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Guest column: Life in prison for Rubashkin is too harsh

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It's hard to feel any sympathy for Sholom Rubashkin, who will be sentenced April 28 for his part in a multimillion-dollar bank fraud scheme. He stands convicted of some very serious federal crimes, and deserves to spend time behind bars. But if you believe that the punishment should fit the crime, you might find yourself arguing for a little compassion instead when it comes to prosecutors recommending Rubashkin should spend life in prison.

Rubashkin was prosecuted in federal court, where sentencing guidelines largely dictate prison term length. Those guidelines sort offenders into one of 43 "offense levels" based on different aspects of their crimes. Higher offense levels reflect more serious conduct, and give rise to longer sentences. In financial fraud cases, offense levels are determined mainly on the amount of money lost.

This makes objective sense. A \$50,000 fraud is (all other things being equal) less serious, and deserving of a shorter sentence, than a \$500,000 fraud. But when it comes to large-scale fraud cases - like that in which Rubashkin was involved - the guidelines' grounding in mathematics sometimes results in sentences disconnected from any common sentencing sense. Indeed, they fall within the realm of prison terms usually reserved for Mafia bosses, major international drug traffickers and terrorists.

Just ask Jeffrey Skilling. Losses to Enron shareholders of more than \$1 billion largely determined his 24-plus year sentence. Or speak with Bernie Ebbers, WorldCom's former chief. He got 25 years based mainly on the \$2.2 billion in losses suffered by his company's shareholders. Sure, these men wreaked enormous financial havoc. But it's hard to contend that they deserved prison terms longer than the average sentence for murder (23 years) or kidnapping (18 years).

Of course, it doesn't have to be this way. The Supreme Court's landmark decision in *United States v. Booker* empowered judges to use old-fashioned common sense to cabin guidelines gone wild. And its decision in *Kimbrough v. United States* authorized judges to impose sentences at variance from federal guidelines that don't rest on empirical data or national experience. In a word, judges today are allowed to consider factors other than federal guidelines when figuring out what sentence to impose, such as the history and

characteristics of the defendant. For Rubashkin, that means, among other things, his deeply religious background, contributions to the community and 10 children.

And some judges have done just that. For example, Ronald Ferguson - the former CEO of reinsurer General Re - was convicted of having engineered a sham transaction to inflate the balance sheet of insurance giant AIG. Federal guidelines recommended life imprisonment. Instead, a Connecticut judge sentenced him to two years in prison. Likewise, a Texas judge imposed a sentence consistent with the guidelines - more than 24 years - on Jamie Olis, a former Dynegy accountant convicted of a series of financial frauds. When presented with the opportunity to reduce Olis's sentence after the Booker decision, that judge imposed a six-year jail term, finding that "a sentence within the applicable guideline range would not be reasonable."

As most defense lawyers (and their clients) know, however, judges generally still hew closely to the guidelines and their loss-driven sentence recommendations. And that's the predicament Rubashkin faces April 28. This isn't to say he should be let off the hook entirely. Rather, the penalty Rubashkin faces should be fair, just and reasonable. Unfortunately, the scheme under which he'll be sentenced - which recommends life in prison - is anything but.