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Trust, The Federal Sentencing Guidelines, and Lessons From Fiduciary Law

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TRUST, THE FEDERAL SENTENCING GUIDELINES, AND LESSONS FROM FIDUCIARY LAW

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Legal commentators, judges, and scholars seem to agree on the social and economic importance of trust and relationships of trust to our society. Recently, a small but distinct group of scholars has emphasized the virtues of trust in a democratic society.[1] Among them, Francis Fukuyama argues that social trust and relationships of trust facilitate economic development.[2] In addition, Robert Putnam refers to the trust among certain organizations as "social capital" and argues that trust in the form of social capital is instrumental to the well-being of society.[3] In this same vein, James Coleman argues that group members who trust one another increase their productivity and can achieve goals unattainable by those lacking trust.[4] This collective recognition of the importance of trust

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1. *See infra* notes 2-4 and accompanying text.

2. *See* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 8 (1995).

3. *See, e.g.*, ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 167-71 (1993); Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 67 (1995) (explaining that the "social trust" developed through the civic engagements known as social capital "pervasively influence our public life, as well as our private prospects"). Glenn Loury has been credited for introducing the concept of social capital. *See* PUTNAM, MAKING DEMOCRACY WORK, *supra* at 241 n.20; JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990). Putnam defines social capital as "features of social organization, such as trust, norms and networks, that can improve the efficiency of society by facilitating coordinated actions." PUTNAM, MAKING DEMOCRACY WORK, *supra* at 164. According to Putnam, social capital is critical to the success of organizations because "[i]f actors are unable to make credible commitments to one another, they must forego many opportunities for mutual gain—ruefully, but rationally." *Id.* at 167. Putnam additionally explains that trust is an essential component of social capital. *Id.* at 170. "Trust lubricates cooperation. The greater the level of trust within a community, the greater the likelihood of cooperation. And cooperation itself breeds trust." *Id.* at 171.

4. *See* COLEMAN, *supra* note 3, at 304. Coleman notes that "a group whose members manifest trustworthiness and place extensive trust in one another will be able to accomplish much more than a comparable group lacking that trustworthiness and trust." *Id.*

is not a novel concept; instead, such a recognition has been an integral aspect of the American legal landscape for centuries.[5] Most notably, by imposing special duties on participants in special trust relationships, the law of fiduciary obligations "permit[s] and encourage[s] the reposing of trust."[6]

Legal commentators, judges, and scholars also appear to agree on the appropriateness of imposing more stringent obligations on those within a special trust relationship.[7] The often-cited words of Justice Cardozo, then chief judge of the New York Court of Appeals, illustrate this point: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[8] Justice Cardozo's words have been cited in many contexts for the principle that fiduciaries, those within a high trust relationship, owe each other a duty of the highest loyalty.[9] Contemporary scholars have echoed this sentiment, noting that the duties of a participant in a high trust relationship "go beyond mere fairness and honesty."[10]

There is also agreement that people who violate or exploit a relationship of special trust deserve to be punished more severely for their crimes.[11] As one Ninth Circuit judge noted, "[A] person who violates a trust may well do serious damage to the ties that bind us together in this complex society and may, therefore, be more

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5. *See* Frank H. Easterbrook & David R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

6. Theresa A. Gabaldon, *Love and Money: An Affinity-Based Model for the Regulation of Capital Formation by Small Businesses*, 2 J. SMALL & EMERGING BUS. L. 259, 280 (1998).

7. *See infra* notes 8-10 and accompanying text. *See also* Meinhard v. Salmon, 164 N.E. 545, 546-47 (N.Y. 1928).

8. *Meinhard*, 164 N.E. at 546-47.

9. *See* Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1692 (1990). Professor Mitchell refers to *Meinhard* as "the oldest war-horse in the repertoire of corporate fiduciary duty" and notes its potent influence on fiduciary principles. *See id.* at 1692-93.

10. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 882. *See also* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829-30 (1983) [hereinafter Frankel, *Fiduciary Law*] (noting that courts "regulate fiduciaries by imposing a high standard of morality upon them"). There are some scholars who have challenged the traditional belief that fiduciary relationships impose special duties on their participants and contend that the duties of a fiduciary are not special. *See* Easterbrook, *supra* note 5, at 427.

11. *See infra* Part I and accompanying notes.

reprehensible than, say, a pickpocket or a sneak thief."[12] This belief is reflected in the application of common law damages where courts impose increased sanctions, including punitive damages, on people found liable for breaching relationships involving a high degree of trust.[13]

The issue upon which these groups cannot agree is how to define a relationship of heightened trust worthy of increased obligations and punishment.[14] Despite the fact that the law related to fiduciary or heightened trust relationships has been in existence for over 250 years,[15] "legal theorists and practitioners have failed to define precisely when such a relationship exists."[16] This failure is due in large part to the fact that a special trust or fiduciary relationship arises in such diverse contexts as the attorney-client relationship and interactions between corporate directors and their shareholders.[17] Because of this diversity, articulations of the qualities that comprise a fiduciary relationship are often imprecise and ill-defined.[18]

The most recent example of the difficulties with defining a trust relationship is the attempt by the Federal Sentencing Commission (Commission), and ultimately the federal courts, to determine what

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12. United States v. Isaacson, 155 F.3d 1083, 1087 (9th Cir. 1998) (Fernandez, J., dissenting).

13. *See infra* notes 46 and 49 (explaining the imposition of increased sanctions for breaches of a fiduciary relationship).

14. *See, e.g.*, Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 134 (1989)("While there is widespread agreement that 'trust' is important in society, there is at the same time a lack of agreement on what exactly constitutes trust.").

15. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1045-46 (1991).

16. *Id.*

17. *See, e.g.*, Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 69 (discussing the wide range of relationships in which the fiduciary obligation can arise); Frankel, *Fiduciary Law*, *supra* note 10, at 795 (noting that many individuals qualify as fiduciaries, including agents, partners, directors, officers, bailees, and guardians, and that fiduciary relationships exist in many areas of the law, such as criminal, labor, securities, corporations, and trusts).

18. As Professor Robert Tuttle explains, "[I]mprecise definitions of the fiduciary's obligations correspond to the highly contextualized nature of fiduciary relationships themselves: i.e., a specific determination of the fiduciary's duties—beyond general norms of loyalty and care—depends not on an a priori legal construct, but on an analysis of what a 'faithful steward' would do in this particular circumstance." Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. OF ILL. L.R. 889, 896.

constitutes a relationship of private trust for purposes of the United States Sentencing Guidelines (Guidelines).[19] Under the Guidelines, a sentencing court may increase the sentence of a defendant who abused a "position of trust" in a manner that significantly facilitated the commission or concealment of a particular offense.[20] Courts have struggled with the application of this provision because of an inability to determine precisely what constitutes a "position of trust."[21] Like the law of fiduciary obligation, one of the difficulties with defining a relationship of trust for purposes of the Guidelines is that courts have attempted to apply the provision to a wide range of positions, including those of a babysitter,[22] a janitor,[23] a truck driver,[24] an airline agent,[25] and a mail carrier.[26] Moreover, neither the Commission nor federal sentencing judges have managed to agree on the features that characterize a relationship of trust.[27] As originally drafted, the statutory language of the Guidelines provided virtually no guidance on this issue. The Guidelines failed to define a position of trust, but they did provide a few examples of the kinds of positions to which the adjustment could be applied.[28] Unfortunately, at least one of the examples "has produced an

19. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2001).

20. *See id.*

21. One circuit court judge noted that by the middle of 1998, approximately 182 published cases in the courts of appeals addressed the abuse of trust provision, thereby demonstrating the uncertainty of its application. *See* United States v. Isaacson, 155 F.3d 1083, 1087 n.1 (4th Cir. 1998) (Fernandez, J., dissenting).

22. *See* United States v. Zamarripa, 905 F.2d 337 (10th Cir. 1990) (holding that a babysitter who committed a sexual crime against a child was in a position of trust).

23. *See* United States v. Drabeck, 905 F.2d 1304, 1305-07 (9th Cir. 1990) (finding that a contract janitor who stole money from a bank in which he worked held a position of trust).

24. *See* United States v. Hill, 915 F.2d 502, 506-07 (9th Cir. 1990) (holding that a truck driver who stole cargo of families moving overseas was in a position of trust).

25. *See* United States v. Castagnet, 936 F.2d 57, 62 (2d Cir. 1991) (finding that an airline agent who had access to valuable information on the company's computer system held a position of trust).

26. *See* United States v. Ajiboye, 961 F.2d 892, 895 (9th Cir. 1992) (holding that a mail carrier is in a "quintessential position of trust" because she is free to steal mail without fear of surveillance); United States v. Lange, 918 F.2d 707, 710 (8th Cir. 1990) (holding that a postal employee who has access to express certified mail, which is more likely to contain valuable items, was in a position of trust). The Guidelines also provide that "because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail." U.S. SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1 (2001).

27. *See, e.g.*, Drabeck, 905 F.2d at 1306-07 (construing "position of trust" in the embezzlement context).

28. *See infra* Part III.

undesirable amount of confusion,"[29] causing several circuits to reject its use.[30] Thus, instead of looking to the statutory language for guidance, federal circuit courts eventually developed their own tests for defining a position of trust.[31] Unfortunately, these courts have utilized at least three different tests that not only lead to different results, but also exclude some relationships that traditionally fall within the scope of a special trust relationship.[32] Recognizing this problem, the Commission solicited comments to the abuse of trust provision in an effort to provide greater guidance on the type of positions that fall within its scope.[33] While these efforts led to amendments of the Guidelines,[34] federal sentencing judges continue to struggle with determining the precise contours of a trust relationship for purposes of applying the abuse of trust provision.[35]

This Article asserts that analyzing and comparing the law of fiduciary obligation with the judicial experiences related to the Guidelines' abuse of trust provision may shed light on the problems confronted by the Commission and federal sentencing judges. This Article then suggests a practical solution to these problems. Both the law of fiduciary obligation and the abuse of trust provision rely on the concept of trust and the notion that abuses of trust relationships pose greater harms, and consequently deserve greater sanctions, than violations of other relationships.[36] Moreover, both apply to a wide range of contexts.[37] Although some federal sentencing courts refer to fiduciary law when

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29. *See* United States v. Lamb, 6 F.3d 415, 420, 420 n.4 (7th Cir. 1993) (noting the Second, Fifth, and Ninth Circuits' dissatisfaction with the Commission's bank teller example).

30. *See infra* Part III.

31. *See infra* Part IV.

32. *See infra* Part IV.

33. *See* Notice of Proposed Amendments and Additions to Sentencing Guidelines, Policy Statements and Commentary, 55 Fed. Reg. 5,718, 5,739 (Feb. 16, 1990).

34. The abuse of trust provision has been amended three times, and at least one amendment aimed at resolving conflicts among the circuits related to the application of the provision. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amendments 346, 492, 580 (2001)(adding language relating to discretion and responding to conflict on whether provision applies to a defendant who pretends to occupy a position of trust).

35. *See infra* Part I.

36. *See infra* Part II.

37. *Compare supra* note 17 (discussing the varying relationships under fiduciary law) *with supra* notes 21-26 (applying the fiduciary obligations to different positions under the Guidelines).

analyzing cases under the abuse of trust provision,[38] there has been no systemic attempt to use fiduciary law to shape or understand the application of the abuse of trust provision. Given the parallels between the two concepts, this oversight is unfortunate and may have impeded sentencing courts' ability to fully appreciate the limits of some of their approaches to applying the abuse of trust provision. Most notably, because of the diverse contexts in which trust relationships arise, the law of fiduciary obligations demonstrates that precisely defining a trust relationship is an almost insurmountable task and may create confusion.[39] This problem suggests that the Commission's attempts to define positions of trust by creating specific examples may only increase the confusion surrounding the application of the Guidelines in this area.[40] In this way, analyzing the experience of defining trust in the context of fiduciary law may have helped the Commission to appreciate the limits of its response. More importantly, such an analysis may suggest a more practical alternative to the Guidelines as currently written.

This Article begins by identifying the abuse of trust provision under the Guidelines and revealing the similarities between its rationale and the concepts underlying fiduciary obligations. Part II of this Article briefly illustrates the difficulties that confront courts and commentators when they attempt to determine the precise nature of a fiduciary relationship. Part III of this Article explores the Commission's attempt at defining trust relationships and pinpoints the sources of commentators' dissatisfaction with those attempts. Part IV explores the judicial effort at defining the precise contours of a special trust relationship for purposes of the Guidelines. Part IV also demonstrates that there is disagreement among the courts about the proper test to apply and that many of these tests are incomplete and inconsistent with

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38. *See, e.g.*, United States v. Jolly, 102 F.3d 46, 48 (2d Cir. 1996) (stating that in order for the abuse of trust enhancement to apply, the defendant must occupy "a position vis-à-vis the victim that is in the nature of a fiduciary relationship"); United States v. Brown, 47 F.3d 198, 205-06 (7th Cir. 1995) (noting that a position of trust refers to a relationship that is fiduciary in nature).

39. *See* DeMott, *supra* note 10, at 881. *See also* Alan M. Weinberger, *Expanding the Fiduciary Relationship Bestiary: Does Concurrent Ownership Satisfy the Family Resemblance Test?*, 24 SETON HALL L. REV. 1767, 1779-80 (1994). Professor Weinberger notes that while the category of relationships giving rise to a fiduciary duty is not closed, "there is widespread disagreement concerning the identity of the members and a shared sense of mystery in English-speaking countries surrounding the criteria for admission of new or 'unconventional' members. A certain vagueness in fiduciary law may be essential to the purposes served by the doctrine." *Id.* (footnotes omitted).

40. *See* Notice of Proposed Amendments and Additions to Sentencing Guidelines, *supra* note 33 (explaining the amendments to the Guidelines); *see also infra* Part III.

the policies of the Guidelines. Part V discusses how experiences related to fiduciary law add value to judicial efforts at defining trust in the sentencing arena.

I. SOME PARALLELS BETWEEN THE GUIDELINES AND THE LAW OF FIDUCIARY OBLIGATION

The concepts underlying the Guidelines' abuse of trust provision appear to mirror those embedded in the law of fiduciary obligation. At their cores, both are based on trust relationships and the notion that abuses of trust create special harms. Accordingly, trust relationships deserve special protections. This Part scrutinizes the similarities between fiduciary law and the Guidelines.

As an initial matter, both the Guidelines[41] and the law of fiduciary obligation[42] center on the concept of trust. The Guidelines explicitly apply to positions of "trust."[43] Fiduciary law also concerns trust because a fiduciary relationship is one that involves special trust between its participants.[44] Indeed, the term fiduciary "was adopted to apply to situations falling short of 'trusts' but in which one person was nonetheless obligated to act *like* a trustee."[45]

Also, both the law of fiduciary obligation[46] and the Guidelines[47] impose increased or special sanctions on those who abuse a special trust relationship. The text of the abuse of trust provision is straightforward and mandates a two-level increase if a defendant "abused a position of public or private trust . . . in a manner that significantly facilitated the

41. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2001) (authorizing the increase in penalties for abuse of a position of trust).

42. *See, e.g.*, J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 442 (1997) ("A fiduciary relationship is a relationship of trust . . . .").

43. *See id.*

44. *See* Hynes, *supra* note 41, at 442; Clark, *supra* note 17, at 69 ("The law imposes a fiduciary obligation on certain relationships where one party stands in a position of trust relative to another."); Frankel, *Fiduciary Law*, *supra* note 10, at 800 n.17 (noting that the concept of trusting is included in most definitions of fiduciaries).

45. DeMott, *supra* note 10, at 880.

46. *See* Ellen A. Scallen, *Promises Broken v. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 911-14 (explaining that a fiduciary may be subject to increased damages).

47. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2001).

commission or concealment of the offense."[48] Such increased sanctions also exist in fiduciary law.[49] Although there is a general rule against punitive damages for breach of contract, breach of a fiduciary relationship qualifies for such increased damages.[50] Similarly, in tort actions, punitive damages are available when there is a violation of a fiduciary duty even when such a violation is not an independent tort.[51] In addition, courts apply a broad range of sanctions to those who breach a fiduciary relationship.[52] Although it is not as straightforward as the Guidelines, caselaw demonstrates that courts are willing to impose more severe punishments on fiduciaries who breach their duties than non-fiduciaries who engage in similar conduct.[53]

In the context of the Guidelines and fiduciary law, recent court decisions suggest that increased sanctions demonstrate the greater culpability of violators who take advantage of the relative vulnerability of others within a special trust relationship.[54] Thus, in the official commentary to the Guidelines' abuse of trust provision (Commentary), the Commission stated that people who abuse a position of trust are "more culpable."[55] Federal judges agree:

> By viewing as especially culpable persons who "abuse" their positions of trust, the guideline also recognizes the time-

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48. *Id.*

49. *See* Scallen, *supra* note 46, at 911-14; DeMott, *supra* note 10, at 900-01 (noting increased penalties for fiduciaries). The Supreme Court has also shown a willingness to impose heightened obligations on "special confidential relationships." *See e.g.*, Dirks v. SEC, 463 U.S. 646, 645-55, 655 n.14 (1983) (noting a breach of a special confidential relationship between underwriters or consultants and the corporation could form the basis for liability under federal securities laws). *See also* STEPHEN S. BAINBRIDGE, SECURITIES LAW: INSIDER TRADING 119-20 (1999) (noting that the cumulative and severe penalties associated with insider trading can stem from a breach of a fiduciary duty); MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW, 310 (3d ed. 2001) (noting the severe penalties associated with insider trading).

50. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (stating that punitive damages may be recovered for breach of contract only if the breach also constitutes a tort that allows for punitive damages); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 636 (1999).

51. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 14-3, at 589-90 (3d ed. 1987).

52. *See* Scallen, *supra* note 46, at 911-12 (noting that the damages courts award for a breach of a fiduciary duty encompass a wider range of remedies than those related to breaches of contract).

53. *See id.* (discussing remedies available against parties who breach a trust relationship).

54. *See, e.g.*, United States v. Ragland, 72 F.3d 500, 503 (6th Cir. 1996); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2001).

55. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. background (2001).

> honored legal concept that theft by deceit is to be dealt with more harshly than simple theft. . . . [and that] a decision to take advantage of that trust . . . is particularly abhorrent, as it undermines faith in one's fellow man in a way that the ordinary pick-pocket simply cannot.[56]

In other words, federal sentencing judges have long accepted the notion that defendants who abuse a trust relationship deserve harsher sanctions because their abuse poses a greater threat to society than that of defendants who violate an arms-length relationship.[57]

Legal scholars have reached a similar understanding in the context of breaches of a fiduciary or special trust relationship. Professor Tamar Frankel notes that fiduciary law reflects the notion that it is more reprehensible to harm someone within a heightened trust relationship.[58] Professor Frankel explains that the fiduciary obtains power to carry out his functions on behalf of the other participant in the fiduciary relationship, known as the "entrustor."[59] However, the delegation of power to the fiduciary creates a significant risk that he will abuse his authority and injure the entrustor.[60] Frankel notes that this risk is greater in a fiduciary relationship; while theft may be discovered in a non-fiduciary relationship, stealing will go undiscovered in a fiduciary one because the fiduciary has enhanced power and discretion over the entrustor and her property.[61] Similarly, Professor Deborah DeMott

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56. *Ragland*, 72 F.3d at 503.

57. *See, e.g., id.*

58. *See* Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 *Or. L. Rev.* 1209, 1226 (1995) [hereinafter Frankel, *Fiduciary Duties*]; Frankel, *Fiduciary Law*, *supra* note 10, at 832 (commenting that while it is wrong to injure anyone, "it is more reprehensible to injure someone who cannot protect himself, as an entrustor in a fiduciary relation is.")

59. *See* Frankel, *Fiduciary Law*, *supra* note 10, at 832.

60. *See id.*

61. *See* Frankel, *Fiduciary Duties*, *supra* note 58, at 127. Professor Frankel notes that "[c]ourts regulate fiduciaries by imposing a high standard of morality upon them." Frankel, *Fiduciary Law*, *supra* note 10, at 829-30. Professor Frankel explains that these moral standards encompass high duties of fidelity, faith, and honor. *See id.* at 830. She further notes that the moral behavior of fiduciaries is both altruistic and voluntary. *See id.* This moral theme stems, in part, from the vulnerability of the participants within a fiduciary relationship and the serious problems posed by abuses of fiduciary authority. *See id.*

notes that one party's vulnerability to the other often justifies the imposition of fiduciary obligations.[62]

Believing that they pose these special problems and harms, courts and commentators view breaches of fiduciary relationships with special disfavor. The Guidelines' abuse of trust provision also reflects this disfavor.[63] Given the parallels between the premises underlying the abuse of trust provision and those embodied in fiduciary law, analyzing the problems associated with defining a fiduciary relationship may afford a better understanding of the complexities involved in defining a position of trust in the context of the Guidelines.

II. FIDUCIARY CONFUSION

While there seems to be agreement that fiduciaries deserve special protection and that those who abuse their fiduciary obligation deserve harsher sanctions, courts historically have struggled with determining how to identify a fiduciary or special trust relationship.[64] As Professor DeMott comments, "[f]iduciary obligation is one of the most elusive concepts in Anglo-American law."[65]

Many argue that this elusiveness stems from the fact that a fiduciary obligation can arise in a variety of different contexts.[66] For example, one classic fiduciary relationship is that between co-partners in a general partnership.[67] Another traditional fiduciary relationship arises between a guardian and a ward.[68] While these relationships both involve a high

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62. *See* DeMott, *supra* note 10, at 902.

63. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1, cmt. background (2001).

64. *See, e.g.*, DeMott, *supra* note 10, at 879.

65. *Id.*

66. *See* Clark, *supra* note 17, at 70 ("The goal of harmonizing the legal principle referred to as 'fiduciary obligations' in these disparate contexts has challenged theorists for the last half century.") (footnote omitted); Hynes, *supra* note 41, at 442-43 (noting that "the very breadth of the fiduciary principle and the indeterminate number and kind of relationships that it touches lead to. . . considerable vagueness and ambiguity") (footnote omitted); Niels B. Schaumann, *The Lender as Unconventional Fiduciary*, 23 SETON HALL L. REV., 21, 24 (1992) ("[T]he use of similar language to refer to differing obligations and standards of conduct makes the underlying concepts of fiduciary law difficult to grasp."); DeMott, *supra* note 10, at 908 ("[F]iduciary obligation eludes theoretical capture because it arises in diverse types of relationships.").

67. *See, e.g.*, Clark, *supra* note 17, at 69; Frankel, *Fiduciary Law*, *supra* note 10, at 795. Indeed, *Meinhard* rested on the fiduciary relationship between partners. Meinhard v. Salmon, 164 N.E. 545, 546-47 (N.Y. 1928) Even though the relationship at issue involved a joint venture, the court reasoned that the principles related to a joint venture were no different from those involved in a partnership relationship. *See id.*

68. *See, e.g.*, Clark, *supra* note 17, at 69; Frankel, *Fiduciary Law*, *supra* note 10, at 795. *See also* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND

degree of trust, they are very different.[69] The partnership relationship can be created without an explicit agreement,[70] whereas a guardian typically must voluntarily accept his or her role.[71] Further, a partnership relationship is based on the sharing of power and authority,[72] while the guardian-ward relationship is characterized by an imbalance in power.[73] Differences such as these make it difficult to define the precise qualities of a fiduciary relationship and to pinpoint those qualities that justify the imposition of increased obligations and penalties.

The task of defining a fiduciary relationship is exacerbated by the fact that commentators cannot agree on the qualities of a relationship that justify the imposition of a fiduciary obligation.[74] Indeed, like the federal sentencing courts in the context of the Guidelines, judges and commentators have developed several different theories to explain the importance of certain qualities found within a fiduciary relationship and the manner in which such qualities distinguish a fiduciary relationship from other kinds of relationships.[75] Unfortunately, the explanatory value of these theories is limited in large part by the fact that such qualities are not duplicated in the varying contexts in which the fiduciary obligations arise. This section will explain some of the more prevalent theories

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TRUSTEES § 482, at 280 (rev. 2d ed. 1978) (stating that conventional categories of fiduciary relationships include guardian and ward, as well as trustee and beneficiary, executor and creditor, principal and agent, and corporate director and corporation).

69. *See infra* notes 70-73 and accompanying text.

70. *See, e.g.*, UNIF. P'SHIP ACT § 6 (1914) (stating that a partnership is created by two or more people conducting business for profit as co-owners). Even when parties do not agree to form a partnership, courts nonetheless may conclude that they have inadvertently formed a partnership, and as a consequence, the partners owe each other fiduciary duties. *See, e.g.*, Hilco Property Servs., Inc. v. United States, 929 F. Supp. 526, 536 (D.N.H. 1996) (noting key determination of a partnership is not the subjective intent of the parties, but the circumstances surrounding their relationship); Arnold v. Erkmann, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996) ("The primary criterion is the parties' intention to enter a relationship which in law constitutes a partnership; intent to form a partnership is not necessary.").

71. *See* Bogert & Bogert, *supra* note 68.

72. *See* UNIF. P'SHIP ACT § 18(e) (1994) (stating that "[a]ll partners have equal rights in the management and conduct of the partnership business").

73. *See* DeMott, *supra* note 10, at 904 ("The ward's dependence on the guardian, [is] the defining feature of their relationship. . . .").

74. *See infra* Part II A-D.

75. *See infra* Part IV (discussing various theories).

related to fiduciary relationships and offer some critiques of those theories.

A. Analogies

Much of the law of fiduciary obligation has resorted to the use of analogy to determine the existence of a fiduciary relationship.[76] This process begins with identifying those relationships that have been described as traditional or conventional fiduciary relationships.[77] Courts then compare the relationship at issue with these conventional relationships to determine if there are similarities between the two.[78] In this way, "the law of fiduciary obligation has developed through analogy to contexts in which the obligation conventionally applies."[79] However, Professors DeMott and Frankel warn that using analogies to determine the characteristics of a fiduciary relationship has proven unhelpful and that analogies to traditional relationships often cannot be adapted to new situations and relationships.[80] Also, courts generally fail to pinpoint the reasons why particular similarities between relationships give rise to fiduciary responsibilities.[81] These problems undermine the effectiveness of analogies as an analytical tool.[82]

B. Voluntary Assumption

Professor Austin Scott has asserted that fiduciary obligations may be justified on the basis that someone voluntarily acts on another's behalf.[83] Similarly, Professor Schaumann has stated, "A party should be bound by fiduciary ties to another only if the party has voluntarily assumed the fiduciary role. Fiduciary power cannot be imposed on a party against its will, or without its knowledge."[84] The acceptance of the power carries with it a corresponding duty and obligation to act in the best interests of

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76. *See* DeMott, *supra* note 10, at 914.

77. *See id.* at 908-09.

78. *See id.*

79. *Id.* at 879; *see also* Frankel, *Fiduciary Law*, *supra* note 10, at 805 (explaining that courts began to use analogies to determine if new relations were fiduciary in nature).

80. *See* Frankel, *Fiduciary Law*, *supra* note 10, at 805. After analyzing the difficulties with the use of analogy, Frankel concludes, "analogies are not helpful in solving specific problems that new situations pose, because the rules that apply to the old prototypes do not necessarily respond to the problems posed by the new ones." *Id.*

81. *See id.*

82. *See id.*

83. *See* Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540 (1949) (defining the nature of a fiduciary person).

84. Schaumann, *supra* note 66, at 56.

the other party.[85] Under this rationale, voluntary acceptance of the fiduciary role will result in a person being held accountable for violation of the responsibilities inherent in the role.[86] Nonetheless, Professor DeMott warns, "exceptions too significant to dismiss undercut the appeal of Scott's formulation."[87] For example, Scott's assertions fail to account for relationships such as partnerships, pursuant to which fiduciary obligations may arise despite the lack of an express undertaking among the parties.[88]

C. Entrustment

Others have argued that the fiduciary constraint applies because something of value is entrusted to one of the parties.[89] This certainly applies to those situations in which a fiduciary, like a trustee, is responsible for the care of some valuable property.[90] Undoubtedly, it is important to impose heightened obligations on those who care for valuable property in order to decrease the temptation to misappropriate that property.[91] However, this formulation does not adequately explain those contexts in which the fiduciary serves in an advisory capacity.[92] Indeed, it may not apply neatly to many conventional fiduciary relationships.[93] Thus, co-partners may entrust one another with the care of their partnership business, but this entrustment may not capture the essence of the relationship between partners. Moreover, although the

85. *See id.* at 56-7.

86. *See id.*

87. DeMott, *supra* note 10, at 910.

88. *See id.* at 911; Scallen, *supra* note 46, at 919-20 (noting that the assumption theory fails to account for those fiduciary relationships that arise without an express contract).

89. *See* Frankel, *Fiduciary Duties*, *supra* note 58, at 1212; DeMott, *supra* note 10, at 912 (explaining that the entrustment concept works best when the fiduciary is a property holder).

90. *See* Frankel, *Fiduciary Duties*, *supra* note 58, at 1212 (elaborating that in fiduciary relationships other than those dealing with real or personal property, it is difficult to determine what is being entrusted to the fiduciary).

91. *See id.* at 1215-17 (noting that fiduciary law imposes duties on fiduciaries to insure against the misappropriation of the entrustor's property).

92. *See, e.g.*, DeMott, *supra* note 10, at 912 (noting the difficulty in determining what a lawyer has been entrusted with other than the confidence of the client).

93. *See id.*

lawyer-client relationship is clearly fiduciary in nature,[94] it is unclear what the client entrusts to his lawyer.[95] One may argue that an attorney is entrusted with valuable information. However, the mere fact that an attorney is provided with valuable or sensitive information may not define adequately a heightened trust relationship worthy of the protection of fiduciary law. This is especially true given that many participants of arms-length transactions receive confidential information, yet the law does not consider all of those participants to be parties to fiduciary relationships.

D. Reliance

Still others have maintained that fiduciary duties may be justified because of the reliance that one party places on another.[96] Certainly an important component of any fiduciary relationship is a higher-than-average degree of reliance.[97] Just as one partner relies on the other partner's good faith, a ward relies on her guardian's honesty and integrity. This theory, however, may be overly broad. Indeed, almost all contracts involve reliance on the part of the party entering into the contract.[98] This fact diminishes the importance of reliance as a dividing line between those relationships that confer fiduciary obligations and those that do not.[99] Moreover, a theory based on reliance is problematic because it focuses on the beneficiary's conduct to the exclusion of the fiduciary.[100] As a consequence, it fails to address whether reliance must be accepted in order for the obligation to arise. May a fiduciary obligation be imposed based solely on one person's reliance on another's integrity? An affirmative response highlights the problems with such a theory while a negative one reveals its limits. In this way, reliance seems a necessary, but insufficient, feature of a fiduciary relationship.

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94. *See, e.g.*, United States v. Chestman, 947 F.2d 551, 568 (2d Cir. 1991) (noting the fiduciary nature of lawyer-client relationship).

95. *See* DeMott, *supra* note 10, at 912.

96. *See* Mitchell, *supra* note 9, at 1684. ("A fiduciary relationship is a relationship of power and dependency in which the dependent party relies upon the power holder to conduct some aspect of a dependent's life over which the power holder has been given and accepted responsibility."); *see also* Ernest Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 17 (1975) (noting that one party in all fiduciary relationships is at the mercy of the other party's discretion).

97. *See* Mitchell, *supra* note 9, at 1684.

98. *See* Scallen, *supra* note 46, at 918.

99. *See id.* at 918.

100. *See id.* at 917-18.

In the end, commentators concur on the difficulty of finding a precise set of factors that apply to all forms of fiduciary relationships.[101] It is difficult to reconcile the various theories with one another, and no one theory appears to apply to every kind of relationship that can arise in the context of fiduciary law. Instead, there appears to have emerged a general understanding that many, if not all, of the above-mentioned qualities may define a fiduciary relationship, depending on the context and circumstances in which a given relationship arises. Thus, scholars apply general rules with varying degrees of force, depending on the particular relationship at issue.

III. TRUST AS DEFINED BY THE COMMISSION

A similar confusion describes the Commission's and courts' experiences with the Guidelines' abuse of trust provision. The Guidelines mandate an upward departure if a defendant "abused a position of . . . private trust . . . in a manner that significantly facilitated the commission or concealment of the offense."[102] In applying this enhancement, courts must conduct a two-step inquiry. First, courts must examine whether the defendant maintained a position of trust; "[i]f not, the inquiry ends and no enhancement accrues."[103] Second, if it is determined that the defendant occupied a position of trust, the court must ascertain whether the defendant utilized the position to facilitate or conceal a crime.[104] This second step "has proven to be rather easily met."[105] In contrast, courts have experienced difficulty in responding to the first part of the inquiry.[106]

Unfortunately, the language of the statute offers little guidance on how to determine the existence of a position of trust. The Commentary explains a position of trust as follows:

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101. *See* Schaumann, *supra* note 66, at 27 ("Although so far no single theory of fiduciary duty has won universal acceptance, there is consensus on many fundamental points.").

102. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2001).

103. United States v. Reccko, 151 F.3d 29, 31 (1st Cir. 1998).

104. *See id.*

105. Erich D. Andersen, *Enhancement for "Abuse of a Position of Trust" Under the Federal Sentencing Guidelines*, 70 OR. L. REV. 181, 194 (1991).

106. *See id.* at 188 (noting that courts have had "tremendous difficulty in determining what it means to 'abuse a position of public or private trust'").

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult).[107]

The Commentary attempts to clarify this definition further by providing examples of the kinds of positions that would fall within and outside of its scope.

> This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.[108]

Applying these concepts, courts have attempted to account for at least two aspects of the statutory language: (1) the use of the term "position,"[109] and (2) the exclusion of an ordinary bank teller.[110]

A. The Primacy of Position

The Commission's use of the word "position" caused some judges to exclude relationships that involved a high degree of trust from the Guidelines' application and ultimately led to an amendment of the provision.[111] Because the Guidelines state that the abuse of trust provision applies to defendants who occupy some "position" of trust, they appear to require that a defendant actually hold a "position" in order to fall under the scope of the Guidelines.[112] Thus, such language

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107. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1 (2001).

108. *Id.*

109. *See infra* Part III.A.

110. *See infra* Part III.B.

111. *See supra* note 34 and accompanying text.

112. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1 (2001). *See also* United States v. Mullens, 65 F.3d 1560, 1566 (11th Cir. 1995).

appears to preclude an enhancement for those who misrepresent that they occupy a formal position.[113] As a consequence, some courts refused to apply the adjustment to defendants who pretended to hold a position, but in fact did not.[114] These courts reasoned that if a defendant holds a position in a sham corporation, then the defendant truly never occupied a "position" of trust and his activities could not fall within the scope of the provision.[115] Other courts disagreed and concluded that even holding a fraudulent position of trust satisfied the requirement that the defendant must hold some "position" because defendants engaging in such pretenses pose the same harms as those who actually hold legitimate positions of trust.[116] This conflict among the courts prompted the Commission to amend the Guidelines in 1998 to include defendants who pretend to hold positions of trust.[117]

Unfortunately, this amendment fails to address other defects concerning the term "position."[118] Consistent with the amendment, courts have required that a defendant either occupy a "formal" position or create "sufficient indicia that he holds such a position" to fall within the scope of the provision.[119] This excludes those defendants who

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113. *See, e.g.*, United States v. Echevarria, 33 F.3d 175, 181 (2d Cir. 1994) (refusing to apply enhancement to a defendant who pretended to be a physician because such punishment was available only "to those who *legitimately* occupy positions of public or private trust").

114. *See id.*

115. *See id.*

116. *See, e.g.*, United States v. Barnes, 125 F.3d 1287, 1292 (9th Cir. 1997) (applying to defendant who impersonated a doctor); United States v. Gill, 99 F.3d 484, 489 (1st Cir. 1996) (applying to defendant who posed as psychologist); United States v. Queen, 4 F.3d 925, 928-30 (10th Cir. 1993) (applying to defendant who posed as financial broker).

117. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 580 (2001). The Commission added a comment to the abuse of trust provision that states: "This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not." *Id.* The Commentary further explains that the adjustment applies to a person "who perpetrates a financial fraud by leading investors to believe that [he] is a legitimate investment broker." *Id.* The Commission includes those who pretend to occupy positions of trust because those who falsely assume roles are as culpable as those who abuse an actual position. *See id.*

118. *See id.*

119. *See, e.g.*, United States v. Koehn, 74 F.3d 199, 201-02 (10th Cir. 1996) (citing *Queen*, 4 F.3d at 929 n.3).

participate in a trusting relationship with their victims, but do not occupy a formal position vis-à-vis their victims.

For example, in *United States v. Iannone*,[120] the defendant established a company and appointed himself the chief executive officer.[121] He then encouraged several war veterans to invest in an oil and gas drilling venture by pretending to be a decorated Vietnam veteran and by befriending other veterans through an online chat room for veterans.[122] The defendant later misappropriated the invested funds.[123] The Third Circuit recognized that the defendant exercised special influence over his victims by using his fabricated combat experience to gain their trust.[124] The defendant argued that the Guidelines could not be applied to him merely because he had developed a trusting relationship with his victims.[125] The Third Circuit appeared to agree but noted that the defendant's argument ignored the "critical fact of th[e] case" that the defendant solicited investments "in his capacity as head of a company."[126] In this way, the appeals court based its application of the abuse of trust provision on whether or not the defendant held a formal "position."[127]

This focus on "position," though grounded in statutory language,[128] appears misguided and potentially excludes many relationships of heightened trust. Clearly, one can be involved in a relationship of trust without occupying a formal position. Thus, in *Iannone*, the most "critical" factor seems to be the special trust the defendant garnered through fraudulent means, not that the defendant served as owner of a particular company.[129] Put another way, if the defendant had used his relationships to entice people to invest in someone else's company, he would have violated the same trust that investors had conferred upon him. The court's focus on "position" misses the point that the trust in these relationships stems not from the title, but from the discretion exercised over those within the relationship.

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120. 185 F.3d 214 (3d Cir. 1999).

121. *See id.* at 223.

122. *See id.* at 214-21 (explaining that the defendant actively encouraged relationships with his victims by preying on the trust and loyalty the victims felt for fellow combat veterans).

123. *See id.*

124. *See id.* at 225.

125. *See id.* at 220-22.

126. *See id.* at 225 n7.

127. *See id.* at 222-25.

128. *See supra* note 117 and accompanying text.

129. *See Iannone*, 184 F.3d at 222-25.

Moreover, to the extent that it is outcome-determinative, the judicial preoccupation with "position" seems an unreasonably mechanical approach for basing a sentencing enhancement. The mere fact that the defendant structured his crime without the inclusion of a formal position should not enable him to escape the sanctions of the abuse of trust provision.

B. The Bank Teller Exclusion

Some courts have relied on the ordinary bank teller exclusion to exempt certain employees from the abuse of trust provision of the Guidelines.[130] The Commentary states that the abuse of trust provision does not apply "in the case of . . . theft by an ordinary bank teller."[131] Based on this language, some courts have reasoned that "the abuse of trust enhancement does not apply to bank tellers because they generally do not have sufficient managerial discretion to create a trust relationship."[132] Extending this rationale, some judges have refused to apply the abuse of trust position to all low-level employees, arguing that such employees have no managerial discretion and hold positions similar to bank tellers.[133] Courts who apply this theory determine if someone occupies a position of trust by analogizing the bank teller position with the particular job held by the defendant. Thus, in one case, the Northern District of Illinois refused to apply the abuse of trust provision to a mail carrier because his position had no managerial authority and was indistinguishable from that of a regular bank teller.[134] In contrast, in another case, the defendant's position as a bank vault teller afforded her a great deal of responsibility and enabled her to escape the security checks required for other bank tellers.[135] Therefore, the Ninth Circuit held that her position as vault teller included responsibilities beyond those of an ordinary bank teller and could be characterized as a position of trust.[136]

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130. *See, e.g.*, United States v. Ragland, 72 F.3d 500, 503 (6th Cir. 1996) (holding that defendant-bank teller was exempt from the Guidelines' enhancement).

131. U.S. SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1 (2001).

132. United States v. Akinkoye, 185 F.3d 192, 203 n.6 (4th Cir. 1999).

133. *See, e.g.*, United States v. Arrington, 765 F. Supp. 945, 949 (N.D. Ill. 1991).

134. *See id.* at 949 (citing United States v. Lange, 918 F.2d 707 (8th Cir. 1990)).

135. *See* United States v. Isaacson, 155 F.3d 1083, 1083-84 (9th Cir. 1998).

136. *See id.* at 1085.

Several courts have rejected the bank teller exclusion as under-inclusive and too mechanistic because it excludes defendants based on their relative seniority within a company or job description.[137] The level of a person's employment or her job title may not reveal the degree of trust she is afforded. For example, although a policeman may be a low-level employee within the departmental organizational chart, she undoubtedly occupies a position of trust for purposes of the Guideline.[138] In this way, rather than focusing on the nature of the relationship between the defendant and her victim, the bank teller exclusion leads courts to decide cases based on "formalistic definitions of job type."[139]

In addition to recognizing the limits of its use, some courts,[140] United States Attorneys,[141] and even a former member of the federal sentencing council,[142] have argued that the bank teller exclusion is inconsistent with the underlying rationale of the provision and should be discarded. They argue that many bank tellers do occupy a position of trust because they are entrusted with customer funds and both the customers and their employer rely on their trustworthiness to insure that the funds are not misused.[143] Judicial confusion results from these attempts to create a standard for distinguishing between bank tellers and other employees.[144] To illustrate, after reviewing various circuit courts' analysis of the bank teller exclusion, the Seventh Circuit concluded that the exclusion should be rejected because its effect was to "confound the plain meaning of the

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137. *See, e.g., Akinkoye*, 185 F.3d at 203 (calling the approach "mechanistic" and rejecting it because it "exclude[s] defendants from consideration based on their job titles"); United States v. Oplinger, 150 F.3d 1061, 1069 (9th Cir. 1998); United States v. Brann, 990 F.2d 98, 102-03 (3d Cir. 1993); United States v. Lamb, 6 F.3d 415, 418-19 (7th Cir. 1993) ("Merely looking at where an employee fits into a hierarchical structure is a far too simplistic approach to determining whether a defendant occupies a position of trust.").

138. *See Lamb*, 6 F.3d at 418-19.

139. *See* United States v. Gordon, 61 F.3d 263, 269 (4th Cir. 1995).

140. *See infra* note 143 and accompanying text.

141. *See* United States v. Odoms, 801 F. Supp. 59, 63 (N.D. Ill. 1992).

142. *See id.* at 64 n.20 (citing a former member of the sentencing council as stating that the bank teller exclusion has created an "irreconcilable conflict" for sentencing judges attempting to apply the abuse of trust provision).

143. As the Ninth Circuit explained, "we are somewhat at a loss to understand why the Sentencing Commission believes that an ordinary bank teller who embezzles should not receive the enhancement." United States v. Drabeck, 905 F.2d 1304, 1306 (9th Cir. 1990), *cited with approval in* United States v. Hathcoat, 30 F.3d 913, 917 n.2 (7th Cir. 1994); United States v. Brown, 941 F.2d 1300, 1305 n.6 (5th Cir. 1991); United States v. Castagnet, 936 F.2d 57, 61 (2d Cir. 1991).

144. *See, e.g.*, United States v. Lamb, 6 F.3d 415, 420 (7th Cir. 1993); *Odoms*, 801 F. Supp. at 63-4.

guideline and distort the analysis of courts applying it."[145] Other circuits concur with this conclusion.[146] Echoing the Seventh Circuit's sentiment, a former member of the sentencing council also noted that the exclusion should be disregarded.[147]

As this Part reveals, the statutory language of the Guidelines has generated considerable confusion among courts regarding the proper method of determining a position of trust. Moreover, the Commission's attempts to alter the language have failed to remedy this confusion.

IV. TRUST AS DEFINED BY THE COURTS

In developing their own techniques for identifying a position of trust, courts have fared no better than the Commission in creating precise and easily applicable criteria. As the Seventh Circuit noted, "[t]he confusion obvious in the disparity of the approaches of the circuits was a mirror of the halting attempt of the Sentencing Commission to provide guidance on the appropriate use of this enhancement."[148] While there seems to be agreement among federal judges on the validity of the enhancement, there is no judicial consensus on the characteristics necessary to establish a position of trust. Some courts have focused their inquiry on the extent to which one person is afforded access or authority over the valuable property of another.[149] Other courts have analyzed the extent to which a position allows its participants to commit a difficult-to-detect wrong.[150] Yet another approach emphasizes the degree of discretion conferred on a person occupying a particular position.[151] Each of these approaches suffers from inadequacies.[152]

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145. *Odoms*, 801 F.Supp. at 63-4; *accord Lamb*, 6 F.3d at 420 (noting that the result of the bank exclusion has been that "courts have jumped over hurdles to contort their analysis of the Guideline . . .").

146. *See supra* note 143 and accompanying text.

147. *See Odoms*, 801 F. Supp at 64 n.20.

148. *Hathcoat*, 30 F.3d at 917.

149. *See infra* Part IV.A.

150. *See infra* Part IV.B.

151. *See infra* Part IV.C.

152. *See infra* Part IV.A-C.

A. Access and Authority

Under the Seventh Circuit's analysis, a defendant's "access or authority over valuable things" characterizes a position of trust.[153] In *United States v. Lilly*, the Seventh Circuit found that a pastor who convinced his parishioners to contribute funds to a bogus investment scheme occupied a position of trust for the purposes of the abuse of trust provision.[154] The court reasoned that church members had entrusted Pastor Lilly with access or authority over two valuable things: the church's bank accounts and the financial direction of the church.[155] First, his position gave him sole authority over the church bank account from which he transferred funds into his personal account.[156] Second, as the church's financial decision-maker, the pastor was the sole manager of the church's finances, which enabled him to secretly misapply those funds.[157] Because he had this kind of access and authority, the pastor's position was one of trust within the meaning of the Guidelines.[158]

The Seventh Circuit's test seems appropriate in some settings. It would be applicable to an attorney who has access to a client's funds or a financial advisor who has control over a client's investment accounts.[159] In other situations, the standard may be applicable to employees such as loan officers and postal workers who clearly have access or authority over valuable property; that is, loan officers have access to money, while postal workers have access to mail.[160] Unlike an attorney or financial advisor, however, these employees may not have authority or discretion to determine the manner in which the property is used. Yet, it seems clear that the access afforded to loan officers or postal workers gives them the kind of trust provided by the Guidelines.

However, a broad reading of this formulation may be over-inclusive because many people may have a similar form of access without ever forming a trusting relationship. In *Lilly*, for example, while the court noted that Pastor Lilly had sole access over the church's bank accounts,

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153. *See* United States v. Lilly, 37 F.3d 1222, 1227 (7th Cir. 1994) (citing United States v. Dorsey, 27 F.3d 285, 289 (7th Cir. 1994)).

154. *See id.* at 1224-25.

155. *See id.* at 1227-28.

156. *See id.* at 1227.

157. *See id.* at 1227-28.

158. *See id.*

159. *See id.* at 1227 (characterizing a position of trust to include a person who has "access or authority over valuable things").

160. *See, e.g.*, United States v. Ajiboye, 961 F.2d 892, 895 (9th Cir. 1992); United States v. Lange, 918 F.2d 707, 710 (8th Cir. 1990) (explaining the special access that mail carriers have to mail, which justifies classifying their role as a position of trust).

the court also stated that the pastor "directed church personnel to transfer funds."[161] Thus, others in the church had access to the accounts without having a relationship with the victims.[162] The court must have found a fundamental difference between the access conferred on the pastor and the access other church members enjoyed.[163] Unfortunately, the court's test fails to indicate how such a distinction can or should be made.[164]

A similar problem can be seen in the context of other investment-related frauds. In a typical investment scam, a defendant will induce investors to deposit funds into an account over which he has considerable, if not sole, access and authority.[165] Under the Seventh Circuit's theory, all defendants who commit these frauds might be eligible for enhanced punishment even when no trusting relationship has arisen. Recognizing the flaw in this rationale, the Eleventh Circuit rejected the argument that the defendant's total control over all of his investors' funds warranted a finding that he occupied a position of trust.[166] As the Eleventh Circuit stated, the fact that the defendant had control over all of his investor's accounts "is merely another way of saying he controlled an elaborate, well-organized ponzi scheme" and fails to specify whether he developed any special relationships with his investors.[167] This argument recognizes that enabling someone to take possession of another's property in the course of her work does not mean that she occupies a "position of trust" for purposes of the Guidelines.[168] For this reason, the Seventh Circuit's theory may be of limited use.

Moreover, this theory may be under-inclusive because it fails to account for schemes that do not involve the perpetrators taking physical possession of a person's property. The "access or authority" rationale works best for defendants who occupy positions in which they manage or

161. *See Lilly*, 37 F.3d at 1227.

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* United States v. Mullens, 65 F.3d 1560, 1566 (11th Cir. 1995) (noting that the concept of control over assets "applies to all investor relationships").

166. *See id.*

167. *See id.* at 1567.

168. *See* United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000) (arguing that a clerical postal worker does not occupy the same "position of trust" as managers who possess greater fiduciary duties).

have control over money.[169] However, it does not work for situations in which the perpetrator serves solely as an advisor. Courts agree that an attorney serving as an advisor to a client occupies a position of trust for purposes of the Guidelines.[170] This is true irrespective of whether the attorney is entrusted with her client's money.[171] By the same token, courts have noted that a financial advisor serves in a similar position of trust for purposes of the Guidelines.[172] Such advisors, while privy to confidential and valuable information, may not have access to any tangible property such as money or other assets. In this respect, the access or authority rationale suffers from the same limitations as the entrustment theory under fiduciary law.[173] Like that theory, the Seventh Circuit's formulation fails to account fully for traditional kinds of trust relationships.

B. Freedom to Commit "Difficult-to-Detect" Crimes

Some courts have adopted the Ninth Circuit's theory that the critical inquiry for an abuse of trust enhancement "is the extent to which the position provides the freedom to commit a difficult-to-detect wrong."[174] The rationale for this theory is as follows:

> If a person is in a relationship such that any attempt by a defendant to abuse the relationship could be simply or readily noticed by the second party to the relationship, presumably the two persons have not formed a "trust" relationship. Conversely, if one party is able to take criminal advantage of the relationship without fear of ready or quick notice by the second party, the second party has clearly placed a level of trust in the first.[175]

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169. *See id.* at 635-36 (emphasizing that attorneys or bank executives embezzling funds would commit a breach of trust).

170. *See, e.g.*, United States v. Post, 25 F.3d 599, 600 (8th Cir. 1994).

171. *See id.* (holding that status as a licensed attorney placed the defendant in a position of public trust).

172. *See, e.g.*, United States v. Gottlieb, No. 93-5255, 1993 U.S. App. LEXIS 22954, at *5 (4th Cir. 1993); United States v. Tardiff, 969 F.2d 1283, 1289 (1st Cir. 1992) (noting that financial advisors "[v]irtually by definition" occupy a position of private trust within the meaning of the Guidelines).

173. *See supra* Part II.C.

174. United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990). *See also* United States v. Koehn, 74 F.3d 199, 201 (10th Cir. 1996); United States v. Garrison, 133 F.3d 831, 838 (11th Cir. 1998) (stating that the primary concern of the abuse of trust provision is to penalize defendants who take advantage of a position that provides them the ability to commit or hide a difficult-to-detect wrong).

175. *Hill*, 915 F.2d at 506.

The difficult-to-detect theory has statutory grounding.[176] The Commentary explains that in order for the enhancement to apply, "the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult)."[177] Based on this language and mirroring the Ninth Circuit's analysis, the Tenth and Eleventh Circuits have noted that whether the defendant is able to commit a difficult to detect crime is the cornerstone of a position of trust.[178]

However, other courts have criticized a reliance on this factor because it too often overemphasizes the extent to which a person is monitored or supervised.[179] Indeed, some prosecutors have argued for the enhancement to apply when the defendant's conduct may have been discovered if the supervisors had not been "inept, . . . sloppy, and derelict in their duty."[180] While courts applying this theory assert that "being subject to lax supervision alone does not convert one's job into a 'position of trust,'"[181] the cases reveal that courts have allowed a lack of supervision to determine whether a defendant holds a position of trust.[182]

In fact, courts reason that a lack of oversight allows a defendant to commit a difficult to detect crime and illustrates that he holds a position of trust.[183] Thus, in finding that a real estate agent occupied a position of trust, the Fourth Circuit focused on his ability to set his own schedule and work odd hours with little supervision.[184] Such a focus suggests that the defendant employer's failure to oversee his employee's actions triggered the determination that the defendant held a position of trust. The Ninth Circuit examined the actions of a defendant supply coordinator who purchased office supplies for a bank and engaged in a

176. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1 (2001).

177. *Id.*

178. *See Garrison*, 133 F.3d at 838; *Koehn*, 74 F.3d at 201.

179. *See* United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000) (noting that courts too often "emphasize . . . erroneously, the supervision an employee receives").

180. *See* United States v. Helton, 953 F.2d 867, 869-870 (4th Cir. 1992).

181. *Id.* at 870 (citing U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2001)); *accord Isaacson*, 155 F.3d at 1085.

182. *See, e.g., Koehn*, 74 F.3d at 201-02; United States v. Lowder, 5 F.3d 467, 473 (10th Cir. 1993); United States v. Queen, 4 F.3d 925, 929-30 (10th Cir. 1993).

183. *See e.g., Koehn*, 74 F.3d at 201-02; *Lowder*, 5 F.3d at 473; *Queen*, 4 F.3d at 929-30.

184. *See* United States v. Akinkoye, 185 F.3d 192, 204 (4th Cir. 1999).

pattern of purchasing unnecessary office supplies and returning them for cash.[185] The court found that the defendant occupied a position of trust meriting a sentencing enhancement.[186] In making this assessment, the court relied on the fact that the defendant restricted access to his supply office, the office was in a remote building removed from his supervisors, and the office was sloppy and disorganized so that only the defendant could determine its contents.[187] According to the court, these facts showed that the defendant could not be under close supervision, and hence, he could pursue his scheme without detection.[188] Therefore, his job enabled him to commit a difficult-to-detect crime indicating that he held a position of trust.[189] These cases illustrate the courts' tendency to find that a defendant held a position of trust due to his employer's failure to oversee adequately his activities.

However, while oversight might be important, it cannot completely define a position of trust. As the Sixth Circuit has emphasized, when there is less direct supervision over some employees, it is more difficult to detect their transgressions, which explains in part the distinction between a trust relationship and a non-trust relationship.[190] Pointedly, an analysis focusing on supervision fails to evaluate both the nature of the position held by the defendant and the nature of the relationship between the defendant and the victim.[191] Indeed, the fact that a defendant is able to commit a crime with ease may suggest that the defendant occupies a position of trust, but it does not identify the quality that defines such a position. The crux of the inquiry should be whether the relationship between the victim and defendant is of such a character that the victim does not feel compelled to investigate the activities of the defendant and conversely that the defendant does not feel the necessity of taking precautions against detection. The freedom to commit a difficult-to-detect crime theory does not respond to that issue and consequently fails to pinpoint properly the difference between a position that confers trust and one that does not. Because the theory overemphasizes supervision, it improperly incorporates some defendants' conduct based solely on the fact that their victims are not diligent enough to discover their activities.

185. *See* United States v. Oplinger, 150 F.3d 1061, 1069 (9th Cir. 1998).
186. *See id.* at 1069-70.
187. *See id.*
188. *See id.*
189. *See id.*
190. *See* United States v. Ragland, 72 F.3d 500, 503 (6th Cir. 1996).
191. *See id.*

C. Discretion

Several federal circuits believe that "the level of discretion accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position."[192] These courts agree that the amount of discretion afforded a defendant captures the essence of the trust relationship.[193]

> Where an individual makes himself particularly vulnerable by entrusting another with substantial authority and discretion to act on his behalf and then relies upon and defers to that person, a decision to take advantage of that trust and vulnerability is particularly abhorrent, as it undermines faith in one's fellow man in a way that the ordinary pickpocket simply cannot.[194]

Like the difficult-to-detect rationale, the text of the provision appears to support the proposition that discretion is a critical component of a private trust relationship.[195] The Commentary notes that a position of trust is "characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)."[196] In applying the provision, the Eleventh Circuit explained that the Guidelines contemplate those positions in which the victim entrusts a defendant with discretion.[197]

While discretion seems to be a critical factor in a relationship or position of trust, it is a concept that sentencing courts do not seem able to define precisely. Thus, because both an investment advisor and the co-partners of a general partnership are entrusted with a high degree of discretion, some courts consider such reliance to involve greater trust.[198]

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192. United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000); *accord* United States v. Reccko, 151 F.3d 29, 31 (1st Cir. 1998); United States v. Jolly, 102 F.3d 46, 48 (2d Cir. 1996) (noting that "the abuse of trust enhancement applies only where the defendant has abused discretionary authority entrusted to the defendant by the victim"); United States v. Garrison, 133 F.3d 831, 840 (11th Cir. 1998).

193. *See, e.g.*, *Tribble*, 206 F.3d at 637; *Reccko*, 151 F.3d at 31.

194. *Ragland*, 72 F.3d at 503; *accord Garrison*, 133 F.3d at 839 n.18 (describing the Sixth Circuit's opinion on this issue as "relevant clarification").

195. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1 (2001).

196. *Id.*

197. *See Garrison*, 133 F.3d at 840 (citing Second Circuit cases with approval).

198. *See, e.g.*, United States v. Tardiff, 969 F.2d 1283, 1289 (1st Cir. 1992) ("Virtually by definition, a money manager or financial adviser who is entrusted with, and who proceeds fully to exercise, broad discretionary power in respect to other peoples' money occupies a position of private trust.").

For example, one court described a relationship of trust as one in which the defendant occupies a position of influence over his victims that exceeds mere reliance on someone's business expertise.[199] This appears to capture the nature of the relationship between an investment advisor and her client as well as that between a lawyer and her client. However, defining discretion is not an easy endeavor. In fact, courts that have adopted this formulation tend to rely on comparisons to fiduciary law.[200] Thus, instead of more concretely defining the meaning of discretion, one court stated, without analysis, that the defendant must occupy a position "vis-à-vis the victim that is in the nature of a fiduciary relationship."[201] The court failed to discuss which theory of fiduciary law sentencing judges should adopt in their application of the Guidelines.[202] More importantly, because fiduciary law has failed to produce a consistent theory for identifying trust relationships, this rather incomplete comparison to fiduciary law may only inject greater confusion in the process.

Additionally, courts that apply this theory could be subject to the same criticism leveled at those who adopt the difficult-to-detect rationale because these courts also tend to overemphasize the amount of supervision that the victim exercised. Thus, one court explained discretion as the lack of close supervision over the defendant's actions.[203] Similarly, the First Circuit noted that a defendant who served as a switchboard operator at a police headquarters and tipped a drug dealer about an impending search did not occupy a position of trust because her position reposed no discernible discretion.[204] Though the court claimed to reject placing emphasis on an employee's freedom to commit wrongs,[205] the First Circuit explained that the defendant's lack of discretion was evidenced by the fact that she was closely supervised and used telephone lines that were regularly monitored.[206] Similarly, the Second Circuit noted that the fact that a victim could not engage in direct monitoring of the defendant's conduct illustrated the defendant's

199. *See Jolly*, 102 F.3d at 49.

200. *See, e.g., id.* at 48-9.

201. *Id.* at 48.

202. *See id.*

203. *See* United States v. Akinyoke, 185 F.3d 192, 204 (4th Cir. 1999).

204. *See* United States v. Reccko, 151 F.3d 29, 32 (1st Cir. 1998).

205. *See id.* at 32-3 (noting that the proper inquiry with respect to a position of trust was the degree of discretion a position afforded a victim, not the extent to which the employee had the ability to commit wrongs that "defy facile detection").

206. *See id.*

discretion.[207] Because the discretion rationale also relies on the extent to which an outside party has supervised a defendant, it may be of limited analytical value.

Finally, while participants in many trust relationships have some discretion over others within the relationship, there are instances where a defendant may not be afforded a high degree of discretion yet still be considered to occupy a position of trust.[208] Thus, federal courts have noted that some defendants, although they are closely supervised and lack the ability to exercise discretion, may occupy a position of trust worthy of the sentencing enhancement because of their unique access to information.[209] A focus on discretion alone would exclude these defendants.

This discussion reveals that federal courts differ on the qualities that identify a trust relationship meriting sentencing enhancement. The theories adopted by individual federal courts conflict with one another, potentially producing differing results. For example, while the Seventh Circuit's "access and authority" rationale may exclude an investment advisor or lawyer from the definition of a relationship of trust, the discretion rationale relied on by other courts may not. This discussion further reveals the limits of all of the theories adopted by each of the federal courts. Like the theories considered in connection with fiduciary law, the theories adopted by federal sentencing courts may apply with varying degrees of force depending on the relationship at issue. This problem contributes to the confusion surrounding the application of the abuse of trust provision.

V. TOWARD A RECONCILIATION

> The Guidelines have attempted to explicate the insight that people who violate a trust placed in them often do more damage to the social fabric and are more culpable than those who steal outright. That insight was no doubt universally

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207. *See* United States v. Jolly, 102 F.3d 46, 49 (2d Cir. 1996) (noting that corporate managers have discretionary control over corporate assets because public shareholders cannot directly monitor their conduct and hence such managers occupy positions of trust).

208. *See, e.g.*, *Reccko*, 151 F.3d at 32-3.

209. *See id.* at 33 (noting that while there may be sound arguments for holding such a person accountable for violating a trust relationship, the language of the Guidelines prevented such a conclusion).

> grasped by sentencing judges before the Guidelines were even contemplated. However, it has been limited and somewhat obfuscated by the Guidelines themselves.[210]

As this statement and the previous sections reveal, there has been much confusion and frustration on the part of judges interpreting the abuse of trust provision.[211] Moreover, the Commission's instructions and responses have been less than enlightening.

This experience mirrors that of fiduciary law. Commentators and judges alike have found it very difficult to agree on the characteristics that define a fiduciary relationship except in the most general of terms.[212] This lack of consensus exists even though such relationships have occupied Anglo-American law and jurisprudence for more than 250 years.[213]

Experiences with fiduciary law suggest that any principle for defining a trust relationship must begin with the premise that the concept of trust cannot be precisely defined.[214] Any solution also should acknowledge that the determination of a trust relationship depends on the facts of each case. As Professor DeMott has stated:

> Although one can identify common core principles of fiduciary obligation, these principles apply with greater or lesser force in different contexts involving different types of parties and relationships. Recognition that the law of fiduciary obligation is situation-specific should be the starting point for any further analysis.[215]

This recognition counsels against the creation of definitive rules or examples. Thus, the Commission first should clarify that the term "position" includes relationships that are characterized by trust. This will minimize any arbitrary distinctions between those who violate trust conferred upon them in their capacity as an office holder and those who do so in some non-official role. Such a clarification will also focus courts on identifying those qualities that truly reveal relationships of high trust.

More importantly, the bank teller exclusion, together with other potentially confusing specific examples, should be eliminated from the Commentary. Part III.B. of this Article illustrates that specific examples,

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210. United States v. Isaacson, 155 F.3d 1083, 1090 (9th Cir. 1998) (Fernandez, J., dissenting).

211. *See supra* Part IV.

212. *See* Cooter & Freedman, *supra* note 15, at 1045.

213. *See id.*

214. *See* Scallen, *supra* note 46, at 902 (noting that any principle must be based on "the understanding that no definition of fiduciary relationships can remain static").

215. DeMott, *supra* note 10, at 879.

such as the bank teller exclusion, have hindered, rather than helped, the application of the abuse of trust provision.[216] First, such examples cause sentencing courts to resort to analogies in seeking to pinpoint a relationship of trust. However, fiduciary law underscores the notion that analogies provide relatively little instruction for those seeking to identify the qualities constituting a trust relationship.[217] Indeed, the variety of settings in which a fiduciary relationship can arise makes it difficult to analogize those relationships except in a general way.[218] Hence, the Commission's examples, though seemingly helpful, can undermine attempts to identify a position of trust. Second, generating specific examples leads to confusion. As fiduciary law reveals, trust relationships "resist[] tidy categorization."[219] For example, the qualities inherent in one bank teller's relationship with her victims are not necessarily indicative of those with other relatively low-level jobs. The fiduciary law recognition that trust relationships tend to be situation-specific suggests the probable ineffectiveness of precise examples as a guide for determining whether relationships involve the level of trust that warrants a sentence enhancement.

Based on this assessment, the Guidelines should avoid identifying specific examples of a trust relationship altogether; instead, they should adopt a general statement of purpose and a broad list of relevant criteria. The Commentary should provide sentencing judges with a list of non-exhaustive factors to which courts may refer when determining what constitutes a relationship of trust. These factors should include characteristics from all theories currently being employed. In generating this list, the Commission should acknowledge that any inquiry related to a position of trust will be fact-specific and that the list may apply with varying degrees of force depending on the relationships and transactions at issue. Because this solution offers only a suggestive list, sentencing judges will need to determine the extent to which the given factors within the list apply to a particular situation.

Given the lessons learned from fiduciary law, these changes may represent a more practical solution to the problem that the abuse of trust

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216. *See supra* Part III.B.
217. *See supra* Part II.A.
218. *See* DeMott, *supra* note 10, at 879-80.
219. *See id.* at 879.

provision presents. Indeed, such changes account for the fluidity necessary for applying fiduciary law concepts and other ideas related to trust relationships more generally.

VI. CONCLUSION

Any attempt to impose a sentencing enhancement based on trust must begin with what scholars of fiduciary relationships have long recognized — namely, that trust is a concept that varies by context and is very difficult to define except in the most general of terms. This Article reveals that, like courts and commentators seeking to define the contours of fiduciary law, sentencing judges have struggled to understand and apply accurately the Guidelines' abuse of trust provision. The circuit courts have developed a variety of different theories aimed at accomplishing this endeavor. These theories result in confusion and some degree of conflict among the circuits about the qualities underlying a relationship of trust. They also reflect a failure to appreciate the lessons learned from fiduciary law regarding the inherent vagueness in the concept of trust.

In light of these problems, the Commission needs to take action and provide some clarity on the issue. Ironically, fiduciary law reveals that the Commission could provide more guidance by rejecting precision in favor of broader instructions in this area. Thus, instead of focusing on greater precision, the Guidelines should be modified to eliminate specific examples in favor of a general statement of purpose and a non-exhaustive list of factors to which judges may refer when determining the existence of a position of trust. This approach may be inconsistent with Congress' goal of providing more predictability and less judicial discretion for federal sentencing.[220] However, a simple review of the cases related to the Guidelines' abuse of trust provision reveals that such a goal is illusive at best. A comparison with fiduciary law underscores and confirms this observation.

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220. Congress enacted the Guidelines to increase uniformity and predictability in the sentencing process and to reduce the discretion of federal sentencing judges, which contributed to sentencing disparities. *See, e.g.*, Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U.L. REV. 1574, 1574-1575 (1997); Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 690 (noting that Congress set out to create guidelines that would make sentencing more predictable and less discretionary); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) (noting that the Guidelines grew out of sentencing reform measures aimed at limiting judicial discretion).