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Madoff Mercy

How long should the Ponzi schemer go to prison for?

By Harlan J. Protass

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Wall Street's elite are dropping as fast as the financial markets in which they work. As investors sort through the trail of financial wreckage left by Bernard L. Madoff, arrested for a $50 billion Ponzi scheme that may be the largest ever, federal prosecutors are preparing to formally charge him with crimes that could land him in prison for the rest of his life. In June, federal prosecutors in Brooklyn, N.Y., charged former Bear Stearns hedge-fund managers Ralph Cioffi and Matthew Tannin with lying to investors about their funds' true value and prospects. And in September, the FBI revealed that it is investigating the people who ran Fannie Mae, Freddie Mac, Lehman Bros., and AIG, all of which were casualties of this year's market meltdown.

Given today's economic climate, it's hard to feel any pity for these guys. Their reprehensible conduct has crippled the nation's financial system and will cost investors and taxpayers billions. But if you believe that the punishment should fit the crime, a mite of sympathy may be what they deserve. Really.

Most big-time frauds are prosecuted in federal court, where the federal guidelines largely control sentencing. Using a complex set of calculations, those guidelines mechanically sort criminals into one of 43 "offense levels" based on different aspects of their crimes. Higher offense levels reflect more harmful conduct. They also give rise to longer prison terms. Offense-level assignment, in turn, is fixed largely by measuring ostensibly discernible quantities, like the amount of drugs in a narcotics case or, in cases involving fraud, the amount of money lost.

Logically, this makes sense. A drug dealer who sells 10 kilos of cocaine is surely a worse offender and deserving of a longer prison term than someone who sells only 1. Likewise, a corporate executive who steals $50,000 has done less damage, and is generally deserving of a shorter sentence, than one who pockets $500,000.

But when it comes to large-scale frauds involving public companies and their millions of shares, the guidelines' grounding in mathematics sometimes results in sentences that are, quite literally, off the chart. They fall within the realm of prison terms usually reserved for mafia bosses, major international drug lords, cop killers, child molesters, and terrorists.

Remember Jeffrey Skilling—losses to Enron shareholders of more than $1 billion largely determined his 24-year-plus sentence. Or consider WorldCom's former chief, Bernie Ebbers. He got 25 years based principally on the $2.2 billion loss suffered by his company's shareholders. Sure, these men destroyed enormous shareholder value, just as the targets of today's criminal cases allegedly did. But it's hard to

contend that they deserved prison terms longer than the average sentence for murder (22 years), kidnapping (14), and sexual abuse (eight).

Tying jail terms to the amount of money lost also puts way too much power in the hands of prosecutors. It gives them the muscle to threaten long prison stretches in order to coerce guilty pleas. If it weren't for the risk of lengthy sentences if convicted, many defendants might opt to test the government's evidence before a jury.

Linking jail time to dollars lost also severs many of the ties to factors courts are supposed to consider when determining and imposing sentences. For example, a relatively short prison term—years, not decades—can be enough to deter prospective financial fraudsters. And economic offenders pose little future threat because they're generally stripped of powers that would permit continued criminal conduct. Also, aren't there more fitting and useful ways to punish the titan fraudsters of Wall Street? Strip them of their wealth. Make them work to pay back those they ripped off or to serve the public good.

The Supreme Court's landmark decision in *United States v. Booker* allowed judges to use good, old-fashioned common sense to reduce radically long sentences produced by the guidelines. And some judges have done that. In 2006, Richard Adelson, former president of Impath Inc., a laboratory services company that collapsed as a result of an accounting fraud, was convicted of securities fraud and filing false documents. The guidelines recommended a life sentence. Instead, a judge sentenced Adelson to 42 months in prison. (A federal appeals court in New York approved that call last week.) Lennox Parris and Lester Parris, co-directors of a New York-based water company, were convicted of securities fraud in connection with a scheme to boost the value of their company's stock with a series of press releases misrepresenting its success in scoring distribution contracts. They were each sentenced earlier this year to five years imprisonment, even though they faced 30 years to life under the guidelines. And this week, the former CEO of reinsurer General Re, Ronald Ferguson, who faced life imprisonment for his role in a rotten deal to artificially inflate the balance sheet of insurance giant AIG, was sentenced to two years in jail.

But honestly, that kind of largesse is rare. Most judges still stick close to the guidelines and the huge sentence recommendations they make for causing huge financial loss. Given that hundreds of billions, if not trillions, were lost on Wall Street this year, we could be talking about a parade of defendants swapping cuff links for handcuffs and facing not years behind bars but decades. That's more punishment than even Bernard Madoff deserves.

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