

Abandoning the Victim Requirement: Clarifying the Position of Trust Enhancement in Federal Sentencing

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INTRODUCTION

Under § 3B1.3 of the United States Sentencing Guidelines, a court may increase a defendant's sentence by two offense levels "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense."¹ This section of the Guidelines, known as the "position of trust enhancement," provides an additional penalty for a defendant who exploits a position of trust with an employer, client, or any other party in order to commit a crime. For example, in *United States v Bhagavan*,² the defendant pleaded guilty to income tax evasion.³ As president of a small engineering firm, Grama Bhagavan diverted checks from clients into his personal bank account without reporting them as income.⁴ Although Bhagavan had deceived minority shareholders to whom he owed a fiduciary duty, he was not charged with an offense against the corporation.⁵ Nonetheless, the Seventh Circuit considered Bhagavan's abuse of his position of trust within the firm when calculating his sentence for tax evasion.⁶

Under the Guidelines, Bhagavan's offense carried a base offense level of eleven.⁷ The court enhanced his sentence by two levels pursuant to the position of trust enhancement but reduced it by two levels pursuant to USSG § 3E1.1 (entitled "Acceptance of Responsibility"), for a final level of eleven.⁸ Without the position of trust enhancement, Bhagavan's offense level of nine would have dictated a sentencing range of four to ten months.⁹ The position of

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¹ USSG § 3B1.3.

² 116 F3d 189 (7th Cir 1997).

³ *Id.* at 191.

⁴ *Id.* at 190–91.

⁵ *See id.* at 191, 193.

⁶ *See Bhagavan*, 116 F3d at 192–93.

⁷ *Id.* at 191.

⁸ *Id.*

⁹ *See* USSG § 5A.

trust enhancement increased that range to eight to fourteen months.¹⁰ Accordingly, the court sentenced Bhagavan to four months imprisonment, four months of community confinement, three years of supervised release, and a \$3,000 fine.¹¹

The Seventh Circuit's approach to the position of trust enhancement in *Bhagavan* stands in contrast to the Tenth Circuit's approach in *United States v Guidry*.¹² Anita Guidry used her position as assistant to the controller of a sheet metal company to embezzle money that she failed to report as taxable income.¹³ Like Bhagavan, Guidry was convicted of a tax offense against the government but was not convicted of an offense against her employer.¹⁴ As in *Bhagavan*, the Tenth Circuit acknowledged that Guidry abused a position of trust with her employer. However, the court declined to apply the position of trust enhancement because Guidry "did not occupy a position of trust vis-à-vis the government, the victim in this case."¹⁵

Courts and legal scholars have attributed the divergent outcomes in cases like *Bhagavan* and *Guidry* to a circuit split over "the relationship a position of trust must have to the victim of the offense for the purpose of enhancement."¹⁶ The *Guidry* court held that the position of trust enhancement applied only to a defendant who held a position of trust with the victim of her offense.¹⁷ By contrast, the *Bhagavan* court found this "victim requirement" inapplicable and applied the enhancement even though the defendant held no position of trust with the government.¹⁸ Such inconsistency runs counter to one of the principal purposes of the Guidelines: to achieve "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."¹⁹ Indeed, in the tax offense context, the varying approaches to the victim requirement "present[] a potentially significant source of white-collar sentencing disparity."²⁰

These commentators are correct about the disparity in applying § 3B1.3 to cases like *Bhagavan* and *Guidry*. However, they have

¹⁰ See *Bhagavan*, 116 F3d at 191.

¹¹ *Id.*

¹² 199 F3d 1150 (10th Cir 1999).

¹³ *Id.* at 1153–54.

¹⁴ *Id.* at 1153.

¹⁵ *Id.* at 1160.

¹⁶ *Guidry*, 199 F3d at 1160 n 6. See also Jon J. Lambiras, Comment, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 *Pepperdine L Rev* 459, 478–80 (2003); Part II.

¹⁷ 199 F3d at 1160.

¹⁸ See 116 F3d at 192–93.

¹⁹ USSG § 1A.1(3).

²⁰ See Lambiras, Comment, 30 *Pepperdine L Rev* at 479–80 (cited in note 16).

consistently overstated the scope of the circuit split over the victim requirement. In fact, this Comment shows that, outside a small category of cases resembling *Bhagavan* and *Guidry*, there is substantial uniformity in judicial outcomes, regardless of the victim requirement. Many of the cases in which courts have relied on the victim requirement to overturn or reject position of trust enhancements could have been decided the same way on other grounds by circuits with no victim requirement. Likewise, in many of the categories of cases where circuits have rejected the victim requirement and upheld position of trust enhancements, circuits with the victim requirement have achieved identical outcomes by expanding the definition of victim. Because courts have never explicitly outlined the categories of cases in which the victim requirement is typically applied or rejected, they have not recognized this substantial uniformity. Accordingly, they have failed to acknowledge that the circuit split is much narrower than it appears.

This Comment addresses the conflict among the circuits in two ways. First, it sorts the fact patterns of victim-requirement cases into coherent categories to demonstrate that the disagreement between circuits is much narrower than courts and legal scholars have previously suggested. Second, it advocates refocusing the inquiry on the requirement that the defendant “abuse” a position of trust. Focusing the inquiry in this way would allow courts to reconcile the positions of circuits both with and without the victim requirement, without disturbing the outcomes in any circuit in most categories of cases. Part I introduces the position of trust enhancement and its origins in the Guidelines “relevant conduct sentencing” scheme. Part II outlines the apparent circuit split over the victim requirement and the reasons courts give for adopting or rejecting the requirement. Part III argues that despite this apparent split, there is substantial uniformity in judicial outcomes. Accordingly, Part IV proposes a unifying principle to harmonize the circuits: courts should abandon the victim requirement and instead focus on the requirement that the defendant abuse a position of trust.

I. THE POSITION OF TRUST ENHANCEMENT AND THE UNITED STATES SENTENCING GUIDELINES

This Part describes the position of trust enhancement and its origins in the relevant-conduct sentencing scheme. Part I.A describes the process of sentencing under the Guidelines and the role of relevant conduct. Part I.B outlines the elements of the position of trust enhancement.

A. Relevant-Conduct Sentencing under the Guidelines

When sentencing a defendant pursuant to the Guidelines, a federal court must calculate the appropriate sentencing range based on the defendant's criminal history and relevant conduct with respect to the offense of conviction.²¹ The court first identifies the applicable offense guideline and determines the base offense level for the offense of conviction.²² The court may then apply various upward or downward adjustments to the base offense level.²³ Using the final offense level and the defendant's criminal history, the court looks up the appropriate sentencing range in the Sentencing Table.²⁴ The court may then adopt a sentence within the sentencing range.²⁵

Since *United States v Booker*,²⁶ it is no longer mandatory for judges to impose a sentence within the Guidelines sentencing range.²⁷ Although the Guidelines are "merely advisory,"²⁸ district courts must still begin by correctly calculating the Guidelines sentencing range.²⁹ Courts may deviate from the Guidelines after calculating the sentencing range, but correctly calculating the appropriate offense level and sentencing range remains important for several reasons. First, miscalculating the sentencing range still compels reversal.³⁰ Second, for the purposes of appellate review, a majority of circuits treat a sentence within the Guidelines sentencing range as "presumptively reasonable" if the range is correctly calculated.³¹ Even "[c]ircuits that have declined to adopt a formal presumption also recognize that a Guidelines sentence will usually be reasonable."³² Lastly, even though *Booker* allows judges to depart from the

²¹ USSG § 1B1.1(a).

²² USSG § 1B1.1(a)(1)–(2).

²³ USSG § 1B1.1(a)(2)–(5).

²⁴ USSG § 1B1.1(a)(6)–(7).

²⁵ USSG § 1B1.1(a)(8).

²⁶ 543 US 220 (2005).

²⁷ See *id.* at 245 (excising the provisions that made the Guidelines mandatory on the grounds that mandatory Guidelines sentences were incompatible with the Sixth Amendment).

²⁸ *Id.* at 233. See also United States Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* iv (Mar 2006).

²⁹ *Booker*, 543 US at 264.

³⁰ See *Gall v United States*, 552 US 38, 51 (2007).

³¹ See *United States v Carty*, 520 F3d 984, 993 nn 9–10 (9th Cir 2008) (noting that seven circuits have adopted a presumption of reasonableness for in-range sentences, while other circuits have declined to do so). See also *Rita v United States*, 551 US 338, 347 (2007) (upholding the constitutionality of treating sentences within the Guideline range as presumptively reasonable); *Gall*, 552 US at 51 ("If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness.") (citation omitted).

³² *Rita*, 551 US at 351.

calculated range, “the fact-driven Guidelines rules continue to determine the sentence for six out of ten federal defendants,” a difference of less than 15 percent from pre-*Booker* levels.³³

Sentences under the Guidelines are based not only on the elements of the offense of conviction but also on the defendant’s other relevant conduct. Under USSG § 1B1.3, relevant conduct includes “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.”³⁴ For example, restraint of a victim,³⁵ possession of a dangerous weapon in connection with a drug offense,³⁶ or reckless endangerment while evading capture³⁷ may all be considered relevant conduct and grounds for an enhanced sentence even when they are not elements of the offense of conviction.

Relevant-conduct sentencing represents a compromise between “real offense sentencing” and “charge offense sentencing.”³⁸ Under real-offense sentencing, a court may consider any “actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted.”³⁹ Under charge-offense sentencing, a court may consider only “the elements of the offense with which the defendant was charged and of which he was convicted.”⁴⁰ Relevant-conduct sentencing allows courts to “take account of a number of important, commonly occurring real offense elements” but otherwise forbids the consideration of conduct outside the offense of conviction.⁴¹ The Guidelines adopted relevant-conduct sentencing to “balance concerns of uniformity (i.e., treating defendants with similar criminal histories who engage in similar offense conduct in a similar

³³ Frank O. Bowman III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U Chi L Rev 367, 467 (2010) (“[T]he percentage of federal cases sentenced within the applicable Guidelines range dropped by 10 percent in the quarter following the January 2005 *Booker* decision, from 72 percent to 62 percent, and drifted slightly further down over the next three years to 58 percent.”).

³⁴ USSG § 1B1.3(a)(1).

³⁵ USSG § 3A1.3.

³⁶ USSG § 2D1.1(b)(1).

³⁷ USSG § 3C1.2.

³⁸ See USSG § 1A1.1(4)(a); William W. Wilkins Jr and John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 SC L Rev 495, 502 (1990).

³⁹ USSG § 1A1.1(4)(a).

⁴⁰ USSG § 1A1.1(4)(a).

⁴¹ USSG § 1A1.1(4)(a).

manner) with concerns of individual fairness, so that the sentences imposed by federal courts are just and effective.”⁴²

Relevant-conduct sentencing means that a defendant may be sentenced based on conduct that formed part of an uncharged—indeed, even acquitted—offense, subject to a preponderance of evidence standard.⁴³ The consideration of such conduct has been upheld against challenges based on due process,⁴⁴ double jeopardy,⁴⁵ and the right to a jury trial.⁴⁶

Accordingly, even where a defendant’s abuse of a position of trust fails to support a conviction for fraud, embezzlement, or another similar offense, a court may often consider that conduct in deciding whether to apply a position of trust enhancement. If the abuse constitutes relevant conduct under USSG § 1B1.3, the court must then determine whether the conduct satisfies the requirements of the position of trust enhancement.

B. The Position of Trust Enhancement

The position of trust enhancement is one of the upward adjustments that courts must consider when calculating a defendant’s offense level. USSG § 3B1.3 provides, in relevant part:

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.⁴⁷

⁴² Wilkins and Steer, 41 SC L Rev at 521 (cited in note 38).

⁴³ See USSG § 1B1.3, background (“Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.”); *United States v Watts*, 519 US 148, 157 (1997) (per curiam) (“[A] jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.”).

⁴⁴ See *Watts*, 519 US at 156 (“[A]pplication of the preponderance standard at sentencing generally satisfies due process.”), citing *McMillan v Pennsylvania*, 477 US 79, 91–92 (1986).

⁴⁵ See *Watts*, 519 US at 154–55.

⁴⁶ See *Booker*, 543 US at 233 (“If the Guidelines...could be read as merely advisory...their use would not implicate the Sixth Amendment.”); Eric P. Johnson, *Advisory Guidelines and Lengthier Sentences: Relevant Conduct Sentencing as an Increasingly Harmful Sentencing Practice Post-Booker*, 1 Hum Rts & Globalization L Rev 147, 166 (2008) (“[T]he Supreme Court...did not invalidate the practice of relevant conduct sentencing [in *Booker*]...[S]entences can be lengthened based on facts not found by a jury beyond a reasonable doubt, but just not lengthened beyond the statutory maximum for the offense.”).

⁴⁷ USSG § 3B1.3.

The enhancement protects the societal value of trust by imposing a greater sentence on defendants who violate a position of trust.⁴⁸ Generally, courts divide the application of this guideline into two requirements: “(1) [T]he defendant possessed a position of trust; and (2) the defendant abused the position to significantly facilitate the commission or concealment of the offense.”⁴⁹

The definition of a “position of trust” was unsettled until a 1993 amendment to the Guidelines.⁵⁰ Initially, some courts looked to “the extent to which the position provides the freedom to commit a difficult-to-detect wrong.”⁵¹ Others focused on whether the position provided the defendant with “access or authority over valuable things.”⁵² However, beginning in 1993, the United States Sentencing Commission (USSC) added an Application Note clarifying that “[p]ublic or private trust” refers to a position . . . characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference).⁵³ The guideline originally included a small per se rule for postal workers that applied “notwithstanding” the aforementioned definition of position of trust,⁵⁴ which has since been supplemented by a second per se rule regarding misappropriation of any means of identification.⁵⁵ The “notwithstanding” language makes it clear that these rules were intended not to modify the definition of position of trust in

⁴⁸ See Joshua A. Kobrin, *Placing Trust in the Guidelines: Methods and Meanings in the Application of Section 3B1.3, the Sentence Enhancement for Abusing a Position of Trust*, 12 Roger Williams U L Rev 121, 129–31 (2006).

⁴⁹ *Guidry*, 199 F3d at 1159. See also Jondavid S. DeLong, *Increase in Base Offense Level under Sentencing Guidelines § 3B1.3 (U.S.S.G. § 3B1.3) for Abuse of Position of Public or Private Trust Significantly Facilitating Commission or Concealment of Offense*, 121 ALR Fed 323, § 2[a] (1994).

⁵⁰ See USSG Appendix C, Amend 492; Kobrin, 12 Roger Williams U L Rev at 140–43 (cited in note 48). For a more comprehensive discussion of the definition of “position of trust,” see generally Lisa M. Fairfax, *Trust, the Federal Sentencing Guidelines, and Lessons from Fiduciary Law*, 51 Cath U L Rev 1025 (2002).

⁵¹ See, for example, *United States v Hill*, 915 F2d 502, 506 (9th Cir 1990). For a general discussion, see Kobrin, 12 Roger Williams U L Rev at 132–33 (cited in note 48); Fairfax, 51 Cath U L Rev at 1048–51 (cited in note 50).

⁵² See, for example, *United States v Lilly*, 37 F3d 1222, 1227 (7th Cir 1994). For a general discussion, see Kobrin, 12 Roger Williams U L Rev at 137–39 (cited in note 48); Fairfax, 51 Cath U L Rev at 1046–48 (cited in note 50).

⁵³ USSG Appendix C, Amend 492; USSG § 3B1.3, Application Note 1.

⁵⁴ USSG § 3B1.3, Application Note 1.

⁵⁵ USSG § 3B1.3, Application Note 2. See also *United States v Ikechuwu*, 492 F3d 331, 334 (5th Cir 2007) (“[T]he purpose of Application Note 2(A) is to clarify that all employees of the United States Postal Service are, by the nature of their employment status, in a per se position of trust as related to the theft or destruction of undelivered United States mail.”); *United States v Abdelshafi*, 592 F3d 602, 611 (4th Cir 2010) (declining to apply the usual test for position of trust because the defendant had satisfied the requirements for Application Note 2(B)).

Application Note 1 but rather to carve out a small exception.⁵⁶ Accordingly, since 1993, each circuit has adopted the new “professional or managerial discretion” standard, although disputes still remain over the degree of discretion required.⁵⁷

Once courts have decided that the defendant held a position of trust, the second requirement—that the defendant abused this position in a manner that significantly facilitated the commission or concealment of the offense—“has proven to be rather easily met.”⁵⁸ USSG § 1B1.1 clarifies that the word “offense” means “the offense of conviction and all relevant conduct,” consistent with the notion of relevant-conduct sentencing.⁵⁹ However, the Guidelines do not define “abuse” or “significantly facilitated.”⁶⁰ The Third Circuit has suggested that “[t]o abuse a position of trust, a defendant must, by definition, have taken criminal advantage of a trust relationship between himself and his victim.”⁶¹ Part IV.A examines the Third Circuit’s definition in more depth. However, most courts assume that this “abuse requirement” is satisfied as a matter of course where the defendant

⁵⁶ See *United States v Spear*, 491 F3d 1150, 1159 (10th Cir 2007) (“[P]ostal employees are subject to the enhancement for different reasons than defendants who meet the requisites of Application Note 1.”); *United States v West*, 56 F3d 216, 220 (DC Cir 1995) (“[T]he inclusion of Postal Service employees under section 3B1.3 in no way mitigates, but rather reinforces, the commentary’s clear focus on positions characterized by professional or managerial discretion.”) (internal quotation marks omitted).

⁵⁷ In particular, circuits remain split over whether a defendant’s exercise of professional or managerial discretion must be governed by a fiduciary duty. Compare *United States v Ragland*, 72 F3d 500, 502–03 (6th Cir 1996); *United States v Brunson*, 54 F3d 673, 677–78 (10th Cir 1995), with *United States v Davuluri*, 239 F3d 902, 908 (7th Cir 2001). Moreover, some circuits have not entirely abandoned standards like “freedom to commit a difficult-to-detect wrong” but have instead incorporated them into their tests for professional or managerial discretion. See *United States v Hussey*, 254 F3d 428, 432 (2d Cir 2001); *United States v Akinkoye*, 185 F3d 192, 203–04 (4th Cir 1999). Unlike the prerevision standards, however, the fiduciary duty and difficult-to-detect wrong standards today are used primarily to determine whether a position is characterized by sufficient professional or managerial discretion to qualify as a position of trust. See Kobrin, 12 Roger Williams U L Rev at 143–50 (cited in note 48); Fairfax, 51 Cath U L Rev at 1051–53 (cited in note 50). This Comment does not take a position on the interpretation of professional or managerial discretion. Although the definition of “abuse” proposed in Part IV employs the phrase, the definition is designed to be flexible enough to accommodate the variety of existing interpretations. Maintaining neutrality on this question should help facilitate a convergence of the circuits in their treatment of the victim requirement despite different definitions of “discretion.”

⁵⁸ Erich D. Andersen, *Enhancement for “Abuse of a Position of Trust” under the Federal Sentencing Guidelines*, 70 Or L Rev 181, 194 (1991).

⁵⁹ USSG § 1B1.1, Application Note 1(H). See also *United States v Young*, 266 F3d 468, 477 (6th Cir 2001).

⁶⁰ See USSG § 3B1.3, Application Notes 1, 4.

⁶¹ *United States v Hickman*, 991 F2d 1110, 1112 (3d Cir 1993).

held a position of trust and that position significantly facilitated commission of the offense of conviction.⁶²

Some courts have suggested that § 3B1.3 also requires that the defendant's position of trust be entrusted to him by the victim of the offense of conviction. The following Part discusses the apparent circuit split over the existence and scope of this requirement.

II. THE VICTIM REQUIREMENT

The previous Part described the elements of the position of trust enhancement and contextualized the enhancement within the overall scheme of the Guidelines. This Part describes an apparent circuit split over an additional, unstated element of the position of trust enhancement, the "victim requirement." Part II.A describes the requirement and the circuits in which it has been adopted. Part II.B describes the alternative approach to the position of trust enhancement in circuits that reject the victim requirement.

A. Victim-Requirement Circuits

Although the text of § 3B1.3 says nothing about the victim requirement, some courts have suggested that the position of trust enhancement applies only to a defendant who occupies a position of trust with the victim of the offense of conviction.⁶³ This Section defines that requirement, gives two examples of its application, and explains the purported legal basis for the requirement.

When courts assess whether to apply a position of trust enhancement to a particular defendant, they begin by identifying any trust relationship that significantly facilitated the offense. The inquiry at this stage focuses on the nature of the relationship, not the identity of the party. The courts examine whether the defendant's relationship with any party fits within the definition of "position of trust," which is to say, whether it is characterized by professional or managerial discretion. As noted above, courts vary in their application of the professional or managerial discretion standard at this stage.⁶⁴ Once the

⁶² See, for example, *Guidry*, 199 F3d at 1159–60 (noting the district court's observation that the defendant used her position to conceal her offense, potentially satisfying the abuse requirement if she had been in a position of trust).

⁶³ See, for example, *United States v Broderson*, 67 F3d 452, 456 (2d Cir 1995) ("However, the cases relied upon by the government indicate that the discretion must be entrusted to the defendant by the victim."); *United States v Moored*, 997 F2d 139, 145 (6th Cir 1993) ("In order for the abuse of a position of trust enhancement to be applied to a defendant, the evidence must show that the defendant's position *with the victim* of the offense significantly facilitated the commission of the offense.") (emphasis added).

⁶⁴ See note 57 and accompanying text.

court has identified a party with whom the defendant holds a position of trust (an “entrusting party”), the court determines whether this position significantly facilitated the offense. In circuits that have no victim requirement, this is the end of the inquiry. Courts in circuits that have a victim requirement next determine whether the entrusting party is a victim of the offense. If the defendant holds multiple positions of trust with multiple entrusting parties, then the position of trust enhancement applies as long as one such position satisfies these requirements.⁶⁵

The Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have each relied on this victim requirement as a reason for finding the position of trust enhancement inapplicable to a particular defendant.⁶⁶ For example, in *United States v Broderon*,⁶⁷ the defendant, Howard Broderon, was vice president of business operations at Grumman Data Systems Corporation, a government contractor. He offered to negotiate financing for the leasing of equipment as part of a contract between Grumman and NASA. However, he misrepresented the interest rate on the lease to NASA.⁶⁸ Grumman then took out a lease at a lower interest rate. When NASA compensated Grumman for the lease at the higher interest rate, Grumman pocketed the difference.⁶⁹ A jury eventually convicted Broderon of fraud, and the district court applied a position of trust enhancement based on Broderon’s position with his employer.⁷⁰ But the Second Circuit reversed the enhancement because Broderon’s position of trust was not “entrusted to [him] by the victim,” namely NASA.⁷¹

Similarly, in *United States v Moored*,⁷² the defendant, a former college trustee, applied for various loans, claiming that he planned to

⁶⁵ See, for example, *United States v Adam*, 70 F3d 776, 782 (4th Cir 1995) (applying a position of trust enhancement based on a physician’s position of trust with the American taxpayers, who were victims of his welfare-kickback scheme, rather than based on his position of trust with his patients).

⁶⁶ See, for example, *Broderon*, 67 F3d at 456 (explaining that examples of abuse of trust in the Sentencing Guidelines involve a victim entrusting an agent); *United States v Moore*, 29 F3d 175, 180 (4th Cir 1994) (internal quotation marks omitted); *Moored*, 997 F2d at 145; *United States v Trice*, 245 F3d 1041, 1042 (8th Cir 2001) (per curiam); *United States v Evans*, 370 Fed Appx 829, 832 (9th Cir 2010); *Guidry*, 199 F3d at 1160 (“[O]ur case law clearly states the position of trust must be found in relation to the victim of the offense.”); *United States v Garrison*, 133 F3d 831, 843 (11th Cir 1998).

⁶⁷ 67 F3d 452 (2d Cir 1995).

⁶⁸ *Id.* at 454–55.

⁶⁹ *Id.* at 455 (explaining that the contract between Grumman and NASA provided for a 13.77 percent interest rate but that the interest rate between Grumman and the leasing company was 10.5 percent).

⁷⁰ *Id.*

⁷¹ *Broderon*, 67 F3d at 456.

⁷² 997 F2d 139 (6th Cir 1993).

use the money to repay a debt to the college.⁷³ As security for the loan, James Moored relied on a falsified offer to purchase stock.⁷⁴ When the banks discovered the falsification, Moored pleaded guilty to wire fraud.⁷⁵ The district court enhanced Moored's offense level by two levels because Moored had used his position as a college trustee to add credibility to his loan application.⁷⁶ The Sixth Circuit reversed the enhancement, however, on the grounds that "the Defendant held no position of trust with the intended victims of his offense."⁷⁷

Courts imposing the victim requirement have provided three reasons for the requirement. First, in *Broderson* and *Moored*, the Second and Sixth Circuits expressed concern that, without the victim requirement, the position of trust enhancement might be overly broad. The *Broderson* court explained:

The government's theory seems so far reaching that it might cause virtually anyone who is commanded by statute to make an accurate report to the government to be subject to a Section 3B1.3 enhancement. All taxpayers who file false tax returns, for example, might be included. We believe that it is fairly obvious that the Sentencing Commission harbored no intent that the enhancement be so sweeping.⁷⁸

Similarly, the *Moored* court cautioned that, without a victim requirement, "a sentencing court would enhance the sentence of virtually every defendant who occupied any position of trust with anyone, victim or otherwise."⁷⁹ A principal virtue of the victim requirement is thus that it provides a limiting principle to the otherwise broad position of trust enhancement.

In addition to the concern about breadth, the Second Circuit has argued that the victim requirement is implied by the choice of examples in the Application Notes to USSG § 3B1.3, each of which "involve factual situations in which the defendant occupies a position vis-à-vis the victim that is in the nature of a fiduciary relationship."⁸⁰ These examples include "embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan

⁷³ *Id.* at 140.

⁷⁴ *Id.*

⁷⁵ *Id.* at 141.

⁷⁶ *Moored*, 997 F2d at 141.

⁷⁷ *Id.* at 145.

⁷⁸ *Broderson*, 67 F3d at 455–56.

⁷⁹ *Moored*, 997 F2d at 145.

⁸⁰ *United States v Jolly*, 102 F3d 46, 48 (2d Cir 1996). See also *Garrison*, 133 F3d at 840.

scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.”⁸¹

Finally, courts have relied indirectly on the subjective nature of the position of trust enhancement to support the victim requirement. In *United States v Castagnet*,⁸² the Second Circuit cited legislative history in support of the proposition that position of trust enhancement “involves some subjectivity.”⁸³ Accordingly, the court endorsed the Ninth Circuit’s suggestion in *United States v Hill*⁸⁴ that “whether the defendant was in a position of trust must be viewed from the perspective of the victim.”⁸⁵

The question in *Castagnet* was whether the position of trust enhancement applied to a defendant who falsely represented to his victim that he held a position of trust.⁸⁶ Because the Second Circuit analyzed the position of trust “from the perspective of the victim,” the defendant could not avoid the enhancement simply because he no longer held the position in question at the time of the offense. Although the victim requirement was not at issue in the case, every circuit to adopt the victim requirement, except for the Sixth Circuit, has relied on the “perspective of the victim” formulation in *Hill* or *Castagnet*, either directly or indirectly.⁸⁷

⁸¹ USSG § 3B1.3, Application Note 1.

⁸² 936 F2d 57 (2d Cir 1991).

⁸³ *Id.* at 62, quoting 134 Cong Rec H 11257 (daily ed Oct 21, 1988) (Rep Conyers).

⁸⁴ 915 F2d 502, 506 n 3 (9th Cir 1990), *revd* on other grounds *United States v Contreras*, 593 F3d 1135 (9th Cir 2010). *Contreras* overturned *Hill*’s “difficult-to-detect wrong” standard but did not address the “perspective of the victim” formulation cited by *Castagnet*. See *Contreras*, 593 F3d at 1136, citing *United States v Contreras*, 581 F3d 1163, 1168–69 (9th Cir 2009).

⁸⁵ *Castagnet*, 936 F2d at 62 (emphasis added), citing *Hill*, 915 F2d at 506 n 3. The *Hill* court offered no support for this assertion, which was not essential to the holding in that case. See 915 F2d at 506 n 3.

⁸⁶ *Castagnet*, 936 F2d at 60–62.

⁸⁷ For example, the Fourth Circuit first endorsed this formulation in *Moore*. See *Moore*, 29 F3d at 179–80. The court cited four cases in support of the requirement. The first is *Hill*. The second, *Hickman*, cites only *Hill*. See *Hickman*, 991 F2d at 1112. The third, *United States v Booth*, 996 F2d 1395 (2d Cir 1993), cites only *Castagnet*. See *id.* at 1396. Finally, the fourth, *United States v Queen*, 4 F3d 925 (10th Cir 1993) cites only *Booth*, *Castagnet*, and *Hill*. See *id.* at 929. In this entire sequence of cases, the only case that offers any justification for the victim requirement is *Castagnet*.

This pattern of derivation from the “perspective of the victim” formulation in *Castagnet* and *Hill* is typical of the circuits that have adopted the victim requirement. For the Second Circuit, see *Castagnet*, 936 F2d at 62, citing *Hill*, 915 F2d at 506 n 3. For the Ninth Circuit, see *Hill*, 915 F2d at 506 n 3. For the Tenth Circuit, see *United States v Trammell*, 133 F3d 1343, 1355 (10th Cir 1998), citing *Queen*, 4 F3d at 929. In the Eighth and Eleventh Circuits, the “perspective of the victim” requirement—first articulated in *Trice* and *Garrison* respectively—can be traced back to *Hill* through a series of citations to other circuits. See *Trice*, 245 F3d at 1042, citing *Garrison*, 133 F3d at 837, citing *Jolly*, 102 F3d at 48, citing *Broderson*, 67 F3d at 456, citing *Castagnet*, 936 F2d at 62, citing *Hill*, 915 F2d at 506 n 3.

B. Non-Victim-Requirement Circuits

Courts in circuits that have rejected the victim requirement begin their assessment of whether to apply a position of trust enhancement in much the same way as courts that have adopted the requirement. They first examine whether the defendant's relationship with any party fits within the definition of "position of trust"—that is, whether it is characterized by professional or managerial discretion. If the court finds a position of trust, it then determines whether the position significantly facilitated the offense.⁸⁸ The only difference is that, unlike in victim-requirement circuits, the inquiry ends here. The court does not consider whether the entrusting party is a victim of the offense.

The Third, Fifth, and Seventh Circuits have each explicitly held that the position of trust enhancement has no victim requirement.⁸⁹ For example, in *United States v Cianci*,⁹⁰ the Third Circuit upheld a position of trust enhancement in a conviction for tax evasion after the defendant failed to report funds embezzled from his employer.⁹¹ As the court noted, "Admittedly, the employer-victim [] was not the victim of the offense of conviction, but no language in the applicable sentencing guideline so circumscribes the enhancement."⁹² The Seventh Circuit initially upheld the victim requirement in *Bhagavan* while adopting a broad definition of "victim."⁹³ However, the Seventh Circuit expressly repudiated the requirement in *United States v Cruz*,⁹⁴ stating that "[c]ourts may apply the abuse of trust enhancement even if the defendant did not occupy a position of trust in relation to the victim of the offense of conviction; it is enough if the defendant also harmed the person whose trust she did abuse."⁹⁵ In *United States v Thomas*,⁹⁶ the circuit went one step further, eliminating the requirement of harm to the person whose trust was abused.⁹⁷ The Ninth Circuit also initially rejected the victim requirement,⁹⁸ though its

⁸⁸ See, for example, *United States v Iannone*, 184 F3d 214, 222 (3d Cir 1999).

⁸⁹ See *United States v Cianci*, 154 F3d 106, 112 (3d Cir 1998); *United States v Buck*, 324 F3d 786, 794–95 (5th Cir 2003); *United States v Cruz*, 317 F3d 763, 766 (7th Cir 2003).

⁹⁰ 154 F3d 106 (3d Cir 1998).

⁹¹ *Id.* at 113.

⁹² *Id.* at 112.

⁹³ 116 F3d at 193 ("It is enough that identifiable victims of Bhagavan's overall scheme to evade his taxes put him in a position of trust and that his position contributed in some significant way to facilitating the commission or concealment of the offense.") (internal quotation marks omitted).

⁹⁴ 317 F3d 763 (7th Cir 2003).

⁹⁵ *Id.* at 766.

⁹⁶ 510 F3d 714 (7th Cir 2007).

⁹⁷ *Id.* at 725–26.

⁹⁸ See *United States v Calozza*, 125 F3d 687, 691 (9th Cir 1997), citing *United States v Duran*, 15 F3d 131, 133 (9th Cir 1994) (per curiam).

recent holding in *United States v Evans*⁹⁹ suggests that it may have moved away from this stance.¹⁰⁰ *Evans* was an unreported case, however, so its precedential value is limited.

The most common justification for rejecting the victim requirement is that it has no basis in the text of USSG § 3B1.3. For example, in *Thomas*, the Seventh Circuit reasoned that “there is nothing in § 3B1.3 that requires the government to prove that the defendant’s conduct ‘victimized’ those whose trust he abused in the commission of the crime.”¹⁰¹

Other courts have emphasized that rejecting the victim requirement is consistent with the Guidelines relevant-conduct sentencing scheme. For example, in *Cruz*, the Seventh Circuit explained that applying the position of trust enhancement to a defendant who abuses a position of trust with a party other than the victim of her offense “serves the purpose of the relevant conduct guideline, which is ‘to free the [sentencing] court from the strict confines of the indictment so that it may hold the defendant accountable for the full range of harms that stemmed from [her] offense conduct.’”¹⁰² The *Cruz* court analogized the position of trust enhancement to the vulnerable-victim enhancement,¹⁰³ which “may apply where the vulnerable victim was not the victim of the offense of conviction, but was harmed by conduct involved in the commission of that offense.”¹⁰⁴ Thus, because the Guidelines allow a court to take into account conduct other than the offense of conviction in other circumstances, it can be inferred that the court may also enhance a defendant’s sentence for abusing a position of trust with a party other than the victim of the offense of conviction.

III. ACHIEVING SUBSTANTIAL UNIFORMITY DESPITE THE VICTIM REQUIREMENT

As Part II demonstrated, courts have offered a variety of arguments both in support of and in opposition to the victim requirement. Despite this apparent circuit split, however, the decisions in victim-requirement and non-victim-requirement circuits are actually relatively consistent. Many of the cases in which courts have

⁹⁹ 370 Fed Appx 829 (9th Cir 2010).

¹⁰⁰ *Id.* at 832.

¹⁰¹ 510 F3d at 725–26. See also *United States v Weiss*, 40 Fed Appx 274, 275 (7th Cir 2002); *Cianci*, 154 F3d at 112.

¹⁰² 317 F3d at 767, quoting *United States v Ritsema*, 31 F3d 559, 567 (7th Cir 1994). See also *Cianci*, 154 F3d at 112.

¹⁰³ *Cruz*, 317 F3d at 766, citing *United States v Stewart*, 33 F3d 764, 770 (7th Cir 1994).

¹⁰⁴ *Cruz*, 317 F3d at 766.

relied on the victim requirement to reject position of trust enhancements could be decided the same way on other grounds in non-victim-requirement circuits. Accordingly, Part III.A outlines the three categories of cases in which courts have relied on the victim requirement to reject position of trust enhancements. It demonstrates that the victim requirement has observably influenced outcomes in only one of these categories.

Just as non-victim-requirement circuits need not object to the decisions of victim-requirement circuits to deny the position of trust enhancement, victim-requirement circuits need not object to the decisions of non-victim-requirement circuits to apply the enhancement. Courts in victim-requirement circuits have generally adopted broad definitions of victim that allow them to join non-victim-requirement circuits in rejecting certain categories of victim-requirement challenges to the position of trust enhancement. Accordingly, Part III.B outlines the three principal categories of cases in which defendants have invoked the victim requirement unsuccessfully. Part III.C argues that victim-requirement circuits have achieved uniform outcomes with non-victim-requirement circuits primarily by expanding the definition of victim.

A. Where Victim-Requirement Circuits Deny the Position of Trust Enhancement: Rejecting the Victim Requirement Does Not Bar Consistent Outcomes

Courts adopting the victim requirement have invoked it as grounds for rejecting a position of trust enhancement in three principal categories of cases. This Section demonstrates that many of these cases could be decided the same way on other grounds in non-victim-requirement circuits. In particular, Parts III.A.1 and III.A.2 demonstrate that the outcomes in two of these categories, “complicit entruster” cases and “remote connection” cases, do not necessitate the victim requirement. Part III.A.3 outlines a third category of cases, “parallel offense” cases. Parallel-offense cases represent the sole category of cases in which the victim requirement has observably led to divergent outcomes. However, Part III.A.3 demonstrates that outcomes in these cases do not consistently break down along the lines defined by the victim-requirement circuit split.

1. The “complicit entruster” category of cases: rejecting the victim requirement does not bar consistent outcomes.

The first category of cases in which circuits have invoked the victim requirement as grounds for rejecting a position of trust enhancement is that in which a defendant uses his professional or

managerial discretion in a manner consistent with the interests of the party that entrusted him with that discretion. This Comment coins the term “complicit entruster” cases to refer to this category. This Section defines the complicit-entruster category of cases. It also argues that, in such cases, non-victim-requirement circuits can reach the same outcomes as victim-requirement circuits without relying on the victim requirement.

Complicit-entruster cases are best exemplified by *Broderson*. In *Broderson*, the defendant held a position of trust as a corporate officer of a government contractor.¹⁰⁵ When the defendant illegally misrepresented the interest rate on a government contract, his employer was able to overcharge the government.¹⁰⁶ While the Second Circuit acknowledged Broderson’s position of trust with his employer, it rejected a position of trust enhancement because the position of trust was not “entrusted to [him] by the victim,” the government.¹⁰⁷ Indeed, the party with whom Broderson held a position of trust was not a victim of his crime but rather a beneficiary.¹⁰⁸ This is the key feature of a complicit-entruster case.

Although *Broderson* relied on the victim requirement as the stated rationale for its decision, the Third Circuit, which has no victim requirement,¹⁰⁹ distinguished the case and spoke favorably of the result in *Cianci*:

There was no discussion by the *Broderson* court nor could there have been about the relevance of any abuse of trust vis-à-vis Broderson’s employer because there was no such abuse. Broderson did not profit personally nor did he victimize his employer. Quite the contrary, the opinion makes clear that Broderson acted so that Grumman, which was in financial difficulty, would have the benefit of the extra funds.¹¹⁰

The Third Circuit’s reading of *Broderson* suggests that an employee cannot be said to “abuse” a position of trust when he rewards that trust by acting in complicity with his employer. Put another way, the position of trust enhancement can be read to exclude a defendant who uses his professional or managerial discretion in a

¹⁰⁵ *Broderson*, 67 F3d at 454.

¹⁰⁶ *Id.* at 455.

¹⁰⁷ *Id.* at 456.

¹⁰⁸ See *id.* at 455.

¹⁰⁹ See text accompanying notes 90–92.

¹¹⁰ *Cianci*, 154 F3d at 112. Similarly, in *United States v Barakat*, 130 F3d 1448 (11th Cir 1987), the Eleventh Circuit questioned the victim requirement but “d[id] not quarrel with the result in *Broderson*.” *Id.* at 1454. Note that the Eleventh Circuit later endorsed the victim requirement in *United States v Garrison*, 133 F3d 831, 843 (11th Cir 1998).

manner consistent with the interests of the party that entrusted him with that discretion. In such cases, the victim requirement is never an essential reason for rejecting the position of trust enhancement because a narrower, less controversial reason exists for reaching the same outcome: the requirement that the defendant abuse his position of trust.

The same problem also arises more commonly when a defendant holds a position of trust with a closely held company but not with the victim of her crime.¹¹¹ In such cases, the party who entrusts the defendant with a position of trust is often a beneficiary of the crime rather than a victim. Thus, the victim requirement once again provides a simple, straightforward reason for declining to apply a position of trust enhancement. As with *Broderson*, however, the victim requirement is never essential to the holding of such cases. Where a defendant in effect entrusts professional or managerial discretion to herself, she cannot *abuse* that discretion by using it in a manner contrary to her own interests.

Accordingly, the outcomes of complicit-entruster cases in victim-requirement circuits, including cases in which a defendant uses the corporate form to entrust professional or managerial discretion to herself, are entirely consistent with the outcomes available in non-victim-requirement circuits. While there is no evidence that non-victim-requirement circuits have actually decided complicit-entruster cases, the Third Circuit's reasoning in *Cianci* suggests that these circuits would likely deny the position of trust enhancement in such cases.

2. The "remote connection" category of cases: rejecting the victim requirement does not bar consistent outcomes.

The second category of cases in which circuits have invoked the victim requirement as grounds for rejecting a position of trust enhancement is that in which a position of trust facilitates a crime, but

¹¹¹ See, for example, *United States v Pierce*, 2006 WL 1371660, *12 (D Minn), aff'd 479 F3d 546 (8th Cir 2007) (declining to apply the position of trust enhancement to the president and owner of a company who overbilled a charter school for services that the company provided); *Garrison*, 133 F3d at 843 (reversing a position of trust enhancement applied to the CEO and owner of a nursing home care provider after she committed Medicare fraud by submitting cost reports for nonallowable expenses to an intermediary insurance company); *United States v Jolly*, 102 F3d 46, 48 (2d Cir 1996) (reversing a position of trust enhancement applied to the president of a fake company who was convicted of mail fraud for scamming investors, because the investor-borrower relationship is at arm's length); *United States v Moore*, 29 F3d 175, 180 (4th Cir 1994) (reversing the position of trust enhancement for the owners of a printing company who were convicted of conspiring with the manager of a newspaper to accept payment from the newspaper for services that they never provided).

the “trust” aspect of the position has only a remote connection to the offense. This Comment coins the term “remote connection” cases to refer to this category. This Section defines the remote-connection category of cases. It also argues that, in such cases, non-victim-requirement circuits can reach the same outcomes as victim-requirement circuits without relying on the victim requirement.

Remote-connection cases are best exemplified by *Moored*. In *Moored*, the defendant used his status as a former college trustee to illegally secure a loan as part of a wire fraud scheme.¹¹² The district court enhanced Moored’s offense level by two because Moored had used his position as a college trustee to add credibility to his loan application.¹¹³ The Sixth Circuit did not dispute that Moored held a position of trust with the college, but it reversed the enhancement on the grounds that “the Defendant held no position of trust with the intended victims of his offense.”¹¹⁴ The court cautioned that, without a victim requirement,

a sentencing court would enhance the sentence of virtually every defendant who occupied any position of trust with anyone, victim or otherwise. An argument could be made in virtually every case that the position of trust, though not directly a part of the offense conduct, had some remote connection with the defendant’s crime.¹¹⁵

This quotation suggests that although the court claimed to rely on the victim requirement to reject Moored’s position of trust enhancement, its narrow reason for invoking the requirement was the remote connection between Moored’s position of trust and his offense. This narrow holding is less controversial but harder to define than the victim requirement. It is hard to imagine that any circuit, with or without a victim requirement, would apply a position of trust enhancement to a defendant whose position of trust was as remotely connected to his offense as Moored’s trusteeship. Yet remoteness is a vague standard—and just as ungrounded in the text of § 3B1.3 as the victim requirement. The victim requirement has the advantage of offering a simple, straightforward reason for declining to apply a position of trust enhancement. Without a clear account of what made Moored’s position “remote,” courts appear condemned to *Moored*’s broader, more controversial holding.

¹¹² *Moored*, 997 F2d at 140–41.

¹¹³ *Id.* at 141–42.

¹¹⁴ *Id.* at 145.

¹¹⁵ *Id.*

One explanation might be that Moored's position as trustee did not significantly facilitate his offense. However, the Sixth Circuit did not dispute the district court's finding that, because of his position, Moored "appeared to the victims to be a better candidate for a loan than most people."¹¹⁶ To decide *Moored* on "significantly facilitated" grounds would have likely required more analysis of the causal connection between the position and the offense.

A better explanation is to focus on abuse, as in the *Cianci* court's reading of *Broderson*.¹¹⁷ Moored did not abuse his position of trust because he did not in any way rely on the trust placed in him as trustee. The Guidelines define a position of trust as a position characterized by professional or managerial discretion.¹¹⁸ Moored did not abuse his position because he did not use his discretion as trustee in a manner that facilitated his offense. Instead, another aspect of the position—the reputational effect of holding the position—facilitated Moored's deception of the banks.

Unlike in complicit-entruster cases, there is no evidence that non-victim-requirement circuits have explicitly endorsed the outcomes in remote-connection cases. Indeed, there is no evidence that these circuits have ever specifically ruled on or commented on a remote-connection case. This Comment argues only that non-victim-requirement circuits *could* endorse these outcomes while continuing to reject the victim requirement. As described in Part II.B, these circuits have offered two main reasons for rejecting the requirement: it has no basis in the text of USSG § 3B1.3,¹¹⁹ and it is inconsistent with the Guidelines relevant-conduct sentencing scheme.¹²⁰ Unlike the victim requirement, however, USSG § 3B1.3 explicitly requires that the defendant abuse a position of trust. Non-victim-requirement circuits would not exceed the text of that guideline or violate its relevant-conduct sentencing scheme by giving content to one of its key terms: "abuse."¹²¹ Accordingly, none of the reasons for rejecting the victim requirement would prevent any court from denying the position of trust enhancement in remote-connection cases like *Moored* or *Hall* on the grounds that the defendant did not abuse his position of trust.

¹¹⁶ *Moored*, 997 F2d at 144.

¹¹⁷ See note 109 and accompanying text.

¹¹⁸ See note 55 and accompanying text.

¹¹⁹ See note 101 and accompanying text.

¹²⁰ See notes 102–04 and accompanying text.

¹²¹ This Comment elaborates on this possibility in Part IV.

3. The “parallel offense” category of cases: the sole category of inconsistent judicial outcomes.

The third category of cases in which circuits have invoked the victim requirement as grounds for rejecting a position of trust enhancement are those in which a defendant’s abuse of a position of trust significantly facilitates the commission or concealment of an unconvicted offense, but the defendant is convicted only of a separate, related offense. This Comment coins the term “parallel offense” cases to refer to this category. This Section defines the parallel-offense category of cases. Unlike the complicit-entruster and remote-connection cases described in the previous two Sections, the victim requirement has observably influenced outcomes in parallel-offense cases. Nonetheless, this Section demonstrates that outcomes in these cases do not consistently break down along the lines defined by the victim-requirement circuit split.

The divergent outcomes in parallel-offense cases are best exemplified by the cases described in the Introduction: *Bhagavan* and *Guidry*.¹²² In *Bhagavan*, the defendant used a position of trust in a company to divert funds from minority shareholders but was not convicted of an offense against the shareholders.¹²³ In *Guidry*, the defendant used a position of trust to embezzle from her employer but was not convicted of embezzlement.¹²⁴ Both defendants were convicted of tax offenses for failing to report the illegally acquired income.¹²⁵ The Seventh Circuit applied the position of trust enhancement in *Bhagavan*,¹²⁶ but the Tenth Circuit rejected the enhancement in *Guidry* because the defendant “did not occupy a position of trust vis-à-vis the government, the victim in this case.”¹²⁷ In short, the Seventh Circuit applied the position of trust enhancement in a parallel-offense case, while the Tenth Circuit held that the enhancement was barred by the victim requirement.

Guidry’s reliance on the victim requirement in a parallel-offense case is consistent with a few (primarily unreported) cases involving tax offenses.¹²⁸ However, the holding is contrary to the majority of

¹²² See notes 2–20 and accompanying text.

¹²³ *Bhagavan*, 116 F3d at 191.

¹²⁴ *Guidry*, 199 F3d at 1153.

¹²⁵ *Bhagavan*, 116 F3d at 191; *Guidry*, 199 F3d at 1153.

¹²⁶ *Bhagavan*, 116 F3d at 191–94 (explaining that defendant’s actions “facilitated the commission of the tax evasion offense and concealed it from others with a connection to the company, making the enhancement appropriate”).

¹²⁷ *Guidry*, 199 F3d at 1160.

¹²⁸ See *Evans*, 370 Fed Appx at 832 (reversing a position of trust enhancement applied to a defendant convicted of tax offenses); *United States v Dean*, 1995 WL 493006, *5 (4th Cir) (reversing a position of trust enhancement applied to the president of a company who was

circuits.¹²⁹ As the remainder of this Section shows, many victim-requirement circuits have upheld position of trust enhancements in parallel-offense cases. Moreover, at least one victim-requirement circuit that denied a position of trust enhancement in a parallel-offense case emphasized grounds other than the victim requirement. Accordingly, although the victim requirement has the potential to influence outcomes in parallel-offense cases, such outcomes do not tend to break down along the lines that the apparent circuit split would predict.

Several victim-requirement circuits, including the Second, Fourth, Sixth, and Ninth Circuits, have upheld position of trust enhancements in parallel-offense cases.¹³⁰ These circuits account for the victim requirement by characterizing the victim of the unconvicted offense as a victim of the offense of conviction. For example, in *United States v Friedberg*,¹³¹ the Second Circuit upheld a position of trust enhancement for a defendant convicted of tax evasion for failing to report income that he embezzled from an organization in which he held a position of trust.¹³² *Friedberg* is a typical parallel-offense case: Daniel Friedberg held a position of trust with an organization from which he embezzled, but he was not convicted of embezzlement. Instead, he was convicted of tax evasion. Under *Guidry*, the position of trust enhancement would not apply because Friedberg held no position of trust with the government, the primary victim of his tax offense. However, the *Friedberg* court characterized the organization from which Friedberg embezzled as an additional victim of his tax offense.¹³³ The court emphasized that “Friedberg’s tax evasion was part of a larger scheme to embezzle funds and hide the income.”¹³⁴

Just as victim-requirement circuits have upheld position of trust enhancements in parallel-offense cases, the Eleventh Circuit has denied a position of trust enhancement in a parallel-offense case even

convicted of a tax offense for failing to report money skimmed from his employer); *United States v Slayton*, 2008 WL 3819836, *2 (D Kan) (declining to apply the position of trust enhancement to a financial controller convicted of tax offenses for failing to report money embezzled from his employer).

¹²⁹ See *United States v Friedberg*, 558 F3d 131, 136 (2d Cir 2009); *United States v Callaway*, 297 Fed Appx 232, 233 (4th Cir 2008); *United States v Duran*, 15 F3d 131, 134 (9th Cir 2004). For examples involving money laundering rather than tax offenses, see *United States v Scott*, 405 F3d 615, 618 (7th Cir 2005); *United States v Young*, 266 F3d 468, 477–78 (6th Cir 2001); *United States v Calozza*, 125 F3d 687, 691 (9th Cir 1997) (explaining that the sentencing enhancement depends on whether the defendant’s actions are “relevant conduct” as defined by the Guidelines).

¹³⁰ See note 129.

¹³¹ 558 F3d 131 (2d Cir 2009).

¹³² *Id.* at 132.

¹³³ *Id.* at 136.

¹³⁴ *Id.*

though it found the victim requirement inapplicable. In *United States v Barakat*,¹³⁵ the defendant, a housing authority official, was acquitted of mail fraud charges arising from an alleged kickback scheme but was convicted of tax evasion for failing to report income earned from the scheme.¹³⁶ The Eleventh Circuit held that the district court had erred in applying a position of trust enhancement.¹³⁷ However, *Barakat* was not decided on the basis of the victim requirement. Indeed, the court explicitly denied that the victim requirement was applicable, calling the requirement “too broad.”¹³⁸ Instead, the court held that Russell Barakat’s abuse of his position of trust as a housing authority official did not substantially facilitate his tax evasion, even though it provided him with the funds that he failed to report on his tax returns. The *Barakat* court reasoned that, in the context of USSG § 3B1.3, “‘offense’ must be read as ‘offense of conviction’ in order to maintain consistency with the definition of relevant conduct in USSG § 1B1.3(a).”¹³⁹ Accordingly, the court read USSG § 3B1.3 to apply only where the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the *offense of conviction*. Barakat’s position helped him obtain the funds that he failed to report, but it did not “give him an advantage in the commission or concealment of the offense of tax evasion.”¹⁴⁰ Therefore, the court held that the position did not significantly facilitate the offense of which he was convicted.¹⁴¹

The Eleventh Circuit’s interpretation of “offense” in *Barakat* was seriously challenged in *United States v Young*.¹⁴² As the Sixth Circuit correctly observed, the Application Notes to USSG § 1B1.1 state that “[o]ffense’ means the offense of conviction and *all relevant conduct* under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context.”¹⁴³ USSG § 3B1.3 does not specify a different meaning of “offense.”¹⁴⁴ Therefore, the position of trust enhancement applies wherever the defendant abused “a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense [of

¹³⁵ 130 F3d 1448 (11th Cir 1997).

¹³⁶ *Id.* at 1450.

¹³⁷ *Id.* at 1456.

¹³⁸ *Id.* at 1454.

¹³⁹ *Barakat*, 130 F3d at 1455.

¹⁴⁰ *Id.* at 1456.

¹⁴¹ *Id.*

¹⁴² 266 F3d 468 (6th Cir 2001).

¹⁴³ *Id.* at 477, quoting USSG § 1B1.1, Application Note 1(H).

¹⁴⁴ See USSG § 3B1.3 & Application Notes 1, 4.

conviction]” or of relevant conduct under § 1B1.3.¹⁴⁵ This is consistent with the Guidelines use of “relevant conduct sentencing.”¹⁴⁶ Under this definition, Barakat should have received a position of trust enhancement. The Eleventh Circuit conceded that the kickback scheme was relevant conduct and strongly implied that his abuse of his position of trust as a housing authority official significantly facilitated that scheme.¹⁴⁷ Thus, Barakat abused a position of trust in a way that significantly facilitated the commission of relevant conduct.

The Eleventh Circuit has yet to offer a response to the reasoning in *Young*, which appears to be irrefutable. With *Barakat*’s reasoning thus contested, the only remaining ground for declining to apply the position of trust enhancement in parallel-offense cases is the victim requirement.

B. Where Non-Victim-Requirement Circuits Apply the Position of Trust Enhancement: The Victim Requirement Does Not Bar Consistent Decisions

The previous Section demonstrated that, in most categories of cases where victim-requirement circuits deny the position of trust enhancement, the victim requirement is not essential to the outcome. Rejecting the victim requirement need not prevent courts from achieving the same outcomes. This Section and the following Section demonstrate the reverse: in most cases where non-victim-requirement circuits apply the position of trust enhancement, the victim requirement does not prevent courts from achieving the same outcomes. In particular, this Section outlines the three principal categories of cases in which defendants have unsuccessfully relied on the victim requirement. It thus completes the typology of position of trust enhancement cases in which defendants have invoked the victim requirement.¹⁴⁸ The following Section then outlines the mechanism by which victim-requirement circuits have achieved substantial uniformity with non-victim-

¹⁴⁵ See *Young*, 266 F3d at 477.

¹⁴⁶ See notes 34–46 and accompanying text.

¹⁴⁷ See *Barakat*, 130 F3d at 1452–54. The kickback scheme qualified as relevant conduct because it was conducted “in preparation for” the offense of conviction. USSG § 1B1.3(a)(1).

¹⁴⁸ Note that the categories in this Section and the previous Section are not necessarily mutually exclusive. While there are no cases that fit into multiple categories yet, it is possible to imagine, for example, a remote-connection case that also falls into the “no risk of financial loss” category described in Part III.B.2. In such instances, the remote connection between the defendant’s position of trust and his offense would defeat any position of trust enhancement based on that position, even if courts dismissed any argument based on the absence of a risk of financial loss. Recall, however, that where a defendant holds multiple positions of trust with multiple entrusting parties, the position of trust enhancement applies as long as one such position satisfies the requirement of USSG § 3B1.3. See note 65 and accompanying text.

requirement circuits in upholding the position of trust enhancement in these three classes of cases.

1. The “nominal victim” category of cases: consistent judicial outcomes.

In the first category of cases in which defendants have unsuccessfully invoked the victim requirement, the definition of the offense of conviction seems to imply a particular primary victim, but the offense directly harms a secondary victim as well. Defendants have argued that only the primary victim implied by the definition of the offense counts for purposes of the victim requirement. This Comment coins the term “nominal victim” cases to refer to this category. This Section shows that courts have consistently upheld the position of trust enhancement in nominal-victim cases.

The simplest example of a nominal-victim case involves bank fraud. For example, in *Cruz*, the defendant pleaded guilty to bank fraud for forging a check in her employer’s name.¹⁴⁹ The district court imposed a position of trust enhancement based on Carmen Cruz’s position with her employer.¹⁵⁰ Cruz challenged the enhancement on the grounds that she held no position of trust with the defrauded banks.¹⁵¹ The Seventh Circuit rejected Cruz’s argument and upheld the enhancement.¹⁵² The court based its holding on a rejection of the victim requirement.¹⁵³ However, other courts have reached similar results within the framework of the victim requirement: the fact that the offense is called “bank fraud” has not prevented these courts from characterizing parties other than banks as victims.¹⁵⁴ Similarly, courts have applied the position of trust enhancement in a conviction for misapplying federal funds where the defendant held a position of trust

¹⁴⁹ *Cruz*, 317 F3d at 765.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 766.

¹⁵² *Id.* at 766–68.

¹⁵³ See *Cruz*, 317 F3d at 766. For a similar case upholding the position of trust enhancement for a defendant convicted of conspiracy to pass a US savings bond over forged endorsements, see *United States v Weiss*, 40 Fed Appx 274, 275 (7th Cir 2002) (“[N]othing in § 3B1.3 requires that the position of trust have been conferred by the bank, because [a third party] was also a victim of Weiss’ fraudulent scheme.”).

¹⁵⁴ See *United States v Ratliff*, 376 Fed Appx 830, 837 (10th Cir 2010), cert denied 130 S Ct 3403 (2010); *United States v Linville*, 228 F3d 1330, 1332 (11th Cir 2000) (per curiam); *United States v Barrett*, 178 F3d 643, 647 (2d Cir 1999). For a similar case upholding the position of trust enhancement for a defendant convicted of conspiracy to pass a US savings bond over forged endorsements, see *United States v Weiss*, 40 Fed Appx 274, 275 (7th Cir 2002). *Weiss* precedes the Seventh Circuit’s rejection of the victim requirement in *Cruz*. See notes 93–97 and accompanying text.

with a nonprofit organization but not with the government;¹⁵⁵ in a conviction for embezzlement from a bankruptcy estate, in which the defendant held a position of trust with creditors but not necessarily with the estate;¹⁵⁶ and in a conviction for diverting funds intended to benefit needy individuals, in which the defendant held a position of trust with the Red Cross but not with needy individuals.¹⁵⁷ These cases suggest that, regardless of the victim requirement, the position of trust enhancement applies in nominal-victim cases.

2. The “no risk of financial loss” category of cases: consistent judicial outcomes.

In the second category of cases in which defendants have unsuccessfully invoked the victim requirement, those defendants have argued that parties who bore no actual risk of financial loss do not count as victims for the purpose of the victim requirement. This Comment coins the term “no risk of financial loss” cases to refer to this category. This Section shows that courts have consistently upheld the position of trust enhancement in no-risk-of-financial-loss cases.

For example, in *United States v Duerson*,¹⁵⁸ a manager at UPS robbed an armored truck carrying UPS funds.¹⁵⁹ David Duerson had used his position at UPS to obtain knowledge that facilitated the robbery and to obtain keys to the trucks used in the getaway.¹⁶⁰ Accordingly, the district court applied the position of trust enhancement.¹⁶¹ On appeal, Duerson argued that the enhancement was inappropriate because the armored truck service, with which Duerson held no position of trust, bore the entire risk of loss of the stolen funds.¹⁶² The Sixth Circuit disagreed, holding that even if UPS bore no risk of financial loss, UPS was a victim because the defendant had assaulted a UPS employee, violated the privacy of a UPS vault, cut UPS phone lines, and stolen a UPS truck.¹⁶³

Defendants often invoke the absence of financial loss in cases involving identity theft. For example, in *United States v Akinkoye*,¹⁶⁴ a real estate agent defrauded creditors by taking out credit cards in his

¹⁵⁵ See *United States v Cameron*, 86 Fed Appx 183, 192 (7th Cir 2004).

¹⁵⁶ See *United States v Love*, 17 Fed Appx 796, 805 (10th Cir 2001).

¹⁵⁷ See *United States v Harness*, 180 F3d 1232, 1236 (11th Cir 1999).

¹⁵⁸ 25 F3d 376 (6th Cir 1994).

¹⁵⁹ Id at 377.

¹⁶⁰ Id at 378–79.

¹⁶¹ Id at 383.

¹⁶² *Duerson*, 25 F3d at 383.

¹⁶³ Id at 384.

¹⁶⁴ 185 F3d 192 (4th Cir 1999).

customers' names.¹⁶⁵ The district court held that Akin Akinkoye held a position of trust with his customers and applied the position of trust enhancement.¹⁶⁶ Akinkoye disputed the enhancement, arguing that even if he held a position of trust with his customers, he held no position of trust with the defrauded banks, which bore the entire risk of financial loss.¹⁶⁷ The Fourth Circuit upheld the enhancement, reasoning that Akinkoye's customers were also victims of his crime even though they bore no risk of financial loss.¹⁶⁸ These cases suggest that, regardless of the victim requirement, the fact that the entrusting party bore no financial loss is not a barrier to the position of trust enhancement.

3. The "victimless crime" category of cases: consistent judicial outcomes.

In the third category of cases in which defendants have unsuccessfully invoked the victim requirement, those defendants have argued that the position of trust enhancement is inappropriate in "victimless crimes." In particular, physicians who write fraudulent prescriptions for controlled substances that their accomplices then resell have argued that their sentences cannot be enhanced for abusing a position of trust.¹⁶⁹ In such cases, courts have consistently found the discretionary authority to write prescriptions to be sufficient to support the position of trust enhancement, even where the court identifies no victim.¹⁷⁰ The *Barakat* court also cited victimless crime cases as a reason to narrow the scope of the victim requirement.¹⁷¹

¹⁶⁵ Id at 196.

¹⁶⁶ Id at 203.

¹⁶⁷ Id.

¹⁶⁸ *Akinkoye*, 185 F3d at 204. See also *United States v Sedore*, 512 F3d 819, 826 (6th Cir 2008) (upholding a position of trust enhancement for a defendant who filed false tax returns using names and social security numbers obtained from tax returns that he had prepared for friends and acquaintances); *United States v Grooters*, 2008 WL 2561380, *5 (WD Mich) (applying a position of trust enhancement for a defendant who used her position at a federal public defender's office to obtain personal information that she used for identity theft).

¹⁶⁹ See, for example, *United States v McCollister*, 96 Fed Appx 974, 976 (6th Cir 2004) (upholding a position of trust enhancement for a physician convicted of conspiring to distribute oxycodone); *United States v Hoffer*, 129 F3d 1196, 1204 (11th Cir 1997) (noting that the defendant, a physician who provided an accomplice with prescriptions to controlled substances that the accomplice sold on the street, received a position of trust enhancement).

¹⁷⁰ See note 169.

¹⁷¹ See *Barakat*, 130 F3d at 1454–55.

C. Expanding the “Victim”: The Mechanism by Which Victim-Requirement Circuits Achieve Substantial Uniformity

As the previous Section demonstrates, courts in victim-requirement and non-victim-requirement circuits alike have demonstrated substantial uniformity in upholding the position of trust enhancement outside the categories outlined in Part III.A. In non-victim-requirement circuits, the grounds for rejecting these challenges are transparent: if the court does not recognize the victim requirement, then a defendant cannot challenge a position of trust enhancement by arguing that the entrusting party was not a victim.¹⁷²

This Section argues that victim-requirement circuits have achieved similar results primarily by expanding the definition of “victim.” These circuits have rarely hesitated to look to positions of trust with “secondary victims” of the offense of conviction.¹⁷³ They regularly look beyond the nominal victim of crimes such as bank fraud¹⁷⁴ and consider nonfinancial harms where only one party bears a risk of financial loss from the offense of conviction.¹⁷⁵ Beyond this, courts have proven incredibly inventive in expanding the definition of “victim” to include parties only tangentially related to the offense of conviction. Accordingly, this Section outlines the ways in which courts have expanded the victim requirement. This Section should prove valuable as a typology of the arguments courts and practitioners in victim-requirement circuits might use to show that a given party is a victim. It also shows that the term “victim” has become too broad to effectively limit the position of trust enhancement outside the narrow categories of cases in Part III.A.

¹⁷² See, for example, *Cruz*, 317 F3d at 766 (rejecting defendant’s argument that sentencing enhancement was inappropriate because she did not occupy a position of trust in relation to the victim of the offense).

¹⁷³ See *Barrett*, 178 F3d at 647 (“[T]he Sentencing Guidelines recognize that there exist primary and secondary victims of fraud.”).

¹⁷⁴ See *Love*, 17 Fed Appx at 805 (“We emphasize that the relevant trust relationship here could be either that between Love and the policyholders or Love and the bankruptcy court.”); *Linville*, 228 F3d at 1332 (“A bank is a possible victim [of bank fraud], of course, but so are other persons, because the fraudulent scheme need only be to obtain money, funds, or credits *under the custody or control* of a federally insured financial institution.”) (internal quotation marks omitted). See also *United States v Cusack*, 66 F Supp 2d 493, 503 (SDNY 1999), affd 229 F3d 344 (2d Cir 2000) (upholding a position of trust enhancement for a defendant convicted of wire fraud and mail fraud after he used a position of trust to steal documents used in the fraud).

¹⁷⁵ See *Sedore*, 512 F3d at 826 (“Nothing in the language of U.S.S.G. § 3B1.3, or the commentary following it, indicates that pecuniary loss is a necessary element for application of the enhancement.”); *Akinkoye*, 185 F3d at 204 (“Akinkoye’s focus on the ultimate financial burden ignores the emotional, financial and other burdens borne by the clients until the extent of the fraud scheme was exposed and corrected.”); *Duerson*, 25 F3d at 383–84 (“Even if the risk-of-loss question had been raised in the district court and resolved in favor of the defendant, we would have found it difficult to say that UPS was not a victim of the crime.”).

1. The public as victim.

One fairly uncontroversial expansion of the definition of “victim” is to treat the general public as the victim of a government employee’s lapse of responsibility. For example, in *United States v White*,¹⁷⁶ two employees of a county water district were convicted of making materially false statements in an official report containing falsified water turbidity measures.¹⁷⁷ The Sixth Circuit upheld a position of trust enhancement, concluding that the defendants held a position of trust with the public, the victim of their crime.¹⁷⁸

USSG § 3B1.3 explicitly states that the position of trust enhancement is applicable to the abuse of a position of “public trust.”¹⁷⁹ Accordingly, a court that applied the victim requirement but refused to count the public as a victim would effectively abridge the Guidelines. Consequently, several courts have expanded the definition of “victim” to include the public.¹⁸⁰ Indeed, the Sixth Circuit described this notion as “self-evident.”¹⁸¹

2. Victim of the scheme.

Some courts have expanded the definition of “victim” by speaking of the victims of a defendant’s overall “scheme,” rather than of the offense of conviction. For example, in *Friedberg*, the grand secretary for the Independent Order of Odd Fellows was convicted of tax evasion for failing to report income embezzled from the organization.¹⁸² In upholding Daniel Friedberg’s position of trust enhancement, the Second Circuit stated:

Friedberg’s tax evasion was part of a larger scheme to embezzle funds and hide the income. He effectuated the scheme by abusing his position as Grand Secretary of Odd Fellows and shielding the

¹⁷⁶ 270 F3d 356 (6th Cir 2001).

¹⁷⁷ *Id.* at 360.

¹⁷⁸ *Id.* at 371–72.

¹⁷⁹ USSG § 3B1.3.

¹⁸⁰ See *White*, 270 F3d at 371; *United States v Fitzhugh*, 78 F3d 1326, 1331 (8th Cir 1996); *United States v Caples*, 1994 WL 131728, *1 (8th Cir) (per curiam); *United States v Armstrong*, 992 F2d 171, 173 (8th Cir 1993). For treatment of a similar case in a non-victim-requirement circuit, see *United States v Snook*, 366 F3d 439, 445–46 (7th Cir 2004).

¹⁸¹ See *White*, 270 F3d at 371:

We have not, in the past, expressly held that the general public could be considered a victim of a government employee’s crime. . . . We believe that our failure to so hold was because it is, or should be, self-evident that an enhancement for abuse of “position of *public* or private trust,” . . . may be appropriate when the public has been victimized by the defendant’s crime.

¹⁸² *Friedberg*, 558 F3d at 132.

illicit income from the government. The embezzlement accomplished in this manner was part and parcel of the crime of conviction insofar as it both provided Friedberg with the funds he failed to report and tended to conceal the criminal activity. As such, it was undoubtedly relevant conduct.¹⁸³

The inclusion of victims of the defendant's "scheme" thus draws support from the Guidelines use of relevant-conduct sentencing.¹⁸⁴ The approach allows courts to apply the position of trust enhancement in parallel-offense cases without abandoning the victim requirement.¹⁸⁵ However, in *Guidry*, as noted above, the Tenth Circuit refused to expand the definition of victim in this manner and instead denied the position of trust enhancement based on the victim requirement.¹⁸⁶

3. Transitive trust.

Where a defendant holds a position of trust with a party other than the victim, courts may also work around the victim requirement by focusing on the victim's relationship with the entrusting party. The Sixth Circuit devised this approach in *United States v Sedore*.¹⁸⁷ In *Sedore*, the defendant prepared tax returns for friends and acquaintances. He then used some of the social security numbers, including those belonging to the children of a close friend, to prepare fraudulent tax returns for his own benefit.¹⁸⁸ Sedore challenged the district court's application of a position of trust enhancement, arguing that although he had a position of trust with his friend, he had no such position with the friend's children.¹⁸⁹ The Sixth Circuit upheld the enhancement, reasoning that "[w]here a parent provides the personal information of his children for the purpose of tax preparation, it is reasonable that any trust relationship between the parent and the preparer extends to the children and the preparer."¹⁹⁰

Subsequently, in *United States v Harrington*,¹⁹¹ the Sixth Circuit upheld a position of trust enhancement for a defendant convicted of

¹⁸³ Id at 136.

¹⁸⁴ See notes 34–46 and accompanying text.

¹⁸⁵ See *Friedberg*, 558 F3d at 136; *Bhagavan*, 116 F3d at 191–94 ("It is enough that identifiable victims of Bhagavan's overall scheme to evade his taxes put him in a position of trust and that his position contributed in some significant way to facilitating the commission or concealment of the offense.") (internal quotation marks omitted) (emphasis added). See also notes 129–34 and accompanying text.

¹⁸⁶ 199 F3d at 1160.

¹⁸⁷ 512 F3d 819 (6th Cir 2008).

¹⁸⁸ Id at 821.

¹⁸⁹ Id at 822.

¹⁹⁰ Id at 825–26.

¹⁹¹ 367 Fed Appx 657 (6th Cir 2010).

defrauding the local Small Business Administration (SBA) office.¹⁹² Although the defendant personally held no position of trust with the SBA, he was the vice president of a company that was a preferred lender with the SBA.¹⁹³ The court cited *Sedore* as grounds for extending Patrick Harrington's position of trust from his employer to the SBA.¹⁹⁴ Taken together, these cases suggest a transitive notion of trust: a defendant holds a position of trust with the victim of his crime if he holds a position of trust with a third party who, in turn, holds a position of trust with the victim.

4. Professional licensing board as victim.

In *United States v Foster*,¹⁹⁵ a district court in the Sixth Circuit strained the definition of victim even further when it identified the Michigan bar as the victim of a lawyer's money laundering scheme.¹⁹⁶ The only way in which the offense impacted the bar was that the lawyer's abuse of his professional license harmed the professional reputation of lawyers in Michigan:

When professionals like Defendant [facilitate criminal activity], they gravely undermine the professions to which they belong and abuse the positions of trust and privileges of trust that society reposes in them. Thus, viewed in this context, there is an identifiable victim in this case despite the fact that there was a sting operation in place. That victim is the Michigan bar (and, indirectly, the people of Michigan), which has licensed Defendant and provided him with the attendant privileges to that license.¹⁹⁷

The court thus held that the victim requirement did not bar a position of trust enhancement.

The district court's reasoning in *Foster* would seem applicable as well to physicians who commit otherwise victimless crimes by abusing their authority to writing prescription for controlled substances.¹⁹⁸ Treating licensing and professional organizations as victims might allow courts in victim-requirement circuits to strain against the limits of precedent while achieving results consistent with the actual language of USSG § 3B1.3.

¹⁹² *Id.* at 662.

¹⁹³ *Id.* at 661.

¹⁹⁴ *Id.*

¹⁹⁵ 868 F Supp 213 (ED Mich 1994).

¹⁹⁶ *Id.* at 216.

¹⁹⁷ *Id.*

¹⁹⁸ See, for example, *Hoffer*, 129 F3d at 1204.

5. Strategic description of the victim.

Even where all parties agree on the identity of the victim of an offense, how a court describes that victim may ease the application of the position of trust enhancement. For example, *United States v Brickey*¹⁹⁹ is a standard parallel-offense case. The defendant failed to report tax income that he obtained by abusing a position of trust with his employer.²⁰⁰ However, in *Brickey*, the defendant's employer happened to be the United States government; while employed by the Immigration and Naturalization Service, Ronnie Brickey accepted kickbacks for permitting cars to cross the border without inspection.²⁰¹ Although there was no necessary connection between the fact that Brickey was employed by the government and the fact that tax evasion deprives the government of money, the Ninth Circuit broadly identified "the government" as the victim of Brickey's crimes.²⁰²

Following the *Brickey* court's reasoning would lead courts to apply different sentences for tax evasion where the defendant embezzles from a government employer than where the defendant embezzles from a private employer. This is contrary to the Guidelines objective of uniformity.²⁰³ Thus, strategic description of the victim allows victim-requirement circuits to achieve outcomes consistent with non-victim-requirement circuits, but only at the expense of consistency between cases.

6. Circular reasoning.

In *United States v Grooters*,²⁰⁴ a district court in the Sixth Circuit granted a position of trust enhancement for a defendant who used her position at a federal public defender's office to obtain personal information that she used for identity theft.²⁰⁵ The defendant held a position of trust with the federal public defender's office but not with the victims whose identity she stole.²⁰⁶ The court relied on circular reasoning to conclude that Pamela Grooters's employer was a victim of her offense: "Viewing the overall conduct at issue, defendant's use of the computer password and access to the database compromised the Federal Public Defender's office security and was a breach of her

¹⁹⁹ 289 F3d 1144 (9th Cir 2002), rev'd on other grounds, *United States v Contreras*, 593 F3d 1135 (9th Cir 2010).

²⁰⁰ *Brickey*, 289 F3d at 1148–49.

²⁰¹ *Id* at 1148.

²⁰² *Id* at 1155.

²⁰³ See note 19 and accompanying text.

²⁰⁴ 2008 WL 2561380 (WD Mich).

²⁰⁵ *Id* at *5.

²⁰⁶ *Id*.

former employer's trust. In that sense, the Federal Public Defender's office was a victim of defendant's conduct."²⁰⁷ In short, the court held that the federal public defender's office was a victim because the defendant had abused a position of trust and that the defendant had abused a position of trust because the office was a victim.

* * *

As the *Grooters* holding demonstrates, courts have stretched the meaning of "victim" to the point where the victim requirement no longer provides a substantial barrier for courts seeking to apply the position of trust enhancement. Courts can effectively waive the requirement in any case by characterizing the party whose trust was abused as a "victim" simply on the grounds that that party's trust was abused.

This flexibility has allowed victim-requirement circuits to reject the position of trust enhancement in the cases described in Part III.A while applying the enhancement in the cases described in Part III.B. Unfortunately, it has also meant that these courts have failed to articulate a clear standard for distinguishing cases in which the position of trust enhancement applies from those in which it does not. In response to this problem, the following Part proposes a unifying principle that reconciles the positions of circuits.

IV. AN ALTERNATIVE TO THE VICTIM REQUIREMENT

The previous Part demonstrated that, despite the apparent circuit split, there is actually substantial uniformity between the outcomes across circuits in cases where defendants have attempted to invoke the victim requirement. Courts have denied position of trust enhancements on the basis of the victim requirement in three categories of cases. In the first two categories—complicit-entruster and remote-connection cases—the victim requirement is not essential to the holding, and non-victim-requirement circuits can reach similar outcomes on other grounds. In the third category—parallel-offense cases—the victim requirement has observably influenced outcomes, but outcomes do not break down along the lines predicted by the circuit split. Outside these three categories of cases, the victim requirement does not bar the application of a position of trust enhancement. This Part argues that the proper legal basis for these outcomes is not the victim requirement but the word "abuse" in § 3B1.3. Focusing on whether a defendant abused a position of trust,

²⁰⁷ Id.

rather than whether the defendant held a position of trust with respect to a victim of the offense of conviction, reconciles the circuits and settles the disagreement over parallel-offense cases. Accordingly, Part IV.A proposes a new definition of “abuse” that provides a unifying principle for the position of trust enhancement. Because this principle eliminates the need for the victim requirement, Part IV.B refutes the justifications offered for the requirement and argues that it should be abandoned.

A. Redefining “Abuse”

As Part III.A demonstrated, focusing on the word “abuse” would allow courts to reach consistent outcomes in complicit-entruster and remote-connection cases regardless of whether they adopt the victim requirement. Implementing this conclusion requires a precise definition of “abuse.” This Section proposes such a definition and argues that it effectively reconciles the positions of the circuits without disturbing the outcomes in any circuit in most categories of cases.

Since the 1993 revision to USSG § 3B1.3, courts have defined “position of trust” as a position “characterized by professional or managerial discretion.”²⁰⁸ However, the Guidelines are silent on what qualifies as an “abuse” of such a position.²⁰⁹ Accordingly, courts have rarely relied on the word “abuse” as a barrier to the position of trust enhancement.²¹⁰

The Third Circuit briefly hinted at the importance of “abuse” in *Cianci* when it suggested that the Second Circuit could have based its holding in *Broderson* on the term “abuse” rather than the victim requirement.²¹¹ However, *Cianci* does not provide a definition of abuse and does not consider the implications of the requirement beyond the narrow factual circumstances in *Broderson*. Even if courts were to extend *Cianci*’s discussion of *Broderson* to other complicit-entruster cases, the implications for remote-connection cases, parallel-offense cases, nominal-victim cases, no-risk-of-financial loss cases, and victimless crime cases would remain uncertain. Accordingly, it is not surprising that this brief note in *Cianci* has not sparked a change in position of trust enhancement jurisprudence.

The Third Circuit did briefly suggest a definition of “abuse” in *United States v Hickman*.²¹² The court stated that “[t]o abuse a position

²⁰⁸ See notes 53–57 and accompanying text.

²⁰⁹ See notes 58–62 and accompanying text.

²¹⁰ See notes 58–62 and accompanying text.

²¹¹ See Part III.A.1.

²¹² 991 F2d 1110 (3d Cir 1993).

of trust, a defendant must, by definition, have taken criminal advantage of a trust relationship between himself and his victim.”²¹³ However, this definition has several flaws. First, it assumes the validity of the victim requirement, which the Third Circuit itself later rejected. Second, defining “abuse” as “taking criminal advantage” adds little content to the position of trust enhancement, which already requires that the position of trust significantly facilitate a crime.²¹⁴ Accordingly, it is difficult to see how this definition would justify the Third Circuit’s later use of the term in *Cianci*.

Nonetheless, Part III.A points the way to a precise definition of “abuse” by demonstrating two ways in which the term “abuse” limits the position of trust enhancement. First, Part III.A.1 suggests that “abuse” excludes defendants who use their discretion for the benefit of the party that granted that discretion. When a defendant uses his professional or managerial discretion to further the interests of the party with whom he holds a position of trust, that defendant does not abuse his professional or managerial discretion and thus does not abuse a position of trust. (Recall that this Comment uses the term “entrusting party” to refer to any party with whom a defendant holds a position of trust.)²¹⁵ Second, Part III.A.2 suggests that “abuse” excludes defendants who do not use their discretion at all but benefit from another aspect of a position of trust. If a defendant does not abuse his discretion, then he does not abuse the position of trust characterized by that discretion. Accordingly, courts should adopt the following definition of “abuse”: *a defendant abuses a position of trust when the defendant uses professional or managerial discretion in a manner contrary to, rather than merely in complicity with, the interests of the entrusting party*. This definition merely codifies the conclusions of Parts III.A.1 and III.A.2.

Courts assessing the position of trust enhancement should begin as they currently do—by identifying any party with whom the defendant held a position of trust, which is to say, a position characterized by professional or managerial discretion. This inquiry should continue to focus on the nature of the relationship rather than the identity of the entrusting party, and courts should continue to apply their existing standards for identifying professional or managerial discretion. If the defendant holds a position of trust with another party, the court should determine whether the defendant used the discretion provided by that position. If so, then the court should

²¹³ *Id.* at 1112.

²¹⁴ USSG § 3B1.3 (increasing a base offense level for abusing a position of public trust in a way that “significantly facilitated” the offense or its concealment).

²¹⁵ See text accompanying note 67.

determine whether the defendant used the discretion to further the interests of the party who granted that discretion. If the defendant used his discretion in a manner contrary to the interests of the party who granted that discretion, then he abused a position of trust. The court should then determine if this abuse significantly facilitated the offense of conviction. This is the end of the inquiry. Unlike under the victim requirement, the court need not determine that the defendant actually harmed the entrusting party because the entrusting party need not be a victim of the crime. Note that if the defendant holds multiple positions of trust with multiple entrusting parties, then the position of trust enhancement applies as long as one such position satisfies these requirements.

Although this approach redefines a key term of § 3B1.3, it is unlikely to have unanticipated, harmful effects. The first step of this inquiry—identifying any party with whom the defendant held a position of trust—is identical to what courts currently do in both victim-requirement and non-victim-requirement circuits.²¹⁶ Accordingly, it should pose no new problems. The same is true of the last step, determining whether the abuse significantly facilitated the offense. The only new steps are determining whether the defendant used the discretion provided by the position and determining whether this use served the entrusting party's interests. Parts III.A.1 and III.A.2 have shown that these steps merely ensure that the position of trust enhancement does not apply in complicit-entruster and remote-connection cases. Furthermore, these steps achieve that end without the need to endlessly expand the definition of victim.²¹⁷

Because the definition of abuse is targeted to exclude only complicit-entruster and remote-connection cases, its consequence in the other categories of cases discussed in Part III should be predictable. Cases where defendants have unsuccessfully invoked the victim requirement should be unaffected, and the position of trust enhancement should continue to apply because there is no question that the defendants in these cases abused a position of trust. For example, in *Cruz*, a nominal-victim case, the defendant abused a position of trust when she forged a check in her employer's name: she used her discretion to write checks in a manner contrary to her employer's interest.²¹⁸ In *Duerson*, a no-risk-of-financial-loss case, the defendant abused a position of trust when he used his discretionary authority as a UPS manager to obtain knowledge and property that

²¹⁶ See Parts II.A and II.B.

²¹⁷ See Part III.C.

²¹⁸ See notes 149–52 and accompanying text.

helped him rob an armored truck carrying UPS funds.²¹⁹ Finally, in victimless crime cases, a physician who helps an accomplice to illegally distribute controlled substances abuses a position of trust when he uses his discretionary authority to write prescriptions in a manner contrary to the interests of the state.

As for parallel-offense cases, redefining abuse will finally bring an end to the inconsistent outcomes that “present[] a potentially significant source of white-collar sentencing disparity.”²²⁰ As Part III.A.3 showed, the only remaining ground for declining to apply the position of trust enhancement in parallel-offense cases is the victim requirement. If courts abandon the victim requirement, this ground will no longer be available. Moreover, the abuse definition poses no difficulties for parallel-offense cases, since these cases involve defendants who abuse a position of trust as part of an unconvicted offense.²²¹ The approach that this Comment proposes protects the Guidelines relevant-conduct sentencing scheme by ensuring that defendants will be punished for abusing a position of trust even if that abuse is part of an unconvicted offense.

The proposed definition has two additional virtues. First, it avoids the principal problem with the victim requirement because it is better grounded in the text of § 3B1.3. Rather than inferring an unstated requirement, the proposal in this Comment merely defines a term used in the guideline. In addition, the definition of “abuse” is consistent with the accepted definition of another term, “position of trust,” which in turn is taken directly from the Application Notes to the guideline.²²²

Second, the proposed definition is consistent with the examples in Application Note 1. An attorney who embezzles a client’s funds while serving as guardian uses his discretion over those funds in a manner contrary to the client’s interest. A bank executive who orchestrates a fraudulent loan scheme uses his discretion over bank funds in a manner contrary to the bank’s interest. Finally, a physician who sexually abuses patients under the guise of an examination uses his discretion to contact the patient’s body in a manner contrary to the

²¹⁹ See notes 158–63 and accompanying text.

²²⁰ Lambiras, 30 Pepperdine L Rev at 478–80 (cited in note 16).

²²¹ See, for example, *Guidry*, 199 F3d at 1159–60 (conceding that if the defendant’s position qualified as a position of trust for the purposes of § 3B1.3, the defendant had abused that position).

²²² See notes 50–57 and accompanying text.

patient's interest.²²³ The defendants in these examples satisfy the abuse requirement under the proposed definition.

The abuse definition is concededly somewhat at odds with Application Note 2. Recall that this note enumerates two small exceptions to the definition of "position of trust" in Application Note 1.²²⁴ Under these exceptions, mail theft by postal workers and misappropriation of any means of identification are per se subject to the position of trust enhancement, even though they may be said to lack professional or managerial discretion. Since the proposed definition of abuse is based on the definition of position of trust in Application Note 1, it cannot be extended to cases where Application Note 1 does not apply. However, the circuit courts have uniformly embraced the "professional or managerial discretion" standard in Application Note 1 as the primary definition of position of trust.²²⁵ The two exceptions in Application Note 2 are narrow, and they are the only exceptions in the Application Notes to the professional or managerial discretion standard.²²⁶ Accordingly, these two exceptions, which apply "notwithstanding" any provision of USSG § 3B1.3,²²⁷ should remain per se grounds for the position of trust enhancement; just as they are currently exceptions to Application Note 1, they should be interpreted as exceptions to the proposed definition of abuse. Application Note 2 thus poses no barrier to the proposed definition of abuse.

For all of these reasons, courts should adopt the definition of "abuse" proposed by this Comment and focus on the term "abuse" rather than the victim requirement.

B. Abandoning the Victim Requirement

The previous Section proposed and defended a new definition of "abuse." This Section argues that the new definition renders the victim requirement unnecessary. As Part II.A explained, courts have offered three justifications for the victim requirement. First, they have expressed concerns that, without the victim requirement, the position of trust enhancement might be overly broad. Second, they have argued that the victim requirement is implied by the choice of examples in the Application Notes to USSG § 3B1.3. Third, they have

²²³ See USSG § 3B1.3, Application Note 1 (explaining that position of trust enhancement applies to "the criminal sexual abuse of a patient by a physician under the guise of an examination").

²²⁴ See notes 54–56 and accompanying text.

²²⁵ See note 57 and accompanying text.

²²⁶ See USSG § 3B1.3.

²²⁷ See USSG § 3B1.3, Application Note 2.

relied indirectly on the subjective nature of the position of trust enhancement. This Section refutes each of these justifications in turn and argues that courts should abandon the victim requirement.

1. Concerns with overbreadth.

The first justification that courts have offered for the victim requirement is that, without it, the position of trust enhancement might be overly broad²²⁸ and might reach, for example “all taxpayers who file false tax returns”²²⁹ or “virtually every defendant who occupied any position of trust with anyone, victim or otherwise.”²³⁰ The Second Circuit expressed these concerns in *Broderson*, a complicit-entruster case, while the Sixth Circuit expressed them in *Moored*, a remote-connection case.²³¹ Part III.A has demonstrated, however, that both of these categories of cases are entirely consistent with outcomes available in non-victim-requirement circuits. Part IV.A showed that the victim requirement is not a necessary limiting principle because the same limit can be assured by the requirement that the defendant “abuse” a position of trust.

2. Examples in the Application Notes.

The second justification that courts have offered for the victim requirement is that the requirement is implied by the choice of examples in USSG § 3B1.3, each of which “involve[s] factual situations in which the defendant occupies a position vis-à-vis the victim that is in the nature of a fiduciary relationship.”²³² This justification assumes that because the examples in the commentary share a common property, that property creates an additional requirement. Courts have rejected this assumption when interpreting other guidelines.²³³ Although the Application Notes to the Guidelines are generally binding,²³⁴ the examples included in the Application

²²⁸ See note 115 and accompanying text.

²²⁹ *Broderson*, 67 F3d at 455.

²³⁰ *Moored*, 997 F2d at 145.

²³¹ See notes 78–79 and accompanying text.

²³² *United States v Jolly*, 102 F3d 46, 48 (2d Cir 1996).

²³³ See, for example, *United States v Lambert*, 498 F3d 963, 969–71 (9th Cir 2007) (noting that a majority of circuits declined to read a misrepresentation requirement into § 2B1.1(b)(8)(A) or its predecessor); *United States v Lewis*, 93 F3d 1075, 1082 (2d Cir 1996) (declining to read a shell corporation requirement into § 2T1.1).

²³⁴ See *Stinson v United States*, 508 US 36, 38 (1993) (“[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”).

Notes are generally illustrative rather than exhaustive.²³⁵ The wording of the Application Notes to § 3B1.3 is consistent with this assumption. For example, the three examples in Application Note 1 all illustrate the “professional or managerial discretion” standard; there is no indication that they are meant to limit the scope of the guideline in any other way.²³⁶ Accordingly, any similarity between the small number of examples in the Application Notes cannot provide a sufficient justification for the victim requirement. In any case, the definition of “abuse” proposed by this Comment is equally consistent with the examples in the Application Notes.

3. Subjectivity.

The third justification that courts have offered for the victim requirement is that, because the guideline is meant to be subjective, the position of trust must be assessed “from the perspective of the victim.”²³⁷ This formulation derives from *Hill*, where it appeared as dicta in a footnote, accompanied by no justification.²³⁸

Much of this formulation’s salience derives from the fact that it has an additional meaning apart from the victim requirement. In addition to emphasizing the victim, the formulation suggests that “position of trust” should be defined subjectively rather than objectively: a defendant who provides victims with indicia that he legitimately holds a position of trust may be eligible for the position of trust enhancement even if he does not really hold the position in question.²³⁹ Pretending to hold a position of trust is enough.

²³⁵ See USSG § 1B1.1, Application Note 2; *United States v Wiant*, 314 F3d 826, 829 (6th Cir 2003) (“The examples listed in the application notes are obviously illustrative not exhaustive, and thus provide no mandate for limiting the scope of the enhancement’s actual language.”).

²³⁶ See USSG § 3B1.3, Application Note 1.

²³⁷ *Castagnet*, 936 F2d at 62.

²³⁸ See *Hill*, 915 F2d at 506 n 3. Although *Hill* has been overruled on other grounds, the “perspective of the victim” formulation has lived on. See notes 85 and 87.

²³⁹ See, for example, *United States v Queen*, 4 F3d 925, 929 (10th Cir 1993):

This focus suggests that the question of whether an individual occupies a position of trust should be addressed from the perspective of the victim. A defendant who convinces a third party that he occupies a formal position of trust may possess the same freedom to commit a difficult-to-detect crime as an individual who actually possesses such a position.

(citations omitted). See also *United States v Trammell*, 133 F3d 1343, 1355 (10th Cir 1998):

To invoke § 3B1.3, the defendant must either occupy a formal position of trust or must create sufficient indicia that he occupies such a position of trust that he should be held accountable as if he did occupy such a position. . . . The question of whether an individual occupied a position of trust is evaluated from the victim’s perspective.

(quotation marks and citations omitted).

The initial version of USSG § 3B1.3 was silent on whether the position of trust enhancement applied in such instances.²⁴⁰ *Castagnet* cites legislative history to suggest that the legislature did intend for “position of trust” to be defined subjectively, and it endorses the “perspective of the victim” formulation on this basis.²⁴¹ The endorsement is thus entirely unrelated to the victim requirement. Even if position of trust is a subjective standard, nothing prevents the position from being assessed from the perspective of an entrusting party that is not a victim.

Moreover, in response to *Castagnet*, Application Note 3 to § 3B1.3 was amended to specify that the enhancement “also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not,”²⁴² thus rendering the “perspective of the victim” formulation obsolete. Because this new language includes the word “also,” it cannot be read to limit the position of trust enhancement. Instead, it merely expands the enhancement to include a defendant who occupies a position of trust from the subjective perspective of the victim, even if the defendant is merely pretending to hold the position. Nothing in the new language prevents any court from continuing to apply the enhancement to a defendant who actually holds a position of trust with the victim or with any other party.

* * *

In summary, courts have failed to articulate a convincing legal basis for the victim requirement. The requirement is not necessary to avoid overbreadth, it is not compelled by the examples in the Application Notes to USSG § 3B1.3, and it does not follow from the subjective nature of § 3B1.3. Moreover, the requirement has no basis in the text of USSG § 3B1.3. Rejecting the victim requirement is consistent with the Guidelines relevant-conduct sentencing scheme.²⁴³ Accordingly, courts should abandon the requirement.

CONCLUSION

The victim requirement for the position of trust enhancement lacks a strong legal foundation and is rendered unnecessary by the

²⁴⁰ See USSG § 3B1.3 (1988).

²⁴¹ *Castagnet*, 936 F2d at 62, quoting 134 Cong Rec at H 11257 (cited in note 83).

²⁴² USSG § 3B1.3, Application Note 3.

²⁴³ See Part II.B.

requirement that the defendant abuse a position of trust. Clarifying the definition of “abuse” would help to unify the circuits. Accordingly, courts should hold that a defendant abuses a position of trust only when the defendant uses professional or managerial discretion in a manner contrary to, rather than merely in complicity with, the interests of the entrusting party. This requirement is better grounded in the text of § 3B1.3, avoids unnecessarily expanding the definition of “victim,” and resolves parallel-offense cases without sacrificing the correct outcome in remote-connection and complicit-entruster cases. In light of these considerations, it is time for courts to admit that the victim requirement is a fiction and abandon the requirement for good.

