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ARTICLES

THE 2001 FEDERAL ECONOMIC CRIME SENTENCING REFORMS: AN ANALYSIS AND LEGISLATIVE HISTORY

FRANK O. BOWMAN, III*

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* Associate Professor of Law, Indiana University School of Law—Indianapolis. Formerly Assistant U.S. Attorney, Southern District of Florida (1989-96); Trial Attorney, U.S. Department of Justice, Criminal Division (1979-82); and Special Counsel, United States Sentencing Commission, (1995-96, on loan from U.S. Department of Justice). I am indebted for many kindnesses to the Sentencing Commission and its staff, particularly the former Chair, Judge Richard Conaboy, the current Chair, Judge Diana E. Murphy, former General Counsel and now Commissioner John R. Steer, former Commissioner Michael Goldsmith, and Chief Deputy General Counsel Donald A. Purdy. I am likewise profoundly grateful for the generosity of Judge George P. Kazen, former Chair of the Criminal Law Committee (CLC) of the U.S. Judicial Conference, Judge William W. Wilkins, current Chair of the CLC, Judge J. Phil Gilbert, former Chair of the Sentencing Guidelines Subcommittee of the CLC, Judge Sim Lake, current Chair of the Subcommittee, and Catharine Goodwin, Assistant General Counsel, Administrative Office of the U.S. Courts, in inviting me to assist the CLC in its work. I am similarly grateful to James E. Felman, Barry Boss, and the other representatives of the defense community who serve on the Sentencing Commission's Practitioner's Advisory Group for welcoming me into their deliberations, and to the many dedicated Justice Department professionals with whom I worked on economic crime reform both during and after my own service in the Department.

INTRODUCTION

On April 6, 2001, the United States Sentencing Commission approved a group of amendments to guidelines governing the sentencing of economic crimes. These measures, known collectively as the "economic crime package," were the culmination of some six years of consultation and debate by the Sentencing Commission, the defense bar, the Justice Department, probation officers, the Criminal Law Committee of the U.S. Judicial Conference (CLC), and the occasional academic commentator. The package contains four basic components. First, the formerly separate theft and fraud guidelines have been consolidated into a single guideline.[1] Second, the "loss table" in the consolidated guideline has been simplified and also substantively modified to reduce the sentences of some low-loss offenders while increasing the sentences of some high-loss

1. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 and § 2F1.1 (2000) (former theft and fraud guidelines) [hereinafter U.S.S.G.], *with* U.S.S.G. § 2B1.1 (2001) (new consolidated economic crime guideline).

offenders.[2] Third, the troublesome term "loss" has, at long last, been redefined.[3] Fourth, the Commission approved changes to the money laundering guidelines that tied offense levels for money laundering more closely to the offense levels of the underlying crime from which the illegal funds were derived.[4]

The economic crime package is a milestone in the history of the Federal Sentencing Guidelines. Its provisions are substantively important because economic crimes comprise between one-fifth and one-quarter of all federal sentencings.[5] The economic crime package represents the first occasion in the nearly fifteen-year history of the Guidelines that the Sentencing Commission has thoroughly rewritten the guidelines governing a major crime category. Of perhaps even greater long-term significance than the substance of the 2001 economic crime amendments is the process that produced them. One of the most persistent criticisms of the Sentencing Commission has been that, to those in the legal community, guidelines' amendments have often seemed to appear out of nowhere, generated with little or no prior public debate and accompanied by no meaningful explanation. Historically, the Commission has used its anomalous status as a quasi-judicial body exempt from the Administrative Procedures Act to conduct much of its work out of the public eye. However, beginning with the term of Chairman Richard Conaboy and continuing under the leadership of the current chair, Judge Diana E. Murphy, the Commission has moved towards a more open and inclusive deliberative process. The economic crime package is the first federal sentencing reform initiative in the guidelines era to have been conducted in the public eye from its inception.

As a participant throughout the long gestation of the economic crime package,[6] I hope that the judges and lawyers who use the new economic crime

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2. *Compare* U.S.S.G. § 2B1.1(b)(1) and § 2F1.1(b)(1) (2000) (former theft and fraud guidelines loss tables), *with* U.S.S.G. § 2B1.1(b)(1) (2001) (new consolidated economic crime guideline loss table).

3. *See* U.S.S.G. § 2B1.1, app. n.2 (2001) (defining "loss" in new consolidated economic crime guideline).

4. *See id.* § 2S1.1. Although the money laundering amendments were not originally conceived as part of the economic crime package, they are important not only in themselves but also insofar as they reduce the incentive of prosecutors to trump the otherwise applicable fraud guideline by adding a money laundering charge. *See infra* notes 146-51 and accompanying text.

5. In 1999, 22.6% of federal criminal defendants were sentenced for fraud, larceny, embezzlement, auto theft, robbery, burglary, forgery, or counterfeiting. U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, tbl. 3 (1999) [hereinafter 1999 SOURCEBOOK]. The percentage of economic crimes as a proportion of all federal offenses has declined slightly in the last few years, although the absolute number of such offenses has increased. For example, in fiscal year 1995, 26.5% of the federal sentences imposed were for auto theft, larceny, fraud, embezzlement, forgery, or counterfeiting. U.S. SENTENCING COMM'N, ANNUAL REPORT 1995 43, tbl. 10 (1995) [hereinafter 1995 ANNUAL REPORT].

6. From 1995 to 1996, when work on the economic crime package began, I was Special Counsel to the U.S. Sentencing Commission, on detail from the Justice Department, and served as a member of the Sentencing Commission staff working group on economic crime. During that same

guidelines will conclude that the more open and participatory process generated high quality sentencing rules. At any event, the process generated a rich and unprecedented "legislative history" that should be of great interpretive value to the bench and bar, particularly when addressing the nuances of the revised definition of "loss." The purpose of this Article is simple—to assist lawyers and judges in understanding and applying the new consolidated economic crime guideline, set out in Section 2B1.1. It will also comment briefly on the revisions to the money laundering guidelines, insofar as those revisions impact economic crime sentencing.

This Article has four parts. First, it describes the general structure of the Federal Sentencing Guidelines and the approach to sentencing economic crimes in effect between 1987 and 2001. Second, it outlines the defects in the former economic crime guidelines that led to the call for reform. Third, it describes the process undertaken by the Sentencing Commission that led to the passage of the 2001 economic crime amendments and, in so doing, provides a roadmap to sources of legislative history. Fourth, it explains and analyzes the new guidelines in light of their legislative history, with primary emphasis on the consolidated economic crime guideline and its redefinition of "loss." This fourth section highlights issues that remain unaddressed by the new guidelines and discusses provisions that may be particularly productive of future litigation.

For purposes of comparison and ease of reference, the text of the new economic crime guideline, Section 2B1.1 of the 2001 Federal Sentencing Guidelines, is set out in Appendix A, and the provisions of the former theft and fraud guidelines relating to loss are gathered in Appendix B.

I. THE GENERAL STRUCTURE OF THE GUIDELINES AND THEIR ORIGINAL APPROACH TO SENTENCING ECONOMIC CRIMES

A. The Structure of the Federal Sentencing Guidelines

The Federal Sentencing Guidelines adopted in 1987[7] are, in a sense, nothing

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period, I participated in the work of the Sentencing Subcommittee of the Attorney General's Advisory Committee (a group of U.S. Attorneys who, as the name implies, advise the Attorney General on matters of policy). After I left the Commission and the Justice Department to teach law in 1996, I began writing about economic crime sentencing reform and became a member of Sentencing Commission's Practitioner's Advisory Group. Beginning in 1998, I was privileged to serve as an academic advisor to the Criminal Law Committee of the U.S. Judicial Conference (CLC).

7. For a 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 WISC. L.R. 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).

more than a set of instructions for one chart—the Sentencing Table.[8] 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, is subject to a sentencing range of sixty-three to seventy-eight months.[9]

The criminal history calculation reflected on the horizontal axis of the Sentencing Table is a rough effort to determine the defendant's disposition to criminality, as reflected in 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.[10]

The offense level reflected on the vertical axis of the Sentencing Table is a measurement of the seriousness of the present crime. 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,"[11] 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 of a particular statutory violation—and a set of "specific offense characteristics." The "specific offense characteristics" are 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 $1000 and a theft of $1 million,[12] 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.[13]

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. Increases in the offense level may be based on factors such as the defendant's role in the offense,[14] whether the defendant

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8. U.S.S.G., ch. 5, pt. A (2000).

9. *Id.* By statute, the top end of the range can be no more than twenty-five percent higher than the bottom end. 28 U.S.C. § 994(b)(2) (1994); U.S.S.G. ch. 1, pt. A. For discussion of the "twenty-five percent rule," see Bowman, *supra* note 7, at 691 n.49.

10. For the rules regarding calculation of criminal history category, see U.S.S.G. ch. 4 (2000).

11. *Id.* app. A.

12. This was true under the former separate guidelines for theft and fraud. *See, e.g.*, *id.* § 2B1.1(b)(1) (reflecting an increase in offense level of two for a theft of $1000 and increase of thirteen for a theft of $1 million). It remains the case under the recently adopted consolidated economic crime guideline. *Id.* (reflecting no increase in offense level for a theft or fraud loss of $1000 and an increase of sixteen offense levels for a loss of $1 million).

13. *Id.* § 2B3.1(b) (reflecting possible increases of up to eleven offense levels for the use of a weapon and causing injuries in the course of a robbery).

14. *Id.* § 3B1.1. The defendant's offense level can be enhanced by either two, three, or four

engaged in obstruction of justice,[15] whether the defendant committed an offense against a government official[16] or particularly vulnerable victim,[17] whether the offense was a hate crime,[18] and the existence of multiple counts of conviction.[19] The court may also reduce the offense level based on a defendant's "mitigating role" in the offense[20] or on his so-called "acceptance of responsibility."[21]

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*.[22] However, in order to "depart" from the range, that is, go above or below it, the judge must explain the reason for the departure, and the explanation must be couched in terms of factors for which the guidelines do not adequately account already.[23] Moreover, except in unusual circumstances, the guidelines specifically *exclude* from consideration for purposes of departing outside the guideline range most factors, such as age, employment record, or family ties, which judges formerly used to individualize sentences.[24]

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levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise.

15. *Id.* § 3C1.1. 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. *Id.* § 3C1.1, app. 4.

16. *Id.* § 3A1.2.

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

18. *Id.* § 3A1.1(a).

19. *Id.* ch.3, pt. D.

20. *Id.* § 3B1.2 (allowing decreases in offense level of two or four levels if defendant is found to be a "minor participant" or "minimal participant" in the criminal activity).

21. *Id.* § 3E1.1 (allowing reduction of two offense levels where defendant "clearly demonstrates acceptance of responsibility," and three offense levels if otherwise applicable offense level is at 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 nothing more nor less than an institutionalized incentive for guilty pleas.

22. *Id.* § 5C1.1(a) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

23. 18 U.S.C. § 3553(c) (1994); U.S.S.G. § 5K2.0 (2000).

24. Chapter 5, Part H of the Guidelines lists factors that the Commission determined to be "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." These include age, *id.* § 5H1.1; educational and vocational skills, *id.* § 5H1.2; mental and emotional conditions, *id.* § 5H1.3; physical condition, *id.* § 5H1.4; history of substance abuse, *id.* § 5H1.4; employment record, *id.* § 5H1.5; family or community ties, *id.* § 5H1.6; socio-economic status, *id.* § 5H1.10; military record, *id.* § 5H1.11; history of charitable good works, *id.* § 5H1.11; and "lack of guidance as a youth," *id.* §5 H1.12. 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

Finally, the Sentencing Commission created "relevant conduct."[25] 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, taken together, transformed what would otherwise have been a predominantly "charge of conviction" system into a "modified real offense" system.[26] The "modified real offense" character of the system is of considerable importance in understanding the Guidelines' approach to sentencing economic crimes.

In general, therefore, 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.

B. The Federal Sentencing Guidelines for 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 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 ranking factors—the culpable mental state of the defendant and the degree of

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and thus did not "adequately [take it] into consideration," when formulating the guidelines. 18 U.S.C. § 3553(b) (1994).

25. The term "relevant conduct" and its applications to guideline calculations are enumerated in U.S.S.G. § 1B1.3 (2001). 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 7, at 702-04.

26. *See, e.g.*, Daniel J. Sears, *Defense Practice Under the Bail Reform Acts and the Sentencing Guidelines—A Shifting Focus*, FED. PROBATION, Sept. 1991, at 38, 40 (categorizing the sentencing process under the guidelines as one 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).

harm caused to the victim. For example, if Mr. A strikes Mr. B, the statutory law of most states stands ready to receive Mr. A into one of nine or more pre-defined categories ranging from capital murder to misdemeanor assault. If Mr. B dies from the blow, there are as many as six kinds of homicide, distinguished from each other primarily by different culpable mental states.[27] If Mr. 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.[28]

By contrast, in early law there were several different crimes of dishonest acquisition, but little or no difference in *degree* between them. It is generally believed that at earliest common law, all larcenies (the only property crime recognized for many years in England) were felony and punishable by death.[29]

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27. First degree murder generally involves both an intentional killing and some form of premeditation. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-102(1)(a) (West Supp. 2000). Second degree murder, where it exists, is usually either a "knowing" killing, *see, e.g.*, COLO. REV. STAT. ANN. § 18-3-103(1) (West 1999), or one carried out purposefully, but without premeditation, *see, e.g.*, WASH. REV. CODE ANN. § 9A.32.050(1)(a) (West 2000). Manslaughter is usually of two types, voluntary, which usually denotes some form of "heat of passion," *see, e.g.*, VA. CODE ANN. § 18.2-35 (Mitchie 1996); MODEL PENAL CODE § 210.3(1)(b) (1985), and involuntary, which usually means "reckless," *see, e.g.*, VA. CODE ANN. § 18.2-36 (Mitchie 1996); MODEL PENAL CODE § 210.3(1)(a) (1985). The two types of manslaughter are, in some states, also two different degrees of homicide. *See, e.g.*, COLO. REV. STAT. ANN. § 18-3-104-105 (West 1999). In Colorado, until recently, voluntary "heat of passion" manslaughter was punished as a Class 3 felony, while reckless manslaughter was punished as a Class 4 felony. In 1996, the crime previously known as "heat of passion" manslaughter became a form of second degree murder, albeit still punishable as a Class 3 felony. *Id.* § 18-3-103(b). Many states have some form of criminally negligent homicide. *See, e.g.*, *id.* § 18-3-105; WASH. REV. CODE ANN. § 9A.32.070 (West 2000) (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.

28. *See, e.g.*, WASH. REV. CODE ANN. § 9A.36.011 (West 2000) (first degree assault committed where defendant "with intent to inflict great bodily harm: [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death"); *id.* § 9A.36.022 (second degree assault committed where defendant administers poison with intent to injure, inflicts grievous bodily harm, or assaults victim with a deadly weapon); *id.* § 9A.36.031 (defining third degree assault in several ways involving less harm and less dangerous weapons than required in first and second degree assaults). The weapon factor is a proxy for measuring blameworthiness as demonstrated by a willingness to inflict the sort of harm that can be caused by dangerous or deadly weapons.

29. 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 Twelfth and Thirteenth Century English criminal practice, *see, e.g.*, Roger D. Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1 (1982), has studied English plea rolls from Thirteenth Century and found a de facto division of larceny cases into offenses meriting hanging and those which did not predate the formal creation

By 1275, larceny was 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.[30] In the 1700s, Parliament enacted statutes creating the crimes of false pretenses[31] and embezzlement,[32] both of which were "misdemeanors" though punishable by penalties we would now consider appropriate for "felonies."[33] Under modern codes, the various types of property crimes are generally consolidated into the single crime of "theft," each of the old familiar categories becoming now but a different method of committing the same offense.[34] There are generally only two or three degrees of "theft," with the primary distinction between the degrees being the value of the thing stolen.[35]

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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 processes when they stole "petty things." Roger D. Groot, *Petit, Larceny, Jury Lenity and Parliament*, *in* "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW (2001).

30. *See* PERKINS & BOYCE, *supra* note 29, at 335 nn.4-5.

31. 30 Geo. 2, c. 24, § 1 (1757) (Eng.).

32. 39 Geo. 3, c. 85 (1799) (Eng.).

33. *See* PERKINS & BOYCE, *supra* note 29, 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, public whipping, or transportation for seven years), at 352 n.6 (noting that the punishment for embezzlement under the 1799 statute was transportation not to exceed fourteen years).

34. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 8.8(c), at 760-61 (2d ed. 1986); PERKINS & BOYCE, *supra* note 29, at 390-91.

35. For example, in Delaware, theft is either a Class G felony or a misdemeanor, depending on whether the property taken is worth more or less than $500. DEL. CODE ANN. tit. 11, § 841 (1995) (theft may also be a Class F felony if the property is worth $500 or more *and* the victim is 60 years of age or older). 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 2000) (theft in the first degree, a Class B felony, is committed when value of property or services taken exceed(s) $1500); *id.* § 9A.56.040(1) (theft in the second degree, a Class C felony, is committed when value of property or services taken is between $250 and $1500); *id.* § 9A.56.050(1) (theft in the third degree, a misdemeanor, is committed when value of property or services taken does not exceed $250). In Washington, first and second degree theft are felonies; third degree theft is a misdemeanor. Colorado divides theft into four degrees based on the value of the thing taken; there are two felony and two misdemeanor classifications. COLO. REV. STAT. ANN. § 18-4-401 (West 2000).

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 2000) (crime of unlawful issuance of bank checks is 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.56.160, 9A.56.170 (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. *Id.*; *see also* COLO. REV. STAT. ANN. § 18-4-410 (West 2000) (theft

In addition, modern state penal codes include crimes such as robbery, burglary, or extortion that customarily involve stealing in some form.[36] These crimes are often divided by statute into degrees, but the focus of these offenses is less on economic harm than on invasions of other interests—the sanctity of the home, the risk of physical violence patent in every robbery and latent in every burglary,[37] and 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 non-economic. The difference between simple and aggravated robbery is the presence or absence of a weapon.[38] 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.[39]

Notably absent from the ranking calculus of traditional common law and state statutory economic crimes is any consideration of mental state or of the nature and quality of the act(s) which make up the crime. Of course, proof of both a culpable mental state and some voluntary act in aid of the crime are prerequisites for the imposition of liability. 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.[40]

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by receiving divided into same degrees as theft, based on the value of the stolen property received).

36. Burglary can be committed when the illegal entry is made for the purpose of committing a non-property crime. *See, e.g.*, WASH. REV. CODE ANN. § 9A.52.020 (West 2000) (defining burglary). Similarly, extortion can involve obtaining either property or services by threat, including sexual favors. *See, e.g., id.* § 9A.56.110 (defining extortion).

37. *See* United States v. Couch, 65 F.3d 542, 545 (6th Cir. 1995) (observing that the federal sentencing 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").

38. *Compare, e.g.*, WASH. REV. CODE ANN. § 9A.56.200 (West 2000) (robbery in the first degree is committed when defendant is armed with or displays a deadly weapon or inflicts bodily injury), *with id.* § 9A.56.210 ("A person is guilty of robbery in the second degree if he commits robbery.").

39. *Compare, e.g., id.* § 9A.52.020 (burglary in the first degree committed where defendant enters a dwelling and is armed with a deadly weapon or assaults any person therein), *with id.* § 9A.56.030 (burglary in the second degree committed if defendant, "with intent to commit a crime against a person or property . . . therein . . . enters or remains unlawfully in a building other than a vehicle or a dwelling"). *Compare* COLO. REV. STAT. ANN. § 18-4-202 (West Supp. 2000) (first degree burglary committed when defendant unlawfully 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 (second degree burglary committed when defendant breaks into, enters or remains unlawfully in a building with intent to commit a crime therein against another person or property).

40. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 32.07 (required mental state for larceny is intent to steal), § 32.09[B] (describing required mental state for embezzlement), § 32.10[C][3] (required mental state for false pretenses is intent to defraud).

No effort has been made, at least by the drafters of statutes, to distinguish between more and less reprehensible conditions of larcenous intentionality. Similarly, theft-type statutes prohibit a host of means by which victims may be relieved of their property, but method is not a factor in ranking such crimes.[41]

The consequence of this pattern of historical development is that there are 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 degrees of seriousness of economic crimes—the value of the thing stolen.

One might well ask why this simple, and seemingly simplistic, approach to categorizing economic crimes persisted in English law, and dominates the law of American states today. The probable answer is that it suited the theft cases that predominated in the developing law of England before very recent times, and which 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.[42] Despite being the source of endless headaches to generations of judges, lawyers, and law students, the common law and early statutory crimes—larceny by trick, embezzlement, and false pretenses—that developed to fill perceived gaps in the early law of larceny[43] 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.[44] The defendant

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41. *See, e.g.*, the consolidated Colorado theft statute, COLO. REV. STAT. ANN. § 18-4-401 (West 1999), which 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. *Id.*

42. 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).

43. *Id.* at 502-20. *See also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW §§ 2.1-2.4, 59-113 (1978).

44. Of the 989,007 inmates in the custody of state correctional authorities in 1995, 230,300 prisoners or 23.3% of the total population, were incarcerated for property offenses. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 9-10 tbl. 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. *Id*. at 10 tbl. 1.12. Of the crimes reported to state police, larceny-theft offenses constitute over fifty percent of all the crimes in the following categories: murder, forcible rape, robbery, burglary, larceny-theft, and motor vehicle theft. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1995, 349 tbl. 3.119 (1995); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1994, at 329 tbl. 3.103 (1994); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE,

stole a car, picked a pocket, tapped a till, wrote a dud check, or doctored the books, and it is easy to identify what was stolen, who it was stolen from, and how much it was worth. In these simple circumstances, the defendant's state of mind is patent and effectively indistinguishable from virtually all other such offenders, his methods are unremarkable, and so 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 thus for the relative seriousness of the crime.

By contrast, there are literally hundreds of federal economic crimes. Of the roughly 970 criminal statutes listed in Statutory Index to the 2000 Federal Sentencing Guidelines,[45] some 250 of them, or more than twenty-five percent, were sentenced using either the theft guideline, Section 2B1.1, or the fraud guideline, Section 2F1.1.[46] This total does not include the federal versions of crimes such as burglary,[47] robbery,[48] extortion,[49] blackmail,[50] bribery,[51] or criminal copyright infringement,[52] all of which are also crimes of dishonest acquisition.[53]

Federal economic crimes are not only numerous, they cover an immense range of disparate conduct and implicate an array of interests far beyond the interest of easily identifiable victims in readily quantifiable money, goods, or services. Federal criminal laws protect the integrity of commodities markets,[54] and prohibit the sale of unregistered securities through the mail.[55] They punish removal, disturbance, or destruction of the "graves, relics, or other evidences of an ancient civilization,"[56] and the removal of documents relating to claims

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SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1993, at 375 tbl. 3.116 (1993). The average property loss (in dollars) incurred for larceny-theft excluding motor vehicle theft ranged from $483 in 1993 to $505 in 1995. *Id.*

45. The Statutory Index to the Guidelines, which appears at Appendix A, is a list of almost all the federal statutory provisions prescribing criminal penalties. It contains a separate entry for each separately chargeable statutory subsection. The list "specifies the guideline section(s) . . . ordinarily applicable to the statute of conviction." U.S.S.G., app. A (2000).

46. *Id.*

47. *Id.* § 2B2.1.

48. *Id.* § 2B3.1.

49. *Id.* § 2B3.2.

50. *Id.* § 2B3.3.

51. *Id.* § 2B4.1.

52. *Id.* § 2B5.3.

53. The Guidelines provisions for all of these crimes incorporate enhancements for "loss." *See id.* §§ 2B5.3(b)(1), 2B4.1(b)(1), 2B3.3(b)(1), 2B3.2(B)(2), 2B3.1(b)(7), 2B21(b)(2).

54. *E.g.*, 7 U.S.C.A. § 6 (West 2001) (restriction of commodities futures trading and foreign transactions).

55. 15 U.S.C.A. § 77e (West 2001) (making it unlawful to sell unregistered securities through the mail).

56. 16 U.S.C.A. § 114 (West 2001) (regarding the removal, disturbance, destruction, or molestation of ruins).

against the United States.[57] They prohibit counterfeiting United States currency,[58] the obligations of foreign countries,[59] and the papers of ships.[60] More familiarly, federal law punishes theft and embezzlement from federally insured banks,[61] and criminalizes every "scheme or artifice to defraud" carried out by means of either the U.S. Mail[62] or interstate wire communications,[63] or directed at any "health care benefit program."[64]

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,[65] to five years per count of conviction for wire and mail fraud,[66] to thirty years for bank fraud,[67] to life imprisonment for conducting a "continuing financial crimes enterprise."[68] 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 ("Class 1" or "Class 2" or "Class 3" felonies, etc.) and then assigns every crime in the criminal code to one of the categories.[69] Such a scheme embraces all types of crime and incorporates legislative judgments about the relative seriousness of different offenses. Instead, the penalty ranges for federal economic offenses seem almost whimsical, owing more to the political enthusiasms of the moment they were enacted than any reasoned effort to compare the relative seriousness of different crimes.[70]

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57. 18 U.S.C.A. § 285 (West 2001) (regarding taking or using papers relating to claims against the United States).

58. *Id.* § 471 (prohibiting counterfeiting "any obligation or other security of the United States").

59. *Id.* § 480 (prohibiting making, altering, or counterfeiting with intent to defraud obligations of foreign governments).

60. *Id.* § 507 (prohibiting falsely making, forging, counterfeiting, or altering registries, licenses, passes, permits, and other ship's papers).

61. *Id.* § 656 (regarding theft, embezzlement or misapplication by bank officer or employee).

62. *Id.* § 1341 (prohibiting mail fraud).

63. *Id.* § 1343 (prohibiting wire fraud).

64. *Id.* § 1347 (prohibiting knowingly and willfully executing or attempting to execute a scheme or artifice to defraud any health care benefit program).

65. *Id.* § 656 (providing that 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).

66. *Id.* §§ 1341, 1343.

67. *Id.* § 1344 (providing that penalty for bank fraud shall be a $1 million fine, or thirty years imprisonment, or both).

68. *Id.* § 225(a) (prohibiting organizing, managing, or supervising a continuing financial crimes enterprise).

69. *See, e.g.*, COLO. REV. STAT. ANN. § 18-1-105 (West 2000) (classifying felonies into six classes) and § 18-1-106 (West 2000) (classifying misdemeanors into three classes); WASH. REV. CODE ANN. § 9A.20.010 (West 2000) (classifying felonies into three classes and misdemeanors into two classes).

70. A notable recent example of the effect of current events on federal criminal sentences is

The void created by the absence of meaningful congressional guidance on questions of relative offense seriousness is compounded 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 in large part because a conviction for such offenses is likely to be of a single count—one murder, one assault, one rape, one robbery. Where there are multiple counts of conviction for crimes against persons, they have a tendency to merge for sentencing purposes, or, when they do not, there are likely to be distinctly different harms 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.[71]

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 is probably going to be limited to a sentence within that range, and be precluded from sentencing the defendant to more than twenty-four years (a penalty range the legislature thought it was reserving for, say, 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.[72] 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

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the fourfold, then sixfold, increase in the maximum penalty for bank embezzlement, from five years to twenty years in 1989, and from twenty years to thirty years in 1990, enacted by a Congress in the grip of the savings and loan debacle of the 1980s. *Compare* Act of June 25, 1948, ch. 645, 62 Stat. 683, 729 (1948) (codified as amended at 18 U.S.C.A. § 656 (West 2001)) (setting maximum sentence for theft, embezzlement, or misapplication by bank officer or employee at five years imprisonment and a $5000 fine), *with* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(b), 103 Stat. 183, 499 (1989) (increasing maximum fine for violation of § 656 from $5000 to $1 million, and maximum term of imprisonment from five years to twenty years), *and* Crime Control Act of 1990, Pub. L. No. 101-647, § 2504(b), 104 Stat. 4789, 4861 (1990) (increasing maximum term of imprisonment for violation of § 656 from twenty years to thirty years).

71. 18 U.S.C.A. § 1341 (West 2001); United States v. Clevenger, 458 F. Supp. 354, 359 (E.D. Tenn. 1978) (holding separate counts for separate mailings in furtherance of same scheme to defraud not multiplicitous); United 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) (each separate use of wire communication in aid of same scheme to defraud is separate offense).

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

statutory sentence for each such count.[73] Thus, at least prior to the Guidelines, the apparent 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 discretion to charge one count or fifty arising from the same scheme, and the equally unlimited power of the judge to sentence anywhere in a legally permissible range that could run from zero to 250 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 Original 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. The first category addresses the treatment of criminal history,[74] the multiple count rules,[75] relevant conduct,[76] adjustments for the defendant's role,[77] adjustments for vulnerable victims,[78] and the virtual exclusion of the defendant's personal circumstances and characteristics from the calculation of guideline range.[79] The second category contains all the rules concerning the offense(s) for which the defendant is being sentenced. These are found in Chapter Two, "Offense Conduct."[80]

The Commission's approach to drafting Chapter Two guidelines for particular crimes was empirical and historical, rather than normative and 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.[81] The Commission studied a sample of 10,000 past cases to

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

74. *See* U.S.S.G., ch. 4 (2000).

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

76. *See id.* § 1B1.3.

77. *Id.* § 5H.1.7.

78. *Id.* § 3A1.1.

79. *Id.* ch. 5, pt. H.

80. *Id.* ch. 2.

81. The most prominent exception to the general approach of attempting to reproduce pre-Guidelines sentence levels was narcotics sentences, where, largely in response to statutory mandates, the Commission created a structure which dramatically increased drug sentences. *See generally* Bowman, *supra* note 7, 733-34, 740-46 (discussing drug sentences under the Guidelines and arguing that they are, in general, too long). *See also* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV.1043, 1067-1126 (2001) (attempting to explain why the average federal narcotics sentence declined significantly between 1992 and 1999).

determine what sentences were rendered and why.[82] The objective was to identify the characteristics of both offenders and offenses that judges had historically deemed important in making sentencing choices. In effect, the Commission attempted to discover the federal common law of sentencing and codify it.

In the case of economic crimes, the original Commission adhered to its historical approach in some respects, but diverged from it in others. On the one hand, the Commission consciously chose to raise sentencing levels for economic crimes over pre-Guidelines levels.[83] The commissioners were plainly concerned that probationary sentences had been too common in economic crimes,[84] and that the Guidelines' objectives would be better served by the imposition of "short but certain terms of confinement for many white-collar offenders . . . ."[85] On the other hand, the Commission did attempt 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 for such crimes.

In my view, the original Commission was correct to raise sentences for economic crimes above their *de minimis* historical levels.[86] However, its effort to identify sentencing factors federal judges had in the past found determinative for economic crimes produced rather lean results. Indeed, the Commission mentioned only two such factors in the commentary to the guidelines governing theft and fraud—the amount of the loss, and the amount and sophistication of planning activity involved in the crime.[87]

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82. Breyer, *supra* note 7, at 7 n.50.

83. *Id.* at 20-21; 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 white-collar offenders whom the Commission found (perhaps correctly) to have been treated with undue solicitude.").

84. As Justice Breyer, then a member of the Sentencing Commission, put it in 1988, "A pre-Guidelines sentence imposed on these criminals would likely take the form of straight probationary sentences." Breyer, *supra* note 7, 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 LAW & SOC'Y REV. 467, 475 (1979) (quoting an Assistant 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").

85. Breyer, *supra* note 7, at 20.

86. *See* Bowman, *supra* note 7, at 734-41 (supporting the Commission's choice to increase economic crime sentences, and arguing that, even under the Guidelines, federal white collar sentences are often too low).

87. In the commentary to the former fraud guideline, the Commission observed:

> 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 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*.

For the purpose of drafting guidelines, the original Sentencing Commission divided federal economic crimes into two basic types: crimes involving "the most basic forms of property offenses: theft, embezzlement, transactions in stolen goods, and simple property damage or destruction"[88] sentenced under Section 2B1.1,[89] and fraud crimes, sentenced under the provisions of Section 2F1.1. Then, having gone to the trouble of creating the distinction between theft on the one hand and fraud on the other, the Commission drafted two virtually identical guidelines, both of them based primarily on the amount of "loss" resulting from the defendant's criminal conduct.[90]

The term "loss" was not defined in the text of the former theft and fraud guidelines.[91] Rather, it was discussed and defined in the commentary to those guidelines. The primary definition of "loss" appeared in Application Note 2 to the theft guideline, Section 2B1.1. The heart of the definition was this: "'*Loss' means the value of the property taken, damaged or destroyed*."[92] The fraud guideline, Section 2F1.1, incorporated this definition, stating: "Valuation of loss is discussed in the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or

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U.S.S.G. § 2F1.1, app. background (2000) (emphasis added).

The commentary to the former 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 . . . 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 to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.

Id. § 2B1.1, app. background.

88. *Id.* ch. 2, pt. B(1), introductory app.

89. Property damage cases were nominally sentenced under Section 2B1.3, but the core of that guideline was a cross-reference to Section 2B1.1 incorporating the loss table of Section 2B1.1(b)(1).

90. *See* U.S.S.G. §§ 2B1.1, 2F1.1 (2000).

91. The word "loss" appeared in guideline text only as a description of the monetary increments in two tables (§ 2B1.1(b)(1) and § 2F1.1(b)(1)) which gave rise to increases in offense level. *See id.* § 2B1.1(b)(1) (2000): "If the loss exceeded $100, increase the offense level as follows: [followed by a table]."

92. *Id.* § 2B1.1, app. n.2 (emphasis added). 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 interest 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. The note then discusses several examples and special cases. *Id.*

services unlawfully taken . . . ."[93]

Application Note 7 to Section 2F1.1 went on to state: "*Frequently*, loss in a fraud case will be the same as in a theft case."[94] This language raised but did not answer the question of *when* loss in fraud cases would be the same as loss in theft cases.[95] The commentary to the former fraud guideline set out a number of special rules for particular cases, such as product substitution cases,[96] fraudulent loan and contract procurement cases,[97] procurement fraud,[98] government program benefits,[99] and Davis-Bacon Act cases.[100] Under both the former 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."[101] Finally, the general rule for both theft cases under Section 2B1.1 and fraud cases under Section 2F1.1 was that the court should use the greater of actual or intended loss, if the intended loss was different than the actual loss and could be determined.[102]

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93. *Id.* § 2F1.1, app. n.8 (emphasis added).

94. *Id.* (emphasis added).

95. For further discussion of this issue, see *infra*, notes 269-89 and accompanying text.

96. U.S.S.G. § 2F1.1, app. n.8(a) (2000).

97. *Id.* § 2F1.1, app. n.8(b).

98. *Id.* § 2F1.1, app. n.8(c).

99. *Id.* § 2F1.1, app. n.8(d).

100. *Id.* § 2F1.1, app. n.8(e).

101. *Id.* § 2B1.1, app. n.3; *id.* § 2F1.1 app. n.9.

102. This rule was plainly stated only in the application notes to former § 2F1.1 concerning fraud cases: "Consistent with the provisions of § 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, app. n.8. Nonetheless, the same principle seems implicit in the examples used for illustration in the former theft guideline:

> Examples: (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, app. n.2.

The concept of intended loss was explicitly imported into the theft guideline *only* in cases of attempt. The former theft guideline read:

> 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 § 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 §2 X1.1.

Id. § 2B1.1, app. n.2. The base offense level for an attempted theft was determined by adding to 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).

II. THE CASE FOR REFORM

A. Consolidation of the Former Theft and Fraud Guidelines

From the inception of the guidelines system, the existence of one guideline for crimes involving "theft," Section 2B1.1, and another for crimes involving "fraud," Section 2F1.1, was the source of some of the confusion surrounding federal economic crime sentencing generally, and the loss concept in particular. In the end, it became clear that there was no good reason to have two separate guidelines for theft and fraud, and that there were compelling reasons to consolidate the two sections.

First, the distinction between theft and fraud is largely illusory. Although not all theft crimes are frauds, virtually every fraud could be charged as some form of theft. Federal law abounds with instances where the same course of thievery is chargeable under multiple statutes, some of which are called "frauds," and some of which are traditional "theft-like" offenses.[103]

Second, even if it were possible to draw a meaningful distinction between thefts and frauds, it would only be useful to do so in writing sentencing guidelines if the objective were to generate different sentencing outcomes for the two categories of cases. However, the sentencing range under both the former theft and fraud guidelines was driven almost entirely by loss amount, and the loss tables in the two guidelines were virtually identical. Moreover, because the fraud guideline essentially adopted the "loss" definition from the theft guideline, application of either former Section 2B1.1 or Section 2F1.1 to the same set of facts customarily produced either the identical sentencing range, or a pair of ranges so close that the top of one approached or overlapped the bottom of the other.[104] Thus, in the overwhelming majority of cases, the existence of separate fraud and theft guidelines was merely a pointless duplication.

Third, the existence of separate theft and fraud guidelines was mischievous. Sections 2B1.1 and 2F1.1, and their commentary regarding "loss," were *slightly* different. Consequently, creative litigants and judges tried to impute meaning into the differences, which often led to confusion.[105]

Throughout the long economic crime sentencing debate, there was little or

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103. *See* Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 490-92 (1998) [hereinafter Bowman, *Coping with "Loss"*] (discussing the illusory character of the theft-fraud distinction in federal law).

104. The Sentencing Table is constructed so that the top of one sentencing range will overlap the bottom of the range two offense levels higher. U.S.S.G. ch. 5, pt. A (2000).

105. *See, e.g.*, Bowman, *Coping with "Loss," supra* note 103, at 493-97 (discussing the series of Third Circuit cases beginning with *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991), and running through *United States v. Badaracco*, 954 F.2d 928 (3d Cir. 1992), *United States v. Coyle*, 63 F.3d 1239 (3d Cir. 1995), and *United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996)); J. Phil Gilbert, *Statement on "Loss" on Behalf of the Judicial Conference Committee on Criminal Law*, 10 FED. SENT. REP. 128, 129 (1997).

no dissent from the view that the theft and fraud guidelines should be consolidated.[106] The Sentencing Commission explicitly acknowledged the foregoing critique when it consolidated the theft and fraud guidelines as part of the 2001 economic crime package.[107] As this aspect of the 2001 economic crime package was non-controversial, it will receive no further detailed discussion in this Article.

B. The "Loss" Conundrum

If the problems in federal economic crime sentencing had been limited to the superfluity of separate theft and fraud guidelines, the debate would have been a short one. Far more significant was the galaxy of difficulties whirling around the concept of "loss." As described above, when the original Sentencing Commission wrote guidelines for economic crimes, it made the idea of "loss" the linchpin of the enterprise.[108] In both the former theft and fraud guidelines the base offense level[109] resulting from conviction alone was very low (4 in theft

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106. The three arguments for consolidation set forth in the text were laid out to the Sentencing Commission at its first public hearing on loss and the theft and fraud guidelines. *U.S. Sentencing Commission October 1997 Hearing on the Definition of "Loss": Excerpts*, 10 FED. SENT. REP. 157, 159 (James E. Felman, ed. and annotator, 1997) [hereinafter *1997 Hearing Excerpts*] (testimony of Professor Frank O. Bowman, III). No member of the Commission expressed any disagreement then or later. A consolidated economic crimes guideline was part of the first economic crime package published for comment by the Conaboy Sentencing Commission. 63 Fed. Reg. 602, 610-14 (Jan. 6, 1998). The CLC supported consolidation beginning in 1997. *See* Gilbert, *supra* note 105, at 129 (statement by then-Chair of CLC Sentencing Guidelines Subcommittee endorsing a common definition of loss in both theft and fraud cases). Commentary by probation officers was favorable, *see* Fred S. Tryles, *A Critique of the Operation of the Theft and Fraud Guidelines from the Perspective of One Probation Officer*, 10 FED. SENT. REP. 131 (1997), and neither the Justice Department nor the Practitioners Advisory Group (the official advisory body representing the defense bar in Sentencing Commission matters) ever expressed opposition to the principle of consolidation.

107. *See* Sentencing Guidelines for the United States Courts, 66 Fed. Reg. 30512, 30540 (June 6, 2001) (setting forth Sentencing Commission's reasons for consolidating theft and fraud guidelines).

108. *See supra* notes 83-102 and accompanying text. For a more complete explanation of the operation of the U.S. Sentencing Guidelines generally, and the guidelines on economic crimes in particular, see Bowman, *Coping with "Loss," supra* note 103, at 472-90.

109. The Guidelines measure offense seriousness on the vertical axis of a sentencing grid. U.S.S.G. ch. 5, pt. A (2000). The unit of measurement on this axis is an "offense level." The "base offense level" for a crime is the number of offense levels awarded simply for conviction of the basic crime covered by the particular guideline in question. A defendant's final offense level will be the product of a process of adding to or subtracting from the base offense level as a result of other factors present in the offense. In economic crimes, one of the principal such factors is the amount of "loss." S*ee id*.; *see also* Bowman, *Coping with "Loss," supra* note 103, at 472-90.

cases,[110] and 6 in fraud cases[111]), while the offense level could increase by up to eighteen levels in fraud cases and twenty levels in theft cases, depending on the amount of "loss" found by the court.[112] More concretely, the maximum term of imprisonment a judge could impose on a first-time fraud offender based on the fact of conviction alone would be six months,[113] but that sentence could increase to more than five years based solely on the amount of loss.[114]

In the years following the Guidelines' adoption, the loss calculation became one of the most commonly litigated issues in federal sentencing law. Because the loss measurement is a primary determinant of sentence length in all crimes of dishonest acquisition, federal district court judges have been obliged to make loss findings in more than 9000 cases every year.[115] There are more than 1200 reported federal court opinions that discuss the loss finding in some way.[116] In addition to the sheer number of opinions on loss, disputes over the meaning of the term produced numerous splits of opinion between the federal circuits.[117]

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110. *See* U.S.S.G. § 2B1.1(a) (2000).

111. *See id.* § 2F1.1(a).

112. *See id.* §§ 2B1.1(b), 2F1.1(b).

113. *Id.* § 5A.

114. *See id.* §§ 2F1.1(b), 5A. The increase in maximum available guidelines sentence from six months to five years posited in the text assumes a first-time offender convicted of fraud with a resulting base offense level of 6 who stole $80 million, the maximum amount on the loss table. It also assumes no other adjustments to offense level other than that for "loss" amount.

115. Loss calculations are required in all fraud, larceny, and embezzlement cases, *see id.* §§ 2B1.1, 2F1.1. In 1999, federal judges sentenced 6144 fraud defendants, 2067 larceny defendants, and 949 embezzlement defendants. 1999 SOURCEBOOK, *supra* note 5, at 24, tbl. 11. In addition, loss calculations are often necessary in burglary and robbery cases, *see* U.S.S.G. §§ 2B2.1, 2B3.1 (2000). In 1999, federal courts sentenced 1771 robbery defendants, and fifty-three burglary defendants. 1999 SOURCEBOOK, *supra* note 5, at 24, tbl. 1.11. Thus, somewhere between 9000 and 11,000, or sixteen to twenty percent, of the 54,903 federal cases sentenced in 1999 required a determination of "loss." *See id.* This proportion has held roughly steady for some years. *See, e.g.*, 1995 ANNUAL REPORT, *supra* note 5, at 60, tbl. 18.

116. For example, a Westlaw search conducted on November 11, 2000 revealed over 1200 federal cases in which loss under Guideline Section 2B1.1 or 2F1.1 is at least mentioned. As of the same date, there were *at least* 300 officially reported federal appellate decisions under Section 2F1.1 *alone* in which the amount of loss was an issue of sufficient moment that the opinion discussed it in detail. *See* ROGER W. HAINES, JR. & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDE § 305 (CD-rom Edition 1, 2000) (The Federal Sentencing Guide provides one-paragraph summaries of significant sentencing issues decided in published opinions by federal courts of appeals. It does not summarize sentencing decisions in district court cases or in unpublished, though publicly available, appellate opinions.)

117. *See* Bowman, *Coping with "Loss," supra* note 103, at 464 n.3. In its statement of reasons for the 2001 economic crime amendments, the Sentencing Commission lists a number of the circuit splits resolved by the amendments. *See* Sentencing Guidelines for United States Courts, 66 Fed. Reg. 30512, 30541-45 (June 6, 2001) [hereinafter Statement of Reasons] (setting forth Sentencing Commission's reasons for adoption of economic crime package).

Perhaps even more significant than either the volume of litigation or the number of identifiable circuit splits was the overall sense of uncertainty, confusion, and sheer aggravation that emerged whenever lawyers and judges who dealt with federal white collar crime discussed loss.[118] An indication of this frustration can be found in a 1996 survey by the Federal Judicial Center of the attitudes toward the Guidelines of federal judges and probation officers.[119] The Federal Judicial Center asked judges and probation officers to rate the clarity of the twelve most commonly used guidelines. Clarity was defined as the "degree to which the terms and definitions in the guideline are understandable."[120] Both groups rated the fraud guideline (which, as we have seen, pivots on the definition of loss) second to last in clarity.[121]

Why has loss proven to be such a problem? No one disputes the notion that stealing more is worse than stealing less. Similarly, almost no one disagrees with the basic judgment at the heart of both the former and newly adopted economic crime guidelines that the sentences of thieves and swindlers should be determined in some significant part by the magnitude of the economic deprivations they caused or intended.[122] Where the Commission fell short between 1987 and 2001 was in the translation of a sound fundamental intuition into a just, doctrinally coherent, easy-to-apply set of rules.

The root of the loss problem was that the former theft and fraud guidelines did not contain a meaningful definition of the term. The descriptive commentary regarding loss following Sections 2B1.1 and 2F1.1 included a series of directives that neither singly nor together amounted to a coherent definition. The basic definition of loss announced in the theft guideline[123] and adopted by reference into the fraud guideline[124]—"the value of the property taken, damaged, or destroyed"[125]—used the language of larceny. The word "taken" is a term of art, denoting to an Anglo-American criminal lawyer the "taking" element of common

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118. See, for example, *United States v. Kaczmarski*, 939 F. Supp. 1176, 1182 n.7 (E.D. Pa. 1996), in which Judge Dalzell refers with obvious exasperation to the task of "construing the vaporous word loss." *Id.* The Second Circuit describes "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)).

119. MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FEDERAL JUDICIAL CENTER, THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY, REPORT TO THE COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE (1997)

120. *Id.* at 18.

121. *Id.* at 19.

122. There is, however, disagreement over the *degree* to which numeric measurements of economic harm should drive economic crime sentences. *See, e.g.*, Jon O. Newman, *Toward Guidelines Simplification*, 13 FED. SENT. 56 (2000) (arguing that the influence of loss amount on sentence length should be substantially decreased). This issue will be addressed further below. *See infra* notes 137-45 and accompanying text.

123. U.S.S.G. § 2B1.1, app. n.2 (2000).

124. *Id.* § 2F1.1, app. n.8.

125. *Id.* § 2B1.1, app. n.2.

law larceny, with its insistence on a transfer of possession of moveable personalty.[126] Outside the limited context of simple larceny-like offenses, this definition was virtually useless. For example, if "taken" retained some vestige of its common law meaning, when was property "taken" in a wire fraud or a check kite or a bankruptcy fraud or an insider trading case? And how? And from whom? Alternatively, if "taken" was intended to invoke no particular doctrinal association, what did it mean?

Aside from the larceny-based core definition, perhaps the most glaring definitional defect in the former loss rules was their treatment of causation. The former theft and fraud guidelines and the cases construing them created a puzzling patchwork, which looked roughly like this:

1. The relevant conduct guideline, Section 1B1.3, mandated a broad measurement of harm, saying that offense levels were to be determined based on "all harm[s] result[ing] from" a defendant's own conduct, and thus apparently set up a rule of pure "but for" causation.[127]

2. By contrast, both the former fraud and theft guidelines defined loss narrowly as the "thing taken," the corpus delicti of the crime.[128]

3. Moreover, former Section 2F1.1, Application Note 8(c), said only "direct damages" counted, and excluded "consequential damages."[129] Both these terms are drawn from contract law and are difficult, if not impossible, to apply in the criminal context.[130] If "consequential damages" was given its customary contract law meaning, Application Note 8(c) excluded from loss even economic harms directly caused by defendant's conduct and foreseeable to him.[131]

4. On the other hand, in cases of procurement fraud and product substitution, former Section 2F1.1, Application Note 8(c), specifically included in loss the "consequential damages" elsewhere excluded, if the loss was "foreseeable."[132]

5. Likewise, under the "relevant conduct" rules, if a defendant has

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126. *See* DRESSLER, *supra* note 40, § 32.04, at 510.

127. *See* U.S.S.G. § 1B1.3 (2000).

128. *See id.* §§ 2B1.1, app. n.2, and 2F1.1, app. n.8.

129. *See id.* § 2F1.1, app. n.8(c).

130. For a complete discussion of the problems created by the importation into the Guidelines of the contract terms "direct damages" and "consequential damages," see Bowman, *Coping with "Loss," supra* note 103, at 511-22.

131. The modern test for whether some alleged economic harm caused by a breach of contract is classified as a "consequential damage" is whether the harm was reasonably foreseeable to the breaching party. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4 at 569 (4th ed. 1995); A. CORBIN, CORBIN ON CONTRACTS. § 1010, at 79 (1964); *see also* U.C.C. § 2-715(2)(a) (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.") If a harm to a contract plaintiff was reasonably foreseeable to the breaching defendant, then it is ordinarily recoverable by the plaintiff absent some special contractual provision excluding such recovery. *See* U.C.C. § 2-715 & cmt. 3 (1998).

132. U.S.S.G. § 2F1.1, app. n.8(c) (2000).

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.[133]

6. In loan fraud cases, pursuant to former Section 2F1.1, Application Note 8(b), the loss to banks caused by a drop in value of pledged collateral was a part of the loss, regardless of whether it was foreseeable and despite the fact that such a loss is a classic "consequential damage."[134]

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

This list describes only some of the problems with measuring losses actually incurred, and deals not at all with the oddities of the former theft and fraud guidelines' treatment of loss in wholly or partially completed offenses. In short, in place of a coherent definition of a concept central to the sentencing of more than one-fifth of all federal defendants,[135] the former theft and fraud guidelines presented judges and lawyers with a jumble of rules developed piecemeal over the first decade of guidelines experience about what loss meant in particular situations.

Finally, there existed a concern among some observers that loss, even if better defined, was too influential in the sentencing calculus. These critics were troubled that loss, by far the largest factor in setting an economic crime sentence, failed to account for other considerations that ought to be important in sentencing economic criminals.

C. Sentence Severity in Economic Offenses

As noted above, the original Sentencing Commission consciously chose to set penalties for economic offenses above their pre-Guidelines levels.[136] Even so, to many observers, economic crime sentences still appeared quite low, both by comparison with sentences imposed for other offenses (particularly narcotics), and as measured by their moral seriousness and the damage they inflict on society.[137] Two points seemed particularly troubling. First, under the former guidelines, a defendant could steal a very substantial sum without being required to serve any prison time. For example, a first-time offender must have stolen more than $70,000 before any sentence of imprisonment was mandated (and the amount rose to $200,000 if the crime was a one-time occurrence involving only

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133. *Id.* § 1B1.3.

134. *See id.* § 2F1.1, app. n.8(b).

135. In 1999, of the 55,408 offenders sentenced in the federal courts, roughly 11,000 were sentenced for the offenses of fraud, larceny, embezzlement, burglary, or robbery, all of which involve calculations of loss amount under the applicable guidelines. *See* 1999 SOURCEBOOK, *supra* note 5, at 12 tbl. 3; U.S.S.G. §§ 2B1.1, 2F1.1 (2000).

136. *See supra* notes 81-87 and accompanying text.

137. Bowman, *supra* note 7, at 740. *See also* Catharine Goodwin, *The Case for a New Loss Table*, 13 FED. SENT. REP. 7 (2000).

minimal planning).[138] Second, defendants who stole obscenely large amounts of money received strikingly low sentences. For example, a swindler who stole between $20 million and $40 million would, if he pled guilty, be sentenced to only thirty-seven to forty-six months.[139]

By contrast, many members of the defense bar saw no need to increase sentences even for high-loss defendants.[140] Moreover, a number of observers both in and out of the defense bar felt that the theft and fraud guidelines were too rigid for offenders who stole relatively small amounts, and that judges ought to be accorded more flexibility to impose probationary or alternative sentences on such offenders.[141]

In the end, a compromise was struck. The Commission adopted a new loss table for the newly consolidated economic crime guideline.[142] The new table both increased sentences for high-loss offenders, and reduced sentences for low-loss offenders. In addition, the new guideline omits the two-level "more than minimal planning" adjustments contained in both the former theft and fraud guidelines,[143] and the "scheme to defraud more than one victim" adjustment in the former fraud guideline.[144] Instead of requiring a factual determination on the existence of more than minimal planning or multiple victims in virtually every case, the new guideline builds the two levels into its loss table beginning with cases in which the loss exceeds $120,000. The details of these adjustments, and

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138. The result was the same whether the crime was a "theft" or a "fraud." *Compare* U.S.S.G. § 2B1.1(b)(1)(I) (2000), *with* § 2F1.1(b)(1)(G) (2000). The $70,000 figure assumes a "more than minimal planning" adjustment under either former Section 2B1.1(b)(4)(A) or Section 2F1.1(b)(2)(A) of the Guidelines; the $200,000 figure assumes a simple crime with only one victim for which no such adjustment is required. Both figures assume a defendant who pleads guilty sufficiently early in the process to avail himself of the three-level reduction for acceptance of responsibility under Guideline Section 3E1.1(a), (b). Moreover, under the former guidelines, a first-time offender must have stolen more than $20,000 before a judge was required to impose even intermediate conditions of confinement such as home detention, community confinement, etc. (a figure that rose to $70,000 if the offense did not involve "more than minimal planning"). *See id.* § 2B1.1; ch. 5, pt. A.

139. This result assumes a first-time offender given a two-level "more than minimal planning" upward adjustment under Guideline Section 2F1.1(b)(2)(A) (2000), and a three-level acceptance of responsibility downward adjustment pursuant to Sections 3E1.1(a)-(b). *See also id.* ch. 5, pt. A.

140. Barry Boss, *Do We Need to Increase the Sentences in White-Collar Cases? A View from the Trenches*, 10 FED. SENT. 124 (1997) [hereinafter Boss, *Do We Need to Increase the Sentences in White-Collar Cases?*]; Barry Boss & Jude Wikramanayake, *Sentencing in White Collar Cases: Time Does Not Heal All Wounds*, 13 FED. SENT. 15 (2000); James E. Felman, *Comments of Practitioners' Advisory Group, Criminal Law Committee, and Probation Advisory Group on Proposed Changes to "Loss" Tables*, 13 FED. SENT. 19 (2000).

141. Goodwin, *supra* note 137, at 12.

142. U.S.S.G. § 2B1.1(b)(1) (2001).

143. *Id.* §§ 2B1.1(b)(4)(A), 2F1.1(b)(2)(A) (2000).

144. *Id.* § 2F1.1(b)(2)(B).

the rationales for them, have been treated elsewhere.[145] In any event, the new table is what it is. For judges and lawyers, an archeological foray into how the particular numbers were chosen is likely to be of little practical use. Hence, the new loss table will receive only incidental mention in the balance of this Article.

D. Money Laundering

Money laundering statutes were passed to address a phenomenon ancillary to all modern crimes committed for money—the ill-gotten gains must be transported and concealed from authorities, and criminals have learned to use the mechanisms and instruments of the modern financial system to accomplish these ends. The "laundering" of criminal proceeds not only facilitates the underlying offenses, but can be an evil in itself, leading to corruption of the financial institutions upon which legitimate modern commerce depends.[146] The money laundering problem is particularly acute in the narcotics trafficking area where narcotics traffickers have employed financial institutions to transform unwieldy stacks of drug cash into more readily transferrable and concealable forms of wealth. However, federal money laundering statutes do not distinguish between drug crimes and other offenses that generate illegal proceeds. The basic conduct prohibited is knowingly engaging in financial transactions involving funds believed to be derived from a long list of unlawful activities, including fraud and theft.[147]

The sentencing controversy involving money laundering arose from the conjunction of two facts. First, the original Guidelines set the penalties for money laundering quite high, with a base offense level of 20 or 23, depending on the particular statutory subsection under which the defendant was convicted, and additional upward adjustments based on the amount of money laundered.[148] Second, until now, the money laundering guidelines took no account of the sentence level for the crime that generated the laundered money. In consequence, a defendant who committed a $70,000 fraud crime for which the sentence under Section 2F1.1 would be ten to sixteen months could receive a sentence of thirty-three to forty-one months if he happened to deposit or wire transfer the proceeds in or through a bank and the government elected to use such transactions as the

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145. *See* Bowman, *Coping with "Loss," supra* note 103, at 499-500 (discussing abolition of more than minimal planning adjustment); Goodwin, *supra* note 137, *passim* (discussing modifications to loss table).

146. The most prominent example of the corrosive effects of money laundering on financial institutions and networks is the infamous *BCCI* case. *See* United States v. BCCI Holdings (Luxembourg), S.A., 46 F.3d 1185 (D.C. Cir. 1995) (describing BCCI litigation and resolving claims of defendant bank's branches to forfeited funds); United States v. BCCI Holdings (Luxembourg), S.A., 961 F. Supp. 287 (D.C. D.C. 1997) (holding that dealing with known rogue bank forecloses bona fide purchaser claim in forfeiture proceeding).

147. 18 U.S.C.A. § (1956 & 1994).

148. U.S.S.G. § 2S1.1(a)(b)(2) (2000).

basis of a money laundering charge.[149] Because it is virtually impossible to commit a fraud crime without engaging in one of the types of monetary transactions covered by the money laundering statutes, prosecutors have enjoyed the option of adding a money laundering charge to virtually any fraud indictment, thus racheting up the potential Guidelines penalty.[150]

Critics complained about this state of affairs on at least three grounds. First, where the financial transaction characterized as money laundering is really nothing more than a necessary incident of an otherwise unremarkable fraud or theft, imposition of higher money laundering penalties circumvents the judgment of the Sentencing Commission about the appropriate punishment for economic crime. Second, because money laundering charges are actually brought and prosecuted to conviction in only a small fraction of the economic crime cases in which they might theoretically be applied,[151] like cases are being treated dissimilarly, at the discretion of local federal prosecutors. Third, even where money laundering charges are not included in the indictment, or if included are not prosecuted to conviction, the looming threat of such charges and the resultant higher penalty is said to give prosecutors unfair plea bargaining leverage.

III. A PROCEDURAL HISTORY OF THE 2001 ECONOMIC CRIME PACKAGE: THE AMENDMENTS TO THE FORMER THEFT AND FRAUD GUIDELINES

The process that culminated in the theft and fraud components of the 2001 economic crime package had its genesis in the guidelines "simplification" initiative of former Sentencing Commission Chair Richard Conaboy.[152] Staff work on economic crime sentencing reform began in 1995.[153] In January 1997,

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149. *See id.* §§ 2F.1.1; ch. 5, pt. A; 25.1.1.

150. I speak here of the effect of money laundering counts on fraud penalties because fraud and theft are the subject of this Article. However, money laundering counts can also be used to increase sentences for other federal offenses, such as bribery or public corruption.

151. It is impossible to determine how many economic crime sentencings might have included money laundering counts had the government chosen to press the matter. However, national sentencing statistics are suggestive. In Fiscal Year 2000, 11,748 defendants were sentenced for larceny, fraud, embezzlement, forgery, counterfeiting, bribery, or tax offenses. U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 28, tbl. 12 (2001) [hereinafter 2000 SOURCEBOOK.] Almost all the offenses in these categories can serve as predicate offenses for money laundering. *See* 18 U.S.C. § 1956(b)(7) (1994). In 2001, an additional 23,002 defendants were sentenced for drug trafficking offenses, which are also predicate offenses for money laundering. 2000 SOURCEBOOK, *supra*. Nonetheless, in 2000, only 980 defendants were sentenced for money laundering. *Id.*

152. Although in the beginning the review of economic crime guidelines was only one small part of an ambitious effort to simplify the Guidelines generally, the 2001 economic crime package ultimately proved to be the only concrete result of the Conaboy Commission's simplification project.

153. *See* U.S. Memorandum of Frank O. Bowman, III, Special Counsel, U.S. Sentencing Commission, to Donald A. Purdy, Chief Deputy General Counsel, U.S. Sentencing Commission,

the Commission promulgated issues for comment on economic crime sentencing reform.[154] In the late summer of 1997, the first comprehensive proposal for consolidating the theft and fraud guidelines and redefining "loss" in terms of principles of causation was circulated to the Commission and other interested participants in the economic crime sentencing debate.[155]

In 1997, the Commission held its first public hearings on economic crime sentencing reform.[156] Interestingly, although debate would continue for another four years, the basic issues were already fairly well defined by the time of these first hearings. The Justice Department, the Criminal Law Committee (CLC) of the Judicial Conference, and probation officers generally favored modifying the loss table to increase sentences for high-loss offenders,[157] while the defense bar opposed such increases.[158] There was little dissent from the idea that

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Summary and Analysis of Judicial Interpretations of the Term "Loss" in U.S.S.G. §§ 2B1.1 and 2F1.1 (April 16, 1996) (on file with author).

154. 62 Fed. Reg. 152, 171-74 (1997).

155. The full proposal and analysis was later published as a law review article. *See* Bowman, *"Coping with Loss," supra* note 103; *see also* Frank O. Bowman, III, *Back to Basics: Helping the Commission Solve the "Loss" Mess with Old Familiar Tools*, 10 FED. SENT. REP. 115 (1997) [hereinafter Bowman, *Back to Basics*] (containing a condensed version of the reform proposal); Frank O. Bowman, III, *Appendix to Guest Editor's Observations: A Proposal for a Consolidated Theft/Fraud Guideline*, 10 FED. SENT. REP. 173 (1997) (containing the text of the proposed consolidated theft/fraud guideline).

156. A public hearing on changing the loss tables for the then-existing theft and fraud guidelines was held in the spring of 1997. *See* UNITED STATES SENTENCING COMM'N, *Public Hearing on Proposed Guideline Amendments* (Mar. 18, 1997), *available at* http://www.ussc.gov/hearings.htm, at 49-63 (testimony of Frederic H. Cohn, member of Sentencing Guidelines Committee of the New York Council of Defense Lawyers). Another "non-public" hearing on the loss table at which representatives of the Justice Department and the judiciary appeared was also held in the spring of 1997, *see 1997 Hearing Excerpts*, *supra* note 106, at 159 (testimony of Judge Gerald Rosen at October 1997 Sentencing Commission hearing recalling another hearing "back in the spring" on the loss tables); however, no public record of these proceedings can be found. A hearing addressing the interlocking questions of changing the tables and rewriting the theft and fraud guidelines themselves was held in October 1997. Full transcripts of the October hearing and copies of the written statements of the witnesses can be obtained at the Sentencing Commission website, *available at* http://www.ussc.gov/hearings.htm. An edited transcript of the October hearing appears in the Federal Sentencing Reporter. *See* 1997 Hearing Excerpts, *supra* note 106.

157. *See* Boss, *Do We Need to Increase the Sentences in White-Collar Crimes?*, *supra* note 140, at 124 ("Spearheading the movement to increase sentences in economic crime cases has been the Criminal Law Committee of the Judicial Conference."); *1997 Hearing Excerpts*, *supra* note 106, at 158 (testimony of Gregory Hunt, chair of the Probation Officers Advisory Group, noting that "probation officers were quite effusive about the streamlining and increased severity of the loss table and they wholeheartedly support its adoption").

158. Boss, *Do We Need to Increase the Sentences in White-Collar Crimes?*, *supra* note 140, at 127 ("By adopting either of the two current proposals, we are not only artificially and unnecessarily increasing the sentences in these economic crime cases, but also legitimizing as a

consolidating the theft and fraud guidelines would be desirable.[159] The tough questions were whether a wholesale rewrite of the economic crime sentencing rules generally, and the loss concept in particular, was really necessary,[160] and if so, additional questions posed whether the loss concept should remain at the heart of economic crime sentencing,[161] whether it needed to be redefined,[162] and whether any redefinition should be based on principles of causation.[163]

In January 1998, the Commission published for comment a comprehensive economic crime reform package that sought to consolidate the theft and fraud guidelines, revise the loss table, and redefine "loss."[164] This first officially proposed redefinition of loss, though still a work in progress, had already assumed the broad outlines that had been suggested in the October 1997 hearings and that would ultimately be adopted in April 2001. That is, actual loss was defined in terms of reasonably foreseeable harms resulting from the defendant's criminal conduct; the concept of intended loss was retained as a measurement of offense seriousness for wholly or partially uncompleted offenses; and a variety of special rules addressing particular problems of loss measurement were appended to the core loss definition.[165] Between January and April 1998, staff and outside groups continued to work on the package. In February 1998, Commission staff produced and circulated for comment a revised draft of the loss

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sentencing baseline the draconian and irrational sentencing schemes in drug cases.").

159. *See, e.g.*, Tryles, *supra* note 106, at 134 ("The Sentencing Commission has an opportunity to advance its goal of simplification by merging the current theft and fraud guidelines.").

160. *See, e.g.*, *1997 Hearing Excerpts*, *supra* note 106, at 157 (statement of Commission Chair Richard Conaboy, opening the hearing with the question, "Why should the Commission consider tackling this whole problem of the definition of loss?"); *id.* at 158, (testimony of Judge Gerald Rosen), 166 (statement of Commissioner Mary Harkenrider, ex-officio representative of the Justice Department, questioning whether anything more than "slight refinements" to the economic crime guidelines were required).

161. *See id*. at 158 (statement of James E. Felman, on behalf of the Practitioners Advisory Group, noting that, "[W]e agree that loss is the best starting point to determine the severity of the offense. We don't think loss is the only way to measure the severity of the offense and the offender's culpability—we just can't improve on it.").

162. *Id.* at 160 (testimony of Judge Gerald Rosen on behalf of the CLC, stating that, "I think the one consistent thing that we heard from all of us is that the core definition [of loss] needs to be redone.")

163. *Id.* at 159, 161, 162 (testimony of Professor Frank Bowman, urging that loss be redefined in terms of causation); *id.* at 163 (testimony of Judge Gerald Rosen on behalf of the CLC, agreeing that "any definition [of loss] ought to include the notions of causation, foreseeability and harm"). *See also* Frank D. Bowman, III: October 15, 1997 Hearing of the U.S. Sentencing Commission, *available at* http:\\www.ussc.gov/hearings/bowman.pfd.

164. 63 Fed. Reg. 602-35 (Jan. 6, 1998). For a general discussion of the status of the evolving debate on economic crime sentencing reform as it existed in early 1998, see Bowman, *Back to Basics*, *supra* note 155, at 115.

165. *Id.*

definition that had been published in January.[166] On March 5, 1998, the Commission held a public hearing on the pending economic crime proposals,[167] at which representatives of the Department of Justice,[168] the defense bar,[169] and the academy[170] testified. In April 1998, a revised version of the economic crime package came within one vote of obtaining the unanimous approval it required from the only four Commissioners then remaining.[171] The elements of the April 1998 package were quite similar to the ultimately successful 2001 package—consolidation of the theft and fraud guidelines, a revised loss table, a redefinition of "loss" in terms of causation ("reasonably foreseeable harms"), and a variety of special and ancillary rules. However, no further formal action was possible between 1998-99 because, by fall 1998, the terms of all the Commissioners had expired and the vacancies remained unfilled until December 1999.

Reconsideration of the loss definition was so plainly essential to any meaningful economic crime sentencing initiative that, even after it became clear

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166. This and several other working drafts are published in *The Final Redefinition of "Loss," Plus Five Preceding Drafts*, 13 FED. SENT. 43 (2000) [hereinafter *Final Redefinition*].

167. The March 5, 1998 hearing was held in San Francisco, California, in conjunction with the annual meeting of the White Collar Crime Section of the Criminal Justice Section of the American Bar Association. *Key Issues: Reassessing Sentences for Federal Theft, Fraud and Tax Crimes*, United States Sentencing Commission, Public Hearing (Mar. 5, 1998) [hereinafter Mar. 5, 1998 Hearing Transcript], *available at* http://www.ussc.gov/agendas/3_5_98/0305ussc.pfd. Copies of the written statements of the witnesses can also be obtained at the Sentencing Commission website, *available at* http://www.ussc.gov/agendas/hrg3_98.htm.

168. Katrina A. Pflaumer & Mary C. Spearing, Testimony Before the United States Sentencing Commission, Mar. 5, 1998, *available at* http://www.ussc.gov/agendas/3_5_98/dojfraud.htm (setting out position of Department of Justice on pending economic crime proposals, including proposed loss table changes and the February 1998 staff draft loss definition). *See also* Mar. 5, 1998 Hearing Transcript, *supra* note 167, at 68 (oral testimony of Mary Spearing); *id.* at 75, 88 (oral testimony of Katrina Pflaumer).

169. T. Mark Flanagan, Prepared Statement to the United States Sentencing Commission, Mar. 5, 1998 Public Hearing, http://www.ussc.gov/agendas/3_5_98/flanagan.htm (discussing the proposed loss redefinition published by the Commission in the January 1998 Federal Register and the February 1998 staff draft loss definition); David F. Alexrod, Statement to the United States Sentencing Commission, Mar. 5, 1998, *available at* http://www.ussc.gov/agendas/3_5_98/axelrod.pfd (discussing proposed amendments to special offense characteristic provisions of theft and fraud guidelines). *See also* Mar. 5, 1998 Hearing Transcript, *supra* note 167, at 55, 98 (oral testimony of Gerald H. Goldstein); *id.* at 61, 96 (oral testimony of David Axelrod); *id.* at 73 (oral testimony of Ephraim Margolin); *id.* at 85 (oral testimony of T. Mark Flanagan).

170. Frank O. Bowman, III, United States Sentencing Commission Hearing, Mar. 5, 1998, Prepared Statement, *available at* http://www.ussc.gov/agendas/3_5_98/bowman98.pfd (containing a detailed critique of the February 1998 staff draft loss definition), and Mar. 5, 1998 Hearing Transcript, *supra* note 167, at 100 (oral testimony of Frank O. Bowman, III).

171. The version of the loss redefinition considered by the Commission in April 1998 is reproduced in *Final Redefinition*, *supra* note 166, at 45.

that the dwindling Conaboy Sentencing Commission membership would be unable to bring reform to fruition, they arranged for the loss redefinition so nearly passed in April 1998 to be "field-tested" during the summer of 1998.[172] The response to the proposed redefinition by the federal judges and probation officers who participated in the field test was overwhelmingly positive.[173] Consequently, even during the 1998-99 hiatus with no sitting Commissioners, the Commission staff, in consultation with interested outside groups, continued to work on refining the draft loss definition, with particular attention to feedback received during the field test. The staff produced a proposal for a revised definition in May 1999.[174] During 1999, work also continued on possible revisions of the loss table.

When the seven empty seats around the Sentencing Commission table were refilled in December 1999, the newly constituted Commission, under the chairmanship of Judge Diana Murphy, made continuation of the economic crime initiative a top priority. In October 2000, the Commission sponsored its *Third Symposium on Crime and Punishment in the United States: Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses* at George Mason University School of Law, Arlington, Virginia.[175] The first day of the symposium was devoted to discussion of problems in sentencing theft and fraud cases, particularly the problems in defining "loss."[176]

Work on the economic crime package continued following the symposium. In January 2001, the Commission published for comment a new set of economic crime reform proposals, including options for revising the loss table and for redefining "loss."[177] The Commission published two proposals for redefining

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172. UNITED STATES SENTENCING COMM'N, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission* (Oct. 20, 1998), *available at* http://www.ussc.gov.

173. *Id.*

174. *Final Redefinition*, *supra* note 166, at 47 (text of Proposed Loss Redefinition, May 1999 Staff Draft).

175. UNITED STATES SENTENCING COMM'N, *Third Symposium on Crime and Punishment in the United States: Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses* (Oct. 12-13, 2000) [hereinafter *Symposium Proceedings*]. Video webcasts of most of the Economic Crime Symposium proceedings can be viewed on the Sentencing Commission website, http://www.ussc.gov.

176. *Symposium Proceedings*, *supra* note 175, at 3-132. *See also* Frank O. Bowman, III, *Briefing Paper on Problems in Redefining "Loss,"* 13 FED. SENT. 22 (2000) (briefing paper on problems of "loss" definition provided to small group discussion leaders prior to the October 2000 Economic Crime Symposium); Transcript, *Plenary Session IV: Major Issues Related to Determination of "Loss" as a Measure of Offense Seriousness and Offender Culpability*, 13 FED. SENT. REP. 31 (2000) [hereinafter 2000 Symposium Transcript] (transcript of the plenary session of the Economic Crime Symposium at which the small group leaders summarized the results of their discussions on redefining "loss").

177. Sentencing Guidelines for the United States Courts, 66 Fed. Reg. 7962 (Jan. 26, 2001) [hereinafter January 2001 Commission Draft].

"loss," a staff draft containing a number of options on each of the contested points, and a separate proposal submitted by the Committee on Criminal Law of the United States Judicial Conference.[178]

The views of the CLC on loss and the economic crime package generally seem to have been particularly influential among the Commissioners.[179] The final proof of their influence came as the deadline for action in the 2000-01 amendment cycle approached. Preparatory to the Commission's March 2001 meeting, Commission staff prepared yet another draft of a reformed "loss" definition.[180] The March 2000 staff draft would have abandoned the foreseeability-based definition of loss that had been widely accepted since the 1998 field test, and suggested reinstating concepts such as "consequential damages" that (as will be discussed below[181]) generated much of the confusion under the former guidelines. At the March 2001 Commission hearing, the judges of the Sentencing Guidelines Subcommittee of the CLC submitted a written statement[182] and testified forcefully in favor of their own proposal. Shortly thereafter, the Commission voted to adopt the final economic crime package, including a reformed loss definition that conformed to the CLC proposal on almost every significant issue.

The final procedural point of interest regarding the 2001 economic crime package is that, following passage of the package, the Commission published a detailed explanation of the newly adopted rules.[183] This explanatory material is a welcome departure from prior practice, and will doubtless prove useful to judges and practitioners.

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178. *Id.* at 7992-98. *See also* Letter of Hon. William W. Wilkins, Jr., Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Chair and Members of the U.S. Sentencing Commission (with attachments) (Nov. 9, 2000) (on file with author). For a detailed discussion of the November 2000 CLC "loss" definition proposal, see Frank O. Bowman, III, *A Judicious Solution: The Criminal Law Committee Draft Redefinition of the "Loss" Concept in Economic Crime Sentencing*, 9 GEO. MASON L. REV. 451 (2000).

179. The CLC was an interested and active participant from the very beginning of the Sentencing Commission's consideration of economic crime sentencing reform. Representatives of the CLC testified at Commission hearings and were heavily involved in negotiations over the shape of the package formally presented to the Sentencing Commission in April 1998. *See, e.g.*, *1997 Hearing Excerpts*, *supra* note 106, at 167 (testimony of Hon. Gerald Rosen before U.S. Sentencing Commission on behalf of the CLC); Gilbert, *supra* note 105, at 128 (statement by then-Chair of CLC Sentencing Guidelines Subcommittee endorsing a common definition of loss in both theft and fraud cases).

180. *Final Redefinition*, *supra* note 166, at 51 (Proposed Redefinition of "Loss": March 2001 Sentencing Commission Staff Draft).

181. *See infra* notes 207-29 and accompanying text.

182. Committee on Criminal Law, Judicial Conference of the United States, *Criminal Law Committee Comments on Proposed Changes to "Loss" Definition*, 13 FED. SENT. 41 (2000) ([hereinafter *CLC Comments*].

183. Statement of Reasons, *supra* note 117 (setting forth Sentencing Commission's reasons for adoption of economic crime package).

IV. AN ANALYSIS AND CRITIQUE OF THE MOST IMPORTANT PROVISIONS OF THE 2001 ECONOMIC CRIME PACKAGE

A. The Fundamental Choices

The two most important decisions made in the course of the debate over the 2001 Economic Crime Package were, first, to retain "loss"—pecuniary harm to the victim—as the primary measure of offense seriousness in economic crime, and second, to redefine loss in terms of causation. Before examining the specifics of the amendments adopted by the Commission, it is important to consider these fundamental choices.

1. The Retention of "Loss" as the Core Measurement of Offense Severity.—A crime occurs when there is a volitional act attended by a culpable mental state and the act causes, or at least risks causing, a harm.[184] All these concepts—act, mental state, cause, and harm—are relevant both to the threshold question of the existence of criminal liability and to assessing offense seriousness for purposes of assigning appropriate punishment.[185] Throughout the long economic crime sentencing debate, the Commission wrestled with the concern that, in the case of completed economic crimes, heavy reliance on a quantitative measurement of loss to determine offense level overemphasizes harm to the near-exclusion of the other traditionally relevant components of offense seriousness, particularly those relating to the defendant's culpable mental state. Conversely, the established rule for wholly or partially inchoate economic offenses that "loss" should be the greater of actual or intended loss[186] could be argued to overemphasize mental state at the expense of considerations of actual harm.[187] In the end, however, the Commission retained loss as the linchpin of economic crime sentencing. Although the Commission never explicitly set out its reasons for adhering to a loss-based model,[188] three considerations may have proven persuasive.

First, although actual loss (even when awkwardly defined as it was under the former Guidelines) plainly measures harm, it also serves as a gauge of the

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

185. "[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).

186. *See* U.S.S.G. §§ 2B1.1, app. n.2 and 2F1.1, app. n.8 (2000).

187. The argument is that by treating an incomplete attempt to steal or swindle $X as the equivalent of actually stealing $X, the Guidelines overemphasize mental state in comparison to actual harm.

188. In its statement of reasons for adopting the economic crime package, the Commission addressed a number of the specific elements of the loss definition, but did not explain the fundamental choice to adhere to a loss-centered system. *See* Statement of Reasons, *supra* note 117, at 30540-42 (setting forth Sentencing Commission's reasons for adoption of economic crime package).

defendant's guilty mind. The persistent historical impulse to rank property crimes by the value of property stolen rests in part on a judgment about mental state. Recall that the mental state element of virtually all economic crimes is some variant of an intent to steal, defraud, or otherwise deprive the victim of the use or benefit of his property.[189] Thus, from the point of view of statutory law, all convicted thieves, embezzlers, and con artists are formally indistinguishable as regards *mens rea*. Even so, stealing more is worse than stealing less and merits greater punishment, not only because a larger loss inflicts a greater harm, but also 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 small one. To this extent, actual loss is not a bad proxy for mental state. (And, of course, intended loss is a direct measurement of culpable mental state.)

Second, careful study of the pre-reform economic crime guidelines reveals that they did not merely rely on either actual or intended loss as crude proxies for mental state, but had already identified and provided specific offense level adjustments for most of the factors relating to mental state traditionally thought important in the imposition of economic crime sentences. The only systematic study of federal sentencing practices for "white-collar" offenders was conducted by Wheeler, Mann, and Sarat in 1988, before the Guidelines' promulgation, and surveyed federal judges about the sentences they gave economic criminals and the reasons for giving them.[190] The survey confirmed the original Sentencing Commission's finding[191] that the amount of planning activity and the complexity of the criminal scheme are considered important by judges in sentencing.[192] The 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. Moreover, Wheeler and his colleagues identified other factors—including leadership role within the criminal undertaking,[193] whether the defendant betrayed a position of trust,[194] indications of genuine contrition,[195] and cooperation with authorities upon apprehension[196]—that entered into judges' sentencing decisions.

All of these considerations are related to assessments of mental state (as well as to other sentencing considerations such as assessment of future dangerousness, likelihood of rehabilitation, and harm to the community), and all are accounted for in the former Guidelines' structure. Complexity of scheme and extent of planning activity were dealt with through the two-level upward adjustment for "more than minimal planning" included in both the former theft and fraud

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189. *See supra* note 40 and accompanying text.

190. STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 1-5 (1988) (describing authors' research methods).

191. *Supra* note 87 and accompanying text.

192. WHEELER ET AL. *supra* note 190, at 93-94.

193. *Id.* at 97-102.

194. *Id.*

195. *Id.* at 120-21.

196. *Id.*

guidelines.[197] The other listed considerations were (and continue to be) accounted for in guidelines applicable to all types of offenses. The defendant's role, as leader or follower, can generate upward or downward adjustments of up to four offense levels.[198] Abuse of a position of trust is penalized by a two-level upward adjustment.[199] Contrition is at least the ostensible subject of the "acceptance of responsibility" guideline.[200] The biggest potential sentencing rewards are reserved for defendants who provide "substantial assistance" to the government in investigating and prosecuting others.[201] These offense level adjustments prove on inspection to account for almost all the factors commonly thought relevant to assessing a financial felon's state of mind during the offense and after his apprehension. All of these adjustments, with the notable exception of the "more than minimal planning" provisions of the former theft and fraud guidelines, are retained in the revised economic crime guideline structure.[202]

One might nonetheless contend that, even though the Guidelines *identify* most of the factors other than loss relevant to assessing the relative seriousness of economic crimes, loss nonetheless receives undue *weight* in the sentencing calculus. After all, a defendant's offense level could be increased by up to twenty levels for amount of loss under the former theft guideline,[203] while the maximum increase or decrease for any of the other factors just listed was (and remains) four.[204] Part of the response to this argument is implicit in the very fact that loss serves multiple purposes. That is, actual loss is not only a direct measure of harm, but also an important proxy measurement of *mens rea*. Similarly, intended loss serves as a direct measurement of mental state, but also as a rough measure of the risk of real harm presented by the defendant's conduct.[205] Thus, loss, both actual and intended, properly looms larger than other

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197. U.S.S.G. § 2B1.1(b)(4)(A) (2000); *id.* § 2F1.1(b)(2)(A).

198. *Id.* §§ 3B1.1-1.2.

199. *Id.* § 3B1.3.

200. *Id.* § 3E1.1(a) (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.

201. *Id.* § 5K1.1. *See* Bowman, *supra* note 7, at 722-24 (discussing sentence reductions for substantial assistance under § 5K1.1); Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7 (1999).

202. As I will discuss below, *see infra* Part IV.H, the Commission addressed the deficiencies of "more than minimal planning" by abolishing that adjustment and substituting enhancement for "sophisticated means" and a graduated adjustment for number of victims.

203. U.S.S.G. § 2B1.1(b)(1)(U) (2000).

204. *Id.* §§ 3B1.1-1.2 (providing for four-level upward or downward adjustments for role in the offense).

205. Speaking broadly, a criminal defendant who intends to steal $1 million, and though unsuccessful, engages in enough completed conduct to subject himself to criminal liability, presents

more narrowly focused sentencing factors.

Moreover, careful reflection on the Guidelines' structure further diminishes, if it does not entirely extinguish, the argument that undue weight is placed on loss. The Guidelines' Sentencing Table is logarithmic, with each increase of two offense levels representing an increase in minimum sentence length of six months or twenty-five percent, whichever is greater. Thus, a mere two-level adjustment for role in the offense, abuse of trust, acceptance of responsibility, or the like will increase or decrease the otherwise applicable sentence by at least twenty-five percent. For example, a defendant who stole $100,000 from his employer, thus abusing a position of trust, would (under the former theft guideline) receive a sentence of ten to sixteen months based on the loss amount alone, but would see his minimum sentence increase by five months or fifty percent as a consequence of the two-level abuse of trust enhancement. If the loss were $400,000, the abuse of trust enhancement would increase the defendant's minimum sentence thirty-three percent from eighteen to twenty-four months to twenty-four to thirty months. Viewed in this light, it is difficult to sustain the position that loss is overemphasized as compared to a factor like abuse of trust when such a factor increases by thirty-three to fifty percent a sentence that would be required by loss amount alone.[206]

The third and final consideration that may have cemented the Sentencing Commission's continued reliance on the loss measurement was that by redefining actual loss in terms of causation, the Commission was able to make loss a better proxy measurement of the defendant's guilty mind than it had been under the former definition. To see why this is so, let us consider the Commission's decision to adopt a causation-based definition of actual loss.

2. The Decision to Define "Loss" in Terms of Causation.—As described above,[207] the "definition" of actual loss scattered in bits and pieces through the commentary on the former theft and fraud guidelines was a hodgepodge—a core definition ("the value of the property taken, damaged, or destroyed"[208]) drawn from the common law of larceny combined with an apparent rule of causation derived by negative inference from the exclusion of a classification of harms ("consequential damages") drawn from civil contract law,[209] plus a gaggle of special rules. Virtually no one defended the old definition. The problem was to identify core principles upon which a new coherent definition could be based. More concretely, the difficulty was to define loss in a way that would account simultaneously for the amount of harm caused by the economic criminal's conduct and for the relationship between that harm and the defendant's state of mind.

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a greater risk to society than a defendant who commits the same quantum of culpable conduct but intends to steal only $10,000.

206. Of course, the force of this argument depends to some degree on which you count first, loss or enhancements such as abuse of trust, role in the offense, etc.

207. *See supra* notes 127-35 and accompanying text.

208. U.S.S.G. § 2B1.1, app. n.2 (2000).

209. *Id.* § 2F1.1, app. n.8(c).

Even in completed offenses, the simple equivalency between harm inflicted and offense seriousness becomes more complex when the defendant's criminal conduct causes harms that the defendant did not specifically desire (even though he may have realized that they might well result), or from which he did not personally benefit. For example, a defendant in a fraudulent loan application case, hopeful that his "ship would come in" in time to make repayment, may not have intended that the bank lose its loan money. Or the author of a telemarketing scheme might not intend that his elderly victims lose their homes as a result of losing their retirement savings to the telemarketer. In these and many other cases, whether the defendant is to be held culpable for particular losses to victims, and thus whether the loss number and perhaps his offense level may be increased, will depend on the legal question of *causation*. In other words, was the causal link between the defendant's conduct and the harm that resulted sufficiently direct that the law should hold the defendant responsible and increase his punishment accordingly?

The literature of criminal law, contracts, and torts usually conceives of causation problems as having two components, customarily labeled "cause-in-fact" and legal cause.[210] Cause-in-fact is about determining the causal relationship between a defendant's act and a subsequent harm to another.[211] It asks whether the conduct truly was a part of the chain of events in the physical world that brought about the harm. Legal cause asks a different question: Assuming that the defendant's conduct truly did play a role in bringing about the harm, is it just to impose legal liability for the harm concededly caused?[212] For example, a hiker who dislodges a pebble on a mountainside may start an avalanche that obliterates a village below. Cause-in-fact is concerned only with the issue of whether the dislodged pebble started the avalanche. Legal cause is about whether, assuming that the pebble did cause the slide, the hiker should, as a matter of law and social policy, be held accountable and punished for the destruction of the village and the death of the villagers.

In both civil and criminal law, the most common causation standard is "reasonable foreseeability."[213] To a certain extent, the familiar reasonable foreseeability standard conflates the analytically distinct questions of cause-in-fact and legal cause. That is, under a reasonable foreseeability standard, a defendant will be held civilly liable or criminally culpable for harms that were caused in fact by defendant's conduct, in the sense that they would not have occurred but for defendant's conduct, and were, at the time of defendant's illegal conduct, foreseeable to a reasonable person in defendant's position. The former economic crime guidelines did not address the issue of causation of loss, except

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210. For an extended discussion of the problem of causation in economic crime sentencing, as well as the relationship of thinking about causation in other areas of the law to this problem, see Bowman, *Coping with "Loss," supra* note 103, at 527-36.

211. *Id.* at 530-31.

212. *Id.* at 532-36.

213. *Id.*

indirectly.[214] The newly consolidated economic crime guideline not only addresses causation, but defines actual loss in causal terms. "Actual loss" will now mean "the reasonably foreseeable pecuniary harm that resulted from the offense."[215]

The decision to define loss in terms of causation came only after the Commission considered and rejected a series of objections:

a. Leaving causation undefined was not a viable option.—From time to time during the loss debate, it was suggested that placing a causation standard in the loss definition was just too troublesome, and that the status quo should be maintained by omitting any reference to cause. This was not a tenable option. No coherent definition of loss is possible without a specification of the required causal nexus between the crime and economic harms that are to be counted as loss. Even if the Commission had ignored the question of causation, courts construing the economic crime guidelines do not have that luxury. The causation issue is latent in every loss determination, regardless of the prevailing formal definition of the term, and was the pivotal question in many cases under the old definition.[216] Moreover, a well-defined causation standard not only provides the immediate rule of decision in some number of cases, but serves as the central organizing principle against which special rules governing particular loss measurement problems should be measured.

b. Reasonable foreseeability is the best available causation standard.—There were those who, while conceding that some causal standard was doubtless necessary, remained skeptical of the particular standard—"but for" causation plus reasonable foreseeability—embodied in the 2001 economic crime

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214. *See supra* notes 127-35 and accompanying text (describing the patchwork treatment of causation implied by current guidelines provisions, including the relevant conduct guideline); U.S.S.G. § 1B1.3 (2000); *see also id*. § 2F1.1, app. n.8(c) (inclusion of the contracts term "consequential damages").

215. U.S.S.G. § 2B1.1, app. n.2(A)(i) (2001).

216. *See, e.g.*, United States v. Hicks, 217 F.3d 1038 (9th Cir. 2000) (employing proximate cause analysis to determine loss), *cert. denied*, 531 U.S. 1037 (2000); United States v. Neadle, 72 F.3d 1104 (3d Cir. 1995) (discussing the necessary causal connection between the conduct of a defendant who lied about the undercapitalization of his insurance company and insurance losses sustained in the wake of Hurricane Hugo), *amended* 79 F.3d 14 (1996). *See also* United States v. Yeaman, 194 F.3d 442 (3d Cir. 1999) (rejecting zero loss where defendant's misrepresentations had "but for" causal connection to loss), *appeal after remand* 248 F.3d 228 (3d Cir. 2001); United States v. Green, 114 F.3d 613 (7th Cir. 1997) (charging nurse who created false bills as part of insurance fraud scheme with entire loss, including payments for pain and suffering, because insurance settlements are customarily based on size of medical bills); United States v. Copus, 110 F.3d 1529 (10th Cir. 1997) (finding in loan fraud case that pecuniary harm attributable to false statement constituted loss); United States v. Cheng, 96 F.3d 654 (2d Cir. 1996) (wholesaler who accepted food stamps from restaurants caused loss); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (suggesting proximate cause analysis); United States v. Krenning, 93 F.3d 1257 (5th Cir. 1996) (finding district court's method of valuing loss bore no reasonable relation to harm from fraud).

package.[217] However, none of the theoretically available alternative standards withstood careful scrutiny.[218] On the one hand, a pure "but for" causation standard would be too inclusive. Chains of cause and effect run on infinitely through time. To hold a defendant criminally responsible for every adverse pecuniary consequence of his wrongdoing, no matter how remote or unforeseeable, plainly would be unfair to the defendant.

Conversely, limiting "loss" to intended economic harms—those the defendant consciously desired—would be too restrictive a measurement of offense seriousness. If a corporate treasurer embezzles company funds to speculate in futures trading or to place bets at the dog track, he may not "intend" to deprive the company of the money. He may honestly "intend" to make good his defalcations, with interest, but when the orange crop freezes or the dogs don't run, his good intentions do not reduce the company's financial loss and should not reduce the defendant's sentence. When the owner of a business starts kiting checks to tide over cash flow problems, he may hope that his business will turn a corner and all the checks can be made good. But when the corner is not turned and the kite collapses leaving banks holding hundreds of thousands of dollars of worthless paper, the economic harm to the banks is not lessened by the defendant's unfounded optimism. When a real estate swindler lies to the bank financing a development, to his partners, to purchasers of the lots, and to contractors working on the project, he may intend to steal for himself only a small fraction of the money and resources invested in the project. But the entirely predictable result of his crimes may be the collapse of the entire undertaking and financial harm to the bank, his partners, the purchasers, and the contractors far in excess of the personal gain on which the swindler's attention was focused. In short, limiting actual loss to the amount subjectively intended by the defendant does not accurately measure the economic harm caused by the defendant's crimes, and it permits the defendant to limit his sentencing exposure by making difficult-to-disprove claims about his benevolent intentions or about his failure to consider the likely consequences of his crime.

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217. This line of thinking would seem to have been the impetus behind one of the options in the Commission staff proposal published in January 2001, as well as in the loss definition in the March 2001 staff draft. In January 2001, the staff offered as Section 2(A) [Option 2] the option of defining "actual loss" as "the pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." *See* January 2001 Commission Draft, *supra* note 177, at 7995. The commentary accompanying Option 2 of the January 2001 staff draft stated that the purpose of this option would be to "make clear 'but for' causation is required but without concept of reasonable foreseeability." *Id.* at 7993. The March 2001 staff draft would have defined "actual loss" to mean: ". . . monetary loss and property damage that resulted from the offense . . . [not including] consequential damages." *See Final Redefinition*, *supra* note 166, at 51.

218. For an excellent summary of the debate over competing standards of causation for loss, see the statement of John D. Cline, facilitator of one of the break-out groups at the October 2000 Sentencing Commission Economic Crime Symposium, 2000 Symposium Transcript, *supra* note 176, at 33-34 (summarizing the discussion in his break-out group over possible causation standards for loss and reporting the consensus that the best standard was reasonable foreseeability).

It became clear that a proper causation standard for loss would lie somewhere between the purely objective standard of "but for" causation and a purely subjective inquiry into the defendant's intentions. The loss definition in the 2001 economic crime package fits this bill. It insists, as a minimum, that the defendant's offense have been a cause-in-fact of the economic harm at issue. However, it limits the defendant's sentencing liability to those losses foreseeable to a reasonable person.

c. The criminal law traditionally imposes punishments for reasonably foreseeable harms caused by a defendant's criminal conduct.—From time to time, it was suggested that holding defendants criminally responsible for reasonably foreseeable harms caused by their illegal conduct was a radical innovation. Of course, exactly the reverse is true. The concept of foreseeability has long been a staple of analysis both in determining guilt and in imposing sentences.[219] Foreseeability is expressly an element of crimes where the prohibited mental state is criminal negligence[220] and even the most aggravated degrees of recklessness.[221] It is also integral to determinations of guilt for crimes in which the ostensible *mens rea* involves intentionality or knowledge.[222] 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.[223] In cases of accomplice liability, an accomplice "is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets."[224] The felony murder rule, which imposes the highest

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219. "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. 1995) (Becker, J., concurring and dissenting).

220. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(d) (1985) (defining criminal negligence to require that defendant should have been aware of a substantial and unjustifiable risk of harm).

221. *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 (Crim. App. 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).

222. *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: "[w]ith intent to prevent . . . a police officer . . . from performing a lawful duty, he causes physical injury to [the officer]," when an officer frisked a struggling defendant and cut his hand on the knife, because the injury was foreseeable to defendant); State v. Williquette, 385 N.W.2d 145, 147, 150 (Wisc. 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").

223. Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). *See also* United States v. Laurenzana, 113 F.3d 689, 693-99 (7th Cir. 1997) (defendant guilty of conspiracy to commit mail fraud where he enters scheme in which it is reasonably foreseeable that mails will be used).

224. People v. Croy, 710 P.2d 392, 398 n.5 (Cal. 1985) (citing People v. Beeman, 674 P.2d

available degree of criminal homicide for killings occurring during the commission of certain dangerous felonies, in effect substitutes foreseeability of death for the intent to cause it.[225]

Foreseeability of harm is also widely employed as a determinant of the harms to be considered in sentencing. Even before the 2001 economic crime sentencing reforms, the Guidelines themselves repeatedly used foreseeability as the dividing line between those harms which count for measuring offense seriousness and those which do not.[226] Inclusion of reasonably foreseeable harms in the criminal sentencing calculus has received the imprimatur of the United States Supreme Court, even in the capital sentencing context.[227]

1318, 1326 (Cal. 1984)). *See generally* DRESSLER, *supra* note 40, § 30.05[B][5].

225. 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. LAFAVE & SCOTT, *supra* note 34, § 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 defendant's felony. *Id.* § 7.5(d), at 626-27.

226. *See, e.g.*, U.S.S.G. § 1B1.3(a)(1)(B) (2000) (dictating that sentencing be based on harms resulting from the foreseeable conduct of defendant's criminal partners); *id.* § 2F1.1, app. n.8(c) (including in "loss" foreseeable consequential damages in procurement fraud and product substitution cases); *see also id.* § 2F1.1, app. n.1(a) (authorizing a departure for "reasonably foreseeable, substantial non-monetary harm"); *id.* § 2F1.1, app. n.10(c) (authorizing departure for "reasonably foreseeable" physical, psychological, or emotional harm); United States v. Sarno, 73 F.3d 1470, 1500-01 (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, hence putting the bank's money at risk.)

227. In *Payne v. Tennessee*, 501 U.S. 808, 818 (1991), 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 had nothing to do with the "blameworthiness of a particular defendant." (quoting Booth v. Maryland, 482 U.S. 496, 504, 505 (1987)). Justice Souter, in his concurrence, responded to this line of 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. Said Justice Souter:

> *Murder has foreseeable consequences*. . . . Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death . . . . *The foreseeability of the killing's consequences imbues them with direct moral relevance*, . . . and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the kinds of consequences that were obviously *foreseeable*.

Id. at 838-39 (Souter, J., concurring) (emphasis added).

In dissent, Justice Stevens tacitly conceded that impact on surviving victims would be relevant if foreseeable. His argument was simply that the majority's holding

A persistent, and in my view ultimately persuasive, argument in favor of employing notions of causation and reasonable foreseeabiliy to define loss was that these concepts were familiar tools to judges and lawyers faced with the task of determining the proper reach of responsibility for the harms caused by legally culpable conduct.[228]

d. A reasonable foreseeability standard requires an assessment of the defendant's blameworthiness by requiring a nexus between the defendant's state of mind and harms counted as loss.—As noted above, a number of the participants in the loss debate expressed concern that heavy reliance on a quantitative measure of loss to determine offense seriousness overemphasized harm as compared to considerations of mental state and other indicators of blameworthiness.[229] In my view, this criticism was somewhat misconceived because loss, however defined, is always a rough proxy measurement of a defendant's guilty mind, at least insofar as we can agree that a plan to steal a lot is more blameworthy than one to steal a little. Moreover, the definition of loss finally included in the 2001 economic crime package represents an improvement over the status quo precisely because it requires a judicial judgment about a defendant's fault for identified harms. It is unjust to put someone in prison for harms he neither intended nor could reasonably have anticipated would result 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 which the defendant either anticipated or could and should have anticipated. The new reasonable foreseeability standard obliges the sentencing court to consider the facts of the case from the perspective of a reasonable person in defendant's situation when it separates harms for which a defendant ought justly to be punished from those for which he should not.

B. The Details of the New Definition of Actual Loss

The new consolidated economic crime guideline defines "actual loss" to mean "the reasonably foreseeable pecuniary harm that resulted from the

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> permits a jury to sentence a defendant to death because of harm to 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 but not in another.

Id. at 863 (Stevens, J., dissenting) (emphasis added).

228. The familiarity of these concepts was a theme sounded from the outset of the economic crime sentencing debate. *See* Bowman, *Coping with "Loss," supra* note 103, at 536; Bowman, *Back to Basics*, *supra* note 155, at 119.

229. *See supra* Part IV.A.2.b; *see also 1997 Hearing Excerpts*, *supra* note 106, at 162 (colloquy of Commissioner Deannell Tacha and Professor Frank Bowman); *id.* at 164 (testimony of Professor Frank Bowman); Newman, *supra* note 122, *passim*; and the comments of Judge Jon O. Newman, Senior Judge, United States Court of Appeals for the Second Circuit, and others, at the Second Plenary Session of the Third Symposium on Crime and Punishment in the United States, Oct. 12, 2000, *available at* http://www.ussc.gov/AGENDAS/symposium.htm.

offense."[230] The key term "reasonably foreseeable pecuniary harm" means "pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."[231] In combination, these two provisions should prove to be a sound, workable core definition of actual loss. Several fine points deserve additional analysis.

1. The Limitation to Harm That "Resulted from" the Offense.—

a. "But for" causation.—As noted above, the concept of causation in the law has two elements, cause-in-fact and legal cause.[232] In the new loss definition, reasonable foreseeability is the standard for legal cause. The phrase "resulted from" addresses cause in fact. In its statement of reasons accompanying the economic crime package, the Commission makes clear that a loss that "resulted from" an offense is one that would not have occurred "but for" the occurrence of the offense.[233]

b. Temporal limitations on includable losses.—Notice that the phrase "resulted from the offense" is expressed in the past tense. This choice of words implies that, in order to be counted in loss, pecuniary harms must already have manifested themselves in some way at the time loss is calculated. The issue of time-of-measurement of loss is addressed in detail below in Part IV.E.

2. The Meaning of "the Offense".—Nearly all of the debate over loss focused on the concept of harm and the proper definition of the causal link between culpable conduct and includable harm. Much less discussed was the question of what conduct should count as the starting point of the chain of cause and effect leading to includable harm. All the early drafts of the loss definition contained language specifying that loss was harm resulting from conduct for which the defendant was accountable under the relevant conduct guideline, Section 1B1.3.[234] The January 2001 CLC draft also included this specification. The last two Commission staff drafts—the January 2001 draft published in the

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230. U.S.S.G. § 2B1.1, app. n.2(A)(i) (2001).

231. *Id.* § 2B1.1, app. n.2(A)(iv).

232. *See supra* notes 210-12 and accompanying text.

233. *See* Statement of Reasons, *supra* note 117, at 30543 ("The amendment incorporates this causation standard that, at a minimum, requires factual causation (often called "but for" causation) and provides a rule for legal causation (i.e., guidance to courts regarding how to draw the line as to what losses should be included and excluded from the loss determination).").

234. *See* Bowman, *Coping with "Loss," supra* note 103, at 572 (proposing loss definition limited to harm "caused by the acts and omissions specified in subsections (a)(1) and (a)(2) of § 1B1.3 (Relevant Conduct)"); *Final Redefinition, supra* note 166, at 43 (Draft Loss Redefinition by USSC Staff, Feb. 20, 1998, limiting loss to harm resulting "from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)"); *id.* at 45 (Proposed Loss Definition, Apr. 2, 1998 version, limiting loss to harm resulting "from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)"); *id.* at 47 (Proposed Loss Definition, May 1999 Staff Draft, limiting loss to harm resulting "from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)"); *id.* at 49 (CLC Proposed Definition of Loss, Jan. 2001, limiting loss to harm resulting "from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)").

Federal Register[235] and the March 2001 staff draft[236]—omitted the reference to the relevant conduct guideline, referring instead simply to "the offense." This same usage was adopted in the final loss definition.[237] The Commission's statement of reasons does not explain this particular drafting choice. Nonetheless, there is no cause to think it has substantive significance. Rather, the drafters felt that the cross-reference to Section 1B1.3 was unnecessary because the relevant conduct rules apply to all offense types.

3. The Limitation to Pecuniary Harm.—The injuries to victims of theft, fraud, and other "economic" crimes are not necessarily limited to economic harm. Victims may suffer emotional harm, damage to reputation, disruption of personal or business relationships, or even physical illness. Because harms of this sort are often foreseeable to defendants, one might, as the economists say, "monetize" non-economic harms by assigning monetary values to injuries such as emotional distress (as courts and juries do routinely in civil lawsuits) and include the monetary value of foreseeable non-economic harms in loss. However, there was never any support for including non-economic harms in loss. Indeed, with a single exception, every draft redefinition of loss advanced during the five-year debate over the economic crime package, regardless of its authorship, contained language limiting loss to "pecuniary" or "monetary" harms.[238] The new definition specifically excludes non-economic harms by defining loss to include only "pecuniary harm."[239] To make the point still clearer, the new guideline commentary defines "pecuniary harm" as "harm that is monetary or that is otherwise readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm."[240]

There will doubtless be cases in which courts will need to explore the

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235. *See* January 2001 Commission Draft, *supra* note 177 (limiting loss to harms resulting from "the offense").

236. *See Final Redefinition, supra* note 166, at 51 (Proposed Redefinition of "Loss": Mar. 2001 Sentencing Commission Staff Draft, limiting loss to harms resulting from "the offense").

237. U.S.S.G. § 2B1.1, app. n.2(A)(i) (2001).

238. *E.g.*, Bowman, *Coping with "Loss," supra* note 103, at 572 (proposing loss definition limited to "pecuniary harm" and stating that "[T]he 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."); *Final Redefinition, supra* note 166, at 45 (Proposed Loss Definition, Apr. 2, 1998 version, limiting loss to "pecuniary harm"); *id.* at 47 (Proposed Loss Definition, May 1999 Staff Draft, limiting loss to "pecuniary harm"); *id.* at 49 (CLC Proposed Definition of Loss, Jan. 2001, limiting loss to "pecuniary harm"); *id.* at 51 (Proposed Redefinition of "Loss": Mar. 2001 Sentencing Commission Staff Draft limiting actual loss to "monetary loss and property damage"). The only proposed redefinition that did not limit loss to pecuniary or monetary harms was the very first Commission staff proposal in February 1998, *id.* at 43 (Draft Loss Redefinition by United States Sentencing Commission Staff, Feb. 20, 1998).

239. U.S.S.G. § 2B1.1, app. n.2(A)(i) (2001).

240. *Id.* § 2B1.1, app. n.2(A)(iii).

boundaries of the pecuniary harm category. In such cases, courts should be mindful that a consistent theme throughout the long economic crime package debate was the concern that defining loss in terms of reasonable foreseeability would transform federal theft and fraud sentencings into civil damage award hearings, with judges obliged to assign monetary values to intangible harms. The limitation of loss to pecuniary harm, those harms "readily measurable in money,"[241] was specifically intended to forestall such wide-ranging inquiries.

4. Product Substitution, Procurement Fraud, and Protected Computer Cases—Specific Examples of Reasonably Foreseeable Pecuniary Harms or Special Cases?—As noted above, the former theft and fraud guidelines contained a number of opaque and convoluted provisions relating to causation.[242] Among these was the limitation of fraud loss to "direct damages," except in cases of procurement fraud and product substitution, where "consequential damages" were to be included in loss if "reasonably foreseeable."[243] The former fraud guideline went on to specify the types of victim costs that should be included in loss in product substitution and procurement fraud cases:

> [I]n a case involving a defense produce substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so it can be used for intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.[244]

In light of the fact that the new economic crime guideline defines loss to include reasonably foreseeable harms for all theft and fraud cases, special provisions for procurement fraud and product substitution cases might have been discarded as superfluous. Alternatively, these provisions might have been retained as examples of the reasonably foreseeable pecuniary harms now to be included in loss.[245] Somewhat oddly, the Commission chose instead to transfer the precise language of the former fraud guideline regarding loss in procurement fraud and product substitution cases to the new loss definition under the subheading "Rules of Construction in Certain Cases."[246]

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241. *Id.*

242. *See supra* notes 127-35 and accompanying text.

243. U.S.S.G. § 2F1.1, app. n.8(c) (2000).

244. *Id.*

245. For example, this was the approach taken by the judges of the CLC in their proposed loss definition. *See Final Redefinition*, *supra* note 166, at 49-51 (CLC Proposed Definition of Loss, Jan. 2001).

246. U.S.S.G. § 2B1.1, app. n.2(A)(v)(I)-(II) (2001).

The retention of special procurement fraud and product substitution provisions is easily explained from a political perspective. The Department of Justice insisted on keeping the old language to insure that loss in these cases would be no less expansive under the new definition than it had been before. However, the way in which the old language was placed in the new guideline gives rise to some potential interpretive difficulties. It is unclear whether sentencing courts should view the procurement fraud and product substitution subsections only as specific directives in those particular types of cases or also as examples of the reach of reasonable foreseeability in other types of cases. The legislative history of the economic crime package tends to support the view that the procurement fraud and product substitution provisions should be considered examples and analogies as well as case-type-specific directives. However, the third provision on the list of "Rules of Construction in Certain Cases" places at least a shadow of doubt on this construction.

The commentary to the former theft guideline provided that loss in an offense involving a "protected computer"[247] "includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service."[248] Notice that this language refers to the reasonableness of the victim's costs, but includes no restriction on the foreseeability of such costs to the defendant. Again in response to Justice Department concerns, the Commission preserved the special "protected computer" section by inserting it into the new loss definition, as the third item on the list "Rules of Construction in Certain Cases."[249] Moreover, the Commission revised the old "protected computer" language before inserting it into the new economic crime guideline. The new version states that, in protected computer cases, the pecuniary harms listed in the former guideline are now to be included in loss "regardless of whether such pecuniary harm was reasonably foreseeable."[250] This added language places computer cases completely outside the loss paradigm governing all other theft, fraud, and destruction of property cases.[251] It would also permit an argument that, in common with the protected computer subsection, the procurement fraud and product substitution subsections are intended to be read as *sui generis*, and not as examples of reasonably foreseeable harms includable in loss in other types of case.

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247. The term "protected computer" is defined in 18 U.S.C. § 1030(e)(2)(A)-(B) (1994).

248. U.S.S.G. § 2B1.1, app. n.2 (2000).

249. *Id.* § 2B1.1, app. n.2(A)(v)(III) (2001).

250. *Id*.

251. This last-minute addition to the computer crime provision of the loss definition seems to have slipped under the radar. It was not the subject of any public briefing, debate, or discussion of which I am aware. Candidly, it seems a bad idea, both unjustifiable as a matter of sentencing theory and unnecessary in practice.

C. Pecuniary Harms Excluded from Actual Loss

The new loss definition excludes from loss interest and most investigative costs. Although such pecuniary harms will often be foreseeable to defendants, the Sentencing Commission decided that their inclusion in loss would do little if anything to advance the purposes of sentencing.

1. The Exclusion from Loss of Foreseeable Investigative Costs of the Government, and Costs Incurred by Victims in Aiding the Government.—One of the foreseeable consequences of crime is that the government will investigate and prosecute those offenses of which it becomes aware. It is also foreseeable that victims of crime will assist the investigation. Criminal investigations and prosecutions cost money. Thus, one might include in "loss" the foreseeable costs of investigating and prosecuting the defendant's crimes. However, there was universal agreement that such costs should not affect sentence length.[252] First, the amount of money the government spends to investigate and prosecute a case often depends on fortuitous factors unrelated to the seriousness of the offense or the defendant's overall blameworthiness—considerations such as the thoroughness of the investigators, the number and location of witnesses, whether expert witnesses or specialized forensic techniques are required, and so forth. Second, even if investigative costs could be shown to bear some rough relationship to offense seriousness or defendant culpability, the investment of judicial time and resources necessary to accurately determine investigative costs would be unlikely to produce commensurate gains in the accuracy of the loss figure as a measurement of relative culpability between defendants. Therefore, the new economic crime guideline specifically excludes from loss "[c]osts to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense."[253]

The only point of contention that might arise under this provision is that its language seems to permit a court to include in loss the investigative costs of both victims and government agencies in connection with civil proceedings. For example, the government might argue that investigative costs it incurred pursuing

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252. No participant in the loss debate ever suggested including investigative costs in loss. Most of the draft redefinitions of loss included language excluding investigative costs. The first proposal to exclude such costs referred only to "costs incurred by government agencies in criminal investigation or prosecution of the defendant." Bowman, *Coping with "Loss," supra* note 103, at 573. The first Commission draft to exclude investigative costs was the April 2, 1998 version, which excluded government investigative costs in a background note. *Final Redefinition*, *supra* note 166, at 47 (Proposed Loss Definition, Apr. 2, 1998 Version). By May 1999, Commission staff had expanded the exclusion to embrace "costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense." *Id.* at 47 (Proposed Loss Definition, May 1999 Staff Draft). This formulation, excluding both government and some private investigative costs, carried through all subsequent drafts into the final version of the economic crime package. *Id.* at 49 (CLC Proposed Definition of Loss, Jan. 2001); *id.* at 52 (Proposed Redefinition of "Loss": Mar. 2001 Sentencing Commission Staff Draft).

253. U.S.S.G. § 2B1.1 n.2(D)(ii) (2001).

administrative remedies or civil forfeiture against the defendant arising out of the offense conduct could be included in loss. Likewise, the prosecution might assert that legal fees and other costs incurred by victims in private civil actions against the defendant arising from the offense conduct should also count as loss. How such arguments will be received by sentencing courts remains to be seen.[254]

2. The Exclusion from Loss of Interest.—The former theft and fraud guidelines excluded interest from loss. Application Note 8 to former Section 2F1.1 said that loss "does not . . . include interest the victim could have earned on such funds had the offense not occurred."[255] Nonetheless, interest proved a difficult issue in the debate over redefining loss because for some years a number of courts of appeals had (depending on one's point of view) either simply ignored the former Guidelines or interpreted them creatively in order to include "bargained-for" interest in loss.[256] The Commission considered two basic approaches to interest: exclude all interest, including both bargained-for and so-called "opportunity cost" interest, or include interest only in cases in which the promise of a return on investment was part of the inducement to fraud ("bargained-for" interest).[257] After considering the arguments outlined below, the

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254. My own sense, drawn from the fairly limited discussions of this particular question during the loss debates, is that the Commission adopted this language contemplating that certain costs incurred by victims to discover the existence of a crime or to remedy its financial effects would be included in loss. The boundaries of this category of includable loss were never discussed in any detail.

255. U.S.S.G. § 2F1.1, app. n.8 (2000).

256. *See* United States v. Sharma, 190 F.3d 220, 228 (3d Cir. 1999) (distinguishing "opportunity cost interest" from "bargained-for interest" and including the latter in loss); United States v. Nolan, 136 F.3d 265, 273 (2d Cir. 1998) (unpaid interest and penalty fees included in loss); United States v. Gilberg, 75 F.3d 15, 19 (1st Cir. 1996) (including $726,637 in accrued mortgage loan interest); United States v. Goodchild, 25 F.3d 55, 65 (1st Cir. 1994) (including finance charges and late fees in loss from unauthorized credit card use); United States v. Henderson, 19 F.3d 917, 928 (5th Cir. 1994) ("Interest should be included if . . . the victim had a reasonable expectation of receiving interest from the transaction."); United States v. Jones, 933 F.2d 353, 354-55 (6th Cir. 1991) (finding interest should be included where defrauded credit card companies had reasonable expectation of specific return on credit extended); *cf.* United States v. Guthrie, 144 F.3d 1006, 1011 (6th Cir. 1998) (holding inclusion of interest lost by creditors of defendant in bankruptcy fraud scheme was erroneous); United States v. Clemmons, 48 F.3d 1020, 1025 (7th Cir. 1995) (finding loss includes bargained-for interest), *overruled by* United States v. Allender, 62 F.3d 909, 917 (7th Cir. 1995); United States v. Moored, 38 F.3d 1419, 1423-24 (6th Cir. 1994) (stating in dictum that loss does not include interest); United States v. Lowder, 5 F.3d 467, 471 (10th Cir. 1993) (holding interest should be included where defendant promised victims a specific interest rate).

The Fourth Circuit excluded interest categorically. *See* United States v. Hoyle, 33 F.3d 415, 419 (4th Cir. 1994); *see also* United States v. Allen, 88 F.3d 765, 771 (9th Cir. 1996).

257. The April 2, 1998 Commission draft includes as Option 1 the exclusion of all interest and similar costs, and as Option 2 the exclusion of all interest except that "bargained for as part of a lending transaction that is involved in the offense." *Final Redefinition, supra* note 166, at 45

Commission decided on a categorical exclusion of interest of all types from loss. The new economic crime guideline states: "Loss shall not include . . . [i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs."[258]

a. An analysis of the arguments for inclusion of interest.—Consistency with the core definition of loss suggests inclusion of interest. If a criminal steals money that the victim would otherwise have loaned to or invested with an honest person or institution, it is reasonably foreseeable that the victim will lose not only his principal, but also the time value of that money. Loss of the time value of money is, from an economic point of view, indisputably a "harm" suffered by the victim of a fraud. But the consistency argument proves too much. If "loss" is to include the time value of stolen money, then consistency dictates that time value should be included not only when the defendant defrauds a victim by promising payment of "interest," but also when he promises a return on investment in the form of "dividends," "capital gains," or "profits." A defendant's sentence should not turn on the fortuity of the name used to characterize the promised return on investment. Likewise, a victim suffers the harm of lost time value of his money even if the scheme is one that involves no promise of return on investment. For example, an insurance company defrauded by an insured who torches his own business and then collects fire insurance proceeds is deprived of the time value of the insurance payout no less than it would be if the company had lost the same amount by investing it with a crooked stock broker who falsely promised a high rate of return.

b. "Bargained-for" interest.—The approach of those courts which sought to evade the former prohibition against interest by including interest specifically promised by a defendant as part of the inducement to the victim to part with his money gave rise to strong theoretical and practical objections.

First, "loss" is primarily a measurement of harm actually suffered by the victim, not of the magnitude of the false promises of the crooked defendant. If a defendant defrauded Victim A by promising payment of ten percent interest monthly, A's "actual loss" is not his principal plus 120% annual interest *because there was never a realistic possibility that the defendant or anyone else would pay him interest at that rate*. The only reliable measure of what the victim lost by giving his money to the defendant rather than investing it with an honest person is the market rate for invested money. (And even this is highly speculative because there is no way of knowing whether the victim would indeed have invested it.)

Second, using the interest rate promised by defendants creates a disparity of punishment between similarly situated defendants. Three defendants who stole the same amount of money should not receive different sentences merely because the first falsely promised his victims a fifty percent return, the second promised 100%, and the third committed a form of fraud (like the arsonist who defrauded his fire insurer in the example above) that involved no promise of return on

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(Proposed Loss Definition, Apr. 2, 1998 Version).

258. U.S.S.G. § 2B1.1, app. n.2(D)(i) (2001).

investment. Likewise, two defendants who stole the same amount of money by falsely promising a twenty-five percent return on investment should not receive different punishments because the first characterized the promised payment as "interest," while the second happened to call the promised payment "dividends."

Third, using different interest rates in every case adds to sentencing complexity. There will be inevitable disputes over exactly what rate of return was promised. Particularly in multi-victim fraud cases, it will often prove that the defendant promised different rates of return to different victims. In such cases, the court would not only have to make findings about exactly what was promised each of perhaps dozens or hundreds of victims, but then someone would have to do the resulting math to arrive at a loss number.

Courts may have been drawn into including bargained-for interest by two unarticulated lines of thought. The first is an unconscious reversion to memories of first-year contracts and the recollection that aggrieved contract litigants are often entitled to the "benefit of the bargain" as a measure of damages.[259] But calculation of loss in a criminal sentencing is not a contracts problem. In contracts, courts are concerned, not with punishment of the morally blameworthy, but with enforcement of (primarily commercial) agreements.[260] The benefit of the bargain rule, when it is applicable, focuses on ensuring that the non-breaching party is disadvantaged as little as possible by the breach of the agreement, not on measuring moral culpability of the party in breach. Moreover, even in contracts, the prevailing litigant is only sometimes entitled to the benefit of his bargain; other measures of damages are as or more common.[261]

The second idea that may lie behind the "bargained for" interest cases is the notion that the magnitude of the defendant's false promises is somehow a proxy measurement for the defendant's blameworthiness. This, however, is a false equivalency. A crook who euchres a victim out of $1000 by falsely promising a ten percent monthly return is by no rational calculation either more or less blameworthy than another crook who inveigles the victim into parting with the same $1000 with a false promise of a fifteen percent monthly return. The harm to the victim in both cases is the same, and the true measure of each defendant's blameworthiness is his settled desire to cheat the victim of $1000, rather than the

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259. *See, e.g.*, JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 219, at 438 (1974). Murray posits that

> 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.

260. "The law of contracts is concerned with the securing and protection of those economic interests which result from assurances." *Id.* § 1, at 2.

261. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 344, app. a (1979) (emphasizing that securing to a non-breaching promisee the benefit of his bargain is only one of three interests served by the law of remedies for breach of contract, the other two being reliance and restitution, and that the relief granted "may not correspond precisely to any of these interests").

particular false promises he makes in his efforts to do so. In short, among the competing proposals regarding interest, the "bargained for" interest option was the least desirable of the lot.

c. Additional arguments for total exclusion of interest.—Including interest introduces all the problems of equity between defendants and complexity of calculation just discussed, but does little to make loss a more accurate measure of relative offense seriousness. Indeed, even when interest is assessed at differing rates for different defendants,[262] the interest component of loss is in some significant degree a proxy measurement, not of relative offense seriousness, but of the length of time elapsed between the taking of the money and the date that loss is measured preparatory to sentencing. For example, assume two defendants each steal $10,000 by the same means on the same date, but one is sentenced six months and the other eighteen months after the crime. If loss is measured as of the date of the sentencing, the defendant sentenced later would have more interest added to his loss figure and therefore, at least potentially, would receive a longer sentence. This is an absurd and unjust result. Even if loss is to be measured at the time of detection,[263] then accrued interest becomes a proxy measurement for the length of time the defendant evaded detection. This may arguably bear some attenuated relationship to culpability, but it is a long stretch.

d. The Commission's decision to exclude interest.—The Commission seems to have been convinced that courts should not expend valuable resources on quantifying interest as an element of loss when the result of the labor advances the purposes of sentencing so little. In its statement of reasons, the Commission wrote that, "This rule [that interest should be excluded from loss altogether] is consistent with the general purpose of the loss determination to serve as a rough measurement of the seriousness of the offense and culpability of the offender and avoids unnecessary litigation regarding the amount of interest to be included."[264]

e. The upward departure for interest.—Despite the blanket exclusion of interest and related costs from loss itself, the Commission nonetheless adopted a provision listing interest as a factor that might support an upward departure. An upward departure may be warranted if "[t]he offense involved a substantial

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262. Had the Commission decided to include in "loss" interest of any type, I would have recommended that the guidelines adopt a standard interest rate for all defendants. This would ameliorate some of the problems identified above. It would accurately measure the true economic worth of the harm suffered by victims fraudulently deprived of the time value of their money, and it would eliminate the inequities created by calculating the sentences of defendants who stole identical amounts based on the fortuity of the particular false promises they made. Federal law establishes a rate to be paid to litigants in civil cases in 28 U.S.C. § 1961 (1994). If interest in any form were to be added into "loss," the simplest, most equitable, and most theoretically sound way of doing so would be to use a standard statutory rate. For further discussion on this point, see Bowman, *Coping with "Loss," supra* note 103, at 540-41.

263. *See infra* Part IV.E (discussing time-of-measurement provisions of the new economic crime guideline).

264. Statement of Reasons, *supra* note 117, at 30543.

amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1)."[265] Considered strictly on the merits, this provision seems difficult to justify. The point of excluding interest is that including it produces difficulties in calculation, invites disparate sentences, and is unlikely to make the resulting loss figure any more accurate a measure of relative culpability. A categorical exclusion produces substantial gains in simplicity and clarity. Circuit courts have already proved remarkably adept at slipping interest into loss, even in the face of the existing prohibition against it.[266] Leaving the back door ajar by putting in a departure provision would seem to risk more of the same. Moreover, with no guidance as to what a "substantial" amount of interest might entail, the language seems likely to prove difficult to interpret, and pregnant with the possibility of unjustifiable disparity between similarly situated defendants.[267] At all events the Commission contemplates that an upward departure based on a substantial amount of interest will be "rare."[268]

D. "Net" vs. "Gross" Loss: The Problem of Accounting for Things of Value Transferred to the Victim by the Defendant

In many economic crime cases, particularly those involving fraud in some form, a defendant will transfer or return something of value to the victim as part of the scheme. Even in simple theft or embezzlement cases a defendant will sometimes return all or part of the money or property stolen before the crime is detected by either the victim or authorities. Because loss is a measurement of the economic harm suffered by the victims of a defendant's criminal conduct, the question then arises whether loss is "net" or "gross." That is, should the value of the money or property abstracted from the victim be offset by the value of the money or property transferred or returned to the victim by the defendant? In the debates over the economic crime package, this question was often referred to as the "crediting" problem.

1. The Law Under the Former Theft and Fraud Guidelines.—Crediting issues were a frequent subject of opinions construing the loss provisions of the former theft and fraud guidelines. The most commonly encountered problems were:

(a) whether a defendant should be given credit for repayments or recoveries

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265. U.S.S.G. § 2B1.1, app. n.15(A)(iii) (2000).

266. *See* note 256 and accompanying text.

267. For the reasons stated in the text, the judges of the CLC opposed a departure for interest. *See CLC Comments*, *supra* note 182, at 42; Bowman, *supra* note 178, at 474. The inclusion of an interest departure was a concession to the Justice Department in the bargaining leading up to the final April 2001 vote on the economic crime package.

268. "[T]he amendment provides that a departure may be warranted in the rare case in which exclusion of interest will under-punish the offender." Statement of Reasons, *supra* note 117, at 30543.

made after discovery of the crime, but before sentencing;

(b) whether a defendant should be given credit for amounts or assets pledged as collateral as part of a fraudulently induced transaction;

(c) whether a defendant should be given credit for repayments made after the completion of the theft or fraud, but before detection of the crime; and

(d) whether a defendant should be given credit in the calculation of actual loss for anything of value he gives to victims as part of a scheme to deprive them of money or property.

The answers to the first and second questions were clear. First, payments made by the defendant or recoveries of property occurring after discovery of the crime but before sentencing, were not credited to the defendant.[269] The only arguable exception to this first general rule was created by a second general rule—assets pledged by a defendant to a victim as part of a fraudulently induced transaction were credited against loss regardless of whether the victim took control of the pledged asset before or after detection of the crime.[270]

The more difficult questions arose in addressing the third and fourth

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269. *E.g.*, United States v. Stoddard, 150 F.3d 1140, 1146-47 (9th Cir. 1998) (refusing to credit post-detection repayments against loss); United States v. Pappert, 104 F.3d 1559, 1568 (10th Cir. 1997) (refusing to credit repayments made after detection, but before arrest); 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. Akin, 62 F.3d 700, 702 (5th Cir. 1995) (presentence restitution did not reduce loss calculation); United States v. Graham, 60 F.3d 463, 467-68 (8th Cir. 1995) (result of loss calculation not be reduced merely because defendant's fraudulent scheme was not entirely successful); United States v. Asher, 59 F.3d 622, 625 (7th Cir. 1995) (fact that check-kiting defendant immediately repaid $160,000 overdraft outstanding at time of discovery does not affect "loss" figure); United States v. Norris, 50 F.3d 959, 961-62 (11th Cir. 1995) (holding that repayments on student loan came to late to reduce loss); United States v. Mau, 45 F.3d 212, 216-17 (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) (no departure for pre-sentence restitution); United States v. Carey, 895 F.2d 318, 323-24 (7th Cir. 1990) (reversing a district court's downward departure for presentencing restitution, noting that restitution may be relevant to acceptance of responsibility under Guidance Section 3E1.1, or to a departure under Section 5K2.0, if extraordinary, but that mere restitution was not enough).

270. Pursuant to Guidelines Section 2F.1.1, app. n.8(b) (2000), actual loss was "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." *Id.* In general, courts construing this provision routinely deducted the value of pledged collateral from loss; however, there remained some disagreement over fine points. *See* ROGER W. HAINES, JR, FRANK O. BOWMAN, III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 485-86 (Nov. 2000 ed.) (discussing treatment of collateral in the measurement of fraud loss under the former fraud guideline); *see also* John D. Cline, *Calculation of Loss Under the Sentencing Guidelines*, 9 GEO. MASON L. REV. 357, 363 (2000) (stating that "several courts have stated that the actual loss is the amount of the loan not repaid at the time of sentencing, reduced by the value of any security pledged by the defendant," and collecting cases).

problems listed above—whether to credit defendants for repayments made prior to detection but after "completion" of the offense, and whether to credit defendants for things of value transferred to victims by the defendant as part of the scheme to obtain the victims' money or property.

For example, there was general agreement that a defendant should be given credit for anything of value he transfers to a victim in return for the money or property obtained by fraud. The commentary to the former fraud guideline required that in a case of fraudulent misrepresentation of the value of goods, any loss suffered by the victim must be offset by the value of the goods delivered by the defendant.[271] Moreover, the courts of appeals held that in almost all economic crime cases with a flavor of fraud that the Guidelines' insistence on a measurement of net detriment to the victim was not limited to cases involving misrepresentation of the value of goods.[272] On the other hand, as will be

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271. U.S.S.G. § 2F.1, app. n.8(b) (2000) stated:

> A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). 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 is overvalued (i.e. $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

272. *See* United States v. Barnes, 125 F.3d 1287, 1290-91 (9th Cir. 1997) (finding that the sentencing court erred in failing to consider benefits the defendant provided a plasma center while fraudulently impersonating a doctor, and holding that "the victim has sustained no loss because he received the services for which he bargained, despite the fact that he received them from a person who was not legally authorized to offer them."); United States v. Sublett, 124 F.3d 693, 695 (5th Cir. 1997) (vacating the defendant's sentence in a contracting fraud case where the trial court failed to give the defendant credit against the loss amount for legitimate services he provided or intended to provide, and holding that, "The district court therefore must deduct the value of the legitimate services actually provided by [defendant's] operation under the first contract and those that he intended to provide under the second contract in its calculation of the loss under section 2F1.1(b)(1)."); United States v. Williams, 111 F.3d 139, 1997 WL 187342 at *4 (9th Cir. 1997) ("Consistent with our prior cases, 'actual loss' under the guidelines should be measured as the 'net loss' flowing from the defendant's conduct."); United States v. Pappert, 104 F.3d 1559, 1568 (10th Cir. 1997) (holding that the sentencing court should calculate "net loss by subtracting the value of what was given to the victim(s) during the course of the transaction from the value of what was fraudulently taken"); United States v. Carroll, 87 F.3d 1315, 1996 WL 266425, at *3 (6th Cir. 1996) (unpublished disposition) ("The guidelines do require the district court to determine the net loss."); United States v. Kohlbach, 38 F.3d 832, 840-42 (6th Cir. 1994) (where defendants fraudulently sold adulterated orange juice containing beet sugar instead of pure orange juice concentrate, loss calculated by subtracting wholesale price of beet sugar from price of orange concentrate, then multiplying by amount of sugar used in the adulterated juice); United States v. Harper, 32 F.3d 1387, 1391 (9th Cir. 1994) (holding actual loss "is a measure of what the victims of the fraud were actually relieved of," or the net loss to the victim) (citing United States v. Haddock, 12 F.3d 950, 961 (10th Cir. 1993)); United States v. Lavoie, 19 F.3d 1102, 1105 (6th Cir.

discussed in detail below, a number of courts declined to credit defendants in "Ponzi" scheme investment frauds with pre-detection repayments to early investors.[273]

Similar discrepancies arose in cases that looked more like theft or embezzlement than fraud. On the one hand, the net loss rule applied to fraud cases was universal in check-kiting schemes. The courts held that the proper measurement of "loss" in a check-kiting case is the actual loss to the victim bank as reflected by the amount of the overdraft at the time the kite is detected.[274] On the other hand, courts took very different approaches to other closely related forms of stealing from banks. In *United States v. Johnson*,[275] a credit union clerk "embezzled" $88,483.41 by transferring it to a dummy account in the credit union and then withdrawing it *and* "misapplied" another $318,915 by transferring it to another account in the credit union, but not withdrawing it. She turned herself in before withdrawing the $318,915. The Eighth Circuit held that the loss

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1994) (loss based on actual or expected loss, rather than face value of total loan proceeds); *Haddock*, 12 F.3d at 961 (holding that in determining actual loss, "only net loss is considered; anything received from the defendant in return reduces the actual loss."); United States v. Whitlow, 979 F.2d 1008, 1012 (5th Cir. 1992) (holding that the loss incurred by consumers to whom defendant fraudulently sold cars with altered odometers was the price paid by the victim to the defendant less the market value of the vehicles as measured by their resale value); United States v. Sloman, 909 F.2d 176, 182 (6th Cir. 1990) (insurer's net out-of-pocket loss due to defendant's fraudulent acts was proper basis for determining the defendant's sentence). In *United States v. Palmer*, the court upheld the district court's loss calculation against defendant's complaint that court failed to credit him "for the value of products received by the victims, refunds, bounced checks, and stop payment orders." 122 F.3d 215, 222 (5th Cir. 1997). The opinion impliedly conceded that such offsets were proper, but relied on the district court's finding that "the government, which generated the total loss figure, had done its best to exclude such items from its calculations." *Id.* *See also* United States v. Peterson, 101 F.3d 375, 383-384 (5th Cir. 1996) (agreeing with the district court that defendant in stock fraud scheme should be credited with amounts paid to investors as returns, but not with money defendant claimed an intention to repay); United States v. Krenning, 93 F.3d 1257, 1269 (5th Cir. 1996) ("the focus of the loss calculation should be on the harm caused to the victim of the fraud," *citing with approval*, United States v. Orton, 73 F.3d 331, 333 (11th Cir. 1996), in which the Eleventh Circuit adopted a net loss approach to determining loss in Ponzi schemes).

273. *See infra* notes 290-98 and accompanying text.

274. *See* HAINES, BOWMAN, & WOLL, *supra* note 270, at 489-91 (collecting cases). The defendant is also entitled to a limited class of immediately available offsets. *See* United States v. Flowers, 55 F.3d 218, 222 (6th Cir. 1995) (finding loss in check kite is the "gross amount of the loss at the time of the detection of the fraud . . . , less funds available for offset . . . and secured collateral"); United States v. Shaffer, 35 F.3d 110, 114-15 (3d Cir. 1994) (holding in check-kiting scheme that loss is amount of outstanding bad checks at time of discovery less applicable offsets); United States v. Marker, 871 F. Supp. 1404, 1409 (D. Kansas 1994) ("[A]ctual loss should be calculated as it exists at the time of detection rather than at sentencing.").

275. 993 F.2d 1358, 1358-59 (8th Cir. 1993).

included the embezzled $88,000, but not the misapplied $318,915.[276] Likewise, in *United States v. Shattuck*,[277] 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.[278]

The Third and Seventh Circuits took a contrary position. In *United States v. Strozier*,[279] 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.[280] In *United States v. Kopp*,[281] the Third Circuit discussed in dictum the situation of a hypothetical clerk who intends to withdraw the money, invest it, and then return it.[282] It noted that, while the "amount taken" would be the amount invested, if the clerk was successful and returned the money without detection, both the intended and actual loss would appear to be zero. The court appeared to view this as an unacceptable result, implying that the proper measure of loss was the whole amount.[283]

2. The New Economic Crime Guidelines Adopt a Net Approach to Loss.— Throughout the long process of forging an economic crime package, crediting loomed as a troublesome issue. As the previous section suggests, existing case law was extensive, dense, and often contradictory. The theoretical issues were complicated. Many of the interested parties had strong views on particular corners of the problem.[284] On balance the new guideline seems theoretically

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276. *Id.* at 1359. The apparent theory was that there was not a "taking" as to the larger sum. For a discussion regarding the problems flowing from the use of the term "taken" in Guideline Section 2B1.1, Application Note 2. *See supra* notes 92-102.

277. 961 F.2d 1012 (1st Cir. 1992). *Shattuck* is cited with approval in *Johnson*, 993 F.2d at 1359 n.2.

278. 961 F.2d at 1017.

279. 981 F.2d 281 (7th Cir. 1992). *Strozier* is cited with approval in *United States v. Yusufu*, 63 F.3d 505, 513 (7th Cir. 1995).

280. 981 F.2d at 284.

281. 951 F.2d 521 (3d Cir. 1991).

282. *Id.* at 530 n.13.

283. 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 amount taken as 'loss'." *Id.*; *see also* United States v. Mount, 966 F.2d 262 (7th Cir. 1992) (Easterbrook, J.). Defendant stole baseball playoff tickets with a face value of $12,000 and sold them in a block to a scalper for $30,000. *Id.* at 264-66. Integral to the scheme was the necessity of placing $12,000 in the baseball team's account to cover up the theft; presumably, the money would come from the sale to the scalper. *Id.* at 266. The court suggested defendant's intention to repay, and perhaps his success in doing so, do not matter: "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 in only blue chip stocks." *Id.* at 266.

284. *See, e.g.*, *1997 Hearing Excerpts*, *supra* note 106, at 164 (testimony of Judge Gerald Rosen regarding crediting rules in Ponzi scheme investment frauds); Pflaumer & Spearing, *supra* note 168 (discussing Justice Department concerns over crediting provisions of February 1998 draft loss definition).

sound and a fair accommodation of most of the most commonly expressed concerns.

The new economic crime guideline comes down firmly in favor of the proposition that loss is a measurement of economic harm to victims and therefore must be a measurement of *net* economic deprivation. It states as a general rule that: "Loss shall be reduced by . . . [t]he money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected."[285] In addition, the new guideline addresses two specific recurring problems in the area of credits against loss—the problem of investment fraud cases, and issues surrounding regulatory offenses and unlicensed professionals—and provides a timing rule for including credits.

The following sections will analyze the language of the general credits rule, as well as the particular provisions governing investment fraud, and regulatory offenses. Finally, I will address an issue not covered by the new guideline: items of *de minimis* value provided to victims by defendants. Discussion of the timing rule for credits will be deferred until the discussion in Part IV.E of timing of loss measurement.

3. The Language of the New Crediting Rule.—The new crediting rule contains one imprecise use of language that might have proven potentially troublesome were it not for the clarification provided by the Commission's statement of reasons.[286] The rule says loss is to be "reduced by . . . [t]he money *returned*, and the fair market value of the property *returned* and the services rendered, by the defendant . . . ."[287] Read literally, the word "returned" might be construed to mean that the only things to be credited against loss are money or property that the defendant obtained from and later gave back to a particular victim. This reading would exclude from the crediting rule anything the defendant transferred to a victim that the victim had not possessed in the first place. For example, it would eliminate the credit explicitly provided under the former fraud guideline for the $10,000 fair market value of stock purchased by a victim in reliance on the defendant's fraudulent misrepresentation that the stock was worth $40,000.[288] In such a case, the defendant would not be "returning" the undervalued (but valuable) stock because the victim never owned it prior to the

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285. U.S.S.G. § 2B1.1, app. n.2(E)(i) (2001).

286. The new crediting rule contains a second verbal imprecision of primarily theoretical concern. It speaks of "reducing loss" by the value of money, property and services passing from the defendant to the victim prior to detection. Properly speaking, since loss is the net economic detriment suffered by the victim in consequence of the defendant's conduct as of the time of detection, loss is not "reduced" by the value of things transferred from the defendant to the victim. Rather, loss is *defined* as the difference in value between what the victim parted with and what the defendant transferred to the victim. For this reason, the CLC draft says that "[l]oss shall be determined by excluding" benefits provided to victims by defendants prior to detection. *Final Redefinition*, *supra* note 166, at 49. The difference is minor, but potentially valuable.

287. U.S.S.G. § 2B1.1, app. n.2(E)(i) (2001) (emphasis added).

288. *Id.* § 2F1.1, app. n.8(a) (2000).

fraudulent transaction.

A construction of the new rule based on a literal reading of the word "returned" would be disastrous, absurd in theory and exclude many cases the Commission plainly intended to cover. Fortunately, both the legislative history of the crediting provision, and more particularly, the Commission's statement of reasons accompanying the new economic crime guideline, make clear that the Commission intends the crediting provision to be a general rule covering all economic benefits passing from the defendant to the victim prior to detection. In its statement of reasons, the Commission wrote:

> The loss definition also provides for the exclusion from loss of certain economic benefits transferred to victims, to be measured at the time of detection. This provision codifies the "net loss" approach that has developed in the case law, with some modifications made for policy reasons. This crediting approach is adopted because the seriousness of the offense and the culpability of a defendant is better determined using a net approach. This approach recognizes that the offender who transfers something of value to the victim(s) generally is committing a less serious offense than an offender who does not.[289]

4. Investment Fraud Cases.—Under the former fraud guideline, courts adopted three different approaches to credits for amounts returned to the victims of investment schemes with more than one victim (such as so-called "Ponzi schemes") in which the defendant repays money to early victims in order to continue the scheme or avoid detection. The Second, Fourth, Fifth, Sixth, and Ninth Circuits held that payments made to Ponzi scheme victims are not deductible from the "loss" figure.[290] The theory of these cases was that a defendant should receive no credit for such payments because they are a necessary part of the scheme designed to gain the investors' confidence in order to secure additional investments and to forestall discovery of the scheme. The Seventh Circuit considered the victims as a class and took a net loss approach: the loss is the amount taken from the class of victims by the defendant minus the amount given back to the class of victims by the defendant.[291] The Eleventh Circuit found a middle ground, adopting a "loss to the losing victims"

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289. Statement of Reasons, *supra* note 117, at 30543.

290. United States v. Munoz, 233 F.3d 1117 (9th Cir. 2000); United States v. Deavours, 219 F.3d 400 (5th Cir. 2000); United States v. Loayza, 107 F.3d 257 (4th Cir. 1997); United States v. Carrozzella, 105 F.3d 796 (2d Cir. 1997); United States v. Mucciante, 21 F.3d 1228 (2d Cir. 1994); United States v. Dobish, 102 F.3d 760 (6th Cir. 1996). At one point, the Fifth Circuit seemed to be leaning toward the Eleventh Circuit's "loss to the losing victims" approach, *see* United States v. Krenning, 93 F.3d 1257, 1269 (5th Cir. 1996) ("the focus of the loss calculation should be on the harm caused to the victim of the fraud," *citing with approval*, United States v. Orton, 73 F.3d 331, 333 (11th Cir. 1996)), but the Fifth Circuit, in *Deavours* took a different course. 219 F.3d at 403.

291. United States v. Holiusa, 13 F.3d 1043, 1045-46 (7th Cir. 1994).

approach.[292] Under this theory, the loss is the total amount lost by those victims who were out money at the time of the scheme's discovery. Those investors who received repayments in excess of their original investment are not considered "victims" at all. Therefore, their windfalls are not counted towards reducing the losses of other investors.[293]

The refusal of the Second, Fourth, Fifth, Sixth, and Ninth Circuits to give credit for any payments to early investors was troublesome even as an interpretation of the former guidelines. The reasoning of these courts was even less persuasive as a guide to what the law should be. First, giving no credit for repayments ran contrary to the basic "net loss" approach embodied in former Section 2F1.1, Application Notes 8(a) and 8(b), as well as the plentiful case law endorsing the net loss approach.[294] Second, as a matter of policy, because the function of the loss figure is to measure economic harm to victims, it must distinguish between greater and lesser harms. A scheme in which a defendant takes and keeps $10,000 causes more economic harm than one in which the defendant takes $10,000, but gives back $5000.

Third, the rationale for the court-created "Ponzi scheme exception" to the basic net loss rule—that defendants deserve no credit for payments made solely to perpetuate the scheme—if written into the guidelines as a caveat to the general rule that "actual loss" is a net concept, would swallow the general rule and eliminate virtually all credits.[295] No defendant truly bent on fraud confers benefits on his victims out of benevolence or a sense of sound commercial ethics. Any swindler who can will steal without incurring any overhead. Thus, almost all payments and transfers by defendants to victims are made in some sense to further the success of the scheme.

Consider four cases: (A) a man steals my wallet containing $10,000; (B) a man convinces me to give him $10,000 in exchange for stock he knows to be worth $5000; (C) a man convinces me to give him $10,000 in exchange for his promise to pay me $13,000 next Tuesday, but actually pays me only $8000 (hoping that this payment will be sufficient to prevent me from going to the police); and (D) a man lies about his assets and convinces me to loan him $10,000 in exchange for an unfulfilled promise to repay the money with interest, collateralized by a security interest in real property worth $9000. Assume in each case that the defendant's purpose throughout was to steal. Under a crediting rule with a "perpetuation" exception, the defendant who steals my wallet with $10,000 in it, of course, gets no credit because he gave nothing back. The defendant who gave me stock he knew to be worth only $5000 in return for my

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292. United States v. Orton, 73 F.3d 331, 334 (11th Cir. 1996).

293. *See id*.

294. *See supra* notes 270-73 and accompanying text.

295. The tendency of these investment cases to erode the general net loss principle can be seen in *United States v. Blitz*, 151 F.3d 1002, 1012 (9th Cir. 1998), in which the court denied defendant telemarketers credit for pre-detection refunds and other payments to victims on the ground that such payments were merely necessary incidents to the execution of the scheme. The court equated such payments with defendants' payment of their phone bills.

$10,000 would, under a "perpetuation" rule, get no credit for the $5000 because the purpose of giving it to me was to convince me to part with my money and to avoid criminal prosecution by giving me something of arguable economic value. Likewise, neither the defendant who made a partial payment of $8000 in order to dissuade me from going to the police, nor the defendant who pledged $9000 in collateral to obtain the loan, would be credited. In each of the cases above, the defendant gave me money or property in order to convince me to part with my own or to forestall apprehension and punishment. Consequently, a "perpetuation exception" has the effect of wiping out the general principle that "loss" is a net concept, and therefore the effect of treating identically cases in which the economic harm to the victims is incontestably quite different. In investment fraud schemes as elsewhere, the difference in harm caused should be reflected in the sentence imposed.

The Seventh Circuit's approach of considering the net loss to the victim investors as a class was likewise questionable because windfalls bestowed on early investors in a Ponzi scheme do nothing to reduce the harm inflicted on later investors left holding the bag.[296]

In its new economic crime guideline, the Commission expressly adopted the Eleventh Circuit's "loss to the losing victims" approach to multi-victim fraud schemes.[297] Accordingly, the new loss definition provides that:

> In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).[298]

5. Regulatory Offenses and Unlicensed Professionals.—Some of the knottiest problems presented by the net versus gross loss debate arose from cases in which defendants evaded FDA regulatory processes in bringing drugs to market. In one case, *United States v. Chatterji*, the defendant provided false information to the FDA to gain approval of a drug.[299] In another, *United States v. Haas*, the defendant purchased drugs in Mexico for sale in the United States,

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

297. "This amendment adopts the approach of the Eleventh Circuit that excludes the gain to any individual investor in the scheme from being used to offset the loss to other individual investors because any gain realized by an individual investor is designed to lure others into the fraudulent scheme." Statement of Reasons, *supra* note 117, at 30544 (referring to United States v. Orton, 73 F.3d 331 (11th Cir. 1996)).

298. U.S.S.G. § 2B1.1, app. n.2(F)(iv) (2001). This language is taken virtually verbatim from the 2001 CLC Draft, *see Final Redefinition*, *supra* note 166, at 50, with the exception of the Commission's substitution of "individual investor" for the CLC's "investor." The significance of the term "individual investor" is unclear. I take it to mean "single investor," and not to convey any distinction between individual and institutional investors.

299. 46 F.3d 1336 (4th Cir. 1995).

thus bypassing FDA controls.[300] In both cases, the defendant sold drugs that were equally effective as those approved by the FDA. In *Chatterji*, the Fourth Circuit found no economic harm and therefore no loss,[301] while in *Haas*, the Fifth Circuit found no economic harm, but remanded the case to the district court for a determination of the defendant's sentence based on his gain.[302] A similar problem was presented in *United States v. Maurello*, where the Third Circuit held that a defendant convicted of mail fraud for deceiving clients by practicing law without a license must be credited in the loss calculation for the value of satisfactory legal services rendered.[303]

Some observers, notably including the Justice Department, argued that those who place consumers at risk by evading regulatory processes for drugs and other products and services should receive significant sentences. From a theoretical perspective, where Congress creates a regulatory authority to regulate risky activities such as the production of medicine, and a defendant intentionally circumvents that authority to make a profit, the fact that the defendant lucked out and did not hurt or kill anybody does not reduce the severity of the crime—or if it does, not by much. Consumers are entitled to rely on the regulatory process. They would not, as a rule, purchase products known to have been produced in defiance of regulatory safeguards. Thus, the entire amount paid for the improperly certified item is indeed a loss because it measures the out-of-pocket expense to fraudulently misinformed consumers. Alternatively, if we consider that the class of victims may include the defendant's competitors—companies that produce equivalent products in conformity with regulatory standards—the value of the defendant's sales is a fair measure of the loss to the defendant's competitors. The same arguments can fairly be made in cases involving unlicensed professionals.

In response to these concerns, the CLC proposed[304] and the Commission ultimately adopted a narrowly targeted exception to the crediting rule under which loss, by definition, includes the amounts paid by victims for

> services . . . fraudulently rendered to the victim by persons falsely posing as licensed professionals; . . . goods . . . falsely represented as approved by a governmental regulatory agency; or . . . goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, with no credit provided for the value of those items or services.[305]

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300. 171 F.3d 259 (5th Cir. 1999).

301. 46 F.3d at 1342-43. Although in a later case involving nearly identical facts, *United States v. Marcus*, 82 F.3d 606 (4th Cir. 1996), the Fourth Circuit found the loss to be the value of the gross sales of an unapproved drug, distinguishing *Chatterji* on the ground that the modifications of the drug formula in *Marcus* affected the bioequivalence of the drug. *Id.* at 610.

302. 171 F.3d at 270.

303. 76 F.3d 1304, 1311-12 (3d Cir. 1996).

304. *See Final Redefinition*, *supra* note 166, at 49-50.

305. U.S.S.G. § 2B1.1, app. n.2(F)(v) (2001).

The new rule for measuring loss in regulatory cases also solves a technical problem in the area of "gain." At various times during the economic crime sentencing debate, the Department of Justice pressed for an extension of the concept of "gain" to deal with regulatory evasion cases. The Department of Justice's solution to the regulatory crime problem would have had a much greater distorting effect on the overall structure of the loss definition than would the newly adopted targeted provision for regulatory and unlicensed professional cases. The new guideline addresses legitimate concerns about imposing appropriate punishment for regulatory crimes without introducing the unpredictable complications that might well ensue from elevating "gain" to equal footing with "loss" as a measure of offense seriousness.

6. Items of de minimis Value.—The Justice Department repeatedly expressed concern about any rule that would require the court to credit defendants for the nearly worthless items sent by telemarketers in place of the items promised—five dollar plastic radios in place of the promised "stereo system," common coins in place of the promised "rare collectibles," etc. The Department was understandably concerned about two points: first, that such junk confers no real economic benefit on the persons receiving it, and thus should not reduce a defendant's punishment, and second, that calculating the value of the stuff is, at best, a nuisance.

Responses to Justice Department concerns took two basic forms. Some loss redefinition proposals included language declining credits against loss for items of "de minimis" value transferred from defendants to victims.[306] Alternatively, Sentencing Commission staff suggested excluding from "loss" anything transferred to victims by defendants if the thing "has little or no value to the victim because it is substantially different from what the victim intended to receive."[307] As phrased, this second approach had the potential to become a Trojan horse undermining uniform application of the net loss concept. The problem was the emphasis on whether the economic benefit conferred is of little or no value "*to the victim* because it is *substantially different from what the victim intended to receive*."[308] In *every* fraud case, what the victim got was "substantially different from what the victim intended to receive." If the victim got what he intended to receive, there would be no crime. And in many (perhaps most) cases, victims, if asked, will say that what they got is of little or no value *to them* because it was not what they bargained for, even if the thing transferred had substantial, measurable economic value. The effect of including this provision would have been to shift the focus of the loss determination from an objective consideration of the market value of whatever the defendant gave the victims to a subjective evaluation of what *the victim thinks* is the worth of what the defendant gave him.

In the end, the Commission included neither proposal in the new loss

306. *See, e.g.*, *Final Redefinition*, *supra* note 166, at 49-50.

307. *Id.* at 52.

308. *Id.* (emphasis added).

definition. As a result, courts will be obliged to address the effect on loss of allegedly *de minimis* benefits on a case-by-case basis.

E. Time-of-Measurement

Critical to the practical problem of measuring loss is a determination of *when* loss should be measured. The time-of-measurement problem has two basic components. The first is the question of when to *value* the worth of stolen assets whose value fluctuates over time, such as stock, precious metals, coins, commodities, real estate, and the like. The second is when to *count* so-called "credits" against loss, such as transfers to victims as part of the scheme, repayments to victims, and posted collateral. The most common counting question is whether to reduce the loss amount by the value of things returned or conveyed to the victim after the crime has been detected. This second component of the time-of-measurement problem also has a sub-issue, in that there must be a rule for *when* to *value* those things *counted* as credits.

To illustrate both components of the time-of-measurement problem, assume that a telemarketer sells, and delivers to the victim, stock falsely represented to be worth $1000, which is, at the time of the sale, actually worth $300. The victim pays the telemarketer by giving him a quantity of gold, then valued at $1000. Assume further that, after the fraud is detected, the telemarketer sends the victim a check for $700. Assume still further that the true market value of the stock has dropped to $200 as of the date of detection the fraud, but climbs up to $400 by the time of sentencing. In the meantime, the value of the gold increases to $1100 at the time of detection, but has dropped to $900 by sentencing day. Ideally, guideline time-of-measurement rules should tell a sentencing judge: when to value the gold from which the victim was swindled; whether to reduce the amount of the loss by the value of the stock initially transferred to the victim; if so, when to value the stock transferred to the victim; and whether to reduce the amount of the loss by the amount of the $700 check.

In my view, the most significant (and indeed only major) defect in the new loss definition is its failure to fully address the time-of-measurement problem. The new guideline contains time-of-measurement rules *only* for cases involving credits against loss: generally, defendants will be credited with things of value transferred to victims prior to detection, and in loan cases, defendants will be credited for collateral pledged by the defendant in "the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing."[309] However, the new guideline contains no general time-of-measurement rule, and no rule about when to value credits other than collateral. The rule on measurements of credits against loss is sound, so far as it goes. The absence of any other timing rules is disappointing.

1. The New Time-of-Measurement Rules for Crediting.—The time to *count* "credits" against loss is the time of detection. If defendants were credited with

309. U.S.S.G. § 2B1.1, app. n.2(E)(i)-(ii) (2001).

repayments made after detection, but before sentencing, the rich (or those who had not yet spent their criminal earnings) could buy themselves out of prison time.[310] The universal rule among those courts that considered the question under the former guidelines was that credits against loss such as transfers to victims, pledges of collateral, and repayments should be measured at the time of detection.[311] The Commission wisely codified this rule.

Second, it is equally clear that "credits" should not be *valued* prior to detection. Early Commission drafts suggested that things of value transferred by a defendant to a victim and credited against loss should be valued at the *time of transfer*.[312] Establishing the value of credits at the time of transfer to the victim would prove terribly cumbersome in many multi-victim or multi-transaction cases, and would produce substantively erroneous and unfair results in certain cases.

Consider the following examples:

a. Precious metals/rare coins boiler room.—Defendants sell over the telephone to hundreds of victims supposedly "rare" coins or ingots of precious metals at vastly inflated prices. The defendants do send coins to the victims, and the coins have some value. However, the value of the coins is much less than represented *and* the value fluctuates over time. Here, the Commission staff's proposed time-of-measurement rule would require the court to determine the date of every "transfer" of coins, and determine the value of the coins for every date on which a transfer occurred. In a routine boiler room case, this would involve hundreds or even thousands of different valuations.

b. Stock fraud.—Defendant makes an initial stock offering in the penny stock market, and makes inflated and untrue claims in the prospectus. Hundreds of victims buy the stock over a six month period, during which time the stock steadily gains in value. At the end of the six month period, the defendant's falsehoods come to light and the value of the stock plunges to zero. In such a case, not only would the proposed "valuation at time of transfer" rule require the court to determine the fluctuating price of the bogus stock on every date on which there was a purchase, but it would produce the absurd result that the victims would be found to have no "loss" at all. Since the amount of money the

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310. *See, e.g.*, United States v. Wright, 60 F.3d 240, 244 (6th Cir. 1995) (Batchelder, J., dissenting).

311. *See, e.g.*, 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); United States v. Akin, 62 F.3d 700, 701 (5th Cir. 1995) (rejecting argument of check-kiting defendant that the loss figure should be reduced by restitution payments made between time of discovery of kite and sentencing, and holding loss to be measured at time of discovery of scheme); United States v. Flowers, 55 F.3d 218, 220-22 (6th Cir. 1995) (holding in check-kiting scheme that loss is to be amount of outstanding bad checks, less any amount in accounts at time of discovery); United States v. Shaffer, 35 F.3d 110 (3d Cir. 1994) (time for determining loss is time crime is detected); United States v. Frydenlund, 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).

312. *See, e.g.*, *Final Redefinition*, *supra* note 166, at 45-48.

victims paid to the defendant would be offset by a credit for the market value of the stock *on the date of transfer*, by definition the "loss" would be zero.

Similar phenomena occur in real estate schemes in which defendants succeed in inflating the market value of otherwise undesirable property. In all such schemes, measuring the value of the thing transferred to the victim at the time of transfer produces a loss of zero. The only way around this result is to argue that the "real" value of the transferred property at the time of the transfer was not its then-current market price, but the value it would have had if full information had been available. But this is nothing more than a roundabout way of saying that the value of transferred property in such cases is actually its value at the time of detection of the crime. So why not adopt that rule in the first place?

Happily, the Commission did not codify a rule requiring that credits against loss be valued at the time of transfer from the defendant to the victim. Unhappily, the Commission adopted no valuation rule at all for credits except in the case of pledged collateral. The rule governing collateral is at least consistent with pre-existing law.[313]

2. Timing Issues Left to the Courts.—As a consequence of the Commission's abstention, sentencing courts will be obliged to develop some time-of-measurement rules by common law processes. In doing so, they may wish to consider the following points:

In theory, loss could be measured, and its constituent elements counted and valued, at any one of a number of points, including the time the crime is legally complete, the time of detection, or the time of sentencing. Moreover, one could envision time-of-measurement rules that counted the components of loss at one time, but valued them at another. We have already seen that some Commission loss definition drafts dealt with the crediting problem by *counting* as credits against loss only those transfers from defendants to victims made prior to detection, but *valuing* the things transferred to the victims as of the time of transfer.[314] Similarly, the January 2001 Staff Draft proposed as one option counting *and* valuing credits at the time of detection, while "measuring" (which I take to mean both counting and valuing) loss generally at the time of sentencing.[315]

In the view of a number of observers, including the Criminal Law Committee, to the extent possible, all the elements of the loss calculation should be counted and valued at the same point in time.[316] Although there may be reasons to deviate in special cases from this principle, the greater the number of exceptions, the greater will be potential for confusion. A strong case can be

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313. Under the former fraud guideline, U.S.S.G. § 2F1.1, app. n.8(b) (2000), collateral was valued at either the amount obtained by the victim through foreclosure and liquidation, or if these events have not yet occurred by sentencing, at the fair market value at the time of sentencing. *See* HAINES, BOWMAN & WOLL, *supra* note 270, at 484-88.

314. *See supra* note 270 and accompanying text.

315. *See* January 2001 Commission Draft, *supra* note 177, at 7994..

316. *See Final Redefinition*, *supra* note 166, at 50; CLC Comments, *supra* note 182, at 41; Bowman, *supra* note 178, at 487.

made that the most desirable point at which to measure loss is the time of detection.

I have already addressed the arguments in favor of both counting and valuing credits against loss at the time of detection, arguments which the Commission found at least partially persuasive. The knottier question remains when to measure loss more generally, or to put it another way, when to count and value those components of loss not involving credits. The argument favoring the CLC position that loss should be measured at the time of detection may be summarized in this way: First, time-of-detection makes the best sense as the moment at which to "freeze the action" for purposes of measurement. Once a crime is discovered by its victims, they can take steps to prevent further losses. Likewise, once a crime is detected, defendants will ordinarily stop their criminal behavior, 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.[317] Additionally, even though losses may sometimes continue to accrue after detection up until sentencing despite the cessation of a defendant's active criminal efforts, there is far too great a potential for arbitrariness in measuring loss at the date of sentencing. For example, defendants should not have to spend more time in prison because losses mount while the government or the court delays a prosecution or sentencing.[318]

Nonetheless, a case can be made for counting and valuing the "non-credit" components of loss at the time of sentencing. In the first place, there is at least some potential tension between a time-of-detection measurement rule and the basic definition of loss as "reasonably foreseeable pecuniary harm that resulted from the offense."[319] Presumably, some of the harms that fall within this definition will not manifest themselves until some time after the moment the crime is detected. Moreover, one could argue that the valuation problem would be made somewhat simpler because probation officers and other experts preparing for sentencing could look to current market values of assets, as opposed to ascertaining those values at the earlier time of detection. However, I confess to finding the valuation argument uncompelling, as I doubt that in most cases valuing assets on a past date certain would prove any more difficult than providing a current market value.

The CLC proposed the following rules, which courts may find of persuasive

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317. Of course, if a defendant persisted in committing additional criminal conduct leading to new losses after detection of the scheme, this rule would not cut off his sentencing liability for the new losses because the additional conduct would not yet have been "detected" for purposes of the rule.

318. *See, e.g.*, United States v. Stanley, 54 F.3d 103 (2d Cir. 1995). In *Stanley*, a bank trust officer bought bonds at a high price for trust clients of a bank. As the bonds began to devalue, the officer misstated their value in bank records and in statements sent to clients. As a result, neither the bank nor clients could act to sell and stem losses. *Id.* at 104. The court calculated loss as the amount of devaluation in period between misstatements to bank and customers and the time at which fraud was discovered. *Id.* at 106.

319. U.S.S.G. § 2B1.1, app. n.2(A)(i) (2001).

value when considering time-of-measurement problems not covered by the new guideline:

> Time of measurement: Loss should ordinarily be measured at the time the offense was detected.
>
> (i) For purposes of this guideline, an offense is detected when the defendant knew or reasonably should have known that the offense was detected by a victim or a public law enforcement agency.
>
> (ii) Except as provided in subsection (D)(iii), the value of any "economic benefit" transferred to the victim by the defendant for purposes of Subsection (C) shall be measured at the time the offense was detected.
>
> (iii) However, in a case involving collateral pledged by a defendant, the "economic benefit" of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the "economic benefit" of the collateral is its value at the time of sentencing.[320]

These proposed rules embody the principle that, in general, all components of "loss" should be measured at the time of detection. This means that the money or property obtained by the defendant from the victim, *and* the money or property transferred back to the victim from the defendant during the course of the scheme, should all be counted and valued as of the date of detection. The only exception to this general rule is the valuation of pledged collateral, which the CLC, like the Commission itself, retained for reasons of ease of administration and continuity with existing practice.

F. Gain

The former fraud guideline provided that a defendant's "gain" from his offense might be used as a means of estimating the loss: "The offender's gain from committing a fraud is an alternative estimate that ordinarily will underestimate the loss."[321] This provision was directed primarily at situations such as large telemarketing frauds with numerous victims in which precise determination of the exact loss suffered by the victim class is difficult or impossible, but an examination of the defendant's records permits a good estimate of the amount the defendant gained from the crime. It was also useful in cases in which the former larceny-based loss definition made it difficult to

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320. *See Final Redefinition*, *supra* note 166, at 50.

321. U.S.S.G. § 2F1.1, app. n.9 (2000).

identify the true victim(s) of the offense.[322] Three major questions about gain were decided during the course of the debate over the economic crime package.

1. The New Economic Crime Guideline Retains "Gain" as a Method of Estimating Loss.—It has been argued that a separate provision addressing a defendant's "gain" is superfluous in a properly drafted loss guideline because "gain" is unnecessary if the victims of defendant's conduct are accurately identified.[323] However, other observers 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.[324] In such cases, it makes good sense to have gain available as a means of approximating loss. The new economic crime guideline treats gain in just this way stating that "The court shall use the [defendant's] gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."[325]

The final guideline correctly abandoned the approach of several earlier drafts that proposed using gain "instead of"[326] or as "an alternative measure of"[327] loss where "gain is greater than loss and more accurately reflects the seriousness of the offense."[328] This approach was freighted with problems. As the judges of the CLC observed:

> The Committee urges the Commission to view with caution proposals that treat "gain" as having independent significance. The loss tables are established on the assumption that they measure relative amounts of economic harm inflicted on victims of crime. As long as "gain" is merely an occasionally useful way of estimating "loss," treating a "gain" of $X the same as a "loss" of $X makes sense because the defendant's gain is some victim's loss. Some of the pecuniary gain options in the Commission Proposal assume, however, that there are cases in which the defendant receives a "gain," but does not cause a corresponding amount of economic harm, either because he causes no economic harm at all or because the amount of the gain is greater than the amount of the loss. (§ 2.(E) [Options 2 and 3])[329] If such cases exist, then in such cases it seems doubtful that gain should have the same effect on punishment as

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322. *See* Bowman, *Coping with "Loss," supra* note 103, at 508-09, 536-37.

323. *Id.* at 508.

324. *See, e.g.*, Carol C. Lam, *Assessing Loss in Health Care Fraud Cases*, 10 FED. SENT. 145, 147 (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.")

325. U.S.S.G. § 2B1.1, app. n.2(B) (2001).

326. *See, e.g.*, *Final Redefinition*, *supra* note 166, at 48.

327. January 2001 Commission Draft, *supra* note 177, at 7994.

328. *See, e.g.*, *Final Redefinition*, *supra* note 166, at 48.

329. The reference here is to the Sentencing Commission staff proposal published in January 2001. *See* January 2001 Commission draft, *supra* note 177.

> loss. In any case in which the "loss" is truly zero, or in which a defendant's gain exceeds the economic loss to all identifiable victims, gain is no longer a true measurement of economic harm. The Committee is unsure of the justification for sentencing the defendant to the same punishment he would have received if he had caused a harm equal to his gain.[330]

Assume two cases. Defendant A steals $100 from Victim, as a result of which he somehow "gains" $1000. Defendant B simply steals $1000 from Victim. The rule proposed in the January 2001 Commission draft and critiqued by the CLC would have punished Defendant A equally with Defendant B, even though Defendant B stole *ten times* as much money from and caused ten times as much economic harm to Victim. There is no justification either in criminal law theory, or in common sense, for such a result.

2. Gain and Regulatory Fraud.—A good deal of the debate over "gain" flowed from very particular Justice Department concerns about a series of appellate decisions finding no loss in cases where pharmaceutical manufacturers sold efficacious drugs after fraudulently obtaining FDA approval to do so, and requiring sentencing courts to offset against loss the value of useful services provided by unlicensed doctors and lawyers.[331] The proposals to allow the use of gain "instead of" loss, or as "an alternative measure" of loss when gain is greater than loss, were crafted primarily with these cases in mind. As discussed above, to address Justice Department concerns, the CLC proposed a special crediting rule, which in effect, defines loss in regulatory fraud cases as the gross amount paid by victims for goods or services fraudulently misrepresented as having regulatory approval or as being provided by a licensed professional.[332] Once this rule (now incorporated in the economic crime guideline[333]) seemed assured of passage, the Justice Department lost interest in an expansive definition of gain.

3. The Rejected Downward Departure for "Gain".—A number of commentators from the defense community argued forcefully that in cases where a defendant's personal gain is substantially less than the loss to the victim resulting from the offense, the Guidelines should provide for an encouraged downward departure.[334] The rationale for such a departure was said to be that a defendant who causes a large economic loss, but receives relatively little personal benefit from the crime, is less culpable than a defendant who garners all or a

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330. Committee on Criminal Law, Judicial Conference of the United States, *Criminal Law Committee Comments on Proposed Changes to "Loss" Definition*, 13 FED. SENT. REP. 41 (2000) (internal footnote added).

331. *See supra* notes 299-305 and accompanying text.

332. *See supra* notes 304-05 and accompanying text (discussing genesis of CLC proposal on measuring loss in regulatory fraud cases).

333. U.S.S.G. § 2B1.1, app. n.2(F)(v) (2001).

334. The most forceful exponent of this view was James E. Felman of the Practitioners' Advisory Group. *See Symposium Proceedings*, *supra* note 175, at 62 (remarks of James E. Felman during the Third Plenary Session of the October 2000 Sentencing Symposium on Economic Crime).

large portion of the victim's loss for himself.[335] A departure on this ground was proposed in several drafts of the new economic crime guideline; however, no such departure appears in the final version.[336] This omission does not categorically preclude a departure based on a defendant's small personal gain. Nonetheless, such a departure would be an "unmentioned," rather than an "encouraged," departure under the taxonomy of *Koon v. United States.*[337]

G. Intended Loss

1. The Theory of Including Intended Loss in Economic Crime Sentencing.— All of the sections of the new economic crime guideline discussed so far have concerned defining and measuring the actual losses inflicted by defendants. We now turn to "intended loss." The new economic crime guideline retains the rule of the former fraud guideline 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.[338] Before addressing the

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335. *Id.*

336. U.S.S.G. § 2B1.1, app. n.15(B) (Downward Departure Considerations) (2001).

337. 518 U.S. 81, 95-96 (1996) (creating a three-tiered structure for reviewing departures under Guideline Section 5K2.0, with different standards of review for encouraged, prohibited, and unmentioned factors). For analyses of the *Koon* case, see Bowman, *supra* note 201, at 23-24; Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After* Koon, 9 FED. SENT. REP. 19 (1996); and Barry L. Johnson, *Discretion and the Rule of Law in Federal Guideline Sentencing: Developing Departure Jurisprudence in the Wake of* Koon v. United States, 58 OHIO ST. L.J. 1697 (1998).

338. *Compare* U.S.S.G. § 2B1.1, app. n.2(A)(i) (2001), *with* U.S.S.G. § 2F1.1, app. n.8 (2000) ("[I]f 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."). For cases construing the former intended loss provision, see, for example, *United States v. Smith*, 62 F.3d 1073, 1079 (8th Cir. 1995) (credit card fraud defendant responsible for total amount of unauthorized charges, receiving 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 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); and *United States v. Watkins*, 994 F.2d 1192 (6th Cir. 1993) (formulating test for when defendant responsible for intended loss: Defendant intended the loss; it was possible for the defendant to cause the loss; and the defendant must have completed or been about to complete all acts necessary to bring about the loss.). In *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991), the court stated:

> [F]raud "loss" is, in the first instance, the amount of money the victim has actually lost (estimated at the 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.

Id. at 535-36. Similarly, in *United States v. Chevalier*, 1 F.3d 581, (7th Cir. 1993), the Seventh Circuit Court of Appeals stated:

> In calculating the amount of fraud, the district court was required to find the amount of

specifics of the new rules on intended loss, it is useful to pause and 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, because "intended loss" is only used when it exceeds actual loss, it is a measurement of harms that never happened.

The Sentencing Commission provides an increase in offense level for "intended loss" in both the old and new economic crime guidelines for the same reasons that substantive criminal liability is imposed for inchoate crimes like attempt and conspiracy.[339] First, criminal law is preeminently concerned with blameworthiness. We punish when, and because, punishment is deserved.[340] 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 desert. Would-be killers who shoot straight are punished for murder while those who don't are not. Nonetheless, we punish unconsumated 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 malignant designs were real and not mere fantasy, and thus that his conduct was morally blameworthy.[341] Second, we punish the

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> money the victim has actually lost (estimated at the 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 the actual loss.

Id. at 585-86.

Many courts held the same rule applicable to theft crimes, despite the absence of language in former Section 2B1.1 applying the intended loss rule generally to such cases. *See, e.g.,* United States v. Offiong, 83 F.3d 430, 1996 WL 195547 (9th Cir. 1996) (unpublished disposition) (applying Guideline Section B1.1, Application Note 4 presumption of $100 per credit card intended loss in stolen credit card case); United States v. Sowels, 998 F.2d 249, 251 (5th Cir. 1993) (same); United States v. Chapdelaine, 989 F.2d 28, 35 (1st Cir. 1993) (applying intended loss in an attempted robbery case, and noting Guideline Section 2X1.1, Application Note 2, which states that, "in an attempted theft the value of the items the defendant attempted to steal would be considered"); United States v. Hernandez, 952 F.2d 1110, 1118 (9th Cir. 1991) (holding intended loss an appropriate component of sentencing calculation for tape counterfeiting defendant sentenced under Guideline Section 2B1.1).

339. *See generally* Richard Buxton, *The Working Paper on Inchoate Offenses: (1) Incitement and Attempt*, 1973 CRIM. L. REV. 656, 660.

340. *See, e.g.*, 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 hence there should be an impossibility limitation on intended loss because in part, "One of the Guidelines' goals is to tailor punishment to a defendant's particular degree of culpability.").

341. Criminal liability for the crime of conspiracy requires evidence of some fixity of purpose in the form of an agreement with one or more co-conspirators. United States v. James, 528 F.2d

unsuccessful criminal not only because he deserves it, but because his frustrated plans present a high enough risk of actual harm that the utilitarian justifications for punishment dictate a dollop of deterrence.

The idea of basing punishment for economic crime on intended loss is grounded in the same moral and utilitarian considerations that impose 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.[342] From the utilitarian perspective, use of intended loss imposes punishment consequences (and thus, one hopes, achieves a deterrent effect) proportional 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.

2. The Language of the New Intended Loss Rule.—The new economic crime guideline says simply that "loss is the greater of actual or intended loss."[343] By contrast, in its May 1999 draft, the staff suggested as Option 2 that loss be defined as either "the sum of actual loss and any additional intended loss" or "the sum of actual loss and any intended loss not resulting in actual loss."[344] The Commission was ultimately unpersuaded by this approach.

There are certainly cases in which the defendant desired to cause pecuniary harm in addition to the actual harm that his conduct did indeed cause. But the vast majority of such cases are already accounted for by the present rule. Consider, for example, a defendant who intends to defraud his victims of $100,000, but only succeeds in getting away with $50,000 before being caught. In such a case, the staff proposal would have added the $50,000 actually stolen to the additional $50,000 the defendant wanted to steal, but couldn't, and get a loss of $100,000. The rule adopted by both the new and former guidelines dictates the identical result because the $100,000 loss the defendant intended

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999, 1012 (5th Cir. 1976); State v. Burns, 9 N.W.2d 518, 520 (Minn. 1943). Morever, a conspiracy normally requires an overt act in furtherance of the conspiracy committed by one of the conspirators. 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. MODEL PENAL CODE § 5.01(2) (1985). *See also* Buxton, *supra* note 339, 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*.

342. *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.")

343. U.S.S.G. § 2B1.1, app. n.2(A) (2001). Neither the former nor new Guidelines, nor any of the draft proposals on redefining loss, amplify the meaning of the word "intended." Drawing on general criminal law principles, it is fair to conclude that the intended loss is the harm the defendant either desired to cause or was practically certain would result from his offense. Whether any language making this point explicit should be included in the Guidelines remains an open question.

344. *See, e.g.*, *Final Redefinition*, *supra* note 166, at 47.

already includes the $50,000 the defendant succeeded in stealing. The staff's proposal was an attempt to address those cases in which a defendant intends to cause a loss in addition to the actual loss, and the actual loss figure includes economic harms reasonably foreseeable to the defendant, but not specifically intended by him. There are no doubt some such cases. There is, however, reason to doubt that they are sufficiently common to make it worthwhile to complicate the definition of loss. In any event, the Commission did not find it so.

3. Impossibility and "Economic Reality."—Should a defendant be held responsible for losses he subjectively desired and intended to inflict even if the achievement of his criminal goals was impossible, or at the least highly improbable? This question arose under the former theft and fraud guidelines 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 was a divergence of views among the circuits on both types of cases.

a. "Sting" operations.—Defendants caught by government undercover operations before they stole any money commonly argued that the intended loss provision of former Section 2F1.1, Application Note 8, should not apply to them because no actual loss was possible. The majority of the circuits to have addressed the question rejected this argument and treated fraud cases no differently than drug cases or other "stings" in which success is foreclosed by the defendant's choice of confederate.[345]

The Tenth Circuit, however, took a different view. In *United States v. Galbraith*,[346] the court wrote that where the defendant is dealing with a government agent and no money changes hands, there is no loss.[347] The thesis was that, because "loss" is supposed to measure economic harm, in a situation where no harm could have occurred, the loss is zero. The *Galbraith* court relied heavily on *United States v. Santiago*.[348] In *Santiago*, the defendant falsely reported to his insurance company that his car had been stolen and submitted a

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345. *See* United States v. Klisser, 190 F.3d 34, 36 (2d Cir. 1999) (holding fact that defendant attempted to conspire with undercover agent does not make intended loss zero); United States v. Schlei, 122 F.3d 944, 995-96 (11th Cir. 1997) (sentencing guidelines permit enhancement for sentences based on defendant's intended loss in sting operation); *Studevent*, 116 F.3d at 1561 (loss calculation includes stolen checks passed to undercover FBI agent despite fact they would never be cashed); 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 the 'intended loss' is zero."); United States v. Yellowe, 24 F.3d 1110, 1112-13 (9th Cir. 1991) (applying intended loss provision of Section 2F1.1 where defendant enters into a scheme with a government informant to make unauthorized credit card charges).

346. 20 F.3d 1054, 1058-1060 (10th Cir. 1994).

347. *See also* United States v. Sneed, 34 F.3d 1570 (10th Cir. 1994) (accord).

348. 977 F.2d 517 (10th Cir. 1992).

claim for $11,000.[349] Because the police intervened, the claim was not processed, but had it been, the maximum the company would have paid would have been the car's "blue book" value of $4800.[350] The court concluded that the "intended loss" thus could not "exceed the loss a defendant in fact could have occasioned if his or her fraud had been entirely successful," in this case $4800.[351]

It is doubtful that *Santiago* compels the result in *Galbraith*. First, 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.[352] To say that Galbraith "could not have succeeded" because he was dealing with government agents is the same as saying that Santiago "could not have succeeded" because the police found about his scam before the claim could be processed.

The Tenth Circuit was apparently attempting to import into fraud sentencing a version of the principles of criminal liability concerning mistake of fact, or perhaps the doctrine of impossible attempts. Even if those 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 negate or disprove the existence of the required mental state.[353] Modern law concerning the doctrine of *impossible attempts* looks at the facts as defendant believed them to be. If he either 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.[354]

If Santiago honestly believed that his insurance claim could yield $11,000, it is hard to see why he is not guilty of at least an attempt to defraud the company of $11,000. At a minimum, and as the *Santiago* court held, his over-optimistic goals certainly do not relieve him of liability for the $4800 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 succeeding in defrauding his putative victims of over $600,000. The answer is plainly yes. The Tenth Circuit's *Galbraith* opinion creates the arguably

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349. *Id.* at 519.

350. *Id.*

351. *Id.* at 524.

352. *Galbraith*, 20 F.3d at 1059.

353. MODEL PENAL CODE § 2.04(1)(a) (1985).

354. *Id.* §§ 2.04(2), 5.01. *See also* United States v. Thomas, 13 U.S.C.M.A 278, 32 C.M.R. 278 (C.M.A. 1962) (servicemen guilty of attempted rape of deceased woman with whom they had intercourse where they believed her to be alive, but unconscious and thus incapable of consent, at the time of the act). *But see* United States v. Berrigan, 482 F.2d 171, 188-89 (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).

anomalous situation 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 attempted to swindle from the same agent.[355]

b. General impossibility or improbability.—In *Galbraith*, the Tenth Circuit also relied on the Sixth Circuit's opinion in *United States v. Watkins*[356] and its own work in *United States v. Smith*, 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*."[357] These two opinions are exemplars of a line of cases that attempted to impose an outer limit on the scope of "intended loss" defined by a notion of "economic reality." 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,[358] a term later omitted.[359] Even after that amendment, some courts continued to consider the probability of success of defendants' schemes.[360] However, the majority position regarding the former

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355. The Ninth Circuit notes this anomaly in *United States v. Robinson*, 94 F.3d 1325, 1329 (9th Cir. 1996), and cites it as a reason to reject the impossibility argument regarding intended loss.

356. 994 F.2d 1192, 1196 (6th Cir. 1993) (formulating test for when defendant responsible for intended loss: defendant intended the loss; it was possible for the defendant to cause the loss; and the defendant must have completed or been about to complete all acts necessary to bring about the loss.); *see also* United States v. Moored, 38 F.3d 1419 (6th Cir. 1994). In *Moored*, the Sixth Circuit discussed the "'probable' loss contemplated by section 2F1.1." *Id.* at 1425. *Moored* adopts the reasoning and language of *United States v. Smith*, 951 F.2d 1164 (10th Cir. 1991), saying that "the record must support, by a preponderance of the evidence, a conclusion that [the defendant] *realistically intended* a loss of more than $1,700,000." *Id.* (emphasis added). Later, the court said:

> Clearly, it would have been proper for the district court to enhance Defendant's offense level if there was sufficient evidence in the record that Defendant did not intend to repay the loan, or even if there was proof in the record that Defendant had no realistic means to pay the loan.

Id. at 1429. As a practical matter, the court seems to suggest that once a defendant asserts an intention to repay money, the government must affirmatively disprove that claim.

357. *Smith*, 951 F.2d at 1168 (emphasis added).

358. *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 Guideline Section 2F1.1, app. n.7, to "probable or intended loss").

359. U.S.S.G. App. C, amend. 393 (1991).

360. In *United States v. Egemonye*, 62 F.3d 425 (1st Cir. 1995), the First Circuit sent equivocal signals. The court 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: "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." *Id.* at 429 (emphasis added). *See also* United States v. Ensminger, 174 F.3d 1143, 1146 (10th Cir. 1999) (holding no loss enhancement appropriate where fraud had not even a remote possibility of success); United States v. Sung, 51 F.3d 92, 95 (7th Cir. 1995) (rejecting $960,000 loss calculation in product counterfeiting scheme that government based on capacity of empty counterfeit cartons purchased

theft and fraud guidelines was that the "amount of loss that the [defendants] intended to inflict does not have to be realistic."[361]

The new economic crime guideline codifies the majority view on both sting cases and the economic reality doctrine. It states that: "'Intended loss' (I) means the reasonably foreseeable pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)."[362]

H. Enhancements

With the exception of the "more than minimal planning" adjustments in both the former theft and fraud guidelines,[363] and the "scheme to defraud more than one victim" adjustment in the former fraud guideline,[364] which were deleted and built into the loss table beginning at $120,000, the new economic crime guideline retains all the offense level enhancements of both the former theft and fraud guidelines. The new guideline adds a new enhancement for offenses involving numerous victims.[365] These changes are related to one another, and to the enhancement for "sophisticated means" added in 1998.[366]

The former theft and fraud guidelines were criticized for taking inadequate account of the defendant's culpable mental state. Two indices of mental state in an economic offense are the complexity of the scheme and the number of victims adversely affected by the defendant's crime. A complex scheme requires more planning and deliberation than an impulsive one. A scheme to steal from many victims suggests a more abandoned mental state than a scheme to steal from only

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by defendant because defendant had "no reasonable expectation" of being able to sell so much product).

361. *See* United States v. Lorenzo, 995 F.2d 1448, 1460 (9th Cir. 1993) (citing United States v. Koenig, 952 F.2d 267, 271-72 (9th Cir. 1991) ("[S]ection 2F1.1 only requires a calculation of 'intended loss' and does not require a finding that the intentions were realistic.")). *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. 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."); United States v. Wai-Keung, 115 F.3d 874, 877 (11th Cir. 1997) (same); United States v. Coffman, 94 F.3d 330, 336 (7th Cir. 1996) (expressly rejecting the argument "that a loss that cannot possibly occur cannot be intended"); United States v. DeFelippis, 950 F.2d 444 (7th Cir. 1991) (irrelevant that there was "no possibility" defendant would obtain loan based on fraudulent misrepresentations).

362. U.S.S.G. § 2B1.1, app. n.2(A)(ii) (2001).

363. *Id.* § 2B1.1(b)(4)(A) (2000), and § 2F1.1(b)(2)(A) (2000).

364. *Id.* § 2F1.1(b)(2)(B).

365. *Id.* § 2B1.1(b)(2) (2001). The new guideline also adds an enhancement for making false statements to a consumer in connection with educational loans. *Id.* § 2B1.1(b)(7)(D).

366. *Id.* § 2F1.1(b)(5) (1998).

one. However, the former theft and fraud guidelines accounted for these factors only through the "more than minimal planning" adjustment in both the fraud and theft guidelines, and the more-than-one-victim adjustment in the fraud guideline. Because the more than minimal planning enhancement was applied to more than eighty percent of all defendants sentenced under the fraud guideline and more than sixty percent of those sentenced under the theft guideline,[367] it did very little to differentiate the relative culpability of fraud and theft defendants. By setting the bar for the enhancement so low, the former guidelines made no distinction between the mental state of a small business owner who carried out a $10,000 check kite and that of a fraudulent telemarketer who defrauded thousands of victims and concealed the proceeds in offshore bank accounts.

It was suggested that the Guidelines could better account for gradations in mental state by: abolishing the more than minimal planning adjustment; creating instead an enhancement for those defendants who really did engage in complex planning; creating a downward adjustment for only minimal planning or a single instance of impulsive behavior; and creating a new enhancement for multiple victims that imposed differing increases in offense level depending on the number of victims.[368] The Commission ultimately adopted three-fourths of this approach.

Effective November 1, 1998, the Commission added a two-level enhancement to the former fraud guideline applicable if "(A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means."[369] This amendment was originally submitted to Congress in September 1998 as a temporary emergency amendment. In 2000, the Commission made the amendment permanent,[370] and renumbered it from Section 2F1.1(b)(5) to Section 2F1.1(b)(6).[371] It is now incorporated in the new economic crime guideline as Section 2B1.1(b)(8).
As noted, the new economic crime guideline eliminates more than minimal planning. The new economic crime guideline also contains a two-tiered enhancement for offenses involving numerous victims.[372] If the offense involved more than ten but fewer than fifty victims, the offense level increases by two.[373] Offenses involving fifty or more victims receive a four-level increase.[374] As yet, the Commission has provided no offense level discount for minimal planning or one-time impulsive behavior.

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367. *See* Bowman, *Coping With "Loss," supra* note 103, at 499 n.186.

368. *Id.* at 497-502.

369. U.S.S.G. § 2F1.1(b)(5).

370. *Id.* app. C, amend. 595 (2000).

371. *Id.* app. C, amend. 596 (2000).

372. For a discussion of the rationale for such an enhancement, see Frank O. Bowman, III, *Coping With "Loss," supra* note 103, at 500-02.

373. U.S.S.G. § 2B1.1(b)(2)(A)(i) (2001).

374. *Id.* § 2B1.1(b)(2)(B).

I. Departures

1. Upward Departures.—The application notes to the consolidated economic crime guideline contain a revised list of encouraged upward departure factors.[375] Some of the revisions merely rephrase encouraged departure factors listed in the former theft and fraud guidelines without any apparent change in meaning. For example, Application Notes 15(A)(i) and 15(A)(ii) of Section 2B1.1 (2001) authorize a departure if a defendant's object in committing an economic crime was to cause a non-monetary harm or if, in committing an economic crime, the defendant caused or risked "substantial non-monetary harm." These provisions merely break into two paragraphs, and provide examples for, the two clauses of Application Note 11(a) of former Section 2F1.1. In some cases, the new phrasing of old departure factors may have substantive impact. For example, the former fraud guideline encouraged departure if "the offense involved the *knowing* endangerment of the solvency of one or more victims."[376] The new economic crime guideline retains this enhancement, but omits the requirement that it be "knowing." The effect is to provide an encouraged departure in any case in which the solvency of a victim was endangered by the offense, regardless of whether the defendant was aware of that possibility.

The new guideline omits three encouraged, but virtually never used, departures listed in former Section 2F1.1: the departure for making false statements "for the purpose of facilitating some other crime,"[377] the departure for "endanger[ing] national security or military readiness,"[378] and the departure for "caus[ing] a loss of confidence in an important institution."[379]

Finally, the new economic crime guideline adds one new encouraged departure factor of considerable importance. Application Note 15(A)(iv) provides for an upward departure where "[t]he offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1)."[380] The inclusion of *risk of loss* as a departure factor is important primarily as a limitation on the category of actual loss. Under the former fraud guideline, a number of courts included in actual loss harms that victims never actually suffered, but which were risked by the defendant's conduct. For example, some courts refused to credit defendants for collateral posted in loan fraud cases, citing a so-called "risk theory of loss" pursuant to which loss would include not only actual economic harm suffered, but also the value of economic interests placed at risk.[381] A similar line of thinking was at work in investment fraud cases in

375. *Id.* § 2B1.1 n.15 (2001).

376. *Id.* § 2F1.1 n.11(f) (2000) (emphasis added).

377. *Id.* § 2F1.1 n.11(b).

378. *Id.* § 2F1.1 n.11(d).

379. *Id.* § 2F1.1 n.11(e).

380. *Id.* § 2B1.1 n.15(A)(iv) (2001).

381. *See, e.g.*, United States v. Najjor, 255 F.3d 979, 985 (9th Cir. 2001).

which courts refused to grant credit against loss for amounts paid to victims as part of the scheme.[382] By negative implication, the risk of loss departure in the new economic crime guideline rejects a "risk theory of loss." Under the new guideline, actual loss includes only actual loss. Unrealized losses risked by the offense are to be considered only for purposes of departure.

2. Downward Departures.—The new economic crime guideline contains only one ground for an encouraged downward departure. A downward departure "may be warranted" in cases "in which the offense level determined under this guideline substantially overstates the seriousness of the offense."[383] This language differs from the analogous provision of the former fraud guideline in that the old language spoke only of the amount of the loss overstating the seriousness of the offense.[384] However, the revision appears to be primarily one of style rather than substance.

J. Ex Post Facto Considerations

In any case covered by Section 2B1.1 (2001) in which the criminal conduct was completed prior to November 1, 2001, the sentencing court will be obliged to determine whether application of the new economic crime guideline will benefit or disadvantage the defendant by comparison with a sentence under the former theft or fraud guidelines. If the defendant would have received a lower sentence under the old guidelines, the Ex Post Facto Clause compels imposition of that lower sentence rather than the higher sentence under Section 2B1.1 (2001).[385] The Guidelines' "one book rule," mandates that "The Guidelines Manual in effect on a particular date shall be applied in its entirety."[386] Therefore, in pre-November 1, 2001 cases, in order to make the before-and-after comparison required by the Ex Post Facto Clause, courts will often have to perform two complete sentencing calculations, one using the old rules in their entirety, and the another using the new rules in their entirety.

K. Changes in Money Laundering Guidelines

The essential critique of the former money laundering guideline stemmed from two points. First, a defendant could be convicted of money laundering for using the ill-gotten proceeds of a broad spectrum of crimes to perform virtually any financial transaction involving a bank or similar institution. Second, the guidelines set very high base offense levels merely for being convicted of a money laundering offense, regardless of the seriousness of the underlying offense (although there were some modest differences) and largely irrespective of the amount of money laundered. That is, money laundering of any type produced a

382. *See, e.g.*, United States v. Munoz, 233 F.3d 1117, 1138 (9th Cir. 2000).

383. U.S.S.G. § 2B1.1 n.15(B) (2001).

384. *Id.* § 2F1.1 n.8(b) (2000).

385. *See* Miller v. Florida, 482 U.S. 423, 432-33 (1987).

386. U.S.S.G. § 1B1.11(b)(2) (2001).

base offense level of 20,[387] and convictions under three subsections of 18 U.S.C. § 1956(a) produced base offense levels of 23.[388] A base offense level of 23 translates, irrespective of any other factor, into a sentence of about four years.[389] When one added on enhancement for the amount of laundered money,[390] the sentences were higher still.

According to some critics, this combination of circumstances often penalized laundering money derived from crime more harshly than the underlying crime itself, and created an incentive for prosecutors to charge money laundering in otherwise unexceptional fraud cases in order to generate far higher sentences than would otherwise be available. After years of debate, the Commission included in the 2001 economic crime package a new money laundering guideline that ties money laundering penalties much more closely to the penalties for the underlying crime that generated the laundered funds.[391] The focus of this Article is economic crime, not money laundering, which is often associated with drug trafficking and other offenses. Consequently, the details of the new money laundering guideline will not be discussed here.

Nonetheless, the new money laundering provision is of considerable importance to economic crime sentencing because henceforth a money laundering sentence will no longer be automatically higher than a fraud sentence. At a minimum, both counsel and the court will have to calculate carefully the differentials, if any, before agreeing to pleas or sentencing defendants.

CONCLUSION

I hope readers find the foregoing analysis useful. The project of passing an economic crime package has been ongoing since 1995, and has drawn on the energy and talents of hundreds of lawyers, judges, past and present Sentencing Commissioners, and members of the Commission staff. Although no law is perfect, I am hopeful (and cautiously confident) that the provisions of this package will both simplify economic crime sentencing and generate sentences that are at least incrementally more just than those imposed under the former guidelines.

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387. *Id.* § 2S1.1(a)(2) (2000).

388. *Id.* § 2S1.1(a)(1).

389. *Id.* § 5A (Sentencing Table).

390. *Id.* § 2S1.1(b)(2).

391. *Id.* § 2S1.1 (2001). For example, the new Section 2S1.1(a)(1) refers to the offense level of the underlying offense as one measure of the proper offense level for money laundering, and Section 2S1.1(a)(2) ties base offense level to amount laundered using the new fraud table, and imposes only a two-level "premium" for money laundering.

Appendix A

The New Consolidated Economic Crime Guideline, U.S.S.G. § 2B1.1 (Nov. 1, 2001), and Selected Application Notes

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; 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 $5,000, increase the offense level as follows:

Loss	(Apply the Greatest)	Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **2**
(C)	More than $10,000	add **4**
(D)	More than $30,000	add **6**
(E)	More than $70,000	add **8**
(F)	More than $120,000	add **10**
(G)	More than $200,000	add **12**
(H)	More than $400,000	add **14**
(I)	More than $1,000,000	add **16**
(J)	More than $2,500,000	add **18**
(K)	More than $7,000,000	add **20**
(L)	More than $20,000,000	add **22**
(M)	More than $50,000,000	add **24**
(N)	More than $100,000,000	add **26**.

(2) (Apply the greater) If the offense

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by **2** levels; or

(B) involved 50 or more victims, increase by **4** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.

(6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery, increase by **2** levels.

(7) 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; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(8) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(9) If the offense involved (A) the possession or use of any device-making equipment; (B) the production or trafficking of any unauthorized access device or counterfeit access device; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

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

(11) If the offense involved (A) the conscious or reckless risk of death or 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 **14**, increase to level **14**.

(12) (Apply the greater) If

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by **4** levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341,

§ 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary
[Selected provisions]

2. Loss Under Subsection (b)(1). This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule. Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss. "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss. "Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm. "Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm. For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases. In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases. In the case of a product substitution offense, the reasonably foreseeable

pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) Procurement Fraud Cases. In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Protected Computer Cases. In the case of an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2), actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: reasonable costs to the victim of conducting a damage assessment, and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

(B) Gain. The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) Estimation of Loss. The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to

determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) The cost of repairs to damaged property.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(D) Exclusions from Loss. Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(E) Credits Against Loss. Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(F) Special Rules. Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not

less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 7(A).

(ii) Government Benefits. In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.

(iii) Davis-Bacon Act Violations. In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.

(iv) Ponzi and Other Fraudulent Investment Schemes. In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

(v) Certain Other Unlawful Misrepresentation Schemes. In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

(vi) Value of Controlled Substances. In a case involving controlled substances, loss is the estimated street value of the controlled substances.

3. Victim and Mass-Marketing Enhancement under Subsection (b)(2).

(A) Definitions. For purposes of subsection (b)(2):

(i) "Mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (I) purchase goods or services; (II) participate in a contest or sweepstakes; or (III) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.

(ii) "Victim" means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

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6. Sophisticated Means Enhancement under Subsection (b)(8).

(A) Definition of United States. For purposes of subsection (b)(8)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement. For purposes of subsection (b)(8)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Enhancement. If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct

that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

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15. Departure Considerations.

(A) Upward Departure Considerations. There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records).

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).

(v) The offense endangered the solvency or financial security of one or more victims.

(vi) In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vii) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a

substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(B) Downward Departure Consideration. There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

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Appendix B

Former Guidelines Provisions Defining "Loss"

From U.S.S.G. § 2B1.1 (Theft Offenses), Application Notes

2. "Loss" means the value of the property taken, damaged, or destroyed. 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 interest 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. Examples: (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.

   Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to '2F1.1 (Fraud and Deceit).

   In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle $5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month period. In this example, the loss is $5,000 (the amount taken), not $45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.

   In stolen property offenses (receiving, transporting, transferring, transmitting, or possessing stolen property), the loss is the value of the stolen property determined as in a theft offense.

   In an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. §1030(e)(2)(A) or (B), "loss" includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

   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 '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 ‘2X1.1.

3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.

4. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than $100 per card. See Commentary to ‘’ 2X1.1 (Attempt, Solicitation, or Conspiracy) and 2F1.1 (Fraud and Deceit).

5. Controlled substances should be valued at their estimated street value.

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15. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).

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Background: 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. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

From U.S.S.G. § 2F1.1 (Fraud Offenses), Application Notes

8. Valuation of loss is discussed in the Commentary to §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; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §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. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the loss would be $40,000.

There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). 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). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) Fraudulent Loan Application and Contract Procurement Cases

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. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, 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. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

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. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

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.

9. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, 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 fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

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11. 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;

(f) the offense involved the knowing endangerment of the solvency of one or more victims.

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

12. Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

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Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

> 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 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.