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A LEGAL DEFINITION OF LEADERSHIP: UNDERSTANDING § 3B1.1 OF THE FEDERAL SENTENCING GUIDELINES

by
Marin Roger Scordato*

This Article offers a formal legal definition of “leadership” drawn from an unusual quarter: criminal sentencing. Sentencing guidelines that include adjustments based on the extent to which a defendant was a “leader” have spawned hundreds of appellate court cases attempting to develop a thoughtful, workable definition of the term. Reviewing these cases, this Article offers 25 separate characteristics courts have found material to a legal judgment as to whether an individual has been a leader within a criminal enterprise.

Eleven of these characteristics can be organized into three categories, which operate on the boundaries of the leadership concept. The first category contains those circumstances courts have found do not, by themselves, confer leadership status. For example, courts have found that controlling property alone does not make one a leader. The second category of leadership characteristics are those circumstances that are not, in themselves, sufficient to show a defendant is not a leader. For example, there may be more than one leader in a group, so the identification of one or more other leaders in a group does not preclude the possibility of characterizing a defendant as a leader as well. A third category of leadership focuses on the external group functions of leadership, the ways in which a leader monitors and mediates the points of contact between the group as a separate entity and important elements outside the group.

The remaining 14 characteristics comprise a fourth category that resides at the center of what courts find establishes leadership status. To courts, the gravamen of leadership is the control, organization, and responsibility for other group members. Examples of characteristics in this category are that a leader inspires members to make sacrifices for the group, possesses decision-making authority within the group, carries ultimate responsibility for the group’s success, and resolves disputes within the group.

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This Article concludes by noting this formal legal definition of leadership, given its basis in criminal sentencing, has generated a set of leadership characteristics all of which appear to enjoy the possibility of general applicability to a broad range of factual contexts including standard business settings, but still notes how very far the formal legal definition of leadership is from conventional definitions grounded explicitly in a moral, value-laden context.

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INTRODUCTION

While the law deals with a vast array of human experience, it does have its boundaries, its ultimately limited jurisdiction. Thus, from this perspective, one would expect the law to devote considerable resources to concepts like replevin, estoppel, and subrogation; and sure enough, considerable legal resources have been invested in defining, and refining, these concepts.¹ Less likely, one might think, is the investment of any formal legal attention to words like “love” and “affection,” and yet they in fact appear, dutifully defined, in Black’s Law Dictionary.² “Spiritual” is also defined there.³

In contrast, “pride” does not appear in Black’s Law Dictionary.⁴ Neither does “success.”⁵ Perhaps unsurprisingly, neither “funny,” “laugh,” nor “humor” is defined within its pages.⁶

¹ *Estoppel; Replevin; Subrogation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

² *Affection; Love*, BLACK’S LAW DICTIONARY.

³ *Spiritual*, BLACK’S LAW DICTIONARY.

⁴ *See id.* (absence of term “pride”).

⁵ *See id.* (absence of term “success”).

Another concept not appearing as a defined term in Black's Law Dictionary is "leadership,"⁷ or "leader,"⁸ and it seems intuitive enough that the law would not be much concerned with formally developing the meaning of this idea. One might expect sustained attention to be paid to the notion of leadership in the realm of business management,⁹ military affairs,¹⁰ or political science,¹¹ and it is to these fields that one might naturally turn for a sophisticated elaboration of the concept. But not the law.

Among the perennial obstacles to teaching leadership studies in law schools is the feeling that many law students possess that the subject of such studies is not law, or that it is not "real law." By this they usually mean that the study of leadership does not typically involve the study, or the product, of legislative statutes, appellate court cases, or administrative regulations. It is therefore, in this view, a soft subject of study, and thus does not enjoy the same stature or importance as do more traditional subjects such as contracts, property, or torts.¹²

And yet, despite all of this, there quietly exist hundreds of appellate court cases, with more being produced every year, that deal directly with the concept of leadership and that attempt to develop a thoughtful, workable definition of the term.¹³ This fascinating line of cases resides not in corporate law or securities regulation or international law, but instead, somewhat surprisingly, in the field of criminal law.¹⁴

⁶ See *id.* (absence of terms "funny," "laugh," and "humor").

⁷ See *id.* (absence of term "leadership").

⁸ See *id.* (absence of term "leader").

⁹ See *Developing a Leadership Style: What Is the Difference Between Management and Leadership?*, WALL ST. J. (Apr. 7, 2009), <http://guides.wsj.com/management/developing-a-leadership-style/what-is-the-difference-between-management-and-leadership/> ("Leadership and management must go hand in hand. . . . Still, much ink has been spent delineating the differences.").

¹⁰ DEP'T OF THE ARMY, ADRP 6-22, ARMY LEADERSHIP 1-1 to 1-2 (2012), http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adrp6_22.pdf (providing a detailed definition of "leadership" according to the Headquarters of the Department of the Army).

¹¹ See generally GLENN D. PAIGE, *THE SCIENTIFIC STUDY OF POLITICAL LEADERSHIP* (1977).

¹² No leadership casebooks are published by West or Wolters Kluwer. *Search Results*, WEST ACAD., <http://store.westacademic.com/Store/?search=leadership> (search for "leadership" returns zero results); *Aspen Casebook Series*, WOLTERS KLUWER, <http://www.aspenlaw.com/series/aspen-casebook-series> (absence of casebooks on leadership).

¹³ See, e.g., *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009). A Westlaw case database search of the terms "leadership" and "definition" resulted in well over 300 federal appellate court cases. *United States v. Martinez* is one example.

¹⁴ By filtering the search results on Westlaw's case database to reflect only federal criminal law, the appellate cases still number well above 200.

I. FEDERAL CRIMINAL SENTENCING

More specifically, a formal legal definition of “leadership” emerges from the Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984,¹⁵ and the striking new era in federal criminal sentencing that it ushered in.

Prior to the enactment of the federal sentencing guidelines, federal courts routinely pronounced indeterminate sentences of imprisonment in criminal cases, with the parole commission empowered to ultimately determine the actual period of incarceration and parole.¹⁶ Under this approach, criminal defendants routinely served far less time than was initially announced by the sentencing court, typically as little as one-third.¹⁷

The formal criminal sentences announced in open court were increasingly perceived to be misleading, perhaps even deceptive, as they strongly suggested a period of incarceration that bore little relation to the actual time served.¹⁸ Moreover, a serious lack of consistency and uniformity in sentencing was thought to plague the system.¹⁹

It was the stated purpose of the new regime of federal sentencing to improve upon the honesty, the uniformity, and the proportionality of these previous practices.²⁰ The Sentencing Reform Act of 1984 sought to achieve these goals by providing for the development of specific guidelines for the sentencing of defendants convicted in the federal criminal-justice system.²¹ It established the United States Sentencing Commission,

¹⁵ The Sentencing Reform Act is codified at 18 U.S.C. § 3551 (2012). The Act was passed as part of The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.). Notably, § 3553(b), the codified section of the Act that would make the sentencing guidelines mandatory, was held unconstitutional by *United States v. Booker*, 543 U.S. 220 (2005), and the application of the guideline revisions to previously committed offenses was limited under the Ex Post Facto Clause by *Peugh v. United States*, 133 S. Ct. 2072 (2013).

¹⁶ See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 281 n.367 (1993) (“[T]he Parole Commission exercised its authority *after* a sentencing judge had acted.” (emphasis in original)).

¹⁷ See Suzanne Cavanagh & David Teasely, *Mandatory Minimum Sentencing for Federal Crimes: Overview and Analysis*, in MANDATORY MINIMUM SENTENCING: OVERVIEW AND BACKGROUND 1, 4 n.4 (Lawrence V. Brinkley ed., 2003).

¹⁸ See *id.* at 11 (“In still other cases, defendants received sentences more severe than their pleas negotiated with the prosecutors.”).

¹⁹ See *id.* (illustrating several examples of the disparity in sentencing as a result of judicial discretion).

²⁰ *Booker*, 543 U.S. at 264 (citing U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 1A1.3 (2014) [hereinafter U.S.S.G.]).

²¹ 18 U.S.C. § 3551(a) (2012); see also U.S. SENTENCING COMM’N, *Other Stakeholders’ Views on Sentencing Reform*, in REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING pt. F. at 1 (2012) (“The [Sentencing

an independent agency within the federal judicial branch, and delegated authority to the Commission to rationalize federal criminal-sentencing practice.²² The work of the Commission is published pursuant to Section 994(a) of Title 28 of the United States Code.²³

An initial set of guidelines, produced by the Commission after an extensive series of hearings and broad solicitation of public comment, were submitted to Congress in April 1987, and officially took effect in November 1987.²⁴ The Commission continues as a permanent federal agency whose work is to continually monitor the use of the guidelines, and to revise them as appropriate.²⁵ Federal appellate courts have the authority to review all sentences to determine if the guidelines were correctly applied, or if any departure by a sentencing court from the result indicated by the guidelines was reasonable.²⁶

II. FEDERAL SENTENCING GUIDELINES

The guidelines established by the Commission mandate that federal criminal sentences be the product of a complex matrix of factors, some of which focus on categories of specific characteristics of the crimes committed by the defendant, and some of which focus on categories of specific characteristics of the defendant himself.²⁷ Among the factors that adjust the sentence based on the role that the defendant played in committing the offense is the following provision:

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

Reform Act of 1984] created the United States Sentencing Commission and tasked it with promulgating mandatory guidelines to meet the statutory purposes of sentencing.”).

²² See 18 U.S.C. § 3551; U.S. SENTENCING COMM'N, *supra* note 21, at 1.

²³ 28 U.S.C. § 994(a) (2012).

²⁴ E.F. Reilly, *History of the United States Parole Commission*, 9 SECURITY J. 49, 53 (1997); see also Cavanagh & Teasely, *supra* note 17, at 13 (stating that the guidelines were in effect in 1987).

²⁵ *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N, http://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf (“The Commission is charged with . . . evaluating the effects of the sentencing guidelines . . . , [and] recommending to Congress appropriate modifications . . .”).

²⁶ U.S.S.G., *supra* note 20, § 1A1.2.

²⁷ See *id.* § 2 (considering characteristics of the crime in determining sentencing); *id.* § 3 (considering adjustments to sentencing); *id.* § 4 (considering factors such as criminal history and livelihood in determining sentencing).

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.²⁸

It is in the application of this section of the Federal Sentencing Guidelines, and the appellate review of those sentences, that federal courts are brought into the project of formally deciding what it means to be a leader. There are hundreds of published (and technically unpublished) opinions of federal courts that address this issue, and a review of those cases makes for a fascinating examination of the characteristics and qualities that our courts, operating in their most formal setting and with serious consequences at stake, collectively view as the defining and essential qualities of leadership.²⁹

III. A FORMAL LEGAL DEFINITION OF LEADERSHIP

What is the concept of leadership that collectively emerges from these hundreds of federal appellate court opinions? By my analysis, courts have identified 25 separate characteristics as material to a formal legal judgment as to whether an individual has been a leader within a given group. In effect, federal courts have officially endorsed 25 factors as being characteristic of leadership.

These 25 basic characteristics of a leader can be organized into four broad categories, three of which operate on the boundaries of the concept and one of which is positioned at the very core of the definition. Taken together, these characteristics offer a rather sophisticated and textured account of the concept of leadership, one that can hold its own and take its place among the notions of leadership thus far developed in other fields.

IV. ATTRIBUTES THAT ARE NOT NECESSARY FOR LEADERSHIP

One category of characteristics operates in the negative. These characteristics address those circumstances that are not necessarily part of the

²⁸ *Id.* § 3B1.1.

²⁹ Many of these cases are collected in case reporters; the American Law Reports' databases are made current by the weekly addition of relevant new cases. *See, e.g.*, Barbara J. Van Arsdale, Annotation, *Construction and Application of U.S.S.G. § 3B1.1(a) Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity—Fraud Offenses*, 32 A.L.R. FED. 2d 445 (2008); George L. Blum, Annotation, *Construction and Application of U.S.S.G. § 3B1.1(a)*, 18 U.S.C.A., *Providing Sentencing Enhancement for Organizer or Leader of Criminal Activity Drug Offenses*, 43 A.L.R. FED. 2d 365 (2010).

definition of leadership. These are circumstances that, in effect, are not required of a person who is properly thought to be a leader.

Within this category, courts have determined that (1) *a person need not be regularly physically present among the group in order to effectively function as a leader.*³⁰ On this view, the core qualities of leadership can be performed without a regular, steady physical presence among the members of the group. Courts have characterized individuals who were not consistently physically present with other group members as leaders under § 3B1.1.

Some of these cases involve defendants who were involved in illegal drug transactions. As one court has noted in this context, “Those of higher rank in drug distribution conspiracies frequently use subordinates as go-betweens to limit their own apparent involvement.”³¹

This same case also recognized that (2) *a leader need not always function as such among the members of the group.*³² Addressing evidence that the defendant’s co-conspirators in the drug trade sometimes engaged in illegal drug transactions that did not involve the defendant, the court stated that “the fact that these participants sometimes functioned independently did not require the district court to discredit other evidence to the contrary.”³³ Going even further, the First Circuit Court of Appeals has taken the position that “[t]o demonstrate clear error in this case, [the defendant] must convince us that the court was mistaken in finding that, on at least one occasion, [the defendant] exercised authority or control over [another participant] or was otherwise responsible for organizing his activities.”³⁴

Courts have also found that (3) *controlling property alone does not make one a leader.*³⁵ Even if the property in question is critical to the operation of the enterprise, even if it is the very inventory that drives the enterprise, a person’s possession or control of that property, or his or her expertise regarding it, is not by itself sufficient to confer upon that person leader-

³⁰ See, e.g., *United States v. Tokhtakhounov*, 607 F. App’x 8, 14 (2d Cir. 2015) (defendant located in New York finding to be a “leader” based on his having organized activities of individuals in Russia and Ukraine).

³¹ *United States v. Soto-Lara*, 60 F. App’x 834, 835 (1st Cir. 2003); see also *United States v. Cruz*, 120 F.3d 1, 3 (1st Cir. 1997) (“This pattern is familiar in many sophisticated but illegal transactions.”).

³² *Soto-Lara*, 60 F. App’x at 835; see also *United States v. Damato*, 672 F.3d 832, 847 (10th Cir. 2012) (“A defendant may be eligible for the leader or organizer enhancement if he leads or organizes even one other participant.”).

³³ *Soto-Lara*, 60 F. App’x at 835.

³⁴ *United States v. Brown*, 298 F.3d 120, 122 (1st Cir. 2002). In *Brown*, the court was reviewing a sentencing enhancement based on the lower court’s finding that the defendant had been a manager, but the court’s logic applies equally to reviewing that a finding a defendant was a leader.

³⁵ *United States v. Miller*, 91 F.3d 1160, 1164 (8th Cir. 1996) (quoting *United States v. Ronning*, 47 F.3d 710, 712 (5th Cir. 1995)).

ship status. This finding by some courts is part of a larger theme within the legal definition of leadership wherein an individual's relationship and influence on other people in the group is far more determinative of their status as a leader than is their relationship to—or expertise regarding—property, regardless of how critical that property may be to the enterprise.

The Eighth Circuit Court of Appeals well illustrated this leadership theme in the 1996 case *United States v. Miller*.³⁶ In that case, the defendant, James Alfred Miller, was convicted of several criminal counts arising from the distribution of methamphetamine.³⁷ One of Miller's regular customers was Don Roe, a dealer who sold the methamphetamines that he purchased from Miller to others, who in turn also sold the drugs further down the line.³⁸

After Miller's jury conviction, the district court determined that he was a leader of a criminal activity sufficient to warrant an increase in the base offense level by four levels.³⁹ Miller was sentenced to a prison term of twenty-four years and four months.⁴⁰

In reviewing the conviction and sentencing, the Eighth Circuit Court of Appeals found that while he very likely knew that the drugs that he was selling to his co-conspirators were routinely being resold, merely "controlling property does not make [him] an 'organizer' or a 'leader.'"⁴¹ The court further noted that "if the words 'organizer' and 'leader' are to have their ordinary meaning, a defendant must do more than sell for resale."⁴² Miller's conviction was affirmed, but on this logic his sentence was vacated and the case remanded to the district court for resentencing.⁴³

In support of its position, the Eighth Circuit Court of Appeals cited a Fifth Circuit Court of Appeals case from 1995 in which the defendant and his partner operated a loan-brokering business named WESTPAC in such a way as to result in the defendant pleading guilty to one count of mail fraud.⁴⁴ The district court applied the § 3B1.1 enhancement to his sentence because it found him to be a leader and an organizer of the criminal scheme.⁴⁵

³⁶ *Miller*, 91 F.3d at 1164.

³⁷ *Id.* at 1162.

³⁸ *Id.* at 1161 (discussing Don Roe's purchases of methamphetamine and the various other people to whom Roe sold or dispensed drugs).

³⁹ *Id.* at 1162.

⁴⁰ *Id.*

⁴¹ *Id.* at 1164.

⁴² *Id.* (citing *United States v. Rowley*, 975 F.2d 1357, 1364 n.7 (8th Cir. 1992)).

⁴³ *Miller*, 91 F.3d at 1164.

⁴⁴ *United States v. Ronning*, 47 F.3d 710, 711 (5th Cir. 1995).

⁴⁵ *Id.*

The Fifth Circuit, in reviewing the sentence, distinguished between the § 3B1.1(b) federal sentencing enhancement for a manager, a three-level enhancement, and the § 3B1.1(a) enhancement for a leader or organizer, a four-level enhancement.⁴⁶ As understood by the Fifth Circuit, one who controls only property in a criminal enterprise qualifies as a manager, but not as a leader.⁴⁷ The court wrote, “Applying a plain-meaning approach to ‘leader’ and ‘organizer,’ we note that their definitions relate to supervision of people only. . . . [A] leader or organizer must control or influence other people.”⁴⁸ The court concluded that, taken alone, the defendant’s “control of WESTPAC’s assets does not allow application of the four-level § 3B1.1(a) enhancement.”⁴⁹

In addition to illustrating that the control of property alone does not make one a leader, the Fifth Circuit case discussed above, *United States v. Ronning*, also clearly illustrates that (4) *there is a distinction between leadership and management within an organization*.⁵⁰ In fact, the court in *Ronning* flatly states as much: “Management responsibility does not make a leader or organizer.”⁵¹

Other cases have also recognized a difference between being a leader of, as contrasted with being a manager within, a group enterprise.⁵² Attributes of management—the responsibility over certain persons and things within the group, the successful implementation of group initiatives, the identification and resolution of specific problems as they occasionally arise—may also, in some cases, be part of a leadership role, but these managerial attributes and functions do not fundamentally characterize or define a leadership role.⁵³ An individual can clearly, on this view, function successfully as a manager within an organization without in any way also functioning as a leader.

One such case involved a defendant who was convicted of participating in a criminal gang engaged in the armed robbery of vehicles, a gang that was clearly organized and led by his co-defendant.⁵⁴ The defendant claimed that he was merely a “foot soldier” in the gang and, on that basis,

⁴⁶ *Id.* at 712.

⁴⁷ *Id.* (citing *United States v. Chambers*, 985 F.2d 1263, 1268 (4th Cir. 1993)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 712 (illustrating differences between the definitions of “leader” and “manager”).

⁵¹ *Id.*

⁵² *See, e.g.*, *United States v. Hernandez*, 451 F. App’x 402 (5th Cir. 2011); *United States v. Rose*, 449 F.3d 627 (5th Cir. 2006).

⁵³ *See Ronning*, 47 F.3d at 712 (stating that although both “manager” and “leadership” roles can encompass the oversight of people, leaders must oversee people, while managers can oversee people or property).

⁵⁴ *See United States v. Lopez-Urbina*, 434 F.3d 750, 755–56 (5th Cir. 2005).

challenged the district court's application of a sentencing enhancement for having been a manager or supervisor.⁵⁵

The court of appeals, analyzing the defendant's appeal, noted a possible sentencing status in which a defendant "[does] not organize, lead, manage, or supervise another participant" but who nevertheless "exercised management responsibility over the property, assets, or activities of a criminal organization."⁵⁶ The court determined that this defendant factually fell into this category and thus was the appropriate object of the sentencing enhancement:

[The defendant] retained control over the stolen vehicles even after the other participants' role in the enterprise had ceased, and testimony indicated that the vehicles were sold in Mexico on both his and [the co-defendant's] behalf. Therefore, we do not find that the district court was clearly erroneous in enhancing [the defendant's] offense level for having a managerial role in the charged offenses.⁵⁷

Finally, courts have noted that (5) *there is a distinction between being a leader and being an organizer of a group enterprise*. While the distinction between leader and manager discussed above is explicitly recognized in the separation of § 3B1.1(a) and § 3B1.1(b), these cases cleave a distinction between the two terms utilized together in § 3B1.1(a) and in § 3B1.1(c).

As recently as November of 2011, the Federal District Court for the District of New Mexico, in a complicated case involving a conspiracy to defeat the administration of the tax laws of the United States, stated, "While there is overlap between the activities that would make a defendant a leader and those that would make a defendant an organizer, the two are distinct."⁵⁸

The Tenth Circuit Court of Appeals confronted a similar question in a case in which the defendant was participating as an equal partner in a joint venture to sell illegal drugs that resulted in his conviction for conspiracy to possess with intent to distribute and distribution of cocaine and methamphetamine.⁵⁹ The district court applied in the sentencing phase of the case a two-level enhancement under § 3B1.1(c) for the defendant's role in organizing the drug-distribution operation.⁶⁰ The defendant appealed the sentence enhancement.⁶¹

The defendant argued on appeal that he never exercised control over any other parties to the conspiracy, including having exercised no

⁵⁵ *Id.* at 767.

⁵⁶ *Id.* (quoting U.S.S.G., *supra* note 20, § 3B1.1 cmt. 2) (alteration in original).

⁵⁷ *Id.*

⁵⁸ *United States v. Tilga*, 824 F. Supp. 2d 1295, 1319 (D.N.M. 2011).

⁵⁹ *See United States v. Valdez-Arieta*, 127 F.3d 1267, 1269 (10th Cir. 1997).

⁶⁰ *Id.*

⁶¹ *Id.*

control over any subordinates or underlings.⁶² The Tenth Circuit agreed.⁶³

Nevertheless, the Tenth Circuit found that an enhancement based on a defendant's status as an organizer does not require a finding of such control, even though an enhancement based on a finding of being a leader does.⁶⁴ The court stated, "A defendant can organize an illegal activity without exercising control over the other participants in the activity."⁶⁵ The court further elaborated this position later in its opinion:

Therefore, while control over subordinates is required to find that a defendant played a management, supervision, or leadership role in a criminal activity, we conclude that a sentence enhancement under § 3B1.1(c) for a defendant who acts as an organizer does not require the presence of underlings in the endeavor. As a result, a defendant may be punished as an organizer under § 3B1.1(c) for devising a criminal scheme, providing the wherewithal to accomplish the criminal objective, and coordinating and overseeing the implementation of the conspiracy even though the defendant may not have any hierarchical control over the other participants.⁶⁶

V. CIRCUMSTANCES THAT DO NOT PREVENT A FINDING OF LEADERSHIP STATUS

A second category of findings by courts interpreting the meaning of "leader" within § 3B1.1 deal with circumstances that, when present in a situation, do not necessarily disqualify a person from performing a genuine leadership function within a group. While the category of characteristics described above consists of features that are not, by themselves, sufficient to confer leadership status, this second category consists of features that are not, in themselves, sufficient to support the opposite judgment—that the person in question is not functioning as a leader of the group.

For example, courts have consistently found that (6) *there may be more than one leader in a group*. Leadership is not, from this perspective, conferred upon, and exercised by, a sole and unique individual within an organization. Thus the identification of one or more leaders in a group does not preclude the possibility of characterizing others as genuine leaders as well, each of whom may be appropriately subject to the leadership sentencing enhancement. Multiple leaders may function as a single

⁶² *Id.* at 1270.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Valdez-Arieta*, 127 F.3d at 1270.

⁶⁶ *Id.* at 1272.

group, much like a board of directors of a corporation,⁶⁷ or they may operate severally and largely independently throughout the organization.⁶⁸

Support for this feature of leadership comes initially, and rather definitively, from the official comments to § 3B1.1: “There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.”⁶⁹ Not surprisingly, many appellate courts in a wide variety of jurisdictions have cited, adopted, and applied this maxim.⁷⁰

Courts have also found that (7) *a person need not exercise leadership over the entire group in order to be identified as a leader.*⁷¹ Persons have been found to qualify for the leadership sentencing enhancement pursuant to § 3B1.1 who have displayed leadership qualities with respect to only part of the overall criminal enterprise—sometimes a relatively small part.⁷² Somewhat surprisingly, some courts have found that in order to qualify as a leader or organizer, a participant in a criminal activity need only lead or organize one other participant.⁷³

In one case, the defendant was found to have qualified for a four-level sentencing enhancement pursuant to § 3B1.1(a) on the basis of having supervised only his brother.⁷⁴ In another, the appeals court affirmed the application of the leader/organizer enhancement despite the district court never having made any specific findings that the defendant supervised any other participant.⁷⁵ In that case the appeals court determined that § 3B1.1 only requires a reasonable conclusion by the trial court that the defendant supervised at least one other participant and does not require the trial court to actually identify any specific factual example of such supervision.⁷⁶

⁶⁷ United States v. Evans, 92 F.3d 540, 545 (7th Cir. 1996).

⁶⁸ See United States v. Martínez-Medina, 279 F.3d 105, 124 (1st Cir. 2002).

⁶⁹ U.S.S.G., *supra* note 20, § 3B1.1 cmt. 4.

⁷⁰ See, e.g., United States v. Thompson, 515 F.3d 556, 562 (6th Cir. 2008); United States v. Bras, 483 F.3d 103, 113–14 (D.C. Cir. 2007); United States v. Mijangos, 240 F.3d 601, 604 (7th Cir. 2001); United States v. Alonso, 48 F.3d 1536, 1545 (9th Cir. 1995).

⁷¹ See, e.g., United States v. Chavez, 549 F.3d 119, 136 (2d Cir. 2008).

⁷² *Id.*

⁷³ See, e.g., United States v. Damato, 672 F.3d 832, 847 (10th Cir. 2012) (“A defendant may be eligible for the leader or organizer enhancement if he leads or organizes even one other participant.”).

⁷⁴ United States v. Serrano, 297 F. App’x 70, 71 (2d Cir. 2008).

⁷⁵ United States v. Aptt, 354 F.3d 1269, 1287 (10th Cir. 2004).

⁷⁶ *Id.*

VI. EXTERNAL FUNCTIONS OF LEADERSHIP

A third category of formal legal-leadership characteristics focuses on the external group functions of leadership. In these cases, a leader is understood to occupy an important position in the presentation and interaction of the group with the world beyond itself. Leadership in this respect involves monitoring and mediating the points of contact between the group as a separate entity and important elements outside the group.

In this vein, courts have determined that (8) *a leader serves as a liaison between the group and those outside the group*. They have also often noted that (9) *a leader holds himself out to the relevant community as a leader of the group*. They have also observed that (10) *a leader is viewed as such by those outside the group*. Finally, courts have repeatedly said that (11) *a leader is involved in recruiting new members to join the group*.

A person's lack of external standing on behalf of the group is not disqualifying of leadership status, for there are many very effective leaders within organizations who are largely unknown beyond the members of the group. Neither is the presence of external responsibilities determinative of genuine leadership, as it is commonly the case that spokespersons for an organization, or its public-relations personnel, are rarely perceived to necessarily be the organization's actual leaders. Nevertheless, the cases make it clear that an important indicium of leadership status is the fact that an individual openly represents himself to the external world as in fact being a leader of the group. Equally important is the fact that an individual is perceived and understood by the external world to be a leader of the group, whether or not that person openly holds himself out to be such.

This cluster of characteristics is well illustrated by a recent case decided by the First Circuit Court of Appeals.⁷⁷ The defendants, Sandra and Anthony Saunders, were a mother and son participating together "in an extensive marijuana distribution conspiracy that extended from Texas to Massachusetts."⁷⁸ The operation attracted the attention of the Department of Homeland Security, Immigration and Customs Enforcement, whose agents, working undercover, infiltrated the organization.⁷⁹

Sandra and Anthony were indicted and charged with conspiracy to distribute at least 1,000 kilograms of marijuana and possession of at least 100 kilograms of marijuana with intent to distribute.⁸⁰ Sandra was convicted of both offenses while Anthony was only convicted of the first offense.⁸¹ Yet Sandra was sentenced to 120 months of incarceration plus

⁷⁷ See *United States v. Saunders*, 553 F.3d 81 (1st Cir. 2009).

⁷⁸ *Id.* at 83.

⁷⁹ *Id.*

⁸⁰ *Id.* at 84.

⁸¹ *Id.*

eight years of supervised release while Anthony was sentenced to 235 months of incarceration and five years of supervised release.⁸² The striking difference in sentences was the result of the district court having applied to Anthony the four-level enhancement as a leader of criminal activity provided for in § 3B1.1.⁸³

In affirming the lower court's application of the leadership enhancement, the First Circuit focused less on Anthony's activities within the group and far more on the role that Anthony occupied with respect to parties outside the criminal conspiracy. The court noted that Anthony "maintained the contacts with the drug suppliers in Texas, arranged and paid for use of the Billerica warehouse, and held himself out to be a leader of the operation."⁸⁴

A second case, also litigated in the First Circuit, further reinforces the point.⁸⁵ In this case, the defendant and six other men were discovered by the United States Coast Guard on a flagless 40-foot boat in poor physical condition riding low in the open seas approximately 45 miles off the shore of Puerto Rico.⁸⁶ The Coast Guard's search of the boat revealed 131 bales (nearly 10,000 pounds) of marijuana and ultimately resulted in a criminal conviction of the defendant for aiding and abetting in the possession of a controlled substance on board a stateless vessel.⁸⁷ The defendant was characterized by the district court as a leader and his base offense level was therefore increased by the four-level enhancement set forth in § 3B1.1.⁸⁸

When the Coast Guard initially approached the boat, it was the defendant among those on board who stepped up and spoke with them.⁸⁹ When they inquired about the nationality of the boat, the defendant said that he was not sure but he thought that it might be Aruban.⁹⁰ He answered more of the Coast Guard's questions and allowed them to board and to search the boat.⁹¹ When threatened with the leadership enhancement, the defendant claimed that he was merely a crew member on the boat, and not a leader, and that he spoke with the Coast Guard because he was the only person on the boat who spoke English.⁹²

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 86.

⁸⁵ *See* *United States v. Piedrahita-Santiago*, 931 F.2d 127 (1st Cir. 1991).

⁸⁶ *Id.* at 128, 130.

⁸⁷ *Id.* at 128, 131.

⁸⁸ *Id.* at 128.

⁸⁹ *Id.* at 129.

⁹⁰ *Id.*

⁹¹ *Id.* at 131-32.

⁹² *Id.* at 132.

Much as in the *Saunders* case noted above, the First Circuit Court of Appeals, in reviewing the district court's application of the leadership sentencing enhancement, focused far more on the defendant's interaction with the Coast Guard and the impression regarding his leadership status that it had on them—his apparent authority—than on the nature of any actual authority that he might have possessed within the group.⁹³ Lacking much direct evidence of the defendant exercising control over the other members of the crew, the court instead relied upon his apparent posture with the Coast Guard.⁹⁴ The court concluded, “While we agree with appellant that the government failed to prove that he acted as an ‘organizer,’ we do not agree that it failed to prove, by a preponderance of the evidence, that he acted as a ‘leader.’”⁹⁵

VII. THE ESSENTIAL QUALITIES OF LEADERSHIP

The fourth category of characteristics found by courts to be determinative of leadership status speaks to the core qualities of leadership, the essential features that reside at the very center of what is meant by “leadership,” and what it means to be a leader. While all of these characteristics need not be present in order for courts to conclude that a person is functioning as a leader, they are the ones that are identified most frequently by the courts and that are relied upon most heavily in supporting the imposition of the leadership sentencing enhancement.

The theme of these core leadership qualities is fairly clear: the gravamen of leadership is the control, organization, and responsibility for the actions of other group members. It is ultimately the influence on, and the responsibility for, the behavior of other group members that characterizes an individual as a leader within the group. It is ultimately not the individual's control of inanimate property or the degree of interaction with non-group members or the individual's technical expertise. Instead, courts clearly view the core qualities of leadership as being internal, and intramural, to the group itself.

A. Control And Management of Other Group Members

These core leadership qualities can usefully be broken down further into five sub-categories. The first of these sub-categories, and the preeminent one, is a leader's distinctive control and management of other group members. Case after case announces that (12) *a leader exercises*

⁹³ *Id.*

⁹⁴ *Id.* at 132 & n.3 (conceding that “[t]he evidence did not demonstrate that appellant organized the voyage, recruited crewmembers, imparted instructions to the other crewmembers, or obtained a larger share of the proceeds”).

⁹⁵ *Id.* at 132.

*general control over the activities of the group;*⁹⁶ that (13) *a leader possesses general decision-making authority within the group;*⁹⁷ and that (14) *a leader directly manages and supervises the activities of other members of the group.*⁹⁸

Mindful of the distinction between a leader and a manager, courts have found that (15) *a leader not only influences others, but often inspires them to make sacrifices for the group.*⁹⁹ Further, (16) *a leader also trains other individuals in the workings of the enterprise.*¹⁰⁰

B. Determination of Group Goals and Strategies

A second sub-category recognizes that leaders take a dominant role in the formulation of group goals and objectives, and in the strategies employed to achieve them. Thus, courts have found that (17) *a leader does not simply follow the dictates of others but instead exercises independent initiative;*¹⁰¹ (18) *a leader sets the agenda for the group;*¹⁰² and (19) *a leader develops basic strategy by which the group attempts to achieve its various goals.*¹⁰³

C. Responsibility For Results

Leaders are also understood to bear unique responsibility within the group for the success or failure of the enterprise. Courts have found that (20) *a leader carries ultimate responsibility for the group's success.*¹⁰⁴ As a result, (21) *a leader often receives a larger share of the profits of the enterprise.*¹⁰⁵

D. Internal Perception

Not only is a leader typically recognized as such by those outside the group, (22) *a leader is also viewed as such by other members of the group.*¹⁰⁶ While outsiders may be misled in their perception of the status of an in-

⁹⁶ See, e.g., *United States v. Johnson*, 906 F.2d 1285, 1291–92 (8th Cir. 1990).

⁹⁷ See, e.g., *United States v. Green*, 334 F. App'x 212, 213 (11th Cir. 2009).

⁹⁸ See, e.g., *United States v. Bahena*, 223 F.3d 797, 806 (8th Cir. 2000); *United States v. Ronning*, 47 F.3d 710, 712 (5th Cir. 1995).

⁹⁹ The kinds of sacrifices a leader may induce from others may look different than in noncriminal contexts, but are a no less distinguishing feature of leaders. See, e.g., *United States v. Juarez*, 546 F. App'x 619, 620 (9th Cir. 2013) (finding a defendant who convinced a co-conspirator to “take the blame” showed a leadership role).

¹⁰⁰ See, e.g., *United States v. Betancourt*, 422 F.3d 240, 246 (5th Cir. 2005).

¹⁰¹ See, e.g., *United States v. Bennett*, 291 F.3d 888, 898 (6th Cir. 2002).

¹⁰² See, e.g., *United States v. Wilson*, 185 F. App'x 6, 9 (1st Cir. 2006) (describing the defendant's argument against classification as a leader due to the various agendas of his co-conspirators).

¹⁰³ See, e.g., *United States v. Quigley*, 373 F.3d 133, 139 (D.C. Cir. 2004).

¹⁰⁴ See, e.g., *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989).

¹⁰⁵ See, e.g., *United States v. Rider*, 388 F. App'x 631, 632 (9th Cir. 2010).

¹⁰⁶ See, e.g., *United States v. Hardamon*, 188 F.3d 843, 851 (7th Cir. 1999).

dividual within the group, other group members are very rarely mistaken, and courts have found that identification within the group itself is a powerful indication of leadership status.¹⁰⁷

E. Judicial Functions

In the same way that courts have found that leaders typically perform classic legislative functions when they formulate goals for the group and establish the group's basic agenda, and that they perform classic executive functions when they motivate and influence group members to achieve those goals, courts have repeatedly found that leaders also perform classic judicial functions, mostly important internal regulation functions, within the group. Thus, courts have determined that (23) *leaders resolve disputes among members of the group*.¹⁰⁸ They have also determined that (24) *a leader disciplines members of the group when they violate group norms*.¹⁰⁹ Finally, they have found that (25) *a leader typically has the authority to expel a member from the group*.¹¹⁰

VIII. THE LEGAL DEFINITION IN OUTLINE

In summary, the current formal legal definition of "leadership" pursuant to § 3B1.1 of the Federal Sentencing Guidelines and the case law that interprets it consists of 25 separate characteristics, which are as follows:

I. Attributes That Are Not Necessary for Leadership

1. A person need not always be physically present among the group in order to effectively function as a leader.
2. A leader need not always function as such among the members of the group.
3. Controlling property alone does not make one a leader.
4. There is a distinction between leadership and management within an organization.
5. There is a distinction between being a leader and being an organizer of a group enterprise.

II. Circumstances That Do Not Prevent a Finding of Leadership Status

6. There may be more than one leader in a group.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See, e.g.,* United States v. Perez, 38 F. App'x 381, 384 (9th Cir. 2002).

¹¹⁰ *See, e.g.,* United States v. Chavez, 549 F.3d 119, 136 (2d Cir. 2008).

7. A person need not exercise leadership over the entire group in order to be identified as a leader.

III. External Functions of Leadership

8. A leader serves as a liaison between the group and those outside the group.

9. A leader holds himself out to the relevant community as a leader of the group.

10. A leader is viewed as such by those outside the group.

11. A leader is involved in recruiting new members to join the group.

IV. The Essential Qualities of Leadership

A. Control and Management of Other Group Members

12. A leader exercises general control over the activities of the group.

13. A leader possesses general decision-making authority within the group.

14. A leader directly manages and supervises the activities of other members of the group.

15. A leader often inspires other group members to make sacrifices for the group.

16. A leader trains other individuals in the workings of the enterprise.

B. Determination of Group Goals and Strategies

17. A leader exercises independent initiative.

18. A leader formulates goals and objectives for the group to pursue; he sets the agenda for the group.

19. A leader develops basic strategy by which the group attempts to achieve its various goals.

C. Responsibility for Results

20. A leader carries ultimate responsibility for the group's success.

21. A leader often receives a larger share of the profits of the enterprise.

D. Internal Perception

22. A leader is viewed as such by other members of the group.

E. Judicial Functions

23. Leaders resolve disputes among members of the group.

24. A leader disciplines members of the group when they violate group norms.

25. A leader typically has authority to expel a member from the group.

POSTSCRIPT

This formal legal definition of “leadership” is both sophisticated and detailed. It can stand alongside approaches to defining the concept and practice of leadership that have been developed in very different fields, such as business,¹¹¹ the government,¹¹² the military,¹¹³ academia,¹¹⁴ and sport.¹¹⁵

Unlike some of these other fields, however, the approach to leadership developed pursuant to § 3B1.1 was built upon the consideration of hundreds of examples of leadership exercised in the context of criminal enterprises often engaged in quite serious illegal activity. This context, of course, turns on its head the usual view of leadership as the exercise of a socially valuable and beneficial quality, much to be admired and sought after.¹¹⁶

¹¹¹ See, e.g., WARREN BENNIS, *ON BECOMING A LEADER* (2009); BUSINESS LEADERSHIP (Joan V. Gallos ed., 2d ed. 2008); PETER F. DRUCKER, *THE EFFECTIVE EXECUTIVE: THE DEFINITIVE GUIDE TO GETTING THE RIGHT THINGS DONE* (HarperBusiness rev. ed. 2006); HBR’s 10 MUST READS ON LEADERSHIP (Harvard Bus. Review Press 2011).

¹¹² See, e.g., JAMES MACGREGOR BURNS, *LEADERSHIP* (Harper Perennial Political Classics 2010) (1978); GORDON CHASE & ELIZABETH C. REVEAL, *HOW TO MANAGE IN THE PUBLIC SECTOR* (1983); *THE JOSSEY-BASS READER ON NONPROFIT AND PUBLIC LEADERSHIP* (James L. Perty ed., 2010); NAT’L ACAD. OF PUB. ADMIN., *TRANSFORMING PUBLIC LEADERSHIP FOR THE 21ST CENTURY* (Ricardo S. Morse et al. eds., 2007).

¹¹³ See, e.g., CTR. FOR ARMY LEADERSHIP, *THE US ARMY LEADERSHIP FIELD MANUAL* (2004); *MILITARY LEADERSHIP: IN PURSUIT OF EXCELLENCE* (Robert L. Taylor & William E. Rosenbach eds., 5th ed. 2005); EDGAR F. PURYEAR, JR., *AMERICAN GENERALSHIP: CHARACTER IS EVERYTHING: THE ART OF COMMAND* (2000); Leonard Wong et al., *Military Leadership: A Context Specific Review*, 14 *LEADERSHIP Q.* 657 (2003).

¹¹⁴ See, e.g., LEE G. BOLMAN & JOAN V. GALLOS, *REFRAMING ACADEMIC LEADERSHIP* (2011); JEFFREY L. BULLER, *POSITIVE ACADEMIC LEADERSHIP: HOW TO STOP PUTTING OUT FIRES AND START MAKING A DIFFERENCE* (2013); WALTER H. GMELCH & JEFFREY L. BULLER, *BUILDING ACADEMIC LEADERSHIP CAPACITY: A GUIDE TO BEST PRACTICES* (2015); ROBERT M. HENDRICKSON ET AL., *ACADEMIC LEADERSHIP AND GOVERNANCE OF HIGHER EDUCATION: A GUIDE FOR TRUSTEES, LEADERS, AND ASPIRING LEADERS OF TWO- AND FOUR-YEAR INSTITUTIONS* (2013).

¹¹⁵ See, e.g., JOHN F. BORLAND ET AL., *SPORT LEADERSHIP IN THE 21ST CENTURY* (2015); DAVID SCOTT, *CONTEMPORARY LEADERSHIP IN SPORT ORGANIZATIONS* (2014); JOHN WOODEN & STEVE JAMISON, *WOODEN ON LEADERSHIP* (2005).

¹¹⁶ In 1990, a book titled *The Leadership Secrets of Attila the Hun* became a huge best seller. WESS ROBERTS, *LEADERSHIP SECRETS OF ATTILA THE HUN* (1985). The successful conceit of the book, its counter-intuitive shtick, is to offer as its leadership

In some respects, from this perspective, it is remarkable that the formal legal definition of leadership, given its factual basis, has generated as conventional a set of leadership characteristics as it has. After all, none of the 25 attributes of leadership identified by the courts in interpreting § 3B1.1 would be wildly out of place as applied in a standard business setting. All attributes seem to enjoy the possibility of general applicability to the exercise of leadership across a broad range of factual contexts.

This circumstance is even more remarkable when one considers that some very popular and highly influential approaches to leadership ground their understanding of the concept in an explicitly moral, value-laden context.

For example, one very popular approach is offered by Stephen R. Covey, a best-selling author and founder and chairman of the Covey Leadership Center and the Institute for Principle-Centered Leadership.¹¹⁷ In his book, *Principle-Centered Leadership*,¹¹⁸ Covey identifies eight characteristics of what he terms “principle-centered leaders.”¹¹⁹ Of the eight characteristics offered, no fewer than half are all but impossible to imagine reliably applying to those who effectively lead drug cartels or outlaw biker gangs or teams of con artists:

They are service-oriented

....

They radiate positive energy

....

They believe in other people

....

They lead balanced lives.¹²⁰

In all fairness, at least one does seem to possibly translate: “They see life as an adventure.”¹²¹

Even more strikingly, Covey discusses what he calls the “seven deadly sins” of ineffective leadership:

Wealth without work

role model “one of the great murderers of the barbarian world.” Herbert Mitgang, *Leadership as Seen by a Scourge and a Philosopher*, N.Y. TIMES, April 1, 1989, at 14.

¹¹⁷ At the time of his death in 2012, Dr. Covey held the Jon M. Huntsman Presidential Chair in Leadership at the Jon M. Huntsman School of Business at Utah State University. *Alumni and Friends Directory*, UTAH ST. U.: JOHN M. HUNTSMAN SCH. BUS., <https://huntsman.usu.edu/alumni/directory?alumni-directory&memberID=4306>. He was named by TIME Magazine as one of its 25 most influential Americans. *Time's 25 Most Influential Americans*, TIME, June 17, 1996, at 64.

¹¹⁸ STEPHEN R. COVEY, *PRINCIPLE-CENTERED LEADERSHIP* (1991).

¹¹⁹ *Id.* at 33–39.

¹²⁰ *Id.* at 34–36.

¹²¹ *Id.* at 37.

....

Pleasure without conscience

....

Knowledge without character

....

Commerce (business) without morality (ethics)

....

Science without humanity

....

Religion without sacrifice

....

Politics without principle.¹²²

These are attitudes and actions that he suggests will destroy and disable attempts to effectively lead.¹²³ When one imagines how many of these seven traits must regularly describe those whom courts very comfortably determine to be leaders pursuant to § 3B1.1, one comes to appreciate how very far from a conventionally morally centered approach to leadership the formal legal definition necessarily is.

¹²² *Id.* at 87–93 (discussing what Mahatma Gandhi called the Seven Blunders of the World).

¹²³ *Id.* at 87.