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Why Me: Application and Misapplication 3A1.1 the Vulnerable Victim Enhancement of the Federal Sentencing Guidelines

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NOTES

"WHY ME?": APPLICATION AND MISAPPLICATION OF § 3A1.1, THE "VULNERABLE VICTIM" ENHANCEMENT OF THE FEDERAL SENTENCING GUIDELINES

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INTRODUCTION

A nine-year-old boy is targeted for sexual torture and murder by child pornographers conspiring to produce a sex-snuff film.[1] A cross is burnt on the lawn of an elderly, ill black couple living in a rural and isolated all-white area.[2] A six-week-old infant is beaten to death by his father.[3] The criminal conduct described above might in its particulars be found especially repulsive and inflammatory. Although these acts would be deplorable under any circumstances, the context in which they occurred exacerbates the moral blameworthiness of the conduct. Specifically, the victims described in these scenarios share a common trait: extreme vulnerability.

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1 United States v. Depew, 932 F.2d 324 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 210 (1991).

2 United States v. Salyer, 893 F.2d 113 (6th Cir. 1989).

3 United States v. Boise, 916 F.2d 497 (9th Cir. 1990), *cert. denied* 111 S. Ct. 2057 (1991).

Intuitively, we recognize that criminal conduct directed at the particularly vulnerable displays an extra measure of depravity on the part of the actor.[4] Historically, this recognition led to intensified punishment for criminals who target such victims. The intensification may be overt, as in laws proscribing criminal conduct defined by particular victims; for example, child pornography statutes, which codify particularly strong sanctions. Alternatively, in keeping with the wide range of judicial discretion in sentencing,[5] recognition of victim vulnerability may be less overt and more idiosyncratic.[6] Individuals who engage in identical criminal conduct may receive dissimilar sentences, according to their choice of victim.[7] These sentences may further vary

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4 *See* RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 86-87 (1979) ("[C]riminals who knowingly select victims who are incapable of defending themselves are more morally blameworthy than others."). *Id.* at 86. One researcher has noted, while analyzing the typical robber's modus operandi: "favored targets for random street robberies are drunks, women with purses, individuals standing by disabled vehicles, and strangers who look as if they do not belong in the area or who obviously are lost." Edward Tromanhauser, *The Offender and the Victim*, 17 PEPP. L. REV. 145, 151 (1989). Tromanhauser also graphs generic defendant assessment of victim vulnerability on a chart ranging from easy targets to hard targets. *Id.*

5 "Under the system of criminal sentencing that prevailed for a century prior to the SRA, judges received wide ranges within which to sentence, but no anchoring point from which to begin . . . . Personal preference dictated each judge's methodology . . . ." Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687-88 (1992). See STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 70-76 (1988) for a discussion by judges of their perceived difficulties in calculating sentences for white-collar criminal activity where "you are dealing with . . . so-called victimless crimes, and one doesn't find in that kind of crime some of the factors which incline [a judge] at least to think almost automatically of a term in prison." *Id.* at 71. The judges conclude that "[w]ith respect to individual victims, there [is] a special concern for those that are viewed as being more defenseless . . . or being in a weaker position to defend themselves." *Id.* at 72.

6 See PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 3 (1977), describing pre-guideline sentencers as "left free to formulate and apply their own personal theories of punishment. They are allowed to impose their beliefs, or biases, or prejudices, or reactions to particular defendants within the very wide margins afforded by our present statutory range of sentences." *Id. See also* Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391 (1989) (identifying inroads by the victim's rights movement as shifting the balance too far in favor of victim impact evidence and calling for a more principled judicial limitation on the consideration of such evidence by employing a relevancy test incorporating the concept of culpability and disallowing evidence overly prejudicial to defendants).

7 *See* 1 NATIONAL RESEARCH COUNCIL, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 83-88 (Alfred Blumstein et al. eds., 1983) (discussing the role of the victim as a primary determinant of sentences and researchers' uncertainty of the role played by sentence determinants generally in influencing sentencing outcomes). *Cf.* Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 215-16 & n.67 (1988) (discussing the impropriety of allowing victim participation at sentencing generally, and at determinate sentencing in particular, to increase the severity of criminal sanctions because it causes different defendants convicted of similar crimes to receive disparate sentences in violation of the principle of equality in sentencing). *But see* Willard E. Sperry, *Victim Impact Evidence Within a Retributive System of Justice*, 25 CREIGHTON L.

depending on particular judges' subjective views of the blameworthiness inherent in the selection of certain victims.[8]

The United States Sentencing Guidelines[9] were promulgated to severely limit such judicial discretion in sentencing.[10] Since their mandate in 1984, through their issuance in 1987, to their most recent amendment in 1992, they have provoked a great deal of controversy and commentary. Much of the scholarship involves global criticism of federal determinate sentencing. Commentators have compared perceived pre-guideline sentencing inequities with post-guideline sentencing,[11] discussed the values which inform the guidelines' rejection of judicial discretion in sentencing,[12] and assessed the success[13] (or

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REV. 1275 (1992) (arguing that the admission of victim impact evidence in capital sentencing is ethical within a retributive system).

8 *See generally* LOIS G. FORER, CRIMINALS AND VICTIMS: A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT (1980). Forer notes that "[u]ntil recently, there were few regulations or limitations on the sentence which might be imposed and few restrictions or rules regulating the procedures to be followed in imposing sentence." *Id.* at 2. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 17 (1972) [hereinafter FRANKEL, CRIMINAL SENTENCES] ("[T]he trial judge is not discouraged from venting any tendencies toward righteous arrogance."); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). *Cf.* Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 395-96 (1991) (after noting that the "identity of the judge became a better predictor of incarceration than the defendant and the crime" in discussing pre-guideline sentencing principles, the authors observe that judges "therefore enjoyed wide discretion to sentence in accordance with their own theories regarding criminal sanctions and with any personal biases and prejudices.").

9 UNITED STATES SENTENCING COMM'N, *Guidelines Manual* (Nov. 1992) [hereinafter U.S.S.G.].

10 This Note explicitly offers no judgment on the wisdom of this decision to limit judicial discretion. Its' thesis merely assumes that by predicating the achievement of the underlying goals of sentencing on a system that severely limits judicial discretion, covert recovery of such discretion will defeat the overall goals of the guidelines. *See supra* note 8 and *infra* notes 11-15 for a discussion the wisdom and ramifications of the overall approach employed by the sentencing guidelines. One commentator provides the following thought-provoking conclusion, offered here as a backdrop for exploring § 3A1.1's goal of shaping and limiting a sentencer's inquiry and decision-making options:

> A sense of justice is essential to one's participation in a system for allocating criminal penalties. When the penalty structure offends those charged with the daily administration of the criminal law, tension arises between the judge's duty to follow the written law and the judge's oath to administer justice.

Freed, *supra* note 5, at 1687.

11 *See* Karle & Sager, *supra* note 8; Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992).

12 *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, (1988); Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367 (1989).

13 *See* Karle & Sager, *supra* note 8, at 420 (noting that their "study indicates that, with the exception of their impact upon prisons, the Guidelines seem to be accomplishing their general goals," while qualifying their assessment with concerns about unwarranted departures); Kathryn A. Walton, *The Federal Sentencing Guidelines: Miracle Cure for Disparity (Caution: Apply Only as Directed)*, 79 KY. L.J. 385, 389 (1991) ("[T]he Guidelines are far from

failure)[14] of the sentencing guidelines in achieving true and just reformation of federal sentencing.

A far smaller body of work has addressed the practical problems and pitfalls that have arisen in the application of this complex statutory sentencing scheme.[15] Now, five years after the promulgation of the guidelines, the existing body of appellate case law provides a basis for assessing the application of the more idiosyncratic aspects of the guidelines. An analysis of these cases reveals divergent and contradictory approaches taken by the federal circuits. This variance precludes uniformity in sentencing, the desire for which was the wellspring of the federal guidelines.

This Note explores section 3A1.1[16] of the federal sentencing guidelines, the "vulnerable victim" enhancement of federal sentences. Section 3A1.1 codifies judicial discretion to impose harsher sentences on defendants who commit similar crimes, but whose choice of victim identifies them as deserving greater punishment.

Codification of sentence enhancement according to victim vulnerability has proven to be a particularly difficult undertaking.[17] Cod-

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polished, but with careful application and a conscious regard of congressional objectives by the sentencing courts, the guidelines are the beginning of a fair and efficient federal sentencing system."). *Cf.* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-*Mistretta*): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289 (1989) ("If the Commission persists in narrowing its own horizon, then the likely outcome is an early sunset to the Commission's useful existence, if not its formal existence as well.").

14 The commentary pronouncing failure far outweighs that deeming the guidelines successful. *See generally* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 949 (1991) ("[T]he equality produced by current guidelines systems is illusory."); Freed, *supra* note 5, at 1752 ("These rigid statutes are wholly at odds with the sort of principled guidance and permissible individualization of penalties that Congress prescribed in the SRA."); Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773 (1992); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755 (1992) ("[T]he imposition of rigid guidelines by an administrative agency on a sentencing system is destined to failure"); Note, *supra* note 11, at 1889 ("[T]he Commission left . . . a . . . serious affront to criminal defendants' rights: constitutionally inadequate factfinding procedures that admit patently unreliable evidence for sentencing.").

15 *See generally* Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957 (1992); Tony Garoppolo, *Confusion and Distortion in the Federal Sentencing Process*, 27 CRIM. L. BULL. 3 (1991) (discussing application problems resulting from discrepancies between guideline sections and their accompanying commentary); Jonathan D. Lupkin, *5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines*, 91 COLUM. L. REV. 1519 (1991); Walton, *supra* note 13 (discussing departures based on criminal history and substantial assistance to authorities); David I. Shapiro, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 COLUM. L. REV. 2051 (1991).

16 U.S.S.G. § 3A1.1, *Vulnerable Victim.*

17 "[A]ll criminals select victims whom they believe . . . will be unable to defend themselves. If a provision is to especially single out this mental element of an offense, it should be as precise as possible." SINGER, *supra* note 4, at 86. Singer lists four "vulnerable victim" codifications, all of which he views as unsuccessful. *Id.* at 86-87.

ifying vulnerability as a factor and seeking to enhance sentences across the whole range of criminal conduct requires a broad approach to application. Consequently, unless restricted to clearly defined criteria and parameters, section 3A1.1 risks becoming a vehicle for covert, individualized judicial discretion.[18] Injection of such discretion can only undermine the guidelines' goal of uniformity across sentencing and proportionality within individual sentences.[19] This Note identifies and argues for section 3A1.1 application principles that will promote measured and consistent sentence enhancement. Unprincipled and inconsistent enhancement will give rise to the unjust sentencing disparities that the guidelines sought to eliminate, thereby ensuring the guidelines' failure.

Part I.A of this Note describes the promulgation of the federal sentencing guidelines and identifies the guidelines' underlying values. Part I.B illustrates sentence computation under the guidelines, noting in particular the role of the vulnerable victim adjustment in the process. Finally, Part I.C explores the purpose and focus of section 3A1.1 by analysing the enhancement's statutory language and accompanying official commentary. Illustrative cases that display a measured and principled application of section 3A1.1 are also examined.

Part II identifies particular problem areas that have arisen during judicial application of the enhancement. These problems are examined through the analysis of inconsistent and contradictory approaches taken by the federal circuit courts towards vulnerable victim enhancement. The problems fall into three categories: (i) judicial failure to identify and articulate reasoning that suppports a finding of *particular* vulnerability not present in all victims of the criminal conduct being sentenced; (ii) improper imposition of a requirement that

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18 *See* Freed, *supra* note 5, at 1683:

> [T]he guidelines system initiated in 1987 simultaneously proceeds on two different levels: (1) the level of formal, visible adherence to, or open departure from, guideline prescriptions in the trial courts, followed by review in the courts of appeals; and (2) the level of informal noncompliance with the new system—practices that are eluding scrutiny by courts of appeals .... Increasingly, the second, underground level of sentencing seems to be displacing the first, visible level.

19 Section 3A1.1 is broadly applicable to all criminal conduct, and, as such, engenders the implicit tension between uniformity and porportionality. One commentator has written that:

> At first glance, uniformity and proportionality appear to be logically interwoven. In reality, however, tension exists between the two objectives making it difficult simultaneously to achieve both goals. In order to perfect uniformity, the criminal justice system would have to be based on broad offense categories.... On the other hand, to perfect proportionality, categories would be eliminated and each offender's sentence would be tailor-made .... [T]he Commission compromised, resulting in integration of both goals but perfection of neither goal.

Walton, *supra* note 13, at 391.

the identified victim vulnerability must have motivated the defendant to target that victim; and (iii) judicial categorization of victims who share a particular characteristic as *per se* vulnerable to certain criminal conduct. Proper section 3A1.1 application is illustrated through an examination of the better reasoned cases found within each category. Part II further identifies the manner in which these application disparities undermine the goals of the sentencing guidelines.

Finally, Part III of this Note identifies a paradiguatic approach to the application of section 3A1.1 based on principles drawn from the cases illustrating measured, proper and consistent application of the enhancement to the identified problem areas. This Note ultimately suggests that adherence to such an approach will enable sentencing courts to apply the vulnerable victim enhancement in a consistent and just manner.

I
PRINCIPLES AND PROCESS: THE FEDERAL SENTENCING GUIDELINES AND VULNERABLE VICTIM ENHANCEMENT

A. The Underlying Goals of the Federal Guidelines and the Process of Guideline Promulgation

Overt disenchantment with the American judiciary's traditionally broad discretion in sentencing developed in the early 1970's.[20] The sentencing issues that gave birth to the federal sentencing guidelines, however, are not exclusively modern considerations. As far back as the colonial period, American jurisprudence struggled to strike a balance between strict codification and judicial discretion in sentencing.[21]

When Congress passed the Sentencing Reform Act of 1984,[22] [hereinafter *SRA*], it established the United States Sentencing Commission. The Commission was to promulgate judicial federal sentencing guidelines, establishing the "policies and practices" that would "provide certainty and fairness in . . . sentencing, avoiding unwarranted sentencing disparities" between like offenders guilty of like criminal conduct, while maintaining sufficient flexibility to allow for

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20 *See* ANDREW VON HIRSCH ET AL., THE SENTENCING COMMISSION AND ITS GUIDELINES 3-5 (1987) (ascribing the shift during this period to growing disfavor with both the rehabilitative model of punishment, and the consequent disfavor with discretion in sentencing, which had previously been thought to enable the systemic functioning of rehabilitation).

21 *See* Joel Samaha, *Fixed Sentences and Judicial Discretion in Historical Perspective*, 15 WM. MITCHELL L. REV. 217 (1989).

22 Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988) and 28 U.S.C. §§ 991-998 (1988) [hereinafter SRA]). The SRA is chapter II of the Comprehensive Crime Control Act of 1984 (codified in 18 U.S.C. § 3551-86, 3621-25, 3742 and 28 U.S.C. §§ 991-98 (1988)).

consideration of individual mitigating and aggravating factors not taken into account by established general sentencing practices.[23] The guidelines took effect on November 1, 1987,[24] and have subsequently undergone periodic amendment.[25] They are published in the United States Sentencing Commission's *Guidelines Manual* [hereinafter *Guidelines Manual*].[26]

The *SRA* calls for the Commission's guidelines to consider the nature and seriousness of the offense, as well as the history and characteristics of the defendant. In addition, the Commision's guidelines should embody the following purposes of criminal sentencing: promotion of respect for the law, just punishment for the offense (i.e., proportionality), adequate deterrence, protection of the public from the defendant's future criminal activity, and principles of rehabilitation.[27] The *SRA* further called for the Commission to issue "general policy statements regarding application of the guidelines or any other aspect of sentencing" that would further the above purposes.[28]

The introduction to the *Guidelines Manual* contains these congressionally mandated policy statements.[29] There, the Commission identifies Congress' three main objectives in sentencing reform. The first is honesty, encompassing both the reduction of the disparity between time sentenced and actual time served, and clarification, by eliminating obscurity as to which sources have informed the sentencing.[30] The second objective is uniformity, which focuses on achieving

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23 28 U.S.C. § 991(b)(1)(A)-(C) (1988).

24 The Commission was to prepare and present its guidelines to Congress by April 1987. The guidelines were to take effect six months later, absent congressional action. 28 U.S.C. § 994(p).

For sharp criticism of the sentencing commission's guideline promulgation methodology, see Parent, *supra* note 14, at 1788 ("But the federal Commission took an ideological, even political, approach to guideline development that disavowed constraints, suppressed discussions of purpose, closed decisionmaking to interested and affected parties, and departed substantially from past sentencing norms.").

25 28 U.S.C 994(p) calls for the Commission to submit guideline amendments to Congress to take effect "no earlier than 180 days after being so submitted . . . except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress."

26 U.S.S.G.

27 18 U.S.C. § 3553(a)(1), (a)(2) (1990). Rehabilitation has been virtually abandoned as goal of sentencing in the SRA. *See* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1027-32 (1991) (advocating legislative abandonment of the rehabilitative model).

28 28 U.S.C. § 994(a)(2) (1990).

29 U.S.S.G., ch. 1, pt. A, intro.

30 *Id.* This Note subsumes the mandate of 18 U.S.C. § 3553(c) (1988) that "[t]he court, at the time of sentencing shall state in open court the reasons for its imposition of the particular sentence," under the congressional goal of honesty in sentencing. Freed characterizes this as a call for candor, embodied in the goal enumerated by the guidelines that "the *Guidelines Manual*, together with the underlying statute, . . . will hold the judge accountable for every sentencing choice. He must state reasons for each sentence, includ-

parity between the federal courts in sentencing like offenders for like criminal conduct.[31] The third goal is proportionality, which is to be accomplished by sentencing defendants in a manner consistent with the severity of of their particular criminal conduct.[32]

In its policy statement, the Commission also acknowledges the tension between underlying philosophies of criminal punishment. The statement claims that there is general agreement that the ultimate aim of law and punishment is crime control. Beyond this threshold, however, the Commission finds that consensus breaks down. The Commission identifies a rift between proponents of the principle of "just deserts,"[33] who call for scaling punishment to "the offender's culpability and resulting harms," and those who advocate the imposition of punishment on the basis of "practical 'crime control' considerations."[34]

Ultimately, the Commission eschews (or at least declines to acknowledge) choosing between these philosophies, claiming that any choice would be profoundly difficult and that either choice would undercut the "widespread acceptance" that effective guideline implementation requires. It adds hopefully that "as a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result."[35]

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ing a 'specific reason' for some sentences, and his decision is subject to appellate scrutiny." (citations omitted). Freed, *supra* note 5, at 1697. *See also* FRANKEL, CRIMINAL SENTENCES, *supra* note 8, at 16 (quoting Learned Hand's observation: "[h]ere I am an old man in a long nightgown making muffled noises at people who may be no worse than I am"); Milton Heumann, *The Federal Sentencing Guidelines and Negotiated Justice*, 3 FED. SENTENCING REP. 223, 225 (1991) (characterizing the pre-guideline sentencer, who was not required to articulate reasoning supporting his sentence, as a "black box" sentencer, completely unconstrained and uncircumscribed in her sentencing choices).

31 U.S.S.G. ch. 1, pt. A, intro.

32 *Id.*

33 One commentator identifies the traditional definition of retribution and the parallel underlying principle of just deserts as the notion that " 'criminal behavior constitute[s] a violation of the moral or natural order . . . and, having offended that order, require[s] payment of some kind'. Therefore, a criminal is punished because he or she 'deserves' it. This justification for punishment is appropriately called the principle of 'just deserts.' " David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 855 (1992) (quoting Paul T. Jensen, *A Christian Defense of Retribution*, 7 CHRISTIAN LEGAL SOC'Y Q. 11 (1986)). *See* Sperry, *supra* note 7, at 1277-1281 (discussing retribution as a philosophical model). *Cf.* Starkweather, *supra* (setting forth a comprehensive discussion of a victim's relevance at sentencing under a just deserts theory of retribution and arguing that under this theory, victim participation in the plea bargaining process is not only appropriate but desirable). *See generally* SINGER, *supra* note 4 (discussing sentencing based on just deserts).

34 U.S.S.G. ch. 1, pt. A, intro.

35 *Id.* at 3. See von Hirsch, *supra* note 12, at 367 for a discussion of the negative effects of the sentencing commission's abdication of its duty to select a rationale. Von Hirsch notes that traditional discretionary sentencing concealed the need for a rationale, while sentencing guidelines bring it into sharp relief: "Without the guidance of a coherent rationale, the choice of a particular set of rules—imprisonment for this kind of case, proba-

This Note argues that, whether or not the lack of an underlying philosophy of punishment affects "most sentencing decisions," individual philosophies may affect the willingness of judges to identify victims as vulnerable for the purposes of applying section 3A1.1. Idiosyncratic identification of guideline vulnerability[36] ultimately undermines both the guidelines' stated goal of proportionality in sentencing and the congressionally mandated goal of uniformity.[37] To the extent that this Note identifies divergent application of the enhancement among circuits, it identifies the failure of the guidelines to fulfill these mandates.

B. The Sentence Computation Process Under the Guidelines

Theoretically, application of the gnidelines is a mechanical process. The sentencing judge is instructed to follow the general application principles contained in the introductory chapter of the *Guidelines Manual*.[38] In reality, application calls for a great deal of judicial decision-making as the sentencing judge identifies the component parts that will yield the fully calculated sentence.[39]

The first step is the selection of the applicable guideline section from Chapter two of the *Guidelines Manual*. This is done by referencing the statutory index, which cross-references federal statutes with gnideline sections.[40] Once selected, the guideline section provides a base offense level, which, in turn, is adjusted by specific offense characteristics contained in that guideline section.

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tion for that kind—is arbitrary: it might produce more consistent outcomes, but it is not apparent why outcomes are more effective or more just." *Id.* at 370-71. *See also* Steven P. Lab, *Potential Deterrent Effects of the Guidelines, in* THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 32, 33 (Dean J. Champion ed., 1989) ("[e]ven a cursory reading of the U.S. Sentencing Guidelines shows which rationale is dominant. While the Commission has paid lip service to the goals of deterrence and incapacitation, . . . the focus is almost exclusively on 'just deserts.' ").

36 "[Sentencers] have discovered that 'creative interpretation' of the guidelines can outflank reform rhetoric and afford them substantial discretion." Alschuler, *supra* note 14, at 925.

37 Talbert, *supra* note 7, at 211-219 (discussing the effect of victim participation at sentencing on the goals of retribution, deterrence, incapacitation, and rehabilitation).

38 U.S.S.G. § 1B1.1.

39 As one commentator notes:

> Each "sentencer" makes critical choices affecting the sentence in the particular case, and—ultimately—the level of disparity in the sentencing system. A sentence emerges not only from the sequential stages in establishing a sentencing range or modifying it, but from variations in discretionary actions taken by different individuals who play the desiguated roles within each stage.

Freed, *supra* note 5, at 1696.

40 U.S.S.G. App. A. *See also* U.S.S.G. § 1B1.2 (describing the rules and exceptions applicable to selecting the appropriate offense guideline section).

For example, in the statutory index, the federal offense of interference with housing rights by means of force or threat of force resulting in bodily injury, codified at 42 U.S.C § 3631(b)(1), corresponds to guideline section 2H1.3, *Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination, Damage to Religious Real Property.* This guideline provides a base offense level of ten if no injury occurred and fifteen if injury occurred. The section also refers to a "specific offense characteristic," e.g., "[i]f the defendant was a public official at the time of the offense, increase by 4 levels." Assuming the violation involved an injury to the victim and a public official was the perpetrator, this computation would result in an adjusted base offense level of nineteen.

The sentencer then applies the various sections of Chapter Three of the *Guidelines Manual* to the adjusted base offense level. Chapter three provides adjustments for factors involving the characteristics of the victims,[41] the role that the defendant played in the offense,[42] and any obstruction of the proceedings by the defendant.[43] It is at this stage in the process that the sentencer considers section 3A1.1, the vulnerable victim enhancement. If applied, the enhancement increases the offense level by two. The court then repeats these steps for multiple offense convictions. A criminal history category is then determined separately from the offense level calculation, based on prior convictions and other considerations, including "career offender" and "criminal livelihood" determinations by the court.[44]

Finally, the sentencer uses separate calculations to compute a sentencing range based on their intersection on a sentencing table contained in Chapter Five of the *Guidelines Manual.*[45] This range is considered in light of the applicability of options contained in Chapter five, which include probation, restitution, imprisonment, community confinement and fines.[46] After deciding whether either an upward or downward departure is appropriate, (a step neither freely allowed nor lightly taken),[47] the court must sentence the defendant within the calculated range.

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41 U.S.S.G. § 3A1.1-3A1.3.

42 U.S.S.G. § 3B1.1-3B1.4.

43 U.S.S.G. § 3C1.1.

44 U.S.S.G. ch. 4.

45 U.S.S.G. ch. 5, pt. A.

46 U.S.S.G. § 5B1.1-5G1.3.

47 A judge's power to depart from a sentencing range is carefully circumscribed under the guidelines and departure is strictly reviewed at the appellate level. *But see* United States v. Merritt, 988 F.2d 1298 (2nd Cir.), 1309, *cert. denied,* 113 S. Ct., 2933 (1993) (advocating departure based on offender characteristics because "departure in the appropriate case is essential to the satisfactory functioning of the sentencing system"). For a discussion of departure under the guidelines, see Ellingstad, *supra* note 15; Shapiro, *supra* note 15; Lupkin, *supra* note 15.

Continuing the above example of interference with housing rights, the base offense level of nineteen for a defendant with no criminal history would mandate a sentence within a range of thirty to thirty-seven months. Had this civil rights offense involved a vulnerable victim under section 3A1.1, the adjusted base offense level of twenty-one would allow a sentence ranging from thirty-seven to forty-six months. Application of section 3A1.1 can increase the available sentencing range from as little as two months to as much as seventy-eight months, depending upon the base sentencing range.

C. Section 3A1.1; The Vulnerable Victim Enhancement Particularized

The question of a crime victim's role at sentencing is as old as society's assumption of responsibility for the well-being and safety of its constituents and its removal of dispute resolution from the realm of self-help.[48] The familiar Biblical *Lex Talionis*, the law of "eye for eye, tooth for tooth,"[49] is simply an ancient victim-in-sentencing statute.[50] Recently, the Supreme Court, in a series of cases, has struggled to define the role of victim impact evidence in the capital sentencing process.[51]

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48 For an interesting thumb-nail sketch of the historic role of victims at sentencing see ANDREW R. KLEIN, ALTERNATIVE SENTENCING: A PRACTITIONER'S GUIDE § 5.02 (1988). Klein concludes by discussing the effects of admitting the testimony of a murder victim's survivor by noting that "[t]he long-term effect of the introduction of victims . . . into the criminal justice system is unknown at present." *Id.* at 143. *See generally* Howard C. Rubel, *Victim Participation in Sentencing Proceedings*, 28 CRIM. L.Q. 226 (1986). Rubel outlines the theory that the state "appropriates" conflicts from victims in an effort to avoid the negative of the increased violence that accompanies individual revenge. *Id.* at 239. Interestingly, Rubel sees the subjective factors of both the "vengeful" victim and the "merciful" victim as inputs to be avoided, through judicial distance, because they lead to general sentencing inequities, thereby undermining the goal of uniformity. *Id.* at 248-9. *But see* JAMES M. BURNS & JOSEPH S. MATTINA, SENTENCING 205-07 (1978) (discussing the role of victims at sentencing, calling for reform and recounting anecdotally the beneficial impact of a "merciful" victim at sentencing).

49 *Exodus* 22:24 (The New Oxford Annotated Bible).

50 *See Exodus* 21:23; 24 *Deuteronomy* 19:21; *Leviticus* 24:20. *Lex Talionis* is traditionally seen as "not an expression of vengeance but a limitation upon measureless vengeance." THE NEW OXFORD ANNOTATED BIBLE 94 n.22-25. *But see* Calum Carmicheal, *Biblical Laws of Talion*, 9 HEBREW ANN. REV. 107 (1985). Carmicheal traces the derivation, as rules of law, of the Exodus and Deuteronomy *Lex Talision* from earlier biblical narratives. Carmicheal's conclusion that "the talionic formula . . . applies to the victim in question and not to types of victim who differ according to injuries sustained," *id.* at 118, gives the biblical statute a reading that parallels precisely this Note's view of § 3A1.1. *See infra* notes 52-58 and accompanying text.

51 See Sperry, *supra* note 7, at 1281-1309 for a cogent description and analysis of Booth v. Maryland, 482 U.S. 496 (1987), South Carolina v. Gathers, 490 U.S. 805 (1989) and Payne v. Tennessee, 111 S. Ct. 2597 (1991). These three decisions reflect the Supreme Court's vacillating view of victim impact evidence. *Booth* and *Gathers* hold that the admission of victim impact evidence at the sentencing phase of a capital trial violates the Eighth

The vulnerable victim enhancement is distinguishable, however, in both process and goals, from most codified and common-law methods of enabling victims to inform penalty proceedings. Section 3A1.1 seeks neither to assess, nor to factor into sentencing, the impact of a defendant's criminal conduct on the victim.[52] Nor does the enhancement allow judicial consideration of a victim's perspective when determining the appropriate level of punishment to impose at sentencing. Section 3A1.1 seeks only to identify particularly vulnerable victims and to inform the court about the nature of the defendant by focusing solely on the criminal conduct at issue.

The vulnerable victim adjustment of the sentencing guidelines reads as follows:

> § 3A1.1 *Vulnerable Victim*
> If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.
>
> *Commentary*
>
> *Application Notes:*
> 1. This adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.[53]
> 2. Do not apply this adjustment if the offense guideline specifically incorporates this factor. For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was unusually vulnerable for reasons unrelated to age.[54]

Amendment's prohibition against cruel and unusual punishment. Ultimately, *Payne* upholds the admissibility of such evidence.

52 *See* Hellerstein, *supra* note 6, at 400-05 (discussing the relationship between victim impact statements and the federal sentencing guidelines).

53 See *infra* note 116 and accompanying text for commentary on the bank teller example provided in Application Note 2. *See generally infra* notes 110-22 and accompanying text.

54 U.S.S.G. § 3A1.1. The adjustment has been amended three times since its inception. On November 1, 1989 the section itself was amended by replacing the language "the victim" wherever it appeared with the language "a victim." The section of the Commentary captioned "Application Notes, Note 1" was amended by deleting the language "any offense where the victim's vulnerability played any part in the defendant's decision to commit the offense," and inserting "offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant"; and deleting "sold fraudulent securities to the general public and one of the purchasers," and inserting "sold fraudulent securities by mail to the

1. *Enhancement Purpose and the Role of the Victim*

Notwithstanding its apparent focus, this sentencing enhancement neither depends on nor inquires into the harm done to the victim of criminal conduct. The decision whether to apply the adjustment is not a function of calibrating a defendant's sentence to a particular victim's suffering. Instead, a sentencer's section 3A1.1 interest in the victim concerns only the victim's role as a *target*[55] of the relevant criminal conduct. As noted in *United States v. Long*,[56] "[t]he section does not authorize sentence enhancement based on the severity of the victim's suffering. A victim's testimony can be relevant to the sentencing courts determination of "vulnerability," but only to the extent that the victim discusses facts that might have been known to [the] defendant . . . ."[57] The enhancement seeks to identify instances where a particularly vulnerable victim was the object of the criminal activity, thereby establishing that the defendant has "show[n] the extra measure of criminal depravity which section 3A1.1 intends to more severely punish."[58] The victim's characteristics serve only to illustrate the defendant's depraved nature, allowing the sentencer to apply that "extra

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general public and one of the victims." These amendments were intended to "clarify the guideline and commentary." U.S.S.G., App. C, amend. 245 (1990).

On November 1, 1990 the section of the Commentary captioned "Application Notes, Note 2" was amended by inserting the complete second sentence, as it now appears. This amendment was intended to "clarif[y] the application of § 3A1.1." U.S.S.G., App. C, amend. 344.

On November 1, 1992 the section of the Commentary captioned "Application Notes, Note 1" was amended by inserting the complete last sentence, as it now appears. This amendment "clarifie[d] the circumstances in which the vulnerable victim adjustment is intended to be applied." U.S.S.G., App. C, amend. 454. *See infra* note 117 and accompanying text for commentary on this amendment.

55 *See* U.S.S.G. § 3A1.1, Comment (n.1).

56 935 F.2d 1207 (11th Cir. 1991).

57 *Id.* at 1211. *See also* United States v. Roberson, 872 F.2d 597, 609 (5th Cir.) *cert. denied*, 493 U.S. 861 (1989) (holding sentence of defendant convicted of fraud was properly enhanced where defendant used dead companion's credit card after burning his corpse, and noting that "whether a corpse may suffer harm is irrelevant" because section 3A1.1 does not require harm).

58 United States v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990).

Of course, the conclusion that the guideline focuses on the offense to inform the court about the offender's "depravity" is a judicial conclusion drawn from the principle of conduct-scrutiny, which the guideline mandates. One commentator discerns the guideline's fixation on the offense differently: "Apparently, the Commission's philosophy of criminal sentencing is to shape the sentence to the crime, rather than to the offender. This policy directly contradicts Congress' desire to maintain individualized sentencing." Lay, *supra* note 14, at 1769.

The question was similarly asked and answered by sitting United States District Judge Orinda D. Evans: "In Sentencing should you focus more on the characteristics of the crime or the characteristics of the criminal? And I think this is an issue that the [SRA] has decided in favor of focusing on the characteristics of the crime. And I suppose reasonable minds can differ, but that is something where [we] judges tend to think differently." *Atlanta Roundtable: Views From the Bench*, 1 Fed. Sent. Rep. 320, 322-3 (1988).

dollop of punishment"[59] to those defendants identified as selecting particularly vulnerable victims as the targets of their criminal conduct.

Nowhere is the victim's paradoxical "absence" from section 3A1.1 sentencing more apparent than in *United States v. Depew*.[60] In *Depew*, a case of "unspeakable evil and tragedy narrowly averted,"[61] a defendant who conspired to kidnap a young male to produce a sex-snuff film, in which a boy was to be sexually tortured and murdered, was convicted of conspiracy to kidnap and exploit a minor in a sexually explicit film. Police detected the nascent scheme thwarted and the defendants during the conspiracy phase. The defendants had not yet "selected" a particular young male to victimize. Despite the absence of an actual victim, the court found that the defendant's sentence was properly enhanced through application of the vulnerable victim adjustment.[62] Noting that "an innocent twelve year old boy was, from the beginning of the conspiracy, to be the target of the crime," the court held that "[a] boy of such age would certainly be 'unusually vulnerable,' if he fell into the hands of the appellant."[63]

Application of the vulnerable victim enhancement to a conspiracy defendant whose intended criminal act never occurred, and whose conduct had no victim, highlights the enhancement's intended purpose. Proper application of section 3A1.1's principles will identify those defendants who target victims that they knew, or had reason to know, were particularly vulnerable to their criminal conduct. The enhancement does not seek to calibrate sentencing on the basis of the harm caused by the criminal conduct. Rather, it seeks to identify and punish particularly heinous offenders.[64]

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59 United Sates v. Newman, 965 F.2d 206, 212 (7th Cir.), *cert. denied*, 113 S. Ct. 470 (1992).

60 932 F.2d 324 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991).

61 *Id.* at 326.

62 Note that the adjustment can only be applied to either kidnapping conspiracy or first degree murder; conspiracy to exploit a minor in a sexually explicit film would be viewed as incorporating the victim's age, (the grounds for the finding of vulnerability), into the offense guideline, and so application of § 3A1.1 would be precluded by its own terms: "Do not apply this adjustment if the offense guideline specifically incorporates this factor." U.S.S.G. § 3A1.1, comment. (n.2). See *infra* notes 75-82 and accompanying text for further discussion of Commentary Note 2.

63 *Depew*, 932 F.2d at 330.

64 *See also* United States v. Yount, 960 F.2d 955 (11th Cir. 1992) (holding that although bank was victim of money laundering, embezzling and misapplication of funds, and that in reimbursing victims the bank ultimately became the victim, the fact that defendant embezzled from very old and infirm trust account holders who were unable to manage their own affairs supported the application of the vulnerable victim enhancement). *Cf.* United States v. Paslay, 971 F.2d 667 (11th Cir. 1992) (holding that although alleged victims were also accomplices, there was no reason why vulnerable accomplices could not be subsumed under U.S.S.G. § 3A1.1). *See also* United States v. Williams, 963 F.2d 374 (6th Cir. 1992) (opinion available in Westlaw) (declining to decide, because issue was not properly raised at trial, whether passengers of defendant convicted of bringing illegal aliens

2. *Necessarily Broad Language v. the Desire to Limit Discretion*

As noted earlier, the difficulty in crafting such an enhancement lies in identifying factors broadly applicable across the full spectrum of criminal conduct.[65] The enhancement language must avoid vagueness. It must simultaneously disencumber, yet shape and limit the sentencing court's discretion to identify "particular" vulnerability when sentencing defendants whose offenses may vary widely between victim, context and criminal conduct.[66]

In *United States v. Boult*,[67] the Eighth Circuit rejected the argument that the language of the enhancement was unconstitutionally vague. After reviewing the factors cited by the guideline ("age, physical or mental disability or particular susceptibility"),[68] the court found that, taken as a whole, section 3A1.1's language sufficiently defined its applicable fact pattern: "[w]e cannot conclude that it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[69]

While the vagueness impediment has been addressed and disposed of by at least one circuit, the tension over appropriate sentencing discretion continues. One means of gauging the discretion inherent in the enhancement is to look at the standard of appellate review that challenged enhancement determinations undergo. The Fifth Circuit addressed this question in *United States v. Mejia-Orosco*,[70] resolving it squarely in favor of district court discretion.

In *Mejia-Orosco*, a defendant petitioning for rehearing urged the Fifth Circuit to adopt a higher standard of appellate review in lieu of the "clearly erroneous" standard that had been applied to his first ap-

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into United States were "victims" of offense, court finds they were vulnerable victims within meaning of U.S.S.G. 3A1.1). *But see* United States v. Velasquez-Mercado, 872 F.2d 632, 636, *cert. denied*, 493 U.S. 866 (1989) (female illegal aliens were smuggled and molested by defendant are more properly considered "customers" than "victims" of defendant illegal transporter).

65 "Sentencing commissions can quantify harms more easily than they can quantify circumstances." Alschuler, *supra*, note 14 at 915. *See also supra* notes 17-19 and accompanying text.

66 "Yet, disparity persists on a more limited scale as a result of differing approaches to ambiguous Guidelines provisions." Karle & Sager, *supra* note 8, at 444. *See also* JACK M. KRESS, PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES 195-97 (1980). Discussing the codification of victims as an offense variable in guideline sentencing, Kress notes "[a] danger with using this variable is that, unless very carefully phrased, the coding may become subjective." *Id.* at 197.

67 905 F.2d 1137 (8th Cir. 1990).

68 U.S.S.G. § 3A1.1.

69 *Boult*, 905 F.2d at 1140. For a general discussion of the constitutionality of the guidelines, see *The Constitutionality of the Federal Sentencing Reform Act After* Mistretta v. United States, 17 PEPP. L. REV. 683 (1990).

70 868 F.2d 807 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989).

peal.[71] To buttress his argument for less deference to district court determinations, the defendant focused on language in the Congressional Record discussing standards of appellate review, using section 3A1.1 as an illustration. The Congressional Record analysis suggested that, while age and physical ailments might be termed "objective facts" and thereby insulated from close review under the "clearly erroneous" standard, "vulnerability" would be a "subjective" judgment, perhaps requiring a different, closer appellate review.[72]

The Fifth Circuit, while pointing out the difficulties of judicial reliance on legislative history, rejected both the logic and the recommendation of the Congressional Record's analysis. In language oft-quoted in subsequent section 3A1.1 decisions, the court wrote:

> [M]atters such as "age" or "physical ailments" are the sort of facts which may effectively be reviewed by an appellate court. . . . On the other hand, "vulnerability" is the sort of *fact* which the trial court is peculiarly well positioned to gauge, . . . vulnerability is a complex fact dependent upon a number of characteristics . . . not reducible to a calculation of the victim's age or to a diagnosis of the victim's disease.[73]

Characterizing the vulnerability finding as one of "fact" should theoretically engender review for "clear error." However, most circuits, many simultaneously citing *Mejia-Orosco's* language with approval, expressly or implicitly review a section 3A1.1 determination as a mixed question of fact and law: the underlying factual predicates are reviewed for clear error, while the reasoning applied to the facts ultimately resulting in the identification of a victim as particularly vulnerable is generally considered a question of law, engendering de novo review.[74]

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71 In applying this standard, the lower court had determined issues unrelated to section 3A1.1.

72 *Mejia-Orosco*, 868 F.2d at 809.

73 *Id.* at 807 (emphasis added).

74 *See* United States v. Long, 935 F.2d 1207 (11th Cir. 1991), where the Eleventh Circuit writes: "The Fifth Circuit has suggested that it believes the applicability of § 3A1.1 to be a *purely factual* determination. While we decline to adopt that conclusion, we agree with that court's observation that 'a judgement as to vulnerability is not reducible to a calculation of the victim's age or a diagnosis of the victim's disease.'" *Id.* at 1211 (emphasis added). *See also* United States v. Caterino, 957 F.2d 681 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 129 (1992) (reviewing guideline interpretation *de novo*, but subjecting determinations of vulnerability to a "due deference" standard). *But see* United States v. Clark, 956 F.2d 279 (10th Cir. 1992) (opinion available in Westlaw) (vulnerability question of fact reviewed for clear error); United States v. Sutherland, 955 F.2d 25 (7th Cir. 1992) (vulnerability is a question of fact reviewed for clear error). *Cf.* United States v. Sabatino, 943 F.2d 94 (1st Cir. 1991) ("[L]egal interpretation and application of sentencing guidelines is subject to plenary review" when reversing guideline application); United States v. Pavao, 948 F.2d 74 (1st Cir. 1991) ("Clearly erroneous" standard applied as court affirms guideline application).

3. *Preclusion, as Vulnerability Factors, of Characteristics "Counted" in the Underlying Offense Guideline*

Another consideration under section 3A1.1 enhancement is the mandate that courts "not apply this adjustment if the offense guideline specifically incorporates . . . [the] factor."[75] The clearest example of this caveat is the one provided by the guideline itself: victim age. In *United States v. Plaza-Garcia*,[76] the First Circuit reversed a district court's section 3A1.1 enhancement of a sentence under guideline section 2G2.1, (sexual exploitation of a minor).[77] The court properly held that the victim's age was specifically incorporated into the offense guideline, meaning that the Sentencing Commission had taken the factor into account when calculating the base offense level; thus section 3A1.1 was inapplicable by its own terms.

Other circuits have been less rigorous in observing this restriction, particularly in the context of sexually abused children. The cases clearly show the courts straining against the limits imposed on their discretion when faced with conduct so egregious that it traditionally invited the strongest sentences in the court's power. In *United States v. Poncho*,[78] a defendant convicted of sexual abuse of a minor argued that the sentencing court had "double counted" by relying on "age" as a vulnerability factor, where the commentary of the offense guideline upon which his sentence was computed described his conduct as "sexual acts lawful but for a victims' age."[79]

The Tenth Circuit affirmed sentence enhancement, holding that application would have been impermissible if it had been predicated on age alone. The court found that the sentencing court had relied on the "victim's age, and the time and place of the sexual abuse," as indicated in the judge's statement at the sentencing hearing.[80] The circuit court further reached sua sponte into the record and buttressed the enhancement based on the victim's niece-uncle relation with her abuser. Directly contradicting the enhancement's unambiguous language, the circuit court wrote that "the complete exclusion of age as one of the circumstances would be contrary to common sense,

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75 U.S.S.G. § 3A1.1, comment.(n.2).

76 914 F.2d 345 (1st Cir. 1990).

77 U.S.S.G. § 2G2.1.

78 968 F.2d 22, (10th Cir. 1991), *cert. denied*, 113 S. Ct. 985 (1993) (opinion available in Westlaw). *See also* United States v. Altman, 901 F.2d 1161 (2d Cir. 1990) (affirming application against defendant convicted of sexual exploitation of minor who argued sentence was improperly enhanced because charged substantive offenses included the same elements as the vulnerability enhancement; section 3A1.1 application nominally relied on the defendant's drugging of the victim, which rendered the victim vulnerable).

79 U.S.S.G. § 2A3.2 Criminal Sexual Abuse of a Minor, Background Commentary.

80 *Poncho*, 968 F.2d 22 at **1 (opinion available in Westlaw).

given the infinite variety of circumstances in which a forty-six year old man may abuse a pre-adolescent child."[81]

Contrary to common sense or not, enhancement based on the victim's age, where the underlying offense guideline clearly incorporates age and the enhancement itself forbids use of the factor in this context, is manifestly contrary to the prescriptions of the guidelines. Such application forcefully illustrates the tension between attempts to limit discretion and the desires of individual judges' to punish that behavior that they consider most heinous. The question of whether a vulnerability factor has been incorporated into a particular base offense level has been the subject of appeals of sentences for a variety of criminal conduct.[82]

4. *Correct Vulnerable Victim Enhancement Illustrated*

Beyond these threshold considerations, the guidelines as a whole mandate strict application parameters, seeking to ensure that vulnerability is found and sentences thereby enhanced on a principled basis. Because the enhancement is of necessity drafted in generalities, its application is best illustrated through an example. The enhancement in *United States v. Hershkowitz*[83] reflects a principled, thoughtful and measured use of the vulnerable victim enhancement. The Second Circuit's analysis is consistent with both the enhancement's plain language and the recommendations in Parts II and III of this Note.

In *Hershkowitz*, a detention enforcement officer of the Immigration and Naturalization Service appealed application of section 3A1.1 following his plea of guilty to assaulting an immigration detainee while acting under color of state law.[84] The defendant attacked and assaulted an immigration detainee in the company of four other guards, slapping and punching the victim in the face, chest and stomach.[85] The sentencing court found that the detainee was a vulnerable

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81 *Id.*

82 *See* United States v. Hershkowitz, 968 F.2d 1503 (2d Cir. 1992) (Prisoner's status as a victim not factored into the offense level for "Civil Rights Violation Committed by Official Acting Under Color of Law"); United States v. Salyer, 893 F.2d 113 (6th Cir. 1989) (race not a factor incorporated in guideline for conspiracy to violate rights of a citizen); United States v. White, 979 F.2d 539 (7th Cir. 1992) (section 3A1.1 enhancement of sentence for interstate transportation of minor for purpose of prostitution held to be proper where defendant knew of 16 year old victim's troubled childhood, history of sexual abuse and current placement in group home); United States v. Clark, 956 F.2d 279 (10th Cir.), *cert. denied*, 112 S. Ct. 3010 (1992) (opinion available in Westlaw) (application of section 3A1.1 not impermissible double counting when imposed with section 3B1.3 enhancement for abuse of position of trust, where defendant sexually assaulted sixteen year old inmate).

83 968 F.2d 1503 (2d Cir. 1992).

84 The enforcement officer violated 18 U.S.C. § 241, which prohibits a "Civil Rights Violation Under Color of Law."

85 *Hershkowitz*, 968 F.2d at 1504.

victim and the Second Circuit affirmed enhancement application to the defendant's sentence.

The defendant first argued that the "vulnerability of the detainee was merely a result of [defendant's] status as a guard,"[86] a factor already accounted for at sentencing by the applicable guideline offense level: "Civil Rights Violation Committed by Official Acting Under Color of Law."[87] The defendant maintained that by using an incorporated factor to find vulnerability, the sentencing court had engaged in impermissible double counting, forbidden by the plain language of the enhancement.[88]

The Circuit Court found that the source of victim's *particular* susceptibility was his status as a prisoner in the custody of, and surrounded by, five guards, when the assault occurred; thus the sentencing court had taken into account "considerations . . . distinct from and in addition to the fact that defendant's actions were taken under color of law."[89] The court held that "acting under color of law" did not necessarily contemplate a victim who was in custody, under the defendant's control, and surrounded by other officers, whose presence increased the coercive nature of the attack.[90] Perceiving these as the factors that the sentencing court had relied on in finding *particular vulnerability*, the circuit court held that these factors were not incorporated into the underlying offense guideline.[91]

The defendant next argued that section 3A1.1 application could only be properly premised on those factors inherent in the victim (i.e. age or physical condition) that were likely to make that person particularly susceptible to the illegal conduct, and not the circumstances surrounding the criminal conduct.[92] While acknowledging that the enhancement listed factors inherent in victims as examples tending to show vulnerability, the Second Circuit noted that the enhancement also provides for application where the defendant was "otherwise particularly susceptible," without limitation as to what factors could be considered.[93] The court properly acknowledged that "[w]hile the focus must remain on the victim's individual vulnerability,[94] the totality of the circumstances, including the status of the victim and the nature

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86 *Id.* at 1505.

87 U.S.S.G. § 2H1.4.

88 *See supra* notes 75-82 and accompanying text.

89 *Hershkowitz*, 968 F.2d at 1505.

90 *Id.*

91 *Id.*

92 *Id.* at 1506.

93 *Id.*

94 *Id.* at 1506 (citing U.S. v. Smith, 930 F.2d 1450, 1455 (10th Cir.), *cert. denied*, 112 S. Ct. 225 (1991)).

of the crime, must be taken into account in determining applicability of the vulnerable victim enhancement."[95]

By expressly acknowledging that the inquiry centered around "the victim's individual vulnerability," the court avoided using judicial shorthand to improperly identify vulnerability in an unprincipled or unarticulated manner. Instead, the Second Circuit conducted a particularized inquiry into the conduct, the context, and the victim, thereby avoiding the three types of improper application invited by *Hershkowitz's* facts: holding that by virtue of their status as prisoners, detainees were categorically vulnerable; concluding that prisoners were per se vulnerable victims to assaults by guards; or asserting that the susceptibility of prisoners to assaults by detention officers could alone support a finding of vulnerability sufficient to trigger section 3A1.1 enhancement.

The relevant factors in this case were the victim's status as a detainee and the coercive presence of four other guards. The court provided articulated reasoning in support of its finding that these factors rendered the victim particularly vulnerable to the criminal conduct. Only this type of articulated and particularized inquiry can ensure the principled identification of vulnerability that is necessary to further the avowed congressional goals of proportionality, honesty, and uniformity under the guidelines. Finding vulnerability without such an analysis, through the truncated inquiries described above, would ultimately lead to disproportionate sentences, obscurity and dishonesty with regard to the factors that determined the sentence, and, finally, idiosyncractic and discretionary findings of vulnerability that would undermine the guidelines' primary goal of uniformity in federal sentencing.

The final contention of the defendant in *Hershkowitz* was that the proper application of the enhancement required the sentencing court to find that the victim's particular vulnerability had motivated the defendant to seek out the victim as a target of his criminal conduct.[96] The court rejected the proposition that section 3A1.1 required vulnerability to play a role in the defendant's decision to target his victim. Noting that the enhancement applied where the defendant "knew or should have known" that the victim was particularly vulnerable, the court held that it was of no consequence whether the defendant actually knew of the particular vulnerability, let alone whether the vulnera-

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95 *Hershkowitz*, 968 F.2d at 1505. *See also* United States v. Redhouse, 916 F.2d 717 (9th Cir. 1990) (opinion available in Westlaw) (holding that victim who was gang-raped at night and again the next morning was rendered more vulnerable to second attack by effects of first attack).

96 *Hershkowitz*, 968 F.2d at 1506.

bility *caused* defendant to target his victim.[97] The court held that the defendant in *Hershkowitz* must have known that his victim could not resist his assault, especially when committed in the presence of the defendant's fellow officers.[98]

Hershkowitz represents a principled and measured application of the enhancement provision in three ways: the Second Circuit conducted a particularized inquiry before finding particular vulnerability; the court resisted finding "per se" vulnerability of particular victims as to particular criminal conduct; and the court rejected the purported requirement that the victim's vulnerability must have motivated the defendant to target his victim. The following part of this Note contrasts cases that properly and improperly address these problem areas of vulnerable victim enhancement, and further identifies and advocates application principles that will result in principled and measured vulnerable victim enhancement.

II
PROBLEMS AND PITFALLS IN ENHANCEMENT APPLICATION

Section II explores the three enhancement principles identified in *Hershkowitz*.[99] First, proper application of the vulnerable victim enhancement requires an articulated finding of *particular* vulnerability not present in all victims of the offense in question. Second, the requirement that a victim's particular vulnerability have *motivated* a defendant to select that victim as a target of his criminal conduct is unwarranted by the enhancement. Third, judicial designation of *per se*, as a matter of law vulnerability, within broad classes of victims of criminal conduct with shared characteristics, is precluded by the requirement of a specific finding of vulnerability, unique to the victim under the facts and circumstances of each case. This Section contrasts court decisions that have recognized and adhered to these principles with decisions that have not, and identifies the negative consequences which follow from improper enhancement application.

A. The Requirement of Articulated Findings of "*Particular* Vulnerability" Not Present in all Victims of the Criminal Conduct

This section focuses on the section 3A1.1 requirement of *particular* vulnerability unique to some victims of the criminal conduct being sentenced. Related to particular vulnerability is the requirement that sentencing courts not only list the factors that they find constitute par-

97 *Id.*
98 *Id.*
99 *See supra* notes 83-98 and accompanying text.

ticular vulnerability, but also articulate reasons in support of their finding of vulnerability based on those identified factors. Particular vulnerability is required both by the plain language of section 3A1.1, and by the guidelines' underlying goal of proportionality.[100] The requirement that sentencing courts articulate their reasoning also supports the guidelines' goal of honesty and candor in sentencing.[101]

The Fifth Circuit has identified and articulated this "particular vulnerability" requirement clearly, correctly and concisely. In *United States v. Moree*,[102] the court reversed the district court's enhancement of a sentence for conspiring and endeavoring to obstruct justice.[103] The defendant had offered to "fix" the case of a Mississippi highway commissioner indicted on eleven counts of extortion, bribery and tax evasion.[104] The court below found that the commissioner was a vulnerable victim because his indictment rendered him particularly susceptible to the defendant's criminal conduct.[105] In reversing the district court's application, the Fifth Circuit held that the "vulnerability that triggers § 3A1.1 must be an 'unusual' vulnerability which is present in only some victims of that type of crime. Otherwise defendants' choice of a likely victim does not show the extra measure of criminal depravity which § 3A1.1 intends to more severely punish."[106] Holding that "a condition that occurs as a necessary prerequisite to the commission of a crime cannot constitute an enhancing factor under 3A1.1,"[107] the court distinguished conditions of susceptibility that give rise to a "vulnerability [that] made the attempted crime possible" from those which could properly serve as a foundation for a sentencing court's identification of "an unusually vulnerable victim."[108]

The *Moree* court held that the highway commissioner's indictment was properly categorized as the kind of susceptibility that made the crime possible.[109] This type of vulnerability could not support an application of the enhancement. The court sought to clarify the distinction through examples, stating that "neither a businessman nor a bank should be considered unusually vulnerable to armed robbery merely because the bank robber knows they have cash on hand or may have some breach in their security system."[110]

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100 *See supra* note 32 and accompanying text.
101 *See supra* note 30 and accompanying text.
102 897 F.2d 1329 (5th Cir. 1990).
103 *Id.* at 1336.
104 *Id.* at 1331.
105 *Id.* at 1336.
106 *Id.* at 1335.
107 *Id.*
108 *Id.* at 1336.
109 *Id.*
110 *Id.*

This reasoning stands in sharp contrast to that of the Eleventh Circuit in the now overruled[111] *United States v. Jones*.[112] In *Jones*, the circuit court affirmed the district court's application of section 3A1.1 to a defendant sentenced for bank larceny, holding that "a bank teller was particularly susceptible to the offense of larceny."[113] The defendant argued on appeal that tellers, trained to deal with thieves and surrounded by cages, cameras, alarms and security personnel, were actually less vulnerable than the average larceny victim.[114] The court cryptically responded that "we think [the defendant] confuses *vulnerability* of the victim with *susceptibility to the criminal conduct*."[115] The court expalined that because tellers are stationed in areas designed for public access and transact business with customers, it is difficult for them to elude thieves. Furthermore, because they are known to han-

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111 United States v. Morrill, 984 F.2d 1136 (10th Cir. 1993), *rev'g*, United States v. Morrill, 963 F.2d 386, (10th Cir. 1992), *vacated and remanded*, 113 S. Ct. 955 (1992).

112 899 F.2d 1097 (11th Cir. 1990), *cert. denied*, 498 U.S. 906 (1990), *overruled by* United States v. Morrill, 984 F.2d 1136 (10th Cir. 1993).

113 *Jones*, 899 F.2d at 1100. This remarkable holding was observed and expanded in United States v. Davis, 967 F.2d 516 (11th Cir. 1992). *Davis* characterizes *Jones* as declaring "that bank tellers as a class were vulnerable victims under section 3A1.1 in cases involving bank larceny." *Id.* at 524 n.9. The "categorization" problem reflected in *Jones* and *Davis* is discussed fully *infra* at notes 136-43 and in the accompanying text.

Jones is evoked here solely to critique the reasoning that would support defining individual bank tellers as "particularly vulnerable" to bank larceny for purposes of § 3A1.1 application. The *Davis* court was forced to side-step the problematic, "particularly susceptible" reasoning of *Jones* to arrive at its own holding that the extortion victim at issue was "no more vulnerable to [defendant's] overtures than the garden variety extortion victim, whose needs are vital enough to provide the necessary incentive for the would-be extortionist." *Id.* at 524.

In trying to distinguish the vulnerability of one extortion victim from another, the *Davis* court found that the defendant's attempts to capitalize on his victim's needs did not reach the requisite level of depravity because "*all* extortion victims share a degree of inherent vulnerability, application [of the enhancement] must be reserved for situations where the susceptibility of the victim goes beyond this general degree of susceptibility. Thus, we must examine whether [the victim], by virtue of his circumstances, was 'particularly susceptible' to extortion, as bank tellers, by virtue of their circumstances, were to larceny." *Id.* at 524 n.9.

Extortion is a difficult (if not impossible) crime to enhance, inherently predicated as it is on the vulnerability of the chosen victim. The susceptibility analysis the Eleventh Circuit is saddled with after *Jones* is inapplicable here: all extortion victims, by definition, are in some manner susceptible to extortion. *See* United States v. Creech, 913 F.2d 780, 782 (10th Cir. 1990) (holding vulnerability of newlyweds to extortion via threats of harm to spouse would not be "unusual" vulnerability required by guidelines). *But see* United States v. Lallemand, 989 F.2d 936, 940 (7th Cir. 1993) (asserting that it is "feasible and proper" to draw distinctions between classes of blackmail victims and holding that a married homosexual was particularly susceptible to, and thus a vulnerable victim of, blackmail and extortion). *Contra id.* at 941-42 (Ripple, J., concurring) (indicating section 3A1.1 unsuitable and unintended for blackmail and extortion, and calling for methodology of upward departure because applicable guideline does not adequately take into account the harm caused by the conduct).

114 *Jones*, 899 F.2d at 1100.

115 *Id.*

dle a great deal of money, "a teller is a very likely target of the criminal conduct that constitutes larceny,"[116] and so is "particularly susceptible to the offense of larceny."[117]

In *United States v. Morrill*[118] the Eleventh Circuit, sitting *en banc*, was forced to overrule its holding in *Jones* after a case relying on that holding was vacated and remanded by the Supreme Court for reconsideration in light of the position taken by the Solicitor General.[119] In overruling *Jones*, the *Morrill* court, writing *per curiam*, noted: "[a]s the Solicitor General points out, section 3A1.1 was intended to apply only when the *special vulnerability* of the victim makes the offender more culpable than he otherwise would be in committing the particular offense."[120] The *Morrill* opinion, however, goes on to hold the concept of susceptibility distinct from that of vulnerability, suggesting that the Eleventh Circuit views mere susceptibility as adequate to support enhancement.

After first acknowledging that, in order to identify more culpable offenders, section 3A1.1 application requires circumstances which differentiate a specially vulnerable victim from the typical victim of that crime,[121] the *Morrill* Court found that "bank tellers, as a class, are not vulnerable victims within the meaning of section 3A1.1."[122] The Circuit goes on to indicate that in some cases individual tellers possessing unique characteristics might properly be identified as vulnerable victims. That concept comports with the requirement of particular vulnerability analysis advocated in this Note. The Eleventh Circuit, however, frames that insight in the following manner:

> This is not to say that bank tellers in individual cases never may be *particularly susceptible* or otherwise vulnerable victims of a bank robbery. Enhancement is appropriate under section 3A1.1 when a particular teller-victim possesses unique characteristics which make him

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116 *Id.* This reasoning evokes the apocryphal story of the answer given by notorious bank robber Willie Sutton in response to the question: Why do you rob banks? "Because that's where the money is," Sutton replied. The same insight was offered in THOMAS W. HUTCHINSON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE (1989).

117 *Jones*, 899 F.2d at 1100. This holding seems to have motivated the November 1, 1992 amendment to section 3A1.1's Application Note 1, which inserted the sentence: "[s]imilarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank." This amendment "clarifie[d] the circumstances in which the vulnerable victim adjustment is intended to be applied." U.S.S.G., App. C, amend. 454. *See supra* note 54 and accompanying text.

118 984 F.2d 1136 (11th Cir. 1993).

119 United States v. Morrill, 963 F.2d 386 (10th Cir. 1992), *vacated and remanded*, 113 S. Ct. 955 (1992).

120 *Morrill*, 984 F.2d at 1137 (citations ommitted).

121 *Id.* at 1137-38.

122 *Id.* at 1138.

> or her more vulnerable *or susceptible* to robbery than ordinary bank robbery victims.[123]

To the extent that the above emphasized language indicates the Eleventh Circuit's view that mere susceptibility, without a further finding of vulnerability, can support vulnerable victim enhancement, *Morrill's* overruling of *Jones'* specific holding perpetuates the erroneous rationale in *Jones*, and can only lead to further section 3A1.1 misapplication.

In *Jones*, the Eleventh Circuit confused the concept of susceptibility with that of vulnerability.[124] Its analysis identified the threshold susceptibility present in all victims of criminal conduct, namely, the susceptibility which makes a victim a "likely target."[125] The *Moree* court calls this susceptibility the "vulnerability [that] made the attempted crime possible."[126] Having identified this threshhold susceptibility, the *Jones* court improperly used it as the basis for the application of section 3A1.1. In *Morrill*, the Eleventh Circuit perpetuates this misconception by indicating that it still views findings of susceptibility as sufficient to support vulnerable victim enhancement.[127] Section 3A1.1, however, intends to identify particular vulnerability within the larger class of those merely susceptible to certain criminal conduct.[128] The "otherwise particularly susceptible" language of the statute can only be read as expanding the enumerated categories of vulnerability ("due to age, physical or mental condition, or that a victim was otherwise particularly susceptible")[129] which can permissibly support an ultimate finding of unusual vulnerability ("that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible").[130]

Any bald finding of "particular susceptibility"—through the enumeration of factors that might make the victim a likely target of the criminal conduct, but without a further, supported conclusion that the susceptibility is emblematic of the unusual vulnerability that

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123 *Id.* (emphasis added).

124 *See supra* note 114 and accompanying text.

125 *See* United States v. Creech, 913 F.2d 780 (10th Cir. 1990). The *Creech* court asserted that "[i]t is logical to assume the intended victim of any premeditated offense will be selected because something in his or her persona *or circumstances* will make successful the intended criminal act. We must therefore assume the Commission adopted § 3A1.1 to enhance a defendant's punishment for an act of depravity." *Id.* at 782 (emphasis added).

126 *Moree*, 897 F.2d at 1335. *See supra* notes 102-110 and accompanying text.

127 *See supra* notes 118-123 and accompanying text.

128 *See* U.S.S.G. § 3A1.1, comment., (n.1) ("This adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant.").

129 U.S.S.G. 3A1.1. *See* United States v. Hershkowitz, 968 F.2d 1503, 1506 (2nd Cir. 1992) ("Although listing such factors as examples tending to show vulnerability, the section nonetheless specifically provides for enhancement in cases where 'a victim was *otherwise* particularly susceptible to the criminal conduct,' without limitation as to the reasons *for such vulnerability*") (second emphasis added).

130 U.S.S.G. § 3A1.1.

section 3A1.1 seeks to identify—cannot support enhancement application. To allow mere susceptibility to support enhancement invites identification of nearly all victims of criminal conduct as particularly vulnerable.[131] For example, in *Jones*, by focusing on the victim's susceptibility when applying enhancement, the court ignored the enhancements' putative function as a "moral depravity" provision.[132] Furthermore, from the standpoint of uniformity in federal sentencing,[133] allowing the enhancement to sweep so broadly invites selective and unprincipled misidentification of defendants whose choice of victims requires enhancement at sentencing. The *Moree* court, and those courts that adhere to *Moree's* requirement of particular vulnerability,[134] have recognized this and applied section 3A1.1 in a correct and consistent manner. Section 3A1.1 applications that are supported by

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131 *See* SINGER, *supra* note 4, at 86-88. *Cf.* United States v. Wilson, 913 F.2d 136 (4th Cir. 1990). In *Wilson*, the court observed:

> The vulnerability that triggers § 3A1.1 must be an "unusual" vulnerability which is present in only some victims of the type of crime. . . .
>
> Moreover, if we were to adopt the government's position, *virtually every defendant* convicted of a crime involving fraudulent solicitation *would be subject to an upward adjustment under § 3A1.1. Those who engage in this criminal activity usually target their solicitations at those they think most likely to respond* to the requests for money. We do not think, however, that the Sentencing Commission intended on that account to impose an upward adjustment on virtually all defendants convicted of fraudulent solicitation.

Id. at 138 (citations omitted) (emphasis added).

132 United States v. Jones, 899 F.2d 1097 (11th Cir. 1990). *See also supra* note 58 and accompanying text.

133 *See supra* note 31 and accompanying text.

134 *See, e.g.*, United States v. Pearce, 967 F.2d 434 (10th Cir. 1992) (holding that an elderly, small and frail rape victim's unusual characteristics of having undergone a double mastectomy and being in an obviously weakened condition supported a finding of "unusual vulnerability," allowing a section 3A1.1 adjustment); United States v. Newman, 965 F.2d 206 (7th Cir. 1992) (noting that the whole idea of fraud was to prey on the vulnerable, normally precluding section 3A1.1 enhancement, but holding that victims of prior sexual abuse were particularly susceptible to future sexual abuse, a rationale which supported application of section 3A1.1 adjustment); United States v. Sabatino, 943 F.2d 94 (1st Cir. 1991) (holding that, although victims were unemployed mothers of small children, the youngest of whom was only 18, such victims were not specially or unusually vulnerable to Mann Act violations); United States v. Boult, 905 F.2d 1137, 1139 (8th Cir. 1990) (holding that the victim of a defendant who relied on relative size difference, and who tested for particular vulnerability prior to engaging in criminal conduct, was "an *unusually vulnerable victim* because of his age *and particular susceptibility* in the circumstances of this case") (emphasis added); United States v. Creech, 913 F.2d 780, 782 (10th Cir. 1990) (holding that the vulnerability of newlyweds to extortion via threats of harm to spouse would not be "unusual" vulnerability under the guidelines); United States v. Wilson, 913 F.2d 136, 138 (4th Cir. 1990) (holding residents of town struck by tornado did not qualify as having that "unusual vulnerability present in only some victims of that type of crime," when fraudulently solicited for hurricane relief aid); United States v. Paige, 923 F.2d 112 (8th Cir. 1990) (holding that young caucasian store clerks who were targeted by defendant as inexperienced and naive were not unusual in their vulnerability so as to support the application of section 3A1.1).

inappropriate findings of susceptibility, and which fail to complete the analysis by identifying the victim's particular vulnerability,[135] do not.

A corollary problem arises when a court identifies a factor that seems to indicate generic susceptibility, and relies on that factor alone to support vulnerable victim sentencing enhancement. The underlying guideline value of honesty in sentencing[136] requires identification of the factors affecting sentencing, as well as articulation of the court's reasons for relying on those factors in determing the sentence. These articulated findings are particularly crucial when courts are enhancing sentences.[137] Sentencing for criminal conduct directed at victims identified under the rubric "elderly," is particularly prone to this type of § 3A1.1 misapplication. For example, in *United States v. Smith*,[138] the Tenth Circuit analyzed a district court's characterization of an auto theft victim as vulnerable based on a finding that she was "elderly." The circuit court noted:

> There was no finding of unusual vulnerability in this case. In sentencing [the defendant], the court simply remarked that the automobile theft "involved a vulnerable victim, that being an elderly woman." The record is otherwise silent as to the age and physical condition of the victim. As revealed by her testimony at trial, the victim's mental condition appears normal.[139]

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135 *See, e.g.*, United States v. Fine, 974 F.2d 1344 (9th Cir. 1992) (opinion available in Westlaw) (holding fraud victim's friendliness, openness and loneliness made him particularly susceptible to the criminal conduct, thus supporting section 3A1.1 enhancement). The "otherwise particularly susceptible" language of § 3A1.1 is fertile ground for questionable findings of victim vulnerability. *See also* United States v. Chick, 955 F.2d 45 (6th Cir. 1992) (opinion available in Westlaw) (holding that an ex-wife was particularly susceptible to defendant's campaigu of harrassment, and so was considered a vulnerable victim because defendant "knew where her pressure points were and which buttons to press and so took advantage"). In United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991), while careful not to rely on it, the court notes in dicta that it saw no reason why either a large insurance company or the United States Department of Defense could not be deemed vulnerable victims of medical claims fraud because they were confronted with innumerable fraudulent claims that on the surface appeared to justify payments, and because the sheer number of claims passing through their claims offices could allow many false claims to slip through the cracks. The court stated that these factors showed a "particular susceptibility to this kind of fraud." *Id.* at 735-36 n.10. In contrast, the court in United States v. Newman, 965 F.2d 206 (7th Cir. 1992), discussed the seeming contradiction of applying § 3A1.1 to fraud victims—fraud by definition playing on a victim's vulnerability "in the sense of being far below average in their ability to protect themselves . . . ." The court also noted that "not all [victims] are [below average in this regard]. Some [victims] are large corporations, or the United States . . . ." *Id.* at 211. In this properly decided case, large corporations and the United States are clearly not vulnerable, and in fact, although capable of being defrauded, possess an inherent lack of vulnerability that serves as a benchmark in identifying victims *particularly* vulnerable to fraud.

136 *See supra* note 30 and accompanying text.

137 *See supra* notes 17-18, 64-66 and accompanying text.

138 930 F.2d 1450 (10th Cir. 1991).

139 *Id.* at 1455.

Holding that such a finding was insufficient to warrant enhancement as a matter of law, the court stated:

> Without more, it appears the district court equated "elderly" status with per se vulnerability. . . . The label elderly, like the label "young," is too vague standing alone, to provide the basis for a finding of unusual victim vulnerability. The use of 3A1.1 . . . requires analysis of the victim's personal or individual vulnerability.[140]

Smith's holding that conclusory characterizations like "elderly" and "young" are too vague to support vulnerable victim enhancement is correct. Allowing generic susceptibility to support section 3A1.1 application risks generalized sentence enhancement, which would undermine its function as an identifier of acts of particular depravity,[141] and would detach sentence enhancement from the distinction between victims which it seeks to identify. Certainly some elderly victims are less vulnerable to certain criminal conduct than some younger victims who could be identified as particularly vulnerable through judicial analysis.

Requiring sentencing courts to articulate individual analysis of victim's and their vulnerability, beyond mere identification of characteristics indicating possible susceptibility, will increase the likelihood of properly identifying those defendants whose sentences section 3A1.1 seeks to enhance. Moreover, such articulated analysis ensures honesty and candor in sentencing. The better reasoned, more candidly supported cases involving section 3A1.1 application based on factual findings of this nature, call for and articulate such analysis;[142] the less well-reasoned and supported cases do not.[143]

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140 *Id. But see* United States v. Brown, 989 F.2d 508 (10th Cir. 1993) (opinion available in Westlaw) (allowing vulnerability enhancement based only on victim's status as elderly, without express finding of vulnerability, where defendant stipulated he knew or should have known that the victim was unusually vulnerable).

141 *Smith*, 930 F.2d at 1444-45.

142 *See, e.g.*, United States v. Segien, 986 F.2d 439, 441 (11th Cir. 1993) (reversing application of section 3A1.1 and noting that in sentencing a bank robber the trial court "should make a fact-specific determimination of what factors, if any, distinguish the teller-victim from ordinary bank tellers . . . ."); United States v. Sutherland, 955 F.2d 25, 27 (7th Cir. 1992) (reversing application of section 3A1.1 based on victims' age and status as war veterans when "court did not hear any evidence . . . regarding . . . victims . . . [or] evidence that . . . victims were vulnerable *because* of age, mental incompetence, physical infirmity or any other characteristic") (emphasis added); United States v. Lee, 973 F.2d 832 (10th Cir. 1992) (holding victim's membership in "class" of elderly, without more, insufficient to support enhancement under section 3A1.1).

143 *See* United States v. Caterino, 957 F.2d 681, 683 (9th Cir. 1991) (holding that the district court finding of vulnerability based on elderly status without more was "not clearly erroneous" under "due deference" standard of review); United States v. Nishinka, 930 F.2d 30 (10th Cir. 1990) (holding that an "elderly" fraud victim was vulnerable, without more, because of her age and financial status); United States v. Rodger, 983 F.2d 1079 (9th Cir. 1993) (opinion available in Westlaw) (affording "due deference" to district court determination that 82 year old woman was vulnerable victim to fraud). *Cf.* United States v. Rocha,

B. Targeted *Because* Vulnerable v. Targeted *and* Vulnerable

Another variation between the circuits in their application of section 3A1.1 concerns the proper role of a defendant's motives. A schism has developed between the circuit court's regarding the role that victim vulnerability must play in motivating criminal conduct and victim selection in order to trigger section 3A1.1. Some circuits have imposed a requirement that the particular vulnerability, once identified, must have played a role in the defendant's decision to target the victim. Other circuits have held that once the victim's vulnerability to the criminal conduct has been established, the sentencing court should apply the enhancement, irrespective of whether the vulnerability motivated the defendant to target the particular victim.

Three reasons support the conclusion that "vulnerability motivation" is not required by section 3A1.1. First, the requirement cannot be found in section 3A1.1's plain language. Second, a vulnerability motivation requirement renders the enhancement's "should have known" language internally inapplicable. Third, those circuits which require vulnerability motivation limit application of the enhancement to a smaller class of defendants, severely undermining the guidelines' goals of proportionality in sentencing and uniformity among those sentenced.

The roots of the vulnerability motivation requirement may be found in the Eighth Circuit's decision in *United States v. Cree*.[144] In *Cree*, the court reversed the district court's application of the enhancement to a defendant sentenced for striking and killing a pedestrian with his car.[145] Rejecting the prosecution's argument that the defendant intended to kill his victim, the jury found the defendant guilty of involuntary manslaughter, acquitting him of second degree murder.[146] The sentencing court applied section 3A1.1 after finding that the victim was drunk, holding that this alcohol-related vulnerability triggered the enhancement.[147]

On appeal, the defendant conceded both that he knew his victim had been drinking and that such activity could render his victim more vulnerable.[148] He argued, however, that his acquittal of second degree murder implied the jury's conclusion that he "had not '*chosen*' anyone" as the victim of his criminal conduct.[149] The Eighth Circuit

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916 F.2d 219 (5th Cir. 1990) (affirming application of enhancement based on the youth of kidnap victim because his age made him more vulnerable to believing defendant's story that Colombians would capture and kill him if he tried to escape).

144 915 F.2d 352 (8th Cir. 1990).

145 *Id.* at 354.

146 *Id.* at 353.

147 *Id.* at 354.

148 *Id.*

149 *Id.* (emphasis added).

agreed, reversing the section 3A1.1 enhancement of the defendant's sentence.

If this had been the extent of the *Cree* holding, reversal of the application would have comported with the guideline. Had the *Cree* court limited the basis of its reversal to a holding that the verdict manifested a finding of fact by the jury that the defendant had not targeted his victim (i.e., that the victim was struck inadvertently, as opposed to targeted by a defendant who intended to harm his victim, but did not intend to cause death),[150] then the court could properly have found that the facts of the case placed this defendant outside of the application note language, which states that the "adjustment applies to offenses where an unusually vulnerable victim is made a target of the criminal activity."[151] But the *Cree* court held that to trigger application of section 3A1.1, the victim must have been "selected *because* of an unusual vulnerability."[152] The court wrote:

> Moreover, even assuming, as the district judge believed, that Cree intended to hit [his victim,] there is no evidence that Cree chose to do so because of [the victim's] alcohol-related vulnerability.... [t]here is no evidence that this "vulnerability" played a role in Cree's decision-making: [the victim] was a victim who simply "happened" to be intoxicated.[153]

The *Cree* court quotes dicta from *United States v. Creech*,[154] and cites *United States v. Boult*,[155] *United States v. Moree*,[156] and *United States v. Salyer*[157] in support of its proposition that the application of section 3A1.1 requires that the sentencing court find both particular vulnerability and vulnerability-motivation. None of these cases, however, inquire whether a defendant's choice of victim was motivated by the

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150 *See* United States v. White, 974 F.2d 1135, 1140 (9th Cir. 1992) ("The *Cree* court's interpretation of the guideline conflates the *mens rea* required to convict the defendant of the crime and the culpability required to trigger the application of § 3A1.1.").

151 U.S.S.G. § 3A1.1, comment.(n.1).

152 *Cree*, 915 F.2d at 354.

153 *Id.* at 355 (*citing* Application Note 1, Guideline § 3A1.1). The *Cree* court cites to Application Note 1, as amended on November 1, 1989, which contains the language "offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant." An earlier version of the guidelines, amended to "clarify the guideline and commentary," deleted the language "any offense where the victim's vulnerability played any part in the defendant's decision to commit the offense." *See supra* note 54 for a history of § 3A1.1 amendments.

154 "[U]nless the criminal act is directed against the young, the aged, the handicapped, or unless the victim is chosen because of some unusual personal vulnerability, § 3A1.1 cannot be employed." *Cree*, 915 F.2d at 354 (*citing* United States v. Creech, 913 F.2d 780 (10th Cir. 1990)).

155 905 F.2d 1137, 1139 & n.3 (8th Cir. 1990). *See supra* notes 67-69 and accompanying text.

156 897 F.2d 1329, 1335-36 (5th Cir. 1990). *See supra* notes 102-10 and accompanying text.

157 893 F.2d 113, 116-17 (6th Cir. 1989). *See infra* notes 173-82 and accompanying text.

requisite vulnerability. Nor do they reverse an application of section 3A1.1 upon finding that a defendant's targeting of a victim was not motivated by vulnerability. Finally, none support *Cree's* proposition that enhancement is justified only when the defendant was vulnerability-motivated in targeting his or her victim for criminal conduct.[158]

The plain language of section 3A1.1 and its accompanying commentary[159] merely require that defendants make an unusually vulnerable victim the target of their criminal conduct. The vulnerability of the victim need not have motivated either the defendant's criminal conduct or victim selection. Certainly those defendants who perceive a victim's particular vulnerability and are inspired by that perception to direct their criminal conduct towards that victim reside at the paradigm center of the class that the enhancement seeks to identify. However, those defendants who simply direct their criminal conduct at

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158 All of these cases turn on the inquiry into "particular vulnerability" that is described in *supra* notes 100-43 and accompanying text.

Creech reverses application of § 3A1.1 because it finds that the victim's vulnerability was not "unusual." *Creech*, 913 F.2d at 782. *Boult* finds the victim "unusually vulnerable," and affirms the enhancement. *Boult*, 905 F.2d at 1139. *Moree* reverses § 3A1.1 enhancement because the victim's vulnerability was not "unusual." *Moree*, 897 F.2d at 1335. *Salyer* finds that a defendant "knowingly [took] advantage of a particular susceptibility of the intended victim" *Salyer*, 893 F.2d at 116.

Creech is the Rosetta Stone that must be deciphered in order to pinpoint the genesis of this improper application requirement. The *Creech* dicta relied on by the *Cree* court, *see supra* note 152, is preceded by the collegial language: "We agree with the Fifth Circuit." *Creech*, 913 F.2d at 782. Apparently the *Cree* court was referring to the *Moree* language quoted earlier in *Creech*: "[t]he vulnerability that triggers § 3A1.1 must be an 'unusual' vulnerability which is present in only some victims of that type of crime. Otherwise, the defendant's choice of a likely victim does not show the extra measure of criminal depravity which § 3A1.1 intends to more severely punish." *Creech*, 913 F.2d at 782 (*quoting Moree*, 897 F.2d at 1335).

Careful reading of this *Moree* language will not yield a requirement that vulnerability *motivate* the criminal conduct. It merely supports the proposition maintained throughout this Note—that to properly apply the enhancement a defendant must only have chosen an unusually vulnerable victim that he knew, or should have known, was particularly vulnerable, as the target of his criminal conduct.

159 The example contained in § 3A1.1, Commentary Note One, which states that the enhancement "would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile," U.S.S.G. § 3A1.1, comment.(n.1), also seems prone to being misinterpreted a requirement that the victim's vulnerability have motivated the defendant's selection of the victim or the criminal conduct. *See also supra* note 54.

Close reading reveals that this language bears only on the distinction between targeting the general public, (and thus inadvertently snaring the vulnerable), and targeting a specific class of vulnerable victims for fraudulent conduct. The Application Note imposes no overall requirement that only criminal conduct motivated by victim vulnerability can trigger the enhancement. It requires nothing more than that which this Note identifies: a defendant need only target a particularly vulnerable victim. *See* United States v. Caterino, 957 F.2d 681 (9th Cir. 1991) (reading the commentary's mail fraud example as excluding defendants who do not know and could not have known that they are dealing with a vulnerable individual, rendering it consistent with the guideline's "should have known" language.).

those they know, or should have known, are particularly vulnerable also fall within § 3A1.1's ambit.

Further militating for application of section 3A1.1 to defendants who were not motivated by their victim's vulnerability is the enhancement's language requiring application to not only persons who knew, but those who "should have known that a victim of the offense was unusually vulnerable."[160] This clause clearly envisions enhancement application to defendants who were not aware of victim vulnerability,[161] but should have been under the circumstances. A court cannot consistently enhance a sentence by using its power to impute knowledge of vulnerability to a defendant while simultaneously requiring that the victim's vulnerability have motivated the criminal conduct.[162] An enhancement which allows a sentencing court to charge a defendant with knowledge that he did not have cannot further require that the knowledge that the defendant did not possess *must* have motivated either his criminal conduct or his victim selection.

The Ninth Circuit has repudiated the requirement of vulnerability motivation and properly applied the enhancement to all defendants who target a particularly vulnerable victim. In *United States v. Boise*,[163] a defendant convicted of second-degree murder for the beating death of his six-week-old son appealed section 3A1.1 enhancement of his sentence. Echoing *Cree*,[164] the court wrote, "[defendant] argues that the Commentary to the vulnerable victim guideline requires a defendant to select a victim intentionally because of his vulnerability. We disagree."[165] Citing the guideline and commentary language, the *Boise* Court held that the "[defendant's] son was a vulnerable victim for purposes of adjusting the base offense level because a six-week old infant is 'unusually vulnerable due to age,' not because [defendant] selected him because of his vulnerability."[166]

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160 U.S.S.G. § 3A1.1.

161 *See* United States v. Luscier, 983 F.2d 1507 (9th Cir. 1993) (affirming application of section 3A1.1 to a defendant who argued that he was too intoxicated to realize victim was vulnerable, and holding that the defendant was responsible for his level of intoxication and should have known victim was vulnerable); *Caterino*, 957 F.2d at 684 ("district judge's finding that Appellants knew or should have known of their victims' vulnerability is entitled to due deference as a factual finding"); *see also Salyer*, 893 F.2d at 115 ("defendant knew or should have known that the [victims] were unusually vulnerable to the threat of cross burning because they are black").

162 *See* Caterino, 957 F.2d at 683 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 129 (1993) ("Where possible, we construe the text of a Guidelines section and its associated commentary to be consistent with one another.").

163 916 F.2d 497 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991).

164 915 F.2d 352 (8th Cir. 1990). Indeed, the language and structure of the holding directly track that of *Cree*.

165 *Boise*, 916 F.2d at 506.

166 *Id.* (citations omitted).

The Ninth Circuit properly concluded that a defendant's knowledge (real or imputed) of vulnerability, coupled with criminal conduct directed at a vulnerable victim, is enough to support enhancement application. Sentencing courts need not conduct elaborate and very likely impossible[167] inquiries into whether the identified vulnerability caused the criminal conduct. Nor must they allow defendants who clearly targeted particularly vulnerable victims to escape the extra punishment that the guidelines mandate for such criminal conduct.

The Ninth Circuit's reading of the enhancement is consonant with its plain language and renders the guideline internally consistent. The cases that follow the Ninth Circuit's approach are the better reasoned cases.[168] Those courts which require vulnerability motivated victim selection[169] have judicially imposed a requirement not con-

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167 Under the Fifth Amendment's privilege against self-incrimination, *see* U.S. Const. amend. V, inquiry into the internal motivation of a defendant would seem to be virtually impossible absent a defendant's own testimony as to what truly led to his criminal conduct and selection of a particular victim.

168 *See* United States v. Caterino, 957 F.2d 681 (9th Cir. 1991) (rejecting appellant's argument that enhancement requires defendants to single out vulnerable victims for harm). *See also* United States v. Sutherland, 955 F.2d 25 (7th Cir. 1992) (rejecting application of § 3A1.1 where there was no evidence that either defendants targeted elderly to exploit age *or* that targets were particularly vulnerable to fraud); United States v. Green, 988 F.2d 123 (9th Cir. 1993) (opinion available in Westlaw) (section 3A1.1 applied to defendant sentenced for homicide of five-month-old daughter); United States v. Flores, 946 F.2d 899 (9th Cir. 1991, as amended 1992) (opinion available in Westlaw) ("[a]pplication of enhancement is mandatory once the district court finds facts sufficient to establish a vulnerable victim . . . , [and] [b]ecause Flores knew his daughter was three weeks old at the time of the assault, this enhancement was available."). *Cf.* United States v. White, 974 F.2d 1135 (9th Cir. 1992). *White* affirms application of the enhancement to an appellant convicted of involuntary manslaughter of his two-year-old stepdaughter. It rejects the *Cree* court's reasoning as to the application of the enhancement to non-intent crimes, writing that even if *Boise* did not foreclose application of *Cree*, "we would reject *Cree's* reasoning." *Id.* at 1140. According to the court, "[m]erely because the crime itself was not intentional does not mean the defendant did not 'kn[o]w or should have known that [the] victim of the offense was unusually vulnerable due to age . . . . '" under section 3A1.1. The court, however, first indicates that application of *Cree* is foreclosed in the Ninth Circuit by *Boise*, which it characterizes as announcing the "rule" that "crimes against children trigger § 3A1.1 regardless of whether the defendant intentionally selects them due to their vulnerabilities." *Id.* This mischaracterizes *Boise's* clear holding that the application of § 3A1.1 in the Ninth Circuit does not require vulnerability motivated targeting of victims.

169 *See* United States v. Callaway, 943 F.2d 29, 31 (8th Cir. 1991) (rejecting application of enhancement because, "[a]lthough record shows that [victim]. . . was both young and handicapped, the record does not support a finding that Callaway chose [victim] as a 'target' for the crime because of her youth and physical handicaps."); United States v. Long, 935 F.2d 1207, 1210 (11th Cir. 1991) ("adjustment . . . focuses chiefly on the conduct of the defendant. . . . where the *defendant selects the victim* due to the victim's perceived susceptibility to the offense."); United States v. White, 903 F.2d 457, 463 (7th Cir. 1990) (affirming application of enhancement but responding to defendant's argument that "victim's vulnerability had nothing to do with [defendant's] decision to kidnap" by holding that it was "not only reasonable but logical to believe that White decided upon the gasoline station attendant as a kidnap hostage after having observed his advanced age and respira-

tained within the guideline. In doing so, they undermine the guideline's twin goals of proportionality and uniformity in sentencing.[170]

C. The *Per Se* Vulnerable Victim Problem

The final problematic application of section 3A1.1 addressed by this Note is the tendency of certain courts to engage in the judicial shorthand of identifying categories of *per se* victims particularly vulnerable to particular criminal conduct.[171] These courts mandate application of the enhancement for victims that they have found are vulnerable as a "matter of law." However, generic inquiry into both sides of the analysis (victim and conduct) cannot substitute for the particularized inquiry into victim, conduct and context which consistent application of the enhancement requires.

This concept of *per se*, "matter of law" vulnerability is explicitly addressed by both the Sixth and Eleventh Circuits in the context of the following compelling question: Are black Americans vulnerable victims to cross-burnings committed in furtherance of criminal activity?[172] The Sixth Circuit has held that black Americans are unusually vulnerable to the threat of cross-burnings. The Eleventh Circuit, on the other hand, has held that section 3A1.1 is not applicable as a mat-

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tory problems that rendered him unable to resist and flee from his attack."); United States v. Smith, 930 F.2d 1450, 1455 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 225 (1991) (reversing § 3A1.1 application on other grounds, but noting that "the record is also silent as to [defendant's] motivation in selecting this particular victim").

170 *See supra* notes 31-32 and accompanying text.

171 Categorization by generic factors which might lead to a finding of particular vulnerability, as discussed in *supra* notes 136-43 and accompanying text. *Per se* categorization may arguably be an improvement over the generic factoring discussed previously, since it generally makes reference to both particular vulnerability and a class of criminal conduct when triggering § 3A1.1. As this Note demonstrates, however, it still cuts impermissibly short the particularized inquiry into the victim, the conduct and the circumstances that is required by the enhancement.

172 A prosecution for cross-burning was barred by the First Amendment in R.A.V., Petitioner v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992). However, as Justice Scalia noted in *St. Paul*, "[w]here the Government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47.

Cross-burning targeted not for its expressive content, but as an activity committed in furtherance of criminal conduct frequently arises in the context of prosecutions for violations of 18 U.S.C. § 241 (conspiracy to interfere with civil rights), 42 U.S.C § 3631(b)(1) (interference with housing rights by means of force or threat of force resulting in bodily injury), and 18 U.S.C. 844(h)(1) (use of explosive in the commission of a felony). Numerous courts have held that race is not a factor incorporated into the base offense guidelines applicable to the above statutes. *See* United States v. Salyer, 893 F.2d 113 (6th Cir. 1989); United States v. Long, 935 F.2d 1207 (11th Cir. 1991); United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990), *cert. dismissed*, 112 S. Ct. 353 (1991); Munger v. U.S., 827 F. Supp. 100 (N.D.N.Y. 1992).

It bears mention here that guideline sentences are computed on the basis of all relevant conduct, not merely charged criminal conduct.

ter of law merely because a cross-burning victim is black. Both holdings result from similar crimes, circumstances and inquiries.

In *United States v. Salyer*,[173] after a particularly searching analysis, the Sixth Circuit affirmed application of the enhancement, holding that "the defendant knew or should have known that the [victims] were unusually vulnerable to the threat of cross-burning because they are black."[174]

In *Salyer*, the defendant had burned a cross in the front yard of an elderly black couple's residence. The defendant pleaded guilty to one count (conspiracy to violate rights of a citizen)[175] of a three count indictment.[176] At sentencing, the district court applied the two-level vulnerable victim enhancement. The defendant appealed the sentence enhancement, arguing that, while blacks might be statistically more likely than whites to be the victims of cross-burning, they were no more susceptible to intimidation by cross-burning than whites or other minorities.[177]

Affirming the application, the Sixth Circuit wrote that "a black American would be particularly susceptible to the threat of cross-burning because of the historical connotations of violence associated with the act."[178] Quoting from the district court opinion, the court asserts:

> [A] black person is more likely than other minorities to be the victim of a cross burning because the act has a special capacity to evoke terror among black Americans. . . .
>
> 'There is a history of violence and intimidation which is directed against blacks and which is symbolized by a burning cross. That's exactly the symbol that these defendants chose to invoke and they chose to do so because that is precisely the way in which the family was most vulnerable to the threat of intimidation.'. . .
>
> We find that the district court's determination that cross burning is a particularly invidious act when directed against a black American, making him particularly susceptible to the commission of the offense, is not clearly erroneous.[179]

Up until this point, the reasoning of the *Salyer* court articulated above is sound. In its own words, the circuit has identified a "particular susceptibility" among black Americans, making them "more likely than other[s]" to be targeted for this criminal conduct.[180] However, the

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173 893 F.2d 113 (6th Cir. 1989).

174 *Id.* at 115.

175 18 U.S.C. § 241.

176 The indictment included counts for interference of housing rights by threat or intimidation, (42 U.S.C. § 3631(a)) and use of explosive in commission of a felony (18 U.S.C. § 844(h)(1)).

177 *Salyer*, 893 F.2d at 116.

178 *Id.*

179 *Id.* at 116-17.

180 *Id.* at 116.

court exceeded that which its reasoning established when it announced that black people victimized by cross-burning are *per se* vulnerable victims.[181]

Although cross-burning directed against black Americans is particularly invidious, the *Salyer* court errs in adopting the logic that this invidiousness somehow makes its targets particularly vulnerable to the act. Cross-burning directed at depriving individuals of their constitutional rights is heinous. However, social abhorrence of such conduct should be reflected in the underlying offense guideline and accompanying mandated sentence. The vulnerable victim enhancement should not be used to increase the sentence for those acts that an individual court considers particularly maleficent. To do so eviscerates the enhancement's unique role, rendering it a vehicle for individual judicial expressions of detestation for particular criminal conduct.

The susceptibility that the court identifies, while inextricably related to the vulnerability to cross-burning shared by many black Americans, should not alone trigger section 3A1.1 enhancement at sentencing. The enhancement requires identification of the particular victim's vulnerability in the context of both the specific criminal conduct and the circumstances under which the criminal conduct occurred. The specific analysis which the *Salyer* court sought to apply to black Americans generally must be applied to each particular victim, case-by-case. Surely there are many black Americans who are not vulnerable to the threat implicit in cross-burning: for example black Americans capable of responding forcefully and effectively to such conduct. Certainly one can envision circumstances where criminal cross-burning would be unable to produce the desired fear and insecurity in its targeted victims. For example, given the cowardly nature of such dead-of-night, hit-and-rnn conduct, one can imagine a cross-burner caught in the act who is far more vulnerable to the anger of his intended victims, than the intended victims were to his criminal conduct.

Put simply, the *Salyer* court actually identifies a *per se* susceptibility to this conduct shared by black Americans. This susceptibility will almost always lend support to the invocation of the "should have known" aspect of the enhancement. Furthermore, this susceptibility will serve to support the identification of race as one factor which will bear upon a flnding of vulnerability when a particular black American is victimized in this manner. It will not support *per se* application of enhancement of sentencing. Proper section 3A1.1 application requires a flnal, particularized inquiry into the victim, the conduct and

181 Tellingly, the court writes that "cross-burning is a particularly invidious act when directed against a black American, making him particularly *susceptible* to the commission of the offense . . . ." *Id.* at 117 (emphasis added).

the context. Only a particularized, rather than a *per se* inquiry, will yield appropriate, properly supported sentence enhancement.[182]

The Eleventh Circuit has gone further to resolve the question addressed by the *Salyer* court. In *United States v. Long*,[183] the Eleventh Circuit wrote:

> We consider first the government's invitation to adopt a presumption that, as a matter of law, the vulnerable victim adjustment should be applied whenever the victim of a cross-burning is a black American. For the reasons outlined below, we think such a presumption misapprehends the purpose behind section 3A1.1 and its proper application on a case-by-case basis.[184]

The court in *Long* eschewed the shorthand of per se vulnerability, and went on to articulate § 3A1.1's requisite particularized inquiry into vulnerability.

The *Long* defendants, like *Salyer*'s, pleaded guilty to one count (conspiracy to violate rights of a citizen)[185] of a three count indictment.[186] The defendants had burnt a cross on the lawn of a black family who had recently moved into a rural, all-white area.[187] The district court rejected the government's motion for application of section 3A1.1 to the defendants sentences and the government appealed.[188]

The Eleventh Circuit wholly rejected the government's invitation to adopt a circuit-wide presumption of vulnerability as to black Americans targeted for cross-burning. Although the court blundered into the question of whether to require vulnerability as the motivator of victim targeting,[189] the court correctly wrote that "[s]weeping presumptions are not favored by section 3A1.1. Instead, the inquiry conducted by a sentencing judge to determine the applicability of section

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182 Ironically, after improperly finding *per se* vulnerability in this context, the exceedingly comprehensive *Salyer* opinion goes on to make such an inquiry, citing the isolation of the victims due to their rural residence, and finding through particularized inquiry that the individual victims had knowledge of the symbolism of cross-burning. *Salyer*, 893 F.2d at 114 ("they had no doubt as to what the cross represented"). The circumstances surrounding the criminal conduct rendered these victims particularly vulnerable. In the context of *Salyer*, the court did not need to rely on *per se* vulnerability to trigger the enhancement. The court properly affirmed the enhancement based on an appropriate, particularized inquiry.

183 935 F.2d 1207 (11th Cir. 1991).

184 *Long*, 935 F.2d at 1210.

185 18 U.S.C. § 241.

186 The indictment also included counts for interference of housing rights by threat or intimidation, (42 U.S.C. § 3631(a)) and use of fire in commission of a felony (18 U.S.C. § 844(h)(1)).

187 *Long*, 935 F.2d at 1209.

188 *Id.* at 1212.

189 A "presumption of vulnerability for the black victims of cross-burning inadequately considers the defendant's motive in selecting the victims." *Long*, 935 F.2d at 1210; *see generally supra* notes 144-70 and accompanying text.

3A1.1 is a mixed question of law and fact, and highly case-specific as a result."[190]

The court, after declining to allow enhancement based solely on the victim's testimony,[191] went on to perform and articulate the appropriate case-specific particularized analysis. First, the court explicitly authorized the use of race as a vulnerability factor, acknowledging that it was relevant to the vulnerability inquiry.[192] The court then identified the following factors which indicated particularized vulnerability in the instant case: the race of the victims, the rural isolated character of their residence, the racial isolation of the victims as the only blacks in an all-white community, and the time of night the defendants chose to act. The court held that "these factors, considered in their totality, are sufficient to justify application of section 3A1.1 to . . . [the] defendants."[193] Declining to express an opinion as to which factor's absence would have precluded section 3A1.1 enhancement, the court wrote that "such a determination is better left to case-by-case analysis."[194]

In *Long*, the Eleventh Circuit correctly perceived that section 3A1.1 "does not favor sweeping presumptions." Enhancement of sentences based on judicial generalizations, even generalizations carefully considering both the victim and the criminal conduct, neglects the necessary inquiry into the particular circumstances of the conduct being sentenced. Without such inquiry, the enhancement's role in identifying the particularly depraved among those who engage in substantially similar criminal conduct is circumvented. Such circumvention undermines the guideline's goal of proportionality in sentencing.

While such presumptions may offer the illusion of furthering the overall congressional goal of uniformity in sentencing, Congress never intended to purchase uniformity at the price of sacrificing particularized inquiry into criminal conduct. "As Congress has noted 'a determination under section 3A1.1 of the sentencing guidelines depends heavily on the unique factual pattern of the case, that determination cannot be considered simply a legal question.' "[195] Those courts that eschew presumption for particularized inquiry[196] correctly apply the

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190 *Long*, 935 F.2d at 1210.

191 *See supra* notes 51-52 and accompanying text.

192 *Long*, 935 F.2d at 1212. *Cf.* United States v. McAninch, 994 F.2d 1380 (9th Cir. 1993), *cert. denied*, — S. Ct. —, 1993 WL 303752 (acknowledging race as a section 3A1.1 factor and noting that race is an improper departure ground, but allowing upward departure based on a defendant's racist motivation).

193 *Long*, 935 F.2d at 1212.

194 *Id.*

195 *Id.* at 1210-11 (*quoting* 100th Cong., 2d Sess., 151 Cong.Rec. 11,257 (1988)).

196 *See, e.g.*, United States v. Garner, 985 F.2d 554 (4th Cir. 1993) (opinion available in Westlaw) (noting that some courts hold that "race alone may not serve as the only basis for a [3A1.1] enhancement" and affirming enhancement of defendant sentenced for commu-

guidelines at sentencing; those courts that replace such inquiry with generalizations and presumptions as to victim vulnerability[197] do not.

CONCLUSION

This Note has acquainted the reader with the goals of the Federal Sentencing Guidelines in general, and the particular role that the § 3A1.1 vulnerable victim enhancement plays in effectuating those goals. The preceding analysis has identified problem areas encountered by various courts as they have attempted to apply the enhancement in a just and consistent fashion. This Note has also identified approaches and solutions to these problems that are consistent with the plain language of Section 3A1.1. In turn, this language embodies the Sentencing Commission's determination of the role best played by victim vulnerability concerns at sentencing.

Sentencing courts should apply section 3A1.1 to the sentences of defendants who have targeted the particularly vulnerable as victims of their criminal conduct. By definition, only particularly vulnerable victims identify the more depraved and heinous defendants that section 3A1.1 seeks to punish. Once the court identifies this class of defendant through particularized inquiry into the victim and the context of the defendant's criminal conduct, and then articulates reasoning to support its finding of particular vulnerability, section 3A1.1 is triggered and the defendant's sentence can and must be properly enhanced.

The preceding analysis further advocates a rejection of the requirement that the victim's particular vulnerability motivate the defendant to target the victim for criminal conduct. No such

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nicating racial threats based on victim's race and further findings of threats to victim's son and girl friend); United States v. Pavao, 948 F.2d 74, 78 (1st Cir. 1991) (affirming application of § 3A1.1 to a "drug user" based on the sentencing court's opportunity to see the victim, but explicitly noting that "we should hesitate to say that anyone involved with drugs becomes *ipso facto* a 'vulnerable victim' to a crime like that of [the defendant]"); United States v. Creech, 913 F.2d 780, 782 (10th Cir. 1990) (rejecting application of enhancement because district court "did not focus on the victim, but rather upon a class of persons to which the victim belonged"); United States v. Sutherland, 955 F.2d 25 (7th Cir. 1992) (rejecting district court presumption of the elderly as per se vulnerable to fraud); Munger v. U.S., 827 F. Supp. 100 (N.D.N.Y. 1992) (declining to adopt *per se* categorization of all black Americans as vulnerable to acts of cross-burning).

197 *See* United States v. Clark, 956 F.2d 279 (10th Cir. 1992) (opinion available in Westlaw) (holding female juvenile detainee constitutes "vulnerable class of victim" as to sexual assault); United States v. Dry, 962 F.2d 15 (9th Cir. 1992) (opinion available in Westlaw) (establishing the rule of law that mothers of young children may be considered vulnerable victims in kidnapping cases); United States v. Jones, 899 F.2d 1097 (11th Cir. 1990), *cert. denied*, 498 U.S. 906 (1990), *overruled by* United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993) (holding that all bank tellers are vulnerable victims as to bank larceny); United States v. Davis, 967 F.2d 516, 524 n.9 (11th Cir. 1992) (affirming reasoning that all bank tellers are vulnerable victims as to bank larceny).

requirement can be justified by the plain language of section 3A1.1. Neither can such a requirement be imposed consistently with the court's power to impute knowledge to those who should have known their victims were particularly vulnerable. Those courts that impose this requirement undermine the sentencing goals of proportionality and uniformity.

Finally, this Note calls for a rejection of victim categorization and findings of per se, as a matter of law vulnerability. Only a fully particularized inquiry into the totality of circumstances surrounding the victim, the defendant, and the context of the criminal conduct can ensure measured, consistent and just sentencing under the federal sentencing guidelines.

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