

# IMPROVING THE GUIDELINES THROUGH CRITICAL EVALUATION: AN IMPORTANT NEW ROLE FOR DISTRICT COURTS

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## I. INTRODUCTION

One of the most interesting aspects of the Supreme Court's post-*United States v. Booker*<sup>1</sup> sentencing jurisprudence is the Court's invitation to lower federal courts to play an active role in improving the Federal Sentencing Guidelines. Sentencing courts can play such a role because the Supreme Court's decisions in *Rita v. United States*,<sup>2</sup> *Gall v. United States*,<sup>3</sup> and *Kimbrough v. United States*<sup>4</sup> authorize them to treat the Guidelines differently than they previously had—no longer as edicts promulgated by an agency with knowledge superior to their own, but rather as a set of

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1. *United States v. Booker*, 543 U.S. 220 (2005).  
 2. *Rita v. United States*, 127 S. Ct. 2456 (2007).  
 3. *Gall v. United States*, 128 S. Ct. 586 (2007).  
 4. *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

essentially provisional recommendations valuable only to the extent that they are persuasive. As the Court indicated in *Rita*, sentencing courts may now reject the sentence called for by the Guidelines not only because of the unique facts of the case or the characteristics of the individual defendant, but also “because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations” and thus “reflect[s] an unsound judgment.”<sup>5</sup> The Court reinforced this message in *Kimbrough* when it made clear that sentencing courts may reject Guidelines sentences if they are “‘greater than necessary’ to achieve § 3553(a)’s purposes.”<sup>6</sup> The Court recognized that judicial decisions criticizing the Guidelines could encourage the Sentencing Commission (Commission) to revise and improve its product.<sup>7</sup>

The Court’s invitation to sentencing courts to critique the Guidelines—like its decision in *Booker* making the Guidelines advisory<sup>8</sup>—represents an opportunity for district courts to participate in the creation of a fairer system of federal sentencing. Although analyzing and critiquing the Guidelines in written opinions requires much work, judges should accept the Supreme Court’s invitation. In this Article, we discuss how courts might go about such work and why many guidelines—including those most commonly applied—are deeply vulnerable to criticism.

## II. CRITERIA FOR JUDGING A GUIDELINE

The extent to which a sentencing court should accord respect to a guideline will generally depend on whether, when it developed the guideline, the Commission functioned as Congress envisioned in the Sentencing Reform Act (SRA).<sup>9</sup> The idea that led to the establishment of the Commission was that an administrative agency, insulated from politics and composed of experts on sentencing, would enact guidelines that advanced the generally accepted purposes of sentencing (punishment, deterrence, incapacitation, and rehabilitation), eliminated sentencing disparity, and were regarded by participants in the sentencing process as fair and just.<sup>10</sup> Sadly, as others have documented, the Commission has

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5. *Rita*, 127 S. Ct. at 2465, 2468.

6. *Kimbrough*, 128 S. Ct. at 575 (quoting 18 U.S.C. § 3553(a) (2006)).

7. *See Rita*, 127 S. Ct. at 2464 (“The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.”).

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

9. *See* 18 U.S.C. § 3553(a).

10. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING

never functioned as Guidelines supporters contemplated.<sup>11</sup> Rather than being independent, the Commission has always been acutely sensitive to the concerns of “law and order” members of Congress and the Justice Department.<sup>12</sup> Additionally, the Commission has never explained how the Guidelines advance the purposes of sentencing.<sup>13</sup> The Guidelines have not eliminated sentencing disparity and, in fact, have made racial disparity in sentencing worse.<sup>14</sup> Finally, few students and practitioners of federal sentencing regard the Guidelines as fair.<sup>15</sup>

Our purpose in this Part of the Article is not to reiterate the failings of the Commission, but rather to provide an outline for evaluating the Guidelines under *Booker*’s advisory regime. For district courts that accept the Supreme Court’s invitation to critique the Guidelines, the question of whether a particular guideline warrants respect will depend largely on how and why it was created. The Commission that created the original Guidelines could not agree on which of the purposes of sentencing deserved priority; thus, it reportedly based some guidelines on past

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GUIDELINES IN THE FEDERAL COURTS 48 (1998). Congress identified these purposes in the SRA. See 18 U.S.C. § 3553(a)(2).

11. See, e.g., Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 26–35 (2003) (discussing the Commission’s philosophical compromises and mixed use of empirical data and past practices, and the resulting confusion this created for the meaning of the Guidelines); Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 726 (1999) (citing the ineffective administration of the Commission as a cause for the Guidelines’ “failure[s]”); Michael Tonry, *The Success of Judge Frankel’s Sentencing Commission*, 64 U. COLO. L. REV. 713, 716 (1993) (arguing that the Commission falls short because no effort has been made to insulate it “from politics and superficial emotion”). But see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 284 (1993) (arguing that when the legislative intent of the Guidelines is taken into consideration, it is no surprise that the Commission has functioned as it has).

12. STITH & CABRANES, *supra* note 10, at 48; Tonry, *supra* note 11, at 716–17.

13. See generally Paul Hofer & Amy Baron-Evans, *New Frameworks for Federal Sentencing* (2008) (unpublished manuscript, on file with author).

14. See U.S. SENTENCING COMMISSION, *FIFTEEN YEARS OF GUIDELINES SENTENCING* 115–17 (2004) (hereinafter *FIFTEEN YEAR REPORT*).

15. See, e.g., Miller & Wright, *supra* note 11, at 726 (characterizing the federal sentencing guidelines as “one of the great failures at law reform in U.S. history” and “widely hated and in many ways dysfunctional,” and stating that the Commission “morphed into an ineffectual caricature of an administrative agency”).

practice, i.e., preguideline sentences.<sup>16</sup> To the extent that it can be established that a guideline is based on past practice, the guideline may be regarded as reflecting the purposes of sentencing and, therefore, worthy of respect.<sup>17</sup> A guideline that is based on Commission research and expertise may also be regarded as properly advancing the purposes of sentencing.<sup>18</sup>

The problem is that few guidelines can be shown to be based on actual preguideline sentencing practice or on Commission research and expertise. This is so for many reasons. First, when the Commission drafted the original Guidelines it had limited data concerning past practice, and the data it did have was sketchy.<sup>19</sup> Second, in determining preguideline sentencing practice, the Commission arbitrarily excluded sentences of probation.<sup>20</sup> This decision significantly skewed the data relating to past practice because approximately 50 % of defendants in the preguideline era received sentences of probation.<sup>21</sup> Third, the Commission, without serious explanation, increased the severity of sentences for a number of offenses.<sup>22</sup> Fourth, since enacting the original Guidelines, the Commission has amended many of them, making them even more severe. As one commentator put it, the result has been a “one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals

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16. STITH & CABRANES, *supra* note 10, at 59.

17. *See* Gall v. United States, 128 S. Ct. 586, 594 & n.2 (2007) (noting that some of the Guidelines are “the product of careful study based upon extensive empirical evidence derived from the review of thousands of individual sentencing decisions”).

18. *See* Kimbrough v. United States, 128 S. Ct. 558, 574–75 (2007) (stating that guidelines based on Commission study and expertise will, in the ordinary case, produce a range that roughly approximates a sentence that might achieve § 3553(a)’s objectives).

19. STITH & CABRANES, *supra* note 10, at 61 (noting that “the Commission’s past practice data were obtained only from the presentence reports for its sample of 10,500 cases—not from court records of actual judgments entered by judges”).

20. *See, e.g.,* Morris E. Lasker & Katherine Oberlies, *The Medium or the Message?: A Review of Alschuler’s Theory of Why the Sentencing Guidelines Have Failed*, 4 FED. SENT’G REP. 166, 167 (1991) (noting that the Commission chose to count only incarcerative sentences in its data).

21. *See, e.g.,* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1222 (2004) (“Before the guidelines, almost 50% of federal sentences were to straight probation. Under the initial guidelines, that figure dropped to around 15%.”).

22. *See, e.g.,* Carissa Byrne Hessick, *Prioritizing Policy Before Practice After Booker*, 18 FED. SENT’G REP. 167, 167 (2006) (stating that the Commission elected to increase sentences above past practice for many categories of offenses).

who apply the rules.”<sup>23</sup> Many of the Commission’s amendments increasing the severity of sentences came in response to Congress’s actions—either its establishment of mandatory minimums or its directives to the Commission.<sup>24</sup> Such amendments obviously are not based on Commission research and expertise.

According to *Gall*, the sentencing court must begin by first “correctly calculating the applicable Guideline range.”<sup>25</sup> Then, after giving both parties an opportunity to argue for the sentence they desire, the court must consider all of the § 3553(a) factors to arrive at an appropriate sentence.<sup>26</sup> In making this determination, the court may not assume that the Guidelines sentence is the correct one.<sup>27</sup> Further, at this stage of the sentencing process, the court should carefully scrutinize the recommended sentence.<sup>28</sup> A court that does so will often conclude that the sentence called for by the guideline is “greater than necessary[ ] to comply with the purposes” of sentencing.<sup>29</sup> Sometimes, a court will conclude that the facts of the case, the characteristics of the defendant, or a combination of both make the Guidelines sentence too high.<sup>30</sup> In *Gall*, the Supreme Court upheld a court’s authority to impose a nonguideline sentence in a case of this type.<sup>31</sup> However, the court might also conclude that while the facts of the case are not unique, the Guidelines sentence is excessive nonetheless. In this type of situation, the court can contribute significantly to the improvement of the guideline by explaining why it perceives the guideline

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23. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319–20 (2005).

24. See, e.g., Paul J. Hofer, *Empirical Questions and Evidence in Rita v. United States*, 85 DENV. U. L. REV. 27, 47–48 (2007); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1028 (2001).

25. *Gall v. United States*, 128 S. Ct. 586, 596 (2007).

26. *Id.*

27. *Id.* at 596–97.

28. See *id.* at 597.

29. See 18 U.S.C. § 3553(a) (2006).

30. It appears that judges rarely find the guideline range too low. See U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. N (2007), available at <http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm> (hereinafter 2007 SOURCEBOOK) (noting that 60.8% of defendants are sentenced within the range, 37.6% below, and just 1.5% above the range).

31. See *Gall*, 128 S. Ct. at 601–02 (considering a sentence outside the Guidelines range and stating that “the Court of Appeals should have given due deference to the District Court’s reasoned and reasonable” application of the § 3553(a) factors).

to be deficient and imposing a nonguideline sentence.

In its explanation, the court should generally focus on how the guideline was developed and whether the Commission has offered a persuasive rationale for it. A court that makes this effort will generally find that the guideline in question is based on neither past practice nor Commission expertise and that the Commission has never persuasively justified it. The only account of the Commission's so-called past-practice study, the *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, is unlikely to contain evidence that a particular guideline reflects past practice.<sup>32</sup> Further, although Appendix C of the *U.S. Sentencing Guidelines Manual* includes sections entitled "Reason for Amendment," neither the manual nor the several other sources that may potentially contain useful information are likely to include any material relating to the merits of the guideline.<sup>33</sup> Sometimes the "Reason for Amendment" section will refer to a congressional action, in which case legislative history may become relevant.<sup>34</sup> However, an inquiring court will rarely find any legislative history that persuasively justifies a sentencing provision.

We emphasize that in urging courts to critically evaluate the Guidelines and discount those that do not properly advance the purposes of sentencing, we do not advocate sentencing by judicial fiat. Rather, we reiterate the hope expressed by the Supreme Court—that thoughtful and constructive criticism of the Guidelines will encourage the Commission to improve them.<sup>35</sup> In a recent decision, Judge Gertner—who is extremely knowledgeable about sentencing—stated that "where the only reason why the Court would reject a Guidelines sentence is because of its disagreement with the Guidelines' policy choices, that is not sufficient in and of itself."<sup>36</sup> Recognizing that *Kimbrough* endorsed judicial rejection of the Guidelines'

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32. See Hofer & Baron-Evans, *supra* note 13, at 46; *see also* U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987), *available at* [http://www.fd.org/pdf\\_lib/Supplementary%20Report.pdf](http://www.fd.org/pdf_lib/Supplementary%20Report.pdf).

33. Hofer & Baron-Evans, *supra* note 13, at 46; *see also* U.S. SENTENCING GUIDELINES MANUAL app. C (2003). The other sources are the Commission's "working group" or "team" reports and privately published articles.

34. Hofer & Baron-Evans, *supra* note 13, at 46; *see, e.g.*, U.S. SENTENCING GUIDELINES MANUAL app. C.

35. *See Rita v. United States*, 127 S. Ct. 2456, 2464 (2007) ("The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process.").

36. *United States v. Matos*, 589 F. Supp. 2d 121, 141 (D. Mass. 2008).

policy, Judge Gertner wrote:

This approach is considerably different from identifying a reasoned basis to challenge a particular guideline, as with the crack cocaine guideline in *Kimbrough*. In many ways, the question before the Supreme Court in *Kimbrough* was akin to a challenge to a regulation under the Administrative Procedure Act, namely, that the Commission's guideline had no rational relationship to the facts on which it was purportedly based—the differences between crack and powder cocaine.<sup>37</sup>

If, by this statement, Judge Gertner meant only that judicial decisions should be reasoned and that judges should not base sentences solely on personal predilections, we agree.<sup>38</sup> However, as Justice Scalia explained in his concurrence in *Kimbrough*, the *Booker* remedy means “the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines.”<sup>39</sup> This does not mean that courts should indulge their own personal philosophies, but rather that they thoughtfully and constructively criticize the Guidelines, which, despite their advisory nature, continue to have great influence. Only if district courts engage in this enterprise will federal sentencing practices improve.<sup>40</sup>

### III. WHAT A COURT EVALUATING A GUIDELINE WILL FIND

As suggested, a court that makes the effort to critically evaluate a guideline will likely discover a trove of information. To illustrate this point, consider the most commonly applied guidelines—those relating to drug trafficking, immigration, fraud, firearms, and pornography—and the kind of information that a court evaluating them will encounter.<sup>41</sup> For a

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37. *Id.* at 141 n.23 (citation omitted).

38. *See, e.g.,* *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (“The sentencing judge cannot, after considering the factors listed in [§ 3553(a)], import his own philosophy of sentencing if it is inconsistent with them.”).

39. *Kimbrough v. United States*, 128 S. Ct. 558, 577 (2007) (Scalia, J., concurring).

40. *See United States v. Booker*, 543 U.S. 220, 264 (2005) (“As we have said, the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”).

41. According to Commission statistics, of the 72,765 defendants sentenced under the SRA in the 2007 fiscal year, 24,332 committed drug-trafficking offenses, 17,592 committed immigration offenses, 9,529 committed larceny or fraud offenses,

variety of reasons, each of these guidelines is seriously deficient. The drug-trafficking guideline is not based on past practice or Commission expertise because it is tied to mandatory minimum sentences enacted by Congress.<sup>42</sup> Similarly, as a result of guideline enhancements directed by Congress, the guideline applicable to offenses involving child pornography does not “exemplif[y] the Sentencing Commission’s ‘exercise of its characteristic institutional role.’”<sup>43</sup> The guidelines governing immigration and gun cases rely mechanically on the offender’s prior criminal record,<sup>44</sup> and the guideline governing fraud relies equally mechanically on the amount of loss.<sup>45</sup> As further discussed below, sentencing courts dealing with these guidelines should not hesitate to conclude that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations.”<sup>46</sup>

### A. Drug-Trafficking Guideline

While the Commission was preparing the original Guidelines, Congress enacted the Anti-Drug Abuse Act of 1986 (ADAA), which established a three-tiered sentencing structure for most drug-trafficking offenses (zero to twenty years, five to forty years, ten years to life) based on the type and amount of controlled substance involved in the offense.<sup>47</sup> The Commission then structured the drug-trafficking guideline around the quantities contained in the ADAA—setting corresponding offense levels

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8,359 committed firearm offenses, and 1,445 committed pornography/prostitution offenses. 2007 SOURCEBOOK, *supra* note 30, at tbl 3. These offenses thus comprise 84.2% of the federal criminal docket. *See id.*

42. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2008). We do not in this Article discuss the 100:1 crack to powder cocaine ratio, which, thanks to *Kimbrough*, a judge may rightfully designate for the dustbin.

43. *United States v. Hanson*, 561 F. Supp. 2d 1004, 1007 (E.D. Wis. 2008) (quoting *Kimbrough*, 128 S. Ct. at 575).

44. Under the guideline applicable to unlawfully entering the United States, the defendant’s offense level is largely driven by the nature of any prior convictions he sustained. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2008). Similarly, under the guideline applicable to unlawful receipt, possession, or transportation of a firearm, the level is significantly affected by the nature of any prior convictions. *Id.* § 2K2.1.

45. *See id.* § 2B1.1.

46. *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007).

47. 21 U.S.C. § 841(b) (2006). For instance, offenses involving more than five kilograms of cocaine carry a penalty of 10 years to life; more than 500 grams of cocaine, 5 to 40 years; and less than 500 grams of cocaine, up to 20 years in prison. *Id.* The statute also contains weight thresholds and corresponding mandatory minimum sentences for heroin, cocaine base, PCP, LSD, marijuana, and methamphetamine offenses. *Id.*; *see also Kimbrough*, 128 S. Ct. at 566–67 (discussing the ADAA).



below, between, and above the amounts specified in the statute.<sup>48</sup> The Commission did not explain why it adopted this approach,<sup>49</sup> compounding Congress's similar failure to provide a rationale for the weight-based sentences it selected.<sup>50</sup> While the basis for the Commission's action is unclear, the effect of it is readily apparent—"increas[ed] prison terms far above what had been typical in past practice."<sup>51</sup>

Many critics of the drug-trafficking guideline assail its elevation of amount over other offense characteristics,<sup>52</sup> question whether quantity can be accurately determined, and note how both of these problems can be compounded by the relevant conduct rules.<sup>53</sup> Others note that the guideline is responsible for three-quarters of the growth in the federal prison population, constitutes a primary cause of increased racial disparity in sentencing, and has been widely condemned for its "'harshness and inflexibility.'"<sup>54</sup> We agree with these criticisms but add another: even if drug weight is a satisfactory proxy for culpability, and even if it can be

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48. FIFTEEN YEAR REPORT, *supra* note 14, at 48–49.

49. *Id.* at 49. In the Fifteen Year Report, the Commission's staff provided some possible *post-hoc* explanations for the guideline. *Id.* at 49–50 (noting that drug type and amount can be seen as a reasonable measure of the harm caused by the offense and that the Commission's approach was necessary to avoid sentencing "cliffs" around the statutory thresholds). Whatever the merits of these explanations, the fact remains that the Commission abandoned its role as an expert agency in setting offense levels in drug cases, acceding instead to the will of the legislature. *See Kimbrough*, 128 S. Ct. at 567 ("The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses. Instead, it employed the 1986 Act's weight-driven scheme.").

50. *See FIFTEEN YEAR REPORT*, *supra* note 14, at 48 (noting that the legislative history of the ADAA consists primarily of floor statements). According to Eric Sterling, counsel to the House Judiciary Committee in 1986, the climate in Congress at the time was "frenzied" and the "careful deliberative practices of the Congress were set aside for the drug bill." William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249–50 (1996) (quoting *Hearings Before the United States Sentencing Comm'n on Proposed Guideline Amendments* (Mar. 22, 1993) (testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation)).

51. FIFTEEN YEAR REPORT, *supra* note 14, at 49. The time served by federal drug offenders more than doubled following the enactment of the ADAA and the guidelines. *Id.* at 53.

52. *Id.* at 50; *see also* *United States v. Cabrera*, 567 F. Supp. 2d 271, 273 (D. Mass. 2008) ("False uniformity occurs when we treat equally individuals who are not remotely equal because we permit a single consideration, like drug quantity, to mask other important factors.").

53. FIFTEEN YEAR REPORT, *supra* note 14, at 50.

54. *Id.* at 48, 55 (citation omitted).

determined in a fair and reliable manner, the deeper problem is that the specific sentences called for by this guideline are based on virtually nothing—not on past practice, not on Commission expertise about the harm caused by drugs, and not on research. The guideline is thus entitled to little respect.

### B. Child-Pornography Guideline

While the drug-trafficking guideline was flawed from its inception, many of the deficiencies in the child-pornography guideline developed over time, based largely on congressional actions taken despite evidence and recommendations by the Commission to the contrary.<sup>55</sup> Congress apparently sought to target mass producers of child pornography and repeat abusers of children, but the changes it made affect few such offenders; instead, they primarily reach men with psychological problems of various degrees of severity who download images from the Internet.<sup>56</sup> Whatever Congress's intent, the result has been an increase in the mean sentence in child-pornography cases from 36 months to 110 months.<sup>57</sup> No Commission research or expertise supports this increase.<sup>58</sup>

Today, based on enhancements applicable in most cases, the guideline range in even a mine-run case can quickly approach the statutory maximum of twenty years.<sup>59</sup> While the flaws in the guideline are too numerous to fully catalog, this Part highlights a few of the enhancements that seem particularly irrational.

The guideline contains a two-level enhancement for use of a computer even though today almost all offenders use a computer and “online pornography comes from the same pool of images found in specialty magazines or adult bookstores.”<sup>60</sup> The guideline also contains an enhancement of up to five levels based on the number of images, despite the fact that Internet swapping allows defendants to easily obtain 600 images with little effort.<sup>61</sup> Furthermore, although most cases involve at

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55. United States v. Hanson, 561 F. Supp. 2d 1004, 1009 (2008) (citing Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, available at <http://sentencing.typepad.com> (June 10, 2008)).

56. See *id.* at 1009–12.

57. *Id.* at 1009.

58. See *id.* at 1009–10.

59. *Id.* at 1010–11.

60. *Id.* at 1010.

61. *Id.*

least one image of a prepubescent minor, the guideline calls for a two-level enhancement for material involving this type of pornography.<sup>62</sup> Finally, the guideline provides a five-level increase based on distribution in exchange for a “thing of value,”<sup>63</sup> which may apply when the offender barter images—a very common practice.<sup>64</sup> Add these substantial enhancements to the base offense level of twenty-two<sup>65</sup>—which the Commission adopted in order to keep pace with Congress’s enactment of a five-year statutory mandatory minimum—and the recommended sentence for an offender with no prior offenses quickly approaches the statutory maximum of twenty years.<sup>66</sup>

A sentencing court inclined to critique this guideline will have much to consider. Because it is “not the result of ‘the Commission’s exercise of its characteristic institutional role,’” the guideline range in such cases should generally be accorded little respect.<sup>67</sup>

### C. *Fraud/Theft Guideline*

The guideline range in fraud and theft cases is driven largely by the amount of loss caused by the offense.<sup>68</sup> According to the Commission:

ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant’s relative culpability and is a principal factor in determining the offense level under this guideline.<sup>69</sup>

However, the Commission has never satisfactorily justified this determination. It has never persuasively explained why loss is entitled to the huge weight conferred on it by the guideline.<sup>70</sup> In fact, in many cases,

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62. *Id.*

63. *Id.* at 1009.

64. *Id.* at 1010.

65. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(2) (2008).

66. *See* 18 U.S.C. § 2252(b)(1) (2006) (mandating a prison sentence of 5 to 20 years for transport, receipt, or distribution of child pornography).

67. *United States v. Baird*, 580 F. Supp. 2d 889, 892 (D. Neb. 2008) (quoting *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007)).

68. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2008).

69. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (cmt. background) (2008).

70. *See United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006)

giving so much weight to loss dramatically and unfairly oversimplifies a complicated fact situation.

First, the guideline fails to take into account the defendant's motive. Rather, it treats a defendant who steals "to finance a lavish lifestyle the same as one who steals the same amount to pay for an operation for a sick child."<sup>71</sup> In terms of culpability, the two situations are very different.<sup>72</sup> The guideline also mandates that the sentence be based on the amount of intended loss if it is greater than actual loss.<sup>73</sup> This is problematic because it is not uncommon for defendants to "devise[] an ambitious scheme obviously doomed to fail and which causes little or no actual loss."<sup>74</sup> Yet, defendants in such cases often face very high guideline ranges.<sup>75</sup> The guideline ignores that defendants of this type usually do not have the same mental state and do not create the same risk of harm as those individuals who devise more cunning schemes.<sup>76</sup>

Further, in some white collar cases—such as those involving publicly traded companies—a heavy loss enhancement, coupled with other enhancements, can result in a guideline range so "run amok" that it is "patently absurd" on its face.<sup>77</sup> In *United States v. Adelson*, for instance, the defendant, who had no criminal record and a lengthy history of good works, faced a guideline range of life; thus, "[e]ven the Government blinked at this barbarity."<sup>78</sup> Likewise, in *United States v. Parris*, the defendants—first-time offenders—faced a guideline range of 360 months to life based on "the 'kind of 'piling-on' of points for which the guidelines

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(citing STITH & CABRANES, *supra* note 10, at 69).

71. *United States v. Ranum*, 353 F. Supp. 2d 984, 990 (E.D. Wis. 2005).

72. *See id.* ("[F]rom the victim's perspective the loss is the same no matter why it occurred. But from the standpoint of personal culpability, there is a significant difference."); *see also* Ellen Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 747 (2007) ("Although motive has never been a mandate of intent and may not be a factor in determining guilt or innocence, motive can be a consideration in punishment theory. The federal sentencing guidelines, however, do not for the most part examine the accused's motive . . .").

73. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(A) (2008).

74. *United States v. Roen*, 279 F. Supp. 2d 986, 991 (E.D. Wis. 2003).

75. *See, e.g., id.*

76. *Id.*

77. *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006); *see also* *United States v. Ebberts*, 458 F.3d 110, 129 (2d Cir. 2006) ("Under the Guidelines, it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment . . .").

78. *Adelson*, 441 F. Supp. 2d at 511.

have frequently been criticized.”<sup>79</sup> The court declined to “impose what [it] believe[d] any rational jurist would consider to be a draconian sentence.”<sup>80</sup>

Thus, district courts inclined to critique the fraud guideline will once again find a wealth of material. As discussed, the Supreme Court has authorized district courts to impose a nonguideline sentence “because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or . . . because the case warrants a different sentence regardless.”<sup>81</sup> Many fraud cases fall into this category.

#### D. *Firearm/Immigration Offense Guidelines*

For status offenses such as felon in possession of a firearm and unlawful reentry after deportation, the guideline range is largely driven by the nature of the defendant’s prior convictions.<sup>82</sup> Specifically, prior convictions for crimes of violence or drug-trafficking offenses result in an enhanced offense level.<sup>83</sup> The enhancement for prior offenses is superficially appealing: a felon with a serious record of violence may present a greater threat with a gun; an alien removed after a conviction of a serious crime should be deterred from returning. Once again, however, the Commission has never explained in any detail why it places so much weight on prior drug-trafficking offenses and crimes of violence, and it clearly did not base its decision on research or expertise.

Regarding the firearm guideline, the Commission tasked one of its working groups with proposing amendments in response to the fact that a significant percentage of sentences were at the high end of or above the guideline range.<sup>84</sup> The group attempted to divine the reasons for such sentences, concluding that characteristics such as actual or intended use of the weapon, drug-related conduct, or possession of particularly deadly weapons accounted for such sentences.<sup>85</sup> The group found “that there was *no strong correlation* between the existence of the types of prior convictions listed (firearm offenses, drug-related offenses, or convictions

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79. United States v. Parris, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (quoting *Adelson*, 441 F. Supp. 2d at 510).

80. *Id.* at 750–51.

81. Rita v. United States, 127 S. Ct. 2456, 2465 (2007).

82. See U.S. SENTENCING GUIDELINES MANUAL §§ 2K2.1, 2L1.2 (2008).

83. *Id.*

84. K. ANTHONY THOMAS, MEMORANDUM IN SUPPORT OF JOHN DOE’S POSITION ON SENTENCING 10 (2008), [http://www.fd.org/pdf\\_lib/2K2.1%20Sentmemo.pdf](http://www.fd.org/pdf_lib/2K2.1%20Sentmemo.pdf).

85. *Id.* at 10–11.

for crimes of violence) and the length of sentence imposed.”<sup>86</sup> However, in direct contravention to these findings, the Commission elected to increase the base offense level from twelve to twenty-four for those defendants convicted following two felony convictions for either a crime of violence or a controlled substance offense.<sup>87</sup> The Commission apparently based its revision on the fact that Congress, in passing the Armed Career Criminal Act, had determined that greater sentences were called for when the defendant had prior convictions for drugs or violence.<sup>88</sup> As a result, the Commission’s research undermines the guideline it established. Unsurprisingly, the average prison sentence for a firearm offense is now double what it was in the preguideline era.<sup>89</sup>

The manner in which the Commission established a sixteen-level guideline enhancement based on a prior conviction of a drug-trafficking offense or a crime of violence in immigration cases is likewise troubling. Based on its analysis of past sentencing practices, the Commission originally set the offense level in such cases at six.<sup>90</sup> In 1988, it increased the offense level to eight, and in 1989 it created a four-level enhancement for defendants previously convicted of certain felonies.<sup>91</sup> In 1991, the Commission adopted a sixteen-level enhancement for those previously convicted of aggravated felonies.<sup>92</sup> To put this action into perspective, a fraud defendant at the time needed to cause a loss of \$20,000,000 to \$40,000,000 to face such an enhancement.<sup>93</sup> The Commission’s justification for the enhancement is strikingly insubstantial:

This amendment adds a specific offense characteristic providing an increase of 16 levels above the base offense level under §2L1.2 for defendants who reenter the United States after having been deported subsequent to conviction for an aggravated felony. Previously, such

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86. *Id.* at 11.

87. *Id.* at 11–12.

88. *Id.* at 12.

89. FIFTEEN YEAR REPORT, *supra* note 14, at 67.

90. *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 961 (E.D. Wis. 2005).

91. *Id.*

92. *Id.* at 962 (citing Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime?: A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 FED. SENT’G REP. 275, 275 (1996)).

93. *Id.* (citing James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 FED. SENT’G REP. 264, 268 (1996)).

cases were addressed by a recommendation for consideration of an upward departure. . . . The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses.<sup>94</sup>

As two commentators explained:

The Commission did no study to determine if such sentences were necessary—or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16-level increase and the Commission passed it with relatively little discussion. The 16-level increase, therefore, is a guideline anomaly—an anomaly with dire consequences.<sup>95</sup>

Subsequently, the Commission attempted to diminish “some of the harshness of [this guideline] by providing gradations of enhancements, from 8 to 16 levels depending on the perceived seriousness of the prior felony.”<sup>96</sup> Today, the sixteen-level enhancement is reserved for drug-trafficking offenses for which the sentence imposed exceeded thirteen months, crimes of violence, firearms offenses, child-pornography offenses, national-security or terrorism offenses, human-trafficking offenses, or alien-smuggling offenses.<sup>97</sup> Nevertheless, application of the guideline remains problematic for many defendants. First, by placing such heavy emphasis on the defendant’s prior record—which is also accounted for in the defendant’s criminal history category—the guideline effectively punishes the defendant twice for the same misconduct.<sup>98</sup> The Commission has never explained what penological goals are furthered by such double counting. Second, a sixteen-level enhancement—which increases the sentence by anywhere from five to fourteen times<sup>99</sup>—seems far out of

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94. U.S. SENTENCING GUIDELINES MANUAL app. C 241 (2003).

95. McWhirter & Sands, *supra* note 92, at 276.

96. *Galvez-Barrios*, 355 F. Supp. 2d at 962 (citing Robert J. McWhirter, *Aggravated Felon Re-entry Cases Under the 2001 Guideline*, 14 FED. SENT’G REP. 295 (2002)).

97. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2008).

98. *Galvez-Barrios*, 355 F. Supp. 2d at 962–63.

99. In criminal history category II, the low end of the range increases from four to fifty-seven months; in category III, from six to sixty-three months; in category IV, from ten to seventy-seven months; in category V, from fifteen to ninety-two months; and in category VI, from eighteen to 100 months. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing table (2008).

proportion to any reasonable assessment of dangerousness.<sup>100</sup> Based on these and other flaws, a court may conclude that the immigration guideline produces a sentence greater than necessary to satisfy the purposes of sentencing.

#### IV. CONCLUSION

Despite the fact that the Supreme Court's *Booker* opinion made the Guidelines advisory, they continue to be very influential. The Commission continues to promote the Guidelines, federal prosecutors continue to recommend Guidelines sentences in most cases, and most courts continue to sentence within or close to the Guidelines. However, this has created a number of problems. Most importantly, because the Guidelines call for much harsher sentences than were common in past practice, Guidelines sentences have contributed to a record number of incarcerated individuals—many of whom are relatively low-level offenders. This problem might be less troubling if it could be shown that there was a persuasive reason for the specified punishment. Unfortunately, as we have discussed, courts that take the time to seriously scrutinize the Guidelines will find that this is often not the case. The Commission has been reluctant to undertake major changes. Thus, if federal sentencing practices are to improve, courts will have to play a significant role. Hopefully this Article will encourage them to do so.

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100. *Galvez-Barrios*, 355 F. Supp. 2d at 963 (citing McWhirter & Sands, *supra* note 92, at 276).