

UNITED STATES V. NACCHIO AND THE IMPLICATIONS OF AN
EMERGING CIRCUIT SPLIT: PRACTICAL AND POLICY
CONSIDERATIONS OF AMENDING FINANCIAL GAIN AS A
MEASURE OF CULPABILITY

INTRODUCTION

Round two of *United States v. Nacchio*¹ before the Tenth Circuit Court of Appeals found the defense team arguing that Joseph Nacchio, former Chief Executive Officer of Qwest, Inc., was over-sentenced under the Federal Sentencing Guidelines due to incorrect calculation of financial gain—the lynchpin of his sentence determination.² Nacchio’s sentence was comprehensive: seventy-two months imprisonment for each of nineteen counts of insider trading, two years of supervised release for each count (both to run concurrently), and a fine of nineteen million dollars.³ Fundamentally, the appeal was delicately hinged on an unconventional theory: that criminal case law⁴ provided insufficient precedent for the calculation of financial gain, so the court must consult civil law to supplement its interpretation.⁵ Finding for the petitioner–defendant, the Tenth Circuit held that the district court had miscalculated gain for the purpose of sentencing and ordered the lower court to apply a theory of civil-remedy calculation to the case on remand.⁶ Thus, the decision in *Nacchio* is at odds with an Eighth Circuit decision⁷ regarding interpretation of an infrequently-consulted and highly-technical area of the Federal Sentencing Guidelines.

In its relative naissance, the circuit split on the calculation of gain for the sentencing of sophisticated-fraud offenders has flown under the radar. In the years directly following the 1987 introduction of the Federal Sentencing Guidelines,⁸ circuit courts appeared inundated by the more litigated issue in economic crimes: the calculation of financial loss.⁹ While the loss calculation prompted multiple circuit splits on the various

1. 573 F.3d 1062 (10th Cir. 2009).

2. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.4 (2008).

3. *Nacchio*, 573 F.3d at 1066. Mr. Nacchio was also sentenced to forfeit profits totaling approximately \$52 million dollars. *Id.* Though the Tenth Circuit also reversed on the issue of forfeiture of profits, the issue will not be considered in this article.

4. See, e.g., *United States v. Mooney*, 425 F.3d 1093 (8th Cir. 2005).

5. See Appellant’s Reply Brief at 30, *United States v. Nacchio*, 573 F.3d 1062 (10th Cir. 2009) (No. 07-1311).

6. *Nacchio*, 573 F.3d at 1086.

7. *Mooney*, 425 F.3d at 1101.

8. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2008).

9. Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 26 (2001) [hereinafter Bowman, *Sentencing Reforms*].

elements of the provision—ultimately, requiring the United States Sentencing Commission to amend the Federal Sentencing Guidelines—the calculation of gain went unchallenged and remained relatively static.¹⁰ Today, in light of recent cases from both the Tenth and Eighth Circuits, the proper calculation of gain is uncertain and poised for debate.

This Comment predicts the emerging circuit split over the calculation of gain for the sentencing of sophisticated-fraud offenders is an issue unlikely to be reviewed by the United States Supreme Court because it is the authorized area of the United States Sentencing Commission to address circuit court splits on Federal Sentencing Guidelines interpretation through amendment to the Guidelines.¹¹ Furthermore, this Comment argues that while the net-gain approach to gain calculation established by the Eighth Circuit in *United States v. Mooney* tends to result in over-sentencing, the alternative market-absorption approach based on the civil remedy of disgorgement established by the Tenth Circuit in *Nacchio* provides an unworkable and burdensome calculation methodology. By paralleling the Commission's prior resolution of the practical problems of the calculation of loss in similar economic crimes to the current issue of gain calculation, and by considering the overriding philosophies driving criminal punishment, this Comment concludes that the ultimate resolution of gain calculation for sentencing purposes demands a new hybrid-calculation methodology established by amendment of the Sentencing Guidelines.

Part I of this Comment reviews the structure of the federal sentencing process since the formation of the U.S. Sentencing Commission in 1984, and focuses on the interrelated roles of appellate review and the United States Sentencing Commission's Guidelines amendment process. Part II considers the consolidation of economic crimes through the Economic Crime Package amendment to the Federal Sentencing Guidelines in 2001 as the basis for paralleling the resolution of loss calculation to the current issue of gain calculation. Part III details the emerging circuit split on the calculation of gain by contrasting the legal theories and analyses presented in *Mooney* and *Nacchio*. Part IV first analyzes both the net-gain and market-absorption approaches to financial-gain calculation under the framework established by the 2001 amendment of loss calculation for similar economic crimes. This is accomplished by contrasting each theory's approach to the practical application of definition, timing, and causation. Second, Part IV seeks to reconcile the two prevailing approaches of gain calculation with the underlying philosophies driving federal sentencing policy and criminal punishment. Finally, Part IV proposes an approach to amending gain as a measure of culpability for

10. See *id.* at 26, 34; see also U.S. SENTENCING GUIDELINES MANUAL app. C, amend 617 (2008) Amendment 617 of the Sentencing Guidelines amended Chapter 2, Part B property crime provisions of the 2000 Sentencing Guidelines.

11. See *Braxton v. United States*, 500 U.S. 344, 347–48 (1991).

sophisticated-fraud offenders. The Comment concludes that because neither approach meets both the practical and policy demands of federal sentencing, the more judicious approach to the resolution of financial-gain calculation methodology is for the United States Sentencing Commission to amend the Federal Sentencing Guidelines to reflect a distinctly new calculation methodology.

I. STRUCTURE OF THE FEDERAL SENTENCING PROCESS

In 1984, Congress established the United States Sentencing Commission (“Sentencing Commission” or “Commission”) through the Sentencing Reform Act.¹² The Commission was charged with reforming and standardizing the federal sentencing process by promulgating federal sentencing guidelines designed to make sentencing honest, uniform, and proportionate in light of the criminal justice objectives of rehabilitation, incapacitation, deterrence, and retribution.¹³ The product of the Commission’s endeavors—the Federal Sentencing Guidelines (“Sentencing Guidelines” or “Guidelines”)—sought to achieve these goals by correlating the specific behavior involved in the offense to the characteristics of the offender, including his or her criminal history.¹⁴ On November 1, 1987, the Sentencing Guidelines took effect, “apply[ing] to all offenses committed on or after that date.”¹⁵ In standardizing the classification of crimes into categories corresponding to sentencing calculation tables, the Commission made uniformity an integral part of sentencing and put offenders on notice of their ultimate sentence term.¹⁶ Incorporated throughout the categories and tables was the overarching principle that not all crimes require the same deterrent effect, nor do they all require retribution to the same degree.¹⁷ In weighing the sentencing separately for each crime, but restricting it to a sentencing range, the notion of proportionality to the crime was affected without sacrificing uniformity among offenders.¹⁸

Though initially mandatory, the Sentencing Guidelines became advisory in 2005 following the U.S. Supreme Court’s decision in *U.S. v. Booker*.¹⁹ *Booker* held that a mandatory sentencing guideline system violated the defendant’s Sixth Amendment right to a jury trial because the sentencing process permitted consultation of facts not presented to

12. 28 U.S.C. § 991(a) (2006).

13. *See id.* § 991(b); U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008).

14. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2008).

15. *Id.*

16. *See id.*

17. *See* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 370–71 (2003).

18. *See* U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 6 (2006) [hereinafter BOOKER REPORT].

19. *See* United States v. Booker, 543 U.S. 220, 259–61, 264 (2005) (explaining the severance and excision of two specific provisions of the Sentencing Guidelines); U.S. SENTENCING GUIDELINES MANUAL § 1A2 (2008).

the jury at trial.²⁰ Nonetheless, *Booker* still requires judges to begin sentencing determinations by looking first to the Guidelines and its accompanying policy statements.²¹ Today, a sentencing court is required to begin with the base offense level specified in the Sentencing Guidelines.²² This base offense level—an intersection of the offender’s criminal history and the level designated for the offense in the relevant provision of the Sentencing Guidelines—anchors²³ the sentencing determination by giving the court a point of departure.²⁴ From there, the offense level is adjusted upward or downward based on the specific characteristics of the particular criminal conduct.²⁵ The court arrives at a numeric offense level which corresponds to a pre-determined sentencing range in the sentencing table; the court retains discretion to deviate from that pre-determined range if it finds a departure is necessary.²⁶

Ensuring proper execution of the Sentencing Guidelines necessitated a formal review process.²⁷ According to the Sentencing Reform Act, the purpose of providing for appellate review was to maintain accuracy in application of the Guidelines, ensure that disparity in sentencing was reduced, provide a check to departure from Guidelines sentencing,

20. See *Booker*, 543 U.S. at 244 (affirming the Court of Appeals holding that *Booker*’s sentence violated the Sixth Amendment); Daniel M. Levy, *Defending Demaree: The Ex Post Facto Clause’s Lack of Control Over the Federal Sentencing Guidelines After Booker*, 77 FORDHAM L. REV. 2623, 2638 (2009).

21. *Booker*, 543 U.S. at 264. Recent statistics indicate that post-*Booker*, the Guidelines still play a significant role in federal sentencing: the rate of compliance with sentencing has remained stable at 85.9 percent, only marginally lower than before the landmark case. BOOKER REPORT, *supra* note 18, at 46. This is perhaps indicative of a general acceptance of the Sentencing Commission’s expertise in “articulat[ing] rules for nationwide application” better than any single judge. Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 140 (2006), <http://www.yalelawjournal.org/2006/07/gertner.html>. Thus, the Guidelines continue to promote uniformity in sentencing, despite their advisory nature. *Id.*

22. See WILLIAM K.S. WANG & MARC I. STEINBERG, INSIDER TRADING 558 (1996).

23. See Gertner, *supra* note 21, at 138 (“Anchoring is a strategy used to simplify complex tasks, in which ‘numeric judgments are assimilated to a previously considered standard.’ . . . In effect, the 300-odd page Guideline Manual provides ready-made anchors.”).

24. See *id.* at 140 (“[Appellate court cases] hold that deviation from Guideline ranges is rarely appropriate and only for reasons that are based on the same faulty premises that under-girded the mandatory regime. Appellate courts have insisted that district court judges begin with—effectively, ‘anchor’ their decisions—in the Guidelines before considering anything else.”).

25. WANG & STEINBERG, *supra* note 22, at 558.

26. *Booker*, 542 U.S. at 233–35 (noting that the Sentencing Guidelines have always permitted discretionary departures from the sentencing range, but that these departures have not been available in every case and, under the mandatory regime, were rare); see also *id.* at 246 (explaining that the remedial majority devises the remedy of making the Sentencing Guidelines advisory while nonetheless preserving “a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve”); BOOKER REPORT, *supra* note 18, at 20–21, 24. Though determination within the sentencing range has always been at the court’s discretion, post-*Booker*, the courts are given more leeway to depart from the designated sentence range. Imposition of a sentence outside the sentencing range is currently subject to appellate review for reasonableness. *Id.*

27. Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 624 (1992); see also BOOKER REPORT, *supra* note 18, at 24 (stating that the appellate court will not reach the question of the reasonableness of the sentence until it has considered the lower court’s calculation of a sentencing range).

fine-tune application of provision language, and, finally, to develop a common law to be used as precedent.²⁸ Principally, the standard of review for issues of Sentencing Guidelines interpretation and meaning is *de novo*, and both the defendant and the State possess limited rights to appeal sentencing.²⁹ The legislative benefit of appellate review of federal sentencing has been that the appeals courts have discovered “technical problems, minor inconsistencies, and other glitches in the drafting and structure of the [G]uidelines.”³⁰ The United States Supreme Court in *Braxton v. United States* determined that Congress intended federal circuit court splits concerning interpretation of the Guidelines to be resolved by the Commission amending the Guidelines.³¹ Hence, it is much more likely the Sentencing Commission will resolve a circuit split on interpretational dilemmas than the United States Supreme Court.³²

In promulgating the Sentencing Guidelines and its amendments, the Sentencing Commission aims “to solve both the practical and philosophical problems of developing a coherent sentencing system.”³³ The practical problems of sentencing are the organization of crimes into categories and provisions, and the application of the technical terms of each provision in sentencing determination.³⁴ By contrast, the philosophical problems are much broader, encompassing the larger framework of goals and purposes of criminal punishment.³⁵ For gain as a measure of culpability, the Sentencing Commission must look first to the larger category of economic crimes to provide a context for considering the necessary changes to be made to the provision; then to the specific practical prob-

28. Zipperstein, *supra* note 27, at 624.

29. *See id.* at 625, 629.

30. *Id.* at 628.

31. *Braxton v. United States*, 500 U.S. 344, 347–48 (1991). The *Braxton* Court held:

A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. . . . Ordinarily, however, we regard the task as initially and primarily ours. . . . The Guidelines are of course implemented by the courts, so in charging the Commission “periodically [to] review and revise” the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest. This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts

Id. (fourth alteration in original); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2008). Though the Sentencing Guidelines are a rigid document, they are by no means static; to the contrary, upon their publication, the Commission emphasized that “the guideline-writing process” was “evolutionary” and would necessitate amendment. *Id.* Amendment to the guidelines is a frequent occurrence: amendments are made annually through submission to Congress and “automatically take effect 180 days after submission unless a law is enacted to the contrary.” *Id.*

32. Douglas A. Berman, *The Sentencing Commission as Guidelines Supreme Court: Responding to Circuit Conflicts*, 7 FED. SENT’G. REP. 142, 142 (1994) (stating that “[w]hen an inter-circuit conflict concerns differences in interpretation of guidelines provisions that do not reach constitutional issues, the Supreme Court has indicated that the Commission has the initial and primary task of addressing and resolving the conflict” (citing 1993 U.S. SENT’G. COMM’N, ANN. REP. 14 (1994))).

33. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008).

34. *See id.*

35. *See id.*

lems of gain as a measure of culpability. Finally, the Commission must ensure any amendment is consistent with the policy framework of the Sentencing Guidelines and criminal punishment.

II. PARALLELING ECONOMIC CRIMES

Nearly a quarter of all federal convictions are for economic crimes.³⁶ Most white-collar crimes fall into the category of economic crimes.³⁷ Originally, the Federal Sentencing Guidelines divided the great variety of economic crimes into three broad categories: (1) section 2B1.1 covered “Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property”;³⁸ (2) section 2B1.3 covered “Property Damage or Destruction”;³⁹ and (3) section 2F1.1 acted as a catch-all to cover most economic crimes not covered by the previous two sections, including “Fraud and Deceit, Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the U.S.”⁴⁰ Insider trading, considered a “sophisticated fraud” under Part F of the Sentencing Guidelines, was included in section 2F1.2.⁴¹

A. The Convergence of Economic-Crime Offenses Under the Sentencing Guidelines

In 2001, the Sentencing Commission amended the Sentencing Guidelines’ applicable economic crimes provisions through the Economic Crime Package—a six-part amendment addressing practical problems.⁴² The reform reorganized the economic crimes sections by consolidating sections 2B1.1, 2B1.3, and 2F1.1 into section 2B1.1, labeled “Theft, Property Destruction, and Fraud”⁴³ because the Commission concluded that the distinction between theft and fraud was “largely illusory,”⁴⁴ and, thus, impractical. The significance of combining three sepa-

36. Frank O. Bowman III, *Coping With “Loss”: A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 461 (1998) [hereinafter Bowman, *Coping with Loss*].

37. Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 428–29 (2007) (defining white-collar crime as a “non-violent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities”); see also Bowman, *Sentencing Reforms*, *supra* note 9, at 8 (noting that “economic crimes comprise between one-fifth and one-quarter of all federal sentencings”).

38. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2000).

39. *Id.* § 2B1.3 (2000).

40. *Id.* § 2F1.1 (2000).

41. *Id.* § 2F1.2 cmt. background (2000).

42. *Id.* app. C, amend. 617 (2008).

43. *Id.*

44. Bowman, *Sentencing Reforms*, *supra* note 9, at 24.

rate sections was to eliminate unnecessary distinctions between crimes with significant similarities in both offense and offender characteristics.⁴⁵

The three original sections required consulting one of two loss tables in section 2B1.1 or 2F1.1 to calculate the increase in the offense level based on the criminal conduct.⁴⁶ Because the outcome under the two tables was nearly identical, judges and practitioners increasingly tried to devise a distinction between the two loss tables and their relation to applicable Guidelines' provisions, frequently leading to a lack of sentencing uniformity.⁴⁷ Ultimately, faced with a variety of circuit splits on the interpretation of loss under the various relevant provisions of the Guidelines, the Sentencing Commission concluded that the two loss tables were unnecessarily duplicative and in need of reform.⁴⁸

The Economic Crimes Package resolved the issue of duplicative loss tables by consolidating the 2B1.1 and 2F1.1 loss tables into a single loss table, section 2B1.1.⁴⁹ This had three effects: (1) "increasing the range of losses that correspond to individual increments"; (2) "compressing the table"; and (3) "reducing fact-finding."⁵⁰ In so amending the Guidelines, the Commission recognized that "inasmuch as theft and fraud offenses are conceptually similar, there is no strong reason to sentence them differently."⁵¹ Thus, uniformity was further built into the Sentencing Guidelines.⁵²

B. The Economic Crime Package and Considerations of Measures of Culpability

Traced from its traditional basis in English law, wherein the majority of economic crimes were considered a form of property theft, the culpability of economic crime offenders has been overwhelmingly measured by "the magnitude and nature of the economic deprivation"⁵³ incurred by the victim.⁵⁴ In his 2001 article on sentencing reforms, Professor Bowman noted that the factor distinguishing economic crime from other criminal conduct is its lack of consideration for the "mental state or of the nature and quality of the act(s) which make up the crime."⁵⁵ He

45. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008); see also Ramirez, *supra* note 17, at 378.

46. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008).

47. See *id.*; see also Bowman, *Sentencing Reforms*, *supra* note 9, at 23–24.

48. See Bowman, *Sentencing Reforms*, *supra* note 9, at 24.

49. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008).

50. *Id.*

51. *Id.*

52. See *id.* § 1A1.3 (2008).

53. Bowman, *Coping with Loss*, *supra* note 36, at 465.

54. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. background (2000) ("The value of property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant."); Bowman, *Sentencing Reforms*, *supra* note 9, at 16.

55. Bowman, *Sentencing Reforms*, *supra* note 9, at 15.

elaborated that although a *mens rea* (mental culpability) is required in some form, it is almost always “some variant of an intent to steal, defraud, or otherwise deprive the owner of the use or benefit of his property.”⁵⁶ Professor Bowman thus drew the following conclusion:

The consequence of this pattern of historical development is that there are a variety of well-developed, long realized statutory guideposts for distinguishing between more and less serious crimes against persons, *but only one recognized, commonly codified determinant of the degrees of seriousness of economic crimes—the value of the thing stolen.*⁵⁷

Under the Sentencing Guidelines, the sheer amount of the loss continues to serve as a proxy for the economic-crime offender’s *mens rea* and is thereby the most important factor determining sentence length.⁵⁸ Where loss is difficult or impossible to determine, the sentencing judge will look to the gain obtained by the offender as an alternative measure of his culpability.⁵⁹ As such, in the area of economic crimes, loss and gain are outcome determinative for sentencing purposes.

1. Loss as a Measure of Culpability

Since the Sentencing Guidelines were promulgated, loss findings were required in over 9,000 cases per year, resulting in significant numbers of appeals and “numerous splits of opinion between the federal circuits.”⁶⁰ The Economic Crime Package of 2001 resolved the calculation of loss to reinstate uniformity in sentencing.⁶¹ The circuit splits on loss calculation had revolved around two key interpretations—definition and causation—and it was on these two points of contention that the Sentencing Commission amended the Guidelines so that the measure of loss would best represent the offender’s true culpability in relation to the seriousness of his or her offense.⁶²

The amended Guidelines provision defined loss as “the greater of actual and intended loss,” where intended loss includes “unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender.”⁶³ The Commission defined actual loss as

56. *Id.* at 15.

57. *Id.* at 16 (emphasis added).

58. *Id.* at 39.

59. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (2008).

60. Bowman, *Sentencing Reforms*, *supra* note 9, at 26.

61. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008). The Economic Crime Package included revision to the loss calculation in four key reforms: (1) revision of the common definition of loss; (2) revision to areas of the Guidelines referring to loss; (3) bringing the Guidelines into technical conformance with the new definition; and (4) amendment to the specific case of tax loss. *Id.*

62. *See id.*

63. *Id.*

“reasonably foreseeable pecuniary harm”⁶⁴ resulting from the offense, acknowledging both cause-in-fact (“but for” causation) and a limit on cause-at-law (legal causation) as what was reasonably foreseeable.⁶⁵ Though the Commission was not compelled to amend the timing factor⁶⁶ based on a circuit split, it anticipated the issue arising and preemptively addressed it.⁶⁷ It adopted the net-loss approach, which specifically excluded certain economic benefits transferred to the victims from incorporation in the loss calculation when those benefits were transferred after the time the crime was detected.⁶⁸ This reform codified the time of detection approach, ensuring that benefits transferred to the victim after the defendant was made aware that his activity had been detected would not mitigate the amount of the victim’s loss used in calculating the sentence.⁶⁹

Thus, the Economic Crime Package transformed the way sentencing is approached in cases of economic-crime offenders. The consolidation of the theft, property destruction, and fraud sections, as well as their corresponding loss tables, acknowledged their historic and current parallels in both the eyes of the Sentencing Commission and the judicial community at large. Moreover, this consolidation reaffirmed the centrality of the loss calculation in determining an offender’s sentence, and improved its practical application as a proxy for both the seriousness of the criminal conduct and the offender’s mental culpability.

2. Gain as a Measure of Culpability

Though the Sentencing Guidelines weigh heavily towards application of the victim’s loss as a measure of the offender’s culpability, when ascertainable,⁷⁰ both loss and gain are applicable to the same loss table, section 2B1.1.⁷¹ Section 2B1.1 states that “[t]he court shall use the gain that resulted from the offense as an alternative measure of loss only if

64. *Id.* (noting that reasonably foreseeable pecuniary harm is defined as “pecuniary harms that the defendant knew, or under the circumstances, reasonably should have known, was a potential result of the offense”).

65. *Id.*; see also Bowman, *Sentencing Reforms*, *supra* note 9, at 42 (“The literature of criminal law, contracts, and torts usually conceives of causation as having two components, customarily labeled ‘cause-in-fact’ and legal cause. Cause-in-fact is about determining the causal relationship between a defendant’s act and a subsequent harm to another. It asks whether the conduct truly was a part of the chain of events in the physical world that brought about the harm. Legal cause asks a different question: Assuming that the defendant’s conduct truly did play a role in bringing about the harm, is it just to impose legal liability for the harm concededly caused?”) (citations omitted).

66. *Infra* Part IV.A.3. Timing refers to the point in time at which the court elects to calculate loss or gain.

67. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008).

68. *Id.*

69. *Id.* (noting that time of detection also includes “about to be detected” to account for situations where the defendant is cognizant that his criminal conduct is soon to be detected).

70. See Mark D. Harris & Anna G. Kaminska, *Defending the White-Collar Case at Sentencing*, 20 FED. SENT’G. REP. 153, 155 (2008).

71. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) & cmt. n.3 (2008).

there is a loss but it reasonably cannot be determined.”⁷² Thus, gain as a measure of culpability arises primarily in the sentencing of insider-trading offenders (a narrow category of fraud found in section 2B1.4), because the manipulative and deceptive nature of insider trading makes it particularly difficult to determine not only the victims of the offense, but the actual pecuniary loss.⁷³ Under the Sentencing Guidelines section 2B1.4, an offender’s culpability is measured by the “gain resulting from the offense,” specifically, the “total increase in value realized through trading in securities”⁷⁴ and is to be calculated using the loss table in section 2B1.1.⁷⁵

Despite being faced with significant disparity in sentencing calculation based on loss as a measure of culpability during the 1990s, the Sentencing Commission failed to foresee that a similar dispute would arise out of interpretation of the gain calculation. In fact, the Economic Crime Package only addressed gain in a cursory fashion by: (1) retaining the rule that gain may be used as an alternative to loss when loss is unascertainable but specifying that it may only be used when there is an actual loss;⁷⁶ and (2) refusing to expand gain to “situations in which loss can be determined but the gain is greater than the loss.”⁷⁷ Substantively, gain as a measure of culpability did not change from the pre-Economic Crime Package to post-2001 amendment Sentencing Guidelines.⁷⁸ Perhaps the Commission intended to wait for the issue to arise through the appellate review process before it attempted to define, address, and remedy the potential complexity of gain interpretation. Or, conversely, perhaps the issue was indeed entirely unforeseen. Whatever its regard, because gain has been deemed an alternative measure of culpability,⁷⁹ the Commission’s resolution on the methodology for loss calculation should be a reasonable basis for analyzing the likely resolution of gain as a measure of culpability by the Sentencing Commission.

III. THE EMERGING CIRCUIT SPLIT ON THE ISSUE OF GAIN CALCULATION

As a litigated issue, gain calculation likely evaded judicial scrutiny for two basic reasons. First, the focus of the Sentencing Guidelines in the area of economic crimes has been the calculation of loss, the mirror image of gain and which has dominated the sentencing of economic

72. *Id.* § 2B1.1 cmt. n.3.

73. *See id.* § 2B1.4 cmt. background.

74. *Id.* § 2B1.4(b)(1) & cmt. background (2008).

75. *Id.* § 2B1.4(b)(1).

76. *Id.* app. C, amend. 617 (“[The Guidelines provision] clarifies that there must be a loss for gain to be considered.”).

77. *Id.* (noting that expanding gain would not be appropriate “because such instances should occur infrequently, the efficiency of the criminal operation as reflected in the amount of gain ordinarily should not determine the penalty level, and the traditional use of loss is generally adequate”).

78. *Compare id.* § 2F1.2(b) (2000), *with id.* § 2B1.4 cmt. background (2008), *and id.* § 2B1.1 cmt. n.3 loss under subsection (b)(1)(B) (2008) (defining “gain” for sentencing purposes).

79. *See id.* § 2B1.1 cmt. n.3 (2008).

crimes.⁸⁰ Second, the calculation is primarily used in cases of sophisticated fraud, a *de facto* subcategory of crimes in which “the victims and their losses are difficult if not impossible to identify.”⁸¹ These cases are highly complex, have a significant stigmatic affect on their high profile offenders, and until recently, were rarely prosecuted due to their complexity.⁸² Though insider trading⁸³ is a highly visible offense, frequently appearing in the news media, there is little case law on the subject regarding relevant sentencing considerations. Given the high profile white-collar crimes of recent years and the federal government’s hard-line on prosecutions and sentencing,⁸⁴ the employment of gain as a measure of culpability is likely to become more prevalent in criminal sentencing law.

A. United States v. Mooney

In 2005, *Mooney* emerged from the Eight Circuit as the first case to challenge the specific calculation methodology for gain under the Sentencing Guidelines economic-crime provisions.⁸⁵ The case involved the

80. See *id.* app. C, amend. 617.

81. *Id.* § 2B1.4 cmt. background. Though not officially defined in the Sentencing Guidelines, sophisticated fraud appears to primarily refer to insider trading (as it is only listed in this section of the Guidelines), but it may cover other frauds as well. The background commentary to § 2B1.4 states “[c]ertain other offenses, e.g., 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also appropriately may be covered by this guideline.” Additionally, Appendix A of the Guidelines references 7 U.S.C. § 13(d) and (f), the statute prohibiting insider trading, as corresponding to Guidelines § 2B1.4. 7 U.S.C.A. § 13(e) (West 2010) (subsection (f) was re-designated as subsection (e) in 2008 amendments) and § 13(d) prohibits “[u]se of information by Commissioners and Commission employees.” Therefore, the language of “sophisticated fraud” rather than “insider trading” is more appropriate in reference to the debacle of gain calculation because the calculation may apply directly to both insider trading in securities and misuse of Commission information.

Furthermore, the language of the Sentencing Guidelines § 2B1.1 may further broaden the application of gain to other yet-unspecified economic crimes. That provision states that “[t]he 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.” See *id.* § 2B1.1 cmt. n.3. By example, in *United States v. Cherif*, a mail and wire fraud case, the court referenced § 2F1.2, the guideline for insider trading, “[t]o justify using the gain to enhance the base offense level.” *United States v. Cherif*, 943 F.2d 692, 702 (7th Cir. 1991). The court explained that despite Cherif’s conviction under mail and wire fraud, not insider trading specifically, § 2F1.2 permitted use of gain to increase the offense level for “certain other offenses . . . that involve misuse of inside information for personal gain” *Id.* (alteration in original).

82. See generally J. Scott Dutcher, Comment, *From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L.J. 1295 (2005) (discussing white-collar crime as stigmatic because the offenders are public individuals, problematic to detect because of the level of concealment, and traditionally lightly punished). Though Dutcher’s discussion pertains to white-collar crime prosecution generally, sophisticated fraud is counted among white-collar crimes.

83. 7 U.S.C.A. § 13(e) (West 2010) (stating that insider trading is a felony offense of “willfully and knowingly” trading “for such person’s own account, or for or on behalf of any other account” or “disclos[ing] for any purpose inconsistent with performance of such person’s official duties . . . any material nonpublic information obtained through special access related to the performance of such duties”).

84. *Infra* Part IV.B.2.a.

85. *United States v. Mooney*, 425 F.3d 1093, 1097 (8th Cir. 2005) (“Because the federal sentencing guidelines in effect in 2002 would have resulted in a higher sentencing range for the amount of gain found to have resulted from his offenses, the district court applied the 1994 guidelines Section 2B1.4, the guideline at issue in this case, is identical in both versions except for

former vice president of underwriting at United Health Corporation, Mr. Alan Mooney, who traded stock based on material, nonpublic information he received during the course of negotiations arranging for United to acquire another healthcare services company, Metra.⁸⁶ Mooney's suspect transactions included the sale of 20,000 shares of Metra stock on May 17, 1995, which resulted in profits of \$775,000; and the purchase of call options in United stock with the proceeds of his sale of shares at the price of \$258,283.03.⁸⁷ The latter transaction gave Mooney the right to buy 40,000 shares in United.⁸⁸ He subsequently sold the call options in July and October when the stock price had "increased markedly," resulting in a return of \$532,482.49.⁸⁹

Mooney was formally charged with and convicted of eight counts of mail fraud, four counts of securities fraud, and five counts of money laundering.⁹⁰ Based on its mandatory consultation of the Sentencing Guidelines, the district court employed a base level offense of seventeen, added two levels for knowledge that the proceeds were fraudulently obtained, and added an additional two levels for the significant dollar amount gained through the transaction.⁹¹ Ultimately, corresponding to the calculated offense level of twenty-one and a criminal history level of I, the court imposed a sentence of forty-two months in prison and a \$150,000 fine.⁹²

Mooney appealed his sentence based on the theory that the district court incorrectly calculated gain by employing the net-gain approach which overstated his culpability, resulting in over-sentencing.⁹³ In essence, net gain is calculated by taking the total amount realized from the trading in securities and subtracting the purchase price of those securities.⁹⁴ Mooney's gain, approximated at between \$200,000 and \$350,000, had increased his offense level by two levels.⁹⁵ The Eighth Circuit affirmed the district court's use of the net-gain approach.⁹⁶ The court found the plain language of the Guidelines "simple and straightforward,"⁹⁷ determined that any question of interpretation could be "decisively resolved by the authoritative definition provided in the commentary to § 2B1.4,"⁹⁸

the use of gender neutral language in 2002, and Mooney does not challenge the court's use of the 1994 manual.").

86. *Id.* at 1095–96.

87. *Id.* at 1096.

88. *Id.*

89. *Id.*

90. *Id.* at 1097.

91. *Id.* at 1097–98.

92. *Id.*; see *supra* notes 23–27 and accompanying text; see generally U.S. SENTENCING GUIDELINES MANUAL § 5A (2008).

93. *Mooney*, 425 F.3d at 1098.

94. See *id.*; see also *United States v. Nacchio*, 573 F.3d 1062, 1068–70 (10th Cir. 2009).

95. *Mooney*, 425 F.3d at 1097–98.

96. *Id.* at 1101.

97. *Id.* at 1099.

98. *Id.*

and, finally, concluded that net gain promotes a “simple, accurate, and predictable rule for judges to apply and follows the congressional mandate that sentences reflect the seriousness of the offense.”⁹⁹

B. United States v. Nacchio

In 2009, the Tenth Circuit departed from the Eighth Circuit’s method of gain calculation by expressly finding *Mooney* to be unpersuasive.¹⁰⁰ A case of some notoriety in the Tenth Circuit, *Nacchio* dealt with the former CEO of Qwest, Inc., Joseph Nacchio, who traded stock in the company based on undisclosed insider information in a series of transactions in early 2001.¹⁰¹ At the inception of his suspect trading, Mr. Nacchio had knowledge that Qwest was heavily reliant on an ill-performing stream of income, and that the corporation had not made changes in its revenue streams necessary to meet year-end guidance levels.¹⁰² This nonpublic information became the basis for his informational advantage as it was undisclosed during the entire period of his suspect trading.¹⁰³

Nacchio’s suspect trading occurred in two primary transaction periods.¹⁰⁴ First, between April 26 and May 15 of 2001, Nacchio exercised options in his compensation package averaging sales of 105,000 shares traded per day at an exercise price in the range of \$37 to \$42 per share.¹⁰⁵ His net sale during this period was 1,255,000 shares.¹⁰⁶ Second, between May 15 and May 29, Nacchio sold additional shares in accordance with an automatic sales plan permitting him to exercise 10,000 options per day so long as the stock price remained at least \$38 per share.¹⁰⁷ Under this plan, Nacchio sold an additional 75,000 shares before the stock price dropped below the exercise price.¹⁰⁸ Nacchio’s gross proceeds from the sales in question were approximately fifty-two million dollars.¹⁰⁹ Corporate earnings were eventually released for the second quarter of 2001 on July 24th, finally disclosing that Qwest was on the low end of its expected earnings range.¹¹⁰ Further disclosure on August 14th decreased target revenues for the remainder of 2001 and for 2002, and both the

99. *Id.* at 1101.

100. *See* United States v. Nacchio, 573 F.3d 1062, 1069–72 (10th Cir. 2009).

101. *Id.* at 1064.

102. *Id.*

103. *Id.* at 1065–66.

104. *See id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1067–68 (“The parties do not dispute that: Mr. Nacchio’s gross proceeds from the relevant stock sales were \$52,007,545.47; the cost of exercising the options was \$7,315,000.00; the brokerage commissions and fees paid were \$60,081.09; and the taxes paid were \$16,078,147.81.”).

110. *Id.* at 1066.

Securities Exchange Commission and the Department of Justice pursued investigations into Nacchio's trading activities.¹¹¹

Nacchio was charged with and convicted of nineteen counts of insider trading for the suspect trades.¹¹² Though his conviction came down in 2007¹¹³—after the Economic Crime Package amendments of 2001 had been made to the relevant sections of the Sentencing Guidelines—the district court sentenced Nacchio under the Guidelines in effect at the time of the completion of his criminal conduct (May 2001).¹¹⁴ Based on the 2000 version of the Guidelines for insider trading, section 2F1.1, Nacchio received a base level offense of eight.¹¹⁵ From the base level, the court imposed a two level increase due to “abuse of a position of trust,”¹¹⁶ and a sixteen level increase due to the amount of financial “gain resulting from the offense,”¹¹⁷ ultimately arriving at an offense level of twenty-six.¹¹⁸ The district court's final sentence imposed (1) a seventy-two month term of imprisonment for each of the nineteen counts of insider trading, served concurrently; (2) two years probation for each count, also served concurrently; and (3) a fine of nineteen million dollars.¹¹⁹

Nacchio appealed his sentence based on the premise that the district court incorrectly calculated the “gain resulting from the offense” by employing the net gain approach from *Mooney*.¹²⁰ On appeal, the Tenth Circuit Court of Appeals reversed and ordered the district court to employ a market-absorption approach on remand.¹²¹ Principally, the market-

111. *Id.*

112. *Id.* at 1064, 1066 (noting that Nacchio was initially indicted on forty-two counts of insider trading, though only convicted of the nineteen related to the transactions referenced above).

113. United States v. Nacchio, No. 05-cr-00545-EWN, 2007 WL 2221437, at *1 (D. Colo. July 27, 2007).

114. *Nacchio*, 573 F.3d at 1066 n.5.

115. *Id.* at 1067 (citing U.S. SENTENCING GUIDELINES MANUAL § 2F1.2(b)(1) (2000)).

116. *Nacchio*, 573 F.3d at 1069 (citing U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2000)).

117. *Nacchio*, 573 F.3d at 1068–69 (citing U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(b)(1)(Q) (2000)).

118. *Nacchio*, 573 F.3d at 1069.

119. *Id.* at 1066.

120. *Id.* at 1069–70.

121. *Id.* at 1086–87. On remand, the district court will apply the Sentencing Guidelines in effect at the time of the commission of Nacchio's offenses as was applied in the first sentencing hearing. By statute, the court is instructed to apply the Guidelines that “are in effect on the date the defendant is sentenced.” 18 U.S.C. § 3553(a)(4)(A)(ii) (2006); U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(a) (2009). The Sentencing Guidelines further specify that if use of the Guidelines in effect on the date of sentencing would violate the *ex post facto* clause, the Guidelines in effect on the date of commission of the offense should be employed. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (2009). In Nacchio's case, the Guidelines in effect at the time of sentencing were post-Economic Crime Package Guidelines and would have substantially increased both the penalty and likely prison term for the offenses committed, thus likely implicating an *ex post facto* issue. Though the various district court and appellate court opinions neither reference nor discuss an *ex post facto* conflict, the earlier Guidelines—the 2000 Guidelines in effect at the time of commission of the offenses—were likely selected for application to avoid such a conflict.

absorption approach is calculated by taking the value of the shares when the insider sold them while in possession of material, non-public information, and subtracting their market value “a reasonable time after public dissemination of the insider information.”¹²² The Tenth Circuit regarded this to be the most appropriate calculation methodology because, it reasoned, “[g]ain should be calculated as the commentary directs, i.e., as ‘the total increase in value realized through trading in securities,’ but that calculation is applicable properly *only* to ‘the gain resulting from the offense’ specified in the guideline provision itself.”¹²³

IV. BIFURCATED ANALYSIS OF GAIN AS A MEASURE OF CULPABILITY

Similar to the case of loss calculation, section 2B1.4 of the Sentencing Guidelines has emerged as problematic because it is difficult to apply a definition of gain in a way that accounts simultaneously for the seriousness of the offense through the amount of harm done while concurrently assessing the relationship between the amount of harm and the defendant’s mental culpability.¹²⁴ The issue of gain thus presents two

The issue of whether the Sentencing Guidelines are subject to *ex post facto* consideration is a hotly debated issue in light of *Booker*. The *ex post facto* clause of the Constitution states that “No Bill of Attainder or *ex post facto* Law shall be passed,” but fails to elaborate upon what is considered to be an *ex post facto* law. U.S. Const. art. I, § 9, cl.3. At common law, the Supreme Court case *Calder v. Bull* specified that the *ex post facto* clause prohibits application of any law which would increase the penalty and punishment for an offense committed before the law came into being. *Calder v. Bull*, 3 U.S. 386, 390 (1798). Further, in *Garner v. Jones*, the Supreme Court set out what is now perceived as a two-prong test for *ex post facto* laws: (1) whether application of the current law would increase the punishment on its face; and (2) whether its retroactive application would result in a longer period of incarceration than the earlier law, and specified that the intent of the test was to determine whether the defendant would be disadvantaged by applying the law in effect at the time of sentencing. *Garner v. Jones*, 529 U.S. 244, 255 (2000). Though when the Sentencing Guidelines were mandatory pre-*Booker*, the Guidelines were interpreted by the lower courts as being subject to the *ex post facto* clause, today there is a split in the circuit courts on whether the *ex post facto* clause applies to merely advisory Sentencing Guidelines. See Levy, *supra* note 20, at 2634 (citing *Miller v. Florida*, 482 U.S. 423 (1987), a state court case in which the United States Supreme Court held state sentencing guidelines were subject to the *ex post facto* clause and the lower courts interpreted this as sufficiently analogous to Federal Sentencing Guidelines and *ex post facto* consideration).

The split divides the Seventh Circuit, in which Judge Posner has found that the advisory Sentencing Guidelines do not implicate *ex post facto* considerations because advisory guidelines are not “laws,” and principally the Eighth, Sixth, District of Columbia, and First Circuits, all holding that the *ex post facto* clause still applies. The Fifth Circuit, rather ambiguously, has stated that it may favor the Seventh Circuit’s interpretation. The issue post-*Booker* is yet to be considered by the United States Supreme Court. Compare *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006) (“We conclude that the *ex post facto* clause should apply only to laws and regulations that bind rather than advise, a principle well established with reference to parole guidelines whose retroactive application is challenged under the *ex post facto* clause.”), with *United States v. Carter*, 490 F.3d 641, 643–46 (8th Cir. 2007) (discussing *ex post facto* implications, but finding that the *ex post facto* claim was forfeited), and *United States v. Duane*, 533 F.3d 441, 446–47 (6th Cir. 2008), and *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008), and *United States v. Gilman*, 478 F.3d 440, 449 (1st Cir. 2007). But see *United States v. Rodarte-Vasquez*, 488 F.3d 316, 323–24 (5th Cir. 2007).

122. *Nacchio*, 573 F.3d at 1078 (citing *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004) (quoting *SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983))).

123. *Id.* at 1073 (emphasis added).

124. See *Bowman*, *Sentencing Reforms*, *supra* note 9, at 41.

questions: how should the court *sanction* the offender for the criminal *conduct*; and what sanction is *proportionate* to his criminal *culpability*?

Thus far, this Comment has established that the Sentencing Commission intended the economic-crimes provisions of the Sentencing Guidelines to parallel one another. Moreover, the provisions' internal references to one another indicated they were intended to complement each other. The following discussion first contrasts the practicality of the two prevailing theories of gain calculation by analogizing them to the loss-calculation methodology employed for sentencing economic crime offenders. It will be argued that the loss methodology forms a reasonable basis upon which to postulate future amendment to gain as a measure of culpability.¹²⁵ Second, each approach's ability to align with the philosophical underpinnings of criminal punishment will be considered as a threshold inquiry into whether an approach will be adopted through Guidelines amendment.

The Sentencing Guidelines contain three relevant authorities. First, the guideline provisions set out the essential information a court will need in order to impose a sentence.¹²⁶ Second, each guideline section has official commentary which provides notes on application of the guideline provision, its drafting background, and any other considerations which may be useful to a court in interpreting ambiguous language.¹²⁷ Lastly, each guideline section contains policy statements that give general explanations of the policy leading to the Sentencing Guidelines and how the Guidelines are to be employed to further the purposes of the Sentencing Reform Act.¹²⁸ In *Stinson v. United States*, the Supreme Court held that the "principle that the Guidelines Manual is binding on federal courts applies as well to policy statements" and that "commentary regarding departures from the Guidelines should be 'treated as the legal equivalent of a policy statement.'"¹²⁹ Thus, in examining the various calculation methodologies relevant to section 2B1.4 gain calculation and section 2B1.1 reference to gain, the analysis herein will employ all three authorities.

A. Plain Language and Commentary: Practical Considerations

Section 2B1.4's limited length and sparse explanation makes analysis of the "gain resulting from the offense" problematic, as there is virtually no direct indication of its suggested use.¹³⁰ By contrast, section 2B1.4's sister section—2B1.1 (Theft, Property Destruction, and

125. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008).

126. *Stinson v. United States*, 508 U.S. 36, 41 (1993).

127. *Id.*

128. *Id.*

129. *Id.* at 42–43. Note that though the Sentencing Guidelines are now advisory, *Stinson v. United States* remains good law.

130. U.S. SENTENCING GUIDELINES MANUAL § 2B1.4 (2008).

Fraud)—is extensive, largely due to prior amendment.¹³¹ Building off of the commentary¹³² regarding the reasons for the amendment of loss as a measure of culpability (which addressed the practical problems of employing the definition, causation, and timing of loss), the viability of the two theories of gain calculation are analyzed below.

1. Definition

The net-gain approach put forth by the Eight Circuit in *Mooney* strongly emphasizes gain as the “total increase in value realized through trading in securities.”¹³³ Beginning with strict statutory construction, the Eight Circuit stated, “[t]he guideline refers to defendant’s gain, *not to market gain*, and it ties gain to the defendant’s offense . . . speak[ing] of gain that has resulted, *not of potential gain*.”¹³⁴ By reading gain generally, as expressed in the Guidelines provision, the court took the approach that the Commission intended the defendant’s gain to be interpreted broadly.

2. Causation

As the broader of the two definitions of gain, net gain projects a predictably wider scope for causation, emphasizing the amount *realized* from the illegal activity.¹³⁵ The Eighth Circuit went to great lengths to establish the definition of “realized” as “well-settled terminology,” finally surmising that “[b]y use of the word realized, the commentary makes clear that gain is the *total profit* actually made from a defendant’s illegal securities transactions.”¹³⁶ The Eight Circuit chose not to distinguish the illegal transaction—what the Tenth Circuit in *Nacchio* specified as the disclosure of material, nonpublic information—from the completely legal activity of trading in general, but rather looked to the entire trade as a whole.¹³⁷ In so doing, the court in *Mooney* defined gain causation as the requisite “but for” the trading in securities and did not attempt to limit its legal causation.

The narrower definition of gain in the market absorption approach necessitates confining gain causation to but-for, plus a little. The Tenth Circuit criticized the net-gain approach as “effectively ignor[ing] the myriad of factors unrelated to [the offender’s] criminal fraud that could have contributed to the increase in value of the securities.”¹³⁸ By going

131. Compare U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2008) with U.S. SENTENCING GUIDELINES MANUAL § 2B1.4 (2008).

132. See *Stinson*, 508 U.S. at 46 (“[T]he courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter.”).

133. *United States v. Mooney*, 425 F.3d 1093, 1099–1100 (8th Cir. 2005) (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.4 cmt. background (2002)).

134. *Mooney*, 425 F.3d at 1099 (emphasis added).

135. *Id.*

136. *Id.* at 1100 (emphasis added).

137. See *id.* at 1101.

138. *United States v. Nacchio*, 573 F.3d 1062, 1074 (10th Cir. 2009).

back to the underlying offense in *Nacchio*—insider trading—the Tenth Circuit stated that the gain must be that which occurs during the commission of the offense, and that the offense ends once the material, nonpublic information becomes public *and* is absorbed by the market.¹³⁹ The court reasoned that, “the underlying value of the share of stock, which is separable from the deceptive practice accompanying its purchase or sale, should not be attributed to an inside trader.”¹⁴⁰ The calculation methodology the Tenth Circuit settled on was the value of the shares when the insider sold them while in possession of material nonpublic information, minus the market value of the stocks “a *reasonable time* after public dissemination of the inside information.”¹⁴¹ In doing so, the court effectively added a limit to legal causation. In footnote thirteen, the court elaborated that, “the court should consider the volume and price at which [the] shares were traded following disclosure, insofar as they suggested the date by which the news had been fully digested and acted upon by investors.”¹⁴² Thus, market absorption defines but-for gain causation as that which is strictly related to the illegality of the transaction and confines legal causation to a “reasonable time after” the material, nonpublic information goes to market.

When amending gain causation, the Sentencing Commission will, therefore, have to decide whether to limit the legal causation of “gain resulting from the offense.”¹⁴³ A comparable issue when the economic-crimes provisions were amended in 2001, loss causation centered around three principle concerns: (1) whether to include “foreseen or unforeseen” losses;¹⁴⁴ (2) whether loss should be limited to the amount of loss in the taken property;¹⁴⁵ and (3) whether loss should include non-consequential or simply direct damages.¹⁴⁶

The resulting amendment specifies that actual loss is the “‘reasonably foreseeable pecuniary harm’¹⁴⁷ that resulted from the offense.”¹⁴⁸ The new definition demands at least factual (“but for”) causation¹⁴⁹ and af-

139. See *id.* at 1073; *Mooney*, 435 F.3d at 1106 (Bright, J., dissenting) (“The offense is not the purchase, but the deception.”).

140. *Nacchio*, 573 F.3d at 1073 n.11.

141. *Id.* at 1078 (citing *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004)) (emphasis added).

142. *Nacchio*, 573 F.3d at 1078 n.13 (quoting *SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983)) (alteration in original).

143. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.4(b)(1) (2008).

144. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008) (citing *United States v. Lopreato*, 83 F.3d 571 (2d Cir. 1996); *United States v. Sarno*, 73 F.3d 1470 (9th Cir. 1995)).

145. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008) (citing *United States v. Marlatt*, 24 F.3d 1005 (7th Cir. 1994)).

146. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008) (citing *United States v. Thomas*, 62 F.3d 1332 (11th Cir. 1995); *United States v. Daddona*, 34 F.3d 163 (3d Cir. 1994); *United States v. Newman*, 6 F.3d 623 (9th Cir. 1993)).

147. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008) (noting that “[r]easonably foreseeable pecuniary harm” is defined as pecuniary harms that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense”).

148. *Id.*

149. *Id.*

fects three key changes in regard to legal causation: (1) consequential damages are excluded from the definition of causation because “reasonably foreseeable” was deemed sufficient for application of the standard;¹⁵⁰ (2) interest and similar costs are excluded, in most cases,¹⁵¹ thereby decreasing unnecessary litigation regarding interest;¹⁵² and (3) costs reasonably incurred by the government or the victims in investigating and prosecuting the case are also excluded because of their fact-finding burden and the fear that inclusion of such costs would distance loss from its purpose as a measure of criminal culpability.¹⁵³

The market-absorption approach comes nearer to the amended-loss causation than net gain because it confines legal causation more tightly. Both gain-causation theories retain the necessary but-for causation, though they differ once again in their emphasis on the underlying offense. As to legal causation, the market-absorption approach of “reasonable time after”¹⁵⁴ parallels “reasonably foreseeable”¹⁵⁵ in the loss-causation. “Reasonable time after”¹⁵⁶ may nonetheless conflict with loss-causation in that loss was amended to decrease unnecessary litigation costs in fact-finding. Determining causation under the market-absorption approach may become fact-intensive and costly to the judicial system—and parties involved in the litigation—because it requires significant fact-finding.¹⁵⁷ Therefore, though market-absorption gain causation is more consistent with the resolution of loss causation because it puts a limit on legal causation and keeps the measure of culpability highly related to the criminal conduct, it may nonetheless defeat the purpose of reducing judicial costs.

3. Timing

Delving deeper into gain causation reveals that the two gain theories also differ in their determination of the proper time at which to calculate gain. Net gain uses the time of sale to calculate gain. This is consistent with net gain as a broad approach to the total profit generally realized by the offender. “The use of actual sales to calculate gain provides a clear and coherent bright-line rule, eliminating the need for extensive factfind-

150. *Id.*

151. *Id.* (noting that in the rare occasion “in which exclusion of interest will under-punish the offender,” interest may be included).

152. *Id.*

153. *See id.*

154. *United States v. Nacchio*, 573 F.3d 1062, 1078 (10th Cir. 2009).

155. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (2008).

156. *Nacchio*, 573 F.3d at 1078.

157. *See id.* at 1068 n.7 (explaining that expert witness Daniel Fischel prepared an event study which “looks to how the price of the stock changed after the fraud was disclosed as evidence of the amount by which it was inflated prior to disclosure” in order to determine the gain specifically resulting from the trading based on material, nonpublic information); *see also id.* at 1068 (noting the State suggests that the expert study is “flawed”).

ing to try to determine when the market has absorbed nonpublic information.”¹⁵⁸

By contrast, the market-absorption approach uses “a reasonable time after dissemination of the [material nonpublic] information” as the timeframe to calculate gain.¹⁵⁹ The reasoning behind this approach is that the stock has inherent value and its market price will move based on other factors not related to the disclosure of the inside information.¹⁶⁰ “It is that illicit, artificially high value [attributable to the nondisclosure of material, nonpublic information] that should be reflected in gain calculation, *not* the underlying value of the stock.”¹⁶¹

The issue of gain causation, therefore, will also require the Sentencing Commission to address at what point in time the measure of gain will be taken. An analogous consideration of loss causation related to timing reveals that the Economic Crime Package reforms adopted the net-loss approach, which specifically excluded certain economic benefits transferred to the victims from incorporation in the loss calculation when those benefits were transferred after the time of detection of the crime.¹⁶² This reform reemphasized the necessary connection between the gravity of the criminal conduct and the offender’s culpability.¹⁶³ In conjunction with net loss, the reform codified the time-of-detection approach,¹⁶⁴ stating that it was “the most appropriate and least burdensome time for measuring the value of the transferred benefits.”¹⁶⁵ Under the amended Guidelines, the benefits transferred to the victim after the offender is made aware that his activity has been detected are not permitted to mitigate the amount of loss used in calculating his sentence.¹⁶⁶

Once again, the timing of gain calculation under the market-absorption approach is more consistent with timing for the calculation of loss. Excluding benefits transferred to the victim after the crime is detected in the loss calculation is analogous to the exclusion of market factors adding to the underlying value of the stock in the gain calculation. Indeed, both recognize the existence of other factors as beyond the reach of the offender’s conduct so that excluding them more accurately reflects the offender’s culpability.¹⁶⁷ But, like with the market-absorption causation, the underlying principle of market-absorption timing may defeat the goal of codifying the least burdensome approach to measuring culpabil-

158. *United States v. Mooney*, 425 F.3d 1093, 1101 (8th Cir. 2005).

159. *Nacchio*, 573 F.3d at 1078.

160. *See id.* at 1076–77.

161. *Id.* at 1076 (emphasis added).

162. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008).

163. *Id.*

164. *Id.* (noting that time of detection also includes “about to be detected” so as to account for situations where the defendant is cognizant that his criminal conduct is soon to be detected).

165. *Id.*

166. *See id.*

167. *See id.*; *see also United States v. Nacchio*, 573 F.3d 1062, 1072 (10th Cir. 2009).

ity. Though market absorption clearly emphasizes the culpability of the offender in calculating gain, it risks requiring courts to employ an unwieldy and fact-intensive methodology for finding gain as a measure of culpability. This is inconsistent with the goals the Sentencing Commission has in amending the Sentencing Guidelines for practicality purposes.¹⁶⁸

In a strictly statutory reading, market absorption more clearly meets the practical requirements necessary for amendment of sections 2B1.4 and 2B1.1 commentary regarding gain as a measure of culpability. Market absorption closely parallels the prior amendment of loss as a measure of culpability through its definition of gain, and determination of causation and timing. Yet, market absorption may nonetheless present complications in execution because its elements of causation and timing may be burdensome on the criminal justice system. To reconcile these issues when determining which approach, if either, to codify by amendment, the Sentencing Commission must look to the larger policy framework of federal sentencing and criminal punishment.

B. Policy Perspective: Revisiting the Philosophical Framework

The third authority of the United States Sentencing Guidelines Manual, the policy statements, defines the philosophical framework that drives the Sentencing Guidelines.¹⁶⁹ The value of the policy statements is in their attempt to guide all interpretation of Guidelines provisions to be consistent with both sentencing policy and the overriding goals and purpose of the criminal justice system, as a sanctioning mechanism for morally reprehensible behavior.¹⁷⁰ When amending gain as a measure of culpability for the sentencing of economic-crime offenders, the Sentencing Commission will likely consider: (1) whether the proposed calculation is consistent with federal sentencing policy; and (2) whether it promotes the stated goals and purposes of criminal punishment.¹⁷¹

1. Sentencing Policy: Honesty, Uniformity, and Proportionality

Under the Sentencing Reform Act, Congress set forth three objectives for the Sentencing Commission: (1) create “honesty” by reining in the discretion of sentencing judges;¹⁷² (2) establish “reasonable uniformity” so as to reduce sentence disparity between like offenders;¹⁷³ and (3) create “proportionality” in sentencing, differentiating between the many

168. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008).

169. See *Stinson v. United States*, 508 U.S. 36, 41 (1993).

170. See *id.*

171. Such an analysis would be consistent with the Sentencing Commission’s general approach in establishing the Sentencing Guidelines. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008).

172. *Id.*; see also Ramirez, *supra* note 17, at 365.

173. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008); see also Ramirez, *supra* note 17, at 366.

criminal conducts punishable by federal statute while relating sentence terms to the specific offender's culpability.¹⁷⁴ Today, and since promulgation, the Federal Sentencing Guidelines embody these principles.

In the realm of economic crimes, the 2001 Sentencing Guidelines reforms reinstated uniformity in the sentencing of economic-crime offenders by emphasizing proportionality in sentencing without promulgating costly, in depth fact-finding.¹⁷⁵ This Comment's analysis of the two gain calculation methodologies resulted in a clear preference for the market-absorption approach. This outcome can largely be explained by looking at which sentencing policy each gain methodology promotes: uniformity or proportionality.

Market absorption arguably requires intensive fact-finding in order to attain proportionality in sentencing.¹⁷⁶ But the *Nacchio* court flatly rejected the government's argument that "criminal punishment would turn on experts hypothesizing 'what ifs'" and that "[g]ain would depend as much on the expert retained and the guesswork permitted as on actual conduct."¹⁷⁷ The court asserted that proportionality is the primary aim of the financial-fraud provisions, that "it is axiomatic that a critical objective of federal sentencing is the imposition of punishment on the defendant that reflects his or her culpability for the criminal offense."¹⁷⁸ Consequently, the Tenth Circuit addressed uniformity in sentencing as a secondary purpose¹⁷⁹:

[T]he greater certainty that presumably would be the product of such a simplistic approach is not a cardinal objective of federal sentencing in financial fraud cases. Indeed, the Guidelines expressly contemplate that sentencing computations in financial fraud cases may involve some element of imprecision Therefore, it stands to reason that, operating within a wide range of discretion in the financial fraud context, courts likely will arrive at different sentencing outcomes on roughly similar facts and that, consequently, *certainty of result cannot be a controlling objective of the Guidelines*.¹⁸⁰

In order to conclude that uniformity is not a goal in financial-fraud cases, the court drew from the statement in the commentary of section

174. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008); *see also* Ramirez, *supra* note 17, at 369.

175. Note that honesty was not a large consideration in reforming the loss calculation in 2001 because the Guidelines were, at the time, mandatory. Today, honesty might be a larger consideration because the Guidelines are now advisory, restoring limited discretion to the sentencing judge. Due to the continuing restraints of the post-*Booker* advisory system, the impact of honesty in sentencing policy goes unconsidered herein.

176. *United States v. Mooney*, 425 F.3d 1093, 1099 (8th Cir. 2005) (stating that market absorption is "inherently speculative" and would "involve extensive factfinding").

177. *United States v. Nacchio*, 573 F.3d 1062, 1079 n.14 (10th Cir. 2009); Brief for the United States at 65, *United States v. Nacchio*, 573 F.3d 1062 (10th Cir. 2009) (No. 07-1311).

178. *Nacchio*, 573 F.3d at 1077.

179. *See id.*

180. *Id.* at 1077 (emphasis added).

2F1.1 of the 2000 Sentencing Guidelines that loss need only be a “reasonable estimate.”¹⁸¹ This seems attenuated: though the Sentencing Commission purposefully included the “reasonable estimate” provision in the current Sentencing Guidelines,¹⁸² it arguably did so with the intent of prompting courts to balance the institutional costs incurred by using a highly-precise calculation that would result in a truly proportionate sentence, against a simpler calculation which may decrease proportionality for the specific offender, but would promote uniformity in the aggregate.¹⁸³

By contrast, the net-gain approach in *Mooney* may do the opposite: by favoring a bright-line rule, the *Mooney* court emphasized uniformity in sentencing but overlooked the rule’s impact on proportionality. One of the criticisms raised by the dissent in *Mooney* was that the net-gain approach results in “unequal sentences for equal crimes.”¹⁸⁴ But, the majority in *Mooney* argued that “imprecise standards,” such as market absorption’s required determination of a reasonable time after dissemination of material, nonpublic information, “are particularly inappropriate in the criminal context.”¹⁸⁵

As framed by *Mooney* and *Nacchio*, the issue is whether the sentencing goals are coextensive or whether there may be a primary goal at the expense of another. In *Mooney*, Judge Bright’s dissent reminded the court that in light of *Booker*, the purpose of the Sentencing Guidelines “‘was to move the sentencing system in the direction of increased uniformity,’ a uniformity that consists of ‘similar relationships between sentences and real conduct,’”¹⁸⁶ thus further emphasizing the desire to balance uniformity and proportionality against one another to achieve the most judicious result. Though both courts purport to do exactly that, neither appears to effectively promote both proportionality *and* uniformity.¹⁸⁷

By favoring a bright-line rule, the *Mooney* court emphasized uniformity across offenders, but overlooked the rule’s impact on proportionality for the specific offender. By articulating a cumbersome and fact-

181. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 cmt. n.9 (2000)).

182. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (2008).

183. Compare U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617, at 687–693 (2008), with U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008).

184. *United States v. Mooney*, 425 F.3d 1093, 1106–07 (8th Cir. 2005) (Bright, J., dissenting).

185. *Id.* at 1101 (majority opinion).

186. *Id.* at 1107 (Bright, J., dissenting) (quoting *United States v. Booker*, 543 U.S. 220, 253 (2005)).

187. See, e.g., *United States v. Nacchio*, 573 F.3d 1062, 1086 (10th Cir. 2009) (stating that the focus of the court’s holding was on “important objectives of federal sentencing—specifically, sentences should reflect the individual criminal culpability of defendants and avoid unwarranted sentencing disparities”); see also *Mooney*, 425 F.3d at 1101 (stating that its focus “on the increase in value realized by the defendant’s trades provides a simple, accurate, and predictable rule for judges to apply and follows the congressional mandate that sentences reflect the seriousness of the offense”).

intensive rule, the *Nacchio* court's market-absorption methodology promoted proportionality for the specific offender over uniformity within the sentencing system. Is it therefore possible that uniformity and proportionality, because they emphasize different policy goals, are mutually exclusive? In application, the current theories of calculating gain as a measure of culpability under section 2B1.4 of the Sentencing Guidelines suggest that uniformity and proportionality perhaps cannot be coextensively achieved. In reforming the measure, the Sentencing Commission must consider whether the goals can be balanced or whether it must elect which goal will become the primary goal, in light of compounding factors such as the practicality of the terms for calculation and the larger policy goals of criminal punishment.

2. The Dilemma of the Purpose of Punishment

The current split in calculation methodology for gain as a measure of culpability evokes two distinctive aspects of criminal justice and punishment. The first is that criminal punishment has the unique goals of retribution and deterrence.¹⁸⁸ The second is that criminal punishment, as a system, seeks to sanction moral wrongdoing, rather than price it.¹⁸⁹ The sentencing phase is arguably the only feasible point at which the tort/crime distinction can now be implemented by properly emphasizing both distinguishing aspects of criminal justice.¹⁹⁰ Therefore, the threshold inquiry into which methodology, if either, should be adopted by the Sentencing Commission when amending financial gain as a measure of culpability is (1) whether the methodology meets the desired retributive and deterrent effects of criminal punishment, and (2) whether the approach is pricing or sanctioning in nature.¹⁹¹

a. Retribution and Deterrence

The Sentencing Commission took a modern approach to sentencing when it wrote the Sentencing Guidelines by specifically emphasizing two of the stated goals of the Sentencing Reform Act: retribution and deterrence.¹⁹² Retribution emphasizes the nature of criminal law and punishment as indicative of the ideals and values of the community.¹⁹³ Thus, under a retributive theory, commission of the crime is a choice by the offender to do "evil over good" and the offender deserves to be punished

188. See 18 U.S.C. § 3553(a) (2006); see also BOOKER REPORT, *supra* note 18, at 5.

189. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1548 (1984).

190. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194 (1991).

191. *Contra supra* note 171.

192. Bowman, *Coping with Loss*, *supra* note 36, at 468 (stating that "the fundamental philosophical approach taken by the Guidelines . . . [is] a virtual abandonment of the rehabilitative or medical model of sentencing in favor a designedly imprecise amalgam of 'just deserts' retributivism and utilitarian 'crime control' theories of deterrence and incapacitation"); see also Ramirez, *supra* note 17, at 371.

193. See Ramirez, *supra* note 17, at 409.

for his immorality in disobeying a community standard.¹⁹⁴ Though retribution incorporates recognition of the community mores, it is nonetheless a theory of just deserts: that “punishment should be scaled to the offender’s culpability and the resulting harms.”¹⁹⁵ Ideally, these two concepts—community mores and just deserts—will align; but, as illustrated in the instance of economic crimes, they may be much more complex in reality.

Deterrence, on the other hand, “serves to prevent future harm” by discouraging both the specific offender from recidivism and the community, generally, from pursuing similar conduct.¹⁹⁶ Punishment by deterrence directs conformity of individual conduct within the bounds of the law.¹⁹⁷ Though traditional theorists would argue that retribution and deterrence theories may be mutually exclusive, the Sentencing Commission has stated that the Sentencing Guidelines execute both, and that the choice between retribution and deterrence “was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.”¹⁹⁸ Thus, taken together, both theories punish nonconformance with the moral standards set by society at large.¹⁹⁹

When the Sentencing Commission overhauled the economic crime sentencing provisions in 2001, it considered the current community perception of the morality of white-collar crime offenders to determine if the current state of the Guidelines reflected community standards.²⁰⁰ The 1990s and early 2000s bore witness to numerous high-profile, high-dollar frauds committed by white-collar corporate offenders, drawing attention to the reality that most white-collar offenders received only minimum penalties and were frequently given probation rather than a prison sentence.²⁰¹ Public outcry progressively encouraged the trend of not only white-collar offenders receiving prison terms, but longer ones.²⁰² Concluding that there was still a disconnect between current sentencing of

194. *Id.* at 409.

195. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2009).

196. J. Scott Dutcher, Comment, *From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L.J. 1295, 1303–04 (2005).

197. *Id.* at 1304.

198. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008) (noting that the Sentencing Commission references “just deserts” (retribution) and “crime control” (deterrence)).

199. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1360 (1991) (stating that “criminal proceedings are special and different because they serve as ‘affirmation[s] of shared moral purpose’”) (alteration in original).

200. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008).

201. WANG & STEINBERG, *supra* note 22, at 557; see also Ramirez, *supra* note 17, at 380 (“The Economic Crime Package illustrates the Sentencing Commission’s continued willingness to move sentencing of high-dollar economic criminal offenses toward more severe terms of imprisonment.”).

202. Gabbay, *supra* note 37, at 435.

white-collar crime offenders and society's perception of their culpability, the Economic Crime Package universally increased penalties for economic-crime offenders.²⁰³ Specifically, the reforms amended the loss table to create substantially higher penalties when moderate to high loss amounts were incurred.²⁰⁴ With additional reform to white-collar crime punishment through the Sarbanes–Oxley Act enacted in 2002,²⁰⁵ the trend has been sustained.²⁰⁶ Furthermore, despite the post-*Booker* Guidelines' advisory nature and return of more of the discretionary role of sentencing judges—a development welcomed by defense attorneys who hoped it would be a mechanism for reversing the trend of longer prison sentences—the average sentence term for white-collar offenders has continued to increase.²⁰⁷

In the instance of economic crimes, retribution addresses the fact that the sophisticated-fraud offender must be made more accountable to society at large for his gain in violation of the community mores because neither the specific victims, nor their loss, are easily identifiable.²⁰⁸ Given the realignment of sentencing for economic-crime offenders and public perception of the immorality of economic-criminal offenses, net gain—not market absorption—appears to be most consistent with the objectives of retribution. But, the retributive concept of just deserts suggests, conversely, that market absorption better implements retribution because it exacts a more proportionate punishment. This conclusion clearly indicates that dependent on the desired retributive effect, either theory may suffice.

Net gain fits the retributive purpose of criminal justice because it accounts for society's growing perception that white-collar crime is morally reprehensible and should be punished more severely. In her article on punishing economic-crime offenders, Professor Ramirez notes that “[t]hose offenders whom society has welcomed into its personal or financial affairs based upon the façade of respectability and trustworthiness projected by the offenders seem the most culpable under a system of retribution” because they are educated, intelligent offenders situated economically so that the decision to take criminal conduct is truly a

203. *Id.* at 436–38 (“[A] national survey on white-collar crime conducted during 1999 found ‘a serious confidence gap between public demand for ‘just deserts’ for white-collar offenders and the perception of the criminal justice system’s ability, or willingness, to administer adequate punishment.’”).

204. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617 (2008).

205. Gabbay, *supra* note 37, at 438–39 (stating that the Sarbanes-Oxley Act “directed the Sentencing Commission to amend the Federal Sentencing Guidelines so that they ‘reflect the serious nature of the offenses and the penalties set forth in this Act’ in order to ‘deter, prevent and punish such offenses’”).

206. Harris & Kaminska, *supra* note 70, at 154 (stating that between 2003 and 2007, the sentences of economic crime offenders on average “increased from 22.4 months to 26.2 months and the median from 15 to 18 months,” with fraud offenders experiencing increases from 14.4 months to 19 months).

207. *Id.* at 155; see also BOOKER REPORT, *supra* note 18, at 46.

208. See Bowman, *Coping with Loss*, *supra* note 36, at 501, 509.

choice.²⁰⁹ Net gain's more global approach to uniform punishment, though tending to increase sentence length because it eliminates finding costly factual distinctions between like offenders, better actuates the retributive purpose of criminal punishment as "enhanc[ing] the criminal law's moral credibility" and not undermining the community's perception of the required means of justice in white-collar crimes.²¹⁰ Therefore, the fact that net gain does not promote proportionality for specific offenders (such as just deserts may require) is overcome by its ability to reflect societal contempt for white-collar crime.

By contrast, market absorption may lose sight of the trend to increase punishments for economic-crime offenders because, by scrutinizing the exact transaction resulting in gain, final determination of the offender's gain for sentence calculation purposes may in fact be distinctly different from his perceived moral culpability in society. In *Nacchio*, the Tenth Circuit drew significantly on civil law cases and their remedies because market-absorption approach comes from the civil remedy of disgorgement.²¹¹ But it has been noted that "criminal and civil law most clearly diverge when the goal is to exact a penalty capable of expressing condemnation—commonly termed retribution."²¹² Market absorption clearly reflects this conclusion because, by narrowing the gain calculation and limiting it to just the illegal transaction, the gain calculation's punitive potential as "a penalty solely to punish" is diminished.²¹³ Conclusively, market absorption's emphasis on the proportionality of the sentence demonstrates just deserts, but it is that exactness in executing the calculation which may diminish market absorption's retributive capacity in light of societal mores.

Likewise, net gain better exemplifies the deterrent purpose of criminal punishment. Similar to findings in retribution theory, deterrence theory has recognized that white-collar crime is generally not committed out of necessity.²¹⁴ It is thus widely accepted that punishment of white-collar crime offenders is most effective as a general deterrent, rather than a specific deterrent.²¹⁵ The purpose of punishment as a general deterrent in the instance of white-collar offenders pushes for "substantial prison terms and . . . financial penalties . . . more severe than [the offenders']

209. Ramirez, *supra* note 17, at 410.

210. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 213 (1996).

211. United States v. Nacchio, 573 F.3d 1062, 1077–78 (10th Cir. 2009) (citing *Dura Pharm. v. Broudo*, 544 U.S. 336, 343 (2005); *United States v. Leonard*, 529 F.3d 83, 93 n.11 (2d Cir. 2008); *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007); *United States v. Ebbers*, 458 F.3d 110, 128 (2d Cir. 2006); *SEC v. MacDonald*, 699 F.2d 47, 52–55 (1st Cir. 1983)).

212. Cheh, *supra* note 199, at 1355.

213. *Id.* at 1357.

214. Ramirez, *supra* note 17, at 417.

215. *See id.*

economic gains, forcing offenders to dip into their savings to reimburse those they cheated”²¹⁶ because:

White-collar crime is difficult to detect, time-consuming to investigate, and costly to prosecute, all resulting in less certainty of punishment. . . . [L]ow rates of imprisonment or meager terms . . . undermine the message of deterrence directed at those who willingly and knowingly have participated in similar activities but were not criminally charged.²¹⁷

Net gain emphasizes general deterrence because it achieves the result of a higher sentence and fine through looking at the general culpability of the offender and not getting bogged down in the details of his specific transaction(s).

By contrast, market absorption likely applies more of a specific deterrent effect, and a low one at that, because the offender’s sentence is compounded strictly by the gain that he personally obtained from his illegal transaction. Furthermore, it may not even achieve specific deterrence, because gain calculation under market absorption may only communicate to the offender “that society has been wronged” and “that he must pay,” much like measures of liability exact a remedy, and less like punishment imposes a sanction.²¹⁸ Arguably, this does not send a message to the community that sophisticated-fraud offenders will be punished “more severe[ly] than their economic gains,”²¹⁹ and thus undermines the goal of punishing white-collar offenders to achieve general deterrence.

Given prior amendment to loss as a measure of culpability through the Economic Crimes Package—which substantially increased penalties for relevant offenders as a response to public outcry—the Commission will likely emphasize the community perception of white-collar crime and the ability of a sentence to deter sophisticated fraud generally, rather than specifically. Net gain executes retribution in light of the fact that sophisticated frauds are crimes in which the offender must answer to society at large—which has increasingly deemed white-collar crime morally reprehensible and deserving of more stringent punishment—and properly emphasizes the purpose of punishing white-collar crime for its general deterrent effect. Net gain is most consistent with the observation that “the criminal law threatens the defendant with a much sharper, more discontinuous jump in the costs that the defendant will incur for [his] violation than does tort law, because the criminal law has little reason to

216. Dutcher, *supra* note 196, at 1308.

217. Ramirez, *supra* note 17, at 415.

218. *Id.* at 416 (“[T]he offender must not be told simply that society has been wronged and that the offender must *pay*, but rather that the offender is the wrongdoer and will *suffer* dire consequences if such course of criminal action is pursued.”) (emphasis added).

219. Dutcher, *supra* note 196, at 1308.

fear overdeterrance [sic] (that is, the chilling of socially valuable behavior) within its appropriate domain.”²²⁰

b. The Necessary Distinction Between Tort and Crime

The essential division between tort and criminal law “has been a hallmark of English and American jurisprudence for hundreds of years.”²²¹ The two systems have largely functioned in tandem, but with the distinction that criminal law “prefers to deal in moral absolutes,”²²² signaling violation of a societal norm, while tort law seeks to measure liability of a wrongdoer, but does not outright condemn the offender for his action.²²³ Though in recent years there has been a significant blurring of the tort/crime line,²²⁴ the trend has not made the distinction irrelevant.²²⁵ Rather, it has been suggested that the role of the Sentencing Commission in promulgating sentencing guidelines is to reinvigorate the tort/crime distinction which has been blurred or overlooked by lawmakers.²²⁶

In academia, a renewed emphasis on distinguishing tort from crime has focused on the essential distinction of pricing conduct in tort law and sanctioning commission of a criminal offense. In his article *Pricing and Sanctioning*, Professor Cooter defines “a price as a money extracted for doing what is permitted” to require individuals to take into account the “external costs of their acts,” while “a sanction [is] a detriment imposed for doing what is forbidden.”²²⁷ He proposes that in making a determination whether to impose a price or a sanction, the following should be observed:

If lawmakers can identify socially desirable behavior, but are prone to error in assessing the cost of deviations from it, then sanctions are preferable to prices. . . . [I]f officials can accurately measure the external cost of behavior, but cannot accurately identify the socially desirable level of it, then prices are preferable to sanctions.²²⁸

Pricing, therefore, indicates that the offender/tortfeasor could reasonably weigh the external costs of his conduct against its benefits before committing the offense, thereby making the price imposed a reasonable

220. Coffee, *supra* note 190, at 195.

221. Cheh, *supra* note 199, at 1325.

222. Coffee, *supra* note 190, at 225.

223. Robinson, *supra* note 210, at 206.

224. See Cheh, *supra* note 199, at 1325, 1332.

225. See Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 758 (1993); see also Coffee, *supra* note 190, at 222 (Through discussion of Judge Posner’s and Judge Calabresi’s position that both tort and criminal law are means of capturing externalities for allocative efficiency purposes, Coffee indicates that even prominent economic law scholars still believe there is a necessary distinction between tort and criminal law.)

226. Coffee, *supra* note 190, at 196, 201.

227. Cooter, *supra* note 189, at 1523.

228. *Id.* at 1524.

means to deter commission of the conduct. By contrast, sanctioning conduct would indicate either that the costs are incapable of being identified accurately, or that the conduct is deemed inappropriate for a cost/benefit analysis because the goal is to deter *any* commission of the offense—not just commission of the offense only when it is above a certain cost premium.

Historically, economic crimes were a form of property theft and thus the value of the thing stolen was the primary factor in determining punishment.²²⁹ In such an instance, the loss to the victim could reasonably be considered an externality of the commission of the crime. Where the victims and their losses were indeterminate, it would be accurate to suggest that the externality—the loss to society—was too great to calculate, so gain to the offender would be assessed instead. Thus, economic crimes have always, to a certain extent, blurred the line between tort—which would award compensation for the thing stolen (the victim's loss)—and crime—which would punish commission of the theft itself. Today, the Sentencing Guidelines, comprised of methodical, arithmetic calculations which incorporate the value of the victim's loss or offender's gain into determination of the economic-crime offender's sentence, reinforce the overlap to a certain extent by retaining the calculation of externalities of the criminal conduct in the assessment of the offender's sentence. Nonetheless, criminal sentencing, as a function of the criminal justice system, has the underlying purpose of sanctioning morally reprehensible behavior and deterring its commission.²³⁰ Thus, the area of economic crimes implicates a potential conflict between pricing and sanctioning at the sentencing stage.

For the specific case of insider trading, Professor Coffee has recognized that the origin of the offense—and indeed its retention as a civil tort—complicates its distinction today as a crime.

At some point, a civil standard can become so deeply rooted and internalized within an industry or professional community that its violation becomes blameworthy, even if it was not originally so. Insider trading may supply such an example, where the norm has long since become internalized within the industry. The relationship of the civil and criminal law here is sequentially interactive: the civil law experiments with a standard, but at some point it may 'harden' into a community standard that the criminal law can enforce. At that point, it may be appropriate to prohibit, rather than price, at least if society believes that the defendant's conduct lacks any colorable social utility.²³¹

229. *Supra* notes 53–57 and accompanying text.

230. *See* Cooter, *supra* note 189, at 1549.

231. Coffee, *supra* note 190, at 201.

Thus, in using gain as a measure of culpability, the issue is whether it is appropriate to adopt a tort law calculation methodology in criminal sentencing determination precisely because there is an experienced formula employed in analogous tort liability cases,²³² even when doing so would put at risk the tort/crime distinction underlying the American legal system.²³³ The analysis of net gain and market absorption in the sections that follow centers around each methodology's nature as a pricing or sanctioning mechanism in order to determine whether either is appropriate for adoption into the Sentencing Guidelines.

The net-gain approach proposed by the Eighth Circuit Court of Appeals in *Mooney* exemplifies sanctioning because "for behavior that society wishes to prohibit, a deliberately sharp and discontinuous jump should be structured into the sentencing guidelines."²³⁴ Through comparison to the loss calculation, it was evidenced that net gain takes a broad definition of gain, employs virtually no limit on causation, and calculates gain at the time of sale. Although the Tenth Circuit criticized this approach by stating that net gain overstated the gain, thereby leading to over-sentencing, the Eighth Circuit court asserted that "[t]he public interest that is served by sentencing criminal defendants has broader goals" than limiting the penalty to disgorgement of the exact gain obtained from the illegal transaction.²³⁵

The theory of criminal punishment as a sanctioning mechanism specifically characterizes an "upwardly biased penalt[y] that seek[s] to 'prohibit' rather than 'price.'"²³⁶ Net gain is consistent with this approach and moreover, is consistent with the supposition that in sanctioning, "[i]t is not essential that the sanction equal the harm caused by the act It is only essential that the sanction be large enough so that his [or her] private costs are minimized by conforming to the legal standard."²³⁷ In sanctioning, "the critical determination is not the price to set, *but the standard of conduct to mandate*, because behavior will be extremely responsive to even a small change in a legal standard that is backed by a

232. *United States v. Nacchio*, 573 F.3d 1062, 1079 (2009) (citing *United States v. Mooney*, 425 F.3d 1093, 1107 n.11 (8th Cir. 2005) (Bright, J., dissenting)).

233. *See generally* Cooter, *supra* note 189. Cooter suggests that "economists tend to view law as a set of official prices" while legal scholars tend to view "law as a set of obligations backed by sanctions," both blindly ignoring the utility of the other. He argues that the behavioral effect of punishment differs depending on whether the reprehensible behavior is sanctioned or priced. His analysis is based on the principle that traditionally, civil liability has employed pricing mechanisms because the intended effect is for the potential offender to perform a cost/benefit analysis, while criminal liability is perceived as requiring a sanctioning mechanism because it seeks to prohibit certain behaviors.

234. Coffee, *supra* note 190, at 242.

235. *Mooney*, 425 F.3d at 1099.

236. Parker, *supra* note 225, at 746.

237. Cooter, *supra* note 189, at 1527.

highly punitive sanction,”²³⁸ thereby increasing the general deterrent effect.²³⁹

With the goal of reducing costs of both enforcing and prosecuting the law, net gain as a sanctioning mechanism is most appropriate for gain-calculation methodology because sanctioning is required where lawmakers “have better information about community standards than about external costs.”²⁴⁰ Gain as a measure of criminal culpability is specifically used in the instance of sophisticated fraud where the victim and the victim’s losses—characterized as external costs—are indeterminate.²⁴¹ Sanctioning of sophisticated-fraud offenders is thus preferable to prices because the loss is unknown and the *precise* gain is fact-intensive and time consuming to determine.²⁴² Furthermore, increasing the sanction is “virtually costless and is extremely flexible”²⁴³ for the judicial system because it does not require committing additional funds to law enforcement for detecting these highly evasive criminals, nor does it require judges to ponderously scrutinize the facts in order to determine with complete precision the amount of gain attributable to the criminal conduct.

In recent years economic analysts have acknowledged “that social policy may safely assume that gain is always less than harm, that there is no surrounding productive behavior to be overdeterred, or that it is impossible to overdeter an activity whose optimal level is zero.”²⁴⁴ This supports using the net-gain calculation because it “deemphasize[s] concerns about the adverse welfare effects of overly punitive penalties.”²⁴⁵ Net gain emphasizes the harm done to society and does not overly-consider the impact of the punishment on the defendant, as might be more appropriate when finding tortfeasor liability.²⁴⁶ Hence, sanctioning the offender through net gain does not overemphasize the potential to over-sentence at the expense of under-detering criminal conduct whose optimal level is nil.²⁴⁷

238. Coffee, *supra* note 190, at 226 (emphasis added).

239. THOMAS S. ULEN, *The Economic Case for Corporate Criminal Sanctioning*, in *DEBATING CORPORATE CRIME* 119, 127 (William S. Lofquist et al. eds., 1997).

240. Cooter, *supra* note 189, at 1549.

241. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3 (2008).

242. *Compare* United States v. Mooney, 425 F.3d 1093, 1098 (8th Cir. 2005), with United States v. Nacchio, 573 F.3d 1062, 1068–69 (10th Cir. 2009).

243. ULEN, *supra* note 239, at 128.

244. Parker, *supra* note 225, at 760.

245. *Id.* at 759.

246. *Compare* Mooney, 425 F.3d at 1100, with SEC v. MacDonald, 699 F.2d 47, 54 (1st Cir. 1983).

247. See Parker, *supra* note 225, at 769 (“[P]recisely determining the parameters of optimal enforcement is very costly. Therefore, law enforcement institutions have been arranged in such a manner as to only roughly determine penalty levels, with an upward bias to minimize the possibility of underdeterrence.”); see also U.S. SENTENCING GUIDELINES MANUAL § 1A1.4 (2008). The Guidelines have a built-in safeguard against overrepresentation of culpability in sentencing calculation by permitting courts to use downward departures to reduce the sentence. This is reinforced by *Booker*’s

By contrast, the market-absorption approach proposed by the Tenth Circuit Court of Appeals in *Nacchio* is akin to a pricing mechanism. With its origins in the tort law remedy of disgorgement, this was inevitable.²⁴⁸ “Disgorgement is an equitable remedy designed to deter future violations of the securities laws and to deprive defendants of the proceeds of their wrongful conduct.”²⁴⁹ It is traditionally employed for unjust enrichment and “the remedy is remedial, *not punitive*, and . . . a court may only order that the defendants restore, with interest, the amount of their profit.”²⁵⁰ In *Mooney*, the Eighth Circuit specifically noted that “[t]his theory of recovery has been characterized as solely remedial in nature *in contrast to criminal punishment*.”²⁵¹ Hence, market absorption based on disgorgement, when employed in the criminal context, prices the violation at the expense of not fully sanctioning its commission.

Pricing criminal conduct presents several complications in light of criminal punishment goals. First, pricing systems do not reinforce societal mores because they do not underline the offense as prohibited; they emphasize only the liability derived from the conduct.²⁵² Second, civil remedies emphasize the *quantum* of the remedy, not the *quality*, and therefore “embod[y] elaborate and fairly rigorous fact-finding procedures to determine the amount of damages to compensate.”²⁵³ Third, rather than deterring criminal conduct entirely, pricing instigates a cost-benefit analysis at the margin, meaning that in a pricing system, “behavior is more elastic.”²⁵⁴ The second and the third implications reinforce each other: “[s]ince individuals are responsive to the magnitude of the price and the frequency of its collection, accuracy is crucial to induce behavior that is efficient or otherwise desirable.”²⁵⁵

Because it is a pricing mechanism, the market-absorption approach may be ill-suited to the criminal context, regardless of its ability to promote proportionality in sentencing. As noted by the Eighth Circuit in *Mooney*, using a tort remedy is unsupported “in judicial decisions for incorporating a civil law standard into the interpretation of a sentencing guideline.”²⁵⁶ The unprecedented use of a “close-fitting civil analog[y]”²⁵⁷ such as market absorption from disgorgement to achieve the

limited restoration of judicial discretion in sentencing through making the Guidelines advisory. Thus, the risk of over-deterrence through overrepresentation of culpability in gain calculation may be further discounted.

248. See *United States v. Nacchio*, 573 F.3d 1062, 1077–78 (10th Cir. 2009).

249. 69A AM. JUR. 2D *Securities Regulation-Federal* § 1616 (2009).

250. *Id.* (emphasis added).

251. *Mooney*, 425 F.3d at 1098 (emphasis added).

252. See *Coffee*, *supra* note 190, at 225.

253. *Parker*, *supra* note 225, at 756 (noting that, by contrast, “criminal sentencing decisions are more rough-hewn and are avowedly punitive”).

254. *Cooter*, *supra* note 189, at 1531.

255. *Id.* at 1532.

256. *Mooney*, 425 F.3d at 1101.

257. *United States v. Nacchio*, 573 F.3d 1062, 1079 (10th Cir. 2009) (citing *Mooney*, 425 F.3d at 1107 n.11 (Bright, J., dissenting)).

sentencing result has remarkable implications for federal sentencing, several of which may not be consistent with the goals of criminal punishment. Market absorption uses “a reasonable time after public dissemination” of the material, nonpublic information as legal causation.²⁵⁸ In the criminal context filled with moral absolutes where the optimal level of prohibited conduct is zero, bright-line rules are exceedingly more effective in obtaining a deterrent effect than such “fuzzy standards” as market absorption’s causation standard.²⁵⁹ Moreover, “[i]t is very difficult to compute the cost of crime to its victims, so large errors would occur [under a market absorption approach]. Thus the information requirements of pricing crime are prohibitive, while the information requirements for sanctioning crimes are relatively low.”²⁶⁰ Market absorption may not be practical because it is an unwieldy calculation, which becomes expensive and time-consuming. Though still punitive—the resulting numeric value is inserted into the sentencing table for computation into a prison term—market absorption risks the necessary distinction between tort and crime by deemphasizing the sanctioning function of criminal law. The underlying ineffectiveness of deterring morally reprehensible criminal conduct in a pricing system by implicating a cost/benefit analysis by the offender rather than outright deterrence may make the market-absorption approach inconsistent with federal-sentencing policy and the goals of criminal punishment.

c. Amending Gain as a Measure of Culpability

The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process.²⁶¹

Conclusively, from a policy perspective, market absorption’s precision in calculation is the downfall of its employment in criminal sophisticated-fraud cases. In comparison to loss calculation, market absorption met the criteria set out by the Sentencing Commission in the 2001 Amendment; however, its emphasis on the underlying offense and narrow calculation of gain directly resulting from that offense reduced both its deterrent effect and potential to exact retribution. From its origins in tort law’s disgorgement remedy, market absorption is unavoidably pricing in nature. In so doing, it defeats the purposes of creating a workable

258. *Id.* at 1078 (citing *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004)).

259. *See Coffee*, *supra* note 190, at 226.

260. Cooter, *supra* note 189, at 1550.

261. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008).

calculation methodology that is not cost prohibitive and appropriately sanctions moral wrongdoing. Its adoption into the Sentencing Guidelines through amendment by the Sentencing Commission would potentially disregard the recent trend toward increasing punishment of economic offenders through sanctions cognizant of the prohibitive nature of insider trading and similar sophisticated frauds as federal criminal offenses.

The alternative approach, net gain, likewise falls short of the requisite for codification into the Sentencing Guidelines by amendment. Though net gain meets the policy objectives of retribution and general deterrence through sanctioning criminal conduct without an unnecessary fear of over-deterrence, the approach lacks the definition and causation specifications of a comprehensive calculation methodology preferred by the Sentencing Commission. In sum, as two divergent methodologies emphasizing different practical and policy considerations, neither the market-absorption approach, nor the net-gain approach fully satisfies the stated requirements of a measure of culpability for sentencing purposes.

Thus, in amending the Sentencing Guidelines, the Sentencing Commission must reconcile the divergent approaches to calculating gain as a measure of culpability by promulgating a hybrid calculation methodology which meets the following three goals: First, the new gain calculation methodology must balance the goals (inasmuch as is possible) of promoting uniformity and proportionality when determining the appropriate definition, causation, and timing for practical application of gain as a measure of culpability. Second, the Sentencing Commission must keep in mind the overriding trend of increasing penalties for white-collar offenders by imposing a sanction likely beyond the precise ill-gotten gains in order to ensure sufficient retribution and a general deterrent effect. Finally, the new calculation methodology need not emphasize precision in calculation at the detriment of imposing costly fact-finding on the sentencing courts; rather, it must recognize that criminal law deals in “moral absolutes”²⁶² and is willing to make “upwardly biased penalties”²⁶³ when sanctioning offenders. Accordingly, the Sentencing Commission will effectively amend gain as a measure of culpability in the sentencing of sophisticated-fraud offenders.

CONCLUSION

United States v. Nacchio presents the unusual occasion to consider the complementary roles of the federal appellate courts in identifying inadequacies in the Federal Sentencing Guidelines and the Sentencing Commission’s role in resolving circuit splits on provision interpretation. Through the lens of *Mooney* and *Nacchio*, the appellate courts have identified the limitations of the current gain calculation in section 2B1.4 of

262. Coffee, *supra* note 190, at 225.

263. Parker, *supra* note 225, at 746.

the Sentencing Guidelines. Though they number only two at present, these cases are merely the beginning of a line of cases that will likely appear across the federal circuits, highlighting the current inadequacy of gain as a measure of culpability in cases of sophisticated fraud. The emergence of these cases will be slow, but the relatively infrequent occurrence of challenges to section 2B1.4 gain calculation should not discount its evident need for reform.²⁶⁴

Federal Sentencing Guidelines section 2B1.4 gain calculation methodology currently lacks specificity and clarity. In its current statutory form, gain calculation methodology defies precise definition and proper determination of the elements of causation and timing. In looking to recent criminal case law on the issue of interpretation, neither the net-gain approach nor the market-absorption approach comprehensively calculate gain as a measure of culpability for sophisticated-fraud offenders. While the market-absorption approach to the interpretation of 2B1.4 appears to be most consistent with the practical construction of the amended-loss calculation for similarly categorized economic crimes, it falls short of the sentencing reform goal of balancing proportionality and uniformity with the punitive nature of the federal felony offenses of insider trading and other sophisticated frauds. Furthermore, market absorption's historic roots as an equitable remedy in tort law reveals its true nature as a pricing mechanism, thus its employment in criminal law risks underemphasizing the sanctioning of morally reprehensible conduct and may ineffectively deter criminal activity, both of which are central objectives of criminal punishment.

Amendment of section 2B1.4 of the Federal Sentencing Guidelines is a requisite to the proper execution of gain as a measure of culpability in cases of sophisticated fraud. That amendment must contain a new hybrid-calculation methodology in order to satisfy both the practical application needs of gain calculation and the policy objectives of federal sentencing and criminal punishment.

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264. Berman, *supra* note 32, at 143 (“[C]onflicts that create *significant unwarranted* disparities and are likely to impact a sizeable number of cases should be identified and resolved expeditiously. In many respects, the Commission would appear ideally suited to be primarily responsible for addressing such conflicts.”).

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