

THE FEDERAL SENTENCING GUIDELINES AND THE PURSUIT OF FAIR AND JUST SENTENCES

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I. INTRODUCTION: FEDERAL SENTENCING AND THE CURRENT STATE OF FEDERAL INCARCERATION

The federal prison system has become an increasingly populated place. With an approximate 91% conviction rate in the federal criminal system,¹ with 97% of all cases entering a plea of guilty prior to trial,² and over 90% of those convictions resulting in a sentence of incarceration,³ imprisonment is a nearly unavoidable part of a criminal defendant's experience in the federal system.

According to statistics by the Federal Bureau of Prisons, the law enforcement agency responsible for the administration of federal prisons, there are a total of 217,180 federal inmates incarcerated in the United States.⁴ This number has drastically increased over the past three decades; the federal prison population was approximately 25,000 in 1980.⁵ Of those incarcerated, approximately 28.8% are

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¹ MARK MOTIVANS, FEDERAL JUSTICE STATISTICS, 2009, at 12 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf>.

² U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2013).

³ *Id.* at fig.D.

⁴ *Population Statistics, FED. BUREAU OF PRISONS*, http://www.bop.gov/about/statistics/population_statistics.jsp (last updated May 22, 2014).

⁵ NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION

serving sentences from five to ten years, the most prevalent sentencing range,⁶ while 13.3% are serving over twenty years or life sentences.⁷

Since the early 1980s, due to changes in federal sentencing and criminal justice policies, including the imposition of mandatory minimum sentences for drug offenses, there has been a rapid and unprecedented growth in the federal prison population.⁸ And while the United States state prison population has seen slight decreases in the last several years,⁹ it has also followed the federal prisons' trend of massive growth over the past several decades.¹⁰ Consequently, the United States has the largest incarceration rate in the world,¹¹ reaching a total of approximately 2.2 million inmates.¹²

Federal prison population growth is, in no small part, due to mandatory minimum penalties for drug offenses, which have increased in number and have been charged more frequently over the past twenty years.¹³ Drug offenses are the most common; nearly half of the entire federal prison population is serving time for drug-related crimes,¹⁴ and over 96% of defendants sentenced for drug trafficking crimes receive a sentence of incarceration.¹⁵ In comparison, violent offenses compose less than 5% of federal inmate convictions.¹⁶ As the numbers of federal inmates rise, so does the Bureau of Prisons' budget. The Bureau of Prisons' budget request for the fiscal year 2012 totaled approximately \$6.8 billion, a 10.3%

BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 2 (2013), <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

⁶ *Sentences Imposed*, FED. BUREAU PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last updated Apr. 26, 2014).

⁷ *Id.*

⁸ See JAMES, *supra* note 5, at 7. Between 1940 and 1980, the federal inmate population stayed relatively stagnant at 24,000 inmates. *Id.* at 2.

⁹ LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 8 app. tbl.1 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus11.pdf>.

¹⁰ *Id.* at 1 & fig. 1.

¹¹ THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2013), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

¹² *Id.* at 2. This data is based on a statistical analysis conducted in 2012. *Id.*

¹³ JAMES, *supra* note 5, at 6 fig. 3 & 8.

¹⁴ *Offenses*, FED. BUREAU PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Jan. 25, 2014) [hereinafter *Offenses*].

¹⁵ U.S. SENTENCING COMM'N, *supra* note 2, at tbl.12.

¹⁶ JAMES, *supra* note 5, at 4.

increase from last fiscal year.¹⁷

Since the rates of conviction and incarceration in the federal system continue to rise, understanding the factors that determine a defendant's sentence is a crucial component in a criminal defense attorney's overall case strategy. While for the majority of United States history federal sentencing remained largely unregulated and indeterminate, the Sentencing Reform Act of 1984,¹⁸ its establishment of the United States Sentencing Commission, and its creation of the United States Sentencing Guidelines (the Guidelines), sought to make federal sentencing more uniform and predictable. The Guidelines, which mandated a certain sentencing range dependent upon a defendant's offense and past criminal history, among other things, placed a considerable restraint on matters that had previously been almost entirely entrusted to individual judges' discretion.

However, in *United States v. Booker*,¹⁹ the Supreme Court held that the federal sentencing Guidelines were "effectively advisory," not mandatory.²⁰ Since *Booker* and its progeny, the Guidelines and the sentencing practices of the district courts have become more discretionary by allowing judges to take into consideration the individualized characteristics of the defendant and the offense.

In contrast to the advisory nature of the Guidelines, mandatory minimum penalties for drug offenses, a product of America's ongoing "War on Drugs," constrain judicial discretion and limit individualized consideration of the defendant by mandating sentences based on drug type and quantity.²¹ The seemingly incongruent relationship between the Guidelines and mandatory minimum penalties for drug offenses makes sentencing all the more complicated. This complexity, coupled with the high federal incarceration rate and the probability that most federal defendants will, indeed, serve prison time, makes sentencing arguably one of the most important, if not *the most important*, part of a defendant's case.

This article analyzes the questions and considerations surrounding the post-*Booker* Guidelines from the perspective of the

¹⁷ U.S. DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM (BOP) 1 (2012), <http://www.justice.gov/jmd/2012summary/pdf/fy12-bop-bud-summary.pdf>.

¹⁸ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

¹⁹ *United States v. Booker*, 543 U.S. 220 (2005).

²⁰ *Id.* at 245.

²¹ See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.); 21 U.S.C. § 841 (2012) (outlining specific sentencing requirements for certain drug offenses).

criminal defense attorney, with particular emphasis on the Guidelines' relationship to mandatory minimum drug laws. Part II considers the history of federal sentencing prior to and after the enactment of the Guidelines, as well as the impact *United States v. Booker* had on judicial sentencing discretion. Part III examines the mechanics of the Guidelines and the various mitigating factors that defense attorneys often raise in their arguments for lower sentences. Part IV discusses mandatory minimum drug offenses and their often conflicting relationship to the Guidelines' enumerated purposes. Part V considers the future of the Guidelines and mandatory minimum drug offenses, particularly in light of recent developments and public policy arguments advanced by the Department of Justice. Throughout the article, we have incorporated the opinions and experiences of prominent criminal defense attorneys and their reflections on the current state of federal sentencing.

II. THE HISTORY OF FEDERAL SENTENCING & THE EVOLUTION OF THE FEDERAL SENTENCING GUIDELINES

A. *The History of Broad Sentencing Discretion, Pre-Sentencing Reform Act*

Sentencing reform in the federal system has long been a topic of debate. For the majority of United States history, federal sentencing was largely indeterminate.²² Federal criminal statutes offered little guidance since many stated only a maximum term of imprisonment.²³ Federal judges had wide, unfettered discretion in imposing sentences, bound only by the statutory maximum. Some judges started at the lower statutory range and adjusted upward depending on the severity of the crime, while other judges would impose the maximum sentence allowable and discount for mitigating circumstances.²⁴ Furthermore, "there was virtually no appellate review of the trial judge's exercise of sentencing discretion."²⁵ This combination of factors resulted in sentences that were disparate and uncertain to predict.

The indeterminacy of sentencing was also a product of an

²² Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685 (1992).

²³ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

²⁴ Freed, *supra* note 22, at 1687-88.

²⁵ Stith & Koh, *supra* note 23, at 226.

ideological shift in the Court's treatment of offenders. By the beginning of the twentieth century, individualized rehabilitation was viewed as more important than fixed punishment. The Court took on a more proactive approach in determining a sentence with any and all information available. As stated by the Supreme Court in *Williams v. New York*,²⁶ "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."²⁷

The advent of federal parole in 1910 further broadened an offender's sentencing possibilities.²⁸ The parole board was responsible for determining the actual release date of federal inmates.²⁹ Most inmates were not eligible for parole until they had served one-third of their sentences, although an alternative statutory provision permitted the sentencing judge the authority to grant a defendant's immediate eligibility for parole.³⁰ "Under the rehabilitative model, parole officials' power to determine a sentence's duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit 'experts' to determine when sufficient rehabilitation had occurred to warrant release from prison."³¹

By the 1950s, however, critics of indeterminate sentencing existed on both ends of the political spectrum.³² Liberal reformers argued that indeterminate sentencing was unsuccessful in terms of rehabilitation, created anxiety and uncertainty among prisoners due to disparities in sentences for the same crimes, and was "fundamentally at odds with ideals of equality and the rule of the law."³³ "Meanwhile, critics from the political right expressed dissatisfaction with the perceived leniency of sentencing judges and parole officials."³⁴

One of the most influential critics of federal sentencing at this time was a federal district court judge in the Southern District of

²⁶ *Williams v. New York*, 337 U.S. 241 (1949).

²⁷ *Id.* at 247.

²⁸ Stith & Koh, *supra* note 23, at 226–27; see Act of June 25, 1910, ch. 387, 36 Stat. 819, 819 (codified at 18 U.S.C. § 4205(a) (1982)) (repealed 1984).

²⁹ Stith & Koh, *supra* note 23, at 226.

³⁰ *Id.* at 226 & n.11.

³¹ *Id.* at 227.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

New York and former Columbia law professor, Marvin Frankel.³⁵ In 1972, Judge Frankel published his book, *Criminal Sentences: Law Without Order*,³⁶ and an article, *Lawlessness in Sentencing*,³⁷ in which he argued that “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”³⁸ Judge Frankel “criticized sentencing institutes, the shortcomings of judicial selection and education, parole, and indeterminate sentencing.”³⁹ Judge Frankel proposed reforms included “the creation of an administrative agency, a ‘Commission on Sentencing,’ with ‘the function of actually enacting rules . . . [and] making law’ in the form of ‘binding guides’ on sentencing courts.”⁴⁰ Throughout the next decade, “Judge Frankel’s work remained the cornerstone of the legislative effort to replace judicial discretion in criminal sentencing with certainty and administrative expertise.”⁴¹

In 1975, Senator Edward M. Kennedy decided to sponsor sentencing reform legislation after hosting a dinner party for Judge Frankel and other scholars in the field.⁴² Around the same time period, “members of the Yale sentencing seminar completed a manuscript on judicial sentencing disparity that contained a detailed proposal for the establishment of a sentencing commission empowered to promulgate sentencing ‘guidelines’ binding on federal sentencing judges.”⁴³ This proposal was ultimately used as the basis for Senator Kennedy’s proposed sentencing reform bill.⁴⁴ The bill received bipartisan support and cosponsorship of seven other senators,⁴⁵ but the Yale authors alleged the bill “fail[ed] to define its sentencing goals clearly and lack[ed] specific instructions for sentencing judges.”⁴⁶ In 1977, Senator Kennedy and Senator John

³⁵ *Id.* at 228.

³⁶ MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972) [hereinafter FRANKEL, *CRIMINAL SENTENCES*].

³⁷ Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

³⁸ FRANKEL, *CRIMINAL SENTENCES*, *supra* note 36, at 5.

³⁹ William H. Pryor Jr., Commentary, *Federalism and Sentencing Reform in the Post-Blakely/Booker Era*, 8 OHIO ST. J. CRIM. L. 515, 515 (2011).

⁴⁰ Stith & Koh, *supra* note 23, at 228 (quoting FRANKEL, *CRIMINAL SENTENCES*, *supra* note 36, at 105, 119, 122).

⁴¹ Stith & Koh, *supra* note 23, at 228.

⁴² *Id.* at 230.

⁴³ *Id.*

⁴⁴ S. 2699, 94th Cong. (1975), reprinted in 121 Cong. Rec. 37563–64 (1975); Stith & Koh, *supra* note 23, at 230.

⁴⁵ 121 Cong. Rec. 37562.

⁴⁶ Stith & Koh, *supra* note 23, at 230 (quoting PIERCE O’DONNELL ET AL., TOWARD A JUST

L. McClellan introduced a revised version of a bill,⁴⁷ which after several arduous congressional sessions,⁴⁸ would later become the Sentencing Reform Act of 1984.⁴⁹ Finally, after nearly a decade of consideration, the bill passed with overwhelmingly strong bipartisan support and marked a new era for federal sentencing.⁵⁰

B. Sentencing Reform Act & the Federal Sentencing Guidelines

The Sentencing Reform Act of 1984 (SRA) was enacted as Chapter II of the Comprehensive Crime Control Act of 1984,⁵¹ an omnibus package of crime control legislation. The SRA created the United States Sentencing Commission (Commission),⁵² an independent agency of the judicial branch of government, composed of seven voting and two non-voting members.⁵³

The Commission's principal purposes are:

(1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.⁵⁴

By a majority vote, the Commission was granted the authority to promulgate sentencing guidelines and policy statements to aid in implementing said guidelines⁵⁵ in accordance with the four basic goals of sentencing: "deterrence, incapacitation, just punishment, and rehabilitation."⁵⁶ In furtherance of these goals, the SRA

AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 89 (1977)).

⁴⁷ S. 1437, 95th Cong. (1978).

⁴⁸ See Stith & Koh, *supra* note 23, at 258–67.

⁴⁹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1976, 1987 .

⁵⁰ See Stith & Koh, *supra* note 23, at 258–67.

⁵¹ § 211, 98 Stat. at 1987.

⁵² 28 U.S.C. § 991(a) (2012).

⁵³ U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2013).

⁵⁴ *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited May 27, 2014).

⁵⁵ 28 U.S.C. § 994(a) (2012).

⁵⁶ U.S. SENTENCING GUIDELINES MANUAL § 1A1.2.

codified provisions that abolished the federal parole system⁵⁷ and granted appellate review of sentences.⁵⁸

Most importantly, the SRA provides detailed instructions as to the Commission's development of sentencing Guidelines.⁵⁹ Discussed in more detail in Part III of this article, the Commission was directed to create categories of offender behavior (the committed offense) and offender characteristics (criminal history).⁶⁰ A defendant's prescribed guideline range is determined "by coordinating the offense behavior categories with the offender characteristic categories."⁶¹ The range of imprisonment a defendant may receive is calculated in months.⁶² The maximum of the range cannot exceed the minimum of the range by more than the greater of either 25% or six months.⁶³

The SRA mandated that the courts must impose a sentence within the defendant's guideline range except if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."⁶⁴ Furthermore, the sentencing judge must state in open court the reasons for imposing a particular sentence,⁶⁵ which not only preserves the record for any potential appeals, but also provides the defendant with an understanding as to the judge's reasoning.

Once the Guidelines were promulgated by the Commission and made applicable to any federal crime committed after November 1, 1987, the federal circuits and district courts were split over three main constitutional challenges to the SRA: "(1) the scope of Congress' delegation of legislative power to the Commission; (2) the blurring of the separation of powers implicated by the Act; and (3) the due process rights of offenders sentenced under the Guidelines."⁶⁶ However, in the seminal case, *Mistretta v. United*

⁵⁷ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 1976, 2027.

⁵⁸ 18 U.S.C. § 3742(a)-(b) (2012).

⁵⁹ U.S. SENTENCING GUIDELINES MANUAL § 1A1.1.

⁶⁰ *Id.* § 1A1.2.

⁶¹ *Id.*

⁶² *Id.* § 5A.

⁶³ 28 U.S.C. § 994(b)(2) (2012).

⁶⁴ 18 U.S.C. § 3553(b)(1) (2012).

⁶⁵ *Id.* § 3553(c).

⁶⁶ Charles R. Eskridge III, *The Constitutionality of the Federal Sentencing Reform Act After Mistretta v. United States*, 17 PEPP. L. REV. 683, 685 (1990).

States,⁶⁷ the Supreme Court held in favor of the Commission's constitutionality based on the issues of excessive legislative delegation and separation of powers.⁶⁸

C. 2005 to Present: United States v. Booker & Its Impact on Sentencing Discretion

For nearly twenty years after the SRA was enacted, federal courts followed the prescribed sentencing Guidelines ranges, except in atypical cases.⁶⁹ In 2005, however, the consolidated cases, *United States v. Fanfan* and *United States v. Booker*, held that the Guidelines were “effectively advisory,” not mandatory.⁷⁰ *Booker* established that the mandatory nature of the federal sentencing Guidelines, namely, the requirement that courts increase sentences under the Guidelines based on findings of aggravating facts by the court, rather than by a jury, violated the Sixth Amendment.⁷¹

In *Booker*, the defendant was convicted of possession with intent to distribute at least fifty grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1).⁷² A jury rendered a guilty verdict upon hearing evidence that the defendant had possessed about ninety-three grams in his duffle bag.⁷³ “Based upon Booker’s criminal history and the quantity of drugs found by the jury, the Sentencing Guidelines required the District Court Judge to select a ‘base’ sentence of not less than 210 nor more than 262 months in prison.”⁷⁴ However, the sentencing “concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice.”⁷⁵ As a result, Booker’s sentence was on the low end of the higher mandatory range of 360 months and life imprisonment.⁷⁶

However, the Supreme Court had already held in the previous cases, *Jones v. United States*⁷⁷ and *Apprendi v. New Jersey*,⁷⁸ that *any* fact that increases the statutory maximum sentence must be

⁶⁷ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁶⁸ *See id.* at 412.

⁶⁹ *See* 18 U.S.C. § 3553(b).

⁷⁰ *United States v. Booker*, 543 U.S. 220, 245 (2005).

⁷¹ *Id.* at 244–45.

⁷² *Id.* at 227.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Jones v. United States*, 526 U.S. 227 (1999).

⁷⁸ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

admitted by the defendant or proven to a jury beyond a reasonable doubt.⁷⁹ Furthermore, in *Blakely v. Washington*,⁸⁰ the Supreme Court held that the Washington State sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial when the defendant in *Blakely* was sentenced above his mandated guidelines range based on aggravating facts found by the judge, not by the jury.⁸¹

Based on these prior decisions, the Supreme Court concluded that the federal sentencing Guidelines were comparable to the Washington State guidelines in that they both violated the Sixth Amendment by using facts not proven to a jury beyond a reasonable doubt or admitted by the defendant as a sentencing enhancement.⁸² The Court held, however, that “[i]f the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.”⁸³ Therefore, the Court severed and excised 18 U.S.C. § 3553(b)(1), the provision which made the federal sentencing Guidelines mandatory, and 18 U.S.C. § 3742(e), the provision which provided appellate review for sentences that departed from mandatory range.⁸⁴ Instead, the Court adopted an “unreasonableness” standard of review, in which the appellate courts would defer to the sentencing court’s decision unless it was deemed unreasonable based on the factors outlined in 18 U.S.C. § 3553(a).⁸⁵ The Court held that advisory guidelines would “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”⁸⁶

Subsequent Supreme Court decisions have elaborated the holding in *Booker* and have guided federal judges through the process of implementing the Guidelines in their newly advisory capacity. In *Gall v. United States*,⁸⁷ the Court held that the Guidelines are “the starting point and the initial benchmark . . . [but] are not the only

⁷⁹ *Jones*, 526 U.S. at 249; *Apprendi*, 530 U.S. at 490.

⁸⁰ *Blakely v. Washington*, 542 U.S. 296 (2004).

⁸¹ *Id.* at 300, 313–14.

⁸² *United States v. Booker*, 543 U.S. 220, 231–32 (2005).

⁸³ *Id.* at 233.

⁸⁴ *Id.* at 259.

⁸⁵ *Id.* at 261.

⁸⁶ *Id.* at 264–65.

⁸⁷ *Gall v. United States*, 552 U.S. 38 (2007).

consideration, however.”⁸⁸ Furthermore, the judge must not presume that the Guidelines range is reasonable.⁸⁹ As explained in *Nelson v. United States*,⁹⁰ “[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”⁹¹

“[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply[.]” Instead, the sentencing court must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter.⁹²

Individualized assessments under 18 U.S.C. § 3553(a), which are discussed in more detail in Part III, are generally more favored by criminal defense attorneys than the former mandatory Guidelines. As prominent attorney Gerald B. Lefcourt⁹³ explains:

I represented clients prior to the adoption of the Guidelines, as well as while they were mandatory and continue to do so now that they are advisory. For me, there is no question that an advisory Guidelines scheme is preferable to one that is mandatory. While there is more

⁸⁸ *Id.* at 49.

⁸⁹ *Rita v. United States*, 551 U.S. 338, 353 (2007).

⁹⁰ *Nelson v. United States*, 555 U.S. 350 (2009).

⁹¹ *Id.* at 352.

⁹² *Id.* at 351 (citation omitted) (quoting *Rita*, 551 U.S. at 351).

⁹³ Mr. Lefcourt received a B.A. from New York University in 1964, a J.D. from Brooklyn Law School in 1967, and an L.L.M. in Tax from New York University School of Law in 1968. Mr. Lefcourt practices primarily in the areas of criminal law and complex civil litigation. He is recognized as one of the country’s foremost trial attorneys and represents a variety of clients, such as Yippie founder Abbie Hoffman, Black Panther Party leaders, Drexel Burnham Lambert securities trader Bruce Newberg, real estate mogul Harry Helmsley, actor Russell Crowe, New York State Assembly Speaker Mel Miller, and hip hop music promoter and Murder Inc. record label head Irv Gotti. He currently represents political figures such as New York State Assemblyman Vito Lopez, Friends of John C. Liu, former treasurer Jenny Hou, and Kerry Kennedy. Mr. Lefcourt has received numerous awards including: the Robert C. Heeney Memorial Lifetime Achievement Award from the National Association of Criminal Defense Lawyers; the Thurgood Marshall Lifetime Achievement Award from the New York State Association of Criminal Defense Lawyers; New York State Bar Association’s Outstanding Practitioner Award; and New York University School of Law’s Milton S. Gould Award for Outstanding Oral Advocacy. Mr. Lefcourt is a past president of the National Association of Criminal Defense Lawyers; a founder of the New York State Association of Criminal Defense Lawyers (NACDL); and founder and past president of the New York Criminal Bar Association. Currently he serves as President of the Criminal Justice Foundation of the NACDL. He also serves as program co-chair of the annual White Collar Crime Conference at Fordham Law School sponsored by the National Association of Criminal Defense Attorneys. Letter from Gerald B. Lefcourt to authors (Sept. 26, 2013) (on file with authors).

uncertainty for clients and attorneys alike, the freedom afforded by the advisory nature of the Guidelines often leads to less harsh sentences. This is particularly true for first time white collar and non-violent offenders as well offenders with particularly noteworthy (positive or negative) upbringings, backgrounds, and histories. Certainly the advisory nature of the Guidelines allows sentencing judges to fully take these circumstances into consideration, whereas before many of these factors were proscribed from the calculus.⁹⁴

Alan Vinegrad⁹⁵ expresses similar sentiments regarding the advisory nature of the Guidelines: “Judges can now consider appropriate factors that the Guidelines permitted limited consideration of, and this, in turn, contributes to greater leniency. For these reasons, the advisory Guideline system is clearly preferable for defendants, at least in federal courts in the northeast in which I’ve appeared.”⁹⁶

As Isabelle Kirshner⁹⁷ explains from her experiences, the *Booker* decision also benefited judges in certain instances:

Once Booker was decided, most judges in our districts were thrilled to be released from the Guidelines and most clients have benefitted significantly from them. I think the judges that have been on the bench the longest are the ones who were most frustrated by the Guidelines, having been forced to impose what they believe were unduly harsh sentences for many years. Newer judges, particularly judges who never practiced Criminal Law and who have no sense of what an appropriate sentence should be, tend to stick closer to the Guidelines. As they gain experience on the bench and gain some perspective, they tend to find their way to some sense of balance.

I’ve been doing this work for a long time. I represented

⁹⁴ *Id.*

⁹⁵ Mr. Vinegrad is a partner at Covington & Burling LLP and primarily practices white collar criminal and regulatory defense work on behalf of individuals and business organizations. He is a former member of the United States Attorney’s Office for the Eastern District of New York and is regarded as one of the top attorneys in the federal court system. Letter from Alan Vinegrad to authors (Oct. 23, 2013) (on file with authors).

⁹⁶ *Id.*

⁹⁷ Ms. Kirshner served as an Assistant District Attorney in the Manhattan District Attorney’s Office from 1982 to 1986 and has been a defense attorney for over twenty five years. She was a member of the Criminal Justice Act panel for twenty years and is considered by the Federal Bar Association as one of the top attorneys in New York. Letter from Isabella Kirshner to authors (on file with authors).

clients before the Guidelines were enacted, while they were mandatory, and since Booker. The advisory aspect of the Guidelines permits Judges to take into account the entire spectrum of relevant information and to formulate more intelligent, appropriate sentences.

In my experience, judges are likely to take into account the effect of the defendant's conduct on "victims" of crimes, as well as a defendant's personal background. Human beings are pretty extraordinary creatures and sometimes, they have extraordinary tales to tell. Telling that tale . . . getting a judge to understand that a defendant is not defined by the narrow information contained in an indictment, is the most important thing one can do for a client at sentencing.⁹⁸

III. THE UNITED STATES SENTENCING GUIDELINES: THE MECHANICS OF SENTENCING & MITIGATING FACTORS TO CONSIDER

A. *Determining the Guidelines Range*

1. Offense Level & Adjustments

The sentencing Guidelines range of a particular defendant is determined by two measures: (1) the seriousness of the offense, and (2) the defendant's criminal history.⁹⁹ As established by the Commission, there are forty-three levels of offense seriousness.¹⁰⁰ The more serious the offense is, the higher the level will be.¹⁰¹ The following seven factors, "among others," are considered when the Commission assigns a level of seriousness to an offense:

- (1) the grade of the offense;
- (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
- (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
- (4) the community view of the gravity of the offense;

⁹⁸ *Id.*

⁹⁹ 18 U.S.C. § 3553(a)(1) (2012).

¹⁰⁰ U.S. SENTENCING GUIDELINES MANUAL § 1A4(h) (2013).

¹⁰¹ *See id.* §§ 2A1.1–1.5 (2013) (illustrating that as the degree of the crime gets lower so does the base level corresponding to that crime).

- (5) the public concern generated by the offense;
- (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
- (7) the current incidence of the offense in the community and in the Nation as a whole.¹⁰²

For example, first-degree murder has an offense level of forty-three,¹⁰³ while minor assault is a level four.¹⁰⁴ Drug offenses, the most frequent convictions in the federal system,¹⁰⁵ range from levels twenty-six to forty-three,¹⁰⁶ depending upon type and quantity of the drugs and special offense characteristics which can increase the offense level.¹⁰⁷ Once an offense level is calculated, it may be adjusted upward or downward depending upon a number of aggravating or mitigating factors.¹⁰⁸ For example, if a “defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive” his offense level is increased by four levels.¹⁰⁹ Conversely, if a defendant was a minimal¹¹⁰ or minor participant¹¹¹ in the criminal activity, his offense level is decreased by four or two levels, respectively. Furthermore, if a defendant “clearly demonstrates acceptance of responsibility for his offense,” most often the case when a defendant pleads guilty before trial, he is entitled to a decrease of offense level by two levels.¹¹²

2. Criminal History Category

The Criminal History category is calculated in a similar manner. Numerical points are assigned to different types of prior convictions and the total number of points then falls into one of six categories.¹¹³ For example, Criminal History Category I includes defendants that have none or one criminal history point, while

¹⁰² 28 U.S.C. § 994(e) (2012).

¹⁰³ U.S. SENTENCING GUIDELINES MANUAL § 2A1.1.

¹⁰⁴ *Id.* § 2A2.3 (applying level 4 to minor assault offenses not involving physical contact or a dangerous weapon).

¹⁰⁵ *Offenses, supra* note 14.

¹⁰⁶ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(a) (“Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy”).

¹⁰⁷ *Id.* § 2D1.1(b).

¹⁰⁸ *Id.* ch. 2, introductory cmt.

¹⁰⁹ *Id.* § 3B1.1(a).

¹¹⁰ *Id.* § 3B1.2(a).

¹¹¹ *Id.* § 3B1.2(b).

¹¹² *Id.* § 3E1.1(a).

¹¹³ *See id.* § 4A1.1.

Criminal History Category VI is for defendants with thirteen or more points.¹¹⁴ Criminal History Category I is the most frequently applied; 44.9% of defendants fell into this category in 2012.¹¹⁵ The types of prior convictions are categorized in section 4A1.1 as follows:

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
- (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points for this subsection.¹¹⁶

For the purposes of calculating criminal history points, certain offenses are not counted such as “[a] sentence imposed more than ten years prior to the defendant’s commencement of the instant offense,”¹¹⁷ or a sentence imposed for an offense committed prior to the defendant’s eighteenth birthday if confinement did not extend into the five-year period preceding the defendant’s commencement of the instant offense.¹¹⁸

Furthermore, sometimes a criminal history category may be challenged if it does not sufficiently represent the defendant. The Guidelines policy statement section 4A1.3 states that “[i]f reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.”¹¹⁹ The policy statement “recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of

¹¹⁴ *See id.* § 5A.

¹¹⁵ U.S. SENTENCING COMM’N, ANNUAL REPORT 2012 at 43 (2012).

¹¹⁶ U.S. SENTENCING GUIDELINES MANUAL § 4A.1.1(a)–(e).

¹¹⁷ *Id.* §§ 4A1.1 cmt. n.1–3, 4A1.2(e).

¹¹⁸ *Id.* §§ 4A1.1 cmt. n.1–3, 4A1.2(d).

¹¹⁹ *Id.* § 4A1.3(b)(1).

criminal history that may occur.”¹²⁰

Obviously, a major reason for imposing an especially long sentence upon those who have committed prior offenses is to achieve a deterrent effect that the prior punishments failed to achieve. That reason requires an appropriate relationship between the sentence for the current offense and the sentences, particularly the times served, for the prior offenses. If, for example, a defendant twice served five or six years and thereafter committed another serious offense, a current sentence might not have an adequate deterrent effect unless it was substantial, perhaps fifteen or twenty years. Conversely, if a defendant served no time or only a few months for the prior offenses, a sentence of even three or five years for the current offense might be expected to have the requisite deterrent effect.¹²¹

Once both the offense level and criminal history category is calculated, the Guidelines range of months of imprisonment, if any, is established by consulting the Sentencing Table, a 258-cell grid in which the forty three offense levels make up the vertical axis and the six criminal history categories make up the horizontal axis.¹²² Where the two axes meet, a sentencing range is located. The ranges are from “0–6 months” to “life.”¹²³ Furthermore, the table sections off four different “zones”—labeled Zone A through Zone D—each of which correlate to a certain range of months.¹²⁴ Depending upon the correlated zone, there are certain rules surrounding mandatory imposition of imprisonment, if any.¹²⁵ As established in *Booker*, a defendant’s prescribed location on the sentencing table is merely advisory.¹²⁶ Therefore, the sentencing judge is free to consider other factors when deciding where within the range, or outside the range, the defendant falls. In 2012, over half of all federal defendants (52.4%) were sentenced within the Guidelines range.¹²⁷

B. Mitigating Sentencing Factors to Consider

After the defendant’s sentencing range is determined, the court

¹²⁰ *Id.* § 4A1.3 cmt. background.

¹²¹ *United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir. 2001).

¹²² U.S. SENTENCING GUIDELINES MANUAL § 5A.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* § 5C1(a)–(d).

¹²⁶ *United States v. Booker*, 543 U.S. 220, 246 (2005).

¹²⁷ U.S. SENTENCING COMM’N, *supra* note 115, at 43.

shall then consider the applicable factors of 18 U.S.C. § 3553(a) taken as a whole.¹²⁸ According to § 3553(a), “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in” § 3553(a)(2), which are defined as retribution, deterrence, incapacitation and rehabilitation.¹²⁹ The following factors are to be considered by the court:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g) . . . are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into

¹²⁸ U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(c).

¹²⁹ See 18 U.S.C. § 3553(a)(2) (2012).

account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) . . . is in effect on the date the defendant is sentenced[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.¹³⁰

The § 3553(a) factors are to be considered alongside the Guidelines—neither is given greater weight.¹³¹ In *Gall v. United States*, the Court describes the process for post-*Booker* sentencing.¹³² First, the judge must properly determine the applicable Guidelines range for the defendant.¹³³ After the Guidelines range is established, the judge should consider whether any of the Guidelines' departure policy statements apply pursuant to 18 U.S.C. § 3553(a)(5).¹³⁴ The judge “must make an individualized assessment based on the facts presented.”¹³⁵ Lastly, the § 3553(a) factors are to be considered, taken as a whole.¹³⁶ A sentence outside the Guidelines range, whether it be based on a departure provision or a § 3553(a) analysis, does not require “extraordinary circumstances.”¹³⁷ Moreover, at the time of sentencing, the judge “shall state in open court the reasons for its

¹³⁰ *Id.* § 3553(a)(1)–(7).

¹³¹ *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

¹³² *Gall v. United States*, 552 U.S. 38, 46–53 (2007).

¹³³ *Id.* at 49.

¹³⁴ *Id.* at 49–50.

¹³⁵ *Id.* at 50.

¹³⁶ *Id.* at 49–50.

¹³⁷ *Id.* at 47.

imposition of the particular sentence.”¹³⁸ “By articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve.”¹³⁹

The § 3553(a)(5) policy statements, which were established by the Commission and described in Chapter Five of the *United States Sentencing Commission Guidelines Manual*, consider characteristics that are deemed potentially relevant to sentencing under 28 U.S.C. § 994(d), which include “age[,] education[,] vocational skills[,] mental and emotional condition . . . [,] physical condition . . . [,] employment record[,] family ties and responsibilities[,] community ties[,] role in the offense[,] criminal history[,] and degree of dependence upon criminal activity [as] a livelihood.”¹⁴⁰ Prior to *Booker*, these policy statements were considered by the Court pursuant to § 3553(b) when departing (i.e., enhancing or subtracting) from an otherwise mandatory Guidelines range due to some “aggravating or mitigating circumstance.”¹⁴¹ Since the policy statements are part of the Guidelines, most circuit courts recognized these departure provisions as part of the Guidelines analysis.¹⁴² Currently, these provisions are not just considered when departing from the actual Guidelines calculation, but are also taken into account when the sentencing court decides whether to grant a “variance” from the range based on the “history and characteristics” of the defendant pursuant to § 3553(a)(1).¹⁴³ “Although courts are required to consider departure policy statements, the use of departures, as opposed to variances, has continued to decrease, as parties increasingly have relied on the section 3553(a) factors rather than on guideline departure provisions.”¹⁴⁴ As the Sixth Circuit describes:

[B]ecause the Guidelines are no longer mandatory and the district court need only consider them along with its analysis

¹³⁸ 18 U.S.C. § 3553(c) (2012).

¹³⁹ *Rita v. United States*, 551 U.S. 338, 357 (2007).

¹⁴⁰ 28 U.S.C. § 994(d) (2012).

¹⁴¹ 18 U.S.C. § 3553(b)(1).

¹⁴² U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 29 n.199 (2012) [hereinafter U.S. SENTENCING COMM’N, REPORT ON *BOOKER*]; see *United States v. Wallace*, 461 F.3d 15, 32 (1st Cir. 2006) (“Only after the district court has conducted the advisory guidelines analysis, *including* a determination of the appropriateness of downward or upward departures under the guidelines, should the court then decide whether the guidelines sentence comports with the sentencing factors set forth in 18 U.S.C. § 3553(a).”).

¹⁴³ 18 U.S.C. § 3553(a)(1).

¹⁴⁴ U.S. SENTENCING COMM’N, REPORT ON *BOOKER*, *supra* note 142, at 29–30.

of the section 3553(a) factors, the decision to deny a Guidelines-based downward departure is a smaller factor in the sentencing calculus. Furthermore, many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court—with greater latitude—under section 3553(a).¹⁴⁵

The factors that can be considered under § 3553(a) are quite extensive, but the law is unclear as to how the individual offender characteristics in this section are to be reconciled with the more limited description of relevant offender characteristics as outlined in 28 U.S.C. § 994(e) and the constitutional constraints on the Commission to remain “entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”¹⁴⁶

In the following sections, we will discuss certain offender characteristics that have been the subject of the Guidelines’ policy statements for departures, as well as factors considered by judges under § 3553(a). For the sake of simplicity, we will examine these factors under their original departure provisions, but note that they can also be considered when granting a variance in sentencing under § 3553(a), as opposed to a departure. In the authors’ experiences, the following are frequent mitigating factors at sentencing.

1. Age and Physical Health

Age is a specific offender characteristic that might be relevant at sentencing for both youthful and elderly defendants. The related issue of physical health may be particularly relevant to elderly offenders since their imprisonment can cost three times the amount of the imprisonment of a young offender.¹⁴⁷ Guidelines policy statement section 5H1.1 states:

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where

¹⁴⁵ *Id.* at 30 (quoting *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006)).

¹⁴⁶ 28 U.S.C. § 994(d) (2012).

¹⁴⁷ Molly Fairchild James, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1026–27 (1992).

a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.¹⁴⁸

On a related note, section 5H1.4 states that “[p]hysical condition or appearance, including physique, may [also] be relevant in determining whether a departure is warranted.”¹⁴⁹

Old age and physical infirmities have long been a consideration of sentencing courts, either used to depart from the Guidelines calculation or examined under a § 3553(a) analysis. It is important to consider that the same sentence applied to a younger offender “may be uniquely disproportionate to the elderly offender; elderly criminals will lose a greater percentage of their lives than younger criminals and may suffer more from the same sentence.”¹⁵⁰

In *United States v. Baron*,¹⁵¹ the district court sentenced a seventy-six-year-old defendant with pituitary tumors, possible prostate cancer, and hypertension, to home detention, instead of within the Guidelines range of twenty-seven to thirty-three months’ imprisonment for bank fraud, because of his age and infirmity.¹⁵² The court analyzed the appropriateness of a downward departure by examining “whether [the defendant’s] physical impairment [met] the following standards a) serious and imminent medical threats b) which would be made worse by incarceration and/or c) which the Federal Bureau of Prisons could not adequately treat.”¹⁵³ However, illnesses that can be simply “monitored” do not warrant a downward departure.¹⁵⁴

In *United States v. Rioux*,¹⁵⁵ the defendant was convicted of a fraudulent scheme to commit extortion in violation of 18 U.S.C. § 1341 and in violation of the Travel Act, 18 U.S.C. § 1952.¹⁵⁶ Due to his medical condition and his charitable acts, the district court granted a downward departure and sentenced Rioux to three years’ probation, six months’ home confinement, and 500 hours of community service, which was upheld by the Second Circuit.¹⁵⁷ Rioux had received a kidney transplant twenty years earlier and his

¹⁴⁸ U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2013).

¹⁴⁹ *Id.* § 5H1.4.

¹⁵⁰ *United States v. Willis*, 322 F. Supp. 2d 76, 83 (D. Mass. 2004).

¹⁵¹ *United States v. Baron*, 914 F. Supp. 660 (D. Mass. 1995).

¹⁵² *Id.* at 662, 665.

¹⁵³ *Id.* at 662–63.

¹⁵⁴ *United States v. Altman*, 48 F.3d 96, 104 (2d Cir. 1995).

¹⁵⁵ *United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996).

¹⁵⁶ *Id.* at 652.

¹⁵⁷ *Id.*

new kidney was diseased.¹⁵⁸ The medicine prescribed for his kidneys caused Rioux to develop bone problems, requiring a double hip replacement.¹⁵⁹ Even though his kidney functions were stable, he required “regular blood tests and prescription medicines.”¹⁶⁰

Age and infirmities are also helpful in determining a defendant’s likelihood of recidivism, and thus, the importance of incarceration. In *United States v. Jimenez*,¹⁶¹ the defendant’s Guidelines range was fifty-seven to seventy-one months’ imprisonment for illegal reentry into the United States after deportation.¹⁶² The original crime that led to his deportation was burglary.¹⁶³ Between the time the crime was committed and the sentencing, the defendant suffered a brain aneurism.¹⁶⁴ The sentencing judge found that this injury left Jimenez physically and mentally weaker and less likely to recidivate.¹⁶⁵ The district court further concluded that a long-term imprisonment would not be necessary to protect the public and would be “wasteful and unnecessary.”¹⁶⁶ The court, in this opinion, did not decide the appropriate sentence but stated that sentence below the Guidelines range would “appropriately accomplish those goals of punishment—vindication of the law and general deterrence—that are applicable here, while recognizing that the extraordinary physical impairment of the defendant warrants a departure”¹⁶⁷

In *United States v. Hough*,¹⁶⁸ the defendant pled guilty to conspiracy to distribute pills of MDMA.¹⁶⁹ At sixty-five-years-old, Hough suffered from kidney problems, skin cancer, and high blood pressure.¹⁷⁰ At sentencing, Judge William H. Pauley sentenced Hough to forty-eight months’ imprisonment at a medical facility so Hough could treat his various medical conditions.¹⁷¹

¹⁵⁸ *Id.* at 663.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *United States v. Jimenez*, 212 F. Supp. 2d 214 (S.D.N.Y. 2002).

¹⁶² *Id.* at 215.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 216.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 219.

¹⁶⁷ *Id.* at 220.

¹⁶⁸ *United States v. Hough*, No. 1:09-cr-1136-WHP (S.D.N.Y. Oct. 30, 2009).

¹⁶⁹ Judgment in a Criminal Case at 1, *Hough*, No. 1:09-cr-1136-WHP (S.D.N.Y. July 21, 2011), ECF No. 55.

¹⁷⁰ Certified Letter at 1, *Hough*, No. 1:09-cr-1136-WHP (S.D.N.Y. July 6, 2011), ECF No. 52.

¹⁷¹ See Judgment in a Criminal Case, *supra* note 169, at 2.

In *United States v. Rea*,¹⁷² the defendant, represented by John Meringolo, initially charged with murder and other offenses, pled guilty—after jury selection—to a single count of conspiracy to commit extortion.¹⁷³ Rea’s Guidelines range was twelve to eighteen months’ incarceration.¹⁷⁴ Rea (age fifty-nine) suffered from various health conditions, which included chronic pain, chronic kidney disease, gastroesophageal reflux disease, glucose metabolism, hypertension, hypercholesterolemia, morbid obesity, diabetic neuropathy, and obstructive sleep apnea.¹⁷⁵ The defense argued in its Sentencing Memorandum that the Bureau of Prisons would not be equipped to adequately address Rea’s health conditions and as such, a non-incarceration sentence was warranted.¹⁷⁶ At sentencing, the Honorable Jack B. Weinstein sentenced the defendant to five years of probation, partially due to Rea’s various health conditions.¹⁷⁷

2. Mental Health & Diminished Capacity

Like physical health and age, a defendant’s mental and emotional conditions may be relevant under § 3553(a) or the Guidelines departure provisions.

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.¹⁷⁸

Furthermore, “[i]n certain cases a downward departure may be appropriate to accomplish a specific treatment purpose.”¹⁷⁹

While a defendant’s mental or emotional condition is not “ordinarily relevant” in determining whether a sentence should be outside the Guideline range, a court can consider such factors when

¹⁷² *United States v. Rea*, No. 1:10-cr-00767-JBW-ALC (E.D.N.Y. Oct. 6, 2010).

¹⁷³ Waiver of Indictment, at 1, *Rea*, No. 1:10-cr-00767-JBW-ALC (E.D.N.Y. Feb. 15, 2011), ECF No. 92; Superseding Information at 1, *Rea*, No. 1:10-cr-00767-JBW-ALC (E.D.N.Y. Feb. 15, 2011), ECF No. 93; Sentencing Memorandum at 1–2, *Rea*, No. 1:10-cr-00767 JBW-ALC (E.D.N.Y. May 3, 2011), ECF No. 96.

¹⁷⁴ Sentencing Memorandum, *supra* note 173 at 1.

¹⁷⁵ *Id.* at 14.

¹⁷⁶ *Id.* at 16.

¹⁷⁷ *See* Criminal Cause for Sentencing at 1, *Rea*, No. 1:10-cr-00767-JBW-ALC (E.D.N.Y. May 23, 2011), ECF No. 100.

¹⁷⁸ U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (2013).

¹⁷⁹ *Id.*; *see id.* § 5C1.1 cmt. n.6.

they are extraordinary.¹⁸⁰ As a “discouraged basis” for departure, the court may depart “only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case”¹⁸¹ In order to be a considered factor in sentencing, the mental health condition must “[rise] to the extraordinary level that can be assumed to cause mental or emotional pathology.”¹⁸² Even though it is not specifically stated, the effects of spousal abuse or child abuse are emotional conditions under section 5H1.3.¹⁸³

Relatedly, the Guidelines also warrant a downward departure based on the defendant’s diminished mental capacity if:

- (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and
- (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.¹⁸⁴

A “significantly reduced mental capacity” exists when “the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.”¹⁸⁵

A significantly reduced mental capacity is the “exception to the general rule that ‘mental and emotional conditions are not ordinarily relevant’”¹⁸⁶ “To establish diminished capacity . . . a defendant need only persuade a judge by a preponderance of the evidence that he suffers from ‘reduced mental capacity’ and that a ‘causal link [exists] between that reduced capacity and the

¹⁸⁰ *United States v. Brady*, 417 F.3d 326, 333 (2d Cir. 2005) (quoting U.S. SENTENCING GUIDELINES MANUAL § 5H1.3) (internal quotation marks omitted); *see United States v. Rivera*, 192 F.3d 81, 85 (2d Cir. 1999); *see also United States v. Lara*, 905 F.2d 599, 603 (2d Cir. 1990) (holding that a downward departure from 121–151 months’ imprisonment to sixty months’ was warranted based on the defendant’s mental and emotional condition, particularly that he was prone to victimization because of his small size, immature appearance, and bisexuality). The appellate court also stated that it agreed with the district court that the offender’s particular vulnerability presented an extraordinary situation, as evidenced by prison authorities’ decision to put him in solitary confinement in order to protect him from predatory inmates. *Id.*

¹⁸¹ *Koon v. United States*, 518 U.S. 81, 96 (1996).

¹⁸² *Rivera*, 192 F.3d at 86.

¹⁸³ *See United States v. Roe*, 976 F.2d 1216, 1217–18 (9th Cir. 1992) (holding that the abuse suffered by the defendant when she was a child, which included savage beatings by her mother’s boyfriend, a narcotics dealer, were sufficiently extraordinary to warrant a downward departure).

¹⁸⁴ U.S. SENTENCING GUIDELINES MANUAL § 5K2.13.

¹⁸⁵ *Id.* § 5K2.13 cmt. n.1.

¹⁸⁶ *United States v. Silleg*, 311 F.3d 557, 562 (2d Cir. 2002).

commission of the charged offense.”¹⁸⁷

In *United States v. Scarbrough*,¹⁸⁸ the defendant was sentenced to time served and three years’ supervised release for wire fraud and bank fraud charges, a departure from the Guidelines range of ten to sixteen months’ imprisonment.¹⁸⁹ The court relied on section 5K2.13 in granting a downward departure based on Scarbrough’s diminished capacity due to his mental condition.¹⁹⁰ Scarbrough was diagnosed with major depression, generalized anxiety disorder, and bipolar disorder and had attempted suicide.¹⁹¹ As the court reasoned, “Scarbrough’s judgment and his ability to control his behavior during his commission of the underlying offenses were impaired by his longstanding mood disorder.”¹⁹² The district court relied on Scarbrough’s psychiatric hospitalization records to conclude that “his mental capacity appears to have been significantly impacted by an apparently pre-existing mood disorder as well as grief for the loss of his partner.”¹⁹³

Even if a downward departure is not granted, a defendant’s mental health may be a relevant factor to the court in considering the defendant’s “history and characteristics” as well as fulfilling the purposes set forth in § 3553(a)(2), namely, “to provide the defendant with needed . . . medical care, or other correctional treatment in the most effective manner”¹⁹⁴

In *United States v. Rodriguez*,¹⁹⁵ the twenty-six-year-old defendant’s history of mental illness was quite extensive and extraordinary.¹⁹⁶ The defendant was diagnosed with bipolar disorder, schizophrenia, and anxiety, among other illnesses, and needed a daily cocktail of medications.¹⁹⁷ Furthermore, the defendant had attempted suicide several times; most recently during the pendency of his case.¹⁹⁸ After he pled guilty to Conspiracy to Commit Wire Fraud and Conspiracy to Commit

¹⁸⁷ *United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (alteration in original) (quoting *United States v. Prescott*, 920 F.2d 139, 146 (2d Cir. 1990)).

¹⁸⁸ *United States v. Scarbrough*, 04 Cr. 354-01 (RWS), 2004 U.S. Dist. LEXIS 20272, at *1 (S.D.N.Y. Oct. 10, 2004).

¹⁸⁹ *Id.* at *1.

¹⁹⁰ *Id.* at *9–12.

¹⁹¹ *Id.* at *3–4.

¹⁹² *Id.* at *12.

¹⁹³ *Id.*

¹⁹⁴ 18 U.S.C. § 3553(a)(1), (a)(2)(D) (2012).

¹⁹⁵ *United States v. Rodriguez*, No. 1:12-cr-00919-PKC (S.D.N.Y. 2013).

¹⁹⁶ Defendant’s Memorandum at 1, 7, *Rodriguez*, No. 1:12-cr-00919-PKC (S.D.N.Y. Feb. 7, 2013), ECF No. 12.

¹⁹⁷ *Id.* at 4–5.

¹⁹⁸ *Id.* at 5.

Access Device Fraud, the defendant was facing a Guidelines range of eighteen to twenty-four months' incarceration.¹⁹⁹ The defense urged the court to consider the defendant's mental health history as part of his history and characteristics.²⁰⁰ At sentencing, the Honorable P. Kevin Castel sentenced the defendant to eighteen months' incarceration and remanded the defendant to a medical facility where he could receive the proper treatment.²⁰¹

3. Family Circumstances

Under section 5H1.6 of the Guidelines, "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."²⁰² However, "[n]ot ordinarily relevant" is not synonymous with "never relevant" or "not relevant."²⁰³ Federal courts "have recognized that a defendant's familial responsibilities may present such 'extraordinary circumstances' that a downward departure in sentencing is necessary and permissible."²⁰⁴ However, "[t]here is no requirement that the circumstances be extra-ordinary by any particular degree of magnitude."²⁰⁵

It is appropriate—indeed, essential—that the District Court consider the impact of a defendant's family circumstances on the purposes underlying sentencing. Particular family circumstances can be relevant to sentencing considerations not only because the potential harm to third-party family members may constitute a "mitigating" factor (thus permitting a downward departure as long as the traditional purposes of sentencing remain satisfied by the ultimate sentence), but also because they have a direct impact on the defendant "in ways that directly implicate the purposes of

¹⁹⁹ *Id.* at 2.

²⁰⁰ *Id.* at 6.

²⁰¹ Judgment in a Criminal Case at 3, *Rodriguez*, No. 1:12-cr-00919-PKC (S.D.N.Y. Apr 9, 2013), ECF No. 19.

²⁰² U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2013).

²⁰³ *United States v. Monaco*, 23 F.3d 793, 801 (3d Cir. 1994).

²⁰⁴ *United States v. Londono*, 76 F.3d 33, 36 (2d Cir. 1996); *see also United States v. Galante*, 111 F.3d 1029, 1033 (2d Cir. 1997) ("We have read § 5H1.6 to mean that when a sentencing court determines the circumstances related to family ties and relationships are extraordinary, the Guidelines do not bar it from considering them as a basis for a downward departure."); *see also United States v. Sharpsteen*, 913 F.2d 59, 63 (2d Cir. 1990) ("The clear implication of section 5H1.6 is that if the court finds that the circumstances related to family ties and relationships are extraordinary, it is not precluded as a matter of law from taking them into account in making a downward departure.")

²⁰⁵ *United States v. Dominguez*, 296 F.3d 192, 195 (3d Cir. 2002).

sentencing.”²⁰⁶

In determining whether a downward departure is warranted based on family ties and responsibilities, the court shall consider the following nonexhaustive list of circumstances: “(i) [t]he seriousness of the offense[;] (ii) [t]he involvement in the offense, if any, of members of the defendant’s family[;] (iii) [t]he danger, if any, to members of the defendant’s family as a result of the offense.”²⁰⁷

In addition, when considering the loss of caretaking or financial support, the court shall also consider:

(i) The defendant’s service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant’s family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant’s family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant’s caretaking or financial support irreplaceable to the defendant’s family.

(iv) The departure effectively will address the loss of caretaking or financial support.²⁰⁸

As exemplified in section 5H1.6, there are a variety of exceptional family circumstances that warrant consideration during sentencing. In *United States v. Galante*, the Second Circuit upheld a downward departure based on the defendant’s exceptional family circumstances, concluding that, “if [the] defendant were imprisoned the family unit would probably be destroyed, and defendant’s wife and children relegated to public assistance . . . [and] ‘removal of the father from this unit at this particular point in time would have a disastrous effect on the children in terms of possibilities of their

²⁰⁶ *Id.* at 198 (footnotes omitted). The court vacated the sentence and remanded to the district court upon a finding that defendant’s family circumstances—taking care of her two elderly, sickly parents—was “truly tragic” and warranted a downward departure. *Id.* at 194, 200.

²⁰⁷ U.S. SENTENCING GUIDELINES MANUAL § 5H1.6, cmt. 1(A).

²⁰⁸ *Id.* § 5H1.6, cmt. 1(B).

education and upbringing.”²⁰⁹ In *United States v. Ekwunoh*,²¹⁰ a downward departure was granted where the defendant was the sole supporter for three young children, the eldest of which had emotional problems.²¹¹ Similarly, in *United States v. Handy*,²¹² a downward departure was granted where the defendant was a single mother raising three teenage children.²¹³

In *United States v. Towe*,²¹⁴ three female defendants were charged with conspiring to obtain adoption subsidy payments to which they were not entitled from New York City’s Administration for Children’s Services.²¹⁵ Judge Pauley, of the Southern District of New York, sentenced the three defendants to nonincarceration sentences due to their unique circumstances.²¹⁶ In particular, defendant Tammy Moore was sentenced to probation because she was a single mother of two teenage boys.²¹⁷

A defendant’s responsibilities to other family members may also be a factor during sentencing. In *United States v. Vaughan*,²¹⁸ a downward departure was granted because the defendant was the sole caretaker of his wife, who suffered from Alzheimer’s disease.²¹⁹ In *United States v. Rose*,²²⁰ a downward departure was granted where defendant had assumed the role of surrogate father to his cousins and contributed to the household budget of his grandmother, who had no social security or pension.²²¹ In *United States v. McGee*,²²² a downward departure was granted where the defendant’s nephew depended on her for safety, health, and education.²²³

²⁰⁹ *United States v. Galante*, 111 F.3d 1029, 1035 (2d Cir. 1997).

²¹⁰ *United States v. Ekwunoh*, 888 F. Supp. 369 (E.D.N.Y. 1994).

²¹¹ *Id.* at 373.

²¹² *United States v. Handy*, 752 F. Supp. 561 (E.D.N.Y. 1990).

²¹³ *Id.* at 564.

²¹⁴ *United States v. Towe*, No. 1:09-cr-00125-WHP (S.D.N.Y. Feb. 10, 2009).

²¹⁵ Sealed Indictment at 3, *Towe*, No. 1:09-cr-00125 (S.D.N.Y. Feb. 10, 2009), ECF No. 1.

²¹⁶ Docket, *Towe*, No. 1:09-cr-00125 (S.D.N.Y. Mar. 26, 2010), ECF Nos. 28, 29, 32.

²¹⁷ See Sentencing Memorandum at 2, *Towe*, No. 1:09-cr-00125 (S.D.N.Y. Nov. 23, 2010), ECF No. 36.

²¹⁸ *United States v. Vaughan*, 92 Cr. 575-04, 1993 U.S. Dist. LEXIS 21076 (S.D.N.Y. Apr. 15, 1993).

²¹⁹ *Id.* at *2–3.

²²⁰ *United States v. Rose*, 885 F. Supp. 62 (E.D.N.Y. 1995).

²²¹ *Id.* at 63.

²²² *United States v. McGee*, 802 F. Supp. 843 (E.D.N.Y. 1992).

²²³ *Id.* at 844.

4. Other Considerations at Sentencing: Defense Attorney Perspectives

Aside from the factors enumerated above, there are a variety of different, individualized circumstances that may potentially mitigate a defendant's sentence. Furthermore, there are certain sentencing factors that, from a defense attorney's standpoint, warrant more consideration. As Gerald McMahon²²⁴ states:

I find that younger defendants, especially those that have experienced tragic family issues or have had substance abuse problems, are more likely to receive a sentence below the Guidelines range. A defendant's likelihood of recidivism is a factor that should receive more consideration. The circumstances surrounding non-violent drug offenses should be less emphasized, because oftentimes these crimes are falsely equated with crimes of violence.²²⁵

Mr. Lefcourt encourages the consideration of a defendant's background as opposed to objective factors of the crime:

An offender's personal and professional background as well as sociological and psychological make-up warrant increased consideration at sentencing as does the actual impact of the charged offense. In addition, post offense rehabilitation should be given greater consideration as should the aberrant nature of an offense and any documented exceptionally good works performed by the client.

.....

Objective factors such as the actual or intended financial loss or the weight of drugs involved have predominated sentencing determinations. Their significance should be considerably limited.

Similarly, consideration of "relevant conduct" should be prohibited. The fact that in fashioning a sentence a court may consider conduct for which a defendant was acquitted or never charged is counter intuitive and offends notions of fundamental fairness. Our constitutional system provides

²²⁴ Mr. McMahon has over thirty years of experience in criminal defense litigation and has tried 150 cases to verdict. He is a former Assistant District Attorney of the Manhattan District Attorney's Office. In 2012, ganglandnews.com honored him as the best lawyer of the year. *Gerald J. McMahon: Profile*, GERALD J. MCMAHON, <http://www.geraldjcmahon.com/profile.htm> (last visited May 28, 2014).

²²⁵ Letter from Gerald McMahon to authors (Sept. 26, 2013) (on file with authors).

that before an individual's liberty may be taken that individual is entitled to his day in court. Allowing a court to punish a defendant for conduct never considered by a jury or worse, considered and rejected by a jury, flies in the face of that constitutional mandate. Unfortunately, however, our current sentencing scheme permits just that.²²⁶

Mr. Vinegrad agrees that:

[The Guidelines] do capture many relevant sentencing factors, but don't allow enough consideration of individual circumstances, both related to the offense and otherwise. Also, some of the sentencing ranges are unduly harsh, particularly those that place heavy emphasis on quantitative factors (such as drug and fraud cases) or have numerous upward adjustments but comparatively few downward adjustments. For these reasons, the Guidelines don't always result in the entire "truth" of a case to emerge.²²⁷

Overall, post-*Booker* sentencing has provided for more judicial discretion and has allowed greater consideration of a defendant's individual characteristics than was possible under the mandatory Guidelines regime. However, as stated by the abovementioned attorneys, there are certain considerations that warrant more emphasis while other factors should be given less weight. As further discussed in Part IV below, it is the authors' opinion that objective and quantitative factors, such as the drug weights and types that govern mandatory minimum laws, negate the purposes of the Guidelines, prevent judges from giving individualized assessments of the defendant, and generally, result in unfair sentences.

IV. MANDATORY MINIMUMS FOR DRUG OFFENSES: INCONGRUENCE AND CONFLICT WITH THE FEDERAL SENTENCING GUIDELINES

A. Mandatory Minimum Sentences for Drug Offenses: A Historical Context

Despite the advisory nature of the Guidelines post-*Booker*, judges are oftentimes limited in their own discretion because of statutory mandatory minimum sentences. Mandatory minimum penalties mandate a certain time period of incarceration for a defendant

²²⁶ Letter from Gerald B. Lefcourt to authors, *supra* note 93.

²²⁷ Letter from Alan Vinegrad to authors, *supra* note 95.

based on the particular crime with which he is charged.²²⁸ In contrast to the advisory nature of the Guidelines, these statutory mandates severely limit a judge's discretion in sentencing. In general, statutory mandatory minimum sentences limit the court's authority, may lack a congruency with the severity of the offense, and cause a whole range of social ills and concerns.

While mandatory minimum sentences have long been a part of United States history, and are applicable to other offenses such as the use of a firearm²²⁹ or explosives during the commission of a crime,²³⁰ arguably their harshest impact has been on federal drug offenses, which are therefore the focus of the following section. As stated in the Introduction, nearly half of the federal prison population is currently incarcerated for drug offenses while less than five percent are serving time for violent crimes.²³¹ In comparison, it is estimated that only seventeen percent of the United States total state prison population is incarcerated for drug offenses (53% of state inmates are incarcerated for violent crimes).²³² These numbers indicate that federal statutory mandatory minimums for drug offenses, along with the growing "federalization" of these crimes, have been the greatest contributor to the unprecedented increase in the federal prison population over the last thirty years.

In response to heightened drug use, specifically the increasing use of crack cocaine, and publicized incidents, most notably the overdose death of University of Maryland basketball star Len Bias, the Anti-Drug Abuse Act of 1986 (the 1986 Act) was enacted,²³³ which established the currently applicable mandatory minimum sentences for federal drug offenses.²³⁴ Due to the apparent urgency of this issue, "Congress bypassed much of its usual deliberative legislative process" and did not hold committee hearings or produce reports on the Act.²³⁵

As indicated by floor statements, the intent of the 1986 Act was to

²²⁸ U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (2011). [hereinafter MANDATORY MINIMUM PENALTIES].

²²⁹ 18 U.S.C. § 924(c) (2012).

²³⁰ *Id.* § 844(h).

²³¹ *Offenses*, *supra* note 14.

²³² E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011, at 9 (2012), <http://www.bjs.gov/content/pub/pdf/p11/pdf>.

²³³ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of the U.S.C.).

²³⁴ *See* 21 U.S.C. § 841(b) (2012).

²³⁵ MANDATORY MINIMUM PENALTIES, *supra* note 228, at 23–24.

create a “two-tiered penalty structure” for drug traffickers where “serious” traffickers received five-year mandatory minimum penalties and “major” traffickers received ten-year mandatory penalties.²³⁶

Senator Robert Byrd, the Senate Minority Leader at the time, explained:

For the kingpins—the masterminds who are really running these operations—and they can be identified by the amount of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years

Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also have to serve time in jail. The minimum sentences would be slightly less than those for the kingpins, but they nevertheless would have to go to jail—a minimum of 5 years for the first offense and 10 years for the second.²³⁷

Pursuant to the 1986 Act, a “trafficker” was identified and categorized by the quantity and type of drug.²³⁸ The 1986 Act distinguished powder cocaine from “crack cocaine” (cocaine base), establishing higher mandatory minimums for crack cocaine while the same quantity of powder cocaine would have a lower mandatory sentence.²³⁹ Specifically, the “100-to-1” ratio of the 1986 Act established a five-year mandatory minimum penalty for offenses involving five grams of crack cocaine, whereas it would take an offense involving five hundred grams of powder cocaine to receive that penalty.²⁴⁰ The Fair Sentencing Act of 2010 subsequently altered this disparity “by repealing the mandatory minimum penalty for simple possession of crack cocaine and by increasing the quantities required to trigger the five- and ten-year mandatory minimum penalties for crack cocaine trafficking offenses from five to 28 grams and 50 to 280 grams, respectively.”²⁴¹ Furthermore, the Omnibus Anti-Abuse Act (the “1988 Act”) established mandatory minimum penalties for drug trafficking conspiracies, essentially

²³⁶ *Id.* at 24.

²³⁷ 132 CONG. REC. 27,193–94 (1986) (statement of Senator Robert Byrd).

²³⁸ MANDATORY MINIMUM PENALTIES, *supra* note 228, at 24.

²³⁹ *Id.* at 24–25.

²⁴⁰ *Id.* at 25.

²⁴¹ *Id.* at 30; Fair Sentencing Act of 2010, Pub. L. No. 111-220, secs. 2–3, §§ 401(b)(1), 404(a), 1010(b), 124 Stat. 2372, 2372 (amending 21 U.S.C. §§ 841, 844, 960 (2012)).

broadening the federal government's reach to all individuals involved in drug trafficking organizations.²⁴²

Under 21 U.S.C. § 841(a), it is unlawful “(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”²⁴³ It is also unlawful to attempt or conspire to commit these offenses under 21 U.S.C. § 846.²⁴⁴ Other drug trafficking offenses include the importation²⁴⁵ or exportation²⁴⁶ of a controlled substance, or the attempt or conspiracy of said importation or exportation.²⁴⁷ Under 21 U.S.C. § 841(b), the penalties for violating § 841(a) vary according to drug type and quantity.²⁴⁸ Under 21 U.S.C. § 841(b)(1)(A), a mandatory minimum of ten years' imprisonment is imposed for cases involving one kilogram or more of heroin, five kilograms or more of cocaine, 280 grams or more of cocaine base (crack), and one thousand kilograms or more of marijuana.²⁴⁹ Furthermore, the mandatory minimum of ten years increases to twenty years if “death or serious bodily injury results from the use of such substance” or the defendant has a prior felony drug offense conviction.²⁵⁰ If the defendant has two or more prior felony drug offense convictions, the mandatory minimum is life imprisonment.²⁵¹ 21 U.S.C. § 841(b)(1)(B) applies to drug quantities of a lesser amount—one hundred grams or more of heroin, five hundred grams or more of cocaine, twenty-eight grams or more of cocaine base, and one hundred kilograms or more of marijuana—and imposes a five-year mandatory minimum which will increase to twenty years if death or serious bodily injury results, or ten years if the defendant has a prior felony drug offense conviction.²⁵² A mandatory life sentence is imposed if there is a prior felony drug offense conviction and death

²⁴² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 6470(a), 102 Stat. 4181, 4377 (amending 21 U.S.C. § 846 (2012)); MANDATORY MINIMUM PENALTIES, *supra* note 228, at 25.

²⁴³ 21 U.S.C. § 841(a).

²⁴⁴ *Id.* § 846.

²⁴⁵ *Id.* § 952.

²⁴⁶ *Id.* § 953.

²⁴⁷ *See id.* § 963.

²⁴⁸ *Id.* § 841(b).

²⁴⁹ *Id.* The threshold quantities are determined by measuring “a mixture or substance containing a detectable amount” of the controlled substance. *Id.* § 841(b)(1)(A)(i)–(viii). Thereby, the substance as a whole need not be only the said narcotic.

²⁵⁰ *Id.* § 841(b)(1)(A).

²⁵¹ *Id.*

²⁵² *Id.* § 841(b)(1)(B).

results.²⁵³ Under 21 U.S.C. § 960(b), the same sentencing structure is applied to the importation and exportation of controlled substances.²⁵⁴ When a defendant charged under said statutes has a prior felony drug offense conviction, the prosecutor may file a “prior felony information” under 21 U.S.C. § 851,²⁵⁵ which enables the prosecutor to charge the defendant with the higher mandatory minimum penalty.²⁵⁶

B. The Two Ways to Evade Mandatory Minimums: Safety Valves and Cooperation

1. The Safety Valve Provision

After realizing that many first time, nonviolent drug offenders were receiving mandatory minimum sentences for offenses that were relatively low-level, Congress enacted a “safety valve” provision to the Guidelines in order to ameliorate the harsh time served by low-level drug offenders.²⁵⁷ Under 18 U.S.C. § 3553(f), and imposed in accordance with the Guidelines section 5C1.2, a defendant may be sentenced “without regard to any statutory minimum sentence,” if the court finds the following five factors are met:

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing

²⁵³ *Id.*

²⁵⁴ *Id.* § 960(b)(1)–(4).

²⁵⁵ *Id.* § 851(a)(1) (“No person who stands convicted of an offense under this part . . . shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.”).

²⁵⁶ *Id.* § 851(d)(1).

²⁵⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985–86 (codified at 18 U.S.C. § 3553(f) (2012)).

criminal enterprise, as defined in section 408 of the Controlled Substances Act . . . ; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.²⁵⁸

According to a survey conducted by the Commission, the fifth prong of the safety valve requirements—whether a defendant has truthfully provided information to the government—is oftentimes the subject of dispute between prosecutors and criminal defense attorneys.²⁵⁹ Furthermore, “[o]nly about 25% of federal drug offenders are currently able to take advantage of the ‘safety valve’ to earn reduced sentences.”²⁶⁰ This is partly due to the fact criminal history points steadily can accumulate for minor offenses, thereby disqualifying a defendant from safety valve eligibility.²⁶¹

In response to the frequency of safety valve disqualification, bipartisan legislation was introduced on March 20, 2013 by Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and Senator Rand Paul (R-Ky.) that would amend 18 U.S.C. § 3553 and expand the current safety valve provision to all federal crimes subject to mandatory minimum penalties.²⁶² The bill would authorize judges to sentence defendants below the mandatory minimum penalties if a lower sentence would fulfill the goals of sentencing as listed in 18 U.S.C. § 3553(a), regardless of whether the crime was one of the “qualifying” crimes for safety valve under 18 U.S.C. § 3553(f).²⁶³

²⁵⁸ 18 U.S.C. § 3553(f) (citation omitted).

²⁵⁹ See MANDATORY MINIMUM PENALTIES, *supra* note 228, at 117.

²⁶⁰ Phillip Smith, *Sens. Leahy, Paul Introduce Federal Mandatory Minimum Reform Bill*, STOPTHEDRUGWAR.ORG (Mar. 21, 2013), http://stopthedrugwar.org/chronicle/2013/mar/21/sens_leahy_paul_introduce_federa.

²⁶¹ See MATTHEW IACONETTI, U.S. SENTENCING COMM’N, IMPACT OF PRIOR MINOR OFFENSES ON ELIGIBILITY FOR SAFETY VALVE 2 (2009), http://www.ussc.gov/Research/Research_Publications/Safety_Valve/20090316_Safety_Valve.pdf (“[M]inor offenses . . . could receive points [if] the sentence for that minor crime was a term of probation of at least one year, the sentence for the minor crime was a term of imprisonment of at least 30 days, or the prior minor crime was similar to the instant offense.”).

²⁶² S. 619, 113th Cong. (2013).

²⁶³ See S. 619; *see also* 18 U.S.C. § 3553(a)(2) (describing four goals of sentencing).

The bill's purpose is to prevent "unjust [and] irrational punishments" and reduce prison overcrowding and federal spending.²⁶⁴ Senator Leahy states:

Our reliance on mandatory minimums has been a great mistake. I am not convinced it has reduced crime, but I am convinced it has imprisoned people, particularly non-violent offenders, for far longer than is just or beneficial. It is time for us to let judges go back to acting as judges and making decisions based on the individual facts before them. A one-size-fits-all approach to sentencing does not make us safer.²⁶⁵

Senator Paul shares a similar sentiment:

Our country's mandatory minimum laws reflect a Washington-knows-best, one-size-fits-all approach, which undermines the Constitutional Separation of Powers, violates the our [sic] bedrock principle that people should be treated as individuals, and costs the taxpayers money without making them any safer. This bill is necessary to combat the explosion of new federal criminal laws, many of which carry new mandatory minimum penalties.²⁶⁶

The benefits of the proposed bill would "allow courts—in some circumstances—to sentence a person below the mandatory minimum if that sentence is too lengthy, unjust or unreasonable, or doesn't fit the offender or the crime," and protect public safety by "reserv[ing] scarce prison space and resources for people who pose a real threat to the community, and . . . help prevent prison overcrowding."²⁶⁷ Until the Justice Safety Valve Act of 2013 is passed, if ever, the current safety valve provision is one of only two ways a defendant can curtail a mandatory minimum sentence.

2. The Substantial Assistance Provision and the Issue of Cooperation

The other statutory mechanism through which a defendant may

²⁶⁴ FAMILIES AGAINST MANDATORY MINIMUMS, THE PAUL-LEAHY "JUSTICE SAFETY VALVE ACT OF 2013": PREVENTING LIVES AND MONEY FROM BEING LOST DOWN THE DRAIN 5 (2013), <http://famm.org/Repository/Files/Justice%20Safety%20Valve%20Act%20Primer%20S.%20619.pdf>.

²⁶⁵ Press Release, Patrick Leahy, U.S. Senator for Vt., Bipartisan Legislation to Give Judges More Flexibility for Federal Sentences Introduced (Mar. 20, 2013), *available at* <http://www.leahy.senate.gov/press/bipartisan-legislation-to-give-judges-more-flexibility-for-federal-sentences-introduced>.

²⁶⁶ *Id.*

²⁶⁷ FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 264, at 4.

avoid a mandatory minimum sentence is by providing “substantial assistance” to the government pursuant to 18 U.S.C. § 3553(e) and imposed in accordance with the Guidelines section 5K1.1.²⁶⁸ As provided under 18 U.S.C. § 3553(e):

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.²⁶⁹

As stated in the Guidelines section 5K1.1 policy statement, the sentencing judge may consider the following factors when deciding whether a sentence reduction is warranted:

- (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant’s assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant’s assistance.²⁷⁰

According to the Commission’s 2012 Annual Report, “[a]pproximately one quarter (27.8%) of sentences were imposed below the [applicable] guideline range at the request of the government”; 11.7% were a result of “the government fil[ing] a motion seeking a reduction in sentence because the defendant provided substantial assistance . . . in the investigation or prosecution of another person.”²⁷¹ Specifically, 33% of all drug trafficking offenders facing mandatory minimum penalties received government sponsored below-range sentences.²⁷² Furthermore, this

²⁶⁸ 18 U.S.C. § 3553(e); *see* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. n.1 (2013).

²⁶⁹ 18 U.S.C. § 3553(e); *see also* 28 U.S.C. § 994(n) (2012) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”).

²⁷⁰ U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a).

²⁷¹ U.S. SENTENCING COMM’N, *supra* note 115, at 43.

²⁷² U.S. SENTENCING COMM’N, REPORT ON *BOOKER*, *supra* note 142, at 17.

figure “grows even higher when prosecutorial charging decisions, plea bargaining, and other mechanisms for avoiding mandatory penalties are taken into account.”²⁷³ The majority of prosecutors surveyed in 2012 by the Commission “thought that being charged with a mandatory minimum penalty did influence an offender’s willingness to cooperate” and was a more influential factor than the Guidelines when deciding whether to cooperate.²⁷⁴ Prosecutors have wide discretion in deciding whether to file a substantial assistance motion with the court, and defendants have no opportunity for judicial review absent prosecutorial misconduct or bad faith.²⁷⁵

Cooperation is most frequent in narcotics cases for various reasons. As explained by Ian Weinstein:

The typical narcotics trafficking defendant has both a strong incentive and good opportunity to snitch. The incentive stems from the generally high probability of conviction, made more onerous by the prevalence of mandatory minimums in narcotics cases. Defendants in narcotics cases almost always have information to offer. Typically, a number of defendants are prosecuted together. Some may testify against their co-defendants, while others may have information about suppliers, customers or other drug dealers. The benefits of cooperation are dramatic for narcotics defendants, at least when their sentences are compared to sentences of similarly charged defendants who do not cooperate.²⁷⁶

There has been criticism of cooperation practices in the context of mandatory minimum penalties. Since departures under 18 U.S.C. § 3553(e) are awarded to defendants that can provide “substantial” information, oftentimes more culpable or “higher ranked” drug traffickers are in a better position than low-level offenders because they are more involved in the trafficking network, and thus, have more valuable information to provide.²⁷⁷ Therefore, in the context of

²⁷³ Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 6 (2008).

²⁷⁴ MANDATORY MINIMUM PENALTIES, *supra* note 228, at 116.

²⁷⁵ For example, in *Wade v. United States*, the Supreme Court held a defendant was not entitled to judicial review of a prosecutor’s decision not to file a motion for substantial assistance. *Wade v. United States*, 504 U.S. 181, 185–86 (1992); *see also* *United States v. Rexach*, 896 F.2d 710, 711 (2d Cir. 1990) (holding that a prosecutor is afforded great discretion and may only be reviewed upon matters of bad faith or prosecutorial misconduct).

²⁷⁶ Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 580–81 (1999) (footnotes omitted).

²⁷⁷ BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 21 (1994).

cooperation, high-level offenders have a better chance at evading mandatory minimum penalties and receiving a shorter sentence, an occurrence referred to by Professor Stephen Schulhofer as the “Cooperation Paradox.”²⁷⁸

C. The Relationship Between Mandatory Minimums and the United States Sentencing Guidelines

This Article contends that mandatory minimum penalties applicable to narcotics offenses have weakened, hindered, and downright conflicted with the purposes of the United States Sentencing Guidelines, particularly as interpreted post-*Booker*. Mandatory minimum penalties have limited judicial authority, flexibility, and individualized considerations during sentencing, contrary to the Court’s intent in *Booker*. Rather, because the only way to avoid a mandatory minimum sentence is to qualify for safety valve or to cooperate with the government’s investigation, mandatory minimum sentencing laws have effectively placed unfettered discretion in the hands of prosecutors, who determine whether a defendant has provided truthful and complete information under the safety valve provision or has provided substantial assistance as per a cooperation agreement. Furthermore, mandatory minimums conflict with the purposes enumerated in 18 U.S.C. § 3553(a), namely, the individualized consideration of a defendant’s history and characteristics, and the nature of the offense.

1. Severity, Disparity, and Lack of Individualized Assessments

The greatest indirect effect that mandatory minimums have on sentencing is through their incorporation into the Guidelines.²⁷⁹ When the Guidelines were created, the Commission established guideline levels “so that the length of imprisonment for all but the least culpable offenders is longer than the length required by the mandatory minimums.”²⁸⁰ Therefore, offenders not subject to mandatory minimum statutes are still affected by the Guidelines’ incorporation of these penalties.

²⁷⁸ *Id.* (quoting Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211–12 (1993)).

²⁷⁹ VINCENT & HOFER, *supra* note 277, at 3.

²⁸⁰ *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2013) (providing sentencing guidelines for various drug offenses).

Despite the indirect consequences to the Guidelines, mandatory minimums, in application, are more severe than offenses based solely on the Guidelines.

Importantly, the structural incompatibility of the Guidelines and statutory mandatory minimum sentences is not merely theoretical. . . . [T]here are important differences between the sentencing practices for offenses that do not carry mandatory minimum sentences and those that do. Those differences can be seen in statistics and case studies that show federal criminal law working reasonably well with the Guidelines in many instances where the mandatory minimums do not apply. Sentencing for most categories of federal crime is characterized by stable average sentence lengths and slowly increasing apparent mitigation. That combination is a sign of balance among important systemic forces. Narcotics sentences, wherein mandatory minimums are at play, however, are not stable over time and sentencing practices are unstable. A closer look reveals an area rife with excessive punishment and injustice.²⁸¹

Over the years, defense attorneys, judges, and scholars across the political spectrum have voiced concerns about the severity of mandatory minimum sentences and their disparate impact on offenders. Judge Paul G. Cassell, an avid critic of mandatory minimums, explains a particularly severe sentence:

Mandatory minimum sentences not only harm those unfairly subject to them, but do grave damage to the federal criminal justice system. . . . Perhaps the most serious damage is to the public's belief that the federal system is fair and rational. Mandatory minimum sentences produce sentences that can only be described as bizarre. For example, recently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer

²⁸¹ Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 100–01 (2003).

22 years in prison—the maximum suggested by the Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.²⁸²

Mandatory minimum sentences tend to be severe because of a “one-size-fits-all” approach to sentencing—that a certain drug type or quantity triggers the mandatory minimum statute. Therefore, similarly situated defendants may receive vastly different sentences because one defendant’s conduct “just barely brings him within the terms of the mandatory minimum”—a phenomena referred to as a sentencing “cliff.”²⁸³ For example, a defendant convicted of distributing twenty-eight grams of cocaine base would be subject to a five-year mandatory term of incarceration, whilst a defendant convicted of distributing twenty-seven grams of the exact same narcotic would not be subject to any minimum penalty.²⁸⁴

Disparate sentences in the context of mandatory minimum penalties are symptomatic of a greater problem in the sentencing structure. Former New York City Police Department Commissioner, Bernard Kerik, has recently criticized mandatory minimums and described the prison system as broken:

I think the system is flawed. I think . . . the system is supposed to punish. . . . It’s not supposed to destroy families and the punishment must fit the crime. I was in prison with commercial fishermen that caught too many fish that spent three years in prison [and] they’re not going to be able to work in that industry for the rest of their lives. That’s a life sentence . . . it’s about a system that’s broken.²⁸⁵

Oftentimes under mandatory minimums, there is no rational relationship between a defendant’s offense (other than the drug quantity) and sentence. In contradiction to the basic notion of checks and balances, judges are stripped of their ability to intervene and make an individualized assessment of the offense.

To check potential abuses of executive power, American law

²⁸² *Mandatory Minimum Sentencing Laws—The Issues: Judicial Conference of the United States Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 1–2 (2007) (statement of J. Paul G. Cassell, United States District Court, District of Utah).

²⁸³ Schulhofer, *supra* note 278, at 209.

²⁸⁴ See 21 U.S.C. § 841(b)(1)(B)(iii) (2012).

²⁸⁵ Interview by Matt Lauer with Bernard Kerik, Former N.Y.C. Police Cmm’r, in N.Y., N.Y. (Nov. 4, 2013), available at <http://www.today.com/video/today/53455672#53455672>.

has historically entrusted the courts with certain fundamental criminal justice decisions. Among the issues properly assigned to the judiciary, opponents argue, is the appropriate sentence for a given offender. Under the current regime, however, no viable judicial check prevents the misapplication of mandatory minimums, which leads to several unsettling consequences. For instance, mandatory schemes can have a “tariff” effect, where some basic fact triggers the same minimum sentence regardless of whether the defendant was a low-level drug courier or instead a narcotics kingpin. Opponents claim that the tariffs are often levied on the least culpable members in a criminal episode. Unlike those in leadership positions, low-level offenders often lack the type of valuable information that can be used as a bargaining chip with prosecutors.²⁸⁶

The unduly harsh sentences of mandatory minimums are not imposed in relation to a defendant’s culpability, nor do the sentences take into account any individualized factors. Therefore, the penalties oftentimes result in illogical and unjust disparities between defendants.

2. Prosecutorial Power and Limits on Judicial Discretion

Mandatory minimums frequently result in disparate and unduly harsh sentences, but they also transfer the authority and discretion granted to sentencing judges to the hands of prosecutors.

Disparity results when prosecutors have unchecked power to choose among an array of applicable statutes with very different sentencing consequences. The pressure to individualize sentences leads to vastly different punishments for apparently similarly-situated defendants. The negative effects extend beyond the problem of disparity and compromise other important values. In a system in which power is unchecked and trial is no longer a realistic option, evidence is rarely tested, prosecutorial power is not challenged, and normative questions go unasked. Our American devotion to limited power and checks and balances should make us worry about a system in which the fairness

²⁸⁶ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 15 (2010) (footnotes omitted).

of sentences is in the eye of the prosecutor.²⁸⁷

Judicial discretion at sentencing, which was expanded in *Booker*'s decision to render the Guidelines merely advisory, is stagnated by mandatory minimums. While judges are statutorily barred from sentencing a defendant to a term of incarceration lower than the mandatory minimums, adversarial prosecutors do not have similar limitations on their charging decisions. Prosecutors have the ability to affect sentences, whether it be by filing a substantial assistance motion under the Guidelines section 5K1.1 for cooperating defendants, or more generally, through unfettered charging decisions, starting with the filing of a complaint or an indictment in which an offender is charged with a particular drug quantity and exposed concurrently to a particular mandatory minimum sentence at the prosecutor's sole discretion. The qualitative factors on which mandatory minimums are triggered—the type and quantity of drugs—are “largely controlled by the prosecutor.”²⁸⁸

A prosecutor's discretion to pursue charges that result in mandatory minimum penalties may not necessarily be based solely on the facts of the case, but may also be used as a tool during plea bargaining and potential cooperation agreements. Opponents of mandatory minimums claim that prosecutors oftentimes use the threat of mandatory minimums to “impose a ‘trial tax’ on defendants who exercise their constitutional rights to trial by jury, proof beyond a reasonable doubt, and other trial-related guarantees—the tax being the mandatory minimum sentence that otherwise would not have been imposed.”²⁸⁹

Furthermore, prosecutors may engage in a charging practice referred to as “‘charge stacking’ (or ‘count stacking’), whereby the government divides up a single criminal episode into multiple crimes, each carrying its own mandatory sentence that can then be stacked, one on top of the other, to produce heavier punishment.”²⁹⁰

Similarly, prosecutors may utilize their authority under 21 U.S.C. § 851 to file a prior felony information to increase the mandatory minimum (i.e., doubling the mandatory minimum penalty under 21 U.S.C. § 841(b)(1)(A) from ten to twenty years) in an attempt to coerce a plea agreement.²⁹¹ Judge John Gleeson, of the Eastern District of New York, criticizes the use of prior felony informations

²⁸⁷ Weinstein, *supra* note 281, at 98 (footnotes omitted).

²⁸⁸ VINCENT & HOFER, *supra* note 277, at 21.

²⁸⁹ Luna & Cassell, *supra* note 286, at 14 (footnote omitted).

²⁹⁰ *Id.* (footnote omitted).

²⁹¹ See 21 U.S.C. § 851 (2012).

in his recent opinion in *United States v. Kupa*.²⁹²

My focus here is narrow and my point is simple: as the defendant Lulzim Kupa's case and countless others show, the government abuses its power to file prior felony informations in drug trafficking cases. The single most important factor that influences the government's decision whether to file or threaten to file a prior felony information (or to withdraw or promise to withdraw one that has previously been filed) is illegitimate. When it enacted § 851 in 1970, Congress had in mind the world that DOJ asked it to create, in which federal prosecutors would carefully cull from the large number of defendants with prior drug felony convictions the hardened, professional drug traffickers who should face recidivism enhancements upon conviction. But instead federal prosecutors exercise their discretion by reference to a factor that passes in the night with culpability: whether the defendant pleads guilty. To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.

Prior felony informations don't just tinker with sentencing outcomes; by doubling mandatory minimums and sometimes mandating life in prison, they produce the sentencing equivalent of a two-by-four to the forehead. The government's use of them coerces guilty pleas and produces sentences so excessively severe they take your breath away. Prior felony informations have played a key role in helping to place the federal criminal trial on the endangered species list.²⁹³

²⁹² *United States v. Kupa*, No. 11-CR-345, 2013 WL 5550419, (E.D.N.Y. Oct. 9, 2013).

²⁹³ *Id.* at *1 (footnotes omitted). The defendant, facing a mandatory minimum prison term of ten years for conspiring to distribute marijuana, was scheduled for trial. *Id.* at *8–9. After rejecting previous plea offers, the prosecutors filed a prior felony information providing notice of his two past marijuana convictions and increasing his potential sentence of life in prison if he proceeded to trial. *Id.* at *9. In order to avoid the life sentence, the defendant subsequently pled guilty to a Guidelines range of 140 to 175 months' imprisonment. *Id.* at *9–10.

Mandatory minimums not only transfer discretion from judges to prosecutors, but the statutes also stagnate the checks and balances of the judicial process.

In the late 1980s, the balance of power shifted among defense lawyers, prosecutors and judges. Mandatory minimum sentences began to have real bite while suppression motions became harder to win as the Supreme Court stepped back from the rights revolution of the mid 1960s and 1970s. Thus, pretrial motions faded in strategic importance. This shift manifested not only in defendants' diminishing likelihood of winning pretrial substantial relief in the form of motions, but also in the fact that the tactical advantages to motion practice faded as judges lost sentencing power to prosecutors. There was less to be gained by showing the judge the weakness of the prosecutor's case and more to be lost by challenging the prosecutor. Most importantly, prosecutors came to realize just how powerful a club they wielded as discretion and authority shifted to them from the judges. By the mid 1990s . . . federal prosecutors could realistically threaten many defendants with very long sentences. In that environment, most will not gamble on a trial, pretrial motion, or any litigation that would jeopardize defendants' limited chances for the sentence mitigation the prosecutor controls.²⁹⁴

Mandatory minimums also discourage defendants from taking part in the judicial process and exercising their right to trial. As Mr. Lefcourt explains:

Mandatory minimums further increase the risks inherent with going to trial. As a result, defendants who face mandatory minimums are incentivized and often opt to enter plea agreements with negotiated stipulated Guidelines calculations in order to get out from under the mandatory minimums. So too are defendants more willing to proffer with the government concerning charged and uncharged conduct in the hopes of qualifying for the benefits of "safety valve" in drug cases, or even better to receive the benefit of a cooperation agreement and 5K Letter.²⁹⁵

Therefore, this transfer of discretion from neutral judges to prosecutors changes the playing field for defendants and ultimately,

²⁹⁴ Weinstein, *supra* note 281, at 101–02 (footnote omitted).

²⁹⁵ Letter from Gerald B. Lefcourt to authors, *supra* note 93.

presents issues not otherwise present in ordinary Guidelines cases. “So long as mandatory minimum sentences, and guidelines anchored by mandatory minimums, are tied to the charges for which the defendant is convicted and prosecutors exercise unfettered discretion in charging decisions, the goals of certainty, uniformity, and the reduction of unwarranted disparity are at risk.”²⁹⁶

3. Mandatory Minimums and the Goals of the Sentencing Guidelines

According to 18 U.S.C. § 3553(a), “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with” the sentencing goals enumerated in § 3553(a)(2)—retribution, deterrence, incapacitation, and rehabilitation of the defendant.²⁹⁷ The evidence indicates, however, that mandatory minimum statutes do not meet these goals.

Retribution—the need for the sentence “to provide just punishment for the offense”²⁹⁸—is not always accomplished because mandatory minimums do not take into consideration the individualized assessments of defendants. Mandatory minimum statutes do not differentiate between “the leaders of a conspiracy who plan and organize the importation of a planeload of drugs and reap the profits, and the underlings who are paid a fixed price to unload the plane, watch for police, or carry out other menial tasks,” while disproportionately considering the “amount of drugs, particular types of prior convictions, and especially the government’s power to move for a reduction of sentence.”²⁹⁹ Mandatory minimums do not have a strong deterrent effect because arguably “[c]ertainty of punishment has more of a deterrent effect than does mere severity of punishment.”³⁰⁰ However, mandatory minimums focus on the severity of the punishment, as opposed to creating an increased probability that one shall be punished.

Similarly, the goal of incapacitation and the need “to protect the public from further crimes of the defendant”³⁰¹ is met by

²⁹⁶ Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 561 (1992).

²⁹⁷ 18 U.S.C. § 3553(a) (2012).

²⁹⁸ *Id.* § 3553(a)(2)(A).

²⁹⁹ VINCENT & HOFER, *supra* note 277, at 13.

³⁰⁰ Weinstein, *supra* note 281, at 115.

³⁰¹ 18 U.S.C. § 3553(a)(2)(C).

incarcerating defendants likely to recidivate, which mandatory minimums do not directly consider. In contrast to the Guidelines, which incrementally consider a defendant's past criminal history, mandatory minimums focus primarily on drug quantity. And while the mandatory penalties do increase for prior offenses, "they do so crudely, and they often similarly treat persons with significantly different risks of recidivism."³⁰²

Incapacitation is only effective if: (1) the imprisoned person would otherwise be committing crime, and (2) he is not replaced by others. Mandatory minimums prove problematic on both criteria, opponents contend. Offenders typically age out of the criminal lifestyle, with long sentences requiring the continued incarceration of individuals who present little danger of further crimes. Moreover, certain offenses subject to mandatory minimums can draw upon a large supply of potential participants; with drug organizations, for example, an arrested dealer or courier is quickly replaced by another.³⁰³

Lastly, similar issues exist in the context of rehabilitation of offenders. Because unduly prolonged periods of incarceration do not differentiate among individual defendants but rather focus on drug quantity, there is no individualized assessment of a defendant's specific rehabilitative needs.

Therefore, in light of the severity and harsh disparities created by mandatory minimum penalties, these statutes fail to meet the basic sentencing goals for which the Guidelines were enacted.

V. THE FUTURE OF FEDERAL SENTENCING: POLICY CHANGES AND PENDING LEGISLATION

While the future of the Guidelines and mandatory minimums are unknown, recent developments have suggested federal sentencing is a continually evolving mechanism that will see changes in the near future. Specifically, in response to a recent Supreme Court decision on mandatory minimums, Attorney General Eric Holder issued a memorandum that provides insight on the future of mandatory minimums in the United States. Furthermore, he has also expressed support for an amendment recently voted on by the Commission that provides a two-point reduction in offense level

³⁰² VINCENT & HOFER, *supra* note 277, at 12.

³⁰³ Luna & Cassell, *supra* note 286, at 14 (footnotes omitted).

calculation for all drug trafficking offenses.³⁰⁴ Most significantly, currently pending legislation in both the Senate and the House of Representatives, entitled the Smarter Sentencing Act of 2014, would reduce the mandatory minimum penalties for narcotics offenses.³⁰⁵ In light of this pending legislation, the Commission's amendment, and the policy shifts within the Department of Justice, it seems as though federal sentencing will experience substantial changes in the near future.

In the recent decision, *Alleyne v. United States*,³⁰⁶ the Supreme Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury" and proven beyond a reasonable doubt.³⁰⁷ The Honorable Justice Thomas, writing for the Court, explained:

In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. . . . *Apprendi's* definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.³⁰⁸

The petitioner, Allen Ryan Alleyne was charged with multiple federal offenses stemming from the robbery of a store manager, including carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A).³⁰⁹ The jury convicted Alleyne and found that a firearm was "used" as defined under 18 U.S.C. § 924(c)(1)(A), subjecting him to a five-year mandatory minimum.³¹⁰ At sentencing, however, the judge found that the firearm was "brandished" which enhanced the prison term to a seven-year mandatory minimum.³¹¹ The Supreme Court found that whether

³⁰⁴ See *infra* notes 316–21 and accompanying text.

³⁰⁵ Smarter Sentencing Act of 2014, S. 1410, 113th Cong. § 4 (2014) (as referred to the Committee on the Judiciary, Mar. 11, 2014).

³⁰⁶ *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

³⁰⁷ *Id.* at 2155.

³⁰⁸ *Id.* at 2158 (citation omitted) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000)).

³⁰⁹ *Alleyne*, 133 S. Ct. at 2155.

³¹⁰ *Id.* at 2156.

³¹¹ *Id.*

the firearm was “used” or “brandished” was an element of the crime and thus, must be found by a jury beyond a reasonable doubt.³¹²

As a result of the Supreme Court’s decision, and following a speech before the American Bar Association’s House of Delegates, Attorney General Eric Holder issued a memorandum regarding the Justice Department’s policy on mandatory minimum sentences.³¹³ As Attorney General Holder explained:

[*Alleyne*] means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty.

The Supreme Court’s decision in *Alleyne* heightens the role a prosecutor plays in determining whether a defendant is subject to a mandatory minimum sentence.³¹⁴

Attorney General Holder acknowledged the issues surrounding mandatory minimums and stated, “[i]n some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.”³¹⁵ As a result, Attorney General Holder issued a new policy in regard to the applicability of Title 21 mandatory minimum sentences, which states that:

[P]rosecutors should decline to charge [drug] quantit[ies] [that are] necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:

(1) The defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;

(2) The defendant is not an organizer, leader, manager or

³¹² *Id.* at 2162, 2163.

³¹³ Memorandum from Attorney Gen. Eric Holder to the U.S. Attorneys and Assistant Attorney Gen. for the Criminal Div. 1 (Aug. 12, 2013), available at <http://www.justice.gov/oip/docs/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [hereinafter Holder Memo]; *Attorney General Eric Holder Asks for ABA’s Help in Efforts to Overhaul Criminal Justice System*, AM. BAR ASS’N (Aug. 12, 2013), http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/attorney_generaleri.html.

³¹⁴ Holder Memo, *supra* note 313, at 1.

³¹⁵ *Id.*

supervisor of others within a criminal organization;
[(3)] The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and
[(4)] The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.³¹⁶

Attorney General Holder also specified additional factors for prosecutors to consider before seeking a recidivist enhancement.³¹⁷ Most importantly, he urged transparency by directing prosecutors to “be candid with the court, probation, and the public as to the full extent of the defendant’s culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant’s role in the offense.”³¹⁸ Furthermore, he stated that “[p]rosecutors . . . should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines. In cases where the properly calculated guideline range meets or exceeds the mandatory minimum, prosecutors should consider whether a below-guidelines sentence is sufficient to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a).”³¹⁹

On January 17, 2014, shortly after Attorney General Holder’s policy-shifting memorandum, the United States Sentencing Commission proposed an across-the-board two-level reduction in the applicable sentencing levels for drug trafficking offenses.³²⁰ On April 10, 2014, the Commission unanimously passed the amendment, which will go into effect on November 1, 2014 if Congress does not object to the change.³²¹ By lowering the base offense level attributed to a specific drug quantity and type as enumerated in the Drug Quantity Table under the Guidelines section 2D1.1, a defendant will now be able to receive an overall

³¹⁶ *Id.* at 2 (footnote omitted).

³¹⁷ *Id.* at 3.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ See 79 Fed. Reg. 3280 (passed pending congressional action Jan. 17, 2014) (to be codified at U.S. SENTENCING GUIDELINES MANUAL § 1B1.10); Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Seeks Comment on Potential Reduction to Drug Trafficking Sentences (Jan. 9, 2014), available at http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140109_Press_Release.pdf.

³²¹ Evan Perez, *U.S. Moves Toward Shorter Sentences for Drug Crimes*, CNN (Apr. 10, 2014), <http://www.cnn.com/2014/04/10/us/sentencing-commission/>.

lower Guidelines range.³²² For example, a defendant convicted under 21 U.S.C. § 841(b)(1)(A) for distributing one thousand kilograms of marijuana has a base offense level of thirty-two according to the Drug Quantity Table.³²³ A base offense level of thirty-two corresponds to 121 to 151 months' imprisonment (assuming the defendant is in Criminal History Category D).³²⁴ However, under the amendment, the defendant is entitled to a two-level reduction in base offense level. Thereby, in the present example, the defendant would be at a level thirty with a corresponding Guidelines range of 97 to 121 months. The Commission has estimated that the amendment would reduce drug trafficking sentences by approximately eleven months, and in turn, would reduce the federal prison population by "approximately 6,550 inmates by the fifth year after the change."³²⁵ The amendment, Guidelines section 1B1.10, also enables defendants that were already sentenced to now be resentenced in accordance with their newly applicable sentencing range.³²⁶

Attorney General Holder testified before the Commission on March 13, 2014 in support of the amendment.³²⁷ Most importantly, even though at the time of his testimony the amendment had not yet passed and was not in effect, Attorney General Holder instructed federal prosecutors not to object to any requests for the two-level reduction based on the proposed amendment.³²⁸

Holder lauded the amendment's passing, stating that it represents a milestone in our effort to reshape the criminal justice system's approach to dealing with drug offenses. This reduction in the federal sentencing guidelines, while modest, sends a strong message about the need to reserve the harshest penalties for the most serious crimes.³²⁹

³²² See U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 21 (2014) [hereinafter AMENDMENTS].

³²³ 21 U.S.C. § 841(b)(1)(a) (2012); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(4) (2013).

³²⁴ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. background.

³²⁵ Press Release, U.S. Sentencing Comm'n, *supra* note 320.

³²⁶ See AMENDMENTS, *supra* note 322, at 2.

³²⁷ Press Release, Dep't of Justice, Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harsh Penalties For Most Serious Drug Traffickers (Mar. 13, 2014), *available at* <http://www.justice.gov/opa/pr/2014/March/14-ag-263.html>.

³²⁸ *Id.*

³²⁹ Perez, *supra* note 321.

The two-level reduction will not alter mandatory minimum penalties. As Judge Patti B. Saris, Chair of the Commission, explains:

Our proposed approach is modest . . . [t]he real solution rests with Congress, and we continue to support efforts there to reduce mandatory minimum penalties, consistent with our recent report finding that mandatory minimum penalties are often too severe and sweep too broadly in the drug context, often capturing lower-level players.³³⁰

Though the Commission cannot change statutory mandatory minimums, it seems as though Congress is following suit. On January 30, 2014, the Senate Judiciary Committee approved the Smarter Sentencing Act (SSA), a bipartisan bill which would modify federal sentencing for certain drug offenses.³³¹ Introduced by Senators Richard Durbin (Democrat, Ill.) and Mike Lee (Republican, Utah), the bill seeks to reduce five, ten, and twenty year mandatory minimum sentences for drug offenses to two, five, and ten years, respectively.³³² Furthermore, the bill seeks to broaden the eligibility criteria of the existing “safety valve” provision under 18 U.S.C. § 3553(f)(1) and also seeks to clarify the retroactive applicability of the Fair Sentencing Act of 2010.³³³ The bill also directs the Commission to amend its Guidelines in order to remain consistent with the decreased penalties.³³⁴

Attorney General Holder has urged Congress to pass the Smarter Sentencing Act, which has “the potential to help make our criminal justice system not only fairer, but also—by reducing the burden on our overcrowded prison system—more efficient.”³³⁵ He stated that the bill “would give judges more discretion in determining appropriate sentences for people convicted of certain federal drug crimes” and would “ultimately save our country billions of dollars in prison costs while keeping us safe.”³³⁶

While the Smarter Sentencing Act is not yet law, nor is the

³³⁰ Press Release, U.S. Sentencing Comm’n, *supra* note 320 (internal quotation marks omitted).

³³¹ Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2014) (as referred to the Committee on the Judiciary, Mar. 11, 2014).

³³² *Id.* § 4.

³³³ *Id.* §§ 2–3.

³³⁴ *Id.* § 5.

³³⁵ Press Release, Dep’t of Justice, Attorney General Eric Holder Urges Congress to Pass Bipartisan ‘Smarter Sentencing Act’ to Reform Mandatory Minimum Sentences (Jan. 23, 2014), *available at* <http://www.justice.gov/opa/pr/2014/January/14-ag-068.html>.

³³⁶ *Id.*

Sentencing Commission's two-level reduction amendment in effect yet, these proposals suggest that the Guidelines, particularly in the context of mandatory minimum penalties for drug offenses, may significantly change in the near future. Attorney General Holder's statements and memoranda on sentencing issues signify the Department of Justice's policy shifts in regard to mandatory minimums and perhaps, a commitment to the purposes of the Guidelines. As such, the recent policy shifts, amendments, and pending legislation provide hope that the problems that plague the mandatory minimum statutes, and by extension, the application of the Guidelines, will potentially be rectified.

VI. CONCLUSION

The United States Sentencing Guidelines provide a reasoned, individualized approach to sentencing while maintaining uniformity and remedying disparities. While the Guidelines do not take into consideration every potentially relevant fact of a defendant's circumstances, they provide defendants, and their defense attorneys, the opportunity to present a slew of mitigating factors that may result in a lower, or "non-Guidelines," sentence. The holding in *United States v. Booker* allows further flexibility at sentencing by granting judicial discretion that was otherwise previously limited by the Guidelines. Although the Guidelines attempt to quantify the unquantifiable, it is our opinion that the Guidelines provide a useful mechanism for sentencing defendants fairly and efficiently.

In juxtaposition to the Guidelines' purposes, mandatory minimum drug laws do not provide for the same individualized assessment at sentencing. Rather, they limit judicial discretion and bar consideration of a myriad of factors otherwise reflected in the Guidelines. As stated by the attorneys cited in this article, the reliance on objective, quantitative factors, namely, drug quantity, does not provide for fair and just sentencing. Mandatory minimums eradicate the consideration of a defendant's individual and unique circumstances, and result in the imposition of unnecessarily severe and oftentimes illogical sentences. More often than not, mandatory minimums impede the goals the Guidelines sought to achieve.

Furthermore, mandatory minimums transfer authority from the sentencing judges to the prosecutors, as they are the individuals who choose whether a defendant is charged under a mandatory minimum law. Prosecutors have discernable power in deciding the

charged drug quantity and consequently, the applicable mandatory minimum penalty. For defendants with past felony drug convictions, prosecutors also have the unilateral authority to file a prior felony information in order to double the applicable penalties. Often, these prosecutorial powers are wielded in order to coerce plea agreements, gain cooperating witnesses, and intimidate defendants from exercising their constitutional rights at trial.

Overall, it is difficult to reconcile stringent mandatory minimums with the flexibility and individualized assessments of the Guidelines. If the Guidelines are to operate at their full potential, the repeal of mandatory minimum drug laws seems to be the only logical conclusion.