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Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines

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I. INTRODUCTION

The primary determinant of sentence length for federal economic criminals is the amount of "loss" resulting from an offender's conduct.[1] The idea of basing sentences for economic crimes primarily on "loss" has become the source of ongoing, complex, and proliferating disputes about what the term "loss" really means and how it should be interpreted in particular cases. The "loss" calculation is one of the most frequently litigated issues in federal sentencing law.[2] There are at present splits of opinion between the federal circuits on at least eleven analytically distinct issues concerning the meaning and application of the "loss" concept.[3] Even more significant than the identifiable circuit splits is the overall sense of uncertainty, confusion, and sheer aggravation that emerges whenever lawyers and judges who deal with federal economic crime discuss "loss."[4]

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1. As described below in more detail, sentence length for both theft-like and fraud-like crimes is determined largely by reference te "loss tables" appearing at U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (1997) (Theft) and § 2F1.1(b)(1) (Fraud) [hereinafter USSG]. *See infra* notes 110-32 and accompanying text.

2. An informal computer search of the Westlaw database for all federal appellate cases (excluding the U.S. Supreme Court), conducted on August 15, 1997, revealed that the concept of "loss" in either USSG section 2B1.1 or section 2F1.1 was discussed in 894 federal appellate opinions dating from November 1987 to August 1997 (search result on file with author).

3. Describing each of these circuit splits in detail would consume more space than appropriate for a footnote. Among those discussed in this Article are differences of opinion over: (1) whether "loss" is te be defined differently in theft and fraud cases, *see infra* notes 148-71 and accompanying text; (2) whether "loss" can ever include so-called "consequential damages," *see infra* notes 248-50 and accompanying text; (3) what "consequential damages" means in the loss context, *see infra* notes 251-81 and accompanying text; (4) whether lost interest should be included in "loss," *see infra* Part IV.B.2.f; (5) when "loss" should he measured, *see infra* notes 342-54, and accompanying text; (6) whether assets pledged as collateral must be credited against "loss," *see infra* Part IV.C.2.a; (7) whether assets available to pay or paid as restitution but not pledged as collateral by a defendant should be deducted from "loss," *see infra* notes 362-74 and accompanying text; (8) whether money repaid before detection of the crime should be deducted from "loss," *see infra* Part IV.C.2.b; (9) whether factual impossibility reduces "loss" te zero, *see infra* notes 406-10 and accompanying text; (10) whether a defendant's criminal intentions must have been realistic te be counted as "intended loss," *see infra* Part V.C.2; and (11) whether intended loss can only be calculated by applying the attempt guideline, section 2X1.1, *see infra* Part V.D.

4. *See, e.g.*, United States v. Kaczmarski, 939 F. Supp. 1176, 1182 n.7 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1173 (3d Cir. 1997) (Judge Dalzell referred with obvious exasperation to the task of "construing the vaporous word loss"). The Second Circuit has described loss more circumspectly as "a flexible, fact-driven concept." United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997) (quoting United States v. Dickler, 64 F.3d 818, 825 (3d. Cir. 1995)).

As Special Counsel to the Sentencing Commission in 1995-96, I was asked to examine the Federal Sentencing Guidelines relating to economic crimes, as well as the cases and materials construing the term "loss," for the purpose of identifying the problem areas and determining whether some adjustments or definitional changes ought to be considered.[5] Since leaving the Commission, I have continued to grapple with "loss." In the course of more than two years of reading "loss" opinions penned by puzzled federal judges, and talking with equally puzzled practitioners, several points have become clear.

First, the United States Sentencing Commission was undoubtedly correct in the basic judgment that the sentences of economic criminals should be determined in significant part by the magnitude and nature of the economic deprivation caused by their crimes.[6] Where the original Commission fell short of the ideal was in the translation of a sound fundamental intuition into a just, doctrinally coherent, reasonably easy-to-interpret set of rules. Since the Federal Sentencing Guidelines ("Guidelines") first went into effect in 1987, the Commission has amended gnidelines provisions regarding property crimes and "loss" many times.[7] Regrettably, each amendment in the series has been a patch designed to fix one small component of a vehicle for sentencing economic criminals that was unwieldy and imperfectly designed to begin with.

Second, although it is possible to view the many problems with the existing economic crime guidelines as a collection of particular technical difficulties to be addressed individually, this approach has been tried and has proven the equivalent of trying to subdue an octopus one tentacle at a time. No patchwork fix will suffice. Only a virtually complete rewrite of the guidelines and application notes regarding theft and fraud offers any hope of significantly ameliorating

5. The memorandum that resulted from my review was distilled into a request for comment on 12 particular issues published by the Sentencing Commission in January 1997. *See* Federal Register Notice BAC2210-40, 62 Fed. Reg. 152, 171-74 (1997) (identifying as issues for comment: (1) changes in the loss tables of section 2B1.1 and section 2F1.1; (2) consolidation of section 2B1.1 and section 2F1.1; (3) standard of causation; (4) market value as measurement of loss; (5) consequential damages and administrative costs as components of loss; (6) inclusion of interest in loss; (7) credit for benefits received by victims against the loss amount; (8) diversion of government benefits; (9) whether pledged collateral should be credited against the loss amount; (10) gain as an alternative measure of loss; (11) intended loss; (12) risk of loss; and (13) loss amounts that over- or understate offense seriousness). This Article addresses all these issues except changes in the loss tables.

6. *See infra* note 172 and accompanying text.

7. The theft guideline, section 2B1.1, has been amended 13 times. See USSG App. C, amends. 7, 99-101, 303, 312, 317, 361, 364, 481, 482, and 512. The fraud guidelines have also been amended 13 times. *See* USSG App. C, amends. 30, 154-56, 303, 317, 364, 393, 470, 481, 482, and 513. In both cases, single amendments often effected multiple changes.

the many problems of both substance and interpretation the current guidelines spawn so regularly.

This Article has three objectives. First, it attempts to rethink the sentencing of federal economic criminals in light of the basic purposes of sentencing and of the Guidelines' particular structure and objectives. Second, it examines the deficiencies in the current sentencing guidelines regarding theft, fraud, and other economic crimes, and the problem areas in the case law construing those guidelines. Third, it proposes and analyzes a consolidated guideline, together with accompanying application notes, for sentencing virtually all theft and fraud cases (a draft of which follows the text of this Article as Appendix A).[8]

The economic harm resulting from a defendant's crime is an important factor in assessing offense seriousness, and therefore in assigning just punishments. The proposed consolidated guideline thus retains as a central component the concept of "loss." In addition, however, it identifies and accounts separately for other sentencing considerations that "loss" does not satisfactorily measure. In particular, the proposed guideline gives more attention to differences in mental state among defendants and attempts to place greater weight on harms not entirely captured in monetary measurements, such as the number of victims and the fact that identical monetary losses may have dramatically different effects on different victims.

The centerpiece of the reform proposed here is a redefinition of "loss." The current "definition" of loss is in truth no definition at all, but a hodgepodge of ill-fitting concepts drawn from such diverse sources as the elements of common law larceny and the remedies provisions of the law of contracts. Consistent with long-accepted principles of criminal liability and with the principles that animate the Guidelines themselves, loss should be redefined in terms of the required causal relationship between the defendant's criminal conduct and the pecuniary harms that result. A defendant should be held responsible at sentencing for economic harms that were caused in fact by his criminal conduct, and that were reasonably foreseeable by him. In addition, because of the complex character of many federal economic crimes, establishing a doctrinally coherent core definition of loss is necessary but not sufficient to meet the practical needs of sen-

8. As is true of the current theft and fraud guidelines, many of the significant aspects of the proposed consolidated guideline appear in the application notes, rather than in the guideline text. For ease of reference, and unless otherwise specified, in this Article any reference to the proposed consolidated economic crimes guideline should be understood to embrace both the proposed guideline and the proposed application notes.

tencing courts. Consequently, the proposed consolidated guideline goes further and sets out specific rules applying the core definition to particular problems such as the identity of the "victim(s)" of economic crime, the inclusion of interest, the time at which loss should be measured, the issue of a defendant's gain, and the question of net versus gross loss. Finally, the Article—and the proposed guideline—address the most common difficulties posed by the concept of "intended loss."

I have no illusions that the proposals made here will be the last word on the punishment of federal economic crime, or even on the conundrum of "loss." The problem is too complicated and my powers too modest. However, there is good reason to believe that the Sentencing Commission is moving toward meaningful change. On October 15, 1997, and March 5, 1998, the Commission held public hearings on economic crime sentencing and the definition of loss.[9] Representatives of the judiciary, the defense bar, probation officers, and the Department of Justice testified, and the proposals in this Article were placed before the Commission. Since the October hearing, Commission staff members have been working actively in collaboration with prosecutors, judges, probation officers, and the defense bar to develop a revised theft/fraud guideline for the Commission's consideration. Although as this Article goes to press the outcome of that process remains uncertain, I hope the suggestions contained in this Article will assist in producing an improved set of rules for sentencing the economic criminal.

9. Witnesses at the October 15, 1997 hearing were Judge Gerald E. Rosen, on behalf of the Judicial Conference's Committee on Criminal Law, James E. Felman, on behalf of the Practitioners' Advisory Group, Gregory A. Hunt, on behalf of the Probation Officers' Advisory Group, and Frank O. Bowman, III. *See* 66 U.S.L.W. 2278 (Nov. 11, 1997) (summary of hearing testimony); 10 FED. SENTENCING REP. 157 (NOV.-DEC. 1997) (edited transcript of hearing). Written statements from the witnesses are available at <<http://www.ussc.gov/hearings.htm>>, under "Hearing Transcripts and Testimony Regarding Sentencing Guideline Amendments."

Witnesses at the March 5, 1998, hearing included Katrina Pflaumer, U.S. Attorney; W.D. Washington; Mary Spearing, Chief, Fraud Section, U.S. Department of Justice; defense attorneys Mark Flanagan, David Axelrod, Gerald Goldstein, and Ephraim Margolin, as well as Frank O. Bowman, III. For a transcript of the hearing and written statements of the witnesses, see <<http://www.ussc.gov/hearings.htm>>. The hearing testimony is summarized in 8 Fed. Sentencing Guide, No. 24, at 1 (Roger W. Haines, Jr., and Jennifer Woll, eds. Mar. 30, 1998).

II. THE FEDERAL SENTENCING GUIDELINES AND ECONOMIC CRIME: A PRIMER

A. *The Role of Sentencing Purpose in Sentencing the Economic Criminal*

A purely theoretical discussion about the punishment of crimes of dishonest acquisition might devote considerable space to the claims of competing philosophies of punishment, considering, for example, the relative merits of rehabilitation, retribution, deterrence, incapacitation, reprobation, and restitution. Likewise, an abstract discussion might compare the relative virtues and demerits of determinate and indeterminate sentencing systems as vehicles for passing judgment on the economic criminal. However, the object here is not to write on a blank slate, but to analyze and propose improvements to an existing system. The analysis here works within the fundamental philosophical approach taken by the Guidelines, which is to say a virtual abandonment of the rehabilitative or medical model of sentencing[10] in favor of a designedly imprecise amalgam of "just deserts" retributivism and utilitarian "crime control" theories of deterrence and incapacitation.[11]

This is not, however, to suggest that considerations of purpose in sentencing must be abandoned except at the level of gross general-

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10. For a general discussion of the federal sentence reform movement that, in general, rejected the rehabilitative model of sentencing and produced the Federal Sentencing Guidelines, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680-92; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); and Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

11. In the section of the Guidelines Manual headed "The Basic Approach," the Sentencing Commission states:

> A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should he defined primarily on the basis of the principle of "just deserts." . . . Others argue that punishment should be imposed primarily on the basis of practical "crime control" consideratious. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.
>
> Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

USSG ch. 1, pt. A(3) (1995).

ity contained in Chapter One of the Guidelines.[12] Professor Marc Miller correctly insists that "[p]urposes ought to play a dominant role in shaping the sentence in each case."[13] In developing a guidelines system, this sensible admonition should manifest itself in two ways. First, the Commission should carefully and explicitly consider sentencing purposes in creating the guidelines for each category of offense. Second, sentencing judges should consider purpose when setting an individual criminal's sentence within the range prescribed by the Guidelines.[14]

It is here that the Commission can sensibly be criticized for its work in creating (and repeatedly amending) the guidelines for the sentencing of economic crime. As we will see, the Guidelines account for a surprisingly large number of the factors one would want to see considered in sentencing of the economic criminal. The difficulty is that a failure to think through and articulate those sentencing purposes peculiar to economic crime has produced a package of sentencing provisions that is excellent in parts, but overall rather like Winston Churchill's description of an inferior pudding—"it has no theme."[15]

This Article proceeds from the following postulates, which are at the least consistent with the Sentencing Reform Act and the understandings of the framers of the Guidelines: (1) A criminal sentence should be no longer than morally justifiable by principles of just deserts; (2) the precise sentence below that maximum should be set by considering the utilitarian goals of deterrence, incapacitation, rehabilitation, restitution, and reprobation; and (3) which utilitarian goal will predominate will vary depending on the type of crime (and sometimes on the category of offender within crime type). The objective is not a universally applicable hierarchy of sentencing values. It is the

12. *See id.*

13. Marc Miller, *Purposes At Sentencing*, 66 S. CAL. L. REV. 413, 463 (1992).

14. Professor Miller has proposed a gradualist approach to an increasing integration of purpose into the Guidelines sentencing process. He suggests that the Commission develop "purpose-based guidelines" which would encourage judges to begin the development of a "common law of purposes," upon which the Commission might then rely to develop more detailed purpose-based guidelines for particular offenses and offenders. *Id.* at 477-78. I confess to some skepticism that such a sophisticated feedback loop could be created or sustained between the judges and the Commission. The tene of Professor Miller's article suggests that he was sadly conscious even in 1992 that his proposals would require more of the participants in the federal sentencing system than they were likely to provide. *See id.* at 478-80.

15. "Take away that pudding—it has no theme." Attributed te Winston S. Churchill, in LORD HOME, WAY THE WIND BLOWS Ch. 16 (1976), quoted in, THE CONCISE OXFORD DICTIONARY OF QUOTATIONS 100 (Angela Partington, ed. 1994).

articulation of sentencing rules with a rational connection to those sentencing purposes which predominate in each category of offense.[16]

B. The Centrality of Offense Seriousness to the Guidelines Regime

In describing its basic approach to drafting the Guidelines, the original Sentencing Commission emphasized the importance of retribution and crime control, but refused to "accord one primacy over the other" because, in the Commission's view, in most cases the two approaches produce roughly equal sentencing results.[17] The Commission was correct to this extent at least—both retributive and crime control sentencing theories ordinarily prescribe more stringent penalties for more serious crimes.[18] The retributivist says that one who commits a serious crime "deserves" a serious penalty. Likewise, the more serious the crime, the greater society's need to deter it. And by the logic of deterrence, the more severe the punishment, the greater the deterrent effect, both general and specific. Similarly, where there is a risk of recidivism, the more serious the crime, the more acute is the need to incapacitate the criminal and thereby protect the public from future transgressions. Finally, if one considers reprobation a separate justification for punishment (rather than merely a description of a type of general deterrence or an explanation of why the public shaming component of punishment is deserved), a scheme that gives powerful object lessons in the community's shared values by imposing stern penalties for notably reprehensible crimes also serves reprobative ends.[19] Thus, a prerequisite to implementation of all these objec-

16. This approach derives in part from H.L.A. Hart's distinction between the general justifying aim of punishment (which he considered to be crime control) and the rationale for allocation of punishments of differing severity among convicted offenders. *See* H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1 (1968). It owes a good deal to the work of Andrew von Hirsch and the members of the Committee for the Study of Incarceration reported in ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). It is closely related to the approach described by Professor Ashworth of "declar[ing] a primary rationale [for punishment], and . . . provid[ing] that in certain types of case[s] one or another rationale might be given priority." ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 59 (1994).

17. *See* USSG ch. 1, pt. A(2) (1996).

18. Whether the Commission was correct that retributive and crime control approaches would produce equivalent outcomes in "most sentencing decisions," *id.* ch. 1, pt. A(3), is debatable. For example, one might conclude that the moral seriousness of high volume drug trafficking crimes, as measured by the social harms they cause, is so great that very long sentences are "deserved" in all such cases. On the other hand, one might also conclude that the objective of crime control would be best served by imposing somewhat shorter sentences than have now become the norm in such cases. *See* Bowman, *supra* note 10, at 740-45.

19. The "reprobative" or "expressive" function of punishment is described in VON HIRSCH, *supra* note 16, at 48-49, and sources cited therein. *See also* Bowman, *supra* note 10, at 742-43

tives in a guidelines regime is the creation of a means of measuring the seriousness of offenses.[20]

A crime occurs when there is a volitional act attended by a culpable mental state which causes, or at least risks causing, a harm.[21] All these concepts—act, mental state, cause, and harm—are relevant both to the threshold question of the existence of criminal liability and to the assessment of offense seriousness.[22] When we rank the severity of crimes, we focus not on any one of these elements, but on their interaction. Likewise, the relative importance of the basic components of criminal liability to judgments about offense seriousness varies among different categories of crime. For example, all grades of homicide are directed at the same harm, the death of a human being.[23] The difference between the statutory degrees of homicide is almost purely a question of culpable mental state. By contrast, the mental state of all larcenies (and indeed of most simple property crimes) is some variant of an intent to permanently deprive an owner of his property; historically, statutory grades of the offense differ according to the value of the property stolen, a factor predominantly related to harm.[24]

Both when discussing the imposition of criminal liability and when ranking offense seriousness, we tend to lump the first three components of a crime—act, mental state, and cause—into the single concept of fault or blameworthiness.[25] The idea of fault often embraces still another consideration—those circumstances or characteristics of the individual defendant relevant to his capacity or disposi-

(discussing the reprobative function of punishment in connection with drug offenses sentenced under the Guidelines).

20. The goal of rehabilitation, by contrast, does not necessarily dictate an invariable proportionality between severity of crime and severity of sentence.

21. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 16-19, 185-90 (2d ed. 1960).

22. "[T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment." Payne v. Tennessee, 501 U.S. 808, 819 (1991).

23. This analysis excludes the special case of capital murder where harms other than the decedent's death may be aggravating factors, proof of which is necessary for imposition of the death sentence. *See id.* at 820, 824-25; Gregg v. Georgia, 428 U.S. 153, 194-95 (1976).

24. *See infra* notes 173-74 and accompanying text (discussing the multiple functions of the loss measurement).

25. For example, if *A*, by pure inadvertence unattended by negligence, acts and sets in train a sequence of events that causes *B*'s death, we say the harm to *B* that indisputably resulted from *A*'s conduct is "not *A*'s fault." Similarly, if *A* passionately desires te kill *B* and lays a deadly snare, but *B* dies in a motor accident before reaching the trap, we also say that *B*'s death is "not *A*'s fault." In the first case, we really mean that, despite the fact that *A*'s act caused *B*'s death, no fault or blame attaches te *A* because he *lacked a guilty mind.* In the second case, we mean that, despite *A*'s guilty mind, his actions did not *cause* the death.

tion to make culpable choices. The question of individual capacities and circumstances arises both in determining the existence of any criminal liability (as in the case of insanity[26]) and in assessing offense seriousness and appropriate punishment (as with diminished mental capacity[27] and voluntary intoxication,[28] which often mitigate offense severity even where they are not complete defenses to liability). Moreover, judges have historically considered many of a defendant's personal characteristics—age, family history, socioeconomic background, mental condition short of insanity, alcohol or drug addiction, physical condition, educational level, employment history, family responsibilities, and the like—that are relevant to the choice of sentence within the legally allowable range because these characteristics have been thought to render a defendant more or less blameworthy for his bad choices and the resultant harms.[29]

A guidelines sentencing system whose philosophical underpinnings confer pivotal importance on offense seriousness must, therefore, contain mechanisms to account for harm (including risk of harm) and the four components of fault (act, mental state, cause, and responsibility) as they manifest themselves and interact in different categories of crime.[30]

C. The General Structure of the Guidelines

The Federal Sentencing Guidelines are, in a sense, nothing more than a set of instructions for one chart—the Sentencing Table.[31]

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26. *See* M'Naghten's Case, 8 Eng. Rep. 718 (1843) (holding defendant not criminally responsible if insane).

27. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.7, at 368-76 (2d ed. 1986) (noting that diminished capacity can exonerate a defendant from criminal responsibility in some jurisdictions where defendant's mental condition is admissible as to all types and grades of offenses on the question of whether the defendant had the mental state that is an element of the crime charged, but may only mitigate the seriousness of the offense of conviction in other jurisdictions where defendant's mental condition is admissible only as to certain more serious offenses).

28. *See id.* at 387-92 (noting that voluntary intoxication is often permitted as a defense to negate so-called "specific" culpable mental states requiring knowledge or intent, but not the "general" mental states of negligence or recklessness required of lesser grades of the same crime).

29. *See* Bowman, *supra* note 10, at 684-85 (discussing individualized sentencing before the Guidelines); *id.* at 707-14 (discussing permissible uses of individualizing factors under the Guidelines).

30. For a stimulating critique of the idea that sentences should be based primarily on offense seriousness, see Russell M. Coombs, *Perfecting a Blunder: Redefining Loss as the Main Gauge of Federal Sentences for Theft and Fraud*, 10 FED. SENTENCING REP. 152 (Nov.-Dec. 1997) (arguing that to maximize crime control, sentences should be based primarily on offender characteristics).

31. *See* USSG ch. 5, pt. A.

The goal of guidelines calculations is to arrive at numbers for the vertical (offense level) and horizontal (criminal history category) axes on the Sentencing Table grid, which in turn generate an intersection in the body of the grid. Each such intersection designates a *sentencing range* expressed in months. For example, a defendant whose offense level is 26 and whose criminal history category is *I* would be subject to a sentencing range of 63-78 months.[32]

The criminal history calculation reflected on the horizontal axis of the Sentencing Table is a rough effort to determine a defendant's disposition to criminality, as indicated by the number and nature of his prior contacts with the criminal law. The basic unit of measurement in this calculation is prior sentences imposed for misdemeanors and felonies.[33]

The offense level reflected on the vertical axis of the Sentencing Table is a measurement of the seriousness of the present crime. In general, the offense level calculation begins with the crime of which the defendant was actually convicted. The court must determine, primarily by reference to the "Statutory Index,"[34] which guideline in Chapter Two ("Offense Conduct") applies to that crime. Most Chapter Two offense conduct guidelines contain two basic components: a "base offense level"—a seriousness ranking based purely on the fact of conviction for a particular statutory violation—and a set of "specific offense characteristics." The "specific offense characteristics" represent an effort to categorize and account for commonly occurring factors that cause us to think of one crime as worse than another. They "customize" the crime. For example, the Guidelines differentiate between a theft of $1,000 and a theft of $1,000,000,[35] or between a bank robbery where the robber hands the teller a note, and a robbery where the robber pistol whips the teller and shoots the bank guard.[36]

Once the court determines an offense level by applying the offense conduct rules from Chapter Two, it considers a series of other possible adjustments contained in Chapter Three. These include increases in the offeuse level based on factors such as the defendant's

32. *See id.* By statute, the top end of the range can be no more than 25% higher than the bottom end. For discussion of the "25% rule," see Bowman, *supra* note 10, at 691 n.49, 712-13.

33. See USSG chapter 4 for the rules regarding calculation of criminal history category.

34. *See* USSG App. A (Statutory Index).

35. *See id.* § 2B1.1(b)(1) (reflecting an increase in offense level of 2 for a theft of more than $1,000 and increase of 13 for a theft of more than $800,000).

36. *See id.* § 2B3.1(b)(3) (reflecting possible increases of up to 11 offense levels for the use of a weapon and causing injuries in the course of a robbery).

role in the offense,[37] whether the defendant engaged in obstruction of justice,[38] commission of an offense against a government official[39] or a particularly vulnerable victim,[40] and the existence of multiple counts of conviction.[41] The court may also reduce the offense level based on a defendant's "mitigating role" in the offense[42] or on his so-called "acceptance of responsibility."[43]

Once the court has determined the offense level on the vertical axis and the criminal history category on the horizontal axis, it can determine the sentencing range. The judge retains largely unfettered discretion to sentence *within that range*.[44] However, in order to go above or below the range, to "depart," the judge must explain why, and must couch the explanation in terms of factors for which the Guidelines do not adequately account already.[45] Moreover, except in unusual circumstances, the Guidelines specifically *exclude* from consideration, for purposes of departing outside the guideline range, most of those factors, such as age, employment record, or family ties, that judges formerly used to individualize sentences.[46]

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37. *See id.* § 3B1.1 (the defendant's offense level can be enhanced by either 2, 3, or 4 levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise).

38. *See id.* § 3C1.1, application note 3 (obstruction of justice includes conduct such as threatening witnesses, suborning perjury, producing false exculpatory documents, destroying evidence, and failing to appear as ordered for trial).

39. *See id.* § 3A1.2.

40. *See id.* § 3A1.1 (creating an enhancement where a victim was selected on the basis of "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" and in the case of a victim "unusually vulnerable due to age, [or] physical or mental condition").

41. *See id.* ch. 3, pt. D.

42. *See id.* § 3B1.2 (allowing 2 or 4 level decreases in offense level if defendant found to be a "minor participant" or "minimal participant" in the criminal activity).

43. *Id.* § 3E1.1 (allowing reduction of 2 offense levels where defendant "clearly demonstrates acceptance of responsibility," and an additional offense level if otherwise applicable offense level is a least 16 and defendant has "assisted authorities in the investigation or prosecution of his own misconduct" by taking certain steps). Despite the euphemism "acceptance of responsibility," section 3E1.1 is simply an institutionalized incentive for guilty pleas.

44. *See id.* § 5C1.1(a) (stating that "[a] sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range").

45. *See* 18 U.S.C. § 3553(b) (1994); USSG § 5K2.0.

46. Chapter 5, Part H of the Guidelines lists factors that the Commission determined to be "not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." USSG ch. 5, pt. H commentary. These include age, *see id.* § 5H1.1 (1995), educational and vocational skills, *see id.* § 5H1.2, mental and emotional conditions, *see id.* § 5H1.3, physical condition, *see id.* § 5H1.4, history of substance abuse, *see id.* § 5H1.4, employment record, *see id.* § 5H1.5, family or community ties, *see id.* § 5H1.6, socioeconomic status, *see id.* § 5H1.10, military record, *see id.* § 5H1.11, history of charitable good works, *see id.*, and "[l]ack of guidance as a youth," *id.* § 5H1.12. In theory, most of these factors nonetheless can justify a departure, but such a departure is permissible only where the excluded factor is present to a degree so unusual that the Commission would not have anticipated its impact and thus did not "adequately [take it] into consideration," 18 U.S.C. § 3553(b), when formulating the guidelines.

Finally, the Sentencing Commission created "relevant conduct."[47] A thorough discussion of relevant conduct is beyond the scope of this Article, but the essence of the concept is that the court can, indeed must, sentence each defendant based on *what he really did* as part of the same transaction or series of related transactions that resulted in the count of conviction, regardless of the specific offense of which a defendant is convicted after trial or as a result of a plea.

The inclusion in the Guidelines of the relevant conduct concept, the customization of sentences through "specific offense characteristics" not included in the elements of the offense of conviction, and the rules governing sentences for multiple counts of conviction, when taken together, transformed what would otherwise have been a predominantly "charge of conviction" system into a "modified real offense" system.[48] The "modified real offense" character of the system is of considerable importance in understanding the Guidelines' approach to sentoncing economic crimes.

In general, therefore, and consistent with their philosophical premises, the Federal Sentencing Guidelines focus pervasively on offense seriousness. The explicit numerical yardstick of offense seriousness, the vertical "Offense Level" axis of the sentencing grid, has forty-three levels, while the horizontal "Criminal History" axis has only six. Because the sentencing range increases by equal increments along either axis, offense level customarily has a far greater effect on sentence than does criminal history.

D. The Federal Sentencing Guidelines and the Economic Offender

1. Sentencing the Economic Criminal: Some History

Creating a sentencing scheme for economic criminals prosecuted in federal courts presents greater difficulties than assigning

47. The term "relevant conduct" and its applications to guideline calculations are enumerated in USSG § 1B1.3. For a general discussion of relevant conduct and its function in the guidelines system, see William W. Wilkins Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990); *see also* Bowman, *supra* note 10, at 702-03.

48. *See, e.g.*, Daniel J. Sears, *Defense Practice Under the Bail Reform Act and the Sentencing Guidelincs—A Shifting Focus*, FED. PROBATION, Dec. 1991, at 38, 40 (categorizing the sentencing process under the Guidelines as a process based on "'real offense' behavior rather than the offense of conviction"). *But see* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1505-12 (1993) (asserting that the Guidelines are actually a charged offense system).

sentences to those who commit crimes against persons. The first of these difficulties might be termed "historical." The common law, and more particularly the body of Anglo-American statutory law that evolved from it, created a plethora of legal categories for crimes against persons that assigned offense seriousness rankings based primarily on only two of the factors previously discussed: the culpable mental state of the defendant and the degree of harm caused to the victim. For example, if *A* strikes *B*, the statutory law of most states stands ready to receive *A* into one of nine or more pre-defined categories ranging from capital murder to misdemeanor assault. If *B* dies from the blow, there are as many as six kinds of homicide, distinguished from each other primarily by different culpable mental states.[49] If *B* lives, there will generally be at least three types of assault charges available, usually differentiated by the degree of physical harm caused (or sometimes merely risked) to the victim and by the type of weapon employed.[50]

By contrast, in early law there were several different crimes of dishonest acquisition, but little or no difference in degree between them. Many historians believe that at earliest common law, all larcenies (the only property crime recognized for many years in England) were felonies and punishable by death.[51] By 1275, larceny was

49. First degree murder generally involves both an intentional killing and some form of premeditation. *See, e.g.*, COLO. REV. STAT. § 18-3-102(1)(a) (1997). Second degree murder, where it exists, is usually either a "knowing" killing, *see, e.g.*, *id.* § 18-3-103(1), or one carried out purposefully, but without premeditation, *see, e.g.*, WASH. REV. CODE § 9A.32.050(1)(a) (1995). Manslaughter is usually of two types, voluntary, which customarily denotes some form of "heat of passion," *see, e.g.*, VA. CODE ANN. § 18.2-35 (1995); MODEL PENAL CODE § 210.3(1)(b) (1980), or involuntary, which usually means "reckless," *see, e.g.*, VA. CODE ANN. § 18.2-36 (1995); MODEL PENAL CODE § 210.3(1)(a) (1980). Many statos also have some form of criminally negligent homicide. *See, e.g.*, COLO. REV. STAT. § 18-3-105 (1997); WASH. REV. CODE ANN. § 9A.32.070 (West Supp. 1997-1998) (defining manslaughter in the second degree as causing the death of another person "with criminal negligence"). In states with the death penalty, the state is required to prove the highest form of culpable homicide plus one or more aggravating factors. *See, e.g.*, COLO. REV. STAT. § 16-11-103 (1997).

50. *See, e.g.*, WASH. REV. CODE ANN. § 9A.36.011 (West Supp. 1997-1998) (first degree assault committed where defendant "with intent to inflict great bodily harm" assaults victim with deadly weapon, administors poison, or inflicts great bodily harm); *id.* § 9A.36.021 (defining second degree assault as assault committed where defendant administors poison with intont to inflict bodily harm, inflicts substantial bodily harm, or assaults victim with a deadly weapon); *id.* § 9A.36.030 (defining third degree assault as involving less harm and less dangerous weapons than required in first and second degree assaults). Because the presence or dangerousness of a weapon is considered to demonstrate a willingness to inflict the sort of harm that can be caused by dangerous or deadly weapons, it functions as a proxy for measuring blameworthiness.

51. *See, e.g.*, ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW 290 (3d ed. 1982) ("Under the early law felonies were punishable by death, and larceny was a common law felony."). Professor Roger Groot, one of the leading authorities on 12th and 13th century English criminal practice, *see, e.g.*, Roger D. Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1 (1982), tells me that his study of English plea rolls from the thirteenth century

divided into grand and petit larceny depending on the value of the goods stolen; both crimes were felonies, but only the former was punished with death.[52] In the 1700s, Parliament enacted statutes creating the crimes of false pretenses[53] and embezzlement,[54] both of which were "misdemeanors" though punishable by penalties we would now consider appropriate to "felonies."[55] Modern codes generally consolidate the various types of property crimes into the single crime of "theft," each of the old familiar categories becoming now but a different method of committing the same offense.[56] There are generally only two or three degrees of theft, with the primary distinction between the degrees being the value of the thing stolen.[57]

In addition, modern state penal codes include crimes such as robbery, burglary, or extortion that customarily involve stealing in

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reveals a de facto division of larceny cases into offenses meriting hanging and those that did not, predating the formal creation of grand and petit larceny categories in the Statute of Westminster of 1275. Professor Groot says that, as early as the 1240s, defendants often were not subjected to the normal criminal process when they stole "petty things." Telephone Interview with Roger D. Groot (October 1997).

52. *See* PERKINS & BOYCE, *supra* note 51, at 335 nn.4 & 5.

53. *See* 30 Geo. II, c. 24, § 1 (1757), *reprinted in* 8 UK Stat. 73 (1948).

54. *See* 39 Geo. III, c. 85 (1799), *reprinted in* 18 UK Stat. 175 (1948).

55. *See* PERKINS & BOYCE, *supra* note 51, at 363-64 (describing the history of the law of false pretenses and quoting the first false pretenses statute as imposing penalties of fine, imprisonment, the pillory, or transportation for seven years); *id.* at 352 n.6 (noting that the punishment for embezzlement under the 1799 statute was transportation not to exceed 14 years).

56. *See* LAFAVE & SCOTT, JR., *supra* note 27, § 8.8(c), at 760-61 (noting that the American criminal system merged crimes of larceny, embezzlement, and false pretenses into a single category, usually referred to as "theft"); PERKINS & BOYCE, *supra* note 51, at 390-91 (discussing the merger phenomenon as it occurred in California and New York).

57. For example, in Delaware, theft is generally either a Class G felony or a Class A misdemeanor, depending on whether the property taken is worth more or less than $500. *See* DEL. CODE ANN. tit. 11, § 841 (1995). Washington divides theft into three degrees based primarily on the value of the thing taken. *See* WASH. REV. CODE ANN. § 9A.56.030(1)(a) (West Supp. 1997-1998); *id.* § 9A.56.040(1)(a); *id.* § 9A.56.050(1) (West 1988). Also in Washington, first and second degree theft are felonies; third degree theft is a gross misdemeanor. Colorado divides theft into four degrees based on the value of the thing taken; there are two felony and two misdemeanor classifications. *See* COLO. REV. STAT. § 18-4-401(2) (1997).

Some states have special laws dealing with bad checks, receiving stolen property, and other variants of simple thievery. *See, e.g.*, WASH. REV. CODE ANN. § 9A.56.060 (West 1988) (stating that the crime of unlawful issuance of bank checks is a Class C felony when the amount of the check or checks exceeds $250, but a misdemeanor if the amount is $250 or less); *id.* §§ 9A.56.150-9A.56.170 (West 1988 & Supp. 1997-1998) (the crimes of possession of stolen property in the first, second, and third degree are divided into same degrees as theft based on same dollar amounts). However, such offenses are customarily divided into the same number of degrees as is theft itself based on the amount of the bad check or the value of the stolen property. *See id.*; *see also* COLO. REV. STAT. § 18-4-410 (1997) (stating that theft by receiving is divided into the same degrees as theft, based on value of stolen property received).

some form.[58] Statutes often divide these crimes into degrees, but the focus of the offenses is less on economic harm than on invasions of other interests[59]—the sanctity of the home, the risk of physical violence, the threat to people, property, or reputation implicit in extortion. Accordingly, the factors establishing the relative seriousness of the statutory degrees of burglary, robbery, and extortion are almost exclusively noneconomic. The difference between simple and aggravated robbery is the presence or absence of a weapon.[60] The difference between first and second degree burglary is most often the presence of a weapon or the commission of an assault during the crime.[61]

Notably absent from the traditional ranking calculus of economic crimes is any consideration of mental state or of the nature and quality of the acts which make up the crime. Of course, imposition of liability requires proof of both a culpable mental state and some voluntary act. However, the mental state necessary to almost all simple theft-type crimes is some variant of an intent to steal, defraud, or otherwise deprive the owner of the use or benefit of his property.[62] No statutes distinguish between more and less reprehensible degrees of larcenous intentionality. Similarly, theft-type statutes prohibit a host

58. *See, e.g.*, WASH. REV. CODE ANN. § 9A.52.020 (West 1988) (burglary); *id.* § 9A.56.110 (extortion).

59. *See, e.g.*, *id.* §§ 9A.52.020 (defining burglary to include illegal entry made for the purpose of committing a nonproperty crime); *id.* § 9A.56.110 (defining extortion to include obtaining by threat either property or services, including sexual favors); *see also* United Statos v. Couch, 65 F.3d 542, 545 (6th Cir. 1995) (observing that the guideline for burglary has a higher base offense level than the theft guideline because "criminal activity that takes place in a dwelling or structure carries with it an increased risk of encountering innocent people and causing physical and psychological injuries").

60. *Compare, e.g.*, WASH. REV. CODE ANN. § 9A.56.200(1) (West 1988) (stating that first degree robbery is defined as robbery in which defendant is armed with or displays a deadly weapon or inflicts bodily injury), *with id.* § 9A.56.210(1) ("A person is guilty of robbery in the second degree if he commits robbery.").

61. *Compare, e.g.*, *id.* § 9A.52.020 (stating that first degree burglary is committed where the defendant entors a dwelling and is armed with a deadly weapon or assaults any person therein), *with id.* § 9A.56.030 (stating that second degree burglary is committed where the defendant unlawfully enters building with intont to commit a crime therein); COLO. REV. STAT. § 18-4-202(1) (1997) (stating that first degree burglary is committed when the defendant enters a building or occupied structure with intent to commit a crime therein and assaults or menaces another person or is armed with a deadly weapon), *with id.* § 18-4-203 (stating that second degree burglary is committed when the defendant breaks into, enters, or remains unlawfully in a building with intent to commit a crime therein).

62. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 32.07, at 518-19 (2d ed. 1995) (stating that the required mental state for larceny is intent to steal); *id.* § 32.09[B], at 524 (describing the required mental state for embezzlement); *id.* §32.10[A], at 525 (describing the required mental state for false pretenses as intent to defraud).

of means by which victims may be relieved of their property, but method is not a factor in ranking such crimes.[63]

This pattern of historical development has produced a variety of well-developed, long-recognized statutory guideposts for distinguishing between more and less serious crimes against persons, but only one recognized, commonly codified determinant of the degree of seriousness of economic crimes—the value of the thing stolen. Why has this simple, and seemingly simplistic, approach to categorizing economic crimes persisted? The probable answer is that it suited the theft cases that predominated in the developing law of England before very recent times, and that continue to predominate in most American state courts. As George Fletcher has observed, early theft law, both in England and on the European continent, concerned itself largely with cases of "manifest thievery," that is, cases that look and feel like the paradigm of a thief seizing one's goods by stealth and carrying them away.[64] Despite being the source of endless headaches to generations of judges, lawyers, and law students, the common law and early statutory crimes like larceny by trick, embezzlement, and false pretenses that developed to fill perceived gaps in the early law of larceny[65] were nonetheless directed at conduct instinctively identifiable as stealing. Even today, the vast majority of economic crimes adjudicated in state courts remain very close to the classic model of manifest thievery or its early offshoots: The defendant stole a car, picked a pocket, tapped a till, wrote a dud check, or doctored the books, and it is easy to figure out what was stolen, from whom, and how much it was worth.[66] The defendant's methods were unremark-

63. For instance, the consolidated Colorado theft statute, COLO. REV. STAT. § 18-4-401 (1997), prohibits direct taking of property from another, obtaining control over property by threat or by deception, knowing use, concealment, or abandonment of the property of another, and unlawfully demanding compensation for the return of another's property, all within the same statute.

64. *See* George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 476-81 (1976) (describing the concepts of manifest thievery in Roman, biblical, early English, and other Indo-European legal traditions).

65. *See id.* at 502-20 (describing the evolution of statutory law with respect to larceny); *see also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW §§ 2.1 to 2.4, at 59-113 (1978) (tracing the history and development of modern larceny).

66. Of the 989,007 inmates in the custody of State correctional authorities in 1995, 230,300 prisoners (23.3% of the total population) were incarcerated for property offenses. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1995, at 9-10 tbls. 1.11, 1.12 (1997). Of this total, 10.9% were incarcerated for burglary, 4.8% for larceny, 2.6% for fraud, 2.2% for vehicle theft, and 2.7% for miscellaneous property crimes such as receiving stolen property, destruction of property, etc. Of the crimes reported to state police, larceny-theft offenses constitute over 50% of all the crimes in the following categories: murder, forcible rape, robbery, burglary, larceny-theft, and motor vehicle theft. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 3.116 (1993), Table 3.103

able, and his state of mind was patent and effectively indistinguishable from that of virtually all other such offenders. In these simple circumstances, the value of the thing taken is not a bad proxy for the extent of the injury caused or threatened by the defendant's behavior, and is thus a good indicator of the relative seriousness of the crime.

By contrast, there are hundreds of federal economic crimes. Of the roughly 970 criminal statutes listed in the Statutory Index to the Federal Sentencing Guidelines,[67] some 250 of them are sentenced using either the theft guideline, section 2B1.1, or the fraud guideline, section 2F1.1.[68] This total does not include the federal versions of crimes such as burglary,[69] robbery,[70] extortion,[71] blackmail,[72] bribery,[73] or criminal copyright infringement,[74] all of which are also crimes of dishonest acquisition.[75]

Federal economic crimes also cover an immense range of disparate conduct and implicate an array of interests beyond those of easily identifiable victims in readily quantifiable amounts of money, goods, or services. Federal criminal laws protect the integrity of commodities markets[76] and prohibit the sale of unregistered securities through the mail.[77] They punish removal, disturbance, or destruction of the "graves, relics, or other evidences of an ancient civilization,"[78] and the removal of documents relating to claims against the United States.[79] They prohibit counterfeiting United States currency,[80] the obligations of foreign countries,[81] and the papers of ships.[82] More

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(1994), and Table 3.119 (1995). The average property loss (in dollars) incurred for larceny-theft excluding motor vehicle theft ranged from $483 (1993) to $505 (1995). *Id.*

67. The Statutory Index to the Guidelines lists almost all the federal statutory provisions prescribing criminal penalties. *See* USSG app. A (1997). It contains a separate entry for each separately chargeable statutery subsection. The list "specifies the guideline section or sections ordinarily applicable to the statute of conviction." *Id.* at 417.

68. *See id.* app. A.

69. *See id.* § 2B2.1.

70. *See id.* § 2B3.1.

71. *See id.* § 2B3.2.

72. *See id.* § 2B3.3.

73. *See id.* § 2B4.1.

74. *See id.* § 2B5.3.

75. The Guidelines provisions for all of these crimes incorporate enhancements for loss.

76. *See* 7 U.S.C. § 6 (1994) (restricting commodities futures trading and foreign transactions).

77. *See* 15 U.S.C. § 77e(a) (1994).

78. 16 U.S.C. § 114 (1994).

79. *See* 18 U.S.C. § 285 (1994).

80. *See id.* § 471.

81. *See id.* § 479 (prohibiting making, altering, or counterfeiting with intent te defraud obligations of foreign governments).

82. *See id.* § 507 (prohibiting falsely making, forgiug, counterfeiting, or altering registries, licenses, passes, permits, and other ship's papers).

familiarly, federal law punishes theft and embezzlement from federally insured banks,[83] and criminalizes every "scheme or artifice to defraud" carried out by means of either the U.S. Mail[84] or interstate wire communications,[85] or directed at any health care benefit program.[86]

Moreover, penalty levels for federal economic crimes vary widely and conform to no discernible pattern. The maximum penalties for federal economic crimes range from misdemeanor levels of a year or less,[87] to five years per count of conviction for wire and mail fraud,[88] to thirty years for bank fraud,[89] to life imprisoument for conducting a "continuing financial crimes enterprise."[90] These penalties are not tied to an overall ranking scheme, such as those nearly universal in state systems, where the legislature creates a limited set of offense categories (e.g., "Class 1," "Class 2," "Class 3") and assigns every crime in the criminal code to one of the categories.[91] Such a scheme embraces all types of crime and incorporates legislative judgments about the relative seriousness of different offenses. By comparison, penalty ranges for federal economic offenses seem almost whimsical, owing more to the political enthusiasms of the moment they were enacted than to any reasoned effort to compare the relative seriousness of different crimes.[92]

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83. *See id.* § 656 (regarding theft, embezzlement or misapplication by bank officers and employees).

84. *See id.* § 1341.

85. *See id.* § 1343.

86. *See id.* § 1347.

87. *See, e.g., id.* § 656 (providing that the penalty for embezzlement of less than $1000 by a bank employee or officer shall be a fine, imprisonment for not more than one year, or both).

88. *Id.* §§ 1341, 1343 (providing that the penalty for wire or mail fraud shall not exceed five years).

89. *See id.* § 1344 (providing that penalty for bank fraud shall be a $1 million fine, or 30 years imprisonment, or both).

90. *Id.* § 225(a).

91. *See, e.g.,* COLO. REV. STAT. § 18-1-105 (1997) (categorizing felonies into six classes); *id.* § 18-1-106 (classifying misdemeanors into three classes); WASH. REV. CODE ANN. § 9A.20.010 (West 1988) (catogorizing felonies into three classes and misdemeanors into two classes).

92. A notable recent example of the overweening effect of current events on federal criminal sentences is the fourfold, then sixfold, increase in the maximum penalty for bank embezzlement, from five years to 20 years in 1989, and from 20 years to 30 years in 1990, enacted by a Congress in the grip of the savings and loan debacle of the 1980s. *Compare* 18 U.S.C. § 656 (1988) (setting maximum sentence for theft, embezzlement, or misapplication by bank officer or employee at five years imprisonment and a $5,000 fine), *with* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (1989) (increasing maximum fine for violation of section 656 from $5,000 to $1 million, and maximum term of imprisonment from five years to 20 years), *and* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1797 (1994) (increasing maximum term of imprisonment for violation of section 656 from 20 years to 30 years).

The void created by the absence of meaningful congressional guidance on questions of relative offense seriousness is enlarged by yet another condition common in federal economic crime prosecutions. Statutory structures, state and federal, for crimes against persons have a marked cabining effect on sentences largely because a conviction for such offenses is likely to be of a single count—one murder, one assault, one rape, one robbery. Multiple counts of conviction for crimes against persons have a tendency to merge for sentencing purposes; when they do not, distinctly different harms are likely being punished—two dead victims if there are two counts of homicide, two robbed stores if there are two counts of robbery. The relationship between the number of counts of conviction and the number of discretely identifiable harms is much more blurred in federal white collar cases. The most notable examples are wire and mail fraud, offenses in which every separate mailing or interstate wire communication in furtherance of the criminal scheme is a separately indictable and punishable offense.[93]

By way of illustration, if a state legislature decides that the appropriate penalty range for one second degree murder is twelve to twenty-four years, the sentencing judge will probably be precluded from sentencing the defendant to more than twenty-four years (a penalty range the legislature thought it was reserving for first degree murder). The judge will be equally constrained from sentencing the defendant to less than twelve years, a range the legislature thought appropriate for various forms of manslaughter.[94] In contrast, until the advent of the Federal Sentencing Guidelines, the length of possible sentence faced by a federal white collar offender ran from a minimum of probation to a maximum term of imprisonment calculated by multiplying the number of counts of conviction times the maximum statutory sentence for each such count.[95] Thus, legislative judgment about offense seriousness implicit in the decision to set five years as the maximum sentence for one count of a crime such as wire fraud disintegrated in the face of untrammeled prosecutorial

93. *See* United States v. Clevenger, 458 F. Supp. 354, 359 (E.D. Tenn. 1978) (holding that separate counts for separate mailings in furtherance of the same scheme to defraud is not multiplicitous); Unitod States v. Brodbeck, 430 F. Supp. 1056, 1060 (E.D. Wis. 1977) (same); *see also* United States v. Calvert, 523 F.2d 895, 914 (8th Cir. 1975) (holding each separate use of wire communication in order to aid the same scheme to defraud to he a separate offense).

94. This illustration assumes a sentencing structure employing statutory ranges with minima and maxima. If there were no minima, the top-end constraints would still exist.

95. *See, e.g.*, United States v. Perez, 956 F.2d 1098, 1102-03 (11th Cir. 1992) (affirming the power of a district court te impose consecutive sentences for convictions of burglary and theft arising from the same transaction).

discretion to charge one count or twenty arising from the same scheme, and the equally unlimited power of a judge to sentence anywhere within a legally permissible range of zero to 100 years. Thus, when the United States Sentencing Commission set out to create guidelines for sentencing economic criminals, it faced an array of difficulties greater than that presented by virtually any other category of offender.

2. The Guidelines' Approach to Economic Crimes

The issues addressed by the Guidelines fall broadly into two categories: first, issues common to all offenders regardless of their particular offense; and second, issues specific to particular offenses. Inte the first category fall treatment of criminal history,[96] the multiple count rules,[97] relevant conduct,[98] adjustments for the defendant's role[99] and for vulnerable victims,[100] and the virtual exclusion of the defendant's personal circumstances and characteristics from the calculation of guideline range.[101] The second category contains all the rules concerning the offenses for which the defendant is being sentenced. These are found in Chapter Two, "Offense Conduct."[102]

The Commission's approach to drafting Chapter Two guidelines was empirical and historical, rather than normative or philosophical. That is, with a few notable exceptions, the Commissioners did not attempt to determine what the penalty for any given offense *should be*; rather, they set out to reproduce the sentencing patterns in existence before the Guidelines.[103] The Commission studied a sample of 10,000 past cases in order to identify the characteristics of both offenders and offenses that judges had historically deemed important in making sentencing choices.[104] In effect, the Commission attempted to discover and codify the federal common law of sentencing.

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96. *See* USSG ch. 4.
97. *See id.* ch. 3, pt. D.
98. *See id.* § 1B1.3.
99. *See id.* ch. 3, pt. B.
100. *See id.* ch. 3, pt. A.
101. *See id.* ch. 5, pt. H.
102. *See id.* ch. 2.
103. Narcotics sentences are the most prominent exception to the general approach of attempting to reproduce pre-Guidelines sentence levels; largely in response to statutory mandates, the Commission created a structure which dramatically increased drug sentences. *See generally* Bowman, *supra* note 10, at 733-34, 740-47 (discussing drug sentences under the Guidelines and arguing that they are, in many cases, too long).
104. *See* Breyer, *supra* note 10, at 7 n.50 (analyzing the basic principles behind the Guidelines' enactment).

In the case of economic crimes, the Commission adhered to its historical approach in some respects, but diverged from it in others. On the one hand, the Commission attempted to ascertain the factors that had historically been important in sentencing economic crimes, and to incorporate their findings in the Chapter Two offense conduct guidelines. On the other hand, the Commission consciously chose to raise sentencing levels for crimes against property over pre-Guidelines levels.[105] The commissioners were plainly concerned that probationary sentences had been too common in economic crimes,[106] and were convinced that the Guidelines' objectives would be better served by the imposition of "short but certain terms of confinement for many white collar offenders."[107]

Although the Commission was correct to raise sentences for economic crimes above their de minimis historical levels,[108] its effort to identify sentencing factors federal judges had in the past found determinative for economic crimes produced rather lean results. Indeed, the Commission mentions only two such factors in the commentary to the guidelines governing theft and fraud: the amount of loss, and the amount and sophistication of planning activity involved in the crime.[109]

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105. *See id.* at 20-21 (discussing the Commission's decision to increase the severity of punishment for white collar crimes); Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047 (1992) ("[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences]—taking particular aim at so-called whito-collar offenders whom the Commission found (perhaps correctly) te have been treated with undue solicitude.").

106. As Justice Breyer, then a member of the Sentencing Commission, said in 1988, "A pre-Guidelines sentence imposed on these criminals would likely take the form of straight probationary sentences." Breyer, *supra* note 10, at 7 n.49; *see also* John Hagan & Ilene Nagel Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 L. & SOC'Y REV. 467, 475 (1979) (quoting a U.S. Attorney regarding office policy of vigorous advocacy in white collar sentencing hearings "because unless we did [advocate strongly for imprisonment] almost everybody would walk out on probation").

107. Breyer, *supra* note 10, at 20; *see also* United States v. Weaver, 126 F.3d 789, 792-93 (6th Cir. 1997) (loss table reflects seriousness with which Sentencing Commission took low-level white-collar crime; district court erred in departing down based on dissatisfaction with guideline range).

108. *See* Bowman, *supra* note 10, at 734-40 (supporting the Commission's choice to increase economic crime sentences, and arguing that, even under the Guidelines, federal white collar sentences are often teo low). The Commission is presently considering raising economic crime sentences further by amending the loss tables in section 2B1.1 and section 2F1.1 to raise the sentences associated with amounts of loss in the middle and upper ranges of the tables. For discussions of these proposed changes, see Frank O. Bowman, III, *Back to Basics: Helping the Commission Solve the "Loss" Mess with Old Familiar Tools*, 10 FED. SENTENCING REP. 115, 115-16 (Nov.-Dec. 1997); and Barry Boss, *Do We Need To Incresase the Sentences in "White Collar" Cases? A View from the Trenches*, 10 FED. SENTENCING REP. (Nov.-Dec. 1997).

109. In the commentary te the fraud guideline, the Commission observes:

> Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was

For the purpose of drafting guidelines, the Sentencing Commission divided federal economic crimes into two basic types: (1) crimes involving "the most basic forms of property offenses—theft, embezzlement, transactions in stolen goods, and simple property damage or destruction,"[110] sentenced under section 2B1.1;[111] and (2) fraud crimes, sentenced under section 2F1.1.[112] Then, having gone to the trouble of creating this "great gulf fixed"[113] between theft on the one hand and fraud on the other, the Commission drafted two virtually identical guidelines. (The theft guideline, section 2B1.1 is reproduced as Table 1. The fraud guideline appears as Table 2).

> an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

USSG § 2F1.1 background commentary.

The commentary to the theft guideline statos:

> The value of the proporty stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm te the victim and the gain to the defendant.... The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential te do considerable harm. Also, planning is often relatod to increased difficulties of detection and proof.

Id. § 2B1.1 background commentary.

110. *Id.* at ch. 2, pt. B(1), introductery commentary. Property damage cases are nominally sentenced under section 2B1.3, but the core of that guideline is a cross-reference to section 2B1.1 incorporating the loss table of section 2B1.1(b)(1).

111. *Id.* § 2B1.1 (omitting subsec. 2B1.1(c) concerning cross-references and application notes).

112. *See id.* § 2F1.1 (omitting application notes).

113. LUKE 16:26.

TABLE 1[114]

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(a) Base Offense Level: 4
(b) Specific Offense Characteristics
(1) If the loss exceeded $100, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$100 or less	no increase
(B)	More than $100	add 1
(C)	More than $1,000	add 2
(D)	More than $2,000	add 3
(E)	More than $5,000	add 4
(F)	More than $10,000	add 5
(G)	More than $20,000	add 6
(H)	More than $40,000	add 7
(I)	More than $70,000	add 8
(J)	More than $120,000	add 9
(K)	More than $200,000	add 10
(L)	More than $350,000	add 11
(M)	More than $500,000	add 12
(N)	More than $800,000	add 13
(O)	More than $1,500,000	add 14
(P)	More than $2,500,000	add 15
(Q)	More than $5,000,000	add 16
(R)	More than $10,000,000	add 17
(S)	More than $20,000,000	add 18
(T)	More than $40,000,000	add 19
(U)	More than $80,000,000	add 20

(2) If the theft was from the person of another, increase by 2 levels.

(3) If (A) undelivered U.S. Mail was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered U.S. Mail, and the offense level as determined above is less than level 6, increase to level 6.

(4) (A) If the offense involved more than minimal planning, increase by 2 levels; or

(B) If the offense involved receiving stelen property, and the defendant was a person in the business of receiving and selling stelen property, increase by 4 levels.

(5) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

(6) If the offense—

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

114. USSG § 2B1.1 (omitting application notes and subsection 2B1.1(c) (concerning cross-references)).

TABLE 2[115]

§ 2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$2,000 or less	no increase
(B)	More than $2,000	add 1
(C)	More than $5,000	add 2
(D)	More than $10,000	add 3
(E)	More than $20,000	add 4
(F)	More than $40,000	add 5
(G)	More than $70,000	add 6
(H)	More than $120,000	add 7
(I)	More than $200,000	add 8
(J)	More than $350,000	add 9
(K)	More than $500,000	add 10
(L)	More than $800,000	add 11
(M)	More than $1,500,000	add 12
(N)	More than $2,500,000	add 13
(O)	More than $5,000,000	add 14
(P)	More than $10,000,000	add 15
(Q)	More than $20,000,000	add 16
(R)	More than $40,000,000	add 17
(S)	More than $80,000,000	add 18

(2) If the offense involved (A) more than minimal planning, or (B) a scheme te defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase te level 13.

(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

(6) If the offense—

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

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115. *Id.* § 2F1.1 (omitting application notes).

The term "loss" is not defined in the text of the Guidelines.[116] The primary definition appears in Application Note 2 to the theft guideline. The heart of the definition is this: " 'Loss' means the value of the property taken, damaged or destroyed."[117] The fraud guideline explicitly incorporates this definition,[118] and Application Note 7 to section 2F1.1 goes on to state: *"Frequently,* loss in a fraud case will be the same as in a theft case."[119] This language raises but does not answer the question of *when* loss in theft cases will be the same as loss in fraud cases.

The fraud commentary sets out a number of special rules for particular cases, such as procurement fraud,[120] diversion of government program benefits,[121] and Davis-Bacon Act cases.[122] Under both the theft and fraud guidelines, "the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information."[123] Finally, the general rule for both theft and fraud cases is said to be that courts should use the greater of actual or intended loss, if the intended loss is different from the actual loss and can be determined.[124]

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116. The word "loss" appears in guideline text only as a description of the monetary increments in two tables (section 2B1.1(b)(1) and section 2F1.1(b)(1)) which give rise to increases in offense level. *See, e.g., id.* § 2B1.1(b)(1) (1997) (stating that "[i]f the loss exceeded $100, increase the offense level as follows: [followed by a loss table]").

117. *Id.* § 2B1.1 application note 2. Application Note 2 goes on to say:

> Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. Loss does not include the intorest that could have been earned had the funds not been stolen. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed.

Id.

118. *Id.* § 2F1.1 application note 7 ("Valuation of loss is discussed in the Commentary to section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken . . . .").

119. *Id.* (emphasis added). For further discussion of this issue, see *infra* notes 147-71 and accompanying text.

120. *See id.* § 2F1.1 application note 7(c).

121. *See id.* § 2F1.1 application note 7(d).

122. *See id.* § 2F1.1 application note 7(e).

123. *Id.* § 2B1.1 application note 3; *id.* § 2F1.1, application note 8.

124. This rule is plainly stated only in the fraud guideline: "Consistent with the provisions of section 2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." *Id.* § 2F1.1 application note 7. Nonetheless, the same principle is implicit in the examples used for illustration in the theft guideline:

> (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.

Id. § 2B1.1 application note 2.

A court would sentence a defendant convicted of a theft-like crime as follows. The base offense level for all theft crimes is 4.[125] If the defendant stole $1,000,000, the court would consider the "specific offense characteristic" of an amount of loss between $800,000 and $1,500,000, and would add another 13 levels.[126] If the defendant took the money from his victim's person, the court would add yet another 2 offense levels.[127] Thus, a million-dollar purse snatch or jewelry grab would yield a total Chapter Two offense level of 19 (*4+13+2=19*).

If the defendant defrauded the same victim of $1,000,000, his base offense level would be 6,[128] and the court would add 11 levels for a loss of between $800,000 and $1,500,000.[129] If the crime involved "more than minimal planning," the court would add another 2 offense levels. A million-dollar fraud would therefore also produce a total offense level of 19 (*6+11+2=19*).

This simple comparison should not be taken to suggest that the theft and fraud guidelines will always produce identical offense levels for crimes with the same loss amount.[130] However, three points should be apparent. First, the theft and fraud guidelines are virtually, though not absolutely, identical. Second, despite identifying the amount and sophistication of planning activity as one of the two traditionally determinative sentencing factors in economic crimes, the Commission's only effort to account for this factor is the two-level

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However, it may be that these examples are best seen as efforts to deal with the problem of *when* loss should be measured, rather than as illustrations of the principle of intended loss. *See infra* Part IV.C.1 for discussion of the "when" problem.

The concept of intended loss is explicitly imported inte the theft guideline *only* in cases of attempt:

> In the case of a partially completed offense (*e.g.*, an offense involving a completed theft that is part of a larger, attempted theft), the offense level is to be determined in accordance with the provisions of section 2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; *see* Application Note 4 in the Commentary to section 2X1.1.

USSG § 2B1.1 application note 2. The base offense level for an attempted theft is determined by adding te the base offense level of the substantive offense "any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." *Id.* § 2X1.1(a).

125. *See* USSG § 2B1.1(a).

126. *See id.* § 2B1.1(b)(1)(N).

127. *See id.* § 2B1.1(b)(2).

128. *See id.* § 2F1.1(a).

129. *See id.* § 2F1.1(b)(1)(L).

130. For example, frauds of less than $2,000 receive no upward adjustment from the loss table, see *id.* § 2F1.1(b)(1)(A) (1997), while thefts of between $100 and $1,000 receive a one-level upward adjustment, *see id.* § 2B1.1(b)(1)(B). Therefore, because the base offense level for frauds is 6, and the base level for thefts only 4, a theft of $500 would have an offense level of 5, while a fraud in the same amount would produce an offense level of 6. For any loss amount greater than $1,000, this effect disappears.

increase for "more than minimal planning."[131] By contrast, the loss amount can change the final offense level by 18 levels in fraud cases and 20 levels in theft cases.[132] Third, and consequently, the operational core of both guidelines is the loss table; more than any other factor, loss will drive the sentencing range under either guideline.

Having sketched the basic structure of the Guidelines' provisions for sentencing economic criminals, this Article now turns to a critique of that structure and offers a series of concrete proposals for revision.

III. AN ANALYSIS OF THE ECONOMIC CRIME GUIDELINES AND A BLUEPRINT FOR REFORM

A. *The Theft and Fraud Guidelines Should Be Consolidated*

There is no good reason to have separate guidelines for theft and fraud. At least three compelling reasons support consolidating the fraud and theft guidelines: (1) The distinction between theft and fraud is illusory; (2) application of either guideline to the same facts produces nearly identical sentences; and (3) separate guidelines produce needless confusion. I will examine each of these contentions in turn.

1. The Distinction Between Theft and Fraud Is Illusory

The Commission's reasons for dividing economic offenses into theft-like crimes and fraud-like crimes remain obscure. Whatever the reasons, the distinction is both doctrinally and practically meaningless. Although not all theft crimes are frauds, virtually every fraud could be charged as one of the common law property crimes, or under one of the modern consolidated theft statutes. Consider, for example, a variation on the classic illustration of the difference between the traditional property crimes of larceny, larceny by trick, false pretenses, and embezzlement:

V owns four horses. *A* sneaks into the corral where the horses are kept and rides away on one of the horses. *B* approaches *V* and asks to rent a horse, promising to pay $10 and to return the horse tomorrow. *B* has no intention of keeping either promise and rides off

131. *Id.* §§ 2B1.1(b)(4)(A), 2F1.1(b)(2).

132. *See id.* § 2B1.1(b) (theft); *id.* § 2F1.1(b) (fraud).

with the horse, never to be seen again. *C* comes to *V* and says that she is acting on behalf of a charitable organization that runs a riding stable for mentally handicapped children and asks *V* to donate a horse. *V* does so and transfers title to a horse to *C*. In fact, *C* is a crook who takes the horse around the corner and sells it for a profit. *D* rents *V*'s last horse, fully intending to return it as promised, but the next morning decides otherwise, keeps the horse for himself, and leaves *V* a message falsely stating that he, too, has donated a horse to the children's stable. In this scenario, *A* has committed larceny,[133] *B* larceny by trick,[134] *C* false pretenses,[135] and *D* embezzlement.[136] Yet, if *B*, *C*, and *D* happened to make their false statements on the telephone across a state line, they could just as easily be charged under federal law with wire fraud.[137] In each case their conduct could be characterized as a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses."[138] Indeed, "fraud," meaning some false statement intended to induce the victim to part quietly with either possession or title to property, is an element of both larceny by trick and false pretenses. Similarly, even though fraud is not an element of embezzlement,[139] it is usually present at some point in most embezzlement cases.[140]

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133. Common law larceny is the taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property. *See* DRESSLER, *supra* noto 62, § 32.02[A], at 508.

134. *See* LAFAVE & SCOTT, JR., *supra* note 27, at 711 n.33 (citing Rex v. Pear, 168 Eng. Rep. 208 (1779) (holding that leasing a horse for part of a day and then selling it under pretense of ownership is forgery)). Larceny by trick is merely one means of committing the crime of larceny. It is a rule that extends the reach of larceny to cases in which the defendant "obtains possession of, but not title to, another's property by lies, then intending fraudulently to convert the property and later doing so." *Id.* at 711.

135. "The primary difference between larceny and false pretenses is that a thief who uses trickery te secure *title*, and not simply possession, of property, is guilty of false pretenses; one who merely secures possession through fraud is guilty of larceny by trick." DRESSLER, *supra* note 62, § 32.10[B], at 525.

136. "The most significant distinction between larceny and embezzlement is that '[i]n embezzlement, the property comes lawfully into possession of the taker and is fraudulently or unlawfully appropriated by him; in larceny, there is a trespass in the unlawful taking of the property.' " *Id.* § 32.09[C], at 524 (citation omitted).

137. *See* 18 U.S.C. § 1343 (1994).

138. *See id.* § 1341.

139. In fact, one of the traditional elements of embezzlement is fraudulent conversion of property; however, "fraudulent" in this sense does not require the making of any false statement upon which a victim relied. Rather, it simply means that the defendant "performed some act that demonstrated his intont to deprive another of the property permanently." DRESSLER, *supra* note 62, § 32.09[B], at 524.

140. For example, in most employee embezzlement cases, the defendant will be obliged at some stage to make some false oral statement or bookkeeping entry to cover up or account for the shortfall in property or funds.

The convergence of theft and fraud crimes is even more pronounced in the codes of states that followed the Model Penal Code and consolidated previously distinct property crimes under the single rubric of "theft."[141] Such statutes customarily define theft in a way that reaches most, if not all, commonly encountored frauds. The reach of these statutes is so broad that some states feel no need for separate fraud laws.[142]

The overlap between theft and fraud is not confined to state criminal law. Where many states have consolidated all property offenses, including those involving fraud, into unitary theft statutes,[143] federal law abounds with instances in which the same course of thievery is chargeable under multiple statutes, some of which are called "frauds" and some of which appear to be traditional theft-like offenses. For example, if an employee of a federally insured bank steals some of the bank's money, he can be charged under 18 U.S.C. § 656 with theft, embezzlement, or misapplication by a bank officer or employee. If in carrying out the defalcation he uses means much more complex than lifting cash out of a drawer and walking out the back door, he can also be charged with bank fraud under 18 U.S.C. § 1344. If he then employs the U.S. Mail or an interstate wire communication, he might also be charged with mail fraud, 18 U.S.C. § 1341, or with wire fraud, 18 U.S.C. § 1343.

In sum, the Guidelines' division of property offenses into theft and fraud crimes is analytically meaningless because it rests on a distinction that has no sound basis in either common or statutory criminal law, and is valueless as a practical matter because identical facts can so often be charged as either a "theft" or a "fraud."

2. Application of Either Guideline to the Same Facts Produces Nearly Identical Sentences

Even if it were possible to draw a meaningful distinction between theft and fraud, it would be useful to do so only if the objective were to generate different sentencing outcomes for the two categories

141. *See* MODEL PENAL CODE §§ 223.1-223.8 (1980).

142. For example, Washington state's consolidated theft statute specifies that theft, meaning "to wrongfully obtain or exert control over the property or services of another . . . with intent to deprive him of such property or services," may be committed "[b]y color or aid of deception." WASH. REV. CODE ANN. § 9A.56.020(1) (West 1988).

143. Federal law has made more of an effort than the states to keep theft and fraud statutes separate. However, all of the state property crime statutes may become a part of federal law under the Assimilative Crimes Act. *See* 18 U.S.C. § 13 (1994) (assimilating state law into federal law for offenses committed in federal enclaves).

of cases. However, as noted above,[144] the sentencing range under both guidelines is driven almost entirely by loss amount. Because loss *apparently* means the same thing in both guidelines (the fraud guideline adopts the theft guideline's definition of loss[145]), application of either section 2B1.1 or section 2F1.1 to the same set of facts usually produces either identical sentencing ranges, or a pair of ranges so close that the top of one will approach or overlap the bottom of the other.[146] Thus, in the overwhelming majority of cases, the existence of separate fraud and theft guidelines is pointless duplication.

3. Separate Theft and Fraud Guidelines Create Needless Confusion

In a guidelines scheme often criticized for its length and complexity, the mere fact that two guidelines are duplicative should be a sufficient argument for consolidation.[147] An even more compelling argument arises from the fact that ingenious judges and lawyers have sought to impute meaning into the theft/fraud distinction, and in doing so have created only confusion.

A series of cases from the Third Circuit graphically illustrates the potential for such difficulties. In *United States v. Kopp*, the defendant obtained a $13.75 million loan by fraud.[148] He argued at sentencing that the loss was zero because the bank liquidated the collateral for more than the loan amount. The Third Circuit addressed the problem by attempting to reconcile the differing approaches to theft and fraud cases suggested by the text and commentary of section 2B1.1 and section 2F1.1. The court noted that "calculations under the two guidelines are essentially consistent," but that slight differences led them to "decline to impose an identical analysis for theft and fraud crimes in all cases."[149] The court concluded, "In both theft and fraud cases, the guideline 'loss' turns out to be the higher of the actual

144. *See supra* note 132 and accompanying text.

145. *See supra* notes 116-19 and accompanying text; *see also* USSG § 2F1.1 cmt. 1 (1997).

146. The Sentencing Table is constructed so that the top of one sentoncing range will overlap the bottom of the range two offense levels higher. *See* USSG ch. 5, pt. A (1997).

147. *See, e.g.*, Marc Miller, *Rehabilitating the Federal Sentencing Guidelincs*, 78 JUDICATURE 180 (1995); Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899, 902 (1992) ("The prohlem of sentencing disparity is not unique to the federal criminal justice system. Only the federal system has produced a solution which outweighs the Manhattan tolephone directory, however."); Jose A. Cabranes, Editorial, *Incoherent Sentencing Guidelines*, WALL ST. J., Aug. 28, 1992, at A11 (referring to the Guidelines as "a byzantine system of rules").

148. 951 F.2d 521, 523-24 (3d Cir. 1991).

149. *Id.* at 529.

loss and the intended loss."[150] Application Note 7 to section 2F1.1 specifies the intended loss measurement as to fraud; no such specification exists in the theft guideline, section 2B1.1, or in its accompanying commentary.[151] The Third Circuit nonetheless concluded that intended loss, if higher than actual loss, was the proper measure in theft cases. In its view,

> [I]n a theft case, the thief *intends* to steal whatever he or she takes; the amount taken is the loss the defendant intended to inflict.... In a theft case, unlike a fraud case, the amount taken (the intended loss) is always as high or higher than the amount the victim actually lost (which may be reduced due to fortuitous recovery of the stolen property).[152]

Even at this point in its analysis, the Third Circuit had strayed onto shaky ground. First, the court erroneously assumed that there was a clear demarcation in federal law between "theft" and "fraud" crimes.[153] Further, the court implicitly assumed that the culpable mental state in theft-like crimes sentenced under section 2B1.1 is "intent to steal," which the court seemed to equate with intent to permanently deprive. However, the required culpable mental state in embezzlement, misapplication of funds, and other similar crimes is merely an intent to convert the property of another to one's own use or benefit, perhaps for a short period.[154] The *Kopp* court recognized this difficulty, suggesting in a footnote that "embezzlement, unlike ordinary theft or fraud, involves not only a taking but also an action akin to a breach of a fiduciary duty, which might justify always using the amount taken as 'loss.' "[155]

The Third Circuit explored the section 2B1.1/section 2F1.1 distinction in detail a year after *Kopp* in *United States v. Badaracco*.[156] The defendant, a bank insider, had interests in his

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150. *Id.*

151. See *supra* note 124 for discussion of the differences between section 2B1.1 and section 2F1.1 regarding intended loss.

152. *Kopp*, 951 F.2d at 529-530.

153. *See supra* notes 125-43 and accompanying text.

154. *See* United States v. Titus, 64 F. Supp. 55 (D.N.J. 1946) (holding that intent to repay and actual reimbursement was no defense to embezzlement where army post exchange employee took cigarettes, sold them to a civilian at a high price, and deposited an amount equal to the low post exchange price in the cash register while pocketing the rest). *See generally* LAFAVE & SCOTT, JR., *supra* note 27, at 736-38.

155. *Kopp*, 951 F.2d at 530 n.13. The court stated in footnote 13, "We can imagine one situation where our reconciliation of USSG §§ 2B1.1 and 2F1.1 might fail, however[,] ... embezzlement crimes." *Id.* One difficulty with this rather dismissive characterization is that embezzlement crimes are a common fixture of the federal criminal landscape, and are regularly sentenced under section 2B1.1.

156. 954 F.2d 928 (3d Cir. 1992).

family's electrical contracting businesses. He coerced a developer/borrower into dealing with the family contractors at prices higher than competing bidders. The defendant banker was convicted of bank fraud for misrepresenting to the bank his relationship with the family companies. The court found that the "loss" was the gross amount of three contracts awarded to the family electrical contractors with no offset either for the market price at which the contracts could have been let or for the value of work actually performed by the family contractors.

The Third Circuit distinguished these facts from fraud, where the measure of loss is the actual economic harm caused or intended. Citing *Kopp*,[157] the court analogized the case of *Badaracco* to embezzlement because it involved a breach of trust; hence, said the court, the proper measure of loss was "gross" gain to the defendant, with no deduction for benefits conferred on the victim after the "taking."[158] In both *Kopp* and *Badaracco*, the version of Application Note 8 to section 2F1.1 in effect at sentencing referred to "offender's gross gain" as an alternate measure of "loss." In both cases, the court noted that the language was amended after sentencing, but before decision on appeal, to omit the word "gross."[159] In neither case did the court think the amendment affected the outcome.

Three years after *Badaracco*, the Third Circuit decided *United States v. Coyle*.[160] The defendant was a health care plan administrator for Hospital Corporation of American ("HCA") who overstated administrative costs and provider charges in order to justify a retention of larger premiums. At sentencing, the district court based "loss" on the gross economic gain to HCA. The defendant argued on appeal that this measure of gain overstated the victim's losses. The Third Circuit avoided the issue of the victim's real economic loss by arguing that "this scheme ha[s] a strong resemblance to embezzlement" and therefore that "gross gain" (i.e., what was "taken" with no deductions for any benefit conferred in return) was an appropriate measure of loss.[161] *Coyle* appeared to confirm that the Third Circuit's use of "gross gain" to measure loss in embezzlement-like cases would survive

157. *See id.* at 938.
158. *See id.*
159. *See id.*; *Kopp*, 951 F.2d at 530 n.15.
160. 63 F.3d 1239 (3d Cir. 1995).
161. *Id.* at 1251. Another marked peculiarity of this approach is that gross gain, which the Third Circuit views as especially appropriate te theft-like offenses sentenced under section 2B1.1, has never been mentioned in the commentary to section 2B1.1.

the 1991 amendment to Application Note 8 to section 2F1.1, which changed "offender's gross gain" to "offender's gain."[162]

This reading of *Coyle* was cast into question by the Third Circuit's 1995 decision in *United States v. Dickler.*[163] There the court "explained" its previous holdings by observing that where fraud is "similar to theft," in that the defendant "takes" something from the victim without giving anything in return, the gross gain measurement is appropriate.[164] By contrast, where "value flows in both directions," then the value flowing to the victim should be subtracted.[165] This "explanation" of the earlier holdings amounts to a finding that "loss" equals net economic loss. It ignores the facts of *Badaracco* and *Coyle*, in which the loss attributed by the court clearly exceeded the actual economic loss to the victims. In both cases, the presence of a breach of trust was made to override considerations of economics.

The 1996 case of *United States v. Maurello* rendered the state of the law in the Third Circuit still more uncertain.[166] The defendant in *Maurello* was a disbarred lawyer convicted of mail fraud for practicing law without a license. The district court, noting the defendant's breach of fiduciary duty, calculated the amount of loss as the total amount of fees charged to unsuspecting clients.[167] The court of appeals reversed, holding that the value of services successfully rendered to the clients should be deducted from the total amount of the fees.[168] In the course of reaching this result, the court cast the entire *Kopp-Badaracco-Coyle* line of analysis into doubt. It attempted to distinguish *Badaracco* by arguing that the crime in that case was more like an embezzlement than the offense in *Maurello.* Recall that Badaracco was a bank officer who was found guilty of coercing certain borrowers of the bank to use contracting companies in which Badaracco had an interest, and misrepresenting to the bank his connection to those contractors. The Third Circuit contended that because Maurello was convicted of mail fraud for inducing his clients to part with fees based on lies about his licensure as an attorney, and therefore "did not fraudulently convert money over which he had possession or control" his crime was less like embezzlement than Badaracco's conduct.[169] The distinction is not compelling.[170] If the

162. *See* USSG App. C., amend. 393, at 221 (Nov. 1, 1991).
163. 64 F.3d 818 (3d Cir. 1995).
164. *Id.* at 825.
165. *Id.* at 826.
166. 76 F.3d 1304 (3d. Cir. 1996).
167. *See id.* at 1308.
168. *See id.* at 1312.
169. *See id.* at 1310-11.

comparison illustrates anything, it is the potential for confusion that flows from the existence of two guidelines which differ only slightly, yet cover overlapping groups of offenses.[171]

B. Retaining the "Loss" Concept, While Identifying and Accounting for Other Sentencing Considerations "Loss" Does Not Measure Well

A consolidated economic crimes guideline should retain as a central component a measurement akin to the current "loss" concept. All else being equal, stealing more is worse than stealing less. This intuitive judgment has been at work among Anglo-American lawmakers since the division of larceny into grand and petit varieties in 1275.[172] The basic principle remains sound, but its incorporation into the Guidelines through the concept of "loss" in section 2B1.1 and section 2F1.1 has proven problematic. As currently defined, loss functions as an imperfect proxy for too many sentencing factors. The first of these is mental state.

1. Accounting for Differences in Economic Criminals' Mental State

As noted above, offense seriousness rankings are the product of the interaction among the fundamental components of criminal liability—act, mental state, cause, and harm.[173] "Loss" is plainly intended te measure harm, but under the present regime it also serves by default as a gauge of the defendant's guilty mind. Recall that the mental element of virtually all economic crimes is some variant of an

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170. Perhaps in recognition of the difficulties *Kopp, Badaracco*, and *Coyle* had created, the Third Circuit in *Maurello* went on to say:

> The mere fact that defendant's scheme involved a hreach of fiduciary duty does not hring it under the penumbra of *Badaracco*. . . .
>
> [E]ven if we agreed with the government's analogy [to *Badaracco*], we would reject their argument that "gross gain" to the defendant is the appropriate measure of loss under *Badaracco* because the portion of the fraud guideline on which that holding was based has been amended. In *Badaracco*, we held that the analogy to embezzlement justified our using the "gross gain" alternative te estimate "loss," expressly authorized in Application Note 8. In 1991, however, Application Note 8 was amended. . . . Although we do not need to reach this issue in this case, it seems clear that the guidelines no longer endorse "gross gain" to the defendant as an alternative measure of loss.

Id. at 1311.

171. For another example of confusion over whether section 2B1.1 or section 2F1.1 applies to a case, compare *United States v. Dion*, 32 F.3d 1147, 1149 (7th Cir. 1994) (holding section 2F1.1 inapplicable to 18 U.S.C. § 656, misapplication of bank funds), with *United States v. Lucas*, 99 F.3d 1290, 1294 (6th Cir. 1996) (holding that section 2F1.1 does apply to 18 U.S.C. § 656, and characterizing *Dion* as a "questionable case").

172. *See* Statute of Westminster I, 1275, 3 Edw., ch. 15 (Eng.).

173. *See supra* notes 21-22 and accompanying text.

intent to steal, defraud, or otherwise deprive the victim of the benefit of his property. Thus, under statutory law, all convicted thieves, embezzlers, and con artists are effectively indistinguishable as regards mens rea. Nonetheless, we instinctively recognize more and less blameworthy conditions of mind in economic criminals, just as we do with murderers. The challenge for a drafter of sentencing guidelines is to identify those factors relating to mental state that should matter in the imposition of economic crime sentences, and then to account for them in the guideline scheme.

The persistent historical impulse to rank property crimes by the value of property stolen surely rests on a judgment about mental state, as well as on the more obvious assessment that size of loss relates to harm. Stealing more is worse than stealing less because one who desires to inflict a large harm is customarily thought to have a more reprehensible condition of mind than one who desires to inflict a smaller harm. To this extent, "loss" is not a bad proxy for mental state.

Nonetheless, our thinking about the relative blameworthiness of thieves is more complex than a measurement of the amount of the loot. The problem is to tease out the nonmonetary considerations. The authors of a systematic study of federal sentencing practices for white-collar offenders conducted in 1988, before the Guidelines, surveyed federal judges about the sentences they gave economic criminals and the reasons for giving them.[174] Although not rigorously empirical, the study confirms many common sense expectations about sentencing practices. The study results confirm the original Sentencing Commission's finding[175] that sentencing judges consider important the amount of planning and the complexity of the criminal scheme.[176] This conclusion is unsurprising. In all types of crime, a defendant who plots, plans, and schemes to achieve an evil end is thought more culpable than one who causes the same harm on impulse. The study also identified other factors that entered into judges' sentencing decisions, such as leadership role within the criminal undertaking,[177] whether the defendant betrayed a position of trust,[178]

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174. *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1988).

175. *See supra* note 109.

176. *See* WHEELER ET AL., *supra* note 174, at 93-94.

177. *See id.* at 97-102.

178. *See id.*

indications of genuine contrition,[179] and cooperation with authorities.[180].

All of these considerations relate to mental state, and the current Guidelines contain provisions dealing with all of them. The two-level upward adjustment for "more than minimal planning" included in both the theft and fraud guidelines accounts for complexity of scheme and extent of planning activity.[181] The defendant's role, as leader or follower, can generate upward or downward adjustments of up to four offense levels.[182] A two-level upward adjustment penalizes abuse of a position of trust.[183] Contrition is at least the ostensible subject of the "acceptance of responsibility" guideline.[184] And defendants who provide "substantial assistance" to the government in investigating and prosecuting others receive the biggest potential sentoncing rewards.[185]

With one notable exception—the "more than minimal planuing" adjustment—these offense level adjustments probably do about as good a job as can be done in a determinate guidelines system of accounting for identifiable factors in assessing a financial felon's state of mind. Nonetheless, the failure of "more than minimal planning" is significant and ought to be remedied. Because courts have applied the language of the provision quite literally, nearly every convicted defendant whose crime was not one of pure impulse receives the upward adjustment. More than eighty percent of all defendants sentenced under the fraud guideline and nearly sixty percent of those sentenced under the theft guideline are assessed the two additional levels for more than minimal planning.[186] Hence, the theft and fraud guidelines do not winnow out the minority of really sophisticated schemers from the mass of ordinary thieves; rather, they separate the minority of simpleminded crooks from the vast majority of felons with even modest claims to cleverness. Moreover, by providing only a uniform two-level adjustment to all qualifying defendants, the guide-

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179. *See id.* at 120-21.
180. *See id.*
181. *See* USSG § 2B1.1(b)(4)(A); *id.* § 2F1.1(b)(2)(A).
182. *See id.* §§ 3B1.1, 3B1.2.
183. *See id.* § 3B1.3.
184. *See id.* § 3E1.1 (conferring two- or three-level offense level reductions where a defendant "demonstrates acceptance of responsibility for his offense"). Of course, realists with some experience of federal sentencing would doubtless say that the "acceptance of responsibility" credit has more to do with rewarding early guilty pleas and the resultant saving in governmental resources than it does with an assessment of contrition.
185. *See id.* § 5K1.1; *see also* Bowman, *supra* note 10, at 722-24 (discussing sentence reductions for substantial assistance under section 5K1.1).
186. *See* U.S. Sentencing Commission, 1995 Datafile MONFY 95.

lines prevent sentencing judges from making distinctions among complex, moderately complex, and truly inspired criminal schemes.

The Commission is presently considering abolishing the "more than minimal planning" adjustment, building the two-level increase into the sentencing table, and adding a section that adjusts for complex planning by analogy to the "sophisticated means" enhancement now available in tax cases under section 2T1.1(b)(2).[187] The Commission should adopt this proposal, with one addition. It should include a section permitting a two-level *downward* adjustment for defendants whose crimes did not involve even minimal planning. Having both an upward and a downward adjustment for sophistication of scheme would create a three-tier system with the simple, impulsive crimes at the bottom, the offenses of average complexity in the middle, and truly sophisticated offenses at the top. Under such a scheme, sentences would vary by up to four offense levels based on degree of planning activity. Such an arrangement would yield both structure and some flexibility for sentencing judges.[188]

2. Accounting for Noneconomic Harms

Although pecuniary loss may seem a somewhat unnatural proxy measurement of mental state, it is the universally accepted measurement of harm in economic crimes. However, even this more intuitively obvious equivalency is not without problems. The difficulties are illustrated by comparison with the other important proxy value in the Guidelines, the weight of narcotics.[189] Leaving to one side

187. *See* 63 Fed. Reg. No. 3, pt. II (Jan. 6, 1998); Memorandum from John R. Steer, General Counsel, U.S. Sentencing Commission, to U.S. Sentencing Commission (June 26, 1997) (on file with author). For discussion of the pros and cons of this proposal, see Hearing before U.S. Sentencing Commission, March 5, 1998, testimony of Mary Spearing, Chief, Fraud Section, U.S. Department of Justice and defense attorney David Axelrod, written statements and transcripts of testimony available at <<http://www.ussc.gov/hearings.htm>>. Section 2T1.1(b)(2) (1997) imposes a two-level increase in offense level where "sophisticated means were used to impede discovery of the existence or extent of the offense."

188. A proposed sophisticated means adjustment appears at section 2Z1.1(b)(8) in the proposed consolidated economic crimes guideline in Appendix A. The proposed guideline defines "sophisticatod means" in virtually the same language used in section 2T1.1:

> *"Sophisticated means," as used in subsection (b)(10), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine economic crime of the same type. An enhancement would be applied, for example, where the defendant used offshore bank accounts, multiple transactions throngh domestic financial institutions, transactions through corporate shells or fictitious entities, or sophisticated technical means.*

Appendix A, Proposed § 2Z1.1 n.16. (I confess that I do not find this language entirely satisfactory.)

189. Sentence length in narcotics cases is determined almost entirely by the weight of the drugs possessed, sold, and distributed. *See* USSG § 2D1.1.

problems with comparisons of gross weight versus dosage units and similar technical matters,[190] narcotics weight is a decent proxy for social harm. Ingestion of banned substances by end users creates direct psychological and physical effects and risks of a host of collateral harms, such as job loss, family breakup, addicted infants, increased crime by addicts to support their habits, etc. One can argue about the degree to which drugs are actually responsible for these harms (and whether incarceration effectively reduces them). However, whatever harms are in truth attributable to the narcotics trade are pretty directly proportional to the amount sold.

By contrast, both the type and degree of harm caused by a dollar's worth of economic crime will vary from crime to crime. A dollar stolen from a millionaire means less than a dollar stolen from a pauper. Stealing from Donald Trump is different than stealing from Mother Teresa. Ten thousand dollars lost from a parent's savings on the eve of a child's entry into college has a vastly different significance than the same amount lost while there is still time to plan for that child's education. Stealing a fifty dollar coffeemaker from an airplane is different than stealing a fifty dollar component of the landing gear. The Guidelines should identify regularly occurring non-monetary harms resulting from economic crimes and account for them outside of the "loss" proxy.

a. Number of Victims

The Guidelines presently take inadequate account of cases involving multiple victims. When a defendant steals from several people, he inflicts losses on a wider segment of the community than if he steals from only one person. The fact that a defendant stole from several people is unquestionably relevant to the amount of planning required and thus to mental state, even where the defendant merely committed the same simple crime against a sequence of new victims. However, the presence of multiple victims is also, and more fundamentally, a factor related to harm.

At present, the Guidelines consider the number of victims only as an alternative means of qualifying for the two-level "more than minimal planning" adjustment.[191] The consolidated economic crimes

190. *See, e.g.*, Chapman v. United States, 500 U.S. 453 (1991) (discussing whether weight of "mixture and substance" containing a controlled substance includes weight of the carrier medium, e.g., blotter paper in the case of LSD).

191. *See* USSG §§ 2B1.1(b)(4)(A), 2F1.1(b)(2)(A).

guideline proposed here provides a separate enhancement that increases offense level with the number of victims.[192] The number of victims used in the proposed guideline (2-4, 5-20, 21+) is concededly arbitrary. The Commission should research the distribution of low, medium, and high numbers of victims among existing cases and make appropriate adjustments.

b. Significant Financial Hardship

The Guidelines already account in section 3A1.1 for situations in which a defendant preys upon a victim who is peculiarly susceptible to the crime at issue.[193] However, the Guidelines provide no adjustment for unusually severe *effects* of crime. Application Note 10(f) does suggest an upward departure where the offense "involved the knowing endangerment of the solvency of one or more victims."[194] This seems rather anemic. "Endangerment of solvency" is a phrase both too vague and too restrictive. On the one hand, it is unclear when a victim becomes insolvent (must he file for bankruptcy protection?), and even more unclear when he is in danger of becoming so. On the other hand, insolvency, however defined, is only one of the unusually severe effects of economic crime that ought to affect sentencing outcomes. When a defendant causes a victim to lose a home, a job, a pension, health benefits, or other components of financial security, the court should account for the nature of those losses as well as their quantity.

As a solution to this problem, the Commission should adopt a two-level upward adjustment for cases in which a defendant causes "significant financial hardship" to one or more victims. A proposed definition of "significant financial hardship" appears as Application Note 5 to section 2Z1.1 in the Proposed Consolidated Economic Crimes Guideline (Appendix A).

192. The proposed enhancement for number of victims reads:

If the offense involved more than one victim, increase the offense level as follows:

(A) If the offense involved 2-4 victims, increase by 1 level.

(B) If the offense involved 5-20 victims, increase by 2 levels.

(C) If the offense involved 21 or more victims, increase by 3 levels.

Appendix A, Proposed § 2Z1.1(b)(10).

193. *See* USSG § 3A1.1.

194. *Id.* § 2F1.1 n.10(f), *construed in* United States v. Hogan, 121 F.3d 370, 373 (8th Cir. 1997) (approving upward departure for knowingly endangering solvency of defrauded victims).

IV. "LOSS": WHAT SHOULD IT MEAN, AND HOW SHOULD IT BE MEASURED?

A. The Problem of Inclusion: Redefining Loss in Terms of Cause-in-Fact and Foreseeability

Although "loss" serves other functions as well, it is first and foremost a measurement of economic harm. Any attempt to rank economic crimes using the concept of loss faces two basic definitional problems: the *problem of inclusion*, that is, deciding which harms to include and which to exclude from the ambit of loss and the *problem of measurement*, that is, creating rules that assist courts in calculating the monetary value of the included categories of economic harm.

The Guidelines are singularly uninformative on the subject of which pecuniary harms should be included in "loss." They leave two fundamental questions largely unanswered. First, who are the victims whose losses are to be counted? Second, which pecuniary harms suffered by those victims are to be included in the loss calculation? As we will see, fundamental principles of criminal liability regarding fault and causation can resolve these questions. But before proposing a solution, we should examine the difficulties the Commission and the courts have encountered in addressing causation and the problem of inclusion.

At the root of the problem of inclusion is the Guidelines' attempt to embrace two distinct, and inconsistent, conceptions of loss. The theft guideline sets forth the basic definition of loss—"the value of the property taken, damaged, or destroyed"[195]—which was plainly drafted with the model of simple common law property crimes in mind. The word "taken" is close to a term of art, denoting to any Anglo-American lawyer the "taking" element of common law larceny, with its insistence on a transfer of possession of moveable personalty.[196] Read on its face, therefore, the basic definition of loss apparently includes only what might be termed the *corpus delicti* of basic property crimes, the "thing of value" of which the victim was deprived. Because the fraud guideline adopts this strikingly limited definition virtually verbatim,[197] it has become the primary measurement of offense seriousness for all federal economic crimes.

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195. *Id.* § 2B1.1.
196. *See* DRESSLER, *supra* note 62, § 32.04, at 510.
197. *See* USSG § 2F1.1 application note 7.

Grafting larceny terminology onto the sentencing procedures of every economic crime has created problems beyond the inevitable definitional confusion.[198] The more fundamental difficulty is that a very narrow definition of loss is at odds with a conception of loss as a broad proxy measurement of offense seriousness in general, and of harm in particular. This basic conceptual conflict is patent both in the Guidelines themselves and in the cases construing them.

1. Who is the "Victim"?

The Guidelines blithely refer to "the victim," yet nowhere do they define the term.[199] This surprising omission is surely an incidental consequence of the Commission's choice to define "loss" with the model of simple common law or statutory theft crimes in mind. In such cases, the identity of the victim is usually obvious and undisputed, both because the transactions are simple, and because the victim is usually identified in the indictment or information. Sentencing federal economic crimes differs from sentencing simple property crimes in two critical respects. First, the nature of federal economic offenses is such that, even as to the counts of conviction, it is often unclear who ultimately suffered financial harm as a result of the defendant's conduct, and even less clear whether those who were harmed in fact ought to be considered "victims" in law. Second, because the Guidelines are a modified real offense system, the class of victims is not limited to those who were injured by the conduct covered by the counts of conviction, but extends to all the victims of a defendant's "relevant conduct."[200] We will consider these problems seriatim.

a. Who Is the Victim of the Offense of Conviction?

Should the Guidelines count the losses only of those with whom a defendant dealt directly, or should loss measure financial harm caused by the defendant's crime but suffered by persons or entities with whom the defendant did not have direct dealings? The

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198. For example, if "taken" retains some vestige of its common law meaning, then what does it mean te speak of "taking" in the context of wire fraud, bankruptcy fraud, or an insider trading case?

199. So far as I can determine, neither has any court of appeals. *See, e.g.*, United States v. Barrett, 51 F.3d 86, 89 (7th Cir. 1995) ("This court has not previously defined the scope of the term 'victim' under [section] 2F1.1 of the Guidelines."). Nor did the *Barrett* court hazard a comprehensive definition of the term "victim."

200. *See* USSG § 1B1.3.

Ninth Circuit grappled with this question in *United States v. Harper*.[201] The defendant obtained possession of heavily encumbered residences for no money by promising the owners that he would assume their mortgages. In fact, the defendant neither assumed the mortgages nor made mortgage payments. Instead, he rented out the premises to tenants and kept the rent. Upon discovery of the scheme, the banks foreclosed on the properties. The defendant pled guilty to mail fraud, equity skimming, and conspiracy.[202] The district court decided that the "loss" was the fair market value of the houses plus the rents paid to the defendant by the tenants.[203] The Ninth Circuit reversed, apparently because the owner-occupants did not control equity equal to the fair market value and thus were not deprived of that amount,[204] and because the banks holding the mortgages did not lose their right to foreclose and thus were not deprived of the entire market value of the property.[205]

Despite rejecting the district court's loss calculation, the Ninth Circuit did not actually decide what the proper measure of loss should have been. The court discussed the possibility that the defendant caused financial injury to the homeowners, the renters, the banks, and the federal treasury. The homeowners suffered damage to their credit ratings and perhaps deficiency judgments resulting from the foreclosures. But since these particular homeowners were on the verge of foreclosure anyway, the portion of such losses attributable to the defendant's scheme was likely to have been small.[206] The renters obtained what they paid for, at least until the fraud was discovered and they were evicted.[207] The real losers were the banks and, potentially, the U.S. Treasury. The banks, though secured to the extent of the foreclosure value of the homes, lost any uncollectible deficiency, as

201. 32 F.3d 1387 (9th Cir. 1994).

202. *See id.* at 1388. *See generally* 18 U.S.C. § 1341 (1994) (mail fraud); 12 U.S.C. § 1709-2 (equity skimming); 18 U.S.C. § 371 (conspiracy).

203. *See Harper*, 32 F.3d at 1388. In reaching its decision, the district court relied on the Tenth Circuit's decision in *United States v. Johnson*, 941 F.2d 1102 (10th Cir. 1991). *See Harper*, 32 F.3d at 1390.

204. *See Harper*, 32 F.3d at 1392.

205. *See id.*

206. The court in *Harper* rejected the idea that the amount of deficiency judgments entered against the original owners following foreclosure would necessarily be the measure of "loss." *Id.* The court said that, "[i]f it can be shown that a portion or all of the deficiency was brought about by Harper's actions, that loss could be considered a part of the actual loss inflicted by him." *Id.* Presumably, the court agreed that the deficiency should he a component of loss if the defendant's actions which caused an owner to vacate his home and suspend mortgage payments led directly to a foreclosure which the owner might otherwise have been able to prevent.

207. *See id.*

well as mortgage payments not made between the transfer of possession from the owners to the defendant and discovery of the fraud. The Treasury lost money to the degree the government was obliged to make good on loan guarantees for homeowners who would not have defaulted but for the defendant's conduct.

The defect in the Ninth Circuit's *Harper* opinion is that it never squarely addressed the question of which of these losers were "victims" whose losses should count under the Guidelines. Because the defendant dealt directly with, made misrepresentations directly to, and obtained something of value directly from both the homeowners and the renters, it is fairly obvious that both these groups should be considered victims for the purpose of sentencing. However, the banks and the Treasury present more difficult problems. The defendant neither dealt with nor deceived the banks or the government, nor did he receive anything of value from either. One possible argument for considering them victims is that the defendant pleaded guilty to violating the equity skimming statute, which is clearly designed to protect the interests of lenders participating in federally guaranteed loan programs, and of the government itself as guarantor.[208] Thus, it might be argued that the banks and the government should be victims in this case because Congress passed the statute of conviction for the *purpose* of protecting banks and the government from exactly the kind of loss inflicted by this defendant.

Although congressional intent is certainly relevant to a determination of the proper scope of "loss" (including the identity of the "victims")[209] exclusive reliance on that factor is problematic, as can be illustrated by assuming slight modifications of the events in *Harper*. If, based on the same facts, Harper had been charged only with mail fraud and not with equity skimming, congressional intent to protect either banks or the U.S. Treasury would not be relevant, and thus pecuniary harms to the banks and the government would not be counted as loss, despite the defendant's identical conduct.[210] Such a result would be contrary to the "modified real offense" design of the

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208. 12 U.S.C. § 1709-2 makes it a felony for any person, with the intent te defraud, te willfully engage in a pattern or practice of (1) "purchasing one- te four-family dwellings" owned by persons whose loans are in or near default and are secured hy mortgages or deeds of trust held or insured by HUD or the Veterans Administration, (2) failing to make payments on the loans, and (3) collecting rent and appropriating it to his own use. 12 U.S.C. § 1709-2.

209. *See infra* Part IV.B.2.e.

210. Similarly, even if the equity skimming charges remained, but some of the homes involved in the scheme to defraud were not purchased with federally insured loans, a congressional intent approach to loss would presumably exclude losses suffered by the lenders on those homes even though they were a part of the same overall scheme.

Guidelines which aims to sentence on the basis of the defendant's actual conduct and resultant harms regardless of how the case is charged or pled.[211]

The most coherent explanation for the *Harper* court's implicit acceptance of homeowners, renters, banks, and the government as legitimate victims for purposes of determining loss is that all four groups suffered economic losses which were *caused in fact* by the defendant's criminal conduct. On the facts of *Harper*, the inclusion of all four groups seems unexceptional. Other cases raise more acutely the issue of the necessary causal connection between the defendant's wrong and the harms of putative victims. For example, the Third Circuit raised, but did not resolve, this question in *United States v. Maurello*.[212] The court found that the loss caused by Maurello's unlicensed legal practice should be calculated by deducting the value of legal services satisfactorily rendered from the amount of fees charged because clients who received satisfactory legal services had suffered no real harm.[213] The government contended that the total fees should nonetheless be counted because that money "was diverted from defendant's legitimate competitors" (i.e., licensed attorneys).[214] The court rejected that argument, saying that only loss to the "direct victims of defendant's conduct" would be counted.[215] Regrettably, the court neither defined the difference between direct and indirect victims, nor explained why losses to the first but not the second should be counted.[216]

So who is the "victim" of an economic crime? Do the pleadings control the identity of the victim? Is the dominant consideration whether the defendant had direct dealings with the putative victim? Is legislative intent relevant? Or is victim identity a fluid concept determined by the facts of the case and the nature of the causal con-

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211. *See supra* note 48 and accompanying text (discussing relevant conduct and modified real offense sentencing).

212. 76 F.3d 1304 (3d Cir. 1996). *Maurello* is discussed above in connection with the consolidation of section 2B1.1 and section 2F1.1. *See supra* notes 166-71 and accompanying text.

213. *See Maurello*, 76 F.3d at 1311-12.

214. *Id.* at 1313.

215. *Id.*

216. Indeed, the court's explanation of its result is entirely circular. It said that it disagreed with the government's argument because that argument would compel use of the total amount of fees in all such cases, and that this "would render the degree of harm caused by a defendant's acts irrelevant to Guidelines sentencing—a result that is contrary to the policy of the Guidelines." *Id.* But the result argued for hy the government only renders the degree of harm "irrelevant te Guidelines sentencing" if harms to "remote victims" do not count. The court never explained who qualifies as a remote victim or why injuries te such a victim do not and should not count.

nection between a defendant's conduct and a victim's injury? Neither the Guidelines nor the cases construing them offer satisfactory answers to any of these questions.

b. "Gain" and the Problem of Identifying the Victim

The term "loss" necessarily connotes a focus on the extent to which the victim (once identified) has been deprived of something. Nonetheless, the fraud guideline permits use of the *gain* garnered by the *defendant* as an alternative measure of loss.[217] The inclination to use a defendant's gain as the measure of loss often arises when the defendant seems to have gotten more out of his fraudulent behavior than the victims appear to have lost. For example, in a fraudulent loan case where the loan is properly collateralized or the bank has other readily available sources of repayment in the event of default, the defendant may profit considerably from his deception, but the lender may ultimately suffer negligible econonric harm. Similarly, in cases of government contract fraud where the defendant secures the contract through misrepresentation but performs all or part of the contract, the loss to the government may be small. Nonetheless, courts and the Commissioners have been reluctant to forego all loss-based enhancement in such cases, though neither group has been very successful in articulating why.

Some courts seem to view gain as a mechanism for penalizing defendants based on the maguitude of the nnjustifiable *risk* they create for their victims, and on the severity of the ultimate harm actually inflicted.[218] What has gone largely unrecoguized is that "gain" to the defendant seems more attractive as a measure of offense seriousness where the true victim of the defendant's crime may not be the putative victim named in the indictment.[219] The Commissioners, however, did recoguize this possibility when they amended section 2F1.1,

217. *See* USSG § 2F1.1 application note 8 ("The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss."). The background commentary to the theft guideline states: "The value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant." USSG § 2B1.1 background commentary. "Gain" is also used to set the sentence for insider trading offenses. *See id.* § 2F1.2(b)(1).

218. *See, e.g.*, United Statos v. Brewer, 60 F.3d 1142, 1145 (5th Cir. 1995) (holding it "proper to calculato loss based on the risk engendered by the defendant's criminal conduct even where the actual loss was lower").

219. *Compare* United States v. Marcus, 82 F.3d 606, 610 (4th Cir. 1996) (holding "gross sales were the appropriate measure of the actual loss"), *with* United States v. Chatterji, 46 F.3d 1336, 1340 (4th Cir. 1995) (holding "gain 'may not support an enhancement'" under section 2F1.1(b)(1) of the Guidelines).

Application Note 7, to add subsection (d), redefining loss in cases involving the diversion of government program benefits to mean "the value of the benefits diverted from intended recipients or uses."[220] In making this change, the Commission recognized that the federal government may suffer no economic loss if, for example, it guarantees a loan or awards a grant to someone not entitled to it,[221] but that for each fraudulently obtained grant or loan guarantee some other deserving person may be deprived of a benefit the government had intended to bestow on that person. In effect, Application Note 7(d) simply says that the intended beneficiaries of government programs are "victims" when the defendant's gain was a benefit intended for them.

This approach is markedly inconsistent with the idea expressed by the Third Circuit in *United States v. Maurello* that loss embraces only economic harm to "direct victims of the defendant's conduct."[222] The harm to potential government program beneficiaries treated as victims by Application Note 7(d) could scarcely be more "indirect," and is hard to distingnish from the harm to licensed attorney competitors deprived of legal business by Mr. Maurello. However, Application Note 7(d) makes perfect sense if loss is supposed to include a broad range of economic harms caused by the defendant, including harms te program beneficiaries whose interests the legislature sought to protect in passing the law violated by the defendant. Considered carefully, therefore, many cases that superficially involve the question of gain are really "who's the victim?" problems.

2. Victims, Relevant Conduct, and Causation

Identifying the victims even of the federal economic crimes of which a defendant was convicted can be challenging. An additional layer of complexity arises because the U.S. Sentencing Guidelines are a "modified real offense" system which requires the sentencing court te consider "relevant conduct," a concept that embraces not only a defendant's own conduct charged in the counts of conviction, but also conduct described in dismissed counts or never charged at all, as well as the conduct of the defendant's criminal partners.

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220. 1991 amendment of § 2F1.1 application note 7, te add subsection (d). *See* USSG App. C, amend. 393 (Nov. 1, 1991).

221. Assuming, of course, tbat the loan is repaid.

222. 76 F.3d 1304, 1313 (3d Cir. 1996).

a. Defendant's Unconvicted or Uncharged Conduct

The relevant conduct guideline obligates the sentencing court to consider "all harm that resulted from"[223] the defendant's "acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction."[224] The court must thus determine the identities of all those who suffered loss resulting from the defendant's actions during the entire scheme or set of transactions that led te his conviction.

The Tenth Circuit applied this concept in *United States v. Sapp*[225] to find a loan fraud defendant responsible for losses to *Lender #1* (not the named victim), who had discounted a loan in response to an uncharged misrepresentation by the defendant that funding could be obtained from *Lender #2* (the named victim) if the first lender discounted its loan. The defendant could have been charged with the falsehoods to *Lender #1* which, upon conviction, would have been grouped for sentencing purposes with the false statements to *Lender #2*. The lies to *Lender #1* were part of the same scheme as the crime of conviction involving *Lender #2*, therefore the defendant was held accountable for the total loss he inflicted on both lenders.[226]

b. Acts of Defendant's Criminal Partners

The relevant conduct guideline also says that sentencing calculations "shall be determined on the basis of . . . all harm that resulted from . . . reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity."[227] As applied to the theft and fraud guidelines, the effect of the relevant conduct rules should be to hold the defendant responsible for all losses to all victims that "resulted from" his own conduct, as well as for the foreseeable losses to the foreseeable victims of his criminal partners.[228]

223. USSG § 1B1.3(a)(3).

224. *Id.* § 1B1.3(a)(2), *construed in* United States v. O'Brien, 119 F.3d 523, 535 n.9 (7th Cir. 1997) (relevant conduct rules allow judges to include in loss calculation losses not mentioned in indictment).

225. 53 F.3d 1100 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 796 (1996).

226. *See id.* at 1104-05; *see also* United States v. Allender, 62 F.3d 909, 916 (7th Cir. 1995) (holding that amounts of fraudulently obtained loans from transactions not charged in the indictment, and from a transaction for which defendant was acquitted, properly included in loss calculation), *cert. denied*, 116 S. Ct. 781 (1996).

227. USSG §§ 1B1.3(a)(3), 1B1.3 (a)(1)(B).

228. *See, e.g.*, United States v. Zaragoza-Barajas, 123 F.3d 472, 477 (7th Cir. 1997) (defendant responsible for all losses in unemployment compensation fraud because, given her "absolutely integral and essential" role in the scheme, the entire loss was foreseeable to her); United States v. Dolan, 120 F.3d 856, 871 (8th Cir. 1997) (attorney liable for all losses from

However, section 1B1.3 somewhat incongruously imposes a foreseeability limitation on harms caused by a defendant's co-conspirators and co-schemers, but no such limitation on harms that "resulted from" the defendant's own behavior.[229] In short, it appears that the relevant conduct guideline contemplates a pure "but for" causal relationship between the defendant's acts and the harms that result. Apparently, section 1B1.3 permits, or perhaps requires, a sentencing judge to count all the victims and all the harms they suffered as a result of defendant's own acts, regardless of how attenuated the causal link between the acts and the harms, and regardless of whether the defendant could have foreseen the existence of such victims or the nature and extent of their injuries.

3. Causation and "Consequential Damages"

The tension between the sweeping language of the relevant conduct guideline and the cramped primary definition of "loss" is patent. Is loss to be a broad measure of "all" economic harm caused by the defendant consonant with the reach of section 1B1.3, or a narrow accounting of property "taken" by the defendant? The uncertainty is rendered still more acute by the Guidelines' treatment of "consequential damages." Application Note 7(c) to section 2F1.1 states: "In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable."[230]

The plain implication of this sentence is that, except in procurement fraud and product substitution cases, loss includes "only

client's bankruptcy fraud scheme); United States v. O'Neil, 118 F.3d 65, 75 (2d Cir. 1997) (defendant responsible for all loss caused by fraudulent telemarketing firms of which he was part-owner because misrepresentations by sales staff were foreseeable); United States v. LaCroix, 28 F.3d 223, 231 (1st Cir. 1994) (holding defendant responsible for 90 or more homes sold fraudulently by the conspiracy); United States v. Jackson, 25 F.3d 327, 330 (6th Cir. 1994) (holding defendant responsible for all losses caused by his associates in an insurance and credit card fraud scheme).

229. USSG § 1B1.3, Application Note 2, states: "The requirement of reasonable foreseeability applies only in respect te the conduct . . . of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addresed under subsection (a)(1)(A)."

Much of the quoted language is, of course, internally contradictory. The Application Note says reasonable foreseeability applies to the conduct of others but not to conduct the defendant "aids, abets . . .[etc.]" But "others" are the only people whose conduct a defendant *can* aid, abet, counsel, command, induce or procure. So when does the reasonable foreseeability apply?

230. USSG § 2F1.1 application note 7(c).

direct damages."[231] Thus, the Commission appears to endorse, almost as an aside and with no effort at elaboration, a general rule about causation: Except in procurement fraud and product substitution cases, "direct damages" are included in loss, but "consequential damages" are not.[232]

The choice of the phrase "consequential damages" as the linchpin of a rule about sentencing causation could scarcely have been less fortunate. "Consequential damages" is a term of art drawn from the law of contracts.[233] Other than in the Guidelines, it is used nowhere else in the criminal law. The attempt to translate the term from contract to sentencing law creates numerous problems. First, the law of contracts concerns agreements, principally commercial agreements.[234] It presupposes identifiable promises between known contracting parties.[235] Its purpose is to protect and enforce, so far as is reasonable and desirable as a matter of policy, the expectations arising from the promise or promises which make up the contract.[236] In consequence, the law of remedies for breach of contract is primarily concerned with ascertaining the scope of the agreement and securing to the non-breaching party, as far as possible, the benefit of his bargain,[237] or, where that is not possible or desirable, restoring the injured promisee to the position he was in before the agreement was made.[238]

By contrast, economic crimes need not involve any promise at all, much less a legally enforceable agreement. Crimes in the larceny family are customarily crimes of stealth and require no acquaintance

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231. *See* United States v. Thomas, 62 F.3d 1332, 1346-47 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1058 (1996) (stating that by adopting USSG § 2F1.1, Application Note 7(c), "[t]he Commission... expressly considered and rejected consequential damages as a factor in determining offense levels under the Sentencing Guidelines, except for government procurement and product substitution cases").

232. In concluding that Application Note 7(c) states a general rule of causation, I assume that "damages" is intended to mean the same thing as "loss." If not, and if there is supposed to be some difference between "loss" and "damage," the matter becomes even more obscure.

233. *See generally* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4 (*Damages for Breach of Warranty—Consequential Damages*) (4th ed. 1995).

234. "The law of contracts is concerned with the securing and protection of those economic interests which result from assurances." JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 1, at 2 (1974).

235. "We... describe a contract as a promise, or a group of promises, which the law will enforce, or the performance of which it in some way recognizes as a duty." *Id.* § 2, at 3.

236. *See id.* § 2, at 3.

237. Murray states:

> The purpose of contract law is often stated as the fulfillment of those expectations which have been induced by the making of a promise. If the promise is breached the legal system protects the expectations by attempting to place the injured promisee in the position he would have been in had the promise been performed.

Id. § 219, at 438.

238. *See id.* § 219, at 439.

between thief and victim, much less an agreement. The same is true of crimes involving receipt of stolen goods and destruction of property. Other basic crimes of dishonesty like embezzlement may arise in the context of a contractual relationship, as for example, an employment contract incident to which the defendant obtains lawful possession of property later embezzled. But an embezzler need not be party to an employment contract, and in any case the purpose of prosecuting and perhaps imprisoning an embezzling employee is not to protect the employer's expectation interest in the fulfillment of an express or implied promise not to convert certain goods.[239]

Fraud cases often do arise in contractual settings. Obvious instances include loan fraud and procurement fraud.[240] But just as often there is either no contract in the case,[241] or the person who suffers an economic loss is not a party to any contract *with the defendant*. A good example of the latter situation is the *Harper* equity skimming case discussed above,[242] in which the defendant entered into contracts with the homeowners to assume their mortgages, and contracts with the renters to provide housing. He breached both sets of contracts. Yet the major economic losers in the case were not the homeowners or renters who contracted with the defendant; those parties either lost little or received most of what they bargained for. The true losers were the banks and the federal government, neither of which contracted with the defendant at all.

Thus, in economic crime cases in which there is no readily identifiable contract, or in which the loss was inflicted on someone not party to any contract breached by the defendant, the distinction between direct and consequential damages provides a sentencing court no useful guidance. How does one decide which economic harms are the direct, and which the consequential, results of the breach of a contract that never existed? In *United States v. Marlatt*,[243] the Seventh Circuit suggested that the Sentencing Commission adopted

239. *See id.* § 219, at 438.

240. In loan fraud, a defendant makes misrepresentations to induce a bank to entor into a loan contract. In procurement fraud, a contractor agrees to provide goods of a certain type to the government, but fails to do so and conceals the failure by fraud.

241. *See, e.g.*, United States v. Kimbrough, No. 96-2816, 1997 WL 73828 (7th Cir. Feb. 14, 1997) (unpublished disposition), in which the defendant committed telecommunications fraud under 18 U.S.C. §§ 1029(a)(5), (b)(2) (1994), by manufacturing and selling cloned cellular telephones. The economic harm was incurred by cellular telephone companies who provided air time free to those who purchased the cloned phones from the defendant, but the defendant had no contractual relationship, or indeed any contact whatever, with the telephone company victims.

242. Discussed *supra* notes 201-07 and accompanying text.

243. 24 F.3d 1005 (7th Cir. 1994).

the prohibition on consequential damages in order "to prevent the sentencing hearing from turning into a tort or contract suit."[244] Unfortunately, the court got it backwards. Regardless of what the Commission's intent may have been, the unavoidable effect of using a contracts term in criminal sentencing is precisely to transform the sentencing process into a piece of contract litigation.

More troubling than the general analytical conundrums occasioned by injecting contracts terminology into criminal sentencing law are problems specific to the phrase "consequential damages." Modern law on consequential damages is generally conceded to be a refinement of the holding in the classic English case of *Hadley v. Baxendale*.[245] (For those who recall from first year Contracts class the brain-twisting holding of *Hadley*, this historical fact alone should create some reluctance to bring "consequential damages" into the criminal law.) Foreseeability is the modern test of whether some alleged economic harm caused by a breach of contract is recoverable as a "consequential damage."[246] If the harm to the plaintiff was reasonably foreseeable to the breaching defendant then it is ordinarily recoverable by the plaintiff absent some special contractual provision excluding such recovery.[247]

The distinction between direct and consequential damages is routinely litigated in contract cases. However, in contract cases in which damages become an issue there is, by definition, an agreement consisting of particular promises, at least one of which has been broken. In that context, it makes sense to speak of direct damages as the monetary value of the broken promise—the cost to the buyer of replacing an undelivered shipment of wheat or to the seller of producing a shipment of shoes for a shop that refuses delivery—and of recoverable consequential damages as the foreseeable additional consequences flowing from the breach. In economic crime cases where there is no contract to serve as a frame of reference, the contract terms "direct damages" and "consequential damages" are stripped of their particular meaning and become, not an actual distinction, but, at best, a sort of metaphor or illustration of the kind of distinction the

244. *Id.* at 1007.

245. 156 Eng. Rep. 145 (Ex. 1854). *See* WHITE & SUMMERS, *supra* note 233, § 10-4, at 314 ("Most of the law regarding consequential damages can be traced back to . . . *Hadley v. Baxendale*.").

246. *See* WHITE & SUMMERS, *supra* note 233, § 10-4, at 564; 5 A. CORBIN, CORBIN ON CONTRACTS § 1010, at 79 (1964); *see also* U.C.C. § 2-715(2) (1995) (stating that a defendant would be liable for "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know. . . .").

247. *See* U.C.C. § 2-715 & cmt. 3.

Commission had in mind. In this view, Application Note 7(c) means something like, "Sentencing courts should not consider harms of the general sort described in contracts cases as 'consequential damages.' "

It will come as no surprise that courts have experienced considerable difficulty in applying the consequential damages concept to sentencing. The Sixth Circuit has held unequivocally that loss does include "incidental and consequential damages."[248] Other circuits routinely intone that loss does not include consequential damages.[249] Indeed, the Eleventh Circuit has found that the Sentencing Commission's intention to exclude consequential damages from the loss calculation is so clear that such damages may not generally be taken into account even in justifying a departure.[250] Nonetheless, it is extraordinarily difficult to discern from the cases any principled dividing line between "loss" and "consequential damages."

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248. *See* United States v. King, 915 F.2d 269, 272 (6th Cir. 1990) (construing section 2B2.2(b)(2), which incorporates the loss table of section 2B1.1, to include in loss "incidental or consequential damages," such as the cost of hiring security guards while bank vault damaged by defendant was repaired); United States v. Jones, 933 F.2d 353, 354-55 (6th Cir. 1991) (citing *King* te hold that interest accrued on purchases made with fraudulently obtained credit cards is a component of loss under section 2F1.1). The continued validity of these holdings is in some doubt, however, because both predate the November 1, 1991, addition of section 2F1.1, Application Note 7(c), excluding "consequential damages" from loss in all but product substitution and procurement fraud matters. *See* USSG App. C, amend. 393, at 223 (Nov. 1, 1991). On the other hand, the Sixth Circuit has never expressly overruled *King*, and indeed cited it approvingly in an unpublished opinion after the addition of Application Note 7(c). *See* United States v. Majszak, No. 91-2179, 1992 WL 188114, at *1 (6th Cir. Aug. 6, 1992) (unpublished disposition) ("We have interpreted [section 2B1.1 n.2] to mean the amount of the victims' 'net out of pocket loss,' including all incidental and consequential damages, as well as accrued interest."); *see also* United States v. Hoffman, No. 95-3445, 1995 WL 465799, at *3-4 (6th Cir. Aug. 4, 1995) (unpublished disposition) (including consequential damages in loss in procurement fraud case, citing section 2F1.1 application note 7(c)).

249. *See, e.g.*, United States v. Daddona, 34 F.3d 163, 171-72 (3d Cir. 1994) (stating that consequential and incidental damages are not included in loss); United States v. Marlatt, 24 F.3d 1005, 1007 (7th Cir. 1994) (stating that consequential and incidental damages "are not to be counted in computing loss"); United States v. Newman, 6 F.3d 623, 630 (9th Cir. 1993) (stating that loss does not include consequential damages); United States v. Wilson, 993 F.2d 214, 217 (11th Cir. 1993) ("The phrase 'property taken, damaged, or destroyed' does not allow for inclusion of incidental or consequential injury. . . ."); United States v. Santiago, 977 F.2d 517, 525-26 (10th Cir. 1992).

250. *See* United States v. Thomas, 62 F.3d 1332, 1346 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1058 (1996) (citing United States v. LNU, 16 F.3d 1168, 1170 (11th Cir. 1994), *modified*, *United States v. Omar*, 24 F.3d 1356 (11th Cir. 1994)). The court considered the express inclusion of consequential damages as part of the loss measurement for product substitution and government procurement cases in USSG section 2F1.1, application note 7(c), and concluded that, "[t]he fact that the Commission deliberately allowed an increase for consequential damages in some but not all types of frauds indicates that 'the absence of an increase . . . is a result of design rather than inadvertence.' " The court left room for a departure based on consequential damages "outside the heartland" considered by the Commission, *id.* at 1347, but did not suggest the factors which might make consequential damages sufficiently extraordinary to warrant departure.

An examination of the case law reveals how confused courts are on this issue. In *United States v. Wilson*, the Eleventh Circuit vacated the sentence imposed by the district court judge assessing against the defendant the full amount of loans promised in an advance fee scheme, even though no loans were ever made.[251] To justify including the full amount of the promised loans, the district court relied on skimpy testimony from individual victims regarding feelings of embarrassment and actions such as quitting jobs taken in detrimental reliance on the expectation of a loan.[252]

In the Ninth Circuit case of *United States v. Mende*, the defendant's company guaranteed large loans and obtained advance fees for channeling loans to banks.[253] The district court charged the defendant with a loss including $3 million for the advance fees, $13 million for defaulted loans guaranteed by the defendant's companies, stock losses of $647,000, and additional actual losses of $500,000.[254] The defendant, relying on the Eleventh Circuit's opinion in *Wilson*, claimed that all losses except the advance fees should be excluded as incidental and consequential damages.[255]

The Ninth Circuit disagreed and upheld the district court. The court distinguished *Wilson* by pointing to a closer causal connection between the losses and the fraud in the present case than had obtained in *Wilson*: "Unlike *Wilson*, there can be no doubt that Mende's fraud cost his victims more than just advance fees. In this case the district court found the victim banks' losses to be the direct result of the defendant's fraudulent misrepresentations, rather than mere consequential and incidental damages."[256] The *Mende* court was undoubtedly correct in finding *Wilson* factually distinguishable; the causal connection between the losses and Mende's conduct was more direct than in *Wilson*, and it rested on less speculative evidence. The interesting part of the decision, however, is that *Mende* defined the difference between "loss" and "consequential damages" purely in terms of causation. For the *Mende* court, economic harms that have a close causal relationship to the crime are "loss." Harms that are more causally remote or are connected to the crime by speculation are "consequential damages" and therefore not "loss."[257] Although as a

251. 993 F.2d 214 (11th Cir. 1993).
252. *See id.* at 216, 218.
253. 43 F.3d 1298 (9th Cir. 1995).
254. *See id.* at 1302.
255. *Id.* at 1302-03.
256. *Id.* at 1303.
257. In *United States v. Ortland*, the Ninth Circuit apparently relaxed the "direct causation" requirement when it characterized *Mende* as having "rejected a claim that all somewhat

matter of policy this is not a bad rule (or at least portion of a rule) for defining "loss," it requires distorting the customary meaning of "consequential damages."[258] In contracts, if consequential damages are directly caused by the defendant's misconduct, as they often are, and if they were foreseeable, the defendant is responsible for paying them.

The Seventh Circuit's decisions on consequential damages are particularly challenging. In *United States v. Marlatt*, the defendant, the owner of a local title company, bought a resort property and secured title insurance policies on time-share units at the resort by lying to the national title insurance company (for which he was the local agent) about the existence of extensive liens and other encumbrances.[259] He sold the units to individuals who agreed to buy in reliance on assurances of clear title (as well as on assurances of the resort's overall sound financial condition implicit in the title documents). When the defendant's fraud was discovered, the insurer had to pay over $476,000 to clear the titles. The resort went bankrupt and closed, rendering the time-share units virtually worthless. The insurer, under threat of suit from the individual owners,[260] spent an additional $565,000 to purchase the units from them and forestall the suit.

Judge Posner, writing for the panel, concluded that the $476,000 paid by the insurer to remove the encumbrances and fulfill the terms of its policies was "loss," but that the costs incurred to buy the resort and forestall a lawsuit were not. The *Marlatt* opinion has been cited frequently,[261] and deserves careful examination.

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indirect fraud losses are a type of 'consequential' damages that cannot be considered under [section] 2F1.1." 109 F.3d 539, 548 (9th Cir. 1997). *Cf.* United States v. Sablan, 92 F.3d 865, 870 (9th Cir. 1996) (suggesting that certain personnel costs incurred by the victim bank during the investigation of defendant's computer fraud, though a foreseeable result of the fraud, might not be includable as loss because they were consequential damages).

258. Moreover, several components of the economic harm the *Mende* court included in loss, notably the steck losses and $500,000 in other actual losses, would clearly be considered consequential damages in a contracts case, and therefore should be excluded from "loss" if the phrase "consequential damages" is to retain any vestige of its meaning as a term of art.

259. 24 F.3d 1005 (7th Cir. 1994).

260. Although the opinion is vague on the point, the presumable ground for such an action was that the defendant was an agent of the title insurer who inveigled the buyers into purchasing soon-to-be worthless property in part in reliance on assurances of clear title bearing the imprimatur of the title insurer.

261. *See, e.g.*, United States v. Green, 114 F.3d 613, 618 (7th Cir. 1997) ("consequential or incidental damages" not to be included in loss calculation); United States v. Morris, 80 F.3d 1151, 1173 (7th Cir. 1996) (although a defendant's fraud may be a "but for" cause of such damages, such damages are not included as loss under section 2F1.1); Creek v. Village of Westhaven, 80 F.3d 186, 189 (7th Cir. 1996) ("Causation in the law is not to be equated to 'but for' causation."); United States v. Barrett, 51 F.3d 86, 89 (7th Cir. 1995) (money spent by title

The court began by getting the "who's the victim?" question wrong. Judge Posner identified only the title company as the victim, and emphasized that the company made a business decision to reimburse the time-share owners, a decision which was in his view neither legally required nor caused by the defendant's fraud. He apparently thought that, because the company volunteered to assume this expense, the sentencing court could not then charge it to the defendant. The defect in this reasoning is that the economic harm represented by the $565,000 the company paid to purchase the worthless apartments would have been suffered by the individual owners had the company not acted. The defendant's scheme was never directed at the title company, except incidentally. The true object of the scheme was to obtain money from time-share buyers by misrepresenting the condition of the titles to individual units, and more importantly by explicitly or implicitly misrepresenting the overall financial soundness of the entire resort. The individual buyers were induced to part with $565,000 in reliance on the defendant's falsehoods and forgeries. Even if the indictment in the case did not identify the purchasers as victims of the scheme to defraud (and one cannot tell from the opinion), the fraud practiced upon them was unquestionably relevant conduct under section 1B1.3. Thus, the owners were victims just as much as the title company. The fact that the title insurer decided to reimburse the individual owner-victims for their losses no more erases those losses from the sentencing calculus than would the business decision of a property insurer to recompense a burglary victim for stolen items not covered by a homeowner's policy.

Judge Posner implicitly addressed the weakness in the approach of identifying the insurer as sole victim by going on to hold that the collapse in value of property at the resort was not caused (except, as he says, "in the sense . . . of 'but for' causality"[262]) by the defendant's fraud. "The fact that the purchasers would not have purchased the time shares had it not been for the title insurance policies issued by Ticor would not make Ticor an insurer against a drop in the

insurer to clear titles includable as loss); *see also* United States v. Barker, No. 95-3262, 1996 WL 294141, at *2 (10th Cir. June 4, 1996) (unpublished disposition) (consequential damages are not to be included in the calculation of loss for purposes of section 2F1.1); United States v. Neadle, 72 F.3d 1104, 1118 (3d Cir. 1996) (Becker, J., concurring and dissenting) (suggesting a "need for finding causation in making a loss determination"); United States v. Gottfried, 58 F.3d 648, 651 (D.C. Cir. 1995) (stating that decisions holding incidental or consequential damages may not be counted toward loss are not persuasive); United States v. Daddona, 34 F.3d 163, 171-72 (3d Cir. 1994) (consequential and incidental damages are generally not to be included as loss under section 2F1.1).

262. *Marlatt*, 24 F.3d at 1007.

real estate market."[263] Judge Posner noted that more than mere "but for" causation has historically been required for the imposition of criminal liability. However, in what at first glance appears a peculiar omission, he neglected to identify what that something more might be, saying only that "[t]he distinction runs throughout the law. Criminal law is no exception."[264] It is nonetheless plain that the "distinction" to which he alluded is the foreseeability element of traditional proximate cause analysis.[265]

Finally, Judge Posner said that "even if" the plunge in value was caused by the fraud, the money paid by the insurer to compensate the owners was a consequential damage excluded from loss by section 2F1.1, Application Note 7(c).[266] Aided by the fact that *Marlatt* did contain a contract, the court nicely melded the guideline definition of loss with traditional contract law on consequential damages:

> The defendant extracted from Ticor [the title insurer] by fraud a bunch of insurance policies on which Ticor was required to make good to the tune of $476,000. This was the loss. In the wake of the loss Ticor incurred other expenses, which were consequences, perhaps even foreseeable consequences, of the fraud, but were not the thing actually taken from Ticor, the loss; the thing taken was the promise to insure and the cost of honoring that promise was $476,000.[267]

The reason for Judge Posner's odd reticence about defining the "distinction [that] runs throughout the law" now becomes clear. Evidently, he was reluctant to point out that foreseeability is the nearly universal "distinction" between those harms chargeable to civil and criminal malefactors and those that are not, because, in contrast to the Ninth Circuit in *Mende*, Judge Posner held in *Marlatt* that even economic harms directly and foreseeably caused by a defendant's conduct are excluded from "loss" if they are "consequential damages." This is, in my view, a regrettable outcome as a matter of policy (a point to which we will turn momentarily). Nonetheless, at least as to

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263. *Id.*

264. *Id.* (citing Brackett v. Peters, 11 F.3d 78, 79-80 (7th Cir. 1993)).

265. Despite Judge Posner's studied avoidance of the term "proximate cause," Judge Becker of the Third Circuit read *Marlatt* as "applying proximate cause analysis." *Neadle*, 72 F.3d at 1118 (Becker, J., concurring and dissenting).

266. *See Marlatt*, 24 F.3d at 1007-08. The opinion refers to Application Noto 7(b), which is the same as the current Note 7(c).)

267. *Id.*

the victim title company, Judge Posner's opinion provides a reasonably convincing interpretation of the Guidelines as now written.[268]

Less than a year later, the Seventh Circuit decided *United States v. Barrett*, a case presenting facts nearly identical to those in *Marlatt*.[269] Defendant Barrett induced a title company to issue clear title commitments based on false representations that existing mortgages had been satisfied. He also made false statements directly to a federally insured savings and loan ("S & L") asserting that lots pledged as collateral for construction loans were free of encumbrances. He was convicted of making false statements to a federally insured lending institution.

After discovery of the fraud, the title company made good on its insurance policy by paying off the existing lienholders. The S & L then foreclosed on the lots, but suffered a loss because the loan amounts exceeded the foreclosure proceeds. The government argued that both the title insurance payout and the S & L's loss due to decreased value of its collateral were components of the loss. The Seventh Circuit agreed.

The court did not dispute Barrett's contention that the loss to the S & L in this case was a "consequential damage" of precisely the same sort suffered by the time-share buyers in *Marlatt* and excluded from loss by Judge Posner. Indeed, the *Barrett* court cited *Marlatt* for the proposition that "[a] loss due to reduced market value, whether it is borne by the property owner or the title insurer, is consequential and is not a loss attributable to the title fraud."[270] The court nonetheless distinguished *Marlatt* on the ground that the victim in *Barrett* was a financial institution, and section 2F1.1, Application Note 7(b) regarding fraudulent loan cases includes as "loss" the decline in value of collateral between the fraud and liquidation of the collateral. Obviously uncomfortable with the disparate results dictated by the Guidelines, the *Barrett* court supported the differential treatment of the title insurer in *Marlatt* and the federally insured lender before it on the ground that the defendant's misrepresentation to the S & L

268. I say "reasonably convincing" because, even on its own terms, the opinion is open to question. Whether the money paid by the title insurer to purchase its insureds' units would be a direct or consequential damage in civil law depends on what civil lawsuit one considers. Presumably, the hypothetical suit would be by the title company against the criminal defendant for breach of the agency contract and fraud. It is not at all clear that the insurer's payouts to its insureds, whether made under threat of suit or not, would necessarily be considered a consequential rather than a direct damage flowing from either the breach of the agency agreement or the fraud or both.

269. 51 F.3d 86 (7th Cir. 1995).

270. *Id.* at 91.

induced the S & L to make a loan it would not otherwise have made by distorting the bank's initial assessment of "the actual likelihood of his defaulting on the loans."[271] The distinction is unconvincing. After all, did not the defendants' misrepresentations to the title companies in both *Barrett* and *Marlatt* cause them to miscalculate the risks they incurred by issuing title insurance policies? The issue in both cases was not whether the defendant's misrepresentations caused victims to part with their money. They did. The issue in each case was whether the defendant's conduct had a sufficient causal connection to the fact that victims lost money when the property he induced them to buy (or accept as a security) declined in value to justify holding him responsible for such losses at sentencing. The law of the Seventh Circuit on consequential damages and loss remains murky.[272]

For its part, the D.C. Circuit seems to find persuasive the Ninth Circuit's approach in *Mende*. In *United States v. Gottfried*, the defendant was an Attorney Advisor to the Board of Veterans' Appeals in the Department of Veterans Affairs.[273] To save himself work, he removed documents from the files of appeals of regional office decisions denying eligibility for disability benefits, and recommended remand of the cases to the regional office because of incomplete files.[274] The defendant was convicted of concealment, removal, and mutilation of government records.[275] The district court counted as part of the loss the costs incurred by the Board in reprocessing the

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271. *Id.*

272. The recent case of *United States v. O'Brien*, 119 F.3d 523 (7th Cir. 1997) muddied the waters further still. Defendant O'Brien was convicted of bank fraud and wire fraud for taking out loans secured by the assets of her oil delivery company and then selling those assets to another company by claiming that they were unencumbered. The successor company was forced to pay the bank to satisfy the liens, and both it and the bank suffered losses. At sentencing, the district court included in the loss calculation as relevant conduct more than $40,000 the defendant had obtained from her principal oil supplier, North Shore Oil, by ordering oil, selling it, and sticking to the proceeds. *See id.* at 534. The Seventh Circuit rejected the defendant's claim that the North Shore losses were excludable consequential damages, employing reasoning closer to the Ninth Circuit's direct causation analysis in *Mende* than to Judge Posner's merger of contract law with the "thing taken" language of section 2F1.1. The court wrote:

> Consequential damages are defined as "damage, loss or injury as does not flow directly and immediatoly from the act of the party, but only from some of the consequences or results of such act. . . . Damages which arise from intervention of special circumstances not ordinarily predictable." In this case, there was ample evidence from which the court could, and did, conclude that the loss caused to North Shore Oil arose as a direct result of O'Brien's fraudulent scheme.

Id. at 535 n.9 (citation omitted).

273. 58 F.3d 648 (D.C. Cir. 1995).

274. *See id.* at 649-50.

275. *See id.* at 649.

thirty-two appeals known to have been tampered with by the defendant.

The D.C. Circuit approved, despite the inclusion of costs to the government such as the pro rata overhead expenses of running the Board.[276] The court analogized the inclusion of overhead expenses to awarding attorney's fees in a civil case.[277] Said the court: "Including pro rata overhead expenses in the amount of the Board's loss . . . for reprocessing the thirty-two appeals merely attributed to Gottfried the cost of undoing the damage he had done."[278]

The court distinguished *Marlatt* and other cases that exclude consequential damages,[279] remarking: "Perhaps more may be discerned, but at the least the cases stand for the general proposition that only 'direct' losses count."[280] In the hands of the *Gottfried* court, the "no-consequential-damages" rule is transmuted into little more than a requirement of "but for" causation.[281]

4. Consequential Damages in Procurement Fraud and Product Substitution Cases

As troublesome as the general exclusion of consequential damages from loss has proven in practice, the mandate of section 2F1.1, Application Note 7(c), that such harms be *included* in loss in procurement fraud and product substitution cases is perhaps even more

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276. *See id.* at 651.
277. *See id.*
278. *See id.*
279. *See id.* at 651-52.
280. *See id.* at 652.
281. The court stated:

> The cost of redoing the thirty-two appeals Gottfried had been assigned to handle was a direct result of his crime. It followed immediately as a consequence of his unlawful action. If Gottfried had not violated the law, the appeals would have been handled once, by him. His illegal initial processing of the appeals forced the Board te reprocess them.

Id.

Judge Henderson's concurrence aptly noted that "the property loss valuation provisions of the Guidelines are a bad fit for the kind of crime committed here (in that they focus on the value of the property taken or damaged rather than the extent of the actual harm caused by the criminal activity)." *Id.* at 653 (Henderson, J., concurring). The concurrence also suggested that an upward departure would be a better approach than straining to assess an economic harm. *Id.* (Henderson, J., concurring).

See also *United States v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991), in which the court assessed a defendant convicted of destroying government documents for loss it equated with the costs incurred in undoing the full extent of the damage, including the costs of "reorganizing the documents," "reinterviewing the witnesses," and "obtaining" and "recopying" the documents. *Id.* at 1390. Said the court, "[T]ime a person spends doing one thing is time that person cannot spend doing something else; therefore, opportunity costs must also be factored into the cost of replacing the documents." *Id.* *Berkowitz* was decided prior to the adoption of Application Note 7(d) excluding "consequential damages" in most cases, and is thus of dubious precedential value.

puzzling as a matter of policy.[282] It is not readily apparent why these categories of cases should be treated differently. For example, why should the "reasonably foreseeable costs of making substitute transactions" and "the reasonably foreseeable administrative cost to the government and other participants of repeating the procurement action affected"[283] be chargeable to the defendant in procurement cases when similar costs incurred by governmental and other victims in non-procurement cases are not?

The explanation offered in note 7(c) for the special treatment of procurement and product substitution cases—that consequential damages "frequently are substantial in such cases"—is hardly adequate. In the first place, the unstated implication that consequential damages in other types of cases are generally insubstantial is, at best, questionable. Second, if the concept of "loss" does not include consequential damages, then the fact that such damages happen to be large in one category of crimes is hardly an explanation for changing the definition.[284]

Indeed, it is plain that some courts have been unable to fathom the reasoning behind the distinction. *Gottfried*, for example, is a case in which the loss measurement sanctioned by the D.C. Circuit can fairly be described as either "the cost of making substitute transactions" or "the reasonably foreseeable administrative cost to the government . . . of repeating the . . . action affected."[285] Notwithstanding their authors' protestations to the contrary, *Gottfried* and *Mende* are

282. See United States v. Hoffman, No. 95-3445, 1995 WL 465799 (6th Cir. Aug. 4, 1995) (unpublished), in which the court relied on USSG section 2F1.1, Application Note 7(c), for the proposition that in procurement fraud or product substitution cases, consequential damages may be part of the loss. In this case, consequential losses included payment for unusable goods and storage costs, removal and inspection of the nonconforming goods, and the cost of holding usable goods in evidence. *See id.*; *see also* United States v. Leahy, 82 F.3d 624 (5th Cir. 1996) (including in loss the amount roofing company overcharged, the amount of false bond premiums, the amount of additional materials the government had to purchase to complete the project, and the amount of physical damage caused by defendant's company).

283. USSG § 2F1.1 application note 7(c).

284. It is undoubtedly true that consequential damages in product substitution cases are sometimes very large indeed. See, for example, *United States v. Roggy*, 76 F.3d 189 (8th Cir. 1996), *cert. denied*, 116 S. Ct. 1700 (1996), in which the defendant defrauded General Mills by promising to spray oats with a pesticide safe for human consumption and instead spraying the oats (16 million bushels of them) with Dursban, a cheaper pesticide not safe for human consumption. *See id.* at 191. The damage to General Mills topped $80 million, and the Eighth Circuit upheld the trial court's assessment of this amount as the loss under section 2F1.1 against the defendant's argument that the loss should be either the amount he saved by using the cheaper pesticide, or, at worst, the total amount he was paid for his services. *See id.* at 193-94.

285. USSG § 2F1.1 application note 7(c).

both cases in which economic harms that would in any other context be termed consequential damages were made part of the loss.

5. Causation and Multiple Factors

The issue of multiple causation commonly arises when a defendant's conduct has apparently caused some actual loss to the victim, but the defendant alleges that but for the intervention of unforeseen factors, the loss would have been smaller or would not have occurred at all. Consider, for example, a victim who purchases stock based on a defendant's fraudulent misrepresentations about its value, and then sees the stock decrease in value still further because of an unforeseen downturn in the stock market after the purchase. From one point of view, the only loss directly caused by the defendant in this case is the difference between the price the victim paid for the stock based on the representations by the defendant and the actual (lower) market value of the stock at the time of purchase.[286] On the other hand, *but for* the defendant's blandishments, the victim would not have been holding the stock to begin with and thus would not have suffered the additional harm caused by the market decline. The fundamental issue is the nature and strength of the required causal nexus between a defendant's criminal conduct and the loss charged to him under the Guidelines.

The Guidelines themselves provide somewhat conflicting advice on this problem. The only direct reference to multiple causation in either the theft or fraud guideline is in Application Note 7(b) of section 2F1.1, which suggests that the amount of loss caused[287] by the defendant's conduct may overstate the seriousness of the offense if there existed some cause or causes extraneous to the defendant's misbehavior.[288] The example given is an unanticipated economic

286. This result is suggested by USSG § 2F1.1, Application Note 7(a), which says, "Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000)."

287. The commentary does not elaborate on what is meant by causation.

288. Section 2F1.1, Application Note 7(b) reads:

> In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example . . . a defendant may understate his debts to a limited degree to obtain a loan (*e.g.*, to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (*e.g.*, an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct . . . [and a] downward departure may be warranted.

USSG § 2F1.1 application note 7(b).

event like a grain embargo.[289] In such a case, the suggested remedy is a downward departure.[290]

By contrast, as noted above in the discussion of *United States v. Barrett*,[291] the very same application note says that loss in fraudulent loan cases will be determined by taking the unpaid balance of the loan at the time of discovery of the fraud and subtracting the amount the "lending institution has recovered (or can expect to recover)" from liquidation of the collateral.[292] The commentary does not exclude from the loss calculation the increase in "loss" which necessarily occurs whenever the value of pledged collateral decreases due to changed market conditions, natural disaster, or other factors arising between the making of the loan and the liquidation of the collateral after discovery of the fraud. Where the victim is a bank, the defendant is responsible for the bank's *entire* loss, whether or not multiple factors are present.

The Guidelines provide no guidance on the question of when losses arising from external factors should be attributed to the defendant and when the connection between the external factor, the defendant's conduct, and the victim's loss is so attenuated that some adjustment should be made by actual modification of the loss amount or by departure. Courts have wrestled with this problem with indifferent success. Some appear to recognize that adjustments to "loss" for multiple causation may be appropriate in certain cases.[293] On the other hand, the Third Circuit is of the view that multiple causation can only be a ground for a downward departure.[294]

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289. *Id.*

290. *See id.*

291. *See supra* note 269 and accompanying text.

292. USSG § 2F1.1 application note 7(b).

293. *See, e.g.*, United States v. Bennett, 60 F.3d 902, 905 (1st Cir. 1995) (rejecting defendant's request for a downward departure based on the claim that the loss was inflated due to an "economic downturn in the regional economy," but recognizing the potential validity of such a claim); United States v. Rostoff, 53 F.3d 398, 405 (1st Cir. 1995) (acknowledging that a downward departure may be warranted in the few instances where " 'a misrepresentation . . . is not the sole cause of the loss.' ") (quoting USSG § 2F1.1 application note 11 (1987)). See also *United States v. Irons*, 53 F.3d 947, 949 (8th Cir. 1995), an insurance fraud case in which the defendant submitted false claims arising from a staged automobile accident. Insurance companies paid out over $221,000. The defendant claimed that real loss was only around $50,000 because insurer had paid only $50,000 in benefits before a second, genuine collision occurred. The court of appeals rejected the defendant's argument on the ground that the insurer's payments were based on the first accident, not the second. *See id.* The opinion implicitly conceded that an adjustment might be appropriate in a case of multiple claims where one or more of the non-fraudulent claims were genuine.

294. The Third Circuit reads noto 7(b) as creating a rule that:

> it is not appropriate to reduce the amount of the loss . . . in order to reflect other causes of the loss which were beyond the defendant's control. An intorvening force that in-

6. Causation: A Summary of the Status Quo

What then can we divine about the required causal relationship between a defendant's criminal behavior and those economic harms the Guidelines now count as "loss"? In truth, the Guidelines and the cases construing them have created an ugly and nearly incomprehensible patchwork:

a. The Guidelines contain no rules for determining the identity of victims whose losses will be taken into account for sentencing purposes.

b. The relevant conduct guideline says that offense levels are to be determined based on "all harm that resulted from"[295] a defendant's own conduct, apparently setting up a rule of pure "but for" causation.

c. By contrast, both the fraud and theft guidelines define "loss" narrowly as the "thing taken," the *corpus delicti* of the crime.

d. Moreover, section 2F1.1, Application Note 7(c), says that only "direct damages" count for the purpose of determining loss, and excludes from consideration "consequential damages." If the latter term is given its customary meaning, Note 7(c) excludes from loss many economic harms which are both foreseeable and directly caused by defendant's conduct.

e. On the other hand, in cases of procurement fraud and product substitution the Guidelines specifically *include* "consequential damages" in loss, if such "damages" were foreseeable.

f. Likewise, if a defendant has co-conspirators or other criminal cohorts, he is responsible for all harms that resulted from all of their "reasonably foreseeable acts and omissions" in furtherance of the crime.

g. In loan fraud cases, a drop in value of pledged collateral is a part of the loss to banks, despite the fact that such loss is a classic "consequential damage." Moreover, the rule is so broad that such losses are counted regardless of whether the decline in value was caused by factors wholly extraneous to the

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creases a fraud-related loss will not decrease the loss valuation but will only provide possible grounds for a downward departure.

United States v. Neadle, 72 F.3d 1104, 1110 (3d Cir. 1995) (relying on *United States v. Kopp*, 951 F.2d 521, 531 (3d Cir. 1991)), *cert. denied*, 117 S. Ct. 238 (1996).

295. USSG § 1B1.3(a)(3).

crime and regardless of whether it was foreseeable to the defendant.

h. Except in loan fraud cases, if a victim's loss is genuinely attributable to several causes, there is no rule for determining what the causal nexus to a defendant's conduct must be before the loss should be counted.

i. In any case, courts routinely evade the no-consequential-damages rule by ignoring it or by interpreting it to impose something like a rule of proximate causation.

B. Causation: A Path Out of the Swamp

Judge Posner is exactly right when he says in *Marlatt* that the idea of causation "runs throughout the law" as a distinction between liability and non-liability.[296] As we noted at the outset, causation is one of the principal requirements, along with an act or omission and a culpable mental state, for a determination of fault for crime.[297] The distinction between harms said to have been "caused" or "not caused" by a party's misconduct is also central to torts and contracts. More to the point for present purposes, and as I hope the foregoing discussion has demonstrated, many, perhaps most, of the difficulties in deciding which economic harms to include in loss under the Guidelines are at bottom problems of causation. In any theory of liability for harm, whether civil or criminal, and in criminal cases whether at the guilt or sentencing phase, the indispensable link between the defendant's conduct and a harm for which the law seeks to impose responsibility is a definition of causation. When the drafters of the Guidelines created a sentencing scheme for economic crime which made measurement of harm the predominant sentencing factor, but failed to define the required causal relation between the criminal conduct and the harm to be measured, the current thicket of uncertainty became not only predictable, but inevitable.

I hasten to add that by "causation" I do not refer only to the purely mechanical relation of cause and effect between defendant's conduct and a particular harm, though this is certainly one component of the problem. While causation analysis takes slightly different forms in different disciplines, two elements are common to causation analysis throughout the law: (1) a requirement of cause-in-fact, that is, a logical cause and effect relationship between the conduct com-

296. United States v. Marlatt, 24 F.3d 1005, 1007 (7th Cir. 1994).

297. *See supra* notes 21-22 and accompanying text.

plained-of and the harm for which liability is sought; and (2) what might be termed "cause in law," that is, some formula for cutting off infinite liability for remote and unpredictable consequences, and thus for keeping legal responsibility within reasonable limits.

To be doctrinally coherent and practically useful, a consolidated economic crimes guideline must have rules concerning each of these elements of causation. Indeed, the Commission should abandon its current dysfunctional larceny-based definition of loss and redefine the term expressly in terms of cause. In the following Section, I propose such a definition in the form of a draft application note, and then analyze the language of the draft.

1. Loss Redefined

The Sentencing Commission should redefine "loss" in application notes to a consolidated economic crimes guideline as follows:

Application Notes:

1. *"Loss" means all pecuniary harm caused by the acts and omissions specified in subsections (a)(1) and (a)(2) of § 1B1.3 (Relevant Conduct) that was reasonably foreseeable to the defendant at the time of such acts or omissions. "Victims" are all persons or entities (public or private) which suffered such harms.*

   (a) *Pecuniary harm*
   The phrase "pecuniary harm" is to be given its common meaning. Many physical and emotional harms, injuries to reputation, etc., can be assigned a monetary value. However, "loss" does not measure harms of this kind. Its purpose is to measure economic harms.

   (b) *Cause-in-fact*
   A harm has been "caused" for the purposes of this guideline if one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of § 1B1.3 (Relevant Conduct) was a substantial factor in producing the harm. "Loss" should not include harms that are causally remote from the specified acts or omissions.

   (c) *Foreseeability*
   A foreseeable harm is one that ordinarily follows from one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of § 1B1.3 (Relevant Conduct) in the usual course of events, or that a reasonable person in the position of the defendant would have foreseen as a probable result of such acts or omissions. . . .
   Loss does not, however, include costs incurred by government agencies in criminal investigation or prosecution of the defendant.

(d) Cases of theft, receipt of stolen property, and destruction of property
In cases involving larceny, false pretenses, embezzlement, and other forms of theft, as well as cases involving receipt of stolen property or the destruction or damage of property, loss includes, but may not be limited to, the value of the property stolen, embezzled, damaged, or destroyed.

(e) Congressional intent
In determining the loss (including the identification of the persons or classes of persons to be treated as victims), the sentencing court shall give particular weight to congressional intent. It shall be rebuttably presumed that pecuniary harm which was: (i) caused by one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of § 1B1.3 (Relevant Conduct); and (ii) suffered by any person or class of persons whose interests Congress intended to protect by passage of the offense(s) of conviction or offense(s) considered by the sentencing court as relevant conduct, was foreseeable to the defendant. For example, in a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended beneficiaries or uses. Similarly, in a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

. . .

(i) Interest
Loss shall include interest if interest or some other similar form of return on investment was bargained for by a victim as part of a transaction which is the subject of the count(s) of conviction, or which is included as relevant conduct under § 1B1.3. In such a case, loss shall include a component of interest at the statutory rate specified in 28 U.S.C. § 1961 calculated from the time at which the money, property, or other thing of value was stolen, embezzled, damaged, or destroyed, or the victim was otherwise deprived of its use or benefit, until the time the crime was detected. In all other cases, loss shall not include interest.

2. Analysis of the Proposed Redefinition of Loss

In drafting this new definition of loss, I have tried to balance several sometimes cross-cutting principles. First, harm matters in ranking offense seriousness; the Guidelines' general modified real offense structure, together with the specific mandate of the relevant conduct guideline to include in the offense level "all harms resulting from" a defendant's crimes, strongly suggest that loss should be a broad-based measure of the economic harm caused by the defendant's criminal behavior. On the other hand, criminal law is preeminently about fault. If a man is to be confined in a locked room for months or years because someone has suffered a pecuniary loss, then we must be able to say that the loss was his fault in more than an arid logical sense. Therefore, in defining for sentencing purposes the required nexus between harm and criminal behavior, I have sought to put into words what I think the Commission has always intended, and what sentencing courts construing the convoluted loss rules have struggled to achieve—that a defendant should be sentenced on the basis of all harms, but only those harms fairly attributable to the wrongs he committed.

a. Cause in Fact

The minimum requirement imposed by any definition of legal cause is that the defendant's conduct be a "necessary antecedent to the harm at issue."[298] This requirement is often referred to as "but for" causation. The Guidelines' definition of "loss" must at the very least require "but for" causation. If a harm would have happened regardless of defendant's behavior, there can be no justice in punishing him for its occurrence. Presumably the relevant conduct guideline refers to "but for" causation when it lays down the general mandate that offense levels are to be determined by considering "all harms resulting from" certain conduct.[299]

The more difficult definitional issue arises in deciding whether to impose on the loss calculation a standard of logical causality stricter than pure "but for" causation. Chains of cause and effect, once initiated, run on infinitely through time.[300] It has been argued that attempts to limit legal liability by defining the logical proximity of conduct to harm are doomed to failure.[301] In this view, language is so imprecise and circumstances are so various that no verbal formula can achieve a useful degree of precision. Moreover, most arguments about causation in both criminal and civil law are less about cause-in-

298. *Neadle*, 72 F.3d at 1119 (Becker, J., concurring and dissenting) (citing 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.2, at 89-91 (2d ed. 1986)).

299. USSG § 1B1.3(a)(3).

300. As Benjamin Franklin observed, "A little neglect may breed great mischief.... [F]or want of a nail the shoe was lost, for want of a shoe the horse was lost, and for want of a horse the rider was lost." BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC, *Preface: Courteous Reader* (1758) (quoting GEORGE HERBERT, JACULA PRUDENTUM, no. 499 (1651)); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984) ("In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go backward to the dawn of human events, and beyond.").

301. *See, e.g.*, KEETON ET AL., *supra* note 300, § 42, at 279 (discussing the "fruitless quest for a universal formula" for proximate cause).

fact than about foreseeability, that is, whether the defendant anticipated, or should have anticipated, the harm at issue.

Nonetheless, it may be useful to adopt as part of the loss definition a standard of cause-in-fact more stringent than "but for" causation. It seems plain both from existing Guidelines' language and the case law that neither the Sentencing Commission nor the courts are disposed to count as "loss" harms logically remote from a defendant's conduct or to which his conduct made only an insubstantial contribution. The definition proposed here maintains continuity with that established approach, and is consistent with the general principle of criminal fault that people should be sent to jail only for harms to which they have a significant connection.

Among the various phrases that have been used over the years to describe a more-than-but-for standard of cause-in-fact, the "substantial factor" language first proposed by Jeremiah Smith[302] and later adopted by the Restatement of Torts,[303] has three notable advantages. First, it does not employ the term "proximate cause," a phrase redolent of the liberal causation rules of tort law,[304] and which is, in any case, mostly concerned with foreseeability. Second, it allows sentencing courts to make sensible limiting choices about cause-in-fact without having to make the tortured analogies between the situations before them and the law of larceny or contracts now required by the use of ill-fitting terms of art like "taken" and "consequential damages." Third, it suggests an approach to cases involving multiple causes more useful than the Guidelines' current glib dismissal of the problem as one to be dealt with by departure.

302. *See id.* § 42, at 278 (citing Jeremiah Smith, *Legal Causes in Actions of Tort*, 25 HARV. L. REV. 103, 223, 229 (1911)).

303. The substantial factor test was adopted as a test for proximate cause by the original Restatement of Torts. In subsequent revisions, the Restatement limited its application to cause-in-fact. *See* KEETON ET AL., *supra* note 300, § 42, at 278.

304. The phrase "proximate cause" immediately calls te the mind of any Anglo-American lawyer the unlikely series of catastrophes described in law school chestnuts like *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), in which a railroad employee trying to help a passenger board a train knocked a package containing fireworks from the passenger's arms, whereupon they exploded, causing a concussion which knocked over scales some distance away on the platform, which in turn injured the plaintiff, and *In re Polemis and Furness, Withy & Co.*, 3 K.B. 560 (Eng. C.A. 1921), in which a plank dropped by a defendant's workman into the hold of a ship struck a spark, which ignited gasoline vapors causing an explosion and fire that destroyed the ship. Even though Judge Cardozo found no liability in *Palsgraf*, and the Privy Council in *The Wagon Mound*, [1961] App. Cas. 388 (P.C. 1961), overruled the finding of liability in *Polemis*, the general perception is that, as a limitation on liability, proximate cause is next to no limitation at all.

b. Foreseeability

Throughout the law, foreseeability of harm is a primary component of rules designed to place limits on liability for harm a defendant caused in fact. In torts, liability is commonly imposed for negligence,[305] and the linchpin of negligence law is "proximate cause." A defendant is civilly liable for negligence if he breaches a legal duty and the breach is the proximate cause of actual loss or damage to the interests of another.[306] However, logical causation is a necessary but not sufficient condition for a finding of proximate cause. Instead, proximate cause is customarily defined primarily by reference to consequences that might ordinarily be anticipated, either by this defendant or by the ubiquitous "reasonable man," a requirement usually denominated "foreseeability."[307] Likewise in contracts, as observed above, the determinant of whether consequential damages arising from a breach of contract are recoverable is whether such damages are foreseeable.[308]

The definition of foreseeability in terts and contracts differs markedly,[309] primarily because the two bodies of law exist to serve different social ends. Torts, although concerned with fault, is equally concerned with the more pragmatic goals of compensating injured persons, restoring their productive abilities, and encouraging social mechanisms for sharing the cost of injuries incident to communal life.[310] Consequently, tort law has tended to define foreseeability quite broadly, never quite saying that if a harm happened then it must have been foreseeable, but at times reaching toward that extreme. Contract law is more narrowly concerned with the fulfillment of private agreements, and has been written against the background of concern that the law not burden beneficial business activity with crippling liability for the occasional breaches of promise which are an

305. *See generally* KEETON ET AL., *supra* note 300, § 7, at 31-32 (identifying three categories of tort).

306. *See id.* § 30, at 164-65.

307. *See id.* § 43, at 280.

308. *See supra* note 246 and accompanying text.

309. Of course, there is also dispute over the definition of what is foreseeable *within* torts and contracts, but the subtleties of those definitional conflicts are beyond the scope of this Article.

310. *See, e.g.*, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866, 869, 871-72 (1986) (holding admiralty law incorporates principles of product liability, and noting that the assessment of liability for defective products in torts is justified by policy considerations of cost-shifting, promotion of product safety, and encouragement of insurance). *See generally* KEETON ET AL., *supra* note 300, § 4, at 20-21 (discussing factors affecting tort liability).

inescapable feature of commercial life.[311] As a result, contract law has taken a narrower, more subjective and therefore more restrictive, view of foreseeability,[312] insisting as did the court in *Hadley v. Baxendale*[313] that a defendant have been warned of the harm at issue or that a reasonable person in defendant's circumstances, knowing what he knew, would have anticipated the harm.

Although the question is less often discussed in criminal law,[314] foreseeability is also a hallmark of criminal causation,[315] and has long been a staple of analysis both in determining guilt and in imposing sentences. In guilt determinations, foreseeability is, of course, expressly an element of crimes where the prohibited mental state is criminal negligence[316] or recklessness.[317] It is also integral to determinations of guilt for crimes in which the ostensible mens rea involves intentionality or knowledge.[318] For example, a party to a conspiracy is responsible for any crime committed by a co-conspirator if it is within the scope of the conspiracy or is a foreseeable consequence of the unlawful agreement.[319] Similarly, a criminal accomplice "is guilty not only of the offense he intended to facilitate or encourage, but also of

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311. *See* MURRAY, JR., *supra* note 234, at §§ 219-24.

312. *See* Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 116 S. Ct. 1813, 1819 (1996) ("[T]he requirement of foreseeability may he more stringent in the context of contract liability than it is in the context of tort liability.").

313. 156 Eng. Rep. 145 (Ex. 1854).

314. *See generally* Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 773 (1958) ("[T]he problem of causation has received scant attention in Anglo-American criminal law literature.").

315. "The notion of causation runs throughout the law—including the criminal law—and it is generally understood to encompass two concepts. A defendant's conduct must generally be both the 'cause in fact' and the 'proximate cause' of some harm before liability is imposed." United States v. Neadle, 72 F.3d 1104, 1119 (3d Cir. 1996) (Becker, J., concurring and dissenting).

316. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(d) (1962) (defining criminal negligence to require that defendant should have been aware of a substantial and unjustifiable risk of harm).

317. *See, e.g.*, Henderson v. Kibbe, 431 U.S. 145, 156-57 (1977) (finding foreseeability of death a necessary component of depraved indifference murder under New York law); Regina v. Cunningham, 2 Q.B. 396 (1957) (holding that "malice" under the Offenses against the Person Act, 1861, embraces both intentional and reckless conduct, and recklessness requires evidence that defendant foresaw the threatened injury).

318. *See, e.g.*, People v. Rakusz, 484 N.Y.S.2d 784, 786 (N.Y. Crim. Ct. 1985) (finding defendant guilty of assault, defined as causing injury to a police officer "[w]ith intent to prevent . . . [him] from performing a lawful duty," when an officer frisking a struggling defendant cut his hand on a knife, because the injury was foreseeable to defendant) (quoting N.Y. PENAL LAW § 120.05(3)); State v. Williquette, 385 N.W.2d 145, 150 (Wis. 1986) (holding that a defendant "subjects a child" to abuse if, by act or omission, "she causes the child to come within the influence of a foreseeable risk of cruel maltreatment").

319. *See* Pinkerton v. United States, 328 U.S. 640, 647-48 (1946); *see also* United States v. Laurenzana, 113 F.3d 689, 693 (7th Cir. 1997) (finding defendant guilty of conspiracy to commit mail fraud where he entered scheme in which it was reasonably foreseeable that U.S. Mail would be used).

any reasonably foreseeable offense committed by the person he aids and abets."[320] The felony murder rule, which imposes liability for the highest available degree of criminal homicide for killings occurring during certain dangerous felonies, in effect substitutes foreseeability of death for the intent to cause it.[321]

Foreseeability of harm is also widely employed as a determinant of which harms to consider in sentencing. As observed above, the Guidelines themselves repeatedly use foreseeability to distinguish between those harms that count for measuring offense seriousness and those that do not.[322] This approach has received the imprimatur of the United States Supreme Court, even in the capital sentencing context. In *Payne v. Tennessee*,[323] the Court approved the use of victim impact evidence over the objection that such evidence concerns "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," and thus has nothing to do with the "blameworthiness of a particular defendant."[324] Justice Souter, in his concurrence, responded to this argument by observing that the harms to the surviving victims of homicide (the families, friends, communities, and loved ones of the deceased) portrayed in victim impact evidence are morally, and therefore legally, relevant precisely because they are so plainly foreseeable.[325]

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320. People v. Croy, 710 P.2d 392, 398 n.5 (Cal. 1985). *See generally* DRESSLER, *supra* note 62, § 30.05[B][5], at 443 (discussing natural-and-probable-cause-consequences doctrine).

321. Some jurisdictions apply the felony murder rule to all deaths caused in fact by the commission of designated dangerous felonies, on the theory that such felonies always present a particular risk of death. *See* LAFAVE & SCOTT, JR., *supra* note 27, § 7.5(b), at 624-25. Other jurisdictions impose a specific requirement that the death in the particular case have been a foreseeable outcome of the defendant's felony. *See id.* § 7.5(d), at 626-27.

322. *See supra* note 229 and accompanying text (discussing section 1B1.3(a) which dictates that sentencing be based on harms resulting from the foreseeable conduct of defendant's criminal partners); *supra* Part IV.A.4 (discussing section 2F1.1, application note 7(c), including in "loss" foreseeable consequential damages in procurement fraud and product substitution cases); *see also* USSG § 2F1.1 n.10(a) (authorizing a departure for "reasonably foreseeable non-monetary harm"), *id.* § 2F1.1 n.10(c) (authorizing departure for "reasonably foreseeable" physical, psychological, or emotional harm). *Cf.* United States v. Sarno, 73 F.3d 1470 (9th Cir. 1995) (finding all losses on fraudulently procured loan attributable to the defendant even where the default was not his fault because it was reasonably foreseeable from the defendant's conduct that the loan would be approved, putting the bank's money at risk).

323. 501 U.S. 808 (1991).

324. *Id.* at 818 (quoting Booth v. Maryland, 482 U.S. 496, 504, 505 (1987)).

325. *See id.* at 838-39 (Souter, J., concurring). In dissent, Justice Stevens tacitly conceded that impact on surviving victims would be relevant if foreseeable. He simply argued that the majority's holding

> permits a jury to sentence a defendant to death because of harm te the victim and his family that the defendant could not foresee, which was not even identified until after the crime had been committed, and which may be deemed by the jury, without any rational explanation, to justify a death sentence in one case and not in another.

Id. at 863 (Stovens, J., dissenting).

The inclusion of foreseeable harms in the sentencing calculus is not only sanctioned by long precedent, it is entirely consistent with the fundamental principles and purposes of criminal sentencing. Again, criminal law is preeminently about fault. It is unjust to put someone in prison for harms he did not intend or that he could not reasonably have anticipated would follow from his choice to do wrong. It is entirely appropriate, however, to punish based on harms that would not have occurred but for the defendant's evil choices, and that the defendant either anticipated or could and should have anticipated.

Because the emphasis in criminal law is on fault, the definition of what is foreseeable for sentencing purposes should be relatively narrow. Accordingly, I have borrowed language from contract law[326] that emphasizes two points: (1) Although the idea of foreseeability is, by definition, an objective standard (we ask not what the defendant *did* foresee, but what he *could have* foreseen), the definition I have chosen requires that the harm have been foreseeable to *this* defendant given the facts available to him at the time he acted; and (2) the proposed standard requires that a reasonable person in defendant's shoes "would have foreseen" the harm in question "as a probable result."

The combination of a more-than-but-for cause in fact standard and a tougher-than-tort-law foreseeability standard should produce several practical results. First, the universe of pecuniary harms that count as loss will be somewhat larger than is now the case. In my view, such a result is desirable as it will provide a closer congruence between the true harm caused by economic offenders and the sentences they serve.[327] Nonetheless, by specifying a relatively restrictive definition of foreseeability, the Commission would sigual that the scope of loss is not limitless, and is instead confined to harms for which a defendant can justly be held accountable.

Second, the new rule should simplify the task of sentencing economic criminals. Some will contend that the rules proposed here

326. The definition of "foreseeability" suggested here draws on Professor Corbin's statement of the modern rule governing the recoverability of consequential damages arising from special circumstances. He wrote:

> All that is necessary, in order to charge the defendant with a particular loss, is that it is one that ordinarily follows the breach of such a contract in the usual course of events, or that reasonable men in the position of the parties would have foreseen as a probable result of the breach.

CORBIN, *supra* note 246, § 1010, at 79.

327. I have argued elsewhere that, in contrast to narcotics sentences, economic crime sentences under the Guidelines are "often too short in relation to their moral seriousness, in relation to the harm they cause, and in relation to the investment of resources required to prosecute them." Bowman, *supra* note 10, at 740.

will impose a far greater fact-finding burden on courts.[328] I disagree. Zealous government advocates in search of more severe sentences will present roughly the same evidence and arguments whether or not the changes advocated here are adopted. Zealous defense counsel will argue just as strenuously that the harms urged by the government have not been proven, or if proven, should not count. The only difference will be that courts will draw the lines of inclusion and exclusion from "loss" in different (and I hope easier to find) places. District courts are very well equipped to make findings of fact. That is, after all, their job. The problem with the loss calculation has never been the factual issues; it has been with trying to apply an incomprehensible set of conflicting rules te well understeod facts.

As some workingman's sage once observed, the key to success in any undertaking is having the right tools. The current Guidelines use the wrong verbal tools to define loss, tools desigued for other tasks. The core issues in defining loss are questions about causation—cause-in-fact and foreseeability. The Guidelines should deal with these questions squarely and give sentencing judges the definitional tools they need to make case-by-case decisions. Judges do not know how to merge larceny language ("taken") with contracts terminology ("consequential damages"). They do know how to determine cause-in-fact and foreseeability. The Commission should let them.

c. Victims and Gain

I am of two minds on the subject of using a defendant's "gain" as an alternate measure of "loss." On the one hand, the issue of gain arises primarily because the present Guidelines tend to obscure the identity of the true victims in criminal transactions. As explained above,[329] the problem of identifying victims is in reality a problem of defining the requisite causal relation between the defendant's conduct and the harms for which we wish to hold him answerable at sentencing. Once the cause riddle is solved, the question of who is the victim answers itself and the need to use "gain" as an alternative measure of loss largely evaporates. A consideration of gain is currently necessary primarily because the present Guidelines tend to obscure the identity of the true victims in criminal transactions. In a regime in which the sentencing court is at liberty to identify all reasonably foreseeable

328. *See, e.g.*, United States v. Newman, 6 F.3d 623, 630 (9th Cir. 1993) (expressing concern that calculation of "consequential damages" for arson or theft in insurance fraud case would be "too complex").

329. *See supra* notes 199-229.

victims of a defendant's conduct and aggregate their economic injuries in the loss calculation, gain as an alternative measure of loss should be superfluous. Therefore, the proposed consolidated guideline contains no reference to gain.

On the other hand, colleagues at the Commission and the Department of Justice have argued persuasively that there are some cases, particularly frauds involving numerous victims with small individual losses, in which proving loss directly victim-by-victim is prohibitively difficult,[330] while proving the defendant's aggregate gain is perfectly practical. It may be that some provision permitting the use of gain should be retained in the Guidelines to account for those unusual cases. If so, gain should be used *only* as an alternative measure of loss when more direct measures prove impracticable.

d. The Object of the Crime

I have included in the proposed guideline application notes[331] a paragraph designed to emphasize continuity with the current primary definition of loss, the "value of the thing taken, damaged, or destroyed."[332] "Loss" under the new regime would begin with the value of the object of the crime, the money or property stolen or embezzled or destroyed by the defendant. However, the revised language eschews the confusing word "taken," and makes clear that the loss calculation always begins, but may not end, with the value of the immediate criminal object.

e. Legislative Intent

As discussed above,[333] the punishment for any crime should be related to the damage inflicted on interests the legislature sought to protect by proscribing the behavior at issue. Given the cornucopia of federal economic crime statutes, any attempt by the Commission to identify and account for all the interests Congress has sought to protect would introduce not clarity, but clutter. The solution is, once again, to let courts do what they already know how to do—in this case

330. *See, e.g.*, Carol C. Lam, *Assessing Loss in Heath Care Fraud Cases*, 10 FED. SENTENCING REP. 145, 147 (Nov.-Dec. 1997) ("It is, of course, logistically impossible to prove widespread fraud on a patient-by-patient, claim-by-claim basis in a medical practice that had thousands of patients, each of whom received multiple services.").

331. *See* Appendix A, Proposed § 221.1 application noto 1(d).

332. USSG § 2B1.1 application note 2.

333. *See supra* notes 208-11 and accompanying text.

determine legislative intent. If there is any question about whether a particular type of economic harm was contemplated by Congress, sentencing courts will apply well understood tools of statutory construction to divine legislative intent.

Because the primary consideration in assessing loss is fault, I have made legislative intent not conclusive, but presumptive evidence of foreseeability. Doing so not only assigns to the legislature its appropriate role, it comports with common sense. If the connection between a particular crime and a particular type of harm was sufficiently clear that Congress bestirred itself to pass a law criminalizing the conduct to prevent the harm, the occurrence of the harm as a consequence of the crime should be reasonably foreseeable to the average perpetrator. Still, exceptional cases will arise and a defendant should be permitted to prove that a connection clear to Congress was neither clear nor foreseeable to him.

f. Causation and the Problem of Interest

The question of whether a defendant should be assessed interest as a part of "loss" is merely a special case of the general causation problem. A proponent of including interest would argue that the defendant's fraud or theft causes not only a loss of the thing stolen, but also the loss of an income stream which would have been generated had the defendant not stolen the asset. Opponents of including interest in "loss" would respond that the causal relationship between the defendant's conduct and a hypothetical income stream is too speculative: In general, we cannot say with confidence how a victim might have used the stolen asset had it not been stolen, or how productive that use might have been.

The Sentencing Commission has sided with the opponents of including interest, stating in Application Note 7 to the fraud guideline that loss "does not . . . include interest the victim could have earned on the funds had the offense not occurred."[334] Despite the apparent clarity of the commentary, at least five circuits have held that interest *should* be counted if it was specifically bargained for by the victim in the transaction which is the subject of the criminal case.[335]

334. USSG § 2F1.1 application note 7, *construed in* United States v. Moored, 38 F.3d 1419, 1423 (6th Cir. 1994) (stating in dictum that loss does not include interest).

335. *See* United States v. Gilberg, 75 F.3d 15, 17 (1st Cir. 1996) (including accrued mortgage interest in loss of $726,637, and distinguishing section 2F1.1, application note 7, on the ground that accrued mortgage interest is not "opportunity cost" interest), *relying on* United States v. Goodchild, 25 F.3d 55, 65-66 (1st Cir. 1994) (holding accrued finance charges on credit cards are not opportunity cost interest and therefore may be included in loss); United States v.

The flaw in the reasoning of courts including agreed-upon interest in loss becomes apparent when we recognize that banks are not the only victims to whom fraud defendants promise to pay interest. The promise of a return on investment is a staple of virtually every con game ever devised. The implication of the cases that count interest promised by contract as "loss" is that the loss caused by any fraud defendant should be measured by the promises he makes but does not keep. By this logic, if the friendly man on the phone guarantees a 10% monthly return on my investment, my "loss" must then be the amount I send him plus the promised 120% per annum.

The only way to escape this parallel is to argue that the interest a defendant promises to pay a bank on a fraudulently obtained loan, or a credit card company in a credit card fraud scheme, is "commercially reasonable," while the expectations of the ordinary noncommercial fraud victim are not.[336] After all, a telemarketer's promise to pay 120% annual interest on the money I send him is distingnishable from my promise to pay the bank 8% interest on the money it lends me only by the differing probabilities that the two promises will be kept. The Fifth and Sixth Circuits seem to have an inkling of this difficulty because both qualify their opinions by saying contractually promised interest should be included in loss where the victim had a "reasonable expectation" of receiving it.[337] Trying to

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Henderson, 19 F.3d 917, 928 (5th Cir. 1994) ("[The] commentary sweeps too broadly and, if applied in this case [a bank fraud case] would be inconsistent with the purpose of [section] 2F1.1.... Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction."); United States v. Allender, 62 F.3d 909, 917 (7th Cir. 1995) (distinguishing between interest a defendant specifically agrees to pay by contract and "speculative 'opportunity cost' intorest"), *overruling* United States v. Clemmons, 48 F.3d 1020 (7th Cir. 1995); *see also* United States v. Jones, 933 F.2d 353, 354-55 (6th Cir. 1991) (finding interest should be included where defendant defrauded credit card companies that had a reasonable expectation of a specific return on the credit extended); United States v. Lowder, 5 F.3d 467, 471 (10th Cir. 1993) (holding interest should be included where the defendant promised victims a specific interest rate); United States v. Kunzman, 54 F.3d 1522, 1532 (10th Cir. 1995) (finding that lower court properly determined loss based upon repaid principle without consideration of repaid interest and that lower court properly excluded from loss the interest due investers).

336. *See, e.g.*, United States v. Clemmons, 48 F.3d 1020, 1025 (7th Cir. 1995) ("The degree of certainty with which defrauded investers expected a return on their investments is not, in our opinion, a significant distinction.... [F]ailure te receive the promised interest is not a loss at all, but a frustrated expectation."), *overruled by* United States v. Allender, 62 F.3d 909, 917 n.2 (7th Cir. 1995).

337. *See* United States v. Henderson, 19 F.3d 917, 928 (5th Cir. 1994) ("Interest should he included if, as here, the victim had a reasonable expectation of receiving interest from the transaction."); *Jones*, 933 F.2d at 354 ("When [defendant] failed to pay [credit card bills], the issuer lost the use of money that ought to have come back to it."). *But cf.* United States v. Bailey, 975 F.2d 1028, 1030-31 (4th Cir. 1992) (excluding from loss the profits promised by a fraud defendant te his investors).

make this distinction takes courts down a very difficult path. For example, if a bank makes a self-evidently risky loan without following customary industry procedures, is that behavior commercially reasonable? Or if a credit card company fails to have a theft detection system or issues cards to people with bad credit histories, is that commercially reasonable?

Several courts, particularly the First Circuit in *United States v. Goodchild*[338] and the Seventh Circuit in *United States v. Allender*,[339] emphasize that including interest in loss is justified where the defendant agreed to pay it and the lending institution relied on that promise in extending credit. But such reliance is present in every fraud case—the defendant promises the victim his money back plus a profit, the victim relies on those promises and writes a check. Holding the defendant to his promises has a superficial appeal, but it strays a very great distance from the concept of loss as something the defendant actually took or intended to take from a victim. Indeed, the "opportunity cost" interest the courts are at pains to distinguish from promised interest comes closer to being a "loss" that can be causally related to the defendant's conduct than does a loss calculation based on pie-in-the-sky promises the defendant never intended to fulfill.

Whether to include interest in the calculation of loss is one of the more vexing problems in redrafting the economic crime guidelines. If causation is to be the *sine qua non* of a new definition of loss, then it would seem that there could hardly be a clearer case both of cause-in-fact and foreseeability than a fraud victim's deprivation of the time value of the money purloined by the defendant. If an elderly couple gives their retirement savings to a confidence man instead of leaving those savings invested in government bonds, the defendant has plainly caused the couple to lose not only their principal but the return they would have earned had they never met the defendant. In such a case, the defendant's conduct was inescapably the cause-in-fact of the loss of accrued interest, and the loss of that accrual was easily foreseeable. And yet, it is hard to say what the victims would have done had they not been victims. Perhaps they would have lost all the money, principal and potential interest, at the nearest gaming emporium. Perhaps they would have stuck it under the mattress, keeping the principal but foregoing the interest.

The rule proposed here takes a middle position. It adopts, with some modifications, the "bargained-for interest" exception cre-

338. 25 F.3d 55, 66 (1st Cir. 1994).

339. 62 F.3d 909, 917 (7th Cir. 1995).

ated by the courts of appeals to the Guidelines' current "no interest ever" rule. Under the new rule, interest will be included in loss if a victim relied on a promise to pay a return on investment in deciding to part with his money or property. This result is justifiable, not because we are giving the victims the benefit of a criminal bargain, but because the fact that the victims' bargained for return on investment is proof that they would have sought some other legal avenue of investment, and thus that there is a genuine causal link between the defendant's conduct and the victim's deprivation of opportunity cost interest.

However, under the proposed rule, the *amount* of interest included in the loss figure would be calculated, not by reference to the defendant's promises, but by reference to the same statutory rates applied to damages awards in civil cases.[340] There are several reasons for taking this approach. First, the opportunity cost component of loss would, and should, remain constant from case to case and defendant to defendant. There is no sound reason for punishing a defendant who commits a $10,000 credit card fraud against an issuer that charges twenty-one percent interest more severely than a defendant who defrauds a different issuer of the same amount simply because the second issuer happens to charge the more reasonable interest rate of fourteen percent. Similarly, it makes no sense to sentence two con men differently because one makes more outlandish promises of improbable profits than the other. Second, use of a standard interest rate simplifies the fact-finding process in two ways: (1) by eliminating the need to determine precisely what the promised rate of return was; and (2) by eliminating the even more troublesome issue of whether any particular promised rate of return was commercially reasonable.

C. Loss and the Problem of Measurement

As noted above, the two basic definitional problems inherent in a scheme to rank economic crimes by measuring economic harm are the problem of inclusion and the problem of measurement.[341] I have argued in the preceding section that the problem of inclusion is best addressed by defining loss in terms of cause-in-fact and foreseeability.

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340. *See* 28 U.S.C. § 1961 (1994) (setting interest on money judgments in civil cases at "a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of United States Treasury bills settled immediately prior te the date of the judgment").

341. *See supra* Part IV.A.

Even under this approach, a number of critical problems of measurement remain, in particular the question of when loss should be measured, and the question of net versus gross loss.

1. When Should Loss Be Measured?

The current Guidelines do not specify when actual loss should be measured.[342] The word "actual"[343] implies that courts are to measure the real economic harm to victims that resulted in fact from a defendant's conduct. But, the result of that measurement may be different depending upon when the measurement is taken. There are at least four different points at which the measurement could be made: (1) the point at which the crime is legally complete, i.e., when there has been a confluence of culpable mental state and *actus reus* on the part of the defendant sufficient to render him criminally liable; (2) the point at which the crime is discovered; (3) the sentencing date; or (4) the point at which all the economic consequences of the defendant's conduct have become final (for example, when civil lawsuits for damages or recovery of property have been concluded).[344]

A simple illustration may be helpful. If *A* breaks the window of my car and steals it, but is apprehended pulling out of my driveway, the "actual loss" to me in real economic terms may differ depending on when I measure it. At the moment *A* assumes control over the vehicle and begins pulling away, my loss is the fair market value of the car because I have lost control over the whole asset. At the moment of *A*'s apprehension, my only loss is the damage to the window, because I have the car but must spend money to repair it. By the time of *A*'s sentencing, I may have suffered no measurable economic loss at all if my insurance company has reimbursed me for the window.[345] After sentencing, again I may have sustained no real loss if *A*

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342. *See* United States v. Flowers, 55 F.3d 218, 220-21 (6th Cir. 1995) ("Neither [section] 2B1.1 nor [section] 2F1.1 of the Guidelines addresses the point in time at which actual loss is to he measured.").

343. USSG § 2F1.1 application note 7.

344. This point could he reached at the moment the crime is legally complete, at the moment of discovery, at the moment of apprehension of the defendant, at the time of sentencing, or at some time long after sentoncing. Picking a time after sentoncing as the point at which loss becomes final does not foreclose making the determination of loss at sentencing; it simply requires an explicit recognition that the loss calculation will involve prediction of future events.

345. If we apply the cause-based analysis suggested above to the question of determining the identity of the victim, the fact that an insurance company would have to compensate me for the damages would surely he foreseeable, and thus the company would be a victim and its loss chargeable to the defendant.

makes restitution or my insurance company reimburses me for the window.

Language in the Guidelines or in the cases provides some support for all four options.[346]

a. Time of the Crime

Application Note 2 to the theft guideline provides two examples that lend support to the use of the time of the crime as the point at which loss should be measured.[347] *Example 1* says that in the case of theft of a check or money order, the loss is the value of the stolen instrument regardless of whether the check was cashed. *Example 2* is the case discussed above of the stolen car "recovered immediately." The commentary says that the loss is the value of the vehicle despite its prompt recovery, a result explainable only if the loss measurement is taken immediately after the legal completion of the theft.

Two, or perhaps three, courts of appeal have implicitly adopted a "time of the crime" rule.[348]

346. The Seventh Circuit, for example, is of many minds on the question, having issued opinions endorsing three of the four possible views. *Compare* United States v. Mount, 966 F.2d 262, 265 (7th Cir. 1992) (time of the crime), *with* United States v. Downs, 123 F.3d 637, 644 n.2 (7th Cir. 1997) (loss measured at time of discovery in fraudulent loan case), *and* United States v. Asher, 59 F.3d 622, 624-25 (7th Cir. 1995) (loss in check-kiting scheme measured at time of detection), *and* United States v. Chevalier, 1 F.3d 581, 585-86 (7th Cir. 1993) (time of sentencing).

347. *See* USSG § 2B1.1 application note 2.

348. *See* United States v. Copus, 110 F.3d 1529, 1535-36 (10th Cir. 1997) (where defendant obtained loan legitimately, but later lied to bank inspector about collateral, offense committed at time of lie and loss should be measured as if bank had foreclosed at that time); United States v. Mount, 966 F.2d 262, 266 (7th Cir. 1992) (stating that embezzler causes loss once property taken, despite intent to repay and lack of discovery). The views of the Eighth Circuit are somewhat hard to divine. See *United States v. Smith*, in which the court considered a credit card fraud case in which, between discovery and sentencing, some items were recovered from co-defendants. 62 F.3d 1073, 1079 (8th Cir. 1995). The court held that the defendant was not entitled to credit for these items. This result could flow from *either* a rule that the time at which loss should be measured is when the crime is complete *or* a rule designating the time of discovery. In *United States v. Morris*, the defendant was convicted of various forms of bank fraud, check-kiting, false statements to obtain loan, etc. 18 F.3d 562, 564 (8th Cir. 1994). During the course of the scheme, but before detection, the defendant arranged for the sum of $156,000 to be repaid to the bank to avoid detection of the scheme by bank regulators. *See id.* at 570. At sentencing, the defendant asked for credit for this amount against the loss. The district court granted the credit; the court of appeals reversed and refused the credit. *See id.* The Eighth Circuit offered no rationale for this holding, but the holding is consistent with a "time of the crime" rule and inconsistent with a "time of detection" rule.

b. Time of Detection

Application Note 7(b) to the fraud guideline says that the loss in a fraudulent loan case is "the amount of the loan not repaid at the time the offense is discovered."[349] The guideline does not address the question of discovery by whom: Is it sufficient that the victim or the authorities discover the crime, or must the defendant be aware that it has been discovered?[350] That question is largely unresolved, but at least seven circuits have written opinions stating that loss should be measured at the time of detection of the crime.[351]

c. Time of Sentencing

The Third and the Seventh Circuits have said that loss should be measured at the time of sentencing.[352]

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349. USSG § 2F1.1 application note 7(b).

350. *See, e.g.*, United States v. Lucas, 99 F.3d 1290, 1296-97 (6th Cir. 1996) (endorsing time of discovery rule and finding that discovery refers to state of mind of victim or authorities depending upon which party discovers the offense first).

351. *See* United States v. Fraza, 106 F.3d 1050, 1055 (1st Cir. 1997) (holding loss is amount of fraudulent loan not repaid at time offense was discovered, reduced by the amount the lending institution may recover from assets pledged to secure the loan); United States v. Akin, 62 F.3d 700, 702 (5th Cir. 1995) (rejecting check-kiting defendant's argument that loss should be reduced by restitution payments made after discovery of the offense but prior to sentencing and holding that loss should be measured at time of discovery of scheme); United States v. Asher, 59 F.3d 622, 624-25 (7th Cir. 1995) (finding time for determining loss is time crime is detected); United States v. Flowers, 55 F.3d 218, 220-22 (6th Cir. 1995) (holding in check-kiting case that loss was amount of outstanding bad checks, less any amount in accounts at time of discovery); United States v. Stanley, 54 F.3d 103, 106 (2d Cir. 1995) (finding loss in bond fraud case was amount of devaluation occurring during period between bank officer defendant's misstatements to bank and customers and the time at which fraud was discovered); United States v. Shaffer, 35 F.3d 110, 115-16 (3d Cir. 1994) (holding that loss should be determined when crime is detected); United States v. Frydeulund, 990 F.2d 822, 825-26 (5th Cir. 1993) (rejecting argument that check-kiting should be treated like fraudulently obtained loan and instead measuring loss at time of discovery of scheme); United States v. Bolden, 889 F.2d 1336, 1341 (4th Cir. 1989) (stating that restitution does not justify reducing minimum sentence under the Guidelines although it may be relevant in deciding what sentence within the Guidelines the court should impose).

352. *See* United States v. Chevalier, 1 F.3d 581, 585-86 (7th Cir. 1993) (finding that loss is " 'the amount of money the victim has actually lost . . . estimated at the time of sentencing' "); United States v. Kopp, 951 F.2d 521, 536 (3d Cir. 1991) (holding that although actual loss in a fraudulent loan application case should be estimated at the time of sentencing, "the 'loss' should be revised upward to the loss that the defendant intended to inflict, if that amount is higher than actual loss"); *see also* Stephen V. Manning & Barbara Bailey Jongbloed, *Timing of Loss in Secured Loan Cases*, 10 FED. SENTENCING REP. 149 (Nov.-Dec. 1997) (arguing that in loan fraud cases loss should be measured at time of sentoncing' ") (quoting *Kopp*, 951 F.2d at 536).

d. Time of Final Resolution of All Claims

While it might seem impractical to suggest that courts should or would attempt to measure loss by taking into account events that have not occurred by the time of sentencing, in fact, the Guidelines attempt in certain respects to do just that. For example, Application Note 7(b) te the fraud guideline states:

> In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan.[353]

The reference te "expected loss" is incompatible with the view that the amount of loss is fixed for sentencing purposes the moment a crime is complete. It suggests a bottom-line economic approach to loss. It clearly implies that the victim's loss cannot be tallied up until all claims have been resolved (or, at the least, until there has been a prediction about how they *will* be resolved) and there is a determination of how much economic harm the defendant ultimately will cause.[354]

2. What Amounts Should Be Credited to a Defendant in Determining "Actual Loss"?

The question of the point in time at which loss should be measured is often another way of asking whether a defendant should receive credit for money or things of value the victim received either during the course of the criminal transactions or thereafter. Among the common problems are:

353. USSG § 2F1.1 application note 7(b).

354. A careful examination of Note 7(b) reveals that it has both "time of detection" and "time of sentencing" components. In making a loss calculation under Note 7(b), the court is asked to begin with "the amount of the loan not repaid at the time the offense is discovered," and then to subtract any amount the bank "has recovered (or can expect to recover) from any assets pledged to secure the loan." *Id.* The use of the phrase "has recovered" plainly refers to the state of affairs existing at sentoncing. The phrase "or can expect to recover" requires tbe sentencing court to make loss calculations based in part on predictions regarding resolution of future foreclosures and subsequent sales of collateral.

(1) Whether a defendant should be given credit in the calculation of actual loss for anything of value he gives to victims in return for the money or property obtained by fraud.

(2) Whether a defendant should be given credit for amounts or assets pledged as collateral as part of a fraudulently induced transaction.

(3) Whether a defendant should be given credit for repayments made after the completion of the theft or fraud, but before detection of the crime.

(4) Whether a defendant should be given credit for repayments or recoveries made after discovery of the crime, but before sentencing.

The answers to the first and fourth questions have been both clear and uniform: Except for assets pledged by the defendant in a fraudulent loan setting, payments made by the defendant or recoveries of property occurring after discovery of the crime but before sentencing, are not credited to the defendant.[355] Similarly, there is general agreement that a defendant is to be given credit for anything of value he transfers to a victim in return for the money or property obtained by fraud. For example, section 2F1.1, Application Note 7(a), provides that where a defendant misrepresents the value of an item, the loss is the difference between the item's actual value and the falsely represented value. The defendant is credited for any real value conveyed to the victim.[356]

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355. *See* United States v. Smith, 62 F.3d 1073, 1079 (8th Cir. 1995) (finding credit card fraud defendant responsible for total amount of unauthorized charges and giving no credit for items obtained by fraud but later recovered); United States v. Asher, 59 F.3d 622 (7th Cir. 1995) (holding that check-kiting defendant's immediate repayment of $160,000 overdraft outstanding at time of discovery does not affect loss figure); United States v. Mau, 45 F.3d 212 (7th Cir. 1995) (arranging a fully collateralized repayment plan after discovery will not reduce loss); United States v. Bean, 18 F.3d 1367, 1369 (7th Cir. 1994) (finding no basis for extraordinary departure when defendant repaid principal of involuntary loan before trial); United States v. Carey, 895 F.2d 318 (7th Cir. 1990) (reversing a district court's downward departure for presentencing restitution, noting that restitution may be relevant to acceptance of responsibility under section 3E1.1, or to a departure under section 5K2.0, if extraordinary, but that district court already considered restitution in awarding two point deduction for acceptance of responsibility and did not present findings or extraordinary circumstances to warrant a further reduction).

But see *United States v. Baum*, in which the Fourth Circuit seems to have held that payments made on a fraudulently obtained loan after discovery of the fraud but before sentencing should have been credited to the defendants to reduce the loss. 974 F.2d 496, 498-99 (4th Cir. 1992). However, this opinion was written before the November 1992 amendment to USSG section 2F1.1, note 7(b), and therefore may no longer be good law, even in the Fourth Circuit.

356. *See* United States v. Jackson, 95 F.3d 500, 505-06 (7th Cir. 1996) (holding loss in telemarketing scam equal to amount paid by victims less cost to defendant of goods transferred to victims as part of scheme); United States v. Maurello, 76 F.3d 1304, 1311-12 (3d Cir. 1996)

The issue of deducting value received by the victim is also presented in government contracting cases where a bidder secures the contract by lying about his qualifications, financial stability, or some other material fact. In the leading case of *United States v. Schneider*, Judge Posner distinguished between the contractor who secures a valuable contract by misrepresenting some fact, but who nonetheless intends to perform the contract to the best of his ability, and the contractor who obtains the valuable concession or contract with no intention of performing ("he means to pocket the entire contract price without rendering any service in return").[357] Although the focus of the opinion is on intended loss where the misrepresentation has been discovered before the contract has been performed, its logic is arguably as applicable to cases in which the contract has been performed in whole or in part before discovery of the fraud, and where the government has thus received some benefit of its bargain.[358]

The Eleventh Circuit adopted an interesting modification of the *Schneider* approach in *United States v. Orton*.[359] There the court calculated loss in a Ponzi scheme using what it characterized as a

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(holding that defendant convicted of mail fraud for deceiving clients by practicing law without a license should be credited in loss calculation for value of satisfactory legal services rendered); United States v. Licciardi, 30 F.3d 1127, 1134 (9th Cir. 1994) (holding defendant should have been credited with value of wine grapes that were delivered, even though they were misrepresented); United States v. Reddeck, 22 F.3d 1504, 1513 (10th Cir. 1994) (remanding case to district court for factual findings on value of degrees received by students at defendant's failed and fraudulently operated proprietary school, holding that gross amount of tuition paid for unaccredited degree was not necessarily correct assessment of net loss to student victims without evidence regarding the value of the degrees received); United States v. Gennuso, 967 F.2d 1460, 1461-63 (10th Cir. 1992) (reducing victims' losses because they received from the defendant the value of the wholesale cost of a water purification system and a vacation package); United States v. Smith, 951 F.2d 1164, 1167 (10th Cir. 1991) (decreasing victims' losses because they received from the defendant value in the form of security interests and promises of individual borrowers to repay fraudulently secured loans). *But see* United States v. Pappert, 104 F.3d 1559, 1567 (10th Cir. 1997) (refusing to credit defendant in fraudulent equipment lease scheme for value of machines retained by victims where there was evidence that sometimes used machines were represented to be new, some machines were pledged as collateral on multiple leases, and in at least one case, machinery had depreciated to point where cost of repossession exceeded value).

357. 930 F.2d 555, 558 (7th Cir. 1991).

358. After *Schneider*, Application Note 7(b) was added to the section 2F1.1 commentary. It begins: "In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss)." USSG § 2F1.1 application note 7(b). The note makes no further reference to contract procurement cases and gives no explanation of how "actual loss" is to be measured in such cases. Likewise, the note does not define "expected loss." *See also* United States v. Stern, 13 F.3d 489, 496-98 (1st Cir. 1994) (suggesting that when contractor uses phony bond to obtain a contract, the court may estimate loss as the cost of a valid performance bond).

359. 73 F.3d 331 (11th Cir. 1996).

"loss to the losing victims" method.[360] That is, the court added up all the losses to victims who actually suffered losses, but gave credit to the defendant for repayments made to early victims *only to the extent of their original investment*. The court did not credit the defendant for "interest" payments made to early victims above their original investment. The court stated: "[This method] does not reward a defendant who returns money in excess of an individual's initial 'investment' solely to entice additional investments and conceal the fraudulent conduct."[361]

The more difficult issues have concerned collateral and repayments made after completion of the crime, but before detection.

a. Credit for Assets Pledged as Collateral

The question of whether to credit the value of collateral against "loss" is closely related to the problem just discussed of whether things of value given to victims by defendants as an inducement or as part of the criminal scheme should be credited. The rule noted there (that credit should be given) is consistent with the specific rule expressed in Application Note 7(b) for cases of fraudulent loan applications, namely that the value of "assets pledged to secure the loan" should be deducted from the loss.[362] The distinction between the

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360. *See id.* at 334.

361. *Id.* The court rejected the defendant's argument for using "net loss" to the victims as a group, because such an approach "focuses on the gain to the defendant, which ordinarily underestimates the loss." *Id.* (citing USSG § 2F1.1 application note 8).

Several courts have held that Ponzi scheme defendants are entitled to no credit against loss for any repayment made to victims. *See* United States v. Loayza, 107 F.3d 257, 265-66 (4th Cir. 1997) (refusing to reduce loss by amounts paid to early investors in fraud scheme); United States v. Carrozzella, 105 F.3d 796, 805 (2d Cir. 1997) (same); United States v. Dobish, 102 F.3d 760, 762-63 (6th Cir. 1996) (holding amount returned to victims as "profits" to maintain investor confidence not deductible from loss); United States v. Mucciante, 21 F.3d 1228, 1237-38 (2d Cir. 1994) (holding amounts paid to maintain confidence of Ponzi scheme investors could not be used to reduce loss).

362. USSG § 2F1.1 application note 7(b). In *United States v. Channapragada*, the Seventh Circuit raised the question of what section 2F1.1, Application Note 7, means by "assets pledged to secure the loan." 59 F.3d 62, 66-67 (7th Cir. 1995). In that case, the defendant gave a personal guarantee of all his personal assets as a condition of the four loans at issue. After the crime was complete, and after discovery but before sentencing, the defendant acquired some stock. *See id.* at 66. He claimed the value of the stock should be offset against the loss. *See id.* The defendant relied on language in *United States v. Mount*, in which the court suggested in dictum that loss should be reduced where the victim has "access to a ready source of compensation." *Channapragada*, 59 F.3d at 66 (quoting United States v. Mount, 966 F.2d 262, 266 (7th Cir. 1992)). The Seventh Circuit denied the offset, stating, "'unrealized plans to repay do not reduce the loss amount.'" *Id.* at 67 (citing United States v. Holiusa, 13 F.3d 1043, 1046 (7th Cir. 1994)). *Channapragada* reached the right result via the wrong route. The impertant peint was that the stock was not among the defendant's assets when he fraudulently induced the

two situations is that the first concerns a transfer by the defendant of ownership or control of the thing of value, and the second concerns transfer by the defendant of a security interest that may be exercised only in the event of the defendant's default on his undertakings.

Despite the apparent clarity of Application Note 7(b), the circuits vary widely in interpreting it. Several circuits have held that a reduction of the loss figure by the value of the "assets pledged to secure the loan" is discretionary with the district court.[363] And although the majority of courts heed the plain implication of Note 7(b) that assets of a defendant not pledged to secure the loan should *not* be credited against the loss figure,[364] one court has taken the position that unpledged assets should be, or at least may be, deducted from the "loss" calculation. In *United States v. Wright*, the defendant fraudulently obtained three loans.[365] Two of the loans were secured by security interests in real property purchased with the loan proceeds; one of these was also secured by a right of set off against a deposit account held by the defendant at the lending bank. The third loan was secured by a fictitious deed of trust.[366] After discovery of the fraud, the bank made good its losses on the first loan by foreclosing on the property and exercising the set-off against the deposit account. On the second loan, the bank recovered most, but not all, of its money by foreclosure. As to the third loan, the defendant made additional

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lenders to make the loans. *See id.* at 66. The focus should be on the defendant's state of mind at the time of the crime, and the economic facts at the time of the crime.

363. *See, e.g.*, United States v. Brewer, 60 F.3d 1142, 1145 (5th Cir. 1995) (holding district court had discretion to refuse to subtract the proceeds of an auction by the bank of property acquired with the fraudulent loan, and that it is "proper to calculate loss based on the risk engendered by the defendant's criminal conduct, even where the actual loss was lower") (citing United States v. Wimbish, 980 F.2d 312, 316 (5th Cir. 1992)); *see also* United States v. Norris, 50 F.3d 959, 961 (11th Cir. 1995) (where repayments were made after detection, holding that a district court that uses Application Note 7(b) should consider repayments, but declining "to hold, that repayments can never be included in loss"); United States v. Sheahan, 31 F.3d 595, 602-03 (8th Cir. 1994); United States v. Morris, 18 F.3d 562, 570 (8th Cir. 1994) (finding that the loss calculation "did not turn on whether [the bank] recovered or could have recovered its potential loan losses by foreclosing on the pledged security").

364. *See, e.g.*, United States v. Chorney, 63 F.3d 78, 83 (1st Cir. 1995) ("To give the defendant credit for other, unpledged assets is simply a free ride for the wealthy defendant and wholly at odds with the underlying purpose of the guideline."); *see also* United States v. Rothberg, 954 F.2d 217, 219 (4th Cir. 1992) (holding in case concerning damages that could be recovered by the victim in a civil proceeding that assets other than collateral which a bank may recover are "akin to restitution and [are] not a proper consideration in determining the loss suffered as a result of the fraud"). *Accord* United States v. Eliassi, No. CR-93-110, 1995 WL 44656, at *3 (4th Cir. Feb. 1, 1995) (holding that "assets other than collateral that a bank may recover 'is akin to restitution and is not a proper consideration in determining the loss suffered as a result of the fraud' ") (quoting United States v. Rotbberg, 954 F.2d 217, 219 (4th Cir. 1992)).

365. 60 F.3d 240 (6th Cir. 1995).

366. *See id.* at 242-43 (Batchelder, J., dissenting).

arrangements to collateralize it *after* discovery of the fraud.[367] The district court credited the defendant only with the amounts recovered from the sale of the real property pledged as loan collateral.

The Sixth Circuit reversed, holding that the set off against the deposit account on the first loan, the post-discovery repayment of the deficiency on the second loan, and the subsequent recollateralization of the third loan could all be credited against the loss.[368] The court ignored section 2F1.1, Application Note 7(b),[369] and concluded: " 'Loss' should not include amounts that a bank can and does easily recover by foreclosure, set off, attachment, simple demand for payment, immediate recovery from the actual debtor and other similar legal remedies, including the sale of a 'pledged' asset covered by the example."[370] In short, *Wright* held that a defendant can buy his way out of a portion of his prison sentence by making post-discovery restitution.[371]

The Sixth Circuit has since limited the holding in *Wright*, but in the course of doing so it created still more confusion. In *United States v. Lucas*, the court held that "application of *Wright* to simple demands for payment is too much at odds with the text of Application Note 7(b) to be accepted."[372] Thus, if a bank discovers a fraud and demands repayment from the defendant and gets it, that repayment apparently will not be credited against loss. However, the *Lucas* court insisted that *Wright* survives in cases where the defendant's fraud assisted a third party to get a loan; in such a case, repayments by the third party after discovery (and even expected repayments)

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367. *See id.* (Batchelder, J., dissenting).

368. *See id.* at 241-42.

369. Its explanation for doing so was that the use of the word "pledge" in the commentary distorts the meaning of the guideline. *See id.* at 241. Presumably, the court meant that the use of the unadorned term "loss" in the guideline restricts the concept to the final economic harm suffered by the victim after all civil or criminal recoveries, foreclosures, and offsets. The court cited *Stinson v. United States*, 508 U.S. 36 (1993), for the proposition that because of the perceived conflict it could ignore the plain language of the commentary. *See Wright*, 60 F.3d at 241-42.

370. *Wright*, 60 F.3d at 242.

371. The panel's opinion in *Wright* is followed by the persuasive dissent of Judge Batchelder, who found no inconsistency between the text of section 2F1.1 and the example in application note 7(b). *See id.* at 243 (Batchelder, J., dissenting). Judge Batchelder noted that the set off against the deposit account had no fixed value (because the amount in the account could be changed at the whim of the defendant), distinguished the Sixth Circuit cases cited by the majority, and chided the majority for focusing purely on the harm to the victim as opposed to the severity of the criminal act. *See id.* at 243-44 (Batchelder, J., dissenting). Finally, she noted that the majority's approach to fraudulent loan application cases "has loaded the scales in favor of the wealthy." *Id.* at 244 (Batchelder, J., dissenting).

372. 99 F.3d 1290, 1299 (6th Cir. 1996).

may be credited against loss.[373] This result seems contrary to the plain wording of Application Note 7(b), to the relevant conduct policy of section 1B1.3 mandating inclusion of harms resulting from the foreseeable acts of one's criminal partners,[374] and to common sense. Why should a defendant be credited for the post-discovery repayments made by his partners when he receives no credit for his own?

b. Credit for Pre-Detection Payments

Should a defendant be given credit for repayments made after the completion of the theft or fraud, but before detection of the crime? This question arises most commonly in two situations: (1) where the defendant's purpose was to misappropriate money or property for a limited time in order to invest it, to cover short-term cash flow problems, or the like; and (2) where the defendant repays money he originally intended to keep either out of guilt or a desire to avoid detection. The courts are divided in cases involving these situations.

In check-kiting cases, the general consensus is that loss is to be measured by determining the size of the overdraft at the time of discovery of the crime.[375] Not all courts agree, however. The Eighth Circuit, for example, adopted a minority position in *United States v. Morris*.[376] Morris was convicted of bank fraud, check-kiting, and making false statements to obtain a loan.[377] During the course of the scheme, but before detection, the defendant arranged for the sum of $156,000 to be repaid to the bank to avoid detection by bank regula-

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373. *See id.* at 1298-99.

374. *See* USSG § 1B1.3(a)(1)(B).

375. *See* United States v. Akin, 62 F.3d 700, 701 (5th Cir. 1995) (holding loss in check-kiting case to be measured at time of detection, and rejecting defendant's argument that the loss figure should be reduced by restitution payments made between time of discovery of check-kite and sentencing); United Statos v. Asher, 59 F.3d 622, 624-25 (7th Cir. 1995) (holding amount of loss in check-kiting scheme is amount of overdraft measured at the time of discovery of the scheme); United States v. Flowers, 55 F.3d 218, 220-22 (6th Cir. 1995) (holding loss in check-kiting case is amount of outstanding bad checks less any amount in accounts at time of discovery); United States v. Mau, 45 F.3d 212, 215-16 (7th Cir. 1995) (holding amount of loss in check-kiting scheme is amount of overdraft measured at the time of discovery of the scheme); United States v. Frydeulund, 990 F.2d 822, 825-26 (5th Cir. 1993) (rejecting argument that check-kiting should be treated like fraudulently obtained loan and instead measuring loss at time of discovery of scheme).

Implicit in this result is the holding that the defendant will not be held responsible for larger overdrafts that existed earlier in the scheme, but which were paid back before discovery. This rule might be thought to stem from the idea that the loss in a kiting scheme would only be measurable at its conclusion, but in truth the net overdraft could be measured at any point in the course of the scheme by a retrospective review of the records.

376. 18 F.3d 562 (8th Cir. 1994).

377. *See id.* at 564.

tors. At sentencing, the defendant asked for credit for this amount against the loss. The district court allowed the credit, but the court of appeals disagreed and refused the credit.[378]

Embezzlement cases also present the problem of whether to credit defendants for repayments made before detection. In *United States v. Johnson*, a credit union clerk "embezzled" $88,483 (by withdrawing funds from credit union accounts) and misapplied another $318,915 by transferring it to another account in the credit union, but not withdrawing it.[379] She turned herself in before withdrawing the $318,915. The Eighth Circuit held that the loss included the embezzled $88,000, but not the misapplied $318,915.[380] Likewise, in *United States v. Shattuck*, the First Circuit indicated in dicta that the amount of "victim loss" in an embezzlement does not include the amount of misapplied funds that remained in a bank account.[381]

The Third and Seventh Circuits have taken a contrary position. In *United States v. Strozier*, the Seventh Circuit held that where the defendant fraudulently deposited $405,000 into a bank account, but withdrew only $36,000, the loss was $405,000.[382] In *United States v. Kopp*, the Third Circuit discussed in dicta the situation of a hypothetical bank clerk who intends to withdraw the money, invest it, and then return it.[383] The court noted that, while the "amount taken" would be the amount invested, if the clerk were successful and returned the money without detection, both the intended and actual loss would appear to be zero. The court appeared to view this result as unacceptable, and implied that the proper measure of loss would be the whole amount.[384]

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378. *See id.* at 570. The Eighth Circuit offered no explanation for this result other than to say, "We believe that the district court's exclusion of the $156,000 from the loss calculation resulted from an erroneous interpretation of [section] 2F1.1 and our prior cases." *Id.*

379. 993 F.2d 1358, 1358-59 (8th Cir. 1993).

380. *See id.* The holding was apparently based on the theory that there was no "taking" as to the larger sum. The problems flowing from the use of the term "taken" in section 2B1.1, Application Note 2, are discussed below in Part III.B.1. *See also supra* notes 195-98 and accompanying text.

381. 961 F.2d 1012, 1017 (1st Cir. 1992), *cited with approval in* United States v. Johnson, 993 F.2d 1358, 1359 n.2 (8th Cir. 1993).

382. 981 F.2d 281, 284-86 (7th Cir. 1992).

383. 951 F.2d 522, 530 n.13 (3d Cir. 1991) (stating that "[i]n that case intended loss would be zero and actual loss might also be zero").

384. The court says that, "embezzlement, unlike ordinary theft or fraud, involves not only a taking but also an action akin to a breach of fiduciary duty, which might justify always using the umount taken as 'loss'." *Id.*

See also *United States v. Mount*, in which the defendant stele baseball playoff tickets with a face value of $12,000 and sold them in a block to a scalper for $30,000. 966 F.2d 262, 266 (7th Cir. 1992). In order to cover up the theft, the defendant planned to deposit $12,000 into the baseball team's account; presumably, the money would come from the sale to the scalper. The

3. Proposed Application Notes Regarding Time of Loss and Net Loss

The consolidated economic crimes guideline should adopt the following application notes containing rules for determining the time at which loss is to be measured, and defining net loss:

<u>Application Notes [cont.]</u>

(f) <u>*Time of measurement of loss*</u>

Loss should ordinarily be measured at the time the crime is detected. However, if the loss was higher at the time the crime was legally complete, the loss should be measured at that time. Likewise, if a defendant continues to engage in criminal conduct that increases the loss after the crime is detected, the increased loss resulting from such post-detection conduct should also be included as loss.

For purposes of this guideline, a crime is detected when either a victim or a public law enforcement agency has (at least) a reasonable suspicion that a crime is being or has been committed and the defendant becomes aware that such suspicion exists. In many cases, the crime will be "detected" at the moment of a defendant's arrest. Examples: (i) In the case of a defendant apprehended in the act of taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately. (ii) In the case of an embezzlement in which the defendant converts to his own use money from a bank to invest or to cover short-term cash flow problems and then returns it before being caught, the loss is the amount of money originally converted. (iii) In the case of a bank fraud involving a bank officer, the crime would be detected when defendant became aware that bank examiners were reviewing irregularities in the bank's books relating to the fraud, or that federal agents were interviewing witnesses or serving grand jury subpoenas relating to the fraud.

(g) <u>*Net loss*</u>

The loss shall be the net loss to the victim or victims.
(i) The amount of the loss shall be reduced by the value of money or property transferred to the victim(s) by the defendant in the course of the offense. For example, where a defendant sells stock to the victim by fraudulently representing that the stock is worth $40,000 when it is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). However, where there is more than one victim, the loss will be the

court suggested that the defendant's intention to repay (and perhaps even whether he did repay) was irrelevant: "An embezzler who abstracts $10,000 to invest in the stock market causes a 'loss' of $10,000 even if he plans to repay before the next audit (to avoid detection) and even if he invests only in blue chip stocks." *Id.*

> *total of the net losses of the losing victims. For example, in a Ponzi scheme in which the defendant repays early victims their entire investment plus a profit in order to keep the scheme going and attract new investments and investors, the defendant should be credited for repayments to early victims only to the extent of their original investment, plus statutory interest in an amount determined by reference to Application Note 7(i).*
>
> *(ii) The amount of the loss shall be reduced by the value of property pledged as collateral as part of a fraudulently induced transaction. Where a victim has foreclosed on or otherwise liquidated the pledged collateral before detection of the crime, the loss shall be reduced by the amount recovered in the foreclosure or liquidation. Where a victim had not foreclosed on its security interest in the pledged collateral at the time of detection of the crime, the loss shall be reduced by the fair market value of the pledged collateral at the time of detection.*
>
> *(iii) With the exception of amounts recovered or readily recoverable by a victim through liquidation or foreclosure of collateral pledged by the defendant as a part of the illegal transaction(s) at issue in the case, the loss shall not be reduced by payments made by the defendant to a victim after detection of the crime. With the same exception, loss shall not be reduced by amounts recovered or readily recoverable by a victim from the defendant through civil process or similar means after detection of the crime.*

4. Analysis of Proposed Application Notes on Time of Measurement and Net Loss

a. When to Measure Loss

From the four possible points at which loss could be measured—time-of-the-crime, time-of-detection, time-of-sentencing, and time-of-resolution of all victim claims—the proposed rule adopts a combination of time-of-the-crime and time-of-detection.

A pure time-of-the-crime rule would seemingly mesh nicely with general principles of criminal liability. Assuming the legislature has made it so, conduct becomes criminal, and thus punishable, once there has been a confluence of harm, causation, a prohibited act or omission, and a prohibited culpable mental state.[385] If a thief is caught wheeling my car out of my driveway, the law deems him to have successfully stolen the whole car, notwithstanding that a policeman happens to foil his getaway. Moreover, regardless of the final

385. *See generally* HALL, *supra* note 21, at 185-90.

outcome to the victim in economic terms, it makes intuitive sense to say that, at the moment of the theft, the victim has suffered an actual loss in the amount of the value of the car.

However, a pure time-of-the-crime rule would pose a number of practical problems. Primary among these is the fact that a crime is often legally complete before the full extent of the ultimate harm is inflicted. To take the simplest example, a conspiracy to rob a bank is legally complete once there has been an agreement to rob followed by an overt act by one of the conspirators,[386] but the amount of the actual loss occasioned by the crime will not become clear until the conspirators secure the loot and leave the bank. Similarly, a fraud case may be federally prosecutable following the formation of a scheme to defraud, a single misrepresentation to a potential victim, and a single wiring or mailing,[387] but the defendant's criminal conduct will continue and the victim's losses will continue to mount until the defendant shuts down the scam or gets caught.

A time-of-detection rule is presently employed by at least seven of the twelve circuits,[388] and for most cases this rule makes the best sense. Once a crime is discovered by its victims, the victims can take steps to eliminate further losses. Because the rule defines "detection" to include an awareness of discovery by the defendant, defendants will ordinarily stop their criminal behavior at detection, either because they have been arrested or because they fear arrest and do not wish to make their punishment worse. Thus, in the ordinary case, the time of detection will be the point of maximum loss. There are three exceptions to this generalization, all of which are accounted for in the proposed rule.

First, some criminals will pay back stolen money before detection out of guilt, remorse, or a desire to avoid getting caught. The charitable approach to such cases would be to give the defendant credit for the money repaid. The objections to such charity are: (1) By using the amount of money originally stolen as the measure of offense seriousness despite the payback, we account for the risk of loss the defendant originally imposed regardless of his good intentions; and (2) a pure time-of-detection rule in such cases would produce disparate sentences for defendants with identical intentions to

386. *See* Braverman v. United States, 317 U.S. 49, 53 (1942) ("The overt act . . . need not be itself a crime."). *See generally* LAFAVE & SCOTT, JR., *supra* note 27, § 6.5(c), at 547-49.

387. *See* 18 U.S.C. §§ 1341, 1343 (1994).

388. *See supra* note 351 and accompanying text. Note that the Seventh Circuit is included in this total, and it has used a variety of time-of-measurement rules. *See supra* note 346.

repay based on the fortuity of *when* the authorities caught on to the scam. I find the objections compelling, as well as in line with existing precedent, and so have eschewed charity.[389]

Second, some obstinate offenders will continue to steal even after the jig is up and they know it. They should not be relieved of liability for defalcations occurring after detection.

Third, although in many cases loss will continue to accrue after detection despite the cessation of a defendant's active criminal efforts, measuring loss at the date of sentencing raises too great a potential for arbitrariness. If defendants were credited with repayments made after detection but before sentencing, the rich (or those who simply had not yet spent the swag) could buy themselves out of prison time.[390] And from the defendants' point of view, they should not have to spend more time in prison because losses mounted while the government or court delayed prosecution or sentencing.

b. Net Loss

The net loss rules proposed here are generally in accordance with existing Guidelines language and with the majority positions of courts that have dealt with the subject. The proposed rules do adopt one minority position, the "loss to the losing victims" approach to multiple victim frauds sanctioned in *United States v. Orton*.[391] The opposing view, that scam artists should receive no credit whatever for money paid to maintain investor confidence and prolong the fraud, is understandable.[392] Nonetheless, if "loss" is indeed to be net loss, it is difficult to draw a principled distinction between payments to Ponzi scheme investors and other benefits conferred on fraud victims that are incontestably deductible from loss, such as undervalued stock or real estate pledged as collateral for a loan. The "loss to the losing victims" approach provides an attractive compromise between crediting a defendant for no Ponzi repayments, and thus overstating the degree of economic harm inflicted, and crediting a defendant with all repayments including overpayments to early investors, a result that iguores the fact that economic losses are experienced individually and that the undeserved bonanzas of early investors are no balm for the uncompensated losses of those victimized after the well runs dry.

389. *See* Appendix A, Proposed § 221.1 application note 1(g).

390. *See, e.g.*, United States v. Wright, 60 F.3d 240 (6th Cir. 1995), discussed *supra* note 365 and accompanying text.

391. 73 F.3d 331 (11th Cir. 1996), discussed *supra* notes 359-61, and accompanying text.

392. For cases adopting this approach, see *supra* note 361.

The proposed rules also emphasize that assets pledged as collateral as part of the inducement in fraudulent loan cases are to be deducted from "loss." The principal change proposed is in the time at which the collateral is to be valued. Consistent with the approach to time of measurement explained in the previous section, the collateral is to be valued at its sale price if sold before discovery of the crime, or if not sold, at its fair market value at the time of detection. This approach continues to penalize the defendant for decreases in collateral value regardless of the reason for the decrease; however, it shortens the period within which such decreases might conceivably occur by excluding devaluations between detection and sentencing.

This approach is a compromise. Where a defendant offers collateral, he ought to receive credit for its value against loss. By the same token, when a defendant fraudulently induces a victim to enter into a transaction, even a collateralized one, it does not seem unreasonable to penalize him when investment risks to which he exposed the victim are realized in the form of a drop in collateral value. However, once the crime is detected, the victim is at liberty to liquidate the collateral or take other steps in mitigation. A defendant should not suffer for a victim's lassitude, or be exposed to the risk of market declines for periods dependent on prosecutorial efficiency, the condition of court calendars, or other factors unrelated to culpability.

V. "INTENDED LOSS" SHOULD REMAIN A COMPONENT OF FEDERAL ECONOMIC CRIMES SENTENCING

A. The Rationale for Sentencing Based on "Intended Loss"

The preceding Part was devoted to defining and measuring the actual losses inflicted by defendants. We now turn to "intended loss." The present fraud guideline provides that where the loss a defendant intended to inflict was larger than the loss the victim actually sustained, the larger intended loss figure should be used to calculate the sentence.[393] Moreover, a good many courts have held the same rule

393. *See* USSG § 2F1.1 application note 7 ("[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greator than the actual loss."). In general, the courts have complied. *See, e.g.*, United States v. Smith, 62 F.3d 1073, 1079 (8th Cir. 1995) (holding credit card fraud defendant responsible for total amount of unauthorized charges, granting no credit for items obtained by fraud but later recovered); United States v. Alonso, 48 F.3d 1536, 1547 (9th Cir. 1995) (holding in credit card fraud case that loss

applicable to theft crimes, despite the absence of language in section 2B1.1 applying the intended loss rule generally to such cases.[394] Before addressing the interpretational problems posed by the current intended loss provisions, however, it may be useful first to consider the place of intended loss in the overall scheme of sentencing economic crime.

A measurement of actual loss caused by a defendant's criminal conduct is an appropriate component of the sentencing calculation because, as noted above, it measures actual harm and serves as a proxy measurement for other offense seriousness factors like state of mind. By contrast, "intended loss," because it is only used when it exceeds actual loss, measures harms that never happened. Therefore, if intended loss is to be included in a revised and consolidated economic crime guideline, it must serve a different purpose than "actual loss."

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equals greater of actual or intended losses); United States v. Mizrachi, 48 F.3d 651, 657 (2d Cir. 1995) (upholding district court's use of intended loss in amount of face value of policy taken out by defendant on property he burned); United States v. Chevalier, 1 F.3d 581, 585-86 (7th Cir. 1993) (stating that loss is calculated at time of sentencing, but revised upward if the defendant intended te inflict loss greater than that actually inflicted); United States v. Watkins, 994 F.2d 1192, 1196 (6th Cir. 1993) (formulating test for when a defendant is responsible for intended loss); United States v. Kopp, 951 F.2d 521, 536 (3d Cir. 1991) ("'[L]oss' is . . . the amount of money the victim has actually lost (estimated at tbe time of sentencing), not the potential loss as measured at the time of the crime. However, the 'loss' should be revised upward to the loss that the defendant intended to inflict, if that amount is higher than actual loss.").

394. One of the notable textual differences between the two guidelines is that section 2F1.1, Application Note 7, provides for use of "intended loss" if greater than "actual loss," USSG § 2F1.1 application note 7, while section 2B1.1 defines loss as the "value of the property taken," and does not refer te "intended loss." USSG § 2B1.1 application note 2. This difference has been the source of some confusion, but the courts count intended loss, if greater, even in many theft cases. *See, e.g., Kopp*, 951 F.2d at 530-31 (holding intended loss, if higher than actual loss, is the proper measure in theft case because, "in a theft case, the thief *intends* te steal whatever he or she takes; the amount taken is the loss the defendant intended te inflict. . . . In a theft case, unlike a fraud case, the amount taken (the intended loss) is always as high or higher than the amount the victim actually lost (which may be reduced due to fortuiteus recovery of the stolen property)."); United States v. Offiong, Nos. 95-50179, 95-50247, 1996 WL 195547 (9th Cir. Apr. 23, 1996) (applying section 2B1.1, application note 4, presumption of $100 per credit card intended loss in stelen credit card case); United States v. Sowels, 998 F.2d 249, 251 (5th Cir. 1993) (affirming determination that loss equalled combined credit limits of stelen cards); United States v. Cbapdelaine, 989 F.2d 28, 35 (1st Cir. 1993) (applying intonded loss in an attempted robbery case, and quoting section 2X1.1, application note 2, which states that, "[i]n an attemptod theft, the value of the items the defendant attempted to steal would be considered"); Unitod States v. Hernandez, 952 F.2d 1110, 1118-19 (9th Cir. 1991) (holding intended loss an appropriate component of sentencing calculation for tape counterfeiting defendant sentenced under section 2B1.1); *see also* United States v. Falcioni, 45 F.3d 24, 26 (2d Cir. 1995) (holding that defendant who acted as middleman in an attempt te bribe IRS employee to relieve codefendant of $41,000 tax liability intended tax loss of $41,000). *But see* United States v. Redlin, 983 F.2d 893, 896 (8th Cir. 1993) (suggesting that intended loss may not be part of calculation under section 2B1.1).

In fact, it serves two. The Sentencing Commission provided an increase in offense level for "intended loss" for the same reasons that substantive criminal liability is imposed for inchoate crimes like attempt and conspiracy.[395] The connection between "intended loss" and inchoate criminality is manifest in the language of section 2F1.1, which says, "Consistent with the provisions of section 2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used. . . ."[396] The Commission was certainly correct to include "intended loss" in the sentencing mix. First, criminal law is preeminently concerned with blameworthiness.[397] While the occurrence of harmful results is ordinarily a prerequisite for criminal liability, to some degree punishment on that basis has more to do with luck than just deserts. Would-be killers who shoot straight are punished for murder while those who aim badly are not. Nonetheless, we punish unconsummated efforts to cause harm as "attempts" or "conspiracies" (albeit usually less severely than completed crimes) so long as the would-be perpetrator has come close enough to success that we can be confident his maliguant designs were real and not mere fantasy, and thus that his conduct was morally blameworthy.[398] Second, we punish the unsuccessful criminal, not only because he deserves it, but because his frustrated plans present a high enough risk of actual harm that punishment for the purpose of deterrence is warranted.

The idea of basing punishment for economic crime on intended loss is grounded in the same moral and utilitarian considerations that

395. For a general discussion of the rationale of the law of attempt, see Richard Buxton, *The Working Paper on Inchoate Offenses: (1) Incitement and Attempt*, 1973 CRIM. L. REV. 656, 660 (1973) ("We have a law of Attempt because persons who threaten to commit acts forbidden by the substantive criminal law should be open to social prevention and deterrence, since such person is, by reason of their intentions, socially dangerous.").

396. USSG § 2F1.1 application note 7.

397. *See* United States v. Studevent, 116 F.3d 1559, 1562-64 (D.C. Cir. 1997) (rejecting defendant's argument that actual loss is the dominant focus of the Guidelines, and thus that there should be an impossibility limitation on intended loss on the ground that "[o]ne of the Guidelines' goals is to tailor punishment te a defendant's particular degree of culpability").

398. Criminal liability for conspiracy requires evidence of some fixity of purpose in the form of an agreement with one or more co-conspirators, *see* United States v. James, 528 F.2d 999, 1011 (5th Cir. 1976), DRESSLER, *supra* note 62, § 29.04[A], at 397, and an overt act in furtherance of the conspiracy committed by one of the conspirators. *See* United States v. Offutt, 127 F.2d 336, 338 (D.C. Cir. 1942). Attempt liability customarily requires the commission of a "substantial step" toward accomplishment of the criminal goal. *See* MODEL PENAL CODE § 5.01(2) (1980); *see also* Buxton, *supra* note 395, at 660:

> The law of Attempt . . . limits its deterrent and preventive role in the interests of freedom by requiring action, of some sort, as well as intention, on the part of the accused; in the same way as in substantive crime the deterrent and preventive role of the law is to some degree limited by the requirement of *mens rea*.

support imposing substantive liability for attempts and conspiracies. Morally, we may consider that a swindler who intends to take a large amount of money is more culpable, and thus deserves a greater punishment, than one who seeks or secures a smaller amount.[399] From a utilitarian perspective, use of intended loss in the sentencing calculus imposes consequences (and thus, one hopes, achieves a deterrent effect) proportionate to the degree of risk the defendant's behavior posed to the economic well-being of his fellow citizens, as measured by the magnitude of his criminal objectives.

B. What Is Meant by Intended Loss?

In "intended loss" cases, most courts say they look to the defendant's subjective intent,[400] rather than presuming the defendant to intend all the natural and probable consequences of his acts.[401] The provision of section 2F1.1 concerning intended loss seems to have been primarily directed at situations in which a defendant is seeking to defraud victims of a large amount, but is forestalled from doing so by arrest, discovery of the scheme, or other happenstance, and actually obtains less than he had planned. Despite the fact that the "intended loss" component of section 2F1.1 may have been primarily

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399. *See Studevent*, 116 F.3d at 1563 ("Limiting intended loss to that which was likely or possible . . . would eliminate the distinction between a defendant whose only ambition was to make some pocket change and one who plotted a million-dollar fraud.").

400. *See, e.g.*, United States v. Egemonye, 62 F.3d 425, 429 (1st Cir. 1995) (considering but not resolving question of whether subjective or objective standard of intent should be used because sufficient evidence was in record to support finding subjective intent); United States v. Quaye, 57 F.3d 447, 448-49 (5th Cir. 1995) (remanding for finding on whether defendant subjectively intended to repay loan); United States v. Falcioni, 45 F.3d 24, 27-28 (2d Cir. 1995) (holding actual knowledge of amount of "intended" loss was not necessary, implying the record was sufficiently clear that no finding was needed); United States v. Moored, 38 F.3d 1419, 1425 (6th Cir. 1994); *see also* United States v. Shaw, 3 F.3d 311, 314 (9th Cir. 1993), (holding that, under the 1989 Guidelines, loss in fraudulent loan case was the unpaid balance of a loan minus the amount the defendant subjectively intended to repay). It is questionable whether *Shaw* remains good law in light of subsequent amendments to section 2F1.1.

401. See, for example, *United States v. Hill*, which stated:

> When reviewing the calculation of an intended loss, we look to actual, not constructive, intent, and distinguish between cases in which "the intended loss for stolen or fraudulently obtained property is the face value of that property" and those in which the intended loss is zero because "the defendant intends to repay the loan or replace the property."

42 F.3d 914, 919 (5th Cir. 1995) (citing United States v. Henderson, 19 F.3d 917, 928 (5th Cir. 1994)).

In a regime based on constructive intent, the government's obligation would be to show the likely effects of the scheme and ask the court to infer from those likely effects the defendant's subjective intent. *See* United States v. Stern, 13 F.3d 489, 497 (1st Cir. 1994) ("In this case, the potential was not realized but it was still intended or reasonably likely and thus a proper measure of loss under the guideline.").

directed at expanding the scope of sentencing liability for enterprising but unsuccessful crooks, it has frequently been the basis of arguments for reducing loss calculations. For example, in *United States v. Schneider*, Judge Posner distinguished between the contractor who lies to get a contract but intends to perform it and the "true con artist" who "means to pocket the entire contract price without rendering any service in return."[402] In other cases, defendants have successfully argued that loss should be reduced if they could establish a subjective intention to repay the victim.[403]

The Ninth Circuit has rejected an analogous argument. *United States v. Yellowe* concerned a credit card fraud in which the defendant tried unsuccessfully to use credit card numbers to make unauthorized charges.[404] The defendant argued that, because section 2F1.1 mandated the use of the greater of either "actual loss" or "intended loss," and because there was no actual loss, then the measure of intended loss should focus on the defendant's subjective expectations about the loss amount. He claimed he only expected 12.6% of the card numbers to be valid and thus he should be accountable only for those. The district and appellate courts rejected his argument and held him responsible for the minimum $100 per card specified in section 2B1.1, Application Note 4.[405]

C. Must the Defendant's Intentions Be Realistic?

Should a defendant be held responsible for losses he intended to inflict even if the achievement of his criminal goals was impossible or highly improbable? This issue arises in two types of cases—those involving government "sting" operations where no loss was possible because the defendant was dealing with government agents, and those in which the defendant's objectives were either impossible or improbable for some other, usually economic, reason. There is a divergence of views among the circuits on both types of case.

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402. 930 F.2d 555, 558 (7th Cir. 1991).

403. *See Hill*, 42 F.3d at 918; *Quaye*, 57 F.3d at 448.

404. 24 F.3d 1110, 1112 (9th Cir. 1994).

405. The precedential value of *Yellowe* is somewhat diluted by the fact that the district court and the court of appeals were able to sidestep the full force of the defendant's argument because of the existence of a specific guideline provision for credit card fraud, section 2B1.1, Application Note 4, which provides that the loss in such cases " 'includes any unauthorized charges made with stolen credit cards, but in no event less than $100 per card.' " *Id.* (citing USSG § 2B1.1 application note 4). Said the court, "Application Note 4 says nothing about probabilities; rather, it presumes $100 per unauthorized credit card number." *Id.* at 1113.

1. Sting Operations

Defendants caught by government undercover operations before they can steal any money commonly argue that the intended loss provision of section 2F1.1, Application Note 7, should not apply to them because no actual loss was possible. The majority of the circuits to have addressed the question reject this argument and treat fraud cases no differently than drug cases or other stings in which success is foreclosed by the defendant's choice of confederate.[406]

The Tenth Circuit, however, has taken a different view. In *United States v. Galbraith*, the court held that where the defendant is dealing with a government agent and no money changes hands, there is no loss.[407] The court reasoned that, because loss is supposed to measure economic harm, the loss is zero in a situation where no harm could have occurred. The court's rationale for ignoring the fraud guideline's directive to use "intended loss" merits some scrutiny.

The *Galbraith* court relied heavily on *United States v. Santiago*.[408] In *Santiago*, the defendant falsely reported to his insurance company that his car had been stolen and submitted a claim for $11,000. Because the police intervened, the claim was not processed; had it been, the insurance company would have paid at a maximum the car's "blue book" value of $4,800.[409] The court concluded that the "intended loss" could not "exceed the loss a defendant in fact could have occasioned if his or her fraud had been entirely successful," in this case $4,800.[410]

Santiago does not compel the result in *Galbraith*. Indeed, literal application of the *Santiago* standard to the facts of *Galbraith* produces a result contrary to the one reached by the court. If Galbraith's "fraud had been entirely successful," he would have secured over $600,000.[411] To say that Galbraith "could not have suc-

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406. *See, e.g.*, United States v. Studevent, 116 F.3d 1559, 1561 (D.C. Cir. 1997) (loss calculation includes stolen checks passed to undercover FBI agent despite fact they would never be cashed); *id.* at 1110 (applying intended loss provision of section 2F1.1 where defendant entered into a scheme with a government informant to make unauthorized credit card charges); United States v. Robinson, 94 F.3d 1325, 1329 (9th Cir. 1996) ("There is no reason why defendants caught as a result of a sting operation should be treated any differently than defendants caught participating in an ongoing fraud."); United States v. Falcioni, 45 F.3d 24, 27 (2d Cir. 1995) ("Simply because the government's crime prevention efforts prove successful . . . does not mean that the 'intended loss' is zero.").

407. 20 F.3d 1054, 1058-60 (10th Cir. 1994); *accord* United States v. Sneed, 34 F.3d 1570 (10th Cir. 1994).

408. 977 F.2d 517, 519 (10th Cir. 1992).

409. *See id.* at 524.

410. *Id.*

411. *See Galbraith*, 20 F.3d at 1058.

ceeded" because he was dealing with government agents is the same as saying that Santiago "could not have succeeded" because the police discovered his scam before the claim could be processed.

The Tenth Circuit is apparently attempting to import into fraud sentencing some version of the criminal liability doctrines of mistake of fact or impossible attempts. Although, as will be suggested below,[412] these principles have a place in sentencing law, the Tenth Circuit does not appear to have applied them properly to the facts of *Santiago*. A defendant claims *mistake of fact* when he wishes to establish that he lacked the requisite culpable mental state necessary to establish criminal liability. The claim will be effective only where the mistaken belief, if honestly held, would disprove the existence of the required mental state.[413] Modern law concerning the doctrine of *impossible attempts* looks at the facts as the defendant believed them to be. If he did everything he could do to complete the transaction or performed a substantial step toward completion, and the completed transaction would have constituted a crime if the facts were as he thought them, he is guilty of attempt.[414]

If Santiago honestly believed that his insurance claim could yield $11,000, he was certainly guilty of at least an attempt to defraud the company of $11,000. At a minimum, and as the *Santiago* court held, his overly optimistic goals certainly should not relieve him of liability for the $4,800 loss that would have occurred without the vigilance of the police. Likewise, the question in *Galbraith* is whether, if the facts were as Galbraith believed them to be, he could have succeeded in defrauding his putative victims of over $600,000. The answer is plainly yes.[415]

In the end, *Galbraith*'s interpretation of section 2F1.1, Application Note 7, is not compelling, and seems to be foreclosed by Application Note 10. Note 10 authorizes a *departure* "where a defen-

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412. *See infra* Part V.E.

413. *See* MODEL PENAL CODE § 2.04(1)(a).

414. *See id.* §§ 2.04(2), 5.01(1)(c); *see also* United States v. Thomas, 13 C.M.A 278-291, 32 C.M.R. 278-291 (1962) (finding servicemen guilty of attempted rape of deceased woman with whom they had intercourse where they erroneously believed ber to be alive but unconscious at the time of the act). *But see* Unitod States v. Berrigan, 482 F.2d 171, 173, 189 (3d Cir. 1973) (reversing convictions for sending letters into and out of a federal penitentiary "without the knowledge and consent of the warden" because, unbeknownst to defendants, their courier had the warden's consent to carry the letters).

415. The Tenth Circuit's *Galbraith* opinion suggests that a defendant can be sentenced based on the amount of nonexistent narcotics he attempted to buy from a government agent, but not on the amount of money he attemptod to swindle from the same agent. The Ninth Circuit noted this anomaly in *United States v. Robinson*, 94 F.3d 1325, 1329 (9th Cir. 1996), and cited it as a reason te reject the impossibility argument regarding intended loss.

dant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it."[416] As the D.C. Circuit observed in rejecting *Galbraith*'s analysis: "It would be unnecessary to authorize such a departure if the unlikelihood of success already limited the intended loss attributable to a defendant under application note 7."[417]

2. Impossibility or Improbability

In *Galbraith*, the Tenth Circuit also relied on the Sixth Circuit's opinion in *United States v. Watkins*[418] and its own work in *United States v. Smith*,[419] where it held that to meet the requirements of section 2F1.1, "the record must support by a preponderance of the evidence the conclusion that Mr. Smith realistically intended a $440,896 loss, *or that a loss in that amount was probable*."[420] *Watkins* and *Smith* are exemplars of a line of cases that attempt to impose an outer limit on the scope of intended loss by reference to some notion of economic reality.[421] Some of the early cases in this line, including *Smith*, seem to have drawn inspiration from the reference to "probable" loss in the pre-1991 guidelines,[422] a term which has since been omitted.[423] Nonetheless, even since that amendment, some courts have continued to consider the probability of success of defendants' schemes.[424]

A particularly interesting example of this phenomenon is Judge Easterbrook's opinion for the Seventh Circuit in *United States*

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416. USSG § 2F1.1 application note 10.

417. United States v. Studevent, 116 F.3d 1559, 1563 (D.C. Cir. 1997).

418. 994 F.2d 1192 (6th Cir. 1993).

419. 951 F.2d 1164 (10th Cir. 1991).

420. *Id.* at 1168 (emphasis added).

421. For an excellent discussion of the economic reality doctrine, see John D. Cline, *Should the Sentencing Commission Adopt the Economic Reality Doctrine?*, 10 FED. SENTENCING REP. 141, 141-42 (Nov.-Dec. 1997) (concluding that the current fraud guideline "does not include the economic reality doctrine," but arguing that the doctrine should be incorporated in any new economic crime guideline).

422. USSG § 2F1.1 app. note 7 (1990). *See, e.g.*, United States v. Dozie, 27 F.3d 95, 99 (4th Cir. 1994) (affirming district court's use of "economic reality" to limit fraud loss calculation, and relying on reference in former version of section 2F1.1, application note 7, to "probable or intended loss").

423. See USSG App. C, amend. 393 at 221-22 (Nov. 1, 1991).

424. In *United States v. Egemonye*, the First Circuit upheld the district court's assessment of loss in a stolen credit card scheme as the aggregate credit limits of all the stolen cards, saying, somewhat equivocally: "Where there is good evidence of intent and some prospect of success, we do not think that a court needs to engage in more refined forecasts of just how successful the scheme was likely to be." 62 F.3d 425, 429 (1st Cir. 1995).

v. Sung.[425] At the time of his apprehension in this product counterfeiting case, the defendant had actual sales of no more that $70,400, but had obtained counterfeit cartons that could have held products worth $960,000.[426] He was convicted of violating 18 U.S.C. § 2320(a), which provides, "Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services' commits a crime."[427] The district court found a loss in the amount of $960,000.[428] On appeal, the circuit court found the defendant responsible for only $70,400 and remanded for resentencing.[429]

The court apparently imposed a test requiring the sentencing court to consider the reasonableness or feasibility of the defendant's criminal intentions. Referring to section 2X1.1 regarding attempts, it asked whether the defendant had any "reasonable expectation of being able to sell" $960,000 worth of counterfeit hair products.[430] The court went on to say: "It is not clear to us that 'but for apprehension' Kim had any hope of reaping a million dollars from counterfeit hair products. . . ."[431] The effect of this language in *Sung* is unclear because a year later, in *United States v. Coffman*, the Seventh Circuit expressly rejected the argument "that a loss that cannot possibly occur cannot be intended."[432]

The current majority position on this issue, adopted to date by the Second, Fifth, Ninth, Eleventh, and D.C. Circuits, is that the "amount of loss that the [defendants] intended to inflict does not have to be realistic."[433]

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425. 51 F.3d 92 (7th Cir. 1995).
426. *See id.* at 94.
427. *Id.* at 93 (quoting 18 U.S.C. § 2320(a) (1994)).
428. *See id.* at 94.
429. *See id.* at 95.
430. *Id.* at 95.
431. *Id.* at 96.
432. 94 F.3d 330, 336 (7th Cir. 1996), *cert. denied,* 117 S. Ct. 1426 (1997).
433. United States v. Lorenzo, 995 F.2d 1448, 1460 (9th Cir. 1993); *see also* United States v. Jacobs, 117 F.3d 82, 94-98 (2d Cir. 1997) (upholding face amount of fraudulent bank drafts as loss despite very small risk that drafts would actually be honored); United States v. Studevent, 116 F.3d 1559, 1561-62 (D.C. Cir. 1997) (intended loss need not be realistically possible); United States v. Wai-Keung, 115 F.3d 874, 877 (11th Cir. 1997) (same); United States v. Ismoila, 100 F.3d 380, 396 (5th Cir. 1996) ("The fact that the victims were not at risk for the charges above their credit limit is not dispositive.").

D. The Cross-Reference to the Attempt Guideline, Section 2X1.1

The application note in the fraud guideline that creates the "intended loss" rule states that "[c]onsistent with the provisions of section 2X1.1 (Attempt, Solicitation and Conspiracy)," intended loss will be used where greater than actual loss.[434] While, as noted above,[435] the "intended loss" provision of section 2F1.1 exists for the same theoretical reasons that inchoate crimes exist, the cross-reference has created no end of confusion in practice. One source of the difficulty is the fact that section 2X1.1 gives a three-offense-level discount for uncompleted conduct. Not surprisingly, defendants have argued that any offense level produced by plugging an intended loss figure into the fraud loss table should be reduced by three levels.[436] There are two views on this question. The Sixth Circuit has suggested that a court can determine intended loss under section 2F1.1 only by applying the attempt guidelines of section 2X1.1(b)(1).[437] The Seventh Circuit has rejected this interpretation, holding that section 2X1.1 comes into play only in the case of uncompleted crimes, and not where the crime is legally complete but some component of the intended loss was not successfully inflicted.[438] The distinction is intellectually tenable, but immensely difficult to apply in practice.[439]

E. Proposed Commentary on "Intended Loss"

The Sentencing Commission should retain the "intended loss" concept, delete the cross-reference to section 2X1.1, and redraft the provisions of the application note concerning intended loss substantially as follows:

Application Notes [cont.]

8. If the defendant intended to cause a loss greater than the actual loss calculated pursuant to Application Note 7, the figure for intended loss shall be used as the "loss" in subsection (b)(1).

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434. USSG § 2F1.1 application note 7.

435. *See supra* text accompanying notes 394-97.

436. *See, e.g.*, United States v. Egemonye, 62 F.3d 425, 429 (1st Cir. 1995).

437. *See* United States v. Watkins, 994 F.2d 1192, 1195 (6th Cir. 1993) ("[F]or intended loss to be deemed relevant under application noto 7 to section 2F1.1, the defendant's conduct must meet the requirements of section 2X1.1(b)(1).").

438. *See* United States v. Yusufu, 63 F.3d 505, 513 (7th Cir. 1995).

439. *See, e.g.*, United States v. Sung, 51 F.3d 92, 95 (7th Cir. 1995) (applying section 2F1.1 Application Note 7 cross-reference te section 2X1.1 to impose requirement of economic reasonableness on losses in product counterfeiting case).

a) Factual Impossibility

The defendant is accountable for all pecuniary harms he intended and which might reasonably have occurred if the facts were as he believed them to be.

b) "Sting" Operations

Intended loss includes pecuniary harms the defendant intended to cause, even if accomplishment of defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

F. Analysis of Proposed Guideline Commentary on "Intended Loss"

Because application of the Guidelines requires a method for ranking the seriousness of particular instances of crimes of the same general type, intended loss or something very like it is indispensable. There must be a way of distinguishing among inchoate (and partially successful) economic crimes. Laws penalizing inchoate crimes exist because such conduct is blameworthy and because it poses a risk of actual harm. Because inchoate and partially successful economic crimes are wholly or partially unconsummated efforts to inflict pecuniary loss, we should rank such crimes according to the amount of harm the defendant desired to inflict.[440] A crook who sets out to steal a million dollars is, all else being equal, both morally more culpable and a greater social risk than one whose more modest goal is to snitch a pack of cigarettes.

Although blameworthiness and risk of harm are both important considerations in punishing uncompleted conduct, blameworthiness is the more significant factor. Therefore, just as in the guilt phase of a criminal trial, at sentencing the factual impossibility or improbability of success of a criminal plan should be no defense. The proposed application note focuses on the defendant's state of mind, on what he intended and what he believed. It holds him responsible for losses he intended, so long as they "might reasonably have occurred if the facts were as he believed them to be." The goal is to hold defendants responsible for their evil objectives, while taking account of risk of harm by leaving open the possibility of subtracting from loss those

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440. James Gibson, Attorney Advisor to Sentencing Commissioner Michael Goldsmith, has argued that the proper measure of loss is not the greater of actual or intended loss, but the average of actual and intended loss, regardless of which is greater. *See* James Gibson, *How Much Should Mind Matter? Mens Rea in Theft and Fraud Sentencing*, 10 FED. SENTENCING REP. 136 (Nov.-Dec. 1997).

rare harms that simply could never have befallen even if things were as the defendant thought them.

It might be argued that there should be a discount for unrealized but intended losses as compared to loss actually inflicted. The consolidated guideline proposed here provides for such a discount, but it requires a moment's thought to see it. The proposed definition of actual loss expands the universe of pecuniary harms counted in loss to include reasonably foreseeable harms. Hence, where a criminal plan is successful, the perpetrator will be liable, not only for the harms he desires, but for such additional harms as are foreseeable to him. By contrast, the unsuccessful criminal is responsible only for the losses he desired to inflict; "foreseeability" does not enter the picture. Therefore, the cross-reference to the attempt guideline is unnecessary as well as confusing, and ought to be abandoned.

VI. CONCLUSION

I am a fan of the Federal Sentencing Guidelines. I think they are an improvement on the system they replaced and, in general, work far better than their many critics believe. Nonetheless, they remain an experiment. If the experiment is to succeed over the long term, the Guidelines and the Commission that shepherds them must be flexible and innovative enough to reinvent parts of the system that do not work well. The Guidelines' machinery for sentencing economic criminals is not broken, but it is unwieldy and inefficient; the gears are creaking, frustration is growing, and it is time for a new model. Whether the approach I have sketched out will be part of the blueprint for that new model remains to be seen. At the least, I hope it provides a place to start.

AFTERWORD

The U.S. Sentencing Commission met on April 7, 1998 to consider a package of proposals which would have consolidated the theft and fraud guidelines and redefined "loss" along the lines very close to those proposed here. The Commission, which at the time of the meeting had three of its seven seats vacant, was unable to come to a consensus on the entire package. It approved a two-level enhancement for sophisticated means similar to that advocated above,[441] but left completion of the work of simplifying economic crime sentencing to the next group of Commissioners and the 1998-99 amendment cycle.

441. *See supra* note 187 and accompanying text.

Appendix A

Proposed Consolidated Property Crimes Guideline

§2Z1.1. Economic Crimes, Including Fraud, Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the loss exceeded $100, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$100 or less	no increase
(B)	More than $100	add 1
(C)	More than $1,000	add 2
(D)	More than $2,000	add 3
(E)	More than $5,000	add 4
(F)	More than $10,000	add 5
(G)	More than $20,000	add 6
(H)	More than $40,000	add 7
(I)	More than $70,000	add 8
(J)	More than $120,000	add 9
(K)	More than $200,000	add 10
(L)	More than $350,000	add 11
(M)	More than $500,000	add 12
(N)	More than $800,000	add 13
(O)	More than $1,500,000	add 14
(P)	More than $2,500,000	add 15
(Q)	More than $5,000,000	add 16
(R)	More than $10,000,000	add 17
(S)	More than $20,000,000	add 18
(T)	More than $40,000,000	add 19
(U)	More than $80,000,000	add 20

(2) If the offense involved (A) a theft from the person of another, (B) the conscious or reckless risk of serious bodily injury, or (C) possession of a dangerous weapon, increase by 2 levels. If the

offense involved either (B) or (C) and the resulting offense level is less than 13, increase to level 13.

(3) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels.

(4) If (A) undelivered U.S. Mail was taken, or the taking of such items was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered U.S. Mail, and the offense level as determined above is less than level 6, increase to level 6.

(5) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

(6) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, then increase to level 10.

(7) If the offense—
   (A) substantially jeopardized the safety and soundness of a financial institution;
   or
   (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(8) If sophisticated means were used to commit the offense, or to impede the discovery of the existence or extent of the offense, increase the offense level by 2 levels.

(9) If the offense involved only minimal planning or represented a single instance of impulsive behavior, decrease by 2 levels.

(10) If the offense involved more than one victim, increase the offense level as follows:
- (A) If the offense involved 2-4 victims, increase by 1 level.
- (B) If the offense involved 5-20 victims, increase by 2 levels.
- (C) If the offense involved 21 or more victims, increase by 3 levels.

(11) If the offense cansed significant financial hardship to any victim, increase by 2 levels.

(c) Cross Reference [regarding theft of firearms—to remain same as in present section 2B1.1(c).]

Application Notes:

1. *"Loss" means all pecuniary harm caused by the acts and omissions specified in subsections (a)(1) and (a)(2) of § 1B1.3 (Relevant Conduct) that was reasonably foreseeable to the defendant at the time of such acts or omissions. "Victims" are all persons or entities (public or private) which suffered such harms.*

   (a) Pecuniary harm

   The phrase "pecuniary harm" is to be given its common meaning. Many physical and emotional harms, injuries to reputation, etc., can be assigned a monetary value. However, "loss" does not measure harms of this kind. Its purpose is to measure economic harms.

   (b) Causation

   A harm has been "caused" for the purposes of this guideline if one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of § 1B1.3 (Relevant Conduct) was a substantial factor in producing the harm. "Loss" should not include harms that are causally remote from the specified acts or omissions.

(c) *Foreseeability*

A foreseeable harm is one that ordinarily follows from one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of § 1B1.3 (Relevant Conduct) in the usual course of events, or that a reasonable person in the position of the defendant would have foreseen as a probable result of such acts or omissions.

Examples: (1) In a case involving product substitution, the loss includes the purchaser's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or modifying the product so that it can be used for its intended purpose, plus the purchaser's reasonably foreseeable cost of rectifying the actual or potential disruption of the purchaser's activities caused by the product substitution. (2) In a case of fraud involving the award of a government contract, loss includes the reasonably foreseeable administrative cost to the government and other public and private participants of repeating or correcting the contracting process affected, plus any reasonably foreseeable increased cost to secure the product or service contracted for. (3) In a case of destruction of commercial property by fire as part of a scheme to defraud, loss includes reasonably foreseeable added costs incurred by local government authorities in suppressing the fire, and reasonably foreseeable pecuniary harm to the owner of the property (if not the defendant) resulting from interruption in his business activity.

Loss does not, however, include costs incurred by government agencies in criminal investigation or prosecution of the defendant.

(d) *Cases of theft, receipt of stolen property, and destruction of property*

In cases involving larceny, false pretenses, embezzlement, and other forms of theft, as well as cases involving receipt of stolen property or the destruction or damage of *property, loss includes, but may not be limited to, the value of the property stolen, embezzled, damaged, or destroyed.*

(e) *<u>Congressional intent</u>*

In determining the loss (including the identification of the persons or classes of persons to be treated as victims), the sentencing court shall give particular weight to congressional intent. It shall be rebuttably presumed that pecuniary harm which was: (i) caused by one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of § 1B1.3 (Relevant Conduct); and (ii) suffered by any person or class of persons whose interests Congress intended to protect by passage of the offense(s) of conviction or offense(s) considered by the sentencing court as relevant conduct, was foreseeable to the defendant. For example, in a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended beneficiaries or uses. Similarly, in a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

(f) *<u>Time of measurement of loss</u>*

Loss should ordinarily be measured at the time the crime is detected. However, if the loss was higher at the time the crime was legally complete, the loss should be measured at that time. Likewise, if a defendant continues to engage in criminal conduct that increases the loss after the crime is detected, the increased loss resulting from such post-detection conduct should also be included as loss. For purposes of this guideline, a crime is detected when either a victim or a public law enforcement agency has (at least) a reasonable suspicion that a crime is being or has been committed <u>and</u> the defendant becomes aware that such suspicion exists. In many cases, the crime will be "detected" at the moment of a defendant's arrest. <u>Examples</u>: (i) In the case of a defendant apprehended in the act of taking a vehicle, the loss is the *value of the vehicle even if the vehicle is recovered immediately. (ii) In the case of an embezzlement in which the defendant converts to his own use money from a bank to invest or to cover short-term cash flow problems and then returns it before being caught, the loss is the amount of money originally converted. (iii) In the case of a bank fraud involving a bank officer, the crime would be detected when defendant became aware that bank examiners were reviewing irregularities in the bank's books relating to the fraud, or that federal agents were interviewing witnesses or serving grand jury subpoenas relating to the fraud.*

(g) *Net loss*

The loss shall be the net loss to the victim or victims.

(i) The amount of the loss shall be reduced by the value of money or property transferred to the victim(s) by the defendant in the course of the offense. For example, where a defendant sells stock to the victim by fraudulently representing that the stock is worth $40,000 when it is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). However, where there is more than one victim, the loss will be the total of the net losses of the losing victims. For example, in a Ponzi scheme in which the defendant repays early victims their entire investment plus a profit in order to keep the scheme going and attract new investments and investors, the defendant should be credited for repayments to early victims only to the extent of their original investment, plus statutory interest in an amount determined by reference to Application Note 7(i).

(ii) The amount of the loss shall be reduced by the value of property pledged as collateral as part of a fraudulently induced transaction. Where a victim has foreclosed on or otherwise liquidated the pledged collateral before detection of the crime, the loss shall be reduced by the amount recovered in the foreclosure or liquidation. Where a victim has not foreclosed on its se-

curity interest in the pledged collateral at the time of detection of the crime, the loss shall be reduced by the fair market value of the pledged collateral at the time of detection.

(iii) With the exception of amounts recovered or readily recoverable by a victim through liquidation or foreclosure of collateral pledged by the defendant as a part of the illegal transaction(s) at issue in the case, the loss shall not be reduced by payments made by the defendant to a victim after detection of the crime. With the same exception, loss shall not be reduced by amounts recovered or readily recoverable by a victim from the defendant through civil process or similar means after detection of the crime.

(h) *Valuation*

Ordinarily, loss will be calculated using the fair market value of the property or other thiug of value at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. When property is damaged, the loss is the cost of repairs up to the replacement cost of the property (plus any other reasonably foreseeable pecuniary harms).

(i) *Interest*

Loss shall include interest if interest or some other similar form of return on investment was bargained for by a victim as part of a transaction which is the subject of the count(s) of conviction, or which is included as relevant conduct under § 1B1.3. In such a case, loss shall include a component of interest at the statutory rate specified in 28 U.S.C. § 1961 calculated from the time at which the money, property, or other thing of value was stolen, embezzled, damaged, or destroyed, or the victim was otherwise deprived of its use or benefit, until the time the crime was detected. In all other cases, loss shall not include interest.

2. *If the defendant intended to cause a loss greater than the actual loss calculated pursuant to Application Note 1, the figure for intended loss shall be used as the "loss" in subsection (b)(1).*

 a) *Factual Impossibility*

 The defendant is accountable for all pecuniary harms he intended and which might reasonably have occurred if the facts were as he believed them to be.

 b) *"Sting" Operations*

 Intended loss includes pecuniary harms the defendant intended to cause, even if accomplishment of defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

3. *For the purposes of subsection (b)(1), loss (or intended loss) need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. For example, this estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the offense and the revenues generated by similar operations.*

4. *The loss includes any unauthorized charges made with stolen credit cards, but in no event less than $100 per card.*

5. *A victim suffers "significant financial hardship" if the offense caused him to file for personal bankruptcy protection, to suffer foreclosure on or eviction from his primary residence, to be terminated from employment which was a significant source of the victim's income, to suffer the closure, bankruptcy, or loss of ownership interest in any business that was a significant source of the victim's income, to lose health insurance protection for a period of six months or more, or to pay significant medical expenses during any period in which health insurance benefits were terminated or unavailable to the victim as a result of de-*

fendant's conduct, to lose a significant portion of his pension or retirement benefits, or to suffer any other financial deprivation similar in scope and effect to the examples listed above. For purposes of applying § 2B1.1(b)(11) only, the term "victim" refers only to natural persons.

[NOTE: Application Notes 5-12 of the current theft guideline, section 2B1.1, would become Notes 6-13 in the consolidated economic crimes guideline. Application Notes 14-17 of the current fraud guideline, section 2F1.1, are identical to Notes 9-12 in the current theft guideline, and so would be incorporated unchanged as Application Notes 10-13 of the consolidated guideline. Application Note 5 of the current fraud guideline, section 2F1.1, would become Note 14 of the consolidated guideline.]

15. *For purposes of calculating the number of victims under subsection (b)(10), the court should count only those victims who were actually deprived of something of value. For example, a wire fraud in which calls were made to three different individuals successfully persuading each of them to invest in a pyramid scheme would involve three victims. However, stealing a single car would ordinarily involve only a single victim, even if the owner were fully reimbursed for the loss of the car by his insurance company.*

16. *"Sophisticated means," as used in subsection (b)(10), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine economic crime of the same type. An enhancement would be applied, for example, where the defendant used offshore bank accounts, multiple transactions through domestic financial institutions, transactions through corporate shells or fictitious entities, or sophisticated technical means.*

17. *In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:*

    (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable substantial non-monetary harm;

(b) *false statements were made for the purpose of facilitating some other crime;*

(c) *the offense caused reasonably foreseeable physical or psychological harm or severe emotional trauma;*

(d) *the offense endangered national security or military readiness;*

(e) *the offense caused a loss of confidence in an important institution.*

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. In such cases, a downward departure may be warranted.