

To Move or Not to Move? That Is the Metaphysical Question

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I've crossed some kind of invisible line. I feel as if I've come to a place
I never thought I'd have to come to. And I don't know how I got here.

Raymond Carver¹

I move, therefore I am.

Haruki Murakami²

Circuit courts are currently split on how to apply the robbery abduction enhancement contained in the United States Sentencing Guidelines. As a result of patchwork interpretations and a failure to agree on when an abduction occurs, courts have come to drastically different conclusions in almost identical cases. In order to resolve the circuit split, courts need a functional test that applies a unified definition of location.

This Comment seeks to provide courts with such a test. In proposing this test, this Comment looks to (1) the Guidelines, (2) sexual assault case law, and (3) kidnapping case law.

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¹ Raymond Carver, *Whoever Was Using This Bed*, in William Stull and Maureen Carroll, eds, *Raymond Carver: Collected Stories* 546, 559 (Library of America 2009).

² Haruki Murakami, *IQ84* 36 (Random House 2010).

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INTRODUCTION

Philosophers have long pondered the metaphysical meaning of an object’s “location” or the “where of a thing.” For example, Aristotle considered location as one of the ten aspects of an object’s being.³ However, debating the definition of location is not solely within the domain of philosophers—location is often an important factor in the law. For crimes in which a change in location is a necessary element, courts must use and apply a definition of location. This definition, when applied, often serves a significant purpose. If a kidnapping conviction requires a change in location, could this change in location requirement be met by movement within state lines? Within a city block? Within a building? Within a room?⁴ If distance is not the determining factor in defining a change in location, what factor or factors should be used in its place? Should the type of forced movement matter?

Developing a precise definition of location is particularly important for courts in determining when to apply abduction related enhancements under the United States Sentencing Guidelines (USSG). These abduction enhancements, which apply when sentencing offenders convicted of robbery or sexual abuse, apply only

³ Aristotle, *Categories* 7 (Oxford 1963) (J.L. Ackrill, trans). Other aspects mentioned by Aristotle include quantity and quality.

⁴ Courts have addressed this exact issue. See *United States v Archuleta*, 865 F3d 1280, 1293 (10th Cir 2017) (Seymour concurring in part and dissenting in part) (“[A]t what level of abstraction should a court define the term location? For example, if a person were standing behind three people in the cashier’s line in the lobby of a bank and the bank was located in Dallas, Texas, what is that person’s location? Fourth in line? The lobby of a bank? A bank? Dallas? Texas? The United States of America?”).

when the offender forces the victim to change location.⁵ As such, the definition of location that courts use can determine whether an abduction enhancement is applied to an offender's sentence. Recently a circuit split has arisen as to how location should be defined and applied in robbery cases.⁶ As a result of these differing definitions of location, some circuits have held that the robbery abduction enhancement applies to forced movement within a room or building, while other circuits have reached different conclusions.⁷

This Comment analyzes how location and forced movement are defined under robbery abduction enhancement provisions within the Guidelines. This Comment proceeds in three parts. Part I provides an introduction to the Sentencing Reform Act⁸ (SRA) and a cursory glance at the robbery abduction enhancement. Part II defines the circuit split and surveys the different approaches used by the circuits. Part III proposes a two-part balancing test that resolves the circuit split. The proposed balancing test weighs both the dangerousness of the forced movement and whether the forced movement occurred over a substantial distance. This balancing test also maintains the distinction between sentencing enhancements for robbery crimes involving abduction and physical restraint, and it provides courts with a practical test rooted in sexual assault and kidnapping case law.

I. ORIENTING WITHIN THE SENTENCING REFORM ACT: ESTABLISHING A BEARING

This Part explains the background behind the SRA while also describing the robbery abduction enhancement that is reviewed in detail throughout this Comment. Part I.A describes the SRA, and Part I.B analyzes the robbery abduction enhancement.

A. The Sentencing Reform Act

Congress enacted the SRA as part of the broader Comprehensive Crime Control Act of 1984.⁹ This legislation created the United States Sentencing Commission, which in turn promulgates the Federal Sentencing Guidelines.¹⁰ These Federal

⁵ USSG §§ 2A3.1(b)(5), 2B3.1(b)(4)(A).

⁶ See *Archuleta*, 865 F3d at 1285–88.

⁷ *Id.*

⁸ Pub L No 98-473, 98 Stat 1987 (1984), codified as amended at 18 USC § 3551 et seq.

⁹ Pub L No 98-473, 98 Stat 1976, codified as amended at 18 USC § 1 et seq.

¹⁰ 28 USC § 994.

Sentencing Guidelines were created, in part, to fix pervasive “in-determinate sentencing,” which resulted in “criminal defendants fac[ing] starkly different levels of punishment depending on which judge happened to draw the case.”¹¹ With the goal of “minimiz[ing] the discretionary powers of the sentencing court,” Congress attempted to bring “honesty,” “uniformity,” and “proportionality” to sentencing by “balanc[ing] the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization.”¹² These structural changes aimed to “reduce crime through an effective, fair sentencing system.”¹³

To determine the recommended sentence under the Guidelines, courts first determine the base offense level and then apply “any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline.”¹⁴ These sentencing modifications add or subtract levels from the base offense level associated with the criminal act.¹⁵ Particularly, “specific offense characteristics” encompass factual patterns that, if applicable, increase or decrease the base offense level. The final offense level, combined with the offender’s “criminal history category,” determines the final sentencing range. For example, a four-level enhancement applied to an offender in the third criminal history category and an offense with a base level of nineteen would increase the sentencing recommendation under the Guidelines from between thirty-seven and forty-six months to between fifty-seven and seventy-one months.¹⁶

Although the SRA was originally intended to be a mandatory restriction on judicial discretion, in 2005 the Supreme Court struck down the mandatory sentencing aspects of the Guidelines,

¹¹ Ryan W. Scott, *Inter-judge Sentencing Disparity after Booker: A First Look*, 63 *Stan L Rev* 1, 6 (2010).

¹² United States Sentencing Commission, *Guidelines Manual* § 1A3 at 1.2–1.3 (1987).

¹³ *Id.* § 1A3 at 1.2.

¹⁴ USSG § 1B1.1(a)(2).

¹⁵ See Laura Waters, *A Power and a Duty: Prosecutorial Discretion and Obligation in United States Sentencing Guideline § 3E1.1(b)*, 34 *Cardozo L Rev* 813, 818 n 26 (2012) (describing how enhancement provisions and mitigating factors function when calculating the applicable sentencing level for a robbery conviction).

¹⁶ See USSG § 5A, Sentencing Table.

essentially restricting the Guidelines to an advisory-only capacity.¹⁷ Despite the nonbinding nature of the Guidelines, many sentences still fall within the recommended range.¹⁸ For this reason, whether a special offense characteristic applies can often affect a sentence—adding or subtracting months or even years.

B. The Robbery Abduction Enhancement

The Guidelines provide for a four-level sentencing enhancement during the sentencing phase of a robbery case “[i]f any person was abducted to facilitate commission of the offense or to facilitate escape”¹⁹ and a two-level sentencing enhancement “if any person was physically restrained to facilitate commission of the offense or to facilitate escape.”²⁰ The four-level robbery abduction enhancement and the two-level physical restraint enhancement are separated by the word “or,”²¹ thus implying that the enhancements apply to different behavior.²²

In regard to the four-level sentencing enhancement for an abduction committed during a robbery, the text of the Guidelines does not clarify what elements are required to establish an “abduct[ion].”²³ However, the commentary to the Guidelines notes that the physical restraint and abduction enhancements “provide[] an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically

¹⁷ See *United States v Booker*, 543 US 220, 246 (2005). However, it is important to note that some elements of the SRA do remain mandatory. For example, sentencing courts are still required to “state the reasons for a sentence” if the sentence is outside of, or even within, the Guidelines’ recommendations. See *United States v Jones*, 460 F3d 191, 196 (2d Cir 2006) (remanding with instructions to amend the written judgment to comply with 18 USC § 3553(c)(2)). Appellate courts are also able to overturn a sentence if the sentencing court “fail[ed] to calculate (or improperly calculat[ed]) the Guidelines range.” *Gall v United States*, 552 US 38, 51 (2007).

¹⁸ See Matthew Van Meter, *One Judge Makes the Case for Judgment* (The Atlantic, Feb 25, 2016), archived at <http://perma.cc/HQF8-VEEW>. See also *U.S. Sentencing Commission Final Quarterly Data Report (2015) *2* (United States Sentencing Commission, Mar 25, 2016), archived at <http://perma.cc/LTG2-X7JW> (finding that 47.3 percent of cases in 2015 fell within the Guidelines range).

¹⁹ USSG § 2B3.1(b)(4)(A).

²⁰ USSG § 2B3.1(b)(4)(B).

²¹ USSG § 2B3.1(b)(4).

²² See *United States v Gall*, 116 F3d 228, 229 (7th Cir 1997) (“In the plea agreement, the parties agreed to disagree about whether Mr. Gall’s conduct concerning the robberies constituted ‘abduction,’ as the government contended, or ‘physical restraint,’ as Mr. Gall asserted. . . . The practical implication for Mr. Gall is an additional 47 months of incarceration.”).

²³ See USSG § 2B3.1(b)(4)(A).

restrained by being tied, bound, or locked up.”²⁴ This statement implies that the robbery abduction enhancement applies if the victim “was forced to accompany the defendant to another location,” while the physical restraint enhancement applies if the victim “was physically restrained by being tied, bound, or locked up.”²⁵ In fact, elsewhere, the Guidelines commentary describes “physically restrained” identically—as “whether the victim was physically restrained by being tied, bound, or locked up.”²⁶ It is important to note that, in clarifying how the physical restraint enhancement should be applied, the Guidelines commentary prefaces “tied, bound, or locked up” with the phrase “such as,”²⁷ implying that these characteristics are not exhaustive. The essential difference between the two enhancements is that, unlike the physical restraint enhancement, the robbery abduction enhancement requires forced movement to a different location. Although, as mentioned above, the two enhancements appear designed to address different behavior, they are not necessarily mutually exclusive because there are some circumstances in which physical restraint can occur during the process of an abduction.²⁸

The commentary in the application notes defines abduction by noting that “[a]bducted means that a victim was forced to accompany an offender to a different location.”²⁹ As an example, the commentary mentions that “a bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.”³⁰ Although it is difficult to point to one set of facts that

²⁴ USSG § 2B3.1, Background. The Supreme Court has held that courts may cite the commentary as authority when issuing a sentencing decision. *Stinson v United States*, 508 US 36, 38 (1993).

²⁵ USSG § 1B1.1, Application Note 1(K).

²⁶ USSG § 1B1.1, Application Note 1(K).

²⁷ USSG § 1B1.1, Application Note 1(K).

²⁸ *United States v Strong*, 826 F3d 1109, 1117 (8th Cir 2016) (describing a situation in which the conduct during an abduction also merited applying the restraint enhancement). See Part III.A.2 for further discussion on courts applying both physical restraint and abduction enhancements.

²⁹ USSG § 1B1.1, Application Note 1(A) (quotation marks omitted). The Supreme Court has held that the requirement of forced accompaniment, by itself, does not connote a distance requirement. *Whitfield v United States*, 135 S Ct 785, 789 (2015). However, it’s important to note that, unlike the text at issue in *Whitfield*, the abduction enhancement also requires that the victim was forced to change location.

³⁰ USSG § 1B1.1, Application Note 1(A).

would most clearly fall under the robbery abduction enhancement, forced movement occurring over a great distance is likely an obvious target of the enhancement.³¹

II. THE CIRCUIT SPLIT: SETTING A TRAJECTORY

Different circuits have reached differing conclusions as to when the robbery abduction enhancement under the Guidelines should be applied. These differences are most stark in cases that involve the forced movement of victims from one room or area to another room or area within the same building. The Tenth Circuit has described the differing approaches as a true “split of authority.”³² Regardless of whether the differing analyses constitute a traditional circuit split, the various approaches lead to drastically divergent results when applied to similar fact patterns, as I describe below. Because questions concerning the abduction enhancement are pertinent in many robbery scenarios, and because the robbery abduction enhancement can add months or years to a sentence recommendation, the parameters and application of the robbery abduction enhancement are significant.

The divergent analyses stem from dissimilar interpretations of the phrase “different location.”³³ While the Third, Fourth, Fifth, and Tenth Circuits have all concluded that forced movement within a building or small area may fit the “different location” language used in the Guidelines commentary,³⁴ the Seventh, Eighth, and Eleventh Circuits have each applied a narrower conception of movement.³⁵

This Part describes the circuit split by discussing the different interpretations of the robbery abduction enhancement. Parts II.A, II.B, and II.C detail the varying approaches used by the various circuits. Part II.D then summarizes the flaws with each circuit’s approach.

³¹ See, for example, *United States v Smith*, 767 F3d 187, 190–91 (3d Cir 2014) (holding that forced movement in a vehicle, from the side of a road to a bank parking lot, constituted an abduction).

³² *Archuleta*, 865 F3d 1280, 1293 (10th Cir 2017). However, the Eleventh Circuit has framed the issue as “sister circuits [taking] a case-by-case approach to the application of the enhancement” instead of as a true circuit split. *United States v Whatley*, 719 F3d 1206, 1222 (11th Cir 2013).

³³ See *Archuleta*, 865 F3d at 1287 (“[W]hat appears to divide the circuits is a difference of opinion regarding the meaning of the term ‘location.’”).

³⁴ See Parts II.A–B.

³⁵ See Part II.C.

A. The Flexible Interpretation

The Fourth and Fifth Circuits have held that courts should interpret the phrase “different location” flexibly.³⁶ In practice, interpreting the Guidelines in a flexible manner favors the use of the robbery abduction enhancement because satisfying any one of several factors allows these circuits to apply the abduction enhancement. Consequently, this flexible interpretation has led the Fourth and Fifth Circuits to hold that the forced movement between different rooms or areas within the same building may constitute an abduction under the Guidelines.

In *United States v Hawkins*,³⁷ the Fifth Circuit provided and applied a flexible definition of location.³⁸ In *Hawkins*, the offender physically moved the victim “50 to 60” feet at gunpoint within the boundaries of a parking lot toward a getaway car.³⁹ While defining the phrase “different location” for purposes of the robbery abduction enhancement, the *Hawkins* Court endorsed the use of “multiple interpretations . . . applied case by case to the particular facts under scrutiny, not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like.”⁴⁰ Citing “ordinary parlance,” the court first determined that “‘location’ can refer to a point inside or outside a building or parking lot, so that a minuscule movement, such as the crossing of a threshold separating the interior and exterior of a building, would constitute movement to ‘a different location.’”⁴¹ However, also citing “ordinary parlance,” the court concluded that “location” may instead be “used in reference to a single point where a person is standing, or to one among several rooms in the same structure, or to different floors in the same building.”⁴² After acknowledging that both interpretations of “location” had merit, the *Hawkins* court held that courts applying the robbery abduction enhancement should define “location” based on the “particular facts under scrutiny” while also considering whether the offender crossed a threshold.⁴³

³⁶ See *United States v Osborne*, 514 F3d 377, 390 (4th Cir 2008); *United States v Hawkins*, 87 F3d 722, 727–28 (5th Cir 1996).

³⁷ 87 F3d 722 (5th Cir 1996).

³⁸ Id at 727.

³⁹ Id at 726.

⁴⁰ Id at 728.

⁴¹ *Hawkins*, 87 F3d at 727.

⁴² Id.

⁴³ Id at 728. The court clarified the interaction of these two factors by stating that, while movement over a threshold “might be [a] factor[] giving support to a conclusion of ‘different locations,’ the absence of such facts does not bar such a conclusion.” Id at 727.

Although the threshold analysis permits courts to apply the robbery abduction enhancement in matters involving a relatively short distance if a threshold was crossed, defining “different location” according to “multiple interpretations”⁴⁴ allows courts to apply the robbery abduction enhancement to forced movement in almost any situation. The use of a precise or exacting definition of location can then cause courts to find that a change in location, and thus an abduction, has occurred even in situations involving short distances. For example, a court may determine that a change in location is defined as a change in position from a particular spatial point, which in turn allows that court to hold that virtually any forced movement meets the “different location” requirement for the robbery abduction enhancement.⁴⁵

The Fourth Circuit explicitly endorsed the flexible *Hawkins* analysis in *United States v Osborne*.⁴⁶ In *Osborne*, the court found that forced movement occurring within a Walgreens store could trigger the robbery abduction requirement because “the pharmacy section and the store area of the Walgreens building can be deemed to be discrete ‘locations.’”⁴⁷ In reaching this determination, the *Osborne* court looked to “ordinary parlance,” which the court determined would describe the “pharmacy section and the store area [as] ‘different locations’ within the Walgreens building.”⁴⁸ The court also noted “that the pharmacy section and the store area are divided by a counter, as well as a secured door.”⁴⁹ The analysis in *Osborne* applied the flexible and multiple interpretations approach proffered in *Hawkins* but contended that ordinary parlance and thresholds within the building were grounds for determining that a change in location occurred.⁵⁰

⁴⁴ *Id.* at 727–28.

⁴⁵ See, for example, *United States v Reynos*, 680 F3d 283, 287–90 (3d Cir 2012) (adopting the Fifth Circuit’s flexible approach and requiring a mere change in position).

⁴⁶ 514 F3d 377 (4th Cir 2008). See also *id.* at 389–90 (“[W]e agree, not only with the Fifth Circuit’s conclusion that movement within the confines of a single building can constitute movement ‘to a different location,’ but also with its flexible, case by case approach to determining when movement ‘to a different location’ has occurred.”).

⁴⁷ *Id.* at 390.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Both the Fourth and Fifth Circuits have offered lower courts virtually no guidance on the limits of the flexible analysis. See Part II.D.1.

B. The Three-Part Test

The Third and Tenth Circuits have established a three-part test to determine whether movement qualifies as an “abduction” for purposes of the Guidelines.⁵¹ Unlike the Fourth and Fifth Circuits, the three-part test used by the Third and Tenth Circuits requires (1) forced movement, (2) accompaniment, and (3) an action in furtherance of the crime. Functionally, however, this three-part test operates almost identically to the flexible analysis used by the Fourth and Fifth Circuits. Indeed, the Third and Tenth Circuits have explicitly adopted the flexible approach.⁵²

The Third Circuit, in *United States v Reynos*,⁵³ looked to the text of the Guidelines and “distill[ed] three predicates that must be met before the abduction enhancement can be applied.”⁵⁴ To establish an abduction, the Third Circuit requires that

[f]irst, the robbery victims must be forced to move from their original position; such force being sufficient to permit a reasonable person an inference that he or she is not at liberty to refuse. Second, the victim must accompany the offender to that new location. Third, the relocation of the robbery victims must have been to further either the commission of the crime or the offender’s escape.⁵⁵

Although the Third Circuit cited the Guidelines in creating this three-part test, the court did not explain how it derived the individual components from the Guidelines.⁵⁶

The *Reynos* court’s application of the robbery abduction enhancement, given the facts of the case, demonstrates how the three-part test functions almost identically to the flexible analysis used by the Fourth and Fifth Circuits. In *Reynos*, the defendant forced store employees at gunpoint to move between thirty-four and thirty-nine feet from a bathroom to a cash register.⁵⁷ The bathroom in which the victims were located was locked and separated from the cash register by a corridor.⁵⁸ When applying the

⁵¹ *Reynos*, 680 F3d at 290; *Archuleta*, 865 F3d at 1287.

⁵² See *Reynos*, 680 F3d at 290 (“We find the flexible approach outlined in the *Hawkins* and *Osborne* decisions to have considerable merit.”); *Archuleta*, 865 F3d at 1288 (adopting “the Third Circuit’s interpretation of the abduction enhancement”).

⁵³ 680 F3d 283 (3d Cir 2012).

⁵⁴ *Id.* at 286.

⁵⁵ *Id.* at 286–87.

⁵⁶ *Id.*

⁵⁷ *Reynos*, 680 F3d at 290.

⁵⁸ *Id.* at 291.

first part of the three-part test, the *Reynos* court determined that the victims were forced to move from their original position “[b]y virtue of [the bathroom’s] locked door, separate walls and distance from the cash register.”⁵⁹ This analysis echoes the flexible analysis the *Osborne* court conducted on thresholds, in which the court focused on the counter and secured door that divided the “pharmacy section and the store area.”⁶⁰ However, because almost any situation involving forced movement will also involve accompaniment and some benefit to the criminal offender, “the first element is doing all the heavy lifting” under the three-part test.⁶¹ Essentially, the Third Circuit’s three-part test turns on whether the offender forced the victim to change location.

Perhaps most importantly, the *Reynos* court acknowledged that, under its three-part test, “even [] the smallest of areas still may contain different locations.”⁶² As an example, the court stated that “a judge’s private office may have a location containing a desk and computer that is separate and distinct from a location containing a conference table and chairs.”⁶³ The dissent in *Reynos* criticized this approach for “‘virtually ensur[ing]’ that any movement at all [] result[s] in an abduction enhancement”⁶⁴ by equating “location” with a more precise concept of “move[ment] from [an] original position.”⁶⁵ In practice, application of this three-part test is contingent on how a court defines and applies a definition of location under the flexible analysis—it is easy to imagine courts using different definitions of “location” with varying degrees of specificity. Although courts in the Third Circuit are bound by the three-part test, interpreting “location” flexibly allows these courts to reach different conclusions depending on their evaluations of the fact-specific nature of each case. The *Reynos* court justified its discretionary test by stating, “It is precisely because of the broad

⁵⁹ *Id.*

⁶⁰ *Osborne*, 514 F3d at 390.

⁶¹ *Archuleta*, 865 F3d at 1294 (Seymour concurring in part and dissenting in part):

[I]t is hard to imagine a scenario where an armed robber would allow his victims to move freely about the crime scene after forcing them at gunpoint to move. The [] second element, that the offender must accompany the victim to their new spot, is almost meaningless because there is no distance standard. The third element . . . is strikingly similar to this circuit’s test for physical restraint. . . . With no distance requirement in its first element, [the] two other elements [] add very little to the inquiry.

⁶² *Reynos*, 680 F3d at 290.

⁶³ *Id.* at 290.

⁶⁴ *Id.* at 293–94 (Ambro dissenting).

⁶⁵ *Id.* at 287.

scope of the term ‘location’ that courts must use a highly flexible approach in finding [an abduction].”⁶⁶

The Tenth Circuit, in *United States v Archuleta*,⁶⁷ “adopt[ed] the Third Circuit’s interpretation of the abduction enhancement, as well as its three-part test for proof of abduction.”⁶⁸ In justifying its adoption of the Third Circuit’s three-part test, the Tenth Circuit referred to the *Oxford English Dictionary* and *Black’s Law Dictionary*, which respectively define location as “[a] particular place or position”⁶⁹ and “the specific place or position of a person or thing.”⁷⁰ Interestingly, the Tenth Circuit appeared to focus on the word “or” in these definitions—the court found it important that the dictionary definitions allow for either “place” or “position” to be used in defining “location.” The Tenth Circuit first defined the term “place” and concluded that it “is sometimes interpreted to refer to [a] building or area used for a specific purpose or activity.”⁷¹ The *Archuleta* court then looked to define the term “position” and noted that the word “appears to be more narrowly confined to the precise place or spot where a person or thing is located at a single moment in time.”⁷² Like the *Reynos* court, the *Archuleta* court elected to use this narrow definition of position.⁷³

By adopting the Third Circuit’s three-part test and its use of “position” instead of “place,” the *Archuleta* court guaranteed that almost any movement could constitute a change in location. Because the commentary looks to a change in “location”⁷⁴ and “position” is defined more precisely than “place,” using “position” as a synonym for “location” sets a much lower standard for establishing a change in location. This analysis played out in the *Archuleta* majority’s decision: in determining the applicability of the abduction enhancement to the forced movement of victims that occurred during a bank robbery, the court held that the “forced movement of victims from one room or area to another room or area within the same building constitutes an abduction.”⁷⁵ The

⁶⁶ *Reynos*, 680 F3d at 290.

⁶⁷ 865 F3d 1280 (10th Cir 2017).

⁶⁸ *Id.* at 1288.

⁶⁹ *Id.* at 1287, quoting *Oxford English Dictionary* (online ed 2017).

⁷⁰ *Archuleta*, 865 F3d at 1287, quoting *Black’s Law Dictionary* (West 10th ed 2014).

⁷¹ *Archuleta*, 865 F3d at 1287, quoting *Oxford English Dictionary* (online ed 2017).

⁷² *Archuleta*, 865 F3d at 1287, quoting *Oxford English Dictionary* (online ed 2017).

⁷³ *Archuleta*, 865 F3d at 1287–88 (defining the term “position” as “[a] place where someone or something is located or has been put”), quoting *Oxford English Dictionary* (online ed 2017).

⁷⁴ USSG § 1B1.1, Application Note 1(A).

⁷⁵ *Archuleta*, 865 F3d at 1285.

dissent in *Archuleta* offered a blistering criticism of the majority's decision to equate "location" with "position" and concluded that, because any movement from "one's precise spot" would satisfy the change in location requirement, the three-part test "is in fact standardless."⁷⁶

C. Narrower Applications of the Robbery Abduction Enhancement

The Seventh, Eighth, and Eleventh Circuits have all held that forced movement within a building does not constitute an abduction under the Guidelines, although the circuits have approached the issue differently. The Seventh and Eleventh Circuits have left open the possibility of "different" locations existing within a building, although neither circuit has explained what it would require to hold that an abduction has occurred within a building. The Eighth Circuit explicitly applied the Seventh Circuit's abduction holdings in a sexual assault case, but it does not appear that the Eighth Circuit has applied the abduction enhancement in the robbery context. Unlike other circuits that apply the robbery abduction enhancement, the Seventh Circuit looks to whether the offender engaged in the type of conduct "targeted by the abduction enhancement."⁷⁷ The Eleventh Circuit's analysis focuses on the interpretation of the word "location" and the need to differentiate between the physical restraint and abduction enhancements.⁷⁸

The Seventh Circuit has held on several occasions that forced movement within a building does not qualify for the robbery abduction enhancement.⁷⁹ In *United States v Eubanks*,⁸⁰ the Seventh Circuit reviewed two abduction enhancements for robberies allegedly committed by the same defendant—a jewelry store robbery that involved dragging a victim a distance of less than six feet into another room and a beauty store robbery that involved the offender forcing the victim into a separate room to

⁷⁶ Id at 1294 (Seymour concurring in part and dissenting in part).

⁷⁷ *United States v Eubanks*, 593 F3d 645, 653 (7th Cir 2010), citing *Osborne*, 514 F3d at 390.

⁷⁸ *Whatley*, 719 F3d at 1222–23.

⁷⁹ See, for example, *United States v Carter*, 410 F3d 942, 956 (7th Cir 2005) (affirming physical restraint enhancement when a bank teller was forced from the bank vault to the teller counter); *United States v Doubet*, 969 F2d 341, 346 (7th Cir 1992) (affirming physical restraint enhancement when three bank tellers were forced into a small room in the back of the bank).

⁸⁰ 593 F3d 645 (7th Cir 2010).

retrieve a surveillance tape.⁸¹ The Seventh Circuit reversed the findings of the district court and held that the robbery abduction enhancement applied to neither crime.⁸² The *Eubanks* court declined to explicitly denounce the Third Circuit's approach in *Osborne* and instead argued that "the distance and nature of the confinements in [the] case were materially different than in *Osborne*."⁸³ The *Eubanks* court deemed the two instances under review not to constitute forced movement to a different location because of the distance covered and the intent behind the forced movement⁸⁴—two elements that were left unaddressed by the Third and Tenth Circuits.

Regarding the element of distance in *Eubanks*, the Seventh Circuit concluded that "under [the] facts . . . transporting the victims from one room to another is simply not enough for abduction. To find otherwise would virtually ensure that any movement of a victim from one room to another within the same building . . . would result in an abduction enhancement."⁸⁵

This appears directly at odds with the majority of the circuits, which have equated "location" with the more precise term "position."⁸⁶ The *Eubanks* court noted that "there may well be situations in which an abduction enhancement is proper even though the victim remained within a single building,"⁸⁷ but the court did not elaborate on how these situations might arise. Outside of the district court opinion that was overturned in *Eubanks*, I have not found any other district court within the Seventh Circuit that has applied the abduction enhancement to a robbery occurring within a single building.

Unlike the majority of circuits, the Seventh Circuit also seems to define "location" with respect to what it perceives as the purpose of the robbery abduction enhancement: punishing the taking of hostages during a defendant's escape. The *Eubanks* court concluded that neither of the robberies met the requirements to establish an abduction enhancement.⁸⁸ In distinguishing *Osborne*, the Seventh Circuit stated, "[I]mportantly, the victims

⁸¹ Id at 652–53.

⁸² Id at 653.

⁸³ Id.

⁸⁴ See *Eubanks*, 593 F3d at 653.

⁸⁵ Id at 654.

⁸⁶ See Part II.B.

⁸⁷ *Eubanks*, 593 F3d at 654.

⁸⁸ Id at 653.

in *Osborne* were essentially taken hostage to facilitate the defendant's escape—which is the type of conduct 'plainly targeted by the abduction enhancement.'"⁸⁹ Although courts often look to the scope of conduct targeted by the language of the abduction enhancement in the context of sexual assault cases,⁹⁰ the approach in *Eubanks* appears unique in that the court seemingly required that the abduction occur with the purpose of facilitating the defendant's escape.⁹¹ Even though the *Eubanks* court did not explicitly hold that the absence of conduct targeted by the Guidelines would be enough to independently reject applying the robbery abduction enhancement, the "importantly" language is telling. This language reveals that the Seventh Circuit limited the robbery abduction enhancement by implicitly requiring that the enhancement provision apply only to conduct targeted by the robbery abduction enhancement—in this case, the taking of hostages. The Seventh Circuit appears to require more than just an intent to isolate or an act in furtherance of the crime, as both of these elements likely were met in both the jewelry store robbery and the beauty store robbery.⁹² Interestingly, the Seventh Circuit did not provide any support for its assertion that the abduction enhancement was created to target the taking of hostages as opposed to other actions.⁹³

Similar to the Seventh Circuit, the Eleventh Circuit has also repeatedly held that movement within a room or building does

⁸⁹ *Id.*, citing *Osborne*, 514 F3d at 390.

⁹⁰ See, for example, *United States v Saknikent*, 30 F3d 1012, 1014 (8th Cir 1994) (determining that, because the application note uses the word "forcing," the enhancement intended to target "those who isolate the very young and very vulnerable whose wills are either undeveloped or can be overcome with less than a full blown assault"). See also *United States v Hefferon*, 314 F3d 211, 226 (5th Cir 2002).

⁹¹ Along somewhat similar lines, the *Osborne* court rejected the defendant's argument that "because he moved [the victims] toward their co-workers in the front of the store area, he did not engage in conduct that the abduction enhancement is designed to prevent: the isolation of his victims." *Osborne*, 514 F3d at 390. The *Osborne* court concluded that "[the defendant] engaged in conduct plainly targeted by the abduction enhancement: keeping victims close by as readily accessible hostages," but this was not a key part of the *Osborne* court's analysis. *Id.* In clarifying that the abduction enhancement applies to both threats and physical force, the Third Circuit also concluded that "the abduction enhancement's intention—at least in part—is to protect victims against additional harm that may come to them by virtue of their isolation." *Reynos*, 680 F3d at 287. However, unlike the *Eubanks* court, the Third and Fourth Circuits did not state that the taking of hostages is a necessary, or even relevant, element in establishing that an abduction occurred. See *id.*; *Osborne*, 514 F3d at 390.

⁹² See *Eubanks*, 593 F3d at 653.

⁹³ See *id.*

not constitute an abduction.⁹⁴ Although the Eleventh Circuit has “decline[d] to adopt a categorical rule,” the court in *United States v Whatley*⁹⁵ concluded that “[t]he ordinary meaning of the term ‘different location’ would not apply to each individual office or room in a local branch of a bank.”⁹⁶ Instead of defining “location” in a vacuum, the Eleventh Circuit attempted to define “location” as it relates to the “ordinary understanding of the word ‘abducted.’”⁹⁷ The *Whatley* court looked to the *Oxford English Dictionary*, which defines abduction as “led or carried away improperly, kidnapped”⁹⁸ and to the *Black’s Law Dictionary*, which defines abduction as “[t]he act of leading someone away by force or fraudulent persuasion.”⁹⁹ In applying these definitions, the court concluded, “An ordinary observer would conclude that [the offender] had taken the bank employees hostage during the commission of the bank robberies, but would not describe those employees as having been abducted or kidnapped.”¹⁰⁰ By treating the bank as a single location, the Eleventh Circuit essentially elected to define “location” as “place” instead of “position.”¹⁰¹

The *Whatley* decision is unique among circuit decisions on the issue of abduction in that the court aimed to preserve the distinction between the physical restraint and abduction enhancements. The *Whatley* court reasoned that the two-level sentencing enhancement for physical restraint was warranted in another case “when the employees and customers of a credit union ‘were forced at gunpoint into the safe room and ordered to lie face down on the floor.’”¹⁰² The court concluded that, if the robbery abduction enhancement were applied too broadly, the wide-ranging interpretation would “blur the distinction between physical restraint and abduction.”¹⁰³ By establishing a higher standard for “different

⁹⁴ See, for example, *Whatley*, 719 F3d at 1222.

⁹⁵ 719 F3d 1206 (11th Cir 2013).

⁹⁶ *Id.* at 1222.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1222–23, quoting *Oxford English Dictionary* 14 (1961).

⁹⁹ *Whatley*, 719 F3d at 1222–23, quoting *Black’s Law Dictionary* 4 (West 9th ed 2009).

¹⁰⁰ *Whatley*, 719 F3d at 1223.

¹⁰¹ See text accompanying notes 67–75 for the Tenth Circuit’s decision to define “location” as “position.”

¹⁰² *Whatley*, 719 F3d at 1223, quoting *United States v Jones*, 32 F3d 1512, 1519 (11th Cir 1994).

¹⁰³ *Whatley*, 719 F3d at 1223.

locations,” the Eleventh Circuit attempted to “preserve[] a distinction between the sentencing enhancement for physical restraint and the sentencing enhancement for abduction.”¹⁰⁴

The Eighth Circuit has adopted the Seventh Circuit’s abduction-related holdings, but only in some circumstances. Although the abduction enhancements for sexual assault and robbery convictions stem from different provisions and are often treated differently,¹⁰⁵ the Eighth Circuit accepted the Seventh Circuit’s limited interpretation of the robbery abduction enhancement in a case involving a sexual assault.¹⁰⁶ In *United States v Strong*,¹⁰⁷ a sexual assault victim escaped the offender’s house but was later dragged back into the house.¹⁰⁸ The Eighth Circuit concluded that, “after [the victim] escaped, she was actually dragged to ‘a different location,’ not merely another room. Thus, the abduction enhancement was proper.”¹⁰⁹ The *Strong* court cited Seventh Circuit case law in concluding that forced movement from room to room does not constitute an abduction for purposes of the sexual assault abduction enhancement, which also requires movement to a different location.¹¹⁰ The Eighth Circuit’s analysis on the issue is cursory at best, and it remains unclear whether the Eighth Circuit would extend this holding to the robbery abduction enhancement.

D. Flaws in the Circuits’ Approaches

All of the circuits this Part discusses interpret and apply the robbery abduction enhancement in a flawed manner. The Third, Fourth, Fifth, and Tenth Circuits use an overly flexible standard that allows for a high level of judicial discretion. Although the approaches used by the Seventh, Eighth, and Eleventh Circuits provide clear benefits, namely restrictions on judicial discretion, these circuits apply these heightened standards without formally rejecting the flexible standard of their sister circuits.

¹⁰⁴ *Id.*

¹⁰⁵ See Part III.B.1.

¹⁰⁶ *United States v Strong*, 826 F3d 1109, 1117 (8th Cir 2016).

¹⁰⁷ 826 F3d 1109 (8th Cir 2016).

¹⁰⁸ *Id.* at 1112.

¹⁰⁹ *Id.* at 1117.

¹¹⁰ *Id.*, citing *United States v Cooper*, 360 Fed Appx 657, 659 (7th Cir 2010); § 2A3.1(b)(5).

1. The overly flexible analysis.

The approaches used by the Third, Fourth, Fifth, and Tenth Circuits ensure that almost any movement can be labeled as a change in location due to the flexible standards articulated and the assertion that “position” is synonymous with “location.” These approaches fail to comply with the original purposes of the SRA¹¹¹ because these circuits expand, rather than cabin, judicial discretion by allowing courts to rely on any one of a number of nonexclusive factors to justify applying the robbery abduction enhancement.¹¹² Furthermore, when the robbery abduction enhancement can theoretically apply to any forced movement, regardless of the distance involved or dangerousness of the underlying conduct, the sentences given for robbery convictions are no longer proportional to the crime committed.

The flexible standard advocated by the Fifth Circuit in *Hawkins*¹¹³ and later affirmed by the Third,¹¹⁴ Fourth,¹¹⁵ and Tenth Circuits¹¹⁶ gives an enormous level of discretion to sentencing courts. By rejecting the “mechanical” application of exhaustive factors in favor of “multiple interpretations,”¹¹⁷ the flexible approach allows courts to point to virtually any location-related factor as justification for determining that an abduction occurred. Under this analysis, courts can apply the robbery abduction enhancement to forced movement over virtually any distance depending on how the court defines “location” or whether the offender forced the victim to cross a threshold.¹¹⁸

Crucially, in determining whether an offender forced a victim to change location, these courts look to the “particular facts under scrutiny” instead of applying a static definition of location.¹¹⁹ For example, it would likely be consistent with the holdings in *Hawkins* and *Osborne* to apply the robbery abduction enhancement to forced movement between store aisles.¹²⁰ Under the flexible analysis, a

¹¹¹ See United States Sentencing Commission, *Guidelines Manual* § 1A3 at 1.2–1.3 (1987).

¹¹² See, for example, *Osborne*, 514 F3d at 390; *Hawkins*, 87 F3d at 727.

¹¹³ *Hawkins*, 87 F3d at 727.

¹¹⁴ *Reynos*, 680 F3d at 290.

¹¹⁵ *Osborne*, 514 F3d at 390.

¹¹⁶ *Archuleta*, 865 F3d at 1288.

¹¹⁷ *Hawkins*, 87 F3d at 728.

¹¹⁸ See notes 42–43 and accompanying text.

¹¹⁹ *Hawkins*, 87 F3d at 728.

¹²⁰ See *Osborne*, 514 F3d at 389–90 (citing ordinary parlance and structures within the store as factors to be considered).

court may have a legal basis for holding that even forced movement from the toothbrush section to the toothpaste section within the same aisle would qualify for an abduction enhancement. The court could justify its conclusion by reasoning that the store contained many discrete locations or that the movement crossed an abstract threshold. Although these scenarios may appear hyperbolic, courts have affirmed abduction enhancements in cases involving distances as short as “a few steps” under the flexible approach.¹²¹ At the same time, however, it is possible that courts could hold that a change in location did not occur—perhaps the store aisle or aisles could be described as part of the larger pharmacy or merchandise sections. Without a clear method of determining when a change in location has occurred, courts within these circuits are able to reach different conclusions based on the same set of facts. The lack of clear boundaries under the flexible approach highlights the discretion inherent in the tests used by the Third, Fourth, Fifth, and Tenth Circuits.

The inherent problems of the flexible test are most evident when courts equate “location” with “position,” as this allows almost any forced movement to meet the requisite standards for applying the robbery abduction enhancement.¹²² The almost automatic application of the robbery abduction enhancement is clearly demonstrated by *Hawkins*. In *Hawkins*, the court found that the abduction enhancement applied to forced movement of “some 50 to 60 feet” within a larger parking lot.¹²³ It is important to note that there is almost an intuitive difference between the factual scenario mentioned in *Hawkins* and the Guidelines’ example of an abduction, in which the offender forcibly moved the victim using a getaway car.¹²⁴ Unlike the fifty to sixty feet of movement in *Hawkins*, the use of a getaway car implies forced movement over a much greater distance. By trivializing the “different location” requirement and bringing practically all forced movement within the reach of the robbery abduction enhancement, the flexible approach may be fundamentally overinclusive, as courts arguably have applied it to actions other than those targeted by the

¹²¹ See *United States v Holiday*, 582 Fed Appx 551, 551–52 (5th Cir 2014) (affirming abduction enhancement when the offender forced the victim into a separate room). See also *United States v Styles*, 659 Fed Appx 79, 84 (3d Cir 2016) (applying the abduction enhancement when “the victims . . . were moved from the first to the second floor of [a] residence”).

¹²² See *Reynos*, 680 F3d at 293–94 (Ambro dissenting).

¹²³ *Hawkins*, 87 F3d at 726.

¹²⁴ USSG § 1B1.1, Application Note 1(A).

Guidelines.¹²⁵ The dissent in *Reynos* echoed these concerns and argued that, by equating “location” with the more precise word “position,” this approach “‘virtually ensure[s]’ that any movement at all [] result[s] in an abduction enhancement.”¹²⁶

2. The ambiguous alternative.

Despite the flaws of the flexible approach, the circuits that have rejected the flexible approach have failed to articulate a clear and workable alternative. Although the Seventh, Eighth, and Eleventh Circuits appear to require more than their sister circuits, the Seventh and Eleventh Circuits have refused to adopt a categorical rule.¹²⁷ The Eighth Circuit, which appears to embrace the Seventh Circuit’s approach,¹²⁸ likely also declines to adopt a categorical rule. Although the Seventh, Eighth, and Eleventh Circuits have not offered a clear alternative to the flexible approach, when compared to their sister circuits, these circuits require a higher degree of forced movement before applying the robbery abduction enhancement. Both the Seventh Circuit and Eleventh Circuit have proven hesitant to define “location” as “position”—justifying their interpretations with the need for a bright-line distinction¹²⁹ and ordinary parlance.¹³⁰ The Seventh Circuit has also sought to constrain the robbery abduction enhancement by limiting its application to hostage situations,¹³¹ while the Eleventh Circuit has endeavored to constrain the robbery abduction enhancement by drawing a bright line between the abduction and physical restraint enhancements.¹³² Although the constraints used by the Seventh, Eighth, and Eleventh Circuits are somewhat effective in reducing judicial discretion, these circuits would benefit from a categorical rule that crystallizes their heightened standards and allows the circuits to apply the robbery abduction enhancement in a clearer, more consistent, and more uniform manner.

¹²⁵ For a discussion of overinclusive statutes, see Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 Buff Crim L Rev 599, 604 (1998) (“[A] statute that is underinclusive is to be preferred to a statute that is overinclusive. . . . It is better to free ten guilty defendants than to punish one innocent defendant.”).

¹²⁶ *Reynos*, 680 F3d at 293–94 (Ambro dissenting).

¹²⁷ See *Eubanks*, 593 F3d at 654; *Whatley*, 719 F3d at 1222.

¹²⁸ See *Strong*, 826 F3d at 1117.

¹²⁹ *Eubanks*, 593 F3d at 654.

¹³⁰ *Whatley*, 719 F3d at 1222.

¹³¹ *Eubanks*, 593 F3d at 653.

¹³² *Whatley*, 719 F3d at 1223.

III. FINDING A UNIFYING DEFINITION OF LOCATION

Before articulating an alternative to the flawed tests I describe in Part II.D, it is important to first note how a new solution could fulfill the purposes of the SRA.¹³³ As I mention in Part II.A, the divergent approaches discussed throughout this Comment differ most significantly as to how to define the phrase “different location.”¹³⁴ Any potential resolution must provide clear parameters as to what constitutes a different location. A well-defined framework for applying the phrase “different location” could limit judicial discretion and ensure uniformity, two of the main purposes of the SRA.¹³⁵ Furthermore, an alternative solution could ensure that the robbery abduction enhancement is applied in a manner that ensures proportionality—another key goal of the SRA.¹³⁶

This Comment seeks to provide a clear solution to the circuit split by offering a functional two-part test that achieves the SRA’s objectives. Part III.A draws a distinct line between the abduction and physical restraint enhancements set forth in USSG § 2B3.1(b)(4). Part III.B presents a modified version of the intent-based test that the Seventh Circuit advocates. This intent-based test ensures proportionality and that the robbery abduction enhancement targets only actions that expose the victim to danger. Part III.C proposes that “location” should be interpreted as “place” instead of “position,” which would effectively add a substantial distance requirement and cabin judicial discretion. Finally, Part III.D combines the prongs that Parts III.B and III.C propose and explains how this two-part balancing test would improve the current state of the law.

To clarify how the approaches in Parts III.B and III.C operate, this Comment applies each approach to the fact pattern in *Reynos*.¹³⁷ Recall that, in *Reynos*, the defendant forced store employees to move from a locked bathroom, down a corridor, and into

¹³³ Case law throughout the circuits strongly supports interpreting the SRA in light of its principal goals. See, for example, *United States v Kirkpatrick*, 589 F3d 414, 416 (7th Cir 2009) (“The Supreme Court has never questioned the principal goal of the Sentencing Reform Act of 1984: to curtail the variable sentencing caused by different judges’ perceptions of the same criminal conduct. The allowable band of variance is greater after *Booker* than before, but intellectual discipline remains vital.”).

¹³⁴ See notes 36–50 and accompanying text.

¹³⁵ United States Sentencing Commission, *Guidelines Manual* § 1A3 at 1.2–1.3 (1987).

¹³⁶ *Id.*

¹³⁷ See notes 57–58 and accompanying text.

a room containing a cash register.¹³⁸ The employees moved between thirty-four and thirty-nine feet during the episode.¹³⁹

A. Defining the Boundaries of Abduction and Physical Restraint

Before delving into the two elements of the proposed balancing test, it is worth noting the importance of differentiating between the abduction and physical restraint enhancements. Because an abduction under the Guidelines is essentially physical restraint plus forced movement to a different location,¹⁴⁰ the definition of location that courts apply determines the boundaries between the two enhancements. Unless courts clearly state how to determine a “change in location,” the two enhancements risk becoming identical in application.¹⁴¹

1. Overly punitive enhancements in the Guidelines.

As Part II.D.1 explains, the majority of circuits interpret “location” and “abduction” so that they may apply the robbery abduction enhancement in virtually any situation involving forced movement. Furthermore, because an offender forcibly moving a victim is likely relatively common in robberies, most circuits transform the robbery abduction enhancement into an almost universal sentencing enhancement.¹⁴² Instead of enhancing the base sentence in only some circumstances, the enhancement increases the recommended sentence for all robberies with forced movement over virtually any distance. This application is overly

¹³⁸ *Reynos*, 680 F3d at 290.

¹³⁹ *Id.*

¹⁴⁰ See *United States v Fisher*, 132 F3d 1327, 1329 (10th Cir 1997) (describing the physical restraint enhancement); USSG § 1B1.1, Application Note 1(A).

¹⁴¹ See *Whatley*, 719 F3d at 1223.

¹⁴² See *Archuleta*, 865 F3d at 1294 (Seymour concurring in part and dissenting in part):

[T]he majority’s “flexible standard” is in fact standardless. Accordingly, it appears that the only way a person could receive an enhancement for physical restraint while not being eligible for an abduction enhancement is if all of his victims remain perfectly still throughout the entire robbery. This is an absurd result.

See also *People v Daniels*, 459 P2d 225, 234 (Cal 1969) (“[W]e now recognize that some brief movements are necessarily incidental to the crime of armed robbery.”). It is important to note that, under the flexible approach adopted by the majority of circuits, courts do theoretically retain some discretion in applying the robbery abduction enhancement. In practice, however, it appears that courts treat the enhancement more akin to a mandatory sentencing enhancement applicable in virtually all cases involving movement.

punitive for two reasons: the enhancement is fundamentally over-inclusive when it applies to almost any robbery offense; and when applied to those offenses, the sentence becomes disproportional to the underlying conduct. Courts have generally felt uneasy about interpreting sentencing enhancement provisions in this overly broad manner, as these interpretations ensure that the Guidelines are universally applied in a manner disproportional to the crime committed.¹⁴³ When faced with an overly punitive interpretation of the Guidelines, courts have often rejected such an interpretation.¹⁴⁴

One of the best examples of courts rejecting an overly punitive application of the Guidelines is courts applying the child pornography Guidelines provisions in USSG § 2G2.2.¹⁴⁵ Congress has not updated the Guidelines provisions for nonproduction child pornography offenses in almost a decade, and changes in technology, “such as the widespread use of peer-to-peer [] file sharing,” often trigger “multiple guideline enhancements” in “the vast majority” of cases.¹⁴⁶ For example, the Guidelines provide for a two-level enhancement “[i]f the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material.”¹⁴⁷ However, modern possession or distribution of child pornography almost always involves a computer or interactive device—which means that this technology enhancement provision applies in virtually all child pornography cases.¹⁴⁸ Because of the potential for overly punitive applications

¹⁴³ See, for example, *United States v Grober*, 595 F Supp 2d 382, 384 (D NJ 2008) (“[W]hen . . . the guidelines for a defendant entering a plea is just months shy of the 20 year statutory maximum, one gets busy asking questions about how that happened. This Court has asked itself: Am I working with a rational sentencing structure, or administering the Code of Hammurabi?”).

¹⁴⁴ See, for example, *id.* (“[T]he Court has concluded that U.S.S.G. § 2G2.2[] fails to provide a just and reasoned sentencing range given the facts of this case and the background of the defendant. As a consequence the Court has significantly varied downward in sentencing [the defendant].”).

¹⁴⁵ This Comment focuses on the technology enhancement for child pornography, but the Supreme Court has held that courts may also categorically disagree with the Guidelines in cases involving crack cocaine sentencing enhancements. *Kimbrough v United States*, 552 US 85, 110 (2007).

¹⁴⁶ *2012 Report to the Congress: Federal Child Pornography Offenses* *207 (United States Sentencing Commission, Dec 2012), archived at <http://perma.cc/558C-XHZR>.

¹⁴⁷ USSG § 2G2.2(b)(6).

¹⁴⁸ *Grober*, 595 F Supp 2d at 397 (“[The government’s witness] testified that *every one* of the cases she had worked on—‘100 percent’—‘involved the use of a computer and of interactive computer service.’”).

of these sentencing enhancements, circuits have held that “district courts may vary from the child pornography Guidelines [] based on policy disagreement[s].”¹⁴⁹

Because the robbery abduction enhancement could apply in almost any situation involving forced movement if “change in location” is defined broadly, the robbery abduction enhancement bears many similarities to the child pornography technology enhancement. Just as technology is a common component of most child pornography crimes, forced movement is a common component of many robberies. Essentially, the universal application of the robbery abduction enhancement ensures that the robbery abduction enhancement is applied in a disproportional manner, thwarting one of the main objectives of the SRA.¹⁵⁰ The similarities to other overly punitive interpretations should provide courts with an independent reason to reject the approaches used by the Third, Fourth, Fifth, and Tenth Circuits. It is worth noting that the argument that § 2G2.2 is overly punitive arose due to evolving technology, whereas the differentiation between the physical restraint and abduction enhancements has not been affected by changing societal forces or technology. But this distinction is likely not highly relevant as both involve enhancements that may apply in virtually all cases.

2. Establishing boundaries.

Similar to USSG § 2G2.2, the robbery abduction enhancement also faces issues of overinclusivity. As Part II.C discusses, the dissent in *Eubanks* voiced the concern that a broad interpretation of “different location” would “virtually ensure that any movement at all [] result[s] in an abduction enhancement.”¹⁵¹ Essentially, interpreting “different location” broadly allows the abduction enhancement to supplant the physical restraint enhancement.¹⁵²

¹⁴⁹ See, for example, *United States v Henderson*, 649 F3d 955, 963 (9th Cir 2011). See also *United States v Grober*, 624 F3d 592, 609 (3d Cir 2010) (“Here, after extensive consideration of § 2G2.2 and the § 3553(a) factors, the District Court determined not to apply the Guidelines range recommended by § 2G2.2. This was not an abuse of its discretion.”); Sarah Einhorn, Case Summary, *United States v. Henderson: Child Pornography Sentencing Guidelines Subject to Challenge on Public Policy Grounds*, 42 Golden Gate U L Rev 127, 133–35 (2011).

¹⁵⁰ United States Sentencing Commission, *Guidelines Manual* § 1A3 at 1.2 (1987).

¹⁵¹ See note 85 and accompanying text.

¹⁵² As Parts II.A and II.B address, the flexible approach endows courts with an enormous degree of judicial discretion. In practice, however, it appears that the majority of circuits apply the abduction enhancement in virtually all robbery cases involving forced movement.

The two-level physical restraint enhancement provision in USSG § 2B3.1(b)(4)(B) is separated from the four-level robbery abduction enhancement provision in USSG § 2B3.1(b)(4)(A) by the word “or,”¹⁵³ which suggests that a distinction exists between the two provisions. In practice, courts have held that the physical restraint enhancement targets behavior that keeps a victim from moving, while the abduction enhancement targets behavior that forces a victim to change location.¹⁵⁴ Courts have consistently rejected double counting claims (applying two mutually exclusive provisions to the same conduct),¹⁵⁵ and there are some situations in which a defendant’s conduct may trigger both enhancements. For example, the Sixth Circuit applied both enhancements when an offender restrained some victims at one location and abducted other victims during the same robbery.¹⁵⁶ Outside of these limited situations in which the crime warrants applying both enhancements, application of an overly broad abduction enhancement merges the two enhancements. Because a change in the victim’s location is the essential difference between the two enhancements, a lower barrier for finding that a change in location has occurred effectively merges the two enhancements. The Eleventh Circuit in particular has noted that applying the robbery abduction enhancement to conduct that is covered under the physical restraint enhancement would “blur the distinction between physical restraint and abduction.”¹⁵⁷ However, alternatives exist, such as the balancing test that Part III.C discusses.

B. The “Dangerousness” Test

As I mention above, the Seventh Circuit in *Eubanks* looked to the purpose of the “abduction” enhancement and held that this purpose would be met if the victims “were essentially taken hostage to facilitate the defendant’s escape.”¹⁵⁸ Despite the *Eubanks* court’s determination that the purpose of the robbery abduction enhancement was “important” in differentiating the facts under review from *Osborne*, the *Eubanks* court did not elucidate this line of analysis.¹⁵⁹ Perhaps most remarkably, the Seventh Circuit

¹⁵³ See notes 21–22 and accompanying text.

¹⁵⁴ See, for example, *United States v Gall*, 116 F3d 228, 230 (7th Cir 1997).

¹⁵⁵ See, for example, *Strong*, 826 F3d at 1116–17.

¹⁵⁶ *Id.* at 1117, citing *United States v Smith*, 320 F3d 647, 658 (6th Cir 2003).

¹⁵⁷ *Whatley*, 719 F3d at 1223.

¹⁵⁸ *Eubanks*, 593 F3d at 653.

¹⁵⁹ *Id.*

did not substantiate its claim that the robbery abduction enhancement was created to target hostage taking.¹⁶⁰ Unfortunately, there appears to be no legislative history or other guidance that can shed light on the purpose of the abduction enhancement as applied to robberies.¹⁶¹ However, an abundance of case law exists on abduction enhancements as applied to sexual assault cases through the sexual assault abduction provision in § 2A3.1(b)(5). Because the sexual abuse abduction enhancement in § 2A3.1(b)(5) and the robbery abduction enhancement in § 2B3.1(b)(4)(A) both use the term “abducted” and require that the victim was forcibly moved to a different location,¹⁶² case law on the sexual assault abduction enhancement can shed light on how the robbery abduction enhancement should be applied. Furthermore, although the circuit courts disagree about how to interpret this language in the robbery context, there appears to be more of a consensus on how to apply the abduction enhancement in the sexual assault context.¹⁶³ This Section describes how courts apply the sexual assault abduction provision and also the advantages of this application.

1. Defining “forced movement” using sexual assault case law.

The Guidelines provide a four-level sentencing enhancement “if the victim was abducted” during a sexual assault.¹⁶⁴ The application notes for abduction enhancements in sexual assault cases

¹⁶⁰ Although the *Eubanks* court did cite a passage in *Osborne* that concluded the abduction enhancement targets hostage taking, the *Eubanks* court left out the *Osborne* court’s broader holding that “the abduction enhancement is intended, at least in part, to protect victims against the additional harm that may result from being forced to accompany an offender, such as being taken as a hostage during a robbery or being isolated to prolong a sexual assault.” *Osborne*, 514 F3d at 387. The Seventh Circuit may have come to a different conclusion if it had applied the broader analysis from *Osborne*. The harm-based analysis in *Osborne* is substantially similar to the dangerousness test this Part advocates—although this Part goes a step further by defining the potential of harm to the victim as an element of an abduction.

¹⁶¹ There is some literature on the types of behavior targeted by kidnapping statutes. See, for example, John L. Diamond, *Kidnapping: A Modern Definition*, 13 Am J Crim L 1, 25–34 (1985) (discussing various actions that kidnapping statutes could target, including conduct that reduces the possibility of detection or poses additional harm to the victim).

¹⁶² USSG § 1B1.1, Application Note 1(A).

¹⁶³ For a representative application of the abduction enhancement in the sexual assault context, see *United States v Kills in Water*, 293 F3d 432, 437 (8th Cir 2002).

¹⁶⁴ *Id.* at 436–37.

refer to the same definition of abduction as the abduction enhancements for robbery.¹⁶⁵ As Part I.B discusses, the Guidelines note that the definition of “abduct[ion]” is met if “a victim was forced to accompany an offender to a different location.”¹⁶⁶ Essentially, the definition of abduction requires forced movement plus a change in location.

Courts have often applied abduction enhancements in sexual assault cases. In these cases, the courts have concluded that the abduction enhancement is intended, in part, to protect the victim from the additional risks that may occur during an abduction.¹⁶⁷ Courts have used the rationale behind the sexual assault abduction enhancement to interpret the abduction enhancement—and the phrase “forced movement” in particular.¹⁶⁸ Instead of looking to a “change in location” as the most important element in an abduction, courts instead focus on whether the victim was exposed to additional harm during the forced movement.¹⁶⁹ These courts still examine whether the offender forced the victim to change location,¹⁷⁰ but generally this analysis is very limited.¹⁷¹ This Comment refers to the analysis of whether the defendant’s actions increased the risk the victims faced as the dangerousness test.

It does not appear that courts have grappled with defining “different location” in sexual assault cases to the same degree as courts in robbery cases. Instead, these courts usually focus on whether the movement to a “different location” increased the likelihood of harm befalling the victim.¹⁷² In fact, courts have often found that abductions occurring over very short distances have

¹⁶⁵ USSG § 2A3.1, Application Note 1.

¹⁶⁶ USSG § 1B1.1, Application Note 1(A).

¹⁶⁷ See, for example, *United States v Saknikent*, 30 F3d 1012, 1013 (8th Cir 1994) (“[A]bduction increases the gravity of sexual assault or other crimes because the perpetrator’s ability to isolate the victim increases the likelihood that the victim will be harmed.”).

¹⁶⁸ See *United States v Kavo*, 128 Fed Appx 447, 450–51 (6th Cir 2005) (interpreting the word “forced” in light of whether “movement of the victim increased the likelihood of harm”).

¹⁶⁹ See, for example, *Kills in Water*, 293 F3d at 437 (“We will uphold a § 2A3.1(b)(5) enhancement for an abduction in situations where ‘the perpetrator’s ability to isolate the victim increases the likelihood that the victim will be harmed.’”) (citations omitted).

¹⁷⁰ See, for example, *United States v Young*, 50 Fed Appx 334, 334 (8th Cir 2002) (“Moving a victim from one location to another meets the definition of abduction.”).

¹⁷¹ See, for example, *Kills in Water*, 293 F3d at 437 (requiring only forced movement to a “physically close location” for the change in location requirement to be satisfied). But see, for example, *Strong*, 826 F3d at 1117 (holding that “dragging a victim from one room to another is not abduction”).

¹⁷² *Kills in Water*, 293 F3d at 437 (quotation marks omitted).

satisfied the dangerousness test for purposes of the sexual assault provisions in the Guidelines. For example, in *United States v Kills in Water*,¹⁷³ the Eighth Circuit reviewed whether an abduction enhancement should be applied when a defendant allegedly forcibly moved the victim from the outside of a trailer to the inside of a trailer prior to a sexual assault.¹⁷⁴ The Eighth Circuit concluded that the abduction enhancement applied because, under the dangerousness test, “[the] defendant’s ability to isolate the victim inside the trailer certainly increased the likelihood of harm to the victim.”¹⁷⁵

Notably, the *Kills in Water* court analyzed the commentary’s example of an offender forcing a victim into a getaway car¹⁷⁶ and concluded that “abduction occurs when a bank robber forces a victim of the robbery to another, physically close location, where the victim’s ability to escape is impaired.”¹⁷⁷ Although distance is not a component of the dangerousness test espoused by the Eighth Circuit, the Eighth Circuit’s total rejection of any distance element may be misplaced—a stationary trailer is actually very different from the mobile getaway car example used in the commentary. This distinction was likely not lost on those drafting the commentary to the Guidelines, especially when a stationary location could have been used instead of a vehicle to furnish an example. It is likely that the commentary meant to imply that the victim in the getaway car example will be taken to a different location—the movement from outside the car to inside the car instead constitutes an *incomplete* abduction. Otherwise, the drafters could have chosen a clearer example without the implication of additional movement associated with a vehicular abduction.

Why does this distinction matter? Despite the Eighth Circuit’s prompt conclusion that nothing more than movement to “another, physically close location” is necessary in establishing an

¹⁷³ 293 F3d 432 (8th Cir 2002).

¹⁷⁴ *Id.* at 437.

¹⁷⁵ *Id.* See also *Kavo*, 128 Fed Appx at 451:

[B]ecause *Kavo* physically carried [the victim], against her wishes . . . the district court held that *Kavo* had abducted his victim within the meaning of the sentencing guidelines and was thus deserving of the four-level enhancement. . . . We agree with the district court’s decision that the movement of the victim increased the likelihood of harm and offered *Kavo* a better chance to consummate his crime.

¹⁷⁶ USSG § 1B1.1, Application Note 1(A) (“[A] bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.”).

¹⁷⁷ *Kills in Water*, 293 F3d at 437.

abduction,¹⁷⁸ the dangerousness test does not speak to whether the movement constituted a change in location. Instead, it looks only to whether forced movement occurred. As an alternative, courts could apply the dangerousness test to determine if the movement was forced while using a separate test to determine whether the offender moved the victim to a different location. Because the definition of an abduction requires both forced movement and a change in location, this alternative is well-suited to use a two-pronged test or a two-part balancing test to incorporate both elements of the definition of abduction.

2. Applying a modified “dangerousness” test.

If the *Reynos* court were to apply the dangerousness test described above, it likely would have found that forcing employees to move from the bathroom to the cash register fails the dangerousness test—that is, it did not merit the robbery abduction enhancement. To begin with, although the employees were held at gunpoint, the actual movement from the bathroom to the cash register may not have added any more dangerousness than if the employees were being robbed within a single location. The employees were not isolated. In other words, the movement, or the “abduction,” may not have added an element of danger. Viewed in this light, the employees are subject to a similar level of danger as if they were held up during a simple store robbery. Applying the Eighth Circuit’s interpretation of the sexual assault abduction provision, § 2A3.1(b)(5), to this fact pattern, it would be unlikely that a court would apply the abduction enhancement because there was no “isolat[ion] [of] the victim [that] increase[d] the likelihood that the victim [would] be harmed.”¹⁷⁹ However, as I discuss below, sexual assault case law involving isolation may be of limited utility.

The dangerousness approach this Section describes offers several key advantages over any of the current methods the circuits use. First, the dangerousness test is more likely to target traditional abduction actions. By looking to the effects of movement forced on the victim rather than the movement itself, this test likely resolves any problems of overinclusion. Instead of applying the abduction enhancement to almost any forced movement, the

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (quotation marks omitted).

dangerousness test ensures that the abduction enhancement targets conduct that is harmful to the victim. For cases in which the victim's forced movement fails the dangerousness test, courts could still apply the physical restraint enhancement to the offender's sentence. Restricting application of the abduction enhancement in this limited manner ensures the proportionality of the enhancement—one of the key goals of the SRA.¹⁸⁰ Second, the dangerousness test is particularly appropriate in the abduction context because the dangerousness test targets behavior that decreases the probability of detection, which also decreases the cost to the offender of committing the crime.¹⁸¹ Lastly, this test incorporates existing sexual assault case law applying the abduction enhancement—case law that has already resolved many questions of application. Courts can draw directly from this case law, which would reduce uncertainty and judicial discretion because many of these issues have already been settled.

However, the dangerousness test may allow judges more discretion in some situations as the dangerousness test is more of a standard than a rule.¹⁸² It is plausible that almost any forced movement could be characterized as increasing the level of danger to the victim by virtue of the movement being forced. For example, moving a victim several feet at gunpoint could arguably increase the risk of injury to the victim because the victim would have an opportunity to resist and an injury may result. In these situations, courts may have to determine how much danger is sufficient to satisfy the dangerousness test. Courts could come to tenable disagreements on this matter.

Furthermore, case law applying § 2A3.1(b)(5) may offer little guidance in these situations as isolation often satisfies the dangerousness test if it precedes a sexual assault. Courts often find that isolation is sufficient to satisfy the dangerousness test because the isolation can give the offender “a better chance to consummate his [or her] crime” or create an additional risk of harm to the victim.¹⁸³ However, the element of isolation is less probative

¹⁸⁰ United States Sentencing Commission, *Guidelines Manual* § 1A3 at 1.2 (1987).

¹⁸¹ This functional analysis is very similar to ideas raised by Jeremy Bentham. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 184 (Clarendon 1879) (“To enable the value of the punishment to outweigh that of the profit of the offense, it must be increased, in point of magnitude, in proportion as it falls short in point of certainty.”).

¹⁸² See Pauline T. Kim, *Lower Court Discretion*, 82 NYU L Rev 383, 415 (2007) (“The classic debate over rules versus standards is in large part a disagreement about the amount of discretion appropriately given to lower courts.”).

¹⁸³ *Kavo*, 128 Fed Appx at 451.

in the context of robbery. Although it is possible for isolation to come before a successful robbery,¹⁸⁴ hostage situations often occur after completion of the robbery, frequently with the purpose of destroying evidence¹⁸⁵ or facilitating the offender's escape.¹⁸⁶ Additionally, unlike sexual assault cases, which often involve only one victim, many robberies with an abduction component involve multiple victims.¹⁸⁷ However, some of these issues are mitigated by implementing the dangerousness test alongside a substantial distance requirement, which the next Section develops.

C. The Substantial Distance Test

Currently, no court has adopted an explicit substantial distance requirement for abduction enhancements under the Guidelines. However, courts could look to legal authorities on kidnapping from sources outside of the Guidelines.¹⁸⁸ Drawing on these sources could help to define what "abduction" means within the robbery abduction enhancement.¹⁸⁹ These sources could include the Model Penal Code¹⁹⁰ (MPC) and kidnapping case law at the state level.¹⁹¹ Although these sources treat kidnapping as a separate crime from robbery and not as an enhancement in the sentencing phase, these sources have dealt with similar issues of proportionality and uniformity.

¹⁸⁴ See, for example, *Reynos*, 680 F3d at 288.

¹⁸⁵ See, for example, *Eubanks*, 593 F3d at 652–53.

¹⁸⁶ See, for example, *Whatley*, 719 F3d at 1210 ("Whatley ushered the employees to the windowless men's bathroom, and Whatley pushed a folding table up in front of the door and told the employees to wait 15 minutes to exit. He left the bank.").

¹⁸⁷ See, for example, *id.*

¹⁸⁸ Looking to the general landscape of a legal doctrine in order to better understand and apply certain provisions is not a unique approach. For a justification of this technique, see generally Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard 1982). Furthermore, courts have dealt with nearly identical issues to those this Comment raises in the context of criminal kidnapping. See *People v Tanner*, 44 P2d 324, 330–32 (Cal 1935) (examining common law definition of kidnapping to interpret a subsequently enacted kidnapping statute).

¹⁸⁹ There is little legislative history or direct commentary to assist in divining the important terms in the robbery abduction enhancement. However, it is relatively common for courts to give weight to common usages when interpreting vague terms. See, for example, *Neder v United States*, 527 US 1, 21 (1999) ("[When] Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.") (quotation marks and citations omitted).

¹⁹⁰ MPC § 212.1 (ALI 1962).

¹⁹¹ See *Virgin Islands v Berry*, 604 F2d 221, 227 (3d Cir 1979) (describing the law of kidnapping in various states).

Although the robbery abduction enhancement was created by the United States Sentencing Commission, courts often look to existing common law doctrines when interpreting sentencing guidelines.¹⁹² This Section looks to kidnapping case law in order to better comprehend the robbery abduction provision.

1. Defining “location” using state law.

While “[t]he traditional rule in American jurisprudence was that any asportation—i.e., carrying away—of the victim, no matter how short in distance or duration, was sufficient to establish the crime of kidnapping,” a series of state court decisions in the 1960s and 1970s “severely [limited] the scope of [] state kidnapping statutes.”¹⁹³ State courts have used a variety of methods to limit the doctrine to cases involving genuine kidnapping instead of lesser crimes, such as false imprisonment.¹⁹⁴ For reasons of clarity and uniformity, this Comment focuses on states that have instituted a substantial distance requirement, such as California,¹⁹⁵ while generally avoiding discussion of states that have not instituted such a requirement.¹⁹⁶ However, it is worth noting that many of the states that have not instituted a substantial distance requirement have instead applied alternative limiting doctrines. For example, the New York Court of Appeals settled on a merger doctrine of sorts by limiting kidnapping convictions to instances in which the ultimate crime (for example, robbery or sexual assault) “could not be committed in the forms planned without the limited asportations [] involved.”¹⁹⁷

Courts in states that adopted a distance requirement predominantly have based their decisions on “[t]he inequity inherent in

¹⁹² *United States v Rodriguez*, 711 F3d 541, 549–52 (5th Cir 2013) (listing circuits that have used common law meanings to define offense categories in the Guidelines).

¹⁹³ *Berry*, 604 F2d at 225–26.

¹⁹⁴ See Wesley M. Oliver, *Charles Lindbergh, Caryl Chessman, and the Exception Proving the (Potentially Waning) Rule of Broad Prosecutorial Discretion*, 20 Berkeley J Crim L 1, 42–56 (2015) (analyzing the Caryl Chessman kidnapping case and different limiting approaches used by states). This perceived need to differentiate between false imprisonment and kidnapping echoes the need to distinguish between the physical restraint and abduction enhancements that Part III.A describes.

¹⁹⁵ See *United States v Sanchez*, 782 F Supp 94, 97 (CD Cal 1992).

¹⁹⁶ See, for example, *State v Salamon*, 949 A2d 1092, 1111 (Conn 2008) (“[B]ecause the statutory definitions of the terms ‘restrain’ and ‘abduct’ contain no time or distance specifications, the offense of kidnapping does not require proof that the victim was confined for any minimum period of time or moved any minimum distance.”).

¹⁹⁷ *People v Miles*, 245 NE2d 688, 694 (NY 1969).

permitting kidnapping prosecutions of those who in reality committed lesser or different offenses, of which temporary seizure or detention played an incidental part.”¹⁹⁸ For example, the California Supreme Court concluded that “incidental movements are not of the scope intended by the Legislature in prescribing the asportation element of [aggravated kidnapping].”¹⁹⁹ The Third Circuit surveyed substantial distance tests and determined that

four factors are central to each of these approaches. Those factors are: (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.²⁰⁰

Only the first and fourth elements are relevant to this Comment.

The MPC has unambiguously instituted a distance or temporal requirement in kidnapping cases that do not involve removal from a home or business. For the state to secure a conviction under the MPC, the state must show that the defendant unlawfully removed a person “from his place of residence or business, or a substantial distance from the vicinity where he is found, or . . . unlawfully confine[d] [that person] for a substantial period in a place of isolation.”²⁰¹ In drafting the MPC, the authors noted that, under the traditional rule, even minor asportation can lead to a kidnapping conviction and “[t]he criminologically non-significant circumstance that the victim was detained or moved incident to the crime determines whether the offender lives or dies.”²⁰² Because the MPC uses “the word ‘vicinity’ rather than ‘place’ and [] requir[es] substantial removal, the section makes clear the purpose to preclude kidnapping convictions based on trivial changes of location having no bearing on the evil at

¹⁹⁸ *Berry*, 604 F2d at 226. See also *id.* at 226–27 (“In sum, the modern approach is to construe the kidnapping statutes so as ‘to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal.’”) (citation omitted); *People v Levy*, 204 NE2d 842, 844 (NY 1965) (“It is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place.”).

¹⁹⁹ *People v Daniels*, 459 P2d 225, 234 (Cal 1969).

²⁰⁰ *Berry*, 604 F2d at 226–27.

²⁰¹ MPC § 212.1 (ALI 1962).

²⁰² *Model Penal Code: Tentative Draft No 11* 14 (ALI Apr 27, 1960).

hand.”²⁰³ In fact, the the MPC drafters were clear that they wanted to “eliminate[] the absurdity of prosecuting for kidnaping in cases where the victim is forced . . . to the back of his store in the course of a robbery.”²⁰⁴ The “substantial removal” requirement likely is doing more of the heavy lifting under the MPC when compared to the MPC’s use of the word “vicinity” rather than “place.” This is because the definition of the word “vicinity” is similar to that of “place.”²⁰⁵

Courts have elected to define the substantiality requirement not in terms of a bright-line distance but rather in terms of the combination of “duration, distance, and [] change in environment.”²⁰⁶ Courts have found that the substantiality requirement may be met in certain instances over short distances, but these cases are usually limited to situations in which the forced movement leads to a change in environment. This change in environment element often informs what constitutes “substantially” instead of a concrete distance requirement.²⁰⁷

These courts define location as “place” instead of “position.” For example, in *Virgin Islands v Alment*,²⁰⁸ the Third Circuit looked to whether the forcible dragging of a sexual assault victim approximately seventy feet “from a lighted interior office . . . into a dark area of bushes” met the dangerousness test and the requirement of substantiality.²⁰⁹ Despite the short distance involved, the duration of the asportation “lasted, at a minimum . . . fifteen minutes, to a maximum of forty-five minutes to one hour.”²¹⁰ The court determined that the forcible dragging, and the physical harm that resulted, satisfied the dangerousness test, while the “duration” and “shift in environment” met the substantiality requirement.²¹¹ Similarly, another Third Circuit case determined that forcibly dragging a minor “eighty-eight feet . . . through the bushes into [a neighbor’s] house” to perpetrate a sexual assault met the sufficient distance requirement because

²⁰³ Id at 16.

²⁰⁴ Id.

²⁰⁵ See *Oxford English Dictionary* “vicinity,” online at <http://www.oed.com/view/Entry/223177> (visited Oct 27, 2018) (Perma archive unavailable) (defining “vicinity” as “[t]he state, character, or quality of being near in space”).

²⁰⁶ *Sanchez*, 782 F Supp at 97.

²⁰⁷ See *Daniels*, 459 P2d at 229–30.

²⁰⁸ 820 F2d 635 (3d Cir 1987).

²⁰⁹ Id at 640.

²¹⁰ Id at 638.

²¹¹ Id.

“pulling [the victim] away from the *place* where she was playing” constituted a change in environment.”²¹² By requiring a change in environment, these courts are essentially requiring a change in “place” rather than a change in “position.”

2. “Place” versus “position” in light of the Guidelines.

Although courts have not adopted an explicit substantial distance requirement for abduction enhancements under the Guidelines, debate over whether “location” should be defined as “position” or “place” looks to fundamentally the same issue.²¹³ Defining “location” as “position” would allow courts to apply the robbery abduction enhancement even over a comparatively short distance, while defining “location” as “place” would limit courts to applying the robbery abduction enhancement only if the victim was forcibly moved from a comparatively larger area.²¹⁴ The importance of this distinction arises from the more exact definition of position²¹⁵ as opposed to the more imprecise definition of place.²¹⁶ This Comment advocates for defining “location” as “place” instead of “position.” Doing so essentially would institute an implied substantial distance requirement.

Part of the justification for an implied substantial distance requirement can be found in the Fourth and Fifth Circuits’ analyses. Instead of applying “ordinary parlance” to determine “different location[s]” as the phrase relates to abductions, these circuits defined “a different location” in the abstract.²¹⁷ By examining the

²¹² *Virgin Islands v Ventura*, 775 F2d 92, 94–98 (3d Cir 1985) (emphasis added).

²¹³ See *Archuleta*, 865 F3d at 1288 (adopting the definition of position); *Hawkins*, 87 F3d at 727 (adopting a similar definition of point); *Whatley*, 719 F3d at 1222 (concluding, consistent with an adoption of the “place” definition, that “[t]he ordinary meaning of the term ‘different location’ would not apply to each individual office or room in a local branch of a bank”).

²¹⁴ See *Archuleta*, 865 F3d at 1287–88 (discussing definitions of location, position, and place).

²¹⁵ *Oxford English Dictionary* “position,” online at <http://www.oed.com/view/Entry/148314> (visited Oct 27, 2018) (Perma archive unavailable) (defining “position” as “[a] place in which a person, thing, etc., is located or has been put”).

²¹⁶ *Oxford English Dictionary* “place,” online at <http://www.oed.com/view/Entry/144864> (visited Oct 27, 2018) (Perma archive unavailable) (defining “place” as “[a] building, establishment, or area devoted to a particular purpose”).

²¹⁷ *Hawkins*, 87 F3d at 727 (quotation marks omitted); *Osborne*, 514 F3d at 389 (quotation marks omitted).

phrase “different location” in a vacuum, courts have reached conclusions that are likely inconsistent with how “different location” would be interpreted by the general public in abduction cases.²¹⁸

3. Applying a substantial distance requirement.

Although this Comment recommends a two-part balancing test that looks to both dangerousness and distance, for purposes of demonstration, this Section applies the substantial distance requirement to the facts of *Reynos* without any elements of the dangerousness test.

If a substantial distance requirement were required in *Reynos*, the court likely would have held that the robbery abduction enhancement was inapplicable. Because the victim in *Reynos* was transported only thirty-four to thirty-nine feet,²¹⁹ the forced movement would almost certainly not qualify as “substantial.”²²⁰ Instead, the movement in *Reynos*, which occurred within a building, would fail the substantiality requirement because the movement transpired within a single “environment” or “place.” However, if the facts were changed so that the forced movement of forty feet or so happened from building A, into an outside area, and into adjacent building B, courts may find that the substantiality requirement is met. In this alternative fact pattern, the victim is moved from “one building or area used for a specific purpose or activity” into another “building or area used for a specific purpose or activity”²²¹—changing one environment for another. Although it is possible that some courts may try to interpret an environment or “an area used for a specific purpose or activity” to include smaller locations,²²² state courts have repeatedly required more

²¹⁸ See Alexander T. Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20, 35 (1988) (“*The Legal Process* makes clear that the adjudicator is not simply charged with analyzing the case in light of the particular purpose behind a particular statute. . . . The job of the adjudicator is to fit the statute and its application into an ongoing, coherent legal system.”).

²¹⁹ *Reynos*, 680 F3d at 290.

²²⁰ See, for example, *People v Brown*, 523 P2d 226, 229 (Cal 1974) (“Defendant [] dragged and pulled the victim out the back door to the side of the house for a distance estimated to be not greater than 75 feet. . . . The asportation of the victim within her house and for a brief distance outside the house must be regarded as trivial.”).

²²¹ See note 216 and accompanying text.

²²² See *Reynos*, 680 F3d at 290 (“Of course, the smaller the space, the more difficult it is to find a change in location. But, even then, the smallest of areas still may contain different locations: a judge’s private office may have a location containing a desk and computer that is separate and distinct from a location containing a conference table and chairs.”).

than movement within a building or confined area when applying the substantiality requirement.²²³ As Part III.C.1 discusses, the substantiality requirement does not look only to distance at the exclusion of other factors but to a combination of “duration, distance, and [] change in environment.”²²⁴

Implementing a substantial distance requirement would first and foremost provide a means to curtail judicial discretion when applying the robbery abduction enhancement under the Guidelines. Courts could draw from decades of judicial kidnapping precedent to apply a uniform definition of location. The Fourth and Fifth Circuits’ flexible approach and the Third and Tenth Circuits’ relatively toothless three-part test would be replaced with a much clearer standard rooted in case law. Although the substantial distance test described in this Section allows courts some discretion in determining its applicability, the substantial distance test cabins discretion compared to the majority approach. If the substantial distance test were adopted, these circuits would be bound by decades of precedent on how to determine a change in location and could not define “location” flexibly. Although it is likely that adopting a substantiality requirement would not change the holdings in the Seventh, Eighth, and Eleventh Circuits, these circuits would also benefit from having their case-by-case approaches standardized.

It is difficult to determine why circuits have not yet created and applied a substantial distance test for the robbery abduction enhancement. One possible rationale is that the Guidelines and commentary do not explicitly mention a substantial distance requirement. However, courts have not hesitated to look beyond the statutory language of the robbery abduction enhancement,²²⁵ and there does not appear to be any reason why the substantial distance requirement should be treated differently.

²²³ See, for example, *People v Sheldon*, 771 P2d 1330, 1340 (Cal 1989) (holding that forced movement within a home is too insubstantial to constitute kidnapping); *Daniels*, 459 P2d at 238 (“Movement across a room or from one room to another, in short, cannot reasonably be found to be asportation ‘into another part of the same county.’”) (citations omitted).

²²⁴ *Sanchez*, 782 F Supp at 97.

²²⁵ See, for example, *Osborne*, 514 F3d at 390 (finding that an abduction occurred, in part, because the areas involved in the robbery were “divided by a counter, as well as a secured door intended to be passable only by authorized persons via keypad”).

D. Implementing the Balancing Test

For cases in the Third, Fourth, Fifth, and Tenth Circuits, courts apply the robbery abduction enhancement in an almost arbitrary manner, relying on a number of indeterminate factors.²²⁶ Furthermore, these courts have repeatedly chosen to apply the enhancement to conduct occurring over very short distances—targeting conduct that may not pose any additional risks to the victim.²²⁷ Although the Seventh, Eighth, and Eleventh Circuits represent an improved approach compared to their sister circuits, the Seventh, Eighth, and Eleventh Circuits have not yet formulated a clear and concise approach for applying the robbery abduction enhancement.²²⁸

Because the dangerousness test and the substantial distance requirement are not mutually exclusive, courts should apply a two-part balancing test that looks to both dangerousness and distance. The Guidelines state that courts should apply the robbery abduction enhancement (1) if the victim “was forced to accompany the defendant” and (2) if that forced movement was “to another location.”²²⁹ Because the dangerousness test establishes whether the movement was forced, and the substantial distance test indicates whether that movement was to a different location, this two-part balancing test provides courts with a clear test that encapsulates the full meaning of “abduction.”

In establishing whether the robbery abduction enhancement should be applied in a given scenario, courts should use a sliding scale.²³⁰ On this sliding scale, an abduction occurring over a substantial distance would require comparatively less danger for the robbery abduction enhancement to apply. Likewise, an abduction that poses a great danger to the victim but occurs over a relatively short distance would also meet the conditions of this two-part balancing test. For example, forced movement over state lines would constitute an abduction even if the victim is not placed in a particularly dangerous situation, but forced movement within a building would require the victim be exposed to a great deal of danger. The California Supreme Court uses a similar multipart

²²⁶ See Parts II.A–B.

²²⁷ See Parts II.A–B.

²²⁸ See Part II.C.

²²⁹ USSG § 2B3.1, Background. See also Part I.B.

²³⁰ Using balancing tests under the Guidelines is not a completely novel idea. See Todd Flaming, Comment, *Laundering Illegally Seized Evidence through the Federal Sentencing Guidelines*, 59 U Chi L Rev 1209, 1210 (1992).

balancing test that looks to both substantial distance and whether the victim was exposed to additional danger.²³¹ The California Supreme Court's multipart balancing test is also a sliding scale.²³²

Applying this sliding scale allows courts to target the most egregious abductions: those posing either a severe danger to the victim or occurring over a greater distance. However, unlike a two-prong test in which both prongs must be met, a sliding scale test also allows courts to apply the robbery abduction enhancement to situations involving moderate danger to the victim and moderate distance. An example of a fact pattern involving moderate danger that likely fails the substantial distance test is *Hawkins*, in which the victim was dragged by the hair at gunpoint "50 to 60 feet" toward a getaway car.²³³ *Hawkins* involved considerable danger to the victims, mainly because the victims were forcibly moved toward a more isolated environment and because of the high potential for injury involved in that movement,²³⁴ but the distance involved was slight to moderate, the duration was relatively brief, and no change in location occurred. In cases like *Hawkins*, in which one prong is clearly met but the other prong tilts the other way, it may be desirable for courts to apply the robbery abduction enhancement to avoid issues of underinclusion.²³⁵

Furthermore, the balancing test provides the additional benefit of preserving the distinction between the physical restraint and abduction enhancements. For example, forced movement

²³¹ See *People v Martinez*, 973 P2d 512, 520 (Cal 1999):

[T]he jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes.

²³² *Id.*

²³³ *Hawkins*, 87 F3d at 726.

²³⁴ It is worth noting that, in *Hawkins*, the offender did eventually shoot the victim "pointblank in the stomach" after the victim refused to get into the getaway car. *Id.* at 726.

²³⁵ Interestingly, the dissent in *Reynos* argued that a sliding-scale test incorporating both danger and distance should have been applied in *Hawkins*, although the dissent characterized dangerousness as an "aggravating circumstance" rather than an element of a two-part test. *Reynos*, 680 F3d at 294 (Ambro dissenting) ("[T]he aggravated nature of the defendant's forcible movement of the victim likely tips the scale in favor of finding that there was movement to a different location despite there having been only one building or site involved and/or a short distance traveled.").

without a requisite change in location would not trigger the robbery abduction enhancement, but it would still satisfy the requirements for applying the physical restraint enhancement.²³⁶ Cases failing either the dangerousness test or the substantiality requirement of the balancing test could instead be categorized as falling under the physical enhancement provision even if they do not satisfy the abduction enhancement requirements.

Moreover, the original goals of the SRA, including proportionality and uniformity,²³⁷ support adopting a two-part balancing test. The dangerousness requirement ensures that the robbery abduction enhancement applies only to conduct that presents an additional hazard to victims, remedying any issues of overinclusivity and ensuring that the robbery abduction enhancement is applied proportionally. The substantial distance requirement brings uniformity and consistency to the abduction requirement while also providing decades of precedent on how “location” should be defined. These requirements complement one another—although the dangerousness test could potentially increase judicial discretion by implementing an open-ended standard, the substantial distance requirement provides a check on that discretion. Compared to the flexible analysis currently used by many courts,²³⁸ this two-part test would greatly constrain courts applying the robbery abduction enhancement. Furthermore, this two-part balancing test would have the added benefit of preserving the distinction between physical restraint and abduction for Guidelines purposes.

If we apply the two-part balancing test described above to the facts in *Reynos*, we can further see how this proposed test would function. Because the distance in *Reynos* was between thirty-four and thirty-nine feet at most,²³⁹ the fact pattern would likely fail the substantial distance requirement.²⁴⁰ Additionally, *Reynos* would probably fail the dangerousness test because there does not appear to be any evidence that the forced movement substantially increased the danger posed to the victims.²⁴¹ Unlike *Hawkins*, in

²³⁶ *Fisher*, 132 F3d at 1329 (“The enhancement for physical restraint is applicable when the defendant uses force to impede others from interfering with commission of the offense.”).

²³⁷ United States Sentencing Commission, *Guidelines Manual* § 1A3 at 1.2–1.3 (1987).

²³⁸ See, for example, *Hawkins*, 87 F3d at 727–28.

²³⁹ *Reynos*, 680 F3d at 290.

²⁴⁰ Part III.C.3 applies the substantial distance element of the two-part test to *Reynos* in further detail.

²⁴¹ Part III.B.2 applies the dangerousness test to *Reynos* in greater detail.

which we apply the abduction enhancement because the dangerousness makes up for the lack of distance, *Reynos* fails both the dangerousness test and the substantial distance test. This two-part balancing test would remedy the circuit split addressed in Part II and alleviate the issues arising out of the overly flexible approach advocated for by the majority of circuits.

CONCLUSION

This Comment has argued that the Third, Fourth, Fifth, and Tenth Circuits have applied an overly precise interpretation of “location.” These circuits have used the robbery abduction enhancement provision in USSG § 2B3.1(b)(4)(A) to apply a four-level enhancement when a physical restraint enhancement would be more appropriate. The Seventh, Eighth, and Eleventh Circuit have remedied some of these issues but have not gone far enough in creating a permanent solution. To address these issues, this Comment advocates adopting a balancing test that looks to both dangerousness and distance. Both principles are heavily rooted in abduction case law, much of which has been developed precisely to remedy overinclusive statutory language in similar contexts. Finally, the adoption of the balancing test would preserve the boundary between the physical restraint and abduction enhancements.