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Restrain Your Enthusiasm: *United States v. Taylor* and Robbery Enhancement for Restraint of a Victim

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RESTRAIN YOUR ENTHUSIASM: *UNITED STATES v. TAYLOR* AND ROBBERY ENHANCEMENT FOR RESTRAINT OF A VICTIM

Abstract: In February 2020, the Second Circuit held in *United States v. Taylor* that the Federal Sentencing Guidelines' enhancement for physical restraint of a victim did not apply to a defendant who threatened a victim with a gun during a robbery. In reaching its decision, the court created a three-part test to determine when a defendant restrained a victim during a robbery. The *Taylor* test provides a much needed limitation on the scope of the enhancement—the application of which has expanded in the First, Fourth, and Tenth Circuits to defendants who did no more than briefly point a gun at a victim. This Comment examines the different approaches to applying the restraint enhancement and their compatibility with the goals of the Federal Sentencing Guidelines. It argues that the test that the Second Circuit proposed in *Taylor* is the most straightforward and effective way to increase clarity and reduce disparity between similarly situated defendants.

INTRODUCTION

A man walked into a bank in Utah, told the occupants not to move, and pointed a gun around the room before robbing the bank.[1] The Tenth Circuit found that he used force to "physically restrain" the bank occupants by pointing a gun to stop them from walking around or leaving.[2] In New York, however, when a man walked into a store, pulled out a gun, and ordered the clerk not to turn around before robbing the store.[3] The Second Circuit found that the

[1] United States v. Miera, 539 F.3d 1232, 1233 (10th Cir. 2008). In *United States v. Miera*, which the Tenth Circuit decided in 2008, the defendant and an accomplice entered a bank, ordered occupants to "put their hands up" and said "don't move" before pointing a realistic-looking pellet gun around the room at customers. *Id.* The Tenth Circuit affirmed two sentencing enhancements to increase the defendant's sentencing range: one for brandishing a dangerous weapon, a pellet gun, and another for physically restraining the victims by pointing the same pellet gun at bank occupants to prevent them from impeding the robbery. *Id.* at 1234.

[2] *Id.* at 1234; *see* U.S. SENT'G GUIDELINES MANUAL § 1B1.1 cmt. 1(L) (U.S. SENT'G COMM'N 2018) (providing an enhancement for the "physical restraint of a victim"). The Sentencing Guidelines define "physical restraint" as the use of force to restrain a victim such as "being tied, bound, or locked up." *Id.*

[3] United States v. Paul, 904 F.3d 200, 201 (2d Cir. 2018). In 2018, in *United States v. Paul*, the Second Circuit considered a defendant and two accomplices who entered a pharmacy. *Id.* One accomplice drew a firearm and warned the clerk "if you turn back around I'm going to shoot you" before directing the clerk to empty money out of the store safe. *Id.* The Second Circuit approved the application of a seven-year mandatory minimum for brandishing a firearm but remanded to the district court for sentencing after finding that the defendant did not forcibly restrain a victim. *Id.* at 202, 204.

robber did not "physically restrain" the clerk because the robber did no more than tell him not to move and such immobilizing orders are a part of most robberies.[4] Despite the similar actions of the two men, the bank robber in Utah faced a sentence ten to twenty-one months longer than the robber in New York, based only on the courts' differing interpretations of the two words "physical restraint."[5]

In 2020, in *United States v. Taylor*, the Second Circuit addressed the disagreement between circuits regarding the application of the restraint enhancement.[6] The Second Circuit found that courts improperly applied the enhancement to a defendant who had merely implied the presence of a gun to victims.[7] In reaching this decision, the court proposed a three-part test for the application of the restraint enhancement.[8]

Part I of this Comment discusses the history and purpose of the United States Sentencing Guidelines as well as the facts of *Taylor*.[9] Part II explores the test for applying the restraint enhancement proposed in *Taylor* and similar tests

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[4] *See id.* at 204 (describing the defendant's instructions ordering the clerk to move to the cash register as more restrictive than ordering victims to lie on the floor, but less restrictive than moving victims into another room or vault).

[5] *Compare Paul*, 904 F.3d at 203 (refusing to apply the physical restraint enhancement for merely using a weapon to threaten a victim), *and* United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) (noting that the physical restraint enhancement is not applicable where a defendant has not used force to physically restrict a victim's movements), *with Miera*, 539 F.3d at 1234 (finding that a defendant did use physical restraint because the gun prevented the victim from physically moving). In 2018, in *Paul*, the Second Circuit held that the restraint enhancement required a defendant to do something more than command victims to lie down on the ground. 904 F.3d at 203. The court concluded that such a command is a feature of nearly all robberies and by creating a separate enhancement for physical restraint the Commission implied conduct beyond that of the typical robbery. *See id.* (explaining that the Sentencing Commission, by including the examples of tying, binding, or locking up victims, emphasized the physical nature of the enhancement); *Anglin*, 169 F.3d at 164 (declining to adopt the government's argument that repeatedly forcing a victim to lie down and stand up at gunpoint qualifies as restraint). The Tenth Circuit also thought that there must be action beyond holding a gun to apply the restraint enhancement but held in 2008, in *Miera*, that pointing a gun at a particular individual or commanding victims not to move is additional behavior that goes beyond merely brandishing a weapon. *See* 539 F.3d at 1234 (declaring that physical restraint occurs if a victim is "specifically prevented at gunpoint" from movement to facilitate the crime); United States v. Pearson, 211 F.3d 524, 525–26 (10th Cir. 2000) (applying the enhancement when the defendant uses any force, "including force by gunpoint," to prevent victims from interfering with the offense (quoting United States v. Fisher, 132 F.3d 1327, 1329–30 (10th Cir. 1997))); U.S. SENT'G GUIDELINES MANUAL §§ 2B3.1(b)(2), 5(A) (providing the enhancement and the sentencing table).

[6] 961 F.3d 68, 81 (2d Cir. 2020). The defendant, Xavier Oneal, did not actually have a firearm on his person during the commission of the robberies but purportedly placed his hand on his belt in a manner that implied the presence of a gun to the victims. *Id.* at 72.

[7] *Id.* at 81.

[8] *See id.* at 79 (providing the three prongs of the test: that the restraint be (1) actual restraint rather than mere use of force, (2) physical in nature, and (3) used to facilitate the robbery); *see also infra* notes 53–56 and accompanying text (explaining the elements of the *Taylor* test).

[9] *See infra* notes 12–49 and accompanying text.

that other circuits have used.[10] Finally, Part III argues that a standardized test is needed for the application of the restraint enhancement and that the *Taylor* test is the clearest and most aligned with the goals of the Sentencing Guidelines.[11]

I. The Sentencing Guidelines and an Overview of *Taylor*

Since the Sentencing Reform Act of 1984, the U.S. Sentencing Guidelines (Guidelines) have greatly influenced the sentencing decisions of judges around the country.[12] Section A of this Part discusses the Guidelines generally and their role in determining the punishment of convicted defendants.[13] Section B reviews the procedural history and factual background of *United States v. Taylor*.[14]

A. The U.S. Sentencing Guidelines

In 1984, Congress enacted the Sentencing Reform Act, which created the U.S. Sentencing Commission (Commission) to draft the Guidelines and reign in the discretion of federal trial judges during sentencing.[15] Although the basic

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[10] *See infra* notes 50–90 and accompanying text.

[11] *See infra* notes 91–122 and accompanying text.

[12] *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 18 U.S.C. §§ 3551–3559 and 28 U.S.C. §§ 991–998) (creating the U.S. Sentencing Commission); United States v. Booker, 543 U.S. 220, 233–34 (2005) (explaining that the mandatory Guidelines often had more control over federal sentencing decisions than the judge); Ryan W. Scott, *Inter-judge Sentencing Disparity After* Booker*: A First Look*, 63 Stan. L. Rev. 1, 6–14 (2010) (discussing the history and purpose of the Guidelines as well as their success at reducing sentencing disparity).

[13] *See infra* notes 15–35 and accompanying text.

[14] *See infra* notes 36–49 and accompanying text.

[15] *See* 18 U.S.C. §§ 3551–3559 (delineating factors a court should consider in crafting a sentence for a convicted person); 28 U.S.C. §§ 991–998 (establishing the U.S. Sentencing Commission). Before the Sentencing Reform Act of 1984, federal trial judges had extreme discretion to "personalize" sentencing decisions, which in practice generated widely disparate sentences among similarly situated defendants. *See* U.S. Sent'g Guidelines Manual § 1B1.13 (U.S. Sent'g Comm'n 2018) (preventing disparate sentences by requiring courts to sentence within the Guideline range except in "extraordinary and compelling" circumstances subject to appellate review); U.S. Sent'g Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 8 (1987), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf [https://perma.cc/3CR8-222N] (explaining the Commission's intention to constrain untethered judicial discretion). The Commission is an independent arm of the judiciary tasked with adding transparency and consistency to the sentencing process by categorizing and grading offenses, unifying sentencing provisions, and limiting the total permissible punishment. Supplementary Report, *supra*, at 7–8. The Commission's first version of the Guidelines was mandatory and obligated courts to sentence within the calculated Guideline range except in exceptional circumstances. Scott, *supra* note 12, at 9–10. The mandatory Guidelines did reduce sentencing disparity. *See id.* at 9 (measuring a drop in inter-judge sentencing disparity between 1987 and 2004 and attributing the decrease to this first version of the Guidelines). The early Guidelines also attracted criticism for their inflexibility and the power they gave prosecutors to determine sentences based on how they charged crimes. *See id.* (noting that some commentators thought judges should have more discretion to create unique sentences for each defendant). Despite the criticism, Congress opted to make the

method for applying the Guidelines has remained the same since 1987, Congress altered the modern Guidelines to allow judges more flexibility to sentence outside of the calculated Guideline range as the Supreme Court mandated in 2005 in *United States v. Booker*.[16]

The Commission designed the Guidelines to accomplish three goals: increase transparency, reduce disparity, and achieve proportionality in sentencing.[17] Following a conviction for a felony offense, a defendant encounters the Guidelines when the court endeavors to determine an appropriate sentence.[18] The Guidelines provide federal judges with a suggested range of imprisonment based both on characteristics inherent in the offense and the defendant's particular conduct.[19] The calculation begins by locating the "base offense level"

Guidelines even less flexible in 2003 with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act. *See* PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–76 (2003) (codified as amended at 18 U.S.C. § 3553(b)(2)) (reducing the circumstances in which a court could vary from the calculated Guideline range); Scott, *supra* note 12, at 11 (explaining that the PROTECT Act removed even more judicial discretion).

[16] *See* 543 U.S. at 246 (finding that mandatory Guidelines were unconstitutional); Scott, *supra* note 12, at 41 (describing an uptick in sentencing disparity since *Booker*, although not rising to the 1980s pre-Guidelines levels). Today, the Guidelines are no longer mandatory following the 2005 Supreme Court decision in *United States v. Booker*, which found that mandatory sentencing Guidelines violated the Sixth Amendment. 543 U.S. at 264–65; *see* U.S. SENT'G GUIDELINES MANUAL § 1A2 (explaining the new advisory role of the Guidelines). Specifically, the old, mandatory Guidelines required judges to make findings of fact to determine a defendant's maximum sentence, a role the Constitution reserved exclusively for the jury. *Booker*, 543 U.S. at 265. To remedy this unconstitutional feature after *Booker*, the Court excised the mandatory portion of the Sentencing Reform Act, rendering the Guidelines "advisory." *Id.* at 246. Following *Booker*, the Act still requires judges to calculate the Guideline range and consider it on the record during sentencing. Scott, *supra* note 12, at 13. Now, however, judges are free to use their discretion to impose a sentence outside of the recommended range, but such decisions are still reviewable for abuse of discretion. *Id.*

[17] U.S. SENT'G GUIDELINES MANUAL § 1A1.3. The Commission's first goal was honest sentencing practices, achieved by clearly communicating the expectations of the Guidelines and thus avoiding confusion and implicit deception critiqued in the pre-Guidelines sentencing system. *Id.* Second, the Commission defined disparity as different sentences imposed upon similar criminals for committing similar offenses. *Id.* The Commission identified diverging applications of enhancements as a source of disparity that the Guidelines sought to eliminate, yet they were not able to reach a completely satisfying solution to the problem. *See id.* (explaining that all Guidelines that the Commission promulgates are the result of compromise and not a single unified rationale). Finally, the Guidelines system aims to generate appropriately different sentences for criminal activity of differing severity. *Id.*

[18] 18 U.S.C. § 3553(b) (requiring judges to calculate and consider the applicable Guideline range during sentencing decisions); *see Booker*, 543 U.S. at 233 (excising the portion of the statute which made the Guidelines mandatory). The Guidelines aim to standardize the federal sentencing process by giving judges a range of acceptable sentences tailored to defendants. *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.2 (explaining that Congress gave the Sentencing Commission the authority to "review and rationalize" federal sentencing practices).

[19] U.S. SENT'G COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2 (2011), https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf [https://perma.cc/UAF7-BXJS].

associated with the conviction in the Guidelines Manual.[20] The base level offense increases with the severity of the crime.[21] A court may add one or more "enhancements" to increase or decrease the severity of the base level offense.[22] Several enhancements are available for each type of offense.[23] Enhancements allow the court to adjust a sentence to reflect a defendant's additional criminal conduct during the commission of the offense.[24] The probation officer scores the total level of the offense with the defendant's "criminal history category" to generate the suggested Guideline range of imprisonment.[25]

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[20] U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(3). The Guidelines provide different base offense levels for crimes based on the Sentencing Commission's evaluation of the severity of the conduct inherent in the offense, and the base offense level impacts the suggested sentencing range. *See* SUPPLEMENTARY REPORT, *supra* note 15, at 17–19 (describing the considerations, such as consistency and rationality, that led to the development of the base-level offense system). A parole officer, a specialist in such calculations, makes the first Guideline calculations in a document called a Presentence Report (PSR). *Presentence Overview*, U.S. PROB. OFF. FOR THE W. DIST. OF TEX., https://www.txwp.uscourts.gov/presentence-overview/index.html [https://perma.cc/3XPV-LAV2]. Although not binding on the court, the predictions made in the PSR regarding criminal history, enhancements, and departures serve as the starting point for the sentencing process. *See The Presentence Report*, U.S. PROB. OFF. FOR THE W. DIST. OF TEX., https://www.txwp.uscourts.gov/presentence-report/index.html [https://perma.cc/NJ75-XYLR] (describing the individual parts of the PSR, such as criminal history, history of the case, and a victim impact statement). The PSR outlines the specific history of the defendant and the facts of the case for the court to use as a reference in the sentencing process and might include a recommendation for Guideline departures. *Id.* A court may elect to depart from the Guideline range if a case presents atypical or extreme factors. U.S. SENT'G GUIDELINES MANUAL § 1A1.4(b) (elaborating that although the court has the discretion to depart from the Guideline range, departures are subject to review on appeal).

[21] OVERVIEW, *supra* note 19, at 2; *see* U.S. SENT'G GUIDELINES MANUAL § 5(A) (providing the Guidelines' sentencing table).

[22] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1 cmt. n.4(A)–(B) (referring to an adjustment on the defendant's base level of offense as an "enhancement"). The Guidelines provide a limited number of enhancements for each offense relating to additional conduct associated with the offense. *Id.* Enhancements are cumulative and a court may apply multiple enhancements to a single Guideline offense. *Id.*

[23] *See id.* § 1B1.1(a)(3) (describing how the court might apply an enhancement in circumstances such as when: the case involved vulnerable victims, the defendant played a key role in a criminal enterprise, and the crime involved instances of obstruction of justice). *See, e.g.*, *id.* § 2B3.1 (b)(1)–(7) (noting seven enhancements to the base level offense of robbery).

[24] *See* U.S. SENT'G COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION—HOW THE GUIDELINES WORK 2 (2011), https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf [https://perma.cc/UAC2-AJ2U] (describing that enhancements provide incremental punishment options for significant additional criminal conduct).

[25] *See* U.S. SENT'G GUIDELINES MANUAL § 5(A) (providing the sentencing range table). A defendant's criminal history category is one of three factors used to calculate a defendant's Guideline sentencing range, along with the facts of the instant offense and enhancements. *See id.* (demonstrating that a defendant with a lower criminal history category will have a lower Guideline sentencing range than a defendant with a higher criminal history category). A court calculates a defendant's criminal history category by placing their past convictions into the Guidelines' standardized grid to place the defendant in a criminal history category from I to VI. *Id.*; *see* OFF. GEN. COUNS., U.S. SENT'G COMM'N, CRIMINAL HISTORY GUIDELINE PRIMER 1 (June 2016), https://www.ussc.gov/sites/default/files/pdf/training/primers/2016_Primer_Criminal_History.pdf [https://perma.cc/UY95-Q69W] (explaining that category I is the least serious and category VI is the most severe). The probation officer

Despite the Commission's progress toward standardizing the federal sentencing process, disparate sentencing of similarly situated defendants remains an issue.[26] A common source of disparity occurs when a court uses a single instance of a defendant's conduct to justify the application of multiple enhancements, known as "double counting."[27] Courts disagree on if and when double counting is permissible and, as a result, can generate very different sentencing ranges for similarly situated defendants.[28] Courts double count by reg-

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weighs each of a defendant's prior convictions according to the seriousness of the offense listed in the Guidelines. GUIDELINE PRIMER, *supra*, at 2–3 (explaining that a past felony conviction will count more heavily towards raising a defendant's criminal history category than, for example, a misdemeanor conviction). The greater the number and severity a defendant's past convictions, the higher their criminal history category. *Id.* at 1. This standardized method of calculation attempts to provide the court with a measure of a particular defendant's dangerousness based on their past criminal behavior. *See id.* (describing the method of scoring past convictions to generate a criminal history category).

[26] James M. Anderson et al., *Measuring Inter-judge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. L. & ECON. 271, 304 (1999). The degree to which the mandatory Guidelines reduced sentencing disparity between similarly situated defendants is still a topic of debate. *See id.* at 279 (explaining that sentencing disparity can be a difficult thing to measure and that there are multiple studies exploring the possible reduction in sentencing disparity). It is clear, however, that the introduction of the mandatory Guidelines in 1984 reduced, but did not eliminate, disparity between similarly situated defendants. *See id.* at 303 (concluding, based on survey data of judge's decisions before and after the Commission introduced the Guidelines, that inter-judge sentencing disparity decreased). Disparity may be on the rise following *Booker*, although not to pre-guideline levels. *See Booker*, 543 U.S. at 245 (rendering the Guidelines advisory); Scott, *supra* note 12, at 41 (stating that empirical data indicates that disparity has risen following *Booker*). The comparative stability after the shift to advisory Guidelines may be because recommended sentences serve to "anchor" judges within the suggested range. *See* Scott, *supra* note 12, at 45–46 (explaining that the "anchoring" effect of the suggested Guideline sentence may contribute to reducing disparity after *Booker*).

[27] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1(4)(B) (explaining that courts ought to apply multiple robbery enhancements cumulatively only for different harm arising out of the same conduct); Jacqueline E. Ross, *Damned Under Many Headings: The Problem of Multiple Punishment*, 29 AM. J. CRIM. L. 245, 300, 306 (2002) (identifying that courts' differing policies regarding double counting can lead to variable punishment for similarly-situated defendants and noting that the Guidelines are silent on the issue). For example, a court properly applies enhancements for both official victim and bodily injury to a defendant who shot a police officer, but it is improper to apply an enhancement for abduction and restraint when a defendant forced a victim to walk across the room. *See* Ross, *supra*, at 306 (advocating against applying enhancements where a defendant's conduct is contained within the core offense). Courts will consider all relevant conduct, including criminal acts that an accomplice or coconspirator committed which were reasonably foreseeable to the defendant, when choosing enhancements. U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a)(1). In many cases, a court will count one set of circumstances or conduct towards multiple enhancements under the Guidelines, thus double counting. Ross, *supra*, at 247.

[28] *Compare* United States v. Victor, 719 F.3d 1288, 1290 (11th Cir. 2013) (affirming that application of the restraint enhancement for a defendant who moved a bank teller a few steps without touching her while pretending to have a gun), *with* United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) (holding that pointing a gun and instructing victims to "get down" is insufficient to qualify as physical restraint). The type of double counting seen in the Eleventh Circuit in 2013, *United States v. Victor*, occurs despite the Guideline prohibition against applying enhancements where the guideline for the offense specifically incorporates an enhancing factor. *See* U.S. SENT'G GUIDELINES MANUAL § 3A1.3 cmt. 2 (defining and discouraging double counting); *see also Victor*, 719 F.3d 1290 (counting the defendant's actions towards an enhancement in the manner described).

ularly applying enhancements based on conduct that is inherent in a crime, which commentators see as undermining the goals of the Guidelines.[29] When courts apply multiple enhancements for a single instance of conduct, they counteract the Guidelines' mission of reducing sentencing disparity and promoting fairness to defendants.[30]

The crime of robbery and its associated enhancements provide an excellent illustration of the disparity created when courts have different theories of enhancement application.[31] Robbery has a Guideline base level of twenty, which translates to a recommended sentence between thirty-three and eighty-seven months of imprisonment, depending on the defendant's criminal history category.[32] But not all courts apply the enhancements associated with robbery in the same manner.[33] Consequently, some circuits will punish a defendant who

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[29] *See* Ross, *supra* note 27, at 299 (explaining that double counting is not prohibited by the text of the Guidelines, but that it varies by jurisdiction when it is appropriate to do so). The Guidelines condone some forms of double counting because the defendant's single action produces multiple harms. *See id.* (providing the example of a defendant's extensive planning to support an enhancement for a leadership role in a conspiracy and also a "more than minimal planning" enhancement). But disparity may arise when the Guidelines are silent on whether courts may apply certain enhancements jointly and some jurisdictions double count despite the silence. *See id.* at 300–01 (advocating that courts should avoid applying enhancements jointly where the Guidelines have not explicitly authorized double counting to avoid injustice and disparity).

[30] *See, e.g.*, United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) (explaining that the Commission designed the enhancements to work against double counting). Circuit courts, however, differ over whether the Commission intended to discourage double counting. *See* Ross, *supra* note 27, at 300 (stating that the Guidelines support conflicting interpretations).

[31] *See* U.S. SENT'G GUIDELINES MANUAL § 2B3.1 (providing the elements of robbery); Carolyn Barth, *Aggravated Assaults with Chairs Versus Guns: Impermissible Applied Double Counting Under the Sentencing Guidelines*, 99 MICH. L. REV. 183, 186 (2000) (examining the disparate application of the restraint and abduction enhancements to robbery). For example, courts often apply robbery enhancements for both abduction and physical restraint arising out of the same instance of harm. *Id.*; *see* United States v. Smith, 320 F.3d 647, 658 (6th Cir. 2003) (finding that double counting the same conduct towards application of restraint and abduction enhancements was not impermissible); United States v. Gall, 116 F.3d 228, 230 (7th Cir. 1997) (rejecting defendant's argument that a single act can constitute either abduction or restraint but not both). *But see* United States v. Strong, 826 F.3d 1109, 1117 (8th Cir. 2016) (applying concurrent restraint and abduction enhancements only when the defendant engaged in two separate acts, each justifying one enhancement).

[32] U.S. SENT'G GUIDELINES MANUAL § 5(A). Robbery is typically a matter of state law, but the Hobbs Act incorporated the offense into federal law when a criminal uses threats or violence to interfere with interstate commerce. *See* 18 U.S.C. § 1951(b)(1) (codifying the federal charge of Hobbs Act robbery). In *Taylor*, the defendant was charged with Hobbs Act robbery. United States v. Taylor, 961 F.3d 68, 72 n.2 (2d Cir. 2020). The basic elements of robbery under the Hobbs Act are "the unlawful taking or obtaining of personal property" from a person against their will using "actual or threatened force, or violence, or fear of injury" to the victim or another. 18 U.S.C. § 1951(b)(1).

[33] *See generally* David J. Sandefer, Comment, *To Move or Not to Move? That Is the Metaphysical Question*, 85 U. CHI. L. REV. 1973 (2018) (commenting on a circuit split over when to apply the abduction enhancement for the crime of robbery and whether courts should apply the abduction and restraint enhancements together). Courts that apply the restraint enhancement more liberally tend to emphasize minor aspects of the defendant's behavior that are not perfectly captured by the basic elements of robbery or another enhancement. *See, e.g.*, United States v. Pearson, 211 F.3d 524, 526 (10th

displays a gun as they attempt to flee separately for both brandishing a firearm and restraint even though both actions are implicit to crime of armed robbery.[34] A circuit split over the application of the restraint enhancement risks disparity and inconsistent outcomes between similarly situated defendants.[35]

B. The Second Circuit's Approach to the Restraint Enhancement

In 2020, in *United States v. Taylor*, the Second Circuit held that the physical restraint enhancement, § 2B3.1(b)(4)(B), was not applicable to a defendant who implied the presence of a gun to victims during the commission of a robbery.[36] The Government charged the defendant, Oneal, following the robbery of four cell phone stores.[37] During the first three robberies, Oneal entered the store with his hand in his waistband, behaving as if he had a gun inside his jacket, and advised the occupants of the store "this is a robbery" and to "get in the back."[38] Finally, Oneal commanded the customers not to do something "stupid" before herding the employees into a back room while a coconspirator stole cash and merchandise.[39] A customer interrupted the fourth and final robbery by announcing that he was a police officer and arrested Oneal after a brief chase.[40] The jury found Oneal guilty by plea agreement of one count of robbery.[41] The plea agreement's sentencing prediction was based on the parole

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Cir. 2000) (finding that applying enhancements for the use of a firearm and restraint of a victim did not constitute double counting because brandishing a gun at a victim does not inevitably restrain the victim, even if the restraint resulted from that very brandishing); United States v. Nelson, 137 F.3d 1094, 1112 (9th Cir. 1998) (upholding the application of both a firearm and a restraint enhancement based on an accomplice's single act of pointing a gun at a victim because the use of a firearm in this manner does not encompass the threat of death to the victim).

[34] U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(2); *see, e.g.*, United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006) (holding that the court properly applied the restraint enhancement together with a firearm enhancement).

[35] *Compare Taylor*, 961 F.3d at 81 (finding that the restraint enhancement was not applicable to a defendant who behaved as if he had a gun to lead victims to another room), *with* United States v. Victor, 719 F.3d 1288, 1289 (11th Cir. 2013) (finding that the restraint enhancement was properly applied to a defendant who behaved as if he had a gun to lead victims to another room). The variable way in which the circuits apply the restraint enhancement is precisely the type of unfair sentencing practice the Commission sought to avoid by enacting the Guidelines. *See* SUPPLEMENTARY REPORT, *supra* note 15, at 9. (describing the bi-partisan goal of the Guidelines as curtailing unwarranted disparity and unequal sentences for similar defendants).

[36] 961 F.3d at 81.

[37] *Id.* at 71–72. Oneal was one of two defendants tried in connection with the four cellphone store robberies. *Id.* at 72.

[38] *Id.* at 72.

[39] *Id.*

[40] *Id.*

[41] *Id.* In the plea agreement, the Government made predications as to the potential length of Oneal's sentence based on the PSR and statements about the defendant's criminal history category, applicable enhancements, and other factors. *Id.* at 82 (citing United States v. Wilson, 920 F.3d 155, 163 (2d Cir. 2019)). In *United States v. Wilson*, in 2019, the Second Circuit wrote that it is "good practice" for the government to provide defendants with an estimated Guideline range in plea deals to avoid unfair-

office's presentence report (PSR) calculations, but the district court differed from the prediction by applying enhancements for the use of a dangerous weapon and restraint of a victim.[42] With these adjustments, Oneal's total offense level reached twenty-seven, which together with a criminal history category of IV generated a recommended Guideline range of 130 to 162 months.[43]

Oneal appealed his sentence, arguing that the court had incorrectly applied the dangerous weapon and restraint enhancements.[44] Specifically, he claimed that because he had not bound, tied, or even touched the victims during the robbery, the trial court had erred by applying the restraint enhancement.[45] The Second Circuit ultimately agreed.[46] The court focused on the plain meaning of the words "physical restraint" and used the commentary's exam-

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ness. *See* 920 F.3d at 158–61, 163 (noting that the defendant pleaded guilty to a drug conspiracy charge based on a sentencing estimate the government provided, only to have the government advocate for a higher Guideline range at the sentencing hearing). Broadly speaking, however, the Guidelines do not allow prosecutors to bind a court to a sentencing range agreed upon or estimated in a plea bargain. *See generally* John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentencing Bargains*, 36 HOFSTRA L. REV. 63 (2008) (discussing the Commission's alterations of prosecutorial bargaining power with defendants and advocating for an expanded role for plea bargains under the Guidelines). In *Taylor*, the government estimated Oneal's Guideline range without the sentencing enhancement for restraint of a victim. 961 F.3d at 72.

[42] *Taylor*, 961 F.3d at 72–73. The district court also varied from the plea agreement by calculating the defendant's criminal history in category IV rather than category III, as estimated in the plea agreement. *Id.* at 73. On appeal, Oneal claimed that the government violated the plea agreement by arguing for the higher criminal history category at sentencing. *Id.* at 82. The reviewing court found this argument unconvincing because the plea bargain based the category III estimate on a mistake in the PSR. *Id.*

[43] *Id.* at 74. The district court granted the defendant a discretionary downward variance in criminal history category because the judge believed the PSR "overstated" the severity of the defendant's past crimes, bringing the Guideline range down to 100 to 125 months. *Id.* The district court sentenced the defendant to eighty-four months imprisonment, a downward departure from both the calculated Guideline range and the range estimated in the plea agreement. *Id.*

[44] *Id.* at 73. The probation office interpreted the Second Circuit's decision in 1999, in *United States v. Anglin*, to bar the application of the restraint enhancement where a defendant had done no more than immobilize victims upon threat of force. *Id.* (citing United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999)). Thus, the probation office initially shared Oneal's objection to the application of the enhancement. *Id.* Ultimately, however, it agreed with the court that the application of the enhancement was appropriate. *Id.*

[45] Brief & Appendix for Appellant Xavier Oneal at 16–17, United States v. Taylor, 961 F.3d 68 (2d Cir. 2020) (No. 18-1710), 2019 WL 3074792, at *16–17. Oneal also argued that the court applied the enhancement for the use of a weapon incorrectly because he did not possess any weapon during the robberies. *See id.* at 14–15 (objecting to the court's application of the enhancement because the defendant did not actually have a firearm and was merely pretending to have a weapon); *see also* U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(2)(E) (U.S. SENT'G COMM'N 2018) (providing the enhancement for use of a weapon during a robbery).

[46] *Taylor*, 961 F.3d at 81. It found that the dangerous weapon enhancement was inappropriate here because although using an object to create the impression of a weapon does qualify for the enhancement, using a hand to imply a separate deadly instrument is too far removed from the purpose of the enhancement. *Id.* at 75–76.

ples of tying, binding, and locking up to guide its interpretation.[47] The court noted that the application of the enhancement should only apply to behavior that is not a part of the typical armed robbery.[48] With this decision, the Second Circuit limited the application of the restraint enhancement, joining the District of Columbia, Fifth, Seventh and Ninth Circuits.[49]

II. The Second Circuit's Proposed Test for Restraint and Competing Approaches

United States v. Taylor, which the Second Circuit decided in 2020, encapsulates the tension between courts that liberally apply the restraint enhancement and those that interpret the enhancement more narrowly.[50] Section A of this Part discusses how the Second Circuit's decision in *Taylor* provided a test which limits the application of the restraint enhancement and the implications of the suggested test.[51] Section B discusses alternative approaches to the restraint enhancement that other circuits use.[52]

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[47] *See id.* at 78 (citing *Anglin*, 169 F.3d at 164) (analyzing the language of the enhancement and comments); United States v. Paul, 904 F.3d 200, 204 (2d Cir. 2018) (interpreting the enhancement language prior to *Taylor*); *see also* U.S. Sent'g Guidelines Manual § 1B1.1 cmt. n.1(L) (providing the enhancement). In *United States v. Paul*, in 2019, the Second Circuit explained that the examples of tying, binding, and locking up, although not exhaustive, demonstrate the type of conduct required to trigger the enhancement. *See Paul*, 904 F.3d at 204 (explaining that in the absence of restraint comparable to binding, locking up, or placing victims in a confining space, the enhancement is not appropriate).

[48] *Taylor*, 961 F.3d at 79. Drawing on *Paul*, the court explained that courts must reserve the enhancement for circumstances that went beyond the conduct typical of most robberies. *Id.*; *see Paul*, 904 F.3d at 204 (stating that adding the enhancement in a case where the defendant used a gun to direct the clerk to a cash register would simply add punishment to conduct inherent in most store robberies).

[49] *See* United States v. Herman, 930 F.3d 872, 875–76 (7th Cir. 2019) (clarifying that "psychological coercion" alone does not qualify as physical restraint); United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017) (holding that discharging a firearm during a robbery did not go "beyond" normal armed robbery behavior); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001) (explaining that Congress intended physical restraint to require "something more" than pointing a gun and commanding a victim once to go to the floor because nearly all armed robberies involve such behavior); United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000) (finding that pointing a gun at a victim was not "physical" within the plain meaning of the enhancement because the restraint was not physical in nature).

[50] *See* 961 F.3d 68, 77–78 (2d Cir. 2020) (citing United States v. Anglin, 169 F.3d 154, 165 (2d Cir. 1999)) (describing the enhancement as a provision intended to deal with a special circumstance and cautioning that courts must interpret it narrowly to avoid an unwarranted increase the Guidelines' base level of the offense).

[51] *See infra* notes 53–69 and accompanying text.

[52] *See infra* notes 70–90 and accompanying text.

A. The Second Circuit's Proposed Test

In *Taylor*, the Second Circuit distilled its reasoning from previous cases into a three-pronged test to restrict the application of the enhancement.[53] The test first examines the defendant's actions and requires that the restraint be physical in nature.[54] Second, the test requires that the physical contact with the victim be for the purpose of restraint.[55] Finally, the test requires that the restraint go beyond what was necessary to facilitate the commission of the crime.[56] The court sought to limit the application of the restraint enhancement to only apply in cases where the intent of the Guidelines warranted it.[57]

The first prong requires that the restraint be physical in nature.[58] The court pointed to the language the Commission chose, requiring the restraint of the victim to be "forcible," and the examples they provided of tying, binding, and locking up.[59] In this regard, the Second Circuit split from the Third, Seventh, and Ninth.[60] This language, the court explained, reveals the Commission's intention that the enhancement apply only to cases where the defendant

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[53] *Taylor*, 961 F.3d at 78–79. The Second Circuit drew heavily from its 1999 reasoning in *United States v. Anglin* to support its decision. *See id.* (emphasizing that liberal application of the enhancement is antithetical to the purpose of Guideline enhancements); *see also* 169 F.3d at 165 (articulating that the restraint enhancement applies only where a defendant's conduct goes beyond actions inherent to the crime of armed robbery). *Anglin* dealt with similar circumstances regarding the restraint enhancement and thus laid much of the groundwork for the court more than twenty years later in *Taylor*. *See Taylor*, 961 F.5d at 73 (referencing *Anglin* as an important part of the court's decision); *Anglin*, 169 F.3d at 163 (describing a defendant who pointed a gun at two bank tellers and instructed them to lie on the floor during a robbery). In *Anglin*, the court found that the district court had incorrectly applied the restraint enhancement to the defendant. 169 F.3d at 163.

[54] *Taylor*, 961 F.3d at 79.

[55] *Id.*

[56] *Id.* The court noted that, for the third prong, restraint that is inseparable from the robbery itself weighs against the application of the enhancement because such conduct would double count conduct inherent in the offense. *Id.* Ordering an employee to move to the cash register, for example, is not additional conduct separate from the robbery within the third prong of the test. *Id.* (citing United States v. Paul, 904 F.3d 200, 204 (2d Cir. 2018)).

[57] *Id.* at 78. Specifically, the court was wary of the trend of liberally applying the restraint enhancement because it effectively "increase[s] the Guidelines' base level, in what one would expect to be the considerable majority of robbery cases, from 20 to 22." *Id.* at 77–78 (quoting *Anglin*, 169 F.3d at 165).

[58] *Id.* at 78.

[59] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1 app. n.(L) (U.S. SENT'G COMM'N 2018) (providing the requirements for the restraint enhancement as well as the examples of tying, locking up, or binding a victim).

[60] *Compare Taylor*, 961 F.3d at 79 (requiring more than pointing a gun at a bank occupant to qualify for the physical restraint enhancement), *with* United States v. Copenhaver, 185 F.3d 178, 181 (3d Cir. 1999) (stating that physical restraint occurs when the victim feels they must comply with the defendant's demands), *and* United States v. Nelson, 137 F.3d 1094, 1112 (9th Cir. 1998) (leading victims from one room to another at gunpoint constitutes restraint), *and* United States v. Doubet, 969 F.2d 341, 346 (7th Cir. 1992) (explaining that a defendant restrained a victim for purposes of the enhancement where the victim felt they were not "free to leave"), *abrogated on other grounds by* United States v. Dunnigan, 507 U.S. 87 (1993).

restrained a victim's movement in a manner comparable to being tied or bound.[61] Effectively, this prong prohibits application of the enhancement in cases where the defendant had no physical contact with any victim, regardless of whether victims felt threatened by the presence of a gun or forceful language.[62]

The second prong of the proposed test requires that physical force used against a victim be for the purpose of restraint, rather than to injure or frighten a victim.[63] The court concluded that it is more consistent with the plain meaning of the word "restrain" and the Guidelines' intended application of the enhancement to separate simple battery from force used to restrain a victim.[64]

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[61] *Taylor*, 961 F.3d at 78 (citing *Anglin*, 169 F.3d at 164). In *Anglin*, the court found that an application of the restraint enhancement where the defendant had not made physical contact with a victim was invalid. 169 F.3d at 165. The court distinguished the defendant's contactless command for the victims to get on the ground while pointing a gun from behavior which is physical in nature, such as putting a boot on the throat of a victim to immobilize him during a robbery. *See id.* at 163 (citing United States v. Rosario, 7 F.3d 319, 321 (2d Cir. 1993)) (explaining that a boot on a victim's throat is different in kind and degree than merely pointing a gun). The first prong thus rejects the "psychological coercion" theory that other circuits use. *Taylor*, 961 F.3d at 78 (citing *Anglin*, 169 F.3d at 165); *see, e.g.*, *Doubet*, 969 F.2d at 347 (describing the defendant's threats to the victim and the presence of a gun as a "figurative lock and key" restraining the victim); United States v. Lucas, 889 F.2d 697, 699 (6th Cir. 1989) (upholding the district court's application of a two level increase for a defendant who forced victims to disrobe at gunpoint because the behavior "arguably" fit the restraint enhancement).

[62] *Taylor*, 961 F.3d at 78. The court noted that adoption of the first prong alone would resolve the split between the First, Fourth, and Tenth Circuits, which maintain that the psychological threat of a gun is enough to physically restrain a victim, and the other circuits, which require action beyond the mere presence of a gun to qualify as physical restraint under the Guidelines. *Id.* (citing United States v. Dimache, 665 F.3d 603, 607 (4th Cir. 2011)). *Compare Dimache*, 665 F.3d at 607 (stating that pointing a gun at a victim is automatically an indication of restraint), *and* United States v. Wallace, 461 F.3d 15, 34 (1st Cir. 2006) (finding that threatening victims with a weapon was sufficient to physically restrain them), *with* United States v. Miera, 539 F.3d 1232, 1235 (10th Cir. 2008) (explaining that restraint only applied because the defendant ordered victims not to move using a "loud, strong voice" in addition to pointing a gun around the room).

[63] *Taylor*, 961 F.3d at 78. In *United States v. Rosario*, decided in 1993, the Second Circuit noted that the "bodily injury" enhancements account for simple battery of victims, and that such uses of force do not amount to physical restraint unless the force purposefully immobilizes the victim to facilitate the offense. 7 F.3d at 321; *see* U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(3) (providing the bodily injury enhancement). The Guidelines also provide a distinct enhancement for threats of death. *See* U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(2)(F) (providing a two-level enhancement if the defendant threatened a victim with death). Despite the separate death threat enhancement for robbery, courts sometimes use threats of death to support a psychological coercion argument for application of the physical restraint enhancement. *See* United States v. Davis, 29 F. App'x 535, 537 (10th Cir. 2002) (explicitly refusing to adopt the approach in *Anglin* and finding that the trial court correctly applied the restraint enhancement to a defendant who threatened victims with death while singling each victim out with a firearm).

[64] *Taylor*, 961 F.3d at 78; *see Rosario*, 7 F.3d at 321 (using "simple battery" to describe force used to generate fear rather than to restrain a victim). The court referenced the dictionary definition of restraint: "to hold back; to check; to hold from action, proceeding, or advancing." *Taylor*, 961 F.3d at 78 (quoting *Restraint*, WEBSTER'S DELUXE UNABRIDGED DICTIONARY (1979)). The court used this definition to establish that the defendant must use force to prevent the victim from proceeding in their movement to qualify as physical restraint within the meaning of the enhancement. *Id.* In an earlier decision on the same enhancement issue, the court stated that by choosing the conjunction "such as,"

The second prong of the test thus restricts the application of the enhancement to behavior that is not addressed more aptly by another enhancement—avoiding double counting.[65]

The third prong of the test proposed in *Taylor* requires that the defendant's actions go beyond the conduct inherent in the crime of robbery.[66] The court stated that most armed robberies follow a similar pattern: the defendant enters a bank or store, pulls out or implies the presence of a gun, and instructs the occupants not to move.[67] The court cautioned that an enhancement that applies to the basic fact pattern of most robberies ceases to be an enhancement for exceptional behavior and instead becomes a de facto increase of the base level for robbery from twenty to twenty-two.[68] By limiting the application of the restraint enhancement to behavior which the base crime of robbery does not encompass, the Second Circuit expressed a desire to preserve the base level offense present in the Guidelines.[69]

B. Alternative Tests and Approaches

In *United States v. Taylor*, the Second Circuit provided a test to limit the application of the restraint enhancement.[70] Some circuit courts, in contrast, approve of the application of the restraint enhancement where a defendant does

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the Commission indicated that their examples of tying, binding, or locking up were meant to provide examples of the types of conduct required to rise above mere force to physical restraint. *Rosario*, 7 F.3d at 320–21 (citing U.S. SENT'G GUIDELINES MANUAL § 1B1.1 cmt. n.1(i)).

[65] *See Rosario*, 7 F.3d at 321 (illustrating the type of force the restraint enhancement addresses, namely force used to restrict a victim's mobility to facilitate the crime). The second prong of this test also avoids applying the restraint enhancement for the force inherent in the crime of robbery. *Id.* The court noted that applying the restraint and dangerous weapon enhancements in conjunction effectively doubled the minimum sentence in this case. *Taylor*, 961 F.3d at 82.

[66] *Taylor*, 961 F.3d at 79. In the context of *Taylor*, the court stated that a defendant's direction to clerks to move does not qualify as physical restraint because such orders are a feature of nearly all robberies. *Id.* (citing *Paul*, 904 F.3d at 204). The court noted that movement to another location can constitute restraint but only if the movement facilitates rather than constitutes the offense. *Id.* at 79–80 (citing *Rosario*, 7 F.3d at 321).

[67] *See id.* at 79 (elaborating that because most robberies are similar is this regard, it makes little sense to apply the enhancement to this basic set of conduct); *Paul*, 904 F.3d at 204 (explaining that because the defendant's instruction to the victim to go to the cash register is a staple of most robberies, it cannot be a valid basis for the application of an enhancement). This prong of the test suggests the exact inverse of the approach that the Tenth Circuit used. *See Miera*, 539 F.3d at 1233 (finding that instructions not to move issued at gunpoint do constitute physical restraint).

[68] *See Taylor*, 961 F.3d at 79 (commenting that increasing the base offense level for most robberies is likely not the intended use of the enhancement).

[69] *See id.* (emphasizing that courts ought to abide by the Guidelines' established base level offense by applying the enhancement only where merited and endeavoring to limit the enhancement's applicability); *see also Paul*, 904 F.3d at 204 (expressing the court's desire to preserve the Commission's assigned base level for robbery).

[70] *See* 961 F.3d at 78–79 (explaining the over-application of the enhancement despite the Commission's intent and advocating for a three-part test to pare down the enhancement's use in inappropriate circumstances).

no more than issue orders to victims at gunpoint.[71] Other circuits, however, require something more and have created various approaches and standards to bring more consistency to the restraint enhancement application.[72]

In 2020, in *United States v. Bell*, the Third Circuit found that forcing a victim to the ground at gunpoint was not physical restraint.[73] The court identified five factors that other courts frequently use to decide whether to apply the restraint enhancement: use of physical force, exerting control over the victim, eliminating all alternatives but compliance, extended focus on an individual victim, and confinement.[74] The court stated that none of the factors are individually dispositive, and courts should balance them as a whole to determine whether the enhancement applies.[75] The physical force requirement is very similar to the force requirement the Second Circuit described.[76] Both distinguish between the restraint described in the Guidelines and subjective psychological restraint felt by the victim.[77] The next factor, requiring the defendant to

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[71] *See, e.g.*, United States v. Dimache, 665 F.3d 603, 608 (4th Cir. 2011) (holding that a defendant physically restrained a victim by ordering them onto the floor at gunpoint); United States v. Wallace, 461 F.3d 15, 34 (1st Cir. 2006) (stating that holding a gun in front of a victim and standing in the exit constituted physical restraint); United States v. Fisher, 132 F.3d 1327, 1330 (10th Cir. 1997) (finding that a defendant who pointed a gun at a security guard's head restrained him because the gun kept the guard "at bay").

[72] *See* United States v. Bell, 947 F.3d 49, 56 (3d Cir. 2020) (describing the Third Circuit's balancing approach); United States v. Herman, 930 F.3d 872, 876 (7th Cir. 2019) (placing focus on the defendant's actions); United States v. Parker, 241 F.3d 1114, 1118 (9th Cir. 2001) (describing the sustained focus standard).

[73] *Bell*, 947 F.3d at 61 (finding that there was no physical restraint because the defendant took only a few seconds to force the victim to the ground).

[74] *Id.* at 56. The court also acknowledged that, based only on the plain language of the enhancement, the defendant did not "physically restrain" the victim by grabbing his neck, holding a fake gun to his neck, and then throwing the victim to the floor. *Id.* at 53, 55. The court emphasized that the restraint must facilitate the commission of the offense or prevent escape to qualify for the enhancement. *Id.* at 66.

[75] *Id.* at 61. Interestingly, the court only examined three of the five factors—use of physical force, alternatives to compliance, and sustained focus. *See id.* (concluding that grabbing the victim's neck and forcing him onto the floor did not meet all the requirements because, although the force was physical and the victim had to comply, the incident was too limited in duration).

[76] *See id.* at 56–57 (modeling this prong after the Second Circuit's physical force requirement in *Anglin*).

[77] *Id.* The court required that the restraining force be physical rather than psychological, explicitly adopting the reasoning in *Anglin* via the D.C. Circuit's 2000 decision in *United States v. Drew*. *See id.* at 56 (endorsing the physical force requirement in *Drew*); *see also* United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) (requiring that the defendant's restraint be physical in nature). In *Drew*, the D.C. Circuit used the Second Circuit's reasoning from *Anglin* to conclude that the defendant's restraint must be physical in nature to qualify for the enhancement. *See* United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000) (using the Second Circuit's logic to liken "physical" in the enhancement context to "physical exercise"); *see also Anglin*, 169 F.3d at 164 (analogizing "physical restraint" to "physical exercise" to illustrate that force cannot be subjective or psychological).

exert control over the victim, adopts the reasoning in *Anglin*.[78] In 1999, in *United States v. Anglin*, the Second Circuit interpreted the plain meaning of the word "restraint" to require the defendant to limit the victim's freedom of movement.[79] The third factor requires that the defendant restrain the victims' options such that they have no choice but to obey.[80] The fourth factor examines whether the defendant sustained his focus on an individual victim for an extended period of time.[81] The final factor asks whether the defendant placed the victim in a confined space.[82]

In 2019, in *United States v. Herman*, the Seventh Circuit found that the district court had incorrectly applied the restraint enhancement to a defendant who shot at two victims that were pursuing him after a robbery.[83] The court suggested that the focus of the enhancement ought to be on the defendant's

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[78] *Bell*, 947 F.3d at 57–58. Specifically, the Third Circuit concluded that the dictionary definition of restraint, to hold back or to somehow impede another from action, comports with the behavior the Guideline language intended to capture. *See id.* at 58 (citing *Anglin*, 169 F.3d at 164) (elaborating that the defendant's actions do not restrain a victim if the victim retains the option to exit). The Ninth Circuit interprets the meaning of "restraint" similarly in this regard. *See* United States v. Foppe, 993 F.2d 1444, 1452–53 (9th Cir. 1993) (relying on dictionary definitions of "restraint" and "forcible").

[79] *Anglin*, 169 F.3d at 164.

[80] *Bell*, 947 F.3d at 57–58. The court added this factor based on decisions from the Second, Seventh, Eighth, and Eleventh Circuits. *Id.*; *see* United States v. Victor, 719 F.3d 1288, 1290 (11th Cir. 2013) (preventing a victim from leaving a location restricted their options and forced compliance); United States v. Rosario, 7 F.3d 319, 321 (2d Cir. 1993) (standing on a victim's throat restricted the victim's options); United States v. Kirtley, 986 F.2d 285, 286 (8th Cir. 1993) (forcing victims to bind themselves at gunpoint constituted physical restraint because the victims had no choice but to be restrained); United States v. Doubet, 969 F.2d 341, 347 (7th Cir. 1992) (defining force as "the operation of circumstances that permit no alternative to compliance" (quoting *Force*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1981))), *abrogated on other grounds by* United States v. Dunnigan, 507 U.S. 87 (1993).

[81] *Bell*, 947 F.3d at 59. This factor, which the Fourth, Ninth, and Tenth Circuits identify, focuses on the increased level of distress that a victim experiences when a defendant singles them out. *See* United States v. Parker, 241 F.3d 1114, 1118 (9th Cir. 2001) (defining "sustained focus" as long enough to command or force a victim to walk to another location); United States v. Khleang, 3 F. App'x 672, 675 (10th Cir. 2001) (focusing on "the nature of the victim's harm" and noting it is one thing to be robbed, but another thing to be traumatized at gunpoint and ordered around); United States v. Wilson, 198 F.3d 467, 472 (4th Cir. 1999) (pointing a gun at a victim briefly to prevent her from leaving her car until the defendants finished robbing her constituted restraint).

[82] *Bell*, 947 F.3d at 60. Although the court grouped the fifth factor with the previous four as non-dispositive, the Third Circuit's previous decision in 1999, in *United States v. Copenhaver*, suggests that enclosing victims in a confined space, even if they are not secured or prevented from exiting, constitutes physical restraint. *See* 185 F.3d 178, 183 (3d Cir. 1999) (concluding that restraint applies where the defendant enclosed or confined a victim in a space with an actual or psychological barrier).

[83] 930 F.3d 872, 873–74 (7th Cir. 2019). The court pointed out that simply pointing a gun and ordering a victim not to move does not remove all the victim's options for reaction, and, therefore, they are not effectively "restrained" as if they were bound, tied, or locked up. *Id.* at 876; *see also* United States v. Taylor, 620 F.3d 812, 813–14 (7th Cir. 2010) (stating that pointing a gun and ordering a victim to open a cash drawer is not similar to tying, binding, or locking up a victim).

actions rather than the victim's *reaction*.[84] As such, the court concluded that a defendant must take some action to deprive a victim of their "freedom of personal movement" for the restraint to be physical in nature.[85] By reorienting the source of the restraint to the defendant's actions, the court required behavior beyond merely psychological restraint to apply the enhancement.[86]

Finally, in 2001, in *United States v. Parker*, the Ninth Circuit found that the restraint enhancement did not apply to a defendant whose coconspirator ordered a victim to lay down on the floor at gunpoint.[87] Similar to *Taylor,* the court in *Parker* sought to apply the enhancement only in cases where the defendant's conduct exceeded briefly pointing a gun at a victim.[88] The Ninth Circuit further clarified, however, that sustaining focus on a particular victim for an extended period of time does go beyond merely pointing a gun.[89] If a defendant forces a victim to walk to another location, keeps them stationary at gunpoint, or requires the victim to stand up and sit down multiple times, then the defendant has restrained the victim under the "sustained focus" standard.[90]

III. Refining the Application of the Restraint Enhancement

The Second Circuit's 2020 decision in *United States v. Taylor* offers an intuitive test that tailors the application of the restraint enhancement to defend-

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[84] *Herman*, 930 F.3d at 876. A victim, although threatened, might choose to ignore the order or to try to escape instead of choosing to comply and is therefore not actually restrained within the meaning of the enhancement. *See id.* (distinguishing the victim's subjective reaction to a defendant waving a gun around and shouting commands from actual restraint).

[85] *Id.* at 875 (quoting *Taylor*, 620 F.3d at 814). The court explained that although there are multiple ways to physically deprive a victim of movement, some action on the part of the defendant is required. *Id.*

[86] *See id.* (documenting the court's continued search for a way to separate "psychological coercion from physical restraint").

[87] 241 F.3d 1114, 1119 (9th Cir. 2001).

[88] *Compare* United States v. Taylor, 961 F.3d 68, 81 (2d Cir. 2020) (seeking a more limited application of the enhancement), *with Parker*, 241 F.3d at 1118–19 (restricting application of the enhancement where the defendant did no more than point a gun briefly at a victim).

[89] *Parker*, 241 F.3d at 1119. The Second and Ninth Circuits provided divergent examples of conduct which qualifies as restraint. *Compare* United States v. Thompson, 109 F.3d 639, 641 (9th Cir. 1997) (stating that ushering a victim from one location to another at gunpoint is possibly more restraining than dragging a victim along by the collar), *with* United States v. Paul, 904 F.3d 200, 203 (2d Cir. 2018) (explaining that forcing a victim to move at gunpoint is a common feature of robberies and is not comparable with the Guidelines' examples of tying, binding, or locking).

[90] *See Parker*, 241 F.3d at 1118–19 (hypothesizing that Congress intended physical restraint to imply more than briefly pointing a gun at a victim and commanding them to the floor because nearly all armed robberies involve such acts); United States v. Nelson, 137 F.3d 1094, 1112 (9th Cir. 1998) (concluding that the defendant restrained employees by moving them into a back room at gunpoint); *Thompson*, 109 F.3d at 641 (explaining that the defendant restrained a victim by ordering her to stand up and sit down multiple times at gunpoint). The court noted that a defendant can restrain a victim without physical contact, referencing the Guidelines' example of locking up as a contactless form of restraint. *Thompson*, 109 F.3d at 64.

ants who actually fit the meaning of the enhancement.[91] A uniform mechanism by which to apply the enhancement works toward the Guidelines' goals of being uniform, non-arbitrary, and transparent in sentencing robbery cases.[92] Section A of this Part discusses the necessity of a test to rein in the application of the enhancement.[93] Section B describes how the *Taylor* test is the clearest test available and most aligned with the intended purpose of the Guidelines.[94]

A. The Need for a Uniform Approach to the Restraint Enhancement

Courts need a bright line rule to direct their application of the restraint enhancement to better achieve the Commission's goals of transparency, reducing disparity, and proportionality.[95] By providing a base level of offense for a crime that applies regardless of jurisdiction, the Guidelines eliminate a source of inconsistency and arbitrary sentencing .[96] But the Guidelines cannot promote nation-wide consistency if some courts apply the restraint enhancement so broadly that it encompasses conduct inherent in the crime of robbery.[97]

The First, Fourth, and Tenth Circuits regularly apply the restraint enhancement in cases where the defendant did no more than tell victims not to move at gunpoint.[98] These circuits often focus on the victim's state of mind

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[91] *See* 961 F.3d 68, 78–79 (2d Cir. 2020) (elaborating on the purpose and intended use of the test); *see also* U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b) (U.S. SENT'G COMM'N 2018) (providing the language of the enhancement).

[92] *See infra* notes 116–122 (elaborating on the goals of the Guidelines and how the *Taylor* test furthers those goals).

[93] *See infra* notes 95–103 and accompanying text.

[94] *See infra* notes 104–122 and accompanying text.

[95] *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (elaborating that the Guidelines intend to reduce disparity by standardizing sentencing practices); SUPPLEMENTARY REPORT, *supra* note 15, at 8 (describing the bi-partisan goal of the Guidelines as curtailing unwarranted disparity and inequality of sentencing for similar defendants convicted of similar crimes).

[96] *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (balancing simple uniformity against proportionality). The Commission explained that providing a few simple categories of crimes would create Guidelines that are uniform and easy to administer, but it would come at the expense of homogenizing offenses that are different in important respects. *Id.* By establishing a national base level of offense for each specific crime, the Commission aimed to establish a basis for consistency and transparency in sentencing for the same crime while still providing ways to tailor a sentence to fit a defendant's specific conduct. *See id.* (using armed robbery and its enhancements as an example of this balance).

[97] *See Taylor*, 961 F.3d at 77 (citing United States v. Anglin, 169 F.3d 154, 165 (2d Cir. 1999)) (advocating for a narrower application of the restraint enhancement). The Second Circuit stated that liberal application of the restraint enhancement in the First, Fourth, and Tenth Circuits to scenarios that are typical to nearly all robberies effectively increases the base offense level for the crime of robbery in those courts. *Id.*

[98] *See, e.g.*, United States v. Wade, 719 F. App'x 822, 827 (10th Cir. 2017) (emphasizing that restraint occurs when a victim is "specifically prevented at gunpoint" from moving to facilitate the robbery (quoting United States v. Fisher, 132 F.3d 1327, 1329–30 (10th Cir. 1997))); United States v. McNeil, 539 F. App'x 190, 192 (4th Cir. 2013) (per curiam) (citing United States v. Dimache, 665 F.3d 603, 607 (4th Cir. 2011)) (endorsing a broad view of the enhancement, applying it if a defendant points a gun at a victim); United States v. Wallace, 461 F.3d 15, 34 (1st Cir. 2006) (defining physical

rather than the defendant's behavior when choosing to apply the enhancement.[99] Perhaps this attitude stems from the court's sympathy for the victims of armed robbery or from innate hostility towards defendants who threaten victims.[100] Regardless of the outrage a court may feel toward a defendant who "menaced" a victim during an armed robbery, the Guideline system is intended to identify a defendant's criminal behavior rather than the reaction of a third party.[101] In addition, the restraint enhancement is not the only mechanism by which a court can increase the Guideline range for robbery.[102] Applying the restraint enhancement so liberally that it impacts a defendant who does no

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restraint as whenever a victim is "specifically prevented at gunpoint from moving" (quoting *Fisher*, 132 F.3d at 1329–30)).

[99] *Compare Wallace*, 461 F.3d at 34 (justifying the application of the enhancement by describing the "intense, one-on-one nature" of a victim's experience during an armed robbery), *and Fisher*, 132 F.3d at 1329–30 (emphasizing that physical restraint may occur without physical contact if a victim feels incapable of movement or escape because of the presence of a firearm), *with* United States v. Garcia, 857 F.3d 708, 713 (5th Cir. 2017) (declining to apply the enhancement because a victim's subjective feeling of restraint is not interchangeable with physical restraint where victims are tied, bound, or locked up).

[100] *See Wallace*, 461 F.3d at 34 (describing the nature of armed robbery as "intense" and "one-on-one" for the victims). Courts with broad applications of the enhancement often use language to emphasize the terrifying nature of the victim's experience and the frightening characteristics of the defendant. *See, e.g.*, *McNeil*, 539 F. App'x at 191 (describing the defendant's conduct as "actually menacing" the victims); United States v. Miera, 539 F.3d 1232, 1235 (10th Cir. 2008) (emphasizing the defendant's "loud, strong voice," domineering nature, and "haphazard" gun use to intimidate the victims into submission); United States v. Ossai, 485 F.3d 25, 32 (1st Cir. 2007) (noting that the defendant was capable of forcing a "large and powerful man" to his knees); United States v. Khleang, 3 F. App'x 672, 675 (10th Cir. 2001) (including in the court's reasoning that the defendant was "in very close physical proximity" to the victim and spoke vulgarly).

[101] *See McNeil*, 539 F. App'x at 191 (using the term "menacing" to refer to pointing a gun at a victim). Although the Guidelines encourage judges to tailor the sentence to the facts of the case and the conduct of the defendant, the purpose of the Guidelines is to create a standardized framework for sentencing. *See* 18 U.S.C. § 3553(b)(1) (providing the factors judges must consider during sentencing); United States v. Booker, 543 U.S. 220, 250–51 (2005) (emphasizing the need to balance a judge's discretion with the Guidelines' goal of reducing sentencing disparities). Using an enhancement as a stick with which to beat an unsympathetic defendant undermines the intended use of enhancements. *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 14 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf [https://perma.cc/2UWA-L3TC] (explaining that the intended use of adjustments is to account for common mitigating and aggravating behavior across offenses).

[102] *See* U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(1)–(7) (U.S. SENT'G COMM'N 2018) (providing more than ten possible enhancements to the crime of robbery). Enhancements are available for defendants who fire, brandish, possess, or "otherwise use" a firearm during the commission of a robbery. *Id.* § 2B3.1(b)(2)(A)–(E). According to the Guidelines' application instructions, "brandished" includes display, announcement, or use of a firearm to intimidate another person for an increase of five points on the base offense level for robbery. *Id.* § 1B1.1 app. n.1(C). Based on this definition, the enhancement for brandishing a firearm is a closer fit for the threatening behavior that some circuits identified. *See, e.g.*, *McNeil*, 539 F. App'x at 191 (applying enhancements for both restraint of a victim and for brandishing a firearm arising out of a codefendant's order for a clerk to move to the cash register).

more than point a gun at a victim undermines the Commission's goal of consistency by double counting conduct inherent in the offense of armed robbery.[103]

B. The Taylor *Test Best Achieves the Goals of the Guidelines*

Of the rules for application of the restraint enhancement that the Third, Seventh, and Ninth Circuits created, the test proposed in *Taylor* best serves the purposes of the Guidelines.[104] The balancing approach that the Third Circuit outlined in 2000, in *United States v. Bell*, is an excellent survey of common factors that can lead to application of the restraint enhancement, but it ultimately fails as a useful rule for application.[105] Because the balancing approach is based on an inventory from circuits that are split on this issue, some of the factors are mutually exclusive.[106] Balancing conflicting factors is even more

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[103] *See* United States v. Paul, 904 F.3d 200, 204 (2d Cir. 2018) (warning that application of the restraint enhancement in cases where it simply adds punishment to conduct typical to most robberies is improper); United States v. Anglin, 169 F.3d 154, 165 (2d Cir. 1999) (stating that the "practical" result of defining physical restraint to include threatening victims with a gun is to increase the base level in most robbery cases, which is a "problematic effect" for a specialized enhancement); United States v. Parker, 136 F.3d 653, 654 (9th Cir. 1998) (clarifying that double counting occurs in a Guideline context when a court uses the same conduct more than once to increase a sentence); Barth, *supra* note 31, at 186 (explaining that double counting occurs when a court uses conduct that is inherent in the base offense to apply an enhancement). The Commission chose the base level of offense for each Guideline crime based on a study of enabling legislation, legislative history, empirical data, and leading theories of punishment and urges courts to avoid frivolously altering the carefully and expensively crafted Guideline system. *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (elucidating that the Commission did not select the base level of offense for each crime randomly).

[104] *See* United States v. Taylor, 961 F.3d 68, 79 (2d Cir. 2020) (explaining that the restraint enhancement is warranted only when the restraint was physical in nature, the physical force actually restrained the victim, and the restraint went beyond the conduct inherent in the robbery); United States v. Bell, 947 F.3d 49, 56 (3d Cir. 2020) (describing five factors to consider when applying the restraint enhancement); United States v. Herman, 930 F.3d 872, 875 (7th Cir. 2019) (requiring defendant's conduct to be comparable to physically immobilizing a victim); United States v. Parker, 241 F.3d 1114, 1118 (9th Cir. 2001) (adopting a "sustained focus" standard).

[105] *See* 947 F.3d at 56 (explaining that the court arrived at the five factors by examining the methods that other circuits use).

[106] *See id.* at 58 (distilling the rationale from other courts into five factors). For example, the first factor, which requires the force to be physical rather than merely psychological, implies a narrower application than the third factor, which allows the application of the enhancement to defendants who do no more than ensure the victim's compliance. *Id.* The cases that the court cited for these propositions show that the factors came from unreconcilable decisions from circuits opposed on this very issue. *Compare Anglin*, 169 F.3d at 164 (vacating a sentence because merely displaying a weapon does not qualify as *physical* force within the meaning of the enhancement, even if the victim felt restrained), *with* United States v. Victor, 719 F.3d 1288, 1290 (11th Cir. 2013) (upholding the application of the enhancement because displaying a gun, even without the use of physical force, effectively restrains the victim). These are incompatible interpretations of "physical restraint," with *Anglin* declining to focus on the victim's subjective psychological state and *Victor* embracing it. *See Victor*, 719 F.3d at 1290 (focusing on the fact that the particular employee felt frightened and was therefore restrained); *Anglin*, 169 F.3d at 164 (noting that one set of circumstances may restrain a timid person but have no impact on a bold person and concluding that the Sentencing Commission must intend a more precise concept). The fourth factor, sustained focus on a particular victim, and the fifth, place-

difficult because the court examines the factors as a whole and none are individually dispositive.[107] Given the uncertainty baked into the rule, it is unclear how a court should evaluate the factors to reach a clear conclusion.[108]

In 2019, in *United States v. Herman*, the Seventh Circuit suggested refocusing the application of the enhancement on the actions of the defendant by searching for conduct that elevates the restraint from subjective and psychological to objective and physical.[109] Although this rule comports with the purpose of enhancements in general, the additional physical conduct that the court described is difficult to divorce from the facts of *Herman.*[110] This rule may prove to be a useful yardstick for courts within the circuit, but a highly referential test is of limited utility to other jurisdictions.[111] Overall, the exclusion of psychological

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ment of the victim in a confined space, are similarly in conflict. *See Bell*, 947 F.3d at 59, 60 (providing the antithetical factors). *Compare* United States v. Copenhaver, 185 F.3d 178, 182–83 (3d Cir. 1999) (finding that shutting a victim in a fireplace is restraint only because the conduct goes beyond merely pointing a gun at a victim), *with* United States v. Khleang, 3 F. App'x 672, 675 (10th Cir. 2001) (affirming application of the restraint enhancement because having a gun pointed at a victim for even a brief period is sufficient to restrain them).

[107] *See Bell*, 947 F.3d at 56 (confirming that no one factor is dispositive and all factors have equal weight). Given the indeterminate weight of each of the factors, it is unclear whether a court faced with facts similar to those in *Taylor* should apply the restraint enhancement. *See* 961 F.3d at 72 (evaluating a defendant who did not have a real gun but nevertheless threatened victims and ordered them out of the way, herding them into a back room but not locking or guarding egress). Even in deciding *Bell*, the court appears to have had trouble deciding how to apply the factors. *See* 947 F.3d at 61 (discussing only three of the five identified factors before reaching a decision).

[108] *See Bell*, 947 F.3d at 56 (lacking guidance for application of the factors).

[109] *See* 930 F.3d at 875 (identifying the Guidelines' term "physical force" as evidence that the Commission intended to exclude psychological force from the enhancement). The court expressed a desire to take a "middle position" by emphasizing that restraint must be physical in nature to justify the enhancement. *Id.* at 875–76.

[110] *See id.* at 875 (defining restraint as "depriving a person of his freedom of physical movement" (quoting United States v. Taylor, 620 F.3d 812, 814 (7th Cir. 2010))). In *Herman*, it was clear that the victims were not psychologically or physically restrained because they chased after the defendant despite having a gun pointed and fired at them. *See id.* at 873 (noting that the defendant's order for the victims to stay where they were did not give them pause). Given these facts, the court's insistence that restraint depends not on a victim's subjective reaction but on the defendant's actions rings hollow because the subjective reaction of the threatened victims was to chase the defendant outside. *Id.*

[111] *See id.* at 875 (defining the limits of the enhancement based on facts of other cases that the court decided). Much of the test suggested in *Herman* builds on previous decisions from the circuit. *See id.* at 876 (citing United States v. Carter, 410 F.3d 942, 954 (7th Cir. 2005)) (using past examples from within the circuit). For example, the court stated that it wished to refine its definition of restraint to comport with its decisions in earlier in-circuit cases. *See Herman*, 930 F.3d at 876 (regretting that the "middle position" it had attempted to create previously was too expansive); *see also Taylor*, 620 F.3d at 812 (holding that forcing a victim to stand up and lay down multiple times at gunpoint was physical restraint); United States v. Doubet, 969 F.2d 341, 346 (7th Cir. 1992) (stating that directing victims into a back room at gunpoint constituted physical restraint), *abrogated on other grounds by* United States v. Dunnigan, 507 U.S. 87 (1993). The court's references to its 2010 decision to apply the enhancement to a defendant who made a victim stand up and sit down more than once in *Taylor* may prove especially confusing for courts applying this rule. *See Taylor*, 620 F.3d at 813 (describing that the defendant's conduct had the same "effect on the victim" as physically tying or binding her). In *Taylor*, the court emphasized that despite the facts of the robbery, it decided whether to apply the

force narrows the scope of the enhancement, but it leaves application questions unanswered.[112] The sustained focus approach that the Ninth Circuit established in *Parker*, in 2001, suffers from similar ambiguity.[113] Even defining the time necessary to "sustain" focus on a particular victim as time sufficient to walk victims to another location, as the court prescribed, the measure is highly variable.[114] Most importantly, the sustained focus test still endorses applying the enhancement to defendants who do no more than point a gun at a victim.[115]

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enhancement based on whether pointing a gun and directing a victim constituted physical restraint rather than on other grounds. *Id.* By referencing that decision in *Herman*, however, the Seventh Circuit labeled that distinction as merely dictum. *See* 930 F.3d at 876 (stressing that the use of a gun was *not* the basis for the enhancement, despite the earlier words of the court). Because the court defined the limits of the application of the restraint enhancement largely based on these prior decisions, the consequences of imprecise language are magnified and limit the ability of the test to resolve the circuit split. *Id.*

[112] *See Herman*, 930 F.3d at 877 (explaining that the enhancement was only created for instances of physical, forcible restraint). In *Herman*, the court clearly stated that being held at gunpoint alone is not physical restraint and, thus, limited the breadth of the enhancement. *Id.* at 876.

[113] *See* United States v. Parker, 241 F.3d 1114, 1118 (9th Cir. 2001) (identifying overuse of the restraint enhancement as a problem but offering only the sustained focus standard as a limiting principle). The court found that physical restraint requires a sustained focus on a particular victim, agreeing with the Second Circuit that physical restraint requires more than momentarily pointing a gun at a victim. *Id.* at 1119 (citing United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999)). The court's definition of "sustained focus," unfortunately, is troublingly undeveloped. *See id.* at 1118 (offering only that "sustained focus" is long enough for a victim to walk somewhere). Drawing on *United States v. Thompson*, which the Ninth Circuit decided in 1997, and *United States v. Nelson*, decided in 1998, the court clarified that "sustained" meant at least long enough for a defendant to walk a victim at gunpoint from one location to another, although *Thompson* implies that the time it takes to force a victim to stand up and sit down may also be sufficient. *See id.* at 1118 (clarifying that "sustained" means singling out an individual victim); *see also* United States v. Nelson, 137 F.3d 1094, 1112 (9th Cir. 1998) (clarifying that a defendant can restrain a victim by merely pointing a gun at a victim); United States v. Thompson, 109 F.3d 639, 641 (9th Cir. 1997) (finding that the defendant physically restrained a victim by forcing them to stand up and sit down *multiple times*).

[114] *See Parker*, 241 F.3d at 1118 (requiring that the defendant focus on a particular victim for at least as long as it takes to walk from one side of the room to another at gunpoint). In 2010, in *United States v. Albritton*, the Ninth Circuit created perhaps the clearest example of the sustained focus test, finding that a defendant who walked a victim from a bank lobby to an office at gunpoint had physically restrained her. 622 F.3d 1104, 1105, 1108 (9th Cir. 2010). Even in this example it is not clear whether it was the defendant's focus on the victim that caused the court to find restraint or, rather, the combination of the gun and the movement from her office and back that elevated briefly pointing a gun at a victim to physical restraint. *See id.* at 1108 (explaining that the presence of the gun and the command to the victim to move constituted restraint).

[115] *See Albritton*, 622 F.3d at 1108 (directing a victim across an office space at gunpoint qualifies as sustained focus); *Parker*, 241 F.3d at 1118 (explaining that this standard includes defendants who direct victims at gunpoint to remain still). The Sixth Circuit noted that the application of the sustained focus test would have afforded the same result as the psychological restraint approach. *See* United States v. Coleman, 664 F.3d 1047, 1050 (6th Cir. 2012) (noting that a defendant commanding a victim to step out from his office into a less-confined area at gunpoint physically restrained the victim within the meaning of the enhancement).

The Second Circuit's *Taylor* test is clear and refines the application of the enhancement within the plain meaning of "physical restraint."[116] The first prong unambiguously eliminates the psychological force argument used to justify the application of the enhancement to defendants who do no more than point a gun at a victim.[117] By doing so, the court reduced the risk of double counting.[118] Secondly, the test requires that the defendant used physical force to restrain the victim rather than for another purpose, thus separating restraint from similar enhancements.[119] Finally, the court clarified that an instruction to move alone is not sufficient to qualify as restraint.[120] Movement can qualify as a restraining force, but only if the defendant confines the victims in some manner.[121] By clearly addressing and categorizing the most common armed robbery scenarios, *Taylor* provided a clear test that is easy to apply across the country.[122]

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[116] *See* United States v. Taylor, 961 F.3d 68, 79 (2d Cir. 2020) (illustrating the test); *infra* notes 54–56 and accompanying text (describing the prongs in detail).

[117] *See Taylor*, 961 F.3d at 78 (clarifying that although brandishing a gun may cause victims to feel restrained, it does not *physically* restrain them). The first prong of the *Taylor* test addresses the psychological and physical force distinction identified in *Herman*, but refines it by focusing on the plain meaning of the enhancement text instead of relying on circuit precedent to illustrate the distinction. *See id.* (stating explicitly that a victim's subjective feeling of restraint does not warrant application of the enhancement); *Herman*, 930 F.3d at 875 (citing multiple circuit cases as examples and counter examples of when the enhancement applies).

[118] *See Taylor*, 961 F.3d at 78 (expressing a desire to "cabin" the use of the restraint enhancement); *see also* U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (U.S. SENTENCING COMM'N 2018) (noting that the Commission intended to replace the arbitrary and opaque nature of pre-Guidelines sentencing practices). Ambiguous language can interfere with the Guidelines' goals of providing a fair and transparent system of punishment. *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (stating that the Commission intended the Guidelines to provide proportionality and clarity to the sentencing process).

[119] *See Taylor*, 961 F.3d at 78 (citing United States v. Rosario, 7 F.3d 319, 321 (2d Cir. 1993)) (noting that courts should use physical injury enhancements for any non-restraining force). This prong clearly sorts fact patterns, such as *Fisher*, where the defendant touches or manhandles victims but does not restrain them, into a category other than restraining force. *Compare* United States v. Fisher, 132 F.3d 1327, 1329 (10th Cir. 1997) (finding that the defendants restrained a security guard by hitting him over the head), *with Rosario*, 7 F.3d at 321 (finding that despite the defendant's other violent acts, it was the physical force of stepping on the victim's neck that qualified as restraining force).

[120] *Taylor*, 961 F.3d at 79. Not only is an "instruction to move" typical of most robberies, but such an instruction is not immobilizing. *Id.* (citing United States v. Paul, 904 F.3d 200, 204 (2d Cir. 2018)). This prevents the application of the enhancement to facts typical of armed robberies, reducing disparity between similarly situated defendants. *Id.* at 78.

[121] *See id.* at 79 (elaborating that confinement can qualify as restraint, but only if it is equivalent to tying, binding, or locking up a victim). A general application of the enhancement transforms what the Commission intended as a special provision for additional punishment to a standard feature. *See* United States v. Anglin, 169 F.3d 154, 165 (2d Cir. 1999) (describing such a result as "problematic").

[122] *See Taylor*, 961 F.3d at 79 (providing a three-part test to limit the overuse of the restraint enhancement).

Conclusion

The test the Second Circuit provided in 2020, in *United States v. Taylor*, has the potential to refine the application of the restraint enhancement to be fairer to defendants and more consistent with the goals of the Guidelines. The First, Fourth, and Tenth Circuits' broad application of the enhancement has warped the plain meaning of the terms "physical" and "restraint" to the detriment of defendants within their jurisdictions. Although the Third, Seventh, and Ninth Circuits have taken action to tailor the application of the enhancement with various rules, ambiguity and impracticality has barred widespread acceptance. The Second Circuit, however, has incorporated the observations of these other approaches in its analysis in *Taylor* to address and clarify the most common sources of disagreement surrounding the enhancement. As a result, the *Taylor* test is clear, simple to apply, and designed to further the goals of the Guidelines.

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