication" would already be reflected in the fraud loss table, since planning often begets greater and more certain loss.

Of course, the Commission could one day significantly overhaul the economic fraud guideline in its entirety, which some commentators have strongly urged.[130] Assuming it keeps the economic fraud guideline intact, however, the Commission will likely find itself revisiting this issue. To the extent sophistication (particularly the term as currently defined) is already bound up in the calculation of intended or actual loss, the enhancement does nothing more than extend most moderate and severe fraud offenders' sentences. Even if one could support such an extension

125. *See supra* note 21.

126. *See* Telemarketing Fraud Prevention Act of 1998 § 6(c)(2) (1998).

127. Of course, Congress could repeal or clarify that directive.

128. United States v. Hoyle, 751 F.3d 1167, 1172 (10th Cir. 2014) (citing United States v. LaBonte, 520 U.S. 751, 757 (1997)).

129. The Telemarketing Act's directive singled out the perpetration of frauds from outside the United States as evidence of sophisticated means. *See* 112 Stat 521, § 6(c)(2), *available at* http://www.justice.gov/sites/default/files/jmd/legacy/2014/01/15/act-pl105-184.pdf (last visited May 25, 2015).

130. The Commission had previously indicated its desire to study and revise the fraud guideline. *See supra* note 3. In 2013, it held an Economic Crime Symposium in New York at John Jay College to solicit feedback from a mix of jurists, practitioners and academics. For a discussion of the Symposium, as well as more substantial reform proposals, see Bowman, *Dead Law Walking*, *supra* note 59, at 1251 (describing symposium and Commission's stated interest in possibly revising fraud guideline).

as necessary and desirable, the proper way to increase sentences for any crime is to do so transparently, following proper deliberation, and not in the *ad hoc* manner that sentencing creep suggests.

VI. CONCLUSION

This Essay has focused on a single provision of the all-purpose fraud guideline, Section 2B1.1. It suggests a reform that is fairly minimal compared to the far more extensive changes that other organizations have promoted regarding the sentencing of white-collar offenders.[131]

Nevertheless, an in-depth analysis of a single enhancement is instructive; among other things, it demonstrates the difficulty inherent in sorting economic crime offenders for lesser and greater punishments. Moreover, it illuminates the instability inherent in criminal sorting devices. Between a state system whose statutes sort bad and worse behavior up front, and a federal system that relies in large part on a quasi-determinate sentencing scheme, the latter regime should be better positioned to intervene when sorting devices lose their efficacy, assuming politics does not get in the way of much needed reform.

Back when the Guidelines were first promulgated, the Commission added an enhancement—more than minimal planning—in an attempt to distinguish some types of fraud offenses from others.[132] By 1998, observers concluded that this device had become ineffective and the Commission retired it in 2001.[133] Thirteen years later, another sorting device may be losing its efficacy. Concededly, the sophisticated means enhancement is still applied in fewer than 12% of all fraud cases, and it may well be that its increasing popularity will level off. Nevertheless, a survey of even a few court cases interpreting the enhancement implies that it has come unmoored from its original meaning. If it was intended for only the *most* intricate frauds, it is gradually turning into an enhancement that will apply to all but the most simplistic. When the Commission again revisits the question of white-collar sentencing, as it

131. For example, the American Bar Association's Task Force has proposed a far more comprehensive and far-reaching type of reform for the sentencing of white-collar crimes. *See* AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, A REPORT ON BEHALF OF THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIME (2014), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf (advocating a number of far-reaching reforms in how economic crimes are sentenced);

132. *See* Steer, *supra* note 18, at 264 (describing Commission's early approach to economic crimes in 1987, which "relied principally on the dollar loss and . . . 'more than minimal planning' to measure offense seriousness").

133. *See supra* at Part I and notes 15–20.

is sure to do, it would do well to reconsider the costs and benefits of this relatively minor but vexatious enhancement.