

**ANTIDOTE TO THE KOOL-AID:  
GIVING THE GUIDELINES SUBSTANTIAL OR PRESUMPTIVE WEIGHT IS  
CONSTITUTIONALLY, TEXTUALLY AND FACTUALLY UNSOUND**

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**I. Introduction**

**A. The Booker Decision**

In United States v. Booker, 543 U.S. 220 (2005), a majority of the Supreme Court held that judicial factfinding under the Sentencing Reform Act of 1984 (“SRA” or “Act”) as written violated the Sixth Amendment because it required judges to increase the guideline range above that authorized by the jury’s verdict or the defendant’s admission, and then, under § 3553(b)(1), to impose a sentence within that range unless there was a ground for departure of a kind or to a degree not taken into account by the Sentencing Commission in formulating the Guidelines.<sup>1</sup> To effectuate what Congress would have intended had it known that the SRA as written violated the Sixth Amendment, and to permit judges to continue to find facts without violating the Sixth Amendment, another majority re-wrote the SRA: It excised § 3553(b)(1), and also § 3742(e), the appellate review section, because it reflected “the Guidelines’ mandatory nature,” and in particular, *de novo* review, since it made Guidelines sentencing “even more mandatory than it had been.”<sup>2</sup> This made the guidelines “advisory” and the remainder of the Act constitutional.<sup>3</sup> After these excisions, 18 U.S.C. § 3553(a) is the governing law in the district court; reasonableness with reference to § 3553(a) is the standard of review on appeal.<sup>4</sup> The primary sentencing mandate is to impose a sentence that is sufficient but not greater than necessary to achieve the statutory purposes of sentencing in light of all relevant sentencing factors, of which the guideline range is one.

**B. The Kool-Aid**

Two weeks after Booker was decided, Main Justice (DOJ) issued a directive to all line prosecutors ordering them to urge the courts to violate the statute and with it, the Sixth Amendment. The directive said that prosecutors (1) "must actively seek sentences

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<sup>1</sup> 543 U.S. at 233-35, 244.

<sup>2</sup> Id. at 259, 261. Additional excisions have been necessary to comply with the Sixth Amendment. See, e.g., United States v. Selioutsky, 409 F.3d 114, 116-117 (2d Cir. 2005) (Booker rationale requires excision of §3553(b)(2)); United States v. Bolano, 409 F.3d 1045, 1047 (8<sup>th</sup> Cir. 2005) (same regarding §3553(f)).

<sup>3</sup> Booker, 543 U.S. at 245, 259.

<sup>4</sup> Id. at 259-61.

within the range established by the Sentencing Guidelines in all but extraordinary cases,” (2) “must oppose” any sentence that “is below what the United States believes is the appropriate Sentencing Guidelines range,” and (3) must report “sentences outside the appropriate Sentencing Guideline range.” DOJ would ensure “consistent and judicious positions in pursuing sentencing appeals.”<sup>5</sup>

Shortly thereafter, on February 10, 2005, the Chair of the Sentencing Commission told the House Judiciary Committee’s Subcommittee on Crime that “the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a),” that the Commission “has considered the factors listed at § 3553(a),” and thus the guidelines should be given “substantial weight.”<sup>6</sup> The Commission traveled across the land delivering the same message to judges, law clerks and probation officers. The same line soon appeared in the government’s briefs supporting *per se* or at the very least presumptively reasonable guidelines.<sup>7</sup> The Eleventh Circuit regurgitated the line: “Indeed, the factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under *Booker* and § 3553(a).” *United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11<sup>th</sup> Cir. 2005).

On March 16, 2006, the Chair of the Sentencing Commission informed the House Judiciary Committee’s Subcommittee on Crime that, though “caution should be exercised in drawing conclusions from the post-*Booker* data collected and analyzed thus far” because it lacks “completeness and accuracy,”<sup>8</sup> a legislative fix including guidelines with “substantial weight” and a heightened standard of review was due now. The Chair cited *Shelton* for the proposition that “the factors set forth in 3553(a)(2) . . . are a virtual mirror

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<sup>5</sup> Memorandum to All Federal Prosecutors from James B. Comey, Deputy Attorney General, January 28, 2005, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/files/dag\\_jan\\_28\\_comey\\_memo\\_on\\_booker.pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf).

<sup>6</sup> Prepared Testimony of Judge Ricardo H. Hinojosa, February 10, 2005, <http://www.uscc.gov/Blakely/bookertestimony.pdf>.

<sup>7</sup> A typical example is the following from the government’s brief filed in *United States v. Jimenez-Beltre* in the First Circuit: (1) “in formulating the Guidelines, the Commission was required to and has considered all of the §3553(a) factors,” (2) one of the only practical ways to maintain uniformity is to follow the Guidelines, (3) thus, “a correctly-calculated Guidelines sentence is presumptively reasonable,” and a “defendant can rebut the presumption of reasonableness ‘only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a),” which the Commission already considered in formulating the Guidelines.

<sup>8</sup> U.S. Sentencing Commission, Final Report on the Impact of United States v. Booker on Federal Sentencing vi, B-2 (March 2006) (hereinafter “Booker Report”), [http://www.uscc.gov/booker\\_report/Booker\\_Report.pdf](http://www.uscc.gov/booker_report/Booker_Report.pdf).

image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a),” and declared: “The sentencing guidelines embody all of the applicable sentencing factors for a given offense and offender.”<sup>9</sup> The Commission now deems within-guideline sentences and government-sponsored sentences outside the range as “in conformance,” while below-guideline sentences imposed by judges in open court and subject to appellate review are not “in conformance.”<sup>10</sup>

Sadly, the Commission’s current position re-writes history and repudiates principle. Judicially-imposed sentences outside the guideline range were always intended to serve an “important role,” partly because of the “difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision,” and also as “an important mechanism by which the Commission could receive and consider feedback from courts regarding the operation of the guidelines.”<sup>11</sup> With its current position, the Commission seems intent on shutting down the conversation it began just two years ago in its Fifteen Year Report, where it candidly acknowledged that many of the guideline rules do not necessarily advance the purposes of sentencing, result in sentences that are unduly severe, and themselves allow or promote unwarranted disparity and inappropriate uniformity.

### **C. The Result: In Some Circuits, the Guidelines Are At Least As Mandatory As They Were Before Booker.**

One year after *Booker*, average sentence length has increased, the rate of sentences above the guideline range has doubled, a larger percentage of defendants are being sentenced to prison, and while the rate of sentences below the guideline range has increased slightly, it has begun to decrease.<sup>12</sup> Still unsatisfied, DOJ and the Sentencing Commission are each calling for a legislative “fix” to restrict judicial discretion.

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<sup>9</sup> Prepared Testimony of Judge Ricardo H. Hinojosa at 2, 18, March 16, 2006, <http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf>.

<sup>10</sup> *Booker* Report at vi, 46, 56-59, 61, 101-104, 129.

<sup>11</sup> U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3, 5 (October 2003) (citing Introduction to the Guidelines Manual), <http://www.ussc.gov/depart rpt03/depart rpt03.pdf> (hereinafter “2003 Downward Departure Report”).

<sup>12</sup> The Commission reports a post-*Booker* rate of non-government-sponsored below-guideline sentences of 12.5% (dubbed “non-compliant”), an increase of 3.9% compared to the six-month pre-Protect Act period and an increase of 7% compared to the fourteen-month post-Protect Act period. *Booker* Report at E-1. Compared to fiscal year 2001, the increase is only 1.6%. 2003 Downward Departure Report at 60.

The percentage of sentences above the range has doubled as compared to any pre-*Booker* period. *Booker* Report at E-1. Average sentence length has increased from 56 months pre-Protect Act to 57 months post-Protect Act to 58 months post-*Booker*. *Id.* at 71, Table 3. “[L]arge reductions below the minimum of the within-range sentence . . . have decreased in the post-*Booker* time

Most disturbing, the “jurisprudence” that has resulted from the drinking of the Kool-Aid makes the guidelines at least as mandatory as they were before Booker was decided. As explained below, the “mandatory” guideline system was (in the words of Congress and the Commission) actually “presumptive” because it acknowledged that the guidelines did not and could not reflect all relevant purposes and factors. The theory that the guidelines already embody all relevant purposes and factors is not only false, but denies the possibility of a sentence outside the guideline range for any reason.

The Fourth, Fifth, Seventh, Eighth and Tenth Circuits have held that the guideline range is entitled to a presumption of reasonableness.<sup>13</sup> These cases offer no rationale grounded in section 3553(a) or the language of Booker, or any explanation of why the presumption does not violate the Sixth Amendment. In its most recent decision on the subject, the Fourth Circuit declares that the presumption of reasonableness must apply because the guidelines reflect all relevant factors and produce individualized sentences.<sup>14</sup> The Fourth Circuit also conducts *de novo* review, telling the district court what sentence it may impose on remand.<sup>15</sup> The Sixth Circuit adopted a presumption of reasonableness in one case,<sup>16</sup> but then acknowledged the governing law in a subsequent case, stating that this was “in fact rather unimportant” because the district court must follow the “statutory mandate to ‘impose a sentence sufficient, but not greater than necessary’ to comply with the purposes of sentencing in section 3553(a)(2),” in doing so it must “consider[] all of the relevant section 3553(a) factors,” and the court of appeals must engage in “meaningful review” of sentences within and outside an applicable guideline range.<sup>17</sup> A

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period. Overall, the courts are imposing below range sentences more often but are not differing from the guideline sentence by a greater extent today compared to the two previous time periods.” Id. at 63. Courts are sentencing people to prison at a higher rate than before; sentences were reduced from a term of imprisonment to probation at a rate of only 10.3% post-Booker, while the rate was 14.5% pre-Protect Act and 13.3% post-Protect Act. Id. At the conclusion of the post-Booker period, the rate of judicial below-guideline sentences was less, and the rate of within-guideline sentences more, than immediately following Booker. Id. at 60, Figure 4.

<sup>13</sup> United States v. Kristl, 437 F.3d 1050 (10<sup>th</sup> Cir. 2006); United States v. Green, 436 F.3d 449 (4<sup>th</sup> Cir. 2006); United States v. Alonzo, 435 F.3d 551 (5<sup>th</sup> Cir. 2006); United States v. Mykytiuk, 415 F.3d 606 (7<sup>th</sup> Cir. 2005); United States v. Lincoln, 413 F.3d 716 (8<sup>th</sup> Cir. 2005). This does not mean that a sentence outside the guideline range is unreasonable. United States v. Haggard, 2006 WL 715758, slip op. \*3 (10<sup>th</sup> Cir. Mar. 22, 2006); United States v. Moreland, 437 F.3d 424, 433-34 (4<sup>th</sup> Cir. 2006).

<sup>14</sup> United States v. Johnson, \_\_\_ F.3d \_\_\_, 2006 WL 893594 (4<sup>th</sup> Cir. April 7, 2006).

<sup>15</sup> United States v. Eura, 440 F.3d 625, 634 (4<sup>th</sup> Cir. 2006); Moreland, 437 F.3d at 437.

<sup>16</sup> United States v. Williams, 436 F.3d 706 (6<sup>th</sup> Cir. 2006).

<sup>17</sup> United States v. Foreman, 436 F.3d 638 (6<sup>th</sup> Cir. 2006).

panel of the Ninth Circuit slipped the presumption into a footnote, then issued an order deleting that sentence.<sup>18</sup>

The First, Second and Third Circuits, and possibly the Eleventh, have declined to hold that the guidelines are entitled to a presumption of reasonableness.<sup>19</sup> The Ninth Circuit has rejected the treatment of the guideline range as the “presumptive” sentence in the district court, as that would be perilously close to mandatory guidelines subject to departure.<sup>20</sup> The First Circuit is the only court of appeals to approve of the district court according the guidelines “substantial weight,”<sup>21</sup> which seems at odds with its rejection of a presumption of reasonableness on appeal. Judge Lipez, joining in the majority’s rejection of the presumption of reasonableness and dissenting from its acceptance of the substantial weight approach, wrote the most well-informed and perceptive opinion by an appeals court judge that I have seen:<sup>22</sup>

There are some who contend that the advisory guidelines largely account for all of the relevant sentencing factors. *See, e.g., Shelton*, 400 F.3d at 1332 n.9 (“The factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under *Booker* and § 3553(a).”); *see also* Prepared Testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), *available at* <http://www.ussc.gov/Blakely/bookertestimony.pdf> (last visited Feb. 25, 2006) (same). That being so, the argument goes, there must still be primary reliance on the guidelines in sentencing.

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<sup>18</sup> *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9<sup>th</sup> Cir. Jan. 19, 2006), amended Feb. 7, 2006), *see* [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/3180B7508C9A29FF8825710D0081BEA5/\\$file/0530066.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/3180B7508C9A29FF8825710D0081BEA5/$file/0530066.pdf?openelement).

<sup>19</sup> *United States v. Fernandez*, \_\_\_ F.3d \_\_\_, 2006 WL 851670 \*6 (2d Cir. Apr. 3, 2006); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1<sup>st</sup> Cir. 2006); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006); *United States v. Lisbon*, slip op., 2006 WL 306343 \*2 (11th Cir. Feb. 10, 2006) (“A sentence within the guidelines range is not presumptively reasonable.”) (unpublished).

<sup>20</sup> *United States v. Zavala*, \_\_\_ F.3d \_\_\_, 2006 WL 914528 (9th Cir. Apr. 11, 2006).

<sup>21</sup> *Jimenez-Beltre*, 440 F.3d at 516-19.

<sup>22</sup> Judge Cassell, clearly concerned about a congressional backlash, wrote an early opinion advocating that the guidelines be accorded “great weight.” *See United States v. Wilson*, 355 F.Supp.2d 1269, 1287-88 (D. Utah Jan. 13, 2005) (Cassell, J.). Judge Gertner has exposed many of *Wilson*’s historical and doctrinal flaws. *See United States v. Jaber*, 362 F.Supp.2d 365, 370-76 (D. Mass. 2005) (Gertner, J.). Other district courts too numerous to mention have also declined to drink the Kool-Aid.

This argument is too facile. As the majority points out, the guidelines are inescapably generalizations. They say little about "the history and characteristics of the defendant." Indeed, the guidelines prohibit consideration of certain individualized factors . . . . The guidelines also discourage--except in "exceptional cases"-- consideration of other individualized factors . . . . The very mention of these prohibited and discouraged factors dismays some critics of sentencing who see in them the potential for unseemly consideration of a defendant's plight and a return to the sentencing abuses and disparities that inspired the guidelines. That potential is surely there. We must be concerned about it. But it is also true that the old system operated in the complete absence of guidelines. . . . Despite the dire predictions of some, there is also the possibility that this new system will permit the individualized sentencing absent under the mandatory guidelines system without repeating the disparities so troubling to Congress. As the remedial majority in *Booker* states, the "features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress's preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." 543 U.S. at 264-65. Section 3553(a)'s other factors are not necessarily antithetical to Congress's "preferred direction," and may be part and parcel of it-- "maintaining flexibility sufficient to individualize sentences where necessary." *Id.*

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The guidelines are no longer self-justifying. They are not the safe harbor they once were. However, if district courts assume that the guidelines sentence complies with the sentencing statute, and focus only on the compliance of the non-guidelines sentence urged by the defendant, the district courts will effectively give the guidelines a controlling weight and a presumptive validity that is difficult to defend under the constitutional ruling in *Booker*. . . . [G]iven the close divisions on the Court about the post-*Booker* role of the guidelines, and given the new composition of the Court, it would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post-*Booker* that approximates, in a new guise, the mandatory guidelines.

Jimenez-Beltre, 440 F.3d at 526-27, 528 & n.11 (Lipez, J., dissenting).

**D. Calling Justice Scalia!**

Justice Scalia warned that "unreasonableness" review may be used to "preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges." See United States v. Booker, 543 U.S. 220, 313 (2005). That has

surely come to pass. While the courts ignore the text of 3553(a), accord the guideline range substantial or presumptive weight, yet continue to find facts by a preponderance of the evidence to increase the guideline range or sentence above it, defendants continue to be deprived of their Sixth Amendment rights under Blakely v. Washington, 542 U.S. 296 (2004) and Booker, and their Fifth Amendment right to proof beyond a reasonable doubt as well.

On February 21, 2006, the Supreme Court granted certiorari in Cunningham v. California, No. 05-6551, 2006 WL 386377 (cert. granted, Feb. 21, 2006), where the issue is whether California's *presumptive* sentencing system is constitutional. Under California law as written, the punishment for Cunningham's offense of conviction was 6, 9 or 12 years' imprisonment, with the middle term required absent facts in aggravation or mitigation. The court found aggravating facts by a preponderance of the evidence and sentenced Cunningham to the upper term of 12 years. This appears to be a flat violation of Blakely. The California appellate courts affirmed, however, relying on People v. Black, 35 Cal. 4<sup>th</sup> 1238 (Cal. 2005). In Black, the California Supreme Court held that the California system did not violate Blakely by interpreting California's sentencing law as giving sentencing courts "discretion" to sentence to the lower, middle or upper term, with the middle term being merely "presumptive," and the upper term being the "statutory maximum" for Sixth Amendment purposes. *Id.* at 1257-58. In opposition to Cunningham's petition, the State of California argued that the California Supreme Court's interpretation of the California sentencing statutes is equivalent to the federal sentencing system left in place by Booker.<sup>23</sup>

It seems likely that Cunningham will shed light on whether guidelines based on judicial factfinding by a preponderance of the evidence must be truly "advisory," as the Court said in Booker, or "presumptive" as they were before Booker was decided.

Meanwhile, the textual and constitutional arguments must be litigated and preserved in the district courts, in the courts of appeals, and in petitions for certiorari. Part II of this paper reviews the text of the governing law and explains why it must be followed. Part III explains that presumptive guidelines have already been held to violate the Sixth Amendment, and that the "new" presumptive system must violate the Sixth Amendment as well. Part IV recounts substantial evidence, including the Sentencing Commission's own reports, demonstrating that the guidelines do not reflect all relevant purposes and factors and produce sentences that are excessive. Part V discusses why the Fifth Amendment requires proof beyond a reasonable doubt in a system that accords the guidelines heightened deference.

## **II. The Text of the Governing Sentencing Law**

### **A. Sentencing in the District Court**

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<sup>23</sup> The Cunningham pleadings are available at <http://www.fdap.org/PostCunninghamCertGrProcedures.htm>.

After Booker, the primary sentencing mandate and organizing principle for all sentencing decisions is contained in the statute: The court "**shall**" impose a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing: just punishment in light of the seriousness of the offense, respect for law, deterrence, incapacitation if necessary to protect the public, and needed rehabilitation and treatment.<sup>24</sup> In determining that "particular sentence," the court "**shall** consider" (1) the history and characteristics of the defendant and the circumstances of the offense (including for the first time all *mitigating* characteristics and circumstances), (2) the sentencing purposes just described, (3) the kinds of sentences available (which need not be the kinds recommended in § 5C1.1 but must comply with any applicable statute), (4) the "advisory" guideline range (neither mandatory nor presumptive), (5) the Commission's policy statements about departures and other matters (also "advisory"), (6) the need to avoid *unwarranted* disparities among defendants with similar records convicted of similar conduct (*not* the need to avoid sentences different from the guideline range), and (7) the need to provide restitution to victims, if any.<sup>25</sup>

What spares judicial factfinding from unconstitutionality in the district court is the courts' duty to faithfully apply § 3553(a) as written.<sup>26</sup> A presumptive system based on the assumption that the guidelines already reflect the requirements of § 3553(a), swallows, negates and renders insignificant subsections (1), (2), (3), (6) and (7) of the statute. It is a basic canon of statutory construction that a statute should not be construed to render any of its provisions inoperative, superfluous, or insignificant.<sup>27</sup> A faithful application of the statute requires judges to independently evaluate the seriousness of the offense, the need for deterrence and incapacitation, and the treatment and rehabilitation needs of the defendant, in light of all of the factors that are pertinent in the case, and then to impose a minimally-sufficient sentence to satisfy the statutory sentencing purposes.<sup>28</sup>

The requirement that the sentence be minimally sufficient to satisfy the statutory purposes of sentencing is not just one consideration in sentencing; it is a cap above which

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<sup>24</sup> 18 U.S.C. § 3553(a)(2).

<sup>25</sup> 18 U.S.C. § 3553(a)(1)-(7).

<sup>26</sup> Booker, 543 U.S. at 259-60.

<sup>27</sup> See Duncan v. Walker, 533 U.S. 167, 174 (2001); Collautti v. Franklin, 439 U.S. 379, 392 (1979); Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas, 417 F.3d 216, 222 n.8 (1<sup>st</sup> Cir. 2005); Herman v. Hector I. Nieves Ttransp., Inc., 244 F.3d 32, 36 (1<sup>st</sup> Cir. 2001).

<sup>28</sup> See United States v. Pho, 433 F.3d 53, 64 (1<sup>st</sup> Cir.2006) (district court may not "construct[] a new sentencing range based on the categorical substitution of a 20:1 crack-to-powder ratio for the 100:1 ratio embedded in the sentencing guidelines," but "we do not intend to diminish the discretion that, after Booker, district courts enjoy in sentencing matters or to suggest that, in a drug-trafficking case, the nature of the contraband and/or the severity of a projected guideline sentence may not be taken into account on a case-by-case basis.").

the Court is statutorily prohibited from sentencing; the sentencing guideline range is statutorily subordinate to it. Recently, in United States v. Foreman, the Sixth Circuit strongly endorsed the primacy of the “sufficient but not greater than necessary” mandate in district courts’ sentencing decisions.<sup>29</sup> Otherwise, it has been articulated by the courts of appeals in only a few cases and not consistently.<sup>30</sup> However, this sentencing principle dates back to the 1800s, influenced the Founding Fathers in their views about punishment,<sup>31</sup> is implicit or explicit in the guideline systems of most states<sup>32</sup> and in the Model Penal Code,<sup>33</sup> and is clearly stated in section 3553(a), which now governs sentencing. Its rationale is that severe penalties are costly to the public, usually harmful to offenders, and have uncertain and limited deterrent value, so the preference is for the least punishment necessary for the public welfare.<sup>34</sup>

It is important to recognize that the role of the guideline range in the new sentencing structure is “advisory,”<sup>35</sup> while its role in the system just struck down was “presumptive.” See Part III, *infra*. Courts tend to calculate it first because it is the only factor with a number attached to it. It seems unobjectionable for the court to calculate that factor first, then once calculated, to “throw[] this ingredient into the section 3553(a) mix,” and consider it in light of the minimally sufficient mandate and other factors material to the case.<sup>36</sup> This does not make the guideline range the primary sentencing

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<sup>29</sup> See United States v. Foreman, 436 F.3d 638, 643-44 & n.1 (6th Cir. 2006).

<sup>30</sup> United States v. Williams, \_\_ F.3d \_\_, 2006 WL 68559 \*4 (11<sup>th</sup> Cir. Jan. 13, 2006) (affirming district court’s conclusion that “its final sentence of 90 months’ imprisonment was ‘sufficient, but not greater than necessary’ to punish, deter, and rehabilitate Williams.”); United States v. Cawthorn, 419 F.3d 793, 802 (8<sup>th</sup> Cir. 2005) (“district court’s duty” is that it “shall impose a sentence sufficient but not greater than necessary”); United States v. Neufeld, 2005 WL 3055204 \*9 (11<sup>th</sup> Cir. Nov. 16, 2005) (a “more-than-adequate sentence would conflict with § 3553(a)’s injunction against greater-than-necessary sentences”); United States v. Soto, 2005 WL 281178 (3d Cir. Oct. 27, 2005) (the sentence must be “adequate and appropriate, not greater than necessary”); United States v. Acosta-Luna, 2005 WL 1415565 (10<sup>th</sup> Cir. June 17, 2005) (the “provisions of 18 U.S.C. § 3553(a), unconstrained by mandatory application of the Guidelines, are now preeminent in sentencing”).

<sup>31</sup> Garry Wills, Inventing America 94 (1979); David McCullough, John Adams 66-67 (2001); Jeremy Bentham, The Rationale of Punishment 23 (1830) (“All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”).

<sup>32</sup> Richard S. Frase, Punishment Purposes, 58 Stan. L. Rev. 67, 68 (2005).

<sup>33</sup> Model Penal Code: Sentencing § 1.02(2)(a)(iii) (Preliminary Draft No. 3 2004).

<sup>34</sup> Frase, *supra* note 26, at 68; Norval Morris, The Future of Imprisonment 59-62 (1974).

<sup>35</sup> Booker, 543 U.S. at 245.

<sup>36</sup> United States v. McBride, 434 F.3d 470, 476 (6<sup>th</sup> Cir. 2006).

mandate or organizing principle of the sentencing decision. To the contrary, § 3553(a) “lists the Sentencing Guidelines as one factor to be considered in imposing sentence.”<sup>37</sup>

## **B. Appellate Review**

In order to preserve the advisory guidelines’ constitutionality, the remedy majority found it necessary to excise the appellate review standards that had given heightened deference to the guideline range. It stated that the pre-2003 statute “told appellate courts to determine whether [a sentence that ‘falls outside the applicable Guideline range’] ‘is unreasonable’ with regard to 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.” 543 U.S. at 261. This standard would now apply not just to sentences outside the guideline range, but “across the board.” *Id.* at 263. “[T]he Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a).” *Id.* at 260.

In fact, contrary to the notion that the guidelines already reflect all relevant purposes and factors, Justice Breyer invited the Sentencing Commission to use this opportunity to do better. He did not claim that reasonableness review would produce “the same uniformity” as the standard just struck down. *Id.* at 263-64. Instead, he invited the Sentencing Commission to “collect and study appellate court decisionmaking” under this new standard, and “modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices,” and “thereby promot[ing] uniformity in the sentencing process.” *Id.* at 263. It seems unlikely that Justice Breyer contemplated that the Commission would learn anything if the courts simply continued to treat the guidelines as presumptively reasonable.

## **III. Presumptive Guidelines Have Already Been Held to Violate the Sixth Amendment.**

Though the Supreme Court called the pre-Booker guidelines “mandatory,” they were actually “presumptive.” Congress adopted the standard set forth in the now-excised §3553(b)(1) -- requiring a sentence within the guideline range unless there was a circumstance of a kind or degree not taken into consideration by the Commission in formulating guidelines -- during the legislative process to ensure that the guidelines were

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<sup>37</sup> Booker, 543 U.S. at 233-34. See also United States v. Gorsuch, 404 F.3d 543, 545(1<sup>st</sup> Cir. 2005) (“the district court must consider the sentencing guidelines – but only on an advisory basis – and also must consider the other statutory factors set forth in 18 U.S.C. § 3553(a) . . .”) (emphasis supplied); United States v. Green, 426 F.3d 64, 65 (1<sup>st</sup> Cir. 2005) (“the district court must still consult the guidelines as one of several factors in resentencing . . . .”); United States v. Robinson, 433 F.3d 31, 35 (1<sup>st</sup> Cir. 2006) (“After Booker, the Guidelines are merely advisory, which means that a district court has considerable leeway to impose a sentence that falls outside of the range suggested by the Guidelines.”).

“presumptive” rather than “advisory” as they had originally been conceived.<sup>38</sup> As Justice Stevens explained for the merits majority, the ability to depart upward might, at first glance, lead one to believe that the judge was bound only by the statutory maximum (thus not requiring Sixth Amendment rights for any sentence up to that maximum), but this was not so because upward departures were only available when the guideline did not take into account a relevant factor. Thus, the “availability of a departure in specified circumstances does not avoid the constitutional issue.” *Id.* 234.

It is difficult to see any difference for constitutional purposes between the presumptive system just struck down (in which departures are allowed based on factors not taken into account by the Commission) and the new presumptive system (in which the guideline range is presumptive because the Commission already took into account all relevant purposes and factors). In fact, the latter appears to be even more mandatory; if the Guidelines already reflect all of the purposes of sentencing and all relevant sentencing factors, as DOJ and the Commission contend, then there is no rationale for ever varying from them.<sup>39</sup>

#### **IV. The Guidelines Are Not a Mirror Image of Section 3553(a).**

##### **A. The Statutory Directives to the Commission and Those to the District Courts Are Not Congruent.**

28 U.S.C. §§ 991 and 994, which contain directives to the Commission regarding how to formulate guidelines, and § 3553(a), which tells the district courts how to impose sentence, are not congruent. Thus, even if the Commission had followed congressional directives to the letter, it would not have produced guidelines that “embody all of the applicable sentencing factors for a given offense and offender.”<sup>40</sup>

**Minimally Sufficient Mandate.** Among other directives, *see* Subpart B, *infra*, Congress directed the Sentencing Commission to establish sentencing policies and practices that “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2).”<sup>41</sup> In contrast, Congress directed sentencing courts that they “shall impose a

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<sup>38</sup> *See* S. Rep. No. 225, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 52 n.193 (1983); 124 Cong. Rec. 209, 382-83 (1978); U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (Fifteen Year Report) at 7, 16-18 (2004), available at [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm); Marc Miller & Ronald Wright, Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Discretion, 2 *Buff. Crim. L. Rev.* 723 (1999) (recounting adoption of “presumptively reasonable” guidelines in the original SRA).

<sup>39</sup> Paul J. Hofer, Immediate and Long-Term Effects of *United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences? at 26-29, forthcoming in *Ariz. State L. Rev.*

<sup>40</sup> Prepared Testimony of Judge Ricardo H. Hinojosa at 18, March 16, 2006, <http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf>.

<sup>41</sup> 28 U.S.C. § 991(b)(1)(A).

sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)].”<sup>42</sup> District courts are subject to the minimally sufficient limitation, while the Sentencing Commission is not.

**Mitigating History, Characteristics, and Circumstances Prohibited or Discouraged.** In determining the “particular sentence” which is sufficient but not greater than necessary, the district court must consider all of the purposes and factors listed in § 3553(a), including the “nature and circumstances of the offense and the history and characteristics of the defendant.”<sup>43</sup> Further, “[n]o limitation shall be placed on the information concerning the background, character, and conduct” of the defendant which a district court “may receive and consider for the purpose of imposing an appropriate sentence.”<sup>44</sup>

In contrast, the Guidelines’ policy statements prohibit,<sup>45</sup> discourage<sup>46</sup> hedge with limitations and exceptions,<sup>47</sup> or simply do not mention the defendant’s mitigating characteristics and mitigating circumstances of the offense. Some of the restrictions the Commission placed on mitigating factors were at the direction of Congress but many were not. Congress directed the Commission to make the Guidelines completely neutral as to race, gender, national origin, creed, and socio-economic status.<sup>48</sup> On its own, the

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<sup>42</sup> 18 U.S.C. § 3553(a).

<sup>43</sup> Id.

<sup>44</sup> 18 U.S.C. § 3661.

<sup>45</sup> See U.S.S.G. § 5H1.10 (race, gender, national origin, creed, and socio-economic status); § 5H1.4 (drug or alcohol dependence and gambling addiction); § 5H1.12 (lack of guidance as a youth and similar circumstances indicating a disadvantaged background); § 5K2.12 (personal financial difficulties or economic pressures on a trade or business); § 5K2.13 (diminished capacity if the offense involved a threat of violence, or where diminished capacity was caused by voluntary use of drugs or other intoxicants); § 5K2.19 (post-sentencing rehabilitation on re-sentencing); § 5K2.20 (single aberrant act if the defendant had any “significant prior criminal behavior” even if so remote or minor that it was uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum).

<sup>46</sup> See U.S.S.G. § 5H1.1 (age), § 5H1.2 (education and vocational skills), § 5H1.3 (mental and emotional conditions not meeting the diminished capacity standard), § 5H1.4 (physical condition or appearance), § 5H1.5 (employment record), § 5H1.6 (family ties and responsibilities), § 5H1.11 (military, civic, charitable or public service, good works).

<sup>47</sup> See U.S.S.G. § 5K2.10 (victim’s conduct), § 5K2.11 (lesser harms), § 5K2.12 (coercion and duress), § 5K2.13 (diminished capacity), § 5K2.16 (voluntary disclosure), § 5K2.19 (post-sentencing rehabilitation efforts), § 5K2.20 (aberrant behavior), and § 5K2.23 (discharged terms of imprisonment).

<sup>48</sup> 28 U.S.C. § 994(d).

Commission prohibited drug or alcohol dependence, gambling addiction, lack of guidance as a youth, similar circumstances indicating a disadvantaged background, post-sentencing rehabilitation on re-sentencing, financial difficulties, diminished capacity in certain circumstances, and aberrant conduct in certain circumstances. Congress told the Commission to assure that the guidelines “reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”<sup>49</sup> The Commission not only strictly limited consideration of those factors, strictly limited the additional factors of age, mental and emotional conditions, physical condition or appearance, and military, civic, charitable or public service, and good works.

As many have noted and a review of these provisions reveals, the Commission did not explain its prohibitions and restrictions or cite to any sentencing purposes, data or research, and departed from past practice in doing so.<sup>50</sup>

Whatever the impetus (Congress or the Commission on its own), the Guidelines’ policy statements do not reflect the same individualized sentencing required by § 3553(a). Thus, the courts have recognized that these previously prohibited or discouraged factors may now be fully considered in sentencing.<sup>51</sup>

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<sup>49</sup> 28 U.S.C. § 994(e).

<sup>50</sup> E.g., Marc Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1225 (April 2004); Michael M. O’Hear, The Original Intent of Uniformity in Sentencing, at 31-37, forthcoming in University of Cincinnati Law Review, Vol. 75 available now at SSRN: <http://ssrn.com/abstract=800831>.

<sup>51</sup> E.g., United States v. Antonakopoulos, 399 F.3d 68 (1<sup>st</sup> Cir. 2005) (defendant was caretaker for brain damaged son though there were alternative means of care); United States v. Haidley, 400 F.3d 642, 645 (8<sup>th</sup> Cir. Mar. 16, 2005) (defendant used embezzled money for her child’s high medical expenses, and had two young children at home); United States v. MacKinnon, 401 F.3d 8,11 (1<sup>st</sup> Cir. 2005) (remanding for re-sentencing where district court had said that career offender guideline produced a sentence that was “unjust, excessive and obscene”); United States v. Heldeman, 402 F.3d 220 (1<sup>st</sup> Cir. 2005) (district court may have imposed lower sentence based on advanced age and medical condition, and that “unlawful activities were the exception to an otherwise lawful medical practice,” though “these factors do not approach what is required to justify a downward departure”); United States v. Morin, 403 F.3d 41 (1<sup>st</sup> Cir. 2005) (defendant “could raise other arguments under advisory guidelines that were previously precluded”); United States v. Gorsuch, 404 F.3d 543 (1<sup>st</sup> Cir. 2005) (“serious mental illness, maternal responsibilities, and lack of a criminal record may be more relevant than under the pre-Booker regime of mandatory guidelines”); United States v. Lewis, 406 F.3d 11, 21-22 (1<sup>st</sup> Cir. 2005) (remanding for re-sentencing where district court may have imposed a different sentence based on its “expressed concern that Lewis’s Guidelines range was significantly higher than that of his co-defendant, despite being sentenced on the same charges,” and that the guideline sentence of 319 months was “a virtual life sentence” given the defendant’s age of 38); United States v. Meada, 408 F.3d 14 (1<sup>st</sup> Cir. 2005) (remanding for re-sentencing because court may not have attached same sentencing consequences to perjury); United States v. Burhoe, 409 F.3d 5 (1<sup>st</sup> Cir. 2005) (remanding for re-sentencing where court could not depart based on restrictions in

**Aggravating Factors Over-Represented.** In contrast to mitigating offender characteristics and offense circumstances, the Guidelines fully (and excessively, see Subpart B(3)(d), infra) reflect one aggravating characteristic of the defendant (criminal history) and a seemingly infinite and ever-increasing sea of aggravating offense circumstances.<sup>52</sup> Thus, it is highly probable that the guideline range already takes into account whatever factor the government may argue for a sentence above the guideline range, and it should be extremely difficult for a judge to justify a sentence higher than the guideline range as insufficient to meet the goals of sentencing. Where the judge gave such a sentence, careful attention should be paid to whether the reasons are already reflected in the base offense level, specific offense characteristics, and/or criminal history rules that produced the guideline range.

**B. The Sentencing Commission Has Acknowledged that the Guidelines Produce Sentences that Are Disproportionate to the Seriousness of the Offense and the Risk of Recidivism in Many Cases, that it Has Not Fully Achieved the Goal of Eliminating Unwarranted Disparity While Providing for Warranted Individualized Sentencing, and that Unwarranted Disparity Persists Under the Guidelines and is Inherent in Many of the Guidelines' Most Basic and Pervasive Rules.**

The authorities in this subpart can be used to factually rebut the claim that the Guidelines reflect the purposes of sentencing and other factors set forth in § 3553(a). Subsection 1 sets forth the statutory directives the Commission was to follow in formulating the Guidelines. Subsection 2 is a brief summary of what the experts say about whether the Commission has carried out those directives; the answer is a resounding “no.” Subsection 3 sets forth a fairly comprehensive summary of the problems the Commission itself has identified in its Fifteen Year Report and a few of its other publications. A few examples should be enough, as relevant to the case.

A general attack on the claim that the guidelines already reflect all relevant purposes and factors should be combined with arguments individualized to the defendant and the offense that the sentence was or was not sufficient but not greater than necessary to achieve the goals of sentencing based on case-specific factors. Further, avoid citing actions by the Commission that could be construed as *required* by Congress. In United States v. Pho, the First Circuit interpreted Congress' inaction with respect to the

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§5K2.13); United States v. Wilkerson, 411 F.3d 1, 10 (1st Cir. 2005) (court could consider “horrible young life”); United States v. Bisanti, 414 F.3d 168, 173-74 (1<sup>st</sup> Cir. 2005) (though not allowed as grounds for departure, court could consider mitigating facts that defendant was ripped off and given bad advice, that he voluntarily returned to this country to face charges, that he had no previous record, and family circumstances); United States v. Ryder, 414 F.3d 908, 920 (8<sup>th</sup> Cir. 2005) (advanced age and serious medical problems indicated no risk of recidivism and burden on prison system); United States v. Lata, 415 F.3d 107, 113 (1<sup>st</sup> Cir. 2005) (though age and infirmity were discouraged bases for departure, they may be considered under 3553(a), especially where they diminish the risk of re-offense).

<sup>52</sup> O’Hear, supra note 49.

powder/crack disparity as a reflection of congressional intent that the disparate ratio be maintained in the Guidelines, and held that the district court therefore was not free to replace that ratio with a different ratio in calculating the guideline range.<sup>53</sup> Taken to its logical conclusion, the “congressional intent” rationale would mean that all of the guidelines are mandatory, since Congress allowed them all to become law and dictated explicit increases on a number of occasions.<sup>54</sup> As Justice Scalia said, “any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional.”<sup>55</sup> Implicitly recognizing that the government’s broad “congressional intent” rationale would collide with Booker’s holding that the Guidelines must be treated as advisory, the First Circuit made clear that, while the district court may not literally replace the 100:1 ratio as a categorical matter, the court may exercise its discretion not to impose a sentence within the range if the nature of the drug (or other circumstances) do not support the severity of that range in the particular case.<sup>56</sup> Nonetheless, for the purpose of demonstrating the falsity of the claim that the Guidelines already reflect § 3553(a) purposes and factors, it is enough, and safest, to focus on the Commission’s actions that were not dictated by Congress. As set forth in subsection 3, the Fifteen Year Report does a fairly accurate job of distinguishing between guideline rules that were the product of congressional directives and those that were due to the Commission’s own actions.

## **1. Statutory Directives to the Commission In Formulating Guidelines**

In 28 U.S.C. § 991(b), Congress directed the Sentencing Commission to:

- (1) establish sentencing policies and practices for the Federal criminal justice system that --
  - (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
  - (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
  - (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

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<sup>53</sup> United States v. Pho, 433 F.3d 53 (1<sup>st</sup> Cir.2006).

<sup>54</sup> See, e.g., United States v. Perry, 389 F.Supp.2d 278, 307 n.33 (D.R.I. 2005).

<sup>55</sup> Booker, 543 U.S. at 311 (Scalia, J., dissenting in part).

<sup>56</sup> Pho, 433 F.3d at 64.

(2) develop means of measuring the degree to which sentencing practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.<sup>57</sup>

Congress directed the Sentencing Commission, in formulating guidelines, to “promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection (b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities,”<sup>58</sup> to “take into account the nature and capacity of [correctional] facilities” and “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons,”<sup>59</sup> and to periodically review and revise the guidelines based on consultation with authorities in the field and representatives from all aspects of the criminal justice system, including the Judicial Conference, the Bureau of Prisons, U.S. Probation, the Federal Public Defenders, and the Department of Justice.<sup>60</sup>

According to then-Commissioner Breyer, the primary drafter of the initial set of Guidelines, “the Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years. Thus, the system is 'evolutionary'--the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time.”<sup>61</sup>

In its Fifteen Year Report, the Commission described the components of guideline development as (1) “collaboration among policymakers, implementers, and other stakeholders,” (2) “utilization of specialized criminological and sentencing expertise,” and (3) “political accountability through Executive participation and Legislative directives and review.”<sup>62</sup> The first component is required by 28 U.S.C. § 994(o), and envisions a “highly collaborative process, so that the Guidelines would be grounded in “reason and practicality,” and to ensure that the essential participants regarded them as “legitimate and credible.”<sup>63</sup> The second component is envisioned by 28 U.S.C. §§ 991(b)(1)(C) and (b)(2), as set forth above. The third is required by 28 U.S.C. § 991(a) (DOJ has an *ex officio* non-voting seat on the Commission), 28 U.S.C. § 994(p)

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<sup>57</sup> 28 U.S.C. § 991(b).

<sup>58</sup> 28 U.S.C. § 994(f).

<sup>59</sup> 28 U.S.C. § 994(g).

<sup>60</sup> 28 U.S.C. § 994(o).

<sup>61</sup> Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 7-8 (1988).

<sup>62</sup> Fifteen Year Report at 19.

<sup>63</sup> Id. at 19-20.

(Commission submits amendments to Congress by May 1 and they become law no earlier than 180 days later and no later than the following November), and whatever directives Congress issues.

## **2. Brief Summary of Assessment of the Commission’s Work by Experts and Observers.**

According to experts and close observers, the Sentencing Commission has failed to promulgate, review or revise the guidelines based on its own data, collaboration with frontline actors, or the purposes of sentencing.<sup>64</sup> Average sentence length has more than doubled as annual amendments have, except in rare instances, made punishment only more and more severe, creating unwarranted disparity and inappropriate uniformity in the process. From the outset, because the Commission could not agree on a sentencing philosophy, it did not develop the Guidelines based on the purposes of sentencing in § 3553(a)(2). It purportedly relied on empirical data regarding past practices, but it departed from empirical data in important respects (e.g., degraded the importance of offender characteristics, increased the severity of sentences for white collar and drug offenders) based on the views of individual Commissioners. From the beginning and over time, the Guidelines have been promulgated without justification in the data and information before the Commission and without explanation. Increasingly, the upward ratchet has been driven by the demands of DOJ, backed with implicit or explicit threats to go to Congress, or pursuant to congressional directives at DOJ’s instance or with its acquiescence. Congress and DOJ are untrustworthy policymakers because they act on the basis of politics. The Commission was created as an independent expert body to provide the neutrality and competence that Congress and DOJ lack. However, the Commission has not acted as an independent expert body even when free of congressional interference. This seems to have bred disrespect for the Commission by DOJ and Congress, and clearly has created a lack of confidence in its work on the part of

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<sup>64</sup> See, e.g., United States v. Jaber, 362 F.Supp.2d 365, 370-76 (D. Mass. 2005) (explaining in detail the historical reasons why guidelines do not reflect the purposes of punishment); Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 419 (1992) (“Since their introduction in 1987, however, the federal sentencing guidelines have not been designed or applied in a manner explicitly intended to achieve specific purposes of sentencing.”); Paul J. Hofer & Mark H. Allenbaugh, The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 Am. Crim. L. Rev. 19, 33-34 (2003) (no Commission has ever articulated a philosophy of sentencing ranking the purposes of sentencing because the original Commission could not agree on one, but two purposes – severity proportionate to seriousness of offense and risk of recidivism – can be “discovered” as primary in the guidelines; however, the guidelines in notable instances produce sentences that are disproportionate to the resulting harm and personal culpability; for example, formulation of drug guidelines was “far from independent or based on consideration of past practice or the purposes of sentencing”); Richard S. Frase, Punishment Purposes, 58 Stan. L. Rev. 67 (2005) (Guidelines “lack a principled basis,” but section 3553(a) reflects the “limiting retributivism” model most widely followed in the United States and could bring “needed coherence” to federal sentencing).

judges, defense lawyers, line prosecutors, and experts in the field.<sup>65</sup> As a result, the guidelines are not treated as a font of wisdom, and are primarily used as a bludgeon to extract guilty pleas, waivers and cooperation.<sup>66</sup>

The Commission's work, moreover, does not have the same reliability as that of other agencies. While the Commission's proposed amendments are subject to a notice and comment period,<sup>67</sup> they are not subject to the other requirements of the Administrative Procedures Act. The Commission's actions cannot be challenged as arbitrary and capricious, need not be rational or justified on the basis of a record, and it need not even address the issues raised in public comment.<sup>68</sup> As a result, the Commission has only occasionally attempted to justify Guideline increases.<sup>69</sup>

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<sup>65</sup> See, e.g., Michael M. O'Hear, The Original Intent of Uniformity in Sentencing, at 31-37, forthcoming in *University of Cincinnati Law Review*, Vol. 75 available now at SSRN: <http://ssrn.com/abstract=800831>; Albert W. Alschuler, Disparity: The Normative and Empirical Failure of the Federal Guidelines, 58 *Stan.L.Rev.* 85 (2005); Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 *Colum. L. Rev.* 1315 (2005); Constitution Project's Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005); Report of the ABA Justice Kennedy Commission, Summary of Recommendations, available at <http://www.abanet.org/media/kencomm/summaryrec.pdf>; Marc L. Miller, Sentencing Equality Pathology, 54 *Emory L. J.* 271, 277 (2005); Michael Tonry, The Functions of Sentencing and Sentencing Reform, 58 *Stan. L. Rev.* 37 (October 2005); Rachel E. Barkow, Our Federal System of Sentencing, 58 *Stan. L. Rev.* 119 (October 2005); Frank O. Bowman, III, Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform, 58 *Stan. L. Rev.* 235 (October 2005); Jeffrey Parker & Michael Block, The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 *Geo. Mason L. Rev.* 1001 (2001); William J. Stuntz, The Pathological Politics of Criminal Law, 100 *Mich. L. Rev.* 505 (2001); Marc Miller & Ronald Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Discretion, 2 *Buff. Crim. L. Rev.* 723 (1999); Marc Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 *Stan. L. Rev.* 1211, 1224-27 (April 2004); Letter to Sentencing Commission from Federal Public and Community Defenders Re: Report on Federal Sentencing Since *United States v. Booker* at 2, 4-6, 10, 12-15, January 10, 2006, available now at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/01/defenders\\_advis.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/defenders_advis.html), forthcoming in Volume 18 of the *Federal Sentencing Reporter*.

<sup>66</sup> E.g., O'Hear, *supra* note 49, at 61-64; Frank O. Bowman III, Only Suckers Pay the Sticker Price: The Effect of "Fast Track" Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System at 4 (September 23, 2003), [http://www.ussc.gov/hearings/9\\_23\\_03/fbowman.pdf](http://www.ussc.gov/hearings/9_23_03/fbowman.pdf).

<sup>67</sup> 28 U.S.C. § 994(x).

<sup>68</sup> Jose Cabranes & Kate Stith, Fear of Judging: Sentencing Guidelines in the Federal Courts 57 (1998); Joseph W. Luby, Reigning in the Junior Varsity Congress: A Call for Meaningful

For those who have time to read only one article, I recommend Michael M. O’Hear, The Original Intent of Uniformity in Sentencing, forthcoming in University of Cincinnati Law Review, Vol. 75 available now at SSRN: <http://ssrn.com/abstract=800831>.

### 3. The Commission’s Assessment of its Work Through 2002.

The Commission’s Fifteen Year Report and some of its other publications acknowledge many ways in which the Guidelines do not effectively (meaning efficiently, proportionately and fairly) achieve the purposes of sentencing and other statutory directives, including minimizing prison overcrowding and avoiding unwarranted disparity. (The Report cites a number of articles that are critical of the Commission’s work; some of that criticism is interspersed with the Commission’s own statements below.)

#### a. Purposes of Sentencing

The Commission “never explicitly articulated a philosophy of sentencing” prioritizing the purposes of punishment because the Commission could not agree on one, but the Guidelines “reflect” a “primary emphasis on punishment proportionate to the seriousness of the offense,” and “lengthier incarceration for offenders most likely to recidivate.”<sup>70</sup> (What this means is that the Commission has never tried to formulate guidelines based on sentencing purposes; the two purposes noted in the Report were “discovered” by Commission staff through a process of “rational reconstruction” of what the purposes “must be” given what the rules are, though the rules are flawed even in achieving those two purposes because, for example, they overemphasize “harm” defined as quantity and underemphasize personal culpability.<sup>71</sup>)

Hence, after fifteen years, the Commission still did not claim to know that the Guidelines effectively meet the purposes of sentencing:

Increasing certainty and severity . . . were not intended as ends in themselves, but as *means* to the ends of just punishment and crime control through deterrence and

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Judicial Review of the Federal Sentencing Guidelines, 77 Wash. U. L.Q. 1199, 1221 (1999).

<sup>69</sup> Frank O. Bowman III, Pour Encourager Les Autres?, 1 Ohio State J. Crim. L. 373, 390 (2004).

<sup>70</sup> Fifteen Year Report at 14, 80.

<sup>71</sup> See Hofer & Allenbaugh, supra note 63. Dr. Hofer is a Senior Research Associate at the Commission. Allenbaugh is a former staff attorney. They note that “the Guidelines require a potentially false precision in the measurement of some offense harms, notably drug quantity, while undervaluing the importance of individual offender culpability in the proper assessment of offense seriousness.” Id. at 24; see also id. at 33-35, 68-73.

incapacitation. Analyses currently underway at the Commission will measure the degree to which the increases in sentence certainty and severity have been “effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of Title 18, United States Code.”<sup>72</sup>

The Commission is *currently* analyzing ways to make criminal history category a better predictor of risk of recidivism, and is *currently* assessing the deterrent and other crime control effects of the Guidelines.<sup>73</sup>

Regarding deterrence, the Commission’s Senior Research Associate, Dr. Paul Hofer, has noted elsewhere that research on deterrence, both general and specific “has not yet yielded findings that can inform the design of specific guideline provisions.”<sup>74</sup> Even the Department of Justice has found that incarceration has little effect on reducing drug crime because drug crime is driven by demand, and low-level dealers and couriers are easily replaced.<sup>75</sup> Nor do lengthy terms of incarceration have a deterrent effect on white-collar offenders, presumably the most rational group of offenders.<sup>76</sup> Importantly, the Commission was advised by a deterrence researcher that certainty is more important to deterrence than severity.<sup>77</sup> DOJ has found that a short prison sentence is just as likely to deter low-level drug offenders as a long prison sentence.<sup>78</sup> Thus, added sentence length for the purpose of deterrence appears to be unwarranted.

Rehabilitation was not taken into account in formulating the guidelines, other than requiring judges to assess the need for training and treatment in imposing conditions of probation or supervised release.<sup>79</sup>

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<sup>72</sup> Fifteen Year Report at 139 (emphasis in original); see also id. at 11 (results of research regarding whether the Guidelines best accomplish the purposes of sentencing will be addressed in a recidivism study underway and other future reports).

<sup>73</sup> Id. at 13.

<sup>74</sup> See Hofer & Allenbaugh, supra note 63, at 61-62.

<sup>75</sup> U.S. Department of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories, Executive Summary 2-5 (February 4, 1994) (“DOJ Drug Offender Analysis”). See also The Sentencing Project, Incarceration and Crime: A Complex Relationship at 6-7 (2005).

<sup>76</sup> See Sally S. Simpson, Corporate Crime, Law, and Social Control 6, 9, 35 (Cambridge University Press) (2002); David Weisburd et al., Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes, 33 Criminology 587 (1995).

<sup>77</sup> Hofer & Allenbaugh, supra note 63, at 61 n. 192.

<sup>78</sup> DOJ Drug Offender Analysis, supra note 74.

<sup>79</sup> Fifteen Year Report at 13.

Departures were intended to “maintain sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices” as required by 28 U.S.C. § 991(b)(1)(B), to “allow fine-tuning of sentences when literal application of a guideline would fail to achieve the guideline’s intended purpose,” and to provide a feedback mechanism to the Commission.<sup>80</sup> However, the Commission and appellate courts have treated the departure power more restrictively than originally intended.<sup>81</sup>

The Commission maintains a large data collection as a way of responding to the statutory mandates to “develop means of measuring the degree to which sentencing is effective in meeting the purposes of sentencing” and to “reflect advancement in the knowledge of human behavior.”<sup>82</sup> However, it lacks “good data on all legally relevant considerations that might help explain differences in sentences,” and the “lack of data is especially severe regarding circumstances that might justify departure from the guidelines,” because it does not collect data on offense and offender characteristics that may justify a sentence outside the guideline range unless a departure was actually granted.<sup>83</sup> Thus, if a defendant in District A receives a below-guideline sentence for extraordinary family circumstances, the Commission records the reason (and reports it in its Booker Report as “non-compliant”). If a precisely situated defendant in District B receives a guideline sentence, the Commission collects no information about her extraordinary family circumstances (and reports the sentence as “compliant”). Despite the labels, the Commission’s data does not tell us whether the defendant in District A received unwarranted leniency or the defendant in District B received unwarranted severity.

### **b. Undue Severity Generally**

When punishment is disproportionate to the offense, it squanders resources, creates disrespect for law, and fails to achieve just punishment.

The average prison term served by federal offenders has more than doubled since the Guidelines went into effect.<sup>84</sup> This dramatic increase in severity has occurred partly as a result of legislation that overrode or ignored the Commission’s research and collaboration, but also as a result of the Commission’s own “substantial independent

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<sup>80</sup> Id. at 33.

<sup>81</sup> Hofer & Allenbaugh, supra note 63, at 83; Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180, \*\*30, 35 (Jan./Feb. 1999)

<sup>82</sup> Fifteen Year Report at 20.

<sup>83</sup> Id. at 119.

<sup>84</sup> Id. at 10, 46, 139.

contribution.”<sup>85</sup> The initial Commission used data on past sentencing practices as a starting point, but for fraud, drug trafficking, immigration offenses, robbery of an individual, murder, aggravated assault, and rape, “the Commission, either on its own initiative or in response to congressional actions, established guidelines that were significantly more severe than past practice.”<sup>86</sup>

At the outset and increasingly over time, “[t]he guidelines have had effects on severity that are independent of mandatory minimum penalty statutes,” and “[m]any offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums.”<sup>87</sup> Independent of mandatory minimums, the Guidelines account for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and a doubling of sentences for firearm trafficking and illegal firearm possession under 18 U.S.C. § 922(g).<sup>88</sup> The effects of the Economic Crimes Package and Sarbanes-Oxley amendments were not available at the time the Report was written.<sup>89</sup>

“Clearly, the guidelines have had an effect on sentencing independent of statutory minimum penalties. In addition, while the guidelines have been generally used to increase sentence severity, they *can be* used to decrease sentence severity for targeted offenses or offenders, *if* policymakers choose to do so.”<sup>90</sup> Obviously, they have not been.

According to the Report, the original Commission did not intend that an endless number of complex adjustments would be added to the Guidelines; rather, departures were supposed to allow fine-tuning for differences. Instead, “factor creep” has occurred: “As more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”<sup>91</sup> Referencing a recent speech by Justice Breyer, the Report states that “[c]omplex rules with many adjustments may foster a perception of a precise

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<sup>85</sup> Id., Executive Summary at vi, xvii; id. at 44.

<sup>86</sup> Id. at 47. The Commission never explained these increases in any document or dataset. See, e.g., Miller & Wright, supra note 19.

<sup>87</sup> Fifteen Year Report at 138.

<sup>88</sup> Id. at 139; see also id. at 54, 62, 64, Fig. 2.13.

<sup>89</sup> Id. at 56.

<sup>90</sup> Id. at 140 (emphasis supplied).

<sup>91</sup> Id. at 137, citing Barry Ruback & Jonathan Wroblewski, The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification, 7 Psychol. Pub. Pol’y & L. 739, 742 (2001) (Complexity of Guidelines has created a “façade of precision” which “undermines the goals of sentencing.”).

moral calculus, but on closer inspection this precision proves false.”<sup>92</sup> In response to “pressure,” adjustments were added “without a sound policy basis” and without a need having been “demonstrated empirically.”<sup>93</sup> The research cited at this point in the Report recounts a history of the Commission acting in response to real or perceived pressures by law-and-order interests within and outside the Commission, rather than data and the purposes of sentencing.<sup>94</sup>

At the outset, many recommended that home, community and intermittent confinement be used as a cost-saving measure for some offenders who would otherwise be imprisoned, but those sanctions have been used almost exclusively to increase the severity of punishment for offenders who would otherwise receive simple probation.<sup>95</sup> A majority of judges responding to a 2002 survey urged greater availability of probation with confinement conditions, especially for drug offenders.<sup>96</sup> The Commission has not studied non-prison alternatives as a more effective and less costly way to satisfy sentencing purposes in certain cases or classes of cases.<sup>97</sup> Only recently has it suggested that rehabilitation programs focused on drug treatment and education may have a high cost/benefit ratio,<sup>98</sup> though it has done nothing about it. Meanwhile, mandatory minimum laws, the drug guidelines independent of mandatory minimums, and the career offender guideline misdirect resources from the kingpins, traffickers, and repeat offenders Congress had in mind (in the Anti-Drug Abuse Act and 28 U.S.C. § 994(h)) toward low-level, low-recidivist offenders.<sup>99</sup>

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<sup>92</sup> Fifteen Year Report at 137. See Justice Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent. R. 180 (Jan./Feb. 1999) (“The precision is false. For this reason, I believe the commission should review the present guidelines, acting forcefully to diminish significantly the number of offense characteristics attached to individual crimes.”).

<sup>93</sup> Fifteen Year Report at 138.

<sup>94</sup> See Jeffrey S. Parker & Michael K. Block, The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?, 27 Am. Crim. L. Rev. 289 (1989); Jeffrey S. Parker & Michael K. Block, The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001 (2001); Aaron Rappaport, The State of Severity, 12 Fed. Sent. R. 3 (July/August 1999); Barry Ruback & Jonathan Wroblewski, The Federal Sentencing Guidelines, Psychological and Policy Reasons for Simplification, 7 Psychol. Pub. Pol’y & L. 739, 752 (2001).

<sup>95</sup> Fifteen Year Report at 44.

<sup>96</sup> Id. at 44-45.

<sup>97</sup> Defenders’ Letter, supra note 64, at 14-15.

<sup>98</sup> See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 16 (May 2004), available at <http://www.ussc.gov/research.htm>

<sup>99</sup> Fifteen Year Report at 132, 134.

As sentences increased dramatically for federal crimes, so did the federal prison population, now the largest in the country,<sup>100</sup> which is remarkable given that federal jurisdiction over criminal matters is, theoretically, limited.<sup>101</sup> The federal prison population has increased from 24,000 in 1980 to over 190,000 today,<sup>102</sup> at a cost of over \$4 billion per year.<sup>103</sup> As of 2004, the Bureau of Prisons was 40% overcapacity.<sup>104</sup>

Congress directed the Commission to formulate guidelines “to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”<sup>105</sup> “Controlling prison populations and correctional budgets, while protecting the public by reserving prison space for the most dangerous offenders, has been one of the noteworthy successes of sentencing reform and sentencing guidelines in the states.”<sup>106</sup> “To date, the guidelines have been used . . . to increase the certainty and severity of punishment,” not “to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.”<sup>107</sup>

### c. Undue Severity of Particular Offense Guidelines

The Report discusses the four most frequently applied guidelines, those for drug trafficking, economic crimes, immigration offenses, and firearms offenses. The discussion of the drug guidelines is helpful in that the Commission acknowledges that they result in penalties that are too severe and create unwarranted disparity and inappropriate uniformity. The drug guidelines have influenced the severity and structure of other guidelines as well. The Report’s discussion of the other three most frequently

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<sup>100</sup> *Id.* at 40.

<sup>101</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>102</sup> <http://www.bop.gov/news/quick.jsp#1>.

<sup>103</sup> *FY 2004 Costs of Incarceration and Supervision*, The Third Branch, Vol. 37, No. 5 (May 2005) (\$23,205.59 per inmate in FY 2004), available at <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html>; U.S. Department of Justice, Bureau of Justice Statistics, *State Prison Expenditures, 2001* 1 (June 2004) (\$22,632 per federal inmate in FY 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/spe01.txt>.

<sup>104</sup> U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

<sup>105</sup> 28 U.S.C. § 994(g).

<sup>106</sup> Fifteen Year Report at 77-78.

<sup>107</sup> *Id.* at 77; see also Dale Parent, *What Did the United States Sentencing Commission Miss?*, 101 Yale L.J. 1773, 1784 (1992) (“The Commission ignored this congressional directive and developed its guidelines without concern for their effects on prison populations.”).

applied guidelines provides a starting point, which you can build on with further research. Note that Congress sometimes gives specific directives to increase guideline penalties, but often tells the Commission to study whether increased penalties are warranted, or makes a general “sense of Congress” statement that increased penalties may be warranted, or simply creates a new offense with no directive at all. The Fifteen Year Report tends to refer to any of these congressional inputs as “directives.”<sup>108</sup> When trying to reconstruct the history of any guideline, it is important to check the “reason for amendment” (if any) in Appendix C of the Guidelines Manual, and if legislation is cited as a reason, check the legislation itself.

**Drug Trafficking Guidelines, Role in the Offense, Relevant Conduct.** Drug trafficking offenses have comprised the largest proportion of the federal docket for over three decades. The number of drug cases has increased every year. Increases in sentence length for drug offenses are “the major cause of federal prison population growth over the past fifteen years,” and a “primary cause” of racial disparity in sentencing.<sup>109</sup>

The Report criticizes mandatory minimum penalties for creating unwarranted uniformity, unwarranted disparity, and undue severity, and for bypassing collaboration with essential participants and criminological research as sources of sentencing policy development.<sup>110</sup> However, the Report essentially acknowledges that the Commission took a bad idea and made it worse.

Congress’ contribution The initial Commission intended to use the quantity of pure drug (as the Parole Commission had), but Congress in the Anti-Drug Abuse Act of 1986 (ADAA) codified quantity-based thresholds for five and ten-year mandatory minimums based on the weight of a “mixture or substance containing a detectable amount” of drugs, which the Commission adopted so as not to conflict with the ADAA. Mitigating factors may take the guideline sentence below the mandatory minimum sentence, in which case the mandatory minimum trumps the guideline sentence. This “creates disparity by treating less culpable offenders the same as more culpable ones.” Congress intended to establish a two-tiered penalty structure with five-year mandatory minimums for “managers of the retail traffic,” and ten-year mandatory minimums for “manufacturers or the heads of organizations.”<sup>111</sup>

The Commission’s contribution The Commission extended the quantity-based approach of the ADAA across 17 different levels below, between and above the two threshold amounts specified in the ADAA. There is no contemporaneous explanation of why the Commission did this, which “is unfortunate for historians, because no other

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<sup>108</sup> Fifteen Year Report at 21-22.

<sup>109</sup> *Id.* at 47-48, 76.

<sup>110</sup> *Id.* at 15, 22.

<sup>111</sup> *Id.* at 48.

decision of the Commission has had such a profound impact on the federal prison population.” The Commission added a variety of aggravating factors which increase the sentence above that dictated by the quantity. The drug trafficking guideline in combination with the relevant conduct rule increased “prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”<sup>112</sup> About 25% of the average drug trafficking sentence of 73 months in 2001 was attributable to guideline increases above the mandatory minimum penalty.<sup>113</sup> The Commission decided not to give more weight to other potentially significant factors such as role in the offense because if so, guideline sentences would be lower than mandatory minimum sentences in a large number of cases.<sup>114</sup> (N.B.: This apparently dictated the extent of role in the offense for all offenses under the Guidelines.)

Thus, “the importance of quantity was greatly elevated compared to other offense characteristics.” The Commission is aware of several problems with this approach: (1) Experts expressed doubt that drug quantity “was a reliable measure of offense seriousness, or that it could be determined with sufficient precision to justify seventeen meaningful distinctions among offenders.” (2) The Commission recognized that “quantity served as a poor proxy for offense seriousness” at least if the weight was affected by dilutants, carrier media, or humidity. It developed a different weighing method for LSD, “but arbitrary variations due to weight of inactive ingredients remain.” (3) “[R]esearch suggested significant disparities in how [the relevant conduct] rules were applied,” and “questions remain about how consistently it can be applied,” given that “disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators.” (4) Drug quantity is “a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making.”<sup>115</sup>

Over 50% of drug offenders are in Criminal History Category I,<sup>116</sup> and of all federal offenders, drug offenders are the least likely to recidivate.<sup>117</sup> Tying punishment to mandatory minimum quantities, enhanced by the guidelines, sweeps in low-level offenders and punishes them as harshly as kingpins. This misdirects law enforcement

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<sup>112</sup> Id. at 48-49.

<sup>113</sup> Id. at 54.

<sup>114</sup> Id. at 48-49.

<sup>115</sup> Id. at 50.

<sup>116</sup> Id. at 54-55.

<sup>117</sup> See U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 13 & Exh. 11 (May 2004), available at <http://www.ussc.gov/research.htm>

resources from the kingpins and traffickers Congress had in mind.<sup>118</sup> This conclusion is strongly supported by a study published by DOJ in 1994. The study found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system. Though these offenders “are much less likely than high-level defendants to re-offend” and “a short prison sentence is just as likely to deter them from future offending as a long prison sentence,” they “still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme.” DOJ concluded that the resources expended on these low-level drug offenders “could be used more efficiently to promote other criminal justice needs.”<sup>119</sup>

Given these problems, experts have called for a “fundamental re-examination of the role of quantity under the guidelines.” Thirty-one percent of judges surveyed “listed drug sentencing as the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing,” with “73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses.” Senator Jeff Sessions asked the Commission in 2000 to identify ways to better target the most culpable and dangerous offenders.<sup>120</sup>

While the Commission identified ways in which drug quantity might underestimate offense seriousness and promulgated commentary encouraging upward departures under these circumstances, see U.S.S.G. § 2D1.1, comment. (nn. 1, 9, 12, 15, 16), comment. (backg’d.),<sup>121</sup> it has not encouraged downward departure to account for the many ways in which drug quantity overstates offense seriousness. Dr. Hofer has written that the Guidelines’ failure to encourage departure when drug amount overstates the seriousness of the offense is a serious shortcoming, as the drug guideline is “most in need of rationalizing interpretation.”<sup>122</sup>

The Commission has recommended reducing the 100:1 powder to crack ratio because “the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine,” but Congress has not yet acted on that recommendation. In addition, at Congress’ direction, the Commission provided a two-level reduction for some offenders who meet safety valve criteria in 1995, and expanded it to all qualified offenders in 2001. In 2002 it capped the quantity-based offense level at 30 for those who receive a mitigating role adjustment, but in 2004 *increased* the cap to

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<sup>118</sup> Fifteen Year Report at 48-55, 132, 134.

<sup>119</sup> DOJ Drug Offender Analysis, supra note 74.

<sup>120</sup> Fifteen Year Report at 52.

<sup>121</sup> Id. at 50.

<sup>122</sup> Hofer & Allenbaugh, supra note 63, at 78-79.

30, 31, 33, or 34 depending on the offense level, based on “concerns” about “proportionality.”<sup>123</sup>

By 1991, average drug offense sentence length was two and a half times what it was before the Guidelines, then decreased by about 20% in the late 1990s, though it was still more than double what it was before the Guidelines.<sup>124</sup> Taking into account all potential influences, the downward trend is best explained as the result of judges and prosecutors finding ways to mitigate the harshness and inflexibility of the drug guidelines.<sup>125</sup>

This, too, is a form of input from frontline actors, though it operates in hidden and inconsistent ways. See Subsection e, infra. As Professor Bowman put it, “if laws are widely and persistently evaded by the very officials assigned to enforce them, at some point one should start questioning the wisdom of the laws rather than the fidelity of the enforcers. In the end, one very good way to promote guidelines compliance is to write guidelines that produce outcomes those who run the system are happy to accept.”<sup>126</sup>

**Economic Crimes.** Economic offenses comprise the second largest proportion of the federal docket. The initial Commission increased sentences above past practice to provide a “short but definite period of confinement.” Early on, however, the Commission began adding aggravating adjustments. According to the Report, the “appearance early in the guidelines era of these mandated sentence increases for economic crimes, and the perceived absence of empirical research establishing the need for them, led one former Commissioner to warn that the SRA’s promise of policy development through expert research was being supplanted by symbolic ‘signal sending’ by Congress.”<sup>127</sup> In the article to which the Report cites, the former Commissioner states that the Commission promulgated “gratuitous” increases in 1989 in response to the DOJ *ex officio*’s argument that certain statutes were “oblique signals” from Congress when the statutes “said no such thing,” that the process was “overtly political and inexpert,” and that the Commission had already abandoned its mandate to create “effective” sentences by failing

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<sup>123</sup> Fifteen Year Report. at 51, 131-32; U.S.S.G., App. C, Amend. 515, 624, 640, 668.

<sup>124</sup> Drug trafficking sentences showed an upward trend since 2000, with the average increasing from 72 months in 2000 to 83 months in 2004 (pre-Blakely) and remaining at 83 months in 2005 (post-Booker). Booker Report at D16-18.

<sup>125</sup> Fifteen Year Report at 54-55. See also Frank O. Bowman and Michael Heise, Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level, 87 Iowa L. Rev. 477, 479-83 (January 2002).

<sup>126</sup> Frank O. Bowman III, The Year of Jubilee...or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker, forthcoming in 43 Houston L. Rev. \_\_ (2006), available now at <http://ssrn.com/abstract=882507>.

<sup>127</sup> Fifteen Year Report at 56. The Report does not claim that there was a basis in research for the increases.

to rely on its own data, failing to measure the effectiveness or efficiency of federal sentences, and failing to provide any analysis of prison impact.<sup>128</sup>

The Report covers developments only through 2002, so does not cover the effects of the Economic Crimes Package of 2001 or the amendments following the Sarbanes-Oxley Act. Average sentence length for fraud/theft offenses has increased from 16 months in 2002 and 2003 to 19 months in 2004 (pre-Blakely) to 21 months in 2005 (post-Booker).<sup>129</sup>

Professor Frank Bowman, a sentencing expert who was involved in the negotiations and events resulting in these amendments, recounts that the Commission set penalties for fraud offenses higher than past practice at the outset, increased the guideline range nearly annually from 1987-1995, then slightly lowered the sentences of some classes of low-loss offenders while significantly raising the sentences of most mid- to high-loss offenders in the Economic Crimes Package of 2001. According to Professor Bowman, the Economic Crimes Package resulted from an unusually deliberative and inclusive process, ending in compromise and agreement by DOJ. A month or two later in early 2002, following a speech by President Bush about recent corporate scandals, DOJ switched positions, engaging in an “aggressive campaign for guideline amendments ratcheting up real sentences for all economic crime offenders.” While Congress focused in the Sarbanes-Oxley Act on the most serious, high-dollar fraud offenses, DOJ insisted on across-the-board increases. DOJ threatened to go back to Congress if the Commission did not acquiesce. The Commission resisted. Then, nine months after the Sarbanes-Oxley Act was passed and a few days before the Commission’s vote, Senator Biden and his staff (not a congressional committee) amended the “legislative history” to state that the Commission should promulgate across-the-board increases, citing, ironically, the “penalty gap” between the fraud and (excessive) drug guidelines. The Commission responded by increasing the base offense level from six to seven for defendants convicted of an offense with a statutory maximum of 20 years (e.g., mail and wire fraud), resulting in a 10% increase for *all* fraud offenders, and restricting or precluding non-prison alternatives for 40% of fraud offenders, *i.e.*, those at the lowest level, in the name of a bill aimed at corrupt captains of industry.<sup>130</sup>

**Immigration Offenses.** Immigration offenses comprise the third largest proportion of the federal docket. Guideline ranges were initially slightly above historical levels, but average sentence length nearly tripled from 1990 to 2000.<sup>131</sup> The ranges under

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<sup>128</sup> Jeffrey S. Parker & Michael K. Block, The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?, 27 Am. Crim. L. Rev. 289 (1989).

<sup>129</sup> Booker Report at D17-18.

<sup>130</sup> See Frank O. Bowman III, Pour Encourager Les Autres?, 1 Ohio State J. Crim. L. 373, 385 & n.74, 387-91, 399-400, 412-15, 419-35 (2004).

<sup>131</sup> Fifteen Year Report at 62, 64, Fig. 2.13.

§2L1.2 for unlawfully entering or remaining were increased four times, the most significant of which was the 16-level increase for re-entry after an aggravated felony. That 16-level increase, the steepest increase in the Guidelines Manual, was not required by Congress, not supported by data or research, and was not explained.<sup>132</sup> The Commission later designed a graduated scale from four to sixteen levels and narrowed the definition of “crime of violence” somewhat.

The real evidence of the undue severity of the immigration guidelines is that for many years, they have been rarely applied.<sup>133</sup> Judges and prosecutors have avoided the harshness of the immigration guidelines through “fast track” charge bargaining and departures.<sup>134</sup> Average sentence length under §2L1.2 decreased from 36 months in 2000 to 35 months in 2001 to 30 months in 2002 to 28 months in 2003 to 29 months in 2004 to 27 months in 2005.<sup>135</sup> The highest departure rates by district are due to fast track programs,<sup>136</sup> and the guidelines have been unsuccessful in reducing inter-judge disparity in immigration cases.<sup>137</sup> Over 73% of illegal re-entry cases are subject to fast-track dispositions,<sup>138</sup> and this figure includes only fast track departures and not fast track charge bargains approved in five districts.<sup>139</sup> Fast-track dispositions are used in cases with and without aggravated felonies.<sup>140</sup>

When the Commission discovered in 2003 that at least 40% of non-substantial assistance departures in 2001 were initiated by the government and most of these were

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<sup>132</sup> U.S.S.G., App. C, amend. 375.

<sup>133</sup> Letter to Sentencing Commission from Federal Public and Community Defenders Re: Report on Federal Sentencing Since *United States v. Booker* at 10-11, January 10, 2006, available now at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/01/defenders\\_advis.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/defenders_advis.html), forthcoming in Volume 18 of the Federal Sentencing Reporter; Frank O. Bowman III, Only Suckers Pay the Sticker Price: The Effect of “Fast Track” Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System at 4 (September 23, 2003), [http://www.ussc.gov/hearings/9\\_23\\_03/fbowman.pdf](http://www.ussc.gov/hearings/9_23_03/fbowman.pdf).

<sup>134</sup> Fifteen Year Report at 87, 91.

<sup>135</sup> Booker Report at D16-18.

<sup>136</sup> Fifteen Year Report at 112.

<sup>137</sup> Id. at 98, 140.

<sup>138</sup> United States v. Perez-Chavez, No. 2:05-CR-00003PGC, slip op. \*24 n. 69 (D. Utah May 16, 2005), citing Federal Justice Statistics Resource Center, <http://jfsrc.urban.org/index.cfm>.

<sup>139</sup> United States v. Medrano-Duran, 386 F.Supp.2d 943 (N.D. Ill. 2005).

<sup>140</sup> United States v. Medrano-Duran, 1:04-cr-00884, Document 19 at 8, 22-37, available on PACER at [https://ecf.ilnd.uscourts.gov/cgi-bin/show\\_case\\_doc?19,143476,....,7745517,1](https://ecf.ilnd.uscourts.gov/cgi-bin/show_case_doc?19,143476,....,7745517,1).

fast-track departures,<sup>141</sup> it concluded that the absence of fast-track reductions in other districts resulted in “unwarranted disparity among similarly-situated offenders.”<sup>142</sup> In districts without fast track programs, defendants are receiving sentences double or more the average in cases sentenced under §2L1.2, because they are among the twenty or so percent who happen to get arrested in a district without a fast track program. This is one of the more striking examples of a guideline that exists for no other purpose but to be used as a club to force guilty pleas.

According to the Commission’s duty to avoid unwarranted disparities and its stated methodology of revising the guidelines based on data from actual practice, the Commission should reduce immigration sentences, but has not done so.

**Firearms Offenses.** Firearms offenses comprise the fourth largest proportion of the federal docket. Independent of mandatory minimums, the Guidelines account for a doubling of sentences for firearm trafficking and illegal firearm possession under 18 U.S.C. § 922(g) since the guidelines’ inception.<sup>143</sup> The following covers only a few of the Commission’s actions with respect to firearms penalties.

The Report states that in the Violent Crime Control and Law Enforcement Act of 1994, Congress “directed the Commission to increase penalties for offenses involving semiautomatic weapons. The Commission amended USSG §2K2.1 in response to these directives.”<sup>144</sup> This is not accurate. The Act created a new offense at 18 U.S.C. § 922(v) criminalizing the manufacture, transfer or possession of a “semiautomatic assault weapon” listed in 18 U.S.C. § 921(a)(30), subject to a five-year maximum under 18 U.S.C. § 924(a)(1)(B); enacted a ten-year mandatory minimum for a violation of § 924(c) with a semiautomatic assault weapon as defined in § 921(a)(30); and directed the Commission to enhance punishment for a crime of violence or drug trafficking offense involving a “semiautomatic firearm,” defined as “any repeating firearm that utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round and that requires a separate pull of the trigger to fire each cartridge.” In response to the congressional directive, the Commission promulgated §5K2.17.<sup>145</sup> But the Commission amended § 2K2.1 to put semiautomatic assault weapons as defined in § 921(a)(30) on the same footing as those described in 26 U.S.C. § 5845 (sawed-off shotguns, machine guns, bombs, silencers) without a congressional directive.<sup>146</sup>

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<sup>141</sup> 2003 Downward Departure Report at iv-v.

<sup>142</sup> *Id.* at 66-67.

<sup>143</sup> Fifteen Year Report at 139.

<sup>144</sup> *Id.* at 66.

<sup>145</sup> *See* U.S.S.G., App. C., amend. 531.

<sup>146</sup> *See* U.S.S.G., App. C, amend. 522.

The assault weapons ban was repealed by the terms of the Act on September 13, 2004. Congress has taken no action to re-instate it. The Commission had a non-controversial opportunity to simplify and lower penalties in an apparently small number of cases. Instead, it voted on April 5, 2006 to retain the enhancement in § 2K2.1(a)(1), (3) and (4) (but not (5)) and to broaden its definition to a “semiautomatic firearm capable of accepting a large magazine capacity.”<sup>147</sup> As the Ninth Circuit recently said in holding that possession of a semiautomatic assault weapon was not a “crime of violence:”

The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting [the defendant’s] position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn’t require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.<sup>148</sup>

The Commission voted on April 5, 2006 to enhance firearms penalties in other respects, including a four-level enhancement for “trafficking in firearms” broadly defined to reach offenders not in the business of trafficking in firearms, an increase in the enhancement for an obliterated serial number from 2 to 4 levels even if the firearm was in fact traceable, and the broadest possible definition of “in connection with” in burglary and drug cases. Criticism of these amendments, which may be used to argue that firearms penalties are greater than necessary to satisfy sentencing purposes is set forth in the Federal Defenders’ written comments and oral testimony.<sup>149</sup>

#### **d. Undue Severity of Criminal History Rules**

Criminal history can be relevant to all of the § 3553(a)(2) purposes – just punishment (according to the Commission, those with criminal history are more culpable in the instant offense, so the reverse must be true), the need to deter the defendant from committing further crimes (recidivism prediction), the need to incapacitate the defendant to protect the public from further crimes of the defendant (same), and the need for

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<sup>147</sup> See Letter from Federal Defenders regarding Proposed Amendments to the Firearms Guideline at 2-10 (March 9, 2006), [http://www.ussc.gov/hearings/03\\_15\\_06/rhodes-testimony.pdf](http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf)

<sup>148</sup> *United States v. Serna*, 435 F.3d 1046, 1049 (9<sup>th</sup> Cir. 2006).

<sup>149</sup> See Letter from Federal Defenders, *supra* note 146; U.S. Sentencing Commission, Public Hearing, March 15, 2006, [http://www.ussc.gov/hearings/03\\_15\\_06/0315USSC.pdf](http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf).

treatment, rehabilitation and other correctional treatment in the most effective manner (there may be little or no need for correctional treatment if it is unlikely the defendant will recidivate, or has a high potential for rehabilitation, or the root cause, such as addiction, would be better addressed through treatment than lengthy incarceration).

According to recent findings by the Sentencing Commission, the Guidelines exclude considerations that predict a reduced risk of recidivism or an increased likelihood of rehabilitation, and include factors that increase the criminal history score but have no predictive value or overstate the risk of recidivism.

The Criminal History Category (CHC) rules were not based on the Commission's own direct empirical evidence because (1) of time pressures, and (2) unlike all other known recidivism scales, CHC seeks not only to predict recidivism, but, more subjectively, to punish repeat offenders for longer on the theory that they are more culpable.<sup>150</sup> The Commission was supposed to incorporate empirical research and data as it became available, but hasn't yet.<sup>151</sup>

The Commission reached several conclusions, which it still has not acted upon either by proposing amendments to the guidelines or making specific recommendations to Congress, including that rehabilitation programs focused on drug use or education would have a high cost-benefit value, legally permissible offender characteristics should be incorporated into the CHC computation,<sup>152</sup> first offender status should be taken into account in the criminal history score, U.S.S.G. 4A1.1(f) should be removed from the criminal history rules,<sup>153</sup> using prior drug convictions as career offender predicates vastly overstates the risk of recidivism, and non-moving traffic violations should not be included in criminal history score.<sup>154</sup>

Career Offender The difference between the rate of recidivism (defined as re-conviction, re-arrest with no information regarding conviction, and supervision revocation within 2 years) between CHC V and CHC VI is almost nonexistent. What

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<sup>150</sup> See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 1-2 (hereinafter "Release 1"), [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf); A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score at 2-4 (hereinafter "Release 3"), <http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf>. There is a third study, Recidivism and the First Offender, [http://www.ussc.gov/publicat/Recidivism\\_FirstOffender.pdf](http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf), which is not included in this paper because I have not reviewed it yet.

<sup>151</sup> Release 1 at 2.

<sup>152</sup> Release 1 at 15-16.

<sup>153</sup> Release 3 at at 7, 11, 15.

<sup>154</sup> Fifteen Year Report at 133-34.

accounts for this is the inclusion of offenders who are in CHC VI because of the Career Offender Guideline, who recidivate at a lower rate than a person who actually has 13 CH points or more.<sup>155</sup> This means that career offender status is not justified by an increased risk of recidivism.

In fact, the career offender guideline vastly overstates the risk of recidivism when the predicates are drug offenses, because the recidivism rate for offenders whose career offenders status is based on drug offenses is no more than that for offenders in the criminal history category in which they would have been placed under the normal criminal history rules. The career offender guideline “makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.” This, furthermore, has a racially disparate impact on Black offenders because most Black offenders fall within the career offender guideline based on prior drug offenses, most likely because drug sales in impoverished minority neighborhoods take place on the street where they are easy to detect.<sup>156</sup>

Though the Commission does not mention it in its Fifteen Year Report, the definition of “crime of violence” in the career offender guideline also is problematic in that it commonly reaches offenders who are not the “repeat violent offenders” Congress had in mind.<sup>157</sup> In 28 U.S.C. § 994(h), Congress instructed the Commission to provide punishment at or near the maximum for certain offenders with two or more prior felonies that were “crimes of violence.” The original career offender guideline defined “crime of violence” as in 18 U.S.C. § 16, section (b) of which defines a “crime of violence” as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical *force* against the person or property of another may be used in the course of committing the offense.” The Commission later changed the definition, narrowing it in some respects but broadening it in others. The catchall clause now covers any offense punishable by more than one year that “involves conduct that presents a serious potential risk of physical *injury* to another.” Unfortunately, the courts have interpreted this to include offenses that are not actually violent, such as failure to pull over for a police cruiser, unlawful use of a motor vehicle, child neglect, breaking and entering an unoccupied commercial building, and pickpocketing. Further, any offense that is “punishable by more than one year” includes misdemeanors and other minor offenses under state laws that do not attempt to calibrate the maximum penalty according to the seriousness of the offense, while ignoring more salient indicators such as the actual sentence served.<sup>158</sup>

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<sup>155</sup> Release 1 at 9 & Exhibit 5.

<sup>156</sup> Fifteen Year Report at 133-34.

<sup>157</sup> S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

<sup>158</sup> See NACDL Report: Truth in Sentencing? The Gonzales Cases, 17 Fed. Sent. Rep. 327, \*\*7-11 (June 2005) (defendant was classified as a career offender based on possession of less than 1 gram of crack and three “crimes of violence” classified as non-violent misdemeanors under state

Offender Characteristics The rules fail to reflect numerous factors that indicate a reduced risk of recidivism:

- Age: “Recidivism rates decline relatively consistently as age increases,” from 35.5% under age 21, to 9.5% over age 50.<sup>159</sup> Under the Parole Commission’s Salient Factor Score (SFS), which is a better predictor of recidivism than CHC, the older the defendant is and the fewer the number of prior commitments, the less likelihood of recidivism, and defendants over 41 get an automatic reduction./Under CHC, age is not accounted for at all. Age is a powerful component of recidivism prediction, which the Guidelines do not take into account.<sup>160</sup>
- Employment: Stable employment in the year prior to arrest is associated with a lower risk of recidivism.<sup>161</sup>
- Education: Recidivism rates decrease with educational level (no high school, high school, some college, college degree). (However, in CHC V, recidivism rates are higher for those with a college education than those with less than a high school education.)<sup>162</sup>
- Family: Recidivism rates are associated with marital status (never married, divorced, married).<sup>163</sup>
- Gender: Women recidivate at a lower rate than men, and the difference is even greater in CHC V and VI.<sup>164</sup>

Non-Violent Offenders Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate, and drug offenders are the least likely to recidivate of all.<sup>165</sup>

Uncounted crimes of violence The Parole Commission’s Salient Factor Score (SFS), which is a better predictor of recidivism than CHC, has no violence component.

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law, all committed at the age of 17, to which he pled guilty on the same day when he was 18, and for which he received a suspended sentence and served 7 months when revoked).

<sup>159</sup> Release 1 at 12 & Exhibit 9.

<sup>160</sup> Release 3 at 8, 13-15.

<sup>161</sup> Release 1 at 12 & Exhibit 10.

<sup>162</sup> Id. at 12 & Exhibit 10.

<sup>163</sup> Id. at 12 & Exhibit 10.

<sup>164</sup> Id. at 11 & Exhibit 9.

<sup>165</sup> Id. at 13 & Exhibit 11.

CHC adds 1 point for each prior conviction of a crime of violence otherwise uncounted, USSG 4A1.1(f). The predictive power of USSG 4A1.1(f) is statistically insignificant.<sup>166</sup>

Minor offenses Inclusion of non-moving violations in the criminal history score does not clearly promote sentencing purposes, and may adversely affect minorities.<sup>167</sup> Some driving offenses have been characterized as “crimes of violence” by the courts, for example, Failure to Stop for a Blue Light under South Carolina law.<sup>168</sup> Many courts and commentators have recognized, and many studies have shown, that Blacks are stopped by the police and not charged with any crime or only with traffic offenses in disproportionate numbers, often called “driving while black.”<sup>169</sup>

First or Near-First Offender Status: Minimal or no prior involvement with the criminal justice system is a powerful predictor of recidivism, which the Guidelines do not take into account.<sup>170</sup> Congress directed the Commission to ensure that the “guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of

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<sup>166</sup> Release 3 at 7, 11, 15.

<sup>167</sup> Fifteen Year Report at 134.

<sup>168</sup> United States v. James, 337 F.3d 387, 391 (4<sup>th</sup> Cir. 2003).

<sup>169</sup> See Bingham v. City of Manhattan Beach, 341 F.3d 939, 954 (9<sup>th</sup> Cir. 2003); Washington v. Lambert, 98 F.3d 1181, 1182 n. 1 (9<sup>th</sup> Cir. 1996); Smith v. City of Gretna Police Dept., 175 F. Supp.2d 870, 874 (E.D. La. 2001); Martinez v. Village of Mount Prospect, 92 F. Supp.2d 780, 782 (N.D. Ill. 2000); United States v. Leviner, 31 F. Supp.2d 23, 33 (D. Mass. 1998); David A. Harris, The Stories, the Statistics, and the Law: Why “Driving While Black” Matters, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, Race and the Fourth Amendment, 51 Vand. L. Rev. 333, 341-52 (1998); Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board, 28 Colum. Hum. Rts. L. Rev. 551, 554-69 (1997); Jennifer A. Larrabee, “DWB (Driving While Black)” and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & Pl’y 291, 296 (1997); David Harris, Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology, 544, 560-69 (1997); Christopher Hall, Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong and the Evolution of Police Discretion, 76 Tex. L. Rev. 1083, 1088 (1998); Matthew Dolan, Summit Addresses Biased Police Stops Officials, Citizens Discuss Solutions in the Shadow of Hampton Incident, The Virginian-Pilot and The Ledger-Star, Norfolk, Va., November 22, 1998, A1; Rick Sarlat, Racial Profiling on Interstates is Under Attack: Pa. Legislation drafted, The Philadelphia Tribune, May 26, 1998, 1A.

<sup>170</sup> Release 3 at 15.

violence or an otherwise serious offense.”<sup>171</sup> The Commission recognizes the need to act on this directive, but has never done so.<sup>172</sup>

Abstinence from drug use Recidivism rates are lower for those without illicit drug use in the year prior to the offense. In CHC V, the recidivism rate is lower for illicit drug users.<sup>173</sup>

Effect of Straight Prison Offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.<sup>174</sup>

Offense Level The Offense Level is not a predictor of recidivism.<sup>175</sup>

**C. The Purposes of Sentencing (Not the Guidelines) Are the Appropriate Measure of Warranted or Unwarranted Disparity.**

The most seductive form of the Kool-Aid theory is the argument that the only practical way to maintain uniformity is to accord the guidelines substantial weight in the district court and presumptive reasonableness in the court of appeals. But just like the argument that the guidelines already reflect all relevant purposes and factors of sentencing, this would make the guidelines as or more mandatory than they were before Booker. Furthermore, it would render subsection (a)(6) redundant, and would incorrectly assume that the guidelines represent a perfect measure of warranted or unwarranted disparity.

As the 1977 Senate Judiciary Committee Report explained, “the key word in discussing unwarranted sentence disparities is ‘unwarranted’” and the “Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.”<sup>176</sup> As the 1983 Senate Committee Report explained, “the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. . . . This will assure that the . . . sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.”<sup>177</sup> In other words, judges were not intended even under

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<sup>171</sup> 28 U.S.C. § 994(j).

<sup>172</sup> See [http://www.ussc.gov/publicat/Recidivism\\_FirstOffender.pdf](http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf); <http://www.ussc.gov/SIMPLE/crimhist.htm>; [http://www.ussc.gov/MINUTES/4\\_5\\_02.htm](http://www.ussc.gov/MINUTES/4_5_02.htm).

<sup>173</sup> Release 1 at 13 & Exhibit 10.

<sup>174</sup> *Id.* at 13 & Exhibit 12.

<sup>175</sup> *Id.* at 13 & Exhibit 11.

<sup>176</sup> S. Rep. No. 95-605 at 1161.

<sup>177</sup> S. Rep. No. 98-225 at 53.

the pre-Booker system to simply use the guideline range as a proxy for avoidance of unwarranted disparity; there could be warranted disparity between offenders with similar records convicted of similar offenses; the judge would decide whether a difference was warranted in light of the purposes of sentencing.

While a primary objective of the SRA was to do away with the disparity that resulted from unfettered judicial discretion in the pre-guidelines era, judicial discretion is not unfettered now -- section 3553(a) provides a structure for judicial decision-making based on enumerated considerations, including but not limited to the guideline range. Given that the Guidelines themselves allow and promote unwarranted disparity in many areas, see below, the case for choosing the Guidelines over the purposes of sentencing as the benchmark for unwarranted disparity is exceedingly weak.<sup>178</sup>

**Constitutional Implications/Statutory Construction.** As the Booker remedial majority said, “We cannot and do not claim that use of a ‘reasonableness’ standard will provide the uniformity that Congress originally sought to secure.”<sup>179</sup> This is the price of constitutionality. Moreover, if the guideline range was the benchmark of unwarranted disparity, all subsections of § 3553(a) other than (4) would be rendered inoperative, superfluous, and insignificant, in violation of principles of statutory construction.

**Whether a Difference is Warranted or Unwarranted Should Be Measured With Reference to the Purposes of Sentencing, Not the Guidelines.** According to the Sentencing Commission, “Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are *relevant to the purposes of sentencing*.”<sup>180</sup> There is no unwarranted disparity “when sentencing decisions are based only on offense and offender characteristics related to the seriousness of the offense, the offender’s risk of recidivism, or some other legitimate purpose of sentencing.”<sup>181</sup>

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<sup>178</sup> Excellent articles on this topic include Michael M. O’Hear, The Original Intent of Uniformity in Sentencing, at 31-37, forthcoming in University of Cincinnati Law Review, Vol. 75 available now at SSRN: <http://ssrn.com/abstract=800831>; O’Hear, Michael M., The Duty to Avoid Disparity: Implementing 18 U.S.C. Section 3553(a)(6) After Booker, at 8-9, forthcoming in McGeorge Law Review, Vol. 36, 2006, available now at SSRN <http://ssrn.com/abstract=871246>; Albert W. Alschuler, Disparity: The Normative and Empirical Failure of the Federal Guidelines, 58 Stan.L.Rev. 85 (2005); Marc Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1218-19 (April 2004).

<sup>179</sup> Booker, 543 U.S. at 263.

<sup>180</sup> Fifteen Year Report at 113 (emphasis supplied and in original).

<sup>181</sup> Id. at 80.

As Dr. Hofer has written concerning the pre-Booker system, the “battle cry of disparity” may explain appellate courts’ enforcement of the guidelines “more rigidly than anyone predicted or than the relevant statutes appear to require,” but “only a shallow conception of disparity supports rigid application of the Guidelines without regard to their purposes,” and leads to “unwarranted uniformity,’ which is just another type of unwarranted disparity. Far from creating disparity, departure [or now variance] in these circumstances avoids true disparity.”<sup>182</sup> “No ground for departure is more important to the rational evolution of the Guideline system and the reduction of true sentencing disparity” than “departure in pursuit of the Guidelines’ own purposes.”<sup>183</sup> Drug amount, for example, is not “a foolproof measure of offense seriousness” and is an example of the irony that “the more incoherent the reasons underlying a guideline, the more rigidly it may be applied, even though these are the guidelines most in need of rationalizing interpretation.”<sup>184</sup>

Whether “two offenders are similarly situated and thus should receive similar sentences (or that they are dissimilar and should receive different sentences)” depends “on the punishment purposes which the sentence is supposed to serve.” Richard S. Frase, Punishment Purposes, 58 *Stan. L. Rev.* 67, 67 (2005).

**Disparity Persisting Under or Inherent in the Guidelines.** The Commission says that it has only partially achieved the goal of avoiding unwarranted sentencing disparities while maintaining sufficient flexibility to permit warranted differences.<sup>185</sup> Why? In theory, the Commission was to develop sentencing policy following consultation with all essential participants and after conducting and studying the best criminological research, but in practice, the system has fallen short.<sup>186</sup> The problems are in implementation (mechanisms to control disparity created by prosecutors’ decisions have only been partially implemented and do not always operate as intended), and in policy development (collaboration and research have been bypassed by the direct and indirect influence of Congress on the Commission’s policymaking).<sup>187</sup> When the Commission does not develop policy informed by its research, “advancement in knowledge of human behavior,” and collaboration with all stakeholders, the purposes of sentencing are not effectively achieved, correctional resources are squandered on ineffective sentences, and guideline implementers circumvent the guidelines.<sup>188</sup>

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<sup>182</sup> Hofer & Allenbaugh, supra note 63, at 83.

<sup>183</sup> Id. at 78.

<sup>184</sup> Id. at 78-79.

<sup>185</sup> 28 U.S.C. § 991(b)(1)(B).

<sup>186</sup> Fifteen Year Report at 142-44.

<sup>187</sup> Id. at 144-46.

<sup>188</sup> Id. at 36.

The Report identifies numerous sources of disparity and inappropriate uniformity built into the Guidelines, invited by the Guidelines, or impervious to change.

Common Sources of Disparity Built into the Guidelines. The over-emphasis on drug quantity, the under-emphasis on personal culpability, the relevant conduct rules, and the unreliability of evidence used to establish quantities and relevant conduct create unwarranted disparity and inappropriate uniformity.<sup>189</sup>

Participants find ways to circumvent the guidelines when they feel the sentence is unjust.<sup>190</sup> Prosecutors, judges and defense counsel circumvent the guidelines because of their overemphasis on quantity, relative neglect of offender characteristics, and overly harsh severity levels.<sup>191</sup> Relevant conduct is not consistently applied because of the rule's ambiguous language, discomfort with law enforcement's role in establishing it, and discomfort with the resulting severity.<sup>192</sup> When the participants avoid or circumvent the guidelines, it may well result in a sentence that better meets the purposes of sentencing, but this only benefits some defendants and not others, and because charging decisions disproportionately disadvantage minorities, may create disparity along racial lines.<sup>193</sup>

According to the Commission, experts, and other observers, while "real offense conduct" under the Guidelines was intended to avoid the transfer of sentencing power from judges to prosecutors, it has not worked as intended, but instead has increased prosecutorial power over sentencing, magnified undue severity and unfairness,

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<sup>189</sup> Id. at 50-52.

<sup>190</sup> Id. at 32.

<sup>191</sup> Id. at 87.

<sup>192</sup> Id. at 87.

<sup>193</sup> Id. at 82, 91, 142.

introduced hidden disparity, and created disrespect for law.<sup>194</sup> The Commission has proposed, but never acted on, ways to limit or abolish relevant conduct.<sup>195</sup>

Cross-references (the number of which has quintupled since the Guidelines' inception) are used by some prosecutors and judges, viewed as optional by others, and not always used as intended.<sup>196</sup>

The complexity of the Guidelines increases the risk that judges will apply the rules differently.<sup>197</sup>

Racial, Ethnic and Gender Disparity/Unnecessary and Ineffective Rules. Racial, ethnic and gender disparity is “built into the sentencing rules themselves. . . . Today’s sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.”<sup>198</sup>

When a rule has a disproportionate impact on a demographic group, there is a heightened need to determine whether the rule “is a necessary and effective means to achieve the purposes of sentencing.”<sup>199</sup> “A rule that serves no clear purpose would be questionable in any event, but rules that adversely affect a particular group deserve extra scrutiny.”<sup>200</sup>

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<sup>194</sup> Id. at 49, 92, 104; American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 140, 159 (1998); David Yellen, Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 425-54 (1993); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993); Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Paul J. Hofer, Implications of the Relevant Conduct Study for the Revised Guideline, 4 Fed. Sent. Rep. 334 (May/June 1992).

<sup>195</sup> U.S. Sentencing Commission, Relevant Conduct and Real Offense Sentencing (Staff Discussion Paper, 1996); 57 Fed. Reg. 62832, 62848 (1992); 58 Fed. Reg. 67522, 67541 (1993); 62 Fed. Reg. 152, 161 (1997); 61 Fed. Reg. 34,465 (1996).

<sup>196</sup> Fifteen Year Report at 83.

<sup>197</sup> Id. at 15.

<sup>198</sup> Id. at 135.

<sup>199</sup> Id. at 113-14.

<sup>200</sup> Id. at 131.

The Guidelines were promulgated in part over a concern about racial disparity. The sentencing disparity between White and minority offenders was small in the pre-Guideline era, but widened considerably in the Guidelines era. For example, by 1994, the number of months of imprisonment for Black offenders was nearly double that for Whites, and has narrowed only slightly since then.<sup>201</sup> According to the Commission, most of the disparity is due to differences in the seriousness of the offense and criminal history, and little if any is due to discrimination by judges.<sup>202</sup> A statistically significant amount of the racial sentencing gap, however, is due to the following guidelines, statutes and practices, which are not necessary to achieve legitimate sentencing purposes:<sup>203</sup>

- Crack/powder ratio “The harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine,” and “[h]igh penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers.”<sup>204</sup>
- Career Offender Guideline The career offender guideline dramatically overstates the risk of recidivism for offenders classified as career offenders based on prior drug trafficking offenses. Further, lengthy incapacitation of low-level drug sellers under the career offender guideline “prevents little, if any, drug selling; the crime is simply committed by someone else.”<sup>205</sup> Because these offenders are disproportionately Black, the career offender guideline has a disparate racial impact not justified by sentencing purposes.<sup>206</sup> Nonetheless, the Commission, without explanation, limited the extent of a departure for criminal history score overstating the risk of recidivism of a career offender to one level.<sup>207</sup> Furthermore, the Commission defined
- Criminal History Rules The use of non-moving traffic violations in the criminal history score may adversely impact minorities without advancing a purpose of sentencing.<sup>208</sup>

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<sup>201</sup> Id. at 115-16 & Figure 4.2, 120-27.

<sup>202</sup> Id. at 117.

<sup>203</sup> Id. at 127, 113, 131, 134.

<sup>204</sup> Id. at 131-32.

<sup>205</sup> Id. at 133-34; U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 9 (May 2004).

<sup>206</sup> Fifteen Year Report at 133-34.

<sup>207</sup> U.S.S.G., App. C, amend. 651 (2004).

<sup>208</sup> Fifteen Year Report at 134.

- Mandatory Minimum Laws, Drug Guidelines, Relevant Conduct Rules Mandatory minimums have a disparate racial impact, create more disparity than downward departures, are costly, and have little effect on crime control.<sup>209</sup> The “drug trafficking guideline,” modeled on the mandatory minimum drug statute but broader, “in combination with the relevant conduct rule” increases “prison terms . . . in many cases above the level required by the literal terms of the mandatory minimum statutes.”<sup>210</sup>
- Uneven charging practices The government uses statutory penalty enhancements based on prior offenses, 924(c) enhancements, and mandatory minimums “unevenly.” While *not* using these enhancements “can lead to *more* proportionate sentencing” that better serves the purposes of sentencing in particular cases, the government’s “charging decisions disproportionately disadvantage minorities.”<sup>211</sup>
- Substantial Assistance Motions In a study published in 1998, the Commission found that “factors that were associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity.” Legally irrelevant factors including race, gender, ethnicity and citizenship are “statistically significant in explaining §5K1.1 departures,” while legally relevant factors such as the type or benefit of cooperation, defendant culpability and offense type “generally were found to be inadequate in explaining §5K1.1 departures.” The unreviewability of prosecutors’ reasons for making substantial motions is “exactly [what] led to charges of unwarranted disparity and passage of the SRA.”<sup>212</sup>

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<sup>209</sup> Id. at 21-22, 48; Constitution Project’s Sentencing Initiative, Principles for the Design and Reform of Sentencing Systems (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); U.S. Sentencing Commission, Cocaine and Federal Sentencing Policy (May 2002); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994); U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991); Federal Judicial Center, The Consequences of Mandatory Prison Terms (1994); Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, Justice on Trial (2000); Paul J. Hofer, Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement, 37 Am. Crim. L. Rev. 41 (2000).

<sup>210</sup> Fifteen Year Report at 48-49.

<sup>211</sup> Id. at 89-91.

<sup>212</sup> U.S. Sentencing Commission, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice 20-21 (1998).

The gap between the sentencing of men and women has also widened in the Guidelines era. A typical male drug offender is twice as likely as a female to be sentenced to prison, sentence length is 25-30% longer for men in all types of cases, women get larger downward departures, and are more likely to get an alternative sentencing option. This may be warranted by lesser involvement by women, greater family responsibilities and greater separation from their families caused by the relative scarcity of prisons for women, or it may be unwarranted disparity driven by paternalism or an incorrect assumption that men do not have family responsibilities.<sup>213</sup>

Pre-Sentence Reports. There is wide variation in the depth, quality and evenhandedness of probation officers in their investigation and presentation of facts in the pre-sentence report, which results in similar defendants being treated differently and different defendants being treated similarly.<sup>214</sup>

Factor Manipulation. Manipulation of sentencing factors by prosecutors and police in undercover investigations (e.g., inducement to cook the powder, repeated transactions, transactions in a prohibited location) is a “significant source of continuing disparity in the federal system.”<sup>215</sup> This is built into the Guidelines because the factors have definite numbers of months assigned to them that are known to law enforcement and cooperators.

Regional Disparity/Prosecutorial Practices and Policies. Regional disparity persists under the Guidelines, and even increased for drug trafficking offenses.<sup>216</sup> Inter-judge disparity was reduced by the Guidelines, but not for immigration or robbery offenses.<sup>217</sup> Most inter-judge disparity is explained by case differences.<sup>218</sup> Most regional disparity is not explained by case differences but by different charging and plea policies in U.S. Attorneys’ offices.<sup>219</sup> This results in sentences that are disproportionately lenient, and disproportionately severe. This disparity is unwarranted and unlikely to change under DOJ policies.<sup>220</sup>

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<sup>213</sup> Fifteen Year Report at 117-18, 127-29, 130.

<sup>214</sup> Id. at 84.

<sup>215</sup> Id. at 82.

<sup>216</sup> Id. at 94, 98, 108, 140.

<sup>217</sup> Id. at 97-99, 140.

<sup>218</sup> Id. at 101-102.

<sup>219</sup> Id. at 86, 87-88, 94, 100.

<sup>220</sup> Id. at 141-42.

Charging and plea bargaining policies are determined more by the local U.S. Attorney's Office than by Main Justice.<sup>221</sup> There is considerable regional variation in the rates and circumstances under which prosecutors file § 851 notices, § 924(c) charges, and mandatory minimum charges, use fast track dispositions (charge bargains and § 5K3.1 departures), and move under § 5K1.1, § 3553(e), Rule 35(b), and § 3E1.1(b).<sup>222</sup>

Based on concerns that the Guidelines would transfer power to prosecutors and thus increase disparities in sentencing, relevant conduct rules, cross references, multiple count rules, and policy statements regulating plea bargaining were included in the Guidelines.<sup>223</sup> According to the Commission, some of the mechanisms intended to ameliorate the effects of prosecutorial charging and plea bargaining decisions “are not working as intended,” and some “tend to work in one direction,” *i.e.*, to the disadvantage of defendants. “The relevant conduct rule, for example, can increase sentences to account for criminal conduct that was not charged or that was dismissed prior to sentencing. But there is no guidelines mechanism to decrease sentences for an offender who, for example, is convicted of several counts of 18 U.S.C. § 924(c) and is therefore subject to multiple consecutive mandatory penalty enhancements. If some offenders are charged in this manner and others are not, there is little a judge can do to compensate for the resulting sentencing disparity.”<sup>224</sup>

Chief probation officers and judges believe that much of the sentencing discretion judges once had has been transferred to prosecutors under the Guidelines. *Id.* at 86. Most judges believe that plea bargains are a source of unwarranted disparity. *Id.* at 86.

“Fact bargaining” may result in unwarranted disparity.<sup>225</sup>

The Commission's empirical analysis shows that “[a]mong discretionary mechanisms within the guidelines system, substantial assistance departures contribute the greatest amount to variation in sentences, while judges' use of the guidelines range contributes the least.”<sup>226</sup> Rates of substantial assistance departures vary widely among districts, and while the Commission cannot be sure whether disparity resulting from substantial assistance motions (or lack thereof) is warranted or not because the government does not make the nature of the cooperation available to the Commission,

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<sup>221</sup> *Id.* at 84.

<sup>222</sup> *Id.* at 85, 89-92, 102, 103, 106.

<sup>223</sup> *Id.* at 10, 25-27, 28.

<sup>224</sup> *Id.* at 92.

<sup>225</sup> *Id.* at 85-86, 89.

<sup>226</sup> *Id.* at 102, 141.

research shows that policies and practices are irregular and inconsistent, and that Blacks consistently receive substantial assistance departures at a lower rate.<sup>227</sup>

The use of fast track charge bargains and departures was only revealed to the Commission after the PROTECT Act was passed. Whether it creates unwarranted disparity cannot be evaluated without data. The Justice Department had not yet provided such data.<sup>228</sup> (But see Part V.B, *infra*.) However, the Commission estimated that in 2001, approximately 40% of the downward departures Congress assumed were judicial departures were in fact government-initiated and mostly fast track departures (which does not include fast track charge bargains), and that judges departed without a government motion in only about 10.9 % of cases.<sup>229</sup> The highest departure rates by district and the greatest variation among districts was due to government-initiated fast track departures.<sup>230</sup>

Departures. The Commission does not know if the disproportionate rates of departure and placement within range among different racial, ethnic and gender groups is warranted or unwarranted because it keeps no data on mitigating characteristics or circumstances present in the case unless a departure was granted, and has no information on the type of assistance given in § 5K1.1 cases.<sup>231</sup> Whether the regional variation in judicial departure rates is warranted or unwarranted is a subject of ongoing debate and unresolved by the Commission.<sup>232</sup> The lack of data on mitigating factors unless a departure was granted impedes resolution of the issue. However, judges' decisions are stated on the record and subject to appeal, while prosecutors' are not.<sup>233</sup>

## **VI. The Fifth Amendment Requires Proof Beyond a Reasonable Doubt.**

The Supreme Court did not decide in Booker what standard of proof the Fifth Amendment requires for judicial factfinding under the new “advisory” guideline system, much less the “substantial weight”/“presumptively reasonable” system now widely in effect. Nor does the Sentencing Reform Act prescribe a standard of proof. The Sentencing Commission’s policy statement stating its belief that a preponderance of the evidence standard meets due process requirements always was advisory and in hindsight probably wrong. Even before the line of cases culminating in Booker, at least seven of

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<sup>227</sup> Id. at 103-05, 141.

<sup>228</sup> Id. at 106-07.

<sup>229</sup> Id. at 111; 2003 Downward Departure Report at 60.

<sup>230</sup> Fifteen Year Report at 112.

<sup>231</sup> Id. at 119, 130, 131.

<sup>232</sup> Id. at 112.

<sup>233</sup> Id. at 82.

the courts of appeals held or stated in dicta that a heightened standard of proof (either beyond a reasonable doubt or clear and convincing evidence), or an opportunity to depart downward, was required for facts with a significant, disproportionate, unreliable, or otherwise unfair impact on the sentence.<sup>234</sup> In both Watts and Almendarez-Torres, the Supreme Court acknowledged these opinions but did not resolve the issue.<sup>235</sup>

As the Supreme Court explained in In re Winship, the function of a standard of proof as embodied in the Due Process Clause of the Fifth Amendment is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”<sup>236</sup> In a civil suit for damages, the preponderance standard is acceptable because it is viewed as no more serious for there to be an error in the plaintiff’s favor than for there to be an error in the defendant’s favor.<sup>237</sup> But “[w]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden \* \* \* of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.”<sup>238</sup> Winship involved factfinding in a juvenile delinquency proceeding, where, as in federal sentencing today, the judge did the factfinding and it did not result in “conviction” of a “crime.” The Court held that those distinctions made no difference; the potential loss of liberty required proof beyond a reasonable doubt.<sup>239</sup>

In Apprendi v. New Jersey, the Court stated: “Since Winship, we have made clear beyond peradventure that Winship’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or

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<sup>234</sup> See United States v. Jordan, 256 F.3d 922, 927-29 (9<sup>th</sup> Cir. 2001); United States v. Shonubi, 103 F.3d 1085, 1087-92 (2d Cir. 1997); United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996); United States v. Lombard, 72 F.3d 170, 186-87 (1st Cir. 1995), aff’d after remand, 102 F.3d 1 (1st Cir. 1996); United States v. Lam Kwong-Wah, 966 F.2d 682, 688 (D.D.C. 1992); United States v. Trujillo, 959 F.2d 1377, 1382 (7th Cir. 1992); United States v. Townley, 929 F.2d 365, 370 (8th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990).

<sup>235</sup> United States v. Watts, 519 U.S. 148, 156-57 (1997) (declining to address the issue because the cases before it did not present such “exceptional circumstances”); Almendarez-Torres v. United States, 523 U.S. 224, 247-48 (1998) (noting but not addressing the Due Process issue because appellant did not raise it).

<sup>236</sup> 397 U.S. 358, 370 (1970).

<sup>237</sup> Id. at 371-72.

<sup>238</sup> Id. at 363-64; id. at 370, 371-72 (Harlan, J, concurring). See also Addington v. Texas, 441 U.S. 418, 423 (1979) (“standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision,” holding that clear and convincing standard is required for civil commitment).

<sup>239</sup> Winship, 397 U.S. at 365-66.

innocence, but simply to the length of his sentence.”<sup>240</sup> In Ring v. Arizona, the Court held that any “increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt.”<sup>241</sup> And in Summerlin v. Schriro, the Court held that Ring was not retroactive because, though the Sixth Amendment rights at stake were fundamental, Arizona’s requirement that the judge make the factfindings *beyond a reasonable doubt* did not implicate the “fundamental fairness and accuracy of the criminal proceeding.”<sup>242</sup>

In Booker, the questions presented and holdings were stated solely in terms of the Sixth Amendment,<sup>243</sup> but there are indications that a majority of the Court would hold that the Fifth Amendment requires proof beyond a reasonable doubt particularly if the Guidelines are again “presumptive” as they were before Booker. In Blakely, the majority strongly criticized real offense sentencing generally.<sup>244</sup> In Booker, a majority indicated that Watts was wrongly decided.<sup>245</sup> Justice Scalia sharply criticized the unreliability of the way in which facts are found under the Guidelines,<sup>246</sup> and Justice Thomas thought that the Court had corrected the Commission’s “mistaken belief” that judges may use a preponderance of the evidence standard.<sup>247</sup>

After Booker, it is clear that disputed facts that increase the guideline range continue to have a definite and measurable effect on the sentence. Once correctly calculated, the guideline range is to be considered against the other 3553(a) factors, and a number of courts have held that the guideline range is not only the starting point but entitled to presumptive weight. The courts certainly have no discretion to calculate the guideline range *inaccurately*. Moreover, courts of appeals have judged whether a

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<sup>240</sup> 530 U.S. 466, 484 (1999).

<sup>241</sup> 536 U.S. 584, 602 (2002).

<sup>242</sup> 542 U.S. 348, 351 n.1, 352, 355-57 (2004).

<sup>243</sup> Booker, 125 S. Ct. at 746, 747 n.1, 748-50, 756, 769.

<sup>244</sup> Blakely, 542 U.S. at 306 (that “a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it” was an “absurd result” that “not even Apprendi’s critics would advocate.”).

<sup>245</sup> Booker, 125 S. Ct. at 754 n.4 (indicating that Watts was wrongly decided and noting Justice Kennedy’s dissent in Watts).

<sup>246</sup> Id. at 790 (criticizing factfinding under the Guidelines as “judges determin[ing] ‘real conduct’ on the basis of bureaucratically-prepared, hearsay-riddled presentence reports”) (Scalia, J., dissenting in part).

<sup>247</sup> Id. at 798 n.6 (Thomas, J. dissenting in part).

sentence is “reasonable” by *how much* it differs from the guideline range.<sup>248</sup> Recognizing that the guideline range still has a definite and measurable effect on the loss of liberty, a number of district courts after Booker have adopted the beyond a reasonable doubt standard as a matter of constitutional avoidance, as a matter of discretion, or as an indicator of how much weight they should give the guideline range, and some have declined to use acquitted conduct.<sup>249</sup> Some courts of appeals have held that the district courts may use the preponderance standard, but so far, none has held that they must.<sup>250</sup> The Third Circuit, which has rejected the presumption of reasonableness, has said that the preponderance of the evidence standard applies, but, “We do not address here the standard of proof for finding a separate crime under relevant law.”<sup>251</sup>

For practitioners in circuits using a rebuttable presumption of reasonableness, Steve Sady has developed a very useful argument, based on the Supreme Court’s burden-shifting cases, including Ulster County v. Allen, 442 U.S. 140 (1979), Mullaney v. Wilbur, 421 U.S. 684 (1975) and others, that the burden of rebutting the presumption may not be shifted to the defendant without proof beyond a reasonable doubt of the operative facts supporting the guideline sentence.<sup>252</sup>

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<sup>248</sup> See, e.g., United States v. Dean, 414 F.3d 725, 729 (7<sup>th</sup> Cir. 2005) (the more the sentence departs from the guidelines sentence, the more compelling the justification based on other 3553(a) factors has to be); United States v. Rogers, 400 F.3d 640, 642 (8<sup>th</sup> Cir. Mar. 16, 2005) (sentence of probation in a case where the guideline range was 51-63 months was “unreasonable” because it “is unreasonable to expect that defendants with similar records, guilty of similar conduct, would receive probation”).

<sup>249</sup> See United States v. Okai, 2005 WL 2042301 at \*\*4-10 (D. Neb. Aug. 22, 2005); United States v. Coleman, 370 F.Supp.2d 661 (S.D. Ohio 2005); United States v. Pimental, 367 F. Supp.2d 143 (D. Mass. Apr. 15, 2005); United States v. Gray, 362 F.Supp.2d 714, 720-24 (S.D. W. Va. Mar. 17, 2005); United States v. Thomas, 360 F.Supp.2d 238, 241 (D. Mass. 2005); United States v. Huerta-Rodriguez, 355 F. Supp.2d 1019, 1028 (D. Neb. Feb. 1, 2005); United States v. Carvajal, 2005 WL 476125 \*4 (S.D.N.Y. 2005); United States v. West, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).

<sup>250</sup> See United States v. Cuellar-Cuellar, 2005 WL 3395371 \*3 n.4 (Dec. 13, 2005) (declining to reach what standard of proof due process requires for prior convictions with a significant effect on the sentence in light of appellant’s failure to argue that he did not admit the fact of conviction); United States v. Vaughn, 2005 WL 3219706 (2<sup>d</sup> Cir. Dec. 1, 2005) (courts may use preponderance of the evidence standard but are not required to take into account acquitted conduct); United States v. Welch, 429 F.3d 702, 704-05 (7<sup>th</sup> Cir. 2005) (district court may use preponderance of the evidence standard); United States v. Pirani, 406 F.3d 543, 551 n.4 (8<sup>th</sup> Cir. 2005) (nothing in Booker requires use of the beyond a reasonable doubt standard).

<sup>251</sup> United States v. Cooper, \_\_\_ F.3d \_\_\_, 2006 WL 330324 \*4 n.7 (3<sup>d</sup> Cir. Feb. 14, 2006).

<sup>252</sup> See Stephen R. Sady, Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt, 18 Fed. Sent. R. \_\_ (March 2006), also available at <http://circuit9.blogspot.com/2006/02/guidelines-appeals-presumption-of.html>.