View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Marquette University Law School

Marquette Law Review

Volume 93
Issue 2 *Symposium: Criminal Appeals: Past, Present, and Future*

Article 18

Temporary Victims: Interpreting the Federal Fraud and Theft Sentencing Guideline

Ryan N. Parsons

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation

Ryan N. Parsons, *Temporary Victims: Interpreting the Federal Fraud and Theft Sentencing Guideline*, 93 Marq. L. Rev. 845 (2009).
Available at: http://scholarship.law.marquette.edu/mulr/vol93/iss2/18

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

TEMPORARY VICTIMS: INTERPRETING THE FEDERAL FRAUD AND THEFT SENTENCING GUIDELINE

I. INTRODUCTION

In most cases, it is easy to identify the victim of a crime. The battery victim with a broken nose, the larceny victim who lost his wallet, and the arson victim whose home has burned to the ground are all readily identifiable. In rare instances, however, it is unclear whether an individual who has suffered from the criminal conduct of another is truly a "victim," at least for purposes of federal sentencing. The determination can alter a prison sentence by years.

Take the case of individual "victims" of bank fraud. In most of these cases, banks reimburse account holders for fraudulent charges. Thus, while a fraudulent ATM charge may cost an individual $300 for a brief time, her lender will quickly make her financially whole. Narrowly interpreting the Federal Sentencing Guidelines (Guidelines), some courts have concluded that such reimbursed individuals are not "victims" when determining a convicted defendant's appropriate sentencing range.[1] Rather, only the lending institution that ultimately suffers the financial loss is included as a victim.[2] This determination can alternatively double or halve a defendant's sentence.[3]

And yet, though the individuals in these cases are "made whole," they are still likely to feel victimized. Beyond just a lingering sense of victimization and a lack of trust in the security of their possessions, these individuals suffer loss because they frequently spend time and effort as a result of the crime. For example, such victims may need to contact their banks several times to secure reimbursement. Some victims must endure a long battle with credit reporting agencies to restore their credit histories and reputations. In cases where a "victim" goes to such lengths, excluding him from the victim total would distort the severity of the crime and improperly exclude the value of the time spent by the individual.

Further, Congress approved the Federal Sentencing Guidelines to establish a system of uniform and proportionate sentencing.[4] A circuit split emerged as some courts included reimbursed individuals as victims and other courts denied such treatment. Consequently, similar defendants committing

1. *See infra* Part III.A.
2. *See id.*
3. *See infra* notes 69–72 and accompanying text.
4. *See infra* Part II.A.

similar crimes received different sentences. Because such variances are at odds with the fundamental goals of the Guidelines, the Federal Sentencing Commission amended the "number-of-victims" provision to ensure consistent treatment of reimbursed parties. Yet the recent amendment is flawed as well.

Part II of this Comment examines the Federal Sentencing Guidelines, focusing on their history and objectives, their application, and the fraud and theft guideline. Part III analyzes the cases interpreting the number-of-victims provision of the Guidelines and the circuit split that has developed. Part IV addresses the recent amendment and explains why both the plain text and the purposes of the Guidelines support a reasonably broad interpretation of "victims." Finally, Part V concludes with a few thoughts on why the Federal Sentencing Commission and federal courts should interpret "victim" in a way that comports with its everyday meaning.

II. FEDERAL SENTENCING GUIDELINES

The Federal Sentencing Guidelines have a profound impact on the sentencing of guilty defendants in federal courts.[5] Through the Guidelines, Congress attempts to control crime through fair and effective sentencing that emphasizes honesty, uniformity, and proportionality.[6] The Guidelines include an entry governing the sentencing of every federal crime. Guideline section 2B1.1 covers fraud crimes. The fraud crimes guideline includes a potential sentence enhancement based on the number of victims of the crime.[7] As the number of victims rises, the sentencing range increases.[8] Thus, federal courts must determine an accurate and consistent interpretation of "victim" to ensure uniform and proportionate sentencing.

A. History and Purpose

The Federal Sentencing Guidelines were created and are overseen today by the Federal Sentencing Commission (Commission), a permanent administrative agency created by Congress in the Sentencing Reform Act of 1984.[9] Congress charged the Commission with a thorough review of federal sentencing procedures and vested the Commission with broad authority to develop sentencing rules that would further two basic goals of criminal

5. Until the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines almost entirely controlled federal sentencing. Still, all sentencing decisions must begin with the determination of the appropriate Guidelines range. Gall v. United States, 552 U.S. 38, 49 (2007).

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

7. *Id.* § 2B1.1(b)(2).

8. *Id.*

9. The Sentencing Reform Act was enacted as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987–2034 (1984) (codified as amended at 18 U.S.C. §§ 3551–3742 and 28 U.S.C. §§ 991–998 (2006)).

punishment: deterrence and retribution.[10] The fundamental goal of the Sentencing Reform Act was "to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[11] To achieve this goal, Congress directed the Commission to create guidelines that fulfilled three qualities: honesty, uniformity, and proportionality.[12]

The Commission easily achieved the goal of honesty; in the Guidelines, the Commission has abolished parole and severely limited sentencing reductions for good behavior.[13] Prior to the implementation of the Guidelines, "truth-in-sentencing" was rare.[14] Federal sentencing was an indeterminate system where judges had broad discretion to choose prison sentences from large statutory windows.[15] Once a prisoner went to prison, however, parole boards largely controlled the length of sentences through their broad power to grant or deny parole.[16] As a result, convicted criminals in the federal system often spent just one-third of their prescribed sentences in prison.[17] Under the Guidelines, however, sentence reductions for good behavior are limited to fifty-four days per year, a maximum of less than 15%.[18] Thus, barring exceptional circumstances, federal prisoners will serve at least 85% of their proscribed sentence before being released.

In addition to honesty, Congress sought a system of sentencing that achieved some degree of uniformity.[19] Because of the great discretion afforded to parole boards and judges prior to the implementation of the Guidelines, federal sentences often varied dramatically for offenders whose offenses and criminal history were largely similar.[20] To combat this perceived injustice, Congress tried to create a system that would limit the flexibility of judges to vary their sentences and eliminate parole.[21] Congress mandated that

---

10. *Id.* at 2018. Notably, Congress explicitly rejected rehabilitation as a goal of federal criminal sentencing. *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 4:6, at 134 n.7 (3d ed. 2004).

11. USSG § 1A1.3. Academics and judges alike question whether the Guidelines have succeeded in this endeavor. *See, e.g.*, Louis F. Oberdorfer, *Mandatory Sentencing: One Judge's Perspective*, 40 AM. CRIM. L. REV. 11, 17–18 (2003) (blaming the Guidelines' failure on the lack of discretion afforded judges).

12. USSG § 1A1.3.

13. *Id.* § 1A1.2.

14. *Id.* § 1A1.3.

15. *See id.*; *see also* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223–30 (1993).

16. USSG § 1A1.3.

17. *Id.*; *see* Stith & Koh, *supra* note 15, at 227–28.

18. USSG § 1A1.3.

19. *Id.*

20. *See* CAMPBELL, *supra* note 10, § 4:6, at 134.

21. USSG § 1A1.2.

the Commission create small ranges for judges to use that would be based on the severity of the crime committed and an individual's criminal history.[22]

Finally, Congress sought proportional sentencing.[23] Proportionality means that criminals committing more serious crimes receive longer sentences; criminals committing less serious crimes are punished less severely. Again, because of varying degrees of leniency granted by parole boards and judges, sentences fluctuated considerably.[24] The natural consequence of these fluctuations was that some criminals who committed more serious crimes received shorter sentences than others who committed less serious crimes.[25] The Commission pored over research to create a rough hierarchy of crimes to determine their severity.[26] The Commission also listed various aggravating and mitigating factors within the Guidelines to differentiate between more and less serious degrees of criminal conduct within the same general offense.[27]

The Supreme Court has addressed a number of challenges to the Guidelines in the last twenty years. Soon after the implementation of the Guidelines, the Court upheld their constitutionality against claims that they violated nondelegation and separation of powers principles.[28] In 2005, however, the Court ruled that mandatory application of the Guidelines is unconstitutional.[29] Consequently, today federal judges may impose non-Guidelines sentences.[30] Despite the *Booker* Court's relegation of the Guidelines to an advisory position, they are still important: The first step in determining any federal sentence, even if deviating from the Guidelines, is to

22. USSG § 1A1.3. Congress mandated that the upper-end of each sentencing range generally could not exceed the lower-end by the greater of six months or 25%. 28 U.S.C. § 994(b)(2) (2006).

23. USSG § 1A1.3.

24. *See* CAMPBELL, *supra* note 10, § 4:6, at 134.

25. The Commission saw this effect frequently in cases of economic crime, such as fraud and embezzlement. Criminals committing such crimes generally received shorter sentences than similar criminals who exhibited "other apparently equivalent behavior." USSG § 1A1.3.

26. *Id.*

27. *See infra* Part II.B. for details on the application of aggravating and mitigating factors.

28. *See* Mistretta v. United States, 488 U.S. 361, 371–72, 412 (1989). The Court upheld the constitutionality of the Guidelines in spite of a number of collateral attacks as well. *See* Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 536 (2009) ("In every case directly challenging their constitutionality [prior to 2000], . . . the Court upheld the Federal Sentencing Guidelines from attack.").

29. United States v. Booker, 543 U.S. 220 (2005). In a badly fractured decision that included six separate opinions, and in which eight justices dissented on at least one point, the Court held, *inter alia*, that mandatory application of the Guidelines violated the Sixth Amendment jury trial guarantee in that it required judges to sentence defendants based on findings of fact that were neither admitted by the defendant nor accepted by the jury as true beyond a reasonable doubt. *Id.* at 249–53.

30. *See id.*

determine the appropriate Guidelines sentence.[31]

B. How Courts Apply the Guidelines

A complex multi-step process is used to determine the recommended sentencing range under the Guidelines.[32] First, the court must determine the offense level, measuring the severity of the crime, according to the rules promulgated by the Federal Sentencing Commission.[33] Every offense has a base level that can be increased or decreased based on enhancing and mitigating factors.[34] Next, the court must determine the criminal history of the defendant based on the quantity and severity of previous convictions.[35] These two factors combine to provide the basic sentencing range for a particular crime and defendant.[36] Judges may deviate upward or downward from that range if they conclude that further mitigating or enhancing factors exist that are not included or sufficiently emphasized in the initial calculation.[37]

Every federal crime has a base level that the Federal Sentencing Commission determines based on the seriousness of the offense, ranging from one to forty-three.[38] The court determines the base level applicable to the crime and then evaluates the Guideline section to determine whether any specific offense characteristics apply.[39] After going through the specific section to determine whether to apply any specific offense characteristics, the court turns to the remainder of the Guidelines to determine whether any large-scale adjustments apply.[40] The result of these additions and subtractions is the defendant's offense level.

The court then turns to the criminal history of the defendant, which is

---

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

32. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2009). The use of this technical process has come under severe criticism. *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1342–43 (2005) ("[T]he complexity of the sentencing table and accompanying rules is an important cause of many common complaints about federal sentencing."). *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

33. USSG § 1B1.1(a).

34. *Id.* § 1B1.1(b)–(e).

35. *Id.* § 1B1.1(f).

36. *Id.* § 1B1.1(g).

37. *Id.* § 1B1.1(h)–(i).

38. *Id.* §§ 1B1.1(a), 1B1.2(a), 2A.

39. *Id.* § 1B1.1(b). An example of an offense characteristic specific to the fraud guideline is the total loss incurred or intended in the fraud. A loss of $5,000 to $9,999 causes a two-level increase, while a $400 million loss causes a thirty-level increase. *Id.* § 2B1.1(b)(1).

40. *Id.* § 1B1.1(c). For example, the offense level for all crimes is lowered for individuals who had a minimal role in the commission of a crime or who cooperated with authorities. Conversely, leaders and organizers face an increased offense level. *Id.* § 3B.

determined on a six-point scale.[41] To determine an individual's score on this scale, the court must calculate the number of "criminal history points" a defendant has accumulated.[42] Defendants receive three points for each prior conviction that had a prison sentence of more than thirteen months, two points for each sentence of sixty days to thirteen months, and one point for any other convictions.[43] The resulting total is transferred onto the six-point scale: defendants with zero or one criminal history points score a I, while those with thirteen or more score a VI.[44]

Finally, the court combines the offense level with the criminal history score to determine an individual's recommended Guidelines sentence.[45] Once the court has this information, it may deviate from the sentence based on factors not adequately considered by the Guidelines or it may choose to issue a non-Guidelines sentence.[46]

It is difficult to see how the Guidelines function without using a real example. The fraud section provides a good illustration. As a hypothetical, imagine a bank fraud scheme where the defendant stole $2,000,000 before being arrested. The base level for most federal fraud crimes is six.[47] Assume that the only specific offense characteristic applicable to the crime is for the $2,000,000 loss. Losses of more than $1,000,000 but less than $2,500,000 add sixteen levels to the offense level.[48] Further, assume that no other enhancing or mitigating factors are applicable to this defendant. Thus, the defendant's offense level is twenty-two.[49] If this defendant is a first-time criminal with a criminal history score of I, his recommended sentence is 41–51 months (3.42–4.25 years).[50] If, on the other hand, he is a repeat offender with a criminal history score of VI, his recommended sentence is

---

41. *Id.* §§ 1B1.1(f), 4A1.1.

42. *Id.* § 4A1.1.

43. *Id.* There are a number of other technical rules beyond the scope of this Note including, for example, adjustments for probation violations, career criminal conduct, and foreign criminal convictions.

44. *Id.* § 5A.

45. *Id.*

46. *Id.* § 1B1.1(i); *see also* United States v. Booker, 543 U.S. 220, 245 (2005).

47. USSG § 2B1.1(a)(2). The base level is seven in cases where the defendant is convicted of a fraud or a theft crime meriting the statutory maximum penalty of twenty years or more. *Id.* § 2B1.1(a)(1).

48. *Id.* § 2B1.1(b)(1)(I).

49. Six for the base offense level plus sixteen for the adjustment based on the $2,000,000 loss. Note that in cases such as this, the amount of loss has a much larger role in determining the ultimate sentencing range than the base level of this crime. This is in accord with the proportionality goal of the Guidelines. A fraud scheme that nets a few thousand dollars is much less serious than one that causes a multimillion-dollar loss. Sentences naturally reflect this disparity.

50. *Id.* § 5A.

84–105 months (7.00–8.75 years).[51]

C. The Fraud and Theft Guideline[52]

As noted above, the base offense level for most fraud and theft crimes under the Guidelines is six.[53] The only exception is for crimes that have a statutory maximum penalty of twenty years or more, in which case the base level is seven.[54] In addition to the number-of-victims enhancement, there are several other specific offense characteristics applicable to this section. For example, courts add two levels when the defendant commits a theft from the person of another.[55] The section also provides for two-level increases for misrepresentations that the defendant was acting on behalf of a charitable organization[56] and the use of fraudulent means of identification in a fraud or theft crime.[57] In total, there are sixteen offense characteristics specific to the fraud and theft guideline.[58]

Among the specific offense characteristics is an enhancement based on the number of victims of the crime.[59] As the number of victims increases, the offense level rises as well. The current version of the Guidelines provides for three levels of increases: a two-level increase for a crime that victimizes at least ten parties,[60] a four-level increase for a crime with fifty or more victims,[61] and a six-level increase for a crime with 250 or more victims.[62]

The controversy surrounding the application of this enhancement arises from the section's definition of "victim," which does not directly address situations of reimbursement. Under the Guidelines, a "victim" is "any person who sustained any part of the actual loss determined under" the loss calculation.[63] Thus, when determining who is a victim of a fraud crime,

---

51. *Id.*

52. The full title of Guideline Section 2B1.1 is "Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States." It covers a wider range of conduct than just fraud and theft, but as those are the most commonly charged crimes under this section, commentators generally refer to it by the shortened title.

53. USSG § 2B1.1(a)(2).

54. *Id.* § 2B1.1(a)(1).

55. *Id.* § 2B1.1(b)(3).

56. *Id.* § 2B1.1(b)(8).

57. *Id.* § 2B1.1(b)(10).

58. As noted in Part II.B., the largest potential increase comes from the loss enhancement, which can raise the offense level as much as thirty levels. *Id.* § 2B1.1(b)(1)(P).

59. *Id.* § 2B1.1(b)(2).

60. *Id.* § 2B1.1(b)(2)(A)(i).

61. *Id.* § 2B1.1(b)(2)(B).

62. *Id.* § 2B1.1(b)(2)(C).

63. *Id.* § 2B1.1 cmt. n.1. "Person" includes both individuals and business entities. *Id.*

courts must look to the loss determination. "Actual loss" is "the reasonably foreseeable pecuniary harm that resulted from the offense."[64] Finally, "pecuniary harm" is "harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm."[65] Thus, a victim is any person (1) who sustains harm that is either monetary or readily measurable in money, (2) whose harm resulted from the criminal offense, and (3) whose harm is included in the total loss calculation.[66]

The definition is inadequate because it is initially unclear whether a person who suffers a temporary monetary loss should be included in the victim calculation. Take, for example, a credit cardholder whose lender guarantees that any fraudulent charges will be reimbursed. Individual victims in these cases may suffer a temporary monetary loss, but the ultimate monetary loss is borne by the lending agency. If individuals are included as victims due to this specific monetary loss, courts run the risk of "double counting" the actual loss as determined in the loss calculation.[67] Yet, it runs counter to the goals of the Guidelines to disregard the individual victims when determining a sentence.[68]

The interpretation of this enhancement is more than a mere academic exercise. It has a significant impact on the potential sentences of those convicted for federal fraud and theft crimes. Take the same hypothetical used above (fraud crime where the defendant stole $2,000,000 and had an offense level of twenty-two). Assume that this criminal fraudulently charged the $2,000,000 on 300 individual bank accounts. Further, assume that the ultimate loss was borne by five credit card companies. If a court determines that only five victims exist for the purpose of the Guidelines, the final offense level is twenty-two, as there is no number-of-victims increase for crimes involving fewer than ten victims. If, however, the court determines that all 300 individuals are victims in addition to the lenders, the final level rises to twenty-eight, due to the six-level increase for crimes of 250 or more victims.

---

64. *Id.* § 2B1.1 cmt. n.3(A)(i).

65. *Id.* § 2B1.1 cmt. n.3(A)(iii).

66. *See* United States v. Abiodun, 536 F.3d 162, 168–69 (2d Cir. 2008), for a similar, though slightly differently worded, definition.

67. *See* United States v. Armstead, 552 F.3d 769, 782 (9th Cir. 2008) (denying individuals recognition as victims when the government claimed the same actual loss for the individuals and for institutional lenders). *But see* United States v. Stepanian, 570 F.3d 51, 55–56 (1st Cir. 2009) (finding reimbursed parties suffered the same loss as reimbursing institutions at different times).

68. *See* United States v. Conner, 537 F.3d 480, 494 (5th Cir. 2008) (Garza, J., concurring in part and dissenting in part) (questioning the proportionality of imposing the same sentences on two defendants when one defrauded many more individuals); *see also* USSG § 1A1.3 for a discussion of uniform and proportionate sentencing.

A six-level increase roughly doubles the recommended sentencing range.[69] As noted above, the recommended sentence for a defendant with an offense level of twenty-two and a criminal history of I is forty-one to fifty-one months.[70] At level twenty-eight, the recommended sentence is seventy-eight to ninety-seven months.[71] The difference at the midpoints of the two ranges is 41.5 months (nearly 3.5 years). Thus, if two defendants in different circuits commit the exact same crime, they could receive substantially different sentences.[72] To ensure uniform sentencing for fraud crimes, it is crucial that federal courts interpret the number-of-victims enhancement consistently across the nation.

III. APPELLATE INTERPRETATION

Eight circuits have addressed the number-of-victims enhancement, with three interpretations emerging from the cases. Four circuits have adopted a narrow interpretation of "victim" that excludes reimbursed parties.[73] Two circuits have adopted a broad interpretation that would automatically include such individuals.[74] Finally, two circuits have adopted a middle approach that would potentially include reimbursed parties as victims, but only if they suffer a loss in addition to the reimbursed money, and if that loss is measured separately from the financial loss suffered by the lenders.[75]

To a degree, the tests adopted by each circuit resulted from the facts of each case. Courts that adopted a broad definition of "victim" tended to do so in cases where the reimbursed party spent more time and effort in securing the reimbursement, while many of the purported victims in the narrow interpretation line of cases were completely unaware of the crimes committed against them. To resolve this split, the Federal Sentencing Commission amended the Guidelines, adding a provision discussed *infra* in Part IV.

A. The Narrow Interpretation—United States v. Yagar

The first line of cases almost categorically rejected the inclusion of reimbursed parties as victims for sentencing. Though some of the courts left open a narrow exception for cases where parties went to extraordinary lengths

---

69. USSG § 5A.

70. *Id.*

71. *Id.*

72. *See infra* Part III.

73. *See* United States v. Kennedy, 554 F.3d 415, 422 (3d Cir. 2009); United States v. Conner, 537 F.3d 480, 489 (5th Cir. 2008); United States v. Icaza, 492 F.3d 967, 969 (8th Cir. 2007); United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005).

74. *See* United States v. Stepanian, 570 F.3d 51, 56 (1st Cir. 2009); United States v. Lee, 427 F.3d 881, 895 (11th Cir. 2005).

75. *See* United States v. Abiodun, 536 F.3d 162, 168–69 (2d Cir. 2008); United States v. Armstead, 552 F.3d 769, 782 (9th Cir. 2008).

to secure reimbursement, the case law makes clear that those cases are out of the ordinary. *United States v. Yagar*[76] largely exemplifies the arguments made in this line of cases.

The *Yagar* court was the first federal appellate court to address the issue of the status of reimbursed parties as victims.[77] In *Yagar*, the defendant engaged in a mail theft and bank fraud scheme where she used stolen checks to deposit money into several victims' bank accounts.[78] After depositing the money, she withdrew a share of it using the victims' stolen account information.[79] All told, Yagar stole more than $20,000 out of forty-seven bank accounts belonging to more than sixty individuals.[80] Of those sixty, at least six spent money to purchase new checks following the theft, and it was unclear from the record whether the individuals' banks ever reimbursed them for the cost of the checks.[81] With the possible exception of those check purchases, five banks completely reimbursed all individual losses.[82]

Yagar pleaded guilty to mail theft[83] in exchange for the dismissal of an additional identity theft[84] charge.[85] The presentence investigation report did not recommend an enhancement based on the number of victims, but the government filed a position paper recommending a four-level enhancement on the grounds that Yagar's crime involved more than fifty victims.[86] The district court rejected the government's request for a four-level enhancement but granted a two-level enhancement based on its determination that there were eleven victims of this crime.[87] The court concluded that the six account holders who spent money buying new checks were victims along with the five banks who bore the ultimate loss.[88]

On appeal, the government argued that even a temporary loss qualifies an individual as a victim under the fraud and theft guideline because the Guidelines provide no indication as to when the actual loss must occur.[89] By

---

76. 404 F.3d 967 (6th Cir. 2005).

77. *Id.* *Yagar* has been cited persuasively by other circuits that have adopted this narrow interpretation. *See Kennedy*, 554 F.3d at 420; *Conner*, 537 F.3d at 489.

78. 404 F.3d at 968.

79. *Id.*

80. *Id.* at 968, 970.

81. *Id*. at 971–72.

82. *Id.* at 971.

83. 18 U.S.C. § 1708 (2000).

84. 18 U.S.C. § 1028(a)(7) (2000).

85. *Yagar*, 404 F.3d at 968.

86. *Id.* at 968.

87. *Id.* at 968–69.

88. *Id.*

89. *Id*. at 971. The government has repeatedly adopted this reasoning in cases with reimbursed parties. *See, e.g.*, United States v. Conner, 537 F.3d 480, 490 (5th Cir. 2008). The *Conner* court held

this reasoning, each individual account holder would be a victim from the moment Yagar depleted the individual's account, regardless of whether the individual purchased new checks or was later reimbursed. Yagar appealed and argued that the banks were the only victims of the crime because they suffered the ultimate loss and the evidence as to the check purchases was insufficient to increase her sentence.[90]

The Sixth Circuit rejected the government's argument and agreed with Yagar's argument, concluding that neither the account holders as a group nor the individuals who purchased checks were victims.[91] The court ruled that the individuals who purchased new checks were not victims because the evidence in the record was insufficient to support a conclusion that the banks never reimbursed the individuals.[92] More substantively, the court concluded that the sixty account holders were not victims.[93] The court reasoned that because the banks immediately reimbursed the individual losses, the individuals suffered no practical adverse effect from the crime.[94] Without such an adverse effect, the individuals were not victims.[95]

The court, however, left open the possibility that individuals suffering temporary losses under other circumstances could be victims, enigmatically noting, "[T]here may be situations in which a person could be considered a 'victim' under the Guidelines even though he or she is ultimately reimbursed."[96] The court did not specify the circumstances in which a court

---

that it would take "a strained reading" of the Guidelines to conclude that individuals become victims at the moment of a loss, and remain so even after being reimbursed. *Id.* This, however, is exactly what the broad interpretation courts have concluded. *See* United States v. Stepanian, 570 F.3d 51, 56 (1st Cir. 2009); United States v. Lee, 427 F.3d 881, 895 (11th Cir. 2005).

90. *Yagar*, 404 F.3d at 969.

91. *Id.* at 971–72.

92. *Id.*

93. *Id.* at 971.

94. *Id.*; *cf.* United States v. Icaza, 492 F.3d 967, 969 (8th Cir. 2007). In *Icaza*, defendants stole merchandise from hundreds of Walgreens stores. *Id.* at 968–69. The government argued that each Walgreens franchisee (and, in the alternative, that each shareholder) was a victim, but the court concluded that only the corporate parent, who reimbursed the individual stores, was a victim. *Id.* at 970. The court relied heavily on testimony from a Walgreens corporate executive, who testified that "ultimately the corporation takes the loss." *Id.* at 969.

95. *Yagar*, 404 F.3d at 971.

96. *Id.* Other courts in this line have likewise claimed that under different facts, a reimbursed party could be a victim. *See* United States v. Conner, 537 F.3d 480, 491 (5th Cir. 2008) ("The evidence here indicated that the account holders were quickly reimbursed for the improper charges on their accounts. If they had paid those charges and encountered difficulty in obtaining reimbursement, a different question would be presented."). One court went so far as to dismiss the existence of a circuit split, and instead concluded that courts adopting the broad interpretation merely "fell within the *Yagar* carve-out for those who could be considered victims, despite ultimately being reimbursed, because they suffered some additional harm." United States v. Kennedy, 554 F.3d 415, 421 (3d Cir. 2009). Because the tests adopted by the other lines are logically distinct from the tests adopted by the narrow line, this Comment concludes that the broad interpretations are not merely

should consider a reimbursed party in the victim calculations. Presumably, the government would need to show that the individuals suffered some adverse effect as a result of the crime, but it is unclear what kind of temporary losses would suffice in this and other "narrow" circuits.

At least one court in this line of cases has rejected the use of logic in concluding that reimbursed parties are victims. In *United States v. Conner*,[97] the trial court reasoned that as a matter of "'garden-variety logic,'" some of the businesses defrauded in a fraud scheme must have lost business time in trying to obtain reimbursement after the fraudulent charges, but the court admitted that it had no evidence for this conclusion.[98] On appeal, the Fifth Circuit explicitly noted that the businesses were quickly reimbursed and did not encounter any difficulties or debts as a result of the crime.[99] Addressing the trial court's garden-variety logic, the court held that courts must base any sentencing enhancements on a preponderance of the evidence.[100] The court left open the possibility of including business losses as part of the victim calculation but held that "the district court's speculation as to the existence of these facts was an insufficient basis to enhance Conner's sentence."[101]

Courts in this line of cases have generally concluded that a plain reading of the text of the fraud guideline reveals that reimbursed parties cannot be victims.[102] Generally, they have offered little analysis for this proposition.[103] This lack of analysis is problematic, especially because other courts have concluded that reimbursed parties may be victims. Indeed, in the circuits that have adopted a broad definition of "victim," reimbursed parties are necessarily victims.

B. The Broad Interpretation—United States v. Stepanian

Two circuits have completely rejected the methodology offered by the preceding line of cases and instead have held that any party who loses money—even temporarily—is a victim from the time of the initial loss. In

---

exceptions to the narrow rule, but rather demonstrate the existence of a circuit split.

97. 537 F.3d at 491.

98. *Id.*

99. *Id.*

100. *Id.* at 491–92.

101. *Id.* at 491. Unlike the other cases in this line, *Conner* provoked a dissent that advocated for a broader interpretation of "victim." *Id.* at 493 (Garza, J., dissenting). Judge Garza examined the purposes of the Guidelines, and concluded that the reasoning of the majority (as well as the *Yagar* and *Icaza* courts) "runs counter to the fundamental sentencing goal of tying the severity of a defendant's sentence to the seriousness of the defendant's crime." *Id.* at 494.

102. *See, e.g.*, United States v. Kennedy, 554 F.3d 415, 419 (3d Cir. 2009) (concluding, with no analysis, that it was "undisputed" that the account holders did not sustain any part of the loss by virtue of the reimbursement).

103. *Id.*

these circuits, reimbursement is irrelevant in determining whether a party is a victim for sentencing purposes. *United States v. Stepanian*[104] best exemplifies this line of cases.

In *Stepanian*, the defendant was part of a team that stole credit and debit card information by replacing debit card terminals at grocery stores.[105] Video surveillance eventually revealed the operation, and a store employee contacted police when he recognized one of the defendant's coconspirators from the video.[106] The defendant was arrested while sitting in a getaway car outside the front of the store.[107] It is unclear from the court's opinion precisely how many individuals' information the conspirators possessed; however, the number surely exceeded 250 because the court applied the six-level enhancement. The unauthorized charges on these accounts prior to arrest totaled more than $130,000.[108]

The defendant pleaded guilty to conspiracy to commit access device fraud[109] and aggravated identity theft,[110] and was sentenced to seventy-two months in prison.[111] The defendant's offense level for sentencing included a six-level enhancement for a crime with 250 or more victims.[112] The trial court concluded that the parties whose accounts were fraudulently charged were victims based on the initial act of having money taken from their account, regardless of future reimbursement:

> "[T]here has been loss experienced by all the victims in the case. The loss experienced by the individual victims may have been for a short period of time, might have been for a week or two weeks or for a day, whatever the case may be. There was reimbursement, no doubt, that occurred, but I don't think the guidelines speak in terms of the length of time that a victim is deprived of their money or access to their money any more than in any other crime of fraud or that involves stealing, that the question of whether the person is a victim is determined by whether they're deprived of their resources for an hour, a day, a month or a year . . . . It seems to me these

104. 570 F.3d 51 (1st Cir. 2009).

105. *Id.* at 53. The terminals they swapped in place of the original terminals collected users' account numbers and PIN codes. *Id.*

106. *Id.* The video also revealed how easy the switches were. One of the defendants distracted a night clerk with conversation while two others switched out the terminals. *Id.* Amazingly, the switches took only twelve seconds. *Id.*

107. *Id.*

108. *Id.*

109. 18 U.S.C. § 1029(a)(2) (2006).

110. 18 U.S.C. § 1028A(a)(1) (2006).

111. *Stepanian*, 570 F.3d at 52.

112. *Id.* at 54.

> people were victims because money was stolen from their accounts."[113]

Because the individuals were deprived of their property, regardless of how long the deprivation lasted, the court considered them victims.

On appeal, the First Circuit agreed with the trial court's analysis and concluded that the reimbursed parties were victims under the fraud and theft guideline's definition.[114] In doing so, the court accepted an argument rejected by those courts that adopted the narrow definition of "victim." Specifically, the court held that the parties were victims at the moment of the withdrawal, and later reimbursement did not delete them from the victim roll.[115] Noting that a victim must sustain a part of the "actual loss," the *Stepanian* court concluded that actual loss included a temporal dimension.[116] Thus, the reimbursed parties sustained actual loss during the period before the reimbursement, while the lenders sustained actual loss following the reimbursement.

The court explicitly broke with the narrow line of cases in taking this position.[117] It rejected the *Yagar* court's assertion that the reimbursed individuals did not "suffer any 'adverse effect as a practical matter.'"[118] To show that the reimbursed individuals did in fact suffer from the crime, the court noted the "'declaration of victim losses'" statements used by the trial court:

> The declarations reveal that one victim who was traveling abroad could not pay her travel expenses during the period of the theft. Another victim described how he and his family had no money for food and gas for a period of time because of the theft, and how their card was denied when they tried to use it to pay for their son's birthday party. That victim concluded "it put a big financial burden on my family for a few weeks." Although every victim of the scheme may not have a similarly dramatic story, these declarations provide tangible support for our conclusion that even where losses are reimbursed, unauthorized withdrawals from bank accounts

113. *Id.* (quoting the trial court at sentencing).

114. *Id.* at 55.

115. *Id.* At least two circuits explicitly rejected this argument when the government made it, concluding that the guideline does not "'stop the clock'" and create victims at the moment of the offense. United States v. Conner, 537 F.3d 480, 490 (5th Cir. 2008); *see also* United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005).

116. *Stepanian*, 570 F.3d at 55.

117. *Id.* at 56 ("In drawing this conclusion, we reject the position of some other circuits that the account holders did not suffer actual pecuniary harm, 'readily measurable in money,' because their losses were reimbursed.").

118. *Id.* (citing *Yagar*, 404 F.3d at 971).

> cause real economic harm.[119]

The court further noted, however, that the government need not show this actual harm in order for the court to apply the number-of-victims enhancement.[120]

The court's textual analysis also led it to adopt the broad interpretation.[121] Included in the loss calculation provision of the fraud and theft guideline is a "Credits Against Loss" provision.[122] The provision provides that loss should be reduced by any amount returned by the defendant "to the *victim*."[123] The First Circuit found this language persuasive in showing that the provision presupposes that an individual is a victim at the time of loss and remains so even if he is entirely reimbursed.[124]

The Eleventh Circuit also found this language persuasive when adopting the broad interpretation:

> When considering the impact of recovered collateral, or the return of money, property, or services, to the victim, the Guidelines treat those so recovering as having suffered a loss but then allow the defendant to take credit against the total loss for the value of the recovered or returned loss. Stated another way, inherent in the credit against loss provision is an acknowledgment that there was in fact an initial loss, even though it was subsequently remedied by recovery of collateral

---

119. *Stepanian*, 570 F.3d at 56.

120. *Id.* at 56 n.7 ("[T]he government [need not] prove the kind of harm described in the letters to establish the applicability of the multiple victim enhancement. We simply offer these accounts in support of our position that such withdrawals, *whatever the particulars of the impact in an individual case*, do represent real economic harm.") (emphasis added).

121. *Id.* at 56–57.

122. The provision reads as follows:

> Loss shall be reduced by the following:
>
> (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.
>
> (ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(E) (2009).

123. *Id.* (emphasis added).

124. *Stepanian*, 570 F.3d at 56.

or return of goods.[125]

United States v. Lee is factually distinguishable from most cases that have addressed the reimbursed victims issue in that many of the victims had to spend considerable time and effort before mitigating their damages.[126] The victim-merchants resorted to repossession and foreclosure to reclaim their property, and in some cases it took them more than a year to secure the necessary legal judgments.[127] Nevertheless, the Eleventh Circuit later extended the broad definition—albeit in an unpublished case—to a factual scenario more similar to the other cases where courts have addressed the issue.[128]

Under the broad interpretation, courts need not prove actual harm separate from the initial loss in order to include individuals as victims. Instead, the fact that the loss occurred at all is sufficient to justify their inclusion. The lack of necessity to prove a more permanent loss is what separates the "broad" line of cases from the middle ground discussed below.[129] In the following cases, the government must prove that the reimbursed party actually suffered a loss and quantify that loss in addition to the reimbursed money.

C. United States v. Abiodun—*A Middle Ground?*

Rejecting both the categorical exclusion and the automatic inclusion of reimbursed individuals as victims, the following cases take a practical approach to the problem. The two circuits deciding cases in this line assessed whether the purported victims practically suffered an adverse effect that could be measured in economic terms. *United States v. Abiodun*[130] is the leading case in this line.

In *Abiodun*, a defendant engaged in an identity theft scheme where he used credit reports belonging to other people to access the equity on their credit cards.[131] After receiving a credit report, the defendant would contact the individual's bank or lender to report a change of address and, several days

125. United States v. Lee, 427 F.3d 881, 895 (11th Cir. 2005) (citations omitted).

126. *Id.*

127. *Id.* Though the defendants were generally loathe to repay any of the defrauded businesses, a threat from a hair replacement therapy business to stop treatments generated quick repayment. *Id.* at 886.

128. *See* United States v. Cornelius, 202 F. Appx. 437, 439 (11th Cir. 2006) ("In *Lee*, we . . . distinguished *Yagar* on the grounds that the losses suffered by the victims were not short-term or subject to indemnity. However, . . . the Guidelines allow a court to find an actual loss by a reimbursed party, and therefore treat that party as a victim.").

129. *See infra* Part III.C.

130. (*Abiodun II*), 536 F.3d 162 (2d Cir. 2008).

131. *Id.* at 164–65.

later, a damaged card.[132] The companies would thus send new cards to the defendant's address. He then withdrew money and purchased merchandise using the new cards.[133] As in the previous cases, banks and credit card companies reimbursed the cardholders for their losses.[134] Police apprehended the defendant after he participated in this scheme for more than five years.[135]

The defendant pleaded guilty to identification document fraud,[136] credit access device fraud,[137] and conspiracy to commit wire fraud,[138] and the trial court sentenced him to ninety-six months in prison.[139] Included in the sentencing determination was a six-level Guidelines enhancement based on the number of victims, as the trial court concluded that it was "'more likely than not'" that the defendant's fraud involved more than 250 victims.[140] The victim total included dozens of corporate victims, a small number of individuals who lost money, and a large number of individuals who "spent an appreciable amount of time securing reimbursement for their financial losses."[141] Though the trial court counted as victims those individuals who suffered monetary loss due to the value of their lost time, it did not include the value of this time in its loss calculation.[142]

On appeal, the defendant argued that under *United States v. Yagar*,[143] individuals who are fully reimbursed for their losses cannot be considered victims for the purposes of the Guidelines enhancement.[144] The government, on the other hand, relied on *United States v. Lee*[145] in arguing that even reimbursed parties are victims.[146] The court fashioned a test that largely split the difference between the two lines.[147] According to the Second Circuit:

---

132. United States v. Abiodun (*Abiodun I*), 442 F. Supp. 2d 88, 93 (S.D.N.Y. 2006).

133. *Id*. The crime was lucrative; the defendant "wore Armani and Versace suits, Movado watches, and Cartier glasses, and drove a Lexus." *Id*. at 94.

134. *Abiodun II*, 536 F.3d at 166.

135. *Id*. at 164.

136. 18 U.S.C. § 1028 (2000).

137. 18 U.S.C. § 1029 (2000).

138. 18 U.S.C. § 371 (2000).

139. *Abiodun II*, 536 F.3d at 163.

140. *Id*. at 166 (quoting the trial court at sentencing).

141. *Id*.

142. *Id*. at 169.

143. 404 F.3d 967, 971 (6th Cir. 2005).

144. *Abiodun II*, 536 F.3d at 168.

145. 427 F.3d 881, 895 (11th Cir. 2005).

146. *Abiodun II*, 536 F.3d at 168. The government made this argument in *United States v. Armstead* as well, arguing that the reimbursed individuals were victims at the moment of the loss and remained so. 552 F.3d 769, 781 (9th Cir. 2008). As in all cases but those within the "broad interpretation" line, the court rejected the argument. *Id*. at 781–82.

147. *Abiodun II*, 536 F.3d at 168–69.

> [I]ndividuals who are ultimately reimbursed by their banks or credit card companies can be considered "victims" of a theft or fraud offense for purposes of [the number-of-victims Guidelines enhancement] if—as a practical matter—they suffered (1) an adverse effect (2) as a result of the defendant's conduct that (3) can be measured in monetary terms.[148]

Thus, the court held that the individual victims in this case who were reimbursed by their banks and credit card companies were victims as long as the trial court could determine that they spent "an appreciable amount of time" ensuring reimbursement and that the value of the time spent could be measured monetarily.[149] Because the trial court failed to include the value of this lost time, the Second Circuit remanded the case with instructions for the district court to: "(1) recalculate the loss amount associated with each of the defendants' crimes to include the time lost by these potential victims *or* (2) determine whether, if these individuals are excluded from the count, it is still 'more likely than not' that Abiodun's crimes affected '250-plus victims.'"[150]

Though the *Abiodun* court concluded that it was simply applying the reasoning of *Yagar*, the court clearly went beyond *Yagar*'s holding. In *Yagar*, the court found that the individuals suffered no adverse effect and, hence, were not victims.[151] The court further speculated, in vague dicta, that there "may be situations" where reimbursed individuals could be victims, but it provided no examples as to what situations might qualify.[152] The Second Circuit in *Abiodun*, however, held that *any time* there is an adverse effect

---

148. *Id.* The court in *Armstead* took a similar approach:

> A loss that is reimbursed immediately does not amount to a pecuniary harm because the ultimate loss cannot be measured in monetary terms. If, however, the reimbursement takes a longer period of time [and requires a great deal of effort on the part of the individual], it is conceivable that the individual may [suffer additional pecuniary harm that is not fully reimbursed]. If that loss is included in the loss calculation, the victim associated with the loss should be included in the victim calculation.

Armstead, 552 F.3d at 782 (citations omitted).

149. *Abiodun II*, 536 F.3d at 169. The trial court in this case did not measure the value of this lost time or include this value in the total loss calculation. In failing to do so, the court violated the Guidelines rule that "victims" include only those who have sustained an actual loss. Thus, the court remanded the case to the trial court to measure the value of this lost time and include it in the total loss calculation. *Id.*

150. *Id.* (citation omitted). Likewise, the *Armstead* court remanded with instructions for the district court to quantify the loss of the reimbursed parties and include it in the loss calculation. *Armstead*, 552 F.3d at 783. For example, if the cost of obtaining a new driver's license was not included in the reimbursement, the court could simply multiply the number of defrauded individuals by the cost of a Washington driver's license, and add the total to the loss calculation. *See id.*

151. United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005).

152. *Id.*

measurable in monetary terms, a reimbursed individual can be considered a victim.[153] In adopting such a broad, bright-line test, the court created a more lenient standard than did the *Yagar* court.

IV. THE *ABIODUN* APPROACH IS SUPERIOR

Since these cases were decided, the Federal Sentencing Commission amended the commentary to section 2B1.1 to include an additional victim definition specific solely to crimes involving the use of "means of identification." Under the amendment, an individual is a victim if he meets the definition in the remainder of the section or if his "means of identification was used unlawfully or without authority."[154] Without changing the overall definition of "victim," the commission nevertheless adopted the broad approach taken by the *Stepanian* court.

There are advantages to such an amendment. First, it eliminates the circuit split and ensures that courts are likely to treat these crimes in a similar fashion. Further, an interpretation that automatically includes reimbursed parties is superior to one that automatically excludes them. The former interpretation recognizes that it is possible for reimbursed parties to suffer a loss, while the latter completely precludes such a possibility. Indeed, the Commission recognized the flaw in the narrow definition of "victim": that reimbursed individuals "must often spend significant time resolving credit problems and related issues, and such lost time may not be adequately accounted for in the loss calculations."[155] Further, the amendment is efficient; rather than requiring courts to determine the value of lost time, it lets them simply add individuals to the victim total.

This amendment nevertheless sacrifices accuracy at the altar of efficiency. By automatically including reimbursed parties as victims, there is no way to distinguish between a crime where parties spent hundreds of hours seeking reimbursement from a crime where the parties were completely unaware of a loss. Establishing such a broad rule penalizes criminals in cases where "victims" were unaware that they were victimized and marginalizes true victims whose lives are upended by a fraud crime.[156]

The better route would have been to codify the *Abiodun* interpretation, interpreting "victim" to include any individuals who spent any amount of time making themselves whole as a result of the defendant's crime, but not those who are unaware of the loss before reimbursement or spend no time or money

153. *Abiodun II*, 536 F.3d at 168–69.

154. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.4(E) (2009).

155. Sentencing Guidelines for United States Courts, 74 Fed. Reg. 21,750, 21,751 (May 8, 2009) (amending the commentary to USSG § 2B1.1).

156. Of course, courts may deviate from Guidelines-recommended sentences, but, in practice, deviations are the exception rather than the norm.

securing reimbursement.[157] First, the plain text of the Guidelines prior to the amendment supported such a reading. Whether an individual is a victim under this section turned on whether that person suffered a loss that is "readily measurable in money."[158] Because an individual's time is readily measurable in money, courts should include it in the loss calculation. Further, the commentary specifically excludes a series of items from the loss calculation,[159] but did not exclude the monetary value of time spent by victims. Second, the purposes of the Guidelines support the *Abiodun* approach. Including time-based losses more accurately ties a defendant's punishment to the severity of her crime, which promotes proportionate sentencing. Thus, the Commission should have adopted an amendment that recognized reimbursed individuals, as victims only if they spent time securing such reimbursement.

A. A Plain Reading of the Guidelines Supports the Abiodun *Approach*

Whether to include an individual as a victim turns on whether the individual suffered a part of the actual loss determined in the loss calculation.[160] That decision depends on whether the loss is a reasonably foreseeable pecuniary harm.[161] No one seriously disputes that an individual cancelling a credit card, requesting a fraud alert, or contacting a bank is a "reasonably foreseeable" consequence of a fraud crime.[162] Thus, the inquiry turns on whether the time invested in such actions is pecuniary harm. Again, pecuniary harm is "harm that is monetary or that otherwise is readily measurable in money."[163]

The value of lost time is "readily measurable in money" using the "opportunity cost" of the lost time.[164] *Black's Law Dictionary* defines opportunity cost as "[t]he cost of acquiring an asset measured by the value of an alternative investment that is forgone."[165] Economists, however, use

157. One exception to this rule would be for individuals who spent time only in cooperating with prosecutors or police as part of the government's investigation. The Guidelines specifically exclude "costs incurred by victims primarily to aid the government in[] the prosecution and criminal investigation of an offense." USSG § 2B1.1 cmt. n.3(D)(ii) (2009).

158. *Id.* § 2B1.1 cmt. n.3(A)(iii).

159. *E.g.*, *id.* (excluding emotional distress and harm to reputation from the loss calculation).

160. *Id.* § 2B1.1 cmt. n.1.

161. *Id.* § 2B1.1 cmt. n.3(A)(i).

162. A consequence of the crime is reasonably foreseeable when the defendant knew or reasonably should have known that the consequence was a "potential result of the offense." *Id.* § 2B1.1 cmt. n.3(A)(iv).

163. *Id.* § 2B1.1 cmt. n.3(A)(iii).

164. Opportunity cost is "[p]erhaps the most fundamental concept in economics." DAVID W. PEARCE, THE MIT DICTIONARY OF MODERN ECONOMICS 315 (David W. Pearce & Robert Shaw eds., 4th ed. 1992).

165. BLACK'S LAW DICTIONARY 398 (9th ed. 2009).

opportunity cost more broadly to measure the value of lost time as well:

> When economists refer to the "opportunity cost" of a resource, they mean the value of the next-highest-valued alternative use of that resource. If, for example, you spend time . . . going to a movie, you cannot spend that time at home reading a book . . . . If your next-best alternative to seeing the movie is reading the book, then the opportunity cost of seeing the movie is the money spent plus the pleasure you forgo by not reading the book.[166]

Thus, the opportunity cost of an hour spent contacting a bank or credit reporting agency because of a fraud crime is the value of the hour to the individual in spending that hour as she would have done but for the crime.[167]

Using opportunity cost, economists are readily able to measure the monetary value of time, even if most judges are not trained to do so. That judges cannot measure this value with scientific precision is not an impediment to using opportunity cost to value time. The Guidelines commentary notes, "[t]he court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence."[168] Consequently, as long as the court can reasonably estimate the value of the time, it can include it in the loss calculations.

Because the value of time is readily measurable in money, courts should include this value in their loss calculations unless another section of the Guidelines excludes such losses. Though the Guidelines specifically exclude

---

166. David R. Henderson, *Opportunity Cost*, *in* THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 44, 44 (David R. Henderson ed., 1993). As an additional example, the cost of attending college is not only tuition, but also the salary the student forgoes by choosing school rather than work. *Id.* at 44–45.

At least one federal court has used opportunity cost in a similar manner. In determining the reasonability of an attorney's hourly rate in a case awarding attorney's fees, the court noted that the attorney's opportunity cost was the amount he forewent by representing the client at issue or, in other words, "the rate the attorney could have received from a client whom he charged by the hour for the same type of work." Morimanno v. Taco Bell, 979 F. Supp. 791, 797 (N.D. Ind. 1997) (emphasis omitted).

167. One possible concern about this method is that different opportunity costs could undercut the proportionality goal of the Guidelines by valuing different victims' time at different rates, and thus imposing different sentences for similar crimes. For example, the value of a law firm managing partner's time is likely higher than that of a retiree. There are two responses to such an objection. First, because "[t]he court need only make a reasonable estimate of the loss," USSG § 2B1.1 cmt. n.3(C), it could estimate the value of the lost time across all the victims, rather than making a separate calculation for each victim. Second, as a practical matter, it is highly unlikely that adding the value of the opportunity cost into the loss calculation will move a defendant into a different loss category, given the size of most of the categories. *See id.* § 2B1.1(b)(1).

168. *Id.* § 2B1.1 cmt. n.3(C). Because the Guidelines call for only a reasonable estimate, a judge does not need to be a trained economist to perform the necessary opportunity cost calculations.

several types of losses, they do not discuss lost time or similar items.

One such exclusion is for "emotional distress, harm to reputation, or other non-economic harm."[169] Lost time is qualitatively different from emotional distress and harm to reputation. Emotional distress and harm to reputation are ethereal concepts that courts cannot reasonably measure. Whereas courts can estimate lost time in units (e.g., minutes or hours) and convert these units to dollar amounts (using opportunity cost), no similar measurements can be made for these other types of harm.[170]

The argument that lost time falls into the catchall "other non-economic harm"[171] category is similarly unavailing. Based on its usage in the section, it is clear that "other non-economic harm" simply refers to items that are neither monetary nor readily measurable in money. The full definition of pecuniary harm is "harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm."[172] The use of the word "[a]ccordingly" indicates a relationship between the first sentence and the second, whereby the latter sentence is a conclusion based in part on the former sentence's major premise. Thus, the text indicates that the Commission was simply distinguishing between items that are measurable in money and those that are not. Because lost time is measurable in money, as discussed above, it does not fall into the latter category.

The Guidelines commentary also excludes "[i]nterest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs" from the loss calculation.[173] The defendant in *United States v. Armstead* argued that the court could not include any time-based losses due to their similarity to the losses excluded in this section.[174] In his brief, the defendant argued that "the costs [the reimbursed individuals] incurred—getting a new driver's license or correcting a credit report—were exactly the type of routine finance costs and fees that the Application Note explicitly excludes from the enhancement's coverage."[175]

The Ninth Circuit did not address this argument because it remanded the case on other grounds.[176] Had the court addressed it, however, it should have

169. *Id.* § 2B1.1 cmt. n.3(A)(iii).

170. Indeed, it would be impossible for courts to determine how many units of emotional distress a "victim" suffered.

171. *Id.* § 2B1.1 cmt. n.3(A)(iii).

172. *Id.*

173. *Id.* § 2B1.1 cmt. n.3(D)(i).

174. 552 F.3d 769, 783 n.14 (9th Cir. 2008).

175. Appellant's Opening Brief at 46, United States v. Armstead, 552 F.3d 769 (9th Cir. 2008) (No. 06-30550).

176. *Armstead*, 552 F.3d at 784–85.

rejected it. Lost time is qualitatively different from finance charges and interest. Note that the appellant in *Armstead* subtly changed the language in the commentary; the appellant argued that the language stands for all "routine finance costs."[177] In reality, the language refers to only a specified type of financial losses, those related to interest, fees, penalties, and the like. The cost of obtaining a new driver's license, contacting a bank or credit card company, and retrieving a credit history are simply different from lost interest from a savings account or late fees on a credit card bill. The language in the commentary excludes just the latter, not the former.

Had the Commission wanted to exclude the value of lost time from the calculation, it could have explicitly done so. By failing to do so, and by expressly creating several exceptions, the canon of construction *expressio unius est exclusio alterius*[178] should prevent courts from reading additional exceptions into the text. This canon of construction frowns upon judicial expansion of lists created by legislatures (or, in this case, quasi-legislative bodies), especially in situations where courts examine exceptions to a general rule: "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[179] Courts should not read additional exclusions into the loss provision without an indication that the Commission intended such exclusions.[180] Because no such intent is present, courts should not exclude the value of lost time from their loss calculations.

Because the value of lost time is readily measurable in money, and because the Commission provides no reason to exclude it from the loss calculation, courts should include such losses in their determination. As such, they should also include the victims whose lost time accounts for these losses when tallying the number of victims of the fraud.

B. The Abiodun *Approach Is Most Consistent with the Purposes of the Guidelines*

Just as the pre-amendment plain text of the fraud and theft guideline made clear that courts should include the value of lost time when determining whether reimbursed individuals are victims, congressional intent further

177. Appellant's Opening Brief at 46, *Armstead*, 552 F.3d 769 (No. 06-30550).

178. The expression of one is the exclusion of others. *See* BLACK'S LAW DICTIONARY 661 (9th ed. 2009). This canon has been criticized as illogical. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983). Yet, it retains its most persuasive force when dealing with exceptions to a general rule. *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 677–78 (2007) (citing TVA v. Hill, 437 U.S. 153, 188 (1978)).

179. Andrus v. Glover Const. Co., 446 U.S. 608, 616–17 (1980).

180. *See id.* at 616–19.

supports this interpretation. Uniform sentencing requires courts across the nation to consistently apply the Guidelines; thus, circuit splits should be avoided where possible. Further, proportionate sentencing dictates that defendants who cause more harm should be punished more severely than those who cause less harm.[181] All other things being equal, defendants whose crimes require many individuals to spend time seeking reimbursement cause more harm than others; therefore, these defendants should receive longer sentences. Thus, including reimbursed individuals as victims when they spend time securing reimbursement is faithful to congressional intent, as well as to the text of the Guidelines.

Uniform sentencing requires that similar defendants who commit similar crimes receive similar sentences. Congress saw uniform sentencing as a key element in its plan to "enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[182] Prior to the use of the Guidelines, wide disparities in sentencing and time served existed for "similar criminal offenses committed by similar offenders."[183] The Guidelines combat these disparities by creating objective standards and categories that judges use to determine a recommended sentencing range.[184] Though courts may deviate from this range, the range provides a consistent starting point from which courts must work. While this system does not guarantee perfect uniformity, it is significantly more uniform than the pre-Guidelines system where a court chose a sentence from a large statutory window and parole boards determined how much of the sentence was served.

Courts jeopardize even the pretense of uniformity, however, when they apply the Guidelines in varying fashions. When courts fail to apply rules consistently, the recommended sentencing range for similar criminal conduct committed by similarly situated defendants may differ significantly. If recommended sentencing ranges for similar defendants committing similar crimes vary significantly, there is little reason for courts to go through the elaborate process required in applying the Guidelines. Thus, regardless of the outcome, it is important that courts apply the number-of-victims enhancement in a consistent fashion.

To ensure uniform sentencing, consistency is imperative. By including as a victim anyone whose means of identification was used, the recent amendment ensures uniformity. To ensure uniform *and proportionate*

---

181. *See* Payne v. Tennessee, 501 U.S. 808, 819 (1991) ("[T]he assessment of harm caused by the defendant . . . has understandably been an important concern of the criminal law . . . in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.").

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

183. *Id.*

184. *See supra* Part II.B.

sentencing, however, the better approach would have been for courts to consistently apply the *Abiodun* definition of "victim." In a sense, proportionality is a corollary of uniformity: If the same criminals committing the same crimes receive the same sentences, the same criminals committing more serious crimes should receive longer sentences. The specificity of the Guidelines attempts to measure incremental differences in the seriousness of crimes in order to "impose[] appropriately different sentences for criminal conduct of differing severity."[185]

The most significant way that courts stratify sentence length under the fraud and theft guideline is via the enhancement based on amount of loss.[186] A loss of $400 million or more will raise the offense level by thirty levels.[187] As noted above, this makes sense: the most important factor in determining the severity of a fraud or theft crime is the amount of money stolen.[188]

The monetary loss alone, however, may be insufficient to measure the total gravity of an offense. The following cases are three hypothetical examples where the monetary loss is the same but the harm inflicted differs. In Case 1, a defendant secures a $1,000,000 loan from a bank and absconds with the money. In Case 2, the defendant uses a bank fraud scheme to steal $10,000 out of 100 different individual accounts at the same bank. Though the individual account holders are aware of the loss and take steps to secure reimbursement and protect their credit ratings, the $1,000,000 loss is borne by the bank. In Case 3, the defendant does the same as the defendant in Case 2, but the individuals are reimbursed immediately and remain unaware of the temporary loss.

In terms of monetary loss, the outcomes are the same: In each case, the bank has lost $1,000,000. Yet, the amount of harm inflicted differs. In the first and third cases, the harm inflicted seems to end with the $1,000,000 loss. In the second case, the bank suffers the same loss, but 100 additional individuals suffer harm as well. Using a highly conservative estimate, assume the individuals spent an average of one hour each contacting their bank, repeatedly checking their credit histories and ratings, and requesting new debit cards or changing passwords. The second fraud thus costs individuals a

185. USSG § 1A1.3.

186. *Id.* § 2B1.1(b)(1).

187. *Id.* The recommended sentence for a first-time offender at level 6 is 0–6 months, and the court has the authority to impose probation in lieu of jail time. *Id.* § 5A. At level 36, the recommended sentence is 188–235 months. *Id.*

188. For an example of the importance of the loss total to the severity of the crime, see the fraud of Bernard Madoff, the New York financier whose Ponzi scheme may have cost investors $50 billion. Mr. Madoff received a 150-year sentence for his crimes. *See* Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1.

total of 100 productive hours from their lives.[189]

Under a narrow definition of "pecuniary loss" and "victim," the crimes in the first two scenarios would receive the same treatment.[190] Under the broad definition, adopted by the Commission with the recent amendment, the second and third cases are treated the same. The *Abiodun* definition, however, best differentiates between the different amounts of harm caused in each scenario. This result accords with the Guidelines' goal of proportionate sentencing: Because the second crime inflicted more harm than the first or the third, the sentence for the second crime should be longer than the sentence for the others.[191]

Thus, in addition to complying with the text of the Guidelines, a broad interpretation of "victims" serves the goals of uniform and proportionate sentencing.

C. Applying the Abiodun *Interpretation*

Again, a hypothetical might best illustrate how a court would apply the broad interpretation of "victim" expounded above. To continue with the facts of Case 2, assume the defendant went to trial and was convicted of bank fraud based on the $1,000,000 he stole from the 100 bank accounts.

Under the *Abiodun* test, the court could not "double count" losses as belonging to both individuals and corporate lenders.[192] Unlike the broad line of cases, the monetary loss will apply only to the bank, as the ultimate bearer of that loss.[193] Unlike the narrow line, however, courts would be able to include a reimbursed individual any time the government proved that the individual spent time dealing with the issues arising from the defendant's criminal conduct. Thus, an individual who spends even fifteen minutes on the phone with her credit card company to alert the company of a fraudulent charge is a victim.[194]

189. In reality, victims of identity theft typically spend much more than one hour trying to restore their credit and ensure reimbursement. A 2003 federal study estimated that victims spent an average of two to nine hours resulting from the crime, with 6% of individuals spending more than 240 hours. FED. TRADE COMM'N, IDENTITY THEFT SURVEY REPORT 45 (2003), http://www.ftc.gov/os/2003/09/synovatereport.pdf. In addition, 37% of individuals paid money out of pocket due to the crime. *Id.* at 43.

190. Without any additional enhancements or mitigating factors, the offense level for both crimes would be twenty (6—the base offense level—plus 14—a loss of more than $400,000). USSG § 2B1.1.

191. *See id.* § 1A1.3 for a discussion of proportionality in sentencing.

192. *See* United States v. Conner, 537 F.3d 480, 491 (5th Cir. 2008); United States v. Yagar, 404 F.3d 967, 971 (6th Cir. 2005).

193. Further, individuals could not be added on the basis of lost interest, which is excluded from the loss calculation in USSG § 2B1.1 cmt. n.3(D)(i).

194. Again, note that under this interpretation there will be circumstances where reimbursed individuals do not qualify as victims. In cases where reimbursement truly is instantaneous, as the

When making a loss determination[195] for the defendant in Case 2, the trial court would add the value of the lost time to the value of the money stolen. Assume that the court concluded that $25 per hour is a reasonable value of the average individual's time lost in the fraud.[196] The value of 100 hours lost then would be $2,500.[197] Thus, the total loss resulting from the crime would be $1,002,500.[198] By including this extra $2,500 in the loss calculation, the court then would be free to include the individual victims when determining whether a number-of-victims enhancement applies. Because the court concluded that roughly 100 individuals suffered losses in addition to the bank, the court should apply a four-level increase based on a finding of more than fifty victims.[199]

To include the individuals in the sentencing determination, the government would need to prove that the individuals spent time responding to and mitigating the fraud. Courts would not be able to rely on "'garden-variety logic'"[200] in order to apply the enhancement; prosecutors or presentence investigation reports would need to present evidence of such losses. Despite its ultimate adoption of the broad interpretation of "victim," the *Stepanian* court provides a good example of how this could be done. Before applying the broad interpretation, the court noted the stories of victims who suffered real financial burdens as a result of the crime charged.[201] Instead of simply listing these individuals as victims, the court should have made an attempt to quantify their loss based on these stories and then add it to the financial loss eventually borne by the reimbursing banks. While the *Abiodun* approach takes longer and is less efficient than the automatic inclusion provision adopted in the most recent edition of the Guidelines, it more accurately reflects the severity of a fraud crime.

V. CONCLUSION

The circuit split discussed above made a mockery of the sentencing

---

courts in *Yagar* and *Conner* discussed, many individuals will lose no time as a result of the fraud. *See Conner*, 537 F.3d at 491; *Yagar*, 404 F.3d at 971. Thus, they would not be victims.

195. USSG § 2B1.1(b)(1).

196. The final value placed on the lost time is, of course, less important than the fact that the court is valuing the time because the purpose of valuing the time is to include the victims in the victim calculation. It is unlikely that the additional loss resulting from the value of the lost time will change the sentencing recommendation. *See supra* note 167.

197. Twenty-five dollars per hour multiplied by 100 hours is $2,500.

198. If the court so desired, it could also calculate the value of the lost time suffered by the bank as a result of the fraud, although it is unlikely that doing so would make any difference to the defendant's ultimate sentence.

199. USSG § 2B1.1(b)(2)(B).

200. United States v. Conner, 537 F.3d 480, 491 (5th Cir. 2008).

201. United States v. Stepanian, 570 F.3d 51, 56 (1st Cir. 2009).

principles of uniformity and proportionality. Defendants in some cases had enhancements applied to them that may not have been applied in other circuits. In the *Yagar* line of cases, individuals who may have rationally viewed themselves as victims were not considered as such. In the *Stepanian* line, individuals who may have had no knowledge of the crime were considered victims. In such a chaotic environment, the Guidelines amendment holds considerable appeal.

Nevertheless, the amendment represents the triumph of efficiency over accuracy in sentencing. The Sentencing Commission's solution is overbroad and does not accurately reflect the harm inflicted during the crime. By simply including every single person whose means were used, the Commission equates the harm caused to a "victim" who was unaware of the theft with that of a "victim" who spent months trying to clear his name with a credit agency. While the new definition has the advantage of being easy to calculate, it is far too blunt an instrument for a procedure as important as sentencing.

RYAN N. PARSONS*

* J.D. 2010, Marquette University Law School. The author wishes to thank his wonderful wife for her support and inspiration, and Professor Lisa Mazzie for her insightful comments on an earlier draft.