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“Loss” Revisited: A Defense of the Centerpiece of the Federal Economic Crime Sentencing Guideline

*Frank O. Bowman, III**

I. INTRODUCTION

Roughly twenty years ago, I was an Assistant U.S. Attorney detailed as Special Counsel to the U.S. Sentencing Commission. Andy Purdy, then-Deputy General Counsel to the Commission, pulled me aside and asked me to study the deficiencies of the then-separate guidelines governing theft and fraud¹ and to work with Commission staff to propose some remedies. That request began my involvement in the six-year-long process that produced, in 2001, the consolidated economic crime guideline, U.S.S.G. §2B1.1.

I was, for better or worse, one of the principal architects of Section 2B1.1 in its consolidated 2001 form.² Over time, I have become a pointed critic both

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1. Prior to 2001, crimes designated as thefts were covered by U.S.S.G. §2B1.1 and those designated as frauds were governed by U.S.S.G. §2F1.1.

2. See, e.g., Frank O. Bowman, III, *Back to Basics: Helping the Commission Solve the “Loss” Mess With Old Familiar Tools*, 10 FED. SENT. REP. 115 (1997); Frank O. Bowman, III, *Coping With “Loss”: A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461 (1998) (setting out and explaining the provisions of a proposed consolidated economic crime guideline) [hereinafter Bowman, *Coping With “Loss”*]; Frank O. Bowman, III, *A Judicious Solution: The Criminal Law Committee Draft Redefinition of the “Loss” Concept in Economic Crime Sentencing*, 9 GEO. MASON L. REV. 451 (2000) [hereinafter Bowman, *Judicious Solution*]; Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001) [hereinafter Bowman, *2001 Federal Economic Crime Sentencing Reforms*].

of errors we made in 2001,³ and of some of the ways the Sentencing Commission has since amended Section 2B1.1.⁴ Nonetheless, I still support the basic structure of Section 2B1.1 and its central component – scaling offense seriousness in large measure based on the economic loss caused or intended by the defendant. In particular, I remain convinced that the definition of “loss” adopted in 2001 remains fundamentally sound. Recently, the *Missouri Law Review* published a thoughtful article from Daniel Guarnera sharply criticizing the component of the loss definition dealing with intended loss,⁵ and, in particular, a clarifying amendment to that definition adopted effective November 1, 2015.⁶ The *Law Review*’s editors asked me to respond to Mr. Guarnera. I agreed in part because Mr. Guarnera’s central arguments, though vigorously expressed, seem to me unpersuasive, but primarily because the invitation provided me an opportunity to defend the conceptually sound core of a guideline that has often, and sometimes deservedly, been the subject of pointed criticism.

II. SENTENCING ECONOMIC CRIMES UNDER THE FEDERAL SENTENCING GUIDELINES: AN INTRODUCTION

A. *The Federal Sentencing Guidelines in Brief*

At their core, the Federal Sentencing Guidelines are a system for assigning to each convicted federal defendant a sentencing range.⁷ This sentencing range is determined by reference to a grid, the vertical axis of which measures the seriousness of the offense(s) for which the defendant is being sentenced – his or her “offense level” – and the horizontal axis, which measures the defendant’s prior criminal history – his or her “criminal history category.”⁸ The intersection determined by these two numbers is a range of months – the defendant’s “sentencing range.”⁹ In addition to rules for determining a sentencing range, the Guidelines have provisions concerning the conditions under which,

3. See, e.g., 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. REP. 270 (2015) [hereinafter Bowman, *Damp Squib*]; Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT. REP. 167 (2008); Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines §2B1*, 18 FED. SENT. REP. 330, 333–34 (2006).

4. 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, 431–35 (2004) [hereinafter Bowman, *Pour Encourager les Autres*].

5. Daniel S. Guarnera, *A Fatally Flawed Proxy: The Role of “Intended Loss” in the U.S. Sentencing Guidelines for Fraud*, 81 MO. L. REV. 715 (2016).

6. *Id.* at 745–46.

7. U.S. SENTENCING GUIDELINES MANUAL ch. 1 pt. A (U.S. SENTENCING COMM’N 2016).

8. *Id.* ch. 5, pt. A, cmt. n.1.

9. *Id.*

according to the Sentencing Commission, judges ought to consider sentencing within, above, or below the calculated sentencing range.¹⁰

Before the U.S. Supreme Court's 2005 decision in *United States v. Booker*,¹¹ a properly calculated sentencing range was deemed presumptively correct and was thus strongly determinative of the judge's sentence.¹² Once *Booker* transubstantiated the Guidelines from mandatory to advisory, the sentencing range remained, at the least, an influential starting point for a judge's sentencing determination. Critical to any discussion of the post-*Booker* era is the understanding that the Guidelines, theoretically advisory though they may be, retain a powerful effect on the sentences defendants actually receive. Just under half of all sentences are still imposed within the judicially calculated guideline range,¹³ and most sentences imposed outside the applicable range remain fairly close to that range.¹⁴ Therefore, the Guidelines still matter, and discussions about the strengths and weaknesses of particular guideline rules retain pressing significance for the defendants sentenced daily in federal courts.

We are concerned here with a subset of those guideline rules that determine the "offense level" and thus determine the defendant's position on the vertical axis of the Guidelines' Sentencing Table. The vertical axis of the Sentencing Table incorporates a simple proportionality principle: all else being equal, a defendant's sentence should be proportional to the seriousness of his offense.¹⁵ The more serious the crime, the greater the offense level, and the more stringent the recommended punishment. Of course, the Guidelines have provisions that accommodate many sentencing considerations other than offense seriousness, such as the defendant's criminal history (thought to have a bearing both on likelihood of recidivism and blameworthiness for the current offense), potential reductions in sentence based on unusual personal circumstances or cooperation with the government, the defendant's choice to plead guilty rather than go to trial, and more.¹⁶ But this Article addresses only the

10. *Id.* ch. 5 pt. K.

11. *United States v. Booker*, 543 U.S. 220, 258 (2005) (holding Federal Sentencing Guidelines unconstitutional as then applied, but constitutional if construed as advisory). For a thorough discussion of the *Booker* opinion, see Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010) [hereinafter Bowman, *Debacle*].

12. Bowman, *Debacle*, *supra* note 11, at 425.

13. U.S. SENTENCING COMMISSION, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.N (2016) (reporting that in FY 2015, 47.3% of all federal defendants were sentenced within the applicable guideline range).

14. See Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227, 1244-50 (2014) [hereinafter Bowman, *Dead Law*].

15. U.S. SENTENCING GUIDELINES MANUAL ch. 5. pt. A (U.S. SENTENCING COMM'N 2016).

16. U.S. SENTENCING GUIDELINES MANUAL §5K5.0 (U.S. SENTENCING COMM'N 2012).

place of the term “loss” in Section 2B1.1, which determines the offense level of economic crimes.

B. The Economic Crime Guideline – U.S.S.G. §2B1.1: Structure and Severity

The basic structure of Section 2B1.1 remains the same as when the consolidated economic crime guideline made its first appearance in 2001 (although the Commission has tinkered with it fairly regularly since).¹⁷ The total offense level of an economic crime defendant is determined by beginning with a base offense level of either 6 or 7, depending on the crime of which the defendant was convicted,¹⁸ then adding a number of offense levels determined by the amount of “loss” caused or intended by the defendant,¹⁹ and then adding a number of offense levels determined by the applicability of other non-loss specific offense characteristics.²⁰

The most common post-2001 critiques of the economic crime guideline have been, first, that it generates excessively severe sentencing ranges for some classes of defendants, and second, that “loss” plays too large a role in sentencing federal economic offenders.²¹ I agree, at least somewhat, with both criticisms, which are interrelated.

As to severity, I have written that “for many, perhaps most, economic offenders the Guidelines do not suggest manifestly unreasonable sentences,” but “for high-loss defendants the fraud guideline is . . . ‘fundamentally broken.’”²² Other observers believe that the Guidelines generate excessive sentences even for defendants with lower loss amounts.²³ Framed this way, it

17. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 (U.S. SENTENCING COMM’N 2016).

18. *Id.* Until 2003, the base offense level for all fraud crimes was 6; amendments enacted in response to the Sarbanes-Oxley Act of 2002 raised that level to 7 for certain offenses. See generally Bowman, *Pour Encourager les Autres*, *supra* note 4, at 431–35 (explaining the scope and genesis of the change to a base offense level of 7 for some offenses).

19. U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(1) (U.S. SENTENCING COMM’N 2015) (loss table).

20. *Id.* §§2B1.1(b)(2)–(b)(19). Additionally, the sum resulting from application of the rules in Section 2B1.1 is then adjusted up or down by applying the provisions of Chapter Three of the Guidelines for factors like role in the offense, characteristics of the victim, and the defendant’s acceptance of responsibility, but these provisions apply to all offense types and are of only tangential concern to this discussion. *Id.*

21. Bowman, *Dead Law*, *supra* note 14, at 1244–50.

22. Bowman, *Damp Squib*, *supra* note 3, at 270 (quoting Judge Patti Saris, Chair of the U.S. Sentencing Commission).

23. See, e.g., Statement of Michael Caruso on Behalf of Federal Public and Community Defenders, Public Hearing on Economic Crime and Inflationary Adjustments Before U.S. Sentencing Commission (Mar. 12, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Caruso.pdf>.

sounds as though the problem is with loss itself, but the reality is far more subtle.

When critics of Section 2B1.1 complain that "loss" has too large an impact on sentencing outcomes, their complaint is not primarily about the *definition* of loss. It is instead a complaint that loss, however defined, now adds too many offense levels to defendants' final guideline calculations and thus that loss can increase sentence length by unjustifiably large amounts.²⁴ In 1988, a first-time offender convicted of mail fraud and sentenced under the original fraud guideline, Section 2F1.1, began with a base offense level of 6, meaning that, loss and other specific offense characteristics aside, his or her starting sentencing range would have been 0-6 months.²⁵ The loss table of Section 2F1.1 then contained twelve one-offense-level steps that added only a maximum of eleven levels for loss.²⁶ Therefore, even if a defendant received the maximum loss adjustment of eleven levels, the resultant offense level, without other specific offense characteristics, would have been 17, equating to a sentencing range of 24-30 months.²⁷

By contrast, the loss table of the November 2015 version of Section 2B1.1 has fifteen two-level steps, pursuant to which loss amount can add from two to thirty offense levels.²⁸ A first-time offender convicted of mail or wire fraud now begins with a base offense level of 7,²⁹ meaning that, loss and other specific offense characteristics aside, his or her starting sentencing range is 0-6 months. Accordingly, if loss can add two to thirty offense levels, then *loss amount alone* can now raise such a defendant's offense level to 37 and the guideline range all the way to 210-262 months (17.5-21.8 years).³⁰

The inflated significance of loss in the current economic crime guideline has been exacerbated by the creeping proliferation of non-loss specific offense characteristics. I have addressed this phenomenon, sometimes referred to as "factor creep," at length elsewhere,³¹ and I will not repeat the entire analysis here. Stated succinctly, factor creep arises from the interaction of three features of the current guideline: (1) the large number of loss level enhancements; (2) the steady proliferation of specific offense characteristics, other than loss, that can add offense levels on top of the combination of base offense level plus loss;³² and (3) the logarithmic structure of the 43-level Sentencing Table, which

24. *Id.*

25. U.S. SENTENCING GUIDELINES MANUAL §2F1.1(a) (U.S. SENTENCING COMM'N 1987).

26. *Id.* §2F1.1(b)(1).

27. *See id.*

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

29. *Id.* §2B1.1(a).

30. U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A (U.S. SENTENCING COMM'N 2010) (Sentencing Table).

31. Bowman, *Damp Squib*, *supra* note 3, at 277.

32. The proliferation of non-loss specific offense characteristics is particularly troublesome because many of these SOCs, such as the number of victims, U.S.

dictates that each increase in offense level has an ever-greater absolute effect on sentence length the higher one goes up the Table.³³ In practical terms, the latter point means that:

[A]dding one offense level to the total of a first-time offender who previously had an offense level of 19 . . . increases his minimum sentence by 3 months and his maximum by 4 months. The same one-level increase from an offense level of 30 increases the defendant's minimum sentence by 11 months and his maximum by 14. And a one-level increase for an offender with an offense level of 36 increases his minimum by 22 months and his maximum by 27.³⁴

In short, when one adds offense levels based on non-loss specific offense characteristics on top of an already-large offense level number generated purely by base offense level plus loss, the resultant final offense level can become unrealistically high very fast.

The solution to this problem has very little to do with the *definition* of loss. Rather, the Commission should reduce the quantitative impact of loss on the final offense level and should take steps to ameliorate the factor creep problem. In testimony before the U.S. Sentencing Commission in 2015, I made proposals to address both issues.³⁵

First, I suggested that the Commission should set a maximum limit for punishment for economic crime and then reverse engineer the Guidelines to distribute sentences rationally below that limit.³⁶ I next suggested that the Commission “give the loss table a haircut”³⁷ by eliminating the top four steps on the Section 2B1.1 loss table, thus making the maximum loss amount measured by the table \$25 million and the maximum offense level increase for loss 22 levels.³⁸ However, despite the tentative endorsement of this proposal by a representative of the Justice Department, the Commission did not include such

SENTENCING GUIDELINES MANUAL §2B1.1(b)(2) (U.S. SENTENCING COMM’N 2015), and the enhancements for sophisticated means, §2B1.1(b)(10)(C), large health care frauds, §2B1.1(b)(7), \$1 million in gross receipts, §2B1.1(b)(16)(A), and participation by an officer or director of a company in securities fraud, §2B1.1(b)(19)(A), correlate closely with large loss amount, thus further inflating the sentence ranges of high-loss defendants.

33. Bowman, *Damp Squib*, *supra* note 3, at 271.

34. *Id.*

35. Frank O. Bowman, III, *Comment on Proposed Amendments to Economic Crime Guideline, § 2B1.1* (Feb. 19, 2015), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf>; Bowman, *Damp Squib*, *supra* note 3, at 270 (recapitulating my February 2015 Commission testimony and commenting on economic crime guideline amendments adopted in April 2015).

36. Bowman, *Damp Squib*, *supra* note 3, at 277–78.

37. *Id.* at 278.

38. *Id.* at 278–79.

a cut in its 2015 guideline amendments.³⁹ Finally, I urged the Commission to reduce the number, size, and cumulative impact of the non-loss specific offense characteristics of Section 2B1.1.⁴⁰ The Commission has, to date, taken no steps to implement these suggestions,⁴¹ nor the even more far-reaching proposals of others, such as the American Bar Association.⁴² Hence, my view of the Commission's 2015 amendments to the economic crime guideline as a "damp squib."⁴³

III. THE PLACE OF "LOSS" IN FEDERAL ECONOMIC CRIME SENTENCING

Even if the Sentencing Commission were to significantly restructure Section 2B1.1, any new economic crime guideline would inevitably take account of the economic harm caused or intended by defendants. Thus, "loss" or something like it will remain a central feature of the economic crime sentencing

39. *Id.* at 279. Ideally, the Commission should go further. It should reduce the total available loss-based offense level enhancements to perhaps 16 or 18, while at the same time recalibrating the amounts of loss associated with each step on the loss table to achieve a reasonable distribution of defendants along the loss table spectrum. Doing so would generate maximum offense levels and sentencing ranges for first-time offenders based on base offense level and loss amount only of Offense Level 23 (46-57 months) if a 16-level loss cap were adopted, or Offense Level 25 (57-71 months) if an 18-level loss cap were adopted.

The American Bar Association has proposed a radically revised economic crime guideline containing a six-step loss table providing for a maximum offense level increase of 14 levels. American Bar Association, Criminal Justice Section, *Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes, Final Draft* (Nov. 10, 2014), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf [hereinafter *ABA Task Force Report*].

40. Bowman, *Damp Squib*, *supra* note 3, at 279–80.

41. The Commission's 2015 amendments to §2B1.1 modified the multi-victim enhancement, §2B1.1(b)(2), which formerly added 2, 4, and 6 offense levels if an offense caused loss to 10, 50, or 250 victims, respectively. Compare U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(2) (U.S. SENTENCING COMM'N 2014), with U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(2) (U.S. SENTENCING COMM'N 2015). The four-level and six-level enhancements are now triggered not merely by victim number, but by a finding of five or twenty-five victims who suffered "substantial financial hardship." §2B1.1(b)(2). The likely result is that the four- and six-level enhancements will rarely be applied because proving substantial financial hardship is difficult. This is hardly a meaningful fix to the overall factor creep problem.

42. See Written Testimony of James E. Felman on Behalf of the American Bar Association Before the United States Sentencing Commission for the Hearing on Proposed Amendments to the Federal Sentencing Guidelines Regarding Economic Crimes (Mar. 12, 2015), <http://www.usc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Felman.pdf>.

43. Bowman, *Damp Squib*, *supra* note 3, at 280.

calculus, and “loss” will need a legal definition. That definition is the subject of the balance of this Article.

Section 2B1.1 now states that the “loss” figure to be plugged into the loss table will be “the greater of actual or intended loss.”⁴⁴ “Actual loss” is defined as “the reasonably foreseeable pecuniary harm that resulted from the offense.”⁴⁵ From 2001 to 2015, “intended loss” was defined as “the pecuniary harm that was intended to result from the offense.”⁴⁶ Effective November 1, 2015, the Commission amended the intended loss definition to read “the pecuniary harm that the defendant purposely sought to inflict.”⁴⁷ Mr. Guarnera’s article is focused on the newly amended definition of intended loss, which he believes is materially different than the old definition and a bad policy choice.⁴⁸ He is mistaken on both counts. Moreover, his suggested alternative, that “intended loss” be defined in terms of recklessness,⁴⁹ is theoretically unsound, problematic in application, and would, if anything, exacerbate the problem of Section 2B1.1’s excessive punitiveness. By contrast, I think the current definitions of loss, actual loss, and intended loss are fine as they stand. They are not perfect, of course, either in theory or as applied to every conceivable economic offense, but they are fundamentally sound rules of general application. To understand why requires stepping back and considering some basics.

A. “Loss” as a Measure of Offense Severity

That the concept of “loss” should be central to federal economic crime sentencing seems intuitively obvious. After all, economic offenses criminalize stealing or destroying other people’s stuff.⁵⁰ They are a legal response to the evil of one person designedly doing economic damage to another. Therefore, it seems entirely proper that the larger the economic deprivation, the more serious should be the crime and the more severe its punishment. However, the intuition that larger loss equals more serious crime requires careful scrutiny if we are not to lose our way when the issues become more complex, particularly in relation to intended loss.

In American criminal law, offense seriousness ranking schemes are based primarily on three factors: the magnitude of any harms actually caused by a defendant’s criminal conduct, the magnitude of harms risked by a defendant’s

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

45. *Id.* §2B1.1 cmt. n.3(A)(i).

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

47. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(A)(ii) (U.S. SENTENCING COMM’N 2015).

48. Guarnera, *supra* note 5, at 719.

49. *Id.* at 755.

50. *See, e.g.*, MO. ANN. STAT. § 570.030 (West 2017).

criminal conduct (sometimes even if they did not occur), and the defendant's culpable mental state.⁵¹

The place of risk of harm in offense seriousness ranking deserves a special word. Criminal law deals with the concept of risk, which is to say the probability that particular behavior will cause harm, in a variety of ways. In the case of harms that actually occurred, the riskiness of the defendant's behavior is baked into rules about mental state and rules about causation.⁵² In offense types where the actual harm is very severe, the law may impose criminal liability and punishment not only if the defendant desired or knew of the high likelihood of the prohibited harm (mental states the Model Penal Code terms purposely, knowingly, or recklessly⁵³), but also if the defendant was not, but should have been, aware of a substantial risk of harm (what the Model Penal Code terms negligence⁵⁴). Conversely, if the actual harm against which the offense is directed is less severe, then criminal liability may be imposed for purposefully or knowingly causing the harm but not for negligent behavior and perhaps not even for recklessness. Homicide, the gravest human transgression, is virtually everywhere a crime, whether committed purposely, knowingly, recklessly, or negligently.⁵⁵ Dispossessing another of property, however, is almost never criminal unless the defendant harbored an intent to steal, meaning a conscious purpose or desire to deprive the victim of ownership or possession of something of value.⁵⁶

Ideas about risk are also incorporated in criminal causation rules. In criminal law, a defendant may not be found responsible for a harm unless his or her prohibited conduct was both the cause-in-fact and the so-called proximate or legal cause of that harm.⁵⁷ Questions of cause-in-fact are *post hoc* empirical examinations of chains of cause and effect in the physical world. Therefore, a cause-in-fact is sometimes, and more helpfully, termed a "but-for cause" because the relevant question is whether the harm would have occurred had it not been for the defendant's conduct.⁵⁸ The doctrine of proximate or legal cause insists that criminal defendants not be held legally accountable for harms that concededly resulted from their conduct, but were not foreseeable in advance.⁵⁹ Proximate cause is an inquiry into the moral connection between risk and legal blameworthiness, in which we take the defendant's causal contribution to harm

51. There may also be a fourth factor – perceived recidivism risk – at work in the ranking of some crimes. For example, sex crimes are commonly punished very severely, at least in part based on the perception (correct or not) that sex offenders as a class have a particularly high recidivism rate.

52. See MODEL PENAL CODE § 2.02 (AM. LAW INST. 2015); see also *id.* § 2.03.

53. *Id.* § 2.02(2) (defining purposely, knowingly, and recklessly).

54. *Id.* (defining negligently).

55. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31 (7th ed. 2015) (law of criminal homicide).

56. *Id.* § 32.02 (law of theft).

57. *Id.* § 14 (law of causation).

58. *Id.* § 14.02[A] (defining "but-for" cause).

59. *Id.* § 14.03 (defining proximate cause).

as a given, but try to assess the situation *before the defendant acted* and ask how likely the harm would have *seemed* to a reasonable person in the defendant's shoes.⁶⁰ The requirement of proximate cause recognizes the moral connection between blameworthiness and risk by declaring that people should not be held criminally culpable for extremely low probability events.

The law customarily punishes causing harm carelessly less seriously than inflicting harm designedly. Reckless manslaughter and criminally negligent homicide are less serious crimes than premeditated murder.⁶¹ But sometimes the criminal law treats a foreseeable but unintended harm just as seriously as if the defendant had desired to cause that harm. Indeed, there is a sort of default presumption embodied in several major criminal law doctrines that if a defendant makes a conscious choice to do evil or violate the law, and the resultant harm to others turns out far worse than the defendant anticipated, then the law will nonetheless hold the defendant responsible for the unanticipated bad consequence.

For example, the felony murder rule commonly imposes liability for the most serious grade of homicide on a defendant who kills someone in the course of committing or fleeing from, say, a robbery, even if the death was the wholly accidental result of striking a pedestrian with a car while driving away from the bank.⁶² Such a defendant must be shown to have the intent to commit robbery (to take property from the person or presence of another by force or fear), but need not be shown to have any culpable mental state with regard to the pedestrian, not even common negligence.⁶³

Similarly, the *Pinkerton* doctrine imposes liability on each member of a conspiracy for the crimes committed by all the other members, even if such crimes were unknown to the other members, so long as such crimes were foreseeable and in furtherance of the conspiracy.⁶⁴ Likewise, at common law and in many states, complicity doctrine imposes liability for the crimes committed by one's accomplices so long as such crimes were the foreseeable consequence of the crime to which the defendant was an accomplice.⁶⁵ In all these instances, the law is making statements about the moral connection between risk and blameworthiness, saying, in effect, that one who consciously chooses evil cannot fairly complain if he is blamed and punished for harm that actually resulted from his choice and was within the zone of foreseeable risk.

Ideas about risk of harm also significantly influence the law of inchoate offenses. As I wrote many years ago:

[W]e punish unconsummated efforts to cause harm as "attempts" or "conspiracies" (albeit usually less severely than completed crimes) so

60. *Id.*

61. *Id.* § 31.10.

62. *See generally id.* § 31.06 (discussing felony murder).

63. *Id.*

64. *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

65. DRESSLER, *supra* note 55, §§ 30.05[B][3], 30.09[2][d].

long as the would-be perpetrator has come close enough to success that we can be confident his malignant designs were real and not mere fantasy, and thus that his conduct was morally blameworthy. [W]e punish the unsuccessful criminal, not only because he deserves it, but because his frustrated plans present a high enough risk of actual harm that punishment for the purpose of deterrence is warranted.⁶⁶

Different offense types emphasize different combinations of harm, risk of harm, and mental state. Different permutations of these factors make one crime type more serious than another. For example, all homicide crimes share the same harm – death – so they are ranked almost entirely on the defendant's mental state in relation to the death his conduct caused, from something like premeditation at the high end of the scale, to criminal negligence at the low end. By contrast, inchoate crimes like attempts and unsuccessful conspiracies produce no actual harm and thus, by definition, can be ranked only in consideration of mental state and harm risked. And crimes like the various grades of assault can produce a spectrum of actual harms, from fright to permanent maiming, can involve mental states ranging from purposeful infliction of injury to mere recklessness, and can also involve an unrealized risk of additional injury due to the defendant's choice of weapon.⁶⁷ Accordingly, statutory ranking schemes for assaults customarily involve multiple permutations of harm,⁶⁸ risk of harm, and mental state.

Matters become still more complicated when we try to rank the seriousness of particular incidents of crime within a crime type. This point is critical to thinking about the provisions of the federal Guidelines that seek to quantify in a single number – the "offense level" – the relative seriousness of every crime of every defendant. Virtually all states have a system of offense classification that slots each statutorily defined crime into an offense seriousness category (e.g., Class A, B, C, or D or Class 1, 2, 3, or 4) carrying a designated maximum and minimum sentence. In such systems, sentencing judges may be left on their own in comparing the relative seriousness of two cases of first degree assault, but at least they know that the legislature considers a first degree assault more serious than a second degree assault and what sentence ranges the legislature thinks appropriate for those crimes. Likewise, state systems of offense classification help judges rank offense seriousness across crime types. If

66. Bowman, *Coping with "Loss," supra* note 2, at 559 (footnote omitted).

67. *See, e.g.,* the Missouri second degree assault statute, MO. ANN. STAT. § 565.052 (West 2017), which includes two forms that involve the use of deadly weapons or firearms.

68. *Compare, e.g.,* the Missouri first degree assault statute, MO. ANN. STAT. § 565.050(1), which defines one form of first degree assault as occurring if the defendant "knowingly causes or attempts to cause serious physical injury to another person," with the Missouri third degree assault statute, MO. ANN. STAT. § 565.054(1), which includes a form of third degree assault occurring when the defendant "knowingly causes physical injury to another person."

a first degree burglary is a Class 1 felony, and manslaughter is a Class 2, the judge knows which crime the legislature views as more serious.

The absence of a basic ranking scheme for crimes is a major deficiency of the federal criminal code. Federal statutory law has neither meaningful standard offense classifications nor standardized penalty ranges. Therefore, to create an offense seriousness scale useful in sentencing individual defendants, the Guidelines' drafters not only had to decide for themselves the relative severity of different crime types like murder, robbery, fraud, and drug trafficking, but in order to rank offenders within each crime type, they had to identify and quantify the relative importance of offense-specific, non-element facts relevant to harm, risk of harm, and mental state. Only by doing this could the Guidelines produce for each criminal incident a single composite numerical measurement of offense seriousness.

B. "Loss" in Guidelines Section 2B1.1

The nearly insuperable challenge posed to the aspiring drafter of a unitary guideline for federal economic crimes is that such a guideline must impose a single ranking scheme on tens of thousands of wildly disparate cases involving virtually every means by which one person can cheat, steal, embezzle, defraud, despoil, or otherwise deprive another of economic value. Moreover, not only did Congress fail to provide statutory seriousness rankings for the many economic offenses in the federal code, but it wrote them so that virtually every offense has effectively the same mental state – some variant of the intent to deprive another of something of value.⁶⁹ Accordingly, the Sentencing Commission was obliged to identify, without any useful legislative guidance, factors relating to harm, risk of harm, and mental state that make one economic crime worse than another. Loss has assumed the dominant role in economic crime sentencing because, as defined in Section 2B1.1, it is a direct or proxy measurement for all three of these determinants of offense seriousness.⁷⁰

69. Congress was following long Anglo-American practice in which the so-called common law property crimes of larceny, false pretenses, and embezzlement all had mental states equating to intent to deprive another of a thing of value. See DRESSLER, *supra* note 55, § 32.07 (required mental state for larceny is intent to steal); *id.* § 32.09[B] (required mental state for embezzlement is intent to deprive another of property permanently); *id.* § 32.10[C][3] (required mental state for false pretenses is intent to defraud).

70. One minor deficiency in Mr. Guarnera's article is that he oversimplifies the function of actual loss in the sentencing calculus, asserting categorically that loss is a proxy for "the seriousness of the offense." Guarnera, *supra* note 5, at 736. This formulation is wrong because: (1) loss is a direct, not a proxy, measurement of harm; (2) loss is also a proxy measurement for both mental state and one aspect of risk; and (3) he equates "seriousness" with "harm" when offense seriousness, whether in economic or other crime types, is a complex amalgam of harm, mental state, risk, and other factors.

1. Actual Loss

The Guidelines define actual loss as "the reasonably foreseeable pecuniary harm that resulted from an offense."⁷¹ On the one hand, it is a nearly perfect measurement of harm – indeed, it *is* the harm against which economic crime statutes are directed. But it is more than that. Stealing a lot is worse than stealing a little not only because a large theft causes more harm to the victim than a small theft, but also because the thief's desire, or at least willingness, to cause a large harm rather than a small one is a signifier of his evil mind and increases his blameworthiness and, with it, the sense that he deserves more punishment.

Relatedly, judges have traditionally found economic criminals who engage in significant planning activities to possess a state of mind more culpable than the statutory minimum requirement of a momentary or transitory intent to steal.⁷² Although the correlation is not a perfect one, dishonest schemes that cause large losses are apt to have required more planning activity than those that cause small losses. Accordingly, actual loss acts not only as a direct measure of harm inflicted, but as an important proxy measurement of mental state – a critical determinant of relative blameworthiness.

Finally, actual loss as defined in Section 2B1.1 incorporates one of the aspects of risk analysis considered above. It imposes sentencing consequences for actual loss only when the defendant has (1) been convicted of a crime with the mental state of desiring to deprive another of economic value and (2) caused economic harm of a type and extent that a reasonable person could foresee as within the sphere of risk of that crime.

At this point, the astute reader may fairly object that while actual loss may be a decent proxy for a defendant's evil mind if the pecuniary harms included in actual loss are those sought or at least consciously anticipated by the defendant, the Guidelines' reasonable foreseeability standard is over-inclusive because it attributes to defendants harms they neither expressly desired nor even consciously anticipated as following from their criminal conduct. This criticism is not without some force, but I think it overstated for at least three reasons.

First, the harm actually inflicted by criminal conduct is customarily the dominant yardstick of offense seriousness, with variations in mental state and risk assuming subordinate roles. Actual loss is primarily a direct measure of harm inflicted on victims and only secondarily a proxy measure of the defendant's mental culpability.⁷³ The fact that a defendant set out to steal only a little

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

72. See STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 93–94 (1988).

73. See U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(A)(i) (U.S. SENTENCING COMM'N 2015) ("Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.").

but set in train a foreseeable series of events that cost victims a lot does nothing to reduce the real financial damage to the victims. Moreover, as just noted, in the criminal law we routinely convict people of crimes when they consciously seek to cause one type or degree of harm but actually cause a greater, though foreseeable, harm than the one intended.

Second, in the overwhelming majority of federal economic crime cases, the actual loss is precisely the money or property the defendant set out to and did in fact steal from the victim.⁷⁴ Telemarketers convince their marks to send money in payment for nonexistent, worthless, or overvalued goods or services.⁷⁵ Perpetrators of health care fraud bill victim insurance companies or government health care programs for unnecessary or overpriced medicines, tests, or procedures, unlawfully enriching themselves in the amounts the victims pay.⁷⁶ Those who fraudulently obtain government benefits or cheat the government procurement process illegally take money from the government and put it in their own pockets.⁷⁷ The object of credit card, stolen check, and identity theft crimes is to transfer money from credit card holders or issuers, bank account owners, and others to the defendants.⁷⁸ In such cases, foreseeability is simply not a material issue inasmuch as actual loss is the amount designedly – and thus by definition, foreseeably – obtained by the defendant from the individual or institutional victim (less some offsets for value transferred from the defendant to the victim as part of the fraudulent scheme⁷⁹).

Third, in most economic crime cases where the loss does not equal the defendant's gain, the loss suffered by the victim – even if not subjectively desired by the defendant – occurred because the defendant's fraud circumvented precautions the victim took to prevent a loss of precisely that type. A classic example is a simple loan fraud in which the defendant lies on a loan application about a matter like his assets, salary, or employment. Even if the defendant hopes (“intends”) to repay the loan, he lies *because* he knows the lender would not loan the money in the absence of the lie, precisely because the lender would not be willing to assume the enhanced risk of non-payment that a truthful statement of the defendant's financial condition would present.

74. *Id.* §2B1.1 cmt. n.3(A)(v)(III).

75. *See, e.g.*, *United States v. Brawner*, 173 F.3d 966, 969 (6th Cir. 1999) (describing a “one-in-five” telemarketing in which victims are told they have won a valuable prize and pressured to send money for an overvalued promotional product).

76. *See, e.g.*, *United States v. McLean*, 715 F.3d 129, 145 (4th Cir. 2013) (holding loss included payments to defendant for unnecessary medical procedures and follow-up tests).

77. *See* ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK*, § 2B1.1, Authors' Discussion § 37 (2015–2016 ed.) (discussing loss in frauds against the government).

78. *See, e.g.*, *United States v. John*, 597 F.3d 263, 269 (5th Cir. 2010).

79. HAINES, BOWMAN & WOLL, *supra* note 77, § 2B1.1, Authors' Discussion § 37 (discussing the principle that actual loss is net loss to the victim).

Of course, even in a simple loan fraud, the magnitude of the loss actually inflicted may be greater than the magnitude of the risk the defendant consciously contemplated at the outset. This is often true in loan frauds that coincide with financial downturns that cause the value of collateral to decline to an unusual degree. But again, it is precisely to guard against the risk of loss occasioned by declines in collateral value that lenders insist on accurate information about the borrower's capacity to repay the loan independent of foreclosure on collateral. To put the matter in criminal law terms, lenders want assurance of borrowers' capacity to repay because market fluctuations, even very large market fluctuations, are entirely "foreseeable." It is hardly unfair to punish a defendant based on the magnitude of an actual loss when the defendant consciously subverted safeguards erected by the victim to prevent precisely that rare but predictable type of loss. And the foreseeability limitation on loss provides an avenue of relief in cases where market fluctuations or other factors affecting loss amount really were so abnormal that the degree of loss was *unforeseeable* to a reasonable person, thus making punishment on that basis unfair.

Insurance fraud provides illustrations of both the foregoing points. Insurance fraud is of two basic types: (1) fraud by insureds who make false insurance claims and collect money to which they are not entitled and (2) fraud by insurers selling fraudulent insurance coverage, which is to say collecting premiums for false promises to provide insurance coverage.⁸⁰

The actual loss to insurers in cases of fraud *by insureds* is the amount improperly paid to crooked claimants – money the claimants sought for themselves and illegally obtained directly from the victim insurer.⁸¹

The actual loss in cases of fraud *by insurers* includes both the premiums paid by insureds to the dishonest insurer,⁸² and in some instances where the insurer fails to honor a contractually valid claim, the amount of the benefits that should have been paid by the insurer to the insured.⁸³ The premiums are

80. A more nuanced version of this type of fraud involves sale of insurance by entities that have misrepresented their own solvency or reserves and thus deceived insureds about their ability to pay claims. *See, e.g., United States v. Needle*, 72 F.3d 1104, 1106 (3d Cir. 1995), *amended* (Jan. 29, 1996), *amended by* 79 F.3d 14 (3d Cir. 1996).

81. *United States v. Jackson*, 696 F.2d 578, 592 (8th Cir. 1982).

82. *See, e.g., United States v. Rennert*, 374 F.3d 206, 211–13 (3d Cir. 2004), *vacated in part sub nom., Miller v. United States*, 544 U.S. 958 (2005).

83. There is some dispute over whether the amount of valid unpaid claims should always be counted as loss in an insurance fraud case. *Compare United States v. Crosgrove*, 637 F.3d 646, 664–65 (6th Cir. 2011) (holding that the proper measurement of loss was the amount of the fraudulently obtained premiums, rather than the amount of the unpaid claims), *with Needle*, 72 F.3d at 1108–11 (holding that the loss in a case where an insurer obtained a license to sell insurance by misrepresenting its reserves was the amount of the unpaid claims). *See also United States v. Yeaman*, 194 F.3d 442, 459 (3d Cir. 1999) and *United States v. Krenning*, 93 F.3d 1257, 1269–70 (5th Cir. 1996). In *Crosgrove*, the amount of the premiums was substantially larger than the amount of the unpaid claims, and the court's ruling seems primarily to have been a

actual loss because they are funds dishonestly inveigled from the insured and paid to the insurer. By contrast, an unpaid claim adds no money to the insurer's pocketbook but nonetheless deprives the insured of money he or she had a right to expect by virtue of having taken the precaution of buying insurance to guard against a foreseeable risk of financial harm. Again, it is perfectly just to punish a defendant based on the occurrence of a financial harm whose foreseeability was so plain that the victim paid the defendant money to insure against it.

Fourth, the subset of fraud cases in which criticisms of the actual loss definition have the most traction is small, and in many of those cases, the criticism would be better addressed by specialized rules for special fraud types. For example, many criticisms of the foreseeability component of the actual loss rule arise in fraud-on-the-market cases in which loss is measured by decline in stock price and the issue is less foreseeability than but-for causation.⁸⁴

Fifth, another common complaint about actual loss arises in cases where the loss is large, but the criminal role of a particular defendant seems relatively small. The solution to this difficulty (when it manifests itself in an unjustly harsh sentencing range and is not merely an expression of the personal distress of a defendant faced with a long sentence for aiding a big fraud) is a reduction in the size of the loss table and solutions to the factor creep problem, as proposed above, in combination with application of the existing adjustments for mitigating role in U.S.S.G. §3B1.2.⁸⁵ A minor role adjustment reduces a defendant's total offense level by four levels, which reduces the sentencing range by one-third or more.⁸⁶ If the offense level generated by application of the loss and specific offense characteristic provisions of Section 2B1.1 were scaled reasonably, a one-third reduction for a minor role should justly account for a defendant's relatively small contribution to a large crime.

At all events, the current rule limiting actual loss to reasonably foreseeable pecuniary harm is a reasonable midpoint between a regime that unduly limited loss to only pecuniary harms that both occurred and were desired by the defendant and a far more expansive regime that would assign sentencing consequences to any loss caused by defendant's crime, regardless of whether that loss was foreseen by, or even foreseeable to, a reasonable person.

2. Intended Loss

So long as the economic crime guideline retains as one of its central components a measurement of the magnitude of the economic harm actually caused

means of denying the defendant an undeserved sentencing windfall. 637 F.3d at 664, 667–68.

84. The ABA has suggested that “certain types of securities offenses where changes in the value of market capitalization drive the loss calculation may be especially suited for consideration under a separate guideline.” *ABA Task Force Report*, *supra* note 39, at 9.

85. U.S. SENTENCING GUIDELINES MANUAL §3B1.2 (U.S. SENTENCING COMM'N 2015).

86. *Id.* §3B1.2(a).

by a defendant's criminal behavior, an "intended loss" rule (or something like it) will be required. This is so because many, perhaps most, of the federal statutes governing economic crime are inchoate offenses in that they are prosecutable and punishable even if the defendants did not achieve their criminal aims and caused no actual economic harm.⁸⁷

For example, the two most commonly prosecuted federal economic crimes, mail and wire fraud, are committed whenever a defendant, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representations, or promises," either mails a letter (mail fraud) or sends an interstate or international wire, radio, or television communication (wire fraud) for the purpose of executing the scheme.⁸⁸ Note that unlike common law property offenses such as larceny, embezzlement, or false pretenses, in which no crime is committed unless the defendant successfully deprives the victim of some possessory or ownership interest in property, wire and mail fraud are complete and prosecutable the moment the defendant devises a scheme to defraud and sends a letter or wire communication in furtherance of the scheme.⁸⁹ The putative victim of the scheme need lose nothing for the crime to be legally complete. The primary federal bank fraud, health care fraud, and securities statutes all have similar structures; in each case, the gravamen of the crime is devising a "scheme or artifice to defraud" and either executing or *attempting* to execute it.⁹⁰ In addition, the basic federal conspiracy statute, 18 U.S.C. § 371, makes it a crime to "conspire either to commit any other offense against the United States, or to defraud the United States."⁹¹ In conspiracy cases, the crime is the formation of the agreement, not the success of the conspiratorial venture.⁹²

The design of all these statutes means that the universe of persons convicted of federal economic crimes will include a great many whose criminal plans to divest others of their worldly goods failed, or were at most only partially successful. A federal guidelines system must therefore include a yardstick for slotting wholly or partially unsuccessful economic criminals into its structure for ranking offense seriousness. Such a yardstick must not only employ a metric for comparing wholly or partially *unsuccessful* swindlers to each

87. DRESSLER, *supra* note 55, § 27.02[D] ("Most jurisdictions provide in some form that a 'person is guilty of a criminal attempt when, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime *whether or not his intention is accomplished.*'").

88. See 18 U.S.C. § 1341 (2012) (mail fraud); 18 U.S.C. § 1343 (wire fraud). See also 18 U.S.C. § 1031 (outlining major fraud against the United States, which has the same structure).

89. See generally 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud).

90. See 18 U.S.C. § 1344 (bank fraud); 18 U.S.C. § 1347 (health care fraud); and 18 U.S.C. § 1348 (securities and commodities fraud).

91. 18 U.S.C. § 371.

92. DRESSLER, *supra* note 55, § 29.04[A] ("The gist – or 'essence' – of a conspiracy is the agreement to commit an unlawful act or series of such acts.").

other, but that metric should mesh seamlessly with the metric for ranking wholly or partially *successful* economic offenders.

Viewed from this angle, the Sentencing Commission's choice to include "intended loss" as an alternative means of measuring "loss" makes perfect sense. As discussed below, actual loss and intended loss are justifiable as measures of crime seriousness on somewhat different, if overlapping, grounds. But both concepts generate a dollar figure that plugs comfortably into a single loss table, thus solving rather neatly the Guidelines' design problem of how to rank the relative seriousness of a class of crimes that includes completed, partially completed, and wholly unsuccessful criminal ventures. Of course, the Guidelines' use of intended loss, either generally or as currently defined, cannot be justified purely on the ground of administrative convenience. It must stand or fall on its merits, to which we now turn.

C. The Theory of Intended Loss as a Measure of Offense Seriousness

The theoretical rationale for including intended loss as one measurement of offense seriousness is straightforward. At its most basic, intended loss is a means of ranking economic crimes that are inchoate in the sense of having caused no pecuniary loss. In such cases, actual harm is unavailable as an offense seriousness grading factor. However, intended loss is an excellent metric for comparing the culpable mental states of economic crime defendants and is also a valuable proxy for assessing the other measurement of offense seriousness, risk of harm.

The mental state required for conviction of virtually all federal economic crimes is a variant of an intent or purpose to deprive the victim of something of value. If defendants are to be differentiated by mental state, it can only be through identification of facts relevant to mental state that are not elements of the crime, i.e., beyond the simple fact that the defendant had the intent to steal something from somebody. For crimes directed at vindicating the infliction of pecuniary harm, it makes perfect sense to rank defendants' mental culpability – and thus the relative seriousness of their offenses – by determining the *size* of the pecuniary harm each defendant sought to inflict.⁹³

That said, it is also important to recognize that the law criminalizes and punishes inchoate crimes not only because those who try and fail to do bad things possess guilty minds, but because, if they combine a desire to do evil with the performance of sufficient conduct to render them criminally liable, *they present a societally unacceptable risk of accomplishing actual harm*. That being so, it is reasonable to presume that a defendant who desires to cause a large harm presents a larger economic risk to society than a defendant who desires to cause a small one. As I wrote when Section 2B1.1 was first adopted,

93. See, e.g., *United States v. Studevent*, 116 F.3d 1559, 1563 (D.C. Cir. 1997) ("Limiting intended loss to that which was likely or possible . . . would eliminate the distinction between a defendant whose only ambition was to make some pocket change and one who plotted a million-dollar fraud.").

"From the utilitarian perspective, use of intended loss imposes punishment consequences (and thus, one hopes, achieves a deterrent effect) proportional to the degree of risk the defendant's behavior posed to the economic well-being of his fellow citizens, as measured by the magnitude of his criminal objectives."⁹⁴ Hence, intended loss is a valuable proxy measurement for risk of economic harm.

D. The Definition of "Intended Loss" in Section 2B1.1

When the consolidated economic crime guideline, Section 2B1.1, was enacted in 2001, it defined intended loss as "the pecuniary harm that was intended to result from the offense."⁹⁵ Effective November 1, 2015, the Sentencing Commission amended the definition to read "the pecuniary harm the defendant purposely sought to inflict."⁹⁶ The occasion for this Article is a response to Mr. Guarnera. A central premise of his argument is that the 2015 amendment materially changed the definition of intended loss.⁹⁷ Mr. Guarnera implies that, prior to the 2015 amendment, intended loss either was defined by the Guidelines to include, or was construed by a substantial body of case law to include, losses that did not occur and were not desired by the defendant but were made more probable by defendant's conduct. This is simply not the case. To the contrary, the 2015 amendment was intended by the Commission to reaffirm the original meaning of the 2001 definition, to wit, intended loss embraces only those pecuniary harms the defendant subjectively desired to occur, and to squelch a small, but troublesome, strain of case law that risked muddying the waters.⁹⁸

There is little question that the 2001 definition of intended loss was meant by the Commission to embrace only harms subjectively intended by the defendant. This had been the overwhelming majority position even under the old regime of separate guidelines for theft and fraud.⁹⁹ It was also the position embraced during the process of drafting consolidated Section 2B1.1. I can say this with some confidence because the operative core of the 2001 definition ("the pecuniary harm that was intended to result from" the offense) is drawn directly from the draft definition of intended loss submitted to the Sentencing Commission by the Criminal Law Committee of the United States Judicial

94. Bowman, *2001 Federal Economic Crime Sentencing Reforms*, *supra* note 2, at 77.

95. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.2(A)(ii) (U.S. SENTENCING COMM'N 2001).

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

97. *See, e.g.,* Guarnera, *supra* note 5, at 719 (arguing that "the new 'purposeful loss' amendment . . . is likely to make the 'fit' between [culpability and intended loss] even more problematic by excluding a significant range of highly culpable conduct").

98. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 25, 28 (Apr. 30, 2015) [hereinafter AMENDMENTS TO THE SENTENCING GUIDELINES].

99. *See* Bowman, *Coping With "Loss," supra* note 2, at 560–61.

Conference, to which I served as academic advisor.¹⁰⁰ Moreover, the words themselves are not readily susceptible of any other interpretation.¹⁰¹

Both before and since 2001, the overwhelming majority of courts have interpreted the intended loss definition as including only harms the defendant subjectively intended,¹⁰² as distinct from a regime in which the defendant is presumed to intend the natural and probable consequences of his acts. Several courts have employed this presumption in intended loss cases,¹⁰³ but most such cases are of little consequence because, properly applied, the presumption is merely a statement of a reasonable evidentiary inference. When determining a

100. Bowman, *Judicious Solution*, *supra* note 2, at 490.

101. Mr. Guarnera characterizes the 2001 definition as “flimsy.” Guarnera, *supra* note 5, at 745. I have to take exception, even if no offense. The phrasing does suffer stylistically from employing the passive voice. I would have preferred the straightforward phraseology of my own original formulation of the definition (“pecuniary harms the defendant intended to cause”). Bowman, *Coping With “Loss,” supra* note 2, at 577. But one has to work pretty hard to interpret it to mean anything other than loss the defendant intended (i.e., subjectively desired) to result from the crime he committed.

102. *See* United States v. Confredo, 528 F.3d 143, 152–53 (2d Cir. 2008) (key to determining intended loss is defendant’s subjective intent); United States v. Diallo, 710 F.3d 147, 153–54 (3d Cir. 2013); United States v. Khorozian, 333 F.3d 498, 509 (3d Cir. 2003) (finding intended loss was \$20 million face amount of counterfeit checks, but treating face amount only as prima facie evidence of defendant’s intent which she might have offered evidence to rebut), *amended* (Aug. 25, 2003); United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) (“[O]ur case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss”); United States v. Quaye, 57 F.3d 447, 448 (5th Cir. 1995) (remanding for finding on whether defendant subjectively intended to repay loan); United States v. Hill, 42 F.3d 914, 918 (5th Cir. 1995) (“When reviewing the calculation of an intended loss, we look to actual, not constructive, intent, and distinguish between cases in which ‘the intended loss for stolen or fraudulently obtained property is the face value of that property’ and those in which the intended loss is zero because ‘the defendant intends to repay the loan or replace the property.’” (quoting United States v. Henderson, 19 F.3d 917, 928 (5th Cir. 1994))); United States v. Moored, 38 F.3d 1419, 1427 (6th Cir. 1994); United States v. Middlebrook, 553 F.3d 572, 578 (7th Cir. 2009); United States v. Berheide, 421 F.3d 538, 541 (7th Cir. 2005); United States v. Mutuc, 349 F.3d 930, 937 (7th Cir. 2003) (noting that defendant’s “state of mind is the relevant benchmark”); United States v. Fearman, 297 F.3d 660, 661 (7th Cir. 2002) (“[T]he relevant understanding of values for purposes of determining intended loss under the sentencing guidelines is that of the criminal, not that of the victim.” (citing United States v. Yeaman, 194 F.3d 442, 460 (3d Cir. 1999))); United States v. Staples, 410 F.3d 484, 490 (8th Cir. 2005); United States v. Manatau, 647 F.3d 1048, 1048 (10th Cir. 2011) (“[T]he term [intended] means exactly what it says: to be included . . . the intended loss must have been an object of the defendant’s purpose.”).

103. United States v. Alli, 444 F.3d 34, 38–39 (1st Cir. 2006) (using presumption to find in stolen credit card case that intended loss was total credit limits of the stolen cards); United States v. Coriaty, 300 F.3d 244, 251 (2d Cir. 2002) (relying on maxim that a defendant “is presumed to intend the natural and ‘probable’ consequences of [his or her] acts” to determine intended loss (alteration in original) (quoting United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997))).

defendant's intent with respect to loss, a court may properly draw reasonable inferences about the defendant's state of mind from his conduct and its foreseeable effects.¹⁰⁴

As Mr. Guarnera notes, several First Circuit cases seem to go further and embrace an objective test pursuant to which intended loss includes not only pecuniary harm the defendant personally desired to occur, but harms a reasonable person in the defendant's position would have anticipated.¹⁰⁵ In *United States v. Innarelli*, the court wrote that intended 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.*¹⁰⁶

And in *United States v. McCoy*, the court said that "'expected' would be a better term" for its approach to intended loss.¹⁰⁷ The First Circuit's choice of language suggests an affinity for the objective view of intended loss stronger than any other court. But these cases are less consequential than they appear.

In the first place, the *Innarelli* decision should never have been framed as an intended loss case. It involved a "land-flipping" mortgage fraud in which defendants bought cheap properties, induced financially weak buyers to purchase the properties at inflated values, and then induced lenders to make high-risk loans secured by over-valued collateral to buyers who had a limited ability to repay.¹⁰⁸ Under Section 2B1.1, Application Note 3E, actual loss in such cases is the unpaid balance of the fraudulently obtained loan, less either the amount recovered by the lender in foreclosure of the property or, if the collateral has not been sold by the time of sentencing, the fair market value of the property at that time.¹⁰⁹ Despite speaking in terms of intended loss, the district and appellate courts in *Innarelli* in fact applied this actual loss rule. The district court used the price the swindlers originally paid for the properties as a measure of fair market value,¹¹⁰ but there was nothing objectionable in this approach.

104. *United States v. Himler*, 355 F.3d 735, 741 (3d Cir. 2004); *United States v. Staples*, 410 F.3d 484, 490 (8th Cir. 2005) ("Absent other evidence of the defendant's intent, the size of the maximum loss that a fraud could have caused is circumstantial evidence of the intended loss which satisfies the preponderance of the evidence standard."); *United States v. Bolla*, 346 F.3d 1148, 1153 (D.C. Cir. 2003).

105. Guarnera, *supra* note 5, at 736–37.

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

107. *United States v. McCoy*, 508 F.3d 74, 79 (1st Cir. 2007).

108. *Innarelli*, 524 F.3d at 290–91.

109. For further discussion of loss in mortgage frauds, see HAINES, BOWMAN & WOLL, *supra* note 77, at 435–40.

110. *Innarelli*, 524 F.3d at 291.

In short, the appellate court's discussion of intended loss was completely unnecessary.

McCoy is a nearly identical land-flip case in which the district court used the same loss calculation as the *Innarelli* judge, including treating the price originally paid for the property by the defendant as the value of the collateral credit.¹¹¹ On appeal, the defendant argued that, under the actual loss rule, he should have received credit not merely for the amount he originally paid for the properties, but in some instances for larger amounts the bank actually recovered through foreclosure prior to sentencing.¹¹² The First Circuit agreed with the defendant that his was the proper interpretation of the rule for actual loss.¹¹³ However, it upheld the trial court's decision as an application of intended loss, concluding that, at the time of the crime, the defendant had no reason to expect the property he was flipping would become more valuable than the price he paid for it, and thus that his expectations were that the bank would never recover a larger amount.¹¹⁴ At most, the *McCoy* court is saying that the loss a defendant *expects* will result from his crime is the loss he intends to cause.

One can split definitional hairs and conclude that this view of "intent" is more akin to Model Penal Code "knowledge" – the defendant is aware "that it is practically certain that his conduct will cause . . . a result"¹¹⁵ – than to Model Penal Code "purposefulness" – the defendant's "conscious object [is] to . . . cause such a result."¹¹⁶ But to say that a defendant "expected" a loss at the time of his crime is nonetheless to assert that he consciously contemplated that result, concluded that it was highly probable, and chose to offend anyway. That is a subjective, not an objective, standard. It is also, from both a moral and evidentiary perspective, so nearly indistinguishable from desiring the loss as to fit seamlessly into any workaday definition of "intended loss."

For a period, the Tenth Circuit produced a line of questionable cases holding that the government may prove "intended loss" by showing either "that the defendant realistically intended a particular loss, or that a loss in that amount was probable."¹¹⁷ The difficulty, of course, is that mere probability of loss is not equivalent to an intention to cause it. As noted above, the existence of a high probability of loss resulting from a defendant's conduct may be good *evidence* of an intention to cause loss, but there is no warrant in the Guidelines for making proof of probability a *substitute* for proving purpose. Recognizing the difficulties in this approach, in 2009, the Tenth Circuit insisted that the government show not merely that a loss was probable, but that the defendant

111. *McCoy*, 508 F.3d at 79.

112. *Id.* at 78–79.

113. *Id.* at 79.

114. *Id.*

115. MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. LAW INST. 2015).

116. *Id.* § 2.02(2)(a)(i).

117. *United States v. Schild*, 269 F.3d 1198, 1200 (10th Cir. 2001) (quoting *United States v. Nichols*, 229 F.3d 975, 979 (10th Cir. 2000)).

knew of its probability.¹¹⁸ And in *United States v. Manatau*, the Tenth Circuit came full circle, holding that, "[i]ntended loss' does not mean a loss that the defendant merely *knew* would result from his scheme or a loss he might have *possibly and potentially* contemplated," and firmly repudiating the notion that intended loss means anything other than "a loss the defendant *purposely* sought to inflict."¹¹⁹

The Sentencing Commission's 2015 amendment to the intended loss definition expressly embraced the approach of the *Manatau* opinion,¹²⁰ and in so doing, merely pulled a few straying courts back in line with the long-standing interpretation of intended loss.

Mr. Guarnera seemingly disagrees with the Commission's decision. If I understand him correctly, he proposes that intended loss include – and defendants' sentences be enhanced for – two classes of loss that did not actually happen: (1) those the defendant desired to inflict, and (2) those as to which the defendant was reckless,¹²¹ i.e., losses that never happened but were made more likely by defendant's conduct and the defendant was aware of the increased risk when committing his offense. This proposal is flawed on multiple grounds.

To begin, it bears repeating that intended loss is a measurement of losses that never happened. The primary justification for enhancing a defendant's sentence for such unrealized harms is that mental state is such an important measure of blameworthiness that proof of a purpose to cause a particular quantum of harm is, standing alone, an acceptable component of the offense seriousness calculus. Mr. Guarnera's proposal is that defendants' sentences be increased for harms that not only never happened, but that the defendant never wanted to happen.¹²² It is one thing to increase punishment, even in the absence of harm, for harboring the most serious class of culpable mental state – purpose to cause a specified harm – but quite another to increase punishment *in the absence of harm*, based purely on a far less serious class of culpable mental state – acting with the knowledge that one's conduct creates risk.

Mr. Guarnera views added punishment as warranted for the reckless creation even of *unrealized* risks.¹²³ But at least from the perspective of substantive criminal law, his suggestion is without obvious precedent. There are scarcely any offenses that criminalize pure recklessness in the absence of a resultant harm. The few that come to mind – reckless driving¹²⁴ and reckless

118. *United States v. Baum*, 555 F.3d 1129, 1133–36 (10th Cir. 2009).

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

120. AMENDMENTS TO THE SENTENCING GUIDELINES, *supra* note 98, at 27.

121. Guarnera, *supra* note 5, at 748–49.

122. *See id.* at 751–54.

123. *Id.* at 755–56.

124. *See, e.g.*, the Florida reckless driving statute, FLA. STAT. ANN. § 316.192(1)(a) (West 2017) ("Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.").

endangerment¹²⁵ – involve the conscious creation of risk of physical harm to persons or property. There is no economic crime of which I am aware which criminalizes conscious disregard of the risk of a pecuniary harm that never comes to pass.¹²⁶

The final, and to me determinative, objection to Mr. Guarnera’s thesis is that the practical effect of adopting his intended loss definition would be to exacerbate what he himself identifies as a primary flaw in Section 2B1.1, that it “consistently generates [sentence] recommendations that are unacceptably high . . . because intended loss is an inherently flawed proxy for culpability.”¹²⁷ Changing the required mental state for “intended loss” from purposefulness to recklessness would increase the loss chargeable to many defendants, push them higher on the loss table, and thus increase their sentencing ranges.

Mr. Guarnera’s discussion of *United States v. Confredo*¹²⁸ illustrates this point perfectly.¹²⁹ Confredo helped small businesses submit fraudulent loan applications to banks.¹³⁰ The total amount requested in all these loan applications was \$24 million.¹³¹ Some loan applications were denied and some were granted but were fully or partially repaid, so the banks’ total actual loss was \$9 million.¹³² The district court found that loss for Guidelines purposes should be intended loss in the amount of the full \$24 million Confredo requested for his clients.¹³³ Confredo argued that he did not expect all the loan applications to be granted, that he did expect that some of the loans approved would be repaid, and thus that he never expected or intended that the banks lose the full \$24 million.¹³⁴ The Second Circuit held that Confredo should be allowed to prove what his subjective expectations were because intended loss requires “a subjective intent to cause a loss.”¹³⁵

Mr. Guarnera believes the Second Circuit was wrong because, by requesting \$24 million in dodgy loans, Confredo consciously created a risk, however

125. See, e.g., the Washington reckless endangerment statute, WASH. REV. CODE ANN. § 9A.36.050 (West 2017) (“A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.”).

126. A similar principle is at work in the nearly universal holding of Anglo-American law that one cannot attempt to commit a crime the mental state of which is recklessness. See generally *State v. Smith*, 534 P.2d 1180, 1184 (Or. Ct. App. 1975). An attempt requires a purpose to accomplish a criminal end, but, by definition, a crime of recklessness involves heedlessness rather than purpose. See *id.* at 1183.

127. Guarnera, *supra* note 5, at 719.

128. 528 F.3d 143 (2d Cir. 2008).

129. Guarnera, *supra* note 5, at 754–56.

130. *Id.* at 752.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 752–53.

small, that banks would suffer a loss of that entire amount.¹³⁶ Adopting this approach would require Confredo to be sentenced based on a \$24 million loss, whereas the Second Circuit's opinion gave the defendant an opportunity to reduce the loss amount and thus his guideline sentencing range. Few observers of the Guidelines are of the view that the existing definition of intended loss is too narrow and includes too few unrealized losses.

Although I am unpersuaded by Mr. Guarnera's proposal to make recklessness the required mental state for counting unrealized economic losses in sentencing, the operation of intended loss in Section 2B1.1 is not without problems. To these we now turn.

E. Further Thoughts on Risk and Intended Loss

Mr. Guarnera is right that the role of risk of harm in the intended loss calculus deserves careful analysis.¹³⁷ However, such analysis suggests that in some cases a fair assessment of the risk posed by the defendant's conduct should limit, not expand, the universe of harms included in intended loss. The *Confredo* case provides a good illustration of the basic issue.

Mr. Guarnera would like defendant Confredo's "intended loss" to be \$24 million, the sum of all the fraudulent loan applications he facilitated, on the theory that Confredo both sought loans in that amount and subjected the banks to a risk of losing that amount.¹³⁸ The first half of that argument makes superficial sense. Confredo presumably submitted each of the fraudulent loan applications desiring that it result in a loan, and thus, if we consider his mental state only at the moments he submitted loan applications, then he can fairly be said to have intended to obtain all \$24 million. But the second part of the argument – that Confredo exposed the banks to a real risk of losing \$24 million¹³⁹ – is strained. Confredo's explanation of the financial realities of the situation, self-serving though it may have been, was spot-on. There was virtually no chance that all the banks would offer loans and a virtual certainty that some of those who did would be repaid wholly or in part. Confredo's scheme exposed the banks to a very high risk of losing some money but a tiny-to-nonexistent risk of losing \$24 million.

The problem this situation poses for a standard definition of intended loss is one of accounting for unrealized losses that a defendant subjectively desired to inflict, but that, given the facts of the case, had little or no chance of occurring. Punishing a defendant for unrealized harms of this type is a challenge to the basic rationale for "intended loss." Recall that use of intended loss as a sentencing factor is justified both because a proven desire to cause harm is a blameworthy mental state *and* because those who consciously seek to cause a particular harm can fairly be seen to present a heightened risk of causing that

136. *Id.* at 753.

137. *Id.* at 752–53.

138. *Id.* at 754.

139. *Id.* at 753–54.

harm and thus to represent a heightened social danger. But suppose the evidence proves that, whatever his intentions, the defendant's conduct presented little or no real risk of causing any pecuniary harm, or at worst, a very small risk of causing the magnitude of pecuniary harm he sought to inflict. In such a case, is use of intended loss justifiable?

A fair argument can be made that in most cases the answer should be yes. Particularly in situations where the defendant's plans were realistic and were thwarted only by bad luck, an alert victim, or the fact that the putative victim was actually a government operative conducting a "sting," there seems little reason to ignore or discount intended loss. In instances of this sort, the defendant not only has the requisite evil mind, but his conduct suggests that, despite his miscalculation or bad fortune in the present case, he presents a continuing social risk fairly measured by the magnitude of the harm he sought to cause. Moreover, a rule dictating no loss enhancement where loss was effectively impossible because of government involvement would significantly undercut the effectiveness and deterrent value of undercover operations in fraud cases.

That said, there remains a set of cases in which the defendant's intentions are so far at variance with the genuine risk his scheme presented, either in the particular circumstances of the case at bar or otherwise, that it seems unfair to punish him for his wholly unrealistic expectations. In 2001, the Commission rejected efforts to codify the so-called "economic reality" doctrine that some courts had previously applied to exclude from intended loss highly improbable economic harms.¹⁴⁰ Intended loss now "includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured amount)."¹⁴¹

The Commission's position is understandable. It is theoretically defensible, protects law enforcement interests, and is relatively easy to apply. Limiting the inquiry to what the defendant subjectively intended eliminates the need to make an additional assessment of the relative improbability of events that never occurred. Nonetheless, in my view, the intended loss rule would be improved if it provided a limited mechanism for excluding highly improbable losses in cases other than government stings. I long ago proposed that this be accomplished by writing into the intended loss rule a variant of the Model Penal Code approach to impossible attempts¹⁴² that would hold a defendant responsible for "all pecuniary harms he intended and which might reasonably have occurred if the facts were as he believed them to be."¹⁴³

The phrase "if the facts were as he believed them to be" has the effect of holding a defendant responsible in most cases where the failure of his scheme

140. For a discussion of the economic reality doctrine, see Bowman, *2001 Federal Economic Crime Sentencing Reforms*, *supra* note 2, at 80–81.

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

142. MODEL PENAL CODE § 5.01(1)(c) (AM. LAW INST. 2015).

143. Bowman, *Coping With "Loss," supra* note 2, at 567.

was due, not to any irresolution on the defendant's part, but simply to a mistake of fact. Hence, a defendant could claim no relief under this provision if the impossibility of his scheme as a whole, or the infliction of some particular quantum of loss, was due to the fact that he was dealing with undercover officers. The phrase "which might reasonably have occurred" would give courts a means of excluding from intended loss those rare pecuniary harms that, despite being consciously sought by the defendant, could not realistically have occurred, even if all the facts were as the defendant believed them to be.¹⁴⁴

F. The Problematic Relation of "Actual Loss" to "Intended loss" in Section 2B1.1

Even if one is convinced that the concept of "intended loss" has a role to play in economic crime sentencing, one might doubt that actual and intended loss should receive the same *weight* in Guidelines calculations. Section 2B1.1 instructs judges to use intended loss in cases where intended loss is greater than actual loss.¹⁴⁵ To fully appreciate this instruction, one must consider four possible situations: (1) the actual loss equaled the intended loss; (2) the actual loss exceeded the intended loss; (3) there was an intended, but not an actual, loss; and (4) there was an actual loss, but the intended loss was greater.

In the first situation, where the defendant stole exactly the amount he intended to steal, intended loss has no Guidelines effect. Indeed, a match between actual and intended loss has no practical significance at sentencing, except, perhaps, insofar as a judge who finds a perfect convergence of the defendant's mental state with the quantum of actual harm caused by defendant's conduct may be confirmed in the conclusion that the amount of loss is a good measurement of offense seriousness.

In the second situation, where actual loss exceeds intended loss, once again intended loss has no Guidelines effect. In such a case, the larger, unintended-but-foreseeable actual harm trumps the smaller intended harm.

The third situation, in which the defendant intended, but failed, to inflict any actual economic harm, is the case in which the practical need for intended loss as an offense seriousness metric is most obvious. If the Guidelines are not to treat all defendants convicted of failed fraudulent schemes identically on the ground that the actual pecuniary harm in all such cases was nil, then the rules must identify factors that distinguish between more and less serious unsuccessful schemes. One relevant factor is the magnitude of the harm intended by the offender. Throughout the Anglo-American law of inchoate crimes, the universe of unsuccessful convicted criminals is sorted largely by assessing the conjunction of mental state and desired harm, which is to say by focusing on

144. I would now modify my original phrasing to say that intended loss includes "all pecuniary harms the defendant intended and which might *realistically* have occurred if the facts were as he believed them to be."

145. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM'N 2004).

the seriousness of the wrong the defendant sought to commit.¹⁴⁶ An attempt to commit murder is more serious than an attempt to commit assault. A conspiracy to import a ton of heroin is a more serious crime than a conspiracy to sell an ounce of marijuana. Accordingly, it hardly seems odd that an unsuccessful scheme to loot the treasury of a major corporation of millions should be a more serious crime than a failed attempt to embezzle a few thousand dollars from a federally insured bank.

This is not to say that the amount a failed swindler intended to steal should be the only measure of the seriousness of his crime. Other factors, such as the defendant's role in the offense, the complexity and sophistication of the scheme, the proximity of the scheme to success, or the potential non-economic impacts of success had it occurred, might well be a part of the seriousness calculus. But some measure of the magnitude of the economic harm sought must surely be a factor in any rational schema for comparing inchoate economic crimes.

The fourth and last situation, in which actual loss occurred but was exceeded by intended loss, raises the most troubling questions. It is one thing to conclude that intended loss is a sound metric for comparing no-loss criminal schemes to one another. However, in a case where an actual loss occurred but the intended loss was larger, a rule that an unrealized intended harm outweighs a harm that really happened requires some explaining. Such a rule seems sensible if one is trying to rank the relative offense seriousness of the crime of Defendant *A*, who intended to and did cause a loss of exactly \$100,000, and the crime of Defendant *B*, who obtained \$100,000 as part of a scheme that was intended to secure \$1 million, and might have done so if not interrupted by the police. These defendants caused the same actual economic harm. But the additional criminal aspirations of Defendant *B* would seem to render him the more blameworthy (and socially dangerous) offender, and a higher sentence for him seems entirely justifiable. But suppose the comparison is between Defendant *A*, who set out to and did steal exactly \$100,000, and Defendant *C*, who set out to steal \$1 million but secured only \$10,000. Or suppose Defendant *C* sought \$1 million but obtained nothing at all. How do we rank a completely successful, if only modestly ambitious, crook in comparison to an ambitious criminal who achieves only modest success or none at all?

There are three possible answers: (1) maintain the approach of Section 2B1.1 and treat actual loss and intended loss as equivalent measures of offense seriousness; (2) assign actual loss and intended loss different weights in the sentencing calculus, which would require establishing some kind of conversion ratio between them; or (3) abandon intended, but unrealized, loss as a measure of offense seriousness. Consider these possibilities in reverse order.

Abandon intended loss: I am aware of only one serious proposal that intended loss be excised altogether from Guidelines calculations. The ABA's Economic Crime Sentencing Task Force issued a report in 2014 recommending

146. Guarnera, *supra* note 5, at 736–37.

that "loss" for Guidelines purposes be limited to actual loss.¹⁴⁷ Remarkably, this dramatic alteration to current practice received no discussion in the report.

Without presuming to read the minds of the ABA Task Force members, their proposal seems to embrace a sort of "no harm, no foul" principle for swindlers and thieves. Under their proposal, unless a criminal actually succeeded in causing a large pecuniary loss, meaningful punishment would almost never be recommended by the Guidelines, regardless of the malignance of the defendant's intentions, the complexity of his scheme, the extent of his preparations, the proximity to success, or the reason for failure.¹⁴⁸ Even schemes defeated only because of discovery by the intended victim or the timely intervention of law enforcement would be treated for sentencing purposes as the next thing to a non-event.¹⁴⁹ And of course, the absence of some accounting for intended loss would eliminate any metric for distinguishing between a wholly successful minor crook and an only partially successful major swindler whose crime inflicted a small loss but was designed to cause a far larger one.

The law treats no other class of crime this way. If your enemy shoots at you intending to kill you, but misses, the law does not say, "No harm, no foul," and charge the shooter only with the unlawful discharge of a firearm.¹⁵⁰ To the contrary, it charges him with attempted murder, and upon conviction, punishes him severely for his unconsummated homicidal intentions. If a defendant grabs a woman and pulls her into a bush intending to rape her, but she escapes, the law does not say that the only actual harm to the victim was a transitory fright, and therefore that the only charge will be for a minor assault.¹⁵¹ To the contrary, the charge and punishment will be for the appropriately grave offense of attempted rape. As noted above, without some measure of intended economic harm, there is no obvious way to rank the relative seriousness of unsuccessful schemes, either in comparison with each other or in comparison with wholly or partially successful ones. Candidly, I think it unlikely that the ABA Task Force's suggestion of abandoning intended loss altogether will gain much traction.

Weight actual and intended loss differently: Even if intended loss is not to be entirely abandoned, a system that weights intended but unrealized harm

147. *ABA Task Force Report*, *supra* note 39 (proposing a model Section 2B1.1 in which the definition of "loss" in its Application Note 1 would be "incorporated from current 2B1.1 with the modification that loss means actual loss").

148. *See id.* The ABA Task Force model guideline contains four basic components: a base offense, a loss table, a set of "culpability" adjustments, and a set of "victim impact" adjustments. *Id.* The model is structured in such a way that, without a loss enhancement, it would be very difficult for a defendant to achieve an offense level that would call for incarceration, and nearly impossible to generate an offense calling for more than minimal incarceration. If intended loss could never be counted on the loss table, the result would effectively be a free sentencing pass for unsuccessful economic criminals.

149. *See id.*

150. *See* 18 U.S.C. § 1113 (2012).

151. *See* MO. ANN. STAT. § 566.030(2) (West 2017).

as exactly equivalent to actual harm actually caused by a defendant's crime is disquieting. At the root of the difficulty is the fact that there are really at least three kinds of loss: (1) actual loss the defendant subjectively intended to cause (or at least expected he would cause); (2) actual loss the defendant did not subjectively intend to cause, but which was the foreseeable consequence of his criminal conduct; and (3) intended loss that never occurred.

One can fairly argue that intended, but unrealized, loss is, on some rough scale, morally equivalent to and therefore ought to count roughly the same as actual loss that was unintended, but foreseeably caused by, fraudulent conduct. In the case of intended, but unrealized, loss, the defendant's mental state is arguably more blameworthy than in the case of merely foreseeable loss. In both cases, there was an intent to steal something, because without such an intent, no conviction could have occurred. However, in the first case the harm intended was larger than in the second case, while in the second case, the defendant inflicted more actual harm than in the first case, even though he lacked a specific purpose to inflict it.

The tougher comparison is between, on the one hand, loss that was both intended by the defendant and actually occurred, and on the other hand, loss that was intended by the defendant but never happened. The mental state in both these cases is the same, but the first involves an actual harm and the second involves none at all. At least in the abstract, it would seem that intended actual harm should count more than intended harm that never happened.

The substantive law on this point in other crime types varies. For some crime types in some jurisdictions, an unsuccessful conspiracy or attempt to commit a crime is a less serious offense than the object crime. For example, in Colorado, an attempt to commit a felony is generally graded as one classification less serious than the object felony.¹⁵² But the reverse is true for other crime types and other jurisdictions. Federal law, in particular, tends to grade conspiracies and attempts as equivalent in seriousness to completed crimes.¹⁵³ And as noted, most federal fraud crimes are inchoate offenses themselves. The crime is the making of the scheme or the attempt to carry it out, not the successful achievement of the criminal objective.

How to address the apparent incongruity arising from the existence of different categories of loss is far from obvious. The most ambitious approach would be to weight each of the three categories differently. Intended actual loss might count the most. Actual, unintended, but foreseeable, loss might count a bit less. Intended, but unrealized, loss might count the least. However, even if one concurred in this theoretical ordering of loss types, devising guidelines rules to implement it would be very difficult. Even more problematic in

152. COLO. REV. STAT. ANN. § 18-2-101(4) (West 2017).

153. *See, e.g.*, 18 U.S.C. § 1349 (2012) ("Any person who attempts or conspires to commit any offense under this chapter [which covers mail fraud and other fraud offenses] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy.").

practice would be the fact-finding burden placed on judges to make the fine distinctions between the categories.

A somewhat simpler approach would be to recognize only two categories of loss – intended and actual – as having different sentencing consequences. In such a regime, one might treat intended, but unrealized, loss as being inherently less weighty than actual loss, whether intended or merely foreseeable, and assign some discount to intended loss. Such a discount might take one of several forms.

One could calculate intended loss and then literally discount that number by some percentage before plugging the result into the loss table. However, this would present numerous problems. The primary theoretical question would be the size of the discount – on what rational basis could one assign a constant discount ratio? Should intended loss count one-half as much as actual loss? Two-thirds as much? How would one decide? Additionally, cases in which there were both actual and intended loss would present a Guidelines design problem. If intended loss without the discount exceeded actual loss but was less than actual loss once discounted, should the loss table figure be actual loss alone? That would seem a peculiar result inasmuch as such a rule would treat as equivalent Defendant *A*, who caused actual loss of $\$X$ and intended no additional loss, and Defendant *B*, who caused actual loss of $\$X$, but also intended to cause a large loss in excess of $\$X$.¹⁵⁴

Alternatively, one could treat intended loss as equivalent to actual loss for purposes of the loss table, but then employ a blanket offense level discount, providing that, in any case in which the loss amount was determined by application of the greater intended loss rule, the offense level produced by application of Section 2B1.1 should be reduced by some number of levels.¹⁵⁵ However, the design and application issues inherent in this approach are similar to those presented by a percentage discount of the intended loss figure itself. How many levels should be subtracted? Should the number be the same for small intended loss figures as for large ones? In a case with both intended and actual loss, if intended loss is larger, does the defendant get the entire offense-level discount, even if that would reduce his offense level to below that which would apply if the actual loss figure were used?

I am intrigued by the possibility of discounting intended loss. However, I am leery of the practical difficulties in designing such a discount to make it both defensible in principle and workable in practice. Perhaps the most workable approach would be non-computational. That is, the intended loss rules should: (1) continue to require that sentencing courts calculate intended loss as

154. James Gibson long ago proposed a neat solution to this design problem – average actual and intended loss. James Gibson, *How Much Should Mind Matter? Mens Rea in Theft and Fraud Sentencing*, 10 FED. SENT. REP. 136, 138 (1997). I think this solution a bit mechanistic, but it has attractions.

155. Something like this existed in the pre-2001 regime via a cross-reference in the fraud guideline, §2F1.1, to the attempt guideline, §2X1.1. U.S. SENTENCING GUIDELINES MANUAL §2F1.1 cmt. n.10 (U.S. SENTENCING COMM'N 2000).

they now do but (2) recommend that judges imposing sentences should consider that intended, but unrealized, loss may overstate the seriousness of the offense.

Maintain the status quo: In truth, until the Commission decides that it wants to materially alter the Guidelines' structure, either for all offenses or just for economic crimes, the basic definition of loss, and the relation between actual and intended loss, is likely to remain essentially the same. For now, advocates who are not happy with the balance struck by the current rules will have to convince judges to employ their *Booker*-enabled discretion to make adjustments.

IV. CONCLUSION

I close by reiterating that I am far from satisfied with the current state of Section 2B1.1, the economic crime guideline. I agree with Mr. Guarnera and many others that it can, in too many cases, suggest unreasonable sentences, and I have in other settings proposed amendments to address this difficulty. I also agree that in the wake of *Booker*'s transformation of the Guidelines from strongly presumptive to purely advisory, the Sentencing Commission ought to reconfigure, not just Section 2B1.1, but the entire guideline structure to take conscious account of the reality of current federal sentencing practice. If and when that reconstruction project commences in earnest, the result will surely be less rule-bound and more standard-like, as Mr. Guarnera would prefer.¹⁵⁶ However, for the immediate future, we have the guideline we have, with the "loss" concept at its core. What I hope to have demonstrated here is that "loss" is properly central to economic crime sentencing (even though the degree of its influence on sentences should be reduced), and that the Section 2B1.1 definition of "loss" and its components – actual loss and intended loss – are fundamentally sound (even if some tweaks might be beneficial).

156. Guarnera, *supra* note 5, at 762–67.