Missouri Law Review

Volume 82
Issue 1 *Winter 2017*

Article 6

Winter 2017

Reply to Professor Bowman's "Loss" Revisited

Daniel S. Guarnera

Reply to Professor Bowman's *"Loss" Revisited*

Daniel S. Guarnera[*]

I. INTRODUCTION

No one has contributed more to our understanding of the history, operation, theory, and pathologies of the U.S. Sentencing Guidelines for economic crimes than Professor Frank Bowman. In addition to his extensive body of scholarship on these topics, Professor Bowman helped design the modern economic crime Guidelines and has remained a vocal advocate for more rational and just sentencing policies.[1] I have learned a great deal from his work, and I draw from it extensively in my 2016 *Missouri Law Review* article, *A Fatally Flawed Proxy: The Role of "Intended Loss" in the U.S. Sentencing Guidelines for Fraud*.[2]

Based on Professor Bowman's response article, *"Loss" Revisited: A Defense of the Centerpiece of the Federal Economic Crime Sentencing Guideline*,[3] I am gratified to find that he and I share much common ground. In fact, I believe our respective positions are closer in many ways than his article suggests. I will use this Response primarily to clarify what I see as the key areas of disagreement about the proper role of loss – and, particularly, intended loss – in the economic crime Guidelines. I will then offer a few brief comments about possible directions for reform.

II. THE MENTAL STATE BEHIND INTENDED LOSS

In general, the U.S. Sentencing Guidelines are a list of instructions that allow judges to compute recommended sentences based on particular facts about the offender or offense.[4] If the sentencing judge finds that one of the facts identified in the Guidelines is present, he or she applies a predetermined

---

[*] Associate at Kellogg, Hansen, Todd, Figel & Frederick, PLLC. My thanks to the editors of the *Missouri Law Review* for their extremely helpful comments on both this Article and its predecessor. Thank you also to the many professors and colleagues who provided feedback on this project.

1. *See, e.g.*, Frank O. Bowman, III, *Comment on Proposed Amendments to Economic Crime Guideline, § 2B1.1*, U.S. SENT'G COMM'N 4 (Feb. 19, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf.

2. 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).

3. Frank O. Bowman, III, *"Loss" Revisited: A Defense of the Centerpiece of the Federal Economic Crime Sentencing Guideline*, 82 MO. L. REV. 1 (2017).

4. For an overview of how the Guidelines function, see Guarnera, *supra* note 2, at 724–26.

sentencing enhancement; by design, the Guidelines limit judicial discretion.[5] The Guidelines can fairly be described as rule-oriented as opposed to standard-oriented,[6] with rules defined as legal directives that "bind[] a decisionmaker to respond in a determinate way to the presence of delimited triggering facts," whereas standards "collapse decisionmaking back into the direct application of the background principle or policy to a fact situation."[7] The rule-driven structure of the Guidelines is a means of maximizing uniformity (and minimizing disparities) between like offenders, while simultaneously respecting the principle that punishments should be proportional to the seriousness of the crime.[8]

Section 2B1.1 of the Guidelines prescribes sentences for economic crimes such as fraud, theft, embezzlement, and property destruction, and it is one of the most frequently applied provisions in the Guidelines.[9] Under Section 2B1.1, the most important sentencing factor is the amount of pecuniary harm – loss – associated with the offense, with higher loss amounts yielding longer sentencing enhancements.[10] The weight given to the loss calculation has been a longstanding criticism of Section 2B1.1,[11] and it is one of the main reasons

---

5. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §1B1.1 (U.S. SENTENCING COMM'N 2016) (describing the "Application Instructions" for calculating a sentence under the Guidelines).

6. *See* Guarnera, *supra* note 2, at 723–24; *see generally* Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CAL. L. REV. 447 (2016); Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1 (2015).

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

8. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (U.S. SENTENCING COMM'N 2016) (noting that "[t]here is a tension . . . between the mandate of uniformity and the mandate of proportionality"). The Guidelines' emphasis on uniform sentencing outcomes raises the question, "Uniform with respect to what?" The answer, somewhat tautologically, is that the Guidelines only promote uniformity with respect to those facts identified in the Guidelines. To the extent that a given Guideline fails to account for a factor relevant to sentencing, resulting sentences will not be uniform along that dimension (unless it is closely correlated with a proxy metric that is incorporated in the Guidelines). The loss calculation plays such a broad and multifaceted role in economic crime sentencing – serving as the primary proxy for, at minimum, actual harm and culpability – that it is not surprising that loss is at the heart of debates about whether Section 2B1.1 accounts for the relevant set of sentencing considerations.

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

10. U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(1) (U.S. SENTENCING COMM'N 2016) (adding up to thirty offense levels based on the loss amount). The Guidelines for economic crimes are found in Section 2B1.1 of the U.S. Sentencing Guidelines.

11. *See, e.g.*, Jillian Hewitt, Note, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1025 (2016) ("The Commission should reduce the severity of the loss table and define loss to cover only actual, as opposed to

that judges are more likely to issue below-Guidelines sentences for economic crimes than almost any other type of offense.[12]

For the purposes of calculating sentences under Section 2B1.1, loss is defined as the greater of the loss *actually* inflicted by the defendant and the loss that he or she *intended* to inflict.[13] As I have argued, actual loss serves primarily (though not exclusively) as a proxy for the harm inflicted by a crime, and intended loss serves primarily (though not exclusively) as a proxy for the defendant's culpability,[14] defined in this context as "[m]oral blameworthiness."[15] From 2001 until late 2015, the Guidelines defined intended loss merely as "the pecuniary harm that was intended to result from the offense."[16] As some courts noted, this definition was "seriously circular"[17] and "assumes that we already know what the word *intended* means."[18] This was especially problematic given that "[t]he meaning of the word 'intent' in the criminal law has always been rather obscure."[19]

In November 2015, the U.S. Sentencing Commission adopted an amendment redefining intended loss as "the pecuniary harm that the defendant *purposely sought to inflict*."[20] Professor Bowman explains the Commission's reasoning as follows: "[T]he 2015 amendment was intended by the Commission to reaffirm the original meaning of the 2001 definition, to wit, intended loss

---

intended, financial losses."); Wes Reber Porter, *Federal Judges Need Competing Information to Rival the Misleading Guidelines at Sentencing*, 26 FED. SENT. REP. 28, 30 (2013) ("The Guidelines have always valued formulas, even unjustified formulas, over individuals and individual circumstances . . . . Section 2B1.1, the fraud guideline, possibly ranks as the most stark example.") (footnote omitted); David Debold & Matthew Benjamin, *"Losing Ground" – In Search of a Remedy for the Overemphasis on Loss and Other Culpability Factors in the Sentencing Guidelines for Fraud and Theft*, 160 U. PENN. L. REV. PENNUMBRA 141, 141 (2011) ("Judges, defense lawyers, and commentators have long called for a reassessment of § 2B1.1's inordinate emphasis on the amount of loss caused by an offense.") (internal quotations omitted); Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 756 (2007) ("Culpability is basically non-existent as a sentencing concern, with the punishment resting on a numerical figure that correlates with the amount of loss occurring as a result of the crime.").

12. *See* U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 9, at tbl.27A (showing that defendants convicted of fraud were given below-Guidelines sentences 28.3% of the time).

13. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM'N 2016).

14. *See* Guarnera, *supra* note 2, at 737–41.

15. *Culpability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

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

18. United States v. Baum, 555 F.3d 1129, 1133 (10th Cir. 2009).

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

20. *See* U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(A)(ii) (U.S. SENTENCING COMM'N 2016) (emphasis added).

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."[21] I agree with Professor Bowman that the purposeful loss amendment was designed to reject the "objectivist" position.[22] This position was taken most prominently by the First Circuit, which held that intended loss equaled "the loss that a person standing in the defendant's shoes reasonably would have expected to cause at the time he perpetrated the fraud."[23] Moreover, I think that the amendment succeeds in clarifying that a subjective inquiry is required.

Whether the purposeful loss amendment materially changed the prevailing definition of intended loss – and whether such a change is beneficial as a policy matter – depends on what the former definition was. Professor Bowman characterizes intended loss as "embrac[ing] only those pecuniary harms the defendant subjectively *desired* to occur," and thus he concludes that the amendment's use of the word "purpose" does not constitute any change in meaning.[24] I certainly agree that there is little daylight between "desire" and "purpose." This is true not only in ordinary usage,[25] but also in the more technical definition that "purpose" generally carries in criminal law.[26] The Model Penal Code ("MPC"), which has heavily influenced the terminology used to delineate mental states, holds that a person "purposes" a result if "it is his *conscious object* to . . . cause such a result."[27] Even though neither Congress nor the Commission has formally adopted the MPC, the Supreme Court has recognized and applied this definition of purpose on numerous occasions.[28] For these reasons,

---

21. Bowman, *supra* note 3, at 19.

22. *See Sentencing Guidelines for United States Courts*, 80 Fed. Reg. 25782, 25791 (notice of submission to Congress of amendments May 5, 2015) (explaining that an amendment to the Guidelines is necessary because "courts have expressed some disagreement as to whether a subjective or objective inquiry is required," and endorsing the subjective approach).

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

24. Bowman, *supra* note 3, at 19 (emphasis added).

25. *Purpose*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004) ("[S]omething set up as an object or end to be attained."); *Desire*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004) ("[C]onscious impulse toward something that promises . . . satisfaction in its attainment.").

26. MODEL PENAL CODE § 2.02(2)(a)(i) (AM. LAW INST., Proposed Official Draft 1962); *see also Purpose*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An objective, goal, or end.").

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

28. *See, e.g.*, United States v. Bailey, 444 U.S. 394, 404 (1980) ("As we pointed out in *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978), a person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct,' while he is said to act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'").

I would agree that if courts construed intended loss as "desired" or "purposeful" loss prior to the 2015 amendment, the amendment's introduction of the word "purpose" would merely codify that pre-existing interpretation.

I do not think, however, that the courts typically restricted intended loss to the pecuniary harm that a defendant desired – nor should they have. Take, for example, the Second Circuit case of *United States v. Confredo*, which both Professor Bowman and I reference.[29] Confredo helped his clients apply for fraudulent loans, but he did not stand to benefit from their subsequent defaults.[30] Thus, his assistance in the fraudulent loan scheme was attenuated from the lenders' losses; Confredo was, at worst, indifferent as to whether or not his clients repaid their loans. As one court explained in an analogous case, if "intent must include an element of purpose or desire[,] . . . then [the defendant] would have a good argument that he intended no loss, because the evidence does not suggest that he desired anyone to lose money or even that his purpose was that the lenders lose money."[31] In other words, Confredo's purposeful loss was $0.

But the Second Circuit did not apply such a narrow definition of intended loss. Instead, it held – quite sensibly, in my view – that "[i]ntended loss refers to the defendant's subjective expectation."[32] For example, the court explained that a defendant who helped others apply for $1 million in loans, anticipating that $250,000 would be repaid, only intended (i.e., subjectively expected) a loss of $750,000.[33] Other courts have defined intended loss similarly.[34] Because it is blameworthy to act with the *expectation* that one's actions will inflict

29. *See* Bowman, *supra* note 3, at 24–25; Guarnera, *supra* note 2, at 752–53.

30. United States v. Confredo, 528 F.3d 143, 145 (2d Cir. 2008).

31. United States v. Baum, 555 F.3d 1129, 1133 (10th Cir. 2009).

32. *Confredo*, 528 F.3d at 152 (quoting United States v. Yeaman, 194 F.3d 442, 460 (3d Cir. 1999)).

33. *Id.* Importantly, under this formulation, loss does not equal every dollar placed at risk; rather, the expected loss calculation should attempt, at least conceptually, to replicate the expected value formula: [likelihood of outcome(s)] * [expected outcome(s)]. For example, a scheme that the defendant believed had a 10% chance of failing to inflict any loss, a 45% chance of inflicting a $1 million loss, and a 45% chance of inflicting a $2 million loss would have an expected loss of [10% * $0 + 45% * $1,000,000 + 45% * $2,000,000] = $1,350,000. Of course, any estimate of loss need only be "reasonable," see U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(C) (U.S. SENTENCING COMM'N 2016), and the feasible degree of precision will vary case to case (as it does now).

34. *See, e.g.*, United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) ("[W]e look to the 'defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims.'" (quoting *Yeaman*, 194 F.3d at 460)); *see also* United States v. Harris, 597 F.3d 242, 255 (5th Cir. 2010) ("A rule that prohibited sentencing courts from inferring intent from a defendant's recklessness would approach effectively creating a defense capable of eviscerating the 'intended loss' provisions of the Sentencing Guidelines for any criminal who managed to insulate his crime from the ultimate infliction of loss.").

harm on others – even if it is not one's *purpose* to do so – I believe that subjectively expected loss is the optimal loss-based metric for grading defendants by culpability.[35]

The Supreme Court has recognized that the definition of "intent" is "ambiguous and elastic,"[36] and this ambiguity enabled courts such as the Second Circuit in *Confredo* to calculate, when necessary, unrealized losses that the defendant did not desire but nonetheless subjectively expected would occur. In most fact patterns, the distinction between purposed and subjectively expected losses will not matter;[37] for example, if defendants undertake a scheme that involves a transfer of property directly from a victim to themselves, they will generally have the purpose of inflicting a loss equal to the loss that they subjectively expect to occur. But there are numerous offenses, similar to the loan fraud at issue in *Confredo*, for which the victim's losses are attenuated from the defendant's crime. Such crimes might include, for example, contracting frauds, crimes involving the sale of stolen checks or credit cards to third parties for flat fees, and accounting or financial reporting frauds committed for the

35. In my previous article, I analogized subjectively expected loss to the MPC's definition of recklessness. *See* Guarnera, *supra* note 2, at 755–56; MODEL PENAL CODE § 2.02(b)(ii) (AM. LAW INST., Proposed Official Draft 1962) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."). The point of the analogy was to emphasize that subjectively expected loss is relevant to the culpability inquiry because it is blameworthy to act in the face of a known and significant risk of harm, even if no loss is "purposed." *See* Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 931 (2000) (arguing that "the basic moral vice of insufficient concern for the interests of others" is the *sine qua non* of all criminal culpability). In drawing this connection, however, I did not mean to imply that the loss calculation should equal the total amount of money placed at risk by the criminal scheme (e.g., in Confredo's case, the total face value of all his clients' loans). *Cf.* Bowman, *supra* note 3, at 25–26. Such an approach would overestimate culpability by ignoring the defendant's own understanding of his or her actions, and it would result in a defendant like Confredo having the same loss calculation as a thief who simply stole an amount equal to the face value of all of Confredo's loans.

36. United States v. Bailey, 444 U.S. 394, 404 (1980); *see also* LAFAVE, *supra* note 19, § 5.2(b) ("[T]he word 'intent' in the substantive criminal law has traditionally not been limited to the narrow, dictionary definition of purpose, aim, or design, but instead has often been viewed as encompassing much of what would ordinarily be described as knowledge.").

37. *See Bailey*, 444 U.S. at 404–05 ("In the case of most crimes, 'the limited distinction between knowledge and purpose has not been considered important, since there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the result[s].' . . . In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention." (first alteration in original) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978))).

benefit of one's employer.[38] Often, these defendants will not have "purposed" any loss at all.

If a defendant such as Confredo had a purposeful loss of $0, then the loss calculation is based exclusively on the actual loss amount.[39] Professor Bowman is correct to point out that there is a correlation between actual loss and culpability – a scheme that actually imposes large losses is often more blameworthy than one that imposes small losses.[40] But actual loss is an even weaker proxy for culpability than intended loss. For example, (1) actual loss includes losses that the defendant never subjectively envisioned, so long as they were foreseeable to an objectively reasonable person;[41] (2) actual loss can fluctuate wildly based on the defendant's "moral luck" (i.e., because of factors unrelated to the defendant's subjective intentions, such as how quickly he or she was apprehended);[42] and (3) as with any loss measure, actual loss excludes a wide range of factors traditionally relevant to culpability, such as motive, the duration of the offense, contrition, the defendant's role in the offense, and nonpecuniary harms.

---

38. *See* Guarnera, *supra* note 2, at 752.

39. *Id.* at 753–54.

40. *See* Bowman, *supra* note 3, at 28.

41. *See* U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(A)(i) (U.S. SENTENCING COMM'N 2016). Professor Bowman defends actual loss as a proxy for culpability despite the fact that actual loss includes all reasonably foreseeable losses, including those not subjectively anticipated by the defendant. *See* Bowman, *supra* note 3, at 12–16. He points out that some criminal law doctrines – like the felony murder rule and coconspirator liability – treat foreseeable-but-unintended harms as equivalent to intended harms. *Id.* at 10. Whether such rules are desirable in the context of creating liability is a hotly contested issue. *See, e.g.*, GUYORA BINDER, FELONY MURDER 10 (2012) ("Legal scholars are almost unanimous in condemning [the felony murder rule] as a morally indefensible form of strict liability."); MODEL PENAL CODE § 2.06 cmt., at 307 (AM. LAW INST., Proposed Official Draft 1962) (arguing that law "lose[s] all sense of just proportion if simply because of the conspiracy itself each [coconspirator is] held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all."). But even if liability should sometimes be imposed in such cases, the distinction between intended and unintended harms would still be of paramount relevance when distinguishing between defendants at sentencing. For example, while a bank robber who accidentally runs over a pedestrian during his getaway has committed felony murder, he is less morally blameworthy than a cold-blooded assassin. That distinction should be reflected in their sentences. In the same way, defendants who caused losses unintentionally will generally be less culpable, and thus deserve lighter sentences, than those who inflicted losses intentionally.

42. *See, e.g.*, United States v. Emmenegger, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) ("To a considerable extent, the amount of loss caused by this crime is a kind of accident, dependent as much on the diligence of the victim's security procedures as on [the defendant's] cupidity. Had [the defendant] been caught sooner, he would have stolen less money; had he not been caught until later, he would surely have stolen more.").

Professor Bowman agrees that something like subjectively expected loss should fall within the scope of intended loss; he writes that "to say that a defendant 'expected' a loss at the time of his crime is [] to assert that he consciously contemplated that result, concluded that it was highly probable, and chose to offend anyway."[43] He continues, "[F]rom both a moral and evidentiary perspective, [expecting a loss is] so nearly indistinguishable from desiring the loss as to fit seamlessly into any workaday definition of 'intended loss.'"[44]

It is regrettable that the 2015 amendment did not expressly define the intended loss in terms of subjectively expected loss.[45] Professor Bowman says this is "split[ting] definitional hairs."[46] Perhaps, but the distinction still has significance, especially in cases like *Confredo*, where desires and expectations do not align.[47] I worry – along with the Department of Justice[48] – that the

43. Bowman, *supra* note 3, at 22.

44. *Id.* Elsewhere, Professor Bowman writes, "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." *Id.* at 23. But once criminal liability has already been established, I see nothing objectionable about using the losses that defendants subjectively expected to result from their crimes as a metric on which to grade their culpability.

45. There is a potential ambiguity in the use of subjectively expected loss: would a defendant who purposed (i.e., desired) a huge loss, but who did not expect the plan to succeed, be punished based on the large purposed loss or the smaller expected loss? One option would be to say that when a defendant purposes that a loss occur, the purposed loss amount takes priority over the expected loss. Alternatively, subjectively expected loss could supplant the purposeful loss inquiry across the board. Since the large majority of defendants expect their plans to succeed, relatively few defendants will have different purposed and expected loss calculations, and culpability is arguably better measured by the results that the defendants expected to flow from their actions than their fanciful desires.

46. Bowman, *supra* note 3, at 22.

47. On questions of criminal liability, courts rarely dismiss questions about the appropriate mens rea standard as mere hair-splitting. *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2011 (2015) (discussing which of the MPC's four-tier hierarchy of mental states should attach to a statute silent as to mens rea); *id.* at 2014 (Alito, J., concurring in part and dissenting in part) (same). Sentencing decisions are not as binary as guilty/not guilty, but it is nonetheless important to ensure that judges are calculating intended loss consistently so that all federal defendants are sentenced by the same standards.

48. *U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 16, 2015*, U.S. DEP'T JUST. 28–29 (Mar. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/DOJ.pdf (arguing that the purposeful loss amendment would "effectively eviscerate use of the intended loss criterion in determining loss. In many fraud cases, defendants routinely assert, with some persuasiveness, that they never intended to inflict any pecuniary harm on their victims, and that they genuinely

definition of "purpose" is sufficiently clear, both in common usage and the criminal law, that judges will be constrained to find an intended loss of $0 when a victim's losses are attenuated from the defendant's actions. Unlike the elastic term "intent," the Supreme Court itself has called the distinction between purpose and lesser mental states "[p]erhaps the most significant" distinction drawn by the MPC.[49] The strength of the argument that "purpose" should carry its plain meaning is reinforced further by the Commission's statement that "[t]he amendment adopts the approach taken by the Tenth Circuit" in its 2011 opinion *United States v. Manatau*,[50] from which it borrowed the amendment's "purposely sought to inflict" language verbatim.[51] *Manatau*, in turn, rigorously employs the full arsenal of statutory interpretation tools to argue that, even under the pre-amendment definition of "intended loss," "intent" means "purpose" as defined by the MPC.[52]

It is, therefore, not surprising that courts and litigants have begun probing the effect of the 2015 purposeful loss amendment. For example, one court has classified the amendment as a "substantive rather than a clarifying change,"[53] and another has recognized that "the changed language . . . stresses that the actual intent of the [defendant's actions] must have been to 'inflict' monetary harm."[54] Litigants are pressing courts on these points as well, advancing arguments that "[t]he court's refusal to distinguish between [the defendant's] knowing conduct and his subjective intent to inflict a loss diluted the *mens rea* requirement of the intended loss enhancement,"[55] and "[t]he Amendment represents a definitive shift . . . and brings intended loss down to the real world level of estimating the amount of money a particular defendant under particular circumstances purposefully sought to obtain; in other words, a pecuniary amount he realistically sought to deprive another of."[56]

---

believed that their victims would receive the benefits that they were originally promised").

49. United States v. Bailey, 444 U.S. 394, 404 (1980).

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

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

52. *Id.* ("We hold that 'intended loss' means a loss the defendant *purposely* sought to inflict."); *see generally id.* at 1050–56 (advancing seven arguments in favor of that conclusion); *see also* Guarnera, *supra* note 2, at 747–51.

53. United States v. Morrison, No. MO-10-CR-135(1), 2016 WL 5886697, at *33 (W.D. Tex. Aug. 10, 2016) (holding that the 2015 amendments are substantive for the purpose of retroactivity analysis).

54. United States v. Free, No. 2:14-CR-0019, 2015 WL 8784738, at *4 n.5 (W.D. Pa. Dec. 15, 2015) (finding that the 2015 amendments reinforce the conclusion that the defendant had presented a "substantial question" in his appeal, thereby justifying his release from prison pending appeal).

55. Appellant's Opening Brief at 29, United States v. Pollock, No. 16-30164 (9th Cir. Dec. 21, 2016), 2016 WL 7435920, at *29.

56. Brief of Defendant-Appellant Shawn McFadden at 66–67, United States v. Cooke, No.16-264-CR(L) (2d Cir. Sept. 15, 2015), 2016 WL 4944300, at *66–67; *see*

Time will tell how courts ultimately apply the purposeful loss amendment. But until this interpretive issue is definitively resolved, the amendment makes sentencing less predictable and increases the risk of inconsistent application between judges, thereby undermining the very uniformity that the Guidelines are designed to promote.

III. ACCOUNTING FOR BOTH ACTUAL AND INTENDED LOSS

There is an additional aspect of the definition of loss that demands attention: under the current formulation of loss, only the "greater of" actual and intended loss contributes to the final Guidelines sentence.[57] Although Professor Bowman states that both "actual loss and intended loss are justifiable as measures of crime seriousness on somewhat different, if overlapping, grounds,"[58] he nonetheless finds the (common) scenario in which intended loss is greater than actual loss "troubling."[59]

I interpret this problem a bit more expansively.[60] Actual and intended loss are both distinct data points of relevance to sentencing. Yet one or the other is *always* excluded from *any* role in determining the Guidelines sentence, regardless of what it might indicate about the nature of the offense.[61] Additionally, by requiring judges to apply only the most punitive measure available in every case, the loss calculation systemically produces higher sentences than would be generated by any algorithm that accounted for both actual and intended loss.

As Professor Bowman points out, this problem could be addressed by discounting the intended loss calculation or combining the actual and intended

---

also Brief of Defendant-Appellant Martha Ednie at 17, United States v. Ednie, No. 16-3825 (6th Cir. Dec. 13, 2016), 2016 WL 7241772, at *17 (arguing that the fact that "borrowers obtained loans in excess of the amounts which would have been approved had the lenders known of the [true value of the collateral] . . . falls far short of establishing that [the defendant] acted with the conscious intent to inflict the lenders with virtually the entire loss of their principal balances"); Appellant's Opening Brief at 16–18, United States v. Dobadzhyan, No. 16-50052 (9th Cir. June 20, 2016), 2016 WL 3521929, at *16–18 (arguing that the general rule in §2B1.1 cmt. n.3(F)(i) that calculates the intended loss per stolen "access device" at $500 must be reevaluated in light of the 2015 amendment).

57. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 cmt. n.3(A) (U.S. SENTENCING COMM'N 2016).

58. Bowman, *supra* note 3, at 17.

59. *Id.* at 28.

60. *See* Guarnera, *supra* note 2, at 741–43.

61. Under the Guidelines, judges can always take actual or intended loss amounts into account when deciding whether to issue a sentence at the top or bottom of the applicable Guidelines range or in some cases to justify a sentence outside the recommended range. But the high rate of departures in economic crime sentencing indicates that Section 2B1.1 systematically generates disproportionate sentences (requiring judges to disregard the advisory sentence), and the greater-of-actual-or-intended-loss formulation is one structural contributor to this problem.

loss figures in some way (such as by averaging them).[62] Professor Bowman states that he is "intrigued by the possibility of discounting intended loss," but:

> 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 they now do but (2) recommend that judges imposing sentences should consider that intended, but unrealized, loss may overstate the seriousness of the offense.[63]

I share Professor Bowman's concern that it would be very difficult to combine actual and intended loss in a way that consistently grades defendants based on the severity of their crimes. In my view, the primary reason for this is that intended loss is such a narrow and unstable proxy for culpability that it is nearly impossible to plug it in to a sentencing formula that yields coherent results across defendants.[64] Even if articulated as subjectively expected loss, intended loss would still fail to account for commonly relevant facts such as motive, nonpecuniary harms, the defendant's role in the scheme, whether the defendant abused a position of trust, the duration of the offense, contrition, and efforts to mitigate the harms from the crime. When grading defendants' culpability, qualitative considerations such as these are not ancillary – they are at the core of what it means to say that one defendant is more (or less) blameworthy than another.

---

62. Bowman, *supra* note 3, at 31; *see also* Guarnera, *supra* note 2, at 742–43.

63. Bowman, *supra* note 3, at 31.

64. *See* Guarnera, *supra* note 2, at 741–42. Any analysis of whether a Guidelines provision yields the "right" sentence depends on at least two assumptions: (1) the types of facts relevant to assessing culpability (i.e., what makes a criminal act blameworthy?), and (2) the role that culpability – in comparison to other sentencing considerations – should play in punishment generally. It is outside the scope of this Article to propose a complete taxonomy of factors related to culpability in the economic crimes context. My modest assertion is that whatever factors one considers relevant to ranking defendants by culpability, they are broader than simply the amount of loss intended or inflicted. With respect to the role of culpability in punishment generally, any assessment is complicated by the fact that the Commission expressly eschewed any clearly defined, internally consistent, philosophy of punishment. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(3) (U.S. SENTENCING COMM'N 2016) (describing how the inaugural Commission rejected calls to adopt either just deserts or utilitarian theories of punishment in favor of an "empirical approach" that, in most cases, tried to replicate pre-Guidelines sentences). Once more, my position is that so long as culpability has *some* relevance to sentencing, the greater-of-actual-or-intended-loss formulation is a very awkward and frequently faulty means of incorporating culpability assessments into the final sentence. *See* Guarnera, *supra* note 2, at 742–43 (arguing that the "greater of actual and intended loss" excludes considerations central to just deserts theory).

Therefore, Professor Bowman's suggestion that judges take a "non-computational" approach and evaluate whether intended loss overestimates the severity of the offense on a case-by-case basis seems promising.[65] But once we have recognized that judges should have the discretion to decide precisely what effect the intended loss calculation should have on any given sentence, we have already taken a significant step away from the rule-driven structure of the current Guidelines and toward a hybrid model that incorporates a standard-like assessment of culpability. Given the inherent difficulties in grading defendants' culpability through the loss calculation, this approach deserves careful consideration.

IV. STANDARDS-BASED SENTENCING AND THE FUTURE OF THE POST-*BOOKER* GUIDELINES

In my original article, I take the position that given the persistently high rate of sentences outside of the range prescribed by Section 2B1.1, and in light of the inherent limitations of the loss calculation as a proxy for (simultaneously) actual harm and culpability, the economic crime Guidelines provide an attractive test case for experimentation in standards-oriented sentencing.[66] Additionally, I argue that a hybrid model incorporating both rules and standards would be more consistent with contemporary sentencing doctrine, which holds that the Guidelines are merely advisory and judges must ultimately ensure that all sentences promote an array of statutory considerations.[67] Professor Bowman "agree[s] that in the wake of [*United States v.*] *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 [G]uideline structure to take conscious account of the reality of current federal sentencing practice."[68] Moreover, he believes that such a reconfiguration "will surely be less rule-bound and more standard-like."[69] I will offer a few comments about the benefits of such a system and its most important features.

To understand why the incorporation of a standard-based sentencing enhancement would be a significant – but worthwhile – departure from the Guidelines' current structure, it is necessary to understand how the Guidelines have evolved from their origins to the present day. When the Guidelines went into effect in 1987, they were mandatory in most cases.[70] The presence or absence of specified facts identified in the Guidelines generated a sentencing range, and with few exceptions, all that was left for the judge to do was select a sentence

65. Bowman, *supra* note 3, at 31.

66. *See* Guarnera, *supra* note 2, at 760–67.

67. *See* Gall v. United States, 552 U.S. 38, 49–50 (2007); 18 U.S.C. § 3553(a) (2012), *partially abrogated by* United States v. Booker, 543 U.S. 220 (2005).

68. Bowman, *supra* note 3, at 32.

69. *Id.*

70. *See* 18 U.S.C. § 3553(b)(1).

within that range.[71] The rule-oriented Guidelines constrained judicial discretion – the perceived source of unwarranted sentencing disparities – through the use of sentencing factors that could be consistently applied by all judges.[72] Having decided as a policy matter that the Guidelines should maximize uniformity and minimize discretion, the Commission's willingness to eschew qualitative considerations (like motive) in favor of readily quantifiable metrics (like loss) is understandable, despite their often self-evident under-inclusiveness.

In 2005, however, the Supreme Court held in *United States v. Booker* that the mandatory nature of the Guidelines violated the Sixth Amendment.[73] It then remedied the violation by deeming the Guidelines advisory.[74] Contemporary Supreme Court-mandated sentencing procedure starts with a Guidelines calculation and ends with the judge ensuring that the final sentence takes into account all the statutory sentencing factors identified in 18 U.S.C. § 3553(a) – titled "Factors to Be Considered in Imposing a Sentence" – such as whether the sentence is "sufficient, but not greater than necessary," to promote the principles of just deserts, deterrence, incapacitation, and rehabilitation.[75] At this last and determinative stage of sentencing, the judge "may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented."[76]

Surprisingly, *Booker*'s foundational transformation of federal sentencing practice has had no discernible effect on the design of the Guidelines themselves. The Guidelines' strictly quantitative, rule-based structure has endured despite their reimagined role in sentencing procedure and judges' new (or, rather, newly effectual) responsibility to evaluate sentences in light of the factors in § 3553(a). This is unfortunate. Post-*Booker*, a significant number of defendants continue to be sentenced within the Guidelines range, which indicates the Guidelines' rules work well for many crimes.[77] But where the rates of out-

71. *See generally* U.S. SENTENCING GUIDELINES MANUAL §1B1.1 (U.S. SENTENCING COMM'N 2016) (describing the process of selecting a sentence using the Guidelines).

72. *See* Guarnera, *supra* note 2, at 722, 735–36.

73. United States v. Booker, 543 U.S. 220, 244 (2005) (holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt").

74. *Id.* at 246.

75. *See* United States v. Gall, 552 U.S. 38, 49 (2007); 18 U.S.C. § 3553(a)(2). Under 18 U.S.C. § 3553(a), courts are instructed to consider factors such as "the nature and circumstances of the offense and the history and characteristics of the defendant," the need for the sentence to account for retribution, deterrence, incapacitation, and rehabilitation, "the kinds of sentences available," and "the need to avoid unwarranted sentence disparities." *Id.*

76. *Gall*, 552 U.S. at 39.

77. *See* Molina-Martinez v. United States, 136 S. Ct. 1338, 1346 (2016) ("In less than 20% of cases since 2007 have district courts 'imposed above- or below-Guidelines sentences absent a Government motion.'" (quoting Peugh v. United States, 133 S. Ct.

of-Guidelines sentences are persistently higher than average, and the challenges of crafting quantitative rules are especially great, the Commission should not tie itself to a failing formula.[78]

Since the loss calculation's ability to measure culpability is inherently limited, one of the most important roles for a discretion-enhancing standard would be to equip judges to evaluate culpability. As I noted in my previous article,[79] the American Bar Association's Task Force on the Reform of Federal Sentencing for Economic Crimes ("ABA Task Force") recently offered a proposal along these lines.[80] It includes several attractive structural features that should be incorporated in any standards-oriented provision to grade culpability in Section 2B1.1.[81]

First, a standards-based system should permit judges to make a direct and holistic determination of a defendant's relative culpability, which would then be integrated into the overall structure of the Guidelines. For example, the ABA Task Force's proposal requires judges to place defendants in one of five tiers based on their degree of culpability, each of which carries an associated sentencing enhancement.[82] These enhancements are then added to the others in Section 2B1.1 and elsewhere in the Guidelines to produce the final sentence.[83] In these ways, the standards-based inquiry is constrained by the otherwise rule-oriented structure of the Guidelines.[84]

Second, the culpability inquiry should not be unguided. Rather, the Commission should offer its unique sentencing expertise to provide a taxonomy of substantive factors relevant to culpability, perhaps categorized by type of offense. For example, the ABA Task Force identifies a non-exclusive list of factors relevant to culpability, such as (1) the motive/nature of the offense, (2) gain, (3) degree of sophistication/organization, (4) duration, (5) extenuating circumstances, and (6) efforts to mitigate harm.[85] It then provides additional insight into how each of these factors might be analyzed under common fact patterns and offers commentary about which are typically associated with

---

2072, 2084 (2013))); U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 9, at tbl.N.

78. *See* U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 9, at tbl.27A (showing approximately 30% of economic crime sentences below the Guidelines recommendation without a government-sponsored departure, second among major offense categories only to child pornography production).

79. *See* Guarnera, *supra* note 2, at 762–66.

80. JAMES E. FELMAN, 28-WTR CRIM. JUST. 31, A REPORT ON BEHALF OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES 31 (2014).

81. *Id.* at 33.

82. *Id.*

83. *See id.*

84. *See id.* The ABA Task Force's proposal eliminates most of the sentencing factors currently found in Section 2B1.1, but the Commission need not necessarily follow that same approach.

85. *Id.* at 32–33.

higher degrees of culpability.[86] In appropriate cases, the Commission might also offer statistics about how judges across the country have sentenced similarly situated defendants, or any other expertise that it can bring to bear in assisting judges as they assess culpability.

Third, the Commission should prescribe a decision-making process that promotes deliberation and encourages judges to give the greatest weight to the most relevant factors. One of the primary ways that the ABA Task Force's proposal does this is by requiring that all of the substantive factors identified in the proposed Guidelines be reviewed in every sentencing.[87] This practice helps ensure that judges consider the full range of relevant factors and grade defendants with respect to the entire spectrum of offenders.[88] Such an approach is analogous to "structured professional judgment" assessments, which have become widely used in fields such as medicine and psychology and have shown the ability to significantly improve decision-making outcomes.[89]

Professor Bowman raises some legitimate objections to the specifics of the ABA Task Force's proposal. One of his primary concerns is that the defendant's intended loss is not adequately accounted for.[90] I strongly concur

---

86. *See id.* at 34.

87. *Id.* at 33 ("Instead, the court arrives at one of five culpability levels after considering the combined effect of all culpability factors.").

88. *Id.* at 34.

89. *See generally* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT 48–51 (2009); Alex B. Haynes et al., *A Surgical Safety Check-List to Reduce Morbidity and Mortality in a Global Population*, 360 NEW ENG. J. MED. 491, 495–96 (2009) (finding that the use of a surgical checklist cut deaths in half); Annegret Borchard et al., *A Systematic Review of the Effectiveness, Compliance, and Critical Factors for Implementation of Safety Checklists in Surgery*, 256 ANNALS SURGERY 925, 927–31 (2012) (concluding based on a meta-analysis of twenty-one studies that the use of check-lists in surgery cuts the rates of mortality and complications by 40%); Jerrod Brown & Jay P. Singh, *Forensic Risk Assessment: A Beginner's Guide*, 1 ARCHIVES FORENSIC PSYCHOL. 49, 54 (2014) (describing how, in structured professional judgment assessments, empirically-driven factors "are used as an aide-memoire, guiding administrators in making a categorical risk judgment"); Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 39 (2011) (describing the effectiveness of structured professional judgments in predicting risk of violence in patients).

90. Bowman, *supra* note 3, at 28–29. Professor Bowman also argues that the culpability enhancement in the ABA Task Force proposal is calibrated such that it will rarely produce significant prison sentences for defendants who did not cause any actual loss. *Id.* at 29 n.148. He notes that when there is no culpability enhancement, a sentence would not account for "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." *Id.* at 28–29. But with the possible exception of the complexity of the scheme, those factors are not accounted for elsewhere in the current Guidelines either. *See* U.S. SENTENCING GUIDELINES MANUAL §2B1.1(b)(10)(C) (U.S. SENTENCING COMM'N 2016) (enhancing sentences by two offense levels if "sophisticated means" were used). The sentences generated by the ABA Task Force's proposal

that this is an oversight. Intended loss (especially when defined as subjectively expected loss) is a highly relevant data point that should be expressly considered every time judges evaluate culpability – just because loss does not capture culpability well on its own does not mean that it should not be part of a holistic evaluation.[91] No doubt, many other adjustments could be made to the ABA Task Force's proposal, and the Commission should seek extensive input from the full range of stakeholders to craft standards-based provisions that are manageable in scope, avoid imposing an undue burden, and are of practical use to judges.

Congress has instructed the Commission to "establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2)."[92] By incorporating difficult-to-quantify factors like culpability into the Guidelines by means of standards, the Guidelines themselves become more transparent, and judges are better equipped to evaluate whether an advisory sentencing recommendation accurately captures the relevant statutory considerations. This will, in the long run, give judges greater confidence that they are assessing the § 3553(a) factors as Congress intended, resulting in more deliberative decision-making at sentencing and increasing the Guidelines' credibility in the eyes of judges and other actors in the criminal justice system.[93]

V. CONCLUSION

The incorporation of a standards-based assessment of culpability into the economic crime Guidelines is a worthy goal, one with the promise of striking a better balance between uniformity and discretion, rules and standards, and centralized and localized decision-making. It would, in short, further the Guidelines' goals of channeling judicial discretion while offering judges the

---

may well need further calibration. But as a matter of design, a standards-based culpability assessment is the best way to account for qualitative factors like those Professor Bowman mentions.

91. For this reason, I disagree with some critics of the Guidelines who reject any role whatsoever for quantifiable measurements in the Guidelines. *See, e.g.*, Wes Reber Porter, *Federal Judges Need Competing Information to Rival the Misleading Guidelines at Sentencing*, 26 FED. SENT. REP. 28, 30 (2013) ("The federal criminal justice system should maintain the structure, organization, and considerations of the Guidelines, but do away with the distracting and misleading numbers and calculations that accompany the Guidelines.").

92. 28 U.S.C. § 991(b)(1) (2012).

93. In an advisory sentencing regime, credibility is essential to the Guidelines' continued effectiveness. *See, e.g.*, Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268, 1277 (2014) ("Judges who have no prior experience sentencing under the mandatory Guidelines regime are more likely to depart from the Guidelines-recommended range than their pre-Booker counterparts, suggesting that newer judges are less anchored to the Guidelines.").

freedom to consider all relevant facts and ensuring that the statutory obligations under § 3553(a) are met. Ultimately, this type of reform would lead to more proportional sentences. But it would also be a dramatic change from the rule-oriented status quo, and one that is best implemented cautiously, one Guideline at a time. Although it is relevant to sentencing, a defendant's intended loss is a fatally flawed proxy for culpability writ large. The assessment of culpability in the economic crime Guidelines would, therefore, be an ideal place for the Commission to begin experimenting with standards in sentencing.