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Guest Editor's Observations: Back to Basics: Helping the Commission Solve the "Loss" Mess with Old Familiar Tools

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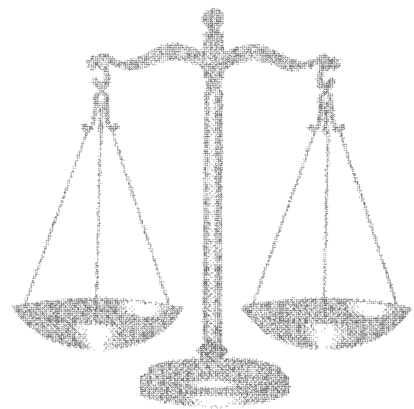

Roughly one-quarter of all convicted federal defendants are sentenced for some kind of economic crime.[1] There is an emerging consensus that the provisions of the federal sentencing guidelines devoted to economic crime do not work very well, a consensus that has created a powerful momentum for significant change. This Issue of FSR is about whether the guidelines concerning economic offenses, principally §2B1.1 (Theft) and §2F1.1 (Fraud), should be materially altered, and if so, how. The debate that has been joined over this question is technically complex and philosophically challenging. There are disagreements over issues as particular as when collateral posted by a defendant in a fraudulent loan transaction should be valued, and as broad as whether actual harm inflicted by crime or the culpable mental state of the criminal should be the most important factor in assessing offense seriousness. Whatever the outcome, the Commission's deliberations in this area promise to be among the most substantive and stimulating in years.

My own involvement with economic crime sentencing began as a fraud prosecutor, and continued as Special Counsel to the Sentencing Commission. After leaving the government, my work on the problem culminated in a comprehensive analysis of punishment in theft and fraud cases,[2] and a specific proposal for a consolidated theft/fraud guideline incorporating a substantial redefinition of the core concept of "loss," both of which were presented to the Commission in October 1997. The proposal is reproduced *infra* at p. 173.

I. Two Related Issues: The Loss Tables and the Loss Definition

The Commission is now addressing two interrelated issues: (1) whether federal sentences for economic crimes are, in general, too short; and (2) whether the guidelines' rules for assessing offense seriousness, particularly the rules governing determination of "loss," should be amended. The Commission's deliberations have taken the form of two debates carried on in tandem. On one track is a set of proposals to "raise the loss tables" in § 2B1.1 and § 2F1.1 to assure that many economic criminals (excepting those who inflict relatively small losses) receive higher sentences for lower amounts of "loss" than is presently the case. The Commission has published for comment two versions of a revised "loss" table, both of which are reproduced in this issue. On the second track is the more intellectually ambitious task of trying to rationalize the bewildering and inconsistent set of rules that purport to explain how a sentencing court should determine the amount of "loss" attributable to a defendant for sentencing purposes. The Commission held one hearing on the "loss" definition problem on October 15, 1997, and another is scheduled in San Francisco on March 5, 1998, in conjunction with the ABA White Collar Crime Conference. An edited transcript of the October 1997 hearing appears in this issue. In December 1997, the Commission published for comment proposals for a sweeping revision of the theft and fraud guidelines and the commentary defining "loss." These proposals are also reproduced here.

The first point of disagreement among the many parties to the current debate is whether the issues of changing the loss tables and of redefining what "loss" itself means should be addressed sequentially or simultaneously. Those who support raising the tables and increasing sentences (including the Department of Justice and the Judicial Conference) generally take the position that the tables should be adjusted first, and that the task of redefining "loss" should be addressed thereafter.[3] By contrast, those opposing an increase in economic crime sentences, primarily the Practitioners Advisory Group, contend that the table and the "loss" definition are inseparably intertwined and should be considered to-gether.[4] Commissioner Gelacak has given indications that he is persuaded by the practitioners' argument.[5]

Regardless of the order in which the Commission chooses to address them, proposals to change the "loss" tables and efforts to reconfigure the "loss" definition are but different parts of a single sentencing problem. This Issue of FSR is devoted primarily to definitional issues, but contains some commentary on the tables as well.

II. The Length of Economic Crime Sentences

There is a marked disparity between the severity of sentences handed out under the guidelines to drug criminals and economic criminals. Sentences for both categories were raised by the guidelines, but drug sentences rose to far higher levels than theft and fraud sentences.[6] Despite the increase over pre-guidelines levels, prosecutors, as well as some judges, probation officers, and commentators, have argued that economic crime sentences remain too low, both by comparison to drug sentences, and as measured by their moral seriousness and the damage they inflict on society.

I am skeptical of the notion that federal narcotics sentences provide a useful benchmark for sentences in other areas. Nonetheless, I share the view that economic crime sentences may often be too low.[7] Two points are particularly troubling. First, under the current guidelines, a defendant can steal a very substantial sum without being required to serve any prison time. For example, a first-time offender must steal more than $70,000 before any sentence of imprisonment is mandated (and the amount rises to $200,000 if the crime was a one-time occurrence involving only minimal planning).[8] Second, defendants who steal obscenely large amounts of money receive strikingly low sentences. For example, a swindler who stole between $20 million and $40 million dollars would, if he pled guilty, be sentenced to only 37-46 months.[9]

Federal defender Barry Boss challenges the assertion that "white collar" sentences need to be raised. His article notes the disparity between drug sentences and property crime sentences, but finds in it only evidence that drug sentences are too high. He observes that the stereotype of white-collar offenders as a class of Michael Milkens is often misleading. And he notes the appa-rent contradiction between the position of the Judicial Conference that white collar sentences need to be raised and the actual sentencing patterns of district court judges, who depart upward very rarely in economic crime cases and seem to distribute their white collar sentences fairly evenly through the lower, middle, and upper reaches of the guideline range. It is to be hoped that the Judicial Conference and the Department of Justice will respond to this thought-provoking critique.

"Evidence of widespread dissatisfaction with the 'loss' definition is growing."

III. Beyond the Tables: "Loss" and Other Problems of Definition

Regardless of whether the loss tables are changed, the problem of what the term "loss" *means* and how it is to be interpreted remains cannot be ignored. When the original Sentencing Commission wrote guidelines for economic crimes, it made "loss" the linchpin of the whole enterprise. Since then, the "loss" calculation has become one of the most frequently litigated issues in federal sentencing law. Because the "loss" measurement is the primary determinant of sentence length in crimes of dishonest acquisition, federal district court judges must make loss findings in 8,000-10,000 cases every year.[10] More than a thousand federal court opinions discuss the "loss" finding in some way.[11]

Evidence of widespread dissatisfaction with the "loss" definition is growing. There are at present splits of opinion between the circuits on at least *eleven* analytically distinct issues concerning the meaning and application of the "loss" concept.[12] Even more significant than the circuit splits is the overall sense of uncertainty, confusion, and sheer aggravation that emerges whenever lawyers and judges who deal with federal white collar crime discuss "loss." A recent Federal Judicial Center survey of judges and probation officers found that both groups ranked the "loss" definition as the second most pressing issue for the Commission to address.[13] Most informed observers, including the Commissioners themselves, seem to agree that some action is needed.[14] As Commissioner Tacha observed at the October 1997 hearing, "I think we've got enough comment from enough people that we've got a problem that we believe in."

A. Consolidation of the Theft and Fraud Guidelines

The source of some of the confusion in sentencing federal economic crimes is the existence of one guideline for crimes involving "theft," §2B1.1, and another for crimes involving "fraud," §2F1.1. There is no good reason to have two separate guidelines. There are compelling reasons to consolidate §2B1.1 and §2F1.1.

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.

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 theft and fraud guidelines is driven almost entirely by loss amount, and the "loss tables" in the two guidelines are virtually identical. Therefore, application of either §2B1.1 or §2F1.1 to the same set of facts will customarily produce either the identical sentencing range, or a pair of ranges so close that the top of one will approach or overlap the bottom of the other.[15]

Third, the existence of separate guidelines is mischievous. Sections 2B1.1 and 2F1.1, and their commentary regarding "loss," are *slightly* different, albeit for reasons that are not easy to discern. Consequently, creative litigants and judges try to impute meaning into the differences, which only leads to confusion.[16]

There now appears to be little or no dissent from the view that the theft and fraud guidelines should be consolidated. Speaking for the Judicial Conference, Judge Gilbert endorses a common definition of "loss" for both theft and fraud cases. Probation Officer Fred Tryles says his colleagues would welcome consolidation, and the Practitioners Advisory Group has expressed no opposition. The Commission has proposed consolidating §2B1.1 and §2F1.1.[17]

B. The "Loss" Conundrum

Sadly, the apparent consensus on consolidating §2B1.1 and §2F1.1 brings us no closer to penetrating the central mystery of federal economic crime sentencing — the conundrum of "loss." Why is "loss" such a problem? No one disputes the notion that stealing more is worse than stealing less. Most commentators agree with the judgment at the heart of the current economic crime guidelines that the sentences of thieves and swindlers should be determined in significant part by the magnitude of the economic deprivations they caused or intended. (Although, in a delightfully stimulating article, Professor Russell Coombs proposes an entirely different approach in which economic criminals would be sentenced based primarily on projections of their future dangerousness rather than assessments of the seriousness of the crime of conviction.) Where the guide-lines now fall short is in the translation of a sound fundamental intuition into a just, doctrinally coherent, easy-to-apply set of rules.

"There are compelling reasons to consolidate § 2B1.1 and § 2F1.1."

The root of the "loss" problem is that the guidelines do not now contain a meaningful definition of the term. The commentary following §§ 2B1.1 and 2F1.1 includes a series of directives which neither singly nor together amount to a coherent definition. In the first place, the basic definition of "loss" — "the value of the property taken, damaged, or destroyed" — uses the language of larceny. The word "taken" is a term of art, denoting the "taking" element of common law larceny, with its insistence on a transfer of possession of moveable personalty. Outside the context of simple larceny-like offenses, this definition is virtually useless. For example, when is property "taken" in a wire fraud or a bankruptcy fraud or an insider trading case, and how, and from whom?

Aside from the larceny-based core definition, perhaps the most glaring defect in the current "loss" rules is their treatment of causation. When we ask what the "loss" is in any particular case, we are really asking two questions about causation: First, what economic harms resulted from defendant's conduct? Second, which among the harms the defendant caused *in fact* should count *in law* in setting his sentence? The guidelines relating to these questions and the cases construing them have created an ugly and nearly incomprehensible patchwork, which so far as I can discern looks roughly like this:

a. There are no rules for identifying the "victims" whose "losses" will count.

b. The relevant conduct guideline, §1B1.3, mandates a broad measurement of harm, saying that offense levels are to be determined based on "all harms resulting from" a defendant's own conduct, and thus apparently sets up a rule of pure "but for" causation.

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

d. Moreover, §2F1.1, Application Note 7(c), says only "direct damages" count, and excludes "consequential damages." Both these terms are drawn from contract law and are difficult, if not impossible, to apply in the criminal context. If "consequential damages" is given its customary contract law meaning, Note 7(c) excludes from "loss" even economic harms which are directly caused by defendant's conduct and foreseeable to him.

e. On the other hand, in cases of procurement fraud and product substitution, §2F1.1, Application Note 7(c), specifically *includes* in "loss" the "consequential damages" elsewhere excluded, if the loss is "foreseeable."

f. Likewise, under the relevant conduct rules, §1B1.3, if a defendant has co-conspirators or other criminal cohorts, he is responsible for all harms that resulted from all of their "reasonably foreseeable acts and omissions" in furtherance of the crime.

g. In loan fraud cases, pursuant to §2F1.1, app. note 7(b), the loss to banks caused by a drop in value of pledged collateral is a part of the "loss," regardless of whether it was foreseeable and despite the fact that such a loss is a classic "consequential damage."

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

In short, as George Banks says in *Mary Poppins*, you have a ghastly mess.

A usable definition of "loss" must address two basic problems: the *problem of inclusion*, that is, deciding which harms to include and which to exclude from the ambit of "loss," and the *problem of measurement*, that is, creating rules that assist courts in calculating the monetary value of the included categories of economic harm.

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1. The Problem of Inclusion

The problem of inclusion should be addressed by redefining "loss" in terms of cause-in-fact and foreseeability.

a. Cause in fact.

At a minimum, a defendant's conduct must be a "necessary antecedent to the harm at issue."[18] Any guidelines definition of "loss" must at the very least require this sort of "but for" causation. If a harm would have happened regardless of defendant's behavior, there can be no justice in punishing him for its occurrence. The more difficult question is whether to impose on the "loss" calculation a standard of logical causality stricter than pure "but for" causation. Chains of cause and effect, once initiated, run on infinitely through time. The recurring legal question is where to cut off liability for harms increasingly remote from a defendant's conduct.

The Commission should adopt as part of the "loss" definition a standard of cause-in-fact more stringent than "but for" causation. I have proposed requiring that a defendant's criminal conduct be a "substantial factor" in the occurrence of the harm at issue.[19] This language is consistent with the general principle of criminal fault that people should be sent to jail only for harms to which they have a significant connection. Moreover, it gives courts some guidance in cases where actual loss stems from multiple causes.

b. Foreseeability

In every area of law to have wrestled with it, the solution to the problem of placing reasonable limits on legal liability for harm which a defendant caused in fact has centered on the concept of "foreseeability," that is, some assessment of which harms the defendant could or should reasonably have anticipated. Criminal law is no different. Foreseeability has long been a staple of analysis both in determining guilt[20] and in imposing sentences.

The guidelines repeatedly use foreseeability as the dividing line between those harms which count for measuring offense seriousness and those which do not.[21] This approach has received the imprimatur of the Supreme Court, even in the capital sentencing context.[22] Criminal law is preeminently about fault. It is unjust to put someone in prison for harms he did not intend or could not reasonably have anticipated would follow from his choice to do wrong. It is entirely appropriate, however, to punish based on harms that would not have occurred but for the defendant's evil choices, and which the defendant either anticipated or, with modest thought, could and should have anticipated.

Nonetheless, it would be a cardinal error to incorporate the concept of foreseeability into the definition of "loss" without some carefully crafted limiting language. Foreseeability is a remarkably protean term. What the law finds "foreseeable" in a tort case is often very different than what it views as "foreseeable" if the subject is breach of contract or negligent homicide. Because the emphasis in criminal law is on fault, the definition of what is foreseeable for sentencing purposes should be relatively narrow. I have proposed language defining foreseeability that emphasizes two points: 1) Although the idea of foreseeability is an objective standard (we ask not what the defendant *did* foresee, but what he *could have* foreseen), the definition I propose insists that the harm have been foreseeable to *this* defendant given the facts available to him at the time he acted. 2) The standard requires that a reasonable person in defendant's shoes "would have foreseen" the harm in question "as a probable result."

The combination of a more-than-but-for cause in fact standard and a tougher-than-tort-law foreseeability standard should produce several practical results. First, a somewhat expanded universe of pecuniary harms will be counted as "loss." This is desirable as providing a closer congruence between the true harm caused by economic offenders and the sentences they serve. Second, the new rule should pose a much simpler analytical task for sentencing courts.

Some will contend that the rules proposed here will impose an intolerable fact-finding burden on courts. I respectfully disagree. The problem with the loss calculation has never been the factual issues; it has been with trying to apply an incomprehensible set of conflicting rules to well-understood facts. As some workingman's sage once observed, the key to success in any undertaking is having the right tools. The current guidelines use the wrong verbal tools to define loss, tools designed for other tasks. The core issues in defining loss are questions about causation — cause-in-fact and foreseeability. The guidelines should deal with these questions squarely and should give sentencing judges the definitional tools they need to make case-by-case decisions. The tools offered here are specialized manifestations of the old familiar ones, rendered both comfortable and adaptable by centuries of use. Judges do not know how to merge larceny language ("taken") with contracts terminology ("consequential damages"). They do know how to determine cause-in-fact. They do know how to determine foreseeability. The Commission should let them.

"The core issues in defining loss are questions about causation—cause-in-fact and foreseeability."

2. The Problem of Measurement

Even if the Commission adopts a core definition of "loss" framed in terms of cause-in-fact and foreseeability, there remain a number of critical problems of measurement that should be addressed in the commentary. Both the Judicial Conference and the Practitioners Advisory Group have been emphatic that a stripped-down core "loss" definition with no commentary on commonly occurring problems of interpretation would do more harm than good.[23]

Particular issues the commentary should address include:

(1) Who are the victim(s)?

(2) *When* should "loss" be measured. I have proposed a general rule that "loss" should ordinarily be measured at the time of detection of the crime, subject to two exceptions.[24] In this article, Assistant U.S. Attorneys Stephen Manning and Barbara Jongbloed discuss the special and difficult problem of deciding when to value collateral pledged by a defendant as part of a fraudulent loan transaction.

(3) Should loss be "net" or "gross"? That is, should a defendant receive credit against the amount of the "loss" for things of value he conveyed to the victims in the course of committing a fraud? In my own view, to do otherwise would be inconsistent with the fundamental notion that "loss" is a measurement of economic harm inflicted on a defendant's victims. The Practitioners Advisory Group plainly agrees with this basic approach.[24] However, at the October 1997 hearing, Judge Rosen seemed to be advocating "gross loss" as the proper measure of a defendant's culpability, at least in cases where providing a victim some benefit was integral to the criminal scheme.

Carol Lam, an Assistant U.S. Attorney who has been a national pioneer in health care fraud prosecutions, examines the special problems that arise in calculating net "loss" in large-scale health care cases where pervasive fraudulent billings are interspersed with the provision of some medically necessary goods and services. Ms. Lam seeks guidance from the Commission on permissible methods of proving "loss" in high-volume, low-individual-amount billing frauds. And like Judge Rosen, in cases where a defendant's operations were "permeated with fraud," she questions the need to give a defendant credit for legitimate benefits provided incidentally to victims.

C. Intended Loss

At present, both the theft and fraud guidelines mandate that "loss" shall be the greater of the actual or intended loss. In my view, this rule should be retained in a consolidated theft/fraud guideline. Because application of the guidelines requires a method for ranking the seriousness of particular instances of crimes of the same general type, "intended loss," or something very like it, is indispensable. There must be a way of distinguishing among inchoate (and also partially successful) economic crimes. Laws penalizing inchoate crimes exist because such conduct is blameworthy and because it poses a risk of actual harm. Because inchoate (or only partially successful) economic crimes are, in essence, wholly or partially unconsummated efforts to inflict pecuniary loss, it makes perfect sense to rank such crimes in large measure based on the amount of harm the defendant desired to inflict. A crook who sets out to steal a million dollars is, all else being equal, both morally less attractive and a greater social risk than one whose more modest goal is to snitch a pack of cigarettes.

1. Weighting Actual vs. Intended Loss

The more difficult question is the proper relationship in the sentencing calculus between actual and intended loss. In a thoughtful article, James Gibson criticizes the "actual-or-in-tended-loss-whichever-is-greater" rule. He suggests that the "loss" for sentencing purposes should always be the average of the loss intended and the loss actually caused by defendant's conduct.

2. "Economic Reality" and "Sting" Cases

" 'Intended loss,' or something very like it, is indispensable."

In cases involving intended loss, defendants often argue that they should not be accountable for losses that could not realistically have occurred, and as to which there was thus never any real risk of harm. This argument commonly arises in government "sting" cases and cases where a defendant's criminal aspirations are out of step with economic reality. Although blameworthiness and risk of harm are both considerations in punishing uncompleted conduct, the first consideration is more significant than the second. Therefore, just as in the liability phase of a criminal trial, at sen-tencing the factual impossibility or improbability of success of a criminal plan should, in general, be no defense. I have proposed an application note governing cases of this type that focuses primarily on the defendant's state of mind, on what he intended and what he believed.[25] It holds him responsible for losses he intended, so long as they "might reasonably have occurred if the facts were as he believed them to be." The goal is to hold defendants responsible for their evil objectives, while taking account of risk by leaving a window, albeit a small one, to subtract from "loss" those rare harms that could not have befallen, *even if* things were as the defendant thought them.

John Cline takes a somewhat different approach in his fine article about the "economic reality doctrine." He concludes that current guidelines, properly interpreted, permit no exclusion from intended loss of factually impossible harms. However, he advocates a rule that would exclude impossible harms from the sentence calculus in both economic impossibility and "sting" cases. This result could be achieved, he says, either by including "in the definition of intended loss a requirement that the loss be realistic," or by of treating all cases where intended loss exceeds actual loss under the attempt guideline, §2X1.1, which would he would amend to exclude factually impossible harms.

IV. The Commission's Pending Proposals

In December 1997, the Sentencing Commission promulgated proposals to significantly amend current economic crime guidelines. As noted above, it proposed consolidating §2B1.1 and §2F1.1, raising sentences somewhat for most economic offenders, and significantly redefining the term "loss." I am encouraged that the proposed new definition of "loss" is couched in terms of causation. Nonetheless, like any first draft, this proposal has room for improvement.

A. The Philosophy of the Reform Proposals

Because the effort to solve the "loss" problem grew out of the Commission's long-running "simplification" project, it has been too easy to fall into the error of thinking that "short" is the equivalent of "simple." If I buy my child a bicycle for Christmas and it comes disassembled with instructions that read, "Figure it out yourself," the *instructions* are both short and simple, but they do nothing at all to make the *job of assembling the bicycle* simpler. When I open that box, I don't care about brevity; I want instructions that are comprehensible, that answer the questions I am likely to ask, and that let me build a bicycle that works.

Likewise, the length of a new economic crime guideline is immaterial. The important questions are whether judges and litigants can understand it, whether it addresses the sentencing problems that most commonly occur, and whether it produces just sentences. Consequently, the Commission's Option One — a revised core definition of "loss" with no accompanying amplifying commentary — should be rejected.

B. An Analysis of Option Two

The three keys to a successful reform are (a) a doctrinally sound core definition of "loss," supplemented by (b) coherent definitions of the concepts that make up the core definition and (c) instructions on how to deal with the most commonly recurring problem cases. The Commission's Option Two satisfies the first condition reasonably well. Conditions (b) and (c) are not so well addressed. Among the areas the Commission should study further are these:

1. *Cause-in-fact and legal cause:* The most immediately noticeable gap in Option Two is the absence of a standard for cause-in-fact or a definition of the standard for legal cause. Option Two does not identify, much less define, a standard for cause-in-fact, relying instead on the bald assertion that loss is harm "resulting from" defendant's conduct. Courts may infer from this language that the cause-in-fact standard is "but for" causation. But why make them guess? The absence of a standard for determining cause-in-fact in the current guidelines has been the root of the difficulty in *United States v. Neadle*[26] and other cases involving remote harms or multiple causes.

   More disturbing that the lack of a *standard* for cause-in-fact is the absence of any *definition* of the standard Option Two (quite properly) adopts for legal cause — "reasonable foreseeability." Although cause-in-fact and legal cause are analytically separate issues, they inevitably get jumbled together in judicial decision-making in every area of the law. The sticking point in most cases, the question on which liability turns, is whether a harm caused in fact by a defendant's conduct was reasonably foreseeable. Option Two now commits the cardinal error against which I warned above, that is, failing to tell judges the meaning of this common, but malleable, term. Make no mistake — telling sentencing courts that the defining characteristic of "loss" is the foreseeability of the economic harm is a huge improvement over the present mess. Still, much trouble could be saved by defining this *very* elastic concept.

2. *Victims:* Option Two, like the current guidelines, does not tell the courts who the "victims" are. The subject lurks beneath the surface of many "loss" calculation quandaries,[27] but is nowhere mentioned in Option Two.
3. *"Taken":* The continued use of the term "taken" in Option Two (app. notes 2(A)(1), and (2)) is puzzling given the demonstrated problems with that word.
4. *"Time of Measurement":* Option Two's provision regarding the time at which "loss" is to be measured needs more thought. Among other problems, the proposed general rule would mean that an embezzler who steals money to invest in a speculative scheme, and then pays it back before detection, would be accountable for zero loss and would thus suffer little or no punishment. This is a "Get Out of Jail Free" card for the successful crooked speculator. Likewise, it provides no deterrence to those of an optimistic disposition who are considering speculations with other people's money. The remainder of the time-of-measurement section is very difficult to follow. The related issues of *when* loss is to be measured and *net vs. gross loss* should be disentangled.

"It has been too easy to fall into the error of thinking that 'short' is the equivalent of 'simple.' "

5. *Interest:* Option Two makes inclusion or exclusion of interest a departure question. Fair arguments can be made for either including or excluding interest.[28] But the Commission has to *decide.* Either interest should count, and the guidelines should say so, or it should not and the guidelines should say that. Without a decision, there will be endless litigation and unavoidable disparity.
6. *Calculating net loss in multi-victim cases:* The "Ponzi schemes" section of Option Two adopts the right rule, but limiting it to "ponzi schemes" so-called is unhelpful. The rule proposed is equally applicable to all multi-victim fraud schemes and the guidelines should say so.

IV. Conclusion

Paradoxically, the very complexity and technical difficulty of the "loss" area of sentencing law may be the factor that makes meaningful reform possible. Although no question regarding the punishment of crime can (or should) ever be resolved in complete isolation from questions of sentencing philosophy, relatively few of the many disputes about the current economic crimes guidelines lend themselves to the ideological polarization and political posturing that have tended to paralyze efforts at substantive change to other areas of the guidelines. Perhaps as a consequence, the Commission has already made impressive progress toward crafting significant improvements in the way economic criminals are sentenced in federal courts.

Whether the Commission will succeed during this amendment cycle in passing any of the changes it has proposed remains very much in doubt. With only four sitting commissioners, unanimity is required for any action. The prospect for early action on new appointments is cloudy, and it is uncertain whether new appointees could educate themselves quickly enough on such complex questions to vote on proposed amendments by April 1998. Even if no action occurs this year, however, it seems likely that economic crime sentencing will remain high on the Commission's agenda for the foreseeable future. The current Commission has laid the groundwork for solid, substantive reform that their successors would be wise to study and build on.

Notes

[1]In fiscal 1995, 26.36% of the federal sentences imposed were for auto theft, larceny, fraud, embezzlement, forgery, or counterfeiting. U.S. Sentencing Commission, Annual Report 1995, Tbl. 18, at 60.

[2]*See*, Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 Vand. L. Rev. — (April 1998) (hereinafter *Coping With Loss*).

[3]*See, e.g.*, the written statement of Judge J. Phil Gilbert of the Criminal Law Committee of the Judicial Conference (p. 128), and the testimony of Judge Gerald Rosen, speaking for the same committee at the October 15, 1997 hearing (p.157).

[4]*See*, testimony of James E. Felman, October 15, 1997 Commission hearing, *infra*.

[5]*See*, remarks of Commissioner Gelacak, October 15, 1997 hearing, *infra*.

[6] Compare § 2D1.1 and § 2F1.1. *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. Rev. 679, 733-40 (1996)

[7]*Id.* at 740.

[8]The result is the same whether the crime was a "theft" or a "fraud." *Compare*, §2B1.1(b)(1)(I) (1997) and §2F1.1(b)(1)(G) (1997). The $70,000 figure assumes a "more than minimal planning" adjustment under either §2B1.1(b)(4)(A) or §2F1.1(b)(2)(A); 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 §3E1.1(a), (b). Moreover, a first-time offender must steal more than $20,000 before a judge is required to impose even intermediate conditions of confinement such home detention, community confinement, etc. (a figure that rises to $70,000 if the offense did not involve "more than minimal planning"). *See*, §2B1.1 and Ch. 5, Pt. A.

[9]This result assumes a first-time offender given a two-level "more than minimal planning" upward adjustment under §2F1.1(b)(2)(A) (1997), and a three-level acceptance of responsibility downward adjustment, §3E1.1(a), (b).

[10]Depending on how one reads them, Commission figures suggest that a "loss" determination is required in 20-25% of all federal sentencings. If so, roughly 8,000-10,000 of the approximately 40,000 annual federal sentencings involve "loss" calculations. *See*, U.S. Sentencing Commission, Annual Report 1995, Tbl. 18, at 60.

[11]A January 30, 1998 search of Westlaw revealed 923 federal appelate opinions discussing the concept of "loss" in either U.S.S.G. §2B1.1 or §2F1.1 and 110 additional such opinions from federal district courts.

[12]For a description of these circuit splits, see Prepared Statement of Frank Bowman, for October 15, 1997 Hearing of the U.S. Sentencing Commission, at 2N.3 available on the Commission website, http://www.ussg.gov.

[13]Federal Judicial Center 1996 Survey on Sentencing Guidelines (FJC 1997).

[14]In this issue, *see* the commentaries of Judge J. Phil Gilbert and Probation Officer Fred Tryles, as well as the testimony at the October 15, 1997 Commission hearing of witnesses James Felman, Frank Bowman and Judge Gerald Rosen. At the October hearing, DOJ Ex Officio Commissioner Mary Harkenrider and Probation Officer Gregory Hunt seemed less convinced of the need for substantial change.

[15]The Sentencing Table is constructed so that the top of one sentencing range will overlap the bottom of the range two offense levels higher. Ch. 5, Pt. A (1996).

[16]*See, e.g.,* Third Circuit cases beginning with *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991), running through *U.S. v. Badaracco*, 954 F.2d (3d Cir. 1992), *U.S. v. Coyle*, 63 F.3d 1239 (3d Cir. 1995), and *U.S. v. Maurello*, 76 F.3d 1304 (1996).

[17]63 Fed. Reg., No. 3, Pt. II (Jan. 6, 1998).

[18]*United States v. Neadle*, 72 F.3d 1104, 1119 (3d Cir. 1996) (Becker, J., concurring and dissenting), *citing* 4 Fowler V. Harper, et al., The Law of Torts § 20.2, at 89-91 (2d ed. 1986).

[19]§2Z1.1, app. note 1(b), Bowman Proposal,infra.

[20]Foreseeability is expressly an element of crimes of criminal negligence and even the most aggravated degrees of recklessness. It is also integral to determinations of guilt for crimes in which the ostensible *mens rea* involves intentionality or knowledge. *See, e.g., People v. Rakusz*, 484 N.Y.S.2d 784 (N.Y. Crim Ct. 1985) 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. 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." *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985).

[21]*See* §1B1.3(a) (dictating that sentencing be based on harms resulting from the foreseeable conduct of defendant's criminal partners); §2F1.1, n. 7(c) (including in "loss" foreseeable consequential damages in procurement fraud and product substitution cases); § 2F1.1, n. 10(a) (authorizing a departure for "reasonably foreseeable non-monetary harm"), § 2F1.1, n. 10(c) (authorizing departure for "reasonably foreseeable" physical, psychological, or emotional harm).

[22]*Payne v. Tennessee,* 501 U.S. 808 (1990)

[23]*See* statement of Judge Gilbert and the testimony of Judge Rosen and Mr. Felman.

[24]*See* testimony of James Felman.

[25]§2Z1.1, app. note 1(f), Bowman Proposal, *infra.*

[26]*See* §2Z1.1, app. note 2(b), in Bowman Proposal.

[27]72 F.3d 1104 (3d Cir. 1995) (note particularly the cogent dissent of Judge Becker).

[28]*Id.*

[29]*See Coping With Loss.*