SENTENCES SHOULD BE REASONABLE, NOT SHOCKING: A DE-EMPHASIS ON LOSS FOR FEDERAL SECURITIES FRAUD SENTENCING

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This Note considers the role of loss in determining appropriate sentences in criminal securities fraud cases. This Note begins with an analysis of the history of loss in federal economic crime sentencing and the changes brought by the U.S. Sentencing Guidelines. This background informs a discussion of the different approaches that courts have taken in calculating criminal securities fraud sentences—namely, either adopting or rejecting the principles governing damages in civil cases. Additionally, this Note considers the increased use of discretion by district courts, as allowed by the decision in United States v. Booker*, to determine that sentences based primarily on loss are unreasonable. The author concludes that the use of loss in sentencing would create a bright-line rule for courts to follow, achieving the U.S. Sentencing Guidelines' goal of uniformity; this uniformity, however, would come at the expense of proportionality and fairness. To resolve this conflict, the author suggests that courts follow civil principles for determining loss but exercise* Booker *discretion in cases where following these principles would be unjust or produce disproportionate sentences.*

I. INTRODUCTION

"In cases where fraud allegedly affects fluctuations in the prices of securities, loss calculation is easily the most complicated and disputed factor in sentencing."[1] This statement encompasses the state of turmoil federal courts face when determining appropriate securities fraud sentences, with loss being the paramount factor in the analysis. Under the U.S. Sentencing Guidelines (Guidelines) the overall loss to investors

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1. Kevin P. McCormick, *Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing*, 82 TUL. L. REV. 1145, 1148 (2008) (discussing the difficulty federal courts have faced in measuring loss and the resulting effects on sentencing).

caused by a misrepresentation or manipulation of securities is the primary determinant of criminal culpability for securities fraud, and directly influences the sentence imposed on a particular offender.[2] Courts have struggled with the loss calculation and as a result, in many cases, have imposed sentences that are disproportionate to the crime.[3] The inevitable complexities and difficulties in administering the loss factor raises questions as to what extent courts should rely on "loss" to determine sentencing, and whether more accurate measures of criminal culpability would lead to a more proportionate and just sentencing regime.

The Guidelines have left courts in a state of disagreement as they struggle to calculate loss to determine reasonable prison terms for securities fraud defendants. The following hypothetical demonstrates not only the important role loss plays in sentencing, but also the enormous effect that different methods of calculating loss have on sentencing. Imagine CEO *A* and CEO *B*, both executives of a major publicly traded company, are tried and convicted for criminal securities fraud violations. At sentencing, experts calculate the amount of loss caused by each executive's fraud. At CEO *A*'s sentencing phase, experts determine that *A* caused $215 million in loss—based on the price of stock before the fraud was revealed minus the price afterward, without excluding external market factors. Experts for CEO *B*'s sentencing phase, on the other hand, exclude extrinsic fluctuations in the market in calculating loss by looking at comparable companies and the market overall, and determine that the defendant's fraud caused $25,000 in loss.

Assuming that neither CEO *A* nor CEO *B* has a prior criminal history, these varying determinations mean that the overall offense levels for CEO *A* and CEO *B* would be forty-three and nineteen, respectively. CEO *A*'s base offense level would be seven.[4] CEO *A* would have a four-level increase if the crime involved more than fifty victims,[5] plus another four levels since he was an officer of a public company.[6] Finally, CEO *A* would have an additional twenty-eight-level increase for losses over $200 million,[7] which brings the total offense level to forty-three. CEO *B* would have the same base level and offense level increases, except there would only be a four-level increase for losses, because investor losses

2. *Id.* at 1148.

3. *See* Paul G. Cassell, *The Edge of Justice: Rubashkin Sentence Must Be Fair—Not Shocking*, THE CUTTING EDGE (Apr. 26, 2010), http://www.thecuttingedgenews.com/index.php?article=12143 (describing how reliance on loss calculation leads to sentences that are disproportionate to the offense).

4. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (2010) (setting the base offense level at seven when a defendant is convicted of securities fraud and the offense has a maximum prison term of twenty years; otherwise a base level of six is required).

5. *Id.* § 2B1.1(b)(2)(B).

6. *Id.* § 2B1.1(b)(17)(A).

7. *Id.* § 2B1.1(b)(1)(O).

were more than $10,000 and less than $30,000.[8] This brings CEO *B*'s overall offense level to nineteen.

Under the Guidelines' sentencing structure, CEO *A* could receive a life-term sentence in prison.[9] CEO *B*, however, would receive a sentencing range between twenty-seven and thirty-three months.[10] The huge influence loss has on sentencing is apparent when comparing CEO *A*'s life term to that of CEO *B*'s maximum range, two years and nine months. According to one critic, "The Guidelines follow no 'economic reality principle' and provide no single universal method for loss calculation,"[11] yet loss is the critical factor in securities fraud sentencing. Courts consistently base sentences on loss, but are unable to agree on a single method of quantifying it. Some courts allow a certain amount of extrinsic factors to enter their loss calculation,[12] as in CEO *A*'s case, while other courts require calculations that reduce the impact of external factors when determining loss caused by an offender's fraud,[13] as in CEO *B*'s case. The impact these different calculations have on an individual's sentence can be extreme, raising the sentence to decades or life in prison.

Courts are currently split on how to measure "loss" for sentencing purposes and the Guidelines have been of little help in defining the appropriate method. Commentary to the Guidelines states that "[t]he court need only make a reasonable estimate of the loss."[14] Despite the lack of clarity of how to measure loss, it remains the primary factor in determining sentencing for white-collar criminal defendants.[15] In the complex arena of securities law, calculating loss is a difficult task, especially for courts; consequently case law lacks uniformity. Recently, circuit courts have begun to examine methodologies used to calculate damages in civil securities fraud cases for guidance in calculating loss in criminal sentencing for Guidelines enhancement.[16] Not all circuits have accepted

8. *Id.* § 2B1.1(b)(1)(C).

9. *Id.* ch. 5, pt. A, Sentencing Table.

10. *Id.*

11. Evan A. Jenness, *'Loss' in the Air Will Not Do*, BUS. CRIMES BULL., Apr. 1, 2008, at 1 (citing U.S. SENTENCING COMM'N, OFFICE OF GEN. COUNSEL, AN OVERVIEW OF LOSS IN USSG § 2B1.1, at 4 (2007)).

12. *See, e.g.*, United States v. Berger, 587 F.3d 1038, 1043–45 (9th Cir. 2009) (refusing to confine loss calculations to losses "proximately" caused by the offender's fraudulent conduct, and allowing external factors to enter into the loss calculation for sentencing purposes); United States v. Eyman, 313 F.3d 741, 744 (2d Cir. 2002) (relying on a "market loss" approach, calculating loss based on the correlation of the decline in stock price with the disclosure of fraudulent conduct).

13. *See* United States v. Olis, 429 F.3d 540, 545–46 (5th Cir. 2005) (stating that "actual" loss, required by the Guidelines, means loss directly caused by the defendant's fraudulent conduct).

14. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(C) (2010).

15. *See* Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1012 (2010) ("Under the current sentencing regime in white-collar cases, the key determinant of a white-collar criminal defendant's sentence is the amount of the loss attributed to that defendant.").

16. *See, e.g.*, United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) ("[W]e see no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime . . . ."); *Olis*, 429 F.3d at 546 ("Useful guidance appears in the applicable principles for recovery of civil damages for securities fraud.").

the idea of borrowing civil methodologies for criminal sentencing purposes, arguing that loss serves different purposes in the civil and criminal contexts.[17] Further, some district courts have begun to stray from the Guidelines' emphasis on loss, especially where it results in shockingly high and disproportionate sentences.[18]

This Note analyzes the various approaches courts use in calculating loss attributable to a defendant's conduct and their reliance on the Guidelines' approach to sentencing. Part II presents the background of applicable law, explains the sentencing regime, and describes the circuit split. Part III explains the application of the different approaches to loss calculation and the justifications and flaws of each. Part IV recommends a fact intensive and individualized approach that would yield results consistent with the concepts of fairness, reasonableness, and penological goals.

II. BACKGROUND: THE HISTORY OF LOSS IN FEDERAL ECONOMIC CRIME SENTENCING

Criminal enforcement of white-collar crimes, securities fraud violations in particular, is a somewhat recent development in criminal law.[19] Since the inception of federal securities laws, enforcement of securities fraud has undergone enormous change. Not only has there been a shift from a focus on civil enforcement to criminal enforcement, but there have also been drastic changes in punishment for securities fraud through the evolution of the Guidelines.

For many years, civil enforcement was the primary means of enforcing securities laws and only recently has criminal prosecution become the enforcement mechanism of choice. Courts encountering these issues in the criminal sphere often look to civil jurisprudence for guidance. This shift in focus from the civil to the criminal context has led to reliance on loss calculation as the determinate factor in securities fraud sentencing. Understanding the debate over loss calculation requires a grasp of the increased criminal enforcement of economic crimes and the history and structure of the Guidelines as they apply to economic crimes.

17. *See Berger*, 587 F.3d at 1043 (declining to adopt civil methodologies because the policy rationale for civil remedies does not apply in the criminal context, and the civil approach is inconsistent with the principles of the Guidelines).

18. *See, e.g.*, United States v. Parris, 573 F. Supp. 2d 744, 750–51 (E.D.N.Y. 2008) (departing downward from the Guidelines range, calling it "draconian" and stating the Guidelines did "not provide realistic guidance").

19. Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 734 (2007).

A. History of the Guidelines

1. The Rise of Criminal Enforcement of Securities Fraud

Private causes of action for securities fraud, implied under Securities and Exchange Commission (SEC) Rule 10(b), have long been recognized by the judicial system.[20] Criminal enforcement of securities fraud, however, was slow to catch on for several reasons. The most notable reason is a lack of government resources to prosecute these cases, compared with private plaintiffs in civil cases who were willing to invest their own resources in order to recover damages.[21]

By the 1980s, high-profile corporate schemes and a growing animosity towards white-collar offenders fueled support for criminal enforcement of securities violations and led to a shift from civil to criminal enforcement of securities fraud.[22] Further, in the mid-1990s the Private Securities Litigation Reform Act made it more difficult to bring securities claims in an effort to limit frivolous claims.[23] A new class of economic crimes emerged as a result of a growing distaste for the fraudulent enrichment of corporate officers.[24]

Further development came in 2002. The Sarbanes-Oxley Act added a provision to supplement the already-existing criminal statutes governing economic crimes by adding a provision covering securities fraud.[25] The Act made it a crime to knowingly execute, or attempt to execute, a fraudulent scheme in connection with the securities of a public company, or to fraudulently obtain money or property in connection with the purchase or sale of such securities.[26] Defendants convicted of violating the securities fraud provision can be imprisoned for up to twenty-five years.[27] As a result of the restructuring of criminal enforcement of white-collar crimes, courts face the challenge of determining the appropriate measure of criminal culpability for securities fraud offenders.

20. Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious As Well As the Frivolous*, 40 WM. & MARY L. REV. 1055, 1067–69 (1999).

21. McCormick, *supra* note 1, at 1155.

22. *Id.* at 1158 (discussing the political reasons that led to the "growing animosity towards corporate officers" which resulted in the shift from civil to criminal enforcement of securities fraud violations).

23. H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730.

24. HOWARD M. FRIEDMAN, SECURITIES AND COMMODITIES ENFORCEMENT 191 (1981) (comparing the sentences for white-collar crimes to sentences for bank robbery and noting that the differences are not only a function of "judicial temperament," but also due to federal statutes).

25. *See* McCormick, *supra* note 1, at 1161.

26. *See* 18 U.S.C. § 1348 (2006) (making it a crime "to defraud any person in connection with any security . . . or . . . to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security").

27. *Id.* ("Whoever knowingly executes, or attempts to execute, a scheme or artifice . . . shall be fined under this title, or imprisoned not more than 25 years, or both.").

2. Pre-Guidelines Sentencing Structure

To get a better understanding of the sentencing regime for securities fraud, it is helpful to briefly discuss the history of the Guidelines. Prior to the inception of the Guidelines, concern over the unwarranted sentencing disparities among similarly situated offenders of federal crimes was growing.[28] Due to a reliance on rehabilitative sentencing and a heavily "individualized" approach to sentencing,[29] "sentences for substantially similar federal crimes varied across regional, racial, and gender lines."[30] In the 1970s, skeptics of the rehabilitative approach sought reform to achieve greater uniformity.[31] In doing this, they moved to reduce judicial sentencing discretion and to adopt a system that placed greater emphasis on the nature of the crime and less emphasis upon the characteristics of the individual defendant.[32]

Recognizing the need for reform, Congress, through the Comprehensive Crime Control Act of 1984, created the U.S. Sentencing Commission to address the growing concern over sentencing disparities.[33] The Commission was empowered to develop guidelines to make sentencing uniform and proportionate in light of criminal law objectives[34] while preserving flexibility.[35] With these goals in mind, the Commission developed the first U.S. Sentencing Guidelines in 1987 and with it ushered in a new sentencing regime for white-collar crimes.[36]

3. Promulgation of the Guidelines

When the Guidelines were drafted, they were intended to promote "achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system."[37] When applied to economic crimes, the Guidelines call for "short but definite" imprisonment for white-collar defendants.[38] The Guidelines sought to achieve congressionally prescribed goals by creating a sentencing structure using behavior categories to determine appropriate sentencing ranges. These behav-

28. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988).

29. 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, 377–78 (2004).

30. *See* Vollrath, *supra* note 15, at 1005.

31. *See* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 28 (2003).

32. *See id.*

33. 28 U.S.C. § 991(a) (2006); *see* Vollrath, *supra* note 15, at 1005–06.

34. 18 U.S.C. § 3553(a)(2) (2006) (emphasizing criminal law objectives such as deterrence, incapacitation, rehabilitation, and retribution).

35. Congress specified various factors to be considered in determining sentences and required the court to "impose a sentence sufficient, but not greater than necessary, to comply with" the goals of criminal law. *Id.* § 3553(a).

36. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2010).

37. *Id.* § 1A1.3.

38. Vollrath, *supra* note 15, 1007.

ior categories take into account categories of specific behaviors involved in an offense, such as fraud or misrepresentation, and correlates these behaviors with an offender's individual characteristics, such as prior criminal conduct, in order to prescribe a guideline range.[39] The goal of proportionality was achieved without disturbing uniformity by weighing sentences separately for each defendant while restricting confinement to the sentencing range.[40]

B. Federal Law Governing Securities Fraud Violations Under the Guidelines

1. Substantive Law

Dissatisfied with previous judicial sentencing practice in white-collar crimes, where "discrepancies between the punishment of white-collar crimes and their blue-collar analogues" were prevalent, the SEC imposed stricter sentences for these crimes.[41] Prior to the enactment of the Guidelines, defendants convicted of theft were punished with imprisonment, whereas white-collar defendants were ordered to pay a fine.[42] In 2001, the Sentencing Commission addressed these disparities among economic crimes and amended the Guidelines' treatment of such crimes.[43] The Commission concluded that "the distinction between theft and fraud [was] largely illusory,"[44] and thus consolidated approximately 250 economic crimes, including fraud, into Section 2B1.1 of the Guidelines.[45] The Commission grouped these crimes into a single section in an effort to eliminate the unnecessary distinctions between crimes with similar offenses and offender characteristics.[46]

39. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2. ("The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories.").

40. *See* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 6 (2006) [hereinafter BOOKER REPORT], http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf (indicating that the Sentencing Commission created this system in an effort to conform with the goal of increased "uniformity in sentencing while not sacrificing proportionality").

41. Vollrath, *supra* note 15, at 1007.

42. *Id.*

43. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617.

44. Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 24 (2001).

45. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617.

46. *See id.*

2. Basic Structure of the Guidelines for Securities Fraud

In an effort to eliminate unwarranted disparities, sentences under the Guidelines are based primarily on two factors: (1) the conduct associated with the particular statutory violation (the offense conduct, which produces the offense level); and (2) the offender's criminal history.[47] The Sentencing Table in the Guidelines uses the relationship between these two factors to determine a specific sentencing range.[48] The Table is set up like a grid with criminal history on the vertical axis and offense levels on the horizontal axis.[49] For each pairing of criminal history and offense level, the Table provides a sentencing range in months, which indicates the appropriate range within which a court should sentence a defendant.[50] For example, if a defendant has an offense level of sixteen and a criminal history of I, the Guidelines recommend a sentence between twenty-one and twenty-seven months.[51]

Before consulting the Table, a court must first determine the defendant's offense level.[52] The offense level is determined by looking up the offense in Chapter 2 and applying applicable adjustments.[53] An offender's offense level is intended to reflect the seriousness of the crime committed.[54] Accordingly, the more serious the crime, the higher the offense level for that defendant.[55] The first step in calculating an offense level is to determine the base offense level, which is based on the statutory violation.[56] For example, a defendant convicted of securities fraud violation receives a base offense level of seven.[57] After determining the base offense level, a sentencing court adds additional levels based on characteristics of the defendant's specific offense and the defendant himself.[58] The most influential offense characteristic in securities fraud cases is the amount of loss caused by the fraudulent conduct, which can result in an offense level from zero to thirty , depending on the amount of loss.[59] Finally, after a sentencing court makes the appropriate adjustments to the base offense level to reach the defendant's overall offense level, it must compare that number to the corresponding sentence range in the Table to arrive at the applicable sentencing range.[60] This reflects the current Guidelines application to fraud cases. While the offense levels have

47. *See id.* ch. 5, pt. A, Sentencing Table.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *See id.* ch. 2, introductory cmt.
53. *See id.*
54. *See id.* § 1A1.3.
55. *See id.* § 1A1.4(h).
56. *See id.* § 1A1.4(a).
57. *See id.* § 2B1.1.
58. *See id.*
59. *See id.*
60. *Id.* ch. 5, pt. A, Sentencing Table.

changed throughout the years, the basic structure of the Guidelines has remained intact throughout their existence.[61]

C. Evolution of the Guidelines Since Their Inception

1. 1980s–1990s: A Trend Toward Punishment

Throughout the late 1980s and 1990s, major developments continued to influence and change white-collar sentencing under the Guidelines. These developments moved the Guidelines from their original "short but definite" sentences to the "complicated and severe system" it is today.[62] The Sentencing Commission amended the Guidelines several times in an effort to "better reflect society's values regarding the criminal culpability of economic offenders."[63] One major change brought by these amendments was altering the loss table to increase sentence levels for white-collar criminals.[64]

2. 1990s–2001: The Economic Crime Package

Another major influence on the Guidelines was the Economic Crime Package amendments, which lowered sentences for defendants whose fraud resulted in relatively low loss, while significantly raising sentences for defendants whose fraud caused high loss.[65] These amendments also made changes to the loss tables and added "offense-level enhancements based on the number of victims."[66] The Commission furthered uniformity by sentencing similarly situated offenders comparably, recognizing that since theft and fraud offenses are conceptually alike, there is no strong reason for them to be sentenced differently.[67]

3. 2002: The Sarbanes-Oxley Act

The most recent development in the Guidelines was the Sarbanes-Oxley Act of 2002, which was Congress's response to the accounting scandals of Enron, WorldCom, Tyco, and Global Crossing.[68] In an effort to deter and punish offenders, the Sarbanes-Oxley Act took an aggressive approach to economic crimes and suggested that the Commission review and amend the Guidelines to reflect the serious nature of these offenses.[69] Although the provisions were stated as "requests," the Com-

61. *See* Vollrath, *supra* note 15, at 1008–12.
62. *See id.* at 1008.
63. McCormick, *supra* note 1, at 1160.
64. Bowman, *supra* note 29, at 387.
65. Vollrath, *supra* note 15, at 1009.
66. *Id.* at 1009–10.
67. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2010).
68. Vollrath, *supra* note 15, at 1010.
69. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 905(a)–(b), 116 Stat. 745, 805–06.

mission responded by enhancing several of the Guidelines' ranges relating to financial fraud.[70]

The most significant impact the Sarbanes-Oxley Act had on the Guidelines was the enhanced sentence range reflecting loss. The Guidelines increased the base level offense from six to seven for individuals convicted of financial crimes and also added two additional sentence enhancements, a twenty-eight-level increase for offenses resulting in losses above $200 million and a thirty-level increase for losses above $400 million.[71] With loss as the new focal point in sentencing, a financial fraud resulting in a highly inflated stock followed by a significant decline in market value upon disclosure of the misrepresentation could add numerous points to the offense level, having significant ramifications on a defendant's sentence.[72] The emphasis on loss and its enormous impact on sentencing have led to much debate as to what the appropriate method of measuring loss should be.[73]

4. 2005: United States v. Booker

Although originally mandatory for courts sentencing defendants, the Guidelines no longer get the final say, because the Supreme Court's decision in *United States v. Booker* in 2005 rendered them advisory.[74] In a subsequent decision, the Court concluded that in assessing the reasonableness of a sentence, a sentencing judge should look primarily to the factors set out in 18 U.S.C. § 3553(a).[75]

Section 3553(a) was part of the Sentencing Reform Act that not only established the current Guidelines, but also set forth factors courts must consider in the sentencing phase.[76] The statute requires a court to impose sentences "sufficient, but not greater than necessary"[77] to accomplish the following goals: (1) "reflect the seriousness of the offense;"[78] (2) "promote respect for the law;"[79] (3) "provide just punishment for the of-

70. 3 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW § 20:4.62 (2d ed. 2011).

71. 2 HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 36:9 (2011).

72. *Id.* Loss is one of several factors used to determine sentencing for securities law violations. The Guidelines also provide increased offense levels depending on the number of victims, whether the defendant is a company officer, and the amount of skill used to commit the fraud. *Id.* This Note, however, will only consider loss for purposes of this argument.

73. *See supra* notes 14–18 and accompanying text.

74. United States v. Booker, 543 U.S. 220, 259 (2005) (holding that the Guidelines are no longer mandatory, but rather one factor for courts to consider when determining sentences).

75. Rita v. United States, 551 U.S. 338, 347–48 (2007) (citing 18 U.S.C. § 3553(a) (2000 & Supp. IV 2005)) (stating that the dominant inquiry in assessing the reasonableness of a sentence is the degree to which that sentence fulfills Congress's objectives).

76. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, §§ 217–37, 98 Stat. 1837, 2017–34 (establishing the Sentencing Commission); *id.* § 212(a)(2), 98 Stat. at 1987–2010 (codifying the purposes of sentencing).

77. 18 U.S.C. § 3553(a) (2006).

78. *Id.* § 3553(a)(2)(A).

79. *Id.*

fense;"[80] (4) "afford adequate deterrence to criminal conduct;"[81] (5) "protect the public from further crimes of the defendant;"[82] and (6) "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[83] In order to achieve these goals, a sentencing court must consider the "nature and circumstances of the offense," the individual offender's history and characteristics,[84] and other forms of available sentences.[85]

The Supreme Court continues to emphasize that it is the responsibility of the sentencing judge to consider the factual circumstances in each case before imposing a sentence.[86] This requires a court to "make an individualized assessment based on the facts presented" rather than presuming the reasonableness of a sentence simply because it is within the Guidelines' range.[87]

Regardless of this reduction in the Guidelines' authority, they still have a huge influence on the imposition of sentences. As the Supreme Court explained in *Booker* and has since emphasized in subsequent decisions, sentencing judges are required to use the Guidelines as a starting point when determining sentences.[88] Once a court determines the appropriate offense level and the corresponding Guidelines sentencing range, the court retains discretion to depart from the range if it finds it necessary.[89] If, however, a court ultimately decides to depart from the Guidelines range, it must provide a compelling justification for doing so.[90] In recent high-profile cases, judges have used high loss calculations and their relation to an offender's culpability as a justification for departing from the Guidelines.[91]

80. *Id.*
81. *Id.* § 3553(a)(2)(B).
82. *Id.* § 3553(a)(2)(C).
83. *Id.* § 3553(a)(2)(D).
84. *Id.* § 3553(a)(1).
85. *Id.* § 3553(a)(3).
86. Gall v. United States, 552 U.S. 38, 52 (2007) ("It has been uniform and constant . . . for the sentencing judge to consider every convicted person as an individual and every case as a unique study . . . ." (quoting Koon v. United States, 518 U.S. 81, 113 (1996))).
87. *Id.* at 50; *see also* Rita v. United States, 551 U.S. 338, 351 (2007) ("The sentencing judge . . . . may hear arguments by prosecution or defense that the Guidelines sentence should not apply . . . .").
88. United States v. Booker, 543 U.S. 220, 245–46 (2005).
89. *Id.* (determining that the Guidelines must be "advisory").
90. A judge should ensure that there is sufficient evidence to justify and support deviation for purposes of appellate review and to promote fair sentencing. *See Gall*, 552 U.S. at 49–50.
91. *See supra* note 18.

D. Economic Crimes: Loss As a Measure of Culpability

There is nothing new about measuring the culpability of economic offenders by "the magnitude and nature of the economic deprivation caused by their crimes."[92] This measure of culpability for economic crimes is deeply rooted in common law, and this failure to consider the mental state of the offender is the primary factor that distinguishes economic crimes from other criminal conduct.[93] The Guidelines echo this traditional method of measuring culpability in securities fraud sentencing. The Guidelines establish that the amount of loss caused by a defendant's offense should be the primary factor in determining sentencing for criminal securities fraud violations.[94]

1. Loss As a Measurement of Culpability

The Guidelines use loss as a means to best represent an offender's culpability in relation to the seriousness of an offense.[95] A defendant convicted of securities fraud violations may have an increased advisory sentence range under Section 2B1.1 of the Guidelines depending on the amount of loss caused by the wrongful conduct.[96] The Guidelines, however, require that the losses be proximately caused by a defendant's illegal conduct.[97]

Courts and legal scholars are unable to agree on an appropriate measure of loss, and the Guidelines offer little assistance. According to the Guidelines, loss is defined as "the greater of actual loss or intended loss."[98] The Guidelines propose that courts look to "intended loss" where intended loss includes "intended pecuniary harm that would have been impossible or unlikely to occur."[99] "Actual loss" is defined as the "reasonably foreseeable pecuniary harm that resulted from the offense."[100] The Guidelines further provide that precision is not required, for a "court need only make a reasonable estimate of the loss."[101]

While the Guidelines provide that a court need only reasonably estimate loss, the method of calculation a court uses must be legally acceptable.[102] To be legally acceptable, the method of calculating loss must

92. Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 465 (1998).

93. Bowman, *supra* note 44, at 15.

94. Vollrath, *supra* note 15, at 1012.

95. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2010).

96. *Id.* (providing that increased loss results in an increased sentence).

97. Under the Guidelines' "relevant conduct" provision, a defendant's sentence should be based on "all harm that resulted from the acts or omissions" of the defendant. *Id.* § 1B1.3.

98. *Id.* § 2B1.1 cmt. n.3(A).

99. *Id.*

100. *Id.* (stating that "reasonably foreseeable pecuniary harm" is "pecuniary harm that the defendant knew, or under the circumstances, reasonably should have known, was a potential result of the offense").

101. *Id.* § 2B1.1 cmt. n.3(C).

102. *See* United States v. Saacks, 131 F.3d 540, 542–43 (5th Cir. 1997).

bear a reasonable relationship to a defendant's conduct.[103] The Guidelines' detailed definitions of loss do not explain how to measure loss, leaving this choice up to the courts.[104] With so much emphasis on loss as the key determinant of an individual's sentence, courts recognize the need to establish a method that accurately captures an offender's culpability, yet they struggle in doing so.[105] Courts have reached varying conclusions on the proper method to measure loss, all of which logically follow the Guidelines' broad definition of loss.[106]

2. Federal Courts' Current Interpretation and Emphasis on Loss

Circuit courts are currently split on the proper method of calculating loss for criminal securities fraud sentencing purposes. The complexities and economic realities of securities law make it difficult for courts to determine the appropriate measure of loss.[107] The Second Circuit notes that determining loss caused by a defendant "inevitably cannot be an exact science."[108]

The Supreme Court addressed loss causation pertaining to civil damages in *Dura Pharmaceuticals, Inc. v. Broudo* and determined that loss should reflect only the loss proximately caused by a defendant's harmful conduct.[109] Federal courts have varied their approach to the loss factor in determining sentencing. The Fifth and Second Circuits adopted the civil approach introduced in *Dura*, stating that principles governing damages in civil securities fraud cases are useful in determining loss for criminal sentencing purposes.[110] The Ninth Circuit, however, recently rejected the use of civil loss calculation for criminal sentencing purposes.[111] Finally, district courts have begun to use their discretion under *Booker*, and are increasingly deciding that sentences based primarily on loss are unreasonable and are looking to other factors in making their determinations.[112]

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103. United States v. Krenning, 93 F.3d 1257, 1269 (5th Cir. 1996) (stating that a legally acceptable "method used to calculate the amount of loss . . . must bear some reasonable relation to the actual or intended harm of the offense").

104. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3.

105. *See, e.g.*, Krenning, *supra* note 102, at 1270 (remanding for resentencing after finding loss calculation unacceptable).

106. *See, e.g.*, *Saacks*, 131 F.3d at 543.

107. *See supra* notes 98–101 and accompanying text.

108. United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007).

109. 544 U.S. 336, 346 (2009) (rejecting the inflated purchase price approach because it takes into consideration factors affecting economic loss, which were not proximately caused by the defendant).

110. *See Rutkoske*, 506 F.3d at 179 ("*Dura Pharmaceuticals*, on which the Fifth Circuit relied, provides useful guidance."); United States v. Olis, 429 F.3d 540, 546 (5th Cir. 2005) (holding that the civil measurement for determining loss in *Dura Pharmaceuticals* is appropriate for sentencing determinations).

111. United States v. Berger, 587 F.3d 1038, 1043 (9th Cir. 2009) (declining to apply the civil measurement in criminal securities fraud sentencing).

112. *See* Alan Vinegrad & Gretchen Hoff Varner, *Non-Guideline Sentences for White-Collar Defendants*, N.Y. L.J., Oct. 14, 2009, at 1 ("A recent series of decisions by the U.S. Supreme Court and

III. ANALYSIS: THE CURRENT SENTENCING REGIME

Circuits are split on the proper method of measuring loss and the Guidelines have been of little help in defining the appropriate method. The Guidelines only require a court to make a "reasonable estimate" of loss, given the evidence available.[113] Sentencing courts have been unable to define a single method for calculating loss. This confusion led to a lack of uniformity in sentencing among defendants with similar offenses and often resulted in grossly disproportionate sentences in relation to culpability. Most methodologies are consistent with the Guidelines suggested "reasonable estimate," however, they often lead to inconsistent sentences and conflict with the goals of sentencing.

A. Loss Causation Applied to Sentencing

1. Loss Causation in the Civil Sphere

In *Dura Pharmaceuticals*, the Supreme Court announced a method to determine loss in the civil arena[114] concluding that a civil plaintiff must first show that one actually suffered a loss, and then prove that the loss was attributable to the defendant's fraudulent actions.[115] The Court rejected the Ninth Circuit's theory of loss causation, which stated that plaintiffs of a civil fraud suit could establish loss causation by merely demonstrating that the price of stock at the time of purchase was artificially inflated because of the defendants' misrepresentation.[116] In its opinion, the Court observed that an inflated purchase price may cause investor loss if the investor sells shares "after the truth makes its way into the marketplace,"[117] but that reduced price may reflect extrinsic factors unrelated to the misrepresentation, such as changed economic conditions.[118] The Court held that a civil plaintiff must exclude extrinsic factors in demonstrating loss and prove the misrepresentation was the proximate cause of the economic loss suffered.[119]

The Court's holding in *Dura* ultimately required the parties to determine the amount of loss that actually resulted from the fraud (as opposed to other market forces) in order to show causation. Subsequent court decisions extended this holding by using the reasoning of *Dura* as a

the U.S. Court of Appeals for the Second Circuit have ushered in a new era of sentencing discretion, leaving the Sentencing Guidelines truly serving only as advisory guidelines.").

113. U.S. SENTENCING GUIDELINES MANUAL, § 2B1.1 cmt. n.3(C) (2010).

114. *Dura*, 544 U.S. at 343.

115. *Id.* ("To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires.").

116. *Id.* at 346.

117. *Id.* at 342.

118. *Id.* at 343 ("[A] lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.").

119. *Id.* at 346.

means of calculating the loss caused by a defendant, rather than merely a basis for establishing the principle that loss causation must be shown by the parties.[120] Thus, the Court's holding in *Dura* was a welcome departure for defendants from other commonly used methods of loss, which fail to exclude loss attributable to external factors, such as market fluctuation.[121] *Dura* is binding on the recovery of damages in civil securities fraud cases. It is important to note, however, that nowhere in the opinion did the Supreme Court comment on whether this standard should apply to criminal securities fraud sentencing.[122] Although some courts have been quick to apply this civil standard to criminal securities fraud sentencing, others have been more reluctant.[123]

2. Application of Dura *in the Criminal Context*

Before *Dura* there were a variety of ways courts calculated loss,[124] and proximate causation was not necessarily a factor in this determination.[125] Most methods involved some measure of calculating loss by subtracting the stock price after the fraud was disclosed from the stock price at a time before it was revealed.[126] Since *Dura*'s loss causation has entered the criminal arena, courts are now faced with a much more nuanced approach to determine what actions actually caused the loss and eradicate extrinsic factors before they reach the loss amount. For courts this means a lot more than a simple mathematical calculation. Testimony is now required from expert witnesses to make complex economic calculations as to what loss was actually caused by the fraud and what loss was caused by extrinsic economic events.

To illustrate the difference in loss calculations before and after *Dura*, consider the following example using the simple rescissory method

120. *See, e.g.*, Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 756 F. Supp. 2d 928, 935 (N.D. Ill. 2010).

121. *See, e.g.*, *id.*

122. *Dura*, 544 U.S. at 338 (specifically limiting the holding to "private plaintiff[s]").

123. United States v. Berger, 587 F.3d 1038, 1043 (9th Cir. 2009).

124. Most pre-*Dura* loss calculations fell into one of the following categories: simple rescissory method, modified rescissory method, market capitalization method, and out-of-pocket calculation method. *See* McCormick, *supra* note 1, at 1164–69.

125. *Id.* (discussing several methods of measuring loss caused by the fraud, none of which take into account proximate cause).

126. The simple rescissory method attempted to restore the victim to the position held prior to the transaction and calculated loss by subtracting the value of the stock after the fraud was disclosed from the price that the victim paid for the it. *Id.* at 1164. The Modified Rescissory Method attempted to alleviate the effects of some factors unrelated to the fraud by calculating the difference between the average stock price in the period the fraud occurred and the average stock price at some point after the fraud was revealed. *Id.* at 1165. By looking only at averages, however, this method failed to take into account many external factors. *Id.* The market capitalization method measured loss by calculating looking at the change in stock price immediately prior to and after the fraud was disclosed. *Id.* at 1166. Finally, the out-of-pocket calculation is based on the theory that the loss to the victim occurs when they purchase the stock for the inflated price. *Id.* at 1168. This method calculates loss as the difference between the price the victim paid for the stock and the value of the stock at the precise moment they bought it. *Id.* at 1169.

and *Dura* loss causation. Imagine a victim bought stock at fifty dollars, and after the fraud was revealed the value of that stock plummeted to ten dollars. Prior to *Dura*, using the simple rescissory method, courts would take the reduced value of the stock after the fraud was disclosed and subtract that number from the price of the stock when the victim purchased it. In this example, the loss would equal forty dollars (fifty minus forty). Before *Dura*, this simple subtraction was all that the court needed to calculate to determine loss in order to apply the appropriate sentence; courts did not carefully eliminate the effects of outside influences on stock price. *Dura*, on the other hand, is much more complex than the previous methods; it actually distinguishes between loss caused by the fraud and variations in price due to extrinsic factors. A court that adopts *Dura* would require experts on both sides of the case to flesh out those extrinsic factors by conducting event studies and various economic analyses. Accordingly, under *Dura*, the loss calculation is no longer something the courts can administer without the aid of an expert economist.

a. Fifth Circuit: *United States v. Olis*

Dura's impact quickly spread to criminal cases. Six months after the Supreme Court decided *Dura*, the Fifth Circuit extended the holding to criminal securities fraud cases in *United States v. Olis*.[127] Jamie Olis, a midlevel manager at Dynergy, Inc., was convicted of securities fraud, mail fraud, wire fraud, and conspiracy to commit fraud.[128] The district court employed the Guidelines and sentenced Olis to a staggering 292 months in prison.[129] The district court found that Olis was responsible for a loss of $105 million to one shareholder, enhancing his base offense by twenty-six levels under the Guidelines.[130] The district court further enhanced Olis's sentence by eight more levels after it determined that, in carrying out the fraud, Olis employed "sophisticated means" and "special skill," and the scheme included more than fifty victims.[131]

On appeal, the Fifth Circuit observed, "[t]he most significant determinant of Olis's sentence [was] the guidelines loss calculation."[132] In reviewing Olis's sentence, the Fifth Circuit determined that the civil damages measure of *Dura* provided "[u]seful guidance . . . [and] should be the backdrop for criminal responsibility both because it furnishes the standard of compensable injury for securities fraud victims and because it is attuned to stock market complexities."[133] Accordingly, the Fifth Circuit vacated the sentence on the premise that the district court's "loss

127. 429 F.3d 540, 545–49 (5th Cir. 2005).
128. *Id.* at 542.
129. *Id.*
130. *Id.* at 543.
131. *Id.*
132. *Id.* at 545.
133. *Id.* at 546.

calculation did not take into account the impact of extrinsic factors on [the defendant company's] stock price decline."[134]

b. Second Circuit: *United States v. Rutkoske*

The trend set by the Fifth Circuit was followed by the Second Circuit in *United States v. Rutkoske*.[135] Rutkoske had been convicted of securities fraud and conspiracy to commit securities fraud.[136] The district court, applying the Guidelines, sentenced Rutkoske to 108 months in prison after imposing a fifteen-level enhancement, an additional eighty-seven months to his base offense, for the amount of the loss.[137]

The Second Circuit held that *Dura* "provides useful guidance" for calculating loss for Guideline enhancements.[138] The court noted that there was "no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence."[139] The Second Circuit vacated Rutkoske's sentence and remanded the case for resentencing, consistent with the *Dura* loss causation approach.[140]

c. Implications of the *Dura* Loss Causation in Criminal Sentencing

Justification for the Fifth and Second Circuits' approach is premised on the idea that the civil measure of loss is more attuned to stock market complexities and can better serve sentencing goals.[141] First, the *Dura* loss causation reduces the impact of the nebulous concept of loss calculation under the Guidelines that equates sentences with often overinflated assessments of loss caused by the defendant's criminal behavior.[142] This approach ties loss directly to the defendant's wrongful conduct and in doing so achieves the "critical objective of federal sentencing [that] the imposition of punishment on the defendant . . . reflects his or her culpability for the criminal offense (rather than for the unrelated gyrations of the market)."[143] Second, borrowing from civil damages allows the court to calculate loss more precisely than other methodologies for measuring loss.[144] Finally, this approach achieves greater uniformity be-

134. *Id.* at 548–49.
135. 506 F.3d 170, 178–79 (2d Cir. 2007).
136. *Id.* at 171.
137. *Id.* at 174, 175.
138. *Id.* at 179.
139. *Id.*
140. *Id.* at 180.
141. *See* James A. Jones, II, Note, United States v. Berger*: The Rejection of Civil Loss Causation Principles in Connection with Criminal Securities Fraud*, 6 WASH. J.L. TECH. & ARTS 273, 279–80 (2011).
142. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 343 (2005).
143. United States v. Nacchio, 573 F.3d 1062, 1077 (10th Cir. 2009).
144. *See* United States v. Olis, 429 F.3d 540, 546 (5th Cir. 2005) ("The civil damage measure should be the backdrop for criminal responsibility both because it furnishes the standard of compen-

cause it is closely tied to an offender's conduct and attempts to eliminate fluctuations in the market.[145] This uniformity provides for more certainty in outcomes and gives defendants greater incentive to go to trial rather than negotiate a plea.[146]

This approach is flawed, however, for a few reasons. First, this approach will significantly burden parties to the litigation.[147] *Dura*'s loss causation requires a showing that loss was proximately caused by the defendant's fraudulent conduct.[148] Discerning proximate cause is complex and requires careful economic analysis to exclude external market factors, including "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events,"[149] which may account for market loss. This raises the burden for both defendants and government prosecutors to employ experts to determine the cause of the drop in share price.[150] Further, these costs may be trivial to civil plaintiffs who have millions of dollars at stake, but the government's limited resources and the increased financial burden of proving proximate cause may inhibit securities fraud prosecution due to lack of funding.[151]

Another drawback is the fact that this approach will likely lead to a battle of experts. A review of case law dealing with criminal securities fraud violations suggests that experts are often a challenge for the courts for several reasons.[152] For one, opposing sides each employ experts who use very different formulas to yield the most favorable result for their side. Faced with this problem, the court in *United States v. Grabske* decided to impose its own loss calculation after reviewing both parties' wildly divergent expert analysis.[153] Finally, it is possible that one party's expert could be more persuasive than the other party's, and that party may be able to sway the judge to adopt its loss causation analysis.[154] This

sable injury for securities fraud victims and because it is attuned to stock market complexities."); *see also Rutkoske*, 506 F.3d at 179.

145. *See* Matthew Foley & David M. Laigaie, *'Loss Causation' Helps Rationalize Sentencing in Securities Fraud Cases*, LEGAL INTELLIGENCER, July 22, 2009, at 5.

146. Steven D. Feldman, *Disparities Seen in Federal Securities Fraud Sentences*, N.Y. L.J., Mar. 20, 2009, at 4.

147. United States v. Bakhit, 218 F. Supp. 2d 1232, 1240 (C.D. Cal. 2002) ("[There] is a prudential and political concern with relying too heavily on expert testimony. Although it may be preferable for the district court to have the benefit of dueling experts and an extensive tutorial to determine the actual loss with exactitude, that is simply not practical in the vast majority of criminal fraud cases.").

148. Dura Pharm., Inc., v. Broudo, 544 U.S. 336, 346 (2005).

149. *Id.* at 343.

150. *See Bakhit*, 218 F. Supp. 2d at 1240.

151. David C. Esseks & Brian A. de Haan, 'Rutkoske'*: Loss Causation for Securities Fraud Sentences*, N.Y. L.J. (Feb. 1, 2008), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=900005502235&slreturn=1.

152. *See, e.g.*, *Bakhit*, 218 F. Supp. 2d at 1240.

153. 260 F. Supp. 2d 866, 869–71 (N.D. Cal. 2002) (finding the government's contention that loss caused by the defendant was $1.9 million and the defendant's contention that loss caused was $164,000 to both be unreasonable).

154. McCormick, *supra* note 1, at 1174.

is undesirable because it renders both the defendant and the prosecution "entirely dependent on the persuasiveness of [their] expert[s]."[155]

3. The Ninth Circuit's Refusal to Extend Dura *to Criminal Sentencing*

a. The Price Inflation Theory of Loss

Not all courts have been receptive to extending *Dura* to criminal sentencing. The Ninth Circuit was highly skeptical of the approach in *United States v. Berger*.[156] Berger was a CEO convicted of bank and securities fraud.[157] The district court found that Berger's total calculated loss was $5.2 million, requiring a fourteen-level increase to his level-sixteen sentence, resulting in a level-thirty sentence range.[158] As a result, Berger's sentencing range increased from 21–27 to 97–121 months.[159] Berger appealed this sentence to the Ninth Circuit on the grounds that the district court did not calculate loss using the *Dura* method.[160]

On review, the Ninth Circuit held that the *Dura* loss causation is not applicable for criminal sentencing purposes.[161] The court declined to extend *Dura*, concluding that the policy rationale of *Dura* does not apply to criminal cases and its principles are not consistent with those of the Guidelines.[162] The Ninth Circuit held that "were *Dura Pharmaceuticals*'s loss causation rule applied to criminal sentencing enhancements, that principle's plain rejection of the overvaluation loss measurement method would collide with Congress's clear endorsement of that method."[163] Instead, the Ninth Circuit emphasized a broader rule that "the court need only make a reasonable estimate of loss" and that the chosen method "should attempt to gauge the difference between . . . share price—as inflated through fraudulent representation—and what that price would have been absent the misrepresentation."[164] This approach, however, only requires the government to show how much of the loss was actually caused by the defendant, it does not require the exclusion of extrinsic factors that may cause the stock price to decline.[165] The court further stated that precision is not required and "some degree of uncertainty is tolerable."[166]

155. *Id.*
156. 587 F.3d 1038, 1042–45 (9th Cir. 2009).
157. *Id.* at 1040–41.
158. *Id.* at 1041.
159. *Id.*
160. *Id.* at 1042.
161. *Id.* at 1043.
162. *Id.* at 1042–45.
163. *Id.* at 1045 (internal citations omitted); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(c) (2010) ("The court need only make a reasonable estimate of the loss.").
164. *Berger*, 587 F.3d at 1045–47 (quoting another source).
165. *Id.*
166. *Id.* at 1045.

b. Implications of the Price Inflation Theory in Criminal Sentencing

Justifications for the Ninth Circuit's approach are premised on the fact that the identity theory of loss is easy to administer and the language of the Guidelines seems to endorse it.[167] First, the Ninth Circuit argues that the policy rationale of *Dura* does not apply to criminal cases and its principles are not consistent with those of the Guidelines.[168] The court stated that primary policy rationale for civil damages looks to the harm suffered by the plaintiff due to the fraud, but in criminal sentencing, "a court gauges the amount of loss caused, i.e., the harm that society as a whole suffered from the defendant's fraud."[169] Second, the court reasoned that the civil standard is inapplicable to criminal context because the Guidelines condone overvaluation, which is inconsistent with *Dura*.[170]

This "inflated purchase price theory," grounded in overvaluation of stock prices, is flawed for several reasons. First, this approach has been frowned upon by federal courts of appeals in criminal sentencing, and the Supreme Court has specifically rejected its application in computing civil damages.[171] It does not distinguish between inflation caused by external factors, such as changed economic circumstances, and inflation directly attributable to the misrepresentation.[172] Second, overvaluation is not consistent with the goals of sentencing, which require courts to take into account culpability by determining the sentence based on the defendant's conduct.[173] Finally, this approach results in decreased uniformity and disproportional sentences. By allowing extrinsic factors to enter into the loss calculation, it allows an inconsistent, fluctuating market to determine sentence enhancements.[174] This approach will have the effect of punishing similarly situated offenders differently, and it will impose sentences on offenders for factors unrelated to their conduct.[175]

167. *Id.* at 1045–47.
168. *Id.* at 1043.
169. *Id.* at 1044 (emphasis omitted).
170. *Id.* at 1045. Note that Section 2F1.1 is no longer applicable to securities fraud sentencing because it has been consolidated in Section 2B1.1. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(C) (2010).
171. *See* United States v. Rutkoske, 506 F.3d 170, 179–80 (2d Cir. 2007); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 340 (2005) (reversing the Ninth Circuit's approach to measuring loss in the civil context).
172. Foley & Laigaie, *supra* note 145, at 5.
173. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3.
174. *See Rutkoske*, 506 F.3d at 179–80.
175. *See id.*

B. The Inadequacy of Using Loss Calculation for Sentencing

Loss calculation generally inflates the Guidelines to unrealistic proportions.[176] Even as a starting point, financial fraud violations under the Guidelines calculation can lead to a sentence of life or greater; a sentence best left for murderers or violent criminals.[177] Although these violations are serious in nature, the loss calculation often leads to grossly disproportionate sentences and hardly reflects the Section 3553(a) concepts.[178] The core problem with this obsessive concern over loss is that such a quantifiable amount has little connection to offenders' culpability.[179]

1. Risk of Trial and the Government's Power: Plea Bargain

Faced with astoundingly high sentences produced by the loss calculation, defendants are often inclined to forgo trial and enter into plea bargains with the prosecution.[180] Unduly harsh sentences often leave offenders at the mercy of the prosecution; even offenders with good defenses are likely to forgo their right to trial for fear of unreasonably high sentences.[181] Courts often view plea bargains as cooperation with the government and accordingly assign lighter sentences.[182] When the government uses astoundingly high sentences as leverage at the sentencing stage, it leaves the offender without a valid choice and tends to rob the offender of his or her rights protected under the Fifth and Sixth Amendments: the right to a jury trial and the right against self-incrimination.[183]

In 2006, 94.9% of security fraud offenders entered guilty pleas, while only 5.1% went to trial.[184] The average sentence for fraud, over that same period, was 18.6 months,[185] which suggests that government plea bargaining results in lighter sentences. This may actually have the opposite effect than intended by the Guidelines. Significantly culpable offenders may receive drastically reduced sentences for cooperation, whereas less culpable offenders may receive higher ones for going to tri-

176. Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 168 (2008).

177. *Id.* at 168–69.

178. *Id.*

179. *Id.* at 171 ("[B]ecause loss serves multiple purposes and measures some factors relevant to criminal blameworthiness directly while acting as an indirect and imperfect proxy measurement of other factors, it can in an individual case overstate or understate the seriousness of an offense or the degree of the defendant's criminal culpability.").

180. *See* Podgor, *supra* note 19, at 749.

181. *See id.* at 749–52.

182. *See id.*

183. *See id.* at 749–52.

184. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.11 (2006) [hereinafter SOURCEBOOK], *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2006/SBTOC06.htm.

185. *Id.* at tbl.13.

al. For example, in the Enron prosecutions, the government handed down sentences that were far below the Guidelines' range to defendants who entered into plea deals with the prosecution.[186] An offender who went to trial and was sentenced within the Guidelines received more than twenty years in prison.[187] Because of cooperation, the highest sentence imposed among the cooperating defendants was six years for the CFO, Andrew Fastow.[188] This is not to say that the Enron defendants are necessarily more culpable than the defendant in the *Olis* case discussed above, but one can surely see the disparity in sentencing between those who enter plea deals and those who risk trial.

2. Disjunction Between "Loss Calculation" and the Requirement of Section 3553(a) that Sentences Be "Sufficient But Not Greater Than Necessary"

Basing punishment primarily on loss undermines the goals of sentencing. The Guidelines serve to promote uniformity, proportionality, and equity.[189] The goal of uniformity suggests that the Guidelines also seek to "avoid reducing sentencing to a game of chance 'in which the length of the sentence is determined by the draw of the judge.'"[190] It must be noted, however, that it has been uniform in the judicial system for sentencing judges to consider each offender individually and base punishment on the specific facts of the case.[191] The Guidelines' reliance on loss completely strips the sentencing phase of this individualized approach and, as a result, often leads to unjust sentences in securities fraud cases.[192]

The loss calculation, which is not tethered to reality or related to actual culpability, at times produces astoundingly high sentences.[193] "In

186. *See* Podgor, *supra* note 19, at 749.

187. *See id.*

188. Kristen Hays & Tom Fowler, *Some Shocked at Sentence: Fastow's 6 Years Has a Few Experts Scratching Heads*, HOUS. CHRON. (Sept. 28, 2006), http://www.chron.com/business/enron/article/Fastow-s-6-year-sentence-confuses-some-experts-1570881.php.

189. 24 C.J.S., *Criminal Law* § 2020 (2010); *see also* United States v. Booker, 543 U.S. 220, 253–54 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute. . . . It consists . . . of similar relationships between sentences and real conduct . . . ." (citations omitted)); Koon v. United States, 518 U.S. 81, 113 (1996) ("The goal of the Sentencing Guidelines is . . . to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.").

190. United States v. Perkins, 108 F.3d 512, 515 (4th Cir. 1997) (quoting United States v. Withers, 100 F.3d 1142, 1149 (4th Cir. 1996)).

191. *See Koon*, 518 U.S. at 113 ("[T]he Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge.").

192. Bowman, *supra* note 176, at 171.

193. *See supra* note 3 and accompanying text.

high-loss corporate fraud cases, the substantial offense-level enhancement provided for loss may itself overstate the seriousness of the defendant's offense."[194] Such a mechanical approach fails to distinguish between offenders with the minimum level of culpability and those with the highest level of culpability necessary for conviction. The Guidelines do not differentiate between "'[a] defendant who consciously sets out to steal or cause economic loss' and a defendant 'who acts dishonestly but without the desire to steal or cause loss.'"[195] Under the Guidelines, both defendants would receive the same sentencing range. This does not comport with the objective that "sentence[s] [be] sufficient, but not greater than necessary, to comply with" sentencing goals.[196] Imposing a lesser sentence on a defendant with minimal culpability than that of the most culpable defendant would be sufficient to further deterrence goals while maintaining fairness. The loss calculation, however, fails to consider culpability and often results in sentences that are greater than necessary.

3. Reliance on Loss Calculations Is Inconsistent with the Fundamental Principles of Criminal Law and Punishment

It is a fundamental principle of criminal law that the punishment imposed should reflect a defendant's moral blameworthiness.[197] Ordinarily, criminal liability requires an act or omission (actus reus), harm to the victim, and a culpable mental state (mens rea).[198] The concept of mens rea refers to the mental state necessary for criminal liability, but it also plays a role in punishment, allowing judges to sort offenders based on their moral culpability.[199] Generally, the criminal law assigns different levels of punishment for varying degrees of culpability.[200] For example, homicide committed intentionally is more blameworthy than the same result caused by recklessness or criminal negligence, and it is therefore punished more severely.[201]

Economic crimes are the exception to this general rule. Although substantive law does call for the requisite mental state for conviction, neither it nor the sentencing regime considers the possible varying degrees of culpability in allocating punishment. The necessary mens rea for

194. Bowman, *supra* note 176, at 171.

195. Cassell, *supra* note 3 (alteration in original) (quoting Professor Frank Bowman).

196. 18 U.S.C. § 3553(a) (2006).

197. WAYNE R. LAFAVE, CRIMINAL LAW 13–14 (4th ed. 2003) (stating that traditionally there is a requirement that there cannot be a crime without a culpable state of mind, but substantive law is relaxing those requirements by creating statutory crimes for negligence and strict liability crimes).

198. *Id.* at 8.

199. *See id.* at 239–300 (describing the different levels of culpability and how culpability relates to punishment).

200. *Id.*

201. ELLEN S. PODGOR ET AL., MASTERING CRIMINAL LAW 72 (2008).

securities fraud violations is willfulness.[202] This precludes criminal liability when the accused acts inadvertently, neglectfully, and through mistake, but recklessness and willful blindness are usually sufficient to establish culpability.[203] After a defendant has been found culpable and convicted, the inquiry into his or her culpable state of mind ends.[204] In the sentencing phase, the resulting harm (the loss caused by the defendant's conduct) is the primary measure of punishment.[205] Even though some defendants intend to cause substantial loss and are more deserving of punishment than others who do so recklessly, they are punished the same. The Guidelines treat them the same because they rely on loss, which mechanically moves the sentences higher, without ever taking into consideration the individual characteristics of the defendant.

Besides reflecting moral blameworthiness, mens rea also serves a deterrence purpose.[206] Punishing someone who acted with a cleaner mind the same as someone who acted with purpose to cause the harm would not be effective,[207] because individuals who are less culpable are not as dangerous and do not require as much deterrence.[208] A counterargument to this position is that punishing even the least culpable individual will serve as a deterrent to others who are more culpable and at the same time will induce others to be more careful and responsible in their actions.[209] This is a valid argument, but it ignores the goals of sentencing and would run afoul of the requirement that "sentence[s] [be] sufficient, but not greater than necessary."[210]

4. Comparison with Violent Crimes

Although the sentencing regime for securities fraud does not follow the norms of punishment available for most other crimes, it often punishes with equal severity.[211] A court must impose a sentence that reflects "the seriousness of the offense," but the emphasis on loss often overstates the severity of an offense.[212] The loss calculation's inability to measure culpable mental states tends to result in sentences that do not fit

202. Securities Act of 1933, 15 U.S.C. § 77x (2006); 15 U.S.C. § 78ff (2006) (providing two main criminal violations for material misrepresentation and insider trading).

203. *See* United States v. Ebbers, 458 F.3d 110, 124–25 (2d Cir. 2006) (finding "consciously avoiding information . . . signing documents he didn't bother to read in full . . . and tossing the management budget variance report in the trash without reading it" to be a willful violation); United States v. Boyer, 694 F.2d 58, 59 (3d Cir. 1982) ("[I]t is proper to charge that the specific intent to deceive may be found from a material misstatement of fact made with reckless disregard of the facts.")

204. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2010).

205. *Id.*

206. PODGOR ET AL., *supra* note 201, at 72.

207. *Id.*

208. *Id.*

209. *Id.*

210. 18 U.S.C. § 3553(a) (2006).

211. United States v. Ebbers, 458 F.3d 110, 129 n.4 (2d Cir. 2006) (issuing a level-forty-two sentence for securities violation, calling for thirty years to life in prison).

212. Bowman, *supra* note 176, at 171.

the crime. The shortcomings of the loss calculation's effectiveness in making the punishment fit the crime is evident when compared to sentencing systems for other crimes, particularly with the sentencing system for violent crimes.

This is not to say that white-collar crimes are not serious offenses in need of punishment. It is, however, difficult to say all defendants convicted of high-loss securities fraud are more deserving, or even equally deserving, of punishment equivalent to those convicted of murder and other violent crimes. But, this is exactly the result of the Guidelines' emphasis on loss and failure to allocate sentences reflecting blameworthiness. Defendants convicted of murder or violent crimes, on the other hand, enjoy a more individualized approach to sentencing than securities fraud defendants.

Relying on loss as the primary factor in punishment could result in minimally culpable securities fraud defendants receiving sentences equivalent to those reserved for some of the most violent offenders. Such a high sentence seems perfectly reasonable for a Bernie Madoff-type offender who is highly culpable and entirely motivated by personal gain. It seems unjust to impose an equal sentence on an *Adelson*-type offender who has the minimum level of culpability and is not motivated by greed.[213] For example, a securities fraud defendant with no criminal record and the minimum level of culpability could receive life in prison due to an offense level of forty-two to forty-three, based mainly on loss.[214] First degree murder also receives a maximum Guidelines' range of life in prison.[215] Second degree murder calls for a maximum of 293 months incarceration.[216] When a drug-trafficking ring results in death, the kingpin should receive a 293-month sentence.[217] A terrorist who sets off bombs in public places, intending to kill bystanders, receives 120 months.[218] Finally, someone convicted of rape is eligible for a minimum of 121 months.[219]

In making such comparisons, skeptics of the Guidelines question the rationale of a loss-based approach.[220]

> If disposed to take a very stringent view of corporate wrongdoing, one might be able to rationalize a multi-decade term for the very worst-of-the-worst, biggest-of-the-biggest corporate criminal, but under the current Guidelines a corporate officer who presides over a fraud involving securities and a loss of only $2.5 million can qualify for life imprisonment.[221]

213. *See infra* Part III.C.1.
214. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1; *id.* ch. 5, pt. A, Sentencing Table (2010).
215. *Id.* § 2A1.1; *id.* ch. 5, pt. A, Sentencing Table.
216. *Id.* § 2A1.2; *id.* ch. 5, pt. A, Sentencing Table.
217. *Id.* § 2D1.1(a)(2); *id.* ch. 5, pt. A, Sentencing Table (citing 21 U.S.C. § 41(b)(1)(A) (2006)).
218. *Id.* § 2K2.4(a)(1); *id.* ch. 5, pt. A, Sentencing Table (citing 18 U.S.C. § 844(h) (2006)).
219. *Id.* § 2A3.1; *id.* ch. 5, pt. A, Sentencing Table.
220. *See, e.g.*, Bowman, *supra* note 176, at 171.
221. *Id.* at 168. Under the current Guidelines a life sentence requires an offense level of forty-three for an offender with no prior history. *Id.* at 172 n.20. A defendant can reach a level forty-three:

Given the potentially shocking results of a loss-based approach to sentencing, it becomes apparent why some judges have begun to question its ability to produce just and reasonable sentences.

C. Divergence from the Guidelines' Emphasis on Loss: Where Sentences Are "Plainly Excessive"

1. Recent Trend in District Courts to De-Emphasize Loss Calculation

The unrest among federal appellate courts has brought about a new era of judicial discretion in white-collar sentencing.[222] Recent district court decisions "demonstrate that judges are taking full advantage of the new, discretionary sentencing regime for white-collar crimes, using their experience and judgment in determining what price an individual defendant should pay for his or her crime."[223] In cases where loss results in sentences that are "plainly excessive," district judges decline to take issue with loss amounts and instead opt to use their discretion to deviate from the Guidelines' emphasis on loss.[224]

A recent decision where the sentencing judge was faced with an astoundingly high sentence based on loss can be seen in the district court case *United States v. Adelson*.[225] Richard Adelson was the Chief Operating Officer of Impath, Inc.[226] Unlike many fraud cases, Adelson was not motivated by greed. Actually, he was a latecomer to the fraud. The district court noted "as President of the company, he feared the effects of exposing what he had belatedly learned was the substantial fraud perpetrated by others."[227] District Judge Rakoff held that the eighty-five year term resulting from the loss calculation was "so patently unreasonable as to require the Court to place greater emphasis on other sentencing factors to derive a sentence that comports with federal law."[228] Rakoff expressed his discontent with the Guidelines' overreliance on loss, stating that it is an "utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[229] Specifically, Judge Rakoff placed considerable weight on

assuming the following Guideline adjustments: base offense level of 7, U.S.S.G. § 2B1.1(a)(1) (2007); an 18-level increase for loss greater than $2.5 million, § 2B1.1(b)(1)(P); a 2-level increase for deriving more than $1 million in gross receipts, § 2B1.1(b)(13)(a); a 6-level increase for more than 250 victims, § 2B1.1(b)(2)(c); a 2-level increase for sophisticated means, § 2B1.1(b)(8)(c); a 4-level increase for violation of securities law by officer of publicly traded company, § 2B1.1(b)(15)(A); and a 4-level increase for aggravated role, § 3B1.1(a).

Id. at 172–73 n.20.

222. Vinegrad & Varner, *supra* note 112.

223. *Id.*

224. *Id.*

225. 441 F. Supp. 2d 506, 506 (S.D.N.Y. 2006).

226. *Id.* at 507.

227. *Id.* at 513.

228. *Id.* at 506, 507.

229. *Id.* at 512.

Adelson's "exemplary" past history and evidence of Adelson's good character.[230] Further, the court relied heavily on the fact that Adelson was a latecomer to the fraud and he only participated in the fraud to protect the company from the impairing effects of disclosure.[231]

The justification for the trend towards non-Guideline sentencing is that it seeks to balance the goals of sentencing with the need to consider each defendant and each case in light of individual and factual circumstances.[232] First, this trend follows the goals of uniformity because it only departs from the Guidelines sentencing range when it results in a "plainly excessive" sentence.[233] This approach takes into consideration the factual circumstances in each case and weighs them against the sentence; if the sentence is not "plainly excessive" then no departure is necessary.[234] Second, this trend favors a more individualized approach over the mechanical loss calculation, which ensures that the sentence is tied to the culpability of an individual defendant.[235] Finally, this approach achieves the aims of reasonableness. The purpose of this approach is to depart from unreasonable sentences that result from the loss calculation and move toward a more fact-sensitive approach and determine a more fitting and just sentence.[236]

Nevertheless, this approach may undermine one of the main purposes of the Guidelines, namely, to increase uniformity in sentencing, and therefore may lead to unpredictable outcomes.[237] First, the particular judge assigned to the case may largely determine the offender's sentence.[238] Increased judicial discretion may render sentences dependent on the draw of the judge, and as a result may lead to decreased uniformity.[239] Second, the lack of consistency makes it difficult for "practitioners and defendants to make informed choices about going to trial."[240] Since the Guidelines became advisory, courts have imposed sentences below

230. *Id.* at 513 ("Over 100 persons from all walks of life submitted detailed letters attesting, from personal knowledge, to Adelson's good works and deep humanity. . . . As these examples attest, Adelson's good deeds were not performed to gain status or enhance his image.").

231. *Id.*

232. *See* United States v. Parris, 573 F. Supp. 2d 744, 755 (E.D.N.Y. 2008).

233. Vinegrad & Varner, *supra* note 112.

234. *Id.*

235. *See* Marcia Coyle, *DOJ Wants Sentences Examined: Prosecutors See Disparity in Fraud, Child Pornography Punishments*, NAT'L L.J., July 19, 2010, at 21 ("It is important to remember that judges are sentencing people and it is not a mere mathematical computation that should control." (quoting Ellen Podgor)).

236. *Id.*

237. *See* AMENDOLA ET AL., *supra* note 189.

238. Coyle, *supra* note 235 (discussing how the Supreme Court's decision to strike down the mandatory nature of the Guidelines has led to "unwarranted sentencing disparities," and has made sentencing dependent on the judicial assignment of the case).

239. *Id.* ("If allowed to go unchecked . . . [fraud sentencing] will lead to unwarranted sentencing disparities, disrespect for federal courts and sentencing uncertainty that could lead to more crime . . . .").

240. Feldman, *supra* note 146, at 4.

the Guidelines range, but have not done so in any predictable manner.[241] Finally, the Department of Justice has voiced concerns that straying from the Guidelines in fraud cases demonstrates a lack of respect for the Guidelines.[242]

2. *Practical Effects of* Booker *on Sentencing Courts*

Although the Guidelines are no longer mandatory, they still have an important place in sentencing and remain in effect for several reasons. First, judges must use the Guidelines as a starting point, and therefore must perform calculations required by the Guidelines before *Booker*.[243] It is important to note, however, that the Guidelines range is not presumed to be reasonable.[244] Most courts, nevertheless, continue to assume that a sentence that falls within the Guidelines complies with the objectives set out in Section 3553(a).[245] Another reason for remaining within the Guidelines range is that a district court decision that varies from the Guidelines in an area resting on empirical evidence must be supported by a compelling justification to support the degree of deviation.[246] Finally, in *Kimbrough v. United States*, the Supreme Court recognized that the Commission "has the capacity courts lack to 'base its determination on empirical data and national experience, guided by a professional staff with appropriate expertise.'"[247] This reasoning may compel judges to follow Guidelines ranges because they believe the Guidelines render rational and supportable results.[248]

Since *Booker* rendered the Guidelines advisory, securities fraud cases have seen a slight increase in below-Guidelines-range sentencing.[249] According to statistics found by the Commission for 2006, 64.4% of fraud cases resulted in sentences within the Guidelines' range.[250] Only 2.3% of all fraud sentences were above the Guidelines' range, and 15.8% were

241. *Id.* (arguing that when the Guidelines were mandatory, "the outcome was far more predictable, albeit harsh").

242. *See* Coyle, *supra* note 235. In the article, Ellen Podgor of Stetson University College of Law, argues that sentences below the Guidelines do not necessarily demonstrate disrespect for the Guidelines, but "[r]ather, it recognizes that these are advisory guidelines for consultation and use in determining a sentence." *Id.*

243. Bowman, *supra* note 176, at 167; *see also* Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

244. *Gall*, 552 U.S. at 50.

245. *See* Bowman, *supra* note 176, at 168 (stating that sentencing judges are likely to find that sentences within the Guidelines are "rational and legally supportable").

246. *Gall*, 552 U.S. at 50 ("[If a judge] decides that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. [It is] uncontroversial that a major departure should be supported by a more significant justification than a minor one.").

247. 552 U.S. 85, 109 (2007) (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnel, J., concurring)).

248. Bowman, *supra* note 176, at 168.

249. *See* Coyle, *supra* note 235.

250. SOURCEBOOK, *supra* note 184, at tbl.27.

downward departures.[251] In these below-range sentences, the district courts used *Booker* and Section 3553(a) factors to form the basis and support their decision to depart from the Guidelines.[252] One thing is clear from these statistics: although the Guidelines are advisory, the fact that there has only been a slight increase in deviation since *Booker* demonstrates that the Guidelines continue to play an important role in sentencing.

IV. RESOLUTION

Fairness, uniformity, and proportionality are the main policy objectives of Guidelines' sentencing. Although loss establishes a bright-line rule favoring uniformity, it often does so at the expense of fairness and proportionality. To maintain uniformity while promoting fairness and proportionality, courts need to adopt a single method for measuring loss and allow flexibility when case-specific facts are in tension with the sentences produced by the loss calculation. Accordingly, *Dura*'s loss causation should be the uniform method used by courts to determine loss. Courts should begin their inquiry by first measuring loss, but when the specific facts of the case regarding loss produce disproportional sentences, courts should exercise their post-*Booker* discretion and take an individualized approach to vary sentences to fit the crime.[253]

A. Why Dura*'s Loss Causation As a Benchmark?*

The Supreme Court has stated that courts should use the Guidelines as a "starting point" for determining sentences.[254] Accordingly, courts need to establish a uniform standard for measuring loss. For the sake of uniformity and fairness, *Dura*'s loss causation should be the primary method sentencing courts use to determine loss.

1. Dura*'s Loss Causation Method Promotes Uniformity*

If uniformity truly is an underlying goal of sentencing, then it hardly makes sense to establish a regime that is primarily based on loss yet allows for various methods of calculating loss. With loss being the primary driver of sentences, differing methods for calculating loss have huge impacts on the resulting sentences and disturb uniformity. The current circuit split is evidence of the very real inconsistencies in sentencing between jurisdictions.[255] Defendants will receive much higher sentences in

251. *Id.*

252. BOOKER REPORT, *supra* note 40, at 77.

253. According to the Supreme Court, district court judges are in the best position to evaluate appropriate sentencing factors in the context of the facts of particular cases and particular defendants. Kimbrough v. United States, 552 U.S. 85, 109 (2007).

254. Gall v. United States, 552 U.S. 38, 49 (2007).

255. *See supra* Part III.A.2–3.

jurisdictions applying the "price inflation theory" of loss compared to defendants in jurisdictions using *Dura*'s approach.[256]

This disconnect in the courts frustrates the principle of uniformity and should be resolved in favor of *Dura*'s loss causation for a couple of reasons. First, the *Dura* approach has achieved broader acceptance in criminal sentencing than the "price inflation theory." Both the Fifth and Second Circuits have adopted *Dura*'s approach.[257] Second, although it is complex to determine, *Dura* leads to more predictable sentences by excluding extrinsic factors that contribute to stock price decline and narrowing the requisite causal connection between the fraud and the loss.[258] Although the "price inflation theory" is easily administered, its simplicity does not overshadow its outright rejection in recent sentencing court decisions.[259]

2. Dura*'s Loss Causation Promotes Fair Sentencing: Proximate Cause*

It is well established that proximate cause is as much a part of criminal law as it is civil law and should apply to criminal sentencing.[260] The "price inflation theory" of loss causation for sentencing, however, does not require proximate cause and is far more lenient than the standard required for civil damages.[261] The low standard does not take into account extrinsic factors unrelated to the offender's conduct, rather the government need only show that losses logically resulted from the criminal activity.[262] It does not make sense to require a stronger causal relationship for civil damages than in criminal cases where liberty is at stake.[263] Accordingly, courts should require a stronger causal connection at sentencing by applying *Dura*'s loss causation.

Dura's loss causation method promotes fairness by excluding extrinsic factors and requiring that loss be proximately caused by the defendant's conduct. This approach measures a defendant's criminal culpability by determining the pecuniary harm to the victims, but it narrows the scope of culpability by holding "a defendant responsible at sentencing only to the extent that losses are caused directly by the offense conduct."[264] This approach recognizes that stock often declines for reasons unrelated to an offender's conduct and such extrinsic causes should not

256. *See supra* Part III.A.2–3.
257. *See supra* Part III.A.2.
258. *See supra* Part III.A.2.
259. *See supra* Part III.A.2–3.
260. *See* United States v. Spinney, 795 F.2d 1410, 1415 (9th Cir. 1986) ("A basic tenet of criminal law is that the government must prove that the defendant's conduct was the legal or proximate cause of the resulting injury."); Benjamin E. Rosenberg, *Damages vs. Loss—Two Answers to the Same Question*, ANDREWS SEC. LITIG. & REG. REP., Oct. 22, 2003, at 19.
261. Dura Pharm., Inc., v. Broudo, 544 U.S. 336, 343–46 (2005).
262. Rosenberg, *supra* note 260.
263. LAFAVE, *supra* note 31, at 236–37 (discussing the different role proximate cause plays in tort cases and in criminal cases and that proximate cause is of greater importance in criminal law cases).
264. United States v. Olis, 429 F.3d 540, 545–46 (5th Cir. 2005).

influence the outcome of the defendant's sentence.[265] Focusing on proximate cause not only results in sentences that accurately reflect the behavior of the offender, but it also uniformly punishes defendants with similar conduct and culpability.

3. Risk of Trial and the Government's Power: Plea Bargains

The entrance of *Dura*'s loss causation into the criminal sentencing regime resulted in sentences that are more closely tailored to culpable conduct, as well as lower sentences, providing offenders "greater incentive to go to trial rather than negotiate a plea."[266] *Dura*'s loss causation thus reduces the prosecution's power to obtain a guilty plea and allows the offender to exercise his or her right to a trial. This has two important implications: (1) it allows those who are less culpable and have a good defense a fighting chance, and (2) it may reduce the number of highly culpable offenders from entering plea deals resulting in lighter sentences than they would otherwise receive.[267]

It is essential that the government not retain too much leverage over offenders so that defendants can effectively choose whether to exercise their Sixth Amendment right to have a trial.[268] *Dura*'s loss causation reduces the government's bargaining power by producing accurate loss estimates that are narrowly tailored to an individual's culpable conduct.[269] Other methods, especially the Ninth Circuit's "price inflation theory," result in unpredictable and high sentences because they allow market fluctuations to influence an offender's sentence. Unable to predict sentences, defendants are likely to enter plea bargains to avoid astoundingly high sentences. In contrast, *Dura*'s narrowly tailored sentences level the playing field and affords defendants the opportunity to make a sound decision whether to enter a plea bargain or exercise their right to a trial.[270]

B. Less Emphasis on Loss Toward a More Individualized Approach

Uniformity is an important goal of sentencing, but it should not overshadow the equally important goal of proportionality. When loss produces disproportional sentences courts should depart from the Guidelines and use an individualized approach to reach a more fitting sentence. This individualized approach requires courts to consider an offender's level of culpability, characteristics, and whether the defendant was motivated by personal gain.

265. *Id.* at 546.
266. Jeff Ifrah, *Sentencing Based on Loss*, NAT'L L.J., Apr. 28, 2008, at 12.
267. *See supra* Part III.B.1.
268. *See supra* Part III.B.1.
269. *See supra* Part III.A.2.C.
270. *See supra* Part III.A.2.C.

1. Degree of Culpability

The Guidelines loss calculation fails to distinguish between more or less culpable behavior. In most settings, the quantifiable loss amount under the Guidelines has little connection to offenders' culpable mental state. It is true that in some cases there is a direct relationship of loss to culpability, for example, cases where the defendant set out to cause loss. In other cases, however, the correlation is completely lacking.

For most crimes, the severity of the punishment flows from the degree of culpability the offender possessed.[271] The same should be true for securities fraud sentencing; a defendant intending a lesser degree of harm or acting recklessly should not be punished to the same extent as a defendant who intentionally caused the result.

"Whether the matter is viewed in relation to the just condemnation of the actor's conduct or in relation to deterrence or correction," there is no basis for imposing on a defendant either the label or the sanctions applicable to one who intentionally caused the results which the defendant fortuitously caused while intending some lesser degree of harm.[272] Accordingly, in securities fraud sentencing, courts should consider varying degrees of culpability and allocate punishment that reflects the moral blameworthiness of a particular defendant.

2. An Offender's Individual Characteristics and Role in the Fraud

Offenders' characteristics and their role in bringing about the fraud are relevant factors that should be considered in sentencing. The Guidelines take into account some individual characteristics, such as criminal history, but they put far more emphasis on loss and ignore the extent to which the offender participated in the fraud.[273] These factors are often good indicators of a defendant's propensity to commit future acts and their need for deterrence.

Since *Booker*, sentencing courts have demonstrated their disagreement with the Guidelines' inflexible approach by giving more attention to specific facts and circumstances of the individual defendant.[274] To better serve the goals of sentencing, courts should assign more weight to an offender's criminal history than they are currently allowed under the loss-based approach.[275] Further, courts should consider an offender's role in the fraud and allow for Guidelines departures where a defendant was a latecomer or played a minimal role, as opposed to being the sole actor

271. For example, it is well-established that where a defendant intends to merely cause bodily harm to a victim but accidently kills the victim, the defendant would be punished for involuntary manslaughter, not murder. LAFAVE, *supra* note 31, at 230.

272. *Id.* at 230–31.

273. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2010); *id.* ch. 5, pt. A, Sentencing Table (2010).

274. *See supra* Part III.C.2.

275. *See supra* Part III.B.1.

in the fraud.[276] Placing more emphasis on case-specific facts and circumstances will lead to fair and proportional sentences.

3. Consider Whether Defendant Was Motivated by Personal Gain

The Guidelines do not consider motive, and while some courts have declined to consider motive, others have found it appropriate for sentencing.[277] Although motive is not necessary to determine guilt, it gives a more accurate picture of an offender's culpability, making it useful in administering proportional sentences. Accordingly, courts should consider motive for personal gain at the sentencing phase.[278]

Courts have taken opposing views on whether motive should be used as a mitigating factor in sentencing. In *United States v. Corry*, the judge stated that to the victim, motive is "mostly irrelevant" and accordingly should not be considered in sentencing.[279] "If someone steals your wallet and gives the money in it to the Humane Society, rather than blowing it in Las Vegas, that's little comfort as you gaze at your empty pocket."[280] In *United States v. Ranum*, however, the court fully examined the individual defendant and considered motive as a mitigating factor.[281] The court noted that "[i]t is true that . . . from the victim's perspective the loss is the same no matter why it occurred. But from the standpoint of personal culpability, there is a significant difference."[282]

The *Corry* court poses a strong argument from the victim's prospective; however, it overlooks the fact that at the sentencing phase the issue is how much to punish, not whether to punish. At sentencing, the defendant has already been found guilty and the main concern is ensuring that the punishment fits the crime and reflects the defendant's blameworthiness. Motive directly correlates with degree of culpability, and it therefore should be an aggravating factor in sentencing.

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276. *See supra* Part III.B.1.

277. *See* Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993) (stating that "[t]he defendant's motive for committing the offense is one important factor" in sentencing); United States v. Corry, 206 F.3d 748, 751 (7th Cir. 2000) (refusing to use motive as a factor in sentencing); United States v. Ranum, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005) (endorsing the use of motive as a factor in sentencing).

278. The Guidelines allow gain to be used as an alternative measure to loss when loss cannot be determined reasonably. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(B) (2010) ("The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."). Although gain is meant to be an alternative measure to loss it may, however, be appropriate to balance gain with loss at the sentencing phase.

279. 206 F.3d at 751.

280. *Id.*

281. 353 F. Supp. 2d at 990 ("[The] defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another."); *see* United States v. Ebbers, 458 F.3d 110, 129–30 (2d Cir. 2006) (suggesting that the court would consider "puffery or cheerleading or even a misguided effort to protect the company, its employees, and its shareholders from the capital-impairing effects of what was believed to be a temporary down turn in business" as mitigating factors, but where personal gain was the sole motivation then a harsh sentence is not necessarily unreasonable).

282. *Ranum*, 353 F. Supp. 2d at 990.

4. Maintaining Uniformity in Downward Departures

Since *Booker*, many judges faced with high-loss securities fraud cases have uniformly rejected the Guidelines as being too restrictive and in some cases unduly harsh.[283] Critics argue that judicial departure from the Guidelines will likely result in erratic and unpredictable sentencing if left unchecked.[284] Accordingly, even though there is uniformity in judicial refusal to impose Guidelines-range sentences, absent a precise calculation, judges may need to take measures to ensure some degree of uniformity.

In order to keep disparate sentencing at a minimum and at the same time allow judicial discretion to impose proportional sentences, district courts should: (1) only depart from the Guidelines when the facts of the case are such that they render the Guidelines' sentences unreasonable in the circumstances; and (2) when choosing to depart, look to sentences in similar securities fraud cases for guidance. Judges should consider the weight courts assign to Section 3553(a) and other mitigating factors that are considered in analogous cases. Applying these factors consistently in similar cases can further both uniformity and proportionality by alleviating disparities among defendants who are equally blameworthy.[285]

V. CONCLUSION

Societal discontent with economic crimes, specifically securities fraud violations, is understandable in the wake of high-profile cases such as Enron that have had significant ramifications on the public. The Guidelines' response to this growing disapproval has been to use loss as a means to ratchet up securities fraud sentences. This mechanical approach, however, has undermined the fundamental principles of criminal law and criminal sentencing by dolling out sentences that are at times grossly disproportionate to the offender's culpability. When loss produces astoundingly high sentences, an individualized approach focused on factors tethered to blameworthiness is necessary for a more just sentencing regime that is consistent with the goals of criminal sentencing.

283. Bowman, *supra* note 176, at 169.

284. *See supra* notes 232–37 and accompanying text.

285. Rodney D. Perkins, Comment, *Purposes-Based Sentencing of Economic Crimes After* Booker, 11 LEWIS & CLARK L. REV. 521, 536 (2007).