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# How Much Should Mind Matter? Mens Rea in Theft and Fraud Sentencing



## JAMES GIBSON

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The U.S. Sentencing Commission recently voted to publish a proposal in the Federal Register that revises the definition of “loss,” the primary determinant of sentence length for theft and fraud offenses.<sup>1</sup> [Ed. Note: The Commission proposal is reproduced at p.168 of this issue of FSR.] Anyone who has followed the Commission’s deliberations on loss will see that the proposed definition attempts to address many of the contentious issues that have arisen in the case law and commentary. The issues that the proposed definition concentrates on, however, such as credits, interest, causation, and gain, tend to inform the inquiry into “actual loss” rather than “intended loss,” even though the latter concept is integral to both definitions.

Although neither the current nor the proposed definition provides much guidance for working with intended loss, the Commission did preserve the “whichever is greater” rule that is currently found in the fraud guideline: if the loss that the defendant intended is higher than the actual loss that occurred, use intended loss as the final loss figure. It also added a short definition of the term: “‘Intended loss’ means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under § 1B1.3 [and that realistically could have occurred].”<sup>2</sup>

Unfortunately, both the “whichever is greater” rule and the proposed intended loss definition are seriously flawed. As the following discussion will demonstrate, the “whichever is greater” rule has the effect of treating different defendants similarly, and the proposed definition fails to account for certain mental states that may merit increased punishment even though they do not rise to the level of “intent.” Correcting these shortcomings would improve the loss definition and help ensure that federal courts impose properly proportionate sentences.

### I. The “Whichever Is Greater” Rule

#### A. What the Nanny Trial Can Teach Us

In order to show that the “whichever is greater” rule is fundamentally flawed, let me turn to a seemingly unrelated area of the law, one familiar to anyone who followed last autumn’s infamous “nanny trial”: homicide sentencing. As we all remember, a Massachusetts jury convicted British nanny Louise Woodward of second-degree murder in the death of an infant in her care, eight-month-old Matthew Eappen. As a

result, she faced a sentence of life in prison, with the possibility of parole after fifteen years. Judge Hiller Zobel, however, reduced the conviction to involuntary manslaughter and sentenced Woodward to the nine months she had already served.

Judge Zobel overruled the verdict not because of any dispute about the result of Woodward’s conduct—like the jury, he believed that Woodward’s criminally culpable actions caused Matthew’s death—but because the evidence did not show the “malice . . . supporting a conviction for second degree murder.”<sup>3</sup> In other words, the difference between a life sentence and “time served” was not the harm done, but the harm intended or foreseen.<sup>4</sup> A murder conviction contemplates a defendant who either sets out to kill someone or engages in conduct that constitutes an obvious risk to someone’s life,<sup>5</sup> whereas involuntary manslaughter (and its more lenient punishment) is reserved for those who produce the same result with a less pernicious mens rea.

Suppose, however, that Matthew Eappen had merely suffered a minor injury. The jury, if it truly believed that Woodward intended to kill the child, would have convicted her of attempted murder. Judge Zobel, with his more charitable view of Woodward’s mens rea, would probably have allowed only a conviction for simple assault and battery. The difference in punishment is again significant, and again turns solely on the difference in mens rea. (A conviction for attempted murder in Massachusetts can result in a sentence of up to ten years in prison—twenty if poison, drowning, or strangulation was involved<sup>6</sup>—whereas a simple assault defendant is subject to no more than a five-year sentence, and only two-and-a-half years if the victim was an adult.<sup>7</sup>)

In ranking the seriousness of homicide and assault offenses, therefore, both the actual result of the crime and the result that the defendant intended play a role. The law reserves its most severe punishment for those who both intend to and do cause death. Those who intend to and do cause mere injury receive the lightest punishment. Finally, those who intend death but cause only injury and those who intend (at most) an injury but cause death fall somewhere in between. And this is as it should be: two people who cause the same result should not receive the same punishment if one had a more evil intent, and two people with the same evil intent should not receive the same punishment if the

conduct of one produced more harmful real-world consequences than the conduct of the other.

#### B. The Loss Analogy

The logic we find in homicide and assault sentencing, however, is absent from both the current loss definition and the new draft definition that the Commission recently published. In both versions, the Commission focuses on the very same elements that distinguish homicide offenses from one another: the actual harm that the offense caused, and the harm that the defendant intended. Fraud defendants, however, are sentenced based on the actual loss that they caused *or* the loss that they intended, *whichever is greater*.<sup>8</sup> While this may appear at first blush to be a methodology sensitive both to a defendant's mens rea and to the actual harm that resulted, it is in fact a methodology that renders one of these two factors completely irrelevant to the defendant's sentence whenever the other is higher. It is the equivalent of sentencing a manslaughter defendant to life in prison merely because he or she caused the same result as a cold-hearted murderer, with no "discount" for the difference in mindset.

The most commonly cited justification for the "whichever is greater" rule is that it is necessary to ensure that defendants whose frauds are exposed before they cause any actual harm are not sentenced too leniently. And it is true that a defendant who intends a \$150,000 loss but whose fortuitous apprehension prevents the loss from exceeding, say, \$10,000 deserves more punishment than a defendant who intended to and did cause no more than a \$10,000 loss. But the "whichever is greater" rule is a poor solution to this problem, for two reasons.

First, in an effort to ensure that inchoate frauds are not treated too leniently, the rule treats them too harshly. An inchoate crime deserves a less severe sentence than a completed crime, because the real-world consequences of one's behavior matter. Attempted murder is just as serious as murder in terms of mens rea, but the actual harm that a murderer causes merits a greater punishment over the attempted murderer. This is not to say that the serious nature of an attempted murderer's *mens rea* should play *no* part in sentencing; it should simply not be the *only* factor that determines sentence. To focus only on mens rea is the equivalent of sentencing all drunk drivers as if they had committed vehicular homicide, on the grounds that only mere fortuity prevented their irresponsible behavior from causing someone's death. Such a policy strikes us as absurd only because we instinctively realize that the actual harm that criminals cause is just as important in sentencing as their mindset. Intended loss should therefore never be the only factor that a court con-

siders when sentencing a theft or fraud defendant.

Second, even if one disagrees with the preceding point and believes that inchoate crimes do deserve the same punishment as completed crimes, the "whichever is greater" rule is overbroad. It does ensure that the evil-minded criminal will not be treated too leniently merely because his or her fraud was interrupted before it could bear fruit. Unfortunately, it also ensures that less evil mindsets will be ignored in many instances. Suppose, for example, that we have an experienced, previously reliable government contractor who submits the lowest bid for a new project, but falsely states on the application that he has never been convicted of a criminal offense. He wins the contract and receives an initial installment of \$150,000, but the fraud is discovered before any significant work has been done. The evidence clearly shows that despite his misrepresentation he intended to perform the contract in full and was capable of doing so, so the intended loss is zero. The actual loss is \$150,000. In such a case, the "whichever is greater" rule would produce a loss amount of \$150,000. In other words, the contractor would suffer the same fate as a con artist who intended merely to pocket the \$150,000 and skip town, even though the latter's mens rea is indisputably more pernicious.<sup>9</sup>

A similar fate befalls the debtor who fraudulently procures an unsecured \$150,000 loan with the intent and ability to repay it on schedule, but who is caught and arrested before any payments are due. The debtor, having already received the loan proceeds from the bank, is accountable under the current and proposed loss definitions for a \$150,000 loss; he or she is treated just like a defendant who stole \$150,000 from the bank's vault. But is the debtor who intends no loss to the bank truly deserving of the same punishment as the thief who intends to make off with the full \$150,000?

In short, the "whichever is greater" rule, in trying to minimize the effect of fortuity on sentences, produces illogical results. By ignoring actual loss when intended loss is higher, the rule sentences inchoate crimes as harshly as completed crimes, even though the criminal law normally recognizes a sub-stative distinction between the two. By ignoring intended loss when actual loss is higher, the rule wrongly ignores the less serious mens rea of the defendant who, but for a fortuitous apprehension, would have given the victims some value for their money.

What is needed, then, is a method that can account for both mens rea and actual harm in every case, a method that never ignores either factor. One possibility is determining the loss amount based on actual loss only, with intended loss as an encouraged

departure factor. This method has the advantage of simplicity, but too many cases would involve different intended loss and actual loss amounts to make it the best choice. Departures should be reserved for relatively rare fact patterns.

A better rule would be to sentence defendants based on the average of their actual loss and intended loss. While this method may frighten members of the mathematically challenged legal profession, it in fact demands little more effort than the current loss definition. The "whichever is greater" rule already requires the courts to determine both the actual loss and the intended loss in every case; an averaging rule would add one simple step.

Indeed, if we view mens rea and actual harm as of roughly equal importance in determining theft and fraud sentences, a method like averaging that accounts for each in equal measure is the only method that makes sense. Suppose we have the following four defendants: Defendant *A* sets out to and does cause \$150,000 in loss. Defendant *B*'s \$150,000 scheme is discovered after causing only \$10,000 in actual loss. Defendant *C* fraudulently procures an unsecured \$150,000 loan, with the intent and ability to pay it back, but is apprehended before any payments are due. Defendant *D* both intends and causes a loss of \$10,000.

Under the "whichever is greater" rule, Defendants *A*, *B*, and *C* are each accountable for loss figures of \$150,000. Defendant *D* is accountable for \$10,000. Under an averaging approach, the same results obtain for Defendants *A* and *D*, but the loss amounts for Defendants *B* (\$80,000, the average of \$150,000 intended and \$10,000 actual) and *C* (\$75,000, the average of zero intended and \$150,000 actual) fall somewhere in between the other two, just as the sentences for attempted murder and involuntary manslaughter fall somewhere in between the sentences for murder and simple assault. Defendant *B* is sentenced more leniently than Defendant *A* for the same reason that attempted murder is sentenced more leniently than completed murder: less actual harm. Defendant *C* is sentenced more leniently than Defendant *A* for the same reason that involuntary manslaughter is sentenced more leniently than completed murder: less serious mens rea. Note, however, that neither Defendant *B* nor Defendant *C* is sentenced as leniently as Defendant *D*; the averaging method ensures that Defendant *B*'s evil intent and the harmful effects of Defendant *C*'s criminality push their sentences upward.

As this example shows, the averaging method would produce a lower loss figure than the "whichever is greater" rule for any defendant whose intended loss differs from his or her actual loss. In fact, if the Commission were to replace the "which-

ever is greater" rule with the averaging method, a defendant whose unrealized aim was a multimillion-dollar fraud would see more of a reduction in his or her loss figure than someone who plotted to steal just a little. If one accepts the premise that intent and actual harm are of roughly equal importance in theft and fraud sentencing, however, this "lowering effect" is inevitable; any perceived inequity demonstrates not that the averaging method is too lenient, but that the current system is too imprecise.

Nevertheless, the lowering effect would seem to be an inopportune result of the averaging method, given the Commission's current proposals to raise theft and fraud sentences.<sup>10</sup> The Commission's interest in higher theft and fraud penalties, however, itself provides a solution to the lowering effect: because the loss tables are currently "in play," the Commission can simply adjust the tables upward to account for any unwanted lowering effect that the averaging method (or, in fact, any aspect of the new loss definition) would have on defendants' sentences. Indeed, the simultaneous revision of the loss tables and the loss definition allows the Commission first to focus on crafting an efficient, workable, principled definition of loss and then change the loss tables to account for any politically unpopular reduction in loss figures that the definition produces.

## II. "Intent" and "Intended Loss"

Another way of mitigating the lowering effect that the averaging method would have on loss levels is to expand the scope of the intended loss concept. Neither the current nor proposed definition of intended loss accounts for states of mind that arguably deserve punishment but that do not rise to the level of intent. In contrast, the proposed definition of actual loss hinges on the element of foreseeability,<sup>11</sup> thereby acknowledging that unintended harms may have a role to play in theft and fraud sentencing. Given this acknowledgment, perhaps the Commission should examine the intended loss concept to see if it merits similar revision.

Suppose we have a post office employee who steals credit cards and sells them for \$100 each. Although she is aware that her buyers use the credit cards to make illegal purchases, her intent is merely to make \$100 per theft. Her intended loss would include the loss to the credit card owners only if we stretch "intent" beyond its normal legal meaning: she would have to be accountable for those losses that she *knew* would occur as a consequence of her actions, even though the credit card charges were not the goal of her criminal acts.<sup>12</sup>

Or suppose we have an investment broker who takes more risks with his clients' money than he was authorized to do. He may well intend for the risky

investments to pay off, and they may not be so risky that one can say he *knows* that a loss will occur, but he is certainly being *reckless* regarding the possibility of a loss. Nevertheless, his intended loss would be zero. In fact, if he gets lucky and the investments pan out, his actual loss would also be zero, resulting in no offense level increase for loss despite the great risks he took.

Anyone who endured the first year of law school will recognize that the foregoing examples draw distinctions between the various states of *mens rea* that the criminal law uses to define statutory offenses. "Intent" (also known as "purpose") is the most serious *mens rea*, with "knowledge" coming next, followed by "recklessness" and "criminal negligence."<sup>13</sup> By concentrating on intent alone, the Commission has implicitly decided to ignore the lesser criminal mental states. This would not necessarily be a problem if it was an explicit policy decision, but the emphasis on actual loss issues has largely kept intended loss issues such as this out of the Commission's view.

Of course, a more sophisticated theft and fraud sentencing scheme would produce a different punishment for each different *mens rea*. The "intent" or "purpose" defendant would receive a greater sentence increase than the "knowing" defendant, who in turn would receive a greater increase than the "reckless" defendant (assuming the same actual loss in each case). Neither the current nor the proposed structure of the loss guideline, however, lends itself to such distinctions, and including such a fine level of detail in the theft and fraud guidelines would likely be more problematic than useful. The Commission therefore needs to make a policy decision regarding whether knowledge and recklessness are sufficiently serious and common mental states to merit inclusion in the existing intended loss concept. The proposed approach, in which these concepts are subsumed in an encouraged departure for unrealized "risk of loss,"<sup>14</sup> may be adequate, but the Commission should explicitly consider whether it makes sense to deal with just one level of *mens rea* (intent) in the intended loss calculation and leave others (knowledge and recklessness) for departure.

Of course, the averaging method works just fine without expanding the current definition of intended loss. And the inclusion of foreseeable losses in the actual loss concept does not necessitate a revision of intended loss; regardless of whether the same *mens rea* element is present in each concept, random chance will ensure that the actual loss and the loss that a defendant intended or risked are not always identical. But an expansion of intended loss would go a long way toward mitigating the lowering effect that the averaging method would have on current loss

levels. For instance, without the expansion our shady investment broker who risks and loses \$100,000 of his clients' money would be accountable for a \$100,000 loss under the current and proposed loss definition, as opposed to just \$50,000 under the averaging method.<sup>15</sup> Expand the scope of intended loss to include the concept of recklessness, however, and even the averaging method produces a loss figure of \$100,000.<sup>16</sup>

### III. Conclusion

One of the difficulties in formulating rules to govern the determination of loss is that someone can almost always devise a hypothetical fact pattern for which a proposed rule is inadequate. The Commission nevertheless only needs to worry about those fact patterns that are common enough to warrant specific commentary. It can leave less frequently occurring cases in the capable hands of individual judges, confident that even if they are resolved differently in different courtrooms their smaller number will have little effect on overall disparity in federal sentencing.

The hypothetical examples given in the above discussion, however, represent categories of cases that are already addressed in the current guidelines, and which therefore presumably occur often enough to merit constant reevaluation. Procurement frauds, loan application frauds, credit card thefts, inchoate offenses, and cases in which intended loss and actual loss differ all occur frequently enough that the Commission has seen fit to write special rules for them. In the course of reforming the loss definition, then, the Commission must consider whether the rules that govern intended loss, and which therefore affect all these cases, are adequate.

### Notes

<sup>1</sup>See 63 Fed. Reg. 614-19 (1998). The Commission actually published two options for revision of the loss definition, but both handle intended loss in the same way, so I shall refer to them together as the proposed definition.

<sup>2</sup>*Id.* at 615, 616. The bracketed language occurs only in the second option; the brackets indicate that the Commission is considering but is unsure about adding that language.

<sup>3</sup>*Commonwealth v. Woodward*, No. Crim. 97-0433, 1997 WL 694119, at \*6 (Mass. Super. Ct. Nov. 10, 1997).

<sup>4</sup>One may argue that Judge Zobel imposed too light a punishment; even with the reduced conviction, Woodward could have been sentenced to as much as twenty years in prison. See MASS. GEN. LAWS ANN. ch. 265, § 13 (West 1997). The point, however, is that Massachusetts, like other jurisdictions, provides for significantly longer sentences for murderers than for those convicted of manslaughter. According to the most recent national statistics, the average sentence for murder is 279 months, with 105 months served. Involuntary manslaughter sentences average 122 months, with 40 months served. CRAIG PERKINS, U.S. DEPARTMENT OF JUSTICE, NATIONAL CORRECTIONS REPORTING PROGRAM, 1992 tbls. 1-14 & 2-6 (1994).

<sup>5</sup>For instance, the prosecution in the nanny trial attempted to prove malice by showing that Woodward engaged in conduct that a

reasonable person would have known created a "plain and strong likelihood" of death. *Woodward*, 1997 WL 694119, at \*3.

<sup>6</sup>Massachusetts law has two statutes that could apply to what I call "attempted murder." "Attempt to murder" applies if poisoning, drowning, or strangulation was involved. See MASS. GEN. LAWS ANN. ch. 265, § 16. Otherwise the "assault with intent to commit murder" statute governs. See *id.* § 15.

<sup>7</sup>*Id.* §§ 13A & 13J. Other jurisdictions obviously have other statutory constraints, but the *relative* ranking of offense seriousness is the same: murder is more serious than attempted murder and manslaughter, which are more serious than simple assault.

<sup>8</sup>See U.S.S.G. § 2F1.1, comment. (n.7) (1997); 63 Fed. Reg. 615, 616 (1998). In contrast, the current theft guideline makes no mention of intended loss, see U.S.S.G. § 2B1.1, which has led courts to some rather convoluted conclusions about the Commission's reasoning. See, e.g., *United States v. Kopp*, 951 F.2d 521, 529-30 & n.13 (3d Cir. 1992).

<sup>9</sup>See *United States v. Schneider*, 930 F.2d 555, 558 (7th Cir. 1991) (Posner, J.) (drawing distinction between con artist and legitimate contractor). This hypothetical is a slight variation of the facts from *Schneider*; in *Schneider*, the contractor's fraud was discovered before any payment was made, resulting in no actual loss (except for the costs of finding a new contractor). *Id.* at 556-58.

<sup>10</sup>See 63 Fed. Reg. 602-04 (1998) (featuring proposals for amending the loss tables in U.S.S.G. §§ 2B1.1(b)(1) and 2F1.1(b)(1) so as to raise theft and fraud sentences).

<sup>11</sup>See 63 Fed. Reg. 615, 616 (1998) ("Actual loss' means the reasonably foreseeable harm resulting from the conduct for which the defendant is accountable . . .").

<sup>12</sup>As one might expect, this has not prevented creative prosecutors from arguing for an expansion of the intended loss concept. See, e.g., *United States v. Wells*, 127 F.3d 739, 745-48 (8th Cir. 1997) (rejecting prosecution argument that "intended loss" means "possible loss that could arise from the charged crime"). Such expansion does seem inappropriate under the current language, especially since 1991 when the Commission removed "probable loss" from the concept of "intended loss." See U.S. SENTENCING COMMISSION, GUIDELINES MANUAL app. C at 210 (1997).

<sup>13</sup>For the most succinct definition of these terms, see MODEL PENAL CODE § 2.02 (1985).

<sup>14</sup>See 63 Fed. Reg. 617 (1998) (encouraging a departure when "the offense created a serious risk of substantially greater economic harm than the loss that actually occurred.").

<sup>15</sup>\$100,000 actual plus \$0 intended, divided by two.

<sup>16</sup>\$100,000 actual plus \$100,000 intended or recklessly risked, divided by two.