Missouri Law Review

Volume 81
Issue 3 *Summer 2016*

Article 6

Summer 2016

A Fatally Flawed Proxy:The Role of "Intended Loss" in the U.S. Sentencing Guidelines for Fraud

Daniel S. Guarnera

A Fatally Flawed Proxy: The Role of "Intended Loss" in the U.S. Sentencing Guidelines for Fraud

Daniel S. Guarnera[*]

TABLE OF CONTENTS

---

[*] Associate at Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC. I would like to thank Brandon Garrett for supervising the initial project that resulted in this Article, and Josh Bowers and Caleb Nelson for their invaluable comments on earlier drafts. I am also deeply grateful to Steve Braga, Darryl Brown, Jim Felman, Jane Anne Murray, Jacob Schuman, Kate Stith, and the participants in the University of Virginia Law & Public Service Program research colloquium (led by Jim Ryan) for their feedback and encouragement. Any errors that remain are mine alone.

I. INTRODUCTION

On November 1, 2015, the U.S. Sentencing Commission promulgated a slate of amendments that capped off a "comprehensive, multi-year study" of the economic crime provisions in the U.S. Sentencing Guidelines.[1] Section 2B1.1 of the Guidelines provides judges with advisory sentencing recommendations for defendants convicted of offenses like fraud and theft,[2] which are among the most commonly prosecuted in the federal system.[3] Yet judges depart from the economic crime Guidelines at higher rates than almost any other major Guidelines provision,[4] leading one Commissioner to lament that Section 2B1.1 has "lost the backing of a large part of the judiciary."[5] The Commission's study and the resulting amendments sought to reassess the economic crime Guidelines in light of these concerns.[6]

The most important driver of sentences for economic crimes under the Guidelines is the amount of pecuniary harm that the defendant either *actually* caused or *intended* to cause.[7] The "loss enhancement" received special focus

1. Final Priorities for Amendment Cycle, 79 Fed. Reg. 49378, 49379 (notice of final priorities Aug. 20, 2014); *see also* Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782, 25782 (notice of submission to Congress of amendments May 5, 2015) (announcing amendments to the Guidelines effective Nov. 1, 2015).

2. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2015).

3. *See* U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2015) [hereinafter U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS] (showing that, in fiscal year 2014, 12.1% of all federal offenders were sentenced under Section 2B1.1).

4. *Id.* at tbl. 27A (showing that defendants convicted of fraud were given below-Guidelines sentences 28.3% of the time, which is more often than any other major offense category other than child pornography production).

5. Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, U.S. Dep't of Justice, to the Honorable William K. Sessions III, Chair, U.S. Sentencing Commission 3 (June 28, 2010), *reprinted in* 23 FED. SENT'G REP. 282, 284 (2011). Jonathan J. Wroblewski was an ex-officio Commissioner on the U.S. Sentencing Commission through his position as the Director of the Office of Policy and Legislation. *Meet the Principal Deputy Assistant Attorney General*, U.S. DEP'T JUST., https://www.justice.gov/olp/jonathan-wroblewski (last updated Jan. 26, 2016).

6. *See* Chief Judge Patti Saris, Chair, U.S. Sentencing Commission, Keynote Address at the Regulatory Offenses & Criminal Law Conference Ctr. on the Admin. of Criminal Law 1 (Apr. 14, 2015), http://www.ussc.gov/sites/default/files/pdf/news/speeches-and-articles/speech_saris_20150414.pdf [hereinafter Saris, Keynote Address on the Administration of Criminal Law] (explaining that "[t]he Commission heard concerns from some judges that the economic crime guideline was too high, that it produced unreasonable sentences, and that it was 'fundamentally broken,'" even as surveys indicated that other judges approved of the current Guidelines).

7. § 2B1.1(b)(1).

in the recent review of Section 2B1.1,[8] but the Commission ultimately rebuffed calls from advocacy groups for a fundamental reimagining of loss's role.[9] The November 2015 amendments did, however, resolve a lingering circuit split by clarifying the definition of "intended loss."[10] Whereas Section 2B1.1 had previously left the word "intended" undefined, the new amendment explained that intended loss means "the pecuniary harm that the defendant *purposely sought to inflict*."[11]

This Article provides the first extended analysis of the new intended loss provision, and it does so primarily through the framework of rules and standards.[12] Generally speaking, a rule is "framed in terms of concepts that can be applied without explicit reference to the principles or policies that might have motivated the rule, usually by specifying operative facts that trigger the

---

8. Sentencing Guidelines for United States Courts, 77 Fed. Reg. 51113, 51113 (notice of final priorities Aug. 23, 2012) (listing "examination of the loss table and the definition of loss" as policy priorities).

9. *See, e.g.*, Theodore Simon, *NACDL Comments on Proposed Amendments for 2015 Cycle*, NAT'L ASS'N CRIM. DEF. LAWYERS 8–9 (Mar. 18, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/NACDL.pdf ("NACDL continues to believe that § 2B1.1 should be re-conceptualized to . . . reduc[e] the outsize role that loss amount currently plays in sentencing determinations."); Cory L. Andrews & Markham S. Chenoweth, *Comments of the Washington Legal Foundation to the United States Sentencing Commission Concerning Proposed Amendments to § 2B1.1 of the U.S. Sentencing Guidelines*, WASH. LEGAL FOUND. 3 (Mar. 18, 2015), http://www.wlf.org/upload/litigation/misc/WLFComments--USSC(Mar182015)(2).pdf ("[T]he fundamental problem in white-collar sentencing lies with the oversized role that loss *amount* plays in the loss calculation, a problem that remains wholly unaddressed by the Commission's proposed amendment.").

10. Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782, 25791 (notice of submission to Congress of amendments May 5, 2015).

11. § 2B1.1 n.3(A)(ii)(I) (emphasis added).

12. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (defining rules and standards in terms of "the extent to which efforts to give content to the law are undertaken before or after individuals act") (emphasis omitted); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 78 (1993) (describing rules as directives that "exclud[e] from consideration some properties of the particular event that a particularistic decision procedure would recognize"); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985) (distinguishing rules and standards); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67–71 (1983) (advocating criteria for choosing the proper form of legal directives in the context of administrative law); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1221 (1982) (characterizing the choice between rules and standards as a "fundamental question in jurisprudence"); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685–87 (1976) (differentiating rules and standards).

rule."[13] In contrast, the use of standards "involve[s] recourse to justificatory principles or policies, mediated by some form of balancing that does not specify in advance the result thereof."[14] For example, a law prohibiting driving over sixty-five miles per hour is a prototypical rule; negligence is a prototypical standard.[15] In the context of sentencing, rules and standards are primarily distinguished by *when* a sentencing directive is given its specific content (before the sentencing hearing or during it) and *who* decides its content (Congress, the Commission, or the judge).[16] The pros and cons of rules and standards have been analyzed in depth in many areas of law,[17] but they have only recently been applied systematically to sentencing.[18]

The U.S. Sentencing Guidelines adopt a predominantly rule-oriented approach to sentencing. Under the Guidelines, judges determine whether predetermined factual triggers exist, and each trigger has a designated effect on the recommended sentence.[19] This framework promotes uniformity and predictability – two characteristics traditionally associated with rules – but those virtues are never absolute when imposing punishment. Congress has mandated that sentences give weight to other normative values as well, most notably proportionality.[20] The Guidelines seek to achieve proportionality within their rule-based framework by adjusting sentences based on the presence of specified facts about the offender and offense. In the economic crime Guidelines, the most important such facts are actual and intended loss. The

---

13. Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM L. REV. 1287, 1295 (2006).

14. *Id.*

15. *See* Kaplow, *supra* note 12, at 560, 564; Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 460 (2016).

16. *See* Covey, *supra* note 15, at 450 ("In general, rules are legal directives that define the content of the law ex ante through prescription of concrete empirical triggers that dictate determinate responses. Standards, in contrast, leave the determination of the directive's content to the applier of the standard ex post, rely on evaluative triggers rather than empirical ones, and guide rather than determine the choice of response."). *See also* Kaplow, *supra* note 12, at 560 ("[T]he only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act.") (emphasis omitted); Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 20 (2015) ("The first way to think about sentence determinacy is in terms of institutional choice, or rather, *who* should decide punishment.") (emphasis added).

17. *See, e.g.*, *supra* note 12.

18. *See generally* Schuman, *supra* note 16; Covey, *supra* note 15. To the author's knowledge, the association between the modern advisory Guidelines' system and standards-based governance was first noted by Adam H. Morse. Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559, 595–604 (2010).

19. *See* Covey, *supra* note 15, at 465.

20. *See* U.S SENTENCING GUIDELINES MANUAL § 1A1(3) (U.S. SENTENCING COMM'N 2015); 28 U.S.C. § 991(b)(1)(B) (2012) (instructing the Commission to "avoid[] unwarranted sentencing disparities").

Commission has explained that actual and intended loss are designed to function as rule-based proxies for the seriousness of the offense and the culpability of the offender, respectively – two of the traditional metrics used to evaluate the proportionality of punishment.[21]

This Article argues that one of the principal reasons that the economic crime Guidelines systematically generate sentencing recommendations that many judges consider disproportionately harsh – resulting in high rates of below-Guidelines sentences – is that intended loss is a fatally flawed proxy for culpability. By its nature, culpability is too complex and heterogeneous an inquiry to be accurately represented by the pecuniary harm that the defendant intended to inflict, and therefore the sentencing enhancements it triggers are not well calibrated to the holistic culpability of the offender. While the Commission adopted the new "purposeful loss" amendment ostensibly to improve the correlation between culpability and intended loss, in fact, it is likely to make the "fit" between them even more problematic by excluding a significant range of highly culpable conduct – criminal acts that the defendant subjectively *expected* would result in losses, but that were not undertaken with the *purpose* of imposing them.

While there are several ways in which the intended loss rule could be reformulated to improve its correlation with culpability, these reforms will never be fully satisfactory as a theoretical or practical matter. Ultimately, a more promising approach would involve shifting the culpability inquiry away from the rule-like intended loss measure and toward a standard that allows judges to evaluate culpability directly. This would be a departure from current Guidelines practice in some respects, though there are partial precedents, most notably the Guidelines' method of determining fines for convicted corporations. In many ways, however, it would also be more consistent with the now-advisory status of the Guidelines. Current doctrine requires judges to evaluate every sentence independently in light of a range of statutorily defined penological objectives, and a standard-like culpability inquiry could help judges in this task. A well-crafted standard that is cabined within the Guidelines' superstructure and requires judges to follow a structured decision-making procedure holds the promise of striking an attractive balance between the uniformity and predictability of rules and the proportionality of standards in the context of economic crime sentencing – and possibly other areas of the Guidelines as well.

Part II of this Article evaluates sentencing policy through the lens of the rules-and-standards framework. The fraud Guidelines and the often-determinative role of the loss enhancement in sentencing are described in Part III, with a focus on the role of intended loss in the overall Guidelines structure. Part IV describes the circuit split over whether an objective or subjective inquiry was required to calculate intended loss. It then analyzes the Commission's response to the split – the 2015 amendment redefining intended loss as "purposeful" loss. In the criminal law, "purpose" almost always

21. *See infra* notes 119, 129–30 and accompanying text.

means one's aspiration or conscious objective. By requiring an intended pecuniary loss to be purposeful, the Commission has set such a high threshold that, if "purpose" is interpreted conventionally, a significant subset of culpable offenders may be found to have no intended loss whatsoever. This Part closes by suggesting an alternative standard – subjectively expected loss – that would be more workable and better reflect the full spectrum of culpable conduct. Finally, Part V examines why, regardless of how it is defined, intended loss is likely to be a fatally flawed proxy for culpability. This Part looks at two possible avenues for reform: a more complex rule that would allow for multiple inputs relevant to the defendant's blameworthiness, and a standard-based approach that would permit judges to evaluate culpability directly. It concludes by arguing that a properly tailored standard – one that structures the decision-making process of judges and incorporates the Commission's sentencing expertise – would be the best way for the economic crimes Guidelines to assist judges in executing their statutory sentencing duties. A brief conclusion follows.

II. SENTENCING GUIDELINES THROUGH THE LENS OF RULES AND STANDARDS

Federal sentencing law over the last century can be categorized into three distinct phases, each marked by an abrupt and decisive transition: a sentencing regime in which judges had almost unchecked discretion gave way to mandatory sentencing Guidelines, which, in turn, were supplanted by a hybrid system requiring judges to impose punishments that advanced a range of statutory objectives, while using the Guidelines as a benchmark. The strengths and weaknesses of each sentencing regime can be usefully understood using the familiar framework of rules and standards.

A. The Origins of the Guidelines

In the decades prior to the Sentencing Reform Act of 1984, federal judges had expansive discretion to assign criminal punishments.[22] The nearly universal "indeterminate" sentencing model cast sentencing judges as clinician-like experts tasked with crafting punishments that maximized the defendant's prospects for rehabilitation.[23] From that premise, it followed that

22. *See, e.g.*, Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 278 (2005) (describing the discretion afforded to judges in the years before modern sentencing reforms as "broad and essentially unregulated").

23. Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 684–85 ("The rehabilitative ideal, what some have called the 'medical model' of sentencing, was at flood tide [under indeterminate sentencing]. The article of faith upon which sentencing rested was that criminal deviance could be treated like any other disorder."). The "indeterminacy" of sentencing was a function both of the dis-

judges were allowed to take into account any fact about the offender or offense that would help them design an individualized rehabilitative "treatment."[24] Congress prescribed broad statutory sentencing ranges, but judges' sentencing decisions within those ranges were effectively insulated from appellate review.[25]

By the late 1970s, however, a bipartisan consensus had emerged against indeterminate sentencing.[26] Although numerous factors contributed to widespread dissatisfaction with the status quo, the two core objections were, first, that judges had less expertise in rehabilitating offenders than had been assumed (as shown by persistently high rates of crime and recidivism), and, second, that sentencing had become capricious and lawless.[27] According to leading reform advocate Marvin Frankel, sentencing practice was infected by "unruliness, the absence of rational ordering, [and] the unbridled power of sentencers to be arbitrary and discriminatory."[28]

The coalition of reformers offered a policy solution: sentencing Guidelines written by politically insulated, expert-led panels, designed to bring transparency, accountability, and the rule of law to sentencing.[29] In 1980, Minnesota became the first state to adopt mandatory guidelines,[30] and Congress followed suit four years later with the Sentencing Reform Act ("the

---

cretion judges enjoyed to issue sentences anywhere within the statutory range (on the front end) and the ability of parole boards to determine the actual term a defendant served (on the back end). *See id.* at 680–82.

24. *See* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695 (2010); *see also* Williams v. New York, 337 U.S. 241, 248 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."); *see also id.* at 249–50 (arguing that limitations on a judge's access to information at sentencing would "undermine modern penological procedural policies").

25. *See* Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("[T]he general proposition [is] that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.").

26. *See* Berman, *supra* note 22, at 279–80; *see also* Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 183–84 (2007) (explaining that Guidelines' systems arose in response to a "double-sided attack [that] was a remarkable, if adventitious, event whereby clashing [liberal and conservative] ideologies found a common enemy and (in theory) a common solution").

27. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 33–37 (1998) (describing the development of determinate sentencing Guidelines by reformers in the 1970s); *see also* Weisberg, *supra* note 26, at 184.

28. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1972).

29. *See* STITH & CABRANES, *supra* note 27, at 33–37.

30. Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 388 (1997).

Act"), which passed with near-unanimous support.[31] The Act created a new agency in the judicial branch – the U.S. Sentencing Commission – and authorized it both to "establish sentencing policies" that "assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. §] 3553(a)(2)" (namely, retribution, deterrence, incapacitation, and rehabilitation) and "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities."[32] Congress also specified the means to those ends: federal sentencing Guidelines, which would be mandatory for judges in most cases.[33]

B. The Rules/Standards Framework

As many scholars have recognized, legal directives such as the Guidelines can be classified on a spectrum with "rules" on one end and "standards" on the other.[34] A rule-like directive "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere" – specifically, by the rulemaker.[35] Standards, meanwhile, "tend[] to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation" and "allow the decisionmaker to take into account all relevant factors or the totality of the circumstances."[36]

One commonly used illustration of the difference between rules and standards is a speed limit.[37] A legislature concerned that high-speed driving increases the risk of accidents could pass a bright-line rule ("no driver may drive over sixty-five miles per hour") or a standard ("no driver may drive at an unsafe speed"). With the rule, the legislature makes an *ex ante* generalization about the maximum safe speed, and the officials tasked with applying the rule need only determine whether a driver was, in fact, driving over the predefined limit. With the standard, on the other hand, the legislature delegates responsibility for determining whether a particular driver was driving at an "unsafe speed" to the officials enforcing the rule. That decision would be made in light of the array of facts (speed in conjunction with weather, driver

31. *See* STITH & CABRANES, *supra* note 27, at 45–48 (recounting the passage of the Sentencing Reform Act).

32. 28 U.S.C. § 991(b)(1) (2012).

33. *See* 18 U.S.C. § 3553(b)(1) (making the Guidelines mandatory unless the court found an aggravating or mitigating circumstance not accounted for by the Commission), *partially abrogated by* United States v. Booker, 543 U.S. 220 (2005).

34. *See* sources cited *supra* note 12.

35. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

36. *Id.* at 58–59.

37. *See* Kaplow, *supra* note 12, at 560; *see also* Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155, 155–56 (1999).

skill, traffic conditions, etc.) that the officials consider relevant to evaluating the safety of the driver's speed under the circumstances.

The speed limit example helps demonstrate the complementary virtues and vices of rules and standards. Because the content of a rule is defined narrowly *ex ante* – before the person subject to the rule acts – rules promote uniformity, predictability, and stability, while risking regimentation, intransigence, and rigidity.[38] Standards promote individualization, flexibility, and dynamism, while risking capriciousness, manipulability, and variability.[39] At least in theory, speed limits provide clear notice to drivers of what conduct is prohibited and clear instructions to police officers and judges on how to determine who is violating the law. By the same token, however, the rule will be both over-inclusive and under-inclusive with respect to its purported goal of reducing accidents – an attentive driver on an empty freeway might be able to drive safely at eighty miles per hour, for example, and in a blizzard, it might be quite unsafe for anyone to drive the posted speed limit.[40] A standard enables officials to account for these facts, but because the task of defining "unsafe speed" is delegated to police officers and judges, there is a heightened risk of unpredictable and inconsistent outcomes.

By mandating the creation of the federal sentencing Guidelines, Congress shifted sentencing law away from the amorphous and idiosyncratic standards of judges and toward a rule-driven framework created by the expert-led Commission.[41] But the Commission was given significant leeway to determine how precisely to operationalize rule-based sentencing.[42] The Commission understood the twin objectives of the Guidelines to be the ad-

---

38. *See* Schlag, *supra* note 12, at 400 (listing traditionally recognized virtues and vices of rules and standards, while expressing skepticism about the virtues-and-vices paradigm).

39. *Id.*

40. Skeptics of the rules/standards dialectic point out that legal directives have a tendency to converge when actually applied in the real world; for example, police officers reserve their ticket-issuing authority for unsafe driving rather than technical violations of the speed limit, and in the sentencing context, prosecutors under-charge crimes to avoid mandatory minimum sentences. Covey, *supra* note 15, at 484–85; *see also* Schlag, *supra* note 12, at 405–06.

41. *See* Covey, *supra* note 15, at 448–49; Richard A. Bierschbach & Stephanos Bibas, *What's Wrong With Sentencing Equality?*, 102 VA. L. REV. __ (forthcoming 2016) ("In practice, the institutions that individualize sentences based on granular, ex post, and process-oriented factors tend to be disaggregated decision-making bodies, like individual judges . . . . A focus on equalizing outcomes thus has a centripetal force to it, pulling sentencing away from those bodies to more centralized, higher-level institutions like sentencing commissions.").

42. As the Supreme Court has noted, the Commission "enjoy[ed] significant discretion in formulating guidelines." Mistretta v. United States, 488 U.S. 361, 377 (1989); *see also id.* at 414 (Scalia, J., dissenting) ("It should be apparent . . . that the decisions made by the Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments.").

vancement of uniformity and proportionality in federal sentencing.[43] Uniformity of application is a paradigmatic benefit of rules. By specifying a limited set of relevant factors and assigning specific consequences to them, rules constrain the officials charged with applying the rule, thereby reducing their discretion and the risk of bias.[44] But uniformity cannot be the only goal of sentencing.[45] Whereas a rule that said every offender receives a five-year sentence would be perfectly uniform, it would also violate Congress's admonition that sentences should be proportional to the crime.[46] And while it is easy enough to conclude that a murderer should receive more severe punishment than a cat burglar, the factors that can serve to make one murder (or murderer) worse than another, or one burglary (or burglar) worse than another, are much more numerous, fine-grained, complex, and difficult to define *ex ante* – and, thus, more difficult to frame as a rule. Crafting rules that would consistently generate proportional sentences was perhaps the greatest challenge the inaugural Commission faced in designing the U.S. Sentencing Guidelines.[47]

C. The Rule-Oriented Structure of the Guidelines

In general terms, the Guidelines provide extensive instructions – over 600 pages today – on how to determine the sentencing range that the Commission considers appropriate for every combination of offender and offense. The primary inputs are the defendant's criminal history and the nature of the crime: 258 possible sentencing ranges are arrayed in a grid, with six "criminal history categories" as the horizontal axis and forty-three "offense levels" as the vertical axis.[48] Both the criminal history category and offense level are determined mechanically based on facts found by the judge during the sentencing hearing.[49] The offense level is the more complex inquiry and consists of two components: the "base offense level" set by the crime of conviction,

43. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (U.S. SENTENCING COMM'N 2015) (describing honesty, uniformity, and proportionality as "the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984," but noting that "[h]onesty [was] easy to achieve" by abolishing parole).

44. *See* Sullivan, *supra* note 35, at 62.

45. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) ("There is a tension, however, between the mandate of uniformity and the mandate of proportionality.").

46. *Id.*; *see also* 18 U.S.C. § 3553(a)(2)(A) (2012) (instructing judges to issue sentences that "reflect the seriousness of the offense" and "provide just punishment for the offense"), *partially abrogated by* United States v. Booker, 543 U.S. 220 (2005).

47. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3); *see also Mistretta*, 488 U.S. at 379.

48. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

49. The U.S. Probation Office prepares a presentence report, calculating the Guidelines' sentence based on its assessment of the facts of the case, which is provided to the defendant, the prosecutor, and the judge. *Id.* § 6A1.1; *see also id.* § 6A1.3.

and "specific offense characteristics" designed to incorporate distinguishing facts about the offender or offense.[50]

In theory, every judge would calculate the same criminal history score and final offense level in every case, thereby fulfilling the Commission's mandate to improve sentencing uniformity. But since rules are over- and under-inclusive with respect to their underlying goals (here, uniform yet proportional sentences), the Commission created mechanisms that allowed judges to account for "multifarious, fleeting, special, narrow facts that utterly resist generalization."[51]

The Commission employed two principal means to achieve this goal. The first was that each box on the grid contained a sentencing *range*.[52] Judges had full discretion to choose a final sentence from within the identified range. The second was to empower judges to issue out-of-range sentences if they found that a given case involved aggravating or mitigating circumstances that had not been adequately accounted for by the Commission.[53] The Commission itself identified some recurring fact patterns that might warrant a departure; for example, Section 2B1.1 suggests that judges consider departing upward (i.e., issuing a sentence above the Guidelines range) if the crime was motivated by the desire to inflict emotional harm[54] and downward (i.e., issuing a sentence below the Guidelines range) if the defendant's ill-gotten gains were an overpayment of legitimate emergency relief aid.[55] Judges also had, and continue to have, the ability to issue departures based on other case-specific factors that they believed were not sufficiently represented in the Guidelines' rules.[56]

On balance, however, these standard-like elements had less influence on sentences than might have been expected. The sentencing ranges contained

---

50. *Id.* § 1B1.3.

51. Koon v. United States, 518 U.S. 81, 99 (1996) (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990)); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b) (recognizing the need for some degree of judicial discretion within the Guidelines' system).

52. 28 U.S.C. § 994(b) (2012) (requiring the Commission to establish sentencing ranges for each federal crime).

53. 18 U.S.C. § 3553(b)(1).

54. U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1 cmt. n.20(A)–(B) (counseling upward departures for offenses involving, among other things, aggravating non-monetary objectives, a substantial risk of loss beyond those measured by the loss calculation, or the use of an unlawfully obtained means of identification).

55. *Id.* § 2B1.1 cmt. n.20(D). *See also id.* § 2B1.1 n.20(C) (recommending a downward departure for securities frauds in which the aggregate loss is large but diffuse).

56. *See id.* § 5K2.0 ("The sentencing court may depart from the applicable Guideline range if . . . there exists an aggravating or mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ."); *see also id.* ch. 1, pt. A(4)(b) ("[I]t is difficult to prescribe a single set of Guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.").

in the Guidelines were relatively narrow; by statute, the top of the range could be no more than 25% higher than the bottom.[57] Therefore, even though the within-Guidelines sentencing decision was entirely left to the judge, that choice often had only a marginal effect on the final sentence. In addition, the Commission expressly discouraged judges from considering many potentially relevant factors when issuing departures (especially ones related to personal characteristics of the defendant),[58] and appellate courts scrutinized out-of-range sentences closely.[59] As a result of these constraints, some judges complained that they were little more than "glorified accountants and bookkeepers" under the Guidelines.[60]

D. United States v. Booker *and a Hybrid System of Rules and Standards*

The mandatory rule-oriented framework of the Guidelines ultimately proved to be their constitutional undoing. In 2005, over fifteen years after the Guidelines went into effect, the Supreme Court held in *United States v. Booker* that the Guidelines violated the Sixth Amendment right to a jury trial because a defendant's maximum sentence under all applicable laws – which included the mandatory Guidelines – was determined by facts found by the

57. 28 U.S.C. § 994(b)(2); *see also* Frank O. Bowman, III, *Comment on Proposed Amendments to Economic Crime Guideline, § 2B1.1*, U.S. SENT'G COMMISSION 4 (Feb. 19, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf [hereinafter Bowman, *Comment on Proposed Amendments to Economic Crime Guideline*] ("Key to understanding the current dysfunction of the fraud Guideline for high-loss offenders is recognition that, because of the logarithmic character of the 43-level Sentencing Table, each increase in offense level has an ever-greater absolute effect on sentence length the higher one goes up the Table.") (emphasis omitted).

58. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. ("Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable [G]uideline range but for other reasons, such as in determining the sentence within the applicable [G]uideline range . . . .").

59. The Supreme Court held in *Koon v. United States* that all aspects of the departure decision should be reviewed deferentially, but Congress responded by mandating that departure decisions be reviewed *de novo*. 518 U.S. 81, 91 (2003); *see also* 18 U.S.C. § 3742(e)(4). The Guidelines still factor into appellate review post-*Booker*. *See* United States v. Gall, 552 U.S. 38, 47 (2007) ("In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines.").

60. Judge Lynn Winmill, *United States Sentencing Commission: Public Hearing*, U.S. SENT'G COMMISSION 71 (May 27, 2009), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090527-28/Transcript_20090527-28.pdf.

judge at sentencing rather than by the jury.[61] For example, in order to return a conviction in a wire fraud prosecution, a jury must find beyond a reasonable doubt that the defendant devised, with the intent to defraud, a scheme that used a wire communication.[62] Under Section 2B1.1 of the Guidelines, however, the jury's determination that those elements have been met only triggers the base offense level of seven that applies to all wire frauds; the final Guidelines range would depend on the *judge's* findings, by a preponderance of the evidence, regarding the amount of loss, the number of victims, the degree of sophistication of the offense, and every other applicable specific offense characteristic.[63] Thus, to preserve the protection afforded to defendants by the jury-trial right, the Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[64]

The Court did not, however, strike down the Guidelines in their entirety.[65] Instead, it merely severed the statutory provisions that made the Guidelines mandatory, converting them instead into an "effectively advisory" system.[66] This approach solved the Sixth Amendment quandary because the longest possible sentence would be set by the statutory maximum associated with the crime of conviction rather than the Guidelines' range. According to the Court, there is no constitutional violation if a judge considers the advice of the Commission in choosing a final sentence, so long as the legally operative minimum and maximum sentences were set by the statute that the defendant was convicted of violating.[67]

Over the course of more than twenty post-*Booker* sentencing opinions,[68] the Supreme Court has outlined the requirements of an emergent federal sentencing procedure that "aims to achieve uniformity by ensuring that sentenc-

61. 543 U.S. 220, 244 (2005).

62. *See, e.g.*, NINTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS § 8.124 (2014), http://www3.ce9.uscourts.gov/jury-instructions/node/583.

63. The Court held that the power of judges to depart from the Guidelines did not obviate the constitutional problem because "departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range." *Booker*, 543 U.S. at 234.

64. *Id.* at 244.

65. *See id.* at 245.

66. *See id.* at 259. The merits and remedial opinions in *Booker* were each decided by a 5-4 vote, with only Justice Ginsburg joining the majority in each. *Id.* at 226.

67. *Id.* at 259; *see also* Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013) (extending the reasoning of *Booker* to hold that facts necessary to trigger a mandatory *minimum* sentence must either be admitted by the defendant or found by a jury beyond a reasonable doubt).

68. *See* Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1228 n.2 (2014) [hereinafter Bowman, *Dead Law Walking*].

ing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."[69] The Court requires judges to follow three steps. First, they must calculate the range provided by the Guidelines, which remain the "starting point and . . . initial benchmark" for all federal sentencing.[70] The failure to correctly calculate the Guidelines range is almost always a reversible error that requires resentencing.[71] Second, the parties must be allowed to argue for their desired sentence.[72] And third, judges must make an "individualized assessment" of the proper sentence – without "presum[ing] that the Guidelines range is reasonable" – that takes into account various factors identified by the Sentencing Reform Act and codified at 18 U.S.C. § 3553(a).[73] Under this statute, which was largely overshadowed by the mandatory Guidelines prior to *Booker*, Congress provided broad, standard-like instructions to judges.

The court, in determining the particular sentence to be imposed, shall consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and

---

69. Peugh v. United States, 133 S. Ct. 2072, 2083 (2013); *see also* Gall v. United States, 552 U.S. 38, 50 (2007) ("If [a judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.").

70. *Gall*, 552 U.S. at 49 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.") (citing United States v. Rita, 551 U.S. 338, 347–48 (2007)).

71. *See* Molina-Martinez v. United States, 136 S. Ct. 1338, 1347 (2016) ("[I]n the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder.").

72. *Gall*, 552 U.S. at 49 (explaining that the judge should then "giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate").

73. *Id.* at 49–50 ("[T]he district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented.") (citations omitted).

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence[s] and the sentencing range established [by the Guidelines;]
>
> (5) any pertinent policy statement [issued by the Commission;]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.[74]

Ultimately, Congress instructed judges to ensure that sentences are "sufficient, but not greater than necessary" to comply with the four purposes of sentencing in paragraph (2) above – retribution, deterrence, incapacitation, and rehabilitation.[75] Congress did not, however, explain how to balance those competing and sometimes contradictory purposes, nor how to account for the other factors in § 3553(a).

In sum, sentencing now involves a "hybrid" model:[76] a rule-based calculation of the advisory Guidelines range, followed by a standard-like assessment of whether the Guidelines' recommendation accords with the factors in § 3553(a) when considered *ex post* in light of all relevant circumstances.

Despite the apparently radical changes to sentencing practice imposed by *Booker*, over the last fifteen years, "[t]he endurance of the Guidelines, but more particularly the degree to which they continue to drive actual sentences, has surprised nearly everyone."[77] As the Court itself has noted, "In less than 20% of cases since 2007 have district courts imposed above- or below-Guidelines sentences absent a Government motion."[78] Commentators have

74. 18 U.S.C. § 3553(a) (2012), *partially abrogated by* United States v. Booker, 543 U.S. 220 (2005).

75. *Id.*

76. *See* Schuman, *supra* note 16, at 14 (describing post-*Booker* sentencing practice as "a new, determinate/indeterminate approach to punishment: a hybrid model").

77. *See* Bowman, *Dead Law Walking*, *supra* note 68, at 1230; *id.* at 1269 (remarking that the Guidelines "still matter nearly as much as they did on the day before Booker was decided"); *see also* Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016) ("The Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing. In most cases district courts continue to impose 'either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion.'") (quoting Peugh v. United States, 133 S. Ct. 2072, 2084 (2015)).

78. *Molina-Martinez*, 136 S. Ct. at 1346 (citation omitted).

proposed several psychologically-driven rationales for judges' continued deference to the Guidelines, including the anchoring effect of the initial Guidelines calculation,[79] judges' predisposition to defer to legal rules,[80] inertia from the pre-*Booker* era,[81] and moral cowardice.[82] But while these explanations may have some influence on the margins, there can be little doubt given the persistently high rate of within-Guidelines sentences that most judges consider the Guidelines substantively reasonable most of the time. Even after independently evaluating the appropriateness of a sentence under the standards identified in § 3553(a), judges usually conclude that the Guidelines' broad-brush rules have prescribed a fair and proportional punishment.[83] Thus, the Supreme Court's observation that "the sentencing judge and the Commission [are] carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale," appears correct[84] – even if, in practice, some Guidelines do so better than others.

III. THE FRAUD GUIDELINES AND THE LOSS ENHANCEMENT

Although the Guidelines remain highly influential, judges do not defer to them at equal rates across all types of offenses. One of the least-followed sets of rules is found in Section 2B1.1, which covers economic crimes. Section 2B1.1 applies to over 300 federal offenses – more than any other section of the Guidelines – including larceny, embezzlement, receipt of stolen proper-

79. *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014).

80. *See* Bowman, *Dead Law Walking*, *supra* note 68, at 1269 ("Judges are men and women of the law. They naturally look for rules and endeavor to apply them. . . . [T]he Guidelines still look and feel like 'law.'").

81. *See* Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 28 CRIM. JUST. 26, 29 (2014) ("[T]here are increasingly few judges who have ever had any sentencing experience except under a guidelines regime."); *see also* Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268, 1277 (2014) ("Judges who have no prior experience sentencing under the mandatory Guidelines regime are more likely to depart from the Guidelines-recommended range than their pre-*Booker* counterparts, suggesting that newer judges are less anchored to the Guidelines.").

82. *See* Rakoff, *supra* note 81, at 29 ("[S]entencing, as any judge will tell you, is no fun, and following the Guidelines permits the judge to avoid the difficult moral questions that sentencing inevitably presents.").

83. *See* Bowman, *Dead Law Walking*, *supra* note 68, at 1249 (stating that even though judges "now operate in an advisory regime," "the judiciary has decidedly not enlisted in a broad-gauge revolt against the severity levels prescribed by the Sentencing Guidelines").

84. United States v. Rita, 551 U.S. 338, 348 (2007).

ty, property destruction, forgery, deceit, and fraud.[85] (Going forward, this Article will use "fraud" as shorthand for all of them.) In total, about 12% of federal sentences are issued under Section 2B1.1, making it the third most common major category of offenses after immigration violations and drug trafficking.[86] In order to capture relevant sentencing considerations across this broad range of cases, the Commission structured the fraud Guidelines with the amount of loss as the predominant sentencing factor. This decision has proven controversial, and it raises difficult questions about whether loss can bear the weight the Commission has placed on it.

A. The Fraud Guidelines and Their Discontents

Members of the judiciary have labeled Section 2B1.1 "fundamentally flawed"[87] and "a black stain on common sense"[88] and decried the "utter travesty of justice that sometimes results from the [fraud] [G]uidelines' fetish with abstract arithmetic."[89] This discontent is not confined to a handful of vocal objectors; judges in fraud cases issue non-Guidelines sentences – more specifically, *below*-Guidelines sentences – at significantly higher rates than average for other offenses. In 2014, slightly over 30% of Section 2B1.1 sentences were lower than the Guidelines' recommendation without a government-sponsored departure[90] (compared to 21% across all offenses), which was the highest rate among any major offense category except child pornography production.[91] Overall, including cases in which the government recommended a below-Guidelines sentence, less than half (46%) of fraud sen-

85. *See* U.S. SENTENCING GUIDELINES MANUAL app. A (U.S. SENTENCING COMM'N 2015) (statutory index specifying the Guidelines associated with various statutory crimes); *see id.* § 2B1.1 introductory cmt.

86. *See Quick Facts: Theft, Property Destruction, and Fraud Offenses*, U.S. SENT'G COMMISSION 1 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Theft_Property_Destruction_Fraud.pdf. *See also* U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 3, at tbl. 17.

87. United States v. Corsey, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., concurring).

88. United States v. Parris, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008).

89. United States v. Adelson, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006).

90. *See Quick Facts: Theft, Property Destruction, and Fraud Offenses*, *supra* note 86, at 2. The most common government-sponsored departure is granted to defendants who offer substantial assistance to the prosecution. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

91. *See* U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 3, at tbl. 27A. The 30% figure is derived from aggregating all of the offenses listed in Table 27A that are punished under Section 2B1.1. *See id.* Child pornography production is the only crime with a higher rate of below-range sentences, at 44%. *Id.*

tences were within the Guidelines range.[92] The rate of departures under Section 2B1.1 has always been among the highest in the Guidelines, and it has increased annually in each of the last five years.[93] Whereas the frequency of below-range sentences for most categories of crime has remained surprisingly constant, "[t]he only anomalous case type is economic crime, in which the average [G]uideline minimum has increased steadily[,] . . . while the average sentence imposed has risen only slightly, from about nineteen months in FY 2008 to about twenty-three months in 2013."[94] Over that same period, the average differential between the minimum sentence recommended by the fraud Guidelines and the actual sentence imposed has quadrupled from two months to roughly eight.[95] In addition, when judges issue sentences below the advisory range in fraud cases, the reduction is significantly greater, on a percentage basis, than for any other major offense category.[96]

Since judges are statutorily required to issue sentences that are proportional in light of the factors listed in § 3553(a), the relatively high rate of sentencing departures in fraud cases strongly suggests that judges find that the fraud Guidelines' rules often fail to advance the policy objectives identified by Congress. More specifically, the relatively high number of downward sentencing departures indicates a systematic tendency of the fraud Guidelines to *over*-punish in light of Congress's mandate to sentence federal offenders proportionally. This indicates that there is a structural problem with the way the fraud Guidelines operationalize the sentencing factors in § 3553(a).

B. The Purposes and Structure of the Fraud Guidelines

To understand why the Guidelines tend to overestimate fraud sentences, it is necessary to understand the means by which the Commission converted the universe of potentially relevant sentencing considerations into the rule-based framework in Section 2B1.1. The base offense level for fraud is six or seven, depending on the underlying statutory maximum for the crime of conviction.[97] These numbers are relatively low; on their own, offense levels of

92. *Quick Facts: Theft, Property Destruction, and Fraud Offenses*, *supra* note 86, at 2.

93. *Id.*

94. Bowman, *Dead Law Walking*, *supra* note 68, at 1250. *See also Quick Facts: Theft, Property Destruction, and Fraud Offenses*, *supra* note 86, at 2 (showing a rise in departures over the last five years).

95. Bowman, *Dead Law Walking*, *supra* note 68, at 1250.

96. Mark Allenbaugh, *"Drawn from Nowhere": A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data*, 26 FED. SENT'G REP. 19, 20–21 n.15 (2013).

97. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (U.S. SENTENCING COMM'N 2015). This feature of Section 2B1.1 – that the base offense level varies depending on the statutory maximum of the crime of conviction – is unusual for the Guidelines and reflects the breadth of offenses categorized under Section 2B1.1. *See id.* § 2B1.1.

six or seven carry a recommended sentence of zero to six months, with the option of probation.[98] But low base offense levels are necessary given that some crimes sentenced under Section 2B1.1 are relatively minor; the base offense level must be calibrated to account for the least serious offense.[99] Therefore, the various specific offense characteristics must do the bulk of the work to grade offenders sentenced under Section 2B1.1.

The Commission decided to use the pecuniary harm associated with an economic offense as the primary means by which to differentiate between fraud offenders: "The Commission has determined that, ordinarily, the sentences of defendants convicted of federal [economic] offenses should reflect the *nature and magnitude of the loss* caused or intended by their crimes. . . . [Loss] is a principal factor in determining the offense level under this Guideline."[100] In short, "[W]hen the original Sentencing Commission wrote guidelines for economic crimes, it made the idea of 'loss' the linchpin of the enterprise."[101] The numbers bear this out. Whereas the base offense level under Section 2B1.1 is six or seven, the median loss enhancement adds eight offense levels, and the maximum one adds thirty.[102] No other specific offense characteristic in the Guidelines is applied more frequently or adds more offense levels to fraud sentences than loss.[103]

The Commission operationalized the loss calculation by means of a loss table.[104] The table currently contains fifteen steps, with enhancements ranging from two offense levels (for losses over $6500) to thirty (for losses over $550 million), and each step of the table is two offense levels higher than the one beneath it.[105] The dollar values for each step of the table were raised to

98. *Id.* ch. 5, pt. A.

99. *See id.* ch. 2, introductory cmt.; *see also id.* § 2B1.1.

100. *Id.* § 2B1.1 cmt. background (emphasis added).

101. Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 25 (2001) [hereinafter Bowman, *The 2001 Federal Economic Crime Sentencing Reforms*].

102. *Quick Facts: Theft, Property Destruction, and Fraud Offenses*, *supra* note 86, at 1 (reporting that the median loss amount in FY 2014 was $118,081). In FY 2014, the median loss amount was less than $2000 below the threshold for a ten-level enhancement. *Compare id.*, *with* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(F) (U.S. SENTENCING COMM'N 2014) (setting $120,000 as the threshold for a ten-level enhancement).

103. *See* Allenbaugh, *supra* note 96, at 19 ("Under the current Guidelines, loss is far and away the primary determinant of the advisory sentencing range under § 2B1.1."). Tax offenses are sentenced using a "Tax Table" similar to the loss table in Section 2B1.1(b)(1). *See* U.S. SENTENCING GUIDELINES § 2T4.1 (U.S. SENTENCING COMM'N 2015). The maximum offense level allowable under the Tax Table is thirty-six, but unlike Section 2B1.1, there is no separate base offense level in the tax Guidelines. *See, e.g.*, *id.* § 2T1.1(a)(1).

104. *Id.* § 2B1.1(b)(1).

105. *Id.*

account for inflation for the first time since 2001 as part of the November 2015 amendments.[106]

There are many specific offense characteristics in Section 2B1.1 in addition to the loss enhancement. In total, Section 2B1.1 has eighteen subsections that provide enhancements, including over twenty-five distinct factual inquiries that can increase a defendant's sentence.[107] Taken individually, however, these non-loss enhancements tend to be small – most are just two levels.[108] And although some non-loss enhancements are applied with regularity – such as those for crimes involving multiple victims and sophisticated means – most are applied infrequently (if at all).[109] This is especially true with respect to low-loss offenses. Not a single non-loss enhancement was applied in over 64% of sentences for crimes where the loss amount was $1 million or less, and 88% of such crimes had no more than one enhancement other than loss.[110] Therefore, despite the high number of non-loss enhancements in Section 2B1.1, loss remains the most important sentencing driver in the fraud Guidelines. For that reason, any reform intended to significantly reduce the number of downward departures must grapple with the role of loss.

1. Historical and Pragmatic Justifications for the Loss Rule

The Commission's decision to use loss as the principal rule-based sentencing factor was not unreasonable. The inaugural Commission conducted an empirical review of contemporary federal sentencing practice and determined that loss was highly correlated with fraud sentences under the indeterminate sentencing system.[111] The tradition of using loss to grade economic

106. *See* Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782, 25789 (notice of submission to Congress of amendments May 5, 2015) (announcing the inflation adjustment).

107. *See* §§ 2B1.1(b)(2)–(19).

108. *See id.* §§ 2B1.1(b)(2)(A), (3), (4), (5), (6), (7), (8)(A), (9), (10), (11), (12), (13)(A), (14), (15), (16)(A), (17), (18).

109. *See 2013 Symposium on Economic Crime: Application Rates for § 2B1.1, Fiscal Year 2012*, U.S. SENT'G COMMISSION 2 (2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Application_Rates_FY2012.pdf (showing less than 23% of sentences under Section 2B1.1 had a multiple-victims enhancement, and 13% had a sophisticated-means enhancement).

110. *See* Allenbaugh, *supra* note 96, at 25 fig. 12. The 64% and 88% figures were calculated by dividing the number of defendants sentenced based on the loss enhancement alone (and the loss enhancement plus one other factor) at each relevant loss level by the total number of offenders at those levels. The data are from fiscal year 2012. *Id.*

111. U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 cmt. background (U.S. SENTENCING COMM'N 1987) ("Empirical analyses of current practices show that the most important factors that determine sentence length are the amount of loss and whether the offense is an isolated crime of opportunity or is sophisticated or repeated.

crimes is much older still. As early as the Statute of Westminster of 1275, thefts were distinguished by the value of the stolen property; the theft of property worth over twelve pence – about the cost of a sheep at the time – constituted grand larceny (punished by hanging), whereas the theft of property worth less than twelve pence was petit larceny (punished by public whipping under the common law, and by seven years of banishment to a colony under later English statutes).[112] The grand/petit larceny distinction prevailed through the American colonial era, and it survives to this day in the many state criminal codes that classify property crimes by degrees based on the value of the property taken.[113]

In addition to its historical lineage, the use of loss had at least three pragmatic benefits given the rule-oriented structure of the Guidelines. First, loss offered an objective, quantifiable metric that could in theory be mechanically tallied by any judge tasked with sentencing any fraud offender.[114] The importance of these characteristics of loss is underscored by the Commission's decision to exclude *nonpecuniary* damages, such as emotional or reputational harms, from the loss calculation because they were too difficult to quantify.[115] Second, loss allowed the Commission to create as many grades

---

Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.").

112. *See* Statute of Westminster I, 1275, 3 Edw. 1, ch. 15 (Eng.); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *229, *235–39.

113. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 7-104(g) (West 2016) (grading punishment for theft based on whether the value of the stolen property exceeded $100; $1000; $10,000; or $100,000); TEX. PENAL CODE ANN. § 31.03(e) (West 2016) (grading punishment for theft based on whether the value of the stolen property exceeded $100; $750; $2500; $30,000; $150,000; or $300,000). Professor Frank Bowman hypothesizes that "simplistic" monetary gradations have remained prevalent because they "suited the theft cases that predominated in the developing law of England before very recent times, and that continue to predominate in most American state courts." *See* Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 479 (1998) [hereinafter Bowman, *Coping with "Loss"*].

114. These same features favored the use of drug quantity as the basis for drug-crime sentencing, and, in fact, sentences for drug offenders are based largely on the weight of drugs attributable to them. *See* § 2D1.1(c). The drug-weight table has also been controversial. *See, e.g.*, Dan Honold, Note, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 HARV. J. LEGIS. 389, 390 (2014) ("The focus on quantity [in the drug-weight table] is a problem because quantity is a poor proxy for the seriousness of the crime committed."); *see also* Johan Bring & Colin Aitken, *Burden of Proof and Estimation of Drug Quantities Under the Federal Sentencing Guidelines*, 18 CARDOZO L. REV. 1987, 1998 (1997); Carrie Legus, *Quantitative Justice: Have the Federal Sentencing Guidelines Forsaken Quality?*, 21 VT. L. REV. 1145, 1157 (1997).

115. *See* Bowman, *The 2001 Federal Economic Crime Sentencing Reforms*, *supra* note 101, at 50 (describing the Commission's concern that "federal theft and fraud sentencings [might turn] into civil damage award hearings, with judges obliged to assign monetary values to intangible harms," and explaining that "[t]he limitation of

of punishment as it wanted – every cent could conceivably be assigned its own offense level.[116] Third, loss was versatile.[117] All of the economic crimes sentenced under Section 2B1.1 are fundamentally about wrongfully-taken property, and thus the measure of the value of that property is a relevant consideration across the broad range of covered offenses.[118]

2. Loss as a Proxy for Culpability and Harm

Of course, neither loss's historical lineage nor its pragmatic advantages would justify its use in the Guidelines if it bore no rational relationship to the purposes of punishment. The Commission has identified loss as a proxy for two critical measures used to craft proportional sentences: "[A]long with other relevant factors under the guidelines, loss serves as a measure of [1] the seriousness of the offense and [2] the defendant's relative culpability . . . ."[119]

These twin considerations are strikingly similar to those associated with one of the most prominent philosophies of punishment: just deserts. As retributivist scholar Andrew von Hirsh puts it, just-deserts theory is fundamentally concerned with imposing "just" punishments as measured on "two dimensions: harm and culpability. Harm refers to the injury done or risked by the act; culpability, to the factors of intent, motive, and circumstance that determine the extent to which the offender should be held accountable for the act."[120] The Commission itself has defined just deserts similarly – as a func-

---

loss to pecuniary harm . . . was specifically intended to forestall such wide-ranging inquiries").

116. *See* § 2B1.1(b)(1) (assigning an offense-level increase for specific loss amounts).

117. *See, e.g.*, United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997) (describing "loss" as a "flexible, fact-driven concept").

118. There was also a notable lack of obvious alternatives. *See* Bowman, *Coping with "Loss"*, *supra* note 113, at 480–83 (arguing that mens rea, *actus reus*, the number of counts, and the attempt/completion distinction were all inhospitable as rule-based measures for grading fraud offenses).

119. § 2B1.1 cmt. background. While most of the just-deserts literature talks about "harm" in place of the Commission's reference to "offense seriousness," *see infra* note 120 and accompanying text, the two concepts are similar, if not identical – an economic crime is serious because of the harm it causes or risks. Notably, actual loss does not reflect risks unless they were actualized as tangible losses; unrealized risks are, however, incorporated in the intended loss calculation. The willingness to impose large risks indicates a heightened degree of culpability, which is the primary sentencing factor for which intended loss serves as a rule-oriented proxy.

120. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, *in* PRINCIPLED SENTENCING 220, 220 (Andrew von Hirsch & Andrew Ashworth eds., 1992); *see also* Covey, *supra* note 15, at 476 ("[T]he primary constituents of desert – harm and culpability – are widely agreed upon . . . ."); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 568 (2003) ("Among just desert theorists, culpability is usually measured along two dimensions: the blameworthiness of the

tion of "the offender's culpability and the resulting harms" – and, in fact, it briefly considered using just deserts as the philosophical underpinning for the Guidelines as a whole.[121] Although the Commission did not expressly invoke just-deserts theory to support the central role of harm and culpability in the fraud Guidelines, it is not surprising that the Commission drew from a theory fundamentally concerned with proportional punishments as it designed the provision of Section 2B1.1 with the most significant effect on fraud sentences – the loss enhancement.[122]

C. Actual and Intended Loss

Having identified culpability and offense seriousness (or harm) as the two sentencing considerations for which the loss calculation would serve as a rule-based proxy, the Commission next needed a definition of loss that would reflect these factors and that judges could apply consistently.[123] From the inaugural Guidelines onward, the Commission has defined "loss" to incorporate both actual and intended losses.[124] The current formulation was promulgated in 2001: "[L]oss is the greater of actual or intended loss."[125] Actual

defendant's mental state and the harm caused by the conduct."); David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 857 (1992) ("The seriousness of a defendant's conduct is expressed as a function of [1] the harm caused by the conduct and [2] the degree of a defendant's responsibility for the crime [i.e., culpability]."); George P. Fletcher, *What Is Punishment Imposed For?*, 5 J. CONTEMP. LEGAL ISSUES 101, 104 (1994) (describing Robert Nozick's formula for determining the appropriate retributive punishment as the "product of the magnitude of the wrongdoing (H) in relation to the degree of culpability (r)").

121. *See* ch. 1, pt. A(1)(3). The Commission ultimately declined to adopt any overarching philosophy of punishment. *Id.*

122. The fraud Guidelines would likely look very different if they had been drafted in accord with economically-oriented "crime control" theory – which the Commission also considered adopting as the basis for the Guidelines – rather than just deserts. *Id*. For example, they might be designed to account more directly for the risk that an individual offender would recidivate and the cost to police of uncovering the crime. *See* Mark A. Cohen, *The Economics of Crime and Punishment: Implications for Sentencing of Economic Crimes and New Technology Offenses*, 9 GEO. MASON L. REV. 503, 513–17 (2000) (describing sentencing strategies designed to minimize the social costs of crime).

123. *See* Bowman, *Coping with "Loss"*, *supra* note 113, at 498 ("The challenge for a drafter of sentencing guidelines is to identify those factors relating to mental state that should matter in the imposition of economic crime sentences, and then to account for them in the guideline scheme.").

124. *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 cmt. n.7 (U.S. SENTENCING COMM'N 1987) ("[I]f a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss.").

125. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM'N 2015).

loss was – and still is – defined as "the reasonably foreseeable pecuniary harm that resulted from the offense."[126] Until the November 2015 amendment, intended loss was defined merely as "the pecuniary harm that was intended to result from the offense."[127] The new amendment redefined it as "the pecuniary harm that the defendant *purposely sought to inflict*."[128]

The Commission has justified the use of actual and intended loss by describing them as proxies for culpability and offense seriousness, respectively:

> The Commission [has] concluded that, for cases in which intended loss is greater than actual loss, the intended loss is a more appropriate initial measure of the *culpability* of the offender. Conversely, in cases [in] which the actual loss is greater, that amount is a more appropriate measure of the *seriousness* of the offense.[129]

It repeated this theme to explain the 2015 purposeful loss amendment:

> The amendment reflects the Commission's continued belief that intended loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements predicated on intended loss, *rather than* losses that have actually accrued, should focus more specifically on the defendant's *culpability*.[130]

To recast the Commission's statements in terms of the framework of rules and standards, the Commission collapsed the range of facts potentially relevant to evaluating harm and culpability into two empirical findings: actual and intended loss, respectively. So long as higher actual losses are associated with greater harm and higher intended losses with greater culpability, the loss-based proxies will further the Commission's goal of uniform and predictable sentences – the traditional benefits associated with rule-based directives – while also grading defendants proportionally by the harm they imposed and their culpability.[131]

---

126. *Id.* § 2B1.1 cmt. n.3(A)(i).

127. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A)(ii) (U.S. SENTENCING COMM'N 2014).

128. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A)(ii) (U.S. SENTENCING COMM'N 2015) (emphasis added).

129. U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II (U.S. SENTENCING COMM'N 2003) (explaining the set of amendments effective Nov. 1, 2003) (emphasis added); *see also* U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II (U.S. SENTENCING COMM'N 2015) (explaining that intended loss includes losses that could not have been realized because "their inclusion better reflects the *culpability* of the offender") (emphasis added).

130. U.S. SENTENCING GUIDELINES MANUAL app. C supp. (U.S. SENTENCING COMM'N 2015) (emphasis added).

131. *Id.* at ch. 1, pt. A ("[T]he Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.").

Of course, many defendants who inflict high actual losses will also be highly culpable, and many defendants with high intended losses will also have risked imposing (or actually imposed) serious harms.[132] But actual and intended loss nonetheless measure different things, and each one provides a distinct data point relevant to sentencing. For example, consider a ruthless con artist with a sophisticated scheme who is arrested before any would-be victims make payments. The actual loss is $0, which accurately reflects the absence of victim losses, but not the defendant's high degree of culpability. Conversely, consider a developer who lies to qualify for a loan but is confident that her collateral would cover any default. An unexpected (but not entirely unforeseeable) market downturn makes her collateral worthless, and later she defaults. Here, the defendant's culpability is relatively low, but her actual loss is the full amount of her loan – the same as someone who simply stole the same sum of money. Actual and intended loss often point in the same direction, but they do not always do so.

By measuring harm and culpability predominantly with respect to actual and intended loss, the rules in the fraud Guidelines are based on generalizations that necessarily fail to capture the full range of facts that might be relevant to evaluating harm and culpability in any given case. The degree to which this under-inclusiveness is problematic will depend on the correlation between the empirical triggers and the principles that they proxy. If the relationship between them is weak, the rule-maker can either identify a better empirical trigger or, if the costs of doing so *ex ante* are prohibitive, delegate authority to officials on the ground to evaluate the facts in light of the relevant policy objectives – i.e., the rule could be converted into a standard.

The relationship between actual loss and the harm from an offense is fairly straightforward. As a general matter, the greater the loss, the more social harm results. Actual loss is certainly not a perfect proxy for offense seriousness; for example, a crime that causes each of ten retirees to lose $100,000 might be more serious (to society and the victims) than one that causes each of 100,000 wealthy investors to lose $10. Additionally, the loss calculation excludes nonpecuniary harms such as emotional or reputational injuries entirely, even though they can significantly affect the harmfulness of an offense.[133] But although actual loss is a simplified measure of harm, the connection between actual losses and harm is clear and intuitive.

It is much less apparent whether intended loss is an adequate proxy for the range of facts that bear on a defendant's culpability. "Culpability" has two common definitions in criminal law: it can be either the mental state re-

132. *See* Bowman, *The 2001 Federal Economic Crime Sentencing Reforms*, *supra* note 101, at 40 ("[A]ctual 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.").

133. § 2B1.1 cmt. n.3(A)(iii) (explaining that "loss" under the fraud Guidelines "does not include emotional distress, harm to reputation, or other non-economic harm").

quired to hold a defendant liable for a crime (i.e., the mens rea element of an offense), or, more generally, it can mean "[m]oral blameworthiness."[134] Since guilt has already been established by the time of sentencing, it is this second definition – the "moral blameworthiness" of one defendant relative to others – that the intended loss calculation must capture.[135]

What makes one defendant more morally blameworthy than another? This question is complex, and the Commission has not endeavored to define culpability's scope.[136] Numerous factors are potentially relevant in the context of fraud sentencing. These might include, but are certainly not limited to, the defendant's motive; the defendant's role in the scheme; whether the defendant abused a position of trust; the duration of the offense; the defendant's efforts to mitigate the harms from his crime; the defendant's contrition; whether the defendant voluntary ceased the offense; the defendant's awareness of the harms likely to be inflicted by the offense; the nonpecuniary harms that the defendant intended to inflict; and the pecuniary harm that the defendant intended to inflict.[137]

---

134. *Culpability*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 320 (1996) ("[O]ne is culpable if he chooses to do wrong in circumstances when that choice is freely made."); John Shepherd Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1026 (1999) ("Conventional moral theory in contemporary America holds that people deserve moral blame when they have had a fair chance to obey the law but have failed to do so."); Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing,* 81 CORNELL L. REV. 989, 1023–24 (1996) (arguing that the Supreme Court has implicitly recognized two theories of moral culpability in capital sentencing, one focusing on whether a defendant acted on his own free will and the other on whether the offense was the result of a defective or evil character).

135. A defendant's mental state is widely recognized as relevant to sentencing; as Judge Jack Weinstein has written, "[O]ne cannot imagine, except in Alice's Wonderland . . . a system in which mens rea is relevant to conviction, but not to sentencing – without imagining an institutionalized miscarriage of justice." Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121, 122 (1994). Unfortunately, the Guidelines' approach to classifying mental states mirrors that of the federal criminal code generally, which uses a hodgepodge of about eighty distinct terms for mental states, almost all of them undefined. *See* PAUL H. ROBINSON, CRIMINAL LAW § 4.1, at 212 n.17 (1997) (calculating seventy-eight mens rea terms in federal law).

136. The Guidelines expressly cabin the culpability inquiry in several ways as a matter of policy. For example, a defendant's education and vocational skills, drug dependence, family ties and responsibilities, prior history of good works, and lack of guidance as a youth are all considered either absolutely or presumptively irrelevant in determining whether a departure is warranted. *See* §§ 5H1.2, 5H1.4, 5H1.6, 5H1.11, 5H1.12.

137. *See* Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 553–54 (2015) (arguing that fraud, along with certain other crimes, contains "offense features – conceptual foundations that are defined according to social context, embeddedness, focus on matters of psychology and autonomy, and fast norm evolution –

Intended loss, by its terms, only incorporates this last factor. Whether the virtues of a given rule for grading defendants by their moral blameworthiness outweigh the vices of the rule's under-inclusiveness turns on both the way intended loss is defined and the next-best alternatives. Those two topics will occupy the remainder of this Article. In order to evaluate them, however, it is important to consider two additional features of the way that intended loss functions in the fraud Guidelines.

1. The Absence of Mitigation in the Fraud Guidelines

One important structural feature of intended loss in Section 2B1.1 stems from the definition of loss itself: "[L]oss is the *greater of* actual loss or intended loss."[138] This definition allows for three possible scenarios: actual and intended loss can be the same (in which case it does not matter which measure is used); actual loss can be greater; or intended loss can be greater. But whichever scenario applies, the loss enhancement is based *exclusively* on either actual or intended loss, and the alternative measure has no effect on the final sentence.

As an initial matter, it is noteworthy that the equal weight given by the Commission to actual and intended loss is a departure from its typical approach to incomplete criminal conduct. Some criminal law theorists (notably the drafters of the Model Penal Code ("MPC"))[139] contend that only intentions should matter in determining proportional punishments, and therefore defendants should not benefit from their failure to inflict their intended harms.[140] This is the view implicitly adopted in the fraud Guidelines. If defendants intended a large loss, the "moral luck" that led them to inflict less harm than they intended does not translate into a sentencing reduction; instead, the loss enhancement is the same as it would have been if they had successfully completed the crime.[141] This is not the normal philosophy of the Guidelines, however. For example, the Commission has taken the position that, as a principle, "harm that is merely risked is not to be treated as the equivalent of harm that occurred,"[142] and criminal attempts are sentenced three offense levels below the level prescribed for the same completed of-

---

[that] make the criminal law's standard task of examining culpability especially difficult").

138. § 2B1.1 cmt. 3(A) (emphasis added).

139. MODEL PENAL CODE § 5.05(1) (AM. LAW. INST., Proposed Official Draft, 1962).

140. *See, e.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 172–73 (2009).

141. *See id.* at 172. *See also* app. C., vol. II ("The Commission concluded that, for cases in which intended loss is greater than actual loss, the intended loss is a more appropriate initial measure of the culpability of the offender.").

142. *See* § 1B1.3 cmt n.6(B) ("Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred.").

fense.[143] The Commission has never explained why it believes that incomplete attempts should receive a sentencing discount but incomplete losses should not.

There is a more fundamental concern with the "greater of" formulation, however. The Commission has indicated that, consistent with just-deserts theory, culpability *and* harm are both relevant to fraud sentencing.[144] But since loss is defined such that only actual *or* intended loss can be the basis for the loss enhancement, only the loss proxy designed primarily for the purpose of reflecting harm *or* culpability is ever actually reflected in the Guidelines calculation – never both.

Furthermore, the choice between actual and intended loss is not random: the greater number applies every time, meaning that the most punitive measure is used regardless of what the lesser number might indicate about the offense. In other words, the Guidelines abandon any effort to holistically reconcile measures of harm and culpability. If a defendant had a grandiose plan to steal $10 million, but the scheme was ludicrously unlikely to succeed, then the defendant would be highly culpable but would have imposed relatively little real-world harm or even risk of harm.[145] A just-deserts analysis might conclude that such a defendant should be punished less harshly than a savvier fraudfeasor who had successfully carried out a $10 million crime. Yet in both cases, the fraud Guidelines would add the full enhancement associated with a $10 million loss in the loss table.[146]

If harm and culpability are independent variables relevant to proportional sentencing, then the greater-of-actual-or-intended-loss formulation obscures potentially relevant information. One way to incorporate both data points into the Guidelines calculation would be to simply average actual and

143. *Id.* § 2X1.1(b)(1).

144. *See id.* § 2B1.1 cmt. background (explaining that "loss serves as a measure of the seriousness of the offense *and* the defendant's relative culpability") (emphasis added); *see also* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 24 (2003) ("The seriousness of an offense depends on both (1) the harm it causes, and (2) the offender's personal culpability for that harm."); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L.J. 507, 508 (1999) (arguing that the "wrongfulness-culpability hypothesis" – which maintains "that the only two grounds that may justify disparate treatment of offenses in the context of criminal law are the wrongfulness of the act or the culpability of the perpetrator" – dominates the contemporary discourse on punishment); sources cited *supra* note 120.

145. *See, e.g.*, United States v. Corsey, 723 F.3d 366, 378–79 (2d Cir. 2013) (Underhill, J., concurring) (arguing that a sentence based on a $3 billion intended loss was substantively unreasonable because "[it] was a clumsy, almost comical, conspiracy" that "could be more accurately described as a comedic plot outline for a 'Three Stooges' episode" and thus posed no real risk of harm).

146. *See* § 2B1.1.

intended loss.[147] Alternatively, actual and intended loss could be weighted differently but combined to create one comprehensive loss calculation. These proposals would ensure that every loss calculation reflected both culpability and harm – as measured by the intended and actual loss – and that a low level of either would reduce the overall loss amount, and thus the resulting enhancement. Such an approach would not be significantly more burdensome for judges than the current system, which already *de facto* requires them to estimate both actual and intended loss to determine which is greater. It would also necessarily drive down loss calculations on average, which would reduce the average length of sentences and, in turn, the rate of below-Guidelines departures.

2. Non-Loss Enhancements and Double Counting

Because actual and intended loss are designed to measure different (though often correlated) things – harm and culpability – they both add unique and relevant information to the sentencing calculus. But Section 2B1.1 has many sentencing enhancements unrelated to loss that also reflect harm and culpability yet are added cumulatively to the loss enhancement. The original fraud and theft Guidelines only had five non-loss-related enhancements.[148] They have proliferated over time, however, and there are now eighteen.[149] For example, offense levels are added if the defendant misrepresented him- or herself as a representative of a charitable or religious organization,[150] was in the business of receiving stolen property,[151] threatened the solvency of a bank,[152] or injured more than ten victims.[153] And in addition to these enhancements unique to Section 2B1.1, there are others that apply across the entire Guidelines, such as if a victim is particularly vulnerable[154] or

147. *See* James Gibson, *How Much Should Mind Matter? Mens Rea in Theft and Fraud Sentencing*, 10 FED. SENT'G REP. 136, 138 (1997) (proposing that intended and actual loss should be averaged).

148. U.S. SENTENCING GUIDELINES MANUAL §§ 2F1.1(2)–(3) (U.S. SENTENCING COMM'N 1987) (prescribing enhancements for offenses involving more than minimal planning, more than one victim, misrepresentation by the defendant that he was acting on behalf of a charitable organization, the violation of a court order, or the use of a foreign bank account). Fraud and theft were punished under separate Guidelines' provisions until 2001, and the original theft Guideline also had five non-loss enhancements. *See id.* §§ 2B1.1(b)(2)–(6) (prescribing enhancements for offenses involving a firearm, theft from the person of another, more than minimal planning, undelivered mail, or organized crime).

149. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(2)–(19) (U.S. SENTENCING COMM'N 2015). There are about twenty-five distinct factual inquiries associated with the eighteen non-loss enhancements. *Id*.

150. *Id.* § 2B1.1(b)(9).

151. *Id.* § 2B1.1(b)(4).

152. *Id.* § 2B1.1(b)(16)(B).

153. *Id.* § 2B1.1(b)(2).

154. *Id.* § 3A1.1(b).

if the offender abused a position of trust.[155] The wide array of available enhancements has led some to compare them to the decorations adorning "a Christmas tree or a Chanukah bush."[156]

The "factor creep" in Section 2B1.1 is partially a function of the perceived inadequacy of the loss calculation rule to fully reflect culpability and harm, as well as the political incentives for Congress and the Commission to add politically popular specific offense characteristics.[157] The upshot is that, whereas at first loss served as a holistic catch-all proxy for harm and culpability, it now exists alongside a parallel system of numerous detailed enhancements that also reflect aspects of harm and culpability. This is a recipe for double-counting. The risk is especially acute for high-loss crimes that, by nature, almost always trigger multiple non-loss enhancements, such as those for large numbers of victims[158] and sophisticated schemes.[159] When these extra offense levels are added to the already-high loss enhancement, the Guidelines can easily recommend life in prison.[160]

The double-counting problem caused by non-loss enhancements could be mitigated. For example, some of the non-loss enhancements could be eliminated, the number of offense levels associated with them could be reduced, and caps could be placed on the total number of offense levels that can be added to a final sentence.[161] Another salutary reform would be to create mitigating special offense characteristics that *subtract* offense levels. Currently, not a single specific offense characteristic in Section 2B1.1 reduces the number of offense levels; like the greater-of-actual-or-intended-loss formulation, the non-loss enhancements function exclusively to push sentences higher. New Guidelines provisions instructing judges to reduce the final offense level by two if the defendant voluntarily ceased the offense or took concrete steps to limit victim losses would (ironically) help counteract the

155. *Id.* § 3B1.1.

156. Saris, Keynote Address on the Administration of Criminal Law, *supra* note 6 ("Some have called [Section 2B1.1] a Christmas tree or a Chanukah bush. As a result, the Commission has heard criticism of the [G]uideline that the specific offense characteristics lead to a 'piling on' for many defendants, particularly at high loss amounts.").

157. *See, e.g.*, Frank O. Bowman, III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 405–07 (2004) [hereinafter Bowman, *Pour Encourager Les Autres?*] (describing the specific offense characteristics that Congress ordered the Commission to implement as part of the Sarbanes-Oxley Act).

158. § 2B1.1(b)(2).

159. *Id.* § 2B1.1(b)(10)(C).

160. This effect would be even more pronounced if non-loss enhancements were not routinely plea-bargained away. *See* Bowman, *Comment on Proposed Amendments to Economic Crime Guideline*, *supra* note 57, at 8–10.

161. Frank O. Bowman, III, *Damp Squib: The Disappointing Denouement of the Sentencing Commission's Economic Crime Project (and What They Should Do Now)*, 27 FED. SENT'G REP. 270, 276 (2015) [hereinafter Bowman, *Damp Squib*].

effects of factor creep, especially for relatively low-harm and low-culpability defendants.

While these reforms to the greater-of-actual-or-intended-loss formulation and non-loss enhancements would be beneficial, they would not address the issues that arise from the inherent under-inclusiveness of intended loss as a proxy for the complex and multifaceted concept of culpability. We turn to that issue now.

IV. THE CHALLENGE OF MEASURING CULPABILITY WITH A RULE: THE 2015 "PURPOSEFUL LOSS" AMENDMENT

Even though "[t]he meaning of the word 'intent' in the criminal law has always been rather obscure,"[162] the inaugural fraud Guidelines did not define intended loss at all.[163] In 2001, the Commission amended Section 2B1.1 to define intended loss as "the pecuniary harm that was intended to result from the offense,"[164] including "intended pecuniary harm that would have been impossible or unlikely to occur."[165] As one court noted, to define intended loss as the loss that was intended to result from the crime was "seriously circular."[166] Yet this fairly flimsy definition remained operative until the November 2015 amendment sought to clarify just what makes a loss "intended."

A. Clarifying the Meaning of "Intended" Loss

According to the Commission, the impetus for the November 2015 amendment was the fact that "courts have expressed some disagreement as to whether a subjective or an objective inquiry is required" when calculating intended loss.[167] The "objective" approach was most consistently applied in the First Circuit, which held:

---

162. WAYNE R. LAFAVE, CRIMINAL LAW § 5.2 (5th ed. 2010).

163. *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(1) (U.S SENTENCING COMM'N 1987); *see also* § 2F1.1 cmt. n.7 (offering examples of intended loss); § 2F1.1 cmt n.8 (explaining that the amount of loss need not be calculated with precision).

164. U.S SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A)(ii)(I) (U.S. SENTENCING COMM'N 2014). The 2001 amendments were themselves designed to resolve circuit splits regarding the loss calculation. *See* Bowman, *Coping With "Loss"*, *supra* note 113, at 464 n.3 (listing various circuit splits prior to the 2001 amendments).

165. *Id.* § 2B1.1 n.3(A)(ii)(II).

166. United States v. Manatau, 647 F.3d 1048, 1050 (10th Cir. 2011).

167. Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782, 25791 (notice of submission to Congress of amendments May 5, 2015). Some commentators have described the split as a disagreement over whether constructive intent was adequate to establish the loss amount, or whether actual intent was required. *See* Gabrielle A. Bernstein, Comment, *The Role of Expectations in Assessing Intended*

> [I]ntended loss . . . is a term of art meaning the loss the defendant *reasonably expected* to occur at the time he perpetrated the fraud. . . . [W]e focus our loss inquiry for purposes of determining a defendant's offense level on the *objectively reasonable expectation* of a person in his position at the time he perpetrated the fraud, not on his *subjective intentions or hopes*.[168]

In other words, "Intended loss is the loss that a person standing in the defendant's shoes reasonably would have expected to cause at the time he perpetrated the fraud."[169] The First Circuit has forthrightly explained that "*expected* [loss] would be a better term" for its approach.[170] Although other courts of appeals have not applied the objective expectations definition as consistently as the First Circuit, they have at times inserted an objective dimension into their intended loss analysis. For example, the Seventh Circuit has held that "[t]he determination of intended loss . . . focuses on the conduct of the defendant and the *objective financial risk* to victims caused by that conduct,"[171] and it has expressly rejected the argument that this approach "fails to account for the defendant's subjective intent."[172]

The majority of appellate courts, however, have "characterized intended loss with reference to a defendant's actual, subjective intent."[173] The subjec-

---

Loss in Mortgage-Fraud Schemes, 2010 U. CHI. LEGAL F. 337, 342 (2010) (arguing that the "objectivist" position should be understood in terms of constructive intent). Indeed, some courts have described the issue in those terms as well. *See, e.g.*, United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) ("When determining an intended loss, the district court must rely on actual, not constructive, intent."); United States v. Morrow, 177 F.3d 272, 301 (5th Cir. 1999) ("We look to actual, not constructive, intent . . . .").

168. United States v. Innarelli, 524 F.3d 286, 290–91 (1st Cir. 2008) (emphasis added).

169. United States v. Iwuala, 789 F.3d 1, 14 (1st Cir. 2015).

170. United States v. McCoy, 508 F.3d 74, 79 (1st Cir. 2007). Even though its intended loss inquiry "focuses primarily on the offender's objectively reasonable expectations," the First Circuit has acknowledged that "subjective intent may play some role," though it has not explained what this would be. United States v. Alphas, 785 F.3d 775, 780 (1st Cir. 2015); *see also Innarelli*, 524 F.3d at 291 (noting that the First Circuit had "suggest[ed] in passing that a subjective component may play some role in the intended-loss inquiry") (citing *McCoy*, 508 F.3d at 79).

171. United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) (emphasis omitted and emphasis added). Note that *Lane* advocates for an assessment of the financial risk that was *actually* imposed by the offense, not merely the risk that an objectively reasonable person in the defendant's position would have recognized (as required in the First Circuit). *Compare id.*, *with Alphas*, 785 F.3d at 780. At other times, the Seventh Circuit has stressed that intended loss is a subjective inquiry. *See, e.g.*, United States v. Middlebrook, 553 F.3d 572, 578 (7th Cir. 2009) ("[T]he true measure of intended loss [is] in the mind of the defendant . . . .").

172. United States v. Durham, 766 F.3d 672, 687 (7th Cir. 2014).

173. United States v. Hartstein, 500 F.3d 790, 798 (8th Cir. 2007); *see also* United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) ("[W]e look to the 'defendant's

tive standard does not require judges to be mind readers, of course, and there is often good reason to infer that defendants intended the probable consequences of their actions.[174] In effect, the difference between the subjective and objective approaches is that the former posits that a reasonable person's expectations are *evidence* of a defendant's intent, whereas the latter holds that they independently *satisfy* the intent inquiry.

Given that the Commission had framed the circuit split as one between a subjective and objective approach to defining intent, the November 2015 amendment redefining intended loss as the pecuniary harm that the defendant purposely sought to inflict is surprising.[175] The Commission could have endorsed the majority position by adding a single word to the current definition: "'Intended loss' means the pecuniary harm that was [*subjectively*] intended to result from the offense." To be sure, the Commission's use of the word "purpose" also serves as a clear rejection of the objectivists' position. But because "purpose" has a technical and narrowly drawn definition in criminal law, the amendment could be interpreted to have significantly changed the scope of intended loss.[176]

The key language in the new amendment – "purposely sought to inflict" – comes directly from a 2011 Tenth Circuit opinion, *United States v. Manatau*,[177] and the Commission expressly stated that "[t]he amendment adopts the approach taken by the Tenth Circuit" in that case.[178] The defendant in *Manatau* had pleaded guilty to stealing two convenience checks with a credit limit over $10,000.[179] He had no way of knowing the credit limit, however, and had already cashed the checks for $1840 when he was arrested.[180] Nevertheless, the district court held that the defendant's intended loss was $10,000, effectively adopting an objective measure based on the loss that was "possible and potentially contemplated by the defendant's scheme."[181]

Writing for the Tenth Circuit, Judge Gorsuch rejected the district court's objective inquiry into intended loss and remanded the case for resentencing.[182] The court reasoned that the actual-loss provision in Section 2B2.1 would be surplusage if intended loss included losses that would have been

---

subjective expectation, not to the risk of loss to which he may have exposed his victims.'") (quoting United States v. Yeaman, 194 F.3d 442, 469 (3d Cir. 1999)); United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (endorsing the subjective measurement of intended loss).

174. *See* Devenpeck v. Alford, 543 U.S. 146, 154 (2004) ("[I]ntent is *always* determined by objective means.").

175. Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782, 25790 (notice of submission to Congress of amendments May 5, 2015).

176. *Id.*

177. 647 F.3d 1048, 1050 (10th Cir. 2011) (emphasis omitted).

178. 80 Fed. Reg. at 25791.

179. *Manatau*, 647 F.3d at 1049.

180. *Id.*

181. *Id.*

182. *Id.* at 1057.

reasonably (i.e., objectively) foreseeable in light of the scheme, but that the defendant did not subjectively intend.[183] This is so because actual loss is defined to equal *only* those losses that actually occurred *and* were reasonably foreseeable.[184] If all reasonably foreseeable losses were by definition intended losses, then the intended loss would always be at least as high as the actual loss.[185] Thus, in order to prevent the actual loss measure from being redundant, intended loss should not be interpreted to incorporate an objective foreseeability test.[186] The Tenth Circuit concluded that "whatever the term 'intent' might mean, we have never heard of a definition that would allow us to say that an individual's *intentions* include things he never [subjectively] contemplated – except perhaps in an Opposite Day game."[187] Apart from the surplusage argument, however, the Tenth Circuit did not discuss the subjective/objective split in any detail; in fact, it downplayed objectivist precedent from the First and Seventh Circuits.[188]

Instead, the bulk of the *Manatau* opinion was devoted to defending "purpose" as the proper meaning of "intent."[189] The Tenth Circuit drew its definition of "purpose" directly from the MPC.[190] One of the MPC's primary innovations was to replace the hodgepodge of mental states that had accumulated in the common law and statutes with a crisply defined four-level hierarchy – purpose, knowledge, recklessness, and criminal negligence – that has become "the predominant 'American' system of culpability distinctions."[191]

---

183. *Id.* at 1053.

184. *See id.* In practice, courts almost never find that a realized loss was so unforeseeable as to be excluded from the actual loss calculation. *See, e.g.*, United States v. Turk, 626 F.3d 743, 750 (2d Cir. 2010) (rejecting the argument that a defendant's actual losses were unforeseeable because of the nationwide subprime mortgage crisis of the late 2000s).

185. *Manatau*, 647 F.3d at 1053.

186. *Id.*

187. *Id.* (emphasis omitted). The Tenth Circuit could probably have vacated Manatau's sentence based on this observation alone. *See id.* Manatau's act of cashing the convenience checks for far less than their maximum possible value is almost decisive evidence that he did not subjectively intend to cause the maximum possible loss.

188. *Id.* at 1055 (finding that *United States v. McCoy* stood merely for the proposition that "judges can and often must reach conclusions about a defendant's *mens rea* based on inferences from known facts about his conduct," and "any suggestion about a possibly lower *mens rea* standard in [United States v. Mei, 315 F.3d 788, 793 (7th Cir. 2003)] is no more than dicta") (citations omitted).

189. *See generally id.*

190. *Id.* at 1050–51.

191. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 816 (1980). The influence of the MPC goes far beyond the jurisdictions that have formally adopted the MPC's mental-states hierarchy in whole or in part. For example, just last year eight Supreme Court Justices assumed that it was their duty to choose which of the MPC mental states should apply to a statute that was

The MPC influences the Guidelines themselves in several places,[192] and numerous courts have used the MPC to interpret the "ordinary, contemporary, [and] common meaning" of terms in the Guidelines.[193]

Under the MPC, a person purposely causes a result (such as the infliction of a pecuniary loss) if "it is his *conscious object* to . . . cause such a result."[194] The empirical risk that harm will result from the defendant's conduct is not relevant to the purposefulness inquiry. Rather, "The purposeful act is purely desire-based. An actor acts purposefully if he desires the very result caused by his wrong."[195] The MPC itself very rarely conditions criminal liability on a showing of purpose, reserving it for crimes such as attempt, conspiracy, burglary, and treason.[196]

Comparing purpose to its adjacent mental state of knowledge shows why it is used so sparingly. A defendant acts with knowledge if he is "aware that it is *practically certain* that his conduct will cause" a specific result.[197]

---

silent as to mens rea. *See* Elonis v. United States, 135 S. Ct. 2001, 2011 (2015); *id.* at 2014 (Alito, J., concurring in part and dissenting in part).

192. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 8C2.4(a)(3) (U.S. SENTENCING COMM'N 2015) (using the "intentionally, knowingly, or recklessly" hierarchy).

193. *Manatau*, 647 F.3d at 1050 (quoting United States v. Lopez-DeLeon, 513 F.3d 472, 474 (5th Cir. 2008)); *see also* United States v. Borer, 412 F.3d 987, 992 (8th Cir. 2005); United States v. Honeycutt, 8 F.3d 785, 787 (11th Cir. 1993). As a general matter, the MPC's method – "resolve as many issues as possible with legislative text, leaving little room for judicial lawmaking" – shifted decision-making power from judges to legislatures, much as the transition from indeterminate sentencing to guidelines-sentencing did. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 267 (2011).

194. MODEL PENAL CODE § 2.02(2)(a)(i) (AM. LAW INST., Proposed Official Draft 1962) (emphasis added).

195. Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1317 (2011); *see also* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 209 (2001) ("[A]ction is not purposive with respect to the nature or result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. It is meaningful to think of the actor's attitude as different if he is simply aware that his conduct is of the required nature or that the prohibited result is practically certain to follow from his conduct," which would fall under the MPC definition of "knowledge.").

196. MODEL PENAL CODE § 5.01(a) (explaining that a person is guilty of attempt if he or she "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be"); *id.* § 5.03 (defining conspiracy as an agreement to commit a crime entered into "with the purpose of promoting or facilitating its commission"); *id.* § 221.1 (defining burglary as the entry into a building "with [the] purpose to commit a crime therein"). *See also* MODEL PENAL CODE § 2.02 cmt. at 125 (Tent. Draft No. 4, 1955) (stating that treason requires a "purpose to aid the enemy"). "Theft by deception" – the MPC analog to fraud – also requires that the defendant have the purpose of obtaining property of another by deception. § 223.3 (AM. LAW INST., Proposed Official Draft 1962).

197. § 2.02(2)(b)(ii) (emphasis added).

As *Manatau* explained, quoting from the MPC commentaries, the difference between purpose and knowledge is that "between a man who wills that a particular act or result take place and another who is merely willing that it should take place."[198] For example, it is the difference "between a farm boy [who] clears the ground for setting up a still . . . *in order to* work a still" and someone who does so "*knowing* that the venture is illicit but just looking for a paying day's work."[199] Other hypotheticals demonstrate just how narrow the MPC definition of purpose is: a person who plants a bomb on a plane because she desires to kill the pilot has only *purposely* killed one person, even though it was "practically certain" that all passengers would die.[200]

Manatau used a variety of tools of statutory construction to conclude that Section 2B1.1's use of "intent" should be interpreted as purpose, not knowledge. The court looked to Supreme Court precedent;[201] the definition of "intent" in popular dictionaries;[202] Guidelines provisions that appear to distinguish between intent and knowledge;[203] background legal norms regard-

198. United States v. Manatau, 647 F.3d 1048, 1051 (10th Cir. 2011) (quoting MPC § 2.02 cmt. 2 at 233 n.6).

199. § 2.06 cmt. 6(c) (emphasis added).

200. *See* Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CAL. L. REV. 895, 906–07 (2000) (using the same hypothetical); *see also* David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1062 (2010) ("'Conscious desire' creates a particularly narrow definition of intent. To see how narrow, imagine a defendant who says, 'Yes, I killed this man, but I didn't really intend to. I knew that what I did was going to result in his death, but I just didn't care whether he died or not.' Technically, this state of mind is not sufficient for a finding of MPC-type intent [i.e., purpose]. Surprisingly, the actor's indifference means that the 'conscious desire' that is the essence of this state of mind is missing."); Jay Sterling Silver, *Intent Reconceived*, 101 IOWA L. REV. 371, 390–91 (2015) (describing the definition of purpose adopted in the MPC as "connot[ing] an aspirational state of mind," while arguing that this definition is ill-conceived).

201. *See* Giles v. California, 554 U.S. 353, 368 (2008) (noting that the "claim that knowledge is sufficient to show intent is emphatically *not* the modern view") (citing 1 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2 (2d ed. 2003)).

202. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 629 (1985) (defining "intend" as "to have something in your mind as a purpose or goal").

203. *Manatau*, 647 F.3d at 1052 ("All these [Guidelines] provisions again stand in sharp contrast to the definition of 'intended loss,' which makes no mention of a knowledge standard. And all would be a nonsense if the term 'intent' already encompassed 'knowledge.'"). *See also* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(13)(B) (U.S. SENTENCING COMM'N 2015) ("If the offense involved misappropriation of a trade secret and the defendant *knew or intended* that the offense would benefit a foreign government . . . .") (emphasis added); *id.* § 5K2.1 (noting the mens rea as "intended or knowingly risked"); *id.* § 5K2.2 (noting the mens rea as "intended or knowingly risked"); *id.* § 5K2.3 (noting the mens rea as "intended or knowingly risked"); *id.* § 8C4.2 (noting the mens rea as "intended or knowingly risked"); *id.* § 1A1.4(f) (noting the mens rea as "knowledge or intent"); *id.* § 2K2.1(c) (noting the mens rea as "knowledge or intent"); *id.* § 2K2.5(c) (noting the mens rea as "knowledge or intent"); *id.* § 2K1.3(b)(3) (noting the mens rea as "knowledge, intent,

ing the mens rea required for inchoate crimes like attempt and conspiracy;[204] and the rule of lenity.[205] The Tenth Circuit concluded that "[t]he Model Penal Code reflects th[e] contemporary understanding," and "in contemporary usage," the meaning of intent is "pretty plain": "Something is intended if it is done on purpose – not merely known, foreseen, or just possible or potentially contemplated."[206]

Because its analysis relied on tools of statutory interpretation, *Manatau* has little bearing on whether intent-as-purpose is optimal sentencing policy. Unlike the Tenth Circuit, the Commission was not bound by the extant text when issuing the November 2015 amendment; it was free to choose whatever rule best enabled "intended loss . . . [to] focus more specifically on the defendant's culpability."[207] By framing the problem to be solved as the subjective/objective circuit split, and then adopting *Manatau*'s conclusion that "intent" should mean "purpose," the Commission glossed over whether purpose was in fact the *best* proxy for culpability in fraud sentencing. It also failed to mention a highly pertinent fact: before *Manatau*, not a single court had *ever* interpreted intended loss to require "purpose" as defined in the MPC.[208]

B. Critiquing the Fit Between Purposeful Loss and Culpability

Because intended loss is defined as the "*pecuniary harm* that the defendant purposely sought to inflict," it is the pecuniary harm – not the fraudulent or larcenous behavior itself – that must be purposed.[209] A defendant who purposely imposes a loss is certainly blameworthy, and all things being equal, it is more blameworthy to impose a large loss than a small one. But the purposeful loss amendment does not simply say that purposely inflicted losses are culpable, or that they are more culpable than less-than-purposeful losses. Instead, it says that only purposeful losses count.[210] For that reason, the purposeful loss amendment risks excluding the blameworthy conduct of a significant subset of culpable defendants. Specifically, it excludes defendants who did not have a conscious desire to inflict a loss because their conduct was in

---

or reason to believe"); *id.* § 2K2.1(b)(6) (noting the mens rea as "knowledge, intent, or reason to believe"); *id.* § 2M5.3(b) (noting the mens rea as "intent, knowledge, or reason to believe"); *id.* § 2M5.3 cmt. (noting the mens rea as "known or intended"); *id.* § 2X3.1 cmt. (noting the mens rea as "known or intended").

204. *See Manatau*, 647 F.3d at 1052–53.

205. *Id.* at 1055–56.

206. *Id.* at 1050.

207. Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782, 25791 (notice of submission to Congress of amendments May 5, 2015).

208. An "All Federal" search on Westlaw of ("intended loss" and purpose! and ("2.02" or "conscious object")) returns *Manatau* as the only result, and neither *Manatau* nor the Commission cites any cases on point.

209. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt 3(A)(2) (U.S. SENTENCING COMM'N 2015) (emphasis added).

210. *See id.*

some way attenuated from their victims' losses – for example, because the defendant did not stand to benefit directly from the loss, or because there was merely a risk of loss. Many defendants convicted of the following offenses will be able to make strong arguments that they did not *purpose* any loss at all:

- loan and mortgage fraud;
- financial reporting fraud;
- contracting fraud (i.e., the defendant's fraudulent assertion that he or she is qualified for a contract or can meet its terms);
- fraud in applying for government programs or benefits;
- crimes involving the resale of stolen checks, credit cards, or other property to a third-party for a flat fee;
- sales of securities or other property whose value is genuinely unknown by the defendant;
- crimes conducted on the behalf of others, including by employees on behalf of their employers; and
- certain Ponzi schemes.

Defendants convicted of the above crimes are blameworthy, which is why their conduct is criminalized in the first place. But these offenders are culpable not because they consciously desired to inflict losses on their victims, but rather because they either *knew* (in MPC terms) that a loss was substantially certain to occur, or they were willing to *risk* a loss. While knowing about or risking a loss may be less blameworthy than purposing one, if judges adopt the MPC/*Manatau* interpretation of "purpose," they may reach the conclusion that such offenders did not have any intended loss at all.

Take, for example, the facts of *United States v. Confredo*.[211] Confredo was a former loan officer who helped hundreds of small businesses submit fraudulent loan applications for amounts over $24 million.[212] In exchange, he received up-front fees and a percentage of the loan amounts, totaling about $2 million.[213] Since some loans were denied and others were partially or fully repaid, the banks' actual losses were approximately $9 million.[214] Confredo argued that because he believed that the bank would deny some of the loan requests and that his clients would repay a portion of what they owed, his intended loss was between $10 and $20 million.[215] The district court, however, concluded as a matter of law that Confredo's intended loss was the full $24 million he requested for his clients.[216] The Second Circuit remanded the

211. 528 F.3d 143, 145 (2d Cir. 2008).
212. *Id.* at 145–46.
213. *Id.*
214. *Id.* at 146.
215. *Id.* at 148.
216. *Id.*

case.[217] It held that although the district court could start with the presumption that Confredo intended a loss equal to the total loan request, he must be given the chance to show "a subjective intent to cause a loss of less than the aggregate amount of the loans."[218]

How would the district court evaluate Confredo's intended loss under the new purposeful loss amendment? If the court follows *Manatau* and the MPC's definition of "purpose," the loss calculation will turn on whether it was Confredo's "conscious object" to inflict pecuniary harm on his clients' lenders. But Confredo received no financial benefit from the loan defaults; in fact, the likelihood of his crime being discovered would only increase if his clients defaulted. In addition, any losses that the lenders might suffer would not occur until after Confredo's role in the crime was complete. The link between his actions and the lenders' possible losses is so attenuated that it is difficult to conclude that he acted for the purpose of causing their losses, even though he certainly foresaw the risk that some of his clients would not repay their loans in full.

The Department of Justice's comments on the Commission's proposed intended loss amendment raised this same concern:

> The Commission's proposal to limit the definition of "intended loss" to that which the defendant purposefully sought to inflict would effectively eviscerate use of the intended loss criterion in determining loss. In many fraud cases, defendants routinely assert, with some persuasiveness, that they never intended to inflict any pecuniary harm on their victims, and that they genuinely believed that their victims would receive the benefits that they were originally promised . . . .[219]

On the one hand, the purposeful loss amendment will not "eviscerate" the intended loss calculation in conventional frauds or thefts where defendants act with the conscious object of transferring property directly from their victims to themselves. Nor is there a valid defense for a defendant who acts with multiple purposes, one of which is to inflict a loss; for example, a defendant who steals $20,000 because he wants to buy a new car has the con-

---

217. *Id.* at 156.

218. *Id.* at 152–53. In so holding, the Second Circuit endorsed the Third Circuit's analysis in United States v. Yeaman, 194 F.3d 442, 460 (3d Cir. 1999) ("Intended loss refers to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims.").

219. *U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 16, 2015*, U.S. DEP'T JUST. 28–29 (Mar. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/DOJ.pdf.

scious object of inflicting a $20,000 loss, even if it is not his ultimate goal, because it is a necessary intermediate step toward that goal.[220]

For frauds like the one at issue in *Confredo*, however, if courts apply the MPC definition of purpose, the attenuation between the criminal offense and the victim's losses will often lead to the conclusion that there was no intended loss at all. The sentences for such defendants would then be driven predominantly by actual losses. But because actual loss is primarily a proxy for harm, it can vary dramatically based on factors that have little bearing on culpability, such as how quickly the defendant is apprehended.

Judges in such cases may be inclined to interpret intended loss as if the November 2015 amendment did not define intent as purpose.[221] But they will have to explain why the Commission specifically inserted the word "purpose" into the Guidelines yet did not intend for it to have its conventional MPC definition – the same one argued for in *Manatau*, whose reasoning the Commission expressly endorsed when adopting the new amendment. The varying fidelity to which courts adhere to the MPC/*Manatau* definition of "purpose" risks becoming a new source of disparity and unpredictability in the application of the fraud Guidelines. And even though the purposeful loss amendment is likely to have a downward effect on average Guidelines sentences – it will be more difficult for the government to prove that a loss was "purposed" rather than merely "intended" – a new definition of intended loss that seemingly excludes large swaths of culpable conduct seems like an unnecessarily capricious means to that worthy end.

C. Expected Loss as an Alternative Measure of Culpability

Ironically, in the same Federal Register notice in which it announced the purposeful loss amendment, the Commission cited cases that take an approach to measuring intended loss that is distinctly different from the purposeful loss amendment – one that fully endorses a subjective inquiry without excluding a significant subset of blameworthy defendants.[222] This alternative

---

220. *See* GLANVILLE WILLIAMS, THE MENTAL ELEMENT IN CRIME 10, 14 (1965) ("[T]he consequence need not be desired as an end in itself; it may be desired as a means to another end. . . . There may be a series of ends, each a link in a chain of purpose. Every link in the chain, when it happens, is an intended consequence of the original act.").

221. As the typical factfinders of intended loss, judges have significant discretion to decide whether a defendant's claims about his or her purpose are credible. For example, in the post-purposeful-loss-amendment case of *United States v. Pollock*, the district court held that a defendant who diverted a disbursement from his lender purposed a loss equal to the entire disbursement, even though he claimed that "we just thought we would pay the bills and just continue forward." No. 3:14-cr-00186-BR, 2016 WL 1718192, at *4 (D. Or. Apr. 29, 2016). The court concluded that "he never intended to repay the bank for its loss; *i.e.*, Defendant's actions belie his words." *Id*.

222. *See* Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782, 25791 (notice of submission to Congress of amendments May 5, 2015) (citing United

approach was expressed concisely in the Third Circuit case *United States v. Diallo*: "[W]e look to the defendant's subjective expectation . . . ."[223] In other words, the Third Circuit takes the same "expected loss" approach used by the First Circuit, but it looks to the defendant's *subjective* expectations, rather than those of an objectively reasonable person. The Second Circuit endorsed this same test in *United States v. Confredo* and explained how it would apply to the facts of that case: "A defendant who applied for, or caused someone else to apply for, a $1 million loan, fully expecting at least $250,000 to be repaid, intended a loss of no more than $750,000 . . . ."[224]

The analytic focus of the subjectively intended loss inquiry is on the blameworthiness of the defendant's decision to engage in conduct with the expectation that it would inflict losses on others. The decision to act despite a consciously known risk of harm is seen by some theorists as the necessary element of all criminal culpability.[225] The MPC captures this culpable state of mind in its definition of *recklessness*, which states that "[a] person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element [of the offense] exists or will result from his conduct."[226] Recklessness is the default mental state that must be shown to impose criminal liability under the MPC,[227] and for the same reason – i.e.,

---

States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013), United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008), and United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003)).

223. 710 F.3d 147, 151 (3d Cir. 2013); *see also* United States v. Yeaman, 194 F.3d 422, 460 (3d Cir. 1999) ("Intended loss refers to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims.") (citing United States v. Kopp, 951 F.2d 521, 529–31 (3d Cir. 1991)).

224. 528 F.3d 143, 152 (2d Cir. 2008).

225. *See, e.g.*, Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 931 (2000) (arguing that "the basic moral vice of insufficient concern for the interests of others" is the *sine qua non* of all blameworthy mental states); ITZHAK KUGLER, DIRECT AND OBLIQUE INTENTION IN THE CRIMINAL LAW: AN INQUIRY INTO DEGREES OF BLAMEWORTHINESS 113 (2002) ("The amount of harm caused and foreseen by the actor also constitutes an important factor in assessing moral culpability.").

226. MODEL PENAL CODE § 2.02(c) (AM. LAW INST., Proposed Official Draft 1962). Recklessness is one of only two mental states that is defined in the Guidelines (the other is criminal negligence), and the Commission's definition tracks the MPC's closely. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A1.4 cmt. n.1 (U.S. SENTENCING COMM'N 2015) ("'Reckless' means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation."); *see also id.* § 8C2.4(a)(3) (calculating the loss amount for the purpose of sentencing corporations as the pecuniary harm "caused intentionally, knowingly, or recklessly"). The Guidelines' definition of criminal negligence also borrows heavily from the MPC. *See id.* § 2A1.4 cmt. n.1.

227. MODEL PENAL CODE § 2.03.

because disregarding a subjectively expected harm to another is blameworthy – defendants who expect that their actions will impose losses should have their culpability measured by the size of those expected losses.

An intended loss measure focused on subjectively expected losses is fully consistent with the Commission's belief that a subjective inquiry is required.[228] It also provides proportional loss figures for defendants who have no "purposeful" loss; as one court has noted, "A rule that prohibited sentencing courts from inferring intent from a defendant's recklessness would approach effectively creating a defense capable of eviscerating the 'intended loss' provisions of the Sentencing Guidelines for any criminal who managed to insulate his crime from the ultimate infliction of loss."[229] A defendant such as Confredo, who subjectively understood that at least some of his clients would default on their loans, expected that his scheme would result in some amount of loss to the lenders involved and should be held responsible for acting in the face of that risk.

The expected loss analysis will usually start with objective facts about the nature of the crime that were known to the defendant: the number of stolen credit cards, the amount of the fraudulent loan request, the number of telemarketing calls made, etc. A secondary question about how the defendant subjectively interpreted those facts will generally follow: what did the defendant understand about the average credit limit on the cards? The likelihood that he or she could repay the loan? The success rate of the fraudulent telemarketing calls? Multiplying the defendant's subjective assessment of a given outcome by the likelihood of that outcome would generate the expected loss amount; if Confredo thought there was a 40% chance that his client would default on a $1 million loan, the expected loss was $400,000.[230]

If a defendant had no discernible expectations, then there should be a presumption that he or she expected the scheme to succeed in full; people generally expect to succeed in their endeavors.[231] But the presumption

228. Although the expected loss measure's ability to grade culpability proportionally is at issue here, some scholars argue that it is also the appropriate metric for maximizing the deterrent effect of sanctions. *See* Cohen, *supra* note 122, at 524 ("Before deciding on whether or not to commit a crime, the 'expected' loss is all that can be estimated, and thus the potential offender relies upon that measure in determining whether or not to commit a crime. The fact that he will be punished on the realization of actual loss does not change that decision calculus . . . .").

229. United States v. Harris, 597 F.3d 242, 255 (5th Cir. 2010).

230. The same basic formula can accommodate more complex calculations, such as crimes involving a small risk of an enormous loss. In most cases, evidence of the defendant's expectations will not come in neat percentages, but the overall goal would be to account for the defendant's understanding of the amount at issue and the concomitant risk that some or all of it would be lost.

231. Once expected losses are included in the loss calculation, the issue arises whether a defendant who acts with the purpose of stealing $1 million is more culpable than one who merely acts with the expectation that $1 million will be lost. Comparing defendants with different mental states is unavoidable if intended loss is the one-dimensional metric for measuring culpability and more than one mental state is cul-

should not be so strong that "the full value of property recklessly jeopardized by a defendant's crime may be considered part of his intended loss"[232] because this would treat someone who applies for a fraudulent loan fully expecting to repay it the same as a con artist who applies for a loan but skips town as soon as the check clears.[233] While both are culpable, the subjectively expected loss measure properly grades the latter defendant as more culpable than the former. If defendants have evidence that they expected losses to be lower than they would have appeared to a reasonable person, courts should take that evidence into account rather than "mechanically" setting intended loss equal to the amount placed at risk.[234]

Any subjective intended loss measure will necessarily raise some tricky evidentiary issues.[235] While this might be an argument in favor of evaluating culpability on dimensions other than loss,[236] there is no reason to believe that an expected loss test would be more difficult to apply than the purposeful loss inquiry currently required. Additionally, the Guidelines instruct that the loss amount under any test must only be proven by a preponderance of the evidence, and the resulting estimate need only be reasonable, not precise.[237]

---

pable. *See* Cohen, *supra* note 122, at 524–25. Since it would be unusual (though not impossible) for a defendant to successfully demonstrate that even though he or she purposed a loss, he or she did not expect it to succeed, the expected loss calculation would serve as a discount to the purposeful loss amount in some cases.

232. *Harris*, 597 F.3d at 252; *see also* United States v. Lauer, 148 F.3d 766, 768 (7th Cir. 1998) (holding that intended loss should equal "the amount that the defendant placed at risk by misappropriating money or other property"); *id.* ("That amount measures the gravity of his crime; that he may have hoped or even expected a miracle that would deliver his intended victim from harm is both impossible to verify and peripheral to the danger that the crime poses to the community.").

233. *See, e.g.*, United States v. Schneider, 930 F.2d 555, 558 (7th Cir. 1991) (distinguishing between "a true con artist" who pockets a contract price with no intention of rendering any services, and a fraud committed "to obtain a contract that the defendant might otherwise not obtain, but [which] he means to perform"). Evidence of past practice will often be the strongest evidence that a defendant's expectations were lower than they might appear. *See id*. at 559 (noting the defendants' history of successfully performing government contracts).

234. *See* United States v. Diallo, 710 F.3d 147, 152 (3d Cir. 2013) (quoting United States v. Geevers, 226 F.3d 186, 193–94 (3d Cir. 2000)).

235. *See* Bowman, *The 2001 Federal Economic Crime Sentencing Reform*, *supra* note 101, at 44 (noting that subjective measures of intent "permit[] the defendant to limit his sentencing exposure by making difficult-to-disprove claims about his benevolent intentions or about this failure to consider the likely consequences of his crime"). *Cf.* Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317 (2009) (describing the psychological process through which juries evaluate the subjective mental states of defendants).

236. *See infra* Part V.

237. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (U.S. SENTENCING COMM'N 2015) ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns

In sum, although the Commission amended the definition of intended loss for the purpose of improving the "fit" between intended loss and culpability, by limiting intended loss to defendants who purposely inflicted a loss, it appears to have excluded a significant subset of culpable defendants. In doing so, the Commission missed an opportunity to redefine intended loss in terms of subjectively expected loss, a reform that would have clarified the meaning of the loss calculation and ensured that there is an intended loss figure for all defendants who expected to inflict a loss.

V. RETHINKING RULE-BASED PROXIES FOR CULPABILITY

Even though defining intended loss to include losses that were subjectively expected would improve the fit between loss and culpability, it would still be a severely under-inclusive rule. Many aspects of blameworthiness – including nonpecuniary factors like motive, the defendant's role in the offense, and the duration of the offense – would remain unaccounted for under any rule based on loss. This Part uses the rules/standards framework to consider approaches other than measuring intended loss – however defined – to grade defendants by culpability at sentencing.

A. Loss and Proportional Sentencing

Discomfort with sentencing rules tied to loss calculations is as old as the use of loss in sentencing. Specifically, there has been a longstanding concern that a one-dimensional focus on pecuniary harm often results in overly harsh punishment. Writing in the early 1600s, Sir Henry Spelman noted that the twelve-pence trigger for grand larceny – a capital offense – had not changed in 800 years and quipped, "[W]hile everything else [has] risen in its nominal value, and become dearer, the life of man ha[s] continually grown cheaper."[238] Furthermore, Blackstone observed that jury nullification – which he called "pious perjury" – was widespread in larceny cases: "[T]he mercy of juries will often make them strain a point, and bring in larceny to be under the value of twelvepence, when it is really of much greater value."[239]

Recent sentencing statistics strongly indicate that federal judges are similarly convinced that the loss calculation in Section 2B1.1 often results in disproportionate sentences. In general, the larger the percentage of a Guidelines recommendation that is attributable to the loss enhancement, the more likely it is that the judge will issue a downward departure. For example,

in resolving disputes regarding application of the guidelines to the facts of a case."); *id.* § 2B1.1 cmt. n.3(C).

238. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *237.

239. *Id.* at *238; *see also* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800 286 (1985) ("Many capital defendants [in the mid-1700s] were saved by an undervaluation or a 'finding' of simple larceny instead of burglary . . . and thus were convicted of an offense for which transportation or whipping were the prescribed sanctions.").

about 84% of fraud sentences in which zero offense levels have been added for loss are within the Guidelines range, compared to about 27% of sentences in which twenty or more offense levels were added based on the amount lost.[240] Recent research indicates that this phenomenon is best explained by judges' distaste for the loss enhancement specifically and not merely for high fraud sentences in general.[241] For example, an offender whose final offense level is driven primarily by the loss enhancement is more likely to be sentenced below-range than one with an identical final offense level that was more heavily influenced by enhancements other than loss.[242]

More generally, the data also show enormous variation in the calculated loss amount for any given sentence length.[243] If all defendants with the same final sentence are ranked by the loss attributed to them, the correlation between final sentences and loss is surprisingly weak. For example, between 2006 and 2012, the middle two quartiles of defendants who were sentenced to twelve months in prison had losses ranging from $31,512 to $204,527; one defendant with a twelve-month sentence had a loss amount of nearly $3 billion.[244] Similarly, the same given loss amount is often associated with final sentences of varying lengths; for example, the middle two quartiles of offenders convicted of having caused a $150,000 loss were assigned sentences that ranged from one to five years.[245]

These statistics indicate that there is a fundamental problem with the way that Section 2B1.1 translates loss into a sentencing enhancement. More specifically, the rules for converting loss into a sentencing recommendation systematically exaggerate loss's influence on recommended sentences; fewer than 2% of fraud sentences are above-range.[246]

Perhaps the simplest explanation for why the fraud Guidelines produce disproportionate sentences is that the loss table is miscalibrated – too many offense levels are added for any given loss amount. The proper baseline for fraud sentences has been controversial since the first Commission decided

---

240. *Sentencing and Guideline Application Information for § 2B1.1 Offenders: United States Sentencing Commission Symposium on Economic Crime*, U.S. SENT'G COMMISSION 8 fig. 8 (2012), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Sentencing_Guideline_Application_Info.pdf [hereinafter *Sentencing and Guideline Application Information for § 2B1.1 Offenders*]. *See also* § 2B1.1. These statistics were compiled for the fiscal year of 2012 using the 2011 Guidelines. *See Sentencing and Guideline Application Information for § 2B1.1 Offenders*, *supra*.

241. Allenbaugh, *supra* note 96, at 21, 23. This research included every fraud sentence issued between fiscal years 2006 and 2012. *Id.*

242. *Id.* at 23 n.22.

243. *Id.* at 23–24.

244. *Id.* at 24 figs. 10, 11.

245. *Id.* at 23.

246. U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 3, at tbl. 27A (showing that only 1.8% of fraud sentences were above the Guidelines range).

that, while in general Guidelines sentences should be more or less equivalent to those issued by judges under the indeterminate sentencing regime, fraud sentences should be higher as a matter of public policy.[247] Since then, Congress has instructed the Commission to raise fraud sentences further.[248] The upshot is that a $100,000 loss enhanced a sentence by five offense levels in 1987 but adds ten offense levels today.[249] The differences are even more pronounced at the highest loss levels; for example, the maximum loss enhancement in 1987 was eleven, and today it is thirty.[250]

A recalibration of the loss table would be beneficial, especially at the highest loss levels. But any reform effort to recalibrate the loss table – or implement the structural reforms discussed above in Part IV – would be incomplete if it did not address the fundamentally weak correlation between a defendant's intended loss and the sentencing factor for which it is a rule-based proxy – culpability.

B. Alternative Approaches to Measuring Culpability

The effectiveness of a rule depends in large part on the relationship between the empirical trigger and the policy goals underlying the rule. The ostensible advantages of the intended loss rule (uniformity, predictability, etc.) are not sufficient to justify its use if it does not – and cannot reasonably be expected to – generate sentences that are proportional with respect to culpability. The relationship between intended loss and culpability is suspect on its face. Intended loss incorporates such a relatively narrow set of facts related to blameworthiness that it is not surprising that it frequently misestimates culpability, thereby contributing to the high rates of out-of-Guidelines sentences – garbage in, garbage out. The conceptually weak correlation between intended loss and culpability means that the intended loss rule, especially following the 2015 amendment, lends itself to a false precision that fails to accurately grade defendants by culpability.

There are two promising alternative approaches to reforming the Guidelines' means of grading culpability in fraud cases. The first would replace the one-dimensional intended loss rule with a more complex rule that incorporates additional facts relevant to culpability. The second, more radically,

---

247. *See* Bowman, *The 2001 Federal Economic Crime Sentencing Reform*, *supra* note 101, at 20–21.

248. *See, e.g.*, Bowman, *Pour Encourager Les Autres?*, *supra* note 157, at 405–11 (describing the fraud sentencing mandates in the Sarbanes-Oxley Act).

249. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(1)(F) (U.S. SENTENCING COMM'N 1987), *with* §§ 2B1.1(b)(1)(F)–(G); *see also CPI Inflation Calculator*, U.S. BUREAU LABOR STATISTICS, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited July 10, 2016) (adjusting for inflation, $100,000 in 1987 would have the same buying power as $211,475 in 2016). The increase would be eight offense levels without adjusting the $100,000 for inflation. *See* § 2B1.1(b)(1)(E).

250. *Compare* § 2F1.1(b)(1)(L), *with* § 2B1.1(b)(1)(P).

would incorporate a standard-based assessment of culpability within the predominantly rule-based framework of the Guidelines.

1. A Rule-Based "Culpability Score"

It is doubtful that there is a single metric that could serve as a better rule-based proxy for culpability than intended loss, especially if it were redefined to incorporate subjectively expected losses. Culpability is multifaceted by nature, and any single factor would be prone to misestimating a defendant's holistic blameworthiness.[251] One solution to this problem would be for the Commission to identify *multiple* facts relevant to the culpability inquiry, while still using rule-like directives to control its effects on the Guidelines' sentence.

A model for this kind of multipart rule already exists in the Guidelines. As described in Section 8C2.5, fines for corporations and other organizational defendants are determined by a baseline fine (set by the crime of conviction) that is then multiplied by a "Culpability Score."[252] The Culpability Score is determined by factors such as the corporation's involvement in criminal activity, its prior criminal history, whether a court order was violated, whether justice was obstructed, the existence of an effective ethics and compliance program, and the degree of self-reporting and cooperation.[253] Within most of those categories, Section 8C2.5 offers several possible point values; for example, the company's involvement or tolerance of criminal activity can add one to five points to the Culpability Score, depending on the size of the organization.[254] The final Culpability Score is the sum of these points.

The use of a culpability multiplier has two notable benefits compared to the current role of intended loss in Section 2B1.1. First, it incorporates a culpability-focused analysis directly into every sentence; there is no parallel to the greater-of-actual-or-intended-loss formulation that can exclude culpability considerations from a sentence altogether. Second, the culpability measure can increase *or decrease* the baseline fine. If a sufficient number of factors are mitigating, the Culpability Score is calibrated such that the multiplier will be less than one, and thus the fine ultimately recommended by the Guidelines will be less than the baseline fine.

Consistent with the overall approach of the Guidelines, Section 8C2.5 is completely rule-based: all the factual triggers are empirical in nature and specified in advance by the Commission, as are their effects on the sentence. In theory, the use of a multifactor culpability test in the fraud Guidelines would allow for more comprehensive assessments of blameworthiness than are possible with the intended loss calculation, while still enabling the Com-

251. *See supra* note 228 and accompanying text.
252. § 8C2.5; *see also id.* §§ 8C2.4, 8C2.7.
253. *Id.* §§ 8C2.5(b)–(g).
254. *Id.* § 8C2.5(b).

mission to promote uniformity by controlling the inputs into the sentencing decision.

A multifactor rule would, however, have two significant limitations. First, there would still be cases that involve a relevant fact – at times, a fact of controlling importance – that is not included in the set of factors comprising the Culpability Score. Rules require the rule-maker to identify relevant factual triggers *ex ante*, and culpability might have too many variables to be suitably captured by a predetermined list of factors. Furthermore, some factors would be difficult to convert into quantifiable metrics that could be consistently applied by all judges; for example, how could the blameworthiness of a defendant's motive or the influence of extenuating circumstances be directly converted to clear, simple rules that judges could consistently apply? The corporate sentencing Guidelines are able to sidestep qualitative measures – focusing instead on facts related to the company's size, criminal history, and ethics programs – in large part because organizational defendants lack motives, desires, remorse, and other attributes related to culpability in natural persons.

Second, and more importantly, the more complex the rule, the more difficult it would be to design its various components so that they fit together as intended. The challenge of assigning weights to all the factors would be particularly daunting, and the complexity would grow exponentially as the number of factors increased. The risk of redundancy and double counting would be magnified, and attempts to mitigate the problem (such as capping the number of enhancements) would further add to the rule's complexity.

The fraud Guidelines' use of a complex rule that accounted for a broader range of relevant facts might, on balance, produce sentencing recommendations that better reflect culpability than the simplistic intended loss measurement. But the practical challenges to drafting such a rule would be significant, and it still might fail to give judges confidence that the Guidelines' sentence adequately accounts for the sentencing factors in § 3553(a).

2. A Standard-Based Alternative

The problems associated with identifying and weighting the factors relevant to grading defendants' culpability could also be addressed by using a standard rather than a rule. A standard-based approach to measuring culpability would give judges the flexibility to determine which factors are most relevant and important to evaluating blameworthiness in any given case. The attractiveness of this option, however, depends largely on the extent to which the deficiencies of standards – the inconsistency and unpredictability that led Congress to authorize the Guidelines in the first place – can be mitigated in the sentencing context.

A recent proposal by the American Bar Association's Task Force on the Reform of Federal Sentencing for Economic Crimes ("ABA Task Force"), composed of sixteen prominent professors, judges, and practitioners, provides an example of how a standard-based measurement of culpability might be

incorporated into the Guidelines.[255] The ABA Task Force proposal keeps the current base offense levels in Section 2B1.1 but reduces the number of specific offense characteristics from nineteen to three.[256] Two of the offense characteristics reflect harm: one measures "victim impact," which includes factors such as the vulnerability of the victims, the significance of their losses, and nonpecuniary harms.[257] The other is based on the actual – and only the actual – loss caused by the offense.[258] The accompanying loss table reduces the number of loss levels to six (down from fifteen), the dollar-value of the highest step to $50 million (down from $550 million), and the maximum loss-driven enhancement to fourteen offense levels (down from thirty).[259]

The most innovative provision, however, is the third and final specific offense characteristic, which aims to account for culpability. The proposal eliminates intended loss entirely and replaces it – along with all other culpability-related enhancements – with a single comprehensive culpability assessment.[260] The number of offense levels triggered by the assessment depends on the degree of the defendant's culpability: lowest, low, moderate, high, or highest.[261] The proposal provides a list of nonexclusive factors that judges must evaluate when deciding the culpability level: (1) the motive/nature of the offense; (2) gain; (3) degree of sophistication/organization; (4) duration; (5) extenuating circumstances; and (6) efforts to mitigate harm, including voluntary cessation, self-reporting, and restitution.[262] The ABA Task Force provides judges with a description of each factor, including subfactors that may bear on culpability.[263] Courts are instructed to expressly consider all six factors (as well as any others they deem relevant) before deciding on a culpability level.[264]

---

255. *A Report of the American Bar Association Criminal Justice Task Force on the Reform of Federal Sentencing for Economic Crimes*, AM. BAR ASSOC. *1, 8 (2014), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.pdf [hereinafter ABA Task Force Report] (the first two pages of the report are not numbered, and that is signified with an asterisk).

256. *Id.* at *2.

257. *Id.* at 5. The Victim Impact Score in the ABA Task Force proposal is also a standard: "As with the culpability levels, there are many factors to consider in arriving at the appropriate level of victim impact. The court should consider how the combination of these factors places the defendant's offense in comparison to victim impact in other cases under this guideline." *Id.*

258. *Id.* at 1.

259. *Compare id.* at *2 *with* § 2B1.1(b).

260. ABA Task Force Report, *supra* note 255, at 1–5.

261. *Id.* at *2.

262. *Id.* at 2–5. A similar five-part structure to incorporate motive into sentencing has been proposed by Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 137 (2006).

263. ABA Task Force Report, *supra* note 255, at 2–5.

264. *Id.* at 1 ("[T]he court instead arrives at one of five culpability levels after considering the combined effect of all culpability factors.").

The ABA Task Force concluded that "there is no workable formula for assigning values to each individual factor" in the culpability score, particularly in light of their "almost limitless variety of possible combinations," and thus the factors are not assigned specific weights.[265] Instead, under the proposal, "[t]he end result of the court's analysis should be a culpability level that 'ranks' the defendant in the hierarchy of five levels of culpability for all defendants sentenced under this [G]uideline."[266] Unlike the current fraud Guidelines, culpability considerations can mitigate, as well as aggravate, the final sentence. "Low" and "lowest" culpability determinations trigger a reduction of 3–5 or 6–10 levels, respectively.[267] A "moderate" culpability rating, which the ABA Task Force says should be the most common culpability level, adds no additional enhancement.[268] "High" and "highest" culpability determinations trigger enhancements of 3–5 and 6–10 levels, respectively.[269] Thus, in keeping with just-deserts theory, culpability is an independent inquiry that is considered in every sentence, alongside factors related to harm.

An approach like the ABA Task Force proposal would represent a pronounced shift toward a standard-based sentencing system because judges would ultimately be required to determine which factors best reflect a defendant's culpability *ex post* and case by case. But it is far from a return to the unbridled discretion of an indeterminate sentencing regime. This is so for at least three reasons. First, the proposal classifies culpability into tiers associated with specified offense-level enhancements, so a judge's discretion to place a defendant in a given culpability tier can only increase or decrease the sentence by the predetermined number of offense levels. Second, the overall weight of the culpability finding on sentencing is bounded by the other components of the proposal, including nondiscretionary rules related to actual loss and the base offense level.

Third, and perhaps most importantly, the multifactor list would channel and guide judicial decision-making. The ABA Task Force proposal would provide judges with a list and description of factors that the Commission believes, in light of its expertise, to be most relevant to evaluating culpability in given categories of offenses. With respect to the motive/nature-of-the-offense factor, for example, the proposal provides judges with a list of four categories of offenses, accompanied by descriptions and an assessment of the relative degree of culpability typically associated with each one.[270] This tax-

265. *Id.*

266. *Id.* at 1.

267. *Id.* at *2.

268. *Id.* at *2, 2.

269. *Id.* at *2.

270. *Id.* at 2–3. The ABA Task Force implicitly recognizes that "risk-shifting" offenses are distinct from purposeful ones:

> These [risk-shifting] offenses are not specifically intended to cause loss. Instead, they shift the risk of any potential loss from the defendant (or from others involved in the criminal undertaking) to a third par-

onomy helps the judge evaluate the defendant's motive and the nature of the offense in an organized and structured manner. Approaching the motive/nature-of-the-offense inquiry in this way places the defendant's actions within the context of the full scope of crimes covered by the fraud Guidelines, reducing the chance that a judge would lose perspective when assessing an individual defendant. Furthermore, the fact that it is a requirement for judges to consider each of the factors identified by the Commission both ensures that none of the factors most relevant to culpability are overlooked, while at the same time discouraging judges from relying on extraneous and potentially irrelevant factors.

In effect, the standard-based ABA Task Force proposal seeks to reduce the unwarranted disparities that can arise from standards by prescribing the *process* that judges must follow when deciding a sentence, rather than by preordaining the inputs to a mechanical formula. The array of factors potentially relevant to evaluating a defendant's culpability is daunting, and judges asked to do so in the abstract would likely adopt many different approaches, some more reliable than others. But by prescribing the process of decision-making, the Commission can significantly enhance deliberation by reducing the judges' reliance – intentional or subconscious – on biases and faulty decision-making heuristics.[271] Structured decision-making models have been the subject of significant empirical study and have produced strong results. For example, checklists – which require decision-makers to formally consider a set of relevant factors before coming to a decision – have been shown to improve decision outcomes in many fields in which experts must make complex, multivariate decisions.[272] In medical and psychological settings in par-

---

> ty, such as the victim of the offense. Examples include false statements for the purpose of obtaining a bank loan that is intended to be repaid. Such offenses are generally less culpable than those where loss is specifically intended.

Id. at 3. The other categories of culpability under the proposal's "motive/nature of the offense" heading are "predatory," "legitimate ab initio," and "gatekeeping" offenses. *Id.* at 2–3.

271. *See, e.g.*, RICHARD H. THAYLER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 94–97 (2008) (describing the effect of "choice architecture" on structuring complex choices); Daniel Kahneman, Dan Lovallo & Oliver Sibony, *The Big Idea: Before You Make that Big Decision . . .*, 89 HARV. BUS. REV. 51, 51 (2011) *reprinted in* HBR'S 10 MUST READS: ON MAKING SMART DECISIONS 21, 25–27 (2013) (listing common decision-making biases and heuristics and methods for minimizing their effect on decision-making).

272. *See generally* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT 48–51 (2009); DANIEL KAHNEMAN, THINKING FAST AND SLOW 222–33 (2011); *see also* Alex B. Haynes et al., *A Surgical Safety Checklist to Reduce Morbidity and Mortality in a Global Population*, 360 NEW ENG. J. MED. 491, 495–96 (2009) (finding that the use of a surgical checklist cut deaths in half); Annegret Borchard et al., *A Systematic Review of the Effectiveness, Compliance, and Critical Factors for Implementation of Safety Checklists in Surgery*, 256 ANNALS SURGERY 925, 927–31

ticular, many assessment tools are designed to encourage "structured professional judgments" that combine empirically-based *aides-memoires* with a subjective, individualized assessment by the examining clinician.[273] Structured professional judgments have been found to produce far more accurate diagnoses than unstructured clinical judgments, while also reducing variability between clinicians.[274] A structured decision-making approach would also enable the Commission to leverage its institutional expertise to provide useful information that individual judges might otherwise lack, such as statistics about sentencing practices, lists of sentencing factors that are particularly relevant to specific types of cases, and perspective on the full spectrum of defendants against which the defendant's culpability should be compared.

Multifactor standards have a bad reputation among some jurists and commentators, but the most forceful objections are blunted in the sentencing context. Justice Scalia, for instance, famously argued that rules are preferable to standard-like balancing tests because such tests engender inconsistency, provide less notice to parties about what is expected of them, and effectively empower judges to impose their personal policy preferences.[275] In the case of sentencing, however, modern post-*Booker* sentencing doctrine already requires judges to use the flexible, standard-like approach mandated by Congress in § 3553(a).[276] The question for the Commission, therefore, is not whether judges should sentence defendants according to the ill-defined standards identified in § 3553(a), because Congress has already decided that they must. Rather, the question now is whether the Commission can best aid judges as they carry out their statutory duty to account for culpability in fraud sentencing: is it with the intended loss calculation, or instead would judges would be better served by expert guidance from the Commission about how to evaluate culpability directly and comprehensively, as presented through a decision-making procedure that fosters deliberation and consistency?

(2012) (concluding based on a meta-analysis of twenty-one studies that the use of checklists in surgery cuts the rates of mortality and complications by 40%).

273. *See, e.g.*, Jerrod Brown & Jay P. Singh, *Forensic Risk Assessment: A Beginner's Guide*, 1 ARCHIVES FORENSIC PSYCHOL. 49, 54 (2014) (describing how, in structured professional judgment assessments, empirically-driven factors "are used as an *aide-memoire*, guiding administrators in making a categorical risk judgment"); Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCIENCE 38, 39 (2011) (describing the effectiveness of structured professional judgments in predicting risk of violence in patients).

274. *See* Brown & Singh, *supra* note 273, at 51–52; Skeem & Monahan, *supra* note 273, at 39. Ironically, whereas the pre-Guidelines indeterminate sentencing regime analogized judges to clinicians, this medical and psychological research indicates that even clinicians benefit from structured guidance. *See supra* notes 23–24 and accompanying text.

275. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

276. *See* 18 U.S.C. §§ 3553(a)(2)(A), (a)(6) (2012), *partially abrogated by* United States v. Booker, 543 U.S. 220 (2005).

Like any standard-based framework, an omnibus culpability assessment would likely generate more sentencing variation than the loss calculation or a rule-oriented multifactor list like the Culpability Score in Section 8C2.5. But if this variation is the result of judges evaluating culpability in a manner that is more accurate than is possible under the best available sentencing rule, then it should be considered a feature, not a bug, of the standard-based approach.

VI. CONCLUSION

The Commission's 2015 amendments to the fraud Guidelines were dismissed by commentators as "anti-climactic"[277] and, more colorfully, a "damp squib."[278] Loss remains at the heart of the fraud Guidelines, and intended (now purposeful) loss is still the primary proxy for defendant culpability.

The Commission's decision to merely tweak the existing fraud Guidelines is consistent with the last decade of its history. Despite the seemingly foundational transformation of the federal sentencing system brought about by *Booker*, one would never know anything had changed by reading the Guidelines themselves. They remain as rigid and rule-oriented as ever, even though judges are now charged with directly applying the standards described in § 3553(a) in every sentence. In short, it has been business as usual for the Commission post-*Booker*.[279]

The Guidelines' ongoing adherence to a rule-based framework is not necessarily problematic. The majority of sentences still fall within the Guidelines range, and the Guidelines are designed to capture the same § 3553(a) factors *ex ante* "at wholesale" that judges must apply *ex post* "at retail."[280] Judges' ongoing, voluntary deference indicates that the Guidelines often succeed at promoting uniformity and predictability, while still generating reasonable, proportional sentences.

Ultimately, the role of the Guidelines should be to assist judges in fulfilling their sentencing duties, which are now ultimately defined in § 3553(a). When a specific Guideline (1) has consistently high rates of departures and (2) is driven largely by a factual trigger that is a self-evidently weak proxy for a critically important sentencing factor, a reevaluation of that provision is in order. When well-designed standards can do so better than clumsy rules, the Commission should not shy away from devolving to judges the authority to evaluate complex sentencing factors directly. This is especially true when the

277. *See* Douglas A. Berman & Robert J. Watkins, *Fiddling With the Fraud Guidelines as* Booker *Burns*, 27 FED. SENT'G REP. 267, 268 (2015).

278. Bowman, *Damp Squib*, *supra* note 161, at 270.

279. *But see* James E. Felman, *Reflections on the United States Sentencing Commission's 2015 Amendments to the Economic Crimes Guideline*, 27 FED. SENT'G REP. 288, 290–91 (2015) (arguing that "many of the Commissioners, given that the current manual was written for a binding system, believe that advisory Guidelines need not be so complex or require such elaborate fact finding and extensive litigation as the current manual").

280. United States v. Rita, 551 U.S. 338, 348 (2007).

standard-like inquiry is channeled through a structured decision-making procedure and integrated into the broader framework of the Guidelines.

The intended loss provision is a prime test subject for the Commission to use to experiment with standard-based Guidelines. As Professors Douglas Berman and Robert Watkins have argued:

> Simply put, persistent emphasis on loss in modern [G]uideline calculations, even if the Commission continues to fiddle with the definition of 'loss' and other related enhancements, cannot be fully reconciled with the structure and intent of [§] 3553 which necessarily requires district judges to look to other offense factors in order to properly discharge their statutory sentencing obligations.[281]

A standard-based culpability provision, properly incorporated into Section 2B1.1, would help judges evaluate culpability in fraud sentences. Assessing culpability with a carefully delineated standard would improve the reliability of fraud sentences as a theoretical matter. Just as importantly, however, it would also increase the confidence of the sentencing judge that the resulting Guidelines' recommendation has accounted for the relevant factors under § 3553(a), as every sentence must.

Despite the Commission's good intentions, the new purposeful loss amendment weakens the correlation between intended loss and culpability by excluding a significant subset of economic crimes in which victims' losses are attenuated from the defendant's conduct. The fraud Guidelines would be improved by amending the definition of intended loss to clarify that it encompasses losses that defendants subjectively expected to occur. But continued fiddling with the intended loss definition can only help so much given the breadth of factors that bear on moral blameworthiness. The Commission would do better to abandon intended loss as a fatally flawed proxy for culpability. The Commission has the opportunity to replace intended loss with a new type of Guideline tailored for post-*Booker* sentencing practice. This hybrid Guideline would capitalize on the virtues of both rules and standards by empowering judges to evaluate the culpability of fraud defendants directly, even as it guides their discretion through a structured decision-making procedure and by making available the Commission's sentencing expertise. This best-of-both-worlds approach holds the promise of helping judges achieve reasonable uniformity in sentences while also imposing punishments that are proportional in light of all the relevant factors – with culpability being chief among them.

281. Berman & Watkins, *supra* note 277, at 268.