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Placing Trust in the Guidelines: Methods and Meanings in the Application of Section 3B1.3, the Sentence Enhancement for Abusing a Position of Trust

Joshua A. Kobrin

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I. INTRODUCTION

When Congress passed the Sentencing Reform Act of 1984 (the Act), U.S. courts entered a new era of determinate and predictable sentencing.[1] In an effort to eliminate disparities in sentencing, the Act created the Federal Sentencing Commission (the Commission), which in turn designed the Federal Sentencing Guidelines (the Guidelines), a set of mandatory sentences for each defendant based on his crime and the manner in which he committed it.[2] The Guidelines forced judges to put their personal assessments aside and apply justice through a formulaic system based on levels and categories.[3] Twenty-two years later, as the federal courts reconceive the role of the Guidelines, the assessment of scholars, practitioners, and judges is mixed.[4] While they reigned, the Guidelines definitely decreased sentencing disparities, but numerous flaws revealed how a lack of individualization could lead to grave injustices.[5] Yet even at their inception, the Guidelines contained sections that invited subjective assessment.

One example is the Sentencing Commission's treatment of trust. The inclusion of trust as a guideline factor complicates a system that aims for uniformity and predictability. A judge cannot easily measure the damage from a betrayal in dollars and

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1. *See, e.g.*, Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679 (1996); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

2. *See generally* Breyer, *supra* note 1.

3. *See generally* U.S. SENTENCING GUIDELINES MANUAL (2004) [hereinafter "GUIDELINES"].

4. Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later: An Introduction and Comments*, 91 NW. U. L. REV. 1231-32 (1997) (outlining contributions to a symposium presenting papers reflecting on the Guidelines); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real Offense System*, 91 NW. U. L. REV. 1342, 1343-44 n.2, 3 (listing scholarly commentary critical of the Guidelines in note 2 and commission members commentary in support of the Guidelines in note 3).

5. *See, e.g.*, Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997); Laurie P. Cohen & Gary Fields, *Reasonable Doubts: How Unproven Allegations Can Lengthen Time in Prison*, WALL ST. J., Sept. 20, 2004, at A1.

cents as the Guidelines often require,[6] nor can she easily discern whether a particular defendant is deserving of an increased punishment because the victim or society placed trust in him.[7] Yet in a variety of places, the Guidelines attempt to capture the additional moral condemnation inherent in a crime committed through a breach of trust.

There are two ways that the Guidelines deal with crimes involving abuse of trust. In conjunction with the criminal code, the Guidelines often provide higher sentences for acts that involve breaches of public or private trust. These include many forms of corruption[8] and crimes defined by the perpetrator's position or occupation.[9] But if an offense fits into a sentencing category that is not sufficiently particularized to reach a breach of trust, the Guidelines also provide a catchall enhancement in § 3B1.3: if the defendant "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense," the Guidelines instruct the judge to add two levels to the offense level.[10]

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6. *See, e.g.*, GUIDELINES §§ 2B1.1, 2B2.1 (guidelines for "Larceny, Embezzlement, and Other Forms of Theft" and "Burglary of a Residence or a Structure Other than a Residence," respectively).

7. *See* GUIDELINES § 3B1.3 (requiring an enhancement for abuse of a position of trust).

8. *See, e.g.*, GUIDELINES § 2C1.1 (guideline for "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions"); *id.* § 2C1.2 (guideline for "Offering, Giving, Soliciting, or Receiving a Gratuity"); *id.* § 2P1.1(b)(4) (enhancement if the defendant was a law enforcement or correctional officer who assisted or instigated an escape from a correctional facility).

9. *See, e.g.*, GUIDELINES § 2D1.1(b)(2)(B) (enhancement if the defendant served as an operation officer on any craft or vessel carrying a controlled substance); *id.* § 2E5.1(b)(1) (enhancement if the defendant is a fiduciary of the benefit plan or labor organization affected by his acceptance, offer, or solicitation of a bribe); *id.* § 2G1.3(b)(1) (enhancement for various sexual crimes with a minor if the defendant was a "parent, relative, or legal guardian of the minor" or "the minor was otherwise in the custody, care, or supervisory control of the defendant"); § *id.* 2T1.4(b)(1)(B) (enhancement for tax fraud if the defendant was "in the business of preparing or assisting in the preparation of tax returns").

10. The section also covers the use of a special skill to commit a crime. In its entirety, the current version of the guideline reads:

§3B1.3. Abuse of Position of Trust or Use of Special Skill

Arguably, these assessments could mean less in the post-*Booker* world of non-mandatory Sentencing Guidelines.[11] With the Guidelines only "recommended," it may be less crucial to understand why someone is sentenced for honest services fraud instead of bribery with a two-level enhancement for abuse of a position of trust. But, given the recent holdings in the wake of *Booker*, and the possible legislative "fixes" in reaction to the decision, the Guidelines remain salient.[12] Under *Booker*, if judges must formulate a Guideline sentence, and then decide whether to apply that sentence, subjective evaluations can serve multiple purposes. They can set the Guideline sentence at a preferable level, providing the judge with an opportunity to follow the Guidelines. Or such evaluations can make the Guidelines better match a sentence based on facts found by the jury or conceded by the defendant. In this manner, *Booker* has troubling implications for subjective portions of the Guidelines. Since the decision allows sentences exceeding the maximum authorized for the crime if facts supporting the sentence are "admitted by the defendant," courts may have to grapple with whether the facts a defendant admitted support a decision that he or she held a position of trust.[13]

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

GUIDELINES § 3B1.3 (2004).

11. *See* United States v. Booker, 543 U.S. 220 (2005) (deeming the mandatory Federal Sentencing Guidelines unconstitutional but maintaining them in a non-mandatory form).

12. *See Implications of the* Booker/Fanfan *Decision for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 33-34 (2005) (statement of Frank O. Bowman, III, M. Dale Palmer Professor of Law, Indiana University School of Law) (explaining "topless guidelines"); *see also* United States v. Crosby, 397 F.3d 103, 114-20 (2d Cir. 2005) (explaining how courts should apply *Booker*).

13. *Booker*, 543 U.S. at 244 ("Any fact (other than prior conviction) which is necessary to support a sentence exceeding the maximum authorized

In order to analyze trust's role in the Guidelines it is essential to understand the role of trust in society. Part II of this Article will examine this role, looking at the ways in which the Guidelines and their commentary correlate with scholarship on trust. Part III will focus on a particular guideline, § 3B1.3, and its enhancement for abuse of a position of trust. The judicial application of this guideline reveals the subjective nature of trust and the numerous ways in which acts can be interpreted as betrayals. Applying the knowledge from Part II's trust scholarship to these sentencing decisions, Part IV recommends a means of applying § 3B1.3 in order to maximize the advantages of trust and ensure enhanced punishments only for breaches that damage beneficial relationships in society.

II. PUNISHING ABUSES OF TRUST IN THE GUIDELINES

A. *The Importance of Trust in Society*

When Congress created the U.S. Sentencing Commission, it directed that the new sentencing regulations achieve "honesty," "uniformity," and "proportionality."[14] Despite the inherent conflict between the latter two goals, the Commission attempted to strike a balance between a perfectly uniform system that punished all defendants with the same sentence and a proportional system that accounted for all possible characteristics before deciding on the appropriate penalty.[15] In its "Policy Statement," the Commission conceded that "a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect."[16] Yet from the Guidelines' inception, commissioners thought trust was important enough to include it

established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); *see also, e.g.*, United States v. Bush, 134 F. App'x 904, 907 (6th Cir. 2005) (finding that defendant did not admit to holding a position of trust in her plea agreement); United States v. Segura, 139 F. App'x 79, 82-83 (10th Cir. 2005) (finding that the defendant admitted enough facts in his plea agreement for the court to apply a sentence enhancement for abuse of trust).

14. *See* GUIDELINES § 1A1.1 cmt. editorial note.

15. *See id.* (providing the Commission's policy statement).

16. *Id.*

in sentencing assessments.[17] As a result, along with more common issues in the realm of criminal law – such as the amount of money a burglar stole,[18] the vulnerabilities of a targeted victim,[19] or the defendant's role in the offense[20] – the Guidelines analyze whether a crime took advantage of a bond of trust between two parties.

Recent scholarship supports this decision. Across disciplines, academic literature points to the important role that trust plays in society.[21] In the field of economics, studies show how trust, rather than regulatory incentives, serves to overcome collective action problems and encourage cooperation.[22] In the area of health care law, professors have debated the degree to which managed care regulations interfere with or bolster the trust between doctors and patients,[23] while other scholars point to the importance of trust in maintaining deference to authority[24] and encouraging mutually

17. UNITED STATES SENTENCING GUIDELINES MANUAL § 3B1.3 (1988).

18. *Id.* § 2B2.1(b) (increases offense level based on loss in a "Burglary of a Residence or a Structure Other than a Residence").

19. *Id.* § 3A1.1 (guideline for "Hate Crime Motivation or Vulnerable Victim").

20. *Id.* § 3B1.1 (guideline for a criminal with an "Aggravating Role").

21. *See* Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591, 596 (2001) (commenting on the sudden spike in scholarly work on trust "from perspectives of law, economics, psychology, sociology, or philosophy"); Joshua A. Kobrin, Note, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 795-803 (2006) (providing an overview of trust theories and their application in legal scholarship).

22. *See, e.g.*, Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333 (2001). Kahan summarizes numerous economic studies of trust that show how individuals who are part of a group contribute to that group – despite collective action problems – because they trust that others are making a similar contribution rather than cheating. Kahan's primary focus is what motivates taxpayers to contribute to the fisc; based on aforementioned studies, he concludes that trust that others are paying taxes, rather than criminal regulations, foster the necessary cooperation.

23. *Compare* Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 470 (2002) (arguing that trust plays an essential role in health care law, but that in the area of managed care, regulations foster "an attitude of distrust," *with* M. Gregg Bloche, *Trust and Betrayal in the Medical Marketplace*, 55 STAN. L. REV. 919, 947-49 (2002) (countering Hall's contractarian position and arguing that managed care regulations can also serve a trust-promoting function).

24. Tom R. Tyler, *Trust and Democratic Governance*, *in* 1 TRUST & GOVERNANCE 276-80 (Valerie Braithwaite & Margaret Levi eds., 1998).

beneficial relationships.[25] Sociologists also cite the role of trust in our society: James Coleman's work shows the degree to which trust is essential to our daily lives while Robert Putnam's much heralded *Bowling Alone* combines statistics, empirical studies, and anecdotes to show how trust can make communities safer, healthier, and more prosperous.[26] According to Putnam, "[w]hen each of us can relax . . . a little [due to our trust], what economists term 'transaction costs' – the costs of the everyday business of life, as well as the costs of commercial transactions – are reduced."[27] As a result, trusting communities have the advantage in everything from commerce and charity to political engagement and other forms of civic participation.[28]

Putnam isolates two forms of trust that contribute to this phenomenon. "Thick trust" – trust in those whom we know well, based on personal experience – provides some of these benefits. Yet, a more generalized form of trust – "thin trust" – is far more prevalent.[29] Because thin trust "extends the radius of trust beyond the roster of people whom we can know personally," it is also arguably more important than thick trust.[30] Many fruitful business and employment relationships rely on thin trust. As thin trust supports these relationships and makes them more productive, trust and the benefits that come with it prove "mutually reinforcing."[31]

Unfortunately, many studies also reveal the contrapositive; while "trust begets trust, mistrust begets mistrust," allowing

25. *See* Carol M. Rose, Lecture, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 533 (1995) ("In real life, people seek explanations or justifications not for trustworthiness, but for defections from it. ... [E]ven if we don't know *why*, we can predict *that* we will find norms of cooperation when people need them."); *see also* Tamar Frankel & Wendy J. Gordon, *Introduction*, 81 B.U. L. REV. 321 (2001) (introducing a variety of theories regarding the interaction of trust and law).

26. JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 91-116 (1990); ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 134-47 (2000).

27. PUTNAM, *supra* note 26, at 135.

28. *Id.* at 134-37.

29. *Id.* at 136-37.

30. *Id.* at 136.

31. *Id.* at 137 (citing Wendy M. Rahn & John E. Transue, *Social Trust and Value Change: The Decline of Social Capital in American Youth, 1976-1995*, 19 POLITICAL PSYCHOLOGY 545-65).

singular betrayals to have far ranging negative effects.[32] Unlike trust, for which benefits can be seen and experienced, distrust is often impossible to invalidate because, according to one scholar, it "prevents people from engaging in the appropriate kind of social experiment or, worse, it leads to behavior which bolsters the validity of distrust itself."[33] Pointing to history, scholars show how failures of trust have led to breakdowns of society, and the rise of the mafia.[34] Putnam even suggests a correlation between eroding societal trust and a rise in the number of lawyers in the United States.[35] The increase is the result of law and other formal institutions supplanting trust and providing a new basis for cooperation.[36] Other academics come to more judgmental conclusions, disparaging the manner in which regulations displace trust and deny people the self-perpetuating benefits of trust relationships.[37]

Trusting parties can also engage in activities that limit the benefits of trust to those within an inaccessible group, often to the

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32. Frankel & Gordon, *supra* note 25, at 322; *see also* Anthony Pagden, *The Destruction of Trust and its Economic Consequences in the case of Eighteenth-century Naples*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 127 (Diego Gambetta ed., 1988) [hereinafter TRUST] (arguing that "most effectively constituted agencies" can destroy trust).

33. Diego Gambetta, *Can We Trust Trust?*, *in* TRUST, *supra* note 32, at 234 ("Once distrust has set in it becomes impossible to know if it was ever in fact justified for it has the capacity to be *self-fulfilling*. ... It then becomes individually 'rational' to behave accordingly, even for those previously prepared to act on more optimistic expectations. Only accident or a third party may set up the right kind of 'experiment' to prove distrust unfounded.").

34. *See* Pagden, *supra* note 32, at 127-41 (explaining how Spanish rule in Naples destroyed trust within society and "ruined the kingdom"); Diego Gambetta, *Mafia: the Price of Distrust*, *in* TRUST, *supra* note 32, at 158-75 (showing how lack of trust, and organized crime's exploitation of distrust, led to the rise of the mafia in southern Italy).

35. PUTNAM, *supra* note 26, at 145-46.

36. *Id.*

37. *See* Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 582 (2001) ("The existence of legal coercion means that one no longer can clearly demonstrate that he respects his promise regardless of self-interest, but rather can show only that he can be legally coerced into performing."); Hall, *supra* note 23, 512-15 (arguing that in health care, regulations send a signal that the industry cannot be trusted); Kahan, *supra* note 22, at 334 (asserting that regulatory incentives to achieve desirable behaviors "may well *undermine* the conditions of trust to hold collective action problems in check").

detriment of society at large. In her study of global corruption, Professor Susan Rose-Ackerman explains how trust can facilitate corruption; the same trust that leads to productive relationships for the public good can also foster bribery and maintain the power of organized crime.[38] And while trust is generally good for society, there are times when trusting parties are simply begging to be disappointed. In this manner, misplaced trust can also have negative effects for society, as the inevitable betrayals only serve to decrease trust.[39]

This recent spate of research reveals that the Commission may have been on to something; in general, it is inadvisable to condone abuses of trust. Crimes that involve such abuses are more culpable because they not only halt the self-perpetuating nature of trust; they also encourage the growth of distrust. And distrust can breed more distrust, leading to damaged communities, inefficient relationships, and costly oversight. Crimes that include a measure of betrayal also have the added cost of threatening an otherwise beneficial system. For example, a criminal who abuses trust to steal not only causes monetary losses; his actions also begin a breakdown of trust between parties that threatens the very system that initially bestowed trust upon the criminal.

B. *Trust in the Guidelines*

The threat that betrayals of trust pose to society may explain why the justice system views crimes involving betrayal as more culpable than other crimes.[40] For example, breaches of securities

38. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 97 (1999). This "counterproductive for society" aspect of trust is apparent in the prisoner's dilemma hypothetical. If the prisoners trust one another, neither will confess.

39. *See* PUTNAM, *supra* note 26, at 135-36 ("[O]nly a seeker of sainthood will be better off being honest in the face of persistent dishonesty."). A variety of scholars allude to levels of trust rising and falling within society and the existence of cycles of trust and distrust. *See* Rose, *supra* note 25, at 554-55 (citing an economic study of cycles of ethics in business and positing similar results in the realm of trust); Kahan, *supra* note 22, at 346 (proposing that initial levels of trust in other groups within a collective (e.g., other taxpayers) may dictate the impact of interceding trust regulations). *But cf.* Gambetta, *supra* note 33, at 234 ("Trust, even if always misplaced, can never do worse than [sustained distrust] ....").

40. *See* GUIDELINES app. C, amend. 666 (effective Nov. 1, 2004); United

laws are criminal regardless of who commits the act, but a registered broker is arguably more culpable. A recent amendment to the Guidelines justifies increases in base offense levels for public corruption crimes with similar logic. According to the Commission, the change reflects the conclusion that,

> in general, public corruption offenses previously did not receive punishment commensurate with the gravity of such offenses. . . . The higher alternative base offense levels for public officials reflect the Commission's view that offenders who abuse their positions of public trust are inherently more culpable than those who seek to corrupt them, and their offenses present a somewhat greater threat to the integrity of governmental processes.[41]

This position appears to have influenced other sections of the Guidelines in which a criminal act threatens an entire institution or profession. The aforementioned broker who commits a securities violation receives a four-level increase over another defendant who commits the same act,[42] while a custodian who sexually abuses those in his care is subject to a two-level increase.[43] The damage done to the immediate victims by these crimes is equal to the damage that results when other perpetrators commit the same acts. The only distinction is that these perpetrators – be they prison guards trusted with the care of inmates or brokers trusted to trade on an exchange – have undermined our trust in the systems in which they served.

While § 3B1.3 does not contain this analysis, the guideline reflects a similar concern. The original section stated that "[i]f a defendant abused a position of public or private trust . . . in a

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States v. Ragland, 72 F.3d 500, 503 (6th Cir. 1996). *But cf.* Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 788 (2001) (arguing that criminal law has been slow to acknowledge the impact of betrayal).

41. GUIDELINES app. C. amend. 666 (effective Nov. 1, 2004).

42. *Id.* §2B1.1(b)(15)(A)(ii).

43. *Id.* §2A3.1(b)(3) (guideline for "Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse"); *see also id.* § 2A3.2(b)(1) (guideline for "Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts," raising a sentence by four levels if the minor was in the "custody, care or supervisory control of the defendant").

manner that significantly facilitated the commission or concealment of the offense, increase by two levels."[44] Therefore, enhancement required that the defendant (1) occupied a position of trust and (2) abused that trust in a manner that significantly contributed to his ability to commit the crime. The adjustment could not be used in conjunction with an "aggravating role enhancement" or for a crime in which abuse of trust was already "included in the base offense level or specific offense characteristic."[45] The short background commentary repeated the guideline's instruction and explained that § 3B1.3 increased the sentence of some defendants because "[s]uch persons generally are viewed as more culpable."[46] The only relevant application note (the other dealt with a separate "special skill" clause of the guideline) served to remind judges that "the position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded another person."[47] The example that followed, however, confused more than it clarified. "The adjustment," the commentary explained, "would not apply to an embezzlement by an ordinary bank teller."[48]

III. JUDICIAL INTERPRETATIONS AND THE EVOLUTION OF SECTION 3B1.3

Judges have generally agreed with both the Commission and various scholars regarding the importance of trust. When interpreting § 3B1.3, several judges have cited the adage that a

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44. The original guideline, in its entirety, read:

> §3B1.3. Abuse of Position of Trust or Use of Special Skill
>
> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided in 3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense or specific offense characteristic.

UNITED STATES SENTENCING GUIDELINES MANUAL § 3B1.3 (1988).

45. *Id.*

46. *Id.* cmt. background.

47. *Id.* cmt. n.1.

48. *Id.* For an analysis of § 3B1.3 focusing on the impact of the term "position" and the bank teller exception, see Lisa M. Fairfax, *Trust, the Federal Sentencing Guidelines, and Lessons from Fiduciary Law*, 51 CATH. U. L. REV. 1025, 1039-45 (2002).

person whose crime takes advantage of another's trust does more harm than the "ordinary pick-pocket."[49] In contrast to common criminals, these offenders "may well do serious damage to the ties that bind us together in this complex society," making their acts all the more reprehensible.[50]

Yet courts have still struggled with the lack of clarity and subjective nature of identifying a position of trust. In the years that followed the institution of the Guidelines, courts espoused three theories to define the meaning of "a position of trust": (1) the position allowed the defendant to commit a "difficult-to-detect crime"; (2) the position provided the defendant with the necessary "access and authority" to commit the crime; and (3) the position provided "managerial discretion" that empowered the defendant to commit the crime. Other issues, however – such as the Guidelines' bank teller exception and the special role of public servants – would continue to frustrate and confuse the application of these theories.

A. *The "Difficult-to-Detect" Standard*

The "difficult-to-detect" theory, which initially provided an example of how an offender's position of trust *could* substantially contribute to the commission of a crime, soon supplied an easy metric for deciding *which* defendants warranted a § 3B1.3 enhancement.[51]

In one early case, the Ninth Circuit held that a police officer who flashed her badge at Drug Enforcement Agents requesting identification, and subsequently revealed that she was smuggling drugs, properly received an abuse of trust enhancement.[52]

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49. *See* United States v. Ragland, 72 F.3d 500, 503 (6th Cir. 1996) ("Where an individual makes himself particularly vulnerable by entrusting another with substantial authority and discretion to act on his behalf and then relies upon and defers to that person, a decision to take advantage of that trust and vulnerability is particularly abhorrent, as it undermines faith in one's fellow man in a way that the ordinary pick-pocket simply cannot."); *see also* United States v. Iannone, 184 F.3d 214 (3d Cir. 1999) (quoting extensively from *Ragland*); United States v. Isaacson, 155 F.3d 1083, 1087 (9th Cir. 1998) (Fernandez, J., dissenting).

50. *Isaacson*, 155 F.3d at 1087.

51. *See* United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990) (citing United States v. Ehrlich, 902 F.2d 327, 331 (5th Cir. 1990)).

52. United States v. Foreman, 926 F.2d 792, 793-94 (9th Cir. 1990).

Defining "'facilitate'" as "'to make easier or less difficult,'" the court explained that the defendant identified herself as a police officer in order to "make it significantly easier to conceal possession of a controlled substance."[53] Because "[t]he public, including fellow law enforcement agents, expect that police officers will not violate the laws they are charged with enforcing," when the defendant used her badge, she "took advantage of that trust to make it easier for her to conceal criminal activity."[54] The dissent, however, pointed out that the Guidelines only applied to "offenders who *abuse* positions of public trust; not merely to those who *occupy* such positions or even to those who *use* such positions."[55] It was not only questionable whether the defendant showed her badge in an effort to deflect suspicion, the dissent argued, it was also highly doubtful that her use of the badge in any way "'*significantly facilitated* the. . . concealment of the offense.'"[56] But the majority's holding foreshadowed the importance of the "difficult-to-detect" standard, through its decision that the effort to conceal trumped the minimal contribution to the crime that such an effort provided.[57]

The Ninth Circuit soon clarified this distinction, asserting that "the primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong."[58] Positions that allowed for such a "wrong" could be identified by two characteristics: "the inability of the trustor objectively and expediently to determine the trustee's honesty" and "the ease with which the trustee's activities can be observed."[59] This analysis found support in § 3B1.3's commentary, which mentioned the role that a position of trust could play in the concealment of a crime.[60]

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53. *Id.* at 796 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 812 (1976)).

54. *Id.*

55. *Id.* at 797 (Reinhardt, J., dissenting) (emphasis in original).

56. *Id.* at 798 (emphasis in original).

57. *See id.* at 796.

58. United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990).

59. *Id.* (explaining that a "criminal act which cannot be discovered as a matter of routine is such a 'difficult-to-detect' wrong" and the ease with which a defendant can be observed implicates his "ability to make an undetected post-crime flight").

60. UNITED STATES SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1

In subsequent cases involving employee/employer relationships, courts struggled with the "difficult-to-detect" standard. In *United States v. Hill*, the Ninth Circuit found that a moving truck driver, who sold and traded items that he was supposed to transport, should receive a § 3B1.3 enhancement.[61] Because the families who owned the property Hill stole had already relocated overseas, they could not expediently determine Hill's honesty, while Hill's role as a "long-distance" truck driver provided few opportunities for observation.[62] This "unwatched and exclusive control over the families' belongings for an extended period of time" made Hill's position one of trust.[63] In contrast, the Fourth Circuit decided that a cashier's embezzlement scheme did not abuse a position of trust, because the defendant's superiors could have detected her crime had they not been "'inept,'" "'sloppy,'" and "'derelict in their duty.'"[64] Poor management did not define the defendant's culpability; to decide otherwise would allow "lax supervision" to "convert one's job into a 'position of trust.'"[65]

B. *The Difficulties of the Bank Teller Exception*

As many courts pointed out, the bank teller exception in the commentary appeared to conflict with the language of the guideline itself.[66] On what basis could a bank teller's embezzlement not be an abuse of a position of trust? The Ninth Circuit answered this question with ease, indicating that "bank teller" was simply not a position of trust.[67] Maintaining the

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(1988).

61. 915 F.2d at 504.

62. *Id.* at 506-07.

63. *Id.* at 507.

64. United States v. Helton, 953 F.2d 867, 870 (4th Cir. 1992) (quoting the district court's findings).

65. *Id.*; *see also* United States v. Hathcoat, 30 F.3d 913 (7th Cir. 1994) (remanding to the district court to decide whether the defendant's freedom of action to commit the crime came from her bank/employer or her co-conspirator/supervisor). *But see* United States v. Isaacson, 155 F.3d 1083 (9th Cir. 1999) (deciding that despite the defendant's supervisors' failure to proceed through the bank's security requirements, and their termination for failing to properly oversee defendant, the defendant held a position of trust).

66. *See* United States v. Lamb, 6 F.3d 415, 420 (7th Cir. 1993); United States v. Odoms, 801 F. Supp. 59, 63 (N.D. Ill. 1992).

67. This is not the most apparent interpretation of the commentary.

"difficult-to-detect" standard, the court held that checking the teller's till balance provided a "simple, objective method of determining whether a teller has embezzled any funds which pass through the teller's hands," while easy surveillance prevented concealment.[68] The Fifth Circuit followed this analysis; while crimes abusing the freedoms of other positions in a bank might warrant an enhancement, an ordinary bank teller did not occupy such a position.[69]

But another bright-line option also existed. In many cases, defendants argued that courts should draw the line at the crime, making "embezzlement" rather than the "bank teller" the commentary's important distinction.[70] According to these analyses, embezzlement already included an abuse of trust as part of its base offense level, making § 3B1.3 inapplicable. Numerous courts acknowledged the apparent legitimacy of this argument: by definition, embezzlement does require a finding of a breach of trust.[71] Yet, looking to the Guidelines, these courts pointed out that abuse of trust under § 3B1.3 had a specific meaning related to a position of trust that must have been *abused* rather than merely *breached*.[72] Furthermore, the commentary's focus on a

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Since the actual commentary reads, "[t]his adjustment, for example, would not apply to an embezzlement scheme by an ordinary bank teller" it does not universally state that a bank teller (and by comparison, other similar positions) is not a position of trust. It merely says that embezzlement in such a position would not constitute an abuse of a position of trust that "significantly facilitated the commission or concealment of the offense...." UNITED STATES SENTENCING GUIDELINES MANUAL § 3B1.3, cmt. n.1 (1988).

68. *Hill*, 915 F.2d at 505.

69. United States v. Brown, 941 F.2d 1300, 1305 (5th Cir. 1991) (citing United States v. McMillen, 917 F.2d 773 (3d Cir. 1990); United States v. Ehrlich, 902 F.2d 327 (5th Cir. 1990)).

70. *See infra* notes 72-74.

71. *See, e.g.*, United States v. Chimal, 976 F.2d 608, 613 (10th Cir. 1992) (admitting that embezzlement by definition involves abuse of trust); United States v. Georgiadis, 933 F.2d 1219, 1225 (3d Cir. 1989) (citing United States v. Sayklay, 542 F.2d 942, 944 (5th Cir. 1976) for the notion that "[t]he essence of embezzlement lies in breach of a fiduciary relationship deriving from entrustment of money").

72. *See Georgiadis*, 933 F.2d at 1225 ("While embezzlers like Georgiadis may indeed *breach* a duty of trust by fraudulently appropriating the property of another ... an *abuse* of trust under the Guidelines requires something more.") (citations omitted); *see also* United States v. Levy, 992 F.2d 1081, 1084 (10th Cir. 1993) (rejecting defendant's argument that § 3B1.3 did not apply because abuse of trust is an essential element of embezzlement,

bank teller's embezzlement seemed too specific to exclude all forms of embezzlement from § 3B1.3 coverage.[73] As a result, despite the easy solution, courts generally ruled that abuse of a position of trust was not an element of embezzlement and was not included in its base offense level.

Yet courts still struggled to harmonize the bank teller exception with the enhancement's application in other scenarios. In *United States v. Lange*, the Eighth Circuit distinguished mail theft by a mail handler from "embezzlement by an ordinary bank teller," by arguing that Lange's access to express and certified mail gave him an opportunity that "[p]ostal employees in general did not have."[74] As a result, Lange had access to mail that was "especially sensitive and probably more likely to contain things of value than mail in general," making the enhancement appropriate.[75]

Dissenting in *Hill*, Judge Heaney pointed out that the bank teller exception served to distinguish "between a position of trust which *substantially facilitates* a crime and one that merely *provides an opportunity* for crime."[76] He argued that like a bank teller, whose job provides access to money but whose position does

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explaining that the base offense level for embezzlement crimes, "covering many forms of theft, does not take into account an abuse of trust"); *Chimal*, 976 F.2d at 613 ("Although embezzlement by definition involves an abuse of trust, embezzlement by someone in a significant position of trust warrants the enhancement when the position of trust substantially facilitated the commission or concealment of the crime."); United States v. Christiansen, 958 F.2d 285, 287-88 (9th Cir. 1992) (holding that although embezzlement includes an element of breach of trust, § 3B1.3 requires more culpable conduct than an ordinary breach); United States v. McElroy, 910 F.2d 1016, 1027 (2d Cir. 1990) (rejecting the argument that a statute punishing the misapplication of bank funds – which could only be committed by individuals in certain positions – includes abuse of a position of trust in the base offense level). *But cf.*, United States v. Jimenez, 897 F.2d 286, 287 (7th Cir. 1990) (commenting in dicta that enhancement for abuse of trust would not be applicable to embezzlement).

73. United States v. Drabeck, No. 89-30237, 1991 U.S. App. LEXIS 22367, at *7 (9th Cir. Sept. 19, 1991) ("If the Commissioners meant for the enhancement not to be applied to all embezzlers because abuse of trust is already included in the crime of embezzlement, they would have no cause to single out 'ordinary bank tellers' in the Application Note."); *see also Georgiadis*, 933 F.2d at 1225.

74. 918 F.2d 707, 710 (8th Cir. 1990).

75. *Id.*

76. *Id.* at 712.

not facilitate its theft, Lange's work "provided him with occasional access to uncertain quantities of cash and valuables," but with "limited . . . opportunities for undetected theft."[77]

With some approval for Judge Heaney's dissent, Judge Shadur of the Northern District of Illinois issued an opinion "in the hope – perhaps forlorn" that prosecutors in the district who continued to argue for trust enhancements for mail theft would be "educable on the subject."[78] "It is the unanimous view of all participants in the Sentencing Council in this District that the United States Attorney's position urging such an across-the-board increase distorts the meaning of the 'abuse of trust' concept," the court explained.[79] Even assuming that the work of the postal system "is instinct with the 'public trust,'" Judge Shadur found that the Sentencing Commission's decision to apply one mail theft guideline to theft by postal employees *and* another to theft by all other persons made it "impossible to conclude that the Sentencing Commission equated all Postal Service employment with the 'public trust' within the meaning of Guideline § 3B1.3."[80]

This analysis also corresponded to the district court's interpretation of the bank teller exception. Challenging the Ninth Circuit's "difficult-to-detect" theory and its explanation of the exception, Judge Shadur held that the Guidelines excluded bank tellers because "the job is at a quite low level and is not a highly-skilled occupation, even though *by its very nature* it provides the employee with extraordinary opportunities for criminal activity."[81]

C. *The Access and Authority Standard and the Rejection of the Bank Teller Exception*

Judge Shadur's halfhearted rejection of the "difficult-to-detect" standard drew a distinction for low level occupations.[82] In

77. *Id.*

78. United States v. Arrington, 765 F. Supp. 945, 946 (N.D. Ill. 1991). The *Arrington* decision distinguished itself from *Lange* but admitted "[t]here is in this Court's opinion a good deal of force to the dissent by Senior Circuit Judge Heaney." *Id.* at 949 (citing *Lange*, 981 F.2d at 712).

79. *Id.* at 946. The court described the Sentencing Council as "[a]bout a dozen of the active judges" who gathered weekly to discuss sentencing recommendations and other related issues. *Id.* at 946 n.1.

80. *Id.* at 946, 948.

81. *Id.* at 949.

82. *Id.* The district court explained that the Ninth Circuit's "difficult-to-

doing so, the judge questioned the prevailing jurisprudence by creating a new explanation and application of the bank teller exception.[83] A focus on the access and authority provided to the defendant further challenged the basis of the "difficult-to-detect" theory, offering an even broader conception of a position of trust.

Just a year after Judge Shadur's opinion, in a case involving a postal worker, the Ninth Circuit cited the "difficult-to-detect" theory but then pointed out that millions of citizens and the postal service place "faith in those it hires to carry and deliver the mail."[84] Evidence of this faith could be found in the fact that the "Service does not routinely spy or check up on its carriers . . . does not register every piece of ordinary mail to ensure that it reaches its intended destination."[85] As a result of this lack of surveillance – not the aforementioned indicia of positions that support the commission of a "difficult-to-detect" wrong – the court held that mail carriers serve in a "quintessential position of trust."[86] The Second Circuit paid similar lip service to *Hill* in *United States v. Castagnet*, but appeared to make its decision based on some other standard.[87] In the case, a former airline employee entered ticketing areas during slow hours and used the airline's computer code to issue tickets to himself.[88] His past employment, and the knowledge of the codes that came with it, provided an opportunity to commit the crime.[89] But it was the timing of the crime, rather than an unsupervised job he no longer held, that made it "difficult-to-detect."[90]

This shift in focus from "difficult detection" to "opportunity accorded" soon received a label in *United States v. Odoms*,[91] another influential decision from the Northern District of Illinois. Subscribing to "A New Standard," Judge Zagel wrote in *Odoms* that positions of trust "confer the access or authority (not

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detect" standard "does not add too much to the analysis" before turning to the bank teller exception. *Id.*

83. *Id.*
84. United States v. Ajiboye, 961 F.2d 892, 895 (9th Cir. 1992).
85. *Id.*
86. *Id.*
87. *See* 936 F.2d 57 (2d Cir. 1991).
88. *Id.* at 58.
89. *See id.* at 63 (Altimari, J., dissenting).
90. *Id.* at 61-62.
91. 801 F. Supp. 59 (N.D. Ill. 1992).

necessarily the right) to handle the valuable things or to direct the disposition of such things."[92] In addition, he argued that this "access or authority increases the defendant's ability to commit or conceal the charged offense."[93] While the "difficult-to-detect" standard and related indicia "remain helpful measures . . . because they stem from an accommodation of the bank teller exclusion in the commentary, they exclude some defendants who fit within the guideline."[94] In contrast to previous courts, however, Judge Zagel did not try to accommodate the bank teller exception. The commentary's exclusion, he wrote, "obscures rather than enlightens" the application of the guideline; due to its conflict with the plain meaning of the enhancement, Judge Zagel simply decided that it "should be disregarded."[95]

This new access and authority test allowed for a broader interpretation of "position of trust." For example, the Seventh Circuit, applying the access and authority standard in a private sector case, found that a church pastor who made false representations in selling certificates of deposit on the church's behalf occupied a position of trust.[96] Despite telling recipients that the church would use the certificates to finance church improvements, the pastor spent much of the funds on extravagant personal expenses.[97] The court held that "as a general matter, a position of trust is characterized by 'access or authority over valuable things.'"[98] Because church members and personnel allowed the pastor to control church finances, their trust put him in a position to mislead investors into believing that the church needed funds.[99]

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92. *Id.* at 63.

93. *Id.* The Northern District cited numerous past cases for the premise that "[t]he guideline already has been applied in a manner which fits this test." *Id.* (citing, e.g., *Castagnet*, 936 F.2d 57; *Ehrlich*, 902 F. 2d 327; United States v. Zamarripa, 905 F.2d 337 (10th Cir. 1990)).

94. *Odoms*, 801 F. Supp. at 64.

95. *Id.* at 63 (citing several circuit court decisions for the premise that when the commentary conflicts with the Guidelines, the Guidelines take precedent).

96. United States v. Lilly, 37 F.3d 1222 (7th Cir. 1994).

97. *Id.* at 1224-25.

98. *Id.* at 1227 (quoting United States v. Dorsey, 27 F.3d 285, 289 (7th Cir. 1994)).

99. *Id.*

D. *The Public Servant Rule*

In yet another postal service case, a panel of the Seventh Circuit reiterated its commitment to the access and authority standard and endorsed Judge Zagel's rejection of the bank teller exception.[100] But, even after finding the defendant's access to mail put him in a position of trust, the Seventh Circuit went one step further, objecting to the postman's violation of "his duty as a sworn public servant to carry out the tasks entrusted to him while performing a governmental function for a public purpose."[101] Based on this analysis, as well as the government's "general interest in projecting a positive public image and a specific interest in assuring efficient use of public resources,"[102] the court concluded "that a government employee who takes an oath to uphold the law (as does a mail carrier) and who performs a government function for a public purpose such as delivery of the U.S. mail, is in a position of trust."[103] It appeared that mere "authority" over a public purpose, coupled with an oath of office, created such a position.

E. *The 1993 Amendment*

In 1993, in an effort to reformulate "the definition of an abuse of position of trust to better distinguish cases warranting the enhancement," the Commission introduced an amendment that substantially changed the commentary.[104] Yet it did not eliminate

100. United States v. Lamb, 6 F.3d 415, 420-21 (7th Cir. 1993) (asserting that "a position of trust is characterized by 'access or authority over valuable things'" and that "[r]ather than providing guidance to the courts, the bank teller example has produced an undesirable amount of confusion. The result has been that courts have jumped over hurdles to contort their analysis of the Guideline in order that they might ultimately place defendants inside or outside the rubric of the bank teller exception") (citations omitted).

101. *Id.* at 421.

102. *Id.* (quoting Edward S. Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. CHI. L. REV. 1335, 1352 (1987)).

103. *Id.*

104. GUIDELINES app. C, amend. 492 (effective Nov. 1, 1993). In 1990 the Commission first requested comment regarding the abuse of trust provision. *See* Notice of Proposed Amendments and Additions to Sentencing Guidelines, Policy Statements and Commentary, 55 Fed. Reg. 5718, 5739 (Feb. 16, 1990). Several amendments followed. *See* GUIDELINES app. C, amend. 346 (effective Nov. 1, 1990) (allowing the use of the abuse of trust enhancement in conjunction with the aggravating role enhancement); GUIDELINES app. C,

the bank teller exception or explicitly endorse any of the aforementioned theories. Instead, it offered a new explanation that borrowed language from existing standards and added language that would foster the creation of a new method of analysis.[105]

Asserting that the guideline referred to positions "characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)," the new note appeared to follow the access and authority standard by asserting that "[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature."[106] Yet the focus on discretion and supervision could also be read to endorse the "difficult-to-detect"

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amend. 580 (effective Nov. 1, 1998) (expanding the definition of position of trust to include those who indicate that they assume a position that they do not and as such gain the trust of their victim in a manner that allows for the crime).

105. GUIDELINES app. C, amend. 492 (Nov. 1, 1993). The amendment changed the first commentary note to read:

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.
>
> Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.

Id.

106. *Id.*

standard, while the "professional or managerial discretion" language appeared to support the Northern District of Illinois's seldom followed "low level position" distinction.[107] The new note's examples also focused on higher-level positions, explaining that the adjustment would apply to "an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination."[108] As if these new explanations drew clear lines, the Commission re-asserted its belief that the "adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller *or hotel clerk* because such positions are not characterized by the above-described factors."[109]

This new language did, however, serve the superfluous purpose of confirming issues *not* in dispute. The Commission's inclusion of an embezzlement scheme among its new examples codified the courts' refusals to grant that embezzlement sentences already included abuse of trust in the base offense level.[110] Also, by keeping the bank teller exception, the Commission seemed to confirm its commitment to the notion that the exception meant *something* and should not be disregarded. But it refused to add any more information on how to interpret the exception's meaning besides adding the "hotel clerk" language. On the whole, the new commentary provided little clarity in deciphering which standard best met Congress's definition without deviating from this ill-defined exception.

Still, by eliminating a large point of dispute from the debate, the Commission may have hoped to make such arguments moot. Creating a per se rule, the new note included an additional paragraph at the end of the commentary that explained "because of the special nature of the United States mail an adjustment for

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107. *See id.*
108. *Id.*
109. *Id.* (emphasis added).
110. *See supra* notes 67-73 and accompanying text; *see also* United States v. Hathcoat, 30 F.3d 913, 918-19 (7th Cir. 1994) ("[The] amendment to the commentary ... ensures that the enhancement is imposed in a manner that is compatible with the nature of the crime of embezzlement, a crime that, as we have noted earlier, always involves a *breach* of trust but oftentimes involves an even more egregious *abuse* of trust that warrants a greater punishment – the punishment permitted by this enhancement.").

an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail."[111]

F. *The Managerial Discretion Standard*

Despite the still unclear application of the guideline, the additional language in the commentary provided the federal courts of appeals with an even greater degree of confidence (and statutory evidence) for their respective theories. Most notably, a new theory emerged, supported by the amendment text explaining that positions of trust are "characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)."[112] In a case reviewed just after the enactment of the new commentary, the D.C. Circuit pointed to this new language and held that a clerk at the Federal Trade Commission who used work information to engage in credit card fraud did not hold a position of trust.[113] The court felt that to characterize such a job as one with "professional or managerial discretion" would make the commentary's definition "so boundless as to be meaningless."[114]

Other courts soon cited the same language, expressing confidence that the new commentary clarified the previous confusion. "It is true that in dealing with the position-of-trust enhancement courts occasionally have emphasized the employee's freedom to commit wrongs that defy facile detection," the First Circuit explained.[115] "But these decisions," the court continued, "deal with earlier versions of § 3B1.3 and, thus, antedate the Sentencing Commission's emphasis on managerial . . . discretion."[116] Proponents of this new standard also pointed to the

111. GUIDELINES § 3B1.3, cmt. n.1.

112. *Id.*

113. United States v. Smaw, 22 F.3d 330, 331-32 (D.C. Cir. 1994). The court also held that it could apply the new commentary, even though at the time of the defendant's sentencing the old commentary was in effect, because the amendment "bespeaks clarification, rather than substantive alteration." *Id.* at 333.

114. *Id.* at 332.

115. United States v. Reccko, 151 F.3d 29, 33 (1st Cir. 1998).

116. *Id.*; *see also* United States v. Tribble, 206 F.3d 634, 637 (6th Cir. 2000) (explaining that "the level of discretion is to be the decisive factor" and that other cases "too often emphasized, we believe erroneously, the

commentary's examples, which distinguished between "situations involving attorneys, bank executives, and doctors on the one hand, and those involving bank tellers and hotel clerks on the other."[117] The difference between these two groupings was the element of professional and managerial responsibility, a focus that significantly narrowed "the sweep of the commentary's definition."[118]

Yet not all courts agreed regarding the degree to which this new standard limited the guideline. In some jurisdictions, clerks and low-level employees, whose jobs the courts would have previously considered "positions of trust," escaped the enhancement.[119] But for defendants in higher positions, inconsistencies remained. For instance, in *United States v. West*, the president and sole employee of a courier company stole checks and credit card information that businesses had contracted with him to transport.[120] The majority of a panel of the D.C. Circuit found West's role as a courier "involved almost no discretion whatsoever – his job consisted of nothing more than transporting certain items from one place to another."[121] As such, it was not a position of trust and any alternative interpretation "would stretch the abuse-of-trust enhancement to cover endless numbers of jobs involving absolutely no professional or managerial discretion, in clear contravention of the plain language of the commentary to

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supervision an employee receives"); United States v. Jankowski, 194 F.3d 878, 884 n.5 (8th Cir. 1999) (stating that prior to the amendment in 1993, the courts applied the enhancement "inconsistently"); United States v. West, 56 F.3d 216, 219 (D.C. Cir. 1995) ("The commentary to section 3B1.3, which was significantly amended on November 1, 1993, provides substantial guidance as to the meaning of a 'position of trust ....'").

117. United States v. Ragland, 72 F.3d 500, 502 (6th Cir. 1996); *see also West*, 56 F.3d at 220 (looking at the commentary examples and stating that "[e]ach of these examples contemplates a 'professional' or 'manager' who, because of his or her special knowledge, expertise, or managerial authority, is trusted to exercise 'substantial discretionary judgment that is ordinarily given considerable deference'").

118. *Ragland*, 72 F.3d at 502.

119. *See, e.g.*, *Reccko*, 151 F.3d at 32 (holding that while a police station receptionist's job may have "afforded her access to information," the position provided her with "no discernible discretion"); United States v. Ward, 222 F.3d 909, 912 (11th Cir. 2000) (holding that the defendant, whose job it was to guard an armored car, had "very little discretion" in the performance of his duties).

120. 56 F.3d at 217.

121. *Id.*

section 3B1.3."[122] In dissent, however, Judge Wald did not describe the defendant as a courier with no discretion; as the president of a company he received no supervision and made discretionary decisions with every contract he decided to accept.[123] Far from having no discretion, Judge Wald believed West had complete discretion.

In a similar analysis, the Eleventh Circuit struggled with whether a position of trust could form outside of the traditional employer/employee relationship. In *United States v. Mullens* the court held that the president of a fraudulent investment firm that functioned as a ponzi scheme was not in a position of trust.[124] Despite the government's argument that the defendant developed personal trust relationships with many of the victims through his country club membership, in addition to receiving the trust of other investors via his control over their funds, the court maintained that the defendant did not hold position of private trust.[125] "Fraudulently inducing trust in an investor," the court explained, "is not the same as abusing a bona fide relationship of trust with [an] investor."[126]

Mullens, and a line of cases that followed, hinted at a new standard that went beyond managerial discretion to require a legitimate fiduciary relationship between the victim entrustor and the defendant entrustee.[127] Some courts applied this theory to distinguish the persistently troubling bank tellers from the attorneys, executives, and physicians. Since the "ordinary dictionary concept of reliance or confidence" would include a bank's trust in its tellers, the Sixth Circuit felt that "as used in the guideline, 'position of public or private trust' is a term of art, appropriating some of the aspects of the legal concept of a trustee

122. *Id.* at 221.
123. *Id.* at 222.
124. 65 F.3d 1560, 1562 (11th Cir. 1995).
125. *Id.* at 1566-67.
126. *Id.* at 1567; *see also* United States v. Morris, 286 F.3d 1291 (11th Cir. 2002) (following *Mullens* to hold that the defendant's representation of himself as both a lawyer and a trader did not place him in a position of trust with respect to those who, knowing this status, chose to provide the defendant with funds to invest).
127. *See, e.g.*, United States v. Ebersole, 411 F.3d 517, 536 (4th Cir. 2005); United States v. Caplinger, 339 F.3d 226, 236-38 (4th Cir. 2003).

or fiduciary."[128] In other situations, courts used the fiduciary theory only to analyze those cases that fell outside the typical employee abuse of trust fact pattern.[129] In these cases, courts tried to distinguish between fiduciary or personal trust relationships and the "ostensibly normal arms-length commercial relationship" in which "no trust relationship exists between the two principals."[130] In one such case, the Second Circuit held that a defendant who sought loans for a nonexistent company was not in a position of trust.[131] The defendant's victims were lenders, not shareholders, and while "a corporation's management of course owes a fiduciary duty to shareholders," borrower/lender "relationships are typically at arm's length, and a firm's obligations to creditors are generally regarded solely as contractual."[132]

The discretion standard also highlighted a pre-existing inconsistency in § 3B1.3's application across the circuits. Even before the Commission's 1993 amendment, some courts focused on an apparent requirement that the victim be the party that entrusted the defendant, while other courts failed to mention this constraint.[133] The new discretion standard, however, required a

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128. United States v. Ragland, 72 F.3d 500, 502-03 (6th Cir. 1996).

129. United States v. Brunson, 54 F.3d 673, 677 (10th Cir. 1995) (explaining that there are two types of cases in which § 3B1.3 apply: where "the victim is a business and the defendant is an employee who has taken advantage of the knowledge and responsibilities acquired by virtue of his or her position within the company" and the "type of case where ... a fiduciary or personal trust relationship exists").

130. *Id.* at 678.

131. United States v. Jolly, 102 F.3d 46, 47-48 (2d Cir. 1996).

132. *Id.* at 48.

133. *Compare* United States v. Hill, 915 F.2d 502, 506 n.3, 507 (9th Cir. 1990) (asserting that whether a defendant was in a position of trust must be viewed from the perspective of the victim and going to great lengths to show that the victim families placed their trust in Hill), *and* United States v. Castagnet, 936 F.2d 57, 62 (2d Cir. 1991) (arguing that despite the fact that the defendant no longer worked for the victim when he committed the crime, "the relationship that [previously] existed ... provided the ability to commit the crime"), *and* United States v. Odoms, 801 F. Supp. 59, 61-62 (N.D. Ill. 1992) (distinguishing between a bank teller and a mail sorter because the latter "cannot be observed by the members of the public who have entrusted her with their mail"), *with* United States v. Lamb, 6. F.3d 415, 420 (7th Cir. 1993) (explaining that the Postal Service placed trust in the defendant but the victims were the "individuals whose property (mail) he stole or destroyed"), *and* United States v. Lange, 918 F.2d 707, 709-10 (8th Cir. 1990)

court to assess whether an employer/fiduciary provided the defendant with discretionary power in order to decide whether the defendant held a position of trust. This analysis, therefore, invited courts to focus on whether the award of discretion came from the victim.[134]

For example, in *United States v. Hathcoat*, the Seventh Circuit remanded a case in which a bank employee's manager joined in her embezzlement scheme.[135] In this situation, reminiscent of the Fourth Circuit's "'sloppy'" supervisors,[136] the court felt that if "Ms. Hathcoat was subjected to the same scrutiny as all other ordinary tellers but simply had, from her perspective, the good fortune to have a supervisor who was as dishonest as she, it would be difficult to conclude that her freedom of action had been bestowed upon her by the bank."[137] The district court was therefore instructed to assess whether the freedom that allowed Hathcoat to commit the crime "was attributable to the actions of the victim Bank or to the actions of her confederate-manager."[138]

In another fact-specific case, a contractor failed to disclose certain details when signing a contract with NASA, in violation of the Trust in Negotiations Act (TINA).[139] The Second Circuit held that despite his fraud, the defendant "did not occupy a position of trust vis-à-vis the government" and therefore could not receive a §

(no mention of victim as entrustor), *and* United States v. Lowder, 5 F.3d 467, 473 (10th Cir. 1993) (same).

134. In contrast, the access and authority standard only required that the position confer "access and authority (not necessarily the right) to handle the valuable things or to direct the disposition of such things." *Odoms*, 801 F. Supp. at 63 (footnote omitted).

135. 30 F.3d 913, 920 (7th Cir. 1994).

136. *See* United States v. Helton, 953 F.2d 867, 870 (4th Cir. 1992); *supra* notes 64-65 and accompanying text.

137. *Hathcoat*, 30 F.3d at 919; *see also* United States v. Isaacson 155 F.3d 1083, 1089 (9th Cir. 1998) (Fernandez, J., dissenting) (stating that the defendant's supervisors' failure to follow security procedures did not provide "a shred of evidence that the bank endowed [the defendant's] position with any special trust form of trust. Rather from its standpoint as the victim of the offense, no significant trust was reposed in Isaacson"). *But see id.* at 1084-85 (majority opinion) (holding that the defendant held a special position of trust as a "head vault teller," and as such "was not required to undergo all of the security checks that the other tellers went through").

138. *Hathcoat*, 30 F.3d. at 920.

139. United States v. Broderson, 67 F.3d 452, 454-55 (2d Cir. 1995).

3B1.3 enhancement.[140] The court pointed to the fact that "the cases relied upon by the government indicate that the discretion must be entrusted to the defendant by the victim," while in the Guidelines "every example of an abuse of trust in the Commentary accompanying Section 3B1.3 also involves a victim entrusting an agent or employee with discretion."[141] Similar arm's length relationships prevented the defendant in *United States v. Garrison* from receiving a § 3B1.3 enhancement.[142] In this Medicare fraud case, the Eleventh Circuit reversed the district court's application of the enhancement because the defendant CEO of a nursing care corporation sent billing information through a fiscal intermediary.[143] As such, the defendant and her company were not "directly in a position of trust in relation to [the] Medicare [program]," the ultimate victim of the scheme.[144]

Not all circuits, however, followed this new standard. Notably, the Seventh Circuit case *United States v. Davuluri*, focused on managerial discretion but refused to require a fiduciary relationship.[145] Though the case was similar to *Mullens*, the *Davuluri* court held that a commercial relationship that provides the defendant with wide discretion to act on behalf of the victim creates a position of trust, even if the parties formed the relationship through an arm's length transaction.[146]

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140. *Id.* at 455.

141. *Id.* at 456. Secondarily, the court relied on the fact that Broderson's underlying crime was a violation of the TINA. As such, the crime was not independent of the abuse of trust and therefore the betrayal was already included in the base offense level. *See id.*

142. *See* 133 F.3d 831, 838-39 (11th Cir. 1998).

143. *Id.* at 841.

144. *Id.* The court distinguished this situation from one in which a doctor makes medical judgments because such judgments involve a tremendous amount of discretion, forcing both the patient and the government to rely on the doctor's honesty. *Id.* at 842.

145. 239 F.3d 902 (7th Cir. 2001).

146. *Id.* at 909. ("While the range of activities that may constitute a position of trust under our prior precedents is not entirely pellucid, we have frequently emphasized that a defendant who has wide discretion to act on behalf of his victim satisfies the first prong of the enhancement test. ... To the extent that *Mullens* holds that a financial advisor with total control over investors' funds does not occupy a position of trust, we respectfully decline to follow that decision as inconsistent with our own case law.") (citations omitted); *see also* United States v. Morris, 286 F.3d 1291, 1305-06 (11th Cir. 2002) (Hull, J., dissenting) (asserting that a defendant entrusted with the discretion to invest the funds of others should receive a § 3B1.3

Other circuits merely paid lip service to the discretionary standard or refused to abandon analyses that preceded the Commission's amendment. For example, in *United States v. Hussey*, the Second Circuit affirmed a two-level sentence enhancement for abuse of a position of trust, asserting that the defendants "created an impression in their principal victims that they occupied a fiduciary-like relationship with them."[147] In order to bolster the credibility of this mere "impression" of a relationship, the court explained that the authority entrusted by the victims also allowed the defendants "a great deal of freedom to commit a difficult-to-detect wrong."[148] In a similar vein, the Ninth Circuit refused to abandon the difficult-to-detect standard,[149] while the Fourth Circuit applied an entirely new four-factor test that focused on:

> (1) whether the defendant had either special duties or "'special access to information not available to other employees'"; (2) the extent of discretion the defendant possesses; (3) whether the defendant's acts indicate that he is "'more culpable' than others" who are in positions similar to his and who engage in criminal acts; and (4) viewing the entire question of abuse of trust from the victim's perspective.[150]

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enhancement).

147. 254 F.3d 428, 432 (2d Cir. 2001).

148. *Id.* During the 1990s, courts struggled with a series of cases in which defendants pretended to serve in positions of trust. The commission eventually added amendment 580, applying the enhancement to situations "in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not." GUIDELINES § 3B1.3, cmt. n.2; *see also* GUIDELINES app. C, amend. 580 (effective Nov. 1, 1998); United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) (holding that a defendant who impersonated a doctor did not legitimately occupy a position of trust and so could not receive a § 3B1.3 enhancement); United States v. Queen, 4 F.3d 925 (10th Cir. 1993) (applying § 3B1.3 to the president of a fraudulent investment company).

149. *See, e.g.*, United States v. Velez, 185 F.3d 1048, 1050-51 (9th Cir. 1999).

150. United States v. Akinkoye, 185 F.3d 192, 203 (4th Cir. 1999) (citing United States v. Gordon, 61 F.3d 263, 269 (4th Cir. 1995)); *see also* United States v. Tribble, 206 F.3d 634, 636 (6th Cir. 2000) (listing post-1994 cases from the Fourth and Ninth Circuits that continued to hold that postal window clerks occupied positions of trust); United States v. Oplinger, 150

These examples demonstrate that standards still differ across the circuits. Meanwhile, even within circuits, the existing standards fail to eliminate subjectivity from the judicial applications of the Guidelines. As Professor Lisa M. Fairfax has pointed out, the current means of applying the enhancement are far from ideal.[151] The "difficult-to-detect" standard overemphasizes supervision, while the access and authority standard can be "over-inclusive because many people have similar forms of access without ever forming a trust relationship."[152] The discretion standard is also not without flaws. Like the difficult-to-detect standard, it often relies too much on the conduct of the victim, while failing to punish those who are trusted but who receive little or no discretion.[153] Fairfax's analysis, however, concludes by inviting a comparison to fiduciary law.[154] In common with § 3B1.3's "trust," she points out that commentators and judges also do not agree on the definition of "fiduciary," causing "much confusion and frustration."[155] From this assessment, Fairfax recommends that analyses of § 3B1.3 concede that "the concept of trust cannot be precisely defined"; eliminate all examples (including the bank teller exclusion); and "adopt a general statement of purpose and a broad list of relevant criteria."[156] Fairfax's list would be non-exhaustive and would "include characteristics from all theories currently being employed."[157]

This solution may make trust analysis more akin to the application of fiduciary law in the civil context. But it would also appear to invite greater confusion, frustration, and subjectivity. A focus on the virtues of trust, examining why we value it and why we deem those who betray it more culpable than other criminals, would do more to clarify the line between defendants who should receive the enhancement and defendants who should not.

F.3d 1061, 1069 (9th Cir. 1998) (applying the "difficult-to-detect" standard); United States v. Isaacson, 155 F.3d 1083, 1086 (9th Cir. 1998) (same).

151. *See* Fairfax, *supra* note 48, at 1045-56.
152. *Id.* at 1046, 1050.
153. *Id.* at 1052-53.
154. *Id.* at 1054.
155. *Id.*
156. *Id.* at 1054-55.
157. *Id.* at 1055.

IV. TRUST THEORIES AND SECTION 3B1.3

Based on the work of numerous scholars we know that much of the value of trust comes from the manner in which it fosters efficient relationships and reduces transactions costs.[158] Complementing this theory, the commentary's examples illustrate positions that rely on positive forms of trust that allow our society to function efficiently. While corrupt lawyers and bankers can victimize others because of their positions, those positions also provide potential victims with countless benefits. As Coleman and Putnam show, trust is more efficient than constant supervision and regulation; the latter not only have immediate costs, but also lead to more distrust.[159] As a result, crimes that abuse trust are more culpable than other indiscretions because they threaten the foundation of many beneficial relationships.[160]

Yet not one of the aforementioned analyses distinguish these threatening abuses of trust from a different sort of betrayal that may serve as a reminder of why we do not allow trust to go too far. When "trust" manifests itself through poor supervision, bad decisions, or blatant breaches of policy, it is arguably not genuine trust – and it is certainly not a form of trust the law should encourage.[161] In many of these situations the trusting party that disregarded a policy or rule may bear part of the blame for *improperly* trusting another party. As such, the justice system should not condone this detrimental type of trust by classifying those who receive it as holding "positions of trust" under the Guidelines. Courts should only apply the stigma and enhanced sentence of § 3B1.3 to defendants who are *properly* trusted. Otherwise, courts risk diminishing the impact of the enhancement by imposing it on those defendants who receive trust through

158. *See supra* Part II.A.

159. *See supra* notes 21-39 and accompanying text.

160. *See supra* Part II.A.

161. The disregarded policies and regulations often aim to serve the same purpose as trust: fostering relationships and, like Putnam's abundance of lawyers, providing a basis for cooperation. In fact, where trust is lacking, regulations can provide a new foundation for trust because without trust parties are able to transact *only* by relying on regulations. *See* Kahan, *supra* note 22, at 339. Scholars, however, debate the degree to which such regulations provide "backstops" to trust rather than merely displacing it. *Compare* Rose, *supra* note 25, *with* Kahan, *supra* note 22, *and* Ribstein, *supra* note 37.

mere ineptitude or accident – a form of trust for which the court should *not* provide added protections.

To apply this "efficient trust" standard to the Guidelines, one should look at how and why the defendant was entrusted. For example, in *United States v. Helton*, the Fourth Circuit recognized that a National Institute of Standards and Technology (NIST) supervisor's "'inept'" failure to oversee the defendant did not make Helton's job a position of trust.[162] In *United States v. Isaacson*, however, the Ninth Circuit found that a Bank of America Branch Manager's and Operations Officer's shared failure to follow bank security procedures amounted to their placing trust in the defendant teller.[163] Despite the fact that the bank fired both supervisors for "not requiring Isaacson to follow all of the normal security procedures," the court held that this breach of protocol amounted to a form of trust.[164] In response to the dissent's argument that the corporate entity, rather than the defendant's supervisors, served as her employer, the majority pointed out that "institutions can act only through people. The Branch Manager and Operations Officer defined the job Isaacson actually performed and made that job a position of trust. . . ."[165]

Unfortunately, such an analysis misses the point. If some crimes are more culpable because they involve an abuse of trust, that initial trust must have value in order for society to deem its abuse worthy of the enhancement. In the case of both Helton and Isaacson, the entrustment was its own abuse – both defendants' supervisors abused the trust placed *in them* by not following office protocol. NIST and Bank of America chose to regulate certain relationships and did *not* want employees relying on trust – possibly because the investment in oversight outweighed the potential benefits of "relax[ing] a little."[166] As such, decisions to ignore such policies should not elevate a position that an organization has already decided *is not* a position of trust.

By focusing on the victim entrustor requirement, the Seventh

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162. 953 F.2d 867, 870 (4th Cir. 1992).

163. 155 F.3d. 1083, 1083-85 (9th Cir. 1998). Holding that the defendant was a "head vault teller," the court avoided problems with the bank teller exception. *Id.* at 1086.

164. *Id.* at 1084-86.

165. *Id.* at 1086 n.3.

166. PUTNAM, *supra* note 26, at 135.

Circuit came to a similar conclusion. In *United States v. Hathcoat*, the Seventh Circuit remanded the case so the district court could decide whether the defendant's employer bank or co-conspirator supervisor had provided her with the freedom to commit the crime.[167] But it could just as easily have recognized the distinction between positive and accepted forms of trust (created by those with the ability and authority to make entrustment decisions) and negative forms of trust that are the result of sloth, incompetence, or criminal motives.

In a similar manner, when the defendant in *Foreman* flashed her badge to avoid questioning, the court should have asked whether the form of trust that Foreman aimed to foster – DEA agents allowing her to avoid suspicion due to her occupation – would be beneficial.[168] The dissent argued that Foreman's act did not meet the guideline's requirement because it had little impact on her ability to commit the crime.[169] The agents clearly did not believe Foreman's position created enough trust for them to let her board the plane and therefore did not actually provide her with any trust to abuse. The distinction between the efficient trust standard and the dissent's analysis would occur if the agents had allowed Foreman to proceed to the plane based purely on her police identification badge. In that case, one would need to ask whether it is acceptable for DEA agents to give other law enforcement officers a presumption of innocence. If the answer is yes, Foreman's use of her badge serves as an abuse of trust that the court should punish. However, if such actions are a poor means of assessing suspicious passengers, then it is an inefficient form of trust that should be discouraged and not protected through sentence enhancements against those who abuse it. Such an analysis is not only more in line with the role of trust in the Guidelines (and in criminal law more generally); it also allows courts to avoid the analytical acrobatics of trying to prove that the victim placed trust in the defendant.

For example, in a welfare fraud case, the Fourth Circuit reiterated the position "that whether a person holds a position of

167. 30 F.3d 913, 919-20 (7th Cir. 1994); *see also supra* notes 135-38 and accompanying text.

168. *See* 926 F.2d 792, 793-94 (9th Cir. 1990).

169. *Id.* at 797-800.

trust must be determined from the perspective of the victim" and asserted that an enhancement was justified because "[t]he 'victims' are the American taxpayers, who must pay the added costs that such fraud imposes."[170] The court presumed the public entrusted the defendant doctor, either directly by virtue of his position, or indirectly through a government that trusted him to receive welfare funds for his services to patients.[171] Such strained logic, however, should be unnecessary. Numerous cases point out that government welfare programs, particularly those related to the medical profession, must trust their professional participants.[172] This policy decision makes welfare distribution possible and, as a result, those who abuse this trust present a "threat to the integrity" of an important – and efficient – relationship.[173]

In *United States v. Hill* the court found that the defendant held a position of trust because his job as a moving truck driver provided him with "the freedom to commit a difficult-to-detect wrong."[174] The Ninth Circuit's analysis, however, struggled to show how the victim families placed their trust in the defendant rather than his employer. "When Hill arrived at the families' doorsteps, the families knew that Hill would be their exclusive server," the court explained, attempting to identify the moment when trust shifted from the moving company to the driver himself.[175] Hill's employer, the families understood, "would not and could not monitor Hill's whereabouts for the duration of the trip."[176] Yet, regardless of which party placed the trust, the company decided that it would be most efficient to entrust its drivers (possibly because monitoring would be too costly or impossible).[177] As such, Hill was in a position of trust regardless

170. United States v. Adam, 70 F.3d 776, 782 (4th Cir. 1995).
171. *See id.*
172. *See, e.g.*, United States v. Rutgard, 108 F.3d 1041, 1064 (9th Cir. 1997) (upholding a § 3B1.3 enhancement for Medicare fraud because "the government as insurer depends upon the honesty of the doctor and is easily taken advantage of if the doctor is not honest"), *amended on other grounds*, 116 F.3d 1270 (9th Cir. 1997).
173. *See* GUIDELINES amend. 666 (effective Nov. 1, 2004).
174. 915 F.2d 502, 506-07 (9th Cir. 1990).
175. *Id.* at 507.
176. *Id.*
177. *Id.*

of what the families purportedly "knew."[178] It should not matter if the victim placed the trust; what should matter is whether a beneficial form of trust, properly placed, assisted the defendant in committing the crime.

Other cases go to even greater lengths to argue victim entrustment, especially when defendants definitively abused a position of trust but may not have had *any* interaction with the victim. Before Judge Zagel of the Northern District of Illinois applied the new access and authority standard, he showed that even under the *Hill* theory, a mail sorter could be distinguished from a bank teller because the former "cannot be observed by the members of the public who have entrusted her with their mail, unlike the bank teller who faces the bank customers throughout the day."[179] In a similar effort, a panel of the Fourth Circuit found that homeowners entrusted a real estate *company* with their financial information.[180] But when an agent of that company used the information to perpetuate fraud against *banks*, he could still receive the enhancement.[181] While the banks may have been the ultimate victims, the court simply felt that the "clients have been victimized as well."[182]

The efficient trust standard would also prevent the application of § 3B1.3 when there was no trust in the first place – essentially situations in which employers or colleagues did not "relax . . . a little."[183] For example, in several of the mail handler cases the decisions conceded not only that supervisors could observe mail handlers, but also that the government invested in

178. *Id.*

179. United States v. Odoms, 801 F. Supp. 59, 62 (N.D. Ill. 1992). *But cf.* United States v. Ragland, 72 F.2d 500, 502 n.1 (6th Cir. 1996) (finding that neither the defendant's employer bank nor the bank's depositors entrusted the defendant); United States v. Ajiboye, 961 F.2d 892, 895 (9th Cir. 1992) (ignoring the victim entrustment requirement, though arguing that "[m]illions drop mail in mailboxes every day trusting that the postal service will safely deliver it to the designated destination" while "[t]he Postal Service places corresponding faith in those it hires to deliver the mail"). As already mentioned, however, when Judge Zagel applied the access and authority standard he chose to disregard the bank teller exception. *See Odoms*, 801 F. Supp. at 63.

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

181. *Id.*

182. *Id.*

183. *See* PUTNAM, *supra* note 26, at 135.

"concealed surveillance areas" and "mirrors . . . in the work area to facilitate observation."[184] While these employees may have been trusted in a general sense, they were not trusted professionally. The enhancement is not for "people who are trusted" but for those in "positions" of trust and institutions must identify these positions. In this case, contrary to the sentencing outcome, policies indicate that the postal service did not place trust in these mail handlers.[185]

In this manner, the efficient trust standard avoids protecting relationships defined by negative or exclusively personal trust and only protects important and valued forms of trust. Like Fairfax's recommendation, it allows courts to identify positions of trust via numerous avenues.[186] But it applies a major limiting factor that forces all of the theories to reach the same destination, compelling courts to remember why we value trust in the first place.

V. CONCLUSION

In the post-*Booker* era, courts continue to struggle with the aforementioned issues as they interpret the meaning of § 3B1.3.[187]

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184. United States v. Cuff, 999 F.2d 1396, 1398 (9th Cir. 1993); *cf. Odoms*, 801 F. Supp. at 61 ("While the post office is equipped with one way mirrors and viewing portals, the open area where the defendant works is filled with employees."); United States v. Milligan, 958 F.2d 345, 347 (11th Cir. 1992) (clerks daily financial reports were audited, though "only once every four months"). *But see* United States v. Lamb, 6 F.3d 415, 417 (7th Cir. 1993) (recapping a postal inspector's testimony "that time and cost constraints prevent the Post Office from keeping a record of each and every piece of First Class Mail that is assigned to an individual letter carrier for delivery on a given day"); *Ajiboye*, 961 F.2d at 895 (explaining that a postal carrier, in contrast to a bank teller, is "free from surveillance when delivering mail").

185. In some jurisdictions, the commentary's mail sorter clause has overcome this error and eliminated some of the ambiguities caused by the bank teller exception. In *United States v. Jankowski*, a case of armed robbery, one of the defendants worked as a messenger for the victim armored car company. 194 F.3d 878, 880 (8th Cir. 1999). In applying the enhancement, the district court found that the defendant's position was "more like that of a postal employee ... than it is that of a bank teller who only handles a small amount of cash." *Id.* at 884. For the same reason, the Eighth Circuit reversed. "Under the commentary," the court explained, "the enhancement for postal employees is an exception to the general definition ... [and] was not meant to carve out a general exception for all those who abuse positions that involve tasks similar to the delivery of mail." *Id.*

186. *See* notes 151-57 and accompanying text.

187. *See* United States v. Coumaris, No. 05-3115, slip op. at *1 (D.C. Cir. Sept. 22, 2006) (holding that an IRS agent is a position of trust that the

Meanwhile the *Booker* decision appears to have further complicated the assessment process. As already mentioned, because the decision allows sentences exceeding the maximum authorized for the crime, if facts supporting such a sentence are "admitted by the defendant" courts must also contend with the question of whether the defendant's admission concedes that he held a position of trust.[188]

These constant struggles to define trust, and positions that are endowed with it, invite the conclusion that sentencing would be easier if the Commission had never deemed abuse of trust an important factor. But the numerous crimes defined by betrayal reveal that much of the criminal law is already pregnant with a concern for trust.[189] The work of numerous scholars also shows how important trust is in the operation of a complex society. As such, its abuse in order to carry out any crime should be recognized and punished accordingly.

But while trust may be a characteristic worth distinguishing for the purposes of proportional sentencing, § 3B1.3 must be applied in a manner that recognizes *why* trust is important. In deciphering a criminal's "position" and degree of "abuse," judges must appraise the value of the underlying trust. Only when a defendant abuses a form of trust that serves society in a positive way (whether by allowing people to save money, make exchanges, or simply "relax . . . a little"[190]) and that society aims to encourage (e.g., not a form inspired by "'slopp[iness]'"[191]) should the court

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defendant "abused on multiple occasions using his special credibility with law enforcement officials in an attempt to avoid detection and divert attention from his criminal conduct ..."); United States v. Baldwin, 414 F.3d 791, 797-99 (7th Cir. 2005) (applying a discretion standard analysis and analyzing the circumstances from the perspective of the victim); United States v. Ebersole, 411 F.3d 517, 536 (4th Cir. 2005) (applying a fiduciary standard); United States v. Coleman, 370 F. Supp. 2d 661, 673-74 (S.D. Ohio 2005) (discussing whether the defendant portrayed herself as someone holding a position of trust).

188. United States v. Booker, 543 U.S. 220, 244 (2005) ("Any fact (other than prior conviction) which is necessary to support a sentence exceeding the maximum authorized established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); *see also* note 13 and accompanying text.

189. *See supra* Part II.B.

190. PUTNAM, *supra* note 26, at 135.

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

apply § 3B1.3 to a sentence. Clear betrayal, by a party appropriately trusted, demands such an enhanced punishment.