

Day One—Plenary Session IV

**Major Issues Related to the Determination of
"Loss" as a Measure of Offense Seriousness
and Offender Culpability**

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**PLENARY SESSION IV:
MAJOR ISSUES RELATED TO THE DETERMINATION OF "LOSS"
AS A MEASURE OF OFFENSE SERIOUSNESS AND OFFENDER CULPABILITY**

VICE CHAIR STEER: Good afternoon. We constitute the wrap-up panel for this afternoon's discussion. I hope each of you had as interesting and productive discussion as occurred in my particular group. What we are about is a combination of reporting and commenting on some of those same issues.

I would like to begin by briefly introducing the distinguished panel members. First, to my immediate left, Judge Julie Carnes, a district court judge in the Northern District of Georgia and a former member of the U.S. Sentencing Commission.

Judge Carnes has had hands-on experience with these issues in a number of different contexts, as a prosecutor, former chief of the Appellate Section in the U.S. Attorney's Office, a Sentencing Commission staff member, and, of course as a sentencing commissioner, and now a district court judge. Judge Carnes also participated in a field test of a proposed revision of the loss definition two summers ago.

To my far left, Professor Frank Bowman, associate professor of law at the Indiana University School of Law in Indianapolis; previously with Gonzaga Law School; prior to that, an assistant U.S. attorney and special counsel to the Sentencing Commission.

To my right, John Cline, a defense attorney with the firm of Freedman, Boyd, Daniels, Hollander, Goldberg & Cline in Albuquerque, New Mexico. John has spoken and written widely about these particular issues and others involving white collar crime and has handled a number of high profile cases.

Between Judge Carnes and Frank Bowman is Josh Hochberg, chief of the Fraud Section of the U.S. Department of Justice, an experienced prosecutor of fraud offenses, former deputy chief in the Public Integrity Section of the Department of Justice.

At various points, we also hope to hear from the other individuals who constituted small group leaders. All four of these panelists served in that capacity and there are three others. As you know, we had seven groups. And I will be calling on, to report from the floor, Mark Flanagan, Miriam Krinsky, and David Axelrod.

Let me give you just a brief word of background with regard to the consideration of the loss issues, and then we will get into some specific sub-issues and comments.

The Commission has wrestled with and revised the definition of loss a number of times over the years. As has been stated, I think, in the course of today's proceedings, we started with and still have, to some extent, a simple, theft-based definition, "the value of the property unlawfully taken, damaged or destroyed." Over the years, as case situations arose that demanded action, the Commission added commentary addressing particular problems and, in some cases, circuit conflicts.

Under Chairman Conaboy, the Commission, several years ago, undertook a major, comprehensive re-look at the loss definition with two twin goals: first, to try to simplify the loss rules overall; and, second, to try to make the guidelines law more uniform.

Out of that effort, the Commission developed a new draft definition, published it for comment, revised it and invited comment, and considered it. And, as things turned out, because there were, at that point, only four voting commissioners, it did not have the unanimity necessary to pass it.

Judge Tacha is smiling about that experience, but then she had a good idea, and it was a novel one as it turns out in the experience of the Commission. She and the other commissioners said, "Why don't we fieldtest this product that has been subjected to a lot of comment? Let's get some cases and let's have some judges apply this new proposed definition to real cases."

And we did that. In the waning days of that Commission, the members of the Criminal Law Committee, plus some other judges like Judge Carnes that we recruited, applied that proposed definition in a field test and then came to Washington and reported their findings. These findings are written up in your materials for any of you who would care to look at the report.

Now we, of course, have a new group of commissioners who have, again, picked up this issue, although we have not, at this stage, formally done anything. We have not put any new draft into the public domain, but the Commission has deemed it worthy to make it a topic of discussion at this symposium and will be further considering it. Certainly, that is the reason why we are asking for your thoughts and discussion at this symposium.

I would like to begin, before we get into the specific issues that were talked about in the groups, by asking each of the panel members to comment from your perspective on whether this whole idea of undertaking a major comprehensive revision of the loss definition is a worthwhile thing to do or not. Should the Commission comprehensively rethink and attempt to rewrite the definition of loss used in the sentencing guidelines?

If we could start over to my left, Professor Bowman, would you care to comment on that for us?

PROFESSOR BOWMAN: For those of you who know me and my history with this issue, it is no surprise that my answer to the question is, yes. I have been wrestling with the loss definition both while I was one of the lowlier members of the staff of the Commission some years ago and throughout my relatively young academic career. But, beyond the fact that I have a lot of time invested in the project, I think the answer is "yes," for a couple of reasons.

I came to this problem as someone who had spent some years as an assistant U.S. attorney, who also spent several years as a deputy district attorney in Denver, and had some experience as a criminal defense lawyer. When I was at the Commission, I was asked by Andy Purdy to take a look at this "loss" thing and read all the cases and come back and report what the problems are.

I was aware of particular problems with interpreting and applying loss in particular cases (those cases that happened to come to my notice because I had litigated them in sentencing as a prosecutor), but I was by no means aware of the breadth and complexity of the difficulties of the loss "definition" in the current guideline until I actually sat down and read all of the guidelines carefully and all of the places within various guidelines that loss is alluded to.

I tried to read all, or at least a representative sampling, of the literally several thousand cases that have been decided on what loss means. The conclusion to which I came was that what we have is not a

definition at all, but a sort of a patchwork which has grown over time in response to various pressures or impetuses of the moment. It doesn't work very well and is not very comprehensible.

I could go on and give details, but I think most of the people here are familiar with at least some of the many difficulties that are created for you as trial lawyers or as judges by the often impenetrable and confusing components of the so-called "loss" definition. At one point, I counted 11 identifiable circuit splits on what this single word means. Andy Purdy would probably argue with me. He thinks there are fewer than that—real circuit splits. I think I could probably show him more.

My conclusion, when I looked at the entire set of guidelines and I looked at the cases, is that we have a rule which is very difficult to understand. Sometimes it can't even be charitably described as a rule at all, but is rather a sort of hodgepodge of provisions. For that reason alone, we ought to go back and consider if we can't do better.

I think we can do better for two reasons. One, I think the hodgepodge that we have produces inconsistent results. It treats similar cases disparately. It treats disparate cases similarly.

Two, even in cases where somehow or other the judges and lawyers work their way through and get a result which they are reasonably satisfied with, the process is fraught with infinitely more agony and has infinitely more potential for the creation of disparity and unnecessary work than would be the case if we simply sat down and looked at this thing from the beginning and tried to think about what function loss serves within the framework of punishment of economic crimes and then try to write a comprehensive, readable definition that somebody of reasonable intelligence could find in this book.

I challenge you, unless you are a guidelines expert, to even find all of the parts of the loss definition within say five minutes in this book. I bet you can't do it. I am constantly finding new things in here that suddenly I realize relate to something else over in some other portion of the guidelines.

So, the first reason for undertaking the project of redefining loss is that we can do this better. I think we can produce more just results, more consistent results, if we have a coherent definition.

Second, even if that weren't the case, even if we weren't going to produce more just results by having an intelligent reconsideration of this problem from first principles—and I think we can do that—I think we can make it so much easier for judges, for defense lawyers, for prosecutors, by simply writing a rule that makes some sense and that can be found easily, can be read, and can be understood. I think that is achievable.

Now, I also think there is a great deal of inherent resistance in lawyers, generally, and members of this group perhaps, in particular, to changing settled law. The definition we have is crazy. It doesn't work. It is in all different places. Still, we have learned to understand it. We live with it, and so there is a resistance to change because, God knows, it might be worse if we change it.

I think it should give those of you who have that instinctive reaction, which is a perfectly rational one, some solace to consider that the basic proposal that is being worked on now, the notion of redefining loss in the way that is set forth in your book, has already been field tested in most of its essentials and has been posed to a group of intelligent, experienced judges and probation officers and lawyers. And the consensus that was arrived at after that field test was that, by the overwhelming majority, all the judges and

probation officers that worked with this new concept concluded that it was easier to work with, that it was simpler to deal with, that it produced results that they felt comfortable with, with far less intellectual effort than was previously the case.

The other finding of the field test was that, by and large, in most cases, the results were not that dissimilar from the results that you get now, but you got to them so much more easily in a so much more comprehensible way.

I think it can be done. I think we can make a loss definition that produces more just results and is certainly easier to use. Moreover, reforming the loss definition is an imperative regardless of whether or not you agree that perhaps we ought to have a system in which there are fewer decision points on loss. If dramatically simplifying the loss table were achievable, I think that would be a nice result. But so long as the theft and fraud guidelines have more than one category for loss quantity, so long as there is a single decision point that depends on the amount of loss, then you must have rules for determining what the amount is. So, if we were to reduce the number of loss-based categories from 21 to three or four or five, you are still going to need rules, as judges and lawyers, to figure out whether in any particular case the loss falls above or below those four or five decision points.

And, therefore, I think the process is worth doing.

VICE CHAIR STEER: On that point, let's see if there is any difference of opinion among our panelists.

Josh, you may or may not feel entirely comfortable with fielding that question for the Department of Justice, but is there anything that you are prepared to share with us on that basic issue?

MR. HOCHBERG: Not on the basic issue, but more that, from my perception, the Department of Justice's greatest concerns are sort of at the fringes of the loss question. And I don't know that any redefinition is going to solve those problems. Most of the breakout groups have identified some of the issues that are arising.

We spent extensive time in our group talking about whether an economic loss criterion is even relevant in regulatory crimes. So, what we perceive is that there are certain types of crimes that aren't handled well by the existing guidelines. Any redefinition of loss may not address those, and there are some more specific issues that need to be resolved.

VICE CHAIR STEER: Judge Carnes, should we go back to the drawing board or work with what we have?

JUDGE CARNES: Well, I respect Frank Bowman's work a great deal, and he has persuaded me that we do have something of a patchwork, and there is an argument that it is not working well.

So I think that is what the Commission is paid to do, and I think they should study and determine what is going on and whether it has been difficult to work with and whether we are achieving the kind of consistent results that Congress sought.

I will say, however, that, before change is made, I am a fan of gridlock and I believe in the maxim, "First, do no harm," so I have to be persuaded that, when we have got a system built up, that the costs of change are going to be worth that change. That is not to say you can't satisfy me of that, but I start on any of these questions with a very slow, cautious sort of approach.

VICE CHAIR STEER: John, how about from the defense perspective?

MR. CLINE: I agree with Frank that the definition should be amended, consolidated, and so forth. I think I would differ with Frank on some of the specifics, but, in principle, I agree with him and for the reasons he stated.

VICE CHAIR STEER: Well, speaking of the specifics, one of the core issues that was discussed in your group, John, and in the group that Frank headed, was this issue of whether or not we need to have and define loss in terms of basic principles of causation in some way different from the limited extent to which relevant conduct addresses these issues for all offenses.

Could you give us a sense of what some of the thinking was in your group and any perspective you might have on that?

MR. CLINE: Sure. We broke the issue down into two broad questions. The first one was as a matter of policy—what should the causation requirement be in the guidelines? Then the second question was—how ought the policy be implemented into the guidelines, once we decided what it was.

Dealing with the first question; that is, as a policy matter, what should the causation standard be? We talked about three principal alternatives. The first was simply a "but for" causation standard, which pretty much every court now seems to have adopted either explicitly or implicitly; that is, the defendant's conduct has to be a cause of the loss in order for the loss to be attributed to the defendant—a cause in the sense that without the defendant's conduct, the loss wouldn't have occurred.

The first possibility would be just to leave it at that. If the defendant's conduct was a cause of the loss, that loss is attributed to him whether or not it was intended, whether or not it was foreseeable or even reasonably foreseeable.

The second, intermediate position that we discussed, would be to engraft a proximate cause requirement onto the "but for" requirement. To attribute loss to the defendant for sentencing purposes, the government would have to show by a preponderance, first, that the defendant's conduct—which, by the way would include relevant conduct as that term is defined in the guidelines—is a "but for" cause of the loss and also that the loss was reasonably foreseeable to the defendant, which would be an objective standard and, if that finding were made, if the loss were reasonably foreseeable, it wouldn't be necessary that the defendant actually foresaw the loss or that the defendant intended the loss.

The third and the most stringent requirement that we talked about would require the government to show, first, that the defendant's conduct including relevant conduct was a "but for" cause of the loss; and, second, that the defendant either actually foresaw the loss that occurred or intended that loss to occur. So it would be a combination of both a "but for" causal requirement and some sort of subjective knowledge or intent on the part of the defendant.

We talked about these matters in some detail, in terms of the number of examples from particular cases, and I think it is fair to say that there was a consensus that, whether or not the guidelines are revised, whether or not this principle is actually put into the guidelines, the intermediate standard would be the appropriate one; that is to say, a requirement that the government show "but for" causation and proximate causation in the sense of reasonable foreseeability.

I say that there was a consensus because it seemed as though, whenever we started talking about a particular example, almost everyone would end up talking about it in terms of reasonable foreseeability, which is that intermediate standard.

Our sub-issue was multiple causation. Suppose the defendant's conduct was one cause but not the only cause of the loss; how do you deal with that? Do you need a special rule for multiple causation or do you deal with that through the standard that you adopt on the causation question, generally?

I may be overstating it a little to say that there was a consensus, but I think the view was that if you adopt a proximate cause type standard, reasonable foreseeability, that will adequately take into account the multiple causation situation; that is to say, if the other causes of the loss are unforeseeable to the defendant or reasonably unforeseeable, they would not count toward the loss determination.

On the other hand, if those other causes that contribute to the harm are reasonably foreseeable, then they would count—then the entire loss amount would count.

So I think—not wanting to put my group in a box—but I think generally speaking, the view was that "but for" causation plus a proximate cause/reasonable foreseeability requirement is the proper analytical approach from a policy standpoint.

We really didn't get to the second question of how that policy ought to be implemented into the guidelines or if it should be. There were two views expressed by my co-panelists. One view was that, if I may roughly summarize it, there really isn't a need to create a new loss definition for purposes of the guidelines; the courts are doing pretty well the way they are.

Perhaps there is a need to solve circuit conflicts to address particular problems, but the courts have essentially worked out a workable system of interpreting the guidelines, which at least is coming to include a proximate cause requirement.

There is a recent Ninth Circuit case, for example, that explicitly adopts a proximate cause standard.

The other view adopted by my other co-panelist, Chief Judge Gilbert, is that it is time to revise the guidelines to include explicitly a cause-based standard; that is to say, it is time to put into the guidelines, along the lines of some proposals that have been offered, an explicit requirement not only of "but for" causation, but also of reasonable foreseeability. That is about as far as we got.

VICE CHAIR STEER: Thank you, sir. Frank, reasonable people often disagree about what is reasonably foreseeable. Is that a sufficiently definite standard to write into a revised guideline dealing with loss? What was your group's thinking on that?

PROFESSOR BOWMAN: Well, I don't know that we addressed it in exactly those terms. Let me, first, answer your question, and then briefly try to summarize what I think our group was thinking or at least what I heard.

Part of my answer to that question is that when we measure loss, it is one of the principal measures of offense seriousness. We are trying to distinguish between dissimilar cases and make sure that like cases are sentenced similarly.

To do that, we want to figure out which harms should count and which shouldn't. The traditional way that Anglo-American law does that in all branches of the law is this business of reasonable foreseeability. We do that in criminal law. We do it in contracts. We do it in torts.

One of the themes that I have heard in some of the comments already today and, certainly, I have heard it for the last several years, is the sense that judges, for example, would like to have more trust reposed in them, and to have more flexibility in determining what harm should count. They would like to have more trust reposed in them in trying to determine what the offense seriousness is.

I think one of the effects of adopting a reasonable foreseeability standard is that it reposes trust, to a large degree, back in the hands of judges for those kinds of harms where there may be some real question about whether or not they ought to be counted. The reasonable foreseeability standard really turns to the judges and asks them to make decisions about what is just, about what harms really ought to count when we are trying to determine the relative culpability of defendants.

I, personally, am more than willing to repose back in the hands of judges at least that much responsibility. So that is my answer to that question.

With respect to our group, my own sense is that there was considerable—I don't know if resistance is exactly the right word—but I think a considerable amount of concern about the notion of changing a set of rules which, however odd they may be in some respects, are at least familiar.

I think much of the sentiment that was expressed in our group was, perhaps, summarized by Judge Carnes in that there was real concern that a change might be worse than what we have. And I think that, at the very least, many of the folks in the group remained to be convinced that changing to a cause-based definition would be desirable. The smaller issues that we looked at were the inclusion of interest and the inclusion of government costs of prosecution.

VICE CHAIR STEER: Let me come back to those if we have a chance. We had a little bit of discussion earlier with regard to the interest issue.

Josh, let me turn to you. You had a group that considered some fundamental issues of what, if any, subtractions should be made from loss that was caused by the defendant for things like partial value provided by the defendant or property returned, collateral, and so forth.

Can you give us a sense of what your group thought about these issues?

MR. HOCHBERG: I think there was some consensus that you should be netting loss—certainly in the typical case where part of the scheme gives some value back to the victim.

We went pretty quickly to the hard cases where there either is no loss and a substantial gain to the defendant or where the harm that we seek to punish as the government is something other than an economic loss. There is a risk or an opportunity that has been created; a regulatory scheme has been violated; there is detriment to, perhaps, competitors; there is detriment to the government; health and safety issues have arisen.

VICE CHAIR STEER: Was there any consensus in your group about how to handle those kind of issues—the government regulatory violations?

MR. HOCHBERG: Well, there was a fair amount of view that the economic model doesn't really work—you are trying to fit a square peg into a round hole—and some discussion of whether you need a separate guideline for those kind of issues where there is material risk to health and safety, especially a guideline that takes that into account; there were other discussions of enhancements or upward departures, of course.

We asked at the end whether people thought that the economic model should be abandoned for those kinds of cases. There were several judges in the group, and they all said, "No, you start with the economic model, and when it doesn't work, you go to something else."

There was some discussion about distinguishing health and safety issues from other regulatory crimes, too, and whether there is a way to set up more absolute punishment criteria for health and safety issues. The government people argued that in health and safety regulatory approvals of drugs, where there has been fraud in getting the drug approved, it should be gross gain.

Most of the private bar thought, "No, there is no reason to distinguish that. It has to be a net figure and maybe you have an enhancement or an upward departure."

VICE CHAIR STEER: Thank you. We had two other small groups that considered the same core issues of credits, as some would call them. Miriam Krinsky led one of the groups. Miriam, I know that your group focused specifically on issues of how to value collateral pledged in, for example, loan cases and other property returned to the victim. What was your group's thinking about these issues?

MS. KRINSKY: We actually, John, looked at the question of credits in three different ways, all of which were tied to the context and scenario where crediting issues arise. I think what we found was that there tended to be agreement or at least a strong majority view, actually unanimity on one of the scenarios, when one divided the issue of credits into particular contexts.

The first context that we looked at where there was unanimity of views among our group is the question that arises where there is collateral pledged—I think it was the context that Josh has already alluded to—where, at the time of the fraud, in the context of the transaction itself, there is collateral that is put up. In that scenario, when the collateral is part and parcel of the fraud, everyone agreed that there should be an offset.

We talked, as well, about the timing issues and when one should measure the offset. The issue of timing was one where there was more divergence of views. But at least everyone agreed that, when collateral is pledged as part and parcel of the fraud, there should be a credit, an offset.

The second context that we looked at was the scenario that arises—more commonly in a theft case—where there is a recovery after the completion of the crime itself. For example, the simplistic scenario that arises where someone steals money from a bank or someone steals a car and immediately following apprehension or perhaps at the time of apprehension there is recovery of the item that was taken. One could even posit that kind of fact pattern in the context of a fraud case where, at the time of apprehension, there is some type of recovery of the item at issue in the fraud. In this type of case, the majority of our group would not apply a credit. It was our view that one should, akin to the current theft definition of loss, look at what is "at risk" in the commission of the crime, what has, so to speak, been "taken." It was our view that the fortuity of what happens to be recovered at the time of apprehension—or even before apprehension—at some point in time after the fraud is complete—does not reduce the defendant's culpability and this should not reduce the sentence that is imposed. So there should be no credit in that scenario.

The final type of case that we looked at, where we had a majority and minority view, was in regard to repayments. This scenario arises where the fraud has ended, but a defendant, over the course of time thereafter, for whatever reason—whether it is because he suspects that the gig is up and that arrest is around the corner or because he has a change of heart and has determined that he would like to try to alleviate some of the criminal conduct that he has caused—elects to make repayments after the completion of the fraud. (We put aside, although everyone kept wanting to talk about it, the "Ponzi" scheme scenario because we knew one of the other groups was looking at that.) In this context, the majority of the folks in our group—and I was the lone prosecutor—would apply a credit, while recognizing that they probably would be less inclined to do it—although even there there was a difference of opinion—if the repayments were post-discovery. But we did have a couple of private practitioners in the room who would even credit post-discovery, while recognizing that much of why we are applying that credit is because of our assumptions about somebody's intent and our assumptions about mitigation of the culpability and that that is very difficult to prove and very difficult to gauge.

The majority would credit. The minority view in the room was that we shouldn't credit against loss, citing the proof problems as well as the complexity of any crediting rule. Maybe we account for the truly pure and untainted motive through departures or through where within the range the sentence is imposed. So those were the three scenarios we looked at.

We also looked at the specific problem of unlicensed professionals. That was one where, interestingly, we were in complete agreement in a view that is thoroughly at odds with all the circuit courts that have considered it. The scenario that arises is how do we apply credits and what credits should be applied when someone who professes to be a professional—a lawyer, a counselor, a doctor—provides services, a charge is made, and there is a monetary loss suffered as a result of those services. One could argue that there was some satisfactory service that could be valued—the doctor may well have provided the physical that was contracted for; the lawyer may well have drafted a completely adequate will or contract; the counselor may well have provided adequate psychiatric counseling or other counseling. They are simply not who they claim to be and probably the victim would never have paid a penny, let alone what they did pay, for the service that was contracted for. All of the circuit courts would have sentencing judges seek to value the satisfactorily performed service and offset it against the loss, although none of the circuit cases really grapple with how you measure that. Whose satisfaction do you look at—the victim's, the market's, or some other measure? How do you measure a fake doctor's services?

We were in complete consensus that we would provide no offset in those cases. And interestingly, all of those circuit courts that have adopted the view that there should be an offset, in the next breath are very quick to talk about the need for the district courts, on remand, to consider departure potential. Which, in my mind, suggests that those circuit decisions aren't particularly comfortable with the notion of offset and very quickly wanted to remind the judges that they could bring in, through the back door, the reduction and offset that they were imposing in the front door through a departure and get back up to where they otherwise might want to get.

It also seemed to us that those decisions really didn't account for non-monetary harms—the damage to the profession, the loss of confidence of society for doctors, lawyers, counselors—to the extent one assumes there is any confidence in any of those professions, especially lawyers. But we all agreed that there should be no offset in those cases. Then we talked about timing issues, as well. There was less agreement among our group as to timing issues.

VICE CHAIR STEER: Thank you, Miriam. Mark Flanagan, your group also considered these same core issues and I had an opportunity, I think, to look at one of the hypotheticals that your group used.

I think you looked particularly at the kind of fraud schemes, such as telemarketing or "Ponzi" schemes, in which there is some money returned to the victim, although arguably it is for the purpose of luring them in even further. What was your group's thinking with respect to these issues and those types of offenses?

MR. FLANAGAN: Thank you, John. I think anyone who was in Breakout 4 would attest that we had a complete consensus on all of our assigned topics. [Laughter.]

VICE CHAIR STEER: Just like the other groups.

MR. FLANAGAN: Actually, the views were very disparate, and what I will try to do is capture some of the sentiments because I don't really think that a consensus kind of rose to the top; probably because of the allotted time, it was difficult to do.

First, on kind of the basic premise of gross versus net, there was a lot of discussion that really just focused on that one issue: the end loss, should it be gross, should it be net? There was the view that there is at least a fundamental tension in application note 8 of §2F1.1 about what is intended to be applied, at least in terms of how the case law has interpreted that application note.

Also, there was the sentiment expressed that a net approach will help address culpability, but that it can be fairly gratuitous in some applications and maybe doesn't go far enough. There was also the view that you need a straightforward approach; that something can be done to streamline it more.

I would also say there was a thread running through our discussion that while loss is a measure to be considered in the gross versus net within the fraud case, is it really enough and does it get to the totality of the circumstances, the role in the offense? And I think Josh had touched on this also in commenting on regulatory schemes, is it fitting enough into the picture of what needs to be addressed? That was kind of a thread that kept on weaving in and out of the discussion.

Turning to investment schemes, we tried to address the "Ponzi" schemes. I think there was a view that it can be very difficult to try to carve something out, certain types of schemes from a general rule that you would apply. Having said that, there was also recognition that there was a three circuit split on "Ponzi-type" schemes and that part of the Commission's mandate should be to address that type of situation, even if it means that a special rule would need to be applied.

I don't think there was any real consensus on the best approach. The panel members included Jonathan Rusch and Michael Goldsmith, a former commissioner. We had lots of interaction with the audience, and I think there were a lot of views expressed on these topics.

As far as the circuit split, to the extent there was a view, it was probably the view that the loss to victims in the 11th Circuit seems to best approach a fairness concept. But, again, there was the recognition that the economic approach to loss has some infirmities itself.

We did not really get to the *de minimus* rule or the proposal that there be an exclusion for a *de minimus* value of things that are given to victims. Our time kind of ran out on that.

And, finally—and I think Frank had mentioned this—there was running in and out of our comments at least the idea or the expression that whatever is done, is there a need to give a little bit more flexibility back to the judges in addressing what is a very formalistic scheme right now. So I would say that kind of tends to sum up most of our discussion.

VICE CHAIR STEER: Thank you.

MR. FLANAGAN: Thank you.

VICE CHAIR STEER: Judge Carnes, how should the Commission deal with the difficult issues of intended loss in the context of attempts and conspiracies and partially completed offenses in which you have both an actual loss and additional intended loss?

JUDGE CARNES: Well, like the other groups, we had a variety of opinions determined, I guess in large part, by the backgrounds and experience that were brought into the room. We started with a "hypo" that we thought was sensible and simple to make this clear to everyone which is: when should intended loss count the same as actual loss? Should it be discounted?

So this group can understand, our hypothetical was the typical credit card ring or counterfeit check ring where people get artificial or fake IDs. They counterfeit checks. They do different sorts of things. They set up a bank account with a \$50,000 check, withdraw \$10,000 from the account, and come back into the bank the next time. We are interested in the hypothetical involving another \$50,000 check and the defendant ready to withdraw some money, an amount undetermined.

So in our hypothetical you had three possibilities: You could count the \$10,000, which is the actual loss and all that was taken. Or you could go as high as \$100,000, which could be argued was the intended loss because had they not been apprehended or stopped by the bank, they would have gotten that amount. Or you could pick some number in between, with the difficulty being to pick that number.

I would say that we had a minority, although a substantial minority viewpoint, that you never use intended loss, that you use only actual loss, that it is simple. Who can know in the heart of man how long they would have gone? How much they would have taken? This view is that this is a simpler result and less disparate in its results.

We had another point of view that pretty much you should count the entire amount. That is what they intended, and the fact that they were stopped should not take away from the intent.

A third point of view was that, "Well, I would like to know more facts. I would like to see this litigated. I would like to figure out what is the likelihood, how many trips would they have taken, how likely would it have been that the bank would have let them exhaust \$100,000." So that was the variety within our committee.

Now, as to the more generic question, which is: should attempts or uncompleted offenses be discounted? In regard to the simple rule that, if you don't finish it, you get some discount, you are not treated as severely as if you had finished the particular crime, I think there was a split. There were some people who thought, "Yes, you do discount." I think some others thought, "You don't." I couldn't really quantify. But, I think that there was some room on both points of view.

That does get into §2X1.1 which is one of the topics we were assigned, and I think that is one topic we had 100 percent agreement on. For those of you who don't know, §2X1.1 is a general attempt provision that allows one to discount an offense level by three points for an attempt, unless you have done everything you thought you needed to do and unless the only reason you didn't finish was because the police came in or whatever.

The exceptions often tend to swallow the rule. I asked if anyone knew about §2X1.1 and didn't get a lot of answers. We all pretty much agreed, myself included, even though I was on the Commission, that every now and then someone brings it up to me in a sentencing and I am always startled because I have always forgotten that it was there.

So we all agreed that, if the Commission intends to incorporate some sort of §2X1.1 concept in the fraud guidelines, that needs to be brought over and explained better in the fraud guidelines than it is right now.

As to the level of discount, I am ambivalent on this. I don't know if the group joined me. We are somewhat problematic about the amount. Three levels can be a mighty large discount. If you are talking about a very low-level fraud, it can almost wipe some of it out. It can be maybe too modest, if you are talking about a larger fraud.

The other topic, John, that you wanted us to look at was something called the "Economic Reality Doctrine." This is something that comes up in fraud cases from time-to-time. This is where you have a person who clearly has larceny in his heart, but it is not clear that the enterprise he was seeking to pursue would have been successful; that is, his fraud was perhaps a little far flung or a little fanciful or the person, while he received some money, would not have likely been able to dupe his victim out of the amount intended.

How do you deal with that? We looked at the bluebook case out of the Tenth Circuit where you ask for a certain amount for your car—a false insurance claim—but you can't get that amount because the bluebook value is going to trump everything.

Our group tended to think that case was rightly decided. We felt, I believe, in the main, that economic reality is something that a judge should be able to consider. I am not saying everybody. I think some people disagreed. Some people felt that we are giving a reward to the dumb; that is, if larceny is in your heart, who cares if you are not real clever? A lot of criminals aren't real clever.

But I think the majority viewpoint was that a judge should perhaps be able to give some discount. And I think, if I am not putting words into my committee's mouth, the sense was that that probably could only be done through some sort of downward departure. We didn't know how to quantify that.

Finally, the last topic we were assigned was "sting operations," which are akin to the Economic Reality Doctrine. Here there is no chance in the world that the defendant is going to succeed because he is dealing with an undercover officer, not a criminal. There is a split in the circuit on this.

I believe that our group pretty much unanimously disagreed with the court that has found that you totally wash the sting amount; that is, you don't give any loss amount or any drug quantity amount if it is a sting operation.

I think that our group felt that that is not the correct approach. However, what you do with that was not exactly clear, and I think that it depends on the facts of the situation. I do think that there were some in the group who feel that there is some room, it is not really so much in the guidelines now. It is maybe a "negotiated upon" drug quantity amount.

But there is some room, perhaps, for partial sorts of entrapment reductions. Perhaps, in a situation where there is a sense that, while the person had larceny in his heart and was somewhat successful, he was pushed somewhat to quantities or losses by the undercover officer that one was not clear would have occurred but for those entreaties—I think there was some view, maybe not unanimous, that there might be some room for a downward departure.

Of course, the downsides to all of those, I suppose if you are concerned about consistency, is if you have enough downward departures, that pretty much is powering the system. On the other hand, I think the group felt that in the discrete areas we were assigned that there was some room for those in the topics I have identified.

VICE CHAIR STEER: Thank you, Judge Carnes. I sat in on the group that David Axelrod led, and I know that there was some discussion about these same issues of partially completed offenses and so forth. But the group spent most of its time discussing the issue of gain and what role it should play in the determination of loss, whether only as a proxy or as an independent consideration and used directly in the equation. David, could you give us a sense of the discussions in your group?

MR. AXELROD: I will try. As John has mentioned, we discussed gain and loss as alternative measurements of culpability and seriousness of fraud offenses.

We focused on a number of specific questions, the first one being, "What is loss?"; whether loss is a purely economic determination of the value of the property taken or whether, instead, we look at loss to the victims and try and use loss as a measurement of harm actually done to the victim of the crime.

We looked at a number of hypotheticals where arguably the loss was zero; arguably the loss was something more, depending on which one of those definitions you adopted.

One of them involved a fairly well-known case involving stolen defective postage stamps, where the stamps would have been destroyed had they not been stolen and then sold to collectors for a substantial amount of money. The victim would probably have said in that case that it suffered no loss, but the stamps, arguably, were worth the price for which they were sold by a willing seller.

We discussed a hypothetical similar to a case that has been mentioned earlier involving pharmaceuticals that were licensed by the FDA through the use of false statements. The pharmaceuticals turned out to be safe and effective, but the review process was evaded. Arguably, the pharmaceuticals were worth nothing because a willing buyer, knowing all the facts about the drugs, probably would have paid nothing for them. On the other hand, they did work, and it presented a conundrum in determining what the loss was in that situation.

We discussed whether gain can ever exceed loss and, if you look at Frank Bowman's paper, he argues that gain always exactly equals loss. And that is certainly true if you look at gain and loss as they are defined in the guidelines right now, which is the value of the property taken or destroyed.

But, on the other hand, if you look at loss and gain with respect to the victim, a victim's loss is sometimes different from the intrinsic value of the property. This can be especially true—and since we are talking about new technology offenses here, this can be especially true with respect to non-traditional property such as trade secrets—where the information or the property can be simultaneously possessed by everyone.

When the property is taken from the company that develops it or the person who develops it, that person still possesses it and can still exploit it, only now, with competition from the defendant who has taken the property or the information unlawfully.

Especially when you get into those non-traditional kinds of properties, it is harder to determine exactly what the gain is and exactly what the loss is. One view, which I think came to about as close a consensus as we could, was that perhaps the real value of the property taken there is the value of a licensing fee.

The problem with that, of course, is we get into issues that resemble a civil trial in trying to establish within a summary proceeding, a sentencing, what sort of a licensing fee would be charged or whether the victim or company would have willingly licensed the product in the first place.

We also discussed whether gain should be used only as a way of looking at loss or whether it should be considered as having some independent significance.

And, finally, we discussed whether gain should be gross gain or net gain. I don't want to put words in the mouths of the other participants in our breakout group, but I do think that we reached something at least approaching consensus on a few points.

The first is that loss is not always adequate as the primary determinant. Loss is an important determinant, but there are many other things that ought to be considered in determining what the defendant's culpability is and how serious the offense really is.

I think we arrived at something approaching consensus that there really are two kinds of loss—loss as presently defined, and loss to victims—and that it is not really a choice of one or the other, but that both should be considered at sentencing time. The value of the property is an indicator of the seriousness of the offense, but you can't overlook the impact on the victim because part of the purpose of the criminal justice system is to provide justice to the victims. So we thought that both ought to be considered.

There was also, I think, something approaching consensus that gain is also important and shouldn't be excluded from consideration simply because we look at loss. Gain is, among other things, what we are trying to deter with the criminal justice system. It is the motive of the defendant for committing the crime in the first place.

So what the defendant intended to get, to the extent measurable, and what he actually got are important considerations that should not be excluded from sentencing.

I think that we agreed that gain, as presently defined in the guidelines, is probably already net gain. If you have a \$1 million operation which delivers \$500,000 in goods and services and fraudulently fails to deliver \$500,000, the value of the property taken there—which is the definition of loss in the guidelines—is \$500,000, so there is some netting already.

There did seem to be some consensus, though, that the defendant is not entitled to a reduction for a reasonable profit or other kinds of overhead expenses.

I think that there was consensus that it is a mistake to think that any single measure is adequate as the overall determinant of the seriousness of an offense or the defendant's culpability.

I think there was agreement that what the courts should be able to do is look at what the overall proof of loss, gain, and intended gain and loss to the extent measurable, say about the defendant; courts should have the flexibility to respond to that with an appropriate sentence tailored to the individualized proof.

VICE CHAIR STEER: Thank you very much, David. Does anyone have a question they would like to pose to any member of the panel?

PROFESSOR BOWMAN: I just want to give a quick summary of the specific issues that Group 1 was asked to talk about. In addition to the broader problem of what causation standard, if any, should be incorporated in the guidelines, we were asked to talk about the specific question of whether or not interest ought to be included within loss and, also, the question of whether or not foreseeable costs to the government in investigating or prosecuting the crime ought to be included.

As you know, with respect to interest there is a rule in the guidelines which purports to exclude interest from consideration. However, a number of circuits include what they call "bargained for" interest in cases where they say that there is some agreement between the victim and the defendant in which the defendant promised to pay the victim interest.

These usually arise in bank loan cases, but at least in one Seventh Circuit case that rule has been applied to a simple ordinary fraud scheme where the defendant simply falsely promised to pay a certain return. The Seventh Circuit said, "Well, you promised to pay it, that is part of the loss."

I think the consensus on both of these issues, from which I heard not a dissenting voice, was that interest should not be included, period; that, whatever its theoretical advantages, the value of doing so in determining the relative culpability of defendants was near nil; and that, also, even more emphatically—and I don't think anyone suggested this as a possibility—but, even more emphatically, that the cost of the government of investigating and prosecuting defendants should not be included.

VICE CHAIR STEER: Thank you, sir. Any questions?

QUESTIONER: I have one question for Frank Bowman about the test on the new fraud guideline where he said that the results were not that different from what really happened with the real cases. You said the result was that it was easier to use the new proposed guideline. And I am wondering if that also means that there was consistency in the findings among the testers in their determination of loss?

PROFESSOR BOWMAN: I don't remember that. John, do you?

VICE CHAIR STEER: I think there was reasonable consistency, which might be appropriate under the circumstances. I think that that is generally summarized in the materials, and I think my answer is generally accurate—reasonably accurate.

Well, I want to thank all of the small group discussion leaders, our four plenary panel members, all of the co-leaders in the breakout groups, and all of you for your participation.

